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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.

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The Sotheby's Case — A Halachic Perspective

Rabbi Simcha Krauss

On June 26, 1984, Sotheby's, a prestigious and prominent auction house in New York, put up for sale 59 rare Hebrew books and manuscripts that had belonged to the Hochschule fur Wissenschaft des Judenthums in Berlin, which was closed by the Nazi authorities in 1942.

Many Jewish organizations have challenged that sale by arguing that the books were not the property of the seller but of the Hochschule, and that since the Hochschule was no longer in existence, they belonged to the Jewish Restitution Successor Organization, and they have urged the New York State Attorney General to nullify the sale. Mr. Robert Abrams, the Attorney General of the State of New York, has indeed filed for a court order to annul the sale, to return the money to the buyers, and to place these books and manuscripts into public institutions where they will be available to the public.[1]

How did these books and manuscripts reach Sotheby's? Here are the facts as presented by Dr. Alexander Guttman, the man who commissioned Sotheby's to sell the books for him.

Dr. Guttman, a professor at the Hochschule, was planning to leave Germany, and he applied for a visa to the United States. A

1. New York Times, Aug. 14, 1984, p. 1 "State Accuses Sotheby's..."

Rabbi, Young Israel of Hillcrest

few months after Krisstallnacht, when rampaging, murder, and looting of Jewish life and property had become commonplace in Nazi Germany, Dr. Guttman learned that he had been granted his visa. He then met with Dr. Heinrich Veit Simon, the chairman of the Hochschule's board, and they agreed that he should make an attempt to smuggle these books out of Germany. In the words of Dr. Guttman:

> Dr. Veit Simon emphasized that because of the enormous risk, any such books or manuscripts that I did remove and thereby save from the Nazis would belong to *me*.[2]

Later on, again according to Dr. Guttman, Dr. Veit Simon instructed the Hochshule's librarian and the secretary to release the books to him.[3]

At great risk to himself and his family, Dr. Guttman succeeded in smuggling the books out of Germany to the United States, where he settled and became a professor at Hebrew Union College in Cincinnati.[4]

As of this writing, the New York State Supreme Court, though it has prevented Sotheby's from distributing the profits of the sale, has not ruled on its legality. Whatever the legal outcome of this case will be, it would be instructive to analyze it halachically.

At first glance, it seems to be quite simple and straightforward. We are, after all, dealing with movable objects *(Metaltelin)* and with regard to movable objects the halacha is clear: They are considered to belong to that person who has physical possession of them — the *Muchzak*. He has the right to these properties, even if the plaintiff has *Chezkat Marah Kamah* — i.e. the plaintiff has witnesses that the objects, at one time, belonged to him.

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2. New York Times, Thursday, Aug. 16, 1984, p. 17,"Ohio Professor Says He Was Smuggler of Hebrew Books" by Douglas C. McGill. Emphasis mine (SK).
3. Ibid.
4. For the full story and details of the rescue of these books see the story in the New York Times noted above.

This halacha is codified in Rambam:

> All movable objects are in the *Chazakah* [presumptive ownership] of him in whose hands they are. For example, this garment or this utensil in your hand or in your house is mine ... and here are the witnesses who know that these were before in my possession, and the defendant says no, but you have sold it to me or you had given it to me as a gift, then the defendant has to give a *Shevuat Heset* [rabbinically required oath], and he is absolved.[5]

Applying this halacha to our case, we can say that Dr. Guttman is the *Muchzak* of these *Sforim*. His contention that the *Sforim* are his, "because of the enormous risk" he undertook to save these books, and that they were given to him, should be accepted at face value. The most that could be demanded of Dr. Guttman is that he take a *Shevuat Heset*, an oath, to substantiate his claim.

There is however, another question. Did Dr. Heinrich Veit Simon, the Chairman of the Board of the Hochschule, have the right to give these *Sforim* to Dr. Guttman? In other words, if Dr. Guttman's claim rests solely upon the basis of Dr. Simon's gift to him, we would have to question whether this gift was within the power of Dr. Simon to give. Did the Board of the Hochschule meet? Was there a quorum at that meeting? Did the Board have the right to give the *Sforim* to a private person?

In spite of this question, however, and its possible answer, a good case can still be made halachically for Dr. Guttman's right to keep these books. That is based on the halacha of *Zuto Shel Yam* — the flood of the sea.[6] Let us examine this issue first.

Ownership can be terminated in a number of ways. An owner has a right to sell his property. An owner may also, if he so chooses, give away that which belongs to him. In addition, an owner may renounce a particular object that is his; this is known

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5. Rambam, *Hilchot Toen V'Nitan*, 8:1.
6. The phrases "flood of the sea," "flooding of the river," "flooding of the sea" are interchangeable.

as *Hefker.* In all of these cases, the owner voluntarily gives up control and ownership of an article that he owns.

There is yet another way whereby ownership of an article can be terminated — that is if the owner loses an object and, in effect, gives up hope of ever finding it or of its ever being returned. In the words of the Gemara, the owner declares, "Woe for I have lost my money." That is despair — *Yeush.*[7] In such a case, ownership is terminated, and the finder may keep the object.

This despair, or *Yeush,* does not necessarily have to be articulated. At times, the circumstances are such that we can assume that *Yeush* has taken place. For example, if one loses an object that does not have identifying marks *(Simanim)* or, even if the object has *Simanim,* but it is lost in a public place,[8] one can assume that the owner has despaired and the finder may keep the object.

There is yet another instance where we can assume that the owner has despaired as a result of the circumstances in which the object was lost. That is the case of an article lost by the "flooding of the river."

The *Braita* in T.B. *Bava Metzia* states as follows:

> ...Whence do we know that an article that was lost by the flooding of a river may be retrieved [by the finder]? For it is written "And so shalt thou do with his donkey; and so shall thou do with his garment; so shalt thou do with every lost thing of your brother's which he has lost and thou hast found" [meaning to say] that only if the object has been lost to him and may be found by any person [is one obligated to return the object] but if the found object is lost to him and not found [not able to be found because the river carried it away] it does not have to be returned.[9]

The context and language of the *Braita* state unequivocally

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7. T.B. *Bava Metzia* 23a
8. T.B. *Bava Metzia* 21a.
9. T.B. *Bava Metzia* 22b.

that an article lost from its owner by the "flooding of the river," may be kept by the finder because the circumstances surrounding this loss presume that the owner has despaired of it. Indeed Rambam spells it out: "If one finds lost property ... which is washed up by the sea, deposited by a river in its uninterrupted flow, it belongs to the finder ... *because the owner has certainly despaired of it.*"[10] It is quite clear from Rambam's language that in the case of an object lost by the "flooding of the river," the finder may keep it because the owner has "certainly despaired of it." Indeed the *Yerushalmi,* quoted by Tosafot, asserts that the very halacha of *Yeush* is grounded in this verse quoted by the *Braita* in *Bava Metzia.* However, there are *Rishonim* who assert that the halacha of the "flooding of the river" is separate and distinct from that of the halacha of *Yeush.* An object that was carried away by the "flooding of the river" may be retrieved by the finder even if the owner did not despair. Rosh, clearly and openly, articulates this position in his commentary to another *Braita* which states the following:

> R. Shimon ben Eleazer said: "If one rescues from a lion, a bear, a leopard ... or from the tide of the sea, or from the flood of the river, or if one finds anything on the high road, or in a broad square, or in any place visited by the crowds, it belongs to the finder, because the owner has despaired.[12]

The simple understanding of this paragraph is that the last phrase, "because the owner has despaired," covers all the cases in the *Braita.* Rosh, however, limits the phrase "because the owner despaired." Says Rosh:

> This reason given [because the owner has despaired] refers only to [articles found in] the broad square, or in any place visited by many people, but the others [articles rescued from the flooding river, etc.] even if

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10. Rambam, *Hilchot Gezelah V'Avedah* 11:10.
11. *Devarim* 22:3.
12. T.B. *Bava Metzia* 24a.

> the owner stands and shouts "I do not despair" it becomes like shouting on his house that collapsed.[13]

A person who saves an article from a "flooding river" may keep the article even if the owner shouts, "I do not despair," argues Rosh. In other words, something that is about to be carried away by an imminent flood is, ipso facto, considered lost.

This difference in interpretation between Rambam and Rosh is of more than theoretical interest. It has very practical consequences. According to Rambam, the person saving an article from the flooding river may keep it only because, absent any contrary knowledge, he can safely assume the "despair" of the owner. But, for example, when the owner shouts, "I do not despair," then the object must be returned to the owner. According to Rosh the finder or saver may keep the article saved from the flooding river, *even if* the owner stands before us and shouts "I do not despair." An object about to be carried away by the ravaging river is considered lost and irretrievable. It is free for all to take.

If we were to end here we could, quite fairly, come to the conclusion that Dr. Guttman has every right to take and to keep the books of the Hochschule. After all, in the Germany of 1939, certainly after Krisstallnacht, the "ravaging floods" were such that Jewish life was not safe. Certainly Jewish property, particularly Jewish property which the Nazis did not allow out of the country, could come under the definition of property about to be carried away by the "ravaging floods." Hence, according to Rosh, these properties were definitely considered lost and irretrievable. But even according to Rambam, one can safely assert that the owners despaired of these books.

The case is not that simple, however. There are some further points that need clarification.

First is the particular halacha regarding *Sforim*. An argument can be made that though the halacha of the "flooding of the sea" applies to movable objects, it does *not* apply to *Sforim*.

Let us begin with a responsum of Ri Migash. Ri Migash was asked:

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13. Rabbenu Asher, *Bava Metzia*, Chapter II *siman* 6.

> Reuven [who] had his belongings, including *Sforim*, in the house of Shimon. And a person from the King [the king gave him permission] has stolen all away from Shimon without leaving him anything. Now the King has put up all the loot for sale and both Jews and non-Jews bought from it. May Reuven now take back his belongings and his *Sforim* ... If he may, does he have to pay for them the price paid by the buyer .... And the buyer who bought [these *Sforim*], who bound them, is this considered sufficient *Shinnui Maaseh*, [physical change) and whether the halacha regarding movable objects is the same as [that of] *Sforim*.

He answers:

> In truth, [as regards] *Sforim*, it cannot be said about them that the owners have despaired except if two witnesses have testified [to the effect] even though this was done with the permission of the King. [This is so] because the *Sforim* have use only for Jews and none other will buy them. And we judge the owner relies upon this, that when these books come to the hand of a Jew he will bring proof, ascertain that it is his, and retrieve them ... This is the halacha regarding *Sforim* ...[14]

We see from this responsum that *Sforim* have a special status. For though they have been taken from their owners by permission of the ruling authorities — "permission of the King" — the assumption is that the owner has *not* despaired. It is safe to assume that articles that have value only to Jews will come back into Jewish hands.

This is the understanding, also, of Tosafot. Tosafot assert that though a person who recognizes his belongings in another's possession does not have the right to claim them after "despair," this does not apply to *Sforim:*

> *Sforim* are always regarded [as being] before despair

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14. This whole responsum is quoted in *Shita Mekubetzet, Bava Metzia* 24b.

> for usually one does not despair of *Sforim* ... because in the end they will come into the hand of a Jew.[15]

Actually, there exists a responsum of Rambam in which he disagrees with this position. Because of its importance we will quote Rambam.[16]

> Question: Whoever bought for the looters holy books and they belong to synagogues from another city, may he take them or does he have to return them to their original place from whence they have been taken? And [if he does return them] will he be able to collect his money? And should he return them only to that synagogue or may he return them to any synagogue...
> Answer: If the looting was done with the permission of the King, then he [the buyer] has acquired all and the sanctity is nullified. If we say in regards to the vessels of the Temple, when they were taken their sanctity has been invalidated, as it is written, and intruders came and have desecrated it..."[17]

In this difference of opinion between Rambam, on the one hand, and Tosafot and Ri Migash, on the other, Ramo decides like Ri Migash and Tosafot. The *Shulchan Aruch, Choshen Mishpat,* discusses the case of a non-Jew who requisitioned the property of a Jew and then sold it to another Jew. There the *Psak halacha* is that the Jewish buyer must return the property to the original owner. On this Ramo adds:

> This applies only to land, of which people do not despair. But movable objects one does not have to return to the original owner except for *Sforim,* because one does not despair of these because we know that they sell them only to Jews.[18]

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15. Tosafot, *Bava Kama* 114b.
16. The full text is found in *Shita Mekubetzet, Bava Metzia* 24b. With slight variations, it is also found in *She'elot Ut'shuvot Rabbenu Moshe Ben Maimon, "Pe'er Hador" #131,* David Yosef, ed. Machon Yerushalayim 5744.
17. Ezekiel 7:22.
18. *Shulchan Aruch, Choshen Mishpat, Siman* #236, par. 8.

One can argue, however, that in the Sotheby's case, even Ramo, Ri Migash, and Tosafot would agree with Rambam that the halacha of *Yeush* (despair) applies even to *Sforim*. For, in the Nazi persecution of the Jews, and in the confiscation of their properties, the purpose was not mere monetary gain. The purpose was, alas, total destruction. *Sforim*, in the Nazi plans, were to be either destroyed or, at best, kept in a museum that would show the world the remains of a people that once had existed. In short, in the German eschatology that prevailed between 1933 and 1945, there would be no Jews around who would buy *Sforim*. Hence, even Ramo, Ri Migash, and Tosafot would agree that in the Sotheby's case *Yeush* would apply even to *Sforim*. Hence, in this respect Dr. Guttman had every right to take these books.

While we have, so far, established that from a legal halachic perspective, the books could be taken, there arises a problem of ethical-moral considerations. These, too, must yield to halachic analysis.

The essential point is made, again, by Ramo. In the halacha, codified by *Shulchan Aruch*, that one who saves from the "flooding of the river" may keep the found article, Ramo adds: "'Still, it is good and just to return (it)."[19] In other words, Ramo holds that though legally one may keep the found article, "it is good and just" to return it. In truth, we do find the concept "you shall do the good and the just" regarding lost objects.

Shulchan Aruch says that in a case of simple despair, without the particular case of the "flooding of the river," though one may keep it, one should act "beyond the limit of the law" and return the object.[20] The question arises whether in the case of something lost via the "flooding river," we have this added consideration "you shall do the good and the just." *Bet Halevi* cites evidence that we do apply the halacha of doing "the good and the just" in objects that a person came to possess by saving from the "flood of a river."[21]

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19. Ibid. #259, Paragraph 7.
20. Ibid. Paragraph 5.
21. *Chidushei Bet Halevi* – Rav Yosef Dov Ber Soloveitchick, Vol. III, Chapter 48, New York, N.Y. 5753.

Bet Halevi points to a Gemara[22] where the discussion revolves around the particular details of how much and in what manner one may save one's belongings from a fire that is raging on Shabbat. The Mishna there states as follows:

> And he may tell others "Come and save for yourselves." And if they are wise, they will ask for an accounting after the Shabbat [they will ask to be paid as laborers — Rashi *ad locum*].

On this the Gemara asks:

> What is the need for an accounting? They have received it from *Hefker*.

Rashi interprets: "For he said 'come and save for yourselves', for your own needs. Hence if they are wise they can keep all the items so saved." Rabbenu Nissim asks: The law should be the same even if he does not say openly "come and save." For it is analogous to the case of saving from the "flood of the sea," where it belongs to the finder.

Rabbenu Nissim, according to *Bet Halevi*, definitely maintains the position that one does not have to return an object from the "flood of the sea" even as a matter of doing "the good and just." Otherwise, one can say that Rashi was forced to insert the open declaration "come and save for yourselves." For without this statement they would have to return it, as a matter of doing "the good and the just."

And even Rashi, according to *Bet Halevi*, says so only because, without the owner's expressly telling them "save for yourselves," one would have thought that they want to take the object from *Hefker*.

On the other hand, *K'tzot Hachoshen* openly states that we do, indeed, hold the position that one should return the object saved from the "flooding of the sea" to the owner and, furthermore, *Bet Din* may even force the finder and saver of these objects to return them.[23]

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22. T.B. *Shabbat* 120A.
23. *K'tzot Hachosen, Choshen Misphat, Siman* 259 par. 5 subparagraph 3.

Be that as it may, Ramo definitely codifies the halacha that even in the case of saving an object from the flood of the sea, it is to be returned to the owner as a matter of doing the "good and the just."

Closer to our times, major halachic authorities have decided analogous questions without leaving clear precedent. Rav Meir Arik[24] was asked a question regarding *Sforim* which were bought from Polish soldiers, who bought them from Russian soldiers, who were about to destroy them and make them into paper. Do these *Sforim* belong to the buyer, or do they have to be returned to the owner?

Rav Meir Arik is reluctant to give a definite *Psak*. He seems, at first, to say that the halacha of the "flooding of the sea" applies only when the flood is already here. In this case, he argues, the Russian soldiers had not yet destroyed the *Sforim*.

He then goes to the *Psak* of the Ramo which maintains that, regarding *Sforim*, the halacha of *Yeush* does not apply because the *Sforim* will somehow end up in Jewish possession. But he hesitates to clearly decide this because "as we have heard many times, the Russians have burned the *Sforim* ... and then we can assume despair." He does state that if one were to find that statistically, in the majority of cases, the *Sforim* were destroyed by the Russians, one could keep such *Sforim* because then we could assume *Yeush*. In the end, however, he says that because he is not certain in his own mind he does not want to rule on the case.

During World War II, Rav Yaakov Mordechai Breisch was asked about buying *Sforim* that had been confiscated by the Nazi puppet regime in Slovakia, and which the Slovakian government now wanted to sell. May one buy these *Sforim*, and do they have to be returned to their owners?

Rav Breisch, after citing one scholar's contention that Ramo's opinion about despair vis-a-vis *Sforim* — "one does not despair of these" — should decide this situation, disagrees.[25] He is emphatic

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24. *She'elot Utshuvot Imrei Yosher*, vol. #59, Krakow 1925.
25. Rav Yaakov Mordechai Breisch, *Sheelot Utshuvot Chelkat Yaakov*, Volume I (second edition, Bnei Brak 5729) #136.

that the buyers of these *Sforim* have truly saved them from the "tide of the sea."

> In our case ... where the owners have gone into exile ... and we know what happened to *Sforim* in the other countries ... they were publicly burned amidst great public humiliation ... it is definite that the owners have despaired.

While agreeing that the Ramo does advise to return such *Sforim* as a matter of doing "the good and the just," Rav Breisch insists that from a strictly halachic point of view, the buyer may keep the *Sforim*.

While the above-mentioned cases are analogous in principle to that of Sotheby's, there exists one case that is, prima facie, identical to it. Ironically, that case also dealt with a Rabbinical Seminary in Berlin. It dealt with the *Sforim* that belonged to the library of the Hildesheimer Rabbinical Seminary and were saved. The person who saved these *Sforim*, a Rav Rebhun, inquired of Rav Yechiel Yaakov Weinberg, formerly the Rosh Yeshiva of Hildesheimer, whether he may keep the *Sforim*. Rav Rebhun contended in his question to Rav Weinberg that he should be allowed to retain the *Sforim* because he had saved these *Sforim* from the "tide of the sea."

Rav Weinberg answered that the halacha of the "tide of the sea" did not apply. He gave the following reasons:[26]

First, one ought to comply with Ramo's decision that things saved from the "tide of the sea" ought to be returned as a matter of "doing the good and the just."

Second, "You did not intend at the time that you had saved the *Sforim* to acquire them, and certainly you intended to save them and return them after the storm had passed. If so, you accepted upon yourself the obligation to keep them for our *Bet Hamidrash*."

Third, continues Rav Weinberg, this case cannot be subsumed

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26. Rav Yechiel Yaakov Weinberg, *Sridei Esh*, vol. III, second edition Jerusalem 5737, Mosad Harav Kuk, #71.

under the rubric of the "tide of the sea." For it is known that the Nazis took all *Sforim* from various libraries and deposited them in different places for safekeeping. Hence, "the hope did not die from our hearts that the wickedness will entirely perish," and therefore the "owners", that is, the authorities of the Hildesheimer Rabbinical Seminary, did not despair. He concludes by citing Ramo that one does not "despair" of *Sforim* and quotes Rav Meir Arik's responsa in *Imrei Yosher,* cited above, as supportive of his ruling.

Though it seems from a first reading of Rav Weinberg's responsum that he would, in our case, urge the return of the *Sforim,* this is not really so.

There are major differences between the Sotheby's case and the case cited in the responsum of Rav Weinberg. Perhaps the most important distinction lies in the facts of the case.

In Rav Weinberg's responsum, Rav Rebhun admittedly took the *Sforim* and saved them for the Hildesheimer Seminary. By taking them and saving them with the intention of returning the *Sforim* to the Hildesheimer Seminary, Rabbi Rebhun became the *Shomer* or bailee of these *Sforim.* In such a situation, *Yeush* (despair) does not apply. One does not despair of objects which are in one's own possession. Dr. Guttman, on the other hand, never became the *Shomer* for the Hochschule. Hence, *Yeush* and the halacha of the "flood of the sea" could apply.

Furthermore, a close reading of Rav Weinberg's responsum will reveal an interesting and, for our purposes, important fact. Many of the authorities of the Hildesheimer Seminary survived or escaped from the European inferno. Rav Weinberg advises Rav Rebhun to consult with the following faculty members and members of the curatorium of the Hildesheimer Seminary: Dr. S. Grinberg, Dr. M. Auerbach, Dr. A. Hildesheimer, Rabbi A. Wolf, Dr. A. Bart, Dr. Zekbach and Rabbi Dr. Yaakov Hoffman, and "together we will decide on this issue."[28] The point is that, in the case of Rav Weinberg, the Hildesheimer Seminary was still functioning. For halachic and legal purposes, the Hildesheimer

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28. *Sridei Esh, loc. cit.*

Seminary still had, at least to Rav Weinberg's mind, legal personality. Hence Rav Rebhun, as the *Shomer* for the Hildesheimer Seminary, had an obligation to return the *Sforim* to the surviving "owner."

With the Hochschule it was otherwise. The tragic and cataclysmic *"Churban Europa"* enveloped in its all-encompassing and destructive flames all of the Hochschuleand totally destroyed it. All the major figures that were involved in the original decision to hand over the books to Dr. Guttman — Dr. Veit Simon, Miss Jenny Wilde, the librarian of the Hochschule, Hans Erich Fabian, the secretary of the Hochschule— all have since died. There is no Hochschule in existence. There are no "owners" to whom the books should be returned. In this case, I believe we can say that even Rav Weinberg would agree that Dr. Guttman has a right to the *Sforim.*

A contemporary *Posek,* HaRav Yitzchack Liebes, also deals with this issue of items that were left over and saved from the European destruction. The responsum of Rav Liebes is wide-ranging and encompasses many issues that are beyond the scope of this article. Still, in relation to *Sforim,* he also concludes, in almost the identical manner of Rav Breisch, that Ramo's contention "one does not despair of *Sforim*" does not apply to our case. "In our case that reasoning does not apply, for in the great catastrophe such as did not exist since the creation of the world, the decree to destroy and kill all the house of Israel ... in such a situation they certainly despaired of all their belongings ... for whoever thought in the ghettos and concentration camps of one's belongings ... do you really think that in such conditions they did not despair of *Sforim?*"[29]

In light of all this, I believe that the Jewish organizations and, in particular, the media have over-reacted. A calmer, more balanced appraisal of the situation may lead to the conclusion that an old man, who dedicated his life to scholarship and was, moreover, a person who himself suffered from the Nazi persecutions, has been unnecessarily vilified.

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29. *Rav Yitzchack Eizik Liebes, She'elot Utshuvot Bet Avi,* Vol. I #157, New York, 5731.

Teaching Torah To Women

Rabbi Moshe Weinberger

Introduction

"Rabbi Chanina said: Only after Avraham set up the tent of Sarah did he establish his own.[1] Traditional Judaism has taken the reference to the "tent of Avraham" and the "tent of Sarah" as representing two spheres of activity within Jewish society. "Sarah's tent" included the family and the home, while "Avraham's tent" extended also the larger community. Bilam reluctantly praised the peope of Israel, "How goodly are your tents, O Jacob."[2] Over the centuries, indeed, the tents were goodly, and each man and woman found contentment and fulfillment in his or her own "tent."

However, we are now living in an age which has seen the rise of a vibrant feminist movement within the ranks of Orthodox Jewry. This movement has evolved within the context of a Jewish society which has always emphasized intellectual curiosity and growth. Numerous women now seek involvement in Judaism on an intellectual level more similar to that of their male counterparts. There is some resisance and also a great deal of adjustment to these new demands.

Rashi explains that according to R. Eliezer, if a woman will be dimensions of this issue. The philosophical or *hashkafic*

1. *Bereshit Rabbah* 29:15
2. *Bamidbar* 24:5.

Rebbe, Ezra Academy, Queens;
Mashgiach, N'vei Tzion of Queens

ramifications of the halacha, notwithstanding their importance, will not be dealt with within the context of the following discussion.

The Problem: Exemption or Prohibition?

In *Kiddushin* 29b, the Talmud states:

> How do we know that she [the mother] has no duty to teach her children? Because it is written, *ve-limaddetem* [and you shall teach], which also reads *u-lemaddetem* [and you shall study]: hence whoever is commanded to study, is commanded to teach; whoever is not commanded to study, is not commanded to teach. And how do we know that she is not bound to teach herself? Because it is written, *ve-limaddetem* [and you shall teach] — *u-lemaddetem* [and you shall learn]: the one whom others are commanded to teach is commanded to teach himself; and the one whom others are not commanded to teach, is not commanded to teach himself. How then do we know that others are not commanded to teach her? Because it is written, "And you shall teach them to your sons" — but not your daughters.

According to the conclusion of the Gemara, a woman's exemption from the commandment of *Talmud Torah* (learning Torah) is manifested in three ways:

1) A woman is not required to teach her sons Torah;
2) A woman is not required to learn Torah herself;
3) A father is not required to teach Torah to his daughters.[3]

The foregoing Gemara concludes only that a woman is not *obligated* to teach or learn Torah. Concerning this general principle there is little controversy. However, the question whether a woman *may* study has proved to be one of the most controversial halachic issues to date.

The source of this controversy is a remarkable *sugya*

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3. See also: Tos. *Kiddushin* 34A and *Shabbat* 32B, Yerushalmi *Brachot* 2:7. *Eruvin* 10:1, Rambam *Talmud Torah* 1:1, *Sotah* 3:20, *Shulchan Aruch* Y.D. 246:6, *Shulchan Aruch Harav, Talmud Torah* 1:14.

(discussion) in *Sotah* (20a-21b).[4] The Mishna there deals with a woman who is suspected of commiting adultery but insists that she is innocent. She must therefore submit herself to the test of drinking the "bitter waters" as prescribed by the Torah.[5] If she is in fact innocent, then she will be unharmed by the water, but if she has committed adultery the water will take its deadly course. However, the Mishna explains that there are cases where although the woman is in fact guilty, the effect of the water may be suspended for up to three years. This can happen when she has to her credit certain "merits" which have in their power to protect her for a limited amount of time. Then the Mishna quotes the following dispute:

> Hence, declared Ben Azzai, "a man must teach his daughter Torah so that if she must drink (the bitter waters) she may know that the merit will suspend her punishment."[6] R. Eliezer says, "If a man teaches his daughter Torah, it is as though he taught her *tiflut* (תפלות)." R. Yehoshua says, "a woman prefers a *kav* together with *tiflut* to nine *kavs* together with restrictions of chastity."

Based upon our first reading of the Mishna we may summarize the three opinions quoted:

1) According to Ben Azzai, a father is obligated to teach his daughter Torah.

2) R. Eliezer (in the Mishna) does not actually cite a specific ruling. He simply berates a father who has chosen to teach his daughter.

3) R. Yehoshua does not mention either a woman's studying

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4. Variant readings of the text may be found in the *Dikdukei Sofrim Hashalem* edition of *Sotah* P. 299.
5. *Bamidbar 5:11-31*
6. In other words, if the woman has learned Torah she will know that the reason the water did not kill her immediately (in spite of her guilt) is because of a *z'chut* (Rashi). The Meiri, however, explains that Ben Azzai is referring to *other* women who are present and perhaps know of the woman's guilt. If *they* have learned Torah they will know that the words of the Torah are true and that the water will eventually take effect. See *Tiferet Israel* on the Mishna.

Torah or a father's obligation concerning his daughter's Talmud Torah. He merely states his evaluation of the nature of an average woman.

The word *tiflut* has been interpreted in two ways. The first interpretation is based upon a verse in Job (6:6): "Can that which is tasteless *(tofel)* be eaten without salt." According to this, *tiflut* would mean trivial and irrelevant things.[7] The Rambam explains that since women are generally not ready to dedicate themselves completely to Torah study, their knowledge will necessarily be superficial. Given such superficial knowledge, a woman will not be able to appreciate the depth and scope of Jewish learning and will come to consider it irrelevant and trivial.[8]

The alternate translation of *tiflut* is immorality or lechery. Rashi explains that according to R. Eliezer, if a woman will be taught Torah she will acquire wisdom and she will thus understand how to conduct immoral affairs without being discovered.[9] This interpretation is based upon a verse in Jeremiah (23:13): "And I have seen *tifla* in the prophets of Shomron." R. Eliezer expressed the same opinion in even stronger terms in an incident recorded in the Yerushalmi *(Sotah* 3:4). A wealthy and educated woman once asked R. Eliezer an incisive question regarding the chapter in the Torah which relates the story of the Golden Calf. He replied that "There is no wisdom in women except with the distaff (spinning wheel)." The Rabbi's son, Hyrcanus, reminded his father that perhaps it would have been better to answer her question since she was in the habit of giving a large annual tithe to their family (who

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7. This interpretation is in accordance with that of the Rambam (*Hilchot Talmud Torah* 11:3) and the Meiri (*Sotah* 20B).
8. *Hilchot Talmud Torah* 1:13 as explained by R. Moshe Meiselman, *Jewish Women In Jewish Law,* Ktav 1978, P. 34-35. The Satmar Rav in *Vayoel Moshe,* P. 444, is of the opinion that because we suspect a woman's Torah learning of being superficial, every woman necessarily falls under the suspicion of being a potential *Talmid She'eino Hagun* to whom we are forbidden to teach Torah. This will be discussed in greater detail. See also R. Shmuel Ashkenazi's notes to the Rav's *Hilchot Talmud Torah* (Kehot 5743) P. 557.
9. See *Resp. Maharil* 199. The Ramo in Y.D. 246:6 clearly concurs with this interpretation. See *Tiferet Israel* and R.G. Ellinson, *Haisha V'Hamitzvot* P. 150, Note 29.

were *Leviim).* In response, R. Eliezer stated, "Let the words of the Torah be burnt, but they will not be handed over to a woman."[10]

The Gemara itself does not provide a definition of the word "Torah." Are the sages referring to the *Torah SheBichtav* (Written Torah), *Torah SheBeal Peh* (Oral Torah) or both? We can safely surmise that Ben Azzai obligates the father to teach his daughter the Oral and certainly the Written Torah. Since the underlying rationale of Ben Azzai's requirement is to ensure that every woman be familiar with the fact that certain "merits" can delay the effect of the water, he obviously requires the study of the Oral Torah since the delaying effect of merit is not mentioned in the Written Torah itself.[11]

R. Eliezer can be understood in two ways: 1) Perhaps he agrees that women may or should be taught the Written Torah and only berates a father who teaches his daughter the Oral Torah. 2) It is possible that he rebukes a father for even teaching his daughter the Written Torah.

R. Yehoshua's description of women can also be interpreted in two ways: 1) Perhaps his opinion is identical with R. Eliezer's and his statement was merely made in order to further substantiate his colleague's. 2) If we assume that R. Eliezer only rejects Ben Azzai's decision concerning the Oral Torah but concurs with his *Heter* to study the Written Torah, it is possible that R. Yehoshua, in his assessment of women, rules that their being taught the Written Torah *also* falls under the category of *tiflut.*[12]

In order to understand the Mishna we must now turn our attention to the famous ruling of the Rambam which is itself the source of considerable controversy:[13]

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10. See also: *Avot D'Rabbi Natan* 18, *Chagiga* 3A and *Yoma* 66B.
11. See the commentary of R. Yoshiyahu Pinto (Rif) to *Ein Ya'akov* in *Sotah, Vayoel Moshe* P. 435, Dr. Meir Hershkowitz, *Or Hamizrach* 17, P. 43. R. Tzadok Hacohen of Lublin suggests a fascinating approach to understanding the *sugya* in *Otzar Hamelech,* T.T. 1:13.
12. See commentary of Rashi to R. Yehoshua's statement regarding Esther in *Megilla* 15B.
13. *Hilchot Talmud Torah* 1:13.

> A woman who studies Torah is rewarded, but not to the same degree as is a man, for she is not commanded and anyone who does that which he is not commanded to do, does not receive the same reward as one who is commanded, but only a lesser reward. However, even though she is rewarded, the Sages commanded that a man must not teach his daughter Torah. This is because the mind of the majority of women is not disposed to study and they will turn the words of Torah into words of nonsense according to their limited understanding. Our sages said that anyone who teaches his daughter Torah is to be considered as if he had taught her her trivial and unimportant things. What were they referring to? The Oral Torah. However, the Written Torah should not be taught before the fact *(lechatchila)*, but if he has taught her, it is not considered as if he has taught her *tiflut*.

This decision of the Rambam presents us with a number of difficulties:

1) The Rambam quotes the statement of R. Eliezer, thereby indicating that he follows his ruling. He endorses the liberal interpretation of R. Eliezer which considers only the teaching of the Oral Torah to be *tiflut*. Nevertheless, he proceeds to forbid, before the fact (לכתחילה), even the study of the Written Torah which should be permitted according to the liberal interpretation which sees no disagreement between R. Eliezer and Ben Azzai as far as the Written Torah is concerned.

2) The *Shulchan Aruch*[14] quotes the Rambam, and the Ramo adds: "However, she is obligated to study those laws which apply to women."[15] Is the Ramo simply elucidating the *psak* of the Rambam, or is the purpose of his note to disagree with any part of his ruling?

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14. *Yoreh Deah* 246:6.
15. This halacha is quoted in the name of the *Agur (Hilchot Tefilla* 2) who quotes the *Smag*. However, it has been pointed out that in fact the origin of this halacha is in the *Smak (Sefer Mitzvot Katan)* in the introduction written by his students. This is also quoted by the *Beit Yosef* Y.D. 340 and will be discussed in greater detail.

3) As far as a woman's studying Torah is concerned, the Rambam rules that she is to be rewarded. On the other hand he accepts R. Eliezer's strong disapproval of a father who teaches his daughter Torah, noting the dangers involved in such an action. Why is the woman herself excluded from R. Eliezer's exhortation if in fact her mind is not adapted to the study of Torah?

4) How do we reconcile the Rambam's ruling with the many recorded historical accounts of prominent Jewish women who excelled in their knowledge of both the Written and Oral divisions of the Torah? To complicate matters, most of these women were the daughters or wives of famous rabbinic authorities who often assisted them in their studies.[16]

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16. The *Tosefta Kelim (B.K.* 4:9) quotes a ruling in the Laws of Ritual Purity in the name of R. Meir's famous wife, Bruriah. (Similar examples of Bruriah's erudition and the Rabbis' acceptance of her rulings may be found in *Tosefta Kelim B.M.* 1:4, Gemara *Pesachim* 62B, *Eruvin* 53B. See also *Shabbat* 133B). In the *Sefer Sibuvei R. Petachya of Regensburg* (p. 9), it is recorded that R. Shmuel b. Eli, the Gaon of Baghdad in the late 12th century, had a daughter who was fluent in Scripture and Talmud and taught these subjects to male Yeshiva students through a second story window. The Chida in *Shem Hagedolim* tells us that the Rashbatz (3:78) quotes a solution to a difficult Talmudic problem in the name of a certain Rabbanit (Rabbi's wife). In a gloss to the Responsa of the Maharshal (no. 30) we find that Rebbetzin Miriam (the grandmother of the Maharshal) taught halacha to advanced Yeshiva students from behind a partition. The son of the famous halachic authority R. Yehoshua Falk (author of the *Prisha* and the *Sma)* in his introduction to the *Prisha,* quotes novellae in the name of his mother Baila, who he says was proficient in many areas of halacha. Regarding other educated women of this period, see Cecil Roth, *Outstanding Jewish Women in Western Europe, 15-17 Centuries,* in The Jewish Library Vol. III, Edited by Leo Jung, P. 151 ff., and Shlomo Ashkenazi, *Dor Dor U'Manhigav,* P. 199-268. In our own time, we have also heard of women who were great Talmudic scholars, particularly the wife of R. Isser Zalman Meltzer who was instrumental in editing his classic commentary on the Rambam, and the sister of the *Aderet* of Ponevizeh.

See also *Responsa Rav Pealim* of R. Yosef Chaim of Bagdahd, *Sod Yesharim* no. 9. The famous Rav of Jerusalem, R. Yosef Chaim Sonnenfeld, was said to have a set *"chavruta"* with his wife for half an hour each day in order to study *Orah Chaim (Sefer Amuda D'nehora,* P. 13). This is related to another difficulty in our understanding of the Rambam. He rules that women are not exempt from the commandments involved in the *Pardes;* namely: The knowledge of G-d and his

Written or Oral Torah?

