

# LAMDAN

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### From the Masechta

# Procreation, Torah Education, and Ben Azzai's Intricate Presentation

By SHLOMO ZUCKIER

Perhaps the most enigmatic figure appearing in Maseches Yevamos is Ben Azzai. In the sugya on *peru urevu* (63b) he both condemns those who do not fulfill that mitzvah as “*ki'ilu shofech damim umema'et hademut*,” and is called “*na'eh doresh v'ei'na'eh mekayem*,” one who cites the halacha without himself following it. What exactly is driving Ben Azzai's opinion and his exceptional personal practice? Is there any way to reconcile the two?

Several possible approaches present themselves in trying to understand Ben Azzai's self-exemption from *peru urevu*. The most basic understanding is one of triage; there are only so many hours in the day, and an hour spent supporting a family's material and emotional needs

is an hour not spent learning Torah. Given this clash, Ben Azzai chooses Torah study over starting a family. A slightly different understanding sees Ben Azzai's concern not as an issue of time management, but rather one of competing concerns. The emotional energy he would need to expend as a husband and father would conflict with a life fully devoted – mind, body, and soul – to Torah study alone. It would be impossible to properly devote emotional energies to both; inevitably, one or the other would suffer. A third preliminary understanding is that Ben Azzai could not marry because his love was overwhelmingly devoted to Torah, to the point that he could not love a woman. This approach fits well with Ben Azzai's formu-

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lation of “*umah e'eseh*”, “what should I do”? He did not present his practice as ideal; rather, it was an inevitable reality for him.

However, I believe that an alternative explanation of Ben Azzai's life choice, viewing it in light of the rules of *petur* Talmud Torah, affords the best explication of his words, and intertwines with his understanding of *peru urevu* as well. If we focus on Ben Azzai's phrase “*efshar la'olam sheyitkayem al yedei acheirim*,” that his procreation is not integrally necessary since the world can continue without it, a relevant *sugya* comes into view. The Gemara in Moed Katan (9b) raises contradictory sources as to whether Torah or *cheftzei shamayim* (i.e. *mitzvot*) take precedence in one's personal calculus of observance. The Gemara rules that if a *mitzvah* can be done *al yedei acheirim*, by others, Torah takes precedence, while if it cannot, the *mitzvah* takes precedence. If so, the general rule is that learning gets superseded only for the sake of a *mitzvah* that cannot be done by others. Of course, this rule does not apply to *mitzvot shebigufo*. In other words, I cannot expect that someone else will put on tefillin to fulfill my obligation, and therefore I need not stop my learning to put on tefillin. All *mitzvot shebigufo* fall under the category of cancelling Torah study to fulfill them. One may only skip result-oriented *mitzvot* such as *bikur cholim* for learning since others can accomplish them, and there is no need for one to perform the *mitzvah* himself.

If this is the case, and if Ben Azzai's statement “*efshar la'olam sheyitkayem al yedei acherim*” invokes this rule, we can take another look at the conflict between his choice to not marry and his seemingly contradictory position on the dire consequences of not marrying. Ben Azzai claims that not procreating is tantamount to murdering and minimizing the image of Hashem. This is sourced in the pasuk (Bereshis 9:6) “*shofech dam haadam baadam damo yishafech ki bitzelem Elokim asa et haadam*,” which is directly juxtaposed to “*v'atem peru urevu*.” As Maharsha explains, this refers to the problem of not increasing the number of lives in the world (equated to murder) and the problem of not increasing the representations of Hashem's image in the world (equated to minimizing Hashem's image). If this is the case, then Ben Azzai's objection to those who do not procreate is not a *mitzvah shebigufo* but rather a result-oriented *mitzvah*, a function of how many lives and *demuyot* exist in the world. Given that it falls into that category, it becomes legitimate for one (including Ben Azzai himself) to invoke the rule of *efshar al yedei*

*acheirim*. Since others will sufficiently increase the number of lives and representations of Hashem's image in the world, one can therefore choose to study Torah instead of having children.<sup>1</sup>

