

# ורפא ירפא

The Journal of Torah and  
Medicine of the Albert Einstein  
College of Medicine Synagogue  
and RIETS

Volume V



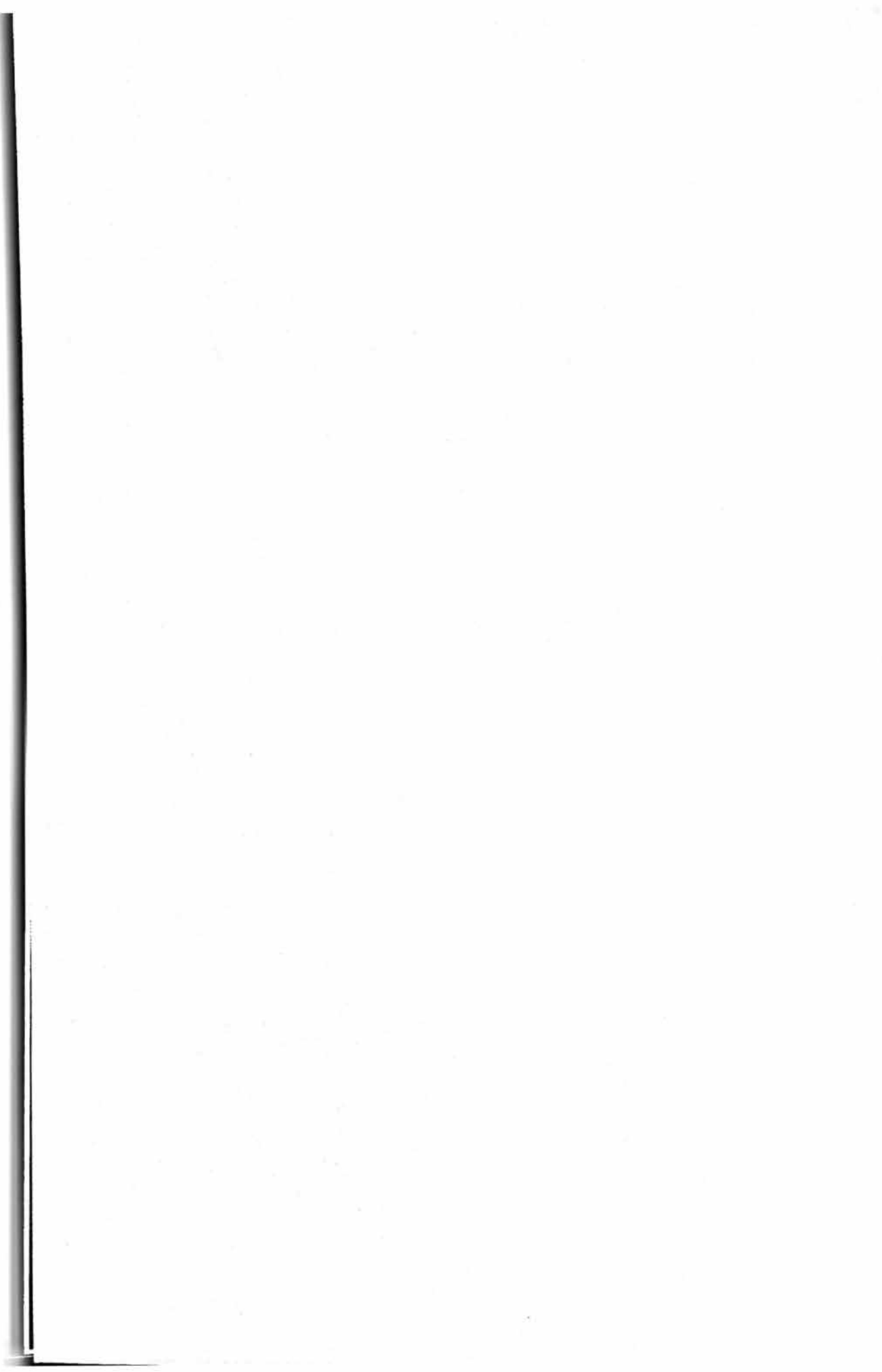


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## Volume V

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# Foreword by the Dean of RIETS

We are excited to present this fifth volume of the Verapo Yerape journal, under the editorship of: Rabbi David Shabtai, MD, a graduate of Rabbi Isaac Elchanan Theological Seminary and the Bella and Harry Wexner Kollel Elyon at RIETS, and Rabbi Peter Kahn, a graduate of RIETS and a fellow in the Rabbi Norman Lamm Kollel L'Horah (Yadin Yadin). We also want to express our appreciation to Rabbi Yair Hindin, rabbi of the Einstein synagogue and RIETS graduate for all of his work with the Einstein community.

The Verapo Yerape journal is an important contribution to the fascinating world of medicine and halakhah, which has been a burgeoning field of scholarship in recent years. We live in an age where scientific discoveries, new treatments and seemingly miraculous innovations appear almost daily. Baruch Hashem, Klal Yisrael has been given a Torah system to grapple with and clarify whatever new discoveries the world of science has to offer mankind.

As the premiere institution following the philosophy of Torah u'Mada - the intense study of Torah and science - Yeshiva University is proud to play a leading role in publishing original works clarifying both the halakhic and hashkafic aspects of modern medicine. It is especially gratifying to see our students - both medical students and rabbinical students - intensely involved with this effort. It is our hope and prayer that these exceptional young men and women will continue to be mekadeish shem shamayim through their holy work for many years to come.

We are indebted to President Richard M. Joel and President Emeritus, Rabbi Dr. Norman Lamm, who have provided the leadership and encouragement necessary to bring our ef-

forts to fruition. I also congratulate the editors and contributors of this volume, students in both RIETS and Einstein, for their top-notch scholarship and concomitant commitment to Torah values and ideals. We also recognize the constant and critical support of Dr. Edward Reichman, Editorial Advisor to the journal, Dr. Jeffrey S. Gurock of the Michael Scharf Publication Trust of the Yeshiva University Press, and, of course, Dr. Edward Burns, the Dean of the Albert Einstein School of Medicine. As always, we are grateful to Michael and Fiona Scharf for their benefaction which allows us to publish this journal of Torah and Science.

I am confident that you will enjoy the articles in this volume, both in terms of their scholarly substance and in terms of their Torah U'Madda synthesis.

*Rabbi Menachem Penner (RIETS '95)*  
*Max and Marion Grill Dean of RIETS*  
*4 Kislev 5775*

## Foreword by the Dean of AECOM

It is once again my pleasure and privilege to write a forward to this fifth edition of the magnificent monograph series *Verapo Yerape* published by the members of the Albert Einstein Synagogue, Birkat Shmuel in conjunction with our parent Yeshiva University. Dr. Belkin, after who the synagogue is named, was an illustrious Greek scholar and Yeshiva's second President. It was his vision that founded the Albert Einstein College of Medicine. He is famously quoted as saying, "We prefer to look upon science and religion as separate domains which need not be in serious conflict and, therefore, need no reconciliation." With that in mind, he created Einstein as a major research medical school suffused with new science that he was confident would not conflict with our religion. But he was unaware of the scientific challenges that would face orthodox Jews precisely in the area he promulgated, biomedical science. Lord Rabbi Immanuel Jakobovits, the creator of the nascent field of Jewish Medical ethics first published his trailblazing work "Jewish Medical Ethics" in 1959, some four years after Einstein's first entering class. How could Dr. Belkin conceive of fields that weren't even in the range of science fiction? Therapeutic cloning, embryonic stem cell therapy, use of computers on Shabbos, even now routine procedures such as heart transplants were not at all in his cosmos.

But Dr. Belkin's confidence was well founded. By promulgating the Torah U'Maddah philosophy in the Yeshiva and its medical school, Dr. Belkin provided the tools for its talmidei chachomim and chachomos to grapple with our age old Torah and its millennium of commentaries to inform the Torah Jew with a Sinaitic halachic and hashkafic perspective on these thorny questions. Our Einstein students of whom I am immensely proud, are scholars of halacha as well as medicine. This fifth volume represents a milestone, which hopefully will

be surpassed in the future. The number five in Jewish tradition has importance in that there are five books of Moses and five sections of sefer tehilim, so that this fifth edition in the series represents a closing of the first chapter in the Birkat Shmuel medical ethics saga. It has completed a major five volume corpus containing valuable contributions which will be widely quoted. The shul's next chapter comprised of future volumes will continue to define the jewel of Yeshiva and Einstein.

*Edward R. Burns, M.D.  
Executive Dean and Professor of Medicine  
Albert Einstein College of Medicine of Yeshiva University*



RABBI ASHER BUSH

## *Signing a Death Certificate on Shabbat and Yom Tov*

On the first day of Yom Tov, the doctor's phone rang. Assuming that there was a health emergency, he took the call. To his surprise, it was actually a request that he sign a death certificate. The death took place in a Hassidic community in which burials are performed on the second day of Yom Tov. Is there ever a case in which it is permitted to sign a death certificate on Yom Tov?<sup>1</sup>

The mandate of the physician and other health care professionals is to provide for the care and wellbeing of the patient. However, medical practitioners do have a small number of responsibilities that do not directly relate to patient care. One significant example of this is the signing of a death certificate. By law, in order for burial to take place, a death certificate must be signed by an authorized individual.<sup>2</sup> In most cases, this certificate can be signed without hesitation; in some

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1 Special thanks to Micah Katz, who first brought this issue to my attention and provided factual background.

2 Qualifications vary from state to state. For example, in New York, a death certificate can only be signed by a licensed physician, physician's assistant, or nurse practitioner; in Oregon, it can also be signed by a licensed funeral service practitioner and in Texas it can even be signed by a justice of the peace.

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cases, it cannot be signed until the cause of death has been determined or other legal concerns have been addressed. These latter cases often provoke concern in the Orthodox community, as Jewish tradition places a premium on prompt burial.

However, the topic of discussion here is not a medical or legal impediment to the signing of a death certificate, but rather a halakhic one. While there is significant permission for a medical practitioner to violate otherwise prohibited activities on Shabbat and Yom Tov in order to attend to the emergency needs of a patient, there is no such blanket allowance to perform forbidden activities for the sake of the needs of a deceased patient, whose life can obviously no longer be saved. Signing a death certificate on Shabbat or Yom Tov – which entails the forbidden *melakhah* of writing – therefore cannot be justified on the grounds of “*pikuah nefesh*.”

### Attending to the Needs of the Dead on Shabbat

Nevertheless, facilitation of prompt burial of the deceased is a great *mitzva*. Could one ask a non-Jewish doctor to sign a death certificate on Shabbat for this purpose?

The Talmud records that in a small number of cases, the Sages permitted asking a gentile to perform otherwise prohibited activities on Shabbat in order to facilitate the performance of a *mitzvah*.<sup>3</sup> However, no such permission is found regarding

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<sup>3</sup> There are only two specific references in the Talmud regarding asking a gentile to perform a prohibited activity on Shabbat for the sake of facilitating the performance of a *mitzvah*. In one case, the Sages permit asking a gentile to write a contract on Shabbat to facilitate the purchase of land in the Land of Israel (*Gittin* 9b; Tosafot ad loc., s.v. *afal gav*; Rambam, *Hilkhos Shabbat* 6:11). Rambam explains that this unusual permission is granted due to the great *mitzvah* to settle the Land of Israel. The second reference relates to facilitating the performance of a *brit milah* on Shabbat (*Eruvin* 68a). There is a great debate among the *Rishonim* regarding how far this permission extends. Rambam (*Hilkhos Shabbat* 6:10) and many other *Rishonim* rule that this permission only extends to having the gentile violate rabbinic prohibitions that are performed for the sake of *milah*. This opinion is codified in *Shulhan Arukh* (*Orah Hayim* 331:6). In contrast,

burial. In fact, the Sages were so strongly opposed to this possibility of burial on Shabbat that the *mishnah* states that a grave dug on Shabbat by a gentile specifically for the burial of a Jew may never be used, even after Shabbat has ended.<sup>4</sup> This is true even when it is clear that the burial will be delayed as a result of not using the gentile's services.<sup>5</sup>

Similarly, the Sages deemed the idea of burial on Yom Kippur to be so unacceptable that they instituted significant adjustments in the Jewish calendar in order to avoid the possibility that Yom Kippur would fall out on Friday or Sunday, in which case there would be two consecutive days on which burial cannot take place, resulting in inevitable dishonor to the deceased.<sup>6</sup> *Shulhan Arukh* views the prohibition of burying on Shabbat and Yom Kippur so stringently that it rules that even if the grave was actually dug before Shabbat or Yom Kippur,

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Behag (quoted by Tosafot, *Bava Kama* 80b-81a, s.v. *omer*) permits asking a gentile to violate even a Torah law for the sake of *milah*. Rama (*Orah Hayim* 307:5) cites the view of some *Rishonim* who extend this permission to ask a gentile to violate Torah prohibitions to *mitzvot* other than *milah* as well.

4 *Shabbat* 151a. Tosafot (*Bava Kama* 80b-81a, s.v. *omer*) explain that the Sages were particularly strict regarding burial because it is shameful and degrading to be buried in a coffin or grave that was prepared under circumstances involving the desecration of Shabbat. Meiri (*Beitza* 6a, p. 38) writes that some authorities wished to permit a gentile to bury on Shabbat in a "*sha'at ha-dehak*," difficult and extenuating circumstances. He states that this view was not accepted except in an extreme case in which the burial will never transpire unless performed on that Shabbat day; in such a case, he writes, it is appropriate to be lenient. Meiri writes that this indeed took place in one community in France in which a pogrom took place on Shabbat and the survivors fled on that same day, first arranging with some benevolent neighbors to attend to the burials of their family members.

5 R. Hershel Schachter (unpublished responsum, 1980) rules that it is similarly prohibited to place a notice of a funeral scheduled for Sunday in a Saturday newspaper, even though fewer people will be aware of the funeral as a result and less honor will accordingly be shown to the deceased, as that honor can only happen due to the work of gentile printers that is performed on Shabbat.

6 *Rosh Hashana* 20a. See comments of Rashi (s.v. *mishum meisayei*) and Meiri on that passage; see also *Shulhan Arukh*, *Orah Hayim* 428:1.

it is still prohibited to have the deceased interred on that day.<sup>7</sup>

Accordingly, it is prohibited to ask a gentile physician to sign a death certificate on Shabbat or Yom Kippur, even though this will likely result in a delayed burial. However, if a doctor signed the document for a patient who died on Shabbat without being asked to do so, one may certainly utilize the document.<sup>8</sup>

### Attending to the Needs of the Dead on Yom Tov

Although it is not commonly practiced today (for reasons explained below), the Sages granted significant permission to perform burial and provide for various other needs of the dead on Yom Tov: "On the first day of Yom Tov, the needs of the dead may be taken care of by gentiles, and on the second day by Jews, even on the second day of Rosh Hashana."<sup>9</sup> *Shulhan Arukh* rules that despite this allowance, a Jew may not perform any prohibited work on the first day of Yom Tov in order to facilitate a speedy burial, whether that burial will take place on the first day or the second day of Yom Tov. In fact, in a case in which the burial will not take place until the second day, it is not even permitted to ask a gentile

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7 *Shulhan Arukh, Orah Hayim* 526:3.

8 Although this act was clearly done on behalf of a specific Jewish person, this case is not comparable to the *mishnah's* case, in which the grave site or shrouds prepared on Shabbat may never be used. The latter activities, although performed in order to honor the deceased, are viewed as eternal dishonor. The signing of the death certificate is not an act performed to honor the deceased, but merely a legal necessity to permit the burial.

9 *Beitzah* 6a. *Meshekh Hokhmah* (*Devarim* 5:14) notes that whereas burial facilitated by violation of Shabbat is considered shameful (see n. 4 above), this is not the case regarding Yom Tov. What is the basis for this distinction, given that gentiles are not commanded to observe Shabbat any more than they are commanded to observe Yom Tov? *Meshekh Hokhmah* explains that Shabbat primarily commemorates the divine act of creation, which relates to all of humanity, while each of the holidays is centered on events that are uniquely part of the relationship between the Jewish nation and God.

to perform prohibited activities on the first day of Yom Tov.<sup>10</sup>

The Talmud concludes that “when it comes to attending to the needs of the dead, the Sages ruled that the second day of Yom Tov should be treated like a weekday, even to allow [such nonessential action as] the making of the shrouds and the cutting of aromatic plants.” Although the particular activity of signing a death certificate is not mentioned by the Sages in the Talmud, it is clear from the rulings of the *Rishonim* and *Shulhan Arukh* that various other activities were permitted in order to facilitate burial even though they were not specified in the Talmud.<sup>11</sup> Based on these precedents, R. Shlomo Zalman Auerbach ruled that it is permissible to ask a gentile to sign a death certificate on the first day of Yom Tov for the sake a burial that will take place on that day and it is permissible for a Jew to sign the document on the second day of Yom Tov in order to facilitate a burial on that day.<sup>12</sup>

### **The Ruling of R. Moshe Feinstein**

As noted above, despite the rulings of the Talmud and *Shulhan Arukh*, the common practice in America is not

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10 *Shulhan Arukh, Orach Hayim* 526:1; *Arukh Ha-Shulhan, Orach Hayim* 526:7.

11 These activities include heating water to wash the body, escorting the deceased outside of the *tehum*, and leasing a boat to transport the body for burial. See *Shulhan Arukh, Orach Hayim* 526:4-8.

12 This ruling is cited in *Shemirat Shabbat Ke-Hilkhatah*, ch. 64, n. 144, and *Nishmat Avraham, Orach Hayim* 526:1.

It is important to note that Rama (*Orach Hayim* 526:4) rules that even on the second day of Yom Tov, whenever it is permitted to perform acts of *melakhah* that are prohibited by Torah law on the first day of Yom Tov, it is still best that they be done by gentiles and not by Jews whenever possible. Accordingly, if a gentile physician could be found on the second day of Yom Tov to sign the death certificate without causing any delay to the burial, that would be the preferred course of action. However, *Mishna Berura* (*Orach Hayim* 526:25) writes that if waiting for the gentile will cause either a delayed burial or any other degree of lack of respect to the deceased, one should not wait for him. In that case, even Torah prohibitions may be performed by a Jew on the second day of Yom Tov. This discussion could be particularly relevant for the case of signing a death certificate.

to bury the dead on either day of Yom Tov. This is based on the ruling of Rabbeinu Tam, who was concerned that lack of proper understanding of Halakhah would likely entail that this limited permission to perform forbidden activities on Yom Tov would be abused and lead to a general breakdown of the laws of Yom Tov.<sup>13</sup> Although it is clear from *Shulhan Arukh* that Rabbeinu Tam's stringency was not viewed as normative,<sup>14</sup> his ruling was accepted as authoritative by R. Moshe Feinstein, who concluded that the concerns that motivated Rabbeinu Tam certainly apply in the United States. Accordingly, R. Feinstein ruled that in our day, it is halakhically prohibited to bury on Yom Tov.<sup>15</sup> This is the prevailing practice in the overwhelming majority of communities in America.

Nevertheless, some communities – such as the one of which the deceased person was a member in the case with which we began – do not follow R. Feinstein's ruling and do bury on the second day of Yom Tov. This practice should not be viewed as a violation of his ruling, as in a highly regulated and closed community such as this particular Hassidic community, R. Feinstein's concerns may indeed not apply. In fact, in commenting on the ruling of Rabbeinu Tam, Meiri writes:

In his day, Rabbinic rulings were not carefully followed and [people] would extend permissive rulings to cases which were not appropriate. However, in our day, all carefully follow the rulings of the leading rabbis and there is no need to prohibit that which is permitted.<sup>16</sup>

It would seem that the same could be said about burial practices in an insular Hassidic community in which individual families

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13 See Tosafot, *Beitzah* 6a, s.v. *ve-ha'idna*. If and when this concept applies is a topic of major debate among the *Rishonim*.

14 *Shulhan Arukh*, *Orah Hayim* 526; see also *Arukh Ha-Shulhan*, *Orah Hayim* 526:9-10.

15 *Iggerot Moshe*, *Orah Hayim* 3:76.

16 Meiri, *Beitzah* 6a, p. 40.

are not in a position to determine funeral procedures.

Since the deceased in our case was a member of a Hassidic community that abides by the original law permitting burial on the second day of Yom Tov, a Jewish doctor may sign the document on the second day of Yom Tov in order to facilitate the burial, as per R. Auerbach's ruling. The fact that the individual who is asked to sign the certificate is not a member of that Hassidic community should in no way affect the propriety of his signing the document. Once a permitted burial is to take place, there is no justification to prohibit him from facilitating it.<sup>17</sup>

However, in our case, the doctor was asked to sign the document on the first day of Yom Tov in order to facilitate a burial on the second day. Assuming that the call related to a bone fide medical emergency, he answered the call, only to discover that this was a request for his signature on a death certificate. As noted above, *Shulhan Arukh* clearly rules that a Jew may not perform any prohibited work on the first day of Yom Tov in order to facilitate a speedy burial, whether that burial will take place on the first day or the second day of Yom Tov; it is not even permitted to ask a gentile to perform prohibited activities on the first day of Yom Tov.<sup>18</sup>

Indeed, this case reveals the wisdom of R. Feinstein's ruling. In this case, the deceased is a member of a closed Hassidic community in which rank and file members generally do not run their own funerals and in which burials therefore take place on the second day of Yom Tov, but due to their great zeal to bury the deceased promptly, they too cheapened the first

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17 In such a situation, it probably would be best to sign the certificate in private, so that no confusing message will be transmitted when the doctor goes against an established community practice. Although the Talmud (*Beitzah* 9a) and *Shulhan Arukh* (*Orah Hayim* 301:45) rule that actions prohibited due to "appearances" (*marit ayin*) may not be performed either publicly or privately, since the activity in this case is in fact completely permitted and is not generally done simply as a precaution, it would not seem to be included in the prohibition of *marit ayin*.

18 See n. 10 above.

day of Yom Tov, potentially causing a fellow Jew to perform a forbidden *melakhah*!

There are many lessons to be learned here, but to my mind, the most striking is that there is reason to be cautious even in strong communities in which one might think that R. Feinstein's concerns do not apply. This is an important conclusion, as one might be tempted to suggest that in the many years since R. Feinstein ruled on this matter in 1971, communal standards have risen and his concerns therefore no longer apply. As Orthodox communities are increasingly populated by more learned and committed laity, the question of the propriety of burial on the second day of Yom Tov may, in fact, be revisited. The case that we have discussed demonstrates that R. Feinstein's ruling should not be limited to his time and situation. Regardless of how committed a community may be, there may still be a place for the precautions taught by our great sages.



MICHAEL KURIN

## *The Use of Electric Breast Pumps on Shabbat*

Perhaps the most symbolic act that represents the deep emotional bond between a mother and her baby is nursing. That fact that the mother's milk is the healthiest and most natural sustenance for an infant is well documented in both the Talmud and the medical literature.<sup>1</sup> In fact, the numerous significant health benefits to both the mother and the infant that come with breastfeeding should compel any Torah-observant Jewish mother to attempt to breastfeed her children when at all possible, based on the principle of "*Ve-nishmartem me'od le-nafshoteikhem*,"<sup>2</sup> the obligation to preserve our health.

However, breastfeeding in the traditional sense is not always possible. This can be due to a variety of medical or practical reasons, including low milk production, excessive pain during latching for the mother, and the infant's difficulty latching or sucking with enough strength. In any of these situations, the mother may be left feeling guilty and inadequate, and nursing can then become a source of great stress for the

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1 "Breastfeeding and the Use of Human Milk," *Pediatrics* 129:3 (March 2012): 827-41.

2 *Devarim* 4:15.

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Michael is a 4th year student at the Albert Einstein College of Medicine. He is currently applying to residency programs in Internal Medicine. Michael earned his BA from Yeshiva College with a major in biology and physics. He received his MA in medieval Jewish History from the Bernard Revel Graduate School of Jewish Studies, and his Semicha from RIETS. Michael lives in the Bronx with his wife and daughter.

entire family.<sup>3</sup>

Thankfully, we now have technological advancements that can solve many of these problems. In order to provide mother's milk to infants whose mothers are either working or unable to sustain their infants through traditional nursing alone, many women choose to purchase electric breast pumps. These machines make use of an electrically generated suction force to extract milk into a container. This milk can then be stored for later use or fed immediately to the infant using a bottle or syringe. When used with enough frequency, these pumps can also be a useful method for a mother to increase her milk supply.

In situations in which daily use of an electric pump is needed, the question of the permissibility of using the electric breast pump on Shabbat arises. This essay will attempt to define the medical and halachic issues that are relevant to this question and determine whether the use of a pump would be permitted on Shabbat in a variety of different circumstances.<sup>4</sup>

## I. The Prohibition of Milking on Shabbat

The earliest explicit source for the prohibition of milking on Shabbat is the Tosefta,<sup>5</sup> which states that a woman

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3 See, for example, the anecdote at this website: [http://www.babycenter.com/400\\_i-am-so-stressed-out-about-breastfeeding-and-want-to-quit-bu\\_7946625\\_401.bc](http://www.babycenter.com/400_i-am-so-stressed-out-about-breastfeeding-and-want-to-quit-bu_7946625_401.bc).

4 This essay deals with Shabbat only. Whether one may pump milk on Yom Tov is a separate question, as there may be more reason to be lenient in that case. In general, *melakhah* for the sake of food preparation is permitted on Yom Tov, but certain *melakhot* remain prohibited even when done for the purpose of making food. *Dosh*, threshing (of which milking is a sub-category), is one of these *melakhot*. However, *Mishnah Berurah* (*Orah Hayim* 495:13) notes a debate among the *Rishonim* as to whether performance of the *melakhah* of *dosh* is a Biblical or Rabbinic prohibition on Yom Tov. If it is only a Rabbinic prohibition, it is likely that pumping milk would be permitted altogether for the sake of an infant. As there is a debate among the *posekim* on this issue, one should consult with her *posek* before deciding how to go about pumping milk on Yom Tov when necessary.

5 Tosefta, *Shabbat* 9:22 (Lieberman edition; 10:14 in some older editions).

should not express her milk into a cup or dish, thereby lightening the weight on her breast, and then feed that milk to her child. *Minhat Bikkurim*, a commentary on the Tosefta, explains that this act of milking would be considered *mefarek*, which is

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There are two exceptional cases in which women are permitted to express milk on Shabbat. The first is the case of a woman who needs to pump because her breasts are engorged and her infant will not nurse enough to fully relieve her pain and prevent the risk of mastitis (infection of the breast). There is universal agreement that in this case, a woman is allowed to express milk by hand or through use of a manual or electric pump (manual or by hand is preferred in this case). However, the important provision is that the milk must be pumped in a way that makes it clear that the purpose of her pumping is to relieve her pain, and not to make use out of the milk. This can be accomplished by allowing the milk to spill directly into the garbage or down the sink, or by pumping into a container that contains soap or alcohol, rendering the milk inedible. The reason for this allowance is that pumping to relieve pain without the intent of using the milk is considered a *melakhah she-einah tzerikhah le-gufa*, an act of *melakhah* done without the intention of deriving benefit or use from the product of that *melakhah*. See *Shulhan Arukh, Orach Hayim* 330:8; *Magen Avraham, Orach Hayim* 330:41; *Mishnah Berurah, Orach Hayim* 330:32; *Lev Avraham*, p. 154; *Shemirat Shabbat Ke-Hilkhatah* 36:20.

The second case is that a woman is permitted to express a small amount of milk onto the infant's lips (when the infant is not latched onto the breast) in order to encourage the infant to nurse. See *Shulhan Arukh, Orach Hayim* 328:35, and *Mishnah Berurah, Orach Hayim* 328:112. See also A.S. Abraham, *Medical Halacha for Everyone*, pp. 58-59. The reason given is that this too is considered a *melakhah she-einah tzerikhah le-gufa*, as the mother's intention is not for this milk to provide actual sustenance to the infant, but rather only that it should encourage the infant to nurse. However, others argue that this should also be considered deriving benefit from the extracted milk, and it therefore does not qualify as a *melakhah she-einah tzerikhah le-gufa*. See *Encyclopedia Hilkhatit Refu'it*, pp. 595-633, whose author suggests a second possibility – that this expression of milk is considered a *shinui*, an unusual way of extracting milk, and that is why it is permitted. See, however, *Sha'ar Ha-Tziyun, Orach Hayim* 328:81, who rejects these two explanations and remains perplexed as to why this practice is allowed. He wonders if the leniency is not partially based on the notion that there would be some sort of danger to the infant if he does not nurse. See also *Yalkut Yosef*, part 4, number 33, n. 32, who suggests that the amount of milk extracted in this case is so small that it is less than the *shiur* (measurement) needed to violate Shabbat on a Biblical level, and this is why it is permitted.

a prohibited act on Shabbat.<sup>6</sup> The Talmud also concludes that the prohibition of milking is included in the subcategory of *mefarek*,<sup>7</sup> and this is the unanimous conclusion of the halakhic authorities.<sup>8</sup> What requires investigation is which of the 39

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6 This, of course, begs the question of how we allow ordinary nursing on Shabbat if it is a true *melakhah*. Why should milk extraction by an infant's sucking be any less prohibited than milk extraction by hand or via a pump? Scholars have struggled with this question for centuries, as it has always been taken for granted that babies can nurse on Shabbat. Several answers have been suggested.

The author of *Ma'aseh Hoshev* (3:18) explains that this is one of several cases in which the principle of *derekh akhilah*, eating in the usual manner, permits something that would otherwise be considered a *melakhah*. For the infant, nursing is the normal manner of drinking milk. Thus, the fact that he performs a *melakhah* when eating is not relevant. As an analogy, squeezing liquid out of grapes involves the same *melakhah* as extracting milk. However, when one eats a grape on Shabbat, he inevitably squeezes out its juice while chewing the grape. This is not prohibited because it is the normal manner of eating a grape. Similarly, the infant is permitted to drink in his usual manner.

Another answer is suggested by *Har Tzvi* (201), who explains that the milk flows into the infant's mouth at a slow enough rate that he never actually has more than 1½ teaspoons of milk in his mouth at one time. Therefore, he does not meet the required *shiur* (measurement) necessary to violate Shabbat on a Biblical level.

A third possible answer, quoted by both *Ma'aseh Hoshev* and *Har Tzvi* (and implicit in *Ohr Same'ah*, *Hilkhoh Shabbat* 8:10), is based on a *gemara* (*Shabbat* 144b) that states that one may milk an animal when the milk falls directly onto a plate of food, but not if the milk is collected on its own or falls into liquid. When inside the breast, milk is considered a part of the animal, and is therefore classified as food, like the animal is. When extracted from the breast onto food, the milk becomes a part of that food, retaining its status as food. Since part of the *melakhah* of *mefarek* involves the transition from food to liquid, which does not occur when the milk falls into food, there is no violation of *mefarek* if the milk is expressed onto food. Similarly, when the infant sucks milk from the mother directly into his mouth, the milk retains its status of food and the transition from food to liquid never occurs. This answer is rejected by most authorities because they do not consider a human to have the status of food, unlike animals.

7 *Shabbat* 95a.

8 See Rambam, *Hilkhoh Shabbat* 8:7, and *Mishnah Berurah* 328:107, for example.

*melakhot mefarek* falls under and how to define *mefarek* accordingly.

## II. What is *Mefarek*?

The Talmud states, “One who throws clay at a palm tree and knocks a date off the tree is liable for *mefarek*. R. Ashi says: This is not the usual way of *mefarek* [and one is therefore not liable].”<sup>9</sup> According to the first opinion in the *gemara*, knocking a date off of a tree is the classic case of *mefarek*.

The *Rishonim* debate the correct interpretation of this case. Rashi states that *mefarek* is a *toladah* of *dosh*, threshing. He identifies the linguistic origins of the word *mefarek* as the word *porek*, which means to unload. Rashi defines *mefarek* as “unloading” one object by removing or extracting it from another. In this case, the dates are being removed from their cluster. This is similar to *dosh*, he writes, which involves extracting the kernels of grain from their chaff and from the stalks.<sup>10</sup> Ramban concurs with this interpretation.<sup>11</sup> Other *Rishonim* quote a different version of Rashi in which he claims *mefarek* in this case is removal of the entire cluster of dates from the tree.<sup>12</sup>

Ri agrees with Rashi’s premise that *mefarek* is a *toladah* of *dosh*, but he argues with Rashi’s definition of *mefarek* and its application to this case. According to Ri, the *mefarek* in this case is not the removal of dates from the tree or the dates from their cluster. Rather, Ri claims, dates contain an outer shell that can be removed by blunt force.<sup>13</sup> *Mefarek* is the extraction of the inner portion of the date from its outer shell, which will inevitably occur when the enclosed date falls to the ground from the tree. This act is truly similar to the extraction of the grain

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<sup>9</sup> *Shabbat* 73b.

<sup>10</sup> Rashi, ad loc. See R. Dovid Ribiat, *The 39 Melochos*, p. 315.

<sup>11</sup> Ramban, ad loc.

<sup>12</sup> See Tosafot, ad loc., s.v. *ahat mishum mefarek*.

<sup>13</sup> Tosafot, ad loc., s.v. *mefarek*.

from its chaff, the classic example of *dosh*.<sup>14</sup>

Ri's opinion is supported by later scholars. For example, *Sefat Emet* questions Rashi's interpretation that removing a date from its cluster is considered *mefarek*. If that were the case, removing a grape from its cluster would also be *mefarek*, yet there is no such known prohibition. Ri's interpretation of the *gemara* therefore seems more logical.<sup>15</sup>

Rambam's view seems to correspond with that of Ri. Rambam writes that *mefarek* is a *toladah* of *dosh* and that squeezing juice out of grapes and olives is the classic case of *mefarek*.<sup>16</sup> Extracting the inner liquid from the outer solid food and peel mirrors the extraction of the date from its outer shell. Rabbeinu Tam maintains a drastically different view.<sup>17</sup> Based on a problematic Talmudic passage regarding the nature of *dosh*, Rabbeinu Tam argues that Rashi's position that *mefarek* is a *toladah* of *dosh* is untenable.<sup>18</sup> Instead, he believes that there are two types of *mefarek*. When extracting foods that grow from the ground, such as dates, *mefarek* is a *toladah* of *dosh*. When extracting foods from things that do not grow from the ground, as is the case of milking, *mefarek* is a *toladah* of *memahek*, smoothening. He explains that milking involves smoothening and softening of the breast (by emptying it of its milk).<sup>19</sup>

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14 Tosafot ad loc., s.v. *ve-ahat mishum mefarek*.

15 *Sefat Emet*, ad loc.

16 *Hilkhot Shabbat* 21:12.

17 Tosafot, *Shabbat* 73b, s.v. *mefarek*, and *Sefer Ha-Yashar*, *Ketuvot* 60a, also quoted in Rashba, *Shabbat* 75a, s.v. *holev*.

18 The *gemara* in *Shabbat* 75a states that one is only liable for *dosh* when the threshing is performed on things that grow from the ground. Since it is known that one who milks animals is liable because of *mefarek* and animals do not grow from the ground, Rabbeinu Tam maintained that *mefarek* cannot possibly be a *toladah* of *dosh*. See text below for a discussion of this *gemara*.

19 In turn, Ri argues that Rabbeinu Tam's position is untenable based on an apparent contradiction with *Shabbat* 144b, which states that one may squeeze milk from an animal onto a plate of solid food, but not into a pot that contains liquid. Ri points out that according to Rabbeinu Tam's definition of *mefarek*, there should be no such distinction, as either way one

There are two other views quoted by *Rishonim* that also define *mefarek* as a *melakhah* other than *dosh*. Rashba quotes a view that *mefarek* is a *toladah* of *gozez*, shearing.<sup>20</sup> Rashi cites another opinion that *mefarek* is a *toladah* of *kotzer*, reaping.<sup>21</sup> These opinions were not accepted by any later authorities. All late *Rishonim* and modern authorities accept the majority opinion that *mefarek* is a *toladah* of *dosh*.<sup>22</sup>

There is one other Talmudic passage that should be noted when defining *mefarek*. The Talmud states that it is permitted to milk an animal such that the milk falls directly onto a plate of food, but it is prohibited when the milk falls directly into a pot of liquid.<sup>23</sup> The commentaries explain that in order to violate *mefarek* in the context of milking, one must extract the milk as a liquid from its original state, when it was considered solid food as a part of the animal that contained it. When an animal is milked directly onto food, the milk becomes a part of the plate of food, and thus retains its status as food. In that case, no *mefarek* has been accomplished since the milk was not extracted from its solid state into a liquid state. As Ran describes, when milk travels from food to food, it is as if one is splitting a piece of food in half, rather than extracting one part from within another. Splitting food is certainly not a violation of any *melakhah*. On the other hand, when the milk falls into a pot of liquid, the milk becomes part of that liquid and *mefarek* has been accomplished.<sup>24</sup>

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is smoothening and softening the breast. This is not a problem for Rashi because *dosh* requires a fundamental change in status of the grain. In the case of milking, one would only be liable for *mefarek* when the milk changes status from food (as part of the animal) to liquid (as part of the liquid in the pot). When squeezed onto food, the milk retains its original status of food and there would be no violation of *dosh*. See n. 6 above and text below for a discussion of this *gemara*.

20 Rashba, *Ketuvot* 60a.

21 Rashi, *Shabbat* 95a.

22 See, for example, *Mishnah Berurah* 328:107, and *The 39 Melachos*, pp. 356-7.

23 *Shabbat* 144b.

24 Ran, *Shabbat* 60a in Rif. While all *Rishonim* agree with this interpreta-

Based on this, we can define *mefarek* more precisely. *Mefarek* means to extract a substance from within another object such that one of two possible transformations occur: the substance is extracted from within a shell, and thus becomes edible, or it is transformed through the extraction from a solid food state to a liquid state.

### III. Is Milking a Biblical or Rabbinic Prohibition?

Having established that milking is an example of *mefarek*, which is a *toladah* of *dosh*, the next important question is whether milking is a *melakhah de-orayta*, a Biblical prohibition, or an *issur de-rabbanan*, a Rabbinic prohibition. Categorizing milking as an act of *mefarek* and claiming that one is liable for milking because it is an act of *mefarek*, as the *gemara* in *Shabbat* does, certainly implies that it is a Biblical prohibition. Nevertheless, there are three reasons that milking with the aid of a breast pump could potentially be considered a Rabbinic prohibition that happens to have similarities to the act of *mefarek*.

#### A. *Gidulei Karka*

First, it is possible that any form of extracting milk from a person may be considered a Rabbinic prohibition because of a specific prerequisite to the violation of *dosh*. The Talmud discusses the case of one who catches a snail on Shabbat and then

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tion, they debate whether this leniency of milking onto food applies only on Yom Tov or on Shabbat as well. *Tosafot* (*Shabbat* 144b, s.v. *holev*) applies it only to Yom Tov, as there appears to be an independent problem applying the leniency to Shabbat. Since one may not slaughter a live animal on Shabbat, the animal itself cannot have the status of food. Therefore, when one extracts the milk from this animal, he is taking food from *pesolet*, its inedible shell, which would be considered a full violation of *mefarek*. In contrast, on Yom Tov, when one may slaughter the animal to eat it, the animal has the status of food and the leniency applies. Most other *Rishonim*, however, maintain that an animal retains its status as food even on Shabbat; it is only Shabbat law that make the animal inedible on Shabbat, nothing inherent about the nature of the animal itself. Rambam (*Hilkhos Shabbat* 8:10), Ramban (*Shabbat* 144b), Rashba (*Shabbat* 144b), and Ritva (*Shabbat* 143) all apply the leniency to both Shabbat and Yom Tov.



squeezes out its blood. According to R. Yehudah, this person violates the prohibition of hunting as well as the prohibition of *dosh*. However, according to the Sages, he is only liable for the prohibition of hunting and not *dosh* because the prohibition of *dosh* only applies to things that grow from the ground (*gidulei karka*).<sup>25</sup> Since milking is analogous to squeezing the blood out of a snail, it seems that according to the Sages, milking is not a Biblical prohibition, as neither people nor animals grow from the ground. Indeed, based on this *gemara*, Rashba rules that milking is not Biblically prohibited.<sup>26</sup> Ritva also rules that milking is only Rabbinically prohibited, since people and animals do not grow from the ground.<sup>27</sup>

However, the majority of *Rishonim* disagree with Rashba and Ritva using two different arguments. One approach is to claim that the halakhic conclusion of the *gemara* follows the view of R. Yehudah, who does not require items to grow from the ground in order to be included under the prohibition of threshing. This is the view espoused by Tosafot,<sup>28</sup> as well as *Hagahot Ashri*.<sup>29</sup>

The other approach is to accept the ruling that *dosh* and all of its subcategories only apply to items that grow from the ground, but to expand the definition of “growing from the ground.” Rambam takes this approach, writing explicitly that threshing only applies to what grows from the ground while also writing that milking is Biblically prohibited as a subcategory of *dosh*.<sup>30</sup> *Maggid Mishnah* explains that Rambam maintains that animals, and presumably people, can be considered things that grow from the ground.<sup>31</sup> He notes that the Talmud sometimes includes people and animals with organisms that

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25 *Shabbat* 75a.

26 Rashba, *Shabbat* 95a, s.v. *holev hayav*.

27 Ritva, *Ketuvot* 60a.

28 Tosafot, *Ketuvot* 60a, s.v. “*Mefarek k’le’achar yad hu*.”

29 *Hagahot Ashri*, commentary to Rosh, *Ketuvot* 60a, p. 244.

30 *Hilkhot Shabbat* 8:7.

31 *Maggid Mishnah* ad loc.

grow from the ground for technical legal purposes.<sup>32</sup> Presumably, this is because people and animals gain their sustenance from that which grows in the ground.

Whatever the reason, the accepted opinion among later authorities is clearly that milking is considered a Biblical prohibition despite the exemption of things that are not *gidulei karka*.<sup>33</sup>

### **B. Pumping is not the Normal Way to Extract Milk**

Another possible reason that using a breast pump may only be a Rabbinic prohibition is that it is not considered a normal way of extracting milk and therefore cannot be included in the Biblical prohibition. While the act of milking is generally considered a Biblical prohibition, it is possible that the specific act of milking with the help of a pump is not.

The Talmud discusses the case of an ill person whose only known cure is to drink goat's milk, concluding that such a person is able to nurse directly from a goat on Shabbat, as this is not considered the normal way of obtaining milk from an animal.<sup>34</sup> Tosafot clarify that the case here refers to a person with a non-life-threatening illness (*holeh she-ein bo sakanah*). Although milking is a Biblical prohibition, extracting the milk in an unusual way is only a Rabbinic prohibition, and a sick individual is exempted from this Rabbinic prohibition.<sup>35</sup>

It follows from the logic behind this ruling that using a breast pump to extract milk from a woman should only be

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32 See, for example, *Bava Kama* 54b.

33 See, for example, *Mishnah Berurah*, *Orah Hayim* 328:107, as well as the authorities quoted in the remainder of this paper who discuss the use of pumps. See, however, *Yabia Omer*, *Orah Hayim* 5:32, who agrees with the accepted opinion is that milking is a Biblical prohibition, but uses the minority opinion of Rashba and Ritva that it is only Rabbinic as an extra reason for leniency in some cases.

34 *Ketuvot* 60a.

35 Tosafot, ad loc., s.v. "*Goneyach yonek chalav b'shabbat*." Performing any Biblical prohibition in an unusual manner (*shinui*) is Rabbinically prohibited.

a Rabbinic prohibition, as this is not the usual way of extracting milk from a woman. Animals are typically milked, while women typically nurse. If nursing from a goat is only a Rabbinic prohibition due to the unusual method, then use of a breast pump should also be a Rabbinic prohibition due to the unusual method. *Tosefet Shabbat* suggests this line of reasoning to render use of a pump a Rabbinic prohibition (although he is uncomfortable ruling this way practically).<sup>36</sup>

There are several difficulties with this approach. First, this particular Talmudic passage, as we have explained it, is legally problematic, as it seems to permit a sick person with a non-life-threatening illness to violate the Biblical prohibition of milking by rendering it a Rabbinic-level violation because it is done in an unusual manner (*shinui*). However, most modern authorities permit ill individuals to violate only Rabbinic prohibitions that are performed in an unusual manner.<sup>37</sup> Accordingly, either this passage follows the opinion that milking is always only a Rabbinic prohibition<sup>38</sup> or this passage is of the opinion that sick people may violate even Biblical prohibitions when performed in an unusual manner.<sup>39</sup> If either of these are true, this passage cannot be used a proof that use of a pump should be a Rabbinic violation only, as the passage does not represent the opinions that were accepted as *halakhah*.<sup>40</sup>

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36 *Tosefet Shabbat, Orach Hayim 328:59*

37 See section IV below for a more detailed treatment of what may be done for ill individuals on Shabbat.

38 See Ritva, *Ketuvot* 60a.

39 As noted above, most authorities disagree with Ritva and maintain that milking is a Biblical prohibition. Nevertheless, not all agree that Rabbinic prohibitions must be done in an unusual manner in order to permit them for a sick person. Rambam, for example, maintains that milking is a Biblical prohibition because people and animals are legally considered to grow from the ground. He also rules that Rabbinic prohibitions may be violated for a sick person without a need to perform them in an unusual manner.

40 *Shulhan Arukh (Orach Hayim 328:33)* notably does accept this passage allowing nursing from a goat on Shabbat. However, he also rules (*Orach Hayim 328:17*) that Rabbinic violations performed for an ill person on Shabbat should be done with a *shinui*. This appears to be a contradiction in the rul-

Furthermore, another Talmudic passage seems to contradict the conclusion that a sick person may nurse directly from an animal. In this passage, the Talmud notes an ancient practice whereby people in distress would nurse from kosher animals on Yom Tov, but not on Shabbat.<sup>41</sup> The fact that this was not done on Shabbat contradicts the above passage in which an ill person was permitted to nurse from a goat even on Shabbat. Given this contradiction, why should we rule leniently based on the first passage rather than ruling stringently based on this second?

The *Rishonim* resolved the contradiction between these two passages in a number of ways. Tosafot explain that the second passage refers to a person in distress due to hunger, rather than a case of illness. Therefore, nursing from the animal was permitted on Yom Tov only, but not on Shabbat. The first passage refers to an ill person who needs the goat's milk for his treatment, and thus nursing is permitted on Shabbat as well.<sup>42</sup> *Tur* also cites this explanation.<sup>43</sup>

Ramban offers a second possibility. He writes that the first passage permits nursing from the goat on Shabbat because if this is not permitted and the ill man's condition is left untreated, he will eventually become critically ill. Even though he will not necessarily become dangerously ill on Shabbat itself, the fact that the natural progression of his illness will lead to this eventual conclusion is sufficient to permit violation of this

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ings of *Shulhan Arukh* that was not discussed by any of the traditional commentaries on *Shulhan Arukh* to the best of my knowledge. *Mishnah Berurah* (*Orah Hayim* 328:107) seems to have picked up on this difficulty and offers an innovative explanation of this passage. He writes that this particular case is an exception to the rule because the treatment for this person is to drink directly from the goat. That being the case, there is no need to perform this act in an unusual manner. Perhaps *Shulhan Arukh* rules that ideally, one should perform Rabbinic prohibitions with a *shinui* or through the work of a non-Jew, but when this is not possible, the Rabbinic prohibition can be violated normally when necessary.

41 *Yevamot* 114a.

42 Tosafot, *Ketuvot* 60a, s.v. "Goneyach yonek chalav b'shabbat"

43 *Tur*, *Orah Hayim* 328:33.

Biblical prohibition on Shabbat, as it is done in an unusual manner. In contrast, the second passage prohibits nursing from the animal on Shabbat because the man in that case did not have an illness that would progress in this same way.<sup>44</sup>

The third approach to resolving the contradiction between the two passages is to simply argue that the two passages disagree with each other. This is the approach of Ri.<sup>45</sup> In a similar manner, Ritva suggests that the first passage may follow the opinion that milking is only a Rabbinic prohibition and thus permits nursing from the goat, while the second passage follows the opinion that milking is a Biblical prohibition and therefore prohibits doing so.<sup>46</sup>

The application of these contradictory passages to the use of breast pumps on Shabbat depends on how the contradiction is resolved. If we accept the approach of Tosafot and *Tur* that both passages agree that an ill person (as opposed to a hungry person) can extract milk in an unusual manner, perhaps there is room to be lenient in the case of the use of breast pumps as well. However, if the approach of Ramban is accepted and permission is only granted when the situation may become critical in the future, there is less room for leniency with regard to breast pumps.<sup>47</sup> If the third approach is accepted and the two passages are deemed contradictory, it is difficult to determine how to apply these passages to our case.

In the end, this entire discussion is likely moot. *Shevet Ha-Levi* argues quite convincingly against *Tosefet Shabbat* that use of a pump is not unusual at all. He first notes that most later authorities maintain that extracting milk from a woman with a pump is not considered sufficiently unusual to prevent

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44 Ramban, *Ketuvot* 60a.

45 Quoted in Tosafot, *Ketuvot* 60a, s.v. "Goneyach yonek chalav b'shabbat."

46 Ritva, *Ketuvot* 60a.

47 One might argue that there is still room for leniency according to this view, as the baby's life will surely be endangered if he never drinks any milk. On the other hand, since the baby can attain sustenance from formula without nursing, even on Shabbat itself, the leniency may not apply. See section V below.

it from being a Biblical prohibition. Second, he argues that nowadays, the use of breast pumps is so commonplace that even *Tosefet Shabbat* would likely agree that this can no longer be considered unusual.<sup>48</sup> This argument, besides for being quite rational, is accepted by most later authorities.<sup>49</sup> Therefore, extracting milk with a breast pump should still be considered a Biblical prohibition, despite the implications of the *Tosefet Shabbat*.

### C. Grama

There is a final reason that milking with an electric breast pump may be considered only a Rabbinic prohibition. Although one might intuit that adding the use of electricity to what is already a Biblical prohibition of milking would only increase the severity of the prohibition, it may actually make the activity less problematic. This is due to the concept of *grama*, an indirect act of *melakhah* in which one does not violate the prohibition directly, but rather creates a chain reaction in which the *melakhah* is completed on its own, either after some delay or via a secondary force. While expressing milk by hand or using a manual pump remain Biblical prohibitions, as has been shown, it is possible that use of an electric pump is not a direct act of *melakhah*, as the user merely sets everything in place while the electric power of the machine does the actual milking. It is thus possible to argue that use of an electric pump should be considered *grama*.<sup>50</sup> If this is true, it would render

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48 *Shevet Ha-Levi* 6:30.

49 See, for example, *Sha'ar Ha-Tziyun*, *Orah Hayim* 328:81, who rejects the argument of *Tosefet Shabbat*. See also the authorities discussed below in section V, who do not use this as a reason for leniency.

50 In a surprising responsum, *Noda Be-Yehudah* (*Mahadura Kama*, *Yoreh De'ah* 39, "afilu") writes that if a non-Jew draws wine from a bottle using the suction force of a straw, he does cause this wine to become prohibited. *Noda Be-Yehudah* considers the drawing of the wine "ko'ah koho," two steps removed from the direct action of the non-Jew, or perhaps entirely unrelated to the sucking of the non-Jew. In reality, the person merely sucks air into the straw; it is the pressure vacuum that causes the fluid to rise. According to this logic, it seems possible that the drawing of milk using even a manual

use of an electric breast pump a Rabbinic, rather than Biblical, prohibition.

While the Talmud unequivocally states that only a full act of *melakhah* is prohibited and that *grama* is Biblically permitted,<sup>51</sup> what precisely constitutes *grama* as opposed to a direct act of *melakhah* is less clear. The Talmud's classic example of *grama* involves the extinguishing of a fire by surrounding the flame with jugs of water. As the flame expands towards the jugs, the jugs will break, allowing the water to spill out and extinguish the flame. While a person placed these jugs around the fire, the delay between his placement and the extinguishing of the flame, combined with the fact that he did not directly pour the water on the fire, make this a case of *grama* rather than a full act of *melakhah*. On the other hand, the Talmud writes that when a person throws a pile of grain into the wind, allowing the *melakhah* of winnowing to occur as a result of the wind, he is liable for a full act of *melakhah*.<sup>52</sup> The person is held accountable because the *melakhah* occurred without delay

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pump, which may be analogous to sucking liquid with a straw, would be permitted on a Biblical level.

R. Shlomo Zalman Auerbach, in his lengthy discussion of milk pumps found in *Minhat Shlomo* 31 (second question), suggests a theoretical argument that would allow more room for leniency in the case of a manual pump than an automatic pump. In an electric pump, the entire function of the pump must be attributed to the one who turned it on and placed it on the body, as will be explained below. In a manual pump, however, this is not the case. When using a manual pump, the person merely creates an air vacuum, while the extraction of milk occurs by the release of this vacuum. The release of the vacuum may be considered a secondary force not connected to the creation of the vacuum. According to this logic, while use of electric pumps is a Biblical prohibition, the use of manual pumps may not be.

However, R. Auerbach himself is not comfortable with this argument, since the release of the vacuum truly is a direct result of the creation of the vacuum. Furthermore, since the pump begins to extract the milk immediately upon release of the vacuum, rather than only once the air pressure has fully returned back to normal, it is difficult to say that this extraction of milk should not be attributed to the one who created the air vacuum.

51 *Shabbat* 120.

52 *Bava Kama* 60a.

after the grain was thrown. Furthermore, although the wind is a secondary force, use of the wind is the normal way of accomplishing the *melakhah* of winnowing.

While these cases are classic examples, there are many other cases that do not fit into a box of *grama* or a full act of *melakhah* so clearly. Some involve a delay in completion of the *melakhah* but do not involve a secondary force; others involve a secondary force but not a delay. Some cases involve either one of these but are not the typical way of performing that *melakhah*. Needless to say, the application of the principles of *grama* to situations that are not explicitly discussed in the Talmud is a complicated undertaking. Any action that can potentially be considered *grama* needs to be compared and contrasted with these two prototypical cases, as well as many others discussed in the Talmud. The presence of a delay between the human action and the completion of *melakhah* needs to be evaluated, the assistance of secondary forces needs to be analyzed, the case at hand must be compared to the classical way of performing that particular *melakhah*, and any possible exceptional factors about a particular case and a particular *melakhah* must be brought into the discussion as well.

In attempting to apply the principles of *grama* to the use of an electric pump, this case must be compared to the gamut of cases of *grama* in the Talmud. It is immediately apparent that use of an electric pump is not entirely comparable to the Talmud's classic case of *grama*, the placement of water-filled containers around a fire. In that case, while placement of the containers indirectly leads to the inevitable extinguishing of the fire, there is no contiguity between placement of the containers and the *melakhah* of extinguishing. In contrast, there is contiguity between the placement of a pump on the breast to generation of the suction force to extraction of the milk.

However, the case of the electric pump presents a number of questions regarding the possibility of classifying it as *grama*. First, there is a time delay between setting up the pump



and the extraction of the milk. Is this reason to consider use of the electric pump to be a case of *grama*? Furthermore, the extraction of milk is only an indirect result of setting up the breast pump, as it actually occurs through a secondary source, the suction force. When a *melakhah* occurs as an indirect result of human action but contiguous to the human action, as in our case, is the *melakhah* attributable to the individual who set up the continuous process?

We must also consider the fact that the electric pump appears to be comparable to a wide array of cases that are considered *grama* due to a secondary force. Finally, we must take note of the fact that even acts that would otherwise be classified as *grama* may still be considered a full violation of *melakhah* in certain circumstances.

#### *a. Timing of the Act and Time Delay*

The classic discussion among modern *posekim* of cases in which a continuous process is set up such that a *melakhah* will be performed after a delay regards the use of timers on Shabbat. Both *Shevitat Ha-Shabbat*<sup>53</sup> and R. Ovadia Yosef<sup>54</sup> argue for the permissibility of timers on Shabbat. They state that a process set up before Shabbat that leads to the performance of a *melakhah* on Shabbat such that the *melakhah* is a continuation of that initial process is considered *grama*. In explaining this ruling, they suggest a legal mechanism by which *grama* turns a prohibited *melakhah* into a permissible action. When a person sets up a continuous process, the inevitable or automatic results of that process can be considered as if they were all performed by that person at the time he set up the process. Therefore, although the actual *melakhah* will occur in full on Shabbat, since the human action that set up the timer occurred before Shabbat began, it is legally considered as if its effects occurred before Shabbat as well. It is as though no violation of

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53 *Shevitat Ha-Shabbat*, *Zorei'a*, end of 9.

54 *Yabia Omer*, *Orah Hayim* 3:17:9.

Shabbat occurred.<sup>55</sup>

The timing of the initiation of the process is crucial to this explanation. Were the timer (or any process) to be set up on Shabbat itself, it would be fully prohibited. Applying this to our case, these authorities would likely permit use of a breast pump on Shabbat if the pump were to be set up before Shabbat.

Unfortunately, this leniency is not very practical. Unlike a timer, which can easily be set before Shabbat, the pump needs to be applied or attached to the mother's body in order to initiate the milking process, and this is most certainly done on

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55 This conclusion is not without debate. Both R. Yosef and *Shevitat Ha-Shabbat* cite dissenting authorities who do not permit use of timers on Shabbat. Apparently, these authorities have a different understanding of the legal mechanism of *grama*. They maintain that the full results of a process should be attributed to the one who set it up, but at the time when performance of the actual *melakhah* begins. Thus, the effects of the timer cannot be attributed to the setting up of the timer before Shabbat, which did not involve *melakhah*. Instead, the effects of the timer are attributed to the moment when the timer first caused a *melakhah* to begin to occur. For example, when a flame is ignited as a result of a timer, it is considered as if the one who set up the timer ignited that flame on Shabbat. The burning of that flame and all of its effects will be attributed to the first moment that the flame became ignited, as that is the beginning of the *melakhah*. According to these authorities, only if the flame were ignited before Shabbat would its later effects be considered *grama*, as they would be attributed to the moment of ignition before Shabbat.

This debate among the authorities stems from differing understandings of *Nimukei Yosef's* explanation (*Bava Kama* 22) of why it is permitted to light candles before Shabbat even though they continue to burn on Shabbat itself. Typically, the burning of a continuous flame remains the responsibility of the one who kindled it until it is extinguished, based on the principle of "*eisho mishum hetzav*" – the liability of the kindler for the flame is analogous to the liability of the shooter for the arrow he shot (see text below). In this case, however, the principle of *grama* on Shabbat allows for the entire course of the burning flame to be encapsulated in the initial act of kindling, which occurs before Shabbat. R. Yosef maintains that this application of *grama* extends to any process that is set up before Shabbat. The dissenting *posekim* argue that the case of lighting candles is only *grama* because the *melakhah* of kindling itself occurred before Shabbat. This should not be extended to use of a timer, in which case the *melakhah* does not occur until Shabbat itself.

Shabbat itself. While a time delay on its own can be of help in making an act *grama*, this is only when the time delay extends to before Shabbat begins. If use of a breast pump is to be considered *grama*, it must be due to other factors.

***b. Is an Indirect Violation Attributed to its Performer?***

The next factor to consider is the fact that the extraction of milk is not directly performed by the one who sets up the pump, and perhaps this means that the *melakhah* should therefore not be attributed to the person. The key question here is the applicability of a principle borrowed from the laws of damages, known as "*eisho mishum hetzav*." This means that the liability of the kindler of a flame is analogous to the liability of the shooter for the arrow that he shot. In the context of the laws of Shabbat, *eisho mishum hetzav* would mean that when a person performs an action that initiates a continuous process whose natural course inevitably leads to the violation of a *melakhah*, the violation of that *melakhah* is attributed to the one who initiated the process, even though technically he himself did not directly violate the *melakhah*. Can, in fact, the principle of *eisho mishum hetzav* be applied to laws of Shabbat? If it is applied, the *melakhah* is attributed to the person who initiated the process. If it cannot be applied, the indirect violation of the *melakhah* is considered *grama*.

One classical source that informs this debate is a discussion found in Tosafot, who discuss several cases of capital offenses in which an accused murderer's culpability is dependent upon whether or not the principle of *eisho mishum hetzav* is applied. Tosafot offer both the opinion that the principle can also be applied to capital law as well as the opinion that its application is limited to property law alone.<sup>56</sup> Maharam Shick extends this discussion to the laws of Shabbat as well, claiming that the two views presented by Tosafot actually determine whether indirect violations of *melakhah* on Shabbat are con-

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<sup>56</sup> Tosafot, *Sanhedrin* 77a, s.v. *sof hama*.

sidered *grama* or *eisho mishum hetzav*. According to the second view presented by Tosafot, *eisho mishum hetzav* is only applied to cases of monetary damages and not to any other area of Jewish law. Since this principle cannot be applied to indirect violations of *melakhah* on Shabbat, such acts remain *grama* and one is not liable for them on a Biblical level. However, according to the first view of Tosafot, the principle of *eisho mishum hetzav* is extended beyond the laws of monetary damages, thus leaving open the possibility that acts of indirect Shabbat violation can create full liability.<sup>57</sup>

Maharam Shick himself rules according to the second view of Tosafot, creating significant room for leniency; without the principle of *eisho mishum hetzav*, many indirect violations of *melakhah* on Shabbat become permissible. For example, he rules that setting up a timer to turn on a light on Shabbat is only *grama*, even when the system is set up on Shabbat itself (while R. Yosef and *Shevitat Shabbat* allowed timers to be set up only before Shabbat).

However, the expansion of this leniency to include the use of breast pumps is less clear. Maharam Shick explains his understanding of the legal mechanism by which *grama* turns a prohibited *melakhah* into a permissible action, arguing that the system that acts as the intermediary between the performed act and the resulting *melakhah* functions as a *hefsek*, a separation that blocks the perpetrator's action from being connected to the *melakhah*. This break in the link between the person's action and the beginning of the violation of *melakhah* is enough to absolve him of Biblical liability.<sup>58</sup> It is not clear whether such

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57 Maharam Shick, *ibid*.

58 This is based on a ruling of Rama (*Orah Hayim* 265:4), who writes that while one may not place a container of water underneath a candle to extinguish the sparks, one may pour water underneath the oil in the container that will be lit. Although the presence of the water will cause the candle to be extinguished sooner, the layer of oil separating between the water and the flame makes it as though the water is not in existence with regards to the flame at the time that the flame is lit.

*Teshuvot Har Tzvi* (*Orah Hayim, Hilkhos Shabbat* 198) compares and con-

a break exists between the setting up of a breast pump and the suction force that extracts the milk from the breast. The apparatus that is placed on the breast is the same apparatus that performs the *melakhah*, without an intermediary piece and without a time delay.

Perhaps for this reason, there is no authority, to the best of my knowledge, who uses the lack of applicability of *eisho mishum hetzav* as a reason to be lenient regarding use of electric breast pumps on Shabbat. Moreover, it is clear that many *posekim* do not accept the view of Maharam Shick, as they do not permit one to set up a timer before Shabbat, let alone on Shabbat itself.

As will be shown in the next section, other *posekim* agree with Maharam Shick that the principle of *eisho mishum hetzav* should not be applied to Shabbat. However, this does not necessarily mean that they consider use of a breast pump *grama*, as this case must still be compared and contrasted to other known cases in order to determine whether it is indirect enough to qualify as *grama*.

### *c. Secondary Forces: Which Cases are Considered Grama?*

Prominent among the *posekim* who support the view that the principle of *eisho mishum hetzav* should not be applied to Shabbat law is R. Shlomo Zalman Auerbach.<sup>59</sup> Because he maintains that this principle does not apply, he must determine the criteria by which certain actions are considered *grama*, while others remain a *ma'aseh be-yadayim*, a full and direct act of *melakhah*.

In performing this analysis, many test cases are utilized, but two rulings of *Magen Avraham* appear to be most relevant

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trasts the use of an electric pump for cows on Shabbat to the case of one who ties down a person or animal in a place where the sun will cause extreme heat, thereby killing the person or animal. In the latter case, *grama* is classically not applicable and the perpetrator is culpable. He uses the language of *hefsek* as well when explaining why the electric pump may be *grama*.

<sup>59</sup> *Minhat Shlomo, Mahadura Tinyana*, 31 section A.

and fundamental. *Magen Avraham* rules that when a person places a leech on himself so that the leech will draw blood from his body, he is in full violation of the *melakhah* of *mefarek*, even though it is the leech that draws the blood and the person merely set the leech in place. *Magen Avraham* rules this way because he maintains that although it is the leech that extracts the blood, when a person holds the device that performs an action in his hand, it is as if the person himself is performing the action.<sup>60</sup> *Magen Avraham* clearly identifies this case as a *ma'aseh be-yadayim*, and not *grama*, even though it is the leech that technically does the sucking. This is, in fact, the logic that attributes culpability to a person for any violation of *melakhah* that he accomplishes directly through the use of a machine.

The second ruling of *Magen Avraham* regards placement of raw wheat into an automatic grinder. *Magen Avraham* writes that one who places wheat into such a grinder on Shabbat is not liable on a Biblical level unless he grinds it himself by hand.<sup>61</sup> Here, *Magen Avraham* seems to imply that the grinding of the wheat by an automatic wheat grinder is considered *grama* for the one who placed the wheat inside.

R. Shlomo Zalman Auerbach relies heavily on these two cases in his analysis of the use of electric breast pumps.<sup>62</sup> He maintains that of all possibly comparable cases, the use of

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<sup>60</sup> *Magen Avraham, Orach Hayim* 328:53. He explains that this is why the Talmud equates one who sinks a snake's teeth into a person's body (causing the snake to bite and release its poison) with a person who stabs another with a knife. Although the snake is the one biting and releasing the poison, since someone is holding the snake in his hands, it is as if that person is directly causing the biting and poisoning to occur. Other authorities (such as the *Even Ha-Ozer*, discussed below) disagree with this connection and argue that sinking a snake's teeth into a person or stabbing him are acts of more direct human cause than simply placing a leech on one's body and allowing it to initiate its own sucking.

