Fall 2022

Survey of Recent Halakhic Literature: Of Tobacco, Snuff and Cannabis (Part III): Shemittah

J. David Bleich

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VII. *Shemittah*

A. Tobacco and Snuff

The criteria defining the sanctity of *shevi'it* that give rise to *shemittah* restrictions are complex, multifaceted and, at times, subject to controversy. Although some few authorities adopt the view that sanctity of sabbatical produce is limited to foodstuffs, most authorities maintain that the rules of *shemittah* are not limited to agricultural produce used as food. Nevertheless, whether tobacco, snuff and/or cannabis are endowed with the sanctity of the sabbatical year is a complex halakhic issue contingent upon a variety of factors.[1]

Not only is cultivation of the land forbidden during the *shemittah* year, but use of produce that grows of its own accord is also proscribed. Produce that is not planted but sprouts of its own accord is forbidden on the basis of *gezeirat sefiḥin*, a rabbinic decree forbidding use of such produce lest a transgressor plant seeds during the sabbatical year but claim that the produce grew spontaneously.[2] Commercial traffic in all produce harvested during the sabbatical year is prohibited. *Ḥazon Ish*, *Shevi'it* 10:12, rules that the rabbinic prohibition regarding produce that sprouts of its own accord during the seventh year does not apply to flax

I wish to acknowledge the assistance of Rabbi Dr. Joseph Cohen of RIETS *and the Technion Medical School. My appreciation also to my son-in-law, Rabbi Benzion Sommerfeld, for his meticulous reading and incisive comments, and, as always, to Rabbi Dr. Shlomo Zuckier for his careful attention to both style and substance. Once again, my gratitude to Rabbi Moshe Schapiro and Mr. Zvi Erenyi of the Mendel Gottesman Library. This column concludes our three-part series on halakhic matters relating to tobacco and cannabis.*

[1] See Ra'avad cited by Ritva and *Shitah Mekubbezet, Bava Kamma* 101b, as well as R. Yechiel Michel Epstein, *Arukh ha-Shulḥan he-Atid*, *Hilkhot Shemittah ve-Yovel* 24:23 and 24:32. Cf., *Ẓiẓ Eli'ezer*, VI, no. 33.

[2] See Rambam, *Hilkhot Shemittah ve-Yovel* 4:2.

DOI: 10.54469/O1HD4AM85

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both because he maintains that flax is not subject to *kedushat shevi'it*[3] and because he asserts that the rabbinic prohibition was limited exclusively to food products. That consideration would apply to tobacco as well, unless it is considered to be a food.[4] *Ḥazon Ish*'s ruling is followed by R. Chaim Kanievski, *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel*, *Bi'ur Halakah* 4:17.[5] However, many authorities make no such distinction. For those authorities, use of tobacco or cannabis that grows of its own accord during the sabbatical year is entirely prohibited.[6]

The earliest categorization of tobacco in the context of *shemittah* regulations occurs in the eighteenth-century work of R. Mordecai Galante,[7] *Gedulat Mordekhai*,[8] no. 9, s.v. *u-le-inyan*, who states that although tobacco is bitter, it is no different than sap of trees regarding which we find no distinction between sweet and bitter. That view is reflected in sabbatical year publications of Jerusalem's *Edah ha-Ḥaredit*, which list approved brands of cigarettes manufactured from imported tobacco.[9]

R. Eliezer Waldenberg, *Ẓiẓ Eli'ezer*, VI, no. 33, sec. 2, distinguishes between smoking tobacco and snuff. *Ẓiẓ Eli'ezer* asserts that cigarette tobacco is subject to the laws of *shemittah* at least as a matter of doubt but that its use as snuff is free of those restrictions. *Ẓiẓ Eli'ezer*, and *Gedulat Mordekhai* as well,[10] rule tobacco to be subject to the restrictions of *shevi'it* even though it is not a food because they regard the laws of

[3] Cf., R. Joshua Moshe Aaronson, *Yeshu'at Mosheh*, no. 1 and R. Moshe Sternbuch, *Shevi'it ke-Hilkhatah*, pp. 72–73.

[4] See J. David Bleich, "Of Tobacco, Snuff and Cannabis (Part 1)," *Tradition*, vol. 54, no. 2 (Spring, 2022), pp. 103–14; R. Joseph Efrati, *Yissa Yosef*, V, no. 51; and R. Moshe Sternbuch, *Shemittah ke-Hilkhatah*, 2nd edition (Jerusalem, 5753) 2:12. See also Rabbi A. Scharf, *Yated Ne'eman*, *Shabbat Kodesh,* no. 18, *Parashat Yitro* (17 Shevat 5775), p. 32.

[5] See also *Yissa Yosef*, V, no. 51, s.v. *u-de-atinan*.

[6] See, for example, R. Joseph Lieberman, *Mishnat Yosef*, no. 18, sec. 9. That is also the position of the *Edah ha-Ḥaredit*. See *infra*, note 9. *Ẓiẓ Eliezer*, IX, no. 33 and XI, no. 69, expresses doubt with regard to the status of tobacco and, accordingly, finds grounds for leniency with regard to applying the superimposed rabbinic restriction regarding *sefiḥin* to tobacco.

[7] Not to be confused with the seventeenth-century Egyptian scholar, R. Mordecai ha-Levi, who discussed the status of tobacco as a food and with regard to *Yom Tov* in his *Darkhei No'am*, no. 9. See "Of Tobacco, Snuff and Cannabis (Part 1)," pp. 103–122.

[8] Published as an appendix to that author's homiletical work, *Divrei Mordekhai* (Livorno, 5620).

[9] See, for example, *Madrikh ha-Kashrut*: *Devar ha-Shemittah*, 5733, p. 18. From this year's *Madrikh ha-Kashrut* (5782) it appears that all cigarettes currently sold in Israel are manufactured from imported tobacco.

[10] Cf., *supra*, note 1.

shemittah to be applicable to all agricultural products provided that their benefit is enjoyed simultaneously with their destruction and provided that their benefit is enjoyed by all. *Ẓiẓ Eli'ezer* regards tobacco as comparable to a food because it "enters the body" and is enjoyed by all because "a majority of people smoke" and hence is subject to the sanctity of *shevi'it*, whereas snuff is designed only "for sneezing" and, accordingly, is exempt from such restrictions. Smoking is regarded by *Ẓiẓ Eli'ezer* as a benefit enjoyed by all; sniffing snuff is not. Snuff, he contends, is processed from a different type of tobacco and therefore not subject to *shemittah* restrictions. However, if a conventional strain of tobacco is also used for snuff it would be forbidden to use even *sefiḥin*, or non-cultivated tobacco that grow of their own accord during the *shemittah* year, for purposes of snuff. The sanctity of *shevi'it* would prevent use of smoking tobacco as snuff, a benefit not "common to all persons," just as it prevents use of a food for making a poultice. The sanctity of *shemittah* produce dictates that its use be limited to forms of benefit that are enjoyed by all.

R. Joseph Lieberman, *Mishnat Ɣosef*, no. 18, sec. 7, regards snuff differently in deeming it to be *shaveh le-khol nefesh* and compares its status to that of spices. He acknowledges that sniffing snuff is not a widespread practice but asserts that smelling the aroma of spices is also not a widespread practice. In both cases, *Mishnat Ɣosef* contends that, given the opportunity, everyone would gladly accept the olfactory pleasure provided by those substances. However, in point of fact, most people disdain the sneezing caused by snuff and would refuse snuff if offered. In truth, that is so with regard to tobacco as well. Persons who find inhaling tobacco to be an unpleasant experience and do not care for the taste of tobacco also refuse proffered cigarettes. Many find the smell unpleasant even when the tobacco is smoked by others.[11]

Mishnat Ɣosef, however, equates snuff with spices whose status is pondered and left unresolved by the Palestinian Talmud, *Shevi'it* 7:1.[12]

[11] Since many find its smell repugnant, tobacco cannot be considered a "spice" whose status is considered to be a matter of doubt by the Palestinian Talmud, *Shevi'it* 7:1. See Rabbi Sternbuch, *Shevi'it ke-Hilkhatah*, p. 75.

[12] R. Shlomoh Siriliyo, *Shevi'it* 7:1, cited by R. Shammai Heiman, *Sha'arei Zera'im*: *Shevi'it* (Jerusalem, 5767), no. 3, *anaf* 4, explains that the doubt expressed by the Palestinian Talmud regarding the status of spices is doubt with regard to the proper understanding of *hana'atan u-bi'uran shavin*. In effect, the question is whether the condition *hana'atan u-bi'uran shavin*, the presence of which is necessary to establish *kedushat shevi'it*, is to be defined literally as simultaneous occurrence of those two phenomena or whether the requirement is only that destruction cannot occur before benefit but there can be *kedushat shevi'it* even if the product continues to exist after benefit has occurred. That is indeed the view of *Ba'al ha-Ma'or*, *Sukkah*

Despite the fact that *shevi'it* restrictions in our day are generally regarded as rabbinic in nature and, accordingly, it would be assumed that doubtful issues be adjudicated permissibly,[13] there are a host of authorities who apply the restrictive rules of *shemittah* to spices.[14]

Mishnat Yosef apparently assumes that some tobacco strains are generally used for smoking and others for snuff but that, at times, at least some strains can be used for either purpose. Assuming that the laws of *shemittah* apply to either snuff or smoking tobacco, but not to both, *Mishnat Yosef* rules that determination of purpose can be made at the time of harvest or of processing the final product on the basis of *bereirah*.[15] *Bereirah* is a principle by operation of which retroactive determinacy is conferred upon an act or status that is inherently indeterminate at the time of inception.

