



Disabilities and Factors in Decision Making

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Question: Our synagogue is building a new sanctuary space and a woman reached out to explain that she suffers from Multiple Chemical Sensitivity Disorder (MCS) which has kept her from attending synagogue for more than a decade. With the construction of a new space, there's potential to accommodate her needs. Her needs include using materials free from phthalates, parabens, chemical flame retardants, volatile organic compounds, and a host of other toxic chemicals and substances regularly applied to everything from furniture to fabric. This will add unknown costs to the project.

Additionally, and perhaps of greater difficulty, due to the heavy presence of phthalates in scented cosmetics, attendees at synagogue services would generally have to forego most perfumes, cologne, and other scented items. Even residue from laundry detergents and shampoo might be problematic, though it would be hard to know in advance, and might vary from week to week. As an additional consideration, she and her husband now have a child (aged three). They have an express need to find friends who keep Kosher and Shabbat, both for themselves and their child.

What are the obligations and responsibilities of the synagogue in constructing a new sanctuary? Does the synagogue have the power to require attendees to refrain from the use of personal care products, cosmetics, etc., which would affect this woman?

Sincerely,

Ploni Almoni, Architect & Chair of the New Building Committee

Response: There are, fundamentally, two separate but related questions. (1) Is the community obligated to spend or fundraise extra money on the construction of a sanctuary space which accommodates this individual's needs. If so, what if any limiting principles exist? Is there a point at which accommodations are simply too expensive to be required or even responsible given other communal needs or priorities? Since any answer to this question will inevitably engage in cost-benefit analysis, properly weighing the benefits and costs, both to the woman and her family, on the one hand, and the broader community, on the other, will be imperative. (2) What sacrifices are individuals in the community required to make in their personal lives to facilitate attendance by this person. Is the principal of *tircha d'tzibura*¹ relevant and what are its applications and limits? Moreover, the scope and nature of communal authority in the current place and time is at issue. That a community could decide to spend more money on an accommodating sanctuary space is not in question; that a community can mandate that all members and invitees refrain from using the vast majority of commonly used cosmetics, scented personal hygiene products, and the like, tests the boundaries of communal authority, both practically and theoretically.

¹ *Tircha d'tzibura* is the notion that, while certain activities may be halachically desirable, the costs and inconveniences they impose on the community are an overriding negative consideration which render them, on net, undesirable.

The religious benefits of attending synagogue and costs of unattendance, formal and informal, are relevant to both analyses.

Tircha D'tzibura

When asking rabbinic colleagues and scholars about how they'd approach this question, they invariably started by noting that imposing restrictions upon personal behavior like wearing colognes, perfumes, or cosmetics, intuitively felt like a *tircha d'tzibura*, an unreasonable burden upon the community. Since this was the knee-jerk response of many learned people, it's worth examining this issue thoroughly to assess its applicability.

The phrase *tircha d'tzibura*, though popular and commonly invoked by observant Jews, is used only occasionally in formal halachic literature. Its general meaning is that some things, though desirable halachically, place an excessive burden on the community and should therefore be passed upon. Another way of looking at it is as the conclusory statement of an unstated cost-benefit analysis. "Though halacha in the abstract would favor x in an ideal world, the costs and burdens to members of the community in accommodating x are unreasonable." Of course, the relative level of halachic preference for the foregone activity, if any, represents an important element, *prima facie*, in this analysis.

The Talmud in Berachot cites the term explicitly:

אמר רבי אבהו בן זוטרתא אמר רבי יהודה בר זבדא: בקשו לקבוע פרשת בלק בקריאת שמע, ומפני מה לא קבעוה — משום טורח צבור.

Rabbi Abbahu ben Zutarti said that Rabbi Yehuda bar Zevida said: The Sages sought to establish the blessings of Balaam that appear in the Torah portion of Balak, as part of the twice-daily recitation of Shema. And why did they not establish it there? Because extending Shema would place an encumbrance on the congregation (torach tzibur).²

Whether it's because the Shema, with its three paragraphs, is already long enough, or because the blessings of Bilaam are relatively lengthy, or both, the sages felt that adding this section to the Shema, otherwise a meritorious idea, was too burdensome. In this context, *tircha d'tzibura* is about taking too much time in a communal setting.

Similarly, the Talmud in Berachot entertains a discussion about whether a person who omits "יעלה ויבא," the insertion for Rosh Chodesh, must repeat the Amidah.

והתניא טעה ולא הזכיר של ראש חדש, בערבית — אין מחזירין אותו, מפני שיש לו לאומרה בשחרית. בשחרית — אין מחזירין אותו, מפני שיש לו לאומרה במוסף. במוסף — אין מחזירין אותו, מפני שיש לו לאומרה במנחה. אמר ליה: לאו איתמר עלה אמר רבי יוחנן בצבור שנו.

² Talmud Bavli. Berachot 12b

But wasn't it taught: One who erred and didn't mention the new month, in the evening prayer, we do not require them to repeat it, since they can mention it in the morning prayer. In the morning prayer, we do not require them to repeat it, since they can mention it in the additional prayer. In the additional prayer, we do not require them to repeat it, since they can mention it in the afternoon prayer. [Rabbi Hiyya bar Abba] said to him: Wasn't it stated about this teaching that 'Rabbi Yochanan stated: this was only taught about the communal prayer.'³

Rabbi Yochanan's teaching is that individuals who omit *יעלה ויבא* must repeat the *amidah* but if the *sheliach tzibbur* omits the passage during the communal repetition, so long as there will be subsequent opportunities to mention the new month in a future communal *Amidah* during that day, they should not repeat. The reason for the distinction is left unstated.

Rambam, following Rashi's commentary, explicates the reason in his codification:

כל מקום שהיחיד חוזר ומתפלל ש"ץ חוזר ומתפלל אם טעה כמותו בעת שמתפלל בקול רם. חוץ משחרית של שהרי. ראש חדש שאם שכח ש"ץ ולא הזכיר יעלה ויבא עד שהשלים תפלתו אין מחזירין אותו מפני טרח צבור תפלת המוספין לפניו שהוא מזכיר בה ראש חדש

*In all cases where an individual praying for himself has to recite the Amidah a second time, the reader of the congregation does likewise, if he committed a similar error when reciting the Amidah aloud. The morning service on the first day of the month forms an exception. If on such a day, the reader forgot to recite the added passage beginning, 'May it ascend and come', till he had concluded the Amidah, he is not to read it a second time, so as not to inconvenience the congregation (*torach tzibur*). The reason is that he has still to read the additional service which contains a reference to the first day of the month.⁴*

Rambam's understanding is quoted verbatim in the *Shulchan Aruch*⁵ with the additional comments that a) it is not considered *torach tzibur* if the communal prayer leader remembers before he concludes the *amidah* and adds the passage in at the end; and b) Rema notes that some follow this opinion not just for Rosh Chodesh but also if the communal prayer leader makes an error with regard to Shabbat or Yom Tov additions.⁶

Following the traditional explanation of this Talmudic passage, this represents another example of *tircha d'tzibbura* amending the idealized *halacha*. Like the example regarding the blessings of Bilaam, the context again relates to not imposing an excessive time burden on the community.

These main examples leave the impression that this concept is only or mainly about respect for the time of community members. Are there any sources that imply a broader notion that

³ Talmud Bavli Berahot 30b

⁴ Mishneh Torah, Prayer and the Priestly Blessing 10:12

⁵ Shulchan Aruch, Orach Chayim 126:3

⁶ See also Tur, Semak

extends to other inconveniences? After all, our inquiry concerns restrictions regarding personal freedom and rules of comportment to be followed while attending synagogue, which aren't about time at all.

The Mishna in the seventh chapter of Yoma adds an example worth considering:

בא לו לכהן גדול לקרות. אם רצה לקרות בבגדי בוץ, קורא. ואם לא, קורא באצטלית לבן משלו. חזן הכנסת נוטל ספר תורה ונותנו לראש הכנסת, וראש הכנסת נותנו לסגן, והסגן נותנו לכהן גדול, וכהן גדול עומד ומקבל וקורא עומד, וקורא אחרי מות וארבע שעות. וגולל ספר תורה ומניחו בחיקו, ואומר, יותר ממה שקראתי לפניכם כתוב כאן, ובעשור שבחמש הפקודים קורא על פה. . . .

