

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

SMOKING ON YOM TOV

Many forms of "labor" which are forbidden on *Shabbat* are permitted on *Yom Tov*. Those activities are not, however, permitted for any and all purposes. An exception to the general prohibition against work on the festivals is found in Exodus 12:16, "... no manner of work shall be done on them, except that which is eaten by every person, that alone may be done by you." Thus, various forms of labor required for the preparation of food are permitted on *Yom Tov*. The Gemara, *Betsah* 12a, indicates that activities associated with the preparation of food are permitted even when such activities are not undertaken for culinary purposes. However, the Gemara, *Ketubot* 7a, declares that the example of food preparation found in Exodus 12:16 and described in that verse as required by "every person" is paradigmatic in the sense that the permitted forms of labor may be performed only for similar purposes, i.e., for needs which are "common to every person" (*davar ha-shaveh le-khol nefesh*). Thus, for example, although cooking and the burning of fuel is permissible on festivals, spices or incense may not be placed over burning coals. Since relatively few persons experience a need or desire for the aroma produced by incense, the burning of incense is not deemed to constitute an act which yields a benefit "common to every person."

In a contribution which appears in the Tishri 5744 issue of *Or ha-Mizrah*, this writer applies these principles to smoking on *Yom Tov* and concludes that, under contemporary conditions, this practice may no longer be sanctioned.

Indeed, the practice of smoking on festivals has long been fraught with controversy. *Korban Netanel*, in his commentary on Rosh, *Beitsah* 2:22, and *Magen Avraham, Orah Hayyim*, 514:4, prohibits this practice. This is also the position of *Hayyei Adam* 95:13. Since presumably there have always been significant numbers of non-smokers, these authorities reason that smoking is not an activity that is "common to every person" and hence is forbidden on *Yom Tov*. Other authorities, cited by *Sha'arei Teshuvah, Orah Hayyim* 210:9 and 511:6, do permit smoking on *Yom Tov*.¹

The authorities who, in the past, have permitted smoking on the festivals did so because in their opinion smoking was "common to every person." Indeed, *Pri Megadim, Mishbetsot Zahav* 511:2, pointedly states that in his day smoking had become "absolutely common to every person." A similar view is expressed in *Pri Megadim, Eshel Avraham* 511:9. Likewise, *Teshuvot Darkei No'am, Orah Hayyim*, no. 9, remarks that smoking has become

widespread throughout the entire world” and only the “smallest minority” (*mi'uta de-mi'uta*) do not indulge in this practice. The prevalence of smoking seems to have varied widely at different times and in different locales. Thus the controversy between the various authorities seems to be based primarily upon diverse behavioral practices rather than upon conflicting halakhic perspectives. As explained by *Bi'ur Halakhah, Orah Hayyim* 511:4, those authorities who permitted smoking on *Yom Tov* did so because in their day the practice had become ubiquitous, while those who opposed this practice did so because they had not encountered smoking as so widespread a phenomenon. The latter experience is reflected in the words of *Korban Netanel* who severely castigates those who smoke on the festivals declaring that, in his day, smoking was certainly no more widespread than was the burning of incense during the talmudic period. R. Chaim Joseph David Azulai, *Mahazik Berakhah, Orah Hayyim* 210:14, cited by *Sha'arei Teshuvah, Orah Hayyim* 210:9, also rules that smoking on *Yom Tov* is permitted in areas where smoking is “common to every person” but not in areas in which only a minority of individuals engage in this practice. A similar opinion is expressed by *Bi'ur Halakhah*. In contrast to this view, *Pri Megadim, Eshel Avraham*, 511:9, tentatively rules that identification of matters which are “common to all persons” is determined by a standard reflecting a practice of “a majority of the world” rather than “a majority of the locale.”

Since the question of the permissibility of smoking on *Yom Tov* rests upon a factual determination, it must be concluded that even those authorities who have permitted smoking in previous times would concede that in contemporary circumstances this practice is forbidden. Statistics for the year 1975 indicate that only 39% of adult

males and 29% of adult females in the U.S. were cigarette smokers [See *Harrison's Principles of Internal Medicine*, 9th ed. (New York, 1980), p. 938]. A statistical delineation of precisely how widespread a practice must be in order to be considered “common to every person” is not found in the writings of early authorities. Despite the scriptural and rabbinic usage of the term “every person,” which conveys the impression that only ubiquitous practices are included in this category, *Teshuvot Darkei No'am, Orah Hayyim*, no. 9, opines that the talmudic principle “the majority is as the entirety” is applicable. Hence, according to that authority, a practice engaged in by the majority of the populace is “common to every person.” An opposing view is expressed by R. Ishmael Kohen, *Teshuvot Zera Emet* no. 73, who explains the view of authorities who forbade such practices by suggesting that, in their opinion, a practice cannot be regarded as “common to every person” in the presence of an identifiable minority who eschew such practice. *Mahazik Berakhah, Orah Hayyim* 210:14, expresses tentative disagreement with the latter view but finds no conclusive talmudic support for either opinion. However, it is clear that all authorities agree that a practice engaged in by but a minority of individuals cannot be considered “common to every person.”

