Mental Incompetence and Its Implications in Jewish Law

Rabbi J. David Bleich

One of the most basic issues of concern to persons involved in the mental health care professions is formulation of the criteria which mark the distinction between mental competence and mental incompetence for purposes of Halakhah. The problem is hardly a novel one. In times gone by the issue was primarily the question of legal capactiy for purposes of executing a religious divorce in situations in which a wife sought a divorce from a husband who was mentally distrubed. At present, when so much more can be done on behalf of the mentally ill, the question arises most frequently in the context of the therapist's obligation to encourage performance of *mizvot* and his concommitant obligation to caution against infraction of Jewish law. These obligations may, at times, be of paramount significance in determining the mode of therapy which may be undertaken in consonance with halakhic norms. In virtually all cases the possibility of undertaking to provide a truly value-free therapy can be contemplated only when, by virtue of his mental condition, the patient may be deemed to be absolved from the obligations and constraints imposed by Jewish law.

Rosh Yeshiva, Rabbi Isaac Elchanan Theological Seminary; Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University

Any analysis of this question must begin with an elucidation of the term *shoteh*. The term is a general one and is employed in rabbinic sources to denote a person who is mentally incompetent either by reason of insanity or mental retardation. Diagnosis of this mental state is by means of overt behavior patterns. The criteria of a *shoteh* are formulated in the *Tosefta*, *Terumot* 1:3, and cited by the Gemara, *Hagigah* 3b, in a somewhat different form:

> Our Rabbis taught: Who is a *shoteh*? One who goes out alone at night; one who spends the night in a cemetery; and one who tears his garments.

The Gemara continues its discussion by adducing a dispute between two Amoraim with regard to the meaning of this dictum. Rav Huna considers the list of symptoms presented as indicative of mental incompetence to be conjunctive in nature. According to Rav Huna, a person is not considered to be a *shoteh* unless he manifests each of the three forms of bizarre conduct described by the *Tosefta*. Rav Yohanan disagrees and asserts that the criteria are listed disjunctively. According to Rav Yohanan a person is deemed a *shoteh* if he manifests any one of the three forms of erratic conduct depicted in the *Tosefta*.

The Gemara, however, is fully cognizant that virtually any mode of conduct may, at times, be entirely rational. Hence, the Gemara is not prepared to accept bizarre conduct in and of itself as arbitrarily establishing mental incompetence. On the other hand, if a person's actions are manifestly irrational it is difficult to perceive why Rav Huna insists that lack of mental competence be evidenced in three diverse types of activity. Accordingly, the Gemera queries:

> What is the case? If he does them in an irrational manner, even one is [sufficient to establish mental incompetence]; if he does not do them in an irrational manner, even all of them [establish] nothing. Indeed [the *Tosefta* refers to a case in which] he does them in an irrational manner. But if he [only] spent the

> night in a cemetery, I might say: He did [it] in order that the spirit of impurity might rest upon him. If he [only] went out alone at night, I might say: He was seized by *ganderipos* (melancholy or heat: Rashi). If he [only] tore his garment I might say: He was lost in thought. But since he did all of them he becomes like [an ox] which gores an ox, an ass and a camel, and becomes [thereby] a forewarned gorer *[mu'ad]* with regard to all animals.

Several principles emerge from this discussion: 1) Erratic conduct, no matter how bizarre it may appear, is not indicative of mental incompetence if there exists a rational basis for such conduct. 2) Irrational behavior, even if limited and manifest in only one type of activity is a sufficient criterion of *shetut* or mental incompetence provided that no rational explanation for such conduct may be advanced. 3) The controversy between Rav Huna and Rav Yohanan is limited to situations in which no obvious explanation for aberrant behavior presents itself but in which such an explanation, albeit one which is farfetched, is conceivable. According to Rav Huna, manifestation of what is *prima facie* an irrational pattern of behavior in one or two areas of conduct may be dismissed by ascribing unlikely but rational explanations; but aberrant behavior in three areas of conduct cannot be rationalized in this manner. According to Rav Yohanan even a single form of behavior which is *prima facie* irrational in nature is sufficient to establish mental incompetence.

This dispute between Rav Huna and Rav Yohanan is considerably modified by the Germara, *Hagigah* 4a. The Gemara cites a further tannaitic dictum: "Who is [deemed to be] a *shoteh*? One who destroys all that is given to him." This form of behavior in and of itself is deemed by the Gemara to constitute absolute evidence of mental incompetence even according to Rav Huna and, accordingly, the Gemara concludes that, "tearing one's garments," since it is but a form of "destroying all that is given to him", is in itself sufficient evidence for establishing mental incompetence. The

Gemara remains in doubt with regard to whether Rav Huna would have completely retracted his earlier stated opinion and would agree that a pattern of going out alone at night or of spending the night in a cemetery is alone sufficient evidence of *shetut* or whether he would continue to disagree with Rav Yohanan in maintaining that the latter criteria cannot individually establish mental incompetence.