The High Priest came to read the Torah. If he wished to read the Torah while still dressed in the fine linen garments, i.e., the priestly vestments he wore during the previous service, he may read wearing them; and if not he is permitted to read in a white robe of his own, which is not a priestly vestment. The synagogue attendant takes a Torah scroll and gives it to the head of the synagogue that stood on the Temple Mount; and the head of the synagogue gives it to the deputy High Priest, and the Deputy gives it to the High Priest, and the High Priest stands and receives the scroll from his hands. And he reads from the scroll the Torah portion beginning with the verse: “After the death” (Leviticus 16:1) and the portion beginning with the verse: “But on the tenth” (Leviticus 23:26), and furls the Torah scroll and places it on his bosom and says: More than what I have read before you is written here. The Torah portion beginning with the verse: “And on the tenth,” from the book of Numbers (29:7), he then reads by heart⁷

The Gemara questions why the High Priest reads the second passage by heart; this is especially true given that the second reading is in the 23rd chapter of Leviticus, just shortly after the reading of *Acharei Mot* in chapter 16.

ג"ו בעשור" של חומש הפקודים קורא על פה. אמאי? נגלול וניקרי! אמר רב הונא בריה דרב יהושע אמר רב ששת: לפי שאין גוללין ספר תורה בציבור, מפני כבוד ציבור.

It was further taught in the mishna: The Torah portion beginning with the verse: “And on the tenth,” from the book of Numbers (29:7), he reads by heart. The Gemara asks: Why does he read it by heart? Let him furl the scroll to that portion and read it from the text. Rav Huna, son of Rav Yehoshua, said that Rav Sheshet said: It is because one may not furl a Torah scroll in public, out of respect for the community.⁸

Normally, it is prohibited to recite verses of Torah by memory, and certainly the ceremonial reading of the Torah must be read from the text.⁹ After all, so much ink has been spilled over the technical details of having a proper Torah text without blemishes, about whether a blind

⁷ Mishna Yoma 7:1

⁸ Talmud Bavli Yoma 70a

⁹ Talmud Bavli Gittin 60b, Temurah 14b

person may have an aliyah because they cannot see, and the like. Still, the Gemara somewhat easily dispenses with all of it because of *kevod hatzibbur*, respect for the honor of the community.¹⁰

Kevod hatzibbur is a slightly different concept than *tircha d'tzibbur*. Yes, the plain sense of the problem here is that the spectators will have to wait idly while the Torah is rolled, even if only for a minute or two. As Rashi explains, “they would have to wait in passive silence.”¹¹ Given the short distance between the two readings, though, it isn’t wasted time that’s at the heart of the matter. Rather, it’s the fact that the community is made to wait passively during a delay of any sort that is at issue. This sort of treatment doesn’t fully honor a holy community. That’s why it’s presented as a problem of *kevod hatzibbur*.

The Shulchan Aruch extrapolates a general rule from this and codifies the principle in this way:

אין גוללין ס"ת בצבור מפני כבוד הצבור ואם אין להם אלא ס"ת אחד והם צריכים לקרות בשני עניינים גוללים
וידחה כבוד הצבו':

*It is not proper to roll the Torah scroll in the presence of the congregation because of the honor of the congregation. If they only have a single Torah scroll and they have to read two portions they may roll and they override the honor of the congregation.*¹²

The notion of *kevod hatzibbur* is not absolute and may be overruled when circumstances are pressing. It’s not that the community absolves the honor owed to them, as might be expected, but rather that this value is superseded when there’s no other option. It’s an objective, not a subjective consideration

Whether we’re talking about *tircha d'tzibura* or *kevod hatzibbur*, there is significant conceptual overlap in terms of application. In all of the above situations, we’re talking about communal religious actions taken as a community. Whether it’s reading Torah or public prayer, it’s only applied to a *tzibbur*. Moreover, both of these concepts are only used as an internal deciding factor within halachic debates, not as halachic values in relation to external policy considerations.

In other words, we care about the burden on the *tzibbur qua tzibbur*, not individuals, even if the individuals are many in number. Even in a theoretical case where every individual is privately inconvenienced, that’s not sufficient to create a *tircha d'tzibbura* problem. The problem must be one that impacts the community in its role and actions as a communal unit. Praying is the quintessential communal action; putting on cologne beforehand is not halachically communal at

¹⁰ See Ritva, who quotes the Talmud Yerushalmi explaining that the second reading is not “from the main reading” and is only read as a summary of the day’s offerings. As such, it is not subject to the rule that written scripture may not be recited by memory and is technically exempted from usual requirements.

¹¹ Rashi, Commentary to Yoma 70a, S.V. “For the Honor of the Community”

¹² Shulchan Arukh, Orach Chayim, 144:3

all. The second relevant takeaway is that *tircha d'tzibura* is fundamentally an internal halachic consideration. In halachic discussions, Rabbis are free to assert that communal inconvenience or burden ought to override some other halachic consideration, as the question is rightly a legal one. Some considerations, though, are clearly discretionary policy considerations, not halachic considerations. For example, no one would doubt the authority of a synagogue to institute a nut-free policy at synagogue events due to a severe nut allergy in the community. Indeed, such policies are commonplace even though they substantially restrict what foods members of the community can eat onsite. Communal burden is not a relevant halachic category in such a conversation. So too, it is clearly within the purview of a synagogue (and perhaps mandatory under certain conditions) to institute a mask mandate or capacity restrictions during a global pandemic. Here too, the community's burden does not serve a halachic counterweight in any capacity. *Tircha d'tzibur* can override a halachic consideration such as the need to repeat the *amidah*, not override a synagogue's decision regarding discretionary matters such as public health, dress, and the like.

In our situation, the burden is not a burden on the community as such. There is no collective communal religious action at play in wearing colognes or perfumes to shul; these are entirely private considerations. It is a general burden that would apply as equally at a shul dinner or kiddush as during prayers. The moment of choice in our situation relates to what individuals do in their homes before coming to synagogue, not something that happens as a communal act in a communal context. It is simply an extra-halachic synagogue policy crafted to promote inclusivity.

It can be concluded, then, that *tircha d'tzibura* is a concept used in the Talmud and Poskim in a limited context even if the phrase is used more broadly socially. Halachically, it is a way of saying that, when we might prolong religious ceremonies or otherwise create more burdensome religious obligations, there is an internal halachic value called *tircha d'tzibura* which can settle debate in favor of less burdensome approaches to ease the burdens of the community. *Tircha d'tzibura* is not, however, a limiting factor that prevents the community from creating general rules or enactments about the comportment of its members on the premises of its property and at its events. This is certainly true when the rules being considered relate to protecting the health and wellbeing of attendees. *Tircha d'tzibura* can never assert itself to permit harming an individual. It does not apply in the situation at hand.

It's not only technical, but about what the community ought to desire. While it's religiously meritorious to rescue the community from certain burdens, like long waits, it's hard to argue that in this case. We should, as a normative matter, create communities that favor religious inclusion as a more important value than attendees' freedom to wear any scented products and cosmetics they so desire without regard for the deleterious effects on the health of other attendees.

Scope and Nature of Synagogue's Authority to Make Rules

A. Conceptual Nature of Modern Communal Authority

The second intuitive concern that folks consistently raise in regard to conversations about accommodation of this individual concern the shul's authority. Can a shul really tell attendees what perfumes or colognes they're allowed to wear? Must they? Should they?

Certainly, from a secular legal perspective, the synagogue, acting as a corporate non-profit entity has the right to set rules for invitees to its property under state law. It is a firmly established legal principle that business invitees are invited subject to any limitations of scope that the business chooses to express. In the classic example, if a business owner also lives in a different, segregated part of the premises, a customer who snoops around and trespasses into the owner's residence is a trespasser, even as they were lawfully invited into the storefront.¹³ A business may invite you to one part of the property but ban you altogether from another part. Similarly, businesses may lawfully impose restrictions on allergens (e.g. peanuts) to create a safe environment for other invitees and may require patrons to wear masks to protect against the spread of illness even if the local polity does not require such measures. These are settled, non-controversial legal claims in American law. Certainly, then, the board of directors has the secular legal authority to impose whatever restrictions it deems appropriate in the current case in their role as owners of the property.

From a Jewish perspective, though, it is useful to clarify the nature and scope of responsibility. The reason for this is twofold. First, it is religiously important for communities to act with the full weight and responsibility of their halachic obligations, and to do so knowingly. The board of directors of a synagogue is not merely a requirement of local corporate legal codes and the Rhode Island Secretary of State; they are the modern evolution of the Talmud's *שבעה טובי העיר*, charged with certain rights and responsibilities by Jewish law.¹⁴ They can vote to sell a synagogue and have the shocking power to override presumptive prohibitions about successor occupants to the property. In doing so, they vote to strip the synagogue of its sanctity, whether it be biblical or rabbinic.¹⁵ Conversely, they can declare previously secular spaces holy and render them with a measure of the sanctity of the Temple itself. Like a *beit din*, they have broad power to affect halachic realities.

