

## The Halachic Background about Smoking

### Introduction

There has been much discussion on the topic of smoking in halacha over the course of the past century or so.<sup>2</sup> One of the unique facets of the halachic discussion on smoking is that the halachic conclusions have evolved over the course of time. This is not because the halachic principles themselves have changed, but rather due to the development and accumulation of medical information detailing the dangers and consequences of smoking. As the medical community has moved toward the conclusion that smoking is clearly extremely dangerous both in the long term as well as in the short term, the *poskim* have also generally adopted more restrictive positions about the halachic permissibility of this practice. This is because we are enjoined not to engage in any potentially dangerous behavior, or activities that could have harmful consequences for our bodies.<sup>3</sup> Since in this case, the halachic issues of avoiding dangerous practices are dependent on the medical positions, it is quite logical that such a transformation would take place.<sup>4</sup>

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Most *poskim* initially permitted smoking, as there was scant evidence that such a practice was harmful in any way, and some even believed that it was beneficial to the body.<sup>5</sup> Even as recently as the 1960s or so, it still was not yet proven that smoking was definitely dangerous, though it was already clear that it might cause irreparable damage. Rav Moshe Feinstein (Y.D. 2:49) was one of the major *poskim* to address smoking during that era,<sup>6</sup> and ruled that although a certain amount of danger was indeed present, and it was appropriate to refrain from doing so, it was not completely forbidden for someone who had already started and had difficulty stopping.

Rav Moshe supported his ruling by invoking the notion of "*shomer pesaim Hashem*," "Hashem protects the innocent" (*Tehillim* 116:6). The Gemara (*Yevamos* 12b) cites one Tannaitic opinion that employs this phrase regarding marriage for a girl between the ages of 11 and 12. Although this opinion holds that intercourse during this time can actually cause pregnancy, which is dangerous for a girl at this age, since she is not yet fully physically capable of carrying a child, nevertheless one may engage in relations normally, due to this rule of *shomer pesaim Hashem*. The Gemara (*Shabbos* 129a) explains that in a case of *dashu bo rabim*, an action that is performed commonly by many people, and is considered normal, then even if a certain amount of danger exists, we can trust that Hashem will protect us, and the action is not forbidden. This is because dangerous things do not necessarily happen in every single case of danger.

A practical example of this principle might be whether one is allowed to eat a non-healthy diet. Although this may not necessarily be the best activity for one's body, it does not violate the directive of protecting one's physical health and welfare, *shemiras ha'guf v'hanefesh*. However, a person who has

a high cholesterol level, and nevertheless eats a diet consisting of large amounts of cholesterol may indeed have violated this obligation, as the concern here is more acute.

Although the halacha is not in accordance with this opinion in the Gemara *Yevamos*, the reason for this is because the Gemara concludes that such an 11 year old girl cannot become pregnant, and therefore no danger exists of engaging in intercourse. However, Rav Moshe suggests that the concept expressed within this opinion of *shomer pesaim Hashem* is still true.<sup>7</sup> He therefore ruled at the time he wrote the responsum that since smoking was normative behavior, it was permitted, due to this notion. However, today, more than 50 years later, smoking may not be normative behavior anymore, at least in many locations. Indeed, someone who starts smoking nowadays for the first time is often perceived as engaging in aberrant behavior. If so, the concept of *shomer pesaim Hashem* may no longer apply with regard to smoking, and Rav Moshe would likely forbid it in current times.

