

# *Metzitzah b'Peh - Paradigm for Halachic Risk Taking*<sup>1</sup>

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While the mitzvah of *brit milah* may be kept by a larger percentage of world Jewry than any other mitzvah, it does not preclude it from controversy, the most recent of which centered on the practice of *metzitzah b'peh*. This traditional third step in the *brit milah* process in which blood is orally suctioned from the wound, is admittedly unfamiliar to many. In the past few years, a number of babies have contracted the herpes virus (HSV-1) shortly after circumcisions that included *metzitzah b'peh*, and controversy arose as to whether the virus was transmitted through the *metzitzah* procedure. The controversy that has made headlines recently with the herpes virus, made similar headlines 20 years ago with HIV and was similarly newsworthy in the 19th century when some questioned the association between *metzitzah* and various illnesses. Today we know that a *mohel* could never transmit HIV to a child, and the chances of a child transmitting to the *mohel* are in fact quite minimal – the risk is now understood to be far less than in the past.<sup>2</sup>

The forthcoming analysis will focus on three issues: (1) What level of risk must (or may) one take upon himself in performing *mitzvot*? (2) Does

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halacha view all risks equally? Is there some minimal threshold that must be reached for the risk to become relevant? (3) How does halacha view competing risks? When can one risk outweigh the next?

## **I. What is *metzitzah b'peh* and why perform it at all?**

Three components of *brit milah* are enumerated in the Mishna (*Shabbat* 19:2), explaining that the requirements of circumcision on Shabbat is no different from that during the week: “One may perform all actions necessary for circumcision on Shabbat: *mohalin* (cutting and removing the foreskin), *por'in* (folding back the underlying membrane) *u-motzetzin* (sucking blood from the wound). As such, it

would appear that *metzitzah* is part of the mitzvah, similar to the other two actions with which it is grouped, namely, *milah* and *peri'ah*. However, while the Mishna (19:6) states that without *peri'ah*, a circumcision is invalid, it makes no such claim regarding *metzitzah*.<sup>3</sup> On the other hand, the Gemara (*Shabbat* 133b) quotes Rav Papa saying that a *mohel* who does not perform *metzitzah* creates a danger (*sakkanah*) and we remove him from his position.

1. A shortened version of this article was published in *The Journal of Halacha and Contemporary Society* 49, 2005. The full version is being first published here with the editor's full permission.

2. There are no documented cases of HIV transmission through saliva (assuming that the *mohel* does not have a bleeding oral lesion). The risk of transmitting HIV through the digestive tract are reported to be quite minimal – especially when considering the fact that the blood is diluted in wine and then immediately expelled.

3. See R. Y. B. Goldberger (*Brit Kerutah li-Sefatayim* (Brooklyn, NY: 1990), 104) however, where he cites the *Tzofnat Pa'aneach* and R. Moshe Mordechai Epstein (*rosh yeshivah* of Slobodka) who in fact believe that without *metzitzah*, the circumcision is invalid.

From the days of the Ran and throughout the generations, *posekim* have analyzed the nature of *metzitzah* and generally understood it in one of two ways: It is either meant as a therapy, solely to prevent an impending danger (*sakkanah*) to the child, or aside from the therapeutic benefit, there is additionally some element of mitzvah as well.<sup>4</sup> Based upon how the obligation is viewed, *posekim* have different opinions as to whether to allow a change from traditional *metzitzah b'peh*, and if so, how and when.<sup>5</sup> The requirement for *metzitzah b'peh* despite a potential danger seems to hinge upon this debate. For the many *posekim* who take the former view that *metzitzah* was instituted solely as a medical therapeutic practice (and therefore not a *mitzvah*), there seems to be no reason to continue with *metzitzah b'peh* today, when performing *metzitzah* may entail a greater potential medical risk than abstaining from its performance.<sup>6,7</sup> Moreover, even for those *posekim* who view *metzitzah* specifically *b'peh* as being an element of mitzvah and part of Jewish heritage, there are a great many *posekim* who explain that applying oral suction via a tube (usually an inverted syringe) is equivalent to performing *metzitzah* directly *b'peh*. Using such a tube would completely prevent transmission of any pathogen from the *mohel* to the child.

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*Why specifically use the mouth?*

The very question is relevant only for those *posekim* who are of the opinion that *metzitzah* is an integral part of the *milah* process (whether as a *halacha le-Moshe mi-Sinai* or otherwise) and that it must specifically be performed by direct oral suction.<sup>8</sup> The argument made for direct *metzitzah b'peh* usually takes one of 4 forms: 1. There is a halacha le-Moshe mi-Sinai that *metzitzah* must be specifically performed in this way (*Shu"t Maharam Shick* Y.D. 245);<sup>9</sup> 2. Kabbalistic rationales having to do with tikkun, a correction, or gematria, numerical value of numbers and their hidden meaning (Chida); 3. Oral suction is the only effective means of performing *metzitzah*, since using a tube forms an ineffective suction<sup>10</sup> and might be considered a *bizuy* (denigration) *ha-mitzvah*.<sup>11</sup> 4. The need to

4. *Hiddushei ha-Ran, Shabbat* 132b.

5. Techniques for performing *metzitzah* without the mouth include using cotton wool or gauze with or without wine, using a vacuum-like device, or most commonly, using a wide tube or inverted syringe that can form an airtight seal against the baby's skin.

6. In 1888 the Orthodox Jewish community of Frankfurt issued a statement allowing *metzitzah* using a glass tube. This statement was signed by R. S. R. Hirsch (*Shu"t Shemesh Marpeh* 55) and agreed to by Rabbi Yitzchak Elchanan Spector and Rabbi E. Hildesheimer. R. Chayim Ozer Grodzinski, R. Kook and others have also written response allowing for use of the glass tube and it is frequently quoted that R. Chayim Soloveitchik insisted on using a tube as well. Recently, the Rabbinical Council of America issued a statement saying that "the normative halacha undoubtedly permits [suction generated by the mouth using a tube] ... and that it is proper for *mohalim* to conduct themselves in this way given the health issues involved [with *metzitzah b'peh*]." For a listing of these and other sources, see *Sefer ha-Brit* in the addendum on p. 222

7. However, please see the position of R. Moshe Feinstein related in section B (V) below.

8. Following an attack on the practice throughout the 19<sup>th</sup> century, a fierce debate erupted and continues to this very day regarding the necessity of direct oral contact. The *Sedei Chemed* (vol. 8 *Kuntres ha-Metzitzah*) cites a proclamation signed by over 42 rabbis proclaiming that *metzitzah* may only be performed by direct oral contact and not via a tube. Closer to our times, after the outbreak of the AIDS epidemic, a similar proclamation was signed by many of the *gedolim* of America, Israel and worldwide prohibiting the use of a tube (*Brit Kerutah li-Sefatayim*, 108). It is important to note, that contrary to popular assumption, many of the signatories are not of Hassidic background (i.e., R. Avrohom Pam, R. Elya Svei, R. Mordechai Gifter and R. Shlomo Zalman Auerbach). While it is abundantly clear that the historical circumstances surrounding the original controversies were far different than the current reality, this article will not address that complex area and the halachic conclusions arrived at will be taken at their face value.

9. Also see *Shu"t Yehudah Ya'aleh* (Assad) Y.D. 1:248.

10. The Rambam (*Milah* 2:2) states that *metzitzah* is meant to suction blood from *ha-mekomot ha-rechokim* (the distant places), and while he does not explain further, these *poskim* understand that the *mohel* must create a vacuum around the wound to accomplish this task.

11. Based on *Pesachim* 57b, relaying the story that a cry [among others] was heard in the *azarah*: "Take out Yisachar *Ish Kefar Barkai*, who honors himself and disgraces the *kodshim*" as he would wrap silk on his hands and perform the service (*avodah*)." Rashi (s.v. *karich yadei*) explains that wearing gloves creates a *hatzitzah* (separation between the *shochet* and the animal) and is also a *bizayon ha-mitzvah*. It is beyond the scope of this article to analyze the scope of *bizuy ha-mitvah*. For further analysis see *Pitchei Teshvuah* (Y.D. 271:19), *Birkei Yosef* (Y.D. 271) and *Iggerot Moshe* (Y.D. 2:16).

maintain the unchanged integrity of revered traditions, *minhag Yisrael*.

Those *posekim* who disagree, argue about the three rationales. Many, even amongst those *posekim* prohibiting the use of a tube, discount the Maharam Schick's contention that *metzitzah b'peh* is derived from a *halacha le-Moshe mi-Sinai*. Furthermore, the role of kabbalistic sources in shaping normative halacha is a contentious matter and is subject to much halachic discussion.<sup>12</sup> Third, these *posekim* contend that using a tube for hygienic reasons in no way represents a *bizayon* since its sole purpose to protect both the *mohel* and the baby from any harm<sup>13</sup> and that furthermore, that using a tube can indeed provide effective suction, when placed correctly.<sup>14</sup>

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## II. Medical facts – Herpes

There are two common subtypes of the herpes simplex virus: HSV-1 and HSV-2. HSV-1 most commonly infects and resides in the oral cavity whereas HSV-2 is associated with the genital area, though each type can be found in both regions. Viral spread of infection occurs via infected salivary secretions during close contact with mucous membranes, with the recent controversy stemming from genital HSV-1 infection in children who underwent *metzitzah b'peh*. Successful transmission results in either a symptomatic mucocutaneous infection in the mouth (cold sores) or an asymptomatic subclinical infection, as the virus hibernates behind the mouth in the trigeminal ganglion, where it can remain for life in

a phase known as latency. Subsequently, reactivation of the virus into the oral cavity can occur at anytime or not at all, triggered by physical or emotional stress, fever, or even ultraviolet light. However, it most commonly occurs in the complete absence of symptoms in a select group of individuals with variable frequency.<sup>15</sup>

HSV-1 infections in the adult are frequently asymptomatic, but even with clinical symptoms, are rarely a serious systemic illnesses.<sup>16</sup> In contrast, HSV-1 infection in newborn usually develops in one of three patterns, which occur with roughly equal frequency: (1) Localized to the skin, eyes and mouth; (2) localized central nervous system disease, or encephalitis (15% mortality); and (3) disseminated disease involving multiple organs (57% mortality).<sup>17</sup> HSV infection of the newborn even just 25 years ago was associated with a case fatality rate of 60%;<sup>18</sup> today however, medications are available to alter the course of the infection if caught at an early enough stage.<sup>19</sup>

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12. See *Shu"t Yabi'a Omer* (O.C. 2:25:14; Y.D. 2:20:4; E.H. 2:7:3; Y.D. 3:13:6; O.C. 4:2:11; O.C. 7:7:3).

13. See *Yalkut Yosef* (*Issur ve-Heter* 1, 6) and *Iggerot Moshe* (Y.D. 2:16) who explain that the Gemara in *Pesachim* does not refer to a person who wears gloves as a means of hygienic protection..

