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Tubal Ligation and the Prohibition of *Sirus*

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The ethical and religious issues that surround the topic of birth control constitute one of the most controversial areas of modern medical ethics. Specifically, for the halacha observant Jew, the abundance of effective methods of contraception available today present many halachic and *hashkafic* (ideological) problems. These subjects have been given serious consideration by many *poskim* and leaders of our generation, and they continue to be areas of major concern to every observant couple. Each individual method of birth control must be examined separately according to the specifications of halacha. In this way we can determine whether it is permitted at all, and if so under what circumstances.

One of the most popular methods of birth control in the world for women who desire permanent sterility is the process of tubal ligation, (commonly known as "tying the tubes"). This procedure involves halachic issues that are unique to this method, and this article is devoted to the elucidation of one of them.

First, a few words about the procedure. Worldwide, tubal sterilization is the most commonly chosen form of contraception by women who have completed their desired childbearing. In the United States, it is chosen by more married or formerly

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married women than any other method.[1] Sterilization has enjoyed increasing popularity since the 1950's, primarily owing to technologic advances and increasing social acceptance. Improvements in technique and technology have rendered it a very safe, effective, and cost-efficient outpatient procedure. Tubal ligation now accounts for 10% to 40% of contraceptive methods throughout the world.[2]

Although there are several methods used in performing this procedure, they are all based on the same principle. In order to understand how it works, let us review the basic anatomy of the female reproductive organs. The female reproductive tract consists of the following major organs:

1. ovaries (left and right) - store the eggs and release (generally) one egg per menstrual cycle.

2. Fallopian tubes (the "oviducts") - transport the egg from ovary to the uterus. There are three basic sections to the tubes:

a. infundibulum (the closest part to the ovaries) and fimbria-like "little fingers" they will "grab" the egg from the ovary.

b. ampulla - middle portion, where fertilization by the sperm usually occurs.

c. isthmus - closest portion to the uterus, a straight tube, connects with the uterus.

3. uterus - The "womb" where the fertilized egg implants and develops into a fetus, bottom portion of which is called

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1. *American College of Obstetricians and Gynecologists Technical Bulletin* "Sterilization" Washington D.C. Committee on Technical Bulletins: The American College of OB/Gyne, No.222 1996

2. Hulka JF, Phillips JM, Peterson HB, et al: "Laparoscopic sterilization:American Association of Gynecologic Laparoscopists 1993 membership survey." *J Am Assoc Gynecol Laparoscop* 2:137, 1995

the cervix.

4. vagina - cervix opens into vagina.

If one were to block the Fallopian tubes in any way, the egg (the "ovum") would never be able to pass from the ovary into the uterus, and the sperm would never be able to fertilize the ovum. This is the principle behind the procedure of tubal ligation. During the procedure, the Fallopian tubes are cut and each end is tied off so that the ovum cannot pass into the uterus. The woman is therefore unable to conceive. The uterus and ovaries, however, remain intact, so the woman still menstruates as usual, and she still retains all other normal hormonal functions.

In theory, if one were to reattach the tubes, the woman would become fertile once again. However, this is not always possible to achieve, and depending on many variables, the reattachment is successful only between 35% and 80% of attempts. [3] Therefore, this is considered an option only for a woman who desires permanent sterility, and is not recommended for anyone for whom future childbearing may be an option.

Before we examine the procedure of tubal ligation according to halacha, a short comment on the subject of birth control in general is appropriate. There are many issues involved in this sensitive subject. The mitzvot of פרו ורבו - "be fruitful and multiply" and לשבת יצרה - "to settle the creation" are only two of the many major issues involved. It is well beyond the scope of this article to discuss when it is appropriate for a couple to use birth control or to advise anyone in this delicate area. It

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3. *Kistner's Gynecology and Women's Health*, 7th edition, Mosby, Inc. 1999 p.344 "The 1-year cumulative pregnancy rates reported after tubal ligation reversal range from 35% to 80% (Boeckx et al, 1986; Henderson, 1984; Rock et al, 1987; Hulka and Halme, 1988)."

should be obvious that these are things which should be considered individually by every couple and their own rabbinic leadership.