The earlier-cited work of R. Joseph Lieberman, *Mishnat Yosef* (Jerusalem, 5739), no. 18, presented the first detailed treatment of the status of tobacco *vis-à-vis shemittah* regulations and was followed some years later by R. Shammai Heiman, *Sha'arei Zera'im* (Jerusalem, 5763), no. 4, *anaf* 4. Each writer prefaces his discussion by citing *Gedulat Mordekhai* who categorizes tobacco as "*hana'ato u-bi'uro shavin*," i.e., a substance whose enjoyment and destruction occur simultaneously.[16]

Most authorities maintain that fruit and other types of vegetation are endowed with the sanctity of the sabbatical year only if they satisfy two criteria: 1) *hana'atan u-bi'uran shavin* – the benefit derived from the produce and its destruction occur simultaneously; and 2) the benefit enjoyed is "common to all persons." The criterion *hana'atan u-bi'uran shavin* is

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40a, and *Mishnah Rishonah*, *Shevi'it* 7:1. See also R. Shlomoh Zalman Auerbach, *Minḥat Shlomoh*, *Tinyana*, no. 123, sec. 2 and III, no. 132, sec. 9. Cf., R. Akiva Eger, *Sukkah* 40a.

Ḥazon Ish, *Shevi'it* 14:9, explains that the doubt expressed by the Palestinian Talmud is whether spices are *shaveh le-khol nefesh* or whether they are comparable to *mugmar* that is used only by delicate or sensitive individuals. Alternatively, the doubt may be whether *kedushat shevi'it* is limited to foodstuffs. See *supra*, note 1.

[13] See R. Israel of Shklov, *Pe'at ha-Shulḥan* 1:52.

[14] See *Ḥazon Ish*, *Shevi'it* 14:9; *Minḥat Shlomoh*, *Tinyana*, no. 123, sec. 2 and III, no. 132, sec. 9; R. Chaim Kanievsky, *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 7:127; R. Samuel ha-Levi Woszner, *Teshuvot Shevet ha-Levi*, II, no. 202; R. Benjamin Zilber, *Az Nidberu*, IV, no. 3; *idem*, *Brit Olam al Hilkhot Shevi'it*, 2nd edition, 5:87; as well as R. Moshe Sternbuch, *Shevi'it ke-Hilkhatah*, p. 74.

[15] The efficacy of *bereirah* as a halakhic principle is the subject of talmudic dispute. As a matter of normative law the principle applies to issues that are rabbinic in nature. See *Encyclopedia Talmudit*, IV (Jerusalem, 5712), 216–246. The laws of *shemittah* are binding in our era solely on the basis of rabbinic decree.

[16] See also *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel*, *Ẓiyyunei Halakhah* 7:222. Cf., however, *Az Nidberu*, IV, no. 3, who expresses doubt with regard to whether tobacco is *hana'ato u-bi'uro shavin*.

crucial to determining status with regard to the sanctity of produce of the sabbatical year. The Gemara, *Sukkah* 40a and *Bava Kamma* 101b, states that the sanctity of *shevi'it* is attendant only upon items "whose benefit and destruction occur simultaneously" as is the case when produce is consumed as a food. The Gemara also makes it clear that produce endowed with the sanctity of the sabbatical year, e.g., foodstuffs, may not be used for purposes whose benefit and destruction do not occur simultaneously, e.g., "dyeing and cleansing." R. Yose posits the condition that sanctity of the sabbatical year attaches only to produce whose usual benefit is one that is "enjoyed equally by all persons (*shaveh le-khol nefesh*)." R. Yose thereby excludes *melugma*, i.e., use as a poultice or for any other therapeutic purpose. The Palestinian Talmud, *Shevi'it* 7:1, seems to reject the criterion "enjoyed equally by all persons." The Palestinian Talmud lists a number of permitted uses, including eating, drinking, anointing the body, use as fuel for a lamp or as dye for clothing, while excluding items used as a *melugma*.

Rabbi Heiman reports a widely-known stringency of R. Chaim Soloveitchik of Brisk. R. Chaim, a heavy cigarette smoker, was careful not to smoke during the period between sundown and nightfall following each day of *Yom Tov*. His concern was fear of violation of the restriction against performing an act of labor on *Yom Tov* in order to reap the benefit on a subsequent day, i.e., labor on *Yom Tov* in "preparation" for benefit on a non-sanctified day. Taking a puff on a cigarette involves an act of burning; the benefit of that act is derived from the smoke generated as a result of burning the tobacco. The precise moment demarcating the end of one day and the beginning of the next is unknowable. Consequently, R. Chaim was concerned that, since drawing on a cigarette results in a benefit that does not occur until some seconds later, the two occurrences might actually take place on separate days.[17]

[17] Cf., *Sha'arei Zera'im*, chap. 4, *anaf* 2 and *anaf* 4. *Sha'arei Zera'im* also posits a controversy between Rashi, *Shabbat* 40a and *Bava Kamma* 101b, and *Tosafot*, *Bava Kamma* 101b, s.v. *ve-ha-ikka*, as opposed to Rabbenu Ḥananel, cited by *Tosafot*, *Bava Kamma* 101b, with regard to the proper definition of *hana'atan u-bi'uran shavin*. Rashi, *Sukkah* 40a and *Bava Kamma* 101b, explains that wood used for fuel is not *hana'ato u-bi'uro shavin* because the heat is derived primarily from coals after the wood is consumed. Absent that significant time gap, infers *Sha'arei Zera'im*, the destruction of the wood and the benefit of heat would be regarded as simultaneous. However, Rabbenu Ḥananel, cited by *Tosafot*, *Bava Kamma* 101b, does not invoke the consideration that heat is derived from coals rather than directly from firewood in explaining why destruction of wood and production of heat are not simultaneous occurrences. *Sha'arei Zera'im* apparently maintains that, according to Rabbenu Ḥananel, smoking tobacco (or marijuana) would not be considered *hana'ato u-bi'uro*

However, the term "*shavin*," or "simultaneous," as used in the context of *shemittah* regulations, must be clarified. The notion of "simultaneity" is not necessarily the same for all areas of Halakhah, i.e., the definition of *shavin* regarding *shemittah* regulations may be different from the application of the notion to the laws of *Yom Tov*. *Tosafot*, *Pesaḥim* 27b, s.v. *mi-khlal*, comments that the "pleasure," or "benefit," derived from food and its destruction are not entirely simultaneous. Food is "destroyed" in the process of mastication whereas benefit does not occur until the food is swallowed. The same is true of tobacco. Smoke is drawn through the lips into the mouth and in the process the tobacco is destroyed and transformed into ash; the benefit is experienced as the smoke is inhaled into the lungs. That process is analogous to consumption of food. Use of wood as fuel that is not regarded by the Gemara as *hana'atan u-bi'uran shavin* is not of the same nature, explain *Tosafot*, in that the benefit of wood used to produce heat occurs after the wood is transformed into embers or coals.[18] It might well be argued that, if mastication and swallowing are regarded as simultaneous events for purposes of *hana'atan u-bi'uran shavin*, burning tobacco by drawing air through the tobacco to produce smoke and then inhaling the smoke should also be regarded as simultaneous occurrences for purposes of *shemittah* regulations.[19]

Whether there is a second criterion that must be present in order to establish *kedushat shevi'it*, *viz.*, a benefit "common to all persons," is a matter of some controversy and presents a separate issue requiring determination of whether or not the benefit present in smoking is one that is "common to all persons."

The Gemara, *Sukkah* 40a and *Bava Kamma* 102a, posits a requirement that produce be used for a benefit "common to all persons" as a condition of *kedushat shevi'it* only according to R. Yose. No such requirement is explicitly mentioned by the Sages who posit only a requirement that the benefit derived from *shemittah* produce be simultaneous with its destruction. Applying usual canons of halakhic decision-making, the

shavin. At the same time, *Sha'arei Zera'im* asserts that drawing smoke through the cigarette prior to inhalation is part of the pleasure of smoking, although he recognizes that R. Chaim thought otherwise.

[18] See also Rashi, *Sukkah* 40a, s.v. *yaẓe'u* and *Bava Kamma* 101b, s.v. *yaẓe'u*.

[19] It may be argued that R. Chaim's analysis of the nature of a forbidden preparatory act of "burning" is correct but that the principle of *hana'ato u-bi'uro shavin* involves a different notion. Many physical acts can be divided into component parts, e.g., drawing air to produce smoke and inhaling that smoke. On *Yom Tov* both parts of the act are permitted but only if benefit of the preparatory burning is actually derived on *Yom Tov*. However, for purposes of *shemittah* classification, temporal contiguity may indeed be equated with simultaneity.

normative ruling should be in accordance with the majoritarian view of the Sages with the result that that the sanctity of *shevi'it* should not be limited to benefits "common to all persons." *Ḥazon Ish*, *Shevi'it* 13:6,[20] does indeed rule that plants used for therapeutic purposes are not endowed with the sanctity of *shevi'it*.[21] Other authorities disagree and rule that "*melugma*" (literally, a poultice), a term used as a category that includes all medicinal herbs and plants, is subject to *kedushat shevi'it*.[22]

If benefit that is common to all persons is a necessary condition of *kedushat shevi'it*, tobacco, whatever its status may have been in an earlier era, can hardly be considered *shaveh le-khol nefesh* in our day.[23] The crucial issue, then, is whether *shaveh le-khol nefesh* is a factor in determining *kedushat shevi'it*. Disagreement with regard to *melugma*—and other therapeutic uses—is predicated upon whether *shaveh le-khol nefesh* is a condition of *kedushat shevi'it*. Thus, apart from the categorization of tobacco for purposes of *shemittah*, whether cannabis cultivated for therapeutic use is subject to sabbatical restrictions is a matter of controversy. The status of cannabis grown for recreational use or for both medical and recreational use requires further clarification.

The disagreement with regard to *melugma* centers upon proper understanding of Rambam's ruling, *Hilkhot Shemittah ve-Yovel* 5:10–11, to the effect that produce of the sabbatical year cannot be employed for use as *melugma*. Rambam, *Hilkhot Shemittah ve-Yovel* 5:10, seems to accept both opinions recorded in the Gemara in ruling that *shemittah* produce cannot be used for "dyeing and cleansing" because the resultant benefit is not simultaneous with destruction of the substances used for those purposes and in concomitantly ruling that such produce may not be used for *melugma* because its benefit is not "common to all persons."