Secondly, an internal framing rooted in halacha and halachic values may be a mechanism of creating a more compelling, cohesive framework for following any directives issued by the board of directors. This is particularly true in a case where individual compliance, voluntarily and hopefully cooperatively, will be necessary for true accommodation. If the board is fulfilling a holy religious obligation, one that increases the glory of The King and opens up access to Torah and Mitzvot, it gives an entirely different sensibility to their rules and a different motivation to community members for compliance. Lastly, it may very well be that an examination of the

¹³ *Whelan v. Van Natta* - 382 S.W.2d 205 (Ky. 1964)

¹⁴ See Talmud Megillah 26a; where the *shiva tuvei ha'ir* are those empowered to sell the synagogue's real and tangible property; see also Karlin, Rabbi Aryeh, "*Shiva Tuvei Ha'ir – Ta'kidam Uma'amadam Hamishpati*" noting the historical evolution from Roman era town managers to the modern-day fiduciaries of the synagogue. See also Responsa of Rabbi Eliahu Mizrahi (Shu"t R'EM) 53; and see Maharshdam on Yoreh Deah 175.

¹⁵ Add footnote about the debate over sanctity of synagogue

boundaries and limits of the power of synagogue leadership contains important halachic takeaways about affirmative religious responsibilities of said leadership. In this way, organic Jewish theories of a synagogue's corporate governance may matter greatly.

First, there is a threshold matter to contend with. It is often stated that our *kehillot* are not truly *kehillot* anymore, with notable exceptions like KAJ in Washington Heights, Satmar, and Elizabeth, New Jersey. Evidence for this claim is adduced from the case of early Shabbat on summer Shabbatot in North America. Even though a synagogue might schedule Friday night davening for a particular time, it is common practice that many, even most people in the community will accept Shabbat at other, later times, depending variously on work schedules, convenience, preference, and the like. Additionally, the fact there are multiple synagogues in a town or city, each with different standards and opinions, reinforces the concept. The idealized Kehillot of the medieval period, on the other hand, controlled communal affairs ranging from Kashrut, the Eruv, the Mikveh, and the acceptance of Shabbat with centralized authority.

The reason it's important to address this issue has to do with the roles communal leadership assumes for itself. If a synagogue's board of directors conceives of itself merely as stewards or fiduciaries for the synagogue's finances and operations, they will tend to focus financial and budgetary concerns. If, however, they perceive themselves as venerated lay volunteers who, like the *shiva tuvei hair* who are named for the "good" that they do, are charged with nurturing a holy community, they will have both a broader set of concerns and one that includes religiosity and communal wellbeing at the heart of the matter.

In response to the claim that we don't have real *kehillot* anymore, it is not necessary, descriptively or normatively, to claim that *kehillot* no longer exist and synagogues are just organizations that run prayer services and activities that people can attend but nothing more. Take the illustrative case regarding the start time of Shabbat. While *Behag* feels that it's candle lighting which is, mainly, the determining factor regarding the start of Shabbat, the *Shulchan Aruch* cites approvingly those who disagree claiming that *ma'ariv/barchu* is the main factor, and noting that, in our days, when Kabbalat Shabbat has been added to the prayers, it's *mizmor shir l'yom HaShabbat*.¹⁶ For an individual, this is true even if they pray before the community.¹⁷ And notably, if the majority of the community accepts Shabbat early (presumably through praying Kabbalat Shabbat), "the minority are forced to follow them."¹⁸

Now, it's clear as day that this *halacha*, as stated, is no longer practiced in that way in many Jewish communities in our country. If the synagogue has early davening on Friday night, most people still accept Shabbat whenever it's most suitable for them. One could make the claim that this is because communities no longer exist as real entities. However, such a solution does not match the ways communities self-identify or objectively operate. Most communities still have storied customs, halachic and otherwise, distinct character, and a notable, distinguishing flavor

¹⁶ See SA:OH 264:10

¹⁷ SA:OH 264:11

¹⁸ SA:OH 264:12

they pride themselves on. When they advertise to newcomers, they self-identify as *kehillot*/communities, often emphasizing the notion of *kehilla kedosha*/sacred community as the most important feature of the synagogue. Modern synagogues are far more than mere minyanim.

The different ways in which synagogue communities' responded to the Covid-19 pandemic reflect this reality; certainly mask mandates and safety measures were not just a reflection of secular legal requirements but also of halachic analysis and debate regarding Jewish legal obligations, *pikuach nefesh*, and the *metziut* before us. Universally, though, synagogues generally acted as much more than big *shtieblach*, but rather set the tone about how to handle not just synagogue life but religious life generally during a pandemic of this sort. This was a reflection of their power and self-perception as modern *kehillot*.

Indeed, other more fitting explanations than the dissolution of *kehillot* are already available in halacha. "If most of the community does not come to synagogue, we do not follow the minority [to mandate early acceptance of Shabbat]."¹⁹ As a matter of fact, due to diverse work schedules and other factors, few modern communities have anywhere near a majority attend Friday night prayer. Moreover, "in a city with multiple synagogues, one need not follow neighboring synagogues."²⁰ The authority of a *kehilla* need not be universal or centralized within a city to be said to exist. Moreover, a *kehilla* need not be able to exercise total control over its members to be called a *kehilla*.

It's my contention that synagogues are most certainly modern *kehillot*, extensions of the powerful communities of yesteryear, but with certain limitations and differences based upon the rhythms and norms of modern living. This matters a great deal because it implies a conceptual framing of a synagogue's board of directors that empowers it to make regulations and policies to foster sanctity and wellbeing broadly speaking. The community's leaders ought to be involved in proactively making decisions like the ones at play in this discussion.

B. Limits & Outer Boundaries

Intuitively, many individuals I spoke with were skeptical about the authority of a synagogue community to create restrictions on attendance that related to the wearing and use of cosmetics and scented products. What is the limiting principle or principles on communal rulemaking in halacha?

To start, it's worth briefly recounting the conceptual framework by which communal rules may be proffered altogether. Modern authority draws originally from the biblical precedent of Ezra the Scribe. Pained by the intermarriage and abandonment of the Torah by those returning from exile, Ezra decreed that all returnees come to Jerusalem in order to demand confession and repentance:

¹⁹ Be'er Heitev, Orach Chayim 264:19

²⁰ Ibid.

*Then Ezra rose from his place in front of the House of God and went into the chamber of Jehohanan son of Eliashib; there, he ate no bread and drank no water, for he was in mourning over the trespass of those who had returned from exile. Then a proclamation was issued in Judah and Jerusalem that all who had returned from the exile should assemble in Jerusalem and that anyone who did not come in three days would, by decision of the officers and elders, have his property confiscated and himself excluded from the congregation of the returning exiles.*²¹

Since Ezra threatened to confiscate the property of anyone who ignores the decree, the sages deduce the principle that “that which is declared ownerless by the court is ownerless.”²²

Similarly, the Talmud cites a *Baraita* that “it is permitted for the residents of the city to set the measures, the prices, and the wages for workers, and to fine people for violating their rules.”²³ Meiri explains that this is simply the application of *hefker beit din hefker*, Ezra’s principle, and that it applies not only to monetary rules but also “if a person is liable for lashes or excommunication”, namely to matters of punishment.²⁴ Notably, the powers originally reserved for a religious authority, like Ezra or Joshua, have been passed down to the *beit din* and now to the “residents of the city” themselves according to the *Baraita*.

Rivash licensed a much-expanded version of this power when he was presented with a dilemma regarding the outer limits of communal legislation. A certain community had enacted a rule that all marriages need prior consent from the leaders of the community and that anyone who married without such consent and without the presence of a quorum of ten would have the marriage retroactively annulled. The proposed legal mechanism to effectuate this ruling was that the “community would render ownerless the money or valued item that the man used to betroth her that it should be deemed null and void and the betrothal would be uprooted and the woman would be able to remarry without a bill of divorce which would not even be required out of doubt [about concern regarding the validity of this decree].”²⁵ In a sense, this is the ultimate test of the authority of *hefker beit din hefker*, as few matters are taken more seriously than the possibility of allowing a married woman to remarry illegally. An errant ruling would result in adultery and possible *mamzerut*.

In a broad testament to the wide breadth of communal authority, Rivash quotes the ruling from Bava Batra 8b and rules that “they didn’t only grant power in these specific matters but also in any matter whatsoever where they see fit to legislate and penalize the violator.”²⁶ Just like for Meiri, the principle of *hefker beit din hefker* is taken to mean much more than the words suggest. They can use their power to creatively annul unvetted marriages, just as Ezra paired

²¹ Ezra 10:6-8

²² See Babylonian Talmud, Gittin 36b and Ramam, *Mishneh Torah*. The Laws of the Sanhedrin and the Penalties within their Jurisdiction 24:6.