14. The writers have indeed confirmed this last point with several *mohalim*. One was confident that by using a tube he created an airtight vacuum at least 95% of the time while another was confident 100% of the time.

15. The frequency ranges from once per month to twice per year in infected individuals. Klein R, "Epidemiology of herpes simplex virus type 1 infection," [www.uptodate.com](http://www.uptodate.com); *The Red Book, American Academy of Pediatrics report of the committee on Infectious Disease*, 25<sup>th</sup> edition, 309-319

16. These symptoms include oral or perioral lesions, ocular infections, non-genital skin lesions and genital skin or mucous membrane lesions.

17. Whitley R, "Predictors of morbidity and mortality in neonates with herpes simplex virus infections," The NIAAD Collaborative Antiviral Study Group, *New England Journal of Medicine* 324 (1991):450-4.

18. Committee on Fetus and Newborn, Committee on Infectious Diseases, "Perinatal Herpes Simplex Virus Infection," *Pediatrics* 66 (1980):1.

19. High dose Acyclovir therapy was associated with a trend toward an increased likelihood of the infant being developmentally normal at 12 months of age. However, less than 30 percent of patients were developmentally normal and approximately 60 percent had moderate to severe disability (Kimberlin DW, "Safety and efficacy of high-dose intravenous acyclovir in the management of neonatal herpes simplex virus infections," *Pediatrics* 108(2001):230-8.

asymptomatic individuals. These people harbor the virus in its latent state and experience asymptomatic shedding of viral particles into their mouths throughout their lives. Such shedding occurs on 1% of days among previously symptomatic 9% of adults and 5-8% of children were asymptomatic salivary excretors of HSV-1.<sup>20</sup> Only about a third of seropositive individuals suffer from recurrent cold sores. The shed virus can be infectious and has been recorded as persisting for an average of 1.2 days for a healthy control group.<sup>21</sup>

HSV-1 infection is quite common. Data from 1986 showed that 40-63% of all people in the United States were seropositive for HSV-1. Seropositivity in this context means having antibodies in the blood against some part of HSV-1 and is an indication that the particular host has previously encountered the virus which now likely resides within that host in latency; more recent data suggest the incidence may be as high as 70%.<sup>22</sup> A 2005 Israeli paper found the unadjusted HSV-1 seroprevalence to be 59.8%.<sup>23</sup> These numbers vary so greatly because of their reliance on different types of tests to determine infection rates. Recently, with the advent of technologies able to detect rather minute amounts of virus in oral secretions, it remains questionable whether such amounts are infectious to others.

To put these numbers into perspective: In a room of 500 people, 300 would have the antibody in their bloodstream and therefore the virus in

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latency. 100 would have occasional cold sores associated with the virus. On any given day 1 person would have detectable levels of virus in his mouth shedding asymptotically. If that one person were a *mohel* performing *metzitzah b'peh* and transmitted a viable infectious virus (though he had saliva and wine in his mouth as he made only momentary unidirectional contact), which did not simply hibernate in latency and cause the usual subclinical asymptomatic carrier state in the child, but rather overwhelmed the child's immune system (60% of children should have protective antibodies), then 2/3 of such cases pose a combined 24% mortality which could potentially be reduced by early intervention with antiviral medication. The risk therefore, is indeed quite minimal. Moreover, there is some question as to the applicability of the quoted rates of asymptomatic shedding of virus amongst individuals who, although infected, have never been clinically symptomatic.<sup>24</sup>

Currently, the medical literature is limited to three articles of isolated case reports demonstrating an association between the practice of *metzitzah b'peh* and infection.<sup>25,26</sup> Retrospective case reports demonstrating association, border on speculation and do not prove causation. Indeed, the HSV-1 virus is known to be quite hardy,<sup>27</sup> but it would be difficult to assess what role, if any,

24. Slacks SL, "HSV Shedding," *Antiviral Research* 63 (2004):S19-26.

25. Rubin LG, "Cutaneous neonatal herpes simplex infection associated with ritual circumcision," *Journal of Pediatric Infectious Disease* 19 (2000):266-8; Distel R, "Primary genital herpes simplex infection associated with Jewish ritual circumcision," *Journal of the Israel Medical Association* 5 (2003):893-4; Gesundheit B, "Neonatal genital herpes simplex virus type 1 infection after Jewish ritual circumcision: modern medicine and religious tradition," *Pediatrics* 114 (2004):e259-63.

26. Since HSV is known to incorporate itself into the host genome, a DNA analysis between an asymptotically infected *mohel* and an affected child could show that they are indeed one and the same strain. Such a test would greatly increase the aforementioned association, but has not been performed (or is simply not part of the public record).

27. HSV remains viable for several hours on skin, cloth or on plastic. (Turner R, "Shedding and survival of herpes simplex virus from fever blisters," *Pediatrics* 70 (1982):547-9). HSV-1 virions have been recovered for up to 2 hours from door handles on which HSV-1 in saliva and in water had been inoculated (Bardell D, "Survival of herpes simplex virus type 1 on some frequently touched objects in the home and public buildings," *Microbios.* 63 (1990):145-50).

20. Corey L, "Infections with herpes simplex viruses," *New England Journal of Medicine* 314 (1986):686.

21. Scott DA, "Oral shedding of herpes simplex virus type 1: a review," *Journal of Oral Pathology & Medicine* 26 (1997):441-7.

22. Schillinger JA, "National seroprevalence and trends in herpes simplex virus type 1 in the United States, 1976-1994," *Sexual Transmission of Disease*, 12 (2004):753-60.

23. Also noteworthy was that the prevalence increased with age in both genders. Davidovici BB, "Seroprevalence of herpes simplex virus 1 and 2 and correlates of infection in Israel," *Journal of Infection* (2005):1-7.

salivary inhibitors of HSV-1<sup>28</sup> or wine with alcohol as an antiseptic (as is taken into the mouth of the *mohel* prior to *metzitzah*) may play in prevention of person-to-person transmission. However, if a host harbors an active cold sore the risk of transmission is known to be elevated. We will therefore assume that all *mohalim* will follow the *pesak* of R. Yosef Shalom Elyashiv and refrain from performing *metzitzah b'peh* if they have an exposed oral lesion or are knowingly symptomatically shedding virus.

This is not the proper forum to debate the merits of these scientific studies. It is important to note however, that there are still many unanswered questions and that many of these articles are not conclusive and may contain several epidemiological flaws. Nonetheless, the rest of this article will assume that there may exist some potential, as yet to be determined, risk of HSV transmission through *metzitzah b'peh*, with the understanding that such a risk is considered questionable (*safek sakkanah*).

### III. Halachic Analysis

When properly employed, suction generated by the mouth using a sterile tube conveys no risk of infectious disease traveling from *mohel* to child or child to *mohel*, yet some level of risk does exist in performing direct *metzitzah b'peh*. All of the subsequent analysis assumes that a *mohel* who knows that he is infectious, will not perform *metzitzah b'peh* for fear of endangering the child. Similarly, it assumes that in accordance with the *pesak* of R. Yosef Shalom Elyashiv, a *mohel* with an exposed oral lesion, will not perform *metzitzah b'peh* either, even without any other systemic symptoms or awareness of illness. The only cases to be analyzed are those involving seemingly healthy

*mohalim* who may nonetheless be asymptomatic carriers of infectious disease. According to the great number of *posekim* who feel that *metzitzah* need not require direct oral contact, there seems to be no reason to continue to practice this method in the face of any danger whatsoever. *The Shulchan Aruch* (C.M. 427:10, Y.D. 116:5) records the prohibition against actively harming oneself and therefore, the question arises only for the previously mentioned *posekim* who argue that *metzitzah* is integral to the *milah* and additionally must be [according to some only optimally] performed by direct oral contact. How and why this may be allowed will be presented below.

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**A. What level of risk must one take upon himself in performing *mitzvot*?**

Must a person literally “make himself sick,” so that he can perform a *mitzvah*? How far does preserving one’s health go in exempting a person from performing *mitzvot*? This issue arises a number of times in halachic discussions, in the unfortunate case where a person must choose whether to fulfill a certain *mitzvah* and in doing so, become physically uncomfortable or even worse, seriously ill.

a. Saving a friend’s life

The issue in question is reflected in the classic case of whether or not one may (or must) save a friend’s life from certain death when the rescue itself entails uncertainty to the life of the rescuer. Rescuing a friend from danger is a component of the *mitzvah* of *va-hasheivota lo* – “and you shall return to him”<sup>29</sup> – and the broader question really hinges upon the risk that one must take in performing this *mitzvah*.<sup>30</sup> The *Beit Yosef* (C.M.

28. Saliva contains factors, in addition to anti-HSV immunoglobulins, that neutralize HSV and may indirectly contribute to the control of recurrent Herpes labialis (Valimaa H, “Salivary defense factors in herpes simplex virus infection,” *Journal of Dental Research*, 81 (2002):416-21).

29. While the simple meaning of this verse refers to returning lost objects, the Gemara *Sanhedrin* 73a explains that this *mitzvah* also includes “returning” a friend’s health, when it may be at risk of being “lost.”

30. It must be noted however, that the prohibition of “*lo ta’amod al dam rei’echa*” – loosely translated as “you shall not stand idly by

426) cites the Hagahot Maimoni (*Rotzeach* 1:14) quoting an unreferenced *Yerushalmi* that a person indeed must enter a situation of *safek sakkanah* (uncertain danger) to save his fellow from a *vaday sakkanah* (certain danger).<sup>31</sup> Although the *Beit Yosef* quotes no other sources on this issue, he makes no mention of this requirement in the *Shulchan Aruch*. The *Sema* (426:2) explains that since this halacha does not appear in the *Rif*, *Rosh*, *Rambam* or the *Tur*, the *Beit Yosef* concluded that this stance, while noble, is not to be considered normative.