[20] See also Ḥazon Ish, *Shevi'it* 14:5, s.v. *ve-nir'eh*.

[21] See also *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 5:10, *Bi'ur Halakhah* s.v., *minei kevusim*, who suggests that even those authorities who maintain that produce designed for *melugma* is endowed with *kedushat shevi'it* would acknowledge that vegetation intended to be pulverized and used as a medicine is not endowed with the sanctity of *shemittah*. The distinction, suggests *Derekh Emunah*, is that *melugma* is used in its natural form whereas plants that are ground into a powder "are changed from their natural state and [the change constitutes a form of] destruction."

[22] See Ri ben Maz, *Shevi'it* 8:1; R. Shlomoh of Chelma, *Mirkevet ha-Mishneh* 7:14; *Tiferet Yisrael*, *Shevi'it* 7:2, *Yachin*, sec. 20; as well as *Minḥat Shlomoh*, *Tinyana*, no. 123, sec. 2 and III, no. 132, sec. 9. Cf., Rash, *Shevi'it* 8:1; *Emunat Yosef*, *Shevi'it* 8:1; and *Mishnat Yosef*, no. 18, sec. 4.

[23] See "Of Tobacco, Snuff and Cannabis (Part 1)," pp. 122–123. Cf., however, *Iggerot Mosheh*, *Oraḥ Ḥayyim*, V, no. 34, who asserts that, regardless of other factors, an activity in which "hundreds of millions of persons engage" must be categorized as "common to all persons."

Thus, Rambam accepts the contradictory exclusions of both the Sages and R. Yose.

According to Rashi's understanding of *Sukkah* 40a and *Bava Kamma* 102a, there are actually two matters of controversy between the Sages and R. Yose that emerge from their diverse exegetical interpretations: 1) whether produce is endowed with *kedushat shevi'it* only if the *species* yields benefit simultaneously with its destruction or whether the species must yield a benefit enjoyed equally by all persons; and 2) whether *use* of products that are endowed with *kedushat shevi'it*, because they are customarily used for purposes of human consumption, may be used for "dyeing and cleansing" or for *melugma*.[24] The Sages maintain that *shemittah* produce may not be used for "dyeing and cleansing" because the benefit derived from produce put to such uses and its destruction are not simultaneous. R. Yose does not posit such an exclusion with regard to use of *shemittah* produce. However, R. Yose maintains that produce of the sabbatical year may not be used for *melugma* because such use is not "common to all persons" whereas the Sages do not explicitly posit such a restriction.

Rambam's ruling accepting the exclusions of both the Sages and R. Yose lends itself to a straightforward resolution. The Gemara, *Sukkah* 40a and *Bava Kamma* 102a, declares that according to R. Yose the phrase "*le-okhlah*" serves to exclude *melugma* but indeed fails to provide a biblical source indicating that the Sages require "common to all persons" as a condition of sanctity.[25] Yet, Rambam may well have understood the talmudic phrase "'*le-okhlah*' – to exclude *melugma*" as an exegetical interpretation accepted by all and hence exclusion of *melugma* as not being a matter of controversy. If so, Rambam's view, unsurprisingly, is entirely consistent with the view of the Sages.

In addition, many authorities point to a contradiction in the Palestinian Talmud as a possible basis for Rambam's view that *shemittah* regulations do not pertain to vegetation used for medicinal purposes. The Palestinian Talmud, *Shevi'it* 7:1, positing "*lakhem*" as the biblical source, enumerates various uses to which *shemittah* produce may be put and explicitly excludes *melugma* on the grounds that it is "[of benefit] only to the sick." That statement is followed in the Palestinian Talmud by a further ruling attributed to R. Yose, thus ostensibly indicating that

[24] Cf., however, *Ḥazon Ish*, *Shevi'it* 13:6.

[25] But neither is there an explicit statement indicating that the Sages reject that requirement. Indeed, in establishing whether a particular *beraita* follows the position of R. Yose or of the Sages, the Gemara does not seize upon the *beraita*'s exclusion of *melugma* as proof that the *beraita* does not reflect the position of the Sages.

the earlier anonymous declaration is accepted by all.[26] At the same time, in an apparently contradictory statement, the Palestinian Talmud, *Shevi'it* 8:1, declares that plants customarily used as food for animals may be employed for *melugma* but questions whether plants generally used for *melugma* may be employed to make dyes to be used for human benefit. In limiting the question to use of animal food for *melugma*, the Palestinian Talmud assumes as a matter of course that produce used for human consumption may not be used for *melugma*. The Palestinian Talmud clearly implies that such plants are subject to *kedushat shevi'it*.[27]

The contradiction between the two discussion of the Babylonian Talmud is resolved if it is understood that the Palestinian Talmud, *Shevi'it* 7:1, regards the Sages as being in agreement that food generally consumed by humans may not be used for *melugma*, whereas the distinction for the Palestinian Talmud, *Shevi'it* 8:1 is limited to produce used solely as food for animals. If so, Rambam may well have interpreted the Babylonian Talmud, *Sukkah* 40a and *Bava Kamma* 102a, in a similar manner, i.e., the Sages and R. Yose disagree only with regard to whether produce fit only for animal consumption may be used for *melugma* as well, but agree that produce that is customarily consumed by humans cannot be used for *melugma*.[28]

Kesef Mishneh, in his commentary on the *Mishneh Torah*, *ad locum*, explains that Rambam maintains that the controversy between the Sages and R. Yose is limited to uses to which edible produce may be put.[29] However, asserts *Kesef Mishneh*, Rambam maintains that produce not fit for consumption by humans is also endowed with *kedushat shevi'it* but that there is no qualification that it be used solely for benefit that occurs simultaneously with its destruction or that it be used only for a benefit "common to all persons."

[26] Of interest is the fact that *Bi'ur ha-Gra* had a version of the text that included an additional expression. Following the phrase "excluding *melugma*, which is [of benefit] only to the sick," *Bi'ur ha-Gra* had an additional phrase, *viz*., "excluding '*alintit*,'" accompanied by the explanatory phrase "a medication prepared for persons who do not experience taste in eating."

[27] For a discussion of these contradictory statements see *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 5:10, *Bi'ur Halakhah*, s.v. *minei kevusim*. See also *Minḥat Shlomoh*, II, no. 123, sec. 2 and III, no. 132, sec. 8.

[28] Cf., however, *Ḥazon Ish*, *Shevi'it* 13:6, who explains that according to Rambam the disagreement between the Sages and R. Yose is with regard to whether harvesting edible produce with intent to use it for "dyeing and cleansing" or *melugma* effects a change in the status of such produce.

[29] See also *Emunat Yosef*, *Shevi'it* 8:1, s.v. *ve-kol she-eino meyuḥad le-ma'akhal adam*. Cf., *Mahari Kurkus*, *ad locum*; *Pe'at ha-Shulḥan* 5:44; and R. Moshe ibn Ḥabib, *Kappot Temarim*, *Sukkah* 40a.

Disagreeing with Rashi, Rambam, according to *Kesef Mishneh,* understands that the controversy between the Sages and R. Yose is limited to permitting use of edible produce for purposes in which benefit and destruction does not occur simultaneously. However, both the Sages and R. Yose agree that produce customarily used for *melugma* is indeed endowed with *kedushat shevi'it* but without similar qualifications of the use to which such produce may be put. Thus, Rambam rules in accordance with the opinion of the Sages and hence restricts use of edible produce to uses in which benefit and destruction are simultaneous. Rambam further maintains that the Sages also restrict use of such produce to benefits that are "common to all persons" while maintaining that there is no such requirement with regard to non-edible vegetation that grows in *shemittah.* Consequently, in formulating his ruling, Rambam, *Hilkhot Shemittah ve-Yovel* 5:11, explicitly limits his ruling permitting dyeing and cleansing with *shemittah* produce to "cleaning agents such as *borit*" that are non-edible but excludes fruit from such use. *Kesef Mishneh* cites the statement of the Palestinian Talmud, *Shevi'it* 7:1, to the effect that produce used primarily as a cleansing agent is subject to *kedushat shevi'it* as the basis of Rambam's ruling and explains that the controversy between the Sages and R. Yose is limited to produce grown for human consumption but that there is no similar controversy with regard to a restriction upon use of non-edible produce.

That novel position arises from the fact that *shemittah* restrictions applicable to edible foods and to non-edible vegetation are derived from different biblical verses and those verses assign different principles to edible foods and to non-edible vegetation. The rule that *shemittah* applies to non-edible vegetation is derived from "'*lakhem* – for you,' *le-khol ẓorkheikhem* – for all your needs" (Leviticus 25:6), a term that explicitly negates a need for the characteristic of simultaneous benefit and destruction. Accordingly, Rambam regards the controversy between the Sages and R. Yose as limited to criteria required for use of edible produce in conformity with *kedushat shevi'it.* However, with regard to non-edible vegetation, the Sages concede that simultaneity of benefit and destruction is not a necessary condition of such use because the term "*le-okhlah* – for food" refers solely to edible produce and hence excludes uses not comparable to eating, i.e., uses in which benefit and destruction are not simultaneous. In contradistinction, the application of *shemittah* regulations to non-edible vegetation is derived from the word "'*lakhem*' – 'to you,' for all your needs" and since there is no implication in the latter term to the effect that use must be comparable in some way to eating, the term serves to include other forms of benefit as well. Indeed, in ruling that "*borit*," a non-edible cleansing agent, is endowed with *kedushat shevi'it* and may be used for cleansing purposes,

Rambam, *Hilkhot Shemittah ve-Yovel* 5:10, explicitly predicates that statement on the term "*lakhem*." In contradistinction, in ruling that "*peirot*," or "fruit," of *shevi'it* may not be used for cleansing purposes, Rambam precludes such use on the basis of the verse "*le-okhlah*."

