

Halachic Issues Raised by Reconstructive Breast Surgery

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I. Medical Background

One of eight women over the course of their lifetime will be diagnosed with breast cancer. It is estimated that there were 192,370 new cases of invasive breast cancer among women in the US during 2009.¹ The treatment for most of these cases involves some form of surgery. The simplest form of surgery is a lumpectomy where the tumor and a small amount of surrounding tissue are removed. Sometimes a few lymph nodes are removed as well. When more of the breast tissue is removed, the procedure is known as a mastectomy.²

The following is a list of the various types of mastectomies:³

Partial mastectomy – In a partial mastectomy, breast tissue, some skin, the lining of the chest muscles below the tumor and, often, some lymph nodes are removed with the tumor. The position of the tumor will determine whether the areola and nipple are also removed.

Simple or total mastectomy – In this procedure, the entire breast is removed including the areola and nipple, but the lymph nodes and surrounding muscle are left intact.

Modified radical mastectomy – The entire breast, the areola and nipple, the lymph nodes under the arm, and the lining over the chest muscles are removed. The muscles remain intact. This is the most common surgical procedure performed for breast cancer.

Radical mastectomy – The breast, nipple and areola, lymph nodes, muscles under the breast, and some of the surrounding fatty tissue are removed. This procedure, rarely performed, is used in cases of extensive tumors and in cases where cancer cells have invaded the chest wall.

Skin-sparing mastectomy – In this relatively new surgical technique the surgeon makes a much smaller incision, sometimes called a "keyhole" incision, circling the areola. Through the small opening, all the breast tissue is removed including the nipple and areola. Scarring is negligible and 90% of the skin is preserved

Subcutaneous mastectomy – The tumor and breast tissue are removed through an incision, placed at times under the breast where it is not detectable. The nipple, areola and the overlying skin are left intact.

Many women who undergo mastectomy decide to have reconstruction.⁴ Other women, for a

¹ American Cancer Society: <http://www.cancer.org>

² Approximately 1/3 of women initially diagnosed with breast cancer undergo a mastectomy. This number may be on the rise, as some women will undergo mastectomy for preventative reasons. Preventative reasons may include those women who test positive for a damaged/mutation BRCA 1, or 2 gene or women with recurrent breast cancer in the same previously treated breast. For a *halachic* discussion of prophylactic mastectomy see, for example, Rabbi Dr. Halperin's response in IRP of the Schlesinger Institute: <http://www.medethics.org.il/DBe/showQ.asp?ID=4178>

³ For additional information regarding surgical procedures to treat breast cancer see: Surgery Choices for Women with Early-Stage Breast Cancer at: <http://www.cancer.gov/cancertopics/breast-cancer-surgery-choices>; Breast Cancer Surgery Options at: http://www.webmd.com/breast-cancer/breast-cancer-surgery-partial_segmental; Surgery for Breast Cancer at American Cancer Society at: <http://www.cancer.org/docroot/CRI>

⁴ It should be noted that 35 of the US states mandate that if a mastectomy is covered by an insurance policy then breast reconstruction must be covered, as well. This factor may also be encouraging some women to follow the treatment route of mastectomy followed by breast reconstruction. See for example:

variety of reasons, choose to forgo reconstruction and instead use a prosthesis placed within their bras. This provides a natural appearance while wearing clothing.

Breast reconstruction may be carried out simultaneously with the cancer surgery or at a later date. Decisions regarding the timing of reconstruction take into account if the woman is to undergo radiation and chemotherapy.

Reconstruction of the breast requires two steps. The first is to create a breast shaped mound and the second is to give this mound the external appearance of a breast by adding a nipple and areola. Generally, these are done as two separate procedures. There are two overall approaches to creating the breast shaped mound. One approach is to insert a mound shaped substance under the skin. The other is to move tissue from another part of the body to create the breast.

The substances that are placed under the skin are called implants. Currently, they are most commonly filled with sterile saline (salt water). In the past *Silicone gel-filled implants* were often used but they have fallen out of favor because of concerns that silicone leakage might cause immune system diseases. However, most of the recent studies indicate that implants do not increase the risk of immune system problems.⁵ Implants shaped from materials and filled with different substances are currently being tested.

Moving tissue from one part of the body to another is known as a tissue flap procedure. The tissue can be taken from the abdomen, back or buttocks. It can either be moved while still

attached by a stalk (or pedicle) to its natural location, or it can be severed from its natural setting and reattached at the new location. The latter is called a free flap procedure. In a free flap technique, microsurgery is used to reattach blood vessels so the tissue has a viable blood supply at its new location.

Tissue flap procedures leave women with scars both at the breast site and at the location from which the tissue was removed. Lack of tissue in the original location can lead to complications at that site. However, the resulting breast has a more natural feel as it is made from body tissue and not an external implant.

Once the newly created breast mound has healed, generally 3-4 months later, many women choose to have a nipple and areola created.⁶ Nipple and areola reconstruction ideally requires symmetry in position, size, shape, texture, color, and projection. Tissue used to rebuild the nipple and areola is taken from the woman's body, such as from the newly created breast, the opposite nipple, the ear, the eyelid, the groin, the upper inner thigh, or the buttocks.⁷ Tattooing is employed to match the color of the nipple of the other breast and to create the areola.

II. Halachic Status of Elective Surgery

Since many women who find themselves facing this surgery are Jewish, it is important to examine the *halachic* issues involved in these reconstructive procedures. Whereas the surgery to remove the cancer is regarded as *pikuach nefesh* and even Torah law is suspended in the face of

Peter Cordeiro, MD, "Breast Reconstruction after Surgery for Breast Cancer", *New England Journal of Medicine* 359:15 (Oct. 9, 2008) pp. 1590-1601: http://www.cancer.org/docroot/cr1/content/cr1_2_6x_breast_reconstruction_after_mastectomy_5.asp; Breast Reconstruction at: <http://www.ohsu.edu/health/health-topics/topic.cfm>; State Mandated Benefits: Reconstructive Surgery after Mastectomy, 2008 at: http://www.Statehealthfacts.org/compar_emaptable.jsp; Reconstructive Surgery Procedures and Reconstructive Breast Surgery Statistics (2007) at: <http://www.Plasticsurgery.org/d.xml/>

⁵ E. Janowsky, L.Kupper, B.Hulka, "Meta-analysis of the relationship between silicone breast implants and the risk of connective-tissue diseases", *New England Journal of Medicine* 342:11 (March 16, 2000) pp. 781-90.

⁶ <http://www.mayoclinic.com/health/breast-reconstruction/MY00207>
http://www.emedicinehealth.com/breast_reconstruction/article_em.htm;
http://www.cancer.org/docroot/CRI/content/CRI_2_6X_Breast_Reconstruction_After_Mastectomy_5.asp

⁷ It is not medically suggested to use the existing nipple (nipple banking) because cancer cells may be embedded in the tissue. From an aesthetic perspective nipple banking is less desirable because the tissue is damaged by the cryo-preservation process.

saving a life,⁸ non life-saving surgical procedures may be constrained by certain *halachic* factors.

There are two fundamental *halachic* questions involved when determining the permissibility of undergoing a procedure for a non-life threatening condition:

1. Is a person knowingly permitted to cause a wound to his/her body (*chabalah*) – an inevitable process during surgery?

2. Is a person permitted to expose him/herself to the risk and danger that accompany anesthesia, surgery itself and recovery (*sakkana*)?

In addition to these two primary issues, which are relevant to all surgeries, specific questions arise when attempting to determine the permissibility of cosmetic surgery where the goal is to improve one's external appearance rather than physical healing. This raises the question of whether such surgery falls within the parameters of the physician's permission to heal the sick. One of the justifications for performing cosmetic surgery is for its psychological benefit. A person's troubled psychological state of mind may factor into the definition of a sick person (*choleh*). This psychological state of mind would then be included in a physician's mandate to heal.

The prohibition to wound and cause injury (*chabalah*)

Causing bodily injury (*chabalah*) without a specific constructive goal is considered a Biblical prohibition. The verse in Deuteronomy 25:3 addresses the laws of lashes (*malkot*) including the number of lashes to be administered. The verse states that not even one additional lash may be meted out. The *halachic* interpretation of this

⁸ Rambam, *Hilchot Shabbat* 2: 1-3; *Shulchan Aruch, Orach Chayyim* (O"Ch) 328:2 is even stronger than Rambam in his formulation regarding desecrating the Shabbat for the ill.

מי שיש לו חולי של סכנה, (ד) מצוה לחלל עליו את השבת; (ה) והזרין, הרי זה משבוח; (ו) א והשואל, הרי זה שופך דמים.

However, regarding transgressing idolatry, murder and illicit sexual relations Rambam states:

...מי שחלה ונטה למות ואמר הרופאים שרפואתו בדבר פלוני מאיסורין שבתורה עושין, ומתראפין בכל איסורין שבתורה במקום סכנה חוץ מעבודת כוכבים וגילוי עריות ושפיכת דמים שאפילו במקום סכנה אין מתראפין בהן...

See also *Shulchan Aruch, Yoreh De'ah* (Y"D) 157:1.

statement is that if additional lashes may not be administered even to a person deserving corporal punishment, how much more so is the prohibition to injure a person who is not liable for such punishment. The *Sifri* ad loc.⁹ and *halachic* authorities including Rif, Rosh, Rambam and the *Shulchan Aruch*¹⁰ maintain that wounding another human being without an express purpose is indeed a Biblical prohibition. In the context of surgery, although it is the surgeon who commits the act of *chabalah*, when a person consents to surgery, he is, at the very least, enabling the wounding process that is also prohibited.¹¹

Exceptions to the prohibition of *chabalah*

Despite the clear prohibition outlined above, an expressed need may override the prohibition of *chabalah*. This is evident from the following *baraita*:

"One may scrape off the dirt (*tzo'ah*) scabs and wound scabs that are on his flesh because of the pain; if in order to beautify himself it is forbidden"¹²

In addition to the overall prohibition to injure others, including oneself,¹³ there is also a specific

⁹ On the verse in Deuteronomy 25:3: "אך רבעים יבגו לא יסוף פן יסוף להכתו על" "אֶלֶּה מִקֵּה רֶבֶּה וְנִקְלָה אֲחִיד לְעִינֶיךָ לֹא יִסְוֶה אִם הִיּה מוֹסִיף עוֹבֵר עַל לֹא תַעֲשֶׂה". The *Sifri, piska* 286 (25:3) states, "לא יסוף אם היה מוסיף עובר על לא תעשה".

¹⁰ Regarding the prohibition of *chabalah* to others see: Rif *b.Bava Kamma* 32a; Rambam, *Hilchot Chovel u-Mazik* 5:1; Rosh *Bava Kamma* 8: 13; *Tur, Choshen Mishpat* (C"Me) 420; *Shulchan Aruch, C"Me* 420:1,3,41.

¹¹ See for example *Tosefta Makkot* 4:15. The *Tosefta* discusses liability regarding the prohibition of tattooing. When a person tattoos onto another person both are liable because their intent is to knowingly transgress a prohibition even when the tattooed is not actively participating in the prohibited tattooing process.

¹² *b.Shabbat* 50b: "מגרר אדם גלדי צואה וגלדי מכה שעל בשרו בשביל צער, אם "בשביל ליפות – אסור".

¹³ *Halachists* were divided regarding the permissibility/prohibition of self-wounding without an express need. Two positions regarding self-wounding emerge based on the statement in *b.Bava Kamma* 91b: "ואין אדם רשאי לחבל בעצמו? והתניא: יכול נשבע להרע בעצמו ולא הרע יהא" "פטור? ת"ל: להרע או להטיב, מה הטבה רשות, אף הרעה רשות...".

Some posit that an individual is forbidden to self-wound, see, for example, Behag *Hilchot Shevu'ot*; Rif *b.Bava Kamma* 91b; Responsa *Ri-MiGash* #186; Rambam *Hilchot Chovel u-Mazik* 5:1; Rosh *Bava Kamma* 8:12; Responsa ha-Rashba 1:416; *Shulchan Aruch, C"Me* 420:1,31,41.

See *Tur, C"Me* 420' who cites two positions: "החובל בעצמו אע"פ שאינו רשאי (פטור) אחרים שחבלו בו חייבים כתב הרמ"ה שאינה הלכה אלא האדם רשאי להחבל בעצמו".

injunction against causing bleeding to one's parent. If, however, there is no one else to care for the parent other than the offspring, Rema maintains, in the case when a parent is in pain and surgery is necessary, it is permitted for the son/daughter to perform the procedure.¹⁴ He bases his position on the above stated text that allows injury to relieve suffering. *Tosafot*, ad loc. States:

"...Because of his pain: even if there is no other pain/sorrow other than a sense of shame that prevents him from mingling with others, it is permitted (to wound himself and remove the scabs) for there is no greater pain than shame."

Shame, a psychological state of mind, is, according to *Tosafot*, a sufficient reason to permit what for other reasons would be considered a prohibited act.¹⁵

Prohibition of exposing oneself to risk

The second *halachic* factor affecting the permissibility of elective surgery is the issue of risk and danger. Addressing this concept from a philosophical perspective the *Chinnuch* states:

"...Even though a person does not bruise his finger on earth unless it was so decreed in the heavens, even so man must care and protect himself from natural dangerous occurrences. God created the

world to run on natural principles... if a large stone falls on a person's head it will shatter his brain... God created man with the sense to protect his/her body from danger..."¹⁶

Based on Deuteronomy 22:8 and quoting two additional verses in Deuteronomy, the *Shulchan Aruch* rules:

"...It is a positive commandment to install a railing on the roof top... (Deuteronomy 22:8) including anything that is dangerous and can cause a person to stumble and die..."¹⁷

Perhaps the most significant reason for being stringent regarding one's personal safety is that only then is one able to properly worship God, as Rambam states:

"The body being healthy is of the ways of the Lord, for it is impossible to understand or know the knowledge of the Creator while unwell. Therefore, one should keep away from things which destroy the body, and accustom oneself to healthy and curing matters..."¹⁸

There are, however, caveats regarding the prohibition of risk taking and of endangering oneself.

