

Offshore Oil Drilling

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Introduction

Sukkot is a holiday where we come in contact with the environment. We leave our homes to sit in an outdoor temporary structure, whose covering must be made of unprocessed vegetation. Sukkot is also called the Chag Ha'Asif, the holiday of harvesting, where farmers get a first glimpse at their economic outlook for the coming year. These two themes, environment and economy, are themes that dominate the presidential campaigns of both major candidates, especially on issues where the two themes converge.

As we approach the elections, the country finds itself in the middle of a major oil crisis. Over the past few months, the price of oil has risen to record levels, causing the cost of almost all goods and services to rise. High oil prices are a result of a combination of tight supply, high demand, and speculation in the energy markets. The problem is exacerbated by our country's dependence on foreign oil. According to the U.S. government's Energy Information Administration, in June 2008, the U.S imported 9.994 million barrels of oil each day, which amounted to 66% of the total oil supply.¹⁶ Dependence on foreign oil has a major economic and political impact on our country.

A plethora of solutions have been touted to solve this problem, including limiting consumption, developing alternative energies, and designing motor vehicles that are more energy efficient. One solution that is currently being debated is whether to conduct oil exploration in the Outer Continental Shelf as well as the Alaska National Wildlife Reserve (ANWR). According to Minerals Management Service, there is an estimated mean of 85.9 billion barrels of undiscovered technically recoverable oil on the outer continental shelf.¹⁷ According to a 1998 United States geological survey there is an estimated mean of 10.4 billion barrels of oil in area 1002 of ANWR.¹⁸

For twenty-six years, there have been executive and congressional moratoria on any additional offshore drilling and drilling in ANWR. With the recent increase in the price of oil, the president as well as congress have allowed the moratoria to expire. However, it is likely that a ban on offshore drilling and drilling in ANWR will be debated after the elections.¹⁹ Proponents of the ban claim

¹⁶ http://tonto.eia.doe.gov/dnav/pet/pet_sum_crdsnd_adc_mbbldpd_m.htm.

¹⁷ <http://www.mms.gov/revaldiv/PDFs/2006NationalAssessmentBrochure.pdf>

¹⁸ <http://pubs.usgs.gov/fs/fs-0028-01/fs-0028-01.pdf>.

¹⁹ According to the New York Times "Both sides say the future of offshore will be decided by the next president." See "House Passes Stopgap Spending Bill, Delaying Major Decisions," available at www.nytimes.com/2008/09/25/washington/25spend.html.

that offshore drilling will harm whales and fish and exploration of ANWR will threaten populations of polar bears, caribou, muskoxen, and birds. They also point to the potential for oil spills which have been proven to cause adverse health effects in humans. Those in favor of lifting the ban claim that the benefits of oil exploration in these areas outweigh the losses and risks associated with oil exploration.

The debate about whether to lift these bans has become one of the key issues in this year's presidential election. In this article, we will attempt to present a Jewish perspective on certain aspects of the debate. We will focus on three aspects of the debate. First, we will discuss the claim that one should not drill for oil at the expense of harming wildlife. Second, we will discuss the extent that one must be concerned about endangering humans. Third, we will discuss the claim of residents of coastal regions that the local harm caused by offshore drilling outweighs the benefit to the nation as a whole. These discussions are not meant to influence anyone's election decision. Rather, they are an opportunity to learn Torah utilizing a topic of current interest.

Before we proceed, it is important to note that each side of the debate presents a different set of facts on questions such as the potential output of offshore drilling and the potential extent of damage to wildlife caused by oil drilling. In this presentation, we will assume that these facts remain unknown.

White Polar Bears v. Black Gold

Judaism certainly values proper treatment of all of G-d's creatures. The verse states:

The LORD is good to all; and His tender mercies are over all His works.
Tehillim 145:9

טוב ה' לכל ורחמיו על כל מעשיו.
תהלים קמה:ט

If G-d has mercy, on all of his creatures, we too should display mercy towards all creatures.²⁰ Rambam explains numerous mitzvot based on the concept that we must treat all creatures properly:

Since, therefore, the desire of procuring good food necessitates the slaying of animals, the Law enjoins that the death of the animal should be the easiest. It is not allowed to torment the animal by cutting the throat in a clumsy manner, by pole-axing, or by cutting off a limb whilst the animal is alive. It is also prohibited to kill an animal with its young on the same day (Lev. xxii. 28), in order that people should be restrained and prevented from killing the two together in such a manner that the young is slain in the sight of the mother; for the pain of the animals under such circumstances is very great. There is no difference in this case between the pain of man and the pain of other living beings, since the love and tenderness of the

וכאשר הביא הכרח טוב המזון להריגת בעלי חיים כונה התורה לקלה שבמיתות ואסרה שיענה אותם בשחיטה רעה ולא בנחירה ולא יחתך מהם אבר כמו שבארנו, וכן אסר לשחוט אותו ואת בנו ביום אחד, להשמר ולהרחיק לשחוט משניהם הבן לעיני האם, כי צער בעלי חיים בזה גדול מאד, אין הפרש בין צער האדם עליו וצער שאר ב"ח, כי אהבת האם ורחמיה על הולד אינו נמשך אחר השכל רק

