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Survey of Recent Halakhic Literature

Coronavirus Queries (Part 2)

Tuition Payment During a Pandemic

I. The Dilemma

At times, financial loss is the result of a person's malfeasance or nonfeasance and the issue to be adjudicated is whether or not an act or the omission of an act results in liability of one type or another. At other times, loss is the result of an accident, an "act of God" or bad luck (*mazlakh garam*). The descriptive talmudic categorization of no-fault loss is "His field became flooded."

The latter aphorism expresses a "tip of the iceberg" reflection of a rather unique Jewish law regarding definition of property. It is almost *de rigueur* for professors who teach first-year law school courses in Property to begin the semester with a pronouncement that "Property is a bundle of rights." The value of property lies in the use or uses to which a property owner can put his property. Of what use is property that cannot be enjoyed? Remember Midas and his mythical touch. If everything that one touches turns to gold, one would soon starve to death. In the annals of Halakhah there is a celebrated controversy with regard to whether there is proprietorship, even in a theoretical sense, in *issurei hana'ah*, i.e., property from which it is forbidden to derive any benefit whatsoever.[1]

To assert that the law conceives of property as a bundle of rights is to say that the legal concept of property is nothing more than the aggregate, or bundle, of those rights. The owner of real property is vested with the right of usufruct, air rights, mineral rights, riparian rights, the right to deny entry to others, etc., and even the right to commit waste. A jurist would say that talk of an underlying entity, a substratum or a *Ding an sich*, in which those rights might coalesce may be metaphysically meaningful but that in a legal sense such depictions are devoid of meaning.

[1] For a list of classic discussions of the question see *Kuntres Mar'eh Makom* (Jerusalem, 5753), p. 23.

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Jewish law also recognizes property as a bundle of rights, but with an addendum. Jewish law recognizes not only positive rights but negative rights as well. An owner of property not only has the right to enjoy the benefits of ownership but also the "right" to suffer the loss of his property. Rothschild had the right to spend sleepless nights fearing the loss of his property. I have no such right because I have no property the loss of which would justify insomnia. That is why Jewish law is unique in its nomenclature referring to "*kinyanei shemirah* – property interests in bailed objects" and "*kinyanei geneivah* – property interests in stolen property." In both cases the "property interest" is acquisition of a "negative right," *viz.*, the right to suffer loss if the property is lost or destroyed. A thief acquires an absolute "right" to suffer any and all losses with regard to stolen property while a bailee acquires the "right" to suffer more limited types of loss with regard to the bailed object, depending on which of the various categories of bailment the bailee has accepted.[2] The right to suffer loss is not a sanction or a punishment. It is not necessarily related to right or wrong, fairness or lack of fairness. With the possible exception of matters pertaining to assignment of tort liability, resolution of financial disputes does not turn upon questions of fairness or equity. That is precisely why the principle "*lifnim mi-shurat ha-din* – beyond the boundary of the law" is incorporated in the halakhic system as a necessary corrective. The law itself is concerned only with applying legal principles in determining assignment of loss. *Lifnim mi-shurat ha-din* tempers such findings by applying principles of equity.

But at times there is no equitable solution. Loss to either of the parties to the conflict strikes us as random, arbitrary, unfair and unjust. In particular, it is cases such as those that cry out for mediation and compromise, i.e., apportioning an unfair and inequitable economic burden among guiltless litigants.

Demand for payment of tuition during a pandemic is certainly a striking example of such a dilemma. Schools have ongoing contractual obligations to teachers, mortgage liability, fixed costs for maintenance of school buildings, etc., none of which can be shirked. Parents are called upon to render payment for services denied them for reasons beyond anyone's control. Often, they incur additional costs for childcare because the children are bereft of supervision that is a concomitant of the educational experience. Against whom should the loss be assigned? Who should bear the loss as a matter of *din*, or strict application of the law? And how should the loss be apportioned as a matter of equity and fairness?

[2] Cf., the perplexity expressed by R. Akiva Eger, *Bava Meẓi'a* 48a, s.v. *U-be-emet.*

II. Schools: Agents or Contractors?

The first question to be resolved in determining *din* as the applicable principle is the nature of the relationship between parents and the school. Is the school a contracting party that has agreed to supply a particular product, *viz.*, the classroom experience, with the result that in no sense is there privity of contract between parents and instructors, and hence the agreement governing the parents and the school is subject only to rules governing commercial relationships? Or, as was the nature of medieval universities, is the school essentially an aggregate of professional teachers who have entered into a service contract between themselves and the parents and who have also engaged administrators to perform ministerial functions, including services as agents for the hiring of educational functionaries? If so, the relationship between parents and schools should logically be governed by provisions of labor law.

The classical sources provide detailed regulations regarding the rights and obligations of a "teacher" and contemporary rabbinic sources seem to treat schools no differently than teachers. I have searched almost in vain for a source suggesting that perhaps a different corpus of law should be applied in adjudicating a dispute between parents and a school. The sole source that I was able to find is a cryptic comment of R. Joshua Blau in his encyclopedic compendium, *Pitḥei Ḥoshen*, III, *Hilkhot Sekhirut* 12:16, note 31: "But there is room to doubt whether the law of hiring workmen applies to a Talmud Torah, for payment is to the institution and not to the teacher."

Rabbi Blau provides neither a source for this doubt nor a discussion of its implications. If an institution is to be treated differently from a teacher, it must be because the institution is not a person and hence could not have contracted to provide the school's "personal" services. Rather, it has agreed to deliver a "commodity" in the form of instruction to be provided by the school's employees. Failure to deliver a commodity, even if for reason of *force majeure*, relieves the purchaser of liability for the purchase price. As will be explained presently, a contract for personal services is subject to different provisions. An employment contract gives rise to an obligation *in personam* assumed by the employee at the inception of the employment period and a reciprocal obligation upon the employer to pay the employee's wages. The impact of future events upon those obligations depends to a large extent upon intent, actual or constructive, of the contracting parties when entering into the relationship.

To our ongoing communal shame, in some sectors of our community many—but by no means all—of our educational institutions are conducted

as enterprises rather than as communal services. That is not necessarily to say that they are profit-making endeavors. It is impossible to make such an assertion without access to financial records. But the absence of financial transparency is emblematic of the fact that many such institutions conduct their affairs with neither lay nor rabbinic oversight. To all intents and purposes, even if they operate at a loss, those institutions are private fiefdoms. If so, they are subject to commercial law rather than to halakhic prescriptions governing employer-employee relationships. One might then conclude that since the product has not been delivered, i.e., no instruction has been provided, there has been a breach of contract and consequently there is no obligation to honor a reciprocal agreement regarding payment of tuition.

There is probably room to argue that even if the school is a *bona fide* communally organized and controlled institution, the categorization heretofore presented remains the correct description of the halakhic relationship between parents and the school. That was probably Rabbi Blau's intention in ascribing his doubt to the fact that the agreement provides that payment is made to the Talmud Torah rather than to an individual. There is nothing in such agreements that leads to the impression that the school acts as a conduit of funds to its staff.

One point must be underscored. Although this description of the parent-school relationship seems financially advantageous to the parents, in situations such as the current closure of schools it can rapidly be turned into a relationship advantageous to the institution. Many schools are now providing limited hours of remote instruction by Zoom or by telephone. The school is in a position to concede that it is in default by not providing classroom instruction during the full period for which it contracted, i.e., the entire school day, and agree to forfeit all further tuition. It might then offer to enter into a new contract for remote instruction for whatever portion of the school day the parties stipulate and renegotiate tuition in whatever sum is acceptable to both parties. If so, the school is in a position to demand a sum equal to the earlier stipulated tuition for full-time classroom instruction in return for what is now truncated Zoom or telephone instruction. The parents obviously have the option of declining the offer. But then the children will be deprived of all instruction.

The disadvantage to the school is that such payment cannot be demanded without prior negotiation. A simple unilateral declaration that payment of full tuition is expected coupled with an announcement that taking advantage of a Zoom session or a telephone tutorial will be deemed acquiescence will not suffice. The parents are certainly in a position to

respond that silence does not constitute acquiescence and that they are perfectly within their rights in insisting that any disagreement with regard to ongoing tuition liability under the existing contract be submitted to a *bet din* for adjudication.

Although Rabbi Blau may or may not agree, it seems to this writer that the structure of a *bona fide* communal school not operated as a personal or family enterprise is not of such nature.[3] Parents are in need of teachers to provide educational services for their children. Communal officials have an obligation dating back to the days of R. Joshua ben Gamla to provide instruction for the children of the community. Parents and communal leaders join together to appoint representatives who constitute the administrative boards of such institutions. The boards, in turn, are charged with many non-pedagogical functions, including the hiring of teachers, etc. Those duties are generally delegated to professional administrators. In discharging those duties, the administrators act as agents of parents and of the community. It is the parents and/or the community as a whole who are the employers; the school officials serve only in a ministerial capacity. The fact that the school has been granted a certificate of incorporation by civil authorities is of scant halakhic import in terms of establishing a halakhic relationship. The result is that there exists an employer-employee relationship between the parents and teachers.

III. Societal Misfortune

If this is an accurate assessment of the parent-school relationship, the classic controversy that arose in times gone by between a parent and a teacher when during the course of the contract period it transpired that the sovereign forbade Torah instruction presents the paradigmatic dilemma. The teacher has obligated himself to provide instruction but cannot continue to do so; the student is prevented from availing himself of such instruction even were it to be provided. The general rule is that, if the child unexpectedly became ill, the teacher need not be paid because it is presumed that the father did not intend to obligate himself in such unforeseen circumstances. Otherwise, a teacher who has bound himself to provide instruction and is ready, willing and able to do so is entitled to be compensated. Rema, *Ḥoshen Mishpat* 321:1, rules that, if the "affliction" is not that of a particular child but an epidemic affecting the entire community, the teacher must be paid in full.[4] Consequently, when the sovereign forbade

[3] Cf., *infra*, note 21.

[4] In situations in which the child becomes incapacitated or the like, and neither the parent nor the teacher had reason to anticipate that such a contingency might arise,

Torah study, since all children were prevented from receiving instruction,

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or both had equal reason to suspect that such a contingency might arise, the loss is to be borne by the teacher because "*mazalo garam* – such was the teacher's fate." See *Shulḥan Arukh*, *Ḥoshen Mishpat* 334:1 and Rashi, *Bava Mezi'a* 77a, s.v. *peseida de-po'alim*. It is only in the case of an "affliction of the country" that Rema apparently presumes that the misfortune must be attributed to the fate of the employer. The rationale underlying that distinction is far from clear. Cf., R. Asher Weiss, *Minḥat Asher: Be-Tekufat ha-Koronah*, *Mahadurah Telita'ah* (Sivan 5780), p. 13.

The distinction between a personal misfortune and a *makkat medinah* can probably best be understood if it is postulated that, unless liability is explicitly disclaimed in certain circumstances, contractual obligations are absolute. Accordingly, liability in face of any consequent calamity or misfortune is integral to the contract. The sole exclusion from absolute liability would be loss attributable to the beneficiary of the undertaking. A worker entering into an employment contract enters into an absolute obligation to provide the required services. By the same token, the employer enters into an unconditional obligation to pay a stipulated wage once the worker has commenced performance, again, unless there is a stipulation to the contrary.