<sup>61</sup> *Magen Avraham, Orach Hayim* 252:20.

<sup>62</sup> *Minhat Shlomo, Mahadura Tinyana*, 31 section B. R. Auerbach's responsum deals with the case of electric cow pumps, specifically for mass production of milk by farmers. While the scenario is different, in terms of the *grama* question, the analysis is the same.

an electric breast pump is most similar to placement of a leech on one's body to draw blood. In both situations, the extraction of fluid begins immediately on placement, but it is a secondary force that accomplishes the actual extraction. The role of the human in each case is only placement of the object on the body, but that placement is contiguous with the extraction of fluid. Since *Magen Avraham* rules that placement of a leech on one's body constitutes a *ma'aseh be-yadayim*, R. Auerbach rules that use of an electric breast pump is a full violation of *melakhah* on a Biblical level, and not *grama*.

Furthermore, R. Auerbach argues that any *melakhah* performed in its typical manner is considered a *ma'aseh be-yadayim*, even if it is completed by a secondary force.<sup>63</sup> Therefore, since use of a pump is a typical way of milking nowadays, this is considered a *ma'aseh be-yadayim* even though it is the electric force of the pump extracting the milk and not the person. R. Auerbach espouses this principle so strongly that he believes it is impossible that *Magen Avraham* actually considered placement of wheat into the automatic wheat grinder to be merely *grama*. Since this is the normal way of accomplishing the *melakhah* of grinding, it must be considered a *ma'aseh be-yadayim*. Rather, he suggests, *Magen Avraham* was referring to a case in which the wheat was placed into a primary holding place that would later automatically empty into the grinder.<sup>64</sup>

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63 Although R. Auerbach does not argue explicitly that use of a leech is a typical way of extracting blood, he does write that because it is the nature of the leech to suck blood once it is placed on the body, the sucking can be attributed to the person who did the placement. It seems that the normal manner of doing a *melakhah* is not a prerequisite to be considered a *ma'aseh be-yadayim*, but it is sufficient to lead to that determination. In other words, if a *melakhah* is done in a normal manner or if a device is used in such a way that the resulting *melakhah* is the natural consequence of the device's use or placement, the violation of the *melakhah* is attributed to the initiator as a *ma'aseh be-yadayim*.

64 R. Auerbach presents a second possibility to explain *Magen Avraham's* view. Perhaps because the grinder was automatically running and already turned on, the placement of wheat did not change anything about the function of the grinder. The *melakhah* is the act of grinding by the grinder, not

Putting all of this together, R. Auerbach maintains that when a person directly operates a machine or any other object that performs a *melakhah* for him, assuming the use of this device is a normal method of performing this *melakhah*, the act of *melakhah* is fully attributed to the person operating the device. As Ramban writes regarding one who uses an animal to plow a field, "The animal is like a tool in the hands of the worker."<sup>65</sup> Similarly, the leech or the pump is merely a tool in the hand of the one who extracts fluid.

Although considering use of an electric breast pump a true *ma'aseh be-yadayim*, as if the person himself is doing the milking, R. Auerbach presents two possible ways to be lenient. The first is that if a pump were designed such that it automatically breaks its attachment to the body and then reattaches itself between each pump, this might break the continuity between one's placement of the pump on the body and the automatic pumping, rendering the pumping *grama* and no longer a *ma'aseh be-yadayim*. The second method is to attach the pump to the body before it is turned on and have it set up to be turned on by a timer. Assuming *eisho mishum hetzav* does not apply in this case, the pumping of the machine is one step further removed from the person's placement of the pump on the body. Therefore, this too may be considered only *grama*. In the end, R. Auerbach is not comfortable relying on either of these leniencies as a practical ruling, as the case involves possible violation of Shabbat, which he does not take lightly.

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the passive result of making ground wheat. Since nothing about the act of grinding changed when wheat was placed inside the grinder, it is not considered a full act of *melakhah*. The leech, on the other hand, did not begin sucking until it was placed on the body, so this is a full act of *melakhah*. R. Auerbach suggests that based on this approach, perhaps there is room to be lenient regarding use of a breast pump if it is already pumping before it is placed on the body and nothing about its activity changes when placed on the body. This is comparable to the case of the automatic grinder and not that of the leech. However, R. Auerbach cautions that he would not rule leniently practically based on this theoretical understanding of *Magen Avraham*.

<sup>65</sup> Ramban, *Shabbat* 133.



It should be noted that *Hazon Ish* wrote a responsum on this topic as well and ruled similarly that placement of a functioning pump onto the body does not qualify as *grama*, but is rather a full act of *melakhah*.<sup>66</sup>

***d. Would-be Grama Cases that are Prohibited***

We have already seen several reasons to dismiss the suggestion that use of an electric breast pump may only be considered *grama*. We will now see that even if one does not accept any of the above arguments and maintains that use of a pump could qualify as *grama*, there is one last factor that may still prevent a *posek* from ruling leniently.

According to some scholars, some actions that may otherwise be considered *grama*, and thus not Biblically prohibited on Shabbat, retain their status as Biblical prohibitions due to the unique Shabbat principle of “*melekheth mahshevet*,” literally “a *melakhah* of thought-out intent.” The meaning of this principle is that the Torah specifically prohibits acts of *melakhah* that are goal-oriented on Shabbat. While in other areas of Jewish law, our focus tends more towards the physical action, in the laws of Shabbat, the condition of *melekheth mahshevet* shifts our focus towards whether or not a person accomplishes the intended result of his actions.

Intriguingly, this principle creates both a stringency and a leniency. The leniency is that one is not Biblically liable for an act of *melakhah* that was mindless, through which a person did not accomplish any desired outcome. The stringency is that if a person does accomplish a certain desired outcome that is a result of a *melakhah*, he may be liable for violation of that *melakhah* even if he did not perform the full act of *melakhah* directly. In other words, when an indirect act of *melakhah* can be considered a *melekheth mahshevet*, the liability of a full violation of *melakhah* can be attributed to its performer. When the indirect act does not qualify as *melekheth mahshevet*, it will default to *grama*.

Given that this is the case, the question that must be

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<sup>66</sup> *Sefer Hazon Ish, Orach Hayim 38:4.*

addressed is where to draw the line. At what point does an action that would otherwise be considered *grama* become a *melekheth mahshevet*?

*Torat Ha-Yoledet* lays out this tension explicitly, with specific application to electric breast pumps.<sup>67</sup> *Torat Ha-Yoledet* writes that at first glance, it seems that use of these pumps is mere *grama* due to the indirect nature of the violation of *melakhah*. After all, the woman merely turns the machine on before shabbat, which creates a pressure vacuum, and it is this vacuum, not the direct force of the woman, that actually draws out the milk. However, he continues, this ruling is not so simple, as it must first be determined whether this action falls into the category of *melekheth mahshevet*.

In order to answer this question, *Torat Ha-Yoledet* cites a debate among authorities pertaining to the applicability of *melekheth mahshevet* to indirect acts that lead to *melakhah*. Once again, the aforementioned rulings of *Magen Avraham* regarding the leech and the wheat grinder have a prominent place in this analysis. According to *Magen Avraham*, who considered placement of wheat into an automatic grinder merely *grama*, our focus remains on the directness of the physical action and how it leads to completion of the *melakhah*.<sup>68</sup> Acts that are indirect remain *grama* even if they lead to an intentional violation of *melakhah*. However, according to *Even Ha-Ozer*, who prohibits placement of wheat into an automatic grinder, *melekheth mahshevet* reigns supreme in the laws of Shabbat. In his view, the determining factor for liability in performance of a *melakhah* is whether one accomplished his intended goal of performing the *melakhah*.<sup>69</sup> *Torat Ha-Yoledet* submits that most authorities

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<sup>67</sup> *Torat Ha-Yoledet*, ch. 41, n. 7.

<sup>68</sup> Although *Magen Avraham* prohibited placing a leech on one's body to draw blood, as noted above, that was only due to his application of the rule that the actions of a device held in one's hand are attributed to the person himself and his analogy to other cases in which this principle is applied. Were it not for this, *Magen Avraham* would not have prohibited this act because of *melekheth mahshevet*, but would have considered it *grama*.

<sup>69</sup> *Even Ha-Ozer*, commentary to shulchan aruch o"c siman 328. It should

rule according to *Even Ha-Ozer*. Therefore, although use of an electric breast pump may be an indirect way of extracting milk, the principle of *melekheth mahshevet* turns it into a full violation of *melakhah*, as the woman fulfills her intent of extracting her milk in this way.

This conflict between *grama* and *melekheth mahshevet* is also discussed by R. Dov Rosenthal in his *Divrei Hefetz*.<sup>70</sup> He suggests that the definition of *melekheth mahshevet* must be reconsidered, maintaining that *melekheth mahshevet* simply refers to an act of *melakhah* performed in its normal manner. For *Divrei Hefetz*, the question of a person's liability for performing a *melakhah* is not about how direct his involvement is in the act of violation of that *melakhah*, nor is it about his intentions and whether or not they were achieved. Instead, what is important is whether or not he caused the *melakhah* to occur in its typical manner. Therefore, for example, he argues that one who places a leech on himself so that it will draw blood from his body should not be liable for the *melakhah* on a Biblical level because placing a leech on one's body is not the usual fashion of drawing blood, and that makes it less of a *melekheth mahshevet*. On the other hand, if a person sends out a group of dogs to hunt on his behalf, he is liable for hunting, even though it is the dogs that technically perform the *melakhah*. This is because it is typical for a person to use dogs as hunters, making it more of a *melekheth mahshevet*.

Applying the logic of *Divrei Hefetz* to our discussion, it would seem then that whether or not use of an electric breast pump is considered *grama* or a full violation of *melakhah* depends on whether it is considered the typical manner of extracting milk from a woman. As discussed above, the opinion of the *Shevet Ha-Levi* that nowadays we must consider electric

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be noted that *Torat Ha-Yoledet* defines *melekheth mahshevet* for the *Even Ha-Ozer* as the common way of performing a *melakhah*. However, this reading of the *Even Ha-Ozer* is difficult, as he explicitly writes that what defines *melekheth mahshevet* is the accomplishment of one's intent.

<sup>70</sup> *Divrei Hefetz* 26.

pumps a typical manner of milk extraction likely prevails.

#### **D. Summary**

We have shown that any attempt to render use of a breast pump *grama* is not accepted by the majority of authorities. Use of a breast pump is likely prohibited because of *eisho mishum hetzav* for those authorities who apply this principle to the laws of Shabbat. For those who do not, it is still Biblically prohibited as either a *melekheth mahshevet*, as use of a hand-held machine that accomplishes a *melakhah*, or because the set up for the *melakhah* occurs on Shabbat.

We have investigated three possible ways in which use of these pumps could be considered a Rabbinic rather than Biblical prohibition – namely, that the Biblical prohibition may apply only to things that grow from the ground, that use of these pumps may be an atypical way of extracting milk, and that use of these pumps may be *grama* rather than a full act of *melakhah* – and we have concluded in each case that the arguments to render this a Rabbinic prohibition are insufficient. Thus, use of an electric breast pump should be considered a Biblical prohibition on Shabbat.

What is the significance of the conclusion that use of an electric pump is a Biblical prohibition? Why does it matter whether the prohibition is Biblical or Rabbinic, and what are the implications of this in Jewish law?

### **IV. Violation of Shabbat for the Ill**

Halakhah permits certain acts that would normally be prohibited on Shabbat to be performed for the sake of a sick person. The leniency of the law in this regard is dependent upon the severity of the illness. To this end, there are two major categories of illness in Jewish law: life-threatening and non-life-threatening.

#### **A. The Critically Ill Patient**

It is widely known that Shabbat may be violated, even

in the most severe way, in order to save the life of a dangerously ill person (*holeh she-yesh bo sakanah*).<sup>71</sup> What is less clear, however, is whether one is permitted to violate a Biblical Shabbat prohibition for the sake of a dangerously ill person when the violation will not directly save the person's life. In other words, is one permitted to violate Shabbat on a Biblical level for a dangerously ill person simply because of that person's status as dangerously ill, even when avoidance of the prohibited act would not necessarily lead to the death or deterioration of that person?

The Talmud states that that any violation necessary for a non-dangerously ill person (*holeh she-ein bo sakanah*) can be performed by a non-Jew on Shabbat.<sup>72</sup> Rashi defines "non-dangerously ill" as any situation in which the avoidance of the particular violation will not endanger the life of the person, even if such a person is severely ill.<sup>73</sup> According to Rashi, one would not be permitted to violate Shabbat on a Biblical level to fulfill a non-critical need for a critically ill person.

Rambam, however, likely disagrees with Rashi. He writes that one may make a furnace to heat the room for a woman who recently gave birth, although one may not do so for a sick person.<sup>74</sup> Rambam does not specify which type of sick person he is referring to. *Maggid Mishnah* explains that Rambam would only possibly prohibit one from making a furnace for a sick person if that person was not dangerously ill. Were his illness life-threatening, Rambam would certainly have certainly allowed heating a furnace, even though the heat from the furnace is not a critical need of the person.<sup>75</sup>

*Shulhan Arukh* rules that one may fulfill all the needs of a critically ill person on Shabbat, even when doing so involves violation of Shabbat.<sup>76</sup> *Magen Avraham* notes that it seems

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71 *Shulhan Arukh, Orach Hayim* 328:1.

72 *Shabbat* 129a.

73 Rashi ad loc., s.v. *kol she-ein bo sakanah*.

74 *Hilkhos Shabbat* 2:14.

75 *Maggid Mishnah* ad loc.

76 *Shulhan Arukh, Orach Hayim* 328:4.

that *Shulhan Arukh* follows the opinion of *Maggid Mishnah* that one may violate Shabbat even to fulfill the non-critical needs of the critically ill person.<sup>77</sup> *Mishnah Berurah*, however, contends that one should be stringent to follow the opinion of those who argue against *Shulhan Arukh* and maintain that non-critical needs should only be fulfilled by a non-Jew.<sup>78</sup> In *Bi'ur Halakhah*, he discusses this debate at length, noting that there are several *Rishonim* on each side of the debate. He concludes that it is only permitted for a Jew to violate Shabbat on a Biblical level for a critically ill person if the act of violation is at least possibly of critical importance. If it is known that the violation is for a non-critical need, it should only be performed by a non-Jew.<sup>79</sup>

As we will see, this debate is especially relevant to the use of breast pumps. In situations in which infants are critically ill, the ability to receive mother's milk through use of a pump may be considered a non-essential need of the infant. In that case, its permissibility would depend on this debate.

## B. The Non-Critically Ill Patient

As noted above, the Talmud states that when it comes to non-critically ill people, Shabbat should be violated for their sake by a non-Jew.<sup>80</sup> In circumstances in which a non-Jew is not readily available, however, there is some debate as to the severity of violation that would be permitted for a Jew to personally perform for such a person.<sup>81</sup>

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77 *Magen Avraham, Orach Hayim* 328:4.

78 *Mishnah Berurah* 328:14.

79 *Bi'ur Halakhah*, ad loc., "*kol she-regilin.*"

80 *Shabbat* 129a.

81 The *gemara* in *Ketuvot* 60a (discussed above, Section III-B) could be viewed as a proof that Jews may perform Rabbinic prohibitions for a non-critically ill person, since the Talmud there allows the sick individual to suck milk from the goat as part of his treatment. R. Akiva Eiger contends that the author of the passage in *Ketuvot* must be of the opinion that one only violates the *melakhah* of *dosh* on a Biblical level with an item that grows from the ground. According to that view, milking an animal would be a Rabbinic violation only, and sucking milk from an animal would then be a Rabbinic

*Rosh* poses this question in a different way. Asking a non-Jew to violate Shabbat is a Rabbinic prohibition in itself. Since we know that this is permitted for a non-critically ill person, do we say that any Rabbinic prohibition can be done by a Jew for such a person, or do we say that only the Rabbinic prohibition of asking a gentile to violate Shabbat is specifically allowed, since it does not involve any active violation by the Jewish person?<sup>82</sup>

Ran writes that for a non-critically ill person, a Jew is not even permitted to violate Shabbat on a Rabbinic level. He claims that a Jew would only be permitted to violate Shabbat on a Rabbinic level if the ill person was in danger of losing a limb.<sup>83</sup> His proof for this view is based on a Talmudic passage that states that one is not allowed to put *kehol*, eye makeup that was used for healing purposes, on the eyelid of an ill person on Shabbat.<sup>84</sup> Ran notes that placing *kehol* on one's eyelid would only be a Rabbinic prohibition, and yet it is still not permitted.

In contrast, Rashba permits Jews to perform Rabbinic prohibitions for the sake of non-critically ill people.<sup>85</sup> Rambam likely agrees.<sup>86</sup> He writes a cryptic statement that anything which does not involve *melakhah* may be done by a Jew for a non-critically ill person. *Maggid Mishnah* contends that it is known that Rambam maintains that it is permitted for a Jew to violate Rabbinic prohibitions for a non-critically ill person. Therefore, when he states that it is permitted for a Jew to fulfill the needs of the ill person that do not involve *melakhah*, it must be that he means that they do not involve Biblical *melakhah*; Rabbinic violations, however, would be permitted.<sup>87</sup> *Tur* shares this interpretation of Rambam, although he also cites Ramban, who argues that even Rabbinic prohibitions are only permitted

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violation done with a *shinui*.

82 Rosh, *Avodah Zarah* 2:10.

83 Ran, *Shabbat* 39b in Rif.

84 *Beitzah* 22a.

85 *Teshuvot Ha-Rashba* 3:272.

86 *Hilkhot Shabbat* 2:10.

87 *Maggid Mishnah* ad loc.

for a non-critically ill person when done with a *shinui*.<sup>88</sup> *Beit Yosef* argues that Rambam only intended to permit Rabbinic prohibitions that have no connection to one of the Biblical *melakhot*, such as grinding medicine. Rabbinic prohibitions that are tied to Biblical *melakhot*, however, would not be permitted even though they would only entail a Rabbinic violation.<sup>89</sup>

*Shulhan Arukh*, following the view of Ramban, rules that when the non-critically ill person is not in danger of losing a limb, a Jew should only perform Rabbinic violations with a *shinui*.<sup>90</sup> *Arukh Ha-Shulhan* concurs with this conclusion,<sup>91</sup> as does *Mishnah Berurah*.<sup>92</sup> However, Rama argues that *Maggid Mishnah's* understanding of Rambam is correct. He adds that the majority of *Rishonim* are lenient in this regard, and that it is therefore appropriate to allow a Jew to violate Rabbinic prohibitions for the sake of a non-critically ill person.<sup>93</sup>

*Shemirat Shabbat Ke-Hilkhatah* concludes that for the sake of a non-critically ill patient, one should perform Rabbinic violations with a *shinui*. However, if a *shinui* is not possible, one may perform the Rabbinic violation even without a *shinui*.<sup>94</sup>

### C. In What Category is the Baby?

The question of whether an electric pump may be used on Shabbat arises when the pump is necessary because the infant is not able to nurse directly. However, the various situations that would warrant use of a pump involve different categories of illness.

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88 *Tur, Orach Hayim* 328:17.

89 *Beit Yosef* ad loc.

90 *Shulhan Arukh, Orach Hayim* 328:17.

91 *Arukh Ha-Shulhan, Orach Hayim* 328:17.

92 *Mishnah Berurah, Orach Hayim* 328:58. It is noteworthy that *Mishnah Berurah* adds that when the non-critically ill person is an infant, a Jew may carry the milk that was prepared by a non-Jew to feed it to the baby, even though that milk is *muktzeh*.

93 *Darkhei Moshe, Orach Hayim* 328:8.

94 *Shemirat Shabbat Ke-Hilkhatah* 33:2.



A baby may be completely healthy, for example, and the reason that direct nursing on Shabbat is not possible may be that his mother is ill. Nevertheless, although technically healthy, all young children have the status of a non-life-threateningly ill person according to Halakhah.<sup>95</sup> On the other extreme, a pump may be needed because an infant was born prematurely, is being sustained by medical equipment, and has not yet developed the strength to suck on his own. Alternatively, an infant may be suffering from a debilitating disease and is unable to nurse for that reason. Such babies have the status of a dangerously ill person.

In between these two scenarios, it is possible that a pump is needed because an otherwise healthy baby has difficulty nursing. This may be due to a lack of development of the sucking reflex, lack of the necessary strength to suck, or difficulty latching. This scenario, which is likely the most common, is also the most difficult to place. It is possible that the general health of these babies means that they should only be allowed the leniencies of a non-dangerously ill person. On the other hand, one could argue that the inability to nurse directly, especially if due to weakness or lack of development of the infant, should be considered a dangerous illness in itself.<sup>96</sup>

In those situations in which the infant is considered critically ill and the use of a pump is considered a critical need of the infant, the question of whether use of a pump is a Biblical or Rabbinic violation of Shabbat is not relevant; it is permitted in either case. However, when use of the pump is not a critical need of a critically ill infant<sup>97</sup> or when the infant is not critically ill, this question is essential, as use of the pump may only be permitted if it entails a Rabbinic violation.

Most questions about use of the pump arise for non-critically ill infants, or at least infants for whom the use of the

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95 Ibid. 33:1(8).

96 Several rabbis with knowledge of this topic espoused this opinion in private email correspondence.

97 According to the majority opinion; see section IV-A above.

pump is not necessarily a critical need. Given that we have shown that use of the pump on Shabbat is considered a Biblical violation, we must investigate whether it is possible to permit use of the pump on Shabbat.

## **V. Practical Approaches of the Modern Authorities**

Despite considering the use of electric pumps to be a full Biblical prohibition, in discussing the practical question of whether or not nursing mothers can use these pumps on Shabbat, modern authorities have found creative ways to permit their use. There are two ways in which this is accomplished. The first is to argue that use of electric nursing pumps can be permitted even as a full-fledged Biblical prohibition. The authorities who espouse this surprising position are able to permit use of the pumps in their typical fashion. The second approach taken by other authorities is to permit use of the electric pumps only in a way in which the prohibition becomes merely Rabbinic. Since the infant is at least given the status of a non-dangerously ill person, one is permitted to violate Rabbinic prohibitions for its sake, especially if done in an atypical manner. In the remainder of this essay, we will present this range of approaches taken by various modern authorities.

### **A. Permission of the Biblical Prohibition**

As was noted above, the simplest yet most surprising approach that would allow for use of electric nursing pumps on Shabbat is the argument that they can be used despite their status as a full Biblical prohibition.

There are two reasons one could make such an argument. The first is the possibility that the infant has the status of a dangerously ill person, for whom Biblical prohibitions are permitted. In other words, even if use of the pump is not life-saving, the legal status of the infant permits its use nonetheless as one of the non-critical needs of a critically ill person. As was discussed above (section IV-A), there is a debate among authorities regarding the permissibility of violating Biblical prohibitions that meet non-critical needs of critically ill people. There-

fore, it is theoretically possible that use of the pump could be permitted as a non-essential need of a critically ill person. This would be relevant for an infant who is in the hospital due to a severe illness unrelated to his ability to nurse, or perhaps even for an infant who does not have the ability to nurse on his own, which may be viewed as a severe illness in its own right.

As noted above, most authorities do not support the allowance of non-critical needs for severely ill people. Nonetheless, it has been suggested that some *posekim* who rule leniently in the case of infants who are unable to nurse on their own rely, at least in part, on this minority opinion.<sup>98</sup>

The second reason an authority may allow the use of electric breast pumps despite their status as a full Biblical prohibition is the possibility that although the infant is not dangerously ill, use of the pump is still considered necessary to save the infant's life. Of course, given the availability of formula as a commonly-used substitute for mother's milk, this approach requires the belief that substitution with formula is either dangerous or not an option that must be considered. Does mother's milk indeed qualify as "lifesaving"?

The Talmud states: "By default, a baby [is considered] in danger with [regard to his need for] milk."<sup>99</sup> Rashi explains that the danger is that without milk, the infant will surely die

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98 See R. Daniel Stein, "Halivah Be-Shabbat Le-Tzorekh Pag Ha-Nimtza Be-Veit Ha-Holim (Milking on Shabbat for the Sake of a Premature Infant who is in the Hospital)," *Beit Yitzhak*, vol. 37, pp. 281-287. R. Stein lists R. Shlomo Zalman Auerbach (as cited in the *Shemirat Shabbat Ke-Hilkhatah*), *Hazon Ish*, R. Ovadia Yosef, and *Nishmat Avraham* as the authorities who rule leniently for this reason when the baby is in the hospital due to prematurity or illness. However, it is not clear to me that any of these authorities would limit their rulings only to infants who are premature or in the hospital. R. Stein later clarified to me that he would include any infant that is unable to nurse (or bottle-feed) without artificial assistance under his definition of a premature infant who is dangerously ill, as their inability to suck is an illness in itself. However, this leniency would not apply to infants who can suck from a bottle but merely have difficulty nursing.

99 *Yevamot* 114a.

of thirst.<sup>100</sup> Based on this comment of Rashi alone, there would be no room for leniency nowadays, when there is no danger of the infant dying of thirst without his mother's milk, as formula is available to sustain the baby.<sup>101</sup>

However, some authorities disagree with Rashi's interpretation of this Talmudic passage. Chief among them is *Hazon Ish*. He writes that the Talmud could not possibly refer only to a case in which the infant has no other source of sustenance, because if that were the case, this ruling would teach nothing unique about milk. Any food or drink is always permitted to any person when the alternative is dying of starvation! Instead, he contends, the Talmud refers to a baby who has other options for sustenance. For example, perhaps only non-kosher milk along with other kosher food or drink is available to the baby, but no kosher milk. The Talmud teaches that even though other kosher food is available, the baby's specific need for milk is so great that one is permitted to feed the baby non-kosher milk in lieu of the other kosher food options. *Hazon Ish* adds that this ruling applies to any baby up to the age of two or three.<sup>102</sup>

This interpretation allows for a special status of milk among other food or drink, but it does not differentiate between mother's milk and formula. However, in the next paragraph, *Hazon Ish* makes an important statement that could lead to such a distinction: "And nowadays, when we find many severe illnesses in babies, it seems that anything that has the possibility of causing stomach illness, be it diarrhea, or constipation, or a stomach ache, or a fever of any level, is included in the category of possible danger [for which Biblical prohibitions may be violated]."<sup>103</sup> *Hazon Ish* here permits cooking, a Biblical prohibition, in order to prevent the danger of stomach illness. Presumably there should be no distinction between cook-

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100 Rashi ad loc., s.v. *sakanah*.

101 This important point is noted by R. Dr. Avraham Steinberg, *Encyclopedia Hilkhatis Refuit*, pp. 595-633.

102 *Hazon Ish, Orach Hayim, Hilkhot Shabbat* 59:3.

103 *Ibid.* 59:4.

ing and any other Biblical prohibition. In light of this strong statement, it seems that if it were to be shown that substituting mother's milk with formula has the potential to cause any stomach problems for the infant, *Hazon Ish* would permit the violation of a Biblical prohibition to allow the baby to drink his mother's milk.

Based on this statement of *Hazon Ish*, several modern authors of compilations of Shabbat law write that a mother may use an electric breast pump in order to feed a baby who is either ill or is unable to nurse directly from the mother.<sup>104</sup> *Torat Ha-Yoledet* and R. Shlomo Zalman Auerbach<sup>105</sup> are the authorities who accept the ruling of *Hazon Ish* and apply it most broadly.<sup>106</sup> *Torat Ha-Yoledet* writes that a woman may pump milk, even manually, for a baby who is in the hospital due to illness or is unable to nurse for whatever reason, because this is considered lifesaving.<sup>107</sup> *Shemirat Shabbat Ke-Hilchatah* writes the same and adds that even substituting with formula may be dangerous in this scenario, and is thus not recommended. R. Auerbach adds further that this is even true for an infant that has not yet started drinking his mother's milk. Since mother's milk is the food that is natural for every baby, this same ruling applies regardless of whether or not the baby has already

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104 See R. Dovid Ribiat, *The 39 Melachos*, pp. 356-7, and A.S. Abraham, *Medical Halacha for Everyone*, pp. 58-59. The former only permits use of the pump when milk is collected in small increments. This seems to be an added stringency, as *Hazon Ish's* argument should permit pumping in the usual manner. A.S. Abraham bases his ruling upon a second source as well. *Bi'ur Halakhah, Orach Hayim* 617:1, s.v. *ubarot*, states that if a baby will only nurse from his mother and it would be dangerous for the baby if his mother fasts on Yom Kippur because he will not get enough sustenance from her milk, she is not obligated to fast. From this statement, we can derive that it is preferable that the mother not fast rather than attempt to give formula to the baby.

105 *Shemirat Shabbat Ke-Hilchatah* 36:21 and n. 62.

106 The author of *Lev Avraham* (p. 154) follows their opinion as well.

107 *Torat Ha-Yoledet* 41:2. He does not yet mention the possibility of substituting with formula.

become accustomed to his mother's milk. R. Auerbach<sup>108</sup> and *Torat Ha-Yoledet*<sup>109</sup> both continue to argue that milk may be pumped even for a healthy baby who is used to drinking his mother's milk alone. If substituting with formula creates a chance that he will experience a stomach illness, one is allowed to violate Biblical prohibitions in order to provide him with his usual food. *Torat Ha-Yoledet* emphasizes that no attempt should be made to substitute with formula in this case. He feels so strongly about this that he even considers the possibility that one could violate Shabbat in order to provide mother's milk to a baby whose normal sustenance is a combination of mother's milk and formula, rather than allow him to have exclusively formula over Shabbat.<sup>110</sup> Although he is not comfortable ruling definitively on this last scenario, the fact that he leaves open the possibility to permit violation of Biblical prohibitions in such a situation shows how seriously he valued this matter.<sup>111</sup>

Finally, in his discussion of this topic, *Tzitz Eliezer* focuses heavily on *Hazon Ish's* discussion, although he qualifies *Hazon Ish's* ruling. *Tzitz Eliezer* maintains that *Hazon Ish* was too extreme in his belief that any lack of hot food or any change in diet could lead to danger even in a healthy child. He is also uncomfortable ruling like *Hazon Ish* that it is permitted to violate the Biblical prohibition of milking in order to provide mother's milk for any baby. He recommends instead that women plan in advance and prepare enough milk before Shabbat so that the baby will be able to be sustained through-

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108 *Shemirat Shabbat Ke-Hilkhata* 37:1.

109 *Torat Ha-Yoledet* 41:4.

110 *Ibid.* 41:10

111 Another possible source in support of the notion that it is considered a danger to substitute mother's milk with formula is *Sha'ar Ha-Tziyun (Orah Hayim* 328:81), who comments on *Shulhan Arukh's* ruling (328:35) that a mother may express a small amount of milk onto a baby's mouth in order to encourage the baby to nurse. Since this expression of milk is likely a Biblical prohibition, *Sha'ar Ha-Tziyun* wonders what the basis is for this allowance. In the end, he remains in doubt but suggests the possibility that perhaps it would be considered a danger for the baby not to nurse, and that is why the Biblical prohibition of expressing milk is permitted.

out Shabbat without pumping. However, he agrees that if this is not done, one is permitted to pump or express milk into a container in order to feed the baby, in accordance with *Hazon Ish*. This is true even for a healthy baby, as long as the scenario is that the baby is unable to nurse directly from the mother.<sup>112</sup>

Thus, there are a number of authorities who permit use of an electric pump on Shabbat, despite this being a Biblical prohibition, on the grounds that it prevents some type of danger to the infant. It is important to note that despite this allowance, all authorities agree that whenever possible, it is best to minimize the amount of transgression of Shabbat. The principle of "*ha-kal ha-kal tehilah*," that the approach involving the least severe violation must be attempted first, outlines the exact order in which it is preferable to use the electric pump. As a rule, if it is possible to operate the pump in such a way that would only require violation of Shabbat on a Rabbinic level (as outlined below in section V-B), that is certainly preferable. What is unique about these *posekim*, however, is that in the event that the alternatives are not possible, they allow full violation of the Biblical prohibition through operation of the electric pump in its typical manner by a Jew.

#### *a. Health Risks of Formula Feeding?*

Since the *posekim* just cited seem to imply that substituting breast milk with formula may be dangerous to the infant, it is worthwhile to examine whether there is any evidence in the medical literature that this is actually the case. This question may, in fact, seem strange to many. After all, formula feeding is extremely commonplace and has been so for several generations. At least to the naked eye, there does not seem to be any significant morbidity associated with formula feeding, certainly not to the extent that we could be concerned that formula feeding could endanger the life of an infant. The truth is, however, that formula feeding, when compared to exclusive breastfeeding, has been associated with an increased risk

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112 *Tzitz Eliezer* 8:15:12.

of a wide variety of medical conditions, including some that can cause acute illness in infants. This has led the American Academy of Pediatrics to make the following statement:

Breastfeeding and human milk are the normative standards for infant feeding and nutrition. Given the documented short and long-term medical and neurodevelopmental advantages of breastfeeding, infant nutrition should be considered a public health issue and not only a lifestyle choice.<sup>113</sup>

The benefits of breastfeeding when compared to formula feeding are manifold. The largest and most comprehensive study in recent times comparing the outcomes of formula feeding to breastfeeding is the meta-analysis performed by the Agency for Healthcare Research and Quality (AHRQ), titled "Breastfeeding and Maternal and Infant Outcomes in Developed Countries."<sup>114</sup> In this study, it was found that formula feeding, when compared to breastfeeding, is associated with significantly increased risk of pneumonia, bronchiolitis,<sup>115</sup> gastroenteritis,<sup>116</sup> otitis media,<sup>117</sup> necrotizing enterocolitis,<sup>118</sup> sudden infant death syndrome,<sup>119</sup> and asthma. Breastfeeding was also shown to be associated with reduced risk of several long-term medical conditions, including diabetes, obesity, and

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113 "Breastfeeding and the Use of Human Milk," *Pediatrics* 129:3 (March 2012): 827-41. See: <http://pediatrics.aappublications.org/content/early/2012/02/22/peds.2011-3552>.

114 A meta-analysis is a compilation of data combining many small studies into one larger, all-encompassing study.

115 The equivalent of bronchitis in children.

116 Commonly called the stomach flu, often involving diarrhea and/or vomiting.

117 Ear infection.

118 A severe infection of the colon with diarrhea that can be life-threatening.

119 Known as SIDS, the sudden death of an infant in the first year of life without a discernible cause.



childhood leukemia. One study found that if 90% of Americans exclusively breastfed, over 900 infant deaths would be prevented each year in the United States.<sup>120</sup>

While these results strongly indicate the importance of breastfeeding, there are several important issues that bring their applicability into question. First, as several of the authors of these studies point out, the studies themselves are not evidence of the highest quality, as they are retrospective observational studies that are also subject to recall bias; much of the information obtained about duration and amount of breastfeeding depended on data given by mothers years later. Randomized controlled trials are the gold standard of evidence in medicine. However, prospectively comparing the effects of formula feeding versus breastfeeding would be unethical, and is thus not possible.

Furthermore, and more importantly for this essay, most of the studies compared exclusive breastfeeding to exclusive formula feeding. Some studies compared exclusive formula feeding to mixed feeding, while few compared exclusive breastfeeding to mixed feeding. The latter two comparisons are the information that is needed to answer our question. An infant who would formula feed on Shabbat to avoid pumping would still be receiving human milk, or at least mixed feeding, on the other six days. The fact that exclusive formula feeding puts infants at greater risk for a wide array of medical conditions does not mean that infants who are given formula for one day out of the week are placed at that same risk.

The fact that there is a lack of studies to this end makes sense. It would be an overwhelming task to attempt to attain accurate information regarding the specific ratio of human milk to formula that each infant received, especially when this information is gathered after the fact. The data would also be-

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120 Bartick M., Reinhold A., "The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis," *Pediatrics* 125:5 (May 2010): 1048-56. See: <http://pediatrics.aappublications.org/content/125/5/e1048.full.html>.

come much more complicated, as mixed feeders would need to be stratified into several groups, comparing different ratios of breast-milk to formula to each other, as well as to exclusive formula and exclusive breastfeeding. This stratification of data would make sample sizes of each group smaller and would make the possibility of finding statistically significant results less likely. However, despite the practical obstacles, such studies would be very informative. Without them, it is difficult to make a statement in either direction as to the safety of substituting with formula on Shabbat alone.

There is a scientific need to compare exclusive breastfeeding to mixed feeding as well. Scientists have long suspected that the reason formula-fed babies are at increased risk for so many medical conditions is related to the complexity of the developing immune system of the newborn, as well as certain proteins contained in formula but not human milk. Cells from the immune system in the mother's lungs and intestines travel to the breast glands and aid in the formation of IgA antibodies that are secreted into her breast-milk.<sup>121</sup> This enables the transfer of immune system protection from mother to infant, whose immune system remains underdeveloped. Besides for these antibodies, oligosaccharides, a biochemical component of breast-milk, have been shown to prevent the attachment of several types of bacteria often implicated in pneumonia and bronchiolitis. Glycoproteins, another biochemical component of breast-milk, have been shown to prevent the attachment of bacteria often implicated in gastrointestinal infections. The particular fats found in human milk also help the immune system fight other common infections involved in respiratory and intestinal infections.<sup>122</sup> Human milk has also been found to contain neutrophils, lymphocytes and macrophages, cells that are an integral part of the body's first line of defense against in-

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121 Stuebe A., "The Risks of Not Breastfeeding for Mothers and Infants," *Reviews in Obstetrics and Gynecology* 2:4 (2009): 222-31.

122 *Ibid.*, 223-4.

fection.<sup>123</sup> Human milk also contains proteins called lysozyme and lactoferrin, which have antibacterial properties, as well as a certain type of protective bacteria that prevents intestinal infections.<sup>124</sup> Formula-fed infants were found to have a wider array of harmful bacteria in their intestines, including *C. Difficile* and *E. Coli*, compared to breastfed infants, whose intestines mostly contain this particular type of bacteria thought to be protective.<sup>125</sup> It has also been found that human milk contains several molecular cytokines and factors, including an especially important one called TGF-beta, which prevent inflammation in the infant, and may also protect against the development of asthma and various allergies and sensitivities.<sup>126</sup>

All of this paints a clear picture. Human milk is the natural nutrition for any infant for a reason – it contains many properties and molecules that protect the infant against infection. This is the likely explanation for the increased incidence of so many medical illnesses in formula-fed babies. However, none of this shows that occasional use of formula takes away these benefits of breast-milk. To the contrary, infants who are fed breast-milk six days out of the week are likely to have sufficiently gained all of these same benefits as infants who are exclusively breastfed. The immunologic properties of breast-milk would not leave the infant's body over the course of one day. Therefore, a true difference between exclusive breastfeeding and mixed feeding – a reason to consider one day of formula per week a legitimate danger to the infant – would have to present itself in the form of harmful substances found in formula that are not found in human milk.

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123 Goldman A., "The Immune System in Human Milk and the Developing Infant," *Breastfeeding Medicine* 2:4 (2007): 196.

124 *Ibid.*, 197.

125 Penders J., et al, "Factors Influencing the Composition of the Intestinal Microbiota in Early Infancy," *Pediatrics* 118:2 (August 2006): 511. See also Rautava S., Walker A., "Academy of Breastfeeding Medicine Founder's Lecture 2008: Breastfeeding – An Extrauterine Link Between Mother and Child," *Breastfeeding Medicine* 4:1 (2009): 5-6.

126 Rautava, "Academy of Breastfeeding Medicine Founder's Lecture," 6-7.

A dose-response relationship between formula and the development of childhood type 1 diabetes has been shown in one large study, meaning that the risk of developing type 1 diabetes increases with earlier introduction of formula to the infant's diet and consumption of greater quantities of formula.<sup>127</sup> The risk of developing diabetes decreased with the use of hypoallergenic and protein-free formula compared to traditional cow's milk formula, meaning that the increased risk of diabetes is due to substances found in formula rather than just a lack of breast-milk. It has been suggested that the offending agent is a protein in cow's milk called beta-lactoglobulin.<sup>128</sup> However, the solution to this may come in the form of better engineered formula. As was noted in the discussion of this same study, a new type of formula with the protein casein hydrosylate was actually found to be protective against type 1 diabetes.<sup>129</sup> Thus, the solution does not necessarily need to come in the form of exclusive breastfeeding, although that certainly would be the most straightforward approach.

Although, as noted, most studies have compared exclusive breastfeeding to exclusive formula feeding or exclusive formula feeding to mixed feeding, there are a few studies that have compared exclusive breastfeeding to mixed-feeding. One study compared the risk of gastrointestinal infections in exclusively breastfed infants to that of a group of formula-fed infants and mixed-fed infants combined. It was found that the formula and mixed group was 2.8 times more likely to have a gastrointestinal infection than the exclusively breastfed group.<sup>130</sup> Of course, this number must be taken with a grain of salt, as the group included both formula-fed and mixed-fed babies. Moreover, the "mixed-fed" group is made up of a wide range of ratios of

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127 Rosenbauer J., et al, "Early Infant Feeding and Risk of Type 1 Diabetes Mellitus – A Nation-Wide Population-Based Case-Control Study in Preschool Children," *Diabetes/Metabolism Research and Reviews* 24 (2008): 211-22.

128 "Breastfeeding and the Use of Human Milk," 830.

129 Rosenbauer, "Early Infant Feeding," 218.

130 Stuebe, "The Risks of Not Breastfeeding," 224.

formula to breast-milk, so no conclusions can be definitively drawn comparing exclusive breastfeeding to breastfeeding six days out of seven.

Another such study used three separate comparison groups, one exclusively formula-fed, one exclusively breast-fed, and the third partially breastfed. Members of these groups were compared for the amount of times they were hospitalized for either a gastrointestinal or respiratory infection in the first 8 months of life. In this study, it was shown that exclusively breastfed infants are at a significantly decreased risk for both diarrhea and respiratory infections leading to hospitalizations compared to formula-fed infants. The results for the partially breastfed group were in between the formula-fed and exclusively breastfed group, but did not have a statistically significant difference from either group. It was estimated that over half of hospitalizations from these causes could be prevented by exclusive breastfeeding, and about one third of them by at least partial breastfeeding.<sup>131</sup> Once again, although indicative that partial breastfeeding has a health advantage over formula-feeding but not as great an advantage as exclusive breastfeeding, the partially breastfed group includes a wide range of ratios of breast-milk to formula and its differences between the other two groups were not statistically significant. That exclusive breastfeeding is better than breastfeeding six days out of seven remains without evidence.

The final study that deserves special mentions concerns necrotizing enterocolitis, a life-threatening stomach illness common in preterm babies.<sup>132</sup> This study is particularly relevant, as it compares a diet of mother's milk supplemented with donor human milk to a diet of mother's milk supplemented by cow-milk-based formula specially designed for preterm infants.

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131 Quigley M., et al, "Breastfeeding and Hospitalization for Diarrheal and Respiratory Infection in the United Kingdom Millennium Cohort Study," *Pediatrics* 119:4 (2007): 840.

132 Sullivan S., et al, "An Exclusively Human Milk-Based Diet is Associated with a Lower Rate of Necrotizing Enterocolitis than a Diet of Human Milk and Bovine-Based Products," *Journal of Pediatrics* 154 (2010): 562-7.

It was found that the human milk only group had a 50% decrease in cases of necrotizing enterocolitis and a 90% decrease in cases that required surgery. It was estimated that for every 10 infants given an exclusively human milk diet rather than a diet of primarily mother's milk supplemented with formula, 1 case of necrotizing enterocolitis would be prevented. For every 8 infants given this treatment, 1 case of necrotizing enterocolitis requiring surgery would be prevented. This result is thus not only statistically significant, but clinically significant as well. Of all the studies discussed, this study poses the strongest argument that supplementation with formula may increase morbidity in infants, even when their diet consists mostly of mother's milk. However, it must be noted that this study dealt specifically with extremely premature infants whose immune systems are less developed and whose health is more fragile. Therefore, we cannot make the assumption that the results of this study would hold true for healthy infants, nor do we know whether or not there was a difference among these groups for any other type of medical condition besides necrotizing enterocolitis.

In the end, the evidence remains inconclusive. There are some indications that even a small amount of supplementation with formula can increase the risk of severe illness in infants. This is especially the case with preterm infants, and this is an extra reason to be lenient in allowing pumping on Shabbat for preterm infants. However, regarding otherwise healthy infants, there is no study to this author's knowledge that meets the standards for evidence in the field of medicine that shows an increased risk of potentially life-threatening harm to infants supplemented with formula provided that they are mostly breastfed. The beneficial biochemical components of human milk have been much better described than any deleterious proteins of formula, and it is unlikely that skipping one day would take away the protective factors afforded by breast-milk.<sup>133</sup> That being said, the intuition that the more

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<sup>133</sup> One possible exception is the protein in formula suspected of increasing the risk of type 1 diabetes in children. If true, it would be fascinating

breast-milk the better does seem to be at least supported, albeit not proven, by the literature. Exclusive breastfeeding remains the ideal, but there is a lack of sufficient evidence to consider it a matter of life and death.<sup>134</sup>

This, of course, does not mean that the *posekim* are wrong to permit pumping on Shabbat rather than substitute with formula. Jewish authorities operate under different guidelines than clinical medicine, and the intuition that giving formula to an infant who has never tried it may be harmful is a reasonable one. It certainly remains true that infants are fragile and susceptible to many types of infection. In the context of preterm infants especially, the rulings of these *posekim* are likely in line with the medical evidence. Even for healthy infants, it is clear that breast-milk is easier to digest than formula, and at the very least prevents minor stomach aches.<sup>135</sup> For those who follow the view of *Hazon Ish* literally, this may be enough to push them to the side of leniency. Moreover, there is certainly no shortage of pediatricians and breastfeeding experts who truly believe that any supplementation with formula has

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to see how *posekim* would deal with that information. Type 1 diabetes can at times be a life-threatening condition, but drinking something now that may increase your risk of developing a potentially life-threatening condition several years later may be too many steps removed from imminent danger for *posekim* to permit Shabbat violation for its sake.

134 It should also be kept in mind that while the word “dangerous” is used to describe the reason why *posekim* permit Biblical prohibitions in order to ensure that infants can be fed breast-milk, “danger” in Jewish law may not be equivalent to the colloquial definition of the word. Halakhah is extremely cautious, such that even the possibility of danger to the life of any person is taken very seriously, sometimes even when that potential danger is farfetched. Where to draw the line between the type of danger that is real enough for Jewish law to be concerned with and the type of danger that is too farfetched to play a significant role in legal decision-making is a topic of great debate that is well beyond the scope of this essay. The point here is that even if colloquially or medically the use of formula is not considered dangerous for a newborn infant, even a slight chance of danger may be enough to convince halakhic decisors to be lenient with regard to Shabbat.

135 See Avraham Steinberg, *Encyclopedia Hilkhatit Refu'it*, pp. 595-633, who notes this as one of the benefits of breastmilk.

the potential to cause serious harm to the infant.<sup>136</sup> At the end of the day, it is often the physician's expert opinion that holds sway in Halakhah.

### **B. Pumping May be Permitted if the Prohibition is Only Rabbinic**

The second approach to permit the use of electric nursing pumps on Shabbat affirms that the prohibition is Biblical, and therefore cannot be violated when there is no imminent danger to the baby. Nevertheless, many modern authorities have found creative ways to allow women to use pumps on Shabbat in such a way that converts the prohibition from Biblical to Rabbinic. Once the prohibition becomes Rabbinic in nature, it is permitted for the sake of any child or baby, especially if done with a *shinui*, as discussed above (section IV-B). Authorities were able to render the prohibition of using the pump Rabbinic in three different ways.

One method of reducing the severity of the prohibition of using the electric pump was suggested by R. Ovadia Yosef.<sup>137</sup> After writing that milking is considered a full Biblical prohibition, he discusses the case in which the infant is ill or cannot nurse for some reason. Unlike the group of authorities previously discussed, R. Yosef writes that this infant is only considered a non-critically ill person, and he therefore cannot permit full use of the electric pump on Shabbat. However, in this scenario, he suggests that use of the pump may be permissible when it is held in place by two women together. The reason for this is that any time two people perform a *melakhah* together, provided that they are each theoretically able to perform the entire *melakhah* on their own, they are not Biblically liable for the violation of the *melakhah*. Their violation is on a Rabbinic level only, and such a violation is permissible for the

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<sup>136</sup> Several pediatricians and breastfeeding experts expressed these feelings to me in private correspondence.

<sup>137</sup> *Yalkut Yosef, Shabbat* 4:33 and n. 32; *Yabia Omer, Orah Hayim* 5:32.



sake of an infant when done with a *shinui*.

R. Yosef writes that there are three reasons that he is willing to be lenient in this case. First, there are several minority opinions who maintain that milking is only a Rabbinic prohibition to begin with.<sup>138</sup> Second, even if it is a Biblical *melakhah* (as R. Yosef contends), the prohibition of two people performing it together is only Rabbinic. Finally, the fact that two people work a pump together is itself considered a *shinui*, an abnormal way of using the pump. This is therefore a Rabbinic prohibition performed with a *shinui*, which is certainly permitted for the sake of the infant.

A second suggestion for making the prohibition Rabbinic was suggested by *Har Tzvi*.<sup>139</sup> Like R. Yosef, he too rejects the opinion of *Hazon Ish* that every infant is considered dangerously ill with regard to needing his mother's milk. He instead prefers Rashi's reading of the Talmudic passage, that the danger to the infant is only when he will die of thirst without milk. However, despite the Biblical nature of the prohibition of milking, *Har Tzvi* permits use of a nursing pump for even a healthy baby who needs more sustenance than they are able to get from nursing directly as long as the milk is collected in small enough increments that the Biblical prohibition is never violated.<sup>140</sup> Every *melakhah* has what is called a *shiur*, an amount or measurement of the result of the performance of this *melakhah* at which point the action is deemed significant

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138 For the reasons discussed earlier in this essay (section III) – namely, that people do not grow from the ground and that milking a woman with a pump is not the normal way of extracting milk from a woman. Although R. Yosef does not accept these opinions, they are used here as an additional reason that he is willing to be lenient.

139 *Har Tzvi*, *Orah Hayim* 1:201.

140 *Har Tzvi* maintains that this is the basis for the permissibility of direct nursing on Shabbat. Nursing itself is a prohibition of milking, and the scholars have long attempted to explain why it is permitted (see n.6 above). *Har Tzvi* explains that nursing is permitted because it is physically impossible for the infant to extract the amount of milk necessary to achieve the *shiur* of the *melakhah* of *mefarek* in a timely enough manner to violate the *melakhah* in full.

enough to violate the prohibition on a Biblical level. In the case of milking, *Har Tzvi* writes that if only 1½ teaspoons are collected at a time, the woman can be assured that she is staying below the *shiur*.<sup>141</sup> This process would be considered a Rabbinic violation only, as long as the infant drinks each of the 1½ teaspoon increments as they are extracted so that only a total of 1½ teaspoons exist in the collection at one time.<sup>142</sup>

While creative, these two approaches are often not entirely practical. First, many women would be too embarrassed or uncomfortable to have a second woman operate the nursing pump with them. Second, although the advice of *Har Tzvi* is possible with a manual pump, it is very difficult to accomplish with an automatic pump. This would involve intermittently placing and removing the pump from the body every time 1½ teaspoons are extracted, and then waiting until the baby drinks that amount before placing the pump on the body again. Since most pumps turn off automatically after a certain amount of

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141 One potential problem with this approach is the legal principle that a *hatzi shiur*, a fraction of the *shiur*, is still considered a Biblical prohibition. *Har Tzvi* explains that this is only true in the laws of food consumption and prohibited foods. However, when it comes to *melakhah* on Shabbat, this principle does not apply and a fraction of a *shiur* is only a Rabbinic violation. Moreover, he cites some authorities who believed that the principle that a fraction of a *shiur* is still Biblically prohibited only applies to men, but not to women.

142 *Har Tzvi* mentions another creative approach that he had heard suggested – that the mother should express her milk onto food and then collect it and feed it to the infant. The *melakhah* of milking, at least with regard to animals, involves the extraction of milk from its solid phase (it is considered a solid food while inside the animal) to its liquid phase (once it is removed from the animal). The Talmud states that if milk is expressed onto food, it retains the status of food that it had while still in the breast and *mefarek* is therefore not violated (see n.6 above). *Har Tzvi* himself does not favor this approach, as he believes that while it is true in the context of animals, human milk is not considered food while it is still in the mother's breast (since the mother herself is not considered food). Since he maintains that human milk remains liquid both inside and out of the breast, the definition of *mefarek* with regards to human milk is extracting the edible portion (the milk) from its shell (the breast), which is still violated when the milk is expressed onto food.

time, this would likely lead to the need to turn on the apparatus several times during each nursing session, and it would also involve a significant time commitment on the part of the mother.

It is therefore likely that most women would prefer to use the third approach suggested by several modern *posekim*. Although, as concluded above, use of the electric pump is a full act of *melakhah* and not *grama*, it is possible to use the pump in such a way that turns it into *grama*. This discussion begins with *Hazon Ish's* discussion of electric pumps used to milk cows.<sup>143</sup> While he does not support the use of these pumps in the normal fashion on Shabbat, as he maintains that this cannot be considered *grama*, he describes a method that he thinks would be *grama* and thus could be permitted. In this method, a timer is connected to the pump that will turn on the pump at a given time. The farmer then attaches the apparatus to the cow such that it will remain attached to the cow before the pump is turned on. The pump will then turn on automatically and begin pumping without the farmer needing to attach the pump to the cow while the pump is running. In this way, the function of the timer, which was set up before Shabbat, creates a buffer between the attachment of the pump to the cow's body and the functioning of the pump. This buffer prevents the entirety of the *melakhah* of milking from being attributed to the farmer who attached the pump. Instead, the farmer only violates the *melakhah* on a Rabbinic level, as *grama*.

*Ma'aseh Hoshev* takes the same approach but applies it to nursing pumps for women.<sup>144</sup> He writes that normal use of the pump on Shabbat would be prohibited on a Biblical level. However, if it were possible to have the pump placed on the woman before it is turned on, at which point a preset timer would automatically turn the pump on, this would be *grama*, provided that the woman does not need to hold the pump in place while it is pumping.

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<sup>143</sup> *Hazon Ish, Orah Hayim* 38:4.

<sup>144</sup> *Ma'aseh Hoshev* 3:18.

For many years, this solution was also impractical. Most breast pumps would not only fall off if placed on the breast before they were turned on, but they also need to be physically held in place while functioning to prevent them from falling off. However, with the recent advent of new types of pumps and new apparel to go with them, the solution of *Hazon Ish* and *Ma'aseh Hoshev* is entirely plausible. There are now pumps designed specifically to remain attached to the body without the need to hold them in place. While this alone does not entirely solve the problem, as they only remain attached when turned on, this too has a solution, as there are now nursing bras designed specifically for breast pumps that hold the apparatus in place so that the woman doesn't have to. These bras can even be used with pumps that otherwise do not remain attached to the body on their own. Therefore, with the use of a nursing bra, it is certainly possible for a woman to attach the apparatus to her body before the machine is turned on. In that case, as long as a timer is set up before Shabbat to turn on the machine,<sup>145</sup> its use would constitute *grama* according to *Hazon Ish* and *Ma'aseh Hoshev*, a Rabbinic prohibition that is permitted for the sake of the infant.

It is important to note that his solution is not universally deemed permitted. R. Joseph B. Soloveitchik was opposed to the use of a timer in this way on Shabbat, as he maintained that once a timer is operative, any adjustment a person makes on Shabbat to either the timer itself or to the machine that will function through the timer causes the entire function of the timer or machine to be attributed to the person through the principle of *eisho mishum hetzav* (see section III-C-b).<sup>146</sup> R. Soloveitchik therefore opposed many of the leniencies suggested by other *posekim* of his generation regarding the use of timers on Shabbat. Unlike other *posekim*, R. Soloveitchik would

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145 Since a woman likely needs to pump several times over Shabbat, it is ideal to use a timer that has the ability to turn on the machine several times throughout the day.

146 Cited by R. Hershel Schachter, *Be-Ikvei Ha-Tzon*, ch. 7, pp. 44-45.

not permit adjustment of the timer on Shabbat. Presumably, he would also not permit placement of the breast pump on the woman's body once the timer is already functioning, as he would not consider this *grama* but rather a full violation of the *melakhah*.<sup>147</sup>

Should one wish to be stringent and follow this view of R. Soloveitchik, it should certainly be permissible for her to ask a non-Jew to turn on the pump rather than use a timer, provided that a nursing bra is used to hold the pump in place before it is turned on. This would constitute both *grama* and *amira le-nokhri*, asking a non-Jew to violate *melakhah* on one's behalf. Both of these are Rabbinic prohibitions and would be permitted for the sake of the infant.

## VI. Conclusions

There are several workable options for women who need to use electric breast pumps in order to provide milk for their infants on Shabbat. The suggestions of using two women to work the pump rather than just one and pumping less than 1½ teaspoons at a time are both legitimate and widely accepted.<sup>148</sup> If found to be impractical, the most preferable way to operate the pump is by attaching the pump with a nursing bra and then asking a non-Jew to turn on the pump. Those who wish to use a timer set up before Shabbat to turn the machine on can rely on the opinion of *Hazon Ish* and *Ma'aseh Hoshev*.<sup>149</sup>

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147 *Har Tzvi* (*Orah Hayim* 198) suggests this possibility as well with regard to cow pumps that function with a timer. In the end, he remains uncertain whether it should be considered *grama*.

148 See Avraham Steinberg, *Encyclopedia Hilkhaitit Refu'it*, pp. 595-633; "Sefer Lamed Tet Melakhah," pp. 356-7.

149 See Avraham Steinberg, *ibid.*, who accepts this approach as well. R. Howard Jachter strongly favors the approach of *Hazon Ish* and suggests that common practice in Israel correctly relies on *Hazon Ish* in using cow pumps on Shabbat with the help of timers. He even suggests that this practice is not necessarily against the view of R. Soloveitchik, arguing against R. Schachter's application of R. Soloveitchik's opinion. See his article in *Beit*

Since all of these methods entail Rabbinic prohibitions alone, they can be used even for otherwise healthy infants, and even for infants who have already tried formula. However, the obligation to avoid a scenario in which even a Rabbinic violation is necessary still stands. One should not use the pump on Shabbat if she has the ability to nurse normally or to pump milk in advance and store it for Shabbat use.

In the event that none of these options are possible, some may choose to rely on the opinions of R. Shlomo Zalman Auerbach, *Hazon Ish*, and others, who permit violation of the Biblical prohibition on the grounds that it would be dangerous for the baby to attempt a substitution with formula. However, it must be kept in mind that even these authorities only gave this permission in certain cases. They certainly permit use of the pump for infants who are in the hospital, are premature, or have not developed the ability to suck. R. Auerbach and *Hazon Ish* also seem to permit use of the pump rather than substitution with formula even for otherwise healthy babies, but only if they have never tried formula before.<sup>150</sup> Permission to pump for infants who have already tried formula was only explicitly considered by *Torat Ha-Yoledet*, and he did not rule in either direction.

Moreover, as noted above, even these authorities only allow operation of the pumps in the normal way when it is impossible to reduce the act of violation to a Rabbinic level. The recommended approach is “*ha-kal ha-kal tehilah*,” meaning that the least severe form of violation should be attempted

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*Yitzhak* (5763), vol. 35, pp. 380-4.

<sup>150</sup> In private discussions with several rabbis, I was told that even these authorities would not permit normal use of the pump for an otherwise healthy baby; they only intended to permit its use for an ill infant or for one who did not yet develop the ability to suck. The relevant texts do not seem to support that conclusion in my humble opinion, but given the severity of the potential Shabbat violation, one should certainly consult with his or her rabbi before deciding to use a pump on Shabbat in a way that violates the *melakhah* on a Biblical level.

first.<sup>151</sup> It is best to have a non-Jew operate the pump, including turning it on and holding it in place. If this is not possible, it should be operated by a small child. If this is not possible, it may be done by the Jewish woman herself, but with a *shinui*, in an atypical manner. If this is not possible, it should be done either by two women together or by extracting only less than 1½ teaspoons at a time. Only when none of these are possible would they permit full operation of the pump by the Jewish woman.

Thankfully, in our times, there are several viable solutions that allow women to provide their milk to their infants on Shabbat, even when those infants are unable to nurse. It is my hope that the spread of information about these possibilities will both decrease the amount of inadvertent Shabbat violation and increase the amount of breastfeeding in the Jewish community, in accordance with the recommendations of the American Academy of Pediatrics.

## **VII. Epilogue: What if One Milked on Shabbat?**

Should a situation arise in which milk was extracted from a woman in a way that violated Shabbat when it was not permissible to do so, there is a debate as to the status of that milk. The Talmudic passage about milking an animal onto a plate of food or a pot of liquid is once again relevant here.

Tosafot state that the permission of milking onto a plate of food does not apply on Shabbat. They therefore argue that on Shabbat, such milk would be *muktzeh* and unable to be used on Shabbat, since it was extracted from something *muktzeh*, namely the animal.<sup>152</sup> Other *Rishonim* apply the leniency to Shabbat as well, disagreeing with Tosafot. First, the Talmud rules according to Shmuel that this type of *muktzeh* is always permitted on Shabbat.<sup>153</sup> Second, Ritva writes that this specific

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151 See Avraham Steinberg, *Encyclopedia Hilkhaitit Refu'it*, pp. 595-633.

152 Tosafot, *Shabbat* 144b, s.v. *holev*.

153 See Ramban, *Shabbat* 144b. How exactly to define the type of *muktzeh*

case is an exception to the rules of *muktzeh*.<sup>154</sup> Typically, when a substance can only be obtained through violation of *melakhah* – such as milk in this case, which can only be obtained through the act of milking – that substance is *muktzeh*. This is because one cannot have in mind that he should be able to obtain and use this substance on Shabbat since doing so would involve violating Shabbat, and anything that one could not possibly intend to obtain and use on Shabbat is *muktzeh* by definition. In this case, however, since there are ways in which one is permitted to obtain milk from an animal – namely, by milking directly onto a plate of food – it becomes possible for one to intend to obtain and make use of milk on Shabbat. Since that is so, the milk is no longer *muktzeh* by definition. In theory, both of these reasons to be lenient and not consider the milk *muktzeh* can apply to milk extracted from a woman as well.

However, the extraction of milk must still be compared to another case. The Talmud explicitly considers juice that exudes from a fruit on Shabbat to be *muktzeh*. This juice is termed “*mashkin she-zavu*,” liquid that flowed [out].<sup>155</sup> One might suggest that the same status should be afforded to milk that is extracted on Shabbat. However, the prohibition of *muktzeh* is only Rabbinic. Therefore, it is certainly possible to suggest that for the sake of a sick person, this Rabbinic prohibition may be violated.

Indeed, in a famous responsum, this exact question was asked of R. Akiva Eiger by R. Samson Raphael Hirsch.<sup>156</sup> While R. Eiger does not present a clear ruling one way or the other,<sup>157</sup> his lengthy back and forth includes a statement that

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included in Shmuel’s leniency is beyond the scope of this essay. However, generally speaking, Shmuel refers to a would-be-*muktzeh* substance that was born from within something *muktzeh* on Shabbat. At times, this type of *muktzeh* is referred to as *nolad* as well.

154 Ritva, *Shabbat* 143.

155 *Shabbat* 143.

156 *Teshuvot Rabbi Akiva Eiger* 5.

157 Later scholars debate what R. Akiva Eiger’s final opinion actually was.



milk extracted on Shabbat is not *muktzeh*.<sup>158</sup>

Despite these reasons to be lenient, *Torat Ha-Yoledet* writes that milk extracted from a woman on Shabbat should be considered *muktzeh*.<sup>159</sup> *Mishnah Berurah* writes that this milk should be considered *muktzeh* just like *mashkin she-zavu*.<sup>160</sup> On the other hand, R. Shlomo Zalman Auerbach, as cited in *Shemirat Shabbat Ke-Hilkhatah*, rules leniently that if no other milk is available, one may feed milk that was extracted on Shabbat to a child.<sup>161</sup>

Since this is a debate among authorities, one should consult with his or her personal *posek* should this situation arise.

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158 See R. Avraham Steinberg in his *Encyclopedia Hilkhatit Refu'it*, who notes this.

159 *Torat Ha-Yoledet*, ch. 41, footnotes.

160 *Mishnah Berurah*, *Orah Hayim* 305:72.

161 *Shemirat Shabbat Ke-Hilkhatah* 37:3.

DOVID WELL

# *Ophthalmic Emergencies on Shabbat*

## **Introduction**

There have recently been reports of God-fearing individuals refusing treatment for diseases of the eye on Shabbat and consequently losing their vision. To make matters worse, some of these individuals acted in this manner at the behest of rabbis who incorrectly quoted the great contemporary *Posekim* as not permitting treatment of the eye on Shabbat. In this article, we will attempt to clarify the proper course of action in situations of ophthalmic emergency on Shabbat from the perspective of Halakhah. Our conclusion will underscore that no one ought to lose his or her vision due to lack of treatment in such situations. It is our hope and belief that this argument is in consonance with the spirit of our holy Torah, "whose ways are ways of pleasantness and whose paths are all paths of peace."<sup>1</sup>

According to Halakhah, one is commanded to violate Shabbat in order to treat a person whose illness could result in death, a *holeh she-yesh bo sakanah*. As Rambam writes:

It is forbidden to be astonished at the [law permitting] desecration of Shabbat for a dan-

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<sup>1</sup> *Mishlei* 3:17.