The Gemara, then, presents a total of four different criteria of mental incompetence but is silent with regard to other forms of aberrant activity. Quite obviously, some persons may suffer from various forms of mental illness manifesting themselves in various forms of bizarre behavior which are quite different from those enumerated by the Gemara. Is a person who manifests such behavior to be categorized as a *shoteh*? Rambam, *Hilkhot Edut* 9·9, declares:

> The *shoteh* is disqualified by biblical law from serving as a witness because he is not subject to the commandments. Not only a *shoteh* who walks around naked, who breaks utensils and throws stones [is disqualified], but anyone who is mentally deranged with the result that his mind is constantly confused with regard to some matter, even though he converses and asks questions to the point with respect to other matters is disqualified [from serving as a witness] and is considered to be among the *shotim*.

The commentaries on Rambam's *Mishneh Torah* raise the obvious question. Rambam, in formulating the disqualification of witnesses on the basis of mental incompetence, ignores the criteria enumerated by the Gemara and presents his own, viz., walking naked, breaking utensils, throwing stones and mental confusion. R. Joseph Karo, *Bet Yosef, Even ha-Ezer* 121, asserts that Rambam seeks to emphasize that the criteria presented by the Gemara are not intended to be exhaustive in nature; those criteria are illustrative and designed to indicate that any form of irrational behavior serves to establish that the individual behaving in such a

manner is mentally incompetent. For this reason, explains *Bet Yosef*, Rambam chose to list a number of examples of aberrant behavior not specifically mentioned by the Gemara.

Bet Yosef argues that the cogency of Rambam's position is readily apparent upon an examination of the earlier cited talmudic discussion. The first definition adduced by the Gemara, *Hagigah* 3b, lists three criteria of a *shoteh;* a second dictum, which is cited subsequently, presents a fourth criterion but fails to mention the three criteria enumerated in the first dictum. From the context of the talmudic discussion it is readily apparent that the Gemara does not perceive these two definitions to be in conflict with one another. Accordingly, argues *Bet Yosef*, it may be deduced that neither definition is exhaustive in nature since, in actuality, *any*, form of irrational behavior is evidence of mental incompetence. The behavior patterns are mentioned in each of the tannaitic statements by way of example only and neither separately nor collectively do they constitute exhaustive criteria of *shetut.* Accordingly, Rambam rules that any form of conduct which is manifestly irrational, even if limited to one aspect of human behavior, is sufficient to establish that the individual is a *shoteh.*

A similar explanation of Rambam's position is offered by R. Aryeh Leib of Metz (*Sha'agat Aryeh)* in his classic responsum concerning the *get* of Cleves, a halakhic *cause célèbre* of the eighteenth century. This responsum originally appeared in *Or ha-Yashar*, a collection of responsa dealing with the controversy edited by R. Aaron Simon of Copenhagen, and was republished in *Sha'agat Aryeh*, addenda, no. 2. The case involved a young man who exhibited signs of paranoia and erratic behavior shortly after his marriage. During this period he executed a bill of divorce on behalf of his wife under the supervision of the chief rabbi of Cleves. A controversy with regard to the validity of the *get* arose among many of the most prominent rabbinic authorities of the day. The issue in dispute was whether or not the husband's erratic behavior was of a nature which rendered him a *shoteh* lacking legal capacity to execute a *get. Sha'agat Aryeh*, together with most of the authorities consulted, upheld the validity of the *get.* In the

course of his lengthy and erudite responsum, *Sha'agat Aryeh* explains Rambam's comments in *Hilkhot Edut* and, in particular, addresses himself to the question of why it is that the Gemara presents four particular examples of aberrant behavior if, in Rambam's opinion, any form of irrational behavior constitutes sufficient evidence of *shetut*. *Sha'agat Aryeh* points out that the Gemara recognized that the examples enumerated in *Hagigah* 3b are indeed usually indicative of mental incompetence but that, nevertheless, the conduct described could, under certain conditions, be explained in a perfectly rational manner. A person who spends the night in a cemetery may seek to have "the spirit of impurity rest upon him"; a person who goes out alone at night may suffer from *ganderipos*, etc. Nevertheless, since *prima facie* such conduct is irrational in nature, a person behaving in this manner is presumed to be a *shoteh*. However, declares *Sha'agat Aryeh*, if another form of erratic behavior is exhibited which is manifestly irrational and cannot be explained in any manner, there is, *a fortiori*, no question that such behavior is a sufficient indication of mental incompetence. Rav Huna, no less than Rav Yohanan, would agree that even a single form of aberrant behavior for which no rational explanation may be found is sufficient to establish that the person is a *shoteh*. The Gemara, in presenting specific examples, seeks to demonstrate only that even forms of behavior which allow for unlikely rational explanation must also be deemed to be manifestations of mental incompetence. Accordingly, Rambam rules that any form of bizarre behavior which does not readily admit of rational explanation is an indication of mental incompetence.