Of course, this understanding of the *mitzvah* of *peru urevu* is by no means simple. In fact, it is possible to read this issue as being at the crux of the dispute between Beit Shammai and Beit Hillel as to how many children one is commanded to have. Beit Shammai argues that every man is commanded to have two boys, as Moshe did.<sup>2</sup> Beit Hillel on the other hand bases himself on the creation of the world and opines that every man must have a boy and a girl. It is possible to see Beit Shammai's position as assuming *peru urevu* is a *mitzvah shebigufo*, part of the expected duties of a good Jew, as evidenced by the fact that the *mekayem hatorah* par excellence, Moshe Rabbeinu, had two sons. Beit Hillel sees *peru urevu* not as a commandment upon the individual, but as part of a broader command to fill the world which devolves upon each man, which is why each male is commanded to father children who emulate the original population of the world, a boy and a girl, and this is also procreation at the approximate replacement rate of society.<sup>3</sup> Though this is not the only way to read the basis of the dispute, it does fit very well with Ben Azzai's position, especially given that we *pasken* both like Ben Azzai and Beit Hillel, who each say that it is a result-oriented *mitzvah* rather than a fully personal obligation. May we all merit to fulfill both the *mitzvah* of Talmud Torah and that of *peru urevu* to our utmost abilities.

1 Of course, if one would procreate in addition there would be even more children, the same way that if one also did an act of *chesed* there would be more *chesed* accomplished, but the point is that the basic requisite overall continuity/*chesed* is accomplished.

2 I present the main understandings of Beit Shammai's and Beit Hillel's positions, as presented in the mishna. A similar analysis could be carried out for the alternate positions discussed later in the Gemara.

3 It is possible, but, to my mind, less reasonable, to argue the opposite by each of these cases, that following Moshe is about Moshe fulfilling the result of populating the world, and creation of the world is based on fulfilling an act of *imitatio dei*, that one has a personal obligation to create a boy and girl just as God did. Additionally, this analysis runs into the interesting question of the relationship between *peru urevu* and *sheves*, which seems to clearly be about the result of populating the world.

# Is Time Always Money?

BY EPHRAIM METH

Mitzvos must be performed for free; we may not charge money for performing a mitzvah. For example, the Mishnah (Bechoros 29a) writes that: one may not charge money to judge between disputants, since judging is a mitzvah; one may not charge money to testify, since testimony is a mitzvah; one may not charge money to mix the ingredients of mei chatas, the waters that purify people from tumas meis, nor to sprinkle the mei chatas on a person, since these actions are mitzvos. The Gemara (ibid.) adds that one may not charge money to teach Torah, since teaching Torah is a mitzvah. The Ramban (Toros haAdam, inyan haMeichush) adds that physicians may not charge money to heal, since healing and saving lives are mitzvos.

However, there are actions that some Rishonim classify as mitzvos while other Rishonim do not. For instance, Ramban writes that the tircha, exertion, that a doctor expends when traveling to his patient is not a mitzvah, and that doctors may charge a fee for that exertion. Similarly, Ramban writes that chalitzah is not a mitzvah, and one may charge a fee for performing chalitzah. This is true both when the yavam and yevamah are suitable for each other (i.e. they are of similar age and interested in one another as people) and when they are unsuitable for one another (i.e. they are of vastly different ages or he is only interested in her money). The Ohr Zarua (Hilchos Chalitzah), however, rules that when the yavam and yevamah are unsuited to each other, the yavam may not collect even for the tircha of traveling to perform chalitzah. This indicates that chalitzah is considered a mitzvah, and that the tircha of traveling to perform a mitzvah is considered part of the mitzvah itself.

The Mishnah (106b) writes that Beis Din should advise against yibbum and for chalitzah when a yavam is unsuited to his yevamah. The Gemara (106a) writes that if the yavam demands money for following this advice, he is not entitled to collect. Some Rishonim (see Ramban, ibid.) maintain that this extortionist yavam may not collect his fee because he has a mitzvah to perform chalitzah, i.e. a mitzvah and perhaps even an obligation to listen to the court's advice. However, only one who extorts for performing a mitzvah is enjoined from collecting; one who

extorts for non-mitzvah services may indeed be entitled to collect his fee. Ramban, though, writes that even when the yavam is an extortionist, chalitzah is not obligatory. Ramban probably feels that under these circumstances, although it is unwise to ignore the court's advice, and it is immoral to act counter to the court's advice, nevertheless, the court's advice is not binding. Hence, Ramban learns from this Gemara that anyone who extorts an excessive monetary commitment, even in exchange for non-mitzvah service, is not entitled to collect.