Nevertheless, the beneficiary of a contract cannot sue for performance if it is he who renders performance impossible. Loss of money or property is a form of Divine punishment. Inability to render services may similarly be a form of Divine punishment, particularly if it results in loss of wages. If a student becomes ill during the period covered by the contract, the teacher is prevented from delivering the agreed upon services. Although the father's obligation to pay the teacher's wages is otherwise absolute, the father is in a position to claim, "*mazalakh garam* – it was your bad luck" that caused the interruption. "*Mazalakh garam*" is the rejoinder that the loss is either direct punishment of the claimant or an indirect punishment because the person was abandoned to the rules of the *mazal*, or stellar constellation, i.e., the vicissitudes of nature. Thus, the claim "*mazlakh garam*" is the claim that the loss is the "fault" of the teacher in the sense that Providence has punished the teacher by depriving him of the opportunity to earn his wages by causing the child to become ill and thereby making further instruction impossible. The teacher cannot claim that the father's obligation is absolute because it is the teacher's "fault" that instruction has been interrupted. The presumption that it is the teacher who is being punished arises from the fact that the interruption occurred after instruction had already begun. The closest and most immediate financial victim is the teacher.

Makkat *medinah*, a natural disaster or a societal calamity, is different in the sense that it is not a personal punishment. See Rambam, *Guide of the Perplexed*, book III, chap. 23. Hence, in such situations, the resultant financial loss is not attributed to personal retribution and, consequently, the teacher cannot be deemed to be "at fault." Since the father bound himself to payment of tuition and did not stipulate release from that obligation in the event of unforeseen circumstances, his obligation is absolute. Thus, there is no supervening act that is the "fault" of the teacher that might mitigate that obligation. Therefore, the loss is that of the father.

The foregoing assumes that lack of foreseeability is not an impediment to responsibility. Proof: A person can assume responsibility even for an *ones gamur* if he does so explicitly. An uncontemplated *ones* is excluded from contractual responsibility only upon claim of "*mazalakh garam*, i.e., the loss is your fault, not mine." The risk of a foreseeable impediment to performance is deemed to be anticipated and impliedly assumed, i.e., the claim of *mazalakh garam* has been waived.

the situation is comparable to instances in which all children in the community suffer illness as the result of an epidemic and the teacher is entitled to payment of wages. *Sema*, *Ḥoshen Mishpat* 321:6 and *Bi'ur ha-Gra* 321:7 disagree with Rema and rule that, since the edict prohibiting Torah instruction is directed against both teacher and student, the loss must be borne equally.

The ambit of Rema's ruling is limited by a number of later authorities. The positions of each of those authorities is discussed in detail in this writer's *Contemporary Halakhic Problems*, IV, pp. 364–367, in the context of school closings that occurred during the Gulf War and need not be repeated in detail. *Orḥot Mishpat* 7:10, cites a ruling of *Ḥatam Sofer* with regard to a comparable occurrence, apparently in the Napoleonic period during the Franco-Austrian War of 1809. *Ḥatam Sofer* reports that a firm resolution of the halakhic issue involved eluded him. *Ḥatam Sofer* reports that he himself paid tuition in full to the tutors of his children. However, apparently as a compromise, he directed the *bet din* to compel parents to pay only half the usual fee.[5] Given that a literal application of Rema's ruling would result in full payment but that applying the limitations placed upon that ruling by R. Shlomoh Kluger, *Ḥokhmat Shlomoh*, *Ḥoshen Mishpat* 321:1,[6] and *Netivot ha-Mishpat* 334:1,[7] whose positions

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Sema, *Ḥoshen Mishpat* 321:6, in disagreeing with Rema, asserts that "an affliction of the country" is the equal misfortune of all concerned. See also *Ḥatam Sofer*, cited *infra*, note 5. Rosh, *Bava Meẓi'a* 6:3, maintains that in ordinary circumstances the laborer need not be paid because he is the plaintiff and the burden of proof is upon him, i.e., he must prove that the bad fortune is to be attributed to the employer rather than to himself. According to Rosh, the result is dramatically different if the teacher has been paid in advance and it is the father who sues for recovery. See R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, I, no. 176. See also *Shakh*, *Ḥoshen Mishpat* 333:5.

Rosh maintains that although it is the teacher who is more immediately affected in not being able to teach, it may be the case that Providence designed that the misfortune occur in order to punish the father by forcing him to render payment of wages for which he has received no services in return. *Sema* maintains that the fact that the teacher is more immediately affected does not imply that Providence has acted against him. Providence may have prevented the teacher from providing instruction in order to punish the father who is under absolute obligation to pay the teacher's wages. Since it is impossible to determine which of the parties is "at fault," i.e., which of the two has been marked for retribution, the burden of proof is upon the plaintiff.

[5] See *Ḥatam Sofer*'s memoir describing the evacuation of Pressburg during that period, *Sefer ha-Zikaron* (Jerusalem, 5717), p. 51.

[6] *Ḥokhmat Shlomoh* asserts that Rema's ruling pertains only if the teacher remains ready, willing and able to provide instruction but not if he is forced to flee the town. During a pandemic the teacher is obviously forced to "flee" the classroom.

[7] *Netivot ha-Mishpat* observes that even though teachers of Torah are forbidden to accept compensation for such services they are not paid for teaching but for monitoring

would render Rema's ruling inapplicable, as well as *Sema*'s opinion to the effect that the loss should be shared equally by both parties, *Ḥatam Sofer*'s mandated compromise of 50% of the agreed upon tuition seems entirely reasonable. *Iggerot Mosheh*, *Ḥoshen Mishpat*, I, no. 77, has ruled that, as a matter of Halakhah, communal institutions cannot contract in a manner that is at variance from normative halakhic principles. If so, schools would not be at liberty to stipulate differently in their tuition contracts. Quite obviously, schools have no right to retaliate, or threaten retaliation, by refusing to accept re-enrollment for the next school year or to increase tuition in order to recoup lost revenue.

However, one other factor must be taken into account. During the current pandemic, many schools are providing remote instruction for a limited number of hours each school day. Indeed, many teachers have expended inordinate time and effort in planning such instruction. The school is certainly entitled to prorated compensation for the hours of meaningful instruction actually provided. The 50% adjustment should be applied only to the balance of the amount that would otherwise be owed.

IV. Civil Law

There is another consideration that must be addressed. Civil law has no intrinsic halakhic bearing upon financial or commercial disputes between Jews. However, *minhag ha-soḥarim*, or common trade practice, is usually regarded as an implied stipulation of a contract. To the extent that it can be shown that the parties anticipated adherence to state law, it may be argued that such law is incorporated in the contract on the basis of *minhag ha-soḥarim*, i.e., "the custom of the merchants," or common trade practice.

Schools that cannot provide instruction because of an epidemic may seek to avoid liability for paying a teacher's salary on a number of grounds: (1) *force majeure* or "act of God"; (2) impossibility of performance; and (3) frustration of purpose.

Force majeure, or "superior force," clauses are generally enforced pursuant to a stipulated clause in a contract. Until the mid-nineteenth century, *force majeure* was an excuse for nonperformance of a contract only if such a clause was incorporated in the contract. While the general stance of Jewish law is that a person cannot be considered to be bound in circumstances that he could not be expected to contemplate, the common law system at one time assumed precisely the opposite. There is no

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the conduct of the pupils. During a pandemic the teachers are clearly not able to offer those services for the entire school day.

shortage of judicial decisions containing dicta to the effect that, if a person did not want to be bound in cases of *force majeure*, he should have so stipulated. The underlying notion seems to have been that, almost by definition, insofar as the law is concerned, no one anticipates a particular event that, for most people, is unanticipated. *Ergo*, a person could not be expected to make any stipulation, either expressly or *in pectore*, regarding an unanticipated event since he cannot anticipate what that event might be. Consequently, if he wishes to protect himself, he must do so by means of a *force majeure* clause or the like that protects globally against the unanticipated.

But everyone does anticipate that there may be *an* unanticipated event even if one has not the vaguest idea of what that event might be. Persons certainly do not wish to be liable for that which they cannot anticipate. Consequently, the common law developed the doctrine of impossibility of performance. The doctrine of impossibility of performance became part of British common law in the second half of the nineteenth century and was first applied in England in 1863 in *Taylor v. Caldwell*, 122 Eng. Rep. 310 (Q.B. 1863). There was no doctrine of impossibility of performance in the United States before the Supreme Court decision three decades thereafter in *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U.S. 1 (1893).

Nevertheless, long before *Taylor* entered the common law, British courts excused nonperformance of a contract when such performance was rendered impossible by an act of God. The term "act of God" connotes an unpredictable and unpreventable event not attributable to either human malfeasance or nonfeasance. The term introduced by Spinoza, "*Deus sive Natura*," would be more appropriate but for the fact that a) the term "act of God" was used by British jurists as early as the late sixteenth century,[8] long before Spinoza, and b) the courts were searching for an English, rather than a Latin, term. Thus, in 1609, in *Shelley's Case*, 76 Eng. Rep. 199, 200 (K.B. 1579-1581), a British court ruled that fire caused by lightning was an act of God, whereas in 1785, in *Forward v. Pittard*, 99 Eng. Rep. 953 (K.B. 1785), Lord Mansfield held that fire that did not result from lighting was not an act of God.[9] Lightning is an uncontrollable phenomenon produced by nature; other fires cannot be

[8] See Shelley's Case, 76 Eng. Rep. 199, 200 (K.B. 1579-1581). Cf., J.H. Baker, *An Introduction to English Legal History*, 3rd ed. (1990), p. 442, who claims that the term came into vogue in the fifteenth century. See also Denis Binder, "Act of God? or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law," *The Review of Litigation*, vol. 15, no. 1 (Winter, 1996), pp. 4–5.

[9] See Arnold O. Ginnow and Milorad Nikolic, *Corpus Juris Secundum*, vol. 1A (St. Paul, 1985), p. 757.

described as caused by the laws of nature that govern the operation of the universe.

The concept is similar to the Roman *vis maior* and the French *force majeure*. The term was incorporated in British decisions in a period when it was politically correct to use English rather than Latin or French. Thomas Wilson, an eminent lawyer and government minister, denounced use of French and "Italianated [words that] counterfeited the kinges Englishe."[10]

Although the Christian influence in coining the term is unmistakable, the term had no theological implication and was used primarily in the sense of an act of nature. Indeed, the Roman law concept was not limited strictly to natural disasters. It included acts of war and crimes committed by pirates and robbers as well.[11]

The same was true in the United States as well. Both before the decision in *Hoyt* and long thereafter, courts in numerous state jurisdictions issued decisions invoking the notion of an "act of God or public enemy" in excusing performance of a contracted undertaking. Most of those cases do not refer either to the original British case or to *Hoyt*. It must be remembered that the latter case involved no question of constitutional law or application of a federal statute. *Hoyt* appears to have been heard in a federal court solely by virtue of diversity jurisdiction. Such decisions generally involve application of state law by federal courts and cannot bind state jurisdictions. Many courts continued to rely solely upon an "act of God" doctrine.