The *Taz* (*Y.D.* 246:4, note 4) provides a source for the Rambam's distinction between the Written Torah and the Oral Torah. In the Torah *(Devarim* 31:10-13) the king is commanded to read certain sections of Mishna Torah *(Devarim)* before all of Israel during the Sukkoth festival at the end of each seven year period. This is called "*Yom Hakahal*" — the day of assembly. The Torah states, "You must gather together the people, the men, women, and proselytes from your settlements and let them hear it." Obviously, writes the *Taz,* the women were included in this day of public learning where portions of the Written Torah were studied. This forms the basis of the Rambam's decision that teaching the Written Torah to women is not equated with teaching *tiflut.* However, asks the *Taz,* if the proof from *Yom Hakahal* is a valid one, why then did the Rambam insist that even the Written Torah should not be studied לכתחילה? The *Taz* answers his own question: "It seems to me that over there [*Yom Hakahal*] the king only taught the simple meaning of the text (פשוטי הדברים) which in truth is completely permissible לכתחילה even according to us as is the custom every day. However, the study of the meaning of the Torah by means of *Hitchakmut* and *Havanah* (thorough analysis) is what was prohibited. This is the meaning of the statement of the Talmud *(Chagiga* 3A), 'Men in order to study and women in order to listen' — the women were only permitted to listen to the simple explanation of the Mishna Torah but took no part in its study." Thus, according to the *Taz,* the Rambam's prohibition to teach

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unity and the love and fear of G-d as explained in *Hilchot Yesodei HaTorah.* As is well known, according to the Rambam the *Pardes* refers to physics *(Maaseh Bereshit)* and Metaphysics *(Maaseh Merkava).* However, he explicitly states that it is not proper to walk about in the *Pardes* unless one has first filled his belly with bread and meat, the knowledge of what is forbidden and permitted. He concludes that this prerequisite knowledge is available to all, *men and women* alike. (Yesodei HaTorah 4:13). This seems to imply that women may indeed study the "*Havayot of Abaye and Rava.*" In order to do this question justice, an in-depth study of the Rambam's conception of *Pardes* would have to be undertaken, which is beyond the scope of this article.

women the Written Torah refers only to an in-depth, analytical form of study, not to a more basic one.[17]

Rabbi Tzvi Hirsch Chajes (Maharatz) cites the *Taz* and offers an interesting proof to verify his explanation from the aforementioned case of the woman who approached R. Eliezer with a question regarding the sin of the Golden Calf. The Maharatz points out that perhaps R. Eliezer refused to respond to her question only because to do so would have required an analytical explanation of the text. Nevertheless, it is apparent that the woman was thoroughly familiar with the *parsha* itself. R. Eliezer was not

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17. The halachic decision of *Shoel U'Meishiv* (4:41) is in accordance with the explanation of the *Taz*. See *Tos. Sotah* 21B and *Chagiga* 3A which quotes the Yerushalmi. This *chiddush* is usually attributed to the *Taz*. However, his father-in-law, the *Bach*, had already reached the same conclusion in his commentary on the *Tur* (Y.D. 246). In fact, there is an important addition in the *Bach*, where he states: "One should not teach women *derech keva* (on a regular basis) but rather only in the form of *shmiya* — listening on an irregular basis." This form of study is considered a mitzvah as in the *parsha* of *Kahal*, in order that they should know how to observe the commandments. Here the *Bach* alludes to the paradox in the Rambam, where a woman is rewarded for Torah study while her father is forbidden to teach her Torah on a simple level, yet learning on an irregular basis is considered a mitzvah. See *Magen Avraham Orach Chaim* 282:6 who derives from the *Yom Hakahal* that women are obligated to hear the weekly readings of the Torah. See Resp. *Tzitz Eliezer*, Vol. 9, No. 3, P. 31.

Interestingly enough, in the *Tur* we find an inverse version of the Rambam: "Our sages have said that anyone who teaches his daughter Torah it is as if he has taught her *tiflut*. To what does this refer, to the Written Torah, but the Oral Torah should not be taught (לכתחילה) but if it is taught, it is not considered *tiflut*." The *Beit Yosef* claims that this version is apparently the result of a scribe's error and the correct version is that which is found in the Rambam. However, R. Aharon Walkin in *Responsa Z'kan Aharon* (Y.D. 66) postulates a fascinating rationalization for the textual version of the *Tur*. As we have seen regarding the *Yom Hakahal*, the "men came in order to study and the women in order to hear." R. Walkin writes that this distinction between studying and hearing is in effect a distinction between the Written Torah which *must* be studied from a text and the Oral Torah which may only be heard and not recorded in a text. (See *Gittin* 60A). Therefore, we may deduce from the *Yom Hakahal* that women may only listen, which refers to the Oral Torah, but may not study the Written Torah by means of the text. Therefore, according to the version of the *Tur*, the main prohibition is the study of the Written Torah and not the Oral Torah. Although this is an innovative approach to the *Tur's*

upset nor did he rebuke her for having acquired this basic knowledge.[18]

One of the major commentators of the Rambam, R. Eliezer Rokeach, author of *Maase Rokeach,* apparently agrees with the *Taz.* He concludes that the primary *issur* involved is the study of the Oral Torah which lends itself to technical hairsplitting and, hence, the possibility of misinterpretation or misuse to which women may be prone. The Written Torah, he says, was prohibited (according to the Rambam) as a result of a *gezerah* (a particular regulation) — if we permit women to study the Written Torah, they would very likely be encouraged and curious to study the Oral Torah, which is forbidden. This eventuality would exist only

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questionable version, it is for the most part an unacceptable one, as R. Walkin himself explains in the Responsum.

This raises another interesting question regarding women and *Talmud Torah.* Does the prohibition of memorizing verses from the Bible apply to women as well as men? R. Eliezer Lopian in a short article in *Moriah (Kislev* 5741, P. 53) decided to investigate this matter after he was informed that a well-known scholar refused to allow his daughter to comply with her teacher's assignment to commit *Shirat Devorah* to memory. According to R. Lopian, this scholar's fears appear to have been unfounded. He attempts to prove that according to Tosafot (B.K. 3B) the prohibition of memorizing verses from the Torah applies only to those who are commanded to study the Torah. Since women are exempt from the mitzvah of *Talmud Torah,* they are not included in the prohibition. R. Avraham Weinfeld in *Resp. Lev Avrham* (no. 13) also rules that teachers may assign their female students to memorize portions of the *Tanach.* According to him, the entire prohibition was only made regarding the *study* of the Written Torah by heart. However, when a student (male of female) uses the actual text but memorizes verses in order to test his or her proficiency, there is no *issur* whatsoever. In the future, R. Weinfeld writes, these students will refer once again to the text in the course of their studies. He concludes with a short investigation identical to that of R. Lopian.

18. *Hagahot Maharatz Chajes, Sotah* 21B. See also his *Hagahot Chagiga* 3A and Responsa No. 32. The Mishna in *Nedarim* (35B) can be understood according to the explanation of the *Taz* and *Maharatz Chajes.* The Mishna deals with a man who has forbidden himself, by means of a vow, to derive any benefit from a particular individual. The Mishna rules that although he himself may not receive any instruction in the study of the Written Torah from this man, his sons and *daughters* can receive such instruction. This would clearly indicate that a woman may be taught the Written Torah. According to the *Taz's* explanation of the Rambam, the Mishna is referring to instruction in the simple meaning of the text

where a woman studies the Written Torah in a manner which is itself analytical. However, there would be no reason to enact a *gezerah* when a woman is simply studying the simple meaning of the text.[19]

R. Shneur Zalman of Liadi in his classic *Hilchot Talmud Torah* (1:14) rules that teaching women the Oral Torah is considered *tiflut*, but he fails to mention any *issur* regarding the Written Torah. There are those who understand this omission as clear proof that the Rav, in opposition to the ruling of the Rambam and *Shulchan Aruch*, permits women to study the Written Torah without any limitations regarding the depth of study.[20] This would be in accordance with the *Piskei HaRid (Nedarim* 37a).[21] There are others, however, who disagree with this

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as opposed to an analytical form of study which is prohibited. See the commentaries of the *Tosafot Yom Tov* and *Melechet Shlomo* on the Mishna. See also the Rosh on the Gemara (35B), the *Biur Hagra* (Y.D. 246:25) and R. Shmuel Ashkenazi's notes on the *Shulchan Aruch Harav*, P. 556.

19. *Maaseh Rokeah* on Rambam T.T. 1;13. R. Yosef Halevi Boskowitz (the son of the *Machatzit Hashekel)* in *Seder Hamishna* (T.T. 1:13) writes that according to the Torah, women are only exempt from *Talmud Torah* but are permitted to study and by doing so receive the reward of one who is not commanded but performs the mitzvah. The prohibition of *Talmud Torah* to women is of rabbinic origin. It was enacted in order to prevent the misuse of the words of Torah on the part of individuals whom they considered likely to do so. However, even the Rabbis could not possibly have included the study of the Written Torah in the category of *tiflut* since in the *parsha* of the *Yom Hakahal* the Torah states: "In order that they may learn to fear G-d."

    According to the *Taz* and others, this refers to the listening of the women. If the Torah itself claims that the study of the Written Torah (on the part of women) is a source of fear of G-d, how could the Rabbis have categorized it as a possible source of "vain talk" (דברי הבאי). R. Boskowitz concludes that the Rambam forbids לכתחילה even the study of the Written Torah for fear that it might lead to the study of the Oral Torah. See R. Dovid Auerbach, *Halichot Beita* (Jerusalem 5743) P. 391, *Shoshanim L'David* on the Mishna in *Sotah, Resp. Maharil (Hachadashot)* No. 45.

20. Resp. *Tzitz Eliezer*, Vol. 9, No. 3, P. 31, R. Shmuel Ashkenazi, Notes on *Hilchot Talmud Torah* P. 555.

21. See *Beit Yosef* and *Taz Orach Chaim*, End of 47, who conclude that women recite *Birchat Hatorah* because of the Written Torah. See R. Reuven Margolies' note on the *Sefer Hasidim* 313 Mosad Harav Kook, edition P. 245.

interpretation of the *Shulchan Aruch HaRav.*[22] There is one halachic authority, the *Ateret Z'kenim,* who rules that women *must* study the Written Torah.[23]

Mitzvot Which Apply to Women

As previously mentioned, the Ramo, in his gloss to the *Shulchan Aruch* (246:6) states: "However, a woman must learn the laws that apply to her." How does this ruling relate to the *psak* of the Rambam? What is the nature of this obligation and its relationship to the prohibition of *Talmud Torah* for women?

Two early sources of this halacha appear in the *Sefer Hasidim* and the *Sefer Mitzvot Katan (Smak).* In the *Sefer Hasidim* we find the following:

> A man must teach his daughters the mitzvot, the *Piskei Halachot.* Concerning what was said that whoever teaches a woman Torah it is as if he taught her *tiflut,* this refers to the depth of the Talmud, the rationale of the mitzvot, and the secrets of the Torah. These are not taught to a woman or a child. However, she should be instructed in the laws of the mitzvot. If she is ignorant of the laws of Shabbat how can she possibly observe it, and similarly with all the mitzvot. We find that in the days of Chizkiyahu, the king of Judah, men, women, and children knew the laws of sacrifices and ritual purity.[24]

The students of R. Yitzchak of Corbeille write in the introduction to the *Smak,* "And he also wrote that we (men) must tell the women the positive and negative mitzvot that apply to them. The *kriah* (reading) and *dikduk* (careful study) in these

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22. Notably, R. Menachem Mendel Schneersohn, the present Lubavitcher Rebbe, in *Likutei Sichot,* Vol. 14, P. 150, ff. 12.
23. *Ateret Z'kenim, Orach Chaim* 47:14.
24. *Sefer Hasidim* 313. See *Vayoel Moshe, Kuntres Lashon Hakodesh,* Ch. 41-42, *Resp. Shoel U'maishiv* 4:41, *Shiurei Beracha* O.C. 47, *Yosef Ometz* 67.

mitzvot will benefit them just as *Esek Hatalmud* (involvement in study) benefits men."[25]

In order to understand the principle involved in this paradoxical obligation on the part of women to study certain segments of the Torah, it will be helpful to digress briefly and first investigate the controversial issue of whether women are permitted (or obligated) to recite the *Birchot Hatorah*. The *Shulchan Aruch* very clearly states, "Women recite the blessing over the Torah."[26] However, in his commentary on the *Tur*, R. Yosef Caro elaborates. He quotes the Maharil who first bases the halacha upon the distinction of the Rambam between the Written and Oral Torah. Women may recite *Birchot Hatorah* because they too may study the Written Torah.[27] Then he quotes the Maharil's concluding statement, "And certainly women recite the blessing, according to the *Smak*, who wrote that women are obligated to study their mitzvot." The *Magen Avraham* in his commentary on the ruling of the *Shulchan Aruch* cites the explanation of the *Smak* as quoted in the *Agur* and the *Beit Yoseph*.[28] According to this, women *must* recite the *Birchot Hatorah*.

The Vilna Gaon[28a] disagrees with this explanation and writes:

> And their opinion is unacceptable for a number of reasons. The Torah itself (as interpreted in the Gemara) shouts' to us "And you shall teach your sons" and not your daughters. So how could women possibly say "Who has commanded us" or "Who has given us [the Torah]"? Clearly, the matter must be explained according to what is written in Tosafot and the other *poskim*, that women are permitted to recite a *bracha* whenever they choose to perform a *Mitzvat*

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25. The *Smak* specifically states that women should study the laws of 'their' mitzvot by means of a text.
26. *Orach Chaim* 47:14.
27. Maharil 199. This will be discussed in greater detail.
28. O.C. 47:14. In addition he quotes the Maharil's contention that women also recite the order of the sacrifices (which contains portions of the Torah) when they pray. This entitles them to recite the *Birchot Hatorah*. See *Mor U'ketziya* O.C. 47.

28a. *Orach Chaim* 47:14.

> *Asei SheHazman Grama* (positive commandment performed at a particular time). Although the Rabbis have taught "whoever teaches his daughter Torah it is as if he has taught her *tiflut*," this statement was only made in connection with the Oral Torah.

Therefore, whereas according to the *Magen Avraham* the ruling of the *Shulchan Aruch* is that women *must* recite the *Birchot Hatorah,* the Vilna Gaon understands that women are simply *permitted* to say the blessing just as they are permitted to recite a *bracha* over any *Mitzvat Asei SheHazman Grama.*[29]

Most notably, what emerges out of this debate is the *requirement,* on the part of major halachic authorities, for women to recite the *Birchot Hatorah.* This would imply that there is in fact an obligation of *Talmud Torah* incumbent upon every woman. These authorities have ruled that since women must study the laws which apply to them, they must recite the bracha which was established by our Sages for the mitzvah of *Talmud Torah.*[30]

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29. According to the opinion of Rabbenu Tam as cited in Tosafot *Kiddushin* 31A. See R. Rakover's *(Birkat Eliyahu)* explanation of the Gra. The *Biur Halacha* adds that this disagreement between the *Magen Avraham* and the Gra has another major effect on the halacha: According to the *Magen Avraham,* the *Birchot Hatorah* of a woman can exempt a man. However, according to the Gaon, the man *must* recite the blessing since as for the woman it is optional, she cannot exempt him. *(Biur Halacha* 47:14 and *Minchat Chinuch* 430). See also R. Moshe Sternbuch, *Hilchot Hagra U'Minhagav, Birchot Hashachar* #8. A number of authorities point to a major difficulty in the Gra. If the Gaon is explaining that the *psak* of the *Shulchan Aruch* reflects its agreement with the opinion of Rabbenu Tam, then why does the *Shulchan Aruch* rule in a number of places that women are not allowed to recite a blessing on a *Mitzvat Asei Shehazman Gerama* (*Orach Chaim* 17:2, 589:6). Various approaches to this dilemma have been suggested. See R. Eliezer Shach, *Avi Ezri* on Rambam T.T. 1:13, *Vayoel Moshe* 3:46, R. Yisroel Meir Paretzky, *Sefer Kavod Harav* (Student Org. of Yeshivat Yitzchock Elchanan 5744) P. 233-236. Some suggest that the Gaon is in fact arguing with the *Shulchan Aruch.* See *Halichot Baita* P. 16, *Birkat Eliyahu* and *Damesek Eliezer* on the Gra.

30. This relationship between *Birchot HaTorah* and *Talmud Torah* on the part of women is clearly spelled out in one of the classic works of the *Acharonim.* The *Shaagat Aryeh,* in Responsum 35, addresses himself to the question of whether a woman is also obligated to write her own Torah. According to the Rosh, the

main purpose of the mitzvah of writing a Torah is for one to study it. The *Shaagat Aryeh* maintains that even according to the Rosh a woman would be obligated to participate in this mitzvah although women are exempt from the general mitzvah of *Talmud Torah*. Since according to many *Rishonim* they must recite the *Birchot HaTorah*, because of the requirement to study the mitzvot which apply to them, they too are included in the obligation of writing a Torah for the purpose of study. Therefore, according to the *Shaagat Aryeh*, the fact that women must make a *bracha* in order to study their mitzvot indicates that they are somehow included in the official category of those who are commanded to study Torah.

A detailed discussion of the *Shaagat Aryeh* may be found in *Mishnat Avraham*, Sub-section 40. See also *Or Someach* (*Hilchot Sefer Torah* 7:1) who points to the correlation between the mitzvah of writing a *sefer* Torah and the mitzvah of studying Torah. "The Torah says, 'Now write for yourselves this song and *teach* it to Bnei Yisrael.' It is clear that the main reason for the mitzvah of writing a Torah is for the sake of studying it. Therefore the Rabbis rules that a woman is exempt from this mitzvah since she is exempt from the mitzvah of studying Torah." A significantly different interpretation of the verse may be found in a recently published responsum of R. Alexander Moshe Lapidus. He claims that the mitzvah of writing a Torah depends on the mitzvah of teaching Torah to others and not on the obligation of studying Torah yourself. The verse emphasizes "and *teach* it to Bnei Yisrael." Even though women must study those mitzvot that apply to them, everyone agrees that they are not obligated to *teach* these mitzvot to anyone else. Hence, they are not obligated to perform the mitzvah of writing a *sefer* Torah. (*Ikvei Beracha*, Edited by R. Pinchos Halevi Lifshitz, P. 123).

The question of the relationship between women, writing a *sefer* Torah, and *Talmud Torah*, is raised in a fascinating responsum of the Radbaz. This authority was asked to state his opinion regarding the question of whether a person who is not related must tear *kriya* when he is at the bedside of a woman who has died. The Radbaz cites a Gemara in *Moed Katan* (25A) which rules that "whoever is standing before the deceased at the time of the departing of the soul must tear *kriya*. This is compared to a *sefer* Torah that has been burned in which case all present are obligated to tear." Rashi explains: "Since the individual could have continued learning, he is like a *sefer* Torah." The Radbaz writes that according to Rashi's understanding of the Gemara this law only applies to a person present in the room of a dead *man*. A woman, who is exempt from the mitzvah of *Talmud Torah*, cannot be considered a *sefer* Torah. The Radbaz then quotes the Rambam who offers two different interpretations of the Gemara which do not distinguish between men and women. The Radbaz rules that we should be strict and follow the Rambam, since even according to Rashi women who do choose to study Torah are rewarded (Rambam TT 1:13). Therefore, they may be considered similar to a *sefer* Torah (Ramban, Resp. No. 988).

The question of whether or not women are obligated to hear the reading of the *Parshat Hashavua* (Portion of the Week) is also related to the fact that they are exempt from the mitzvah of *Talmud Torah*. The *Magen Avraham* (O.C.

282:6) contends that women are indeed obligated to hear the weekly reading of the Torah since the Mishna (*Sofrim* 18:4) includes women among those who may be counted among the seven people who are called up to the Torah on Shabbat. He explains that even though the mitzvah of *Kriat HaTorah* was established for the purpose of *Talmud Torah* from which women are exempt, they are nonetheless obligated to hear the reading of the Torah. The reason for this is that once the mitzvah of *Kriat HaTorah* was established it attained the status of a mitzvah in its own right. Therefore the particulars of the mitzvah of *Kriat Torah* are not dependent on the halachot of *Talmud Torah. Kriat HaTorah,* like the *Yom Hakahal,* is a by-product of the mitzvah of *Talmud Torah.* Upon its establishment *Kriat HaTorah* gained its own halachic independence. (See also the *Birkei Yosef* 282:7).

R. Yechiel Epstein in the *Aruch Hashulchan* strongly objects to the *Magen Avraham's* interpretation of *Masechet Sofrim* and insists that women are exempt from the mitzvah of *Kriat HaTorah* for two reasons: 1) They are exempt from the mitzvah of *Talmud Torah* which cannot be viewed as a separate mitzvah. 2) *Kriat HaTorah* is a *Mitzvat Aseh SheHazman Grama* a mitzvah which is performed at a specific time from which women are exempt. (See also R. Yaakov Emden, *Mor U'ketziya* O.C. 417). The Tosafot (*Rosh Hashana* 33A), the Rosh (First *Perek Kiddushin, Siman* 49) and many other *Rishonim* quite clearly agrees with the *Aruch Hashulchan* regarding his claim that the mitzvot of *Kriat HaTorah* and *Talmud Torah* are inseperable, since they are all bothered by the fact that women can be included in the seven who are called up to the Torah in spite of the fact that they are exempt from the mitzvah of *Talmud Torah.* See comment of *Chida* in *Kisei Rachamim* on the Mishna in *Masechet Sofrim.*

The *Mishna Brura* concludes that the custom of women is not to make any special effort to hear *Kriat HaTorah.* As a matter of fact, he writes that many women are careful to *leave* the synagogue in order *not* to hear the reading of the Torah. R. David Auerbach (*Halichot Beita* P. 62 Note 4) suggests two possible reasons for this strange custom; 1) Perhaps it originates from the ruling of a number of *Poskim* that women who are in a state of Niddah may not look upon a *Sefer Torah (Magen Avraham, Taz* 88:2, *Mishna Brura* 88:8); 2) Since it is very difficult for the women to hear the reading of the Torah from the women's section, the custom developed to leave the synagogue instead of risking the possibility of getting involved in unrelated conversations which would be a disgrace to the *Sefer Torah.* Based upon the above, R. Yosef Shalom Eliyashuv of Jerusalem has ruled that it is preferable that a woman who arrived late to the synagogue recite the *Shmone Esrei* while there is still time even though in doing so she will not be able to hear *Kriat HaTorah.* (Quoted by R. Yitzchok Fuchs in *Halichot Bat Yisroel* P. 55 Note 77). R. Eliyashuv was also said to have added that in modern times, since most women understand what is being read, an effort should be made by such women to pay attention to *Kriat HaTorah.* As far as those days besides Shabbat during which we read the Torah see *Halichot Beita* P. 62-63. The question of whether women are obligated to hear *Parshat Zachor* is one of the most "popular" issues found in the *Acharonim.* R. Auerbach refers to many of these *Acharonim* in his discussion of the topic (P. 63-67).

Rabbi Yoseph Ber Soloveitchick in the *Beit Halevi,*[31] like the Vilna Gaon before him, could not accept an approach which so explicitly seems to contradict the accepted talmudic dictum that women are exempt from the mitzvah of *Talmud Torah.*[32] Nevertheless, a formidable group of *Rishonim* as well as *Acharonim* determined that women must recite the *Birchot Hatorah* because they too are obligated to study the mitzvot which apply to them. In order to resolve this problem, the *Beit Halevi* makes an important distinction between two forms of *Talmud Torah:* a) study of Torah b) knowledge of Torah. We have already seen that at the *Yom Hakahal* the men were to study and the women were to listen.[33] Why did the Torah distinguish between studying and listening if women are also obligated to study their mitzvot? The *Beit Halevi* therefore concludes that women are not commanded to *study* even their mitzvot. Only men have a positive commandment of *Talmud Torah* and fulfill their obligation even by studying subjects that do not apply to them (or possibly anyone else in the absence of the *Beit Hamikdash).* Although the *Smak* and others hold that women must study their mitzvot, they do not perform any mitzvah in the act of studying. Their only obligation is to "know" the mitzvot which apply to them, and "study" is simply a means of obtaining that knowledge. That is why the men came to study and the women to listen — to gain the information necessary for them to observe the commandments. The fact that women can recite the *Birchot Hatorah* is a result of the *psak* of Rabbenu Tam that women are allowed to make *brachot* even on those commandments from which they are exempt.[34] According to this conclusion of the *Beit Halevi,* once a woman is familiar with her

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31. *Beit Halevi* 1:6. See *Beit Halevi* on the Torah, *Parshat Mishpatim.* See R. Shlomo Wahrman, *Shearit Yosef,* Vol. II, P. 52.
32. Rambam T.T. 1:1.
33. *Chagiga* 3A and Tosafot, and Tosafot *Sotah* 21B.
34. The reason the *poskim* make special mention of the fact that women can make the *Birchot HaTorah* is only because with these *brachot* there is an additional reason why perhaps they would *not* be recited, namely, the halacha of R. Eliezer in *Sotah.* See *Beit Halevi.* Also, *Minchat Chinuch* end of Mitzvah 430.

halachot, she is no longer required to study them in any form.[35]

In halachic terminology, an act which is a prerequisite to the fulfillment of a mitzvah is known as a *"Hechsher Mitzvah."* According to the *Beit Halevi* and many other *Acharonim, Talmud Torah* is a *Hechsher Mitzvah* which is required of women in order that they may actually observe those commandments which are incumbent upon them. R. Chaim Ozer Grodzinsky, in one of his responsa in *Achiezer,* deals with the question of whether extra money which was originally designated for a men's Yeshiva may be transferred to the account of a local girls' Yeshiva *(Beit Yaakov).* In his short reply, he quotes the suggestion of the questioner himself, that the solution of the problem could very well depend on how we define the nature of a woman's *Talmud Torah* as opposed to that of a man. Since women are exempt from the actual mitzvah of *Talmud Torah,* their obligation to study the mitzvot can only be categorized as a *Hechsher Mitzvah.* Naturally,

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35. The Chida, in his authoratative *Birkei Yosef (Orach Chaim* 47) reached the same conclusion as the *Beit Halevi* from a text in *Shabbat* (33B) which quotes R. Shimon as saying that the disease of *Askara* is caused by *Bitul Torah.* The Gemara asks, if R. Shimon is correct, then why do women, who are exempt from *Talmud Torah,* also die of *Askara*? The Gemara answers that women die of *Askara* because they disrupt the Torah of their husbands. The Chida writes that the Gemara should have answered that *Bitul Torah* is possible by women also — if they are negligent in the study of their mitzvot. Since the Gemara did not offer this answer, the Chida deduces that only men are commanded to study and women are only responsible to know. The Chida further develops this approach in his responsa *Yosef Ometz* No. 67 and *Tov Ayin* No. 4. For a lucid explanation of the Chida see responsa *Tzitz Eliezer,* Vol. 15, No. 24, who discusses this issue in the context of the general nature of the *Birchot HaTorah* as being a *Birchat Hamitzvah* or *Birchat Hashevach,* or *Birchat Hanehenin.* See *Resp. Chikrei Lev* 1:45, *Halichot Beita* P. 17-18. The Rebbe of Sochatchov in *Avnei Nezer* does not mention the responsum of the *Beit Halevi* but is opposed to the *Shaagat Aryeh* on the same grounds and reaches the same conclusion. He explains that the learning of women is part of their fulfillment of the mitzvah. When a woman studies a mitzvah, she is in essence beginning the action of that mitzvah since the actual physical fulfillment of the commandment is impossible without previous knowledge as to how it is to be carried out. (Y.D. 352, Introduction to *Eglei Tal.* See also R. Meir Dan Plotzki, Introduction to *Chemdat Yisrael.* See also *Hagahot HaYavetz Tosafot Kiddushin* 34A and R. Shlomo Yosef Zevin, *L'eor Hahalacha* P. 207). R. Yechezkel Landau in his talmudic

there would be a problem involved in transferring funds that were set aside for a mitzvah in order to be used for the purpose of a *Hechsher Mitzvah.*[36]

There are authorities, however, who understand that a woman's responsibility to study her mitzvot and recite the *brachot* implies that her Torah study is more than just a *Hechsher Mitzvah.* The *Bayit Chadash (Bach)* quotes the Maharshal, "Women have affinity to the words of the Torah when they study mitzvot that apply to them."[37] What is the nature of this affinity to *Talmud Torah* that on the one hand allows (or requires) women to recite the *Birchot Hatorah* but on the other hand complies with the accepted halacha that women are exempt from the mitzvah of *Talmud Torah*? One possible solution to this is proposed by R. Menachem M. Schneerson, the present Lubavitcher Rebbe.[38] The Rambam, based upon a Mishna in *Zevachim,* rules that: "We have therefore learned that an improper thought invalidates a sacrifice when it occurs during any of the four stages of the sacrifice: slaughtering, receiving the blood, carrying of the blood, and sprinkling of the blood upon the altar."[39] R. Yosef Rosen, better known as the Gaon of Rogatchov, comments on this halacha:

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commentary *Tzlach (Berachot* 11B) writes that according to Tosafot a man who has interrupted his learning is not required to repeat the *Birchot HaTorah* when he resumes learning because he is constantly obligated to learn; therefore the interruption is not considered a break. However, a woman who is responsible only to know her mitzvot and not to study them would have to repeat the *Birchot HaTorah* in the course of the day each time she resumes her study of the mitzvot. The opinion is not found in any of the *Rishonim,* and the *Tzlach* himself concludes "however, I have not found even a trace of this in the words of *Rishonim* or the *Acharonim.*" See *Yeshuot Yaakov* O.C. 47:8.

36. *Achiezer* III, No. 79. See R. Yoel Teitelbaum, Resp. *Divrei Yoel* I, P. 266.
37. *Tur* Y.D. 246. The *Drisha* quotes the same Maharshal but instead of writing that women are שייכות to Torah, he simply says that according to the Maharshal it is a mitzvah for them to study their commandments. The Chida *(Yosef Ometz* 67) claims that the *Bach's* version of the Maharshal seems to be the more accurate one. He contends, however, that the *Drisha* would also agree that women have a שייכות to *Talmud Torah* which obligates them to study their mitzvot and make the proper *brachot* before learning. See *Tzitz Eliezer,* Vol. 15, P. 59.
38. *Chiddushim U'Beurim BaShas.* (Kehot 5739) P. 217-223.
39. *P'Sulei Hamukdashin* 13:4.

"Even though the carrying of the blood to the altar is in reality just a necessary action that must be taken in order to perform the actual ceremony of the sprinkling of the blood, that action acquires its own significance and is therefore counted as one of the stages of sacrifice, where an improper thought invalidates the sacrifice."[40] In other words, any cause which is absolutely essential to its effect has by that very characteristic gained an independent significance of its own. A similar situation exists, according to R. Schneerson, in the case of women and *Talmud Torah*. Although the Torah exempts women from *Talmud Torah*, it obligates them to observe their commandments. In order to attain this end there exists an indispensable means — study. Because of its necessity, this study gains its own significance and identity although it does not fall under the general category of *Talmud Torah*. This is the meaning of women "having an affinity" to *Talmud Torah*.

This form of *Talmud Torah* has its own unique identity which is related to the regular mitzvah of *Talmud Torah*. Therefore, a woman may recite the *Birchot Hatorah* and may continue to be involved in her act of *Talmud Torah* even after she has acquired enough knowledge to observe the commandments.[41] It would also seem that according to this approach there would be no restrictions regarding the level in quality of study as long as the woman remains within the confines of her form of *Talmud Torah*. According to R. Yosef Shaul Nathanson, when the Temple existed women were able to study all the intricate laws of ritual slaughter *'Mitoch HaTalmud'* — in the talmudic manner — since they too brought sacrifices.[42] Anyone who is familiar with the talmudic method realizes that its study entails much more than a review of practical halachic conclusions.

Independent Study — Sincere Motivation

Let us return to the statement of the Rambam: "A woman

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40. *Tzafnat Paneach* on the Torah, Beginning of *Parshat Masaei* and commentary on the Rambam, Vol. II, P. 51 (3). See also *Tzafnat Paneach* on *Devarim* P. 372.
41. See also R. Shmuel Ashkenazi's notes to the *Shulchan Aruch Harav* P. 560-561.
42. *Shoel U'Meishiv*, Vol. IV, No. 41. Although he writes that this deduction was

who has studied Torah has a reward, but it is not like the reward of a man for she was not commanded, etc.. Yet even though she has a reward, the Sages commanded that a man not teach his daughter Torah for the mind of the majority of women is not adapted to be taught, etc.. The Sages said, 'Anyone who teaches his daughter Torah, it is as if he taught her *tiflut.* "[43]

R. Yehoshua Falk in the *Prisha* comments:

> The minds of most women *(rov)* are not adapted to be taught Torah. However, if a woman has taught *herself,* it is apparent to us that she is no longer included in the category of *rov* (most) women. Therefore, the Rambam wrote that she is rewarded. This refers to a woman who has studied Torah properly and consequently will not turn the words of the Torah into words of nonsense. A father is forbidden to teach his daughter Torah lest she turn the words of Torah into words of nonsense since he does not know what lies in her heart.[44]

The *Prisha,* in this brief note, has turned our attention to two crucial points which most of the authorities did not mention:

1) At the beginning of the halacha, when the Rambam writes that a woman studying Torah is rewarded, he specifically mentions the woman *herself* without referring to her being taught by her father or any other instructor.

2) According to the Rambam, *most* women are not geared for Torah study. This would imply that certain women are to be considered exceptions who are indeed prepared to study.

Thus, according to the *Prisha,* the general prohibition to teach women Torah is surely in effect. However, if a woman demonstrates her motivation by studying Torah on her own, thereby showing that she considers it to be a serious pursuit, the prohibition is removed.[45] A father (or teacher) may not impose

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made by means of pilpul alone we do not find anything in the rest of his discussion which contradicts this conclusion.

43. Rambam, *Hilchot Talmud Torah,* 1:13
44. *Tur, Yoreh Deah, Prisha* 246:6
45. Meiselman, P. 38. See R. Eliezer Shach *Avi-Ezri,* Rambam, *T.T.* 1:13.

Torah knowledge upon women in an "arbitrary" manner as one does upon men, but may teach Torah to a woman who demonstrates the proper motivation.[46]

Similarly, the Chida points to the case of Bruriah whose vast knowledge of the Written and Oral Torah is recorded in numerous places in the Gemara. Apparently, he claims, the Rabbis after much scrutiny came to the conclusion that Bruriah could not be included in the category of the majority of women, by virtue of her brilliance and sincerity. Since she was self-motivated to such a degree, she was permitted to receive Torah instruction.[47] An early source of this important distinction may be found in the Responsa of the Maharil who states the following: "The prohibition applies specifically to the father who teaches his daughter, but a woman who studies on her own is rewarded as one who is not obligated to

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46. Ibid.

47. Chida, *Resp. Tuv Ayin*, No. 4. See also R. Isaac Abraham Hakohen Kook, *Igrot Reiya* No. 467. The *Tzitz Eliezer* (Vol. 9, No. 3) quotes the *Mesharet Moshe* on the Rambam, *T.T.* 1:13 who disagrees with the Chida and insists that the Rabbis could not possibly have allowed for exceptions when the *issur* was established. Since the *heter* would depend on the extent of the woman's sincerity, it would be very difficult to consistently make reliable character judgements. He points to the tradition that in the end Bruriah herself was misled. See *Resp. Maharil* 139 and *Yefeh Lelev*, Y.D. 246:19. R. Yeruchem Ciechanowicz in *Torat Yerucham* reaches the same conclusion as the Chida and attempts to prove that Tosafot (*B.K.* 15A) concur with this line of reasoning.

When dealing with the question of how could Devorah be a judge, the Tosafot were never troubled by the fact that women are forbidden to study Torah. (This is before the conclusion that she judged by means of prophecy). Hence, according to the Tosafot, Devorah was recognized as being competent and sincerely motivated and was therefore permitted to learn herself as well as to teach Torah to others. See also Tosafot *Yevamot* 45B, *Chinuch*, Mitzvah 77. The case of Devorah raises another question: may a woman render decisions in practical halacha? According to the *Shulchan Aruch*, under ordinary circumstances, a woman may not be a judge (*Choshen Mishpat* 7:4). However, the *Chinuch* states: "The prohibition to render a halachic decision (while drunk) applies to all places, at all times, to men as well as to wise women who are proficient in *Horaah*" (rendering halachic decisions). (Mitzvah 152). This is quoted by the *Birkei Yosef* (*C.M.* 7:12) as well as the *Pitchei Teshuvah* (*C.M.* 7:5) and the *Shaarei Teshuvah O.C.* 462:17), *Machzike Beracha* (*Y.D.* 42:30). See also Tosafot, *Niddah* 50A, Ran, *Shevuot* 30A. Midrash *Bamidbar Rabba*

perform a mitzvah but has done so because she has sincere intentions."[48]

These authorities apparently view the Rambam's ruling as one which allows for a shift in attitude due to a change in the general orientation of women toward intellectual pursuits. This is a broad and bold *heter* which would basically allow serious women the option of studying all areas of the Torah with the traditional and halachically-expected intensity of their male counterparts.

This liberal approach to the issue of women and *Talmud Torah* found an articulate spokesman in an obscure authority quoted by R. Baruch Halevi Epstein in the *Torah Temimah:*

> I have seen it fit at this point to copy something that I have found written in an old, rare *sefer* called *Maayan Ganim* written by R. Shmuel ben Elchanan Yaakov Rekavalti, in which the author addresses a letter to a certain "educated" woman concerning the *heter* of women to study Torah: "The statement of our Rabbis,'Whoever teaches his daughter Torah is considered as if he has taught her *tiflut*', is perhaps referring to a father who teaches his daughter while she is still young and impressionable and tends to understand everything in a literal sense. Certainly, in such a case there is reason to apply the warning since most women are frivolous and spend their time involved in trival things ... However, those women, whose hearts have motivated them and brought them closer to the work of G-d as a result of their own choice to do what is right, may ascend the mountain of G-d and dwell in His holy place. These women are considered exceptional and the Torah sages of their

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(Nasso 10:15). However, there is no question whatsoever regarding the general reliability of women to describe a particular object or situation even though this will effect the halacha. See R. Yitzchak Fuchs, *Halichot Bat Yisroel,* P. 125 ff. 29. In *Iggerot Moshe (Y.D.* Vol. II No. 44-45) R. Moshe Feinstein discusses the question of whether a woman is permitted to serve as a kashrut supervisor in a restaurant or catering hall.