What lies behind the dispute about whether or not tircha is part of the mitzvah? The Ramban cites a Mishnah (Bechoros, ibid.) to prove that tircha is not part of the mitzvah: one is permitted to charge for bringing the ingredients of mei chatas to the person who will mix them. Presumably, this indicates that one may also charge for bringing the mixer to the ingredients, as only the actual act of mixing is a mitzvah. The Ohr Zarua might respond that there is a fundamental distinction between bringing the ingredients to the mixer, and the mixer traveling to the ingredients: the mixer's travels and the mixer's mixing are performed by the same person (the mixer) and therefore combine into one elongated mitzvah action, while transporting the ingredients and mixing them need not necessarily be performed by one person, and hence are considered two separate actions.

This thesis is borne out by an intriguing formulation of the Meiri (Yevamos 106a). Whereas Ramban writes that one may not collect an excessive fee for providing a patient with critical medicine, the Meiri writes that one may collect such a fee. The Meiri lists three reasons for this, one of which is that the injunction against collecting excessive fees "was only said about *one who must use his body in the mitzvah*. A person is not obligated to expend his assets [for free] for others to save them and their property, lest he later need those assets [to save himself]..." Just as here the Meiri does not consider parting with one's assets part of the mitzvah, he may not consider bringing the ingredients of mei chatas part of the mitzvah; only actions that implicate the body alone are part of the mitzvah, but every such action, even tircha, is part of the mitzvah.

# From the Parasha

## *Brit Milah: Passion and Punctuality*

BY DAVID JASPHY

As a prelude to the laws of the *Metzora* the Torah raises the concept of *tum'at leidah*. Within this discussion lies the commandment to circumcise one's son eight days after his birth. Circumcision, the indispensable tradition of the Jewish nation, has its roots in the covenant framed between God and Avraham. The Book of *Bereishit* describes the exemplary manner in which Avraham carried out God's will. It is from Avraham's passion to meet his creator's demand in a timely fashion that the idea of *zerizin makdimin l'mitzvot* is introduced. Let us analyze a few instances of where this principle has been applied in regards to *brit milah*.

The *Meiri*, on Mesechet Yoma, says that the entire eighth day is fit for performing *brit milah*. However, it is preferable to circumcise the boy in the morning so that it shouldn't appear as if the father is being negligent in his conduct of the *mitzvah* on account of compassion for his son. In this domain it is pronounced that *zerizin makdimin l'mitzvot* should be incorporated when one wants to affirm his enthusiasm and full heartedness in compliance with a *mitzvah*.

Late one evening the *Noda B'Yehuda* received a *she'elah* from his grandfather concerning the timing of a *brit milah* (*Noda B'Yehuda* 166). The text went as follows: "If a baby is not circumcised on the eight day due to illness, yet the child recovers by the ninth day, can the father of the boy postpone the *brit milah* until *Erev Pesach* in order that the firstborns may have a *se'udat mitzvah* to avoid fasting?" The *Noda B'Yehuda* answered that this remedy would be an egregious violation of *zerizin makdimin l'mitzvot* and therefore is prohibited. We can see that the *Noda B'Yehuda* felt that "zerizin" is not just an *etzah tova*, but even a *d'var halachah*.

Rav Asher Weiss, in his great work the *Minchat Asher*, offers a fascinating illustration of the principle of *zerizin makdimin l'mitzvot*. If one has twins and A is born during *bein hashmashot* (twilight) and B is born at night, which boy should be circumcised first? The dialectic as to which child should be circumcised first centers around the concept of *zerizin makdimin l'mitzvot*. On one hand A's *brit milah* would have to be on the ninth day, rather than on the eighth day, since the baby was born during twi-

light. However, he was born first and therefore perhaps we should hurry to perform the *mitzvah* and circumcise him before B. Rav Asher Weiss quotes the *D'var Avraham* as saying that of course the first child born is circumcised first, since the *mitzvah aseh* to circumcise this child is being neglected every moment that it is postponed thereby violating *zerizin makdimin l'mitzvot*. However, the *Yad Eliyahu* contends that B is circumcised first since this *milah* is more common and it is better to perform a *mitzvah* at the proper time. It is a *hidur mitzvah* to complete a commandment in its proper time. Through this illustration we are introduced to a difficult contrast between the *hidur mitzvah* of performing *mitzvot* at the proper time and the *halachic* principle of *zerizin makdimin l'mitzvot*.

