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# **Journal of Halacha and Contemporary Society**

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**Rabbi Alfred S. Cohen**

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The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School, Dr. Marvin Schick, President. The Rabbi Jacob Joseph School, located at 3495 Richmond Road, Staten Island, New York 10306, welcomes comments on this issue and suggestions for future issues.

It is the purpose of this Journal to study the major questions facing us as Jews in the twentieth century, through the prism of Torah values. We will explore the relevant Biblical and Talmudic passages and survey the halachic literature including the most recent Responsa. The Journal of Halacha and Contemporary Society does not in any way seek to present itself as the halachic authority on any question, but hopes rather to inform the Jewish public of the positions taken by rabbinic leaders over the generations.

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# The Journal of Halacha and Contemporary Society

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# Taking The Law Into One's Own Hands

Rabbi Alfred Cohen

Every citizen of a democracy cherishes the sense of personal freedom guaranteed by the law of the land. No "lord of the manor" can force him to act against his will, no autocratic ruler can disrupt his tranquillity. This sense of being ruled by an orderly system is a right which all Americans honor and cherish.

On the other hand, as Americans we also pride ourselves on being unfettered, free spirits. The pioneer image is a powerful lure, and we are fiercely proud to think of ourselves as rugged individualists, forging our own destiny through our own initiative. That there is a conflict between these two self-portraits is readily apparent. While we respect the security implicit in a society carefully structured in an all-encompassing legal system, we nevertheless admire those who are not afraid to break the rules, those people who can "fight the system" and get things done their own way.

In the past few years there seems to be an increasing tendency for individuals to feel they have the right to act unilaterally to achieve their aims. Whether we call them terrorists or "freedom fighters", Montana Freemen or Oklahoma Bombers, or even fanatics who assassinate a Prime Minister who follows a policy they deem undesirable, the phenomenon of unilateral action, without sanction of law or government, is no longer a rarity.

Unfortunately, while it might be only mildly startling to observe the shenanigans of a bunch of cowboys in the remote

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West who thumb their noses at the authority of the United States Government, it is quite something else when a "religious fanatic" murders the Prime Minister of Israel or shoots up a group of Arabs at prayer, and then justifies the horror as being sanctioned by Torah law.

Now that the shock and pain of those terrible assassinations have subsided a bit, we do need to examine the proposition inherent in the actions of those who take the law into their own hands, convinced that Jewish law permits or even requires such violent deeds. Before we proceed, let me make it clear that Amir and Goldstein were both unquestionably totally wrong and unjustified in what they did. Nevertheless, there is some truth in the assertion that at times Jewish law gives an individual the right to take matters into his own hands. In Jewish legal parlance, the principle is known as "*Avid inish dinei lenafshei*." There is obviously a broad continuum of activities, starting from legitimate unilateral action to save one's life or property – and reaching all the way to murder. Where does Jewish law draw the line? How far may one go in defiance of standard civil procedure? What is legitimate and what is criminal – and how does one distinguish between them?

That is the topic of the present study: the conflict between a society governed strictly by law and the needs or desires of individuals to assure their own rights without resorting to governmental institutions and procedures. There are times when a person feels absolutely compelled to take the law into his own hands – and perhaps one does sometimes have the prerogative to take unilateral action. The present inquiry will explore the attitudes of Jewish law in various scenarios which might lead a person to pre-empt the standard procedures and decide to settle a matter his own way. We will try to determine the parameters which distinguish between justifiable and criminal behavior.

## i

In the Torah we find a number of instances when individuals undertook to settle matters without recourse to courts or legal procedure. One cannot summarily conclude that the Torah disapproves of their behavior. Actually, a cursory reading yields some ambiguity on this point: When the brothers Shimon and Levi massacred the entire town of Shechem to avenge the rape and kidnap of their sister, they were bitterly rebuked by their father Yaakov for the murder of innocents.<sup>1</sup> Yet, when Pinchas picked up a spear and killed Zimri, Prince of the tribe of Shimon, for brazenly consorting with a Midianite woman, he was praised by the Allmighty and granted great rewards for his outstanding bravery and zeal.<sup>2</sup> The festival of Chanukah still glorifies the audacity of Mattityahu, who sparked the Maccabean revolt to fight for religious freedom. But for more than two thousand years, we have been observing a Fast Day for the assassination of Gedalia, Governor of Judea, killed by a band of political opponents.

Consequently, we must analyze carefully the fine points of the talmudic debate on the topic in order to arrive at a correct understanding of Jewish law regarding a person's taking the law into his own hands, "*avid inish dinei lenafshei*."

The Jewish system of law (halacha), like the American one, is based on a foundation of organized structure, procedures, and well-publicized rules. If there is a question of Jewish law, the Rabbi is supposed to be consulted; if there is a dispute between Jews, they are to settle it before a Beth Din, a Rabbinic

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1. Genesis 34:30.
2. Numbers 25:10-13.

Court.<sup>3</sup>

Albeit there is a "standard procedure", there are clearly times when the Gemara itself recognizes that "*Avid inish dinei lenafshei*", a person may take the law into his own hands.<sup>4</sup> There are a number of variables which the rabbis took into account in determining the halachic guidelines on this question.

The halachic debate in the Gemara evolves from a dispute which was brought before Rav Nachman:

There was a well belonging to two persons. It was used by them on alternate days. One of them, however, came and used it on a day not his. The other party said to him: "This day is mine!" But as the latter paid no heed to that, he took a blade of a hoe and struck him with it. Rav Nachman thereupon replied: "There is no penalty to him even if he would have struck him a hundred times with the blade of the hoe. For even according to the view that a man may *not* take the law into his own hands for the protection of his interests, in a case where an irreparable loss is pending, he is certainly entitled to do so."<sup>5</sup>

From the ensuing debates, it becomes evident that all

3. The very foundation of the Jewish system of law is that all members of the society must adhere to the rules of that system, known as halacha. Universal respect for the dictates of the law is considered so fundamental, that the Talmud lays down the principle: "*makin ve-onshin shelo min hadin*." If the religious leaders of a generation perceive an air of laxity with respect to observance of details of the halacha, the Jewish Court was given the power to impose punishments and penalties greater than stipulated by the law, in order to preserve or return the populace to the proper level of adherence.

4. *Bava Kamma* 27b.

5. *Ibid.*

*Amoraim* (talmudic rabbis) accept the principle *Avid inish dinei lenafshei* (a person can take the law into his own hands), but there is strong disagreement as to the applicability of the principle. The critical point of debate is – **when, and under which circumstances**, does the law sanction such drastic action? Simply to state the principle *avid inish dinei lenafshei* without specific limitations would be tantamount to anarchy; the law of the jungle would prevail.

As noted, there is no disagreement in the Gemara that a person may take the law into his own hands for the protection of his interests; but there is a strong difference of opinion whether this applies in all cases where a person wants to protect his rights, or only when an irreparable loss is pending. (For example, "A" sees his stolen car parked in "B"'s garage. May he break in to retrieve his car, or should he call the police? Some say yes he may, others say no.)

Rav Yehudah said: "No man may take the law into his own hands for the protection of his interests," whereas Rav Nachman said: "A man may take the law into his own hands for the protection of his interests."<sup>6</sup>

The two rabbis are not disagreeing about the basic principle; they are debating how far to extend its scope:

Rav Yehudah maintains that no man may take the law into his own hands for the alleged protection of his interests, for since no irreparable loss is pending, let him resort to the Judge; whereas Rav Nachman says that a man may take the law into his own hands for the protection of his interests, [even if no irreparable loss is imminent] for since he acts in accordance with the prescriptions of the law, why need he take the trouble

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6. Ibid.

to go to Court?<sup>7</sup>

In the law codes, the *Rishonim* and the *Shulchan Aruch* follow R. Nachman in ruling that "A person may make a law for himself; if he sees his property in the hands of another who stole it from him, he may take it back from him."<sup>8</sup>

However, there are many permutations to this ruling, for in discussing the controversy between R. Nachman and R. Yehudah, the Gemara probes the issue at great length, and in the process adds many dimensions to the principle of *avid inish*... A review of their discussions will enable us to arrive at a better understanding of the many variables which Jewish law has developed in this principle.

Ben Bag Bag said: "Do not sneak into your neighbor's premises without his knowledge, even for the purpose of appropriating something that belongs to you, lest you will appear to him as a thief. However, you may break his teeth and tell him, 'I am taking possession of what is mine.'<sup>9</sup>

Another case wherein the rabbis consider the principle *avid inish dinei lenafshei* has to do with a trespasser who filled his neighbor's premises with pitchers of wine and pitchers of oil.

The owner of the premises is entitled to break them

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7. Ibid.

8. Rambam, *Hilchot Sanhedrin* 2:12; *Shulchan Aruch, Choshen Mishpat* 4. However, note *Sheiltot Bereishit* 2 and other *Rishonim*, who rule that a person may not take the law into his own hands. The Talmud in *Bava Metzia* 101b and *Bava Kamma* 23b apparently restricts the principle *avid inish* in a number of ways, as does *Choshen Mishpat* 97.

9. The reason for this concept being omitted by the Rambam and the *Shulchan Aruch* are discussed in *Minchat Chinuch* 224; *Iggerot Moshe, Choshen Mishpat* 3; *Yabia Omer, Choshen Mishpat* VI:1.

when he goes out and break them when he comes in. [Apparently, the Gemara seems to be agreeing with R. Nachman that a person may take the law into his own hands to protect his rights.] But R. Nachman b. Isaac explained that "he is entitled to break them [and make a way out] when going out to complain to the Beth Din....."<sup>10</sup>

This discussion seems to conclude that although a person may protect his property, he does not have carte blanche to inflict whatever damage he wants upon the trespasser. We will discuss hereinafter the proper amount of force which a person is entitled to employ.

All the forgoing examples are clearly dealing with situations where there is no controversy about the legitimacy of the owner's claim. Otherwise, the permission to take the law into one's own hands could be construed as resorting to the law of the jungle- "*lo shavakta chai lechol beria*".<sup>11</sup> Let us turn now to other situations where a person might think to act without first consulting a Beth Din.

### Using Force Against A Sinner

In the Torah, there is a provision for a Jew to be sold as a servant until a specific time, when he must be set free (the Jubilee year). What if the slave wants to remain in servitude,

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10. Ibid.

11. *Yam Shel Shlomo, Bava Kamma* 3:4, who indicates that this is also the ruling of the Rosh and the *Hagahot Maimoniyot*. In *Choshen Mishpat* 4, the law is codified in this way, and the author adds "but this is only if the person is able to know specifically that he is taking back his own." Rambam, *Hilchot Sanhedrin* 2:12 also requires that a person act within narrow confines of the law, such that he would be able to prove his right were he called before a Beth Din. See further also in *Ha'amek She eilah, Bereishit* 26:6.

in violation of the law? It then becomes the master's obligation to use whatever means necessary to assure that the law will be observed. Rashi<sup>12</sup> explains that the master is even permitted to beat him in order to force him to depart his servitude because, as a slave, the man was married to a non-Jewish slave girl, who would not be permitted to remain as his wife once he is free. Since he does not want to leave his non-Jewish wife, he is willing to remain as a slave. But it is the obligation of the master to forcibly remove him from the relationship which is now forbidden to him, as he is a free man.

Can this ruling be construed as a license for any Jew to beat up anyone he sees committing a sin, in order to prevent the transgression? Is this a precedent which permits throwing rocks on Shabbat at people who drive by in cars?<sup>13</sup> Or does the Gemara simply indicate that the person in charge of the household is responsible to see to it that no sin is committed in his domain (such as controlling his children),<sup>14</sup> but that in ordinary circumstances one has no right to interfere with the activities of others? Maybe the Gemara and Rashi intend to teach us that all Jews should be concerned with sinful behavior – maybe even to the extent of taking personal action.

The author of *Terumat Hadeshen* does permit a person who is responsible for another, to prevent him from committing a sin, even to the point of physical force.<sup>15</sup> This would apply

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12. *Bava Kamma* 28a.

13. I have dealt with this specific question at great length in an article on reprimanding a sinner, "Protest Demonstrations", *Journal of Halacha and Contemporary Society*, Vol. XXV, p. 5 ff. See also *Minchat Chinuch* 8:10 and 558, note 20.

14. See Meiri, *Bava Kamma* 27b, "Shema Ya-aseh aveira beveito".

15. *Terumat Hadeshen* 218, and accepted by Ramo in *Choshen Mishpat* 421:13. See also *Even HaEzer* 154 and Ramo *Yoreh Deah* 161:11, who rules that if a person finds an IOU which someone lost, and in the

to a parent or a teacher, or someone in a similar situation. But *Yam Shel Shlomo* extends this provision to anyone who observes another Jew sinning. Nevertheless, he cautions that one should be very hesitant about hitting another individual, even to prevent sin. One attracts far more bees with honey than with a stick, to use the vernacular. Even so, he writes, permission to use force is not only for the master to his slave, but "it is the same for any Jew – he may strike his fellow Jew in order to remove him from that which is forbidden."<sup>16</sup>

This blanket license to use force against anyone who is committing a sin seems astounding – until we read the next sentence written by the *Yam Shel Shlomo*:

But [permission to strike another Jew applies] specifically only to a person who is undoubtedly known for his rectitude, about whom it is known that he is acting strictly for the sake of heaven, and that he be a person who is important and outstanding [in the community]... [Because otherwise] any "empty" person could go and beat up his fellow man [with the excuse that he is trying to stop him from sinning] because there

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IOU it indicates that interest is to be paid (which is contrary to Torah law), he should destroy the document rather than return it. However, the *Chochmat Adam* 133:5 rules that if the finder is afraid that the lender will harm him for destroying the document, he should not destroy it. See also *Moadim Uzmanim* 8:15, *Radbaz* 1:100, and *Netivot* 3.

16. *Bava Kamma* 3:9. The Netziv (*Ha'amek She'elah Bereishit* 26:6) notes that the Rambam (*Hilchot Avadim*) while not sanctioning beating a servant, nevertheless writes that the master cannot be punished for it. Rashi, however, writes that it is permissible *ab initio* for the master to strike his servant in order to force him to do the right thing. It is interesting to see how the Netziv applied this rabbinic disagreement to the question of a husband's hitting his wife; see also the Rosh (#64) on this issue.

is no person in this world who is totally righteous, always doing good and never sinning...

In ancient and even in medieval times, the local Beth Din was authorized to enforce public observance of Jewish law, utilizing whatever powers of coercion or persuasion they had. In ruling on the specific issue of beating someone in order to stop their sinning, the *Minchat Chinuch*<sup>17</sup> concludes that nowadays we no longer have the option to force others to *observe* mitzvot, but only to stop them from actively violating a negative commandment. His ruling is based on the opinion of *Tosafot*,<sup>18</sup> who limit the prerogative to "force someone to use a succah and lulav" only to a "mumcheh", an expert – which no one today is considered to be.

Thus, we see that the medieval decisors reserved the prerogative of striking a Jew to prevent his/her sinning only for the few outstandingly pious people in a generation.<sup>19</sup> Extrapolating from this principle, we may assume that possibly Rav Moshe Feinstein would have been entitled to throw rocks at Sabbath desecrators – but that right does not extend to others.<sup>20</sup> Self-styled religious vigilantes, who do not even make a pretense of being leading rabbinic scholars, certainly cannot high-handedly force their understanding of right and wrong upon others. When they resort to violence – they are murderers. No

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17. No. 558:20.

18. *Sanhedrin* 2a.

19. The only exception is that one may physically intervene to prevent a person's being beaten up by another.

20. However, the Radbaz (1:100), writing about a case when a poor person is deprived of an object that he was about to take into his possession, rules that the one who prevents him from acquiring this morsel is called a *rosho*, and it is a mitzvah for every Jew to come to his aid.

See also *Moadim Uzemanim* 8:15; *Netivot* 3.

"halachic casuistry" should be allowed to obscure that bald and dreadful reality. They are murderers.

### *Avid Inish Dinei Lenafshei*

As we have seen, the Gemara records the opinion of R. Yehudah, that a person may take the law into his own hands only if, failing to do so, he would suffer an irrevocable loss. According to R. Yehudah, if a mugger has grabbed his wallet and is running away with it, the victim may beat him up to take it back. But if a person believes that his radio was stolen by his neighbor, he is not permitted to break into the house to seize it. Rather, he must call his adversary to the Beth Din to adjudicate the matter. If the victim can regain his property through the normal channels of the law, he must follow the prescribed path rather than enforcing his claims himself.

Let us now address some real-life situations and see what responses the halacha might direct, based on our study so far:

A number of years ago, Bernard Goetz became practically a household word, as reports of his shooting some would-be muggers on the subway spread across the headlines. According to his testimony, Goetz admitted shooting the four youths after they accosted him on the train. Fearing for his life, he testified, he shot at them. On the face of it, here was a perfect example of what the Gemara meant when it said that a person could take the law into his own hands, "*avid inish dinei lenafshei*".

However, looking more closely at the facts, we see that a number of considerations have to be addressed. If a person fears for his life or his property, he may certainly shoot to protect himself. But in this case the would-be mugger was *shot in the back*, evidently as he was fleeing upon seeing the gun in the hands of his intended victim. The Meiri clearly writes "However, whoever has passed through the violence, for example, he has already been robbed...is not included in

the proviso '*avid inish....!*'<sup>21</sup> If Mr. Goetz was in danger, he could shoot to protect himself. But if there is no longer imminent danger, and there is no stolen property to retrieve – the Jewish law would probably not countenance what he did, as we can see from the following talmudic text:

In their discussion about the propriety of taking the law into one's own hands, the *Amoraim* debate the amount of force which one may employ:

In the case of an ox throwing itself upon the back of another person's ox so as to kill it, if the owner of the ox that was beneath arrived and extricated his ox so that the animal that was on top dropped down and was killed, he is exempt [from any penalty]. However, if [the owner of the ox underneath] *pushed* the ox from above and caused it to be killed, he would be liable to compensate...Why?.. Since he was able to extricate his animal from beneath [without harming the animal above].<sup>22</sup>

Even if we concede that a person is entitled to take action to save his property or his rights from irreparable harm, that entitlement is limited. All *Rishonim* agree that excessive force, or inflicting unnecessary damage, renders the person liable for damages which he caused in saving his property.<sup>23</sup> To cite an example: if I see someone trying to steal my car, I can rush out

21. Meiri, *Bava Kamma* 27b.

22. *Bava Kamma*, 28a.

23. Meiri, Raavad, *Nimukei Yosef*, to *Bava Kamma* 3. See also Rambam and Raavad on the topic *haba bemachteret*. Even if there is a person running after his victim in order to kill the aggressor – in which case everyone must try to stop him – yet, if it is possible to stop him by wounding rather than killing him, it might be considered murder if one did kill him (*Sanhedrin* 74a).

with a baseball bat and beat him up to prevent it – but if there is a policeman nearby who could just as quickly be called to arrest the perpetrator, I am not allowed to cause him physical harm.

If we were to apply this rationale to our own times, we would readily conclude that Jewish law does not permit an individual or a group to act as vigilantes when they do not approve of the way the country is being run. After all, there is recourse to the ballot box, and every citizen has the right to be heard – via his vote – but not to take the law into his own hands in order to force or prevent government action, when that government action is approved by the majority of citizens, no matter how misguided one may think that majority is.

Another area where this issue is germane is spousal abuse, or the reverse scenario, when a woman resorts to violence against the man who is beating her.<sup>24</sup> In America, there have lately been a number of instances when a battered wife attacked her husband, mutilating or even killing him. What is the opinion of Jewish law in such a scenario?

It may not be politically correct to state the obvious. However, we have seen that halacha, while permitting a person to save him/herself or property, does limit that right to exercising only the force necessary to prevent the harm. Consequently, one has to ask, in the case of a woman's attacking her tormentor, whether other *viable* options were available to her. Obtaining a judicial restraining order seems to have little efficacy in saving lives. However, there may be other options, such as flight or calling the police. Killing another human being, however despicable he may be, cannot be sanctioned

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24. Unfortunately, this is not a new phenomenon, and was discussed by rabbinic authorities long ago. See *Even Haezer* 154; *Yam Shel Shlomo*, *Bava Kamma* 3:9.

unless that is the only way to save one's life or escape serious injury.

We can see this principle being applied by the rabbis, in a less inflammatory instance: A farmer wanted to protect his crops from the grazing of animals belonging to others. Therefore he spread poison in his field, thereby killing all the animals who strayed onto them. The farmer was held liable for the animals he killed, inasmuch as he could have protected his crops by taking less drastic measures.<sup>25</sup>

### Turning To Non-Jews For Help

The Torah forbids a Jew's turning to the courts of the secular authorities; whenever there is a dispute between Jews, they are to place the matter before a Rabbinic Court.<sup>26</sup> Only when the Jewish Court is unable to effect a solution may the Jew turn to secular courts for redress of his grievances.

Now the question arises: in those situations where a person is entitled to take the law into his own hands, would this include resorting to the police and/or courts of the secular government? This is a question whose resolution carries far-reaching implications in many areas of Jewish law and practice.

Rav Shlomo Kluger ruled that it was certainly permissible for a person to resort to the secular authorities to collect money which the Beth Din had ruled was owed to him.<sup>27</sup> This is permissible even without the specific permit of the Beth Din.

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25. *Teshuvot Maharsham* 4:140. The lack of intent to cause harm is a mitigating factor in this decision. See *Chavot Yair* 65.

26. Exodus 21:1.

27. *Ha-elef Lecha Shlomo, Choshen Mishpat* 3. One can only wonder what this great Torah sage had in mind when he wrote, "and especially in our times, when it has become the widespread custom to turn to the secular courts [even] without permission from a Beth Din."

But absent the ruling of a Beth Din, what about the case of a Jew who feels he is being robbed by his Jewish associate in a business matter – may he ask the courts for an injunction, at least to stop his loss?

The Ramo rules that one may not seek the help of outsiders:

[The talmudic principle that a person may take the law into his own hands] applies only specifically in a situation when he [the victim] can [save himself from harm] by taking action himself. But it is forbidden to do so by means of non-Jews. However, if a person did turn to the [local] nobles to save him, if there was no other option—what was done, is done.<sup>28</sup>

In this ruling, the Ramo was relying on the precedent of the *Terumat Hadeshen*,<sup>29</sup> who termed the use of non-Jews against Jews "an ugly matter."

However, the *Yam Shel Shlomo*<sup>30</sup> writes that if the only way to save oneself from loss is by getting help from non-Jews, it is permissible. In fact, this is the second opinion brought by Ramo, to the effect that if no physical harm is perpetrated by the police, it would indeed be permissible to ask their help, if no other way exists in practice.<sup>31</sup> In the opinions of the Ramo, one senses a certain hesitancy as to how far the leniency would apply: If there is no other way to prevent a loss, a secular court's injunction might be advisable; but surely it would be preferable to utilize the powers of Beth Din, if that is feasible.

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28. *Choshen Mishpat* 4. Also, *Chavot Yair* 65.

29. 304. The same is found in *Responsa Rosh* 68:13. See also *Mordechai* to *Bava Kamma* 117.

30. *Bava Kamma*, chapter 3:6.

31. *Choshen Mishpat*, ibid, based on *Maharik* 161. See also *Kovetz Zichron Knesset Yisrael, Lezecher Nishmat R. Yechezkel Abramsky*.

In practice, what does the halacha include in permitting one to take the law into one's own hands? How far may a person go to protect rights and property?

The *Shulchan Aruch* rules that physical force may be employed, if no other means are available to save one's property.<sup>32</sup> *Chochmat Shlomo* permits using trickery or other devious methods to secure one's rights or property.<sup>33</sup> The Rashba, however, strongly objects to lying in order to save one's property: "The remnant of Israel should not act deviously and should not speak falsely."<sup>34</sup> He supports this position by citing a text in *Shevuot*<sup>35</sup> which teaches that a person is forbidden to give false testimony, even in order to secure what is unquestionably his.

Let us consider a slightly different scenario, wherein a person's property is being damaged by the animals of his neighbor. Here, the neighbor has no intention of causing harm. Does that factor affect the victim's right to act unilaterally to salvage his property?

In the opinion of *Chavot Yair*, the lack of intent to cause harm definitely limits the actions permitted to the victim. In a case where a neighbor's chickens were damaging grains kept in a store and the storeowner killed the chickens, he writes,

It is only when his neighbor comes intentionally and willfully to cause him harm [that he may take extreme action]....but this is not the case when the other's animal causes him damage without his friend's knowledge or

32. *Choshen Mishpat* 4:1. See also *Shach*, note 1, who cites the Talmud in *Bava Kamma* 28.

33. *Choshen Mishpat* 4:1.

34. 3:81.

35. Beginning of fourth chapter.

will.<sup>36</sup>

Consequently, the rabbi ordered the storeowner to pay for the loss of the chickens.

