

HALOCHOSCOPE ^{TOI}

Correction to last issue. Unfortunately, the last line was cut off, including, mainly the references to that section. The line should read as follows: So far, no credible source has been found by this author to forbid painting Tefilin at night. [See Menachos 35a-b Tur O.C. 32:52 33:3-5, commentaries. Marpei Lanefesh (R. Raphael Silber) O.C. 15:7.]

Is there an obligation to build a *Maakeh*, protective railing, on a garage roof? What if this roof is not totally flat, or is not walked on, except when refinishing its surface? Does this ruling depend on whether the garage is attached to a house?

The issues:

(A) The Mitzvah of *Maakeh*

(B) Which type of roof requires a *Maakeh*?

(A) *Maakeh*

Two Mitzvos pertain to erecting a railing around a roof, one positive and the other negative. The positive Mitzvah is to build a *Maakeh*. The negative commandment forbids passively allowing a hazard to remain in one's home. Thus, though worded in negative language, "do not allow blood-loss in your house," it is really an active duty to prevent such harm. This Mitzvah also applies to any other hazardous situations. Therefore, even if there is no positive Mitzvah of *Maakeh* in our case, making the railing could be a Halachic obligation. There is also a general positive Mitzvah to watch one's personal health and safety. The difference between these Mitzvos and the specific Mitzvah of *Maakeh* is that the erection of a *Maakeh* has a *Brocha* recited before it.

The commentaries point out that the Torah's terminology implies that the positive Mitzvah of *Maakeh* is directly due to the hazard. Accordingly, while the exceptions to a Scriptural Mitzvah are often simply excluded by the Torah's language, in this particular case there are instances where the exception is due to a logical reason. For example, as shall be shown in the next section, a shul roof is excluded. It is not considered "your roof." The commentaries add a reason for this. It is a public building, not owned by an individual, and it is not lived in. This is taken to mean that it does not have a regular use, as does the roof of

a private house. Thus, the positive Mitzvah is exempted in certain cases, due to direct or indirect inferences, where the negative Mitzvah would still apply. However, where the negative Mitzvah would not apply, due to the lack of hazard, it would appear that the positive Mitzvah would also not apply.

The railing must be ten *Tefachim* high, and must be continuous. [There is a view that requires three *Tefachim* for a roof used very infrequently, and ten for a much used roof.] If there is a ladder or there are steps up to the roof, with an opening, it must have a door or gate. (A ramp will be discussed later.) Halachically, *Lavud*, spaces of less than three *Tefachim*, are allowed, vertically or horizontally, for many types of required *Mechitza*, wall or partition. However, in this case, the idea of the fence is not as a partition but as a safety measure. It is possible that *Lavud* is Halachically sufficient for the positive Mitzvah of *Maakeh*, but the hazard has not been removed, leaving the negative commandment. Moreover, since the danger is specified as the reason for the positive Mitzvah, it is possible that one does not fulfil it unless he removes the danger. We find that a weak fence is sufficient for a *Mechitza*. For the *Maakeh* a rail must be erected that can be leaned on. This is because the Torah implies that it is to prevent people from falling from it. Thus, discretion must be exercised, ensuring that the spaces are not big enough to pose a hazard. [See Parshas Ki Seitzei 22:8, Sifri, commentaries (Torah Temimah 77 79). Sukah 3a-b, Moed Katan 11a, Yerushalmi, Yuma 11a-b, Baba Kama 51a, Chulin 136a, Poskim. Tur Shulchan Aruch Choshen Mishpat 437, commentaries.]

(B) Which type of roof requires a Maakeh

The place specified for the Mitzvah of *Maakeh* is a roof over a dwelling. [Some Poskim maintain that a water hole in the ground (included by a Midrashic inference) is also included in the Scriptural Mitzvah. Others consider it simply another form of hazard which requires protective measures. In this case a covering is sufficient.] The definition of a dwelling is what concerns us here. The use of the building under the roof determines its status. Therefore, a shul, which is not lived in, does not need a *Maakeh* around its roof. If the roof is used, a rail must be built around it for safety, but, according to many Poskim, this is not included in the positive Scriptural Mitzvah of *Maakeh*. No *Brocha* is recited when erecting it.

The Mitzvah of *Mezuza* also only applies to the doorway of a dwelling. The Talmud compares the Mitzvos of *Mezuza* and *Maakeh*. For *Mezuza*, a storage shed or barn is considered a dwelling by some Poskim, but is exempted by others. We follow those who require a *Mezuza* on these dwellings. However, some of the

same Poskim exempt a cattle barn, a hay barn, or any storage area from *Maakeh*. The explanation offered for this discrepancy is that a dwelling for *Mezuza* is defined by its use by the dweller. Storage is considered use. The Mitzvah of *Maakeh* is defined by the use of the roof and subsequent danger. It is assumed that one only uses a flat roof above a real dwelling, as, say, a multi-purpose "yard." Thus, a barn roof is not used, and need not be fenced in.