There were a significant number of controversies prior to the Spanish flu pandemic of 1918 involving teachers who sued school districts for unpaid wages during periods in which schools were closed because of outbreaks of diphtheria or smallpox.[12] Unsurprisingly, a cluster of cases

[10] Thomas Wilson, *The Rule of Reason* (London, 1551), reprinted (New York, 1970), cited in *Dictionary of National Biography*, vol. 21 (New York, 1909), pp. 603–607 and Peter E. Medine, *Art of Rhetoric: (1560) Thomas Wilson* (University Park, 1994), p. 188.

[11] In a parallel manner, Jewish law designated armed robbers (*listim mezuyan*) as an absolute *ones* (compulsion) that absolves a bailee otherwise liable for theft from responsibility for loss resulting from armed robbery. That is reflected in British cases in the phrase "act of God or the king's enemies" and in American case law by use of the term "act of God or enemy of the people."

[12] Dewey v. Union School District of the City of Alpena, 43 Mich. 480, 5 N.W. 646 (1880); Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N.E. 808 (1900); McKay v. Barnett, 21 Utah 239, 60 Pac. 1100 (1900); Smith v. School District No. 64 of Marion County, 89 Kan. 225, 131 Pac. 557 (1913); Holter, Appellant v. School District of Patton, 73 Pa. Superior Court 14 (1919). Similarly, in Carpenter v. Centennial

involving nonpayment of teachers' salaries followed in the wake of the Spanish flu pandemic.[13] In those decisions the courts almost uniformly held that when schools are closed because of contagious disease the teachers are entitled to be paid the salary that had been stipulated in their contracts. The courts asserted that, if the schools had not been willing to obligate themselves to pay the teachers during those periods, they should have, and could have, inserted a stipulation to that effect in their contracts.

Under the law of the time, those decisions seem to be unexceptionable. Those courts were not required to recognize a doctrine of impossibility of performance. Nevertheless, there are many cases involving school closures in which the court considered an "act of God" defense but found that the doctrine did not apply. The most far-reaching of those decisions was *McKay v. Barnett*, 21 Utah 239, 60 Pac. 1100 (1900). In denying that closing the school was an act of God, the Utah court asserted:

> Where the contract is to do acts which can be performed, nothing but the act of God or of a public enemy, or the interdiction of the law as a direct and sole cause of the failure will excuse the performance. This principle is elementary. The schools were not closed for any such cause by the board of education. While the closing of the schools may have been wise and prudent, the closing was not due to any cause which made it impossible for the schools to keep open. The board of education might have stipulated

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Life Ass'n, 68 Iowa 453, 27 N.W. 456, 457 (1886), a case that did not involve a dispute regarding a teacher's contract, the Supreme Court of Iowa declared that "[i]t is a familiar rule that when the performance of a contract becomes impossible by the act of God, the obligor is excused, and his rights under the contract are not forfeited." Also, in Wheeler v. Connecticut Mut. Life Ins. Co., 82 N.Y. 543, 550 (1880), the court held, "[w]here the contract is for personal services, which none but the person contracting can perform, inevitable accident, or the act of God, will excuse nonperformance."

[13] None of these cases draws a distinction between a *makkat medinah*, i.e., an epidemic, and a more limited unforeseeable event. Rema's ruling describes a widespread supervening factor attributed to the "bad luck" of the employer who remains bound by the contract. *Sema*, who disagrees with Rema, does so only because the "bad luck" reflected in a widespread misfortune is that of both parties equally. A Jewish law finding of *makkat medinah* would, according to Rema, lead to a judgment in favor of the teacher. However, neither the Spanish flu nor any of the other forms of contagion was a *makkat medinah* in a halakhic sense. In each of those cases, the teacher was ready, willing and able to fulfill his duties and there was no legal constraint placed upon the teacher (as distinct from the school) that would have prevented him from doing so. Nevertheless, the school board's concern for the health and safety of the students prompted it to act prudently and their position that they had no need for the continued services of the teacher was entirely cogent. Hence, the unforeseen eventuality was the "bad luck" of the teacher.

> that the plaintiff should have no compensation during the time the school should be closed on account of the prevalence of contagious diseases, but, not having done so, it cannot deny the compensation during such time on account of the prevalence of smallpox.

In *McKay*, the court acknowledged that the epidemic itself was an act of God but contended that the response to the epidemic was not at all an act of God. Later the same year, in *Libby v. Inhabitants of Douglas*, 175 Mass. 128, 55 N.E. 808 (1900), a Massachusetts court declared that "the prevalence of the disease made the keeping open of the school unwise, but not impossible."

During the early part of the twentieth century, another factor became significant in judicial determinations of whether teachers must be paid during school closings due to contagion, namely, the fact that schools were often closed by government authorities. A number of courts, both before and during the period of the Spanish flu, held that when schools are closed by health officials acting under statutory authority the teacher is not entitled to payment of salary.[14] There are also a number of cases holding that the teachers are entitled to recover lost wages under such circumstances.[15] Those courts assumed that only an act of God—rather than other forms of impossibility of performance—render a contract unenforceable. The novel issue that is addressed in those cases is whether a legal constraint should, in effect, be categorized as the equivalent of an act of God.

In the earliest of those cases, decided before the advent of the Spanish flu pandemic, in *School District No. 16 of Sherman County v. Howard*, 5 Neb. (Unof.) 340, 98 N.W. 666 (1904), in holding that the teacher could not recover, the court said:

> It is not claimed that the board of health did not have authority to close the school, or that the order was illegal in any respect. This being so, that order, so long as it remained in force, was a valid legal prohibition against the continuance of the school, and the district by the force of law was

[14] School District No. 16 of Sherman County v. Howard, 5 Neb. (Unof.) 340, 98 N.W. 666 (1904); Gregg School Township v. Hinsaw, 76 Ind. App. 503, 132 N.E. 586 (1921).

[15] Dewey v. Union School District of the City of Alpena, 43 Mich. 480, 5 N.W. 646 (1880); Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N.E. 808 (1900); McKay v. Barnett, 21 Utah 239, 60 Pac. 1100 (1900); Smith v. School District No. 64 of Marion County, 89 Kan. 225, 131 Pac. 557 (1913); Holter, Appellant v. School District of Patton, 73 Pa. Superior Court 14 (1919). The latter case involved school closure because of an outbreak of infantile paralysis.

> unable to complete its contract.... But the action of the district in closing the school was not voluntary. It was the act of the law, which the district and all others were compelled to obey.

Later, in the post-Spanish flu era, in *Gregg School Township v. Hinshaw*, 76 Ind. App. 503, 132 N.E. 586, 17 A.L.R. 1222 (1921), the court was even more emphatic: "It was in the exercise of this police power, which had been delegated to it by statute, that the health officials closed the school here involved, and such act was independent of the authority of the township trustee, and entirely beyond his control.... The law of the land is a part of every contract."[16]

The distinction between closing a school because of legal duress and closing a school because it is "wise and prudent" to do so is quite clear. Nevertheless, there is a list of cases decided both before and after the Spanish flu epidemic that do not equate legal duress with an "act of God."[17] Correctly or incorrectly, those decisions limit the doctrine to "acts of God," i.e., unforeseeable and unpreventable acts of nature, and reasoned

[16] The omitted sentence, "The law delegating this authority to the board of health was in force at the time the contract involved was entered into...." must be deemed dicta rather than part of the holding. If legal constraint is to be considered as impossibility of performance there can be no difference where the law was enacted prior to inception of the contract or subsequent thereto. In *McKay*, the court found the school liable because "the local board of health had no such authority at the time the contract was made, and *have not since* had any such authority" (emphasis added).

[17] Gear v. Gray, 10 Ind. App. 428, 37 N.E. 1059 (1894); Randolph v. Sanders, 22 Tex. Civ. App. 331, 54 S.W. 621 (1899); Board of Education of City of Hugo, Chocton County v. Couch, 63 Okla. 65, 162 Pac. 585 (1917); Montgomery v. Board of Education of Liberty Tp., Union County, 102 Ohio State 189, 131 N.E. 497 (1921); Phelps v. School District No. 109, Wayne County, 302 Ill. 193, 134 N.E. 312 (1922); Crane v. School District No. 14 of Tillamook County, 188 Pac. 712 (1920); Montgomery v. Board of Education of Liberty Township, 102 Ohio State 189, 131 N.E. 497 (1921). See also Town of N. Hempstead v. Pub. Serv. Corp. of Long Island, 107 Misc. 19, 24–25, 176 N.Y.S. 621, 625 (Sup. Ct. 1919), aff'd, 192 A.D. 924, 182 N.Y.S. 954 (App. Div. 1920); Sauner v. Phoenix Ins. Co., 41 Mo. App. 480, 485 (1890); Varagnolo v. Partola Mfg. Co., 209 A.D. 347, 350–51, 204 N.Y.S. 577, 579 (App. Div. 1924).

22A N.Y. Jur. 2d Contracts § 400 states, "[w]here performance becomes impossible because of a change in the law or action taken by the government, performance is excused, provided the promisor is not at fault or does not assume the risk of performing, whether impossible or not. Nonperformance is excused where performance is rendered impossible by the law, because one of the conditions implied in a contract is that the promisor will not be compelled to perform if performance is rendered impossible by an act of the law." N.Y. Jur. 2d Contracts § 400 categorizes legal constraint as an implied condition rendering a contract nugatory rather than identifying legal constraint as a form of *force majeure*.

that a law requiring containment of the ravages of nature is not a law of nature but a responsible human response to an act of nature.

That contention was forcefully rejected in *Phelps v. School District No. 109, Wayne County*, 302 Ill. 193, 134 N.E. 312 (1922). *Phelps* involved a case in which the state board of health ordered schools closed and the teachers sued for lost wages. The Illinois court ruled that "where performance of the contract is rendered impossible by act of God or the public enemy" there would be no reciprocal liability. The court refused to recognize the epidemic as an "act of God or public enemy" and ruled that, since the teacher "is ready and willing to continue his duties under the contract," the school district remains liable for full payment of the teacher's salary.

The Illinois court recognized only an act of God as grounds for relieving the contracting party of liability. If one limits the legal analysis to semantic denotations, the *Phelps* court was obviously correct. Even granting that the Deity causes epidemics, He certainly does not turn the key in the schoolhouse door. "Act of God" connotes an event of nature over which man has no control. Laws are made by man, not by nature. But surely, the distinction as a category of law is a distinction between that which is within the power of the contracting parties, their agents, employees, etc., and that which is totally beyond their control. Acts of the Divine Sovereign are beyond the control of His creatures; acts of the temporal sovereign are similarly beyond the control of the sovereign's subjects. Acts of the Divine Sovereign cannot be countermanded by his creatures; attempts to counteract the acts of the temporal sovereign will be frustrated by the sovereign's police power. Certainly that should be the result if "act of God" is not assumed to be a theological concept—a doctrine foreclosed to U.S. judges by virtue of the First Amendment—but a convenient colloquialism used as a stand-in for *force majeure*.[18]

[18] One commentator, Town Hall, "Rights of a Teacher in the Public Schools when School is Closed," *Kentucky Law Journal*, vol. 25, no. 3 (March 1937), pp. 261–268, argues that the decisions that allowed the teacher to recover wages when schools were closed pursuant to a legal order have been wrongly construed. The contracts upon which litigation in those cases was predicated contained clauses requiring teachers to hold themselves ready to perform their duties when called upon. That commentator argues that, since the teachers were required to hold themselves in readiness at all times, the contract remained in force. Accordingly, if the contract remained in force, the teachers were certainly entitled to compensation.

