The latest volume of the Library of Contemporary Jewish Philosophers, titled *J. David Bleich: Where Halakhah and Philosophy Meet*, was recently published. A Jewish law textbook, *Jewish Law and Contemporary Issues*, authored by Rabbi Bleich with Arthur Jacobson, has been published by Cambridge University Press.

Survey of Recent Halakhic Periodical Literature

VACCINATION

On April 29, 2015 a scientific panel established by global health authorities, including the Pan American Health Organization, the U.S. Centers for Disease Control and Prevention, UNICEF and the United States Foundation, announced that rubella, also known as German measles, has been eliminated in the Western hemisphere.[1] Unhappily, the disease has not been eradicated in other parts of the world. In most cases, both in children and adults, rubella produces only a mild rash and fever. However, if contracted by a pregnant woman during the first trimester of gestation, rubella is devastating to her fetus. Many afflicted babies are born deaf and/or blind due to cataracts and suffer severe irreversible neurological damage. Worldwide, approximately 120,000 children are born each year with severe congenital defects attributed to rubella. During the course of a major outbreak in the United States in 1964-65, an estimated 12.5 million cases occurred throughout the country. Eleven thousand fetuses were miscarried, died *in utero* or were aborted. Twenty thousand infected infants survived to term. Of those, 2,100 died in the perinatal period, twelve thousand were deaf, 3,580 were blind and 1,800 suffered permanent mental disabilities.[2]

There is no known cure for rubella but the disease can be prevented by inoculation with a highly effective vaccine. The inoculate as currently administered contains three vaccines known as M.M.R. and is designed to provide immunity to three childhood diseases: measles, mumps and rubella. Vaccines are also available to protect against diphtheria,

[1] See *New York Times*, April 30, 2015, p. A7.
[2] *Loc. cit.*

TRADITION 48:2-3 / © 2015
Rabbinical Council of America

Haemophilius influenza type b (Hib), hepatitis A, hepatitis B, human papillomavirus (HPV), meningococcal disease, pertussis (whooping cough), pneumococcal disease, polio, rotavirus, tetanus, chicken pox and variously occurring strains of influenza.

Rubella has been completely eradicated in the Western hemisphere by means of routine childhood immunization conducted over a period of years. However, despite eradication of indigenous rubella in the United States, some danger still continues to exist because of international travel involving unprotected carriers of the virus. Two other diseases have also been eliminated in the Western hemisphere by means of similar vaccination programs. Smallpox virtually disappeared by 1971 and was declared eradicated worldwide in 1980. The last known naturally occurring case appeared in Somalia in 1977,[3] although a later isolated incident occurred in Birmingham, England, in 1978 as the result of a laboratory accident.[4] The same became true of indigenous occurrences of polio in the Western hemisphere by 1994. The last occurrence of polio in Africa was in Somalia on August 11, 2014.[5] Unfortunately, a small number of cases of polio continue to appear in some areas, primarily in Pakistan. Measles will also disappear in the not too distant future but only if vaccination efforts are successful.[6]

Eradication of infectious diseases of such nature is possible only over an extended period of time. Immunization programs do not reach every potential victim nor is the vaccine one hundred percent effective. But, since the disease spreads from person to person, as more and more individuals become immune, there are fewer and fewer infected victims to spread the disease and fewer and fewer potential victims who lack immunity. Hence, after a period of time, the disease simply disappears.

Vaccinations are not without serious, albeit rare, side-effects. That is equally true of even the most commonplace drugs, including aspirin and Tylenol. In the words of Ramban in his *Torat ha-Adam*, "There is

[3] *Report of the Investigation into the Cause of the 1978 Birmingham Smallpox Occurrence,* December 21, 1978, p. 2.

[4] *Ibid.*, p. 38.

[5] See *New York Times*, August 12, 2015, p. # 1.

[6] Recent studies indicate that elimination of measles will also carry in its wake a significant reduction of deaths from a variety of non-measles infectious diseases. Measles, when contracted, makes it more difficult for the victim to stave off other illnesses for a period of up to twenty-eight months. The studies indicate that an increase in the incidence of measles in a given population is followed by a commensurate increase in deaths from other illnesses. See Michael Mina, "Long-term Measles-Induced Immunomodulation Increases Overall Childhood Infectious Disease Mortality," *Science*, vol. 348, no. 6235 (May 8, 2015), pp. 694-699.

naught in medicaments but danger; that which cures this one kills that one."[7] The potency of a drug renders it efficacious; it is that selfsame potency that, on rare occasions, also causes danger. Fortunately, the risks associated with inoculation against childhood diseases are so extremely remote as to fade into insignificance when measured against the dangers of non-inoculation.[8]

A serious measles epidemic occurred in Philadelphia between October 1990 and June 1991 among adherents of a fundamentalist Christian group who eschewed immunization on religious grounds. In the course of that epidemic, 1400 people contracted measles and nine children died. Public health officials in Philadelphia obtained a court order allowing them to vaccinate children against the will of their parents.[9]

In recent years, there have been a number of outbreaks of childhood diseases in several Orthodox Jewish communities in which a significant number of children were not immunized. In 2001 there was an outbreak of measles among unvaccinated children. In 2009 there were multiple instances of mumps in Orthodox summer camps and upon the return of the children to school in the fall the disease spread further within the community. During the fall of 2011 there was an outbreak of measles in Orthodox enclaves in Brooklyn.[10] In 2013 a measles outbreak erupted in Borough Park and was traced to an unvaccinated youngster who contracted measles during a visit to England and upon his return to this country transmitted the disease to other unvaccinated family members. Other Borough Park residents became infected and the disease spread to Williamsburg as well. A total of 58 cases occurred in those neighborhoods, including a young woman who became afflicted with measles and suffered a miscarriage.[11] Measles outbreaks occurred in *hareidi* areas of Jerusalem in 2001, 2004, and 2007. A more recent outbreak involving 63 cases occurred in northern Israel in 2012.[12] There were also 21 confirmed

[7] *Kitvei Ramban*, ed. R. Bernard Chavel (Jerusalem, 5724), II, 43.

[8] For a review of the medical literature regarding the side effects of vaccines see the website of the Center for Disease Control, www.cdc.gov.

[9] See Paul A. Offit, *New York Times*, February 10, 2015, p. A21.

[10] See Anemona Hartocollis, "Health Department Reports Spike in Measles Cases in Brooklyn, *New York Times*, October 21, 2011.

[11] *Hamodia, Inyan*, February 18, 2015, p. 17.

[12] *Loc cit.* A report of the State Controller issued in 2014 revealed that, as of 2010, 10% of Israeli children were not vaccinated. Their parents came largely from *hareidi* families, low-income groups, upper socio-economic classes and Bedouins lacking full access to health services. Israel provides monthly child allowances to every family. The coalition agreement signed on April 2015 by the Likud and the United Torah Judaism party included a clause calling for legislation to withhold child allowances from families that refused to vaccinate their children. Such legislation is opposed by the Israel National

cases of whooping cough in Williamsburg and Borough Park between October 2014 and April 2015. Included in that number were eighteen children and three adults. Among the children, twelve were entirely unvaccinated and two were incompletely immunized. Ten of the afflicted children were under 10 months of age and two infants required hospitalization. In none of those cases had the mother received the recommended tetanus-diphtheria-accellular pertussis (TDIP) vaccination during pregnancy.[13]

In the general community, the most recent serious outbreak occurred this past winter when more than 120 people in 17 states contracted measles as a result of an outbreak during December 2014 in Disneyland, Anaheim, California. It is presumed that the source of the outbreak was an infected person returning from a foreign country. Of the 34 California cases in which vaccine status has been documented, 28 of the victims were unvaccinated.[14]

Historically, the earliest form of inoculation was designed to prevent the spread of smallpox. Originally inoculation against smallpox involved infecting the person to be protected with a small amount of the disease-causing agent in order to produce a mild form of smallpox in the hope that the patient would produce antibodies that would immunize him against recurrence of the disease in a virulent form. The morality of such self-endangerment was questioned by no less a personage than Immanuel Kant.[15] Quite understandably, the notion of infecting perfectly healthy people with a dangerous disease was looked upon askance even by some members of the medical community. In the wake of a smallpox

---

Council for the Child because its effect would be to harm children on account of the actions of their parents. See *JTA World Report,* May 27, 2015, pp. 3-5.