In contemporary times, both Rav Shmuel Vozner (the *Shevet HaLevi*) and Rav Eliashiv publicized rulings that they believe it is completely forbidden to smoke, as it is clearly dangerous, both in the long term as well as the short term, and in the long term it is also clearly deadly. As mentioned, a person has an obligation, which may even be a negative prohibition, of *shemiras haguf*, to protect his health and not endanger himself.<sup>8</sup> The same logic applies for one who has overly high levels of fat. If he is on a clear collision course with a heart attack, then continuing to consume high quantities of fat may violate the injunction of *v'nishmartem l'nafshoseichem*. If so, it shouldn't matter if avoiding such dangerous activities causes financial hardship or spiritual hardship, it is still a halacha that must be kept.<sup>9</sup>

Another dimension of the issue of smoking that has changed over time is the question of whether one may smoke on Yom Tov. It is well-known that one may cook on Yom Tov for the purpose of eating the food on that day itself (*Shemos* 12:16; *Betza* 2b). However, the Gemara (*Kesubos* 7a) notes that only foods that are *shaveh l'chol Nefesh*, equally beneficial to everyone, are included in this allowance. Therefore, only foods that most people might eat are included. In addition, the Gemara (*Betzah* 22b) discusses the question of *mugmar*, perfume, which at the time was only a luxury affordable by the rich. Therefore, the Gemara rules that this is not *shaveh l'chol Nefesh*.

The *Pnei Yehoshua* (*Shabbos* 39b) suggested in his time that smoking was actually *shaveh l'chol Nefesh* because at that time it was done for health reasons, which he viewed as qualifying as *shaveh l'chol nefesh*. In the 21st century, however, even in Israel, where smoking is still common in certain populations, it is definitely not *shaveh l'chol Nefesh*. If so, then smoking on Yom Tov should violate the biblical prohibition of cooking on Yom Tov when it does not qualify as *ochel Nefesh*, and those that still do so today would appear to be inappropriately lenient on a genuine *issur deoraisa*.<sup>10</sup>

**Secondhand Smoke and Requesting that Others not Smoke Nearby**

Although the halacha today should be clear that smoking is problematic, there are other halachic issues that arise related to smoking. Can one who does not smoke request or demand that one who does refrain from doing so in a public area? Rav Moshe Feinstein (*Igros Moshe* C.M. 2:18) was asked about such a scenario in 1981, by which time the dangers of smoking was already known (though perhaps not the extent of the danger) by a *kollel* where some members wanted to smoke, while others were disturbed by it. Was it permitted for those that were bothered by the smoke to demand from the smokers that they not do so in the *kollel*? His analysis of the issue is interesting and very significant, so we will present a summary of it here.

Rav Moshe invokes the rules of *nizkei shechenim*, the laws of neighborly relations, which are the subject of the second chapter of tractate *Bava Basra*.<sup>11</sup> Most of these cases are not cases of regular damage, where one person or animal directly damages or causes a loss to another person or animal, like those discussed in tractate *Bava Kamma*. For example, the Mishna (*Bava Basra* 17a) discusses one who has a pit containing caustic chemicals used for cleaning clothing, which creates a high acidity level, and can potentially eat seep through the ground and cause damage to the foundation of his building or his pits dug for water supply. The Mishna here rules that one must leave a minimum distance between this damaging pit and the neighbor's wall to prevent damage. The *mishnayos* and Gemara there discuss extensively which cases one is obligated to move back from the wall even if one's neighbor came later, which cases he may have the right to maintain his operation if he was there first, and other relevant details.

In any case, it seems clear that the types of cases discussed there of *Nizkei shechenim* are significantly different in terms of the parameters for what is defined as damage from the regular cases of damages. What exactly is the difference between them, and where do we draw the line between the two? The most basic difference between them is that the laws of damages are clearly biblical, and are discussed clearly in the Torah in *Parshas Mishpatim* (and elsewhere). However, *nizkei shechenim* appears to be *derabanan*, as they are not mentioned anywhere in the Torah. There are some opinions though who argue that even *Nizkei shechenim* may be *deoraisa*, such as Rabbeinu Chananel (*Sanhedrin* 7b), the Rosh (*Shut* 79:5:3), and the *Chasam Sofer*.<sup>12</sup> Nevertheless, even these opinions agree that this category is independent and distinct from the regular *halachos* of damages.