²⁰ Chatam Sofer, Shabbat 154b, states that the source for the prohibition against cruelty to animals is this verse.

mother for her young ones is not produced by reasoning, but by imagination, and this faculty exists not only in man but in most living beings. This law applies only to ox and lamb, because of the domestic animals used as food these alone are permitted to us, and in these cases the mother recognizes her young. The same reason applies to the law which enjoins that we should let the mother fly away when we take the young. The eggs over which the bird sits, and the young that are in need of their mother, are generally unfit for food, and when the mother is sent away she does not see the taking of her young ones, and does not feel any pain. In most cases, however, this commandment will cause man to leave the whole nest untouched, because [the young or the eggs], which he is allowed to take, are, as a rule, unfit for food. If the Law provides that such grief should not be caused to cattle or birds, how much more careful must we be that we should not cause grief to our fellowmen.

Guide for the Perplexed (Friedlander Translation) 3:48

אחר פעל הכח המדמה הנמצא ברוב בעלי חיים כמו שנמצא באדם, והיה זה הדין מיוחד בשור ושה, מפני שהם מותר לנו אכילתם מן הבייתות הנהוג לאכלם, והם אשר תכיר מהם האם את הולד, וזהו הטעם ג"כ בשלוח הקן, כי הביצים אשר שכבה האם עליהם והאפרוחים הצריכים לאמם על הרוב אינם ראויים לאכילה, וכשישלח האם ותלך לה לא תצטער בראות לקיחת הבנים, ועל הרוב יהיה סבה להניח הכל, כי מה שהיה לוקח ברוב הפעמים אינו ראוי לאכילה, ואם אלו הצערים הנפשיים חסה תורה עליהם בבהמות ובעופות כל שכן בבני אדם.

מורה נבוכים ג:מז

The most extensive discussion in the Talmud regarding treatment of animals appears in Baba Metzia 32a-33a, regarding the following verse:

If thou see the donkey of your enemy lying under its burden, you shall forbear to pass by him; you shall surely release it with him.

Exodus 23:5

כי תראה חמור שנאך רבץ תחת משאו וחדלת מעזב לו עזב תעזב עמו.

שמות כג:ה

The Gemara questions whether the requirement to remove the load from the donkey is based on the principle of tza'ar ba'alei chayim, the suffering of creatures, or whether it is based on the obligation to help the owner of the donkey. The Gemara states that this is contingent on whether we are biblically obligated or only rabbinically obligated to prevent tza'ar ba'alei chayim. Many Rishonim assert that the conclusion of the Gemara is that we are biblically obligated to prevent tza'ar ba'alei chayim.²¹ Other Rishonim conclude that we are only rabbinically obligated to prevent tza'ar ba'alei chayim.²²

Rambam's position on the status of tza'ar ba'alei chayim is somewhat puzzling. As we noted earlier, Rambam explains numerous mitzvot based on the concept of proper treatment of all creatures. Yet, regarding removing the load from a donkey, Rambam states:

The enemy mentioned in the Law does not mean a foreign enemy but an Israelite one. How can an Israelite have an Israelite enemy when Scripture says, "Thou shalt not hate thy brother in thy heart?" The Sages decreed that if one all alone sees another

השונא שנאמר בתורה הוא מישראל, לא מאומות העולם, והיאך יהיה לישראל שונא מישראל והכתוב אומר לא תשנא את אחיך בלבבך, אמרו חכמים כגון שראהו

²¹ Ramban, Shabbat 154b, s.v. Ha, Rashba, Baba Metzia 33a, s.v. U'Linyan, and Maharam MiRutenberg, in his responsa (Prague edition) no. 49.

²² See *Sefer Yerei'im* no. 142.

committing a crime and warns him against it and he does not desist, one is obligated to hate him until he repents and leaves his evil ways. Nevertheless, even if did not yet repent, if you find him occupied with his load there is a positive commandment to remove the load and help him move it and you should not leave him to die, for there is the possibility that he will remain there in order to secure his property and become endangered etc.

Rambam Hilchot Rotzeach 13:14

לבדו שעבר עבירה והתרה בו ולא חזר הרי זה מצוה לשנאו עד שיעשה תשובה ויחזור מרשעו. ואע"פ שעדיין לא עשה תשובה, אם מצאו נבהל במשאו מצוה לפרוק ולטעון עמו ולא יניחנו נוטה למות שמא ישתהה בשביל ממונו ויבא לידי סכנה.
רמב"ם הל' רוצח יג:יד

Rambam clearly does not explain the mitzvah to remove the load from the donkey as based on the concept of tza'ar ba'alei chayim. Rather it is based on the obligation to help the owner of the donkey.