In this article, we will examine one specific aspect of tubal ligation, whether it is prohibited on the basis of the prohibition against "*sirus*". *Sirus* is the talmudic term for sterilization – a process or procedure which causes an animal or human being to become incapable of bearing offspring. For the purposes of this article, we will differentiate between two types of sterilization, "active" and "passive". By active we refer to what the *poskim* call "סירוס על ידי מעשה" which is sterilization brought about by the physical mutilation of the reproductive organs that renders the individual infertile. Passive sterilization refers to an act not done directly to the reproductive organs, such as the taking of a medication which accomplishes the same result of infertility. The example most often cited in the Talmud is the drinking of a "כוס של עיקרין" a "cup of roots", a medication used in talmudic times to achieve infertility.

The active sterilization of a male human being or animal is a clear Torah prohibition. The verse in *Vayikra* states, "ובארצכם לא תעשו" "in your land you shall not do these things."[4] From here we derive the prohibition for causing sterilization to any male, human or animal. The verse in *Devarim* adds "לא יבא פצוע דכא וכרות שפכה בקהל ה'."[5] From here we derive that any man who has been actively sterilized may not have sexual relations with a Jewish woman. The Torah explicitly refers only to the male reproductive organs, however. This brings us to ask the following, what then is the law regarding the active sterilization of a female?

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4. ויקרא כ"ב פסוק כ"ד.

5. דברים כ"ג פסוק ב.

There are several sources in *Chazal* which refer to the sterilization of a female. The first is the Gemara in *Shabbat*.[6] The Gemara there discusses a medication used to cure a certain disease called ירוקנא. A side effect of this treatment was to cause infertility. The Gemara is concerned that treating a man with this disease should be prohibited because of the prohibition against the sterilization of a male. After attempting several answers to the problem, the Gemara proposes that only the treatment of a woman is permissible, for the sterilization of a woman is not prohibited. Therefore, she is allowed to cure herself with this medicine.

The simple reading of the Gemara, and indeed the way the majority of the *Rishonim* explain this, is that according to the Gemara there is no halachic prohibition against the sterilization of a female.[7] However, there are two other places in rabbinic literature where female sterilization is discussed. One is in the Tosefta *Makkot*,[8] and the other is in the Sifra.[9] Both sources record a disagreement between the first opinion and R. Yehuda, with some significant variations. In the Sifra, the disagreement is recorded as follows:

> מנין שהנקבות בסירוס? ת״ל כי משחתם בהם מום בם ר׳ יהודה אומר בהם אין הנקבות בסירוס.

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6. שבת ק״י ע״ב - קי״א ע״א.

7. ראה רש״י ד״ה אלא באשה. שאינה מצווה בפריה ורביה כדאמרי ביבמות פרו ורבו ומלאו את הארץ וכבשוה איש דרכו לכבש ואין דרכה של אשה לכבש ותוס׳ ד״ה בזקנה ובעקרה. באשה נמי לא שייך בה מסרס אחר מסרס דאין שייך בה סירוס: ועיין רשב״א בזקנה א״נ בעקרה, כלומר דליכא משום ביטול פריה ורביה ומשום סירוס נמי ליכא דבאשה ליכא משום סירוס דאדם הוא דאסר רחמנא: ועיין רמב״ן ניחא ליה לאשכוחי בשריותא, ובמסקנא אוקימנא באשה זקנה א״נ עקרה ועא״פ שיש בה תוספת סירוס שהיא מצטננת ואינה נזקקת שוב לבעל אפי׳ הכי באשה שרי שאין בה דין סירוס, ועיין גם בריטב״א, חידושי הר״ן בשם הרא״ה, המאירי ובלשון הטור.

8. תוספתא מכות פרק ד׳ ברייתא ד.

9. תורת כהנים פרשה ז׳ ברייתא י״ב.

> "From where do we know that females are included in [the prohibition of] sterilization? The verse states (*Vayikra* 22:25) "for their corruption is in them, there is a blemish in them." [But] Rabbi Yehuda says, "females are not included in [the prohibition of] sterilization."