Teshuvot Darkei No'am rules that smoking is permitted on *Yom Tov* on entirely different grounds. Since smoke is inhaled, argues *Darkei No'am*, it must be deemed a form of “food.” A later scholar, R. Chaim David Chazan, *Yishrei Lev*, page 5b, similarly regards tobacco as a form of food for habitual smokers. *Darkei No'am* argues that any edible food may be prepared on *Yom Tov* even if the particular foodstuff is itself not a type of food which would be regarded as acceptable fare by all persons. *Darkei No'am* asserts that while labor for the purpose of providing

various other forms of pleasure is permitted on the festivals only if the benefit is one which is "common to every person," nevertheless, preparation of food is permitted even though the benefit may not be "common to every person." Hence, rules *Darkei No'am*, although smoking may not constitute a need "common to every person" it is nevertheless permitted as a form of food preparation.

Darkei No'am's comparison of inhalation of tobacco smoke to the consumption of food is not as strained as it may seem at first glance. With regard to a related matter, *Magen Avraham, Orah Hayyim* 210:8 expresses doubt as to whether one must pronounce a blessing prior to smoking, just as one is required to pronounce a blessing prior to partaking of food, since "many are satiated from [smoking] just as if they had eaten and drunk." Despite the fact that virtually all subsequent authorities deny any requirement for a blessing, it remains possible that tobacco might be considered a foodstuff in other applications of Halakhah. Even were tobacco smoke to be considered a form of food, inhalation of smoke might nevertheless not require a prior blessing either on account of its inherently bad taste or because the smoke is immediately exhaled.

This point notwithstanding, *Darkei No'am's* basic assumption appears to be contradicted by earlier authorities. The Gemara, *Shabbat* 134a, forbids the preparation of mustard on *Yom Tov* by means of roasting over charcoal. Although different commentators offer different explanations, *Ba'al ha-Ma'or, Beitsah* 23a, who is followed in this matter by *Shulhan Arukh ha-Rav, Orah Hayyim* 510, explains that, at least during the talmudic period, only persons accustomed to delicacies and fine cuisine enjoyed the use of mustard. Other individuals would have declined this condiment even when readily available. The clear inference to be

drawn from *Ba'al ha-Ma'or's* explanation is that only those foods which are "common to every person" may be prepared on *Yom Tov* by means of otherwise proscribed labor, i.e., only those foods which constitute fare "common to every person" may be cooked on *Yom Tov*. Tobacco, which is disdained by nonsmokers, certainly cannot be regarded as a "food" which is "common to every person."

Quite apart from the foregoing considerations, a number of significant authorities have permitted smoking on other, albeit somewhat curious, grounds. *Pnei Yehoshu'a* in his commentary on *Shabbat* 39b, reports that, although he, too, had earlier deemed this practice to be forbidden and had personally refrained from smoking on *Yom Tov*, he felt constrained to reverse his position on the basis of the comments of *Tosafot, ad locum*.

Tosafot notes that the use of steam baths in order to induce perspiration was forbidden by the Sages lest bathing, which is forbidden on *Yom Tov*, mistakenly be regarded as permissible as well. Bathing on the festivals is forbidden, according to *Tosafot*, as an activity which is not "common to every person" [Cf., however, *Shittah Mekubetset, Beitsah* 21 b.]. *Tosafot* notes that, although bathing is forbidden as not being "common to every person," steam baths were not proscribed on the same grounds even though he assumed that steam baths are not at all "common to every person." According to *Tosafot*, steam baths were not forbidden by the Sages on the grounds that their use is not "common to every person" because it was the accepted practice to induce perspiration for reasons of health. To be sure, not all persons found it necessary to induce perspiration for therapeutic purposes. For that matter, there are many foods which are not ordinarily consumed by most persons. The Gemara, *Ketubot* 7a, notes that deer are not available to all

persons but yet rules that deer may be slaughtered on *Yom Tov* since such slaughter serves to satisfy a need (*tsorekh*) which is common to every person. Thus, a food which would be consumed by every person when readily available may be prepared on the festival even though consumption of that particular food is not "common to every person." So too, *Tosafot* appears to reason, although a specific medicament or therapeutic procedure may not be required by every person, medicines and therapeutic procedures are indeed "common to every person." Illness is common to the human condition and any particular medication or therapeutic procedure is "common to every person" in the sense that it serves to satisfy a need experienced by any person afflicted by a malady for which its use is appropriate. Hence, declares *Tosafot*, despite the fact that in the usual course of events steam baths do not serve a need which is "common to every person," when required for therapeutic purposes, their use does satisfy a need "common to every person."

Activities such as cooking and the like are clearly permissible when performed for therapeutic purposes since cooking *per se* serves a need common to all. Less clear is the permissibility of activities performed entirely for reasons of pleasure which satisfy a need "common to every person" only when undertaken for therapeutic purposes. From the phraseology employed by *Tosafot*, *Pnei Yehosh'a* infers that an act which on occasion is undertaken for reasons of health is rendered "common to every person" in an objective sense regardless of the subjective motivation of the individual. *Tosafot* carefully notes that activities which are designed "solely for purposes of pleasure" are not deemed "common to every person" unless such practices are widespread. The inference to be drawn from those comments is that activities from which

therapeutic benefit ensues, even if unintended, cannot be categorized as designed "solely for pleasure" and hence are deemed to be "common to every person" by virtue of their therapeutic aspect. Such activities serve to satisfy at least one need which is common to all and may therefore be pursued even for entirely different purposes. Hence, absent rabbinic legislation forbidding induced perspiration, since steam baths *do* serve a therapeutic purpose, their use on *Yom Tov* would be permissible even when undertaken entirely for purposes of enjoyment and pleasure.