One can question Rambam's position: If in fact tza'ar ba'alei chayim is a rabbinic concept, why does Rambam explain certain mitzvot based on the concept that we must treat all creatures properly? Furthermore, Rambam, in presenting the idea of cruelty to other creatures, states:

There is a rule laid down by our Sages that it is directly prohibited in the Law to cause pain to an animal, and is based on the words: "Wherefore hast thou smitten thine ass?" etc. (Num. xxii. 32). But the object of this rule is to make us perfect; that we should not assume cruel habits: and that we should not uselessly cause pain to others: that, on the contrary, we should be prepared to show pity and mercy to all living creatures, except when necessity demands the contrary: "When thy soul longeth to eat flesh," etc. (Deut. Xii. 20). We should not kill animals for the purpose of practicing cruelty, or for the purpose of play.

Guide for the Perplexed (Friedlander Translation) 3:17

ואמנם אמרם צער בעלי חיים דאורייתא, מאמרו על מה הכית את אתונך וגו', הוא על דרך ההשלמה לנו, שלא נלמד מדת האכזריות ולא נכאיב לבטלה ללא תועלת, אבל נכון אל החמלה והרחמנות, ואפילו באי זה בעלי חיים שיזדמן, אלא לעת הצורך, כי תאוה נפשך לאכול בשר, לא שנשחט ע"ד האכזריות או השחוק.
ספר מורה הנבוכים חלק ג:יז

Rambam does not derive the source for proper treatment of creatures from the verse relating to removing the load from the donkey. Rather, he derives the source for proper treatment of creatures from the fact that Bilam was chastised for hitting his donkey. Why doesn't Rambam derive tza'ar ba'alei chayim from the same source as the Talmud?

R. Ya'akov Kamenetzky (1891-1986) answers:

It is puzzling that [Rambam] derives on his own the source for tza'ar ba'alei chayim from Bilam. He also does not mention in the Guide, the discussion in Baba Metzia regarding removing the load and reloading it which is where we derive the concept of tza'ar ba'alei chayim. Perhaps [Rambam] is of the opinion that when one actively causes suffering to the creature, that is a biblical prohibition. However, regarding removal of the load from the donkey, where the suffering is happenstance, that is what the Gemara debates and Rambam concludes that it is

תמוה מה שחידש מדעתו מקור לצעב"ח מהא דבלעם, וגם לא הביא במורה נבוכים הסוגיא בבבא מציעא לגבי פריקה וטעינה שמשם ילפינן לאיסור צער בעלי חיים. ואפשר שסובר דהיכא דהוא מצערה בידים זה הוי איסור דאורייתא, אבל גבי פריקה דהצער הוא ממילא - בזה הוא דשקיל וטרי בפרק אלו מציאות, ושם דחינו לה, ופסק דאין זה אלא מדרבנן ודו"ק.

According to R. Kamenetzky, there are two instances of the suffering of creatures. One instance is where a human being intentionally causes suffering to the creature. Causing suffering to a creature constitutes a biblical violation whose source is the verse that chastises Bilam for hitting the donkey. The second instance is one where a creature is already suffering. The Gemara that presents the dispute as to whether tza'ar ba'alei chayim is a biblical concept or a rabbinic concept refers to the second instance, i.e. whether there is a biblical obligation to act to alleviate the suffering of a creature.

R. Kamenetzky's analysis builds a framework for further discussions about the parameters of tza'ar ba'alei chayim. When dealing with the halachic parameters of tza'ar ba'alei chayim, we must note whether the case at hand is one where the suffering is directly inflicted or whether it involves merely alleviating the suffering of a creature.

Tza'ar Ba'alei Chayim for Human Benefit

One of the most relevant discussions concerning tza'ar ba'alei chayim is the discussion about tza'ar ba'alei chayim that provides some human benefit. R. Yisrael Isserlin writes:

May one remove feathers from live geese: is it similar to shearing sheep, or is it considered tza'ar ba'alei chayim? Also, may one cut the tongue of a bird in order to allow it to speak, or cut the ears or tail of a dog in order to beautify it? It would seem that there is no prohibition against tza'ar ba'alei chayim; he does so for his benefit or service because the creatures of the world were created to serve man, as it states in the last chapter of Kiddushin. You should know that in the second chapter of Baba Metzia, removal of a load from a donkey is considered tza'ar ba'alei chayim, but one might question: how is it permissible at the outset to load the donkey with a heavy load to travel from place to place? Is this not considered tza'ar ba'alei chayim? ... From these proofs, it seems that in the aforementioned cases there is no prohibition, but many people are nevertheless cautious and do not do so. It is possible that they refrain because they do not want to behave cruelly to the creatures.

