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Summer 2022

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

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SURVEY OF RECENT HALAKHIC LITERATURE

OF TOBACCO, SNUFF AND CANNABIS (PART II)

V. PERMISSIBILITY OF TOBACCO, SNUFF AND MARIJUANA

1. Cigarette Smoking: Self-Harm and *Shomer Peta'im*

Permissibility of cigarette smoking was discussed in this column, *Tradition*, 16:4 (Summer, 1977), 121–123. That discussion need not be replicated here, particularly since much has changed in the interim both in terms of scientific knowledge of the effects of smoking and in resultant human behavior. Suffice it to say that, at the time, many halakhic authorities permitted smoking on the basis of the talmudic principle formulated by the Gemara (*Shabbat* 129b, *Yevamot* 12b and 72a, *Ketubot* 39a, *Nedarim* 35b, *Avodah Zarah* 30b and *Niddah* 45a): “*Shomer peta'im Ha-Shem*—the Lord preserves the simple” (Psalms 116:6). The definition and halakhic parameters of that principle were analyzed in this writer’s *Bioethical Dilemmas*, II (Southfield, Michigan, 2006), 241–246 and in *Contemporary Halakhic Problems*, VII (Jerusalem, 2016), 457–463.¹ Despite the fact that the dangers associated with smoking, although not the full extent of those dangers, had already been

I wish to acknowledge the assistance of Rabbi Dr. Joseph Cohen of RIETS and the Technion Medical School and Rabbi Shalom Zeitlin of the Benjamin N. Cardozo School of Law. 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.

Cannabis cultivation, for better (medical marijuana) and for worse (recreational use), is a thriving industry in Israel. The present sabbatical year has prompted scholarly focus upon details of growing cannabis in light of shemittah observance. This series will conclude with Part III in Tradition’s Fall 2022 issue, focusing on whether non-nutritional produce, when significant economic concern is involved, is subject to shemittah restrictions

¹ For other contemporary applications of *shomer peta'im* see J. David Bleich, “May Tissue Donations Be Compelled?,” *Contemporary Halakhic Problems*, IV (New York, 1995), 285–287 and 308–309 and “New York City Water,” *Contemporary Halakhic Problems*, VI (Jersey City, 2012), 241–243.

well-documented, many rabbinic decisors permitted smoking because they regarded the principle *shomer peta'im* to be applicable.

That ruling, at the time, was hardly surprising. The conclusion seemed entirely compatible with the analysis of *shomer peta'im* formulated by R. Jacob Ettlinger, *Teshuvot Binyan Zion*, no. 137.² *Shomer peta'im* is a limitation upon the general rule that a person may not engage in an act of self-endangerment. Nevertheless, sea voyages and the like are permitted despite the fact that the attendant dangers are well recognized. Such dangers are reflected in the halakhic provision that a seafarer, for example, is required to recite a blessing of thanksgiving upon safe return from his voyage. The principle of *shomer peta'im* is amplified in the *baraita* of the Three Women for whom pregnancy posed a recognized danger to the woman herself, to her fetus, or to her nursing child. The majority view of the Sages declares that, on the basis of *shomer peta'im*, those women are required or advised³ not to employ shunned forms of contraception. *Binyan Zion* explains that self-endangerment is permitted if three conditions pertain: 1) The danger is generally ignored by the populace at large.⁴ 2) The act, e.g., coitus, or embarking on a sea voyage, does not pose an imminent danger; rather, the danger arises only later in pregnancy, upon birth of the child or, in the case of a sea voyage, upon subsequent development of turbulence in the course of the voyage. 3) Such future danger occurs only in a minority of instances.

Decades ago, dangers associated with smoking were already well-known. Nevertheless, 1) the danger was ignored by the populace at large; 2) it was maintained that the danger did not arise immediately upon inhalation of cigarette smoke but became manifest only later as a result of physiological processes triggered in a minority of smokers by inhalation

² For views differing from that of *Binyan Zion* see R. Aryeh Balhüber, *Shem Aryeh*, no. 27 and R. Eliyahu Klatzkin, *Imrei Shefer*, no. 29. See also J. David Bleich, *Bioethical Dilemmas*, II (Southfield, Michigan, 2006), 239–246.

³ See *Tosafot*, s.v. *shalosh nashim*, *Yevamot* 12b, *Ketubot* 39a and *Niddah* 45a.

⁴ R. David Pardo, *Mikhtam le-David*, *Yoreh De'ah*, no. 33, s.v. *u-bar min dein*, citing R. Chasdai Perachya, author of *Torat Hesed*, remarks *en passant*, that only a “*peti* – a simple,” i.e., an ignorant, person may rely upon the principle but one who is cognizant of the danger may not act in the manner of a *peti* who ignores such danger. That position is not tenable. In each of the cases in which the Gemara posits the principle, including the *baraita* of the Three Women, as well as in the case of seafarers, the dangers were certainly well recognized but nevertheless widely ignored. In particular, the danger to an infant who requires the milk of a pregnant mother was self-evident and known to all. Even in recent times, it was not unusual for a nursing mother first to become aware of a new pregnancy because her child refused to nurse. Hence, women could hardly be described as ignorant of the danger.

of tobacco smoke⁵; 3) it was assumed that the majority of smokers did not succumb to illnesses caused by smoking.

The situation at present is far different. Subsequent to the Surgeon General's report issued in 1964 and the mandated warning printed on every package of cigarettes, coupled with a dramatic decrease in the number of smokers, it is not at all clear that the general populace regards the dangers associated with smoking with equanimity. More significantly, it is virtually certain that a majority of cigarette smokers may anticipate death at an earlier age than nonsmokers. Indeed, a majority of smokers will not succumb to any single malady associated with smoking, e.g., lung cancer, emphysema, cardiovascular disease or chronic obstructive pulmonary disease (COPD). Nevertheless, proportionally, more smokers than nonsmokers die of each of those maladies and do so at a younger age. In the aggregate, the proportion of smokers whose lives are fore-shortened by those diseases is greater than the total proportion of the general population who succumb to those maladies. Statistics indicate that it is virtually certain that, in the aggregate, a majority of all smokers die of one or another of those conditions in excess of the proportion of nonsmokers who die of those diseases and that they do so at an earlier age than the rest of the population.⁶ It has been demonstrated that, on the average, smokers die ten years earlier than nonsmokers.⁷ If habit-

⁵ R. Chaim Joseph David Azulai, *Teshuvot Hayyim Sha'al*, no. 59, maintains that, because we are not sufficiently competent to assess the extent of any particular danger, *shomer peta'im* may be relied upon only in circumstances in which the Gemara explicitly invokes the principle. See also R. Yekuti'el Yehudah Halberstam, *Teshuvot Divrei Yatziv*, II, no. 33 and R. Jacob Mordecai Breisch, *Teshuvot Helkat Ya'akov*, IV, no. 12, who extend application of the principle to matters cited by early-day authorities. Those opinions are largely ignored by other decisors.

R. Joseph Zechariah Stern, *Teshuvot Zekher Yehosef*, no. 28, contends that *shomer peta'im* applies only to matters pertaining to a *mizvab*. In effect, that view regards *shomer peta'im* merely as an extension of "a person observing a *mizvab* will not experience misfortune" (Ecclesiastes 8:5). See also *Maharshakh, bayit 2, heder 13* and R. Moshe Stern, *Teshuvot Be'er Mosheh*, VI, nos. 159–160. That position is rejected by R. Yechiel Michel Epstein, *Arukh ha-Shulhan, Yoreh De'ah 263:5*. Indeed, the Gemara, *Avodah Zarah 30a*, applies *shomer peta'im* in permitting consumption of figs at night despite the possibility that dangerous venom may have been deposited in the fruit.

⁶ See P. Jha, C. Ramasundarhettige, V. Landsman *et al.*, "21st Century Hazards of Smoking and Benefits of Cessation in the United States," *New England Journal of Medicine*, vol. 368 (January, 2013), pp. 341–350.

⁷ See Emily Banks, Grace Joshy, Marianne F. Weber *et al.*, "Tobacco Smoking and All-Cause Mortality in a Large Australian Cohort Study: Findings From a Mature Epidemic With Current Low Smoking Prevalence," *BMC Medicine*, 13:38 (Feb. 24, 2015). <https://doi.org/10.1186/s12916-015-0281-z>; Kirstin Pirie, Richard Peto, Gillian K. Reeves, *et al.*, "The 21st Century Hazards of Smoking and Benefits of

ual smoking results in the early demise of a majority of smokers, even if potential occurrence of such deaths is generally ignored and actual death much delayed, the principle of *shomer peta'im* as defined by *Binyan Zion* cannot be invoked.

It has been contended⁸ that a series of laudatory or innocuous acts that must ultimately culminate in an interdicted result cannot be prohibited because each act, examined in isolation, is permissible. Cigarette smoking and administration of narcotics for palliation of pain are two examples of matters regarding which that consideration had been advanced. Because of the complexity of the issue and the far from obvious nature of the arguments involved, discussion of that topic will be deferred and addressed in an endnote.

2. Recreational Cannabis

(1) Self-Endangerment

A comparable question with regard to possible danger to life and health arises as well with regard to use of marijuana. An intriguing question

Stopping: A Prospective Study of One Million Women in the UK,” *Lancet*, 381 (9861) (Jan. 12, 2013), 133–141. <https://doi.org/10.1136/bmj.38142.554479.AE>; and Richard Doll, Richard Peto, Jillian Boreham and Isabelle Sutherland, “Mortality in Relation to Smoking: 50 Years’ Observations on Male British Doctors,” *BMJ: British Medical Journal* (June 22, 2004), 328 (7455), 1519. <https://doi.org/10.1136/bmj.38142.554479.AE>. See also Neil Mehta and Samuel Preston, “Continued Increases in the Relative Risk of Death from Smoking,” *American Journal of Public Health*, 102(11), 2181–2186 (November 2012). <https://doi.org/10.2105/AJPH.2011.300489>. Indeed, it would be sufficient to demonstrate that a majority of smokers die even one day sooner than non-smokers. The studies cited do not demonstrate that point directly. The studies do not necessarily mean that the median loss of life is ten years. Mathematically, if some forty percent suffer a twenty-five-year decrease in longevity and sixty percent suffer no loss whatsoever, the average would be the same. Empirically, however, that is a highly unlikely scenario and a detailed analysis of the data upon which the published study is based would almost certainly show that the majority of smokers suffer a significant loss of longevity anticipation.

⁸ Dr. Abraham S. Abraham, *Nishmat Avraham*, I, *Orah Hayyim* 511:1, note 2, cites R. Shlomoh Zalman Auerbach and R. Ovadiah Yosef as being of the opinion that activities such as smoking cannot be banned since each individual act does not entail danger; rather, the danger arises from cumulative acts of smoking. See also Rabbi Auerbach’s letter of approbation to volume I of *Nishmat Avraham*. Cf., Dr. Abraham’s contrary inference from Rambam, *Hilkhos De’ot* 4:1. See also R. Avigdor Nebenzahl, *Be-Yizhak Yikarei* (Jerusalem, 5739), no. 57, p. 138 and R. Dov Ettinger, *Pe’er Tahat Efer* (Jerusalem 5749), p. 82. The position espoused by Rabbi Auerbach and Rabbi Yosef will be discussed in conjunction with an analysis of R. Moshe Feinstein’s responsum, *Iggerot Mosheh, Yoreh De’ah*, II, no. 49, in the extended endnote.

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addressed to R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah, Mahadura Tinyana, Yoreh De'ah*, no. 10, concerns a person who wished to engage in hunting as a recreational sport. *Noda bi-Yehudah* professes sympathy for a poor man who has no other means of earning a livelihood but expresses astonishment that a Jew would otherwise entertain the thought of placing himself in a place “surrounded by wild animals” and expose himself to danger. *Noda bi-Yehudah* recognizes full well that gentiles do hunt for sport but remarks that such activity may be understandable on the part of Esau who is described by Scripture as an “*ish zayid*”—a term *Targum Onkelos* does not translate as “a hunter” but as “*gvar nahshirkhan*,” best rendered as “a person of leisure.”⁹ Yet that translation does not fully capture the nature of the appellation. The term connotes “leisure” but in the sense of an idle person, a layabout who has no meaningful way to occupy himself. Esau has nothing constructive to do and much time to waste. In his boredom he seeks entertainment and pleasure to while away the time. Think of an English gentleman to whom gainful employment is anathema but who delights with his hounds in chase of the fox. His lack of seriousness and inability to find meaning in life lead him to embark upon frivolous activities and dangerous sports in order to amuse himself. A Jew has better things to do and more important issues to ponder than even to entertain the permissibility of hunting.

There is little doubt that *Noda bi-Yehudah* would have disposed of a question concerning permissibility of marijuana in exactly the same manner. A non-Jewish society may find it necessary to weigh the health dangers and societal consequences of marijuana use and debate whether or not it should be criminalized. But *Noda bi-Yehudah*'s reaction would likely be that he fully understands the cogency of the question with regard to medical marijuana but cannot fathom why a Jew would even ponder recreational use of marijuana. Esau seeks frivolous pastimes for their own sake—as a *bonum per se* rather than as an instrumental means of maintaining physical and mental health. A Jew, declares *Noda bi-Yehudah*, does not engage in recreation for its own sake but to preserve his ability to engage in the divine mission with which he is charged. The sheer waste of time engendered by use of marijuana in the sense that it forces the user to forego meaningful activity is sufficient reason for a Jew to place it beyond the pale of consideration.