The fundamental question regarding risk is how to establish what would be a level of risk that would prohibit the surgery. Rabbi Feinstein maintains that the risk factor depends on what is considered the accepted norm. He traces the practice of blood letting from the Talmudic sources through the *rishonim* literature and present day practice and establishes that risk is viewed differently in differing locales and throughout the generations. Risk is established both by the

A minority position also exists maintaining that even if there is an express need a person may not subject him/her self to *Chabalah*. See *Tosafot Bava Kamma* 91b s.v. *ela chai tannahu de-tanya*; *Piskei ha-Tosafot* 215 wherein he states that it is prohibited to subject oneself to *chabalah* for monetary purposes.

Menachem Elon in his *ha-Mishpat ha-Ivri*, Jerusalem 1978, vol. 2, p. 1065, presents three possibilities regarding authorship of *Piskei ha-Tosafot* including *Tur*, *Rosh* and an anonymous *halachist*. An anonymous work, although noteworthy, is necessarily of more tenuous *halachic* significance.

¹⁴ *Shulchan Aruch*, Y"D 241:315.

¹⁵ *Tosafot, b.Shabbat* 50b: "ואם אין לו צער אחר אלא " שמתבייש לילך בין בני אדם שרי דאין לך צער גדול מזה

See Rambam, *Hilchot Chovel u-Mazik* 1: 9,10,14; 3:1-7; *Shulchan Aruch*, C"M 420: 34-37, 39. *Shulchan Aruch* even discusses the *halachic* ramifications of person (A) shaming person (B) while he slept. Person (B) died in his sleep thereby never having actually experienced the intended shame. Is person (A) liable for damages associated with the intended shame?

This question implies that even the mere intent to shame another warrents liability.

¹⁶ *Sefer ha-Chinnuch*, mitzvah 538 (*ma'akeh*).

¹⁷ Rambam, *Hilchot Rotze'ach u-Shemirat ha-Nefesh* 11:4,5; *Shulchan Aruch* C"M 427:1,6-10; *Shulchan Aruch* Y"D 116:5:

הגה: וכן יזהר מכל דברים המביאים (ו) לידי סכנה, כי סכנתא חמירא מאיסורא ויש לחוש יותר לספק סכנה מלספק איסור, ולכן אסור לילך בכל מקום סכנה... וכל אלו הדברים הם משום סכנה, ושומר נפשו ירחק מהם ואסור לסמוך אגס או לסכן נפשו בכל כיוצא בזה.

¹⁸ Rambam, *Hilchot De'ot* 4:1.

medical community and by what people do in practice. When society accepts a procedure with the risks involved, the practice becomes a permitted act and the risks are considered *halachically* acceptable.¹⁹

Cosmetic Surgery

The issues of *chabalah* and *sakkana* form the basis of discussion within the *halachic* literature regarding the status of cosmetic surgery.

Rabbi Jakobovits, one of the first to address questions of Jewish medical ethics,²⁰ maintains that the concerns of *chabalah* and *sakkana* could be overruled and plastic surgery would be permitted if:

"...The damage resulted from trauma or disease or if the injury is left untreated a sense of insanity will overtake the person. This psychological state is parallel to other medical conditions requiring attention. If the disfigurement is present on a woman and is such that it prevents finding a suitable *shidduch* or interferes with the equanimity of the couple the surgery would be warranted..."²¹

Rabbi Jakobovits, when specifically addressing cosmetic surgery for women acknowledges that a woman's appearance may affect her ability to find a life partner and, if already married, her external appearance may affect the couple's relationship.

Although it may be difficult to accept such emphasis on outer appearance, in reality we are indeed visual creatures who initially connect with others based on external presentation. Traditional sources acknowledge this conflict by validating the importance of one's external appearance, but temper this by also stating, "Said Rabbi Meir: Look not at the vessel, but at what it contains". (*Avot* 4:20).

The issues raised by Rabbi Jakobovits remain the basis for subsequent responsa literature regarding plastic/cosmetic surgery. A number of responsa will be presented to illustrate the problems raised and the positions adopted.²²

In the mid 1960s Rabbis Breisch, Klein and Feinstein were asked to respond regarding the permissibility of plastic/cosmetic surgery in order to enhance one's appearance. They all address a situation wherein there is a specific psychological and practical need and not a case wherein the request for surgery is for beauty reasons alone.

Rabbi Breisch maintained that if the doctor has experience and is reputable in his field it is then a *mitzvah* for the doctor to heal even though it is a non life-threatening situation. The prohibition of exposing oneself to danger (*Rema, Y"D* 116:5) is abrogated when the physician is considered a responsible practitioner. Abrogated as well is the issue of *chabalah*, based on the *Tosafot's* position that psychological pain is a valid reason to overrule the prohibition of *chabalah*, as is also codified in *Rema*.²³

¹⁹ See Rambam *Hilchot De'ot* 4:18; *Kesef Mishneh, Haggahot Maimoniyot* ad loc.; Responsa *Iggrot Moshe, C"M* 1:103:

אם מותר להניח לרופאים להוציא ממנו דם להרוחת ממנו... אבל בחבלה זו להוציא דם ע"פ השגחת הרופאים יש טעם גדול שלא לאסור, דהא מצינו שבדורות הקודמים היו נוהגין להקזו דם אף רק לאקולי...ועתה נשתנה עוד יותר שאין מניחין להקזו כלל, מ"מ ודאי גם עתה איכא גם רפואה בזה דלא יהיה שינוי גדול כ"כ, וגם היום מוציין הרופאים כמעט בלא צער, ולכן אפשר אין לאסור בחבלה זו דהקזת דם. והרופא להקל אין למחות בו כיון שהיא סברא גדולה.

²⁰ The phrase "Jewish medical ethics" was first coined by Rabbi Jakobovits in his Ph.D. thesis title in 1955 and subsequently in his book, *Jewish Medical Ethics: A Comparative Historical Study of the Jewish Religious Attitude to Medicine and its Practice*, New York 1957.

²¹ Rabbi I. Jakobovits, "*He'arot u-Berurim*: (5) *Nituchim Plastiyim le-shem Noy*", *No'am* 6 (1963) pp. 273-275:

הקלקול נעשה ע"י אסון או חולי; או כשהוא צפוי להביא לידי טירוף דעת רציני שאו הטירוף הוא כמו שאר רפואות... אם... יש בזה ממש משום כדי חייו ופרנסת בני משפחתו... אם הקלקול באישה והיא מניעה ממשית לשידוך או לשלום בית היות ותתנגד על בעלה.

²² The following represents some of the literature that addresses this topic:

יוסי גרין, משפט ורפואה, תל אביב תשס"ג; ישראל יעקובוביץ, "הערת וביירוים: (ה) עמ' רעג-ערה; אברהם סופר אברהם, ניתוחים פלסטיים לשם נוי", נועם ו (תשכ"ג) דבי קורן, "שקר החן והבל נשמת אברהם, חלק חושן משפט סי' תכ, ירושלים תשס"ז; היופי-חילוקי דעות על ניתוחים פלסטיים, כנס קולך תשס"ז; אברהם שטיינברג, אנציקלופדיה הלכתית רפואית, ירושלים תשס"ו; Daniel Eisenberg, "Judaism and Cosmetic Surgery" in: <http://www.aish.com/societyworks/sciencenature>; Chaim Jachter, "Cosmetic Surgery – A Review of Four Classic Teshuvot", pts 1,2 in <http://www.koltorah.org/ray>; Immanuel Jakobovits, "Medicine and Judaism – An Overview", *Assia* 3-4 (1980), pp. 57-78.

²³ Rabbi Mordecai Yaakov Breisch (Poland 1896-1977 Switzerland) Responsa *Chelkat Ya'akov, C"M siman* 31 (new edition):

שני חששות:

א. משום דאסור לחבול בעצמו.

ב. דכל נתוח בחזקת סכנה, ואסור להכניס את עצמו למקום סכנה.

Rabbi Klein also permits the surgery, claiming that this type of surgery does not pose any danger to the patient. *Chabalah* in this case is not a *halachic* concern. Talmudic literature records situations where medicine is called upon to improve external blemishes. The Mishnah discusses a case wherein the man betroths the woman on condition that she has no defects. *Tosafot* ad loc. maintains that the marriage is indeed valid even though the woman had her imperfections medically rectified. The Talmud (*b.Ketubot* 74a) defines the parameters of defects intended, including facial flaws for which a woman today would seek cosmetic surgery. Rabbi Klein, based on the *Tosafot*, regards this surgery as permitted.²⁴

Rabbi Feinstein in line with the above *halachic pesak* permits this particular type of cosmetic surgery. Rabbi Feinstein also maintains that it is within the purview of the physician's responsibility to heal even though it is not a life-threatening situation. This is because it is in the best interest of the patient to undergo this surgery. The problem of *chabalah* exists, according to Rabbi Feinstein, only when the intent of the *chabalah* is to cause damage and shame. Rabbi Feinstein basis his position on Rambam's statement of:

"It is forbidden to cause injury to himself or to others... be it an adult, a minor, a man or woman, when done in a damaging manner. The person transgresses a negative commandment..."²⁵

Rabbi Feinstein, citing a variant reading of the text that links injury to shame, interprets the Rambam as prohibiting *chabalah* only when the outcome of the act causes shame/damage. Therefore, according to Rabbi Feinstein, when a procedure is carried out that is meant to benefit

the patient in some fashion the concomitant initial wounding inflicted by the surgery is not prohibited.²⁶

These three *halachists* maintain that when cosmetic surgery is for the express purpose of improving the woman's appearance it is regarded as a benefit, since it may increase her chances in finding a proper life partner. In this case, the benefit overrules the prohibition of *chabalah*.

Rabbi Weiss was also asked to address the question of cosmetic surgery. Rabbi Weiss follows Rabbi Feinstein's understanding of Rambam, that the prohibition of *chabalah* is only relevant when the wounding is carried out with the intent of damaging and denigrating the person. In the absence of such intent, cosmetic surgery is theoretically permitted. However, Rabbi Weiss maintains that the risk of surgery is a serious *halachic* matter. Rabbi Weiss limits the extent of permitted surgeries even when the deformity was caused by a traumatic event. According to Rabbi Weiss, a request for cosmetic surgery may indicate psychological illness but this is not a life threatening condition and he is therefore reluctant to permit such surgery.²⁷ Rabbi Weiss represents a more conservative approach to cosmetic surgery than Rabbis Breisch, Klein and Feinstein.

The most fervent in his position against cosmetic surgery is Rabbi Waldenberg who maintains that even before a discussion of *chabalah* and *sakkana* one must define the parameters in which a physician is permitted to intervene. Rabbi Waldenberg claims that cosmetic surgery is not part of the physician's mandate to heal. It is, therefore, neither permitted for the physician to perform this type of surgery nor is it permitted for the patient to undergo such a procedure. Rabbi Waldenberg states that, since the

²⁴ Rabbi Menashe Klein (Slovakia 1925 - Israel 2011) Responsa *Mishneh Halachot* 4:246.

²⁵ Rambam, *Hilchot Chovel u-Mazik* 5:1:
אסור לאדם להבול בין בעצמו בין בחבירו, ולא החובל בלבד אלא כל המכה אדם כשר מישראל בין קטן בין גדול בין איש בין אשה דרך נציון הרי זה עובר בלא תעשה, שנ' לא יוסיף להכותו, אם הזהירה תורה שלא להוסיף בהכאת החוטא קל וחומר למכה את הצדיק.

²⁶ Rabbi Moshe Feinstein (Russia 1895 - USA 1986) Responsa *Iggrot Moshe C"m* II:66.

See *Chemdat Yamim of Eretz Chemdah, parshat Terumah* 5765. A question was posed regarding the obligation to remove a tattoo. See discussion in note 6 of the article analyzing *Tosafot* and Rambam's positions on *chabalah* in a damaging fashion.

²⁷ Rabbi Yitzchak Ya'akov Weiss (Poland 1902 - Israel 1989) Responsa *Minchat Yitzchak* 6:105:2.

person is not regarded as ill nor in pain, he is not permitted to request a procedure that involves risk and wounding. He does not distinguish between wounding with intent to benefit the person or wounding with intent to disgrace and cause shame. Accordingly, any wounding that is not *halachically* justified, i.e. that is not for physical health, would be prohibited. He adds that it is certainly prohibited to undergo the risk of cosmetic surgery even though the risk may be minimal.²⁸ Furthermore, Rabbi Waldenberg writes that surgically altering one's appearance constitutes an affront to God since it implies that His work is lacking.²⁹

Rabbi Waldenberg's position is a minority one, as noted by the positions of Rabbis Breisch, Klein and Feinstein. Rabbi Waldenberg does, however, leave room for the possibility that when ill and in pain some surgeries may be permitted. He would, though, require a working definition of illness and pain. Indeed a person in psychological distress may be both ill and in pain, as *Tosafot* explains. Rabbi Waldenberg maintains prohibition when, "there is no reconstruction of a lost body part" thereby leaving room for permitting non-life threatening plastic surgery for reconstructive surgery.