What may an employer do if he realizes that one of his workers is stealing from him? Let us imagine in such a case that the employer happened to find an expensive watch which the worker had misplaced. Could he keep it, claiming "since you stole from me, I'll hold on to your property until you return mine?"

This is precisely the situation discussion in the Gemara *Berachot* 5b: Once, four hundred jars of wine belonging to Rav Huna turned sour, which was a tremendous financial loss. Rav Judah and some other scholars went to commiserate with Rav Huna, urging him to review his past actions and repent for the wrongdoing which he must have done to warrant such a punishment. Rav Huna was astounded that they could suspect him, but nevertheless responded, "If somebody has heard of anything against me, let him speak out." They responded, we hear you are withholding wages you owe your tenant-worker. To which he replied, but he steals from me! They responded to him, "That is exactly what the proverb says: If you steal from a thief, you also have a taste of it."

In other words, although Rav Huna felt fully justified to reduce his worker's pay to compensate for his loss by the worker's theft, apparently he was at fault. The *Mordechai* is perplexed by this incident: why wasn't Rav Huna entitled to recoup his losses – after all *avid inish dinei lenafshei*?<sup>37</sup> The answer he gives to this apparent contradiction is that a person

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36. 165.

37. *Mordechai* to *Bava Kamma*, chapter 3, note 30.

may act only to take back exactly what was stolen from him, but nothing more. It is not a case of *quid pro quo*, such that one may say – "you stole my produce, I'll take your watch," or "since you're not paying me enough, I'll go home early." The worker was stealing vines, but Rav Huna was withholding pay.

In a similar vein, the *Noda Biyehuda* ruled that even if a person is withholding money from charity by giving less than he ought, one cannot take it from him. A woman approached him with the following problem: she felt that her husband didn't give enough charity. She was now pregnant and wanted the extra merits of giving more charity. Could she distribute alms without telling her spouse? The rabbi reacted vigorously:

G-d forbid that one should accept money from her, and it is outright theft; even though Beth Din is empowered to force people to give [the proper amount of] *tzedaka*, but who appointed his wife as judge [over him]?<sup>38</sup>

Furthermore, he writes, "even a Beth Din has no right to take his money without his knowledge...taking without his knowledge is theft."

These examples illustrate the reality that there are considerable limitations to the permit to take the law into one's own hands: one may retrieve the lost object, not anything else. Nor is it a license to perpetrate an evil, just because the other person did so first.

### *Chilul Hashem*

In *Moed Kattan*<sup>39</sup> the Gemara rules that "*tzurba*

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38. *Tanina, Yoreh Deah* 158.

39. 17a.

*merabbanan avid dinei lenafshei*" (a rabbi may take the law into his own hands). It is puzzling that the Gemara finds it necessary to state this. After all, why should a rabbinic scholar be different than others? Why shouldn't he be able to take the law into his own hands in cases where others can? Rashi explains that the Talmud is giving permission to a *talmid chacham* to take back his own possessions in a dispute where he is himself a litigant, since he is certain that he is right.<sup>40</sup> However, the Rosh was strongly opposed to such high-handed unilateral action on the part of a rabbi, particularly since it has a great potential for *chilul hashem* (causing disrespect for Torah teachings). Consequently, he held that that could not be the intent of the talmudic text:

For even if the law is clear to him, it is not clear to others, and [therefore] it creates a *chilul hashem*.<sup>41</sup>

Already hundreds of years ago, the Ritva was concerned for the potential desecration of the honor of Torah were a person recognizable as Orthodox (such as wearing a *kippa*) to take the law into his own hands.<sup>42</sup> Since the actions of a rabbi or a person known to be observant are scrutinized very carefully by the public, such a person has to be particularly cautious in his public behavior, even when he technically has the right to act. We must be very careful that people do not get the impression that a religious leader considers himself above the law, and that he can get away with anything he wants. Thus, although the Ritva does agree that the Gemara permits the *talmid chacham* to act unilaterally to save his property, just

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40. Rabbenu Tam interprets the text as giving a *talmid chacham* the power to issue a ban (*cherem*) upon a person who does not follow the halacha – even if he is himself a party to that controversy.

41. *Moed Kattan* ibid.

42. Ibid. See also *Dinei Yisrael*, vol. IV, p. 98, for a fuller discussion.

as any one else may, yet he warns that extreme care ought to be exercised in implementing this right.

The issue of *chilul hashem* is an overriding concern in Jewish thinking, for virtually nothing can atone for bringing disrespect, ridicule, or contempt upon Judaism and Jewish thinking. We need to understand the parameters of this crucial matter before we loosely use the term. Not everything disliked by others is considered a *chilul hashem*. However, it does mean that Jews (and especially Orthodox Jews) have to be exquisitely sensitive to act within the parameters of honorable behavior, as understood by others.

The issue was carefully defined in a responsum by the author of *Chavot Yair*.<sup>43</sup> A Jew had been convicted and hanged by the state court for being a thief. Now a ransom was demanded for his body, and the rabbi was asked if the Jewish community should try to raise the money so that the thief might be accorded burial in a Jewish cemetery. Some were opposed to paying anything at all to redeem the body, inasmuch as it posed a danger to the Jewish community (the Gentiles would now have an excuse to accuse all Jews of being criminals, and attack or kill them). But the *Chavot Yair* refused to accept this argument. He wrote,

Although there is a *chilul hashem* when Gentiles accuse the Jewish people of being criminals, yet this is nothing more than the talk of the mob, and not of their wise people...for after all, in their own community and of their own people, they see thousands [of thieves] like them...

He goes on to explain that when a Jew does the wrong thing, it is deplorable. But not everything wrong is a *chilul*

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43. Responsum 139.

*hashem*. However, when a Jew breaches the accepted norms of decent behavior, evoking a response of contempt for the Jewish system, he has caused unspeakable damage.

If the possibility of a *chilul hashem* exists, it precludes a person's taking unilateral action, even when he is within his rights. How much greater is the desecration when the person is *not* doing what Jewish law considers to be right! We must shudder when we contemplate the gross and tragic *chilul hashem* which has taken place when self-proclaimed "righteous zealots" take the law into their own hands, claiming that they are following the dictates of halacha.

### Conclusion

Briefly summarizing this study, we can conclude as follows:

\*Jewish law permits one's taking action to protect his person, his rights, and his property – when irremedial damage would accrue to him were he not to act. However, if it is possible for him to protect himself by recourse to a Beth Din, or retrieve his property in that way, he is not entitled to take unilateral action.

\*A parent or teacher, or someone in a similar position of responsibility for the actions of others, may forcibly cause the persons under his charge to follow Torah law.

\*In most circumstances, a Jew cannot unilaterally intervene to force others to observe Jewish law. (Of course, this does not apply to saving another person from physical harm.)

\*A rabbi or other person visibly Orthodox must be particularly careful in exercising the prerogative of *avid inish dinei lenafshei*, as a terrible *chilul hashem* might ensue.





# Mixed Seating At Weddings

Rabbi Eli D. Clark

The separation of men and women by a partition (mechitzah) during prayer is a hallmark of halachic observance.<sup>1</sup> A related question arises with respect to gatherings of men and women which do not involve prayer. Such events fall into three general categories: (1) religious events, such as wedding ceremonies, funerals and Torah lectures (*derashot*); (2) mitzvah dinners (*se'udat mitzvah*) associated with weddings, circumcisions and the like;<sup>2</sup> and (3) events of a religiously neutral character, such as fund-raising dinners and concerts. For both practical and methodological reasons, this discussion will focus on the wedding dinner;<sup>3</sup> nevertheless, many of the relevant

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1. See, e.g., Norman Lamm, "Separate Pews in the Synagogue," *Tradition* I (Spring 1959), pp. 141-164; Baruch Litvin, ed., *The Sanctity of the Synagogue* (New York, 1959); Joseph Stern, "The Contemporary Synagogue," *Journal of Halacha and Contemporary Society* X (Fall 1985), pp. 30-38.

2. According to some authorities, any dinner which includes a *derashah* would be elevated to the status of a *se'udat mitzvah*. See R. Yair Bachrach, *Chavot Yair*, no. 70 (Lemberg, 1896), pp. 40a-b. Regarding the status of a dinner related to a *pidyon ha-ben*, see R. Israel Isserlein, *Terumat ha-Deshen*, no. 268 (Bnei Brak, 1971), p. 49a.

3. As used herein, the term "wedding dinner" is intended to include any wedding-related dinner during which the *sheva berachot* are or may be recited. See n. 6, below.

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sources and issues examined below should apply equally to other **se'udot mitzvah** and neutral gatherings. Mixed seating at a wedding ceremony and other religious events requires some separate analysis.

Classification of the wedding dinner as a **se'udat mitzvah** is rooted in the rabbinic decree obligating a groom to make his bride joyful for seven days after the wedding.<sup>4</sup> Indeed, the Mishnah specifically describes a groom's attendance at a wedding dinner hosted by his father-in-law as a mitzvah.<sup>5</sup> In addition, guests at a wedding dinner are afforded the opportunity to perform the "great mitzvah" of making the bride and groom joyful,<sup>6</sup> a mitzvah which justifies abstaining from Torah study.<sup>7</sup> Finally, a wedding dinner culminates with the recitation of grace (*birkat ha-mazon*), supplemented with the seven *birchot chatanim* (wedding benedictions). Recitation of these requires a quorum of ten adult males (*minyan*), signifying the activity as a *davar she-bikedushah* (sacred activity).

However, in addition to its positive religious aspects, the wedding dinner also commonly involves, as Rashi points out, "drunkenness and light-headedness."<sup>8</sup> This dialectical

4. In some cases, three days. See *Ketubot* 7a-b; *Rambam, Mishneh Torah, Hilchot Ishut* 10:12; R. Joseph Caro, *Shulchan Aruch, Even ha-Ezer* 64:2. Thus, the issue is not restricted to the dinner on the wedding day, but applies to all of the dinners held during the seven days of celebration (*shiv'at yemei ha-mishteh*).

5. *Pesachim* 3:7.

6. R. Jacob b. Asher, *Arba'ah Turim, Even ha-Ezer* 65. Cf. *Shulchan Aruch, Even ha-Ezer* 65:1.

7. *Megillah* 3b, 29a; *Ketubot* 17a; *Mishneh Torah, Hilchot Avel* 14:9; R. Moses Isserles, *Mappah to Shulchan Aruch, Even ha-Ezer* 65:1.

8. *Sukkah* 25b, s.v. *u-min ha-tefillin*. Cf. Rosh to *Sukkah*, chap. 2, no. 8.

combination of the spiritual and the physical distinguishes the wedding dinner from the purely religious event, such as the public *derashah*, on the one hand, and from the purely secular celebration, on the other. Indeed, from a theoretical point of view, the duality associated with the wedding dinner would appear to demand separation of the sexes, in order to preserve the spirituality of the event and mitigate the negative consequences of the “drunkenness and light-headedness.”<sup>9</sup>

In contemporary practice, the method of seating at wedding dinners varies among the different segments of the Orthodox community. Thus, at different affairs, one may find that males and females are seated in separate rooms, in the same room but separated by a *mechitzah*, in the same room at different tables, together at the same table, or some combination of the foregoing. Seating arrangements may also differ for relatives and non-family members. Although these differences may be viewed as reflecting sociological distinctions within the larger observant community, the question of mixed or separate seating is a matter governed by halacha and requires analysis as such.

### I. Source for Separating the Sexes

The basic halachic source for the separation of men and women derives from the talmudic description of the *Simchat Bet ha-Sho'evah*, the festivities surrounding the water libations at the Temple on Sukkot. The Mishnah states: “On the evening following the first day of the festival, they would descend to the women’s gallery and would make a great installation”

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9. Indeed, in theory one might adopt a stringent position regarding mixed seating at a wedding dinner, because of this distinctive combination of sacred and secular activities, while taking a more lenient position regarding religiously neutral events, such as a fund-raising dinner.

(*Sukkah* 5:2). The Gemara asks:

What was the “great installation”? R. Elazar said: As we learned: Originally it [the area of the festivities] was flat, then they surrounded it with a balcony and decreed that the women should sit above and the men below. Our Rabbis taught: Originally the women were within and the men without, and they came to light-headedness. It was [therefore] decreed that the women should sit outside and the men within, yet they still came to light-headedness. [Therefore,] they decreed that the women should sit above and the men below. How could they do so [i.e., alter the Temple structure]? But it is written: “All of this is put in writing by the hand of God Who instructed me” (I Chron. 28:19). Rav answered: They found a verse and expounded: “And the land shall mourn each family apart, the family of the House of David apart and their wives apart” (Zachariah 12:12). They reasoned: Is it not a *kal va-chomer*? If in the future to come, when they are engaged in mourning and the evil inclination does not govern them, the Torah says that men and women should be separate, at this time when they are engaged in joy such that the evil inclination governs them, how much more so?<sup>10</sup>

For purposes of our discussion, this passage is rich with implications. First, though this text is usually cited in discussions regarding the separation of the sexes during prayer, the Gemara itself relates to the gala celebration known as the *Simchat Bet ha-Sho'evah*, which involved no prayer of any kind.<sup>11</sup> Hence, this passage seems particularly relevant to discussions of

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10. *Sukkah* 51b-52a. Cf. PT *Tosefta, Sukkah* 4:1; *Sukkah* 5:2.

11. *Sukkah* 5:2-4; *Tosefta, Sukkah* 4:1-2; *Mishneh Torah, Hilchot Lulav* 8:12-14.

religious events such as weddings which do not involve prayer. Moreover, the joyous atmosphere of the *Simchat Bet ha-Sho'evah* closely resembles the merriment of a wedding celebration. On the other hand, the Gemara states that the phenomenon which *Chazal* were intent on preventing was *kalut rosh*, light-headedness.<sup>12</sup> As a general rule, *kalut rosh* is less a sin than a prelude to sin (*hechsher averah*).<sup>13</sup> But, in the context of the *Simchat Bet ha-Sho'evah*, light-headedness violated the sanctity of the Temple and itself constituted a sin. This standard applies equally to the contemporary synagogue, where light-headedness is prohibited,<sup>14</sup> but does not readily extend to a wedding dinner, where frivolity is the order of the day. Of course, the Talmud's citation of the verse in Zechariah suggests that men should be separated from women whether or not they are on the Temple grounds – as the mourning foretold in the prophecy is not said to be limited to the Temple – and whether or not they are engaged in joyful or mournful activities.

However, one ambiguity in the text in *Sukkah* bears directly upon our topic, namely, what was the specific aim of the balcony built in the women's gallery? The Mishnah writes: "The women watched from above and the men from below, in order that they not be mixed."<sup>15</sup> Thus, the function of the balcony was the prevention of intermingling of the sexes. This explanation

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12. For a definition of *kalut rosh*, see Rashi, *Berachot* 31a, s.v. *mi-toch kalut rosh*.

13. See, e.g., *Berachot* 31a; *Shabbat* 30b; *Pesachim* 117a; *Mishneh Torah*, *Hilchot Korban Pesach* 2:4.

14. *Tosefta, Megillah* 2:18; *Megillah* 28a-b; *Mishneh Torah*, *Hilchot Tefillah* 11:6; *Shulchan Aruch*, *Orach Chayyim* 151:1. For this reason, there may be a requirement of separation of the sexes in the synagogue even on occasions which do not involve prayer.

15. *Middot* 2:5.

is echoed by Rambam in his *Mishneh Torah*<sup>16</sup> and by R. Menachem ha-Meiri.<sup>17</sup> But in his *Commentary to the Mishnah*, Rambam states that the purpose was “so that the men would not gaze at the women.”<sup>18</sup> A number of later authorities follow this view.<sup>19</sup> Contemporary halachists are divided on the issue, some assuming that the balcony prevented only intermingling of the sexes,<sup>20</sup> others that prevention of gazing at women was also a function of the balcony.<sup>21</sup>

In fact, the Talmud appears to contemplate the possibility of men and women dining together. In discussing the laws of eating the korban Pesach, the Mishnah states that when a bride eats from the sacrifice, she should turn her face away from the other diners.<sup>22</sup> The Gemara explains that she does so out of embarrassment (*bushah*), which according to Rashi refers to “embarrassment to eat in front of men because they are

16. *Hilchot Lulav* 8:12; *Hilchot Bet ha-Bechirah* 5:9.

17. *Bet ha-Bechirah*, *Sukkah* 51b, s.v. *mi she-lo ra'ah* (Jerusalem, 1966), p. 176.

18. *Commentary to the Mishnah*, *Sukkah* 5:2, J. Kafih, ed. (Jerusalem, 1964), p. 187.

19. R. Yom Tov Lippman Heller, *Tosafot Yom Tov*, *ad loc.*; R. Moses Schick, *She'elot u-Teshuvot Maharam Schick*, *Orach Chayyim*, no. 77 (Munkacz, 1880), pp. 23a-b.

20. E.g., R. Moses Feinstein, *Iggerot Moshe*, *Orach Chayyim* I, no. 39 (New York, 1959), pp. 98-99; *Seridei Esh* II, no. 14 (Jerusalem, 1977), pp. 28-30.

21. E.g., R. Judah Greenwald, *Zichron Yehudah*, *Orach Chayyim*, no. 62 (Budapest, 1923), p. 49; R. Eliezer Waldenberg, *Tzitz Eliezer* VII, no. 8 (Jerusalem, 1963), pp. 80-82; R. Samuel ha-Levi Woszner, *Shevet ha-Levi* I, no. 29 (Bnei Brak, 1970), p. 30; R. Moses Stern, *Be'er Moshe* IV, no. 147 (Brooklyn, 1975), pp. 234-36; R. Joel Teitelbaum, *Divrei Yoel* I, *Orach Chayyim*, no. 10 (Brooklyn, 1982), pp. 53-68.

22. *Pesachim* 7:13.

gazing at her.<sup>23</sup> Clearly, then, no **mechitzah** was in place during the **Pesach** meal, although the men and women ate together. It is also pointed out that the Mishnah prohibits women from eating the sacrifice in a group with slaves and minors,<sup>24</sup> implying by omission that women are permitted to eat in a group which includes free adult males.<sup>25</sup> Similarly, the Mishnah prohibits women from participating in a **zimmun** with slaves and minors,<sup>26</sup> presumably reflecting that dining with men is permitted.<sup>27</sup>

Thus, it appears that at the time of the Talmud men and women did dine together in circumstances which allowed men to see the women. However, as is well-known, people in that period did not dine seated around a single table, as is the custom today, but reclined separately on individual couches before which separate tables were placed.<sup>28</sup> Therefore, these sources may be viewed as a precedent for men and women eating together in one room at separate tables, but not necessarily at the same table.

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23. Ibid.; Rashi, *ad loc.*, s.v. *bushah*.

24. Ibid. 8:7.

25. This inference is drawn by R. Moshe Feinstein, *Iggerot Moshe*, *Orach Chayyim* I, no. 41, p. 102.

26. *Berachot* 7:2.

27. This inference is drawn by R. Ben Zion Uziel, *Piskei Uziel bi-Sh'elot ha-Zeman*, no. 44 (Jerusalem, 1977), p. 233. When eating together, women are obligated to join in **zimmun** with men. See R. Moses of Coucy, *Sefer Mitzvot Gadol*, *Mitzvot Aseh* 27 (Venice, 1547), p. 110a; R. Asher b. Yehiel, *She'elot u-Teshuvot ha-Rosh* 4:17 (Jerusalem, 1994), p. 26; *Shulchan Aruch*, *Orach Chayyim* 199:7.

28. *Berachot* 42a and *Tosafot*, *ad loc.*, s.v. *salek itmar*; *Pesachim* 115b. Cf. B.M. Lewin, ed., *Otzar ha-Geonim* I (Jerusalem, 1928), *Chelek ha-Teshuvot*, *Berachot* 42a, p. 94.

## II. Mixed Seating at Dinners: The Medieval Sources

There is precious little material addressing the issue from the period of the **Geonim** and **Rishonim** (medieval authorities), but the few sources which exist generally oppose mixed seating. Thus, a Geonic responsum provides as follows:

What is the law regarding gathering people in a place of celebration (*bet ha-mishteh*)<sup>29</sup> or of *gemilut chasadim*, where they would eat a dinner in which men and women were mixed together? This is the [appropriate] practice: If the women sit together by themselves and the men by themselves, it is permitted, provided the men do not pour wine for the women and vice versa. And this applies also to the serving of dishes and condiments. But they are forbidden to dine at a time when they are mixed together one with the other, men and women. For it is forbidden for a man to mix with women at a dinner, except for his sister, his father's sister, his mother's sister, and his wife's sister, provided that his wife is also at the dinner, for she will guard him from sin.<sup>30</sup>

Careful analysis of this **teshuvah** reveals several important points. The Gaon makes clear that, generally speaking, men and women should sit apart. Apparently, this means separate

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29. The term *bet mishteh*, as used by the Geonim, includes both wedding and non-wedding celebrations. See *Teshuvot ha-Geonim*, no. 70, A.E. Harkavy, ed. (Berlin, 1887), p. 27. But cf. R. Menachem ha-Meiri, *Bet ha-Bechirah*, *Sotah* 9:11, s.v. *mi-she-batlu Sanhedrin* (Jerusalem, 1967), p. 119, who translates *bet ha-mishtaot* as "house of wedding celebrations (*bet chuppah chatanim*)."

30. In B.M. Lewin, "Ma'asim li-Vnei Eretz Yisrael," *Tarbiz* I:1 (Oct. 1929), p. 97, cited in idem, *Otzar ha-Geonim* VI (Jerusalem, 1934), *Chelek ha-Teshuvot*, *Sukkah* 52a, pp. 69-70.

seating areas within the same room, because the responsum warns against the men and women serving wine and food to one another, a concern that is not likely to arise when a wall separates the men and women. Moreover, the circumstances described appear to fall into the category of religiously neutral gatherings, rather than *se'udot mitzvah*.

The *teshuva* provides a short list of women with whom a man is permitted to sit, provided his wife is present: his sisters, his aunts and the sister of his wife. This list presents a host of interpretative difficulties. The *Gaon* omits daughters and mothers from his list, no doubt because sitting with these women was too obviously permitted to warrant mention.<sup>31</sup> The omission of nieces and other young female relatives suggests that the primary concern here is adult women, or perhaps married women only. On the other hand, it is unclear why the *teshuva* permits sitting with the women specified, all of whom fall into the category of *arayot*, i.e., biblically prohibited relations.<sup>32</sup>

Of course, the responsum requires that a man's wife be present at any dinner including these other women, because "she will guard him from sin." But this provision raises more questions. If the presence of one's wife will keep one from sinning with a sister-in-law or aunt, should it not also prevent one from sinning with women not mentioned by the *Gaon*, such as those who are not relatives? Moreover, the notion that a wife's presence serves to "guard" her husband is a principle

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31. Thus, a man is permitted to remain in seclusion (*yichud*) with his mother or daughter and even to share a bed with them without committing a transgression. *Kiddushin* 4:12; *Shulchan Aruch, Even ha-Ezer* 22:1. This rule extends to granddaughters as well. See R. Joel Sirkes, *Bayyit Chadash*, *ad loc.*, s.v. *u-mah she-katav chutz min ha-av*.

32. See Lev. 18:9, 12, 13, 18.

associated with the prohibition against seclusion (*yichud*).<sup>33</sup> Thus, use of this phrase may suggest that the “sin” with which the Gaon is concerned is that of *yichud*. If so, this *teshuva* would apply only to intimate gatherings, but not to the large-scale public meals associated with contemporary weddings and other such dinners.<sup>34</sup> On the other hand, the reference in the text to a “place of celebration” suggests that *yichud* concerns may exist even in a public place. Alternatively, the Gaon’s focus may not be *yichud* but *kalut rosh*, in which case he apparently believes that a wife’s presence may serve as an effective safeguard against such frivolity.

In interpreting this *teshuva*, we do not enjoy the benefit of any authoritative commentary or explanation. As is the case with much of the Geonic responsa, this ruling was not cited by subsequent halachists and is not reflected in the *Mishneh Torah*, *Arba’ah Turim* or *Shulchan Aruch*.

A later source, which has also languished in obscurity, is the following passage from *Sefer ha-Pardes*, the halachic compendium from the school of Rashi:

It is forbidden to mix together men and women, whether at a dinner or any other occasion. Rather, women [sit] apart and men apart. [This is derived] from a *kal va-chomer*: If regarding a time of mourning it is written, “And the House of Israel shall mourn each family apart, the House of David apart and their wives apart,” [then

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33. *Kiddushin* 4:12; *Mishneh Torah*, *Hilchot Issurei Bi’ah* 22:4; *Shulchan Aruch*, *Even ha-Ezer* 22:3.