Terumat HaDeshen, Pesakim U'Ketavim no. 105

אם למרוט נוצות לאווזות חיים, אי דומה לגיזת כבשים או אי הוּו צער בעלי חיים גם לחתוך לשון העוף כדי שידבר, ואזנים וזנב מכלב כדי ליפותו, נראין הדברים דאין אסור משום צער בעלי חיים אם הוא עושה לצורכיו ולתשמישיו. דלא נבראו כל הבריות רק לשמש את האדם, כדאיתא פרק בתרא דקידושין. ותדע דבפ' ב' דב"מ חשיב פריקה צער בעלי חיים, וא"כ היאך מותר משא כבד על בהמתו להוליכו ממקום למקום הא איכא צער בעלי חיים ... ומתוך הלין ראיות הוה נראה קצת דליכא איסור בכה"ג, אלא שהעולם נזהרים ונמנעים, ואפשר הטעם לפי שאינו רוצה העולם [לנהוג] מדות אכזריות נגד הבריות. תרומת הדשן פסקים וכתבים ס'קה

R. Isserlin implies that tza'ar ba'alei chayim is permissible if there is any human benefit. Even cropping the tail and ears of a dog for cosmetic purposes (a procedure still taught at some veterinary schools) is permitted. R. Isserlin proves this from the Torah's permission to place a load on a donkey. Certainly the donkey suffers from the load, and nevertheless it is permissible

to place the load on the donkey because human benefit is involved. However, R. Isserlin notes that it is nevertheless common practice to refrain from cruelty towards other creatures.

R. Isserlin's comments are codified by Rama (1520-1572):

Anything that is for health purposes or other purposes, there is no concern for tza'ar ba'alei chayim. Therefore, it is permissible to pluck feathers from live geese and there is no concern for tza'ar ba'alei chayim.

Nevertheless, many people refrain because it is cruel.

Rama, Even HaEzer 5:14

כל דבר הצריך לרפואה או לשאר דברים, לית ביה משום איסור צער בעלי חיים. ולכן מותר למרוט נוצות מאווזות חיות, וליכא למיחש משום צער בעלי חיים ומ"מ העולם נמנעים דהוי אכזריות.
רמ"א אהע"ז ה:יד

However, some Acharonim assert that Rama's allowance has limitations. R. Eliyahu Klatzki, Imrei Shefer no. 34, states that Rama's permission to cause suffering is limited to situations serving health purposes. If there is a pressing situation that requires one to cause suffering to a creature, one may do so. However, if it is just for the purpose of earning profit, Rama does not allow any activity that causes suffering to creatures.

R. Avraham D. Wahrman (1771-1840), Ezer Mekudash 5:14, takes the opposite approach. He discusses the practice of plucking feathers from live geese to make them fatter. It is clear from his description of the case that he doesn't believe that it really works. He thinks that it is a feel-good activity so that people don't agonize over the growth of their geese. He nevertheless permits plucking the feathers because tza'ar ba'alei chayim for any purpose, even to appease the minds of people who think that removing feathers from a goose will produce a fatter goose, is permitted. However, he did not allow this practice to take place in his own home.

R. Ya'akov Etlinger (1798-1871) implies that one must consider what type of suffering is caused to the creature and what type of human benefit is produced:

Certainly whatever is done for one's own benefit does not violate tza'ar ba'alei chayim, and we prohibit amputating an animal's hooves only because there is no benefit. Similarly it is prohibited to place a bechor in confinement (without feeding it) because of tza'ar ba'alei chayim because there is no direct benefit, just a removal of additional work or damage. It is also possible that the reason that these are prohibited is that these two practices involve great suffering ... Therefore, inflicting a wound that does not involve great suffering and has a direct benefit because now the animal is permissible to eat, certainly does not violate tza'ar ba'alei chayim.

Teshuvot Binyan Tzion no. 108

אלא ודאי שמה שעושה לתועלתו לית בי' משום צער בעה"ח ומה דאסרינן ע"ז (דף י"א) לעקור הבהמה הוא דוקא משום ששם אין לו תועלת וכן מה שאסרו להכניס בכור לכיפה משום צער בעה"ח שם ג"כ הטעם שאין לו תועלת מוחלט רק שלילות שינצל מטורח או מהזק או אפשר ג"כ שבאילו יש צער גדול וכבר חילק הריטב"א בזה שפי' דמה דאמרינן (שם) עיקור שיש בו טרפה אסור ושאין בו טרפה מותר דבאין בו טרפה אין צער גדול כ"כ ולכן י"ל דבעשיית מום שאין בו צער גדול וגם יש בזה תועלת מוחלט שע"ז יותר הבהמה לאכילה לכ"ע אין בזה משום צער בעה"ח.
שו"ת בנין ציון סימן קח

According to R. Etlinger, one may only cause suffering to a creature if the nature of the suffering is minor and there is direct benefit. R. Etlinger's conditions indicate that one must weigh the

benefits against the costs. If there is great benefit and minor suffering, it is certainly permissible. If there is great suffering and only a minor or indirect benefit, it is prohibited.

This approach is implicit in the comments of Tosafot. The gemara mentions that when a king died, we would cripple all of his animals, because it would slight the deceased king's honor if someone else were to use his animals. Tosafot ask:

Why does the Gemara not question this practice based on tza'ar ba'alei chayim? One can answer that the honor of the king is different because it represents the honor of the entire Jewish People, and the honor of the public overrides tza'ar ba'alei chayim.