Similar concepts are expressed in multiple sources, at times with somewhat different nuances. For example, with regard to self-endanger-

⁹ For various translations in early-day authorities see R. Raphael Benjamin Posen, *Parshegen* (Jerusalem, 5772), Genesis 25:27.

ment, *Be'er ha-Golah*, in his final gloss to *Shulhan Arukh, Hoshen Mishpat* 426:90, remarks:

The reason the Torah commanded us with regard to safeguarding life is that the Holy One, blessed be He, created the universe in His lovingkindness to benefit the created that they may recognize His greatness and engage in His service in fulfilling His commandments and His Torah as Scripture states, "All who call upon My name I have created for My honor" (Isaiah 43:7) and to give them ample reward for their toil. But one who endangers himself disdains the will of his Creator and desires neither His service nor His reward. There is no derogatory scoffing greater than that.

Speaking of pursuit of pleasure for its own sake, Rabbenu Yonah, *Sha'arei Teshuvah*, chap. 1, sec. 30, states:

Eradication of corporeal pleasure: A person should recognize that desire causes the soul to sin and draws transgression with ropes that are vain. A person should make a fence to preserve the way of repentance, separate himself from pleasures and not be drawn after his desire, even of permitted things, and conduct himself in the path of abstinence and eat only to assuage hunger and preserve his body, as it is said, "The righteous eat only to the satisfaction of his soul" (Proverbs 13:28). . . . For so long as a person follows desire he is drawn after the effects of corporeality.

There is a remarkable paucity of responsa addressing use of controlled substances in general and of marijuana in particular.¹⁰ That is probably the case because, accepting as dispositive the evidence of adverse health effects resulting from habitual use of marijuana, there are obvious grounds for banning its use. Although presented in an entirely different context, the Gemara, *Berakhot* 32b, posits two biblical sources for banning engagement in a life-endangering activity: 1) "Only be watchful of yourself and preserve your life" (Deuteronomy 4:9); and 2) "You shall be exceedingly watchful with regard to your lives" (Deuteronomy 4:15). The ambit of the latter prohibition extends to self-generated acts having non-fatal deleterious health consequences and encompasses a prohibition against cursing oneself as well.¹¹ Those provisions are codified by Rambam,

¹⁰ The lengthiest of those discussions, R. Samuel Tuvia Stern's discussion, *Teshuvot ha-Shavit*, III, no. 3, *berurim be-inyanim shonim*, p. 133, although ostensibly a formal halakhic responsum, is more closely akin to a lengthy heuristic admonition.

¹¹ See *Minhat Hinnukh*, no. 546. For an extensive survey of sources discussing whether these prohibitions are biblical in nature or rabbinic in the form of *asmakhta*, i.e., associated with a biblical verse as an *aide memoir*, see *Pe'er Tahat Efer*, chap. 2.

Hilkhot Roze'ah 12:1–14, *Shulhan Arukh*, *Hoshen Mishpat* 427:7–10 and *Shulhan Arukh ha-Rav*, *Hilkhot Shemirat Guf va-Nefesh* 4–13.¹²

The matter is probably best addressed in a short, succinct statement authored by R. Shlomoh Zalman Auerbach, *Ma'adanei Shlomoh*, 2nd ed. (Jerusalem, 5763), p. 148. Rabbi Auerbach prohibits use of “drugs” because use of controlled substances “certainly harms the body and is prohibited as [a form of] wounding the body that constitutes an absolute prohibition.” Rabbi Auerbach predicates his pronouncement banning use of marijuana entirely on the presumption of physiological harm. In addition, in a comparatively brief and unsourced treatment of use of hashish and marijuana, *Iggerot Mosheh*, *Yoreh De'ah*, III, no. 35, R. Moshe Feinstein points to the prohibition against self-harm as the first in a series of considerations supporting a ban against the use of cannabis.

(2) Mental Dissonance

There are multiple additional issues that must be addressed: *Iggerot Mosheh* forbids use of drugs on several different grounds: 1) The practice harms the body. 2) It interferes with “the intellect” (*ha-da'at*) thereby preventing “correct understanding” and hence interferes with Torah study, prayer, and fulfillment of biblical commandments. 3) Perhaps most intriguing is his depiction of use of hashish and marijuana as causing “great desire, greater than the desire for eating and the like, and there are some who cannot limit (*le-zamzem*) and curb their cravings.”¹³ 4) The Gemara, *Sanhedrin* 68b, declares that a rebellious son is severely punished because, if left to his devices, he is likely to engage in acts of robbery to support a lifestyle to which he has become accustomed. There is ample evidence that substance dependence frequently leads to criminal conduct. 5) In the case of adolescents and young people, the practice is likely to result in anguish to the parents and constitute a violation of the commandment to honor one’s father and mother. 6) Finally, asserts *Iggerot Mosheh*, the practice is subsumed in the general admonition “You shall be holy” (Leviticus 19:2), which is understood by Ramban in his

¹² *Hokhmat Adam* 68:4 maintains that self-endangerment constitutes a transgression of both a positive and a negative commandment. See R. Shlomoh Luria, *Yam shel Shlomoh*, *Bava Kamma* 8:59 who maintains that at least some forms of self-harm are prohibited as *bal tashhit*, i.e., a form of wanton destruction. Cf., *Perishah*, *Hoshen Mishpat* 420:21.

¹³ The depiction of substance dependence associated with marijuana is probably exaggerated. The frequency of cannabis use disorder is between 10 and 12.7% of regular cannabis users. See *infra.*, note 45.

Commentary on the Bible, ad locum, as a general admonition to refrain from hedonistic practices even if such practices are not explicitly banned.¹⁴

Many of those considerations, as well as other issues, require further elucidation. *Iggerot Mosheh's* assertion that use of marijuana cannot be sanctioned if it leads to nonfulfillment of, or interference with, performance of a *mizvah* echoes a ruling of *Hayyei Adam, Hilkhot Megillah* 155:30, with regard to consumption of wine on Purim. *Hayyei Adam* advises that a person who recognizes that he may not pray with appropriate concentration,¹⁵ fulfill a *mizvah* properly, or that he may behave with levity should refrain from drinking wine despite the *mizvah* to do so on Purim.¹⁶

(3) Forgetting Torah Knowledge

R. Eliezer Waldenberg, *Ziz Eli'ezer*, XXI, no. 8, points to a related, even clearer possible prohibition. The Gemara, *Menahot* 99b, declares that a person who forgets even a single item of his Torah studies transgresses the commandment "Only beware for yourself and guard yourself greatly lest you forget the matters..." (Deuteronomy 4:9).¹⁷ A statement of R. Abraham, a brother of R. Elijah of Vilna, in his *Ma'alot ha-Torah* is widely quoted as explaining that the prohibition encompasses engaging in perfectly mundane acts that cause a person to focus his attention upon activities that distract him from concentration upon Torah.¹⁸

(4) Limiting Appreciation of the Deity

Moreover, *Iggerot Mosheh's* basic point is even more fundamental than it might appear. *Iggerot Mosheh* speaks of cannabis as a drug that diminishes intellectual acumen preventing the user from "understanding a matter in a proper manner," which he describes as an "even more serious" halakhic concern without spelling out the nature for the basis of the prohibition.

It is more than likely that use of cannabis will render a person incapable of fulfilling the commandment "And you shall love the Lord,

¹⁴ Cf., however, R. Baruch Finkelstein, *Zohar*, no. 52 (5788), pp. 95–101 and R. Israel Katz, "Ishun Cannabis le-Hana'ah—Ha-Im Ra'uy?" *Be-Khol Derakhekha Da'ehu*, no. 35 (Elul 5780), pp. 19–28.

¹⁵ Cf., Rema, *Orah Hayyim* 99:3 and *Mishnah Berurah* 99:17.

¹⁶ For a discussion of whether a person may voluntarily place himself in circumstances in which he is an *anus*, i.e., in a situation in which he can later claim *force majeure* in violating halakhic requirements, see J. David Bleich, *Contemporary Halakhic Problems*, V (Southfield, Michigan, 2005), 125, note 74.

¹⁷ See *Menahot* 99a. See also *Ethics of the Fathers* 3:8 as well as *Tosefet Yom Tov, ibid.*

¹⁸ See *Ma'alot ha-Torah* (Jerusalem, 5749), s.v. *od amru*, pp. 63–67. See also *ibid.*, pp. 139–140 and the commentary *Or Torah, ibid.*, p. 291.

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your God” (Deuteronomy 6:5) as formulated by Rambam. Rambam’s depiction of love of God is complex and somewhat enigmatic. Rambam’s understanding of the nature of that *mizvah* must be gleaned from several somewhat disparate statements in his various writings.

In *Hilkhot Yesodei ha-Torah* 2:2, Rambam declares that fulfillment of the commandment “And you shall love the Lord, your God” requires that: “When a person reflects upon His great and wondrous works and creatures and perceives from them his wisdom which has no comparison and no end, he will immediately love, pray, and experience an intense desire to know His great name.”

Contemplation of the wondrous nature of creation, itself intellectual in nature, evokes a yearning to apprehend the Deity. It is that apprehension, in and of itself, that Rambam herein declares to be the essence of the love commanded by this *mizvah*.

In his *Sefer ha-Mizvot*, *mizvot aseh*, no. 3, Rambam writes:

To reflect upon and to scrutinize and concentrate upon His *mizvot*, statements and His acts until we apprehend Him and experience the ultimate pleasure in apprehension of Him. This is the love that is mandated (Deuteronomy 6:6). It is written “And you shall love the Lord your God” (Deuteronomy 6:5) . . . and let these words be upon your heart for from that you will recognize He who said and caused the world to come into being. Behold we have explained to you that concentration leads to apprehension and such pleasure leads to apprehension and love will follow.

Here, as well, Rambam includes reflection upon *mizvot* among the matters that must occupy the mind in order to effect the fulfillment of the commandment “And you shall love the Lord, your God.”

In *Hilkhot Yesodei ha-Torah* 4:12, Rambam declares that love of God arises directly from knowledge of God’s creation and is directly commensurate with a person’s knowledge of the natural order:

When a person reflects upon these matters, recognizes all these creative things, from the angels and spheres to men and similar things and recognizes the wisdom of the Holy One, blessed be He, in all fashioned and created entities, his love of God will *increase* (emphasis added), his soul will thirst, his flesh will learn to love God, may He be blessed.

That love of God is correlative with apprehension of God and depends upon the degree of intellectual attainment is stated most forcefully and at greater length in *Guide of the Perplexed*, Part III, chap. 51.

Rambam, *Guide of the Perplexed*, Part III, chap. 28, states even more succinctly, “We have already explained in the Mishneh Torah that this love is impossible other than by means of apprehension of all of existence in accordance with what it is and understand His wisdom [displayed therein] and the nature of the universe regarding it.”

The commandment to love God is ongoing and continuous. Since knowledge of God and love of Him are two sides of the same coin, it is not surprising that in *Hilkhot De’ot* 3:2 Rambam states: “A person should direct his heart and all of his actions, sitting, rising and speaking should all be directed toward knowledge of God.”

Indeed, a close reading of *Hilkhot De’ot* makes it clear that molding a healthy body and healthy character do not simply constitute “walking in the image of God” in fulfillment of the commandment “And you shall walk in His ways” (Deuteronomy 28:9),¹⁹ but serve as a means of acquiring the

¹⁹ Rambam, *Hilkhot De’ot* 1:5, explains that the commandment “And you shall walk in His ways” (Deuteronomy 28:9) requires man to emulate the attributes of the Deity. In *Hilkhot De’ot* 1:6 Rambam explains that such conduct is termed “the way of God” and is the substance of God’s description of Abraham, “For I know him that he will command his children and his household to observe the ways of God,” and assures God’s reciprocal reward “so that God may bring upon Abraham that which He has spoken of him” (Genesis 18:19). Rambam does not, at this point, explain the meaning of the “ways of God.” In *Hilkhot De’ot* 3:5–7 Rambam focuses on the commandment “And you shall walk in His ways” and explains that it is instrumental in nature, connoting development of character traits and a healthy body necessary to apprehend the Deity. In *Hilkhot De’ot* 3:2, he emphasizes that all conduct must be directed to that end because reflection upon the nature of God is an ongoing and continuous obligation. In *Hilkhot De’ot* 3:12, Rambam further states that the commandment “And you shall walk in His ways” (Deuteronomy 28:9), to the discussion of which the bulk of the first two chapters of *Hilkhot De’ot* are devoted, is an instrumental *mizvah* designed to lead to apprehension of the nature of the Deity. Thus, “And you shall walk in His ways,” while itself a *mizvah*, is to be defined as an instrumental *mizvah* directed to fulfillment of “And you shall love the Lord, your God.” In *Hilkhot De’ot* 4:1, Rambam further remarks, “For since a healthy and perfect body is among the ways of God for it is impossible that a person understand or know any matter [regarding knowledge of the Creator] if he is ill.” The point Rambam is making is that acquiring the knowledge and understanding to which he refers constitutes fulfillment of the commandment “And you shall love the Lord your God” (Deuteronomy 6:5). According to Rambam, a healthy body and proper conduct are necessary prerequisites for appreciating the wondrous works of the Creator and apprehending the nature of God and hence for fulfillment of the commandment “And you shall love the Lord your God.” It is in that sense that Rambam’s statements, *Hilkhot De’ot* 3:2 and 4:1, must be understood. Both physical health and proper ethical conduct emulating the ways of God are necessary prerequisites for fulfilling the commandment “And you shall love the Lord your God.”

