

One day out of jail: When should you take it? "אין מעבירין על המצוות"

Imagine a Jew imprisoned in a hostile country, but granted by the authorities **one day a year** out of jail: Which day should he choose? And what should he do on that day?

As we explore the answers to these questions we will uncover meta-principles of *halachah* relating to the prioritization & timing of mitzvos and the choices between them.

This session is about **making choices** – not choices between good and bad, which we are perhaps more familiar with, but rather between good and good – between two mitzvos.

Here are some of the key questions this class will address:

- If a Jew is granted only one day out of jail, which day should he choose?
- What are the halachic principles underlying the answer to this question?
- What is the philosophical approach behind the Torah's guidelines for choosing between one mitzvah and another?
- What are some common applications of the principles behind choosing between mitzvos?

A True Story:

*In Communist Russia of 1970, Alexei Shimonovich, a teacher of Judaism and fifteen-year refusenik (“refused” permission to emigrate to Israel), was tracked by the KGB, tried and convicted for alleged subversion and espionage. He was sentenced to a thirty-year jail sentence in a high-security Soviet prison. His arrest and incarceration sparked a wave of protests by activists from the movement to release Soviet Jewry. After high-level foreign diplomats exerted pressure on the Soviet government, Shimonovich was made an extremely strange offer. He would be allowed **one day out of jail a year; he could choose the day.***

Shimonovich, a devoutly religious Jew, managed to smuggle out a message requesting that someone contact a leading halachic authority to instruct him which day out of the year he should choose.

If, God forbid, you were in his tragic position, which day would you choose and why?

Here is a partial list of possibilities:

- Yom Kippur – the holiest day of the year.
- Purim – the day on which Jews worldwide celebrate the victory over Haman and the thwarting of his plot to annihilate the Jewish people.
- Rosh Hashanah – the day that the shofar is sounded.
- Pesach – the holiday commemorating the Exodus of the Jews from Egyptian slavery and oppression.
- Simchas Torah – the joyous holiday on which the Torah is completed and begun anew, a day especially embraced by Soviet Jewry.
- Shabbat – the weekly commemoration of God's resting after creating the world.

What do you think??

As we shall see, this question is in fact a matter of debate amongst some of the great Halachic authorities of previous generations:

In One Corner:

This question was raised some 500 years ago, and sent to Rabbi David ben Zimra (1479-1573), among the leading authorities of the time. **Radbaz**, as he is commonly known (“Radbaz” being an acronym for his name), served as Chief Rabbi of the Egyptian Jewish community and later as one of the sages of Tzefat, where he spent the last twenty years of his life.

In the Other Corner:

Chavei Adam (Rabbi Avraham Danzig zt”l, Vilna, 1748-1820) responded to the identical question some 300 years later, regarding Jewish soldiers in the Czar’s army who were typically conscripted for 25 years!

1 – THE OPINION OF THE RADBAZ

Source 1. Shut Radbaz 4:13 – Which day should I choose?

Question: Reuven was imprisoned in jail and was not able to leave to pray with [a *minyan* (quorum) of] ten nor to fulfill other mitzvot. He beseeched the minister or governor yet was not granted permission, other than for one day a year – a day of Reuven’s choice. Let the teacher instruct us: Which day of all the days of the year should Reuven choose to go to the Beit Hakneset (synagogue)?

Answer: I have seen that one of the wise men of our generation responded to this question. He dived into deep waters but brought up a pottery shard, and he built his construction upon shaky foundations. At first he said that Yom Kippur is the best [day to choose]. Then he switched it for Purim, because of the Megillah reading and publicizing of the miracle, which requires [a quorum of] ten. It is not fitting to rely on his words.

שְׁאֵלָה: רְאוּבֵן הָיָה חִבּוּשׁ בְּבֵית הַאֲסוּרִים וְלֹא הָיָה יָכוֹל לְצֵאת לְהַתְפַּלֵּל בְּעֵשְׂרֵה וְלַעֲשׂוֹת הַמִּצְוֹת. וְהִתְחַנֵּן לִפְנֵי הַשָּׂר אֹד הַהֲגֵמוֹן וְלֹא אָבָה שְׂמוֹעַ לְהַנְיָחוֹ, זֹלָתֵי יוֹם אֶחָד בַּשָּׁנָה אֵינָה יוֹם לְשִׁחְפוּץ. יוֹרָה הַמּוֹרָה אֵינָה יוֹם מְכַל יְמוֹת הַשָּׁנָה יִבְחַר רְאוּבֵן הַנִּזְכָּר לְלַכֵּת לְבֵית הַכְּנֶסֶת?