The same considerations, *ugur Pnei Yehoshu'a*, argue in favor of permitting smoking on *Yom Tov*. Some individuals, he observes, utilize tobacco "to aid in digesting food and to stimulate appetite." Hence, concludes *Pnei Yehoshu'a*, since smoking has therapeutic value, it must be regarded as an activity "common to every person." Thus it follows that, according to the thesis formulated by *Tosafot* smoking on *Yom Tov* is permissible even when undertaken solely for enjoyment.

Pnei Yehoshu'a does not stand alone among rabbinic scholars in ascribing medicinal properties to tobacco. *Pri Megadim*, *Mishbetsot Zahav*, *Orah Hayyim* 511:2, reports that he personally indulged in smoking on *Yom Tov* for therapeutic reasons. R. Jacob Emden, *Mor u-Ketsi'a* 511, reports that tobacco is not only beneficial to individuals afflicted with digestive problems but that its prophylactic properties are beneficial to healthy persons and hence concludes that smoking serves a need which is indeed "common to every person." Elsewhere, *Mor u-Ketsi'a* 210, he peremptorily dismisses the suggestion that a blessing be required prior to inhaling tobacco smoke stating, "in truth, it is [used] only for purposes of cure, as a laxative, an aid in digestion and to regulate the blood." *Sha'arei Teshuvah*, *Orah*

Hayyim 210:9, summarizes the various positions with regard to smoking and concludes by stating that a person who refrains from smoking on *Yom Tov* should expressly state that he does not accept such abstinence as a vow "so that if he at some time has need of [smoking] for therapeutic purposes it be permissible to him."

Although his position is at variance with that of *Pnei Yehoshu'a*, *Hayyei Adam*, *Nishmat Adam* 95:2, similarly regarded smoking as therapeutic in nature. As noted earlier, *Hayyei Adam* forbids smoking on *Yom Tov*, i.e., smoking for purposes of pleasure. However, he expresses doubt with regard to whether a person who is actually ill may smoke for therapeutic purposes. Noting that some authorities permit various activities on *Yom Tov* for therapeutic purposes as constituting activities which are "common to every person," *Nishmat Adam* nevertheless draws attention to a seemingly contradictory statement made by the *Gemara*, *Baba Kamma* 102a, in a different context. Produce which grows of itself during the sabbatical year may be used for purposes of food (Leviticus 25:6). The *Gemara* also permits the use of such produce for other purposes which are "common to every man" but not, for example, for a poultice which is of benefit to persons afflicted by illness. The *Gemara* expressly states that the use of a poultice is not "common to every man." Similarly, reasons *Nishmat Adam*, the fact that an activity may be necessary for the treatment of the sick does not render such activity "common to every person" insofar as the laws of *Yom Tov* are concerned.

In point of fact, *Nishmat Adam's* position with regard to the concept of "common to every person" is explicitly formulated by early authorities. *Imrei Blnah*, *Dinei Tom Tov*, no. 2, quotes *Sefer Yere'im*, no. 113, and Ramban, *Torat ha-Adam*, who both explain that the burning of incense which the *Gemara*, *Beitsah* 22b, forbids on *Yom*

Tov is prohibited because it is a practice engaged in only by the sick. These authorities are obviously of the opinion that only activities pursued by the healthy are "common to every person." This is also the position of Ravad, *Teshuvot Temim De'im*, no. 120, sec. 3; *Nahal Eshkol*, II, 147; and *Magen Avraham* 532:2.

It appears to this writer that, regardless of the merit of *Pnei Yehoshu'a's*, argument, his conclusion cannot be sustained in light of contemporary knowledge of the deleterious effects of smoking. During earlier periods of time tobacco may have been utilized for certain putatively therapeutic purposes and hence have been rendered permissible on that account as an activity "common to every person." However, at present, in light of the demonstrated injurious nature of smoking, tobacco cannot be regarded as endowed with any medicinal property. If considered as undertaken solely for purposes of enjoyment, smoking is certainly analogous to the burning of incense. Although smoking is indeed an indulgence enjoyed by many, it certainly cannot now be deemed an activity "common to every person."

To be sure, as has been reported in this column in the Summer 1977 issue of *TRADITION*, the adverse effects of tobacco, as presently known, do not in themselves serve to establish a prohibition against smoking. Risks which are commonly ignored by society at large may be assumed on the basis of the principle "The Lord preserves the simple" (Psalms 116:6). In addition to the responsa of R. Moses Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, II, no. 49, and R. Benjamin Silber, *Oz Nidberu*, X, no. 65, in which this view is set forth, this ruling has been confirmed by R. Joseph Eliashiv in a statement published in *Am ha-Torah*, vol. 2, no. 3 (5742), p. 102, and is reported by Dr. Abraham S. Abraham, *Lev Avraham*, II, 35, as having been endorsed by R.