Rambam's position is opposed by at least three early authorities. *Bet Yosef*, *Even ha-Ezer* 119 and *Even ha-Ezer* 121, cites the opinion of Rabbenu Simchah of Shapira, R. Shalom Shimshon ben Abraham and R. Joseph Kolon, *Teshuvot Maharik*, no. 19, who maintain that the criteria enumerated by the Gemara are exhaustive in nature. According to the position espoused by these authorities, a person may be deemed to be a *shoteh* only upon manifestation of the particular types of behavior described by

the Gemara. Any other form of bizarre behavior, even though manifestly irrational, does not constitute a criterion of *shetut*. However, *Shulhan Arukh, Hoshen Mishpat* 35:8, in describing a *shoteh* who is disqualified from serving as a witness, quotes the language of Rambam verbatim. Similarly, R. Moses Isserles, *Darkei Mosheh, Even ha-Ezer* 119:5, citing *Teshuvot Mahariv*, no. 42, apparently maintains that Rambam's opinion is normative.

II

However, acceptance of Rambam's position that any form of irrational behavior is sufficient evidence that the individual comporting himself in such a manner is a *shoteh* does not fully resolve the issue. The question which remains to be clarified is the delineation of the areas of Jewish law in which this operative definition of *shoteh* is applicable.

In his commentary on *Hagigah* 3b, Rashi carefully spells out the ramifications of the definition presented. Rashi states that the definition of *shoteh* formulated in *Hagigah* is universal in nature. The *shoteh* thus defined, declares Rashi, is the *shoteh* "to whom reference is made in every place as being exempt from the commandments and from penalty, whose acquisition is not an acquisition and whose sale is not a sale." According to Rashi the criteria of mental incompetence presented in *Hagigah* serve to define every occurence of the term in talmudic writings.

It is remarkable that although the term *shoteh* occurs repeatedly throughout the *Mishneh Torah*, Rambam seeks to define this concept only in *Hilkhot Edut* in conjunction with the disqualification of the *shoteh* from serving as a witness. Rambam's definition of the term in this context is at once both puzzling and illuminating. Rambam makes it clear, albeit in an indirect manner, that the definition of *shoteh* formulated in *Hilkhot Edut* serves also to define the *shoteh* who is exempt from *mizvot*. A *shoteh* is incompetent to serve as a witness, Rambam tells us, not, as we might have anticipated, because his mental condition renders his testimony unreliable, but because "he is not subject to the

commandments." Inplicit in this statement is a ruling that a person defined as a *shoteh* in *Hilkhot Edut* is exempt from the obligation of fulfilling the *mizvot* of the Torah. Indeed, the latter exclusion, according to Rambam, is halakhically antecedent to the exclusion of the *shoteh* from the class of acceptable witnesses.

The fact that Rambam makes the disqualification of a *shoteh* as a witness contingent upon his exemption from *mizvot* is conceptually problematic. Much more obvious grounds for excluding the testimony of a *shoteh* may be found in the fact that his testimony is simply not reliable. Indeed in the very next section, *Hilkhot Edut* 9:10, Rambam himself rules that mental impairment of a degree which falls short of categorization as *shetut* suffices to disqualify a person from serving as a witness simply because of the inherent unreliability of such testimony. Accordingly, Rambam rules:

> The inordinately foolish who are unable to discriminate between contradictory matters and who do not comprehend matters as other people do and similarly those who are mentally disoriented and impulsive and those who are excessively deranged [in conduct] are included in the category of *shotim*. This matter [is to be determined] in accordance with the perception of the judge for it is impossible to be precise in writing.

The categories of the mentally impaired defined in *Hilkhot Edut* 9:10, in contradistinction to those described in *Hilkhot Edut* 9:9, include individuals who are considered to be *shotim* solely for purposes of disqualification from serving as witnesses but are deemed to be "normal" for all other purposes. The feeble-minded are bound by the commandments although their testimony may not be accepted. Their testimony is excluded by reason of the fact that they "do not comprehend matters" and hence are not competent to testify to matters before the court. If so, the persons described in *Hilkhot Edut* 9:9, since their competence is diminished even beyond that of those described in *Hilkhot Edut* 9:10, should

logically be disqualified from serving as witnesses for that reason alone. Hence the reason posited by Rambam, viz., that the *shoteh* "is not subject to commandments" seems to be superfluous.

A number of suggestions have been offered for resolving this difficulty, some of which have important halakhic ramifications. One such explanation is offered by R. Moses Feinstein, *Iggerot Mosheh, Even ha-Ezer,* I, no. 120. Rabbi Feinstein describes the first divorce proceeding at which he presided while yet a young man serving as rabbi of Luban in Bylorussia. The husband insisted that he was the Messiah. In addition, he exhibited rather erratic forms of behavior which he explained by claiming that it was his mission to bring the universe to perfection. On occasion he was wont to parade in the nude. In all other matters the young man was entirely normal. The question, of course, was whether the husband possessed the legal capacity necessary in order to execute a valid *get.* Rabbi Feinstein ruled in the affirmative. The principal reason advanced by *Iggerot Mosheh* is that a person's conviction that he is the Messiah, although erroneous, is not necessarily irrational. The other forms of bizarre conduct manifested by the young man flowed from this belief and hence could readily be assumed to be rational. Even the man's nudist practices are explained by *Iggerot Mosheh* as being entirely rational. The same exaggerated notion of self-worth which causes an individual to believe that he is the Messiah may also lead him to believe that he enjoys the exalted moral status of Adam prior to the sin of the Tree of Knowledge and that he may therefore walk about unclothed.

