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I was blessed with the honor of teaching the Y9 Gemara Shiur (third of four levels of Seniors) at the Torah Academy of Bergen County during the 5764 school year. The Talmidim were a wonderful mix of fun-loving young men who enjoyed Torah learning. We had so many great discussions over the year and so many beautiful ideas emerged from these discussions, that we wanted to memorialize the Torah gems that we created. We learned much of the second, fourth and eighth P'rakim of Masechet Sanhedrin as well as many Sugyot (topics) and Inyana D'yoma (subjects that were related to the Yamim Tovim). We have compiled some of these pearls from the variety of topics that we studied, in this Sefer that we have entitled **Pe'ninei Torah** (pearls of Torah). I hope that this volume will be a source of warm memories for the Y9 Talmidim as well as provide insights to Torah students of all ages and levels. We especially hope that Rebbeim will find this Sefer of use in preparation for their interactive Shiurim.

My Tefillah is that all of my Talmidim and I continue to grow in our love of Torah and Yir'at Shamayim. I wish to especially thank my wife Malca and our four children Bracha, Binyamin, Chaya Zipporah and Atara for allowing me the time to complete this special project. I wish to especially thank the Rosh Yeshiva of the Torah Academy of Bergen County, Rav Yosef Adler, for his encouragement and support for this wonderful project. I wish to thank the entire administration, board and staff of the Torah Academy of Bergen County for their great efforts and unwavering support. I owe a debt of gratitude to Mr. Richard Schulz of Teaneck who reviewed the text for grammar and to TABC alumnus Dr. Avi Klein of Teaneck who provided considerable technical support for this important project.

We dedicate this Sefer as a Tefillah to Hashem for the R'fuah Sh'leimah of two relatives of Torah Academy graduates – Yitzchak Zvi ben Miriam Aida, and Moshe Zvi ben Brana.

Rabbi Chaim Jachter
Rebbe, Torah Academy of Bergen County

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Pe'ninei Torah - Torah Gems

This section of the Sefer consists of a collection of some of the brief Torah gems that we produced during our year of learning together. The ideas are presented in the order of when we learned the topics.

1. Sanhedrin 71a – The Gemara presents the view of Rabi Shimon that Ben Sorer U'moreh can never happen as “just because he [stole and] ate a Tarteimar of meat and drank a half a Log of Italian wine, his parents will take him to be stoned”. The Talmidim thought this argument is difficult, as Rabi Shimon seems to be saying that because a Halacha does not seem reasonable to us it does not apply. We responded that Rabi Shimon might be making an argument for why Ben Sorer U'moreh **by definition** is impossible to occur. Perhaps his argument is that parents who bring their son to be stoned are not mentally competent (Shotim). Thus their act of bringing their son to Beit Din (required by the Torah (D'varim 21:19) is invalid, since all actions of Shotim have no Halachic validity (for a somewhat similar argument to spare anyone from the death penalty, see Makkot 7a and see the argument later on this page of Gemara as to why an Ir Hanidachat could never occur).

Rabi Yonatan's response to Rabi Shimon might be understood as saying that such parents are indeed mentally competent and are qualified to bring their wayward son to the Beit Din to administer the death penalty. Jack Newhouse added that a precedent for such parental actions is Avraham Avinu's actions at the Akeida, where he brought his son to be killed in obedience to Hashem's command even if it did not “make sense”. Avraham Avinu is certainly not regarded as a Shoteh. In fact, the Sefer Hachinuch (331) writes that Avraham Avinu's actions at the Akeida should serve as an inspiration and guide for the depth of commitment that we should have to Hashem and His Torah.

2. Sanhedrin 71a - The Talmidim were curious as to why both the Braita here and the Mishna (Sanhedrin 70a) state that the Ben Sorer U'moreh stole money and purchased *Italian* wine. Rashi (ad. loc. s.v. Yayin Haitalki) explains that Italian wine is “Tov and Me'ulah”, exceptional (we noted that Rashi was certainly knowledgeable about Italian wine as he was a professional winemaker). The Ben Sorer U'moreh, we explained, is someone who is developing “expensive tastes” at an early age and does not appreciate the importance of limiting his spending to what he can afford. We also noted the spiritual dangers of developing expensive tastes and spending beyond what one can afford, as the Biur Halacha (329:1 s.v. V'al Y'tzamtzeim) writes “this evil practice leads to theft and crime and will ultimately lead one to be disgraced”. The Biur Halacha urges everyone to establish a budget and discipline one's entire family to strictly adhere to it.

3. Sanhedrin 71a – The Gemara cites Tannaim who believe that an Ir Hanidachat (a city that the Torah requires us to destroy because all or a majority of its inhabitants had become idol worshippers) has never happened and will never happen. First, we noted that this assertion applies only to a Jewish town, as Yericho appears to be treated as an Ir Hadidachat (as the Da'at Mikra commentary to Yehoshua notes; the word Yericho comes from the word moon, suggesting that Yericho was a city of moon-worshippers). Second, we asked why it is impossible for an Ir Hanidachat to occur just because it is

forbidden to burn a Mezuzah that contains Hashem's name. The Tanna'im (including Rabi Eliezer) who argue that Ir Hanidachat cannot occur assume that every Jewish town had at least one Mezuzah and thus could not become an Ir Hanidachat. The problem is that if a Jewish town does not have even one Mezuzah it indeed can become an Ir Hanidachat. Why then does this logic exclude the possibility of a Jewish town becoming an Ir Hanidachat?

Avi Davidowitz answered that the fact that the town identifies itself as Jewish forces us to assume that there must be a Mezuzah somewhere in the town, perhaps buried in someone's attic somewhere in town. Avi Eserner added that it seems that even if the one Mezuzah in the Ir Hanidachat is Pasul (disqualified) it would spare the town from destruction, since even a Mezuzah P'sulah contains Hashem's name, which we are forbidden to destroy. Accordingly, these Tannaim believe that one must assume that a town that identifies itself as Jewish must have at least one Mezuzah (or at least one Mezuzah P'sulah) somewhere in its midst. Rabi Yonatan who believes that it is possible for an Ir Hanidachat to occur disagrees and believes that we are not compelled to make such an assumption. Rabi Eliezer (and the Tannaim who agree with him), though, seem to base their opinion on a fundamental faith in Am Yisrael (an idea that Rav Soloveitchik develops and emphasizes in *Al Hateshuva*).

We also noted that it is related that the Lubavitcher Rebbe (who followed the Chassidic tradition of emphasizing the importance of love and mercy to virtually all Jews) once stated that an Ir Hanidachat would never happen as if he would hear of a city that would seem to qualify as an Ir Hanidachat, he would awaken in the middle of the night and quietly attach a Mezuzah to one of the homes in the city. Other Jews, though, if they would hear of a potential Ir Hanidachat that had one Mezuzah affixed to a home, would sneak into the town in the dark of night and quietly remove that one Mezuzah in order to insure that the town be destroyed. Perhaps the dispute among the Tannaim hinges upon this dispute as to whether one should love and be merciful even to the Jewish residents of a potential Ir Hanidachat. Of course, this dispute has major ramifications regarding how one should relate to Jews that might have only one Mezuzah affixed to their homes and even that one Mezuzah is P'sula. That one Mezuzah P'sulah might be the one act of Yiddishkeit that preserves that family's Jewish identity and spares the family from being spiritually destroyed.

4. Sanhedrin 71a - We noted that this phrase might be understood in a number of ways. Rav Yosef Dov Soloveitchik (in the *Ish Halacha*) understands the phrase to teach the value of Torah study even if it does not have any practical applications. We noted that the Gemara's (*Brachot 17a*) description of *Olam Habah* includes *Tzadikim* sitting and enjoying the radiance of the divine splendor, might support this view. The reward of Torah study, as Josh Berger notes, involves enjoying the close encounter with Hashem (enjoying the radiance of the divine splendor) even if there is no real life application. However, we noted that even if there will not be a case of *Ben Sorer U'moreh* we receive a this-worldly reward from the practical lessons we learn from *Ben Sorer U'moreh*. For examples of these lessons, see *Teshuvot Igrot Moshe* (Y.D. 3:35) and further in this work.

Jeremy Kenter asked if the study of *Korbanot* today also might be described in terms of *D'rosh V'kabel S'char*. I responded that the study of *Korbanot* today involves far more than that. First, learning about *Korbanot* serves as a substitute for offering *Korbanot* (*Menachot 110a*). In fact, I have heard that the *Chafetz Chaim* explains that it is due to this Talmudic passage that the *Talmud Bavli* extensively comments on the *Masechtot* that discuss *Korbanot* even though it does not comment on issues that do not apply "in our times", such as almost all of *Seder Zera'im* and *Seder Taharot*. Moreover, the Gemara (*Rosh Hashana 30a*) teaches the importance of *D'rishat Tzi'on* (devoting attention to matters concerning *Yerushalayim*). Studying *Korbanot* seems to fulfill the *Mitzva* of *D'rishat Tzi'on*. Finally, one expresses his yearning for the arrival of the *Mashiach* by studying the *Halachot* regarding *Korbanot* in eager anticipation of soon offering them in the *Beit Hamikdash*. Indeed, the *Rambam* (*Hilchot Melachim 11:1*) teaches that it is insufficient to believe that the *Mashiach* will arrive, but that one must yearn for the *Mashiach* as well (*Rabi Yehuda Haleivi's* writings are an example of such yearning).

5. Sanhedrin 68b - Yisrael Ellman asked: Why was the original formulation of the Halacha recorded in this Mishnah expressed in an ambiguous manner in order to not explicitly state an indelicate matter? The indelicate matter had to be explicitly stated anyway and the goal of speaking B'lashon N'kiyah (euphemistically) was not accomplished in any case. I answered that the attempt to speak euphemistically teaches the profound importance of speaking B'lashon N'kiyah. Although the goal was not accomplished in this particular case, the fact that Chazal made such an effort teaches us to speak B'lashon N'kiyah whenever possible. I suggested a reason for the importance of Lashon N'kiyah. Sexual matters have the potential to overwhelm one's attention and personality; witness this unfortunate phenomenon in the Western world today. This is a psychologically destructive phenomenon for at least two reasons. First, is that it cheapens these matters, thereby diminishing the importance of marriage, family and life itself! Second, it overwhelms one's personality, thereby diminishing other vitally important aspects of his personality. A potentially positive and healthy aspect of one's personality is thereby transformed into a destructive force.

6. Sanhedrin 68b – 69a - The Halacha that a boy potentially can become a Ben Sorer U'moreh only from ages thirteen to thirteen and three months, teaches a vitally important message. Our concern is that the behavior of the Ben Sorer U'Moreh is a predictor of future criminal activity (Nidon Al Shem Sofo; Sanhedrin 71b). The very beginning of one's post-Bar Mitzva or adult life is thus the predictor of future activity. Indeed, in Halacha we find that the very beginning characterizes the rest of the process in many contexts (e.g Tefilla – Brachot 34b; writing a Get – Gitin 5b; also see Rav Soloveitchik's Shiurim L'zecher Abba Mori Z"l 1:25). This teaches the vital importance for a Bar Mitzva to be especially careful in his behavior in the first few months after he has turned thirteen, as this time period potentially can characterize his behavior for the rest of his life.

7. Sanhedrin 68b - Tosafot s.v. Ben Sorer U'Moreh – The Talmidim noted that the Pasuk that Tosafot cite from Sefer Melachim is particularly fitting to prove that one is not categorized as an "Ish" at age twelve. David HaMelech addresses his son Shlomo in this Pasuk immediately before the former's death and urges his son to strengthen himself and become an Ish, implying that Shlomo was not yet an Ish at this point. Since the Tanach teaches that Shlomo Hamelech was twelve years old during this conversation, Tosafot's assertion is clearly proven.

8. Sanhedrin 69b – We noted a problem in the Rambam, Hilchot Mamrim 7:11. The Gemara states that a girl cannot become a Bat Sorer U'moreh because of a G'zeirat Hakatuv (a law pronounced by Hashem with no apparent reason). Yet the Rambam offers a reason for this Halacha, that it is not normal for a girl to become obsessed with food and alcohol as a man (girls historically were far less likely to engage in aberrant behavior than boys; one of the many unfortunate effects of modern day life is the increased percentage of girls who engage in aberrant behavior). Yisrael Ellman also asked on the reasoning of the Rambam, why should we care that it is not likely for a girl to engage in aberrant behavior – if she does in fact engage in such activity she should be punished the same as a boy. We first noted that the Rambam (see Hilchot Me'ilah 8:8, Hilchot Temurah 4:13 and the third section of the Moreh Nevuchim) strongly believes that all of Hashem's actions and Mitzvot have a reason that humans can discern upon serious contemplation, even if the Mitzvot are fundamentally Gezeirot Hakatuv. Thus, even if the rule that a girl cannot become a Ben Sorer U'moreh is a Gezeirat Hakatuv, the Rambam believes that we should nevertheless search for a reason for this Halacha. We also answered that Ben Sorer U'Moreh alerts and warns us about deviant behavior among early adolescents. Thus, this Halacha teaches that we must be more vigilant about a boy's potentially deviant behavior, than we are regarding a girl. Indeed, I recall hearing an Orthodox female psychologist who reported that boys more frequently "go off the Derech" than girls. This, of course, does not imply that we should pay less careful attention to our daughters than our sons. It only notes the higher risk involved in raising boys.

Avi Davidowitz notes the the Rambam teaches that a girl is not judged as a Ben Sorer U'Moreh even though she exhibits all the signs of developing into one who will murder in order to obtain money. Yet, Avi notes, she is not treated as a Rodef, despite the fact that her behavior indicates that she will very likely develop into one. Avi notes that this teaches that one is not defined as a Rodef, even if it is

seems to be extremely likely that he will develop into a Rodef (we judge a person “as is”, Ba’asher Hoo Sham; see Rashi to Breishot 21:17). This seems to imply that a very young Arab child who is being raised in a hate filled environments such as in the Balata refugee camp near Jenin is not considered to be a Rodef despite the very high likelihood of his becoming a Rodef in the future.

In general we noted the tension between the concepts of judging one Ba’asher Hoo Sham and Nidon Al Shem Sofo. We suggested that judging Ba’asher Hoo Sham constitutes the norm and thus the Halacha severely limits when we judge someone Al Shem Sofo.

9. We asked why the Rambam (Hilchot Avodat Yom Hakippurim 1: 7) records that the Dayyanim who would administer an oath to the Kohen Gadol would cry because they suspected him of heresy even though there was no basis to be concerned that this particular individual was a heretic. This seems to have been a necessary aspect of the preparation of the Kohen Gadol during the period of Bayit Sheini when heresy was somewhat prevalent. However, since according to the Rambam (Hilchot Melachim 11:1) Korbanot will not be practiced until the arrival of the Mashiach, why does the Rambam record this practice that seemingly will be irrelevant during the idyllic Messianic period? We answered that it might teach the lesson that although it was necessary for the Dayyanim to administer the oath, it nevertheless constituted an Aveira to suspect one regarding whom there are no indications of wrongdoing or wrong thinking. The Rambam might be teaching that that there are consequences even for an Aveirah performed for noble reasons (an Aveirah Lishma) as Rav Elchanan Samet explains at length in his first volume of Iyyunim B’farshot Hashavua regarding Parashat Toldot. This explains why the Dayyanim were crying and feared that there would be divine retribution for this act, as stated in the Gemara (Yoma 19b).

10. Yoma 1:7 – the Talmidim asked that this seems to be disrespectful to the Kohen Gadol. We answered that the Pirchei Kehuna addressed the Kohen Gadol respectfully as “Ishi”, “my sir” and that Chazal are seeking to harness their youthful enthusiasm for Torah in the service of Torah (also see Sukkah 51a).

11. Rambam Hilchot Teshuva 5:1 – Adam Blass noted that the Rambam writes that one has the choice of being either a Tzaddik or a Rasha. The Rambam does not offer the option of being mediocre, as one should not view this as an option in life, even though many people adopt this approach to life. Indeed, the Rambam writes in many places in the Mishneh Torah that one should act K’fee Kocho or K’fee Y’cholto (as best as he can; for example see Hilchot Tefillah 1:3, Hilchot 15:16 and Hilchot Me’ilah 8:8). Ari Ash noted that this might be the reason for Chazal’s surprisingly harsh condemnation of Orpah for failing to join Naomi on her return journey to Eretz Yisrael (Sotah 42b). It seems difficult to condemn Orpah as she does not seem to do anything wrong. Ari explained that Chazal are condemning the phenomenon of mediocrity in general, that we should **not** think that Rut is great, but Orpah is not so bad either and that we have the choice of either following Rut’s example or Orpah’s example. Seth Avner, though, distinguishes between mediocrity, which the Rambam implicitly rejects, and moderation, which the Rambam enthusiastically embraces in Hilchot Dei’ot.

