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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.

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York, 10977. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

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The Journal of Halacha and Contemporary Society

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Gittin Sheloh K'dat Moshe V'yisrael

Rabbi Chaim Malinowitz

The plight of the modern-day *agunah* (i.e. a woman whose spouse refuses to give a *get* when one is halachically called for)[1] is a well-known problem plaguing the Jewish community, although the dimensions of this problem remain a subject of controversy. Various "solutions" have been propounded over the years, whose effectiveness (and more importantly, whose halachic validity) are questionable. The purpose of this article is to discuss the halachic status of some of the current "solutions" being suggested.

The popular press has, in recent months, publicized the purported actions of some "rabbis" claiming that they are implementing nullification of marriages based on three possible options. It is difficult to verify the veracity of these reports; this article will be limited to discussing the halachic possibilities of such "solutions." These solutions include the following:

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1. This requirement, which should be obvious, is unfortunately commonly dispensed with in most discussions of the *agunah* problem. The Torah does not countenance a "*get*-on-demand," neither by the woman nor, for the last ten centuries, for the man. The specious statistics bandied about regarding thousands of *agunahs* have no statistical or factual basis; furthermore, it admits to counting whoever *wants* to be divorced.

Dayan, Beit Din of Kollel HaRabonim;
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A) That halachically valid marriages be "annulled" under the guise of finding them flawed in a way that would retroactively render the marriage non-valid. This would involve the woman claiming that her marriage was entered into under mistaken or false pretenses or assumptions, rendering the marriage a "*mekach to'ut*" (a mistaken transaction), hopefully obviating the need for a *get*. (The implication is given that this claim of *mekach to'ut* would include the existence of the *agunah* situation itself, i.e., had the woman known the man would not give her a *get*, she would not have married him.) These claims would obviously vary; this article will simply discuss if and under what circumstances *mekach to'ut* claims might be valid.

B) Utilization of the principle of אפקעינהן רבנן לקדושין מיני – the rabbis declaring a marriage retroactively voided. This principle is found in the Talmud in certain circumstances, and is based on the idea that whenever one enters into marriage, it is implicitly with the tacit agreement of the Sages, which they can then withdraw. This finds voice in our formula for *kiddushin* – "*harei aht mekudeshet lee...k'dat Moshe v'Yisrael*" – "You are hereby betrothed unto me according to the laws of Moses and Israel."[2]

C) A third method to end marriages that is being proposed is a misnamed ,גט זכוי, a *get* which is written and given "for" the husband, despite his opposition.

We will now examine these three "solutions."[3]

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2. See Tosafot *Ketubot* 3A ד"ה אדעתא.

3. It is important to explain the fallacy and spurious nature of incorrect solutions, and to continue to propound to the public the need to follow halachic guidelines as ruled by recognized *talmidei chachamim* and experienced *poskim*. It cannot be stressed enough that erroneous solutions are worse than no solution at all. An erroneous

I) ***Mekach To'ut*** – Mistaken Transaction

There exists in Jewish law the concept of *mekach to'ut*, a mistaken transaction. In broad terms, this refers to any one of a number of circumstances where the transaction was entered into with a certain understanding and/or assumption which proved to be false. Being that the will, or intent, for this transaction is erroneous, the transaction is invalid, and is thus canceled. We will examine the halachic principles and the practical applications of such cases, and discuss their relevance to *agunah* situations. [4]

The Mishnah in *Bava Batra*[5] and *Shulchan Aruch Choshen Mishpat*[6] discuss two types of mistaken transactions:

A) Where the object bought/sold turned out to be something other than that which was specified: e.g., he bought a jar of what was ostensibly wine, having asked for a jar of wine, and it turned out to be vinegar. Here, the object specifically transacted for was not the object taken or sold. In this case, either party can void the transaction, for it is intrinsically and fatally flawed – there was no will or intent for the object that was sold. Since it is a different item, in reality there was no transaction on "this," and

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halachic conclusion would result in still-married women "marrying" other men – i.e., adultery; a tragedy further compounded by the birth of children who are thus "*mamzerim*"(bastards) and who cannot enter (i.e. marry) into the Jewish nation – neither they nor their descendants!

4. *Kiddushin* is, at least theoretically, a "transaction" which could be invalidated through such an error [see for example *Kiddushin* 48B-50B].

5. 83B.

6. 233:1.

thus even the party who may have gained by this error (the seller) can retract and void it. This is the most fundamental *mekach to'ut*, involving as it does a complete lack of intent/will for the item, for it was not the item transacted for.

B) A second type is where the error is more subtle – it is not intrinsic to the item bought/sold (e.g. it *is* wine),[7] but the item is of an inferior sort, and it is clear that "had the buyer known, he would not have agreed to this transaction." In other words, will and intent are here, but they were predicated upon a certain expectation about the item which proved to be false (we deal, of course, with a case where it is clear that this expectation existed). This is actually the most common case of *mekach to'ut*, since it encompasses just about every case where merchandise is found to be defective. The halacha in such a case is that only the aggrieved party can retract or annul the sale, for only the aggrieved party "would not have made the transaction had he known." In short, there exists intent for a particular sale, but it is a mistaken one, based on a false assumption or premise, and as such is now invalid.

Interestingly, this most common *mekach to'ut* – a defect or flaw – is understood differently by leading rabbis of the past centuries. R. Akiva Eiger[8] understands the basic halachic mechanism as follows: every transaction has an inherent, unspoken, implicit condition – namely, that this transaction is agreed to on the condition that it contains no defects or other attributes that [an average person]

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7. As Rashbam, puts it (*B B* 83B ד"ה מכר לו), "for they stipulated to sell wheat, and they sold him wheat."

8. *Mahadura Tinyana* #106.

would not want.[9] R. Akiva Eiger thus posits that a transaction which is not subject to a conditional framework (e.g., a *chuppah*, the marriage ceremony creating the fully married state) cannot be declared a *mekach to'ut* either.

The *Beit HaLevi*,[10] however, apparently disagrees. He considers such a transaction to be fundamentally flawed: intent or will for a transaction which is based on a mistaken assumption is flawed intent, and is thus not valid. In other words, an error-based intent is tantamount to no intent at all – thus we need not postulate some "unspoken condition." Intent/will based on incorrect assumptions simply cannot effect a transaction.

For either of these forms of *mekach to'ut* to be applicable, we must be dealing with a flaw or defect which already exists in the item. For only then can we talk about a "defective object," and therefore postulate assumptions about the sale, and intent based on those assumptions.[11]

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9. Being automatic and inherent means by definition that the unspoken condition precludes only those defects obviously unwanted and rejected by the average, everyday buyer.

It seems quite clear to this author that R. Akiva Eiger is endeavoring to find a legal framework only for the second type of *mekach to'ut*. In the first type (he sold him wine... he gave him vinegar), surely we need not postulate that there is an unspoken condition, for he sold him something other than what he thought he bought.

10. III:3.

11. This would certainly include flaws which only showed up in the future, as long as they stem from a situation clearly present at the time of sale e.g., a car which can't go above, say, 40 mph or a toaster which burns itself out every two weeks. The defect exists *now* – but it becomes apparent only in the future, which surely does not affect its status as a full-fledged, present deficiency.

No misconduct of a party in a marriage, no matter how base or nefarious, could ever be the subject of these forms of *mekach to'ut*. He/she is certainly not (clinically or objectively) a "different item" than transacted for; neither is he/she, at the time of the *kiddushin*, clearly and obviously "deficient" with a *mekach*-breaking defect. (Of course, if the husband has, for example, an undisclosed debilitating illness, that is an objective defect, and there may be grounds for *mekach to'ut* – it would then be subject to the other halachic guidelines discussed in this article.)

We do find, though, a form of *mekach to'ut* which takes into account future events – for example, *Kiddushin* 49B speaks of a person selling his lands, expecting to move to Eretz Yisrael; he subsequently did not. The Gemara states that the sale would be invalidated if the seller had spoken of his assumption *at the time of the sale*. If he did not, we apply the principle "*devarim sheb'lev aynom devarim*" – unexpressed intent contrary to normal outward appearance is of no legal consequence. Indeed, the halacha states[12] that if a person sells property in anticipation of a future event, and expresses that anticipation at the time of the transaction, it is considered as if he had made a conditional sale; if the anticipated event does not come about, the sale is rendered invalid retroactively.

Thus, the *Shulchan Aruch* allows a clearly expressed assumption to be considered a condition of the sale. This poses no difficulty, though, to the previously cited *Beit HaLevi*; since one does not have the legal right to "assume" a future event and then base a transaction upon it, the only legal format to invalidate the transaction is by viewing the expectation as a legal condition which of course, anyone

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12. *Shulchan Aruch Choshen Mishpat* 207:3.

can make regarding anything. The *Beit HaLevi* is discussing a present situation, which "can be assumed" and can form a basis for the transaction; this, he holds, automatically invalidates the transaction if it is unfulfilled. Future events, though, must function through the legal labyrinth of conditions.

The *Shulchan Aruch* stipulates that the person trying to annul the transaction retroactively in this case must have expressed his expectation *at the time of the sale.*[13] The Ramo adds that if there is a clear *"umd'na d'muchach"* – an obvious, universal, clear-to-everyone expectation – nothing need be said, and, if the expected did not occur, the sale would be invalid. The exact parameters require further elaboration:[14]

A) When the expectation is obvious and inherent in the very nature of the act itself – it is part-and-parcel of what anyone in this situation would be doing. For example, a person on the verge of death who gives away his properties in obvious expectation of his demise. In such a case, nothing at all need be said; we assume the unspoken condition, i.e., that if he recovers, the gift is nullified. It has the legal power of a spoken condition with all of the technical requirements fulfilled. When we see a very ill person give away all his property, we see he is sick, we understand the *umd'na*, and we know on our own that if he doesn't die, he would not sell.

B) Where the conditional nature of the transaction is not inherently obvious, but once the situation is explained and known, it then becomes obvious to all; in such a case,

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13. See ibid and 207:4.

14. See Rosh, *Bava Batra* 8:48 and Tosafot, *Ketubot* 97A, ד"ה זבין.

we do not require all the technical legalisms of the laws of stipulations, as long as the assumption is spoken out at the time of the transaction. If the context and basis of the transaction is made clear at the time of the transaction, we then – and only then – have a clear *umd'na* that the transaction would be made only in the context of the state mentioned. Without anything having been said, however, we do not know that the link exists; it therefore is of no legal consequence.

For example, as mentioned, the Gemara (*Kiddushin* 49B-50A) speaks of one who sells all of his properties, planning to move to Eretz Yisrael, but says nothing at the time of the sale. He subsequently does not move. The Gemara applies the rule of "*d'varim sheb'lev aynom d'varim*" – unexpressed intent contrary to outward appearances is legally irrelevant. The *Rishonim* there explain that had he but stated *at the time of the sale* that he was selling his land with that expectation, he could subsequently have invalidated the sale, even absent the technicalities of making stipulations. Although the act of selling one's properties bespeaks nothing about a trip to Israel, once the seller states at the time of the transaction "because I am moving," the buyer is now informed of that reality, and in that context, the sale's being dependent upon that move is universally and clearly obvious to all.

When a person sells all his property, we may not automatically assume he is doing so only in the expectation that he is moving – people, after all, sell properties all the time. But once he tells us that he's doing so only because he expects to move and thus establishes the link, the "conditional" aspect of the sale becomes clear and obvious. Therefore he doesn't have to make an official condition.

C) There is a third category. Let us take the above case, but the seller is selling not his land, but rather his

clothing, and states that he is doing so because he is moving. Since he has not fulfilled the legal requirements of conditions (a complex formula), the sale is final and valid, even if he does not move. Tosafot[15] explain that since people do not usually link these two items together, tying the sale to this event requires a full-fledged, legal condition with all of its technicalities – for it is never inherently clear that the transaction is dependent on the condition being met. There is no obvious link, even if he tells us – i.e., he's selling his clothing expecting to move. He might sell his clothing regardless; thus an official, technically correct condition must be made.

To sum up: a transaction dependent on some future event needs, under most circumstances, some sort of explicit statement at the time of the transaction – and in most cases, must fulfill the complex technicalities of the laws of conditions. Marriage does not inherently take place with an understanding that a *get* will be given (even if a *get* may eventually be called for). It is not an intrinsic part of marriage! *Thus, even if one were to specifically state that his or her consent to the marriage is subject to a get being given at the appropriate time, and even if one were to state this at the time of the wedding, it would be meaningless unless technical legal "conditions" were to be made. Even then, it is not at all clear that the marriage would be rendered invalid – see further in this article.*

A further point: The *Shulchan Aruch*[16] states that if a person subsequently states that he intended a certain stipulation to be in effect when performing *kiddushin*, that claim is meaningless and the *kiddushin* is valid come what

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15. Ibid., and other commentaries there and in other relevant texts.

16. *Even Ha'ezer* 38:24.

may. *Aruch HaShulchan* there[17] states that this remains true even in a case of obvious *umd'na d'muchach* (universal assumption): the stringency of marriage demands nothing less than an explicit, clear-cut condition at the time of the *kiddushin* (and the Gemara's cases to the contrary involve only monetary transactions). *Tashbatz*[18] and *T'shuvot Maharshal*[19] also state that this is so even when the person's expectations have been verbally expressed; we must always have a technically correctly-made condition.[20] (However, there are some exceptions to this;[21] the *poskim*[22] explain that the conditions on *kiddushin* are limited to those explicitly mentioned in the Gemara.)

Yet another point in considering an *agunah* situation as a *mekach to'ut:* the Mishnah in *Ketubot*[23] cites the opinion of R. Elazar Ben Azaryah that a monetary obligation that was accepted by a husband in addition to the basic *ketubah* (marriage contract) need not be paid if the marriage is terminated prior to consummation or the *chuppah,* because there is obvious intent on the husband's part to accept this marital obligation only if there will indeed be a full-fledged marriage. Here, nothing need be expressly spoken. Tosafot ask:[24] Every time someone buys an animal and it

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17. 38:90.

18. I :130.

19. #25.

20. See *Pitchei T'shuvah* 38:14 who cites other sources for this.

21. See for example, *Ketubot* 72B.

22. See *Aruch HaShulchan* and *Otzar HaPoskim* to *Shulchan Aruch Even Ha'ezer* 38:24.

23. *Ketubot* 54B.

24. Ibid., 47B.

subsequently dies or gets fatally injured, why can't the buyer nullify the sale by invoking this reasoning – i.e., surely, he only bought the animal with the understanding that it would be fully utilized? Certainly it is obvious that the animal was bought for that purpose! Tosafot answer that since the future is always unknown, we assume that the buyer of an animal is willing to enter into the transaction with this doubt unresolved – i.e., fully cognizant of the possibility that the animal may die, yet willing to take the chance. In other cases, however,[25] a person is not willing to take that risk, for he is buying only with the presumption of the condition's being fulfilled, that being the only purpose of the transaction in the first place.

Marriage is never for the purpose of a divorce; thus we cannot say that whenever a *get* is deemed appropriate, there is an *umd'na* that it is to be given as a fulfillment of the state of marriage. Rather, it is similar to a regular sale where no *umd'na* exists, and a full-fledged condition need be made.

Furthermore, any transaction where both parties' interests are equal, must, by necessity, involve a "meeting of the minds."[26] When an animal is being sold, the seller wants to sell his animal under all circumstances, and would thus expect that an explicit condition be made by the buyer if there is to be an insistence on his part on a certain event's occurring or not occurring. Marriage is obviously also such a case – to whatever degree the woman would theoretically condition her consent on the man's acquiescing to her expectations, the man enters the

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25. E.g., *Ketubot* 97A, where a person sells properties for the purpose of using the proceeds to buy something else.

26. See Tosafot ibid.

marriage expecting to be master of his own fate. Thus, the requirement for a "meeting of the minds" results in the impossibility of anything other than an explicit condition being effective.

Another factor which makes a conditional *kiddushin* halachically moot (even if making an explicit condition at the time of the wedding) is the preponderance of halachic opinions *that any type of condition is rendered void upon consummation of the marriage (nisu'in)*. Because of the seriousness with which normative halacha views the consummation of marriage (as well as all subsequent conjugal relations), even explicit conditions are seen as becoming voided or waived by the couple themselves, inasmuch as otherwise, said marital relations would run the risk of being considered non-marriage-related sexual relations. This is explicitly spelled out in *Shulchan Aruch Even Ha'ezer* 38:35, and is elaborated upon by all commentaries.[27]

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27. This is based on the legal finality of marriage – see *Ketubot* 72B-73B at length. See *Shulchan Aruch Even Ha'ezer* 38:35 with *Chelkat M'chokek* #48. See also *Shulchan Aruch* 44:4 with *Beit Shmuel* #7 and *G'ra* #7 who say this would apply even to a defect of great magnitude, where we would think the possibility of a spouse accepting such a *kiddushin* is almost nil. See also *Tur Shulchan Aruch Even Ha'ezer* #39 who rules that even if the consummation was apparently done subject to the *kiddushin's* explicit condition, it is rendered irrelevant by the consummation of the marriage. See *Shulchan Aruch* #38, *Taz* #18, *Beit Shmuel* #59. See further in *Shiltei Ha'giborim* ch. 77 of *Ketubot* and Tosafot *Ketubot* 73A ד"ה לא תימא וד"ה אליו. See *Hagahot Ashrei* ibid #12; these opinions hold that even if an "explicit condition" were made at the time of consummation, it would be irrelevant.

Even in cases where the woman, unbeknownst to the man, "turned out to be forbidden to him", most *acharonim* rule the *kiddushin* valid – see *Noda BiYehuda* II #50 and #80 (see *Pitchei Teshuva* 39:4); *Be'er*

In fact, Rav Eliyahu Henkin *zt"l*, in *Sefer Teshuvot Ivro*, No. 77, recalls that in 1931, a pamphlet clarifying all aspects of the impossibility (halachically) of making a conditional marriage was printed, and cited how in 1908 over 400 rabbis signed a halachic statement to that effect. Indeed, the present proposals – quite properly – do not suggest doing so (since such conditions would be invalid in Jewish law). However, the point is that the attempt to somehow find *kiddushin* retroactively "mistaken", could only at best be considered a condition for *kiddushin*, which condition is voided by *nisuin* (consummation). *Otzar HaPoskim*[28] cites a multitude of opinions regarding consummation of a marriage as effectively sealing the marriage unconditionally, even when a condition has been made. Also discussed there are cases where one's spouse turned out to be an apostate, or forbidden to marry, and the even greater legal unlikelihood of a conditional full-fledged marriage when it is the man who is the "problem."[29]

Although one could theoretically cite only lenient opinions about some of the above points, the salient point remains that without a clear-cut ruling to the contrary, any talk of being lenient, even when an express condition exists, is halachically irresponsible – and is absurd when dealing with an unspoken one.

To summarize this section: There are any number of halachic reasons, and any single one of them suffices, to unequivocally state that suggestions of *mekach to'ut* in an *agunah* situation is wishful thinking but halachically unsound.

Yitzchok #3.

28. To *Even Ha'ezer* #39:5.

29. See also *Chazon Ish Even Ha'ezer* 69:23.

II) The Annulment of *Kiddushin*

The concept of אפקעינהן רבנן לקידושין מיני (retroactive annulment of *kiddushin*) derives from a power the Sages of the Talmud refer to, based on the requirement for their tacit agreement to every marriage.[30] This certainly seems to be a temptingly simple "solution" to the *agunah* problem. Whenever a problem arises, we could simply find rabbis who would annul the *kiddushin*![31]

Upon closer look, however, we see that the circumstances which evoke this principle are extremely rare and unusual. The Sages of the Talmud were the ones who formulated the principle and decided on the circumstances when it might apply. They limited it to certain unique situations,[32] and even in those situations, it was done only in conjunction with a standard *get* (which would otherwise have been invalid) or upon an unsubstantiated report of the husband's death.[33] There are also other specific cases throughout the Talmud which some *Rishonim* explain as being cases where the Sages utilized this power.[34]

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30. See *Ketubot* 3A, *Gittin* 33A and other places throughout the Talmud, with commentaries who explain this concept fully.

31. The *kiddushin* would be nullified *retroactively*, once the Sages' consent is removed, since the *kiddushin* was effected in that context only – there is no way *kiddushin* can be "annulled" only in the present, save through a *get* or the husband's death. This means that even if this rule is used, any children would retroactively be out-of-wedlock children, and the couple, it turns out, have lived together outside of marriage.

32. See *Gittin* 33A; *Ketubot* 3A; *Gittin* 73A; *B B*48B, *Yevamot* 110A.

33. See, for example, Rashi *Ketubot* 3A ד"ה בל, Rashi, *Gittin* 33A ד"ה אדעתא. See also *Shita Mekubetzet* to *Ketubot* 3A.

34. See *Shut* Rashba I:1, 162; *Rashi Shabbat* 145B, Ramban *Gittin*

All these cases employing the principle of אפקעינהן רבנן are unique; never is there extrapolation to other cases. This rabbinic power was never, for example, invoked as a weapon against forbidden marriages, although logically it would have been useful. Nor was it used to solve the many *agunah* situations which are discussed throughout the Talmud and *Rishonim*. It is obvious that the Sages never countenanced using it as a general "weapon" against social problems. Indeed, already in the twelfth century, Ra'avan (*Even Ha'ezer* III, *Hilchot Gittin*) ruled explicitly that no *Beit Din* even in his day had the right to apply this principle to cases other than those explicitly stated in the Talmud. The consensus of all major *poskim* throughout the generations[35] has followed this ruling. In addition, it seems almost superfluous to state that in our times, even if in theory this power would exist, there being no form of any sort of real centralized authority to invoke it, the very thought of an unselected and arbitrarily chosen "Rabbinic Tribunal" invoking this law has an Alice-in-Wonderland quality to it.

III) *Get Zikkui*

A third proposal suggests that it is possible to have a *get* written, signed, and given on behalf of the husband even when he is in opposition to it.

78A; Ran *Nedarim* 90B.

35. *Teshuvot* Rashba 1162, 1185; *Maharik* #84; *Mahari Ibn Lev* I:126; *Radvaz* IV 56; VII 52; *She'elot U'teshuvot Beit Yosef* #10; *Beit Yosef* to *Tur Even Ha'ezer* #28; Ramo to *Shulchan Aruch Even Ha'ezer* 28:21; Maharit E.*H.* II:40; Mabit I:206; *Chacham Tzvi* #124; *Melamed L'hoil* III:22, 51; *Heichal Yitzchok, Even Ha'ezer* I:2; *Minchat Shlomo* #76; An entire section of the book "*Ayn T'nai B'nisuin*" contains various sources to prove that this power no longer exists.