A garage is usually considered a storage area. However, when it is a part of a house, the roof of which is used, it might be considered part of a dwelling. Similarly, if there is one continuous roof covering a house and a storage area attached to it, the entire roof must have a *Maakeh*. It is therefore possible that a roof covering only the storage area, but which is attached to a regular dwelling, is included in the Scriptural Mitzvah. In addition, the indication is that some Poskim might include a roof over any storage shed in the Scriptural obligation. It must also be noted that an attached garage can be used as an addition to the house for regular "living area" uses. For example, it might be used as a den or workshop even if it has not been fitted out for this use. Thus we see it is really considered part of the house, an extension of the lived in area. Even a porch roof might be considered part of the house roof, though it is somewhat separate from the rest. The Talmud refers to a *Maakeh* for a balcony. The balcony in the Talmud's case is probably over a yard. However, some commentaries maintain that this does not refer to a Scriptural obligation of *Maakeh*, but the obligation to remove a hazard. Nonetheless, our garage is somewhat more connected to the house. All this implies that there is indeed a Scriptural obligation in these cases.

On the other hand, if the garage roof is not part of the house roof (but on a different level), the house roof itself is not even flat, nor is either roof used, there might be no Scriptural obligation. Furthermore, if these considerations are sufficient to exempt the roof from the positive Mitzvah, they should exempt it from the negative Mitzvah. The basis for either Mitzvah is the element of hazard.

However, one major consideration must be taken into account. Though it is not emphasized by the Poskim, it appears to be a deciding factor in the obligation to build a *Maakeh*. Since, clearly, the Poskim assume that the Torah gives the reason for this Mitzvah as the hazard posed, a roof that is not considered hazardous is exempted. The main hazard is posed during normal use. The determining factor, then, should be the extent of a hazard that it poses. In that case, a roof that is not used regularly should also be exempt. This applies to a roof that slopes too steeply to be used. [In fact, the Talmud exempts a ramp. Some say this refers to the ramp

of the altar. However, this itself poses problems. Why is it considered a roof? If the intended exemption is from the negative Mitzvah, why does the Torah only exempt this ramp? Yet, it is possible that a ramp would not be exempt because it is made to be used. A steep roof is not made to be used. Other Poskim assume the reference to any ramp. However, some Poskim maintain that this exemption does not refer to the sides of the ramp, but to the top, where the ramp reaches the roof. While the rest of the roof requires Maakeh, this gap does not. The ramp provides a safety net.] It should also exempt a roof that is not intended for use, even though it is flat. This should even exempt it from the negative Mitzvah.

A number of prominent sources allude to this idea. There was a controversy surrounding the practice in Tzefas and in Teverya not to build a Maakeh on their roofs. Some maintained that the accessibility of the roof was a factor. These roofs could not be accessed from inside the houses, but by ladder outside. They infer from the language of some Poskim that if the roof does not have a living area on it it is exempt. Many Poskim disagree. They maintain that the language in reference deals with the use of the house underneath. Then they question how these roofs could be exempted if they are “used for slaughtering, laundering, recreation and sleeping there on hot summer nights”? The clear implication is that this is the determining factor for the obligation of Maakeh. One could argue that this factor is used as added ammunition. However, the issue being dealt with is the Mitzvah of Maakeh, rather than the negative obligation to remove a hazard. Therefore, this must be the reason for the positive Mitzvah. In any case, it has already been mentioned, that in the absence of the negative Mitzvah there should be no requirement for the positive Mitzvah. Other sources cite references to the relative use of a roof being the deciding factor on how high the rail should be. Though this is not followed by our Poskim, it does indicate the reason for the obligation in the first place. Accordingly, in our case, if the roof is not used regularly, it is exempt of the obligations both positive and negative. [See Moed Katan 11a (Ritva) Yerushalmi, Baba Kama 51a (Shita Mekubetzes), Chulin 156a, Poskim. Tur Shulchan Aruch Choshen Mishpat 437:1-2, 5, 7, commentaries (Sma, Gra, Ar. Hash. 1, 10.) Biur Halacha 540:1. Chayei Adam 15:24-25. Chazon Ish C.M. Likutim 18. Torah Temimah, Ki Seitzei 22:note 75. Sdei Chemed, Klalim, Mem 195. Halochooscope I:22 III:31-33 V:6.]

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Rabbi Shimon Silver

2018 Wightman Street

Pittsburgh, PA 15217 (412) 521-5419/ 422 3993

e-mail: halochooscope@bargainbd.com Website: <http://bargainbd.com/halocho>