Subsequent to describing the conduct conducive to fulfillment of “And you shall walk in His ways” Rambam, in chapter 5 of *Hilkhot De’ot*, describes the proper context of the “wise man.” In particular, in *Hilkhot De’ot* 5:3, Rambam speaks of a

intellectual capacity to know God and hence to fulfill the commandment “And you shall love the Lord your God.” The commandment “And you shall love the Lord your God” mandates preservation of a healthy body without which concentration upon the nature and prowess of the Deity is impossible.

Clearly, cannabis-induced euphoria interferes with contemplation and is antithetical to fulfillment of the commandment “And you shall love the Lord your God.”

(5) Profligacy

(i) Prohibition

In support of his assertion that such activities are forbidden, *Iggerot Mosheh* cites the prohibition addressed to the rebellious son described in Deuteronomy 21:18–21. *A fortiori*, contends *Iggerot Mosheh*, a person is forbidden to bring upon himself “an even greater desire for something regarding which there is no known human need.” *Iggerot Mosheh* cites the rationale presented by the Gemara, *Sanhedrin* 68b, for the harsh punishment imposed upon the rebellious son pursuant to his relatively minor infraction of stealing a modest quantity of meat and wine from his parents. The Gemara declares that the rebellious son, if left to his own devices, will ultimately turn to robbery in order to fund his craving—a phenomenon that is an all-too-common concomitant of drug addiction.

Iggerot Mosheh’s depiction of use of marijuana as subsumed in the prohibition addressed to the gluttonous son is both incisive and novel. The biblical verses describe the gluttonous son and prescribe punishment but do not contain an explicit admonition not to engage in the conduct described. The general principle is “There is no punishment without an admonition” (*Sanhedrin* 56b). Accordingly, the Gemara, *Sanhedrin* 63a, posits the verse, “You shall not eat upon the blood” (Leviticus 19:26) as the prohibition.²⁰ Rashi, as well as Rambam, *Sefer ha-Mizvot*, *mizvot lo*

wise man who consumed alcohol to the state of inebriation as “ruining” his wisdom. The wise man is held to a higher standard because his ability to apprehend the Deity is greater. In order to achieve that greater apprehension he must have enhanced moral perfection; that type of character development would be of no particular avail to an individual incapable of an enhanced state of intellectual capacity.

²⁰ The literal meaning of the verse is ambiguous and described by the Gemara as a generalized negative prohibition (*lav she-be-klalot*) applicable to a list of additional disparate acts: 1) not to eat the flesh of an animal “while the blood is still in it,” i.e., before the animal has actually died; 2) not to partake of the flesh of a sacrificial animal before its blood has been sprinkled on the altar; 3) not to offer hospitality and comfort to the surviving relatives of an executed trespasser; 4) forbidding members of the *Sanhedrin* to partake of food on the day on which they pronounce capital punishment; and 5) not to eat “before you pray for your blood,” i.e., before you pray for your life.

ta'aseh, no. 295 and *Hilkhot Mamrim* 7:1, explain that the verse is to be interpreted as prohibiting consumption of food that will entail death, i.e., the gluttonous eating of a rebellious son.

(ii) Social Evils

The social evils born of unsatisfied craving for drugs are known to all. Actually, the expensive nature and deleterious effect of such habits are reported in a talmudic passage. *Pesahim* 113a reports: “Rav said to his son Hiyya, ‘Do not drink drugs (*sama*).’” The statement is enigmatic. The advice is unequivocal but no explanation is supplied. Rashi explains that regular use of drugs will cause “your heart to demand them and you will dispense money.” Rashbam repeats that explanation virtually verbatim but adds “and do not drink as a cure if another cure is possible.”

Iggerot Mosheh points to this statement of the Gemara in describing profligacy and its likely outcome in the case of the rebellious son and applies it with obvious and appropriate reason to use of controlled substances in our day. Profligacy is certainly an undesirable character trait. Profligacy in the form of substance dependence may even be dangerous. Profligacy does not rise to—or better, does not sink to—the level of violation of an express biblical commandment. Nor do either Rav or *Iggerot Mosheh* maintain that it does.

The biblical description of the rebellious son—and its talmudic circumscription even more so²¹—severely curtail the class of rebellious sons who are subject to punishment for gluttony and also narrow the circumstances in which punishment may be imposed. Indeed, according to one opinion recorded in *Sanhedrin* 71a, the rebellious son “never existed and will never exist in the future,” that is, the conditions and circumstances of culpability are so limited as to be applicable only to a null class.

Pursuit of hedonistic pleasure is certainly not compatible with the values of Judaism but *Iggerot Mosheh* does not mean to imply that the biblical prohibition extends to all such pastimes. *Iggerot Mosheh* states only that the prohibition encompasses acts that lead to uncontrolled desire and assuredly to acts that also result in deleterious behavior while failing to satisfy any positive human need.

The identical line of reasoning might well be applied, *mutatis mutandis*, to cigarette smoking, gambling or avaricious practices. Yet, *Iggerot Mosheh* fails to ban cigarette smoking for any comparable reason. For that matter, much more innocuous hobbies and pastimes, e.g., avid collection of baseball cards—to choose a trivial and frivolous example—also

²¹ See *Sanhedrin* 68b–71a.

generate novel and purposeless desires and often prove to be expensive as well. It may well be the case that nicotine has a beneficial calming and soothing effect; judicious use of marijuana may also have a similar effect.

That having been said, *Iggerot Moshel's* points are well taken and may indeed be applicable to use of tobacco as well. *Iggerot Moshel's* penetrating analysis of the pedagogical and moral values that may be derived from the institution of the rebellious son would have been worthy of inclusion by Ralbag in his *To'aliyot*, the section of his commentary on the Bible devoted to elucidating the moral and edifying lessons that may be extrapolated from scriptural passages. However, one searches in vain for precedent in the writings of halakhic decisors establishing normative rules derived from the provisions governing the rebellious son.

(6) Parental Honor

Iggerot Moshel's point with regard to parental honor may seem obvious but in actuality is highly questionable. The same issue arises in situations in which parents forbid a child to smoke cigarettes or even interdict an entirely innocuous activity. What are the limits, if any, of the duty to obey parents? Examples of the duty of honor presented by the Gemara, *Kiddushin* 31b, all involve matters of personal service designed to provide for parental needs or benefits, e.g., assisting the parent with eating, drinking, dressing and physical movement. *Tosafot*, *Kiddushin* 32a, s.v. Rav, as well as a host of other early-day authorities²² indicate that "honor" is to be defined solely in terms of service from which the parents derive direct benefit.²³ Much later, the ambit of the obligation to honor one's father and mother became the subject of a seminal responsum by R. Joseph Colon, *Teshuvot Maharik*, no. 166. The question involved a father who threatened not to travel on behalf of his son in furthering the latter's commercial affairs unless the son swore an oath not to marry a woman of whom the father disapproved. In that responsum devoted primarily to defining the nature of duress, *Maharik* rules in accordance with *Tosafot* in limiting the duty to honor, as does *Bi'ur ha-Gra*, *Yoreh De'ah* 240:36.²⁴ R. Simon ben Zemaḥ Duran, *Tashbaz*, II, no. 53, disagrees

²² See, *inter alia*, *Tosafot*, Ramban, Rashba, Ritva, *Tosafot Rabbenu Perez* and *Tosafot Rid*, *Yevamot* 6a; Ritvah and *Shitah Mekubbezet*, *Bava Mezi'a* 32a; as well as *Teshuvot Maharik*, no. 166. Cf., Rema, *Yoreh De'ah* 240:8.

²³ *Teshuvot R. Akiva Eger*, no. 68, observes that disobedience causes "pain" to the parents and obedience results in gratification. As such, obedience is a form of direct benefit in that it both eliminates pain and results in pleasure.

²⁴ See also *Teshuvot Maharam Lublin*, no. 136 and R. Ze'ev Nachum Borenstein, *Teshuvot Agudat Ezov*, no. 16.

with that position while the views of a number of early-day authorities, particularly Rashba, are unclear.²⁵

R. Pinchas ha-Levi Horowitz, *Ha-Makneh*, *Kiddushin* 31a, makes an incisive observation. *Tosafot* engages in an elucidation of the commandment concerning “honor” of one’s parents. There is, in addition, a parallel admonition, “You shall, each man, fear (*tira’u*) his mother and his father” (Leviticus 19:3). The term “*tira’u*” should more correctly be translated as connoting “awe” rather than “fear.” Included in the commandment requiring “awe” of one’s parents is a provision forbidding a child to contradict a parent. *Ha-Makneh* contends that the commandment does not forbid only verbal contradiction of a parent; a child who disobeys a parent is, in effect, also contradicting the parent and thus violating his duty of “awe”²⁶—a matter not at all addressed by *Tosafot*. Accordingly, contends *Ha-Makneh*, *Tosafot* would acknowledge that obedience, although not required as a form of honor, is nevertheless required as a form of awe. “Awe” is almost certainly not limited to matters involving a need or pleasure of a parent.²⁷ R. Mordecai Dov of Hornisteipel, *Emek She’elah*, *Hoshen Mishpat*, no. 6, calls attention to a controversy between *Taz*, *Yoreh De’ah* 240:2, and *Shakh*, *Yoreh De’ah* 240:2, with regard to whether a child is permitted to contradict a parent outside of the parent’s presence. *Emek She’elah* notes that the same controversy should also obtain with regard to acts of disobedience carried out beyond the presence of the parents.

Some latter-day authorities, including R. Moshe Grunwald, *Teshuvot Arugat ha-Bosem*, *Orah Hayyim*, no. 19, agree that, since “honor” is limited to matters pertaining to the benefit and pleasure of the parent, a child need not necessarily always obey a parent. However, recognizing that pleasure and pain are two sides of the same coin, *Arugat ha-Bosem* concludes that causing psychological or emotional pain is the antithesis of providing pleasure and consequently, a child may not overtly disobey his

²⁵ See, *inter alia*, R. Moshe Grunwald, *Teshuvot Arugat ha-Bosem*, *Orah Hayyim*, no. 19; R. Shalom Schwadron, *Teshuvot Maharsham*, I, no. 101; R. Jacob Reischer, *Teshuvot Shevut Ya’akov*, I, no. 168 and II, no. 95; and R. Samuel ha-Levi Wosznier, *Teshuvot Shevet ha-Levi*, II, *Yoreh De’ah*, no. 71, sec. 2.

²⁶ See also Me’iri, *Yevamot* 5b and Rabbenu Yerucham cited by R. Yerucham Perlow in his commentary on *Sefer ha-Mizvot* of R. Saadia Ga’on (New York, 5722), I, 100b. *Teshuvot R. Akiva Eger*, no. 68, states that “perhaps” such matters are encompassed in the category of “awe.”

²⁷ Surprisingly, R. Eliyahu Kaphsali, *Me’ah She’arim* (Jerusalem, 5775), p. 278, asserts that the obligation of “awe” is similarly limited to matters impinging in some way upon the personal interest of the parent.

parents if such disobedience will cause anguish to the parent.²⁸ Disagreeing with *Ha-Makneh*, R. Moshe Feinstein, *Dibberot Mosheh, Kiddushin*, no. 50, sec. 14, states that verbally contradicting a parent is demeaning and hence antithetical to “awe” but quietly ignoring a parent’s wishes is not forbidden.

R. Yitzchak Yosef, *Talkot Yosef: Kibbud Av va-Em* 9:1, rules “in accordance with the majority of the decisors” that a child is not required to obey a parent regarding matters that are of no personal concern to the parent but because of the obligation of “awe” should conform to the parents’ wishes in their presence as a matter of pious conduct. In *Kibbud Av va-Em* 7:17, Rabbi Yosef rules that “if a father directs his son not to smoke, although the matter does not involve a *mizvah* of honoring a father or mother, since it does not involve a matter pertaining to a need of the father, nevertheless, it is proper for the child to obey his father. . . . and, in any event, the son should not smoke in the presence of the father.”²⁹

In a relatively brief summary of laws pertaining to honoring one’s parents, R. Shalom Joseph Eliashiv, *Mevakshei Torah: Kibbud Av va-Em*, Part I (1 Adar 5757), sec. 5, p. 152, rules that, assuming there is no serious danger in smoking, but that the father yet demands that his son refrain from doing so because the father is concerned with regard to possible health impairment, it is forbidden for the son to smoke in the father’s presence. Rabbi Eliashiv similarly rules that neither may the son smoke outside the presence of the father if the matter will become known to the father.