This is, simply put, not a halachic option. One of the most basic of all laws in *Gittin* is that only the husband can order a *get* to be written and/or signed; only the husband (or his directly appointed agent) can give the *get*.[36]

There are cases where some *poskim* allow acquiring a *get* on behalf of a woman (never a man!). Under ordinary circumstances, one can only act on someone's behalf (without being appointed explicitly by that person) for things which are beneficial to that person.[37] A *get* is normally assumed to be detrimental;[38] however, there are circumstances where some *poskim* consider a *get* to be an unqualified, objective benefit for the woman and allow others to accept the *get* for her, even without her appointing an agent. But to apply this halachic possibility to a man who is refusing to give a *get*, creating *gittin* without the consent and direct command of the husband, is a leap into near-irrationality. [39]

I have studied a 475-page book which purports to show halachic basis for this misnamed *get-zikkui*. This book is full of interesting information[40] – however, its

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36. See Mishnah *Gittin* 71B, 72A, Rambam *Gerushin* Ch. 1 and 2. *Shulchan Aruch E.H.* 120 and 123.

37. *Eruvin* 81B, *Gittin* 11B.

38. See ibid and *Yevamot* 118B. See *Shulchan Aruch, E.H.* 140:5

39. To list some differences: it is not an objective, unqualified benefit for the man; you're not acquiring anything on his behalf, you're taking from him; he's stating he doesn't want to do it, while there is a specific law that a *get* needs the consent of the husband.

40. E.g. It's "*gait*" not "*get*"; the author compares himself to Eliyahu HaNavi at Mt. Carmel in his ability to make supra-halachic rulings; one can desecrate Shabbat to help an *agunah*, etc.

Since the author of the book feels such a *get* (excuse me, *gait*) would be valid, the author feels the halacha against being "מוציא לעז" on

"precedents" are cases where the *husband* is forced to give the *get* (an entirely different halachic concept, one which all agree can be done where appropriate); cases of a *get* being *received* on behalf of the wife; cases where the husband wrote a letter that a *get* be written and given. (Again, an entirely different halachic issue: Can such a letter serve in place of a verbal command?) There remain precious few sources which do discuss a *get* written for the husband, sans his command to do so – and these, although they do discuss it, conclude by reiterating that it is halachically impossible.[41]

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In conclusion, we must all share the sorrow of an *agunah* and try to help her. There is much being done to help those who find themselves in *igun* situations. What they do *not* need are false solutions proposed by perhaps well-meaning, but unknowledgeable do-gooders.

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a *get* now applies.

41. See for example, *Shut Heichal Yitzchak E.H.* #64; *S'ridei Eish* #25.

Burial In Israel

Rabbi Alfred Cohen

With the return of the Jewish people to their ancient homeland over the past century, as well as with the ease of travel in the aviation age, it has now become much more feasible to fulfill an age-old dream of millions of Jews – burial in the Holy Land. This has become a popular option familiar to most of us.

The question arises, however, whether this is actually a desirable trend. How does the halacha (Jewish normative law) view the phenomenon of individuals from all over the globe being transported to Israel for burial?Although many think of burial in Israel as a pious option for the soul which was not fortunate enough to live in Israel during its lifetime, or as an expression of the eternal yearning of the Jew for his homeland, the reality is that halacha is ambivalent about choosing to be buried in Israel when one has not lived there.

There are essentially three views on the matter: pro, con, and "it depends". The present article will seek to explain each of these positions in the halachic matrix.

It is interesting to find that this is not a modern question, although inventions of the modern age have given the issue a new immediacy. Long, long before our own time, the topic was being debated in the Palestinian

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Talmud, written in the fourth century.[1] Already there we find two opposing opinions:

> Rabbi bar Kirie and Rabbi Elazar were walking in Isterin and saw the coffins of people who had died outside the Land being brought to Eretz Yisrael. Rabbi bar Kirie said, "What did these [deceased persons] accomplish [by being buried in Israel]?[2] To them, the verse applies, 'And My inheritance you have turned into an abomination in your lifetimes and you come and render My land impure in your death...' He [the second rabbi] answered him, "As soon as they [the coffins] arrive in the Land of Israel, [people] take a handful of dirt and place it on the coffin, as it is written 'and His land will atone for His people.'"

This talmudic anecdote perfectly illustrates the elemental reason that many people have wanted to be buried

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1. *Yerushalmi Kelaim* 9, end of halacha 3 (4 in some editions). It is very interesting to find that virtually all the *poskim* who dealt with this question omitted two tangential topics which might have impacted on the normative halacha: (a) Is burial in a family plot preferable to burial in Israel? The *Kol Bo al Avelut*, p. 252, discusses the desirability of having a family burial plot as well as how one defines or determines what is a family plot (i.e., is it any relative or only the parents whose graves designate the area as a family plot). (b) How important or desirable is it that the person be buried in a place where family members can readily visit, as is discussed in *Sefer Chassidim* 710, and should that factor be considered in deciding where to bury the person? See further *Berachot* 18b-19a and Tosafot to *Sota* 34, s.v. "*avotai*", as well as *Iggerot Moshe, Yoreh Deah* II 162.

2. Apparently, the censure was expressed for people who could have come to live in Israel, but chose not to (*Pnei Moshe*). A similar objection is expressed in the *Zohar*, Parshat Vayechi 515-516.

in Israel: there is an almost intuitive belief that in some mystical way, being buried in the soil of the Holy Land has a beneficial effect on the soul of the departed. In contrast, the text also reflects a measure of Divine anger that Jews who disdained to live in His land and uplift it through living a Torah life there, choose only to leave their dead bodies there. Even those who disapprove the practice, however, concede that in certain cases it might be acceptable or even desirable, as will be explained later herein.

The Case For Burial In Israel

Beyond the emotional ties that many people feel for our land, there are also many sources in Jewish literature, law, and liturgy which seem to indicate that it is beneficial for the soul if the body is interred in Israel.[3]

The Gemara in *Ketubot* 111 states that "Whoever walks four cubits in Eretz Yisrael is guaranteed that he has *Olam Habo (ben Olam Habo)*." This statement elicits the talmudic question--"And righteous people outside the Land of Israel do not 'live'?!" To this, the Gemara answers, "[They live] by means of *gilgul*"[4], i.e., their bones "roll" to Eretz Yisrael

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3. It is the opinion of *Shut Radbaz* 601 that any pain caused the person is still worth being buried in the Land of Israel, "*Kol she-hu mishum toelet ain bo mishum bizayon.*" The *Shut Rashdam* 203 also rules, "*kol she-aino mishum sakana, mitzvah le-ha'aloto le-Eretz Yisrael.*"

4. See also *Bereishit Rabba* 96. Rav Waldenberg in *Tzitz Eliezer* XI: 74 and XIV:79 rules in favor of bringing people to Israel for burial. However, he cites the Rambam and Ramban that such burial should be in the vicinity of Jerusalem. For comments on why the Patriarch Jacob requested burial in Chevron (at the Me'arat Hamachpelah) rather than Jerusalem, see *Pardes Yosef* p. 338-339.

and there they will receive eternal life. But the Gemara is not wholly satisfied with this answer: "But *gilgul* for righteous people is [undeserved] pain?" " Said Abaye, "[For the righteous] paths will be opened in the ground [and they will be able to travel to Israel without pain]."[5]

This talmudic discussion reflects the belief that after death, the soul comes back to life in some manner, but that this can only take place in Israel. If the bones of those who died outside the Land are to achieve resurrection, they must somehow reach Israel. The righteous, however, will be spared the pain associated with this.

Rambam writes that it is desirable to live in Israel, not only to be buried there:

> There is no comparison to being included there [in the Land] during life than to being included after his death. Nevertheless, the great Sages used to take

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5. After recording this discussion, the Gemara goes on to discuss why Yaakov and Yoseph were desirous of having their remains buried in Eretz Yisrael – since they were *tzaddikim*, they would not have to worry about the pain associated with the body's traveling to Israel? But the Gemara explains that albeit they realized that they were righteous, they did not have confidence that they were worthy enough to have these paths opened up for them to effectuate their reaching Israel without pain.

However, in his commentary on *Chumash*, Rashi gives another view – our Father Jacob knew he was considered righteous and would not have to suffer the pain of transferance; however, he wanted to be buried in the Land of Israel so that the Egyptians would not be able to turn his tomb, in Egypt, into an object of worship.

It should be noted that the pain associated with transferring bodies, mentioned in *Ketubot* and various *medrashim*, is not cited by any of the halachists who discuss the question of burial in Israel, with the exception of *Chelkat Yaakov* III:142, who raises this point.

their dead to be buried there.[6]

In support of his position, Rambam adds, "Go and learn from [the example] of Jacob our Father and Joseph the Righteous One." The Torah records that Jacob and Joseph, both of whom died in Egypt, left specific instructions that their remains be transported for burial in Israel.

This is a very strong argument for burying Jews in Israel – from our earliest history, it has been the wish and the goal of the Jew, and our greatest leaders made sure that it would happen for them. Jacob and Joseph showed that even if one lives outside the Land, it is desirable to buried in the Land.[7]

Further support for choosing to bury a person in Israel is adduced from the *Shulchan Aruch*, which rules that in general we do not move the remains of a person who has been buried. One of the exceptions is in order to re-bury the person in Israel.[8]

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6. *Hilchot Melachim* 5:11. Maharsha (commentary to *Ketubot 111*) feels that the only factor to consider is where the person died, and not where they are buried, and that is what is meant by the phrase "*eino domeh koltot mechaim*".

7. It could be argued that Jacob and Joseph cannot truly serve as a paradigm for other Jews. Theirs is a special case, for they were forced against their will to leave the Land of Israel where they had been living. Since they were born and lived in Israel, it is understandable that they felt the only proper place for them to be buried was there. But Jews who have lived their entire lives not in Israel can perhaps not take their example as a precedent in all cases. The Medrash *Bereishit Rabbah* does make this distinction, stating, "The one who declared it as his land is buried in His land, but one who did not praise it as His land, is not buried in His land." See also *S'dei Chemed, Ma'arechet 1; Sefat Emet*, p. 194.

8. *Yoreh Deah 363*:1. Other exceptions to the rule are also listed there. In his notes on this ruling, *Shach* no. 3, cites the verse "And

Writing in our own era, the author of *Chelkat Yaakov* concludes that all *poskim* agree that it is beneficial and advantageous for the person to be buried in Israel, and not one has ever doubted this nor suggested that it is forbidden.[9]

It Depends

Despite this definitive statement of *Chelkat Yaakov*, it seems that this principle is not universally accepted. Many *poskim* did not consider burial in Israel as an absolute mandate, but rather felt that the desirability depended on who was being transported to Israel for burial – if the deceased was a person who lived an examplary life, then it might be considered a good thing (perhaps because his being buried there might be considered an honor for the Land?) And was this a person who all his life had expressed a great desire to live in Israel? If so, it might be desirable; otherwise, it was not advisable.

His land will atone for His people." The *Pitchei Teshuva*, no. 2, writes that even if a person in his lifetime expressed the sentiment that he did not wish to be buried in Israel, it is nevertheless a mitzvah to do it for him.

There is a fascinating debate which took place between the two halachic giants R. Moshe Feinstein and Rav Ovadia Yosef, on the question of moving the body of the long-dead Sir Moses Montefiore, who had been a great benefactor of the Jewish people and especially the Jews in Eretz Yisrael, from its burial place in Europe and re-interring him in Israel. Rav Yosef, as cited in *Techumin* VIII p. 382, considered it a mitzvah, but Rav Moshe was strongly opposed (*Iggerot Moshe Yoreh Deah* III, 163). Rav Feinstein had a novel approach, inasmuch as he raises the question that even if it is a mitzvah to move remains to Israel, the mitzvah might apply only to the children, perhaps not to anyone else. See Ibid, II 153.

9. III:142.

Rabbi Moshe Feinstein openly took the position that a person living in America should not choose to be buried in Israel. Nevertheless, one time he displayed amazement that a certain Rosh Yeshiva was not being buried in Israel. Based on his reaction at that time, Rav Feinstein's own family decided, upon his death, that they would bury him in Israel.

When the Karliner Rebbi died in America a generation ago, a discussion ensued regarding burying him in Israel, with both positive and negative opinions being cited. The issue was sent to Rav Tzvi Pesach Frank in Israel for resolution. He responded,

> And since his acquaintances know that the greatest desire of the Grand Rabbi *z"tzl* was to live in Jerusalem... therefore it is a mitzvah to bring him and to bury him in Eretz Yisrael.[10]

In this specific case only, Rav Henkin concurred:

> Certainly great Torah scholars, whose strict adherence to observance of mitzvot is known to all... it is proper for them and for the public that they be transported to Israel [for burial], following the examples of Jacob and Joseph.[11]

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10. *Har Tzvi, Yoreh De'ah* 274. Why this desire should be the determining factor is difficult to determine, since one could argue that the reality that he could have gone to Israel to live but chose to stay in America should be a more cogent factor in determining his final resting place. See *Divrei Yoel*, I:103.

11. *Kitvei Harav Henkin, II*, p. 91, no. 8:3 and p. 90, no. 66. However, *Chelkat Yaakov* III:142 writes that if a person was wicked ("*rasha*"), his remains should not be transferred to Israel. He adds, however, that unless known otherwise, all Jews are assumed to be "kosher".

However, in general he was opposed to the widespread custom of burial in Israel for people who died elsewhere.[12] This brings us to the arguments which speak against burial in Israel for those who did not live there.

The Case Against

Rav Henkin spelled out the reasons why he and many others were opposed to the practice:[13]

For two thousand years, the Jewish custom has been to bury the dead in a simple shroud in a plain wooden box. But that was not always the case. It used to be the custom to bury the dead with lavish accoutrements. Sometimes, poor people who could not afford these, would run away and abandon their dead in the streets. Seeing this, Rabban Gamliel, the Head of the Sanhedrin in the second century, left a will that he be buried in a simple shroud and plain box. Thereafter, this became the universal custom – if it was good enough for the greatest man of his generation, certainly it was good enough for anyone.[14]

Thus we see, argues Rav Henkin, that it is the obligation

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12. "In essence, this practice is not all acceptable to me." (Ibid.) He concedes that one cannot protest the custom of burying people in Israel, since the law specifically permits exhumation for that purpose. Nevertheless, he writes that even if all family members agree to bury the person in Israel but one objects, they have to follow the wishes of the one dissenter "since he has said the law."

13. Ibid. *Minchat Yitzchak* VII, No. 136, relying on the *Zohar* (see note 2) was also opposed to the practice of burying non-residents in Israel.

14. In a similar vein, Rav Moshe Feinstein writes that he prefers using a chapel owned by Gentiles rather than using one owned by Jews who charge exorbitant rates, even if there will be a breach of communal peace because of this. *Iggerot Moshe, Yoreh Deah III 134.*

of Jewish law to be concerned with burdensome debts placed upon the people. How then can we popularize a practice which adds thousands of dollars to the already great expense of burying our dead properly? How is it proper for an individual to do it, and more to the point, how can we sanction this practice becoming so common that it will become the accepted proper mode? How can we be so callous in wasting the resources of widows and orphans, who will feel that they must also do this, in order to show the proper respect and not embarrass their dead? Therefore, writes Rav Henkin, "it seems to me that there is in this [custom] theft from widows and orphans."

The Satmarer Rebbe also was not in favor of transporting people to Israel for burial (and is himself buried in Kiryas Yoel in New York State).

> But we have not seen nor heard that any of the righteous ones nor the greats of the generations of all times did this.[15]

However, he felt it necessary to explain his view, in light of the ruling in *Shulchan Aruch,* mentioned previously, that it is permissible even to exhume a body in order to bury it in Israel. Based on the reality that the tradition was not to bury in Israel, the Rebbe argues that even despite the proviso in *Shulchan Aruch,* there must be

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15. *Divrei Yoel II:103; Idem,* commentary to *Parashat Vayechi* 515-516, where the Rebbe relies heavily on the *Zohàr* quoted in Footnote 2.

In the responsum of Rav Moshe Feinstein, cited earlier, concerning the re-interment of Sir Moses Montefiore in Israel, Rav Moshe also writes that removing this one individual would be an insult to the great rabbis buried in Europe who are left behind.

some very good reason why it was seldom put into practice.[16]

He does not seem to take into account that previous generations might not have chosen burial in Israel due to the difficulties of transport in earlier times and also due to the fact that in those times Israel was not blessed with the dense Jewish population of our own times.

Conclusion

This brief survey indicates that there is surprising diversity in the attitude of our rabbinic leaders, in the past and in the present, towards the widespread desire, often actualized, of being buried in Israel. We look forward to the advent of *Mashiach*, when all Jews will return to the Land in their lifetimes, and the question will become moot. Also, we hope for fulfillment of the prophetic promise that the Allmighty will wipe out death altogether, which will render our discussion purely academic.

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16. There is an exception for those who request burial in Israel. Ramo, *Yoreh Deah* 363:1 seems to approve the custom of placing some earth taken from Israel into a grave. The *Kol Bo* writes that one would think that it is not the soil which is holy but the place where the soil is (i.e., Israel). As an example, if one were to bring dirt from America to Israel, and thereafter plant crops in that soil. Since the crops grew in Israel, they would surely be obligated in *teruma* and *ma'aser*, even though they grew in soil from America. Logically, the reverse should also be true about dirt from Israel placed in a grave in a different country.

Circumcision Clamps

Rabbi Donny Frank

It has been a long-standing practice among the vast majority of American parents to have their sons routinely circumcised at birth. In fact, circumcision is the most common surgical procedure in the United States.[1] Over the last 25 years, however, the question as to whether there actually exist medical indications for this widespread practice has been addressed. In 1975, and again in 1983, the Committee on the Fetus and Newborn of the American Academy of Pediatrics found no significant medical indications for routine neonatal circumcisions. Since those reports, compelling new evidence has suggested otherwise, prompting the American Academy of Pediatrics Ad Hoc Committee, in 1989, to revise its recommendations and delineate "potential medical benefits and advantages" for newborn circumcision.

But while the circumcision rate shifts as this debate plays itself out, it has remained significantly high enough to preclude presumptions that parents who volunteer their sons for circumcision are necessarily Jewish. This being the case, how should we, as Jews, view this trend to

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1. According to the National Center of Health Statistics, 1.19 million boys born in the United States in 1987 – 61% of the boys born that year – were circumcised. The operation is less common in other countries. During the 1950s and 1960s, 90% of newborn boys in the U.S. were circumcised. The rate of circumcision in the U.S. has declined in recent years and is lowest along the West Coast. Niku, Stock, Kaplan, *Urologic Clinics of North America*. 22(1):57-65, 1995.

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circumcise? For a ritual that originated as a symbol of our coveted covenant with God to be "usurped" by the Gentile community as a somewhat standard surgical protocol begs the age-old question: Is this phenomenon good for the Jews or bad for the Jews?

The answer is not a simple one.

On the one hand, a strong argument can be made that the general trend to circumcise "permits" many secular Jews, who might otherwise reject this mitzvah as beyond the pale, to do so as well. However, this argument is blunted by the growing tendency for Jewish parents to accept the hospital's routine offer to have their sons circumcised by physicians – in most instances Gentile ones – and before the eighth day! In either case, the *brit* is not in accordance with halacha and a subsequent *hatafat dom brit*, drawing of blood, might very well be required.[2]

In addition, there is another consequence to this trend that might also lead to possible halachic problems.

From the Jewish perspective, a circumcision is much more than a mere medical procedure; it is a mitzvah of the highest order. As the rite of passage into a special relationship with God, the *brit* procedure is a mitzvah rich with symbolism, and every aspect leading to a revealed *atarah* is not merely incidental to achieving that goal but a significant step towards it. Moreover, as a Torah directive, every element of a *brit* must conform to "*deracheha darchai noam*," ("The ways of Torah are pleasant") performed with extreme concern for the baby. These considerations are among those that keep the operation within the purview of a *brit kodesh*.

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2. See Rabbi Moshe Isserles (Ramo) to *Yoreh Deah* 264, and *Shach*, ibid., 262:2, both referenced later in this article.

However, from a strictly medical perspective, revealing the *atarah* is the singular goal and provided that the steps leading to it are medically sound, it is within the scope of a legitimate circumcision. The popularity of routine circumcision among Gentiles has raised the consciousness of medical professionals to pay closer attention to the methods of circumcising; this has propelled the creation of various circumcision clamps designed solely on the basis of secular medical preferences with little or no regard to religious considerations.[3] Thus, many of these clamps eliminate essential elements that are associated with a traditional *brit*.

To be sure, innovations in the circumcision procedure have been introduced and largely accepted by the Jewish community over the centuries. The probe, plain shield, and sometimes hemostats, are common features at *britot* today. However, with the advent of circumcision clamps, designed primarily to perform "bloodless" circumcisions, there has been serious scrutiny and criticism by contemporary *poskim* over using these devices. The purpose of this article is to see whether or not the use of clamps is seen as being consistent with the framework (*tzurah*) and goals of a *brit kodesh*.

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3. The assertion that the rate of demand for the procedure correlates with the degree of attention paid to the methodology for performing it is echoed by E. J. Schoen, MD, in a study related to the use of anesthetics for circumcisions. He writes: "Recently, the Task Force on Circumcision of the AAP found evidence of advantages as well as disadvantages to newborn circumcision which could prompt a resurgence in popularity of the procedure, making the question of pain relief more relevant." *Clinical Pediatrics*, July 1991.

The Anatomy and Circumcision

It is worth reviewing the basic anatomy and halachic requirements associated with *brit milah* before discussing the use of clamps.

The *arlah* (foreskin) is a loose fold of skin lined with a layer of a mucosal membrane. This double layered *arlah* of an uncircumcised male covers the round tipped glans. A kosher *brit* is achieved by surgically removing enough of the foreskin with its accompanying mucosa so that the *atarah*[4] is completely revealed.

The basic *brit* consists of three basic components: *Chituch, Priah,* and *Metzitzah.*

Chituch refers specifically to the process of removing the outer layer of foreskin. While doing so, the *mohel* (ritual circumciser) tries to grip and cut (at least) some of the mucosal lining during the *chituch*; otherwise, it will be difficult to do the ensuing *priah* for the entire membrane. As such, most *mohelim* will use a probe, a straight, blunt edged instrument,[5] prior to the *chituch* in order to break any adhesions that attach the mucosa to the glans.

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4. There is a debate among the *rishonim* whether the *atarah* refers to the glans or just the corona. See *Bait Yosef* and *Bach, Y. D.*, 264.

5. The most significant halachic question concerning the probe relates to its use on Shabbat. The issue revolves around whether it is considered necessary for performing the *brit* and, if not, whether it necessarily causes bleeding. *Chavat Da'at*, VI:53, concludes: "It is permitted to use a probe on Shabbat to separate the foreskin from the glans; and even if, at times, it is possible that one will draw blood with it, since it is not his intention to do so (*davar she'aino mit'kavain*), it is permitted. Nevertheless, it is appropriate to probe carefully, even on the weekday." See *Minchat Yitzchak* (VIII:90) who rules stringently on the basis of reports from *mohelim* that suggest the use of a probe constitutes a *p'sik raisha.*

Priah is the act of revealing the glans by removing whatever is left of the mucosa after the *chituch*. Traditionally this has been accomplished by tearing the membrane with a thumbnail and peeling it back below the corona, the lower ring of the glans.

Metzitzah is the process by which the *mohel* draws blood from the wound. There is a great controversy whether *metzitzah* is an integral part of the *brit* or just a health indication. We will return to this matter later on.