34. See *Iggerot Moshe*, *Orach Chayyim* I, no. 41: “The law requiring separation so that [men and women] should not mix together is the opposite of the prohibition against *yichud*, because it is when many men and women are assembled together that the primary prohibition [against intermingling] applies.”

at a time of] celebration and revelry how much more so, given that the evil inclination provokes them.<sup>35</sup>

This rule represents a logical extension of the Gemara in *Sukkah* discussed above, adopting the talmudic syllogism and applying it to the contemporary situation of festivities and celebration. It is possible, but by no means certain, that this passage contemplates a physical wall or *mechitzah* separating men from women, by analogy to the arrangement in the Temple. On the other hand, the text makes no mention of preventing men from being able to see women. In any case, as with the Geonic responsum, this rule never enjoyed subsequent citation or reference and therefore never became an authoritative halachic statement.

In contrast to the *Sefer ha-Pardes*, one medieval authority which discusses separation of the sexes at a wedding was widely cited and invoked, thus becoming the central medieval source on the topic and the springboard for most later discussion. The *Sefer Chasidim*, discussing the special wedding dinner benediction “she-hasimchah bi-m'ono” (that there is joy in His abode), states as follows:

Anyone who recites the benediction “she-ha-simchah bi-m'ono” must investigate whether they [indeed] fulfilled [their obligation] and celebrated with awe.<sup>36</sup> But if a man takes a woman who is not suitable or she takes a man who is not suitable or both are unsuitable or there is no refinement (*tarbut*) there and coarse speech

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35. *Sefer ha-Pardes*, *Inyan Issur ve-Heter*, H. Ehrenreich, ed. (Budapest, 1924), p. 72; cf. *Otzar ha-Geonim* VI, *Chelek ha-Teshuvot*, p. 70. In the opinion of B.M. Lewin, this passage is based on the Geonic responsum analyzed above. See “*Ma'asim li-Vnei Eretz Yisrael*,” *Tarbiz* I:1 (Oct. 1929), pp. 81-82.

36. See *Yoma* 4b; *Berachot* 30b.

[is spoken] between them or women sit among the men such that there are licentious thoughts – [in such situations] it is not fitting to recite “she-ha-simchah bi-m'ono” . . . Every mitzvah through which a sin is committed, it is better that the mitzvah not be performed. For example, [there is the] mitzvah of making the groom joyous, but if there are people of loose morals there and one knows that there will be no [fulfillment of the mitzvah] without immoral conduct or that it cannot be [fulfilled] without licentious thoughts or without looking at women, then he should not be there.<sup>37</sup>

According to the *Sefer Chasidim*, the benediction of “she-ha-simchah bi-m'ono” refers to situations in which the joy demonstrated at a wedding is mirrored, as it were, by Divine gladness in heaven. Hence, where the conditions of the marriage or the wedding are religiously objectionable, the recitation of such a benediction is clearly inappropriate. One such situation, writes *Sefer Chasidim*, is that of men and women sitting together, because mixed seating will cause improper thoughts among the men. Moreover, a man should refrain from attending any wedding at which he will even see women, because this would constitute a *mitzvah ha-ba'ah ba-averah*, a mitzvah whose performance involves the commission of a sin.

Note that the concern of the *Sefer Chasidim*, in contrast to the Geonim quoted earlier, is not merely to prevent men sitting together with women, but to prevent men from seeing women at all. Practically, this would require men and women to sit in separate rooms or to be divided by a full-sized *mechitzah*. This rule against mixed seating is cited in the *Hagahot ha-Minhagim* to the fourteenth century *Sefer ha-Minhagim* of R.

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37. *Sefer Chasidim* (Bologna), no. 393, R. Margalioth, ed., (Jerusalem, 1957), p. 284. Cf. *ibid.*, no. 1120, p. 561.

Isaac Tyrnau.<sup>38</sup> A similar statement appears in *Orchot Tzaddikim*, the fifteenth-century ethical treatise.<sup>39</sup> However, the issue of mixed seating at weddings is not addressed in any way in either the *Arba'ah Turim* or *Shulchan Aruch*. This may reflect a position that the *Sefer Chasidim* is prescribing an ethical ideal (*midat chasidut*) rather than a halachic norm.<sup>40</sup>

### III. Sixteenth Century Dispute: Have Circumstances Changed?

Two pillars of sixteenth century Ashkenazic halacha cite the rule of the *Sefer Chasidim*, but only in discussions of local customs. Perhaps for this reason, their views of the applicability of the *Sefer Chasidim* differ sharply. In a halachic analysis of the wedding customs in his land, R. Solomon Luria writes:

In the majority of cases, the groom and his friends eat in one house and the bride with her friends in a different house. Indeed, the *Sefer Chasidim* wrote that one should not recite “she-ha-simchah bi-m'ono” where men and women sit in the same room, because Satan incites, and there is no joy before God. And I myself

38. *Sefer ha-Minhagim le-Rabbi Yitzchak Isaac Tyrna, Minhagim le-Kol ha-Shanah*, no. 14, S. Spitzer, ed. (Jerusalem, 1971), p. 166. While the *Sefer ha-Minhagim* itself dates from the fourteenth century, the authorship of the glosses is believed to be the work of many hands spanning several centuries. See *ibid.*, preface; R. Judah Herzl Henkin, *Benei Banim I*, no. 36 (Jerusalem, 1991), p. 117.

39. *Orchot Tzaddikim, Simchah* (Jerusalem, 1969), pp. 208-10. As has been pointed out, this work contains many statements which mirror the ethical prescriptions of the *Sefer Chasidim*.

40. On the relationship of normative halacha to *Sefer Chasidim*, see Haym Soloveitchik, “Three Themes in the *Sefer Hasidim*,” *AJS Review* I (1976), pp. 311-325.

have witnessed the affliction of my people, that several [episodes of] corruption have resulted from such [an arrangement].<sup>41</sup>

R. Luria cites the *Sefer Chasidim* in support of the local custom in his area (Poland/Lithuania) and laments the occasions on which this custom was not followed. He falls short of formulating an explicit prohibition against seating men and women together, but makes clear his disapproval of the practice. Moreover, he seems to extend his objection to the seating of men and women at separate tables in the same room.

In contrast, R. Luria's student, R. Mordechai Jaffee (known as the *Levush*), reports an entirely different custom and evinces an entirely different attitude toward the stricture of the *Sefer Chasidim*. At the end of a list of customs appended to his commentary on *Orach Chayyim*, the *Levush* quotes the *Sefer Chasidim*, then states:

People are not careful with this today, possibly because nowadays women are very accustomed to being with men. Consequently, there is not much in the way of sinful thoughts [caused by women's presence] because they appear [to us] as white geese as a result of their great regularity among us. And since they have become so accustomed, they do not mind.<sup>42</sup>

In the time of the *Levush* (only one generation after R. Luria's), apparently, men and women were not seated apart at weddings and nevertheless recited "she-ha-simchah bi-

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41. *Yam shel Shelomoh, Ketubot*, chap. 1, no. 20 (Bnei Brak, 1959), p. 9b. Cf. *ibid, Gittin*, chap. 1, no. 18 (Berlin, 1861), p. 3a. However, R. Luria does not seem to view the sight of women as inevitably leading to sinful thoughts among men. See *ibid, Kiddushin*, chap. 4, no. 25, p. 45a.

42. *Levush ha-Chur, Minhagim*, no. 36 (Berditchev, 1818), p. 200a.

m'ono." This causes the *Levush* no consternation; to the contrary, he readily offers an explanation for the practice. The presence of women among men has become routine, he observes, which has eliminated the kind of prurient thoughts which in earlier times were aroused by the sight of women. The *Levush* may disapprove of this development, but does not express any desire that it be reversed.

This explanation represents an innovative application of a talmudic statement. The Gemara relates that R. Gidal would sit at the entrance of the mikveh and instruct women how to immerse themselves. Responding to an inquiry how he could engage in such behavior without falling victim to the evil inclination, R. Gidal states: "In my eyes they are as white geese."<sup>43</sup> What the Talmud presents as a unique individual's departure from standard practice, the *Levush* applies as a community-wide exception.<sup>44</sup> Whereas R. Gidal's exemption presumably was based on his exceptional piety and spirituality, the communal exemption proposed by the *Levush* derives from a sociological circumstance: man's frequency in the company of women has dulled his sensitivity to the allure of the feminine presence.<sup>45</sup>

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43. *Berachot* 20a.

44. Cf. R. Isaac of Corbeille, *Sefer Mitzvot Katan*, no. 30 (Satmar, 1915), p. 23: "The [prohibition against] looking at a woman is not referring to [looking] for immoral purposes, but merely where one derives enjoyment from looking. But if they appear to one as . . . white geese, it is permitted."

45. This rationale has been cited by two contemporary halachists in discussing the current permissibility of certain activities previously considered prohibited involving the presence of women among men. In *Tzitz Eliezer* IX, no. 50 (Jerusalem, 1967), pp. 194-95, R. Eliezer Waldenberg quotes a statement of the *Leket Yosher, Yoreh De'ah*, J. Freimann, ed. (Berlin, 1904), p. 37, that it is permitted nowadays to walk behind the wife of a *chaver*. R. Waldenberg suggests – and R.

Notably, the *Levush* does not criticize the communal practice of mixed seating, though it violates a prohibition appearing in the *Sefer Chasidim* and, as we have seen, in a *teshuvah* from the *Geonim* and *Sefer ha-Pardes*. Instead, the *Levush* offers a halachic defense of mixed seating, based on a change in social conditions and a creative (some might say strained) application of a talmudic passage. In fact, this justification of a popular practice that contravenes halachic sources is consistent with the rulings of other Ashkenazic poskim of the period.<sup>46</sup>

The *Levush* is not clear on one matter: does the practice he permits involve seating men and women at separate tables or even at the same tables? Conceptually, his reasoning could apply equally to both cases. On the one hand, his endorsement of mixed seating is not based on the fact that men are accustomed to seeing women, but because *murgalot ha-nashim harbeh bein ha-anashim*, women are very accustomed to being among men. On the other hand, the *Levush*'s allusion to R. Gidal may suggest that it is the act of seeing women which has lost its sexual allure, while sitting next to women might still give rise to improper thoughts. As we shall see, later halachists are

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Solomon Zalman Auerbach concurs – that the rationale must be that men are now accustomed to seeing women in public and therefore walking behind a woman will not lead to licentious thoughts. Similarly, R. Ovadiah Yosef, *Yabi'a Omer* VI, *Orach Chayyim*, no. 13(5) (Jerusalem, 1976), p. 43, cites the *Levush* in support of his suggestion that it is permissible today to recite *shema* in the presence of a married woman whose hair is uncovered because such a sight is no longer likely to arouse a man to improper thoughts. R. Yosef also quotes the *Levush* in support of his view that women may recite *birkat ha-gomel* in the synagogue. *Yabi'a Omer* VIII, *Orach Chayyim*, no. 23(15), (Jerusalem, 1985), p. 108.

46. See, e.g., R. Jacob Moellin's justification of lending orphans' money with interest, *She'elot u-Teshuvot Maharil*, no. 37, S. Spitzer, ed.

divided on the practical scope of the *Levush*'s statement.

#### IV. The Custom in Cracow: Evolution of a Stricture

The rule of the *Sefer Chasidim*, though considered by the *Levush* in some ways obsolete, was applied by a younger contemporary, R. Joel Sirkes (the "Bach"), although not in a discussion of normative requirements. The *Bach* writes:

In Cracow they have the custom at the dinner which they make on the evening of the second day [following the wedding] to recite the benediction "Asher bara" (Who has created), but not "she-ha-simchah bi-m'ono." This is a wonder, and I have not found any reason for their custom. Yet, [the reason may be that] the dinner is a small one and they seat the men and women together in one room, and it is written in the *Minhagim* [of the *Levush*] that we do not recite "she-ha-simchah bi-m'ono" where there is a possibility of sinful thoughts. But according to this [rationale], where there are only men at the dinner, they must certainly recite "she-ha-simchah bi-m'ono."<sup>47</sup>

The *Bach* was confronted with a curious practice; in Cracow they would omit the benediction "she-ha-simchah bi-m'ono," but only on the evening of the second day after the wedding. Although there is some halachic discussion regarding reciting "she-ha-simchah bi-m'ono" during the month and year following a wedding, and limiting its recitation after a re-marriage, there is no basis for treating the meal on the second evening differently from the meal on the second day or the third evening.<sup>48</sup> Nevertheless, the *Bach* was able to justify the

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(Jerusalem, 1989), pp. 30-36; R. Moses Isserles' justification of drinking *stam yeinam* (Gentile wine), *She'elot u-Teshuvot Ramo*, no. 124, A. Siev, ed. (Jerusalem, 1971), pp. 184-88; and R. Meir Stern's and R. Israel

Cracow custom, by invoking the **Sefer Chasidim** and applying it to the unique circumstances of the dinner on the evening of the second day. In particular, that dinner was conducted on a small scale in close quarters. On this basis, he concludes that the omission of the benediction in Cracow may have been motivated by the concern of the **Sefer Chasidim** for prurient thoughts, given that the men and women dined together in a confined area.

The position of the **Bach** becomes still clearer upon examination of his responsum on the subject in which he explains:

Because that particular dinner on the second evening they make only for relatives and they all sit in the "winterhouse" and they dine with the groom and several men and women;<sup>49</sup> therefore, they do not recite "she-ha-simchah bi-m'ono" in accordance with the **Sefer Chasidim**. This is not the case on the Sabbath at the Third Dinner which they make a great meal with men apart and women apart. Nor at the dinner on Sabbath eve and Sabbath morning, where the only diners in Cracow are the [unmarried] young men and women, [in which case] there are no sinful thoughts. Rather, [the benediction is omitted] only when they dine on the second evening with women who have had relations with their husbands.<sup>50</sup>

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nos. 66, 73, pp. 38a-39a, 41a-b.

47. *Bayyit Chadash, Even ha-Ezer* 62, s.v. *ve-yesh omrim*.

48. Indeed, though "she-ha-simchah bi-m'ono" was omitted in Cracow, "Asher bara" was recited. This appears to run contrary to the talmudic discussion (*Ketubot* 8a), which indicates that one continues to recite the former benediction even after one ceases to recite the latter.

49. The "men and women" referred to were probably invited to

Thus, the *Bach* invokes the *Sefer Chasidim* for the sole purpose of justifying the wedding customs of the Jewish community of Cracow. He argues persuasively that the nature of the dinner on the second evening was such that men were able to gaze at women, giving rise to improper thoughts; therefore “she-ha-simchah bi-m’ono” was omitted. But what of the other meals? Here the explanation is more difficult to understand. Apparently, the weddings were held on Friday,<sup>51</sup> the bride and groom ate Friday night and Sabbath morning dinner with their friends, then a grand, community-wide wedding dinner was held on Sabbath afternoon. At this last meal, the men and women were seated separately, allowing “she-ha-simchah bi-m’ono” to be recited. But at the two previous meals, apparently, the young people did not sit separately, yet recited the benediction. The *Bach* explains that this practice was valid because the young women at these meals were virgins, and therefore did not inspire improper thoughts among the young men. This statement, taken at face value, is nothing short of amazing. However, it seems clear that the statement should not be read out of context, but understood as part of the *Bach*’s attempt to formulate a halachic justification for a novel wedding custom in Cracow.

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serve as “new faces.”

50. *She’elot u-Teshuvot ha-Bach ha-Chadashot*, *Yoreh De’ah*, no. 55 (Koretz, 1785), p. 28b. The *Bach* explains that the *chuppah* ordinarily took place on Friday “before *Borchu*,” referring presumably to a period immediately before the commencement of the Sabbath. Therefore, the meal on the evening of the second day (*leil sheni*) apparently refers to the Saturday evening meal, in contrast to the three Sabbath meals enumerated in the responsum. The *Bach* mentions that, at the time of the meal on the second evening, the fulfillment of the mitzvah of conjugal relations had not yet occurred. Cf. *Bayyit Chadash*, *Yoreh De’ah* 391, s.v. *ve-yesh nohagim*; R. Shabbetai ha-Cohen, *Siftei Cohen*, *Yoreh De’ah* 391:7.

51. The Ashkenazic custom to marry on Friday dates at least to the

Yet, many later citations of the **Bach** clearly interpret his statements more broadly. Thus, R. Samuel Feivush, the seventeenth-century scholar, writes: “The **Bach** wrote that when men and women are in one room, they do not recite ‘she-ha-simchah bi-m’ono,’ because there is no joy when the evil inclination governs.”<sup>52</sup>

## V. Eighteenth and Nineteenth Centuries: The Debate Continues

In the absence of halachic rulings, opposition to mixed seating at weddings was expressed in communal legislation. Thus, in 1761, the Council of the Land of Lithuania promulgated the following decree regarding wedding celebrations:

The bride and groom shall not be secluded in the bedroom on the night of the ceremony. And men and women should not sit together in the same room. And they (i.e., the women) should not go out dancing in the house of the men to dance there. And a ban [is placed] on the guests if they do not enforce this.<sup>53</sup>

When such legislation is promulgated, it is difficult to determine whether this represents an enforcement of the halachic requirements or an additional rule to buttress halachic standards. Indeed, whether such separation is halachically required remained a source of contention among decisors. R. Raphael Meldola,<sup>54</sup> R. Chayyim Joseph David Azulai,<sup>55</sup> R. Joshua

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days of R. Asher b. Jacob. See *Ketubot* 3a; *Tosafot ad loc.*, s.v. *ishah nis’et be-chol yom*; R. Asher b. Jacob, *Rosh, ad loc.*, no. 3; *Arba’ah Turim, Even ha-Ezer* 54; *Shulchan Aruch, Even ha-Ezer* 54:4.

52. *Bet Shemuel, Even ha-Ezer* 62:11. Cf. R. Judah Ashkenazi, *Be’er Heitev, ad loc.*

53. *Va’ad ha-Kehilot ha-Rashiyot be-Medinat Lita (Pinkas ha-Medinah)*,

Solomon Ardit,<sup>56</sup> R. Solomon Wilf,<sup>57</sup> R. Abraham Zvi Hirsch Eisenstadt,<sup>58</sup> and R. Chayyim Hezekiah Medini,<sup>59</sup> all cite the *Levush* in support of the recitation of “she-ha-simchah bi-m’ono” where men and women are seated together. It is not clear whether these authorities view the *Levush* as permitting mixed seating at the same tables or merely in the same room. R. Judah Ketzin cites the rule of the *Sefer Chasidim*, then notes that “we do not follow this.”<sup>60</sup>

R. Judah Aszod reports a Hungarian custom according to which the women would recite grace (*birkat ha-mazon*) to themselves shortly before recitation by the men, then retreat with the bride to a separate room.<sup>61</sup> Under this custom, men and women ate the wedding dinner in the same room, but the recitation of “she-ha-simchah bi-m’ono” was deferred until the women had departed, honoring the letter of the *Sefer Chasidim*, if not the spirit.

In contrast, R. Judah Ashkenazi and R. Solomon Ganzfried prohibit mixed seating on the basis of the *Bach*.<sup>62</sup> A number of other commentators on the *Shulchan Aruch* also cite the

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no. 973(16), S. Dubnow, ed. (Berlin, 1925), p. 267.

54. *Chuppat Chatanim* 9:9 (Jerusalem, 1961), p. 42.

55. *Yosef Ometz* no. 47 (Jerusalem, 1961), p. 112a.

56. *China ve-Chisda* I (Izmir, 1864), p. 116a.

57. *Imrot Shelomoh* 5:12 (Jerusalem, 1970), p. 35.

58. *Pitchei Teshuvah, Even ha-Ezer* 62:18.

59. *Sedei Chemed* VII, *Maarechet Chatan ve-Kallah ve-Chuppah*, no. 12 (New York, 1962), p. 27.

60. *Machaneh Yehudah* I, no. 2 (Jerusalem, 1989), p. 52. Other authorities also report a local custom that did not follow the *Sefer Chasidim*. See R. Abraham ibn Nachman ha-Cohen, *Taharat ha-Mayyim* 2:18; *Menachem Meshiv* II, no. 20, both cited by R. Ovadyah Yosef, *Yabi'a Omer, Orach Chayyim*, no. 13(5), p. 43.

61. *She'elot u-Teshuvot Mahariya* (Yehudah Ya'aleh) II, nos. 45(5), 256(3)

**Bach.**<sup>63</sup> Similarly, R. Joseph Kosman cites the *Sefer Chasidim* and calls it “good advice (*musar nechmad*).”<sup>64</sup> R. Eliezer Papo, based on the talmudic sources, writes that “the groom should sit among the men and the bride should sit among the women, so that neither group can see the other.”<sup>65</sup>

However, R. Meir Posner utterly rejects the prohibition of mixed seating, as well as the explanation of the **Bach** which served for many as the basis of the prohibition. In his commentary to *Even ha-Ezer*, R. Posner sets forth an explanation of a custom described by R. Elazar of Worms,<sup>66</sup> to stop reciting “she-ha-simchah bi-m'ono” on the second day after the wedding:

... because all of the joy comes to an end. And this is also – in my humble opinion – the [identical] custom of Cracow which the **Bach** cites here and in *Yoreh De'ah*, that they would cease reciting “she-ha-simchah bi-m'ono” immediately on the second evening. [In adopting this custom], they relied on that which is said in *Mo'ed Katan*, the primary joy is on the first day. But not as the **Bach** strained [to explain] that their rationale was that women were [present] in the house more [on the second evening] than on the first evening. For I have no doubt that on the first evening they recited

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(Lemberg, 1873), p. 20b.

62. *Be'er Heitev*, *Even ha-Ezer* 62:11; *Kitzur Shulchan Aruch*, 149:1 (Jerusalem, 1975), p. 292.

63. See *Otzar ha-Poskim* XVII, to *Even ha-Ezer* 62:13, 67:3 (Jerusalem, 1988), p. 54a, citing *Chukkei Derech*, *Gur Aryeh ha-Levi*, *Eretz Tzvi*, and *Tiferet Yaakov*.

64. *Noheg ke-Tzon Yosef*, *Nisu'in*, no. 15 (Tel Aviv, 1969), p. 115.

65. *Pele Yo'etz*, *Chatan* (Jerusalem, 1969), p. 66b-77a.

66. See *Sefer ha-Roke'ach* no. 354 (Jerusalem, 1967), p. 140. R. Elazar

[“she-ha-simchah bi-m’ono”], even though there were women in the house. And the proof [that the presence of a woman does not preclude recitation of “she-ha-simchah bi-m’ono”] is that the primary occasion for reciting “she-ha-simchah bi-m’ono,” as explained in the *Tur* in the name of the *Rosh*, is [when one finds oneself] at the primary location where the bride and groom sit. And, presumably, the bride [sits] with her [female] friends.<sup>67</sup> And [even if her friends are not present] what difference does it make if there is only one woman (i.e., the bride), as opposed to many, provided the situation does not involve *yichud* or the immorality against which the *Sefer Chasidim* warned?<sup>68</sup>

Thus, according to R. Posner, the Cracow custom was utterly unrelated to the rule of the *Sefer Chasidim* and the issue of mixed seating. Rather, in R. Posner’s view, the custom is rooted in a talmudic statement identifying the day of the wedding as the primary occasion of joy. In support of his interpretation, R. Posner points out that “she-ha-simchah bi-m’ono” is always recited in the company of at least one woman – the bride – and usually in the presence of the many women who make up her coterie of friends. That being the case, R. Posner rules out the possibility that the presence of women in the same room as men may preclude recitation of “she-ha-simchah bi-m’ono.” Practically, then, R. Posner permits men and women to sit together at a wedding dinner. Conceivably, he may require them to sit at separate tables, in keeping with the concerns of the *Sefer Chasidim*, but he clearly would not require separate rooms or a *mechitzah*.

Another lenient position was enunciated by R. Zev Elimelech

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reports that he heard from his teacher, R. Judah he-Chasid, that fish is eaten on the second day and “she-he-simchah bi-m’ono” is no longer recited. Therefore, a mourner would be permitted to participate in

Shapiro, who writes in his *Derech Pekudecha* regarding the need for men to refrain from speaking with women. Yet, he wonders, pious and learned men seem to disregard this stricture. R. Shapiro explains this phenomenon by reference to the issue of mixed seating at weddings. Thus, whereas the *Sefer Chasidim* prohibited the recitation of “she-ha-simchah bi-m'ono” when men and women sit in the same room, “we have never seen anyone who was concerned for this.” R. Shapiro then cites the *Levush*’s justification for the change on the basis of the regularity with which men are in the presence of women.<sup>69</sup>

However, R. Isaac Zvi Lebovits writes that men and women should not sit together in one room where they can see one another. He cites the lenient position of the *Levush* and R. Shapiro, but then explains that these authorities were relating to a situation in which women dressed modestly, whereas contemporary women no longer do. Therefore, though people do not generally refrain from reciting “she-ha-simchah bi-m'ono” in the presence of women,

in the first instance (*le-chatchillah*), it is incumbent upon us to be careful in this matter . . . and we must build a fence within a fence, so that even if it is not possible to have two [separate] rooms, at least one should make the semblance of a *mechitzah*.<sup>70</sup>

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67. In contrast, see the account of R. Luria above.