48. Maharil, Resp. (Hachadashot) No. 45. See however his responsum in the earlier edition of his Teshuvot No. 139. Tzitz Eliezer Vol. 9, No. 3 (P. 29).

> generation must encourage, strengthen, and direct them ... Carry out your plans and succeed, and from Heaven you will be helped."[49]

This *heter* is clearly an all-inclusive one. Motivated and capable women may study and be taught the Written and Oral Torah and are rewarded for their efforts. Thus, what appears to be a legal prohibition in both the Gemara and the Rambam has been reduced to a practical warning for the majority of women who are either unmotivated or insincerely motivated to pursue the study of the Torah. Such women may not be *taught* Torah for the reasons listed in the Gemara and the Rambam.[50] However, any mature woman who exhibits a sincere desire to study Torah (whether written or oral) has by doing so removed herself from the category of the majority of women who are not prepared to learn Torah and are likely to misinterpret or misuse it. A direct implication of this view would be that in contemporary society, where women are regularly involved in serious academic pursuits, they may (or should) be allowed to seriously pursue their Torah studies.[51] Moreover, according to the *Maayan Ganim* and the Chida, once a woman has demonstrated her deviation from the majority, she should actually be taught Torah by a competent authority since the entire prohibition no longer applies to her. The father, as well as anyone else, has by this time a clear indication of "what lies in her heart," and they can teach her Torah without any hesitation. Rabbi M. Meiselman points to an historical precedent, namely the period of King Chizkiya, concerning which the Talmud states: "They searched from Dan to Beersheva and did not find an ignoramus, from Gevat to Antipot and could not find a young boy or girl, man

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49. *Torah Temimah, Devarim* 11:17.

50. See the conclusion of *Torat Yerucham* I. *Shearith Yosef,* Vol. II, P. 49 R. Chaim Dovid Halevi of Tel Aviv, *Livnot Yisrael,* Ch. 49. The *Tzitz Eliezer* (Vol. 9, No. 3) points out that this view can be reconciled with the ruling of the *Taz* and the Gra (*O.C.* 47:14) regarding *Birchot HaTorah.*

51. Meiselman, P. 39.

or woman who was not completely conversant with the detailed laws of ritual cleanliness."[52]

The factors of motivation and historical perspective have provided impetus for a broad spectrum of twentieth century authorities to assume a liberal position regarding the formal study of Torah by women who attend *Beit Yaakov* and other women's Yeshivot. R. Yisroel Meir Hakohen (the *Chafetz Chaim),* in his commentary to *Sotah,* states the following:

> It would seem to me that this (prohibition) is only at those times of history when everyone lived in the place of his ancestors and the ancestral tradition was very strong for each individual, and this motivated him to act in the manner of his forefathers as it is written, "Ask your father and he will tell you." In this situation we can say that women may not study Torah and she will learn how to conduct herself by emulating her righteous parents. However, nowadays, when the tradition of our fathers has become very weakened and it is common for people not to live in the same place as their parents, and women learn to read and write a secular language, it is an especially great mitzvah to teach them Bible and the traditions and ethics of our sages like *Pirkei Avot* and *Menorat HaMaor* and the like, so that the truth of our holy heritage and religion will become evident to them; otherwise, Heaven forbid, they may deviate entirely from the path of G-d and violate all the precepts of the Torah.[53]

There are some modern-day writers[54] who concluded from the

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52. Ibid. P. 38. The Gemara is found in *Sanhedrin* 94B. This interpretation of the Gemara is by no means universally accepted. R. Yoel Teitelbaum in *Vayoel Moshe* P. 444-447 offers a different interpretation as well as a good number of *Rishonim* and *Acharonim* who seem to support his approach.
53. *Likute Halachot, Sotah* 20A. See also his collected letters, 23 *Shevat* 5693, as quoted in R. Yaakov Fuchs, *Halichot Bat Yisroel,* P. 121 and conclusion of *Chomat Hadat.*
54. See for example Arthur M. Silver "May Women Be Taught Bible, Mishna, and Talmud? Tradition, 17 (Summer 1978).

above statement that the *Chafetz Chaim* had basically done away with all the traditional (and for many — halachic) restrictions of *Talmud Torah* for women. The Satmar Rav strongly opposed this reading of the *Chafetz Chaim:*

> There are fools who have misinterpreted the words of the *Chafetz Chaim* as they are recorded in his *Likutei Halachot* on *Sotah* ... thereby attributing to him nonsense which he never spoke and consequently defaming the name of that *Tzaddik*. According to them it appears as if, G-d forbid, the *Chafetz Chaim* said that a clear halacha originating from the Talmud and *Rishonim* and codified in the *Shulchan Aruch* no longer applies. These writers have eyes but do not see that all the subjects that he mentioned (Torah, Prophets, and Ethics of *Chazal*) are not forbidden according to the *din* as I have explained. In spite of their being permitted, a number of generations were strict and did not allow women to study even these subjects. There could have been a number of reasons for this stringency. One is that perhaps they were concerned that the study of these subjects might lead to the study of those areas which are prohibited to them. Therefore, they relied upon the *Kabbalat Avot* — family transmission of the necessary halachot as we see in the Maharil. Regarding this, the *Chafetz Chaim* wrote that because of the weakening of *Kabbalat Avot* in modern times it is no longer sufficient for a girl to rely on family traditions but, rather, it is a mitzvah to teach her those subjects which we are (and always were) permitted to teach women. This can be done in spite of the custom of previous generations to refrain even from this permissible area of study. The *Chafetz Chaim* never intended, G-d forbid, to permit that which is forbidden according to halacha nor to disregard what *Chazal* described as teaching *tiflut*. Certainly, in our feeble generation where *Kabbalat Avot* is weaker than ever, the prohibition remains in effect.

Therefore, according to the Satmar Rav, the only innovation made by the *Chafetz Chaim* was to allow initially the non-

analytical study of the Bible and talmudic ethics on the part of women. These subjects have always been permitted halachically, but in previous generations, for various sociological reasons, were not taught to women. The *Chafetz Chaim* did not make any mention of Mishna or Gemara in his famous *heter*. Similarly, R. Moshe Feinstein writes the following:

> The Sages commanded us not to teach women *Mishnayot* which is *Torah SheBaal Peh* and falls under the category of *tiflut*. Therefore, we should prevent women from studying it. Only *Pirkei Avot*, which deals with matters of morals and ethical behavior, should be taught to women in order to inspire in them love of Torah as well as noble characteristics. Other tractates may not be taught.[56]

R. Zalman Sorotzkin, in an often-quoted responsum, very enthusiastically endorses the liberal approach to our issue and its implementation in the curriculum of *Beit Yaakov* and other girls schools. Nevertheless he writes:

> Practically speaking, the question of women studying the Oral Torah requires further investigation. However, in reality, in the *Beit Yaakov* schools, the Oral Torah is never analyzed anyway ... The statement of *Chazal*, "Whoever teaches his daughter, etc." was only made regarding the study of the Oral Torah by means of thorough analysis and *pilpul*.[57]

Thus we are presented with a perplexing paradox. Many of the twentieth century authorities who seem to be relying upon the approach of the Maharil, *Prisha*, Chida and *Bach* in order to permit Torah study for women, do not follow the *heter* to its logical conclusion; namely, the permissibility to study or be taught Oral Torah.[58] Apparently, they are very hesitant to write off the Gemara

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55. *Vayoel Moshe* P. 451-452.
56. *Iggerot Moshe* Y.D. 3:87. See also Y.D. 2:139, 2:109.
57. *Resp. Moznayim Lemishpat* No. 42, *Hadea V'Hadibur, Drush* 3.
58. See also R. Samson Rafael Hirsch, *Horeb*, Ch. 75, Commentary to Siddur, *Kriyat Shma*.

in *Sotah* as well as the Rambam as an outdated warning which would not possibly apply to the twentieth century.

The view of the *Prisha* and even of the *Maayan Ganim* had very little to do with the actual status of even a small minority of women in their times. At most, it provides us with a rationalization of the historic reality of isolated cases of women who were well-versed in all areas of the Torah.

Nevertheless, the *Prisha's* interpretation of the Gemara and the Rambam has gained immense significance in our "Bruriah-filled" society. R. Ben Zion Firrer points out,

> Today, the question is not whether or not a woman should study Torah, but rather should a woman study Torah or should she study other subjects which are unrelated to the Torah. An obsession to pursue the tree of knowledge has taken hold of all people, women as well as men ... If a modern woman does not study Torah, she will *certainly* study *tiflut*.[59]

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59. *Noam*, Vol. III, P. 131-134. See also R. Shlomo Malka, *Resp. Mikveh Hamayim*, No. 21, *Resp. Chemdat Tzvi* Y.D. II No. 8, Dr. Meir Hershkowitz, *Or Hamizrach* 17, P. 40-52, 124-132. *Resp. Zekan Aharon*, Y.D. No. 66, R. Avraham Y. Neimark, *Eshel Avrohom, Sotah* 20B, *Tzitz Eliezer* Vol. 9, No. 3, R. Elimelech b. Shaul *Mitzvah Valev*, Vol. II, P. 139-159. These scholars would also agree that the fact that a girl attends Yeshiva high school does not necessarily mean she is either mature or serious in terms of Torah study. However, because of the inevitable onslaught of the corrupt values of modern society, it is essential that every Jewish girl be exposed to a broad program of Torah study. The danger of "shrewdness and vain talk" with individual girls is much less imminent and detrimental than the certain *tiflut* of society and its educational institutions which all of the girls will eventually have to contend with. R. Aharon Walkin (*Resp. Zekan Aharon* Y.D. No. 66) quotes the *Shiltei Giborim* who rules that it is permitted to teach non-Jews the books of the *Neviim* and *Ketuvim* in order that they may read of the comforting prophecies since this may lead them to attach themselves to Torat Yisroel. R. Walkin then writes: "We can make a *kal v'chomer;* the teaching of Torah to a non-Jew is forbidden from the Torah and yet it is permitted because it *might* bring him to G-d. This is the law in spite of the fact that according to the Sages, converts have often been the source of difficulty for the Jewish people and Judaism in general does not encourage conversion. Certainly, when we are dealing with the daughters of Israel who have a standing obligation to observe the mitzvot, there is a great responsibility to teach them Torah. This is the case even though the subject matter itself might

The same sentiments are expressed by R. Meiselman,

> Most say that they (the Sages) urged caution and prudence out of fear of the dangers of superficial knowledge. No authority ever meant to justify the perverse modern-day situation in which women are allowed to become sophisticatedly conversant with all cultures other than their own. If in the 20th century American women are more familiar with the Protestant ethic than with the Jewish ideal, it is nothing but a violation of the original intent of R. Eliezer's statement.[60]

These scholars have indeed accepted the view of the *Prisha* and the others as one which represents a sweeping *heter* for modern women to study and be taught both the Written and Oral parts of the Torah.[61] We can only conjecture what the attitude of the *Chafetz Chaim* might have been today.

As we have seen, one authority, the Satmar Rav, has insisted that the *Chafetz Chaim* did not deviate in the least bit from the

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not be of benefit to women, since through study they will be motivated to remain in religious schools and they will be saved from the current of heresy flooding the streets. In the *Nachalat Shiva* (83) it is written that in order to save a Jew from a possible situation of conversion one is obligated to desecrate the Shabbat. We have seen with our own eyes that due to the *Beit Yaakov* schools tens of thousands of souls have been spared eternal (spiritual) death. Therefore, we can understand the obligation of every Jew to support the establishment of these schools. Even if there is a possibility of an *Issur* involved we must consider at the present time our responsibility to save our daughters from *Shmad* and spiritual death before which all the laws of the Torah are suspended."

60. Meiselman P. 40

61. These scholars would also agree that the fact that a girl attends high school does not necessarily mean she is either mature or serious in terms of Torah study. However, because of the inevitable infiltration of the corrupt values of modern society, it is essential that every Jewish girl be exposed to Torah study.

    As a result of the fact that there are presently many women who are professional teachers, a number of authorities have discussed the halachic status of a woman who is well-versed in Torah. Does she have the same status as a *Talmid Chacham*? How are her students or other Jews expected to treat her? R. Ovadiah Yosef (*Yechave Daat* Vol. III, No. 72) quotes the Gemara in *Shevuot* (30B) which tells us of an actual case where R. Nachman stood up out of respect

halachic norms as expressed in the Rambam. According to the Satmar Rav, the Talmudic prohibition of R. Eliezer[62] must be adhered to more stringently in our permissive era than ever before. His opinion is central to any discussion of the topic not only because of his legendary brilliance and erudition, but also because it has molded the educational institutions and attitudes of thousands of Jewish girls and women in both American and abroad. The Satmar Rav's first contention is that even Ben Azzai, who was of the opinion in *Sotah* that a father must teach his daughter Torah, would agree with R. Eliezer that it is forbidden once the Torah's requirement that the suspected woman drink the bitter water is no longer in effect.[63] According to Ben Azzai, the

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for the wife of R. Huna because "the wife of a *chaver* is considered like a *chaver*." At first glance, writes R. Yosef, this would suggest that certainly one must stand before a woman who is herself learned. However, the Gemara could be interpreted to mean that one should stand before the wife of a *Talmid Chacham*, because that is considered another form of honoring the *Talmid Chacham* himself, not because the woman by virtue of her own qualities deserves such respect. In fact, according to most of the *Rishonim*, the obligation to stand up for this woman is no longer in effect once her husband has died. On the other hand, R. Yosef cites the opinion of the *Sefer Hasidim* (P. 578) that the commandment to stand before an elderly person refers even to an elderly woman. (See also *Sefer Hachinuch* 257). Indeed, R. Ovadiah Yosef quotes the responsa of two Sephardic authorities who rule that one must stand before a woman well-versed in Torah regardless of her age. (R. Yehuda Iyas, *Beit Yehuda* Y.D. Vol. I, No. 28 and R. Yitzchok Ataya, *Zera Yitzchok* P. 88B). The *Minchat Chinuch* also rules accordingly (257:3). Since the mitzvah to rise before an elderly person is found in the Torah itself, therefore in a case of doubt (*safek*) such as a wise woman, R. Yosef rules that it is best to rise before her. As far as a student rising out of respect for her female teacher, R. Ovadia rules that there is no question that she must, and she is also forbidden to refer to a female teacher by name (unless its accompanied with "my teacher"). The Gemara deduces that a student must respect his Rebbe because it is he who "brings him into the life of the coming world." (*Bava Metzia* 33A). This reasoning applies to a female teacher as well in spite of the fact that neither she nor the student are obligated to study Torah. The woman is nonetheless considered the girl's "Rebbe" since the girl is obligated to know those laws which apply to her and her teacher is the person who provides the information required.

62. Which he agrees applies primarily to the Oral Torah as well as the analytical study of the Written Torah.
63. All authorities agree that the drinking of the waters by the *Sotah* is no longer possible. *Sotah* 47A. Rambam *Hilchot Sotah* 3:19.

daughter must be taught Torah so that she will know that certain merits have the power to postpone her death. Once it is no longer necessary that she be knowledgeable in that specific area, he would agree with R. Eliezer that a father is forbidden to teach his daughter Torah. The only debate would then be whether or not a father who has nonetheless studied Torah with his daughter is to be considered as if he has taught her *tiflut*. The Satmar Rav agrees that even according to R. Eliezer the simple meaning of the Torah, as well as the final halachic conclusions in areas of law which apply to women, may be taught.[64]

R. Teitelbaum's second contention is a most fascinating one. According to the halacha, it is forbidden to instruct an unworthy student (תלמיד שאינו הגון).[65] A major source of this halacha is R. Gamliel's policy concerning the admission of prospective students into the yeshiva. כל תלמיד שאין תוכו כברו אל יכנס לבית המדרש — "Any student whose 'inside' is not the same as his 'outside' should not enter the study hall."[66] This prohibition was primarily directed at men who are commanded to study the Torah. The Satmar Rav writes that certainly it applies to women, who are exempt from the mitzvah of *Talmud Torah* and a majority of whom are presumed to misunderstand and misuse the teachings of the Torah. He concludes that the argument in the Gemara between R. Eliezer and Ben Azzai could very well be revolving around R. Gamliel's controversial policy. Both sages would agree that any woman who falls within the category of "her inside is not like the outside" may not be taught. Similarly, they do not argue that in a case when we are not positive that she is consistent we must suspect her of being inconsistent and hence, she may not be taught Torah. The only point of debate is where we are certain that a woman is sincerely interested in studying Torah for its own sake. According to R. Eliezer, the prohibition still stands, whereas according to Ben Azzai, such a woman should be taught. Therefore, concludes the Satmar Rav, under the present circumstances where we are no

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64. *Vayoel Moshe* P. 433-440.
65. *Hullin* 133A, Rambam *Talmud Torah* 4:1, *Shulchan Aruch* 246:7.
66. *Brachot* 28A.

longer capable of judging the sincerity of another person, we are certainly not permitted to teach Torah (the Commentaries, Oral Torah) to women.[67]

As far as teaching women the positive and negative commandments that apply to them, R. Teitelbaum quotes the Maharil's ruling that even these halachot may not be taught in a formal manner, by means of a text. Instead, the required information must be transmitted according to the tradition. By growing up in an observant home the girl should be able to know these halachot. If she does need some additional information, she can direct her inquiries to a competent halachic authority.[68] The Satmar Rav writes that throughout history this decision of the Maharil was more or less adhered to by the vast majority of Jewish communities. He continues that, unfortunately, in the twentieth century this method is no longer applicable. Very often the girl's

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67. *Vayoel Moshe* P. 440-444. In an article published in *HaPardes* (June-July 1956) R. Leib Baron of Montreal disagrees with the Satmar Rav's understanding of the principle of *Talmid She'eino Hagun*. He cites the Maharsha (*Berachot* 28) who explains that *Talmid She'eino Hagun* is referring to a *Talmid Chacham* who is not G-d fearing. Based upon this it it impossible to make a broad classification of women as lacking in fear of G-d. The Maharsha (*Chullin* 133A) offers another explanation of *Talmid She'eino Hagun* as a student who from the very start of his learning appears to have unworthy intentions. Clearly, an average woman does not undertake the study of Torah with dangerous or improper intentions. *Chazal* only feared that through the study of Torah a woman might eventually be led astray. According to R. Baron if every woman is to be considered a *Talmid She'eino Hagun* the *Poskim* would never have ruled that she is permitted to study the simple meaning of the Torah and obligated to study the laws of her mitzvot.

68. *Resp. Maharil* 199. Interestingly enough a relatively modern authority, R. Yechiel Michel Epstein in the *Aruch Hashulchan*, writes: "Our teacher the Ramo has written that a woman must study the laws that apply to her. However, it has never been our custom to teach them the halacha by means of the text nor have I ever heard of such a custom, but rather a woman teaches her daughter and daughter-in-law the necessary laws. Recently the laws that apply to women have been printed in the vernacular (Yiddish) and may be studied. Our women are scrupulous and whenever there is any doubt (concerning a halacha) they inquire, never relying on their own judgement in even the smallest matter." (*Y.D.* 246:19). This clearly concurs with the Satmar Rav's opinion that at least as far as Ashkenazic Jewry is concerned, the Maharil's method was used. R. Epstein does

parents are uninformed or misinformed in many areas of practical halacha. Also, modern day Jewish girls are for the most part growing up in an atmosphere which discourages respect for traditional laws and values. In order to overcome these obstacles, R. Teitelbaum agrees that it is absolutely essential that we establish and maintain Yeshivot for girls.[69] As far as the curriculum in these yeshivot is concerned, he writes that the written Torah may be taught, but commentaries such as Rashi are forbidden since they consist of an in-depth analysis of the text as well as the *drashot* of *Chazal.*[70] Naturally, the study of Mishna or Gemara is absolutely forbidden. Books such as *Menorat Hamaor* and *Tzenah Ure'enah* may be studied although they contain quotations from the Gemara, since they are primarily *mussar* (ethics) texts which do not anlalyze the texts quoted.[71]

Although most modern day *Poskim* disagree with the conclusions of the Satmar Rav, his *psak* has made a major impact upon his considerable following, as well as upon the *Eidah Charedit* community of Jerusalem which was also under his jurisdiction. All Chassidic communities have established Yeshivot for girls which for the most part attempt to emulate the European tradition of educating girls. The study of *Mussar* texts, *Midrash,* and legends of the *Tzaddikim* form the core of the curriculum. In varying degrees, an analytical approach to studying Torah is avoided. In recent years a number of Chassidic educators have suggested and even implemented more innovative and analytical

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not rule that it is forbidden for women to study the text in a formal manner. He simply relates to us an historic reality that to the best of his knowledge it was not done.

69. *Vayoel Moshe,* P. 447, Letters Vol. I No. 34 and 55. R. Teitelbaum also writes that the Mahril himself alluded to the fact that the degree to which his ruling applies depends upon the Torah conditions of each particular generation. See *Vayoel Moshe* Ch. 43.
70. *Vayoel Moshe* P. 452.
71. Ibid. P. 450. See also *Iggeret Hagra,* R. Yosef Dovid Epstein, *Mitzvot Habayit,* P. 94-97.

approaches to the study of the Written Torah. The study of the Oral Torah in any form is still forbidden.[72]

Conclusion

We have seen that the *Rishonim* and *Acharonim* may be divided into two distinct schools regarding their understanding of the Rambam's statement in *Hilchot Talmud Torah.*

1) One view interprets the Rambam's statement as a permanent prohibition. Hence, women may not study nor be taught Torah. However, the actual prohibition applies only to the study of the Oral Torah as well as to in-depth study of the Written Torah. These forms of study fall under the category of *Tiflut* and *Divrei Havai.*

2) An alternate view refuses to understand the Rambam's statement as a rigid prohibition against *Talmud Torah* for women. Instead, this school is concerned with the underlying rationale of the *psak.* It asks: What if a woman is clearly not one of those who should be suspected of misinterpreting the Torah? May a woman teach herself Torah? Was the Rambam's *psak* no more than a warning to a society whose women were for the most part intellectually unmotivated? Within this school there are authorities who subscribe to a moderate *heter:* women may study the Written Torah with all of its commentaries. The Oral Torah may be studied on an individual basis under careful supervision and guidance. Other authorities in this school permit "open enrollment" of women into classes of all areas of the Torah, under the condition that such a program constructively caters to the needs of a good number of women in a particular society.

All religious authorities agree that women should study the laws that apply to them. They differ as to how those mitzvot should be studied and whether or not this form of study is related to the mitzvah of *Talmud Torah.*

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72. This information was obtained by means of personal discussions I have had with educators from the Satmarer, Bobover, Vishnitzer, Klausenberger, Gerer, and Belzer courts.

Returning on the Sabbath from A Life-Saving Mission

Dr. Fred Rosner & Rabbi Wilfred Wolfson

It is axiomatic in Judaism that human life is of infinite value and that the preservation of human life takes precedence over all biblical commandments except the cardinal three of idolatry, adultery/incest and murder. Biblical laws and rabbinic decrees are all set aside for the overriding consideration of saving a human life. He who saves a single life is as if he saved an entire world.[1]

This principle is discussed in great detail in the Talmud, as is as the question of saving a life, *pikuach nefesh*, on the Sabbath. For example the Mishnah states:

> מי שאוחזו בולמוס מאכילין אותו אפילו דברים טמאים
>
> If a person is seized with ravenous hunger, it is even permitted to give him non-Kosher food to eat since he may die if he does not eat immediately.[2]

The same Mishnah further states:

> מי שנפל עליו מפולת ספק הוא שם, ספק אינו שם ספק חי ספק מת מפקיחין עליו את הגל
>
> If a building collapsed on the Sabbath or Day of

1. *Sanhedrin* 4:5.
2. *Yoma* 83a.

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> Atonement and there is doubt if the person is there or not, or if there is doubt whether or not the person survived, it is permitted to clear away the debris, [an action normally prohibited on the Sabbath] because of the concept פקוח נפש דוחה את השבת "Saving a life requires the setting aside of Sabbath.

This rule is biblically mandated (וחי בהם) because of the sanctity of human life.

The purpose of our article is to present relevant Jewish sources which deal with several issues related to the concept of *pikuach nefesh.*

Without hesitation, in response to an urgent call to see a patient who is seriously or potentially seriously ill, a physician must drive his own car on the Sabbath if that is the most expeditious method of reaching the patient. So, too, emergency medical technicians must respond on the Sabbath with their fully-equipped ambulance to emergency calls for medical assistance.

Several recent articles *(vide infra)* address the subject of a physician's returning to his home on the Sabbath after caring for a seriously ill patient and emergency medical technicians returning with their ambulance to their home base following their response to an emergency call. In both cases, there is no longer any danger to human life involved. Is it, therefore, permissible for them to return to their point of origin on the Sabbath in their car or ambulance, respectively, after the conclusion of the life-saving or potentially-life-saving mission? Must they remain at the site where the patient care was delivered until after the Sabbath? Must they walk home, if possible? What are the guidelines in Jewish law?

Classic Jewish Sources

There are numerous Jewish sources which discuss the return on the Sabbath from a mission, whether or not the saving of human life is involved. One classic discussion relates to the sanctificiation of the new moon. According to the Talmud[3] the Sabbath limits of two thousand cubits from the town, beyond which it is not

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3. *Rosh Hashanah* 1:4.

ordinarily permissible to walk, may be desecrated by messengers who go and give evidence before the court of the appearance of the new moon in order to determine the right time for sacrifices.[4] The Talmud explains[5] that the reason why witnesses may profane the Sabbath to testify about the appearance of the new moon is based on Scripture: "These are the appointed seasons of the Lord.... which ye shall proclaim in their appointed seasons."[6]

Of historical interest is the fact that there was a large courtyard in Jerusalem where all the witnesses assembled and there the court examined them; large meals were prepared for them to encourage them to make it their habit to come. Originally, they did not leave that place the whole day if they came on the Sabbath, as they had already exceeded the limit of two thousand cubits. But Rabban Gamliel the Elder ordained that they could go two thousand cubits in any direction.[7] And not only these but also a midwife that comes to assist a delivery, or one who comes to rescue someone from a burning house or ravagining troops or from a river flood or a collapsed building — they, too, are deemed to be people of the city and may move within two thousand cubits in any direction.[8]

Many rabbinic codifiers *(Poskim)* present an analysis of these questions using the talmudic principle called התירו סופו משום תחילתו. Our sages permitted an action which ordinarily would be prohibited in order not to discourage people from involving themselves in this action initially. This concept is discussed in the Talmud[9] as follows:

> שלשה דברים התירו סופן משום תחלתן ואלו הן עור לפני הדורסין תריסי חניות וחזרת רטיה במקדש
>
> Ulla said that there are three cases where the Sages allowed the completion of an action (which is not

4. Numbers 28:11-15.
5. *Rosh Hashanah* 21b-22a.
6. Lev. 23:4.
7. *Rosh Hashanah* 2:5.
8. *Ibid.*
9. *Betzah* 11b.

> necessary on a Festival) on account of its beginning (which is necessary for the enjoyment of the Festival) and they are as follows: the placing of the hide for people to tread on, the replacing of a shutters from stalls and the replacing of a bandage (of a Kohen) in the Temple.

There are also situations which do not entail danger to life where the Sages permitted an otherwise forbidden action lest one discourage people from involving themselves in such an action in the future. For example, Rabbi Joseph permitted the people of Be Tarbu to walk through water in order to go to a discourse on the Day of Atonement and to return through the water, whereupon Abaye said: "It is quite right to permit them to do so on the way to the discourse, but why the permission on their return? Lest you put a stumbling block in their way for the future." i.e., they will abstain from attending future discourses because of the discomfort of having to wait until the end of the Day of Atonement for their return home.[10]

Other rabbinic dispensations even in the absence of immediate saving of life include four things which were permitted to warriors in a camp: they may fetch wood from any place without fear of being accused of stealing, they are exempt from washing their hands before eating, from the laws of *Demai* produce, and from preparing an *Eruv* for the Sabbath.[11] Rambam extends this rabbinic decree when he states that just as the warriors are permitted these four things when they go forth to war, so too they are permitted these things when they return, before they are mustered out.[12]

The question arises whether the principle of "allowing the end because of the beginning" applies only to an action which is ordinarily rabbinically prohibited and in these examples the Rabbis decided to permit them, or even to an action which is biblically prohibited.

In the opinion of R. Shlomo Kluger in his Sefer *Uvacharta*

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10. *Yoma* 77b.
11. *Erubin* 1:10.
12. Maimonides, M. *Mishneh Torah, Hilchot Melachim* 6:13.

BaChaim,[13] only those actions rabbinically prohibited are allowed, based on the principle ,הם אמרו והם אמרו "they forbade, [so] they can permit." However, biblical precepts cannot be set aside by rabbinic decree. But according to the opinion of *Hatam Sofer,*[14] even a biblical prohibition is included in the principle התירו סופו משום תחילתו the final act is permitted because the initial action was permitted. The basis for his opinion is the Mishnah in *Rosh Hashanah:*[15]

> מעשה שעברו יותר מארבעים זוג ועיכבן ר"ע בלוד, שלח לו רבן גמליאל אם מעכב אתה את הרבים נמצאת מכשילן לעתיד לבא
>
> Once, more than forty pairs of witnesses came forward to testify about the appearance of the new moon, and Rabbi Akiba restrained them. Rabban Gamliel thereupon sent to him saying: "If you prevent the multitude from coming to give evidence, you will be the cause of their stumbling in the future" [as people will be reluctant to come to give evidence].[15]

According to Rabbi Akiba, the prohibition of walking beyond two thousand cubits outside the city limits is a law of the Torah; yet Rabban Gamliel questioned this approach in not allowing the testimony, since he is of the opinion that even a biblical law may be set aside for the principle התירו סופו משום תחילתו. It was ruled that the Sabbath may be desecrated by witnesses who come to testify about the appearance of the new moon, even if their testimony is not necessary, because of the possible causation of their stumbling in the future.

In summary, although there is no saving of human life involved in giving testimony about the appearance of the new moon, yet the Sabbath may be desecrated because of the scriptural command. The witnesses may also return because of Rabban

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13. # 99
14. *Orach Chayim* 203
15. 23b

Gamliel's decree allowing the completion of an action because of its beginning because one might otherwise discourage them from testifying in the future.

Returning from a life-saving mission

In regard to returning home from a life-saving mission on the Sabbath, we have already cited the talmudic statement[16] that a midwife who comes to assist a delivery or one who comes to rescue someone from a burning house or ravagining troops or from a river flood or a collapsed building is allowed on the Sabbath to move two thousand cubits in any direction. Elsewhere[17] the Talmud explicitly permits returning from a life-saving mission on the Sabbath:

> If a man went out [on the Sabbath] on a permissible errand and is then told that the act had already been done, he has the right to move within two thousand cubits in any direction; if he was within the Sabbath limit, it is as though he had not gone forth; for whoever goes out to save [someone who is in danger] may return to his place [of starting.]

The commentary of Rashi interprets the "permissible errand" to refer to one who testifies about the appearance of the new moon, or who comes to save a life from an invading gang or from a river flood, or a midwife going to assist a woman in childbirth. Rashi is obviously referring to the talmudic discussion cited above.[18]

The Talmud[19] itself questions the apparent contradiction in this Mishna, since the second part implies that the person may walk more than two thousand cubits whereas the first part states that he may walk only two thousand cubits. Two answers are given. Rav Judah said in the name of Rab that at first warriors used to leave their weapons, when returning to their homes on the Sabbath, in a house that was nearest to the town wall. Once it happened that the enemies recognized them and pursued them, and as these entered

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16. *Rosh Hashanah* 2:5.
17. *Erubin* 4:3.
18. *Rosh Hashanah* 2:5.
19. *Erubin* 45a.

the house to take up their weapons, the enemies followed them. There was a stampede, and the men who killed one another were more than those whom the enemies killed. At that time it was ordained that men in such circumstances shall return to their places of origin with their weapons.

The second answer is given by Rabbi Nachman ben Isaac, who said that the first clause which limits one to two thousand cubits refers to a case where the Israelites overpowered the heathens, whereas the second clause — which implies even more than two thousand cubits — concerns a case where the heathens were victorious. In the latter case, the heathens might attack again and hence the Israelites are safer if they seek shelter in their own town; it seems that this permission to desecrate the Sabbath by doing a biblically-prohibited action was granted in this specific case so that they may save their own lives in a situation of danger. (However this case is not analagous to that of a doctor who is called to administer to a patient or an ambulance driver since there is no personal danger to them if they remain at the hospital until after the Sabbath).

Another interpretation of the talmudic discussions concerning the return on the Sabbath from a life-saving mission is that of Maimonides[20] who rules that:

> It is a religious duty for all Israelites who are able to do so to come and sally forth on the Sabbath to assist their besieged brethren and to deliver them from the heathens; indeed, it is forbidden to postpone doing so until after the Sabbath. Having delivered their brethren, they are likewise permitted to return home with their weapons on the Sabbath, in order that they should not be tempted to stay away on a future occasion.

Elsewhere in his Code, Maimonides[21] rules that:

> If a person exceeds his Sabbath limit with permission,

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20. Maimonides, M. *Mishneh Torah, Hilchot Shabbat* 2:23.
21. *Ibid.* 27:17.

> but is told while en route that the religious duty he had set out to discharge has already been discharged, he may walk two thousand cubits in any direction from the place where he happens to be. If the Sabbath limit which he had left overlaps the two thousand cubit range from the place where he happens to be, he may return to his original location, and is regarded as if he had never left it.
> If people exceed their Sabbath limits in order to rescue Israelite lives endangered by heathens, by a flooding river, or by a collapsed building, they may walk two thousand cubits from the place where they effect the rescue. If the power of the heathens is so great that the Israelites are afraid to spend the Sabbath at the place where they have effected the rescue, they may return to their own location on the Sabbath and carry their weapons with them.

A contradiction seems to be emerging from these two rulings. In chapter two of the laws of the Sabbath, Maimonides gives the general rule that it is permissible to return with one's weapons to one's site of origin because otherwise one might refuse to go out on a life-saving mission on the Sabbath in the future. Yet in chapter twenty seven, he distinguishes between situations where the Israelites or the heathens have the upper hand. Only in the latter case does he allow return to one's site of origin with one's weapons even if more than two thousand cubits; otherwise he limits the permissibility to two thousand cubits.

Many commentators attempt to reconcile this apparent contradiction in Maimonides' rulings. The most commonly cited explanation is that the permissibility to walk two thousand cubits is because "they permitted the completion of an act because of its beginning" and the permissibility for more than that in the case of weapons is because of danger, as occurred in the aforementioned incident or to avoid reluctance in the future by people to go out on a life-saving mission.

Recent Rabbinic Rulings

With this background from classic Jewish sources, let us now

return to the original question. Is a physician or are emergency medical technicians allowed to return to their homes on the Sabbath by car or ambulance after the conclusion of an emergency call?

Rabbi Moshe Feinstein discusses at great length the above-mentioned problems. Would the doctor be unwilling to respond to an emergency call if he may not return home by car on the Sabbath? Would his family dissuade him from responding? In a responsum published in 1980[22] and reprinted the following year in his famous *Iggerot Moshe*,[23] Rabbi Feinstein praises the Jewish emergency medical service known as *Hatzoloh*. The *Hatzoloh* attendants must drive their ambulance on the Sabbath or Jewish Holy Day to reach the scene of a medical emergency and administer, if necessary, life saving cardio-pulmonary resuscitation.

Rabbi Feinstein rules that even if the attendants could run to the scene of the emergency and arrive in time, they are obligated to drive the ambulance because if they run they may be tired and, therefore, not able to give their best efforts to the patient. If a non-Jewish driver is available, it is preferable to use him; but if not, no time should be wasted looking for a non-Jewish driver, and the Jewish emergency medical technician should immediately drive the ambulance to the site of the emergency.

Having taken care of the medical emergency, can the Jewish driver and other attendants return in the ambulance on the Sabbath to their site of origin if the distance is too far to walk or if they are afraid to walk lest they be attacked by muggers? Certainly if there is no other ambulance and crew available and they might be needed again on the Sabbath, they are permitted to return to their home base because of the potential need for their services for another life-threatening emergency.

But what if another ambulance and crew are available? Do we permit them to return to their homes because otherwise they might be reluctant or refuse to go forth to perform such life-saving

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22. Feinstein, M. When can those who go forth on the Sabbath on a life saving mission return to their site of origin? *Techumin*, Zomet, Alon Shevut, Gush Etzion (Israel), 1980, Vol. 1, pp. 13-23.
23. Feinstein, M. Responsa *Iggerot Moshe, Orach Chayim*, Part 4 #80.

errands in the future, or because the Sages "allow the completion of an action on account of its beginning?" Rabbi Feinstein rules in the affirmative. He also permits[24] the *Hatzoloh* attendants to carry beepers or radio relays on the Sabbath to maintain contact with their central office to be rapidly notified of the site of an emergency. Such attendants do not need to remain at home throughout the entire Sabbath but can go to the synagogue and elsewhere carrying their radio relays.

In the Talmud[25] the commentary of Tosafot ask why the Mishnah which rules that those who go to save a life may return home is not mentioned in tractate *Betzah*, in connection with the three instances cited which permit a person to carry out a later action in order that he will be willing to involve himself initially. Tosafot answer that this rule of the Mishnah is not a novel concept *(chidush)* as are the examples in *Betzah*. Therefore the case in the Mishnah in *Erubin* is not mentioned in *Betzah*.

Rabbi Feinstein comments[26] that the words of Tosafot refer to the latter part of the Mishnah כל היוצאין להציל "Those who go to save a life may return home" — not only people whose lives are in danger may return to their homes but also any individual who is involved in a life-saving action, even if he is in no danger, may also return to his home on the Sabbath. For example, a midwife who helps give birth to a child on the Shabbath may return to her home. This law is logical and self-understood, and thus is not comparable to the cases in tractate *Betzah* which must be taught and elucidated.