Description of Shields and Clamps[6]

The following is a brief description of three methods for performing the *milah*.

1. Plain Mogen; Guard: This flat shield is a metal plate with a thin slit down the middle. It is slid over the stretched foreskin and protects the glans while the foreskin is cut.

This guard is virtually universally accepted and few *britot* are done without it.[7]

2. Mogen "Bronstein" Clamp: This hinged instrument can be described as a heavier flat shield that clamps shut. It has a small latch that completely closes the slit over the foreskin and crushes it. After waiting some time for hemostasis (i.e. cessation of bleeding), the foreskin is cut

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6. While there do exist many variations of clamps, the two most popular ones are the Mogen and Gomco, and therefore our discussion will focus on these two.

7. Though opposition to the use of the plain shield can be found in *Migdal Oz, Nachal 9* ("...if the *mohel* was expert enough, he could perform the *brit* without this tool and spare pain to the baby"), *Pri Megadim* in *Aishel Avraham, Orach Chaim* 75:8, actually prefers that it be used, so that the *mohel* doesn't have to hold the *arlah* when making the *bracha*, a prohibition recorded in *Magen Avraham*.

and the clamp is removed.

3. Gomco Clamp: This device has four parts to it and requires a series of steps to apply. First, a vertical incision is made along the baby's foreskin, which is then pulled back. Next, the bell, a metal, cone-shaped cap, is fitted over the exposed glans and the foreskin is drawn back over the bell. A plate with a round opening is then placed over the capped glans until the inner edges of the opening and the bell come together on either side of the foreskin, at the place where the incision is to be made. The arm of the clamp is fitted into its place, and a nut is screwed on tightly at one end, exerting a crushing force on the foreskin at the junction of the bell and plate at the other end. The clamp is left on until hemostasis is achieved, at which time the foreskin is surgically removed by carefully cutting the crushed foreskin around the perimeter of the base of the bell.

In general, the following halachic arguments apply to both the Gomco and Mogen clamps, though some may argue more strongly against one than the other. This will be pointed out when relevant.

Problems with Clamps

Pain Factor

Brit milah, by its nature, is an invasive procedure. In fact, according to some authorities, this is not accidental but by design. Rabbi M. Arik,[8] for example, suggests that the presence of pain is an essential element of a *brit*, leading several contemporary *poskim* to discourage the use of

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8. *Imrai Yosher*, Volume 2, No. 140.

anesthesia.[9] Even so, Rabbi Moshe Feinstein[10] writes that there is a prohibition to cause excessive pain to the baby beyond what is necessary to perform a kosher *brit*, and there is no reason to think that anyone would disagree. As such, eliminating any unnecessary pain would be the goal of all *poskim*, thereby establishing the first standard by which to evaluate any new instrumentation.

In this vein, let us consider Rabbi Eliezer Waldenberg's[11] graphic description of a *brit* performed with a clamp:

> "At the moment the clamp is applied to the baby, his entire body turns blue from the enormous pain inflicted upon him [by its application]... I have been invited to observe the Mogen two or three times...and I stood stunned, unable to believe my ears that here, in our holy and glorified city [Jerusalem], there are light-headed *mohelim* who breach the walls of the *brit kodesh* and use such an instrument for *milah*!..."

He records Rabbi Yitzchak Rosenthal's firsthand account of Rabbi Tzvi Pesach Frank's reaction to the first time he observed the clamp:

> "...And after he saw it used, he trembled from the excessive pain inflicted upon the baby and issued his *psak*, saying: 'This is not the *milah* that God

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9. The issue of anesthetics for *brit milah* is an important contemporary issue but not within the purview of this article. However, it should be noted that, while there are *poskim* who do discourage their use, Rabbi Moshe Dovid Tendler, in a recent letter advocating the use of anesthetics, writes that Rabbi Moshe Feinstein, Rabbi Shlomo Zalman Auerbach, and *Yibadel Lechayim*, Rav Eliashiv, "concurred that it is permissible."

10. *Iggerot Moshe, Yoreh Deah*, III:99.

11. *Tzitz Eliezer*, VIII:29.

commanded us to do!'"

Related to the pain factor, Rabbi Waldenberg also expresses concern about the health of the baby when a clamp is used. He writes:

> "...It was made known to me that an expert physician, the head of a well-known hospital, said that [clamp use] can cause the child to have heart murmurs and worse, God forbid. And when I spoke with several well-known physicians they reaffirmed that the degree and suddenness of the pain [caused by clamps] can create these kinds of conditions..."

These descriptions and observations set the tone for a responsum that relentlessly rejects the use of clamps.

Although Rabbi Waldenberg is the most descriptive in his repulsion of the clamps, other *poskim* also agree that it causes an excessive amount of pain. But while it seems that this argument presents an open and shut case against the use of clamps, two points ought to be considered before moving on.

1. While a clamp clearly causes more pain than necessary at the time of the excision, the argument has been advanced that by the time the *mohel* has made his last visit, it is possible that the baby will have experienced less pain than if one had not been used. This is because with the plain guard, a *mohel* will have more reason to revisit the wound, redress it, and be required to return another day to remove the bandage – all of which will cause additional discomfort to the baby. On the other hand, with the clamp, the wound is virtually healed "on the spot" and often nothing more than a lubricated bandage need be applied, which can

subsequently be removed with ease.[12]

2. In this matter, a distinction should be made between the Mogen and Gomco clamps. With the Mogen, the pain threshold is crossed only because it crushes the foreskin rather than merely gripping it firmly. The Gomco, however, is a more cumbersome technique which involves many additional invasive procedures[13] that add pain and prolong the *brit*, making it especially intolerable.[14] For this reason

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12. See Rabbi Moshe B. Pirutinsky's *Sefer HaBrit*, p. 178. Nevertheless, Rabbi Waldenberg's concern over the suddenness and intensity of the pain caused by the clamp might, in the long run, be a more overriding concern than the potential for a longer healing process caused by the plain shield.

13. An article discussing the effects of some non-invasive pain reduction interventions delineates the fourteen steps of a "Gomco Circumcision," ten of which it identifies as invasive. Among the ten, at least four are not present in a "Mogen Circumcision." They include: (1) the use of 2 hemostats to grip the foreskin; (2) A dorsal slit (i.e. a vertical incision down the center of the foreskin) along the area that a third hemostat had been placed; (3) A second probing to loosen the adhesions after the foreskin is retracted; (4) a cumbersome application and removal of the clamp. "Pain Reduction Interventions During Neonatal Circumcision." Marchette, L., Main, R., Redick, E., Bagg, A., Leatherland, J. *Nursing Research*, vol. 40, July/August, pp. 241-244.)

14. The Associated Press recently reported the results of a study that compared the use of Mogens and Gomcos, stated that: "In a study involving 48 newborn boys... the boys circumcised with a Mogen...had less than half the heart rate increase and total crying time of infants circumcised with a Gomco, the device used by most doctors. Oxygen levels were also higher in the Mogen infants, a sign they suffered less stress... With the Mogen clamp, half of them didn't cry at all. They were comfortable... With the Gomco clamp they cried longer... over 60% of the time... The doctors did not know whether to attribute the babies' shorter crying time and lower stress level to the use of the Mogen itself, to the fact that the Mogen requires less manipulation of the foreskin, or simply to the brevity

alone many refuse to use it.

Chituch and Priah as One – Without the Thumbnail

We mentioned earlier that a *brit* consists of removing both the foreskin and the mucosa, and that in the traditional *brit*, the mucosa is partially cut with the *chituch* and then peeled back with the thumbnail. However, with the clamps,[15] the *chituch* and *priah* are generally accomplished with a knife and in one act. This raises the following questions:

a. Must the *priah* be done with the thumbnail?

b. If not, must the *chituch* and *priah* be done as two separate acts (albeit both with a knife)?[16]

In this matter, there is a wide-ranging debate.

1. According to Rabbi Yaakov Ettlinger,[17] *priah* must be done with the thumbnail. He admits that, while he has the support of the Rambam, *Tur*, and *Shulchan Aruch*, each of whom mentions *priah* with a thumbnail, he has no talmudic source for this requirement. Nevertheless, he bases his position on the following arguments:

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of the procedure..."

Note that the article mentions that experts warn that while the report is intriguing, it was a relatively limited study.

15. While the Gomco must be used in this manner, it is possible to apply the Mogen clamp in a similar manner as the plain shield, leaving some mucosa after the *chituch* to allow for a subsequent *priah* – even with the thumbnail, though this is not the way it is intended to be used.

16. Keep in mind that this question was raised well before clamps came on the scene. Many *mohelim*, even when they use the plain guard, use a hemostat to grip both the foreskin and the mucosa in a way that the *chituch* can accomplish both the *chituch* and the *priah*.

17. *Binyan Tziyon*, No. 88.

a. Since *priah* with the thumbnail has been an age-old *minhag* (custom), we can apply the concept of "*minhag Yisrael Torah.*"

b. Ultimately, the details of this mitzvah, which has been performed continuously since the days of Moshe, were known through our *mesorah* and do not necessarily require scriptural support.

c. *Yalkut Tehilim* (723) quotes King David as having said: "I praise You with all of my limbs and fulfill mitzvot with them... With my nails: I do *priah*, I nip the necks of birds [i.e. *melikah*, in lieu of *shechita*], and I look at [them] from the light of the havdalah candle." R. Ettlinger takes liberties to compare *priah* with *melikah* – just as *melikah* must be done with one's nail and not with a knife, so it is with *priah*.

2. Rabbi Moshe Feinstein, on the other hand, holds that one is permitted to do the *chituch* and *priah* simultaneously, without the thumbnail, and that any Midrash associating *priah* with thumbnails does so only because that was the most practical way to grab hold of the mucosa.

One of his proofs is from the Talmud *Yerushalmi*.[18] There, in reference to a Shabbat *brit*, it says that if one has time to do the *priah* before Shabbat ends, "he can do the *priah* and not be concerned." Rabbi Feinstein,[19] searching for the novelty of this law (i.e. that you can do the *chituch* and *priah* on Shabbat if you have time for them) and why the *Yerushalmi* says one "can do the *priah*" rather than "he must do the *priah*," understands it to suggest that

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18. *Shabbat* 90a.

19. *Iggerot Moshe, Yoreh Deah*, I:155.

even if the person knows how to do a *chituch* and *priah* in one act of cutting, he may do them as two separate procedures without being concerned that he is violating Shabbat unnecessarily with a separate act of *priah*.

To be sure, a much earlier responsum, attributed to Rav Hai Gaon, also permits *chituch* and *priah* done as one. However, Rabbi Feinstein accepted the authenticity of this responsa only after he himself found a solid source for it in the Gemara. This said, Rabbi Feinstein does suggest that *mohelim* leave a little of the mucosa in order to fulfill the words of the Midrash.

3. A more extreme position is implied by the *Levush*.[20] He writes that the permission to do *chituch* and then *priah* on Shabbat presumes that it is physically impossible to do them both at once; therefore, to do the *brit*, one must be allowed to make two cuts. This clearly suggests that if it were possible to do them as one, as it is today, he must do them as such on Shabbat.[21]

Bloodless Brit

Several sources indicate that drawing blood is an integral element of a *brit milah*. And, since the primary purpose of clamps is to achieve quick hemostasis and to produce "clean" circumcisions, this medical virtue might very well be their most serious halachic setback.

Following are a few of the sources:

a. There is a procedure known as *hatafat dom brit*, used when a *brit* must be rectified through the drawing of blood.

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20. *Yoreh Deah* 266:14.

21. Rabbi Pirutinksy tries to understand the position of the *Levush*. See index in the *Sefer Ha'brit*, 264:88-90, and page 208.

Rabbi Moshe Issreles requires this when one is circumcised at night[22] or by a Gentile,[23] and the *Shach*[24] requires it when it is done before the eighth day. Now, if drawing blood had no relevance to the essential mitzvah of *brit milah*, what purpose could it possibly serve once the foreskin has already been removed?[25]

b. The text of the second *bracha* recited at a *brit* for a convert or slave explicitly mentions *hatafat dom brit*.[26]

c. In a responsum addressing the issue of using lasers for *brit milah*, Rabbi Yitzchak Yaakov Weiss[27] speculates that while *Chazal* may not have been expected to anticipate lasers, they certainly could have envisioned another method of bloodless *brit*ot (e.g. clamps that crush the skin). Yet they did not mention it as an option for one whose brothers died as a result of *milah*. If so, he concludes, *Chazal* must have felt that it is better to leave the baby uncircumcised than to change the procedure from its proper halachic manner which involves the drawing of blood.

d. There are several verses that underscore the significance of the blood of the *brit*. *Yechezkel* (16:6) says: "Then I passed you and saw you wallowing in your blood [a reference to the blood of circumcision], and I said to you: 'In your blood you shall live'; I said to you: 'In your blood you shall live.'" *Zecharia* (9:11) reveals the merit by

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22. *Yoreh Deah* 262:1.

23. Ibid. 264.

24. Ibid. 262:2.

25. *Iggerot Moshe, Yoreh Deah*, II:119.

26. Ibid. See responsum for a reason why *hatafat dom* is not mentioned in the text of a Jewish baby's *bracha*.

27. *Minchat Yitzchak*, VIII:89.

which the Jews will ultimately be redeemed from exile: "Through the blood of your covenant I will have released your prisoners from the pit in which there is no water." The Gemara (*Shabbat*, 137b), too, emphasizes the blood of the *milah* when it says: "If not for the blood of the *brit*, the heavens and earth would not exist."

e. The Gemara[28] records two cases in which R. Natan was asked whether a baby was healthy enough to be circumcised on the eighth day. In the second case, R. Natan saw that the baby, who already had had two brothers die from *milah*, was green, and he assumed that it was because there was no blood under the surface of the skin. Therefore, he suggested that the mother wait until the baby's blood level become normal. According to Rashi and Ran, one of two considerations for R. Natan's decision was that "if he would do the *milah*, no blood would be drawn, and *hatafat dom brit* is a mitzvah, as it is written in *Zecharia* (ibid.)."

Several points should be made before moving on:

1. It is true that anyone who observes both a traditional *brit* and a "clamp circumcision" will readily see the difference regarding the amount of blood that is drawn. But clamps, particularly the Mogen, do not guarantee total hemostasis. Instructions for clamp use indicate that they be left on for a certain period of time before being removed and even then there is no guarantee that there will not be any blood at all. In addition, Rabbi Moshe Feinstein says that while he cannot endorse the Mogen for other reasons, he has heard that it can be used in such a way that the *chituch* does draw blood and would therefore not be

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28. *Shabbat* 134a.

disqualified on the basis of the need for *hatafat dom*.[29]

2. Rabbi Feinstein[30] also entertains the possibility that blood drawn before the *arlah* is removed counts for *hatafat dom brit*, since it is drawn at the time the *mohel* is involved in performing the *brit*. Nevertheless, he remains unsure and concludes that "the matter requires further investigation." This argument, if true, would seem to work in favor of Gomco clamps, which require an incision (i.e. dorsal slit) to apply the clamp. However, practically speaking, even when a dorsal slit is made, a hemostat is usually first applied to the area to crush that part of the foreskin, precisely so that when the slit is made there is, in fact, no bleeding then either.

3. Granted that a *brit milah* must draw blood – but how much? Regarding the requirement of *hatafat dom brit*, the Chazon Ish[31] writes: "...and the scratch (*seret*) has no minimum amount; there need not be any blood actually drawn – as long as the smallest amount of blood has [been made to] gather together [internally] as like a very fine scratch..." If so, even with the clamp use – especially with the Mogen if it is removed immediately after the *chituch* – there is at least as much bleeding as the finest scratch, and more.[32]

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29. It should be noted that Rabbi Feinstein describes a method of clamp use that is not the standard procedure, namely, that it is clamped shut several seconds after the *chituch*, after a significant amount of bleeding could already have taken place.

30. *Iggerot Moshe, Yoreh Deah*, III:98.

31. *Yoreh Deah* 154:3.

32. Note that the *Minchat Yitzchak* (Vol. 5, No. 24:2) makes a distinction between a *hatafat dom brit* procedure and a regular *brit*, claiming that while it is true that just a drop of blood is required for the former, the amount of blood that would normally be drawn

Metzitzah

Assuming one does, in fact, achieve a "bloodless" result with the clamp, there would be no way to perform the *metzitzah*. Whether this poses any problem in its own right depends on how we view *metzitzah*. While some contend that it is an integral component of the mitzvah,[33] others hold it is merely a health precaution.[34] In addition, even if there *is* minimal bleeding, some question whether blood can be drawn from distant places – a requirement of *metzitzah* according to some *poskim*.[35]

Chituch on a Crushed Foreskin: Possible Problems

Several *poskim* suggest that, after the clamp is applied, the foreskin might be effectively considered severed from the rest of the body. This is because even though it is still physically attached, it would eventually blacken and fall off on its own if left uncut.[36] Since the clamp kills the skin, it is unable to reattach itself to the body. This prompts the following additional questions regarding the use of clamps:

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from a full-fledged *brit* should be drawn without employing any methods to try to suppress any of it.

33. For example, *Maharam Shik, Yoreh Deah* 244, goes so far as to suggest that *metzitza b'peh* might be on the level of *halacha l'Moshe m'Sinai*.

34.Rabbi Moshe Feinstein, *Iggerot Moshe, Yoreh Deah*, I:154, writes: "...it is obvious that *metzitzah* is not an integral component of the mitzvah of *milah* because it is only for health reasons.

35. The subject of *metzitzah* has already been dealt with extensively in an earlier edition of this Journal. The reader is referred to "*Brit Milah* and the Specter of AIDS" *JHCS*, XVII, pp. 93-115, by Rabbi A. Cohen.

36. Rabbi Waldenberg, in *Tzitz Eliezer* X:38, claims this to be true even if the clamp is immediately removed.

1. The *mohel*'s use of a knife to cut the foreskin under these circumstances is an act of deception, for it misleads parents and guests into thinking that it is actually needed to perform the *brit*.[37]

2. A general rule regarding *birchot ha'mitzvah*, blessings over mitzvahs, is that they must be recited prior to the performance of the mitzvah. As such, if the *brit* is effectively accomplished by the clamp – even before the *arlah* is removed with the knife – reciting the *bracha* after the clamp is already applied would constitute a *bracha l'vatalah* (an unnecessary blessing).[38]

3. *Minchat Yitzchak*[39] prohibits performing the *chituch* with a clamp. At first he writes that if it were only for the fact that doing so goes against the long-standing *minhag*[40] to use an *izmel* for *brit milah*, that would be enough to discredit it. But further on he quotes the *Imrai Yosher*[41] who maintains that the word *"himol,"* used in the commandment to circumcise, implies that the *mohel* must actively cut the foreskin off with his hand or knife. This requirement, argues the *Imrai Yosher*, excludes the use of special creams that, once applied, eat away at the foreskin on their own. Since the clamp deadens the foreskin and causes it to eventually fall off on its own, the *Minchat*

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37. Ibid.

38. *Sefer HaBrit*, p. 177. Note that several *mohelim* have indicated that, in order to avoid this problem, they recite the *bracha* just before tightening the clamp.

39. Volume V, 24:2.

40. According to the *Maharitz Chiyut*, the source for this is *Yehoshua* (5:2), where *Hashem* tells Yehoshua to make *"charvot tzurim"* in order to circumcise the Jewish people, which the *Targum* explains as "sharp knives."

41. Vol. II, 140.

Yitzchak groups it together with those creams.

4. Rabbi Moshe Sternbuch[42] suggests that some degree of *kavanah* (religious intent)[43] is necessary when performing a *brit*. Therefore, he writes, if the mitzvah of *milah* is effected by the *chituch*, (an issue that is subject to debate,)[44] the necessary *kavanah* would be lacking, because when the *mohel* applies the clamp he generally intends just to prepare for the mitzvah, not to perform it yet. Afterwards, when he does the *chituch* with the intention of doing the *milah*, he is merely cutting skin that might already be considered severed.

Deception

Applying the Gomco is a lengthy and painful procedure. Therefore, some circumcisers prepare the baby in another room and bring him out with the clamp already on. At that point, the *mohel* impresses the crowd by performing an unusually painless *brit*, hoping they are not made aware of all he had to do before he brought the baby out.[45]

Untraditional

A recurring argument cited, and a palpable undertone sensed in responsa that address the use of clamps, is the reluctance to infringe on the traditional methods of *brit milah*. Apart from the specific issues cited above, the

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42. In his *Sefer Dat V'Halacha*, p. 62.

43. He compares it to *shechita*, where if one "is *mit'asek* and has *kavanah* for something else [other than for the mitzvah], the *Yam Shel Shlomo* holds that he has not fulfilled [the mitzvah of *shechita*] and [the meat] is considered like *nevailah*."

44. Others hold the mitzvah of *milah* is to reveal the *atarah* (following the *chituch*).

45. *Sefer HaBrit*, p. 177.

guiding force seems to be the sentiment of "*Chadash assur min Ha'Torah* (innovations are biblically prohibited)." In fact, Rabbi Moshe Feinstein writes that his personal policy was not to attend any *brit* in which innovations were introduced and, when asked for his opinion on the use of clamps, said that he did not want to respond to the issue of the clamp because "we should discourage all innovations..."[46]

Piskai Halacha

In surveying the written opinions of *poskim* on the matter of clamps, we find virtual unanimity regarding the Gomco, but a wider range of views regarding the Mogen.

To begin with, the convention of the Agudat HaRabanim, held in Kislev of 5711, unanimously adopted and circulated the following decisions in response to the Gomco Clamp:

> 1) It is prohibited to use the "clamp" in any way in the circumcision of Jewish children.
>
> 2) This *issur* applies equally to the *Mohel*, the parents of the circumcised child, and to the hospitals or other places where the circumcision takes place.
>
> 3) Whoever will use the clamp in the circumcision of Jewish children after the publication of this *issur* will be considered a violator and desecrator of the

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46. *Iggerot Moshe, Yoreh Deah*, Vol. 3, No. 99. The application of "*Chadash assur min ha'Torah*" to methods for *brit milah* is a curious one for, as mentioned earlier, innovations have been introduced over the centuries, including the plain shield which is commonplace today. Yet, some of therse innovations have met with resistance along the way to acceptance (See note 7).

Abrahamic Covenant.

4) Whoever will use the clamp on the Sabbath henceforth will be considered as a desecrator of the Holy Sabbath in public.

While this proclamation was formulated in response to the Gomco and not to the as-yet-not-created Mogen, there is debate as to whether it should be extended to the Mogen clamp as well.

On this, there appear to be three attitudes:

1. The great majority of written opinions hold that the Mogen is to be included, for all intents and purposes, in the ban of the Gomco.