68. *Bet Meir, Even ha-Ezer* 62:7.

69. *Derech Pekudecha, Lo Ta'a seh* 35:8 (Lemberg, 1921), p. 84a. R. Shapiro explains the social change in terms of economics. Centuries earlier, earning a living did not require the participation of women; therefore women were never seen and their appearance was novel and liable to cause sinful thoughts. But harsher economic conditions have forced women to engage in business, and, consequently, the appearance of women is no longer a likely cause of improper thoughts. Cf. R. Moses Yagid, *Machatzit ha-Shekel* 21:6 (Jerusalem, 1994), p. 144b.

In practice, it would appear that many Jewish communities did not seat men and women in separate rooms at a wedding dinner and perhaps not even at separate tables. This conclusion is based on the numerous attempts by rabbis in communities across the Jewish world to curtail mixed dancing at weddings.<sup>71</sup> While these attempts to enforce halacha met with varied degrees of success, the very possibility of mixed dancing represents evidence that men and women did not sit separately at wedding dinners.

## V. Contemporary Rulings on Mixed Seating at Weddings

Contemporary halachists have taken different positions on the issue. Some have justified mixed seating, others have required separate tables, and a number insist on either a partial or full **mechitzah**. For many, resolution of the question involves

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70. *Shulchan ha-Ezer* 9:5 (Monsey, 1989), p. 71a.

71. See, e.g., *Kol Bo* III, no. 66, D. Abraham, ed. (Jerusalem, 1993), p. 217; R. Benjamin b. Matthew, *Binyamin Ze'ev* II, nos. 203-08 (Jerusalem, 1959), pp. 224-47; R. Solomon Luria, *Yam shel Shelomoh, Gittin*, chap. 1, no. 18, pp. 3a-b; R. David ha-Cohen, *She'elot u-Teshuvot ha-Radach*, no. 12; R. Isaiah Horowitz, *Shenei Luchot ha-Berit, Sha'ar ha-Otiyyot, Kedushat ha-Zivvug*, no. 6 (Jerusalem, 1993), p. 136; R. Joseph Steinhardt, *Zichron Yosef*, no. 17 (Fuerth, 1773), pp. 22b-23a; R. Jacob Ettlinger, *Binyan Tziyyon*, no. 139 (1868), p. 59a; R. Judah Aszod, *She'elot u-Teshuvot Mariya* (Yehudah Ya'aleh) I, *Orach Chayyim*, no. 91, p. 33b; R. Zvi Elimelech Shapiro, *Derech Pekudecha, Lo Ta'aseh* 35:14, pp. 84b-85a; R. Chayyim Hezekiah Medini, *Sedei Chemed, Ma'arechet Chatan ve-Kallah ve-Chuppah*, no. 12, pp. 27-31; R. Yechiel Michel Epstein, *Aruch ha-Shulchan, Orach Chayyim* 529:7, *Even ha-Ezer* 22:3; R. Israel Meir ha-Cohen, *Bi'ur Halacha, Orach Chayyim* 339:3, s.v. *le-hakel ba-kol*; R. Isaac Zvi Lebovits, *Shulchan ha-Ezer* 9:2, p. 71a. Cf. the communal decrees against mixed dancing cited above, p. 13, and in R. Israel Schepansky, *Ha-Takkanot be-Yisrael* IV (Jerusalem, 1993), pp. 236-37. For a fuller

not only interpreting halachic texts, but justifying communal practice. This often results in a two-part ruling, one establishing the ideal practice (*le-chatchillah*), the second relating to what is merely acceptable.

R. Moses Feinstein, in a number of early statements, appears to express some ambivalence on the **mechitzah** issue. Thus, he writes in a 1946 responsum:

We are slightly compelled to say that this law [requiring **mechitzah**] is Pentateuchal in every place of assembly. After all, it is the future mourning from which we learn [the rule, and] we have not found [in any source] that this will take place in the Temple . . . Rather, the implication is that in every place where we must gather together men and women, they are forbidden to be there without the separation of a **mechitzah** between them, in order that they not come to light-headedness.<sup>72</sup>

Yet, in a 1951 **teshuvah** he writes:

In a gathering place for permitted activities and even at weddings, I am in doubt as to whether there is such a prohibition [against intermingling of the sexes] in a circumstance in which there is no concern for *yichud*. And [I am] more inclined [to say] that there is no such prohibition. For we find with respect to the eating of the [korban] **Pesach** that men and women would eat together in the same house, and there would be several [unrelated] families there . . . . We see that, even according to R. Judah whose opinion we follow, [men and women] were permitted to eat in one group, which is to say, without a **mechitzah**.<sup>73</sup>

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treatment of the issue of mixed dancing, see Samuel Katz, *Kedoshim Tihyu*, chap. 4 (Jerusalem, n.d.), pp. 35-57.

By way of support, R. Feinstein cites a number of talmudic statements suggesting that men and women sat together when eating the korban Pesach.<sup>74</sup> In attempting to reconcile these two rulings, R. Elyakim G. Ellinson has suggested that R. Feinstein was drawing a distinction between a dinner with assigned seating, at which no **mechitzah** is required, and one in which people assemble without order, where a **mechitzah** is necessary, as in the case of the mourning foretold by Zachariah.<sup>75</sup> While this explanation is reasonable, it enjoys no textual support in R. Feinstein's rulings.

Alternatively, R. Feinstein may be drawing a distinction between two kinds of gatherings – those for purposes of fulfilling a halachic obligation and those which are unconnected to any such obligation. Thus, in his 1946 responsum, he requires a **mechitzah** "in every place where we must (tzerichim) gather together men and women." Similarly, in his 1951 responsum, he writes:

From the future mourning from which we learn [the prohibition], it seems that there is a prohibition in any place where people assemble for any obligation. And where there is no requirement [or] obligation to gather, even in the Temple it is permitted, as was the case with Hannah who prayed in the Temple in the company of

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72. *Iggerot Moshe, Orach Chayyim* I, no. 39, p. 99.

73. *Ibid.*, no. 41, p. 102.

74. See text accompanying notes 23-26. R. Feinstein also draws support from the dispute between R. Judah and R. Simeon whether a single Paschal lamb may be eaten by two separate groups, *Pesachim* 86b). Although R. Judah permits two groups separated by a **mechitzah** to share a single animal, there is no indication that he would *require* men and women to sit separated by such a **mechitzah**. In describing R. Feinstein's argument, Joseph Stern, "The Contemporary Synagogue," *op. cit.*, p. 38, mistakenly cites R. Simeon's opinion as

Eli.<sup>76</sup>

R. Feinstein classifies the future mourning as an assembly for an “obligation” (*chiyyuv*),<sup>77</sup> and concludes that all such gatherings require a *mechitzah*.<sup>78</sup> In contrast, Hannah, who visited the Temple in the absence of any obligation, did not require a *mechitzah*. (Of course, Hannah also came as an individual, not as part of a larger assemblage, but R. Feinstein attributes no importance to that fact.) Similarly, as we have seen, he broaches the permissibility of gathering without a *mechitzah* “in a gathering place for permitted activities (*le-divrei reshut*) and even at weddings.”

In any case these responsa deal only with the requirement of a *mechitzah*, leaving unanswered the question of men and women sitting at the same tables. However, at some of the weddings of R. Feinstein’s children, men and women were seated together at the same tables.<sup>79</sup>

R. Israel Zev Mintzberg, writing in 1957, reviews the

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authoritative, whereas the halacha follows R. Judah.

75. *Hatzne'a Lechet* (Jerusalem, 1987), p. 30, n. 65.

76. *Iggerot Moshe, Orach Chayyim* I, no. 41, p. 101.

77. R. Feinstein is presumably following the opinion that the people would be mourning Messiah the son of Joseph. See *Sukkah* 52b; PT *Sukkah* 5:2. In such case, there may be a communal obligation to mourn, by analogy to the mourning for a Jewish prince. *Mishneh Torah, Hilchot Avel* 3:10. R. Feinstein does admit the possibility that, in the mourning case, the requirement of *mechitzah* was not Pentateuchal, but merely a measure to protect the modesty of women. But he concludes that it is more reasonable to assume otherwise.

78. Although R. Feinstein states explicitly that people were “required to gather” at the *Simchat Bet ha-Sho’evah*, I have not found a source to that effect. Indeed, it is difficult to understand why he would consider the *Simchat Bet ha-Sho’evah* to be a required gathering, while viewing weddings as falling outside such a category.

statements of the **Sefer Chasidim**, the **Levush** and the **Bach**, but seems content to rely on R. Shapiro's comment in **Derekh Pekudecha** that no one enforces the seating of men and women in separate rooms.<sup>80</sup>

R. Moses Stern, the Debreczyner **Rebbe**, agrees in principle that no **mechitzah** is halachically required at a wedding dinner. He cites the **Mitnagdic** custom in Europe to suffice with seating men and women at separate tables and declares that he himself saw that "great rabbis and famous **tzaddikim**" followed this practice. He explains, however, that in those days women dressed modestly, and even "modern" women would not wear a garment with a hem above mid-calf. But today, he writes, even the **Chasidic** women wear garments with much shorter hems and with sleeves that reveal the forearm. Therefore, separate tables for men and women are clearly insufficient and complete separation by a **mechitzah** is required.<sup>81</sup>

R. Moses Sternbuch prohibits the seating of men and women in the same room at a wedding dinner, basing his ruling on the **Bach**. Like R. Stern, R. Sternbuch argues that the need for separation is even greater today given the immodest dress of women. He notes that the majority of wedding dinners in his own city of Johannesburg involve mixed seating, but declares that rabbis who participate in such affairs, not to mention rabbis who permit mixed seating at their own affairs, are sinners and causes of the public to sin (**chotim u-machti'im et ha-rabbim**).<sup>82</sup>

A different view of **mechitzah** is given by R. Solomon Braun in his commentary on the **Kitzur Shulchan Aruch**.

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79. Conversations of the author with R. Moses D. Tendler, son-in-law of R. Feinstein, and with R. Reuven Feinstein, son of R. Feinstein.

80. *She'arit Yisrael, Even ha-Ezer*, no. 8 (Jerusalem, 1963), p. 255.

81. *Be'er Moshe* IV, no. 147(31) (Brooklyn, 1975), p. 236.

Addressing R. Ganzfried's statement that men and women should not eat together at the wedding dinner, R. Braun cites R. Shapiro's statement in *Derech Pekudecha* that the rule is no longer followed. R. Braun then adds, "It appears to me that, even for those who are strict [in this matter], it is sufficient in any case for men to erect a partition of less than three hand-breadths to separate between the men and women."<sup>83</sup>

Sephardic authorities are also divided on the issue of *mechitzah*. R. Ovadyah Yosef writes:

It is necessary to be careful that men and women not sit intermingled; rather, they should designate a separate place for the men by themselves and the women by themselves.<sup>84</sup>

In support, R. Yosef cites the Cracow custom discussed by the *Bach*. R. Yosef also quotes the permissive view of the *Levush*, then concludes, "Nevertheless, in the first instance (*le-chatchillah*) one should certainly enforce [separation] as much as possible." Thus, R. Yosef takes an intermediate position. He makes no mention of *mechitzah* and cites ample authority permitting mixed seating. Yet, he states that it is preferable for men and women to sit separately, presumably on separate sides of the same hall.

In contrast, R. Chayyim David Halevi rules that men and women at a wedding – and everywhere else – must be separated by an "absolute *mechitzah*" which would prevent men and women from seeing one another. He bases his ruling on the *Gemara* in *Sukkah*, which he views as teaching that there is a legal obligation to separate men from women, even outside

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83. *She'arim Metzuyanim ba-Halacha* IV, 149:1 (Jerusalem, 1971), p. 39.

84. *Yabi'a Omer* III, *Even ha-Ezer*, no. 10(9) (Jerusalem, 1960), p. 252.

the Temple grounds. R. Halevi cites the **Levush**, but interprets the latter not as permitting **le-chatchillah** the seating of men and women together, but as making a favorable plea (**melamed zechut**) on behalf of those who recite “*she-ha-simchah bi-m'ono*” in mixed company. On this basis, R. Halevi concludes that one should not admonish those who merely seat men and women on opposite sides of the same hall, given that “everyone is accustomed – in the street and office, in trade and industry – to the mixing of men and women, such that there is not a great concern from mere seeing.” But he emphasizes that “it is far better to also erect a substantial **mechitzah**, as is the custom of the faithful to God’s Torah.” R. Halevi adds that the case of the **Bach**, relating to a small family dinner, indicates that mixed seating is prohibited even when the only dinner guests are the relatives of the bride and groom. However, R. Halevi concedes the existence of a “very widespread” custom to allow mixed seating in such a setting; he therefore recommends that male and female relatives sit at opposite ends of the table, in which case the rationale of the **Levush** would apply to permit the recitation of “*she-ha-simchah bi-m'ono*.<sup>85</sup>

## VI. Conclusion

From the time of the Talmud onward, many sources in halachic literature have focused on the need to separate men and women, especially at times of celebration. Historically, however, the primary issue regarding the wedding dinner has been **how much** separation is required. As we have seen, the

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85. *Aseh Lecha Rav* III, no. 40 (Tel Aviv, 1979), p. 204. Cf. R. Halevi’s statement in *Mekor Chayyim la-Chatan la-Kallah ve-la-Mishpachah* 4:16 (Tel Aviv 1972), p. 44: “Praiseworthy is he who designates separate tables for men and women.” This more lenient position relates even to wedding dinners involving non-relatives.

**Sefer Chasidim**, as well as an anonymous Geonic source, dictate total separation, but most subsequent halachists do not follow this view, citing either the **Levush** or local custom. In rejecting the **Sefer Chasidim**, it is unclear whether the **Levush** and other authorities require some separation or none, but they clearly assume that men have become less susceptible to immoral thoughts at the sight of women. A number of twentieth-century halachists follow a lenient approach, either dismissing the need for **mechitzah** or categorizing it as desirable **le-chatchillah**, especially given the decline in standards of modesty in women's dress. Yet, several living authorities – from Chasidic, Ashkenazic and Sephardic circles – deem the **mechitzah** to be an absolute halachic requirement.

One issue that awaits clarification involves the reception (**kabbalat panim**) preceding the wedding. Logically, the same halachic principles which apply to wedding dinners should apply to pre-wedding ceremony receptions, but most weddings which utilize a **mechitzah** during the dinner do not enforce physical separation between men and women during the **kabbalat panim**.<sup>86</sup> It remains to be seen whether halachists will endorse this practice or seek to curtail it.

In any case, with respect to wedding dinners, nearly every variety of current practice enjoys some support within halacha. Dinners with a **mechitzah** and without both represent valid halachic options. And all of the authorities seem to agree that the fundamental goal of every wedding celebration is fostering joy in the Uppermost Realm, **simchah bi-m'ono**.

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86. A similar anomaly was pointed out by the late R. Elyakim G. Ellinson in *Hatzne'a Lechet*, p. 30, n. 65.





# The Early Yom Tov Sheini

Rabbi Yisroel Moshe Janowski  
and Steven Oppenheimer, D.D.S.

The question as to whether it is permitted to make **Yom Tov Sheini** (the second day of **Yom Tov**) early<sup>1</sup> is discussed in several halachic responsa which this article will explore. The issue is not merely theoretical but has serious practical application. When days are long, especially during Daylight Savings Time, it is difficult for older individuals or families with young children to wait until after *Tzait HaKochavim* (nightfall) to *daven*, make Kiddush, and eat the **Yom Tov** meal. Waiting is not only a hardship, but may take away from the *simchat Yom Tov*, the enjoyment of the holiday. Are we permitted to make an early **Yom Tov Sheini**? Halachically, may we 1) *daven* early, 2) make Kiddush early, and/or 3) eat the festive meal early? We will attempt to explore the halachic ramifications of making an early **Yom Tov Sheini**.<sup>2</sup>

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1. After *Plag HaMincha* (according to the *Levush* and the *Gra* this would be 1 1/4 halachic hours before sunset) but before *Tzait HaKochavim* (the appearance of three stars or nightfall).

2. For an analysis of making an early Shabbat, see Schneider, *Journal of Halacha and Contemporary Society*, Vol. 25 pp. 49-66.

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In **Yom Tov Sheini Kehilchato**<sup>3</sup>, which discusses the halachic intricacies of the second day of **Yom Tov**, the author, Rabbi Yerachmiel Fried, opines that, "Ma'ariv should not be recited until after dark on **Yom Tov Sheini**." His contention is that "reciting Ma'ariv before dark would degrade (**mezalzel**) the first day of **Yom Tov**" and in a footnote he refers the reader to the **Levush** and **Taz**. This is puzzling, since neither the **Levush** nor the **Taz** mention degrading (**zilzul**) **Yom Tov**. In the same footnote, Rabbi Fried supports his contention "that Ma'ariv should not be recited until after dark on **Yom Tov Sheini**" by advising "see **Kaf HaChaim, Orach Chaim 639:57**." Examination of the **Kaf HaChaim** cited, however, reveals no prohibition against davening Ma'ariv early.

In addition, when one of the authors of this article approached Rav Shlomo Zalman Auerbach, z"l, and asked whether it was permitted to accept **Yom Tov** early, Rav Auerbach responded, "Lama lo?" (why not?) If Rav Auerbach was not troubled by the permissibility of making **Yom Tov** early although there are those who apparently disapprove, it seems appropriate to examine the sources for a clearer understanding of the permissibility of accepting **Yom Tov Sheini** early.

The Talmud<sup>4</sup> states, "Rav used to say the **Shabbat Tefillah** on the eve of **Shabbat**; Rav Yoshiyah said the **Tefillah** for the conclusion of **Shabbat** on **Shabbat**." The **Shulchan Aruch** states,<sup>5</sup> "From **Plag HaMincha** onwards, one may kindle the **Shabbat** lights and accept upon oneself the sanctity of **Shabbat** by praying **Ma'ariv** and eat immediately thereafter." Rabbi Shimon Sofer,

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3. Published by Targum Press, Inc., 1990. Also, Hebrew edition, published by Machon Sha'arei Ziv, 1988.

4. *T.B. Brachot 27b*

5. *Sh. Aruch, O. Ch.*, 267:2.

z"l (1850-1944) rules that this also applies to the case of accepting the second day of **Yom Tov** early.<sup>6</sup> He writes that one may accept the second day of **Shavuot** early. He further states that **Lechatchilo** one may make **Kiddush** early and eat the festive meal early. In order to understand why one is permitted to accept **Yom Tov Sheini** early, there are several questions which need to be answered.

### Hachana

If one were to make **Yom Tov Sheini** early, would there be a problem of preparing for the second day of **Yom Tov** on the first day of **Yom Tov**? In **Sefer Maharil (Minhagim)**,<sup>7</sup> the author wrote,

It is customary during [the two days of **Yom Tov** of] the **Shalosh Regalim** (the three major festivals) to wait between **Mincha** and **Ma'ariv** because they are two sanctities and one is not permitted to prepare from one **Yom Tov** to another. We are concerned that if they daven [**Ma'ariv**] during the day (after **Plag HaMincha**), the women will err and will prepare during the day [**Yom Tov Rishon**] for the needs of the (following) night [**Yom Tov Sheini**] .... However, I have seen, during the **Shalosh Regalim**, in Magentza (Mainz), **Mahari Segal**<sup>8</sup>

6. *Responsa Hitorerut Teshuvah*, No. 299, Machon Chatam Sofer, Jerusalem, 5750.

7. This work was compiled by R. Zalman of St. Goar the pupil of **Maharil (Moreinu HaRav Rav Ya'akov haLevi Moellin)**. It was first published in 1556.

8. **Mahari Segal** is another name for **Maharil** (1360-1427). He is also referred to as **Mahari Moellin** and **HaRaMaH (HaRav Rav Moellin Halevi - after his father Moshe)**. **Moellin** means son of **Moshe**. (See **Sefer Shem HaGedolim**).

had the custom<sup>9</sup> not to wait between the first and second days of **Yom Tov**.<sup>10</sup>

Rav Zalman quotes the custom of Maharak to wait between **Mincha** and **Ma'ariv**, because he is concerned that women may come to prepare (**hachana**) from the first day of **Yom Tov** to the second day. In Magentza, however, the custom of Rav Zalman's Rebbe, **Maharil**, was not to wait between **Mincha** and **Ma'ariv** of **Yom Tov Sheini**.

The **Levush**<sup>11</sup> adds that we wait until **Borchu** is recited before any preparation may be done. It seems, therefore, that according to the first view found in **Sefer Maharil** and the opinion of the **Levush**, it would be permitted to **daven Ma'ariv** early, but we are concerned that the women may prepare on the first day of **Yom Tov** for the second day. According to the second opinion brought down in **Sefer Maharil** (i.e. the practice of **Maharil** in Magentza), there would be no problem davening **Ma'ariv** of **Yom Tov Sheini** early.

**Maharak**<sup>12</sup>, **Mahari Tirna**,<sup>13</sup> **Yosef Ohmetz**,<sup>14</sup> and **Levush**<sup>15</sup> disregard **Maharil's** permissive opinion that allows accepting **Yom Tov Sheini** early. It seems that this concern arose during their time, because women were dependent upon hearing

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9. It seems that the custom of **Maharil** and the community of Mainz was not to wait between **Mincha** and **Ma'ariv**.

10. These two customs are also brought in *Maharak*, no. 120.

11. *Hilchot Pesach*, 488:3.

12. *Sefer Minhagim, Pesach*. Moreinu HaRav Rav Avraham Klausner, z"l (Vienna, d. 1407) was **Maharil's** teacher.

13. *Minhag Shel Pesach*.

14. No. 826. **Yosef Ohmetz** was written by Rabbi Yosef Hahn Neuerlingen, z"l (1570-1637).

15. *Hilchot Pesach*, 488:3.

Borchu<sup>16</sup> to determine when Shabbat or **Yom Tov** was over. Yosef Ohmetz<sup>17</sup> wrote that one should not daven Ma'ariv of **Yom Tov Sheini** until after night, because the Jewish maids start cooking immediately after hearing the **chazan** recite Borchu.<sup>18</sup> Rabbi Yehuda Herzl Henkin, shlita<sup>19</sup> has proposed an interesting explanation<sup>20</sup> stating that, in those days, the Jews lived on their own street right near the synagogue. Everyone heard the congregation praying. Since the wives and maids had become accustomed to marking the end of Shabbat and **Yom Tov** by the **chazan's** recitation of Borchu, if the congregation davened early the evening of **Yom Tov Sheini**, the women would err and think it permissible to begin preparations for the evening meal. Today, however, in most countries, Jews live spread out among the Gentiles and not in close proximity to the Shul. Women do not rely upon the **chazan's** recitation of Borchu, but refer to the published luchot for the times for candle lighting and **Motza'ei Shabbat** and **Yom Tov**. Rav Henkin opines, therefore, that today the concern of Yosef Ohmetz would not apply. He rules that one may combine this reason with the lenient opinion of the Maharil and accept **Yom Tov Sheini** early.

### Kedushat HaYom

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16. *Levush* (loc. cit.) specifically states to wait until after *Borchu*. Similarly, *Mateh Ephraim* (599:2) writes regarding the second day of Rosh Hashanah that Ma'ariv should be slightly delayed because people begin to cook when they hear the Ma'ariv service begin.

17. Loc. cit.

18. It seems he is writing regarding Jewish maids, as is indicated in No. 828.

19. Grandson of Rabbi Yosef Eliyahu Henkin, *z"l* and author of *Responsa B'nai Vanim*.

20. Written responsum to authors.

If one were to accept the second day of *Yom Tov*<sup>21</sup> early, would one take away from the sanctity of the first day of *Yom Tov* (which derives its sanctity from the Torah)?

The *Shulchan Aruch* states,

On Shabbat night and *Yom Tov* night one should make the blessing and count [the *omer*] after Kiddush (has been made) in the Synagogue. On *Motza'ei Shabbat* and *Motza'ei Yom Tov* [one should make the blessing and count the *omer*] before Havdalah... When the final day of *Yom Tov* Pesach falls on *Motza'ei Shabbat*, in which case Kiddush and Havdalah are said concurrently, one should count [the *omer*] before the blessing is made over the cup of wine in the Synagogue.<sup>22</sup>

We count the *omer* in Shul after making Kiddush, because we wish to advance the sanctification of the day (Shabbat). However, at the conclusion of the Shabbat, we count before Havdalah, because we want to extend the Shabbat. On the last day of Pesach that falls on *Motza'ei Shabbat*, when we recite Kiddush and Havdalah together, we count prior to making Kiddush in order to extend the *kedushah* (sanctity) of Shabbat.

The *Taz* introduces a new factor to consider.<sup>23</sup>

And it seems to me, on the evening between the seventh and eighth day of Pesach, even during the week, it is proper to count before the Kiddush of the last day of Pesach because the seventh day derives its sanctity from the Torah and the eighth day's sanctity is rabbinic.