3. Medical Cannabis

Therapeutic use of marijuana is a matter of an entirely different nature. As alluded to earlier, before issuance of the Surgeon General’s report, the halakhic attitude toward nicotine had a somewhat strange history. In the eighteenth century, *Pnei Yehoshu’a, Shabbat* 39b, wrote that tobacco may be employed as a digestive aid and as an appetite stimulant. R. Jacob Emden, *Mor u-Kezi’ah, Orah Hayyim* 210, s.v. *ve-ha-emet*, acclaimed its use as a medicament “to empty the person, to dispel waste, to assist in digestion and to cleanse blood.” In a further comment, *Mor u-Kezi’ah, Orah Hayyim* 511, s.v. *ibra*, is even more effusive in extolling the important “nature and

²⁸ See also R. Eliyahu Rogoler, *Teshuvot Yad Eliyahu*, no. 40, who stresses the reverse, i.e., that fulfilling a parent’s wishes provides pleasure to the parent.

²⁹ In a note to *Kibbud Av va-Em* 9:1, Rabbi Yosef presents an exhaustive list of responsa addressing the issues raised together with a comprehensive analysis of those questions. For additional sources and discussion see R. Zuriel Taseh, *Ozar Dinei Kibbud Av va-Em* 240:25, secs. 716–718.

effect of tobacco in digesting food and cleansing the mouth, curbing secretions, dispelling waste, aiding in movement of vital powers and congealing blood which is the source of health.” *Sha’arei Teshuvah, Oraḥ Ḥayyim* 210:9, cautions that a person who refrains from smoking on *Yom Tov* should be careful not to renounce use of tobacco on *Yom Tov* in the form of a vow since he may later require use of tobacco on *Yom Tov* to aid in digestion. Yet, in the early twentieth century, *Hafez Ḥayyim, Kuntres Likkutei Amarim*, no. 13, decried smoking because of its negative effects upon the body, stating that cigarette smoking can cause harm “to those of weak constitution.” Consequently, he strongly advised against the practice of cigarette smoking because of the great difficulty involved in breaking the nicotine habit.

Marijuana is not solely a recreational drug. Cannabis also has medicinal properties that yield therapeutic benefits. Probably the most widely known use of medicinal marijuana is in combating chemotherapy-induced nausea and vomiting.³⁰ Cannabis has also been found effective in increasing appetite in H.I.V. positive and AIDS patients³¹ and in alleviating symptoms of post-traumatic stress disorder.³² In addition, there is significant evidence pointing to the efficacy of cannabis in management and treatment of chronic pain,³³ particularly of chronic neuropathic pain caused by lesions or disease of the somatosensory system.³⁴ Although some studies report only minimal benefit³⁵ others report a reduction of

³⁰ See *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, National Academies of Sciences, Engineering, and Medicine (2017).

³¹ *Ibid.*

³² J. Sarris, J. Sinclair, D. Karamacoska *et al.*, “Medicinal Cannabis for Psychiatric Disorders: A Clinically-Focused Systematic Review,” *BMC Psychiatry*, vol. 20 (2020), p. 24.

³³ See R.K. Portenoy, E.D. Ganae-Motan, S. Allende *et al.*, “Nabiximols for Opioid-Treated Cancer Patients with Poorly-Controlled Chronic Pain: A Randomized, Placebo-Controlled, Graded-Dose Trial,” *The Journal of Pain*, vol. 13, no. 5 (May, 2012), p. 438. See also C. Cameron, D. Watson, and J. Robinson, “Use of a Synthetic Cannabinoid in a Correctional Population for Posttraumatic Stress Disorder-Related Insomnia and Nightmares, Chronic Pain, Harm Reduction, and Other Indications: A Retrospective Evaluation,” *Journal of Clinical Psychopharmacology*, vol. 34, no. 5 (October, 2014), p. 559.

³⁴ D.E. Moulin, A. Boulanger, A.J. Clark *et al.*, “Pharmacological Management of Chronic Neuropathic Pain: Revised Consensus Statement from the Canadian Pain Society,” *Pain Research and Management*, vol. 19, ID 754693 (2014). <https://doi.org/10.1155/2014/754693>.

³⁵ M. Nicolodi, V. Sandoval and A. Terrine, “Therapeutic Use of Cannabinoids – Dose Finding, Effects, and Pilot Data of Effects in Chronic Migraine and Cluster Headache,” Abstract Presentation at the 3rd Congress of the European Academy of Neurology (EAN), Amsterdam (June 24, 2017).

between twenty and fifty percent in severity of pain.³⁶ In particular, cannabis has been employed in relieving the pain of muscular spasticity in patients suffering from multiple sclerosis.³⁷ Cannabis may also be of benefit in treating rheumatoid arthritis and musculoskeletal pain conditions of the back and neck.³⁸ Cannabis has also been used with good effect in treating gynecologic pain associated with endometritis, gynecologic malignancy, vulvodynia, chronic pelvic pain and bladder pain syndrome.³⁹

Additionally, there is tentative support for a use of cannabis in treatment of some psychiatric conditions, particularly for adjunctive use in treatment of schizophrenia.⁴⁰ Use of marijuana has also been reported in conjunction with treatment of generalized psychotic disease⁴¹ and insomnia⁴² and may be effective as well in managing symptoms of attention deficit hyperactivity disorder (ADHD).⁴³

4. Medical Risks

At the same time, there are indeed significant health risks associated with ongoing use of cannabis attributable to the presence of delta-9-tetrahydrocannabinol (THC). The therapeutic benefits of cannabis render the health risks less surprising rather than more so. In the words of

³⁶ T.J. Nurmikko, M.G. Serpell, B. Hoggart *et al.*, “Sativex Successfully Treats Neuropathic Pain Characterised by Allodynia: A Randomised, Double-Blind, Placebo-Controlled Clinical Trial,” *Pain*, vol. 133, nos. 1–3 (December, 2007), p. 210.

³⁷ G. Podda and C.S. Constantinescu, “Nabiximols in the Treatment of Spasticity, Pain and Urinary Symptoms Due to Multiple Sclerosis,” *Expert Opinion on Biological Therapy*, vol. 12, no. 11 (September, 2012), p. 1517.

³⁸ H. Johal, C. Vannabouathong, Y. Chang *et al.*, “Medical Cannabis for Orthopaedic Patients with Chronic Musculoskeletal Pain: Does Evidence Support its Use?,” *Therapeutic Advances in Musculoskeletal Disease*, vol. 12. (July, 2020). <https://doi.org/10.1177%2F1759720X20937968>.

³⁹ See A.L. Liang, E.L. Gingher and J. Coleman, “Medical Cannabis for Gynecologic Pain Conditions: A Systematic Review,” *Obstetrics & Gynecology*, vol. 139, no. 2 (February, 2022), pp. 287–296.

⁴⁰ P. McGuire, P. Robson, W.J. Cubala *et al.*, “Cannabidiol (CBD) as an Adjunctive Therapy in Schizophrenia: A Multicenter Randomized Controlled Trial,” *American Journal of Psychiatry*, vol. 175, no. 3 (March, 2018), p. 225.

⁴¹ M. Haney and A.E. Evins, “Does Cannabis Cause, Exacerbate or Ameliorate Psychiatric Disorders? An Oversimplified Debate Discussed,” *Neuropsychopharmacology*, vol. 41, no. 2 (January, 2016), pp. 393–401.

⁴² M.O. Bonne-Miller, K.A. Babson and R. Vandrav, “Using Cannabis to Help You Sleep: Heightened Frequency of Medical Cannabis Use Among Those With PTSD,” *Drug and Alcohol Dependence*, 136 (March, 2014), 162–165. C. Reinerman, H. Nunberg, F. Lanthier and T. Heddleston, “Who are Medical Marijuana Patients? Population Characteristics from Nine California Assessment Clinics,” *Journal of Psychoactive Drugs*, vol. 43, no. 2 (2011), p. 128–135.

⁴³ See T.J. Nurmikko, M.G. Serpell, B. Hoggart *et al.*, *supra*, note 36.

Ramban in his *Torat ha-Adam*: “With regard to cures there is naught but danger; what heals one kills another.”⁴⁴ The sole question is the extent and severity of those risks.

The most prevalent identifiable risk is cannabis use disorder, which develops in between 10 and 12.7 percent of regular cannabis users⁴⁵ and is connected primarily with cognitive impairment resulting from depression, bipolar disease, neural disorders and psychoses, including schizophrenia.⁴⁶ A study of 6,534 individuals born in northern Finland in 1986 that evaluated participants between ages 15 and 16 and again at age 30 found an increased risk of psychosis for those who use cannabis five times or more prior to 15 to 16 years of age. It is however unclear whether, and to what extent, there is a direct causal relationship between cannabis use and those psychiatric comorbidities or whether both result from common risk factors.⁴⁷ The same is true of the association of schizophrenia with cannabis and other psychoactive substances including stimulants, opiates and hallucinogenic agents. It is considered unlikely that cannabis use disorder and schizophrenia are the result of the same genetic liability.⁴⁸ The presence of obsessive-compulsive disorder and attention deficit hyperactivity disorder (ADHD) is also higher among marijuana users.⁴⁹ There is strong evidence that many users of marijuana later become users of other psychoactive substances. What is unclear is whether marijuana

⁴⁴ See *Kitvei Ramban*, ed. R. Bernard Chavel (Jerusalem, 5724), II, 48.

⁴⁵ D.S. Hasin, T.D. Saha, B.T. Kerridge *et al.*, “Prevalence of Marijuana Use Disorders in the United States Between 2001-2002 and 2002-2003,” *JAMA Psychiatry*, vol. 72, no. 12 (December 2015), pp. 1235–1242.

⁴⁶ S.H. Gage, M. Hickman and S. Zammit, “Association Between Cannabis and Psychosis: Epidemiologic Evidence,” *Biological Psychiatry*, vol. 79, no. 7 (April, 2016), pp. 549–556. See also M.S.K. Starzer, M. Nordentoft and C. Hjorthøj, “Rates and Predictors of Conversion to Schizophrenia or Bipolar Disorder Following Substance-Induced Psychosis,” *American Journal of Psychiatry*, vol. 175, no. 4 (April, 2018), pp. 343–350; and T.H. Moore, S. Zammit, A. Lingford-Hughes *et al.*, “Cannabis Use and Risk of Psychotic or Affective Mental Health Outcomes: A Systematic Review,” *Lancet*, vol. 370, no. 9584 (July, 2007), pp. 319–328.

⁴⁷ A. Mustonen, S. Niemelä, T. Nordström *et al.*, “Adolescent Cannabis Use, Baseline Prodromal Symptoms and the Risk of Psychosis,” *British Journal of Psychiatry: The Journal of Mental Science*, vol. 212, no. 4 (March, 2018), p. 227.

⁴⁸ C. Hjorthøj, M. Uddin, T. Wimberley *et al.*, “No Evidence of Associations Between Genetic Liability for Schizophrenia and Development of Cannabis Use Disorder,” *Psychological Medicine*, vol. 51, no. 3 (February, 2021), p. 479.

⁴⁹ S.S. Lee, K.L. Humphreys, K. Flory *et al.*, “Prospective Association of Childhood Attention-Deficit/Hyperactivity Disorder (ADHD) and Substance Use and Abuse/Dependence: A Meta-Analytic Review,” *Clinical Psychology Review*, vol. 31, no. 3 (April, 2011), p. 328.

serves as a “gateway” drug involving a causal relationship⁵⁰ or that the selfsame environmental and genetic factors give rise to all forms of substance use and substance use disorders.⁵¹ There is a similar relationship between cannabis use disorder and alcohol use disorder. Persons afflicted with cannabis use disorder are three to four times more likely to suffer from alcohol use disorder as well. Studies of whether the relationship between cannabis dependence and major depressive disorder is causal or genetic and/or environmental reported a conflicting result.⁵² Recent studies show evidence linking cannabis use during pregnancy to psychiatric problems in children. The behavioral issues may be linked in part to changes in the activity of genes found in the placenta which provides nutrients and oxygen to the developing fetus. Maternal cannabis use is associated with greater anxiety, aggression and hyperactivity in children. Exposure to cannabis during gestation can result in a lower birth rate as well as in increased rates of autism and depression.⁵³

In addition, a study of 50,373 Swedish military conscripts showed a somewhat elevated mortality risk to cannabis users.⁵⁴ The association between use of cannabis and mortality is less pronounced. Increased causes of death associated with cannabis use included cardiac infarction, cardiovascular disease and injuries of unknown causes. Most curious is a 4.9-fold increased risk of myocardial infarction within an hour subsequent to use of marijuana.⁵⁵ A similar study of 41,470 Danes found a somewhat elevated mortality rate in persons suffering from cannabis

⁵⁰ J.L. Treur, D. Demontis, G.D. Smith *et al.*, “Investigating Causality Between Liability to ADHD and Substance Use, and Liability to Substance Use and ADHD Risk, Using Mendelian Randomization,” *Addiction Biology*, vol. 26, no. 1 (January, 2021). <https://doi.org/10.1111/adb.12849>.