Shlomoh Zalman Auerbach and by R. Ovadiah Yosef. Yet, although smoking may not be forbidden on health grounds, nevertheless, the practice can no longer be regarded as "common to every person" on the grounds that it is designed to promote good health and hence should be regarded as forbidden on *Yom Tov* [Cf., R. Solomon Braun, *She'arim ha-Metsuyanim be-Halakhah*, II, 98:19.].

Curiously, R. Ovadiah Yosef, *Yabi'a Omer*, V, *Orah Hayyim*, no. 39, sec. 3, examines the position of *Pnei Yehoshu'a* in light of the now recognized unhealthful effects of tobacco but nevertheless declines to forbid smoking on *Yom Tov*. Rabbi Yosef cites the oft-quoted words of Ramban to the effect that any drug potent enough to cure one patient may cause the death of another [See *Kol Kitvei Ramban*, ed. C.B. Chavel (Jerusalem, 5724), II, 43.]. He further cites *Teshuvot Levushei Mordekhai, Mahadura Batra*, no. 105, who describes tobacco as "unhealthful and injurious to the lungs, but nevertheless healthful for the body." Accordingly, argues Rabbi Yosef, smoking may yet be regarded as therapeutic in nature, i.e., although it may cause certain harmful effects it is nevertheless useful as an aid in digestion. Rabbi Yosef's position is based upon the erroneous presumption that use of tobacco is beneficial in some ways and unhealthful in others. In point of fact, tobacco serves no medicinal purpose whatsoever. There is absolutely no evidence indicating that smoking serves as an aid in digestion or in any other beneficial pharmaceutical capacity. In the opinion of this writer, since tobacco has no known medicinal or curative power, smoking on *Yom Tov* cannot be permitted.

SMOKING IN PUBLIC PLACES

The question of whether or not it is permissible for a person to smoke in a

public place despite the stated objections of other persons present in the area is discussed by Rabbi Yehezkel Grubner of Detroit in a recent issue of *Am ha-Torah*, vol. II, no. 3 (5742), published by Zeirei Agudath Israel. Appended to this article is a response by Rabbi Joseph Eliashiv, a former member of the Israeli Supreme Rabbinical Court of Appeals. The identical question is also the subject of a responsum authored by Rabbi Moses Feinstein which appears in the most recent issue of *No'am*, vol. 24 (5743), and is treated by Rabbi Eliezer Waldenberg in a contribution to *Halakhah ve-Refu'ah*, vol. III (5743). Rabbi Waldenberg's comments appeared earlier in *Ha-Mahaneh ha-Haredi*, 13 Tevet 5742 and 20 Tevet 5742, as well as in the Shevat 5743 issue of *Assia*. The question is actually three-fold in nature:

1. Is smoking forbidden in circumstances in which it is injurious to the health of others?
2. Is smoking forbidden even when experienced by others simply as a nuisance?
3. Is smoking permitted in public areas in which the practice has previously been permitted, without objection having been raised by non-smokers, on grounds that an easement has been established by reason of adverse encroachment (*hazakah*)?

Shulhan Arukh, Hoshen Mishpat 155, codifies numerous regulations predicated upon the principle that a person must desist from any act which results in harm to a neighbor. Such activities are forbidden even when performed within the confines of a person's own property but in a manner such that their harmful effects interfere with a neighbor's quiet use or enjoyment of his own land. A person may restrain his neighbor from such activities and compel him to remove the cause of such

disturbance. Rambam, *Hilkhot Shekhenim* 10:5, compares such practices to those of a person who stands on his own land and shoots arrows into the courtyard of his neighbor. Thus, for example, *Teshuvot Rivash*, no. 197, cited by Rema, *Hoshen Mishpat* 155:15, rules that a person may not pound groats or the like within the confines of his own property if his neighbor suffers from headaches and the latter's condition is aggravated by noise.

The Gemara, *Baba Batra* 23a, describes "smoke" not only as a nuisance which must be eliminated upon demand but also as a noxious use for which no easement encumbering land of an adjacent owner may be claimed on grounds of adverse use of the servient land without protest by the owner. *Tosafot*, however, states that this categorization of smoke is limited to the smoke emitted by a furnace since that type of smoke is abundant and does extreme harm. *Teshuvot Maharam Rothenberg*, IV, no. 233, in a like manner distinguishes the smoke emission of a furnace as "constant" in nature and as "doing damage." Similarly, *Nimukei Yosef* indicates that the "smoke" which is the subject of the regulations recorded in *Baba Batra* 23a includes any form of smoke which is constant and which causes physical harm. Assuming, *arguendo*, that tobacco smoke does not cause damage as severe or as ongoing in nature as is produced by the smoke of a furnace, it follows that *Baba Batra* 23a cannot be adduced as a source establishing a prohibition against such practice.