From the Sifra it is clear that according to the first opinion the prohibition of sterilization *does* apply to females. This apparently contradicts what we have just seen in the Gemara in *Shabbat.*

The commentaries answer this difficulty in one of three ways. Some explain that the Sifra is referring only to *sirus* as it pertains to disallowing an animal as a sacrifice (Ritva, *S'mag*).[10] According to them the *braitha* is not referring to the prohibition of sterilization at all, only that a female animal which has been sterilized would be considered unfit for use as a sacrifice in the Temple. Others explain that our Gemara holds like R. Yehuda, who is of the opinion that there is no prohibition of sterilization for a female (*Minchat Chinuch*).[11] A third view maintains that the Sifra is referring to "*sirus bemaaseh*" – "active" sterilization – whereas the Gemara only permits the passive sterilization of a female (*Shevet Levi*).[12]

In the Tosefta *Makkot*, the same disagreement is recorded with two significant variations:

> המסרס את האדם ואת הבהמה וכו' בין זכרים ובין נקבות הרי זה חייב
> ר' יהודה אומר הסרס את הזכרים חייב ואת הנקבות פטור.

One who sterilizes a human being or an animal....

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10. ריטב"א שבת ק"י ע"ב, סמ"ג מצוות לא תעשה ק"ו.
11. מנחת חינוך מצוה רצ"א אות ט' ביאורו לשיטת הרמב"ם והמגיד משנה.
12. עיין פירוש הר"ש משאנץ ופירוש הראב"ד על הספרא ובשו"ת שבט הלוי ח"ו סימן ר"ו ביאורו בשיטות הגר"א.

> whether male or female, this person is liable [for the punishment of 39 lashes ("*makkot*") – as it is a Torah prohibition]. Rabbi Yehuda says, one who sterilizes males is liable, one who sterilizes females is exempt.

A careful analysis of Rabbi Yehuda's words as recorded in the Tosefta would lead to the conclusion that even according to him there is a prohibition against the sterilization of females. This is because he uses the language "פטור" rather than "מותר". This generally means that it is prohibited, usually because of rabbinic decree, but is not liable for punishment with lashes because it is not prohibited by the Torah. Furthermore, it seems that according to the *tanna kamma* (the first unnamed opinion recorded in the Tosefta) there is a punishment of *makkot* for one who sterilizes a female, as opposed to the Sifra where it is unclear whether there is such a punishment involved.

This Tosefta is even more difficult to reconcile with the Gemara in *Shabbat*. It is clearly referring to the prohibition of *sirus* and not to the eligibility of an animal as a sacrifice, eliminating one of the three interpretations of the Sifra. However, the other two answers that were proposed by the commentaries can still be applied. We can still say that our Gemara holds like R. Yehuda, and although even R. Yehuda admits (according to the Tosefta's version of the disagreement) that there is a rabbinic prohibition against *sirus* for a female, in the case of an illness where the sterilization is being done for medicinal purposes it would be permitted. We can also still explain that the Sifra is only referring to active, as opposed to passive, sterilization.

With this background, we can examine the words of the Rambam.[13] After recording the law regarding *sirus* for a male, he writes as follows: "והמסרס את הנקבה בין באדם בין בשאר מינים

13. רמב"ם הלכות איסורי ביאה פרק ט"ז הלכה י"א.

פטור", one who sterilizes a female, whether a human being or any other species, is not liable."

The commentaries offer three different explanations of the opinion of the Rambam. The *Maggid Mishnah* explains that the Rambam follows the opinion of R. Yehuda in the Sifra, and there is no Torah prohibition of sterilization of a female. However, since R. Yehuda uses the language אין הנקבה בסירוס as opposed to the language מותר לסרת הנקבות, he must mean that although the female is not included in the Torah's prohibition, a rabbinic prohibition still applies. It is this explanation which is brought by the *Beit Yosef*,[14] and subsequently in the *Shulchan Aruch*, where he writes as follows; "והמסרס את הנקבה בין באדם בין בשאר מינים פטור אבל אסור" – "one who sterilizes a female, whether a human being or any other species is not liable but it is prohibited."[15]

The Gra, however, explains that the prohibition against sterilization of a female is actually of Torah origin.[16] He holds that the halacha is actually in accord with the *tanna kamma*,[17] but there is no punishment of *makkot* because the prohibition of sterilizing females is not technically included in the prohibition of לא תעשו כן, rather it is derived from the extra verse, כי משחתם בהם. Therefore, the Rambam did not write that female sterilization is *muttar* (permitted), because it is prohibited

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14. The *Beit Yosef* apparently explains that the Gemara rules like Rabbi Yehuda, and that the version of the Tosefta was correct in that Rabbi Yehuda holds that there is a rabbinic prohibition. He would thus answer the contradiction between the Gemara and the Tosefta. See note 11.