⁵¹ L. Degenhardt, L. Dierker, W.T. Chiu *et al.*, “Evaluating the Drug Use ‘Gateway’ Theory Using Cross-National Data: Consistency and Associations of the Order of initiation of Drug Use Among Participants in the WHO World Mental Health Surveys,” *Drug and Alcohol Dependence*, vol. 108, nos. 1–2 (April, 2010), p. 84.

⁵² See T.H. Moore, S. Zammit, A. Lingford-Hughes *et al.*, *supra*, note 46. See also A. Mustonen, S. Niemelä, T. Nordström *et al.*, *supra*, note 47.

⁵³ G. Rompala, Y. Nomura and Y.L. Hurd, “Maternal Cannabis Use is Associated with Suppression of Immune Gene Networks in Placenta and Increased Anxiety Phenotypes in Offspring,” *Proceedings of the National Academy of Sciences*, vol. 118, no. 47 (November, 2021). <https://doi.org/10.1073/pnas.2106115118>.

⁵⁴ E. Manrique-Garcia, A. Ponce de Leon, C. Dalman *et al.*, “Cannabis, Psychosis, and Mortality: A Cohort Study of 50,373 Swedish Men,” *American Journal of Psychiatry*, vol. 173, no. 8 (August, 2016), p. 790.

⁵⁵ M.A. Mittleman, R.A. Lewis, M. Maclure *et al.*, “Triggering Myocardial Infarction by Marijuana,” *Circulation*, vol. 103, no. 23 (June, 2001), pp. 2805–2809.

use disorder.⁵⁶ Various studies of cases of marijuana and injury resulting from motor vehicle accidents showed an increase of between 32 and 97 percent.⁵⁷ The danger is greatly enhanced when combined with use of alcohol.⁵⁸

5. Legal Restriction

R. Yitzchak Zilberstein, *Zohar*, no. 11 (*Shevat* 5763), was consulted with regard to providing illegal substances to terminally-ill patients. It is well established that Halakha regards pain in a terminally-ill patient as a life-threatening factor.⁵⁹ *Iggerot Mosheh, Hoshen Mishpat*, II, no. 73, sec. 9, states that given two equally ill terminal patients, one of whom suffers extreme pain whereas the second does not, the second will survive for at least a marginally longer period of time. R. Shlomoh Zalman Auerbach is quoted by Dr. Abraham S. Abraham, *Lev Avraham* 32:8 and *idem, Nishmat Avraham, Oraḥ Hayyim* 334:4, note 3a, as permitting palliation of pain even in situations in which there are grounds to fear that the analgesic may foreshorten life.

Despite the halakhically cognized life-shortening threat posed by excessive pain, Rabbi Zilberstein was willing to entertain the position that the State has the right to ban medicinal use of controlled substances for the greater benefit of society. His father-in-law, R. Joseph Shalom Eliashiv, rejected that position out of hand. Although the precise grounds for Rabbi Eliashiv's ruling are not reported, his reasoning appears to be quite simple. Even assuming that *dina de-malkhuta* is rooted in biblical

⁵⁶ C. Hjorthøj, M.L. Østergaard, M.E. Benros *et al.*, "Association Between Alcohol and Substance Use Disorders and All-Cause and Cause-Specific Mortality in Schizophrenia, Bipolar Disorder, and Unipolar Depression: A Nationwide, Prospective, Register-Based Study," *Lancet Psychiatry*, vol. 2, no. 9 (August, 2015), p. 801.

⁵⁷ See S. Hostiuc, A. Moldoveanu, I. Negoii and E. Drima, "The Association of Unfavorable Traffic Events and Cannabis Usage: A Meta-Analysis," *Frontiers in Pharmacology*, vol. 9 (February, 2018), p. 99; S. Hostiuc, A. Moldoveanu, I. Negoii and E. Drima, "Corrigendum: The Association of Unfavorable Traffic Events and Cannabis Usage: A Meta-Analysis," *Frontiers in Pharmacology*, vol. 9 (May, 2018), p. 564; O. Rogeberg and R. Elvik, "The Effects of Cannabis Intoxication on Motor Vehicle Collision Revisited and Revised," *Addiction*, vol. 111, no. 8 (August, 2016), pp. 1348–1359; as well as O. Rogeberg, R. Elvik and E. White, "Correction to 'The Effects of Cannabis Intoxication on Motor Vehicle Collision Revisited and Revised' (2016)," *Addiction*, vol. 113 (January 2018), p. 967.

⁵⁸ R.L. Hartman, T.L. Brown, G. Milavetz *et al.*, "Cannabis Effects on Driving Lateral Control With and Without Alcohol," *Drug and Alcohol Dependence*, vol. 154 (September, 2015), pp. 25–37.

⁵⁹ See J. David Bleich, "Palliation of Pain," *Bioethical Dilemmas*, II (Southfield, Michigan, 2006), 184–190.

law,⁶⁰ there is no reason to assume that, as is the case with other biblical laws, it should not be suspended in instances of *pikuah nefesh*. The same is true if legislation in the nature of *dina de-malkhuta* is based upon the general social welfare interest in the form of *takkanat ha-zibbur*.⁶¹ Or,

⁶⁰ See *Avnei Milu'im* 25:2; *Teshuvot Hatam Sofer, Yoreh De'ah* nos. 314 and 127; and R. Abraham Dov Kahana-Shapiro, *Teshuvot Devar Avraham*, I, no. 1. Prominent among the authorities who regard *dina de-malkhuta dina* as a rabbinic edict are *Shemesh Zedakah, Hoshen Mishpat* 53:14; *Bet Shmu'el, Even ha-Ezer* 28:3; and R. Jacob Ettlinger, *Binyan Zion ha-Hadashot*, no. 15. R. Shlomoh Zalman Auerbach, *Ma'adanei Erez*, no. 29, sec. 13, regards the biblical ambit of the principle as limited to the relationship of individuals to the state while he views its application to inter-personal matters as rabbinic in nature. For a more detailed discussion of the principle, see Shmuel Shilo, *Dina de-Malkhuta Dina* (Jerusalem, 5735), 85–87.

⁶¹ Even were such authority to exist there seems to be no reason why the endangered person should himself be morally restrained from avoiding the law. There is significant authority in support of the position that even a transgressor sentenced to death by a *bet din* may justifiably seek to save his own life. R. Isaac Elchanan Spektor, *Teshuvot Be'er Yizhak, Yoreh De'ah*, no. 24, observes that the obligation to convict and execute persons guilty of a capital transgression is incumbent solely upon the *bet din*. Hence, there is no provision requiring a person guilty of a capital crime to assist in his own conviction and execution. R. Joseph Shalom Eliashiv is quoted by R. Yitzchak Zilberstein, *Hashukei Hemed, Sanhedrin* 49b, as stating that the malffeasor need not surrender to the authorities and may seek to escape in order to avoid punishment. Indeed, Rabbi Zilberstein suggests that one falsely convicted is obligated to evade punishment in order to spare false witnesses from complicity in the execution of an innocent person. It would further seem that, in such circumstances, a person has a similar obligation of *pikuah nefesh vis-à-vis* himself. R. Elchanan Wasserman, *Kovez Shi'urim, Kiddushin*, sec. 100, accepts the same premise regarding a person who knows that he has been unjustly convicted. Cf., however, R. Chaim Eleazar Shapiro, *Teshuvot Minhag Elazar*, I, no. 18, sec. 4, and no. 73, as well as II, no. 53, who expresses doubt regarding this matter. Cf., also, R. David Schreiber, *Ateret Shlomoh* (29 Adar, 5775), p. 8 and R. Nisan Shlomoh Kaplan, *Shalmei Nisan*, sec. 121. See also R. Yair Chaim Bacharach, *Teshuvot Havvot Ya'ir*, cited by *Pithei Teshuvah, Yoreh De'ah* 2:5 and R. Jacob of Lissa, *Havvat Da'at, Yoreh De'ah* 185:2. For further references to a person's right to rely upon his own knowledge and conviction see Rambam, *Hilkhot Avot ha-Tum'ah* 15:11; R. Israel Lipschutz, *Tiferet Yisra'el, Toharot* 8:9, *Yakbin*, sec. 51; and *Iggerot Mosheh, Yoreh De'ah*, I, no. 54.

See also R. Ya'akov Kanievsky, *Iggerot u-Reshimot Kehillot Ya'akov*, IV, *Parashat Mas'ei*, who maintains that the putative executioner of a person who knows himself to be innocent has the status of a *rodef* who may be killed by individuals personally aware of the convicted person's innocence. *Shalmei Nisan* maintains that execution of a person pursuant to judgment of a *bet din* cannot be homicide and hence the executioner cannot be a *rodef*. *Shalmei Nisan*, somewhat less convincingly, also asserts that the convicted person who knows himself to be innocent may not kill the executioner. The unidentified issue in the latter case is whether there is a right of self-defense independent of the law of *rodef*. See R. Joseph Saul Nathanson, *Teshuvot Sho'el u-Meshiv*, I, no. 22, p. 13a and Me'iri, *Sanhedrin* 72b.

Cf., Thomas Hobbes, *Leviathan*, Part I, chap. 14: "For . . . no man can transfer, or lay down, his Right to save himself from Death, Wounds and Imprisonment . . .

more broadly, Rabbi Eliashiv's position may reflect the fact that *dina de-malkhuta* is far, far from all-encompassing. A comprehensive analysis of the ambit of *dina de-malkhuta* is beyond the scope of this undertaking but suffice it to say that the halakhic basis of *dina de-malkhuta* is subject to wide-ranging controversy among early-day authorities.⁶² The underlying theses of *dina de-malkhuta* do not extend in application to all matters of personal conduct and certainly do not permit its application in a manner that is contrary to Halakhah.

VI. KASHRUT SUPERVISION

It might seem that, were taking snuff an innocuous practice, there would be no reason for *kashrut* supervision. Such an assumption may not be—or in days gone by may not have been—entirely accurate. Snuff was available in a variety of different forms, both dry and moist, aromatic and non-aromatic. R. Ya'akov ibn Nayim, *Teshuvot Zera Ya'akov*, no. 9, and R. Moshe Schick, *Teshuvot Maharam Shik, Orah Hayyim*, no. 242, report that some suppliers of snuff soaked their products in non-*kosher* wine. Another problem with regard to use of aromatic snuff and tobacco on *Pesach* came about because, at times, whisky was used to produce the aroma. Nevertheless, there is no record of a *kashrut* imprimatur ever having been bestowed upon tobacco products for either year round or Passover use.

In July, 2014 the State of New York amended its Compassionate Care Act to permit prescription of marijuana on behalf of certain patients. Qualifying patients include those who suffer from cancer, H.I.V. infection or AIDS, neuropathy, amyotrophic lateral sclerosis (ALS), Parkinson's disease and Huntington's disease. For the patient to be entitled to use of marijuana, any one of those conditions must be accompanied by wasting syndrome, severe or chronic pain, severe nausea, seizure or persistent muscular pain.

[A man] cannot Covenant thus, Unless I do so, or so kill me . . . I will not resist you when you come to kill me." In chapter 21, Hobbes reiterates that "Covenants not to defend a man's own body are void" and continues by declaring even more strikingly, "But in case a great many men together . . . have committed a Capital crime for which every one of them expected death, whether have they not the Liberty than to join together and assist, and defend one another? Certainly they have."

⁶² For a general treatment of *dina de-malkhuta* see *Encyclopedia Talmudit*, VII (Jerusalem, 5756), 295–308. A comprehensive analysis, although presented in a historical, rather than in a thematic, format, is presented in Shilo, *Dina de-Malkhuta Dina*.

TRADITION

At present, ten manufacturers have been licensed to produce medical marijuana in New York State.⁶³ Only one of those producers has received authorization to use cannabis pills, oil and vapor in its products. Those products are legally available for distribution only in the State of New York and limited to a small number of designated locations. Currently, a single American manufacturer has received *kashrut* endorsement of cannabis products by a national organization and is legally limited to distribution at a small number of facilities, all of which are within the State of New York. In addition, Kosher CBD dispenses marijuana edibles in a retail outlet located in Brunswick, New Jersey with *kashrut* certification of the Central Rabbinical Congress (*Hitahdut ha-Rabbanim*) and Star-K as well as in a Brooklyn location with certification of the OK.

The pain-relieving ingredient in cannabis, THC, can be imbibed by smoking or vaping or, in the alternative, THC can be isolated from the cannabis plant, combined with other ingredients and then consumed as part of a foodstuff. In addition to the practical and societal advantages of “eating” rather than smoking cannabis on *Shabbat*, there are halakhic reasons to prefer ingesting cannabis in the form of consuming a food product. In theory, marijuana smoke might be accumulated in a container and inhaled on *Shabbat* even by a patient who is not suffering from a life-threatening condition but is rendered dysfunctional by pain.⁶⁴ However, the rabbinic prohibition against a person, other than a patient who has “taken to bed,” availing himself of therapeutic measures on *Shabbat* does not apply to consumption of a foodstuff commonly eaten by a healthy person.⁶⁵ That is so even if such use of the food product is intended solely for therapeutic or medicinal reasons. Nor, according to many authorities, does the prohibition apply to ingesting medication that has been combined with other foodstuffs.⁶⁶

⁶³ New York State Department of Health, “New York State Department of Health Adds Five New Registered Organizations to Medical Marijuana Program” (August, 2017), https://www.health.ny.gov/press/releases/2017/2017-08-01_mmp.htm.