That argument is misconceived. There is no question that the thrust of that contractual stipulation was that the teacher would hold himself in readiness to perform his duties whenever school was in session. Thus, if classes were dismissed early because of a broken waterpipe and, despite the fact that it was thought that the pipe could not

In an earlier case, *Gear v. Gray*, 10 Ind. App. 428, 37 N.E. 1059 (1894), the court also allowed recovery despite the fact that the school was required to close by government authorities. Unlike the contention of the commentator, in *Gear* the school did not forego a pleading of illegality as constituting the legal equivalent of an act of God. On the contrary, the court explicitly held that "it can make no difference whether the order was made by the school authorities themselves or by the board of health.... [T]he closing of a school by the order of a school board or a board of health is not the act of God, however prudent and necessary it may have been...." It had been contended by the school board that "the act of closing the school was made imperatively necessary by the order of the secretary of the county board of health, which order the appellant was

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be repaired overnight, when the school opened the next morning because it became evident that there was no impediment to continuing the usual schedule of studies, the teacher could not plead that he assumed that he was free to make other plans.

What, however, was the state of mind of the parties during smallpox or diphtheria closings? Schools were closed by the police power of the state. If, as it is urged, by the school board, exercise of that power constitutes *force majeure* tantamount to an act of God, the board is not liable for payment of wages. Suppose the teacher asked directly, "Am I going to be paid during closure of the school?" As evidenced from its posture during the course of litigation, the school board did not wish to bear that financial burden. They certainly wished to terminate the contract.

Any morning on which the school was closed school officials might be asked by the teacher, "Am I expected to hold myself in readiness today?" The school officials must answer either "Yes" or "No." Those officials know full well that they will not reopen that day. If they nevertheless answer "Yes" they remain liable for wages. We know, at least in retrospect, that they had no intention of paying wages; they intended to plead *force majeure* in the form of the police power of the state. If so, they perforce would have answered, "No. Today, you may do as you please." It would have been nonsensical to order a teacher to remain ready to do what he could not possibly do. Nor does it make sense for the teacher to hold himself ready to perform an obligation that he cannot possibly perform. In effect, the order directing the school to close told the teacher *not* to hold himself in readiness to teach.

The intention of the school board was clearly to abrogate the contract in its entirety so that they might be able to plead *force majeure*. The school board was either hypocritical in not honoring a demand to pay wages or believed the contract to have been abrogated in its entirety. The teacher would have been quite foolish to hold himself ready to teach on a date on which he was told both by the state and by school officials that his services were not going to be required. Telling a teacher not to come to school because of an outbreak of disease is inclusive of telling him not to hold himself ready to perform any services that day. It would have been facetious for the teacher to claim to do so. He could only claim that his own obligation to hold himself in readiness was abrogated by *force majeure*. Since the school board effectively abrogated the contract *in toto* for that period, it can be ordered to pay wages only if the defense of *force majeure* is rejected. The cases that ordered payment must be regarded as having rejected closure by the police power of the state as the legal equivalent of an "act of God."

in duty bound to obey, and further that, if such order had not been made, the contagious disease mentioned, which was an act of God, justified said act of closing, and excuses the appellant in the nonperformance of its part of the contract."[19] The court's response was that neither is an epidemic an act of God nor is the closing of a school pursuant to an order of state authorities an act of God.[20] The court explicitly held that only an act of God can excuse nonperformance. The court rejected any form of impossibility of performance, other than by virtue of an act of God, as a defense for nonperformance unless expressly stipulated in the contract.

Slowly, American courts began to cite both *Taylor* and *Hoyt* and explicitly acknowledge the doctrine of impossibility of performance. Once American courts accepted the doctrine of impossibility of performance as not limited to an act of God, the doctrine of impossibility of performance quickly blossomed into an expanded doctrine of impracticability. Indeed, as early as 1916, long before the doctrine of impossibility of performance was widely accepted, the Supreme Court of California, in *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916), ruled that "a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." As a result of *Howard* and a significant number of subsequent cases, § 454 of the First Restatement of Contracts, published in 1932, expanded the doctrine of impossibility to include impracticality in providing that the duty of the promisor is discharged where performance is impossible or impracticable "because of extreme and unreasonable difficulty, expense, injury or loss involved." The Restatement (Second) of Contracts § 261 similarly recognizes impracticality as a defense to nonperformance of a contract when performance would involve "extreme

[19] See Town Hall, *supra*, note 18, who maintains that in *Gear* the school board did not raise the issue of legal constraint as a defense and hence *Gear* cannot be regarded as authority for the proposition that closure by virtue of the police power of the state is not tantamount to an act of God because the school board chose to forego a pleading of illegality. The commentator's contention that "nowhere did the school board interpose the defense that it was prevented from carrying out its contract by operation of the law" is patently in error as demonstrated by the excerpt from the decision cited in the text.

[20] In *Gear v. Gray*, 10 Ind. App. 428, 37 N.E. 1059 (1894), the school board argued that the act of closing the school was made necessary both by the epidemic and the order of the county of the board of health and that each of those factors constituted an act of God. The argument was that two separate acts of God were involved: (1) the epidemic; and (2) closing of the schools by legal authorities. The court rejected the allegations and ruled that neither constituted the nature of an act of God.

and unreasonable difficulty, expense, injury, or loss" and explains the rationale underlying the doctrine:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

That explanation mirrors the Jewish law notion of unforeseen impracticality as a reason for abrogating a contractual obligation. Jewish law would describe unforeseeable impracticality as an implied condition of the contract justifying nonperformance of the contract.

There is another factor crucial to the issue of whether there can be the equivalent of a *minhag ha-soḥarim*. No private school has ever been involved in litigation regarding nonpayment of teachers' wages during periods of interrupted instruction. Such schools are usually incorporated. A corporation may be a legal person, but the corporation as an entity cannot provide personal services. Even if the school is unincorporated, a secular court will almost assuredly adopt a view similar to that of Rabbi Blau[21] regarding a Talmud Torah, namely, that such a school is an unincorporated organization rather than a teachers' guild or partnership. If so, the school has entered into a contract for delivery of a commercial product, namely, educational instruction, rather than for personal services. A party that has contracted for delivery of a quantity of widgets but does not perform, regardless of the reason for its nonfeasance, cannot sue to recover the agreed upon price.[22] The school, recognized for legal purposes as an organizational entity, cannot deliver the educational product for which it has contracted; assuredly it has no claim for payment of undelivered services.

The implication of the foregoing is that there is not—and could not be—a *minhag ha-soḥarim* arising from customary practice based upon state law that might govern a teacher's contract between parents and a school. Moreover, articles that have already appeared in law journals during the course of the coronavirus pandemic have cast doubt upon how those issues would be resolved by a secular court under current circumstances.[23] One need not analyze the merits of arguments pro or con to

[21] See *supra*, note 3 and accompanying text.

[22] See Uniform Commercial Code (UCC) § 2-601, Buyer's Rights on Improper Delivery.

[23] See e.g., Adam Schramek, "Force Majeure in the Age of Coronavirus: Top Five Questions to Consider When Analyzing Your Business Agreements," *Texas Bar Journal*,

recognize that the result is not a foregone conclusion. Certainly, if the issues are matters of scholarly debate, the law cannot be regarded as settled, publicly known, accepted and relied upon. In short, there does not seem to be a *minhag ha-soḥarim*.

As has been stated, this is not to assert that settled principles of civil law are irrelevant to a decision of a *bet din*. Civil law can be considered in adjudicating financial relationships between Jews, not because of *dina de-malkhuta*, but because it may be tantamount to *minhag ha-soḥarim* as an implied condition of the contract. Statutory legislation is much more likely to generate a *minhag ha-soharim* than is the situation with regard to judicial precedent, particularly when the case law is sparse and/or of recent vintage. In order to qualify as an implied condition, the practice must be publicly known, accepted and relied upon. Moreover, it would be paradoxical to advance a claim based upon unforeseeability of circumstances and simultaneously to claim reliance on "common practice" in adjudicating a dispute arising as a result of such unforeseen circumstances.

It should also be noted that, although it is doubtful, it may be the case that there is past precedent for payment of full salary by Jewish day schools when instruction has been interrupted for periods of time shorter than the present closure and that such precedents are sufficient in number to establish a *minhag ha-medinah* or "common trade practice" that is generally considered to be tantamount to an implied condition of a contract.[24]

V. Considerations of Equity

The question of whether the agreement between the parents and the school is a commercial agreement or an employment contract also merits consideration in fashioning a compromise settlement. That is certainly true of privately controlled schools but, as has been stated, even with regard to *bona fide* communal institutions the position that the institution is not simply a conduit facilitating arrangements between parents and staff is also colorable.

Equitable arbitration regarding that issue would result in a further reduction of tuition. The parents' position would be that they are not liable for even the 50% of the tuition balance assessed against them on the basis

vol. 83, no. 5 (May, 2020), p. 303; Brendan S. Everman, "Force Majeure and Covid-19 Live Event Cancellations," *Los Angeles Lawyer*, vol. 43, no. 3 (May, 2020), p. 36.

[24] During the recent pandemic many day schools and *yeshivot* quite appropriately continued fully to compensate their faculty even though they found remote instruction unfeasible. There may now be a *minhag ha-soḥarim* that will govern future situations that, Heaven forfend, may arise.

of Rema's ruling. The school, of course, would claim that, in light of Rema's ruling, 50% of the stipulated tuition is its due as a compromise settlement. Taking account of those conflicting arguments as applied to the contemplated award of 50%, it would be reasonable to mediate that claim as well and to further reduce the 50% figure by one half with the result that the final award would be reduced to 25% of tuition fees representing hours for which no instruction was provided.

Nevertheless, a *bet din* might find that an equitable solution of the latter issue would result in no adjustment in the previously outlined award. Resolution of the question of the nature of the relationship is relatively simple—at least for schools providing at least a modicum of remote instruction. The school is being called upon to cancel its claim for instruction not provided. The school's justifiable response is that, in light of its ongoing unmitigated financial obligations, it is justified in demanding higher tuition because of the higher cost of the educational benefits it actually continued to provide. Reasonable adjudication of that dispute would be for the two parties to drop both the claim and the counterclaim subject to the mediated settlement earlier outlined.

Another potential consideration is presented by Rema, *Shulḥan Arukh*, *Ḥoshen Mishpat* 335:1, involving circumstances in which an employee has been engaged for a specific period of time but the employer is prevented from using, or has no further need for, the ongoing services of the employee. In principle, the employer is liable for payment of the employee's wages in full. However, laborers would generally be content to receive lower remuneration if they would be excused from actual work. Hence, compensation to which they are entitled when their labor is no longer required is assessed as that of *po'el batel*, or "idle laborer," i.e., the amount which the worker would have been willing to accept if allowed to remain idle.[25]

However, Rema qualifies that rule as applied to teachers. There are idealistic and dedicated teachers of Torah subjects who would prefer to teach students rather than to sit idle. Such teachers, Rema rules, are entitled to full compensation. Rema further rules that whether or not a teacher fits into that category is a matter to be left to the judgment of the *bet din*.