The consensus of halakhic opinion is that tobacco is not a food.[30] However, as has previously been explained, if it is the case that Rambam regards *melugma* to be subject to *shemittah* restrictions even according to the Sages, it is on the basis of applying the verse "*lakhem*" – '*le-khol ẓarkheikhem*'" which includes every need or benefit. Nevertheless, produce made subject to *shemittah* regulations on the basis of that verse can be used only for such benefits as are "common to all persons." Since, as has been argued, smoking tobacco is now recognized as no longer being a benefit "common to all persons," it may well be concluded that tobacco is not subject to *shemittah* strictures. That conclusion is at variance with the rulings of *Gedulat Mordekhai* and *Mishnat Yosef* who explicitly state that tobacco is subject to *shemittah* restrictions just as the conclusion that smoking is no longer *shaveh le-khol nefesh* now renders smoking on *Yom Tov* impermissible, contrary to the view of the many authorities who, in earlier days, permitted smoking on *Yom Tov*.

One further point: Although he regards tobacco to be subject to *kedushat shevi'it*, *Mishnat Yosef*, no. 18, sec. 8, nevertheless rules that tobacco is not subject to *bi'ur*, i.e., removal from the owner's domain.[31] *Mishnat Yosef* presents the novel view of R. Moshe di Trani, known as *Mabit*, *Kiryat Sefer*, *Hilkhot Shemittah ve-Yovel*, chap. 7, to the effect that the requirement of *bi'ur* pertains solely to foodstuffs, including foods eaten only by animals, but that vegetation which is endowed with *kedushat shevi'it* only because it is suitable for other uses is not subject to *bi'ur*.

B. Cannabis

1. Cultivation

While suffering from a terminal illness, the late R. Abraham Genechovsky, who served as Rosh Yeshivah of the Tchebiner Yeshivah in Jerusalem,

[30] See "Of Tobacco, Snuff and Cannabis (Part 1)," p. 103.

[31] Leviticus 25:7 commands, "And for your cattle and for your animals that are in your land shall all the produce be for food." That verse serves as the commandment concerning *bi'ur*. *Bi'ur* becomes incumbent when there is no longer food in the field that satisfies the needs of undomesticated animals. A person who has earlier collected *shemittah* produce declared *hefker* is obligated to remove from his domain even the limited produce taken for his personal use and make it available to both man and beast.

experienced excruciating pain for which cannabis was prescribed. Although R. Chaim Kanievsky ruled separation of *terumot* and *ma'aserot* from cannabis to be unnecessary, R. Genechovsky insisted upon doing so despite the considerable expense involved.[32] Rambam, *Hilkhot Kilayim* 1:4, rules that the prohibition against hybridization is limited to plants "suitable for human consumption" to the exclusion of "herbs and the like that are suitable only as a cure." The implication is that only normally consumed foodstuffs are subject to the obligations of *terumot* and *ma'aserot*.

Nevertheless, the status of cannabis with regard to restrictions associated with the sabbatical year is somewhat more complex. The most significant general treatments of that issue are an article based upon a recorded lecture by R. Joseph Shalom Eliashiv published in *Halikhot Sadeh*, no. 122 (n.d.) and R. Joseph Efrati, *Halikhot Sadeh*, no. 214 (Tammuz 5781), and in his *Yissa Yosef*, *Shevi'it*, V, no. 51.[33] Prior to the 5782 sabbatical year, Rabbi Efrati, *Halikhot Sadeh*, no. 214, modified his position in light of changed circumstances regarding cannabis use.

If, as *Magen Avraham* and *Ẓiẓ Eli'ezer* suggest, "inhaling and exhaling" or "substances that enter the body" constitute a form of eating, both tobacco and cannabis should be categorized as agricultural species subject to the laws of *shevi'it*. If, however, tobacco is a foodstuff only because it satiates, as is the second consideration advanced by *Magen Avraham*, it would follow that tobacco may be a food whereas cannabis is not.

The general rule is that fruit that grows of itself during the sabbatical year must be treated in accordance with the "sanctity of the seventh year." Such produce must be treated as *res nullius*, made available to all and sundry, and eaten as food or consumed in some other permissible manner rather than "wasted" or used for some other purpose. As noted earlier, a rabbinic edict in the form of *gezeirat sefiḥin* forbids use of vegetation that sprouts from the ground without cultivation.

The Mishnah, *Shevi'it* 8:1, declares that all food products "designated," i.e., generally used, for human consumption that grow during the sabbatical year may not be used as a therapeutic poultice. Use of such agricultural products is reserved for human consumption. The status of produce *meyuḥad*, i.e., "designated" or customarily used, for human consumption cannot be varied by intent of the grower or purchaser.

[32] See R. Abraham Resnikoff, *Teḥumin*, XXXVII (5779), 111, note 11.

[33] See also Rabbi A. Sharf, *Yated Ne'eman*, *Shabbat Kodesh*, no. 18, *Parashat Yitro* (17 Shevat 5775), p. 52; R. Yitzchak Zilberstein, *Ḥashukei Ḥemed*, *Yevamot* 122a; and R. Asher Weiss, *Minḥat Asher*: *Shevi'it*, no. 29.

Therapeutic use of a foodstuff is prohibited only if the food is "designated" for human consumption; a foodstuff that is not designated for human consumption, i.e., not customarily eaten by humans but nevertheless edible if necessary (*al yedei ha-deḥak*), may be fed to animals and also used for therapeutic purposes.[34] *Ḥazon Ish*, *Shevi'it* 13:7, rules that vegetation designated for use in producing dye is also regarded as "designated for humans" and hence may not be used as a medication. As noted, Rambam, *Hilkhot Shemittah ve-Yovel* 5:10–11, rules that edible produce of the sabbatical year may not be used as *melugma*.

Nevertheless, it would seem obvious that, since severe pain is regarded as life-shortening to a patient suffering from a terminal malady,[35] cannabis may be grown during *shemittah* for use by such patients. It would seem equally obvious that the quantity that may be cultivated may be no larger than necessary to satisfy the needs of such patients and that sale for profit would be forbidden. Thus, the issue is limited to use of cannabis that grows of its own accord in treating non-life-threatening illnesses and also for recreational purposes.

There are then two questions that must be addressed: 1) whether cannabis is a species subject to the sanctity of the sabbatical year and 2) if yes, may cannabis be used for medical treatment or palliation of pain by patients suffering from non-life-threatening illnesses. The resolution of those questions is dependent upon: 1) whether a condition of *kedushat shevi'it* is that the produce yield a benefit common to all persons and 2) whether the benefit of cannabis is indeed common to all persons. Those considerations are identical with the considerations earlier discussed with regard to tobacco.

Ḥazon Ish, *Shevi'it* 10:5, followed by R. Chaim Kanievski, *Derekh Emunah, Hilkhot Shemittah ve-Yovel* 4:17, rules that plants customarily used solely for medical purposes do not have the sanctity of *shevi'it*. Invoking *Ḥazon Ish*, Rabbi Efrati, in his earlier writings, *Halikhot Sadeh* and *Yissa Yosef*, assumes such to be the case regarding cannabis and hence rules that cannabis is included in that category. The implication is that if a plant or herb is customarily used as a medicament, the intention of the grower is irrelevant, and, therefore, cannabis illegally cultivated for the recreational market also lacks *kedushat shevi'it*. That conclusion flows from the principle that any produce customarily used for a specific purpose has the status of its customary use and is not subject to variation

[34] See *Mishnah Rishonah*, *Shevi'it* 7:1.

[35] See J. David Bleich, "Palliation of Pain," *Bioethical Dilemmas*, II (Southfield, Michigan, 2006), 184–190.

by the grower.[36] However, citing *Ḥazon Ish*, *Shevi'it* 14:5, Rabbi Efrati, *Halikhot Sadeh*, no. 214, suggests that if it is the case that cannabis is commonly used both for medical and recreational purposes, and some persons cultivate the crop for one purpose and others for the second, its classification for purposes of *shemittah* will depend upon the intent of the owner of the field.

Nevertheless, in his more recent article published in *Halikhot Sadeh*, no. 214 (p. 11), prior to the last sabbatical year, Rabbi Efrati asserts that, in Israel, the status of cannabis has changed. Although sale remains restricted to use for medical purposes, with the decriminalization of use of marijuana perfectly healthy individuals became consumers of cannabis since it is "always available without difficulty" and many "tens of thousands of Israeli residents are cannabis consumers … and according to my information even young children, Heaven have mercy, are consumers of cannabis without difficulty and readily order cannabis in the free market." Consequently, Rabbi Efrati now regards cannabis as *shaveh le-khol nefesh* and hence subject to *shemittah* regulations.

Rabbi Zilberstein's position is somewhat more complex. Rabbi Zilberstein, *Vavei ha-Ammudim*, notes that the status of a particular fruit or plant does not depend upon the purpose for which the owner of the field in which it grows intends to cultivate the produce but is determined by the purpose for which it is customarily used.[37] It may be the case that, at present, the vast majority of cannabis plants are cultivated for recreational use. If so, even if an individual grower reserves his entire crop for use as medical marijuana, the plant should retain *kedushat shevi'it*.[38] Since marijuana is now widely used for recreational purposes it would seem that its use is also "common to all persons." However, marijuana used for recreational purposes is harmful and for that reason recreational use is eschewed by many, and probably most, people. As a result, it has been argued that, despite its widespread use, cannabis[39] cannot be considered a substance whose benefit is *shaveh le-khol nefesh*.

[36] See Rambam, *Hilkhot Shemittah ve-Yovel* 5:11 and *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 5:11, sec. 82. See also, *Ḥazon Ish*, *Shevi'it* 13:10.

[37] See *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 5:11, sec. 82.

[38] If so, it should be the case that if cannabis is customarily used for recreational purposes, its status is that of "a food for the healthy." Consequently, it would be permissible even for a non-seriously ill patient to consume marijuana on *Shabbat* for medical purposes even if not combined with an edible food product.