15. שו"ע אהע"ז ה' סעיף י"א.

16. הגר"א אהע"ז סימן ה' ס"ק כ"ה.

17. The Gra apparently explains that the Gemara is only referring to passive sterilization, thus there is no contradiction between the Gemara and the Sifra and Tosefta. See note 12.

by the Torah, only not as explicitly as the male prohibition. This is also the Gra's opinion, *halacha lema'aseh* – that female sterilization is a Torah prohibition.

The third opinion is that of the *Bach*.[18] He explains that there is no difference in halacha between active and passive *sirus*. Just as there is no prohibition, neither a rabbinic or a Torah prohibition, against the *passive* sterilization of females – there is also no prohibition against the *active* sterilization of a female. As we stated before, there are other reasons why a woman should not use birth control, aside from this issue of sterilization. However, all *poskim* agree that in cases of need, passive sterilization is permitted,[19]such as in a case where it causes undo pain to the woman to become pregnant.[20] Therefore, the *Bach* holds that the *active* sterilization of a female would also be permitted under the same set of circumstances.

The *Taz* offers a similar explanation for this prohibition. He explains that the only prohibition involved in the sterilization of a female is that of making a wound and causing pain. He agrees with the *Bach,* however, that the prohibition of sterilization, both active and passive, does not apply to females.[21]According to the *Taz*, even active sterilization would

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18. ב"ח אהע"ז סימן ה' ד"ה ואשה.

19. It is important to note that the "need" required to permit passive sterilization is much less stringent than the need required to permit active sterilization, according to the Gra and the *Shulchan Aruch*. If there is a prohibition – even if it is a rabbinic prohibition – the criteria for permission are much more severe. Especially if it is a Torah prohibition, when only a life and death situation would be sufficient.

20. יבמות ס"ה ע"ב - מעשה בבתו של רבי חייא ע"ש.

21. The *Bach* and the *Taz* apparently hold that the Sifra had the correct version of Rabbi Yehuda's opinion, and there is no rabbinic prohibition. The Gemara in *Shabbat* therefore must hold like Rabbi Yehuda. Or alternatively, they could hold like the Ritva and *S'mag*

be permitted in cases where there is a constructive purpose, and the pain is minimized. Therefore, according to the *Bach* and the *Taz*, the Rambam did not write that it is permitted to sterilize a female, because it can only be done in cases of need, just like passive sterilization.

We have thus identified three basic opinions regarding the prohibition of the active sterilization of females.

1. That it is a prohibition of Torah origin, although there are no *makkot* – Gra.

2. That it is a prohibition of rabbinic origin – *Maggid Mishnah* and *Shulchan Aruch.*

3. That there is no specific prohibition, and it may be done in case of need(according to the same criteria as passive sterilization) – *Rishonim* on the Gemara *Shabbat*, *Bach* and *Taz.*

The criteria for "need" which would allow the use of passive sterilization (such as with medication) have been discussed by the *poskim*, and it is not the focus of this article to review the extensive literature on this subject. However, it is clear according to all *poskim*, that whatever prohibition (the Torah prohibition according to the Gra or the rabbinic prohibition according to the *Shulchan Aruch*) might apply to *active* sterilization of the female, it does not apply to *passive* sterilization. This is clearly the opinion of even the most stringent of the opinions regarding active sterilization. Even the Gra, who holds that the active sterilization of a female is a Torah prohibition, still agrees that there is no specific prohibition for a female to drink a כוס של

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who explain that Rabbi Yehuda and the *tanna kamma* only argue in reference to the laws of sacrifices, and there is no prohibition even according to the *tanna kamma*. This seems to be the opinion of most of the *Rishonim* who explain the Gemara in *Shabbat*, that there is no prohibition of *sirus*, and they must use one of the two above explanations. See note 7.