Tosafot, Avodah Zarah 11a. s.v. Okrin

וא"ת ואמאי לא פריך והאיכא צער בעלי חיים ... וי"ל דשאני כבוד המלך שהוא כבוד לכל ישראל ואתי כבוד רבים ודחי צער בעלי חיים. תוספות עבודה זרה יא ד"ה עוקרין

According to Tosafot, an action that would be considered tza'ar ba'alei chayim for an ordinary individual is permissible for the honor of the king, which ultimately honors the entire Jewish People. Ostensibly, tza'ar ba'alei chayim is only forbidden when suffering outweighs benefit. However, when there is great benefit, such as the honor of the entire nation, the benefit outweighs the suffering. This approach will require a careful assessment of how to gauge benefits and suffering.

- Question: How can we apply these sources to the debate about offshore oil drilling?

If one follows the approach of R. Isserlin and R. Avraham Wahrman, it is certainly permissible to drill for oil at the expense of wildlife, even if the immediate impact only provides "psychological benefit."²³ According to R. Klatzki, monetary benefit alone does not justify causing suffering to wildlife. However, it is possible that R. Klatzki's ruling is only applicable to simple profit of one individual. The proponents of oil drilling claim that oil drilling will have a major impact on the national economy. Perhaps R. Klatzki will agree that if such a claim is true, tza'ar ba'alei chayim is permissible. According to R. Etlinger, one must weigh the benefits of oil drilling against the suffering that might be caused. Proponents of drilling will argue that the benefits certainly outweigh the caused suffering, while opponents will argue the opposite. An objective assessment on this matter is required. One must also keep in mind that R. Isserlin and Rama both recommend refraining from actions that cause suffering to creatures even when there is human benefit.

There are a number of additional considerations to address regarding tza'ar ba'alei chayim and oil drilling. First, as we mentioned earlier, according to Tosafot, something of national interest is governed by a different set of rules regarding tza'ar ba'alei chayim.

Second, R. Ya'akov Reisch, Shevut Ya'akov 3:71, writes that although R. Isserlin and Rama recommend refraining from causing suffering to creatures even for human benefit, their recommendation only applies if the suffering is caused immediately by one's actions. If one

²³ See "Obama Assails Remarks by McCain on Offshore Oil Drilling" at www.nytimes.com/2008/06/25/us/politics/25campaign.html

performs an action whose long term result is the suffering of a creature, one need not be as concerned. Hence, one must explore whether oil drilling causes immediate harm to wildlife or whether the harm to wildlife is a long-term effect.

Third, R. Moshe Sofer, Chatam Sofer, Shabbat 154b, notes that monetary benefit only overrides tza'ar ba'alei chayim when the monetary benefit cannot be procured by another means.

Proponents of drilling claim that this is the only means of significantly lowering fuel prices and achieving national oil independence. Opponents of drilling claim that we should explore alternative energies and we should not view drilling as the last resort to lowering fuel prices.

Risk to Humans Due to an Oil Spill

One of the arguments against offshore oil drilling is the risk to humans due to an oil spill. According the U.S. Department of Health and Human Services, the most severe risks of an oil spill include a small increase in the risk of skin cancer when oil comes in contact with skin and toxicity due to ingestion. Reversible dermatitis is also a risk factor.²⁴

In Shavuot-To-Go 5766, we discussed the prohibition against self-endangerment. The question of allowing oil drilling with a potential risk to humans is similar to self-endangerment in that the government, as representatives of the nation, is debating whether to allow actions that may potentially harm a portion of the nation. We will therefore reproduce the relevant portions of that article. It is important to keep in mind two major differences between self-endangerment of an individual and public danger. First, we are concerned with the welfare of every individual and we would not want anyone to be harmed by a public activity. An activity that only bears a slight risk may be considered safe for a single individual, but in a public context, it is more likely that someone will be harmed. Second, the benefit of a public service is much greater than the benefit that one individual receives from an activity. As we noted in the aforementioned article, weighing the benefits against the risks is critical to this discussion.

The usual questions of self-endangerment involve activities where the risks are quantifiable, or potentially quantifiable. There are statistics available to guide one's decisions in cases of potential danger in order to determine whether the benefits of a given action outweigh the risks. The risk of an oil spill is an unquantifiable risk. There is no way to determine the risk factor. It is entirely possible that there will never be an oil spill that affects humans and it is also possible that one or more oil spills will occur as a result of an increase in offshore oil activity. How does one treat such a potential hazard?

Let us explore the following question regarding the prohibition of self-endangerment: Is the prohibition of self-endangerment a function of a positive commandment to actively guard and protect one's health, or is it a function of a negative prohibition to participate in activities that are dangerous?

According to most Rishonim, the source for the prohibition against self-endangerment is a section in Devarim:

²⁴ Source: <http://www.bt.cdc.gov/disasters/hurricanes/katrina/murphyoil>.