Rabbi Shlomo Zalman Auerbach[27] disagrees with this interpretation of Tosafot and states that we cannot derive from this Mishnah that a person who is in no danger may return home by car on the Sabbath.

Another point discussed by Rabbi Feinstein relates to the Mishnah[28] which states:

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24. Feinstein, M. *Ibid.*, Part 4 #81.
25. *Erubin* 44b.
26. Feinstein, M. Responsa *Iggerot Moshe, Orach Chayim, Ibid.*
27. Auerbach, in *Sefer Hazikaron LeRabbi Shneur Kotler* (1983), p. 123.
28. *Rosh Hashanah* 23b.

ולא אילו בלבד אמרו אלא אף חכמה הבאה לילד

> Not only those [who come to testify about the new moon may walk two thousand cubits in any direction] but also a midwife who comes to help give birth [may walk this distance].

Rabbi Feinstein questions the expression אלא אף חכמה הבאה לילד. Is it not axiomatic that if witnesses who come to testify may violate a law of the Sabbath, surely a person who is involved in a life-saving action may do so? If witnesses were confronted with a situation of *pikuach nefesh*, would they be obligated to delay their testimony to save a life?

To answer this question, Rabbi Feinstein asserts that the law that a person who has gone beyond the permitted distance on the Sabbath may then proceed only four cubits never applied to a person who went to testify or to a person who went to save a life and was told his action was not needed. Rabban Gamliel added that when the concept of walking two thousand cubits was instituted by earlier Rabbis it was their intention to exclude certain people from this edict. Thus, the Mishnah is teaching that a midwife and others in similar situations may walk that distance back from their mission for two reasons:

To encourage them to respond to future *pikuach nefesh* situations and because they were never included in the law of not being allowed to walk two thousand cubits from the place they had reached.

On this basis, Rabban Gamliel allows witnesses, who in fact were not needed to testify, to walk two thousand cubits in order not to discourage them from coming to testify in the future. Rabbi Feinstein states that this concept grants similar permission to a physician to return home on the Sabbath, for otherwise he might not be willing to respond to a life-saving situation in the future.

Rabbi Auerbach[29] disagrees with this approach, arguing that our Rabbis do not permit a person to violate biblical law because of the possibility of later non-involvement.

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29. Auerbach *loc. cit.*

In a later responsum, Rabbi Feinstein reiterates[30] the ruling that if a non-Jewish driver is not readily available to drive to a medical emergency on the Sabbath, one of the *Hatzoloh* attendants should do so, and they are not permitted to telephone a non-Jew on the Sabbath to ask him to go to the site of the emergency and to drive the *Hatzoloh* attendants home, because there is no danger to life involved which would allow one to desecrate the Sabbath to make such a phone call. Rather, the *Hatzoloh* attendants should drive themselves home for the reasons discussed above, primarily in order not to discourage them from going out on a future life-saving mission. Rabbi Feinstein thus allows even the waiving of biblical prohibitions such as driving for the return journey.

Rabbi Yitzchak Isaac Liebes[31] points out that Jewish emergency medical technicians should not ordinarily be allowed to drive back in their ambulance to their homes and/or ambulance base, even if they are the only ambulance and team available, since they can be contacted by two-way radio if they are needed elsewhere for another emergency. Therefore, they could theoretically wait until after the Sabbath before returning home. However, in view of the fact that the ambulance attendants would be separated from their families for a substantial part of the Sabbath and might not have food or drink or even a place to sleep at the site of the emergency if it occurred on a Friday night, they might be extremely reluctant in the future to go out on an emergency call, thus possibly endangering someone's life. Therefore, states Rabbi Liebes, the Rabbis permit Jewish emergency medical technicians to return in their ambulance from a life-saving emergency. Rabbi Liebes seriously questions whether the permisson also involves biblical prohibitions and cites in detail numerous classical Jewish sources to indicate that only rabbinic prohibitions may be set aside when emergency medical technicians return on the Sabbath from an emergency call.

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30. Feinstein, M. Whether the rescue society *(Hatzoleh)* has to engage a non Jew to drive them back from an emergency on the Sabbath, in *Halachah Urefuah* (M. Hershler, Edit). Jerusalem. Regensberg Institute, 1983, Vol. 3, pp. 53-56.
31. Liebes, Y.I. The law in regard to returning from a life saving mission. In *Halacha Urefuah* (M. Hershler, editor) Jerusalem, 1983, Vol. 3, pp. 73-85.

Rabbi Abraham-Sofer Abraham[32] also asserts that those who go forth on the Sabbath on a life saving mission are permitted to return on the Sabbath so that they will not be reluctant or refuse to go out on such a mission at some future time. He cites the *Shulchan Aruch*[32a] and the commentary of Abraham Gumbiner known as *Magen Avraham,*[33] who state that it is permissible for them only to set aside rabbinic but not biblical prohibitions during their return trip. Therefore, a physician or layman who drives on the Sabbath to help someone whose life is or may be in danger is prohibited from driving back to his home, unless there is the possibility that he might be needed for another dangerously ill patient. However, he is permitted to ride home in his or another car with a non-Jewish driver or to use public transportation because the Rabbis permitted the completion of an action on account of its beginning only in regard to rabbinic prohibitions. It is also permissible for physicians, nurses, and others who work shifts in a hospital which cares for Jewish patients, even those who are not dangerously ill, to ride with a non-Jewish driver to the hospital at the beginning of their work shift and to return the same way at the conclusion of their shift. They are not obligated to set up residence within walking distance to the hospital. Rabbi Abraham also quotes Rabbis Moshe Sofer[34] and Jacob Emden[35] who permit returning from a life-saving mission even if the return involves biblical prohibitions.

Rabbi Avigdor Nebenzahl[36] asserts that it is permissible for a physician to drive himself home in his car after a Sabbath hospital visit because he might be needed soon again for another patient. Rabbi Eliezer Yehudah Waldenberg[37] quotes Rabbi Shlomo Kluger[38]

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32. Abraham, A.S. *Nishmat Avraham,* Section *Orach Chayim,* Jerusalem, 1983, p. 223.
32a. *Shulchan Aruch, Orach Chayim* 407:3.
33. *Ibid.* 497:18.
34. Sofer, M. Responsa *Chatam Sofer, Orach Chayim* #203.
35. Emden, J. Responsa *She'elat Yavetz, Orach Chayim,* Part 1 #132, s.v. *udekashiya.*
36. Nebenzahl, A. In regard to a physician returning home by car on the Sabbath from a hospital visit. *Assia* (Jerusalem), 1976, Vol. 1., p. 322.
37. Waldenberg, E.Y. Responsa *Tzitz Eliezer* Vol. 8 #15:7:2 and Vol. 11 #39-40.
38. Kluger, S. Responsa *Uvocharta Bachayim* #99.

and others who say that only rabbinic prohibitions are waived for a physician returning from a visit to his seriously ill patient, and Rabbi Moshe Sofer[39] and others who also waive biblical prohibitions. Rabbi Waldenberg himself concludes that:

> It is difficult to permit a physician who has just cared for a seriously ill patient to desecrate the Sabbath to return home if biblical prohibitions are involved [such as driving a car]. However, it is certainly permissible for him to be driven home by a non-Jewish driver.

Rabbi Menachem Waldman[40] cites Rabbi Zvi Pesach Frank[41] who does not allow a physician to return by car from visiting a sick patient, but also Rabbi Isaac Herzog[42] who waives even biblical prohibitions to enable police officers to return to the police station on the Sabbath. Rabbi Waldman himself concludes that it is permissible for a Jew to return from a medical emergency on the Sabbath if only rabbinic prohibitions are involved. Thus, a Jew can return from such an emergency by riding in (but not driving) an ambulance or bus or police or military vehicle which is being driven to its destination irrespective of whether or not the Jew is a passenger.

Rabbi Mordechai Halperin[43] asserts that if a lay person has concluded a life-saving act, he is no different than any other person and may not desecrate the Sabbath to return home. Physicians whose return home from visiting patients necessitates desecration of the Sabbath are permitted to do so, since they would otherwise be reluctant in the future on the Sabbath to go to take care of seriously ill patients. Such permission, continues Rabbi Halperin, applies if only rabbinic prohibitions are involved, according to Rabbi Shlomo Zalman Auerbach,[44] or even if biblical prohibitions

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39. Sofer, *loc. cit.*
40. Waldman, *loc. cit.*
41. Frank, Z.P. Responsa *Har Zvi, Orach Chayim,* Part 2 #10.
42. Herzog, Y. Responsa *Heichal Yitzhok, Orach Chayim* #32 and *HaTorah VeHamedinah* (Jerusalem), Vol. 5-6, pp. 26-27.
43. Halperin, M. Can those who go forth to save a life (on the Sabbath) return? *Assia* (Jerusalem), Vol. 4, pp. 60-69.
44. Auerbach, S.Z. Questions relative to danger to life. *Moriah* (Jerusalem). Vol. 3 #3-4, 27-28.

are involved, according to Rabbi Moshe Sofer.[45] In a letter to the editor of *Assia*,[46] Rabbi Waldman criticizes Rabbi Halperin for presenting only the opposing views of Rabbis Auerbach and Sofer, since many others, including Rabbis Herzog, Frank, and Feinstein have written on this topic.

Finally, Rabbi Joshua Neuwirth[47] states that a driver who drove to the scene of a medical emergency is not allowed to drive back home unless he may be needed for another emergency. For example, an ambulance driver, in a town where there is an insufficient number of ambulances and drivers for the number of seriously ill patients, is permitted to drive the ambulance back to its station after an emergency call, provided he makes no unnecessary stops such as for personal business on the return trip. The same applies to a physician. He is not allowed to drive home on the Sabbath from an emergency call unless there is a reasonable possibility that he may be needed again for another patient. Certainly if there is a non-Jewish driver readily available, so much the better, continues Rabbi Neuwirth. The physician is allowed to telephone for a non-Jewish driver to drive him to an emergency and then to be driven home the same way.

Conclusion

A physician is obligated to respond expeditiously to an urgent call on the Sabbath to care for a dangerously or potentially dangerously ill patient, even if that entails driving his car to reach the patient. Emergency medical technicians must also respond on the Sabbath with their fully-equipped ambulance to emergency calls for medical assistance. Some rabbinic authorities also allow the physician and/or ambulance attendants to drive home on the Sabbath from such a life saving mission either because the Sages "allow the completion of an action on account of its beginning," or because they might be needed for another medical emergency on the same Sabbath, or because they would otherwise be reluctant or refuse to go out on a life-saving mission in the future.

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45. Sofer. *loc. cit.*
46. Waldman, M. *Assia* (Jerusalem), 1983, Vol. 4, pp. 70-71.
47. Neuwirth, J.I. *Shemirat Shabbat Kehilchatah*, Jerusalem, revised 1979, Vol. 1, Chapt. 40: 66-71. pp. 538-540.

Cosmetic Powder on Shabbat

Rabbi J. David Bleich

The use of most cosmetics including, but not limited to, lipstick, rouge, mascara, eyeshadow, as well as cleansing and moisturizing creams, on the Sabbath is forbidden. The application of cosmetics prepared in stick or pressed block form involves a biblically proscribed act of *memachek*, or "scraping." Included in the prohibition is not only the reduction of a solid substance to a powder, but also removing the roughness from the surface of a material by means of grinding, polishing, rubbing or smoothing. A second prohibition, which applies to liquid makeup no less than to cosmetics prepared in a solid state, is *tsove'a* or "dyeing." All manner of dyeing, painting and coloring is forbidden on the Sabbath.

There is, however, some controversy with regard to the circumstances under which the act of coloring or painting constitutes a biblical infraction and the circumstances under which such an act constitutes a rabbinic infraction. Rambam[1] maintains that only the application of a pigment or coloring agent which causes a "permanent" change in the color of the object to which it

1. הלכות שבת ט - י"ג

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is applied constitutes a biblically proscribed act. According to Rambam, the use of a coloring agent in circumstances in which the color produced is not durable *(eino mitkayyem)* is not biblically proscribed but is forbidden by rabbinic decree. [The precise definition of *mitkayyem* (lit: "permanent" or "enduring") with respect to Sabbath laws is the subject of some doubt among latter-day authorities. *Mishnah Berurah*[2] questions whether the term is to be understood literally, i.e., as connoting permanent pigmentation, or whether adherences of the coloring substances for the period "of the Sabbath day" renders the color *"mitkayyem."* In another context,[3] he suggests that only an effect which is quasi-permanent or intended to endure for an extended period of time is to be regarded as *mitkayyem. Minchat Chinuch*[4] regards adherence for even a brief period *(zman mah)* as *mitkayyem.*[5]] A coloring agent which adheres for even a minimal period of time is generally regarded as being in the category of *eino mitkayyem.*

Sefer Mitsvot Gadol and *Sefer Yere'im* disagree with Rambam and maintain that, when there is intent to paint or color a substance or object, the act is forbidden by virtue of biblical law even if the intention is only for a temporary or transitory pigmentation. Hence, according to all authorities, application of liquid as well as solid-state cosmetics on Shabbat constitutes a forbidden form of "dyeing;" the sole dispute is whether the prohibition is biblical or rabbinic in nature. Thus, *Chayyei Adam*[6] states that a woman "who paints her face or hands" incurs a rabbinic transgression according to Rambam even though the "paint" is a substance lacking in durability *(davar she-eino mitkayyem),* while according to *Sefer Mitsvot Gadol* the infraction is biblical "since such is the wont of women *(keivan she-darkan bekach).* However, *Mishnah Berurah*[7] rules that the "painting" or "dyeing" involved in the application of

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2. שער הציון ש"ג:ס"ג
3. ביאור הלכה שמ:ד
4. ל"ב אות ט"ו
5. ראה ג"כ ר' אברהם חיים נאה, קצות השולחן, ח, בד' השולחן קמ"ו ט-כ.
6. הלכות שבת כ"ד - ב
7. שג:עט

cosmetics is rabbinic in nature by virtue of an entirely different consideration, i.e., *Mishnah Berurah* rules that the painting of the human skin on Shabbat involves a rabbinic, rather than a biblical, transgression even if the coloration is designed to be "permanent" in nature.[8]

In an early responsum, Rabbi Moses Feinstein[9] explicitly affirms the prohibition against the use of lipstick on Shabbat whether in a solid or in a liquid (i.e., lip gloss) form. Rabbi Feinstein, however, adds a further comment: "But to cast *(lizrok)* white powder on the face which does not remain at all *(she-eino mitkayyem klal)*, this does not involve a prohibition of 'dyeing.' " It has been generally assumed that Rabbi Feinstein's ruling reflects no major halachic *novellum*, but was predicated upon the entirely empirical presumption that talcum powder, when "cast upon the face," does not adhere to the skin but instead tends to fall off. A similar ruling was much earlier recorded by R. Abraham Chaim Noe in his halachic compendium, *Ketsot ha-Shulchan*.[10]

This is certainly the vein in which Rabbi Feinstein's ruling was construed by the Debrecziner Rav, R. Moshe Stern.[11] The Debrecziner Rav permits the use of white powder on Shabbat but forbids the use of colored powder. While signifying his agreement with Rabbi Feinstein's ruling regarding the use of white powder on Shabbat, the Debrecziner Rav takes sharp issue with R. Ephraim Padawer,[12] who quotes Rabbi Feinstein as permitting the use of colored powder as well. The Debrecziner Rav protests, "In truth, *Iggerot Mosheh* explicitly permits only white powder ... I do not know on what basis the author wrote in his name the opposite of his words which are explicit in his work *(Iggerot Mosheh, Orach Chayyim*, I, no. 114)."

The practical effect of this ruling is rather dubious since it does

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8. ראה ג"כ הרב מרדכי בריסק, תשובות מהר"ם בריסק, א:כ"ג. אבל השוה מנחת חינוך לב:טו.
9. אגרות משה אי"ח א־קי"ד.
10. חלק ח, בדי השולחן קמ"ו־כ.
11. תשובות באר משה ו־קכג
12. פסקי הלכות שבת א, ז:ה (תשלה)

not seem to be the case that women customarily utilize talcum powder or white face powder as a cosmetic other than in conjunction with other cosmetic agents which do adhere to the skin. Although the practical application of this halachic ruling is not enhanced thereby, it appears to this writer that the consideration that women do *not* customarily use talcum powder as a coloring agent in and of itself renders the practice permissible. *Mishnah Berurah* 303:79 and 320:58 points out that the prohibition against "dyeing" is applicable only with regard to a substance which is customarily used for dyeing or coloring purposes. Thus, there is no restriction against handling foodstuffs, such as cherries and the like, which stain the skin. Similarly, *Mishnah Berurah* 303:79 rules that a male may apply colored substances to his face since it is not the custom for men to use such substances for purposes of coloring or staining. Thus, there is no question that talcum powder may be applied to the body of a child on the Sabbath and, arguably, such powder may be used by women as well on the grounds that it is not the usual practice to use talcum powder as a coloring agent. In a like manner, R. Yechezkel Posen, *Sefer Kitsur Hilchot Shabbat* 21:4, writes: "Nevertheless, it may be permitted [to a woman] to apply that powder (face powder) to her face in order [to absorb] sweat if the color of the powder is the same as the color of the skin ... since her intention is not for coloring."

The language of his earlier responsum notwithstanding, Rabbi Feinstein, in a brief item apperaing in *Le-Torah ve-Hora'ah*, no. 7 (Elul 5737), p. 28, declares that his earlier ruling applies with equal force to "colored powder" as well. Were the ruling understood as applying only to colored powder possessing the selfsame property ascribed to the "white powder" discussed in *Iggerot Mosheh*, i.e., colored powder "which does not remain at all," the permissive conclusion could readily be explained. The prohibition against dyeing applies only in situtations in which the coloring agent adheres to the surface upon which it is applied. Accordingly, the application of colored powder "which does not remain at all," but which falls off without adhering to the skin, would appear to be entirely permissible. This conclusion would also appear to be consistent with the ruling of *Ketsot ha-Shulchan*. Although, in

formulating his ruling, *Ketsot ha-Shulchan* sanctions only the use of "powder" and explicitly forbids the use of a colored base, he permits the use of powder on Shabbat on the grounds that "it is dry and does not adhere firmly *(ve-einah mitdabbeket dibbuk gamur)* to the skin of the face." It would follow that colored powder of a similar nature would also be permissible. Nevertheless, two extraneous questions would be in order: one, empirical; the second, pragmatic. 1) Is such a powder commercially available? 2) What cosmetic purpose would be served by use of such a powder?

Further clarification of Rabbi Feinstein's position is contained in a letter reproduced and translated in the October-November, 1984, issue of *Jewish Woman's Outlook*. Rabbi Feinstein states that upon "testing and investigation" it appears that blanket permission cannot be given for the use of even "white powder" since most powders sold as cosmetics contain an oil base which causes powder to adhere to the skin. Rabbi Feinstein reports, however, that there are indeed some cosmetic powders which do not remain on the skin and, hence, use of those powders is permissible. He cautions, however, that "without experience in assessing a matter of this nature it is difficult to make a determination."

The item which appears in *Jewish Woman's Outlook* includes an addendum enumerating specific cosmetic powders which purportedly conformed to the criteria specified by Rabbi Feinstein, viz., cosmetic powders which do not adhere to the skin. Hence, consistent with Rabbi Feinstein's ruling, the use of those cosmetics on the Sabbath is permitted. Those products were tested by Rabbi David Weinberger, a member of the *kolel* of the Rabbinical Seminary of America and a highly competent scholar in his own right. Rabbi Weinberger cautions that "no base or water be applied to the face" prior to the application of the powder. Quite obviously, such application would have the effect of causing the powder to adhere to the skin. *Ketsot ha-Shulchan* [13] notes that, for the same reason, powder may not be applied on Shabbat even if the cosmetic base has been applied prior to the Sabbath.

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13. בדי השלחן קכ"ו - כ

Attempts to confirm the findings reported in *Jewish Woman's Outlook* were unsuccessful. Five of the cosmetic powders approved for Sabbath use were selected at random and applied to the surface of the skin. In each case the color remained clearly visible for periods varying between 60 and 90 minutes. Ordinary talcum powder was found to be recognizable for 45 minutes subsequent to application. An attempt was made to remove those products by brushing and rubbing the skin lightly. No appreciable difference was found in the effort required to remove the approved substances as distinct from the effort required to remove non-approved substances. To be sure, since such tests do not lend themselves to precise quantification, the assessment of the results is largely subjective. Nevertheless, it would appear to this writer that those substances are encompassed within the category of *davar she-eino mitkayyem,* i.e., substances which adhere but which do not adhere for an extended period of time, and hence the use of such substances is proscribed *de minimus* by virtue of rabbinic decree.

It should be noted that *Iggerot Mosheh's* permissive ruling regarding the use of talcum powder has been challenged by at least one prominent authority. R. Joshua Neuwirth [14] quotes the noted Jerusalem scholar, R. Shlomoh Zalman Auerbach, as forbidding even the use of talcum powder on the Sabbath "for whenever there is intention to color even for a short period of time on what basis [are there grounds] to permit [the practice]?" Rabbi Auerbach's ruling is predicated upon two empirical presumptions, both of which are entirely cogent: 1) Talcum powder, when applied to the face, is designed to modify skin color. 2) Talcum powder *does* adhere to the face for at least a minimal period of time.

R. Israel Abraham Landau, *Teshuvot Bet Yisra'el,* (Brooklyn, 5736), no. 56, forbids the use of talcum powder on different grounds. The Palestinian Talmud[15] declares that application of a substance designed to enhance the white color of the face constitutes a forbidden form of *melaben,* i.e., "whitening" or

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14. שמירת שבת כהלכתה י"ד - נ"ח אות קנ"ח
15. שבת ז - ב

cleaning. However, R. Yeshayah Kaufman, writing in a publication of the *kolel* of New Square, *Zera Emet*, Iyar 5744, points out that *Amudei Yerushalayim, ad locum*, records a variant reading of the text of the Palestinian Talumud which completely changes the meaning of that statement. Moreover, accepting the published version of the text, R. Mordecai Brisk[16] shows that this position is rejected by the Babylonian Talmud.

Teshuvot Maharam Brisk[17] accepts the premise that application of talcum powder is designed to effect some change in facial color but nevertheless permits its use on Shabbat. *Maharam Brisk* bases his ruling upon a determination that the painting or coloring of human skin is prohibited only by virtue of rabbinic decree and that use of a *davar she-eino mitkayyem* is similarly forbidden only by virtue of rabbinic decree. He further adduces authorities who maintain that, although deepening or enhancing an already existing color on Shabbat is forbidden, such an act is not forbidden by biblical law but is proscribed only by rabbinic edict. The application of white powder to the skin is designed to enhance or highlight the natural color of the skin. Since it enhances an already existing color but does not change the basic color, such an act, argues *Maharam Brisk*, is only rabbinically enjoined even if its effect would be permanent. Hence, application of talcum powder on Shabbat would be forbidden only upon a configuration of three rabbinic decrees: 1) a prohibition against coloring by means of a *davar she-eino mitkayyem;* 2) a prohibition against painting or coloring human skin; and 3) a prohibition against enhancing an already existing color. Although *Maharam Brisk* concedes that acts involving a configuration of two rabbinic edicts are indeed proscribed, he asserts that rabbinic legislation does not forbid acts involving the configuration of three rabbinic decrees.[17a]. *Maharam Brisk* forbids the application of colored powder on Shabbat since such use would involve a configuration of only two rabbinic prohibitions.

Although the consideration is not applicable to the ordinary

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16. תשובות מהר״ם בריסק ב־צ״ח:כ
17. א־כג
17a. השוה פרי מגדים, הקדמה לאורח חיים, הנהגת השואל והנשאל, א:יד.

use of cosmetics, there may be grounds for permitting the use of cosmetic agents designed to hide a disfiguring birthmark or skin blemish when the cosmetic is applied by a non-Jew. Tosafot[18] declare that a condition which causes a person embarrassment of a magnitude such that the individual is ashamed to appear in public constitutes a form of grave pain. Thus, the psychological anguish which may result from not being able to engage in normal social intercourse is halachically regarded as a form of severe pain. A person experiencing such pain is, arguably, in the category of a patient afflicted by a "sickness of the entire body" on whose behalf a non-Jew may be directed to perform an otherwise forbidden act as recorded in *Shulchan Aruch, Orach Chayyim.*[19] Indeed, were the remedy to involve an act forbidden only by virtue of rabbinic edict, the act might be performed even by a Jew provided that it is performed in an unusual manner, e.g., by use of the left hand. However, as stated by *Mishnah Berurah*[20] only rabbinically proscribed acts may be performed in an unusual manner under such circumstances. Therefore, since cosmetics generally utilized for such purposes require use of substances involving the prohibition of *memachek*, they may be applied only by a non-Jew. A liquid substance which does not involve the prohibition of *memachek* is, minimally, a *davar she-eino mitkayyem*, the use of which, for some authorities, as indicated earlier, entails a biblical prohibition of "dyeing" and, if designed to adhere for a significant period of time, the use of such a substance constitutes a biblical transgression according to other authorities as well. In light of those considerations, a substance designed to cover a disfiguring blemish should be applied only by a non-Jew.

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18. שבת נ:
19. שכ"ח - י"ז
20. שכ"ח נ"ד, נז

Conversion in Jewish Law

Rabbi Aaron Lubling

The halachot of *Gerut* are "contemporary" in the truest sense of the word. One reason for this is the increasing number of conversions being performed; the halachic acceptability of some of these conversions is a pressing issue both in America and Israel.

Yet there is another reason which gives these halachot a special meaning for our time. The Gemara states:[1]

אין מקבלין גרים לימות המשיח

> Proselytes will not be accepted in the days of the Messiah.

Although there a number of opinions as to what precisely is meant by the messianic era, it does appear to many that we are either living in or about to enter into that great epoch. We are in a sense witnessing the final days of קבלת גרים, accepting converts, and are thereby amongst the last generation of the Jewish people who will have the opportunity to study these halachot על מנת לעשות, for a practical purpose.

The Attitude of Halacha on Conversion

There is no mitzvah in the Torah to convert Gentiles into

1. יבמות כד:

Rabbi Randallstowm Synagogue, Maryland;
Formerly Rabbi of Congregation Eitz Chayim, Danville, Va.

Jews.[2] In most, if not all cases, in which converts *(gerim)* are discussed in Scripture and rabbinic writings, it was the prospective *ger* who approached the Jews and sought to be converted. The Gemara states:[3]

רעה אחר רעה תבא למקבלי גרים

> Evil after evil comes upon those who receive proselytes.

This statement of R. Yitzchok, which seems to take a negative view of *gerim,* is supported by a statement made by R. Chelbo:[4]

קשים גרים לישראל כספחת העור

> Proselytes are as hurtful to Israel as a sore on the skin.

Yet there are numerous places in which the rabbis have a very positive outlook on *gerim.* One example is the following text:[5]

לא הגלה הקדוש ברוך הוא את ישראל לבין האומות אלא כדי שיתוספו עליהם גרים

> The Almighty did not exile Israel among the nations save in order that proselytes might join them.

Tosafot[6] explain that rabbinic negativism concerning converts was only when missionary tactics are used. However, when we are approached by a Gentile who seeks conversion for sincere reasons (לשם שמים),it is our obligation to convert such a person. Admitting

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2. רשבץ, זוהר הרקיע מצוה מ׳
3. יבמות קט:
4. שם
5. פסחים פז:
6. יבמות קט: ד״ה תבא למקבלי גרים

such *gerim* into the ranks of our people is indeed one of the major objectives of our wanderings around the globe during the period of exile. It is converts such as these which the Torah instructs us in 36 or 46 different places[7] to treat with extra sensitivity.

For a variety of reasons, the validity of conversions overseen by Reform and Conservative clergyman has been challenged. (The reasons will be discussed later). Furthermore, the recent decision by the (Reform) Union of American Hebrew Congregation to have an "Outreach Program"[8] with the goal of "converting unchurched Gentiles," is exactly the kind of policy upon which our rabbis looked askance.

The Talmudic perspective on conversions is found in tractate *Kiddushin*.[9]

> אמר רבה בר רב הונא זו מעלה יתירה יש בין ישראל לגרים דאילו בישראל כתיב בהו "והייתי להם לא־לקים והמה יהיו לי לעם" ואילו בגרים "ואנכי אהיה לכם לא־לקים"
>
> Rabbah son of R. Huna said: This is the extra advantage which Israel possesses over proselytes. For in respect to Israel it is written, "And I will be their G-d, and they shall be my people." Whereas of proselytes it is written, "For who is he that hath boldness to approach unto Me?" saith the Lord. "And ye shall be my people, and I will be your G-d."

Rashi explains that the Almighty acts as our G-d even when we do not act as His chosen people. In this way He brings us closer to Him, so that eventually we will once again attain our spiritual status as His chosen people.

> אבל גרים אין מקרבין אותן מן השמים אלא אם כן הן מקרבין עצמם תחילה להיות טובים

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7. בבא מציעא נט:
8. Wall Street Journal — April 13, 1984
9. קדושין ע:

However, continues Rashi, converts are not drawn close by the Almighty until they take the first step, the initiative.

At this point, a distinction must be made between the גר צדק, a convert who wishes to be a full-fledged member of the Jewish people, taking on all the responsibilities incumbent upon a born Jew, and the גר תושב,[10] the "convert of the gate." A גר תושב was a Gentile who accepted the seven Noachide laws[11] but retained his status as a Gentile, although entitled to certain privileges which other Gentiles did not have. The name *Ger Toshav* indicates one of those privileges, the right to live amongst the Jews in Eretz Yisrael. Rambam explains:[12]

"Why is he (the *ger)* called תושב — settler? Because he may settle amongst us in Israel."

Whereas the rabbis took a negative view when missionary tactics were used as has been outlined above, their attitude was quite different with regard to converting Gentiles into "converts of the gates" (גר תושב).

The Rambam writes:[13]

> וכן צוה משה רבינו מפי הגבורה לכוף את כל באי העולם לקבל מצוות שנצטוו בני נח וכל מי שלא יקבל יהרג (כשישנו תחת ידינו) והמקבל אותם הוא הנקרא גר תושב בכל מקום וצריך לקבל עליו בפני שלשה חברים.
>
> And so did Moshe Rabbenu command us by the Almighty's instruction, that we force all Gentiles to accept the Noachide commandments. A Gentile who accepts them is called a convert of the gate.

It is a Jewish mission to see to it that the entire world accept and observe the minimum biblical requirement — the seven Noachide laws. The underpinnings of the laws are the rejection of idol worship and the requirement to establish a moral and law-

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10. דברים י"ד - כ"א
11. רמב"ם הלכות איסורי ביאה פרק י"ד - ז'
12. שם, עיין רש"י סנהדרין צו: ד"ה "גר תושב" ובספר באר שבע שם
13. רמב"ם הלכות מלכים פרק ה' - י'

abiding community. It is through our promoting these seven mitzvot to the gentile world that we can be "a light unto the nations."[14]

Nowadays, however, there is no category of *Ger Toshav*, as the Rambam explains:[15]

> A *Ger Toshav* can only be accepted when the *yovel* laws (Jubilee Year) are in effect [when there is the Temple in Jerusalem]. However, today if a Gentile wishes to accept the entire Torah with the exception of one (rabbinic) decree, he is not accepted.

When the Jubilee observance was still in effect, a Gentile could either accept the seven Noachide laws and become a *Ger Toshav*, a convert of the gate, or accept all the mitzvot and become a *Ger Zedek*, a true proselyte. Today there is only one kind of *Ger*, the *Ger Zedek*. Failure by the prospective convert to accept even one decree renders the conversion invalid.[16]

Who Requires Conversion?

The halachot of *Gerut* quite obviously teach us how to bestow Jewish identity on one who was born a non-Jew. What is not as obvious is just who is considered a non-Jew requiring conversion in order to be a member of the Jewish people.

The majority of *poskim*[17] maintain that a Jew is one who is born of a Jewish mother, regardless of whether the father is Jewish or not. There are, however, a number of *poskim* who state that in

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14. ישעיה מ"ב - ו'

15. רמב"ם הלכות איסורי ביאה פרק י"ד - ח'

16. The conversions which tradition teaches were performed by Avraham and Sarah (*Breishit* 12:5) should be understood in terms of גר תושב. The message which Avraham and Sarah brought to the world was the belief in one G-d and the need for a just and moral society.

עיין ג"כ בספר "יהודי מיהו ומהו" — אהרן קורמן — דף ע' בענין הויכוח בין הנכרי אֶמֶה פאַלְיֶיר ובין הרב אליהו בן אמוזג (1892). הנכרי רצה להתגייר לשם שמים אבל רב בן אמוזג יעץ לו שיקבל עליו את שבע המצות שנצטוו בני נח, ובזה יקיים רצון ה'.

See also "The Seven Laws of Noah" by Rabbi Aaron Lichtenstein, Pages 5-11, where some of the correspondences between Rabbi Benamozegh and Aime Palliere have been printed.

17. רמב"ם הלכות איסורי ביאה פרק ט"ו - ד', שולחן ערוך אבן העזר סימן ח' - ה'

order for one to be considered a Jew, *both* parents must be Jewish. R. Yaakov of Lisa[18] is of the opinion that, unlike all conversions which confer Jewish status upon the *Ger* only for the future, the conversion performed on a child of a Jewish mother and non-Jewish father renders the child not a "convert" but retroactively a born Jew. Should such a child be a first-born boy and undergo a conversion, he would require a *Pidyon Haben* just like a born Jew. Also, such a child after conversion would not be permitted to marry a *mamzer* or *mamzeret*, as he is halachically considered a born Jew. (A convert, on the other hand may marry a *mamzer* or *mamzeret*). However, we shall proceed with the normative halachic view that a Jew is one who is born of a Jewish mother, regardless of the status of the father. Any person born of a non-Jewish mother, regardless of the father's Jewishness, must undergo a halachic conversion[19] to be considered Jewish.

The Halachot of Gerut

The Gemara in *Kritot* states:[20]

> רבי אומר "ככם כאבותיכם" מה אבותיכם לא נכנסו לברית אלא במילה וטבילה והרצאת דמים אף הם לא יכנסו לברית אלא במילה וטבילה והרצאת דמים

> "They [converts] shall be as ye" means, "as your forefathers": As your forefathers entered into the Covenant only by circumcision, immersion and the offering of sacrifices, so shall they enter the Covenant only by circumcision, immersion, and the offering of sacrifices.[21]

Can a conversion be performed when there is no longer a Bet Hamikdash in which to offer sacrifices? The Gemara continues:

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18. עיין תשובות חמדת שלמה אבן העזר סימן ב', ג'
19. עיין בפתחי תשובה, אבן העזר סימן ד' - א'
20. כריתות ט.
21. עיין רש"י יבמות דף מו. ד"ה "באבותינו שמלו", חולין קא: עיין עוד בגור אריה על התורה פרשת ויגש ד"ה "וו דינה", פרשת דרכים דרוש א'

> אלא מעתה האידנא דליכא קרבן לא נקבל גרים אמר רב אחא בר יעקב וכי יגור אתכם גר או אשר בתוככם לדורותיכם ת"ר גר בזמן הזה צריך שיפריש רובע לקונו אר"ש כבר נמנה עליו רבן יוחנן בן זכאי ובטלה מפני התקלה.
>
> If so, we should nowadays not receive any proselytes, since there are no sacrifices today? — said R. Aha son of Jacob: "It is written, 'And if a stranger sojourn with you, or whosoever may be among you, etc.,' Our Rabbis taught: A proselyte in these days has to put aside a fourth (of a dinar) for his sacrifices of birds." Said R. Simeon: "R. Yochanan B. Zakkai held a vote on this rule and abolished it for fear of misuse."

The *Avnei Nezer*[22] maintains that according to a number of *Poskim*, during the time of the Bet Hamikdash the *Ger* could not eat from sanctified foods or marry a Jew until he brought this sacrifice, although in other respects he was considered a Jew after circumcision and immersion. Today, however, the procedural requirements for conversion are only circumcision and immersion for a male, and immersion for a female.

I use the term procedural requirements, because there are other aspects of the conversion process which the Gemara does not mention in this context. Yet in fact, one of these aspects, the קבלת המצות, acceptance of all of Torah and halacha by the prospective convert, is actually the most crucial aspect of the *Gerut*. Though there is a difference of opinion whether three people must witness the circumcision and immersion, all agree that three men constituting a Bet Din must be present during the formal acceptance of mitzvot and that it must take place during daylight hours.[23]

Why then does the Gemara in *Kritot* not mention the absolute requirement for this acceptance by the *Ger*? According to Rav Moshe Feinstein,[24] קבלת מצות, the acceptance of mitzvot, is the

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22. שו"ת אבני נזר יורה דעה חלק ב' סימן שמ"ג, שד"מ
23. שולחן ערוך יורה דעה סימן רס"ח - ג'
24. "שלכאורה קבלת המצות אינו מעצם מעשה הגרות דלא הוזכר בגמ' למוד על זה ואף שאפשר שייך גם זה למילף מאבותינו שאמרו נעשה ונשמע, מ"מ הא לא מצינו בגמ'

"application form" of the prospective convert. Only after a Bet Din is convinced that this prerequisite for conversion has been satisfied, may the actual conversion procedures begin. The Gemara in *Yevamot* 46b states that a Bet Din must be present during conversion, because the Torah uses the word *Mishpat*, judgment, in reference to *Gerim*. According to all *Poskim*, a Bet Din must be present during קבלת מצות. It is at that time that the Bet Din renders a "judgment": The prospective *Ger* has or has not met the prerequisite criteria for conversion, and therefore can or cannot go through the procedural phase of *Gerut*.