²³ Babylonian Talmud, Bava Batra 8b

²⁴ Commentary of Meiri to Bava Batra 8b, SV *ur’shain*

²⁵ Teshuvot Rivash 399

²⁶ Ibid.

the threat of property confiscation with a holistic agenda of national repentance. In fact, a community can do whatever it wants, more or less, and create punishments to give teeth to its rulings.

Is there any limiting principle on the discretion of communal enactments outside of ritual violation of the Torah itself? Rivash cites a ruling of Rashba regarding a city that sought to levy a tax on real property of residents of the city, whether or not the real property was within their geographic jurisdiction or not. Rashba ruled that legislative intent mattered in this case and felt they were only enacting the rule to levy more taxes against one specific wealthy individual. “This seems to me nothing more than robbery and the community cannot vote to legalize robbery.”²⁷ Rivash generalizes the²⁸ abstract principle:

*[T]he community may not legislate to the prejudice of any of its members; and any such legislation is unlawful as to any individual thus prejudiced who does not consent to being included within its ambit. The governing principle is that the community may not legislate to steal from anyone.*²⁹

Rema, citing Rivash’s ruling, notes:

*It is clear that the communal leaders do not have the power to legislate except in accordance with law and justice, and that they may not abuse individuals, nor may the majority rob individuals . . . and Rashba wrote to the same effect, in a responsum cited by Rivash (#477) concerning a community that sought to adopt an enactment to collect taxes on all property there or elsewhere, their purpose being to impose liability on a particular individual who resided among them . . . the residents of the city do not have the power to legislate as they please, but have only the power conferred on them by law. This [unlimited power] never was and never will be!*³⁰

Rashba, Rivash, and Rema are consonant in suggesting two distinct but overlapping concerns in these cases, 1) a lack of equity in the law and 2) laws that are unjust and immoral. Akin to the bills of attainder banned in the American constitutional system or the equal protection clause of the 14th Amendment, halacha requires communal enactments be equal, both in theory and in enforcement.

In a sense, the restrictions on access contemplated in this case are not categorically different than a policy whereby an Orthodox synagogue has rules barring phones or photography on Shabbat, asks Jewish males to wear kippot, asks women to dress in a particular way, or closes a parking lot. In this community, individuals would simply have to exercise care in the various ways necessary to allow for this woman’s attendance.

²⁷ Teshuvot Rashba 5:178

²⁸ This is what becomes evident from the rulings of Rashba, Rivash, etc. as it was the application of the rule in its prejudice against a specific individual which rendered it problematic.

²⁹ Teshuvot Rivash 477

³⁰ Teshuvot Rema 73

There is a longstanding Jewish custom of communal organs leaning into their authority for the religious benefit of individuals in the community. It began with Ezra, who threatened confiscation of property as a means to incentivize repentance and separation from non-Jewish wives. In that spirit, Rivash permitted a community to utilize its broad power to enact strict requirements surrounding marriage to protect against ill-advised relationships. In our time, with the proliferation of new environmental toxins uncommon in previous generations, new needs have arisen but the fundamental process is the same. It is not just within the power of the community to enact necessary *takkanot*, it is the customary and righteous practice to proactively address problems as they arise.

Dina D'Malchuta Dina & The Role of Equity

This responsa is addressing two related but distinct questions. The first relates to the necessary comportment of invitees and attendees at the synagogue in order to facilitate attendance of a person with Multiple Chemical Sensitivity Disorder (hereinafter “MCS”). That’s the question we’ve chiefly been addressing until this point. The second relates to financial costs that would need to be incurred by the synagogue as they construct a new sanctuary space (a fundraising and construction project that was happening anyway) in a way that accommodates this individual. Both issues may be significantly affected and governed by the application of secular American law regarding disability accommodation if it can be said to have been incorporated via the mechanism of *dina d'malchuta dina*.

It's worth making a Jewish jurisprudential note at this juncture. Broadly, many conversations regarding disability accommodation, and cost benefit analyses in particular, in Jewish law, resort to value-based appeals or creative halachic constructs. After all, disability accommodation as such is a modern concept. Does Jewish law require a synagogue to build a ramp or provide for wheelchair accessibility? Provide an ASL interpreter for *tefillah* and *shiurim*? At the expense of a nicer weekly kiddush or youth prayer groups? Money is fungible and institutions constantly struggle to meet the vast, diverse needs of the community. While traditional sources have much to say about the need for inclusion and halachic barriers thereto, there is not a clear halachic rubric for how to evaluate these sorts of questions concretely. True, there are sources which address the relative preference of a Rabbi or a *chazan*, school or *mikveh*, etc. But these analyses usually weight the relative value of key institutions of Jewish life when there is a dearth of resources to establish the central organs of the community. They do not provide a modern rubric for how synagogues or other institutions might evaluate the costs of disability inclusion.

Instead, answers tend to rest in the authority of the Rabbi being asked and the community’s desire to comply with their rulings and preferences. Secular law, however, does have detailed laws and guidelines regarding disability accommodation in workplaces, public forums, schools, and other core areas of public life, providing frameworks to evaluate when accommodation is required and what is deemed sufficient. My contention is that this framework serves as a bona fide peg to ground halachic analysis in this area and is the main lens to evaluate whether accommodation is discretionary or mandatory. Even if there are not clear answers, as there

often will not be, the secular legal standards provide a mechanism for evaluating and a language for critical discussion and debate within communities.

Equity and moral uprightness³¹ are not only limiting factors as it relates to the scope of communal power as discussed above; they are similarly the limits placed upon the principle that, in non-ritual matters, the secular law is incorporated as a facet of Jewish law (*dina d'malchuta dina*).³² As Professor Shmuel Shilo noted in his exhaustive studies on the topic, equal application of the law is the main bar to incorporating secular law into Jewish law, and that view is unanimously held. “There may be some different interpretations of the equality rule, but the rule in itself is one that has been accepted by all earlier and later authorities, whether they are of the Ashkenazic school or the Sephardic school, or followers of any other halachic school.”³³ The equality rule (which surfaced in teshuvot of Rashba, Rivash, and Rema cited earlier) was first promulgated by Ri Migash,³⁴ codified by Rambam,³⁵ and followed by Tashbetz,³⁶ Shulchan Aruch,³⁷ and all subsequent authorities.

A responsa by Mahari Bruna dating from 15th century Germany sheds an important light on the rationale undergirding acceptance and incorporation of secular law into the Jewish legal system.³⁸ At the time, there was a German regulation banning a lawyer for one litigant from serving another party in the same lawsuit due to a conflict of interest. Rabbi Israel was presented with a case in Beit Din where the former lawyer of one party was now representing the opposing party. Though he permitted it at the time, he wrote that his decision was, in retrospect, an error. Crucially, the reasoning was that we Jews are supposed to live up to a ethical standard and could not allow Jewish law to be seen as morally inferior.

Similarly, Chatam Sofer rendered an important decision about the applicability of secular trade regulations in the wine and liquor industry and their acceptance in Jewish law.³⁹ There he reasoned that Jewish law would have made the same or similar regulations were it in a position of legal power and responsibility. By implication, regulations of secular governments are broadly benevolent and, if so, should be seen as gap-fillers that approximate what Jewish law would arrive at were it fully autonomous. Professor Shilo describes this decision as “the watershed decision about adopting secular law on the bases of its equitable content.”⁴⁰

³¹ See Teshuvot HaRosh 18:16 for an application of how a law must be deemed morally righteous to be accepted as Jewish law via incorporation. In that case, there was insufficient notice about a loss of financial rights and the failure of the secular law to require adequate notice was seen as barring incorporation via *dina d'malchusa dina*.

³² See Talmud Bavli Nedarim 28a, Talmud Bavli Gittin 10b, Talmud Bavli Bava Kamma 113a, Talmud Bavli Bava Batra 44b.

³³ Shilo, Shmuel. “Equity as a Bridge Between Jewish and Secular Law.” Cardozo Law Review. Volume 12 at Pg. 737.

³⁴ Commentary of Ri Migash to Bava Batra 54b, S.V. *Dina d'malchuta*.

³⁵ Mishneh Torah, Sefer Nezikin, Hilchot Gezeilah v'aveida 5:14

³⁶ Tashbetz Responsa No. 1:158

³⁷ Shulchan Aruch Choshen Mishpat 369:8

³⁸ Mahari Bruna Responsa No. 132

³⁹ Sofer, Rabbi Moshe. Shut Chatam Sofer, Choshen Mishpat, Responsa No. 44

⁴⁰ *Supra* Note 33 at 745.