[13] *Ibid*., p. 9 and *Hamodia,* May 28, 2015, p. 25.

[14] New York Times, February 15, 2015, p. TR 11. In the wake of the Disneyland outbreak California enacted legislation revoking the right of parents to refuse vaccination of their children on personal or religious grounds. Similar laws were already in effect in West Virginia and Mississippi. See *New York Times*, July 1, 2015, p. A19. The U.S. Supreme Court has held that parental religious objection to vaccination does not justify avoiding vaccination of children despite the First Amendment's protection of religious freedom. See *Prince v. Massachusetts*, 321 U.S. 158 at 166-167 (1944) and *Workmen v. Minjo County Board of Education*, 2011 WL 1042330 (4th Cir. 2011). Regarding religious objections to health measures generally see *Annot*., 94 A.L.R. 5th 613 (2001). The severe constraints placed upon the Free Exercise right of religious practice by the Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), serve to reinforce the constitutionality of such legislation.

[15] See Andreas-Holgen Maehle, "Conflicting Attitudes toward Immunization," *Clio Medica*, vol. 29 (1995), 198-199 and 222, note 5.

epidemic that ravaged the Boston area in 1721, the city's leading physician, William Douglas, and his colleagues publicly argued that deliberately infecting healthy people was more dangerous than a policy of *laissez faire*. Interestingly, Douglas' efforts to discourage vaccination were vociferously opposed by Cotton Mather, a famous Puritan clergyman and Hebraist. Mather quite forthrightly used his pulpit to urge widespread inoculation, which he regarded as a miraculous divine gift, rather than as a sinful attempt to avert a divine decree.[16]

The earliest published reaction from within the Jewish community came in 1785. An otherwise unknown individual named Alexander ben Solomon Nanisch of Hamburg, who had lost two of his own children to smallpox, published a work entitled *Aleh Terufah* (Leaf of Healing) in London containing a responsum discussing the halakhic permissibility of inoculation against smallpox. A briefer version of the same material bearing the identical title appeared at approximately the same time in the Enlightenment journal *Ha-Me'asef*, Tishri 5545, "Letters," sec. 2, pp. 5-15.

Toward the end of the eighteenth century Edward Jenner astutely observed that milkmaids who had contracted cowpox did not succumb to smallpox. Despite some initial opposition, the safer, but by no means innocuous, use of cowpox vaccine rapidly spread throughout Europe. The first recognized rabbinic authority to endorse use of the vaccine was the Sephardic scholar R. Ishmael ben Abraham ha-Kohen of Modena, *Zera Emet* (Livorno, 5556), *Yoreh De'ah*, no. 32. A similar position was espoused by R. Israel Lipschutz, *Tiferet Yisra'el*, *Yoma*, *Bo'az* 8:3; R. Eleazar Fleckles, a disciple of R. Ezekiel Landau of Prague, *Teshuvah me-Ahavah*, no. 135; and, reportedly, by R. Mordecai Benet of Nikolsburg as well.[17]

[16] For an excellent survey of the history of attitudes towards vaccination against smallpox in both Jewish and non-Jewish communities see David B. Ruderman, "Some Jewish Responses to Smallpox Prevention in the late Eighteenth and Early Nineteenth Centuries: A New Perspective on the Modernization of European Jewry," *Aleph*, no. 2 (2002), pp. 111-144.

[17] Judah Leib Jeiteles, *Bnei ha-Ne'urim* (Prague, 5681), p. 72, claims that the campaign of his father, Jonas Jeiteles, a medical practitioner, to encourage the Jewish population of Prague to be vaccinated was supported by R. Mordecai Benet, author of *Perashat Mordekhai*. There seems to be no written statement authored by R. Mordecai Benet himself.

For sources pertaining to the smallpox issue in rabbinic literature see R. Pinchas Eliyahu Horowitz, *Sefer ha-Brit* (Jerusalem, 5750), pp. 247ff; J. D. Eisenstein, *Ozar Yisra'el*, (New York, 5711), I, 76-77; H. J. Zimmels, *Magicians, Theologians and Doctors* (London, 1952), pp. 107-109 and David Margalit, "Harkavat Ababu'ot lifnei Jenner," *Derekh Yisra'el be-Refu'ah* (Jerusalem, 5730), pp. 376-379.

It is a well established principle of Halakhah that hazardous medical intervention may be undertaken in the hope of achieving a cure despite the very real possibility that failure may entail imminent loss of life. The paradigm is a patient whose death is expected within a matter of days but for whom a medication is available that will either cure his malady or cause him to die precipitously. The patient, in effect, is entitled to risk forfeiture of a brief lifespan of which he is reasonably assured in anticipation of achieving a much greater period of longevity.[18] *Tiferet Yisra'el*'s ruling regarding vaccination is an illustration of that principle. *Tiferet Yisra'el* treats the danger of future contagion as an already present risk.[19] The mortality rate associated with smallpox is extremely high. The danger of inoculation, even in the days of *Tiferet Yisra'el*, was far lower than the danger of exposure to smallpox but hardly insignificant.[20] *Tiferet Yisra'el* permitted the as yet unafflicted person to assume the risk of imminent death attributable to the vaccine despite the fact that survival until actually contracting smallpox, i.e., *hayyei sha'ah*, would have been a certainty. Moreover, he regarded that risk as acceptable despite the fact that the person exposed to the risk of vaccination might never contract the disease. His ruling reflects the view that assumption of an imminent risk of a lower magnitude in order to avoid the higher risk of eventual death as a result of contagion is justified.[21]

Nevertheless, assuming the risk of loss of *hayyei sha'ah* in anticipation of a cure is discretionary rather than mandatory. *Tiferet Yisra'el* sanctioned inoculation against smallpox and urged its acceptance as a prudent

[18] See R. Jacob Reischer, *Teshuvot Shevut Ya'akov,* III, no. 75. For a fuller discussion of this issue see J. David Bleich, "Hazardous Medical Procedures," *Bioethical Dilemmas*, II (Southfield, Michigan, 2006), 239-275.

[19] For the permissibility of vaccination on *Shabbat* see R. Eleazar Fleckles, *Teshuvah me-Ahavah,* I, no. 134; R. Joseph Stern, *Zekher Yehosof, Orah Hayyim,* no. 104; and R. Asher Anshel Katz, *Teshuvot U-le-Asher Amar*, no. 15.

[20] The mortality rate at that time is estimated to have been between 0.5 and 2%. See Edward Reichman, "*Halakhic* Aspects of Vaccination," *Jewish Action,* Winter 2008, p. 10.