Rav Yaakov Shmuel Shtark clarifies why it is phrased *zerizin makdimin l'mitzvot* as opposed to *zerizin makdimin b'mitzvot*. The point being stressed is that while it is very commendable to prepare and plan for a *mitzvah* as quickly as possible, one must be careful to execute each *mitzvah* fervently and cautiously. *Zerizin makdimin l'mitzvot* should not be used as a point to expedite the actual process of the *mitzvah*, ergo making it appear as a burden upon the individual. Rather, the preparation should be completed as soon as possible so that the actions of the commandment can be done with passion and enthusiasm.

Directly after the passage mentioning the circumcision of Avraham, the Torah elaborates that Avraham sat at the entrance to his tent in the heat of the day. Rashi (*Bereishit* 18:1) explains that Avraham was sitting at the entrance to his tent so that he could invite any potential guests that may appear under the hot desert sun. Therefore, God visited Avraham in the desert so that he would not be distressed that did not have any guests to help. Rav Moshe Feinstein asks an insightful question: Why was Avraham pained that he couldn't serve any guests? If there are no guests present then there is no obligation of *hachnasat orchim*! Rav Moshe likens this to one who is troubled during the week that it is not Shabbat today. He answers that even though there was no obligation for Abraham to invite guests, he was still pained at this loss due to his great love and desire to do *mitzvot*. It is like a person who is

hungry on a fast day. Why should he be hungry if there is no way that he can eat? The answer is that his body still desires to eat even though he cannot right now. So too the soul desires to adhere to God's will even when it cannot. The message is clear; the commandments are not just rituals that must be followed, but gifts and opportunities

from our Father in Heaven that we should yearn for with enthusiasm and passion. When God consecrated this great covenant with Avraham, to circumcise every Jewish boy, it was a directive that we must impart a deep love and appreciation for *mitzvot* to many future generations.

## Inyana D'yoma

# Sefirat Ha'omer: Making it Count

BY YOSEF JACOBS

*Bnei Yisroel* are commanded to count seven complete weeks, starting on the second night of Pesach and culminating with *Shavuos*. The *Gemara Menachos* 65b expounds on the verse "*usfarthem lachem*" to teach that each individual member of *Klal Yisrael* has the *mitzvah* to count.

*Sefiras Ha'omer* can be understood in two ways- a *mitzvah* of *amirah* or of *ma'aseh sefira*. Is the *mitzvah* defined as a formal requirement to articulate syllables which connote that this day has a specific number (*amirah*), or is the *mitzvah* defined as an informal requirement to somehow express one's awareness that this day has a certain number (*ma'aseh sefirah*).

Four *nafka minas* which result are as follows:

1) Am I *yotzei sefiras ha'omer* by listening to my friend's count, through the mechanism of *shomea ki'one*?

The *Mishna Berura* [s.489 sk.5] writes that by other *mitzvos teluyos bi'amira* my friend can be *motzi* me. Through hearing my friend's *kiddush* I have fulfilled my obligation to recite *kiddush*. Through hearing my friend's *birkat hamazon* I have fulfilled my obligation to recite *birkat hamazon*. Regarding the *brocha* of *sefirah*, I am *yotzei* by hearing my friend recite the *brocha*; however, with regards to the actual count of *sefira*, I must count on my own. Based upon the *din* derived from *lachem* in *Menachos*, I cannot rely on listening to friend's *sefira*.

There are a number of *acharonim* who disagree. They assume the *din* in the *Gemara* of *lachem* is to get rid of the notion that *Klal Yisrael* should rely on the *Beis Din* to count. Therefore, they *paskun* that *shomea ki'one* would be a valid means for one to fulfill his *sefiras ha'omer*.

2) The *Magen Avrohom* [s. 489], while addressing the law of *shomea ki'one* regarding *sefiras ha'omer* alludes to a second *nafka mina* as to the identity of the *mitzvah*. He

*paskuns* one is not *yotzei* his count via *shomeah ki'one*. The *Magen Avrohom* learns this *halacha* based on another *din* unique to *sefiras ha'omer*. Generally, when one performs *mitzvos* of *amirah* he must have a very basic *kavonoh*- to understand the words he says. There is one exception; once one utilizes the special *koach* of *lashon hakodesh* he is *yotzei* regardless of whether or not he understands what he says.

An example of this idea is *mikra megillah*. If the *megillah* is read in a language other than Hebrew, one listening must have an understanding of that language in order to be *yotzei*. However, when hearing the *megillah* read in Hebrew, he will automatically fulfill his *chiyuv* of *mikra megillah*.