12. Rambam Hilchot Teshuva 3:7 – The Raavad expresses his compassion for those who believe that God is not incorporeal because of their misunderstanding of P’sukim and Midrashim. The Rambam elsewhere (Hilchot Mamrim 3:3) expresses compassion for those Karaites who reject the Torah She’be’al Peh because of the environment in which they were raised. Accordingly, we see that someone is not truly a Rasha if his behavior merely is a result of the way that their parents raised them. David Brandler, in turn, made the poignant observation that if one observes the Torah simply because this is the way he was raised, he is not truly righteous. Thus, the challenge is to observe the Torah not only because of the way in which we were raised but also because we ourselves are committed to Torah. Indeed, we refer to Hashem in the Shirat Hayam as both Zeh Keili (this is my God) and Elokei Avi (the God of my fathers) and in Shemoneh Esrei as both Elokeinu (our God) and Elokei Avoteinu (the God of our fathers).

We wondered why the Rambam expressed compassion for those who did not believe in the Torah She’be’al Peh yet he expressed no compassion for those who believe that Hashem has physical

features (some suggest that this seeming contradiction reflects the fact the Rambam changed his mind about this matter, see Professor Blidstein's essay in the eighth volume of *Techumin*). We suggested that perhaps the Rambam could not express any tolerance for any article of faith that can be proven logically (such as Hashem's incorporeality) and is not dependent on a tradition that is transmitted from parent to child (Teshuvot Radbaz makes such a distinction with respect to the Rambam's attitude toward those who do not believe that in creation).

13. Rambam Hilchot Teshuva 5:7 – The Raavad criticizes the Rambam for raising a question that we cannot not answer. We noted in *Shiur* that the Rambam could defend himself and cite as a precedent the fact that the Tanach raises the problem of Tzaddik V'ra Lo even though no clear answer is provided to solve this problem (e.g. see *Sefer Iyov*; Maurice Rabbeinu added that part of being a Jew and a psychologically healthy human being, is knowing how to live with unanswered questions; in fact, Tosafot and other Meforshim occasionally raise questions and present no answer). The Raavad, though, could respond that the Gemara never raised the Rambam's question regarding the contradiction between free will and divine foreknowledge. If Chazal did not raise this issue, the Raavad might reason, then why did the Rambam raise this irresolvable issue? The Rambam might respond that the Gemara did not raise it because it is not a book of philosophy. The Raavad might respond that the fact that Chazal never composed a book of philosophy indicates that one should not write such books. Accordingly, the core of the dispute between the Rambam and the Raavad might be whether it is proper to write books of philosophy that address issues that Chazal do not discuss.

14. Rambam Hilchot Taanot 5:2 – The Rambam offers a different reason for Tzom Gedalia than what appears in the Gemara (Rosh Hashana 18b). We suggested that the Rambam presents the primary reason for the observance of Tzom Gedalia and the Gemara presents the secondary reason for its observance. The Gemara does not present the primary reason for Tzom Gedalia because it is obvious (Lo Miba'ee Ka'amar). The Rambam, though, might be coming to correct the potential for the primary reason for Tzom Gedalia to be overlooked. This might constitute an example where the Rambam intends us to see both the Gemara and the Rambam in order to understand an issue completely (although even if one merely reads the Mishneh Torah he would know the primary reason for Tzom Gedalia;). Thus, the Rambam's Mishneh Torah on one hand stands alone (as the Rambam writes in his introduction to the Mishneh Torah) but it also serves as a commentary and supplement to the Gemara (see *Harerei Kedem* 2:317-318 where Rav Soloveitchik is cited as providing a different resolution to this problem).

15. Sanhedrin 32b – The Gemara cites Rav Kahane's explanation of the Mishna that we begin a capital trial with Beit Din making a statement that it appears from the testimony of the witnesses that the defendant will be acquitted. The idea behind Rav Kahane's statement appears to place the Beit Din in a frame of mind to be able to search for any reasonable manner to find the defendant innocent. We see that sometimes, mere encouragement facilitates the resolution of a problem. It appears to me that this might be the reason behind something Rav Yosef Dov Soloveitchik told a Talmid when I brought him for a visit in 1985. The Talmid was about to undergo surgery that had the potential to possibly correct some effects of his cerebral palsy. The surgeons told the Talmid that the surgery had only a partial chance of success and the Talmid recounted to Rav Soloveitchik that if the surgery will be successful that some of his problems would be resolved. The Rav immediately responded and corrected the student and said "**when** the surgery will be successful". Indeed, the surgery was successful. I believe that the Rav put the Talmid in a frame of mind where he was confident and able to allow himself to be healed.

16. Sanhedrin 33a – The Gemara presents cases where a Halachic ruling can be reversed. However, we never find that Chazal formally established an institution of an Appellate Beit Din where people can seek an appeal of a Beit Din ruling. This seems to be the core of the debate among the Gedolim of the twentieth century regarding the propriety of the Israeli Rabbinate establishing a Beit Din L'irurim (a rabbinic court of appeals). Such a court has functioned with Rav Kook and Rav Uzziel's sanction since the 1920's; however, many in the Chareidi community continue to disapprove of this institution (see the fourth volume of Rav J.David Bleich's *Contemporary Halachic Problems* for a

discussion of this dispute). Those who approve of this institution may point to the fact that the Gemara provides for the occasional reversal of a Beit Din ruling by a Rav of more eminent stature. Those who oppose the institution may point to the fact that Chazal never established such an institution and therefore neither should we. The same might be said regarding the institution of training women to advise women regarding Hilchot Niddah (Yoatzot Halacha). Proponents of this institution may cite the Gemara (Niddah 13b) that tells of a woman who served in such an advisory role. Opponents of this institution might note the fact that Chazal never established such an institution. It seems to me that these disputes might be resolved over time by seeing if these institutions are a long-term success. We shall discuss later that Rav Soloveitchik expressed that sometimes history resolves certain policy disputes that arise within our community.

17. Sanhedrin 70a – The Gemara states that Hashem created wine simply to soothe mourners and to reward the wicked in this world. Ben Lowy noted that this Gemara obviously should not be understood literally (see the Rambam’s introduction to Perek Cheilek), as wine is a necessity for N’sachim in the Beit Hamikdash. Gershon Rossman explained that we must look at the statement as a whole. Just as wine serving as a reward to the wicked for the few good deeds that they perform is obviously not in the best long-term interest of the wicked, so too mourners drinking wine to soothe their pain does not serve the long-term interests of the mourner. Indeed, we discussed in general that the Gemara’s discussion of Ben Sorer U’moreh should alert us to the danger of alcohol abuse as well as the abuse of food. We also conducted a discussion in Shiur about the disturbing phenomenon of “Kiddush clubs” in Shul and the problem of weekend alcoholics. We noted that Kiddush for Shabbat meals does not pose such a danger (to those without a family history of alcohol abuse) because there is a Shiur for the required quantity of wine, which limits and controls the amount of wine that is consumed.

18. Sanhedrin 72a - We asked why the topic of Kam Lei B’d’rabba Minei, which is a general rule in the Torah that applies in dozens of Halachic contexts, is discussed in the Mishna specifically with respect to Ba B’machteret. Gershon Rossman responded based on the Acharonim (see Margalioth Hayam ad. loc. number seven) who assert that the Torah **permits** but does not require one to kill a Ba B’machteret, (one who tunnels under one’s house in an attempt to enter the house and steal) unlike a Rodef, which the Torah **requires** us to kill. The Torah ideally wishes for us not to kill the Ba B’machteret. The better option is to allow the Ba B’machteret to steal and later summon him to Beit Din for restitution. Gershon observed that if one kills the Ba B’machteret then one cannot demand in Beit Din that his estate pay for the damage that the Ba B’machteret did to one’s property, due to the rule of Kam Lei B’d’rabba Minei. If, on the other hand, one follows the Torah’s ideal and does not kill the Ba B’machteret then one can demand in Beit Din that the Ba B’machteret pay for the damage done to his property. Thus the Mishna presents the rule of Kam Lei B’d’rabba Minei in the context of Ba B’machteret to motivate and accentuate the Torah ideal to choose the option of not killing the Ba B’machteret. One might speculate that the Gemara does not explicitly articulate this ideal, as it would encourage thieves to break into houses. Hence, the Mishna, Gemara and Rambam express this point subtly.

In this context we discussed the question of whether the Torah requires one to try to maim the Ba B’machteret instead of killing him if this will save the householder. This Halacha is explicitly stated in the context of Rodef and it is not clear if it applies to Ba B’machteret as well. Gershon Rossman suggested that it does not apply to Ba B’machteret as it occurs unexpectedly and requires a quick and unplanned response. Thus, one will most likely be unable to maim instead of killing the thief. A Rodef, on the other hand, can often be expected and one can plan in advance how to immobilize the Rodef without killing him such as Tzahal’s use of rubber bullets to control violent Arab street riots. On the other hand, Avi Davidowitz suggested that the Halacha did not have to state that one should use non-lethal methods to stop a Ba B’machteret if possible, because it is obvious that this Halacha applies to Ba B’machteret since it applies to Rodef.

We also discussed whether one is permitted to kill a Katan who is Ba B’machteret just as we are permitted to kill a Katan who is a Rodef (Sanhedrin 72b). We thought that the fact that the Gemara only states that a Katan may be killed if he is a Rodef (immediately after the Gemara concludes its discussion

of Ba B'machteret) implies that one may not kill a Katan who is a Ba B'machteret. Had it been permitted to kill a Katan who is a Ba B'mechteret then the Halacha would have stated this Halacha only in the context of Ba B'machteret and then it apparently would have applied to Rodef as well. The fact that it is stated only regarding Rodef suggests that it does not apply to Ba B'machteret.

19. Sanhedrin 72a – Yoni Safier commented on a Ba B'machteret that Ein Lo Damim, which Rashi (s.v. Mai Taima) explains “it is as if he has no blood or Neshama and it is permitted to kill him”. Yoni notes that this phrase seems to indicate that killing a Ba B'machteret (and certainly a Rodef) is not categorized as “permissible murder”. Rather it is not an act of murder at all. A Nafka Minah (practical implication) could be whether a Kohen who kills a Ba B'machteret (or Rodef) is permitted to serve in the Beit Hamikdash as well as recite Birkat Kohanim, just as Rav Ovadia Yosef permits a Kohen who (while serving in Tzahal) killed an enemy soldier, to recite Birkat Kohanim (Teshuvot Yechave Da'at 2:14, and see Rav Ezra Frazer's essay in Beit Yitzchak 35:661-662).

20. Sanhedrin 72a – See the Margali'ot Hayam (ad. loc. number 72) who presents that the Rambam and Ra'avad argue whether the Halacha considers the straightforward (Pshat) reading of the Chumash in both the context of whether the Ba B'machteret rule applies during the day and whether wild animals will literally no longer roam free during the time of Mashiach. The Margali'ot Hayam argues that the Raavad believes that we cannot ignore the plain meaning of a Pasuk in the Torah. We suggested that this might be a reason why the Ra'avad expresses compassion for those who do not accept the incorporeal nature of Hashem.

21. Sanhedrin 72b - The Gemara states that a father would certainly not kill his son but that a son might kill his father. This indicates that the feelings of a father for his son are deeper and more profound than the feelings of a son for his father. The reason for this might be since a son must break from his father and establish an identity independent of his father, as stated in the Torah (Breishit 2:24). In this light one may understand a conversation I had with Rav Yosef Dov Soloveitchik in 1983. I asked the Rav whether one should recite the Bracha of Shehechyanu when seeing one's father upon returning from a year of Torah learning in Eretz Yisrael (one recites this Bracha only for someone that one is particularly excited to see, Shulchan Aruch Orach Chaim 225:1). The Rav responded that a father should likely recite it when he sees his son but that he is not so sure if a son should recite it when he sees his father (I recited this Bracha when I saw my father when I returned from learning in Eretz Yisrael, as I enjoyed a particularly close relationship with my father z"l).

22. Sanhedrin 72b – The fact that the Gemara permits us to violate Shabbat in order to save a Ba B'machteret (if Yesh Lo Damim) if the tunnel that he was digging caves in and threatens his life, seems to prove the consensus opinion among Poskim that we are permitted to violate Shabbat in order to save the life of someone who intentionally and negligently placed himself into danger (unlike the opinion of Rav Shlomo Kluger, Chochmat Shlomo Orach Chaim 329:1). One who digs a tunnel in order to burglarize a house is certainly recklessly endangering his life. Nonetheless, the Gemara requires us to violate Shabbat to save his life despite his negligence. The Poskim who rule leniently include the Mishna Brura (Shaar Hatziyun 331:17), Rav Moshe Feinstein (Teshuvot Igrot Moshe Yoreh De'ah 3:90) and the Shmirat Shabbat K'hilchata (32: note 96).

23. Sanhedrin 72b – The Margali'ot Hayam (ad. loc. number 10) grapples with the question as to whether we are permitted to kill a Safek Rodef (someone who might be a Rodef). This issue seems to be debated by two of the greatest Poskin of the latter part of the twentieth century, Rav Moshe Feinstein (Teshuvot Igrot Moshe Choshen Mishpat 2:69) and Rav Shlomo Zalman Auerbach (cited in Nishmat Avraham 3:225). They debate whether an abortion is permitted in a case where a fetus **possibly** endangers the life of the mother (we are permitted to perform an abortion according to the Rambam Hilchot Rotzei'ach 1:9 and the Shulchan Aruch Choshen Mishpat 425:2 only if the fetus is regarded as a Rodef with respect to its mother). We discussed in Shiur how this issue often occurs in the Israeli army where situations arise where it is not clear whether an Arab is endangering one's life. Our Shiur heard from a guest speaker from Israel who fought in Jenin in 2002 who described that Tzahal's policy was not

to shoot at someone classified as only a Safek Rodef. This seems to be in accordance with the view of Rav Moshe Feinstein who forbids killing a Safek Rodef. On the other hand, TABC's Dr. Joel Berman described to me how Tzahal's policy in Lebanon in the 1980's permitted killing a Safek Rodef. This policy seems to accord with the view of Rav Shlomo Zalman Auerbach. Rav Shlomo Zalman is cited as proving his ruling from the fact that our Gemara explicitly permits killing a Ba B'machteret regarding whom there is only a Safek that he might be willing to kill. On the other hand, Rav Shlomo Zalman's proof seems to be debatable, as we have noted that the Halachot regarding Ba B'machteret and Rodef are not necessarily identical. Moreover, the fact that one has engaged in attempting to break into another person's house allows us to regard his life as forfeited even if we are not sure that he potentially intends to kill if he encounters resistance. However, the Safek Rodef may not be endangering another person's life and might be doing nothing wrong at all even though his action raises suspicions (such as an Arab walking through a field in the middle of the night in a tense border area). Thus, it is not clear that one may kill a Safek Rodef even though one may kill a Ba B'machteret regarding whom we are not certain that he intends to kill.

24. Sanhedrin 72b – Rashi s.v. Yatza Rosho. Rashi asks on the Mishna's rule of Ein Dochin Nefesh Mipnei Nefesh (we do not kill one individual in order to save another) from the wise woman of Shmuel 2:20 who sacrificed Sheva ben Bichri's life in order to spare her entire town from destruction by Yoav ben T'zruyah. The Talmidim asked why not simply answer that she acted incorrectly. I answered that the Tanach signals its approval of her action. First, the Tanach (Shmuel 2:20:16) refers to her as a wise woman (she is one of a number of "wise women" in Sefer Shmuel who dramatically impact the course of events in this Sefer). Second, the Tanach (ad. loc. Pasuk 22) describes her as arranging "in her wisdom" the execution of Sheva ben Bichri. Third, the Tanach never records any negative reactions to Sheva's execution as it does with respect to the killing of Avner ben Ner or Amasa ben Yeter (see e. g. Melachim 2:2:5).

Rashi offers two defenses of the wise woman's actions – either that Sheva ben Bichri would have died in any case or that Sheva ben Bichri was not innocent as he was a Moreid B'malchut (a rebel against the monarchy, whom Halacha permits one to kill, probably because he is a Rodef to the community as he threatens the stability of the country). We noted an incredibly important Nafka Minah between these two opinions, whether we may kill someone who is going to be killed anyway, in order to preserve other lives. Rav Itamar Warhaftig (Techumin 4:144-152) discusses this issue in the context of whether one may destroy part of a collapsed building (and thereby kill those remaining in that part of the building) in order to save the lives of the people in the remaining sections of the collapsed building. Rav J. David Bleich (Tradition Fall 1996) discusses whether we may kill one Siamese twin in order to save the other twin if the twins would both have died had nothing been done. We noted that the question of whether we are permitted to shoot down a hijacked airplane in order that the terrorists not drive it into a building and kill thousands, to a great extent hinges on the two approaches presented by Rashi.