[39] Unlike *mugmar*, which appeals only to "delicate" individuals, cannabis would be comparable to venison which, but for its expense and scarcity, would be sought by all. Cf., *Bi'ur ha-Gra*, Palestinian Talmud, *Shevi'it* 7:1, s.v. *ve-ha-tani* and s.v. *ma'i*. *Ḥazon Ish*, *Shevi'it* 10:4 and *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 5:77.

Rabbi Zilberstein presents an intriguing argument to the contrary. Used in extremely small amounts, and only on an occasional basis, cannabis probably has no ill effects. Basically, then, everyone would enjoy the recreational pleasure associated with cannabis but for fear of engaging in such use because the threshold dose that is safe is unknown or because of fear of temptation to overindulge. As a result, Rabbi Zilberstein argues, "perhaps" the species of cannabis is, in reality, *shaveh le-khol nefesh.*

That argument does not seem to be correct. The same might be said of any pleasant-tasting poison. Yet no one would risk the effects of a poison. The net result is that poisons, even in minute quantities, are eschewed by all persons and, no matter what pleasant experiences non-lethal doses might provide, no one engages in consumption of poison. Non-lethal doses of poison are not comparable to the venison described by the Gemara, *Ketubot* 7a, as a "*ẓorekh*," or benefit for all, if not for its scarcity or expense. Rather, non-lethal doses of poison are comparable to *muqmar*, which has no appeal other than to a limited class of individuals. The same is true of marijuana. In theory, cannabis might be a product that would be enjoyed by all but, in practice, it is enjoyed by relatively few and rejected by most. The motive leading to such rejection would be irrelevant. Accordingly, recreational use of cannabis would be considered *eino shaveh le-khol nefesh.*

Since he regards use of cannabis in present-day Israel as ubiquitous, R. Yitzchak Zilberstein, *Vavei ha-Ammudim*, no. 7 (Tammuz 5775) and *Ḥashukei Ḥemed*, *Ɣevamot* 122a as well as *Divrei Shir*, no. 533, *Parashat Pinḥas* (18 Tammuz 5781), describes cannabis as "designated" for both recreational and medical use and hence deems it to be endowed with the sanctity of *shevi'it.* However, he maintains, if the product is generally used for both purposes, the grower's intention to dedicate his crop to medical use exclusively would render it no longer subject to *kedushat shevi'it.*[40]

2. Safeguarding

A serious problem lies in the fact that cultivation of cannabis is strictly regulated by the Israeli government. In 5775, the last *shemittah* year, only eight producers were licensed to cultivate marijuana. One of those firms was owned by a newly-observant Jew who contacted R. Joseph Efrati for advice with regard to how to conduct himself during the sabbatical year. The areas in which cannabis were grown were enclosed by a 3.5-meter-high

[40] See Rambam, *Hilkhot Shemittah ve-Ɣovel* 5:11.

fence and were also under twenty-four-hour video surveillance. In addition, those areas were patrolled by security personnel accompanied by guard dogs.[41] Alarms were set to go off if the perimeter was breached. The Israeli government held and continues to hold the owner responsible for any breach of security. Cannabis plants maintained under such conditions can hardly be considered *res nullius*.

A similar problem occurred during the days of the Temple. The Gemara, *Bava Meẓi'a* 118a, reports that emissaries of the *bet din* were dispatched to safeguard barley growing in the field for use in the *omer* offering and, seemingly, to acquire title to the barley as well. The *shemittah*-related question is obvious: How did those emissaries comport themselves during the sabbatical year when all produce must be declared *hefker*? Many early-day commentators advanced various explanations that have no impact upon resolution of the cannabis grower's problem.

Ḥazon Ish, *Shevi'it* 10:5, resolves that difficulty in stating that the entire populace acquiesced to the action of the *bet din*'s emissaries by renouncing their potential right to the barley with the result that residual title vested exclusively in the *bet din* or their designees. *Ḥazon Ish* compares the resultant situation to *pe'ah* (a corner of the field left unharvested and reserved for the poor) which becomes *res nullius* and hence permissible to all if the poor collectively renounce their right to the *pe'ah*.

R. Shlomoh Zalman Auerbach, *Ma'adanei Ereẓ*, chap. 5, sec. 5, takes issue with *Ḥazon Ish*'s explanation and dismisses the analogy to *pe'ah*. Title to *pe'ah*, upon being left in the field by the landowner, argues *Ma'adanei Ereẓ*, vests in the poor collectively. Consequently, if all impoverished individuals renounce title there is no residual owner and hence the produce becomes *res nullius*. Produce that grows during *shemittah*, on the contrary, belongs to no one and hence becomes *res nullius* in the field. Thus, unlike *pe'ah*, vegetation that grows during the sabbatical year has no proprietor empowered to renounce ownership. Consequently, abandonment of title would be meaningless and of no effect whatsoever. In contrast, *pe'ah* is prohibited to persons of means only because seizure of *pe'ah* by such persons would violate the rights of the poor. Harvesting produce of the sabbatical year is forbidden unless equal opportunity is provided for all to do so as well.[42] In any event, it cannot be anticipated

[41] See Rabbi A. Scharf, *Vavei ha-Ammudim*, no. 7 (Tammuz 5774), pp. 57–61 and *idem*, *Yated Ne'eman*, *Shabbat Kodesh*, no. 17, *Parashat Beshalaḥ* (Shevat 5775), p. 32.

[42] For an analysis of the views of early-day authorities regarding the general obligation of *hefker vis-à-vis* produce of *shemittah*, see *Sha'arei Zera'im*, no. 12, *anaf* 1. For an analysis of the nature of the controversy between *Ḥazon Ish* and Rabbi Auerbach, see *ibid*., p. 227.

that, in our day, the general populace would emulate the conduct of their forebears by renouncing their right to use cannabis grown during the *shemittah* year.

Rabbi Zilberstein found a solution to the grower's problem in a puzzling ruling of R. Chaim Kanievski regarding another matter. Produce of the sabbatical year is exempt from tithes. Rambam, *Hilkhot Shemittah ve-Yovel* 4:12, rules that in an instance of doubt with regard to sanctity of *shevi'it* the owner of the field is forbidden to treat the produce as his own property but is under no obligation to declare the produce *res nullius.* Since no one can make use of the produce, the result would be that the produce would spoil and be of no use to anyone. But, questioned *Ḥazon Ish*, why should the owner of the field not be compelled to renounce ownership to crops of doubtful sanctity in order to prevent the produce from going to waste?[43] *Ḥazon Ish* is quoted by R. Chaim Kanievski, *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 4:12, *Bi'ur Halakhah*, s.v. *harei hu*, as stating that the owner has the option of not making the produce available to the general public but only to "ten of his friends."

Rabbi Zilberstein, and apparently *Derekh Emunah* as well, presume that the import of Rabbi Kanievski's ruling is that renunciation of ownership in favor of a minimum of ten persons qualifies as *hefker.* Rabbi Zilberstein, in turn, seized upon that ruling and proposed using it as an expedient for solving the marijuana growers' problem.

Rabbi Efrati, *Yissa Yosef,* V, *Shevi'it*, no. 51, however, points out that Rabbi Zilberstein's ruling is astonishing because the normative rule is presumed to be that *hefker* is valid only if it is for the benefit of all and sundry.[44] Rabbi Efrati suggests that the solution to the use of doubtfully sanctified *shemittah* produce lies in declaring the produce *hefker* in favor of all but that the owner might make only a limited number of his friends aware of his abandonment of the produce with the result that the public at large would not become aware of its right to seize the produce. For obvious reasons that would not be a viable solution for a cannabis grower whose activity is subject to public scrutiny.

[43] The grounds for such compulsion would be "*Kofin al middat Sedom* – We apply duress to [persons who conduct themselves according to] the trait of Sodom" (*Eruvin* 49a and *Ketubot* 103a), i.e., rather than allowing people to act in accordance with the character trait of the inhabitants of Sodom, we compel individuals to make property from which they can derive no benefit available to persons who can derive benefit from such property.

[44] There is significant controversy regarding the entirely different question of whether *hefker* can be declared privately or only in the presence of three people. See *Encyclopedia Talmudit*, X (Jerusalem, 5762), 69-62. There does not appear to be any authority who requires that *hefker* be declared in the presence of ten persons.

Rabbi Zilberstein himself is of the opinion that safeguarding medical marijuana from seizure by healthy persons during *shemittah* is permissible for a different reason. *Shemittah* produce must be consumed in a manner consistent with the sanctity of *shevi'it*. A non-Jew is not himself constrained from consuming the produce of *shemittah* but a Jew may not make such produce available to him because, since the non-Jew is under no obligation with regard to eating the produce of *shemittah*, his consumption of such produce constitutes "waste" of the produce and is not compatible with *kedushat shevi'it*.[45] Accordingly, a field may be guarded in order to prevent non-Jews from entering.[46] In such a situation, safeguarding the field is not for the purpose of preserving the property interests of the owner but for the extraneous reason of preventing non-Jews from "wasting" the produce.

Rabbi Zilberstein offers a novel two-step argument: Since recreational marijuana is harmful to health, use of cannabis for recreational purposes is a "waste" of a *shemittah* product. Since using marijuana for recreational purposes is antithetical to the sanctity of *shevi'it*, marijuana may be protected from putative recreational users for whom use of marijuana is harmful and hence a form of "waste."