It must, however, be noted that it would be equally fallacious to cite the distinction drawn between the smoke of a furnace and other forms of smoke as grounds for permitting smoking in public areas. The distinction drawn by these authorities between various forms of smoke applies only to the question of whether a servitude can be established on the basis of adverse encroachment.

Most authorities explain that the rationale underlying this provision is a presumption that no person intends to grant a servitude for an activity which causes continuous and ongoing damage. *Tosafot*, *Baba Batra* 23a, maintains that such servitude, even when expressly consented to, may be nullified on the plea that the servitude was erroneously granted in the mistaken belief that the attendant harm would be sufferable. Ramban, *Baba Batra* 59a, Ritva, *Baba Batra* 23a, and *Teshuvot ha-Rashba*, II, no. 45, offer a different explanation. According to the analysis of those authorities, a servitude can be acquired only for a nuisance which causes damage to, or prevents enjoyment of, property. Since such easement constitutes a property right, once granted, it cannot be revoked unilaterally. However, activity which leads to physical harm or discomfort constitutes interference with the neighbor's person rather than merely interference with the use of his property. Interference with a neighbor's person cannot become a servitude upon the land. Accordingly, since permission to conduct such activity does not constitute the granting of a property right, it may be revoked at any time.

Granting that an easement may be obtained to permit smoke-producing activities when the smoke is less severe or less constant than the smoke emission of a furnace, it does not follow that a person may smoke with impunity in a public area in which this is not the established and accepted practice. The validity of an already obtained easement in establishing a right to the use of property in a manner which constitutes a nuisance does not entail a right to commit the nuisance *ab initio* despite the objection of a person affected thereby. Whether or not a person may inflict a form of smoke emission upon others when such smoke is less intense than that associated with use of a furnace would, upon first analysis, appear

to be the subject of dispute between *Shulhan Arukh* and Rema. *Shulhan Arukh, Hoshen Mishpat* 155:37, rules that a person may restrain a neighbor from any smoke-producing activity even if the neighbor does not engage in such activity on a continual basis. Rema disagrees and declares that such activities may be prevented only if the smoke is produced on an ongoing basis. Numerous latter-day authorities, including *Shakh* 155:19, rule in accordance with the position of *Shulhan Arukh*. Others, including *Teshuvot R. Akiva Eger*, no. 151, and *Teshuvot Maharsham*, I, no. 178, follow the view of Rema.

Ostensibly, the question of whether or not it is permitted to smoke tobacco in a public place should depend upon the resolution of this controversy. Rabbi Grubner, however, argues that, upon analysis of the nature of the controversy, it may be concluded that even Rema would concede that smoking in such areas is forbidden. The basic principle that a person may not inflict harm upon another is beyond dispute. Hence it stands to reason that the permissibility of causing smoke emission is entirely a question of whether or not the level of emission is such that it is capable of adversely affecting a neighbor. If so, there appears to be no area in which a substantive halakhic controversy between *Shulhan Arukh* and Rema might exist. *Hoshen Aharon*, in elucidating the area of controversy between *Shulhan Arukh* and Rema, *Hoshen Mishpat* 155:55, explains that all authorities agree that activities which result in emanation of smoke are forbidden when it is known that there will be resultant damage. According to *Hoshen Aharon, Shulhan Arukh* asserts that such activity may be enjoined even if it is merely *possible* that some damage may result or that a neighbor may be prevented from quiet enjoyment of his property; Rema forbids such activity only when a likelihood of adverse effect exists. When, however, it

can be demonstrated that any given degree of smoke emission does cause harm of any kind, concludes *Hoshen Aharon*, even Rema would concede that any activity which causes such smoke to be emitted is forbidden. Accordingly, argues Rabbi Grubner, since tobacco smoke is known to be injurious to health, all authorities would be in agreement that smoking is forbidden when it is likely to affect a neighbor adversely.

As Rabbi Waldenberg demonstrates, activity which is forbidden within the confines of one's own property because of noxious effect upon a neighbor is also forbidden in a public domain when such harm results. *Hazeh ha-Tenufah*, authored by a disciple of Rema and published as an appendix to *Teshuvot Hayyim Sha'al* of R. Chaim Joseph David Azulai, states explicitly that noxious activities may be restrained under such circumstances. As indicated by *Shulhan Arukh, Hoshen Mishpat* 155:41, any individual adversely affected by such activities may demand that others desist even though other persons experience no harmful effect.

Rabbi Grubner further argues that a person may not claim the right to smoke even in areas in which the practice has been a long-standing one. In Jewish law adverse possession is of no avail other than when accompanied by claim of title. Similarly, adverse use with regard to establishment of a servitude must be based on a claim of actual or constructive conveyance of a right. The Gemara, *Megillah* 26a, declares that title to "synagogues of metropolises" is vested not merely in the local citizenry but, rather, since such edifices are built for the convenience and use of travelers and visitors as well, the property is viewed as belonging to the public at large. Accordingly, synagogue members have no right to grant an easement which interferes with the property rights of others who may wish to use the premises in an un-

disturbed manner. The same considerations, argues Rabbi Grubner, apply to smoking on public property when the smoke is harmful to others.