In the course of this responsum *Iggerot Mosheh* elucidates an interesting ramification of Rambam's ruling in *Hilkhot Edut* 9:9. Rambam declares that a person who is "constantly confused with regard to some matter" is a *shoteh* even though he is entirely rational with regard to all other matters. Rambam declares that such an individual is not only disqualified from serving as a witness but is also exempt from all commandments. Why, queries *Iggerot Mosheh,* should a person be exempt from all *mizvot* if absence of rationality is limited to one specific area of conduct?

Absent Rambam's ruling, it would be assumed that a person is obligated to observe any and all *mizvot* with regard to which his mental state does not constitute an impediment. Mental aberration which is limited in nature need not cause general diminution of mental capacity. *Iggerot Mosheh* answers that, according to Rambam, the Torah does not establish partial obligations with regard to *mizvot*. A person is either "subject to commandments" or he is not subject to commandments; a person cannot be obligated with regard to some *mizvot* and exempt from others. A deranged person is clearly exempt from the *mizvot* for which he lacks mental competence; hence he must be exempt from all *mizvot*. Since such a person is exempt from *mizvot* he is disqualified from offering testimony even pertaining to matters with regard to which he is entirely lucid and fully competent. Accordingly, Rambam advances the reason "he is not subject to the commandments" in order to justify absolute exclusion of any testimony of such an individual even though his testimony may concern matters with regard to which he is entirely rational. However, concludes *Iggerot Mosheh*, for all other purposes of Jewish law, and specifically with regard to legal capacity to execute a *get*, Rambam would agree that a person who behaves irrationally in a limited area of conduct is not to be considered a *shoteh* with regard to other matters in relation to which he manifests no irrationality. It is only insofar as obligation regarding fulfillment of *mizvot* is concerned that, according to Rambam, a person who exhibits irrational conduct in one aspect of human behavior is exempt from fulfillment of all *mizvot*.

However, this analysis of Rambam's position is not accepted by all authorities. Rambam, *Hilkhot Hamez u-Mazah* 6:3, rules that a person who suffers an epileptic attack and eats the required quantity of *mazah* on Passover eve while mentally incompetent as a result of that affliction must again partake of *mazah* after the attack has subsided and he has returned to a normal cognitive state. The reason advanced by Rambam is that the *mazah* consumed by the epileptic during the course of a seizure was eaten "at a time when he was exempt from all commandments" by virtue of mental incompetence. The exemption of a *shoteh* from *mizvot*, it

should be noted, is categorically distinct from the exemption of an *anus*, i.e. a person prevented from fulfilling a *mizvah* by virtue of physical inability, force or the threat of force. Although *force majeure* and physical incapacity similarly relieve a person from the fulfillment of commandments they do not constitute an intrinsic exemption from *mizvot* but simply an exemption from responsibility or culpability. A person who is physically incapable of swallowing is exempt from eating *mazah* only in the sense that he cannot be held responsible for doing so. A *shoteh* is exempt for the more fundamental reason that he is not at all bound by the obligation (*lav bar hiyuva*). Hence consumption of *mazah* while in a state of mental incompetence cannot satisfy an obligation which devolves upon the individual only subsequently, i.e. upon his regaining mental competence. A person who eats *mazah* while suffering an epileptic attack has fulfilled no obligation. Upon recovering he becomes obligated to perform the *mizvah* which he has as yet not fulfilled.

R. Ezekiel Landau, author of *Teshuvot Noda bi-Yehudah* employs this premise in explaining Rambam's position. *Noda bi-Yehudah's* elucidation of Rambam's position is formulated in the course of a responsum dealing with the divorce of Cleves. This responsum is also published in *Or ha-Yashar*, no. 27. *Noda bi-Yehudah* maintains that, even according to Rambam, a *shoteh* is exempt from *mizvot* only to the extent that his mental impairment interferes with rational fulfillment of such obligations. A person who is irrational in even a limited sense is exempt from any *mizvah* requiring an act which he cannot perform in a rational manner. Moreover, as noted earlier, any *mizvah* performed in an irrational manner is not deemed to constitute the fulfillment of an obligation. Nevertheless, such a person remains bound by any commandment which he can perform in a rational manner. However, a person who is to any extent exempt from *mizvot* by virtue of mental incompetence is excluded entirely from the category of qualified witnesses. The Gemara, *Baba Kamma* 88a, in establishing categories of qualified witnesses cites the verse "and behold, if the witness be a false witness and has testified falsely

against his brother" (Deuteronomy 19:18). The phrase "his brother" (which certainly cannot be understood in a literal manner since no person's testimony is accepted for or against his brother) is understood by the Gemara as denoting "a brother in *mizvot*," i.e., a person equally bound by the commandments. Accordingly, the principle is established that a person who is not subject to the commandments is disqualified from serving as a witness. *Noda bi-Yehudah* argues that even if he behaves irrationally with regard to only one specific type of conduct a *shoteh* is disqualified from serving as a witness even though he is exempt only from *mizvot* with regard to which such behavior serves as an impediment. Since such a person is bound by only a limited obligation regarding commandments he is not "a brother (i.e., an equal) with regard to commandments." According to *Noda bi-Yehudah's* analysis of Rambam's position, as distinct from that of *Iggerot Mosheh*, a person suffering from a limited form of mental incompetence is fully bound by those commandments whose rational fulfillment is not affected by his mental condition.