תְּשׁוּבָה: הִנֵּה רְאִיתִי אֶחָד מִחֻכְמֵי דוֹרֵנוּ בְּתִשְׁבּוּבָה דְבָר זֶה צָלַל בְּמַיִם אֲדִירִים וְהֵעֲלָה חֶרֶס בְּיָדוֹ וְעַל יְסוֹד רַעוּעַ בָּנָה יְסוֹדוֹ. בְּתַחֲלָה פָּתַח דְּעָדִיף יוֹם הַכְּפוּרִים וְאַחֲרַי כִּד הַחֲלִיפוּ בְיוֹם הַפּוּרִים מִשּׁוּם מִקְרָא מְגִילָה וּפְרָסוּמֵי נֶסָא דְבַעֲיָנוּ עֲשָׂרָה, וְאֵין רְאוּי לְסַמוּךְ עַל דְּבָרָיו.

After bringing the answer of one of the other great sages of his day, the Radbaz proceeds to reject this approach and introduces a new, and perhaps shocking idea:

Source 2. Ibid.

Yet, the ruling that one should rely on is based on the principle, “*Ein ma’avirin al hamitzvos* – We may not pass up mitzvot.” There is no opposition to this principle; therefore, the first mitzvah he encounters that cannot be fulfilled while imprisoned takes precedence. We do not pay attention to whether the first mitzvah he encounters is a “light” or a “weighty” one, for one cannot know the reward of mitzvot. This is very obvious to me.

David son of Shlomo ibn Avi Zimra

אָבַל מַה שְּׂרְאוּי לְסַמוּךְ עָלָיו הוּא דְאַנָּן קִיַּמָּא לֹן דְאֵין מַעֲבִירִין עַל הַמִּצְוֹת וְאֵין חוֹלֵק בְּזֵה כָּלֵל הַלְפָד הַמִּצְוָה הַרְאֻשׁוֹנָה שְׁתַּבָּא לְיָדוֹ שְׂאֵי אֶפְשֵׁר לַעֲשׂוֹתָהּ וְהוּא חִבּוּשׁ בְּבֵית הַאֲסוּרִים קוֹדֶמֶת וְאֵין מְשַׁגְּיחִין אִם הַמִּצְוָה שְׁפָגְעָה בּוֹ תַחֲלָה הִיא קְלָה אוֹ חֲמוּרָה שְׂאֵי אַתָּה יוֹדֵעַ מִמֶּנּוּ שְׂכַרְוֹן שֶׁל מִצְוֹת וְזֶה פְּשׁוּט מְאֹד אֲצֵלִי. דְּוָד בֶּן שְׁלֹמֹה וְ אַבִּי זִמְרָא.

The Radbaz rules that the Jew should take the very first day available out of jail and jump on the first mitzvah that comes his way! Radbaz bases his halachic position on two principles:

1. “We may not pass up mitzvot.” This Talmudic principle teaches us that it is wrong to pass up one mitzvah for the sake of fulfilling a different mitzvah. Rather, one should perform the first mitzvah he encounters, even if this means that he will not be able to fulfill a different mitzvah
2. “We cannot know the reward of mitzvot” – One mitzvah might appear less important than another, yet we cannot know their true reward.

Let's address the source for each of these principles:

1. אין מעבירין על המצוות

Source 3. Yoma 33a – What is the Radbaz's Talmudic source?

Reish Lakish says, "We may not pass up mitzvos"	אמר ריש לקיש: אין מעבירין על המצוות.
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Rashi (in his commentary to the Gemara) explains that the source for this principle is rooted in a Midrash about *matzah*.

Source 4. Mechilta Parshat Bo, Parsha 9 – What is the source for this principle?