Rabbi Feinstein's responsum is addressed to a member of a *kolel* in which some students found smoking in the *Bet Midrash* to be annoying and discomfiting. In forbidding smoking under such conditions, Rabbi Feinstein cites a narrative recorded in *Baba Batra* 22b-23a which serves as the source of a halakhic ruling forbidding a person to engage in an activity which affects the property or person of another individual in a manner which causes pain or discomfort as distinct from financial or bodily harm. A group of bloodletters established themselves near a grove of date trees owned by Rav Yosef and sought to practice their profession in the shade of those trees. In doing so they attracted "ravens who ate blood" and soiled the dates with blood through which they had waded. Although, as noted by *Tosafot*, the bloodletters had not physically trespassed upon his property, Rav Yosef prevailed in causing them to desist from practicing their profession in the area abutting his date trees on the plea that he was a delicate and sensitive person who was being deprived of enjoyment of his dates because he could not bring himself to eat fruit which had been soiled by blood. Such activity was forbidden solely because of the discomfort it caused Rav Yosef. Similarly, argues Rabbi Feinstein, a person may not cause his neighbor discomfort by exhaling smoke in his presence within a public area.

A view which conflicts sharply with the position adopted by Rabbi Grubner is advanced by R. Joseph Eliashiv. As has been noted, Rabbi Eliashiv agrees that, although hazardous activities in general are forbidden, the practice of smoking is permissible despite the attendant health hazards on the principle "The Lord preserves the simple"

(Psalms 116:6). Contrary to the assumption of Rabbi Grubner, Rabbi Eliashiv demonstrates that a person may engage in an activity defined as non-hazardous even if another person is affected thereby. Actions which come within the ambit of the principle, "The Lord preserves the simple" are regarded as non-hazardous for purposes of Halakhah and hence, argues Rabbi Eliashiv, may be undertaken despite the distinct possibility that some other person may be harmed thereby. This is evident from the statement of the Gemara, *Yevamot* 72a, declaring that a baby may be circumcised on a cloudy day. The Gemara permits circumcision under such conditions, despite the presumption that such weather conditions may have an adverse effect upon the child, because society at large regularly and customarily disregards this hazard. The practice is permitted not simply as a risk that one may assume oneself, but as a hazard that one may impose upon another, viz., the child who is subjected to the hazard although his consent has obviously not been obtained. According to this view, since smoking does not meet the halakhic criteria of a "hazard," there are no grounds upon which objection to others smoking in one's presence can be sustained as a matter of right.

Rabbi Waldenberg espouses a sharply conflicting view and rules that smoking in general cannot be sanctioned and, moreover, that smoking in public places is forbidden by Halakhah. However, the factual premise upon which Rabbi Waldenberg bases his ruling is markedly different from that accepted by Rabbi Eliashiv. Rabbi Eliashiv assumes that the statistical incidence of the dangers associated with smoking is not of a nature which places smoking beyond the pale of activity encompassed by the principle "The Lord preserves the simple." Rabbi Waldenberg, citing the comments of an Israeli physician, assumes that even passive

inhalation of tobacco smoke is directly injurious to health.

In point of fact, it is not all certain that exposure to usual levels of passive inhalation of tobacco smoke poses any hazard to the nonsmoker. The 1979 Surgeon General's report of the dangers of smoking presents the conclusions of a comprehensive survey of the known effects of passive smoking. The report states: "Healthy non-smokers exposed to cigarette smoke have little or no physiological response to the smoke, and what response does occur may be due to psychological factors." The most recent Surgeon General's report, issued in 1982, states that the evidence is "not sufficient to conclude that passive or involuntary smoking causes lung cancer to non-smokers." In an article published in the March 26, 1980 issue of *The New England Journal of Medicine* two medical researchers report that, although it has been demonstrated that there occurs "a reduction in measures of small airways of healthy non-smokers exposed to cigarette smoke in the workplace," nevertheless, "there is no proof as yet that the reported reduction in airways function has any physiological or clinical consequences." The most recent Surgeon General's report, issued in 1984, concludes that "some studies suggest that high levels of involuntary smoke exposure might produce small changes in pulmonary function in normal subjects." The report carefully notes that the "physiologic and clinical significance of these small changes in pulmonary function in adults remains to be determined." The conclusions of a Japanese study published in the *British Medical Journal*, CCLXXXII (1981), pp. 183-185, indicating that passive smoking constitutes a danger to health have been contradicted by other studies and have been challenged as based upon data obtained through faulty methods of investigation [See, for example, I. Garfinkel, "Time Trends in Lung Cancer

among Non-Smokers and a Note on Passive Smoking", *Journal of the National Cancer Institute*, LVI (1981), pp. 1061-66; correspondence published in the same volume of the *British Medical Journal*, Feb. 28, pp. 733-734, March 21, p. 985, April 4, p. 1156, April 25, pp. 1393-1394, Oct. 3, pp. 914-917, and Nov. 28, pp. 1464-1466; and P. N. Lei, *The Lancet*, April 3, 1982, p. 791. It should, however, be noted that, in a less widely cited study, a group of researchers reported a higher incidence of lung cancer among a limited group of non-smoking Greek women married to smokers; see D. Trichopoulos *et al.*, "Lung Cancer and Passive Smoking," *International Journal of Cancer*, XXVII (1981), pp. 1-4. cf. also, James L. Repace, "The Problem of Passive Smoking," *Bulletin of the New York Academy of Medicine*, vol. 57, no. 10 (December, 1981), pp. 936-46. The 1984 Surgeon General's report also sites some evidence of a higher incidence of respiratory illnesses, including bronchitis and pneumonia, in very young (less than 2 years old) children of smoking parents. Accordingly, the report suggests that it would be "prudent to advise parents of children who are suffering from recurrent respiratory illnesses or persistent wheeze or asthma not to smoke."