The special *koach* of *lashon hakodesh*, however, will not help by *sefiras ha'omer*. If one counts in a language that he does not understand, he is not *yotzei*. He must know what day he is counting and understand the meaning of his words. Based on this unique principle, says the *Magen Avrohom*, we can infer that one will not be *yotzei* his count of *sefiras ha'omer* via *shomeah ki'one*. According to this, the identity of the *mitzvah* of *sefiras ha'omer* is precisely to count, a *ma'aseh sefirah*, and not merely a *mitzvah* of *amirah*. This *mitzvah* is upon each individual; therefore, one must enunciate his own personal count, and cannot rely upon that of others.

3) Does counting *sefirah* with *roshei taivos* i.e. "*hayom lag b'omer*" represent a valid count? This too, is a dispute amongst *acharonim*, which we can explain with the *chakirah* mentioned above. If we assume the nature of *sefirah* is one of *amirah*, then counting in this manner will not constitute a valid count for he did not enunciate the formula in its proper manner. But, should we assume that the *mitzvah* is one of a *ma'aseh sefirah*, then such a count

would be valid. He counted the day, albeit in an unusual fashion, but for all intents and purposes, the day has been counted.

The *Shaarei Teshuvah* [s. 489] brings the following *machlokes*: the *sefer Get Pashut paskuns* that one is *yotzei* through this shorthanded version of counting, while the *Pri Chadash* and the *Yaavetz paskun* one is not *yotzei*. The *Birkei Yosef* has a more neutral approach and recommends, to be safe, one should count again. Perhaps the *Birkei Yosef* understands the mitzvah of *sefiras ha'omer* as containing both *tzadadim- amirah* as well as *sefirah*.

4) If one writes a letter (or email) to his friend and records the day of the *omer* for the sake of dating the letter, is this considered a proper count for fulfilling *sefiras ha'omer*?

This question was posed to Rabbi Akiva Eiger by his uncle, Rav Binyamin Wolfe. This correspondence is written up in *Shut Rabi Akiva Eiger* [volume 1, sections 29-32]. Rabbi Akiva Eiger is willing to consider such a method as a potentially valid means for counting *sefiras ha'omer*, while Rabbi Wolfe does not entertain such a possibility. The *Shaarei Teshuvah* quotes from the *Birkei Yosef*

that one cannot fulfill his *chiyuv* in such a manner. The *Shaarei Teshuvah* writes this with regards to an arbitrary count, but he extends the law to include a scenario where the person wrote the number of the day in the proper formula, with every single *kavana* to be *yotzei*. Even in this case, the *Shaarei Teshuva paskuns* he is not *yotzei* and must count again properly.

The dispute here can once again be explained with the *chakirah* presented above. Namely, if *sefiras ha'omer* is identified as a *mitzvah* of *amirah*, a formal requirement to articulate syllables which connote that this day has a specific number, then certainly one will not be *yotzei* by writing it out on paper; his vocal chords must be involved. If however the mitzvah of *sefiras ha'omer* is identified as a *ma'aseh sefirah*, an informal requirement to somehow express one's awareness that this day has a certain number, writing the day will suffice for fulfilling his obligation.

*Adapted from Sefer Harerei Kedem by Rabbi Michel Zelman Shurkin on the shiurim of Rav Yosef Dov Halevi Soloveitchik ztz"l siman 110.*

## Bar Mitzvah during Sefirah: Ideal or Ordeal?

BY JOSH WERNICK

During the weeks between Pesach and Shavuot, we count 49 days until *kabbalat ha'Torah*, a count known as *sefirat ha'omer*. There is a *machloket* throughout the *poskim* whether a *katan* that became a *gadol* during this period or one who converts can count *sefirah*. The *Shulchan Aruch* (489:25) explains that in such a case, they may continue to count without a *beracha*. The *Malbim* (*Parshat Emor*), *Chiddushei Ha'Rim*, and *Avnei Neizer* explain that such a *katan* cannot count with a *beracha*, since counting with a *beracha* requires complete days, or *temimot*, and the days that he counted as a *katan* do not combine with the days he counted when he became a *gadol*. Rav Yosef Engel learns that even if a *katan* was lacking one day of counting, he can start again by counting with a *beracha* when he becomes a *gadol*. This is because from this day he becomes a *chayav b'poel* and the process of the days counting as *temimot* begins only when he becomes *chayav b'poel*. The same would apply to a *ger*. Furthermore, the *Maharam Shik* explains that a *katan* can count with a

*beracha* since the *sefira* of a *katan* is considered a *mitzvah*. This is because when one who is not included in a *mitzvah* performs that *mitzvah* anyway, it is still considered a *mitzvah* for him and would be considered part of the *temimot* he needs.