Given the incorporation of secular law, our analysis turns to the application of secular law in this case. In the United States, the Americans with Disabilities Act (hereinafter “ADA”) bans discrimination and broadly requires reasonable accommodations for those with disabilities in order to access public settings and services; in Israel, the Equal Rights for People with Disabilities Law requires approximately the same things. True, since most Jewish communities are located in Israel or the United States, it happens to be a legal truism that almost all Jewish communities, currently, are under some legal obligation of inclusion through accommodation. More importantly, from a perspective of halachic analysis, these laws codify social norms of inclusion that virtually all modern representative legislatures have enshrined with the force of law; the law is then evidence of an international universal social and legal norm. And so it can fairly be said that Jewish communities, which have additional religious mandates for inclusion well beyond secular ethical considerations, or which must be at least as ethical, as per the rationale of Mahari Bruna, Chatam Sofer, et. al. have *a fortiori* commitments in this realm. From the Chatam Sofer’s perspective, these can be said to represent approximately what Jewish courts would have enacted in a situation of full autonomy.

Now, as an aside, it is worth noting that religious institutions are granted an exception to certain elements of the ADA. One might try to argue that this means there is no incorporation of secular law as the law in question does not apply to religious institutions. In a limited sense, this is not accurate, as most religious institutions also engage in social and other functions which are not exempt from the regulations of the ADA; only distinctly religious events are covered. While davening is exempted, a soup kitchen is not. In the bigger picture though, this exception is only granted because of secondary constitutional concerns in the United States regarding the separation of church and state and the state’s limitations of legislative power where religious acts are concerned. Ironically, while it may be a feature of U.S. law that religious institutions cannot be held even to an equal standard as other institutions by the state, it is conversely a feature of Jewish law that we may not hold ourselves to a lower ethical standard than said other institutions. As such, *sevara* dictates that *dina d’malchusa dina* should apply in this case and synagogues would be bound by provisions of the ADA as a matter of Jewish law, technical exemptions notwithstanding.

At first, those suffering with MCS were not successful bringing claims under the ADA for two reasons.⁴¹ First, courts were skeptical about the reliability of MCS as a bona fide medical condition. District Courts in both New York and Alabama granted motions barring Plaintiffs from bringing testimony about their medical conditions. Essentially, judges in the recent past viewed Plaintiffs’ conditions as fake or psychosomatic.⁴² Secondly, even when courts were convinced

⁴¹ It’s worth noting that most legal claims to date have been brought under Title I of the ADA, which deals with employees and accommodating workspaces, not public accommodation generally. Still, the analysis would be more or less the same for public accommodation under the ADA.

⁴² Andrew K. Kelley, Sensitivity Training: Multiple Chemical Sensitivity and the ADA, 25 B.C. Env’tl. Aff. L. Rev. 485 (1998), <http://lawdigitalcommons.bc.edu/ealr/vol25/iss2/5>

there was a disability, they held that required accommodations were unduly burdensome as a matter of law.⁴³

Generally, a five-factor test is conducted to determine if an accommodation is burdensome under the ADA. Those factors are 1) net cost of the proposed accommodation; 2) overall financial resources of the covered entity and effect on overall operations; 3) size, type, and number of locations at play; 4) what type of operation is being discussed; and 5) effect upon other employees, attendees, etc. We'll come back to this five-factor test as it applies to our case.

Recently, though, there has been a dramatic shift in the way courts have handled MCS accommodation cases. In 2007, Susan McBride sued the City of Detroit, claiming she could not work as a City Planner unless the City of Detroit instituted a fragrance-free workplace policy in the buildings in which she worked, switched to using scentless soaps and cleaning products, and generally enacted the same sort of accommodations contemplated in our case.

A Federal Court ruled in her favor.⁴⁴ The Court noted that the ADA requires that a major life activity be interfered with in order to have a qualifying “disability” and that in this case, Plaintiff’s workplace interfered with breathing, certainly a major life activity.⁴⁵ As such, MCS is now recognized as a disability under the ADA according to Federal law. The court noted in *dicta* that some who suffer from MCS have only minor symptoms and these would not represent a disability under the ADA. Severe symptoms, however, are. Further, the Court noted that a fragrance-free policy was not unreasonable and individuals in the workplace and the City itself should institute appropriate policies in order to allow the Plaintiff to safely attend work.

This provides a helpful, modern rubric for cost benefit analysis in our case and regarding accommodations in Jewish institutions generally. The rubric can be applied to both elements of the questio. As the Court noted in *McBride v. City of Detroit*, the cost of creating a fragrance-free environment is low and is merely a question of will. While it certainly would impact the Certainly, just as a synagogue enforces any other policies regarding attendance, as mentioned above, it would be able to institute such a policy. The cost would be negligible, and synagogues do not generally have multiple buildings or large areas that render enforcement difficult. True, synagogues are less formal than workplaces and attendees come voluntarily, and so one might argue that the nature of the institution cuts against the idea of enforcing a strict fragrance-free policy. On the other hand, synagogues are literally named for the collective gathering that occurs there (*beit kenesset*) and charged with being bastions of moral authority; inclusion seems eminently reasonable in a house of worship. Lastly, it certainly does have an effect on

⁴³ *Ibid.*

⁴⁴ *McBride v. Detroit, City of*, No. 2:2007cv12794 (E.D. Mich. 208)

⁴⁵ The ADA does not seek to list disabilities precisely to allow for a flexible definition that adapts to real world circumstances as experienced in the lives of human beings. That’s the thinking behind a requirement that a major life activity be substantially interfered with.

the other attendees, the last factor in the analysis, but the effect is objectively small. Folks are not being asked to take any particular action but rather to refrain from doing something which would injure another attendee. While it's more involved and less familiar, it's not categorically different than banning peanuts on the premises due to a severe allergy. In essence, it's akin to saying someone is allergic to an ingredient in many cosmetics and we're asking attendees to not harm this individual.

As it relates to increased costs for chemically clean construction, the analysis is more complicated. In the case at hand, the synagogue is undergoing a capital campaign with anticipated excess proceeds well beyond the cost of construction. Monies raised above the costs involved will be placed in an endowment fund meant to be invested and serve as both a source of interest income and to support the long-term security of the institution. Spending a bit extra on acceptable materials will only have an indirect effect on synagogue operations by slightly reducing future interest income; no program will be directly affected budgetarily by the extra expenditure. Indeed, publicizing the construction of a chemically clean, safe and inclusive sanctuary may indeed garner support or donations that offset the extra costs to some degree.

According to this ADA style analysis, if there were an accommodation which would significantly affect the existing programming or constitute an unreasonable expense given the assets and size of the organization, accommodation would not be required. While this is just one of many possible rubrics for cost benefit analysis, itself subject to highly subjective evaluation, it nonetheless represents a legal mechanism for analyzing and considering whether a synagogue ought to make an accommodation given inconvenience or expense.

In conclusion, *dina d'malchusa dina* and the incorporation of the American with Disabilities Act (or other similar acts in other jurisdictions) becomes, *ipso facto*, a Jewish law obligation. We must not have lower ethical standards, and these standards are a fair approximation of what religious governance would have produced. Synagogues, schools, and other institutions should, as a matter of halacha, seek to determine whether they would likely be obligated to accommodate a particular individual under the ADA, acknowledging that even those analyses are quite subjective and subject to debate.

Tzorchei Hair

For certain fundamental communal obligations and institutions, is it accepted law that a minority of the community may coerce the majority in specific performance even if the majority objects. Analysis of the applicable principles in this area will shed more light on how a community should act in this and similar situations. Self-evidently, the notion that the minority can coerce a majority is fraught, as minority rule is generally a detestable state of affairs involving coercion and discord that, by definition, violates the express desires of most people. Therefore, there must be strong limiting factors on such an idea and compelling, objective justification for minority coercion. As the Shulchan Aruch codifies:

The residents of a town can force one another (even the minority can force the majority - Rabbenu Yerucham 6:31) to put up a wall with gates and a bolt for the town; and to build a synagogue and to purchase a Torah scroll, Prophets, and Writings so that anyone from the community may read from them. Gloss/Rema: And the same is true for all the needs of the town and see Orachot Chaim 55 - Laws of Hiring a Cantor for the People of the Town; and also ibid., 53. And the residents of the town can force one another to provide hospitality for guests, distribute charity to them and to contribute to the charity container (Mordekhai on Bava Barta: Chapter 1; Teshuvot Maimoni on Mishneh Torah, Acquisition 59)⁴⁶

Notably, there are two sorts of fundamental concerns included, those that are not distinctly religious but promote general welfare or security (e.g. a city wall, gates, etc.), and those that are about the religious life of the community (e.g. Torah scrolls, etc.). Explicitly stated in the rationale of the Shulchan Aruch is equality of need. Everyone shares in the benefits provided by a secure city; so too, everyone shares in the benefit of the town having a Torah scroll. This is why he states, “so that anyone from the community may read from them.” The Torah is a public resource, to be read from at synagogue (also a communal obligation according to many authorities) but also to be available for study, akin to important books in the reference section of public libraries in modern secular societies.