[21] It may be suggested that *Tiferet Yisra'el*'s ruling served as precedent for R. Israel Salanter's celebrated ruling permitting eating on *Yom Kippur* in Vilna during a cholera epidemic in surrounding areas. See sources cited by Hillel Goldberg, *Between Berlin and Slabodka: Jewish Transition Figures from Eastern Europe* (Hoboken, 1989), p. 163, note 28. In effect, R. Israel Salanter treats the future danger of the epidemic spreading in the city as tantamount to an already present danger. See R. Jacob Kaminetsky, *Emet le-Ya'akov al Arba'ah Helkei Shulhan Arukh*, *Orah Hayyim* 554:6, who asserts that the conflict between R. Israel Salanter and the Vilna *bet din* was with regard to whether a possible future danger constitutes a danger for purposes of Halakhah. Cf., R. Moshe Sternbuch, *Oraita,* no. 16 (Elul 5748), p. 177 and this writer's *Contemporary Halakhic Problems*, IV (New York, 1995), 373, note 4.

prophylactic measure but did not rule it to be mandatory. R. Isaiah Horowitz, *Shnei Luhot ha-Brit* (*Shelah*), cited by *Magen Avraham* 576: 3 and *Mishnah Berurah* 576:14, declares that a person who does not flee a city during an epidemic will be held accountable by Heaven. However, fleeing a city is not necessarily hazardous. Hence, that statement does not entail the conclusion that such an individual must also risk *hayyei sha'ah* in order to avoid the dangers associated with an epidemic.

Nevertheless, speaking of a person who fails to inoculate his children against smallpox in a time of epidemic, *Teshuvah me-Ahavah*, no. 135, declares that "the blood of his children is upon his head." *Teshuvah me-Ahavah* took cognizance of the risk involved in inoculation against smallpox but nevertheless regarded assumption of that risk on behalf of a child to be a parental obligation. Presumably, *Teshuvah me-Ahavah*'s uncited source is *Kiddushin* 29a. The Gemara records an opinion that includes a duty to teach a child how to swim among the duties incumbent upon a father *vis-à-vis* his son. Rashi, in his commentary *ad locum,* explains that the child may one day be shipwrecked and, if unable to swim, will perish in the water. However, there is no gainsaying the fact that swimming accidents do occur. In teaching his child how to swim, the father is imposing upon his son a present risk of drowning in order to avert a future, but statistically more significant, danger. Imposing that risk upon the child in the course of teaching him to swim is not merely discretionary but mandatory.

An obvious objection may be raised against appeal to that source as a precedent for compelling the assumption of the risk of contracting smallpox as a result of vaccination, at least under the conditions prevalent at the time of *Tiferet Yisra'el*. Swimming and the process of learning how to swim are not devoid of danger, but the danger is remote and well within the parameters of "*shomer peta'im Ha-Shem* — God protects the simple" (Psalms 116:6) as cited by the Gemara, *Shabbat* 129b; *Yevamot* 12b, 72a and 100b; *Ketubot* 39a; *Nedarim* 35b; *Avodah Zarah* 30b; and *Niddah* 45a. That principle reflects the notion that dangers that are both remote and also assumed by most people as a matter of course do not rise to the threshold of danger of which Halakhah takes cognizance. The level of danger associated with smallpox inoculation, at least in the time of *Tiferet Yisra'el*, was not accepted with equanimity by the public at large as evidenced by the many voices that decried assumption of that risk.

In response to that objection, it must be remembered that, as previously stated, a person, if he so desires, has the right to refuse to accept a permissible risk within the category of "*shomer peta'im*." Such refusal is

sanctioned even if the result will be non-fulfillment of an otherwise mandatory *mizvah*. The Gemara, *Yevamot* 72a, reports that circumcision on a cloudy day entails a certain level of risk. The principle "*shomer peta'im Ha-Shem*" is invoked by the Gemara as justification for assumption of that risk. Moreover, the principle of *shomer peta'im* warrants imposition of the risk upon others as well, to wit, imposition of the danger of circumcision on a cloudy day upon an infant who, himself, is as yet not bound by the commandment concerning circumcision. Nevertheless, despite license to assume risk in the nature of *shomer peta'im*, *Nemukei Yosef*, in the opening section of his commentary on the eighth chapter of *Yevamot*, cited by *Bet Yosef*, *Yoreh De'ah* 262, indicates that a person has the right to eschew even that low level of danger despite the fact that such demurral will result in abrogation of the *mizvah* to perform circumcision on the eighth day following birth. Accordingly, rules *Bet Yosef*, a person may perform circumcision on a cloudy day but he is not required to do so.

Yet a father is obligated to teach his son how to swim, despite the attendant danger, in order to preserve him from more serious future danger. Apparently, then, *Teshuvah me-Ahavah* maintains that, although a person may decline to accept the danger of *shomer peta'im* for himself, he does not enjoy the prerogative of declining that danger on behalf of another when prudence dictates that it be accepted in order to avoid greater danger. Duties to children, in particular, require scrupulous exercise of prudence.

The case for mandatory inoculation of children in contemporary circumstances is even more compelling. Assuredly, *Nemukei Yosef,* who sanctions non-performance of circumcision on a cloudy day, certainly would not countenance a plea that absolutely no risk (other than the risk associated with the incision itself) must be assumed. No human activity is entirely without risk. A person awakens in the morning and must decide whether to remain in bed or whether to rise from his bed. If he remains in a prone position he risks an embolism; if he gets out of bed he risks inadvertently banging his head in the process and developing a hematoma — not to speak of the myriad dangers encountered in the course of routine daily activities. Of course, no normal person ponders those alternatives each morning. In all likelihood, were a person to do so in an earnest manner, and similarly to assess all aspects of normal daily activity, his mental health would rapidly become compromised — a matter that carries with it its own dangers.

Nemukei Yosef would surely respond that there are dangers so remote as to be of such little significance that they do not require the *mattir* — or dispensation — of *shomer peta'im* to justify their assumption.

When the danger is so far-fetched and so statistically insignificant a person cannot plead that he may avoid a *mizvah* because he is unwilling to rely upon *shomer peta'im*. Thus, for example, although he may decline to circumcise his own son on a cloudy day, a father cannot claim exemption from the commandment of circumcision because he does not wish to accept the perfectly innocuous danger of carrying the baby to the synagogue or to the residence of the *mohel*.[22]

It may readily be shown that Halakhah recognizes that a category of *de minimis* danger does exist but that such danger is to be entirely ignored in determining matters of Jewish law. The classic and most widely known exposition of the principle of *shomer peta'im* is that of R. Jacob Ettlinger, *Binyan Zion*, no. 137. *Binyan Zion* limits the principle of *shomer peta'im* to risks that lie in the future, e.g., embarking on a sea voyage which at its inception is devoid of danger, and whose estimated frequency of occurrence is less than fifty percent. *Binyan Zion* fails to draw any distinction in terms of the motive for prompting assumption of a risk justified by the principle of *shomer peta'im*. Apparently, according to *Binyan Zion,* a risk falling within the parameters of *shomer peta'im* may be assumed even for frivolous purposes.

A present danger, e.g., passing under an unstable wall, is always forbidden. All forms of conduct specifically censured by the Sages, such as drinking water that has been left exposed overnight, involve imminent, albeit scant, danger. A firm and steady wall may also collapse but the danger cannot be presently perceived. No cognizance at all is taken of dangers falling below the threshold level of *shomer peta'im*. Hence, one cannot plead fear of such danger as justification for avoidance of a *mizvah*. It would appear that, according to *Binyan Zion*, all risks fall into the dichotomous categories of the forbidden and the permitted by virtue of *shomer peta'im*. It is, of course, quite difficult to delineate the point of demarcation between danger so insignificant that it does not require justification on the basis of *shomer peta'im* and danger that does require invocation of that principle.