The *Radbaz* (*Shu"t Radbaz* 3:627) takes this position somewhat further when asked about a rather terrible incident where a non-Jew threatened to kill a Jew unless the victim's friend allowed his hand to be cut off or his eye gouged. Even assuming that severing a limb entails no life threatening circumstance, the *Radbaz* argues that such an action on the part of the friend is not required but is nonetheless considered a righteous deed. The *Radbaz* argues that since the Torah's precepts are described as "*darchei no'am*" – ways of pleasantness – it is impossible to assume that the Torah would require a person to have his eyes gouged or his arm severed to save somebody else's life.<sup>32</sup> The *Radbaz*

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is clear however, that if the amputations involves a risk to life (as it probably did in the early sixteenth century before the advent of antibiotics and sterile technique), then one who goes through with such an action is a *hassid shoteh* – a deranged pious person.<sup>33</sup> Many *posekim* derive from this responsum that normative halacha does not require a person to risk his own life to save his friend's, even when the risk to the rescuer is only possible (*safek*) while the risk to the friend is certain (*vaday*).<sup>34</sup>

#### b. "Three cardinal sins"

There are well known instances however, where one is obligated to risk one's life or even give up one's life so as not to violate certain *mitzvot*, namely the "three cardinal sins" of murder, idolatry and forbidden sexual relations (*Shulchan Aruch* Y.D. 157:1). It must be noted that even the very formulation of this category of *yehareg ve-al ya'avur* – be killed rather than violating the prohibition, applies specifically to passively refraining from performing these prohibitions. Halacha does not demand that a person give up his life in the active performance of a *mitzvah*. Regarding such instances the *Gemara* (*Sanhedrin* 74a) explains that the Torah (*Va-Yikra* 18; 5) requires "*ve-hai ba-*

while your friend's life is in danger" – is also operative in this context. As will be explained later, more is required of a person in avoiding violating a prohibition than in performing a positive *mitzvah*. While this might be a rationale for the *Yerushalmi*'s position, the *Beit Yosef* does not suggest it.

31. The *Beit Yosef* then quotes the familiar *Gemara* in *Sandhedrin* 37a that a person who saves the life of one Israelite is considered to have saved (established) the entire world, with no further comment. Perhaps this is meant as his justification of the *Yerushalmi* – the calculus must not be risking one's life to save another's from certain death, but rather risking one's life to save the entire world. The halacha in other areas recognizes a difference between saving the life of an individual versus saving the lives of many people. See *Yerushalmi Terumot* (8:4) where the *Gemara* discusses giving up one person's life to save an entire city.
32. The *Radbaz* seemingly assumes that by the three cardinal sins that one must give up his life to fulfill, the Torah must specifically mandate that by these sins but not others, even *darchei no'am* has limits.

33. It is important to also see the *Radbaz*'s other [often overlooked] responsum (5:218) where he states that a person is obligated to risk his life to save his fellow's when the risk to the rescuer is less than 50%. This responsum clearly limits the applicability of the former principle.

34. See *Tzitz Eliezer* (12:57; 13:100) and *Yabi'a Omer* (H.M. 9:12) and the sources cited therein. It is possible to say however, that the *Radbaz* did not mean to establish a general rule by all *mitzvot*, but rather dealt only with the specific case in front of him. Perhaps the *Radbaz* felt that it was a violation of *darchei no'am* principle to purposely not set a very dangerous precedent of Jews being threatened with sacrificing their limbs to save their fellows from imminent death. Alternatively, he felt that *darchei no'am* would prohibit a person from risking his life for a seemingly frivolous purpose – namely to prevent a assailant from harming another person. Perhaps however, for the constructive purpose of positively saving a friend's life, the *Radbaz* may have indeed felt that such actions were permitted and perhaps required. Furthermore, see *Shu"t Afarkesta de-Anyah* (H.M. 4:320) who argues that other *posekim* do not necessarily arrive at the same conclusion.

*hem ve-lo she-yamut bahem*” – [these are the *mitzvot* that] one should live through [by] them and not die by them. However, certain *posekim* maintain that while halacha does not require one to risk one’s life to fulfill a positive commandment, certain people may nonetheless elect to do so. *Tzaddikim* or other Torah leaders may take upon themselves a life-threatening danger when they feel that performing the *mitzvah* despite this risk will have some benefit to the greater community, especially when death is not a certainty.<sup>35</sup> This permission is not widely accepted nor extended to the general public and as such has limited applicability with regard to *metzitzah b’peh*. It seems clear therefore, that a person need not accept a risk of death in performing *mitzvot*.

### c. Dwelling in a *sukkah*

There are other, more mundane applications of this question as well. The Gemara already provides a model for exempting a person from performing a *mitzvah* based on level of pain or discomfort that he must endure. *Sukkah* 26a relates that a person who is *mitzta’er* (pained), is exempt from dwelling (eating, sleeping) in the *Sukkah*.<sup>36</sup> The *Shulchan Aruch* (640:4) limits this exemption and explains

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that it does not apply on the first night of the festival. The *Acharonim* debate whether the exemption of *mitzta’er* is a model to be used throughout halacha even though it is only mentioned here, or is limited to the *mitzvah* of *sukkah*.<sup>37</sup> The *Chelkat Yo’av* (*dinei ones, anaf* 7) explains that for *sukkah* there is a unique exemption for even somebody who is suffering [or perhaps would suffer] from only minor discomfort. However, for all other *mitzvot* there is also an exemption of one who is also *mitzta’er*, albeit requiring a more substantial pain / discomfort (*tza’ar gadol*). Therefore, he exempts a *holeh she-ein bo sakkanah* – a bedridden sick person whose malady poses no risk to life – from *mitzvah* performance. The *Chelkat Yo’av* agrees with Ramo (640:4) that a *mitzta’er* is only exempt from dwelling in the *sukkah*, when refraining from doing so will alleviate his *tza’ar*. However, if one’s ailing health will not deteriorate by dwelling in the *sukkah* and the *sukkah* does not cause him any additional *tza’ar*, he is obligated to dwell in the *sukkah*. A similar paradigm should apply throughout all areas of halacha.<sup>38</sup>

The *Binyan Shelomoh* (47) following the rationale of Rabbeinu Manoach (Hil. *Sukkah* 6:2) argues that a *mitzta’er* is exempt only from the *mitzvah* of *sukkah* (at all times except for the first night), but is nonetheless obligated in all other *mitzvot*. In a similar manner to the *Chelkat Yo’av* above, the *Binyan Shelomoh* parallels a *holeh she-ein bo sakkanah* to a *mitzta’er*, but because of his understanding of the exemption of *mitzta’er* by

35. See sources cited in *Yabi’a Omer* Y.D. 6:13:5.

36. The exemption lies in the nature of the *mitzvah* of *sukkah*. The Gemara (*Sukkah* 26a) explains that one must dwell in the *sukkah* in the same manner in which one dwells in a house (*teishvu ke-ein taduru*). Just as a person would not dwell in a house where he experiences discomfort, similarly he is exempt from dwelling in a *sukkah* in such a scenario. However, the nature of this *mitzvah* is different on the first night. The Gemara explains that the requirement to dwell in the *sukkah* on the first night is derived from a *gezeirah shavah* from the *mitzvah* of eating matzah on the first night of Pesach and not from *teishvu ke-ein taduru*. Therefore, there is no reason to exempt a *mitzta’er* on the first night of *Sukkot*. There is indeed a controversy regarding the source of this pain or discomfort and will be dealt with shortly.

37. One of the only other places that there is an exemption for one who is *mitzta’er* is by *tefillin*. The Ramo (*O.C.* 38:1) explains that a sick person who is *mitzta’er* is exempt from wearing *tefillin* since, as the *Mishnah Berurah* (38:5) explains, the discomfort will prevent him from properly concentrating on the *mitzvah* of *tefillin*. This certainly seems like a local ruling regarding the specific requirement of *yishuv ha-da’at* by *tefillin* and cannot be extrapolated from here to other areas of halacha.

38. The Taz (*O.C.* 640:8) however, believes that even where refraining from dwelling in the *sukkah* will not prevent an increase in *tza’ar* a person is nonetheless exempt from the *mitzvah*. He explains though that this is because of the unique requirement of *sukkah* of *yishuv ha-da’at* for the proper *kavannah* of dwelling in the *sukkah*, and therefore would seem to agree that this paradigm is valid in other areas of halacha.

*sukkah*, obligates a *holeh she-ein bo sakkanah* in all other *mitzvot*.<sup>39</sup> The Maharam Schick (Shu"t Maharam Schick O.C. 260) goes slightly further and explains that even when performing a *mitzvah* will certainly entail some physical harm, albeit not posing a risk to life, one is obligated to perform that *mitzvah*.

#### d. Drinking four cups of wine at the *seder*

This issue also arises with the requirement to drink four cups on wine at the *seder*. The *Shulchan Aruch* (O.C. 472:10) writes that even a person who greatly dislikes wine or does not normally drink wine because it harms him (*maziko*), must nonetheless push himself to fulfill the *mitzvah* of drinking all four cups. The *Mishna Berurah* (472:35) limits this harm to causing physical discomfort and / or developing a subsequent headache; the obligation does not go so far as to require pushing one's self so far becoming bedridden (*yipol le-mishkav*). Subsequent *posekim* debate whether this rule is applied to all *mitzvot* or is limited to drinking wine at the *seder*.

The *Sha'ar ha-Tziyyun* (472:52) explaining the reason for the *Mishna Berurah*'s limitation, says that such consequences would label the drinking as not in the manner of [exhibiting] freedom (*derech cheirut*). It seems logical to conclude therefore, that in all other areas of halacha where this unique characteristic does not apply, one must indeed perform any *mitzvah* even knowing that

***Even when performing a mitzvah will certainly entail some physical harm, albeit not posing a risk to life, one is obligated to perform that mitzvah***

consequently he will become so sick that he will become bedridden. R. Tzvi Pesach Frank<sup>40</sup> and R. Moshe Shternbuch<sup>41</sup> reject this conclusion and claim that the *mitzvah* of drinking the four cups of wine differs in other aspects as well and therefore has a unique limiting factor. The *Shulchan Aruch* (O.C. 472:10) records that one is required to go to great lengths not ordinarily required by other *mitzvot* to secure wine to drink at the *seder*. One would have therefore thought that the stringent nature of this *mitzvah* would permeate all aspects of its performance and would require exerting one's self further than required by any other *mitzvah*, even to the point of becoming bedridden. The requirement of *derech cheirut* is a reason for leniency in this stringent *mitzvah* that reduces the level of required exertion by drinking the four cups to the level required by all other *mitzvot*. The *mitzvah* of the four cups, in their opinion, is similar in character to all other *mitzvot* – none of which require pushing one's self so far as to become bedridden.

R. Chayyim Pinchas Scheinberg argues against Rabbis Shternbuch and Frank's logic.<sup>42</sup> He cites numerous examples where the level of exertion required for fulfilling the *mitzvah* of the four cups is compared and otherwise viewed in parallel to several other *mitzvot*. If, as Rabbis Shternbuch and Frank claim, the *mitzvah* of the four cups is unique in its stringency, no parallel could be made between it and other *mitzvot*. R. Scheiberg therefore concludes that the limiting factor of *derech cheirut* functions to lessen the level of required exertion only by the *mitzvah* of the four cups.<sup>43</sup> In all other *mitzvot* however, where this factor is irrelevant, one must exert himself so

39. Interestingly, the debate between the *Chelkat Yo'av* and the *Binyan Shelomoh* surrounds their different readings of the Gemara's question of Rava's claim that a *mitzta'er* is exempt from *sukkah*. The Gemara questions Rava by claiming that the Mishnah only exempted a *choleh* from dwelling in the *sukkah* but not a *mitzta'er*. The Gemara responds that by a *choleh*, even his attendants are exempt from dwelling in the *sukkah*, whereas the attendants of a *mitzta'er* are nonetheless obligated.