In contrast to Rabbi Waldenberg's position is the approach of Rabbi Yosef who maintains that a woman may ameliorate her external appearance for the sake of finding a suitable husband. This permissive position also includes a married woman who will benefit from cosmetic surgery thereby improving her relationship with her husband.³⁰ Rabbi Yosef's permissive position assumes that the doctor involved is a specialist in

the field with extensive experience, thereby mitigating the risk factor.³¹

Rabbi Auerbach, while addressing a question concerning reattaching a severed limb, maintained that it is permitted to undergo the risk of surgery in an attempt to look normal.³²

Rabbi Auerbach also addressed the case of a man undergoing plastic surgery, which from a *halachic*-historical perspective is far more complex to permit, than in the case of a woman. He states:

"...When the surgery is done, *not for beauty* but because of the pain suffered from embarrassment endured one may be lenient, based on the *Tosafot*. It is permitted because the person wants to remove the blemish and appear as a normal member of society. If it is solely for beauty reasons the procedure would be prohibited. The prohibition of *chabalah* is not applicable because the result is a desired one."³³

The principle of allowing surgery due to the need to appear normal, articulated by Rabbi Auerbach for a man, is certainly applicable for a woman undergoing cosmetic surgery. The human need to fit in within society and feel comfortable with one's own appearance is critical for most people. It is a factor that, according to many *halachists*, also carries weight within the *halachic* process.

Halachic implications for reconstructive breast surgery

In light of the above *halachic* discussion, we will now consider post-mastectomy breast reconstruction surgery. As we have seen, the

²⁸ Rabbi Eliezer Waldenberg (Yerushalayim 1916-2006), Responsa *Tzitz Eliezer* 11:41 and 12:43 where he rules that truly elective surgery is never permitted.

²⁹ *ibid.*

³⁰ The notion of "*shalom bayit*" appears in Talmudic literature, permitting what would normally be prohibited: " אמר רבי ישמעאל... ומה לעשות שלום בין איש לאשתו אמרה תורה: שמי שנכתב בקדושה ימחה על...המים" (*b.Shabbat* 116a).

³¹ Rabbi Ovadiah Yosef (Bagdad 1920 – Israel, present) Responsa *Yabbia Omer*, *C"m* 8:12. Rabbi Yosef adds that he would likely also permit a man to undergo the same cosmetic surgery if the disfigurement causes him such shame that it prevents him from normal social interaction, especially interfering with his ability to find a marriage partner.

³² Cited in Avraham S. Avraham, *Nishmat Avraham* (Jerusalem 2007) *C"m*: 420:2 pp. 119-120 s.v. *kotev ha-grsh"z Auerbach z"l*.

³³ Rabbi Shlomo Zalman Auerbach (Yerushalayim 1910-1995) Responsa *Minchat Shlomo (tanina)* 86:3.

permissibility of cosmetic surgery depends on the existence of psychological suffering. Many women following cancer surgery, radiation and/or chemotherapy experience a pervasive sense of loss of their body's vitality and need to reaffirm their sense of wellbeing and normalcy by resuming as natural an appearance as possible. This type of surgery may therefore positively affect a woman's recovery both in the short and long term. As this is the goal of the surgery, it stands to reason that the *halachic* authorities permitting cosmetic surgery would permit breast reconstruction. Furthermore, as the goal of the surgery is to reconstruct a body part that has been removed, it is possible that Rabbi Waldenberg would also allow the surgery for this reason. Rabbi Dr. Halperin wrote supporting reconstructive breast surgery after mastectomy recognizing its beneficial process for healing.³⁴

As to the specific *halachic* concerns, *chabalah* should not be a factor to prohibit the procedure, according to many *halachists*, as the intent is a beneficial one. The risk factor must always be addressed and each woman, depending on her particular medical situation, should seek medical advice as how to best evaluate the risks and dangers involved in such a surgery. Overall, however, cosmetic surgery has become readily available and in demand, and it would thus appear that the risk factor falls under the category of both a generally and *halachically* accepted risk.

The remaining analysis will focus on the *halachic* implications of tattooing particularly when used as part of the procedure to create a nipple and areola, as the final stage of breast reconstructive surgery.

III. Tattooing

Tattooing³⁵ is a Biblical prohibition as stated in Leviticus 19:28:

³⁴ See the Schlesinger Institute IRP: www.medethics.org.il/db/showQ.asp?ID=196,2427,2602,1146,4730

³⁵ It was not an uncommon phenomenon in ancient times, to mark the skin. In Elephantine (Egypt) 5th C BCE, records show that slaves owned by Jews were marked with the owner's name, paralleling the

practice amongst the general population, as well. See Arthur Cowley, ed and trans., *Aramaic Papyri of the Fifth Century BC*, Oxford 1923, p. 103. The phrase "יִתְּנוּם בְּיָדְךָ כִּלְעָדָם" in Job 37:7 is contextually a reference to God putting a sign on a person's hand indicating the master-servant relationship. Amos Chacham, (*Sefer Iyyov with Da'at Mikra. Commentary*, Jerusalem 1982) however, comments ad loc. that it was the custom to imprint on the hand of a slave the name/symbol of the master, to indicate ownership. Although it is not clear that these symbols were tattooed into the skin in *Tosefta Makkot* 3:6 we note, "שְׁנֵיהֶם חֵיבִין... הַרוּשָׁם עַל עַבְדוֹ שֶׁלֹא יִבְרַח פְּטוֹר הַכּוֹתֵב כְּחוֹבֵת קַעֲקַע בְּבִשְׂרוֹ שֶׁל חֵבִירוֹ" – contextually this statement is referring to a tattoo. In *b.Gittin* 20a discussion ensues regarding the validity of a get tattooed on the hand of a slave and then delivering the slave/get to the woman. These two sources will be addressed, see notes 52, 53 *infra*.

The skin was also marked with the name/symbol of a diety to show servitude to that specific god. In *Maccabees* 3 (a record of events during the reign of Ptolemy Philopater of Egypt, 221-205 BCE) we note: "וכל המתפקדים יצרם באש על בשרם עלה הקיסוס הוא אות דיוניסוס (מכבים)". The kysos leaf, the sign of Dionysus, god of wine and fertility in nature, was burned into the skin indicating indentureship to that diety. In *b.Sanhedrin* 103b we read of *Yehoyakim* king of Yehudah: "ויתר דברי יהויקים ותעבתיו אשר עשה והנמצא עליו. מאי והנמצא עליו? רבי יוחנן ורבי אלעזר: חד אמר: שחקק שם עבודה זרה על אמתו, וחד אמר: שחקק שם שמים על אמתו..." Some say of *Yehoyakim* that he engraved the name of idolatry on his flesh whereas some say that he engraved the name of God onto his flesh. Since *amato* is understood as his male parts engraving the name of God at that place is certainly considered a sacrilegious intent.

Although these sources indicate marking the skin with the name of a diety there is also indication that people would write the name of God on the skin as well. See for example *Yeshayahu* 44:5, "זֶה אֵמַר לֵה' 'אָנִי וְנָה יִקְרָא בְשֵׁם יְעֻקֵּב וְנָה יִקְרָא לֵה'..."

Amos Chacham (*Sefer Yeshayahu with Da'at Mikra Commentary*, vol. II, Jerusalem 1992) states that the person will indicate on his hand that he belongs to God, either by affixing a trinket to the hand with "to God" written on it or by writing the name of God on his hand. This is reminiscent of the slave who has the name of the master written on his hand, testifying to the master-slave relationship. A more definitive source is in *b.Yoma* 8a: "הרי שהיה שם כתוב על "בשרו – הרי זה לא ירחץ, ולא יסוך, ולא יעמוד במקום הטנופת".

The *Baraita* teaches that a person with the name of God on his body is bound by the prohibition of erasing God's name. Therefore, when immersing in the *mikveh* he must take precautions to prevent the Name from being erased, also when washing he must be careful. In addition, he may not remain in a filthy place because of the inherent *bizayon* (disgrace) to the Name that is engraved on to the skin. Prof. Bar-Ilan in his article, "ושמו שמי על בני ישראל" (<http://www.faculty.biu.ac.il-barilm/vesamu>), is of the opinion that after the *kohanim* blessed the nation they would write the name of God on those people present. It was the concretization and finale to the blessing. Regarding the function of certain markings on the skin see M. Bar-Ilan's article:

"חומות מאגיים על הגו: אצל יהודים במאות הראשונים לספירה", *תרביץ* נ"ז (תשמ"ה) עמ' 37-50.

See also: Y. Licht's entry in *Encyclopedia Mikra'it*, vol. 4, Jerusalem 1963, pp. 378-380, wherein a survey on skin markings in ancient times is presented.

For a comprehensive perspective concerning the widespread phenomenon of skin markings and tattooing see C. Jenkinson, "Tattooing" in J. Hastings *Encyclopedia of Religion and Ethics*, vol. 12, Edinburgh 1921, pp. 208-214.

"And a tattoo³⁶ (*ketovet ka'aka*) shall you not place upon yourselves – I am Hashem."

Although the verse seems initially uncomplicated in its intent of prohibiting tattooing, the terms defining the process and end result are rather ambiguous. The following three questions are basic for our analysis regarding what constitutes the Biblical prohibition of tattooing, a transgression that is punishable by *malkot*:³⁷

1. What technical procedure is indicated by the phrase *ketovet ka'aka*?

2. Does a person transgress for any resulting tattoo or are there certain images/colors that are not Biblically prohibited?

3. In order to violate the prohibition of tattooing must a tattoo be permanent or is a non/(semi)-permanent tattoo also a Biblical infringement?

Each factor may impact on whether or not a person violates a Biblical prohibition. Although one usually does not distinguish between Biblical and rabbinic law, there exist situations when a rabbinic prohibition may be overruled in a specific case due to other additional factors.

The discussion on tattooing will comprise three sections. The first is a cursory presentation of

Biblical commentators on the verse in Leviticus 19:28 in an attempt to properly understand the terms and intent of the verse thereby setting the stage for the discussion of Talmudic and post-Talmudic *halachic* literature in the second section. The final section will include a summary of sources and discussion of implications regarding tattooing a nipple and areola complex after reconstructive breast surgery.

Reading the Verse

Onkelos³⁸ translates *ketovet ka'ak'a* as *reshumin charutin*, indicating that the colored marking is engraved into the skin.³⁹ The term *reshumin* is ambiguous in that there is no indication whether the engraved colored area is a defined shape. The term does, however, indicate that color is introduced since the form/picture/letter that is engraved into the skin is visible to the eye.

Rashi uses the term *ketav* in explaining *ketovet* but, like Onkelos, it is not clear if *ketav* implies a specific form/picture/letter.⁴⁰ Paralleling Onkelos, Rashi explains that *ketovet* is the act of introducing color whereas *ka'ak'a* is the act of cutting the skin so that the color seeps through the dermis.⁴¹ Some, unlike Rashi, explain the term *ketovet* as the act of cutting the skin and *ka'ak'a* as the act of introducing color.⁴²

Seforno offers a rather general comment stating that we are prohibited from introducing an 'ot (sign) into the flesh other than the 'ot of circumcision.⁴³ Even though Seforno references

³⁶ This is the English translation of the verse as it appears in, *The Chumash*, Artscroll Series, New York 1993. Marking the skin can be achieved in two different fashions. One process is called cicatrization, where there is no color/dye introduced into the skin instead the skin is cut and scarring is induced by preventing the healing process. When healing does finally take place keloids (raised scars) are evident around the tissue. These scars are usually a different color than the original skin before the cutting. Tattooing refers to the process of introducing pigmentation under the skin. The prohibition in our verse may be a combination of cicatrization and tattooing proper. Unique to tattooing is the process of forcing color under the skin, sometimes accomplished by rubbing burnt wood-ash into a wound. The word tattoo was first introduced into the English language by Captain Cook (1769). He learned of the word while exploring Tahiti, one of the Polynesian Islands. Because the word tattoo entered the English language in the 18th century in early English translations of the Bible the word tattoo does not appear. In the Wycliffe translation – 14th century – of Leviticus 19:28 he writes, "nether ye schulen make to you any fyguris, ethe makis in your fleisch; Y am Lord". In the Kings James Version, first published in 1611, the verse is translated as, "nor print any marks upon you I am the Lord". In the Darby translation, printed in 1890 we already find, "nor print any marks nor tattoo".

³⁷ See Deuteronomy 25:1-3; Rambam, *Hilchot Sanhedrin* 18, 19:4-144

³⁸ In the Babylonian Talmud (*Megillah* 3a) the *Targum* to the Torah is attributed to Onkelos the proselyte whereas in the *Yerushalmi* Talmud (*Megillah* 1:11) translation of the Torah is attributed to Aquila the proselyte (2nd century CE).

³⁹ Onkelos, ad loc. states: "ורושמין חריתין לא תתנו בכון אנה יי".

⁴⁰ Rashi, Leviticus 19:28:

כתבת קעקע – כתב המחוקה ושקוע שאינו נמחק לעולם שמקעקעו במחט והוא משחיר לעולם: קעקע לשון (במדבר כה ד) והוקע אותם, (שמואל ב כא ו) והוקענום. תחבין עץ בארץ ותולין אותם עליהם ונמצאו מחוקין ותחובין בקרקע, פורפויינ"ט בע"ז [נערץ].

⁴¹ See *Ibn Ezra al-ha-Torah* ad loc.; see also commentaries to *b.Makkot* 21a including Rivan, Ritva, Meiri and *Nimukei Yosef*, Bartenura to Mishnah. They define *ketovet* as the act of introducing color/dye and *ka'aka'* as cutting the skin.