Nevertheless, one should not infer that assumption of permissible future risk is always devoid of censure. Although not cited in *Binyan Zion*'s discussion of permissible endangerment, the Gemara, *Ketubot* 30a, declares "All is in the hands of Heaven with the exception of hypothermia

[22] It might perhaps be argued that the level of danger involved in swimming instruction is so low that *shomer peta'im* need not be invoked. If so, the talmudic source for *Nemukei Yosef*'s assertion that one is not obligated to assume a risk within the category of *shomer peta'im* in order to fulfill a *mizvah* remains obscure.

and heatstroke, as it is said, "Cold and heat (*zinim pahim*)[23] are in the way of the stubborn; he who safeguards his life distances himself from them" (Proverbs 22:5). In context, the Gemara declares only that the afflictions caused by exposure to the elements are self-inflicted rather than manifestations of divine providence but is silent with regard to permissibility of undertaking the risk associated with such exposure. *Tosafot,* in obliquely comparing such exposure to walking in close proximity to a wobbly wall, implies that exposing oneself to "cold and heat" is not permissible. If so, "the way of the stubborn" to which the verse refers is actually prohibited. Alternatively, it might be suggested that brief exposure to even extremes of intemperate climatic conditions are of no danger. The danger, since it arises only after relatively long exposure, is future rather than imminent. The danger becomes actual only if a person subjecting himself to extreme temperature is unable to assess the danger until it is too late. If so, the initial exposure, it may be contended, is, according to *Binyan Zion*'s analysis, within the boundaries of *shomer peta'im*. Nevertheless, assumption of that risk, although permissible, is *derekh ikesh* — unwise and foolhardy.

Binyan Zion's distinction between imminent danger and future danger is ignored by R. Aryeh Balhuver, *Shem Aryeh*, no. 27, and is explicitly rejected by R. Eliyahu Klatzkin, *Imrei Shefer,* no. 29. Contra the view of *Binyan Zion*, *Shem Aryeh* responds to the problem posed by the seeming contradiction between the permissibility of sea voyages and caravan journeys through the desert and the prohibition against walking in the proximity of an unstable wall by candidly acknowledging the inherently dangerous nature of sea voyages and caravan journeys. Accordingly, *Shem Aryeh* regards assumption of even imminent danger, at least in some circumstances, as permitted by virtue of the principle of *shomer peta'im*. The Gemara, *Bava Mezi'a* 112a, explains why the Torah (Deuteronomy 24:15) commands that a workman's wages be paid without delay: "Why did he go up on a ladder, hang from the tree, deliver himself to death, if not for his wages?" The hazards of tree-climbing were clearly recognized, argues *Shem Aryeh*, but nevertheless permitted for the purpose of earning a livelihood. Recognized hazards are acceptable on the basis of the principle of *shomer peta'im*, but may be assumed solely for purposes of

[23] Rashi, in this commentary on the Gemara, studiously translates the phrase "*zinim pahim*" as "cold and heat" to indicate that the Gemara's exegetical rendering of the verse is not its literal meaning. Standard English translations follow *Mezudat David* in rendering the phrase "thorns and snares." See also Ralbag, *ad locum*. Cf., Rashi's commentary on Proverbs 22:5 in which, relying upon his own rendition of Ezekiel 23:24, Rashi translates the phrase as "regiments of soldiers and highwaymen."

earning a livelihood[24] or, as is evident from the Gemara's ruling (*Yevamot* 12b and 100b; *Ketubot* 39a; and *Nedarim* 35b), permitting pregnant women, lactating mothers, and young girls to engage in unprotected marital intercourse, despite attendant danger, "for that is the wont of the world." According to *Shem Aryeh*, sea voyages are permitted only for prudent purposes such as earning a livelihood but are not sanctioned for mere pleasure jaunts or tourism. The somewhat higher than usual risk of pregnancy faced by already pregnant women, lactating mothers and young girls may also be assumed for the salutary purpose of marital relations. However, assumption of risk in earning a livelihood, he asserts, is permitted only if *lo shekhiah hezeika,* i.e., only if untoward results are unlikely to occur.

According to *Shem Aryeh, shomer peta'im* is not at all based on psychological denial of danger nor in its application is there any distinction between present and future danger. *Shomer peta'im* is limited to the category of low probability risk somewhat vaguely defined as *lo shekhiah hezeika*.

Shem Aryeh also permits acceptance of risks in reliance upon *shomer peta'im* for purposes of fulfilling a *mizvah*. According to *Shem Aryeh*, an obligation to accept a small measure of risk in fulfilling a *mizvah* is reflected in the Gemara's ruling, *Berakhot* 33a, that a person must interrupt recitation of *shemoneh esreh* if a scorpion attaches itself to his ankle although, as the Mishnah, *Berakhot* 30b, declares, a person may not interrupt his prayer if he finds a "snake" coiled around his foot. The difference, asserts *Shem Aryeh*, is that, although both the snake and scorpion represent a present danger, the scorpion is *shekhiah hezeika,* i.e., likely to bite, whereas the snake is *lo shekhiah hezeika*, i.e., unlikely to bite.[25] *Shem Aryeh* maintains that assumption of risk when danger is likely to follow – *shekhiah hezeika* — is always forbidden. Assumption of risk, even if *lo shekhiah hezeika*, is forbidden if the purpose is frivolous.

Imrei Shefer differs from *Shem Aryeh* with regard to two points. *Imrei Shefer* refuses to sanction assumption of risk for the purpose of fulfilling a *mizvah* even if the risk is remote, i.e., even if *lo shekhiah hezeika*. *Imrei Shefer* disposes of the problem posed by the seemingly

[24] R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah, Mahadura Tinyana*, no. 10, permits hunting for purposes of obtaining hides for commercial purposes despite the danger involved but censures hunting for sport because of danger to the hunter.

[25] *Binyan Zion,* in accordance with his thesis, explains that a scorpion is always prepared to bite and hence represents an imminent danger, whereas a snake is generally placid unless provoked or aroused. Thus, in a presently tranquil snake the danger lies only in the future.

contradictory ruling that one may not interrupt *shemoneh esreh* even when confronted by a snake by marshaling sources demonstrating that "snakes" act against human beings in an aggressive manner only when explicitly delegated by Heaven to do so. *Imrei Shefer* limits the permissibility of risk-taking for purposes of earning a livelihood as described by the Gemara, *Bava Mezi'a* 112a, to risks that are *lo shekhiah hezeika* and forbids even assumption of risks of such a level for purposes of fulfilling a *mizvah*.

Imrei Shefer acknowledges that most human activity entails an element of risk but nevertheless maintains that *shomer peta'im* does not serve to render all such activity permissible. He posits a rule to the effect that, although a non-routine frivolous activity involving a known risk is forbidden even if *lo shekhiah hezeika,* the risks posed by normal, non-frivolous commonplace activities may be assumed if *lo shekhiah hezeika* but only if the risk cannot be completely eliminated. Risk-taking for purposes of fulfilling a *mizvah* is similarly forbidden when the danger can be entirely eliminated.[26] When the risk cannot be entirely eliminated, the risk is permitted but only if it is in the nature of *lo shekhiah hezeika*. The same is true of all non-frivolous activities. Thus, as is evident from the Gemara, *Shabbat* 90a, one is permitted to eat dates even though they may be infested with unperceivable creatures capable of harm. Unavoidable danger associated with such usual activity is permitted by the Gemara, *Avodah Zarah* 30b, on the basis of *shomer peta'im*.[27] Similarly, the "three women" described by the Gemara for whom pregnancy represents a danger need not employ a contraceptive because such devices are not foolproof and the danger of pregnancy is sufficiently remote as to be *lo shekhiah hezeika*. Danger of such a low magnitude, asserts *Imrei Shefer*, may be accepted on the basis of *shomer peta'im* unless the danger can be completely dispelled.