<p>"You should guard the matzot (and prevent them from leavening)" (Shemos 12:17). Rabbi Yoshiah said, "Do not (only) read this Hebrew word as it is voweled (<i>matzot</i> – referring to unleavened bread), but read it as <i>mitzvot</i>, meaning that "You should guard the <i>mitzvot</i>." Just as you should not cause matzah to leaven (by leaving the dough to rise) so you should not cause the mitzvot to "leaven" (by delaying them). Rather, whenever you encounter any mitzvah, do it immediately.</p>	<p>"ושמרתם את המצות". ר' יאשיהו אמר אל תקרי בן אלא 'ושמרתם את המצות'. כדרך שאין מחמיצין את המצה, כך אין מחמיצין את המצוה. אלא, אם בא מצוה לידך עשה אותה מיד.</p>
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Matzah is a paradigm for all mitzvos. In order to prepare matzah, one has to move fast and not delay. The leavening process will kick in (even if you do not add any yeast) if the dough sits idle without constant kneading, possibly rendering it *chametz* (leavened) and unfit for consumption on Pesach. Similarly, we must not let the opportunity to do a mitzvah pass us by.

**Timing is of the essence. Strike while the iron is hot!
Do not pass up the opportunity to do a mitzvah!**

2. LIGHT AND HEAVY MITZVOS

The 2nd ingredient in the Radbaz's equation establishes that one should not even pass up on a "minor" mitzvah in order to perform a "great" one.

He refers to a Mishnah in Pirkei Avos:

Source 5. Pirkei Avot 2:1 – Be careful about all mitzvot.

Be as careful about a "light" mitzvah as you would a "weighty" one, for you do not know the reward of mitzvos.

וְהָיָה זְהִיר בְּמִצְוָה קְלָה כְּבִתְמוּרָה, שְׂאִין
אֶתָּה יוֹדֵעַ מִתֵּן שְׂכָרָן שֶׁל מִצְוֹת.

What is the underlying concept here? Why, indeed, can't we give an assessment of the relative 'value' of the mitzvohs?? This touches upon a foundational idea in mitzvah-observance:

Source 6. Rabbi Binyamin Blech, Understanding Judaism: The Basics of Deed and Creed, pp. 7-8

God alone knows what weight to give every action in the cosmic scheme of reality. For us, every mitzvah must be equal simply because each one shares its source in the Divine imperative. Each is to be observed because God said so. That is true for the simplest act, and it is true for the most demanding one as well.

It is here that a profound point begins to emerge. If we were to give preference to one mitzvah over another for whatever reason, it is then we who become final arbiters of the purpose of commandments. To rank one law above another might not seem a crime, but whenever we call one thing more important than the next, we also diminish the one not chosen for highest priority.

Treat all mitzvot equally, because to do otherwise is to say I think that this particular law is not so important. If I like the ethical parts of the Torah, but do not feel constrained by the rituals, then of course I will say the former is what God really cares about. Do I find rituals rich in symbolism, pageantry, and beauty, but laws restricting me in my business practices too confining? Then obviously God only meant to be taken seriously when He told me to pray to Him, but He was not serious when He insisted I not prey upon my fellow man.

Selectivity is the transgression that allows us to pick and choose from the law and hence to redefine it... That is the point of the Mishnah that the Radbaz used as the basis for his response to the Jew forced to "select" a day of religious observance. Choose the first day so that you don't in fact choose, but rather God chooses for you. Choose the first day, because if you are granted the freedom to practice your religion on any one day, you dare not defer it to another and thereby declare that you are "looking for something better."

2 – THE OPINION OF THE CHAYEI ADAM

Chayei Adam, who presents the dissenting opinion to the Radbaz, points out (68:1) that one of the earlier great commenters – Tosafos – clearly disagrees with the Radbaz:

Source 7. Tosafos, Yoma 33a

<p>Reish Lakish’s principle (that you may not pass over mitzvot) only applies where you have to do both, and it instructs you to give precedence to the one you encounter first. But the principle does not apply where a person can only fulfill one of the two. Under such circumstances, one should perform the more frequent one and not the less frequent one.</p>	<p>דלא שייכא דריש לקיש אלא היכא דבעינן למעבד תרנייהו שיש להקדים ההוא דפגע ביה ברישא אבל היכא דלא עבדינן אלא חד לא גמרינן מיניה ונעביד לתדיר לחודיה ולא נעביד לשאינו תדיר:</p>
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(Note: Tosafos bases this distinction upon many proofs throughout the Talmud supporting this position. On the other hand, Tosafos himself, Megilah 6b, actually brings a proof for the opinion of the Radbaz! The analyzation of these sources – both supporting and refuting the positions of Tosafos and the Radbaz – are, however, beyond the scope of this learning session)

According to Tosafos, the principle of “not passing up mitzvos” is not applicable when deciding between two mitzvos where only one of them will be performed. Rather, the principle teaches us that where two mitzvos **are** to be fulfilled, one should not pass up the first that comes one's way, but rather perform them in the order they arrive. Likewise, one should make sure to do an individual mitzvah at the first possible opportunity. But when it comes to deciding between two mitzvos of which only one can be fulfilled, the principle does not apply.

What is the explanation for this?

The Chayei Adam, Rabbi Danzig, explains this exception to the principle:

Source 8. Chayei Adam 68:1 – When does the principle not apply?

<p>The principle of not passing over mitzvot only applies where one means to perform two mitzvos, for instance putting on both a tallis and tefillin. In this case, one must perform whichever one he encounters first [and then perform the other]. But if one does not have the opportunity to do both of them, the principle does not apply. <i>On the contrary, we would then prefer the more severe mitzvah.</i> For instance, when the choice is between tzitzit or tefillin – one or the other – one should prefer tefillin because of their greater sanctity and also because their obligation applies to the body itself (whereas tallit applies to clothing) ... Even if one has a biblical-level mitzvah to do today, but its fulfillment will preclude the fulfillment of another, more stringent, biblical mitzvah tomorrow – tomorrow’s mitzvah takes precedence.</p>	<p>דלא שיהי דלא מעבירין אלא כשרוצה שתי מצות, כגון שרוצה להניח טלית ותפלין דבאיזה שיפגע תחלה צריך לעשות. אבל אם אין לו פנאי לקיים שניהם רק אחד, לא שיהי בזה אין מעבירין, אלא אדרבה אזלינן אחר המצנה המורה, כגון ציצית ותפלין, תפלין חמורה שהיא קדושה ביותר וגם חובת הגוף ... ואפילו יש לפניו מצוה דאורייתא לעשות היום, רק כשיצטוו היום לא יוכל למחר לעשות מצוה דאורייתא אחרת שהיא חמורה מזו, מצוה דלמחר עדיף.</p>
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Rabbi Danzig addresses one of their very unfortunate halachic dilemmas.

Source 9. Chayei Adam 68:1 – When should Jewish soldiers return to their posts?

<p>Therefore, concerning the matter of Jewish soldiers¹ – it seems to me that if he must go to his post on the day before Yom Kippur, so that he will not be able to put on tefillin that day (the day preceding Yom Kippur), yet, on the other hand, he will be able to fast the next day, on Yom Kippur... we do not say, “do not pass up mitzvos”</p>	<p>וְלִכְּוֹן נִרְאָה לִי בְּאַנְשֵׁי חֵיִל יְהוּדִים שְׂצָרֵיהֶּ לִילָהּ עַל מְשֻׁמֵּר שְׁלוֹ בְּעֶרְבַּ יוֹם כְּפוּר וְכִיּוֹצֵא בּוֹ אֶלֶּא דְּאִזְ לֹא יָכוֹל לְהַנִּיחַ תְּפִלִּין בְּאוֹתוֹ יוֹם, וְלַעֲוֹמַת זֶה יָכוֹל לְמַחֵר בְּיוֹם הַכְּפוּרִים לְהִתְעַנּוֹת ... לֹא אֲמַרִּינּוּ אִין מְעַבְרִין עַל הַמִּצְוֹת.</p>
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The Chayei Adam argues with the Radbaz on both of his 2 foundational-points!!!