25. Sanhedrin 73a – Rashi (s.v. Ve'eilu) explains that one reason that we kill a Rodef is to spare him from performing a terrible Aveirah. Jack Newhouse explains this Rashi in light of the celebrated explanation of the Rambam (Hilchot Geirushin 2:20) that we may coerce a man to give a Get in a situation where the Halacha requires him to do so (even though the man's consent is necessary to execute a Get), since one's Neshama truly wishes to perform Mitzvot. The Rambam explains that it is only one's Yetzer Hara that is preventing him from doing what his "true self" wishes to do. One's Neshama's desires represent the true self and thus the man is not considered to be acting against his will, even though Beit Din coerces him to give a Get. Jack suggested that a Neshama of one who is about to perform a heinous crime such as murder or rape would prefer to die rather than do such a terrible deed. Thus, Jack argues that Rashi means that by killing a Rodef one is acting in accordance with the wishes of the Rodef's true self and is literally saving the soul of the Rodef.

26. Sanhedrin 73a – Avi Eserner asked why the Mishna describes the Rodef as one who pursues "Chaveiro", a colleague. I responded that perhaps it is teaching that one is considered to be a Rodef only if he is pursuing someone who is an "equal". We should clarify, though, that the Halacha essentially

considers all people to be equal in terms of the value of their life, as Rashi explicitly states (Sanhedrin 74a s.v. S'vara hee). However, Rashi (Sanhedrin 72b s.v. Yatza Rosho) and the S'ma (Choshen Mishpat 425:8) argue that a fetus is not considered to constitute a "complete life" and thus we may save a woman by aborting her fetus if her fetus is threatening her life. Accordingly, I suggested that perhaps a doctor who is about to perform an abortion that is not sanctioned by the Halacha is **not** considered to be a Rodef, since the fetus is not considered a "colleague" of the Rodef. This question seems to be identical with the question of whether one must sacrifice his life in order to avoid performing an abortion (this question arose during World War Two when Nazis threatened Jewish doctors with death if the doctors refused to perform an abortion; see Rav Unterman's discussion of this issue in volume six of Noam, page 52). The Minchat Chinuch (296) rules that one is not required to sacrifice his life in order to avoid performing an abortion, since the blood of one who is born is "sweeter" than the blood of a fetus. Moreover, the Minchat Chinuch writes that one who aborts a fetus (in a situation that the Halacha forbids one to do so) is not considered a Rodef. See, however, Teshuvot Igrot Moshe (Choshen Mishpat 2:69:4) where Rav Moshe Feinstein raises the possibility that one might be required to sacrifice his life in order to avoid performing an abortion. Indeed, Rav Moshe adopts the approach (perhaps more so than any of the other major Poskim) that abortion constitutes murder from a Halachic perspective. However, since he is not certain about this matter, one may **not** infer from Rav Moshe that one who performs an abortion has the status of a Rodef.

27. Sanhedrin 74a – Rav Akiva Eiger cites the view of Tosafot (Sotah 10b s.v. Noach) who argues that since the Gemara (Bava Metzia 59a) equates embarrassing others with murder, that one must give up his life in order to avoid embarrassing others. The Meiri (in his commentary to Brachot 43b and Sotah 10b) clearly disagrees with the opinion of Tosafot and Rav Yehuda Henkin (Teshuvot B'nei Banim 1:41) notes that the Sefer HaChinuch (240), Rav Yehuda HaChasid and Menorat HaMa'or (2:5:2) also seem to disagree with the ruling of Tosafot (for further discussion of this matter, see Rav Daniel Feldman's *The Right and the Good* pp. 3-10 who presents the views of the various Rishonim and Acharonim who debated this issue). Maurice Rabbeinu presented an interesting *reductio ad absurdum* argument (a method used often by the Gemara to disprove an argument, by showing that it leads to an absurd conclusion) on behalf of the Rishonim who disagree with Tosafot. He argues that embarrassing someone cannot possibly literally constitute the equivalent of murder, as Beit Din does not administer capital punishment to one who embarrasses another. Similarly, Beit Din does not simply humiliate someone who deserves the death penalty instead of putting him to death.

28. Sanhedrin 37a – Enon Avital thought that the reason why the Gemara cites the Pasuk "Vayarach Et Rei'ach B'gadav" (Breishit 27, where Yitzchak Avinu smells the clothes of Yaakov Avinu in an attempt to discern whether it is Yaakov or Eisav who is standing before him) to prove that it was worthwhile for Rabi Zeirah to be friendly with and positively influence a group of hooligans, is that it hints to the efforts Yitzchak Avinu made in an attempt to draw Eisav closer to the path of Avraham Avinu. It also might support the Amora'im who criticized Rabi Zeirah for these efforts as the Eisav story might demonstrate the futility and danger for a Tzaddik to attempt to positively influence those who have deviated from the Torah path.

Nonetheless, the Gemara notes that eventually the hooligans became observant, thus vindicating and possibly proving the approach of Rabi Zeirah. In fact, this Gemara seems to prove the approach of Rav Yosef Dov Soloveitchik (cited in *Chamesh D'rashot* and *Nefesh HaRav* p.88) that sometimes "history" proves certain opinions to be correct. The Rav, for example, argues that the devastating losses of the Nazi Holocaust proves the approach of Religious Zionism that Jews should move to Eretz Yisrael and help build a Jewish State. In *Nefesh HaRav*, Rav Hershel Schachter cites a number of sources to prove the Rav's assertion that history may decide and resolve certain disputes. In addition to these sources and the conclusion of the Rabi Zeira story we may cite the Ramban (Breishit 49:10) who proves his assertion that the Chashmona'im sinned by assuming the monarchy from the fact that they met a terrible end. The Da'at Z'keinim (Breishit 9:5) proves that the Rav who ordered children to be killed instead of being forcibly converted during the Crusades made a grave error, from the facts that the edict abated and the children were killed unnecessarily and that the Rav was killed in a very painful manner.

29. Sanhedrin 37a – The Mishna states that the fact that Hashem created only one man at first, teaches that each person should believe that the entire world was created for him. Moshe Katz observed that this is not an arrogant attitude, rather a strategy for building self-esteem. It serves as an antidote to the Yetzer Hara that sometimes tries to destroy us each day (Kiddushin 30b) by diminishing our self-esteem. We noted that the lesson of the Mishna (regarding the murder of Hevel) that we view a person as a combination of himself and of his descendants. This serves to enhance one's self-esteem as it magnifies an individual's self-worth (see Yeshayahu 56:3-5 for how the Navi enhances the self-esteem of the infertile). Teachers can use this as a strategy for enhancing the positive manner in which they regard their Talmidim and of the awesome responsibility that faces them.

30. Sanhedrin 37b – The Mishna cites a Pasuk in Mishlei that teaches that there is joy when the wicked die. This seems to contradict the Mishna (Avot 4:24) that cites a Pasuk in Mishlei that teaches us not to rejoice when our enemy falls. Moshe Katz observed that a typical method of the Tanach is to present two contradictory P'sukim in order to arrive at the truth (see the thirteenth of Rabi Yismael's methods of interpreting the Torah that we read each day during Shacharit). The contradictory P'sukim temper each other and place each other in proper perspective. In this case Moshe suggested that the P'sukim do not teach that one should rejoice that the wicked have perished, but rather we should simply view it as a positive phenomenon. Ami Kozak added that we should understand that the world is a better place when the wicked are gone. Adam Blass added that we should feel a sense of relief when the wicked fall and not rejoice.

31. Sanhedrin 37b – The Gemara describes a case where Rabi Shimon ben Shetach witnessed overwhelming circumstantial evidence that a murder occurred. Nevertheless, he indicated that a Beit Din would not convict, because two witnesses did not see the actual murder (he did say, though, that Hashem would punish the murderer). We discussed whether a Beit Din would convict O. J. Simpson for the alleged murder of Nicole Brown. I noted that there are two reasons why he might be convicted. First, is that many Poskim (including Rav Zalman Nechemia Goldberg, see Techumin volume 23) rely on DNA evidence. Indeed, the Beth Din of America relied on DNA evidence to a great extent in resolving the Aguna problems of the World Trade Center disasters (as I discuss in my forthcoming Gray Matter Part Two). Second, is that the Melech enjoys the right to punish a criminal in a case where Beit Din cannot punish someone due to a Halachic technicality, such as the failure to administer a warning (Rambam Hilchot Melachim 3:10 and Derashot HaRan 11).

32. Sanhedrin 37b – The Gemara describes that a snake came and killed the murderer that Rav Shimon ben Shetach had encountered. We noted the parallel between this story and the story recorded in Sanhedrin 19b where Rav Shimon ben Shetach successfully summoned an angel to punish those Dayyanim who feared Yannai HaMelech. In both cases Rav Shimon ben Shetach fully complied with the Torah's instruction to Dayyanim (Devarim 1:17) not to fear any man, as even murderers did not intimidate him. In Sanhedrin 19b an angel executed Rav Shimon ben Shetach's order and here a snake executed Rav Shimon ben Shetach's order. Both the angel and the snake were the agents that Hashem sent to carry out the order of the great Tzaddik, Rav Shimon ben Shetach. Maurice Rabbeinu suggested, based on these two passages, that perhaps we can view the snake of Breishit Perek 3 as an agent from Hashem to test Chavah to see if she would obey the command to refrain from eating from the Eitz HaDa'at.

33. Sanhedrin 37b – The Gemara concludes that we do not accept circumstantial evidence even in the context of adjudicating monetary disputes. We noted that this is one of the reasons why Beit Din encourages parties to agree to Peshara (equity and compromise) where the rules of evidence are not as stringent (as I discuss in my forthcoming Gray Matter Part Two and see the rules of the Beth Din of America @ www.bethdin.org). We suggested in Shiur that just as the Melech's justice supplements the Beit Din's rulings in the context of criminal law (Dinei Nefashot), so too Peshara supplements the technical Halacha regarding monetary law (Dinei Mamonot).

34. Sanhedrin 37b – We discussed a monetary dispute that came to my attention. A woman reported that she was driving her car along a quiet narrow two-way road on a weekday afternoon when a large SUV came speeding down the other side in her immediate direction. She swerved to the right in order to avoid the SUV and slammed into a parked car. She explained that she feared for her life, as the SUV was much larger than her car. Meanwhile, the driver of the SUV drove away without stopping and the woman was unable to record the license plate of the SUV. She left a note on the damaged parked car informing the owner of what happened and it turned out that the parked car belonged to a friend. The Talmidim's first reaction was that Adam Mu'ad L'olam, that a person is always responsible for damage he causes unless it is a case of Oness Gammur (entirely beyond one's control, as we fully explained in our discussion of the case of the flying disk). This situation did not seem to constitute Oness Gammur as she made a conscious decision to swerve to the right to avoid the SUV and one who saves himself by damaging another's property must compensate the person who suffered the damage (Bava Kamma 60b, Tosafot ad. loc. s.v. Mahu and Shulchan Aruch Choshen Mishpat 388:2). We suggested, though, that perhaps the woman should be excused from payment since the driver of the SUV gave her no choice but to swerve into the car. Thus, the driver of the SUV would be the culpable party and since it is impossible to identify him, the one who suffered the damage would not be able to recover his loss. This would appear to be analogous to the case described in the Shulchan Aruch (Choshen Mishpat 388:3) where a corrupt government official forces a Jew (by threat of death) to inform him of where a specific fellow Jew stores his valuables. The Shulchan Aruch rules that if he does inform the corrupt official and the latter takes the valuables, the former does not have to compensate his fellow Jew for the lost valuables. In this case the corrupt government official is the Mazzik and the Jew is not responsible since he is not acting of his own volition. We suggested that one is obligated to compensate the individual who sustained the damage only in a case where he had a choice regarding what he would damage. An example of this is the case described in Shulchan Aruch (C.M. 388:2) where a corrupt government official orders one to bring him wine and he subsequently chooses to inform the official about a fellow Jew's operation of an active winery. Since the corrupt official did not order him to deliver the wine from a specific winery, the Jew made a choice regarding whose winery would sustain a loss. In our case, however, the driver of the SUV essentially forced the woman to damage a specific car and thus she should be excused from payment. Yisrael Ellman argued, though, that perhaps the woman has no Ne'emanut (credibility) that an SUV forced her into the car. I argued, though, that since apparently no one witnessed this event, she should be believed because she has a "Meego" to support her claim that an SUV forced her into the parked car. If she was dishonest, then she would have not have reported the accident (Meego D'ee Ba'ee Shatik, see Ketubot 22a). Accordingly, a reasonable argument can be made to excuse the woman from responsibility for damaging the parked car. This case was not submitted to a Beit Din since a claim was submitted to insurance. This does not violate the prohibition to adjudicate monetary disputes in Beit Din as I discuss in my forthcoming Gray Matter Part Two.

35. Sanhedrin 37b – The Gemara describes Galut (exile) as a form of Kappara (atonement). Yoni Safier suggested that this is because Galut can be a form of rebirth, as one begins a new life (as we find regarding Kayin, who drastically changed his lifestyle after murdering Hevel). In addition, see the Rambam Hilchot Teshuva 2:4.

36. Sanhedrin 37b – We noted that it is interesting that the Gemara records a dispute between two Amoraim who were brothers (note that the Gemara specifically states that they were brothers) regarding Kayin's murder of Hevel. We suggested that the Gemara is seeking to communicate that the natural sense of competition that exists between brothers should be channeled into constructive efforts such as clarifying Torah matters, in contrast to the behavior of Kayin.

37. Sanhedrin 37b – The Gemara states that Kayin had to wound Hevel in many places in order to murder him because he did not know how to kill. Avi Davidowitz asked didn't Kayin witness Hevel offer his Korban to Hashem (as the P'sukim seem to indicate) and thus he would know how to kill? We answered that Kayin would not kill Hevel in this manner because Kayin was so pained by the fact that Hashem accepted Hevel's Korban and not his Korban. We also suggested that the Gemara does not

have to be understood literally; rather it is vividly expressing the tragic loss of innocence that accompanies one who commits a grievous sin.

38. Sanhedrin 18a – Rabi Yehuda and the Chachamim disagree as to whether a Melech is permitted to marry the Almanah of a previous Melech. Gershon Rossman suggested that the dispute hinges on whether the respect that the Torah requires us to extend to a king is to the institution of the kingship or to a specific king.

Rabi Yehuda seeks to prove his opinion regarding the permissibility of a king marrying the Almanah of a previous king from the fact that Natan the Navi tells David that Hashem gave David HaMelech “the women of your master [King Shaul]”. Rabi Yehuda understands this to be referring literally to King Shaul’s wives. The Chachamim, though, understand that it is referring idiomatically to King Shaul’s daughters and not literally to the wives of Sha’ul. Josh Pollack was troubled by the fact that the Chachamim interpret the phrase in a manner that is inconsistent with the straightforward reading of the Pasuk. I responded that the Chachamim are probably motivated by the fact that the Navi never records that David HaMelech married the widows of Sha’ul. It does, however, explicitly record his marriage to Michal (and see Sanhedrin 19b regarding his connection with Meirav).

39. Sanhedrin 18a – Daniel Wohlberg asked why the Torah does not forbid the Kohen Gadol to leave the Beit Hamikdash (according to Rabi Yehuda) in the case of the death of a very close friend, lest he violate his Kehunah by touching the dead body, as is forbidden with respect to a very close relative. I responded that it is probably because the incredibly intense emotions exist only at the funeral of family members and the desire to touch the dead body, as Yosef did when Yaakov died, Breishit 50:1. Rav Yosef Dov Soloveitchik’s explains (cited in Yemei Hazikkaron p. 105) that after a very close relative passes away, the connection to him intensifies. Thus, we can understand the temptation to touch the body of a close family member who has passed away. These emotions apparently are not as intense even at the passing of a very close friend.

40. Sanhedrin 18a – We wondered whether it is permissible for a Kohen Gadol to waive the honor that is due him, the same way that a Rebbe and a parent are permitted to waive their honor. On the other hand, perhaps the Kohen Gadol is similar to a Melech who may not waive his honor. David Brandler suggested that the Melech should be exceptional because if he waives his honor then both internal and external security is imperiled (the Melech must maintain both internal and external security, see Rambam Hilchot Melachim 4:10). If the king is not honored, sinister elements inside and outside society will perceive this as a sign of weakness and will likely seek to exploit the situation. Since this concern seems not to apply to a Kohen Gadol, David suggests that perhaps he may waive his Kavod.