The entire conversion process, the "judgment" phase as well as the procedural phase, are outlined in Tractate *Yevamot* 47a:

> תנו רבנן גר שבא להתגייר בזמן הזה אומרים לו מה ראית שבאת להתגייר אי אתה יודע שישראל בזמן הזה דוויים דחופים סחופים ומשורפין ויסורין באין עליהם אם אומר יודע אני ואיני כדאי מקבלין אותו מיד ומודיעין אותו מקצת מצות קלות ומקצת מצות חמורות.... ומודיעין אותו ענשן של מצות.... וכשם שמודיעין אותו ענשן של מצות כך מודיעין אותו מתן שכרן.... ואין מרבין עליו אין מדקדקין עליו קבל מלין אותו מיד.... נתרפא מטבילין אותו מיד ושלשה (מסקנא) תלמידי חכמים עומדים על גביו ומודיעין אותו מקצת מצות קלות ומקצת מצות חמורות (פעם שניה) טבל ועלה הרי הוא כישראל לכל דבריו, אשה נשים מושיבות אותה במים עד צוארה ושלשה (מסקנא) תלמידי חכמים עומדים לה מבחוץ ומודיעין אותה מקצת מצות קלות ומקצת מצות חמורות (פעם שניה)
>
> Our Rabbis taught: If at the present time a man desires to become a proselyte, he is to be addressed as follows: "What reason have you for desiring to become a proselyte? Do you not know that Israel at the present time is persecuted and oppressed,

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ביבמות דף מו בהברייתא שיליף למילה וטבילה מהאבות ואמהות שיליף שם נמי לקבלת המצות. אלא נראה דקבלת המצות אינו ממעשה הגרות אבל מי שלא קבל המצות לא הוכשר להעשות גר.... ולכן כשקבל המצות בפני ג' וגם זה גופא למול ולקבל מורין לו שהיא כשר להעשות גר" שו"ת אגרות משה יורה דעה חלק ג' סימן קי"ב

> despised, harassed, and overcome by afflictions?" If he replies, "I know and yet am unworthy," he is accepted forthwith, and is given instruction in some of the minor and some of the major commandments... He is also told of the punishment for the transgression of the commandments.... And as he is informed of the punishment for the transgression of the commandments, so is he informed of the reward granted for their fulfillment... He is not, however to be persuaded or dissuaded too much. If he accepts, he is circumcised forthwith... As soon as he is healed, arrangements are made for his immediate ablution, when three learned men must stand by his side and acquaint him with some of the minor commandments and some of the major ones (a second time). When he comes up after his ablution he is deemed to be an Israelite in all respects. In the case of a woman proselyte, women make her sit in the water up to her neck, while three learned men stand outside and give her instruction in some of the minor commandments and some of the major ones (a second time).

The conversion process can be broken down into the following steps:

1) a) הודעות המצות Informing the *Ger* of fundamental concepts of Judaism
   b) קבלת המצות Acceptance of mitzvot
3) מילה Circumcision
4) טבילה Immersion in a Mikvah

Let us now turn to some of the halachic questions concerning each of these requirements.

Informing The Prospective Convert

The Rambam[25] clarifies this first step as follows:

> ומודיעין אותו עיקרי הדת שהוא יחוד השם ואיסור עבו"ם מאריכין בדבר הזה ומודיעין אותו מקצת מצות קלות ומקצת מצות חמורות ואין מאריכין בדבר זה

We inform him/her of the fundamental concepts of

25. רמב"ם הלכות איסורי ביאה פרק י"ד - ב'.

> our religion, which are the oneness of G-d and the prohibition regarding idol worship, and we expand upon this matter. We also inform him/her of some of the easier commandments as well as some of the more difficult ones but we do not expand upon these matters.

The *Nimukei Yosef*[26] states:

> אם לא הודיעו אינו מעכב הכי משמע בפרק כלל גדול
>
> Failure to inform him of mitzvot does not invalidate the conversion.

The *poskim* maintain that this is the halacha.[27]

At this juncture, an extremely important distinction must be made. We have already stated that if there is no acceptance of mitzvot, the conversion is invalid. However, according to halacha, failure to *inform* the prospective convert of mitzvot will not invalidate the *Gerut*. *Chemdat Shlomo* explains the apparent dichotomy in the law.[28] According to his explanation, קבלת מצות is the sincere commitment on the part of the *Ger* to accept all the laws which Judaism requires. The *Ger* need not know the specifics of these laws, but he must be prepared to accept them as he becomes aware of them. We can therefore have a case in which there was no formal teaching of any particular mitzvot to the *Ger*, yet since he accepted the Torah, whatever its demands will be — the conversion was valid.

The proof cited for this distinction is a text in *Shabbat* 68a which discusses the case of a convert whose conversion was

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26. נמוקי יוסף יבמות פרק ד' ד"ה "ת"ר גר שבא להתגייר"

27. בית יוסף סימן רס"ח ד"ה "וכשבא להתגייר" עיין שם בחדושי הגהות, עיין עוד רמב"ם הלכות איסורי ביאה יג: יז

28. שו"ת חמדת שלמה יורה דעה סימן כ"ט - כ"ב.
"על כן נראה לעניות דעתי דקבלת המצות והודעת המצות שני ענינים דקבלת המצות היא בסתם שקיבל עליו ליכנס ברת יהודית דזה הוי ממילא קבלת המצות והודעת במצות הוא להודיע לו ענין המצות כראיתא בגמ' אכלת חלה וכו' וכן שכרן ועונשן כראיתא שם וזה אינו מעכב ולעולם בקבלת המצות בסתם מעכב דזו עיקר הגירות שנכנס לדת יהדות"

performed before three Jewish men,[29] but who lived amongst Gentiles and had no contact with other Jews. The Gemara describes a situation in which the *Ger* was not aware of the prohibitions against idol worship, nor of the laws of Shabbat.

The Gemara questions how many penitential sacrifices should this *Ger* bring when he finds out about these laws, which he violated unintentionally? Obviously during all the time he was worshipping idols and violating Shabbat, he was considered Jewish and therefore requires a sacrifice for these unintentional infractions. How is it possible for his conversion to have been valid if the *Ger* was not even aware of the prohibition against idolatry and Sabbath desecration?

The *Rishonim*[30] answer this question with the distinction between הודעת המצות and קבלת המצות. The *Ger* being discussed in the Gemara was not informed of any mitzvot. However he did make what the Bet Din thought was a sincere commitment to accept whatever demand the Torah makes, as he became aware of them. Living among Gentiles he was not aware of the laws regarding idolatry and Shabbat. Had he been aware of these laws he would have abided by them. The *Ger* transgressed not out of *rejection* of the Torah, but out of *ignorance* of it. Rejection of a mitzvah invalidates *Gerut*, while ignorance of a mitzvah does not. After all, a prospective convert is not taught every mitzvah and every halacha, so that every *Ger* at the time of conversion is ignorant of some mitzvot. The Bet Din however must feel certain that the *Ger* is sincere in his commitment to follow all of the Torah, as he/she becomes aware of it.[31] This distinction between rejection of a mitzvah as compares to ignorance of a mitzvah will be very significant for modern-day conversion, as we shall see.

The high proportion of Jews who are ignorant about the precepts of their faith and their concomitant non-observance of mitzvot has a profound effect on many of the halachot of *Gerut*.

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29. תוספות שם ד"ה גר
30. עיין נמוקי יוסף יבמות פרק ד' ד"ה "ת"ר גר שבא להתגייר" - "סברא דרבוותא"
31. עיין אגרות משה יורה דעה חלק א' סימן קנ"ט "אך בכלל עוקר הגרות..."

During the ages when a closely-knit autonomous Jewish community existed, overseen by a Bet Din with sufficient power to implement its decisions, הודעת המצות meant informing the candidate for conversion of some rudimentary Jewish tenets. Thereafter, the *Ger* would quickly learn all that was required of him just by living in the environs of the observant Jewish community (after conversion, the medieval *ger* would certainly have had no place in a hostile Gentile community). In a short matter of time he could be fully assimilated in the Jewish community.

Emancipation, enlightenment, and the disappearance of the ghetto wall, however, have created many changes in the life of the Jewish community. Non-observance of Torah has become not only acceptable, but a way of life. Is it reasonable to assume under these conditions that even a sincere candidate for conversion, informed only of "the oneness of the Almighty and the prohibitions against idol worship"[32] together with a superficial view of some mitzvot, will automatically quickly learn all that is required of him? In the modern milieu it is doubtful if a sincere *Ger* will automatically assimilate properly into full Torah observance.

Therefore, nowadays it is necessary before a halachic conversion can be performed, that the candidate study with a Rabbi capable of teaching basic halachot which affect the daily life of a Jew. Which halachot should be taught and in how much detail must be decided by the responsible teacher, based upon each situation. Factors such as the age of the *Ger*, his place of residence, and the type of work the *Ger* is engaged in ought to be considered in making this decision. Rabbi Feinstein[33] rules that *Gerim* who will not observe mitzvot due to ignorance even if they have made a sincere commitment to observe what they become aware of, should not be converted. אין לגייר שלא יקיים אחר כך מצוות אף אם יהיה מחמת שלא ידע.

The *Minchat Elazar*[34] maintains that it is necessary that a *Ger* be taught the *Shema* and the prayers before conversion, so that he

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32. רמב"ם הלכות איסורי ביאה פרק י"ד - ב'
33. אגרות משה אבן העזר חלק ב' סימן ד'
34. שו"ת מנחת אלעזר חלק ד' - ס"ג

can fulfill these mitzvot immediately after the *Gerut*. Converting a gentile who cannot even *daven* after conversion constitutes a violation of לפני עור לא תתן מכשול "do not put a stumbling block before a blind man."[35]

Circumcision

The *Bet Yosef*[36] maintains that there is a difference of opinion as to whether the absence of three men (who are halachically fit to serve as a Bet Din) during the *milah* invalidates the conversion even post factum. He writes that most *poskim* hold that preferably three men (כשרים לדין) should be present during the *milah*. However, if only two[37] men were present, this in itself would not invalidate the conversion. The final act of conversion (usually the *tvilah*) is the time when Jewish status is "officially" bestowed upon the prospective *Ger*. For this reason we require that the *Ger* make a second declaration of acceptance of mitzvot at that time. It is at this crucial stage during the conversion process, in the view of Rav Feinstein,[38] that the presence of three men is an absolute necessity. Whichever step is the final one in the *Gerut*, be it the usual *tvilah* or post factum the *milah*, that is the time during which a Bet Din of three qualified men is absolutely required, according to all opinions.

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35. עיין חגיגה יג "אין מוסרין דברי תורה לעכו"ם" עיין בתוספות שם ד"ה "אין מוסרין." האים מותר ללמוד תורה עם נכרי הבא להתגייר? עיין תוספות בבא קמא לח. ד"ה קראו, מאירי סנהדרין מט., מהרש"א שבת לא., שו"ת רבי עקיבא איגר סימן מ"א, שו"ת פאר הדור להרמב"ם סימן נ'

36. שו"ע יורה דעה סימן רס"ח הלכה ג'

37. עיין ש"ך שם סעיף קטן י'. According to *Bet Yosef*, Rif and Rambam would invalidate the conversion if three men were not present as a Bet Din during the *milah*. עיין ערוך השולחן יורה דעה ס' רס"ח ס"ק ד'. *Bach*, however, disagrees with *Bet Yosef* and states that if the *milah* were performed before two qualified men, even Rif and Rambam would accept the conversion. עיין טור ש"ע ס' רס"ח. Rav Feinstein claims that even *Bet Yosef* agrees that two qualified witnesses during *milah* are sufficient, in the view of all *poskim*, and the *Bet Yosef's* interpretation of Rif and Rambam's disapproval applies only if *tvilah* precedes the *milah*, for actually *milah* should come first.
עיין אגרות משה יורה דעה ח"א ס' קנח. הרמבן כתב ביבמות מז: דמלין תחילה "כיון שהמילה קשה עליו מלין אותו תחילה כדי שאם דעתו נוקדו יפרוש."

38. אגרות משה יורה דעה חלק א' סימן קנ"ח

גר שנתגייר כשהוא מהול — a prospective *Ger* who has been previously circumcised, for reasons which have nothing to do with Judaism, requires הטפת דם ברית — convenantal blood drawing. Unlike the standard circumcision of a *Ger,* no blessing is recited for this symbolic ritual,[39] because some halachic authorities question whether there is any need to draw this convenantal blood from a person who is already circumcised. The questionable necessity of this ritual has a bearing on a situtation which often arises in modern society:

Let us say that a woman, incorrectly thought to be Jewish, or who was converted by a Reform or Conservative conversion which is invalid,[40] gives birth to a boy who is then halachically circumcised. The child matures and finds out that halachically he is not considered a Jew, because his mother is not Jewish; he thereupon decides he wants to go through a halachic *Gerut.* Does this young man require the convenantal drawing of blood הטפת דם ברית besides *tvilah?* This question is especially germane today with the constant increase in the *Baal Teshuvah* movement, which draws children from homes which may have mixed marriages.

Before this question can be answered we must discuss one more aspect of circumcision of the convert, and that is, does the *milah* have to be performed specifically for the purpose of conversion or is it sufficient if the *milah* is done as a Jewish law לשם מילה סתם ולא לשם מילת הגר? In other words does it have to be known that the circumcision is being performed for a Gentile who seeks to become Jewish, or is it sufficient that we know that the circumcision is being done for religious purposes — for Judaism, to the exclusion of health reasons? Under the latter position, it would not be necessary for it to be known that the child in the situation described above is a Gentile who requires the *milah* for conversion purposes. The knowledge that he is being circumcised because Judaism demands circumcision is sufficient, though the reason for the demand of circumcision in this case is not because the child is a

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39. שו״ע יורה דעה רס״ח הלכה א׳
40. עיין באגרות משה יורה דעה חלק ב׳ סימן קכ״ח

born Jew but because he is converting to be a Jew. The consideration of *why* the circumcision is being performed is irrelevant as long as it is being performed to satisfy Jewish law. Rabbi Hoffman[41] and Rabbi Tzvi Pesach Frank[42] are of the opinion that it is enough if the child is circumcised for reasons of Judaism.

Rav Feinstein[43] aids us in understanding the lenient position taken by Rabbi Hoffman and Rabbi Frank, though not mentioning their responsum. Even assuming that *milah* for the sake of Judaism is enough, still a minimum of two (possibly three) men who are halachically suited to be witnesses must be present. How can that be assumed if the circumstances are a *brit milah* performed on a child of a Reform or Conservative father and his halachically non-Jewish wife? Is it reasonable to assume that there will be men present who can qualify for a Bet Din? In foregoing the requirement for even a covenantal drop of blood, Rav Feinstein relies on an opinion of Tosafot[44] according to which, if it is publicly known that the *tvilah* or *milah* is being performed, כאילו עומדים שם דמי — it is as if the witnesses were standing there.

The lenient ruling of Rav Feinstein in the above case cannot be applied to a case where a Gentile wants to convert but circumcision cannot be performed because of health considerations. Rabbi Hoffman[45] and Rabbi Frank[46] both maintain that a Gentile who

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41. שו"ת מלמד להועיל יורה דעה סימן פ"ב
42. שו"ת הר צבי יורה דעה סימן רי"ט
43. אגרות משה יורה דעה חלק ג' סימן ק"ה
In the case which Rabbi Hoffman deals with, there was doubt if the *Mohel* knew that the child was not Jewish. It is therefore possible that the *Mohel* did perform the *Milah* for *Gerut*, if he knew that the mother was not Jewish. And even if he thought that the child was a born Jew and the *Milah* was not for *Gerut*, [assuming that the intention must be for the *milah* to be for the sake of *Gerut* which Rabbi Hoffman claims is not], there is still some doubt if a gentile who is already circumcised requires covenental blood drawing for conversion, hence this is a case of a double doubt, ספק ספיקא. Rav Feinstein accepts this lenient position only reluctantly and rarely, such as where the mother of the child wants the child (as well as herself) to be Jewish according to halacha, but for health reasons does not want the blood drawing to be performed.
44. תוספות יבמות מה: ד"ה "מי לא טבלה" ועיין עוד תוספות קדושין סב:
45. שו"ת מלמד להועיל יורה דעה סימן פ"ו
46. שו"ת הר צבי יורה דעה סימן רכ

cannot be circumcised due to danger, cannot be converted at all. Rabbi Y. Weinberg[47] goes even further and states:

> ולא עוד אלא שגם בדיעבד אם מל את עצמו בפני ג' הדיוטות שלא ברשות בית דין חיכך אני להחמיר, שאין זה בית דין שעברו על איסור שלא לסכן את הנכרי מחמת חילול ה' ולדינא צ"ע

> Even if this Gentile was circumcised before three ordinary men but without the consent of Bet Din, I lean towards the position that the three men are not considered a Bet Din for they have violated the prohibition of endangering the Gentile, which could lead to a desecration of G-d's name.

Another question which Rabbi Weinberg[48] discusses is the use of anesthesia during a circumcision. This question is especially relevant where the circumcision is being performed on an adult. Rabbi Weinberg concludes that "An adult (born Jew) or an adult male who wants to convert should not be put to sleep before the circumcision. However, regarding a local anesthetic to minimize the pain, it is possible to be lenient."

It should be emphasized that the candidate for conversion is not considered Jewish until after all the steps of the *Gerut* are completed. Usually the *tvilah* is the final step; the *Ger* is considered Jewish upon emerging from the Mikvah, as the Gemara states[49] טבל ועלה הרי הוא כישראל לכל דבר. "After he immerses himself and emerges from the Mikvah, he is then a Jew in every respect."

The Second Acceptance of Mitzvot

The Gemara in *Yevamot* 47 speaks of קבלת המצות, acceptance

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47. שו"ת שרידי אש חלק ב' סימן ק"ב
48. שם חלק ג' סימן צ"ו
49. יבמות מז:
שו"ת רדב"ז חלק ג' סימן תע"ט, ועיין עוד בשי"ת דובב מישרים חלק א' סימן ז' (להגאון מטשעבין) דסובר דבן ישראלית מנכרי שמל ולא טבל דינו כנכרי אף על פי דבן ישראלית מנכרי גמור הוי כישראל.

of mitzvot, occurring twice — once after the initial confrontation and again before *tvilah*, which is the final step in the process. Naturally the necessity of this first acceptance can be understood, as without it the Bet Din cannot possibly begin the conversion procedures. After this initial acceptance, the *critical* acceptance must be made by the *Ger* at the time of *tvilah*. Rashi explains the need for this second commitment as follows:[50]

> דהשתא על ידי טבילה הוא נכנס לכלל גירות הלכך בשעת טבילת מצוה צריך לקבל עליו עול מצות
>
> For now through the immersion in the Mikvah he enters the category of a complete convert; therefore during this immersion he must accept the mitzvot.

We have previously cited Rav Feinstein's analysis of the conversion process, wherein he explains that the initial acceptance is the pre-condition to beginning the procedures of *Gerut*, and that it is not part of the conversion process per se. A careful reading of the Rambam results in the same conclusion:[51]

> וכן לדורות כשרוצה העכו"ם להכנס לברית ולהסתופף תחת כנפי השכינה ויקבל עליו עול תורה צריך מילה טבילה והרצאת דמים
>
> And so it is for all generations, that should a gentile wish to enter the convenant and take refuge under the wings of the Almighy and he will accept upon himself the yoke of the Torah, he will require circumcision, immersion, and a sacrificial offering.

As the words of the Rambam indicate, the initial acceptance is not part of the procedure of conversion, it is rather the essence of conversion. The very definition of "a Gentile who comes to convert" is a Gentile who wants to accept the Torah. The

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50. רש"י שם ד"ה ומודיעין אותו מקצת מצות
51. רמב"ם הלכות איסורי ביאה פרק י"ג - ד'

procedures of *Gerut* begin, in the words of Rambam, with the circumcision צריך מילה.

Failure by the Gentile to accept the entire Torah invalidates the conversion. The Gemara states:[52]

> עו"כ שבא לקבל דברי תורה חוץ מדבר אחד אין מקבלין אותו ר"י אומר אפילו דקדוק אחד מדברי סופרים

> If a heathen is prepared to accept the Torah except one religious law, we must not receive him. R. Jose son of R. Judah says: Even (if the exception be) one point of the special minutiae of the scribes' enactments, (we do not accept him as a convert).

The vast majority of *poskim* are of the opinion that failure by the Gentile to accept all the Torah will void the conversion even post factum.[53] There is, however, some question regarding the validity of a conversion when the Gentile refuses to accept a rabbinic decree. According to R. Chaim Ozer Grodzenski,[54] rejection by the Gentile of a rabbinic decree is tantamount to rejection of the biblical commandment to heed the words of our religious leaders,[55] and hence could well invalidate the *Gerut*.

Before the *Gerut* can begin, an investigation must be made to ascertain the motives of the prospective *Ger*. We must be certain that the Gentile has no ulterior motives for the conversion, that his *gerut* is "for the sake of heaven."[56] There always exists the possibility that the Gentile seeks conversion to facilitate marriage to a Jew. Such Gentiles should not be accepted for conversion. Still, the Gemara states[57] (and such is the halacha[58]) that once such

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52. בכורות ל:
53. אגרות משה יורה דעה חלק ב' סימן קכ"ד, אבן העזר חלק ב' סימן ד'
54. שו"ת אחיעזר חלק ג' סימן כ"ו, עיין עוד בשו"ת היכל יצחק חלק א' - י"ט
55. דברים י"ז - י"א
56. שו"ת אחיעזר חלק ג' סימן כ"ו
57. יבמות כד:
58. רמב"ם הלכות איסורי ביאה פרק י"ג - י"ז שולחן ערוך יו"ד סימן רס"ח - י"ב

conversions are performed, they are nevertheless valid.

These last two rulings seem to contradict each other. When conversion is sought for insincere reasons such as marriage, it is well within reason to doubt the *Ger's* motivation. Since failure by the *Ger* to accept even one mitzva invalidates the process, how can a *Gerut* sought for insincere reasons be valid?

At first glance, it would seem that the rule דברים שבלב אינם דברים — mental reservations cannot invalidate action — might be the rationale for the (reluctant) validity accorded insincere conversions.[59] It could be argued that as long as the *Ger* declares that he accepts the Torah and undergoes circumcision and immersion, his mental reservations about accepting all mitzvot cannot void the *Gerut*. However, the *Rishonim*[60] use a different line of reasoning. According to the their explanation, an element of coercion is operating upon the insincere convert. To actually be considered Jewish, the *Ger* understands that he will have to comport himself as a Jew, or he will not receive the benefits for which he is undertaking conversion. The *Ger* realizes that his goal will be achieved only by making a commitment to live like a Jew and accordingly accepts the obligations of the Torah.

According to this reasoning, no mental reservations exist with regard to his accepting mitzvot: אגב אונסייהו גמרו וקבלו[61] — because of an element of coercion they (insincerely-motivated converts) have decided to accept the Torah.[62]

Rabbi Avraham Dov Ber Kahane[63] and Rabbi Herzog[64] state that the reasoning of the *Rishonim* is not operative nowadays. When the Jewish community was able to demand conformity with the laws of the Torah, it was within reason to assume that even a Gentile whose motivation for *Gerut* was personal gain accepted the

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59. עיין באגרות משה יורה דעה חלק ב' סימן קכ"ד, ועיין עוד בבית יצחק יורה דעה חלק ב' סימן ק' דסובר דבענין גירות לא אמרינן דברים שבלב אינם דברים.
60. נמוקי יוסף יבמות פרק ב' ד"ה (מתני) הנטען
61. לשונם של הראשונים
62. בית יצחק יורה דעה חלק ב' סימן ק', שו"ת אחיעזר חלק ג' סימן כ"ו, כ"ח
63. דבר אברהם חלק ג' סימן כ"ח
64. שו"ת היכל יצחק חלק א' סימן כ', כ"א

obligations of Jewish life. Failure to live according to the tenets of the Torah would have led to his rejection by the Jewish community and the probable loss of his desired goal. Today, however, pressure for religious conformity does not exist, and we have no reason to assume that such a Gentile ever accepted the Torah. Furthermore, when conversion is a preliminary to marriage to a non-observant Jew, we certainly have no right to assume that the convert will be more observant than the born-Jewish spouse. Even if the Gentile accepts the Torah via an oral declaration, there is obviously valid reason to assume that there was never a halachically-acceptable commitment to Jewish observance (אנן סהדי אומדנא דמוכח). In this instance, mental reservations are tantamount to overt action. Certainly the rejection of a mitzvah would invalidate a *Gerut*.

The rampant non-observance of Torah which we are painfully witnessing has a most significant effect on the halachot of *Gerut*. Though at one time the conversion motivated by personal gain might have been valid, today because of non-observance being perceived as a norm, we can no longer assume that the *Ger* with ulterior motives for conversion ever accepted the Torah. This side of the coin reasons that non-observance among born Jews has created a situation which would invalidate insincerely-motivated conversions, even those already a fait accompli.

There is however a second side to the coin. We have already discussed the talmudic text in *Shabbat* from which it is evident that ignorance of Torah law does not of itself invalidate a conversion. Certainly any *Ger* at the time of conversion is ignorant of many halachot. But the Bet Din must be convinced that the *Ger* is committed to observe all the laws of the Torah, those of which he is aware at the time of conversion as well as those he will learn about thereafter. Rav Feinstein[65] relies upon this Gemara to find some justification for those Rabbis who accept possibly insincere converts (motivated by marriage to a Jew) so that שלא יחשבו עוד גרועין מהדיוטות "They be not considered inferior even to ignorant Jews." He claims that because of non-observance amongst born Jews, it is

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65. אגרות משה יורה דעה חלק א' סימן ק"ס

possible that the candidate for conversion assumes that observance of Torah and halacha is not a requirement but sort of a voluntary endeavor on the part of the religiously pious.

Thus the intention of the convert not to observe all the mitzvot may be due to his ignorance as to their binding nature, rather than out of rejection. As we have noted, ignorance of even the most basic Torah laws does not invalidate a conversion. Thus we see how the laws of conversion may be affected by the modern Jewish society in two diametrically opposed fashions: On the one hand, non-observance creates a setting in which insincere conversions are invalid even post factum because the rationale that social pressures will enforce observance is no longer operative (אגב אנסוהו גמרו וקבלו). However, based upon the text in *Shabbat*, converts whose commitment to observing the Torah is tenuous might still be considered Jews according to halacha.

It would seem logical that where insincere motives exist for conversion, especially where conversion is sought for the sake of marriage to a non-observant Jew, the conversion would be invalid since אגב אנסוהו גמרו וקבלו cannot be a reasonable assumption nowdays. This is indeed the opinion of a number of *poskim*.[66]

However, where conversion was sought for sincere reasons, even if after conversion the *Ger* is not totally observant, the assumption can be made that non-observance is due to ignorance rather than rejection.

There are a number of lenient opinion with regard to what constitutes גרות לשם אישות, conversion for the sake of marriage. A number of *poskim*[67] are of the opinion that where the Gentile and Jew have cohabited even once, passion has been reduced, and a subsequent conversion need not be considered as being solely for the sake of marriage. Others posit[68] that where a civil marriage has taken place the conversion of the non-Jew can be considered, "for

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66. עיין מספר 63, וגם באמרי יושר חלק א' סימן קע"ו ובתשובות מנחת יצחק חלק א' סימן קכ"ב

67. שו"ת טוב טעם ודעת חלק א' סימן כ"ל

68. עיין אמרי יושר בשם פרי השדה ועיין עוד שו"ת מלמד להועיל אבן הועזר סימן י' ובשו"ת שרידי אש חלק ג' סימן נ'

the sake of heaven," since a permanent conjugal relationship has already been established and will most likely continue even without the conversion. Rabbi Meir Arik[69] rejects these views, arguing that the Jewish partner may be seeking to religiously legitimize his marriage.

Rabbi David Hoffman[70] posits the opinion that the absolute necessity of accepting all the mitzvot exists only if the conversion is for the sole benefit of the convert. However where the conversion will be beneficial (תקנתא) to a Jew, even though it is obvious that the convert will reject a specific mitzvah, the conversion may be performed. An example of this is the case to which Rabbi Hoffman responded: A Kohen married a Gentile woman in a civil ceremony. The woman wanted to convert, with the intention of continuing here relationship with this Kohen — but a Kohen is prohibited from marrying a convert! Thus it was obvious that she intended to reject this biblical commandment. However, Rabbi Hoffman pointed out that the Jewish man would benefit from the conversion in two important ways. First, prior to her conversion, the Kohen was consorting with a Gentile woman, a trangression more severe than his consorting with a convert. Second, תקנתא דזרעו, to save this man's children who, barring this conversion, would be non-Jews. Rabbi Hoffman does not cite any proofs for his decision, and indeed it is rejected by numerous *poskim.*[71]

Rav Feinstein[72] states that conversion may be performed if there is a likelihood that denying conversion to the Gentile will cause the Jewish spouse to leave the path of Judaism. Since the prohibition of accepting converts for conjugal purposes is not "a clear cut prohibition," then if observance of mitzvot can be assumed, such insincere conversions may be performed for the spiritual benefit of the Jew. However, rejecting the opinion of Rabbi Hoffman, he asserts that since the prohibition of a Kohen's consorting with a convert is clearly interdicted by the Torah, no Bet

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69. אמרי יושר חלק א' סימן קע"ו
70. שו"ת מלמד להועיל אבן העזר סימן ח'
71. אגרות משה אבן העזר חלק ב' סימן ד'
72. שם

Din may violate an *issur* (converting a woman who has rejected a mitzvah) in order to save the Jewish man from transgressing a more serious *issur*.

Rabbi Hoffman himself limited his lenient view in two significant ways.[73] First, he insisted that the man and woman would have to scrupulously follow the laws of *Nidah*, for otherwise, rather than saving the Jewish man from the severe sin of consorting with a Gentile woman, the Bet Din has given him the opportunity to have sexual relations with a Jewish woman who is a *Nidah* — a far more grievous transgression!

> גם בלא זה אם יתרבו המכשולים שבני ישראל ישאו נכריות, יהיה הכרח לעשות גדר שלא לקבל גיורות כאלה
>
> If the stumbling block of the Jewish people — intermarriage — shall increase, then such converts are not to be accepted.

In a recently published responsum, Rav Feinstein notes[75] that there is one biblical commandment which the Gentile might admit to being unable to observe, and yet the Bet Din could perform the conversion. That is the mitzvah of יהרג ואל יעבור, to suffer martyrdom rather than violate the Torah. Should the prospective convert admit that he probably lacks the courage to fulfill this mitzvah — *Kiddush Hashem* — he can still be converted. (In his responsum Rav Feinstein elaborates upon his reasoning).

Immersion

The Gemara in *Yevamot* 47 states:

> ובמקום שנדה טובלת שם גר ועבד משוחרר טובלין וכל דבר שחוצץ בטבילה חוצץ בגר ובעבד משוחרר ובנדה

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73. שו״ת מלמד להועיל אבן העזר סימן ח׳, עיין עוד שו״ת אחיעזר חלק ג׳ סימן כ״ו - ו׳
74. שו״ת מלמד להועיל אבן העזר סימן י׳
75. אגרות משה יורה דעה חלק ג׳ סימן ק״ח ועיין שם לענין אם אמר הגר שאינו יכול לעמוד בנסיון של אונס ממון

> And only where a menstruant may perform her ablution may a proselyte and an emancipated slave perform their ablution; and whatever is deemed an interception in ritual bathing is also deemed to be an interception in the ablutions of a proselyte, an emancipated slave and a menstruant.

The *tvilah* of a *Ger* has the halachot of *tvilah* for a *Nidah*.

There is some discussion if the presence of three men during the *tvilah* is absolutely required or only desirable. It is possible for the acceptance of mitzvot to take place before a Bet Din of three men, while the *tvilah* might be witnessed by only two men. But to fulfill the requirement according to all rabbinic opinions, another *tvilah* should take place before a Bet Din of three.

Rav Feinstein[76] requires the Bet Din to observe the immersion. (Naturally a woman is immersed up to her neck in the mikvah before the Bet Din enters). He states that all three members of the Bet Din should be in the room in which the mikvah is located and each should be able to view the *tvilah*. If they see the *tvilah* from another room, it is questionable whether it can be considered that they were "present" ואף אם ראו דרך הפתח יש ספק אם נחשבו שהיו הב"ד שם. However if the Bet Din was in the room in which the mikvah is located but because of the small size of this room the three men stood behind each other, and only the man standing in front saw the *tvilah*, the *Gerut* is still valid.[77]

After the *tvilah* the convert recites the blessing for the *tvilah*. Upon emerging from the mikvah — הרי הוא כישראל לכל דבר, he is considered as a Jew for all matters.

Rabbi Y. Weinberg writes,[78] "And there is a custom that the

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76. אגרות משה יורה דעה חלק ב' סימן קכ"ז, יורה דעה חלק ג' סימן קי"ב

77. מעוברת שנתגיירה בנה אינו צריך טבילה דעלה לו טבילת אמו, עיין רמב"ם הלכות איסורי ביאה פרק י"ג - ז', שולחן ערוך יורה דעה סימן כס"ח - י', ועיין בגר"א שם סעיף קטן ה' שכתב "ואחר שנולד הוא כישראל גמור אף בלא מילה אלא שמלין אותו כמו תינוק ישראל". לפי שיטת הנודע ביהודה (דגול מרבבה יו"ד שם) צריך הב"ד לדעת בשעת טבילה שהאשה מעוברת, בעל ערוך השולחן (יו"ד שם הלכה י"א) חולק וסובר דאין הב"ד צריך לדעת זה בשעת טבילה.

78. שו"ת שרידי אש חלק ב' סימן ק"ח

convert fasts on the day the conversion if finalized. A male convert after circumcision and a female convert after ablution recite the blessing *Shehecheyonu.*"

Havchana

A married Gentile couple who convert together must separate from each other for three months of *Havchana.*[79] This is required להבחין בין זרע הנזרע בקדושה לזרע שלא נזרע בקדושה "to differentiate between the seed planted as holy seed and that planted not as holy seed." A number of *poskim* state that if the couple convert while the wife is pregnant, the *havchana* is not necessary.[80] There are also other circumstances under which this three month separation requirement is waived.[81]

After the Conversion

The Gemara in *Yevamot* 22a declares: גר שנתגייר כקטן שנולד דמי "One who becomes a proselyte is like a child newly born." Accordingly, upon conversion a *Ger* is considered as having no blood relatives,[82] and could theoretically marry a woman such as his sister, assuming of course that she converted as well. However, this is forbidden שלא יאמרו באנו מקדושה חמורה לקדושה קלה "So that it will not be said, 'We came from a strict law to a lenient law.' " If a *Ger* could marry after conversion a woman whom he was prohibited from marrying before (under the Noachide Laws), people might conclude that Jewish law is not as "holy" as Noachide law.

Following this rationale also, Rambam teaches that after conversion the *Ger* must still honor his parents.[83]

> הגר אסור לקלל אביו העכו"ם ולהכותו ולא יבזוהו כדי שלא יאמרו באנו מקדושה חמורה לקדושה קלה שהרי זה מבזה אביו. אלא נוהג בו מקצת כבוד.

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79. שולחן ערוך יו"ד סימן רס"ט הלכה ט'
80. עיקרי דינים יו"ד סימן כ"ט סעיף קטן ח', שו"ת מלמד להועיל אבן העזר סימן י', ועיין עוד במשנה למלך הלכות גירושין פרק י"א - כ"א
81. עיין דגול מרבבה יו"ד סימן רס"ט, אגרות משה אבן העזר חלק ב' סימן ה'
82. שולחן ערוך יו"ד סימן כס"ט
83. רמב"ם הלכות מלכים פרק ה' הלכה י"א

> A convert is forbidden from cursing, hitting, or embarrassing his Gentile father, so that it should not be said the *Ger* comes from a strict holiness to a lenient holiness, for now (as a Jew) he embarrasses his father. Rather he (the *Ger)* should honor his father in some small fashion.

In a recently published responsum, Rav Ovadiah Yosef[84] states that a *ger* may say kaddish for his deceased parents. The *ger* may also pray for his parents, should they be ill. The rules of mourning, however, do not apply to a *ger*.

Reform, Conservative, and Joint Conversions

Conversions which are overseen by Reform and Conservative clergymen have no validity, for numerous reasons.

1. *Milah* and *tvilah*, even if performed, are not performed in accordance with halacha.

2. Even if the *milah* and *tvilah* are performed properly, the acceptance of mitzvot *cannot* be according to halacha, for Reform (and some Conservative) Judaism specifically rejects halacha. The Gentile is not going to accept more than his mentor himself professes.

3. According to all *poskim*, the declaration of commitment to mitzvot must be made before a Bet Din. Conservative and Reform clergymen cannot serve as members of a Bet Din.[85]

Having Orthodox Rabbis perform a conversion jointly with Conservative or Reform clergymen does not validate the conversion. There are many *poskim* who forbid such joint action, and thus the Rabbis serving on a Bet Din despite an *issur* of doing so cannot validly carry out a rabbinic function:[86]

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84. שו״ת יחוה דעת חלק י׳ סימן ס׳

85. אגרות משה יו״ד חלק א׳ סימן ק״ס, מ״ד חלק ב׳ סימן קכ״ה, אבן העזר חלק ג׳ סימן ג׳ Also, see Journal of Halacha and Contemporary Society, Number VI, Essay by Rabbi J. David Bleich, Pages 13-18.

86. שו״ת הר צבי יו״ד סימן כט״ז, צריכים להדגיש דלא מוכר שם דהגירות נעשה שלא כהלכה. אדרבה משמע דכל מעשה הגירות היה על פי הלכה ואף על פי כן לא חל הגירות.

ועד"ז יש לומר דנידון דידן דבמקום איסור לא עבדינן שליחותייהו והגרות בטלה לגמרי

Where the conversion is being performed in violation of an *issur*, those involved are not representatives (of the rabbinic authority) and the conversion is invalid.

At times an Orthodox Rabbi who refuses to take part in a conversion is told that if he will not do it, a non-Orthodox clergyman will perform the conversion. Conversions by non-Orthodox clergymen, although invalid, could possibly lead to confusion in the future regarding *yichus*, (identity), especially considering the fact that people are constantly moving from community to community. At some future date it is possible that such "converts" will mistakenly be accepted as Jews. What should he do?