Rabbi Moshe Isserles expands the category not just quantitatively but qualitatively as well. First, he notes that this is true “for all the needs of the town/העיר צרכי”. Still, from this alone, it could be presumed that this meant all the needs of the town that are public goods, akin to the other enumerated examples in the Shulchan Aruch, which benefit the public at large. Rema would just mean, then, that the Shulchan Aruch’s list is not exhaustive but illustrative. Rema’s examples, however, prove a different understanding altogether. Both “hospitality for guests” and “charity for the poor” are categories that will not expressly benefit all or even most of a city’s residents. Instead, they represent the חייובי העיר/the religious obligations of a city in order to be a morally upright community. Moreover, they aren’t just any regulations, but those regulations which provide security and comfort for those in vulnerable or isolated positions. If a city is obligated to provide hospitality or charity, the minority may coerce the majority. The principle is now expanded to state that a minority may coerce the majority in matters related to the fulfillment of the communal religious obligations of a city. In this way, they are similar to the Cantor, who helps members of the community fulfill their individual and communal religious obligations, respectively. Though there are individual requirements of both charity and hospitality in Jewish law, the Rema is relating to the components of those *mitzvot* which are fulfilled communally, as communal obligations, which is why, apparently, they can fairly be classified as צרכי העיר.

True, Rabbi Joshua Falk appears to limit the expansiveness of his revered teacher, Rema, when he ruled that a minority may not coerce a majority to bribe public ministers to help collect debt owed to Jews, reasoning that this was not something “needed by all Jews,” in contrast to a *mikveh* or wedding hall.⁴⁷ *Pitchei Teshuva* explains Sema’s ruling as requiring universality; in

⁴⁶ Shulchan Aruch, Choshen Mishpat 163:1 and Rema

⁴⁷ Sema 163

order to qualify a public need objectively, it must be “customary across all Jewish communities.”⁴⁸ It’s apparent to me that this is not a technical requirement. Rather, Rabbi Eisenstadt is seeking a bright-line limiting principle to define which issues are rightly subject to minority coercion. Logically, those needs shared by all communities, or perhaps the vast majority of communities, are therefore objectively necessary.

Applying the above to our case, certain requirements become evident. Broadly, all communities have religious obligations regarding inclusion and the need to thoughtfully ensure access to those who may require accommodations. This religious norm is also a secular legal norm, as we have discussed above at length, a point which proves its universality. From a bird’s eye view, collecting extra funds for inclusion is not dissimilar from communal collections for charity. Inclusion broadly seems to fall within Rema’s version of צרכי העיר.

It’s possible to claim, then, that even if only a minority of the synagogue wants to spend extra money to build a synagogue which the person with Multiple Chemical Sensitivity Disorder can access, they can coerce the majority to do so and share the costs. Inclusion is a universal communal need, present for all communities. True, it’s possible that looking at inclusion, categorically, is too broad a scope, and one would need instead to look at the relative rarity of a particular category of disability in order to decide if the inclusion of that specific disability is applicable “across all Jewish communities.” According to this logic, accommodation of extremely rare conditions is not subject to minority coercion as it is not applicable, for a particular need, “across all Jewish communities.”⁴⁹ Notably, this is a different sort of analysis than that of the ADA, which does not concern itself with the commonality of the particular disability but rather with the severity of the disability, however rare or unusual.

In our case, it should be noted that MCS is surprisingly common. According to the benchmark 2018 study, peer-reviewed and highly reputable, conducted by Dr. Anne Steinemann of the University of Melbourne, fully twenty-five percent (25%) of Americans (approximately 55 million people) suffered some symptoms of Multiple Chemical Sensitivity, with 76.2 percent of that group suffering severe symptoms.⁵⁰ Just under half of those who reported symptoms had a formal medical diagnosis and approximately 22 million Americans had taken time off from work or lost a job altogether due to the illness in the prior year. While there is surprisingly little public discussion about the harmful effects of phthalates, parabens, flame retardants, and volatile organic compounds, both the pollutants themselves and their harmful effects are, in fact, ubiquitous. Not only this, but the incidence will only grow with the continued increase of

⁴⁸ Pitchei Teshuva, Choshen Mishpat 163

⁴⁹ A powerful retort to this is evidenced by legislation such as the Americans with Disabilities Act and similar legislation which does not pay heed to the rarity of the accommodation needed or the relative commonality of its cause. Rather, it is the costs and burdens of the accommodation required which are live questions.

⁵⁰ Anne Steinemann. **National Prevalence and Effects of Multiple Chemical Sensitivities.** *Journal of Occupational and Environmental Medicine*, 2018; 60 (3): e152 DOI: [10.1097/JOM.0000000000001272](https://doi.org/10.1097/JOM.0000000000001272)

chemical pollutants. According to Steinemann, “MCS is a serious and potentially disabling disease that is widespread and increasing in the US population.”⁵¹

While only one person has come forward expressly asking for accommodating synagogue construction, it's statistically likely that others, perhaps many others, currently suffer or will require comparable accommodation in the future. It's taken as a given, both legally but also informally, that accommodation for people in wheelchairs, whether via ramps, Shabbat elevators, or other means, is necessary, and this is “customary across all Jewish communities.” Statistically, Multiple Chemical Sensitivity Disorder is far more common. In fact, Dr. Steinemann, the leading expert on MCS, specifically recommends “choosing products without any fragrance, and implementing fragrance-free policies in workplaces, health care facilities, schools and other indoor environments.”⁵² It stands to reason that synagogues ought to consider implementing such policies even absent requests for accommodation.

To be clear, this rubric is primarily useful as a conceptual framework, not as the legal bases for coercion. Often, accommodation is viewed as something done for a minority of excluded individuals but something that's peripheral to the main activities of the community. The Rema challenges us to recast how we understand communal assistance and outreach as a fulfillment of our collective Torah obligations.

Environmental Hazards Generally

In this case, it is also relevant that the classes of chemicals being references cause negative health effects generally apart and aside from those suffering MCS.

“God blessed them and God said to them, “Be fertile and increase, fill the earth and master it; and rule the fish of the sea, the birds of the sky, and all the living things that creep on earth.” Procreation is not just a commandment among the 613, it is the original mission statement given to humankind and the lens through which the actions of humans are regularly judged in the Book of Genesis. Formal legal analysis of the parameters of the command to be fruitful and multiply is unnecessary to highlight the importance of the concept. As Rabbi Isiah Levi Horowitz notes in his popular prayer for the wellbeing of children:

You created the world in order to make your Godliness known through your holy Torah, as the sages, of blessed memory, taught: “In the beginning - for the sake of Torah and the sake of Israel,” for Israel is Your nation and Your heritage. It is the nation You chose from all others, to whom You gave Your holy Torah, and which you brought close to your great Name. To ensure the continuation of your Torah, we received from You, Lord, our

⁵¹ University of Melbourne. "One in four Americans suffer when exposed to common chemicals: University of Melbourne research reveals that one in four Americans report chemical sensitivity, with nearly half this group medically diagnosed with Multiple Chemical Sensitivities (MCS), suffering health problems from exposure to common chemical product." ScienceDaily. ScienceDaily, 14 March 2018.

⁵² *Ibid.*

*God, two commandments: You wrote in your Torah, “Be fruitful and multiply” and You also wrote, “You shall teach them to your children.” These two commandments have a single purpose: You did not create the world so that it be desolate, but rather that it be inhabited by people; it is for Your honor that You made, created, and fashioned the world, so that we, our offspring, and the offspring of all Your people know Your Name and study Your Torah.*⁵³

Procreation is mission critical in the Torah.

At the same time, rising infertility amongst the population generally but also in observant Jewish communities has caused immeasurable pain, hardship, and burden. Support groups, financial assistance, dedicated awareness Shabbatot, and a host of other responses have emerged in response to this increasingly common tragedy. While infertility is certainly not new, modern incidence far exceeds past prevalence. While many assume that social factors such as later marriage and contraception are the primary causes, the leading studies tell a different story.

In reality, endocrine disrupting chemicals are dramatically reducing testosterone in men with large effects on fertility and reproduction.⁵⁴ One of the worst offenders is the class of chemicals called phthalates used in children’s toys, medical tubes, floor and wall coverings, soaps, shampoos, and fragrances, among many other things, which are frequently used to soften plastic or bind fragrance.⁵⁵ Bisphenol A (BPA) has been proven to cause higher rates of male sexual dysfunction, poor egg quality, and premature ovarian insufficiency.⁵⁶ Chemical flame retardants are found in vehicles, stuffed animals, mattresses, yoga mats, and a wide variety of other flammable materials. Used ubiquitously to prevent fire, they are proven endocrine disruptors which make it harder to become pregnant (they also have negative effects on fetal development).⁵⁷

As it happens, these groups of chemicals are the very same ones that cause MCS. This is relevant because it helps reframe the request for accommodation. While the particular request is due to acute symptoms caused by the presence of chemical toxins, those same chemicals are proven to cause infertility.