A reduction in tuition based upon the consideration of wages that would be accepted by a *po'el batel* is probably not warranted in situations

[25] *Taz*, *Ḥoshen Mishpat* 33:1, cites a number of early-day authorities who regard that amount to be equal to 50% of the stipulated wages. However, a number of early-day authorities regard that amount as contingent upon the difficulty of the labor and the nature of the workmen. See *Teshuvot ha-Rashba*, I, no. 996; *Teshuvot ha-Rashba ha-Mayuḥasot le-Ramban*, no. 70; *Teshuvot ha-Rosh*, *klal* 92, chap. 4; and *Teshuvot Radvaz*, II, no. 793. See also *Teshuvot Rema*, no. 50.

in which schools are closed because of the pandemic for several reasons. A *bet din* may perhaps find that Rema's categorization describes some *roshei yeshivah* but it is certainly not every elementary school teacher who can be described in that manner. More significantly, most teachers in schools providing remote instruction do not sit idle. They provide instruction to different groups of students *in seriam* during the course of the usual school day.

The mediated settlement reflected above is based upon *Ḥatam Sofer*'s conclusion that a *bet din* would be unable to decide between the opinions of conflicting authorities with regard to this matter. If the parties are willing to submit to *pesharah*—as would be commendable and to be encouraged—the relative economic condition of each of the parties should be taken into consideration. Businesses were forced to suspend operations during the pandemic. The national unemployment rate stood at 14.7%. For many families ongoing tuition obligations became onerous. The *bet din* may also take into consideration on a case by case basis any out-of-pocket expenses incurred by the parents resulting from expenditures for childcare, purchase of materials with which to occupy the children and the like. On the other hand, under normal conditions, schools operate on a tight budget and are dependent upon tuition income. During this period schools suffered disruption of fundraising endeavors. Parents of means are certainly in a better position to assume the loss. Those factors as they impact upon particular situations must also be recognized by a *bet din* fashioning a *pesharah*.

Many schools require payment of tuition in full at the beginning of the academic year in the form of post-dated checks. That method of payment has no bearing upon preservation of the rights of the respective parties. As this writer has shown elsewhere,[26] a check is no more than a directive to a bailee to deliver funds to a third party on behalf of the bailor or, more accurately, to a debtor to deliver funds to a third party on behalf of a creditor. In effect, the arrangement calls upon the bank to serve as an agent in delivering those funds. The agency may be nullified with impunity at any time by an order addressed to the bank to stop payment. Physical possession of the check does not make the recipient a *muḥzak*, i.e., the party in possession. Nor, indeed, in the present instance, is identifying the *muḥzak* a matter of consequence. It is precisely because, as *Ḥatam Sofer* acknowledged, a *bet din* is not in a position to resolve the underlying halakhic dispute that a compromise judgment is mandated.

[26] See J. David Bleich, "Checks," *Contemporary Halakhic Problems*, IV (New York, 1995), 46–61.

Gloves and Masks

"The laws of *Shabbat* are as mountains suspended from a hair for their text is scant but the *halakhot* are numerous" (*Ḥagigah* 10a). The 39 categories of forbidden activity and their progeny are difficult to define with exactitude. The principles governing the application of those categories are equally difficult to grasp. Superimposed are myriad rabbinic restrictions designed to create "fences" lest, in ignorance or confusion, one inadvertently transgress a biblical prohibition, not to speak of the numerous rabbinic enactments designed to preserve and enhance the spirit of the day.

Perhaps the most complex of *Shabbat* regulations are those governing *hoẓa'ah*, a category that encompasses carrying or otherwise transporting an object from a private domain to a public thoroughfare or vice versa as well as traversing a distance of four cubits in a public domain with such an object. Delineated with precision are the various domains, *viz.*, private, public, *karmalit*, i.e., a rabbinically designated public domain, and *makom petur*, i.e., "extra-halakhic" or neutral areas that are treated as essentially nonexistent. The elements of *hoẓa'ah*, i.e., items subject to the restriction as well as prohibited modes of "carrying" or "transporting," require careful elucidation. Little wonder, then, that more folio pages of the Gemara are devoted to regulations governing *hoẓa'ah* on *Shabbat* than to any other topic.

There are exceptions to prohibitions against *hoẓa'ah* on *Shabbat*. The admonitions "You shall not take out a burden (*masa*) on the Sabbath day… nor shall you take out a burden from your dwelling on the Sabbath day" (Jeremiah 17:21–22) limit the prohibition to items categorized as a *masa* or burden. A person may "carry" himself, i.e., he may traverse the various domains with impunity. He may wear clothing and some forms of adornment while walking through those domains because such items are deemed to be accessories to his body or decorations of his apparel rather than a "burden." Nevertheless, although biblically permissible, the Sages forbade wearing many such items *dilma shalfa u-maḥavya* (*Shabbat* 59b), i.e., lest the person remove the item and carry it in his hand.

I. Gloves

The issue with regard to gloves and masks is whether either or both always constitute an item of apparel or an "adornment" or are deemed to be included in one or the other of those categories at least in limited circumstances such as during an epidemic.

Garments categorized as accouterments or accessories to the body include items of clothing designed to protect the body or to preserve its

dignity,[27] provided that the particular item of apparel in question is generally worn for that purpose and the garment is donned *derekh levishah*, i.e., "in the manner of dressing." Application of that definition is contingent upon locale and time and thus determined by societal practice. Hence, a robe or *tallit* designed to envelop the body may not be folded and placed over a shoulder because, since that is not the manner in which such apparel is customarily worn, it does not become an accessory to the body.[28] But, on the other hand, a person who is completely incapable of walking without a cane may avail himself of such an accouterment on *Shabbat* because in enabling the person to ambulate the cane becomes an adjunct of the body even though it is not worn as a garment.[29] Similarly, a shackled prisoner may walk in a thoroughfare with chains around his feet because they are considered to be an adjunct to the body rather than a "burden" being transferred from one place to another.[30]

A *takhshit* or "adornment" need not necessarily be an item designed for an aesthetic or decorative purpose. A *takhshit* is defined as any item attached to the body or clothing that is designed not to protect against the elements but to satisfy some personal need. Such items are regarded as accessories to the body or to the garment and may be worn even if not visible either to a bystander or to the person himself. Thus, *Tosafot*, *Shabbat* 60a, s.v. *she-eino*, describe an item attached to the body for medical purposes as an "ornament for a sick person." However, such items may not be transported in the manner of a "burden," i.e., by being carried by hand or placed in a pocket, but must be attached to the body or clothing in the manner in which such objects are customarily "worn."

[27] See *Shabbat* 77b. In giving the etymology of a number of Aramaic words the Gemara states that the word "*levusha*," defined by Rashi as an outer garment, is a contraction of the words "*lo bushah*," meaning no shame.

[28] See *Shulḥan Arukh*, *Oraḥ Ḥayyim* 301:29. However, *hoẓa'ah* is biblically prohibited only if the item is transported *derekh hoẓa'ah*, i.e., "in the manner of carrying." Since such an item is usually carried by hand, transferring it from one place to another by means of placing it on the shoulder is not *derekh hoẓa'ah* but is nevertheless prohibited by rabbinic decree.

[29] See *Shulḥan Arukh*, *Oraḥ Ḥayyim* 301:17.

[30] See *Shulḥan Arukh*, *Oraḥ Ḥayyim* 301:19 and *Mishnah Berurah* 301:69. Cf., Me'iri, *Shabbat* 65b, s.v. *kise semukhot*, who explains that anything designed as a *shemirah*, i.e., to "guard" a person's body, is adjunctory to the body and permissible even if the object satisfies no physical or aesthetic need. See also *Mishnah Berurah* 305:55 who employs the same principle in explaining that an item designed to restrain an animal is not a "burden" and hence an animal may be permitted to "carry" such an item on *Shabbat*. Cf., *Mishnah Berurah*, *sha'ar ha-ẓiyyun* 301:75 and R. Simcha Ben-Zion Rabinowitz, *Piskei Teshuvot* (Jerusalem, 5775), 301:28, note 189.

Despite the paucity of scriptural verses identifying activities specifically forbidden on *Shabbat*, rabbinic exegesis finds two Pentateuchal verses that serve as the loci of the prohibition concerning carrying. The Gemara, *Eruvin* 17b, vocalizes the phrase "*al yeẓe*" that occurs in Exodus 16:29, "a person shall not exit (*al yeẓe*) from his place on the seventh day" as "*al yoẓi*" rendering the verse "a person shall not take out (*al yoẓi*) [an object] from his place on the seventh day." The Gemara, *Shabbat* 96b, points to Exodus 36:6, "Neither man nor woman shall do any more labor for the offering of the sanctuary and the people were restrained from bringing," in which the word "*melakhah*," meaning "labor" is juxtaposed with the word "*me-havi*—from bringing" in the phrase "and the people were constrained from bringing." The Gemara interprets the verse as defining "bringing" as a form of labor. The Gemara categorizes "bringing" or carrying from one domain into another on the Sabbath as a prohibited form of labor.[31] *Kol Bo*, no. 31, cited by Rema, *Oraḥ Ḥayyim* 301:16, in conjunction with laws concerning carrying on *Shabbat*, urges that a person not exit a private domain on *Shabbat* without an item of apparel that he does not customarily wear on weekdays so that the unique Sabbath garment will serve to remind him that it is the Sabbath day.[32]

Because human beings are creatures of habit and are also prone to distraction and forgetfulness, it is quite easy for them inadvertently to commit the transgression of *hoẓa'ah* or "carrying." Consequently, the Sages promulgated a series of prohibitions against wearing certain types of clothing and accessories on *Shabbat*. The Sages prohibited carrying many of those items, particularly women's adornments, because of a fear that they might be removed and carried by hand. The concern underlying that series of prohibitions was either that a woman might meet a friend and wish to exhibit her jewelry to that friend or because such items must be

[31] See *Tosafot*, *Shabbat* 96b, s.v. *u-me-mai*, and Rambam, *Hilkhot Shabbat* 12:8.

[32] The Gemara, *Shabbat* 12a, records a dictum of Rabbi Chananya requiring every person to feel his clothing late Friday afternoon in order to be certain that there is nothing in a pocket lest he forget and leave his home on *Shabbat* with some object in his clothing. R. Joseph amplifies that remark with an observation that "This is an important regulation for the Sabbath." This writer recalls seeing an unremembered source that translates the phrase *hilkhata rabbata le-Shabbata*, not as "an important *Shabbat* regulation," but as "an important regulation *on Shabbat*," i.e., it is even more important that a person conduct such an examination of his clothing before leaving home *on* the Sabbath day. Cf., *Mishnah Berurah* 252:56 who refers to such examination as a recommended practice but does not posit it as a mandatory regulation.