40. *Mikra'ei Kodesh Pesach* 2, no. 31

41. "Im Adam Chayyav Lehachnis Atzmo le-Choli Lekayyem Mitzvat Aseh," *Halacha u-Refu'ah* 4, 147.

42. "Be-din Choleh u-Mitzta'er be-Mitzvot," *Halacha u-Refu'ah* 4, 125.

43. See *Shu"t Chazon Ovadiah* no. 4 where Chacham Ovadiah Yosef extends the application of *derech cheirut* to other *mitzvot* of the *seder* as well, namely *matzah* and *marror*. He therefore argues that similar exemptions should apply to these *mitzvot* as well and one need not exert himself so much in their performance that he become bedridden.



much, that he would even become bedridden as a result of performing the *mitzvah* at hand.

### e. Spending money on *mitzvot*

R. Scheinberg raises a global argument relating to the nature of the performance of positive commandments. The Ramo (O.C. 656:1) explains (based on Ketubot 50a) that a person need not spend a substantial sum of money (*hon rav*) to obtain the means to perform a positive commandment since a person should generally not spend [waste] more than 20% of his net worth. It follows that a person is nonetheless obligated to spend up to 20% of his wealth. The Rambam (*Erchin va-Charamim* 8:13) explains that this limit was set so that a person should not run the risk of becoming poor. R. Scheinberg points out that Chazal viewed the risk of poverty with great severity (*ma'aviro al da'ato ve-al da'at Konoh*) and therefore exempted a person from *mitzvot* in which such a risk was apparent. Based on Shabbat 118a, the *Mishna Berurah* (242:1) explains that one must “make Shabbat as a weekday and not rely on receiving charity from others” means that one who is in dire financial straits is exempt from having three meals on Shabbat. The *Bi'ur Halacha* (656 s.v. *afilu*) explains that the limits and regulations regarding how far one must exert himself for Shabbat purposes apply to all other *mitzvot* as well. R. Scheinberg quotes the famous Gemara of Berachot 61a which explains why the Torah requires us to love Hashem both “with all our soul [body]” as well as “all our resources” (Devarim 6:5). The Gemara explains that the Torah’s admonition includes all sorts of people, those that prefer their bodies to their wealth and those that prefer their wealth to their bodies. R. Scheinberg therefore concludes that the Torah is aware of some individualistic component in this regard, and therefore is reluctant to offer a concrete method of balancing the two values.

R. Scheinberg therefore argues that there is a difference between the risk of poverty and the risk of a curable illness, with the former being far more serious. By the risk of poverty, Chazal were willing

to allow the violation of a given *mitzvah*, because otherwise a person may unfortunately become so poor that he will be unable to fulfill any of the other *mitzvot* anyway.<sup>44</sup> R. Scheinberg posits that an illness that “undermines the entire life of a person in all ways” and presents a risk of a person “losing his mind” (*ma'aviro al da'ato ve-al da'at Konoh*) is parallel to the risk of poverty and one is exempt from performing any *mitzvah* that engenders such a risk. However, the risk of a curable illness is indeed not parallel to the risk of poverty and therefore a person must perform a *mitzvah*, knowing going in that there is a risk that he will become curably ill.<sup>45</sup>

### B. Does halacha view all risks equally? Is there some minimal threshold that must be reached for the risk to become relevant?

*The halacha also seems to have some minimum threshold of risk that is acceptable or even ignored in certain cases*

Every action we perform entails some element of risk. Even such mundane acts as crossing the street to get to shul involve the risk of being hit by a car.

Such a risk however, seems to fall off our radar, and we take no cognizance of it during our daily lives. Many people practice the custom of kissing the sefer Torah (either directly by mouth or by touching the sefer and then kissing their hand) while it is being taken to the bimah, completely disregarding the reality that numerous people have done so before them, and the sefer’s montel (cover) appears as an ideal breeding ground for various bacteria. Similarly, the halacha also seems

44. R. Scheinberg formulates this in a manner familiar to many from the laws of Shabbat. The Gemara in *Yoma* 85b attempts to find a source for the permission to violate the laws of Shabbat in saving a life by deriving from *Shemot* (31:16) that it is preferable for a person to violate one Shabbat so that he may [live to] fulfill the *mitzvah* of Shabbat in the future.

45. Several specific *mitzvot* however, have different local parameters that govern the exertion required in their fulfillment such as *sukkah* and *tefillin*.

to have some minimum threshold of risk that is acceptable or even ignored in certain cases, as is evident in numerous discussions.

## I. Background

The Talmud enumerates various procedures which are technically forbidden, because they are dangerous, yet, since so many people do these things anyway, it has become common practice to permit them. Thus, the Gemara in Shabbat (129b) mentions specific days when one is forbidden from bloodletting (“leeching”). Although Fridays should be included in this list as well (similar to Tuesday, it is a multiple of three), the Gemara relates that the common practice was to perform bloodletting before Shabbat and since “many have already trodden upon it [this path]” (*keivan de-dashu beih rabbim*) – “Hashem protects the simple-hearted / minded” (*shomer peta'im Hashem*) (*Tehillim* 116:6). Similarly, in *Yevamot* (72b) there is discussion about prohibiting making a brit on cloudy days or days with a strong south wind as these circumstances present some risk of danger. Once again, the Gemara rationalizes with the same phrase – *keivan de-dashu beih rabbim, shomer peta'im Hashem*. In a more complex scenario, the Gemara (*Yevamot* 12a) records a dispute between R. Me'ir and the Sages regarding the use of certain contraceptives (*moch*) for women for whom pregnancy was strictly contraindicated for fear of death to her, her fetus, or her young child whom she is nursing. The Sages argue that despite this risk, such women may not use a *moch* and “from the Heavens they will have mercy on her,” as the verse says, “*shomer peta'im Hashem*.”<sup>46</sup>

***The Gemara describes other instances when despite a perceived danger, a person may nonetheless continue a given action, relying upon divine protection***

The Gemara describes other instances when despite a perceived danger, a person may nonetheless continue a given action, relying upon divine protection. The rationale is that “people engaged in a *mitzvah* are not harmed” - *sheluchei mitzvah einam nizokim* (*Pesachim* 8b). Thus, the Gemara concludes that pilgrims ascending to Jerusalem for the festivals need fear no physical or monetary harm since they are engaged in a *mitzvah*. Similarly, *posekim* allow and perhaps even require performing certain *mitzvot* despite a known risk, since “a person who keeps the *mitzvot* will know no harm” (*shomer mitzvah lo yeda davar ra*). The *Sefer Maharil* permits using water left exposed overnight at the start of *tekufat Nissan*, despite the general prohibition of using such water, since the *matzot* are to be used for a *mitzvah* (at least *matzot* for the first night of *Pesach*<sup>47</sup>), the principle of *shomer mitzvah lo yeda davar ra* applies.<sup>48</sup> The *Shuchan Aruch ha-Rav* (O.C. 455:16) goes so far as to say that one is forbidden to discard this water even if other water is available since by doing so such a person denigrates the idea of *shomer mitzvah lo yeda davar ra*. The great majority of *posekim* use the phrases *shomer peta'im Hashem, shomer mitzvah lo yeda davar ra* and *sheluchei mitzvah einam nizokim* interchangeably. All three convey the conviction that a person engaged in a *mitzvah* has a certain measure of divine protection.

In the discussion that follows, we will attempt to analyze various uses of these themes and uncover some systematic approach to their application, with an eye towards determining whether the ideas expressed may legitimately be invoked for performing *metzitzah b'peh*.

## II. Mechanism and rationales

46. From the first cases discussed by the Gemara it may seem that because *dashu beih rabbim*, we may apply the principle of *shomer peta'im Hashem*. However, from this last case it seems clear that there is no requirement of *dashu beih rabbim*, but rather, it is only a reason to apply the principle.

47. See *Shu"t Yabi'a Omer* O.C. I (23:5) as to how this idea might be applied to *matzot* prepared for the latter days of the festival.

48. *Sefer Maharil, hilchot maya de-lishat ha-matzot*, [7] s.v. *tekufat*.

In the course of *Torat Chesed's* (Lublin) (E.H. 44) discussion of contraceptives, he attempts to provide a mechanism for the idea of *shomer peta'im Hashem* through a discussion of a dispute between Rashi and Ritva. He explains that Rashi believes that the three women listed in *Yevamot* 12b are **prohibited** from using moch contraceptives, since *shomer peta'im Hashem* and therefore, *min ha-Shamayim yerachamu*. The Ritva (*Ketubot* 39b) rejects this approach since he does not believe that Chazal would force women to accept such risks upon themselves. The Ritva opines that these women **may** take the precaution of using a contraceptive (moch) or alternatively, may rely upon *shomer peta'im Hashem* and have normal relations; the choice is left to the woman. *Torat Chesed* points out that there should be a parallel disagreement by performing a *milah* on a cloudy day (*Yevamot* 82a), and indeed Ritva (ad loc.) explains that on such a day a person has the option whether or not to perform the *milah*.<sup>49</sup> The *Torat Chesed* argues that Rashi would disagree and, consonant with his previous stance, would argue that a person is obligated to perform a *milah* on a cloudy eighth day, even if it were Shabbat. This position is accepted by the *Shulchan Aruch* as normative.<sup>50</sup>

*Torat Chesed* suggests that the basis for the disagreement between Rashi and Ritva is how to evaluate the reality of danger (*sakkanah*) once Chazal invoke *shomer peta'im Hashem*. It would seem that according to Ritva, although there is a

***The principle of sheluhei mitzvah einam nizokim does not apply and may not be relied upon in cases where danger is prevalent (shechiach [kevia] hezeika)***

general prohibition to engage in risky behavior, once Chazal invoke *shomer peta'im Hashem*, one is permitted to continue this activity despite the inherent risk. There is no absolute requirement to perform the action, since invoking this principle does not actually diminish the real risk in any way.