In 1971, the *Vaadah Hamifakachat al Inyanai Milah* in Israel issued a decisive "*Moda'ah* and Warning" that was published in newspapers and distributed to *mohelim*. It stated:

> "It is already some time since the *milah* apparatus known as the "Mogen Clamp" (Bronstein) has arrived from the United States and which all the *Rabanim* and *Battai Din* in the Land and abroad expressed their opinions that it is prohibited to use, and that the mitzvah of *milah* is not fulfilled through it at all![47] Since this prohibition is not publicized enough, and the nature and shape of the apparatus is not known and recognized by many to

47. When it was suggested to Rabbi Feinstein that a *brit* done without one of its essential elements (e.g. *hatafat dom*) is as worthless as using a lulav without one of its species, he entertained the possibility that the child is nevertheless considered *mal* (without the need for a subsequent *hatafah*), though he left it *b'tzarich iyun*. (*Iggerot Moshe, Yoreh Deah*, I:223).

be able to pay attention and be scrupulous about this, we found it right to publicize the *psakim* of the *Battai din* in our Holy Land... [Note: Pictures of the plain Mogen "an accepted apparatus from generation to generation" and the Mogen Clamp, "prohibited by all the *Gedolai Yisroel* – you can recognize it by the handle" appear on the poster] ...And from here there is warning to each father, before he approaches to fulfill the mitzvah of *milah* on his son, that he demand that the *mohel* show him the apparatus that he plans to use, because there are *mohelim* who do not listen to the decisions of the *rabanim*; therefore, it is also good to watch during the *brit* [itself]...

The aforementioned poster quotes an excerpt from *Tzitz Eliezer* (8:28) as well as the following two decisions:

a. The *Beit Din Tzedek* of Jerusalem:

Regarding the matter of which we have heard, that recently there has been a proliferation in our holy land of the use of the destructive apparatus known as the "Mogen" for the mitzvah of *milah* by light-headed *mohelim*... the *Gedolai Yisroel* have already screamed and protested against this... We submit our opinion that those who use the "Mogen" for the mitzvah of *milah*, not only do they not fulfill the mitzvah – not *chituch*, not *hatafat dom brit*, and not *metzitzah*, and are considered as though they are cutting dead skin – but they are desecrating Shabbat if they use it then, and also endanger the child for a variety of reasons... it is prohibited to take a *mohel* who uses the "Mogen," and anyone who sees a *mohel* use this destructive apparatus is required to pass his name onto the [members of the] *Beit Din* signed below...

b. The Chief Rabbinate of Israel:

It has come to our attention by many people, that in recent times several *mohelim* have begun to use new apparatuses for *milah*, [including the] "Gomco Clamp" and "Mogen Clamp," brought here from the United States, as if there were a *hechsher* from *rabanim* to use them. We have hereby come to inform regarding this matter that these apparatuses, and any like them, are absolutely prohibited to use... anyone who uses them for *milah* does not fulfill the mitzvah *k'halacha*.

Rabbi Yitzchak Yaakov Weiss, a signatory on this letter, echoes these sentiments in his response to clamps in *Sefer Minchat Yitzchak* (quoted earlier).

Along these same lines, Rabbi Moshe Sternbuch, in *Dat V'Halacha*, concludes his essay on clamps with the following remarks:

> [With] the apparatus known as the Mogen Clamp there is no *milah k'halacha* because the flesh is already killed [beforehand], there is no *priah k'halacha* because it is not with the nail and because it is performed as one with the *chituch*, and there is no *metzitzah* since there is no blood from the *brit*; but what we do have here [with the Mogen] is a *mohel* who desecrates Shabbat, a great danger that the child will become physically blemished, a rebellion against *minhag Yisrael* in the manner by which circumcisions have been performed throughout the generations...

Rabbi Moshe Feinstein, too, in each of his letters regarding clamps, reiterates his disapproval of them.[48]

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48. See *Iggerot Moseh, Yoreh Deah*, II:119, and III:99.

2. On the other hand, Rabbi Eliezer Silver, in an opinion seconded by Rabbi Yitzchak Isaac HaLevy Herzog, seems[49] to have a favorable view of the Mogen and refuses to compare it to the Gomco. They write:

a. R. Eliezer Silver:

> "...the protector known as the "Mogen" that [Rabbi Bronstein] invented is a tong-like device that [enables the mohel to] take hold of the foreskin, and the mohel cuts the foreskin with his double-edged knife and does *priah* on the mucosal membrane and draws blood and performs *metzitzah*, in the manner that *mohelim* have done over the generations, and so have expert *mohelim* testified. Therefore, I have found it [appropriate] to state the absolute truth that there is nothing in this protector known as the "Mogen" that can be associated with that known as the "Gomco" or by any other name that has been prohibited by us at the assembly of the Agudat HaRabanim, and by me in the role of an individual *rav*; it is permitted to use this protector in a manner that it be used with a knife, with *chituch*, *priah*, and *hatafat dom brit* with *metzitzah*...And my hope is that this protector will dismiss all other apparatuses that are invalid and that have been prohibited by me and my colleagues, the *rabanim ha'muvhakim*, and to enable

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49. The reader should be aware that there is considerable discussion as to whether Rabbi Silver's letter describes the conventional Mogen Clamp and its method of application as we know it today. The description reads:
...כמלקחיים הנהו ליקח עור המילה, והמוהל חותך בסכין פיפיות בידו עור המילה ופורע עור הפריעה, ומטיף דם ומוצץ, ככל אשר יעשו כל המוהלים מדור דור...

mohelim to use only kosher apparatuses like this one, in accordance with our Torah...

b. Rabbi Herzog:

"...[In regard to] the apparatus for *milah* known as "Mogen," of Rabbi Tzvi Bronstein, according to the way it had been explained to me by my friend, Rabbi Grozovsky, and as had already been testified upon by the great and famous Gaon, Rabbi Eliezer Silver, there is no question or concern at all as to the *kashrut* of a *milah* [done with it.]"[50]

3. A third perspective suggests that, while one should avoid the use of all clamps, there may be circumstances in which the "Mogen" may be used. Consider:

a. R. Shlomo Zalman Auerbach:[51]

An American physician/*mohel* made the following inquiry of Rav Shlomo Zalman Auerbach *zt"l* in my presence: There are parents who are prepared to have their sons circumcised in a proper halachic manner with the condition that the Mogen Clamp be used; if not, they will either not have a *brit* at all or they will call someone from the Reform movement to do it at a convenient time – at night or before the eighth day, or on Shabbat when it is not the eighth day. His question was whether it is permitted for him to use the Mogen Clamp, as per the parents' request, but not to close it too tightly to ensure that at least a little bleeding will occur, or whether it is

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50. See *Tzitz Eliezer,* VIII:29, who contends that Rabbi Herzog was misinformed about the clamp and later regretted the above decision.

51. Cited in *Nishmat Avraham,* Vol. V, pp. 86-87.

> prohibited because of *Marit Ayin* [i.e. causing a false impression] [or for other reasons mentioned in the *Nishmat Avraham*]. And Rabbi Shlomo Zalman Auerbach *zt"l* answered that it is permitted on condition that there be blood from the *brit*.[52]

b. R. Yosef Eliyahu Henkin:[53]

Rabbi Henkin stipulates that if the father refuses to allow his son to be circumcised unless the *mohel* uses the Gomco, he may do so, provided that he does the *chituch* immediately – without waiting for the skin to die; otherwise, he writes, performing a *brit* on a dead foreskin does not fulfill the mitzvah of *milah* at all.

However, with the advent of the Mogen clamp and the advantages that it has over the Gomco, one wonders whether Rabbi Henkin would have adjusted his decision to accommodate the Mogen and not the Gomco.

In Conclusion

With the exception of Rabbi Eliezer Silver's defense of the Mogen Clamp,[54] the prevailing attitude of the *poskim* is that, whenever possible, and certainly within the circles of Torah-observant Jews, clamps should not be viewed as a method that conforms to the standards of a *brit kodesh*. Nevertheless, under certain extenuating circumstances, a broader base of *poskim* permit the use of the Mogen Clamp, but only in such a way that some bleeding is guaranteed.

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52. Rabbi Waldenberg, to the same question, answered: "The *mohel* must refuse to use the Mogen Clamp and let the outcomes be as they may, etc."(*Nishmat Avraham*, ibid).

53. *Aidut L'Yisroel* (*The Writings of Rav Henkin*), Vol. I, p. 144.

54. See Note 49.

And, since the vast majority of *poskim* views clamps as far from ideal, evidenced by the strong language employed in their rejection of them, the choice to use them should be made responsibly. From speaking to *mohelim* who include the Mogen Clamp among their instruments, I have found that many continue to consult with their personal *rabbanim* regarding this matter.

One more point is in order. While we have presented possible defenses to many of the criticisms raised against clamps, particularly for the Mogen Clamp, let us not forget that we are dealing with a ritual whose importance cannot be overestimated. Tampering with its methods, therefore, is no small matter. And, it is especially important, during a time when the aura of *brit milah* is threatened by the phenomenon of routine circumcision, that we remain focused on the sanctity of the procedure.[55] Consequently, as innovations continue to be introduced, we need to be guided by competent rabbinic authorities. It is only in this spirit that we can look to the fulfillment of *Yechezkel's* prophecy: "Through the blood of your covenant I will have released your prisoners from the pit in which there is no water" – speedily and in our day!

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55. In fact, the *Mishpetai Uziel* (*Yoreh Deah*, 46), also found at the end of the *Sefer Brit Olam* on *Milah* and cited in the *Tzitz Eliezer*, has a unique definition of a *maifer brito shel Avraham Avinu*, as he applies it to the method by which one performs the circumcision. He asserts: "Any act of performing a *milah* that is done with the intention that there not be any *dom brit* is merely a (secular) act of cutting the foreskin that the Gentiles do as an inheritance of their progenitors or for hygienic reasons, and has no relation to the mitzvah of *milah* that was given to Israel; anyone who does it [in such a way] is not fulfilling the *brit* which the Torah commands, and is rejecting the *brit* of Avraham Avinu."

Liability For Motor Vehicle Damages In Halacha

Rabbi Tzvi Sendler

Much attention has been paid of late within the Torah community to the "last" section of *Shulchan Aruch* – that of *Choshen Mishpat*, business and monetary law. We have to be as careful to be guided by the dictates of halacha within our business dealings as we are with kashrut in our kitchen and prohibited labors on Shabbat. Our lack of awareness, though, as to where *Choshen Mishpat* issues arise, and our lack of familiarity with this area of halacha, often make this a difficult task. Also, the application of Torah law to specific legal issues often involves the interplay of halacha and secular law, with secular law operating both as a framework in which such issues may arise, and also at times as a determining factor in what the halacha itself may be.

In order to discover and clarify some of these pertinent issues, we will examine the relevant halachic guidelines in one particular area of civil law – that of financial liability and right-of-collection in an automobile collision. Our attention will focus specifically on property damages, although much of the discussion applies to medical claims as well. By examining the issues involved in this specific case, we may gain a more general understanding of how halacha operates within the legal arena of the modern world.

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Torah Law – *Mishpat*

The purpose of a system of civil law is to allow for the resolution (or the avoidance) of disputes between individuals. Secular law operates based on society's sense of justice and "fairness", along with that which allows for a smooth functioning of that society. We can usually understand (whether we agree with it or not) the source of the law, both in a general sense and in its specific application.

The Torah's system of justice, *mishpetei haTorah*, does not necessarily correspond to secular law in this regard. Since *mishpetei haTorah* derive from a source beyond human intellect, it is not surprising to find that there are *Chukim* within the Torah's legal code – instances where the parameters of Torah law are far from our intuitive sense of right and wrong or fairness. And even *mishpatim*, those mitzvot which make apparent sense to us and whose reasons are self-evident (e.g. prohibition of theft), must ultimately be obeyed because we are commanded to do so by *Hashem*, and not simply because our logic dictates to us that it is proper to do so.[1]

With this foundation, let us examine some significant aspects of the halachic guidelines in determining liability in a standard automobile collision case.

i) Car – Man or Machine?

Although it might seem intuitively obvious that the

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1. Nevertheless, the mitzvot are ultimately given to us by *Hashem* for our own benefit. As such, it is not surprising to find that much of Western jurisprudence, in its attempt to find the most equitable system of justice and fairness, finds its source in the legal code of the Torah.

damage caused by a vehicle being driven by an individual should be judged no differently than damage caused directly by the individual himself, the halacha differentiates in a number of instances (e.g. *shechita*, murder) between a primary and a secondary outcome of the action of an individual. Many *Rishonim* apply this differentiation also in the realm of liability for causation of damages.[2]

Thus, when a person throws an object which strikes a second person, he is liable for damages caused by that object; but if the first object strikes a second, and that second object goes on to do damage, the halacha may in fact *exclude* the thrower from liability. The motion of an automobile is the result of a chain of actions, with the depression of the accelerator by the driver being just the catalyst which sets this chain in motion. Furthermore, if the gas pedal of the automobile is being continuously depressed by the driver, any fuel which goes into the engine after the initial first surge might be equivalent (depending on the exact mechanism which allows the fuel to enter) to the secondary surge of water released by the removal of a dam – a force also characterized as secondary in nature (and perhaps non-culpable) according to halacha.[3] Might these halachic exceptions cause us to say that the motion of a car is so removed from the direct action of the driver as to render any damage resulting from the movement of

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2. Ritva, *Makkot* 8a. See, however, Rosh, *Baba Kamma* 19a, who seems to hold that *koach kocho* is liable in cases of *nezikin*.

3. *Sanhedrin* 77b. Tosafot, *B.K.* 4b . These two examples of secondary actions are not identical in halacha. The first is referred to as *koach kocho*, while the latter is termed *koach sheni*. See *Pitchei Choshen* (Blau), *Hilchot Nezikin* 3:1, for a thorough discussion as to the respective parameters and differences of these two.

that car exempt from strict liability according to halacha?[4]

The *Teshuvot HaRosh* (101:5) records a question regarding liability for damage caused by a horse's trampling on property while being ridden by its owner. The questioner wanted to exempt the owner from damages since the damage occured in the *reshut harabbim* (public domain), where the owner is not liable for damages caused by his property. The Rosh, however, states conclusively that so long as the horse is being ridden, the animal is considered as an extension of its rider, with the rider being liable for all resultant damages. Although the basis for this reasoning is by no means clear,[5] the decision is nevertheless accepted without qualification by *Shulchan Aruch*.[6] An automobile,

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4. One might argue that an automobile, being a machine whose very nature is meant to move as a result of a chain of mechanical actions, should not be viewed in terms of the separate mechanisms which lead to that motion, but rather as a single entity whose motion is directly caused by its driver. According to Rambam, who understands the exemption of *koach kocho* (in accidental murder) as a result of its similarity to *ones*, this might well be the case. However, according to other *Rishonim* who understand simply that *koach kocho* is not considered to be *ma'aseh adam* (human action), there apparently would exist no differentiation in this regard. Much of the debate concerning whether or not machine-made matzot may be considered *lishmoh* revolves around this issue. See *Teshuvot Tevuot Shor* 3:4, *Minchat Shlomo* 10, *Tzitz Eliezer* 1:20 for similar cases.

5. See *Chazon Ish* (*B.K.* 4:8) who questions why the proximity of the owner to his animal should make the owner any more liable than if he merely directs the animal to damage (a case which is not considered to be a damage caused directly by man, but only as a consequence of the halachically less stringent liability of an owner for damage caused by his property – see *B.K.* 3a). Perhaps being guided by the physical direction of a human is the operative factor in determining status as damager according to the Rosh.

6. *Choshen Mishpat* 378:9.

while being driven by an individual, would seem to be directly analagous to an animal being directed by its rider. The driver of an automobile, therefore, will in fact be held liable in halacha for damages caused directly by the action of his vehicle.

ii) Determination of Liability

Although according to halacha there are a number of primary factors in the determination of liability which correspond to those of secular law, such as negligence of the *mazik* (damager) and contributory negligence of the *nizak* (damaged party), there are still significant differences between the two systems of law. In a clearcut case where the *mazik,* while operating his vehicle in an improper fashion, causes damage to another party who was in no way a contributing factor to the collision, then the *mazik* is generally held liable for resultant damages.

Even this seemingly straightforward rule, though, has its limitations and exceptions in halacha. For instance, even though running in the *reshut harabbim* (the public domain – the modern equivalent of exceeding the speed limit) is considered to be improper action, nevertheless the halacha recognizes the permissibility of this action in the case of one rushing on *Erev* Shabbat in order to complete his Shabbat preparations (an excuse unlikely to be regarded as valid in the eyes of secular law).[7]

Another example of the clearly different standards of halacha would be in a case where one party brings his car to a complete stop without cause (or even without

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7. *C.M.* 378:8. See *Pitchei Teshuva* (378:4) for a discussion as to whether this exemption applies to haste in performance of any mitzvah.

indication that he has stopped – i.e. brake lights) in the middle of a busy highway. Secular law (based on our intuitive sensibility) would hold this first party responsible for damage incurred by a second car which, while being driven in a completely proper manner, collides with the first. The halacha, however, although it would regard the first vehicle as a *damager* since it is an obstacle in the public domain" (*"bor b'reshut harabbim"*), excludes it from liability for damage to a utensil (e.g. a car) although liable for damage to people or animals.[8] This is an example of how the Torah's *chukim* operate at times not in accordance with our intuitive notions of fairness.

If both *mazik* and *nizak* are operating in a similar manner, either both acting properly or both improperly, then there exists a significant difference of opinion among the *Rishonim* as to assignment of liability. Rashi seems to differentiate between cases of "active" damage, where the damage is caused directly by the motion of the *mazik* (or in the case under discussion, his vehicle) upon the *nizak* and for which the *mazik* would be liable for damages, and that of "passive" damage, where the *nizak's* own motion into the *mazik* (even if the *mazik* is negligent in some regard) is the cause of the resultant damage to the *nizak*–for which no liability is assigned to the *mazik*.[9]

Within this view there is an opinion that even in the case of "active" damage, if the motion of the *nizak* is at all contributory to the resultant damage, then the *mazik* is

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8. Based on the logic of "*Chamor velo kelim.*" See *B.K.* 53b. It is possible that if the second party suffers damage immediately after the first party stops, it is considered as if the first party himself is the damager, rather than his property. See *B.K.* 31a ; *Rosh, Nemukei Yosef.*

9. See Rashi *B.K.* 48b.

also exempt from liability.[10] The Rambam does not differentiate between active or passive damage, but assigns liability to the damager (*mazik)* in this case only if the *mazik* acted intentionally to damage[11] (an uncommon occurrence in most motor vehicle accidents.) Neither view accepts the notion of partial liability – the *mazik* is either completely liable or completely exempt from responsibility (as opposed to secular law in many states). *Shulchan Aruch* seems to accept the opinion of the Rambam primarily, but also brings the opinion of Rashi as a secondary view,[12] a circumstance which may lead to amibiguity insofar as rendering a decision in a specific case.[13]

iii) Situations of Doubt; Unclear Circumstances

In many accidents the circumstances of the event are often difficult or nearly impossible to determine with any great degree of accuracy. Whether because of deliberate concealment of facts, or as a result of differing impressions of an event by the parties involved, there may remain a basic lack of clarity to *Beth Din*, or any similar halachic decisor rendering an opinion. In addition, even after the circumstances have been satisfactorily resolved, there may still remain questions as to the final halachic determination of responsibility because of differing opinions among established halachic authorities in a given case.

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10. Opinion of Ramah, brought by *Gra* 378:21.

11. Rambam *Hilchot Nizkei Mamon* 7:7.

12. See *C.M.* 378:6,7 and commentaries.

13. In general, in any question of financial liability in halacha where there is a recognized dispute among the authorities as to whether or not compensation is due, the defending party can claim the opinion of a minority view on his behalf. See *Klalei T'fisa, klal* 20.

In secular law, many legal systems accept the indication of a "preponderance of evidence" in civil matters in order to uphold a party's monetary claim. Halacha differs greatly from secular law in this regard. In any situation of doubt, whether it be factual or halachic in nature, the general principle which guides halacha is that of *hamotzi m'chavero alav ha-ra'aya* – the claimant must bring absolute proof of his claim in order to collect. [14] For this reason, even those presumptive rules which the halacha relies upon for resolving questionable situations of *issur* (prohibitive law), such as substantial indication of circumstance, are not operative in deciding monetary issues. Only testimony of "kosher" witnesses, or agreement to the facts by the defending party, would be sufficient to justify a requirement of payment according to strict halacha.[15] This halachic principle will in general give much support to the position of the *mazik*, and effectively puts a substantial burden on the *nizak* to justify any claim.

iv) Compensation

Once it has been determined that a *mazik* is in fact obligated to compensate the *nizak* for damages in a particular situation, the amount of compensation must next be examined. Secular law generally requires payment of repair cost (up to the value of the vehicle) as compensation for damages to an automobile. The corresponding determination of the halachically-mandated degree of compensation, however, is by no means clear.

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14. *B.K.* 46b

15. *C.M.* 408:1. See however *C.M.* 30:14 and *Aruch HaShulchan* 30:17, in regard to when *Beth Din* may rely on *umd'na* (strong presumptive evidence) to decide a case even in the absence of technically strict evidence.

Shach (387:1) writes that in a case of damage where the damaged item is repairable, it is incumbent upon the *mazik* to do so. Seemingly, this would correspond to the assignment of repair costs of secular law. However, a simple reading of the *Tosefta*[16] seems to differ with the *Shach*, and indicates that loss of value, and not repair cost, is the prime determinant of required compensation.[17] There might be significant difference between these two amounts.

The Maharshal goes even further in limiting the compensatory liability of the *mazik*.[18] The Talmud states that one who stamps out the minted impression of a metal coin is exempt from paying damages to the owner of the coin since the damage which he caused is only indirect (*"gramma"*) in nature – i.e. the physical entity of the coin is still completely extant, with the owner simply being required to pay a minter to bring his coin back to its former condition. The Maharshal understands this damage as the equivalent of the medical expenses which are obligatory on the *mazik* if he were to cause injury to a person, but for which we find no corresponding obligation in halacha in regard to the restoration of damaged property. The Maharshal therefore seemingly limits liability to loss of value due to unrepairable damage. Any damage, though, which may be corrected through repair costs alone (perhaps such as pulling out a dent) would be exempt from (at least strict) liability according to halacha.[19]

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16. *B.K.* Chapter 3. Brought by *Gra* 387:1.

17. See Tosafot *B.K.* 33a *"l'potro"* who also seems to assume this position. *Terumot Ha'Kri* (387:1) also differs sharply with the *Shach* on this point.

18. *B.K.* 98a. Quoted by *Shach* (386:7).

19. This understanding of the Maharshal's position is in line with that of the *Machane Ephraim* (*Nizkei Mamon* 4). The *Ketzot*

v) Obligation in the "Eyes of Heaven"

In the monetary realm *mishpetei haTorah* are intended to determine the absolute standard by which an individual is bound to conduct himself, and the parameters by which *Beth Din* determines and enforces strict judgment. Nevertheless, just as within *issur v'heter* (religious law) there are gradations in terms of what is expected of an individual beyond the strict letter of the law, so too in monetary matters. The obligation that one individual may have to another, though perhaps not enforceable in *Beth Din*, may nonetheless truly be an obligation "in the eyes of heaven". The existence of this *chiyuv b'yedei shamayim* (obligation in the eyes of heaven) may serve, where it in fact exists, to effectively limit the often exceptional aspects of halacha in civil matters.[20]

The Talmud cites a number of instances where despite being technically exempt from financial responsibility for a particular action, there nonetheless exists a *chiyuv b'yedei shemayim* to pay. For instance, if one opens a gate and allows someone's animal to escape, this is considered by halacha to be a *gramma b'nezikin* (indirect damage). Although it is exempt from strict liability, the Talmud states

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Hachoshen (363:4) seems to follow a similar line of thought. Perhaps if there is any degree of direct damage whatsoever, the Maharshal would agree with the position of Tosafot (*B.K.* 98a) who state that we require compensation even for the otherwise exempt non-direct damages to an object where there is also any amount of liability for direct damage in a given case. See also *Chazon Ish* (*B.K.* 6:3).