Rav Ezriel Hildesheimer[87] writes that where a conversion should halachically not be performed, it is not the concern of the Orthodox Rabbi if his refusal to get involved will cause the Gentile to seek an invalid non-Orthodox conversion. Rav Chaim Ozer Grodzenski[88] concurs.

There is an additional halacha which is especially relevant to any discussion about present-day conversions. In *Yevamot*, the Mishna states:

הנטען על השפחה ונשתחררה או על העובדת כוכבים ונתגיירה הרי זה לא יכנוס ואם כנס אין מוציאין מידו

If a man is suspected of intercourse with a slave who was later emancipated, or with a heathen who

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87. שו"ת ר' עוריאל הילדעסהיימער סימן כל"ד

88. שו"ת אחיעזר חלק ג' סימן כ"ו - ו'. באם מותר לקבור בבית עולם ישראלי, גר או גיורת שנתגיירו אצל ריפורמער או קאנסערוואטיוועז עיין תשובות אגרות משה יו"ד חלק א' סימן ק"ס ושו"ת שרידי אש חלק ג' סימן ק'

For a discussion on the halachot of "גר קטן" and adoption, see Journal of Halacha and Contemporary Society, Number IV, Essay by Rabbi Melech Schachter.

> subsequently became a proselyte, he must not marry her. If however, he did marry her, they need not be parted.

Rashi explains the reason for this prohibition, which forbids the marriage of a Jew to a female convert with whom he is suspected of having had intercourse before conversion, as being דאתי לאחזוקי לקלא קמא that such a marriage might confirm the rumor of previous immorality.

May a *Gerut* be performed when it is evident that after the conversion the couple will want to be married, and there is reason to believe that they have been living together prior to her conversion? Does the rabbinic prohibition mentioned in the above mishna extend to cases where the couple is *known* to have had intercourse, rather than merely being *suspected* of such activity? This second question is especially germane to situations in which the conversion is being sought after a civil marriage has already taken place. In such cases, a permanent conjugal relationship has been established as fact, not a mere suspicion.

From Rashi's explanation of the prohibition it would seem that where previous immorality is a known fact, marriage after conversion would be permitted, since the marriage would not lend credence to the rumor of previous immorality which is already a known fact.

However, Rav Shlomo Kluger[89] argues that this cannot be the halacha, for then it would be a case of חוטא נשכר, the sinner is rewarded: Mere suspicion of promiscuity is cause for prohibition of marriage after conversion, but known promiscuity does not carry with it this *Issur*? Of course this is illogical, and in fact according to a number of *Rishonim* the prohibition does extend to cases of known immorality. Nevertheless there is a leniency accorded to this prohibition under certain conditions, for the mishna itself rules that they need not be parted.

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89. שו״ת טוב טעם ודעת חלק א׳ סימן כ״ל

90. עיין שו״ת הרשב״א סימן תתר״ה, שו״ת מהרי״ק סימן קכ״ט, שו״ת אחיעזר חלק ג׳ סימן כ״ו, שו״ת מלמד להועיל אבן העזר סימן י׳ אגרות משה אבן העזר חלק א׳ סימן כ״ז

The general consensus amongst *poskim*[90] is that if a civil marriage has preceded the request for conversion or if there is a chance that refusing to perform the *Gerut* might cause the Jew to leave Judaism altogether, one may be lenient. Once again it must be emphasized that if the couple have no intention of following the laws of *Nidah*, this leniency cannot apply.

The Torah offers Gentiles the opportunity to convert to Judaism, but this opportunity is only intended for those who seek conversion "for the sake of heaven," who want to embrace the very Torah which made their conversion possible. *Gerut* was not intended to be a quick remedy for intermarriage.

Gerut is the avenue though which sincere Gentiles assimilate into Judaism, not a "way out" by which our young people can feel free to date and marry Gentiles and assimilate into their ranks.

We must protect Jewish identity — *Yichus* — for it is our pride and glory and is cheapened by farcical conversion. The Midrash[91] tells us that the Almighty added part of his name to the family names of the twelve tribes, as a sign that their *Yichus* was in proper order.

It has been said in the name of the Kotzker Rebbe, who was known for his lightning-wit short statements, that the importance which the Almighty attaches to *Yichus* is because: אז מען ווייסט פון וואנען מען קומט, ווייסט מען צו וואנען מען דארף גיין, when one knows where he comes from, he then knows where he must go.

Let us seriously keep in mind where we come from, our roots, and the responsibilities that that distinction entails, before we bestow the identity of G-d's people on others.

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91. עיין רש"י במדבר כ"ו - ה'.

Arbitration and The Courts In Jewish Law

Rabbi Dr. Dov Bressler

Few concepts in Jewish law are more important than that of justice. Scriptures and talmudic literature are replete with references to its centrality. Indeed, no society can long endure in its absence,[1] and it is an imperative for all humanity and included in the obligations placed upon Noach and his descendants.[2] The esteem and high station it occupies and the rewards it brings are the subjects of much comment[3]; the consequences of its abrogation are also spelled out in the harshest of terms.[4]

The need for an organized system of justice is, of course, quite apparent. One of the facts of living in any society is the presence of disputes, litigation and conflict. This is true even in the most simple and primitive of societies, and it is compounded in our modern and complex society. Moreover, matters are further complicated for religious Jews because they must live by a dual system of justice. As citizens, residents, or even migrants, they must heed secular law

1. אבות פ״א י״ח
2. רמב״ם הל׳ מלכים פ״ט הל׳ י״ד
3. משלי כא: ג׳ ט״ו; דב״ר פ״ה; שבת י׳; סנהדרין ז׳; אברת ה:ח
4. ישעי׳ א׳: כ״ד ל״א; שבת לג, קלט; סנהדרין ז׳; אבות ה:ח

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both because it is the law of the land accompanied by governmental enforcement powers and because they are subject to the talmudic injunction of *"Dina D'Malchuta Dina"*[5] — the law of the government is binding law. Nonetheless, they are simultaneously subject to religious law which is full and comprehensive not only in regard to religious practice but also for civil and monetary matters. Wherever possible, Jews are required to use their own religious courts to settle disputes.

This paper seeks to clarify the role of arbitration in Jewish law. How does this practice differ, if at all, from compromise judgments *(Peshara)?* Under what conditions can either be used as a substitute for a formal application of statutory justice *(Din)?* Which approach is preferable? May a Jew seek relief for civil claims through a secular arbitration process? Under what circumstance may a religious Jew serve as a lawyer? At a time when, in the words of a noted authority, droves of Jews are uninformed about the injunction against seeking civil relief in secular courts, what advice can we give to litigants whose daily business and financial lives are tied to the secular world?[6]

In the process we will need to outline and clarify each of the following concepts:

(a) *Din* (דין) - Strict statutory justice in accordance with halacha

(b) *Peshara* (פשרה) - Compromise judgment imposed by rabbinical courts

(c) Voluntary Arbitration

It will also be necessary to see the effect that *Dina D'Malchuta* has upon the halachic legal system.

Din vs. Peshara

In Jewish jurisprudence, the process of securing justice where

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5. נדרים כח; ב"ק קיג
See also article by Rabbi Herschel Schachter, Volume I, No. 1, *Journal of Halacha and Contemporary Society.*

6. ראה משנה ברורה סי' נ"ג ס"ק פב

there are contesting parties, as in civil suits, may technically proceed along one of two tracks. The litigants may seek a strict application of the relevant statutes, i.e., *Din*. Alternatively, if they mutually agree to be bound by a compromise judgment, i.e., *Peshara*, such a settlement may be imposed by the court (Beth Din).

Proper judicial procedure requires that at the outset the litigants not only be offered the opportunity for *Peshara*, but actually be encouraged to select this opinion.[7] Moreover, judges are advised to keep their distance from cases that require a strict application of Jewish Civil Law and to do everything possible to avoid becoming committed to a strict application of such statutes.[8]

This admonition is based on the great difficulty of truly probing to the fullest extent all subtleties and aspects of many cases,[9] which is referred to in talmudical literature as *Omek Hadin*.[10] The Maharal too dwells on the infinite depth and the intricacies of justice, explaining that no mortal can perfect its art.[11] This concept — that it is much preferable for judges to arrange for a compromise judgment rather than for strict statutory justice — is also utilized by Radvaz.[12]

Just as judges must be ever-vigilant to be scrupulously unbiased in the application of statutory justice, they must similarly ensure that any compromise judgment arrived at does not favor one side to the detriment of the other.[13]

The process of *Peshara* is subject, of course, to some variation as to what is an equitable compromise. Nonetheless, the award should not be arbitrary and must bear a definite relationship to what statutory justice would have dictated. Adjustments from that base may be made. In fact, the word *Peshara* is related to the word *Poshrin* (lukewarm). A judgment based on *Peshara* is neither "hot" nor "cold" but "lukewarm."[14]

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7. שו"ע ח"מ סי' י"ב ס' ב; ועיין בסמ"ע ס"ק ו'
8. שם ס' כ'
9. ערוך השלחן סי' י"ב ס"ק ב'
10. פסחים נ"ד
11. נתיבות עולם למהר"ל ח"א נתיב הדין פ"א
12. שו"ע רדב"ז ח"א סימן צט
13. שו"ע שם ס' ב'
14. שו"ת שבות יעקב ח"ב סי' קמ"ה

Nonetheless, in a case where one litigant who had agreed to *Peshara* complained after the fact that he was "scalded" by the judgment, *Shvut Yaakov* ruled that in the absence of definite proof that justice was miscarried, the judgment of the court is to be accepted without amendment.[15]

In the event that the agreement for compromise judgment stipulates that the compromise is to be "close to statutory justice," the range of deviation from the statutory base is further narrowed, in the view of *Shvut Yaakov,* to a maximum of 33.3 percent. This figure is only an outer bound, and the court should, if possible, seek to reduce it further if in the process relative peace and contentment can be achieved.[16]

Agreement to submit to a compromise judgment may be cancelled by either party unless one of the accepted methods of affirming a *Kinyan* (binding agreement) is effectuated.[17] A written agreement to accept this form of judgment serves this purpose.[18]

In the absence of an explicit statement to the contrary, compromise judgments can only be imposed by unanimous agreement. This differs from court proceedings imposing statutory justice. To avoid an impasse, it is therefore advisable to specify in the written agreement that judgment may be rendered by majority opinion.[19]

On the basis of these principles, it is now accepted practice to request litigants to sign an agreement consenting to the imposition of a *Peshara* judgment. This agreement is recognized and enforceable under local and federal arbitration law, which can be invoked if one of the parties refuses to heed the decision of the court.

Cases waiting for adjudication may be referred to judges in two different ways. The dispute may be assigned to a local court. If, however, one of the parties objects to a particular court, a special

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15. שם סי' קמ"ד
16. שם סי' קמ"ה
17. שו"ע ח"מ סי' י"ב ס' ז
18. רמ"א בשם ב"י שם
19. ערוך השלחן סי' יב, ס' טו

tribunal of judges may be selected. Under this procedure, each party choses one qualified judge, who thereupon mutually agree to a third.[20]

There is a certain merit to this approach, as evidenced by a decision of *Shvut Yaakov* concerning a city with a long tradition of convening Jewish courts for civil suits by having each side choose one judge. At some juncture, a desire arose among the leadership of the city to supplant this process with a Beth Din permanently convened to hear all civil disputes. The ruling handed down was that the traditional procedure should not be altered because it was based on the talmudic principles that when each side chooses one judge, there is a greater likelihood of compliance and equity,[21] as well as the fact that this had been the longstanding tradition.

Secular Courts

A central principle of halacha is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts. Litigants are enjoined from submitting their disputes to secular courts when both parties are Jewish. This applies even if it is known that the secular court will follow principles identical to the Jewish law. It certainly pertains if there is the possibility that the evidentiary procedures or the mode of legal analysis or the outcome of the case will be affected. Even if a contract contains a clause explicitly accepting the authority of a secular court, it is invalid in Jewish law.[22]

It is, however, recognized that Jews are not always masters of their own fate and that one of the litigants may refuse to submit to the authority of a rabbinical court, which may then be unable to enforce its decisions. In such cases the defendant is to be summoned to appear. If he refuses and the rabbinical court lacks the authority to place a lien on his property, permission will be

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20. שו״ע ח״מ סי׳ ג׳ ס׳ א וסי׳ י״ג ס׳ א
21. שו״ת שבות יעקב ח״ב סי׳ קמ״ג
22. שו״ע ח״מ סי׳ כ״ו ס׳ א׳ ג
See also article by Rabbi S. Kraus in Volume II, No. 1, *Journal of Halacha and Contemporary Society*.

granted to the plaintiff to protect his interests by pursuing his claim in secular courts.[23]

The process of properly using the good office of the secular courts is viewed by the *Chatam Sofer* as totally consistent with the primacy of Jewish authority over its people in civil matters. The fact that a case is submitted to the secular court only with its consent preserves the authority of the rabbinical court. Nonetheless, such consent will only be forthcoming in instances when there is no way to compel one of the parties to appear before the rabbinical court.[24]

Even in a case where an entrepreneur has misrepresented non-kosher food and sold it as kosher, he may not, according to *Iggerot Moshe*, be brought up on legal charges unless a rabbinical court has first attempted to reprimand him and ensure that the practice ceases and desists. Only if he continues to defy the rabbinical court may he be reported to the legal authorities. At that point the situation is analogous to the litigant who has no other recourse but to submit his claim to a secular court.[25]

Governmental Law (*Dina D'malchuta*)

One of the basic principles of Jewish civil law is *Dina D'malchuta Dina* i.e., governmental law is binding law.[26] Various writers have been troubled by an apparent inconsistency between this guidepost and the injunction against petitioning secular courts for relief under their civil statutes.

The Rashba reconciles these diverse strands of Jewish law by explaining that *Dina D'malchuta* applies only to matters in which the state has substantial interest, such as tax collection or procedures of eminent domain. *Dina D'malchuta* would not extend to allowing Jewish litigants to disregard Jewish courts and proceed directly to secular courts because the state incurs no loss by virtue

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23. שם סי' ב
24. שו"ת חת"ס סופר ח"מ סי' ג
25. אגרות משה ח"מ סי' ח
26. נדרים כח; ב"ק קי"ג

of individuals' not using the public courts to settle their civil claims.[27]

This view is, however, not in accord with the Ramban, who believes that *Dina D'malchuta* applies to any principle or institution which has governmental authority. Whether or not the government stands to gain something tangible is not pertinent.[28] Nonetheless, the *Shach* insists that the principle of *Dina D'malchuta* would only be applicable to those cases where governmental law does not conflict with express Jewish law. Since the evidentiary rules of secular courts deviate from Jewish law, *Dina D'malchuta* cannot sanction their use.[29]

Yet another reconciliation of the paradox is provided by Chida who asserts that *Dina D'malchuta* is only applicable to those principles whose adherence is insisted upon by the government. The state, however, most certainly has no quarrel if disputants make no use of public courts and instead submit to some other process of adjudication. On this basis there would be no dispensation which would allow the use of secular courts for civil disputes.[30]

A somewhat related question arises in regard to the use of official courts established by the State of Israel to adjudicate civil matters. Would the fact that both the judges and the government are Jewish sanction the utilization of those courts for civil disputes? The *Chazon Ish* and R. Ovadia Yosef are among the many who are adamant that such courts are precisely like any other secular courts because they are not bound by nor accord with halachic principles.[31]

Jewish Attorneys in Secular Courts

If Jewish litigants are enjoined from pursuing civil claims in secular courts, what about the propriety of a Jewish lawyer

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27. שו"ת הרשב"א ח"ה סי' קצח וח"ו סי' רנ"ד ועיין בשו"ת מהרי"ק סי' סו
28. חי' רמב"ן ב"ב נה
29. ש"ך ח"מ סי' ע"ג ס"ק ל"ט
30. שו"ת יחוה דעת ח"ד סי' ס"ה בשם החיד"א
31. עיין בשו"ת יחוה דעת שם

representing a Jewish client? R. Ovadia Yosef and R. Menashe Klein prohibit a Jewish lawyer from representing a Jewish plaintiff in a civil suit before a secular court. Such representation undermines the authority of the rabbinical court no less than processing one's own claim.[32]

On the basis of the above, it would appear that Jewish lawyers are in strategic positions to promote adherence to halacha by informing their Jewish clients of the legal procedures that would accord with religious requirements. This would include the initial summoning of the Jewish defendant to a rabbinical court and proceeding to a secular court only upon that party's refusal.

In regard to representing a Jewish defendant in a civil suit brought by another Jew in a secular court, it is quite clear that to do so would be in accord with halacha. By bringing such a suit into the secular courts, the plaintiff has obviously defied the religious courts. Consequently, the defendant is entitled to the best possible defense in the arena where he must contest the action.[33]

Voluntary Arbitration

Virtually all courts suffer from problems of overcrowded calendars, severe time delays, numerous and lengthy appeals and costly proceedings. These features are sometimes exacerbated by a lack of confidence in the quality of justice that will be meted out. Consequently, it is not surprising that other forms of resolving disputes have appeared and, indeed, are becoming more common with the passage of time. These alternatives approaches to the settlement of disputes are substitutes for formal litigation processes. While the precise form, terms, and conditions may vary, their key feature is the element of voluntary arbitration.

It is because of these developments that most people, at one time or another, are confronted with decisions as whether to accept arbitration as a means of settling a wide array of claims. These range from consumer product reliability to commercial disputes.

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32. שו"ת יחוה דעת שם. משנה הלכות ח"ז סי' רנ"ה
33. שו"ת יחוה דעת שם

They include landlord-tenant quarrels, worker grievances, accident claims and and the collection of unpaid debts.

Under the federal Magnuson-Moss Warranty Act, manufacturers may write into their warranties a stipulation that requires consumers to participate in some dispute resolution process such as arbitration before being able to assert their rights under this law. The recently enacted New York Automobile Quality Products Act, otherwise known as the "Lemon Law," includes provision for arbitration of complaints. Similar laws have already been enacted in more than a dozen other states. Under the terms of an agreement between General Motors and the Federal Trade Commission, arbitration will be utilized as one way to resolve complaints about serious automobile defects.

These specific examples are just illustrations of the increasing use of arbitration as a substitute for formal court action. In fact federal and state laws authorize the submission to arbitration of almost any controversy that would otherwise be the subject of civil litigation. Given the earlier discussions of this paper, it is now necessary to determine whether the proscription against the use of secular courts contained within Jewish law pertains to secular arbitration.

Of course, just as arbitration law protects and guarantees the enforcement of secular arbitration agreements, it would, in like manner, provide the same protection to arbitration agreements that accept the judgment of a rabbinical court as the final arbiter of a dispute. In the latter case there will consequently be no problems in Jewish law or in secular recognition or awards.

Nonetheless, it frequently happens that it is not possible to secure the mutual agreement of both parties to utilize a Beth Din as the arbitration panel. Under such circumstance, is secular arbitration a viable alternative for someone wishing to accord with halacha? Moreover, under certain pre-existing arbitration agreements, the arbitration panel is stipulated even before any specific complaint is filed. Can a religious Jew feel free to utilize such arbitration remedies or must he be concerned about the injunction against processing civil claims outside rabbinical courts?

It may at first blush be argued that since arbitration is a

substitute for court action and equally enforceable, it should be subject to the same restrictions as the secular courts themselves. However, before any conclusion can be reached, it is necessary to consider several additional points of Jewish law which are relevant to the issue at hand.

Suppose that the disputants in a civil suit agree to accept the testimony of a person who would ordinarily lack credibility or to submit their dispute to judges who would be legally unacceptable to serve. Such agreements are binding and enforceable if accompanied by a *Kinyan* (legal affirmation).[34]

Upon consent of the disputing parties, the testimony of someone who is not Jewish may be accepted in a rabbinical court. However, Jews may not submit their disputes to non-Jewish judges even by mutual consent.[35] The Ramo clarifies this to mean that such judges are not to be selected to begin with, but ex post facto, i.e., if the case were already decided in accordance with a valid agreement, the decision would be binding.[36]

The *Shach* makes an important distinction in regard to the above matter. Only if the agreement between the parties calls for the submission of the case to a non-Jewish judge who will adjudicate the matter according to secular law would such an agreement be invalid. However, if an agreement was made to rely upon the non-Jew's best sense of fairness and equity and not on any standard body of statue or law, such an agreement when reinforced with a *Kinyan* would be binding.[37]

Although this view is contested by the *Netivot,* the *Aruch Hashulchan* strongly supports the position of the *Shach* and in fact dismisses the contrary opinion.[38] The logic behind this ruling is easily understood. By accepting the judgment of someone who is not a member of a rabbinical court, the parties are not distorting the halacha because they have mutually agreed to rely on a

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34 שו״ע ח״מ סי׳ כ״ב ס׳ א

35. שם ס׳ ב

36. רמ״א שם

37. ש״ך שם ס״ק טו

38. ערוך השלחן שם ס״ק ח; נתיבות המשפט שם ס״ק י״ד

reasonableness doctrine rather than the legal dictates of the case. In regard to money matters, individuals can clearly agree to whatever they please. There is also no denigration of Jewish law because they are not substituting in its place any foreign or alien body of law. Only if parties agree to use some other system of law whether in a strict application of statutory law or in a compromise judgment which is based on statutory law would there be a denigration and distortion of Jewish statutory law.

It now remains for us to show that a typical arbitration case is analogous to the alternative case given by the *Shach*. The crucial question then resolves around whether an arbitration decision is most essentially based on some body of law, in which case a secular arbitration award, even a compromise judgment, falls into the category of secular court judgments. Alternatively, is an arbitration award a judgment which is essentially independent of any given body of law, in which case it amounts to relying upon the good sense and fairness of the arbitrator. If the latter is true, then a mutual agreement made by both disputing parties will be binding just as any other monetary agreement they enter into.

To resolve this question, we must examine how the legal system itself views arbitration. The literature of arbitration would seem to answer this question resoundly in favor of the latter hypothesis. Consider the following statement from the Committee on Arbitration of the Association of the Bar of the City of New York:

> The arbitrator need not apply substantive principles of law. The arbitrator is not bound by evidentiary rules; he need not give reasons to support his ultimate determination and his award is not subject to judicial review for errors of law or fact. The arbitrator, *free from rules of law* may decide solely on the equities of the case. (emphasis added)[39]

This statement is based upon actual case law and decisions

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39. The Association of The Bar of The City of New York, *An Outline of Procedure Under Arbitration Law in New York*, April 1984, p. 6-7.

issued by various courts in response to sundry challenges to arbitration procedures, decisions and authority.[40] It indicates quite explicitly that the arbitration process is distinct and apart from a judicial proceeding, not merely in degree but in substance and concept. Judicial decisions must be based on a body of law and must use only accepted rules of evidence in drawing conclusions. As such, any determination is subject to objective review. Arbitration, on the other hand, is rooted in a sense of reasonableness, fair play, and equity. By its very nature it has a strong subjective component and as such is neither subject to the usual objective rules of evidence or judicial review.

A similar overall description of the arbitration process is given in a classic text in the field which concludes that the arbitrator "performs functions which are normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."[41]

This brief survey of arbitration procedure and practice makes it abundantly clear that the process is remarkably similar to the case cited above by *Shach* in which no body of law is involved. The process is inherently unlike the application of statutory justice or even the imposition of compromise judgments which are based on fixed bodies of law. Thus an agreement to submit a dispute to secular arbitration should not, according to the *Shach* and *Aruch Hashulchan*, be included in the general injunction against secular courts.

On the basis of all of the above, it appears that the practice of submitting civil claims to arbitration processes is based on solid halachic grounds, providing it is accompanied by a *Kinyan* (legal

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40. See *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Hale v. Friedman*, 281 F. 2d 635 (D.C. Cir. 1960); *Grombach v. Simon & Schuster*, New York Law Journal, p. 19, Col. 2., Oct. 5, 1970: *Matter of Wilkins*, 169 N.Y. 494, 62 N.E. 575 (1902); *Schine Enterprises, Inc. v. Real Estate Portfolio of New York, Inc.*, 26 N.Y. 2d 799, 309 N.Y.S. 2d 222 (1970).

41. F. Elkouri and E. A. Elkouri, *How Arbitration Works* (Third Edition), Bureau of National Affairs Inc., Washington D.C., 1973, p. 8.

affirmation). This invariably takes place because all arbitration processes do in fact require written agreements.[42]

Summary

Faced with the prospect of pursuing a civil claim against a fellow Jew, any individual should adjudicate matters in a rabbinical court preferably through *Peshara* or compromise judgment rather than strict statutory justice. If the opposing party refuses to appear before such a tribunal, the plaintiff will be granted permission to process his claim through the secular courts. Alternatively, the plaintiff could at the outset seek arbitration of his claim. Under frequent circumstances in the commercial and industrial world this may appear to be the more practical course. Moreover, arbitration may in fact be mandated as the accepted route to resolve differences, as in labor-management and consumer-producer disputes. If it is possible to select rabbinical judges as arbitrators, there will be no halachic problems according to all authorities. Secular arbitration is, apparently, also acceptable and in accord with halacha according to the *Shach* and *Aruch Hashulchan*. Individuals who may ordinarily tend to ignore rabbinical courts should therefore be counselled into selecting arbitration rather than a strict judicial hearing.

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42. See Civil Practice Law and Rules, Article 75, Sec. 7501 and U.S. Code-Arbitration, Title 9, Sec. 2.

Problems Of A Forced Get

Rabbi Tzvi Gartner

In recent years, the Jewish community has become increasingly aware of what is aptly referred to as "the modern-day *Aguna* problem," the case of a woman living apart from her husband with no apparent hope of reconciliation, yet unable to remarry because her husband is holding back in granting a *get* (Jewish divorce), for purposes of revenge or blackmail (monetary or otherwise). There is no need to elaborate upon the dimensions of this tragedy, nor the pitfalls it presents in terms of human suffering, potential *Chilul Hashem* and violation of the prohibition of *Aishet Ish* (adultery). They are well known to all, layman and professional alike.

Many individuals are shocked to find Jewish marriage and divorce laws which they consider archaic, unfair and unreasonable. Drastic changes have been suggested, nay demanded, as the numbers grow of those who feel themselves "trapped" by technicalities. It is our intention here to examine the halachic issues and to seek to explicate the nature of the obstacles barring an easy solution. It is not indifference which has so far caused the solutions to be unavailable, but rather the unhappy realization that a solution might create a further problem, worse than the one it was intended to resolve.

Jewish law requires that a *get* can only be granted by the willing acquiescence of the husband (as will be discussed later).

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Thus any *get* which is given against his will or under duress is potentially a worthless document, and if a woman remarries on the strength of such a questionable *get*, she may be committing adultery and her subsequent children may be *mamzerim*.

There is no one who would argue that a woman should not be released from an unhappy marriage — but it cannot be at the cost of creating thousands of questionable marriages and possibly myriads of *mamzerim!* If the cure is worse than the illness — it is not a cure.

Hopefully, the following study of the halachot will clarify the problem.

The underlying premise of the halacha is that the execution of a *get* demands the free will of the husband. The reasoning behind this is twofold; firstly, Rashbam[1] writes that וכתב ונתן מדעתו משמע the directive of the Torah "he shall write and give (a *get*)" presupposes free will. In Jewish law, marriage is primarily not a religious ceremony, but rather a legal contract between a man and woman through which he acquires her as a wife, and in divorce he removes his claim upon the woman, thereby freeing her to remarry as she sees fit.[2] And, as Rabbi Chaim HaLevi writes[3]:

> ובגו"ק צריך דעת בעלים על עצם הגירושין והקידושין ומשום דעיקר הקידושין והגירושין נעשה ע"י הבעלים, והם האוסרים והם המתירים, ועל כן צריך דעתם.
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> For in (cases of) marriage and divorce the will of the owners (husband) is necessary for the marriage and divorce itself, because the essence of marriage and divorce is effected by the owners (husband), and it is they who cause her to be forbidden, and it is they who cause her to be permitted, and as such their will is essential.

Secondly, as Rambam writes[4]:

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1. ב"ב מח, א ד"ה וכן, וע"ע ריטב"א גיטין פח, ב, הובא בשו"ת ר"ב אשכנזי סט"ז.
2. רש"י קידושין ב, א ד"ה וקונה ושו"ת רדב"ז ח"ג סי' תר"ח.
3. הל' יבום וחליצה פ"ד הט"ז.
4. הל' גירושין פ"א ה"א-ב.

> עשרה דברים הן עיקר הגירושין מן התורה, ואלו הן: שלא יגרש איש אלא מרצונו כו' ומנין שעשרה דברים אלו מן התורה שנאמר והיה אם לא תמצא חן בעיניו כו' מלמד שאינו מגרש אלא ברצונו ואם נתגרשה שלא ברצונו אינה מגורשת.
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> Ten points constitute the essence of divorce according to Torah laws: 1) The husband must not be compelled to divorce against his will, etc. The source for these ten points is the Torah (Deut. 24:1). "And if it shall come to pass that she no longer finds favor in his eyes, he shall write for her a bill of divorce" etc. This teaches that he shall not divorce against his will, and if she was divorced against his will, she is not divorced.

Unlike other transactions (i.e. purchases and sales) which require only the free will of the concerned parties, divorce demands something more, will of the heart, ריצוי בלב. Not only must the man be intellectually prepared to divorce his wife, he must also come to terms on an emotional level with the significance of the act he is about to undertake.[5]

Despite these stringent prerequisites and perhaps because of them, the fate of the woman was not in every instance left to the whim of her husband. To prevent abuses of the system, safeguards had to be erected. Under certain circumstances, rabbinic intervention of one sort or the other was warranted; in extreme cases, even physical violence to the person of the husband was allowed.

In all probability, this provision for rabbinic intervention is based on Torah law, rather than a *Takanah* enacted by the rabbis of a later generation. *Torat Kohanim*[6] comments: "וקדשתו — בעל כרחו, if a priest defiles his sanctity through marriage to an unfit woman (i.e. a divorcee) you shall sanctify him, even against his will; you shall coerce him into granting her a *get*." This

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5. נתיבות המשפט סי' ר"ה סק"א.
6. ויקרא כא, ח.

passage of *Torat Kohanim* is quoted in the Talmud[7] as well as in a responsum from the geonic era[8] and by Rashba,[9] Ribash[10] and Mabit.[11]

Radak[12] asserts that Saul coerced David into granting his daughter Michal a *get* for fear lest he disappear and leave her an *"Aguna."* Therein lay the nub of their differences concerning her legal status: Saul deemed it legal coercion (עישוי כדין), and as such she was no longer the wife of David and he (Saul) was permitted to give her in marriage to Palti the son of La'ish. In the eyes of David, however, she was still wedded to him, for this was illegal coercion (עישוי שלא כדין).

Rashi[13] makes passing reference to the practice during the First Temple era of incarcerating recalcitrant husbands until such time as they would grant their wives a *get* in compliance with the dictates of the rabbinic courts.

We thus find ourselves confronted with two apparently antithetical premises: on the one hand, the Torah tells us that a prerequisite for the execution of a *get* is genuine will of the heart (ריצוי הלב). On the other hand, we are told וקדשתו — בעל כרכו,, sanctify him, even against his will. How might we reconcile these seemingly contradictory laws? Some commentators[14] explain simply that through legal coercion (עישוי כדין) a state of willingness is attained, for מצוה לשמוע דברי חכמים,[15] it is a mitzvah to obey the behest of the rabbis.

Other commentators[16] reject this view. As they see it, although

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7. יבמות פח, ב (ועי' שו"ת רא"ם סי' נ"ט, חתם סופר ח"ו סי' י"ב ודובב מישרים ח"ב סי' מ"ה).
8. תשובת רב נטורנאי גאון,הובא בב"י אה"ע סי' ו' וארחות חיים הל' ביאות אסורות סי' י"ז.
9. סי' אלף קפ"ז.
10. סי' שמ"ח.
11. קרית ספר הל' גירושין פ"ב ה"כ.
12. שמואל א כה, מג.
13. פסחים צא, א ד"ה בית האסורין.
14. נתיבות המשפט סי' ר"ה סק"א וט' ושו"ת חתם סופר ח' אה"ע א' סי' כ"ח וקט"ז.
15. קידושין נ, א וב"ב מח, א.
16. חלקת יואב דיני אונס ענף ה' וחזו"א ח' אה"ע סי' צ"ט סק"א-ב. וכן דעת מבי"ט בקרית ספר הל' אישות פי"ב, וראה באור שמח הל' גירושין פ"ב ה"כ ואמרי בינה דיני דיינים סי' א'.

we do accept the premise that legal coercion leads to emotional acceptance (ריצוי הלב)it is unlikely that he desires the *get* in its own right; rather, he has come to accept it as the means to fulfilling his innate wish to heed the words of the rabbis. Nevertheless, they conclude, in instances of עישוי כדין, such a level of emotional acceptance suffices.

The basic tenets of coercion to divorce (עישוי בגט)have been articulated by the *Tanna* in tractate *Gittin:*[17]

> גט מעושה בישראל כשר ובנכרים פסול ובנכרים חובטין אותו ואומרין לו עשה מה שישראל אומרים לך.
>
> A *get* given under compulsion by an Israelite court is valid, but by a Gentile court is invalid. A Gentile court may flog a man and say to him "Do what the Israelites command you" (and it is valid).

This is amplified somewhat by R. Nachman quoting Shmuel:[18]

> גט המעושה בישראל כדין כשר שלא כדין פסול ופוסל ובנכרים כדין פסול ופוסל שלא כדין אפילו ריח הגט אין בו מה נפשך אי נכרים בני עישויי נינהו איתכשורי נמי ליתכשר אי לאו בני עישויי נינהו מיפסל לא ליפסל אמר רב משרשיא דבר תורה גט מעושה בנכרים כשר מה טעם אמרו פסול שלא תהא כל אחת ואחת הולכת ותולה עצמה בנכרים ומפקעת עצמה מיד בעלה א"ה שלא כדין אפילו ריח הגט אין בו ונהוי כשלא כדין בישראל ומיפסל נמי לפסול אלא הא דרב משרשיא בדותא היא וטעמא מאי כדין בכדין דישראל מיחלף שלא כדין בכדין דישראל לא מיחלף.
>
> R. Nachman said in the name of Shmuel: A *Get* given under compulsion by an Israelite court with good legal ground is valid; if without sufficient legal ground it is invalid, but it still disqualifies the woman for a priest. If enforced by a Gentile court on legal grounds, it is invalid but disqualifies; if without sufficient legal ground there is no tincture of a *Get* to it. If Gentile enforcement is valid, then the *get* should be considered valid; if Gentile enforcement is not

17. פח, ב.
18. שם בגמרא.

> acceptable, then it should not be able to disqualify her? Rabbi M'sharshye said, according to the Torah, a *get* enforced by a Gentile court should be valid, and the Rabbis declared it invalid to prevent Jewish woman from attaching themselves to Gentiles, and thereby releasing themselves from their husbands. If so, why does a *Get* enforced by a Gentile court without sufficient legal ground have not even the tincture of a *Get*? Let it at least be on a par with a similar *Get* exacted by an Israelite court and disqualify the woman! The truth is that R. M'sharshye's explanation is erroneous, and what then is Shmuel's reasoning? A *Get* enforced by a Gentile court on good legal grounds is likely to be confused with one enforced by an Israelite court, but a *Get* enforced by a Gentile court without proper grounds will not be confused with one enforced by an Israelite court with legal grounds.

According to the majority of commentators[19] this interpretation of R. Nachman in the name of Shmuel is the accepted halacha. גט מעושה כדין בישראל, a *get* enforced by Israelite court on good legal grounds is valid. שלא כדין בישראל וכדין בנכרים פסול ופוסל, a *get* without sufficient legal grounds in an Israelite court, but which the Gentile court forced him to give because there are sufficient grounds in their court, is null and void in the eyes of the Torah but within the framework of rabbinic law is considered a *get*, thereby disqualifying the woman from remarrying into a priestly family,[20] and, perhaps, necessitating that she receive a *get* from any man whom she might marry prior to receiving a second *get* from her first husband.[21] But שלא כדין בנכרים אפילו ריח הגט אין בו, a *get* without proper grounds even in the Gentile court, such a *get* is null and void even within the framework of rabbinic law.

Rashbatz[22] and Rashbash[23] derive the admissability of עישוי בגט(coercion) from the verse לרצונו;[24] just as Beth Din is

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19. טור וב"י אה"ע סי' קל"ד שו"ע שם סעי' ה־ט.
20. רמב"ם הל' גירושין פ"י ה"א.
21. רש"י ור"ן בגיטין שם.
22. ח"ב סי' ג'.
23. סי' תצ"ח.
24. ויקרא א, ג.

obligated to coerce a person into bringing the sacrifices he has vowed to offer up,[25] so, too, are they to coerce a recalcitrant husband into granting a *get*. *Chelkat Yoav*[26] explains this in the following manner: צריך רק שיהיה נוטה לרצונו ולא רצון גמור – If he is leaning towards wanting the *get* that is sufficient, he need not will it totally.

All forms of coercion fall into one of two categories: כפי' בשוטי literally, coercion through sticks, and כפי' במילי, coercion through words.[27] In instances where coercion is called for by halacha, the intent is to physical coercion, for בדברים לא יוסר עבד,[28] a slave is not chastised by harsh words alone. So, too, when the Talmud discusses the halachic ramifications of legal and illegal coercion (עישוי כדין ושלא כדין) it is in the context of כפי' בשוטי.[29] Pressure brought to bear upon a recalcitrant husband through the כפי' במילי process is not deemed sufficient to necessitate his categorization as one whose subsequent actions are the product of coercion.