Rav Moshe explains that forbidding these cases requires a separate source, because, as the Gemara says, *adam osek b'toch shelo*, a person is engaging in his own pursuits within the confines of his own home, where he can do as he wishes. Regular damage is defined as invading another's space, such as by throwing a rock through their window, allowing one's animal to enter their yard and consume their crops, etc. However, an act of damage performed by one who remains in his own space cannot be defined objectively as a *maaseh mazik*, an act of damage.

Rav Moshe adds that even Rabbi Yosei, who holds that some of the cases of *Nizkei shechenim* are permitted (see *Bava Basra* 22b, 25b), agrees in cases of *gira dideh*, where one's property causes direct damage, that it is forbidden. In these cases, Chazal imposed a new understanding of the limitations of a person vis-à-vis their neighbor. Although one never left his own property, if he damages in such a manner that the other cannot use his own space, then it is considered as if he damaged or threw him out from his backyard. Although this may sound like a regular case of damage if one's actions directly caused a loss to the other, in similar, standard cases of *gerama*, indirect damage caused, one is not liable to pay (though there is an obligation imposed by heaven to pay in that case).

The difference between *mazik* and *nizkei shechenim* is evident as well from the opposite angle: In the case of a regular *mazik*, one is only liable to pay for damage once the damage occurred. However, if a neighbor uses his property in a manner that clearly prevents the other from living normally on his own side, then the first must distance himself immediately, even if no damage has occurred yet. Rav Moshe proves this from the case of Rav Yosef (*Bava Basra* 22b-23a), where one of his neighbors was bloodletting on one side of the fence under his trees (whose shade extended over the fence). Crows then came and consumed the blood on the ground, and then flew up to the dates on the rest of the tree, causing the dates to be smeared with blood, and rendering them inedible in their current form. Rav Yosef insisted that the bloodletters move, despite being on their own property the entire time. He explained that since he had a delicate nature (*istenis*), and could not bear to have blood-stained dates, even though could simply be washed off. This was sufficient grounds for them to be required to stop.

One final example of *Nizkei shechenim* is the case of *hezek re'iya*, described by the Mishna (*Bava Basra* 2a): If two people are living in one courtyard (that consists of multiple houses), and there is a lack of privacy for both in the yard, each one has the right to demand that they divide the property with a fence, even if the other does not agree. The reason given is that *hezek reiya*, the harm caused by the ability of one person to see into the neighbor's property, is considered tangible damage.<sup>13</sup> Many commentaries wonder why this type of case, which serves as the introduction to the laws of *Nizkei shechenim* in tractate *Bava Basra*, is referred to a *hezek*, damage. What connection is there between this case and an actual *ma'aseh hezek*? Rav Issur Zalman Meltzer (in the *Even Ha'azel*, beginning of *Hilchos Nizkei Shechenim*) explains that this category imposes a definition of damage that one who makes it difficult for his neighbor to use his own property is in essence destroying it. Therefore, each of these two individuals can issue claims against the other for a certain amount of time.

Based on this analysis, Rav Moshe concludes that smokers clearly may not say they are "*osek b'toch shelo*" when smoking in public, since it is not their space. Like in the case of Rav Yosef, this is a case where one person's action prevents a neighbor from the ability to use his own space properly, thereby inconveniencing him. It is therefore included under the rubric

of *nizkei shechenim*, and one is forbidden from smoking in these areas, despite the smoker's right to be in the room just as much as the non-smoker.<sup>14</sup>

A variation of this scenario often occurs in shuls during the winter months regarding closing or opening the window. One person who sits near the window may be cold and try to close it, but the rest of the people present may want it open if the heat is on a high setting and the rest of the room is very hot. Alternatively, one person may prefer for all the windows to be open, while everyone else claims that it is too cold. In these cases, the window must be used in a manner that is acceptable for everyone else, and the individual may not decide on his own what to do. If not, then he would violate the property rules of a jointly owned area, even if no action would qualify as a true *ma'aseh hezek*. A similar approach should be taken with regard to parking in a way that inconveniences pedestrians. If one does so, then he has abused his joint property right at the expense of others, who cannot exercise their rights to use the space appropriately. Therefore, this too should be forbidden due to *nizkei shechenim*.