41. Sanhedrin 18a – The Mishna states that a Kohen Gadol may serve as a Dayyan. Enon Avital assumed that he might serve as a Dayyan only on the supreme Sanhedrin of seventy one Dayyanim, as this would seem to befit his stature and the honor that is due him. I responded that the Mishna does not state such a limitation, implying that the Kohen Gadol might serve as a Dayyan on any Beit Din. I noted that this recalls an insight that Rav Yosef Dov Soloveitchik (Al HaTeshuva pp. 271-272) cites from the Chatam Sofer. He notes that Yitro suggested that Moshe Rabbeinu delegate authority to others and establish a hierarchy of Batei Din to adjudicate disputes. In Yitro’s vision of this system, Moshe Rabbeinu would handle anything that is a “Davar Gadol”, a matter of great importance (Shmot 18:22). Moshe Rabbeinu, though, implemented Yitro’s suggestion differently. Instead of arranging that a Davar Gadol be brought to him, he arranged that anything that is a “Davar Kasheh” (a matter of great difficulty) be brought to him for adjudication (Devarim1:17). Similarly, one could argue that the Kohen Gadol may serve as a Dayyan on a case that is a Davar Kasheh even if it does not warrant the attention of the Sanhedrin.

42. Sanhedrin 19a – The Gemara presents Halachot that were enacted in Tzipori. In Yerushalayim, Jews did not live together with other nations before the Churban. In Tzipori, however, Jews lived together with Nochim as is evident from a visit to the sight of ancient Tzipori (it had, for example, a

Roman amphitheater). This explains the need for higher standards regarding modesty and greater concern for Jewish unity, as this was the place where many Jews relocated after the Churban (which according to Chazal was caused by lack of Jewish unity).

43. Sanhedrin 19b – We discussed the morality of waging a Milchemet Reshut (discretionary war), which the Rambam (Hilchot Melachim 5:1) describes as expanding the borders and enhancing the reputation of the king (see Rav Yehuda Amital's essay that addresses this issue and appears in Techumin Volume Eight). Ami Kozak suggested that a Milchemet Reshut is waged to enhance the long-term security needs of Am Yisrael. Although one may transgress almost all sins to save a life, one may do so only in a case where there is a present danger, Choleh L'faneinu (see Teshuvot Nodah B'yehuda 2:Yoreh De'ah 210). However, Rav Yechiel Yaakov Weinberg (in a responsum printed in Techumin Volume Twelve) writes that this limitation does not apply to the safety of an entire country. Thus, he argues that the Choleh L'faneinu limitation is not relevant to the question of the permissibility of conducting autopsies that will enhance the health not only of a particular individual, but rather of an entire nation. Similarly, one could argue that Milchemet Mitzva is conducted to save us from an immediate threat and a Milchemet Reshut is waged to enhance the nation's long-term security needs. This probably explains why the Gemara (Brachot 3b) states that the Sanhedrin and Urim V'tumim are consulted before commencing a Milchemet Reshut. Since there is no immediate threat in such a situation, there is time to conduct such a consultation (unlike in a Milchemet Mitzva). Moreover, the Urim V'tumim is best suited to provide guidance for our long term needs and the Sanhedrin can gauge the morality of engaging in such a war.

44. Haggada – We discussed the meaning of the "Dayyeinu" poem. We cited Rav Menachem Leibtag who explains that it is a list of reasons to recite Hallel and each reason is Dayyeinu, sufficient cause for us to do so. Josh Berger suggested that it is a list of reasons for why we should believe in Hashem. Each reason is sufficient cause for us to enhance our Emunah in Hashem, which is a major theme of the Seder (as is discussed in the Rambam toward the end of his commentary to Parshat Bo; in addition, see my Bikkurei Sukkah Number Sixty).

45. Yom Hashoah – We discussed the debate as to whether Yom Hashoah should be integrated into Tisha B'av or commemorated as a separate day (an essay that I authored that summarizes the debate regarding this issue appears at www.koltorah.org). Maurice Rabbeinu and Gershon Rossman suggested an argument for why Yom Hashoah should be commemorated separately from Tisha B'av. Tisha B'av is commemorated for various reasons including the importance of remembering Eretz Yisrael and Yerushalayim (D'rishat Tzion, see Rosh Hashana 30a) and motivating us to perform Teshuva (see Rambam Hilchot Ta'aniot 5:1). Yom Hashoah can be seen as an opportunity to fulfill the Mitzva to remember the evil perpetrated by the ideological heirs to Amalek (The Rav once told me that studying the Nazi Holocaust is a fulfillment of the Mitzva to remember Amalek) and to motivate us to destroy Amalek (see Rambam Hilchot Melachim 5:4). Thus, since these days have different objectives, Maurice and Gershon suggested that Yom Hashoah should be commemorated independently from Tisha B'av.

The Conflict between Rav Shimon ben Shetach and Yanai HaMelech Implications for our Relationship with Medinat Yisrael

In honor of Yom Ha'atzma'ut, we shall analyze an important Halacha and a related story in the Gemara, which has profound implications for the manner in which Torah observant Jews relate to Medinat Yisrael. We shall focus on the question of Beit Din imposing its authority on a Jewish government in Eretz Yisrael that is not fully committed to Torah principles and authority. We shall also analyze this issue in light of the conflict between Rav Shimon ben Shetach and Yanai HaMelech that is recorded in Sanhedrin 19a-b. Our discussion of this issue is based on Shiurim that I delivered to the 5764 "Y9" Gemara Shiur and I am indebted to the Talmidim who contributed many insights.

The Mishna – Checks and Balances in a Torah Government

The Mishna (Sanhedrin 18a) states that Beit Din may judge and impose its authority upon the Kohen Gadol. This seems to be an example of the desirability of having checks and balances built into a Torah government. Indeed, one might understand the Ramban's (commentary to Breishit 49:10) severe criticism of the Hasmoneans (who were Kohanim) for their assuming the role of Melech (king) in this light. When the Kohen Gadol also serves as King, the separation between powers is diminished and the necessary checks and balances between the various leaders of Am Yisrael are impaired (see D'rashot Haran 11, where the Ran discusses the checks and balances between the King and Beit Din and Rav Aharon Lichtenstein's Leaves of Faith Part Two where he devotes an entire chapter to discussing the interaction of Religion and State in Medinat Yisrael).

My Talmid Josh Pollack explains that a Melech will potentially be receptive to Mussar (rebuke) from a Navi because it is understood that this is the role of the spiritual figure in relation to a lay leader. However, a Kohen Gadol will be far less likely to be receptive to a rebuke as he himself is a spiritual figure. The Kohen Gadol will likely view a Navi as a competitor and be less receptive to his message than a Melech who is not a spiritual leader as well.

Josh adds that the desired separation between the powers of a Kohen Gadol and the Melech might be similar to the Torah's division of roles and power between men and women. He added that it might also teach that the powers of the Shul rabbi and president be separated, another example of the importance of separating between the sacred and the profane (Havdalah Bein Kodosh L'chol). We should briefly note that Havdalah is a very fundamental Torah value as we find that in each of the seven days of creation, Hashem makes some sort of separation. It is one of Hashem's primary methodologies that He used in Creation (Rashi to Breishit 2:2 might be understood in light of this insight into the methodology of Creation).

Moreover, my students noted that once a Kohen Gadol assumes political leadership and power he would be an entirely ineffective Kohen Gadol. The effectiveness of a Navi in Tanach emerges from the fact that he was politically powerless and thus objective in his teachings. If a Navi assumes political power, he loses his credibility (except for Moshe Rabbeinu and a very few other exceptions). The same might apply to a Rav. My students added that women in Tanach in many cases exert profound influence (such as Chanah who envisioned the rise of a Melech, see Shmuel 1:2:10). Women exerted such

influence precisely because they had no political power (Paroh's daughter is another example, as is Bat Sheva's influence over Shlomo Hamelech as described in Sanhedrin 70b).

It seems that the Torah fundamentally agrees with John Locke's celebrated assertion that "absolute power corrupts absolutely". This attitude is somewhat reflected by the Halacha (Shulchan Aruch Yoreh De'ah 156:3) that states that Tzedaka is not collected by less than two individuals and is not distributed by less than three people. In fact, the Shulchan Aruch states "No communal authority regarding monetary issues is imposed with less than two individuals".

Similarly, the Mishna (Avot 4:10) strongly advises (see Tosafot Sanhedrin 5a s. v. K'gone Ana) against judging alone as only Hashem is capable of judging alone. Thus, a hallmark of a Beit Din proceeding is the presence of three Dayanim (rabbinic judges) to decide a case (although one judge may adjudicate a dispute in case of need, see Shulchan Aruch Choshen Mishpat 3:2). In fact, the Gemara (Yevamot 121a) lauds the practice of rabbis consulting each other before issuing rulings (especially ones of great importance) citing the Pasuk in Mishlei (11:14) "salvation is found when one seeks much counsel".

However, the Mishna states that Beit Din does not judge a king. This appears very difficult in light of the many instances in the Tanach where a Navi (prophet) rebukes a king, such as the severe criticism directed to Sha'ul HaMelech by Shmuel Hanavi and Natan Hanavi's strong rebuke of David Hamelech. Accordingly, the Gemara (Sanhedrin 19a) limits this ruling of the Mishna to "Jewish kings" or non-Davidic kings, but does not apply to the "kings of the house of David". The Rambam (Hilchot Sanhedrin 2:5) explains that we do not judge non-Davidic kings who do not submit to Torah authority "lest trouble result". The Rambam in Hilchot Melachim 3:7 adds that the non-Davidic kings are arrogant and seeking to impose Torah authority upon them will cause "trouble and losses" to the cause of Torah.

My Talmid Alex Itzkowitz notes that the term "kings of the house of David" do not refer specifically to the family of David HaMelech. Rather, it is a genre of kings who submit to Torah authority (the Gemara presents David as the paradigm for kingly behavior). His proof is that Sh'muel Hanavi criticized Sha'ul HaMelech in Shmuel One Chapter Fifteen and the latter accepted the criticism (see, though, Shmuel 1:16:2; although this may have been after Sha'ul Hamelech became mentally ill). Thus Sha'ul Hamelech would appear to be included in Malchei Beit David for this purpose (for further exploration of the distinction between Davidic and non-Davidic kings, see the Kesef Mishneh and Lechem Mishneh to Hilchot Melachim 3:7).

The Rambam's Evaluation of Jewish Governments that do not Accept Torah Authority

In 1985 I engaged a prominent Chareidi educator in a conversation concerning the values of Religious Zionism. I asked him what he thought of Rav Aharon Lichtenstein and Rav Yehuda Amital's inference from the Rambam (Hilchot Chanukah 3:1) who writes that among the reasons we celebrate Chanukah is the restoration of Jewish sovereignty (Malchut Yisrael) over Eretz Yisrael for more than two hundred years. Rav Amital and Rav Lichtenstein observe that most of the Jewish rulers at this time, such as Herod, were hardly ideal leaders from a Torah perspective. Accordingly, Rav Amital and Rav Lichtenstein conclude that the Rambam believes that the restoration of Jewish sovereignty over Eretz Yisrael is sufficient cause to celebrate even if the Jewish leadership is far from ideal from a Torah perspective.

The Chareidi educator replied that the Jewish kings at that time were at least submissive to the Torah authorities of their time. I replied that our Mishna and Gemara in Sanhedrin show that the kings in the time of Bayit Sheini (the Second Temple) were hardly submissive to Torah authority (they even killed Torah authorities, see Kiddushin 66a and Bava Batra 3b-4a). Although the Chareidi educator did not have an answer to my point, I defend the Chareidi perspective (they follow Rashi who seems to disagree with the Rambam) in an essay that we published last year in Kol Torah in honor of Yom Ha'atzma'ut.

The Conflict between Rav Shimon ben Shetach and Yanai Hemelech

The Gemara cites a story to illustrate why we do not judge Jewish kings who do not submit to Torah authority. The Gemara relates an incident where a slave of Yanai Hamelech killed someone. Rav Shimon ben Shetach told the other rabbis that “let us put our eyes to him (Yanai) and judge him”. It is important to note that Rav Shimon ben Shetach was Yanai’s brother-in-law (he married Yanai’s sister) and that the two had a tense relationship (see Brachot 48a and the Margalioth Hayam commentary to Sanhedrin 19a). Rashi (s.v. Tenu Eineichem; as noted by the Margalioth Hayam ad. loc.) indicates that Rav Shimon ben Shetach, who was the Av Beit Din (Chief Justice), ordered the other Dayanim (rabbinic judges) to judge Yanai, as Rav Shimon ben Shetach was disqualified to judge the case because of his relationship to Yanai.

The rabbis proceeded to summon Yanai to appear in Beit Din, writing to him “your slave has killed someone”. Yanai, in turn, sent his slave to Beit Din for judgment. The rabbis replied to Yanai that he must also come, as the Torah (Shmot 21:29) requires that the owner of the slave appear in Beit Din when his slave is judged. Yanai came to Beit Din and he sat instead of standing respectfully before the Beit Din. Standing while the Beit Din remains seated expresses acceptance of the Beit Din’s authority. Tosafot (Sanhedrin 19a s.v. Yanai, the second Tosafot with this heading on that page) rule that the litigants must rise during the witnesses’ testimony, as well as during Beit Din’s pronouncement of its ruling (G’mar Din; Shavu’ot 30b).

Tosafot equate the need to rise during the G’mar Din and during the witnesses’ testimony, as these are critical moments in a trial and a time when recognition of the Beit Din’s authority is of utmost importance. Rising during the G’mar Din expresses one’s commitment to abide by the Beit Din’s decision. Rising during the witnesses’ testimony, in turn, expresses one’s commitment to present witnesses who will testify in a completely honest manner. Accordingly, since Yanai already implicitly signaled his lack of respect towards the Beit Din, Rav Shimon ben Shetach felt it necessary at the outset of the trial for Yanai to express his acceptance of the Beit Din’s authority.

We should note that Yanai’s behavior is reminiscent of a rebellious student who cannot blatantly disregard his teachers but will “push the envelope” and irritate his teachers and do whatever he can “get away with” as a subtle way of resisting authority. It appears that Yanai could not “get away” with blatantly disregarding the Sanhedrin. Instead he resisted the Beit Din’s authority in more subtle ways.

Rav Shimon ben Shetach then ordered Yanai to stand, as the Halacha (see D’varim 19:17 and Shavuot 30a) requires. Rav Shimon ben Shetach explained that standing is not done to respect the Dayanim, but rather is an expression of respect to the Creator who is present during Beit Din proceedings (see D’varim ad. loc. and Tehillim 82:1). Yanai replied that he would rise only when Rav Shimon ben Shetach’s colleagues request that he rise (recall that Rabi Shimon ben Shetach was not formally serving as a Dayan in this case because of his relationship to Yanai).

The rabbis were petrified of Yanai because he killed great rabbis who did not submit to him (see Kiddushin 66a and Brachot 48a; interestingly, Brachot 48a indicates that Yanai was nonetheless observant of Jewish ritual law). Rav Shimon ben Shetach looked to the Dayanim on his right and his left to see if they would support him in his demand for Yanai’s submission to Torah authority (this was the essence of this conflict, whether Yanai would submit to Torah authority as David Hamelech submitted to Natan the prophet). The Dayanim hung their heads low due to their fear of Yanai (see Pitchei Teshuva Choshen Mishpat 12:1 and Rav J. David Bleich’s Contemporary Halachic Problems 2:134-138 for a discussion of whether the Torah command not to fear any man, D’varim 1:17, requires Dayanim to risk their life).

Rav Shimon ben Shetach then excoriated the Dayanim for being intimidated by Yanai and proclaimed that Hashem will punish them for their lack of faith. The Gemara records that immediately the angel Gavriel came and killed the Dayanim. The Gemara also states that as a result of this tragic

incident, Chazal decreed that we should not impose Torah authority on non-Davidic kings. Interestingly, Gavriel also kills Paroh's daughter's assistants who protested her resisting her father's order to kill all Israelite boys (Sotah 12b).