Thus, the *Taz* introduces a new concept that one cannot

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21. The sanctity of the second day of *Yom Tov* is rabbinic in origin.

22. *Sh. Aruch, O. Ch.*, 489:9.

23. *O. Ch.* 489:10.

usher in the second day of **Yom Tov** at the expense of the first day, because there is a difference in their inherent sanctity. The **Mishnah Berurah** points out, however, that the **Acharonim** disagree with the **Taz's** ruling.<sup>24</sup>

The **K'tav Sofer**<sup>25</sup> took issue with the **Taz**.<sup>26</sup> Pointing out that the **Taz's** premise is weak, the **K'tav Sofer** wrote that making Kiddush for the eighth day of Pesach does not affect the sanctity of the seventh day of **Yom Tov**. The Kiddush of **Yom Tov Sheini** is the same as the Kiddush of **Yom Tov Rishon**. There is no indication made when reciting the Kiddush of **Yom Tov Sheini** that one is separating between the sanctity of **Yom Tov Rishon** and **Yom Tov Sheini**. Kiddush is unlike Havdalah, which does separate between the sanctity of Shabbat and **Yom Tov**.

Similarly, Rabbi Natan Gestettner, **shlita**, explained that **Ma'ariv** and Kiddush of **Yom Tov Sheini** do not contain Havdalah and, therefore, should not detract from the sanctity of **Yom Tov Rishon** when one **davens** and makes Kiddush after **Plag HaMincha**.<sup>27</sup> Thus the **Taz's** innovative reasoning that reciting Kiddush of **Yom Tov Sheini** would detract from the sanctity of **Yom Tov Rishon** is weak, in the opinion of the **K'tav Sofer**. The **Chok Ya'akov**<sup>28</sup> also wrote that the words of the **Taz** are contrary to the position of the **Shulchan Aruch**.<sup>29</sup>

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24. *Mishnah Berurah*, 489:43.

25. Rabbi Avraham Shmuel Binyamin Wolf Sofer, *z"l* (1815-1871), eldest son of Rabbi Moshe Sofer, *z"l* (Chatam Sofer).

26. *O. Ch.* 489. (K'tav Sofer's comments appear within the glosses of his father, Chatam Sofer).

27. *Responsa Lehorot Natan, Choshen Mishpat*, Vol. 9, No. 60.

28. Rabbi Ya'akov Reischer, *z"l*, 1670-1733.

29. *Peri Megadim* also ruled against the **Taz**.

The **Acharonim** rule against the **Taz**. Kiddush is recited before counting the **Omer** between the seventh and eighth days of Pesach. We are not concerned, as the **Taz** contends, that doing so would take away from the sanctity of the first day of **Yom Tov**.

In *Responsa Hitorerut Teshuvah*,<sup>30</sup> Rabbi Shimon Sofer, *z"l*<sup>31</sup> responded to the question whether it is permissible to eat the festive meal of the second day of **Yom Tov** after **Plag HaMincha** on the first day of **Yom Tov**.<sup>32</sup> Additionally, would it be permitted to **daven** early and accept the sanctity of **Yom Tov Sheini**? Rabbi Sofer responded that obviously it is permitted since it is similar to the ruling brought by the *Shulchan Aruch*<sup>33</sup> that permits one to **daven**, make Kiddush and eat **Erev Shabbat** and **Erev Yom Tov** after **Plag HaMincha**. This is because one is **davening** the same **Tefillah** and making the same Kiddush as the first day of **Yom Tov**. Rabbi Sofer permits this even **lechatchilo**. One is permitted to **daven**, make Kiddush and eat early (after **Plag HaMincha**) the evening of **Simchat Torah**, the evening of the last day of Pesach, and the evening of the second day of **Shavuot**.<sup>34</sup> Rabbi Yosef ben Meir *Teomim*<sup>35</sup> (1727-1792), author of *Kuntres No'am Megadim*, permitted **davening** and making Kiddush early the second day of **Shavuot** "since

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30. Loc. cit.

31. Rabbi Shimon Sofer, *z"l* (1850-1944), son of *K'tav Sofer* and grandson of *Chatam Sofer*.

32. This query concerned an individual whose doctors recommended that he eat dinner before night time.

33. *O. Ch.*, 267:2.

34. Rabbi Akiva Menachem Sofer, *shlita*, grandson of Rabbi Shimon Sofer. His commentary, *Ikvei Sofer*, is included in *Responsa Hitorerut Teshuvah*.

35. Also known by his work *Peri Megadim*.

we are experts in establishing the calendar."<sup>36</sup>

Rabbi Zev Feldman of London wrote to Rabbi Y.Y. Weiss, z"l (1902-1989) expressing concern that making Kiddush early on **Yom Tov Sheini** for hospital patients would take away from the sanctity of **Yom Tov Rishon**. Rabbi Weiss, disagreed and pointed out that the **K'tav Sofer, Chok Ya'akov** and **Peri Megadim** argue with the opinion of the **Taz** that accepting **Yom Tov Sheini** early takes away from the **kedushah** of **Yom Tov Rishon**. Rav Weiss permitted making Kiddush early for hospital patients on **Yom Tov Sheini** of Shavuot, both days of Rosh Hashanah, and the last days of Pesach and Sukkot.<sup>37</sup> Rabbi Weiss limited his permission to **sha'at hadechak beno'gai'a le'veit cholim** (a time of great need regarding hospital patients).

Responding to a written query by the authors whether one is permitted to accept **Yom Tov Sheini** early by davening, making Kiddush and eating the festive meal after **Plag HaMincha**, Rabbi Gavriel Zinner, shlita<sup>38</sup> wrote,

**Halacha LeMa'aseh** (halacha in actual practice):  
 Regarding every **Yom Tov**, one is always permitted to be lenient and daven **Ma'ariv** after **Plag HaMincha**.<sup>39</sup>  
 One may be lenient and make Kiddush early on the last day of Pesach and the second day of Shavuot.

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36. *Kuntres No'am Megadim*, page 23b, No.9. This seems to be at odds, however, with No. 20 (p. 35b) where he wrote that one should wait until night before davening **Ma'ariv** at the end of **Yom Tov Rishon**.

37. *Responsa Minchat Yitzchok*, Vol. 10, No. 41.

38. Author of *Neta'ei Gavriel*.

39. This ruling of Rav Zinner has precedent in the comment of *Shelah* who writes (in the beginning of his remarks on Shavuot), "...and don't answer me that we daven **tefillah** (**Ma'ariv**) during the day (after **Plag HaMincha**), for this does not matter since Rav Yoshiyah said the **tefillah** for the conclusion of Shabbat on Shabbat..."

However, one should not make Kiddush early on the second night of Pesach since Kiddush and the **Arbah Kosot** (four cups) must be at night. Similarly, on the first two nights of Sukkot, **Magen Avraham**<sup>40</sup> and **Mateh Ephraim**<sup>41</sup> conclude that Kiddush should not be made early because **z'man (she'he'cheyanu)** must be at night. On Shemini Atzeret, if one were to make Kiddush early, one would abrogate the mitzvah of sitting in the Sukkah. However, according to the Chassidic custom that one does not sit in the sukkah on Shemini Atzeret, one is allowed to **daven** early on Simchat Torah, because, in any event, one is not eating in the sukkah. This is the halacha according to the **Shulchan Aruch** and the **Poskim**.

**Davening Ma'ariv** early on Simchat Torah would allow people to eat early and return for **Hakafot** rather than having the **Yom Tov** meal very late at night (or leaving prior to the completion of **Hakafot**). There are **poskim** who also permit making the second day of Rosh Hashanah early.<sup>42</sup>

### Too Confusing?

Would making **Yom Tov Sheini** early cause confusion and lead people to make mistakes?

Ramo states,

One should not eat on the first night [of Sukkot] until it

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40. 639:11.

41. *Siman* 625.

42. See *Ikvei Sofer*, cited in note 34. The first opinion cited in *Maharak (Sefer Minhagim)* also permits *davening Ma'ariv* early on Rosh Hashanah.

is definitely night.<sup>43</sup>

**Magen Avraham** explains that Kiddush could be made a little bit early, while it is still daytime, and the blessings of **leishev ba'sukkah** and **ha'motzee** would then be said at night. This would even be permitted during Pesach at the **seder**, except that the cup of wine for Kiddush is part of the four cups which must be drunk at night. However, since the custom on the first night of Sukkot is first to say the blessing of **leishev ba'sukkah** and then the **she'he'cheyanu** blessing, Kiddush must also be said at night.<sup>44</sup> Accordingly, **Peri Megadim** explains, on the second night, when the custom is to say **she'he'cheyanu** and then **leishev ba'sukkah**, one could make Kiddush and **she'he'cheyanu** during the day. **Leishev ba'sukkah** could then be said at night followed by the festive meal. However, one who has the custom to say **she'he'cheyanu** after **leishev ba'sukkah** on the second night as well, would have to wait until night (**Yom Tov Sheini**) to make Kiddush.<sup>45</sup>

**Kaf HaChaim**<sup>46</sup> adds that since not everyone is well versed in the fine points of the law, one might get confused and do something that would be improper. **Kaf HaChaim** lists three possible pitfalls that could occur: 1) people might eat the festive meal (of the second night of Sukkot) during the day (before night); 2) they may come to make Kiddush in a place other than where they will eat the meal (i.e. outside the Sukkah); 3) they may (out of confusion) come to make the festive meal of the first night of **Yom Tov** early. Therefore, no differentiation should be made between the first two nights (of Sukkot), and

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43. *Ramo, O. Ch.*, 639:3.

44. *Magen Avraham, O. Ch.*, 639:11. The first night **She'he'cheyanu** applies to the mitzvah of Sukkah as well as Kiddush.

45. See *Peri Megadim, Aishel Avraham*, 639:11.

46. *Rabbi Ya'akov Chaim Sofer, z"l* (1869-1938).

so Kiddush should not be made until night. *Kaf HaChaim* makes his comments only regarding making Kiddush in the sukkah and does not make any restriction regarding davening Ma'ariv. Eating the festive meal at night is a requirement the first two nights of Pesach and the first two nights of Sukkot,<sup>47</sup> and so one should not differentiate between the first and second nights regarding Kiddush. This is not a requirement for the other *Yomim Tovim*. Therefore, at most, *Kaf HaChaim*'s restriction not to differentiate would apply only to the first two days of Pesach and the first two days of Sukkot.

As further evidence that *Yom Tov Sheini* may be made early, in *Responsa Rav Pe'alim*,<sup>48</sup> Rav Yosef Chaim, z"l permitted making *Yom Tov Sheini* early. The custom in Baghdad, when it was warm, was to eat the evening meal outside on the roof of the house. There was concern that if they would wait until dark to eat, they would not be able to see the mosquitos which might fall into their food. Rav Yosef Chaim permitted davening Ma'ariv, candle lighting, Kiddush, and eating the evening meal of *Yom Tov Sheini* while it was still daylight.<sup>49</sup>

In *Ben Ish Chai*, Rav Yosef Chaim repeated his support for accepting *Yom Tov Sheini* early and wrote,

On the second night of *Yom Tov*, for people who reside outside of Israel, one does not have to wait until it is night (to make Kiddush), but one may make Kiddush

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47. See *Mishnah Berurah*, Chap. 639, subpar. 19.

48. Rabbi Yosef Chaim ben Eliyahu al-Chacham, z"l (1835-1909), born in Baghdad. Also known by his work, *Ben Ish Chai*.

49. *Responsa Rav Pe'alim*, O. Ch., Vol. 4, No. 23. Rav Yosef Chaim presents a lengthy justification for lighting *Yom Tov* candles during the day, if one is going to be making Kiddush and eating at that time.

during the day (after Plag HaMincha). It is even preferable to make Kiddush during the day in those places where there are many mosquitos because of warm summer nights. If one makes Kiddush during the day, his wife will be able to light candles during the day, and this is not considered preparing from the first day [of Yom Tov] to the next since she is lighting candles for the purpose of Kiddush and, according to many poskim, it is a mitzvah to have candles [lit] during Kiddush. Therefore, since one is making Kiddush during the day [after Plag HaMincha], one may also light candles [of Yom Tov Sheini] during the day [after Plag HaMincha].<sup>50</sup>

He did not express concern that this procedure would involve compromising the sanctity of Yom Tov Rishon. Eating the festive meal of Yom Tov Sheini during the afternoon of Yom Tov Rishon (but after Plag HaMincha) would not constitute preparation from the first day of Yom Tov to the second day because the meal is beginning before dark.<sup>51</sup>

## Cooking

There is an additional question. If one had pre-cooked the food for the Yom Tov Sheini meal prior to Yom Tov or if one was planning to eat left-overs from Yom Tov Rishon, there would be no concern regarding *hachana* (preparation) from Yom Tov Rishon to Yom Tov Sheini. Is one permitted, however, to cook food during the afternoon of Yom Tov Rishon for the Yom Tov Sheini meal that is being eaten early [after Plag

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50. *Ben Ish Chai, Shana Rishona, Bamidbar*.

51. See *Hitorerut Teshuvah*, loc. cit.

### HaMincha]?

Rabbi Shimon Sofer (*Hitorerut Teshuvah*) permits cooking during the afternoon of **Yom Tov Rishon** for the evening meal of **Yom Tov Sheini**, provided that one eat, before davening **Ma'ariv**, a *kezayit* of each food prepared. This is based upon the **Ramo**'s ruling that even though it is forbidden to cook from the first day of the holiday to the second day, one may cook many dishes and eat a little from each one.<sup>52</sup> Since it is only a rabbinic prohibition, explains Rav Sofer, for the sake of a mitzvah one is permitted to use *ha'arama* (preparation under the guise of needing the food for **Yom Tov Rishon**). "Even though the **Shulchan Aruch** permitted such preparation only before the afternoon meal on the first day of **Yom Tov**, in our case, since it is really the same day and there is no Torah prohibition, one may be lenient and cook even after the afternoon meal."<sup>53</sup>

### Custom

One might ask, what is the custom? There are places in Europe, where during the summer, night begins later than the United States, even taking into account Daylight Savings Time. In these places, it seems they waited to have the **Yom Tov** meal after dark. Rabbi Yechiel Mechel Epstein, *z"l* wrote that the custom in his location and time was not to eat the **Yom Tov** meal before night.<sup>54</sup>

Rabbi Henkin writes,<sup>55</sup> however, that one cannot compare one place or generation to another since what may constitute

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52. *Ramo, O. Ch.*, 503:1.

53. *Responsa Hitorerut Teshuvah*, No. 299.

54. *Aruch HaShulchan, O.Ch.*, 668:6.

55. Written responsum to authors.

**tza'ar meni'at simcha** (detracting from the enjoyment of **Yom Tov**) in our generation, may not have been a problem in a previous generation.

In previous generations in Europe, it was unusual to make an early Shabbat. In Europe and Israel today, it is unusual to find communities that make an early Shabbat. Today in America, however, during the summer months, in any city with a sizable Jewish population, one can always find an early Friday night *minyan*. In America today, unlike Europe and Israel, making Shabbat early is not *bedi'avad* but *lechatchilo*. Clearly, during the summer in America today, many Jews prefer to make Shabbat early.

There is historical precedent to make **Yom Tov Sheini** early. In Magentza, Maharil did not wait between *Mincha* and *Ma'ariv* of **Yom Tov Sheini**. In Baghdad, **Rav Pe'alim** reports that the custom was to *daven*, light candles, make *Kiddush* and eat early. Each **Rav**, in his own community, will decide whether making an early **Yom Tov Sheini** is an option that is desirable.

## Summary

Waiting until after **Tzait HaKochavim** to *daven*, make *Kiddush* and eat the **Yom Tov** meal may be a hardship for many people. In Miami Beach, Florida, for example, **Tzait HaKochavim** Shavuot, 5757, was 8:57 P.M.<sup>56</sup> Waiting until after this time to start *davening* *Ma'ariv* of **Yom Tov Sheini**, one would probably not be able to start the **Yom Tov** meal until 9:45 P.M. or later.

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56. Forty-five minutes after sunset. 9:24 P.M. was *Tzait HaKochavim* according to *Rabbeinu Tam*.

A close examination of the sources do not appear to support the conclusion that one may not **daven** Ma'ariv early on **Yom Tov Sheini**. There are those who may choose to be strict and wait until night to **daven**, make Kiddush and eat the **Yom Tov** meal. They base their decision on **Maharak**, **Levush** and **Taz**. Others may elect to **daven** early and also make Kiddush and eat the festive meal early.<sup>57</sup> They base their decision on **Maharil**, **K'tav Sofer**, Rav Shimon Sofer, Rav Yosef Chaim and the reliance today upon published candle lighting times (and not the start of Ma'ariv) to determine when **Yom Tov** begins. Still others may adopt a compromise position and **daven** earlier than **Tzait HaKochavim** (nightfall) but eat afterward.<sup>58</sup>

Sources have been brought which permit **davening** and/or making Kiddush and eating the **Yom Tov** meal early. Doing so would significantly increase the **simchat Yom Tov** of many families. It is up to the Rav of each community to decide what would be most appropriate for his congregation.

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This article is dedicated to the memory of Dr. Oppenheimer's beloved grandparents, Tuvia Gedalia ben Yehoshua Tzvi HaCohain, A" H and Esther bat Feivel, A" H.

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57. On the last day of Pesach, the second day of Shavuot and Simchat Torah.

58. Rabbi Moshe Sternbuch wrote (*T'shuvot VeHanhangot*, Vol. 3, No. 150, Jerusalem, 5757) that the custom is to *daven* Ma'ariv before dark on **Yom Tov Sheini**. In that way, certain preparations (but not actual *melacha*) may be made at the start of the Ma'ariv service.



# Is Turkey Kosher?

Rabbi Ari Z. Zivotofsky, Ph.D.

## Introduction:

With Columbus' serendipitous discovery of the "New World", came not only the blessing of a new land in which Jews would find a safe haven, but also unknown species of flora and fauna with which the halachic system would have to deal. Turkey, a New World bird, is a good example of this. According to the National Turkey Federation, Israel leads the world in turkey consumption. At a whopping 26.9 pounds per capita in 1996, Israelis consumed about 45% more than Americas, who are the world's number two consumers. How is it that the turkey, the quintessential New World species which Benjamin Franklin proposed as the national bird of the United States, has become so universally accepted as a kosher species that Israel leads the world in its consumption? To appreciate the question one must understand how fowl are classified as permissible or forbidden, and to recognize why a "new" species of fowl presents a significant halachic challenge.

## Kashrut Of Birds – The Biblical Story:

For the purpose of identifying kosher animals, the **Shulchan Aruch**<sup>1</sup>, based on Lev. 11:1-27 and Deut. 14:3-20, divides the

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1. *Yoreh De'ah* 79, 82, 83 and 85.

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animal kingdom into four categories.<sup>2</sup> These are: terrestrial mammalian quadrupeds, birds, fish, and invertebrates. In general, the Torah specifies the features which characterize a kosher species. For example, among the mammalian quadrupeds, an animal is kosher if it both chews its cud (*ma'alay gara*) and has fully split hooves (*mafreset parsah v'shosa'at shesa prasot*). In many cases the talmudic sages clarified and elaborated the indicators, and these are often recorded as normative halacha in the *Shulchan Aruch*.

Birds are categorically different from the other three classes in that the Torah offers no identifying features to distinguish the kosher from the non-kosher species. The Torah simply provides a listing of those birds that are not kosher. An even score of species are listed<sup>3</sup> and after several of them "and its species" is stated, for a total of 24 non-kosher species.<sup>4</sup> By inference, all of the other, vast number of bird species, are kosher.<sup>5</sup> Thus, for Moshe Rabbenu, or any expert ornithologist who is able to correctly identify the 24 listed species, things are relatively straightforward – all other birds are kosher. However, today when these can no longer be accurately identified, things

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2. *Aruch Hashulchan* YD 79:1. A fifth category – bugs (YD 84) – has no kosher members. In addition, any creature that does not fit into one of the categories is not kosher.

3. In Lev 11:13-19; Deut 14:11-18 lists 21 species.

4. *Chullin* 63b. Species here is used in a decidedly non-scientific manner. What is really meant is 24 broad classes of birds. Thus, for example, the Talmud (*Chullin* 63b) states that there are 100 birds in the east that are all types of *ayah*.

5. Most authorities, e.g. Rashi (*Chullin* 61a); Rambam, *Maachalot Asurot* 1:15; Meiri; *Shulchan Aruch* YD 82:1; *Chochmat Adam* 36:2. There is a dissenting opinion that says that there are non-kosher species other than the 24 listed (*Tosafot* and *Rashba*, *Chullin* 61a).

are quite a bit more complicated.<sup>6</sup> "In order to fully explain the identification of kosher birds would take a small booklet of its own,"<sup>7</sup> and Chatam Sofer, Rabbi Yonatan Eibschutz, and others wrote several of them. What will be presented here is, by necessity, only a brief summary of the main ideas, with a focus on those relevant to the question of turkey.

### Kashrut Of Birds – The Rabbinic Story:

The rabbis, cognizant that not everyone is familiar with all of the non-kosher species enumerated in the Torah, provided the following four identifying features to help categorize birds.<sup>8</sup> The Mishnah states "every bird that is 1) *dores* ("a predator") is not kosher. Every bird that has 2) an extra toe,<sup>9</sup> 3) a *zefek* [crop – *ingluvius*, the biblical *more'eh*, e.g. Lev 1:16], and 4) a *korkuvan* [gizzard, "pupik" in yiddish] that can be peeled, is kosher."

The definition of a *dores* (predatory species) is the subject of a major debate. Rashi (*Chullin* 59a) and Rav Ovadiah Mibartenura (*Chullin* 3:6 – first explanation) explain that it refers to a bird that seizes its food with its claws and lifts it off the

6. For conjectures about the identity of the 24 species see Prof. Yehuda Feliks, *Chai v'Tzomaach ba'Torah*, 1984, p.110 and Rabbi Aryeh Kaplan, *The Living Torah*, Moznaim, 1981.

7. *Minchat Chinuch*, *mitzvah* 157.

8. The Tosefta (*Chullin*, 3:22-23, ed. Zuckerman) states that certain *tanaim* and locales relied on subsets of the signs mentioned in the Mishnah. Compare also *Targum Yonatan* on Lev. 11:13 and Deut. 14:9.

9. *Shut Chavatzelet Hasharon* (*mahadura tanina*, #26; R. Menachem Munish Babad; 1865-1938) discusses whether an extra extra-toe, i.e. two extra toes, is as problematic as no extra toe and concludes that one should be strict about it.

ground to its mouth. Rashi (*Chullin* 62a, *Niddah* 50b) and Rambam (*Perush Hamishnayot*, *Chullin* 3:6) explain that the bird holds down its prey with its claws and breaks off small pieces to eat. The Raavad elaborates and says that a bird is a **dores** if it holds down its food with its feet. The food can be a live or dead animal or even vegetables.

Ran, Tosafot (*Chullin* 61a, s.v. *hadores*) in the name of Rabbeinu Tam, *Sefer Haeshkol*,<sup>10</sup> and Rav Ovadiah Mibartenura (*Chullin* 3:6 – second explanation) reject Rashi's definition because it would seem to include chickens. Rather, they explain it to mean that the bird hits its prey and<sup>11</sup> ingests its prey while it is still alive. The *Beit Yosef*, *Meiri*, and *Rashba* in the name of Rabbeinu Tam explain that the eating of live worms by chickens is not a problem since worms are not true "animals". This would apply to flies as well. The *Rashba* limits it specifically to birds that eat other birds alive. *Divrei Aharon* (#29) in the name of the *Rashash* explains that the critical feature of **dores** birds is that they whack their prey before consuming them alive. This is not characteristic of chickens and other birds that eat small insects and insects.

Ramban, *Rashba*, *Sefer Hachinuch*, and *Shach* define **dores** as birds that either claw their prey to death or inject them with a venom. Raavad rejects this since many of the non-kosher birds listed in the Torah, including the *orev*, have no poison. *Rabbenu Gershom* interprets **dores** to mean that they seize their prey in flight, without first alighting on the ground.

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10. By R. Abraham ben Isaac of Narbonne (c. 1110-1179). This was the first halachic codification of Southern France. It should be pointed out that the edition with the *Nachal Eshkol* by R. Zevi Benjamin Auerbach (1808-1872) of Germany is surrounded by a major controversy. See *EJ* 2:146, 3:843, and 10:342 for some details.

11. As explained by *Divrei Aharon* #29.

Chazal provided two indicators to recognize a **dores** (Mishnah, *Chullin* 3:6). If, while standing on a rope, it spreads two toes to each side it is **dores** and definitely not kosher; if it splits its toes three and one it is not a **dores** and may be kosher.<sup>12</sup> Second, if one throws food in the air and the bird catches it and eats it without the food ever touching the ground, it is a **dores**.