Imrei Shefer limits the degree of risk that, when not completely avoidable, may be accepted for purposes of earning a livelihood as well as for fulfilling a *mizvah,* to the category of *lo shekhiah hezeika*, a degree of risk he regards as permissible only because of *shomer peta'im*. *Shem Aryeh* categorizes the degree of danger acceptable for earning a livelihood and for purposes of a *mizvah* as *shekhiah hezeika* but nevertheless regards the danger as permissible because of *shomer peta'im*. Both regard sea voyages and the like to be impermissible when undertaken for frivolous purposes. But, since all human activities entail at least a slight degree of danger, both

[26] Presumably, according to *Imrei Shefer* circumcision is permitted even on a cloudy day on the basis of *shomer peta'im* because the dangers normally associated with circumcision can never be completely eliminated.

[27] See also *Imrei Shefer,* no. 63, *s.v. ve-al kol panim*.

Shem Aryeh and *Imrei Shefer* recognize that there must be an additional category of danger below the threshold level of *shomer peta'im* that is always acceptable. Sea voyages undertaken for frivolous purposes may not be permitted but there is no hint that a pleasure jaunt in a horse-driven carriage is forbidden for that reason.

Childhood vaccinations are not accompanied by any significant danger. Despite widespread belief to the contrary, autism is not at all associated with M.M.R. inoculation. That misinformation gained currency and became widespread because of a spurious article based upon fraudulent research that appeared in a British medical journal. The principal author's malfeasance was subsequently exposed and his license to practice medicine was revoked. Possible connections between autism and M.M.R vaccine were rigorously investigated and in 2004, in a publication entitled "Immunization Safety Review: Vaccines and Autism," the Institute of Medicine reported that epidemiological evidence failed to establish a causal relationship. Other dangers attendant upon various forms of inoculation are infinitesimal.[28] The dangers that do exist are well within the parameters of *shomer peta'im* as defined by *Binyan Zion*. For *Shem Aryeh* and *Imrei Shefer* they are far below the threshold level requiring even invocation of *shomer peta'im*.

Even assuming a higher degree of danger, as earlier argued, a parent is nevertheless charged with assumption of a minimal danger on behalf of a child in order to ward off more serious danger, as evidenced by a father's obligation to teach his sons to swim.

Nor can the principle of *shomer peta'im* be invoked to justify assumption of a recognized danger that can be readily averted. That is clearly the import of the statement of R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, IV, no. 10, to the effect that, with the development of blood tests to determine whether prospective marriage partners are both carriers of the gene responsible for Tay-Sachs disease, one may no longer rely upon *shomer peta'im* in assuming the risk of that disease. For precisely the same reason, a danger posed by childhood disease for which a vaccine is available may not be assumed on the plea of *shomer peta'im*. That is certainly the import of the statement attributed to the late R. Yosef Shalom Eliashiv to the effect that "failure to immunize would amount to negligence."[29]

Perfection of vaccines that immunize against disease results in a situation in which failure to vaccinate is tantamount to willfully exposing oneself

[28] See the website for the Center for Disease Control, www.cdc.gov. See also, Alice Park, "How Safe Are Vaccines?" *Time Magazine,* June 2, 2008.

[29] See Akiva Tatz, *Dangerous Disease & Dangerous Therapy in Jewish Medical Ethics,* (Southfield, Michigan, 2010), p. 48.

to *zinim pahim*. Once divine providence has made a vaccine safely available, any misfortune resulting from failing to avail oneself of immunization is to be attributed to human negligence rather than to divine decree. Exposure to the disease without immunization is equivalent to exposure to the elements without protection. Allowing a child to be exposed to the ravages of communicable disease is no different from exposing the child to *zinim pahim*. Any resultant harm is not at the hands of Heaven but is *derekh ikesh* for which the parent bears full responsibility.

There is only one mitigating consideration. The risk of infection can become infinitesimal even without vaccination as a result of a phenomenon known as "herd immunity." Vaccination of a large population of a "herd" provides protection even for unvaccinated members of the herd. The higher the proportion of immune persons present in a community, the lower the likelihood that any individual will be exposed to someone who is infected. The fewer people who contract the disease, the lower the chance that a chain of infection will be maintained. Those who refuse to be inoculated derive vicarious benefit from the vaccination of others.

The problem is that, as the number of people who refuse to be vaccinated grows, the extent of immunity diminishes and ultimately disappears. A single case of infection can rapidly spread to all members of the community who lack immunity to the disease and also impact those few persons who have been inoculated but in whom the vaccine proved to be ineffective.

From the communal vantage point, the question of whether unvaccinated students may be excluded from *yeshivot* and Day Schools is even more pressing. Rema, *Yoreh De'ah* 116:5, writes that a person should abandon a city affected by pestilence. R. Akiva Eger appends a gloss citing Rabbenu Bahya's comment on Numbers 16:21:

> Why is it necessary to say "separate yourselves?" The Holy One, blessed be He, is capable of slaying the many and sparing one in their midst, as the Sages of blessed memory wrote: "Two or three people can cover themselves with a single garment; two die and the middle one is spared as Scripture says, 'A thousand shall fall at your side and ten thousand at your right.'" (Psalms 91:7). Rather, [the reason is] so that the bad air of the affliction of the pestilence shall not attach itself to them as is said with regard to the wife of Lot "and his wife looked behind him" (Genesis 19:26) or, as the Sages said, "When the attribute of law is unfurled it does not discern between the righteous and the evil" (*Bava Kamma* 60a).

Sefer Hasidim, no. 673, advises that a person suffering from an infectious dermatological malady should not bathe in a bathhouse with another Jew

unless he informs the latter of his condition. To expose another person to the danger of infectious disease, declares *Sefer Hasidim,* is a transgression both of "You shall love your fellow as yourself" (Leviticus 19:18) and "You shall not stand idly by the blood of your fellow" (Leviticus 19:16).

A person is certainly under no obligation to allow others to pose harm to him or to his children. In days gone by, a teacher accepted students for tutelage exercising discretion in choosing his charges in the manner of any other artisan or professional. Alternatively, a group of parents cooperatively engaged a teacher to provide instruction for their children. Such arrangements were entirely at the discretion of the parents and the teachers. Presently, for better or for worse, entire schools are established in much the same manner by a single educator or by a group of administrators. Technically, those schools may or may not be charitable eleemosynary institutions but, not infrequently, in *din Torah* proceedings the principal or administrator has no compunction in arguing that, halakhically, the institution enjoys the status of a proprietorship with decision-making vested in himself or his associates. An entrepreneur is fully entitled to make decisions predicated upon his perception of the measures needed to assure the success of his enterprise. Thus, unfortunately, at times, such institutions have no compunction in turning away prospective students lacking means for payment of tuition. Sadly, in some instances, those schools also seek to exclude students whose families do not adhere to certain norms of religious or socio-religious conduct, not upon ideological or pedagogical grounds, but because of impact upon future enrollment. Proprietary institutions exercising such prerogatives may retain autonomy of action but as a consequence forfeit any claim to communal financial support.