⁴² See for example *Semag's* negative precept 61; *Semak mitzvah* 72; *Chinnuch mitzvah* 253.

⁴³ Ovadiah b.Ya'akov Seforno:

what is a permitted 'ot he does not clearly stipulate what is prohibited. This leaves the ambiguity open-ended and subject to the broadest interpretation of prohibition.

The *Korban Aharon* offers a more literal understanding of the term *ketovet* in stating that the term *ka'ak'a* includes both acts of cutting and introducing color whereas the term *ketovet* describes the form of the prohibited tattoo. According to the *Korban Aharon* the Biblical prohibition is applicable when tattooing formed letters.⁴⁴ In an attempt to define the prohibited colored form, Bulah, in his contemporary commentary *Da'at Mikra*, states that *ketovet* is not limited to written words (letters) but includes pictures as well.⁴⁵

From the selected citations of Biblical commentators we note that the Biblical prohibition of tattooing may include: cutting the skin, introducing color and a tattoo comprised of either letters or pictures.⁴⁶ The ambiguity of some of the commentaries leaves us with the impression that, at one extreme, the prohibition of tattooing exists only when a letter is formed and, at the other extreme, some maintain that the prohibition is in effect when a mere colored mark is etched into the skin. We will now pursue, in the *halachic* literature, this specific issue of what type of colored

appearance constitutes a Biblically prohibited tattoo.⁴⁷

Halachic Sources

Talmudic Literature

The *Sifra* states:

"*Ka'aka*: Is liability possible if *katav* but did not *ka'aka*? It is stated *ka'aka*. Is liability possible if *ka'aka* but did not *katav*? It is stated *u-ketovet*, therefore both actions are necessary to incur liability. {*Ka'aka*}: using ink, dye or anything that leaves a mark. Rabbi Shimon b. Yehudah says in the name of Rabbi Shimon {he} is not liable until writing *Shem Hashem* as the verse states, Ye shall not... nor imprint any marks upon you: I am the Lord..."⁴⁸

The *Sifra* records two positions regarding liability. The first position states that coloring and cutting the skin effects liability, without any additional qualifying details regarding the character of the finished product. This position maintains that any color etched into the skin, irrespective of its form, is a Biblical violation. It would, then, seem that tattooing some dots into the skin is a Biblical *issur*. The second position is that of Rabbi Shimon who states that one is liable only when etching "the name" into the skin. Presumably, then, tattooing a rose into the skin

(כז-כט) ובהיות מדרכי יראת הא-ל וכבודו שלא נחלל גופות עמו אשר קודש לעבדו אמר לא תקיפו... וכן בכתובת קעקע לתת אות בבשרינו מלבד אות הברית.

⁴⁴ Aharon ibn Chayyim, *Korban Aharon al Torat Kohanim*, Dessau 1656, *parshat Kedoshim* ch 6:10:

...ואי קעקע כלומר ואם אמר קעקע ולא אמר כתבת הייתי אומר דעל הקעקוע לחוד מבלי שיהיה בו צורת אותיות יהיה חייב לזה אמר כתבת קעקע שירצה כתיבה ובהפירה עד שיכתוב אותיות ויקעקע אותם במה שהוא רושם.

⁴⁵ *Sefer Vayikra 'im Perush Da'at Mikra*, Jerusalem 1992: "משמעות כתבת": "אינה כאן דוקא למילים כתובות אלא גם ציור

⁴⁶ The sequence of the prohibited tattooing process is contingent on the definition of the terms *ketovet* and *ka'ak'a*. The *achronim* debate whether the sequence of coloring/cutting impacts on the prohibition. Some authorities maintain that one transgresses a Biblical prohibition only if the acts of cutting/coloring follow a specific order. See Rabbi Yosef Hochgelernter, *Mishnat Chachamim*, 1794, section *Yavin Shmu'ah*:(a) who cites Rambam, *Semag* and Rabbi Ovadiah of Bartenura who claim that *malkot* is warranted only if the tattoo followed a certain order of events. Others maintain that the order of cutting the skin and introducing color is irrelevant. Therefore, when the end result is a tattoo the person force transgressed a Biblical *issur*. See *Bah, Tur, Shulchan Aruch Y"D 180, Shach Shulchan Aruch, Y"D 180 siman katan 1*.

⁴⁷ For a comprehensive *halachic* discussion of some of the issues see:

חיים אמסלם, ברכת חיים, חלק יו"ד, ירושלים תשנ"ו, סי' כ; עזרא בצרי, "קעקוע במקום גבות העיניים", תחומין י' (תשמ"ט) עמ' 282-287; גשטטר, שו"ת להורות נתן (לעיל); עובדיה יוסף, טהרת הבית עם משמרת הבית, חלק ג', ירושלים תשס"ו, עמ' כט-לד; שנעבאלג, שו"ת שרגא המאיר, (לעיל); ברוך שרגא, שו"ת והיה העולם, ירושלים תשמ"ג, עמ' קנה-קסד; פסקי דין - ירושלים דיני ממונות וביורורי יהדות ד עמוד קנה-קנז, בהרכב הדיינים: הרב אברהם דב לוין, אב"ד; הרב שמואל ביבס; הרב ברוך שרגא. תיק מס': 102 - נה

פס"ד בתביעת החזר דמים ששולמו עבור איפור שאסור עפ"י דין, נושא הדין: התובעת עשתה טיפול של איפור קבוע במכון לקוסמטיקה מפורסם בירושלים... לאחר שנעשתה את האיפור ושילמה עבורו סך 1200 ש"ח, נודע לה שקיימת בעיה הלכתית לגבי האיפור משום שיש בו איסור של כתובת קעקע, תבעה את דמי האיפור בחזרה וטענה כלפי הקוסמטיקאית שהכשילה אותה באיסור חמור. הקוסמטיקאית הנתבעת טוענת שרובים מסויימים התיירו את הדבר וכי אין בזה שום עבירה רק מצוה להתנאות.

J. David Bleich, "Survey of Recent *Halachic* Periodical Literature: Medical and Cosmetic Tattooing", *Tradition* 42 (2009), pp. 58-95; Chaim Jachter, "Permanent and Semi-Permanent Make-up-Cosmetic Tattooing", pts. 1,2,3.

at: <http://www.koltorah.org/ravj/14-19%20>

⁴⁸ *Sifra, parshat Kedoshim, parshah 3, s.v. perek 6(10) u-ketovet*.

would not be a Biblical *issur*, according to Rabbi Shimon, depending on his definition of the phrase "the name". Rabbi Shimon's position is based on his understanding of the verse's ending words, "I am God". Engraving a name/image that contradicts the unity and uniqueness of God is the basis for the prohibition. Rabbi Shimon puts forth a significantly limited context of prohibition.

The Mishnah, although differing from the *Sifra* in its literary construct, conveys the same information as the *Sifra*.⁴⁹

The *Tosefta* states:

One who engraves a *ketovet ka'aka* in the flesh of his friend, both are liable when both acted with intentionality (*mezidim*), if both acted unintentionally (*shogegim*) they are both acquitted (*patur*), if one acted unintentionally and the other acted intentionally the *shogeg* is *patur* and the *meizid* is liable. And one is not liable (*ayno chayyav*)⁵⁰ until he is *kotev ve-yeka'aka* with ink, dye to *avodah zarah*. One who scrapes (the skin) with a knife is *patur*; one

who marks his slave to prevent his fleeing is *patur*.⁵¹

The *Tosefta* source differs from the *Sifra* and Mishnah in two important points. First, the *Tosefta* introduces the concept of intent to transgress (*chayavin be-zeman she-hayu mezidim*) without which the participants are relinquished from responsibility (*peturim*). Second, the *Tosefta* appears to relay only the position of Rabbi Shimon that tattooing is prohibited when markings are etched into the skin for idolatrous purposes. Rabbi Shimon's position in the *Tosefta* sheds light on the phrase "*Et Hashem*" (the name) in the *Sifra* and Mishnah. When Rabbi Shimon claimed liability regarding a person who tattooed "the name," it is not the actual name of God that is prohibited but rather a name/image that contradicts the end of the verse – I am God. Such a contradiction to the theme of "I am God" is an idolatrous name/image.⁵²

The *Tosefta* also states that a person who marks his slave for the express purpose of preventing his escaping is released from liability – *patur*. Some regard this statement as a continuation of Rabbi Shimon's position explaining that even when tattooing an idolatry image the act is no longer viewed as a Biblical prohibition when the intent is for another defined purpose-

⁴⁹ Mishnah Tractate *Makkot* 3:6:

[ו] הכותב כתובת קעקע כתב ולא קעקע קעקע ולא כתב אינו חייב עד שיכתוב ויקעקע בדיו ובכחול ובכל דבר שהוא רושם רבי שמעון בן יהודה משום רבי שמעון אומר אינו חייב עד שיכתוב שם השם שנאמר (ויקרא י"ט) וכתובת קעקע לא תתנו בככם אני ה'

Variants to this text include:

- עד שיכתוב שם את השם
- עד שיכתוב השם
- תוספות י"ט: עד שיכתוב שם השם

Wherein the first "sh'm" is vocalized with a *kametz* i.e. "*shum ha-shem*" – until he writes there the Name. See also *Dikdukei Sofrim* ad loc.

⁵⁰ The term *ayno chayyav* is recorded in the *Sifra*, *Mishnah* and *tosefta* and is critical in determining whether liability is of Biblical or rabbinic status. If all the requirements that comprise a Biblically prohibited tattoo are not met then a person is not liable for transgressing the prohibition of tattooing. It is unclear from the term *ayno chayyav* if the person is not Biblically liable at all or is, in fact, Biblically liable though exempt from the punishment of *malkot*. See *Sedei Chemed* who relays both positions. How *ayno chayyav* is understood by the *halachists* will factor into the *halachic* status of tattooing. See, for example, Chayyim Chezkiyahu Medini, *Sedei Chemed*, I, *Ma'arechet ha-alef, kallahim* 38, 83: *ayno lokeh alav*:

ברור לי דנמצא לשון אין לוקה וכן אינו חייב דר"ל דאיסורא נמי ליכא... הבאתי מערכה מול מערכה בזה והבאתי מקומות רבים שאינו אלא איסור דרבנן...

Sedei Chemed III, *Ma'arechet Kaf, kallahim* 22:

...ודקדקו הראשונים מילקא היא דלא לקי הא איסורא איכא ונחלקו אם האיסור הוא מדאורייתא או אינו אלא מדרבנן.

⁵¹ *Tosefta Makkot* 4:15 (Zuckerman edition):

הכותב כתובת קעקע בבשרו של חברו שניהם חייבין במה דברים אמורים בזמן שהיו שניהם מזידין אבל אם היו שניהם שוגגין שניהם פטורין אחד שוגג ואחד מזיד שוגג פטור מזיד חייב ואינו חייב (עד שיכתוב ויקעקע בדיו ובכחול לעבודה זרה קלפו באומלל פטור הרושם על עבדו שלא יברח פטור).

⁵² Rabbi Shimon's narrow definition of the prohibition aids in explaining the *sugya* in *b.Gittin* 19a. The *sugya* discusses the case where a writ of divorce is tattooed into the skin of a slave and the slave is then delivered to the woman as her bill of divorce. *Tosafot* ad loc. (s.v. *be-ketovet ka'aka'a*) states both positions regarding liability for tattooing, that of *chachamim* and that of Rabbi Shimon. *Tosafot* explains that according to Rabbi Shimon, since there is no tattooing to idolatry, tattooing a bill of divorce on a slave comprises a rabbinic *issur*.

See *b.Gittin* 19a regarding the controversy between *chachamim* and Rabbi Yossi, regarding types of materials on which a get may be written. *Chachamim* are more lenient whereas Rabbi Yossi maintains that a get may not be written neither on anything alive nor on foodstuff. See Rambam *Hilchot Gittin* 4:4; *Tur Shulchan Aruch, Even ha'Ezer (E"Z)* 124 who concur with the validity of the get. See also *Shulchan Aruch, E"Z* 124:6 whose formulation is quite similar to Rambam.

identifying the slave and his owner.⁵³ Others maintain that the slave owner is *patur* because this was not a bona-fide tattoo just coloring of the skin. There is, then, no concept of intent regarding the type of tattoo involved.⁵⁴ In line with this explanation Rivan claims that Rabbi Shimon considers all tattooing as a Torah prohibition the distinction is whether the act warrants lashes or not.^{55,56} Others are of the opinion that according to

Rabbi Shimon a non-*avodah zarah* tattoo constitutes a rabbinic prohibition.⁵⁷

The editors of the *amoraic sugya*⁵⁸ deliberate about how to define Rabbi Shimon's position. Rabbi Acha son of Rava asserts that the Biblical prohibition of tattooing is defined as tattooing God's actual name whereas Rabbi Ashi claims that violation occurs when writing a name other than God, i.e. the name of idolatry. No other deity may be sanctioned, as implied in the text of *ani Hashem* and, therefore, no other. The *sugya* continues with a statement by Rabbi Malchiya who prohibits even the application of wood ash to a wound because it resembles a tattoo (*mar'it ayin*).⁵⁹ Rabbi Bibi son of Abaye was even more stringent in forbidding wood ash even on a very small wound. Rabbi Ashi, in opposition to Rabbi Malchiya and Rabbi Bibi states that the presence of a wound eliminates the suspicion that color was introduced by the prohibited act of tattooing. *Tosafot* ad loc. (*s.v. Rabbi Ashi omer*) states that *halacha* is in accordance with Rabbi Ashi.⁶⁰ These issues will have ramifications for our topic, as well.