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gerously ill person. As Scripture writes, “that a person do them [the commandments] and live by them,” [from which we derive that] one should not die through them. From here we understand that the laws of the Torah are not intended to wreak vengeance in the world, but rather to bring mercy and kindness and peace to the world.<sup>2</sup>

This obligation to violate Shabbat applies even when the risk of death is unlikely.<sup>3</sup> When time may be of the essence, one should not ask questions concerning what is permissible on Shabbat, but rather do whatever may be beneficial to the patient as quickly as possible.<sup>4</sup> Importantly, any time that the patient is aware that it is Shabbat and demands treatment, he should be treated as a *holeh she-yesh bo sakanah*, even if a physician claims that the patient is not in real danger.<sup>5</sup>

At the same time, minor aches and pains are not medically treated on Shabbat. In former times, it was common for people to grind herbs for medicinal purposes, an action that is considered a *melakhah de-oraysa*, a Biblical prohibition, on Shabbat. Out of concern that people might come to grind medicines on Shabbat, the Sages prohibited the use of any medications for minor pains on Shabbat.<sup>6</sup>

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<sup>2</sup> *Hilkhos Shabbat* 2:3.

<sup>3</sup> *Shulhan Arukh, Orach Hayim* 329:2, 3.

<sup>4</sup> *Ibid.* 328:2. If a particular action will benefit the patient but will, with absolute certainty, not help his prospects for recovery, there is a difference of opinion regarding its permissibility on Shabbat. According to *Mishnah Berurah* (328:4; cf. his analysis in the more technical *Bi'ur Halakhah* loc. cit.), one should refrain from performing a Biblical prohibition in such situations.

<sup>5</sup> *Tur, Orach Hayim* 328, and the commentary of *Bah. Bah* further discusses whether the patient must claim that his life may be in danger if this action is not performed or whether it is sufficient for him to state that he can no longer tolerate his situation.

<sup>6</sup> *Shulhan Arukh, Orach Hayim* 328:1. For an interesting discussion about whether this rabbinic injunction still applies today, when individuals

What remains less clear is the law regarding two intermediate categories of medical issues, which are not grave enough to be considered life-threatening but are more severe than minor pain. The more serious of these categories is a *holeh she-yesh bo sakanat ever*, a patient whose illness threatens one of his limbs.<sup>7</sup> The less severe is a *holeh she-ein bo sakanah*, a patient who is not in any danger. This refers to one who is bedridden, experiences aches in his entire body,<sup>8</sup> or who is lethargic.<sup>9</sup>

In order to elucidate the laws concerning these two categories, as well as the laws regarding ophthalmic emergencies on Shabbat, we will analyze the text of the pivotal relevant *gemara*.

### **Saving a Limb on Shabbat**

R. Zutra b. Toviah said in the name of Rav: If one's eye gets out of order, it is permissible to paint it [apply a form of medication] on the Sabbath. He was understood to be of opinion that this only holds true when the medical ingredients had been ground the previous day [and there is therefore no violation of a Biblical prohibition entailed through the use of this medication]; but if it is necessary to grind them on the Sabbath and carry them through a public road [two actions that are both violations of Biblical prohibitions], it would not be permitted. But one of the Sages, R. Yaakov by name, remarked to him: It was made plain to me on behalf of R. Yehudah that even grinding on the Sabbath and carrying through the public street are permissible.

R. Yehudah declared it permissible to paint the eye on

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no longer grind their own pharmaceuticals, see Dr. Abraham Abraham's commentary, *Nishmat Avraham*, ad loc.

<sup>7</sup> *Nishmat Avraham*, *Orah Hayim* 328:17, cites the opinion of R. Avraham Hayim Na'eh (in his commentary *Ketzot Ha-Shulhan*), who places those who will lose full limb function (e.g. those who will limp) in this category as well.

<sup>8</sup> *Shulhan Arukh*, *Orah Hayim* 328:17.

<sup>9</sup> See *Arukh Ha-Shulhan*, *Orah Hayim* 328:19.

the Sabbath. Whereupon R. Shmuel b. Yehudah said: He who acts according to Yehudah violates the Sabbath. After some time, when he himself [R. Shmuel b. Yehudah] had a sore eye, he sent to ask of R. Yehudah: Is it permitted or forbidden? He sent back: To everyone else it is permitted, but to you it is forbidden [because you disagreed with my ruling]. Was it on my own authority [that I permitted it]? It was on that of Mar Shmuel.

It once happened to a maidservant in Mar Shmuel's house that her eye became inflamed on a Sabbath; she cried, but no one attended her and she lost her sight [lit., her eye dropped]. On the morrow, Mar Shmuel went forth and pronounced that if one's eye gets out of order, it is permissible to paint it on the Sabbath, the reason being that eyesight is connected to the membranes of the heart.<sup>10</sup>

What kind [of disorder]? Said R. Yehudah: Such as discharge, pricking, congestion, watering, inflammation or the first stages of sickness, excluding the last stage of sickness or the brightening of the eyesight, in which cases it is not permitted.<sup>11</sup>

Based on this Talmudic text, Tosafot argue that the law is the same regarding a patient whose illness threatens a limb as it is for a patient suffering from a life-threatening illness; in both cases, one is permitted to desecrate Shabbat, even by violating a Biblical prohibition.<sup>12</sup> Tosafot do not elaborate on what part of the text makes this so evident, but it seems that they deduce this law from the story of Mar Shmuel's maidservant. Although she only lost her eye – she did not die – her experience nevertheless moved Mar Shmuel to proclaim that one should desecrate Shabbat in cases of eye infection. This view of Tosafot permitting the violation of a Biblical prohibition in cases of

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<sup>10</sup> This translation follows the commentary of Rashi. The Soncino translation is "because the eyesight is connected with the mental faculties." The latter translation follows the interpretation of Tosafot.

<sup>11</sup> *Avodah Zarah* 28b. Translation based on A. Mishcon, *The Soncino Press*, found at: [http://www.come-and-hear.com/zarah/zarah\\_28.html#PARTb](http://www.come-and-hear.com/zarah/zarah_28.html#PARTb).

<sup>12</sup> Tosafot, *Sukkah* 26a. Tosafot on *Avodah Zarah* 28b may share this opinion as well.

potential loss of limbs is also quoted by R. Asher ben Yehiel (Rosh)<sup>13</sup> and espoused by R. Alexander Zuslin,<sup>14</sup> R. Menachem ben Shlomo Meiri,<sup>15</sup> and Rabbeinu Tam.<sup>16</sup>

The generally accepted halakhic opinion, however, is that one may not violate a Biblical prohibition in order to save a limb on Shabbat. This opinion is maintained by R. Shlomo Yitzhaki (Rashi),<sup>17</sup> R. Moshe ben Nachman (Ramban),<sup>18</sup> R. Asher ben Yehiel (Rosh),<sup>19</sup> R. Nissim ben Reuven (Ran),<sup>20</sup> R. Yaakov ben Asher (*Tur*),<sup>21</sup> and R. Yosef Karo (*Shulhan Arukh*).<sup>22</sup> These commentators understand the Talmud's explanation that "the eyesight is connected to the membranes of the heart" to mean that loss of eyesight may actually lead to the patient's death. Since eye infections are life-threatening, the patient is considered a *holeh she-yesh bo sakanah*, which is why Biblical prohibitions may be violated on his account. It is not possible to extrapolate from this case to cases of loss of a limb.

These commentators note that while the Talmud concludes that eye infections are life-threatening and worthy of the violation of a *melakhah de-oraysa*, the passage began with the assumption that eye infections are not life-threatening. That is why the

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13 *Tosafot Ha-Rosh, Sukkah* 26a.

14 *Sefer Ha-Agudah* 148c; commentary on *Sukkah* 26a.

15 *Beit Ha-Behirah, Avodah Zarah* 28b.

16 Quoted by the *Ohr Zarua, Hilkhhot Yom Ha-Kippurim* 280.

17 Rashi, *Avodah Zarah* 28b.

18 Ramban, *Avodah Zarah* 28b.

19 Rosh, *Avodah Zarah*, ch. 2.

20 Ran, *Shabbat* 39b in the pages of Rif.

21 *Tur, Orach Hayim* 328.

22 *Shulhan Arukh, Orach Hayim* 328:17. R. Eliezer Yehudah Waldenberg (*Tzitz Eliezer* 14:89) contends that this is the view of Rambam as well. He deduces this from Rambam's statement that someone with an eye infection is "*be-khlal holim she-yesh bahem sakanah*," "included among those patients whose lives are in danger." I do not understand why R. Waldenberg concludes that this means that an eye infection may lead to death; perhaps it means that possible loss of an eye, and implicitly loss of limb, is in the same halakhic category as possible death.

passage stated, “He was understood to be of opinion that this only holds true when the medical ingredients had been ground the previous day,” as one would not be permitted to grind the ingredients on Shabbat itself. Yet even while considering loss of eyesight to be non-life-threatening, the Talmud understood that the violation of a Rabbinic prohibition – the use of medications ground the previous day – would be permissible. Accordingly, conclude these commentators, while loss of a limb does not permit the violation of a Biblical prohibition, it does permit the violation of Rabbinic prohibitions.<sup>23</sup>

According to this opinion, which permits the violation of Biblical prohibitions only in cases in which life is threatened, what changed Mar Shmuel’s position concerning treatment of an eye infection? It seems that he originally maintained that one is not permitted to treat eye infections on Shabbat, which is why he did not obtain treatment for his maidservant when she first showed signs of infection. Following the “dropping” of her eye, however, he determined that infected eyes ought to be treated on Shabbat because of danger to life. Yet danger to life had never been exhibited!<sup>24</sup>

It is possible that Mar Shmuel assumed from the outset that loss of an eye is life-threatening, but he did not realize that eye infection could lead to the loss of an eye. Once his maidservant lost her eye, he realized that eye infection itself is life-threatening.<sup>25</sup> However, knowledge that the loss of an eye may be life-threatening but failure to realize that an eye infection may lead to the loss of an eye is an unlikely scenario indeed!

It is more likely that the commentators who maintain that only potential loss of life permits Biblical prohibitions on Shabbat, and not potential loss of limb, have another version of the text. In fact, Ramban explicitly deduces his position from

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23 See Rashi, Ramban, Ran, loc. cit.

24 Regardless of what Mar Shmuel’s original assumption was, it remains unclear why he did not call for the aid of a non-Jew to heal the maidservant.

25 This is the explanation offered by the *Tzitz Eliezer*; see text at n. 56 below.

the fact that his text of the Talmud says that the maidservant died. Thus, Mar Shmuel knew from the outset that eye infection can lead to loss of an eye; he was simply previously unaware that it could eventually cause loss of life.<sup>26</sup>

Regarding the threat of loss of a limb, two further points of possible leniency should be taken into account. First, R. Shabtai ben Meir Ha-Kohen (*Shakh*) permits the violation of a Biblical prohibition in cases of danger to a limb,<sup>27</sup> although some argue that his ruling does not apply to prohibitions concerning Shabbat, which are more stringent.<sup>28</sup> Second, R. Eliezer Yehudah Waldenberg notes that the accepted medical opinion is that losing a limb is a risk for infection, which may in turn be life-threatening. Thus, a risk to a limb is often a risk to life, and a patient who is threatened with the loss of a limb should therefore be treated like a *holeh she-yesh bo sakanah* on Shabbat.<sup>29</sup>

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26 Ran likely also had this version of the text, as the text of R. Yitzchak ben Yaakov Alfasi (Rif), upon which Ran comments, states that the maidservant died. The Munich manuscript of the Talmud has this text as well; see the compilation of various Talmudic textual versions known as *Dikdukei Soferim*, *Avodah Zarah* 28b.

As noted above, the opinion of Tosafot is that the lesson of Mar Shmuel's story is that Biblical prohibitions can be violated even to save a limb. Had the maidservant in Mar Shmuel's story died, it would be difficult to extrapolate from her case to other cases in which a limb was threatened but there was no threat to life. It is therefore likely that the authorities who agree with Tosafot had our version of the Talmudic text, that of the Vilna manuscript, which does not describe the maidservant as dying. Rabbeinu Hananel ben Hushiel has this text as well.

The understanding that the difference of opinion regarding the laws of saving a limb depends on the text of the Talmud helps explain why the Ra'avya (cited in *Ohr Zarua*, *Hilkhoh Yom Ha-Kippurim* 280) writes that the *gemara* in *Avodah Zarah* 28b contradicts the ruling of Rabbeinu Tam. Ra'avya apparently had the version in which the maidservant died.

27 *Shakh*, *Yoreh Deah* 157:3 ?.

28 See R. Moshe Hershtler, *H alakhah U-Refuah*, vol. 1, p. 106.

29 *Tzitz Eliezer* 8:15.



## The Patient Who is Not in Mortal Danger

Many Talmudic passages discuss the case of a sick person whose life is not in danger, a *holeh she-ein bo sakanah*.<sup>30</sup> All of the major *Rishonim* conclude from these discussions that a Jew may not violate a Biblical prohibition on behalf of such a person, and it seems clear that a non-Jew may be asked to perform such an action on behalf of a sick Jew. The authorities strongly debate, however, whether a Jew may violate Rabbinic prohibitions for a *holeh she-ein bo sakanah*.

Tosafot,<sup>31</sup> Rambam,<sup>32</sup> Ramban in his novella,<sup>33</sup> Rashba in his responsa,<sup>34</sup> Ra'avad,<sup>35</sup> and Rama<sup>36</sup> maintain that a Rabbinic prohibition may be performed in its normal manner for the sake of a patient who is not in mortal danger. *Magen Avraham* agrees with this conclusion as well.<sup>37</sup> Others, however, argue that while a *melakhah de-rabbanan* may be performed, it may

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30 See for example *Shabbat* 108b, 129a, and 148a, *Yevamot* 114a, *Kesubot* 60a, *Beitza* 22a, and *Avodah Zarah* 28b. ?.

31 *Ketuvot* 60a, s.v. *Gonech* ?; *Yevamot* 114a, s.v. *Shabbat* ?; *Shabbat* 73b, s.v. *Mifarek* ?.

32 *Hilkhot Shabbat* 2:10 ?, as understood by *Maggid Mishneh* and *Tur*. However, it is important to note that according to *Beit Yosef's* understanding of *Maggid Mishneh* (*Orah Hayim* 328), this view of Rambam cannot be extrapolated to eye disease, as he holds that *Maggid Mishneh* believes that the category of *holeh she-ein bo sakanah* is restricted to those with a sickness affecting the entire body. Those with a localized sickness, even if a danger to a limb, are permitted only to ask a non-Jew to perform a *melakhah de-rabbanan*. This is an unusual view, as danger to a limb is generally viewed as at least as worrisome as a case of *holeh she-ein bo sakanah*. According to *Magen Avraham*, *Maggid Mishneh* agrees that someone with danger to a limb is considered a *holeh she-ein bo sakanah*. *Maggid Mishneh* meant only that a localized sickness that does not pose danger to a limb permits only a *melakhah de-rabbanan* performed by a non-Jew.

33 Ramban, *Avodah Zarah* 28b.

34 *Teshuvot Ha-Rashba* 7:272.

35 Quoted by *Maggid Mishneh*, *Hilkhot Shabbat* 6:9.

36 This is clear from his *Darkhei Moshe* commentary on *Tur*, *Orah Hayim* 328. His gloss to *Shulhan Arukh* 328:37 likely also reflects this view, although some commentators argue otherwise.

37 *Magen Avraham*, *Orah Hayim* 307:7; 328:30, 44; 496:3. See R. Moshe Hershler, *Sefer Halakhah U-Refua*, vol. 1, p. 102.

only be performed with a *shinui*, a change from the normal manner of performance. These commentators include Rashba in his novellae<sup>38</sup> and Ramban in *Torat Ha-Adam*.<sup>39</sup>

Other authorities maintain that a Jew may never perform a *melakhah de-rabbanan* for the sake of a *holeh she-ein bo sakanah*. *Eglei Tal* presents this view as that of Rashi<sup>40</sup> and *Mishnah Berurah* presents it as the view of the Yerushlami.<sup>41</sup> Rosh is uncertain whether a Jew is permitted to perform a *melakhah de-rabbanan* in this case or if this could only be done by a non-Jew.<sup>42</sup> He does not appear to entertain the possibility that a *melakhah de-rabbanan* may be performed by a Jew with a *shinui*. Either a Jew may perform the *melakhah* in the normal

38 Rashba, *Shabbat* 129a.

39 *Torat Ha-Adam*, *Sha'ar Ha-Mihush*. The view of Ran on this question is subject to dispute. Ran himself writes that his opinion is that of Ramban in *Torat Ha-Adam*; see his novellae on *Avodah Zarah* 28b and his commentary on Rif, *Shabbat* 39b and 60a. *Eglei Tal* (*siman* 38, *ot* 1) understands these statements literally and believes the position of Ran to be that of Ramban in *Torat Ha-Adam*. However, *Beit Yosef* (*Orah Hayim* 328) argues that unlike Ramban in *Torat Ha-Adam*, Ran does not ordinarily permit a Jew to perform a *melakhah de-rabbanan* with a *shinui* for the sake of a *holeh she-ein bo sakanah*; he permits only asking a non-Jew to perform the action. Nevertheless, if a non-Jew is unavailable, the opinion of Ran may be that of Ramban in *Torat Ha-Adam*, permitting the performance of a *melakhah de-rabbanan* through a *shinui*. The Vilna Gaon (*Bi'ur Ha-Gra*, *Orah Hayim* 328:17) similarly understands Ran to hold that when a non-Jew is unavailable, a Jew may perform a *melakhah de-rabbanan* with a *shinui*. Thus, in such a case, Ran would agree with Ramban's view in *Torat Ha-Adam*. R. Akiva Eiger (novellae on *Ketuvot* 60a, and responsa 5) interprets Ran differently, noting that in one comment (*Shabbat* 60a in the pages of Rif), Ran writes that when a non-Jew is unavailable, a Jew may perform a *melakhah de-rabbanan* himself. According to R. Akiva Eiger, Ran maintains that a Jew may perform a *melakhah de-rabbanan* in the usual manner when a non-Jew is unavailable, and his view thus differs from that of Ramban even in such circumstances.

40 *Eglei Tal*, *Melekheth Tohen*, *siman* 38, *ot* 2.

41 *Bi'ur Halakhah*, *Orah Hayim* 328.

42 Rosh, *Avodah Zarah* 2:10, quote by *Tur* 328. Some argue that the fact that Rosh prohibited squeezing pomegranate juice for a sick person (quoted by *Tur* 320) indicates that he eventually decided that it is only permitted to perform a *melakhah de-rabbanan* through a non-Jew.

manner or he may not perform the *melakhah* at all.

The position of Ramban in *Torat Ha-Adam* that it is permitted for a Jew to perform a *melakhah de-rabbanan* with a *shinui* for the sake of a *holeh she-ein bo sakanah* may have broad applications. It is Rabbinically prohibited to perform a *melakhah de-orayta* with a *shinui* on Shabbat. Since the performance of such an action with a *shinui* is essentially a *melakhah de-rabbanan*, according to Ramban, may one perform a *melakhah de-orayta* with a *shinui* for the sake of a *holeh she-ein bo sakanah*?

Many early authorities – including Ritva,<sup>43</sup> *Nimukei Yosef*,<sup>44</sup> and *Shulhan Arukh*<sup>45</sup> – seem to imply that this is not a plausible interpretation of Ramban's position. In order for the action to be permitted, the *melakhah* itself must be prohibited *mi-de-rabbanan* and it may then be performed with a *shinui*. Two lenient aspects – a *melakhah de-rabbanan* and a *shinui* – must be present. Nevertheless, more some recent authorities write that this was not the intention of the *Rishonim*; in fact, even a *melakhah de-orayta* may be performed with a *shinui*.<sup>46</sup> R. Shlomo Zalman Auerbach rules that if one is unable to have a non-Jew perform the action, one may perform even a *melakhah de-orayta* with a *shinui* according to Ramban.<sup>47</sup>

The generally accepted opinion is that a *melakhah de-rabbanan* may only be performed for the sake of a *holeh she-ein bo sakanah* when done with a *shinui*. *Shulhan Arukh*<sup>48</sup> and

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43 Ritva, *Ketuvot* 60a.

44 *Nimukei Yosef*, *Yevamot* 114a.

45 *Shulhan Arukh* 328:17. *Mishnah Berurah* ad loc. also has this implication.

46 *Shulhan Arukh Ha-Rav* 328; *Eglei Tal*, *Melekheth Tohen*, ot 38.

47 See *Shemirat Shabbat Ke-Hilkhatah* 33:2, n.17\*. This ruling requires some explanation. As we will see below, R. Auerbach rules that a *melakhah de-rabbanan* may be performed in the usual manner in situations in which it is not possible to perform the action with a *shinui* or through a non-Jew. If a *melakhah de-rabbanan* is entirely permitted for the sake of a *holeh she-ein bo sakanah*, then a *melakha de-orayta* with a *shinui* should certainly be permitted, regardless of Ramban's view in *Torat Ha-Adam*.

48 *Shulhan Arukh*, *Orah Hayim* 328:17.

*Mishnah Berurah*<sup>49</sup> follow this opinion. However, considering the opinions permitting a *melakhah de-rabbanan* even without a *shinui* in such a case, some authorities maintain that in a situation in which one would be unable to aid the *holeh she-ein bo sakanah* with a *shinui*, he may perform a *melakhah de-rabbanan* without a *shinui*.<sup>50</sup> *Hayei Adam*,<sup>51</sup> *Shemirat Shabbat Ke-Hilkhatah*,<sup>52</sup> and R. Moshe Hershler<sup>53</sup> are of this opinion.

### Ophthalmic Emergencies on Shabbat – The View of *Tzitz Eliezer*

R. Eliezer Yehudah Waldenberg permits the performance of a *melakhah de-orayta* in the case of eye emergencies on Shabbat for two different reasons. First, as noted above, based on accepted medical opinion, the loss of limb is considered potentially

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49 *Mishnah Berurah, Orah Hayim* 328:17.

50 It seems that this opinion would also allow performing a *melakhah de-oraysa* with a *shinui*, which is generally considered to be at most on the level of a *melakhah de-rabbanan* without a *shinui*.

51 *Hayei Adam, Hilkhot Shabbat U-Mo'adim* 69:12. *Hayei Adam* stipulates that one must also attempt to arrange for a non-Jew to perform the task before a Jew performs the *melakhah de-rabbanan* with a *shinui*. (When *Hayei Adam* is quoted by *Mishnah Berurah* [328:32], this stipulation is not included.) The requirement that a non-Jew be sought first would seem to indicate that that *Hayei Adam* holds like *Shulhan Arukh le-khathilah* – one should not perform a *melakhah de-rabbanan* in the usual manner – and like *Tosafot be-dievad* – one may do so after exhausting all otherwise options.

52 *Shemirat Shabbat Ke-Hilkhatah* 33:2. Like *Hayei Adam*, he requires that a non-Jew be sought first.

53 R. Moshe Hershler, *Sefer Halakhah U-Refuah*, vol. 1, p. 107. I assume that like *Hayei Adam* (see n. 51 above), R. Hershler holds like *Shulhan Arukh le-hatkhilah* and like *Tosafot be-dieved*. Since R. Hershler does not stipulate that a non-Jew must be sought first, it is possible that he holds entirely like Ramban in his novellae, permitting a *melakhah de-rabbanan* in the usual manner when it is not possible to perform it with a *shinui*. It seems reasonable to argue that the other *Rishonim* who permit a *melakhah de-rabbanan* without a *shinui* would agree that this should only be done when it is not possible to perform it with a *shinui*.

life-threatening due to a risk of systemic infection.<sup>54</sup> While this may suffice to permit a sick patient to perform a *melakhah de-orayta* in seeking treatment for an ophthalmic emergency, it would not permit an ophthalmologist to treat the problem in instances in which he recognizes the emergency to present no risk to life. In fact, while a case could be made that infectious emergencies pose an extremely remote, although theoretically possible, threat to life, it would be very difficult to make such an argument regarding non-infectious cases, such as the common retinal detachment.

Surprisingly, *Tzitz Eliezer* permits a physician to perform a *melakhah de-orayta* in order to treat a patient whose life is not in danger at all, but who could potentially lose his vision.<sup>55</sup> Although he notes the opinions cited above that maintain that a *melakhah de-orayta* may be performed in any case of threat to a limb (the view of *Tosafot Ha-Rosh*, *Sefer Ha-Agudah*, Meiri, and Rabbeinu Tam), he does not base his leniency on this opinion, as this view is not accepted as the final law. He mentions these opinions only in order to make it slightly easier to be lenient.

*Tzitz Eliezer's* chief argument is that even when an ophthalmologist insists otherwise, we follow the Talmudic passage quoted above, which indicates that danger to vision is considered danger to life. *Tzitz Eliezer* deduces this novel argument from the fact that the maidservant of Mar Shmuel did not die; she only lost her vision. Nevertheless, that event led Mar Shmuel to determine that eye infections must be treated on Shabbat because they are life-threatening. Perforce, Mar Shmuel previously knew that loss of vision is life-threatening, but until his maidservant's experience, he did not realize that eye infection leads to loss of vision. If Mar Shmuel knew that loss of vision is life-threatening, argues *Tzitz Eliezer*, then that is the assumption of the law even if an ophthalmologist argues otherwise.<sup>56</sup>

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54 *Tzitz Eliezer* 8:15.

55 *Ibid.* 14:89.

56 This is not the forum to discuss the question of whether the science of

This argument is difficult for three reasons. First, as we explained above, the mainstream opinion that a *melakhah de-orayta* is only permissible in life-threatening situations is likely based on a version of the Talmudic text that described the maidservant of Mar Shmuel as dying from her eye disease. If this is true, then Mar Shmuel never assumed that loss of vision is life-threatening. On the contrary, only after his maidservant died did he realize that an eye infection could possibly lead to death. It would have been illogical for Mar Shmuel to conclude from this occurrence that every eye infection is a danger to life; he would only have concluded that some eye infections could be a danger to life.

Second, in his explanation of the view permitting a *melakhah de-orayta* only when there is danger to life, Meiri writes:

Some commentators [explain] that this [permission to perform a *melakhah de-orayta* on Shabbat] was said only in reference to a sick person whom a physician recognizes to be in mortal danger, as [the Talmud] explains that the reason is that the sinews of the eyes have their roots in *halal ha-guf* (the body's internal cavity) – in other words, that there is mortal danger. However, if a sick person is not in mor-

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the Talmud supersedes modern science. In an apparent attempt to bridge the gap between the two, *Tzitz Eliezer* writes, “*Hazal* established their holy words on even distant possibilities that are not apparent to the eye.” It is open to question whether *Tzitz Eliezer* would use the same criterion of remote possibility (which must be quite remote, as it is unobservable) in other cases as well.

*Tzitz Eliezer's* reasoning might only permit all *melakhah* for the specific forms of sickness mentioned in the Talmud, but he nevertheless seems to permit *melakhot de-orayta* in the case of all threats to vision. In general, Rambam states (*Hilkhot Shabbat* 2:4) that the specific symptoms mentioned in the Talmud are not restrictive; any similar sign of disease is sufficient to be considered in the same category, although the degree of similarity required remains undefined.

tal danger, even though he has potential loss of sight, one does not grind medicine [for him] on Shabbat.<sup>57</sup>

Meiri explicitly writes that if a physician were to classify a patient with an eye infection as not being in mortal danger, then one would not be permitted to perform a *melakhah de-orayta* on his behalf.<sup>58</sup>

Third, the Talmud's paradigm for a life-threatening illness is that of a "*makeh shel halal*," an internal sore.<sup>59</sup> Rambam writes that this describes the case of a sick person "whose life is endangered and who does not require [professional] evaluation because his sickness is serious, and we therefore desecrate Shabbat immediately, without evaluating him."<sup>60</sup> The implication (stated explicitly by Ramban in *Torat Ha-Adam*<sup>61</sup>) is that while patients with serious illnesses do not require evaluation, if they are evaluated by a physician who determines that there is no danger to life, then Shabbat is not violated for them.

One could claim that the conclusion of the *gemara* in *Avodah Zarah* is that an eye infection is uniquely dangerous and therefore not subject to the normal halakhic parameters of a *makeh shel halal*. However, Meiri's statement implies otherwise. He writes that "the sinews of the eyes have their roots in *halal ha-guf*" – meaning that eye infections are considered life-threatening because they are a *makeh shel halal*. Because the eyes are connected to the heart, they are considered internal. Furthermore, Rambam also seems to imply that the laws concerning an eye infection and an internal sore are similar.<sup>62</sup>

In an ironic twist, while *Tzitz Eliezer* believes that the

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57 Meiri, *Avodah Zarah* 28b.

58 The view of Meiri himself is that danger to a limb is sufficient to permit a *melakhah de-orayta*.

59 See *Shabbat* 109a and *Avodah Zarah* 28a. ?.

60 *Hilkhhot Shabbat* 2:5.

61 Quoted by *Beit Yosef* 328.

62 *Hilkhhot Shabbat* 2:5, "*ve-khen*."

Talmud holds vision loss to be potentially life-threatening even if modern science does not, it seems that in actuality, modern science believes vision loss to be potentially life-threatening even if the Talmud does not! A recent study using the huge database of information compiled through the National Health Interview Survey found that some degree of visual impairment is an independent risk factor for increased mortality.<sup>63</sup> Practically, this validates the conclusion of *Tzitz Eliezer*, although for different reasons than he offers. According to these statistics, anyone with risk to vision should be considered a *holeh she-yesh bo sakanah*, for whom any *melakhah* must be performed on Shabbat.<sup>64</sup>

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63 Lee DJ, Gomez-Martin O, Lam BL, Zheng DD, “Visual Acuity Impairment and Mortality in US Adults,” *Arch Ophthalmology* 120 (2002): 1544-1550.

64 In general, someone with risk to life is considered a *holeh she-yesh bo sakanah* even if the risk is minimal. There are opinions that when the risk is that something life-threatening may evolve in the future but it is non-existent presently, the patient is considered a *holeh she-yesh bo sakanah* only when there is probable risk; minimal risk does not suffice. Thus, present eye illness that may in an unlikely event lead to some other cause of death in the future would not be categorized as a situation of *holeh she-yesh bo sakanah*. This argument appears to be logically difficult.

Strangely, *Pri Megadim* and *Hayei Adam* maintain that the Talmud requires that symptoms of disease come together with the beginning of the sickness. If they arrive later, the patient is not considered a *holeh she-yesh bo sakanah*. This is their reading of the last line in the Talmud’s discussion, “Such as discharge, pricking, congestion, watering, inflammation, or the first stages of sickness, excluding the last stage of sickness.” This is difficult to understand medically, and the early commentators seem to disagree. Rashi defines the “late stage of sickness” as being “[when the patient] has already been healed and has only minimal temperature.” The implication is that if the symptoms are severe, even if they do not arrive immediately, it is not considered to be the last stage of the sickness. Rabbeinu Hananel also implies that the symptoms are what define the illness as being in its early stages. The fact that Rambam does not mention the requirement of it being the early stages of sickness presumably indicates that he too understands the symptoms as defining the early stages of sickness.

Of course, if one accepts that impaired vision causes higher mortality, then these particular symptoms and their timing are inconsequential. Anyone whose condition may lead to vision impairment is a *holeh she-yesh bo*



## Practical Summary

Based on the sources and arguments cited above, the following seems to me to describe the halakhic course of action in the case of medical emergencies on Shabbat:

- 1) In any situation of potential danger to life, one should do everything necessary to treat the patient, even if it involves a *melakhah de-orayta*. Included in this category is any ophthalmic emergency in which there is discharge, tearing, blood, or inflammation, unless a physician has determined that there is no danger to life. If the ophthalmic emergency is deemed life-threatening, one should not search for a non-Jew or child to perform the prohibited actions, but rather have an adult Jew perform them.<sup>65</sup> Any time the patient is aware that it is Shabbat and demands treatment, he should be treated as a *holeh she-yesh bo sakanah*, even if a physician says that he is not in danger.
- 2) In any situation of potential damage to vision, one should attempt to deal with the situation through the performance of *melakhot de-rabbanan* or through a non-Jew. If one is unable to do so, one may perform *melakhot de-orayta* as well.<sup>66</sup>
- 3) One who has severe eye pain or inflammation that has been deemed by a physician to not be dangerous to

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*sakanah*.

<sup>65</sup> *Arukh Ha-Shulhan* 328:6-7.

<sup>66</sup> This is based on the opinion of *Tzitz Eliezer* that the Talmud deems danger to vision to be life-threatening, as well as the medical possibility that impairment of vision is an independent risk factor for mortality. In addition, one can rely in this case on the opinions that one may perform a *melakhah de-orayta* in any case of *sakanat ever*. Despite these reasons to allow a *melakhah de-orayta*, given the problems noted with the reasoning of *Tzitz Eliezer*, I present this opinion only *be-dieved*.

his life or his vision may be treated either by a non-Jew or by a Jew performing a *melakhah de-rabbanan* with a *shinui*. If a Jew is unable to treat through these methods, he may perform a *melakhah de-orayta* with a *shinui*<sup>67</sup> or a *melakhah de-rabbanan* in the usual manner.

- 4) One who has non-severe eye pain should not be treated on Shabbat. However, any form of treatment that would not be perceived as definitely medicinal (as a healthy person might perform the action as well) is permissible.<sup>68</sup>

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67 R. Auerbach rules that a *melakhah de-orayta* with a *shinui* may only be used *be-dieved*. Were it not for this ruling, I would have thought that this should be permitted even *le-khashilah* – that is, even when there are other options. This is based on the fact that the majority of opinions maintain that one may perform a *melakhah de-rabbanan* for a *holeh she-ein bo sakanah*, and even according to the opinion that *Shulchan Aruch* accepts – that a *melakhah* performed for a *holeh she-ein bo sakanah* must be done with a *shinui* – some understand that this includes the performance of a *melakhah de-orayta*. This should, at the very least, create a doubt as to whether a *melakhah de-orayta* with a *shinui* is permissible or Rabbinically prohibited. The general rule is that if it is unclear whether there is a Rabbinic prohibition, the action is deemed permissible out of doubt. Certainly when dealing with a sick person, one should be lenient in such situations.

68 *Shulchan Aruch, Orach Hayim* 328:20.

RAPHAEL HULKOWER

# *The Taboo on Boo-Boos: Methods and Medications Permitted on Shabbat for Minor Ailments*

## **Introduction**

Although the act of medication consumption itself does not violate any Torah prohibition of Shabbat, the Sages of the Talmud prohibited this act for fear that it might lead to violation of the formal Shabbat *melakhot*. Since the grinding of herbs was (and, in rare cases, remains) an essential part of concocting medicinal remedies, *Hazal* feared that in one's haste for relief from their medical condition or the pain thereof, he or she might go so far as to grind fresh medication on Shabbat if none were available, violating the biblical prohibition of *tohen*.

Since the decree was intended to safeguard Shabbat, and not to endanger life or cause severe suffering, the decree does not apply to critically ill individuals (*holeh she-yesh bo sakanah*) or even to non-critically ill individuals who are sick enough to be bedridden or incapacitated from pain (*holeh she-ein bo sakanah*). The decree only applies to those suffering minor ailments or pain (*meihush be-alma*), who are strong enough to function as any other healthy individual.<sup>1</sup> The scope of the

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<sup>1</sup> *Shulhan Arukh, Orach Hayim* 328:1, 2, 17; *Mishnah Berurah* 1.

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decree in this regard appears to be universally accepted.

However, there are additional limitations of *Hazal's* ruling such that in certain situations, those suffering even minor ailments may receive medical therapies on Shabbat. In this article, we will discuss and explicate those situations in which medical therapy is permitted on Shabbat even for minor medical problems. The first section will discuss methods of medication consumption that allow one to consume medication on Shabbat even for minor ailments. The second section surveys various medications that are intrinsically permitted on Shabbat according to some authorities. In prelude to these discussions, we will first discuss the decree and its modern applicability.

### **The Rationale of the Decree**

The Rabbinic decree prohibiting medical therapy on Shabbat for minor illnesses is discussed in many sources throughout the Talmud and medieval commentators.<sup>2</sup> The primary source is *Shabbat* 53b, where the Talmud rules that if an animal is “overcome with blood” (i.e. suffering from plethora, or perhaps a fever), one is not allowed to place the animal in water to cool it off. On the other hand, a human with the same condition is permitted to cool off in water because such an act could be construed as a leisure activity rather than a therapeutic act. Since animals generally do not bathe to cool off, allowing the animal to bathe would be understood by onlookers as an overt therapeutic act. Thus, engaging in an unambiguous medical therapy would be equally prohibited for humans and animals; the medical therapy is permitted in this case only due to the technicality that this action may be deemed recreational for a human. The Talmud then raises the question of why a therapeutic act is prohibited and responds, “Ullah said: It is a decree [to prevent] the grinding of herbs.” Rashi elaborates:

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<sup>2</sup> See *Eglei Tal, Meleket Tohen* 16:36 for a long list of citations where this decree is mentioned among the medieval commentators.

For acts of medical therapy were proscribed by the Rabbis due to the fact that if one were to permit any act of therapy, people might come to permit themselves to grind herbal spices, which is a Torah violation of *tohen* (grinding).<sup>3</sup>

Notably, the talmudic passage goes on to declare that the application of this decree to animals is debated among the *Tanna'im* and concludes that we follow the lenient approach (thus permitting one to place an overheated animal in a cooling bath).

Why were the Rabbis so concerned that the ordinary Shabbat observer might mistakenly come to grind herbal medicines on Shabbat? The medieval commentators Rabbeinu Asher (Rosh) and Rabbeinu Yitzhak Alfasi (Rif) on the above passage explain that the Sages were concerned that people often become *bahul*, “crazed” or “discombobulated” about their need for medical therapy, to the point that they might come to grind fresh medicine to obtain relief.<sup>4</sup> The Rosh and Rif’s psychosocial reasoning behind this decree is adopted by many later commentators, such as *Mishnah Berurah*, *Eglei Tal*, and *Shulhan Arukh Ha-Rav*.<sup>5</sup> *Hayei Adam* understands the rationale in a slightly different manner, explaining that all medical acts were prohibited, even when no Shabbat *melakhah* is violated, for fear that people may come to think that one is allowed to vio-

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3 Rashi, *Shabbat* 53b, s.v. *gezeirah mishum shehikat samemanim*.

4 Rosh, *Shabbat* 5:3; Rif, *Shabbat* 24b (in the pages of Rif). Rosh and Rif express their opinion via the counterpoint: They state that the reason the decree against medication on Shabbat does not apply to animals is because a person would not become “*bahul*” about his animal’s illness to the extent that he might violate Shabbat over it. See also *Shabbat* 117b for a similar Rabbinic decree in a situation in which the Sages were concerned that one might become “*bahul*” about losing his money and therefore come to perform a *melakhah*.

5 *Eglei Tal*, *Melekheth Tohen* 16; *Mishnah Berurah* 328:86; *Shulhan Arukh Ha-Rav* 328:31. The latter two authorities imply this approach by stating that one is allowed to replace a bandage on an old wound since one is not “*bahul*” enough about this to accidentally violate Shabbat as a result.

late Shabbat for medical care even in situations in which there is no danger to life. The fear that people will violate *tohen* in order to grind fresh herbs is simply one example of this decree.<sup>6</sup>

Interestingly, the Talmud Yerushalmi offers a different rationale behind the prohibition against medical therapy on Shabbat. According to the Yerushalmi, medicinal foods may not be eaten on Shabbat “in order for one not to act on Shabbat as one normally acts on a weekday.”<sup>7</sup> Thus, according to the Yerushalmi, the Sages prohibited medical actions to proactively preserve the sanctity of Shabbat, rather than to prevent possible violations.

### **Modern Applicability**

If the Sages’ decree against medical therapy on Shabbat was intended as a safeguard against grinding fresh medicine, is the decree applicable in the modern era of industrialized pharmacology? Nowadays, nearly all medication is produced in biochemical laboratories; individuals do not grind the medication themselves. In fact, most doctors and pharmacists, let alone the average person, do not even know how to prepare fresh medications from their original ingredients!

Many modern halakhic authorities have raised this question and have offered a variety of approaches in response. The most well-known proponent of the idea that this decree may not be fully applicable today is *Ketzot Ha-Shulhan*, R. Avraham Hayim Naeh. In his *Badei Ha-Shulhan* commentary, R. Naeh argues that this decree should be viewed leniently:

The prohibition against medical therapy [on Shabbat], as part of the decree against grinding herbs, is very lenient in our times. This is because we lack expertise in grinding herbs and our medicines are produced by pharmacists in

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<sup>6</sup> *Hayei Adam* 69:1.

<sup>7</sup> *Yerushalmi, Shabbat* 14:3.

pharmacies requiring a doctor's orders. Therefore, it is not application to make a decree out of concern that one might come to grind herbs.<sup>8</sup>

R. Naeh argues that this decree is comparable to the decree against dancing or clapping on Shabbat for fear that one might come to repair an instrument (a violation of *tikkun maneh*). Tosafot state that the decree against dancing or clapping no longer applies since we are no longer experts in repairing instruments, and therefore need not be concerned that such actions will lead to violation.<sup>9</sup>

R. Naeh is ambivalent in the end, stating that although most people do not grind fresh medicine, there are still places in the world where people know the art of grinding fresh medicine or use home remedies. Based on this, the original reasoning of the decree is still applicable enough that one cannot completely rescind *Hazal's* decree against using medicine on Shabbat.<sup>10</sup> Nevertheless, R. Naeh concludes that since the ability to grind medicine is not common, one can use this reasoning to advocate for leniency. As such, he maintains that one can rule leniently regarding the consumption of medication whenever there is a dispute among the halakhic authorities in this matter. Similarly, if one is suffering great discomfort but is in doubt whether his level of pain is incapacitating enough to permit medication consumption, R. Naeh advocates for leniency based on the idea that this decree is less applicable in our day and age. In all other cases of minor ailments, the decree still stands.

*Olat No'ah* is another theoretical proponent that the

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8 *Ketzot Ha-Shulhan* 134 and *Badei Ha-Shulhan* 7, note 2.

9 Tosafot, *Beitzah* 30a, s.v. *tenan ein metaphin*. R. Naeh notes that other halakhic authorities, such as Rema and *Magen Avraham*, have also extrapolated this ruling of Tosafot to cases beyond dancing or clapping on Shabbat.

10 R. Naeh argues that this is comparable to the *halalkhot* of *eruin* in modern times. Most people do not live in areas that qualify as bona fide public thoroughfares (*reshut ha-rabbim*), but since such places do exist in the world, the *Halakhah* still applies as well.

decree against taking medicine on Shabbat should no longer apply. Similar to R. Naeh, *Olat No'ah* notes that Rema extrapolated the permissive ruling of Tosafot regarding clapping and dancing on Shabbat to other decrees where the reason no longer applies. Thus, he permitted a marriage to be performed on Shabbat, despite the fact that the Talmud prohibits this for fear that one may come to write the *ketubah* on Shabbat, because most grooms no longer compose their own *ketubah* and it is written long in advance of the marriage day. As such, there is no concern that getting married on Shabbat would lead to a violation of writing; the reasoning of the original decree no longer applies.<sup>11</sup> *Olat No'ah* writes:

Just as Rema compared the decree against marriage on Shabbat, for fear that one may write, to Tosafot's permission of the decree against dancing and clapping because one may repair instruments, so too we may compare the decree against medication on Shabbat to Rema's permissive ruling. In fact, the ruling against medication has even more reason to be uprooted than these other decrees. In the context of the other decrees, the Talmud never explicitly showed that they do not apply when the reason is not relevant... However, in the context of the decree against medication, the Talmud gave explicit examples when the ruling does not apply, in situations in which there is no concern for grinding herbs.<sup>12</sup>

Despite these strong arguments, *Olat No'ah* concludes by stating that "all I have written is the pure *halakhah*, but is not to be followed in practice." He states that Rabbinic violations of Shabbat are very serious matters and he therefore de-

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<sup>11</sup> Rema, responsum 125.

<sup>12</sup> *Olat No'ah*, *Orah Hayim* 3.



fers to the other authorities who rule more stringently in this matter.<sup>13</sup>

Many other modern halakhic authorities differ, implicitly or explicitly, with the arguments of *Ketzot Ha-Shulhan* and *Olat No'ah*. R. Naeh himself cites the opinion of *Torat Hesed* that we can only uproot one of *Hazal's* decrees when we are sure of the reasoning and therefore are certain that it no longer applies. Regarding the prohibition of medication on Shabbat, one cannot be certain that there were no other reasons for the decree in addition to the concern for grinding herbs:

Who among use has the power to know which decrees had clearly defined reasons, in order to be able to uproot the decree without another rabbinic quorum? Rather, we can only rely upon those matters where the medieval commentators wrote explicitly that the reason for the decree was known and no longer applies [such as Tosafot's opinion regarding clapping and dancing on Shabbat].<sup>14</sup>

*Torat Hesed's* implication that there are other reasons for the prohibition against using medication on Shabbat is supported by a responsum of R. Moshe Feinstein. In the context of discussing whether a person incapacitated by illness is allowed to take medication for other minor aches and pain, R. Feinstein writes that this person is prohibited from taking

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13 Ibid.

14 The opinion and quotation of *Torat Hesed* is cited in *Badei HaShulhan*. R. Naeh presents a rebuttal to the argument of *Torat Hesed*, noting that *Torat Hesed* himself writes that if a decree has clearly demarcated exceptions that are established at the same time as the decree, this demonstrates that the decree has a known reason and would be uprooted when that reason does not apply. Based on this, R. Naeh points to two talmudic precedents where the decree against medical therapy on Shabbat does not apply – instances in which there is no concern for grinding herbs, proving that this is the only reason for the decree.

the other medication because there is still the concern that he might “grind medication, or perform cooking, or carry into a public thoroughfare.”<sup>15</sup> By adding these other possible violations as reasons not to allow the consumption of medication, R. Feinstein implies that the prevention of these violations is also included in the rationale of *Hazal’s* decree.

R. Moshe Hershler states unequivocally that the decree still applies nowadays. Although he acknowledges that the majority of people today are not capable of grinding their own medicine, he argues that most medications are still produced in pharmacies where grinding and mixing processes remain in use. “At the foundation of medicine [production] is the biblical *melakhah* of grinding, and therefore the principle for the decree still pertains.”<sup>16</sup> R. Hershler also refers to the passage in *Beitzah* regarding the prohibition of dancing and clapping, but he argues that in that case, the original reason for the decree is completely irrelevant today.<sup>17</sup> Furthermore, since *Hazal* made many exceptions to this decree – such as for someone truly incapacitated with illness and the exceptions to be discussed below – R. Hershler argues that one should not attempt to create new exceptions or even use the applicability argument to rule more leniently, as R. Naeh had suggested.<sup>18</sup>

## **Medication Permitted Based on the Method of Consumption**

### **A. Medication dissolved into food prior to Shabbat**

When *Hazal* prohibited the use of medication on Shabbat, they only prohibited the **consumption** of medication

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15 *Iggerot Moshe, Orach Hayim* 3:53.

16 *Halakhah U-Refuah*, vol. 1, p. 68.

17 R. Hershler does not explain why that decree is any less relevant than the one regarding medicine; after all, musical instruments still require repair at times by those trained in this craft.

18 *Halakhah U-Refuah*, *ibid.*

on Shabbat, not the **effects** of the medication. Thus, one who requires a daily medication or anticipates a need for medication on Shabbat may certainly take the medication even moments before Shabbat begins. This point seems intuitive. Less intuitive, however, is the argument of some *posekim* who also allow one to take medication **on Shabbat** provided that the medication was unrecognizably mixed into food or drink **before** Shabbat.

This ruling is based upon the *gemara* in *Shabbat* (108b):

Mar Ukva said in the name of Shmuel: A person is permitted to soak collyrion<sup>19</sup> before Shabbat and place it on his eyes on Shabbat without any concerns [that he is transgressing].

Rashi explains the reasoning for this exception to the general decree against taking medication on Shabbat: Since the person with the eye ailment is required to soak the medication prior to Shabbat, there is a “*heker*,” a reminder, intrinsic in this act that one cannot violate Shabbat to prepare medication, and there is therefore no need for the *gezeirah* against consuming the medication. Furthermore, onlookers will not know that he is taking medication, since it simply appears as though he is washing his eyes with wine.<sup>20</sup> This ruling of Shmuel with Rashi’s explanation is cited directly by *Shulhan Arukh*.<sup>21</sup>

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19 Collyrion, or collyrium, was the most widely used form of eye remedy in Talmudic times. Although its ingredients are not listed in the Talmud, it is clear that the paste was mixed with a liquid to form an ointment. It was mixed with either water, wine, human milk, dew, or egg whites. See Julius Preuss, *Biblical and Talmudic Medicine*, trans. and ed. by Fred Rosner (New York, 1983), 277-78.

20 Rashi, *Shabbat* 108b, s.v. *ve-noten al gabei einav*. Presumably, washing one’s eye with wine was a common practice in the *gemara* and/or Rashi’s time, and soaked collyrion took on the appearance of wine either because of a color change or because one would actually mix the paste with wine rather than water. *Mishnah Berurah* 328:69 notes that people used to wash their eyes with wine for pleasure.

21 *Shulhan Arukh*, *Orah Hayim* 328:21.

R. Naeh rules that one may use this exception for other types of medication as well. In the context of discussing ways to treat acid reflux on Shabbat, R. Naeh writes that if one prepares soda water (i.e. alka seltzer) before Shabbat, it is permissible to drink it on Shabbat for the same reasons that Rashi presented. For the consumer himself, there is a reminder, since he had to prepare the medication before Shabbat. In addition, onlookers will not be able to identify this as medication, since it appears to be merely water. R. Naeh emphasizes that this ruling only applies if the soda tablet is thoroughly dissolved in the water so that it cannot be identified. He concludes his remarks with an even greater leniency, stating that if one did not prepare the soda water before Shabbat, he can prepare it on Shabbat with a *shinui*, such as placing the soda tablet into tea and sipping it slowly.<sup>22</sup>

Other halakhic authorities expand and qualify *Ketzot Ha-Shulhan's* ruling. R. Yitzhak Yaakov Weiss (*Minhat Yitzhak*) notes that the Sephardic *posek Mishpitei Tzedakah* permitted the use of medication dissolved into normal food substances, even if they were mixed on Shabbat itself. R. Weiss is hesitant to be this lenient, and concludes by stating that one may rely upon *Ketzot Ha-Shulhan's* ruling in situations of great suffering.<sup>23</sup> R. Shlomo Zalman Auerbach adopts *Ketzot Ha-Shulhan's* ruling as well, adding that not only can one dissolve the medicine into a liquid before Shabbat, but one may also grind medicine and mix it into sugar (i.e. powder) before Shabbat, provided that the medicine is mixed in so well that it cannot be identified. Therefore, even medication that does not come in liquid or dissolvable form can be included in Shmuel's ruling. R. Auerbach cautions, however, that simply concealing pills or medication inside food, without creating a thoroughly homogenous mix-

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<sup>22</sup> *Ketzot Ha-Shulhan* 138, in *Badei Ha-Shulhan* after note 31.

<sup>23</sup> *Minhat Yitzhak* 6:28. While this is the most likely reading of the responsum, it is also possible to read R. Weiss as stating that in situations of great suffering, one may rely upon the opinion of *Mishpitei Tzedakah*, who allows the use of medication even mixed on Shabbat. See also *She'arim Metzuyanim Be-Halakhah* 91:2.

ture, does not meet the criteria to rely on Shmuel's ruling.<sup>24</sup>

While R. Auerbach appears to agree with *Ketzot Ha-Shulhan*, he differs on a major point. According to R. Auerbach's understanding of Shmuel's case, one is only allowed to use the collyrion on Shabbat because one does not normally soak collyrion. By soaking it on Erev Shabbat, one is performing an abnormal act, a *shinui* – indicating that he would never prepare medication in a normal fashion on Shabbat. As such, there is no need for any *gezeirah*. Accordingly, R. Auerbach argues that if a medication is normally dissolved or mixed into a solution or mixture, one is not allowed to consume this medication on Shabbat, even if it was prepared before Shabbat. On this basis, he specifically states that those who suffer from indigestion should not use soda water mixed before Shabbat except in situations of great need, since this is the normal fashion of preparing and consuming this medication.<sup>25</sup>

In contrast to these opinions, R. Moshe Feinstein maintains that one is not allowed to consume medicine that is dissolved in food or liquid before Shabbat. According to R. Feinstein, collyrion normally required soaking before usage, but it was customarily soaked **immediately** before use. Since the act of soaking collyrion itself is not considered a *melakhah* on Shabbat, requiring one to perform this task before Shabbat acts as a sufficient reminder that one is not allowed to consume medication regularly on Shabbat. Furthermore, by soaking the collyrion before Shabbat, it is considered to a certain extent as though one has started consuming the medication before Shabbat. With this in mind, R. Feinstein opines that one cannot generalize this ruling to all medications and create a home-made *heker* by dissolving medication in food or liquid. If this were allowed, then just as the Sages were worried that one may

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24 *Shulhan Shlomo, Hilkhot Shabbat*, Vol. 3, *Orah Hayim* 328:36.

25 *Shulhan Shlomo*, vol. 3, *Hilkhot Shabbat* 328: 37. See also 328:39, where R. Auerbach claims that both Tosafot and Meiri understood that collyrion was normally used without soaking; the purpose of the soaking was to create a *shinui* allowing one to use this concoction on Shabbat.

violate Shabbat in the urgent need to prepare medication, one might also forget to dissolve the medication in an urgent moment, since the act of dissolving the medication is extraneous in any case. R. Feinstein concludes that any medication that is regularly prepared by being dissolved in food immediately before consumption is permitted for use if the dissolution is performed before Shabbat, as this situation is directly comparable to Shmuel's collyrion case.<sup>26</sup>

Thus, while *Ketzot Ha-Shulhan* allows all medication to be consumed on Shabbat when it has been mixed into food before Shabbat, R. Auerbach and R. Feinstein argue with this view depending on the type of medication that one wishes to consume. If a medication that is normally not dissolved (most medications) is mixed into food before Shabbat, it would be permitted to consume it on Shabbat according to R. Auerbach, but it would be prohibited according to R. Feinstein. If a medication is normally mixed into a food or liquid right before use (such as alka seltzer or Metamucil) and is instead prepared before Shabbat, it would be permitted to consume it on Shabbat according to R. Feinstein, but it would be prohibited by R. Auerbach.

### **B. Medication that must be taken on consecutive days**

A more well known exception to *Hazal's* decree against medication consumption on Shabbat is the view of many authorities permitting one to consume medication that must be taken for many days in a row. One of the earliest proponents of this leniency is the early 19<sup>th</sup> century *posek* R. Shlomo Kluger in his *Sefer Ha-Hayim*:

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<sup>26</sup> *Iggerot Moshe, Orach Hayim* 2:86. R. Feinstein adds that if one received the dissolved medication premade, then this would not be permitted. The consumer must actually perform the act of dissolution. Thus, one would not be allowed to use pre-soaked collyrion on Shabbat, as this would remove the *heker* for the consumer.

It has become well known among the people that if a person begins taking medication before Shabbat, he is permitted to continue taking the medication on Shabbat, although he is not permitted to start taking the medication on Shabbat. However, I do not know from where this ruling was disseminated.

R. Kluger goes on to explain what he believes is the rationale behind this exception to the decree. When a person wants to start consuming a medication on Shabbat, the Sages were concerned that in his urgency, he might come to grind medication or perform *melakhah* in order to obtain the medication. However, in a situation in which a person initiated a course of medication before Shabbat, he presumably has already made the necessary efforts to ensure that the medication is readily available and will not be at risk of violating Shabbat in order to prepare the medication.<sup>27</sup>

R. Kluger concludes that even if one wishes to be more stringent on this matter, one can certainly be lenient to continue medication courses that have been initiated before Shabbat when the medication in question must be cooked before use. He maintains that we are not worried that a person in haste would grind and cook medication on Shabbat, since cooking is universally known to be a very serious Shabbat violation. Since most modern medications are prepared in a fashion that

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<sup>27</sup> *Sefer Ha-Hayim* 328, beginning of ch. 6. R. Kluger explains that this concept may be derived from the fact that replacing a bandage is prohibited out of concern that one will come to spread ointment (violating *merihah*), while the initial placement of a bandage is a violation of the decree against using medication out of concern of grinding. The fact that replacing a bandage must be prohibited for a different reason demonstrates that the decree does not apply when one has already started a therapy, since one will have taken care of all preparation ahead of time. Regardless of this extrapolation, R. Kluger states that he thinks it logical to allow one to consume medication when we know they will have made all the necessary preparations ahead of time.

involves some cooking process, this added stringency will not exclude most medications.<sup>28</sup>

The permissibility of taking medication on consecutive days that include Shabbat may also be rooted in the ruling of Rambam. Based on a *gemara* in *Shabbat* (140a), Rambam rules that one who begins drinking a medicinal potion called *Halitit* several days before Shabbat may continue consuming it on Shabbat as well, “in order that he not become sick if he interrupts the consumption.”<sup>29</sup>

Many other modern authorities have adopted R. Klugers’ approach. R. Shlomo Zalman Auerbach also allows one to continue taking a medication course that was initiated before Shabbat, but only in one of two situations: 1) If interrupting the medication course would cause the person harm or 2) the required medication course is long enough that one must take a dose on Shabbat in order to complete the full course (i.e. the medication must be taken for at least 8 days). Along the lines of the first condition, *Shemirat Shabbat Ke-Hilkhatah* rules that one may continue taking a medication on Shabbat, even once his illness has resolved, if taking the medication will prevent recurrence of the illness.<sup>30</sup> Hazon Ish is also quoted by his students as allowing one to take medication on Shabbat if it must be taken on consecutive days without a day’s interruption, even if the individual would not have been permitted to take this medication otherwise (i.e. for a minor ailment).<sup>31</sup> R. Gedalya Nadal quotes Hazon Ish’s lenient view on this matter, explaining that Hazon Ish allowed one to consume medication on Shabbat if it was required to be taken on consecutive days even if the course is less than 7 days. According to R. Nadal,

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28 See *Shemirat Shabbat Ke-Hilkhatah*, ch. 34, n. 7.

29 *Hilkhot Shabbat* 22:7. This source is likely why R. Shlomo Zalman Auerbach only allows one to continue taking a medication course on Shabbat if the interruption will lead to harm (see below).

30 *Shemirat Shabbat Ke-Hilkhatah*, ch. 34, n. 76.

31 Hazon Ish’s opinion is quoted in R. Meir Grainiman, *Sefer Imrei Yosher: Seder Mo’ed* (Bnei Brak, 1974), appendix entitled “*Kuntres Pesakim U-Devarim Me-Maran Ha-Hazon Ish*,” section 97.



Hazon Ish understood that only a *meihush*, a minor ailment sufferer, was prohibited from taking medication on Shabbat. However, if a person is required to take medication for many days consecutively, this is not considered a mere *meihush*, but rather a more significant disease (*mahalah*), for which one is permitted to take medication on Shabbat.<sup>32</sup>

In opposition to these views, R. Moshe Feinstein states emphatically that he does not understand how one could consider the possibility of allowing medication consumption on Shabbat simply because it will interrupt a treatment course. R. Feinstein is only willing to entertain this leniency in a situation of mental illness, when one is at risk of suffering a “nervous breakdown” should his treatment course be interrupted.<sup>33</sup>

### **C. Taking medication preventatively**

Another situation in which a mildly ill person may take medication on Shabbat is when the medication will prevent his condition from worsening to a point at which he would be halakhically permitted to take medication. A person who is incapacitated or bedridden by illness (*holeh she-ein bo sakanah*) or whose illness causes the whole body to ache or weaken is permitted to consume medication on Shabbat.<sup>34</sup> According to some authorities, if a person knows that he will fall into one of these categories if he does not consume medication, he may

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32 Quoted in R. Avraham Ha-Levi Horowitz, *Sefer Orhot Rabbenu* (Bnei Brak, 1990), ch. “*Hanhagot Orah Hayim*,” section 214. Of note, R. J. David Bleich writes based upon this source that Hazon Ish allows one to take even the initial dose on Shabbat. See “Survey of Recent Halakhic Periodical Literature” in *Tradition* 41:4, p. 64. While this may be true based on Hazon Ish’s reasoning, it is not obvious in the wording of the source, which states, “Any medical therapy that requires consecutive days is permitted to start immediately and continue taking it even on Shabbat.” The implication appears to be that one need not delay the initiation of care in order to try to avoid taking it on Shabbat (for example, when the medication course is less than 7 days), but it does not clearly state that one may begin the first dose on Shabbat.

33 *Iggerot Moshe, Orah Hayim* 3:53.

34 *Shulhan Arukh, Orah Hayim* 328:17.

take the medication ahead of time to prevent this situation.

The main proponent of this opinion is R. Shlomo Zalman Auerbach. In his responsa work, *Minhat Shlomo*, R. Auerbach writes:

It is clear that one is allowed to take medication in a situation in which he will become sick if he does not take the medication, **for why should he wait to become sick?!**

R. Auerbach notes that a statement of Radvaz can be interpreted to rule against this position, as he writes that a person who is imprisoned is not allowed to ask a non-Jew to bring him food on Shabbat in order to prevent him from starving and possibly taking ill. R. Auerbach explains, however, that Radvaz's case is one in which a person has a **chance** of becoming ill by fasting; when a person is **certain** that he will become ill without taking medication, it is certainly permitted to take the medication on Shabbat without waiting at all.<sup>35</sup>

R. Auerbach applies this ruling even if withholding the medication will only cause a person to become a *holeh she-ein bo sakanah* and not seriously ill. In *Shulhan Shlomo*, he writes that if a healthy person will become bedridden if he does not take his medication on time, "he is considered at the present time to be a *holeh she-ein bo sakanah*."<sup>36</sup> In a practical application of this ruling, R. Auerbach is quoted by Dr. Avraham Avraham as permitting one to ingest vitamins on Shabbat if he is prone to catching colds, respiratory infections, or other ailments for which one is allowed to consume medication to cure on Shabbat if he needs to take these vitamins daily to prevent these ailments.<sup>37</sup>

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<sup>35</sup> *Minhat Shlomo* 2:60, part 16. Emphasis is my own.

<sup>36</sup> *Shulhan Shlomo*, vol. 3, *Hilkhos Shabbat* 328:24.

<sup>37</sup> *Nishmat Avraham*, *Orah Hayim* 328:3 (second edition).

## Substances That are Not Considered “Medicine”

Having discussed situations in which *Hazal's* decree against consuming medication on Shabbat does not apply because of the method of consumption, we will now address another major exception – foods or pharmaceutical products that are not considered “medicine” by Halakhah.

### A. Ordinary food (*Ma'achal Beri'im*)

Many ordinary foods contain important vitamins and nutrients, such as iron, calcium, and fiber. A person suffering from a minor ailment is permitted to consume these foods, even if it is apparent to all that the sole purpose is to treat his ailment. This is true even if the food is difficult to tolerate for some healthy individuals.<sup>38</sup> Since one is only consuming ordinary food items, this act will not lead observers to conclude that purely medicinal substances are permitted for consumption as well. Thus, ordinary food and drink consumption for medical purposes was not included in *Hazal's* decree.<sup>39</sup>

A good example is consuming prunes to help cure constipation. Since healthy individuals also consume prunes, one who suffers constipation is allowed to eat them on Shabbat.<sup>40</sup> Similarly, one suffering a cold may consume orange juice or hot tea to relieve the cold symptoms, as these are drinks normally consumed by healthy individuals as well.

However, even ordinary food may be prohibited if used in a way that indicates that the food is specifically being used for medical purposes. For example, *Shulhan Arukh* rules that one suffering a toothache may not sooth it with vinegar (or whiskey) if he spits it out afterwards, but he may do so if he swallows the liquid. Spitting out the liquid indicates that the

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38 *Shabbat* 109b; *Shulhan Arukh, Orach Hayim* 328:37.

39 *Berakhot* 38a (and Rashi ad loc.) expresses this reasoning slightly clearer than the *mishnah* in *Shabbat* 109b. See also *Shabbat* 53b where therapeutic acts are permitted on Shabbat when the action is something that a healthy individual may engage in as well.

40 See Rabbi Moshe Shtern, *Be'er Moshe* 1:33.

sole purpose is medicinal and thus falls under *Hazal's* prohibition.<sup>41</sup>

### **B. Vitamins and medicinal substances that do not cure an ailment**

Thus far, this article has only discussed ways in which one who suffers a minor ailment (*meihush*) may take medication on Shabbat. What about a perfectly healthy individual? Is a healthy individual prohibited from consuming medication on Shabbat since he is still consuming "medication," or is this not viewed as a therapeutic act and is therefore permitted? While this question appears theoretical in nature, it is relevant for situations in which medication is used for pleasure and to the important discussion of consuming vitamins on Shabbat.

As noted above, the *mishnah* in *Shabbat* (109b) rules that one may eat or drink any substance that healthy individuals regularly consume, even if the intention is medicinal. The *mishnah* then provides a few examples of food items that are not regularly consumed by healthy people: "A person may drink all beverages, except for the water of palm trees... because it is used to heal jaundice; however, he may drink the water of palm trees to quench his thirst." Rashi adds a very significant qualification, adding "if one is not sick."<sup>42</sup> R. Moshe Hershler notes that other *Rishonim* appear to disagree with Rashi.<sup>43</sup> Nevertheless, this *mishnah* and Rashi's interpretation are codified by *Tur*.