An Analysis of the Dispute between Rav Shimon ben Shetach and the Dayanim

Rav Shimon ben Shetach and the Dayanim implicitly debated whether Dayanim should risk their lives in an attempt to impose Torah authority upon a non-cooperative civil authority. This argument seems to be similar to other debates between prominent Torah figures and Dayanim who counseled submission to the civil authorities. A classic example is Miriam's criticism of her father Amram (whom Chazal say was the Gadol HaDor, spiritual leader of the generation) for divorcing his wife Yocheved in the wake of Paroh's decree to throw every Jewish newborn baby boy into the Nile (Sotah 12a). Midrashim relates that the Sanhedrin (Jewish Supreme Court) supported Amram's submission to Paroh's decree (Midrash Rabbah 1:13 describes Amram as the Rosh Sanhedrin and P'sikta Rabbati 43 s.v. Davar Acheir Kee describes Miriam as presenting her complaint to Amram and the Sanhedrin). Another example is the Midrash (cited in the Torah Sh'leimah 17:21) that records that Dayanim criticized Mordechai for refusing to bow to Haman, arguing that this action gravely endangers all of the Jewish People.

Similarly, the commentators to the Torah argue whether Yaakov Avinu was correct in his submission to his brother Eisav (Yaakov bowed no less than seven times to Eisav, Breishit 33:3). The Ramban (introduction to Parashat Vayishlach) criticizes Yaakov Avinu whereas the Seforno (33:4) supports him. The "argument" between Rav Shimon ben Shetach and the other Dayanim might be seen in light of this dispute. Sometimes one should follow Yaakov Avinu's example of bowing to Eisav and sometimes one should follow the example of Mordechai refusing to bow to Haman. Rav Shimon ben Shetach and the Dayanim were "arguing" whether to follow the example of Mordechai or Yaakov Avinu regarding Yanai. Yet another example is the debate (see Gittin 56) between Rabi Yochanan ben Zakai and others as to whether it was worthwhile resisting the Roman army in the waning days of the Second Temple era.

It is interesting that the Halacha follows the opinion of the Dayanim that it is best to avoid a confrontation with non-Davidic kings. This illustrates an idea that I have heard from Rav Hershel Schachter that the Torah believes that sometimes one has to choose the less objectionable of two bad choices (see Sotah 48a). Here Chazal felt that it is a better choice to avoid confrontation than attempt imposing Torah authority upon a recalcitrant king.

It is also very interesting that the Halacha follows the opinion of the Dayanim and not Rav Shimon ben Shetach even though the angel Gavriel (who of course does not act independently, but only on Hashem's orders) supported Rav Shimon ben Shetach. Indeed, my student Josh Berger noted that this seems to constitute another example of "Lo Bashamayim Hee", that Rabbanim make Halachic decisions independent of divine guidance and rulings.

This principle is recorded in the Gemara (Bava Metzia 59b) where Rabi Eliezer tried to prove his position in his debate with the rabbis (regarding the ritual purity status of a Tannur shel Achnai) by supernatural means. He even summoned a voice from heaven that proclaimed that the Halacha follows Rabi Eliezer's opinion. Rabi Yehoshua then dramatically rose and proclaimed (citing a Pasuk from D'varim 30:12) that Lo Bashamayim Hee (the Torah is not in heaven). The Gemara then records that Rabi Natan met Eliyahu Hanavi who reported that Hashem was pleased with Rabi Yehoshua's reaction as Hashem "smiled" (of course that is not meant to be understood literally, as Hashem has no physical features) and proclaimed that "My children have defeated Me, my children have defeated Me". Chazal seem to follow the rule of Lo Bashamayim Hee in our case as well, as they disregard the heavenly ruling in favor of Rav Shimon ben Shetach.

Implications for Medinat Yisrael Today

My Talmidim reacted to this story and felt that it has great implications for the question of resisting the current Israeli government's plan to evacuate the Jewish Communities in the Gaza Strip. If one believes that such an evacuation violates Halacha (see my Gray Matter, part one, where I devote two chapters to this issue) then perhaps one should follow the example of Rav Shimon ben Shetach and resist its implementation, as my Talmid Gerson Rossman reacted. My Talmid Avi Davidowitz, though, thought that our Gemara teaches that it is not worthwhile to impose Torah values on a government that does not accept Torah authority. One could counter, though, that the Gemara is speaking of Yanai who was a ruthless dictator who murdered those who opposed him. In a democracy, however, citizens enjoy the right to engage in peaceful civil disobedience.

It seems, though, that this discussion has much broader implications for the fundamental role of Religious Zionism in Medinat Yisrael beyond the specific issue of resisting the evacuation of Jewish communities. Religious Zionism from the inception of the modern Zionist movement has sought to insure the Jewish character of Medinat Yisrael, such as laws that prohibit the sale of Chametz on Pesach and pork year round, Shabbat and Kashruth observance in Tzahal and public transportation not operating on Shabbat. Essentially, this involves imposing Halacha on a civil authority that does not (yet) accept Torah authority. Indeed, Religious Zionists have sought to join almost every Israeli government in order to be part of the civil authority and insure that Medinat Yisrael observes Halacha at least in regard to public matters.

As we know, the implementation of this policy has not always been simple. A prime example is the authority that Medinat Yisrael grants to the State Rabbinical Courts. Officially, the State Rabbinic Courts have authority over all matters of personal status for the Jewish residents of Medinat Yisrael. Thus, marriage, divorce and conversion fall under their exclusive jurisdiction. However, the Israeli civil courts often strive to limit the authority of the State Rabbinic Courts and often impede their effectiveness, such as their ability to resolve situations of Igum. This phenomenon is documented by Rav Yitzchak Breitowitz (who serves as a Professor of Law at the university of Maryland) in his book entitled "The Plight of the Agunah" and Rav Shlomo Dichovsky (a highly regarded member of the Supreme Rabbinic Court of Medinat Yisrael who has made great efforts to reach out to the secular legal establishment) in Techumin 24:51-70.

Our Gemara might provide guidance regarding the efforts that Religious Zionists (who are currently a minority in Israel) should make in imposing Halachic authority on the majority of Israelis who do not fully accept Torah authority. Our Gemara teaches that it is sometimes imprudent to impose Halachic authority although we enjoy the Halachic right to do so (the Mashiach, for example, will coerce all Jews to observe Halacha, see Rambam's Hilchot Melachim 11:4) We should note, though, that there is actually quite a range of acceptance of Torah authority in Israel, as in addition to the religiously observant population, many Jews consider themselves Traditional and are quite content with the current arrangement regarding religion and state in Israel. At minimum, I believe that our Gemara in Sanhedrin teaches that when we exercise our religious authority over Jews who regard themselves as secular, we should do so with utmost sensitivity (for example, when conducting a wedding for a non-observant couple). For further discussion of this critical issue, see the aforementioned essay by Rav Aharon Lichtenstein on Religion and State.

Post Talmudic Development

The Halacha requiring litigants and witnesses to rise in Beit Din has undergone a very interesting post-Talmudic development (although we are not permitted to deviate from Talmudic norms, there is some flexibility regarding certain limited matters). The Rambam (Hilchot Sanhedrin 21:5) records the established practice of all Batei Din in the post-Talmudic era to permit litigants and witnesses to sit during Beit Din proceedings in order to avoid strife "since we do not enjoy the authority to impose Torah law". The Shulchan Aruch (Choshen Mishpat 17:3) cites the Rambam's assertion as normative.

The Shach (C.M. 17:7), however, cites the Bach (both the Shach and the Bach lived in the seventeenth century) who does not challenge the ruling of the Rambam and Shulchan Aruch. Rather, he challenges all Jews “who have the fear of God in their hearts and whose ancestors stood at Mount Sinai (and accepted the authority of Torah Law)” to be concerned for the honor due to Torah and fulfill the Mitzva requiring witnesses and litigants to stand. The Bach writes that the litigants and witnesses should tell the Beit Din that they wish to stand out of respect for the Beit Din and Hashem who is present during its proceedings.

Interestingly, the Aruch Hashulchan (C.M. 17:5), writing in the late nineteenth century, records the practice of many Batei Din where the litigants and witnesses rise respectfully without any strife emerging as a result. The Aruch Hashulchan thus records a transformation that occurred among many Jewish communities where lay Jews heeded the words of the Bach and Shach and restored the honor of Torah without the coercion of the Rabbanim.

Conclusion

The story of the conflict of Rav Shimon ben Shetach and Yanai teaches us the risks involved in attempting to impose Torah law on a civil authority that does not accept Torah authority. It seems to teach that it might be prudent for Rabbanim to sometimes exercise restraint in imposing Halachic authority. However, the Shach and Aruch Hashulchan teach that it is the obligation of the lay community to create a grassroots movement to respect Rabbanim and Torah authority.

Postscript

The Chayyei Adam (67:20) writes that it is forbidden for parents to be excessively demanding of their children, as this will cause them to violate the Mitzvot of honoring and fearing one’s parents. Rather, writes the Chayyei Adam, parents should be “Mocheil on their Kavod” (waive the honor and fear due them) as permitted by Halacha (Kiddushin 32a). We might add that the same applies to Rabbanim, Rebbeim and teachers. One of the sources of the Chayei Adam’s ruling seems to be the Gemara we discussed in this week’s Halacha column that teaches that it is sometimes prudent to waive the honor that one is due.

However, children have the obligation to do their best to fulfill their obligation to honor and fear their parents. Families should strive to create a healthy balance where parents avoid causing their children to violate their obligations to honor and fear their parents and children do their best to fulfill their obligations to their parents. It seems that the Mishna Brura’s urging (239:9) all to be Mocheil offenses committed against them, every evening before they go to sleep, should be understood in light of the Chayyei’s Adam’s ruling and our discussion of the conflict between Rav Shimon ben Shetach and Yanai.

Torah Perspectives on Cloning

There has been considerable debate throughout the world regarding the propriety of cloning. The Torah world has also engaged in considerable discussion of this important issue and a significant literature grappling with this issue from a Torah perspective has emerged. In this essay we shall summarize the basic Hashkafic (philosophic) and Halachic debates that have emerged regarding this issue. This essay also incorporates insights from my TABC Talmidim to whom I presented Shiurim on this topic, especially the 5764 "Y9" Gemara Shiur.

Hashkafic Perspectives

Rav Chanoch (Kenneth) Waxman of Alon Shvut frames the fundamental Hashkafic issues regarding cloning in an essay that appears in Volume Nine of the Torah U'madda Journal. He notes that the core issue is whether cloning constitutes an appropriate exercise of humanity's mandate to conquer the world (Breishit 1:28) or an inappropriate intrusion into the world order similar to the sin of Kilayim (the prohibition to interbreed various species of animals and plants).

On the one hand, Hashem commanded man to be fruitful and multiply and conquer the world. The Ramban (commentary to the Torah ad. loc.) writes that this Biblical verse authorizes man to engage in invasive actions in Hashem's world such as removing metals from the ground. Rav Yosef Dov Soloveitchik in his great essay the Lonely Man of Faith writes that space exploration is a legitimate expression of our mandate to conquer the world. On the other hand, the Ramban (commentary to Vayikra 19:19) explains that Kilayim is forbidden because it constitutes an inappropriate reordering of Hashem's world.

Thus, the basic Hashkafic question regarding cloning is whether it is analogous to Kilayim or space exploration. Rav Yosef Shalom Eliashiv (a leading Israeli Posek) is quoted by Dr. Abraham S. Abraham (see Torah U'madda Journal 9:195 and 216) as asserting that cloning violates the spirit of the Torah, as it is similar to Kilayim. In addition, Rav Eliezer Waldenberg (Teshuvot Tzitz Eliezer 15:45:4) strenuously objects to cloning. On the other hand, Rav J. David Bleich (a leading American Posek who serves as a Rosh Kollel at Yeshiva University) writes (Tradition Spring 1998) that the Halacha could potentially approve of some products of cloning if governments throughout the world strictly monitor and control cloning procedures to insure that it is used only for moral purposes. In addition, Rav Moshe David Tendler wrote in a letter printed in the New York Times (12/12/97) that cloning is advisable under certain circumstances.

Rav Bleich and Rav Tendler's approach seems to be supported by comments made by the Meiri (an important Rishon who lived during the thirteenth century) in his commentary to Sanhedrin 67b. The Meiri writes that making creatures asexually is permitted, since anything performed naturally is not defined as a prohibited act of Kishuf (sorcery). It is incredible that the Meiri notes (in the thirteenth century!) that one who understands how nature functions is aware of the fact that it is possible to produce beings asexually.

Dr. Eitan Fiorino of Teaneck (in the aforementioned volume of the Torah U'madda Journal) articulates Hashkafic objections to cloning. He argues that cloning violates the Biblical and Talmudic model of reproduction since cloning does not involve the union of two individuals or of their genetic material. The Gemara (Niddah 31a) speaks of Hashem, father, and mother being the three partners in the creation of man. Moreover, Dr. Fiorino argues that cloning radically alters the family structure, which has the potential to further destabilize society beyond the damage inflicted by the high divorce rate, surrogate mothers, and homosexual unions. Other potential problems include cloning for profit, for spare parts or other uses, and differential access to cloning among socio-economic classes. Other authors mention the potential nightmare of evil individuals such as Osama Bin Laden cloning themselves on a large scale.

On the other hand, Rav Bleich (in the aforementioned essay in Tradition) argues that if cloning were conducted in a manner that is strictly supervised by government authority, cloning could potentially yield some positive products. These include cloned animals as well as tissue and organs for therapeutic purposes such as to produce bone marrow for someone afflicted with leukemia. Cloning animals is clearly permitted as is evident from Sanhedrin 65b that we shall cite later in this essay.

Halachic Issues

Cloning raises a host of Halachic issues. These include the questions of whether Halacha regards a clone as human, whether a man who produces a child by cloning has fulfilled the Mitzva of P'ru Urvu, and the propriety of an unmarried man or woman cloning himself or herself. A particularly tantalizing possibility has been raised that cloning can prevent a Mamzer/Mamzeret from passing his/her status to the next generation.

Is a Clone Human?

Poskim in the modern context are constantly challenged to precisely define Halachic concepts that have not been explicitly defined by earlier generations. For example, the discovery of electricity compels Poskim to precisely articulate the Halachic definition of fire - does an incandescent light constitute a fire despite the fact that there is no fuel consumption. The introduction of in vitro fertilization motivates Poskim to define whether motherhood is established by providing the genetic makeup of the child (i.e. by donating the egg) or by giving birth to the child. Rav Hershel Schachter once remarked that the emergence of new issues requires us to rigorously define each of the thirty-nine categories of forbidden labor on Shabbat. Similarly, cloning challenges Halachic experts to articulate a Halachic definition of humanity.

A potential Talmudic source to answer this question is the highly unusual passage regarding the creation of a Golem (Sanhedrin 65b). The Gemara states

Rava stated: if they wish, Tzadikkim (Rashi: who are free of sin) could create a world. Rava created a man (Rashi: by using the book called Sefer Y'tzirah which teaches how to combine the letters of the divine name) and he sent it to Rabi Zeirah. Rabi Zeirah spoke with it and it did not respond. Rabi Zeirah then stated "you are created by my colleague (see Maharsha ad. loc.), return to your dust" (i.e. die). Rav Chanina and Rav Oshiah would sit every Friday and study the Sefer Y'tzirah and create a calf that has reached a third of its potential development (this was considered a great delicacy in the times of the Gemara) and subsequently eat it. My Y9 students understandably found this Gemara quite odd. We suggested that perhaps the entire reason that this passage is included in the Gemara is because Hashem wished to provide precedents and insights for many generations later regarding cloning.

At first glance, it would appear that this passage indicates that a clone is not human. Rava's Golem was not considered human, as Rabi Zeirah "killed" it and the Gemara does not record any objection to this action. Thus, one might be tempted to argue that since a clone is not a product of

sexual reproduction, it is not human. Indeed, the Chacham Zvi (Teshuvot number 93) argues that Rava's Golem was not considered human because it was not created in a woman's womb.

This definition of humanity is problematic, as noted by the Radzhiner Rebbe (Sidrei Taharot Ohalot 5a), because it leads to the absurd conclusion that Adam HaRishon was not human. Accordingly, we must search for a different definition of humanity. The Maharsha (commenting to Sanhedrin 65b) seems to say that the Golem created by Rava was not human because of its inability to speak. This approach seems rooted in Onkelos' translation of the Pasuk (B'reishit 2:7) "and man became a living being" as "and man became a talking being". This definition of humanity, though, appears problematic; as it would also lead to an absurd conclusion that one who is unable to talk due to illness does not have the status of a human being. It appears that Rav J. David Bleich (in the aforementioned Tradition article) offers a very fine definition of humanity. He writes

The matter of identification as a member of a species is best summed up in a pithy comment attributed to Rav Chaim Soloveitchik. It is reported that Rav Chaim explained a certain Halachic concept by posing the following query: Why is a horse a horse? Is it a horse because it manifests certain characteristics which are necessary conditions of being a horse, or is a horse a horse because its mother was a horse? The answer is that a horse is a horse because its mother was of that species. For that reason the Mishna, Bechorot 5b, declares that the offspring of a kosher animal is kosher even if it has the appearance and physical attributes of a non-kosher animal and, conversely, the offspring of a non-kosher animal is non-kosher even if it has the appearance and the physical attributes of a kosher animal. Thus identity as a member of a particular species is determined not by distinguishing characteristics, but by birth.