A similar, yet somewhat different, explanation is advanced by *Teshuvot Hatam Sofer, Even ha-Ezer*, II, no. 4. *Hatam Sofer* agrees that a mentally ill person is obliged to fulfill *mizvot* to the extent that he is capable of doing so in a rational manner. *Hatam Sofer* asserts that in describing a person who manifests only a limited form of irrational behavior as not bound by commandments Rambam means that such a person cannot be held culpable should he commit perjury since he may plead that his false testimony was the product of his dementia. The general rule is that any testimony for which a witness cannot be held accountable should the testimony prove to be false (*edut she'i atah yakhol le-hazimah)* must be excluded.

Thus, according to both *Noda bi-Yehudah* and *Hatam Sofer*, a person who manifests irrational conduct of a circumscribed nature is disqualified from serving as a witness and is exempt from *mizvot* which he cannot fulfill in a rational manner but is nevertheless obligated to perform any *mizvah* whose fulfillment is not

compromised by diminished mental competence, while according to *Iggerot Mosheh* such a person is entirely exempt from all commandments. According to *Noda bi-Yehudah* and *Hatam Sofer*, Rambam concedes that the criteria of a *shoteh* which serve to establish total mental incompetence for all purposes of Halakhah are restricted to those enumerated in *Hagigah*. Rambam's broader difinition is limited to disqualification from serving as a witness and to exemption from performance of specific commandments. *Iggerot Mosheh* reaches the same conclusion save that in his opinion such an individual is, according to Rambam, exempt from all *mizvot*.

The comments of *Tosafot*, *Hagigah* 3b, are also of significance with regard to this question. The Gemara states that a person who acts in an aberrant manner, and whose actions cannot be explained rationally even in a farfetched manner, is judged to be a *shoteh* on the basis of but a single form of irrational conduct; three forms of aberrant behavior are required according to Rav Huna only when such conduct can be rationally explained in a possible, but unlikely, manner. *Tosafot* challenges this assumption and offers a possible alternative interpretation of the tannaitic dictum cited by the Gemara. Perhaps, queries *Tosafot*, irrational behavior must be evidenced in three diverse areas of conduct in order to establish that a person is mentally incompetent with regard to all matters, just as an ox is declared to be a *mu'ad* with regard to all animal species only upon goring animals of three different species. Otherwise it may be assumed that the ox has a predilection for goring only one or two species. Similarly, it may well be the case, argues *Tosafot*, that a person is classified as a *shoteh* with regard to all matters only if he manifests irrational behavior in three aspects of human conduct; otherwise there may be grounds to assume that the individual's lack of mental competence is limited to the areas in which he has exhibited irrational behavior. To this query *Tosafot* responds that if a person is a *shoteh* with regard to one type of conduct "he must certainly be presumed to be a *shoteh* in all matters" (*vadai yesh le-hahaziko be-hezkat shoteh le-kol davar*).

The grounds for this presumption are not immediately clear since it is indeed certain that a person may suffer from a limited form of mental aberration. *Tevu'at Shor, Hilkhot Shehitah* 1:51, explains that *Tosafot* asserts that the human mind cannot function in an irrational manner with regard to one matter and remain entirely rational in all other areas. According to this analysis, *Tosafot* declares, in effect, that a person whose mental incompetence is manifest in any mode of conduct must be deemed to be mentally incompetent with regard to all matters. It would then follow that, according to *Tosafot*, a person who manifests irrationality in some form is exempt from all *mizvot* since all actions of such an individual are governed by an irrational mind. There is, however, no direct evidence which would serve to indicate *Tosafot's* position with regard to the question of whether any form of patently irrational behavior constitutes a sufficient criterion of *shetut* or whether the criteria indicative of this state are limited to those specifically enumerated in *Hagigah*.

Iggerot Mosheh, however, disagrees with the analysis of *Tosafot* advanced by *Tevu'at Shor* and argues that *Tosafot* employs the term *hazakah* in the sense of presumptive evidence. Thus, the fact that a person behaves irrationally with regard to one area of conduct serves to establish a presumption of irrationality with regard to other matters as well. However, since this is only a presumptive conclusion it is subject to rebuttal if it can be established that the individual is mentally competent with regard to other matters. *Iggerot Mosheh* adds that although, according to his understanding of Rambam, a person exempt from any *mizvah* by virtue of mental incompetence is exempt from all commandments, there is no reason to ascribe a similar view to *Tosafot*. Hence, according to *Tosafot*, a person of diminished rational capacity is nevertheless obligated to fulfill all *mizvot* which he can perform in a rational manner.