Any substance that is not a food or drink regularly consumed by healthy individuals is forbid-

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41 *Shulhan Arukh, Orach Hayim* 328:32. The talmudic source is *Shabbat* 111a. *Mishnah Berurah* 328:102 writes that the same is true of whiskey. *Mishnah Berurah* 328:101 adds that one is not even allowed to leave the vinegar in his mouth for a while and then swallow, since this also indicates the act is abnormal and medicinal in nature. However, he writes that one may be lenient to do so if he is in great pain.

42 *Shabbat* 109b and Rashi ad. loc, s.v. *le-tzamo*.

43 *Halakhah U-Refuah*, vol. 1, p. 74.

den to consume for medical purposes. However, one may eat or drink it to satisfy his hunger or thirst provided that he is not sick.<sup>44</sup>

*Tur's* ruling based upon Rashi's explanation teaches two important points. First, a sick individual may not consume substances normally used for medical purposes even if his intentions are simply to satisfy hunger or thirst. This point appears quite logical in the spirit of *Hazal's* decree against medication on Shabbat, but is nevertheless not explicitly stated in the *mishnah*. Second, a healthy individual may consume medicinal foods if his intention is purely for enjoyment.

Thus, for example, a healthy individual may consume a cough or throat lozenge on Shabbat to simply enjoy the taste. However, someone suffering a minor cough would not be allowed to enjoy the lozenge, even if his intention was similarly for pleasure.

While the precise language of *Tur* only allows a healthy person to consume medicinal substances for "hunger or thirst," *Beit Yosef* argues that *Tur* did not intend to limit the ruling to only such cases. Rather, *Tur's* implication is that:

Whoever is not sick at all is allowed to eat or drink substances not normally consumed by healthy individuals – for since he is not sick, there is no reason to apply the decree [against medication]. Therefore, even if he is not hungry or thirsty, he may eat or drink [the medicine]. And the fact that the *Tur* wrote "for hunger or thirst" was not meant to be specific, but rather to describe a common occurrence.<sup>45</sup>

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<sup>44</sup> *Tur*, *Orah Hayim* 328:38.

<sup>45</sup> *Beit Yosef*, *Orah Hayim* 328:37-38. *Beit Yosef* notes that *Mordekhai* supports his ruling, as he writes that one is allowed to consume sweet medicines and to swallow a raw egg to enhance one's voice since these acts are not therapeutic in light of the fact that he has no illness.

Thus, according to Beit Yosef, a healthy individual is allowed to consume medication even if his intention is **therapeutic** rather than purely pleasure.

In sharp contrast to this opinion, *Magen Avraham* writes that since *Tur* specifically codified that it is permitted to consume medication “for hunger or thirst,” this implies that it is prohibited to consume medication for therapeutic purposes, even when the person is healthy.<sup>46</sup>

R. Moshe Hershler elucidates that this dispute between *Beit Yosef* and *Magen Avraham* revolves around a fundamental difference in their respective views of the decree against medical therapy on Shabbat. According to *Beit Yosef*, the prohibition is for one to cause himself to be healed. Therefore, one who is healthy is permitted to take medication, since he will not be “healed” by its consumption. In contrast, *Magen Avraham* understands that *Hazal* simply prohibited the action of consuming medication. When a healthy person consumes medication with therapeutic intentions, the pills are considered a prohibited object, regardless of their effects.<sup>47</sup>

In codifying this ruling regarding healthy individuals consuming medication in his *Shulhan Arukh*, R. Yosef Caro is consistent with his writings in *Beit Yosef* and does not restrict the ruling to situations of “hunger or thirst.” Since he does not comment, it appears that Rema agrees as well.<sup>48</sup> However, *Mishnah Berurah* comments that this ruling only applies when one is trying to satisfy hunger or thirst, siding with the view of *Magen Avraham*.<sup>49</sup>

R. Moshe Feinstein writes that this dispute between *Beit Yosef* and *Magen Avraham* greatly impacts the question of whether one may consume vitamins on Shabbat. As most people use vitamins for therapeutic intentions rather than taste, it would appear that *Beit Yosef* would permit this consumption,

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46 *Magen Avraham*, *Orah Hayim* 328:43.

47 *Halakhah U-Refuah*, vol. 1, p. 80.

48 *Shulhan Arukh*, *Orah Hayim* 328:37.

49 *Mishnah Berurah* 328:120.

while *Magen Avraham* would forbid it. R. Feinstein adds that it is appropriate to follow the view of *Magen Avraham* in this dispute, since he is the later opinion.

However, R. Feinstein then raises a profound question: When a person is “healthy,” how can consuming medication be considered “therapeutic” in the eyes of Halakhah? Despite a person’s therapeutic intentions, the medication has no direct effect. Returning to the rationale of the decree against medication on Shabbat, R. Feinstein offers that no one will be “*ba-hul*,” or crazed, about taking a substance that has no immediate impact on his or her health. Accordingly, R. Feinstein concludes that even *Magen Avraham* would only prohibit vitamin consumption for a healthy person who is “weak in nature and wants to strengthen himself through oral consumptions” by taking vitamins on Shabbat. Since this type of person actually becomes stronger as a result of consuming the medication or vitamin, despite being healthy and without specific malady, *Magen Avraham* prohibits such an act on Shabbat, while *Beit Yosef* is lenient. Thus, R. Feinstein concludes that even *Magen Avraham* would permit a person to consume vitamins that do not significantly strengthen or heal, but rather simply prevent the individual from becoming sick more easily.

In practical application, R. Feinstein ends his response by writing that although the practice is to follow the opinion of *Magen Avraham*, this only applies to vitamins or medications that **significantly** strengthen a healthy person. If the vitamins will only strengthen a person slightly, and certainly if their purpose is simply to prevent one from becoming sick easily, they are permitted on Shabbat. R. Feinstein indicates that most vitamins would fall into this category, even those that strengthen a person slightly, “just as eating meat strengthens a person slightly in comparison to eating only vegetables.”<sup>50</sup>

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<sup>50</sup> *Iggerot Moshe, Orach Hayim* 3:54. This comparison to meat consumption perhaps implies that iron supplementation is allowed on Shabbat, since meat is a rich source of iron. Furthermore, anemic individuals often feel slightly weak or fatigued but are otherwise completely healthy, an apropos

However, a vitamin supplement were to significantly heal or improve an individual who is not sick enough to be considered a *holeh*, such a vitamin would be subject to the dispute between *Magen Avraham* and *Beit Yosef*, in which case one should be stringent.<sup>51</sup>

Many other modern halakhic authorities also permit one to take vitamins on Shabbat. R. Eliezer Waldenberg notes that vitamin consumption has become so widespread that it is possible to view them as supplemental nutrition rather than medication. Accordingly, he reasons that vitamin consumption should be permitted from one of two different angles. First, vitamin consumption is so widespread that one can rightly view their consumption as “normal food” (*ma’achal beri’im*), which is permitted even if one’s intentions are therapeutic in nature. Second, even if vitamins are not considered regular food, their consumption is permitted for a healthy individual, as codified in *Shulhan Arukh*. R. Waldenberg dismisses the opinion of *Magen Avraham* on two grounds. First, *Magen Avraham* is the minority opinion, as both *Shulhan Arukh* and Rema seem to permit healthy individuals to consume medication even if not taken for hunger or thirst. Second, even *Magen Avraham* may have viewed vitamins as meeting the requirement of being eaten for “hunger or thirst,” since most vitamins are available in normal food sources; consuming vitamins prevents a person from needing to eat or drink large quantities of food in order to obtain the nutrients that he is lacking in his diet, which might lead to unnecessary weight gain. Thus, one consumes vitamins to “sate his hunger” more effectively and efficiently. Furthermore, R. Waldenberg adds that even if one is consuming vitamins out of weakness and in order to improve his health, since so many individuals take them simply as supplemental food, it will not be apparent when one is actually consuming them for

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example of the slight improvement in strength that perhaps even *Magen Avraham* would allow.

<sup>51</sup> Ibid.



therapeutic purposes.<sup>52</sup>

R. Moshe Stern similarly permits vitamins consumption on Shabbat, although he presents a more novel reading of *Beit Yosef*. In his understanding, when *Beit Yosef* stated that a healthy person may consume non-food substances even if his purpose is not for hunger or thirst, he meant that since the person is completely healthy, even when he consumes non-food items for therapeutic purposes, onlookers will assume that he is simply consuming them for his hunger or thirst, and the act is therefore permitted. According to R. Stern, although *Magen Avraham* does not permit this when the substance will strengthen a person – as this is considered a medicinal act – even he would permit vitamin consumption if the effect will only be to prevent one from becoming weak. In addition, like R. Waldenberg, R. Stern also raises the point that perhaps vitamin consumption is so widespread that one can consider them to be like normal food, with the caveat that this would not be true of vitamins that are only taken for therapeutic purposes.<sup>53</sup>

Finally, R. Ovadia Yosef permits the consumption of vitamins on Shabbat, especially as Sephardic Jews commonly follow the view of *Beit Yosef*. In deference to *Magen Avraham*, however, he recommends that one try to begin taking the vitamins on Erev Shabbat,<sup>54</sup> and he states that a person who can safely manage to avoid taking these pills on Shabbat will receive

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52 *Tzitz Eliezer* 14:50. R. Waldenberg also adds as a final point that since one consumes the vitamins every single day, there is no concern that he will be *bahul* about their consumption and there is therefore no risk that he would violate Shabbat to obtain them. See also *Tzitz Eliezer* 11:37 for a similar point.

53 *Be'er Moshe* 1:33. R. Stern also discusses the possibility that aspirin usage is so widespread that it may also be considered *ma'achal beri'im* and therefore permitted for anyone on Shabbat. He reports that the *posek* R. Yonson Shteif permitted aspirin on Shabbat, but R. Stern himself disagrees. Of note, the context of this discussion appears to be usage of aspirin for minor pains or simply for preventative health. Patients who are prescribed aspirin for heart disease or stroke prevention would likely be viewed more leniently.

54 This is based on the idea that one may continue taking daily medications on Shabbat.

extra blessing.<sup>55</sup>

In contrast to these authorities, R. Shlomo Zalman Auerbach rules that there is no difference between vitamins and other medications; one is only allowed to ingest vitamins in the same situations in which he would be permitted to consume regular medications. As such, he writes that one may only take vitamins if he would become bedridden or be in significant pain if he did not take the vitamins on Shabbat. He recommends that one try to take the vitamins immediately before and after Shabbat if this would allow him to take a daily vitamin without having to consume it on Shabbat itself.<sup>56</sup> The only area where R. Auerbach feels there is room to be lenient regarding vitamin consumption on Shabbat is for children under the age of nine who are recommended to take a daily vitamin by their doctor, as children in that age group have the status of a *holeh she-ein bo sakanah* even when healthy.<sup>57</sup>

### C. Therapies not considered *refuah* by Halakhah

Finally, there is a limited group of medications that, although they produce immediate and noticeable effects (unlike vitamins), are nevertheless permitted by some authorities on Shabbat. Most of these medication exceptions are based on the rationale that the medication is not truly treating the condition or that the effects are not considered therapeutic in the eyes of Halakhah. The precedent for this category is found in the ruling of *Mordekhai*:

One is permitted to eat sweet resins or swallow a raw egg on Shabbat in order to make his voice more pleasant, **since the purpose of this act is to strengthen his voice and is not considered medicinal (*refuah*)**, as he has no ailment in

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55 *Yalkut Yosef* 4:328:55.

56 *Shulhan Shlomo*, vol. 3, *Hilkhos Shabbat* 328:1.

57 *Shulhan Shlomo*, vol. 3, *Hilkhos Shabbat* 328:1, n. 2.

his throat.<sup>58</sup>

*Shulhan Arukh* codifies this opinion of *Mordekhai*, and *Mishnah Berurah* reiterates that this is permitted since “the act is not *refuah*, so there is no need for the decree again grinding herbs.”<sup>59</sup> Later authorities have extended this ruling or this reasoning to include other therapies as well.

### *1. Sleeping pills and stimulants*

Based on similar reasoning, *Eshel Avraham* and *Ketzot Ha-Shulhan* permit one to consume sleeping medication on Shabbat. *Eshel Avraham* writes that one is permitted to wash his head with a potion that induces sleep since sedatives are not considered *refuah*, similar to enhancing one’s voice with a raw egg.<sup>60</sup> *Ketzot Ha-Shulhan* explicitly permits sleeping medication on Shabbat:

A person who cannot sleep without taking medication is permitted to consume it on Shabbat as well, **because this is not a cure for any ailment (*refuah le-holi*)**, since insomnia is not considered an ailment, and the medication does not heal anything, but rather simply sedates and brings about sleep... Furthermore, insomnia causes great suffering to a person and harms the entire body.<sup>61</sup>

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58 *Mordekhai*, *Shabbat* 384.

59 *Shulhan Arukh* 328:38; *Mishnah Berurah* 328:122.

60 *Eshel Avraham* (Buczacz) 327:1. The direct connection to swallowing a raw egg is only listed in the citation of this source by R. Shlomo Zalman Auerbach in *Shulhan Shlomo*, vol. 3, *Hilkhot Shabbat* 328:57. R. Auerbach is ambivalent about whether *Eshel Avraham* would allow one to take sleeping pills, since the decree against grinding herbs may be more relevant when using actual pills.

61 *Ketzot Ha-Shulhan* 138 in *Badei Ha-Shulhan* 31.

R. Naeh argues that in addition to the fact that sleeping aids are not considered “*refuah*” by Halakhah, insomnia may also cause significant suffering to the point that those suffering from lack of sleep are considered a *holeh kol gufo*, one whose entire body aches, which is equivalent to the status of a *holeh she-ein bo sakanah* and who is permitted to take medication in any event. Interestingly, R. Naeh concludes with his controversial argument discussed above – since the grinding of medication is nearly obsolete in current times, one can rule more leniently in matters of consuming medication on Shabbat.<sup>62</sup> R. Ovadia Yosef also permits sleeping pills on Shabbat for insomniacs, citing the reasoning of *Ketzut HaShulhan* as well as the fact that many other authorities permit their use.<sup>63</sup>

While other halakhic authorities dispute the notion that sedatives or sleep aids are not considered *refuah* in Halakhah, some still permit their use when insomnia causes significant suffering. In contrast to the above opinions, R. Eliezer Waldenberg writes that insomnia is no different than any other minor ailment.<sup>64</sup> R. Shlomo Zalman Auerbach also maintains that “taking pills to prevent or to induce sleep is considered like the therapy (*refuah*) of *Aluntis*,” a mixture of aged wine, clear water, and balsam oil that is forbidden for use on Shabbat.<sup>65</sup> Nevertheless, elsewhere R. Auerbach writes that a person suffering insomnia should be considered incapacitated as a genuine *holeh*, and therefore one who is “suffering greatly” from insomnia is considered like one whose entire body aches,

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62 Ibid.

63 *Yalkut Yosef* 4:328:54. R. Yosef also cites the lenient opinions of *Eshel Avraham* (mentioned above), *Mishneh Shabbat* 4:51:2, *Be'er Moshe* 6:39, *Tzitz Eliezer* 8:15:15 note 14 and 8:17, and *Rivevot Ephraim* 5:202.

64 *Tzitz Eliezer* 9:17:2:40. *Tzitz Eliezer* writes that lack of sleep is “not worse” than any other minor ailment, as he is arguing that it is not severe enough to deem the person a true *holeh* who is permitted to take medication. However, since he forbids the use of sedatives, the implication is certainly that he does not consider insomnia any less than a minor ailment as well.

65 *Shulhan Shlomo*, vol. 2, *Orah Hayim* 321:23. *Aluntis* is forbidden on Shabbat in *Shulhan Arukh*, *Orah Hayim* 321:17.

and he is permitted to take sleeping medication on Shabbat.<sup>66</sup> This approach is adopted by *Shemirat Shabbat Ke-Hilkhatah* as well.<sup>67</sup>

While many authorities permit sleeping pills for various reasons, there is more divided opinion when it comes to stimulant medications. By omission, it would appear that R. Auerbach is more stringent regarding caffeine pills or stimulants. While he writes that one who uses them may be considered as causing harm to oneself and that they are therefore not considered *refuah*, he does not provide a situation in which they would be permitted, as he does with sleeping pills. *Minhat Yitzchak* and *Shemirat Shabbat Ke-Hilkhatah* take this approach explicitly, as they forbid the use of medications that prevent sleep on Shabbat, despite the fact that the latter source permits sleeping pills.<sup>68</sup> In contrast, R. Ovadia Yosef and R. Moshe Stern permit the use of stimulant medications provided that one's intention in staying awake is for the purpose of learning Torah or another *mitzvah*.<sup>69</sup>

## ***2. Lactase Pills for Lactose Intolerance***

The *Eretz Hemda Institute* was asked whether one is permitted to ingest lactase pills ("Lactaid") on Shabbat in order to enable one who is lactose intolerant to consume dairy products. The respondents note that this application is related to the vitamin discussion above, but it is more nuanced. On the one hand, a person feels no ailment prior to taking lactase, and he may thus be viewed as similar to a healthy vitamin consumer. On the other hand, the person has a genuine medical condition, an inability to produce sufficient lactase, which causes discomfort if the pills are not taken prior to ingesting milk. They conclude by supporting a lenient approach based upon a

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66 *Shulhan Shlomo*, vol. 3, *Orah Hayim* 328:57.

67 *Shemirat Shabbat Ke-Hilkhatah* 33:16 and n. 67.

68 *Minhat Yitzhak* 3:21; *Shemirat Shabbat Ke-Hilkhatah* 34:31.

69 *Yalkut Yosef* 4:328:54; *Be'er Moshe* 1:33. *Be'er Moshe* adds that these pills "have no power to heal."

fascinating argument – the mechanism of the medication:

Lactase replacement pills act differently from most pills. They provide the enzymes without which the consequences of lactose intolerance follow. They simply break down milk's lactose into sugar that the body can absorb. In fact, the active enzymes can be added directly to the milk (i.e. "Lactaid milk"), and the desired breakdown will occur outside the body. Thus, the pill just causes that the problematic condition never arises. **The body's deficiency is not addressed, as it is not healed into producing its own lactase enzymes.** Therefore, the situation is more lenient than even that of vitamins.<sup>70</sup>

Thus, in effect, lactase pills are not considered *refuah* in Halakhah. Although they produce a direct result on one's symptoms, the effect is external to one's body, and the underlying condition is never impacted.

### ***3. Medications for Erectile Dysfunction (Viagra)***

The discussion of Viagra (Sildenafil) use on Shabbat integrates many of the halakhic concepts discussed throughout both sections of this essay. R. Yoel Katan argues for leniency based on four arguments.<sup>71</sup> His first argument raises the point that Viagra should not be considered a true "remedy" in halakhic terms. From a biochemical point of view, Viagra does not "heal" the area of the body which is dysfunctional, but rather indirectly acts on the blood vessels of the penis to enable and enhance the normal mechanism of erection.<sup>72</sup> With this

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70 Daniel Mann, ed., *Living the Halachic Process* (New York, 2007), 137-39.

71 R. Yoel Katan, "Use of Viagra on Shabbat," *Assia* 73-74 (5764).

72 Viagra works by inhibiting phosphodiesterase type 5, thus enhancing the

in mind, R. Katan cites the opinion of R. Eliezer Waldenberg, who maintains that medicine that does not heal a condition but rather simply decreases one's pain is not included in the decree against medication on Shabbat.<sup>73</sup> R. Katan also cites the opinion of *Be'er Moshe*, mentioned above, who permits one to consume stimulant medications on Shabbat based upon the same concept.

However, R. Katan adds that R. Yehoshua Neuwirth wrote to him stating that this argument was not sufficient to permit one to consume substances that are not normally consumed by healthy individuals. Rather, he implies, *Tzitz Eliezer* and *Be'er Moshe* only permitted one to consume **normal** food substances, despite their having therapeutic intentions.<sup>74</sup> R. J. David Bleich, in his analysis of R. Katan's article, adds a more compelling counterpoint. Even if Viagra is not viewed as a "cure" to an ailment, it may certainly be viewed as a substance not regularly consumed by healthy individuals that significantly **strengthens** a person. As mentioned in our discussion on vitamins, even R. Feinstein and others who permit vitamins on Shabbat only appear to do so when the vitamins or medication lack significant effects. Viagra's effects would likely be too potent to fall into this category.<sup>75</sup>

R. Katan's second argument is that even if erectile dysfunction medication is viewed as a true therapy, perhaps such therapy is permitted to enable one to fulfill a *mitzvah*, such as having relations on Shabbat. He notes that R. Yitzchak Yaakov

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effects of nitric oxide, which relaxes the smooth muscles of the blood vessels that feed the tissues of the penis. This increases blood flow to the penis, enabling and enhancing an erection. Other medications used for erectile dysfunction work through similar mechanisms.

<sup>73</sup> *Tzitz Eliezer* 8:15:15. See also 14:50.

<sup>74</sup> This is obviously a hard point to swallow (pun intended), given that the Talmud and *Shulhan Arukh* appear to be quite clear that one may consume regular food substances even if his intention is clearly medicinal. R. Katan notes this point regarding R. Neuwirth's counterargument.

<sup>75</sup> R. J. David Bleich, "Survey of Recent Halakhic Periodical Literature: Blood Sugar Tests – Use of Viagra on Shabbat," *Tradition* 41:4 (Winter 2008): 61-67.

Weiss permits one who suffers angina (chest pain) and is required by his physician to take medication before intercourse to consume this medication on Shabbat in order to engage in relations. Since R. Neuwirth disagrees with R. Weiss's opinion on this matter, R. Katan states that this argument is not sufficient alone, but combined with the first argument, it should be grounds for leniency regarding Viagra on Shabbat.

R. Katan's third argument is that perhaps one is permitted to consume medication for erectile dysfunction because in the case of this ailment, it is considered as if one's limb is endangered, a situation in which one is permitted to consume medication on Shabbat. This argument is essentially an extension of the same argument advanced by R. Dr. Avraham Avraham to permit penile injections on Shabbat based upon the concept proposed by many halakhic authorities that loss of function of a limb is considered the halakhic equivalent of actual loss of a limb. This argument is often raised in permitting other fertility treatments on Shabbat as well.

Regarding this argument, R. Bleich counters:

There is no evidence indicating that transient dysfunction constitutes *sakanat ever* or that enhancement of the function of an organ is permitted... A medication that would entirely reverse impotence would certainly be permitted on Shabbat. However, Viagra...only makes sustained erection possible for a limited period of time. Nor does failure to use Viagra for any period of time compromise its future efficacy as a treatment for impotence.<sup>76</sup>

R. Katan's final argument is based on the concept that one who is required to take medication for many consecutive days is permitted to continue taking it on Shabbat as well. R. Katan subscribes to the interpretation advanced by *Hazon Ish*

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<sup>76</sup> Ibid., 66.



that the requirement to take a medication on a regular basis demonstrates that this person is truly sick (*holeh*), rather than a minor ailment sufferer, and is therefore permitted to consume medication on Shabbat. Although one does not necessarily need to take Viagra daily, R. Katan views the fact that one requires the medication for every act of intercourse as if one has a consistent condition that would also categorize him as a *holeh*.

### **Conclusion**

In discussing the variety of exceptions to *Hazal's* prohibition of medical therapy on Shabbat, this essay highlights the many nuances of this decree. Far from being an overarching decree against medical therapy on Shabbat, this decree was meant as a specific safeguard of Shabbat observance and limited to situations in which an unprepared sufferer of minor ailments or mild pain might come to violate Shabbat in a moment of overwhelming haste. When the pain is intense or the ailment reaches the status of a true *mahalab*, many halakhic authorities are lenient on this matter. Furthermore, the common thread highlighted in the first part of this article is that when a minor ailment sufferer is in a situation in which they will assuredly not be *bahul*, overwhelmed, about obtaining medication – such as when he dissolves it before Shabbat or takes it daily – many halakhic authorities permit medication consumption on Shabbat.

Finally, the second section of this article raised the fascinating discussion of what is defined as medical therapy from a halakhic point of view. Ordinary food, despite its many positive influences on health and disease, is universally understood to be outside the category of “therapy.” This question becomes more controversial when it comes to vitamins and their mild health impact, although many *posekim* find grounds to view vitamins as outside the realm of halakhic medicine. When pushing this question of how to define medical therapy to the extreme, some authorities have even argued that sleeping pills, lactase pills, and even Viagra may not be considered truly ther-

apeutic in their effects.

Of course, it becomes hard to draw a line in this type of discussion. Despite all the great advances in society's knowledge of medicine, genetics, and pharmacology, few medications truly **cure** disease. Aside from some areas of surgery, oncology, and infectious disease (and of course emergency situations), most therapies are aimed to **control** a disease – to prevent disease progression or complications. When viewed in this light, perhaps nearly all medical therapies can be viewed as disease management instead of halakhic "*refuah*."

While this idea may seem radical in concept, it would mean that *Hazal's* decree against medication on Shabbat in true modern application is often limited to the use of over the counter remedies for minor aches and pains. Such a narrow application implies that *Hazal's* decree was simply meant to decrease Shabbat desecration at the expense of a minor amount of suffering, which is likely quite tolerable to the average observant adult.

RABBI EPHRAIM METH

*A Doctor's Work is  
Never Done: When May  
Physicians Strike?  
Part II*

This article was presented as the fourth annual Dr. Abraham Weissman Memorial Lecture at Yeshiva University. It is a continuation of "May Physicians Strike?" published in *Verapo Yerapei*, vol. 4, p. 85.

Secular law currently entitles many segments of the labor force to strike in order to improve their work conditions or salary, but health care providers are often excluded from this right. In fact, such strikes are deemed illegal in a number of countries. A recent strike by health care providers in Israel prompts the question of how Halakhah views such activities.

While considerations such as *dina de-malkhuta dina* and *hillul Hashem* pertain to this discussion, historically, when Jews formed insular autonomous communities with permission from the gentile authorities, these considerations were minimal. Similarly, when Jews will once again be independent of non-halakhic authorities, these considerations will diminish in relevance. Even nowadays, in *Eretz Yisrael*, it is difficult to argue that *dina de-malchuta dina* and *hillul Hashem* alone are sufficient reasons to forbid physicians from breaching their

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contracts. However, *Tzitz Eliezer* notes that democratically elected assemblies in consultation with Torah scholars may at times limit or expand workers' rights to strike. Similarly, workers' rights to strike will sometimes depend on the spontaneously adopted customs of a community. These considerations apply equally to workers and to physicians.<sup>1</sup>

The present article will discuss the permissibility of strikes in the absence of *dina de-malkhuta dina*, *hillul Hashem*, and communal legislation or custom. It will further discuss whether the laws of strikes apply equally to workers and to physicians or whether workers and physicians are governed by two distinct sets of laws.

There are three reasons that workers are halakhically bound to uphold their contracts. First, they may damage their employer (causing him to lose profit or causing his assets to deteriorate) by breaching the contract. Second, they neglect to show their employer proper gratitude by breaking their contract. Third, they fail to uphold their commitment by breaking the contract. We will presently examine some of these reasons and their applicability to physicians.

## **I. Damage to an Employer or to Patients**

We are Biblically enjoined from damaging the person or property of others.<sup>2</sup> This prohibition applies equally to direct damage, such as punching someone's nose or burning his house, and to indirect damage. The following is an example of indirect damage. My friend was able to hire any worker he wanted, but he neglected to hire anyone because I committed to work for him. Subsequently, when other workers were no longer available for hire, I reneged on my commitment. As a

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1 *Tzitz Eliezer* 2:23. Interestingly, Maharik (181) finds it necessary to emphasize that physicians and workers are equally bound by laws established by the consensus of members of their professions. This emphasis suggests that Maharik understood that there is room to differentiate between workers and physicians.

2 See *Kehillot Yaakov, Bava Kama* 1.

consequence, my friend's merchandise deteriorated. Since my commitment and subsequent withdrawal caused his merchandise to deteriorate, I am liable for his losses.<sup>3</sup> Moreover, since my withdrawal will cause his merchandise to irreversibly deteriorate, I am forbidden to withdraw under the interdict against damaging others' property.

Similarly, if a patient was able to engage any doctor, but neglected to do so because I committed to heal him, then if my withdrawal would cause his health irreversible damage (or at least damage that would be expensive to correct), I am forbidden to withdraw under the interdict against damaging others. Conversely, however, if my withdrawal would not cause him irreversible damage, it would seem to be permitted.

What if I am uncertain whether or not my withdrawal will cause the patient damage? For instance, what if he is recuperating and if all goes well, he will recover on his own, but if complications arise, my absence would result in his deterioration? Presumably, my withdrawal would be permitted only if the chances of such complications arising are below 50%. If the chances are above 50%, then my withdrawal would be forbidden.

What if my withdrawal would not lead to his health deteriorating, but would prolong his hospital stay? This case, I believe, is similar to a case disputed by Rama and *Shakh*. If one engaged a babysitter to watch his child while he works, Rama rules that the babysitter may not renege, since her withdrawal

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<sup>3</sup> When employees illegally resign, such as in circumstances in which resignation causes their employer a loss of profit, they must pay reparations to their employer. *Sema* (333:8) writes that these reparations are for the damage that their employer suffered. *Ketzot Ha-Hoshen* (333:2-3), however, writes that these reparations are only imposed because the employee implicitly agreed to refund his employer for profit lost as a result of his resignation. In other words, the reparations are required because one is morally obligated to uphold his commitments. If a doctor was hired by the hospital, but the lost profit was suffered by his patients, *Sema* would require him to reimburse the patients, since he damaged them, but *Ketzot Ha-Hoshen* would argue that he need not reimburse anyone, since the hospital suffered no loss and the doctor never committed to reimburse his patient.

will necessitate one's absence from work, which in turn will lead to either failure to profit or genuine loss.<sup>4</sup> *Shakh*, however, rules that the babysitter may be permitted to renege.<sup>5</sup> In our context as well, the doctor's commitment and subsequent withdrawal will cause the patient unnecessary absence from work. In light of Rama's ruling, it is therefore forbidden in instances in which the patient's absence from work will result in a genuine loss.

The above only applies when the hospital or patient had greater opportunity to find doctors before this doctor committed himself. If doctors were already unionized before the hospital hired them or before the patient engaged their service, then they do not damage their employer by renegeing. Had they not consented to be hired, their employer would have been in the same bind. Their consent and subsequent strike, therefore, did not cause the employer to lose any opportunity.<sup>6</sup>

However, all of the above may be a moot discussion given that physicians are not considered typical employees. Rama rules that only workers who are paid for their work are enjoined from resigning when such resignation damages their employer, whereas volunteers may resign under any circumstances.<sup>7</sup> Although *Shakh* argues that volunteer workers may not resign and that they may only request payment in exchange for their services,<sup>8</sup> *Netivot Ha-Mishpat* upholds the simple reading of Rama that such workers are entirely entitled to resign

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4 Rama 333:5.

5 *Shakh* 333:23.

6 See *Shulhan Arukh, Hoshen Mishpat* 333:5. This ruling may depend on the availability of strike-breakers. If more strike-breakers were available when the doctors were hired than were available when they went on strike, then the doctors are indeed damaging their employer by striking. However, it may be halakhically forbidden to act as a strike-breaker, as legislation by the majority of a profession's practitioners may be binding even on the minority of practitioners. See *Maharik* 181; *Tzitz Eliezer* 2:23; and *Minhat Shlomo* 1:87.

7 Rama, *Hoshen Mishpat* 333:5.

8 *Shakh, Hoshen Mishpat* 333:31.

without penalty.<sup>9</sup> The Vilna Gaon similarly implies that since the workers were not receiving anything in exchange for their services, they have fewer obligations to their employers.<sup>10</sup> *Shulhan Arukh* rules that physicians are essentially volunteers; any monies that they receive are simply in exchange for foregoing more lucrative opportunities.<sup>11</sup> It follows that physicians should be allowed to resign even when their resignation causes their employers or patients financial loss.<sup>12</sup>

It is important to note that the concept that one may not damage others by striking is a corollary of the broader principle that one may not transgress any Torah prohibition by striking. For example, R. Moshe Feinstein<sup>13</sup> and R. Ovadia

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9 *Netivot Ha-Mishpat, Biurim* 12.

10 *Be'ur Ha-Gra, Hoshen Mishpat* 333:36.

11 *Shulhan Arukh, Yoreh De'ah* 336:2. *Shulhan Arukh* rules that physicians may not charge a fee for dispensing their wisdom or healing, but they may charge for opportunity cost and for effort expended. R. Moshe Feinstein (*Iggerot Moshe, Hoshen Mishpat* 1:59) and R. Hershel Schachter (*Ginat Egoz*, p. 187) explain that payment for opportunity cost is construed as an inducement for the physician to free himself from other obligations so that he or she can volunteer services to patients. Furthermore, effort expended only applies to effort in reaching the patient, not to effort expended to heal the patient, since the latter form of effort is a *mitzvah*. Since most employers do not differentiate between doctors with long commutes and doctors with short commutes, it is reasonable to conclude that they pay their doctors for opportunity cost alone, not for effort expended.

It should be noted that *Pithei Hoshen (Hilkhot Sekhirut, p. 221)* suggests that nowadays, physicians are entitled by universal custom to charge for their services, not just for opportunity cost. According to this view, doctors are not volunteers, but are rather ordinary employees. Most authorities, however, do not accept this suggestion as authoritative.

12 Whereas physicians whose patients are exclusively Jewish are deemed volunteers, physicians whose patients are exclusively gentile are deemed employees. Physicians who have both Jewish and non-Jewish patients may be entitled to abstain from treating Jewish patients, but not from treating gentile patients. Practically, however, physicians may be obligated to treat all their patients, since volunteers may not break their commitments, as noted below.

13 *Iggerot Moshe, Hoshen Mishpat* 1:59.

Yosef<sup>14</sup> rule that *rebbeim* may not strike (except when their collective financial situation renders them incapable of properly concentrating on teaching), since by striking they transgress the prohibition of *bitul Torah*. Accordingly, physicians may not strike when their strike would transgress the prohibition against standing idly by while someone's blood is being spilled or the prohibition against averting one's eyes rather than restoring someone's lost health. However, as we have noted elsewhere,<sup>15</sup> these prohibitions may only apply when a doctor has already begun treating his patient, when his assistance was directly requested, or when his absence creates a statistical certainty that patients will die. Absent these criteria, it seems that physicians who strike do not transgress any prohibitions.

## II. Keeping Commitments

Even if no Torah prohibition is violated when doctors strike, we must consider the fact that the Torah enjoins us to uphold our commitments. Hence, it is forbidden to break a contract for frivolous reasons. As we will see, it may even be forbidden to break a contract for monetary gain. However, it is almost certainly permitted to break a contract for the sake of one's spirituality, responsibility, dignity, or happiness.

The Torah terms the Jewish People "*avdei Hashem*," servants of God, emphasizing that we should not be servants of servants.<sup>16</sup> The Talmud<sup>17</sup> and *Rishonim* derive three laws from this principle. First, one should not hire himself out for more than three years at a time, since by doing so he makes himself a "servant of a servant." Second, one who hires himself out may quit at any time, since were he unable to quit, he would truly be a servant of a servant. This law is classically understood as depriving workers of the right to irreversibly commit themselves.

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14 *Yehaveh Da'at* 4:48.

15 "May Physicians Strike," *Verapo Yerape*, vol. 4, p. 85.

16 *Vayikra* 25:42, 55.

17 *Bava Metzia* 10a, 77a.



Hence, even if a worker commits to not quitting, his commitment is not legally or morally binding. However, Ritva seems to understand this law as creating only an assumption that any commitment is intended to be reversible. Hence, Ritva posits that if the worker demonstrates intention to irreversibly commit himself, he becomes irreversibly committed.<sup>18</sup> The third law derived from this principle is that one who quits retains the financial upper hand in salary disputes. Thus, if the price of labor rises and the employer now must pay more to complete the job, the worker who quit is still entitled to his entire prorated salary.

It seems likely that these laws are not co-dependent. For example, *Havot Ya'ir* writes that paupers may hire themselves out for more than three years, but they may also quit at any time, and they do not enjoy the upper hand in salary disputes.<sup>19</sup>

Do these laws apply equally to ordinary workers and to physicians, or are physicians exceptions from any or all of these laws? There are four possible rationales for these laws, and our question must therefore be considered from the vantage point of each rationale.

### **A. Flexibility**

First, as servants of *Hashem*, we must preserve our flexibility to upgrade our service of Him should the opportunity to do so present itself. For instance, a dockworker who received a

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18 See *Shakh* 333:14 and *Mahaneh Ephraim, Hilkhos Sekhirut Po'alim* 1-2. A worker may demonstrate intention to irreversibly commit himself by performing an act of ritual acquisition (*kinyan*) with his employer or by accepting his wages in advance. The logic behind this position seems to be that ordinary workers are bound to serve their employers by a moral obligation, while workers who performed a *kinyan* indelibly changed their relationship to their employer. Therefore, even if their moral obligation was annulled, they remain committed to their employer by virtue of their relationship until their commitment is discharged or until a ritual act restores the new subservient relationship to its original state.

19 *Havot Ya'ir* 106.

large inheritance should not be hindered from joining a *kollel* by an unbreakable long-term commitment to his dockworker job. Similarly, one who prays *Shaharit* before *netz ha-hamah* in order to commute to work on time should not be hindered by an unbreakable commitment from accepting a job that would allow him to pray after *netz*.

Based on this, *Havot Ya'ir* tentatively suggests that women's commitments to their employers are unbreakable. Since women are exempt from time-bound positive commandments, it is unlikely that an employment commitment would seriously conflict with their *avodat Hashem*. However, *Havot Ya'ir* ultimately rejects this suggestion.<sup>20</sup>

*Havot Ya'ir* further entertains the possibility that workers who break their contracts and immediately enter new contracts with new employers who offer them no additional latitude should be compelled to honor their original contracts. This is because their termination of the first contract was clearly not motivated by a desire to be a greater "servant of *Hashem*." Although *Havot Ya'ir* rejects this suggestion as well, *Pithei Teshuvah* upholds it.<sup>21</sup>

Similarly, Rama writes that workers may not break their commitments simply for monetary profit. Indeed, the courts will enforce any commitment broken for so trivial a reason.<sup>22</sup> The only valid reason to break an employment commitment is spiritual or emotional, since our entire allowance to break such commitments is predicated on our spiritual servitude to *Hashem*. Even people engaged in extremely worthwhile occupations, such as teachers or doctors, may find a more worthwhile occupation or a more spiritually worthwhile form of their own occupation. Hence, even doctors may resign.

This ruling of Rama seems to present an insurmountable obstacle to strikes, since the striking employees intend to continue working for their original employer and are striking

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20 Ibid.

21 *Pithei Teshuvah* 333:4.

22 Rama, *Hoshen Mishpat* 333:4.

only for better benefits or a higher salary. However, *Pithei Teshuvah* interprets Rama as permitting workers to quit for money, but ruling that if they choose to quit for money, they do not enjoy the upper hand in salary disputes. Furthermore, *Pithei Teshuvah* notes that *Havot Ya'ir* implicitly argues with Rama and maintains that if workers quit for money, they are still entitled to the upper hand in salary disputes.<sup>23</sup>

### **B. Responsibility**

Second, as servants of *Hashem*, we must feel responsible for our actions. For this reason, *Maggid Mishneh* writes that a worker paid per hour is considered a *po'el* and can never surrender his right to renege, while one paid per service is a *kablan* and may at times surrender his right to quit.<sup>24</sup> A *po'el* is bound to his boss, while a *kablan* is bound to his labor. A *kablan* is distinguished by his responsibility; if he is efficient, he will keep more time for himself, while if he is slothful and incompetent, he will suffer the consequences. In contrast, a *po'el* who works efficiently will simply be assigned another task by his boss; responsibility is not encouraged by the nature of his position. In order for him not to become a "servant of a servant," a *po'el* must always have the ability to quit his position.

### **C. Dignity**

Third, as servants of *Hashem*, we are enjoined to preserve the dignity of our independence and our equality. It is disgraceful to sell oneself to another person, to commit indefinitely one's time and energy to another's whim and to make one's will second fiddle to another's will. By giving the worker unqualified permission to resign, the Torah partially restores his dignity.

Perhaps for this reason, Maharik rules that partners may make servant-like commitments to one another – as in, "I will man the store for you this year if you compensate by manning it

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<sup>23</sup> *Pithei Teshuvah* 333:4.

<sup>24</sup> *Maggid Mishneh, Hilkhos Sekhirut* 9:4.

for me next year” – since “no one has more authority over his friend than his friend has over him.”<sup>25</sup> The dignity of equality is not compromised when two people are both master and servant to one another.

Based on this, *Havot Ya'ir* posits a possible distinction between teachers and cantors, a distinction that also applies to workers and physicians. Teachers are paid to provide particular services – namely, supervising young children and teaching them the Torah cantillation. In exchange for money, they surrender their right to use their time as they wish. Hence, teachers are like “servants of servants.” Their obligations derive from an altered, subservient relationship to their employers, and they therefore may not sign contracts obligating them for more than three years. In contrast, cantors are not allowed to charge for their services. Cantors’ salaries are designed to free the cantors from financial pressure so that they can volunteer their services to the community. Since the cantorial profession is a volunteer profession, cantors are not “subservient” to their employers; they are in servitude directly to *Hashem*. For this reason, their contracts do not implicate them in a disgraceful, subservient relationship, and they therefore may sign contracts obligating themselves to serve for more than three years.<sup>26</sup>

Like cantors, physicians are proscribed from charging patients for their services. They receive payments only as incentives to lure them away from lucrative employment.<sup>27</sup> Once they consent to abstain from such employment, they are free to voluntarily tend to their patients. Hence, they are not subservient to their patients or employers; they are subservient directly to *Hashem*.

If we were to generalize from permission to enter long-

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25 Maharik 181.

26 *Havot Ya'ir* 140, as interpreted by *Kesef Ha-Kedoshim*, *Hoshen Misphat* 333:3.

27 See *Shulhan Arukh*, *Yoreh De'ah* 336:2 and notes 11-12 above. Halakhah limits the amount of payment physicians may receive in order to ensure that the payment is genuinely an incentive to lure them from other professions and not payment for services rendered.

term contracts to inability to renege on contracts, it would follow that since physicians are permitted to enter into long-term contracts (that is, long-term abstention from lucrative employment), unlike "servants of servants," they are not allowed to renege on their contracts. After all, with their dignity intact, what reason have we to permit them to renege on their word? However, as noted above, *Havot Ya'ir* explicitly writes that paupers may enter into long-term contracts but may still resign, and it can be deduced that physicians are no different.

One might differentiate between paupers and physicians, however. Paupers may enter long-term contracts because they have no alternative; once bound, had the Torah not granted them the opportunity to renege, they would be deemed "servants of servants." In contrast, physicians are permitted to enter such contracts precisely because they are not considered "servants of servants." It follows that the Torah need not have granted them the opportunity to renege.

#### **D. Trust in *Hashem***

Fourth, as servants of *Hashem*, we should look to Him for fiscal security and we should not depend on fickle humans for such security. The Talmud *Yerushalmi* suggests that both employees and employers may breach their contracts, perhaps to emphasize how tenuous man's commitment to provide for his fellow man is and to encourage even hired workers to place more trust in *Hashem*. Moreover, Rama emphasizes that workers are prohibited from entering contracts for more than three years only if they are dependent on their employer for sustenance (*samukh al shulhano*). If they have alternate, independent sources of income, and hence do not place their trust in their employer, they may enter into a long-term contract.<sup>28</sup> Based on this, even though physicians are volunteers, since their employer committed to sustain them long-term and they committed to serve him long-term, they should be entitled to strike.

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28 Rama, *Hoshen Mishpat* 333:3, based on *Hagahot Mordekhai*, *Bava Metzia* 460.

## Conclusion

In lieu of a summary, I offer the following quote from R. Aharon Lichtenstein, which, although written about an entirely different issue, is highly germane to the topic of physicians' strikes:

I have refrained from setting down definitive conclusions, but have been satisfied to indicate general principles, tendencies, and possibilities in the Halakhah. This approach ... is rooted in a view of the nature of *pesak* in general ... [The question] involves areas in which the halakhic details are not clearly fleshed out in the Talmud and *Rishonim*, and in addition the personal circumstances are often complex and perplexing. In such areas there is room and, in my opinion, an obligation for a measure of flexibility. A sensitive *posek* recognizes the gravity of the personal situation and the seriousness of the halakhic factors. In one case, therefore, he may tend to view points of contention one way, while in a second, which exhibits slightly different details, he may tilt the decision on these points in the other direction. He may reach for a different kind of equilibrium in assessing the views of his predecessors, sometimes allowing far-reaching positions to carry great weight, and other times ignoring them completely. He might stretch the limits of halakhic leniency where serious ... tragedy looms, or hold firm to the strict interpretation of the law when, as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass. This approach is neither cavalier nor discriminatory. The flexibility arises from a recognition that halakhic rulings

are not, and should not be, the output of human microcomputers, but of thinking human beings; a recognition that these rulings must be applied to concrete situations with a bold effort to achieve the optimum moral and halakhic balance among the various factors. Thus, it is the case that halakhic rulings have more the character of general directives than of specific decisive rulings – within set limits, of course, and when the *posek* is not absolutely convinced respecting the point at issue. However, as we noted above, this application of *pesak* must be the outcome of serious deliberation, in the broadest sense of the term, by committed and observant men of Torah who are sensitive to the human and halakhic aspects of the case at hand, and possess the stature and ability to confront the halakhic problems.<sup>29</sup>

I believe that it is in light of this perspective that R. Moshe Feinstein ruled that workers' obligations may be mitigated in extenuating circumstances in consultation with *gedolei Yisrael*. Thus, practically, physicians must consider a number of factors before striking. Will the strike likely endanger the lives of present or future patients? Is their strike against secular law or communal custom, and will it create a *hillul Hashem*? Will it cause irreversible deterioration of their present patients' health, deterioration that the patients would have avoided if not for the doctors' commitment? Will the strike cause their employer a loss of profit that he could have avoided if not for their commitment? Are they striking for better wages or for something else? Are doctors halakhically considered volunteers, and if they are, what are the volunteer's obligations in Halakhah?

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29 Rabbi Aharon Lichtenstein. *Leaves of Faith* Volume 2, pp. 251-2.

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The subject of physicians', nurses', and paramedics' strikes is a painful one. We all have immense appreciation, *hakarat ha-tov*, for the helpfulness, kindness, and expertise of our health-care providers. We believe that they deserve a standard of living commensurate with their intellectual prowess, expended effort, and nobility. Moreover, health-care providers should be offered salaries that encourage gifted students to flock to the field, to ensure that we do not face a shortage of such life-critical professionals. However, maintenance of our own standard of living, which is also often rightfully deserved, may preclude us from providing health-care providers with their due. This is particularly true in socialist countries, such as Israel, where the collective responsibility towards health-care providers must be balanced against all the other priorities of well-balanced government.

*Hashem* has blessed us with a standard of comfort that exceeds any attained by our ancestors. We pray that He increase our blessing and fulfill the promises of "I am *Hashem* your healer"<sup>30</sup> and "I will remove illness from your midst."<sup>31</sup>

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30 *Shemot* 15:26.

31 *Ibid.* 23:25.



ALEX GIPSMAN

## *Smoking in Halakhah*

The use of tobacco, particularly in the form of cigarette smoking, has been shown to be the leading cause of preventable illness and death in the United States since the year 1982.<sup>1</sup> The statistics correlating smoking and death are quite frightening. Every year, there are an estimated six million smoking-related premature deaths worldwide<sup>2</sup> and smoking accounts for 30% of all cancer deaths.<sup>3</sup> According to a report of the US Surgeon General, people who quit smoking before the age of 50 cut their risk of dying during the following 15 years in half. Put simply, a person who smokes has a much higher chance of dying prematurely than a non-smoker.

Does Jewish law permit engaging in this dangerous activity? The large number of Jewish smokers might lead one to conclude that smoking is in fact permitted. Approximately 20% of the Jewish population living in Israel smokes on a consistent basis.<sup>4</sup> Furthermore, about 12.8% of Israeli adult men classified as “ultra-Orthodox” are smokers.<sup>5</sup> Although the

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1 American Cancer Society, “Cigarette Smoking,” <http://www.cancer.org/acs/groups/cid/documents/webcontent/002967-pdf.pdf>.

2 World Health Organization, *WHO Report on the Global Tobacco Epidemic* (2011).

3 US Department of Health and Human Services, *The Health Consequences of Smoking – A Report of the Surgeon General* (2004).

4 J. Siegel-Itzkovich, “Privatizing Enforcement of Smoking Laws Rejected,” *Jerusalem Post* (May 2012)

5 E. Kopel, “Cigarette Smoking and Correlates Among Ultra-Orthodox Jewish Males,” *Oxford Journals* (2012)

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percentage of smokers who self-identify as Torah observant is lower than that of the general Jewish Israeli smoking population, it does constitute a large number of people. In this article, we will outline the halakhic issues involved with smoking and summarize the opinions of the leading *posekim*.<sup>6</sup>

## The Obligation to Protect One's Health

The Torah commands:

Only beware for yourself and greatly beware for your soul (*rak hishamer lekha u-shemor nafshecha me'od*), lest you forget the things that your eyes have beheld and lest you remove them from your heart all the days of your life, and make them known to your children and your children's children.<sup>7</sup>

The simple explanation of this verse is that we are commanded not to forget the details of the revelation that took place at Har Sinai.<sup>8</sup>

A few verses later, the Torah discusses the prohibition of idol worship:

But you shall greatly beware for your souls (*venishmartem me'od le-nafshoteikhem*), for you did not see any likeness on the day *Hashem* spoke to you at Horev, from the midst of the fire. Lest you act corruptly and make yourselves a carved

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<sup>6</sup> According to many studies, obesity is quickly approaching smoking as the leading cause of preventable death in the United States, and has even surpassed smoking according to other studies. The discussion in this article is applicable to eating habits that lead to obesity as well, and the halakhic ramifications are likely the same.

<sup>7</sup> *Devarim* 4:9-10.

<sup>8</sup> In *Pirkei Avot* ch. 3 and *Menahot* 99b, this verse is interpreted as a warning against forgetting one's Torah learning.

image, a likeness of any shape, a form of a male or a female.<sup>9</sup>

However, when the *gemara* quotes the above verses, it provides an entirely different context:

Our Rabbis taught: There was once a pious man praying by the roadside when an officer came by and greeted him, and he [the pious man] did not return his greeting. So he [the officer] waited for him until he had finished his prayer. When he had finished his prayer, he [the officer] said to him: "Fool! Is it not written in your Torah, 'Beware for yourself and greatly beware for your soul' and 'You shall greatly beware for your souls'? When I greeted you, why did you not return my greeting? If I had cut off your head with my sword, who would have demanded satisfaction for your blood from me?" He [the pious man] replied to him: "Be patient and I will explain to you. If you had been standing before an earthly king and your friend had come and given you a greeting, would you have returned it?" "No," he [the officer] replied. "And if you had returned his greeting, what would they have done to you?" "They would have cut off my head with the sword," he [the officer] replied. He [the pious man] said, "Is this not a *kal va-homer*? If you would have behaved in this way when standing before an earthly king who is here today and tomorrow is in the grave, how much more so I, when standing before the supreme King of kings, the Holy One, blessed be He, Who endures for all eternity?" The officer accepted his explanation, and the pious man

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<sup>9</sup> *Devarim* 4:15.

returned to his home in peace.<sup>10</sup>

It seems that the *gemara* interprets the verses of “*rak hishamer lekha*” and “*ve-nishmartem me’od le-nafshoteikhem*” as referring to an obligation that one protect his wellbeing (*shemirat ha-guf*). Maharsha notes that the *gemara*’s interpretation of these verses is quite different from their simple meaning.<sup>11</sup> *Torah Temimah* understands Maharsha to be concluding that in truth, no such commandment to protect one’s health is implicit in these verses. The pious man in the *gemara*’s account could have simply told the officer that he had misinterpreted the verses, but he gave him a different answer instead to brush him away.<sup>12</sup> *Torah Temimah* disagrees with what he believes to be the opinion of the Maharsha, writing that other sources indicate that the opinion of the *gemara* is that the obligation to protect one’s health is in fact derived from these verses.<sup>13</sup> Many *Aharonim* agree that the obligation of *shemirat ha-guf* is derived from the verse of *ve-nishmartem* and is thus a Biblical obligation.<sup>14</sup>

Rambam’s view on this issue is important, as it is the one that is codified in *Shulhan Arukh*.<sup>15</sup> Rambam writes:

וכן כל מכשול שיש בו סכנת נפשות מצוות עשה להסירו ולהשמר ממנו ולהזהר בדבר יפה יפה, שנאמר “רק השמר לך ושמור נפשך.” ואם לא הסיר והניח המכשולות המביאין לידי סכנה,

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10 *Berakhot* 32b.

11 Maharsha, ad loc., s.v. *dikhtiv*.

12 *Torah Temimah*, *Devarim* 4:9.

13 Some authorities dispute *Torah Temimah*’s understanding of Maharsha. It is possible that Maharsha is simply noting that the Talmud interprets the Torah verses differently than their simple meaning would suggest, but the Talmud nevertheless maintain that we derive a halakhic obligation to protect one’s health from these verses.

14 Netziv (*Ha’amek Davar*, *Devarim* 4:15), Hafetz Hayim (*Likutei Amarim*, ch. 3), and *Minhat Hinukh* (546:11) write that the obligation to protect one’s health is derived from the verse of *ve-nishmartem*.

15 *Choshen Mishpat* 427:8.

ביטל מצות עשה ועבר על "לא תשים דמים."

And so too regarding every obstacle in which there lies a life threatening danger, there is a positive commandment to remove it and to guard oneself from it, and to be extremely careful in avoiding it, as the verse says, "Beware for yourself and greatly guard your soul." If he did not remove it and left obstacles that presented danger, he neglected to fulfill a positive command and violated the command of "Do not place blood on your house."<sup>16</sup>

The Vilna Gaon<sup>17</sup> and *Be'er Ha-Golah*<sup>18</sup> write that the source for Rambam's ruling is the *gemara* in *Berakhot* quoted above. From this *halakhah*, it seems apparent that Rambam concurs that the obligation to protect one's health is a Biblical one; indeed, one who fails to do so violates both a positive and negative commandment.

However, in the very next *halakhah*, Rambam seems to contradict this point, implying that one who endangers himself violates a Rabbinic prohibition:

הרבה דברים אסרו חכמים מפני שיש בהם סכנת  
נפשות, וכל העובר עליהן ואומר הריני מסכן בעצמו  
ומה לאחרים לי בכך או איני מקפיד בכך מכין אותו  
מכת מרדות.

The Sages forbade many acts because they are dangerous, and anyone who transgresses them and says, "I will endanger my own self, and it does not concern other people," or, "I don't mind it" receives *makkat mardut* [lashes admin-

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16 *Hilkhot Rotze'ah Ve-Shemirat Ha-Nefesh* 11:4.

17 *Bi'ur Ha-Gra, Hoshen Mishpat* 427:6.

18 *Be'er Ha-Golah*, *ibid.*

istered to punish one who violates a Rabbinic prohibition].<sup>19</sup>

Rambam then continues to detail specific activities that *Hazal* forbade because they are potentially dangerous.

First, Rambam writes that doing anything dangerous violates a Torah prohibition, and in the very next *halakhah*, he indicates that there is only a rabbinic prohibition to engage in these activities. How can the words of Rambam be reconciled?<sup>20</sup>

In light of the sources quoted above indicating that *shemirat ha-guf* is a Torah commandment, it is difficult to argue that Rambam maintains that it is actually Rabbinic in nature. *Sedei Hemed* therefore writes that Rambam's language of "the Sages forbade many things" does not necessarily imply that he is referring to a law that is not a Torah commandment; there are many instances in which Rambam uses similar language with regard to Torah laws.<sup>21</sup> *Tevuot Shor* similarly writes that Rambam maintains that *shemirat ha-guf* is a Torah commandment; when Rambam writes that "the Sages forbade," he is referring to those activities that were derived by *Hazal* but are still prohibited on the level of Torah law.<sup>22</sup>

According to a second approach, Rambam first refers to activities that pose a definite life-threatening danger. Re-

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19 *Hilkhot Rotze'ah Ve-Shemirat Ha-Nefesh* 11:5.

20 In *Hilkhot De'ot* (4:1), Rambam's statement regarding the obligation to protect one's health is somewhat ambiguous. He writes:

עצמו מדברים המאבדין את הגוף ולהנהיג עצמו בדברים המברים המחלימים.  
מדרכי ה' הוא, שהרי אי אפשר שיבק או ידע והוא תולה, צריך אדם להרחיק  
הואיל והיות הגוף בריא ושלם

Since having a healthy body is among the ways of God, as it is impossible to know or understand [the ways of God] if one is ill, one must therefore distance himself from things that damage the body and conduct himself in a healthy manner.

From this statement, it is unclear whether this is an obligation or simply a suggestion regarding how one should live his life.

21 *Sedei Chemed, Ma'arekhet Ha-Elef Kelalim* 273; quoted by *Pe'er Tahat Eifer*, p. 61.

22 *Tevuot Shor* 13:2

garding these, he writes that there is a Torah prohibition. He then writes that there are many activities that *Chazal* prohibited because they could **potentially** become life-threatening. In other words, an inherently dangerous activity is prohibited according to Torah law, whereas an activity that is not as inherently dangerous is only Rabbinically prohibited.<sup>23</sup> This is the opinion of R. Ovadia Yosef and R. Moshe Feinstein.<sup>24</sup>

A third approach to this apparent contradiction in Rambam is to parallel it with another apparent contradiction in his rulings. Rambam writes in *Hilkhot Ma'achalot Assurot*<sup>25</sup> that it is forbidden to eat certain revolting foods based on the Torah verse, "*al tishaktzu et nafshoteikhem.*"<sup>26</sup> This implies that Rambam is referring to a Torah prohibition. However, Rambam continues to write that anyone who eats these foods receives *makkat mardut*, implying that the prohibition is merely Rabbinic. *Beit Yosef* offers two possible explanations for this apparent contradiction. First, he suggests that Rambam actually maintains that the prohibition to eat disgusting foods is only a Rabbinic derivation from the Torah verse (*asmakhta*). Alternatively, Rambam maintains that there is a Torah prohibition to eat these revolting foods, but *Hazal* had a tradition that one does not receive Torah lashes (*malkot*, as opposed to *makkat mardut*) for eating them.<sup>27</sup>

Commenting on *Shulhan Arukh's* ruling regarding the prohibition of engaging in dangerous activities, which follows the view of Rambam, *Be'er Ha-Golah* quotes both answers of the *Beit Yosef*.<sup>28</sup> This implies that the contradiction in the words of Rambam regarding the obligation to protect one's health can

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23 Thus, eating particularly unhealthy foods (mentioned in the second *halakhah*) is Rabbinically prohibited because the danger is not as definite and direct, while leaving one's roof without a fence (mentioned in the first *halakhah*) is prohibited on a Torah level because it presents a direct danger.

24 *Yabia Omer*, *Yoreh De'ah* 1:8:4; *Iggerot Moshe*, *Hoshen Mishpat* 2:76.

25 *Hilkhot Ma'achalot Assurot* 17:29-30.

26 *Vayikra* 11:43.

27 *Beit Yosef*, *Yoreh De'ah* 116, s.v. *ve-assur*.

28 *Hoshen Mishpat* 427.

be resolved in the same two ways that *Beit Yosef* resolved the contradiction in the context of eating disgusting foods. According to the first answer, Rambam is of the opinion that engaging in a life-threatening activity is only a Rabbinic prohibition and the verse quoted is an *asmakhta*. According to the second answer, Rambam maintains that a life-threatening activity is forbidden according to Torah law based on the verse *rak hishamer lekha*, but one does not receive *malkut* (Torah lashes) for violating the prohibition. That is what Rambam means when he says that “the Sages forbid many things” – the prohibition itself is from the Torah, but the punishment of *makkat mardut* is Rabbinic.

Given that most sources indicate that the prohibition is Biblical and not Rabbinic, the second answer of *Beit Yosef* quoted by *Be'er Ha-Golah* seems to be the most logical explanation of Rambam's view. Even according to the first explanation, it is not necessarily true that *Be'er Ha-Golah* maintains that **every** life-endangering activity is only a Rabbinic prohibition. He may agree with the approach of R. Yosef and R. Feinstein that the specific activities that Rambam lists are Rabbinically prohibited, while a Torah prohibition is entailed in the case of definite and direct danger.<sup>29</sup>

*Arukh Ha-Shulhan* seems to conclude along these lines, as he quotes only the second answer of *Beit Yosef*:

Rambam writes that he [one who puts himself in danger] receives *makkat mardut*. This is not to say that it is only a Rabbinic prohibition, for it is certainly a Torah prohibition. Rather, one does not receive Torah lashes, as in the case of many prohibitions that are Torah mandated and yet do not entail lashes.<sup>30</sup>

*Arukh Ha-Shulhan* assumes that endangering oneself is clearly a Torah prohibition and interprets Rambam's statement accordingly. *Hatam Sofer* similarly states that Rambam's

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<sup>29</sup> *Pe'er Tahat Efer*, p. 63.

<sup>30</sup> *Hoshen Mishpat* 427:8.



opinion is that **any** life-threatening activity is forbidden under Torah law.<sup>31</sup>

In summary, there are two plausible conclusions that can be drawn from the words of Rambam:

- (1) Any activity that presents any sort of threat to one's life carries a Torah prohibition; the implication from Rambam that it is only Rabbinic should not be taken at face value.
- (2) Those activities that are most certainly dangerous are forbidden by the Torah, while activities that are potentially but not inherently dangerous are only forbidden on a Rabbinic level.

Given the proven life-threatening effects of smoking, it seems that according to all opinions, this activity constitutes a danger that falls under the category of a Torah prohibition. It is impos-

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31 *Hiddushei Hatam Sofer, Avoda Zara 30a, s.v. mishum gilui*. There is another source in the *Rishonim* that explicitly states that even a potentially life-threatening activity is forbidden under Torah law. The *gemara* in *Shavuot* (25a) writes that anyone who takes an oath not to sleep for three days and nights or not to eat anything for seven consecutive days and nights receives *malkot*, Torah mandated lashes. Ran writes (10a in the *dapei ha-Rif*) that the reason for this is that he has taken an oath to violate the Torah and it is therefore an oath in vain (*shevuat shav*), which is prohibited by the Torah. In what manner would one be violating the Torah if he were not to eat for seven days or not to sleep for three days? Ran offers two possibilities, the second of which is the command of "*rak hishamer lekha*." His proof that this verse refers to the prohibition of endangering oneself is another *gemara* in *Shavuot* (36a) that says that one who curses himself receives lashes. Even though the *halakhah* is that one who takes an oath to damage himself (but not endanger his life) does not receive lashes for that oath, that is only because the prohibition of damaging oneself in a non-life-threatening fashion (*hovel be-atzmo*) is derived from a *drashah* and not from an explicit verse. However, killing oneself violates an explicit verse; an oath to do so is therefore a *shevuat shav* and he receives lashes. Essentially, Ran maintains that when a person engages in an act that will ultimately end his life, he has violated a Torah prohibition. Furthermore, even damaging himself in a non-life-threatening way violates a Torah prohibition; it is just that if he takes an oath to engage in that activity, he has not taken a *shevuat shav*.

sible to argue that smoking poses only a “potential” danger. Accordingly, it is most certainly an act that is forbidden according to Torah law.

### Permission to Endanger Oneself

Despite the prohibition to conduct dangerous activities, in a number of places, the Talmud writes that if a person puts himself in a certain dangerous situation, he can rely on God to protect him. This is based on the verse, “*Shomer peta'im Hashem,*” “God protects fools.”<sup>32</sup>

However, the Talmud implies that the concept of *shomer peta'im Hashem* permits a dangerous activity only in a situation of “*dashu bah rabbim,*” when it is considered normal to engage in the particular dangerous activity.<sup>33</sup> Although this condition is only mentioned twice in the Talmud, many authorities rule that this is the *halakhah*.<sup>34</sup>

Why does *shomer peta'im Hashem* apply only if the condition of *dashu bah rabbim* is present? The simple explanation is that in a case in which it is clear that many people engage in a particular act and are not harmed, we conclude that God protects those who are performing this activity, even though it seems to be dangerous.<sup>35</sup> Others explain that God protects the majority of the population; thus, if the majority of the population does something dangerous, they will be protected.<sup>36</sup>

According to the first explanation, the principle of *shomer peta'im Hashem* is not relevant to the case of smoking, as there is clearly direct (albeit non-immediate) harm to the majority of those who smoke. However, if the reason for the condition of *dashu bah rabbim* is that God protects the majority of the Jewish People, even if the activity has been repeatedly

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32 *Tehillim* 116:7.

33 *Shabbat* 129b; *Niddah* 31b; *Yevamot* 12b, 72a; *Hullin* 9b.

34 See *Korban Netanel, Avoda Zara* 2:12:20; *Tiferet Tzvi, Yoreh De'ah* 91; *Tzitz Eliezer* 15:39; *Helkat Yaakov, Even Ha-Ezer* 35.

35 *Tzitz Eliezer* 9:39.