Rav Bleich cites one of Rav Chaim's primary Talmidim, Rav Elchanan Wasserman (Kovetz He'arot 8:33), who argues that the principle articulated by the Mishna in B'chorot (Yotzei Min HaMutar Mutar and Yotzei Min HaAsur Asur) applies to all areas of Halacha and not just to Kashrut. Accordingly, a clone is human because it is created from a human being. Thus, Rav Bleich argues that the fundamental difference between a Golem and a clone is that a clone is a product of a human being and a Golem is not. It seems to this author that the Chazon Ish (Yoreh Deah 116:1) adopts this approach as well. Accordingly, the Golem is not human, whereas a clone is most definitely regarded as a human being.

Does a Man Fulfill his Mitzva of P'ru Urva by Cloning?

A major issue to be discussed is whether a man fulfills his obligation of P'ru Urva by cloning. This issue depends on whether on whether one's clone is defined as his child according to Halacha. We must clarify that Halacha does not define parenthood solely based on biology. For example, if a Jewish man fathers a child with a Nochrut, he is not considered to be the Halachic father of the child. In order to put this question in proper perspective we must first examine the debate whether a child produced either through artificial insemination or in vitro fertilization (IVF) is defined as one's child according to Halacha.

The Chelkat M'chokeik (Even HaEzer 1:8) raises the question as to whether one is regarded as the Halachic father if his child is not conceived by a sexual act. The question is whether fatherhood is conferred by donating the semen or is a sexual act also necessary to create a paternal relationship. Rav J. David Bleich (in the aforementioned Tradition article) concludes that the majority of Poskim (including Rav Shlomo Zalman Auerbach and Rav Ovadia Yosef) rule that the semen donor is the Halachic father of the child. For an extensive list of Poskim who address this issue see Rav J. David Bleich, Contemporary Halachic Problems 4:240, footnote nine.

Rav Eliezer Waldenberg (Teshuvot Tzitz Eliezer 15:40) argues that even those who rule that one who fathers a child by artificial insemination is considered to be the Halachic father, would agree that one who conceives a child by IVF is not considered to be the child's Halachic father. He believes that one is defined as the father only when his semen is introduced directly into the wife's uterus and the fertilization

occurs in the uterus. The procedure of IVF, argues, Rav Waldenberg, differs too much from natural reproduction for Halacha to regard the man as the father. However, Rav Avigdor Nebenzahl (Sefer Assia 34:5) and Rav J. David Bleich (ad loc. p. 239) disagree with Rav Waldenberg and believe that the man who donates the sperm in the IVF procedure is considered the Halachic father even though fertilization occurs outside the womb. Rav Gedalia Orenstein (Techumin 24:156-159) presents a most convincing rebuttal of Rav Waldenberg's arguments.

Cloning, however, is different according to Rav Bleich. Rav Bleich argues (in the aforementioned Tradition article) that a man who donates body material for cloning is not considered the Halachic father, even if the clone was created from body material of both the husband and wife. Rav Bleich asserts that a man is not defined as the father if he has not donated semen to produce the child. Rav Bleich, though, notes that the Halacha might be different if the child is cloned from a sperm cell.

Rav Yitzchak Sheilat (a leading Rebbe at Yeshivat Maaleh Adumim, a major Yeshivat Hesder), on the other hand, argues (Techumin 18:138-140) that a man who produces a child by cloning is considered the child's Halachic father. He cites the Minchat Chinuch (Mitzva 1) who argues that the Mitzva of P'ru Urvu is fulfilled when one has children and not by engaging in marital relations. Thus, Rav Sheilat argues that just as one fulfills the Mitzva of P'ru Urva even if he produces children by artificial insemination or IVF, so too he fulfills this Mitzva by cloning. Rav Sheilat does not believe that Halacha considers whether the child emerges from sperm cells or any other body material. Nonetheless, the basis of Rav Sheilat's approach is debatable as many Acharonim disagree with the Minchat Chinuch's assertion, especially in light of the Rambam's comments in Hilchot Ishut 15:1. On the other hand, the majority ruling that one fulfills P'ru Urvu with artificial insemination seems to accord with the view of the Minchat Chinuch.

Husband – Wife Cloning to Produce a Child

Aside from ramifications regarding Yibbum and Chalitzah, the dispute between Rav Bleich and Rav Sheilat has profound implications. According to Rav Sheilat, it is appropriate for an infertile couple to produce a child by cloning. On the other hand, Rav Bleich argues that it is not appropriate for an infertile couple to produce a child by cloning.

Dr. Avraham Steinberg and Dr. John Loike (in an essay that appears in the aforementioned issue of Tradition) present a fascinating ramification of the dispute between Rav Bleich and Rav Sheilat. Drs. Steinberg and Loike suggest that according to Rav Bleich's approach cloning might be a way for Mamzeirim to produce children in a manner that will not pass the stain of Mamzeirut to the next generation. If a man is not the Halachic father of his clone, his Mamzeir status is not passed to the next generation. This suggestion, Drs. Steinberg and Loike argue, is analogous to Rabi Tarfon's advice to a Mamzeir to marry a Shifcha K'na'anit as he will not be regarded as the Halachic father to their child (Kiddushin 69a). Indeed, Rabi Tarfon's ruling is codified in the Shulchan Aruch as normative Halacha (Shulchan Aruch Even Haezer 4:20).

Cloning of Single Individuals

Rav Sheilat, however, strenuously objects to a single person cloning himself. Indeed, the Sefer HaChinuch (Mitzva 682) writes "Hashem wishes for people to be born from the union of a male and a female who unite in a kosher manner". The Chinuch clearly implies that Hashem does not want people to be created from a single male or female. Similarly, Rav Shlomo Zalman Auerbach (cited in Nishmat Avraham 4:E.H.1:3) strongly objects to a single woman conceiving a child by means of artificial insemination. In addition, Rav Yigal Shafran (an authority in the area of medical Halacha) writes (Techumin 20:351) that retrieving sperm from a recently deceased man in order to artificially inseminate his widow constitutes a severe violation of the spirit of Halacha. The Torah wants a child to be raised by a father and mother and it is offensive to produce a child knowing in advance that it will be raised without the benefit of being raised by both a mother and a father. Accordingly, Rav Sheilat writes that cloning

should be placed under government supervision to assure that cloning should be performed only on behalf of infertile married couples and not on behalf of singles wishing to have children asexually.

Conclusion

One of the great wonders of the modern age is the application of the Halacha to modern circumstances, despite the fact that we may not introduce new Halachot after the compilation of the Talmud. Thus, every Halachic issue must be adjudicated on the basis of a precedent in the Gemara and its commentaries or based on an analysis of the principles articulated and implied by the Gemara. It is profoundly wondrous that Poskim consistently find a precedent in the Gemara and its commentaries for every new issue that emerges in modern times. In our case, it is particularly astonishing that the Meiri explicitly addresses the possibility of cloning. It appears that Hashem's subtle involvement in the Halachic process facilitates the existence of precedents in the Gemara and its commentaries for every new issue and challenge that arises.

Chazal's Interpretation of Cham's Sin

Occasionally we encounter a biblical interpretation of Chazal that appears not to be well grounded in the text. However, upon very careful scrutiny of the text we can discover the basis for these enigmatic assertions of Chazal. Rav Yoel Bin Nun (one of the leading contemporary teachers of Tanach) writes (in Mussar Milchamah V'kibush p.40) "we read the words of Chazal and the Tanach as one work. By reading the Tanach with great care and precision we can reveal the basis of Chazal either in the P'sukim themselves or from a broader perspective in light of P'sukim that are found elsewhere".

Rav Hayyim Angel (a leading instructor of Tanach at Yeshiva University) once commented to me "Chazal never miss a beat". Rav Yaakov Meidan (a leading instructor of Tanach at Yeshivat Har Etzion) once said to me (in Hebrew) "I am unaware of even one assertion of Chazal for which we cannot find a basis in a P'shat reading of Tanach". Chazal perceive every nuance and detail in the Chumash and it is our responsibility to search for the basis of their assertions.

Cham's Sin According to Chazal

In this essay we shall examine a seemingly peculiar interpretation of Chazal and seek to demonstrate that it is exceedingly well grounded in the text of Tanach. The Torah (Breishit 9:22) records that Cham saw his father drunk and uncovered in his tent and informed his brothers of his father's indignity. Chazal assert (Sanhedrin 70a cited in Rashi to Breishit 9:22) that Ham also either raped his father or castrated him (Rav and Shmuel debate whether the crime was rape or castration). Our discussion is based on Shiurim that I delivered at TABC and the responses of the Talmidim, especially of the "Y9" Gemara Shiur of 5764 (which studied Masechet Sanhedrin).

The basis for each opinion seems at first glance to be far-fetched. The Gemara states that the basis for the assertion that a rape occurred is the fact that the word Vayar (and he saw) appears both in the contexts of Cham seeing his father and the rape of Dinah (Breishit 34:2, where the Torah records that Shechem saw, took and raped Dinah). The Gemara states that the basis for the assertion that Noach was castrated is the fact that Noach cursed the fourth son of Cham (Ca'naan, see Breishit 9:25 and 10:6). This opinion asserts that Noach cursed Cham's fourth son because Cham prevented Noach from fathering a fourth son.

An Explanation of Chazal

Upon closer scrutiny, though, we will see that these assertions are quite sensible. Let us begin with the first assertion. This approach seems to be rooted in a general phenomenon in Sefer Breishit, that those who make unwanted sexual advances are described first as seeing before they act. In addition to the rape of Dinah, this description is found in connection with the Dor HaMabul (generation of the Great Flood; Breishit 6:2), Sarah Imeinu's being taken to Paroh (Breishit 12:14-15) and Potiphar's wife's pursuit of Yosef Hatzaddik (Breishit 38:7). The Tanach seems to note the vision of the rapists to teach that these actions were premeditated – the villains first visualized their crime before they performed it. Moreover, it seems entirely unnecessary for the Torah to mention that Cham saw Noach's

indignity; the Torah could have simply recorded that Cham informed his brothers of their father's activity and it would be obvious that Cham saw what Noach was doing. Chazal seem to perceive the Torah's mentioning that Cham saw Noach as a literary cue to link the action of Cham with the actions of the Dor Hamabul, Paroh, Shechem and Potiphar's wife.

Interestingly, Avimelech or his servants are not described as first seeing Sarah before taking Sarah Imeinu (Breishit 20:2). The absence of such a description seems to signal that the Torah does not want us to group Avimelech together with the Dor Hamabul, Cham, Paroh, Shechem and Mrs. Potiphar.

Now let us examine the second opinion. This opinion seems to believe that there is obviously something missing in the story of Noach and Cham. The Chumash records that when Noach awoke he cursed Ca'naan in a most severe manner (Breishit 9:25). This seems to be entirely unjustified in light of the concept of Middah K'negged Midda punishment (the punishment matches the crime), which is a pillar of the Torah's worldview. Why should Cham's son be subject to a severe curse if Cham simply saw his father's indignity and reported it to his brothers? Granted that such behavior is exceedingly insensitive and inappropriate but the punishment seems entirely disproportionate to the crime. Moreover, why should Ca'naan be punished for his father's sin?

These glaring problems lead this opinion to conclude that there is an omission in the Torah's presentation of this story (this type of textual analysis is referred to in the Gemara as "Chisurei Mechsara"). The second approach argues that we can infer Cham's crime from the punishment that Noach administered (and that Hashem seems to sanction). The Torah did not need to explicitly state Cham's crime because we are able to infer it from the story. The assertion that Cham castrated his father accounts for the severity of the punishment and serves as a basis for a "Middah K'negged Middah type of explanation" for why Canaan was punished for his father's crime.

Although cursing Canaan or Cham that they should not have children would appear to be more Middah K'negged Middah, such a punishment contradicts Hashem's instructions to repopulate the world after the Mabul (as we shall explain later in this essay). Accordingly, Canaan will be permitted to have children (even though he does not deserve to have children) but they are destined to be slaves to slaves.

One may speculate that the Torah does not explicitly state the crime of Cham because of the Torah value of speaking B'lashon N'kiyah (modestly; see Pesachim 3a and b for a list of examples of this phenomenon in Tanach). The Torah omitted this ugly incident because we are able to discern that it occurred without it having to be stated explicitly. For an example of the Mishna omitting certain information that one can independently infer from the text, due to concern for preserving Lashon N'kiyah, see Sanhedrin 68b.

Another example of this hermeneutical tool will clarify this point. Chazal (see Rashi to Shmot 4:24) assert that an angel almost killed Moshe Rabbeinu because he failed to give his son a Brit Milah. Chazal seem to infer this from the fact that Moshe Rabbeinu was saved when Tziporah performed a Brit Milah on their son. The fact that performing Brit Milah was the remedy to the problem indicates that not performing Brit Milah was the cause of the problem. Thus, the Torah does not state things that we are able to discern independently. We should note, in addition, that there are other factors that lead Chazal to assert that Moshe Rabbeinu deserved punishment for failing to engage in Brit Milah (see Rav Moshe Lichtenstein's Tzir Vatzon).

Rashi's Approach

Rashi (commenting on Breishit 9:22) cites both the opinions of Rav and Shmuel without indicating a preference for either interpretation. Rashi seems to regard both approaches as viable. What seems important to Rashi is that a severe crime occurred and that the crime was of a tangible and sexual nature. We will seek to present seven literary cues that seem to have pointed Rashi (and Chazal) in this direction.

First is the question of how Noach knew that he had been violated when he awoke from his drunken state (Breishit 9:24)? This question seems to lead Chazal to conclude that a tangible crime had occurred and not merely that Cham saw his father in a compromising position and told his brothers about it. Second, the Pasuk states that “Vayei’da” (and Noach knew) what had occurred. The word “Vayeida” sometimes has a sexual connotation in Sefer Breishit (see 4:1, 4:17 and 19:5).

Third is the Torah’s use of the word Shechem in 9:23 in describing that the brothers took a blanket and put it on their shoulders (Shechem Sh’neihem). It is unnecessary for the Torah to state that they put the blanket on their shoulders. The Torah seems to mention their shoulders simply because it wishes to use the word Shechem (which is rarely used in Tanach when not referring to the town of Shechem) to literarily and thematically link this story with the story of Dinah’s rape by Shechem ben Chamor. Indeed, Rashi interprets the use of the term Shechem in Breishit 48:22 in a somewhat similar manner.

Fourth is that the Torah describes Canaan (in Breishit chapter 34 and Vayikra 18) as exceedingly promiscuous and engaging in the full range of sexual crimes. Thus, it is not surprising that the father of this nation is associated with a severe sexual crime (see Rashi to Breishit 9:22 who cites a Midrash that Canaan collaborated with Cham in his crime). Canaan’s severe punishment for his association with this severe sexual crime seems to foreshadow the severe punishment that Hashem commands Am Yisrael to impose on the nation of Canaan for their committing severe sexual crimes (see Vayikra 18:24-25).

Parallels to Sedom Story

A fifth literary cue is the many parallels that exist between the stories of the destruction of Sedom and the Mabul (Rav Chanoch Waxman outlines the thematic and literary parallels between these stories in an essay on Parashat Vayeirah that is available on Yeshivat Har Etzion’s Virtual Beit Midrash). These two stories seem to fully parallel each other in the four basic sections of each story. In both stories, an entire society is corrupt and promiscuous. Hashem imposed a collective punishment on the entire society in both stories. Third, Hashem spared the few worthy individuals who lived in each society. In the aftermath of the Sedom story, the Torah relates how Lot’s daughters sexually abused their father (Breishit 19:30-38). This seems to be the one missing parallel between the Sedom story and the story of the Dor Hamabul. Chazal thus infer that in the aftermath of the Mabul a child sexually abused his father, completing the parallel between the Mabul and Sedom stories.