What is meant by כפי' בשוטי and what by כפי' בשוטי? כפי' בשוטי includes, obviously, all forms of physical violence to the person of the husband, even to the point of beating him until he is on the threshold of death,[30] incarceration,[31] and (according to the majority of *Poskim*[32]) the imposition of a rabbinic ban (חרם), for חמירא שמתא מנגידא, a rabbinic ban is to be dreaded more than a

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25. ערכין כא, א.
26. דיני אונס ענף ה', וכדאי להעיר שכל זה בגט מעושה כדין, אבל בשלא כדין ברור שצריך רצון גמור. יש לתמוה, איפה, על הרב שלמה דיכובסקי מב"ד הרבני בתל אביב־יפו שלא עמד על נקודה זאת במאמרו "כפיית גט ע"י המלצמה לניכוי שליש ממאסר" (תחומין חוברת א' הוצאת אריאל ירושלים חורף תש"מ).
27. כתובות עז, א.
28. משלי כט, יט.
29. גיטין פח, ב ורש"י שם ד"ה מעושה. בחזקה:
30. ערכין כא, א: כופין אותו עד שיאמר רוצה אני, ובכתובות פו, א (בדין כופין על המצות) מכין אותו עד שתצא נפשו.
31. רש"י פסחים צא, א ד"ה בית האסורין שו"ת ריב"ש סי' קכ"ז ורשב"ץ סי' א'.
32. חוץ מהרא"ש יבמות סד, א ותוספות הרי"ד כתובות עז, א. ועי' שו"ת בית מאיר סי' י"ד שכן דעת הטור אה"ע סי' קנ"ד.
33. פסחים נ, א.

statutory beating.[34] Rashbatz[35] is uncertain as to whether coercion through the causing of monetary loss (אונס ממון) is considered כפי׳ במילי or כפי׳ בשוטי. This question is dealt with at length in rabbinic literature.[36]

כפי׳ במילי encompasses all lesser forms of coercion; i.e. verbal abuse such as publicly labeling the husband עבריינא, transgressor[37], as well as הרחקה דרבינו תם,[38] a rabbinic decree initiated by Rabbenu Tam calling upon members of the community to relate to the husband exactly as if the חרם ban had been imposed upon him, though in reality it has not. Ramo writes:

> יכולין ליגזור על כל ישראל שלא לעשות לו שום טובה או לישא וליתן עמו או למול בניו או לקברם עד שיגרש ובכל חומרא שירצו ב״ד יכולין להחמירן בכה״ג ובלבד שלא ינדו אותו.
>
> The Beth Din may prohibit the entire community to render him any assistance in any form whatsoever, to have any business dealings with him, not to circumcise his children or bury them should they pass away, until he agrees to divorce. In general they may censure him in any manner they see fit short of actually pronouncing the *cherem* ban upon him.

Although the ruling of Rabbenu Tam (הרחקה דר״ת) was initially well-accepted, it has not had an untroubled history. Many leading Rabbis have opposed using it and in practice it is not an option which is utilized.[40]

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34. ס׳ הישר לר״ת סי׳ כ״ד, מרדכי ריש פ׳ המדיר, שו״ת ריב״ש סי׳ קכ״ז, רשב״ץ סי׳ א׳, מהרי״ק שרש כ״ט, רמ״א אה״ע סי׳ קנ״ד סע׳ כ״א ועוד.
35. סי׳ א׳.
36. שו״ת ר״ב אשכנזי סי׳ ט״ו, ראנ״ח סי׳ ס״ג, מבי״ט ח״ב סי׳ קל״ח, תורת גיטין סי׳ קל״ד סע׳ ה, שו״ת אגרות משה ח׳ אה״ע א׳ סי׳ קל״ד ועוד.
37. תוס׳ כתובות ע, א ויבמות סד, א ד״ה יוציא, רמב״ן כתובות עז, א, מרדכי ריש פ׳ המדיק, רא״ש יבמות סד, א, ש״ע אה״ע סי׳ קנ״ד סע׳ כ״א, ע״פ שבת מ, א.
38. ס׳ הישר סי׳ כ״ד, שו״ת ריב״ש סי׳ קכ״ז ומהרי״ק שרשים כ״ט, ק״ב וקל״ה.
39. אה״ע סי׳ קנ״ד סע׳ כ״א, וע״ש בלבוש.
40. שו״ת מהר״י בן לב ח״ב סי׳ י״ח, ס׳ גבורת אנשים להש״ך סי׳ ע״ב, והובא בפתחי תשובה אה״ע סי׳ קנ״ד סק״ל, חוו״א ח׳ אה״ע סי׳ ק״ח סקי״ב ע״פ תשובת הרשב״א שבב״י

Other measures classified as כפי׳ במילי are coercion through an unrelated issue and withholding from him needed assistance (כפי׳ על דבר אחר ומניעת הטבה.) (According to *Seder Eliahu Raba,*[41] the הרחקה דר״ת is predicated on these principles.) Rabbenu Tam was the first to articulate these principles in a hallmark decision which has come down to us from several sources:[42] If a man marries a woman and subsequently she finds him so repulsive that she is unable to live with him (מאיס עלי), it is forbidden to coerce him in any manner to grant her a *get.* The halachot of מורדת and מאיס עלי will be dealt with at length later in this article. However, if he has been imprisoned for failure to discharge his outstanding debts, the relatives of the woman are permitted to pay his debts and free him from prison on the condition that he divorce his wife. Since he has been incarcerated on a different matter, we do not view his imprisonment as coercion to divorce, despite the fact that in reality it is his desire for freedom which drives him to grant a *get.* (There is much discussion among later commentators as to the exact criteria for determining when the coercion is indeed on a side issue and when it is merely a subterfuge employed primarily to coerce him into granting the *get.*[43]) Neither do we consider the refusal of the wife's family to assist him as illegal coercion even though they do so expressly to get him to acquiesce in their demands, for refraining from tendering aid is not classified as coercion; this is the rule even when they are commanded by the Torah to help him, as is the case here where he has been imprisoned by Gentiles.[44]

When the decision to coerce a recalcitrant husband is taken,

אה״ע סי׳ קנ״ד. אבל עי׳ בשו״ת ר״ב אשכנזי סי׳ ו׳ וי״ט, מהר״ם לובלין סי׳ א׳ ול״ט וס׳ אליהו רבה סי׳ י״ג שסמכו על הרחקה דר״ת למעשה, וע״ע ערוך השלחן אה״ע סי׳ קנ״ד סע׳ ס״ג שכתבה להלכה.

41. סי׳ י״ד.

42. הג׳ מרדכי גיטין סי׳ תס״ט שו״ת ריב״ש סי׳ קכ״ז מהרי״ק שרש קס״ו ומבי״ט ח״א סי׳ כ״ב.

43. שו״ת ריב״ש סי׳ קכ״ז, רשב״ץ סי׳ א׳, ר״ב אשכנזי סי׳ ט״ו, ראנ״ח סי׳ ס״ג, מבי״ט ח״ב סי׳ קל״ח, פני יהושע ח״ב סי׳ ע״ה, תורת גיטין סי׳ קל״ד סי׳ ה׳, שו״ת אגרות משה ח׳ אה״ע א׳ סי׳ קל״ד, ועוד.

44. שו״ת שארית יוסף סי׳ ט״ז ע״פ מהרי״ק שרש קס״ו.

what are the criteria upon which it is based? The Mishna tells us:[45]

> האיש שנולדו בו מומין אין כופין אותו להוציא, אמר רשב"ג בד"א במומין הקטנים אבל במומין הגדולים כופין אותו להוציא. ואילו שכופין אותו להוציא, מוכה שחין ובעל פוליפוס והמקמץ והמצרף נחושת והבורסקי בין שהיו עד שלא נישאו ובין משנישאו נולדו ועל כולן אמר רבי מאיר אע"פ שהתנה עמה יכולה היא שתאמר סבורה הייתי שאני יכולה לקבל ועכשיו איני יכולה לקבל וחכ"א מקבלת היא על כרחה חוץ ממוכה שחין מפני שממקתו. מעשה בצידון בבורסקי אחד שמת והיה לו אח בורסקי אמרו חכמים יכולה היא שתאמר לאחיך הייתי יכולה לקבל ולך איני יכולה לקבל.
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> A man in whom bodily defects have arisen cannot be compelled to divorce his wife. R. Shimon ben Gamliel said: "This applies only to minor defects, but in respect to major defects he can be compelled to divorce her." The following are compelled to divorce their wives: A man who is affiliated with boils, or has a polypus, or gathers objectionable materials, or is a coppersmith or a tanner, whether they (the defects) arose before the marriage or after. And concerning all of the above, R. Meir said: "Although the man made a condition with her, she may plead, 'I thought I could endure him, but now I cannot.' " The Sages, however, said: "She must endure despite her wishes, the only exception being a man afflicted with boils, because she will enervate him." It once happened at Sidon that there died a tanner whose brother was also a tanner. The Sages ruled: "She may say 'I was able to endure your brother, but I cannot endure you.' "

The *Tanna* does not supply us with any broad guidelines; rather, he cites specific instances warranting rabbinic intervention. The recurrent theme in all of them is that a situation has arisen where even minimal requirements of a normal marital relationship

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45. כתובות עז, א.

are left unmet. In the words of Rashi[46] הנך בשוטי נמי רדינן ליה שאי אפשר לה לקבל "in these cases we apply even physical punishment [to him] for it is impossible that she accept [the existing situation]." This is further elaborated by Radbaz in a responsum:[47] ירדו חכמים לסוף דעת כל הנשים ואינן יכולות לסבול "The Sages gauged the nature of women, and determined her incapable of tolerating (such disabilities)." In the case of the Mishna, such a state of affairs has come about due to a noxious odor emanating from the husband's person, be it the result of physical disability or the circumstances of his profession, which makes it almost impossible for anyone, particularly a wife, to function normally in close proximity to him.

A totally different sort of instance warranting coercion is that of R. Yehudah in the name of R. Assi:[48] אין מעשין אלא לפסולות "We do not coerce except for (instances of) unfit women." Here the marital relationship is not wanting on the intrapersonal level; rather, it is the qualifications of the Torah which are unfulfilled — אלמנה לכהן גדול גרושה וחלוצה לכהן הדיוט ממזרת ונתינה לישראל בת ישראל לנתין ולממזר — the marriage of a widow to a high priest, or a divorcee or *chalutza* to a priest, a *mamzer* to an Israelite. All these are marriages forbidden by the Torah, and it is proper to force him to divorce her.

There is much discussion as to the reasoning behind this halacha. Do we coerce the husband into granting her a *get* solely for fear lest he be led into temptation, or are we prompted also by the realization that the woman is a veritable *Aguna*, inasmuch as in her present situation she is forbidden either to live with her husband or to remarry? This question finds practical expression in the case of an adulteress who, according to halacha, may not live with her husband nor with her paramour. Although it is unlikely that a cuckolded husband will be tempted to live with the woman who has betrayed him, yet the second argument, that she is a de

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46. שם ד"ה הא במילי.
47. ח"ד סי' אלף רכ"ח (קנ"ז).
48. כתובות שם.

facto *Aguna* is perhaps still applicable, though she has been brought to this pass purely through her own actions.[49]

Another reason for forcing a man to divorce his wife is mentioned in the Talmud.[50]

> כי אמריתה קמיה דשמואל אמר כגון אלמנה לכהן גדול כו׳ אבל נשא אשה ושהה עמה עשר שנים ולא ילדה אין כופין אותו ורב תחליפי בר אבימי אמר שמואל אפילו נשא אשה ושהה עמה י׳ שנים ולא ילדה כופין אותו.
>
> R. Yehudah stated in the name of R. Assi: We do not compel divorce except in the case of those who are unfit. When this was mentioned in the presence of Shmuel, he remarked: "As, for instance, a widow to a high priest, a divorcee or *chalutzah* to a common priest, a *mamzeret* or *nethinah* to an Israelite, or the daughter of an Israelite to a *mamzer* or a *nethin;* but if a man married a woman and lived with her ten years and she bore him no children, he cannot be compelled to divorce her." R. Tachlifa ben Abimi, however, stated in the name of Shmuel: "Even a man who married a woman and lived with her ten years and she bore no child must be compelled to divorce her."

The consensus among major *Poskim*[51] is that a childless marriage should be terminated after ten years, with pressure put on the husband if he is unwilling. This is because a primary concern of the Torah is that marriage be a vehicle for the fulfillment of the commandment פרו ורבו "be fruitful and multiply."[52] However in

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49. תוס׳ זבחים ב, ב ד״ה סתם, שו״ת רשב״א סי׳ תת״מ ואלף קפ״ז, רמ״א אה״ע סי׳ קי״ז סעי׳ א׳ ובית מאיר שם, שו״ת מהר״י באסן סי׳ ח׳, תשובות המג״א בשו״ת גאוני בתראי סי׳ ס״ב, תשובות שבסוף דו״ח רע״א ח״א עמ׳ ק״ט (צ״א), ועוד.
50. שם בכתובות.
51. רי״ף וראי״ש כתובות שם רמב״ם הל׳ אישות פט״ו ה״ז וטור וש״ע אה״ע סי׳ קנ״ד.
52. שמטעם זה קידושין ונשואין הוי מצוה, עי׳ ביצה לו, ב ורש״י שם, מועד קטן יח, ב וברש״י ד״ה דקא עביד, וראי״ש כתובות פ״א סי׳ י״ב.

actuality this principle is seldom put into practice. In a decision quoted by Ramo,[53] Ribash[54] explains:

> If the Beth Din were to address themselves to such matters of marriage, by coercing the parties according to the letter of the law, they would have to coerce them all ... and strife and arguments would abound. Therefore, throughout the generations the rabbis have closed their eyes and refrained from interceding in these matters. ... They are content to rule according to the strict halacha only in those instances when the husband and wife themselves disagree and bring the matter up before the Beth Din, then they will rule according to the Torah.

This sentiment is echoed by *Tshuvot Maimoni*[55] concerning a מורדת, a "recalcitrant wife."

> נראה בעיני שכופין אותו להוציא כדי שיוכל לישא אחרת ולקיים פריה ורביה כו' וכן נ"ל מדין תורה אך שקשה דבר שא"כ עשינו תקנה לפרוצות, ולכופה להנשא לו אינה תקנה טובה דאין אדם דר עם נחש בכפיפה הילכך יעשו ב"ד כפי ראות עיניהם.

> Being that in our times he is proscribed by the *takkanah* of Rabbenu Gershom from taking a second wife, and he has yet to fulfill the Torah's commandment of "be fruitful and multiply," it is my opinion that he should be forced to divorce so that he be able to remarry and beget children. So it appears to me according to the letter of the law, but this is a difficult matter, for by adopting this approach we would be aiding and abetting such scandalous behavior. Neither is it realistic to compel her to consummate the marriage, for a person cannot dwell

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53. אה"ע סי' א' סע' ג' וסי' קנ"ד סע' י'.
54. סי' ט"ו.
55. ספר נשים סי' ל"ד, וע"ע שו"ת רמ"א סי' ל"ו וצ"ו, ר"י מסלוצק סי' פ', תשובות שבסוף דו"ח רע"א ח"א עמ' ק"י (צ"ב), ושו"ת עין יצחק ח' אה"ע א' סי' ד' סק"י.

with a serpent in one abode *(Ketubot* 72a). Therefore, let the Beth Din do as they see fit.

In some instances,[56] the Mishna and Talmud are less explicit. We are told simply יוציא ויתן כתובה "he should divorce and pay the *Ketubah.*" Rabbinic authorities differ as to the application of this directive. Rashi[57] and R. Yitzchak[58] are of the opinion that it means כופין אותו עד שאמר רוצה אני he should be beaten until he agrees. Rabbenu Chananel,[59] however, basing his decision on a passage in the Talmud Yerushalmi, concludes that in such cases only non-physical coercion is acceptable.

Some of the instances included under the rubric "he should divorce her" are those of a husband who is either unwilling or unable to support his wife or to fulfill his conjugal duties towards her, an apostate, a dissipate, a wife-beater, and an epileptic.[60]

In addition, although according to halacha *Ketubah* is payable upon divorce and not before, a special *takkanah* was enacted in such cases obligating him to pay it regardless of whether he divorces or not.[61] There is no question of illegal coercion here, for since he will in any case have to pay the *Ketubah* it is clear that any subsequent decision he might take regarding a *get* will not have resulted from the coercion as to the *Ketubah.*

After a lengthy discussion of the matter, Tosafot[62] conclude:

ומיהו אין לכוף שום אדם לגרש ולעשות מעשה עד שנמצא ראיה ברורה דהא אמדינן דגט מעושה בישראל שלא כדין פסול ואין להתיר אשת איש מספק.

It is important not to coerce anyone to divorce without conclusive proof of his obligation, for a *get* enforced without sufficient legal ground is invalid,

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56. כהנך דכתובות ריש פ' המדיר.
57. גיטין פח, ב ד"ה כדין.
58. תוס' יבמות סד, א וכותובות ע, א ד"ה יוציא.
59. תוס' שם.
60. טור ושו"ע אה"ע סי' ע', ע"ז וקנ"ד, ס' גבורת אנשים להש"ך, ועוד.
61. ריטב"א נדרים סו, א שו"ת בית מאיר סי' ל"ט ואותיות דרע"א סי' ב'.
62. כתובות ע, א ד"ה יוציא.

> and a married woman cannot be released from her bonds when the validity of her divorce is under question.

This decision is quoted by R. Asher,[63] *Tur*,[64] and Ramo[65] as the final word in the matter, and has been accepted as such by rabbinic courts for generations. If a man is improperly forced to divorce his wife, when there are no clear cut grounds for it, the *get* is not valid.

In contrast to the cases discussed above where clearcut, specific grounds for coercion are to be found, is the halacha of the woman claiming מאוס עלי, that her husband is repugnant to her and she is unable to live with him. Above and beyond any particular problems which may or may not exist in the marriage, what concerns us here are the often purely subjective feelings of hatred and disgust that the woman entertains towards her husband. Rambam writes:[66]

> האשה שמנעה בעלה מתשמיש המטה היא הנקראת מורדת ושואלין אותה מפני מה מרדה אם אמרה מאסתיהו ואיני יכולה להבעל לו מדעתי כופין אותו לשעתו לגרשה לפי שאינה כשבויה שתבעל לשנוא לה.

> A woman who refuses to allow her husband marital relations is called *"moredet"* — rebellious. They [Beth Din] ask her why she rebelled. If she said, "He disgusts me, I cannot have relations with him willingly," then they force him to divorce her, for she is not like a captive, to have to live with someone she hates.

According to this viewpoint shared by Rashi[67], Rashbam[68],

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63. יבמות סד, א.
64. אה"ע סי' קנ"ד.
65. שם סע' כ"א, וע"ע שו"ת עבודת הגרשוני סי' ל"ה.
66. הל' אישות פי"ד ה"ח.
67. כתובות סג, ב ד"ה לא כייפינן, ע"ש בריטב"א.
68. דעתו הובא בראי"ש כתובות סג, ב וס' הישר לר"ת סי' כ"ד.

S'mag[69], Rabad[70] and Tosafot[71] it is inconceivable that the Torah would obligate a woman to function as a wife when her feelings of ill will towards her husband have built up to such an extent as to render her utterly incapable of doing so on her own accord.

Other commentators,[72] however, take issue with Rambam's thesis. Though they accept his reasoning as sound, they note that in practice it stands on shaky grounds, for there is always the fear that עיניה נתנה באחר her claim of "he disgusts me" is merely a subterfuge employed by her to gain the freedom to marry another man who has caught her fancy; alternatively, while she is not telling a cold-blooded lie, still her negative feelings may be generated not by an existing flaw she perceives in her husband, but rather by her interest in someone else.

R. Asher writes in a responsum[73]

> ומה נתינת טעם לכוף האיש לגרש ולהתיר אשת איש? לא תבעל לו ותצרור אלמנות חיות כל ימיה, הלא אינה מצווה בפריה ורביה! וכי בשביל שהיא הולכת אחרי שרירות לבה ונתנה עיניה באחר וחפצה בו יותר מבעל נעוריה נשלים תאותה ונכוף האיש שהוא אוהב אשת נעוריו שיגרשנה? חלילה וחס לשום דיין לדון כן.
>
> What manner of reason is this to force a husband to divorce and to release a married woman from her ties? Let her not have family relations with him and remain as a widow all her days, for she is not commanded to beget children! Just because she follows the fancy of her heart and casts her eyes

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69. לאוין פ"א.
70. ע' מגיד משנה ומשנה למלך הל' ייבום וחליצה פ"ב ה"ט.
71. גיטין פד, א ד"ה הכא.
72. ר"ת (ס' הישר סי' כ"ד), תוס' כתובות סג, ב ד"ה אבל, רא"ש מרדכי בעל המאור ורמב"ן שם בכתובות, שו"ת רא"ש כלל מ"ג סי' ו', ח', ט', י"ג וי"ד שו"ת רשב"א סי' אלף קצ"ב ורל"ח, ח"ב סי' רע"ו, ח"ו סי' ע"ב ומיוחסות סי' קל"ד וקל"ח, טור וב"י אה"ע סי' ע"ז ורמ"א שם סע' ג'.
73. כלל מ"ג סי' ח'.

> upon another, desiring him more than the husband of her youth, shall we bow to her desires and coerce the husband to divorce the wife of his youth whom he loves? Heaven forbid were any judge to rule thus!

Although Rambam's ruling was not accepted as a carte blanche permit for coercion in all instances of a woman's claiming "he disgusts me," neither was it totally rejected. Rabbinic literature is replete with incidents where the decision was reached requiring Beth Din to coerce the husband into granting a *get* on the grounds of מאיס עלי. In a ruling quoted by Ramo,[74] R. Asher[75] writes of the widow of a noted Talmudic scholar who accepted *Kiddushin* from her boarder, and then, with a claim of מאוס עלי, refused to consummate the marriage. After a lengthy discussion of whether or not the *Kiddushin* ceremony itself was valid, he concludes:

> אמנם אם נראה לכם רבותי הקרובים אל הדבר שגם המקדש אינו אדם ראוי והגון לדבק בבת טובים ובנכל ובתרמית פתיה קרוב הדבר לדמותו לעובדא דנרש דגרסינן ביבמות בפרק ב"ש (קי, א) משום שנעשה שלא כהוגן הפקיעו הקידושין גם זה שעשה שלא כהוגן נהי דקדושין לא נפקיע מ"מ יש לסמוך הנדון זה על דברי קצת רבותינו שפסקו בדינא דמורדת דכופין אותו לגרשה אמנם יש לנסות אם יוכלו לפייסו בריצוי כסף ואם לא יאות אני נגרר אחריכם לכופו לגרשה.
>
> However, if it appears to you, my rabbis who are dealing with this matter, that it is neither fitting nor proper for this man to marry such a fine woman, and that he persuaded her through chicanery and trickery, then this case closely resembles that which took place (in *Yevamot* 110a) where the marriage was annulled because it was performed improperly. Here, too, where he behaved improperly, though we will not annul the marriage, we will rely upon those

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74. אה"ע סי' ע"ז סע' ג', וע"ע שו"ת חתם סופר ח' אה"ע א' סי' קט"ז.
75. כלל ל"ה סי' א'.

> authorities who ruled that we may force the husband of a *moredet* to divorce her. Nevertheless, it is proper to persuade him to divorce her in exchange for monetary compensation, but should he refuse, then I concur with your decision to force him to grant a *get*.

In another responsum[76] (in fact, the very one in which he came out so strongly against the stand of Rambam), he nevertheless concludes:

> אמנם בנדון זו ספר לי אחיה אמתלאות שנותנת למרידתה ואתה דיין בדבר הזה תחקור על הדבר אם יש בה ממש בדבריה. ואם דעתו לעגנה ראוי הוא שתסמוך על מנהגכם בעת הזאת לכופו ליתן גט לזמן.
>
> However, in this case her brother related to me her reasons for rebelling, and you as the judge in this matter must ascertain whether or not there is any substance to her claims. But if his intent is to leave her an *agunah*, then it is proper that you rely upon your custom and force him to give a *get*.

Bet Yosef[77] cites Rashbash:

> אשה שטענה מאיס עלי שקודם נישואין היתה מאסה אותו ואמה השיאתה לו בע"כ נראה דאפילו לאומר שאין כופין לגרש בטענת מאיס עלי יודו בזה שמה שאמרו שלא לכוף משום דחיישינן שמא עיניה נתנה באחר אם הדבר מפורסם שבעל כרחה נשאת לו נסתלקה חששא זה דהא ה"ר מאיר כשהיתה נותנת האשה טענה ואמתלאה לדבריה למה הוא מאיס עליה היה כופה לגרשה עכ"ל.
>
> Regarding the woman who claimed that even prior to her marriage her husband was repulsive to her, and her mother forced her to consummate the marriage against her will, it would appear that even those who

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76. כלל מ"ג סי' ח'.
77. אה"ע סי' ע"ז.

> generally stay away from coercion to divorce on grounds of מאיס עלי would agree here, for their reasoning is that we suspect that her fancy has been caught by another man, and this fear is inoperative where it is widely known that she married him contrary to her own wishes. By the way of proof, we may cite the custom of R. Meir of Rothenburg to coerce the husband of a woman who substanstiated her claim of מאיס עלי with a convincing explanation.

The impression one receives from these and other responsa is that in principle, the rabbis accepted the rationale that "a Jewish woman is not like a captive, to have to live with someone she hates." What occasioned such strenuous objection was the indiscriminate fashion in which the principle was to be applied. Given the subjective criteria upon which it is based, it was felt that such legislation could not be implemented wholesale. Rather, it should be left to the discretion of the rabbis who would invoke it in limited instances only, and even then only when they were reasonably sure that it was not a claim arising out of the woman's desire to marry another man she had met.[78]

A different aspect of the problem is illustrated through an oft-mentioned *takkanah* dating back to the geonic era, the דינא דמתיבתא.[79] According to the Talmud,[80] a woman who out of spite has rebelled against her husband and refuses to live with him is subjected to an elaborate process designed to persuade her to repent. She is kept in a state of limbo for twelve months, receiving neither financial support from her husband nor a *get*. Throughout this period, the Beth Din publicizes her shameful behavior on a regular basis, and applies punitive measures in the form of deducting from her *Ketubah*. In the days of the *Geonim*, an alarming trend began to develop. Rather than bear this twelve-

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78. עי' שו"ת רבינו יוסף מסלוצק סי' פ' שהאריך בביאור נקודה זאת.

79. ריי"ף כתובות סג, ב, רמב"ם הל' אישות פי"ד הי"ד, ריטב"א קידושין ג, א, ס' קורא הדורות פרק ראשון ד"ה וכתב עוד הגאון, ועוד.

80. כתובות סג, ב.

month waiting period and its accompanying hardships with fortitude, women would look elsewhere for salvation. In some instances, they would request of Gentiles that they come to their assistance by coercing their husbands into granting a *get*. In other instances, they would even go so far as to leave the fold of Judaism (יוצאות לתרבות רעה). For fear lest such practices become widespread, a series of far-reaching reforms were instituted by the *Geonim*. Amongst them was a provision calling upon the husband to grant a *get* quickly and, should the necessity arise, empowering the Beth Din to coerce him into doing so.

The legal grounds upon which the validity of such *gittin* are based is the subject of a disagreement between R. Yishaya HaZakain (תוס' הרי"ד)[81] and R. Asher.[82] R. Yishaya writes וכיון, שנתרצה ליתן גט ע"י עישוי גיטו גט דיש כאן מצוה לשמוע דברי חכמים, תקנות ב"ד הגדול. Inasmuch as it is a mitzva to obey the Rabbis, the *get* is valid, for this principle is every bit as applicable here as in the cases enumerated by the Mishna. R. Asher, however, takes a different tack. According to him אמרו על זה כל המקדש אדעתא דרבנן מקדש והסכימה דעתם להפקיע הקידושין כשתמרוד אשה על בעלה. The דינא דמתיבתא is predicated on the regulatory powers invested in the rabbis enabling them to annul a marriage that in their judgement warrants such measures.

The דינא דמתיבתא was employed on a regular basis for close to five centuries, up until the days of Rif.[83] But in subsequent generations in Europe, the practice fell into almost total disuse. Though significant exceptions are to be found, in the person of R. Yishaya Hazakain[84], R. Chaim Or Zarua,[84] and others,[85] the mainstream of *Rishonim* follow the lead of Rambam[86] and Rabbenu Tam[87] in rejecting the *takkanah* as a viable solution:

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81. הובא באור זרוע סי' תשנ"ד ושו"ת ר"ח או"ז סי' ס"ט וקכ"ו, וע"ע תוס' הרי"ד גיטין פח, ב.
82. שו"ת כלל מ"ג סי' ח'.
83. רמב"ן מלחמת כתובות סג, ב.
84. עי' הערה 81.
85. עי' קונטרס הבירורים פ"א.
86. הל' אישות פי"ד הי"ד.
87. ס' הישר סי' כ"ד.

לא פשטו אותן המנהגות ברוב ישראל ורבים וגדולים חולקים עליהם ברוב המקומות וכדין הגמרא ראוי לתפוס ולדון. Indeed, some *Rishonim* were not aware then of its exact nature. R. Zerachia HaLevi[88] (בעל המאור) and Rashba[89] wrote that the דינא דמתיבתא was an extraordinary measure (הוראת שעה) enacted by the rabbis for that generation alone, and not for later ones. According to Mordechai[90] and R. Asher[91] quoting Rabbenu Tam, it did not include a provision for coercion at all, it merely permitted the husband to waive the twelve-month waiting period prescribed by the Talmud and to grant a *get* immediately.

This view of R. Asher is further complicated by a separate responsum[92] written by him where he states clearly that under דינא דמתיבתא recalcitrant husbands were actually coerced into giving a *get*.[93]

Let us now sum up the situation: For a Jewish divorce to be effective, the man must grant it willingly. What practical options are available in our time, and what steps can the Jewish community take to protect the family structure?

One suggestion that has arisen periodically is that perhaps the time is ripe to accept the ruling enunciated by Rambam that "he disgusts me" (מאיס עלי) is grounds for coercion; others suggest that the coercion clause of דינא דמתיבתא should be reinstated.[94] While there is little doubt that these suggestions are motivated by honorable intentions, they have been given short shrift by most responsible members of the Rabbinate throughout the world, and for reasons readily understandable.

The halachic objections to such a course are formidable.

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88. כתובות סג, ב.
89. בתשובות הנ"ל הערה 72.
90. כתובות סג, ב.
91. שם.
92. כלל מ"ג סי' ח'.
93. קובץ שעורים כתובות סי' ר"י-י"א.
94. A Problem In Jewish Divorce: An Analysis and Some Suggestions — Irwin H. Haut, Tradition.

Among the dissenters to these coercion devices are *Rishonim* (early commentators) who unquestionably stand in the ranks of our people's foremost halachic authorities (Rabbenu Tam, Rambam, Rashba, R. Asher, *Tur*, and Ramo). Students of *Choshen Mishpat* are well acquainted with the ruling of *Chavot Yair* (quoted by R. Yaakov of Lisa in his *Netivot HaMishpat.*[95]) במקום שסתמו המחבר והרב בהג"ה ולא חלקו עליהם הסמ"ע והש"ך אין יכול לומר קים לי כפוסק אחר. "In an instance where both the *Shulchan Aruch* and Ramo adopted one opinion, and neither the *S'ma* or *Shach* disagreed, one may not say 'I wish to conduct myself in accordance with a variant opinion.' "

Barely a century ago, R. Yitzchak Elchanon Spector[96] articulated a similar sentiment in matters pertaining to *Even Haezer*. כלל מסור בידינו דדעת הפוסקים שלא הובא בש"ע כלל אף בלשון יש אומרים דלא חיישינן להו כלל. "A rule has been passed down to us from generation to generation that an opinion of the *Poskim* not mentioned at all in the *Shulchan Aruch*, even in the form of a variant opinion, is not to be taken into consideration at all."

In the case of דינא דמתיבתא, an additional problem exists, the opinion of R. Asher that it is predicated upon the principle of מיניה אפקעינהו רבנן לקידושין (the Rabbis may annul a marriage retroactively). There is much discussion in the responsa literature as to whether or not the present day Rabbinate is empowered to enact such a *takkanah* (or to re-vitalize a long dormant one).[97]

Moreover, we must ask ourselves if such a course, even if permissible, is wise. Certainly, were such legislation initiated by the Rabbinate, it would not remain under their sole jurisdiction.

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95. דיני תפיסה כלל כ', וע"ע תומים קת"כ סוף סי' קכ"ד שהסכים להחות יאיר, "**כי הכל בכתב מיד ה' השכיל על ידם** כי קושי' רבות שהקשו עליהם האחרונים ותי' בדרך חריף ועמוק וכמו כן כלל במתק וקוצר לשונם דינים הרבה ולאין ספק שלא כוונו להכל כי איך היה אפשר כו' **רק רוח ה' נוסחה בקרבם להיות לשונם מכוון להלכה בלי כוונת הכותב וחפץ ה' בידם הצליח** וע"ע שו"ת ברית אברהם בהקדמה.

96. שו"ת עין יצחק ח' אה"ע ב' סי' נ"ז סק"ח, וע"ע ח' אה"ע א' סי' ד' סק"ד, ומ"מ יש לדחות, שכתב מש"כ בכדי להקל ולא להחמיר.

97. ס' אין תנאי בנשואין, שו"ת מהר"י בן לב ח"א סי' קכ"ו, דרכי משה אה"ע סי' ז' סקי"ג, שו"ת מהרש"ם ח"ב סי' ק"י ושרידי אש ח' אה"ע סי' כ"ה פ"ג סק"י.

Irresponsible and unethical charlatans bearing the title "Rabbi" could easily apply it in totally unacceptable fashion.

In a speech before the Rabbinical Council of America, Harav HaGaon R. Yosef Dov HaLevi Soloveitchik שליט"א of the Yeshiva University addressed himself to just such a possibility.[98]

> I have to discharge a duty. Believe me, I do it with sadness in my heart. You know me; I never criticize anybody, I've never attacked anybody. I have never set myself up as a judge or arbiter who approves or disapproves of statements made by people. But today, כלו כל הקיצין, I feel it is my duty to make the following statement...
>
> I also was told that it was recommended that the method of אפקעינהו רבנן לקידושין מיניה be introduced [i.e. the Beth Din will be able to annul a marriage retroactively without consent of the parties]. If this recommendation were accepted — I hope it will not be accepted — then there'll be no need for a *get*. We'll be able to cross out the mishna of קונה את עצמה בגט. Every Rabbi will be able to suspend *Kiddushin*. If such a privilege exists, why should it be monopolized by the Chief Rabbinate in Eretz Yisroel? Why shouldn't the Rabbinical Assembly [Conservative] do it as well as the Chief Rabbinate?
>
> Do you expect to survive as Orthodox Rabbis, do you expect to carry on the מסורה under such circumstances? Chaos will replace the Torah.
>
> I hope those gathered here will join me in objecting to such discussion and debates at a Rabbinical convention. I cannot imagine a Republican National Convention or Democratic National Convention where a symposium would be held as to whether communism should replace democracy in the United States.
>
> To speak about changing *halochos* of *Chazal* is at least as nonsensical as discussing communism at a Republican National Convention. It is discussing methods of self-destruction and suicide.

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98. Excerpted from: Surrendering to the Almighty Light # 116, 17 Kislev 5736. וע"ע תשובת הגאון ר' חיים ברלין זצ"ל (ס' הזכרון להגר"י הוטנר וצ"ל עמ' תרס"ח).

Elsewhere in the same speech, HaRav Soloveitchik שליט"א discusses the words of Rambam: הכופר בפירושה והיא תורה שבעל פה, והמכחיש מגידיה כגון צדוק ובייתוס, "whoever denies the authenticity of the Oral Torah is a Sadducee."

> Why did he add והמכחיש מגידיה, whoever denies the authority of the scholars of the oral tradition? Under the category of כופרים בתורה (rejecting the Torah) are classified not only those who deny תורה שבעל פה (oral tradition) — there is no doubt about that — but even those who accept the truthfulness of תורה שבעל פה but are critical of *Chazal*. They find fault with חכמי חז"ל, faults in their character רחמנא ליצלן or in their behavior, or that they had some prejudice. He is a כופר, for he denies the perfection and truthfulness of *Chazal*.
>
> Let me add something very important. Not only the halachos, but also the *chazokos* [principles] *Chazal* introduced are indestructible. You must not tamper, not only with the halachos, but even with the *chazokos*. For the *chazokos Chazal* spoke of rest, not upon transient psychological behavioral patterns, but on permanent ontological principles rooted in the very depths of the metaphysical human personality which is as changeless as the heavens above.
>
> If you should start modifying and reassessing the *Chazokos* upon which a multitude of halachos rest, you will destroy *Yahaduss!* Instead of philosophizing, let us take a match and set fire to the *Beth Yisrael.*

In view of the very real fear of עיניה נתנה באחר, (she wants a divorce because she has her eye on another man) delineated by *Chazal* (one which existed in the days of the Mishna,[99] Rabbenu Tam,[100] R. Asher[101] et al, as well as today), it is only natural to expect that were the principle of Rambam adopted forcing a

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99. נדרים צ, ב.
100. ס' הישר סי' כ"ד.
101. שו"ת כלל מ"ג סי' ח'.

husband to divorce a woman who does not want to live with him, an unavoidable side effect of such a move would be an inordinate number of petitioners motivated (be it consciously or subconsciously) by עיניה שנתנו באחרים, a desire for some other man. Such a state of affairs would surely have an adverse effect on the sanctity and stability of marriage in the Jewish community. Given the already weakened position of marriage as an institution today, it is more than possible that this is too high a price to pay, even when what is at stake is alleviating the misery of the numerous individuals otherwise unable to easily obtain a *get*.