However, be careful and guard yourselves very well, so that you do not forget the things you saw with your own eyes and that they are not removed from your heart your entire lifetime, and you shall inform your children and grandchildren of them ... You shall be very careful of yourselves, since you did not see any image on the day the ETERNAL spoke to you at Chorev from within the fire.-

Devarim 4:9,15 (Feldheim Translation)

רק השמר לך ושמר נפשך מאד
פן־תשכח את־הדברים אשר־ראו
עיניך ופן־יסורו מלבבך כל ימי
חייך והודעתם לבניך ולבני בניך
... ונשמרתם מאד לנפשתיכם כי
לא ראיתם כל־תמונה ביום דבר
ה' אליכם בחרב מתוך האש.

דברים ד:ט-טו

The Gemara states:

(He who curses) himself (is culpable) as it is stated "You shall be very careful of yourselves," as per the statement of R. Avin in the name of R. Illa who stated 'Any place where the words hishamer, pen or al are mentioned, it connotes a negative commandment.'

Sh'vuot 36a

עצמו דכתיב רק השמר לך ושמור
נפשך מאד כדרכי אבין אמר רבי
אילעא דאמר כל מקום שנאמר
השמר פן ואל אינו אלא לא תעשה.
שבועות לו.

One can only receive lashes for violation of a negative commandment. The Gemara, in explaining why someone receives lashes for cursing himself, bases itself on the premise that the word "hishamer" used in the context of the prohibition of self-endangerment connotes violation of a negative commandment.

This ruling is codified by Rambam:

One who curses himself receives lashes (in the same manner) as if he cursed others as it is stated "be careful and guard yourselves very well."

Rambam, Hilchot Sanhedrin 26:3

המקלל עצמו לוקה כמו שקלל
אחרים שנאמר השמר לך ושמור
נפשך.

רמב"ם הל' סנהדרין כו:ג

Does this necessarily lead one to the conclusion that the prohibition of self-endangerment is a negative commandment? Let's see another ruling of Rambam:

Any hazard that is potentially lethal there is a positive commandment to remove it and to beware of it and to be extremely cautious in this matter as it is stated "be careful and guard yourselves very well." And if one does not remove them or places obstacles that lead to danger one has violated a positive commandment.

Rambam, Hilchot Rotzei'ach 11:4

כל מכשול שיש בו סכנת נפשות
מצות עשה להסירו ולהשמר ממנו
ולהזהר בדבר יפה יפה השמר לך
ושמור נפשך, ואם לא הסיר, והניח
המכשולים המביאין לידי סכנה,
ביטל מצות עשה.

רמב"ם הל' רוצח יא:ד

How does this passage differ from the previous passage? Does this passage lead one to the conclusion that the prohibition of self-endangerment is a positive commandment?

R. Yerucham F. Perlow (19th-20th century) SeferHaMitzvot LaRasag, Aseh no. 1 and Aseh no. 77 offers two approaches to resolve the apparent inconsistency in the rulings of Rambam. R. Chanoch H. Eiges (Marcheshet 3:29) offers a third approach.

Approach #1:

Rambam is of the opinion that *hishamer l'cha ush'mor nafshecha me'od* is a negative commandment. That which Rambam states "Any hazard that is potentially lethal there is a positive commandment to remove it," does not refer to the verse *hishamer l'cha ush'mor nafshecha me'od*, but rather to the mitzvah of *ma'akeh*, the positive obligation to build a fence around the roof of one's house (Devarim 22:8). [The entire chapter 11 of Hilchot Rotzei'ach deals with this mitzvah.] Rambam then states "and to beware of it and to be extremely cautious in this matter as it states '*hishamer l'cha ush'mor nafshecha me'od*,'" as a tangential matter referring to the negative violation of self-endangerment. Rambam never meant to associate the verse *hishamer l'cha ush'mor nafshecha me'od* with any positive commandment.

Approach #2:

Hishamer l'cha ush'mor nafshecha me'od is a positive commandment. The Gemara that states that there is a negative violation for cursing oneself does not refer to the violation of *hishamer l'cha ush'mor nafshecha me'od*, but rather to the general negative violation of using G-d's name in vain. The positive commandment of *hishamer l'cha ush'mor nafshecha me'od* serves to expand the prohibition of using G-d's name in vain to include cursing oneself. Had there been no violation of self-endangerment, cursing oneself might be considered a permissible form of using G-d's name. However, since there is a positive commandment to guard one's life, and cursing oneself constitutes a transgression of that commandment, use of G-d's name to curse oneself constitutes a violation of using G-d's name in vain.

Approach #3:

When the situation requires one to be proactive in eliminating hazards, one who fails to do so is in neglect of a positive commandment. Therefore, Rambam in Hilchot Rotzei'ach records a positive commandment for failure to remove dangerous obstacles. However, when the situation requires one to avoid danger, one who actively places himself in a dangerous predicament is in violation of a negative commandment. Therefore, Rambam in Hilchot Sanhedrin records a negative commandment for one who curses himself.

We can now address the issue of unknown risk. If the prohibition of self-endangerment is a function of a positive commandment to guard and protect oneself, one would be required to be proactive in guarding one's health. One must know that an activity is safe before partaking in it. If the prohibition of self-endangerment is a function of a negative violation, the violation may only apply to dangers with quantifiable risks. If the risks are not known, perhaps it is not considered a dangerous activity.