The talmudic sections (*Chullin* 60b-63b, 65a) dealing with the above-cited Mishnah are cryptic, and their practical application is the source of a great deal of controversy. It led the Meiri to comment on the lack of clarity by the commentators and the *Sefer Haeshkol* to observe that in this subject matter "due to our many sins we are groping and searching in the dark and searching for God's word and not finding the truth."

According to the Talmud (*Chullin* 61a), the two prototypical birds from which we derive the kosher characteristics are the *tur* (turtle dove – Feliks) and the *nesher* (Griffon Vulture (Feliks) or eagle<sup>13</sup> (Kaplan)). The *tor* is one of the two birds that was suitable for sacrifices in the Temple and exhibits all four kosher signs.<sup>14</sup> The *nesher* heads the list of non-kosher birds and has none of the kosher signs. An orderly presentation of many of the possibilities of how to understand these talmudic sections

12. See *Sefer Haeshkol, hilchot simanei behema, chaya, v'of*.

13. Tosafot *Chullin* 63a, s.v. *netz* seem to dispute this. *Darkei Tshuva* (82:1) in the name of *Hagaot Mamoni* says that the *nesher* cannot be the eagle since the *nesher* has none of the kosher signs and the eagle has one.

14. The *Sifra* lists as prototypes both the *tor* (turtle dove) and *ben yonah* (pigeon), the two species of bird that were eligible to be brought as sacrifices. The Karaites permitted only these two species for consumption and prohibited even the chicken, which they claimed is the biblically prohibited *duchefus*. Rav Saadiah Gaon and Ibn Ezra (Lev 11:19) soundly refuted this contention.

is offered by the Meiri<sup>15</sup> who divides them into four principal explanations. These are summarized as follows:

The first opinion is that of Rashi.<sup>16</sup> It states that to be kosher a bird must have all four indicia. Thus, it is necessary for a bird to be a **non-dores**, because even if it exhibits all three physical signs, it may still be a **dores** and hence non-kosher.

This condition presents a major problem since it is sometimes difficult to determine a bird's **dores** status. The Talmud presents the story of the bird known as *tarnugulta d'agma* which was assumed to be a kosher species and was widely eaten and only later was found to be a **dores** and declared non-kosher.<sup>17</sup>

According to the *Aruch Hashulchan* (YD 82:12), the most widely accepted opinion is the second one, that of Rav Moshe ben Rav Yosef (Rambi). In this view,<sup>18</sup> there are really only three signs. Any bird that exhibits all three physical signs is by definition not a **dores** and is kosher. In addition, all birds that are **dores** are not kosher, and all **non-dores** are kosher except for either the **peres** or the **ozniyah**. Since neither of these is

15. *Pri To'ar* 82:3 gives a lengthy, organized presentation of the various opinions. He includes a long defense of Rashi, and offers Rambam's view as well. *Gra* YD 82:2, also presents a detailed outline of several of the opinions and mentions that most *poskim* follow Rambi's opinion in these matters. A lucid review of these four opinions and how they relate to the talmudic discussion and to halacha is given by *Tzemach Tzedek* (YD 1:60).

16. It is also cited by the Ramban and Ran, accepted by the Rosh, Rashba, *Chinuch* (*mitzvah* 157), and *Chochmat Adam* (36:2), and according to *Tosafot Yom Tov* (cited in *Tzemach Tzedek* YD:1:60) the Rambam, and it is strongly defended by *Pri Toar* and *Tzemach Tzedek*.

17. *Chullin* 62b, Rashi s.v. *chazyuha d'dorsa*.

18. Also followed by Razah, Ramban, Rashban, Ran, the *Ittur*, Maharshal, and others.

found in settled areas they are a non-issue.<sup>19</sup> The presence of three indicators is such a strong proof that it is not *dores* that the *Yam Shel Shlomo* (cited in *Shach*, YD 82:8) says that if such a bird is observed being *dores* it is anomalous behavior and can be ignored.

In response to a statement that most *Rishonim* and *Acharonim* (early and later rabbinic authorities) follow Rashi, *Shoel U'maishiv* (3: YD:2:121) wrote "this is an error. The truth is the opposite. Nearly all of the *Rishonim* follow *Rambi*." He emphasizes that *Ramban* held that if the bird has all three kosher signs and is not known to be *dores* it is definitely kosher. And the *Rashba*, *Ran*, and *Maharshal* agree with this.<sup>20</sup>

The final two opinions agree that if presented with a bird that has all three physical attributes there is no need to investigate its *dores* status – it is certainly kosher. The last opinion gives special consideration to the *kurkavan* sign, prompting the *Aruch Hashulchan* (YD 82:12-13) to say that if a bird has at least two of the three signs and one of them is a peelable *kurkavan*, many people will declare it a kosher species without a need to verify its *dores* status.

### Kashrut Of Birds – The Need For A Mesorah:

With all the conflicting opinions, what is the normative halacha? Some *Rishonim*, such as the *Ramban* (*Chullin* 62) who

19. Although the *Ran* cites an opinion that nowadays this talmudic claim cannot be relied upon, the *Chinuch* says about such people: "Do not be a *tzaddik* [righteous] overmuch" (*Kohelet* 7:16).

20. *Nachal Eshkol* (*Hilchot Simanei Beheimot* ...), pg 63-65), in reaction to this letter of Rav Nathanson posits that even Rashi would admit that his opinion is a rabbinic stringency. Biblically there is no need to suspect that a bird with all three indicia is *dores* and in case of an error, no penitence would be necessary.

describes examining many birds to identify the kosher traits, were willing to trust their understanding of the Talmud and to rely on the physical characteristics. The *Shulchan Aruch* (YD 82:3) narrowed the use of physical signs and required *a priori* knowledge that the bird is not a *dore*s. The *Shulchan Aruch* also provided some means, to be discussed below, of ascertaining that a bird is not a *dore*s.

Rashi (*Chullin* 62a), based on the incident of the *tarnugulta d'agma* in which people ate a non-kosher bird as a consequence of applying physical characteristics<sup>21</sup> as a criterion, opines that we can never be sure that a bird is not a *dore*s and hence rules that birds may be eaten only if there is a **mesorah** – a tradition attesting to the acceptability of this particular species.

The *Ramo* (YD 82:3), the principal authority for all Ashkenazic lands, followed the lead of Rashi and the *Levush* and ruled that the only applicable principle as far as he is concerned is that "no bird should be eaten unless there is a **mesorah** that it is a kosher species."<sup>22</sup>

This ruling of the *Ramo*,<sup>23</sup> that there is an absolute

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21. In an important dissension to this Rashi, Rashba (*Torat Habayit, bayit 3, sha'ar 1*) asserts that the *tarnugulta d'agma* did not have the physical indicators and the people ate it based on an erroneous tradition that it was not *dore*s. This Rashba is used by the *Shoel U'meshiv* (3:YD:2:121) as part of his strong proof that we do not follow Rashi in these halachot.

22. This is an ironic twist on the talmudic dictum that "Rav Yitzchak said 'a kosher bird may be eaten based [solely] on a *mesorah*.'" (*Chullin* 63b). Rav Yitzchak was coming to be lenient – even if there was uncertainty regarding the physical indicia, a tradition was sufficient to permit the bird. This was quite a permissive ruling and is used as such by Rambam (*Ma'achalot Asurot* 1:15). The *Ramo* in turn was coming to be strict and to permit a bird only based on tradition.

23. In fact the *Mechaber* fully agrees that a *mesorah* is required. The

requirement for a **mesorah**, motivates the question regarding turkey, a New World species, and will be the launching platform for what follows. If "no bird should be eaten in the absence of a **mesorah**," how is it possible for a New World species to be considered kosher?

### Mesorahs: Transmitting, Making, Applying and Amending:

**FUNCTIONING OF A MESORAH:** The reliance on a **mesorah** also provides a leniency. When a reliable **mesorah** exists there is no need to investigate the characteristics of the bird (see *Yerushalmi, Chullin* 3:6). Even if the bird is shown to be lacking some of the three physical characteristics, the **mesorah** can be relied upon and the bird eaten.<sup>24</sup> The only exception to this rule would be a bird that is empirically found to be a **dorex**, in which case it is concluded that the **mesorah** was erroneous and must be rejected.<sup>25</sup>

For the above rule to apply, the **mesorah** needs to be "reliable." The Rosh<sup>26</sup> was asked whether a particular bird, the *chasida*,<sup>27</sup> could be eaten. He responded that in his region and in Spain there was a tradition that it was not kosher, i.e. they had a negative tradition. The Rosh emphasized that inspection of the signs is insufficient to render it kosher and even in the

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only difference is that he provided a few small loopholes, such as the goose comparison (see below) to circumvent the need for a *mesorah*. Thus, almost the entire discussion in this paper is equally applicable to the *Mechaber's* opinion as well.

24. *Shach, YD* 82:9; *Pri To'ar* 82:3.

25. *Ibid*, 82:6).

26. *Shut Rabbenu Asher, Clal* 20, #20.

27. Coincidentally, this is the name of one of the non-kosher birds listed in the Torah.

talmudic period errors were made. Although he conceded that others have what they term a **mesorah** to permit that bird, he insisted that he would not rely on such a **mesorah** since its origin is unknown, whereas he traces his negative **mesorah** to the saintly **chachmei Ashkenaz** – leaders of German Jewry. He explains that the talmudic dictum (*Chullin* 63b) that birds are eaten based on a **mesorah** means that an unfamiliar species may be eaten based on testimony of another locale that they have a tradition that it is kosher. However, a species that the sages know to be non-kosher cannot be eaten based on a **mesorah** of another, less trustworthy group. It could be that their **mesorah** originated when someone erroneously relied on his own interpretation of the indicia and declared it kosher.

A similar idea is mentioned in *Shut Maharil*, 95 (Cited in *Da'at Torah*, YD 82:3) who writes not to eat a particular bird even though some people have a **mesorah** since the higher quality **mesorah** of Ashkenaz says not to eat it. He further specifies that a **mesorah** can be introduced to a locale only by an important person, the likes of which don't exist any more today.

*Mei Be'er* (#19) cites the *Tzemach Tzedek* (#29)<sup>28</sup> who raises the important issue regarding the origin of a **mesorah** in another locale. It is not sufficient to know that they eat a particular species. For example, they may be a Sefardic group relying on the goose comparison (see below), a leniency rejected by Ashkenazim. This is a very logical point, for otherwise it would mean that in practice all places could accept any and all leniencies accepted by any recognized group.

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28. Not the *Tzemach Tzedek* cited above. This is the late 17th century R. Krochmal who started a "duck war" by prohibiting a specific type of goose. The *Kreiti u'Plati* disagreed with him, and *Tshuvot Tshuot Chen* (43; by Rav Shimshon Zelig) eloquently rebutted the *Kreiti u'Plati*.

Despite its cogency, this point is not mentioned by the **Aruch Hashulchan** (YD 82:32), who states that if a person from a place that treats a certain bird as prohibited because of a lack of a **mesorah** goes to a locale that has a reliable tradition, he may eat the bird based on their tradition. That is because his home town refrained from eating it not because of a known prohibition but because of a lack of a **mesorah**. As an extension of this, the **Aruch Hashulchan** (YD 82:33) emphasizes that there is no question whatsoever that if all the inhabitants in a particular place that does not have a **mesorah** want to rely on the **mesorah** of a locale with a **mesorah**, they may unquestionably do so.<sup>29</sup> The Gra and many others seem also to accept this position.

Can names of species be relied upon for a **mesorah**? In many places the Talmud seeks to translate biblical bird names into contemporary ones, possibly indicating that knowledge of the name is sufficient. However, all the commentators, seemingly without exception, held otherwise. Rashi (*Chullin* 59a, s.v. *v'harei tzvi*) explains why he held that what was called *tzvi* in his day was not the *tzvi* of the Talmud's time. Tosafot (*Chullin* 63a, s.v. *netz*) prove that the *netz*, *nesher* and *korah* in their time were different than the *netz*, *nesher* and *korah* of the talmudic period. Meiri also discussed difficulties in trying to understand some talmudic names of birds.

**Beit Yosef** (YD 82) quotes **Rabbenu Yerucham** in emphasizing that names cannot be relied upon. What we today call an *orev* does not have the signs attributed to it by **chazal**. They said that it has no *zefek*, yet our *orev* does.<sup>30</sup> Similarly,

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29. See *Tur*, end of YD 82, and *Zivchei Zedek* (82:25-27) who state likewise. See also *Pri To'ar* who he concurs that if there is no local custom a permissive **mesorah** can be imported. *Sefer Haeshkol* and Rav Moshe Feinstein also seem to agree (*Iggerot Moshe* YD:1:34).

30. Similarly Tosafot found it has a *zefek*, while Ramban found no

what we call a **nesher** has an extra toe, yet **chazal** stated that the **nesher** had none of the kosher signs. Finally, **Rabbenu Yerucham** states that what we call the **netz** has only one kosher sign, an extra toe, yet **chazal** indicated that it had additional kosher signs. In deference to this naming conundrum, the new **Artscroll Stone Chumash** followed the lead of Rabbi Samson Raphael Hirsch and transliterated rather than translated the bird names in Leviticus and Deuteronomy. Apparently, relying on contemporary names is problematic.<sup>31</sup>

**TRANSMITTING A MESORAH:** In 1832 Rav Isaac ben Meir ha-Kohen, of Leghorn (Livorno), central Italy, wrote **Zivchei Cohen**, a book on **shechita**, **bedika**, and **nikkur**. He provided diagrams and Italian names of 30 birds for which he says a **mesorah** existed. This list is reproduced with (the presumed) Hebrew, English and scientific names in Feliks (p. 109). It includes pheasant, peacock, quail, mallard, dove, and robin, but omits chicken and turkey. Early editions of the work with color diagrams have recently been found, and the color drawings

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*zefek*. *Pri To'ar* 82:3, while not asserting that names can be relied upon, is concerned that these modern inspections may have been done poorly and thus, for example, not noticed a small *zefek*.

31. Rav Moshe Feinstein also states explicitly that names cannot be relied upon (*Iggerot Moshe* YD:1:34).

The problem in assuming that contemporary and talmudic names refer to the same object arises in other halachic areas as well. The Mishnah (*Niddah* 19a) refers to blood that is the color *yarok*. In modern Hebrew *yarok* is green and that is how Meiri understood it. But Tosafot (*Niddah* 19b) explain *yarok* as yellowish like a ripe *etrog*. The *Shulchan Aruch* (YD 188:1) seems to follow the opinion of Tosafot. The same ambiguity about the color *yarok* is relevant in *treifa* laws as well. The *Shulchan Aruch* (YD 38:1-4) enumerates those lung colors that render an animal a *treifa*. In that list *yarok* can be defined as the problematic color of an egg yolk (YD 378:1) or as the permissible green (38:4). The *Shach* (38:1) writes that there are additional shades of *yarok*.

have been republished.<sup>32</sup> *Zivchei Cohen* possibly held that a **mesorah** could be transmitted in writing. Similarly, the Chida (*Machzik Bracha* YD:82:6) and the *Kaf Hachaim* (YD 82:17) say they "saw" the **mesorahs** of Leghorn.<sup>33</sup> Furthermore, many works on the subject, such as *Kaf Hachaim* and *Zivchei Tzedek*, offer lists of names of permitted and forbidden birds. These authors presumably believed that they were fulfilling some purpose by providing these lists and must have believed that they participated in the transmission of a **mesorah**.

In opposition to this, *Darkei T'shuva* (82:34) cites sources that require a verbal and personal, rather than a written, testimony to the acceptability of a bird. This seems to have been the opinion accepted by Rav Moshe Feinstein (*Iggerot Moshe* YD 1:34). This would be similar to other areas of halacha. For example, the *Ramo* (YD 64:7) writes that the details of *nikkur* (removing the forbidden fats – *chailev*) cannot be adequately explained in writing and in order to really understand them one must observe an expert.

What about reliance on a non-Jewish **mesorah**? In other words, if a non-Jewish text (according to those who would rely on written transmission) or a group of non-Jews attest to the fact that Jews of a certain locale consumed a particular type of bird, would that be a sufficient "**mesorah**" to reinstate a Jewish **mesorah** for that species? The *Radbaz* (*Shut Haradbaz* 6:2206) uses a non-Jewish tradition, in conjunction with other evidence, to establish one of the borders of the Land of Israel by identifying the biblical *Nachal Mitzrayim* with Wadi El Arish.

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32. *Guide to Masechet Chullin* (2 vol), I.M. Levinger, Maskil L'David, Jerusalem, 1995

33. Leghorn was one of the most important Italian-Jewish communities and was graced with many illustrious rabbis. Its *mesorah* is often cited.

EXTENDING OR "CREATING" A MESORAH: There are several alternative methods for establishing the kashrut of an unknown bird species and these fall into two general categories. Of those listed below, the first two and the last one enable an unknown bird to be subsumed under the **mesorah** of a known bird. The fourth and fifth are circumventions of the requirement for an existing **mesorah** and enable the "creation" of a new one for the unknown species.<sup>34</sup>

**Kilayim:** If two birds are not **kilayim** with each other, then the **mesorah** of one applies to the other (*Chatam Sofer*, YD:74). Today, the determination of which birds are **kilayim** are based on **mesorah** as well, and I don't believe there exist any "non-**kilayim**" **mesorahs** that would expand the pool of kosher species.

**Eggs:** If one can demonstrate that the eggs of an unknown bird are indistinguishable from the eggs of a known kosher species that is sufficient grounds to encompass the new bird within the old **mesorah** (*Avnei Nezer*, YD:1:76:6-12). Unfortunately, turkey eggs are significantly different from chicken eggs. They are almost twice as large as ordinary chicken eggs (100 g compared to 55-65 g) and are pale creamy tan and speckled with brown as opposed to either plain white or brown chicken eggs.

The Gemara (*Chullin* 64a) and **Shulchan Aruch** (YD 86) provide indicators to distinguish kosher from non-kosher eggs. All eggs which have two rounded ends or two pointed ends are definitely from non-kosher species, but all eggs that have

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34. I am not sure under which category to put the third test.

After assembling this list, I discovered that the *Arugot Habosem*, in permitting the kibitzer hen, systematically goes through these methods of permitting a new species. He applied them to the kibitzer hen and often to the turkey as well.

one rounded and one pointed end may be from kosher birds. If the yolk is inside and the albumen (white) is on the outside it may be kosher, but if the yolk is outside, it is non-kosher and if the two are intermingled, it is the egg of an insect.

This test would seem only to rule out non-kosher species but be ambivalent about declaring an egg kosher. **Arugot Habosem** claims that even Rashi would agree that three physical indicators in conjunction with the egg test is sufficient to declare a bird as kosher.

**Shachen V'nidmeh:** The Gemara concludes (**Chullin** 65a) that if an unknown species of bird lives with and resembles a known non-kosher species it too is non-kosher. Similarly, if it dwells with a kosher species and resembles it, it too is kosher. **T'shuvot Beit Yitzchok** (1:YD:107:10) was asked whether this can be applied to a new type of bird that lives among chickens. He prohibited it since although the **Yam Shel Shlomo** (siman 117) had cited this Gemara, the **Shulchan Aruch** does not, and the **Rambam**<sup>35</sup> only cites it in the direction to prohibit an unknown species.<sup>36</sup> In addition, he contends that this new species was not living with chickens on its own volition. A farmer had placed them together, and thus their living together does not prove anything. There are some sources, such as **Arugot Habosem**, who permitted birds based on **shachen v'nidmeh** and simply expressed surprise at the **Shulchan Aruch**'s omission.

**Minchat Yitzchak** (5:31:25<sup>37</sup>) cites earlier sources who argue that it is a logical flaw to use only half of the **shachen v'nidmeh** principle. If an unknown bird lives with a known kosher species

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35. *Ma'achalot Asurot*, 1:20.

36. See also *Meshiv Davar* YD:22.

37. He further analyzes this in subsequent subsections.

and we cannot thereby permit the new bird, then it is by default forbidden. Now the known species is **shachen v'nidmeh** with a non-kosher species and it should be prohibited! Although it may be logically inconsistent, the halachic response is that the **mesorah** of the accepted species is salient enough to outweigh **shachen v'nidmeh** and leaves it as a permitted species despite the fact that the new species is now prohibited.

The "Goose Comparison": An avenue around the need for a **mesorah** is provided by a statement of the **Baal haMaor** which is almost universally accepted.<sup>38</sup> He states that any bird that has a wide beak and<sup>39</sup> webbed feet like the **avaz** (goose) is not a **dores**. This, in conjunction with all three physical indicia<sup>40</sup> can be used according to the **Shulchan Aruch** to permit an unknown species.

Some of the later authorities make an effort to relate this to the original four methods of understanding the Talmud. The **Taz** and **Prisha** say that Rashi would not accept the "goose comparison." It only works because the halacha in reality follows **Rabbenu Tam** and the **mesorah** that is required is only a token in deference to Rashi. The **Kreiti uPlayti** in his monograph **Pnei Nesher** used the goose comparison to permit a bird. He argued that since the **Rosh** and **Rashba** were strict like Rashi many followed suit, but really the halacha is not like Rashi and three

38. *Shut Harosh*, clal 20:5 in the name of **Rabbeinu Zerachia HaLevi**; **Rashba**; **Tur**; **Beit Yosef**; **Ran**.

39. Some sources (Meiri, Maharsham in *Da'at Torah*, *Sefer Haeshkol*, *Maggid Mishnah* (*ma'achalot asurot* 1:20), *Ran* (page 21b in the *Rif*), **Rosh**) have "or" instead of "and." The "or" option seems to be problematic because that would make it possible to include the white stork (*Ciconia ciconia*), a bird that is almost universally accepted as non-kosher and is identified as the *chassida* listed in the Torah. See also *Prisha* YD 82:1.

40. *Shut Mei Be'er* # 19.

physical signs should be sufficient. Therefore, in conjunction with the goose comparison we can unquestionably permit an unknown species that has all three physical signs. *Darkei Moshe* held that since the "goose comparison" removes any doubt of the bird being a *dores*, even according to Rashi it should be efficacious, since there is no longer any need to be concerned that it is a *dores*. *Divrei Aharon* (#27) proves that Rashi would accept the goose comparison since Rosh, who agrees with Rashi, explicitly accepts the goose comparison.<sup>41</sup> Nonetheless, the *Darkei Moshe* says that one should reject it and be stringent, and that is precisely what he does in *Ramo YD* 82:3.<sup>42</sup>

A straightforward analysis is provided by *Tzemach Tzedek* (YD:60). He explains that the goose comparison is intended to remove any doubts as to the bird being a *dores*. According to the *Baal haMaor*, who defines a *dores* as a bird that hunts and eats other birds, similar to a lion, a bird which passes the goose comparison is physically incapable of being a *dores*. However, according to Rashi's explanation that *dores* simply means that the bird holds its food down with its feet, even a bird that passes the goose comparison can be a *dores*. Hence, it is perfectly logical and clear that Rashi would reject the goose comparison.

**Hybridization Test:** With regard to quadrupeds, the Talmud (*Bechorot* 7a) states that kosher and non-kosher species cannot cross-breed. This is cited as an undisputed halachically valid and sufficient, but not necessary, means of distinguishing between kosher and non-kosher animals (*Rambam, Maachalot Assurot* 1:13). The *Chatam Sofer* (YD:74) was unsure whether

41. *Tzemech Tzedek* YD:60 notes that although the Rosh cites it in *Chullin*, he rejects it in his responsa (20:20).

42. Some Sephardi *poskim* have also accepted this position and rejected the use of all signs. See for example *Birchat Moshe* #23, second section about Tunisians on Djerba, and *Zivchei Zedek* 82:23-24 about Iraqis.

this rule applies to birds while the *Netziv* (*Meshiv Davar* YD:22) and *Arugot Habosem*, based on the *Rambam*'s language, seem convinced that it does but were hesitant to apply it in practice.

The *Avnei Nezer* (YD:1:75), while discussing a new bird that was brought to Warsaw from a part of Russia where there were no Jews, opines that although the *Chatam Sofer* presented both sides, he actually held that this rule applies to birds. Similarly, *Maharsham* (*Da'at Torah* YD 82:3) felt that the *Chatam Sofer* accepted the hybridization test. The *Avnei Nezer* concludes (YD:1:75:19) that if an unknown bird can mate with a known kosher bird and produce live offspring then the unknown bird may be treated as kosher.<sup>43</sup> He felt that this alone was enough to permit an unknown species. However, the *Beit Yitzchak* (YD 1:106) and *Minchat Yitzchak* (5:31) disagree and say that kosher and non-kosher birds can successfully mate, and hence such a hybridization does not prove anything.<sup>44</sup>

It must be emphasized that the hybridization test is circumventing the need for a **mesorah**, not broadening an existing **mesorah**. It is not labeling the new species as being of the same species as the old one, but rather of the same very broad category – permissible to eat.