36 *Tiferet Tzvi, Yoreh Deah* 91.

proven to be dangerous, smoking would be permitted as long as many people continue to smoke.<sup>37</sup>

The principle of *shomer peta'im Hashem* may still be inapplicable to smoking, as some authorities maintain that it applies only in the specific cases mentioned in the Talmud.<sup>38</sup> However, others disagree and argue that the rule can be applied to situations not mentioned explicitly in the Talmud.<sup>39</sup> Furthermore, while some *poskim* only permit reliance on *shomer peta'im Hashem* in the case of the fulfillment of a *mitzvah*,<sup>40</sup> others disagree.<sup>41</sup> Nevertheless, as we will see below, many *posekim* write that in the case of a direct and certain danger, one cannot rely on *shomer peta'im Hashem*.

Some have argued that smoking is permitted because it only causes damage after an accumulated number of acts of smoking; one puff of a cigarette does not necessarily have the ability to kill a person.<sup>42</sup> R. Shlomo Zalman Auerbach writes that this is implied from the words of Rambam in *Hilkhot De'ot*. Rambam lists many foods that are like "a death potion," yet he writes only that it is "befitting" for a person not to eat them; he does not say that it is **forbidden** to eat them.<sup>43</sup> However, this inference from the Rambam is unclear, as elsewhere in *Hilkhot De'ot*, the Rambam writes that a person "must" distance himself from things that are bad for his health, which may imply an obligation and not merely good advice.<sup>44</sup> With this being said, a study published in the *British Medical Journal* in January

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37 The definition of "*rabbim*" here does not appear to be "the majority," but rather a significant portion of the population. What exact percentage this constitutes is unclear.

38 *Helkat Yaakov* 4:12.

39 *Eshel Avraham* 3.

40 *Be'er Moshe* 159 and 160.

41 *Minhat Asher, Parshat Va'etchanan; Arukh Ha-Shulhan, Yoreh De'ah* 263:5.

42 *Lev Avraham* 2:17.

43 Quoted in the approbation to *Lev Avraham* and in *Nishmat Avraham, Choshen Mishpat* 155:2

44 *Hilkhot De'ot* 4:1. This point is noted in *Nishmat Avraham, Orach Hayim* 511

2010 concludes that a single cigarette shortens a person's life by 11 minutes, on average. According to this study, it is difficult to argue that smoking can be permitted because it only is detrimental to one's health if prolonged.

## The Bottom Line

We have seen numerous sources that indicate that smoking is potentially halakhically prohibited, as well as sources that might be used to defend the practice. Because our knowledge about the effects of smoking has drastically improved over the course of the last century, this topic has become a matter of dispute among contemporary authorities.

Hafetz Hayim writes that smoking is forbidden for two reasons – not only because of the command of “*ve-nishmartem me'od le-nafshoteikhem*,” but also because it limits one's ability to function to his fullest capacity. How can a person put himself in a situation in which he will be unable to carry out his purpose in this world of serving the Almighty? Certainly, writes Hafetz Hayim, one who smokes will be held responsible for his actions.<sup>45</sup> It is important to note that these words were written in the early 20<sup>th</sup> century, well before the current knowledge about the dangers of smoking was accepted.

R. Dr. Mordechai Halpern writes that three points are clear based on Hafetz Hayim's words:

- (1) The existing medical knowledge establishes the *halakhah* with regard to *shemirat ha-guf*.
- (2) In the time of Hafetz Hayim, it was known that smoking damages one's health and is potentially life-threatening if one who smokes is “of weak health.”
- (3) There is a clear prohibition to begin smoking.

There is no doubt, R. Halpern writes, that the stringency of smoking in the eyes of Halakhah has increased greatly since the time of Hafetz Hayim.<sup>46</sup>

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<sup>45</sup>*Likutei Amarim* 13.

<sup>46</sup>M. Halpern, “*Ha-Ishun – Sekira Hilkhait*,” *Assia* 5 (pg. 238)

R. Moshe Sternbuch writes that smoking is absolutely forbidden by the Torah, but he is unsure as to whether it is worthwhile to rule this way publically, as it is clear that many people will not listen to the ruling.<sup>47</sup> This concern seems to be based on the Talmudic principle that it is better for someone to transgress a sin unknowingly than to do so knowingly.<sup>48</sup> If someone is aware that smoking is forbidden and nonetheless continues to smoke, he is worse off than he would be if he were to smoking without knowing that it is forbidden. R. Sternbuch adds that smoking is certainly not comparable to eating unhealthy foods, because it is much more directly detrimental to one's health. Furthermore, he adds, one who smokes violates the command "Do not stray after your hearts,"<sup>49</sup> in addition to *ve-nishmartem me'od le-nafshoteikhem*. The principle of *shomer peta'im Hashem* is irrelevant because we clearly see that smoking is dangerous and kills people, and *shomer peta'im Hashem* only applies to activities that are **possibly** dangerous.

R. Sternbuch concludes with the following story. A great Torah sage had smoked many cigarettes over the course of his life, and he was eventually diagnosed with lung cancer. He was told that he had one month to live. He gathered ten men and told them, "I know that in Heaven I will be judged for having brought death upon myself because I smoked, but I pray to God that because I am confessing before you and saying that I regret that which I have done and beg of you not to follow in my ways, perhaps my sin will be partially rectified."

In a *teshuvah* composed in 1963, R. Moshe Feinstein writes that although it is definitely improper to smoke, he cannot formally rule that it is forbidden for two reasons. First, he considers smoking to be in the category of *dashu bah rabbim*, thus enabling the application of the principle *shomer peta'im Hashem*. Second, we find that many great Torah sages have

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47 *Teshuvot Ve-Hanhagot* 3:354.

48 *Beitzah* 30a; Rama, *Orah Hayim* 428:2.

49 *Bamidbar* 15:39.

smoked, and it must therefore not be forbidden.<sup>50</sup>

It is important to note that this *teshuvah* was written over 50 years ago, when the frightening statistics about smoking were not yet fully known. Since it is clear that the rule of *shomer peta'im Hashem* is only said in relation to activities that are not certainly and directly life-threatening, one could certainly argue that R. Feinstein's ruling was only issued based on the information that was readily available to him at the time that it was written. In fact, R. Shlomo Aviner writes, "I have been told by a Torah scholar that Rav Moshe publicized in his yeshiva and in other yeshivas a piece of paper stating that his ruling was based on the medical information that was given to him at the time that the *teshuvah* was written."<sup>51</sup> This is clear from another *teshuvah* of R. Feinstein:

All of the things that Rambam specifies are not literally forbidden, since most people are not damaged by them... Smoking cigarettes is similar to these things, as people who are accustomed to smoking receive great pleasure in smoking them and are in pain when they cannot smoke, more so than one suffers when he cannot attain good food... **And the damage that results from them [cigarettes] is only a small minority, all the more so to become sick from cancer...** With a concern of this [small] magnitude, it is relevant to say *shomer peta'im Hashem*.<sup>52</sup>

It is clear from R. Feinstein's words that he believed that smoking was not unhealthy for most people, and that is the **only** reason that he wrote that it is permissible to rely on *shomer peta'im Hashem*.

R. Eliezer Waldenberg writes that smoking is clearly

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<sup>50</sup>*Iggerot Moshe, Yoreh De'ah* 1:49.

<sup>51</sup>S. Aviner, "*Ha-ishun l'fi ha'halakha*" *Assia* 8 (pg. 354)

<sup>52</sup>*Iggerot Moshe, Hoshen Mishpat* 2:76.

prohibited by Torah law, and since it has been proven that smoking kills people, the principle of *shomer petaim Hashem* is certainly not applicable.<sup>53</sup> R. Avigdor Nevenzahl similarly writes:

לענ"ד לא שייך שומר פתאים ה' בדבר דאנן סהדי  
דאין רצונו ית' לשמור.

In my humble opinion, the rule of *shomer petaim Hashem* is not relevant with regard to something that it is clearly not the will of God to protect people from.<sup>54</sup>

Although the sources that we have cited clearly indicate that smoking is forbidden by the Torah, some refuse to accept this based on responsa that were written many years ago. It is important to note that even the authorities who did not technically forbid smoking because they were not aware of the extent of the true danger entailed all stated unequivocally that it is not a proper activity to engage in for any reason.

In closing, it is fitting to quote the words of *Be'er He-Golah* regarding to the obligation to protect one's health:

נלענ"ד הטעם שהזהירה תורה על שמירת הנפש  
הוא מטעם שהק"ה ברא את העולם בחסדו להיטב  
לנבראים שיכירו גדולתו ולעבוד עבודתו  
בקיום מצוותיו ותורתו כמו שאמר הכתוב כל  
הנקרא בשמי לכבודי בראתיו וכו' וליתן להם  
שכר טוב בעמלם, והמסכן את עצמו כאילו  
מואס ברצון בוראו ואיט רוצה לא בעבודתו  
ולא במתן שכרו אין לך זלזול אפקירותא יותר מזה.

In my opinion, the reason that the Torah commanded one to protect his health is that God created the world in His kindness to do good to

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<sup>53</sup> *Tzitz Eliezer* 15:39.

<sup>54</sup> Cited in Halpern, n. 46 above.

His creations, so that they would recognize His greatness and serve Him through performing His *mitzvot* and fulfilling His Torah, as the verse states, "Anyone who is called in My name was created for My honor," and to give them reward for their toil. When one puts himself in danger, it is as if he disdains the will of his Creator and does not want to serve Him or to receive reward. There is no greater disgrace and heresy than this.<sup>55</sup>

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<sup>55</sup>*Be'er Ha-Golah, Hoshen Mishpat 427:90.*



MICHAEL GOTTESMAN

# *Imposition of Treatment: A Judeo-Legal Perspective*

## **Introduction**

One of the central principles of secular medical ethics is patient autonomy. A patient owns his body and has the right to decide what will be done with it. Thus, it is necessary to obtain patient consent for most treatments; if a patient with capacity refuses treatment, a physician must legally adhere to the patient's wishes.

The aim of this paper is to analyze the topic of patient autonomy and the physician's role through the lens of Jewish law. Does Judaism lend as much credence to the patient's desires, or does it instead require the physician to coerce a refusing patient to undergo treatment? If there are instances in which a Jewish physician would be required to coerce treatment, how could he reconcile this obligation with the dictates of secular law?<sup>1</sup>

To properly understand the Jewish perspective on coercion of treatment, we must first establish what, if any, obligations exist for medical treatment in terms of both the patient's obligation to seek treatment and the physician's obligation to heal.

## **The Patient's Obligation to be Treated**

The *gemara* in *Berakhot* records a dispute in which two

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<sup>1</sup> This paper is intended as an overview of this topic. Any physician who finds himself in a situation in which coercion is relevant should consult his Rav for proper guidance.

opposite perspectives on medical treatment are advanced:

On going in to have blood let, one should say, "May it be Your will, O Lord, my God, that this operation may be a cure for me, and may You heal me, for You are a faithful healing God and Your healing is sure, since men have no power to heal, but this is a habit with them." Abaye said: A man should not speak thus, since it was taught in the school of R. Yishmael: [It is written], "And he shall provide for healing." From this we learn that permission has been given to the physician to heal.<sup>2</sup>

According to the initial perspective presented by the *gemara*, it seems that not only is one not obligated to seek medical treatment, but it is in fact looked down upon to do so. Thus, prior to receiving a remedy, one should recite a prayer acknowledging that he has no right to seek medical treatment. Ideally, a person should rely solely on the healing powers of God. Abaye, however, retorts that this is not a proper attitude and such a prayer should not be recited. The Torah demands that if one individual injures another, the one who inflicts injury must pay the medical expenses of the other: "And he shall provide for healing."<sup>3</sup> Since the Torah demands that medical expenses be paid, it is clear that it has authorized medical treatment. Although Abaye does not explicitly mandate seeking medical treatment, it is clear that he does not condemn it like the initial opinion presented in the *gemara*.

The *Rishonim* further elaborate on the Jewish perspective regarding seeking medical treatment. In his commentary on the Torah, Ramban seems to align himself with the first position presented in the *gemara*. He states that a righteous person is not bound by the laws of nature, as God directly influences

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<sup>2</sup> *Berakhot* 60a.

<sup>3</sup> *Shemot* 21:19.

his life. As such, God Himself heals him and there is no reason for him to seek medical treatment. Ramban further posits that although the Rabbis learn from the verse "and he shall provide for healing" that a doctor is authorized to heal, they do not derive that the patient may seek out the physician. A righteous patient should rely on divine providence for his healing, as the laws of nature do not apply to him. However, once people have become accustomed to seeking medical treatment, God leaves them subject to the laws of nature, and a physician should not think that it is forbidden for him to treat patients.<sup>4</sup>

In one of Ramban's other works, *Torat Ha-Adam*, his view of medical care seems to differ from the one he espouses in his commentary on the Torah:

We can derive from this that any doctor who is knowledgeable about medicine is obligated to heal and if he refrains from doing so, he is considered a shedder of blood.<sup>5</sup>

Here, Ramban seems to be approaching medicine with a much more positive attitude. Not only is the physician not prohibited from healing, but he is obligated to heal.

R. Hayim Yosef David Azulai observes the tension between Ramban's two writings and resolves it by distinguishing between the main focus of each. In his commentary on the Torah, Ramban states that ideally, those who are ill should not rely on human treatment. In *Torat Ha-Adam*, he considers only the physician's perspective; the physician is not only given permission, but has an obligation to treat the ill.<sup>6</sup> According to this explanation, the conclusion of Ramban in both writings is that one should ideally not seek medical treatment. Once one does seek treatment, however, Ramban maintains that there is

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<sup>4</sup> Ramban, *Vayikra* 26:11.

<sup>5</sup> *Torat Ha-Adam, Sha'ar Ha-Mehush*, s.v. *Inyan ha-sakanah*.

<sup>6</sup> *Birkei Yosef, Yoreh De'ah* 336:1.

an obligation for the physician to heal.<sup>7</sup>

R. Eliezer Yehudah Waldenberg resolves the tension between the Ramban's writings in a different manner.<sup>8</sup> In his view, Ramban's statement in *Torat Ha-Adam* implies not only that the Torah obligates the physician to heal, but also that the Torah obligates the patient to seek healing. Additionally, R. Waldenberg maintains that the *gemara's* conclusion follows the opinion of Abaye, who authorizes seeking medical treatment, and not the initial opinion presented. He finds it difficult to believe that Ramban would deviate from the conclusion of the Talmud. R. Waldenberg therefore posits that in his commentary on the Torah, Ramban is stating his view of how medical treatment should be viewed in an ideal world. In such a world, in which people are righteous and rely on God's healing, one should not seek human treatment. However, in *Torat Ha-Adam*, Ramban is presenting a more practical approach to medicine given the current reality of the world. Either because we are not righteous enough to merit divine healing or because we have forfeited our privilege to divine healing by accustoming ourselves to seeking human treatment, Ramban encourages the patient to seek medical attention, and he may even obligate him to do so. Thus, Ramban in fact rules in accordance with the opinion of Abaye with regard to the practical law.<sup>9</sup>

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7 Although R. Azulai does not conclude that Ramban maintains that there is an obligation to seek treatment, his own opinion is that patients are obligated to seek treatment in current times. This is also the conclusion of *Taz, Yoreh De'ah* 336:1.

8 *Tzitz Eliezer*, vol. 5, *Ramat Rahel* 20:3.

9 R. Ovadia Yosef (*Yehaveh Da'at* 1:61) similarly suggests that Ramban agrees that in post-prophetic times, there is an obligation to seek medical attention. It should be noted, however, that R. Abraham Bornstein (*Avnei Nezer, Hoshen Mishpat* 193) relies on Ramban's view as a source for a patient to refuse a treatment that involves eating prohibited food. R. Bornstein argues that the patient has the right to refuse in such a case because he can rely on Ramban, who encourages people not to seek medical treatment. In addition, R. Bornstein notes that this is also the view of R. Avraham Ibn Ezra, who writes in his commentary on the Torah that permission is granted to seek healing for external wounds only, but not on illnesses that manifest

## The Physician's Obligation to Treat

As we saw above, the *gemara* derives that a physician is permitted to heal from the verse "and he shall provide for healing." Many authorities explain that we need this verse to teach us that healing is permissible because we might otherwise have thought that it is prohibited to treat a sick person. But is a physician obligated to heal?

The *gemara* in *Sanhedrin* discusses the source for the obligation to save another person who is drowning at sea. The *gemara* states that we learn this obligation from the verse "You shall not stand aside while your fellow's blood is shed (*lo ta'amod al dam rei'akha*)."<sup>10</sup> This statement is then questioned, as the verse "and return it to him (*ve-hashevoto lo*)"<sup>11</sup> referring to the obligation of returning lost objects, includes an obligation to return a "lost" body. Why is there a need for the verse commanding one not to stand idly by as another's blood is shed when there is already a verse that dictates an obligation to return a person's body? The *gemara* explains that the obligation entailed in the verse "and return it to him" only demands that one do whatever he is personally physically capable of doing to save his peer. The seemingly extraneous verse "You shall not stand aside while your fellow's blood is shed" is necessary to teach that one's obligation to save another person extends to hiring others to help if necessary.<sup>12</sup>

While these verses do not speak directly to the physician, they certainly reflect a general obligation to care for the wellbeing of others. Rambam indeed singles out the verse "and return it to him" as the source for the physician's obligation to

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within the body.

10 *Vayikra* 19:16.

11 *Devarim* 22:2.

12 *Sanhedrin* 73a. The *gemara's* conclusion can be interpreted differently. R. Yosef Babad (*Minhat Hinukh* 237:1) seems to understand that once it is concluded that one's obligation to save another extends to hiring others, that obligation is included in both the precept of "*ve-hashevoto lo*" and "*lo ta'amod al dam rei'akha*."

treat.<sup>13</sup>

Several other verses are cited by other authorities as sources for the physician's obligation. R. Shmuel Eliezer Edels (Maharsha) implies that in addition to "and return it to him," the correlating negative precept of "you shall not hide yourself"<sup>14</sup> that commands one not to ignore a lost object also includes the obligation to save another's life.<sup>15</sup> According to Ramban, the verse "and let your brother live with you"<sup>16</sup> requires one to save lives.<sup>17</sup> R. Waldenberg writes, based on Ramban's writings, that the precept of "you shall love your fellow as yourself"<sup>18</sup> also teaches an obligation to heal others.<sup>19</sup> Finally, R. David Ha-Levi (*Taz*) may indicate that the verse cited by the *gemara*, "And he shall provide for healing," not only permits, but also obligates one to heal another person.<sup>20</sup> Thus, there seem to be at least five different Biblical sources that Rabbinic figures use as the basis for an obligation to heal.

## Forcing Another Person to Perform Torah Obligations

Assuming that there is an obligation for a patient to seek treatment, as presented above, the question becomes

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13 Rambam, commentary on the Mishnah, *Nedarim* 4:4.

14 *Devarim* 22:3.

15 Maharsha, *Hiddushei Halakhot, Sanhedrin* 73a, s.v. *le-hatzilo be-nafsho*.

16 *Vayikra* 25:36.

17 Ramban, *Vayikra* 25:35-37.

18 *Vayikra* 19:18.

19 *Tzitz Eliezer, Ramat Rahel* 5:21.

20 *Taz, Yoreh De'ah* 336:1. This interpretation of *Taz* is presented by R. Dr. Yaakov Genizi, <http://www.daat.ac.il/daat/kitveyet/assia/hovat-4.htm>. *Taz* writes that ideally, one should be healed from the heavens. However, since people are generally not worthy of divine healing, God gives us permission to heal according to the laws of nature. Once we have that permission and do not merit a divine healing, *Taz* suggests that we have an obligation to treat. R. Dr. Genizi interprets *Taz* to mean that there is an obligation to treat based on the verse "and he shall provide for healing." However, it is possible that *Taz* derives that obligation from one of the other sources cited above in the text.

whether a physician is Torah-obligated to force a patient who chooses to forgo treatment to accept that treatment.

The *gemara* in *Ketuvot* implies that if one is not fulfilling a Torah obligation incumbent upon him, others have the right, and perhaps even the obligation, to force him to do so:

When a man is told, "Make a *sukkah*," and he does not make it [or, "Perform the commandment of the] *lulav*," and he does not perform it, he is flogged until his soul departs.<sup>21</sup>

Applying this to the physician-patient relationship, a physician potentially has the obligation to coerce a patient who is neglecting his obligation to be treated. However, this is not a foregone conclusion, as there may be a limited scope to one's ability to force another to fulfill his obligations.

The authorities dispute whether the concept of coercion applies only to compelling someone to fulfill a positive precept or also includes forcing someone to refrain from violating a negative precept.<sup>22</sup> R. Yosef Babad is of the opinion that no distinction should be made between negative and positive

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21 *Ketuvot* 86a-b. Rashi states that the flogging can only be performed prior to the violation of the positive precept and while the person still has the ability to fulfill the *mitzvah*. Clearly, in Rashi's view, the flogging is intended to lead to fulfillment of the *mitzvah* and is not merely a punishment.

R. Asher Weiss (*Minhat Asher, Parshat Vayikra*) mentions two possible sources for coercing others to fulfill commandments. One possibility is that it is a result of the principle of *arevut*, the mutual responsibility Jews have for one another. He cites the *Hikrei Lev (Orah Hayim 1:48)*, who writes that we strike others to compel them to perform the commandments because we are responsible for each other; if we do not coerce others to fulfill their obligations, it is considered as though we have taken part in their sin. Alternatively, coercion may be viewed as a method of fulfilling the command to rebuke one's fellow Jew. R. Weiss notes that according to Rashi (*Arakhin* 16b), the obligation to rebuke one's fellow includes using physical force.

22 A "positive precept" refers to a commandment formulated in the Torah as an obligation to perform a certain action. A "negative precept" refers to those commandments formulated as an obligation to not perform a certain action.

commandments. Just as one may coerce someone to fulfill a positive commandment, he may coerce someone who is going to violate a negative commandment not to do so.<sup>23</sup> R. Yair Hayim Bachrach, however, maintains that coercion can be applied only to one who will otherwise fail to perform a positive precept. He reasons that coercion cannot be applied in the case of a negative commandment. One cannot coerce prior to the actual violation because a violation has not yet been committed and the person may yet decide not to violate. Once he does violate the commandment, coercion is impossible because the violation is complete; at that point, only punishment is possible. However, when someone fails to fulfill a positive commandment, he already violates it by passing up the initial opportunity to do so. Others may coerce him because he still has the opportunity to fulfill the commandment.<sup>24</sup>

Assuming that there is an obligation to seek medical treatment, the precept under which this obligation falls will determine whether this dispute regarding coercion is relevant in this context. If the obligation is a positive commandment, then all authorities would agree that it is subject to coercion. If, however, it is a negative commandment, then it is possible that some authorities would maintain that coercion cannot be applied.<sup>25</sup> The *posekim* are not explicitly clear regarding which

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23 *Minhat Hinukh* 8:5.

24 *Havot Ya'ir* 166. Some commandments are formulated as negative commandments but are violated passively (*lav she-ein bo ma'aseh*). Based on R. Bachrach's logic, it seems that coercion should also apply to these commandments, as the rationale behind coercion for positive commandments applies in this case as well.

25 R. Azulai writes that there is probably a prohibition against relying solely on God's healing and refraining from seeking medical treatment either because the ill individual's attitude reflects arrogance, as the individual believes that he is worthy of God's healing, or because he relies on a miracle in a dangerous situation. However, it is not clear which specific precepts one would be violating by acting in this manner. R. Yitzhak Zilberstein (*Shiurei Torah Le-Rofim* 178) mentions that the *gemara* in *Berakhot* (32b) presents the verse "but you shall greatly beware for your souls" (*Devarim* 4:15) as a source for one's responsibility to maintain his health. Even if seeking medi-



precept is entailed here, and it is therefore difficult to determine if coercion could be applied according to R. Bachrach's view.

Furthermore, even if the patient's obligation to seek treatment is determined to be a positive commandment, it may not be incumbent upon the physician to coerce the patient to accept treatment, as there is a dispute regarding who has the power to coerce others to fulfill their obligations. R. Aryeh Leib Heller rules that a court of three judges is necessary to force someone to perform a positive commandment; an individual is only authorized to force someone to refrain from violating a prohibition.<sup>26</sup> If seeking treatment is indeed a positive commandment, R. Heller would seemingly conclude that an individual physician does not have the authority to coerce treatment. However, R. Yaakov Lorberbaum disagrees and maintains that an individual is authorized to coerce others to perform even positive commandments.<sup>27</sup>

### **Patient Refusal and the Physician's Obligations**

Regardless of whether the physician is authorized or even mandated to coerce the patient to fulfill his obligation, the physician has an independent obligation to treat. Does the physician's obligation dissipate due to the patient's refusal, or does his mandate remain in force?

R. Yosef Babad writes that if someone is on his way to commit suicide, the precept of "and return it to him" no longer applies. Just as one is not obligated to return a lost object if its

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cal treatment is determined to be a negative commandment, it is possible that it would be treated as if it were a positive commandment, since it is an obligation that is violated passively and can still be fulfilled as long as the patient is still living; see note 24 above.

<sup>26</sup> *Ketzot Ha-Hoshen* 3:1 and *Meshovev Netivot* 3:1. The force an individual is authorized to use in this instance is more limited than the force a court of three could use to coerce someone to perform a positive commandment. While a court can hit the individual in question to the point where his soul departs, an individual can merely strike one who is about to sin.

<sup>27</sup> *Netivot Hamishpat Beiurim* 3:1.

owner decides that he is no longer interested in it, one is not obligated to “return” someone’s life when that person has no further interest in living. R. Babad further explains that since “and return it to him” no longer applies to someone who is committing suicide, it is clear that the precept of “you shall not stand aside while your fellow’s blood is shed” also does not apply. The Talmud states that both of these verses are necessary, as “you shall not stand aside” teaches that one must even hire others to save someone; it does not conclude that this verse teaches that one must even save someone who intentionally throws his life away. Thus, R. Babad asserts, there is no such difference between these two precepts.<sup>28</sup>

R. Shlomo Yosef Zevin argues with R. Babad’s presentation.<sup>29</sup> He finds it hard to believe that the obligation of “you shall not stand aside” does not apply in a case in which someone is harming himself. However, R. Zevin acknowledges R. Babad’s point that the Talmud does not distinguish between the two verses in this context, and R. Zevin therefore concludes that the verse “and return it to him” must similarly apply in the case of someone who is killing himself. It is true that in the context of monetary losses, the precept of “and return it to him” does not apply if the owner decides that he no longer desires his lost property. However, a person cannot knowingly give up his life, as he is not considered his body’s owner; God is the true owner. Thus, R. Zevin concludes, both verses obligate one to save a person who is committing suicide.

R. Zevin further notes that even if these two precepts do not apply in the case of someone who is committing suicide, one would still be obligated to save him in order to prevent him from committing the sin of killing himself. R. Zevin argues that R. Babad would agree with this conclusion as well;

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28 *Kometz Minhah, Minhah Hinukh* 237:1. R. Dr. Genizi (cited in n. 20 above) writes that it is further evident that the precepts of “you shall love your fellow as yourself” and “and let your brother live with you” do not apply to someone who is killing himself.

29 “*Mishpat Shylock lefi Ha-Halakha*,” *Le-Ohr Ha-Halakhah*, pp. 191-2.

he merely maintains that the obligation is not based on the precepts of “and return it to him” and “you shall not stand aside while your fellow’s blood is shed.”

R. Yehezkel Lesitzin similarly argues that R. Babad would agree that there is an obligation to save a person who is committing suicide based on the obligation to rebuke one’s fellow Jew.<sup>30</sup> Since one attempting suicide is violating a prohibition, his fellow Jew is obligated to stop him. R. Lesitzin notes that there is an important practical difference between an obligation based on “you shall not stand aside while your fellow’s blood is shed” and one based on the precept commanding rebuke. If the source of the obligation is rebuke, then one does not have to spend more than a fifth of his money to fulfill it, as that is the limit of the requirement in the case of all positive commandments. If, however, the source of the obligation is “you shall not stand aside while your fellow’s blood is shed,” there is no limit to how much one must spend to save the person, as in the case of all negative commandments.<sup>31</sup>

Does this discussion pertaining to suicide relate to our discussion of a physician imposing treatment on a refusing patient? It is tempting to argue that the cases are parallel and that according to those who argue that bystanders are obligated to save someone from committing suicide, a doctor is obligated to save a patient who refuses treatment, and vice versa. However, it is not self-evident that this comparison between the cases can be made, as distinctions may be drawn between the cases. A patient may refuse treatment for a multitude of reasons, including pain associated with the treatment or illness, religious beliefs, or no longer wanting to be a burden on those caring for him. Those who maintain that one is Biblically mandated to save someone from committing suicide because no one has a right to forfeit a body that does not belong to him may ac-

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30 “*Tipul Be-Holeh Mesukan Negged Retzono*,” *Ateret Shlomo* 6, pp. 133-41.

31 As will be discussed below, it is not absolutely clear that one would have to spend more than a fifth of his money even to fulfill the precept of “you shall not stand aside while your fellow’s blood is shed.”

knowledge that some of these reasons for refusing treatment would be deemed legitimate justifications by God, the body's owner. Conversely, those who maintain that one's obligations to save another person do not extend to someone who is committing suicide may be of the opinion that the obligations do persist in the context of a refusing patient because the patient still has an intrinsic desire to live and he is merely being motivated by external factors.

### **Rabbinic Rulings**

With this background in mind, we will turn our attention to the rulings of the Aharonim with regard to coercion of treatment.

#### **R. David ben Zimra (Radvaz)**

R. David ben Zimra was asked to rule regarding a case in which it was deemed necessary to violate Shabbat for the sake of a particular ill person, but the patient refused treatment because he did not want Shabbat to be violated on his behalf.<sup>32</sup> Should the ill person's wishes be respected or should treatment be forced upon him? Radvaz responds that he considers this patient to be a "pious fool" and that treatment should be coerced. The Torah's principle of "And by which he shall live"<sup>33</sup> instructs that as a general rule, one should not observe a law if it is going to cost him his life. Thus, this patient should not sacrifice his life in order to avoid the violation of Shabbat. Indeed, if this patient were to die as a result of his refusal, Radvaz believes that God would hold him accountable and consider him to have his blood on his hands. Radvaz maintains that it is so obvious that treatment should be coerced in such a scenario that anyone who takes the time to even ask for a Rabbinic ruling in this case is considered a shedder of blood.

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<sup>32</sup> *Teshuvot Ha-Radvaz* 4:67.

<sup>33</sup> *Vayikra* 18:5.

## **R. Yaakov Emden**

R. Yaakov Emden comments on the case discussed by Radvaz and states that Radvaz's response most likely relates to a sick person refusing an established treatment that is certain to work in order to avoid the violation of the Shabbos. However, if a sick person refuses treatment because he does not believe in the treatment's efficacy, he cannot be coerced to accept treatment. This is true even if the sick person is basing his opinion on his own knowledge and instinct, and it is certainly true when another physician supports his stance.

R. Emden seems to qualify that the patient's ability to refuse treatment based on a lack of confidence in the efficacy of the treatment is limited to treatments that are not objectively well-understood and proven. In that case, a patient can refuse based on a lack of faith in the treatment, and it is even praiseworthy for him to rely on God instead of a questionable treatment. However, when the treatment is well-understood and proven to be effective, it is the physician's responsibility to coerce treatment of the patient.<sup>34</sup> Thus, for R. Emden, the level of understanding and certainty of efficacy of particular treatments plays an important role in determining whether to coerce patients to undergo them.<sup>35</sup>

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<sup>34</sup> *Mor U-Ketzia, Orach Hayim* 328.

<sup>35</sup> In the beginning of the *siman*, it seems that R. Emden's focus is on the patient's motivation for refusing treatment. If the motivation is lack of trust in the treatment, coercion cannot occur. In the continuation, R. Emden's focus turns to the treatment itself and its objective reliability. It seems that he is saying that if a patient refuses an objectively proven treatment because he personally does not believe in it, coercion should occur. However, one line in his discussion calls this understanding into question. When R. Emden discusses that it is crucial for one to coerce an ill person who is refusing objectively proven treatment, he states that this is despite the fact that the reason for refusal is that the patient no longer wants to live in pain and prefers to die. If R. Emden maintains that coercion is appropriate for objectively proven treatments even when the patient is refusing because he does not believe in the treatment's efficacy, then he should have specified that as the patient's reason for refusal, and not his desire to no longer live in pain. Nevertheless, despite this nuance, the general gist of the writing and

## **R. Moshe Feinstein**

R. Moshe Feinstein writes that the duty to coerce is dependent on the patient's reason for refusal.<sup>36</sup> If the patient believes in the efficacy of the treatment and is merely refusing treatment because he is in a state of despair, the physicians should coerce treatment upon him. However, if his refusal is based on a lack of faith in the physicians, they should not coerce treatment upon him and should rather seek out physicians whom he will trust. R. Feinstein qualifies that if there is no time to wait for other physicians to gain his trust, coercion should be implemented if all the doctors in the hospital agree that this particular treatment is appropriate for the patient. Recognizing that forceful treatment could be traumatizing to the patient and potentially lead to death, R. Feinstein cautions that one should be careful not to coerce in such a way that will negatively affect the patient. In fact, it may be better to avoid coercion so as not to be directly responsible for accelerating the patient's death through psychological trauma. R. Feinstein concludes that if there are potentially dangerous complications to the treatment – even if the complications are less likely relative to the potential complications of the patient's illness – the physician should not force treatment upon the patient. It seems from this responsum that R. Feinstein ideally would encourage coercion of treatment, but practical considerations lead him to be less supportive of this measure.

In his next responsum, R. Feinstein continues to discuss the concept of coercion in different contexts.<sup>37</sup> First, he states that one should not provide treatment that will prolong the patient's life as is, without curing him or alleviating his pain.<sup>38</sup> However, he can administer such treatment in order to

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some of the language in this piece suggests that R. Emden focuses on the objective reliability of the treatment, as opposed to the patient's motivation for refusal. The patient's motivation for refusal only becomes significant in the context of treatments that are less objectively understood and effective.

<sup>36</sup> *Iggerot Moshe, Hoshen Mishpat* 2:73.

<sup>37</sup> *Ibid.* 2:74.

<sup>38</sup> Oxygen supplementation, which reduces pain, and provision of food,

buy time until a physician with the necessary expertise to cure the patient can arrive. R. Feinstein states that there is no need to obtain consent from the patient to perform life-prolonging management in such a circumstance and that even if the patient explicitly refuses, the physicians should not listen to him. R. Feinstein notes that the physicians should first try to persuade the patient, as bringing a physician against his will is associated with potential danger (presumably from the psychological trauma). However, if the patient refuses, R. Feinstein maintains that coercion should be implemented in this case despite the potential danger.<sup>39</sup> This is in contrast to the previous responsum, in which R. Feinstein seems to have concluded that it is better to refrain from coercion when faced with potential psychological trauma that could hasten death.

Subsequently in this responsum, R. Feinstein writes that one should coerce an incurable patient to eat. However, he qualifies that what he means by "coercion" is that the patient does not really want to eat and is only eating because the doctors are ordering him to do so; the physician cannot physically coerce the patient to eat, as doing so could harm the patient's overall health. R. Feinstein notes that according to Halakhah, if a person on his deathbed verbally pledges a gift to another person, the transaction is considered to have occurred, despite the fact that verbal statements are not typically sufficient to enact a transaction, because we are concerned that the terminally ill person's health will further deteriorate if he feels as though he is not being listened to. Similarly, if treatment is administered against the patient's will, he will feel as though he is not

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which increases the patient's strength, should be provided according to this guideline.

<sup>39</sup> Although R. Feinstein states that there is some danger associated with bringing another physician against the patient's will, he does not address the danger associated with implementing treatment by force. While one might argue that he distinguishes between the coercion of actual treatment and that of bringing in another physician, it seems from the context that he believes that one can implement the treatment to buy time for another physician to arrive against the patient's will as well.

being listened to and his health will deteriorate. R. Feinstein concludes his discussion by stating that if the patient can be fed without being aware of the feeding, he should be fed as long as the presiding physician is considered an expert.

Finally, R. Feinstein discusses a case of a patient who refuses an operation to cure him from impending death because it will leave his body blemished. R. Feinstein states that one fulfills a mitzvah by tying him down and performing the operation as long as there is no reason to be concerned that he will deteriorate psychologically as a result of this coercion. Indeed, if there is the possibility of emotional deterioration, one should still perform the operation forcefully if failure to do so will certainly result in the patient's death. The certainty of death without the operation outweighs the possibility of psychological trauma.

In these two responsa, R. Feinstein conveys the approach that when a patient refuses treatment, coercion is ideal. However, there are several practical considerations that, when present, lead R. Feinstein to advise against coercion. If the patient has a legitimate reason for refusing the treatment, such as not trusting his physicians, R. Feinstein maintains that one must try to gain the patient's trust before turning to coercion. Additionally, if there is significant concern for psychological trauma from the coercion, R. Feinstein may suggest refraining from coercion. However, it is unclear at exactly which point R. Feinstein endorses coercion, as he seems to approach this question differently in these responsa. At times, the concern for psychological trauma is enough to advise refraining from coercion; at others, it is not. Is he distinguishing between the level of coercion (physical vs. verbal), the level of concern for psychological trauma, or the degree of illness in the particular case? R. Feinstein's criteria are unclear, but there are clearly many nuances at play in any case of coercion.



## **Practical Applications**

While there are certainly circumstances in which authorities maintain that coercion of medical procedures is not warranted, it is evident from our discussion that there are some scenarios in which some authorities maintain that coercion is called for. If the treatment has been objectively proven to be successful, R. Yaakov Emden is supportive of coercion. Although R. Feinstein discourages coercion in some cases in which it may result in psychological trauma, he certainly seems to encourage the use of coercion in certain circumstances. As a result, the practicing Jewish physician in America may face a degree of conflict over the course of his career. As noted in our introduction, secular society places significant emphasis on patient autonomy.<sup>40</sup> Situations may potentially arise in which the Jewish physician feels a religious obligation to implement treatment despite patient refusal, but if he does so, he may face serious legal consequences.

According to Halakhah, one is not obligated to spend more than 20% of his finances in order to fulfill a positive commandment. However, one is required to forfeit all of his money to avoid violating a negative commandment. Since the physician's duty to coerce treatment may be based on the negative commandment of "you shall not stand aside while your fellow's blood is shed," it would stand to reason that a physician should have to administer unwanted treatment even if he stands to be

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40 In Israel, the Patient's Rights Act of 1996 makes it less likely – although still possible – that a physician will face such a conflict. This law states that if a patient refuses treatment but is in a state of danger and must receive treatment soon, the physician can administer treatment as long as an Ethics Committee finds that the following criteria are met:

- The patient has been provided sufficient information with which to make an informed decision.
- It is believed that the treatment will cause significant improvement for the patient.
- It is reasonable to believe that after treatment is administered and the patient recovers, he will retroactively provide consent to the treatment.

fired and sued.

However, R. Moshe Sofer (Hatam Sofer) rules that whether one has to sacrifice all of his money for the sake of a commandment is not truly dependent on its status as a positive or negative precept, but rather on whether in protecting his money, one would be violating an obligation passively or actively.<sup>41</sup> If a commandment is violated passively (*lav she-ein bo ma'aseh*), it is acceptable to violate the commandment in order to avoid losing more than 20% of one's finances. However, one may not actively violate a commandment regardless of how much money is on the line. Although "you shall not stand aside while your fellow's blood is shed" is technically a negative commandment, a physician only violates it passively – by not providing treatment. Thus, R. Eliezer Waldenberg argues that a physician can rely on Hatam Sofer's view and does not have to implement coercion when he stands to face serious legal repercussions.<sup>42</sup>

## Conclusion

The physician's potential obligation to coerce treatment upon an objecting patient must be viewed from two perspectives. On the one hand, an obligation may stem from the physician's obligation to force the patient to fulfill his obligation to be treated. On the other hand, the obligation may arise from the physician's independent personal obligation to heal. While there are certainly circumstances in which the authorities would not endorse coercion, there are clearly cases in which coercion would be mandated by Halakhah. In such scenarios, a

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41 R. Akiva Eiger (*Yoreh De'ah* 157) cites a disagreement on this matter. *Havot Ya'ir* (139) maintains that when a negative precept is violated passively, one is not required to spend all of his money to fulfill the *mitzvah* (see also *Bikkurei Yaakov* 656:13). However, Rivash (387) is of the opinion that one must spend all of his money in order to fulfill any negative precept, even if he would only violate it passively. R. Sofer rules in accordance with *Havot Ya'ir*.

42 *Tzitz Eliezer* 18:40.

Jewish physician may be placed in a very uncomfortable position, in which he must choose between violating his religious obligations and facing legal repercussions. He may, however, be able to rely on R. Waldenberg's position that a physician does not have to forfeit his finances for the sake of this obligation, as it is a negative commandment that he will only be violating passively.

DOVID MORADI

# *Celiac Disease and Eating Matzah: A Model for Risk-Taking in Performance of Mitzvot*

The question of taking risks in order to perform *mitzvot* has been discussed extensively, but these discussions have focused mainly on *mitzvot* performed to save another person's life or to protect oneself from imminent danger.<sup>1</sup> The focus of the present article will be on the degree of danger that a person may undergo in order to perform a *mitzvah* that may cause him to become ill.<sup>2</sup> We will focus specifically on the case of a person with celiac disease who wishes to perform the *mitzvah* of eating *matzah* on Pesach.

## **I. Medical Analysis and Description of Celiac**

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1 See, for example, Shabtai, D., "Metzitzah b'Peh – Paradigm for halachic risk taking," *JME* 6:1 (2007): 26-48.

2 For specific halakhic information for people with celiac disease, see the comprehensive guide by R. Dovid Cohen of the Chicago Rabbinical Council, *Celiac: A Guide to Mitzvah Observance* (2010), available at [http://www.crcweb.org/kosher\\_articles.php](http://www.crcweb.org/kosher_articles.php). Several of the sources that R. Cohen notes are cited in the present article.

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### **Disease<sup>3</sup>**

Celiac disease (or celiac sprue) is an autoimmune disease in which genetically predisposed people have an allergic reaction to gluten, a class of proteins made of glutenins and gliadins that is found in wheat, or other similar proteins found in grains, such as hordein and secalin found in barley and rye respectively.<sup>4</sup> The only known treatment for celiac disease is a gluten-free diet.

Over the last twenty years, the scientific community has begun to recognize the full extent of celiac disease in the population. The prevalence of celiac disease is approximately 1% in the general population in the United States and Europe; it increases to 16% among those with relatives who have celiac disease or who have certain other comorbidities.<sup>5</sup> A study of 850 young adult Jewish army recruits from the Israeli Defense Force showed a prevalence of 1.1%.<sup>6</sup>

Individuals with celiac disease who consume gluten may be asymptomatic or become ill enough to require hospitalization. The disease affects the small intestine, causing an inflammatory reaction via lymphocytes and the flattening of the

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3 The author thanks Dr. Lawrence Brandt of Montefiore Medical Center for his medical expertise and valuable input to this section.

4 Donald Kasarda, a former research chemist for the United States Department of Agriculture, has shown that spelt may also be associated with gastrointestinal reactions in patients with celiac disease, which he attributes to spelta, a protein containing amino acid sequences similar to gliadin, a glycoprotein found in gluten. See <http://www.celiac.com/articles/185/1/Gluten-Free-Grains-in-Relation-to-Celiac-Disease---by-Donald-D-Kasarda-Former-Research-Chemist-for-the-United-States-Department-of-Agriculture/Page1.html>; Kasarda DD., "Deduces amino acid sequence of an a-gliadin gene from spelt wheat (spelta) includes sequences active in celiac disease," *Cereal Chemistry* 76 (1999): 548-51.

5 Niewinski M., "Advances in celiac disease and gluten free diet," *Journal of American Diet Association* 108 (2008): 661-72; Fasano A., Catassi C., "Clinical practice: Celiac disease," *New England Journal of Medicine* 367(25) (Dec. 20, 2012): 2419-26.

6 Israeli, E. et al., "Prevalence of celiac disease in an adult Jewish population in Israel," *IMAJ* 12 (2010): 266-9.

intestine's absorptive lining. These abnormalities cause malabsorption and result in gastrointestinal symptoms.<sup>7</sup> Typical symptoms include diarrhea, abdominal distention, constipation, weight loss, weakness, flatus, vomiting, vitamin deficiencies, and failure to thrive and short stature in children. Atypical manifestations of celiac disease include anemia, infertility, miscarriage, neuropathy, and osteoporosis.

Celiac disease is known to be associated with other autoimmune diseases, including diabetes mellitus type 1, Hashimoto's thyroiditis, rheumatoid arthritis, and systemic lupus erythematosus. Those who cannot be compliant with a gluten-free diet have increased risk of small bowel malignancy, adenocarcinoma, and T-cell lymphoma. Because of the increased long-term risks and the significant adverse effects of not following a gluten-free diet, patients are encouraged to work very closely with a dietician in order to find the most healthful regimen.<sup>8</sup>

Gluten challenge is a test in which a specific amount of gluten-containing food is given to a patient with celiac disease to observe his immunologic and physical responses. Catassi et al. studied the effects of 100mg and 500mg gliadin challenge doses for four weeks in 20 children. The results showed that even in the 100mg group, there were significant changes seen in lymphocyte count and villus height/crypt depth ratio, both signs of small intestinal damage due to small amounts of gliadin.<sup>9</sup> Furthermore, studies have shown microscopic changes within the small intestine in up to 22% of patients who show no clinical symptoms of celiac disease after gluten challenge. These changes, although not causing physical symptoms, may predispose patients to long-term consequences of celiac disease, such as cancer and lymphoma.<sup>10</sup>

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7 Fasano A, "Clinical practice."

8 Niewinski, M., "Advances in celiac disease."

9 Catassi, C., "Dose dependent effects of protracted ingestion of small amounts of gliadin in celiac disease children: A clinical and jejuna morphometric study," *Gut* 34(11) (Nov. 1993): 1515-9.

10 Lahdeaho, M., "Small-bowel mucosal changes and antibody responses after low- and moderate-dose gluten challenge in celiac disease," *BMC Gas-*

Hischenhuber et al.<sup>11</sup> concluded that the safe limit of gluten is 10-100mg per day and that the term “gluten-free diet” should be used to refer to a diet including up to 100mg gluten per day. As a frame of reference, a 25g slice of bread contains 1.6 grams of gluten.<sup>12</sup>

There continues to be much discussion in the scientific community regarding whether oat products should be included in a gluten-free diet. In 2006, Srinivasan et al. performed a study in which ten patients with celiac disease who had previously been on a gluten-free diet were given 50 grams of oats for three months. No patient developed any clinical or laboratory evidence of adverse effects.<sup>13</sup> Based on these results and other studies, many physicians permit patients with celiac disease to consume non-contaminated oat products.<sup>14</sup> The FDA, based on these studies, has allowed “gluten free” labeling to appear on products made of oats.

## **II. Celiac Disease and the *Mitzvah* of *Matzah***

Celiac disease poses a unique problem for Jews, as eating wheat *matzah* at the Pesach *sefer* is one of the most observed *mitzvot* among all Jewish people, regardless of their level of religious observance. The Torah commands: “In the first month [Nisan], on the fourteenth day, in the evening, one should eat

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*gastroenterology* 11 (2011):129.

11 Hischenhuber, C. et al., “Review article: Safe amounts of gluten for patients with wheat allergy or celiac disease” *Aliment Pharmacol Ther.* 2006 Mar 1;23(5):559-75.

12 Catassi C., Fasano A., “A prospective, double-blind, placebo-controlled trial to establish a safe gluten threshold for patients with celiac disease,” *Am J Clin Nutr.* 85(1) (2007):160-6.

13 Srinivasan, U., “Immunohistochemical analysis of celiac mucosa following ingestion of oats,” *Clin Exp Immunol* 144(2) (May 2006): 197-203.

14 It is important to note that most commercial oats are contaminated with wheat or other gluten-like containing grains, and one who desires or requires fully gluten-free oats must therefore purchase specially produced oat products.

*matzot*, until the twenty-first day of the month at night.”<sup>15</sup> Rashi quotes the *gemara*, which derives that there is a Biblical obligation to eat *matzah* only on the first night of Pesach; on all the other days of the holiday, it is forbidden to eat leavened substances, but one is not required to eat *matzah*.<sup>16</sup> The *mishnah* states that *matzah* must be made of one of the five grains: *hitah*, *se'orah*, *kusmin*, *shipon*, and *shibolet shual* –wheat, barley, spelt, rye, and oats. Wheat, barley, spelt, and rye include gluten, the protein that may potentially cause an allergic reaction in patients with celiac disease.<sup>17</sup>

To the best of my knowledge, the gluten content in baked *matzah* has not been studied. In March 2012, I contacted several *matzah* companies regarding the gluten content in their products. The Manischewitz company responded that their wheat *matzah* includes 8-9% gluten. The Yehuda Matzah company responded that their dough is 73% wheat flour, which contains 8% dry gluten and 23% wet gluten, with a gluten index of 93.

In general, celiac disease has been shown to have different phenotypes; symptoms differ from patient to patient. As a result, it is difficult to determine the quantity of *matzah* that one can eat without developing physical or pathological consequences. Indeed, it is because of this difficulty in predicting a reaction that doctors encourage patients to avoid gluten as much as possible and adhere to a gluten-free diet.

The inclusion of oats as one of the five grains has allowed people with celiac disease to fully participate in many of the *mitzvot* requiring bread, including *matzah*. Oat *matzah* is increasingly available from reliable vendors and bakeries, eliminating the problem for some. However, although oats are tolerable for most people with celiac disease, they do not solve the problem for everyone. Furthermore, the inclusion of oats

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15 *Shemot* 12:18.

16 *Pesachim* 120a.

17 *Pesachim* 35a.



among the five grains is subject to dispute.<sup>18</sup> As a result of the dispute on this matter, for the purposes of this paper, we will assume that eating oat *matzot* is not a halakhic option for a person with celiac disease who wishes to fulfill the *mitzvah* of eating *matzah*.

How should an individual with celiac disease conduct himself with regard to this *mitzvah*? Is one obligated to eat *matzah* if it will cause him physical discomfort or long-term consequences due to his disease? Is it permitted to intentionally make oneself sick or risk becoming sick in order to fulfill the *mitzvah* of *matzah*? In general, what is the proper approach to performing a *mitzvah* that results in a health risk? Is it obligated, permitted, laudable, or forbidden to risk one's health in order to perform a *mitzvah*?

### III. The Obligation of a Healthy Lifestyle

Although the performance of *mitzvot* is central to Jew-

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<sup>18</sup> The definition of *shibolet shual* as oats is based on Rashi's comment on *Pesahim* 35a, where he translates the grain using the French word "avino." Dr. Yehudah Felix, an Israeli botanist, disagrees with the definition of *shibolet shual* as oats based on several arguments, including that oats do not contain gluten. His opinion continues to be a point of contention among halakhic authorities. R. Herschel Schachter, Rosh Yeshiva of Yeshiva University, maintains that oats are not considered one of the five grains. R. Michael Broyde, in an article titled "Oat *Matzah*" (<http://torahmusings.com/2011/08/oat-matzah/>) discusses the definition of *shibolet shual* and concludes that one should not use oat *matzah* for the *mitzvah* of *matzah* at the *sefer*. (See his article for recommendations as to how a person with celiac disease should conduct himself for *mitzvat matzah*.) R. Dov Linzer ("The Daily Daf," <http://www.the-daf.com/talmud-conceptual/are-oats-really-one-of-the-5-species-of-grain/>) relates that R. Shlomo Zalman Auerbach began reciting the blessing of *she-hakol* on his morning oatmeal due to Dr. Felix's findings. When R. Yosef Shalom Elyashiv found out about this, he told R. Auerbach that our *mesorah* indicates that oats are one of the five grains and he should therefore return to reciting *mezonot* on his oatmeal. It is also important to note that Rama (*Orah Hayim* 453:1) rules that the best flour for *matzah* is wheat flour. Under ordinary circumstances, one should follow that ruling.

ish life, the Torah indicates that there is another responsibility that one must balance alongside it – the obligation to guard one's health.

The *gemara* in *Berakhot* recounts a story about a righteous man who was praying and did not heed a passing non-Jewish nobleman.<sup>19</sup> The nobleman rebuked him for risking his life in order to pray based on two verses in *Devarim*: “Only guard yourself and guard your soul very much (*rak hishamer lekha u-shemor nafshekha me'od*), lest you forget the things that your eyes have seen and you remove them from your heart for all the days in your life, and make them known to your children and your children's children”<sup>20</sup> and “and you shall very much guard your soul (*ve-neshmartem me'od le-nafshoteikhem*), because you did not see any likeness on the day that *Hashem* spoke to you at Horev from the fire.”<sup>21</sup> Although these verses seem to be completely unrelated to any obligation to protect one's wellbeing and despite the fact that this interpretation was first advanced by a non-Jewish nobleman and not by one of the Sages, it seems that this interpretation has become the accepted source obligating a Jew to live a life of health and reduced risk.<sup>22</sup>

Rambam writes that by maintaining the health of one's body, one follows in the ways of *Hashem*. Because a person cannot understand the Torah or the ways of *Hashem* while sick, one must distance himself from anything that detracts from his body; instead, he must conduct his life in a healthy way.<sup>23</sup> The *Be'er Ha-Golah* writes that *Hashem* created the world in His kindness to allow people to realize His greatness and perform

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19 *Berakhot* 32b.

20 *Devarim* 4:9.

21 *Ibid.* 4:15.

22 Maharsha, *Berakhot* ad loc., notes that the verse “only guard yourself and your soul very much” is used to teach two different ideas. In *Avot* 3:13, the verse is understood according to its plain meaning, as a warning not to forget the Torah. In *Shavuot* 36a, the *gemara* forbids one from cursing himself based on this verse, as cursing oneself is essentially an act of putting oneself into a risky situation and thereby not guarding oneself.

23 *Hilkhot De'ot* 4:1.

His *mitzvot*, so that He can give us reward for our actions. One who endangers himself shows disdain for *Hashem's* wishes and clearly does not want His rewards, and there is no greater disrespect or heresy than this!<sup>24</sup>

Based on this, an individual with celiac disease is clearly obligated to adopt a medically recommended diet in order to best maintain his health. A partnership between the patient's rabbi and doctor will enable him to have the best opportunity to remain healthy while still conducting himself within the confines of Halakhah.

Moreover, it may be forbidden or counterproductive for such an individual to eat gluten products in order to fulfill a *mitzvah*. Rambam writes: "It is forbidden to hit oneself or others in a degrading manner... because of the negative commandment of *lo yosif le-hakoto*."<sup>25</sup> *Kitzur Shulhan Arukh* writes that even one who fasts excessively or becomes a *nazir* is considered a sinner, and he causes *habalah* (damage) to himself.<sup>26</sup> Furthermore, according to Halakhah, eating in a way that causes damage is considered different from eating in a healthy way. The *gemara* states that if one eats on Yom Kippur in a manner that is *mazik* (damaging) himself, he has not violated Yom Kippur.<sup>27</sup> Rambam explains that this type of eating is not considered eating at all and therefore does not fall into the category of forbidden eating on Yom Kippur.<sup>28</sup> This *gemara* has significant implications regarding how we should view eating gluten for one who has celiac disease. If eating gluten is considered harmful eating, it would seem that a person with celiac disease who eats regular *matzah* on Pesach has not fulfilled the *mitzvah* of *matzah*, as it would not be considered legal eating!

The additional negative commandment against damaging oneself demonstrates the Torah's emphasis on living a

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24 *Be'er Ha-Golah, Hoshen Mishpat* 427:90.

25 *Hilkhhot Hovel U-Mazik* 5:1.

26 *Kitzur Shulhan Arukh* 29:7.

27 *Yoma* 80b.

28 *Hilkhhot Terumot* 10:8.

healthy lifestyle. The halakhic authorities clearly viewed intentional damage to one's health in a very negative light. Both Rambam and *Shulhan Arukh* write that anyone who ignores the prohibition to avoid *sakanah* and performs dangerous activities despite the prohibition is punished with lashes. *Shulhan Arukh* adds that one who is careful to avoid these things is blessed.<sup>29</sup>

After *Shulhan Arukh* lists several actions that may cause a person danger, Rama writes:

Be careful from all things that bring one close to danger, because dangerous things are more stringent than forbidden things (*sakanah hamirah mei-issura*). One must be more careful regarding an uncertain danger than an uncertain prohibition.<sup>30</sup>

What does Rama mean when he states that a case of possible danger (*safek sakanah*) should be treated more stringently than a case of transgressing something that is possibly forbidden? *Taz* gives the example of *batel be-shishim*. In the context of forbidden mixtures, the *halakhah* is that if the forbidden part is only 1/60<sup>th</sup> of the mixture, the entire mixture is permitted. Thus, if a drop of milk falls into a pot of meat stew and the dilution content of milk to stew is 1:60 or less, one would be permitted to eat the stew. *Taz* writes that according to Rama's assertion that we are more stringent regarding possible danger than possible transgression, if something possibly dangerous fell into food, one would never be allowed to eat the mixture no matter how large the dilution content.

According to this *halakhah*, those with celiac disease who develop severe reactions to gluten are forbidden from con-

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29 *Hilkhot Rotze'ach* 11:5; *Shulhan Arukh, Hoshen Mishpat* 427:10. Sema (427:12) writes that the source for avoiding *sakanah* is the verse from *Devarim* 4:9, "Only guard yourself and guard your soul very much."

30 Rama, *Yoreh De'ah* 116:5.

suming any gluten due to the *sakanah* it poses to their health. Those with less severe reactions to gluten or those who experience only microscopic reactions but not physical reactions are in a more questionable state. How does Halakhah view these physical reactions? Is our stringency regarding *sakanah* relevant only to threats to one's life or the possibility of immanent sickness, or does it apply in the case of any threat to one's physical wellbeing, even if not sickness-related?

The next *halakhah* in *Shulhan Arukh* is relevant to our discussion. *Shulhan Arukh* rules that it is forbidden to eat or drink anything that causes the life of a person to be shortened.<sup>31</sup> This *halakhah* may have significant implications not only for our discussion of celiac disease, but for many other health issues as well. Given our current knowledge regarding diabetes, hypertension, and other diseases, which foods are permitted or forbidden to eat? How far are we to take the words of *Shulhan Arukh*? Is a person who suffers from diabetes permitted to eat excess sugar? May someone with hypertension eat a salty meal? May one with high cholesterol eat excess fat? Does the health of a person determine what types of foods he may or may not eat, or is the permissibility of a food based objectively on the food itself?

#### **IV. Risk Taking and *Mitzvah* Observance**

Thus far, we have seen that there is a general requirement to maintain one's health and that one is forbidden to take actions that jeopardize his health. How is this obligation fulfilled if it contradicts the obligation to fulfill the other *mitzvot*?

The Torah commands: "You shall observe my decrees and my laws, which man shall carry out and by which he shall live (*va-hai ba-hem*); I am *Hashem*."<sup>32</sup> The *gemara* in *Sanhedrin* derives from the phrase "*va-hai ba-hem*" that one should live by doing the *mitzvot* and should not die because of them.

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31 *Shulhan Arukh, Yoreh De'ah* 116:6.

32 *Vayikra* 18:5.

There are only a few exceptions to this rule, cases in which one would be obligated to die in order to observe the *mitzvot* – to avoid the sins of murder, idolatry, adultery, a transgression that would desecrate *Hashem's* name, and possibly during a time of decrees against the Jewish People.<sup>33</sup> We learn from this *gemara* that the *mitzvot* are commanded to us in order to enhance our lives, not to cause us pain, suffering, or death. With very few exceptions, one is not expected – nor allowed<sup>34</sup> – to give up his life in order to perform a *mitzvah*.

For this reason, the *gemara* in *Yoma* concludes that “*pi-kuah nefesh doheh Shabbat*,” saving of a life overrides the Shabbat.<sup>35</sup> As the *gemara* explains, one Shabbat is transgressed in order to allow further Shabbatot to be observed. The *gemara* concludes that Shabbat is violated in order to save someone in a case of *vadai sakanah*, certain danger, as well as *safek sakanah*, possible danger.

R. Chaim Pinchas Scheinberg extends this exemption to all other *mitzvot*; one is not required to put himself in a state of possible danger in order to perform a *mitzvah*. He posits that if one is permitted to desecrate the Shabbat in order to ensure that further Shabbatot will be observed, it would not make sense to allow one to perform a *mitzvah* that would hinder observance of other *mitzvot*.<sup>36</sup> This view seems to imply that one should not eat gluten *matzah* if it will cause him to be admitted to the hospital and to possibly become bedbound, ultimately reducing his ability to perform other *mitzvot*. Indeed, Halakhah does not seem to demand that one risk his life for the sake of any *mitzvah* other than the exceptions mentioned in *Sanhedrin*, even in order to save another person's life.<sup>37</sup>

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33 *Sanhedrin* 74a.

34 Based on *Ran* in *Yoma* 82a in explaining the *Bereishit* 9:5.

35 *Yoma* 85a.

36 *Halakha U-Refuah* Volume 4 , pp. 125-38. Essay entitled: *B'din Choleh U'mitzvot B'mitzvot*.

37 *Shulhan Arukh* (*Hoshen Mishpat* 426:1) rules that one must save another person's life through physical or monetary methods if he has the ability to do so. Commenting on this ruling, Sema quotes a remarkable *Yerush-*

Some might argue that the halakhic principle of “*shomer peta'im Hashem*,” “God protects the fools,” should be applied in this case. Someone who suffers from celiac disease and nevertheless eats gluten *matzah* is acting foolishly, but *Hashem* will protect him from harm. This would allow someone with celiac disease to eat gluten products throughout the year, but eating *matzah* would be especially permitted given the fact that “*sheluhe'i mitzvah einan nizakin*,” “messengers of *mitzvot* are not harmed.”

However, *Hidah* defines two rules for application of the leniency of “*shomer peta'im Hashem*.” First, the masses must do this action, and second, it must not lead to any deterioration of the body.<sup>38</sup> It seems to this author that since the majority of patients diagnosed with celiac disease attempt to follow a gluten-free diet and since studies show specific microscopic alterations in the small intestines when gluten is consumed by

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almi (*Terumot* 8:4) that states that one must even put himself into a *safek sakanah*, possible danger, in order to save another person; failure to do so would violate the command “You shall not stand by while your brother’s blood is spilled” (*Vayikra* 19:16). It seems that the Yerushalmi assumes that one is expected to undergo possible danger in order to save someone else from certain danger. *Sema* concludes, however, that because *Rif*, *Rambam*, *Rosh*, and *Tur* do not mention this Yerushalmi, *Shulhan Arukh* omitted it, and there is therefore no obligation to risk one’s life to save another person. See *Havot Ya’ir*, *Bava Metziah* 62a, regarding the case of two people in a desert with only one flask of water. He presents a novel approach as to how the water should be divided based on this Yerushalmi.

See also *Yehaveh Da’at* 3:84, where R. Ovadia Yosef rules that we do not permit someone to put himself into a possibly dangerous situation in order to help someone in a certain dangerous situation. As proof, he cites the *gemara* in *Niddah* (61a), which recounts that R. Tarfon did not hide certain people because he was afraid of the situation it would place him in. R. Yosef discusses this point in the context of the permissibility of donating one’s kidney given the danger associated with organ transplants. R. Moshe Feinstein (*Iggerot Moshe*, *Yoreh De’ah* 2:174:4) writes that it is permitted to undergo pain and possibly even some risk in order to help save another person’s life via organ donation, but one is not obligated to do so.

The application of the Yerushalmi’s approach for a *mitzvah* that does not save another person’s life is unclear.

38 *Teshuvot Hayim Sha’al* 58:59.

such individuals, the leniency of “*shomer peta'im Hashem*” cannot be used to permit someone with celiac to eat gluten. Similarly, the *gemara* in *Pesahim* states that the principle of “*sheluheh mitzvah einan nizakin*” applies only in cases in which damage is not common.<sup>39</sup> In the case of celiac disease, it is clear that there is at least pathologic damage, and possibly physical damage.

Despite these arguments, which seem to indicate that one should not risk his health in order to eat *matzah* on Pesach, several sources from *Tanakh*, the Talmud, and Halakhah seem to indicate that one may indeed perform *mitzvot* despite the associated risk. For example, when King Darius issued a decree that “whoever makes a request of any god or man within the next thirty days besides the king shall be cast into a pit of lions,” Daniel continued to pray to *Hashem* three times a day nonetheless.<sup>40</sup> Furthermore, the story brought by the *gemara* in *Berakhot* regarding the pious man who continued praying despite the presence of the nobleman – the source for the obligation to maintain one’s health – also seems to indicate that one may risk his health in order to fulfill a *mitzvah*, as the pious man did, even when not obligated to do so.<sup>41</sup>

The *gemara* describes such risk-taking even in the context of Rabbinic enactments. The *gemara* in *Eruvin* recounts that when R. Akiva was in jail, he was only given a small amount of water each day. He decided to use the water in order to wash his hands before eating bread instead of for drinking, despite the fact that he knew that he would not have enough water to keep him alive. R. Akiva declared, “The rabbinic laws carry the

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<sup>39</sup> *Pesahim* 8a.

<sup>40</sup> *Daniel* 6:8, 11.