⁶⁴ It is reported apocryphally regarding one or another prominent Torah scholars of yesteryear that, addicted to nicotine in his youth, he was wont to collect tobacco smoke in a jar and inhale the smoke on *Shabbat*. *Sha’arei Teshuvah, Oraḥ Hayyim* 328:30, permits use of snuff on *Shabbat* to alleviate a headache because snuff is generally used for pleasure. *Sha’arei Teshuvah, loc. cit.*, also permits use of chewing tobacco on *Shabbat* for the same reason.

⁶⁵ See *Shulḥan Arukh, Oraḥ Hayyim* 328:37. Cf., however, *Bi’ur Halakhah, ibid.*, s.v., *ve-khen*.

⁶⁶ See *Iggerot Mosheh, Oraḥ Hayyim*, II, no. 86 and R. Joshua Neuwirth, *Shemirat Shabbat ke-Hilkhatāh* 34:6, note 23. *Ziz Eli’ezer*, VIII, no. 15, chap. 15 and XIV, no. 50, sec. 8, permits use of analgesics on *Shabbat* by all persons. Similarly, R. Moshe Stern, *Teshuvot Be’er Mosheh*, I, no. 33, permits use of sleeping pills on *Shabbat*. [Other authorities permit use of sleeping pills on *Shabbat* because they do not regard lack of

Cannabis can readily be combined with other non-kosher ingredients and consumed in the form of edibles, such as cookies, candy or the like. Consequently, unless the patient is seriously ill, baked goods containing non-kosher shortening or flavoring fortified with cannabis extract and used for therapeutic purposes present a *kashrut* problem. As a result, legalization of medicinal marijuana has given rise to a policy dilemma within the Jewish community: Should *kashrut* organizations supervise production of edible marijuana products designed for therapeutic use in order to ensure the *kashrut* of those products or should it eschew such supervision lest *kashrut* certification be interpreted as an ecclesiastic imprimatur for general recreational use of cannabis? A major U.S. *kashrut* agency has undertaken such supervision while Israeli and Canadian authorities have rebuffed such requests.

Policy decisions—unlike halakhic rulings—depend upon their context at a particular place and time. In addition to other considerations, it is widely known that, in Israel, under the guise of medical need, cannabis is readily acquired for recreational use and possession has been decriminalized. As of this writing, further liberalization of use of cannabis is pending before the Knesset. In Canada, use of cannabis is now legal for both medicinal and recreational purposes. It is certainly arguable that, in such circumstances, *kashrut* certification, were it forthcoming, would be perceived by the public as endorsement of marijuana for recreational use. The various U.S. jurisdictions in which only medical use of marijuana has been legalized both license and regulate consumption of medical cannabis and strictly enforce laws governing its use. In those states, rabbinical supervision of production of edible cannabis products would probably not be broadly interpreted as blanket halakhic approval for use of marijuana. Nevertheless, it would certainly be judicious to append a legend to the seal of *kashrut* approval indicating that use of the product is sanctioned for medical purposes only.⁶⁷

sleep as an illness. See R. Abraham Chaim Noe, *Kezot ha-Shulhan, Badei ha-Shulhan* 38:18, note 31, s.v. *mi-she-ein*. Cf., however, *Shemirat Shabbat ke-Hilkhatav* 33:16, note 67.] Both authorities maintain that the rabbinic ban applies only to medications having curative power. If so, use of cannabis to control pain or discomfort would also be permissible for everyone. However, *Shemirat Shabbat ke-Hilkhatav* 34:3, note 7, takes issue with that position. Rabbi Neuwirth cites R. Shlomoh Zalman Auerbach, who contends that the underlying concern, *viz.*, lest the apothecary grind the ingredients being compounded on *Shabbat*, is present in use of all drugs regardless of their purpose and that, indeed, the primary thrust of the rabbinic edict banning medications on *Shabbat* was to prohibit medication for alleviation of pain. See also R. Abraham Resnikoff, *Tehumin*, XXXVII (5777), 110, note 10.

⁶⁷ An analogous practice has long been adopted by a major matzah bakery that labels its egg matzahs as approved for use on Passover only by the ill and elderly.

ENDNOTE: INDETERMINATE *PESIK REISHA*I. Cumulative/Indeterminate *Pesik Reisha*

R. Moshe Feinstein has been widely quoted as declining to ban cigarette smoking for several reasons. He is reported to have ruled that self-harm cannot serve as the basis of a prohibition against cigarette smoking because there is no immediate harm. That ruling is recorded by Dr. Abraham S. Abraham, *Nishmat Avraham, Orah Hayyim*, I (Jerusalem, 5743), 279, with a citation to *Iggerot Mosheh, Yoreh De'ah*, II, no. 49. Although the phrase is absent in the published text of the responsum, *Nishmat Avraham* records *Iggerot Mosheh* as ruling that smoking cannot be banned because cigarettes “do not cause harm other than after some years.” Since that understanding of *Iggerot Mosheh* has received widespread currency the underlying rationale must be elucidated whether or not the attribution to *Iggerot Mosheh* is accurate.

That phrase might readily be read as a statement asserting that only self-harm that is imminent in nature is forbidden. There is certainly no shortage of sources demonstrating that self-infliction of harm is forbidden even if the harm is temporally remote.⁶⁸ Hence, such an understanding of the comment would simply be incorrect.

Alternatively, the comment might be read as stating that activity causing harm that results only from an aggregate of acts performed over a period of time is not forbidden.⁶⁹ The rationale would be that the acts themselves are performed in order to achieve an entirely innocuous purpose; there is certainly no intention to cause self-harm. The series of acts can be forbidden only because the forbidden outcome is a necessary and inevitable result, i.e., a “*pesik reisha*.”⁷⁰ The literal meaning of the aphorism “*Pesik*

⁶⁸ Rambam, *Hilkhot Roze'ah* 4:3, records this principle with regard to homicide. Regarding self-harm see R. Ya'akov Yeshayahu Blau, *Pithei Hoshen*, V, *Nezikin* 2:2.

⁶⁹ Cf., *supra*, note 8.

⁷⁰ The principle denoted by the term “*pesik reisha*” is the opposite of the double-effect doctrine. The double-effect doctrine asserts that a person who intends to accomplish a perfectly innocuous result but simultaneously also causes a morally odious effect cannot be held culpable for the unintended effect. The most widely known example of a double effect is perhaps that of a pregnant woman suffering from cancer of the uterus. Treatment of the malady consists of performing a hysterectomy which will necessarily also result in elimination of the fetus.

In that example, cure of cancer is a moral desideratum; causing the death of a fetus is immoral but unintended. In some moral systems sacrifice of a fetus to preserve the life of the mother is generally not countenanced. Nevertheless, acceptance of the double-effect doctrine renders causing death of the fetus morally permissible in such circumstances, provided that the morally odious consequence is unintended. For Jewish law, such an act would not be permissible, even though it is intended to

reisha ve-lo yamut – Sever its head and it will not die?” (*Shabbat* 75a) is that one cannot decapitate an animal without anticipating its demise. The halakhic denotation of the aphorism is that a necessary but unintended result of an act is treated as tantamount to having been intentionally performed. One cannot “amputate the head at the neck” with intent to feed the head to a dog or for some other purpose without recognizing that the animal will die. Accordingly, the person performing such an act will be held fully accountable for the unintended result.

achieve a laudable purpose, because the unintended secondary effect is unavoidable. To the contrary, the act would be prohibited as a *pesik reisha* because of its second, immoral, albeit unintended, consequence. In Jewish law the hysterectomy might be justified in light of the superseding principle of *pikuah nefesh* in the form of rescue of the mother but that is an entirely different consideration.

The effect of the doctrine of *pesik reisha* is to treat an unintended and undesired effect as though it were intended. The concept is probably best expressed in the vernacular as “constructive intent.” For example, in the marital law context constructive desertion is deemed desertion and hence in many jurisdictions may serve as grounds for divorce. Desertion is defined as forsaking one’s spouse by departing the marital abode without intent to return. Constructive desertion consists of offending conduct rendering continuation of the marriage unsafe or unendurable thereby causing the offended spouse to seek safety outside the marital domicile. Constructive desertion does not depend upon the offending spouse actually removing him- or herself from the marital abode.

Generally, a legal system may construe a constructive act as tantamount to the act itself if the person “knew or should have known” the likely consequence of his or her act. There is somewhat of an ambiguity in that formulation. Does it mean that the law does not recognize invincible ignorance and assigns responsibility despite the absence of actual intent? Or does it mean that, although the person may not actually have intended the result and may not even have been aware that the result may occur, nevertheless, the law assumes that since the result is necessary, there must have been at least dim awareness at some psychological level that the result would occur and hence some level of intent to achieve the result?

The halakhic principle of *pesik reisha* can be elucidated in either of these two ways: 1) An act that results in a *pesik reisha* is a culpable act because intention of the result is ascribed by operation of law—a legal fiction, if you will; or 2) because the aspect of necessity must, at some level, generate awareness and such subliminal awareness constitutes intent. Which of those alternative explanations is correct is a matter of disagreement among latter-day halakhic theorists. See *Hiddushei R. Akiva Eger, ma’arakhah assirit*; R. Abraham Borenstein, *Eglei Tal, Melekhbet Horesb* 11:20, sec. 15; R. Isaac Elchanan Spektor, *Teshuvot Be’er Yizhak, Orah Hayim*, no. 15; R. Shimon Yehudah ha-Kohen Shkop, *Sha’arei Yosher, sha’ar 3*, chap. 25, s.v. *u-be-ikkar*; *idem.*, *Ketubot*, no. 4; R. Meir Michel Rabinowitz, *Ha-Me’ir le-Olam*, I, no. 1; R. Elchanan Wasserman, *Kovez Shi’urim, Ketubot*, sec. 19; R. Moshe Feinstein, *Iggerot Mosheh, Orah Hayyim*, I, no. 6 and *Orah Hayyim*, IV, no. 8, *anaf 2*; *idem.*, *Dibberot Mosheh, Ketubot*, no. 5; R. Chaim Pinchas Scheinberg, *Am ba-Torah, mahadura bet*, no. 12; *Sefer Zikaron*, pp. 246–248; and R. Meir Acker, *Melekhbet Mahashevet*, 4th edition (Beitar, 5777), chap. 8, sec. 1. The discussion presented herein is not contingent upon acceptance of one or the other of those expositions of the doctrine of *pesik reisha*.

TRADITION

It might be argued that the principle of *pesik reisha* is operative only if it serves to assign constructive intent to but a single act that is identifiable at least retroactively. However, in situations such as cigarette smoking, even if harm will certainly and necessarily result, it will only occur as the cumulative effect of a series of discrete acts, or as a result of one such act, but it is impossible to predict which act will be causally responsible for the undesired effect. Is the principle of *pesik reisha* operative in either or both of those situations?⁷¹

The halakhic issue is: Can intent be retroactively assigned in light of necessity of result only if a single act is involved or is the principle of *pesik reisha* applicable even when no particular act can be identified as the causal source of resultant bodily harm? Can constructive intent be ascribed only to a single act or can intent be ascribed even to a series of acts? Restricting *pesik reisha* in the manner indicated would reflect the notion that the psycho-halakhic construct of *pesik reisha* can be attributed only to a particular act. Thus, no unidentifiable act leading to an unintended but necessary result can be regarded as intended if performed as one of a series of acts. And when the result is the product of an aggregate or conglomeration of separate acts, such constructive intent must be imputed to an entire series of acts none of which, in itself, is capable of causing the result. Stated a bit differently, when a result is necessary (in the Aristotelian sense of the term), i.e., a *pesik reisha*, intention is imputed, but only if such intent can be ascribed to a particular identifiable act.

Applying that limitation to cigarette smoking, although the act that actually causes harm cannot be identified in advance, nevertheless, *pesik reisha* would serve retroactively to render the act determinate were the act that causes harm identifiable. But *pesik reisha* cannot serve to assign intent to each of a series of acts, each one of which is indeterminate. The argument would be that no particular act of smoking can be forbidden because every individual act in that series remains a *davar she'eino mitkaven*, i.e., an act performed without intent to cause harm. However, limiting the doctrine of *pesik reisha* in that manner seems to this writer to be incorrect.

Rejection of such limitation upon the doctrine of *pesik reisha* must be justified. Let us first address the situation of a person who intentionally sets out to commit a transgression that can be accomplished only as the result of an indeterminate number of acts. The Gemara, *Sanhedrin* 78a, establishes a number of points: 1) In a situation in which a multiple number of individuals administer multiple blows to a single victim simultaneously,

⁷¹ See *infra*, note 78.

whether each blow is lethal or the blows are lethal only in the aggregate, none of the perpetrators is liable to the death penalty. 2) A person who kills a *treifah*, i.e., an individual who has sustained a trauma to one of a number of talmudically enumerated organs or who suffers from one of a number of specifically identified anatomical anomalies of one of those life-sustaining organs such that his or her resultant life-expectancy is less than twelve months, is not liable to capital punishment. 3) In contrast, a person who kills a *goses*, i.e., an individual suffering from a physiological condition that will cause imminent death, is fully culpable. 4) There is a controversy between the Sages and R. Judah ben Beteirah with regard to capital culpability in the case of a person who strikes a *goses bi-yedei adam*, i.e., an individual who has previously suffered a lethal trauma at the hands of another person, whose life has now been further foreshortened as a result of a final act of violence.