**Zivug Test:** Both the *Netziv*<sup>45</sup> and *Arugot Habosem*,<sup>46</sup> who

43. Fertile offspring do not seem to be required. The expression in the Talmud is that a pregnancy has to result. It could be that even a live birth is not required.

44. Many other sources simply assume that kosher and non-kosher birds can mate and discuss the status of the offspring. These sources (such as *Minchat Yitzchak* 2:85; *Chidushei Chaviva* page 16) clearly reject the hybridization test. I have no evidence one way or the other whether the *Ramo* would accept the hybridization test.

45. *Meshiv Davar* YD:22.

accepted the hybridization test in theory but were hesitant to use it in practice, were willing to use the *zivug* test in practice. That is, if the questionable bird is placed together with birds of the opposite sex both of its species and a known kosher species and of its own volition sometimes chooses the kosher species, the *Netziv* was willing to permit the new bird. He is claiming that even if the hybridization test is no good, and really kosher and non-kosher birds can breed, this test reveals that they are actually one and the same species. Similarly, the *Nachal Eshkol*<sup>47</sup> concludes a lengthy discussion of the hybridization test that if an unknown species regularly reproduces with a known kosher species, the three physical indicators can be relied upon, and no further tradition is required, since they are considered one species. *Chesed L'Avraham* agrees as well.<sup>48</sup>

### Kashrut Of The Turkey.<sup>49</sup>

The common assumption is to associate turkey with chicken despite the fact that turkey is really more closely related to pheasant and partridge. However, chicken and turkey are in the same Order (Galliformes), and according to some authorities, in the same family (Phasianidae) as well. A good starting point to this section would therefore be a short discussion of the chicken, which is universally accepted as kosher.

Records indicate that chickens were domesticated and eaten in Israel as early as the seventh century BCE. There is little

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46. *Kuntrus Hatshuvot*, 16.

47. Ed. Halberstadt, 1868, p.62 note 10.

48. *Tanina* YD:23,24 – cited by *Darkei T'shuva* (82:32).

49. For many of these sources see: *Darkei T'shuva* YD 82:26; *Torah Lodaat* XIV:29 (*Shmini*) 1990; *Modern Kosher Food Production From Animal Sources* by Rabbi Dr. I.M. Levinger, 1985; and *Sichat Chullin* by Amiti Ben-David.

question that a chicken is a kosher bird regardless of its breed.<sup>50</sup> Just as scientifically they are all chickens, so too halachically. This includes breeds that look quite different and are relatively new, such as the popular leghorn. *Divrei Aharon* (beginning of #27) proves that small differences do not create a new halachic species. Rabbi Yitzchak Isaac Liebes,<sup>51</sup> in discussing Rock Cornish Hens, essentially says "if it looks like a chicken, walks like a chicken and quacks like a chicken, it is a chicken," and since Rock Cornish Hens are [just like] the common chicken, they fall under the chicken *mesorah*.

Historically there have been several major fights over what was included as a chicken. In the last century a "chicken" that was slightly larger than the usual, had feathers on its legs, and made deeper sounds arrived in Europe from India, Africa or some island in the Middle East. It had a laundry list of different names by which it was called, with the most common being something like "kibbitzer hen."

In some responsa it is called the "Americanisha hen" and Rav Yaakov Etlinger claims that they came to Europe from India but originated in America. This might lead some people to erroneously assume that, for example, *Divrei Chaim* YD 2:45-48 and *Maharam Shick* YD 98-100, were discussing turkey. They are almost definitely NOT discussing the turkey. Many of the responsa discuss the offspring of this kibbitzer hen and regular chickens and assert that in some locales the hybrid was now the majority of chickens. This could not possibly happen with turkeys and chickens. Many responsa, and even whole monographs, sometimes with extremely strong language and personal attacks,<sup>52</sup> were written about this bird.<sup>53</sup>

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50. See *Darkei T'shuva* YD 82:24.

51. *Shut Beit Avi; mesorah*, 1990, 3:60-65.

52. This was not new. There are several places in the Talmud (e.g.

There are two types of wild turkey,<sup>54</sup> both of which are strong fliers and among the fastest runners. One type is originally from Yucatan and Guatemala and the other is from Mexico and the US. Currently there are seven main varieties (subspecies) of domesticated turkey, all of which are flightless and descend from the Mexican and US wild turkey.

The terminus *ante quem* for the discovery of domesticated turkeys by Europeans is the Cortez expedition of 1519. The Spanish Conquistadors brought turkeys back to Europe where they were savored as a delicacy. They were eventually acquired by other European countries, probably reaching England in 1524. When the Pilgrims came to settle the New World in 1620, they brought turkey back to its native land.

As the turkey's acceptance spread through Europe, somehow, Jews also started eating it, and eventually the question of its kosher status was posed to various rabbis, who usually permitted it.

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*Chullin* 65a) where there are disagreements about the status of a bird and the one who prohibits states about those who eat it that "They will in the future have to pay the price."

53. It was permitted by, among others, *Shoel U'mashiv* (3:YD:2:121; also in *Yad Shaul* YD:82), Rav Nisson Adler, *Yehuda Ya'aleh*, *Chesed L'Avraham*, *She'elot Shalom* (22 and 47), *Uri v'Yishi* (11 and 12), *Dvar Moshe* (4), *Tslusa d'Avraham* (7), *Arugot Habosem* (*Kuntras Hatshuvot* 16), *Divrei Chaim* (2:YD:45-48), and *Divrei Moshe* and forbidden by, among others, Rav Yitzchak Shmelkes (*Beit Yitzchak* YD 1:106-107), *Yad Levi* (YD:35-39; Rav Yitzchak Dov haLevi Bamberger of Wartzburg), Rav Yaakov Etlinger (*Aruch le'ner*), Rav Shlomo Kluger, *Hechal haBracha* (*Dvarim* 12a), *Maharam Shick*, *Shut Chavatzelet Hasharon* (*mahadura tanina*, #26), and Rav Yitzchak Aharon Landsberger.

See *Darkei T'shuva* YD:82:34 and footnote 59 on pages 48-50 of the 1979 edition of *Binyan Tzion* for short summaries and *Hagaon Shenishkach*, by Rav David Tzvi Neiman, pages 19-37, for a thorough synopsis of this very fascinating piece of halachic history.

54. Other birds with the name turkey in them, such as turkey

A major problem in analyzing the responsa is the confusion surrounding the turkey's name, which relates to the confusion of where Columbus had landed and where this new bird came from. About 1530, when this new dish started appearing on English tables, it had been brought to England by merchants trading in the eastern Mediterranean. These merchants were called "Turkey merchants" because the whole area was then part of the Turkish empire and the bird was called "Turkey bird" or "Turkey cock". It became so popular so rapidly that only sixty years later Shakespeare (*Twelfth Night*, Act 4, Scene 5) was able to refer to it and assume his audience knew what it was.

The English are among the few who related this bird to Turkey. Nearly everyone else thought it came from India, whereas in reality it came from Mexico, which was then known as the Spanish Indies or the New Indies. Thus, in most European languages, Arabic, and Hebrew it is called something like the "bird of India". Even in Turkey they call it *hindi*, as though it came from Hindustan, which is Turkish for India. The modern Hebrew (*tarnagol hodu*) and Yiddish (*hendika hen*) names both mean "Indian chicken".

Many rabbis believed that turkey came from India, and as will be seen, included this as part of their discussion of its kosher status. The confusion of the name has led to there being responsa that talk about *perlähener*, *indika hen*, *anglisher hen*, or even *tavas*. Many of these deal with the turkey, but some discuss pheasant, guinea fowl or peacock.

The wild turkey has a crop, its gizzard is peelable, it has an "extra" toe, and its eggs have the indicators of kosher eggs, all signs indicating the turkey may be kosher.

It is possible that not everyone permitted the turkey. No

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vulture (*Cathartes aura*), are unrelated.

less an authority than Rabbi Shlomo Kluger (1785-1869)<sup>55</sup> was asked about birds that come from America. He responded that we only eat birds with a **mesorah**, there were no Jews in America before 100 or so years ago, ergo there cannot be a **mesorah** and all American birds are prohibited. He concludes with the warning that whoever fails to heed him will in the future have to answer for his actions. Based on specifics in the responsa, it is most likely that Rabbi Shlomo Kluger was addressing the issue of the kibbitzer hen that some people thought came to Europe from America via India, and that he did not have turkey in mind. Nonetheless, it is difficult to see why his logic should be any different for turkey than for the generic American bird that he discusses.

A diametrically opposite attitude towards American birds that would explain why turkey is permitted has also been suggested. **Chazal** were able to identify all 24 of the non-kosher birds found in the biblical list. Since they did not know about turkey, it could not have been in the list. But this is clearly a fallacious argument because there are New World birds that are obviously non-kosher. Examples include the bald eagle, peregrine falcon, and osprey. Even though the osprey is a New World bird, Rabbi Aryeh Kaplan suggests that one of those listed in the Torah, the **azniyah**, might be the osprey. Thus, the Torah's list may actually include New World birds. Even if it does not, presumably what is meant by the fact that **chazal** could identify the non-kosher birds is that if they were to be shown any bird, even a New World bird, they would be able to determine whether it belonged to one of the 24 categories of prohibited birds.

The Netziv (**Meishiv Davar** YD:22) posits that when the **indik** (turkey?) was brought from India there were questions

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55. *Ha'elef Lecha Shlomo* 1:YD:111.

about its status, and for some people those questions still remain. However, the vast majority of the Jews have accepted it as kosher. Once that has happened, unless there is overwhelmingly compelling evidence to declare it nonkosher, such as that it is found to be truly *dores*, it cannot now be declared nonkosher.<sup>56</sup> The rule that birds are eaten only if a *mesorah* exists coupled with the fact that the origins of a particular *mesorah* are unknown, is insufficient reason to declare an accepted bird unacceptable. Rather, we treat it as if we now have a *mesorah*<sup>57</sup> and follow the rule that when a reliable *mesorah* exists there is no need for further investigation and the bird may be eaten (*Shach, YD* 82:9) unless it is found to be truly a *dores*, in which case it would be assumed that the *mesorah* was in error and must be rejected (*ibid, 82:6*). That has not happened with turkeys. This attitude is interesting in light of the strong insistence of the *Rosh*<sup>58</sup> on knowing the origins of a *mesorah*.

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56. This idea is in line with the statement (*Halachot Ketanot* (1:9) quoted by *Tzitz Eliezar* 11:36) that G-d would not let all of the Jewish people err and follow an isolated opinion. If a Jewish practice exists it must have a strong basis. So too if the vast majority of Jews are eating a particular bird, there must be a solid justification for it. This is similar to the idea (*Chullin* 5b) that G-d does not allow even the animals of the righteous to eat improper food by accident. Based on this principal the *Taz* (YD 82:4) questions how a large number of people came to eat *turnugulta d'agma*. *Chidushei Chaviva* (p.11-12) rejects the *Taz*'s answer and offers his own. The idea of not reversing an accepted practice, even if the practice has shaky roots, is found in the *Ktav Sofer*'s response to the kibbitzer hen controversy (*Shut mi'Ktav Sofer YD* 3-4).

57. *Tzemach Tzedek* (YD:60) in permitting a species of goose adopted a similar attitude that if a bird is widely eaten, that in and of itself is a form of a *mesorah*. This is similar to the opinion of *Shut Yachin u'Boaz* 1:64 that if a particular species of grasshopper is eaten, that is a sufficient *mesorah* even if it is no longer called *chagav*.

58. *Shut Rabbenu Asher*, Clal 20, #20 – cited above.

Shut Mei Be'er<sup>59</sup> opines that we eat turkey (*indik*) relying on the Jews of India, the place of origin of the turkey, who had a clear tradition dating back to Moses that the turkey was kosher. As far as he was concerned, the only question that ever existed with regard to turkey was whether Europeans could rely on the Indian *mesorah* and this, he claims, was settled in the affirmative by the Rivash.

The Kaf Hachaim (YD 82:21) also permitted the turkey (*tarnagol inglishi henner*) based on the fact that it was eaten in India. Zivchei Zedek (82:17) in an apparent reference to turkey notes that in Iraq it was permitted and it originated in India, but he does not link the two statements. Nachal Eshkol<sup>60</sup> believed that 300 years before his time turkey came from India to England and then Germany and was now consumed without any hesitation. He permitted it based on the fact that in Russia and England it was eaten. He seems unconcerned about the origin of the tradition.

The Arugot Habosem<sup>61</sup> very neatly presents the quandary: Birds require a tradition to be kosher, and turkey (*indik*) is a bird that comes from America, a place that was not discovered until the year 5254 (1494) and so no tradition is possible.<sup>62</sup> Yet, he notes, all Jews, except for one well-known family in Russia, the Frankels, eat it. He therefore reaches the very important conclusion that when the Ramo requires a tradition, it is only

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59. *Siman* 19.

60. On *Sefer ha'Eshkol, hilchot behema chaya v'of*, 22:10.

61. Rabbi Aryeh Lebush Bolchiver, author of *Shem Aryeh*, Russia, published 1870; *kuntras ha'tshuvot* in the back, *siman* 16.

62. He rejects the argument that the turkey *mesorah* was established prior to the Ramo's (d. 1572) codifying the need for a *mesorah* since the Ramo was merely formalizing a rule that seems to have been prevalent in Ashkenazic lands for many years and is already mentioned by Rashi (d. 1105).

when there is uncertainty about the bird's **dores** status. He posits that if a bird is no longer "new" but has been observed for a long period of time, i.e. 12 months, and observed to be **non-dores** it is possible to say with certainty that it is not a **dores**. Furthermore, he rejects the *Avnei Nezer*'s (YD 1:76:13-14) contention that domestication and living among "friends" may be the reason for the **non-dores** behavior. *Arugot Habosem* therefore posits that even according to Rashi and the *Ramo*, a bird, like the turkey, that is raised in thousands of houses for hundreds of years and is clearly not a **dores** does not require a **mesorah** if it also has the three other indicia of a kosher bird; which the turkey does.

The *Shoel u'Meshiv* in a strongly worded responsum (5 pt.1 no 69) used the acceptability of the turkey to prove that a **mesorah** was not always necessary. It must be that the Ashkenazic community did not fully accept the *Ramo* in this regard but reinterpreted him to hold that a **mesorah** is not necessary if the bird has all three physical signs.<sup>63</sup>

The Lubliner Rav, (1852-1932) in *Dvar Halacha* (siman 53) disagrees with the *Shoel u'Meshiv* and holds that the *Ramo* should be taken at face value and that a **mesorah** is always required.<sup>64</sup> He permitted the turkey because he understood

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63. The *Shoel u'Meshiv* expressed similar sentiments in 3:YD:1:15. The *Divrei Moshe* and *Tslusa d'Avraham* seem to concur with the reasoning of the *Shoel u'Meshiv* in "rejecting" the *Ramo*. The *Darkei Tshuva* (YD 82:26) audaciously (mis)interprets the *Shoel u'Meshiv* in light of how he thinks the halacha should be, and claims that the *Shoel u'Meshiv* is prohibiting turkey. *Dvar Halacha* (1921; siman 53, page 74) says explicitly that the *Shoel u'Meshiv* was saying that his generation did not follow the *Ramo* in this regard.

64. The *Maharam Shick* (YD 98-100), *Binyan Tzion* (#42), and *Divrei Chaim* agreed with the *Dvar Halacha*. *Divrei Yisrael* (YD:10) writes strongly against anyone who would deviate from the simple reading

that the Ramo required a **mesorah** only for a new category of birds and that turkey falls within the same general category as chickens.<sup>65</sup> He does not offer a definition of "category", and because chickens are quite different from turkeys, this line of reasoning opens a Pandora's box of potential problems and abuses.

A possible explanation as to how the turkey came to be accepted despite the Ramo's position is that it came via Sephardic lands. The Spanish and Turks were the first to bring it to Europe, and Sephardim, who were not constrained by the Ramo,<sup>66</sup> accepted it as kosher. When turkey then made its way to eastern Europe the knowledge that there was a **mesorah** traveled with it. The origin of this **mesorah** was jumbled, and hence the references to **mesorahs** from India and the like.

Two additional possibilities are offered in the *Otzar Yisrael*.<sup>67</sup> He discussed the controversy that existed in his time surrounding turkey, a bird that was brought from America to Europe, possibly having been brought first from India to America. He expresses bewilderment how the authorities at that time permitted it. He offers two rationales. One is that at that time the decisors did not hold like the Ramo and hence relied on the physical signs. Alternatively, he calculates that

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of the Ramo in this regard, and all the logical arguments in the world won't make a difference. Similarly, *Minchat Yitzchak* (2:85) writes that we cannot be lenient without a **mesorah**, and there is no one in our generation who can argue against the Ramo. He further establishes that the position of the Ramo is on solid halachic ground.

65. This is cited with approval in 1935 in *Menachem Meshiv* 2:30, page 168.

66. Although as noted above the *mechaber* also requires a **mesorah**, he seems more "flexible."

67. Cited by R. Liebes, *Mesorah*, 1990; 3, page 63. I have been unable to find this in *Otzar Yisrael*.

the Ramo was born in 1540, 46 years after the discovery of America. Hence, it could be that the turkey issue was decided before the Ramo established his position, and at that time there were those who followed Rambi, although today we must follow the Ramo.<sup>68</sup>

A method to prove that turkey is kosher is the hybridization test. Turkey-chicken hybrids do not seem to occur naturally. However, viable hybrids have been successfully produced and are used in scientific research.<sup>69</sup> Furthermore, intergeneric crosses between ring-neck pheasants and chickens and between ring-neck pheasants and turkeys are well documented (Crawford, pp. 376-377) and may provide yet another avenue to permit turkeys. If hybridization between species is a legitimate test of kosher status, and many authorities accepted that it is, these crosses verify the acceptability of pheasant, and then confirm the status of turkey.

To the best of my knowledge, all of the major kashrut organizations (O-U, Star-K, Vineland (CRC-Hisachdus Horabonim-Satmar), Margareten, Breuer's, and all Israeli Rabbinates and Badatzs) treat the turkey as a kosher bird, and it is consumed by all segments<sup>70</sup> of the Jewish world.<sup>71</sup>

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68. See, however note 55.

69. See: Turkey-Chicken hybrids, *Journal of Heredity*, 1960, 51:69-73 and *Comparative Biochemistry and Physiology B: Comparative Biochemistry* 1973, 46B(3):533-9.

70. An e-mail rumor that Klausenberg-Sanz Chassidim do not eat turkey is false. I have verified this in a conversation with the rebbe's secretary (November 25, 1997).

71. There are, of course, individual exceptions, some notable. It is reported that Rabbi Yaakov Kaminetzky and his family did not eat turkey. However, he attributed the non-eating to a lack of *mesorah*, but did not hold that a *mesorah* was impossible. Thus, when his son's daughter got married he told her that she would now be able to eat

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turkey. (Reported by his granddaughter's husband, Rabbi Doniel Neustadt of Cleveland). His son, Rabbi Shmuel Kaminetsky, has further explained that his father's family did not have a tradition to avoid turkey. His father adopted the custom out of respect for his wife, whose family did not eat turkey. Thus, although Rabbi Shmuel Kaminetsky continues to refrain from turkey in deference to the custom he was raised with, his wife and children all eat it. (Reported by Rabbi Shmuel Kaminetzky's son-in-law, Rav Shalom Kelemer, and by Gilad J. Gevaryahu in Mail-Jewish on Dec. 19, 1995).

It is reported that Rav Dovid Lifshitz did not eat turkey. His son-in-law (personal conversation with Prof. Chaim Waxman, June 19, 1997) strongly emphasized that this was a personal stringency which he did not advocate for others, and indeed his children and their families eat turkey. A former student who wishes to remain anonymous reports that Rabbi Lifshitz commanded him on refraining from turkey but seemed to not want to publicize the issue.

The Horowitz family, descendants of the *Shlah haKadosh* (Rabbi Isaiah ben Avraham haLevi Horowitz; 1565? – 1630), have a tradition that the *Shlah* supposedly left instructions that they should not eat turkey, and to this day there are members of that family who adhere to this custom. This instruction is not found in the *Shlah*'s writings.

There is also a similar custom among the Lapidus family and other descendants of the *Tosafot Yom Tov* (Rabbi Yom Tov Lippman ben Nathan ha'Levi Heller; 1579-1654). These two traditions may share a common source.

There is also the "well-known" Russian family (Frankel) who, *Arugot Habosem* (*Kuntras Ha'tshuvot*, 16) writes, did not eat turkey.

Finally, there are several prominent contemporary rabbis who do not eat turkey but who have requested not to be cited. The idea of abstaining from eating a bird that has been deemed kosher but has questionable roots is explained by the *Divrei Chaim* 2:YD:45-48 who permitted the kibbitzer hen but personally refrained from eating it. Similarly, in *Kuntrus Mishpachat Ram* there is a letter to the Chazon Ish from his father, Rabbai Shmaryahu Yosef Karelitz, that mentions that although the kibbitzer hen (NOT the turkey as indicated in footnote 48 to the 1989 edition of *Binyan Tzion* edited by Yehuda Horovitz) is kosher, in his father-in-law's house they refrained from eating it since a careful person should avoid eating items that required a *p'sak*. [Presumably this is based on the exegesis of a verse in Ezekiel

Most of the responsa cited seem to have been post-facto, and their purpose was either to unravel the apparent inconsistency of accepting the Ramo and yet eating turkey or to use the universal acceptance of turkey as part of an answer to another question.

Many rabbinic authorities have attested to the acceptability of the turkey *derekh agav* – in a passing manner.

The Mishnah Berurah<sup>72</sup> identifies the "red chicken" as an "inglish hen" or "indik" – a turkey – and implies that it is kosher.

Rabbi Herzog<sup>73</sup> was asked about a particular bird and responded that there were reports that it was really the offspring of two kosher species, one of them being the turkey. So he too, without any discussion, accepts the turkey as kosher.

Contemporary authorities have likewise indicated its acceptability. In a discussion on the propriety of celebrating Thanksgiving, Rabbi Michael J. Broyde<sup>74</sup> quotes numerous halachic authorities who parenthetically permit the eating of turkey. For example, Rav Moshe Feinstein is quoted as saying "halacha sees no prohibition ... with eating turkey" (ibid, p. 51). Rabbi Joseph B. Soloveitchik's opinion is quoted by Rabbi Hershel Schachter in *Nefesh HaRav* (p.231): "in his [Rabbi Soloveitchik's] opinion there was no question that turkey did not lack a tradition of kashrut." In the course of offering their

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4 found on *Chullin* 36b.]

The question of how those who refrain from turkey should deal with the utensils in every kosher butcher shop, catering hall, and private home is an important one and in need of further study.

72. 79:26, citing the *Magen Avraham* and *Ateret Zkainim* who in turn are quoting the *Bach*.

73. YD;1:25.

74. *Journal of Halacha and Contemporary Society*, Fall 1995, 30:42-65.

opinions about the observance of Thanksgiving, Rabbi David Cohen (of *Gvul Yavetz*), Rabbi Eliezar Silver, and Rabbi Ephraim Greenblatt note that the turkey is a kosher bird.

Despite the fundamental difficulty with permitting turkey, virtually all of the responsa are permissive, and it is unlikely that that will change in the future. It seems that unless one has a specific family custom to refrain from turkey, there is no reason to adopt such a behavior. The turkey is no longer new and its kosher status has been addressed by the leading Jewish minds for over 250 years and has received near-universal endorsement. There is thus little credible reason to question the practice.



## Letters To The Editor

Dear Rabbi Cohen א"ט: שליט

I enjoyed reading your recent edition of the Journal. I would like to share with you the following comments:

Rabbi Twerski א"ט, in footnote #59, mentions the possibility that the Bait Halevi actually had two objections: one quoted by the Radziner Rav ל"צ and the second communicated orally to his family. His theory is actually correct. In a conversation with Horav A. Y. Soloveitchik א"ט, the Rosh Yeshiva of the Brisker Yeshiva in Yerushalyaim, he told me that his father, Horav Berel ל"צ, was told by his father, the Brisker Rov ל"צ, that he had been approached by the Radziner Chassidim and asked to use the **Techelet**. He responded that his grandfather, the Bait Halevi, said that the **Passuk** states – **שאלא אביך ויגדר, זקניך ויאמרו לך**. The meaning of **זקניך** is the Sanhedrin that decides halachic issues. However, the meaning of asking **אביך** is for the simple identification. However, the meaning of asking **אביך** is for the simple identification. **מיר וויסען או א שעפסיל איז א שעפסיל, וויל אונזער טאטע האט אונז געזאגט**. We know that a lamb is a lamb because our father told us so.” This is what Rabbi Y.B. Soloveitchik was quoting, as mentioned in the article.