III

All authorities are, however, in agreement that a person who

is entirely irrational in his conduct is not obligated to fulfill *mizvot*. If so, is it permissible to provide therapy for such patients which involves acts which constitute transgressions? May such persons be institutionalized for custodial purposes if such a procedure involves providing the patient with non-kosher food? Granted that the patient himself is under no restriction by virtue of mental incompetence, it is nevertheless not clear that others may cause him to engage in acts which are proscribed by Jewish law. A halakhic parallel exists with regard to minors. The Gemara, *Yevamot* 114a, states that although minors are exempt from *mizvot*, nevertheless, by virtue of biblical law, an adult is forbidden to feed children non-kosher food (*bal ta'akhilum*). By the same token an adult may not directly or overtly cause a minor to commit any forbidden act. Since, for purposes of Halakhah, a *shoteh* and a minor are regarded in a like manner the same restrictions are applicable with regard to a *shoteh* as well. [Cf., *Likutei He'arot al Teshuvot Hatam Sofer*, I, no. 83, sec. 1.]

The classic responsum commonly cited in discussions of this question is *Teshuvot Hatam Sofer, Orah Hayyim*, no. 83. The inquiry directed to *Hatam Sofer* involved a child of approximately seven years of age. *Hatam Sofer* was asked whether it would be permissible to send the child to a school in Vienna specializing in the treatment of such youngsters with the anticipation that the boy's problems would be ameliorated. However, kosher food was not available in that institution. *Hatam Sofer* replied that, at least in terms of normative Halakhah, it would be permissible to enroll the child in such a school since the parents, in delivering the child into the custody of the school authorities, would merely be making it possible for others to serve him non-kosher food but would not do so themselves. He cautioned, however, that the child should be removed from the institution upon reaching the age of *Bar Mizvah*.

Hatam Sofer also presents a novel argument demonstrating that a Jew might even feed the child forbidden food directly if a cure would be effected thereby and, as a result, the child would become capable of fulfilling *mizvot* upon reaching religious maturity.

The Mishnah, *Pesahim* 87a, describes an orphan who is the ward of a multiple number of guardians and rules that each of the guardians may acquire a Paschal sacrifice on his own behalf and on behalf of his minor ward. The orphan may then, at his option, partake of whichever sacrifice he desires. The general rule is that a person may eat only of a Paschal sacrifice "on which he has been counted", i.e., in which he has acquired a proprietary interest. An ancillary principle is that a person may not acquire such an interest in, and partake of, more than a single Paschal offering. Nevertheless the Mishnah rules that the child may partake of whichever Paschal sacrifice he chooses.

Tosafot, Pesahim 88a, raises an obvious question. Since the child may legitimately acquire an interest in only one such animal, how may the guardian serve the meat of the Paschal offering to the child? In doing so, the guardian transgresses the commandment against causing a minor to eat a forbidden food. *Tosafot* answers that this prohibition does not apply to actions which are designed to train a child in the performance of *mizvot*. Accordingly, argues *Hatam Sofer*, it would be permissible to cause a child to eat forbidden food or to commit some other infraction of Jewish law if, by doing so, he would regain mental competence and thereby be enabled to fulfill *mizvot* at some future time.[1] Such an act would

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1. In presenting this analysis of *Tosafot's* position *Hatam Sofer* evidently follows the interpretation of *Tosafot* advanced by *Magen Avraham, Orah Hayyim* 343:3. According to *Magen Avraham's* understanding of *Tosafot*, a minor may be caused to commit even a biblical transgression when incidental to *hinnukh*. This intrepretation of *Tosafot's* position is however challenged by *Minhat Hinnukh*, no. 7. *Minhat Hinnukh* argues that since *hinnukh* is literally a matter of "training" it would be inconsistent to encourage a minor to perform an act — even if the act itself constitutes fulfillment of a *mizvah* — even if the same act would be forbidden to an adult because of an attendant prohibition. *Hinnukh* or "training" of such a nature constitutes training and habituation in the performance of a forbidden act rather than of a meritorious one. Thus, argues *Minhat Hinnukh*, it would be incongruous to present a child with flesh of the Paschal sacrifice which has been cooked in liquid subsequent to roasting or with meat which has been defiled since, as an adult, such meat would be forbidden to him. On the contrary, proper training would require that the child be taught that such meat is forbidden.

be no different from "training" (*hinnukh)* in the performance of *mizvot.*[2] *Hatam Sofer's* reasoning would be equally applicable to similar conduct vis-a-vis an adult who might be cured of mental incompetence which renders him a *shoteh.*

Minhat Hinnukh contends that *Tosafot's* statement is limited in application. This scholar views the principle formulated by *Tosafot* as applicable only in a situation in which the act of the minor involved a transgression which, in a comparable set of circumstances, would not attend upon the selfsame act when performed by a person who has reached the age of hakakhic capacity. In the case described by *Tosafot* the minor is not among the *minuyim,* i.e., among those "counted" upon the Paschal sacrifice because of the actions of his guardians. As an adult competent of acquiring a share in the animal on his own behalf, such a difficulty would not arise. In such a case — and in such a case alone — argues *Minhat Hinnukh, Tosafot* permits the child to be given a portion of the *korban Pesach* for reason of *hinnukh* despite the attendant transgression. Such "training" is entirely valid since, were the child to repeat the same act as an adult, it would entail no prohibition. A similar explanation is presented by R. Naphtali Zevi Yehudah Berlin, *Meromei Sadeh, Haggigah* 2a.