20. How strong an obligation is a *chiyuv b'yedei shamayim*? Meiri (*B.K.* 55b) states that one who does not satisfy such an obligation is disqualified from serving as a kosher witness. But see *Yam Shel Shlomo* (*B.K.* 6:6) who states that the *Beth Din* should merely inform the liable party that such an obligation exists, but not coerce him to pay in any way.

that there remains a *chiyuv b'yedei shamayim* to compensate the owner.[21]

There is disagreement among the authorities as to when this more personal obligation exists. R. Boruch Ber Lebowitz assumes that in any instance where common sense or intuition would dictate financial responsibility, even though the Torah may exempt one from liability, there is still a *chiyuv b'yedei shamayim* to pay. Thus, even though the owner of a "pit in the public domain" (*bor b'reshut harabbim)* is not liable for damage to *kelim* (utensils, see above), he is still obligated *b'yedei shemayim* to provide compensation.[22] Chazon Ish differentiates between cases where no obligation is mentioned by the Torah (such as *gramma*), where a *chiyuv b'yedei shamayim* may exist, and cases (such as *bor b'reshut harabbim*) where the Torah grants a specific exemption for damage and here no obligation remains.[23] The Chazon Ish states further that a *chiyuv b'yedei shamayim* exists only when the *mazik* intentionally did damage (even if he cannot be held accountable in *Beth Din*), but if he accidentally, or even negligently, but without intent, commits such an act, he is also completely released from any degree of liability. [24,25]

This brief overview provides some insight into the

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21. *B.K.* 55b.

22. *Birchat Shmuel* (*B.K.* 2).

23. *Chazon Ish* (*B.K.* 2:7).

24. Ibid, (*B.K.* 5:4). See though *Maharit* (1:95) who maintains that a *chiyuv b'yedei shamayim* exists at least in cases of negligent damage. Tosafot (*B.K.* 56a) also apparently differentiate in this manner.

25. Even further beyond the strict letter of the law lies the notion of *lifnim m'shurat hadin.* This is not really an obligatory responsibility in any way, but rather a meritorious action which is appropriate for an individual who is at such a level. See *B.M.* 83a.

unique nature and often difficult application of *mishpetei haTorah* in the area of liability for damages.

Dina D'malchuta

The well-known talmudic edict, *dina d'malchuta dina* – the rule of the land is the (halachic) law – often has significant impact on the halacha where civil or monetary issues are concerned. This is not to say that *dina d'malchuta* is somehow above Torah law. Rather, Torah law recognizes and allows for a formal application of civil law to operate in certain instances under the prescribed direction of halacha itself. The extent to which *dina d'malchuta* applies in a civil matter or dispute is subject to a significant difference of opinion.[26]

Ramo applies *dina d'malchuta* to a much broader extent than does *Shach.*[27] According to Ramo every area of law must be examined to see if it falls under the category of *takanat b'nei hamedina* – a particular law which is of benefit to the citizenry as a whole and therefore under the rubric of *dina d'malchuta.*

Which legal issues fall under this definition of *dina d'malchuta* is a very relevant topic in today's world, and there is much discussion among authorities on many of these issues. For example, the declaration of personal bankruptcy as a permanent exemption from debts is an idea which is totally foreign to halacha – an individual is

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26. *Yoreh Deah* 165:5. See article by Rabbi Herschel Schachter in *Journal of Halacha and Contemporary Society* 1:1 for a greater discussion of the extent and parameters of *dina d'malchuta.*

27. See *Shach* (*op. cit.*) who takes issue with Ramo as to the reason why *dina d'malchuta* applies to the case of collateral. See also *Ketzot Hachoshen* (259:3).

considered always to be responsible for payment of debts, even if temporarily unable to pay. If a Jew files for bankruptcy protection under civil code, what of his Jewish creditors?[28] Most contemporary halachic authorities rule that debts between private individuals are strictly a personal matter between the lender and the borrower, and thus any exemption granted by secular law has no halachic standing.[29] R. Moshe Feinstein, however, understands that the underlying motive for the laws of a country to afford personal bankruptcy protection is to give individuals the confidence and incentive to take risks of entering business without fear that a turn of fortune might leave them permanently and irrevocably in debt. As he sees it, the true purpose of the bankruptcy laws are to encourage and stimulate a country's economy by promoting personal risk in business, and therefore these laws may well be considered *takanat b'nei hamedina* to which *dina d'malchuta* would apply.[30]

With this example in mind, we may examine whether or not the determination of liability for damages might also fall under this category. It seems quite reasonable to assume that insofar as traffic regulations themselves are concerned, these would surely be considered *takanat b'nei hamedina* and thus obligatory upon all drivers (and not abiding by them would be considered not only an infraction of *dina d'malchuta* but also negligent action according to halacha). The secular laws concerning liability and degree of compensation for an accident itself, however, would seem

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28. In any matter involving non-Jews, a Jew may surely rely on *dina d'malchuta*. See *Journal of Halacha and Contemporary Society* Vol. 24 for a more complete discussion of bankruptcy in halacha.

29. See for example *Minchat Yitzhak* (3:134).

30. *Iggerot Moshe, C.M.* 2:62.

to be more a matter between individuals rather that of a societal need. Obviously, a society needs a set of regulations governing such matters, but there is no reason why society will find it detrimental to have individuals operating according to their own, mutually agreed upon, system of law (i.e.Torah law) to resolve their individual disputes. Thus, since there is no specific or compelling need for secular law in this matter to be imposed across the board, it should not be considered *takanat b'nei hamedina* to which *dina d'malchuta* would apply. R. Moshe Feinstein seems to agree that *dina d'malchuta* would not apply to *nezikin* (damage) issues arising between individual Jews.[31]

Minhag Hamedina

There are instances where the decision of halacha is going to correspond to that of secular law, not as a result of *dina d'malchuta*, but rather because of the general rule *hakol k'minhag hamedina* – that the custom of the land determines the general intention of an individual. In any matter where the nature of an obligation could potentially be determined by contractual agreement between two parties, if the customary guidelines of such an agreement are well-known and familiar to those who deal in such matters, then such guidelines may be considered to be in effect as an unspoken agreement, even if not explicitly stated. The *minhag* (common custom) thus in effect automatically sets the ground rules in an issue of a monetary nature. And just as a specified agreement between individuals can set conditions which are different than those of the standard conditions specified by halacha (because halacha permits people to agree to any mutually

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31. Ibid.

acceptable financial condition), so too can the local custom establish guidelines recognized by halacha.

For instance, the reduction of debts through declaration of bankruptcy is not, according to some authorities, a case to which *dina d'malchuta* would be applicable. Still, R. Akiva Eiger points out that if the custom of those in business is in fact to settle with debtors for partial compensation in instances of financial difficulty, even though there is no basis for this exception in halacha, then *Beth Din* should force individual creditors to agree to such a settlement because all those in business operate with this arrangement in mind.[32]

Might we say with regard to liability for damages that even though not strictly dictated by *dina d'malchuta*, still the secular law will determine the halacha, because all who drive accept secular law in regard to settlement of damages, and accept upon themselves responsibility according to the strictures of this system of law?[33]

Ramo writes that we apply the rule of following *minhag hamedina* " if it is commonly found and occurs on a frequent basis...".[34]

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32. R. Akiva Eiger, *Glosses* on *Shulchan Aruch* 12:13. Though this may be true in a business setting, it would seem that on a personal basis individuals do not necessarily extend loans with this possibility in mind, and a borrower could not claim the secular exemption of bankruptcy to exempt him from personal obligations.

33. Even though this situation is not exactly analagous to a transaction or agreement contracted between two individuals, which might be more clearly established according to *minhag hamakom*, nevertheless we do find application of *minhag* to fix responsibility in such a more general setting. See for instance, *Shach* 356:10.

34. *C.M.* 331:1

It would seem difficult to suggest that personal involvement with matters as judged by secular law is so familiar to individuals that we could posit voluntary acceptance of such law by all drivers upon themselves.[35]

In addition, even if Jews commonly decide liability issues between themselves according to the guidelines of secular law, this manner of conduct might still not be accepted as halachically valid to establish it as *minhag hamakom*. Rosh rules that a custom that has not been formally accepted or established by *Beth Din* does not have the strength to override halacha in matters of financial obligation.[36] Although it may be common for Jews to act between themselves according to the guidelines of secular law, it is reasonable to assume that this is not based on a clear, well-established *minhag*, but rather on a lack of awareness (or difficulty in application) of the Torah halacha in this regard.

Thus, both *dina d'malchuta* and *minhag hamakom* do not seem to be operable halachic mechanisms to allow the application of secular law to issues of liability for damages. *Mishpetei haTorah* alone should be employed to ascertain financial responsibility between Jew and fellow Jew in relation to such claims.

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35. See *Teshuvot Chacham Tzvi* [61] who assumes that in order for a particular custom to be established as *minhag hamakom*, it must occur on basically a daily basis in the lives of people.

36. *Teshuvot HaRosh* 55:10. The Rosh certainly accepts the notion of *minhag hamakom* establishing the guidelines of interpersonal financial matters, but evidently differentiates between those customs which developed through tacit agreement between individuals, and custom which developed through the improper conformance to nonhalachic standards of law.

Dealing with the Secular Judicial System

It is the view of Ramo that in those instances where *dina d'malchuta* does not apply (e.g. the laws of inheritance), there would be a severe prohibition in choosing to pass judgment according to those laws,[37] for accepting secular law grants importance to a system of law other than the Torah, and in effect shows a lack of regard for Torah law itself. This prohibition applies even if *Beth Din* itself would choose to utilize secular law as a basis for their judgment.[38]

There is a specific prohibition for two Jews to bring any dispute to secular courts, even if the decision reached by that court would coincide with that of halacha.[39] Such an action is deemed to be a *chilul hashem* – a desecration of G-d's name as it denigrates the status of *Beth Din* and the Torah system of justice in the eyes of others.

Insurance

Nowadays, virtually every instance of automobile damage involves a party beyond the classic *mazik/nizak* paradigm of the Talmud: namely, third-party insurance, whether from the *mazik*'s side or on behalf of the *nizak*. The existence of insurance introduces a number of interesting halachic twists, and some important provisos, insofar as the determination of personal liability for damages is concerned.

i) Where the insurance of the *nizak* provides compensation for damage suffered, does this exempt the

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37. *C.M.* 369:11.

38. See *Be'er Heteiv C.M.* 369:14.

39. *Gittin* 88b.

mazik from his own halachic obligation for payment? If the insurance of the *nizak* itself claims reimbursement from the *mazik* (or the *mazik*'s insurance) for expenses they incur, certainly the *nizak* cannot also claim from the *mazik*.[40] However, in a case where the *nizak*'s insurance is not going to make a claim on the *mazik* after compensating the *nizak* (e.g. where according to secular law the *mazik* is exempt from damages), but where halachically the *mazik* is still liable for such damages,[41] the remaining obligation of the *mazik* towards the *nizak* must be examined.

The *Ohr Sameach* discusses a case where a house, which has been insured by the owner against damage, was leased to a renter who explicity assumed liability for any damages suffered by the property during the term of his rental.[42] The house was destroyed by fire, and the owner received compensation for this damage from his insurance. The *Ohr Sameach* rules that despite having received this compensation, the owner is nevertheless still entitled to collect a second payment for damages from his renter. The fact that the owner chose to purchase insurance for his house is his own private affair, between himself and his insurance. The fact that he may receive double compensation for incurred damages in no way affects the personal responsibility of the renter. Similarly, in our case

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40. Technically speaking, any claim that he may have had on the *mazik* has been transferred to his insurance through their initial compensation of damages

41. For instance, in a rear-end collision, where secular law almost always assumes (for convenience's sake) that the rear driver is at fault, but where this assumption is not necessarily true according to halacha, and the driver of the front vehicle may be in fact halachically liable.

42. *Hilchot Sechirut* 7:1.

of motor vehicle accident, even though the *nizak* may have chosen to purchase insurance to safeguard his own property against loss and will thus receive payment from his insurance for any damage incurred, the *mazik* might still be obligated to pay damages by halacha.

R. Elchonon Wasserman apparently has a different perspective on this situation.[43] The Talmud discusses a case of " Reuven", who consumes an item of food which was stolen by a different individual, Shimon, from the original owner.[44] The Talmud rules that the owner can collect compensation for his loss from either Reuven, for his destruction of his property, or from Shimon, for the theft itself. From the fact that the Talmud does not allow the owner to collect from both Reuven and Shimon independently, even though their respective obligations stem from different actions, R. Wasserman deduces that an individual cannot receive double compensation for a single loss.[45] *Teshuvot Harei Besomim* shares this view.[46] According to these opinions, the *nizak* would have the option of collecting from his own insurance, or from the *mazik* according to his halachic liability, but not from both.

ii) A situation which is perhaps more commonly found is that in which the *mazik* has liability insurance to cover

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43. *Kovetz Shiurim, Ketubot* 65b.

44. *B.K.* 111b.

45. Although it would appear that one could differentiate between this case, where both obligations stem from the loss of an object (either through theft or through damage), and that of a case as discussed above, where there are two independently contracted financial obligations, nevertheless R. Wasserman seems to apply his analysis in this scenario also.

46. 2:245. The case he discusses is virtually identical to our question of the possibility of collecting twice for a single loss.

damages caused by his vehicle to the property of others. Very often the assessment of damages in a given situation by secular law will be greater than that required by halacha, both because responsibility for damages is much more easily assigned to the *mazik* by secular law than by halacha, and also because the amount of compensation for specific damages is assessed by a different standard (halacha generally requires compensation for loss of value, whereas secular law requires the usually greater cost of repair). The *nizak,* therefore, would usually prefer to claim through the insurance of the *mazik* in order to receive this greater compensation, rather than claim from the *mazik* directly and be able to collect no more than his halachic due.[47] The *mazik*, however, might very well prefer that the matter be handled entirely as a personal matter between himself and the *nizak*, with the damages being assessed (usually in a much lower amount or even being exempt entirely) solely by halacha. The *mazik* could thus avoid the involvement of his insurance, and the insurance premium increase which invariably results from the payment of any claim.

Can the *nizak* insist on his right to receive compensation through the insurance of the *mazik*? Or can the *mazik* maintain that the insurance is only a guarantor for his own personal obligation, but the *nizak* has no right to make a claim on his insurance (causing

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47. Filing a claim with the insurance of the *mazik* would not by itself involve the prohibition of submitting a dispute to secular judgment because the insurance itself is a non-Jewish entity and may thus rightfully be pursued in the secular courts. Furthermore, even if a claim must technically be filed against the *mazik* himself in order to collect from his insurance, if this is the only method by which to obtain that which is properly due to the *nizak,* then it would be permissible. See *Beth Yitzhak, C.M.* 34.

indirect harm to the *mazik* in this way) beyond the amount which he personally is obligated according to the halacha?

In theory, the purpose of automobile liability insurance is perhaps simply to cover the obligation of the *mazik* for damages caused to the *nizak*. Consequently, the option of the *nizak's* making a claim directly from the *mazik's* insurance should be at the discretion of the *mazik*,since the insurance exists basically on his behalf and at his behest. In practice, though, the function of automobile liability insurance operates quite differently. Secular law in every state requires that the owner of a vehicle have such insurance, and the law, in assigning damages, presupposes that the insurance of the *mazik* will be the one paying the bill and not the *mazik* himself. In effect, a separate obligation is created by the secular law between the insurance of the mazik and the *nizak*, with the parameters of the obligation being similarly defined by that law.[48] [49] Although the compensation of the *nizak* on the part of the *mazik*'s insurance will surely exempt the

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48. In those states where the primary claim of the *nizak* is established by law to be on the insurance of the *mazik*, rather than the *mazik* himself, this fact it clearly true. Even in those states where the *nizak* must file a claim against the *mazik* himself (and sometimes cannot even mention the existence of the *mazik's* insurance in any suit), nevertheless it appears that in point of fact the legal system recognizes and expects the obligation to be assumed by the insurance, and assigns liability based on this fact.

49. This analysis is true only for automobile insurance, where the fact that the law requires every driver to be covered by such insurance creates an obligation on the part of the insurance itself to the *nizak*. Other types of insurance, however, (for instance, to protect a homeowner from liability for injury which occurs in his property), is taken out solely at the discretion of the owner, and exists only as a guarantor of the primary liability of the homeowner, a liability which would be established by halacha.

mazik from separate payment for any halachic obligation (unlike the previous case, here the payment of the insurance is defined to be on behalf of the *mazik*), nevertheless, the indebtedness of the insurance would seem to be halachically recognized as distinct from that of the *mazik*.

If this is indeed the case, we may reformulate our question: may one party, the *nizak* in this case, take advantage of a monetary prerogative which is due to him (i.e. collecting the larger liability amount from the insurance of the *mazik*), if the exercise of this right will cause a loss to the *mazik*? The nature of the loss in this instance, the resultant increase in insurance premiums for the *mazik*, would be viewed by halacha as a *gramma b'nezikin* – an indirect causation of damage or loss to another. The general rule stated by the Talmud in relation to *gramma* is that *gramma patur aval assur* – even though one is not financially liable for this type of damage, it is nonetheless forbidden to cause such damage *a priori*.[50] On first glance, submitting a claim to the *mazik's* insurance and thus causing his rates to increase would seem to fit this category and thus be prohibited.

However the nature of the prohibition *gramma benezikin* may depend on the circumstances. The *Beit Yitzhak* was asked about a case of two co-owners of a house which they shared as a residence.[51] One of the partners chose to rent out his half of the dwelling, thereby making the complete dwelling a business enterprise in the eyes of the authorities and, as such, wholly liable in taxes. The remaining occupant complained that his partner had

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50. *Baba Batra* 22b.

51. *Teshuvot Beit Yitzhak, C.M.* 40

unfairly caused him to be responsible for taxes on the half of the dwelling which he was still maintaining as a residence – an instance of *gramma benezikin*. The *Beit Yitzhak* responded that since there was no intent to do damage in this case, and because the first partner was acting solely to profit from an opportunity which was already within his domain, there would be no prohibition of *gramma benizikin*.[52]

The Maharsham[53] takes issue with this decision of the *Beit Yitzhak*, asserting that it is not reasonable that one individual should reap benefit from an action which causes a loss to another, even indirectly.[54] He therefore rules that the renting partner must compensate his former housemate for the increased taxes he must now pay. Although an individual may avail himself of the right to profit from an opportunity , he must make certain that his actions do not even indirectly cause loss to another.[55]

The difference of opinion between these authorities

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52. The *Beit Yitzhak* brings a proof to this assertion from the *Teshuvot haRosh*. The Rosh brings from the Talmud that one can build a store directly adjacent to the existing store of another, even though by doing so one causes an (intangible) loss of value to the first store and its owner. The Rosh concludes from this case that a non-direct damage which is caused simply by an individual's exercising a valid right is entirely within the bounds of halachic propriety.

53. *Teshuvot Maharsham* 2:269.

54. The Maharsham brings this notion from an earlier source, the *Ginat Veradim* 3:42.

55. It would seem that the remaining partner cannot prevent the first partner from going into business, so long as the first partner agrees to pay compensation for losses incurred by his action.

may be extrapolated to our issue.[56] It appears that the *Beit Yitzhak* would allow a *nizak* to claim his rightful due from the insurance of the *mazik*, even though this action might cause an indirect loss to the *mazi*k. But the Maharsham would not allow it unless the *nizak* agrees to compensate the *mazik* for the resultant increase in insurance premiums. Contemporary halachic opinion does not rule conclusively as to which opinion should be followed.[57] [58]

This brief overview of the application of *mishpetei haTorah* to determination of liability for motor vehicle accident damages provides a glimpse into the complexity of this area of halacha. Many of the issues presented herein would be equally pertinent to other questions arising in the monetary/civil realm of everyday Jewish life. The analysis of these issues is surely an endeavor which merits significant attention from the Torah world.

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56. See Ramo, *C.M.* 66:23, 388:5 for similar examples of these conflicting viewpoints.

57. It is unclear whether the *nizak* could claim *Kim Li* (i.e. assert his right to claim in accordance with the opinion in his favor) and make a claim on the *mazik*'s insurance without intent to compensate him in this way, or whether this would be an issue of *safek issur* (the *issur* of causing damage to another) which would be dealt with more stringently. See *Urim V'Tumim, Kuntres Tuk'vo Cohen* 127.

58. See *Teshuvot V'hanhagot* (R. Moshe Sternbuch) 3:444; *Meishev B'halacha* (Machon L'Horaah) 6:88; *Minchat Yitzhak* 3:126.

Electric Shavers

David H. Schwartz

"Shaves as close as a blade or your money back."[1] In an increasingly competitive and lucrative market,[2] electric shavers over the last few decades have become technologically sophisticated to the point that their advertisements actually make such promises.

Given that the Torah prohibits shaving with a razor blade, however, the permissibility of using electric shavers depends upon their halachic dissimilarity to the very razors whose effects they are designed to duplicate. Which – and even whether any – electric shavers are indeed sufficiently distinct from razors is the subject of much dispute. This article will discuss the prohibition of shaving with a razor, "*hashchatat pe'ot hazakan*," and examine the criteria that determine whether shaving with certain electric shavers may also constitute a violation.

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1. Slogan appearing in popular advertisements for Remington electric shavers in the early 1990s. This already dated promise is currently mocked in a recent ad for Norelco shavers: "If it shaves like a blade, we'll give you your money back."

2. The men's electric shaver market has an estimated $400 million in annual sales, up from $335 million in 1992. *Chain Drug Review*, Jan. 20, 1997, p. 43; *Home Furnishing Network* newsletter, Mar. 20, 1995, p. 52.

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I. Biblical Prohibition

The Torah actually contains two prohibitions that directly relate to the removal of men's[3] facial hair: *hakafat pe'ot harosh*, and *hashchatat pe'ot hazakan* (the subject of this article). The first, "Do not round (*Lo takifu*) the corner of your head,"[4] forbids the removal[5] of hair from one's sideburns and temple area (the *pe'ot harosh*[6]). The *Shulchan Aruch* rules that this prohibition applies regardless of whether a razor or other mechanism (e.g., an electric shaver) is used;[7] the parameters of this commandment are therefore beyond the scope of this article.[8]

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3. Women are not included in the prohibitions relating to shaving and may remove facial hair in any manner. *Shulchan Aruch Y.D.* 181:12 (based on *Kiddushin* 35b). Nevertheless, the prohibitions may still enjoin women from shaving men's facial hair (in a manner that would be prohibited were the man shaving himself). See ibid., 181:6. Regardless, when one person shaves another, both violate the prohibitions; therefore, a man certainly could not circumvent the prohibitions by arranging to be shaved by a woman, or, for that matter, by a non-Jew. See ibid., 181:4.