Along with the issue of what type of skin marking defines the prohibited tattoo, an ancillary factor impacting on its prohibition is the question regarding the tattoo's permanence. We will see a similar range of positions defining the Biblical *issur* of tattooing in the post Talmudic literature, as well.

Post-Talmudic Literature

be exempt from *malkot*. See, *Bach* on *Tur Y"D 180 siman katan 1, s.v. ketovet ka'aka*.

⁵⁷ See for example, *Tosafot Gittin 20b*:

לר' שמעון אינו חייב אפי' כתב וקעקע עד שיכתוב את השם פי' שם דע"ו...בכתובת...כדמפרש התם בגמרא ומיהו איסורא דרבנן איכא הכא...

Tosfot ha-Rosh Gittin 21a, s.v. be-ketovet ka'aka:

כר"ש... אינו חייב עד שיכתוב את השם ומיהו איסורא דרבנן איכא אם שם בו כחול...
Aruch la-Ner, b.Makkot 21a:

...י"ל דסבר ג"כ כריב"ן, דר"ש רק מדאורייתא קאמר. אבל מכל מקום מודה דאיסור דרבנן איכא בכל קעקע אפילו בלא שם ע"ו...

⁵⁸ *b.Makkot 21a*:

גמ'. אמר ליה רב אחא בריה דרבא לרב אשי: עד דיכתוב אני ה' ממש? אמר ליה: לא, כדתני בר קפרא: אינו חייב עד שיכתוב שם עבודת כוכבים, שנאמר: וכתובת קעקע לא תתנו בכם אני ה', אני ה' - ולא אחר.

⁵⁹ Rivan ad loc. restricts this statement to the *epher makleh*; because of its abrasive quality it cuts the skin, the color seeps in and remains for some time. Other ash is not included in this *issur*. Ritva ad loc. cites a position claiming that all such material is prohibited.

⁶⁰ Rosh, Ritva, Meiri, *Nimukei Yosef* and others, concur with *Tosafot's* position regarding Rabbi Ashi.

⁵³ It is necessary to see this statement of *ha-roshem... patur* in context of the whole *piskah* (paragraph). After the *Tosefta* records the position of Biblical liability (cutting and coloring for idolatry) the next statement is:

קלפו באוזמל פטור הרושם על עבדו שלא יברה פטור.

According to *Chazon Yechezkel* (*Tosefta im perush Chazon Yechezkel*, Jerusalem 2000, *Makkot 3:9, be'urim*), the cutting was, in fact, accompanied by color. The person is *patur* because, in spite of the dual action, there is some element that is absent. This, then, reduces liability from a Biblical prohibition to a rabbinic *issur*. In this case, according to *Chazon Yechezkel*, cutting and coloring is not sufficient to warrant liability, the missing element is a defined and recognizable image or writing. A few dots would not warrant Biblical liability. Therefore, what is indeed a Biblical prohibition according to some is a rabbinic prohibition according to Rabbi Shimon. In a similar fashion *Chazon Yechezkel* explains the lack of liability regarding the servant. Although cutting, coloring and a defined idolatrous image were all present the expressed intent for something other than an idolatrous purpose renders this act as a rabbinic and not Biblical *issur*. *Chazon Yechezkel* understands Rabbi Shimon as purporting that an unopposed act of tattooing the name/image of idolatry is a Biblical *issur* because the mere act testifies to the intent of idolatry. If, however, there is evidence contradicting the intent of idolatry then the tattooing is no longer, according to Rabbi Shimon, an act of Biblical proportions. So too regarding the second statement; when the intent is absent the act is not categorized as a Biblically prohibited tattoo. It is, though, rabbinically prohibited.

⁵⁴ *Chasdei David* (*Tosefta im perush David Fardo*, Jerusalem 1994), *Makkot 3:9* explains these two statements differently:

"קלפו באוזמל פטור" is the singular act of cutting without introducing color and is therefore *patur* because both requirements were not met. This statement may also be in line with Rabbi Shimon, however, *Chasdei David* states that concerning the servant it can only be understood according to *rabbanan* since the marking is not an idolatrous image, it perforce removes Rabbi Shimon from the discussion. Regarding the marking (*roshem*) on the servant, according to *Chasdei David* the term may not necessarily indicate tattooing. There is, then, color without cutting of the skin and hence Biblically *patur*. *Chasdei David* explains the *Tosefta* in a rather stringent manner since either act alone constitutes a rabbinic prohibition. *Chazon Yechezkel* presents the most lenient understanding of Rabbi Shimon's position since even a tattoo of idolatry would not necessarily be a Biblical *issur* if countered by intent to something other than the idolatrous purpose.

⁵⁵ Rivan, *Makkot 21a*:

וכתובת קעקע לא תתנו בכם - שום כתובת קעקע לא יעשו לפני שאני ה' ואסורין אתם לכתוב שם אחר על בשרכם אלמא עיקר חזיבא משום שם עבודת כוכבים הוא ומיהו אסור לכתוב שום כתיבה בעולם אפי' לר"ש אלא דחזיב מלקות ליכא.

⁵⁶ *Bach*, based on Rivan, maintains that even according to Rabbi Shimon all tattooing is Biblically prohibited. The only distinction to be made is that a tattoo of an idolatry image/name warrants lashes whereas any other form/image, albeit a Torah prohibition, would

When defining what constitutes a prohibited pictogram, Rabbi Shimshon (Rsh) of Sens and Ra'avad both state that even in the absence of letters one violates the Biblical *issur* of tattooing. Rsh of Sens explains that the mere application of color into the skin, even though the person did not form a letter, constitutes *ketovet*. Ra'avad, in consonance with Rsh of Sens, states that one need not form letters, just a *roshem* – indication of color – constitutes the prohibition.⁶¹ Rambam makes no mention of letters nor does he indicate any limiting factor on the introduction of color and states, "from the time the person introduces color... after cutting the skin... warrants *malkot*".⁶² In a similar fashion, the *Shulchan Aruch* states that a tattoo entails cutting the skin and filling the cut with ink.⁶³ The impression from the texts of Rambam and *Shulchan Aruch* is that their approach is maximalistic in the *issur* of tattooing, i.e. any color etched into one's skin is a Biblical *issur*. These *rishonim* are aligned with Rsh of Sens and Ra'avad, all basing their positions on *rabbanan* in the *Sifra* and *Mishnah*.⁶⁴

Even according to the *rishonim* who maintain that any colored tattoo comprises a Biblical violation, there is, according to some *achronim*, a caveat somewhat limiting this broad prohibition. The *Minchat Chinnuch* cites the position that even if any colored form is prohibited it must be an etching with significance.⁶⁵ Rabbi Nebenzahl validates this position by maintaining that the

broad definition of a tattoo is limited to a defined picture, figure or words. A mere imprinting of color would not comprise the Biblical prohibition of tattooing.⁶⁶ Rabbi Nebenzahl opposes the position that a *roshem* alone is a Biblical violation.

Among some *rishonim* we note a limiting factor in what constitutes a prohibited tattoo. *Semak* states, "cuts letter like forms and embeds in the color".⁶⁷ Aharon of Lunel initially states that tattooing is prohibited but then cites *Semak's* position.⁶⁸ *Chinnuch* states, "if one violated this and wrote even one letter ('ot)... that was engraved in color, he receives *malkot*".⁶⁹ Whereas *Semak*, *Orchot Chayyim* and *Piskei Tosafot*⁷⁰ refer to letters in the plural form, the *Chinnuch* establishes violation at the one-letter level.⁷¹ The *Me'il Tzedakah*, an *achron*, also suggests that in order to be deemed a Biblical *issur* a letter must be formed. Any non-letter tattoo would then be regarded as a rabbinic prohibition.⁷²

Albeit that Rambam, *Tur* and *Shulchan Aruch* adopt the strict position of *rabbanan* regarding tattooing, Rabbi Shimon's position is nevertheless also supported in the literature. Rabbi Yerucham

⁶⁶ Rabbi Nebenzahl's position is cited in Baruch Shraga's article, "Ippur Kav'u a u-Ketovet Ka'ak'a" *Techumin* 18 (1998), p. 113.

⁶⁷ Rabbi Yitzchak of Corbeil, *Sefer Mitzvot Katan*, mitzvah 72.

⁶⁸ Aharon of Lunel, *Orchot Chayyim*, *Dinei Pe'ot haRosh vehazakan* 4.

⁶⁹ *Sefer ha-Chinnuch*, mitzvah 253.

⁷⁰ *Piskei ha-Tosafot* #32.

⁷¹ See *Sefer Ma'ayan ha-Chochmah* by Rabbi Noah Chayyim Zvi abd'k Ahu, Rodelheim 1804, p. 57. He questions *Chinnuch's* position that one letter is sufficient to violate the prohibition of tattooing. Rabbi Noah Chayyim Zvi claims that he does not know the basis for *Chinnuch's* position. He also states that he is not aware of any other *posek*, except *Chinnuch*, who makes such a claim. Rabbi Noah maintains that there are two issues that contradict *Chinnuch's* position: 1. By defining writing as defined for the laws of Shabbat then one violates the *issur* with a minimum of two letters and 2. By taking in to account the position of *Rif* and *Rosh* who follow Rabbi Shimon, according to Rabbi Noah, writing the name of a diety requires a minimum of two letters.

Both of these points are refuted by other *halachists*. The laws of tattooing need not necessarily parallel the Shabbat laws of writing and *Patshegen ha-Ketav*, as cited in this text, maintains that tattooing a cross constitutes a Torah prohibition representing a symbol of *avodah zarah*, even though not considered formed letters.

⁷² op. cit Landsofer, *Responsa Me'il Tzedakah, siman* 31:

...בלומדינו במכות נתעורר אצלינו ספק בדין כתיבת קעקע אם האיטור לענין חיוב מלקות בענין שיהי בו כתיבה ממש כעין אותיות מוסכמים אף כי סתמא דמילתא לא בעינן כתב אשורית... או איזה רושם שיהיה... ואלו אחרי חופשי הפוסקים בחיפוש מצאתי ראיתי כי בעינן כתב אותיות ממש... ומיהו לענין כמה אותיות בעינן סגי ליה באחד... וודאי שגם את האחד מקרי כתב ובכל לשון שהוא כתב הסכמי כ"ל

⁶¹ *Sifra with Commentary by Rsh of Sens and Ra'avad, parshat Kedoshim, parshah* 3, s.v. perek 6 (10) u-ketovet.

⁶² Rambam, *Hilchot Avodat Kochavim* 12:11:

כתובת קעקע האמורה בתורה הוא שישרט על בשרו וימלא מקום השריטה כחול או דיו או שאר צבעונים הרושמים, וזה היה מנהג העכו"ם שרושמינן עצמן לעבודת כוכבים כלומר שהוא עבד מכור לה ומרשם לעבודתה, ומעת שירשום באחד מדברים הרושמינן אחר שישרט באי זה מקום מן הגוף בין איש בין אשה לוקה...

⁶³ *Shulchan Aruch, Y"D* 180:1.

⁶⁴ Others understand Rambam's position differently. See for example, Rabbi Yonah Lansdsofer (Prague 1678-1712) *Responsa Me'il Tzedaka, siman* 31, he states that according to Rambam tattooed letters is what constitutes the Biblical prohibition. Alternatively, *Aruch La-Ner* (Rabbi Ya'akov Ettlinger, Germany 1798-1871), tractate *Makkot* 21a; *Sho'el u-Meyshiv [tanina]* (Rabbi Yosef Shaul Natanson, Poland 1810-1875), pt I *siman* 49 and Rabbi Ovadiah Yosef, in his *Taharat ha-Bayit*, vol. III, pp. 29-31, 34, suggest that Rambam's position follows that of Rabbi Shimon thereby limiting the Biblical *issur* of tattooing to *avodah zarah*.

⁶⁵ *Sefer ha-Chinnuch with Minchat Chinnuch*, Jerusalem 1988, II mitzvah 253 s.v. shelo nichtov bivshareinu ketovet ka'aka.

renders a *pesak* in accordance with *rabbanan* but acknowledges the existence of the position in line with Rabbi Shimon, that one is Biblically liable only when tattooing the name of idolatry.⁷³ Ritva, although maintaining that the flow of the *sugya* is clearly in line with *rabbanan*, ends his *sugya* analysis stating, "but Rif z"l gave a *pesak halacha* in line with Rabbi Shimon...".⁷⁴ Rosh states, "and he is not liable until he engraves the name of *avodah zarah*".⁷⁵

In the section, *Reading the verse*, we noted that Rashi's comments were ambiguous regarding the type of pictogram that constitutes *issur*. However, Rashi does state rather definitively vis-à-vis a tattoo's permanence, *ayno nimchak le-olam* – the tattoo is never erasable, certainly indicating that anything less than forever does not constitute a Torah *issur*. Rivan⁷⁶ and Ritva⁷⁷ concur with the requirement of *le-olam*. Accordingly, Rivan and Ritva would maintain that a tattoo that fades after a few years would not constitute a Biblical prohibition. It is *Nimukei Yosef* who reduces the *le-olam* requirement and states that a tattoo that is evident for *zeman gadol* (a long time) is prohibited.⁷⁸ Neither Rambam nor the *Shulchan*

Aruch mention the issue of permanence, perhaps indicating that their position is in line with the *Nimukei Yosef* that a tattoo must simply be evident for a long time in order for a Biblical *issur* to have been violated.