1. Whereas Radbaz applied the principle of “אין מעבירין על המצות” even in a case where one can only do 1 mitzvah (i.e. leave jail for one day), Chayei Adam says that “אין מעבירין” does not at all apply in this case, but, rather only in a case where one has multiple mitzvohs to choose from.
2. Whereas Radbaz established that one cannot choose between different mitzvohs, and choose the “weightier” one, Chayei Adam (and Tosafos) delineate exactly which mitzvohs are more important than others! (ie Yom Kippur vs tfillin; frequent vs in-frequent; etc...)

¹ In the Chayei Adam’s time Jewish youth were involuntarily conscripted into the Czar’s army, where keeping Torah mitzvot was extremely difficult. These soldiers, referred to as Cantonists, were forcibly snatched by the authorities for army service (the problem was most acute during the reigns of Alexander I and Czar Nicolai, between 1801 and 1856). Most of the boys were between the ages of twelve and eighteen; some were as young as eight or nine. They were forced to serve for twenty-five (!) years after their eighteenth birthday. Simultaneously, they were victims of aggressive attempts to convert them to Christianity. Rarely did these soldiers succeed in maintaining a lifestyle of traditional Jews. However, in exceptional cases, and through tremendous self-sacrifice, these soldiers were able to retain Jewish belief and practice.

3 – UNDERSTANDING THE DISPUTE

1) The Heart of “אין מעבירין על המצות”

How can we understand the disagreement as to whether or not “אין מעבירין” applies only to situations in which one will be able to perform both mitzvohs, or even in a situation where one must choose to perform only one? Let’s dig to the core: *What exactly is wrong with passing a mitzvah by? What is the basis of the principle that one must not pass over mitzvot?*

This question was asked by Rabbi Zvi Chanoch Levin, a renowned Torah scholar and the son-in-law of Rabbi Yehudah Arye Leib Alter, the renowned "Sefas Emes."

Source 10. Kovetz Torani Merkazi Sivan 5744 p. 23

We need to know the reason that it is forbidden to pass up mitzvot. What is the rationale behind this? It seems that there are two possible reasons: Either it is considered a disgrace to a mitzvah to leave a mitzvah and take another in its stead – that is a disgrace to the first mitzvah. Alternatively, we might suggest that the reason is that we must perform mitzvot with zest at the first possible time and place.

דהנה הא דאין מעבירין על המצות טעמא
בעי מה זאת? ונראה דיש לומר שני טעמים
בזה, או דהני בזוי מצנה, דמניס מצנה זו
ולוקח עצמו לשניה הני בזיון מצנה הקודמת,
או דיש לומר משום דזריזין מקדימין למצות
בזמן ובמקום, ולזה אין מעבירין.

There are two ways of understanding the conceptual principle of אין מעבירין:

- A) Out of enthusiasm for a mitzvah, **you** should do it as soon as possible, and therefore they should not be passed up; or
- B) It is an affront to **the mitzvah itself** to pass it up

In other words, we could present the following ‘Talmudic query’:

- Is “אין מעבירין על המצות” a concept which applies to the person
 - i.e. you should approach mitzvohs with alacrity, and grab the 1st one that comes your way, or;
- Is it a concept which applies to the mitzvah itself, as it were
 - i.e. the mitzvah should not become disgraced, so to speak, by having been ‘skipped-over’

We can say that the dispute between Radbaz and Chayei Adam hinges around these two rationales:

- Tosafos will side with approach A, whereby the person should perform a mitzvah as soon as possible. This would apply when one needs to choose between 2 mitzvot. However, in circumstances where one can only do 1 mitzvah, it’s not due to a lack of alacrity to perform the 1st available mitzvah which causes the ‘skip’, but, rather, a deliberate weighing of one’s options, to select the heftier of the two mitzvot.
- The Radbaz, on the other hand, will side with approach B – the mitzvah is disgraced by passing it up, therefore, this would apply even if only one mitzvah can be performed.

2) Weighing Mitzvoahs

How could the Chayei Adam respond to the Radbaz's 2nd principle, (as articulated above in source 7), whereby leaving the choice up to us will imply a subjective approach to mitzvah performance?

The answer is that the choice between mitzvot is not made based on whim, convenience, or emotional preference. Rather, the Torah itself guides us and gives us Divinely ordained criteria to make choices between mitzvot!

(In fact, much of what we do in learning various topics throughout the Gemara is in fact clarifying which mitzvohs/halachos take precedence over others...but based on sources rooted in the Torah itself!)