Ma'aseh Rav, sec. 141, reports that the Gra was careful never to place anything in the pocket of a Sabbath garment. *Pnei Shabbat*, III, no. 1, sec. 12, reports that some pious individuals had their *Shabbat* garments tailored without pockets.

removed before immersion in a *mikveh* with the result that a woman, in her haste, might remove them en route to the *mikveh*.[33] Wearing certain other items was forbidden because of a fear that they might become loose and fall, leading the wearer to retrieve the article and carry it in his hand. Other items that give the wearer a bizarre appearance were prohibited because the wearer might be prompted to remove them in order to avoid self-consciousness or ridicule.[34] Some dual-purpose items, i.e., items that are ornamental but also have a utilitarian function, were forbidden because of *mar'it ayin*, i.e., an observer might focus upon the object's utilitarian purpose and hence perceive the wearer as transporting a burden.

There is no mention of gloves in the Gemara, probably because in the Middle Eastern climate gloves were not usual items of apparel, and accordingly, there is no express talmudic prohibition against wearing gloves on *Shabbat*.[35] The earliest reference to the status of gloves on *Shabbat* occurs in the thirteenth-century work of R. Ẓidkiyah ben Abraham ha-Rofeh, *Shibbolei ha-Leket*, *Inyan Shabbat*, no. 107, who states that, at times, "a person removes his gloves because he is being bitten by a louse or to scratch his skin." A second reference occurs in the fifteenth-century work of R. Jacob Landau, *Sefer ha-Agur*, *Hilkhot Hoẓa'ot Shabbat*, no. 441, who, in an apparent reference to *Shibbolei ha-Leket*, reports, "some forbid going out [of the house] on *Shabbat* with gloves, known as '*gavanti*' because of the cold lest they fall from his hand etc. but, if they are tied [to his garment] with a permanent knot so that there is nothing to fear, it is permissible." A similar qualification appears in *Shibbolei ha-Leket*. *Shulḥan Arukh*, *Oraḥ Ḥayyim* 301:37, commences that subsection with a ruling to the effect that wearing gloves on *Shabbat* is permissible but continues, in an obvious reference to those authorities, by stating that "There is an authority who is stringent in requiring that he sew them to the sleeves of his garment or tie them with a permanent knot; and it is proper to be concerned regarding his words." Gloves are certainly designed to protect against cold and there is no doubt that they constitute a garment. *Sefer ha-Agur* admonishes that they not be worn on *Shabbat* because of a fear that a person may remove them in a public domain and then proceed to

[33] The applicability of a number of those edicts in our day is a matter of considerable discussion among rabbinic scholars. See, *inter alia*, R. Yechiel Michel Epstein, *Arukh ha-Shulḥan*, *Oraḥ Ḥayyim* 303:21–23.

[34] See ibid. 301:49 and 303:1.

[35] Nevertheless, R. Shlomoh Zalman Auerbach commented that instances of inadvertent transgression occurring as a result of wearing gloves is far more rampant than any situation described by the Gemara. See R. Joshua Neurwirth, *Shemirat Shabbat ke-Hilkhatah*, 2nd ed. (Jerusalem, 5739), chap. 18, note 28.

carry them in his hand. *Mishnah Berurah* 301:141 observes that the common practice is to wear gloves but that, nevertheless, a *ba'al nefesh*, i.e., a pious person, should not do so. *Arukh ha-Shulḥan*, *Oraḥ Ḥayyim* 301:105, rules that gloves may be worn by everyone when it is exceedingly cold because extreme cold renders it highly unlikely that any person would remove his gloves.

It may be readily be concluded that gloves may be worn on *Shabbat* even by a *ba'al nefesh* in order to protect against contagion. Indeed, it is not clear that latex gloves should not be worn on *Shabbat* even under ordinary circumstances. Commentaries on the *Shulḥan Arukh* struggle to explain why a person who dons gloves in the first place would take them off in the course of walking through a public domain. They assume that the only motives for such conduct is the fact that a glove may slip off a person's hand or that a bug or insect might make its way into the glove. The wearer is likely to suffer discomfort or become annoyed and remove the glove in order to rid himself of the creature responsible for his distress. That eventuality can readily occur if the glove is even relatively loose-fitting. Tight-fitting gloves do not fall off of their own accord nor can external objects or creatures find their way into such a glove. Latex gloves are designed to be tight-fitting with the result that an insect would not be able to find its way into the glove once the hand has been inserted. As a result, it is extremely unlikely that a person would become aware of a bug in his glove while traversing a thoroughfare.

Nevertheless, it is likely that latex gloves would not be permitted on *Shabbat* for an entirely different reason. As will be explained later, garments that are likely to cause embarrassment may not be worn on *Shabbat* because a person will be likely to remove such garments in order to avoid shame and self-consciousness. In normal circumstances latex gloves probably fit into that category.[36] That is certainly not the case during times in which contagion is a serious concern.

Social mores are subject to change. If *Shibbolei ha-Leket* or *Sefer ha-Agur* were writing today, it is likely that their concern would not be with regard to an itinerant bug but with a recognition that, when meeting a friend or acquaintance, it is quite common to extend one's hand in greeting. Etiquette requires that, if a glove is worn, it be removed before proffering or accepting a handshake. A person doing so is quite likely to mindlessly continue walking, glove in hand. Nevertheless, it would seem that *Arukh ha-Shulḥan*'s caveat regarding extreme cold remains applicable. In Siberia, people do not shake hands in the street. In our situation,

[36] Cf., *Pitḥei Teshuvot* 301:48.

removing tight-fitting latex gloves is cumbersome. It seems doubtful that a person would go to the trouble of doing so simply to be polite. More to the point, if a person will not remove a glove because of extreme cold, he certainly will not remove a glove in order to shake hands and thereby expose himself to contracting a serious malady. The sole purpose for which gloves are now being worn is to prevent contagion that arises from tactile contact. Removing gloves to shake hands is antithetical to the very purpose for which those gloves are worn. Certainly, under present circumstances, no one is self-conscious about wearing latex gloves in public.

II. Masks

Wearing masks on *Shabbat* presents somewhat more of a quandary. To be permitted on *Shabbat*, a garment must first and foremost be worn *derekh levishah*, i.e., the garment itself must be apparel that is appropriate to the particular time and place. Thus, *Pri Megadim*, *Eshel Avraham*, *Oraḥ Ḥayyim* 13:2, suggests that a male who wears a female garment in a public domain on *Shabbat* or vice versa, in addition to violating the prohibition against wearing transgender apparel, is in violation of *Shabbat* restrictions regarding carrying the garment because it is not worn *derekh levishah*.[37] The nature of *derekh levishah* is dependent upon how garments are worn in a particular locale at a particular time.[38]

In a later dated 4 Iyar 5780, R. Moshe Mordecai Karp, a noted authority residing in Kiryat Sefer, makes an interesting point with regard to wearing masks during an epidemic. Assuming that, since it is not a usual form of apparel, a mask is not to be considered a garment but a "burden," nevertheless, wearing a mask in a public domain on *Shabbat* is not a biblical offense because placing a "burden" on one's face in order to transfer it from one place to another is not *derekh hoẓa'ah*, i.e., it is not a usual mode of carrying. However, it is rabbinically forbidden to carry even in an unusual manner. Nevertheless, *Shulḥan Arukh*, *Oraḥ Ḥayyim* 308:18, discusses the situation of a person who comes upon an obstacle in a public domain that might not be noticed and hence cause harm to a passerby who might inadvertently trip over it. *Shulḥan Arukh* rules that the obstacle

[37] See also *Minḥat Ḥinnukh*, no. 313, sec. 8; *Teshuvot Yad Sofer*, no. 63; *Shemirat Shabbat ke-Hilkhatah*, I, chap. 18, note 2; as well as sources cited by *Pitḥei Teshuvot* 301:29, note 199. See also *Pitḥei Teshuvot* 301:53 regarding a *tallit* worn by a woman on *Shabbat* as well as *Magen Avraham* 301:54; *Mishnah Berurah* 301:158; *Arukh ha-Shulḥan* 101:116; and *Pitḥei Teshuvot* 301:53 regarding *tefillin* worn by a woman on *Shabbat*.

[38] See, *inter alia*, *Magen Avraham* 301:15; *Pri Megadim*, *Eshel Avraham*, *Oraḥ Ḥayyim* 301:47; as well as *Mishnah Berurah* 301:33 and 301:72-–73.

may be carried less than a distance of four cubits, even repeatedly, until the obstacle is in a place where it is no longer a potential cause of harm. *Shulḥan Arukh* explains that the object might cause harm to the "*rabbim*," i.e., the public, and the Sages suspended rabbinic prohibitions in situations in which action is necessary to prevent harm to the public. Transporting an object a distance of less than four cubits in a public domain constitutes a rabbinic infraction. Similarly, carrying an object in an unusual manner constitutes a rabbinic infraction. Accordingly, argues Rabbi Karp, since wrapping a mask around one's face is not a usual form of carrying or transporting the mask,[39] the rabbinic prohibition against doing so is also suspended in order to prevent contagion which is without doubt a form of public harm.

Rabbi Karp's argument is based on the assumption that masks are necessary solely in order to prevent harm to others in the form of spreading the pathogen by sneezing or in the course of talking as distinct from a benefit to the wearer. The coronavirus is highly contagious because it is airborne and may be propelled over a relatively large area by tiny aerosol droplets expressed in sneezing and even in the course of conversation.

R. Chaim Rotter, *Kuntres Hevi'ani ha-Melekh Ḥadarov* (Arad, 5780), no. 9, makes the same assumption regarding the function of a mask but reaches a different conclusion. In usual circumstances, a mask certainly may not be worn on *Shabbat* for a number of reasons. In usual circumstances, a mask neither serves to protect the body nor is it an adornment. It is cumbersome, uncomfortable and impedes normal breathing with the result that a person is quite likely to remove the mask, place it in his pocket or carry it in his hand. The mask is also in the nature of a garment that causes embarrassment. A person may not wear such a garment in a public domain on *Shabbat* lest he remove the garment in order to avoid ridicule. Thus, for example, a person may not wear a single shoe unless the other foot is in a cast or a bandage. Under normal conditions, a person wearing one shoe will be self-conscious or embarrassed. Accordingly, he is likely to remove the single shoe in order to avoid ridicule. It would seem that a Purim mask would certainly not be permitted both because it is not a normal item of clothing and hence not worn *derekh levishah* and also because, although it may be an acceptable accouterment to a jest or party, once the entertainment has run its course, continued wearing of such an item becomes inappropriate and, consequently, is likely to be removed.

In times of epidemic, wearing a mask is not at all a source of embarrassment. Indeed, a mask was long recognized as an effective safeguard

[39] See *Mishnah Berurah* 301:17.

against disease, and people were urged to wear masks when there was a fear of contagion.[40] The remaining issues are a) whether a mask worn on the face to prevent spread of disease is *derekh levishah* and b) whether there is a likelihood that the mask will be removed for any other reason.