<sup>41</sup> *Berakhot* 32b. The pious man defends himself before the nobleman by claiming that just as the nobleman would not dare to interrupt a conversation with a king in order to speak to a lower officer, he could not possibly interrupt his conversation with the King of kings in order to respond to the nobleman. *Tzelach* comments that the pious man was confident in this argument because it was the nobleman who opened the conversation, which showed a certain amount of humility on his part and indicated that the *kal va-homer* argument would likely work.



death penalty; better that I die by myself [due to thirst] than transgress the will of my friends [the other Rabbinic figures who made the law].”<sup>42</sup> Tosafot write that this was not required of R. Akiva by law and that he was being stringent on himself.<sup>43</sup>

According to what we have seen, those with celiac disease whose health is endangered by eating gluten products are clearly exempt from eating wheat *matzah*, as it is associated with known health risks. The question remains, however, if it is proper to conduct oneself in the manner of Daniel, the pious man, and R. Akiva, who fulfilled *mitzvot* despite the attendant risks. Is such behavior only appropriate for people of their caliber, or may anyone choose to take a risk and eat gluten containing *matzah* in order to fulfill his obligation?

A number of sources indicate that there is no blanket prohibition forbidding risk-taking. The *gemara* in *Mo'ed Katan* discusses the permissibility of crossing the Mediterranean Sea; given that *Birkat Ha-Gomel* is recited after crossing an ocean, it is clearly dangerous to do so, and perhaps it should be forbidden to put oneself in such a situation. The *gemara* answers that one may certainly cross the sea for sustenance.<sup>44</sup> This ruling displays the value that Halakhah places on the *mitzvah* of providing for one's family, even permitting one to put himself into danger for this purpose.<sup>45</sup> R. Yitzchak Zilberstein offers a similar explanation in answering a question posed to him regarding the permissibility of a doctor travelling with a tour group into a jungle in order to take care of the tourists.<sup>46</sup> R. Eliezer Waldenberg argues that the *gemara's* conclusion explains why anyone is permitted to become a doctor in the first place given the risk of contracting a disease from a patient, arguing that this work

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42 *Eruvin* 21b.

43 Tosafot ad loc, s.v. *mutav*.

44 *Mo'ed Katan* 14a.

45 There is a significant discussion regarding the permissibility of putting oneself in danger for leisure (e.g. skiing, paintball, skydiving, and possibly even smoking). This topic is beyond the context of our discussion.

46 *Medical Halachic Responsa by Rav Yitzchak Zilberstein*, trans. and ed. by Fred Rosner. Maimonides Research Institute 2013, pp 73.

is necessary for one's livelihood and is further necessary for the proper functioning of society.<sup>47</sup>

## V. Discomfort and *Mitzvah* Observance

Thus far, we have considered the balance between the obligation to preserve one's life and the obligation to fulfill *mitzvot*. It is evident that one is not obligated to fulfill a *mitzvah* if it will put his life in danger. In this section, we will discuss the possibility of exemption from *mitzvot* in cases of discomfort, *mitzta'er*. As we have noted, many people with celiac disease suffer from abdominal distention and diarrhea when they eat gluten products.

The *mishnah* in *Sukkah* states that one on a *mitzvah* mission, sick people, and those caring for them are exempt from living in a *sukkah* on Sukkot. The *gemara* further includes one who is *mitzta'er*, one who experiences distress or discomfort, in the list of exemptions.<sup>48</sup> The details of how "distress" is defined in this context are discussed by the halakhic authorities. The broader and more relevant question to our discussion is if the exemption of *mitzta'er* applies to other *mitzvot* as well. Would one be exempt from eating *matzah* due to distress?

Rav Yosef Engel discusses this question and rules that "*mitzta'er patur min ha-sukkah*" should not be used as a general principle. The reason that a *mitzta'er* is exempt from the *mitzvah* of *sukkah* is that one is obligated to live in his *sukkah* just as he lives in his house ("*teshvu ke-ein taduru*"); just as an uncomfortable person would not sit in his house, he is exempt from being in the *sukkah* if it makes him uncomfortable. This reasoning does not apply to other *mitzvot*.<sup>49</sup>

Another possible precedent is found in the context of

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47 *Tzitz Eliezer* 9:17:5. R. Joshua Flug ("Self Endangerment and Safeguarding One's Body [December 24, 2010], available at [yutorah.org](http://yutorah.org)) extends this idea to permit Jews to becoming policemen and firemen, both inherently dangerous jobs that are needed in order for society to be safe and peaceful.

48 *Sukkah* 25a-b.

49 R. Yosef Engel, *Gilonei Hashas, Berakhot* 8a.

the *mitzvah* of *tefillin*. Rabbeinu Yonah writes that R. Yochanan would don *tefillin* only once a year because he was afraid of the headaches it would cause him. In fact, after wearing *tefillin* once around the time of Pesach, he would have to wrap his head until Shavuot because of the headache.<sup>50</sup> Can this exemption be extended to other *mitzvot* as well? *Shulhan Arukh* rules that one who is *mitzta'er* or distracted is exempt from wearing *tefillin*. However, he qualifies that the reason for this exemption is that one cannot maintain the proper intention while wearing *tefillin* if he is *mitzta'er* or distracted.<sup>51</sup> It is only because of the special intention required for *tefillin* that one is relieved of performing the *mitzvah* if he is uncomfortable.

A more helpful precedent is found in the context of the exemptions from fasting. Rama writes that pregnant and nursing women are exempt from the four fasts (the fasts other than Yom Kippur and Ta'anit Esther) because they are "*mitzta'arot harbei*."<sup>52</sup> *Mishnah Berurah* extends this exemption to those who are bedbound and writes that they are forbidden from being stringent upon themselves if they feel weak. This comment of *Mishnah Berurah* may shed some light on our question. It is possible that a person with celiac disease would be considered exempt from eating *matzah* if doing so would make him bedbound. Additionally, it would be forbidden for him to be stringent on himself if he felt somewhat weak or suffered from active inflammation or sickness when Pesach began.<sup>53</sup>

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50 Rabbeinu Yonah, *Berakhot* 14b in the pages of Rif.

51 *Shulhan Arukh, Orach Hayim* 38:9.

52 Rama, *Orach Hayim* 550:1.

53 R. Scheinberg writes that there is a difference between a person who suffers from an acute illness and one with a chronic illness. If the illness will go away with time, one would be obligated to perform the *mitzvah* despite the possibility that doing so will make him bedbound, provided that it does not pose any significant threat to his health. Even if performing the *mitzvah* will make the acute illness worse, one is obligated to fulfill his obligation. In contrast, someone with a chronic illness – and celiac disease seems to fall into this category – would be exempt from performing the *mitzvah* if it would provoke the ongoing chronic condition that he lives with.

R. Scheinberg offers a comparison to *hilkhot milah*. If a baby requires sur-

Radvaz utilizes the principle of *mitzta'er* to allow for a leniency in two cases. He writes that one may shave during the days of the *omer*, when it is customary to refrain from doing so due to the mourning for the students of R. Akiva, if he is in distress or in an uncomfortable physical state due to not shaving.<sup>54</sup> Similarly, he extends the use of the principle of *mitzta'er* to exempt a blind person from reading *shenayim mikra*.<sup>55</sup> According to Radvaz, it would seem that the discomfort experienced by a person with celiac disease after eating foods containing gluten would fall under at least a similar amount of distress. The principle may therefore be used to relieve him of his duty to eat *matzah* on the first night of Pesach.

## VI. The Rule of *Homesh*

R. Moshe Feinstein discusses the case of a patient in a hospital who was told that although he had clinically recovered from the illness for which he was admitted, he had to remain in the hospital for observation in order to avoid deterioration or relapse. Because this patient was in the hospital, he would miss *shofar* blowing on Rosh Hashanah. Should the patient leave the hospital to hear the *shofar*, or is he exempt from hearing it?

R. Feinstein responds to this question based on two *gemarot* that shed light on one's obligation to "take a loss" for the sake of a *mitzvah*. The *gemara* in *Berakhot* cites R. Eliezer's

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gery for some condition and performing the surgery within the first eight days of life would delay the time of the *brit milah*, it is only permitted to perform the surgery and delay the *brit* if the condition will otherwise be permanent. However, if the condition will not leave the child permanently maimed, it is treated as an acute illness. Therefore, one must first perform the *brit* and only then perform the surgery.

54 *Teshuvot Ha-Radvaz* 2:687.

55 *Ibid.* 3:425. This position is discussed by other authorities, including R. Ovadia Yosef (*Hazon Ovadia, Pesach, siman* 4, p. 56) and R. Yosef Engel (*Gilyonei H'shas, Berachot* 8a), who rule that the discomfort entailed for a blind person who must sit with a person who can see and read *shenayim mikra* is not significant enough to exempt him. Despite this argument, it is interesting to observe the use of the exemption and its possible applications.

question on the verse in *keriat shema* demanding that one serve God “*u-ve-khol nafshekha u-ve-khol me’odekha*,” “with all your soul and with all your resources.”<sup>56</sup> Why was it necessary to write both? Certainly, if one must serve God with all his soul, he must serve Him with all of his funds! The *gemara* explains that “*u-ve-khol nafshekha*” is addressed to those who value their bodies more than their money, whereas “*u-ve-khol me’odekha*” is addressed to those who value their money more than their bodies.<sup>57</sup> Nevertheless, there is clearly a limit to how much money one must spend in order to serve God. The *gemara* in *Ketuvot* states that one may not spend more than 1/5 (*homesh*) of his total assets in order to perform a *mitzvah*.<sup>58</sup> Based on the comparison in *Berakhot*, just as one may not spend more than 1/5 of his funds for a *mitzvah*, he may not make himself sick in a manner worth 1/5 of his possessions for a *mitzvah*.

Based on this argument, R. Feinstein rules that the patient should remain in the hospital, as one’s health is worth more than 1/5 of his possessions. The patient is therefore not permitted to leave the hospital in order to hear the *shofar*.<sup>59</sup>

Similarly, R. Avraham Steinberg rules (based on the position of *Minhat Yitzhak*) that if a doctor suggests that a patient not eat *matzah*, *maror*, or listen to the *shofar* due to a health concern and the patient does so nevertheless, it is not only considered as though the person did not fulfill the *mitzvah*, but is even considered a sin.<sup>60</sup>

## VII. The Four Cups at the *Seder*

One source that may be directly relevant to our question has to do with another *mitzvah* on Pesach night – the Rabbinic obligation to drink four cups of wine. The *gemara* in

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56 *Devarim* 6:5.

57 *Berakhot* 61b.

58 *Ketuvot* 50a; see *Shulhan Arukh, Yoreh De’ah* 249:1.

59 *Iggerot Moshe, Orach Hayim* 1:172. See *Binyan Shlomo* 47 for further discussion of this position.

60 *Sefer Assia*, vol. 2, p. 35.

*Nedarim* and the *Yerushalmi* in *Pesachim* recount similar stories regarding R. Yehudah ben R. Ilai (*Nedarim*) and R. Yonah (*Yerushalmi*), who would drink wine for the four cups at the *seder* and therefore suffered headaches until Shavuot (R. Yehudah ben R. Ilai) or Sukkot (R. Yonah).<sup>61</sup>

*Shulhan Arukh* rules that a person who does not regularly drink wine because it is *mazik* him or he dislikes it must push himself and drink it at the *seder* in order to fulfill the *mitzvah* of the four cups.<sup>62</sup> How much discomfort is one expected to endure in order to fulfill the *mitzvah* of drinking the four cups? Is the principle demanding even endurance of discomfort in order to fulfill the *mitzvah* relevant to our discussion of eating *matzah* at the *seder*?

*Rosh Yosef* explains that in the *gemara's* case, the wine did not cause pain immediately after drinking, but rather after time. Because there were no immediate consequences to drinking the wine, R. Yehudah thought that it was possible that this reaction would not occur again, and he therefore drank the four cups every year with the hope of not having another reaction. Had the wine caused immediate pain upon drinking, *Rosh Yosef* writes, he would have been exempt from drinking.<sup>63</sup>

Maharam Shick rules that just as one must push himself to fulfill the *mitzvah* of the four cups, one must do so for *matzah* and *maror*. However, if the food is very dangerous to the person, causing an immediate reaction, he is not only forbidden to eat the food, but may not even recite a *berakhah* on

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61 *Nedarim* 49b and *Yerushalmi*, *Pesachim* 69a.

62 *Shulhan Arukh*, *Orah Hayim* 472:10.

63 *Rosh Yosef* 48a. The *Teshuvot Besamim Rosh* (94) suggests another approach to this *gemara*. He writes that R. Yehudah exerted himself to such an extent because of his love for the special *mitzvah* of the four cups. This exertion was permitted because: 1) The four cups are a beloved *mitzvah*; 2) performance of the *mitzvah* only caused a headache and did not cause him to become bedbound; and 3) it was a *middat hassidut*, a pious act. (The veracity and authorship of *Besamim Rosh* is subject to much discussion. I include it here because it contributes further understanding of the topic without changing any halakhic parameters.)

it, as its consumption is not termed “eating” by Halakhah.<sup>64</sup>

*Mishnah Berurah* comments that one does not have to drink wine if it will cause him to become bedbound; drinking the four cups of wine is supposed to be a reflection of freedom, *herut*, and becoming bedbound would not display this aspect.<sup>65</sup> R. Ovadia Yosef argues that this idea may be applied to all of the *mitzvot* of the night, exempting one from becoming bedbound by eating *matzah* or *maror* as well as the four cups.<sup>66</sup> This application seems logical at least for *matzah* because of the requirement to lean for this *mitzvah*, another display of freedom.

However, other authorities are not convinced regarding the application of *herut* to the other *mitzvot* of the *seder*, limiting the exemption of avoiding becoming bedbound to the four cups. In contrast, regarding other *mitzvot* of the *seder*, one must risk becoming bedbound, although one should not put himself in a position of *sakanah*.<sup>67</sup>

Other authorities reach the opposite conclusion, positing that the *mitzvah* of the four cups is more stringent than the other *mitzvot* of the *seder* and therefore demands greater effort. R. Scheinberg writes that the four cups have an added element of publicizing the miracle of Pesach, which is absent with regard to the other *mitzvot* of the night.<sup>68</sup> R. Tzvi Pesach Frank suggests that the four cups are more stringent based on the *halakhah* that one is obligated to sell his shirt or rent himself out in order to have money to buy wine for the four cups.<sup>69</sup> This rule is not found regarding any other *mitzvot* in the Torah and may even overrule the law cited above regarding not spending more than 1/5 of one's possessions for the sake of a *mitzvah*. R. Frank therefore concludes that Halakhah expects one to experience pain and discomfort while drinking the four cups

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64 *Teshuvot Maharam Shick, Orach Hayim* 260. See text above at n. 48.

65 *Mishnah Berurah* 472:35 and *Sha'ar Ha-Tzion* 472:52.

66 *Hazon Ovadia* 1:4, pp. 48-69, citing *Binyan Shlomo* 47.

67 See discussion in *Hazon Ovadia* 1:4, pp. 48-69, citing multiple sources.

68 *Halakha U-Refuah*, vol. 4, pp. 125-38.

69 *Shulhan Arukh, Orach Hayim* 472:13.

of wine (although not to the point of becoming bedbound), but does not expect this type of hardship regarding any other *mitzvah*, including *matzah*.<sup>70</sup> Based on this understanding of the *mitzvah* of the four cups, the *herut* reflected in the *mitzvah* demands a special degree of effort that one must exert for the *mitzvah*, one that is not required by any other *mitzvot*.

Indeed, the language of *Shulhan Arukh* seems to imply that the extraordinary efforts demanded of a person in order to fulfill the *mitzvah* of the four cups are limited to that context alone. *Shulhan Arukh* writes that one must push himself, “*le-dehok et atzmo*,” in order to fulfill this particular *mitzvah*.<sup>71</sup> Based only on the simple reading of *Shulhan Arukh*, it is difficult to imagine that one is required to exert himself regarding *matzah* more than for the four cups. Therefore, if eating *matzah* will cause one to become bedbound or require hospitalization, it does not seem that the Torah would endorse such effort or behavior.

### VIII. Rulings of the *Posekim*

*Binyan Shlomo* rules that it is forbidden to hurt oneself in order to perform any *mitzvah*, including *matzah*, *maror*, or living in a *sukkah*. By extension, he writes, one must follow his doctor’s guidelines even if that will mean that he will not be able to perform a *mitzvah*. If one would be willing to spend more than 1/5 of his possessions in order to avoid the pain that will result, he would be exempt from performing the *mitzvah*.<sup>72</sup>

*Besamim Rosh* rules that although *matzah* is a Biblical

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70 *Mikra’ei Kodesh, Hilkhot Pesach*, vol. 2, pp. 118-19.

71 There are only four places in *Shulhan Arukh* where the word “*le-dehok*” is used, and this is the only context in which it relates to pushing oneself to perform a *mitzvah*. The four contexts are *Orah Hayim* 3:9 (regarding bowel movements), *Orah Hayim* 328:42 (regarding pushing on a baby’s abdomen to help express stool), *Orah Hayim* 472:10 (regarding the four cups), and *Hoshen Mishpat* 181:1 (regarding partners in a field trying to save one another).

72 *Binyan Shlomo* 47.



*mitzvah*, one is not permitted to eat it if it will cause him to be in a bedbound state for 1-2 days. If such a person were to eat *matzah* anyway, he would be in violation of the prohibition of causing damage to oneself.<sup>73</sup>

Rav Scheinberg similarly rules that one may not harm himself when doing a *mitzvah*. He advances a theory that no *mitzvah* can be more stringent than the prohibition of eating on Yom Kippur, which carries a punishment of *karet*. Therefore, just as if a doctor forbids one from fasting on Yom Kippur, one must follow the doctor's suggestions, the same is true of eating *matzah*; if one's doctor forbids gluten-containing food, it is forbidden to eat that type of food.<sup>74</sup>

*Nishmat Avraham* offers an interesting approach to our problem. He writes that first and foremost, a person must consult with his doctor and listen to the suggestions given to him. That being said, an individual with celiac disease should try his best to buy oat *matzah* and eat five *ke-zeitim* of the *matzah*, the requisite amount at the *seder*.<sup>75</sup> If purchasing oat *matzah* is not possible, the permissibility of consuming wheat or gluten-containing *matzah* depends on several factors. If one knows that eating the *matzah* will cause him to have a reaction, then it is forbidden to eat any *matzah*. However, if during the year one eats some gluten containing foods with minimal reaction, then one may eat one *ke-zayit* of regular *matzah* for the *afikoman* only. He should perform all the parts of the *seder*, eat his meal, and then wash and eat the *afikoman*.<sup>76</sup> I discussed this view

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73 *Besamim Rosh* 94.

74 *Halakha U-Refuah*, pp. 125-38, "Din holeh u-mitzta'er be-mitzvot." R. Scheinberg agrees with the theory of the *Binyan Shlomo* comparing 1/5 of one's possessions to the amount of pain one may endure for a *mitzvah*, validating this theory based on the *gemara* in *Berakhot* 61b cited above.

75 There is much discussion as to the exact amount of *matzah* that one is required to eat at the *seder*. According to *Shulhan Arukh* (*Orah Hayim* 473-477), it seems that one must eat four *ke-zeitim* (two for *Motzi Matzah*, one for *Korekh*, and one for the *afikoman*). However, *Mishnah Berurah* (477:1) comments that one should eat two *ke-zeitim* for the *afikoman* as a commemoration of the *korban Pesach* and the *matzah* eaten with the *korban*.

76 *Nishmat Avraham*, *Orah Hayim* 272:9, 273:5, and 472:10. See also *Lev*

with several gastroenterologists at Montefiore Medical Center (Bronx, New York), and although they emphasized that each patient is different and making general statements is therefore difficult, they agreed that this view constitutes a very logical argument and ruling as a whole.

R. Waldenberg also rules leniently in our case. He writes that a person with celiac disease is exempt from the *mitzvah* even if he will not become bedbound from the gluten ingestion. He adds that if a doctor permits one to eat a certain amount of *matzah* and the patient is nevertheless hesitant to do so, the patient should rely on the principle of "*shomer mitzvah lo yada davar ra*," "one who performs a *mitzvah* will not know bad things," resting assured that performing a *mitzvah* will not result in something negative.<sup>77</sup> Similarly, R. Moshe Sternbuch rules leniently regarding a woman who experiences pain after eating wheat-containing products.<sup>78</sup>

R. Ovadia Yosef writes that if one were to become bedbound after eating *matzah*, he is completely exempt from the *mitzvah*. However, he adds that one should be stringent on himself to eat less than a *ke-zayit*, even a morsel, if doing so will not make him bedbound.<sup>79</sup>

## IX. Final Thoughts

One must always consider the *mitzvah* of living a healthy life in all decisions one makes. Specifically when it comes to taking a risk in one's performance of a *mitzvah*, one must balance the amount of danger, discomfort, and monetary value of extending oneself and risking one's sacred body in order to fulfill that commandment. The constant realization that

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*Avraham* 11:8 and *Sefer Assia*, vol. 12, pp. 110-11.

<sup>77</sup> *Tzitz Eliezer* 19:22.

<sup>78</sup> *Halakha U-Refuah*, vol. 4, p. 147.

<sup>79</sup> *Yalkut Yosef, Hilkhos Pesach*, on *Motzi Matzah*, *halakha* 22 (p. 400). R. Yosef adds that although one should try his best to eat even a small amount, indicating that there is a *mitzvah* to eat even a small quantity, one should still not make a *berakhah* on anything less than a *ke-zayit*.

*Hashem* is present and wants us to live by His Torah and His commandments must be our goal, with no alternative agendas in mind. As observant Jews, we are fortunate to have the Torah and its commentators to help guide our actions.

Unfortunately, a person with celiac disease must follow a diet that is extremely restricting and at times very isolating. Pesach is a *mitzvah* that occurs once a year, a *mitzvah* that is observed and cherished by Jewish people of all levels of observance. The thought of being unable to fulfill the *mitzvah* of *matzah* at the *seder* may be very frustrating to people who suffer from this disease.

The *gemara* in *Ketuvot* states that “All is in *Hashem*’s hands besides fevers and chills.”<sup>80</sup> This is actually an extremely empowering statement. A fever or chill, symptoms of the common cold, often occur because we do not adequately take care of ourselves. We often do not take the correct precautions by washing our hands, wearing a coat, or taking any other rational approaches to staying healthy. The *gemara* teaches us that *Hashem* has power over everything besides our approach to taking care of our bodies. *Hashem* puts each of us on this planet with a certain body and in a certain condition; it is our job to appreciate the gift we were given and keep ourselves as healthy as possible. By keeping healthy, we will have the opportunity not only to learn Torah and understand the ways of *Hashem*, but also to perform the *mitzvot* to the greatest degree possible.

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80 *Ketuvot* 30a.

RABBI PETER KAHN

# *Kohanim* in Medical School? An Examination of *Tumat Akum Be-Ohel\**

Throughout Jewish history, there have been many *kohanim* involved in the sacred practice of medicine. Two notable *Kohen-Rabbi-Physicians* are listed in the Talmud – R. Haninah ben Dosa and R. Haninah bar Hamah.<sup>1</sup> In medieval times, *Kohen-Physicians* include rabbinic figures such as Avraham Ha-Kohen of Zante,<sup>2</sup> Toviyah ben Moshe Ha-Kohen,<sup>3</sup> Yehudah

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1 See Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics*, p. 839.

2 <http://www.jewishencyclopedia.com/articles/573-abraham-ben-shabbethai-cohen-of-zante>.

3 <http://www.jewishencyclopedia.com/articles/4533-cohn-tobias>.

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ben Moshe Ha-Kohen,<sup>4</sup> Yehoshua ben Meir Ha-Kohen,<sup>5</sup> Yehudah ben Shmuel Ha-Kohen Cantarini,<sup>6</sup> and various others. Indeed, given the background of these great men, there would seem to be significant precedent for *kohanim* to join the ranks of those who participate in the venerable tradition of healing. Nevertheless, throughout history, questions have arisen about the propriety of *kohanim* joining the ranks of physicians. Given the Biblical injunction prohibiting *kohanim* from defiling themselves with certain types of ritual impurity, mainly impurity of dead bodies,<sup>7</sup> it would seem that the profession of medicine is necessarily closed to any and all *kohanim* who wish to join. Recently, this question has become even more acute given the almost uniform requirement to take classes in human anatomy and work in hospitals throughout one's medical training. In both of these situations, it is certain that dead bodies or parts of dead bodies will be present during the course of training. Since there is an explicit prohibition against ritual defilement, it seems that *kohanim* simply cannot become doctors given the requirements of modern medicine. Upon closer examination, however, there is room to discuss this important issue preventing *kohanim* from practicing medicine.

The Talmudic interpretation of the Biblical command prohibiting *kohanim* from defiling themselves extends to three different types of defilement: *maga* (touching), *masa* (carrying), and *ohel*. *Tumat ohel* is understood as itself referring to three different types of defilement: sharing a common roof (*ohel hamshakhah*), placing oneself or a part of one's body over the deceased (*ma'ahil*), or the deceased being placed over the

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<sup>4</sup> [http://en.wikipedia.org/wiki/Yehuda\\_ben\\_Moshe](http://en.wikipedia.org/wiki/Yehuda_ben_Moshe); [http://www.chabad.org/library/article\\_cdo/aid/112510/jewish/Rabbi-Yehuda-Ben-Moshe-HaKohen.htm](http://www.chabad.org/library/article_cdo/aid/112510/jewish/Rabbi-Yehuda-Ben-Moshe-HaKohen.htm)

<sup>5</sup> <http://www.jewishencyclopedia.com/articles/8858-joseph-ha-kohen>.

<sup>6</sup> [http://en.wikipedia.org/wiki/Judah\\_ben\\_Samuel\\_ha-Kohen\\_Cantarini](http://en.wikipedia.org/wiki/Judah_ben_Samuel_ha-Kohen_Cantarini); <http://www.jewishencyclopedia.com/articles/3980-cantarini-judah-leon-ben-samuel-simon-ha-kohen>.

<sup>7</sup> *Vayikra* 21:1.

person (*ma'ahil*).<sup>8</sup>

The prohibitions against the *kohen* touching or moving a cadaver (*maga* and *masa*) are almost ironclad in Jewish law, regardless of whether the body is that of a Jew or a non-Jew.<sup>9</sup> Given the limitations of the prohibitions of *maga* and *masa*, a *kohen* may not come in contact with a deceased body in any way, shape, or form. In terms of medical school, he certainly may not touch any cadaver in the anatomy lab and may not touch a deceased patient at any point in his training. This severely curtails possible participation in an anatomy lab; a *kohen* may not actively perform the dissection itself, and if there are requirements to show structures on the body, he may only do so through pointing. Similarly, if a *kohen*-physician needs to declare death in a hospital setting, he may not touch the body to do so.

Nevertheless, even with these limitations, a *kohen* can certainly engage in a robust practice of medicine. The trained *kohen*-physician may and must participate in saving the lives of his patients, even when the prognosis is poor so that he can be part of the healing process. However, given the major limitations imposed upon the *kohen* who wishes to become a physician, any *kohen* interested in pursuing a career in medicine must ensure that he has a *posek* (legal decisor) of stature to guide him and prepare him for what will surely be a career requiring flexibility and adaptation.

The challenges posed by *tumat maga* and *masa* will not

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8 See *Arukh Ha-Shulhan Ha-Atid, Taharot* 1:3 for additional background regarding *tumat ohel*.

9 I write "almost ironclad" because *Sefer Yerei'im* (322) maintains that non-Jews do not transmit *tumah* that is forbidden to *kohanim*. This position is often cited in rabbinic literature along with the position of Ra'avad (*Hilkhot Nezirut* 5:15, as explicated by *Mishneh La-Melech, Hilkhot Avel* 3:1), who writes that *kohanim* today need not be concerned about *tumah*. On the topic of Ra'avad's true position, see D. Shabtai and Y. Jaffe, "It is upon him to bring the proof": A Note on Historiography, Printing, and the Power of Hearsay in a Position of Rabad" *Hakirah* 7: 165-175 (<http://hakirah.org/Vol%207%20JaffeShabtai.pdf>).

be discussed in the present article. We will focus our attention on the topic of *tumat ohel*, and particularly *ohel hamshakhah* (sharing a common roof). This issue is discussed extensively by the *posekim*, and it serves as fertile ground for further investigation into the topic of *kohanim* in medical school.<sup>10</sup>

It is important to emphasize that the discussion in this article – and the ensuing suggestions regarding *kohanim* in medical school – applies only in countries in which Jews are a minority of the population. *Kohanim* in Israel, where the majority of cadavers and patients are Jewish, face unique problems. Throughout their training, there is no way that they can be assured that they are not in contact with *tumah* of Jewish bodies, most likely *be-ohel*. The Biblical prohibition regarding *tumah* of Jewish patients is non-negotiable in all three of the manners of transmission – *maga*, *masa*, and *ohel*. This presents what is likely an insurmountable problem for *kohanim* who wish to train as doctors in areas with a majority of Jewish citizens (i.e. Israel or areas such as Monsey and the like). The present exploration of the possibility of *kohanim* studying in medical school is only intended for an area in which the majority of patients are not Jewish and the cadavers under discussion are those of non-Jews.<sup>11</sup>

### **Talmudic Sources – Bavli**

Although it is clear that touching or carrying a non-Jewish dead body is forbidden for *kohanim*, there is lack of clarity regarding *tumah be-ohel* for non-Jewish bodies, “*tumat akum be-ohel*.” The laws of *tumah be-ohel* are introduced in the Torah with the words “*Adam ki yamut be-ohel*,” “When a person dies

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10 We will be examining only the issue of *tumat akum be-ohel* and not the topic of *sof tumah la-tzeit* (the transmission of *tumah* through the air) and other related issues, which may also be relevant.

11 The *posekim* note that dissecting cadavers of Jews is problematic for all Jewish medical students, not only *kohanim*, as is benefitting from the dissection.

in a tent.”<sup>12</sup> The *gemara* in *Yevamot* states that in the opinion of R. Shimon b. Yohai, these laws of *tumah* apply to Jews alone:

It was taught: And so did R. Shimon b. Yohai state that the graves of idolaters do not impart priestly *tumah be-ohel*, for it is said, “And you My flock, the flock of My pasture, are men” (*Yehezkel* 34:31); you are called “men,” but the idolaters are not called “men.” An objection was raised: “And the people were sixteen thousand” (*Bamidbar* 31:40) [referring to non-Jews]! [Here, non-Jews are referred to as men] due to [the mention of] cattle. [Another objection:] “Wherein are more than six-score thousand people who cannot discern between their right and their left hand” (*Yonah* 4:11)! [Here, non-Jews are referred to as men] due to [the mention of] cattle. [Another objection:] “Whoever has killed any person, and whoever has touched any slain, purify yourselves” (*Bamidbar* 31:19)! One of the Israelites might have been slain. And [how do] the Sages [respond]? [Scripture states:] “Not one man of us is lacking” (*Bamidbar* 31:49) [and it therefore cannot be that any Jews were killed]. And [how does] R. Shimon b. Yohai [interpret this verse]? “Not one man of us is lacking” – through indulgence in sin.<sup>13</sup>

According to R. Shimon b. Yohai (Rashbi), for the purposes of the Torah’s discussion of *tumah*, non-Jews are excluded from the legal category of “*adam*.”<sup>14</sup> It appears from the

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<sup>12</sup> *Bamidbar* 19:14.

<sup>13</sup> *Yevamot* 61a.

<sup>14</sup> See Rambam’s commentary on the Mishnah, introduction to *Taharot*, for a clear exposition of this notion, as well as the commentary of the *Mei Nafto’ah* (26).



continuation of the discussion that the Sages (*Rabbanan*) disagreed with Rashbi's position. Whereas Rashbi is lenient and would allow a *kohen* to become impure for a non-Jewish body, the *Rabbanan* are stringent and assume that non-Jewish bodies transmit *tumah* as well.<sup>15</sup> However, it is possible to conclude from the text that there is, in the end, no disagreement among the parties as to whether non-Jews are *metamei be-ohel*; all agree that they are not.<sup>16</sup>

The Talmud recounts Rashbi's teaching in *Bava Metzia* as well:

Rabbah b. Abbuha met Eliyahu standing in a non-Jewish cemetery... Said he [Rabbah] to him: Are you not a priest? Why then do you stand in a cemetery? He replied: Has the Master not studied the laws of purity? For it has been taught: R. Shimon b. Yohai said: The graves of gentiles do not defile, for it is written, "And you my flock, the flock of my pasture, are men" – only you are designated "men"...<sup>17</sup>

Based on the simple interpretation of the Talmud, it is clear that Eliyahu believed that non-Jews are not *metamei* through *tumat ohel*.<sup>18</sup> Additionally, Eliyahu clearly intended to teach that the source quoted by Rashbi in the *gemara* in *Yevamot* is meant to be applied in a practical setting. According to *Minhat Hinukh*, Eliyahu was wearing special shoes that protected him from the *tumah* of the graves below him.<sup>19</sup> However,

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15 See *Kesef Mishnah*, *Hilkhot Tumat Meit* 1:13, and *Tosafot*, *Yevamot* 61a

16 This is the reading of *Tziyun Le-Nefesh Tzvi*, p. 283, among others whom he quotes. On the topic of how the word "*be-ohel*" in the Talmud is relevant to the conclusion, see *Petah Ha-Ohel*, p. 131; *Teshuvot Ri Migash* 120; and *Dikdukei Soferim*, *Yevamot* 61a.

17 *Bava Metzia* 114a.

18 See *Petah Ha-Ohel*, p. 131, regarding how this impacts the understanding of the *sugya* in *Yevamot*.

19 *Minhat Hinukh* 263:28.

even according to this interpretation, the fact remains that Eliyahu taught Rabbah that the position of Rashbi is meant to be applied *halakhah le-ma'aseh*.<sup>20</sup>

An additional Talmudic source comes from an unlikely place – the discussion of the *kashrut* of various species of fish in *Messekhet Avodah Zarah*. The *gemara* presents R. Ashi's statement regarding a particular fish and a mnemonic device (*si-man*) to remember its name based on a play on words:

R. Ashi said: Shefar fish is permitted; kedash fish is prohibited. An aid to the memory is "Kodesh la-Hashem" ["kodesh" is for G-d – i.e., not for men]. According to another version, he said that the kever fish is prohibited, an aid to the memory being the phrase "kivrei nokhrim."<sup>21</sup>

As cited here, this passage follows the text of Rashi, who writes that the kever fish is forbidden and that the way to remember this is by recalling that the *kivrei nokhrim*, the graves of non-Jews, are *tamei*. However, according to the text of Rabbeinu Hananel, cited by Tosafot, that text is incorrect. In fact, the text should read that the kever fish is *tahor* (kosher), just like the graves of non-Jews are *tahor*.<sup>22</sup> Tosafot note that if the Talmud wished to teach that the kever fish is forbidden like graves, the mnemonic should simply have been "kever" (grave), without the modifier "nochrim," since Jewish graves are also *tamei*. According to the reading of Rashi, it would seem that the Talmud is of the opinion that the graves of non-Jews are indeed *metamei be-ohel*. According to the reading of To-

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20 Rambam (*Teshuvot Ha-Rambam* 145) similarly suggests that Eliyahu was *ma'ahil* over the graves, which is only possible if he was floating or perhaps walking between the graves. However, as noted regarding the view of *Minhat Hinukh*, even according to Rambam's view, Eliyahu was teaching Rabbah that Rashbi's view should be applied practically.

21 *Avodah Zarah* 39a.

22 Tosafot, ad loc.

safot, however, the position of the Talmud is clearly that non-Jews are not *metamei be-ohel*.

A discussion in *Ohalot* appears to present a challenge to the latter view. The *mishnah* discusses the *tumah* of “*medorat akum*,” the *tumah* of non-Jewish houses. This is a Rabbinically enacted *tumah* relevant in the Land of Israel, which does not otherwise have *tumat eretz ha-amim*, the impurity of the “lands of the nations.”<sup>23</sup> The special impurity of *medorat akum* was imposed by the Rabbis due to the concern that gentiles would bury their dead without marking the graves, thus causing *kohanim* to contract *tumah* when they dwelled in the very houses in which non-Jewish bodies were buried. The *mishnah* teaches:

Anterooms are not subject to the law of *medorat akum*. R. Shimon b. Gamliel says: The law of *medorat akum* does not apply to a city that was destroyed.<sup>24</sup>

There is extensive discussion among the *Rishonim* regarding whether the view of R. Shimon b. Gamliel (Rashbag) is accepted. Ra'avad<sup>25</sup> and Tosafot<sup>26</sup> rule in accordance with the opinion of Rashbag that the concern of *medorat akum* no longer exists after the city has been destroyed. The Sages were concerned for *tumat akum be-ohel*, and therefore instituted the enactment of *medorat akum* so that *kohanim* would not become defiled upon entering non-Jewish houses. However, once the city has been destroyed, there is no longer concern for *tumat ohel*, and since animals likely consumed any bodily remains, there is also no longer concern for transmission of *tumat maga* and *masa*.<sup>27</sup> In contrast, Rambam rules that Rashbag's position is not accepted; the enactment of *medorat akum* applies even

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23 See Rambam, *Hilkhot Tumat Meit* 11:7, 11; Rash, *Ohalot* 18:7.

24 *Ohalot* 18:9.

25 Ra'avad, *Hilkhot Tumat Meit* 11:9.

26 Tosafot, *Bava Metzia* 114a, s.v. *mahu*; *Yevamot* 61a.

27 See Rambam's explanation of Rashbag's opinion, *Ohalot* ad loc.

if they city was destroyed.<sup>28</sup> Rambam maintains that *medorat akum* is an independent *gezeira* that has nothing to do with *tumat akum be-ohel*, and it therefore applies even after the city has been destroyed.<sup>29</sup>

According to the view of Ra'avad and Tosafot, the concept of *medorat akum* certainly seems to imply that there is *tumat akum be-ohel*.<sup>30</sup> According to Rambam's view, however, it seems that the opinion of Rashbag is not relevant to our discussion, as the enactment of *medorat akum* teaches us nothing about *tumat akum be-ohel*.

Despite the dissenting view among prominent *Rishonim*, reviewing the position of the *Bavli* as a whole, it seems that the *Bavli* is of the position that non-Jews are not *metamei be-ohel*. This is indicated by the nature of the interaction between the Rabbanan and Rashbi in *Yevamot*, the story of Eliyahu in *Bava Metzia*, and the text and reasoning of Tosafot in *Avodah Zarah*.

### Talmudic Sources – *Yerushalmi*

The Talmud *Yerushalmi* notes in various locations that the skull of Arnan the Jebusite was buried underneath the *mizbei'ach* (temple altar), and that because of the resultant *tumah*, King Hizkiyahu added a month to the year.<sup>31</sup> The *Yerushalmi* appears to conclude that non-Jews are *metamei be-ohel*, as Arnan's body was the cause of *tuma* in the *Mikdash*.<sup>32</sup>

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28 *Hilkhot Tumat Meit* 11:9.

29 See also *Tosafot Yom Tov, Ohalot* 18:9, who writes that the concern of *medorat akum* was for *maga* and *masa*.

30 See below in the section on "Rishonim who Disagree – Non-Jews are *Metamei Be-Ohel*."

31 *Yerushalmi* Vilna *Sotah* 5:2; Vilna *Sanhedrin* 1:2; Vilna *Psachim* 9:1; Venice *Nedarim* 6:3 (39d). The *Yerushalmi* is quoted by Tosafot, *Sanhedrin* 12a, While the *Yerushalmi* refers to him as Arnan, he is called Aravna in *Shmuel II* 24:18.

32 See Rashi, *Sanhedrin* 12a, who suggests that Hizkiyahu added a month to the year because of the *tumah* of *avodah zarah*, not the skull of Arnan. Similarly, see *Shiyarei Korban, Sotah* 5:2, s.v. *kamah*, who suggests that the story in the *Yerushalmi* is inaccurate and that it was not necessarily the skull

This would seem to contradict the conclusion of the Talmud *Bavli*, as explained above.

Some authorities clearly interpret the *Yerushalmi* to express the position that non-Jews are *metamei be-ohel*.<sup>33</sup> R. Ovadiah Yosef maintains that the *Bavli* indeed disagrees with the conclusion of the *Yerushalmi*.<sup>34</sup> He, along with a number of other *posekim*, simply disregard the concern of the *Yerushalmi* in light of the text of the *Bavli*.<sup>35</sup>

*Ve-Shav Ha-Kohen* writes that given the position of the *Yerushalmi*, *mei-ikar ha-din*, it is appropriate to follow the position that there is *tumat akum be-ohel*.<sup>36</sup> Nevertheless, *Ve-Shav Ha-Kohen* himself suggests that it is possible that Arnan was a *ger toshav* and therefore had an increased level of *tumah*, making the case of the *Yerushalmi* moot, or at least not analogous. Similarly, *Sidrei Taharot* posits that Arnan converted to Judaism, which would clearly make the case of the *Yerushalmi* irrelevant.<sup>37</sup>

R. Reuven Margaliot presents a novel way to understand the *Yerushalmi* as agreeing with the *Bavli*.<sup>38</sup> He suggests that when Rashbi taught that non-Jews are not *metamei be-ohel*, he was only referring to the context of the prohibition of *tumat kohanim*,<sup>39</sup> whereas when the *Yerushalmi* writes that non-Jews

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of Arnan that was the cause of the *tumah*.

33 See *Mishneh La-Melekh*, *ibid*; *Beit HaBehirah* 1:13; and *Hatam Sofer*, *Yoreh De'ah* 336.

34 *Yabia Omer* 1, *Yoreh De'ah* 10:2. R. Yosef quotes from *Teshuvot Ein Yitzhak* (*Yoreh De'ah* 36), who notes that the verse quoted in the *Yerushalmi* (*Sotah* 5:2) as proof that the skull of Arnan was under the *mizbei'ach* (*Haggai* 2:14) is used in the *Bavli* (*Pesahim* 17a) to derive something else.

35 See *Minhat Kohen* 2:127a; *Sedei Hemed* 40:103; and *Ateret Paz*, *Yoreh De'ah* 10, who explain that in cases of disagreement between the *Bavli* and *Yerushalmi*, and particularly in this case, we disregard the concern of the *Yerushalmi*.

36 *Ve-Shav Ha-Kohen* 75, quoted in the *Pithei Teshuvah* 372:6.

37 *Sidrei Taharot* 4a, citing the *Yerushalmi*, *Pe'ah* 8:7. See also Ralbag, *Shmuel II* 24:18.

38 *Margaliot Ha-Yam* 12a.

39 *Nega'im*, among other things, are included in this category; see *Panim*

are *metamei*, it speaks only in the context of *tumat ha-Mikdash*, which is more stringent than other *halakhot*.<sup>40</sup> Thus, the two Talmuds are in fact talking about different cases and there is no disagreement between the two.

### The Position of Rambam – Non-Jews are Not *Metamei Be-Ohel*

Rambam writes explicitly in *Hilkhot Tumat Meit* that the graves of non-Jews do not transmit *tumah* because non-Jews are not *metamei be-ohel*.<sup>41</sup> He writes that this is a “*kabbalah*” derived from the verse of “*kol ha-nogei’a be-halal herev*,” which indicates that one becomes *tamei* upon touching a non-Jewish dead body, but makes no mention of the concept of *ohel*.<sup>42</sup> In his *teshuvot*, Rambam explains that in the Talmud’s account in *Bava Metzia*, Eliyahu did not touch any of the graves, but was merely *ma’ahil* over them, and this does not pose a problem because we accept the view of Rashbi that there is no *tumat akum be-ohel*.<sup>43</sup> Rambam also relates to this matter in *Hilkhot Avel*, where he notes that there is no prohibition for *kohanim* to come into *ohel* contact with graves of non-Jews since they are not *metamei be-ohel*.<sup>44</sup> Radvaz notes that Rambam follows the *psak* of Rashbi, as opposed to that of Rashbag, because Eliyahu employed the *psak* of Rashbi, clearly indicating that it was meant to be followed *le-halachah*.<sup>45</sup>

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*Meirot* 2:14 and 2:152.

40 See *Tziyun Le-Nefesh Tzvi*, p. 200, who disagrees.

41 *Hilkhot Tumat Meit* 9:4.

42 *Hilkhot Tumat Meit* 1:13. In this context, “*kabbalah*” refers to a tradition regarding how to interpret the verse quoted.

43 *Teshuvot Ha-Rambam* 145. As mentioned in n. 21 above, according to this view, we would be forced to explain that Eliyahu was flying, hovering over, or perhaps walking between the graves. While the former two options may be a problem for humans, Eliyahu may have taken the form of an angel or exercised special powers. This is indeed the interpretation of Tosafot Rid, *Bava Metzia* 114b.

44 *Hilkhot Avel* 3:3.

45 Radvaz ad loc. Other sources that support the reasoning of the Radvaz are quoted by R. Ovadiah Yosef, *Hazon Ovadiah, Aveilut* 2:19.

*Arukh La-Ner* explains that since the Talmud in *Yevamot* relates to the *halakhah* of *tumat akum be-ohel* in the context of the war against Midian (recounted in *Bamidbar* 31), Rambam understood that the source for this *halachah* must be in that same *parshah*.<sup>46</sup> Interestingly, *Petah Ha-Ohel*<sup>47</sup> suggests that the position of Rambam is analogous to that of Radvaz, who writes that *kohanim* were not enjoined to avoid any form of *tumat akum* until the war against Midian.<sup>48</sup> If this position is correct, then when the laws of *tumah* for non-Jews were formulated at that time, the prohibition of *ohel* was simply never included. According to this view, there is no reason for concern about employing leniency, as the Torah never prohibited *tumat akum be-ohel* in the first place.

Although there is a robust discussion in the later *Aharonim* regarding Rambam's derivation of this law and other technical matters, the position of Rambam on the matter of *tumat akum be-ohel* is quite clear – non-Jews are not *metamei be-ohel*.

### **The Position of the Majority of *Rishonim* – Non-Jews Are Not *Metamei Be-Ohel*<sup>49</sup>**

Ramban maintains that non-Jews do not transmit *tumah b'ohel*,<sup>50</sup> and this view is cited approvingly by Rashba,<sup>51</sup>

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46 *Arukh La-Ner*, ad loc. Other *Aharonim* (see *Sidrei Taharot*, p. 4) learn from the opening word of the passage in *Yevamot*, “*ve-khen*” (“and similarly”) that this passage is connected to the previous one, which relates to Midian. See Hidah, *Petah Einayim*, *Yevamot* 61a, who disagrees and explains that “*ve-khen*” is the language of the *beraita* quoted, not the Talmud itself.

47 *Petah Ha-Ohel*, p. 130.

48 Radvaz 5:21.

49 The lists of *Rishonim* in the next two sections are taken from *Hazon Ovadiah*, *Ateret Paz*, *Nefesh Tzvi*, and *Taharat Sadeh Ha-Mahpeilah*.

50 Ramban, *Yevamot* 61a.

51 See *Teshuvot Ha-Rashba* 830, which seems to imply that non-Jews are not *metamei be-ohel*. He notes, however, that others disagree, and he brings a source for that approach as well. This understanding of Rashba's view follows that of R. Ovadiah Yosef, who also quotes another responsum of Rashba (194) to bolster this position.

Ritva, and Meiri in their commentaries to the passage in *Yevamot*. Rabbeinu Hananel concurs,<sup>52</sup> and his view is supported elsewhere by Tosafot,<sup>53</sup> Tosafot Shantz,<sup>54</sup> and Tosafot Rabbeinu Yehudah.<sup>55</sup> Although there is a text of Rabbeinu Hananel that seems to agree with the opposing tradition espoused by Rashi (unlike the text of Rabbeinu Hananel discussed by Tosafot), *Sidrei Taharot*<sup>56</sup> and Tosafot Rabbeinu Yehudah defend the position that *kivrei akum* are not *metamei* in any case.

According to one interpretation, Ra'avad writes that non-Jews are not *metamei* at all, since they are analogous to animals for the legal purposes of *tumah* and *taharah*.<sup>57</sup> Ra'avan concurs with the position that non-Jews are not *metamei be-ohel*,<sup>58</sup> and Kolbo writes that a *kohen* need not be concerned about the *tumah* of non-Jews *be-ohel*.<sup>59</sup> *Hagahot Maimoniyot*,<sup>60</sup> *Sefer Ha-Hinukh*,<sup>61</sup> *Nimukei Yosef*,<sup>62</sup> *Rokei'ah*,<sup>63</sup> *Sefer Ha-Eshkol*,<sup>64</sup> Ran,<sup>65</sup> Mabit,<sup>66</sup> Radvaz,<sup>67</sup> and R. Avraham Min Ha-Har<sup>68</sup> all agree with the position that non-Jews are not *metamei be-ohel*.

From this formidable list of *Rishonim*, it is quite clear that a great number of authorities maintain that there is no concern of *ohel* contact with *tumah* of non-Jews.

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52 Rabbeinu Hananel, *Bava Metzia* 114a.

53 *Avodah Zarah* 39a.

54 Tosafot Shantz, *ibid*.

55 Tosafot Rabbeinu Yehudah, *ibid*.

56 *Sidrei Taharot* 4a.

57 Ra'avad, *Hilkhot Avot Ha-Tumah* 2:10. This is how Ra'avyah (*Hullin* 1:153) and R. Ovadiah Yosef (*Hazon Ovadiah* pp. 52-57) read the Ra'avad. This is not the simple reading of his words.HH

58 Ra'avan 317.

59 Kolbo, *Hilkhot Avel* 114, cited in *Hazon Ovadiah*.

60 *Hagahot Maimoniyot*, *Hilkhot Avel* 3:2.

61 *Sefer Ha-Hinukh*, *mitzvah* 250.

62 *Nimukei Yosef*, *Bava Metzia* 69b and 114b.

63 *Rokei'ah*, p. 129.

64 *Sefer Ha-Eshkol*, vol. 2, p. 180.

65 Ran, *Bava Batra* 8a in pages of Rif.

66 *Teshuvot Ha-Mabit* 3:22.

67 Radvaz 6:2, 203 and 3:548.

68 R. Avraham Min Ha-Har, *Yevamot* 61a.



## ***Rishonim* who Disagree – Non-Jews are *Metamei Be-Ohel***

There are *Rishonim* who disagree with this position, however. Chief among the *Rishonim* who maintain that non-Jews are *metamei be-ohel* is Rabbeinu Tam, cited in the commentary of Tosafot on the *gemara* in *Bava Metzia*.<sup>69</sup> Tosafot further note that there is a tradition that Eliyahu was not a *kohen* at all, and as such, the proof from the story is moot.<sup>70</sup> Behag concludes his discussion of the *sugya* with the note: “But Rabbeinu Yaakov concluded that the *halakhah* is not like Rashbi.”<sup>71</sup> Semak<sup>72</sup> and Maharam Mi-Rotenberg<sup>73</sup> are also in agreement

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69 Tosafot, *Bava Metzia* 114a, s.v. *mahu*.

70 See Radvaz, 6:2, 203, who writes that although Eliyahu may not have been a *kohen* himself, he had the soul of a *kohen*.

71 Behag, positive commandment 231 and negative commandment 235. While the simple reading of Behag is that this is indicative of Behag’s own position, *Sedei Hemed* (*Kelalei Ha-Posekim* 12:5) is not entirely convinced that this language indicates Behag’s agreement with this position.

72 Semak, *mitzvah* 89.

73 *Teshuvot Maharam Mi-Rotenberg* 3:330 (3:2 in the Mossad HaRav Kook edition). The text reads as follows:

There are *kohanim* who are not careful about walking upon the graves of non-Jews, the place in which they bury their dead, or entering a house in which there is a deceased non-Jew inside. Therefore, I have written this in the name of my teacher [Maharam], he should live. One time, a non-Jew died in the bathhouse on Erev Shabbat and he [Maharam] prohibited *kohanim* from bathing, since Rabbeinu Tam decided that the *halakhah* does not follow the view of R. Shimon bar Yohai, who taught in *Yevamot* 61a that the graves of non-Jews are not *metamei be-ohel*. [The reason Maharam agreed with Rabbeinu Tam is that] Rashbag disagreed with him [Rashbi] in the *mishnah* in *Oholot* 18:7 [18:9 in our versions] and taught that the houses of non-Jews (*medorat akum*) are *tamei* in the locations where weasels and ferrets are found. In the first chapter of *Pesahim*, it is taught that in every location in which R. Shimon ben Gamliel taught his view, the *halakhah* is in accordance with his position...

We further find that Maharam Mi-Rotenberg actively followed this position (Mossad HaRav Kook Edition, vol. 3, *Pesakim U-Minhagim* 134):

And I saw that R. Meir [Maharam] would protest to *kohanim* that they should not walk upon the graves of non-Jews. And he who is stringent should be blessed.

with this position. Tashbetz notes that the *mishnah* in *Oholot* quotes R. Shimon ben Gamliel as disagreeing with the position of Rashbi, and according to the rules of *psak* cited by Tashbetz and others, the *halakhah* always follows R. Shimon ben Gamliel.<sup>74</sup>

## The Position of Rosh

The opinion of Rosh regarding *tumat kohanim be-ohel* is unclear. Rosh discusses this topic in a number of places. In his commentary on the Talmud, he cites the view of Rabbeinu Tam.<sup>75</sup> In his second treatment of the matter in his responsa, however, his view is less straightforward.<sup>76</sup> In the beginning of his responsum, he notes that “there are those who rule like Rashbag [that non-Jews are *metamei be-ohel*],” perhaps indicating his approval of that position. At the end of this portion of the responsum, however, he concludes, “R. Meir [Maharam Mi-Rotenberg] protested to *kohanim* that they should not walk on the graves of non-Jews.<sup>77</sup> And he who is stringent should be blessed.” According to Rabbeinu Tam, it is forbidden for *kohanim* to walk on the graves of non-Jews; avoiding doing so is not supererogatory, as Rosh’s conclusion suggests. Furthermore, in *Halakhot Ketanot*, Rosh does not quote the position of Rabbeinu Tam, perhaps indicating that his own position is in line with those who disagree with Rabbeinu Tam’s view and is rather in accordance with the latter part of his responsum (“and he who is stringent should be blessed”).

Nevertheless, practically speaking, it appears that Rosh is clearly on the side of those who claim that non-Jews are *metamei*

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74 *Tashbetz* 578. Some claim that this rule does not exist; see *Yad Malakhi* (307); Rif (*Bava Batra* 81a); Tosafot Yom Tov, ad loc., in the name of Rambam (*Hilkhhot Eiruvim* 8:7). As noted above, many *Rishonim* claim that R. Shimon ben Gamliel’s concern in *Oholot* was not about *tumat akum be-ohel*, but rather *maga* and *masa*; see *Sefer Ha-Eshkol* (2:180), Meiri (*Yevamot* 61a), and others cited in *Hazon Ovadiah*.

75 Rosh, *Bava Metzia* 9:47.

76 *Teshuvot Ha-Rosh* 30:1.

77 See n. 75 above.

*be-ohel*. In his discussion, Rosh writes that the only room to be lenient is in a case in which there exists a “*potei’ah tefah*,”<sup>78</sup> and even in that case, Maharam cautions against traveling to those graves lest one err in determining which graves are permissible.<sup>79</sup> Rosh writes that even if the graves in question have a *potei’ah tefah*, “*ha-mahmir tavo alav berakhah*.” For all intents and purposes, when there is no *potei’ah tefah*, Rosh agrees with Rabbeinu Tam, as he himself notes at the start of the responsum.<sup>80</sup>

### The Position of *Tur*

Independent of Rosh’s personal position on this matter, his responsum is of crucial importance, as it appears to serve as the basis for further discussion in *Tur* and *Shulhan Arukh*.

*Tur* initially quotes the position of Rambam and then follows this quotation with the ruling of his father, Rosh, the conclusion of which he quotes directly from the responsum noted above.<sup>81</sup> According to the simple reading of *Tur*, Rosh does not agree with the position of Rambam. However, some commentators interpret *Tur* as intending that while we follow the position of Rambam *mei-ikar ha-din*, it is proper to be concerned about the position of Rosh/Maharam Mi-Rotenberg and to thus refrain from walking on the graves of non-Jews. According to this reading, Rosh is understood to agree with Rambam *mei-ikar ha-din*; he only suggests a *humrah* to avoid walking on non-Jewish graves.<sup>82</sup>

In his *Beit Yosef* commentary on *Tur*, R. Yosef Karo be-

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78 A *potei’ah tefah* is an *ohel* the size of a cubic *tefah*, which can contain the *tumah*, not allowing it to escape. The *tumah* then does not extend above the grave and contaminate *kohanim*. The effectiveness of a *potei’ah tefah* is subject to a *mahloket Rishonim*. Rosh’s *psak* reflects how Semag (negative commandment 235) reads the *gemara* in *Bava Metziah* 114a.

79 This particular discussion does not appear in Maharam’s responsa.

80 See, however, *Hazon Ovadiah*, p. 55, col. 1, who reads Rosh as agreeing with Rambam.

81 *Tur*, *Yoreh De’ah* 372:2.

82 See *Perishah* ad loc.

gins his exposition on this topic by reviewing the entire *sugya* in brief. Following this discussion, he concludes with the statement that practically speaking, one ought to be *mahmir*. The authorities dispute what precisely *Beit Yosef* is referring to here. According to *Darkhei Moshe Ha-Arokh*, *Beit Yosef* means that one ought to be stringent regarding the question of whether non-Jews transfer *tuma* through *maga* and *masa*.<sup>83</sup> According to this reading of *Beit Yosef*, *tumat akum be-ohel* is not problematic at all. However, *Lehem Mishnah* understands that *Beit Yosef* refers in his conclusion to the dispute between Rambam and Rabbeinu Tam.<sup>84</sup> Accordingly, although we really hold like Rambam, one ought to be stringent for the position of Rabbeinu Tam. As we will see below, this seems to be how R. Karo rules in *Shulhan Arukh* as well.

### The Position of *Shulhan Arukh*

Referring to non-Jewish graves, *Shulhan Arukh* rules: “*Nakhon li-zaher* (ליזהר) *ha-kohen mi-leileikh aleihem*.”<sup>85</sup> There are two essential ways of translating this statement:<sup>86</sup>

1. “The *beit din* (or whoever else can do so) should warn the *kohen* regarding walking on the graves of non-Jews.”<sup>87</sup>
2. “The *kohen* should warn himself [i.e. be careful] not to walk on the graves of non-Jews.” It is up to the *kohen* to police himself.<sup>88</sup> Similarly, in Aramaic, “*li-zaher*” means “should

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83 *Beit Yosef* previously discusses the views of *Sefer Yerei'im Yerei'im*, who maintains that contemporary *kohanim* are not cautioned against contacting impurity of non-Jews, and *Hagahot Maimoniyot*, who maintains that non-Jews are *metamei* through *maga* and *masa* and contemporary *kohanim* must therefore be concerned about their *tumah*.

84 *Lehem Mishnah* ad loc.

85 *Shulhan Arukh*, *Yoreh De'ah* 372:2.

86 See the grammatical analysis in R. Yochanan and R. Yonatan Kaganoff's presentation in *Sefer Yishmeru Da'at*, *chelek* 1.

87 According to this interpretation, “*li-zaher*” is a transitive verb.

88 According to this interpretation, “*li-zaher*” is an intransitive verb and the *kohen* is the subject of the statement, and not the object, as in the first translation. This is the interpretation preferred by R. Ovadiah Yosef, who quotes an extensive number of sources to prove that *Shulhan Arukh*

be warned.”<sup>89</sup>

According to the second interpretation, the ruling of *Shulhan Arukh* concurs with the reading of Rosh according to which this is a matter of conscience and not a strictly legal issue. Indeed, read in isolation, it seems that *Shulhan Arukh* intends here to suggest appropriate conduct and not to legislate it. This is similarly indicated by the language of Rama, who writes that although some authorities are lenient, “*nakhon le-hahmir*,” he does not write “*yesh le-hahmir*,” as he does elsewhere.<sup>90</sup> Given the complexity of this issue, the position of *Shulhan Arukh* makes perfect sense. Since there are many disparate positions regarding this topic, *Shulhan Arukh* found it appropriate to conclude that the safest practice is to refrain from coming into contact with *tumat akum be-ohel*.

To be clear, *Shulhan Arukh* does legislate that in all circumstances, one should avoid contact with the cadavers of non-Jews, and it is clear that he rules that *le-khathilah*, a *kohen* should avoid *tumat akum be-ohel*.<sup>91</sup> However, the nature of his language seems to indicate that he maintains that *mei-ikar hadin*, non-Jews are not *metamei be-ohel*. Moreover, according to the second interpretation of his ruling, it is possible to con-

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maintains that non-Jews are not *metamei be-ohel* and that *Shulhan Arukh* is merely encouraging *kohanim* to be careful due to the dispute among the *posekim*. Of particular note is his quote from *Taz, Orach Hayim 244:4*.

<sup>89</sup> See the entry on “*z.h.r.*” in the Jastrow Dictionary and *Aids to Talmud Study* (4<sup>th</sup> edition), p. 58.

<sup>90</sup> *Shulhan Arukh* uses the language of “*yeish le-hahmir*” 72 times, “*nakhon le-hahmir*” 5 times, “*yeish li-zaher*” 49 times, and “*nakhon li-zaher*” 5 times. It seems that *Shulhan Arukh* uses the language of “*nakhon li-zaher*” when the action itself is not forbidden, but might lead to something more problematic; see *Orach Hayim* 210, 216, and 263.

<sup>91</sup> *Dagul Mei-Revavah (Yoreh De'ah 372:2)* initially suggests that given the position of Ra'avad (*Hilkhos Nezirut 5:17*) that *kohanim* are not able to become more *tamei* than they already are and therefore need not be worried about further *tumah*, as well as the lack of clarity regarding the prohibition of walking on the graves of non-Jews, it is possible for *kohanim* to be lenient. However, *Dagul Mei-Revavah* concludes that the position of the Ra'avad is unclear, and he therefore retracts this leniency.

clude that the community is not supposed to involve itself in issues related to the conduct of individual *kohanim*. Instead, it is the task of each *kohen* to make himself aware of these issues and take note of the advisement of *Shulhan Arukh* to refrain from coming into contact with the dead non-Jews.

### ***De-Orayta or De-Rabbanan?***

According to the *posekim* who maintain that there is indeed *tumat akum be-ohel*, is this prohibition *mi-de-orayta* or *mi-de-rabbanan*? If it is prohibited from the Torah for *kohanim* to come in contact with *tumat ohel* of non-Jews, than any question regarding this issue should likely be resolved stringently, following the rule of *safek de-orayta le-humrah*. If, however, the question is one of a rabbinic prohibition, there is likely more room to resolve the question leniently. The question of whether *tumat akum be-ohel* is *de-orayta* or *de-rabbanan* has another important practical ramification as well. *Shulhan Arukh* rules that in a case in which the performance of a *mitzvah* would entail transmission of *tumah de-rabbanan*, one is allowed to violate the *de-rabbanan* in order to fulfill the *mitzvah*.<sup>92</sup> Accordingly, if *tumat akum be-ohel* is prohibited *mi-de-rabbanan* and one assumes that learning medicine is a *mitzvah*, there would be room to be lenient regarding the question of *kohanim* in medical school.<sup>93</sup>

From the discussion of the Talmud, it seems that there are only two options – either *tumat akum be-ohel* is prohibited on a Biblical level or it is permitted entirely. Indeed, the position of Tosafot seems to be that the concern here is on the level of *de-orayta*.<sup>94</sup> According to this position, the level of serious-

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92 *Shulhan Arukh, Yoreh De'ah 372:1*.

93 It is certainly not unanimously agreed that the study of medicine is a *mitzvah*. R. Moshe Feinstein rules that it is not. See the article by Drs. Raymond and Sammy Sultan in the *Journal of Halacha and Contemporary Society* (Spring 2009), for citation of the *posekim* who disagree.

94 See, for example, *She'eilot U-Teshuvot Yad Ramah* 129.

ness of the prohibition is indeed severe. Nevertheless, there are some authorities who conclude that if the prohibition exists, it is *de-rabbanan*.<sup>95</sup> Furthermore, there are many *posekim* who maintain that if the body of a non-Jew is in a different room than the one in which the person is standing, the *tumah* is only *de-rabbanan*.<sup>96</sup>

Given the language employed in formulating their rulings, it appears unlikely that Rosh, *Tur*, and *Shulhan Arukh* maintain that the prohibition is *de-orayta*. If the prohibition were indeed Biblical in nature, the language of “*nakhon li-zaher*” would be far too weak to describe it.

### **Contemporary Posekim**

R. Ovadiah Yosef explicitly follows the position of Rambam, ruling that non-Jews are not *metamei be-ohel*.<sup>97</sup> Throughout his discussion, he cites, as is his practice, a large number of sources to buttress his position and defends Rambam’s view against its detractors.

R. Tzvi Pesach Frank discusses whether a *kohen* may enter a school building in which human skulls are stored.<sup>98</sup> In treating this issue, he clearly understands *Shulhan Arukh* to be referring to *tumat akum be-ohel*, and in so doing makes explicit reference to the fact that “many *posekim*” conclude that there is no prohibition for a *kohen* to come into contact with a dead non-Jew. Nevertheless, he is hard-pressed to find a *heter* for a *kohen* to enter the school.

R. Pinchas Zevichi writes that *Shulhan Arukh* maintains that one should be *mahmir* for the position of Maharam Mi-Rotenberg, which he explains to mean that non-Jews are

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95 See *Gesher Ha-Hayim* 1:6; *Teshuvot Minhag Shai*, *Yoreh De’ah* 21; *Taharat Kohanim Ke-Hilkhatat*, p. 70, citing R. Yehoshua Mi-Kutna (R. Israel Joshua Trunk). This position is not fully explicated in any of the sources in which it appears; perhaps those who maintain this view understand that the verse cited in the *gemara* is merely an *asmakhta*.

96 See the lengthy discussion in *Ateret Paz*, *Yoreh De’ah* 1:3.

97 *Hazon Ovadiah*, *Aveilut*, *Tumat Kohanim* 19, p. 52.