Institutions that are established by the community at large and remain responsible to the community that supports them are held to a different standard.[30] Communal institutions must be concerned with the educational welfare of all children in the community. Yet, even such institutions dare not sacrifice the many for the sake of the few. Quite to the contrary, their mandate is to maximize educational opportunities by safeguarding the health and welfare of all prospective students.

Policy decisions by community schools regarding admission of unvaccinated children should be made by judiciously weighing the risks and benefits involved. The danger of contagion may vary from time to time and from locale to locale. The number of students who are likely to refuse inoculation and the bearing of that number upon "herd effect" is a significant consideration. Above all, the decision should be made

[30] See, for example, R. Moshe Feinstein, *Iggerot Mosheh, Hoshen Mishpat* I, no. 77.

objectively and dispassionately by knowledgeable and informed persons in consultation with infectious disease experts. The risks to the school population — including teachers for whom the danger is even greater than for youngsters — dare not be ignored.

Vaccination of one's children is unquestionably a parental responsibility.[31] Education of parents in their halakhic responsibilities in light of the overwhelming benefits of vaccination and their resultant voluntary compliance would entirely obviate the quandary forced upon dedicated and well-meaning educators.[32]

MONEY FOUND IN AN AUTOMOBILE

Hitchhiking is a far more common mode of transportation in Israel than in other countries. As reported, an incident occurred in which a considerate driver provided a ride for two hitchhikers who were unknown to one another. One of the hitchhikers, having reached his destination, exited the vehicle during the course of the journey. Before the conclusion of the journey the second passenger found a sizable sum of money in the vicinity of the seat previously occupied by his fellow passenger. The identity of the first hitchhiker was unknown either to the driver or to the finder of the money and inquiries designed to establish the identity of that hitchhiker were unfruitful.

Both the driver and the passenger claimed to have acquired valid title to the lost money: the driver because he was also the proprietor of the vehicle and the finder because he was the first to discover and take personal possession of the lost property. The issue of ownership is discussed by R. Yitzchak Zilberstein, in his *Be-Toratekha Sha'ashu'ai* (5768), no. 10. A virtually identical situation was addressed some years earlier by R. Zevi Yehudah Ben-Ya'akov in a collection of rulings of the Rabbinical District Court of Petah Tikvah entitled *Mishpatekha le-Ya'akov*, II, (Bnei Brak, 5757), no. 30, pp. 374-394. The sole difference between the two situations is that,

[31] Medical care is integral to the obligation of child support. See R. Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yizhak*, VI, no. 150.

[32] For sources and a discussion of the obligation to heal even non-life-threatening maladies incumbent upon any person capable of rendering assistance, see this writer's *Judaism and Healing*, 2nd ed. (Jersey City, 2002), pp. 1-5. That obligation includes prophylactic measures to prevent illness from occurring. See R. Eliezer Waldenberg, *Ziz Eli'ezer*, XV, no. 40, who declares that such medical procedures should be performed despite refusal of treatment on the part of the patient and that, in particular, school officials are obligated to assure that students receive ophthalmological examinations for prevention and treatment of myopia.

in the latter case, the automobile was leased from a car rental company. The question of title to money found by a passenger in a taxi is addressed by R. Zevi Spitz, *Mishpetei ha-Torah, Bava Meẓi'a* (Jerusalem, 5769), no. 26.

The claim to title advanced by the owner of the automobile is rooted in the fact that, since the money undoubtedly slipped onto the seat of the car from the pocket of the person to whom the money originally belonged, the proprietor of the automobile was first in possession. The owner of the vehicle came into possession of the money simultaneously with its loss by the original owner and hence possession on the part of the owner of the vehicle was clearly prior to that of the finder. That possession, the owner contended, also served to establish *kinyan*, i.e., acquisition and title, by virtue of "courtyard" or *hazer*.[33]

Halakhah provides that acquisition of title to property requires taking possession by means of a formal act of *kinyan*. Chattel can be conveyed to the owner of a "courtyard" by placing it within his property. Title to ownerless property that comes to rest in a courtyard is also acquired in that manner by the owner of the *hazer*. Not only real property but also utensils and chattels can serve as a *hazer* for the purpose of acquiring title.[34] Acquisition by means of *hazer* occurs *nolens volens,* that is, vesting of title does not require intention to acquire ownership or even knowledge of the presence of the object on or within one's property. Accordingly, the owner of the vehicle in which the lost money was found might claim that title to the lost property vested in him by virtue of *kinyan hazer* before the money was discovered by his passenger.[35]

That consideration, however, is not conclusive. Rabbi Spitz cites the rule formulated by the Mishnah, *Bava Meẓi'a* 26b, with regard to money found in the public area of a commercial establishment. Money found in places to which the public has access belongs to the finder rather than the proprietor. *Shakh, Ḥoshen Mishpat* 260:18, explains that the owner of the

[33] *Tosafot, Bava Mezi'a* 26a, s.v. *de-shatikh*, maintain that *hazer* is not a *kinyan* with regard to small objects such as coins that may never be found. Presumably, that is not the case with regard to currency left on the seat of an automobile.

[34] For a comprehensive discussion of *kinyan hazer* see *Encyclopedia Talmudit* XVII (Jerusalem, 5743), 172-286.

[35] It is indeed the case that, as stated by the Gemara, *Bava Batra* 85a, a person's vessels cannot serve as a *hazer* for purposes of acquiring title when such vessels are situated in a public thoroughfare. However, *Tosafot, Bava Batra* 85b, s.v., *kelav*, explain that the rationale underlying that rule is that others entitled to use of the thoroughfare do not grant permission to any of their number to place his utensils in a commonly held public area. However, there is clearly a mutual and reciprocal grant of permission to drive an automobile on a public roadway. If so, an automobile can serve as a *hazer* for purposes of *kinyan* even when situated on a public road.

establishment realizes that his customers have free access to those areas. Since the customers are not subject to his control, he recognizes that he cannot prevent them from taking possession of objects lost in his store. Consequently, reasons Rabbi Spitz, the establishment cannot be regarded as a *ḥaẓer mishtameret le-da'ato*, i.e., a courtyard effectively safeguarding items present therein on behalf of the proprietor of the courtyard. A *ḥaẓer* that provides no security, e.g., an unenclosed parcel of land, cannot serve to effect *kinyan ḥaẓer*. Since customers are entitled to access to public areas of the store, those areas cannot be considered a *ḥaẓer ha-mishtameret*. Rabbi Spitz contends that the passenger seats of a taxi are comparable to public areas of a store and hence the owner of the vehicle cannot assert a claim on the basis of *kinyan ḥaẓer*.

Rabbi Ben-Ya'akov and Rabbi Zilberstein do not take note of this consideration. Presumably, they regard the passenger area of a taxi or car as dissimilar from the public area of a store. The driver's awareness of his passengers' conduct is more acute than that of the proprietor's awareness of the comings and goings of his customers. The limited number of passengers in a taxi and their proximity to the driver gives the driver reason to assume that they will inform him of objects they may find on their seats. If so, it might be contended, the taxi is a *ḥaẓer* safeguarding lost objects on behalf of the owner of the taxi. Those authorities might indeed concede that the more public nature of a bus and the constant embarking and disembarking of passengers renders a bus comparable to a store rather than to a taxi.