4. *Vayikra* 19:27.

5. Removal of this hair is referred to as "rounding" because its usual effect is that the remaining hair surrounding the head forms a circle. See Rashi, ibid. While the prohibited action is described in the context of one who is "rounding" his remaining hair, the actual prohibition applies equally to one who shaves off his *pe'ot harosh* along with all the rest of his hair. *Shulchan Aruch Y.D.* 181:2.

6. These are popularly referred to as "*payos*." Among other reasons, the widespread practice among Hasidim of growing long sidelocks stems from what they consider an enhanced observance of this mitzva.

7. See ibid. at 181:3.

8. For a comprehensive treatment of *hakafat pe'ot harosh*

The second prohibition, *hashchatat pe'ot hazakan* (destroying the corners of the beard), is our focus herein. This prohibition is formulated twice in the Torah. In the same verse as the above prohibition of *hakafat pe'ot harosh*, the Torah adds, ". . . and do not destroy (*lo tashchit*) the corner of your beard."[9] Later, in the context of various laws which apply uniquely to *kohanim*, this prohibition is reformulated: "They should not shave (*lo yegaleichu*) the corner of their beards."[10] The *Sifra*[11] informs us that these are simply two formulations of the same prohibition; the repetition and change of wording (from "destroy" to "shave") serve not to add a new prohibition for *kohanim*[12] but to clarify the type of action that is prohibited to all Jewish men. The parameters of this action, as well as the definitions of the terms "*hashchata*" (destroying), "*giluach*" (shaving), and "corners of the beard" will be discussed below. Specifics temporarily aside, shaving one's entire beard area with a regular razor blade certainly constitutes a prototypical biblical violation.

(including a discussion of their exact location), see Rabbi Ya'akov Haber, *Beit Yitzchak* 5752 (1992), p. 168.

9. *Vayikra* 19:27.

10. Ibid., 21:5.

11. Ibid.

12. Neither *Smag*, Rambam, nor *Sefer ha'Chinuch* count the verse referring to *kohanim* as an independent prohibition. *Behag*, however, does. See also *Meshech Chochma* and *B'chor Shor* to *Vayikra* 21:5 (explaining that the prohibition is repeated in the context of laws relating to *kohanim* in order to teach that a *kohen* who violated it is not fit to participate in the *avoda*); *Bechorot* 45b; *Shulchan Aruch O.H.* 128:40 (regarding possible ramifications for *birkat kohanim* and receiving the first *aliyah*); *Haketav Ve'Hakabala* to *Vayikra* 21:5. There is nevertheless a heightened requirement for *kohanim* to refrain from *hashchatat pe'ot hazakan*, manifested in the positive

II. *Ta'am Hamitzva*: The Rationale for the Mitzva

The Torah supplies no reason for the prohibition of *hashchatat pe'ot hazakan*, and, as an unqualified biblical mandate, it certainly applies in every generation and every social context. Nevertheless, many commentators have suggested possible reasons for the prohibition.

Although no reason is overtly stated in the Torah, the verses themselves may provide some indication. The first formulation of the prohibition ("*lo tashchit*...") is both preceded and followed by several other prohibitions that proscribe certain practices of idolators.[13] Therefore, context suggests that one reason *hashchatat pe'ot hazakan* is prohibited is because it was a common idolatrous practice.[14] Indeed, this is the reason offered by Rambam[15] and *Sefer HaChinuch*,[16] who note that such was the prevalent custom

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commandment, "*K'doshim yih'yu le'lokaychem*" (*Vayikra* 21:6). See Rashi, s.v. "*Yachol*," *Nazir* 58a.

13. These include "You shall not eat anything with the blood"; "You shall not use enchantment" (*lo tenachashu*); "You shall not observe times" (*lo te'onenu*); "You shall not make any cuttings in your flesh for the dead"; and "You shall not print any marks upon you."

14. See *Beit Yoseph*, *Y.D.* 181:1. Note also the opening to the *parsha* (in the sense of *parshiot p'tuchot* and *stumot*) in which these verses appear: "And when you come to the land [of Israel], ..." Upon entering Israel and coming into contact with its idolatrous inhabitants, *B'nei Yisrael* are forewarned from following these people's idolatrous practices.

15. *Sefer HaMitzvot*, Negative Commandment 44; *Mishneh Torah*, Laws of Idolatry 12:7; *Moreh Nevuchim* 3:37. While Rambam often provides reasons for mitzvot in other contexts, it is unusual for him to do so in his code of halacha, the *Mishneh Torah*. Regarding Rambam's departure from this practice when discussing *hashchatat pe'ot hazakan*, see *Tur*, *Y.D.* 181:1; *Beit Yoseph*, ibid.; *Darchei Moshe*,

among pagan priests.[17] In a similar vein, Ibn Ezra explains that the objective is to distinguish and separate us from the Gentiles.[18]

Another explanation given is that the beard is one of the features that distinguish men from women, and those who were created as men should not reject such a feature.[19] Rabbeinu Bachya thus compares *hashchatat pe'ot hazakan* to violating the prohibition of *kilayim*: both acts constitute a negation of the intentional manner in which *Hashem* created the natural world in all of its species and genders.[20]

Rabbeinu Bachya also suggests a symbolic reason for the prohibition. The five *pe'ot hazakan*[21] represent the five senses, and just as we could not survive were we to totally deny to our senses that which is permitted them, so too we are commanded not to obliterate our *pe'ot*.[22]

Finally, several sources suggest that the prohibition stems from the fact that there is some intrinsic, positive

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ibid.; *Taz*, ibid.; Haber, *supra* note 8, at 169.

16. Positive commandment 252.

17. This would also explain the placement of the second formulation of the prohibition amongst the various mitzvot pertaining to the *kohanim*.

In the *Sefer HaMizvot*, Rambam also compares this practice to that of the Catholic priests of his day. Indeed, it is not coincidental that the Hebrew nickname for Christian priest, "*galach*," comes from the same root as the word for shaving, "*giluach*."

18. *Vayikra* 19:27. Ibn Ezra brings an additional opinion that the prohibition is thematically linked to the verse that follows; making "cuttings in the flesh" and shaving were both idolatrous modes of mourning for the dead. Compare *Iyov* 1:20.

19. See Rabbeinu Bachya and Abarbanel to *Vayikra* 19:27.

20. Ibid.

value to having a beard. In an aggadic passage, the Gemara states that "the beard is the glory of the face,"[23] and Sforno quotes this phrase as the basis for the prohibition.[24] Similarly, Ibn Ezra maintains that the beard was "created for [man's] splendor" and therefore should not be removed.[25]

What is perhaps most striking about all these reasons for the prohibition is that they do not address the method whereby the *pe'ot hazakan* are removed and seem to apply equally to any method of removing them. Yet, as discussed below, we know that the prohibition does not ban all methods of shaving. Although it may seem surprising that the reason for the prohibition seems to advocate a broader scope for the prohibition than the actual halacha does, we must bear in mind – just as when we are faced with the opposite situation, where the reason for a prohibition does not seem relevant to all cases in which the halacha applies it – that ultimately the manner of our compliance with the halacha is not dictated by our understanding of its objectives. Nevertheless, the fact that the prohibition of *hashchatat pe'ot hazakan* applies only to certain methods of shaving may support the view of the *Prisha*:[26] that it is actually a *chok* – a commandment which, at least to our understanding, does not have a reason.

It should be noted that apart from the prohibition of *hashchatat pe'ot hazakan* (and even where it does not

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21. See *infra* Section III.

22. Ibid. See also the fascinating kabbalistic reason brought there.

23. *Shabbat* 152a.

24. Sforno, *Vayikra* 19:27. He proceeds to group the beard and the *pe'ot harosh* with the *brit milah* as sacred "signs" on one's flesh.

25. Ibn Ezra, ibid. Note also *B'chor Shor*'s surprising formulation: "It would be unbefitting of the subjects of the King to look so

apply), there may well be other reasons why growing a beard would be religiously desirable. Besides the aggadic passage quoted above, there are several kabbalistic sources that attribute great importance to beards. It is widely reported that the *Ari z"al* was so careful never to remove any hairs from his beard that he would never even touch it.[27] However, the mystical issues that may be involved are both beyond the comprehension of this author and beyond the scope of this article, whose focus is the specific halachot regarding *hashchatat pe'ot hazakan.*[28]

III. *Pe'ot Hazakan*

The Torah prohibition of *hashchatat pe'ot hazakan* does not apply to all facial hair but only to those sections of hair referred to as the "*pe'ot hazakan*," the "corners" or "edges"[29] of the beard. Yet whereas the meaning of the word "*pe'ot*" in the context of the prohibition of *hakafat pe'ot harosh* is manifest – sideburns are conspicuous protrusions which are understandably described as the "edges" of a head of hair – the same word is much more vague in the context of *hashchatat pe'ot hazakan*. What are the "edges" of a beard?

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repulsive."

26. *Y.D.* 181:1.

27. See *Be'er Heitev*, *Y.D.* 181:5; *Beit Lechem Yehuda* to 181:3; *Birkei Yoseph* to 181:10. But see *Be'er Eshek* 70, cited in *Gilyon Maharsha* to 181:10 (suggesting that beards may be kabbalistically desirable only in Israel but not in *chutz la'aretz* and reporting that several students of the *Ari zal* would shave their beards (with scissors)); *Iggerot Moshe, O.C.* 4:111 (noting that the *Ari zal's* practice was unprecedented in the *rishonim*).

28. See *Chatam Sofer, O.C.* 159 (refusing to ascribe halachic significance to the kabbalistic sources favoring beards and naming

The Mishnah recounts an oral tradition that there are five *pe'ot hazakan*, two on each side of the face and one in the middle "below."[30] These represent five discrete units, even warranting five different sets of lashes for one who shaves all of them.[31] As to their location, the Gemara provides two clues. We are told that the edges of the beard in some way resemble an ear of grain[32] and that they are located between the "sections" of the beard.[33] These cryptic phrases have led to several opinions among commentators as to the exact location of the five *pe'ot*.

There are at least five different opinions regarding the location of the two *pe'ot* on each side of the face. Rashi describes two corners on the upper, broad part of each cheek, near the temples.[34] Rivan[35] places one on the sharp part of the jawbone under each ear and one on each side of

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several prominent kabbalists who went beardless).

29. See Rashi, *Shavuot* 2b (in the context of *pe'ot harosh*).

30. *Makkot* 20a.

31. Mishnah, ibid.

32. "*Shibbolet zekano*." Ibid, 20b. The commentaries dispute whether this analogy refers to all five *pe'ot* (Rashi cited by Ritva, *Makkot* 20b) or only to the fifth, central *pe'ah* (Rabbeinu Chananel, ibid.; Rambam, *Mishneh Torah*, Laws of Idol Worship12:7). See also Mishnah *Nega'im* 4:9. The image is generally understood to represent a protruding area. See, e.g., Ritva, ibid.

33. "*Bein pirkei d'dikna*." Ibid, 21a.

34. *Vayikra* 19:27; *Shavuot* 3a. Rosh on *Makkot* 21a also quotes such an opinion. Ritva, ibid., sides with this view, and explains that these two "edges" are simply the two ends of the upper jawbone, the first where the upper jawbone connects with the lower jawbone, and the second where the upper jawbone connects with the temples. As noted by *Prisha, Yoreh De'ah* 181:11, Rashi's view seems to allow much overlap between the *pe'ot hazakan* and the *pe'ot harosh*.

the chin. Me'iri[36] seems to place one on the sharp part of the jawbone under each ear and one adjacent to each ear. Rabbeinu Chananel[37] locates one on each side of the face where the jaw connects with the temples and one on each side of the mustache.[38] Finally, Rambam seems to include the entire span of the beard from the ear to the chin as comprising these *pe'ot*.[39]

While there is almost complete consensus that the fifth, central *pe'ah* is on the center of the chin, Rosh injects some uncertainty even here. Citing a Mishnah which delineates the halachic boundaries of the beard in a different context,[40] Rosh suggests that the area of the neck corresponding to the cartilage on top of the trachea (the

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35. R. Yehuda b. R. Natan (Rashi's son-in-law), *Makkot* 21a.

36. *Makkot* 13a.

37. Cited in Rosh, *Makkot* 21a.

38. This is also the opinion of Rashbam in his commentary on Rif, ibid.

39. See Commentary to the Mishnah, ibid., 20a; *Sefer HaMitzvot*, Negative Precept 44; *Mishneh Torah*, Laws of Idol Worship 12:7; see also Ritva, *Makkot* 21a. Rambam thus excludes from the prohibition only the mustache and the tuft of hair between the lower lip and the chin (and then cites a custom to refrain from shaving even these). *Mishneh Torah*, ibid. This is also the opinion of the *Sefer HaChinuch*, *Mitzva* 252.

40. "What is [meant by] beard? From the [upper] joint of the jawbone [at the ears] to the protruding ball of the trachea." *Nega'im* 10:9. To constitute a leprous scall (*netek*), a discoloration of the minimum halachic size – a *gris* – must appear entirely on either the head area or the beard area (or on other delineated parts of the body); a half-*gris* on the beard area may not combine with an adjacent half-*gris* on the head area. While Rosh implies that this Mishnah's definition of the beard area for the laws of leprosy may be applicable to the laws of *hashchatat pe'ot hazakan* as well, note that at least

"Adam's apple") may be the fifth *pe'ah*. Due to this possibility, as well as to our uncertainty regarding the location of the other four *pe'ot* (as manifested in the multitude of opinions cited above), Rosh recommends that one should refrain from shaving with a razor on any part of the beard.[41] This recommendation has been codified in the *Shulchan Aruch*.[42] Thus, prohibited methods of shaving are effectively forbidden on all facial hair.

IV. Methods and Implements

A. "*Giluach*" and "*Hashchata*" Defined

The accepted ruling in the Mishnah is that one is not liable for *hashchatat pe'ot hazakan* unless he shaves with a razor.[43] However, the Torah makes no reference to razors nor to any other shaving implements. What is the basis for this major limitation?

In the two verses which describe the prohibited action, two different words are used: *hashchata* (destroying) and *giluach* (shaving). The *Sifra*,[44] quoted by the Gemara,[45]

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the *Tosefta* is clear in its distinction between the two spheres. See *Nega'im* 4:9.

41. Commentary to *Makkot* 21a, also cited in *Tur, Yoreh De'ah* 181. See also Ritva, ibid.; Rambam, Laws of Idol Worship 12:7, as explained by *Beit Yoseph, Yoreh De'ah* 181. Me'iri, *Makkot* 21a, quotes an opinion offering a different reason for the same recommendation, based on the prohibition of *beged isha*.

42. 181:11. This includes the throat area, Ramo, ibid., and the mustache, *Taz*, ibid. While there is no opinion that considers the center of the mustache to be part of the *pe'ot hazakan* – even Rabbeinu Chananel referred only to the edges of the mustache – our practice is to refrain from shaving even there, lest one inadvertently shave the edges of the mustache as well. *Beit Yoseph*, ibid.

understands these as complementary terms, the combination of which provide the basis to derive that only a razor is prohibited:

> "They should not shave (*lo yegaleichu*) the corner of their beards." You might think that even if he shaved with a scissors, he would be liable; therefore, [the other verse] teaches, "Do not destroy (*lo tashchit*)." And if the Torah had stated only "Do not destroy (*lo tashchit*)," you might think that even if he removed it with a *malket* or a *rehit'ni* [certain other types of implements] he would be liable; therefore, [the original verse] teaches, "They should not shave (*lo yegaleichu*)." How can this be? [The verses together refer to] shaving that constitutes destruction (*giluach sheyesh bo hashchata*); say, then, that this means [with] a razor.

This short but critical passage provides us with much of the information that is at the heart of the shaving controversy. First, the passage limits the prohibition to shaving with a razor, which achieves both "*giluach*" and "*hashchata*." Second, by implying that shaving with scissors would constitute *giluach* but not *hashchata*, and that shaving with a "*malket*" or "*rehit'ni*" would constitute *hashchata* but not *giluach*, the passage indirectly provides us with definitions for the terms "*giluach*" and "*hashchata*." Let us first present these definitions.

1. *Giluach* and Depilatory Powder

The *Sifra* informs us that unlike a razor or scissors, a *malket* and a *rehit'ni* do not render a *giluach* and are therefore permitted. "*Malket*" and "*rehit'ni*" are variously

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43. *Makkot* 20a.

defined by the commentaries as either types of tweezers[46] or types of planes haphazardly utilized as shaving implements.[47] It is agreed, however, that their relevant characteristic in this context is that they are not usually used for shaving. Thus, "*giluach*" is apparently defined as a standard, usual method of shaving;[48] the term therefore serves to exclude the *malket* and *rehit'ni* from the prohibition because they fail to satisfy this requirement.

Until the advent of electric shavers,[49] the only permissible method of obtaining a clean shave also relied on this requirement of *giluach*. As recently as forty years ago, men would commonly buy depilatory powder – cans were even sold in Jewish book stores on the Lower East Side – which they would mix with water and spread on their faces in order to burn off their facial hair, taking care to scrape off the foul-smelling mixture before it proceeded to burn off the skin as well. This method of avoiding the prohibition goes back at least to the fourteenth century, when Ritva[50] adduced a similar type

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44. *Vayikra* 19:27.

45. *Makkot* 21a; *Kiddushin* 35b; *Nazir* 40b, 58b.

46. Rambam, *Commentary to the Mishnah, Makkot* 20a; *Nemukei Yosef*, ibid.; Me'iri, *Kiddushin* 35b.

47. Rashi, *Kiddushin* 35b (tools used to smooth and fashion parts of swords and shields); Rashi, *Shabbat* 97a.

48. See Rivan, *Makkot* 21a; Rashi, *Kiddushin* 35b; *Tosafot, Nazir* 40b, s.v. "*iy*." Those commentators who define "*malket*" and "*rehit'ni*" as tweezers do not happen to articulate their exact definition for "*giluach*." It is conceivable that for them, "*giluach*" means not just any standard method of shaving but specifically the method that is employed by razors and scissors: removing the hair by *cutting*. This may be the implication of Me'iri, *Kiddushin* 35b.

49. The first electric shavers, invented in 1928 by Jacob Schick, a

of ointment as an example of a shave which is permitted because, as an unusual method of shaving, it does not constitute *giluach*.[51]

Unlike both depilatory powder and the *malket/ehit'ni*, however, an electric shaver is certainly not an atypical shaving implement. On the contrary, it is designed and used solely for shaving. Thus, the requirement of *giluach* provides no basis upon which to permit electric shavers.

2. *Hashchata*

From the *Sifra*'s implication that cutting off one's beard with scissors would generally not constitute *hashchata*, the commentaries infer the definition of *hashchata*: a method of removing hair which, unlike cutting with scissors but like shaving with a razor, removes the hair at or near its root.[52] Thus, even assuming that scissors are a common, typical shaving implement (thereby satisfying the *giluach* requirement), their failure to remove the whisker near its root (*hashchata*) excludes them from the prohibition.

If electric shavers were classified as not achieving *hashchata*, they would similarly be excluded from the

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retired U.S. army colonel, were sold in 1931. "A Brief History of Shaving," *Los Angeles Times* (June 20, 1992), D1.

50. *Makkot* 20a, s.v. "*veha.*"

51. See also Rav Ovadia Yosef, *Or Torah* (Tevet 5749); *Gilyon Maharsha* to *Y.D.* 181; *Noda B'Yehuda*, *Y.D.* 2,81 (cited in *Pitchei T'shuva*, *Y.D.* 181:5) (responsum authored by Rav Shmuel, the son of the *Noda B'Yehuda*, permitting the use of a depilatory ointment, provided that one does not use a sharp instrument to scrape the ointment off the face); *Birkei Yosef* to *Y.D.* 181 (citing and disagreeing with an opinion prohibiting the use of such an ointment).

52. See Rivan, *Makkot* 21a; Tosafot, *Nazir* 40b s.v. "*detanya*"; Rosh,

prohibition. Indeed, when electric shavers were first introduced, some halachic authorities permitted them based on their failure to give a smooth shave – i.e., to achieve *hashchata*.[53] However, now that shavers have become much more sophisticated and are able to provide a close, smooth shave, it is harder to permit them on this basis.[54] While electric shavers still may not provide quite as close a shave as razors do[55] – shavers generally cut above the skin line, whereas razors may take off a layer of dead skin along with the facial hair – the difference is so small that many authorities do not consider it sufficient to take electric shavers out of the category of *hashchata*.[56] The shavers certainly do provide a clean shave by cutting the hair near its root, and as that is the widely accepted definition of *hashchata*, it may be "splitting hairs" to permit them due

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ibid.; Rabbeinu Bachya to *Vayikra* 19:2; *Panim Yafot* to *Vayikra* 19:27. See also *Nemukei Yosef, Makkot* 20a (defining *hashchata* as removing the hair "so that no discernible whisker remains").

53. See Rabbi Moshe Heinemann, "Electric Shavers," *Kashrus Kurrents* (Va'ad Hakashrut of Baltimore).

54. Ibid.

55. But see *supra* note 1 and accompanying text.

56. Rabbi Avrohom Blumenkrantz, however, is of the opinion that because the outside screen on most electric shavers blocks the skin from reaching the inside blade, this interruption between the blade and the skin (as thin as the screen may be) prevents any cutting at the roots – i.e., *hashchata*. (This may not apply, however, to Norelco's "Lift and Cut" models, which purportedly compensate for the thickness of the screen by lifting the hair before cutting it.) Rabbi Blumenkrantz nevertheless prohibits several electric shavers, based on the ruling of the *Terumat HaDeshen* cited by Ramo, *infra* Section IV.C. Oral communication (August, 1997); Rabbi Mendel Kolodny, "Halacho: The Use of Shavers," Kollel Anshei Chemed newsletter (summary of *shiur* delivered by Rabbi Blumenkrantz). Rabbi Blumenkrantz bases his opinion on that of Rabbi Moshe Feinstein,

to the slight superiority of a razor-blade shave.[57]

B. Razors and *Giluach Sheyesh Bo Hash'chata*

1.The *Sifra* Re-Examined

Thus far, we have established that electric shavers certainly satisfy the *giluach* requirement of the prohibition and quite possibly satisfy the *hashchata* requirement as well. It would appear, then, that electric shavers should be

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thereby presenting a different version of Reb Moshe's view from that cited in Section IV.B.4 below.

57. Rabbi Shabtai Rappaport departs slightly from the aforementioned definition of *hashchata* and consequently permits electric shavers that fail to achieve *hashchata* under his definition. According to Rabbi Rappaport, a cutting system performs *hashchata* only if it both cuts the hair near the root – which electric shavers may do – and removes many hairs simultaneously – which only a razor does. "The Use of Electric Shavers," 13 *Techumin* 200 (1993). This is based on Rav Ya'akov Tzvi Mecklenburg's commentary to the Torah, which defines "*hashchata*" as the feature, particular to shaving with a razor, whereby one motion across the face can remove a large part of the beard (unlike cutting with scissors, which are limited to the area between the two blades). *HaK'tav VeHakabala* to *Vayikra* 19:27, cited in *Melamed L'Ho'il Y.D.* 64. Because many electric shavers cut with a scissors motion, Rabbi Rappaport argues, they never cut more than a few hairs at any given moment, and therefore do not achieve *hashchata*.