See also R. Akiva Eger, *Drush ve-Hiddush R. Akiva Eger, ma'arakhah* 8, who rules that for purposes of *hinnukh* a minor may be caused to commit a rabbinic infraction but not a biblical transgression, e.g., a minor may be given a *shofar* to blow on *Rosh Hashanah* even when *Rosh Hashanah* occurs on *Shabbat* since the prohibition against use of musical instruments on *Shabbat* is not biblical in nature.

2. *Hatam Sofer's* position is apparently constradicted by R. Isaac Blazer (known as Reb Itzele Peterburger), *Pri Yizhak,* I, no. 11. *Pri Yizhak* asserts that *Tosafot's* ruling is limited to situations in which a minor is caused to transgress in the course of the actual performance of a *mizvah,* e.g., while engaged in eating the Paschal sacrifice. However, *Tosafot* does not explicitly sanction an act causing a minor to transgress for the sake of fulfillment of a *mizvah* at some future time even though the act may be preparatory to the fulfillment of a *mizvah.*

In support of this distinction *Pri Yizhak* cites a statement found in *Eruvin* 82a to the effect that a child of less than six years of age does not require an independent *eruv* but may enjoy the benefits of an *eruv* prepared by his mother on her own behalf. The general principle is that an *eruv* may be utilized only for the sake of fulfilling a *mizvah,* e.g., visitation of a mourner or participation in post-nuptual festivities (cf., *Tosafot, loc. cit.,* s.v. *katan*). Since an *eruv* may be prepared only when required for the purpose of fulfilling a *mizvah* it should then follow that a minor has no need whatsoever of an *eruv.* A minor may be caused to transgress for the sake of *hinnukh* in performance of a *mizvah.* It then follows that a minor may journey to the home of a mourner or to a wedding feast without benefit of an *eruv* while for a purely discretionary journey the *erev* is of an avail. Thus, the Gemara's statement indicating that a minor may utilize his

This argument notwithstanding, in practice, *Hatam Sofer* strongly advises against such a course of action even if, as a result, the child would become fully competent. *Hatam Sofer* advises that the child not be permitted to eat forbidden foods even if he would thereby ultimately be restored to normalcy and be enabled to fulfill *mizvot*. He reasons that as long as the child is mentally afflicted he is exempt from all commandments. A person who is exempt from *mizvot* is not obligated to seek ways and means of becoming obligated to fulfill *mizvot*. [Cf., however, *Magen Avraham, Orah Hayyim* 340:29, to whom this is a matter of doubt. See also R. Iser Yehudah Unterman, *Shevet me-Yehudah*, I, 49 and 64.] Such a course of action is actually contraindicated, argues *Hatam Sofer*, if in order to accomplish this objective a person must partake of forbidden foods even though no actual transgression is involved thereby. The Gemara states that the eating of forbidden foods, quite apart from any transgression which may be incurred, causes *timtum ha-lev*, i.e., the food consumed has an adverse effect upon the person's moral character and spiritual well-being. Such an individual may later in life succumb to temptation and be led to all manner of transgression. Accordingly, advises *Hatam Sofer*, "Better

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mother's *eruv* appears to be problematic since for purposes of fulfilling a *mizvah* a minor, according to these premises, should not require an *eruv*.

Pri Yizhak contends that a distinction must be made between causing a minor to transgress in the actual fulfillment of a *mizvah* and causing him to transgress in performing an act which is merely preparatory to the fulfillment of a *mizvah*. The former, as is evident from the comments of *Tosafot*, is permissible; the later is not. According to *Pri Yizhak*, it would then follow that a minor (or a mentally incompetent adult) may not be fed forbidden foods in the course of therapy in order that he may become competent to fulfill *mizvot* since consumption of forbidden foods under such circumstances is not intrinsic to the actual fulfillment of a *mizvah* but is merely preparatory in nature. It should be noted that *Teshuvot R. Akiva Eger*, no. 15, permits an adult to give a prayer book to a child on the Sabbath for the purpose of carrying the prayer book to the Synagogue. In order that the child may be able to participate in communal prayer. This is permitted by R. Akiva Eger even though carrying the prayer book is merely preparatory to prayer but does not, in itself, constitute the fulfillment of a *mizvah*. This ruling, although contradicted by *Pri Yizhak*, is entirely compatible with the position espoused by *Hatam Sofer*.

that a person be a *shoteh* all his days rather than be wicked a single moment in the eyes of G-d" (see *Idiyut* 5:6).