Rabbi Eliashiv adds that, although the practice may not be forbidden as a matter of normative law, it is certainly not proper to smoke in the presence of a person who finds smoke to be discomfiting. The Gemara, *Hagigah* 5a, declares that a person should not expectorate in the presence of an individual who is revolted thereby. The Gemara counsels that one should refrain from conduct which others find repulsive even when no physical harm or deprivation of enjoyment of property ensues.

Rabbi Eliashiv's ruling that smoking in public places is not for-

bidden as a matter of normative law does not appear to extend to situations in which smoking occurs in the presence of a person who is afflicted with a condition known to be exacerbated by inhalation of smoke, e.g., a person suffering from asthma or from certain allergies. In such circumstances, smoking would appear to be forbidden just as it is forbidden, as has been shown earlier, to generate noise which has the effect of aggravating the discomfort of a person suffering from headaches.

Although it might seem that there is a conflict between the rulings of Rabbi Feinstein and Rabbi Eliashiv, it appears to this writer that, in light of the foregoing comments, there is no discrepancy between them. Rabbi Eliashiv addresses himself to a demand for refraining from smoking on grounds that the smoke may be injurious to the health of other persons. This claim he dismisses on the basis of the contention that the danger, since it is accepted by society at large, is not recognized by Halakhah as constituting a health hazard of which cognizance must be taken. Rabbi Feinstein carefully notes that, in the question addressed to him, the person demanding that others refrain from smoking "wrote in the text of the request that they experienced great discomfort and headaches. . . ." It would appear that, in Rabbi Feinstein's opinion, they are entitled to prevail in their demand by virtue of the actual and immediately perceived pain and discomfort which they experience rather than on the basis of possible future danger which might result. It should, however, be noted that this point is not explicitly spelled out by Rabbi Feinstein and, moreover, may be contradicted by Rabbi Grubner's report that he has submitted his own article to Rabbi Feinstein for comment and that the latter fully supports Rabbi Grubner's own conclusions. In any event, there is no doubt that all rabbinic

decisors are in full agreement that smoking in public areas is forbidden when it causes actual harm, pain or discomfort to others. While the potential health hazards of passive inhalation of tobacco smoke may be subject to debate, it is certain that involuntary inhalation causes discomfort to many non-smokers. Such discomfort may not be imposed upon non-smokers who are entitled to "quiet enjoyment" in public areas.

FOOTNOTE

1. However, those authorities who do sanction smoking on *Yom Tov* caution that care must be taken not to extinguish the flame used for lighting the cigarette, not to flick ashes from the cigarette and, in the case of a pipe, once lighted, not to tamp the tobacco. See *Sha'arei Teshuvah*, *Orach Hayyim* 511:5 and *Bi'ur Halakhah* 514:4.

Pri Megadim, Mishbetsot Zahav 511:9, forbids the use of aromatic tobacco, comparing its use to the burning of incense which is forbidden on *Yom Tov*. This point is entirely cogent as employed with regard to aromatic tobacco of a type which would be disdained by most smokers. Use of such tobacco is analogous to the burning of *mugmar* or incense described by the Gemara. The fragrance used to produce the aroma in the tobacco may similarly not be burned on *Yom Tov* in order to produce a pleasant smell. However, when absorbed by the tobacco, the fragrance becomes an integral part of the tobacco itself. Hence the sole question should be whether tobacco treated in this manner is *shaveh le-khol nefesh*. That is to say, assuming that tobacco itself is "common to every person," aromatic tobacco would be permissible if the tobacco so treated would be acceptable to the very same smokers. Such tobacco would then be but another type of tobacco of which, like food, there are many types and varieties.

Pri Megadim, Mishbetsot Zahav 511:2, also forbids the smoking of cigarettes bearing writing on the wrapper

because of "erasure" of the letters in the burning of the wrapper. This ruling is, however, the subject of considerable controversy among latter-day authorities. The numerous sources dealing with this question are cited by R. Ovadiah Yosef, *Yabi a Omer*, IV, *ORah Hayyim*, no. 39, secs. 4-5.