Rashi, on the other hand, would argue that once Chazal invoke *shomer peta'im Hashem*, it is as if the risk is non-existent. Although the statistical probability of incurring the danger remains, risks below some probability threshold are simply ignored by halacha. "*Shomer peta'im Hashem*" means that a person may engage in normal activities and not be constrained or concerned by the minute risks continually involved. This "halachic reality" is so strong as to create an obligation for a father to perform *milah* on his son even on a cloudy day (and even on Shabbat).<sup>51</sup>

### III. Calculating minimal risk-thresholds

Since, as noted previously, the *Shulchan Aruch* seems to be in accord with Rashi's approach, it is important to quantify the risk-thresholds that scan below the halachic radar. Quantitatively, there are certain guidelines to apply. The Gemara (*Pesachim* 8a, *Kiddushin* 39b) is clear that the principle of *sheluhei mitzvah einam nizokim* does not apply and may not be relied upon in cases where danger is prevalent (*shechiach [kevia] hezeika*) and the *Torat Chesed* (*ibid.*) easily extends this limitation to the question of prohibiting certain contraceptives and relying on *shomer peta'im Hashem*.<sup>52</sup> Since he does not quantify the risk-threshold that qualifies as "prevalent," we may (rather conservatively) assume that any risk-threshold, below the level of *mi'ut ha-matzui* (a prevalent minority) is certainly included. This value normally ranges between 10-14.5%.<sup>53</sup> R. Chayyim Ozer Grodzinski (*Achi'ezer*

49. He also advises that on a cloudy Shabbat, it is proper to not perform the *milah*. See the comments of R. Refael Yasfan (footnote 219) in the *Mossad ha-Rav Kook* edition of the Ritva (72b) as to why *milah* on a cloudy Shabbat is only not advisable but not forbidden.

50. As per *Shu"t Hayyim Sha'al I* (59).

51. For a variant on this approach, see R. Stanley Boylan, "*Chashash Sakkanah le-Ohr ha-Halacha*," *Ohr ha-Mizrach* 32 (1984):48-59.

52. See also *Shu"t Avnei Nezer O.C.* (454), *Shu"t Mishneh Halachot* 15 (81).

53. The *Mishkenot Ya'akov* (Y.D. 17) goes to great lengths to prove that *mi'ut ha-matzui* is defined as a 10% occurrence and R. Shlomo Zalman Auerbach is oft quoted as endorsing the *Mishkenot*

1:23) insists that *shomer peta'im Hashem* certainly overrides a *mi'uta de-mi'uta* – a minority of a minority, and in a different context, the Chatam Sofer (Y.D. 338) argues that halacha takes no cognizance of events that occur only once in a thousand years (although from the historical context of the responsum it seems that he used the phrase as hyperbole).<sup>54</sup> Even assuming a more robust calculation of the risk involved in performing *metzitzah b'peh*, while it may occur more than once in a thousand years, it likely comes in beneath the halachic risk-threshold.

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#### IV. General limitations and localized application

There is a trend among *posekim*, starting with the early medieval commentators, of reluctance to apply *shomer peta'im Hashem* broadly. The *Terumat ha-Deshen* (211) very reluctantly permits behavior that the Rabbis had labeled as “dangerous” but was practiced anyway, without apparent harm. Some scholars were marrying women who had already been widowed twice previously (a *katlanit*), although Rambam had ruled (*Issurei Bi'ah* 21:31) that such marriage is to be avoided (forbidden) due to some assumed danger. Despite the lack of statistical risk

availability for this type of danger, the *Terumat ha-Deshen* frowned upon this practice and was uncomfortable in invoking *shomer peta'im Hashem*. He begrudgingly approved of the practice because otherwise these women could never marry again (*mishum iguna*) and he was worried that these non-marriageable women might succumb to “undesirable lifestyles” (*tarbut ra'ah*).

##### a. Relying on miracles

Similarly, the Maharil (cited above) argued against using water left exposed overnight at the start of *tekufat Nissan* to bake *matzot*. While the Mordechai and Rokeach held that such water may be used because *shomer mitzvah lo yeda davar ra*, the Maharil preferred the common practice of avoiding this situation by sealing the water in metal containers, insisting that “we do not rely upon miracles.” Although here too there is no calculation of risk probabilities, the choice of the term *nes*, would make it seem that there was some level of observable danger in drinking such water. Perhaps Maharil felt that relying on divine protection was not warranted when such situations could easily be avoided.

##### b. Requisite “counterweights”

Other later *posekim* were similarly disinclined from liberally applying the notion of *shomer peta'im Hashem* and explain each instance of Chazal's usage of this idea rather conservatively. The *Divrei Yatziv* (Y.D. 31) explains that we may rely upon *shomer peta'im Hashem* only when there is a rather compelling reason / counterweight to permit or even require the action in question, such as the mitzvah of *milah be-zemanah* (in its appropriate time) despite the danger perceived in doing so on a cloudy day. Similarly, Chazal relied upon *shomer peta'im Hashem* in allowing the three women of *Yevamot* 12b to have normal relations because of the dual ‘counterweight’ of the mitzvah of *onah* (marital relations) and the fear of *hashchatat zera* (wasting of seed). However, absent any compelling reason to do so, he is reluctant to apply *shomer peta'im Hashem* without adequate precedent.

<sup>54</sup> *Ya'akov's* opinion (see *Bedikat ha-Mazon ka-Halacha*, p. 181 who quotes R. Yosef Shalom Elyashiv as well as endorsing the 10% approach). R. Hershel Schachter frequently cites R. Yosef Dov Soloveitchik's opinion that *mi'ut ha-matzui* should be approximately 14.5%, based on what he determined was the actual incidence of *sirchot* in cow lungs in his time. See however, *Shu"t Shevet ha-Levi* Y.D. (4:81) who seems to adopt a more subjective approach.

54. This responsum deals with the German law that required that a body be left for three days since declared dead by a physician before burial. There were apparently instances in which a person, who had been previously declared dead and subsequently buried, was later found to calling for help from his grave. From the very fact that this legislation was deemed necessary, it seems that it was to prevent an occurrence of some noticeable frequency, certainly much greater than once in a thousand years. These types of events are the subject of the Chatam Sofer's statistical estimate.

### c. Danger stemming from the mitzvah itself

The *Beit She'arim* (Y.D. 320) goes to great lengths to further limit the application of *shomer peta'im Hashem* even in his understanding of Chazal's usage of the idea.<sup>55</sup> He explains that one may not rely on such ideas when the risk of danger is constant and always present, since protection from such danger would qualify as a miracle and the Gemara (*Pesachim* 50b) informs us that miracles are not everyday occurrences (*lav kol yoma mitrachish nissa*). While he does not provide proof for this explanation, it seems that he took a very literal reading of both the Gemara and Maharil's usage of the word *nes*. The *Beit She'arim* also provides a rather novel suggestion that the idea reflected by *shomer mitzvah lo yeda davar ra* only applies when the mitzvah per se is the sole cause of the danger. He explains that the danger of a *katlanit* arises only from her marriages; a man who would have relations with such a woman without marrying her however, would be free from harm. Since the danger arises only from performing the mitzvah, one can rely upon *shomer mitzvah lo yeda davar ra* to protect him from this danger when his intentions are for the sake of the mitzvah.

The *Beit She'arim* goes on to explain the opposite case. The *Shulchan Aruch* (Y.D. 263:2) rules that a woman who has had two sons die from their *milah* should not perform a brit on her third son lest he die like his brothers. The danger is commonly assumed to be some form of hereditary blood clotting disorder and the fear is that the child will bleed to death from his *milah* wound. The *Beit She'arim* explains that even though performing a *milah* is a mitzvah, there is no divine protection afforded since the danger does not result from the mitzvah per se. The same level of

risk would exist if a non-Jew were to perform the circumcision and thereby not fulfill any mitzvah. Even though the cause of the danger is the performance of the mitzvah (without any circumcision there is surely no risk at all) the existence of the danger does not stem solely from the mitzvah performance (*ma'aseh ha-mitzvah*) and therefore one cannot rely on *shomer mitzvah lo yeda davar ra*.

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While this is a rather novel approach, it seems likely to be a post facto explanation for the application of *shomer mitzvah lo yeda davar ra* in a few limited instances. It does not explain why R. Papa invoked *shomer peta'im Hashem* to allow performing *milah* on

cloudy days when the risk inherent in the weather does not seem to be dependent on whether or not one fulfilled the mitzvah of *milah* with this specific circumcision. It also does not explain why the Chazal relied upon divine protection in prohibiting the three women of *Yevamot* 12b from using a moch during marital relations. The Gemara details the dangers that would befall these women (death to themselves, their fetus or their newborn child) and none of them seem to be dependent on whether or not the mitzvah of *onah* is fulfilled during marital relations. While not addressing this point directly, R. Menashe Klein explains that his grandfather meant to distinguish between the concepts of *shomer mitzvah lo yeda davar ra* and *shomer peta'im Hashem*.<sup>56</sup> He claims that the former applies only and provides protection from those dangers that result from divine intervention in this world and not natural occurrences (*derech ha-teva*). From the previous discussion it would seem that this protection is further limited to

55. The *Beit She'arim* was written by R. Amram Bloom, grandfather of R. Menasheh Klein, the *rav* of Ungvar and *rosh yeshivah* of the institution bearing the name of his grandfather's book.

56. *Shu"t Mishneh Halachot* (4:190, 15:70, 81). The authors were unable to find a responsum directly addressing this point in the *Beit She'arim*.

dangers that arise from mitzvah performance per se. When the danger is natural consideration however, one may rely on *shomer peta'im Hashem* when the danger is not prevalent (*lo shechiach hezeika*). One could therefore argue that the *Beit She'arim* (320) meant to discuss only the halacha of *shomer mitzvah lo yeda davar ra* and did not mean to address *shomer peta'im Hashem* at all in that responsum. Therefore, he would say that whatever the principle of *shomer mitzvah lo yeda davar ra* leaves out, *shomer peta'im Hashem* picks up the slack. While he claims that this in fact what his grandfather held, it makes much of the *Beit She'arim*'s discussion merely theoretical if all of the cases excluded from *shomer mitzvah lo yeda davar ra* are included in *shomer peta'im Hashem*. This makes the *Beit Shearim*'s nuanced distinctions entirely unnecessary and does not seem to be a very plausible reading of the text of the responsum. It does however, provide answers to the rather fundamental challenges posed above.

#### d. Unique characteristics of *milah*

When dealing with *milah* however, there might be more reason to be stringent when it comes to accepting risks. The Rambam (*Milah* 1:18) lists various conditions that require delaying performing the *milah* past the eighth day and concludes that “We only perform *milah* on a child who is free from illness, since [even] questionable risks to life override all [*mitzvot*]; we can perform the *milah* at a later time but we cannot return one [lost] Jewish soul.”

Based on the Rambam's ruling, the Chatam Sofer (Y.D. 245) suggests that a potential risk can delay a *milah* only when the *milah* could be performed in the future, presumably when the risk will be alleviated or sufficiently mitigated. However, if the potential risk were consistently present throughout one's lifetime, one could not delay the *milah* on account of that risk, since doing so will insure that the *milah* will never be performed. The Chatam Sofer bases this upon the various reasons provided by the Gemara as to why risks of danger override mitzvah performance, but

it remains somewhat ambiguous whether or not he accepts this idea as final.<sup>57</sup> If this logic is accepted however, it would seem to apply to the situation of *metzitzah b'peh* quite well since there is ample reason to assume that the rate of asymptomatic carriage of HSV-1 will not change in the near future and therefore, the possible inherent risk would be consistently present throughout one's life. It would stand to reason that according to this view, there is no reason not to perform *metzitzah b'peh*. Even if the Chatam Sofer would conclude differently however, it would appear that the statement of Rambam should have little to no bearing on the issue as discussed above.