Parallels between the Dor Hapelaga and the Dor Hamabul

In her work on Sefer Breishit (Iyunnim B’Sefer Breishit pp.39-43), Nechama Leibowitz notes that the Dor Hamabul did not emerge in a vacuum. She outlines how a series of three sins of increasing severity recorded in the beginning of Sefer Breishit culminated in the Dor Hamabul. First was the sin of Adam and Chava partaking of the fruit of the Eitz HaDa’at. Second was Kayin’s murder of Hevel. Third, was the sin of Lemech. Lemech murdered an adult and a child simply because they bruised him and then he celebrated his prowess in song and confidently asserted that he will not be punished for his crime (according to the interpretation of the Malbim, in his commentary to Breishit 4:23). This series of sins culminated in the widespread practice of the Dor Hamabul of powerful men routinely taking women by force and without anyone objecting (Breishit 6:2), demonstrating how thoroughly corrupt that society had become.

One could discern a similar pattern leading to the Dor Hapelaga (the generation of the dispersion as a result of the Tower of Babel incident, Breishit 11:1-9). The first sin was Noach’s choice to build a vineyard (see Rashi, Seforno and Radak’s commentary to Breishit 9:20).

Interestingly, the unusual word Vayachel is used in connection with Noach’s planting of vineyards. A form of this word is used in connection with the Dor Hamabul and its preceding troubled generations (Breishit 4:26 and 6:1) suggesting a thematic link between the Dor Hamabul and the Dor

Hapelaga in general and the action of Noach planting in vineyard specifically. Indeed, a form of the word Vayachel is used in connection with Nimrod (10:8) and the Dor Hapelaga itself (11:6), thus suggesting a link between the sins that occurred before the Dor Hapelaga and the Dor Hapelaga (the Da'at Mikra to Breishit 9:20 notes the use of the variations of the word Vayachel in all of these places).

The second sin leading to the Dor Hapelaga was Cham's abuse of Noach. Third were the sinful activities of Nimrod (I hope someday to write an essay showing the literary basis for Chazal's assertion, unlike Ibn Ezra, that Nimrod was an evil man). The fourth sin was that of the Dor Hapelaga (see Rav Elchanan Samet's *Iyunim B'farshiot Hashavua* for a discussion of what precisely was their sin).

Furthermore, there seems to be a clear parallel between the sins that led to the Dor Hamabul and the sins that led to the Dor Hapelaga. The first sin in each set involved improper use of fruit. Interestingly, this also might be a source of the opinion that the fruit that Adam and Chava sinned with was a grape, (see Sanhedrin 70a and b). It is also interesting that Chazal discuss the question of which fruit was eaten by Adam and Chavah, immediately after the Gemara discusses Cham's sin against Noach. This juxtaposition of Talmudic discussions suggests that Chazal conceptually linked the eating from the Eitz Hada'at and Noach's planting of vineyards.

Nimrod seems to parallel Lemech as both are powerful individuals who murdered for pride's sake without any fear of retribution. Nimrod is described as conquering many lands and building an empire (Breishit 10:8-11). One who builds an empire forcibly conquers lands belonging to others and certainly murders many people simply for the purpose of the pride in establishing an empire. Nimrod feared no retribution because of his power and he certainly made no attempt to hide his very public murders and thievery. The Dor Hapelaga and the Dor Hamabul are obviously parallel, as both involve entire societies engaging in sinful behavior.

The missing parallel in this scheme is the sin of Kayin and the sin of Cham. However, according to Chazal's interpretation of Cham's sin, the parallel is complete as both Kayin's sin and Cham's sin involve severe sins committed against the bodies of close family members.

Noach's Punishment

A seventh basis for Chazal's approach to Cham's sin seems to be the concern for justice in Noach's disgrace. As we emphasized earlier, "Middah K'negged Middah style punishment" is a hallmark of the Tanach. We can find the Middah K'negged Middah in Noach's disgrace based on Chazal's interpretation of Cham's sin.

The Abarbanel (commentary to Breishit 8:15; Rav Chanoch Waxman expands upon this insight of the Abarbanel in an essay on Parashat Noach that appears on Yeshivat Har Etzion's Virtual Beit Midrash) notes a subtle yet significant failure of Noach when he left the Teivah (ark). Hashem commanded Noach to leave the Teivah in a specific order and Noach disobeyed that command.

Hashem commanded Noach to leave alongside his wife and his sons alongside their wives (Breishit 8:16). Noach, in turn, left alongside his sons and his wife alongside her daughters-in-law (Breishit 8:18). Abarbanel explains that Hashem indicated to Noach that his family should repopulate the world in the aftermath of the Mabul. Noach, though, was not prepared to repopulate the world due to his fear that the Mabul would reoccur and his efforts to repopulate the world would be for naught.

Rav Waxman understands Noach's exposure in his tent as expression of Noach's repudiation of Hashem's command to repopulate the world. Instead of engaging in the Mitzva of Pru Urvu in his tent, he was exposed and drunk in his tent. Accordingly, we can perceive a Middah K'negged Middah punishment to Noach according to Chazal. Noach's rape or castration constituted a Middah K'negged Middah punishment for his rejecting Hashem's command to repopulate the world.

Conclusion

We see that Chazal's seemingly bizarre explanation of Cham's sin is firmly rooted in the text of the Tanach. A rigorous study of Tanach is necessary in order to grasp the basis of Chazal in their statements. Although they sometimes seem simple at first, they reflect profound insights into the text of the Torah.

The Rambam writes in his introduction to his philosophic work *Moreh Nevuchim*, that the words of Chazal are often comparable to golden apples encased in a silver mesh (see *Mishlei* 25:11). One only sees the silver mesh if he does not peel off the outer layer of silver covering the proverbial golden apple. Similarly, one who does not probe deeply into the ideas of Chazal will only perceive the silver mesh, Chazal's assertions that are appealing even on a superficial level, but will not appreciate the golden apple, the profundity of Chazal, that lies beneath the outer layer. Every faithful student of Torah echoes David HaMelech's plea to Hashem (*Tehillim* 119:18) "Open my eyes so that I may behold the wondrous things from Your Torah".

Postscript

The *Chayei Adam* (67:3) writes that one should respect his parents in thought as well as action. He asserts that one should regard his parents as prominent individuals that are worthy of great honor. This, in turn, will facilitate one giving proper *Kavod* to one's parents, since one's thoughts profoundly impact one's actions. Indeed, one might interpret Cham's sin against his father (*Breishit* 9:22) as first denigrating his father in thought, then in words and, according to Chazal, then in deed.

Although harboring positive thoughts about one's parents might be inaccurate, it seems to be a healthy illusion in many cases. In fact, a cousin described to me her doctoral thesis in psychology, which explores the positive therapeutic impact of partial denial in certain circumstances. Indeed, one could possibly interpret the actions of Shem and Yafet (*Breishit* 9:23) as "covering up" their father's sin both in deed and in thought in order to preserve their positive image of their father.

Late Lighting of Chanukah Lights

A few years ago we discussed the question of what precisely is the optimal time to kindle Chanukah lights. In this issue, we will discuss situations when Halacha might tolerate delaying the lighting after the optimal time. I am indebted to TABC's Y9 class of 5764 for the insights they contributed when we studied this topic.

The Optimal Time

Although a variety of opinions exist on this matter, the optimal time for Chanukah lighting seems to be at Tzeit HaKochavim (Mishna Brura 672:1), which for this purpose is approximately a half hour after sundown. The Shulchan Aruch (Orach Chaim 672:1 based on the Gemara, Shabbat 21b) states that one may light Chanukah candles "until the last people have left the marketplace". The Shulchan Aruch states that this is a half an hour after the optimal time for lighting.

Today there are two reasons why Chanukah lights may be kindled even later than mentioned in the Gemara and Shulchan Aruch. First, the Rama (O.C. 672:2, citing Tosafot Shabbat 21b s.v. D'ee) rules that "in our times", we light inside our homes and the primary "target audience" for the Chanukah candles are not the people passing outside our homes. Thus, today we may light even later than a half an hour past Tzeit HaKochavim. Second is that in the modern era when the streets are illuminated with electric lights, the last people do not leave the marketplace until significantly later in the evening. In some places, such as Manhattan, this may be extremely late. Thus, one could suggest another reason why today we are permitted to light Chanukah lights even later than a half an hour past Tzeit Hakochovim (see Rav Moshe Shternbuch's Moadim U'z'manim 1:141 for further discussion of this issue).

Nonetheless, the Rama (ad. loc.) writes that even in our times one should preferably light at the optimal time for lighting according to the standards established by Chazal. It is possible that this ruling is an application of the general rule of Z'rizim Makdimim L'Mitzvot, that one should perform a Mitzva at the earliest possible time (see Pesachim 4a). The Aruch Hashulchan (O.C. 692:4) adds that our Mitzvot should be performed in a manner that is as close as possible to the original Takkanah (enactment) of Chazal. This is a very fundamental assertion and seems to constitute an underlying theme and motivation for numerous Halachic rulings issued in modern times when circumstances have changed so dramatically. Despite the many changes, we nevertheless seek as much as possible not to deviate from the practices of earlier generations.

The Practice at the Yeshiva University Kollelim

Students at TABC have always posed the question of why we do not end classes early on Chanukah to allow students to arrive home and light at the optimal time. Rav Yosef Adler (the principal and Mara D'atra at TABC) always cites in response that when he studied at the Yeshiva University Kollel, Rav Hershel Schachter would post a sign every year regarding the proper time for the Kollel students to light Ner Chanukah. The sign stated that when the Kollel began (in the early 1960's) the original Rosh Kollel, Rav Aharon Lichtenstein, posed the question to Rav Yosef Dov Soloveitchik whether the Kollel

Seder (learning period) should conclude early on Chanukah to allow the students to light Ner Chanukah at the optimal time. The Rav stated that they should not interrupt their studies and they should light only after they have finished their afternoon Seder at the usual time (which is well after Tzeit HaKochavim).

The Rav cited as a precedent the Meiri (Shabbat 21b, first paragraph) who records the custom of Yeshiva students in France to **not** interrupt their daily learning schedule in order to fulfill the Mitzva of Chanukah lights at the optimal time. Rav Schachter posted this sign during the years that I studied in the Kollel as well. This ruling applies to TABC as well since most of the Limudei Kodesh (Torah studies) for the Juniors and Seniors are in the afternoon.

Rav Moshe Feinstein (cited by Rav Aharon Felder, Moadei Yeshurun p. 8) agrees with this ruling. He reasons that since essentially one may light late into the evening, it is not proper to interrupt the Yeshiva's Seder in order to light at the optimal time. Interestingly, though, other than the Meiri there appears to be no source for this practice. Indeed, the ruling of the Rav and Rav Moshe (to the best of my knowledge) is not addressed in the Mishna Brura, Aruch Hashulchan, or any other major classic Halachic authority. Indeed, Rav Felder, who clearly mastered the Halachic literature on Chanukah, cites no authority who either agrees or disagrees with this ruling. However, I recall that Rav J. David Bleich (the noted Halachic authority who serves as the Rosh Kollel of the Yadin Yadin Kollel at YU) would leave in the middle of the afternoon Seder to light Chanukah candles at the optimal time. I recall hearing that Rav Bleich did not subscribe to the approach of the Rav and Rav Moshe to this issue.

It appears that this dispute hinges on how one interprets and applies a ruling of the Rambam. The Rambam (Hilchot 15:2) rules that a man may postpone marriage (and his fulfillment of the Mitzva of P'ru Urvu) in order to further his Torah studies. The Shulchan Aruch (Even Haezer 1:3) rules in accordance with the Rambam. It seems that the value of Talmud Torah outweighs the value of Z'rizim Makdimim L'Mitzvot regarding the Mitzva of P'ru Urvu (the earlier one marries, the earlier he fulfills the Mitzva of P'ru Urvu). The Rav and Rav Moshe (and the Meiri) seem to extrapolate from the Rambam that Talmud Torah always outweighs the value of Z'rizim Makdimim L'mitzvot. Thus, Yeshiva students should not interrupt their studies in order to light Chanukah candles at the earliest time.

Rav Bleich, on the other hand, seems to believe that one may not extrapolate a universal rule from this ruling of the Rambam. Pru Urvu might fundamentally differ from all other Mitzvot, as the Halacha tolerates delaying its performance past the age of Bar Mitzva. This differs from all other Mitzvot which a male becomes obligated to perform at age thirteen (see Chelkat M'chokeik 1:2, Beit Shmuel 1:3, and Pitchei Teshuva 1:3 for a discussion of this issue). Thus, even though Talmud Torah is more important than the timely fulfillment of the Mitzva of P'ru Urvu, nevertheless Talmud Torah might not outweigh the timely fulfillment of the Mitzva of Ner Chanukah.

Moreover, the Halacha tolerates in theory, (we never practice this today ; see Aruch Hashulchan E.H. 1:14) one who devotes his entire life to constant Torah study and never marries. The Halacha, by contrast, does not tolerate foregoing lighting Neirot Chanukah entirely in order not to interrupt one's Torah studies, according to all opinions. This seems to point to the fact that the Mitzva of Pru Urvu is unique and thus it is difficult to extrapolate from the rules regarding Pru Urvu to other areas of Halacha.

One might ask on the Rav and Rav Moshe's ruling why the Kollel student does not simply resume his studies after he lights Chanukah lights at the optimal time at home. We may answer that although he resumes Torah study at home, he will not return then to public study of Torah (Talmud Torah D'Rabbim). Halacha attaches greater significance to Talmud Torah D'rabbim than Talmud Talmud conducted privately (see Megillah 3b). Thus, the Kollel students should learn until the usual conclusion time of the afternoon Seder in order not to miss the time of Talmud Torah D'Rabbim.

In addition, it appears that the ruling of the Rav and Rav Moshe applies only to a situation where it is difficult for the Talmidim to reassemble after they have returned home to kindle Chanukah lights. Thus, at Yeshivat Har Etzion we interrupted the afternoon Seder to kindle Chanukah lights at the optimal

time and we subsequently returned to our learning soon afterward. This was possible because the vast majority of the Talmidim lived on campus.

Delay for Shalom Bayit

Rav Yaakov Kaminetzky is cited (Emet L'Yaakov p. 254) as ruling that one may delay the lighting of Chanukah lights until the wife returns from work so that the family kindles Chanukah lights together. He cites as a source for this ruling, the Halacha (Shulchan Aruch 678:1 based on Shabbat 23b) that if one has a choice of either lighting only Ner Shabbat or Ner Chanukah (such as someone who finds himself with only one candle), that one should light Ner Shabbat. Since Shabbat candles are lit to insure Shalom Bayit (domestic tranquility), they enjoy priority over Chanukah candles. Thus, if Shalom Bayit overrides Chanukah lighting altogether, it certainly suffices to delay Chanukah lighting.

Interestingly, Rav Yaakov's ruling states that Chanukah lighting may be delayed until the wife returns from work. Why does he not also rule that Chanukah lighting may be delayed until the husband returns from work? An answer might be that the husband might not be upset if the family does not wait for him, as it is possible (as my student Yoni Safier noted) for the family to reassemble when the husband arrives in the house for his lighting. However, this might not be sufficient to avoid the wife being upset (see Bava Metzia 59a).

We should note that there appears to be no problem for the husband to light long after his family has lit, even though he could potentially fulfill his basic obligation through their lighting. Since he plans on lighting his own Menorah, he implicitly intends not to fulfill the Mitzva with the family lighting. The Halacha (see, for example, Biur Halacha 489:4 s.v. Sh'eem Yomar) follows the overwhelming majority of Rishonim who believe that one does not fulfill a Mitzva against his will, namely, if his intention is not to fulfill the Mitzva.

Late Lighting or Better Lighting

My student Daniel Orlinsky, who lives at home with his parents in Fair Lawn, posed the following Halachic question to me during Chanukah 5764. He planned that on one of the evenings of Chanukah he would leave his home during the day and not return until late in the evening when no member of the family would be awake. Daniel asked if it is preferable for his mother to light on his behalf at the optimal time or for him to light when he arrives at home late at night. Although the Rama (O.C. 671:2) rules that it is preferable (Hiddur Mitzva) for each family member to light his own Menorah, it might be preferable to fulfill the Mitzva through his family members who light at the ideal time.

This question appears to be conceptually identical to a theoretical question that was reportedly raised by the Brisker Rav (Rav Yitzchak Zev Soloveitchik, the Rav's uncle). He asked which of the following scenarios is the preferable way to fulfill the Mitzva of taking the Etrog – taking an ordinary Etrog at the optimal (earliest, Z'rizim Makdimim L'Mitzvot) time (sunrise) or taking an extraordinarily beautiful Etrog that one will have access to only later on in the day. The question is which Halachic value is a priority, Z'rizim Makdimim L'Mitzvot or Hiddur Mitzva (performing the Mitzva in a beautiful and preferable manner). Daniel also was faced with the dilemma whether the value of Z'rizim Makdimim L'Mitzvot outweighs the value of Hiddur Mitzva or vice versa.