Here is one example, from a Mishnah. The Mishnah presents a principle of precedence, but **quotes a biblical source** to support it.

Source 11. Mishnah Zevachim 89a – Frequency creates precedence.

Any [mitzvah] that is more frequent than others takes precedence. The daily sacrifices precede the *musaf* (additional) sacrifices; the musaf of Shabbos precedes the musaf of Rosh Chodesh (the first day of the Jewish month); and the musaf of Rosh Chodesh precedes the musaf of Rosh Hashanah (the first of the year). This is based on the verse (Bamidbar 28:23): “You should do these [other sacrifices] besides [here implying ‘after’] the daily burnt offering.”

כָּל הַתְּדִיר מִתְּבָרוֹ, קוֹדֵם אֶת תְּבָרוֹ.
הַתְּמִידִים קוֹדְמִים לְמוֹסָפִין, מוֹסָפֵי
שַׁבָּת קוֹדְמִין לְמוֹסָפֵי רֹאשׁ חֹדֶשׁ,
מוֹסָפֵי רֹאשׁ חֹדֶשׁ קוֹדְמִין לְמוֹסָפֵי
רֹאשׁ הַשָּׁנָה, שְׁנֵאמַר (בַּמִּדְבָּר כח),
"מִלְבַּד עֲלֵת הַבֶּקֶר אֲשֶׁר לְעֹלֹת
הַתְּמִיד תַּעֲשׂוּ אֶת אֱלֹהֵי:"

Here, the Gemara derives a biblical-principle that frequency creates precedence. This has applications in many context throughout daily Jewish-living. Here's some examples:

1. Putting on a tallis (that is worn every day of the week) before tefillin (which are not worn on Shabbos);
2. Reading the Torah portion for Rosh Chodesh (which is read once a month) before that of Chanukah when the two coincide (on Rosh Chodesh Teves);
3. Counting the Omer (which is done for 49 days of the year) only after praying the (daily) Maariv service.

4 – COMMON APPLICATIONS

A. The Seder Plate

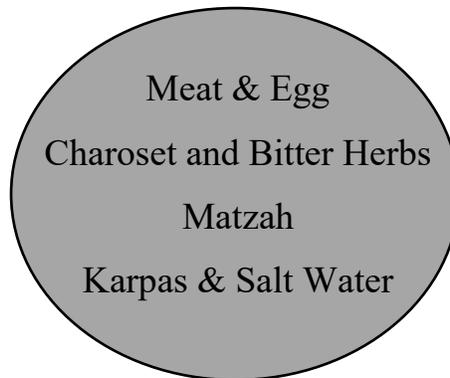
Seder night is a night of mitzvos, including a number of different mitzvah objects – all of them types of foods. Besides wine for the four cups, our list of foods for the evening includes (in the following order): *karpas* (a vegetable like potatoes or celery), salt water or vinegar to dip the karpas in, matzah (unleavened bread), *marror* (bitter herbs), *charoses* (mixture made of nuts, wine, cinnamon, and apples – to dip the marror in), a hard-boiled egg (often eaten with salt water, reminiscent of a holiday sacrifice that was brought on the day before Pesach), and a shank bone (not eaten on the Seder night).

The Rema writes how these foods should be arranged on the table to ensure we follow the principle of “*ein ma’avirin al hamitzvos*”:

Source 12. Rema, Shulchan Aruch Orach Chayim 473:4

<p>The Seder Plate should be arranged in a way that will prevent passing over a mitzvah [enabling a person to physically encounter the performed mitzvot in chronological order]. That is, the karpas (vegetable to be dipped in the beginning of the Seder) should be closest (to the person leading the Seder) of all, and the vinegar (salt water) closer to it than the matzah. The matzos should be closer than the marror and charoset, and they should be closer than the meat and egg.</p>	<p>ויסדר הקערה לפניו בענין שאינו צריך לעבור על המצות. דהיינו - הפרס? היא למעלה מן הפל, והחמץ סמוך לו יותר מן המצה, והמצות מן המרור והחרוסת, והם יהיו יותר קרובים אליו מן הבשר והביצה.</p>
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Here is how the Seder Plate is arranged, according to the Rema, so that the bottom items, which are taken first, are closest to the leader of the Seder²:



² There are a number of other customs for how to arrange the Seder Plate; the Rema’s approach is based purely on “*ein ma’avirin al hamitzvos*”

B. The Shabbos Challah

After making Kiddush over wine on Shabbos evening, we open our meal by making a blessing over two breads specially baked for Shabbos. Every detail of the Shabbos meal, including making the blessings over the challos, is laden with meaning. The mystical tradition, which in this case has become common custom, teaches us to eat specifically the bottom bread on Shabbos evening, and the top one on Shabbos morning.