***When dealing with milah however, there might be more reason to be stringent when it comes to accepting risks***

#### V. The nature of the risks in question and possible applications

While the reductionist trend does appear among *posekim*, many are willing to at times rely upon *shomer peta'im Hashem*. It is important to note that the Gemara applies *shomer peta'im Hashem* to a variety of different cases, including several that involve a direct risk to life. While the Gemara does not detail the harm that may befall a baby circumcised on a cloudy day, it does specifically mention the different risks of **death** to

57. He explains that according to the view that one may “desecrate one Shabbat so that he may keep more *Shabbatot* in the future” (*Yoma* 85b), the permission to desecrate the first Shabbat is contingent upon the ability to perform that very same mitzvah (keeping Shabbat) in the future. When the possibility to perform the specific mitzvah in question is not possible, there is no permission to violate the halacha in the first place. He notes that the Rambam himself accepts the alternate rationale of violating halacha for *pikuach nefesh* of “*ve-hai bahem*” and that according to this view, the violation of halacha is not contingent upon possible future performance. The Chatam Sofer notes however, that ‘elsewhere’ he discusses that in practice we require both of these rationales to permit mitzvah violations. He seems to discuss this issue in *Shu”t Chatam Sofer O.C.* (85), but does not provide a conclusive answer and explicitly mentions that that discussion is meant only theoretically. His conclusion therefore, seems somewhat ambiguous.

each of the three women of *Yevamot* 12b arising from a possible future pregnancy. It would seem therefore, that the level of risk is decisive in determining the application of the principle, not the consequences of the danger being avoided.

#### a. From where does the danger stem?

Some *posekim* address the nature of dangers directly. The *Beit She'arim* (*ibid.*) explains that one may only rely upon *shomer mitzvah lo yeda davar ra* when the danger is not part of the natural world (*eino be-teva*). Because this unique divine protection of *shomer mitzvah lo yeda davar ra* is itself outside the boundaries of the natural world, it may only be relied upon when the

***That the level of risk is decisive in determining the application of the principle, not the consequences of the danger being avoided***

danger is similarly beyond the scope of nature. This seems to include dangers that do not have an obvious causal relationship with the action from which they arise. When the risk of danger however, 'seems' to be 'entirely' natural, such as the myriad cases of *pikuach nefesh*, one may not rely upon divine protection and must not participate in the action in question. Practically, it seems rather difficult to determine how to apply these two categories and is instructive to see the examples cited. The *Beit She'arim* claims that the danger inherent in marrying a *katlanit* is beyond nature and as such, *posekim* are willing to rely upon *shomer mitzvah lo yeda davar ra* in permitting such marriages. The danger that circumcision may pose to a child whose two brothers had died as a result of theirs, is within the scope of the natural world and therefore, the circumcision is not performed since there is no room for reliance upon *shomer mitzvah lo yeda davar ra*. This seems difficult, since the danger posed to the three women of *Yevamot* 12b seems to be well within the scope of nature, and the Gemara, at least according to Rashi, requires reliance upon *shomer peta'im Hashem*.

The simplest answer would be to argue as above that the *Beit She'arim* incorporated natural events within the rubric of *shomer peta'im Hashem* and not *shomer mitzvah lo yeda davar ra*, but this answer is fraught with the same difficulties noted above.

R. Menashe Klein adopts his grandfather's approach and provides examples of dangers that fit into each of these two categories that may shed light onto how to classify the possible risks inherent in performing *metzitzah b'peh*.<sup>58</sup> The *Shulchan Aruch* (O.C. 433:7) writes that a person is exempt from checking for *hametz* in a hole shared with his non-Jewish neighbor, since the neighbor may become enraged from mistakenly thinking that the Jew is performing some sort of witchcraft against him and the matter may come to great danger.<sup>59</sup> Shortly thereafter, the *Shulchan Aruch* (O.C. 433:8) writes that a person is not required to check for *hametz* under a collapsed wall that previously housed *hametz* for fear of scorpions amongst the rubble. The Gemara (*Pesachim* 8a) explains that there really is no fear of scorpions during the act of *bedikat hametz* since the person is in the midst of mitzvah performance and *sheluchei mitzvah einam nizokim*. Rather, the fear is that perhaps during the *bedikah* the person may drop a needle into the rubble and after having completed the *bedikah* may return to retrieve that needle. Since the mitzvah is completed, there is no longer any special divine protection and the risk of scorpions abounds.

Many of the *posekim* wonder why in this latter case (433:8), if not for the external concern about the needle, was there a willingness to rely upon *sheluchei mitzvah einam nizokim*, but in the former case (433:7) of a hole shared with a non-Jewish neighbor, was there no attempt to rely upon this principle? R. Menashe Klein applies his grandfather's distinction to understand the

58. *Shu"t Mishneh Halachot* 4 (190).

59. The *Mishnah Berurah* (433:30) explains that the non-Jew will misunderstand why the Jew is walking around with a candle at night checking locations throughout his house since the next morning, such checking could be done much more easily.

difference between the cases.<sup>60</sup> He explains that the danger posed by the non-Jewish neighbor is within the scope of the natural world, while the danger posed by scorpions is not (*lo al pi derech ha-teva*). Therefore, one may only apply *shomer mitzvah lo yeda davar ra* to the latter, and not the former case. One may have previously assumed that the danger presented by the scorpion should fall within the realm of the natural world. Placing such a danger outside of the natural framework, makes it very difficult to systematically group other types of danger. While the possible danger inherent in *metzitzah b'peh* is initiated by a person's actions, there is certainly no attempt to harm and not even any active knowledge that one is causing any harm at the time. It would be interesting to see whether R. Klein thinks that *metzitzah b'peh* is more similar to the danger presented by the non-Jewish neighbor or by the scorpion beneath the rubble.

#### b. 'Naturally' encountered risks

R. Moshe Feinstein provides some guidelines as to different types of danger and how they relate to *shomer peta'im Hashem*.<sup>61</sup> In discussing which types of women may not use contraceptives, he explains that there is more room to be lenient for a woman for whom pregnancy may be life threatening. Reliance on *shomer peta'im Hashem* (and therefore strictly prohibiting contraceptive use) is legitimate for dangers that are "natural" for all women to experience, such as childbirth itself, when offset by an appropriate counterweight, such as mitzvah performance. He explains that this is not reliance upon miracles since the danger is minimally and equally present for all women.

60. The *Magen Avraham* (433:12) and others explain that in the case of the shared hole, the danger was rather prevalent (*shechiach hezeika*), and as mentioned previously, in such circumstances, reliance upon divine protection is inappropriate.

61. *Shu"t Iggerot Moshe E.H.* (1:63:1-2, 4:73:1).

Chazal (*Yevamot* 12b as per Rashi and *Shulchan Aruch* as per Hidda [n. 37] as understood by *Torat Chesed* [Lublin]) prohibited the use of contraceptives despite the rare unfortunate cases of tragedy. R. Feinstein uses the term "naturally" to denote a status equal for all – actions that present risks of this stature may be performed, when properly offset, relying upon *shomer peta'im Hashem*.

It would be interesting to see how the *posekim* understand the possible risk inherent in *metzitzah b'peh* in light of R. Feinstein's distinction. If we are to assume that the prevalence of sub-clinical shedding of HSV-1 by asymptomatic carriers hovers around 60-70%, then one might argue that the possible risk posed by performing *metzitzah b'peh* applies to all infants

equally and can therefore be dispensed with by relying upon *shomer peta'im Hashem*. If some specific child would have a unique condition that would make him unusually sensitive to HSV-1 transmission, this would parallel the risk of pregnancy in a woman for whom it is lethally contraindicated – in both cases, R. Feinstein would not permit reliance upon *shomer petaim Hashem*. Practically, one may suggest that a *mohel* who has a bleeding mouth sore would fit into this category and as such should not perform *metzitzah b'peh*, while all other healthy *mohalim* may continue the practice.

#### c. Normal societal practices

R. Elchanan Wasserman also distinguishes between the natures of different risks and posits that *shomer peta'im Hashem* applies only to those dangers that are not within the person's control.<sup>62</sup> However, when a person can protect himself from

62. *Kovetz Shiurim, Ketubot* no. 136.



the danger but chooses not to – he is liable for his own tragedy. R. Wasserman clearly does not mean this to be taken literally, because in all of the cases cited by the Gemara, the risk could have been avoided by abstaining from the action, but nonetheless the Gemara relies upon *shomer peta'im Hashem*. He therefore goes on to explain that a person need not abstain from acting in accordance with “normal” societal practices and actions (*ein ha-adam hayyav lehimana mi-minhag derekh erez*). Therefore, dangers that arise from such actions are categorized as those that are beyond his control and not within his capacity to protect himself from; in such cases, reliance upon *shomer peta'im Hashem* is appropriate. Understood in this way, both R. Wasserman and R. Feinstein differentiate between that which is normal and common and that which is deviant, although they couch these distinctions in different terms. In R. Wasserman’s view, the *posekim* will have to decide whether or not the practice of *metzitzah b'peh* is within the realm of “normal societal practices” (*mi-minhagei derekh erez*) or is considered something beyond normal events that a person is obligated to protect himself from. In theory, R. Feinstein and R. Wasserman disagree as to whether the risk to all people involved must be equal or that the manner in which people actually perform this action must be equal. Practically, however, the approaches seem very similar – if *metzitzah b'peh* is considered to be the normal practice, then by extension, the possible danger inherent in its performance is posed equally to all infants and *shomer peta'im Hashem* can be invoked and relied upon.

#### d. Modern application

Perhaps the most revealing approach to this question is a story recounted by R. Romi Cohen when he performed *milah* on R. Moshe Feinstein’s great-grandson approximately two weeks before R.