TURBOT

The presence of *snafir ve-kasketet*, usually translated as "fins and scales," is the distinguishing criterion which serves to identify those species of fish which are permitted as kosher. The term "scales," however, is an inexact translation of the biblical term "*kasketet*" which occurs in Leviticus 11:9. There exist a variety of anatomical structures known as "scales" which do not satisfy the halakhic definition of *kasketet*. As evidenced by the terminology employed by the Gemara, *Avodah Zarah* 39a, and by *Targum Onkelos*, Leviticus 11:9, the term *kasketet* denotes only scales which can be "peeled" or removed without injury to the underlying skin. [See also *Teshuvot Tsemah Tsedek he-Hadashot*, *Yoreh De'ah*, no. 81.] In terms of biological classification, both ctenoid scales and cosmoid scales possess this characteristic. Scales of other types, are, in fact, projections or tubercles of the skin itself rather than a separate covering. Since scales of non-kosher species are integral to the skin itself, removal of such scales causes damage to the skin. Such damage can be observed visually at the time of removal. Thus, whether or not the scales of a particular species meet the criteria of *kasketet* may be established at the time of their removal. Removal of the scales without damage to the skin establishes that the scales removed constitute a separate covering or *kasketet* and not merely projections of the skin itself. [See Dr.

Israel Meir Levinger, *Mazon Kasher min ha-Hai*, 2nd edition (Jerusalem, 5740), pp. 92ff.]

The nature of the scales covering a particular fish is not always readily apparent on visual examination prior to removal. Moreover, there exist closely related species of fish some of which are kosher and some of which are not. The distinguishing criterion is, of course, the nature of the scale which is present. The close resemblance of a non-kosher fish to a kosher variety has, at times, generated confusion and has led to error.

Turbot is a case in point. The fish, known in Latin as *Rhombus maximus* and in German as *Steinbutt*, possesses bony tubercles but lacks the type of scale which qualifies as *kasketet*. Rabbi David Feldman, *Shimushah shel Torah* (London, 5711), p. 19, reports that turbot is easily mistaken for kosher species such as plaice and halibut. Rabbi Feldman presents a simple method for determining whether a given fish of this type is of a kosher variety or is the non-kosher turbot. Both the kosher and non-kosher species are black on one side and white on the other. However, the various species differ in that the left side of the turbot is black, while in kosher species it is the right side which is black. Accordingly, to determine whether the fish in question is kosher or non-kosher, the fish should be held spine upward with the head pointing away from the body of the holder. If the black side of the fish is observed to be on the left, it may be concluded that the fish is a turbot. If, however, the left side of the fish is white, the fish may be presumed to be of a kosher species. Rabbi Feldman hastens to add that since this criterion is not formulated in talmudic sources it should not be regarded as absolute. Accordingly, a careful examination of the scales should always be made before the fish may be accepted as a member of a kosher species. However, if it is determined that the left side is black, it may

be concluded that the fish is a non-kosher turbot and hence any further investigation is without purpose.

Nevertheless, despite the definite absence of *kaskeset*, turbot has not always been recognized as a non-kosher species. As is evident from communications which have appeared from time to time in the letters to the editor column of the London *Jewish Chronicle*, turbot, which is common in England, was accepted as kosher in some circles until a formal pronouncement labeling it a forbidden species was issued by the London *Bet Din*. Dr. Israel Meir Levinger, writing in the Tevet 5742 issue of *Ha-Ma'ayan*, reports that, although turbot was banned in Amsterdam, it was accepted as kosher in The Hague until World War II. It is possible that this confusion was compounded by the fact that in some instances the term "turbot" has been used to denote a kosher variety of fish rather than the non-kosher *Rhombus maximus*. Thus, for example, the 1980 edition of *A Guide To Kashrut*, published by the student organization of Yeshiva University, while carefully noting that European and South American turbot are non-kosher, reports that a species sold commercially as "Greenland turbot" is a kosher fish.

Similar confusion existed in earlier periods as well. *Semak*, no. 111, reports in the name of R. Judah he-Hasid that a certain fish known as *barbuta* is non-kosher, but adds that other prominent rabbinic authorities did partake of that fish. Similarly, *Hagahot Asheri*, *Avodah Zarah* 2:41, quotes R. Judah he-Hasid as stating that one who par-

takes of *barbuta* will not be privileged to eat of the leviathan, but reports that Rashba declared in the name of Rabbenu Simchah that *barbuta* was a permitted species. This is apparently the position of Rosh, *ad locum*, as well. *Hagahot Asheri* further recounts that Rabbenu Ephraim originally permitted *barbuta* to be eaten but rescinded his permissive ruling upon experiencing a vision in a dream chastising him for his earlier leniency.

It is difficult to fathom the nature of the dispute concerning *barbuta*, particularly since in none of these sources is a controversial halakhic point enunciated. Apparently, these halakhic decisors themselves failed to grasp the reasoning of their opponents. This is evident in the words of Rosh who states, "It is difficult for me [to understand] the nature of the doubt on the part of all the great authorities." Dr. Levinger suggests that the confusion is, to a certain extent, linguistic in origin and centers upon identification of two different species, but that in point of fact, no substantive dispute exists. The *barbuta* forbidden by R. Judah he-Hasid, he asserts, is none other than *Rhombus maximus* or turbot. The authorities who issued permissive rulings, argues Dr. Levinger, intended their rulings to apply to a closely related species, *Rhombus Laevis*, known in English as kite or brill. *Rhombus Laevis* is, however, known in French as *barbue*; hence the reference to a permissive ruling with regard to *barbuta* and the confusion of this fish with the related non-kosher species, *Rhombus maximus* or turbot.