Applying this discussion to offshore drilling, two perspectives exist. One can argue that one should not place the public in a situation of potential danger in order to drill for oil unless there is a certain degree of certainty that it will not cause harm. One can also argue that oil drilling is not inherently dangerous, because proper measures will be instituted to reduce the risk of an oil

spill and if it does occur, proper measures will be taken to avoid harm, and therefore, one should proceed with drilling.

Not in My Backyard

The term NIMBY is an acronym for "not in my backyard," and is used to describe someone who opposes a project because of the close proximity of the project to one's locale. Politicians are often accused of nimbyism when they oppose projects planned for their local district. In the offshore drilling debate, politicians who represent coastal states and cities are accused of nimbyism for opposing offshore drilling.²⁵ Michaud, et al., note that a litmus test to determine whether an opposition to drilling is due to nimbyism or environmentalism is whether the individual also opposes drilling in ANWR.²⁶ If someone who represents a coastal area opposes offshore oil drilling but supports drilling in ANWR, his position is likely motivated by nimbyism.

In this section, we will deal with the claim of a nimby. Does the local community have a claim when they oppose projects that are in the best interests of the nation as a whole? Should the local community be compensated for housing such a project? As we present the relevant sources on this topic, bear in mind that the sources do not represent U.S. law and are for comparative purposes only.

In Biblical times, the Land of Israel was under autocratic rule. The king was given the authority to confiscate property in order to build roads necessary for waging war.

He can open an area in order to build a road and one cannot protest. The road of the king has no fixed size; he may build it according to his needs. He does not curve the roads because of this one's vineyard and that one's field. Rather, he walks a straight path to wage war.

Rambam, Hilchot Melachim 5:3

ופורץ לעשות לו דרך ואין ממחין בידו,
ודרך המלך אין לה שיעור, אלא כפי מה
שהוא צריך, אינו מעקם הדרכים מפני
כרמו של זה או מפני שדהו של זה, אלא
הולך בשוה ועושה מלחמתו.
רמב"ם הלכות מלכים ה:ג

Rambam implies that a king has a very expansive right to seize property. Nevertheless, R. Moshe Zacuto (ca. 1620-1697), Teshuvot HaRamaz, no. 46, notes that despite the king's legal rights to seize property, King David did not seize the property of Aronah HaYevusi in order to bring a sacrifice. He would not even accept the property as a gift and insisted on paying for it.²⁷ R. Zacuto further states that the legal right for the king to seize property only applies in situations similar to war where there is no option other than to seize the property. He admits that it is appropriate to seize property for national interests when there is no other option and when the property owners are compensated properly.

²⁵ See for example, "Energy Ideas, New and Old," *Washington Times*, June 27, 2005, available at <http://washtimes.com/news/2005/jun/27/20050627-090226-7199r/>.

²⁶ Michaud, Carlisle, and Smith "Nimbyism vs. Environmentalism in Attitudes Toward Energy Development", *Environmental Politics*, 17:1 (2008): 20-39.

²⁷ Shmuel II, Chapter 24.

There are times when seizure of property for the local public good is permissible just as seizure for nation public good if permissible.

That which you asked regarding the leaders of the community who want to change the tax structure and issue a tax on land similar to the tax on money - In all of these lands, taxes are not paid with land ... We do not allow changing the practice without unanimous approval on something that benefits one person and is detrimental to another, where there is no cause for punitive measures ...

Mordechai, Baba Batra no. 481

וששאלתם על ראשי הקהל שבאו לשנות ולהטיל מס על שוה ליטרא קרקע כמו על ליטרא מעות בכל מלכותינו אין נותנין מס מן הקרקעות ... לשנות שלא מדעת כולן במידי דאיכא רווחו להאי ופסידא להאי ולא מיגדר מלתא היא אין שומעין להן לעשות תקנה לעצמו שלא כתורה.

מרדכי בבא בתרא ס' תפא

R. Avraham Y. Karelitz (1878-1953) Chazon Ish, Baba Batra no. 4, explains Mordechai's opinion based on the assumption that the local leaders have the same authority as the beit din (the rabbinical court). The beit din has the authority to seize property for punitive measures or for the betterment of society (tikkun olam). Under normal circumstances, the local leaders cannot impose a tax requiring the citizens to pay a portion of their land because it does not represent tikkun olam.

If the public wants to widen the road and they find that it will benefit the city, one can question whether they can seize the property of private individuals who live on the sides of the roads using the powers of the seven elders of the city that have the status of a beit din for the purpose of seizing property. The point of doubt is that it is possible that this is similar to taxation of land and is not necessarily considered betterment of society. It all depends on the leaders to determine the importance of the project. Nevertheless, in all instances, the individual does not incur a loss and the public must reimburse him for his loss ... If the seven appointed elders of the city are not proper leaders and their intentions are not altruistic, but rather their actions depend on the influence of certain individuals, their decisions are not binding.