Not at all discussed by the Gemara is the culpability of a person bent upon killing his victim by administering multiple blows, each one in itself non-lethal in nature, but whose cumulative effect is the death of the victim. There is nothing in the talmudic discussion of the situations that are addressed that would lead to a conclusion of non-culpability in the latter situation provided, of course, that death of the victim was the announced intention of the assailant from the moment of his initiation of those acts and that proper *hatra'ah*, or warning, had been administered.

Me'iri, however, in his commentary, *ad locum*, is more explicit. Addressing the case of ten assailants who administer ten blows *in seriam*, Me'iri writes, "But, if the earlier wounds were non-lethal while the final one is lethal in [the victim's] present state, [the assailant] is culpable." Rambam, *Hilkhot Rozeah* 4:7, rules in a similar manner. That ruling is entirely logical and unexceptionable. The victim is taken in his physical state at the time of actual assault. A person who administers a blow that is lethal to a person in a debilitated state is guilty of a capital crime for that single blow alone. If that is so, then, *a fortiori*, if the earlier non-lethal blows were administered by the same person who administers the final lethal blow, that person is culpable. Indeed, it would be illogical to exonerate the murderer because he had earlier engaged in acts of non-lethal assault.⁷²

⁷² These circumstances differ from those that are the subject of the controversy between the Sages and R. Judah ben Beteirah. In the situation that is the subject of that controversy, the victim had already suffered mortal wounds that in themselves would have constituted acts of homicide; the final act served only to prepone actual death of the victim. It would seem that even the Sages would agree that if a single person administers ten blows sequentially that cumulatively result in an act of homicide he is guilty of a capital crime.

TRADITION

Consider the case of a person who seeks to commit homicide by administering small doses of arsenic to his intended victim. No single dose is sufficient to kill, but each dose does leave its mark upon the organs of the victim so that at some point a similar small quantity of arsenic added to the poison already present in the victim's system will result in death. It stands to reason that, absent an issue concerning administration of the requisite admonition, the murderer acting with full knowledge and malice aforethought, having made his intention known in advance, would be fully culpable for the slow poisoning of his victim. That would be so even if the culprit does not know how many cumulative doses are necessary to assure the death of his victim. Having intentionally caused the death of the victim by his successive and cumulative acts, the perpetrator is guilty of capital homicide.

The same reasoning should apply to self-harm caused by a series of acts. Assuming, as we must, that a smoker's first cigarette cannot cause lung cancer, emphysema, cardiovascular disease or any other fatal malady and that a smoker could cease smoking at any time without foreshortening his life or suffering any other serious physical effect, his initial acts of smoking would be innocuous. But, in the course of time, the cigarette smoker is likely to reach a point of no return and the next cigarette will cause lethal physiological changes in vital organs. The smoker cannot know when that day has arrived. Thus, at some point every puff upon a cigarette becomes a potential act of foreshortening his life. From a halakhic perspective, foreshortening one's life is suicide. From that moment forward, every puff becomes a *safek*, or doubtful, act of further curtailment of longevity. The course of activity in which the susceptible smoker is engaged will result in death as a matter of necessity but the particular act that will be lethal is indeterminate. The result is a *pesik reisha* which serves to confer intent upon an otherwise *davar she-eino mitkhaven*. Constructive intent for a desired result must be assigned to each of an entire series of acts. In the aggregate, the entire series of acts constitutes a single *pesik reisha* just as a cumulative number of intended non-lethal acts are tantamount to a single lethal act.⁷³

⁷³ The counterargument would be that *pesik reisha* serves to establish intent only with regard to a single act but is insufficient to ascribe intent to an entire series of indeterminate acts that cause the forbidden effect only cumulatively or of which the particular act causing the forbidden effect cannot be identified. Such intent, it would be argued, is too broad to be established constructively by operation of *pesik reisha* or too weak to attach itself to multiple acts. Since the smoker does not know that the next cigarette will be lethal, and certainly does not wish to kill himself, goes the counterargument, the consequences of his act are *eino mitkhaven*, or

Support for that conclusion may be adduced from a comment of *Bereshit Rabbah* 31:5 regarding the *dor ha-mabul*, the generation of the Deluge. Scripture declares, “And the earth was filled with robbery” (Genesis 6:13). The Midrash amplifies that statement by commenting that the people described were very crafty thieves. They recognized that, under the Noahide Code, theft of property having the value of a *perutah*, a small copper coin, is a capital crime. To avoid culpability, those thieves formed bands and sought out as their potential victims persons in possession of *turmisin*, coins each equal in value to half a *perutah*. Each thief would seize only one of those small coins, secure in the knowledge that there would be neither recovery nor punishment. The net result was that the victim had no recourse against any one of the thieves but, since all of the victim’s coins were taken from him, he was left impoverished.

The point of the Midrash is to demonstrate the iniquity of the generation of the Deluge in avoiding punishment while committing theft. The Midrash is remarkable in that it states that those nefarious individuals found it necessary to form bands in order to secure their goal. Each person stole only half a *perutah*; since the extent of each person’s theft was less than a full *perutah*, no individual could be held culpable. The problem that presents itself is, why was it necessary to form bands? Why did not each individual simply steal only one of those *turmisin* at a time and then return again and again, each time stealing only one of the *turmisin* until the victim was left destitute without a single coin? Each one might have performed multiple acts of theft, none of which would have resulted in either civil or criminal culpability. Cooperative efforts should have been superfluous. The answer may well be that a person who *ab initio*

unintentional, and hence none of his acts is forbidden. That counterargument could well acknowledge that, even if it is a certainty that the smoker will perish as a result of a smoking-related disease, the smoker may continue to smoke because the result remains *eino mitkhaven*. That would be so despite the fact that the phenomenon of *pesik reisha*, i.e., the certainty of the untoward result, serves to ascribe intent *vis-à-vis* the result. The thrust of that argument is that, although the ultimate result is unavoidable, continuing smoking does not constitute a *pesik reisha* or intentional acceptance of the result. Smoking cannot be interdicted, the argument would run, because not a single one of the acts, including the act causing the terminal illness, can be constructively deemed intentional by virtue of *pesik reisha* and culpability lies in association of the outcome with a culpable act.

A person intending to commit homicide by administering arsenic in cumulative doses cannot offer as a defense that none of his acts was performed with intent to produce a lethal result because he has announced in advance that he will continue to perform such acts until they have achieved his desired goal. Thus, the perpetrator can no longer plead lack of intent. An announcement of such intention has the effect of causing those acts to coalesce with intent becoming one prolonged act.

TRADITION

intends to steal an entire *perutah* but does so in two separate acts, stealing a half *perutah* at a time, has, in effect, committed one single act, i.e., the theft of an entire *perutah*, and would be held fully culpable. A person who announces that he will commit an infraction of the dietary code by consuming the minimum punishable quantity of a forbidden food in two bites cannot claim that each bite is a separate and distinct act and hence that he has not performed a culpable act.

Nevertheless, even granted, *arguendo*, that *pesik reisha* cannot serve to assign intent to an entire series of acts would not render cigarette smoking permissible because of lack of intent to cause self-harm. Culpable suicide, or even culpable self-harm, is certainly sufficient to render cigarette smoking a forbidden activity, but the issue does not hinge upon culpability. Both performance of a non-punishable infraction and doubtful violations are also prohibited.

Possible self-harm is justifiable only if it can be sanctioned on the basis of the doctrine of *shomer peta'im*. The issue regarding cigarette smoking is not culpable suicide or culpable self-harm but rather whether cigarette smoking is in the category of *shomer peta'im*, i.e., a far-fetched and generally ignored risk. To be prohibited, the acts in question need not be accompanied by intent to commit harm; such activity need only be accompanied by knowledge that the act is not of the form of risk licensed by the doctrine of *shomer peta'im*. In our era, in light of present-day knowledge, a habitual smoker is no longer in a position to invoke the defense of *shomer peta'im* because, given the current state of awareness of the dangers of cigarette smoking, he can no longer assert that each individual act is permitted since it is not accompanied by intention to cause harm. The principle of *rov*, i.e., that the majority of smokers will suffer a diminution of longevity due to smoking, is sufficient for a presumptive determination that over a period of time self-harm will occur. Once the smoker's nicotine habit has placed him within the danger zone, it is not ascribed constructive knowledge in the form of *pesik reisha* of the outcome of the act that renders his activity forbidden but his actual knowledge of the existence of a *rov* regarding compromised longevity or physical harm. Intentionally placing oneself in danger is forbidden even if no actual harm results. Thus, *pesik reisha* of actual self-harm is not necessary to render smoking prohibited; in light of the *rov* establishing that the majority of smokers are seriously harmed by cigarette smoking, every act of smoking is forbidden even if no harm actually results. Intent for the forbidden outcome, i.e., placing himself in danger, is ascribed to the smoker by application of the principle of *rov*.

The latter point is not at all novel. Indeed, it is that point that is reflected in the correct understanding of the comment attributed to *Iggerot Mosheh*. *Iggerot Mosheh*'s responsum is directed at a phenomenon in which the harm, albeit necessary, is remote both temporally and in terms of likelihood of occurrence. Those factors, taken together, define the circumstances in which reliance upon *shomer peta'im* is justified in accordance with the explication of that doctrine by *Binyan Zion*.

The full statement attributed to *Iggerot Mosheh*, written in an earlier era, is that cigarette smoking cannot be forbidden by reason of self-harm “for [cigarettes] do not cause harm other than after some years and also because [cigarettes] enjoy wide use and many have trodden thereupon. With regard to this it is said ‘and the Lord preserves the simple.’”⁷⁴ *Iggerot Mosheh* states simply that absence of immediate deleterious effects pursuant to smoking makes it possible to ignore the attendant danger. The long delay and the fact that most smokers never succumb to tobacco-related illnesses, in part because they die of other causes in the interim, combine to create circumstances in which *shomer peta'im* is operative. That was the presumed reality when *Iggerot Mosheh*'s responsum was authored and those are the criteria posited by *Binyan Zion* for application of *shomer peta'im*. *Iggerot Mosheh* does not present an elucidation or limitation of the doctrine of *pesik reisha*. His comments are a brief and succinct explanation of why *shomer peta'im*—in his day—was pertinent to smoking.

In the wake of considerable scientific research and the Surgeon General's report, the situation has changed dramatically. The extent of the danger of not only fatal consequences but also of non-terminal morbidity is now known to be far greater than earlier imagined. Moreover, according to *Binyan Zion*, recognition that the inception of harmful physiological processes—at least at a certain juncture in the course of a smoker's engagement in that activity—occurs immediately would itself be sufficient to negate applicability of *shomer peta'im*.

2. R. Shlomoh Zalman Auerbach

A similar confusion concerning the parameters of *pesik reisha* also arose regarding the view of R. Shlomoh Zalman Auerbach. Dr. Abraham S. Abraham, in his brief compendium, *Lev Avraham*, II, chap. 2, sec.1, invokes Rambam's statement, *Hilkhot De'ot* 4:1, admonishing a person to renounce conduct potentially injurious to health as reason to abstain from smoking. In a note authored by Rabbi Auerbach and appended to

⁷⁴ The second part of the quotation, beginning with the word “because,” does appear in the published text of *Iggerot Mosheh*.

Lev Avraham, Rabbi Auerbach comments that Rambam, *Hilkhot De'ot* 4:9, declares that there are foodstuffs that a person should never eat because they are “deathly poisons to the body” and pointedly concludes “but [Rambam] did not employ terminology of prohibition” in urging abstinence.⁷⁵

Elsewhere, in a contribution to *Halakhah u-Refu'ah*, II, ed. R. Moshe Hershtler (Jerusalem, 5741), 189, Dr. Abraham cites Rabbi Auerbach as permitting administration of “morphine and the like” for alleviation of pain even if it is known that there is a likelihood that palliative treatment will foreshorten life.⁷⁶ Rabbi Auerbach adds the caveat that administration of a further dose of morphine at any point in the course of treatment is permissible “only if it, in itself, does not shorten the life of a patient; rather, [the patient’s] life will be shortened as a result of many [injections].” Dr. Abraham further clarifies the matter in stating that, if it is known that a single additional injection “is likely (*alul*) to precipitate respiratory arrest,” it is forbidden to administer additional morphine even if the patient is experiencing severe pain.

Rabbi Auerbach’s comments have been understood in much the same vein as the earlier discussed comment attributed to *Iggerot Mosheh*, viz., unintentional diminution of longevity is permitted even when it is known that the patient will definitely succumb as result of a series of palliative

⁷⁵ See also *Nishmat Avraham*, IV, *Hoshen Mishpat* 154:41, note 2.