This principle, that our compassion for the plight of the individual is tempered by concern for the well-being of the community, is not new. אין פודין את השבויין יתר על כדי דמיהן מפני תיקון העולם[102], we do not redeem captives for more than their real value. Rambam[103] explains: שלא יהיו האויבים רודפין אחריהם לשבותם, care must be taken that our endeavors on the captive's behalf not serve as an impetus for even more abductions.[104]

But above and beyond all these objections, there is the question of practicality. For such an undertaking to succeed, it would need the approval of world Jewry. Otherwise, in a very short time, we should be faced with the frightening specter of myriads of *gittin* deemed valid by some factions and invalid by others. Sadly, given the diverse and fragmented nature of the rabbinate, and indeed of orthodox Jewry itself, today it is difficult to envision such approval being readily forthcoming.

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102. גיטין מה, א.

103. הל' מתנות עניים פ"ח הי"ב, וע"ע טור ש"ע יו"ד סי' רנ"ב דע' ד', ובפ"ת שם סק"ה מהרדב"ז שגם כשפודים יתר על כדי דמיו כגון בתלמיד חכם חייבים להסביר להשבאי שהוא מקרה בודד, ושבדרך כלל אין פודין את השבויין יתר על כדי דמיהן.

104. For further discussion of this halachic principle, see *Journal of Halacha and Contemporary Society*, Vol. VII, Spring, 1984 "On Maintaining a Professional Confidence," by Rabbi Alfred Cohen, p. 79.

Determining Jewish Identity: Ethiopian Jewry

Rabbi Hershel Schachter

Recent efforts by the world Jewish community aimed at transporting the starving and persecuted Jews of Ethiopia to Israel and helping them adjust to modern life there have been based on the assumption that the recipients of this aid are indeed Jewish, as defined by halacha, or sufficiently Jewish to be included under the Biblical imperative of providing life-preserving help. The Jewish identity of this group has been discussed in our own generation and earlier eras by respected halachic authorities.[1] The layman, however, may not be familiar with some of the considerations that go into ascertaining authentic Jewish identity.

The halachic criteria for making a determination on the validity of the Ethiopians' claims to be a Jewish tribe are formidable. This paper will consider briefly some of the these issues. Among the questions which have to be addressed are the following:

1. How is Jewish status determined? Can anyone who claims

The author wishes to thank his *talmid*, Moshe Rosenberg, for preparing this material for publication, excerpting it from Rav Schachter's *shiurim*.

1. See, for example, *Responsa Radvaz*, Vol. 7, no. 9; *Responsa Tzitz Eliezer*, Vol. II, no. 25; HaRav Ovadiah Yosef: *Be'ayot HaGiyur Bezmanenu* in *Torah Shebeal Peh*, Vol. 13 (5731); unpublished letter of HaRav Moshe Feinstein, dated 26 Sivan 5744.

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descent from Jewish forbears be granted instant recognition as a Jew? Would such recognition extend to granting permission to marry within the Jewish community? The answers will hinge upon whether his claims about himself are sufficient or whether further proof might be required.

2. Even if a claimant has the right to be believed, need we probe whether he, in good faith, knows enough about Jewish law to really *know* if he is a Jew?

3. Assuming the Ethiopian claim to be Jewish is accepted, what halachic problems might be raised? What would be their status if their claim were not accepted?

4. How might their halachic problems be solved?

The *Targum* to the first verse of *Megillat Ruth* lists ten famines, nine already past, and one yet to be in the history of mankind. The tenth famine is to occur in the days preceding the advent of *Mashiach* and will differ in nature from all the rest. Whereas the other famines were physical manifestations, this final one will not be "a hunger for bread, nor a thirst for water," but rather a longing for the prophetic word of God. The underlying idea of this passage is felt most acutely in approaching a halachic topic of the sort to be discussed herein. In the era before *Mashiach*, halachic dilemmas will arise, the nature of which we have not previously encountered, and for which we have no established methods of adjudication. When faced with such complex and pressing problems, we will be consumed with the longing for Divine assistance to help us reach the proper conclusions. We will lament the absence of *Ruach Hakodesh*, for these questions seem beyond human ken.

Any notion that an individual's black skin color per se will have an effect on his Jewishness may be discarded from the outset. The Mishna[2] in *Bechorot* explicitly makes reference to a black

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2. 45b. The disqualification stems not from discrimination based on color, but from the Biblically-derived rule of *"eino shaveh bezar'o shel Aharon."* See glosses of Rabbenu Gershom. See also Mishna *Negaim* 2:1.

2a. R. Chaim Volozhin in *Sefer Chut Hameshulash*, #5, states that people who

Kohen and, while disqualifying such a Kohen from Temple service, the Mishna clearly considers him a Jew. More relevant to the topic will be issues bearing on the trustworthiness of any claim to membership in the Jewish people.[2a]

Establishing Jewish Identity

The crucial question to be decided is whether a person's own claim to be Jewish may be presumed sufficient to confer that status upon him. Is his lone testimony enough or must he offer further corroboration?

The Talmud in *Pesachim*[3] relates how a certain non-Jew would regularly travel to Yerushalayim for Pesach, and, impersonating a Jew, would partake in the Paschal sacrifice. His participation was directly in contradiction to Biblical law[4], and yet his claim to Jewish identity was honored, until the sage advice of Rabbi Yehuda ben Beteirah "tipped off" the Jewish authorities and ensnared the greedy imposter. Why did the Jewish Beth Din of the time believe this charlatan, without demanding proof of his supposed Jewishness? Does this story imply that any claim to being Jewish is taken at face value?

The Tosafot on the spot refuse to come to such a conclusion. They suggest, rather, that most people in Jerusalem at the time were Jewish, and the principle of *Rov* (majority) entitled the Jews to assume any particular individual to be part of the majority. In *Yevamot*[5], however, the Tosafot cite Rabbenu Tam as concluding from the passage in *Pesachim*, as well as from other sources, that one who claims to be a Jew is believed and granted all

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cannot speak Yiddish are not to be accepted as Jewish. The *Chazon Ish*, in *Even Ha'ezer* 117:8, comments that obviously R. Chaim's words are not to be taken literally; he was speaking about Russian - Polish Jews of his time. This passage indicates that external considerations are also a factor, not just halachic ones.

3. 3b.
4. *Shmot* 12:43. *"Kol ben nechar lo yochal bo."*
5. 47a. See, however, *Chazon Ish Even Ha'ezer* 117:17, who argues that Tosafot in *Yevamot* holds that they are believed due to the rule of *rov*.

accompanying rights and privileges. Which of these two views in Tosafot is accepted in practical halacha? Does the Beth Din have to check into the Jewish identity of a stranger, or is he to be believed on the basis of his unproven claim alone? Another Talmudic passage may clarify matters, by helping us understand on precisely what issue our question hinges.

In *Yevamot*[6], the Gemara records a dispute between Rabbi Yehuda and the *Chachamim* regarding the veracity of a person who claims to have converted to Judaism. While the *Chachamim* require under all circumstances corroboration of two witnesses, Rabbi Yehuda finds the word of the convert himself to be sufficient, unless there is some independent reason to suspect this would-be Jew of lying, in which case he, too, would agree with the *Chachamim* that two witnesses are required. The Gemara then states that in such a case, two witnesses who attest to the truth of such a claim of conversion are believed, even if they merely testify that they heard of the conversion from two *other* witnesses. While such second-hand testimony is labeled *"eid mipi eid,"* and is usually invalid, a leniency is prescribed by the Gemara in this case. However, *eid mipi eid* cannot be valid in capital cases, monetary matters, or *erva*. The Rosh[7], however, suggests that the leniency is not universally accepted by the *Tannaim;* it was only formulated within the opinion of Rabbi Yehuda to satisfy the requirement of two witnesses when there is suspicion of deceit, and would be contested by the *Chachamim*. The *Chachamim* would require two witnesses who themselves saw the conversion and who would be acceptable witnesses in any other legal situation. This opinion of the Rosh is accepted by the *Tur* and *Shulchan Aruch*.[7a] The *Korban Netanel*[8] comments that the Rosh has declared two seemingly unrelated issues to be connected. What, after all, does the acceptability of *eid mipi eid* testimony have to do with the

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6. 46b - 47a.
7. סוף אות ל"ד
7a. See *Noda Biyehuda,* Vol. I, *Yoreh Deah* No. 55.
8. אות ח'

dispute as to whether two witnesses are required always, or only in situations of possible deception?

Determining Personal Status

Rav J.B. Soloveitchik[9], by shedding light on the nature of the dispute between Rabbi Yehuda and the *Chachamim,* explains why the question of second-hand testimony depends upon the same point of contention. In debating whether a convert is believed to testify regarding his status, the *Tannaim* are actually arguing as to the classification of testimony regarding personal status. The *Chachamim* consider such testimony as pertaining to *davar shebi'erva*[10], regarding which the law clearly requires two witnesses. Rabbi Yehuda, on the other hand, classifies the case as *issurim* (other prohibited categories of the Torah), and applies to it the principle of *Eid echad ne'eman be'issurim* — any individual Jew is believed to determine the presence or absence of such prohibition.[11] Once we are dealing with a case of *issurim,* which does not require the testimony of two witnesses, we understand why, according to Rabbi Yehuda, when, on occasion, two witnesses *are* necessary, we would nevertheless accept the testimony of a witness who heard the testimony from another person. The halacha distinguishes between *davar shebi'erva* and *eid echad ne'eman be'issurim.* For *davar shebi'erva, eid mipi eid* cannot be used; for *issurim,* it is acceptable.

The question of whether determining personal status is a *davar shebi'erva* or only *issurim* is, then, a *Tannaitic* dispute, with ramifications for the credibility of a person testifying about himself. If the matter is considered *davar shebi'erva,* then two

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9. In his *shiurim* to *Masechet Pesachim.*
10. This term will be defined at length later.
11. The standard example given to illustrate *eid echad ne'eman be'issurin* is the credibility of a restaurant owner or wife to assure a customer or husband that food being served is kosher.

    A similar formulation of *gerut* being either *issurin* or *davar shebi'erva* can be found in *Noda Biyehuda* Vol. I, *Yorah Deah* no. 55, and in R. Shlomo Kluger's *Responsa Tuv Ta'am Va Da'at* pt. 2, *Hilkhot Gerut.*

additional witnesses must support his claim; if, however, it is a question of *issurim*, then his own testimony suffices.[11a] Armed with this information, we can return to the Gemara in *Pesachim* and the two explanations of Tosafot. If, as Tosafot write in *Pesachim*, the non-Jew was believed in his claim of Jewishness only because most people there were Jewish, then the situation is unrelated to the debate recorded in *Yevamot*. If, however, the imposter was believed because of the principle of *eid echad ne'eman be'issurin*, it would turn out that his credibility or lack thereof would depend upon the two positions voiced by Rabbi Yehuda and the *Chachamim* as to whether personal status is categorized as *issurim* or *davar shebi'erva*.

How is personal status determined in Jewish law? The answer will lie in our definition of *davar shebi'erva*, as opposed to *issurim*. In fact, at least four opinions exist regarding the definition of a *davar shebi'erva*.

Rabbi Avraham of Sokhachov, in his responsa *Avnei Nezer*[12], specifies that any testimony regarding a *person* is considered *davar shebi'erva*, while testimony about an *object* is considered *issurim*. Once, he was asked to provide a written *hashgacha* for a person whose reliability was vouched for by the distinguished Rabbi Naftali Adler of London. Nevertheless, the *Avnei Nezer* cites the opinions of the Ritva and Rabbi Akiva Eger that it takes two trustworthy witnesses to testify regarding a person. Rabbi Adler would have to obtain the corroboration of another witness before his testimony could be accepted and the *hashgacha* granted. This same definition of *davar shebi'erva*, as apart from *issurim*, is supported by the *Machane Ephraim*.[13]

Rabbenu Tam[14], on the other hand, clearly defines *davar shebi'erva* as a function of the prohibition of *giluy arayot*, not as a

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11a. In light of this, it is difficult to understand the position of *Pnei Yehoshua*. See *Gilyon Maharsha, Ibid.*

12. *Choshen Mishpat*, no. 20.

13. מחנה אפרים, הלכות עדות יג.

14. *Sefer Hayashar* pg. 83d (Prague edition). See also Tosafot to Gittin 2b, *s.v. eid echad ne'eman*. See *Noda Biyehuda*, mentioned above in note 11, who assumes

variable based on "person" as opposed to "object." That the sexual offenses included under the term *giluy arayot* form a separate category is clear from the fact that only they, like idolatry and murder, carry the condition of *yehareg ve'al ya'avor*, one must give up his life rather than violate these prohibitions.[15] Rabbenu Tam, however, takes an additional step, equating the category of *giluy arayot* with *davar shebi'erva*. This position becomes clear from Rabbenu Tam's classification of the sin of relations with a *nidah* as not being *giluy arayot*. Were *nidah* to be categorized as *giluy arayot*, he reasons, that would automatically confer upon it *davar shebi'erva* status, and, like any *davar shebi'erva*, it would require two witnesses. We know, however, that the *nidah* herself is believed to testify as to her status; in fact a verse concerning the *nidah* provides, according to Tosafot, the very source for the principle of *eid echad ne'eman be'issurin*. In the course of his reasoning, Rabbenu Tam's equation becomes clear: *giluy arayot* equals *davar shebi'erva*. This opinion is shared by the Ran.[16]

A third definition of *davar shebi'erva* becomes evident from an examination of a puzzling ruling by Rambam. In *Hilchot Sanhedrin*[17], the Rambam rules that only one witness is needed to determine that a woman is a *zonah* and may not marry a Kohen. This ruling seems to fly in the face of a Gemara in *Kiddushin*[18] which, in discussing the status of King Yannai's mother, concludes that two witnesses are needed to confirm that a woman married to a Kohen was taken captive and consequently became forbidden to her husband as a *zonah*. The *Machane Ephraim*[19] and other authorities resolve this difficulty by noting that the Rambam

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the definition of Rabbenu Tam and suggests a distinction between ascertaining whether a man or a woman had converted. For a Jewish man to live with a non-Jewish woman is considered *giluy arayot* and considered *davar shebi'erva;* but not in the reverse. See however note 21a.

15. *Sanhedrin* 74a.
16. In his glosses on the Rif to *Gittin* 64a.
17. 16:6.
18. 66a.
19. See note 13.

permitted the testimony of only one witness when dealing with an unmarried woman, where the testimony will have no direct bearing on matters of marital status. But, these authorities maintain, the Rambam's opinion is that anything which affects marital status is considered a *davar shebi'erva* and requires two kosher witnesses. This would certainly include marriage and divorce, which constitute *ishut*. Also included would be testimony about a *sotah* — a woman suspected of faithlessness to her husband — because a number of sources indicate clearly that such a woman has only incomplete *ishut* with her husband.[20] And, finally, testimony that a Kohen's wife had been taken captive would also be categorized as *davar shebi'erva*, because it seeks to end an *ishut* relationship by rendering the woman forbidden to her husband. Therefore, the Rambam, too, can reconcile the Gemara in *Kiddushin:* since Yannai's mother was a Kohen's wife, testimony about her indeed constituted a *davar shebi'erva* and called for two witnesses.

A fourth possibility is entertained by the *Tosafot Rid* to *Bava Batra*[21], where he suggests that testimony merely for purposes of identifying a person or object is classified as *issurim*; only testimony about an action or event is a *davar shebi'erva*. To identify a person as a first-born, or an item as non-kosher, we need but one witness; to say that a forbidden liaison took place would require two.

Having studied various definitions of *davar shebi'erva*, we must return to our original case of testimony regarding *gerut* to see whether such testimony would be termed *davar shebi'erva* under any of our definitions. Certainly we are not dealing with a prohibition of *giluy arayot* (Rabbenu Tam), nor are we determining *ishut* or non-*ishut* (Rambam). Were we to accept, however, the *Avnei Nezer's* contention that testimony on a person, as opposed to an object, requires two witnesses, we would be forced to apply

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20. For this reason the Talmud rules that this woman's husgand may not inherit her property, nor annul her vows. See *Responsa Avnei Nezer, Even HaEzer*, no. 240.

21. *Bava Bathra* 126b.

the same standard to anyone who advances a claim of Jewishness. This definition, however, is not accepted by the *Poskim*, who rule that, according to Biblical law, one witness is sufficient to establish a man as a Kohen. Even the man himself is believed. Only because of a rabbinic decree for the purpose of safeguarding matters of lineage, do we require that someone other than himself testify, and we even require two witnesses. Testimony regarding identity of a person is really *issurim*.[22]

The *Tosafot Rid's* definition, as well, might present a problem. If testimony on an action or event be a *davar shebi'erva*, one could argue that *gerut*, too, might fall under this category. Such an argument would be based on the opinion of the Rambam[23] that every Jew owes his Jewishness to some act of conversion. Rather than saying that recent converts are Jewish by virtue of the act of their conversion, but people born Jewish are Jewish naturally, without need of any act, past or future, the Rambam assumes that each and every Jew is Jewish because of an act of conversion somewhere in history, whether that act is a recent one or dates back to Mount Sinai. This difficulty, however, is easily resolved, for no *Posek* accepts the definition of the *Tosafot Rid*; the *Tosafot Rid* himself later rejected his own idea as untenable.

From our discussion it emerges that a person *is* believed to testify as to his own Jewishness because, under all the definitions examined, such testimony would be a matter of *eid echad ne'eman*

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22. This conclusion is reinforced by a closer examination of the laws concerning the establishing of a man as a Kohen, and identifying husband and wife for purposes of writing a *get*. In both cases, the parties involved are believed, Biblically, to identify themselves (see *Bava Batra* 167 and *Even HaEzer*, 120:3), and for that reason, in emergencies we revert to the *d'oraita* level, and do not require witnesses (see *Gittin* 66a and *Ketzot Hahoshen* 49:2). For many years it has been considered an emergency situation, in that constant persecution has caused many Jews to flee, and made it impossible to provide witnesses. Consequently, Kohanim have been believed on their word. Nonetheless, the *Shach* cites the opinion of the Maharil Y.D. 322 that since the rabbinic law has not been observed, we do not permit any Kohen to eat the priestly *Challah* today.

23. *Hilchot Issurei Biah* 1523. See also *Hapardes*, Tishrei 5736.

be'issurin. At most, we might refrain from marrying such a person due to the rabbinic decree regarding lineage,[23a] but the person's Jewishness is not in question. The trust we place in the person's veracity is of course contingent upon there being no reason of any kind to suspect him of dissembling.

What Does the Claimant Know?

Yet, even assuming the truthful nature of the claim advanced, we must deal with the question of whether the person making the claim in good faith is familiar enough with the relevant areas of law to know that his claim is true. A person who declares honestly that he slaughtered an animal and prepared its meat in accordance with the law may still be an *"eino yodea she'eino yodea"*, i.e., he may be ignorant of the pertinent laws, without even being aware of his ignorance.[24]

What, then, do we make of such a person's claim to be Jewish, when his words are only of doubtful reliability? Until his status can be determined conclusively, he is considered *safek Yisrael, safek Akum* — maybe he is a Jew, maybe a Gentile.

In *Ketubot* 15b the Gemara rules that even a *safek* (doubtful) Jew must be saved when his life is threatened. The requirement *lehachayoto* — to preserve his life — is in force, and includes spending money to achieve the desired result. Since, however, the Jewish status of this person is now in doubt, we would require a

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23a. Rambam, *Issurei Bi'ah* 13:10; *Yoreh Deah* 268:10.

Here it is stated explicitly that the requirement for two witnesses is only a rabbinic ruling if one wishes to marry a convert. Obviously Rambam and *Shulchan Aruch* consider that the debate in *Yevamot* 47a between R. Yehuda and the Rabbis are *"derashot"* on biblical verses. As such, the *derashot* constitute an *asmachta*, and biblically there is no requirement for two witnesses. However, *Chazon Ish, Even Ha'ezer* 117:9, finds in the said Gemara a clear implication that the *derashot* are authentic, and not in the nature of an *asmachta;* thus, biblically, two witnesses would be required.

24. This, explains the *Bet HaLevi*, is why someone who slaughtered an animal and can still be found must be tested to see if he knows the laws of *shechita*, rather than just being asked if he slaughtered properly. Being ignorant of his own ignorance, he may say that he knows the necessary halachot.

conversion ceremony, but without the recitation of a *beracha*. No *hatafat dam brit* would be mandated to fulfill the circumcision requirement, because when a circumcision is performed for the sake of the mitzvah of *Milah*, even should something later be found amiss with the *gerut*, the *Milah* condition is satisifed.[25]

Halachic Problems

A complicating factor in our determination of the Jewishness of Ethiopians and other such groups is the looming possibility of *mamzerut* (bastardy). If we assume these people to be non-Jewish, no problem would exist, for the Talmud in *Kiddushin*[26] rules that *mamzerut* does not apply to Gentiles. If we consider that the Ethiopians are not Jews, then as soon as they convert they are accepted as Jews, without problems of *mamzerut*. But if we consider the people in question to be Jews, or at least *safek* Jews, we must deal with the possibility that, over the course of their history, they did not observe properly the laws of divorce as we have them, since they seem to be noticeably lacking in Rabbis. Consequently, women improperly divorced, who later remarried, may have had children in later marriages who would be termed *mamzerim*. These *mamzerim* subsequently would have intermingled with the general population, casting doubt upon the status of every member of the group. Should it be historically shown that the laws of divorce were not properly observed, we would be faced with a formidable problem indeed. How could we allow a possible *mamzer* to marry into the Jewish people?

Possible Resolutions

Our problem might be happily resolved if we could allow ourselves the liberty of one very questionable assumption, namely, that laws made by the central halachic authorities of Israel after the separation and isolation of Ethiopian Jewry are not binding upon

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25. All this is predicated on the *Mohel's* being Jewish — if the circumcision was performed by a non-Jew, this lenient rule does not apply. See *Mishpatei Shmuel*, No. 1.

26. *Kiddushin* 69a. See also 68b.

these far-flung members of our people who had no awareness of them. In other words, since Ethiopian Jews trace their lineage to the lost ten tribes of Israel who were exiled long before many of the laws concerning divorce were formulated by Talmudic or post-Talmudic authorities, perhaps they may claim exemption from such laws and are justified in administering divorces in the manner that had been practiced in Israel before their exile. According to such logic, not only would the question of *mamzerut* be resolved, but there would be room to argue as well that Ethiopian Jews need not celebrate Purim, for example, because they were separated from *Klal Yisrael* before that holiday was instituted and never accepted it upon themselves.

Such a solution, however, does not stand up to rigorous halachic scrutiny. In fact, all laws originating from the Great Sanhedrin or the Talmud certainly apply even to segments of Jewry unaware of their institution. As for the Sanhedrin, one need go no further than the verses in *Devarim* 17:10-11 to see the vast legislative authority of that judicial body: "And you shall act according to the word spoken to you from that place [i.e. the Temple, where the Sanhedrin was located] . . . do not stray right or left from what they tell you." The Rambam[27] spells out the mandate of the "Great Beth Din (Sanhedrin) . . . they are the pillars of instruction from whom laws and statutes issue forth to all Israel." Laws made by the Sanhedrin were binding on all Jews, regardless of location.[28]

But even after the cessation of the activities of the *Beth Din HaGadol*, the *Sefer HaChinuch*[29] points out, the very same Biblical passage binds all Jews to obey the laws enacted by the great Torah authorities of every generation. Therefore, when, as the Rambam writes[30], Ravina and Rav Ashi assembled all the sages of their time

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27. *Hilchot Mamrim* 1:1; see also *Chinuch*, Mitzvah 495.
28. Exactly when the period of the Sanhedrin HaGadol's power came to a close may be, according to Rav Soloveitchik, a dispute between the Ramban and Rambam in *Sefer HaMitzvot*, regarding *Kiddush Hachodesh. (Mitzvat Aseh 153).*
29. Mitzvah 496.
30. Introduction to *Mishneh Torah.*

to adopt the laws of the Talmud, those laws became binding upon the entire Jewish people. This binding nature of Talmudic laws, due to their acceptance by all the sages of the time, is expressed by the Talmud through the phrase *Ravina veRav Ashi sof hora'ah*[31] — "Ravina and Rav Ashi mark the end of authoritative halachic ruling." This means that, while sages of the Talmudic period may disagree with one another on points of law, no sage of the post-Talmudic period may disagree with a sage of the Talmud. The reason for this is that since the era of the Talmud, there has not been a convocation of all the Rabbis of a generation for legislative purposes. Consequently, only the laws of the Talmud became universally binding and impervious to later assault. Even as the Sanhedrin constituted Torah leadership for purposes of obligating all Jews to follow certain laws, so too did the Talmudic sages embody Torah leadership for the same purpose. Subsequent laws, however, bind only the followers of the particular Rabbis who enacted them. Each congregation or community would follow its own post- Talmudic laws and customs.[32] Only from this area of later law could Ethiopian Jews conceivably claim exemption; everything through the Talmudic era would be fully binding on them.

We are left, then, with a problem of possible *mamzerut* that must be addressed. Assuming that the laws of Jewish divorce were

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31. *Bava Metzia* 86a. Some authorities consider that the laws of the Talmud are binding to the same degree as the decisions of the Great Sanhedrin. See Vilna Gaon, *Ch. M.* 25:6 and *Responsa* Maharam Schick, *Y.D.* 115:3.

32. The *Chazon Ish (Yoreh Deah)* explains the overall structure of these rules: essentially the law requires one to follow his Rabbi in matters of halacha. Even if the Rabbi is a minority opinion, his followers may practice according to his ruling. What is more, they may continue to do so even after the Rabbi's death. The community of Rabbi Eliezer the Great followed their revered teacher's minority view regarding the permissibility of performing *machshirei milah* on Shabbat, even after the death of Rabbi Eliezer. The Sanhedrin and the sages of the Talmud are considered halachically to be the Rebbeim of all the Jewish people. Similarly the Tosafot write (*Bava Kamma* 41b.) that the *gedolei hador* are considered a person's *Rebbeim muvhakim*, even if he never studied directly under them.

not properly kept, this entire group would be *safek mamzerim.* Not only individuals can be classified *safek mamzer;* families and whole groups, as well, can be so labeled. The classic case of an entire family is known in the Talmud as *almanat issa,* and is treated in *Ketubot* and *Kiddushin.*[33] As for a group, the Vilna Gaon[34] draws our attention to a passage in *Kiddushin*[35] where the Cuthean sect, being unfamiliar with requisite laws, are declared *safek mamzerim.* Such a designation would apply to any group which lacks knowledge or practice of the necessary laws. How, then, can we resolve the problem of possible *mamzerut* with regard to Ethiopian Jewry, and thereby allow them to mingle and marry freely among *Klal Yisrael*?

Sfek Sfeka

In a different context HaRav Ovadiah Yosef[36] suggests a solution based on a *sfek sfeka* — the compounding of two doubts in particular fashion. The reasoning of this *sfek sfeka* runs as follows: perhaps over the centuries, there was so much intermarriage, coupled with the acceptance of improperly-converted *gerim,* that the majority of these people are descendents of non-Jews and therefore not subject to the stain of *mamzerut.* And even if they be Jews, each is only a *safek mamzer,* and may actually not be a *mamzer* at all. On this basis, Rav Yosef rules that, after the necessary *gerut* process, Jews of questionable origin may marry within the ranks of the Jewish people.

The guiding assumption of Rav Ovadiah's solution is that a *sfek sfeka* may be used to resolve problems of *mamzerut.* That assumption is not without its difficulties, as will become clear upon further examination.

Although normally when faced with a doubt regarding a Biblical law we opt for the more stringent of two possible courses

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33. *Ketubot* 14a; *Kiddushin* 75a.
34. *Even HaEzer* 4:101.
35. 75b—76a.
36. See note 1 above.

of action *(sfeka d'oraita lechumra)*, the law of *mamzerut* is one of several notable exceptions to the rule. The Gemara in *Kiddushin*[37] deduces from a verse that *safek mamzer eino mamzer* — on a Biblical level, a doubtful case of *mamzerut* is not classified *mamzerut*. Only rabbinically is a *safek mamzer* considered a *mamzer*. The *Avnei Nezer*[38] explains the mechanics of this law. This is not a case of a *safek d'oraita* being treated leniently. Rather an essential condition for the existence of *mamzerut* is *yediat ha'issur* — a clear knowledge and determination that the *issur* is present. This knowledge is lacking in the case of a *safek mamzer*. *Safek yediah* (doubtful knowledge), according to Torah law, does not qualify as *yediah*(knowledge), and, therefore, the *issur mamzerut* cannot begin. And even when the Rabbis declared a *safek mamzer* to be a *mamzer*, they did not do away with the requirement of *yediat ha'issur*, but declared instead that a *safek yediah* is considered a partial *yediah*. For this reason, when there is absolutely no *yediat ha'issur* we do not fear for *mamzerut*. This is the basis of the ruling[39] that *mishpacha shenitme'ah — nitme'ah*, i.e. when it has become wholly unknown whether *mamzerut* exists within a family, the stain ceases to be a consideration. Should a particular individual know of the *mamzerut*, he need not alert others to its presence. Moreover, writes the *Avnei Nezer*, the person who knows about the *mamzerut* may even officiate as Rabbi in marrying the *"mamzer"* and another Jew. [39a] If there is no *yediah* (knowledge), there is no *issur*.[40]

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37. 73a.
38. *Avnei Nezer, Even Ha'ezer* 17.
39. *Even HaEzer* 2:5.
39a. This opinion is also expressed by R. Elchanon Wasserman in *Degel Hatorah* 93:4.
40. In this respect the law of *mamzerut* parallels the law of *orlah b'chutz la'aretz*. Fruit that grows for the first three years of a tree's life is classified as *orlah*, and may not be eaten nor benefited from in any way. Should this *orlah* grow, however, outside of the land of Israel, several leniencies will apply, among which is the requirement for *yediat ha'issur*. In other words, if the fruit is not *known* to be *orlah* — it isn't. One needn't even investigate the fruit's origin. And just as the Rabbi may marry off a *"mamzer"* if he is the only one aware of the *mamzerut*, so does the Gemara *Kiddushin* 39a record that the *Amoraim* used

Being that even on a level of rabbinic law, *yediah* is a prerequisite for *mamzerut*, and *safek yediah* is considered a partial *yediah* perhaps even a *sfek sfeka* does not eliminate *yediah*, but it too is classified by the Rabbis as partial yediah? If this be the case, and *sfek sfeka* be termed *yediat ha'issur*, then we are again faced with the same problem we had with a *safek mamzer* — we have a case which, on a rabbinic level, must be treated as *mamzerut*. In short, *sfek sfeka* may not solve our *mamzerut* question after all.

Rav Soloveitchik has explained that the question of whether or not *sfek sfeka* constitutes *yediah* is a major dispute among *Rishonim* and revolves around the question of how we are to view *sfek sfeka* in general. Does a *sfek sfeka* mean that there was a *leidat hasafek* — a doubt arose — but was resolved leniently based on the *sfek sfeka*? Or perhaps *sfek sfeka* means that the doubt is challenged since for a number of reasons the halacha considers no doubt ever existed; there wasn't even a *leidat hasafek* demanding resolution. If we say that a doubt did indeed exist, then it is conceivable that such a doubt, in a case of *mamzerut*, might be classifed rabbinically as a partial *yediah*. If, however, there never was a doubt, then there would be no *yediah*, and no *mamzerut*,

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to feed their unknowing colleagues meals that consisted of the *orlah* of *chutz la'aretz*. Since the meal's partaker wasn't aware of the *issur*, the *issur* did not apply to him.

The most classic case, though, of the requirement for *yediah* is *aveilut*. In order for the laws of mourning to take effect, the bereaved person must know of his loss. This requirement provides the rationale for the famous law that if a person is rejoicing at a wedding and, unbeknownst to him, one of his relatives has died, the others present who are apprised of the situation need not tell him. What he doesn't know, in *aveilut*, cannot hurt him. For this very reason the term *"shmuah"* (literally: something heard) is used commonly by the Talmud in describing *aveilut*, for the *aveilut* cannot start unless the *avel* hears of his loss.

In fact, based on this requirement of *yediah* for *aveilut*, Rav Elchanan Wasserman, in *Kovetz He'arot* to *Yevamot* 87, comments that by right we should require the testimony of two witnesses to establish to our satisfaction that *aveilut* may begin. After all, if we seek *yediah*, we must use the Torah's standards for establishment of knowledge. The reason we accept the word of even one person, the *Rishonim* explain, (*Tur, Yoreh Deah* 397) is only because *aveilut* is a *milta de'avida le'gluyei* — a matter whose truth must necessarily surface — and therefore no witness would hazard a lie. With this idea it becomes clear that even notification with no witnesses can be acceptable, as in the case of

even on a rabbinic level, in any case of *sfek sfeka.*[41] This latter view must be the approach taken by Rav Ovadiah Yosef, who, as we have seen, advances *sfek sfeka* as a solution for the *mamzerut*

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an *avel's* reading of a relative's demise in the obituary column of his newspaper.

Moving back to *mamzerut*, we can now better understand the law that only the testimony of two witnesses can establish a person as a *mamzer (Even HaEzer 2:3).* See also *Pithei Tshuvah* (Sub. Sec. 3). Despite the fact that Rabbi Eiger and Rabbi Ya'akov of Lissa debate whether *mamzerut* is *issurim* or *davar shebi'erva*, neither can assert that their dispute would affect the number of witnesses required to establish *mamzerut.* Even were we to assume that *mamzerut* is *issurim*, we would still require the two witnesses, because only through two kosher witnesses who testify in court is it possible to create the necessary *yediah* for *mamzerut* to exist. In *mamzerut*, unlike *aveilut*, we cannot suffice with one witness, because it is not a *milta de'avida le'gluyei.*

41. This very issue of whether there is a *leidat hasafek* which eventually is resolved by the ruling, or *hachra'ah*, of the *sfek sfeka*, or whether no *safek* even arises proves pivotal in two other disputes. Firstly, the permissibility of intentionally creating a situation of *sfek sfeka* would depend on the two possible understandings. The *Magen Avraham* to *Hilchot Tzitzit (10:11)* rules that one may not set up a scenario of *sfeka de Rabbanan lekula*, because deciding a doubt on Rabbinic law leniently really constitutes applying a *hachra'ah* to a doubt, and one may not construct a situation where such an application becomes necessary. If, then, *sfek sfeka* be viewed as a *hachra'ah*, one would not be permitted to engineer such a case. See also responsa *Shivat Zion*, 45, who in fact shows that this is a dispute already found in the *Rishonim.*

Similarly the question of whether one might rely on a *sfek sfeka* in a case of a *davar sheyesh lo matirin* (something which will become permissible automatically with the passage of time) would hinge, as well, on the two ways of looking at *sfek sfeka.* Generally, a *davar sheyesh lo matirin* is treated with the attitude of: why rely now on a *hachra'ah*, when by tomorrow the item will be permissible without need of any *hachra'ah* at all? (See *Betzah* 4a).

Therefore, if *sfek sfeka* should constitute the *hachra'ah* of a doubt, it too would be forbidden in a case of *davar sheyesh lo matirin.* If, instead, no doubt ever existed, the *sfek sfeka* would be permissible, even in such a case. See *Pithei Teshuvah* to *Yoreh Deah* 110, subsection 11.

Which of the two possibilities do the *Poskim* accept? Tosafot to *Ketubot* 14a (דס"ה אלמנת עישה) forbid the use of a *sfek sfeka* in *mamzerut*; they apparently assume that a *leidat hasafek* occurs in every case of *sfek sfeka.* The Ramo, however, rules that, in circumstances of need, one may rely on a *sfek sfeka*, even in a case of *davar sheyesh lo matirin (Yoreh Deah 110:8).* Clearly he holds there to be no *leidat hasafek* at all. The *Pnei Yehoshua* to *Ketubot* 14a explains further that the particular *sfek sfeka* that Tosafot saw fit to forbid is not actually a bona fide *sfek sfeka* anyway for another reason: it does not meet

question. It is the view accepted by the Ramo[42] and other *Acharonim,* and can thus truly help us in solving our problem.

Yet even after overcoming all the hurdles encountered in the theoretical realm, we must recognize that our *sfeka sfeka* has still not passed its ultimate test in the hard world of facts. For any *sfek sfeka* to function, both of its components must be bona fide doubts, not superficial imitations. By this we mean that each *safek* must have two equally possible resolutions in order to form a *sfek sfeka.* If one side of a *safek* is more likely to be true than the other, the *safek* is said to be resolved via the principle of *rov*[43] (majority), and can no longer be advanced as half of a *sfek sfeka.* Only if the odds on a given *safek* are 50-50, or if the percentages are simply unascertainable, is the *safek* a valid one.

For our purposes this means that it would be necessary to consult an anthropologist to determine whether the first *safek* in our *sfek sfeka* ("perhaps they are not Jews") is valid. If through known trends and statistics it becomes clear that intermarriage and the like rendered a majority of Ethiopian Jews non-Jewish, then our *safek* is resolved, and so is our *mamzerut* problem. While they would not be Jews until their conversion, neither could they ever be *mamzerim.* If, however, research were to reveal that the majority are Jewish, then again our *safek* is eliminated, leaving us only one *safek* — are they *mamzerim.*

Only if the numbers are half and half — a most unlikely situation — or if the majority be impossible to determine, may we resort to the use of a *sfek sfeka* to reach our desired result: the granting to Ethiopian Jewry of a full share in our heritage.

This essay makes no pretensions to actual *psak.* For a practical conclusion to be reached, all the relevant facts would have to be determined and considered. The purpose of this article is not to examine the historical background of the question, but merely to acquaint the reader with some of the important issues that confront a *posek* before rendering his decision.

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all the requirements for *sfek sfeka,* being *safek echad beguf vesafek echad beta'arovet* (see Y.D. 110, paragraph 9). The *Acharonim* accept the view of the Ramo, and so, we have seen, does Rav Ovadiah Yosef.

42. Cited in footnote 41.

43. As is evident, for example, from the discussion of the Gemara *Ketubot,* beginning of 15b. See *Shev Shma'ata,* Section 1:18.