Rabbi Rabinowitz א"ט, in his article regarding crockpots (page 111) mentions the possibility that a crockpot is considered **שמירת שבת בhalbתת גראף וקטום**, similar to a ruling mentioned in the name of Horav Auerbach ל"צ. He also says that Rabbi Sheinberg א"ט considers a crockpot to be **ק"ג**. The ב"ש mentions the following reasons why the hotplate is considered **ק"ג**, and none of these reasons apply to a crockpot: 1) The food is removed from the flame before Shabbat and then put on the hotplate; 2) the temperature cannot be adjusted; 3) food is never cooked on a hotplate – just warmed. Clearly, the ב"ש would **not** consider a crockpot to be **ק"ג**.

Also, Rabbi Sheinberg שליט"א does not say in the article which he quotes that a crockpot is considered ק"ג. He is discussing the question of whether the prohibition of partial Hatmonoh on coals [according to the מהבר [appplies when the "coals" are covered, such as in the case of a crockpot. However, the question of ק"ג relevant to **שהיה** is dependent on whether one is cooking in the normal fashion or whether one has done something to "lessen" the flame. If it is the דרך בישול it would clearly be forbidden.

He continues (on page 112) to theorize that according to the ש"ב it would be permitted to do so as well. I feel that this is also an error, and I hope that the author will agree and correct this in the next edition.

Finally, I would like to comment on your response to Rabbi Leff שליט"א. I did not see the earlier edition upon which this exchange is based. However, it is very distressing to see you describe Rabbi Feinstein's ל"ז position as "middle ground". A simple reading of the Teshuva that you quote is quite clear. He was not being a "Rodef Shalom" and did definitively prohibit their actions. I quote to you the ending of the responsum:

זה יש לכתר"ה להסביר בכל פעם וליהו תקיף וחוק בדעתו שהוא כדיני התורה למחות באלו הנשים, שאחר כל זה יעדמו בדעתן האולת והעוקשה שלא לשנות שום דבר ממנהגי ישראל הקדושים.

It is abundantly clear into which category these women's prayer groups fit. They are seeking "equality" and to "right the injustice" that they have suffered during past generations. I am distressed that they will use your words as yet another source for their corrupted anti-Torah ways.

Also, Rav Moshe ל"צ who addressed the question of whether it is permitted to remove a Sefer Torah from the Aron for פרשת זכור was addressing those women who had never heard of these "prayer groups". They had been raised to come to

shul for פָּרָשָׁת זְכָרָן and were unable to come because of young children. The question was whether it would be permitted for them to go hear the reading after their husbands came home. These women were obviously motivated "leshem shamayim", and yet Rav Moshe ruled that it is a נִזְבָּן (disgrace) to take out the **Sefer Torah** for them. How then can you postulate that Rav Moshe נִזְבָּן would permit taking out a Torah for these groups if they are well meaning?

Allow me to end off בְּטוּב, that I enjoyed the informative edition and look forward to the future editions.

GERSHON BESS

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Rabbi Cohen responds:

I continue to be amazed at the tremendous attention currently being given to the topic of Women's Prayer Groups. The number of calls and comments I have received about this issue are astounding. It therefore becomes all the more important not to twist sources in order to prove a point, nor to read into innocent remarks sinister or weighty imputations.

My comment about the "middle ground" which R. Moshe Feinstein took referred to his adopting a mild tone – rather than explicitly forbidding the women's prayer group, he chose an oblique style in his responsum, permitting it only if it were done solely "for the sake of heaven" without any other agenda. If Rabbi Bess had read my original article, he would have seen that I very carefully wrote, "A close reading of R. Moshe's **teshuva** clearly indicates that he was of the opinion that in most cases the proper motivation was lacking." Forgive me if I fail to discern how this statement can be used as proof that I (or Rav Feinstein) approved the practice.

Furthermore, I take umbrage at your referring to those who are interested in holding such groups as having "corrupted

anti-Torah ways" or as "people seeking to right the injustice they have suffered in past generations." Rav Moshe Feinstein carefully stayed away from that kind of rhetoric, and I think it would be very constructive if we all followed his example. You may be right – but, on the other hand, you may not. In general, I believe that judging other people's motivations and weighing their sincerity is best left to the Ribono Shel Olam.

As for Rabbi Bess's comment on *parshat Zachor*, I am curious to know how you can be so certain that the women who come to shul for that *kriah* do mean it *le'shem shamayim*. Since Rav Moshe rules that they can discharge this obligation by reading at home from a printed *chumash*, why do they choose instead to come to shul? We all seem to agree that Rav Moshe was opposed to the practice of taking a *Sefer Torah* out to read *parshat Zachor* for women only – nevertheless, it is a fairly widespread practice. How come Rabbi Bess is not disturbed by that? If he finds it acceptable because, in his judgment, the women who come to hear a special reading of *parshat Zachor* do it "for the right reasons", it would seem proper to entertain the notion that perhaps other women could also be similarly motivated in other circumstances.

RABBI ALFRED COHEN

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Rabbi Rabinowitz responds:

Rabbi Bess takes issue with the comparison of a crockpot to a hot plate. I definitely think that his arguments are valid, as I myself make the same arguments in the article (p. 111). I clearly state that the *issur* of *sh'heah* would be circumvented if a crockpot had the same halachic status as a hot plate. I then went on to argue that a crockpot may not be similar to a hot plate as it is *derekh bishul* (the ordinary method of cooking) which is not true with regard to a hot plate. Rabbi Bess also thinks that since the crockpot has an adjustable temperature it

would not fit the criteria to be classified as a hot plate. I also brought up this objection in my article (p. 111) and had a possible solution of covering the temperature knob. Rabbi Bess takes further issue using this comparison to exempt a crockpot from the prohibition of **chazarah**.

I am not sure on which point he thought I erred. With regard to the comparison of a crockpot to a hot plate, I already stated the objections to that (p. 111). Perhaps Rabbi Bess feels that with regard to a hot plate, though there is no prohibition of **sh'heah**, there is still a problem of **chazarah**. He would not be alone in thinking this, as in footnote 53 I quote Rabbi Tzvi Pesach Frank ruling the same way. In conclusion, all of Rabbi Bess's points are valid, as a closer perusal of the article will reveal.

RABBI DANIEL RABINOWITZ

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To The Editor:

I found the article "Identifying the Chilazon" (JHCS XXXIV Fall 1997) truly amazing. Contemporary research has discovered a method to produce the dye, indigo, from a mucus found in the snail, *Murex Trunculus*. Indigo, by the author's own admission, is the dye Chazal called *k'la ilan*, specifically identified as **possul** for **techelet**. Yet the article contends to have established an **umdanah d'muchach** – a proven assumption – that this dye is in fact **techelet**.

The article mentions two serious disputes among the **Rishonim** concerning the identity of the chilazon. Rabbenu Bachya is quoted as implying the chilazon is a **kosher** species while Rashi in *Sanhedrin* describes it as a worm. The article also quotes the Rambam's statement that the chilazon has black "blood" while Rashi and Tosafot imply that the "blood" is blue (frankly, I will admit that I fail to follow the author's argument concerning the

position of Rashi and Tosafot). This, in and of itself, should preclude the possibility of anyone from recent generations making a definitive identification. To quote the author, "In matters of fact ... both cannot be correct." If I understand the thesis he presents correctly, it contends that both Rambam and Rashi are wrong regarding the color of the "blood", the dye itself being first colorless and then purple, the blue color appearing only after the dyed fabric is exposed to oxygen.

But there are more fundamental textual problems with identifying the chilazon. As the article states, Rashi in *Sanhedrin* describes it as a *tola'at*, a worm. But the Rambam quite clearly identifies it as a fish (*Hilchot Tzitzit* 2:2). Furthermore, Rashi in *Menachot* 24a interprets the statement "*Bri'ato* is like a fish" (curiously translated in the article as "its creation") as "*tavnit di'yiukno*" – its physical form is like a fish (see gloss *za 'yin* in the *Shita Mekubetzet*; see also the commentary of Rabenu Gershom ad. loc.). This statement also appears to be the source of the aforementioned Rambam.

The author brings impressive evidence to show that the chilazon is a mollusk. His explanation of "*ha-potzeiah chilazon*" is ingenious but at variance with Rashi's interpretation. Rashi (*Shabbat* 75a) explains "*ha'potzeiah*" as one who "squeezes it [the chilazon] with his hand so that the blood comes out." Rashi's explanation implies more a soft-skinned creature than a hard-shelled mollusk. Tosafot and other *Rishonim* seem to accept Rashi's interpretation.

The article also quotes the *Beraita* of R. Yosef in *Megillah* 6a which identifies "*sfunei tmunei chol* – treasures buried in the sand" with the chilazon. This, it is claimed, fits the *Murex* which burrows into the sand. In fact, though, the *Beraita* splits up the *possuk* and only the word "*sfunei*" – "treasures" is considered an allusion to the chilazon. The word "*tmunei*" is explained as a reference to the fish *tarif*, apparently a kosher species. Rashi ad. loc. identifies it as the tunny fish. Therefore there is no implication

that the chilazon itself is to be found in the sand.

Of course, if we could positively identify the chilazon, we would have to reinterpret the various statements of **Chazal** in light of that identification. We could perhaps disregard the descriptions of the **Rishonim** inconsistent with our identification on the basis that they were unfamiliar with the chilazon. But in fact, how can we identify the chilazon on the basis of "history, chemistry and archaeology" and ignore the statements of the Talmud and the **Rishonim**?

I believe the identification of the chilazon with the **Murex Trunculus** is a valid scientific hypothesis. The circumstantial historical evidence that the article brings is formidable. And the discovery of a blue dye naturally produced from a Mediterranean sea creature is, in and of itself, significant. But the true issue facing **poskim** today is whether it is **halachically** significant enough to override the ruling of the **Shulchan Aruch** (Orach Chaim 9:5) that the **tzitzit** should be the color of the **talit** (for Sephardim) or the ruling of the **Ramo** (ibid) to use only white **tzitzit** (for Ashkenazim).

No one with even rudimentary familiarity with the halachic process would expect to find certainty. But **mesorah**, in the broader sense of the word, can provide a framework that enables us to deal with the uncertainty that exists. Without a **mesorah**, we are left fishing in the murky waters of historical supposition.

AARON GOLDSTEIN

Kollel – Yeshivas Toras Moshe,  
Jerusalem

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Rabbi Twerski responds:

I thank Rabbi Goldstein for his careful study of my article and for bringing some valid points to light. I am thankful to

him as well for bringing his issues to print in a public forum, for I have been made aware that Rabbi Reisman has issued a taped lecture that focused on much of these same issues. Consequently, this forum allows me the opportunity to reply to these questions. After due consideration, I find that none of the points raised, nor even the sum of all of them, are significant enough to discredit the thesis of the article.

I shall respond in order of his questions.

A) The first point he raises (if I understand him correctly) is that the fact that dye produced by *k'la ilan*, (indigo) is the same as produced by *murex*, disfavors the identification of *murex* as the *chilazon*, for if the dye chemical of *murex* is identical, why should one be valid and the other not valid?

From my perspective, if we accept the evidence that *chilazon* is a mollusk, then the most powerful evidence in favor of identification of *murex* as *chilazon* is the fact that the chemical dye, indigotin, is the same. It therefore amazes me that the same fact that is seen by me to be the most convincing evidence in favor of identification with *murex*, is seen by Rabbi Goldstein as a point against identification. But such is the nature of men, *בשם שאין פרצופיהן שווין כך אין דעתן שווה*.

To answer to Rabbi Goldstein's question: Although the chemical dye from indigo and *murex* is one and the same, the source is different. One comes from the *chilazon* and the other comes from the indigo plant. There need be nothing more to distinguish between the two. By analogy, there is no question that artificial parchment, if ever invented, would be totally invalid for the *mitzvah* of *t'fillin* and *mezuzot* even if, in fact, it would be chemically identical to and indistinguishable from parchment made from the hide of an animal. The identity in color is a point in favor, not against, identification with *murex*.

B) Rabbi Goldstein writes "frankly, I will admit that I fail to follow the author's argument concerning the position of Rashi

and Tosafot" regarding the blue color of the dye.

Rabbi Goldstein is correct; I was not clear enough. The argument can be found in the Radziner's *Sefer, Ein Ha'techelet* § 22, and I shall elaborate.

The strongest argument in favor of the Radziner's identification with *sepia* is the statement of the Rambam, that the color of the dye is black before introducing chemicals to alter the color. One of his opponents pointed out that Rashi and Tosafot both seem to hold that the color of the "blood" of the *chilazon* is the color of *techelet* (i.e. blue). Rashi states that the chemicals introduced into the dye were introduced only to fix the dye into the fabric and Tosafot *ad loc*, ask (seemingly accepting Rashi) that if chemicals are introduced into the dye, then the purity of the *techelet* would be compromised.

The one who asked the question, as well as the Radziner who accepted the question, reasoned thus: we have two choices 1) the color of the "blood" itself is blue or 2) it is some other color and chemicals were added to change the color to blue. Since Rashi states that the chemicals are added only to fix the dye, we may infer that the purpose was not to alter the color as it comes from the *chilazon*. Since the dye color is blue, then the "blood" itself must therefore also be blue.

Tosafot ask on the *Baraitha*: if chemicals (to fix the dye to the fabric) are introduced into the process, then the purity of the *techelet* is compromised. The questioner asks that if the color of the dye would be black, then Tosafot's question would have no validity, since it would be obvious that something must be added to the "blood" of the *chilazon* to change the color from black to blue. Tosafot's answer, that it is with the added chemicals that we have the color of *techelet*, did not seem to him to be a total retreat from the assumptions taken in the question (though one could argue that it is).

The Radziner's solution to this problem, that these **Rishonim** were merely surmising what the color of the dye was, since they did not have the **chilazon** in hand, for it had been in disuse for about 400 years by the time Rashi and Tosafot were dealing with the question, is certainly a valid argument.

Now, assuming that **murex** is the **chilazon**, the color of the dye, after going through several stages, is known to be purple, not blue. What is important, however, are two points, 1) chemicals needed for the **techelet** dyeing process are, as Rashi assumed, for the sake of fixing the dye to the fabric (though not exactly as Rashi assumed that the chemicals were added to the wool as a mordant, but rather in order to make the dye water soluble, which then allows the dye to saturate the wool); and 2) it is not the chemicals that create the change in color, but sunlight. Thus, neither Rashi nor Tosafot stated explicitly that the color of the dye as it was extracted from the **chilazon** was blue, only that the chemicals introduced into the dye were not for the sake of changing the color. This in fact is so. Chemicals are added to make the dye water soluble, and in the process the color is changed by the sunlight, not by the chemicals per se. Nothing that Rashi or Tosafot say here is inconsistent with identification with **murex**.

At this point, I would like to address what seems to be an incorrect implication in the first paragraph of Rabbi Goldstein's letter. He states (paraphrasing the article) "Contemporary research has discovered a method to produce the dye, indigo, from a mucus found in the snail, *Murex Trunculus*." Implied by this is that this discovery is only of recent origin and it is quite likely that the ancients knew nothing of it.

In a footnote of my article, I noted that Otto Elsner made the discovery that if the reduced solution containing dibromoindigo is exposed to sunlight, the ultraviolet rays of the sun will detach the bromine atoms from the indigo and these would be replaced by hydrogen atoms, yielding indigotin.

It would be of interest to the reader to know how the secret of obtaining *techelet* out of dibromoindigo was discovered by Otto Elsner. As anyone who has witnessed the dyeing process with *murex* will attest, the vat solution of dibromoindigo emits a strong, offensive odor (a fact noted by Pliny as well). Elsner did much of his research in his home. Mrs. Elsner had just about as much as she could tolerate and asked her husband to conduct future experiments out of doors. He complied, and then, to his surprise, noticed that the resultant dye was no longer deep purple but sky-blue. It did not take very long to realize that this was the result of the exposure to sunlight. This being the case, it would hardly be conceivable that those who worked with dyes in the ancient world would not come to the same discovery due to the very same circumstances that led Elsner to his discovery.

C) As Rabbi Goldstein says, the Rambam identifies the *chilazon* as a fish. However, I cannot agree with him that the source of this identification is the *Beraitha* that describes the *chilazon* as בָּרִיתוֹ דָמָה לְדָג. When attempting to describe something, one will never use the object itself as a means of comparative identification. If the *chilazon* is indeed a fish, in the same sense that trout, salmon or cuttlefish are fish, then it would not be said that the *chilazon* is like or similar to a fish, for then it is a fish. To describe a creature that is a fish by stating that it is like a fish would be a meaningless description. The only way to make sense of the Rambam in light of the *Beraitha* is to say that the Rambam means by "fish" that it is a creature of the sea, but not a fish in the common sense of the word. If so, the Rambam is not saying anything about its form.

It was acknowledged in the article that the meaning of the *Beraitha*'s statement, that בָּרִיתוֹ דָמָה לְדָג, is somewhat difficult to explain. The suggested answer (that this means, in a literal sense, "its creation", – its way of coming into existence) was not meant to be the simplest and obvious interpretation. (At the same time, I don't consider this a far fetched or extremely

forced interpretation, either.) Perhaps there are better solutions as to how to reconcile this statement with **murex**. Had the **Beraitha** itself used the word **צורתו** or **חניתו**, I would have to agree that this would be a strong argument, perhaps even a conclusive argument, against identification with **murex**, but, as the Radziner said with regard to the color of the mucus, the interpretation of the term **בריתו** by Rashi and other **Rishonim**, even if in total variance with identification with **murex**, could nevertheless not be considered as strong evidence against such identification, since the **Rishonim** lived long after the **chilazon** had disappeared from the scene.

The assertion that **chilazon** is a mollusk comes from a number of sources. Foremost of these is the fact that the word is still extant in several Semitic languages and means 'snail' in each one. Rav Herzog (*The Royal Purple and the Biblical Blue*, Ehud Spanier ed., Keter Publishing, page 57) says,

Chilazon of the Talmudim, the Midrashim, and Targum Jonathan is the Syriac Helzuna and the Arabic Halazun. In these languages the word denotes: (1) the land shell-snail, French limacon (as distinct from limace, naked snail); (2) the sea shell-snail (limacon de mer). It doubtless has the same meaning in the Jewish sources. The shell of the **chilazon** is called נרתיק, garment, cloak. The verb פצע employed of the crushing of the **chilazon** has reference in Tanaitic [usage] to some hard crustaceous substance. An allusion to the shell seems to be contained in *Megillah* 7: שפוני טמוני חול תנא רב יוסף. Rashi annotates: שפוני זה חילזון טמוני זו טריית חול זו זוכבית לבנה. More probably, I think שפוני is interpreted in its biblical significance of something hidden from view, concealed, treasured; the shell snail or rather the particular species yielding the precious purple dye.

We add to the list of linguistic identifications that the word

for snail in Assyrian, the spoken language which is the direct descendent of Aramaic (as much as Spanish and French are descendants of Latin), is also **chilazon**.

I would venture to say that this alone would be sufficient for positive identification of **chilazon** as "snail". The **Beraitha** that states the shell of the **chilazon** grows along with it adds powerful support to this identification. Any proofs beyond this are merely "icing on the cake." In my mind, there can be no doubt whatsoever that the **chilazon** is a snail. The question is only which snail.

I do not agree that Rashi's statement about **פְּצִיעַת** **chilazon** is at variance with the assertion that the **chilazon** is a mollusk. Rashi states merely that one would **פּוֹצַץ** a **chilazon** to squeeze out its blood. I think that Rashi would also agree that the term **פּוֹצַץ** means to crack open. However, that itself (the cracking of the snail's shell) is not a **melacha** to which the Gemara could refer to in employing this term. The Gemara is referring to the **melacha** of **dosh** which involves extracting one matter from another. It is therefore squeezing the blood out of the **chilazon** that is meant by the Gemara. This is why Rashi stresses the squeezing, rather than the cracking, of the **chilazon**. It is therefore quite possible for Rashi to state that one squeezes the **chilazon** to extract the dye, even if he agrees that it has a hard shell that will be cracked in the process, which is the source of the term **פְּצִיעַה**.

D) The objection to the article's employment of the above quoted **Beraitha** in **Megillah** has merit. I could explain my position, that the **Derasha** relies on the end of the phrase for identification with **chilazon**, but, instead, I concede this point. It is of no great significance. The identification of **chilazon** as "snail" stands rock solid with all the other proofs, as stated above.

E) The final objection with regard to the identification of **murex** as **chilazon**, is the main thrust of Rabbi Goldstein's

argument. There are statements in the **Rishonim** that are not consistent with **murex** being the **chilazon** of **techelet**. There are also some statements of **chazal** that would require at least some interpretation. The arguments in favor come from archeology, history, and chemistry along with a few supporting statements from **chazal**. Is this sufficient, without a **mesorah**, to identify **murex** as **chilazon**?

Let's take what is known. I would consider the identification of **chilazon** as a mollusk as a certainty based on linguistic comparisons and the statement of **chazal** that the **chilazon** has a shell. Add to this 1) the fact that the **murex** was known was known to be used in the ancient world for dyes, as archeology has established beyond any doubt, 2) the fact that **techelet** was used by the royalty in ancient times, as is evident from several references in **Nevi'im** and **Ketuvim** 3) that the color of **murex** is known to be the color of **techelet**, 4) that the **murex** is found where the **chilazon** of **techelet** was known to be found, off the coast of ancient Phoenicia, 5) the **murex**-based dye is permanent, a feature **techelet** has in common with **murex** dyes and what was uncommon in ancient dyes, 6) the identification of **techelet** as **purpura** by the **Ra'avya**, 7) that there is no **Mishnah** or **Beraitha** that warns against the use of an indigo type dye of any other mollusk source, as it did warn against the use of plant indigo, which is a clear indication that there was no mollusk existent in ancient times that would be invalid for **techelet**. Now, weigh all these points of evidence in favor of identification with **murex** against the few points raised in opposition. In my opinion the weight of the evidence goes far beyond being a mere "scientific hypothesis" or "murky historical speculation." I would consider this identification of **murex** as **chilazon** as proven well beyond a reasonable doubt.

F) The last point of Rabbi Goldstein does not concern the issue of whether **murex** identifies with **chilazon**, but regards a secondary issue, whether there is any harm in wearing the

blue dyed strings if it turns out that this is not *techelet*. The article quoted the Radziner Rebbe's position that there is no harm whatever. Rabbi Goldstein dissents by saying that we do indeed lose if we are not correct in the identification, for there is a custom quoted in the *Ramo*, that only white colored strings should be used for *tzitzit*.

The *Mechaber* writes (*Hilchot tzitzit* 9:5) "Some say that the *tzitzit* should be the same color of the garment. Those who are exacting in the fulfillment of mitzvot conduct themselves this way." The *Ramo* adds to this: "the Ashkenazim make the *tzitzit* only out of white material even if the garment is colored, and one should not alter this."

The source of this *Ramo* is the *Terumat Hadeshen* 46. The question discussed in that response is whether one may sew a torn corner with colored silken thread. We would normally be concerned lest the leftover thread be used for the *tzitzit* which would, of course, be *passul*. In the statement where the *Terumat Hadeshen* states the custom to make the *tzitzit* only with white threads, he states, "I have never seen anyone wear anything but white *tzitzit*, although it makes no difference what color the *tzitzit* are. Nevertheless, since it is not the custom [to make *tzitzit* out of colored threads] it would appear to me that we should not be concerned [that the colored silken threads would be used for *tzitzit* and it should be permitted to allow the sewing of the corners with colored silk thread]."

It is apparent from the source of the *Ramo* that the custom to have white thread is not built upon a concern for an halachic opinion. It is certainly unreasonable to assume that the *Ramo* meant to forbid the use of blue colored threads if this would be a serious attempt to fulfill the *din Torah* of wearing *techelet*.

Moreover, the Radziner (*Ein Hatchelet* §40) in addressing this issue, concludes, with cogent arguments based on the

Gemara in *Menachot*, that the rule of the *Ramo* applies only to the three threads of *lavan*, not to the white replacement thread of *techelet*, which can be of any color, even in absence of *techelet*.

I would think that the question that *poskim* face is not whether this *minhag* of wearing only white threads should be upheld in face of wearing "questionable" *techelet*. The question will be whether or not to establish *techelet* as a rediscovered *mitzvah* or not, and resistance to change and concern for tradition for tradition's sake will be the most important negative factor. The concept of *chadash assur min hatorah* will be employed by those who find comfort in maintaining exactness in keeping with the traditions of Judaism as practiced in Europe. The question is more one of attitude than of halacha.

As I stated in the article, we have no continuous *mesorah* with regard to *techelet*. The existence of a *mesorah* in any *mitzvah*, is, of course, the most reliable source of knowledge for the fulfillment of *mitzvot*. How else do we fulfill the *mitzvah* of *arba minim* or *t'fillin*? However, I know of no source in the *Talmud* or in the *Poskim* that indicates that in absence of a *mesorah* we are obligated to push aside a *mitzvah* that has, beyond a reasonable doubt, been identified. The light of *mesorah* is indeed bright. However, in its absence, the light of reason and understanding should be sufficient to dispel the murky darkness of our ignorance.

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