98 *Har Tzvi* 283.

indeed *metamei be-ohel*. However, in further analysis of this question, he quotes numerous *Rishonim*, *Aharonim*, and *posekim* who are lenient.<sup>99</sup> Interestingly, R. Zivihi attempts to apply the notion of “*safek tumah be-reshut ha-rabbim*” in this context. If this principle applies, in a public gathering place, there may be additional room for leniency given the doubt regarding the status of *tumat akum be-ohel*.

The view permitting *kohanim* to come into contact with non-Jewish bodies *be-ohel* in a *reshut ha-rabbim* is explicitly taken by *Panim Me'iroi*<sup>100</sup> and *Petah Ha-Ohel*,<sup>101</sup> who suggests that this is precisely the case that *Shulhan Arukh* refers to when he uses the language of *humrah*, as opposed to *hiyuv*. In a *reshut ha-rabbim*, it is best to be stringent, but not obligatory; in a *reshut ha-yahid*, it is completely forbidden to become *tamei* through *tumat kohanim be-ohel*. This explanation gives rise to both a leniency and a stringency. In cases of need, one may come into contact with the *tumah* of a non-Jew *be-ohel* in a *reshut ha-rabbim*, but in a *reshut ha-yachid*, it would be forbidden to do so.

R. Yitzhak Weiss discusses whether a *kohen* may travel on a bus that travels along a road covered with branches that are *ma'ahil* over a non-Jewish cemetery.<sup>102</sup> He notes that many *posekim* maintain that non-Jews are not *metamei be-ohel*, and therefore treats this issue as one of the *sefeikot* contributing to a *sfeik sefeika* toward leniency. Elsewhere, R. Weiss relies on Ra'avad's view that contemporary *kohanim* need not avoid *tumah*.<sup>103</sup> R. Zivihi writes that combining the arguments of these two responsa, perhaps one could allow a *kohen* to visit a doctor who has body parts of non-Jews in his office.<sup>104</sup>

In his responsum on the topic, *Avnei Nezer* writes that since the position of the majority of *Rishonim* follows the view

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99 *Teshuvot Ateret Paz, Yoreh De'ah* 3 and 10.

100 *Panim Me'iroi* 2:14.

101 *Petah Ha-Ohel* 134.

102 *Minhat Yitzhak* 4:31.

103 *Ibid.* 1:30.

104 *Ateret Paz, Yoreh De'ah* 10.



of Rambam, that is the position that ought to be adopted. However, he writes that since Rama explicitly suggests that *kohanim* should conduct themselves in accordance with the stringent opinion, it is inappropriate to rule otherwise.<sup>105</sup>

### **The View of R. Herschel Schachter**

R. Herschel Schachter writes that there are actually a number of elements to the prohibition of *tumat kohanim*:

1. The *kohen* may not become *tamei* with the *tumah* of a dead person (“*le-hitamei be-tumat meit*”).
2. The *kohen* may not be close to the dead (“*le-hitkarev*”).
3. The *kohen* may not be close to the dead even when there is no *tumah* and he may not become *tamei* even when the deceased is not actually present.<sup>106</sup>

Based on this understanding, a *kohen* is forbidden to be in the same *ohel* as a deceased person because the prohibition of *tumat kohanim* is for the *kohen* to be close to the dead. According to the strict letter of the law, R. Schachter writes, non-Jews are not *metamei be-ohel*. However, it is appropriate to forbid (“*yeish le-asor*”) being in the same room as the body of a non-Jew because of the prohibition to be close to the dead. Since the prohibition of *tumat kohanim* is to be close to the dead even in cases in which the deceased is not presently *metamei*, R. Schachter prohibits being close to a non-Jewish body through *ohel* contact.<sup>107</sup>

However, even if there is a prohibition of *tumat akum be-ohel*, R. Schachter writes that according to many authorities, it only applies in the case of *ma'ahil*, and not in the case of *ohel hamshakhah*, in which the *kohen* and the dead body

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105 *Avnei Nezer, Yoreh De'ah* 466.

106 *Be-Ikvei Ha-Tzon*, ch. 35.

107 R. Schachter also applies this position *le-kulah* and maintains that if a *kohen* flies in an airplane at 10,000 feet, he is not in contact with a dead body in a cemetery below and he need not be concerned about *tumah* at such a distance.

share one roof.<sup>108</sup> Given the potential for additional leniency here, *posekim* have discussed that in cases of need, *kohanim* can be lenient and be in the same *ohel* as the deceased,<sup>109</sup> and this would allow far more room for leniency when it comes to the question of *kohanim* in medical school.

### The View of R. Moshe Feinstein

No discussion of the issue of *kohanim* in medical school is complete without reference to the important responsum of R. Moshe Feinstein on the topic.<sup>110</sup> At the beginning of the responsum, R. Feinstein fulminates against those who wish to upend explicit Torah prohibitions through creative logic, explaining that the prohibition against contact with dead bodies is unequivocal. Toward the middle of this *teshuvah*, he moves on to the topic under consideration and addresses many of the points that we have discussed:

Immediately upon my return from the summer, I wish to write to strengthen your posi-

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108 R. Schachter quotes this view from *Petah Ha-Ohel* 5:2 (who quotes the *Zekher Tzaddik Yesod Olam*, p. 13 in *devar halakhah*) and R. Aharon Felder, *Yesodei Semahot* 66-67 and 7-71. See also *Hatam Sofér*, *Beitzah* 10a, and the article by R. Yaakov Yaffe and R. David Shabtai, "Kohanim in Hospitals-Does Tumah Spread Through Elevator Shafts" *Assia* 85-86 (<http://www.medethics.org.il/articles/ASSIA/ASSIA85-86/ASSIA85-86.12.asp>). The *posekim* discuss whether roofs constructed of tree leaves or branches should be judged more leniently; see, for example, *Minhat Yitzhak* cited here. This discussion is extremely complicated and we will not broach it here.

109 See *Taharat Kohanim Ke-Hilkhatah*, p. 70, who quotes sources such as the *Tuv Ta'am Ve-Da'at* 3:240; *Even Yekarah*, *Yoreh De'ah* 1:27; and *She'elat Shalom* 1:167.

110 *Iggerot Moshe*, *Yoreh De'ah* 3:155. This is one of only two responsa in *Iggerot Moshe* written to R. Shimon Schwab, the rabbi of the Breuer's Kehillah. I was told by a member of the Breuer's community that this was because R. Feinstein felt that matters of the German community should be decided by its own rabbis based on their *mesorah*. In this case, a rabbi from another community had apparently permitted a *kohen* from the Kehillah to attend medical school, prompting R. Schwab to turn to R. Moshe for guidance and a response on the matter.

tion and openly declare that it is forbidden for *kohanim* to learn medicine in the schools in our land which require that *kohanim* ritually defile themselves. They must not be lenient and rely on the fact that among our ancestors we find rabbis who were both *kohanim* and physicians, since they, with their enormous talent, learned the entire science of medicine through the oral tradition, without ever glancing at or seeing cadavers. They also certainly never touched dead bodies and never shared a roof (*tumat ohel*) with the dead bodies either. In our times, however, when it is impossible [to learn anatomy in this manner], it is obviously prohibited [to study medicine].

The prohibition of R. Feinstein appears to be clear-cut; a *kohen* may not defile himself through contact with the dead body, be it *tumat maga*, *masa*, or *ohel*. This prohibition, however, clearly has nothing to do with the nature of the practice of medicine itself, as R. Feinstein himself points out that many exemplary *kohanim* were doctors in the past. It seems that his issue relates solely to the educational process of medical school. Despite the unequivocal tone of this *teshuvah*, upon closer examination of other *teshuvot* of R. Feinstein, it is clear that in this *teshuvah*, he cannot be referring to a prohibition of *tumat ohel* with non-Jewish cadavers. Elsewhere, R. Feinstein clearly assumes that non-Jews are not *metamei be-ohel*.<sup>111</sup> R. Moshe Dovid Tendler confirms that his father-in-law maintained that non-Jews are not *metamei be-ohel* and that he held this position *le-khathila*.<sup>112</sup> Clearly, in the case of contact through *maga* and

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111 See *Iggerot Moshe, Yoreh Deah* 1:248 and 2:166. R. Pinchas Zevihi also adds *Yoreh Deah* 1:230:3 as proof that R. Feinstein holds like Rambam and further suggests that R. Feinstein maintained this was the opinion of both Rama and *Shulhan Arukh*.

112 Conversation with the author, May 9, 2012.

*masa*, R. Feinstein does apply this prohibition to non-Jewish cadavers and would prohibit a *kohen* from attending medical school if he were obligated to violate the prohibitions. However, regarding *tumat akum be-ohel* (perhaps *ohel hamshakhah*), R. Feinstein cannot mean that it is forbidden since he himself wrote *teshuvot* based on the assumption that non-Jews are not *metamei be-ohel*. The position of R. Feinstein therefore seems to be that if *kohanim* can attend medical school without violating the prohibition of *tumat kohanim*, they may do so. A series of important rulings quoted in the name of R. Feinstein are relevant in this context. R. Aharon Felder records the following rulings in his *Yesodei Semahot*:

8a. A *kohen* may visit a patient in a hospital if absolutely necessary (i.e. to visit close relatives). In such a case, the *kohen* should ascertain that there is no Jewish body in the hospital at the time of his visit. If no such information is available, he may still enter the hospital provided that there are relatively few Jewish patients present in the hospital...

11. A *kohen* may not study to become a doctor if he will be in a situation where he will be in contact with cadavers or parts of bodies while studying...

14a. A *kohen*, if necessary, may enter a room where a dead non-Jew is lying but should not touch the body. Likewise, one should not lean over the grave of a non-Jew.

14b. A *kohen* may, if necessary, enter a museum (where remains are on display) or be present in a room where human tissue is being clinically examined.

15. A *kohen* may travel on a road where branches of a tree cover the road of a non-Jewish grave

or cemetery.<sup>113</sup>

Furthermore, R. Felder is reported as saying in the name of R. Feinstein that *Shulhan Arukh* was only referring to a prohibition to walk over the graves of non-Jews. In any other case, there is no prohibition, as all opinions concur that non-Jews are not *metamei be-ohel*.<sup>114</sup> Thus, R. Felder suggests that R. Feinstein categorically and unquestionably maintained that non-Jews are not *memtamei be-ohel*.<sup>115</sup>

This explanation of R. Feinstein may explain the precise formulations of Maharam Mi-Rotenberg, Rosh, *Shulhan Arukh*, and others regarding walking over the graves of non-Jews, where in addition to the concern of *ohel hamshakhah*, there is also concern for *maga* and *ma'ahil*. However, there are also problems with this interpretation, including the formulation of Rosh, who explicitly notes that the issue at hand is one of *ohel*.<sup>116</sup>

## Conclusions and Direction for the Future

Based on our discussion, if a *kohen* refrains from touching cadavers during his training and the cadavers are those of non-Jews, it may be possible for him to become a physician and participate in the *mitzvah* of healing. Of course, given

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113 *Yesodei Semahot*, pp. 66-67. In his approbation to *Yesodei Semahot*, R. Feinstein writes that R. Felder brought the manuscript to him for approval. Indeed, in almost every footnote regarding the rulings cited here, R. Felder quotes a responsum or teaching of R. Feinstein as support.

114 Quoted in *Sefer Yishmeru Da'at*, *chelek* 1.

115 According to this perspective, however, the question remains why R. Moshe was hesitant to allow *kohanim* to visit the sick in a hospital setting. It is possible that R. Feinstein was concerned that people will not adequately or properly investigate the situation in the hospital to determine whether the deceased are Jews or non-Jews. Since this is a situation in which it is possible to clarify (*efshar le-vrurei*), perhaps R. Feinstein maintained that it is incumbent upon a *kohen* to do so.

116 In response to this concern, see *Sidrei Taharot*, *Oholot* 518-519, who suggests that the real concern is one of *maga* or *heset*.

the complexity and *mahloket* surrounding even the most basic pieces of this discussion, this can only be attempted under the guidance of *posekim* of great stature. As the rabbinic aphorism notes, the laws of ritual purity and impurity are among the most complicated areas of Jewish law. Practical decision making in this area requires tremendous training and expertise.

To review:

1. The issue of *tumat akum be-ohel* is not resolved. However, a great number of *posekim* maintain that it is permissible for *kohanim* to come into contact with a non-Jewish dead body through *tumat ohel*, whether *le-khathilah* or otherwise.
2. Although there are *posekim* who disagree with the above statement, many do so by saying, “*yesh le-hahmir*” or similar language, indicating that *me-ikar ha-din*, they maintain that non-Jews are not *metamei be-ohel*.
3. In the context of medical school, the *tumah* would be in the vicinity of the *kohen* when he is in a laboratory. Perhaps this can be considered a *reshut ha-rabbim*, in which case additional leniencies may apply.
4. Even if one assumes that non-Jews are *metamei be-ohel*, perhaps the *ohel* in this case (*ohel hamshakhah*) is not the type of *tumah* prohibited to *kohanim*.
5. Even if the *tumat ohel* here is the type prohibited to *kohanim*, perhaps the prohibition is *de-rabbanan*.
6. Even if the *tumah* is *de-orayta*, some *posekim* (such as R. Pinchas Zevihi and R. Ovadiah Yosef, among others) cite the position of Ra'avad that *kohanim* need not be concerned about *tumah* today in conjunction with the position of *Sefer Yerei'im* that non-Jews do not transmit any *tumah* that is forbidden to *kohanim* in order to be lenient in cases of necessity.

Given these positions, it may be possible to tackle the

question of *kohanim* being in the presence of non-Jews' dead bodies for the worthy purpose of attending medical school.

Medicine has always been a theologically significant profession. God is known as the Healer,<sup>117</sup> and those who practice medicine are truly partners with God in this extraordinary endeavor of caring for His children. To join the ranks of those privileged to heal is to join with God in partnership. May it be His will that His partners continue to act with compassion toward their patients and that the ill be healed speedily in our days so that He alone may be our Physician.

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117 *Shemot* 15:26.

IRA BEDZOW & ASHER SIEGELMAN

# The Four Who Entered the *Pardes* And the Study of PTSD

In this article, we will analyze the Talmudic account of the four scholars who entered the *Pardes* and their reactions to this experience. Our objective is to demonstrate how studying Jewish texts and their interpretations can contribute to the study of post-traumatic stress disorder (PTSD). We will show that the four scholars can serve as paradigms for the ways that people interpret their experiences and that hermeneutical inclinations can predispose a person towards being affected in a particular way by traumatic experiences.

Among our assumptions is that people use the same method of interpretation both before and after a traumatic event. While the motive for explanation may change, the method is the same. This may be a critical factor in predicting an individual's reaction to a given trauma. If there is a possibility to predict how a person will respond to a traumatic event by studying his or her method of interpreting both texts and

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personal experiences, there may also be a curative or preventative value to this study, as one may be able to change his or her method of interpretation. Our analysis is based on the hypothesis that people do not change their methods of interpreting experiences after a traumatic event, even if they do change their perspective bias or orientation, and that hypothesis must be tested.<sup>1</sup> However, if it is empirically proven to be the case, then our study of Jewish texts will have contributed to a cognitive theory for PTSD that can account for individual circumstances of PTSD and may hopefully lead to its prevention and cure.

## **Introduction to PTSD**

Since 1980, when the psychological community first recognized Post-Traumatic Stress Disorder (PTSD) as an official diagnosis, researchers have attempted to understand the underlying mechanisms that cause the disorder and the processes that can ameliorate it.<sup>2</sup> Contemporary research has made a great deal of progress in understanding and treating PTSD, to the point that what was once viewed as a weakness in a soldier is now recognized as a common phenomenon for anyone who has experienced a traumatic experience. According to epidemiological studies, approximately 8% of the population suffers from PTSD, approximately twenty-five million people.<sup>3</sup>

The symptoms that people who suffer from PTSD typically endure fall into three general categories: re-experiencing, avoidance, and hyper-arousal.<sup>4</sup>

Re-experience occurs when a person has intrusive

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1 For the purposes of prevention or cure, one must also test whether people's methods of interpretation can be changed through intervention.

2 Friedman, M. J., Keane, T. M., and Resick, P. A., *Handbook of PTSD: Science and Practice* (London/New York, 2007): 4; Foa, E. B., Steketee, G., and Rothbaum, B. O., "Behavioral/cognitive conceptualizations of post-traumatic stress disorder," *Behavior Therapy* 20 (1989): 155-76.

3 Spitzer, R.L., *DSM-IV-TR Casebook: A Learning Companion to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*, 1st ed. (Washington, DC, 2002).

4 McWilliams, Cox, & Asmundson, (2005).

memories and/or emotions about the traumatic event.<sup>5</sup> However, although re-experiencing has a cognitive component, the main effect is on one's senses. Due to the fact that the memory is oftentimes more sensory than consisting of content, a person who has this memory is usually unable to put it in proper context, or even reflect on it at all. The experience is therefore usually perceived as a threat rather than accepted as a memory. At times, however, a person can suffer primarily from intrusive thoughts, rather than emotions. When this occurs, the thoughts consist of evaluative judgments and/or assessments about one's sense of self, one's relationship with others, and one's posture towards the world around him vis-à-vis the lasting effect of the trauma.

Avoidance is the maladaptive need to evade contact with any person, place, or thing that may evoke memories of the trauma.<sup>6</sup> The avoidant person actively seeks to avoid any connection with the trauma or with anything that could cause him to remember it. Hyper-arousal is an extreme, debilitating physiological sensitivity to a stimulus. It is a physical reaction that typically occurs along with re-experiencing, whereby physiological changes in the person accompany his reliving of the event. In recognizing that a person maintains his method of interpretation after a traumatic event, the possibility of changing that detrimental interpretative posture may mitigate the harm of re-experiencing.

Several theories have been developed to explain PTSD, such as conditioning theory, schema theory, and cognitive theory. Conditioning theory is based on the assumption that a person develops PTSD through classical conditioning and instrumental conditioning. A person first develops a sense of fear through classical conditioning. Then, through the process of

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5 Ehlers, A., Hackmann, A., and Michael, T. "Intrusive re-experiencing in post-traumatic stress disorder: phenomenology, theory, and therapy," *Memory* 12(4) (2004): 403-15.

6 Plumb, J. C., Orsillo, S. M., and Luterek, J. A., "A preliminary test of the role of experiential avoidance in post-event functioning," *Journal of Behavior Therapy and Experimental Psychiatry* 35 (2004): 245-57.

instrumental conditioning, he or she seeks to avoid that fear by preventing exposure to any stimulus that may elicit the original fear response. There are different variations of schema theory, but they all share the notion that trauma challenges a person's previous assumptions about his self, life, and the world. The change in a person's assumptions is what leads to his processing the trauma in the way that he does.

Our arguments fit well with a cognitive theory to explain PTSD.<sup>7</sup> Cognitive theory attempts to explain reactions to traumatic experience based on cognitive appraisal and orientation of memory. People's reactions to trauma are indeed a combination of emotional and sensory-motor functioning. Anxiety disorders and PTSD occur with the increase of dysfunctional emotions, which ultimately result from inappropriate interpretations.<sup>8</sup> For those who suffer from PTSD, the way the event is conceived is based on how one's memory of it is contextualized, and the experience is often viewed as continually present as opposed to being in the past. If healthy interpretations can be created to replace unhealthy ones, then we believe the person's emotional reactions may also improve. Although we did not examine the Talmudic literature with any particular theory in mind, we found through our analysis that cognitive theory provided the most accurate and coherent lens through which to explain the reactions of the four scholars in the Talmudic literature.

Previous scientific research has suggested the idea of paradigms (discussed as "trajectories") of traumatic reaction. However, we did not find any study that explored the possibility of paradigms of different methods of cognition and orientations of cognizance, which we believe is a possible next step after positing trajectories of traumatic reaction.

Stenkamp and his colleagues conducted latent class growth analysis (LCGA) of over 100 women who experienced

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7 Ehlers, A. and Clark, D. M., "A cognitive model of posttraumatic stress disorder," *Behaviour Research and Therapy* 38 (2000): 319-45.

8 *The Handbook of PTSD*, 66.

sexual assault.<sup>9</sup> The particular trauma of sexual assault was chosen for this study because it is considered severe. LCGA is a type of analysis that is based on the premise that there are unique growth trajectories in a population. These trajectories represent distinct homogenous subgroups of individuals who experience the same type of growth curve. Within this study there were four trajectories that were revealed from this group. The researchers found a high chronic trajectory, moderate chronic, moderate recovery, and marked recovery. Chronic indicated levels of distress and dysfunction, while recovery indicated a period of symptoms that dissipated within several weeks or months. These findings indicate that there are distinct types of reactions to a specific trauma. Further inquiry may also demonstrate the existence of distinct methods of interpretation, as our current study suggest.

### **Previous Attempts at Using Jewish Studies as a Resource**

While there have been previous attempts to use the Bible as a resource for information about trauma, the majority of studies that have done so have been descriptive, providing only general suggestions for practical applications to the field of mental health. Furthermore, much of the research examining the different theories of PTSD does not provide an account for individual circumstances, either regarding what causes PTSD or regarding determining the best treatment. Our focus is to develop paradigms for those who have traumatic experiences that can allow us to explain individual circumstances of a sufferer's condition, with the hope that it may contribute to an overall theory of PTSD.

Some psychologists and social theorists have claimed that the social milieu of the Near East in the times of the Talmud was so different than that of modern society that any

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9 Steenkamp, M. M., Dickstein, B. D., Salters-Pedneault, K., Hofmann, S. G., and Litz, B. T., "Trajectories of PTSD symptoms following sexual assault: Is resilience the modal outcome?" *J. Traum. Stress* 25 (2012): 469–74.

comparison is ineffectual. Others have claimed that descriptions of people and events in the Talmud serve rhetorical purposes and are therefore an unreliable foundation for any theory. We will show that despite the different social ethos of the time and place of the Talmud and despite the fact that events are not described through a historiographic methodology but rather as part of a greater ethico-religious dialogue, the paradigms in the Talmud can serve as an insightful and profound foundation to begin understanding individual circumstances that affect a sufferer's condition.

### **The Four Who Entered the Pardes**

The Talmud records an incident in which four scholars enter the Pardes. As a result of the experience, Ben Zoma becomes insane, Ben Azzai dies, Elisha ben Abuya (Aher) becomes an apostate, and R. Akiva is unaffected.<sup>10</sup> Although most scholarship discussing this incident places the story in the context of the relationship between Jewish mysticism and rabbinic culture, the story can also be used to shed light on the reasons that people react to traumatic events in different ways.

Before beginning our study, it is important to note that our goal is not to examine the teachings or teaching methods of these four scholars against the background of Jewish law, although we also do not seek to interpret them contrarily. We recognize that a few aphorisms from a person's scholarly career and a few incidents recounted about his life are wholly insufficient to form a historically accurate picture of a person's character. Moreover, it would be incorrect to assume that a person's legal positions are guided solely by motivations of character.

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<sup>10</sup> *Hagigah* 14b. See also *Yerushalmi*, *Hagigah* 2:1; *Tosefta*, *Hagigah* 2:3-4; *Shir Ha-Shirim Rabbah* 1:4. There are differences between these accounts. For example, in the *Yerushalmi*, the fates of Ben Azzai and Ben Zoma are reversed, and the description of Elisha ben Abuya is longer and less flattering. We have chosen to present the material in the manner that we have based on the assumption that the account in the *Bavli* is better known and more consistent given its relationship to other parts of the canon. We do, however, use the other sources for material that the *Bavli* does not include.

We recognize the shortcomings of assuming that the description of an isolated event is illustrative of the essential nature of a person, or even that our interpretation of that event can wholly consider the background of a person's entire life. Rather, in discussing various legal positions and descriptions of particular events, we solely intend to construct four archetypes for the way some people react to traumatic events.

In this section, we hope to demonstrate that each of the four scholars had a distinct method of interpretation that influenced his experience and reaction to it and that affected his psychological state afterwards. We will examine the sources that relate to each scholar separately. Based on the quantity and quality of the sources, we will organize the archetypal descriptions differently. Due to the dearth of narrative regarding Ben Zoma and Ben Azzai in the Talmud, in their cases, we will focus more heavily on how they interpreted specific texts in order to extrapolate how they would interpret real life situations. In contrast, with regard to Elisha ben Abuya and R. Akiva, we will use both examples of their respective exegesis as well as descriptive narrative to portray how these two figures relate to texts and life experiences exegetically.

In the following subsections, we will show that the four scholars fit the following archetypal descriptions:

	<b>Ben Zoma</b>	<b>Ben Azzai</b>	<b>Elisha ben Abuya (Aher)</b>	<b>Rabbi Akiva</b>
<b>Community</b>	Involved	Not Involved	Antagonistic	Conciliatory
<b>Manner of Involvement</b>	Passive	Passive	Active	Active
<b>Hermeneutic</b>	Undifferentiated Totality - continual present -mass of people	Take to logical extreme/conclusion Focus on abstract	Interpretation as Justification Goal: Self-serving	Interpretation as Justification Goal: Positive outlook, consistency with tradition Differentiated Plurality Moderate conclusion Focus on practical/particular
<b>Talmud Term</b>	Insanity	Death	Apostasy	Whole
<b>Psychological Term</b>	Obsessional Neurosis	Death	Paranoia	Healthy

The four paradigms that we have identified are:

**Ben Zoma** – This type of person interprets events with a synchronic orientation. Previous experience and knowledge does not inform the present or future. This type of person also continually reinterprets the past so that it conforms to currently-held opinions, so that the person sees life as an undifferentiated totality. This is reflected in how the person defines everything in his or her life by the present moment.

**Ben Azzai** – This type of person has a tendency towards interpreting events abstractly, and thus may take ideas to a logical extreme. However, while the person's ideology may be extreme, his behavior often contradicts that ideology, which he justifies through a sense of personal exemption. This person also has little to no interest in social involvement.

**Aher** – This type of person will form a conclusion based on just one experience and then will search for evidence to support his conclusion, without considering other possibilities. Interpretation for this person serves merely as a justification for his personal view. This person's social involvement tends to be antagonistic.

**R. Akiva** – This type of person interprets events in a manner that is consistent with his traditional narrative, and that narrative serves to provide a positive outlook with a moderate conclusion. He also interprets experiences in a diachronic manner so that events are related to one's past and serve as a guide for one's future. His social involvement is conciliatory.

This is not to say that only four paradigms for interpreting experiences exist, nor does this mean that people fall solely into one category. Rather, each scholar used a different method of interpretation, which allowed us to discover that paradigms actually exist and can be examined through studying the rabbinic literature.

Although our research analyzes the vast majority of the Talmudic passages that refer to these four scholars, for the purpose of clarity and exigency, we will provide only a few examples that demonstrate our point. Another study will further



develop this idea by incorporating the other Talmudic examples.<sup>11</sup>

## **Ben Zoma**

Shimon Ben Zoma is known for his ability to interpret verses,<sup>12</sup> yet his method of interpretation reveals that his preconceptions regarding time and memory may be a weakness in his ability to incorporate traumatic events into his world-outlook. This hermeneutical inclination thus predisposes him towards being adversely affected by traumatic experiences. We therefore believe that he can serve as a paradigm to identify potential victims of post-traumatic stress disorder by their interpretive inclinations.

The Talmud recounts a disagreement between Ben Zoma and the Sages regarding whether one must recite the third paragraph of the Shema in the evening.<sup>13</sup> This passage discusses the obligation to wear ritual fringes (tzitzit) on one's garments, and it also emphasizes that God redeemed the Jewish People from Egypt. Ben Zoma, based on exegetical support, reasons that one must say the third paragraph. In contrast, the Sages maintain that the paragraph need not be recited, since one is not obligated to wear tzitzit at night.

The outcome of the disagreement is not relevant for our analysis. What is relevant for our discussion is how each position is justified. Ben Zoma legitimates the necessity to recite the third paragraph by expounding a Biblical verse, which states, "That you may remember the day when you came out of Egypt all the days of your life (kol yemei hayekha)."<sup>14</sup> Ben

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11 For more information, feel free to contact Ira Bedzow (ijbedzow@gmail.com) or Asher Siegelman (aesiegelman@yahoo.com).

12 *Sotah* 49a.

13 *Berakhot* 12b-13a. The *Shema* is the centerpiece of the morning and evening Jewish prayer services, as it emphasizes the monotheistic essence of Judaism. Although all agree that the *Shema* consists of three paragraphs in the morning service, there was a Talmudic debate over whether it should consist of two or three paragraphs in the evening.

14 *Devarim* 16:3.

Zoma explains that the expression “the days of your life” would have been sufficient to demand that one remember the Exodus every day. The fact that Scripture uses the word “all” implies that one remember – that is, recite – the passage at night as well. “All the days of your life,” according to Ben Zoma, means “the entire day of your life.”<sup>15</sup>

Ben Zoma’s motivation for understanding the verse in this way is related to his understanding of a verse that refers to the time of the Messiah. Yermiyahu prophesizes: “Therefore behold the days to come, says the Lord, that they shall no more say, ‘As the Lord lives that brought up the children of Israel out of the land of Egypt,’ but, ‘As the Lord lives that brought up and that led the seed of the house of Israel out of the north country and from all the countries whither I had driven them.’”<sup>16</sup> According to Ben Zoma, this verse foretells a time when there will be an obligation to make mention of the Messianic redemption instead of an obligation to make mention of the Exodus from Egypt. Since we will no longer be obligated to mention the Exodus from Egypt after the Messianic redemption, the verse demanding that we recall the Exodus “all the days of your life” cannot mean that we must remember it each and every day, forever. It must therefore mean that we are required to recite the Shema both in the morning and the evening. The fact that the paragraph also discusses tzitzit and tzitzit are not worn during the day is of no consequence.

The Sages interpret the phrase “all the days of your life” to include the days of the Messiah. According to the Sages, the obligation to remember the Exodus will play a subordinate role in comparison to the Messianic redemption, but it will nevertheless still have an independent recognition. In fact, the Exodus will actually shape how the Messianic redemption will

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<sup>15</sup> The Hebrew word “*kol*” can mean both “all” or “the entire.” Ben Zoma understands it in this context as “the entire;” one must remember the Exodus the entire day, both in the morning and in the evening. The Sages, in contrast, interpret it to mean “all” in this context.

<sup>16</sup> *Yermiyahu* 23:7-8.

be perceived. R. Yehudah Loewe (Maharal) explains the reason for this as follows:

[T]he Sages held that one will make mention of the Exodus even during the days of the Messiah, for how could it be that the cause is not remembered with the effect? From the level that Israel acquired when they left Egypt, they will acquire another level. If they had not left Egypt and Israel had not become a nation, they would not have merited the level they will attain in the future. Therefore, the Exodus from Egypt is in essence the cause of the Messianic redemption... Because of this, the two redemptions are joined together as one and are as one redemption.<sup>17</sup>

The Sages support their claim that the Exodus will be considered as part of the Messianic redemption by drawing an analogy to the two names of the third patriarch, Yaakov and Yisrael. After God changed Yaakov's name to Yisrael, the name Yaakov was not forgotten. Rather, Yisrael became the principal name and Yaakov became secondary. As the Bible testifies, God continues to call Yaakov by his former name when his actions or circumstances reflect that name's character. The name Yisrael becomes principal because it signifies a new telos, but it does not erase Yaakov's past; in the same manner, the Messianic redemption marks the beginning of a new stage but does not eliminate the importance of the Exodus from Egypt.

The Sages also support their claim by referencing the verse, "Remember not the former things, neither contemplate the things of old."<sup>18</sup> The Sages explain that "Remember not

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17 *Netzah Yisrael*, Introduction. R. Yehudah Loewe ben Bezalel (1520–1609), the Maharal of Prague, was an important Talmudic scholar, Jewish mystic, and philosopher who served as a leading rabbi in the city of Prague.  
18 Isaiah 43:18.

the former things” refers to Israel’s subjugation to the other nations; “Neither contemplate the things of old” refers to the Exodus from Egypt. Although the subjugation to the other nations will not be remembered in the Messianic Era, the Exodus will be remembered, but it will not be a subject of meditation.

When compared to the Sages, Ben Zoma’s understanding of the relationship between remembering the Exodus and the Messianic Era reveals a weakness in how he negotiates between interpretation and memory. It also reflects a weakness in his inability to consider, or his deliberate ignoring of, what is actually occurring around him outside of his exegesis.<sup>19</sup>

The examples that the Sages bring to support their claim demonstrate that a person must always consider his point of origin, the present situation, and the future destination. The present does not erase the past, but it may influence how one considers it. Similarly, the past does not completely define the present and future, but it does necessarily remain with it, if only latently. Therefore, “all the days of your life” is a diachronic reference.

Ben Zoma, on the other hand, understands “all the days of your life” synchronically. Each day is independent of the last and of the next. The consequence of this is that at every instant, the person perceives only the present moment, without finding or at least trying to find coherence over time. The search for coherence is also a way to re-evaluate one’s past and present in light of a desired future.

Ben Zoma’s passivity and his propensity to aggregate matters into a single fixation rather than to allow for detail and particularity is also demonstrated in his use of the word “all” in another Talmudic passage. The Sages teach that if a person sees a crowd of Israelites, he should say “Blessed is He who discerns secrets,” in order to show appreciation for the fact that God can create people as individuals even when they are gathered

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<sup>19</sup> Many times, people have a narrative of the behavior that does not correlate with their actual behavior. They maintain that narrative either out of a lack of awareness or through deliberate denial.

in a general collective.<sup>20</sup> The blessing is a recognition of the diversity of existence, an admission of a person's inability to understand that which is beyond his grasp, and admiration for God, who knows how everything comes together. The Talmud records an incident in which Ben Zoma, while standing on the steps of the Temple Mount, sees a crowd of Israelites and recites two blessings. He first says the blessing that the Sages prescribed, but then he says a personal blessing: "Blessed is He who has created all these to serve me."<sup>21</sup> The meaning behind Ben Zoma's blessing is explained in the Talmud as follows:

He used to say, "What labors Adam had to carry out before he obtained bread to eat! He plowed, he sowed, he reaped, he bound [the sheaves], he threshed and winnowed and selected the ears, he ground [them], and sifted [the flour], he kneaded and baked, and then at last he ate, whereas I get up, and find all these things done for me. And how many labors Adam had to carry out before he obtained a garment to wear! He had to shear, wash [the wool], comb it, spin it and weave it, and then at last he obtained a garment to wear, whereas I get up and find all these things done for me. All kinds of craftsmen come early to the door of my house, and I rise in the morning and find all these before me."<sup>22</sup>

In a similar sense as the disagreement regarding the interpretation of the word "all" above, the Sages' blessing reveals that they do not consider the crowd solely as a unit; they recognize the people as individuals who join together. Ben Zoma, on the other hand, aggregates the people into one indistinguishable mass. The practical ramifications of this perceptual inclination

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20 *Berakhot* 58a.

21 *Ibid.*

22 *Ibid.*

are that for the Sages, the collection is still divisible; thus, if one individual is removed or another added, there is still flexibility to allow the collection to be maintained. For Ben Zoma, however, the collection is a unit; any slight change will change the nature of the unit. Just as in relation to time, in this case, Ben Zoma's perceptual schema disallows the maintaining of continuity when there is change. Furthermore, Ben Zoma relates to the crowd solely in a self-serving manner. They exist to provide for him; he does not perceive any responsibility towards them. Life for Ben Zoma has a solitary purpose as well as a solitary focus. He is meant to attain knowledge of God and the world is meant to assist him in that goal.<sup>23</sup>

The Talmud records a dialogue between Ben Zoma and R. Yehoshua ben Hananiah after the incident of the Pardes that supports the assumption that Ben Zoma's exegetical presuppositions were a causative factor in becoming mentally unstable after the event:

Once R. Yehoshua ben Chananiah was standing on a step on the Temple Mount, and Ben Zoma saw him and did not stand up before him. So [R. Yehoshua] said to him: Whence and whither, Ben Zoma? He replied: I was gazing between the upper and the lower waters, and there is only a bare three fingers [breadth] between them, for it is said: "And the spirit of God hovered over the face of the waters" – like a dove that hovers over her young without touching [them]. Thereupon, R. Yehoshua said to his disciples: Ben Zoma is still outside [i.e. insane]. See now – when was it that the spirit of God hovered over the face of the water? On the first

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23 In an expanded study, we will show how Ben Zoma's definition of "wisdom" differs from that of the Sages and that their disagreement reflects different assumptions regarding the method one should use to interpret the past so as to make sense of the present and look toward the future.

day [of Creation]; but the division took place on the second day, for it is written: "And let it divide the waters from the waters!"<sup>24</sup>

R. Yehoshua ben Hananiah was Ben Zoma's teacher, and Ben Zoma should therefore have immediately stood for him, but Ben Zoma was too involved in his own contemplation to act with the respect demanded of him. Moreover, his contemplation did not pertain directly to his experience in the Pardes. Rather, he was trying to make sense of his experience by reinterpreting his perception of history all the way back to its beginning. His understanding of the past did not mediate his discernment of the present; instead, his perception of the present reinterprets his past. Ben Zoma's behavior reflects that of an obsessional neurotic, who comports himself mainly in isolation and whose traumatic experience profoundly alters the meaning of his life while at the same time becoming a threat to himself.

### **Ben Azzai**

Shimon Ben Azzai is known for his persistent attention in the study of Torah.<sup>25</sup> However, his tendency to go to the logical extreme without considering the particulars of a situation leads to a vulnerability in enduring traumatic events. Although Ben Azzai often takes a stance more radical than that of the Sages, his thinking reflects a tendency to consider the abstract without bearing in mind his own situation or that of others vis-à-vis the ideal position that he demands.

Examples of how Ben Azzai amplifies the words of the Sages can be seen in a number of instances. For example, when the Sages taught, "The Amen uttered in response should be neither hurried nor curtailed nor orphaned, nor should one hurl the blessing, as it were, out of his mouth," Ben Azzai provides the following warning: "If a man says an 'orphaned' Amen in response, his sons will be orphans; if a hurried Amen, his days

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<sup>24</sup> *Hagigah* 14b.

<sup>25</sup> *Sotah* 49a.

will be snatched away; if a curtailed Amen, his days will be curtailed. But if one draws out the Amen, his days and years will be prolonged.”<sup>26</sup> Similarly, when the Sages say that when going through a city, one should say a prayer when entering and upon leaving, Ben Azzai says that he should say two when entering and two upon leaving, so that he can give thanks for the past and supplication for the future both on the entering and leaving of the city.<sup>27</sup>

An example of how Ben Azzai looks at matters generally and in the abstract, as opposed to with a mind towards one's personal situation, can be found in his disagreement with R. Akiva regarding the greater general principle in the Torah. Ben Azzai considers “This is the book of the generations of Adam” to be a great general principle of interpersonal relations, as it emphasizes the inherent equality of all people as descendants of one father. However, Ben Azzai's principle focuses on people in general, considering humankind in the abstract, which makes the general principle vulnerable to those who attempt to do great things on behalf of humankind while at the same time hurting individuals. R. Akiva's principle, “Love your neighbor as yourself,” mitigates this deleterious zeal by emphasizing that each person is an individual; humankind is not a reified entity, but rather a collection of neighbors and friends.

Ben Azzai's inclination towards generality not only influences his dealing with broad ethical statements; it also occurs in his discussions of Halakhah. For example, the mishnah states that when a court issued a decision and it is later discovered that they had erred and withdrew the decision, if an individual acts in accordance with the erroneous judgment, R. Eliezer distinguishes between whether the person stayed home or went to a country beyond the sea. Ben Azzai, however, questions making such a distinction, until he is told that it must be considered whether the person was in a position to ascertain

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<sup>26</sup> *Berakhot* 47a.

<sup>27</sup> *Ibid.* 54a.



what had occurred.<sup>28</sup>

Ben Azzai's inclination towards generality and the fact that he does not hold himself accountable to his own judgments is also demonstrated by his position regarding the obligation to procreate. In the Talmud, the discussion regarding the command to procreate is as follows:

R. Eliezer stated: He who does not engage in propagation of the race is as though he sheds blood, for it is said, "Whoever sheds man's blood by man shall his blood be shed," and this is immediately followed by the text, "And you, be fruitful and multiply." R. Yaakov said: It is as though he has diminished the Divine Image, since it is said, "For in the image of God He made man," and this is immediately followed by, "And you, be fruitful, etc." Ben Azzai said: It is as though he sheds blood and diminishes the Divine Image, since it is said, "And you, be fruitful and multiply." They said to Ben Azzai: Some preach well and act well; others act well but do not preach well. You, however, preach well but do not act well! Ben Azzai replied: But what shall I do, seeing that my soul is in love with the Torah; the world can be carried on by others.

In this exchange, Ben Azzai takes a radicalized position by incorporating the exhortations of both R. Eliezer and R. Yaakov. However, Ben Azzai's position demonstrates the contradiction between his ideological stance and his behavior, as he did not marry and have children. Moreover, when this is brought to his attention, Ben Azzai neither admits that he does not live according to his own standards nor tries to change his behavior. Rather, he sidesteps the issue by claiming that he is

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28 *Horayot* 3b.

unable to change and need not do so by virtue of his love of Torah. He further justifies his position in light of his behavior by asserting that the command still applies to others.

Another point one can draw from this passage is that although Ben Azzai recognizes that the command to procreate is a social necessity as well as an obligation, he still refuses to participate. One could say that Ben Azzai's love for the Torah overrides the obligation, yet this exemption still contradicts his own instruction to run to pursue even a minor mitzva and flee from a transgression. Ben Azzai's adamancy in fulfilling commandments is demonstrated by his belief that the performance of a mitzva brings another mitzva, a transgression brings another transgression, and the reward of a mitzva is a mitzva and the reward of transgression is transgression.<sup>29</sup> Therefore, one would think that even if exempt, Ben Azzai would still try to fulfill the command.

It is possible to attribute Ben Azzai's combination of having an extreme general perspective with his personal sense of exemption to his self-perception. Ben Azzai recognizes his talents and his understanding of the Torah. He even said about himself, "I thread words of the Torah onto the Prophets and words of the Prophets onto the Writings, and the words of the Torah are as joyful as when they were given at Sinai."<sup>30</sup> It is possible that he therefore thinks that he understands what his role in the world is, and that it is different than any general position for which he advocates. It is his inclination towards the extreme and his personal sense of exemption that makes Ben Azzai an archetype for those who take deleterious risks during a traumatic event.<sup>31</sup>

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29 *Avot* 4:2.

30 *Vayikra Rabbah* 16:4.

31 In an expanded study, we will show how Ben Azzai's explanation of the portion of the verse, "For this is the whole of man" (*Kohelet* 12:13) and his statements in the *Mekhilta* (*Vayetzei*, Section 1) and *Tosefta*, *Yoma* 2:7, support our findings.

### **Elisha ben Abuya (Aher)**

Elisha ben Abuya first forms a supposition based upon an initial experience or encounter and then justifies his inchoate supposition by finding an interpretation that fits his desired outcome, rather than the one that best fits the text holistically with other examples. Through these justifications, he also reinforces his belief in his initial supposition at the expense of other possibilities.

Before he entered the Pardes, Elisha ben Abuya believed in the notion of Divine reward and punishment for one's actions.<sup>32</sup> After his experience in the Pardes, however, he abandons this belief. The process by which he formulates a new belief to replace the old one is gradual, yet it results in his eventual inability to be convinced otherwise. He first proposes rhetorical questions that only imply his dismissal of the old view and adoption of a new one. He then explicitly challenges the old view and upholds his new beliefs. In the end, he acts contrary to social norms in order to demonstrate his adoption of the new view in practice.

The *Yerushalmi* recounts two experiences that Aher has after leaving the Pardes. In the first experience, Aher witnesses a man climbing a tree to perform the Torah commandment of sending away the mother bird before taking its eggs. The fact that the man is performing this particular act is significant because the verses describing this commandment give as a consequence of its fulfillment, "that it may be well with you, and

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32 Support for this assumption is found in the *Yerushalmi*. At the conclusion of the passages related to Elisha ben Abuya, the Talmud relates that when he fell ill, his student, R. Meir, went to visit him. He said to him, "Will you not repent?" Elisha replied, "If I repent, will it be accepted?" R. Meir then responded, "Does not Scripture state, 'You turn men back to dust?' Until the destruction of the soul, they are accepted." At that moment Elisha wept, passed on, and died. R. Meir then said, "It seems my teacher died in repentance." Whether or not R. Meir is correct that Elisha repented, the account insinuates that Elisha originally believed in the notion of divine reward and punishment for one's actions, as well as the notions of Gehinnom and the World to Come.

that you may prolong your days.”<sup>33</sup> Aher sees the man fulfill the commandment and descend the tree upon which the nest lies, only to get bitten by a deadly snake and die soon thereafter. After seeing this transpire, Aher responds with the question: “Where is the good in what happened to this one? Where is the longer life for this one?” In the second experience, he sees the tongue of R. Yehudah Ha-Nahton lying in the mouth of a dog. Upon seeing this, he says, “This is Torah? This is its reward?”<sup>34</sup>

The importance of Aher’s reactions is two-fold. First, he immediately responds by referencing the experience to a textual account. His previous understanding of the Biblical text led him to expect certain conclusions based on particular events. When he sees that there is a contradiction between his expectations and what transpires, he questions his understanding of the relevant texts. Second, his question of the Biblical text broadens from the first case to the second. He first questions particular passages, but he eventually questions the value of the entire Torah based on his new orientation.

When the Bavli describes Aher’s exchange with R. Meir after the incident in the Pardes, it shows that Aher’s motive and method for interpreting texts is the same as how he understands his own experiences.<sup>35</sup> In the two accounts presented in the Talmud, Aher provides an interpretation that remains close to the local meaning of the words that he is expounding while ignoring the greater context of the passage. He does so in order to use the texts as a rhetorical tool to justify a point. When R. Meir interrupts him so as to contradict his interpretation, Aher responds that he has already heard from behind the Veil: “Return you backsliding children – except Aher.” By using what he heard in the Pardes to justify his defiant interpretation,

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<sup>33</sup> *Devarim* 22:7.

<sup>34</sup> In *Kiddushin* 39b, the transition is much faster. In this account, he sees the tongue of Hutzpit the Interpreter dragged along by a swine. However, he does not ask a rhetorical question, but rather exclaims, “The mouth that uttered pearls licks the dust!” The account concludes by saying that he then went and sinned.

<sup>35</sup> See *Hagigah* 15a.

Aher not only reaffirms his belief that he cannot repent, but he shows that his understanding of the world is part of his textual exegesis and vice versa.

In the first example given in the Bavli, Aher asks R. Meir the meaning of the following passage: “[In the day of prosperity be joyful, and in the day of adversity consider;] God has made even the one as well as (*le-umat*, literally opposite) the other [to the end that man should find nothing after him.]”<sup>36</sup> The general context of the passage is that people cannot understand God’s ways and should therefore not consider themselves overly wise. Moreover, as the following verse notes, it is vanity for a person to think that he knows how God judges.<sup>37</sup> What one may consider an improper judgment may only seem to be so since he does not have all of the facts. Aher, on the other hand, uses the literal meaning of the phrase that he cites to prove that God pre-ordains separate and contrasting entities. Furthermore, whereas R. Meir gives examples of opposites from the natural world, Aher’s examples are from the moral realm.<sup>38</sup> There are righteous and wicked people, and there is the Garden of Eden and Gehinnom. According to Aher, God makes righteous people and wicked people and God decides who goes to Heaven and who to Hell. This is not based on a person’s actions, since there is no reward in this world or the next for the Torah that one possesses.<sup>39</sup>

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36 *Kobelet* 7:14.

37 “All things have I seen in the days of my vanity; there is a righteous man that perishes in his righteousness, and there is a wicked man that prolongs his life in his evil-doing” (*Kobelet* 7:15).

38 Aher’s localized interpretation is actually better than R. Meir’s because he uses examples from the next verse and provides examples that better portray the meaning of the word “opposite (*le-umat*).” R. Meir’s explanation, both in this example and the next, seems to indicate that he recognizes that he is giving a sub-par answer because he knows what Aher’s intentions are. He therefore provides an answer that he hopes will direct the conversation in a way that leaves him the possibility for a rejoinder, and he succeeds in the second example.

39 Support for our interpretation of Aher’s exegesis is the Talmudic passage that puts a very similar argument in the mouth of Job and its response in

In the second example, Aher asks R. Meir, "What is the meaning of the verse: 'Gold and glass cannot equal it; neither shall the exchange thereof be vessels of fine gold?'"<sup>40</sup> In his response, R. Meir combines gold and vessels of fine gold and contrasts them with glass, which may be a justifiable reading in terms of the materials mentioned, but does not fit with the syntactical and semantic structure of the sentence. Aher interprets the sentence in a way that is better aligned with the sentence structure, but he draws a semantic analogy that misrepresents the broader theme of the passage.<sup>41</sup> In the name of R. Akiva, Aher interprets the verse to mean that just as vessels of gold and vessels of glass, although they may be broken, have a remedy, a scholar, although he has sinned, has a remedy.<sup>42</sup> Aher is not able

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the mouths of his friends:

Raba said: Job sought to exculpate the whole world. He said, "Sovereign of the Universe, You have created the ox with cloven hoofs and You have created the ass with whole hoofs. You have created Paradise and You have created Gehinnom. You have created righteous men and You have created wicked men, and who can prevent You?" His companions answered him, "Yea, you do away with fear and restrain devotion before God. If God created the evil inclination, He also created the Torah as its antidote." (*Bava Batra* 16a)

In our research, we did not find any statement of R. Akiva that would fit Aher's understanding of predetermination. Although it is just conjecture, we think that the words of R. Akiva that Aher manipulates are from his statement in *Avot* (3:19): "All is foreseen, but freedom of choice is given." Aher manipulates the statement in two ways. First, Aher emphasizes that all is foreseen at the expense of free choice, relegating free choice to mean acting without consequences, whereas R. Akiva means just the opposite. Second, and as support for the first, Aher ignores the second half of the statement, "The world is judged in goodness, yet all is proportioned to one's work," in order to make his point.

<sup>40</sup> *Iyov* 28:17.

<sup>41</sup> The entire chapter is a continuation of Job's parable regarding the preciousness of wisdom. It discusses the difficulty of its acquisition and ends with the verse, "And to man He said: Behold, the fear of the Lord, that is wisdom; and to depart from evil is understanding." As such, R. Meir's interpretation better fits the general theme of the chapter, even if it does not fit well with the particular verse when taken alone.

<sup>42</sup> We think that the words of R. Akiva that Aher manipulates are from

to finish the analogy between the verse and his interpretation, as R. Meir interrupts him. However, if we were to complete the analogy, it would look as follows:

<u>Gold and vessels of glass</u>	=	<u>Vessels of fine gold</u>
If broken, have remedy		If broken, do not have remedy
<u>Scholar</u>	=	<u>Person finer than scholar</u>
If sin, has remedy		If sin, has no remedy

R. Meir interrupts his teacher since he relies on the part of the analogy that makes Aher a scholar who is able to repent. Aher, however, responds to Rabbi Meir that he has already heard from behind the Veil: "Return you backsliding children – except Aher." At this point, Aher has fully accepted his new worldview and has such a confidence in his understanding of the world that he can imply through his exegesis that he is better than his former interpretative community.

After the experience in the Pardes and his transformation of worldview, the Yerushalmi (and Bavli) record incidents in which Aher kills Torah scholars and successful students and attempts to lead unsuccessful students to heresy. His actions demonstrate that he will go to any length to confirm his views

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his statement in *Sanhedrin* (90b), which is based on the verse, "Because he has despised the word of *Hashem* and has broken His commandment; that soul shall utterly be cut off (*hikaret tikaret*); his iniquity shall be upon him" (*Bamidbar* 15:31). R. Akiva interprets the phrase "*hikaret tikaret*:" "*Hikaret* – [he shall be cut off] from this world; *tikaret* – in the next world." However, R. Akiva also understands the expression "his iniquity shall be upon him" to mean that [that he shall be cut off] only if his iniquity is still in him – that is, he still despises the word of *Hashem*. R. Meir recognizes that Aher is using this statement of R. Akiva and therefore calls out for him to repent, yet Aher ignores the latter part of the interpretation to emphasize that he is different from all other *talmidei hakhamim* in that he cannot repent, thereby supporting his interpretation that he is unable to repent and that his fate has been decreed from heaven.

and to protect the honor he still believes he is accorded. His actions become completely destructive. Because of his self-imposed isolation, the only way for him to connect to others and the world around him is to destroy them.

## **R. Akiva**

R. Akiva's influence on the Talmudic literature is extensive and a comprehensive account of R. Akiva's life and method of interpretation would take us far afield from the scope of the present analysis. The sources studied below will therefore only demonstrate how R. Akiva's unique approach directly contrasts with the approaches of the other three scholars.

Like Elisha ben Abuya, R. Akiva also has a partiality that influences his interpretation. However, the goal towards which his exegesis is focused is to legitimate a general positive perspective on life and adherence to the tradition in which he operates.<sup>43</sup> He does not try to self-servingly prove a point or justify a personal opinion. In contrast to Ben Zoma's view of a continual present that influences how one sees the past, R. Akiva views the present as part of an evolving history, so that the present can only be understood in relation to the past and the future. In contrast to Ben Azzai, R. Akiva interprets texts and situations with sensitivity to the uniqueness of the experience and its practical requirements, bearing in mind his own situation or those of others vis-à-vis the ideal position that the situation demands.

In a positive example of how R. Akiva interprets life, and not only texts, through this exegetical perspective, the Talmud recounts:

R. Akiva was once going along the road and he came to a certain town and looked for lodgings but was everywhere refused. He said, "Whatever the All-Merciful does is for good," and he

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<sup>43</sup> See *Berakhot* 61b; *Menahot* 29b.



went and spent the night in the open field. He had with him a rooster, a donkey, and a lamp. A gust of wind came and blew out the lamp, a weasel came and ate the rooster, and a lion came and ate the donkey. He said, "Whatever the All-Merciful does is for good." The same night, some brigands came and carried off the inhabitants of the town. In retelling the story, he said, "Did I not say to you, 'Whatever the All-Merciful does is all for good?'"<sup>44</sup>

Even in times of personal distress, R. Akiva would focus on the positive aspects of an experience rather than the negative, no matter how great the disparity between the two. For example, when his two sons died at the prime of their lives, all of Israel went to lament for them. As the people were about to leave, R. Akiva stood and addressed them:

Our brethren, the House of Israel! Even though these two sons were "bridegrooms," I am consoled on account of the honor you have done [them]. And even though you have come on account of Akiva, there are many Akivas! But this it is what you said [to yourselves]: "The law of God is in his heart, [his footsteps will not falter]." All the more then, two-fold is your reward. Go home in peace!<sup>45</sup>

Despite the pain of losing two sons, R. Akiva consoles himself through the response of his brethren, who came to lament for only a brief period of time.

At the end of his life, R. Akiva shows a similar acceptance of his situation. The Talmud recounts that when R. Akiva was being taken out for his execution by the Roman govern-

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<sup>44</sup> *Berakhot* 60b-61a.

<sup>45</sup> *Mo'ed Katan* 21b.

ment, it was time to say the evening Shema. As the executioners combed his flesh with iron combs, he began to recite the Shema. His students said to him, "Our teacher, even to this point?" He responded:

All my days I have been troubled by this verse, "With all your soul," [which I interpret,] "Even if He takes your soul." I said: When shall I have the opportunity to fulfill this? Now that I have the opportunity, shall I not fulfill it?<sup>46</sup>

R. Akiva's students could not understand how he could maintain perspective because they saw the circumstances of R. Akiva's situation as a challenge, presenting an opposing message to that of the Shema. The Shema mentions the bounty that Jews will receive if they keep the commandments, yet R. Akiva was being executed for doing so. R. Akiva, on the other hand, did not see a challenge, but rather an opportunity. For him, there was no conflict; God provided, even in such a dire circumstance, the possibility for further understanding and commitment. His positive perspective is grounded by his belief that he is beloved by God.<sup>47</sup> He therefore interprets God's providence in a way that continuously demonstrates that he is loved.

R. Akiva not only interprets his own life experiences in such a light, he even interprets the experiences of others and the Jewish community as a whole in a similar fashion. The Talmud records that when R. Eliezer fell sick, his disciples went to visit him. He implied to them that God must be very angry with him to have afflicted him to such a degree. While all the other students broke into tears, R. Akiva laughed. He explained that his teacher's suffering revealed that he has not been given all of his reward; his suffering allows him to settle his debts to merit a more complete reward in the future. R. Eliezer challenged R.

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<sup>46</sup> *Berakhot* 61b.

<sup>47</sup> *Avot* 3:14.

Akiva's interpretation, "Akiva, have I neglected anything of the whole Torah?" Yet R. Akiva justifies his perspective through R. Eliezer's own teaching: "You, O Master, have taught us that there is not a just man upon earth who does [only] good and not sin." R. Akiva also justifies his reasoning with further Scriptural proof.<sup>48</sup>

R. Akiva's positive outlook concerning national events can be seen in his perspective on the destruction of the Temple in Jerusalem. The Talmud records two events in which R. Akiva's interpretation comforted R. Gamliel, R. Eliezer ben Azariah, and R. Yehoshua. In the first story, while they were walking on the road, they heard the noise of the Romans who were a hundred and twenty miles away. The three rabbis fell to the ground weeping, but R. Akiva was merry. They wept over the observation that the Romans were victorious while the Temple was destroyed. R. Akiva, on the other hand, was merry over the observation that the Romans, who offend God, live in safety and ease; therefore, the Jews, who obey God, will clearly have it much better than the Romans in the end. In the second story, the group came to Mount Scopus and saw a fox emerge from the Holy of Holies. Again, while the three rabbis wept, R. Akiva was merry. His merriment was based on his interpretation of various verses in the Prophets which foretell both the destruction of the Temple and its rebuilding. His argument was that since the prophecy of destruction had been fulfilled, the prophecy of its rebuilding must be fulfilled as well.<sup>49</sup> In both cases, as well as in the story with R. Eliezer, R. Akiva does not see the incident as an isolated event; rather, it is part of an evolving history whereby the present can only be understood in relation to the past and the future. This perspective is in contrast to Ben Zoma's view of a continual present.

R. Akiva's perspective of considering everything in the best possible light is reflective of the influence of his teacher Nahum Ish Gamzu, from whom he studied for twenty-two

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48 *Sanhedrin* 101a-b.

49 *Makkot* 24a-b.

years.<sup>50</sup> Nahum Ish Gamzu was known to live by the expression, "This too is for the best," and the Talmud records two different events that demonstrate his perspective.<sup>51</sup>

R. Akiva's flexibility to allow for the most efficacious interpretation of events, which can allow for the most optimal possibility of further growth and opportunity, is also found in his interpretation of texts. He allows for the possibility of deriving many rules and principles from one verse,<sup>52</sup> and he oftentimes relies on verses to support a position rather than rely on tradition alone.<sup>53</sup> In addition, he uses the principle of "inclusion and exclusion" (*ribui u-miut*) instead of "general and particular" (*kelal u-perat*).<sup>54</sup> Through these methods, R. Akiva has more flexibility in justifying his position exegetically as well as more freedom to see alternative positions due to the accepted multiplicity inherent in the three methods. However, R. Akiva also limits the realm of interpretative permissibility by disallowing the derivation of the possible from the impos-

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50 *Berakhot* 22a-b; *Hagigah* 12a-b.

51 *Ta'anit* 21a.

52 "There will arise a man, at the end of many generations, Akiva ben Yosef by name, who will expound upon each tittle heaps and heaps of laws" (*Menahot* 29b). This is in contrast to R. Akiva's contemporary, R. Yishmael, who claimed that one may not derive a large number of teachings from one text.

53 For examples where R. Akiva relies on Scriptural texts to support his position, see *Niddah* 73a and *Mo'ed Katan* 4a.

54 *Shavuot* 26a. The method of "inclusion and exclusion" differs from the method of "general and particular." Through the method of "general and particular," when a verse has a general clause and is then followed by a clause that gives particular examples, the particular is taken to explain the general so that the group that consists of the general category includes no more than that which was particularly specified. Through the method of "inclusion and exclusion," on the other hand, the particular clause limits the general clause to a lesser degree, so that all cases are understood to be included in the general category except for those specifically resembling the particulars which have been explicitly excluded. The method of "inclusion and exclusion" therefore allows for a broader application of the general category.

sible.<sup>55</sup>

R. Akiva's exegetical flexibility allows him to adapt his understanding of a text or an event so that his obligation or expectations can be partially fulfilled when circumstances are less than the assumed ideal. For example, in contradistinction to Ben Zoma's approach, R. Akiva does not interpret pluralities as a unified whole, but rather sees them in their particularities. This is shown in his reading of a passage in Yehezkel:

"But if a man be just, and do that which is lawful and right, and has not eaten upon the mountains, neither has lifted up his eyes to the idols of the house of Israel, neither has defiled his neighbor's wife, neither has come near to a woman in her impurity; and has not wronged any, but has restored his pledge for a debt, has taken naught by robbery, has given his bread to the hungry, and has covered the naked with a garment; he that has not given forth upon interest, neither has taken any increase, that has withdrawn his hand from iniquity, has executed true justice between man and man, has walked in My statutes, and has kept My ordinances, to deal truly; he is just, he shall surely live, says the Lord God."<sup>56</sup> R. Gamliel wept, saying: Only he who does all these things shall live, but not merely one of them! R. Akiva, however, said to him: If so, [what about the passage] "Defile not yourselves in all these things"? Is the prohibition against all [combined] only, but not against one? [Surely not!] But it means in one of these things; here too, for doing one of these

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<sup>55</sup> See *Mekhilta De-Rabbi Yishmael, Nezikin, Mispatim*, 16; *Sifra, Shemini* 10:5-6.

<sup>56</sup> *Yehezkel* 18:5-9.

things [he shall live].<sup>57</sup>

By drawing the comparison, R. Akiva demonstrates that he consistently reads multiple conditions as particulars and not necessarily as a combined unity.

## **Conclusion**

To review our original assumptions, we believe that people use the same method of interpretation both before and after a traumatic event. While the motive for explaining an event may change, the method is the same. This assumption may be a critical factor in predicting an individual's reaction to a trauma. If there is predictive value in studying a person's method of interpretation, there may also be a curative or preventative value in trying to alter his method. Although we have only provided an initial account and analysis of how the Talmudic literature can help to acknowledge that there are distinct interpretative methods that people use to understand the world around them and how those methods influence a person's reaction to trauma, we believe that further investigation along these lines would be fruitful for the study of PTSD.

These assumptions are open to a number of challenges:

1. Are these four methods of interpretation actually distinct? If so, are they paradigmatic? If not, do people use a combination of these methods simultaneously, and how would this affect a predictive analysis?
2. Do people actually use the same method of interpretation both before and after a traumatic event? If so, is PTSD really symptomatic of a change in a person's grounding premise and orientation for understanding the world rather than a change in his method of interpreting the world?
3. Is it possible to change a person's method of interpretation, either before a possible traumatic event (as a means

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<sup>57</sup> *Sanhedrin* 81a.

of prevention) or afterwards (as a means to cure)?

4. How can we effectively test these assumptions?

While proper scientific experimentation and analysis is vital for understanding PTSD, we have attempted to show that incorporating the analysis of Jewish texts into the discourse on how to approach PTSD opens a new avenue for thinking about why people react to trauma in different ways. The paradigms we have culled from the Talmudic literature serve as examples of how interpretation and social engagement colors a person's experiences. This is more than mere literary theory rooted in ancient literature; it has the practical and positive benefit of suggesting new types of research into people's distinct manners of engagement and its relationship to PTSD. Of course, drawing these paradigms from literature is not the same as observing human behavior. However, the similarities between the two are strong with respect to how anecdotal evidence provides a background for empirical hypotheses. As the findings of Steenkamp and colleagues regarding distinct growth trajectories from traumatic experience indicates, our examination of the Talmudic literature has pointed towards cognitive trajectories that imply distinct reactions to trauma.

As a broader point, our research has suggested that science, social science, and the humanities can inform each other. Our explanation of religious texts cannot replace the scientific method, yet it can provide a new understanding of where to focus when engaged in scientific inquiry, opening up avenues for experimentation that were previously unseen or ignored. The narratives provide premises or hypotheses that can subsequently be tested, thereby offering valuable insights for the psychological and spiritual health of individuals and society.

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## *Is Prayer Ever Futile? Three Contemporary Perspectives*

As I sat with the parents of a very sick young patient who was in emergency surgery, I knew the patient's chances of survival were not good. "Can we say some prayers for her speedy recovery?" the patient's father inquired. "Of course!" I responded, and we proceeded to recite *Tehillim* (Psalms) and a *Mi Sheberach* (healing prayer). No sooner had we finished praying than I received a call letting me know that the parents were about to receive the worst news possible. We grieved together. When I went to visit them during *shiva* the next week, the father of the patient intently made his way through the throngs of people gathering to offer their condolences, pointed right at me, and cried "Rabbi, your prayers didn't work!"

This incident brings up crucial questions. In addition to examining the efficacy and goals of prayer in general, we must specifically address the question of prayer in this situation. How should we approach prayer for an end-stage termi-

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nal patient, for whom medical professionals predict no chance of recovery? It is precisely at these moments that families of patients frequently ask their rabbis to hold “*Tehillim* rallies” (gatherings to recite Psalms) or to recite other prayers in the hope that they will contribute to a miraculous recovery. Are such activities encouraged by classic Jewish texts and rabbinic scholars? We will examine three recent leading rabbinic authorities’ approaches to this issue, along with some of the sources that support each of their opinions.