While this definition may provide a basis for permitting electric shavers, the simple reading of the *rishonim* seems to be that *hashchata* is achieved as long as the hair is removed at or near its root. See *supra* note 52. Furthermore, under this definition it is not clear why the *Sifra* deems removing hair with tweezers (i.e., *malket* and *rehit'ni*, according to most *rishonim*; see *supra* Section IV.A.1) to constitute *hashchata*. Finally, Aharon Frazer notes that the application of the *K'tav VeHakabala*'s principle to electric shavers is questionable, since shavers, however designed, may be comparable to razors and not scissors in the speed, ease, and, efficiency with

prohibited, having fully met the *Sifra*'s criteria. Nevertheless, the *Sifra* may still be interpreted in a way that permits many electric shavers.

Using the exegetical analysis described above, the *Sifra* derived that although the admonitions in the Torah make no mention of a razor, they serve jointly to limit the scope of the prohibition to shaving with a razor as opposed to with scissors or with a *malket/rehit'ni*. That is, of the various implements described in the *Sifra*, only a razor – which performs both *giluach* and *hashchata* (in the words of the Gemara, "*giluach sheyesh bo hashchata*"[58]) – is prohibited.[59] However, this conclusion leaves room for two subtly but vitally different interpretations. On one hand, the *Sifra* may be solely presenting the normative definitions of the terms *giluach* and *hashchata*; the subsequent conclusion that only a razor is proscribed is simply a natural result of the fact that razors satisfy these criteria. On the other hand, the entire passage quoted may constitute one extended exegesis whose result is the derivation of the razor as the unmentioned referent of the verses. Are we to understand that the verses prohibit shaving with a razor simply because a razor satisfies the

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which they remove hair. See Frazer's "*Pe'at Hazakan*," available at www2.cybernex.net/~afraz/beitaharon/imshefer.html.

58. "A shaving that constitutes destruction."

59. Although this is the simple understanding of the passage, *Sefer HaChinuch*, 252, and *Mirkevet HaMishneh*, Laws of Idol Worship 12:7, claim that Rambam, *Mishneh Torah*, ibid., understood the passage as limiting only the administration of the punishment of lashes to violators who shaved with a razor; shaving with scissors or *malket/rehit'ni* would nevertheless constitute a violation, albeit an unpunished one. However, *Minchat Chinuch*, 252 s.v. "*vekatav*," argues convincingly that this is a misreading of Rambam, and Rav Yosef Karo in his commentary on the *Mishneh Torah*, *Kesef Mishneh*

derived requirement of *giluach sheyesh bo hashchata* – but if another implement were to satisfy this requirement it would fall equally within the purview of the prohibition[60] – or are we to understand that the *Sifra* is conveying to us that the traditional interpretation of the verses is that they refer specifically (and exclusively) to shaving with a

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(ibid.); in *Beit Yoseph* 181; and in *Shulchan Aruch*, 181:10, authoritatively rules against this interpretation.

60. Support for this understanding may perhaps be gleaned from an analysis of the (rejected) opinion of Rebbi Eliezer in the Mishnah. Rebbi Eliezer agrees that scissors are excluded from the prohibition, but disputes the exclusion of the *malket* and *rehit'ni*. The Gemara explains that although Rebbi Eliezer subscribes to the *Sifra*'s requirement of *giluach sheyesh bo hashchata*, he believes that using a *malket* or *rehit'ni* satisfies this requirement, as it does constitute *giluach*, i.e., *malket* and *rehit'ni* are sufficiently normal, typical shaving implements to be included in the prohibition. Rivan, *Makkot* 21a. While this view is rejected – the accepted opinion in the Mishnah rules that using these implements is not *giluach*, as presented above – it is noteworthy in that it clearly does not understand the requirements of *giluach* and *hashchata* as merely exegetical clues which reveal that the prohibition applies *only* to razors but rather as practical criteria for determining whether *any* given implement is prohibited. Rebbi Eliezer certainly believes that any implement that effects *giluach sheyesh bo hashchata* is included in the prohibition. Although it is possible that the accepted opinion in the Mishnah rejects this premise of Rebbi Eliezer as well, there is no indication that the dispute with Rebbi Eliezer hinges on anything besides whether *malket* and *rehit'ni* perform *giluach*.

Similarly, the fact that Ritva permits the use of depilatory ointment only because it does not constitute *giluach* (see *supra* note 50) suggests that Ritva is of the opinion that any implement that does satisfy the criterion of *giluach sheyesh bo hashchata* is included in the prohibition. Note, however, that this comment of Ritva appears in the context of his discussion of Rebbi Eliezer's view; it is thus conceivable that Ritva would agree that according to the accepted opinion in the Mishnah, use of such ointment would be permitted even if it did constitute *giluach*. However, Ritva never

razor?[61]

This question is critical in assessing the halachic status of electric shavers. It is clear that before the advent of electric shavers, scissors would not generally achieve *hashchata*, since cutting a hair manually with a pair of scissors inevitably leaves a whisker at least as long as the thickness of the scissors' edge. However, even if today's electric shavers cut with a scissors motion, they arguably do achieve *hashchata*, as discussed above.[62] Therefore, if scissors were excluded by the *Sifra* simply insofar as they fail to meet the requirement of *hashchata*, then electric shavers which arguably do satisfy this requirement would be prohibited no less than razors. But if the *Sifra*'s conclusion is that scissors are absolutely excluded from the prohibition because the exegesis of the verses derives that only a razor is prohibited,[63] then those electric shavers that cut with a scissors motion may fall outside the prohibition, even if they do achieve *hashchata*.[64] Thus,

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mentions such a possibility.

61. Note the Aramaic translation for "*lo tash'chit*" in *Targum Yonatan ben Uziel*: "*lo taglevun*," which *Yonatan* notes is a conjugation of the word "*galav*" – Aramaic for "razor"! See also *Ba'al Haturim* to *Vayikra* 21:5, who notes that the *gematria* of the words "*upe'at zekanam*" ("and the corners of their beards") in that verse is equivalent to that of the phrase "*zu beta'ar*" ("This [refers to] with a razor."). (This *gematria* is actually off by one.)

62. See *supra* Section IV.A.2.

63. See *Ba'al Haturim* on "*ve'lo tashchit*," who notes that the *gematria* of those words matches that of the phrase "*zehu ta'ar velo misparayim*" ("this is a razor and not scissors"). This one works out exactly.

64. According to this understanding of the *Sifra*, a shaving implement may theoretically achieve the same exact effect as a razor and would nevertheless be permitted. While this result may

the halachic status of electric shavers may depend on which of these two interpretations of the *Sifra* is accepted by the halacha.

2. *Misparayim Ke'eyn Ta'ar*

If the halacha adopts the interpretation that the *Sifra* excludes scissors absolutely from the prohibition, then even scissors that could somehow match the effects of a razor would theoretically be permitted. This question may have been addressed directly by the *Shulchan Aruch*.

Quoting the Mishnah based on the *Sifra*, the *Tur* rules that one violates the prohibition only by shaving with a razor.[65] Rav Yosef Karo in his gloss[66] to *Tur* notes that this implies that there is no prohibition against shaving with "*misparayim ke'eyn ta'ar*" ("scissors similar to a razor"), and he adopts this ruling in the *Shulchan Aruch*.[67] Thus, not only are the scissors referred to in the Mishnah – which certainly fail to achieve *hashchata* – permitted, but "scissors similar to a razor" are permitted as well. However, the exact meaning of *misparayim ke'eyn ta'ar* is unclear. If the term is taken literally to refer even to cutting with scissors in a way that attains virtually the same effect as a razor, then we can infer that the *Shulchan Aruch* has adopted the interpretation that the *Sifra* absolutely excludes scissors from the prohibition, and only a razor is prohibited.

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seem counterintuitive, recall that even according to the alternative understanding of the *Sifra* – that any implement which accomplishes both *giluach* and *hashchata* is prohibited – the permissibility of a shaving implement does not depend solely on the result it effects but also on the manner in which it shaves, since the requirement of *giluach* addresses method, not effect. Thus, there is no interpretation of the *Sifra* that assesses shaving implements solely on the basis of their effects.

As a result, any electric shaver that cuts with a scissors motion would be permitted regardless of how close it shaved. Alternatively, perhaps *misparayim ke'eyn ta'ar* means simply cutting with scissors near the skin in order to obtain as close a shave as scissors are capable of providing – but one which certainly falls short of shaving with a razor and which is ultimately permitted only because it still falls short of *hashchata*. So defined, "*misparayim ke'eyn ta'ar*" would not include electric shavers if the shavers do achieve *hashchata*; the *Shulchan Aruch*, then, would not be discernibly endorsing either interpretation of the *Sifra* and would provide no basis upon which to permit such electric shavers.

Thus, whether or not the *Shulchan Aruch* permits electric shavers even if they achieve *hashchata* (but provided that they cut with a scissors motion) depends on what the *Shulchan Aruch* means by the term "*misparayim ke'eyn ta'ar*" – specifically, whether or not *misparayim ke'eyn ta'ar* achieve *hashchata*. Fortunately, this term was not invented by the *Shulchan Aruch*. In other contexts, the term "*misparayim ke'eyn ta'ar*" appears several times in the Gemara. Almost always, it is explained by the commentaries as referring to a cutting that essentially matches the effect of a razor and, as such, apparently does achieve *hashchata*.[68] Moreover, several early halachic

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65. *Y.D.* 181.

66. *Beit Yoseph*, ibid.

67. Ibid, 181:10. Ritva on *Makkot* 21a also rules that *misparayim ke'eyn ta'ar* are permitted.

68. See Tosafot, *Nazir* 40a, s.v. "*u'veta'ar*," and 39a, s.v. "*nazir*" (explaining that "*ke'eyn ta'ar*" implies removal of the hair from its root and thus *hashchata*); *Tosafot Rosh*, ibid. ("*ke'eyn ta'ar*" means removing the entire hair); Rashi, *Nazir* 40a, s.v. "*e'la*" (defining

authorities equate the effects of *misparayim ke'eyn ta'ar* and actual razors.[69] Therefore, assuming that the *Shulchan Aruch* uses the term in the same way as it is generally understood in other contexts and by other halachic authorities, the authoritative interpretation of the *Sifra* – that is, the interpretation endorsed by the *Shulchan Aruch* – appears to be that scissors are absolutely excluded from the prohibition of *hashchatat pe'ot hazakan*.[70] A shaver

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the "scissors that are *ke'eyn ta'ar*" prohibited to be used on a *nazir*'s head as an implement which "removes the hair near its root"); Rambam, *Laws of Nezirut* 5:11 (scissors "*ke'eyn ta'ar*" cut the hair from its root) (but see *Lechem Mishneh*, ibid.). See also *Keren Orah* to *Nazir* 41a, who wonders how the *Sifra* on *hashchatat pe'ot hazakan* could have excluded all scissors from that prohibition for failing to satisfy the requirement of *hashchata*, if indeed *misparayim ke'eyn ta'ar* are scissors which were known to achieve *hashchata*. This question appears compelling only according to one of our two aforementioned interpretations of the *Sifra*; given the fact that scissors *generally* do fail to achieve *hashchata*, the *Sifra* presents no difficulty if read as one long exegesis deriving that razors are the unmentioned referents of the scriptural admonitions.

The term "*misparayim ke'eyn ta'ar*" also appears in the context of the prohibition of *beged isha* (cross- dressing), where the Gemara rules that, in certain contexts, this prohibition forbids men from copying the feminine practice of shaving certain body hair with a razor, yet does not prohibit the same act with *misparayim ke'eyn ta'ar*. *Nazir* 58b. Rashi there defines "*ke'eyn ta'ar*" as "shearing with scissors close to the skin as with a razor."

69. See *Prisha*, *Y.D.* 181:1, who describes using *misparayim ke'eyn ta'ar* as "shaving the entire hair off until [the skin] is smooth as if shaved with a razor"; *Chochmat Adam*, *Y.D.* 181, who similarly describes "shaving close to the skin so that nothing remains from the hair near the skin"; *Shach*, *Y.D.* 181:2, who quotes the definition above from Rashi in *Nazir* 58b, *supra* note 68. These comments actually refer to the rulings of the *Tur* and *Shulchan Aruch* regarding the prohibition of *hakafat pe'ot harosh*, not *hashchatat pe'ot hazakan*. Whereas *misparayim ke'eyn ta'ar* are permitted on the *pe'ot hazakan*,

that cuts with a scissors motion would accordingly be permitted whatever its effect. Nevertheless, this issue remains the subject of much controversy, further discussed below.

3. The *Chatam Sofer*'s Rejection of the Two-Step Shave

An interesting, but universally rejected, method of obtaining a clean shave and yet avoiding the prohibition of *hashchatat pe'ot hazakan* is suggested by the *Besamim Rosh*,[71] based on a Mishnah in *Masechet Nidda*.[72] The Mishnah presents a rule that in any context where the halacha depends on the existence of two hairs (for example, two black hairs disqualify a *para aduma*), there is a minimum length required in order for the hairs to be halachically recognized. The Mishnah proceeds to list a variety of opinions as to this minimum length, the last of which is "that which can be cut with a pair of scissors" (Rabbi Akiva's opinion). After assuming both that the halacha follows Rabbi Akiva's opinion and that the rule of this Mishnah is applicable to the context of *hashchatat pe'ot hazakan*, the *Besamim Rosh* suggests that one can circumvent the prohibition by following a two-step process: first cutting the beard with scissors as closely as possible and then proceeding to shave the remaining whiskers – whose existence should not be halachically recognized – with a razor.

This suggestion is discussed at length by both *Noda*

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as discussed here, they are prohibited on the *pe'ot harosh*. *Shulchan Aruch, Y.D.* 181:3. Presumably, however, these definitions of the term apply equally to its usage in the (adjoining) context of *hashchatat pe'ot hazakan*.

70. This also appears to be the opinion of *Bach, Y.D.* 181:9, who implies that *misparayim ke'eyn ta'ar* achieve *hashchata*. See also *Shach* 181:7.

B'Yehuda[73] and *Chatam Sofer*,[74] who thoroughly reject it on a number of grounds challenging the aforementioned assumptions upon which it is predicated. One of *Chatam Sofer*'s arguments in this regard is particularly noteworthy and relevant to our discussion. If the whisker remaining after the "scissors stage" were halachically insignificant, *Chatam Sofer* reasons, then the scissors stage must have already achieved *hashchata*; and if scissors achieved *hashchata*, they would satisfy the requirement of *giluach sheyesh bo hashchata* and would thus be included in the prohibition. From the fact that scissors are *not* prohibited, then, we can deduce that the whiskers that remain after cutting with scissors *are* halachically recognized, for purposes of this prohibition. Therefore, a subsequent shave with a razor would be prohibited, contrary to the claim of the *Besamim Rosh*.

It is clear from this argument – which includes the suggestion that even scissors could be prohibited if they achieve *hashchata* – that *Chatam Sofer* is of the view that razors are not necessarily the sole means of violating the prohibition of *hashchatat pe'ot hazakan*; rather, any implement that performs *giluach sheyesh bo hashchata* is included in the prohibition. That is, *Chatam Sofer* apparently understands the *Sifra* as merely establishing the criteria of *giluach sheyesh bo hashchata*, not limiting the prohibition only to razors. Similarly, the *Shulchan Aruch* must permit *misparayim ke'eyn ta'ar*, according to *Chatam Sofer*, only because they fail to achieve *hashchata*.

As explained above, the ramifications of this view for electric shavers are severe, and, indeed, many prominent

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71. *Siman* 17.

72. 52b.

poskim have prohibited electric shavers on this basis. The *Chafetz Chaim*,[75] referring to a mechanical precursor of the electric shaver which was the latest technology at that time, implies that any method of obtaining a clean shave is included in the prohibition.[76] It is also reported that both *Chazon Ish*[77] and Rabbi Aharon Kotler[78] prohibited

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73. *Y.D.* 2,80. This *t'shuva* is cited in *Pitchei T'shuva*, *Y.D.* 181:4.

74. *O.H.* 154.

75. Rav Yisrael Meir Kagan (1838-1933), author of the *Mishnah Berurah*.

76. *Likutei Halachot* to *Makkot* 21a ("The new machines used for shaving . . . which shave just like a razor and remove the hair entirely and nothing remains, one who shaves his beard with them, it would seem, violates [the prohibition], and one who cares for his soul should stay far away from them.").

77. See *Minchat Yitzchak* 4:113 (Rav Yitzchak Ya'akov Weiss, Av Beit Din of Yerushalayim), where Rav Weiss reports that *Chazon Ish*, after concluding that the electric shavers of his day achieved *hashchata*, categorically prohibited them. *Chazon Ish* reportedly reached this conclusion after experimenting with various electric shavers by smearing ink on his hand and applying the shaver where the ink dried. Because the shavers would remove some of the ink, he determined that they cut at skin level and are therefore halachically equivalent to razors. Ibid.

Rav Weiss's own ruling is that he is inclined to prohibit all electric shavers and urges those who continue to use them at least to seek out older models and those that cut furthest away from the skin. See also Rav Ovadia Yosef, *Or Torah* (Tevet 5749), who issues a blessing to those who refrain from using any electric shavers and prohibits using them to obtain a clean shave; rather, one may only gently move the shaver across the face without pressing against the skin (which would guarantee *hashchata*). This is based on a ruling of Rav Tzvi Pesach Frank, cited in *Chelkat Ya'akov* 2:133.

78. See *Minchat Yitzchak*, reporting that Rav Kotler at least "questioned the permissibility" of electric shavers. See also Rabbi Moshe Wiener's volume, *Hadrat Panim – Zakan* (1977), a 700-page

electric shavers based on their view that any method of obtaining *giluach sheyesh bo hashchata* is prohibited no less than shaving with a regular razor.

4. Rabbi Moshe Feinstein

It was Rabbi Moshe Feinstein who most prominently endorsed the more lenient understanding of the *Sifra* and *Shulchan Aruch*.[79] Rabbi Feinstein espoused the interpretation that the exegesis of the *Sifra* simply derives that razors are the sole referent of the verses prohibiting shaving. All other methods of shaving, even if they could achieve *giluach sheyesh bo hashchata*, are permitted. Thus, scissors are absolutely excluded from the prohibition. Electric shavers which operate based on a scissors mechanism and do not contain a razor blade (or its equivalent) would therefore be permitted.

To be sure, this ruling of Rabbi Feinstein far from automatically permits all electric shavers. Only those shavers whose structure and operation clearly warrant halachic categorization as scissors rather than razors would be permitted even according to Rabbi Feinstein. Indeed, several contemporary *poskim* follow Reb Moshe's opinion

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treatise presenting and vigorously defending every conceivable basis upon which to prohibit shaving by any method and particularly via electric shaver. Among the letters of approbation printed at the beginning of the volume are one from Rabbi E.M.M. Shach prohibiting all electric shavers based on the opinions of *Chafetz Chaim* and *Chazon Ish*, and one from Rabbi Chaim Kanievski attesting that his father, Rabbi Ya'akov Yisrael Kanievski (the "Steipler Gaon"), refused to permit using electric shavers and had been inclined to prohibit them, based upon the opinion of *Chafetz Chaim*.

79. Rabbi Moshe Heinemann, "Electric Shavers," *Kashrus Kurrents* (Va'ad Hakashrut of Baltimore); Rabbi Mordecai Tendler (Oral

and nevertheless each arrive at a different conclusion regarding which specific models of electric shavers are permitted.[80] However, only by espousing Reb Moshe's understanding of the *Sifra* could one permit modern electric shavers without engaging in the difficult exercise of proving that the shavers fail to achieve *hashchata*, as discussed above.

C. The *Terumat HaDeshen*

We have seen that the *Shulchan Aruch* permits shaving with scissors and that, according to Reb Moshe Feinstein, this *heter* applies even if the scissors are able to duplicate the effect of shaving with a razor. However, the Ramo[81] adds an important restriction to shaving with scissors, based on the opinion of the *Terumat HaDeshen*, which may affect the halachic status of certain electric shavers.

The *Terumat HaDeshen*[82] raises the concern that although shaving with scissors is theoretically permitted, in practice there is a risk that one edge or blade of the scissors might cut the hair against the face without assistance from the other edge, thereby effectively acting as a razor and causing a biblical violation. The *Terumat HaDeshen* cites this concern from the *Gilyon HaTosafot*,[83] who recommends therefore that one who shaves with scissors should hold the lower blade of the scissors (the

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communication, April 1998). Reb Moshe never published this ruling, but, while its ramifications as to specific electric shavers is the subject of much controversy, the essential ruling permitting electric shavers in principle is well known. See also *supra* note 56.

80. These include Rabbi Dovid Feinstein; Rabbi Moshe Dovid Tendler and Rabbi Mordecai Tendler; Rabbi Yisroel Belsky; Rabbi Moshe Heinemann.

81. 181:10.

blade touching the face) absolutely motionless and make sure that only the upper blade moves. This method, which ensures that all the hair is cut with a two-edged scissors motion as required, is quoted (and mandated) by the Ramo. The *Terumat HaDeshen* himself acknowledges this solution, but out of concern with its feasibility (it is extremely difficult consistently to cut with scissors while moving only one of the two blades), he recommends an alternative solution: simply refraining from using very sharp scissors. If the blades of the scissors are not sharp enough to cut on their own, there is no question that all the hair will be cut with a scissors motion.

Because electric shavers are permitted even according to Rav Feinstein only insofar as they operate like scissors, this concern of the *Terumat HaDeshen* and Ramo would obviously apply to electric shavers as well. Therefore, to be permitted, an electric shaver must either contain no blade that is sharp enough to cut the hair on its own (corresponding to the solution recommended by the *Terumat HaDeshen*)[84] or operate in such a way that there is

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82. *Siman* 295.

83. *Shavuot* 3a; see also Rabbeinu Ya'akov MeKutzi cited by Ritva, *Makkot* 20a; *Piskei Tosafot, Makkot, Siman* 28.

84. This was, by many accounts, Reb Moshe's sole criterion for evaluating electric shavers that were brought before him. Rabbi J. David Bleich reports witnessing an episode in which Reb Moshe opened up a shaver in order to expose the inner surface, rubbed the surface against his hand to verify that it was not razor-sharp, and on this basis permitted the shaver. (Oral communication, August 1997). Rabbi Moshe Heinemann similarly describes how Reb Moshe would follow a procedure reminiscent of a *shochet* demonstrating the sharpness of his slaughtering knife: he would hold a hair in his hand and test whether the shaver blade would cut the hair (with minimal pressure) when the hair was pulled taut. *Kashrus Kurrents*,

no possibility of a blade cutting hair on its own, without assistance from the screen (corresponding to the suggestion of the *Gilyon HaTosafot*).