Chazon Ish, Baba Batra no. 4

אם הצבור רוצא להרחיב את הרחוב ומוצאים הדבר לתיקון העיר, יש לדון אם יכולים להפקיע קרקעת היחידים שעל מצר הרחוב בכח ז"ט העיר שהן כב"ד להפקיר ממונו של היחיד [כמבואר במרדכי] ומקום הספק דאפשר דזה כמס מן הקרקעות וכיו"ב ולא חשיב תיקון העולם כל כך והכל לפי ראות עיני הדיין עד כמה נחיצת הדבר, ומיהו בכל אופן אין היחיד צריך להפסיד ממונו אלא הציבור חייב לשלם לו הפסדו שהרי אין היחיד חייב לעשות צרכי הציבור משלו ... ואם ז"ט העיר שנבררו אינם טובים באמת ובני העיר שבררו אותם לא היתה כונתם לשם שמים אלא כפי קירוב דעתם לאנשים מסויימים, אין להנבררים שום כח.

חזון איש בבא בתרא ס' ד'

According to Chazon Ish, seizure of property in order to build a road is permissible for the betterment of society as long as the leaders determine that building the road is more important for the city than the displacement of those whose property will be seized. Furthermore, the property owners must be compensated for their loss. Chazon Ish places special emphasis on the motives of the local leaders. Seizure of property is only permissible if it is clear that their actions are motivated by their interest in the betterment of their constituency. If their actions are motivated by the influence of lobbyists, their actions are ineffective (because we cannot trust their objectivity in determining what it considered tikkun olam).

Regarding property seizure, the nimby can claim that the project in his locale does not serve the greater interests of the people. The validity of his claim must be carefully examined by the leaders of the people. The nimby can further claim that he is entitled to compensation for his losses.

Offshore oil drilling does not involve seizure of property. Rather, the claim of the coastal residents is primarily a claim of unsightly drilling rigs and potential pollution. Rambam, Hilchot Shecheinim 11:1-2 and Shulchan Aruch, Choshen Mishpat 155:34, both rule that a private individual who produces pollutants may not produce these pollutants if the wind will blow these pollutants onto his neighbors' property. However, if he does produce pollutants that travel to the neighbor's property, the neighbor is not entitled to compensation. Therefore, from a halachic perspective, the coastal communities do not have a claim for monetary compensation against the government or the oil drilling companies.

Final Thoughts

In this article we focused on three aspects of the debate about offshore oil drilling. We discussed the concept of tza'ar ba'alei chayim as it relates to situations that involve human benefit. We discussed the human risk factor and how it relates to unquantifiable risks. We also discussed the claims of those who live in coastal regions and object to drilling because of the specific impact it can potentially have on their region.

Some may describe the debate about offshore oil drilling as part of a broader conflict between capitalism and environmentalism. Those in the capitalist camp place economic interests ahead of environmental concerns. Those in the environmentalist camp are concerned about the welfare of the environment, even at great economic cost.

There is an allusion to the conflict between capitalism and environmentalism in R. Yosef D. Soloveitchik's *The Lonely Man of Faith*.²⁸ R. Soloveitchik notes that in chapter one of Genesis, Adam is told:

'Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that creepeth upon the earth.'

Genesis 1:28

פרו ורבו ומלאו את הארץ וכבשה
ורדו בדגת הים ובעוף השמים ובכל
חיה הרמשת על הארץ:
בראשית א:כח

In the words of R. Soloveitchik, the quest of Adam the first (Adam as described in the first chapter) is "to harness and dominate the elemental natural forces and to put them at his disposal."

By contrast, the second chapter of Genesis states:

And the LORD God took the man, and put him into the garden of Eden to dress it and to keep it.

Genesis 2:15

ויקח ה' אלהים את האדם וינחהו בגן עדן
לעבדה ולשמרה:
בראשית ב:טו

²⁸ R. Joseph B. Soloveitchik, *The Lonely Man of Faith*, Doubleday Publishing (2006): 9-14.

In the second chapter, Adam's mandate is to watch and guard the Garden of Eden. R. Soloveitchik notes that the mandate in this chapter contrasts to Adam's mandate in the previous chapter to conquer the land. R. Soloveitchik's idea is supported by a comment of the Midrash:

When G-d created Adam, he showed him all of the trees of the Garden of Eden and said to him 'See my works how beautiful and praiseworthy they are and everything that I created, I created for you. Make sure that you don't ruin and destroy my world.

Kohelet Rabbah 7:13

בשעה שברא הקב"ה את אדם הראשון
נטלו והחזירו על כל אילני גן עדן ואמר
לו ראה מעשי כמה נאים ומשובחין הן
וכל מה שבראתי בשבילך בראתי, תן
דעתך שלא תקלקל ותחריב את עולמי.

קהלת רבה ז:יג

Man's duty is to conquer the earth, while at the same time preserving it for future generations. Our job is to find the right balance between conquest and preservation. We have to realize the long-term environmental impact of our conquests, but with an understanding that sometimes tikkun olam can be achieved by destroying a forest in order to build a nuclear power plant.