Although Rashi seems clear that one of the definitions of a prohibited tattoo is its life-long permanent characteristic, Rabbi Gestetner, a contemporary Israeli *halachist*, interpreting Rashi's terminology of *le-olam* maintains that it is not to be understood literally.⁷⁹ He is of the opinion that the term implies a long time, thereby equating Rashi's position with that of *Nimukei Yosef* of *zeman gadol*. This is a more stringent approach, according to which a tattoo that lasts for a long time, even though not forever, is indeed a Biblical prohibition. Unlike Rabbi Gestetner, Rabbi Schneebalg, a contemporary British *halachist*, is of the opinion that Rashi is to be understood literally. Therefore, according to Rabbi Schneebalg a tattoo is Biblically prohibited when it is known to be permanent.⁸⁰ Rabbi Schneebalg maintains that all *rishonim* agree that a non (semi)-permanent tattoo is, at the very least, a rabbinic prohibition.⁸¹

Summary and Implications

The *halachic* status of tattooing an areola/nipple complex is determined by the differing positions as to how to define the prohibited skin marking along with the question of its permanent characteristic. Whereas some prohibit a tattoo if it simply lasts a long time others regard *issur* only if it is permanent-forever. In the

⁷³ Yerucham b. Meshullem, *Toldot Adam ve-Chava, netiv* 17, pt. 5, p. 159:2.

⁷⁴ *Chiddushei ha-Ritva, Massechet Makkot* 21a.

⁷⁵ *Kitzur Piskei ha-Rosh le-Massechet Makkot* 3:6.

⁷⁶ Rivan, Rashi's son-in-law, is credited with the commentary on tractate *Makkot* from page 19b till the end. One position maintains that Rashi died before finishing his commentary to tractate *Makkot* based on the Venice 1520 edition of tractate *Makkot* 19b, wherein it records:

"רבינו גופו טהור ויצאה נשמתו בטהרה לא פירש יותר. מכאן ואילך לשון התלמיד ר' יהודה בר' נתן".

Although it is possible that part of Rashi's commentary was missing and was replaced by the copiers with the available commentary of Rivan. This based on a manuscript edition of Rashi's commentary to tractate *Makkot*:

"עד כאן דברי הרב מכאן ואילך דברי התלמיד"

Rivan, *b.Makkot* 21a states:

כתב תחילה על בשרו בסם... ואח"כ מקעקע הבשר במחט או בסכין ונכנס הצבע בין העור לבשר. ונראה בו כל הימים.

Tosafot Gittin 20b, regarding a writ of divorce tattooed on to a slave's hand, maintains that in spite of the fact that the tattooing was a prohibited act (whether *de-orayta* or *de-rabbanan*) the *get* is nevertheless valid. Even though a product of a prohibited act, one criteria of a valid *get* is that the writing is permanent with which the text cannot be tampered. A permanent tattoo fits this requirement.

⁷⁷ Op. cit. note 74.

⁷⁸ *Nimukei Yosef le-Massechet Makkot* 4b:

עד שיכתוב ויקעקע: כלומר אחר שקרע עורו הניח דיו וניכרת שם זמן גדול ובעיני תרתי לחיובא שריטה וכתובה ולישנא דקרא נקט... עד שיכתוב שם השם כלומר על אותה שריטה שיכתוב השם ומפורש בברייתא שם עבודת כוכבים... ולית הלכתא כוותיה אלא כת"ק.

⁷⁹ Rabbi Natan Gestetner, Responsa *Le-Horot Natan*, Bnei Brak, 1997 section *Yoreh De'ah* 10:64, pp. 88-92.

⁸⁰ Rabbi Shraga Feivel Shneebalg, Responsa *Shraga ha-Meir*, London, 1980, 8:44-45, pp. 74-78.

⁸¹ In *b.Makkot* 21a discussion ensues regarding applying ash wood onto a wound. Although there is no active skin cutting (the wound exists of its own accord) the *gemara* debates the status of such a skin marking because the outcome resembles a tattoo and raises the concern of *mar'it ayin*. Rabbi Schneebalg maintains that the parallelism established between this temporary marking and a bona fide albeit non (semi) permanent tattoo indicates that one certainly violates a prohibition on a rabbinic level.

case of a tattoo's permanence, it is the maximalistic position requiring life-long staying ability that is actually a leniency because short of forever the tattoo is then rendered a rabbinic prohibition and not a Biblical *issur*. The minimalistic claim requiring a lesser time frame regarding the tattoo's existence more readily creates a Biblical prohibition. The maximalistic and minimalistic approaches exist concerning the form of the skin markings, as well.

The maximalistic approach of Rsh of Sens and Ra'avad would prohibit such a procedure since any tattooed colored smudge is Biblically forbidden. The *halachists* who support *rabbanan* of the *Sifra* and *Mishnah*, as Rsh of Sens and Ra'avad, but who also maintain that a tattoo is prohibited only when a picture/image of relevance is evident may consider the tattooed areola and nipple as not Biblically *assur*. The authorities who posit that one is liable only when tattooing letters would certainly regard the finale to reconstructive breast surgery as a Biblically permitted act. The *halachists* who support Rabbi Shimon's definition of the prohibition would regard such tattooing as a Biblically permitted procedure.

Although there is much support in the literature to exclude the nipple/areola tattooing from the Biblical *issur* of tattooing, it would still fall into the category of a rabbinic prohibition. How we deal with the aspect of rabbinic prohibition will be addressed in the next section.

IV. Kevod Ha-Briyot

Before addressing two contemporary questions involving tattooing and a final question regarding tattooing an areola and nipple complex as the finale to reconstructive breast surgery, we must make mention of a principle that will be invoked by some *halachists* when analyzing the permissibility of tattooing for reconstructive

breast surgery. What follows are summary remarks⁸² concerning the principle:

"Great is human dignity, since it overrides a negative precept of the Torah" (*b.Berachot* 19b)⁸³

The statement regarding the supremacy of *kevod ha-briyot* appears in the *Bavli* and *Yerushalmi talmud*.⁸⁴ In the *Bavli* (*Berachot* 19b) the concept of *kevod ha-beriyot*, as a basis for

⁸² For a comprehensive presentation of the topic of *kevod ha-briyot* within *halachic* literature see, "Kevod ha-Briyot", *Encyclopedia Talmudit*, vol. 26 pp. 477-542.

⁸³ Nachum Rakover, in his article "Kevod ha-Briyot", *Shanah be-Shanah* (1982), pp. 221-233, states that in the *tannaitic* period the concept of *kevod ha-briyot* was employed to merely explain the differences in *halachic pesak* but not as a general principle used to generate *halachic pesak*. When moving into the *amoraic* period, Rakover claims there was a shift in Talmudic literature from an explanatory concept to a basic legal principle that both expands on and limits rights. One is then able to follow the development from the notion of *kevod ha-briyot* to a formulated statement of, " גדול כבוד הבריות שדוחה [את] לא תעשה שבתורה". Rabbi Lichtenstein, in his article "Kevod ha-Briyot", *Machanayim* 5 (1993) pp. 8-15, opines that the statement of " גדול כבוד הבריות שדוחה [את] לא תעשה שבתורה" is a summary outcome of the discussed cases and not a working principle evoked to establish guidelines for *pesikah*. The *halachic* implication between these two positions is evident. According to Rakover one approaches *halachic* deliberation with *kevod ha-briyot* as one of the possible guidelines impacting on *pesak*. According to Rabbi Lichtenstein one must approach *halachic pesak* with a certain perspective and sensitivity to *kevod ha-briyot* but not that it is necessarily a working principle equal in value to other *halachic* principles.

⁸⁴ See the following sources:

מקורות ארץ ישראליים:

מכילתא דרבי ישמעאל מס' נויקין פרשה יב, מהד' הורוויץ-רבין, עמ' 291-292

מדרש תנאים לדברים כ:ח מהד' הופמן, עמ' 120

ירושלמי: ברכות בא; ניר זא, נו"א; כלאים ט:ב, לב:א

מקורות בבליים:

ברכות יט:ב-כא; מגילה ג:ב; מנחות לז:ב-לח:א; סנהדרין פב:ב;

עירובין מא:ב; סג"א; שבועות ל:ב; שבת פא:ב, צד:ב.

Dani Eivers, in his "Kevod ha-Briyot", *Tallelei Orot* 7, (1997), pp. 125-135, maintains that the central *sugya*, *b.Berachot* 19b, is, in fact, a theoretical discussion regarding the applicability of the principle of *kevod ha-briyot*. Eivers states that sages of the Talmud were willing to override a *halacha* based on the principle of *kevod ha-briyot* in only two areas: 1. Regarding a deceased person and 2. Regarding bodily functions and nakedness. The fact that the *gemara* limits applicability of this principle may have had an impact on subsequent *halachists* who seem reticent to base *pesak* on the principle of *kevod ha-briyot*.

Ya'akov Blidstein, in his article, "'Gadol Kevod ha-Briyot' – Iyyunim be-Gilgulehah shel Halacha", *Shenaton ha-Mishpat ha-Ivri*, vol. 9-10 (1982-1983), pp. 130-183, also suggests that the principle of " גדול כבוד הבריות שדוחה [את] לא תעשה שבתורה" is post *Mishnaic* and even within the *Mishnaic* period the notion of *kevod ha-briyot* has its origin in *Aggadic* literature. *Aggadic* concepts are usually called upon in order to affect, influence and enhance behavior and, therefore, do not necessarily lend themselves to definitive categorization. In our case the *Aggadic* concept is redressed in *halachic* terms however, *halachists* are cognizant of its origin and therefore continue to afford it only limited *halachic* validity.

overriding a Torah prohibition, is discussed along with the equally significant but opposing principle of:

"Wherever a profanation of God's name is involved no respect is paid to a teacher".⁸⁵

This statement of "wherever a profanation of God's name is involved" tempers and reigns in the broad statement of "human dignity overrides a negative precept of the Torah". The phrase of "no respect is paid to a teacher" indicates that a person's needs are not relevant when in conflict with the observance of a divine commandment. If human needs take precedence over mitzvah observance *chillul Hashem* will result. The *sugya* understands *chillul Hashem* in its broadest sense of desecrating a divine command.

The final resolution of when and to what extent these principles are invoked is reached, in the *Bavli*, in a statement expressing a compromise position. The principle of *kevod ha-briyot* is relevant only when overruling a rabbinic prohibition,⁸⁶ but not a prohibition of Biblical status.⁸⁷ In the *Yerushalmi* it appears that the

principle of *kevod ha-briyot* was invoked to overrule a Biblical prohibition, as well. Unlike the *Bavli*, which records the principle in terms of *kevod ha-briyot*, the *Yerushalmi* cites the principle in terms of *kevod ha-rabbim*. This may imply that only public *kavod* is considered and not personal *kavod*.⁸⁸

Talmudic sources⁸⁹ indicate that the principle of *kevod ha-briyot* is limited to abrogating laws of *tum'ah* when *tum'ah* conflicts with the respect due to a *met mitzvah* (a corpse without someone to tend to his burial), a mourner and a king. Certain laws are passively pushed off so that one may tend to a *met mitzvah*. Similarly, an elder ignores his *halachic* responsibility to return a lost item because it does not benefit his status. Another *halacha* abrogated based on the principle of *kevod ha-briyot* concerns a person wearing a garment prohibited because of *kelayim de-rabbanan* (a garment prohibited on a rabbinic level, an extension of the Torah *issur* of mixing wool and linen). Whereas a person wearing a garment prohibited on the Biblical level must de-robe even in the market place, in spite of the shame incurred, a person wearing a garment that is prohibited on the rabbinic level need not undress in public.

Evident from this source is that one component defining *kevod ha-briyot* is the notion of shame and disgrace (*busha, bezayon*). According to some *halachists*, *tza'ar* (pain) is also a component of *kevod ha-briyot*, thereby overruling certain prohibitions.⁹⁰ Some of the Talmudic cases cited, wherein *kevod ha-briyot* is invoked to overrule an existing *halacha* occur in the public eye thereby seemingly indicating that *kevod ha-briyot* overrides a prohibition only when there is a public

⁸⁵ The textual basis for the principle of "כל מקום שיש חלול השם אין חולקין" "כבוד לרב" is Proverbs 21:30, "אין תקמה ואין תבונה ואין עצה לנגד ה'". Man's assumptions, understanding and rationalization cannot conflict with God's command. To do so would constitute *chillul Hashem*.

⁸⁶ *Rabbanan* restricted their enactments by validating the supremacy of the principle of *kevod ha-briyot* over *gezerot*; they also restricted the all-encompassing character of *kevod ha-briyot* by establishing guidelines for its applicability. Regarding these caveats see *Encyclopedia Talmudit*, vol. 26, pp. 534-542.

⁸⁷ Yizchak Brand, in his article, "*Gadol Kevod ha-Briyot*", *Sidra* 21 (2006), pp. 6-34, maintains that the compromise approach was formulated by Rav (1st generation *Bavli Amora*). Initially even in the *Bavli* it was legitimate to override a Torah prohibition, if overriding the *de-orayta* was via passive non-performance (*shev ve-al ta'asseh*) as opposed to actively negating the mitzvah (*kum ve-asseh*). The ability to override a *de-orayta* was overruled by Rav at the time of the harsh rulings of the Sassinead rulers. See also H"Z Reines, "*Kevod ha-Briyot be-Halacha*", *Sinai* 27 (1950), pp. 157-168, who makes a similar historical point regarding the impact that Rav had on limiting the use of *kevod ha-briyot* as a working *halachic* principle.