V. Conclusion

Which specific models of electric shavers meet the criteria described in this article is a very complex question which truly demands the technical acumen of a mechanical engineer and the authority of a *posek*. Moreover, the technology of electric shavers is constantly changing and improving, so that a brand that is "kosher" today conceivably may not be tomorrow. Therefore, a competent *posek* should be consulted to assess the permissibility of each new model of electric shaver as it is developed.

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supra note 53. Rabbi Mordecai Tendler describes the same procedure but with the hair dangling, not pulled taut. Using this and similar procedures, Reb Moshe never found a blade that he considered sharp enough to warrant prohibiting a shaver, according to Rabbi Tendler. (Oral Communication, August 1997 and March 1998). Finally, Dr. Josh Ladelle of Jerusalem, a former principal research scientist at North American Philips Laboratories (the parent company of Norelco), recalls demonstrating to Reb Moshe Feinstein the difference in sharpness between the blade of a Norelco shaver and a regular razor blade. Reb Moshe subsequently permitted the shaver, which was a "Rototrac" model, containing the same essential cutting mechanism that is now commercially described by Norelco as the "Lift and Cut" system, according to Dr. Ladelle. (Oral Communication, April 1998). Of course, because many small changes may have been made to the design of Norelco shavers in recent years, no definitive conclusion about the permissibility of the current Norelco shavers may necessarily be reached solely on the basis of this episode.

Tattoos: Halacha and Society

Rabbi Moshe Weiss

Introduction[1]

Permanently marking the skin with colors, commonly known as tattooing, has been practiced since antiquity. The Torah, in *parshat Kedoshim* (*Vayikra* 19:28), specifically prohibits the practice of tattooing:

ושרט לנפש לא תתנו בבשרכם וכתבת קעקע לא תתנו בכם אני ה׳

"And a wound on your soul you shall not put in your flesh, and a tattoo you shall not place in you, I am *Hashem*."

This article defines tattooing both according to Jewish law and as it is practiced in the modern world. It also addresses whether tattoos are prohibited by Jewish law.

A tattoo in Jewish law and in the modern world

The Mishnah in *Makkot* (3:6) defines a tattoo according to Jewish law:

> One who inscribes a tatto – if he writes[in ink] and does not puncture the skin, or if he punctures the skin but does not write [in ink], he has not inscribed a tattoo. Rather, for one to deserve the punishment of lashes, he must write with ink and puncture the skin [in the place where he wrote with ink], and

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1. Much of the research of this article is based on פתשגן הכתב, by Rabbi Chaim Kanievsky, in the compendium of his works, שיח השדה.

Associate, law firm of Fish & Neave, New York.

> the ink must be a permanent ink or anything that makes a permanent impression.

The Mishnah clearly requires two steps to transgress the biblical prohibition against tattooing: (1) There must be a mark made with some type of permanent ink, and (2) The skin must be punctured so as to allow the ink to penetrate to a level of the skin, an act which extends the life of the mark indefinitely.

At this point, it is important to digress from the Jewish law aspects of tattooing and explain the medical reality of what makes a tattoo permanent. The following is an excerpt from the Columbia University Healthwise WebSite:

> The human skin is made up of two principal parts, the epidermis and the dermis. The outer, thinner epidermis consists of four or five cell layers. The inner dermis is made up of two portions: the upper, papillary region and the reticular region. Tattoos are made by inserting ink deep into the dermis portion of the skin. Although both the epidermis and the dermis shed cells, the dermis, containing collagenous and elastic fibers, sheds at a much slower rate than the epidermis, and is thereby able to hold tattoos for a long period, even a lifetime. www.cc.columbia.edu/cu/healthwise/0684.html

Thus, Jewish law's requirement of a permanent ink and a sub-skin inscription of some sort is based on the scientific reality that such a process will permanently mark the person receiving the tattoo.

The *Rishonim* on the words "כתובת קעקע"

The *Rishonim* offer two interpretations to the Mishnah in *Makkot*.

1. Rashi and Ibn Ezra, in their respective commentaries

to the verse in *Kedoshim*, interpret the word כתובת to mean the actual writing with ink or other permanently marking substance, and קעקע to mean puncturing or sub-surface scratching of the skin necessary to make the ink mark permanent. Concerning כתובת קעקע, Rashi comments,

> ["Tattoo" mentioned in the verse refers to] a writing that is inscribed, deep and permanent, and which can never be erased, that one punctures with a needle and it remains dark forever. "*Kaka*" is from the language of "and he will hang them ", and they will be hanged [implying that the the mark is permanent, like a cross or pole is stuck in the ground to hang a person. Rashi makes this connection between the two ideas based on the letters קע that is in the root of both words.][2]

The interpretation of the words of the verse by Rashi and Ibn Ezra, specifically that כתובת implies writing and קעקע implies puncturing, is followed by the Rivan in his commentary on Tractate *Makkot*[3] and by other *Rishonim*.[4]

2. However, Rambam (12:11) in *Hilchot Avoda Zara* writes,

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2. Rabbi S. Raful, in a conversation with the author, pointed out that the *Even Shushan* dictionary המלון החדש, in interpretation of והוקע, explains that the word connotes publication of a person's bad deed as an embarrassing sign. This is clearly the deeper connection intended by Rashi when he connects the verb והוקע with כתובת קעקע, since both hanging an executed criminal and putting a tattoo on oneself are a publication of a person's bad deed. This deeper connection between the two concepts is evident from the relationship between the words themselves, as both contain the letters קע as part of their root.

3. *Makkot* 21a.

4. פתשגן הכתב פרק א.

> The tattoo mentioned in the Torah refers to puncturing one's flesh, and filling the puncture with dye or ink, or other permanent colors. This process was the practice of gentiles, who would mark themselves for idol worship. The Gentiles, by marking themselves, would show a servitude to the idol's service. When [a Jew] has marked himself [permanently]with one of the permanent marks on any place on the body, whether a man or a woman, he is punishable by lashes. However, if the person punctured the skin [Rambam uses the word כתובת to refer to puncturing, unlike Rashi] but did not mark, or marked without puncturing the skin [Rambam again uses the word כתובת to refer to puncturing], he is not punishable by lashes, as the verse says, *"u'ketovet kaka,"* [thereby requiring both acts. Obviously the Rambam is based on the above-mentioned Mishnah in *Makkot*.]

From the last line of the Rambam, it is clear that he interprets כתובת as puncturing the skin. Therefore, the Rambam must interpret the word קעקע as marking with ink or dye. Thus, the Rambam interprets the words כתובת קעקע differently from Rashi. Others sharing the opinion of the Rambam include *Semag, Semak, Chinuch*, Rabeinu Yerucham, Rosh, the *Tur*, and the *Targum Yonatan*.[5]

There is one more important point concerning the *Rishonim*'s interpretation of כתובת קעקע. Among the *Rishonim* who adhere to the opinion of Rambam with regard to the explanation of the aforementioned verse, there is no difference of opinion concerning the order with which the two acts of writing and puncturing must take place.

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5. סוף פרק א, שיח השדה.

All *Rishonim* in this category understand that the act of puncturing must come before the act of marking. They interpret the verse as requiring כתובת (puncturing) first, and then marking along the puncture.[6]

However, among those *Rishonim* who interpret the verse like Rashi, that the word כתובת represents marking, and קעקע represents puncturing, there is a difference of opinion as to which act must come first. The language of Rashi implies that the marking should be followed by the puncturing, because he states, "a writing that is inscribed, deep and permanent, and which can never be erased; that he punctures with a needle and it remains dark forever." The wording clearly implies that one must write or mark first, and then puncture it thereby making it permanent by allowing the ink to flow deeper into the skin. The reasoning for Rashi's interpretation is based on the order of the words in the verse: כתובת קעקע, writing first and then puncturing. Rashi opines writing must precede puncturing. The Rivan agrees with Rashi concerning this point.[7]

Nevertheless, there are *Rishonim* who agree with Rashi concerning his interpretation of the meaning of the words, but agree with the Rambam that one must puncture first and then fill the puncture with ink. Harav Ovadia Bartenura, the author of *Nemukei Yosef,* R'i Almadari, and the Meiri are in this group[8]. They all opine that כתובת קעקע connotes an act of puncturing and then marking, although they interpret כתובת to mean writing, and קעקע to mean puncturing. This flows from their interpretation that the

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6. פתשגן הכתב פרק ב.

7. Rivan, *Makkot* 21a.

8. פתשגן הכתב.

verse describes the act not in the order in which it is performed. Indeed, Rav mi-Bartenura states, וקרא הכי משמע דכתיב וכתובת בתוך קעקע לא תתנו בכם "and the verse implies, [although כתובת means writing and קעקע means puncturing] the writing should take place within the puncturing." Thus, although the order of the two acts in the verse is reversed, Rav mi-Bartenura holds that first one must puncture and then one must write within the puncture.

The *Shulchan Aruch*[9] rules according to the Rambam and the Bartenura concerning the order in which the act must take place to be called כתובת קעקע. "Tattoo is puncturing the flesh and filling the puncture with ink or dye or other coloring materials." Clearly, the *Shulchan Aruch* rules that the first act must be the puncturing and the second act is marking in the puncture.

Other *Acharonim* (later decisors) add that even according to the *Shulchan Aruch* and the *Rishonim* who rule similarly, if one switches the order of the two acts, by marking first and puncturing second, he is still violating a Torah prohibition. The *Bach* writes that independent of the order of application of puncturing and ink, one violates a Torah prohibition and is punishable by lashes if properly warned. The *Shach* agrees, as does the *Yad Ketana* and *Shoshanim Le'David*. The reasoning of *Bach* is that Rashi and the Rambam do not argue but are merely explaining possible cases of כתובת קעקע, but are not excluding any possible situation.

However, according to all opinions, even if one does the marking first and then the puncturing, such an act is still prohibited by the Rabbis.[10] According to Rabbi Chaim

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9. יורה דעה קפ סימן א.

10. See פתשגן הכתב סימן ב and the *Minchat Chinuch* who quote

Kanievsky, author of פתשגן הכתב, the reason is that people who see the person after he has received his tattoo will not know in which order the tattoo was applied. Thus they will consider tattooing an unrestrictedly permitted act, since they see observant Jews doing it. Unbeknownst to them, the observant Jews may have applied the tattoo in a permitted order. Because of this confusion, the onlookers may come to do it themselves in a manner that is prohibited.[11]

In summary, there is debate on how to interpret the verse prohibiting tattooing. Nevertheless, the majority of the *Rishonim* as well as the *Shulchan Aruch* rule that the Torah prohibition applies to the act of puncturing and then marking. Some *Acharonim* hold that the Torah prohibition applies independent of the order of the marking and puncturing. Finally, everyone seems to agree that the act of permanently marking oneself by marking and then puncturing is, at the least, rabbinically prohibited.

The Application of Jewish law

The U.S. Food and Drug Administration's Center for Food Safety and Applied Nutrition, in a public bulletin, describes the application of tattoos:

> Permanent tattoos are applied using a small electric machine with a needle bar that holds from one to 14 needles, each in its own tube...
>
> The tattooing machine operates like a mini-sewing machine: The needle bar moves up and down as it

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numerous *Acharonim* that such an act is prohibited by the Rabbis, though it is not in violation of a Torah prohibition.

11. A rabbinic prohibition of this type is called מראית עין, prohibited due to the view of others.

> penetrates the superficial (epidermis) and middle layer (dermis) of the skin. The tattooist holds the machine steady while guiding it along the skin. The electric current (needed to engage the needles) is controlled by a foot switch.
>
> The needles protrude only a couple of millimeters from the tubes, so they don't penetrate deep into the skin. Each needle has its own tube, which enables the needle bar shaft to operate smoothly without damaging the needles. A single needle is used to make fine, delicate lines. A row of needles is used for shading and denser lines.
>
> The end of the needle tube is dipped in a small amount of ink. As the tattooist guides the machine over the skin, the needle moves up and down, puncturing the skin and depositing ink. . . [12]

The F.D.A.'s bulletin states that modern tattooing, and the less common practice of applying permanent makeup (e.g., eye-liner), punctures and marks the skin substantially simultaneously. Halachically, such an act is certainly prohibited on the level of a rabbinic prohibition, for reasons mentioned above, and is probably prohibited according to most *Rishonim* and *Acharonim* on a Torah level as well. In this author's opinion, since the needle enters deeply into the skin and injects ink, modern tattooing is the equivalent of independent acts of puncturing and then marking, which forces ink deep into the skin. Therefore, the modern world's practice of tattooing is prohibited on the Torah level according to the *Shulchan Aruch* and most, if not all, *Rishonim.* In fact, even according to Rashi, who opines that one must first write, and then mark, it is not clear

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12. Available at http://vm.cfscan.fda.gov/ ~dms/cos-204.html.

that he opines that the Torah permits the action of simultaneously injecting ink and puncturing the skin.

What is the "*Shiur*" of a Tattoo?

As mentioned above, permanent tattooing is prohibited. How much does one have to tattoo to warrant the biblical punishment of lashes?

In מוצל מאש חלק א סימן נא, the Veizner Rav expresses doubt as to the amount of writing necessary to violate this prohibition.[13] He questions whether כתובת קעקע requires two letters of writing, as does the violation of writing on Shabbat, or if a recognizable mark is sufficient.

In fact, he points out that this issue is disputed by *Rishonim*. The Rambam, in *Hilchot Avoda Zara* 12:11, defined the requirement as שישרט על בשרו וימלא מקום השריטה דיו, implying that tattooing a picture is not required for lashes. However, some opine that the Rambam also implied that some recognizable mark is required. *Sefer haChinuch*, mitzvah 253, writes that tattooing even one letter obligates one for lashes. The final decision on the issue of the *shiur* (amount) of tattoo is not clear. *Piskei Tosafot* writes[14] כתובת קעקע שמסרט בשרו בסכין כעין אותיות: "Tattooing is puncturing in the flesh with a knife in the form of letters." This seems to say that a minimum of two letters are required for the halachic definition of tattooing. Thus, the opinions of the *Rishonim* concerning the minimum mark required for tattooing fall into three categories: 1) A recognizable mark, 2) one letter, and 3) two letters.

Minchat Chinuch, mitzvah 253,writes, "It requires much

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13. The Veizner Rav may have been dealing with the tattooing applied to the Jews in the concentration camps.

14. מכות, סימן לב.

thought as to whether we [the *Acharonim]* should raise our voices concerning this issue, since the *Rishonim* [the early decisors] were quiet concerning this matter." In that spirit, and since lashes are not given today, this matter will not be considered further here.

Non-permanent Tattoos

A more complicated halachic question involves a tattoo that does not permanently mark a person. There are two common occurrences where this question plays an important role: (1) Recently, the non-permanent tattoo has become easy to apply, fashionable, and commonly practiced in the non-Jewish world. (2) Non-permanent marks are often applied to the skin to show payment for admission to certain amusement parks or similar events. These marks typically provide a means for quickly verifying payment of admission by the patron during the event, or upon re-entry to the event.

Rabbi Chaim Kanievsky writes[15] that the halacha may depend on a dispute between Tosafot and *Tosafot haRosh* in Tractate *Gittin* 20:

Tosafot

The Talmud in *Gittin* 20 states:

> Rami Bar Chama inquired: If it was known that a particular Canaanite slave belonged to a certain [individual], and a *get* [a divorce document] was written by that individual on the slave's hand, and subsequently the slave was produced in court by the individual's wife, what is the law? Do we say

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15. פתשגן הכתב.

> the fact that she has control over the slave proves that the husband legally transferred the slave to her, or perhaps the slave entered her possession, and accompanies her to court, on his own accord?

The Gemara now argues that there is no difficulty deciding the law in this case.

> Rava said: But derive [the law] that such a *get* is indeed invalid because it is a writing that is able to be forged?

The Mishnah on *Gittin* 21b establishes that according to R. Meir, who maintains that a *get* is validated by the testimony of the witnesses signed upon it, any *get* that is able to be forged or altered is invalid from the outset. Rami Bar Chama perforce follows R. Meir's opinion here, since he speaks of a case in which there were no witnesses to the delivery of the *get*. Thus, assuming the writing on the slave's hand is erasable, it is possible someone altered a provision of the *get* after the witnesses signed it; hence the *get* should be ruled invalid even if the husband legally transferred the slave to his wife.

The Gemara asks and answers a different question according to Rava:

> How, then does Rava answer for the Mishnah which states that one may write a *get* on the hand of a servant? Rava may be talking about a case where there were witnesses to the giving of the *get*. However, for Rami bar Chama, whose query necessarily concerns a case in which there were no witnesses to the delivery of the *get*, Rava indeed poses a difficulty.

The Gemara qualifies Rami bar Chama's case, thus avoiding Rava's difficulty, and explains:

> For Rami bar Chama, as well, there is no difficulty, since Rami speaks of where the *get* was a tattoo indelibly marked into the hand of the slave. Such a *get* cannot be altered, and thus could be valid.

Concerning the final answer of the Gemara, Tosafot comment:

> According to Torah law, there is no prohibition until one writes and punctures with ink [or some other permanent coloring], as it is taught in the Mishnah in the third chapter of Tractate *Makkot*. And according to Rabbi Shimon, one is not fully obligated until one writes the name of a deity of idol worship, as was explained there in the Gemara. However, there is certainly a rabbinic prohibition here, for even if one applies dark-colored ash to a wound, it is rabbinically prohibited because ash upon a wound appears like a tattoo.

The *Acharonim's* Interpretation of Tosafot

Tosafot state that one is not punishable for tattooing, according to Torah law, unless one punctures and writes, in accordance with the Mishnah in *Makkot*. It seems, however, from the final part of Tosafot's statement, that one is not allowed even to write non-permanently on one's skin, because Tosafot add, "there is certainly a rabbinic prohibition here." "Here" refers to Tosafot's understanding of the passage of the Gemara which entailed writing on one's skin without making a full tattoo. This implies that where one merely wrote on one's skin with ink, the Rabbis prohibit such an act. The *Beit Shmuel* interprets Tosafot in this fashion.[16]

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16. בית שמואל אבן העזר סימן קכד סעיף קטן טז.

However, the *Minchat Chinuch*, mitzvah 253, qualifies the above-mentioned interpretation of Tosafot. He states that Tosafot could be understood only to prohibit writing upon one's flesh in a fashion that would permanently mark him, albeit not in a full-fledged tattoo.[17]

Thus the *Acharonim* interpret Tosafot to prohibit either non-permanent marking or some other permanent writing that falls short of actual tattooing. It should be noted, however, that the prohibition against writing on oneself extends only to writing that appears like tattooing. As cited above, placing ash on a wound is prohibited because "it appears like a tattoo." Thus it seems that any prohibition against non-permanent tattoos is based on מראית עין, that no one should assume that tattooing is permitted. Even according to the opinion that non-permanent tattooing is prohibited, only a mark that looks like a tattoo is prohibited. Therefore, a mark from an amusement park is not prohibited, nor is any type of non-permanent make-up, e.g. blush, eye-liner, or eye shadow, because no one will think that the person with the mark has applied a tattoo.

The *Tosafot haRosh*, and the debate among *Rishonim*

The Rosh interprets כתובת קעקע differently than Tosafot. He copies the first part of Tosafot nearly word for word,

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In addition, the *Mishnat Chachamim* in explanation of *Sefer haMitvot*, mitzvah 263, adds that in a case of writing on one's flesh, there is an additional problem of *chatzi shiur*, doing half of the required act of a Torah violation, which is also considered a Torah violation.

17. Rabbi Chaim Kanievsky states that the only rabbinically prohibited act that Tosafot could be referring to is one of inscribing or puncturing one's flesh without writing. However, writing upon one's flesh is permissible.

omitting a single word, and thereby changes the implications of the commentary. He writes," כתובת קעקע וליכא איסורא כדתנן" . . . Whereas Tosfaot state "there is no Torah prohibition" (in merely writing on oneself), the Rosh states "there is no prohibition", purposefully omitting the word "Torah". This omission generalizes the Rosh's statement, implying that there is no prohibition whatsoever in writing on one's self.

From this omission, it is clear that some difference between Tosafot and the Rosh exists on this point. Whether their dispute was based on the permissibility of non-permanent writing or permanent writing (but not tattooing) is an issue discussed by the *Acharonim*. The *Beit Shmuel* held that the dispute was based on non-permanent writing, and the *Minchat Chinuch* held that it was based on permanent writing, albeit not tattooing.

What is the Halacha?

According to the great majority of decisors, one who wishes to write upon himself in a non-permanent fashion has authorities to rely upon.[18] However, most decisors would agree that a permanent mark upon the body is prohibited, even if that mark is not tattooing.[19]

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18. פתשגן הכתב סוף סימן יח.

19. *Minchat Chinuch* 253.

Letters To The Editor

To the Editor:

You are responsible for a fine journal, so I was very disturbed by the letter from Gershon Bess which appeared in the Spring 1998/Pesach 5758 (No. XXXV) issue. The writer makes reference to many individuals, living and deceased. Except in one case, all of the living are duly assigned, "שליט"א" and all of the deceased are assigned "זצ"ל". The only exception is his reference to "Rabbi Y. B. Soloveitchik" without "זצ"ל".

In the final analysis, it is not the writer who surprised me but the Editor, for allowing the letter to be printed without making a correction which is not only his prerogative but his responsibility.

Cordially,

RABBI CHAIM WAXMAN

* * *

Rabbi Cohen responds:

I apologize for the oversight, which was wholly inadvertent on my part. Be assured that I have the greatest admiration for the Rav, זצ"ל, and would never knowingly have slighted his honor.

RABBI ALFRED COHEN

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To the Editor:

I enjoyed Rabbi Clark's article on mixed seating at weddings. I just wish to add some personal observations to his halachic discussions.

As he mentions in the article, the wedding of Rabbi Moshe Tendler to the daughter of Rav Moshe Feinstein

had mixed seating. I have checked with some people from Frankfurt and was told that the custom there was to have mixed seating at the wedding, with the extra proviso that a man sat next to his wife while his other neighbor was another man with the wife at the far end. Hence, no man sat adjacent to a woman except for his wife. While learning years ago at Yeshiva University some of the students inquired of Rav Mendel Zaks (son-in-law of Chafetz Chaim) what was the procedure at his wedding. He replied that while there was mixed seating, each table was occupied by a family. Thus, the mixed seating would only be between close relatives. Thus, we see that in practice many different customs were observed.

Rabbi Clark states that the issue of the reception needs further clarification. While I shall not address the halachic issues, I note that *Haredi* weddings in Israel usually have separate areas for men and women during the reception. However, the *chupah* is outdoors in some courtyard. Everyone stands around the *chupah* with the result that there is some mingling of men and women during the actual ceremony. In contrast, other weddings have seating at the *chupah* with the result that men and women are separate during the ceremony, though there is mixed seating during the dinner.

Finally, Rabbi Clark does not mention anything specific about the dancing. Therefore, I mention that at Hesder weddings it is common to have a *mechitza* between the men and women during the dancing even when there is mixed seating during the dinner. I am not sure if this is an extra action to prevent any possible mixed dancing or whether they feel that it is improper for men to look at dancing women.

Sincerely,

ELI TURKEL