⁷⁶ The rationale given by Dr. Abraham is that no single dose will cause death; rather, hastening demise of the patient is the cumulative effect of administering many doses over a period of time. It seems to this writer that such a factor is only the first premise of the reasoning justifying such a procedure. It cannot be a full explanation because it is certain that administering consecutive doses of poison over time until accumulation of poison causes death, or making serial incisions that cumulatively result in death because of loss of blood, would constitute homicide [even if the warning prior to each individual act might be regarded as a “warning doubtful,” or *hatra'at safek*, rather than a “warning certain,” or *hatra'at vadai*, the acts are nevertheless acts of homicide, albeit acts for which the perpetrator will not suffer capital punishment because of the absence of a necessary element].

R. Eliezer Waldenberg, *Ziv Eli'ezer*, XIII, no. 87, permits administration of narcotics likely to curtail longevity on the grounds that “he shall surely heal” (Exodus 21:19) grants license for all forms of therapeutic ministrations, including palliation of pain, and does so even when palliation of pain may cause death. There is no reason to belabor the point that alleviation of pain is legitimate practice of medicine. See J. David Bleich, “Palliation of Pain,” *Judaism and Healing*, augmented edition (Jersey City, 2002), pp. 167–174 and *idem*, “Palliation of Pain,” *Bioethical Dilemmas*, II, 164–166. The issue, however, is whether the accompanying danger to life is warranted. The same issue is attendant upon employment of any hazardous medical procedure and is not resolved simply by an appeal to the principle “he shall surely heal.”

acts, provided that it is not known in advance that such a result will be attendant upon any specific act.⁷⁷

Fortunately, Rabbi Auerbach himself provided explicit and unambiguous clarification of his opinion. In a letter of approbation to R. Dov Ettlinger's *Pe'er Tahat Efer* (Jerusalem, 5749), p. 5, Rabbi Auerbach explicitly rebuts the contention that acts that become harmful only in the aggregate, as is the case with regard to smoking—and certainly administration of a series of low doses of morphine—are permissible. Smoking is forbidden, declares Rabbi Auerbach, because “everything is done by the smoker alone who harms himself continuously from beginning to end.” Rabbi Auerbach clearly declares that a *pesik reisha* resulting from a series of cumulative acts, or even from a series of acts each of which is indeterminate at the time of performance, is forbidden. Rabbi Auerbach adds that at no time had he joined in the halakhic rulings of authorities who permitted smoking. The clear implication is that, even before the Surgeon General's report, he refused to sanction smoking and rejected the argument that conduct resulting in harmful effects that come about only as a result of a confluence of individual acts is justifiable.

Rabbi Auerbach's comment to the effect that Rambam states that it is “not proper” to partake of possibly spoiled foods but does not state that it is forbidden to do so is entirely consistent with that position. Rambam, *Hilkhot De'ot* 4:9, states, it is “not appropriate” to consume “stale salted fish or cheese etc.” but, as Rabbi Auerbach points out, he does not declare it to be forbidden to do so. The reason is not because such foods are harmful only cumulatively and it is not possible to pinpoint the threshold quantity that gives rise to danger. Rather, the reason is because most people will not contract botulism by consuming food that is only somewhat “off.” Is the food forbidden? Particularly in earlier times when there was no refrigeration, people, by and large, ignored the remote danger caused by improper preservation of food. If so, *shomer peta'im* is applicable. But is such conduct appropriate? Rambam's response is negative. Why? Because, in the context of the view expounded by Rambam, *Hilkhot De'ot* 1:5, reliance upon *shomer peta'im* in such matters, particularly when there is no significant benefit in doing so, is contraindicated by the admonition “and you shall walk in His ways” (Deuteronomy 28:9). The conduct encouraged in the opening chapters of *Hilkhot De'ot* is not based upon absolute halakhic rules but strongly advocated as a form of *imitatio Dei*.

⁷⁷ See R. Avigdor Nebenzahl, *Be-Yizhak Yikarei*, no. 57, p. 138 and R. Dov Ettlinger, *Pe'er Tahat Efer*, p. 82.

3. Further References to Indeterminate *Pesik Reisha*

Support for the conclusion that a *pesik reisha* is forbidden even if it is bound to occur only in conjunction with one of a number of acts performed over a period of time is found in *Shulhan Arukh, Oraḥ Hayyim* 328:49. *Shulhan Arukh* rules that it is not permitted to use a suppository on *Shabbat* in order to overcome constipation. *Bi'ur Halakhah, ad locum*, explains that, to be effective, suppositories that were then in use⁷⁸ needed to be inserted and removed multiple times. Even though it was not a certainty that any particular insertion would cause anal hairs to be pulled, nevertheless, during the course of multiple insertions, it was inevitable that such a result would occur.

Similarly, *Shulhan Arukh, Oraḥ Hayyim* 336:3, rules that on *Shabbat* it is permitted to walk on grass even though it is quite likely that, in the course of walking, some blades of grass will be severed from the ground. *Mishnah Berurah* 336:24 adds that strolling through grass on *Shabbat* is permitted even if the grass is tall and the person is walking barefoot because, despite the strong likelihood that some grass will be pulled from the ground, that result is unintended. *Mishnah Berurah* 336:25 adds that the person may walk, but not run, through the grass because running will certainly result in some blades of grass being plucked from the ground. Again, the result is a *pesik reisha* that a forbidden result will occur but which one of a number of acts will be the forbidden cause of that result cannot be determined.

R. Joshua Neuwirth, *Shemirat Shabbat ke-Hilkhatav*, 2nd ed. (Jerusalem, 5739) 26:19, note 62, quotes R. Shlomoh Zalman Auerbach as ruling, contrary to the view of *Mishnah Berurah*, that even if it is a certainty that a blade of grass will be plucked from the ground in the course of strolling through the grounds, it is permitted to tread upon the grass. The proffered explanation is that each footstep must be considered separately and, since no single footstep involves a *pesik reisha* of a forbidden result, the activity is permissible. Rabbi Auerbach's comment reflects the position that, even when the series of actions is contemplated in advance and it is entirely predictable that one of those acts will result in a forbidden outcome, there is no transgression unless there is an identifiable act that involves a *pesik reisha*.⁷⁹ To put the matter in other words, Rabbi

⁷⁸ Cf., *Teshuvot Ziz Eli'ezer*, VIII, no. 15, chap. 15, sec. 2; R. Benjamin Zilber, *Oz Nidberu*, I, no. 27; and R. Simchah Rabinowitz, *Piskei Teshuvot* 328:48, sec. 74.

⁷⁹ It would seem to this writer that a distinction might be drawn between prohibitions such as homicide, self-harm and the like as opposed to *Shabbat* violations. The distinction lies in the underlying nature of the prohibition. Of course, it is always the act that is forbidden. But with regard to prohibitions such as homicide, self-harm

Auerbach's ruling seems to reflect the proposition that intention can be ascribed constructively only if such intention can be assigned to a specific act but not if it must be assigned to a series of acts.

However, Rabbi Auerbach's ruling seems to be contradicted by *Teshuvot Rivash*, no. 394. Brushing hair on *Shabbat* with a hard brush or combing hair with a comb lacking adequate space between its teeth is regarded as causing a forbidden *pesik reisha* because it is inevitable that some few hairs will be severed from the head. Rivash was queried: If that is the case, why is there any hair at all left on a person's head following successive combings? Rivash responded that, were it indeed true that every single stroke of the brush plucks hair from a person's head, the hair would rapidly be depleted and the head would be denuded. But not every single stroke of the brush pulls out hair. It is only sometime during the course of a full brushing of the head that it is inevitable that some hairs will be pulled out. Rivash clearly affirms that it is forbidden to engage in a series of acts that includes an indeterminate act that will, as a matter of necessity, cause a forbidden effect. Thus, Rivash apparently disagrees with Rabbi Auerbach's analysis of the nature of *pesik reisha*. In a note included in the third edition of *Shemirat Shabbat ke-Hilkhatah*

etc., it is certainly the result of the act that the Torah seeks to prevent, i.e., the death of the victim or harm to oneself. Hence, homicide accomplished by means of a series of intentional discrete acts, i.e., administration of small doses of arsenic, is a capital crime. Intent to commit homicide by means of a series of acts renders the entire series tantamount to a single act. Hence, as stated earlier, *pesik reisha* with regard to such matters is defined in terms of the entire series of acts. "Labor" is forbidden on *Shabbat* because it is antithetical to the "rest" required on the Sabbath day. Only intentional labor—*melekhet mahashevet*—is forbidden; the focus is on the act *per se*, not the result of the act. *Pesik reisha* is construed as intent—but only as intent for the result, not necessarily as intent for any particular act. Hence, it may well be the case that a series of acts that cumulatively assure that "labor" is performed do not render any one of those acts a prohibited *melekhet mahashevet*, i.e., none of those acts individually can be categorized as antithetical to "rest" whereas a series of acts that necessarily result in homicide qualify as a *pesik reisha* because each of those acts is rendered intentional by virtue of *pesik reisha*. Even though each of those acts is rendered intentional by virtue of *pesik reisha*, nevertheless, none of those acts individually becomes a *melekhet mahashevet*, i.e., individually intended. See J. David Bleich, *Bioethical Dilemmas*, II (Southfield, Michigan), pp. 186189.

A distinction might also be drawn between a *pesik reisha* that serves to ascribe intention to an otherwise unintended effect if the effect is the result of the cumulative operation of a series of acts each one contributing to the forbidden result, e.g., cigarette smoking or administration of morphine, and a *pesik reisha* involving a series of indeterminate acts only one of which will cause the forbidden result but whose identity cannot be established. The latter situation involves a much broader assignment of constructive intent since it involves a series of acts most of which are innocuous.

(Jerusalem, 5770) 20:19, note 67, Rabbi Neuwirth reports that, upon being shown Rivash's responsum, Rabbi Auerbach acknowledged the difficulty and commented that the matter requires further reflection (*zarikh iyun*).

However, R. Yitzchak ha-Kohen Rappaport, *Teshuvot Battei Kehunah*, no. 18, presents an analysis of the concept of *pesik reisha* that serves to reconcile *Teshuvot Rivash's* view with the thesis espoused by Rabbi Auerbach. The examples provided by Rivash all involve situations in which the *pesik reisha* occurs with regard to a specific, identifiable entity. Only loosely attached hairs will be severed by a comb. A close examination, contends *Battei Kehunah*, would indeed identify those hairs in advance. A talmudic example of *pesik reisha* (*Shabbat* 26a) involves pulling a bed or a heavy article from one place to another over loose earth or sand and "digging" a furrow in the process. Unintended creation of a hole or furrow is permitted but if such result is necessary, albeit unintended, it is forbidden. *Battei Kehunah* asserts that the *pesik reisha* in that example is an identifiable act, at least in principle. An analysis of the density of sand or loose earth in comparison to the weight of the object drawn across its surface coupled with the degree of pressure applied would enable a scientist to predict in advance precisely where the loose earth will give way and form a pit. The notion of *pesik reisha*, according to *Battei Kehunah*, is recognition of a theoretically predictable predetermined result of an act or a series of acts. The deterministic nature of the result is the factor that is regarded as tantamount to *kavvanah* or intention.

In contradistinction, when a person sets out on a stroll through a garden full of grass, there is no scientific way to determine which blades of grass will be displaced. Exhaustive knowledge of all pertinent empirical data will be of no avail because laws of nature do not dictate which blades of grass will be trod upon. Even though it is a *pesik reisha* that a person traversing the grass at a rapid pace will trample upon and pluck out some grass, it cannot be said that such general knowledge constitutes constructive intention to pull out any particular blade of grass. Rather, that determination depends upon the individual's freely chosen future actions. *Pesik reisha* in such cases generates only general intention to perform "labor" but such general intention is not even constructively attached to any particular act of "labor."⁸⁰ Plucking any particular blade

⁸⁰ Cf., however, R. Yehoshua Leib Diskin, *Teshuvot Maharil Diskin, Pesakim*, no. 6. *Maharil Diskin* entertains the possibility that *pesik reisha* encompasses and assigns intention to an act that will necessarily result in two separately categorized forms of "labor." *Avnei Nezer, Orah Hayim*, I, no. 236, demonstrates that such an act is biblically permissible but later forbidden by virtue of rabbinic decree. *Avnei Nezer* compares the case to a situation in which a prohibited foodstuff becomes mingled

of grass is an act of labor distinct from the plucking of any other blade of grass. According to *Battei Kehunah*, *pesik reisha* is applicable only if it serves to predict a particular prohibited act, i.e., pulling out a particular blade of grass from the ground. Hence even constructive intent based upon *pesik reisha* cannot be ascribed unless an identifiable result can be known in advance.⁸¹

with sixty other foodstuffs of equal size, each forbidden by virtue of an independent prohibition. Each proscribed foodstuff loses its identity and is nullified by virtue of the presence of sixty other foodstuffs. Hence, since no single prohibited foodstuff is identifiable, the mixture is biblically permissible. However, since the mixture is overwhelmingly composed of forbidden food, it was banned by rabbinic edict.

⁸¹ Similar questions involving essentially the same issue regarding application of the principle of *pesik reisha* are discussed by *Teshuvot Arnei Nezer, Orah Hayyim 236; Be'er Yosef, Shabbat*, no. 145; and *Melekhbet Mahashevet*, chap. 8, sec. 1.