The Shulchan Aruch and commentators apply the principle of *ein ma'avirin al hamitzvos* to how the challos are held as we recite the blessing.

Source 14. Shulchan Aruch and Rema, Orach Chayim 274:1

<p>One recites the blessing over two (whole) loaves. This is done by holding both in his hands and cutting the bottom one.</p> <p>Rema: This refers specifically to Shabbos night, but on Shabbos day or Yom Tov night, one cuts into the top challah. The reason is rooted in the Kabbalah (the Jewish mystical tradition).</p>	<p>בוֹצֵעַ עַל שְׁתֵּי כִפּוּרוֹת (שְׁלֵמוֹת) שְׂאוֹתָו וְשִׁמְיָהוּן בְּיָדוֹ וּבוֹצֵעַ הַתְּחִלָּה: הַגָּה וְדוֹקָא בְּלִילֵי שַׁבָּת (דַּעַת עֲצָמוֹ) אֲכַל בְּיוֹם הַשַּׁבָּת אוֹ בְּלִילֵי יוֹם טוֹב בּוֹצֵעַ עַל הָעֲלִיוֹנָה (כֹּל בּוֹ וְהַגָּהוֹת מִיְּמוֹנֵי פ"ח מֵהַלְכוֹת חֲמִצָּה וּמִצָּה) וְהַטַּעַם הוּא עַל דְּרָדָךְ הַקְּבִלָה.</p>
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The Mishnah Berurah shows how earlier commentators dealt with the issue of *ein ma'avirin al hamitzvos*:

Source 15. Mishnah Berurah, Orach Chayim 274:5

<p>Bach (Rabbi Yoel Sirkes, author of Bayit Chadash) pointed out the difficulty with cutting the bottom challah, because [passing up the upper challah] contravened the principle of “not passing over a mitzvah,” [and he therefore ruled that you should always make the blessing over the top challah]. The Taz (Rabbi David Halevi, author of Turei Zahav) found a way of circumventing this problem: he had the practice of placing the bottom challah closer to himself than the top one, so he would encounter the bottom one first, and not pass over the top one. Alternatively (the Magen Avraham’s solution), one could take the challah that was uppermost at the time of making the Hamotzi blessing, place it below the other challah, and only then cut it (thus, one never “passes over” the top challah).</p>	<p>הַתְּחִלָּה - הַבִּיחַ תְּמַה דְּאִי מְעַבְרִין עַל הַמִּצְוֹת. וְהַטַּעַם תִּיקוֹן זֶה, וְנִהְיֶה לְהַגִּיחַ הַתְּחִלָּה קְרוֹב אֵלָיו יוֹתֵר מִן הָעֲלִיוֹן, וְנִמְצָא שֶׁפּוֹגֵעַ תְּחִלָּה בַּתְּחִלָּה. אוֹ לִוְקָחִין הָעֲלִיוֹנָה בְּשַׁעַת בְּרַפְתַּי הַמוֹצֵיא, וּמְנִיחִין אוֹתָהּ לְמִטָּה וּבוֹצֵעִין עָלֶיהָ.</p>
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The Taz’s solution is common practice.³

It is interesting to note that Rabbi Yechiel Michel Epstein (Aruch Hashulchan, Orach Chaim 274:6) quotes an approach contending that the principle of *ein ma'avirin al hamitzvos* should not apply here, based on Tosafos’ approach, as discussed above: Because the intention is to eat only one of the two challos, and not both, the principle of “*ein ma'avirin*” does not apply!

³ Shmiras Shabbos Kehilchasa Volume 2, 55:23