The *Minchat Chinuch* (Mitzvah 306) on the other hand rules that such a person can continue to count with a *beracha* as long as he did not miss a day of counting when he was a *katan*. His reason is based on the *Mordechai* in *Megillah* (*siman 798*) who explains that an act performed when one is only obligated *mid'rabanen* can suffice for a *d'orayta* obligation. In a similar vein we see one can fulfill his obligation to hear *kiddush* on *Shabbat* during a time in which he is only obligated *d'rabanen*, like *plag ha'hincha*. Therefore, since a *katan* who became a *gadol* at least reached the age of *chinuch* beforehand, his *chiyuv drabanen* can apply to continue the count as a *chiyuv d'orayta*. However, the *Maharam Shik* explains that this point depends on the *machloket* whether the *katan* is

obligated in the *mitzvah* of *chinuch* himself or his *chiyuv* only comes through his father. This point is a *machloket* between *Rashi* and *Tosafot* (Brachot 48). According to *Rashi*, the *chiyuv* is on the father and not on the *katan* at all. Therefore, it seems that he does not have the same level of obligation as a *gadol*, and he should not be able to be *motzi* others through his father's *chiyuv*. According to *Tosafot*, the *chiyuv* is on the *katan* himself, which would imply that he is able to be *motzi* others.

The *Gemara* in *Berachot* (20b) says that women and children can be *motzi* men in *birkat hamazon* as long as the men ate only a *k'zayit* and are therefore only *chayav mid'rabanan* as well. However, when a man eats a full meal and is therefore *chayav mid'orayta*, a woman or *katan* cannot be *motzi* him. *Rashi* explains that a *katan* is not *chayav* at all, even *d'rabanan*, since the *chiyuv* of *chinuch* falls primarily on the father and not on the son. According to *Rashi*, we can understand why a *katan* cannot be *motzi* a *gadol* in *birkat hamazon* and *sefirat ha'omer*, since the *chiyuv* is on the father and not on the *katan* himself. However, Rabbi Akiva Eiger (on 48a) asks why women cannot be *motzi* men in their *chiyuv*. The *Kuntrasei Shi-*

*urim* (*Nedarim* 4:3) answers that a woman's *chiyuv* is considered a completely separate *chiyuv* than that of men. For a *katan*, he is at least included in the *mitzvah* of men through *chinuch*.

The *Kehilat Yaakov* similarly explains that in order for one to be *motzi* someone else, he must be considered a *bar chiyuv* and *chayav b'poel*. A *katan* is a *bar chiyuv* and is really considered *b'oto davar* which means he is included in the *kiyum d'orayta*, but he is not *chayav b'poel*. Therefore, he can not be *motzi* men. However, women are not part of the *chiyuv birkat hamazon* since there is no *kiyum d'orayta*, and therefore they can not be *motzi* men in their *chiyuv*.

According to *Tosafot*, we understand why women and *katanim* have the same status since their *chiyuv d'rabanan* is on themselves and not a *chiyuv* from anyone else. However, it is more difficult according to *Tosafot*, why a *katan* can not be *motzi* a *gadol* in his *chiyuv*, since a *katan* is considered both a *bar chiyuv* and *chayav b'poel*. We can give an answer by saying that even though a *katan* is *chayav b'poel* and a *bar chiyuv*, since he is only a *chayav b'drabanan*, he can not be *motzi* a *chiyuv d'orayta*.

## The YU Ethicist

# Marriage and Mystery: Concealing Information from a Potential Partner

BY NETANEL WIEDERBLANK

There is a common dilemma that arises in many arenas of life: must one share all relevant information in a given interaction, even though it may adversely affect the other party's opinion on the matter? This question is relevant both in commercial transactions as well as when one is dating for marriage.