Rabbi Efrati, *Yissa Yosef*, V, no. 51, counters with a *reductio ad absurdum*. High-calorie fruits such as grapes are unhealthy for diabetics. Therefore, it should be appropriate to guard vineyards against diabetics. Going a step further, all foods are unhealthy when consumed in excess. Therefore, the result should be that all foods may be protected against overeaters. Rabbi Efrati does not venture an explanation of why such a conclusion is absurd. The reasoning must be that s*hemittah* produce may indeed be guarded to preserve the sanctity of *shevi'it* and any use of *shemittah* produce by a non-Jew is a violation of that sanctity. However, parsimonious consumption of otherwise unhealthful foods is generally not unhealthy. Moreover, with a bit of ingenuity one can often find legitimate uses for *shemittah* produce other than consumption as food. The result is that all *shemittah* produce can be utilized for either a legitimate or illegitimate purpose. Apparently, then, the existence of persons who may either preserve the sanctity of *shevi'it* or violate it does not warrant restricting access. Preservation from seizure by a non-Jew is different in that there is no manner in which a non-Jew might himself use *shemittah* produce in conformity with the sanctity of *shevi'it*.

However, another suggestion does present itself. It might seem that, due to exclusion of non-Jews from the law of agency, a Jew is not guilty of a transgression if he requests a non-Jew to guard his field to prevent

[45] See Rambam, *Hilkhot Shemittah ve-Yovel* 5:13.
[46] See *ibid*. 4:30.

others from gathering produce during the seventh year. However, that is not a viable expedient for a number of reasons:

1) Agency must be invoked in order to affect a legal act or a change in status but is not at all required to effect a change in empirical reality. The effect of dispatching a robot to fetch a cup of coffee is not thwarted by the robot's lack of legal capacity to serve as an agent. Lack of agency means only that the robot cannot generate a contractual obligation binding its owner to pay for the coffee, although some level of payment may be required under principles of unjust enrichment. Preventing access to produce grown during *shemittah* is forbidden. Lack of access to a field is an empirical fact. When effected by a Jew it is a transgression. The level of the transgression is contingent upon whether the Jew is the proximate cause or whether he sets another cause or causes into motion as a form of *gerama*. Minimally, posting a non-Jew as a guard seems to be no different from utilizing a scarecrow or guard dog to restrict access to the property and need not involve invocation of the legal institution of agency.[47]
2) Moreover, *Maḥaneh Efrayim*, *Hilkhot Sheluḥim ve-Shutafim*, no. 11, presents a novel thesis in asserting that a Jew may hire a non-Jew to build a *ma'akeh*, or parapet, around his roof while the Jew himself pronounces the appropriate blessing because the workman's act is tantamount to the act of his employer. *Maḥaneh Efrayim* contends that, although ordinary agency is not operative in such instances, a paid employee is "bound" to his employer with the reciprocal implication that the employer enjoys a *shi'bud* or "property interest" in his employee. Consequently, the employee's act is comparable to that of a slave having no independent legal capacity. Rather, the slave, and hence the employee, is regarded as an extension of the person of the master. Hence, the employee's act is tantamount to the act of the employee himself. Thus, the need for agency in constructing the parapet is obviated.[48]

[47] Cf., *Ḥazon Ish*, *Shevi'it* 10:45 and *Derekh Emunah*, *Hilkhot Shemittah ve-Yovel* 4:174.

[48] For that reason, maintains *Maḥaneh Efrayim*, although a person cannot seize abandoned property on behalf of a third party to the detriment of the right of all other persons to seize the property, nevertheless, a person employed to perform all manner of labor may acquire title to such property on behalf of an employer. *Maḥaneh Efrayim* distinguishes between an agent and a laborer. An agent must explicitly intend to acquire title on behalf of the principal. A laborer, unless he explicitly reneges on his contract, automatically acquires title on behalf of his employer. The reasoning is that a laborer does not function as an agent but as a physical extension of his employer.

3) Nor may a Jew simply request a non-Jew to protect the *shemittah* produce *ex gratia*. Other than for some limited exceptions, e.g., for the sake of even a non-seriously ill patient, directing a non-Jew to perform forbidden labor on *Shabbat* is forbidden according to all talmudic authorities. In addition, the Gemara, *Bava Mezi'a* 90a, records a controversy with regard to whether a similar rabbinic edict forbids a Jew to direct a non-Jew to perform other acts prohibited to a Jew. Most authorities, including Rambam, *Hilkhot Issurei Bi'ah* 16:13 and *Hilkhot Sekhirut* 13:3, as well as *Shulḥan Arukh*, *Ḥoshen Mishpat* 338:6 and *Even ha-Ezer* 5:14, prohibit such conduct.[49] Consequently, although hiring, or even merely requesting, a workman to guard the marijuana patch would be impermissible just as it would be impermissible for the Jew to do so himself.

3. Cannabis Extracts

There is another consideration that might augur in favor of permitting use of cannabis oils or extracts. Rambam, *Hilkhot Terumot* 11:2 and *Hilkhot Ma'akhalot Assurot* 10:21–22, rules that consumption of sap, juice or liquid expressed from *orlah* or *terumah* (with the exception of grape juice

[49] However, a minority opinion, Ra'avad, as cited by Rosh, *Bava Mezi'a* 7:2 [but cf., Ra'avad, *Hilkhot Kilayim* 1:3], maintains that the usual rule of lenient adjudication in matters of controversy pertaining to rabbinic edicts applies in this matter as well.

There is a further controversy with regard to whether it is permissible to instruct a non-Jew to direct a second non-Jew to perform a forbidden act, including a *Shabbat* violation, on behalf of a Jew. R. Ya'ir Chaim Bacharach, *Teshuvot Ḥavvot Ya'ir*, nos. 46 and 53, regards such a procedure as permissible. His interlocutor, R. Gershon Ashkenazi, author of *Teshuvot Avodat ha-Gershuni*, whose opinion is published in *Teshuvot Ḥavvot Ya'ir*, no. 49, disagrees. Moreover, observance of the laws of *shemittah* in our day is a matter of rabbinic obligation. [The opinion of R. Shlomoh Luria, *Maharshal*, *Bava Mezi'a* 90a, who maintains that it is biblically forbidden for a Jew to instruct a non-Jew to commit a *shevi'it* infraction because the commandment "and the land shall rest" (Leviticus 25:2) interdicts the outcome of the act rather than the act itself, is limited to cultivation of the field during the sabbatical year.] Yet a third consideration is the opinion of R. Gershon Ashkenazi who maintains that denying access to *shemittah* produce to others during the sabbatical year is itself a rabbinic, rather than a biblical, prohibition. Moreover, many authorities, including Rema, *Oraḥ Ḥayyim* 468:1, maintain that the prohibition against directing a non-Jew to perform a proscribed act does not extend to matters involving rabbinic, rather than biblical, prohibitions.

Assuming that posting a non-Jewish watchman is not the equivalent of employing a guard dog but is merely directing a non-Jew to prevent trespassers from entering, the weight of authority would augur for a permissive adjudication. See "Of Tobacco, Snuff and Cannabis (Part I)," p. 128. That is particularly so in light of the fact that it is a rabbinic, rather than biblical, obligation that is involved and that the matter is the subject of three separate controversies, each of which results in a rabbinic infraction.

or olive oil) is not subject to the punishment attendant upon consuming the product itself. The liquid extracted from such produce is regarded as "mere sweat" (*zei'ah be-alma*) rather than as an integral part of the foodstuff.[50] Consequently, since *terumah* must be consumed in a manner compatible with the sanctity of *terumah*, Rambam, *Hilkhot Terumot* 11:2, rules that it is forbidden to squeeze juice from fruit designated as *terumah*. *Kiryat Sefer*, *ad loc.*, explains that it is forbidden to do so because the act of expressing juice nullifies the sanctity of *terumah* inherent in the juice while it is yet part of the fruit. R. Joseph Efrati, both in *Vavei ha-Ammudim*, no. 7 (Tevet, 5774) and in his *Yissa Yosef*, V, *Shevi'it*, no. 51, asserts that the same principle applies to produce of the *shemittah* year. Earlier, R. Joseph Shalom Eliashiv, *Halikhot Sadeh*, no. 122, professed a contrary view in distinguishing between the nature of the sanctity of *shemittah* produce as opposed to the sanctity of *terumah*.[51] The sanctity of *terumah* is attendant upon "fruit," i.e., produce designated for presentation to the *kohen*. Juice, since it is not a "fruit" but "mere sweat," is not endowed with that sanctity. In contradistinction, the sanctity of *shevi'it*, argues Rabbi Eliashiv, is not contingent upon status as a fruit or vegetable; the sanctity of *shevi'it* is attendant upon any agricultural product whose "benefit and destruction" occur simultaneously. That category includes vegetation that is not at all edible, e.g., plants that are used solely for manufacturing dyes. Thus, status as a "fruit" is not a necessary condition of *kedushat shevi'it*.[52] Consequently, even "mere sweat" can be subject to *kedushat shevi'it*. If so, concludes Rabbi Eliashiv, *kedushat shevi'it* is attendant upon cannabis extract no less so than upon the plant itself.

[50] See *Berakhot* 48a.

[51] A practical matter of medical halakhah arises from this controversy. If use of cannabis is otherwise forbidden but permitted for palliation of pain by reason of *pikuaḥ nefesh*, use of the cannabis plant represents a single prohibition, i.e., violation of *kedushat shevi'it*. If, however, extraction of liquid is forbidden because it is a form of "destruction" of *shemittah* produce, two violations are involved: 1) extraction of the liquid; and 2) use of liquid otherwise prohibited as *yoẓei*. Consequently, if practical under the circumstances, use of the cannabis plant itself, i.e., by smoking the cannabis, should be preferred over introducing the extract in a foodstuff.

[52] Cf., however, *Ḥazon Ish*, *Shevi'it* 25:32, who regards the principle of "*zei'ah be-alma*" as applicable to produce of *shemittah*. Nevertheless, *Ḥazon Ish* engages in a lengthy discussion regarding the status of fruit grown for use as juice and whether it is permissible to produce juice from fruit that is grown during *shemittah* for that purpose. *Minḥat Shlomoh* is also cited by Rabbi Efrati, *Halikhot Sadeh*, no. 214 (Tammuz 5781), as applying the principle of *yoẓei* to *shemittah* produce, contrary to the view of Rabbi Eliashiv.