In light of Reines' and Brand's thesis the question arises if we are bound to practice a *halacha* that evolved because of historical devastation (*shemad*)? Rav was attempting to increase and strengthen *halachic* observance by limiting one's ability to overrule Biblical prohibitions. In our day and age it must be evaluated whether we are accomplishing what Rav set out to do for his community or are we losing more of our constituency by not

employing one of *halacha's* more humane principles. Brand (p. 32) ends his article by stating:

נראה כי דעת הרוב היא "שאין מביאין ראיה משעת הסכנה" כלומר: שעת סכנה – נסיבותיה חריגות ואין ללמוד ממנה הלכה לשעת שגרה.

⁸⁸ See Blidstein, op. cit., Brand ibid., and Yisrael Ta-Shema, "*Tzadikim aynam Metamim – al Halacha ve-Aggadah*", *JSIJ* 1 (2002), pp. 45-53, all of whom address the *Yerushalmi's* broader use of the principle of *kevod ha-briyot*.

⁸⁹ See sources cited in note 84 with particular emphasis on *b.Berachot* 19b ff.

⁹⁰ See for example: *Sefer ha-Hashlamah Shabbat* 43b; (implied in) *Or Zaru'a* 11:6; *Chavot Yair*, *siman* 191; *Michtam le-David*, *O"C*, *siman* 20.

presence. However, *halachists*, almost unanimously maintain that *kevod ha-briyot* is also applicable to the individual confronting him/herself in the absence of all others.⁹¹ This point will prove important in our discussion of reconstructive breast surgery and tattooing.

Halachists, who resist applying the principle of *kevod ha-briyot*, do so in consonance with Rivash's position, who prohibits expanding on the principle of *kevod ha-briyot* beyond the precedents stated in the Talmud.⁹² However, one finds in the *halachic* literature *poskim* who employ the principle of *kevod ha-briyot* – and its corollaries of shame and disgrace – as the basis for their *pesak* even in areas of *halacha* not mentioned in the *gemara*.⁹³ One such example rather charged by the nature of the subject material, is the responsum penned by Rabbi Waldenberg.⁹⁴ Basing himself on previous *halachists*, including *Chavot Ya'ir*, *Ya'avetz*, *Ma-Harit* and *Rav Pe'alim*, Rabbi Waldenberg states, in his summary statement:

"A married woman who had an adulterous relationship or who was raped and became pregnant, even from a non Jew wherein the child will not be a *mamzer*, and the woman subsequently returned to mitzvah observance, some great *poskim* support her in aborting either because of the disgrace incurred or desecration of

God's name and the blemish and shame to the family (including additional reasons mentioned in the text)..."

The possible permissibility of abortion in very specific situations is based on many *halachic* issues including the notion of the "mother's great need", be it a physical or emotional factor. In the text of Rabbi Waldenberg's responsum we note that the pain of shame and disgrace is considered a "great need", one to be addressed.⁹⁵ Although there are certainly, at the very least, rabbinic prohibitions involved in prohibiting abortion, Rabbi Waldenberg employs the principle of *kevod ha-briyot* as defined by its elements of shame and pain, in a case where one's visceral response may find it hard to justify. In addition, whereas many *halachists* maintain that *kevod ha-briyot* merely permits pushing aside a rabbinic prohibition by passive non-performance (*shev ve'al ta'asseh*) this is not the case according to Rabbi Waldenberg. Rabbi Auerbach concurs with this position. Rabbi Auerbach maintains that a person may not only passively push off a rabbinic negative precept but may, in certain situations, do so in an active fashion (*kum ve-asseh*) in order to prevent embarrassment to him/herself or to others.⁹⁶

Two statements in *rishonim* literature illustrate the supremacy of *kevod ha-briyot*. Rambam states,

"All that has been stated should be implemented according to the judge's evaluation and according to the needs of the time. Above all the judge's actions should be with the heavens in mind and human dignity should not be light in his

⁹¹ The following sources support the idea that *kevod ha-briyot* is applicable on an individual level as well: *b.Shabbat* 81a; Rambam *Hilchot Shabbat* 26:4; *Tur*, *O"C* 312; *Rosh Eruvin* 4:1; *Chiddushei ha-Meiri le-Eruvin* 41a; *Chazon Ish*, *O"C*, *siman* 58, *siman katan* 8: "even though we are stringent in rabbinic prohibitions here because of *kevod ha-briyot* we are lenient"; *Shulchan Aruch*, *O"C* 406:1; *Responsa ha-Rambam*, Blau edition, *siman* 308; *Responsa Tashbetz* pt. IV column 3; See also *Chavot Yair*, *siman* 96 who seems to require a public presence in order for shame (*bizayon*) to be a factor that impacts on *halachic* observance.

⁹² *Responsa Rivash siman* 226; *Responsa Chavot Yair siman* 95 who states:

ואני תוהה מאוד אפילו במידי דרבנן לומר נדחה מפני כבוד הבריות שלא זכור בש"ס

⁹³ Nachum Rakover, *Gadol Kevod ha-Briyot: Kevod ha-Adam ke-Erech – Al*, Jerusalem 1998. In Rakover's fourth chapter (pp. 119-142) he cites examples not mentioned in the Talmud, where the principle of *kevod ha-briyot* is employed. See also Hershey Friedman, Human Dignity in Jewish Law, in:

academic.brooklyn.cuny.edu/economic/friedman/HumanDignityJewish.htm where he lists citations regarding human dignity in *Aggadic*, Talmudic and post-Talmudic *Halachic* literature.

⁹⁴ *Responsa Tzitz Eliezer* IX:51 ch.3.

⁹⁵ *ibid.*:

(י"ב) אשת איש שזנתה או נאנסה ונתעברה ואפילו מעכו"ם שאין הולד ממזר וחזרה בתשובה, מצדדים כמה מגדולי הפוס' להתיר לסדר הפלה אי משום בויגה ואי משום חלול השם ופגם ובזיון המשפחה [ואי משום נימוקים אחרים הנזכרים בפנים]

(ח) ברם מתקבל על הדעת לומר דעיקר נימוק היתר מה שיש להתיר בא"א שזנתה הוא מפני דנקרא זה לצורך אמו בכדי להצילה ע"כ מבושת ובזיון שנתחל ויהא מנת חלקה בהולדו לכל ימי חייה, והוי זה בדומה למה שלאחר מיכן כתב היעב"ץ לצדד אפילו הפלת ולד כשר לצורך גדול אפילו אינו משום פקו"נ אמו אלא להציל לה מרעתה שגורם לה כאב גדול, דאין לך צורך גדול וכאב גופני ורוחני גדול לאם השבה בתשובה יותר מזה שחטאת ולדה הממזר יעמוד חי נגדה תמיד, ופשוט ומוכן דאם נתיר משעם זה אזי יש להתיר גם כשהא"א נאנסה הדולד הרי הוא ממזר גם כשנוצר ע"י שנאנסה

⁹⁶ *Responsa Minchat Shlomo* I:7, s.v. *ve-nireh de-heny*.

eyes since it pushes off a rabbinic negative precept..."⁹⁷

Rambam addresses the judges instructing them to regard with gravity the notion of human dignity/respect since this concept suffices to offset a rabbinic level negative precept. Meiri, in a more positive manner states:

"Human dignity is a very dear (*chaviv*) concept. There is no quality that is as special as human dignity. An important principle was said: human dignity overrules all negative rabbinic precepts, and one even overrides such a precept in an active manner (*kum ve-asseh*)."⁹⁸

Summary and Implications

In the previous summary section we presented a number of positions that would seem to regard a non-defined colored tattoo as a rabbinic prohibition. The principle of human dignity employed at times to override a rabbinic prohibition should then be employed to override the rabbinic prohibition of tattooing a non-descript colored smudge. This, then, would theoretically permit the tattooing of an areola/nipple complex as the finale of reconstructive breast surgery.

V. Contemporary Issues Involving Tattooing

A case was brought to the Bet Din of Yerushalayim wherein a woman sued the cosmetician for financial compensation. The plaintiff had make-up tattooed on to her face and subsequently was made aware of the fact that it was a prohibited act. The cosmetician claimed that some authorities permit such tattooing.⁹⁹ The *halachists* who define the prohibition of tattooing in its minimalistic sense – the name of a deity or color in the form of letters – would not regard cosmetic tattooing as a Biblical *issur*. Therefore, tattooing eyebrows onto a woman who is

completely without, would not, according to the minimalistic position, be considered a Biblical prohibition. To be sure, such a procedure may be deemed a rabbinic *issur* and would have to be viewed within the context afforded rabbinic prohibitions. The *halachists* who maintain the maximalistic definition of tattooing – any colored smudge even when lasting for a long time (though not forever) would regard cosmetic tattooing as a Biblical prohibition. Whether these *halachists* would regard tattooing for corrective purposes (including scar concealment) outside the purview of a Biblical *issur* is questionable.

Two practical differences that exist between body art and cosmetic tattooing require mention as they may impact on the *halachic* status of tattooing. The needle used for body art tattooing punctures the skin forcing the ink to penetrate into the deeper layers of the dermis, whereas with cosmetic tattooing the needle raises the upper layers of the dermis and introduces the pigments under the skin in a less invasive and penetrating manner.¹⁰⁰ Rabbi Shraga acknowledges this distinction regarding depth of penetration but concludes that from a *halachic* perspective no distinction is to be made between cosmetic and body art tattooing based on depth penetration.¹⁰¹ From a practical perspective, though, a more superficial penetration of color is indeed a causative factor in a tattoo's lack of permanence. Rabbi Amsalem recognizes this distinction regarding penetration of color and maintains that the difference is significant enough to distinguish between body art and cosmetic tattooing.¹⁰²

An additional distinction between body art and cosmetic tattooing concerns the colored dyes used. The pigments used for cosmetic tattooing differ from traditional tattoo ink in that cosmetic

⁹⁷ Rambam, *Hilchot Sanhedrin* 24:10.

⁹⁸ *Beit ha-Bechirah le-Rabbenu ha-Meiri, Berachot*, Dickman edition, Jerusalem 1965, ch. 3, p. 65, s.v. *zeh bi'ur ha-Mishnah*.

⁹⁹ Op. cit. note 47.

¹⁰⁰ Personal communication by Dr. Linda Dixon, anesthesiologist by training and president of the American Academy of Micropigmentation (AAM). Additional information was provided by Juliet Verdi, licensed in applying permanent make-up via tattooing. Ms. Verdi services the Jewish community in Maryland.

¹⁰¹ Rabbi Baruch Shraga, *Responsa ve-Hayah ha-Olam*, Jerusalem 2003, *siman* 15, p. 164.

¹⁰² Rabbi Chayyim Amsalem, *Responsa Birkat Chayyim*, Jerusalem 1996, *Y"D siman* 20, *Ippur Kav'u'a*, p. 51ff.

tattooing ink typically consists of fine particles of inert pigment granules in a liquid suspension as opposed to the fully dissolved inks used for traditional tattooing. The particulate nature of this pigment suspension and the fact that most of the cosmetic tattooing pigments are "natural pigments" contribute to the non/(semi)-permanence of the tattoo. Cosmetic tattooing lasts from 1-5 years. Both the more superficial subdermal placement of the color and the nature of the pigments used yield a less permanent tattoo. Because of this fact certain organizations including the American Academy of Micro-pigmentation, a subsidiary of the International Academy of Micro-pigmentation call cosmetic tattooing by the term micro-pigmentation and not traditional tattooing.¹⁰³

Three Halachic Questions Involving Tattooing

1. A question was posed to Rabbi Batzri if it is permissible to tattoo eyebrows onto a woman who completely lacked eyebrow hair.¹⁰⁴ He summarizes the facts as follows:

a. Tattooing eyebrows introduces color into the skin without forming any letters. It is, according to some *halachists*, the formation of letters that constitutes the Biblical prohibition. Any non-letter tattoo is, therefore, rabbinically forbidden.¹⁰⁵

b. According to Ritva both Rif and Rosh maintain that the Biblical prohibition of tattooing is only applicable when writing the name of another deity. Any non-idolatrous tattoo is a rabbinic prohibition.¹⁰⁶

c. This case of tattooing eyebrows is parallel to the case of tattooing a writ of divorce onto the servant's hand. The person tattooing is exempt because the intent of the action was not to tattoo

but rather to create a writ of divorce.¹⁰⁷ It ought be regarded, as in the laws of Shabbat, as a *melachah she-ayna tzrichah le-gufah* (an action that when carried out for its usual purposes is regarded as a Biblical prohibition but, when carried out for non-conventional reasons may, according to some, be considered a rabbinic *issur*).

Based on his analysis, Rabbi Batzri is of the opinion that in this case tattooing eyebrows onto a woman who is missing eyebrows constitutes a rabbinic prohibition. He addresses the maximalistic positions of Rsh of Sens and Ra'avad who maintain that prohibition is already violated with a *roshem* – a tattooed colored smudge of any kind.¹⁰⁸ Rabbi Batzri states that even those *rishonim* would acknowledge that since the intention of the tattooing is not to benefit from the act itself (*melachah she-ayna tzrichah le-gufah*) but rather for the end result of looking normal by introducing eyebrows,¹⁰⁹ it is not a Biblical violation¹¹⁰ Having established that tattooing in this specific case is to be deemed a rabbinic prohibition and not of Biblical proportions Rabbi Batzri invokes the principle of *kevod ha-briyot*. He maintains that *kevod ha-briyot* should factor into the deliberations because tattooing eyebrows onto this woman would alleviate her sense of embarrassment by providing her with a more normal look.

¹⁰⁷ See pp. 53-54 and note 53 *supra*.