A second consideration lies in the fact that the rule that a *ḥaẓer* serves to acquire title on behalf of its proprietor is derived from a pleonasm, "if found it shall be found (*himaze timaze*) in his hand" (Exodus 22:3). The Gemara, *Bava Mezi'a* 10b, declares that employment of the seemingly redundant double verb "*himaze timaze*" serves to indicate that, in order to serve as a *kinyan,* the object to be acquired need not necessarily be found "in his hand"; rather, if it is found in any place comparable to a "hand," e.g., a courtyard, *kinyan* has occurred. At the same time, the Gemara, *Bava Mezi'a* 9b, asserts that the phrase "his hand" serves as a paradigm that excludes a *ḥazer* that is not comparable to a "hand," *viz.*, a "walking *ḥazer*" (*ḥazer mehalekhet*). The underlying concept is that a person's hand, and hence any object placed in this hand, is controlled by the person and safeguarded by him in accordance with his desire (*mishtameret le-da'ato*). A person's slave or animal has an independent will with the result that, since the slave or animal may roam at will, chattel placed upon either of them is not properly safeguarded in accordance with the intent of the master of the slave or of the animal.

The Gemara then reports that R. Pappa and R. Huna the son of R. Joshua queried whether a boat propelled by water is also a "walking *hazer*." The question is directly relevant in situations in which fish flip themselves onto a boat. Does the owner of the boat acquire title immediately upon entry of the fish onto the boat or may an interloper seize the fish from the boat and thereby acquire title? Rava responded, "The boat is at rest and it is the water that moves it." The Gemara poses a similar question with regard to a *get* or bill of divorce. To be effective, the wife must acquire the *get* by means of *kinyan*. Depositing a *get* in a utensil owned by the wife constitutes conveyance by means of *hazer*. The question is whether a *get* is effective if it is placed by the husband in a basket of a type that during the talmudic period was customarily worn by women upon their heads. The Gemara's response is similar: "Her container (*kiltah*) is at rest; it is [the woman] who moves from underneath it." Thus, the notion of a "walking *hazer*" is limited by definition to denote only a self-propelled *hazer* such as a slave or an animal but not to an essentially immobile object propelled by an external force.

Applying that reasoning, Rabbi Zilberstein observes that a motor vehicle is not a *hazer mehalakhet,* or "walking *hazer*," because it is essentially inanimate and therefore stationary; the automobile moves from place to place only because it is set into motion and propelled by the driver. Accordingly, concludes Rabbi Zilberstein, an automobile has the status of a "courtyard" capable of acquiring title on behalf of its owner even while it is in motion.

However, on closer examination, it might seem that such a conclusion is not necessarily compelled. The comparison of an automobile to a *kalit* or container, at least on first analysis, does seem apt. To be sure, neither an automobile nor a *kalit* is self-propelled; the *kalit* moves in tandem with the woman whose head it covers and an automobile moves because of acceleration initiated by the driver. However, Ramban, *Gittin* 21a, explains that the crucial difference between the usual *hazer* and a "walking *hazer*" lies in the fact that a *hazer* must be comparable to a hand. A person can control and safeguard his hand and hence its contents are safeguarded as well. The same is true of a conventional *hazer,* whereas a "walking *hazer*" can distance itself from its owner, and once it does so, the *hazer* and its contents are no longer safeguarded by virtue of the will and direction of the owner. An automobile is comparable to an ordinary *hazer* only in the sense that the vehicle must be put into motion by a driver. But, once in operation, the automobile will be in a state of uncontrolled motion until the limited amount of fuel within its combustion chamber is exhausted unless the automobile is steered by the driver or

curtailed by braking.[36] If, in the midst of his intercity journey, the driver of the vehicle in which the money was found were to have removed his hand from the steering wheel and his foot from the brake pedal the automobile would have acted as if it had a mind of its own. The likely ensuing calamity would provide ample testimony to the fact that the automobile was not "safeguarded according to the intention of its owner." In rebuttal, it may be argued that, unlike a slave or an animal endowed with an autonomous will, an automobile so long as it is controlled by a driver is subject to the will of its operator. That control may render the *hazer* to be *mishtameret* or "safeguarded." If a wagon pulled by hand is regarded as a *hazer ha-mishtameret* even in situations in which, if released, the wagon would be in a state of uncontrolled motion, the same should be true of an automobile.

One other point must be considered. Let us assume that, contrary to the aforesaid, a moving vehicle is a "walking *hazer*." However, when a vehicle is not in motion it is not a "walking" *hazer* and hence, when stationary, should unquestionably serve as a *hazer* for the purpose of acquiring title. In the case under discussion, it is not possible to determine whether the money fell out of the passenger's pocket during the course of the journey or if it was lost by the passenger while exiting the vehicle, that is, after the driver had already stopped in order to allow the hitchhiker to leave the car. If the latter is what actually occurred, the driver would have acquired title while the car was stationary. That would also be the case if the passenger did not find the lost money until after the driver had already stopped the car upon arriving at his destination.

Although a "walking *hazer*" cannot serve to vest title in its owner, nevertheless, the proprietor of a *hazer mehalekhet* in which the object to be acquired is present enjoys the status of a *muhzak,* i.e., he must be regarded as in physical possession of any object present on his property. Possession of an object is not necessarily proof of ownership but possession does serve to place the burden of proof upon any claimant who wishes to disturb that possession. Since the money is deemed to be in the possession of the *muhzak*, *viz.,* the owner of the vehicle, the burden of proof would be upon the finder to show that the person in possession, i.e., the owner of the

[36] Of course, the status of an automatic car, yet to be perfected but which will undoubtedly be available sooner that might be expected, would be quite different. Such vehicles will render steering and braking superfluous. See *New York Times*, April 3, 2015, p. B3. Presumably, since such a vehicle can never deviate from its programmed instructions, there would be no doubt that, according to Ramban's analysis, the automobile will not be deemed a walking *hazer* during periods of automated driving.

vehicle, lacked title to the money of which he is in possession. Since such proof is not likely to be forthcoming, the right to possession of the *muhzak*, i.e., the owner of the vehicle, cannot be disturbed.

Rabbi Zilberstein assumes that an automobile is not a "walking *hazer*," and hence might serve as a *hazer* in order to acquire title on behalf of its owner, but takes notice of another consideration that would defeat the owner-driver's claim. The finder of a lost object acquires title only if he comes into possession of the lost property after the loser has entered into a state of "*ye'ush*," i.e., after the owner has despaired of its recovery. If the finder comes into possession before *ye'ush* has occurred, he cannot subsequently acquire title upon the actual occurrence of *ye'ush* on part of the owner. The explanation for the distinction between taking possession before *ye'ush* and taking possession after *ye'ush* is either that before *ye'ush* has occurred the finder, in taking possession, incurs an obligation to restore the lost property to its rightful owner and that obligation is not extinguished upon *ye'ush* on the part of the rightful owner or that, before *ye'ush,* the finder, in taking custody, assumes the obligations of a bailee *vis-à-vis* the rightful owner. As a bailee, his domain is the domain of the bailor and *ye'ush*, or despair of recovery, is of no effect with regard to property within a person's own domain. Thus, subsequent *ye'ush* on the part of the owner is *ye'ush* with regard to property within his domain. Such property, despite *ye'ush*, is regarded as merely misplaced rather than lost.