In addition to fertility concerns, the classes of chemicals discussed abet ongoing environmental catastrophe. For example, BPA is known to cause serious problems in animal life and particularly in aquatic life. Chemical flame retardants wind up in water systems and aquatic

⁵³ Horowitz, Rabbi Isiah Halevi, Prayer for Parents for their Children, found in Siddur Sha’ar HaShamayim.

⁵⁴ See Levine H, Jørgensen N, Martino-Andrade A, Mendiola J, Weksler-Derri D, Mindlis I, Pinotti R, Swan SH. Temporal trends in sperm count: a systematic review and meta-regression analysis. Hum Reprod Update. 2017 Nov 1;23(6):646-659. doi: 10.1093/humupd/dmx022. PMID: 28981654; PMCID: PMC6455044.

⁵⁵ Swan, Shanna. Countdown: How Our Modern World is Threatening Sperm Counts, Altering Male and Female Reproductive Development, and Imperiling the Future of the Human Race. Pgs. 115-117.

⁵⁶ *Ibid.* at 117-119.

⁵⁷ *Ibid.*

life.⁵⁸ Phthalates are extremely destructive to animal life with significant negative impacts on animal fertility.⁵⁹

Famously, Rabbi Yehezkel Landau asserted that hunting was forbidden not only because it ran counter to the values of Judaism but because of the life-threatening danger involved.⁶⁰ Now, at no point did Rabbi Landau demonstrate that hunting posed a significant level of risk such that it should constitute a technical violation of the commandment to protect life. Still, the presence of serious danger in an otherwise religiously frowned-upon activity was sufficient to assert a bona fide prohibition.

So too here, the commandment to be fruitful and multiply and the proscription not to destroy are brought to the fore. While it is hard to know if the presence of these chemicals will meaningfully contribute to fertility in a particular couple, they certainly do so at scale. Moreover, whatever the legal theory, religious souls cannot tolerate the precarious state of God's glorious creation on our planet today. We find ourselves in a position not imagined since the generation of the flood, whereby the end of all life is in front of our very eyes. As the Sefer HaChinuch notes in his commentary to the commandment not to destroy fruit-bearing trees:

The root of this commandment is well-known - it is in order to teach our souls to love good and benefit and to cling to it. And through this, good clings to us and we will distance [ourselves] from all bad and destructive things. And this is the way of the pious and people of [proper] action - they love peace and are happy for the good of the creatures and bring them close to Torah, and they do not destroy even a grain of mustard in the world. And they are distressed by all loss and destruction that they see; and if they can prevent it, they will prevent any destruction with all of their strength. But not so are the wicked - the brothers of the destructive spirits. They rejoice in the destruction of the world, and they destroy themselves - [since] in the way that a person measures, so is he measured; which is to say that he clings to it forever, as the matter that is written (Proverbs 17:5), "the one who rejoices in calamity, will not be cleared (of evil)." And the one who desires the good and rejoices in it, 'his soul will dwell in the good' forever. This is known and famous.⁶¹

Famously, Rav Kook gently rebuked *tzaddik* Reb Aryeh Levine when he aimlessly picked a flower from the ground saying, "believe me — in all my days, I have been careful never to pluck a blade of grass or flower needlessly, when it had the ability to grow or blossom. You know the teaching of the Sages, that there is not a single blade of grass below, here on earth, which does not have a heavenly force above telling it, *Grow!* Every sprout and leaf of grass says

⁵⁸ Maron, Dina Fine. "Toxic Fire Retardants Will Linger in the Environment for Years," Scientific American, March 1, 2014.

⁵⁹ Przybylińska, Paulina A. and Wyszowski, Mirosław. "Environmental contamination with phthalates and its impact on living organisms" *Ecological Chemistry and Engineering S*, vol.23, no.2, 2016, pp.347-356. <https://doi.org/10.1515/eces-2016-0024>

⁶⁰ Noda B'Yehuda Tinyana, Yoreh Deah 10.

⁶¹ Sefer Hachinuch. Mitzvah 529.

something, conveys some meaning. Every stone whispers its inner message in its silence. Every creature utters its song.”⁶² How much more does this apply to our wanton destruction of the planet and the ongoing mass extinction of wildlife that threatens to bring the whole system of God’s earthly creation crumbling down. Even absent the request for accommodation, the contemplated actions would constitute the fulfillment of many different commandments and be a virtuous, worthwhile endeavor from a religious perspective.

Value of Synagogue Life

To this point, we have examined whether accommodations are possible, wise, or required, but have not stated explicitly what is at stake for the individual. Any analysis must engage empathically by placing the proverbial shoe on the other foot. What is at stake for this woman and her family, religiously and personally? While it may be helpful to enumerate the various benefits, individually, involved in attending a synagogue, that sort of analysis doesn’t get to the heart of the matter.

In Parshat Ki Tavo, the Torah details a public ceremony on Mount Gerizim and Mount Ebal plainly meant to serve as a summary of and commitment to the terms of this Teaching and observe them.—And all the people shall say, Amen. Covenant upon entering the Land of Israel. After a series of blessings and curses, the ceremony concludes with these words:

*Cursed be he who will not uphold (yakim) the terms of this Teaching and observe them.—And all the people shall say, Amen.*⁶³

What does the verb, *yakim*, mean? It is conjugated in the *hiphil* (causative) construct, and therefore means “to cause to stand” or “uphold.” In his commentary on the verse, Ramban takes homiletic license:

And by way of a homily the Rabbis said: “This refers to the *prayer leader* who does not stand up the Scroll of the Law to set it up properly so that it should not fall.” *It appears to me that it refers to the prayer leader who does not stand up the Scroll of the Law before the public to show the face of its writing to all people as it is explained in Tractate Sofrim 14:14 that “they lift the Torah high and show the face of its writing to the people who stand there to the right and left thereof and turns it frontwise and backwards, for it is incumbent upon all men and women to see the written words and bend the knee and say And this is the Law which Moses set before the children of Israel,” and such is the custom.*⁶⁴

⁶² Raz, Simcha. A Tzaddik in our Time. Pgs. 108-109.

⁶³ Deuteronomy 27:26

⁶⁴ Ramban on the Torah, Deuteronomy 27:26.

Ramban roots the practice of *hagbah* as a partial *kiyum*/fulfillment of this commandment. Importantly, he deviates slightly from the Rabbinic interpretation of the verse (about not letting the Torah fall) and instead posits something more proactive; everyone, men and women, must see the face of the Torah's text. Taken in context, Ramban is saying that the Torah will be upheld and followed only when everyone has a chance to be tangibly engaged with the Torah scroll and its holy words in its ritual use. Everyone must be able to see the text, regardless even of gender.

This is the same holy spirit of inclusion found in the forceful words of the Rabbi Binyamin Aharon Solnik regarding the halachic controversy about people who suffer blindness receiving *aliyot*:

And I said, "If the spirit of the ruler rises against you, leave not your place" (Kohelet 10:4), for you should not be cast off forever (Eicha 3:31). For from times of Avi Zanoach (Moshe, cf. Chronicles I, 4:18), the Torah has always been placed in a corner (accessible to all, see Kiddushin 66a), so that whoever wishes may come and take it. And even one mitzvah should not be negated . . .

*I remain astounded regarding those who forbid – how have they decided the law [with the effect] of casting off the Heavenly yoke from people? How much more so regarding an important and public mitzvah such as this! This is not what we have learned from our Rabbis, the authors of the Mishna and the Gemara! For behold they said... that Yonah's wife would go up to Jerusalem for the Pilgrimage Festival (olah la'regel) and bring the burnt offering for appearing in the Temple. And then there is the case of how the sages would bring a sacrifice (which was being offered by women) into the Women's Courtyard so that the women could do the laying of the hands... and regarding every positive time bound mitzvah - women are permitted to perform them and recite the blessing over them.... nevertheless the Rabbis waived these concerns, because the value of accepting the Yoke of Heaven was more important, and also for the sake of giving religious satisfaction, as we said in Hagigah, "not because laying of the hands on sacrifices applies to women, but for the sake of giving religious satisfaction to women." The same, then, is true in our case. We should waive [any concerns] in the case of the person who is not literate person and the person who is blind, and we should not object to them being *oleh* to the Torah and from making the blessings, so that they may be included in the accepting of the Yoke of Heaven and to give them religious satisfaction....⁶⁵*

In a matter of legal controversy, empathy (the author was blind) and the Torah value, evidenced in many different ways, of religious inclusion is the deciding factor.