¹⁰⁸ See pp. 55-56 *supra*.

¹⁰⁹ Rabbi Gestetner disagrees with Rabbi Batzri's position and argues that the purpose of the tattooing is for the writing/coloring to be in place, that an aspect of beauty is attained is simply a side benefit. It is clear that Rabbi Batzri and Rabbi Gestetner perceive differently the concepts of intent and desired end result.

¹¹⁰ Rabbi Batzri bases himself on his understanding of Rema (*Shulchan Aruch, Y"D* 180:4) who states that branding a slave is initially *assur* but the person is not liable for the act. According to Rema the owner is exempt from liability because the intent was not for the act of tattooing but rather to prevent the slave from fleeing by branding the slave with the owner's name. The branding was the desired result of the tattooing and the tattooing was merely the method employed. *Get Pashut* (124:30) cited in *Minchat Chinnuch* 253:2 explains that a Biblical prohibition is violated when the desired effect of the tattooing is for the sake of the writing to be evident on the skin. Regarding the slave, the desired effect is to prevent the slave from fleeing and not for what is written. Therefore, there is no Biblical violation. *Get Pashut* parallels the laws of tattooing with the Shabbat laws according to Rabbi Shimon who maintains that if the intent of the presumed forbidden act is not for the *melachah* itself it is not a Biblical violation.

¹⁰³ See article by AAM, "Should Micropigmentation Professionals Drop the "Permanent" out of Permanent Makeup?" www.micropigmentation.org

¹⁰⁴ Rabbi Ezra Batzri, "*Ka'aku'a be-makom Gabot ha-Eynayim*", *Techumin* 10 (1989), pp. 282-288.

¹⁰⁵ See pp. 52-56 *supra*.

¹⁰⁶ See pp. 55-56 *supra*.

Rabbi Batzri does not address the question of the permanent quality of the tattoo. He bases his *pesak* on certain *halachic* issues establishing that the tattooing process, in this case, is a rabbinic *issur* thereby enabling him to introduce the concept of *kevod ha-briyot* which then overrules the rabbinic prohibition, as well.

2. Another question posed involving tattooing concerns the issue of "permanent" (semi-permanent) make-up. Rabbi Shraga was asked regarding tattooed make-up.¹¹¹ Rabbi Shraga maintains that it is categorically prohibited and states that in a verbal communication with: Rabbi Yosef, Rabbi Elyashiv, Rabbi Fischer, Rabbi Kanievsky et al., all support his position and prohibit applying make-up by tattooing. *Nishmat Avraham* explains that there exists a distinction between cosmetic tattooing for beautification and the question posed to Rabbi Batzri wherein the tattooing is an attempt to ameliorate a disfigurement. *Nishmat Avraham* makes this distinction based on the position of Rabbi Auerbach who permits the removal or repairing of a scar or blemish.¹¹²

Rabbi Yosef, although initially counted amongst the *halachists* who prohibited tattooing make-up, recently re-evaluated his position based on his newly acquired information about the needle used.¹¹³ He maintains that according to his information since the color penetrates only the upper layers of the dermis, unlike a regular tattooing needle that usually penetrates past, at least, two layers of skin, make-up applied in this fashion lasts only 2-4 years. From a *halachic* perspective, according to some *halachic* authorities, tattooed make-up would then not be considered a permanent tattoo.¹¹⁴ Rabbi Yosef

continues to substantiate his position of leniency in line with Rabbi Batzri's position. Since there is no letter formed and there is no intent to idolatry Rabbi Yosef maintains that the application of this type of make-up is not a Biblical prohibition. Rabbi Yosef adds that along with Rif and Rosh, Rambam may also be of the opinion that Biblical violation occurs only when tattooing for idolatrous purposes.¹¹⁵ Accordingly, the three pillars of *hora'ah* are the basis to suggest that applying make-up in this fashion may be permitted as long as the caveat regarding the depth of skin penetration is observed. Rabbi Yosef cites Rabbi Amsalem and Rabbi Nebenzahl as authorities permitting tattooed make-up even for beauty reasons alone. Rabbi Yosef states, (seemingly in a reluctant tone) that there is *halachic* support to permit tattooed make-up for beauty reasons alone. Rabbi Nebenzahl permits the process because there is no letter formed and the color is not permanent.¹¹⁶

Rabbi Amsalem is of the opinion that the process of creating non (semi) permanent make-up is not comparable to the process of body art tattooing and is therefore not prohibited. Rabbi Amsalem maintains that tattooing make-up to darken the skin where it normally would be colored, as with eyebrows, is not discernable as tattooed make-up and therefore is not considered

opinion that even semi-permanent make-up is a Biblical *issur*. Rabbi Shneebalg is inclined to consider semi-permanent cosmetic tattooing as a rabbinic prohibition based on his understanding of Rashi, who states that a tattoo is prohibited if it is *le-olam* (forever). Rabbi Shneebalg understands *le-olam* literally, hence his *halachic* perspective on semi-permanent cosmetic tattooing.

¹¹⁵ See note 62 *supra*.

¹¹⁶ Rabbi Nebenzahl's final position is unclear. Rabbi Shraga cites Rabbi Nebenzahl in his article in *Techumin* 18 published in 1998. Rabbi Nebenzahl is cited as permitting tattooed make-up even when the sole reason is beauty. Rabbi Shraga subsequently published his Responsa *ve-Hayah ha-Olam* in 2003. In a response addressing the question of tattooed make-up, on p. 161, Rabbi Shraga cites Rabbi Nebenzahl as permitting tattooed make-up. However, on p. 162, upon further analysis impacting on Rabbi Nebenzahl's permissive position, Rabbi Shraga then states, "ולאחר זמן התקשר אלי בטלפון והסכים עמנו לאסור". Rabbi Yosef, in his 3rd volume of *Taharat ha-Bayit*, published in 2006, cites Rabbi Nebenzahl's permissive position and notes his source as Rabbi Shraga's Responsa *ve-Hayah ha-Olam* p. 161. It is a curiosity that Rabbi Yosef does not cite Rabbi Nebenzahl's subsequent position which seems to prohibit, as is recorded on p. 162 of Responsa *ve-Hayah ha-Olam*.

¹¹¹ Rabbi Baruch Shraga, "Ippur Kav'u a u-Ketovet Ka'ak'a", *Techumin* 18 (1998), pp. 110-114.

¹¹² Rabbi Avraham S. Avraham *Nishmat Avraham*, Y"D 180:3.

¹¹³ Rabbi Ovadiah Yosef, *Taharat ha-Bayit im Mishmeret ha-Bayit*, Jerusalem 2006, III, pp. 33-34. Rabbi Yehuda Henkin has independently used similar reasoning regarding tattooing when responding to questions posed to Nishmat's Women's Health and Halacha Website (www.yoatzot.org).

¹¹⁴ Rabbi Gestetner maintains that three years constitutes a long time, thereby indicating *halachic* permanence; he is therefore of the

a prohibited tattoo. He also states that such make-up has no pictorial form and even someone concerned with *mar'it ayin* would permit this procedure. Additionally since the needle simply inserts the dye and does not tear the skin there is no *halachic* writing nor skin dyeing. Rabbi Amsalem suggests that in such a case there is even no rabbinic prohibition.¹¹⁷

Rabbi Yosef proceeds to address the case of a person with a scar who is embarrassed by its presence. Rabbi Yosef states that if the tattooed make-up matches the skin tone one may be lenient based on the principle of *kevod ha-briyot*. and the *Tosafot*.¹¹⁸ In the case of a scar Rabbi Yosef introduces the concept of "*roshem*" (non specific coloring) that matches the original skin tones along with the principle of *kevod ha-briyot* to support a lenient *pesak* regarding tattooing. This concept is reminiscent of Rabbi Amsalem's position that when emphasizing the normally dark color of the skin (eyebrows), albeit through tattooing, it is not comparable to tattooing and therefore also not comparable *halachically*, because another person would look and assume that the color was applied with regular make-up. Rabbi Yosef ends his discussion by stating, "to conceal a scar and to complete eyebrows one should even initially be lenient".¹¹⁹

3. The final case concerns nipple and areola tattooing as the finale of reconstructive breast surgery. A responsum and a more detailed study were penned at the Schlesinger Institute. Rabbi Dr. Halperin writes that all *poskim* prohibit tattooing non (semi) permanent make-up and refers the reader to Rabbi Shraga's article, "*Ippur Kav'u a u-Ketovet Ka'ak'a*". Rabbi Dr. Halperin continues his responsum and points out that in spite of the *pesak halacha* regarding non (semi) permanent make-up a woman who underwent a mastectomy and will undergo reconstructive breast surgery in order to

heal, such a woman may rely on the *poskim* cited in Rabbi Batzri's article and undergo breast reconstruction with all that it entails.¹²⁰

The more detailed study is more extensive in describing the actual process of reconstructive surgery and also acknowledges that reconstruction is advantageous in that it helps a woman in her recovery, emotionally improves her self-image and may also help in the inter-personal relationship between husband and wife. The analysis includes the opinion that in difficult cases, i.e. a young woman, wherein the psychological factors impact on a complete recovery, it is then permitted to tattoo. It is, however, preferable that a non-Jew perform the tattooing and that the woman be fully anesthetized to prevent compliance in the process.¹²¹ This *pesak* is based on a letter penned by Rabbi Zilberstein in the name of Rabbi Elyashiv. Whereas Rabbi Elyashiv prohibits tattooing non (semi) permanent make-up, in this case, Rabbi Elyashiv responds differently. Rabbi Elyashiv's position is based on the *Me'il Tzedakah*,¹²² an *achron* who proposes that tattooing letters is what constitutes the Biblical prohibition of tattooing. In the absence of letters, according to Rabbi Elyashiv, *in this specific case*, it is not even a rabbinic prohibition. Based on Rabbi Elyashiv's position and, considering the risks associated with general anesthesia the stipulation requiring that the woman be fully anesthetized may be questioned. So too, the caveat of a "young woman" since a woman at any age may find it difficult to return to her previous healthful state when constantly reminded of the traumatic event she experienced. In an article published in the *New England Journal of Medicine*, Dr. Cordeiro states, without specifying any age limit:

"...the most important consequence of mastectomy is the psychosocial effect of the physical and aesthetic deformity which can

¹¹⁷ op. cit. Responsa *Birkat Chayyim*.

¹¹⁸ op. cit. *Taharat ha-Bayit*, III p. 34.

¹¹⁹ *ibid.* נראה לי שאף העושה כן אפילו רק לגוי וליופי, יש לה על מה שתסמוך, ואין מזניחין אותה. ומיהו לכסות ולטשטש צלקת ולהשלים צורת שערות בגבות העין יש להורות להקל אף לכתחילה.

¹²⁰ Schlesinger Institute:

<http://www.medethics.org.il/db/showQ.asp?ID=4665,1146>

¹²¹ Schlesinger Institute:

<http://www.medethics.org.il/articles/tora/subject92.asp>

¹²² See p. 56 *supra*.

include anxiety, depression and negative effects on body image and on sexual function. Studies suggest that breast reconstruction restores body image; improves vitality, femininity and sexuality; and positively affects the patient's sense of well-being and quality of life..."¹²³

Conclusions

The common denominator underlying these three cases is that one need not necessarily endure psychological pain when it may be *halachically* possible to alleviate some of the suffering. The benefits of breast reconstructive surgery for a woman following a mastectomy are multifaceted. Accordingly, most *halachists* would support this form of plastic surgery in spite of the risk involved in this procedure especially to alleviate the psychological pain that she will endure if left without a reconstructed breast. Recent responsa support reconstruction including the tattooing of the nipple and areola complex. Even if subscribing to the maximalistic position of some *rishonim* (wherein even a smudge constitutes a Biblical prohibition), the *halachic* notion that original skin tone may not necessarily constitute the prohibition of tattooing, introduced by Rabbi Amsalem and Rabbi Yosef, is a novel and *halachically* liberating concept. While it is true that a mastectomy remains in one's private domain, not evident to public scrutiny, the issues impacting on a woman with an external scar remain the same for a woman after a mastectomy i.e. self-image, inter-personal relations and a desire to appear normal. The *halachic* system recognizes human trauma and psychological difficulty as fundamental reasons for attempting to permit, when *halachically* possible, what is seemingly prohibited, thereby emphasizing the care and respect due to each human being.

International Responsa Project

Subject: Fertility

Answered by: Rabbi Meir Orlian

Is a woman allowed to put herself through surgery for the sake of her husband's fulfilment of Pru Urvu? Why?

What if she is single and faces radiation/chemotherapy – is she allowed to undergo oocyte retrieval procedures in order to freeze her eggs?

Shalom,

A woman is permitted to put herself through surgery for the sake of having children with her husband if the risk is not high, for a number of reasons: **First**, the woman also benefits from having children. **Second**, although she does not have a formal obligation of *Pru Ur'vu*, according to many authorities she is included in the human responsibility to populate the world (*shevet*) and fulfils a mitzvah by bearing children. (*Tosfot Gittin* 41b s.v. lo; *Otzar Haposkim, Even Ha'ezer* 1:13:84) **Thirdly**, she has a responsibility to enable her husband to fulfil *mitzvot* according to her ability, certainly in the area of fertility.

If she is single and faces radiation/chemo, it is recommended that she undergo oocyte retrieval to allow her to conceive with her own eggs.

All the best,

¹²³ Peter Cordeiro, "Breast Reconstruction after Surgery for Breast Cancer", *New England Journal of Medicine*, Oct. 9, 2008, vol. 359: num. 15:1590-1601) p. 1591.