**R. Moshe responded,  
“Heaven forbid  
changing a holy minhag  
that Jews practice, and  
this too is encompassed  
within shomer mitzvah  
lo yeda davar ra.”**

Feinstein’s passing in 1986.<sup>63</sup> He recounts that after the *milah*, R. Feinstein was asked whether it was advisable to continue the practice of *metzitzah b'peh* in light of the rampant AIDS epidemic, for fear of the child infecting the *mohel*. It must be stressed that in 1986 very little was known about HIV transmission, let alone therapeutics, and the fear of transmission was very real and very scary.<sup>64</sup> R. Moshe replied emphatically, “Heaven forbid that [*metzitzah b'peh*] should be abolished, since *shomer mitzvah lo yeda davar ra!*” R. Cohen describes the astonishment of all those present to this unequivocal proclamation and reports that several people tried to press R. Moshe on the very real danger that could come from this decision. R. Moshe simply repeated “*shomer mitzvah lo yeda davar ra.*” R. Cohen relates that R. Reuven Feinstein continued to press R. Moshe on the point that R. Moshe had elsewhere decided that *metzitzah* is not an inherent part of the *mitzvah* of *milah* but rather only a *minhag* and therefore should not be continued in the face of possible danger.<sup>65</sup> R. Moshe responded, “Heaven forbid changing a holy *minhag* that Jews practice, and this too is encompassed within *shomer mitzvah lo yeda davar ra.*” He qualified this by stating that in the rare instance of a specific reason to worry about the risk of AIDS, only then is it forbidden to perform *metzitzah b'peh*. With the understanding of R. Feinstein’s previously cited formal responsa in mind, this rather powerful anecdote is merely an application of R. Feinstein’s systematic approach to *shomer peta'im Hashem*. It would stand to reason that R. Feinstein would feel the same way today regarding the potential risk of HSV-1 infection.

63. *Brit Avraham ha-Kohen*, 199-200.

64. See Boffey P.M., “U.S. counters public fears AIDS,” *The New York Times*, 20 September 1985; Levine J, “AIDS: prejudice and progress,” *Time Magazine*, 8 September 1986; Korcock, M, “AIDS hysteria: a contagious side effect,” *Canadian Medical Association Journal* 133 (1985):1241-8.

65. See *Shu"t Iggerot Moshe Y.D.* (1:223).

## VI. To whom does *shomer peta'im Hashem* apply?

Many of the *posekim* cited previously required some element of counterbalance when taking upon one's self any level of risk – be it, that such actions are simply understood as natural and everyday occurrences, or be they elements of a mitzvah. When it comes to the latter, it is important to analyze who is performing the mitzvah and who is obligated in its performance.

### a. *Milah* of a child whose brothers died from their *milah*

The *Beit She'arim* (*ibid.*) explains that *shomer mitzvah lo yeda davar ra* does not allow [require] performing *milah* on a child whose two older brothers died from their *milah*, since the risk of danger is posed to the child and children are generally not obligated in *mitzvot*. It is the father who is obligated to perform *milah* on his eight day old child and it is he who performs the mitzvah.<sup>66</sup> Whenever there is a discrepancy between the person performing the mitzvah and the person to whom the mitzvah poses a danger, the *Beit She'arim* posits that we may not apply *shomer mitzvah lo yeda davar ra*. However, it is important to remember that R. Menashe Klein argues that despite the limitations that the *Beit She'arim* incorporated in the application of *shomer mitzvah lo yeda davar ra*, he nonetheless believed in an expansive definition of *shomer peta'im Hashem* and this case may be possibly covered by the latter principle. Presumably however, since this child's brothers died from their *milah*, there is some element of *chazakah*, that something may go wrong with this child's *milah* and therefore the danger is considered *shechiach hezeika* and not covered by *shomer peta'im Hashem*.

### b. The participants in the mitzvah of *milah*

Aside from the previous case of *shechiach hezeika*, (where harm is common) it seems that

*shomer peta'im Hashem* should apply in the case of a *milah* of a [genetically] healthy child. While the mitzvah per se is incumbent on the father, the child is integral to the mitzvah; the father cannot perform the mitzvah without him. The *Avnei Nezer* (Y.D. 321) seems to assume this position in discussing delaying the *milah* of a child with some leg deformity, when physicians state that therapeutic surgery must be done immediately and cannot wait until after the eighth day. After the

### *The risk of a permanent ambulatory disability overrides the mitzvah of performing the milah bi-zemanah, at its proper time*

surgery the child would be considered a *holeh* and his *milah* delayed until he recovers completely. While he decides that it is proper to delay the *milah* in this case, he analyzes the question in terms of how much suffering and / or risk a person must endure for the sake of performing a mitzvah. In the end he believes that the risk of a permanent ambulatory disability overrides the mitzvah of performing the *milah bi-zemanah*, at its proper time. Nonetheless, the question he poses relates to the baby himself – how much risk must the baby endure, despite the fact that the mitzvah of *milah* is incumbent upon the baby's father.<sup>67</sup>

The Rogachover Gaon (*Tzofnat Pa'aneach* 152) presents a very complex view of the different aspects of *milah* where he explains that *metzitzah* is really part of the child's mitzvah that he is to fulfill when he becomes of age, but we assume that he would allow his father to perform that mitzvah for him during his *milah*. Even though the mitzvah of *milah* is incumbent upon the father and not the child, since any risk to the child delays the mitzvah (since he is not obligated in its performance) –

66. *Shulchan Aruch* Y.D. (260:1).

67. This explanation is somewhat difficult however, since elsewhere, the *Avnei Nezer* (O.C. 444) states that specifically by *milah*, *shomer mitzvah lo yeda davar ra* can only apply to the father since it is only he who is obligated in the mitzvah. This apparent contradiction is left unresolved.

practically, it is equivalent to saying that the father's mitzvah is dependent upon the child's acceptance of risk. While indeed, these are two separate halachic actors (the father is obligated and the child is not) – they are intrinsically bound together. Therefore, both the *Avnei Nezer* and the Rogachover consider the mitzvah of *milah* to be considered somewhat 'belonging' to the child, at least enough to apply the dictum of *shomer mitzvah lo yeda davar ra*.

### c. Applying *shomer peta'im Hashem*

While the concept of *shomer mitzvah lo yeda davar ra* depends on the concomitant obligation and risk of performing a specific mitzvah, the *posekim* do not always require such a vigorous 'counter balance' to the application of *shomer peta'im Hashem* as mentioned previously. It is appropriate to refer to the *Torat Chesed's* (*ibid.*) understanding of the two different schools of thought regarding the nature of this principle – whether the risk is ignored because it is considered miniscule (Ritva) or because it is no longer considered to be halachically existent (Rashi). If we are to assume Rashi's position (and indeed the Hida showed that this was the position of the *Shulchan Aruch*), then it would appear that *shomer peta'im Hashem* applies to the possible risk incurred by the baby during *metzitzah b'peh*. If the risk is no longer considered existent, then even if we assume that one person's mitzvah obligation cannot override an unobligated person's risk of danger – the father may nonetheless perform the *milah* despite the possible risk, since it is no longer considered meaningfully existent. It would appear therefore, that many of the *posekim* that still require [optimally] performance of *metzitzah* specifically by oral suction, believe that any possible risk is below the halachically meaningful 'risk-threshold' – rendering such a potential risk as halachically non-existent and invoking the principle of *shomer peta'im Hashem*.

### C. How does halacha view competing risks? When can one risk outweigh the next?

The Gemara (*Shabbat* 133b) declares that a *mohel* who neglects to perform *metzitzah* puts the child at risk and 'we' depose the *mohel* from his position. As mentioned previously, *posekim* disagree as to the purpose of *metzitzah* and within both camps, there are various opinions as to the nature of the danger of neglecting *metzitzah*.

***The Gemara (Shabbat 133b) declares that a mohel who neglects to perform metzitzah puts the child at risk and 'we' depose the mohel from his position***

### I. What is the danger that *metzitzah* attempts to alleviate?

Throughout history, *posekim* have understood that after a *milah* the baby is in some type of danger and that performing *metzitzah* [properly] alleviates this risk. Many have argued that *metzitzah* comes to solve a medical or physiological problem – with various opinions attempting to identify the specific risk. Many of these opinions seem to reflect the 'contemporary' understanding of medicine of their respective generations.

#### a. Historical medical opinions

The Rambam (*Milah* 2:2) requires that the *metzitzah* be of sufficient strength to draw blood from 'the distant locations' (*ha-mekomot ha-rechokim*) but does not give a more accurate description of his requirement. From a modern medical perspective, one could speculate that since sterilization was not possible, the purpose of *metzitzah* was to remove any bacteria that may have accumulated on the wound during the *milah*. This would also explain why the Gemara (*Shabbat* 129a) views the third day after *milah* as the most 'dangerous' – despite *metzitzah's* best efforts, a bacterial infection, takes on average, three days to establish a systemic disease. The *Tiferet Yisrael*

(*Shabbat* 19, *Yakhin* 1) cites the ‘current’ medical opinion that *metzitzah* is meant to prevent swelling of the surrounding areas, while others mention the risk of inflammation if *metzitzah* is not performed properly.<sup>68</sup>

### b. Current medical opinion

Medical science today however, does not recognize any medical benefit to performing any sort of *metzitzah*, let alone *metzitzah b'peh*. Consequently, doctors who circumcise infants in hospitals do not apply any suction upon completing the incision; vacuum suction actually delays hemostasis, or the cessation of bleeding. While it is useful to clean the area of clots, ultimately in order to promote optimal healing conditions, direct pressure to occlude the source of bleeding and cleaning of the area with gauze is usually sufficient. Much of the scientific literature from the late nineteenth and early twentieth century adduced to defend the practice is no longer considered valid and is not relied upon medically.<sup>69</sup> Therefore, according to those who view *metzitzah* solely as preventive medicine, there seems to be little reason from a medical point of view to continue its practice today. For those who see two roles for *metzitzah*, with elements of both mitzvah and prevention, it seems appropriate to continue the practice because of the ritual aspects.

The question about *metzitzah* arises only when the procedure itself may pose a danger, as is contended by some today. It would seem that

68. See *Kovetz Dam Brit*, 1-2.

69. Many of these authorities were unaware of many of the myriad infectious agents known today and therefore could not have considered their effects appropriately. R. Goldberger quotes extensively (p. 26) from Dr. Sherhai (*Meishiv Nefesh*) indicating the ‘current’ medical opinion of 1906 that was unaware of blood borne pathogens. Today we are aware that many pathogens live, replicate and cause infection in the blood, making Dr. Sherhai’s discussions no longer relevant but nonetheless cited by R. Goldberger as authoritative.

according to the first view, the two medical risks should be weighed against each other – the risk of not performing *metzitzah* vs. the risk of performing *metzitzah* and take the route of least risk. For those *posekim* who see some element of mitzvah as well in the act of *metzitzah*, the discussion of section B above is vitally important in deciding what risks may, or must be accepted in performing *mitzvot*.

### c. Other types of risks

Other *posekim* cite different types of dangers that *metzitzah* protects against – mostly non-medical risks. There are several mystical / kabbalistic descriptions of the risks that *metzitzah* alleviates with various explanations for the mechanism of this protective measure.<sup>70</sup> These *posekim* understand that the Gemara (*Shabbat* 133b) means to say that although performing *metzitzah* prevents only some supernatural or otherwise non-medical danger, it is nonetheless so important that we depose of any *mohel* who neglects the practice.<sup>71</sup> According to this view, it is impossible to weigh the risks of performance vs. non-performance against each other since the latter are supernatural and hence non-quantifiable. This equation would seemingly depend on how these *posekim* understand the reasons for *metzitzah*. If seen solely as a function of preventive medicine, it would appear that the possible medical risk of performing *metzitzah* would outweigh the mystically derived risk of non-performance. However, for those who view *metzitzah* as more than just preventive medicine, the equation is more complex as alluded to above.