### **I. R. Shlomo Zalman Auerbach**

R. Shlomo Zalman Auerbach takes a very cautious approach to this issue, ruling that prayer for an end-stage terminal patient who is suffering and for whom there is no known medical cure is forbidden under the prohibition against praying for a miracle.<sup>1</sup> This prohibition is based on a *mishnah*:

To cry out over an occurrence which has passed is to utter a prayer in vain. [For example,] if a man’s wife is already pregnant and he says, “May it be Your will that my wife give birth to a male,” this is a prayer in vain. Similarly, if one is coming along the road and he hears the sound of screaming in the city, if he says, “May it be Your will that this is not taking place within my house,” this is a prayer in vain.<sup>2</sup>

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1 *Nishmat Avraham, Yoreh De’ah* 335:4 (12). Similarly, it has been reported that when R. Yosef Shalom Elyashiv was asked whether one should pray for the recovery of someone who was brain dead, he answered, “This is a vain prayer!” See Moshe Halbertal, “The Limits of Prayer,” *Jewish Review of Books* (Summer 2010). In a personal communication with the author, it was explained that the context of the question was actually even broader; R. Elyashiv said that praying for any patient who the doctors say has no chance of survival is considered a prayer in vain.

2 *Berakhot* 9:3. A similar point is made in *Rosh Hashanah* 17b-18a regarding prayer for an ill person or for someone in other dangerous situations.

This ruling is codified by *Shulchan Aruch*.<sup>3</sup> R. Auerbach cites the note of R. Akiva Eiger there: “It is forbidden for a person to pray that God perform a miracle that includes a deviation from the natural order.”<sup>4</sup>

Furthermore, R. Auerbach writes that it is best to avoid public prayer gatherings for a person whose physicians have already given up on curing. R. Auerbach was concerned that if people’s prayers are frequently not answered and the patients do not recover, this would lead to a weakening of their faith. Thus, in such a case, one should not specifically pray for the patient to be cured, but rather that “it should be good for the ill person and their family,” that the patient not suffer, and that

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In such cases, the *gemara* states, prayer recited before the divine decree is issued can be answered, but prayer said after the determination of a divine decree cannot be answered. R. Saadia Gaon (*Emunot Ve-De’ot* 5:6) seems to incorporate these rulings into his systematic presentation of Jewish belief when he writes that there are seven things that prevent prayer from being accepted, the first of which is “prayer after a divine decree has been issued.” He bases this view on God’s rejection of Moshe’s prayer to enter the Land of Israel after it had been decreed that he could not go in (*Devarim* 3:23). *Sefer Hasidim* (95) strengthens this point by quoting the *mishnah* in *Berakhot* and arguing that it is forbidden to pray for anything that is improper (“*eino ra’ui*”). Even though it is indeed possible for God to do these things (“*af al pi she-yesh yekholet be-yad Ha-Kadosh Barukh Hu la-asot ken*”), it is still considered a prayer said in vain. Similarly, the Gra comments on our *mishnah* that even though God is capable of answering our prayers with a miracle, asking God to do so still qualifies as a prayer said in vain (*Shenot Eliyahu, Berakhot* 9:4).

3 *Orah Hayim* 230:1.

4 *Hagahot R. Akiva Eiger, Shulhan Arukh*, ad loc. R. Auerbach quotes this source in *Halikhot Shlomo, Hilkhos Tefillah*, ch. 8, n. 56. Interestingly, R. Auerbach conflates prayer for a miracle with prayer in vain.

There are many more sources and nuances related to the issue of praying for (and benefiting from) miracles, as well as regarding the issue of when it is permitted to pray for a patient to die (which R. Auerbach mentions in the context of our discussion in *Minhat Shlomo* 91:24). These sources are beyond the focus of this paper. For a summary of approaches and exceptions to this ruling against prayer for a miracle, see R. Yehuda Turetsky, “Prayer and the Terminally Ill Patient,” *Verapo Yerape* 4: 146-9.

God mercifully do that which is right in His eyes.<sup>5</sup>

R. Auerbach would counsel teachers to instruct their students not to become accustomed to thinking that all prayers are answered the way they want them to be. Rather, he would tell students to view themselves as children standing before a parent; each child asks for something different, and the compassionate parent makes his own accounting of how to respond. A person should pray for his needs, not expect an immediate answer, and rely on the fact that God – Who knows all of the specific accountings of the world – will do the right thing.

R. Auerbach notes out that even when circumstances are bleak, one should never lose hope in God's capability of bringing a cure, should He so choose. However, argues R. Auerbach, even as we maintain hope and trust in God, we should not engage in numerous, persistent prayers for a miraculous cure, for the reasons mentioned above.<sup>6</sup>

This approach recognizes the pitfalls of false hope and seeks to protect us from the dangers of excessively irrational optimism. In my case, then, perhaps it would have been better not to have acquiesced to the father's request for healing prayers, but rather to have found some other way to calm him in a compassionate but realistic manner.

## II. The Steipler Gaon

R. Yaakov Yisrael Kanievsky, known as the Steipler Gaon, takes a different approach to this issue. He is quoted as arguing that it is a mistake to ever lose hope in the value of prayer, even for a desperately ill patient who has no chance of recovery according to the laws of nature.<sup>7</sup>

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<sup>5</sup> *Halikhot Shlomo, Hilkhos Tefillah*, ch. 8, n. 56.

<sup>6</sup> *Ibid.* It is possible that R. Ovadia Yosef was of the same opinion as R. Auerbach, as the prayer he suggests to use in situations in which it is permissible to pray for someone to die is: "Have mercy on this patient and revive him, but if the decree has already been issued, remove his suffering and do what is right in your eyes" (*Hazon Ovadia, Aveilut* 1:39).

<sup>7</sup> *Sefer Toledot Yaakov*, p. 118.

R. Kanievsky offers five reasons for this view. First, even if the patient is not cured, it is possible that his or her suffering will be slightly diminished as a result of our prayers. Second, the patient may live a little bit longer than he would have otherwise, and this also has tremendous value. A third reason is based on the Talmudic statement that, "Even if a sword is placed on one's neck, one should not despair of God's mercy."<sup>8</sup> Even if it seems impossible, R. Kanievsky points out, there are numerous stories about people who have been miraculously cured, and we should thus never give up. Fourth, even if the prayers do not result in any change at all in the patient's condition, they are nevertheless a source of merit for him or her. All of those who prayed aroused Heavenly compassion through their prayers, which were uttered specifically because of this individual. These merits will stand by the individual in the World to Come and may also protect his or her offspring in the future, and they thus have incredible value.<sup>9</sup> Finally, argues R.

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8 *Berakhot* 10a. R. Bahya ben Asher (*Kad Ha-Kemach*, "Tefillah") also quotes this Talmudic source as encouraging one to pray in a case exactly like the one we have described – that of a dying patient ("holeh noteh la-mut"). In contrast, the author of *Minhat Hinukh* points out that the Talmud tells one not to give up hope only when the sword is on ("al") his neck; it is not referring to when the sword is actually penetrating his neck ("mamash betzavaro"). See *Ke-Motzei Shelal Rav: U-Refuah Kerovah La-Vo*, p. 203, for this quote and pp. 203-8 for the opinions of some of those who disagree with it. The latter include R. Bentzion Rabinowitz, the Biala Rebbe, himself a descendant of *Minhat Hinukh*. The Biala Rebbe argues (*Mevaser Tov: Ma'amar Tehiyat Ha-Meitim*) that one should pray for mercy no matter how bleak the situation is, even if one's physician has told him that there is no medical cure for his illness. He bases his opinion on the statement of Ritva (*Bava Metzia* 85b) concerning the two prayers for resurrection of the dead recited in the daily *Amidah*. Ritva writes that the first mention of resurrection alludes to the request to "revive sick people who have reached the gates of death." Abudraham similarly comments that the prayer refers to a patient whom the "doctors consider as if dead." The Biala Rebbe concludes that since the Sages established one prayer in the *Amidah* for the deathly ill to recover in addition to another prayer for all other ill people (*Refá'einu*), it is clearly appropriate to pray that such a critically ill patient recover.

9 This point seems to be based on *Sefer Hasidim* 378.

Kanievsky, these prayers can bring recovery to other individuals and to the community as a whole.<sup>10</sup>

R. Kanievsky thus concludes that one should always engage in prayer, no matter how desperate the situation seems. In the End of Days, when all will be revealed, we will learn how every prayer uttered by each individual somehow did indeed bring about great goodness and salvation.

Perhaps we can suggest that this outlook is supported by the Talmud, which quotes R. Pinchas bar Hamah's teaching: "Whoever has a sick person in his house should go to a sage and have the sage plead for mercy on his behalf."<sup>11</sup> Based on this statement, Meiri writes, "A person should always be confident that if he prays properly, it will nullify the bad decree."<sup>12</sup>

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10 This point finds support in *Nefesh Ha-Hayim*, *Sha'ar* 2:10 (based on *Zohar*, *Toledot* 137a), which states that God desires prayers because they increase holiness and Godly influence in the world, benefitting all those in need of that prayer. I thank R. Yaakov Siegel for bringing this source to my attention.

11 *Bava Batra* 116a.

12 Meiri, *Bava Batra* 116a s.v. "*La'olam*." Similarly, the statement in *Rosh Hashanah* 18a that prayer said after the determination of a divine decree cannot be answered (see n. 2 above) also records an opinion that although "*tefillah*" (prayer) said too late cannot be answered, "crying out in prayer (*tza'akah*) is beneficial for a person both before and after a decree is issued." See also *Berakhot* 32b: "Although the gates of prayer have been locked, the gates of tears have not been locked, as it says, 'Hear my prayer, God, give ear to my outcry; to my tears be not silent.'" Similarly, the Talmud Yerushalmi (*Ta'anit* 8b) states: "Three things cancel a bad decree (*mevatlin et ha-gezeirah kashah*) – prayer, charity, and repentance." Moreover, the *Midrash Tanchuma* (*Vayeitzei* 8) quotes the *mishnah* in *Berakhot* that crying out over an occurrence that has passed constitutes uttering a prayer in vain, but contends that "even until the moment a woman is giving birth, one may still pray about the gender of the child, for it is not difficult for God to transform females into males or males into females." *Bereishit Rabbah* (*Vayeitzei* 6) also quotes this idea in the context of the claim of the Targum Yonatan ben Uziel (*Bereishit* 29:22) that Dina was originally conceived in Rachel's womb but God transferred her to Leah's womb because Rachel prayed to give birth to Yosef instead. See also Rabbeinu Bechaye (*Devarim* 11:13): "The strength of prayer is so great that it can even change nature and save a person from danger, nullifying a decree." For a summary of perspectives

Indeed, R. Kanievsky points out elsewhere that one is not only encouraged to pray in such circumstances, but this is the ideal time to pray. Although reciting daily prayers is a rabbinic enactment according to most opinions, prayer during an “*eit tzarah*” (a time of distress) is obligated by the Torah.<sup>13</sup>

What about R. Auerbach’s concern that this falls under the prohibition against praying for a miracle? R. Kanievsky quotes *Hazon Ish* (his brother-in-law), who was asked this precise question. *Hazon Ish* responded that he knew of a rabbi who was told by his physicians that he would live only a short while longer, but who then went on to live another thirty years. Sometimes, despite a dire prognosis, a person can indeed live much longer. We are thus not praying for a miracle, but simply that the doctors are wrong.<sup>14</sup>

This approach maintains the crucial value of hope and affirms that there are often ways of finding optimism and courage even in the bleakest of situations. According to this worldview, it was certainly appropriate for me to engage in prayer with the patient’s father. Although the father did not perceive that these prayers were answered, we are called upon to maintain faith that the prayers did have some impact, even if it is beyond us to know exactly how.

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on how some heartfelt prayers nevertheless appear to go unanswered, see R. Yehuda Turetsky, “Prayer and the Terminally Ill Patient,” 142-4.

13 *Peninei Rabbeinu Ba'al Ha-Kehillat Yaakov*, vol. 1, p. 118.

14 *Sefer Toledot Yaakov*, p. 118. Similarly, *Nishmat Avraham, Yoreh De'ah* 338:1(4) quotes R. Avraham Yitzchak Ha-Kohen Kook (*Da'at Kohan* 140) as claiming that most terminal predictions made by doctors cannot be considered certainties (“*torat vada'i*”), but must be categorized as only possibly true (“*anu mahzikim rak le-safek*”).

Another approach, offered by R. Yaakov Kaminetsky, is that since prayer for a terminally ill person to be cured is a forbidden prayer for a miracle, “rather than praying that the patient be miraculously cured, one should pray that a cure be found for the disease;” see Yonasan Rosenblum, *Reb Yaakov* (Mesorah Publications, 1993), 368. Such a prayer would be permitted, as it does not beseech God to alter the natural order, but assumes the cure must already exist in nature and is just waiting to be discovered. I thank R. Yaakov Siegel for bringing this source to my attention.

### III. R. Joseph B. Soloveitchik

An entirely different perspective on this issue was offered by R. Joseph B. Soloveitchik. In the Rav's view, the goal of prayer is not receiving God's sympathetic answers to our requests, but rather to develop a supportive relationship between a human being and God:

When man is in need and prays, God listens. One of God's attributes is *shomea tefillah*: "He who listens to prayer." Let us note that Judaism has never promised that God accepts all prayer. The efficacy of prayer is not the central term of inquiry in our philosophy of *avodah she-ba-lev*. Acceptance of prayer is a hope, a vision, a wish, a petition, but not a principle or a premise. The foundation of prayer is not the conviction of its effectiveness but the belief that through it we approach God intimately and the miraculous community embracing finite man and his Creator is born. The basic function of prayer is not its practical consequences but the metaphysical formation of a fellowship consisting of God and man.<sup>15</sup>

Similarly, the Rav summarizes his view as follows:

We have the assurance that God is indeed a *shomea tefillah*, One who **hears** our prayers, but not necessarily that He is a *mekabel tefillah*, One who **accepts** our prayers and accedes to our specific requests. It is our persistent hope that our requests will be fulfilled, but it is not our primary motivation for prayer. In praying, we do not seek a response to a particular request

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15 R. Joseph B. Soloveitchik, *Worship of the Heart* (Ktav, 2003), 35. In the same essay (p. 29), the Rav refers to prayer that is not accompanied by distress and anxiety as the only "futile" prayer.

as much as we desire a fellowship with God.<sup>16</sup>

In the view of the Rav, it is always essential to pray, even when there appears to be no chance of recovery or any hope that our prayers will be answered (although the contours of these prayers may have to be adjusted at times to avoid “prayer in vain”). The emphasis of our faith is not on God’s answer, but that God hears our prayers, which forces us to expand what we mean by prayer being “effective.” Truly effective prayer is not that which results in our desired ends, but that which brings about a change in the one offering the prayer, specifically in creating a meaningful relationship and providing true comfort. After all, the experience of being in God’s caring presence throughout our time of need can be the best possible comfort, as the *midrash* says:

It is the way of a father to have mercy, as it says, “As a father is merciful towards his children, so has the Lord shown mercy to those who fear him” (*Tehillim* 103:13). It is the way of a mother to give comfort, as it says “Like a man whose mother consoles him, so will I console you” (*Yeshayahu* 66:13). God says: “I will do that of the father; I will do that of the mother” as it says, “I, only I, am He Who comforts you” (*Yeshayahu* 51:12).<sup>17</sup>

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16 Abraham R. Besdin, *Reflections of the Rav*, vol. 1 (Ktav, 1993), 78.

17 *Pesikta De-Rav Kahana* 19, s.v. *Anochi anochi*. There are many verses in *Tanakh* that emphasize the comforting role that God can play, such as “I am with him in distress” (*Tehillim* 91:15). Similarly, *Tehillim* 147:3 describes God as “the Healer of shattered hearts” and 118:6 states, “God is with me; I have no fear.” Along these lines, *Sefat Emet* (*Va’etchanan* 5632) writes that God is close to a person to the extent that he has *kavanah* in prayer. He homiletically interprets the concept of “*semikhat geulah le-tefillah*” (the proximity of the prayer for redemption to the *Amidah* prayer) as the ability of a person to achieve personal redemption through his understanding of – and connection to – the divine, which is achieved through prayer.



Profound comfort can be experienced as a result of prayer, since it can ultimately bring us closer to God; the comfort itself is the effectiveness of prayer. According to this view, the goal of contact with the Almighty is not only to get our needs fulfilled, but also to be ennobled, to deepen our relationship with God, and to be brought to heights that we could not otherwise reach. Even if we do not receive what we prayed for, prayer that uplifts us and brings us to a closer relationship with God is certainly not uttered in vain. The value of prayer lies not in the response to our prayer from God, but rather in our response to intimately experiencing God's presence.<sup>18</sup>

Not surprisingly, the perspective of the Rav seems to find support in the thought of Rambam.<sup>19</sup> There appears to be a contradiction within Rambam's writings regarding prayer. On the one hand, he suggests certain philosophical problems with the notion that our prayers can change God's mind. Foremost among them, God is not like humans and does not experience human emotions or change His mind.<sup>20</sup> At the same time, Rambam certainly rules that we must pray and supplicate for all of our needs.<sup>21</sup> One profound resolution of these con-

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18 It should be pointed out that according to the Rav, we cannot expect to achieve this connection through prayer alone, but rather through an entire Godly way of life: "Any kind of injustice, corruption, cruelty or the like desecrates the very essence of the prayer adventure... If man craves to meet God in prayer, then he must purge himself of all that separates him from God. The Halakhah has never looked upon prayer as a separate magical gesture in which man may engage without integrating it into the total pattern of his life..." (*The Lonely Man of Faith*, 65).

19 It should be noted that the Rav's view of prayer as "worship of the heart" (*avodah she-ba-lev*) is motivated by his halakhic/existential perspective; the Rav's concern tends to be with human religious consciousness as we direct ourselves to God. Rambam's view, on the other hand, is a more philosophical/theological consideration, focusing on the world as seen from God's vantage point. I thank Professor Lawrence Kaplan for pointing out this distinction.

20 *The Guide of the Perplexed* 1:36, 56; *Yesodei Ha-Torah* 1:11-12.

21 Commentary to the Mishnah, *Berakhot* 4:2; *Hilkhhot Tefillah* 1:2, 8:1; *Hilkhhot Teshuvah* 7:7; *Hilkhhot Matanot Le-Evyonim* 10:16; *Hilkhhot Ta'anit* 1:3-4.

cepts is based on the way that Rambam categorizes the *mitzvah* of prayer, placing prayer among the “actions prescribed to remind us continually of God and of our duty to fear and to love Him, to keep all His commandments, and to believe concerning God that which every religious person must believe.”<sup>22</sup> Based on this and Rambam’s ruling that during prayer one must view himself as though he were literally standing before the Divine presence,<sup>23</sup> some maintain that Rambam does affirm the import of petitionary prayer, but it can be conceptualized as follows:

Just as the Temple code with its laws of purity is intended to create an awe of the Divine presence, so is prayer of supplication intended to sustain a loving awareness of the presence of God, rather than to satisfy a human need. Prayer presents the humanity of the worshiper – including its needfulness that is expressed in petition – before God, but it is not intended as means to satisfy those needs...<sup>24</sup>

*Kiryat Sefer*, one of the commentators on Rambam, explains in the same spirit:

A person should not consider that the primary purpose of prayer is to have his requests answered. This principle is found in *Berakhot* 32b that a person who expects to have his prayers

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22 *The Guide of the Perplexed* 3:44.

23 *Hilkhot Tefillah* 4:16. The Rav similarly defines prayer as “an awareness of man finding himself in the presence of and addressing himself to his Maker, and to pray has one connotation only: to stand before God” (*The Lonely Man of Faith*, 35).

24 Ehud Benor, *Worship of the Heart* (SUNY Press, 1995), 85. This is not to say that God cannot or does not respond to prayer according to Rambam, but simply that the **intention** of prayer is the awareness of God’s presence, not God’s answer.

answered will simply end up heartbroken and that one whose prayers are not answered should keep trying... The purpose of prayer is to show that there is no one other than God to whom to pray and one should realize that he is inherently lacking in this world and only God can rectify the awareness of reality... We want to acknowledge that we are lacking many things, which we mention in prayer before Him to show that there is no one who can fulfill our needs and to save us from our suffering except for God... God does what is good in His eyes as to whether to accept our prayers if they are appropriate or not.<sup>25</sup>

The essence of prayer is thus the sense of accessibility, that we can turn to God and develop the crucial comforting experience of being in God's presence. This does not deny the possibility of Divine acceptance of prayers, but it does view prayer primarily as a mode of worship that inculcates essential beliefs and emotions in the worshiper. This perception recognizes the crucial need for hope within the realistic limits of expectations, encouraging us to maintain faith as we refocus our expectations on something more attainable and possibly even more crucial.

As individuals offering support to patients and their families in a clinical setting, our job is not only to pray for whatever people want, but also to facilitate the deepest spiritual healing possible for those individuals in order to enable them to deal with adversity. After all, even if we pray for an unlikely outcome and the patient miraculously recovers, that miracle

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25 R. Moshe DiTrani, *Beit Elokim, Sha'ar Ha-Tefillah*, 2. Variations of this theme are found in many works. For example, R. Shlomo Breuer (*Hokhmah U-Mussar*, vol. 1, p. 110) asks why we have to ask God for what we need if it would be given to us by God in any event if it is in fact necessary. R. Breuer explains that the primary purpose of prayer is clearly for us to be reminded of our dependence on God.

will necessarily be impermanent; life is fraught with suffering and everyone eventually dies. According to this view, it was indeed highly appropriate to pray with the anxious father of the critical patient, but imperative to couch the focus of those prayers in a desire for God's proximity and support during those trying times and the difficult days ahead, more than in specific pleas for a miraculous recovery.

## **Conclusion**

We have seen three very different, although related, approaches to prayer in bleak circumstances. Each works for different people at different times. The position of R. Shlomo Zalman Auerbach is an important reminder that there may be limits to what it is appropriate to pray for and that we must be sensitive to the ramifications of "unanswered prayers" for many individuals. On the other hand, the Steipler's points serve as a powerful reminder that we can always turn to prayer in times of need and that we must think more broadly about the unfathomable ways in which the Almighty might, in fact, respond to our heartfelt prayers. The Rav offers a nuanced middle approach that affirms the efficacy of prayer and the necessity to pray during trying and seemingly impossible circumstances, while encouraging us to re-conceive the ultimate multifaceted impact of our prayers.

Every individual must develop a philosophy of life and prayer – ideally well before a critical situation arises<sup>26</sup> – that can be integrated into his life and help inoculate him against total despair. It is my fervent prayer that one or all of the approaches presented here will help others strike a balance between maintaining hope and managing appropriate expectations under trying circumstances.

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26 R. Shlomo Breuer (*Hokhmah U-Mussar*, vol. 2, p. 1) makes the point that prayer is meant to inculcate trust in God's omnipotence and compassion, which should optimally be done before a crisis, not in the midst of one, based on the Talmudic statement (*Sanhedrin* 44b), "One should always offer prayers in advance of trouble (*le-olam yakdim adam tefillah le-tzarah*)."

RABBI E. REICHMAN, MD

*Pidyon Ha-Ben*  
(Redemption of the Firstborn)  
in the 21<sup>st</sup> Century:  
An Appendix to  
*Shulhan Arukh*

**Introduction**

*Siman* 305 of *Shulhan Aruch* discusses the laws of *pidyon ha-ben*, the redemption of the firstborn. Below is a brief summary of the basic laws relevant to our discussion.

1. It is a *mitzvah* to redeem every Israelite male child who is a *bekhor* (firstborn) to his Israelite mother with five coins (*selai'm*), which are to be given to a *kohen*.
2. If the father is a *kohen* or *levi*, or if the mother is a *bat kohen* (daughter of a *kohen*) or *bat levi*, the firstborn male child is exempt from a *pidyon*.
3. In order for *bekhor* status to be conferred upon the child, the child must be

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- a) a living, viable child
  - b) a firstborn male, and
  - c) the first to exit the birth canal (*peter rehem*), as the Torah states, “*Kol peter rehem li.*”<sup>1</sup>
4. If a woman has a miscarriage when the fetus is at a very early developmental stage, then a subsequent living male child may still be considered a halakhic *bekhor*. If the stage of the fetus is greater than forty days gestation, it would be considered a *peter rehem* but would not have the legal status of a *bekhor*, as it is not viable. It would therefore preclude the *bekhor* status of a subsequent male birth, as the second child would not be a *peter rehem*.
5. If a woman gives birth to a firstborn male child through cesarean section, the child would not be a *bekhor*, as it is not a *peter rehem* (as it did not exit the birth canal). Furthermore, a subsequent male child born through natural delivery would not be considered a *bekhor*, even if it is a *peter rehem*, as it was preceded by another and is not the firstborn.

The *siman* further addresses a number of complex cases and areas of ambiguity related to this unique ceremony.

Since the completion of *Shulhan Arukh* some 500 years ago, a number of technologies and developments have arisen that present fresh challenges to the *halakhah* of *pidyon ha-ben*. As a means of illustrating the halakhic impact of these technologies, we humbly suggest the addition of a number of *se'ifim*, or supplemental sections to *Shulhan Arukh*, that could possibly be added to the chapter on *pidyon ha-ben* if it were written anew today. Each *se'if* contains one or more halakhically related statements, akin to the format of *Shulhan Arukh*, and is followed by

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<sup>1</sup> *Shemot* 34:19.

a narrative commentary. Of course, these statements are by no means to be considered authoritative, but are rather used as a literary vehicle to explore the different issues. This exploration is merely preliminary and is intended to reflect the possible halakhic implications of today's advancing scientific technologies. We await the subsequent additions of the *nosei kelim* (i.e., the reader).<sup>2</sup>

### **Supplemental *Se'ifim* (sections)<sup>3</sup>**

1. Gender Selection
2. Conjoined Twins and the Two-Headed Child
3. The Kohen Gene
4. Fetal Surgery
5. Ectogenesis
6. Male Pregnancy
7. Animal Gestation
8. Artificial Reproductive Seed
9. Uterus Transplant
10. Ovarian and Testicular Transplant
11. Nuclear Genome Transfer
12. Gestational Surrogacy

### ***Se'if* 1 – Gender Selection**

One is not required, and it may in fact be forbidden, to perform gender selection in order to increase the likelihood of a firstborn male child so that the *mitzvah* of *pidyon ha-ben* may be fulfilled.

#### *Commentary*

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2 Each *se'if* merits its own full article. Some references are provided for those interested in pursuing the research further.

3 Other supplemental chapters could include the laws of *pidyon* as they relate to forceps delivery and the use of incubators for neonates. Both of these issues have received ample treatment in the halakhic literature.

If one gives pause to consider how often a *pidyon ha-ben* is performed today, it seems remarkably infrequent, or at least less frequent than one would anticipate. After all, there appear to be many firstborn male children. To what can we attribute this statistical oddity? The answer lies in the halakhic exclusions for *pidyon ha-ben*, which include a female firstborn child, if either the mother or father is a *kohen* or *levi*, if the child is born through cesarean section, or if the birth is preceded by a miscarriage of a minimum developmental age.

These exclusions are generally not in one's control, except perhaps the case of cesarean section. Of course, if an emergency cesarean section is medically indicated for the welfare of the mother or child, there are no other options, but today the threshold for performing cesarean sections is remarkably low. In non-emergent cases, one could perhaps express a preference for a natural birth.<sup>4</sup>

However, there is now another one of the exclusions that is potentially under one's control – the gender of the first child. If an Israelite couple marries, why should they leave the gender of their first child to chance and tolerate a roughly 50% possibility<sup>5</sup> that they will not be able to fulfill the *mitzvah* of *pidyon ha-ben* when they can avail themselves of the technique of gender selection and virtually guarantee that their firstborn child is a male?<sup>6</sup>

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4 R. Y. Zilberstein discusses the case of a woman who prefers a cesarean section for psychological reasons, and whether the husband can force his wife to undergo a natural birth in order to facilitate the performance of the *mitzvah* of *pidyon ha-ben*. In the context of this responsum, R. Zilberstein considers how much one would have to pay in order to bring in an expert physician who will prevent a cesarean section and deliver the child naturally. See *Shiurei Torah Le-Rofim* 4:238.

5 This statistic ignores the possibility of a miscarriage.

6 We will not discuss the merits of the different methods of gender selection, which range from sperm-sorting to pre-implantation genetic diagnosis, the latter of which is far more effective.



All forms of gender selection require sperm procurement, which is halakhically problematic.<sup>7</sup> Is gender selection permitted in order to facilitate the performance of the *mitzvah* of *pidyon ha-ben*?

The use of gender section has been discussed by a number of contemporary authorities.<sup>8</sup> There is unanimity with respect to allowing its use to prevent sex-linked diseases. There is likewise unanimity against its use for family balancing (unrelated to fulfilling the *mitzvah* of *peru u-revu*). There is, however, debate as to when and if it can be used to facilitate fulfillment of the *mitzvah* of *peru u-revu* to have the minimum number of male and female children. Some allow gender selection if a couple have four or five children of one gender and wish to conceive a child of the other gender to fulfill *peru u-revu*.

The rabbis of the Talmud proffered suggestions regarding how to conceive a male child.<sup>9</sup> Thus, if, in theory, gender selection is not halakhically problematic, it stands to reason that it would be permitted. For example, it may not be permitted to prospectively procure sperm exclusively for gender selection. However, if a couple is undergoing infertility treatment and has already produced embryos for implantation, some *posekim* have permitted the performance of gender selection on the pre-existing embryos. In any case, no rabbinic authority permits the use of gender selection for the exclusive purpose of fulfilling the *mitzvah* of *pidyon ha-ben*.

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7 Sperm procurement is generally permitted, with limitations, in the treatment of infertility and the fulfillment of *peru u-revu*. See, for example, Jakobovits, Y., "Male Infertility: Halakhic Issues in Investigation and Management," *Tradition* 27:2 (1993): 4-21.

8 See, for example, Steinberg, A., "Behirat Min Ha-Ubar," *Assia* 77-78 (20:1-2) (January 2006): 76-89; Zilberstein, Y., and Grazi, C., "Choosing Embryos for Implantation in Order to Prevent Disease or Choose Gender" (Hebrew), *Sefer Assia* 8 (5755), 46-50.

9 See Reichman, E., "Tazria and Childbirth: An Open and Shut Case," in D. Z. Feldman and S. W. Halpern, eds., *Mitokh Ha-Ohel* (New York, 2010), 263-76.

## **Se'if 2 – Conjoined Twins and the Two-Headed Child**

2a- In a case of conjoined twins, a number of factors require consideration to determine if the laws of *pidyon ha-ben* apply: the type of conjoined twins (at which part of the body they are conjoined), the type of birth, and the likelihood of survival.

2b- In the case of a two-headed baby who is born naturally, ten coins must be given to the *kohen*.

2c- In the case of twins joined by different body parts who clearly can be separated, if the birth occurs naturally, only five coins must be given to the *kohen*.

2d- If the conjoined twins are determined to have a prognosis of less than a year, they are considered a *treifah* and no *pidyon* is required. There is a debate as to whether the determination of prognosis and *treifah* status is made based on the present status of the twins or based on their status after surgical separation, assuming such separation is possible.

### *Commentary*

The birth of conjoined twins is not an event of modern origin; conjoined twins have been observed since antiquity. However, the ability to diagnose conjoined twins prenatally, usually via routine ultrasound, is a phenomenon of the modern era. While this has clearly had an impact on the incidence of abortion of conjoined twins, it has also significantly reduced the number of conjoined twins who are born through vaginal delivery. This in turn limits the likelihood of a requirement of *pidyon ha-ben* for conjoined twins. However, conversely, the performance of an ultrasound allows the team of physicians to prepare for a possible natural delivery if preferred or indicated, thus increasing the success of such a natural delivery beyond that of pre-ultrasound days.

There are, of course, many laws that relate to this complex situation. Interestingly, the most famous rabbinic source about conjoined twins deals primarily with the issue of *pidyon ha-ben*.<sup>10</sup> The Talmudic passage addresses a case of a two-headed child, a variant of conjoined twins, and based on scriptural analysis requires ten coins be paid to the *kohen* for redemption, five for each head (*gulgolet*).

This exceptional requirement of ten *sel'a'im* may only apply to a two-headed child, who has two heads with one body. It is unclear how this would apply to other forms of conjoined twins, which vary depending on their organs of connection. In a case in which the twins are clearly two separate beings, only five coins would be required. Thus, in the case of the famous Siamese twins, who were born vaginally, had they been Jewish, only one of them – the one whose head exited the birth canal first – would have been obligated in *pidyon ha-ben*.

R. Yaakov Reischer addresses the case of craniopagus twins (joined at the head) and states that since they are halakhically two separate beings, if they are born breech (the only manner in which to deliver them naturally), only five coins are required to redeem the child whose head exited first. However, ten coins would be required if the heads exit together.<sup>11</sup> This logic is not entirely clear to me. If R. Reischer considers the conjoined twins to be separate halakhic entities, then there can only possibly be one firstborn. As such, irrespective of how the babies are delivered, assuming it is through the birth canal and not by cesarean section, only five coins should be owed to the

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<sup>10</sup> *Menahot* 37a. For halakhic discussions on conjoined twins, see, Bleich, J.D., "Conjoined Twins," *Tradition* 31:1 (1996): 92-125; Reichman, E., "Are Two Heads Really Better Than One: Halakhic Issues Relating to Conjoined Twins and the Two Headed," *Verapo Yerapei* 4 (2012), 25-49.

<sup>11</sup> *Shevut Yaakov* 1:4. This would actually have been impossible in the specific case of craniopagus twins that R. Reischer discusses, as he describes in detail a case in which the heads are connected at the top and the two children are aligned in sequence.

*kohen*. Indeed, *Shulhan Arukh* states that if two males are born and we do not know which exited first, only five coins are given to the *kohen*.<sup>12</sup>

Tur accepts the conclusion of the Talmudic passage and requires ten coins for the two-headed child, but does not discuss other forms of conjoined twins.<sup>13</sup> *Shulhan Arukh* makes no mention even of the Talmudic case of the two-headed baby. Given today's knowledge of conjoined twins, in addition to the ability to separate them, this case would merit addition to the modern *Shulhan Arukh*. Dr. A. Abraham assumes that the issue of *pidyon ha-ben* for conjoined twins is halakhically moot as these cases are invariably born by cesarean section. There are, however, a number of recorded cases of different types of conjoined twins that have been born vaginally.<sup>14</sup> For these cases, the obligation for *pidyon ha-ben* would potentially apply.

### **Se'if 3- The Kohen Gene**

3a- The presence of the *kohen* gene (Kohen Modal Haplotype) in a man who is not otherwise known to have been a *kohen* by family history does not preclude the requirement of a *pidyon* for his firstborn son.

3b- The absence of the *kohen* gene from a man who is a practicing, self-identified *kohen* with a family lineage of *kohanim* (*kohen muhzak*) does not negate the exemption from *pidyon* for this man's firstborn son.

3c- The *kohen* gene has no impact on the mother's status as a *bat kohen*, as the gene has only been identified on the Y chromosome, which women do not possess.

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12 *Shulhan Arukh, Yoreh De'ah* 305:25.

13 *Tur, Yoreh De'ah* 305.

14 See, for example, Keith, D., "Vaginal delivery of full-term conjoined twins," *Journal of Obstetrics and Gynaecology of the British Empire* 64:5 (1957): 726-7; Munkonge, L., "Conjoined twins in Zambia," *East and Central African Journal of Surgery* 7:1(2002): 35-39.

*Commentary*

A number of years ago, a group of scientists who were researching Jewish population genetics decided to apply the tools of their trade to identify a genetic commonality among *kohanim*.<sup>15</sup> The initial results piqued the interest of the Jewish community and have subsequently been revised and re-evaluated.<sup>16</sup>

This gene is not found in all *kohanim*, and from a scientific perspective, it is nowhere near certain that this gene (or genes) traces its genetic lineage to a *kohen* who served in the *Beit Ha-Mikdash*. From a halakhic perspective, the value of the so-called Kohen Gene is limited at best. Even if, in theory, the test were 100% determinative of a genetic link to previous generations of male *kohanim*, the test cannot reveal if these earlier *kohanim* had a status of a *halal* (invalid *kohen*), or even if the bearer of the gene is Jewish, as the gene is only paternally transmitted. If a *kohen* married a non-Jewish woman, his son could possess the *kohen* gene even though he is not Jewish.

Might the gene feasibly have some role in the halakhic process? Perhaps when the *Beit Ha-Mikdash* is rebuilt it could be used to convert a presumed *kohen* into a certain *kohen* in order to allow admission to the temple service. We can speculate regarding other uses as well.

### ***Se'if 4- Fetal Surgery***<sup>17</sup>

*4a-* If the fetus is partially removed through an incision in the uterus for the performance of fetal surgery, is sub-

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15 Skorecki, K., et. al., "Y Chromosome of Jewish Priests," *Nature* 385:6611 (January 2, 1997), 32.

16 Hammer, M.K., "Extended Y chromosome haplotypes resolve multiple and unique lineages of the Jewish priesthood," *Human Genetics* 126:5 (2009): 707-17.

17 I thank my son Shmulie Reichman for suggesting this *se'if* for addition to the list.

sequently returned to the uterus for the remainder of gestation, and is then delivered naturally, a *pidyon ha-ben* may be required. Others say no *pidyon* is required.

*Commentary*

Fetal surgery is a relatively new surgical frontier and has been used to treat conditions such as neural tube defects, congenital diaphragmatic hernias, twin to twin transfusion, and congenital heart disease. Its impact on the laws of *pidyon ha-ben* has not previously been considered.

There are two types of fetal surgery – open and minimally invasive. In minimally invasive fetal surgery, the procedure is done under ultrasound and instruments are inserted through a number of small incisions in the mother's abdomen. In these cases, since the baby is not removed from the uterus, there is no immediate impact on the laws of *pidyon ha-ben*. Subsequently, the baby may be born either naturally or via cesarean section, depending on the nature of the procedure. The standard laws of *pidyon ha-ben* would then apply.

In open fetal surgery, an incision is made in the uterus and the fetus is partially or completely removed in order to perform the procedure. After the procedure, the fetus is returned to the uterus and the incision is repaired. From a halakhic perspective, does the partial or complete removal of the fetus during the procedure constitute a cesarean birth, such that no *pidyon ha-ben* is required? Or does the subsequent natural birth obligate a *pidyon*, as the child is a *peter rehem*? At present, this question is moot, as invariably, in cases of open fetal surgery, the subsequent delivery is via cesarean section, as the incision will likely not have healed sufficiently to withstand a normal labor. However, if the incision is small enough, it is possible that the question of *pidyon* could become relevant.

The *gemara* discusses an apparently relevant case of an

animal birth.<sup>18</sup> If an animal is 1/3 removed through an incision in the abdominal wall and the remaining 2/3 is delivered through the birth canal,<sup>19</sup> R. Huna rules that the animal is a *bekhor* (*kadosh*), while Rabbah says that it is not. The debate is whether the conferring of *bekhor* status begins immediately at the initiation of the birth process – in which case the *bekhor* status in this case is nullified, as the birth process did not begin through the birth canal – or if we instead view the entire process in retrospect, and since the majority was born through the birth canal, the animal is a *bekhor*. This passage would seem to be applicable to our case of fetal surgery, although in the latter case, there is a prolonged delay between the stages.

### **Se'if 5- Ectogenesis**

*5a-* A child who developed<sup>20</sup> through ectogenesis would not require a *pidyon ha-ben*, as the criterion of *peter rehem* is clearly not met.

*5b-* If a child underwent the initial stages of development through ectogenesis and was then transferred to the womb of a woman for the completion of gestation and natural birth, a *pidyon* would likely be required.

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18 *Hullin* 69b.

19 Rashi ad. loc. describes what appears to be a cesarean section. He describes this procedure in many places as being performed on both living animals and living human beings with post-surgical survival. Interestingly, medical history only records the first case of cesarean section with maternal survival around the year 1500. Rambam was unaware of the performance of cesarean section with maternal survival and as a result devises a unique circumstance to explain the *mishnah* in *Bekhorot*. On the history of the cesarean section in Rabbinic literature, see Boss, J., "The Antiquity of Cesarean Section with Maternal Survival: The Jewish Tradition," *Medical History* 5 (1961): 117-31; Lurie, S., "Vaginal Delivery after Cesarean Delivery in the Days of the Talmud (2<sup>nd</sup> Century BCE- 6<sup>th</sup> Century CE)," *Vesalius* 12:1 (2006): 23-24.

20 Note that the word "born" is not used, as there is no distinct birth process.

5c- If a child underwent the initial stages of gestation in utero and was then removed through the birth canal and underwent the remainder of development through ectogenesis, it is unclear if a *pidyon* is required. This may depend on the stage of development at the time of its transfer.

### Commentary

One focus of research in assisted reproduction is towards the creation of an entirely artificial womb, whereby part or all of embryological development from the time of conception takes place in the laboratory, entirely outside the uterus. This process is called ectogenesis. In this case, it is possible that there would be no human being at all associated with gestation, and there would be no birth per se. One would simply “pluck” the completed child from the artificial medium when it is ripe. One could argue that such a creature is not even human, as it is not born of woman,<sup>21</sup> although for our purposes we assume that it is. Ascribing maternity in this case would be a matter of discussion,<sup>22</sup> but *pidyon ha-ben* would surely not apply in the unequivocal absence of a *peter rehem*.

In cases in which ectogenesis is used in conjunction with conventional gestation, either before or after, the laws of *pidyon* could apply, depending on the scenario. If *bekhor* status is conferred when the fetus exits to the open air, then the fetus

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21 One could possibly make a similar argument regarding the case of male pregnancy. On the definition of the human being, see Loike, J., and Tendler, M.D., “Revisiting the Definition of Homo Sapiens,” *Kennedy Institute of Ethics Journal* 12:4 (2002): 343-50; Steinberg, A., “The Halakhic Definition of a Human Being” (Hebrew), *Tehumin* 30 (5770), 122-7.

22 For discussions on ectogenesis in rabbinic literature, including the definition of maternity, see Ralbag, M., “Surrogate Motherhood and the Definition of Maternity” (Hebrew), *Ateret Shlomo* 8 (5763): 201-8, esp. 207; R. Waldenberg, E., and Mayer, D., “IVF: A Medical and Halakhic Analysis,” *Sefer Assia* 5 (5746), 84-93, esp. 90-91; Schor, D., “Different Methods of Assisted Reproduction in *Halakhah*” (Hebrew), *Ha-Ma’or* 51:4 (1998): 24-29, esp. 25.



would have to be viable at the time. If the child is not viable upon transfer from the womb to the laboratory, even though it exits the birth canal, it may not receive *bekhor* status.<sup>23</sup>

In the context of his discussion on maternity in surrogate motherhood, R. Z. N. Goldberg theorizes about a case in which a fetus is removed from one woman and transferred to another.<sup>24</sup> His analysis could possibly be applied to this case. He maintains that if the fetus is at an early developmental stage (*lo nirkemu eivarav*) when removed from the first woman, it is not a *bekhor*, and it does not preclude the possibility of *bekhor* for a subsequent birth (*peter rehem*). If it is removed at a later embryological stage, although still non-viable (*nefel*), it likewise would not be deemed a *bekhor*, but would be considered a *peter rehem* and would preclude the possibility of *bekhor* for a subsequent birth.

## **Se'if 6- Male Pregnancy**

*6a-* If a man gestates a fetus in an artificially constructed womb within his body, the resultant child would not require a *pidyon*, as the criterion of *peter rehem* is not met.

*6b-* If a man received a transplantation of the female reproductive organs, including the uterus and external genitalia, and “gave birth” to a male child, it is possible that this child would require a *pidyon*.

### *Commentary*

The fictional film *Junior* (starring the former governor of California) tells the story of a man who becomes pregnant.

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<sup>23</sup> The issue of whether the status of *bekhor* is only activated once the fetus exits to the open air is debated regarding the case of “two uteri adhered to each other and the fetus exits from one and immediately enters the other” (*Hullin* 70a), which is discussed below.

<sup>24</sup> R. Goldberg, Z.N., “The Definition of Paternity and Maternity” (Hebrew), *Yeshurun* 21 (2009): 546-56, esp. 552.

While this scenario has not yet entered the realm of factual science, it is now much closer to fruition.<sup>25</sup> With the combination of stem cell research and scaffolding technology, whereby a scaffolding of an organ is created with biodegradable material and stem cells are cultured around it, scientists are creating organs for transplantation and replacement. Organs including a trachea and bladder have been created and transplanted with the use of this technology. The bladder is not dissimilar in size and shape to the uterus. Perhaps an artificial uterus could be transplanted into a man, who could then carry a child to term. Of course, a number of essential steps are missing in order to accomplish this objective, but it is theoretically possible that it will become a reality in the near future.

What would the *halakhah* be regarding *pidyon ha-ben* in this case? As there are no external female reproductive organs in a male, the delivery would of necessity be a form of cesarean section. This would preclude a *pidyon ha-ben*. However, other scenarios might be more halakhically challenging. Consider, if you will, if this man's wife also bears him a child subsequently. Is it required that his firstborn be born of woman, or would the child he bears be considered the *bekhor* for inheritance purposes? The child born to him would technically fit the criterion of "first of his loins." Consider further if the man serves as a gestational host for a child that is not genetically related to him. Regarding conventional surrogacy, there is an ongoing halakhic debate about whether genes or gestation confers the status of maternity. According to those who consider the gestational mother the legal mother, would gestation of a child within a male confer any parental status whatsoever upon this male, or would it be wholly irrelevant? Is it the gestation per se or the natural gestation of a child within the innate womb of a woman that is halakhically significant?

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25 A. Rowe, "The Future of Reproduction: Male Pregnancy," <http://upstart.bizjournals.com/companies/innovation/2009/04/27/Male-Pregnancy.html?page=all> (accessed on September 1, 2014).

While ovarian transplants have been performed, transplanting an entire set of reproductive organs from a woman into a man presently remains in the realm of science fiction. In the spirit of hypothetical Talmudic inquiry, we include it in our discussion, realizing that it is theoretically possible that it will become a reality. If a man received a transplant of female reproductive organs and the child was a *peter rehem* of this transplanted womb, it is possible that the laws of *pidyon* would apply.

The passage in *Hullin* 70a, which will be discussed further below and is relevant to a number of our scenarios, bears relevance here as well:

Two uteri are adhered one to another and a fetus exits one womb and enters another. Can an animal only have a *peter rehem* for its own child, or is it possible to have a *peter rehem* even if the child is not hers (*lav velad didei hu*)?

The Talmudic debate about whether an animal can confer *bekhor* status (or *peter rehem*) on a genetically unrelated fetus would have a potentially interesting application in this case. Here, the fetus is not *velad didei* (the parent's own child) in the conventional sense, as this usually refers to the woman carrying her own child in her own womb. Similarly, in the case of male pregnancy, the child is "genetically" the man's child, although he is carrying it in a transplanted womb.<sup>26</sup>

### ***Se'if* 7- Animal Gestation**

*7a-* If a human embryo is gestated in the womb of an animal and delivered through the birth canal, it may be subject

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<sup>26</sup> The impact of such a surgery on the gender status of the recipient is beyond the scope of this article. The literature on sex change operations and gender reassignment would be a good starting point.

to the laws of *pidyon*, but it is unclear if the laws of human or animal *pidyon* would apply.

*Commentary*

In the case of male pregnancy, we questioned whether gestation would confer some status of parenthood on the male. Gestation, at least until now, has been the domain of the female of the same species. There are now experiments that are aimed at gestating the human fetus in the womb of another species, specifically the cow. For the sake of discussion, let us assume that the fetus could be delivered through the cow's birth canal. Would the laws of *pidyon* apply to this progeny, and if yes, *pidyon* for a human firstborn or an animal firstborn?

The fundamental question, whether the progeny is human or animal, merits further analysis. Can the debate of maternity in surrogate motherhood be simply assimilated to this discussion?<sup>27</sup> Following the logic to its absurd extreme, according to the opinion that the birth mother is the halakhic mother, the progeny of the cow, despite its genetic human origins, is definitionally an animal. As such, it would indeed be a *peter rehem*, but with a different set of laws – those of an animal firstborn. If genetics determines maternity, then the child is a human that is a *peter rehem* from an animal. Would this cross species *peter rehem* require a *pidyon ha-ben*? Here, we would invoke the same passage in *Hullin* 70a cited above about the two uteri that are adhered one to another and a fetus exits one womb and enters another. Can an animal only have a *peter rehem* for its own child, or is it possible to have a *peter rehem* even

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27 See Y. Scheinberger and A. Rosenberg, "Halakhic Analysis of the Transfer of a Human Embryo into an Animal" (Hebrew), *Ha-Refuah Ve-Hilkhotehab* (Jerusalem, 5758), 65-69; Rotenberg, C., "An Animal Gestational Host" (Hebrew), in *Divrei Haninah* (Jerusalem, 5766), 86-91; R. Halperin, L.Y., "Transplanting a Human Embryo into the Womb of an Animal," in *Ma'aseh Hoshev* 3:1; A. Sherman, "The Status of One Born through IVF with Donor Seed: The Position of Rav Elyashiv זצ"ל," *Yeshurun* 21 (2009): 535-45, esp. 536.

if the child is not hers (*lav velad didei hu*)? What if the child not only is not her genetic child, but is also not her species!? The Talmud leaves this question unanswered (*teiku*) with regard to fetuses of the same species; logic dictates all the more so for those of disparate species.

The *gemara* records the following passage, which superficially seems to be remarkably relevant to our case:

R. Ada bar Ahava asked Abayei: According to R. Meir, who holds that an animal form found within the womb of a woman is considered a viable human fetus (*velad me'alya*) with respect to certain laws, what would the law be for a human form found within the womb of an animal? What is the legal relevance? Whether it is permitted to be eaten.<sup>28</sup>

According to Tosafot, there is no doubt that a human form found within an animal has the legal status of an animal and would be permitted for ingestion.<sup>29</sup>

There is an obvious fundamental difference between the Talmudic case and our case of animal gestation. The passage above refers to a case in which the animal conceived naturally from another animal and gave birth to a creature with a human form. It is unlikely that the conclusion of the *gemara* would apply similarly to a case in which a human embryo derived from human reproductive seed is implanted artificially into an animal. In our case, there is less reason to accord the legal status of an animal to this fetus.

A passage in the *Yerushalmi* is also of potential relevance:

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28 *Niddah* 23b.

29 Tosafot ad loc., s.v. *u-matza*.

If the body is human and the face that of an animal, even if it is reading from the Torah, we say come and let us slaughter you. If the face is human and the body is of an animal and it is plowing the fields, we say to him come and perform *halitzah* for the wife of your brother.<sup>30</sup>

This passage appears to favor facial morphology as the determinant of species. However, none of the above passages is precisely analogous to our case, in which a fertilized human embryo is implanted into an animal for gestation. In this case, as no reproductive material derives from the animal, there is the least reason to ascribe animal status to the child.

R. L.Y. Halperin applies the debate about maternal status in surrogate motherhood to the case of animal gestation. He states that with respect to maternity, if genetics is the determinant, the child is human irrespective of the location of gestation. Regarding *pidyon ha-ben*, while there is technically a *peter rehem*, it is not of a human *rehem*; thus, no obligation would devolve. However, if maternal status is abrogated once the reproductive seed is removed from its natural source, then gestation may establish maternity. If so, perhaps the fetus has a legal status of an animal. It thus may be subjected to *pidyon bechor* for an animal.

### **Se'if 8- Artificial Reproductive Seed**

8a- If the reproductive seed from either a man or wom-

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30 *Yerushalmi, Niddah* 3:2. Another passage that refers to interspecies breeding is found in *Bekhorot* 8a: "Dolphins procreate from man." Rashi and Tosafot interpret this to mean that man and dolphin are crossbreeding. Does the progeny of this mating have the halakhic status of man or animal? If man, would a firstborn male require a *pidyon ha-ben*?

an used in the creation of a firstborn child is produced artificially and the man is a *kohen* or the woman is a *bat kohen*, it is unclear whether the child would be exempt from a *pidyon*.

*9a-* If a man produces a firstborn child with the use of artificial reproductive seed, it is not clear whether he is obligated to give a *kohen* five coins for a *pidyon*.

### *Commentary*

Scientists are now able to produce artificial gametes from human stem cells. Furthermore, it is possible through this process for women to produce artificial sperm and men to produce artificial eggs.<sup>31</sup> This will clearly have profound impact on the definition of maternity, given that it is possible for a woman to contribute the sperm and a man the egg. There is no precedent regarding whether this artificially produced reproductive seed has the status of genuine seed or if it confers the halakhic status of its donor.

In the case of artificial insemination or in vitro fertilization, even though conception may occur in a non-natural fashion, the majority of authorities consider the sperm donor to be the legal father. In the case of artificial reproductive seed, it is not clear if the donor will have legal status as the father. It has been suggested that if a halakhic *mamzer* produces a child through artificial reproductive seed, the status of bastardy is not bestowed upon the child.<sup>32</sup> According to this logic, that the legal status is abrogated with the use of artificial seed, the transmission of the *shevet* status, normally conveyed paternally, would also be abrogated. Thus, if a *kohen* or *bat kohen* produces a child in this fashion, the child may not be exempted from a *pidyon ha-ben*.

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<sup>31</sup> No child has yet been born through this procedure, although there has been proof of concept.

<sup>32</sup> Raiskin, S., "Insemination with Artificial Reproductive Seed" (Hebrew), *Assia* 81-82 (Adar 5768): 69-78.

## Se'if 9- Uterus Transplant

9a- If a childless woman undergoes a uterus transplant from a childless donor and a child is born naturally, a *pidyon* is required. If either the donor or recipient had previous issue, then it is questionable if a *pidyon* is required.

### Commentary

The first uterus transplant was performed in Saudia Arabia in 2000. From 2012 to 2014, nine transplants were performed in Sweden.

Uterus transplant, along with transplantation of the hand, trachea, and larynx, belongs to the category of non-vital organ transplants. Due to the complexity of the surgery and the risk of the post-operative medications, the first transplants were done exclusively for vital organs, such as hearts, livers, lungs, and kidneys. Today, the field has expanded into non-vital organ transplantation. While this topic merits its own exploration from a halakhic perspective, our focus in the present essay is on *pidyon ha-ben* in the case of uterus transplantation.

For a curious reason, the topic of *pidyon ha-ben* in a case of uterus transplant was discussed in 1907, despite the fact that an actual uterus transplant would not take place until close to a century later.<sup>33</sup> In this preliminary analysis, a number of approaches were suggested.<sup>34</sup> R. Eliezer Deutch cites the hypothetical Talmudic case in which the walls of the birth canal are so dilated that the fetus floats out without directly contacting the walls of the birth canal. The Talmud queries whether it is

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33 Regarding the following discussion, see Reichman, E., "Uterine Transplantation and the Case of the Mistaken Question," *Tradition* 37:2 (2003): 20-41.

34 Deutch, E., letter, *Va-Yelaket Yosef* 10:3 (November 7, 1907): 17.



the physical contact with the walls of the birth canal or merely passage through the air space of the birth canal that generates the *bekhor* status.<sup>35</sup> Rambam considers this a case of a *safek* or questionable *bekhor*.<sup>36</sup> R. Deutch applies this directly to the case of uterine transplantation, in which the walls of the birth canal may still be associated with the organ donor but the air space belongs to the recipient. He therefore considers this a case of a questionable *bekhor*. In a later issue of the same journal,<sup>37</sup> R. Sheftel Weiss cites another passage on the same Talmudic page (cited above) about the case of the two uteri that adhered to one another and the fetus exited from one directly in to the other. The Talmud in this case ponders whether a *bekhor* status can be conferred on an animal conceived by one animal that exits the birth canal of another. This appears analogous to the case of uterine transplantation.

While both R. Deutch and R. Weiss consider the transplanted organs to retain their association with the donor, R. David Tzvi Katzburg, responding to the same query in another journal, considers the organs to completely assume the identity of the recipient. As such, even if the uterus had previously borne a child in the donor, it assumes an entirely new identity in the recipient; a firstborn male child to the organ recipient would be considered a full-fledged *bekhor*.<sup>38</sup>

### ***Se'if* 10- Ovarian and Testicular (Spermatogonial Stem Cell) Transplant**

*10a-* If a man receives a testicular transplant, it is unclear whether the donor or recipient would be obligated to give five coins to the *kohen*. The child should redeem himself when he comes of age.

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35 *Hullin* 70a.

36 *Hilkhot Bechorot* 4:19.

37 Weiss, S., letter, *Ve-Yelaker Yosef* 10:6 (December 1907): 21b, n. 54.

38 Katzburg, D. T., letter, *Tel Talpiyot* 17:19 (June 1908): 169-71.

*10b-* If either the donor or recipient of an ovarian or testicular transplant is a *kohen* or *levi*, no *pidyon* is performed out of doubt.

*10c-* If a previously childless woman receives an ovarian transplant and gives birth to a firstborn male, it is unclear whether the child would require a *pidyon*.

### *Commentary*

In pre-modern times, the definitions of maternity and paternity were clear and irrefutable. Only one candidate was considered for each; the genetic mother and birth mother were one and the same, and only one person could possibly be the father. Since the advent of gestational surrogacy, there have been two possible candidates vying for the status of mother – the egg donor and the gestational surrogate. There is no halakhic consensus on which is the halakhic mother.

There has been no analogous discussion with respect to paternity. While there have been discussions as to whether paternity is generated in cases of assisted reproduction, the question has been whether the sperm donor is considered the legal father or not. There has never been consideration of more than one potential candidate for the father. Recent strides in the field of testicular transplantation, however, might bring the halakhic discussion regarding paternity more in line with those of maternity by introducing another possible candidate for paternity.

The success of treatment of pediatric cancers has created a new medical reality. Many of these children are rendered infertile by chemo or radiation therapies. To remedy this problem, scientists are experimenting with the transplantation of spermatogonial stem cells. This method can, of course, be applied to all infertile men.<sup>39</sup> If a man who has no reproduc-

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<sup>39</sup> The details of this technology are beyond the scope of this article and we

tive seed receives a transplant of testicular tissue with immature sperm cells (spermatogonial stem cells) and produces a child, who is the halakhic father of this child, the donor or the recipient?<sup>40</sup> Genetically, the child is related to the donor, but the “gestation” of the spermatogonia into mature sperm (and subsequent emission) occurs within the recipient’s body. Does this grant complete or partial paternal status to the recipient? Will this question simply lead to a replay of the debate about maternity in gestational surrogacy, or are there differences between the two cases? Regarding our issue of *pidyon haben*, since there will undoubtedly be debate about paternity, we cannot obligate either the donor or recipient in the *pidyon*.

With respect to ovarian transplantation, if we assume that the ovarian tissue retains the identity of the donor, the analysis of gestational surrogacy could be assimilated to this case.<sup>41</sup> However, if we consider the ovarian tissue as an integral part of the recipient, then there is reason to require a *pidyon* for a firstborn male child.

## ***Se’if 11- Nuclear Genome Transfer***

*11a-* If an Israelite woman undergoes nuclear genome transfer to prevent the transmission of mitochondrial disease and the mitochondrial donor is a *bat kohen*, it is questionable whether a firstborn son born from this process would be exempt from a *pidyon*.

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will simplify them for our purposes.

40 On testicular transplants in halakhah, see Gestetner, N., *Le-Horot Natan*, vol. 4, *Even Ha-Ezer* 98-103; Abarzel, E., *Dibberot Eliyahu* 6:30; Katan, C., and Raiskin, S., “Ovarian and Testicular Transplants” (Hebrew), *Asia* 81-82 (Adar 5768): 54-68; Ehrenreich, M., and Carmel, Y., “Testicular Transplants” (Hebrew), unpublished responsum to Dr. Richard Grazi.

41 On ovarian transplants, see Reichman, E., “The Halakhic Chapter of Ovarian Transplantation,” *Tradition* 33:1 (1998): 31-70, Ryzman, T., “Ovarian Transplants” (Hebrew), *Yeshurun* 21 (2009): 565-82; Deutch, M., “The Status of One Born through Ovarian Transplantation,” *Yeshurun* 21 (2009), 586-89.

11b- If the nuclear donor is a *bat kohen* and the mitochondrial donor is not, the child is exempt from a *pidyon*.

### Commentary

Certain genetic defects are found not in the nuclear DNA, but rather in the small amount of DNA that resides in the mitochondria of the human egg. These defects are transmitted only through the mother, as they are found exclusively in the female egg. There is presently a procedure called nuclear genome transfer whereby one can remove the nuclear DNA of the affected woman and place it into the egg of another woman whose nuclear DNA has been removed. The new egg contains the nuclear DNA of one woman and healthy mitochondrial DNA of another. According to those who consider genetics the sole or partial halakhic determinant of maternity, does the mitochondrial donor have a claim on maternity?<sup>42</sup> If yes, then perhaps if only the mitochondrial mother is a *bat kohen*, a first-born child would be exempt from a *pidyon*. According to the other positions on maternity, the status of the mitochondrial donor would bear no relevance to the laws of *pidyon*.

### Se'if 12- Gestational Surrogacy

12a- If a previously childless gestational host has a first-born child through the use of an egg donor who was previously childless, it is questionable whether a *pidyon* is required.

12b- If the gestational host conceived a second child naturally and it is a male, there is reason to require a *pidyon*, as this is her firstborn halakhic child.

12c- If the egg donor subsequently conceives and gives

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42 See Loike, J., and Tendler, M.D., "Creating Human Embryos Using Reproductive Cloning Technologies," *Journal of Halacha and Contemporary Society* 67 (Spring 2014): 37-60. They maintain that the maternal status of the mitochondrial donor is a *safek*.

birth naturally to a male child, a *pidyon* is required.

### *Commentary*

New reproductive technologies have developed at a dizzying rate, and while they have led to the successful treatment of thousands of infertile couples, they have also generated a plethora of complex dilemmas in the secular and halakhic world. Gestational surrogacy in particular, in which one woman contributes the genetic material and another gestates the child in her womb, has proven to be one of the more complex dilemmas. The lion's share of halakhic literature on this topic addresses the issue of the definition of maternity. There is no consensus on this issue and virtually every possible opinion is represented in halakhic literature. While our issue presently is that of *pidyon ha-ben* and not maternity, the explication of the latter bears directly on the former.<sup>43</sup>

If *pidyon ha-ben* only applies to a woman who gives birth to her own legal child, then the *halakhah* in all of the above cases will depend on how maternity is defined. Once we define the halakhic mother, we then need to determine if the criteria for *bekhor* status are met. Is this a firstborn child, and is it the first to exit the birth canal of its halakhic mother?

If no maternity is generated, clearly no *pidyon ha-ben* is required. If the gestational woman is the halakhic mother, it stands to reason that if the other criteria are met (not a *kohen* or *levi*, and first birth) a *pidyon ha-ben* would be required. It is the third possibility, that the genetic donor is the halakhic mother, which is the most interesting from our perspective. A *bekhor* for *pidyon ha-ben* must be a *peter rehem*, but must it be the *peter rehem* for the one Halakhah deems the legal mother?

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43 For a comprehensive discussion of the issue of *pidyon ha-ben* in gestational surrogacy see Halperin, L.Y., "Pidyon Ha-Ben for a Child Born to a Gestational Host" (Hebrew), *Ateret Shlomo* 7 (5762): 91-105, reprinted in his *Ma'aseh Hoshev* 7:16.

Prior to the advent of the gestational host, the event of *peter rehem* was inextricably linked with the halakhic mother. Now it is possible for a woman to deliver a firstborn child through the birth canal even though the child may not be halakhically hers. Does the obligation of *pidyon ha-ben* only devolve if the birth mother and halakhic mother are the same, or are the two halakhic requirements separable?

If we consider the egg donor to be the mother, then even though the child is a firstborn for the gestational surrogate, it is not necessarily a *bekhor*, as the child is not the legal progeny of the gestational host. However, *bekhor* status may possibly be generated even if a woman gives birth to a child to whom she is genetically unrelated. This notion is reflected in the passage in *Hullin* 70a cited above:

Two uteri are adhered one to another and a fetus exits one womb and enters another. Can an animal only have a *peter rehem* for its own child, or is it possible to have a *peter rehem* even if the child is not hers (*lav vlad didei hu*)?

The interpretation of this terse and cryptic passage has occupied commentators for many a century.<sup>44</sup> In fact, due to the extreme improbability, if not impossibility, of its occurrence, it is often cited as the prototypical "hypothetical" case or thought experiment that is not intended to reflect reality but rather to test the parameters and intricacies of the law. It is therefore remarkable how relevant this hypothetical Talmudic case is to the contemporary cases discussed in this article.<sup>45</sup>

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44 For particularly creative homiletic interpretations of this passage, see Braffman, M.D., *Sha'arei Torah* (5685), 7b-8a; Wolf, Y.B., *Nahalat Binyamin* 1 (1907), 33-35.

45 For a detailed explication on the application of this passage to our case, see the article by Halperin, L.Y., *op. cit.*

## **Conclusion**

In sum, we have explored how new scientific advances force us to rethink virtually every aspect of *pidyon ha-ben*. It is noteworthy how the many technologies can impact in varying degrees on the fulfillment of just one *mitzvah*. Analyzing the broader halakhic impact of these advances merits further exploration and perhaps even a dedicated institute.

The responsa form of rabbinic literature, whereby we wait for a practical question to be asked before providing an answer, has served us well for many centuries. However, it may no longer be sufficient for this generation. We may need to engage in anticipatory halakhic analysis lest we fall too far behind.