Rabbi Rotter argues that the function of a mask is comparable to that of a shield designed to protect against arrows or to that of an umbrella designed to protect against rain. Such items, even were they attached to the body in some manner, would not thereby be transformed into garments. Moreover, he contends, since a mask is not a garment and since it is designed to be "carried" upon the face by means of attached loops, wearing a mask on *Shabbat* in a public domain is *derekh hoẓa'ah* and hence constitutes a biblical offense. In addition, argues Rabbi Rotter, even if a mask were to be considered a garment, it is both uncomfortable and readily removeable and hence encompassed within the rabbinically prohibited category of *dilma shalfa u-maḥavya*.[41] Rabbi Rotter does recognize that the mask also serves to protect persons other than the wearer but argues that garments, by definition, are designed to protect the wearer rather than others. It is for that reason that *Mishnah Berurah* 305:55 defines a muzzle attached to an animal as a "burden."

Rabbi Rotter correctly observes that the halakhic categorization is not changed by virtue of a government decree mandating the wearing of a mask even though, arguably, the government's decree will inhibit a person from removing his mask. There was a time when Jews living in some jurisdictions were forced to identify themselves as Jews by attaching yellow patches to their outer garments. Rema, *Oraḥ Ḥayyim* 301:23, permits wearing yellow patches as ordered by the government because, due to "fear of the government," those patches would not be removed. However, as explained by *Mishnah Berurah* 301:83, patches actually sewn onto the garment are permitted regardless of the reason for doing so because the patch becomes an integral part of the garment. The yellow patches in question were permitted even when not sewn to the garment but attached by a pin or the like. The unsewn patch does not become part of the garment but does become an "adornment" or "decoration" of the garment. As an adornment it would have been forbidden on *Shabbat* because of the ease with which it might have been removed. Fear of the government served as a countervailing consideration that mitigated concern for removal and

[40] See *Bi'ur Halakhah* 554:6.

[41] Rabbi Rotter also points out that a violation occurs even if the mask is not removed but only pulled down and worn around the neck or on the chin.

subsequent carrying of the patch. Fear of government does not transform a "burden" into an article of clothing; it can only obviate concern for removal. Since a mask is neither a garment nor an "adornment" of a garment, argues Rabbi Rotter, it cannot acquire the status of a garment because of a governmental fiat.

Both Rabbi Rotter and Rabbi Karp ignore the fact that masks serve a dual function: a) to prevent the user from infecting others and b) to protect the wearer from being infected by others who may carry the virus. It has now been established that people wearing face coverings inhale fewer coronavirus particles. Reduced intake of the virus leads to fewer infections, milder symptoms, and a higher proportion of asymptomatic cases.[42] Acknowledging the benefit of masks to the wearer leads to an entirely different analysis of the permissibility of wearing masks on *Shabbat*.

There is a controversy with regard to whether it is permissible to attach something to the body on *Shabbat* that is designed solely to ward off pain or discomfort. *Shulḥan Arukh*, *Oraḥ Ḥayyim* 301:22, rules that one may enter a public domain with a compress or dressing placed upon a wound for a therapeutic purpose. It is also permissible to place or tie a piece of cloth or the like, e.g., adhesive tape or a band-aid, around the dressing to hold it in place provided that the attachment is of a nature such that it will be disposed of when the dressing is removed. In such circumstances the attachment is regarded as an adjunct of the dressing.[43] However, *Shulḥan Arukh* also rules that a non-disposable "string" or band (*ḥut*), or a sheath (*meshikhah*), may not be employed for that purpose because those items are significant (*ḥashivi*) and hence are not considered adjuncts to the dressing. The difference between a compress and a sheath is that a non-therapeutic item is not *tafel* to, or an appurtenance of, the body and hence constitutes a "burden." *Mishnah Berurah* 301:77 quotes *Bi'ur ha-Gra* 301:22 who understands Rambam, *Hilkhot Shabbat* 19:13, as permitting a person to enter a public domain on *Shabbat* even while wearing a non-therapeutic appendage designed solely to protect the wound from abrasion and the like provided that the protective item is placed directly over the wound. *Mishnah Berurah* 301:108 cites *Eliyahu Rabbah* and other latter-day authorities who rule that even nonmedicinal items that are designed solely to prevent pain or discomfort are permitted on *Shabbat*. An item designed to enhance the body in a positive way is an adornment.

[42] Monica Gandhi, Chris Beyrer and Eric Goosby, "Masks Do More than Protect Others during COVID-19: Reducing the Inoculum of SARS-CoV-2," *Journal of General Internal Medicine*, vol. 35, no. 8 (August, 2020).

[43] See *Mishnah Berurah* 301:77.

The controversy is whether an item designed solely to ward off pain or discomfort is similarly deemed to be an adornment.

R. Asher Weiss, *Minḥat Asher: Be-Tekufat ha-Korona, Mahadura Kamma* (Nisan 5780), no. 9, correctly points out that this controversy is limited to non-therapeutic bandages and the like that are clearly not "garments" but nevertheless may become "ornaments" under certain circumstances. However, all authorities agree that any item worn *derekh levishah*, i.e., in the mode of a garment, is permissible even if it serves only to preserve the body from discomfort. That, after all, is the nature and purpose of a garment. Masks, at least during times of epidemic, are worn as ordinary items of apparel designed to protect the body from disease.

Any fear that a person might remove a mask while walking in the street seems misplaced. A person wearing a mask recognizes the danger and would not defeat the purpose of the mask by removing it. Even if the person wearing the mask experiences discomfort or has difficulty in breathing the reaction would be to draw the mask down somewhat thereby exposing the nostrils but leaving the mouth covered. A mask covering the mouth alone is also *derekh levishah.*

R. Azriel Auerbach is quoted in the *Yated Ne'eman*, 11 Tammuz 5780, p. 24, as being somewhat equivocal with regard to this matter. Rabbi Auerbach's original position was, "Since one is wearing it for protection and is *makpid* (insistent) that it remain in place we don't have to be concerned that he will do this on *Shabbat.*" However, he continues, "I have noticed that many people take them off and carry them in their hands and, therefore, I think that it is preferable that as a general rule one should not use them in a *reshut ha-rabbim* (a public domain)."

A window in my study faces a major thoroughfare. During the past days and weeks I have made a conscious effort to observe whether or not passersby are wearing masks. A significant majority of the people whom I have observed have been wearing masks; a minority have not. On many occasions I have observed individuals lowering masks and placing them over their mouths. Not once among the hundreds of persons that I have observed, have I seen a single individual remove his mask completely or even lower it to his throat or chin.[44]

There are definitely locales in which ordinary gloves are never removed and other places in which they are frequently removed. Consequently, the proper response to a question regarding whether gloves may

[44] It has been reported that in some less populous areas people do remove and replace masks depending upon their proximity to other individuals. If so, the ensuing comments regarding gloves are applicable to masks as well.

be worn depends upon where the question is being asked. It is more than likely that the same is true with regard to gloves worn to prevent contagion. Based upon his observations in *Erez Yisra'el*, Rabbi Auerbach is ambivalent; based upon what I have observed over a span of time, the situation in Manhattan is much more clear-cut. It is not surprising that the correct answer with regard to wearing masks on *Shabbat* will vary with the time and place that the question is posed.

There is one source that requires elucidation. R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, IV, no. 20, reports that in the early days of World War II there was fear that the Germans might use poison gas bombs in bombarding civilian areas. The British government distributed gas masks to the population. Rabbi Yechezkel Abramsky, then head of the London Beth Din, forbade wearing those masks on *Shabbat*, allegedly because of the biblical prohibition against "carrying," and advised concerned individuals to remain at home over the course of *Shabbat* rather than wear the mask in a public domain. An opponent of Rabbi Abramsky is quoted as having permitted wearing gas masks offering the rationale that "since everyone wears them, it is as if it were a garment."

A ruling against wearing gas masks on the basis of the rabbinic edict prohibiting wearing items that are likely to be removed and carried would seem to be incontrovertible. Masks are uncomfortable and gas masks in particular cause the wearer to appear comical. Moreover, since air raid sirens generally gave warning of impending aerial bombardment in sufficient time for the masks to be properly reaffixed there was scant reason not to remove them temporarily.

But Rabbi Abramsky is reported to have ruled that an actual biblical prohibition against carrying on *Shabbat* was involved rather than a lesser rabbinic infraction based upon fear of removing the mask. There is a significant distinction between gas masks and masks worn to protect against disease. Both are attached to the body but not everything that is attached to the body is *derekh levishah*. A sheet or band-aid is not a conventional item of apparel. A sheet or band-aid that is not designed to keep a compress in place prevents further harm and possible discomfort but is itself of no intrinsic benefit to the body; a non-medicinal covering serves only to ward off pain and discomfort. During the days of Rema, a yellow patch pinned to a garment was designed to achieve the same result, *viz.*, to avoid the "pain" of incarceration or worse, but was permitted as an appurtenance of the garment. Garments are designed to prevent harm. In normal circumstances, neither gas masks nor ordinary masks are worn as garments. They protect against nothing and do naught to enhance a person's human dignity. Although masks are not items of apparel, they are worn directly

upon the body "in the manner of clothing" rather than "in the manner of carrying" and thereby reduce the infraction to a rabbinic transgression,[45] but they are not clothing. A mask is a garment only during periods of contagion when it serves to protect against disease or during an air raid when it serves to protect against poison gas and is commonly employed as a "garment" to provide such protection. Rabbi Abramsky addressed a situation in which no gas was present; there was only a fear of an impending gas attack. During that period the mask had the potential to become a garment but was not yet a garment. The fact that everyone wore masks was irrelevant just as is the argument that "everyone wore them" would have been irrelevant to the halakhic status of a Purim mask as a garment.[46] Since the gas mask is not a garment, the fact that everyone went about with a gas mask affixed to his face, if true, could only have rendered wearing a gas mask *derekh hoẓa'ah* and thereby elevated the severity of the violation to the level of a biblical infraction.[47]

Traversing a public domain on *Shabbat* with a mask around one's neck is certainly forbidden. Although such is not the usual mode of transporting a mask, it is nevertheless a form of carrying *she-lo ke-derekh hoẓa'ah* and hence is rabbinically forbidden. Nevertheless, even in a locale in which people do on occasion lower the mask when it becomes uncomfortable, but do not remove it, it may be argued that there is no restriction against wearing the mask on *Shabbat*, provided that the mask is worn in the appropriate manner, *viz.*, covering the nose and the mouth. The rabbinic edict at issue is "*shema ya'avireno daled amot be-reshut ha-rabbim* – lest he remove the item and transport it four cubits in a public domain." The edict is designed to prevent inadvertent transgression of a biblical prohibition. In circumstances in which there is no fear of transgression of a biblical prohibition, because even if one is forgetful the untoward result would be a violation of a rabbinic edict rather than a biblical prohibition, there is no indication that the decree was promulgated. Indeed, the general principle is that the Sages created "fences" to prevent transgression of biblical prohibitions but did not issue decrees in the form of a *gezeirah le-gezeirah*, i.e., an ordinance designed to safeguard against violation of a rabbinic ordinance. Consequently, in a locale in which people seek relief from the discomfort of a mask by lowering it, but not by removing it, the

[45] See *Mishnah Berurah* 301:70.