A person can despair of recovering a lost object only if its loss is known to him. At the moment that money falls out of a person's pocket he is unaware of his loss. Despair can occur only when he seeks to ascertain the continued presence of the money in his pocket and discovers its loss. It is obvious that the passenger would not have left the vehicle without recovering his money had he known that it had fallen from his pocket. Thus, the money must have come into the *hazer* of the owner-driver before the loser became aware of his loss and hence before the loser despaired of its recovery. If so, the owner-driver has no claim to the lost money.[37]

The foregoing is the rule according to Rosh, *Bava Mezi'a* 2:9, Rashba, *Bava Mezi'a* 25b, Me'iri, *Bava Mezi'a* 23b, and *Shakh*, *Hoshen Mishpat* 268:2, all of whom maintain that the rule denying title to a person who comes into personal physical possession of a lost object before *ye'ush* has

[37] *Netivot ha-Mishpat* 262:2 asserts that if, when coming upon the lost object, the finder renounces the earlier vesting of title by means of *hazer* that occurred before *ye'ush* without his knowledge, he would be in a position to claim a valid *kinyan hazer* at the time of his actual finding, provided that the latter event occurs subsequent to *ye'ush*.

occurred applies equally to a person who comes into possession of such an object by means of *hazer*. R. Solomon Luria, known as Maharshal, in his commentary on *Tosafot*, *Bava Mezi'a* 26a, s.v. *de-shatikh*, understands *Tosafot* as distinguishing between those two situations.[38] *Mahaneh Efrayim*, *Hilkhot Kinyan Hazer*, no. 5, explains that a person cannot incur an obligation to return an object that he does not realize he has "found." By the same token, he cannot become a bailee, and hence can have no responsibility for returning, an object of whose possession he has no knowledge. Hence, if the owner of the *hazer* had no previous knowledge of its presence within his domain, title to the lost item can be acquired by the proprietor of the *hazer* immediately upon *ye'ush* on the part of its original owner. As already noted, acquisition of title by means of *hazer* requires neither intent nor knowledge. *Mahaneh Efrayim* seeks to demonstrate that this is also the position of Rambam, *Hilkhot Gezelah ve-Avedah* 16:4.

In light of this unresolved controversy among early-day authorities, Rabbi Zilberstein maintains that the finder, i.e., the second hitchhiker, who is in physical possession by virtue of having found the money, is entitled to remain in possession since the burden of proof is upon the owner-driver[39] who is in no position to demonstrate that the authorities relied upon by the finder are wrong as a matter of normative Halakhah.

Rabbi Zilberstein assumes that, if the owner of the vehicle has not acquired title either because the vehicle is a *hazer mehalekhet* or because he came into possession of the lost money prior to *ye'ush* on the part of the prior owner, the finder may claim title by virtue of his own present possession. However, it is not clear that such is the case. If the owner of the vehicle preemptively acquired title by virtue of *hazer*, the finder obviously has no claim. If, however, the owner of the automobile does not acquire title because the vehicle is a *hazer mehalekhet,* it may be asserted that, since the rightful owner's proprietary interest has not been disturbed, the owner of the *hazer mehalekhet* becomes a bailee on behalf of the rightful owner immediately upon coming into possession of the lost money. If so, he must continue to hold the object on behalf of the bailor and the bailor's subsequent *ye'ush* would be of no effect. The dispute, then, would be between the loser (were he to present a claim) and the owner-driver, whereas the finder is not in a position to interpose any claim.

[38] See also *Karnei Re'em, ad locum.*

[39] With regard to this issue, the owner of the vehicle cannot claim that he is in possession since the underlying issue is whether his *hazer* places him in possession or whether he has custody only as a bailee in which case his *hazer* is regarded as the *hazer* of the bailor and hence it is the bailor who must be deemed to be in possession.

If, however, as *Mahaneh Efrayim* maintains, property lost in the *hazer* of a person in circumstances in which the owner of the *hazer* has no knowledge of the presence of such property gives rise neither to an obligation to restore the lost property to its owner nor to the responsibilities of a bailee, it would follow that the owner of the *hazer* is entitled to acquire title immediately after *ye'ush* on the part of the loser. Accordingly, an issue arises between the owner of the vehicle and the finder of the money with regard to whether *ye'ush* on the part of the loser occurred before the money was discovered by the finder, and hence title vested in the owner of the vehicle, or whether *ye'ush* occurred only after the money came into the possession of the finder. If the latter is the case, the finder, who cannot acquire title since *ye'ush* did not occur before he came into possession, must be regarded as holding the money for return to the original owner. Since, as noted earlier, the owner cannot be deemed to be a *muhzak,* the result is that the finder may assert that he is the *muhzak* and that the burden of proof falls upon the owner who wishes to recover the lost property from him. To support that position, the finder must claim that the position of *Mahaneh Efrayim* creates doubt sufficient in nature for the finder to claim that, since he is in actual possession, the owner of the automobile must satisfy an unsustainable burden of proof in order to prevail against him.

In the case of a leased car, the issue is whether the lessor or the lessee enjoys the privilege of use of the leased object for purposes of acquiring property by means of *hazer*.[40] The issue hinges upon diverse understandings of a discussion of the Gemara, *Bava Mezi'a* 102a. Rashi, in his comments *ad locum*, s.v. *ve-turei*, as well as in his comments on *Gittin* 77a, s.v., *kanah ba'alah*, and in *Bava Mezi'a* 49b, s.v. *muzkeret*; *Tosafot*, *Bava Mezi'a* 102a, s.v. *tartei;* Ritva, *ad locum*; and Ra'avad, *Hilkhot Sekhirut* 6:5,[41] maintain that the lessee enjoys the right of use of the premises for the purpose of *kinyan hazer*.[42] However, Rambam, *Hilkhot Sekhirut* 6:5, rules that it is the lessor who enjoys that right. For an analysis of Rambam's ruling see *Maggid Mishneh, ad locum*, and *Hilkhot Mekhirah* 3:6, as well as R. Iser Zalman Meltzer, *Even he-Azel, Hilkhot Sekhirut* 6:5. Rambam's view is shared by R. Moses of Coucy, *Sefer Mizvot Gadol, Esin*, no. 89, s.v. *od sham*, and accepted by *Shulhan Arukh*, *Hoshen Mishpat* 313:3.[43]

[40] For a comprehensive review of this question see *Encyclopedia Talmudit*, XVII, 230-246.

[41] For additional sources see *ibid.,* p. 230, note 764.

[42] For an analysis of the underlying rationale see *Kezot ha-Hoshen* 313:1; *Teshuvot R. Akiva Eger*, no. 133, s.v. *hashavti; Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 117; and *Hiddushei ha-Rim*, *Gittin* 77a.

[43] For additional sources see *Encyclopedia Talmudit*, XVII, 331, note 777.

Rit Elgazi, Bekhorot 2:22, s.v. *eileh*, presents a novel analysis in which he asserts that there is no controversy between Rashi and Rambam. Rit Elgazi maintains that both authorities agree that either the lessor or the lessee can use the leased property for purposes of acquiring title from a third party seeking to transfer title to either of them. However, when title is not conveyed by a third party but the *hazer* serves as *kinyan* in acquiring property that is *res nullius* or in acquiring lost property, the lessor retains the right to the *hazer's* function in effecting *kinyan*.

Shakh, *Hoshen Mishpat* 268:5, asserts that, according to some early-day authorities, the lessor can acquire title to chattel by means of presence of the chattel in his *hazer* only if the lessor himself renders the *hazer* a *hazer mishtameret* by safeguarding it personally; if, however, it is the lessee who renders it *mishtameret*, he cannot avail himself of the *hazer* for purposes of *kinyan*.[44] A leased car driven by the lessee is not safeguarded by means of the physical presence of the proprietor of the rental company or of any of its employees.

Regardless of whether *hazer* would vest title in the lessor or the lessee, in the case under discussion it is the finder who was in possession. Since the finder's claim to title is substantiated by early-day authorities other claimants could not prevail against him.

[44] See *Teshuvot R. Akiva Eger*, no. 133 and R. Yehuda Ben Ya'akov, *Mishpatekha le-Ya'akov* (Bnei Brak, 5757), II, 390-391.