***Nonetheless, we rely on the best medical knowledge of our time when required to violate Shabbat or Yom Tov, since even a case of doubtful risk warrants violation of these commandments***

70. Commentary of the Vilna *Ga'on* to the *Tikkunei Zohar* (37) and *Tikkun* 18 as well as *Sha'arei Orach* (*sha'ar* 5 in analyzing *Tehillim* 118) both cited by R. Goldberger, 82.

71. See R. Chayyim Vital, *Ta'amei ha-Mitzvot* (end of *parshat Lech Lecha*) and R. David Lida (*Sefer Sod Hashem*) cited by R. Goldberger, 96.

## II. The weighing of risks

R. Kook disagrees with these conclusions in one of his classic responsa dealing with medical science.<sup>72</sup> He argues that science and especially medical science cannot make absolute claims about health. It is a continuously changing field, with “one generation destroying what the previous had built.” He claims that by its very nature, medical science can at best only provide its current assumption for certain causes and effects and does not even view itself as the final arbiter of truth. Nonetheless, we rely on the best medical knowledge of our time when required to violate Shabbat or *Yom Tov*, since even a case of doubtful risk warrants violation of these commandments. However, in other areas of halacha, R. Kook claims that there is no solid proof that medical evidence can cause the abrogation of any Torah ordained mitzvah. His understanding is even more apparent today as we witness the most rapid progress of medical sciences in history. Harrison’s Principles of Internal Medicine, often considered the “bible of internal medicine,” begins with a Notice: “Medicine is an ever-changing science ... [the] information ... is complete and generally in accord with the standards accepted at the time of publication ... However, in view of ... changes in medical science ... neither the editors nor contributors ... of this work warrants that the information contained herein is in every respect accurate or complete.”<sup>73</sup> This “notice” forms the basis of modern medical education. Therapies that were thought to be beneficial are now understood to be harmful and surgeries that were routinely performed are now shunned for their recently discovered potential harm.

72. *Shu't Da'at Kohen* (142). In responsum 140 he elaborates further and attempts to prove that medicine is always halachically viewed as only possible truth.

73. Kasper, D.L., et al, *Harrison's Principles of Internal Medicine*, 16<sup>th</sup> ed. (New York: McGraw-Hill, 2005), vi.

### a. How to weigh potential dangers

R. Kook argues that since the Torah can and does provide absolutes, when Chazal declared that neglecting to perform *metzitzah* poses a risk to a child – they ‘knew’ this to be absolutely true.<sup>74</sup> In terms of halacha, this type of danger is considered a certain risk (*vadai sakkanah*), while medical risks are halachically defined as posing only possible risks (*safek sakkanah*). Therefore, any possible risk posed by *metzitzah* cannot be assumed to be ‘more dangerous’ than non-performance unless proven otherwise. Since the majority of the *posekim* cited throughout understand *metzitzah* to have both ritual and preventive medical elements and the possible risk of HSV transmission is far from proven – according to R. Kook’s logic it would seem appropriate to continue the standard practice of *metzitzah b'peh*.<sup>75</sup>

### b. Understanding medicine

The previous discussion assumes that any risk discussed by the Gemara must be taken very seriously and heeded to even in spite of contradictory medical opinion. The basic understanding is that since Torah is eternal, its dicta cannot be subject to contradiction by medical opinion, which by its very nature is transitory and non-absolutist. Such logic would be very cogent for the Maharam Schik and R. Yehudah Assad cited previously who believe that *metzitzah b'peh* derives from a *halacha le-Moshe mi-Sinai*. The same conclusion may not hold true for risks and precepts established by the rabbis. Authorities as early as R. Shereira Ga'on already claimed that the sages of the Talmud were indeed just that, sages and not

74. See also *Meshech Chochmah*, *Bo* quoting the Gra in explaining that the reasons expressed by the Sages for various laws are not exhaustive and, that for some reason, the Sages chose not to publicize other considerations.

75. It is important to note that R. Kook himself however, did not see any problem with using a tube to perform *metzitzah* and therefore recommended its use in any case of possible danger.

physicians and therefore, one should not employ their suggested medical therapies.<sup>76</sup> Many *posekim* however, do take many of these talmudic proclamations at face value and an even greater number adopt R. Kook's understanding of medical science and apply it practically in their halachic decisions. R. Kook's analysis is not without precedent as the Chatam Sofer, who preceded R. Kook by many years similarly explained that medical science is an empirical study and therefore can only establish theoretical, possible doubts (*sfek sefeikot*) but never anything absolute.<sup>77</sup> This understanding has formed the basic assumption about the practice of medicine in much of the current halachic-medical discussions. R. Ovadiah Yosef, R. Eliezer Yehudah Waldenburg and R. Yitzchak Ya'akov Weiss all adopt R. Kook's understanding of medical science and elaborate on it, issuing their *pesakim* accordingly.<sup>78</sup>

### c. Non-medical risks expressed by the Gemara

Aside from adopting R. Kook's approach, many *posekim* understand many of the talmudic discussions of specific dangers to be applicable in our times. Such an approach is not necessarily at odds with R. Shereira Ga'on's understanding, since frequently the reasons behind these dangers remains hidden. Therefore, one cannot assume that these dangers are necessarily medically understood and as such be dismissed based on R. Shereira Ga'on's dictum. Rather, there are many examples of these pronouncements that are taken quite literally by current *posekim* and require abstaining from such activities even today.

1. The Gemara (*Shabbat* 129a) states that a woman who has just given birth is considered to be a *holah she-yesh bah sakkannah* for first 72 hours post-partum. As such, Shabbat restrictions are set aside and she is exempt from fasting on Yom

76. *Otzar ha-Ge'onim X, Gittin* 68b. Such a trend is found throughout the rest of halachic history in many areas but it is beyond the scope of this article to trace this line of thinking.

77. *Shu"t Chatam Sofer Y.D.* (175).

78. *Shu"t Yabi'a Omer O.C.* (7:53), *Shu"t Tzitz Eliezer* (8:15:10, 14:89) and *Shu"t Minhat Yitzchak* (3:145).

Kippur. R. Ovadiah Yosef (*ibid.*) writes that despite a physician's opinion that such a woman is healthy enough to fast and the fast will not harm her or the baby in any way – she is still forbidden from fasting since Chazal already decided that she is in a state of *sakkannah*.

2. When a baby suffers from jaundice, the halacha (*Yoreh De'ah* 263:1) requires that the *milah* be postponed; the length of postponement depends on the type of jaundice present.<sup>79</sup> In addition, many *mohalim* have a tradition

***Many mohalim have a tradition (mesorah) as to postponing a milah based on the shade of the baby's skin***

(*mesorah*) as to postponing a *milah* based on the shade of the baby's skin. R. Yitzchak Weiss (*ibid.*) explains that if even if expert physicians claim that there is no risk in circumcising such an infant, it is still forbidden to do so, since the halacha categorically considers such a child to be in a state of *sakkannah*.

3. In defining how one ascertains whether or not some danger requires the violation of Shabbat regulations, the *Shulchan Aruch* (O.C. 328:3-4) states that certain injuries always mandate a necessary violation – such as injuries to the back (dorsal surface) of the hand or foot, as well as a disease known as *tzafдина*, a certain type of tooth disease. While doctors may decide that any such injuries are in fact non-threatening, the *Peri Megadim* (O.C. MZ 328:2) and *Bach* (O.C. 328:2) explain that since Chazal declared such dangers as *sakkannot*, Shabbat violations are still appropriate. The *Tzitz Eliezer* (*ibid.*) expands upon this principle and expands it to several other specific maladies mentioned by Chazal, which in spite of current medical opinion to the contrary, still permit Shabbat violations.

79. See R. Joshua Flug, "Jaundice and Circumcision," *JME* 5 (2004):40-8.

#### d. Possible applications

Assuming the *posekim* understand and take seriously Chazal's concern for the danger of not performing *metzitzah* – there is legitimate concern for performing it accurately and correctly. While there is a possible medical risk of danger to the infant through this procedure, these *posekim* nonetheless view the process as definitely halachically therapeutic. In our case, the therapy that halacha demands poses a dilemma: action entails a potential medical risk whereas inaction would result in a definite risk. This discussion therefore should then relate to how halacha views using a potentially risky therapy (*safek sakkanah*) to treat a more dangerous (*vaday sakkanah* as per R. Kook) underlying condition. Such a discussion is beyond the scope of this paper, but see *Nishmat Avraham* 2 (155:2) for a thorough analysis and review of applications of this topic.

#### IV. Conclusion

The halacha demands that a person extend great effort in performing its precepts – possibly laying out large sums of money and undergoing personal hardships. These demands include accepting certain levels of risk as outlined above, relying on the framework of *shomer peta'im* Hashem. We hope that this article has provided a proper framework for assessing how the potential risks involved with *metzitzah b'peh* fit into the general understanding of risk-taking in halacha as a starting point for further discussion.

## International Responsa Project

**Subject:** BRCA

**Date:** August 2007

**Q:** Does Jewish law permit a healthy woman who has tested positive for a mutation in the BRCA 1 gene to undergo a prophylactic bilateral mastectomy? If so, what are the halachic grounds by which we permit a currently healthy woman to take on the risks of surgery and unknown possibly deleterious long-term consequences of surgery?

**A:** 1. Jewish law does permit a healthy woman who has tested positive for a mutation in the BRCA 1 gene to undergo a prophylactic bilateral mastectomy.

2. A person is allowed to put himself at risk in order to avoid more severe risk in the future.

See also Tr. *Avoda Zara* 27 ב"ב עמוד ב'.

**Subject:** Feeding with a tube on Shabbat

**Date:** August 2007

**Q:** I'd like to ask a *shaalah*.

*My niece is severely braindamaged, and feeds with a tube through her intestines in her stomach. She is 2.5 years old. My brother's family is not religious, but I will be visiting and want to know whether on Shabbat I will be able to feed her turn on and off the machine that feeds into her stomach. Am I allowed to charge the machine on shabbos if the battery is dead (I realize that this should be done before Shabbat but in the case that it isn't).*

*Also, is the machine considered *muksah* when she is not feeding? If I want to take her for a walk with an *eiruv*, can I take the machine too, in case I need to feed her later?*

**A:** If possible you should ask a non-Jew to turn the machine on and off. If not, do it with the knuckle of your finger.

Similarly, ask a non-Jew to charge the battery or, if not able do so using both hands at the same time to attach and remove it from the charger.

The machine is not *muksah* and you may take it with you.

*Tizke l'mitzvot*

Continuation of the IRP section on p. 64