Iggerot Mosheh, Orah Hayyim, II, no. 88, offers diametrically opposed advice in the case of a mental patient who has been pronounced incurable. Such a person, declares *Iggerot Mosheh,* may without question be committed to a mental institution where he will be given non-kosher food. *Iggerot Mosheh* maintains that *Hatam Sofer* would have agreed with this advice. *Hatam Sofer* refused to counsel such a course of action, argues *Iggerot Mosheh,* only because a reasonable possibility existed that the child might be cured. The *timtum ha-lev* engendered in the course of effecting a cure might then lead him to transgression. However, in the case of an incurable patient, argues *Iggerot Mosheh,* there is nothing to fear. Since the patient will not be cured he will never be bound by the commandments and therefore will never be in a position to transgress. If by chance, adds *Iggerot Mosheh,* the patient is indeed cured such a cure can only be miraculous in nature. In such circumstances one need not fear that the patient will be adversely affected by the non-kosher food which he has eaten since G-d, it may be presumed, will not work an imperfect miracle.

A grandson of *Hatam Sofer,* R. Simchah Bunim Sofer, *Teshuvot Shevet Sofer, Even ha-Ezer,* no. 21, indicates that *Hatam Sofer* was not addressing himself to a situation involving a mentally ill person but to a case involving a feebleminded child who would become subject to commandments upon reaching the age of thirteen. This appears evident from the fact that *Hatam Sofer* ruled that as a matter of normative Halakhah the child must be removed from the school upon reaching the age of *Bar Mizvah.* However, rules *Shevet Sofer,* even according to the opinion of *Hatam Sofer* a person who is totally incompetent may be committed to a mental institution in the hope of achieving a cure which will render the patient capable of performing *mizvot. Shevet Sofer* reasons that if no cure is achieved there is no reason to be concerned with regard to *timtum-ha-lev,* while if a cure is achieved the gain to the patient in being able to perform *mizvot* far

outweighs any negative effect which may arise from *timtum ha-lev.* [See also *Teshuvot Bet Yizhak, Even ha-Ezer,* no. 39, sec. 6.]

Curiously, none of these authorities takes note of a positive obligation to cure the mentally ill. It would stand to reason that the obligations which mandate extension of therapeutic aid (including the commandment "And you shall return it to him," Deuteronomy 24:26, which is understood by Rambam as mandating restoration of health no less than of property) would apply to restoration of mental, no less than of physical, health. If so, it may well be argued that, in the absence of a prohibition against permitting a *shoteh* to partake of forbidden foods, the immediate obligation to provide health care is not set aside for reason of the uncertain future effects of *timtum ha-lev.*

IV.

It is clear that insanity which poses a threat to the life of the patient or to the life of others is to be regarded no differently from any other threat to life. Accordingly, infractions designed to cure the illness and thereby remove the threat to life are warranted according to the general regulations governing *pikuah nefesh. Isur ve-Hetter he-Arukh* no. 59, sec. 35, records a query addressed to an earlier authority, Maharam, concerning an epileptic who sought advice regarding the permissibility of partaking of a forbidden food believed to posses medicinal properties capable of curing this disease. Maharam responded that, under the circumstances, such food would be permissible provided that the efficacy of the remedy has been established. This decision is predicated upon a determination that epilepsy constitutes a threat to life since the patient may endanger himself by "falling into fire or water." This decision is cited by many latter-day authorities in ruling that insanity constitutes a danger to life for the self-same reason.

The sole authority who differs with regard to this ruling is R. Iser Yehudah Unterman, *Ha-Torah ve-he-Medinah,* IV, 27, and *Shevet me-Yehudah,* IV, 27, and *Shevet me-Yehudah,* I, 49 and 297. Rabbi Unterman distinguishes between epilepsy (which is a

neurological illness) and psychiatric illnesses in presenting the rather strange-and indeed contrafactual-argument that the instinct for self-preservation is so deeply ingrained and suicidal tendencies are so rare that mental illness cannot be considered as falling within the catagory of diseases which imperil life. In support of his position Rabbi Unterman quotes the above cited responsum of *Hatam Sofer, Orah Hayyim,* no. 83. Rabbi Unterman argues that *Hatam Sofer* could not have counseled against institutionalizing the child in question if mental illness were deemed a threat to life. However, as shown earlier, in point of fact, *Hatam Sofer's* responsum deals with a case of feeblemindedness rather than with a form of mental illness. In any event, Rabbi Unterman's position is contradicted by numerous rabbinic scholars who deem insanity a threat to life. These authorities include R. Israel Meir Mizrachi, *Pri ha-Arez,* III, *Yoreh De'ah,* no. 21; R. Yehudah Leib Graubart, *Havalim ba-Ne'imim,* IV, no. 13; R. Mordecai Winkler, *Levushei Mordekhai,* I, *Hoshen Mishpat,* no. 39; Waldenberg, *Ziz Eliezer,* IX, no. 51, chap. 3, sec. 9; *Iggerot Mosheh, Even ha-Ezer,* I, no. 65; and R. Yitzchak Ya'akov Weisz, *Minhat Yizhak,* I, no. 115.