Rabbi Efrati, *Vavei ha-Ammudim*, no. 7 (Tammuz 5774), p. 69, counters that, although *kedushat shevi'it* is not contingent upon status as a "fruit," juice or sap does not have the sanctity of *shevi'it*. Rabbi Efrati contends that the principle declaring liquid yielded by fruit to be "mere sweat" negates the notion that the juice lacks even the status of an emission or derivative (*yoẓei*) of a fruit. Rabbi Efrati argues that the implication is that liquid expressed from the pulp or residue is neither "fruit" nor the derivative of fruit. Rather, the liquid as it is extracted from the fruit constitutes a portion of the plant that has effectively been destroyed in being reduced to *zei'ah*. If so, any benefit derived from the sap or extract occurs only after the plant is destroyed. Rabbi Efrati compares cannabis extract to the heat of a fire that is produced only after destruction of the fuel with the result that benefit and destruction do not occur simultaneously. Similarly, since the "benefit" comes only after destruction of the "fruit," the extract is not subject to the restrictions of *shemittah*. To put the matter somewhat differently: The material substance that becomes juice is, in effect, destroyed because it no longer exists in a solid state and in its present liquid state it is "mere sweat" and, as such, is not recognized as a halakhic substance.

This writer remains uncertain with regard to the cogency of that depiction. Wood is destroyed in making a fire; destruction occurs before being transmuted into a flame. An extract expressed from the cannabis plant is certainly not thereby destroyed. If the liquid expressed from the fruit or plant is "mere sweat" it stands to reason that such liquid has the status of "mere sweat" even while yet within the plant. If so, no "destruction" occurs when the liquid is expressed from the plant.[53] Nor is the residue of the cannabis plant that remains after its moisture is extracted necessarily "destroyed" by being converted to a waste product. The "pulp" may or may not be suitable for use as animal feed but it is quite likely that it remains useful for the production of hemp. Granted that if one were to convert a solid having *kedushat shevi'it* into a liquid that is "mere sweat" the desanctification of the portion of the plant thus converted would be deemed a waste of *shemittah* produce because of that desanctification. However, even if it were to be contended that marijuana cultivated exclusively for animal feed or hemp is not endowed with *kedushat shevi'it*, residue of a plant cultivated for a purpose that does engender

[53] Rabbi Efrati, on the other hand, seems to conceptualize "mere sweat" as coming into existence upon destruction of the solid in which it inheres much as a flame is halakhically regarded as arising spontaneously upon destruction of wood it consumes.

kedushat shevi'it that remains usable for some beneficial purpose presumably is not to be considered to be "destroyed" in the physical sense.

4. Therapeutic Use

In Israel, recreational use of cannabis may well be widespread and hence *shaveh le-khol nefesh*. Thus, if the primary use of cannabis is recreational in nature, it might be assumed that cannabis is subject to the restrictions of the sabbatical year. However, if customary use of marijuana is restricted to medical purposes, the status of cannabis may be entirely different.

The phenomenon of medical marijuana gives rise to the consideration of whether such use in itself might generate *kedushat shevi'it* or whether, to the contrary, if cannabis is in fact endowed with *kedushat shevi'it* by virtue of its recreational benefit, use of cannabis is "common to all persons," and hence may not be used for therapeutic purposes. As has been shown, the Gemara, *Sukkah* 40a and *Bava Kamma* 102a, explicitly declares that, according to the Sages, the biblical term "*lakhem*" excludes *melugma*, or use for therapeutic purposes, because such use does not constitute a benefit enjoyed by all.

That explicit statement renders problematic the position of *Pnei Yeshoshu'a* who regards preparation of all medicaments on *Yom Tov* to be *shaveh le-khol nefesh*. As has been discussed previously,[54] *Pnei Yeshoshu'a* understands *Tosafot*, *Shabbat* 39b, s.v. *u-Bet Hillel*, and *Mordekhai*, *Beiẓah*, sec. 680, as stating that cooking medicaments on *Yom Tov* is permitted because the telos of *beri'ut*, or good health, is "common to all persons." R. Abraham Benjamin Samuel Sofer, *Teshuvot Ketav Sofer*, *Oraḥ Ḥayyim* no. 66, understands that to mean that all persons require good health and hence any activity undertaken to achieve that goal represents a matter "common to all persons."[55]

Pnei Yehoshua's position is disputed by many latter-day authorities, including R. Abraham Danzig, *Ḥayyei Adam* 95:13. In *Nishmat Adam* 95:2, a work that consists of notes appended to his classic work *Ḥayyei Adam*, Rabbi Danzig points to what seems to be a stark contradiction.

[54] "Of Tobacco, Snuff and Cannabis (Part 1)," p. 123.

[55] *Mishnat Yosef* accepts *Ketav Sofer*'s understanding of *Tosafot* and cites his son-in-law, R. Menachem Mendel Fuchs, who resolves *Nishmat Adam*'s perplexity on that basis. For purposes of *Yom Tov* regulations *shaveh le-khol nefesh* is defined on the basis of the purpose of the act performed, e.g., good health, which is desired by all. Sanctity of *shemittah* produce, he argues, is not contingent upon the purpose to be achieved but must be determined on the basis of the nature of use of each item of produce, i.e., it must be used in a manner consistent with *kedushat shevi'it*.

As earlier noted, the Gemara, *Sukkah* 40a and *Bava Kamma* 102a, records a controversy between the Sages and R. Yose with regard to use of produce that grows of its own accord during the sabbatical year. Scripture commands that produce that grows without cultivation be consumed: "And the resting-produce of the land shall be to you for food" (Leviticus 25:6). Both the Sages and R. Yose recognize that "for food" is an exclusionary term, i.e., consumption of the produce for purposes of sustenance is permitted, and in fact commanded, but other forms of disposal, even if they yield human benefit, are forbidden. At the same time, both acknowledge that the phrase "*lakhem* – to you" is a pleonasm indicating a more expansive license. Both the Sages and R. Yose recognize that, taken together, the thrust of the contradictory implications is to include some other forms of benefit in addition to food, rendering those benefits permissible, and to exclude others, rendering them forbidden.

According to the Sages, "*le-okhlah* – for food," occurring in the same verse, is to be understood as an exclusionary term limiting the class of permitted uses; the term "to you," interpreted more expansively as "for all your needs," grants license for at least some additional uses. For the Sages, any additional permitted benefits must share the distinguishing characteristic of use as a foodstuff, *viz.*, *hana'ato u-bi'uro shavin*, the benefit derived from the produce and its destruction must occur simultaneously. "'To you'– for all your needs" serves to grant permission to utilize the produce of the sabbatical year for any benefit closely resembling that of food, *viz.*, any benefit that occurs simultaneously with its destruction, but not for "*mishrah u-kevisah* – dyeing or cleansing," i.e., a detergent. Indeed, when used for those purposes, the vegetal product is destroyed before benefit is realized. R. Yose disagrees and opines that "for food" establishes a broad paradigm. According to R. Yose, "'to you' – for all your needs" is to be interpreted in the broadest possible sense. For R. Yose, the distinguishing quality of food is that it is a benefit enjoyed by all persons—*shaveh le-khol nefesh*—and hence it serves as a paradigm permitting all benefits that are "common to all persons," including dyeing and cleansing. Excluded by the term "for food" are only benefits that are enjoyed by some but not by others. The Gemara's example of a benefit excluded according to R. Yose is *melugma*, a poultice. It is clear that *melugma* is simply an example of a medicament and that the exclusion encompasses all therapeutic uses because cure of an ailment is not *shaveh le-khol nefesh*; *melugma* constitutes a benefit that cannot be enjoyed by the healthy. *Nishmat Adam* professes astonishment at *Pnei Yehoshu'a*'s thesis advanced in conjunction with *Yom Tov* restrictions to the effect that medications are a benefit "common to all persons" because the

Gemara explicitly declares the opposite in the context of its discussion of the rules of *shemittah*.

The presumed contradiction of *Pnei Yehoshu'a*'s thesis might perhaps be resolved on the basis of narrow exegetical grounds. For the Sages, "'to you' – for all your needs" serves to expand the scope of factors to be considered in defining the paradigmatic nature of "for food," *viz.*, not only food but all analogous benefits, i.e., all uses in which benefit and destruction of the product occur simultaneously. The exegesis adopted by R. Yose recognizes that the verse defining permitted uses of *shemittah* produce includes both a generalization (*lakhem*) and an exclusion (*le-okhlah*). For R. Yose, the exclusionary phrase "for food" is to be rendered in as narrow a manner as possible so as to understand "'to you' – for all your needs" as referring to the greatest number of people. Hence, the term "to you" must denote "dyeing and cleansing," rather than medicaments because the former is a more common need, i.e., more people benefit from dyeing and cleansing than from *melugma*.[56]

There is no similar tension or need to accommodate both expansive and limiting concepts in interpreting the verse "no manner of labor shall be done" (Exodus 12:16). "No manner of labor," taken by itself, is absolute. The exception requiring scriptural license, granted by the verse "only that which is to be eaten by every person, that alone may be done by you" (Exodus 12:16), is the act of labor necessary to cook food; enjoyment of food following cooking does not require dispensation. The phrase "to be eaten" would serve as a paradigm serving to permit labor for all manner of human benefit but for the pleonasm of "*le-khol nefesh*" found in that verse which is interpreted as restricting the paradigm in as minimal a manner as possible by construing the limitation of the license to labor for such needs to activities "common to all persons."

The same explanation of the exegetical considerations can be formulated from a conceptual perspective. In describing how *shemittah* produce may be enjoyed, the purpose of the verse is both to define the license regarding the growth of the seventh year and to clarify its rationale, i.e., to indicate that the Torah's intention is that *shemittah* produce be put to beneficial use. Hence, the more purposes to which the produce may be put to use, the more opportunity for deriving human benefit, as is the intent of the Torah. Cooking on *Yom Tov*, to the contrary, is an exception to otherwise prohibited categories of activity. It stands to reason that any exception should be construed as narrowly as exegetically possible. Thus,

[56] Cf. *Mishnat Yosef*, no. 18, sec. 6.

the interpretation permitting cooking on *yom tov* is understood as limiting the type of permitted labor to labor that is "common to all persons."