[46] *Shulḥan Arukh*, *Oraḥ Ḥayyim* 301:20, rules that it is forbidden to enter a public domain while wearing a "*farmi*," i.e., a replica of a human countenance that is placed over the face to scare children.

[47] See *Arukh ha-Shulḥan*, *Oraḥ Ḥayyim* 301:50.

rabbinic prohibition predicated upon the fear that the wearer might remove the mask and transport it over a distance of four cubits in a public thoroughfare would not apply. Accordingly, in places in which masks are appropriately worn during periods of contagion, there is no halakhic impediment to their use on *Shabbat*.

III. Moses' Mask

Divrei Siaḥ is one of a large number of bulletins published weekly in Israel and distributed to synagogues for perusal by *Shabbat* worshippers. *Divrei Siaḥ* is published in Bnei Brak and focuses upon the scholarship and personalities of R. Chaim Kanievsky and his late father, R. Ya'akov Kanievsky, popularly known as the *Steipler*. The recent *Mattot-Mas'ei* 5780 issue features a curious anecdote relating to a mask.

Exodus 34:33–35 relates that, following his descent from Mount Sinai, Moses wore a mask to conceal his countenance that had become resplendent as a result of his exposure to the Divine Presence. The narrator of the anecdote recorded in *Divrei Siaḥ* reports that R. Ya'akov Kanievsky was approached at a wedding reception by R. Dov Landau of Bnei Brak and asked whether Moses wore the mask referred to in Scripture on *Shabbat* as well as on weekdays. The question appears in Rabbi Landau's talmudic novellae, *Ḥiddushei R. Dov Landau*, *Shabbat* 11b. Rabbi Kanievsky is reported to have replied that there is a passage in the *Zohar* that seems to indicate that Moses did indeed wear the mask on *Shabbat*. However, due to the high decibel level of the festivities, it was not possible for a bystander to grasp a reference to the location of that statement in the *Zohar* or a description of the context in which it occurs.

The question is particularly intriguing since rabbinic ordinances prohibiting fulfillment of various *miẓvot* on *Shabbat* have been attributed to Moses himself. *Pnei Yehoshu'a*, *Rosh ha-Shanah* 29b, and R. Zevi Hirsch Chajes, *Ma'amar Divrei Nevi'im Divrei Kabbalah*, chap. 9,[48] as well as many other scholars cite *Sefer Miẓvot Gadol*, *miẓvot aseh*, no. 225 as ascribing to Moses the rabbinic ordinance prohibiting the sprinkling of the water mixed with the ashes of the red heifer on the seventh day of defilement when that day occurs on *Shabbat*.[49] *Sefer Miẓvot Gadol* explains that R. Akiva cited in the Mishnah, *Pesaḥim* 65b, maintained that the incident described in Numbers 9:6–8 involving individuals who appeared before Moses and Aaron bemoaning their inability to offer the paschal sacrifice

[48] Published in *Kol Kitvi Maharaẓ Ḥiyut* (Jerusalem, 5718), I, 173–174.
[49] See Rambam, *Hilkhot Korban Pesaḥ* 6:1.

because of ritual impurity were persons who required sprinkling of the water of the red heifer on the seventh day of uncleanliness. That sprinkling would have taken place on the fourteenth of Nisan, which that year occurred on *Shabbat*, but was prevented from taking place by virtue of the edict forbidding sprinkling of the water on *Shabbat* "lest it be transported four cubits in a public domain."[50] Many authorities maintain that the parallel edicts abolishing blowing the *shofar* on Rosh Hashanah when it occurs on *Shabbat* and fulfilling the *mizvah* of the four species on *Shabbat* were similarly promulgated by Moses.[51]

Subsequently, one scholar identified *Zohar*, *Parashat Shelaḥ*, p. 163a as the likely source. The *Zohar* relates that on each *Shabbat*, *Rosh Ḥodesh* and festival souls of the *roshei yeshivah* of the generation of the wilderness assemble on Aaron's mountain. On those occasions, Aaron leads them to the "*yeshivah*" of Moses where they find Moses ensconced behind a "mask" that conceals his body. The mask is encircled by seven Clouds of Glory. The *roshei yeshivah* are permitted to stand between the mask and the Clouds of Glory. Aaron himself approaches closer and seems to be described as being enveloped within the mask. Aaron receives instruction from Moses and transmits it to the *roshei yeshivah*. The *roshei yeshivah*, in turn, impart that wisdom to other scholars who have been waiting beyond the Clouds of Glory.

The indicated passage of the *Zohar* is of no relevance to the permissibility of wearing a mask in a public domain on *Shabbat*. Moses is described as being in, and remaining in, his "*yeshivah*," a private domain in which there cannot be an issue with regard to *hoẓa'ah*. For that matter, the "mask," as described, is not necessarily worn by Moses, and certainly not as a covering for his face, but is transformed into an interposition between Moses and the external world.

Rabbi Meir Shetzigal, *Shomer Emet*, *Parashat Ki Tisa*, adduces another source indicating that, at least on one occasion, Moses wore a mask on Yom Kippur. Rashi, Exodus 18:13, states that Moses' establishment of a

[50] The Gemara, *Shabbat* 30a, declares, "Moses, our teacher, promulgated many edicts and ordained may ordinances and they remain forever and ever." R. Zevi Hirsch Chajes, *Ma'amar Divrei Nevi'im Divrei Kabbalah*, chap. 9, presents a list of those edicts and ordinances. Cf., however, *Maharsha*, *Shabbat* 30a.

[51] Thus, Rabbi Landau's question may have been, not whether Moses felt bound by a later rabbinic decree, but whether the edict against wearing ornaments that might be removed and carried in a public domain was included among similar ordinances decreed by Moses. However, since Moses had particular reason to be vigilant in shielding his countenance with the mask, it is certainly arguable that the fear underlying the rabbinic prohibition against wearing various "adornments" while traversing a public place did not apply to the mask worn by Moses. If so, any issue must be with regard to the state of Moses' mask as a garment.

judiciary took place on the day after his encounter with his father-in-law. *Siftei Ḥakhamim*, Exodus 35:1, indicates that the meeting between Moses and Jethro took place on Yom Kippur and it was on that day that Moses "went out" to greet his father-in-law as described in Exodus 18:7. It was on Yom Kippur that Moses descended from Mount Sinai and placed a mask upon his face. If so, Moses "went out" to greet Jethro on Yom Kippur attired in a mask. The encampment of the Israelites in the wilderness was a public domain. Presumably, the encounter with Jethro regarding which Scripture tells us that Moses "went out" required traversing a public domain.[52]

The mask worn by Moses was attached to his face and removed both when God communicated with him in the Tent of Meeting and when he addressed the assembled community. Rashi, Exodus 34:33, indicates that Moses removed the mask only after he finished addressing the populace and the assembled then turned their attention to other matters. The mask, according to Rashi, did not serve to prevent overwhelming the populace with a suffusion of Divine radiance, as might perhaps be inferred from Exodus 33:30, but to prevent them from basking in that radiance while engaging in mundane affairs.

Rabbi Shetzigal assumes that Moses was always accompanied by an entourage. *Shulḥan Arukh*, *Oraḥ Ḥayyim* 362:5, rules that an area totally enclosed on all sides by human beings is a private domain even if those persons are not stationary. Assuming that Moses was encircled on all four sides, he would, suggests Rabbi Shetzigal, always have been in a private domain.

However, it may be objected that Rema, *Oraḥ Ḥayyim* 301:7, rules that one may avail oneself of such an expediency in order to carry only "*be-sha'at ha-ẓorekh u-be-sha'at ha-deḥak*—in time of need or in time of exigency." Moreover, even assuming that Moses' perambulations were

[52] If, however, the question is whether Moses wore a mask on *Shabbat* after receiving a Divine communication, the issue is somewhat different. Divine communication with Moses took place in the Tent of Meeting. Moses' abode was in the encampment of the Levites, removed from the Tent of Meeting by a distance of two thousand cubits. That area was neither a private domain nor a public domain. Presumably, its status was that of a *karmalit*, i.e., an area in which carrying is forbidden by virtue of rabbinic decree. As stated, the mask did not serve to "protect" Moses in any way. On the contrary, according to Rashi, it was designed to prevent others from inappropriately deriving benefit from Divine radiance. Thus, the mask was not a garment designed to benefit the wearer. Nevertheless, a "burden" is not customarily "carried" on the face. Accordingly, wearing a mask is an unusual mode of "carrying" and, as such, is rabbinically proscribed. If so, if the issue is the propriety of Moses wearing the mask during his return from the Tent of Meeting to the encampment of the Levites, the infraction involved in "carrying" would have been rabbinical in nature and would also have taken place in an area in which "carrying" was only rabbinically proscribed. Nevertheless, even a noncustomary form of "carrying" is generally forbidden in a *karmalit*.

always in the company of such an escort, there remains a further problem. *Shulḥan Arukh*, *Oraḥ Ḥayyim* 362:5, rules that human walls are valid for the purpose of carrying on *Shabbat* only if none of the individuals forming the wall is aware that he is being used for that purpose. *Shulḥan Arukh* further rules that a person who has been placed in such a "wall" on one occasion should not be employed for that purpose a second time because the individual is likely to become aware of the fact that he is being conscripted to function as an integral part of the wall. Granted that no one had to be solicited to accompany Moses, we must assume that it is unlikely by far that the individuals accompanying Moses were ignorant of the halakhic problem caused by the mask and of their contribution to its resolution. *Mishnah Berurah* 362:39 rules that a human wall fashioned by persons who are aware of their role in forming the wall cannot be regarded as part of the wall even post-factum.

Ibn Ezra explains the purpose of the mask in an entirely different way. In a manner diametrically opposed to that of Rashi who states that the mask was designed to prevent ongoing enjoyment of the radiance that emanated from Moses, Ibn Ezra asserts that the Divine radiance dissipated when God ceased to communicate with Moses. Departure of the Divine Presence was an embarrassment to Moses. According to Ibn Ezra, the purpose of a mask was to conceal Moses' loss of Divine radiance from the populace. If so, the mask served to preserve Moses' privacy and dignity. As such, it served as a garment in the usual sense of the term and its use on *Shabbat* would have been unexceptional. But, then, people would surely have questioned the propriety of wearing the mask on *Shabbat*. Their perplexity could have been remedied only by revealing the truth, namely, that the radiance had dissipated leaving Moses in a state of embarrassment. If the truth were indeed revealed, the continued use of the mask would seem to have been purposeless.

Kli Yakar presents yet a third reason for use of a mask by Moses. God entered into a face-to-face encounter with Moses. The radiance manifested by Moses was a "natural" accompaniment of that encounter. Nor, according to *Kli Yakar*, did the radiance have to be concealed from the populace for their benefit. *Kli Yakar* also assumes that there was nothing unseemly in the pleasure the assembled populace experienced in gazing upon that radiance. It was Moses who felt a need for the mask. *Kli Yakar* explains that Moses was a humble man and embarrassed to be the focus of attention because of the radiance that emanated from his countenance. The mask did indeed serve to safeguard Moses' modesty and privacy. Thus, the function and purpose of Moses' mask, according to *Kli Yakar*, was fully comparable to that of any other garment designed to safeguard privacy.