This quandary seems to lie at the heart of the dispute regarding the earliest time to recite Kiddush Levana. The Shulchan Aruch (O.C. 426:4) rules that one should not recite Kiddush Levana until seven days from the Molad (birth of the new moon) have passed. The Mishna Brura (426:20), though, writes that the majority of Acharonim disagrees with the Shulchan Aruch and permit reciting Kiddush Levana after three days from the Molad have passed. Sephardic Jews (see Teshuvot Yechave Da'at 2:24) and Chassidim follow the opinion of the Shulchan Aruch, while non-Chassidic Ashkenazic Jews recite Kiddush Levana after three days from the Molad have passed.

It seems to me that this dispute hinges on the dispute whether the value of Z'rizim Makdimim L'Mitzvot outweighs the value of Hiddur Mitzva. Non-Chassidic Ashkenazic Jews would seem to acknowledge that reciting Kiddush Levana on a "fuller" moon is a more Mehuddar way to perform the Mitzva (as the moon is more beautiful when it has "reached" half of its size). The Gemara (Shabbat 133b) states that it is preferable to use a more beautiful Tzitzit, Shofar, Lulav, Sukkah, and Sefer Torah. Similarly, it seems preferable to recite Kiddush Levana on a more beautiful moon (provided that it is recited before the latest time permitted by Halacha for Kiddush Levana).

Thus, the non-Chassidic Ashkenazic tradition values Z'rizim Makdimim L'Mitzvot over Hiddur Mitzva. The Sephardic and Chassidic tradition, on the other hand, seems to value Hiddur Mitzva over Z'rizim Makdimim L'Mitzvot. Based on this logic, since Daniel is a non-Chassidic Ashkenazic Jew, I told him that he should ask his mother to kindle Chanukah lights for him, since for him Z'rizim Makdimim L'Mitzvot outweighs the value of Hiddur Mitzva.

There are additional Halachic benefits to this approach. First, it is questionable whether Daniel is permitted to recite a Bracha when he lights Ner Chanukah at a very late hour when hardly anyone is walking outside and no family members are awake. The Chofetz Chaim, Sha'ar Hatziyun 672:17 cites various opinions about this matter and does not issue a clear cut ruling and Rav Moshe Feinstein (Teshuvot Igrot Moshe 4:105:7) rules that one should recite the Bracha. Furthermore, Daniel avoids the problem of eating before performing a Mitzva (see, for example, Shabbat 9b). Most important, he avoids the risk of forgetting to light Ner Chanukah when he arrives at home light at night exceptionally tired. Thus, it appears that for many reasons it is a better for Daniel to have his mother light for him at the optimal time rather than light himself late at night.

Conclusion

One should make every effort to light Ner Chanukah at the optimal time. There are, however, circumstances where the Halacha tolerates or even encourages delaying the fulfillment of this Mitzva.

The Case of the Flying CD Player

In my Gemara Shiurim at TABC, we will occasionally conduct a Din Torah when a monetary issue arises between the students. This serves a number of purposes. It often brings alive many situations that are discussed in the Gemara and it is an effective means to teach Talmudic principles. It also teaches students to honestly and forthrightly present their monetary disputes to a Rav for adjudication (see Mishna Brura 606:1). It teaches students the procedures of Beit Din, such as Kinyan Suddar (the act of demonstrating one's seriousness by accepting a utensil such as a handkerchief or a watch as symbolic consideration) and Peshara (compromise). Finally and perhaps most importantly, the dispute is resolved in a manner that the fairness of the proceedings and decision making is apparent to all, as it is resolved and discussed in the presence of the young disputants and their peers.

Parenthetically, we should note that one Dayan (rabbinic judge) suffices to adjudicate a case if both parties agree to submit to his authority (Shulchan Aruch Choshen Mishpat 3:2). Rav Moshe Snow told me that he saw Rav Moshe Feinstein act alone in adjudicating a monetary dispute. Rav Mordechai Willig told me (in 1992 and I have observed the accuracy of his report) that this is the widely accepted practice (see www.bethdin.org/rules.htm, for the rules of when a dispute will be adjudicated by only one Dayan in the Beth Din of America).

The Case

In the 5764 "Y9" Gemara Shiur of TABC, we adjudicated a most interesting dispute. Two Talmidim, whom we shall refer to as Reuven and Shimon (R. and S.), were playing basketball together at S.'s house. R. drove his car to S.'s house and parked his car near the basketball court, leaving the windows open. S. put his CD player on the seat of the front passenger position in order that R. and S. could listen to their favorite Jewish music while they were playing ball.

In the middle of the game, R. decided that he wanted to take a break and drive his car for a few minutes (S. raised no objections to this). R. drove his car while the CD player continued to play music. In a bizarre turn of events, while R. drove his car around a traffic circle the CD player came flying out of the car and was destroyed. R. and S. subsequently asked me to adjudicate the question whether R. is responsible to compensate S. for the destroyed CD player. I will present the stages of discussion in our Shiur of how the case was adjudicated.

Three aspects of how this case was resolved facilitated a peaceful and fair decision. First, was that all proceedings and discussions occurred in the presence of both parties (see Shulchan Aruch Choshen Mishpat 17:5). Second, considerable efforts were undertaken in order to properly ascertain the facts of the case. The Chazon Ish is often cited as saying that most mistakes made in rendering Halachic decisions are due to misunderstanding the facts of the case (see Sanhedrin 33a for an example of this phenomenon). Third, is that both sides were committed to doing whatever the Halacha requires. Both Talmidim presented their case honestly and free of manipulations, exactly as the Mishna Brura (ad. loc.) requires.

We should note that Beit Din must adjudicate any case that involves a dispute over a matter that is worth at least a Perutah (the equivalent of approximately two cents; Shulchan Aruch Choshen Mishpat 6:1). Civil courts (even small claims court) will not adjudicate matters of such little value because of a fundamental difference in the attitudes towards dispute resolution. Civil courts do not resolve disputes involving very small amounts since their goal is to maintain a peaceful and orderly society. Disputes over very small amounts usually will not cause disruptions in society. However, Halacha seeks truth and thus even disputes over small amounts of money are worthy of the attention of Rabbanim (even great Rabbanim as we shall see in this case). Thus, this case merited rabbinic attention even though this used CD player was not worth a significant amount of money.

Shomer Chinam

At first we thought that R. was a Shomer Chinam (an unpaid watchman) who is only responsible to pay if the item he watches is lost or destroyed as a result of negligence (Peshia; Shulchan Aruch Choshen Mishpat 291:1). We sought to clarify whether the fact that the CD player flew out of his car window proves that R. was driving recklessly. R. insisted that he was not driving at an excessive speed or in any other reckless manner. We decided that an expert should be consulted to resolve this question, just as Chazal (Sanhedrin 33a) consulted with Todos the physician to resolve a monetary dispute. We asked Dr. Joel Berman, a Ben Torah who teaches physics at TABC, for his opinion on the matter.

Dr. Berman (who earned a doctorate in physics) thought that this was an odd occurrence but he felt that the fact that the CD player flew out of the window did not prove that R. was driving recklessly. Accordingly, since it seemed that we were not able to resolve the question of whether R. was Poshei'ah (negligent), R. was excused from compensating S. for his destroyed CD player. The cardinal rule regarding monetary issues is "Hamotzi Mei'chaveiro Alav Ha'ra'ayah" (the burden of proof rests upon the one who demands the money or colloquially, "possession is nine tenths of the law"; Bava Kama 46a). Thus, R. was excused from payment since S. was unable to prove R.'s obligation to pay.

Sho'el

The students, though, raised the question of whether R. was only a Shomer Chinam regarding the CD player. They thought that perhaps R. was a Sho'el (borrower) regarding the CD player, in which case R. is responsible for damages to the borrowed item even if the damage occurred accidentally and not through negligence (Shulchan Aruch C.M. 340:1). This question led to a more fundamental question – was R. considered to be a Shomer of S.'s CD player?

The Shulchan Aruch (C.M. 291:5 and 307:1) cites two opinions regarding when one becomes a Shomer of someone else's property. One opinion is that one becomes a Shomer only when one makes a Kinyan (Halachic act expressing one's acceptance of responsibility, such as a Kinyan Suddar that we are familiar with from weddings and Mechirat Chametz) with the owner of the property. The second opinion is that as soon as the owner entrusts the other person to watch his item, the other person becomes a Shomer (as long as the other party is aware that the owner's item is in his possession) even if no Kinyan is made.

Accordingly, the question of whether R. is considered a Shomer hinges on this dispute recorded in the Shulchan Aruch. Since the Shulchan Aruch does not resolve this matter, the money remains with the Muchzak (the one who possesses it; see Rav Ezra Basri's Dinei Mammonot 3:263; Rav Basri serves as a Dayan in the Jerusalem District Rabbinical Court). Thus, it appeared again that R. was excused from paying.

However, one of the students raised the following question - didn't R.'s agreement (or lack of objection) for the CD player to be placed in his car constitute an implicit acceptance of responsibility regarding S.'s CD player. I responded that this question appeared to hinge on a dispute between the Tannaim.

The Mishna (Bava Kama 47a and b) discusses a case where someone placed an item he owned in another's property with permission of the owner and the item was subsequently damaged. The Tanna Kama dispute whether the owner of the property is responsible for the damage. The Tanna Kama (the first anonymous view recorded in the Mishna) rules that the owner is responsible. Rebbe (Rabi Yehuda Hanassi, the editor of the Mishna), on the other hand, believes that the property owner is not responsible unless he explicitly accepts upon himself the responsibility of watching the item. Thus, if the ox belonging to the property owner damages the item that the other person placed in his property, then the property owner is responsible according to the Tanna Kama and is not responsible according to Rebbe.

The Amoraic scholars Rav and Shmuel (Bava Kama 48b) disagree regarding which Tannaitic opinion is accepted as normative. The Rishonim also disagree regarding which opinion is accepted as normative. The Rif (Bava Kama 21) and the Rambam (Hilchot Nizkei Mammon 3:13 and 7:4) rule that the owner does not assume the responsibility of a Shomer merely by permitting the item to be placed in his property. On the other hand, Tosafot (Bava Kama 48b s.v. U'Shmuel) and the Rosh (Bava Kama 5:3) rule in accordance with the opinion of the Tanna Kama that when a property owner grants someone permission to place an item in his property, he has implicitly accepted the responsibility to guard and protect that item.

This dispute depends to a great extent on Talmudic rules of Halachic resolution. On the one hand, the Halacha usually follows the majority opinion. Accordingly, the Halacha should follow the Tanna Kama. On the other hand, Shmuel rules in accordance with Rebbe, unlike Rav who rules in accordance with the Tanna Kama, and the Halacha usually follows Shmuel in his disputes with Rav concerning monetary matters.

This matter continues to be disputed in the Shulchan Aruch (C.M. 398:5). The Mechaber rules in accordance with the Rif and the Rambam who follow Rebbe, and the Rama rules in accordance with Tosafot and the Rosh who follow the Tanna Kama. This is hardly surprising as the Mechaber (Rav Yosef Karo, the great authority for Sephardic Jews) rules in accordance with the Sephardic Rishonim and the Rama (the great authority for Ashkenazic Jews) rules in accordance with the Ashkenazic Rishonim. Thus, it would seem that R. is responsible to pay since R. and S. are Ashkenazic Jews (it would be even more interesting if R. was Ashkenazic and S. was Sephardic, as it would have to be clarified whether the case would be adjudicated according to Ashkenazic or Sephardic Halacha).

Nonetheless, the Taz (ad. loc.; the Taz is a very important Ashkenazic authority) writes that this dispute has not been resolved even according to Ashkenazic standards. The Taz notes that the Rama elsewhere (C.M. 291:2) cites both the opinions of Rebbe and the Tanna Kama and does not clearly state whom the Halacha follows. Thus, the Taz concludes that this dispute remains unresolved and we may not demand that a defendant pay money if such a situation arises. Indeed, the Aruch Hashulchan (C.M. 398:5) cites both the opinions of Rebbe and the Tanna Kama and does not state which opinion constitutes the normative opinion. Thus, it seems that R. is excused from paying S. for the broken CD since the Halacha remains unresolved as to whether R. implicitly accepted responsibility for the CD when he permitted S. to put it in his car.

Adam HaMazik

The students (see Sanhedrin 32a, where we see that the students are given a voice in Beit Din hearings), however, stated that our case is not analogous to the case that is discussed in Bava Kama 47 where the ox of the property owner caused the damage. In our case the property owner (R.) did the damage. Thus, it is appropriate to investigate whether we should view R. as an Adam HaMazik (damager) to S.'s CD player.

The Mishna (Bava Kama 26a) states that Adam Mu'ad L'olam, that a human being is always responsible for the consequences of his actions. The Mishna states that this applies whether the person

acted deliberately (Meizid) or negligently (Shogeg) or whether he is awake or asleep. The Gemara (Sanhedrin 72a) adds that a human being is responsible even if it is a situation of Oness (accident). Tosafot (Yevamot 53b s.v. Haba) add that some believe that one is responsible even if he was coerced to cause damage. Accordingly, R. should be obligated to pay as an Adam HaMazik who must compensate the victim even if he damaged accidentally.

This point, however, seems to hinge on a dispute among the Rishonim regarding the scope of the obligation of an Adam HaMazik. Tosafot (Bava Kama 27b s.v. Ushmuel) argue that an Adam HaMazik must pay only in an ordinary case of Oness. However, if the damage was completely beyond one's control (Oness Gamur) then even an Adam HaMazik is exempt from payment.

For example, say Tosafot, one is obligated to pay if while sleeping he damaged the person sleeping next to him. However, one is excused if one damaged while sleeping next to someone who came and slept next to him after the former fell asleep. Tosafot cite as a proof to their assertion the Mishna (Bava Kama 31b-32a) that excuses one who is holding a beam and is walking behind one who is holding a barrel and damages the barrel. He is excused if they were walking together and the one holding the barrel stopped suddenly without warning and he continued and damaged the barrel.

Tosafot even set a standard for Oness Gamur. They write that if it is an Oness as severe as theft, one is excused from paying for the damage that he caused. Thus, an Adam HaMazik is responsible for his actions to the same extent as a Shomer Sachar (paid watchman).

The Ramban (Bava Metzia 82b s.v. V'ata Rabi Yehuda) disagrees and rules that an Adam HaMazik is responsible even in a case of Oness Gamur. He cites a proof from the fact that the Gemara (Bava Kama 27a) obligates one to pay if one was pushed off a roof by an unusually strong wind and damaged someone. The Ramban writes that an Adam HaMazik is responsible no matter how severe the Oness. The Maggid Mishneh (commenting to Hilchot Chovel U'Mazik 6:1) and the Shach (C.M. 378:1) argue that the Rambam (ad. loc.) agrees with the Ramban, as the Rambam does not seem to distinguish between Oness Gamur and Oness (see Kesef Mishnah ad. loc. who disagrees and argues that the Rambam agrees with Tosafot).

This issue seems to continue to be debated in the Shulchan Aruch. The Rama (C.M. 378:1) rules explicitly in accordance with Tosafot. On the other hand, the Shach (ad. loc.) argues that the Mechaber agrees with the Ramban as the Mechaber does not explicitly distinguish between an Oness Gamur and an ordinary Oness. The Taz (C.M. 378:2) asserts that the Shulchan Aruch adopts a compromise position and excuses an Adam HaMazik only in an extraordinary situation of Oness. The Taz's example of an extraordinary Oness is someone who ascends a roof that is encompassed by a fence and an unusually strong wind thrusts him above the fence and fall and causes damage. The Aruch Hashulchan (C.M. 378:8) rules in accordance with the Taz. He notes (C.M. 378:1 and 378:9) that most Rishonim agree with Tosafot and that even Tosafot would agree that if one intends to damage, he is responsible to pay even in a case of Oness Gamur.

Accordingly, in our case we must determine whether R. is defined as an extreme Oness Gamur comparable to the case of the Taz and the Aruch Hashulchan. There was some debate among the Talmidim and we decided that the case should be referred to a Rav of eminent stature for a decision. I called Rav Hershel Schachter who ruled that it was not a case of Oness Gamur and thus R. was obligated to compensate S. for the damaged CD player.

Conclusion

It is often quite difficult to determine a proper ruling regarding a monetary dispute (see Shulchan Aruch C.M. 12:20 and the comments of the Vilna Gaon ad. loc.). However, when the Rav and the disputants are dedicated to finding a truthful ruling, a fair judgment can be reached with the help of Hashem.