More fundamentally, *Nishmat Adam*'s perplexity may be founded upon a misunderstanding of *Pnei Yehoshu'a*'s thesis. *Pnei Yehoshu'a* demonstrates that *Tosafot* presume medicaments to be "common to all persons" but do not inform us why or in what sense that is the case. It cannot be because, on *Yom Tov*, all persons require, or would benefit from, medicine of one kind or another because that is patently not the case. *Teshuvot Ketav Sofer*, *Oraḥ Ḥayyim*, no. 66, explains that the benefit conferred by medication, *viz.*, good health, is an end desired and sought by all people. Indeed, *Tosafot* do employ the term "*beri'ut*," or "health," in distinguishing between the health benefits of a steam bath and the pleasure of bathing.

However, it is not at all obvious that this reflects a proper understanding of *Pnei Yehoshu'a*'s comment. The concept "common to all persons" arises in the context of forms of labor permitted on *Yom Tov*. The focal point is the *act* as performed, not the ultimate purpose or "final cause" (to use the Aristotelian term) of the act. The question is whether the act is one that is common to all people—not whether it promotes a good that is common to all people. A litmus test for determining which analysis is correct would be whether the license "common to all people" includes even a patient who employs some bizarre or adjunctive therapy that cures one patient's malady but is inefficacious for all other patients. To this writer's knowledge, that question is not explicitly addressed in any halakhic source.

But there is a broader distinction that emerges from application of each of the two alternative explications of *Pnei Yehoshu'a*'s position. The issue is whether it is the act or the outcome of the act that must be *shaveh le-khol nefesh*. *Pnei Yehoshu'a* is most readily understood as focusing upon the act rather than upon the outcome of the act. The crucial factor in defining "common to all persons" is whether all persons have need of the act that will result in a physical benefit. The defining factor is the act rather than the result. *Tosafot* speak of steam baths as leading to benefit in the form of good health, but that is merely the goal that motivates all persons to avail themselves of steam baths. The purpose renders the act of heating the water *shaveh le-khol nefesh*. Scripture had need to grant permission to engage in the *act* of cooking on *Yom Tov*, not to allow the end result, i.e., availability of cooked food. Applying the criterion "common to all persons" to health measures, it must be the therapeutic *means* that must be common to all persons, not merely the goal of good health.

Preparation of medication on *Yom Tov* is permitted, not because all persons desire good health, but because all persons engage in acts that

result in good health. The Gemara, *Yevamot* 101a, in excluding *melguma* as not *shaveh le-khol nefesh*, simply adds to that depiction. The Gemara, it may be argued, uses *melugma* as a paradigm in order to make it clear that, to be classified as "common to all persons," it is the particular medicament in question that must be required by all persons. Sooner or later, everyone contracts some sickness; sooner or later, everyone requires some medicine. But not everyone contracts the same illness. Sooner or later, everyone uses Tylenol because, sooner or later, everyone suffers from a malady against which Tylenol is effective. Sooner or later, everyone avails himself of a steam bath because, sooner or later, everyone will find it necessary to avail himself of that amenity in order to promote good health. Fortunately, not everyone will be affected by cancer. Certainly, even during the course of an entire lifetime, not everyone will require chemotherapy. Even in the course of a lifetime not everyone will suffer from a trauma that requires a *melugma* for its cure. Accordingly, Tylenol is *shaveh le-khol nefesh* but a poultice is not.

Pnei Yehoshu'a explains that *Tosafot* would regard tobacco to be *shaveh le-khol nefesh* because it aids in digestion, serves as a laxative or the like. Tobacco was used to ameliorate complaints that are "common to all persons" and hence all persons would benefit from tobacco in assuaging such complaints. Hence, smoking tobacco was "common to all persons."

Ramban, *Torat ha-Adam, Sha'ar ha-Meihush*[57] and *Sefer Yere'im*, no. 113, did not regard preparing *mugmar* on *Yom Tov* to be prohibited because it is sought only by sensitive or delicate individuals but explain that it is prohibited to prepare *mugmar* on *Yom Tov* because *mugmar* serves a therapeutic function. Those authorities do not necessarily disagree with the fundamental position of *Tosafot*, who, as explained by *Pnei Yeshoshua*, regard therapeutic measures as *shaveh le-khol nefesh. Mugmar*—and aromatherapy—are therapeutic but not *shaveh le-khol nefesh.* There is no indication that conditions requiring the curative power of *melugma* are common to all persons. Certainly, not everyone

[57] *Kitvei ha-Ramban*, ed. R. Chaim Dov Chavel (Jerusalem, 5724), II, 22. Ramban clearly states that needs that are particular to the sick are not *shaveh le-khol nefesh.* Ramban adds the phrase "comparable to *mugmar*," lending the impression that *mugmar* was used for therapeutic purposes and for that reason is not *shaveh le-khol nefesh.* If so, Ramban is presenting a firm source for his ruling. It is, however, possible to read the reference to *mugmar* in the text, not as a proof, but as a parallel, i.e., just as *mugmar* is not *shaveh le-khol nefesh* because it is enjoyed only by delicate and pampered individuals so also anything required only by the ill is similarly not *shaveh le-khol nefesh.*

will suffer a malady that lends itself to cure by means of aromatherapy. Therefore, preparing *mugmar* is not *shaveh le-khol nefesh*.

Of course, even if it were true that tobacco is effective in treating constipation or as an aid in digestion or whatever, now that it is known that tobacco is a carcinogen, prudent individuals would not use tobacco for alleviation of some minor distress for which it might be effective. Hence, use of tobacco would no longer be *shaveh le-khol nefesh* even were all members of a small group of individuals afflicted by a rare malady to continue to use it in order to alleviate a particular health need.[58]

Moreover, it seems to this writer that, although *shaveh le-khol nefesh* with regard to *Yom Tov*, as defined by the Gemara, *Ketubot* 7a, means *zorekh*, i.e., "needed" by all persons rather than actually used by all persons and that, accordingly, a medication needed by all is permissible, the definition of "common to all" in conjunction with regulations of *shevi'it* is "common to all" in the sense of *actually* used by all. The reason for the different connotation is unique to *shevi'it*. The exegetical question is whether it is *melugma* or "dyeing and cleaning" that is closer in concept to "eating." The nature of *kedushat shevi'it* requires that *shemittah* produce be put to beneficial use and not wasted. The answer, then, is dependent upon sheer numbers. Many more people require dyes and detergents than require medicaments. The produce will be more widely used for "dyeing and cleansing" than for *melugma*. Therefore, as between the two, it is more reasonable that *melugma* is excluded because its use is not "common to all."

Consequently, it would seem that even if marijuana is decriminalized and becomes readily available to all for recreational use, it would not be *shaveh le-khol nefesh* because, although it will be used by more people, it will presumably continue to be used only by a minority of the populace.[59]

[58] Indeed, tobacco has been shown to be effective in treatment of ulcerative colitis, yet no gastroenterologist prescribes cigarette smoking in treating that condition because its potential harms are greater than its benefits.

[59] Cf., however, *Iggerot Mosheh*, *supra,* note 23. Rabbi Efrati, in his contribution to *Halikhot Sadeh*, explains that since cannabis is readily available, it is *shaveh le-khol nefesh*. Even at present—and even if *shaveh le-khol nefesh* has an identical meaning for *Yom Tov* and *shevi'it*—absent usage by a majority of persons its status should be no different than the status of *mugmar* during the talmudic period. Cannabis would then be excluded from the sanctity of *shevi'it*, not because its use is limited to medical purposes, but because its particular use is no more *shaveh le-khol nefesh* than *melugma*.

C. Conclusions

1. According to most authorities, all agricultural products are subject to *shemittah* regulations. Some authorities maintain that the established custom in the Land of Israel, as reflected in the *Madrikh ha-Kashrut* of the *Edah ha-Ḥaredit*, is to treat tobacco as subject to *shemittah* regulations.
2. If there are areas within the boundaries of the sanctified territory of the Land of Israel[60] in which all use of cannabis is banned and the populace is generally law-abiding, *shemittah* restrictions do not apply to cannabis in those areas.
3. According to many authorities, including *Ḥazon Ish*, in any area within the sanctified territory of the Land of Israel in which use of cannabis is legally restricted to therapeutic use and if otherwise generally unavailable, the status of marijuana is comparable to *melugma* and not subject to *shemittah* restrictions. However, according to R. Shlomoh Zalman Auerbach and other authorities, *melugma*, and hence cannabis, is subject to *shemittah* restrictions in those areas, at least as a matter of doubt.
4. In locales in which, despite legal restrictions, marijuana is widely used for recreational purposes and not socially frowned upon, cannabis is subject to *shemittah* restrictions.
5. Cannabis cultivated explicitly for medical purposes, in all locales, is treated as *melugma* and, whether or not it is subject to *shemittah* restrictions, is a matter of controversy.
6. On the basis of the principle of *bereirah*, as explained by *Mishnat Yosef*, cannabis cultivated without specific intention to be used for recreational purposes or for therapeutic purposes, but later harvested, purchased or processed with intention to use the cannabis for therapeutic purposes, has the status of *melugma* and hence, as indicated, its status is a matter of controversy.
7. The foregoing notwithstanding, if the imported product is not available, cannabis may be cultivated and safeguarded for means of palliating pain of patients afflicted with a life-threatening illness, but only in quantities limited to satisfying the needs of such patients. For many authorities, under such circumstances, when possible, cannabis itself, rather than a liquid extract, should be used for relief of pain.

[60] For a description of the boundaries and a listing of sanctified areas, see *Shemittah ke-Hilkhatah*, pp. 75–78.