There are important distinguishing factors between this case and ours. There, the question was not one of fulfilling primary religious obligations or access to communal life writ large but rather full inclusion in the religious ceremonies of the community as an equal participant. In our case,

⁶⁵ Solnik, Rabbi Binyamin Aharon, Responsa Maseit Binyamin, 62.

where access altogether is what is at stake, the scales lean even further on the side of inclusion. Moreover, there, the controversy was legal, with Rabbi Yosef Karo and serious halachic considerations in opposition. Here, in our case, there is no legal controversy whatsoever. The only issues are financial cost, communal will, and individual compliance.

The Talmud in Berachot stated plainly the religious value of praying in a synagogue:

*It was taught that Abba Binyamin said: One's prayer is only heard in a synagogue, as it is stated, "to listen to the song and to the prayer." In a place of song, that is where prayer should be.*⁶⁶

As an aside, it is noteworthy and interesting that the *baraita* presumes the synagogue to be a place of communal song, even that which is not directly related to formal prayer. Prayer must occur in the place where song is found, the synagogue. This is codified as legally binding by both Rambam and Shulchan Aruch.⁶⁷

Why should prayer be in a synagogue, even if it is solitary and not communal? The continuation of the gemara notes God's acute presence there. "Ravin bar Adda said that Rabbi Yitzhak said: From where is it derived that the Holy One, Blessed be He is located in a synagogue? As it is stated: "God stands in the congregation of God . . ."⁶⁸ As Rav Chaim Brisker famously taught, prayer is definitionally about standing in the presence of God, and the requisite rules of intention derive from that basic premise.⁶⁹ While the whole earth is full of His glory, His presence is found in synagogue.

The Talmud in Berachot also stressed the tremendous religious value of communal prayer and the lengths encouraged to make it possible:

*Rabbi Yitzhak said to Rav Nahman: Why did the master not come to the synagogue to pray? He said to him, I was unable to come. He said back to him: Let the master gather ten and pray. He replied to him: It is difficult for me. He said to him: Then the master should tell the congregation to send a messenger when the congregation is praying to come and inform the master. He asked: What is the reason for all of this? He said to him: As Rabbi Yochanan said in the name of Rabbi Shimon ben Yochai: What is the meaning of that which is written: "But as for me, let my prayer be unto You, Lord, in a time of favor . . ." When is a time of favor? At the time when the congregation is praying.*⁷⁰

Here, Rav Nachman was too weak to come and Rabbi Yitzhak would not let him off the hook easily. Ostensibly, this was a one-off or temporary situation. In our case, it is this woman's entire religious life.

Relatedly, this passage of Gemara goes on to note how various sages derived that praying with the community causes greater efficacy in prayer.⁷¹ While three other proof texts are noted, the

⁶⁶ Talmud Berachot 6a

⁶⁷ See Rambam, Mishne Torah, Laws of Prayer 8:1; Shulchan Aruch, Orach Chaim 90:9.

⁶⁸ *Supra* note 49

⁶⁹ See e.g. Soloveitchik, Rabbi Joseph B. *Ish HaHalacha, Ra'ayonot al Hatefillah* 1:7.

⁷⁰ Talmud Berachot 7b-8a

⁷¹ *Ibid.*

basic point is the same. Prayer that is joined to that of the community is a different experience with greater efficacy.

The gemara relates that one who has a synagogue in town but does not join is called a “bad neighbor” and causes exile to their children.⁷² This stresses a different aspect of synagogue attendance, communal participation. The plain interpretation is that exile is the natural result, measure for measure, for separating from the community. True, in our situation, the woman’s current lack of attendance is through no fault of her own. Nonetheless, the effect to her and her child is the same. They will not experience the transcendence, humility, and sense of give and take that is being part of the community. The *baraita* adds something we wouldn’t have known intuitively. This is not merely a social reality; the social dynamics of communal participation are a central religious value, and they are inherently intergenerational. If this woman is not able to attend fully, her child is likely to be separated from the community even despite her best efforts at religious childrearing.

This aggadic teaching may actually be the most important lens on the issue. Synagogues are named “houses of gathering” for a reason. Fundamentally, they are the place where the Jewish community develops friendships and relationships, studies and debates, celebrates and mourns, and teaches the next generation the paths of Torah. Without synagogue, this woman will lack natural relationships in the observant community, Shabbat meal invites, and the organic, deep bonds that develop through the rhythm of observant Jewish life shared in sacred community over time. It renders it virtually impossible for she and her family to experience so much of the depth of Jewish life. Alienation, represented in this teaching by “exile,” is entirely inevitable.

In addition to the power of ritual participation, communal prayer, and participation in community generally, there is the related matter about the atmosphere of the synagogue itself. Rabbi Yochanan could not understand how anyone lived to an old age in Bavel. After all, the promise long life is for “on the land.”⁷³ When he learned that these people go to the synagogue early in the morning and late at night, he understood. Presence in the synagogue is likened to the holiness of the land of Israel, and “that is what was effective for them” to live long lives.⁷⁴

Along these lines, the Talmud in Megillah records in the name of Rav Huna that one who enters a synagogue to pray can make a shortcut of it and leave through a more convenient exit, something forbidden to those who enter for non-religious purposes.⁷⁵ Notably, the proof text from Ezekiel states, “And when the people of the land shall come before the Lord in the appointed seasons, he that enters by way of the north gate to bow down shall go forth by way of the south gate.”⁷⁶ The source quote doesn’t give an option, though, it describes the normative behavior required. As a result, Rosh and Rif both prefer a different *girsah* of the Gemara which changes *mutar* (it is permissible) to *mitzvah* (it is required). In their versions of the text, one *should* leave through a different exit, in order to traverse the entire synagogue on accord of its

⁷² Talmud Berachot 8a

⁷³ Deuteronomy 11:21

⁷⁴ Talmud Berachot 8a

⁷⁵ Talmud Megillah 29a

⁷⁶ Ezekiel 46:9

sanctity.

In our case, even this is at issue. If the accommodations are not made, the woman will not be able to soak up the sanctity, comparable to that of the land of Israel and the Holy Temple, that is present in our modern synagogues.

As a final though not trivial matter, it must be noted that many *mitzvot* occur naturally in the context of a synagogue. Responding to *devraim shebikdusha* like *barchu*, *kaddish*, and *kedusha* will happen only there. She will also be forced to miss the regular public reading of the Torah, the reading of Megillat Esther, and the blowing of the *shofar*. Yes, private shofar blowings and the reading of Megillat Esther are regularly arranged in many communities for those who, for whatever reason, cannot attend. Here, though, such separation from the community is both avoidable and ongoing. "*B'rov am hadrat melech* – in multitudes, there is glory for the King" is a halachic principle, not just a Proverb.⁷⁷ It is the reason we prefer the performance of mitzvot in large public gatherings. If this person were missing due to failure to accommodate, God's glory would be unnecessarily diminished.

Rav Tzvi Elimelech Spira zt"l made an observation about the sin of Adam and Eve in his mystical classic about the calendar, *B'nai Yissaschar*. All of the senses are mentioned in conjunction with the sin save for the sense of smell. "It is only about fruit of the tree in the middle of the garden that God said, 'You shall not eat of it or touch it.'⁷⁸ When the woman saw that the tree was good for eating and a delight to the eyes . . . she took of its fruit and ate."⁷⁹ They heard the sound of the Lord moving about the garden . . . "⁸⁰ Surely, part of the appeal of the forbidden fruit was its sense of smell, yet smell is the only one of the five senses notably absent from the story. Smell, then, was not subject to the sin of Adam and Eve, and, through the "pleasant aroma" of the sacrifices or the spices of Motza'i Shabbat, retains purity and innocence.

For us, prayer serves as a substitute for the sacrifices and the synagogue is a *mikdash m'at*, a microcosm of the Holy Temple itself. If the finishes of the furniture and fragrances of the people, no matter how pleasant the smell, cause illness and exclusion from religious life, they are most decidedly not a "pleasant aroma before God." While it's hard to speak definitively in terms of assur or mutar, the weight of the law and preponderance of the evidence suggest that accommodations are possible here and ought to be required. They further provide rubrics for how to evaluate cases with different details and trade-offs.

While other choices are conceivable, we ought to be striving for inclusion when not unduly burdensome. Further, the pernicious negative consequences of these chemicals for public health, fertility, and environment are unseen yet documented and destructive, adding further weight to the calculus. Given the broad and growing incidence of MCS, not just this community but all communities should proactively consider toxin-free policies and modifications in order to create clean, safe, and inclusive synagogues.

⁷⁷ Proverbs 14:28

⁷⁸ Genesis 3:3

⁷⁹ Genesis 3:6

⁸⁰ Genesis 3:8

Sincerely,

חיים בעריל דולינגר