For example, do I have to tell my potential spouse that a number of my family members died of cancer at a young age? Do I have to tell her that I am afraid of flying? What if telling people will likely prevent me from finding an appropriate spouse? What if I suffer from a condition against which people unfairly discriminate, though I know it will have no bearing on the marriage? Similar questions arise in the world of *Choshen Mishpat*. For example, if a woman knows she is fully qualified for a job but fears she will not be hired because she is too old, can

she dye her hair to look younger? In a transaction do I have to reveal all information that I know will cause the other party to retract?

The *Shulchan Aruch* rules that a seller must reveal any possible blemishes in an article being sold (*Choshen Mishpat* 228:6). This is especially important for uncommon defects about which the purchaser cannot be expected to inquire (based on *Chulin* 94a). Moreover, the burden of revealing imperfections falls upon the seller; the seller must reveal any blemishes even if he did not state the article is unblemished (*Tosafot* *ibid.*) and even if the article is being sold "as is" (*Choshen Mishpat* 232:7). Finally, *halacha* requires disclosure even of defects that would not lower the value of the item (*Chafetz Chayim, Rechilut* 9:10).

Thus, the following question frequently arises: must a seller reveal information that will cause the buyer to erro-

neously perceive the good as tainted? Likewise, if I know that some people consider something about me a blemish must I reveal this fact to a potential spouse if I know that in fact it is not a blemish?

A story in *Yevamot* 45a sheds light on our dilemma. We pasken that if someone's mother is Jewish, then they are Jewish even if their father is not. However, there were people who would not consider marrying such a person. The Talmud records that Rav Yehudah advised someone whose father wasn't Jewish move to a place that people did not know his lineage so that his ancestry would not serve as a deterrent to marriage. Clearly, Rav Yehudah is advising him to not reveal information that other people would see as damaging. Accordingly, the Steipler rules that a person may withhold information from a prospective spouse that might cause unwarranted discrimination (*Kehillot Yaakov, Yevamot, 44*). Likewise, the Steipler does not require disclosure of certain medical procedures that may hurt a party's chances of finding a spouse if these medical conditions will not affect the marriage. Of course, any information that might cause actual harm must be disclosed. Rav Shlomo Zalman Aurbach, who accepts this ruling, adds that even if withholding such information is legitimate, one may never lie (quoted in *Nishmat Avraham* EH 5:7).

Along similar lines Rav Elazar Meir Preil justifies a man dying his hair to appear younger when applying for a job if he fears unwarranted age-discrimination. (The discussion about whether hair dying is prohibited for other reasons is beyond the scope of this article.) Seemingly, this ruling is at odds with the Talmud's prohibition of dying the hair of a slave that one is selling. Such deception is prohibited because it overstates the value of the slave. However, Rav Preil argues that this prohibition is only relevant when selling a slave because of the shorter life expectancy of an older slave. A job applicant, however,

who knows that he is perfectly qualified for the position, does not violate *genaivat da'at* by dying his hair because the employer is wrong in his presumption that a younger worker will prove to be more profitable (*Teshuvat HaMeor* 1:26).

Others disagree and argue that one must reveal information that the other party perceives as damaging even if the seller disagrees with their assessment. *Divrei Malkiel* (3:90) and Rav Elyashiv (*Kobetz Teshuvot* 1:159) adopt this view and require the disclosure of medical information that one party feels is irrelevant if the other party may be concerned. Regarding the proof from *Yevamot, Nishmat Avraham* (ibid.) quotes Rav Elyashiv as distinguishing between a case where the people were acting inappropriately by ignoring the ruling of Rav Yehuda, the *gadol hador*, when discriminating against a person whose father was non-Jewish, and the case of a medical condition where no such definitive stance can be made.

Regarding the case of the potential employee covering up his age, Rav Yitzhak Grossman argues that Rav Preil overlooks some important practical considerations. For example, he assumes that since wages are independent of the employee's age, actuarial considerations are irrelevant, but this presumes that there are no per-employee fixed costs. In the real world, this is often not the case; there may be recruiting or training costs, or other material considerations that make it significantly more expensive to hire an older worker who will not work as many years as a younger one. (Consideration of secular laws against age-discrimination lies beyond the scope of this article.)

Ultimately, these questions prove so difficult because they pit honesty, which the Torah cherishes, against self-preservation, which the Torah also values. Often times the answers to these questions hinge on the details, and thus competent rabbinic advice must be sought.

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The Lamdan Staff would like to extend a warm Mazal Tov to layout editor Ezra Seligsohn upon his recent engagement to Ma'ayan Hachen. May the home they build be a source of pride and joy to their family, friends, and entire community.