עיקרין.[22]

Now that we understand how the laws of active and passive sterilization apply to females, we can attempt to apply them to the procedure of tubal ligation. At first glance it would seem obvious that tubal ligation should be subject to the laws of active sterilization. After all, it involves the active mutilation of a reproductive organ resulting in permanent sterilization. This has been the general consensus of the modern *poskim*. Based on this, most modern *poskim* have permitted active sterilization only in extreme circumstances and only when there is no other option for contraception. The reason for the stringency is the opinion of the Gra, and the rationale for the leniency in extreme cases is the opinion of the *Rishonim* and the *Taz*.[23]

However, the only recorded active sterilization of the female in *Chazal* is called "נטילת (חתיכת) האם".[24] The modern correlate of this would be a hysterectomy, when for various reasons, a woman's uterus would be removed. By extension, it has been assumed by most of the *poskim* that קשירת החצוצרות or "tubal ligation" would be considered halachically equivalent to a hysterectomy because it also entails damaging one of the female reproductive organs.[25] However there may be reason to suggest that this might not be the case.

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22. גר"א אהע"ז ה' ס"ק כ"ז.

23. אגרות משה אהע"ז ח"א סימן י"ג אהע"ז חלק ד' סימינים ל"ג-ל"ה, שרידי אש אהע"ז סימן ע', ציץ אליעזר חלק י"ד סימן צ"ו חט"ז סימן מ"א.

24. ראה מסכת סנהדרין דף לג ע"א מעשה בפרה (של בית מנחם) שניטלה האם שלה והאכילה רבי טרפון לכלבים ובא מעשה לפני חכמים ביבנה והתירוה שאמר תודות הרופא אין פרה וחזירה יוצאת מאלכסנדריא של מצרים אלא אם כן חותכין האם שלה כדי שלא תלד, וגם בסנהדרין צ"ג ע"ב ובכורות כ"ח ע"ב.

25. ציץ אליעזר שם, אגרות משה אהע"ז חלק ד' סימן לב ועוד, אבל ראה גם ב"הדרום" נ"א, עמוד 55, שכתב הרב נחום רבינוביץ שי"ל דרק נטילת האם הוי סירוס בנקבה ולא קשירת החצוצרות ע"ש.

The basis of this suggestion is the definition of "איברי זרע" or "reproductive organs." Which organs in particular are to be considered part of this prohibition? The specific female reproductive organs that are included in this prohibition are not clearly elucidated in *chazal*. However, the male reproductive organs are clearly listed in the verse, and discussed by *chazal* in detail. It would therefore seem logical for us to examine the laws of male sterilization to find the guidelines for what should and what should not be considered a reproductive organ.

Before we enter this discussion it is important to review the basic anatomy of the male reproductive organs. They consist of the following:

1. testis (left and right) – in which the sperm are produced.

2. epididymus (left and right) – small pathways in which the sperm mature, leads to the vas deferens.

3. vas (ductus) deferens (left and right) – transport the sperm from testis to the urethra.

4. prostate – produces secretions that make up some of the semen, vas deferens runs through it.

5. urethra – the secretions of the glands and the sperm from the vas deferens mix and are ejaculated through urethra into the female reproductive tract.

The Rambam describes three organs that are halachically considered the male reproductive organs.[26] Damage to one of these three would render an individual a *patzua daka*(one who would be prohibited from having sexual relations, if done intentionally – and the act of damage would be prohibited as an active sterilization of a male). In the Rambam's words:

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26. רמב"ם הלכות איסורי ביאה פרק ט"ז הלכה ב'.

> ושלשה איברין אפשר שיוליד הזכר בגיד ובביצים ובשבילין שבהן תתבשל שכבת זרע והן הנקראין חוטי ביצים וכיון שנפצע אחד משלשה איברים אלו או נכרת או נדך הרי זה פסול.
>
> ...and with three organs it is possible for a man to fertilize, the penis, the testicles and the pathways within which the semen becomes matured, [these pathways] are what are called the "strings of the testicles" and if any one of these three organs is either cut or crushed this person becomes unfit [for sexual relations]:

The meaning of the phrase "חוטי ביצים" – "strings of the testicles" is defined by the *poskim*. Rashi describes them as, "וחוטי ביצים שהביצים תלוין בהן בתוך הכיס" – "the strings of the testicles, that the testicles are hanging on them *within the scrotum*".[27] From the words "within the scrotum" it would seem that only the portions of the "strings" that are contained within the scrotum are included in the prohibition of *sirus*. This would lead one to conclude that if one were to cut the portions of the vas deferens that traverse the body outside of the scrotum, which are not considered reproductive organs halachically, it therefore would not render one a *patzua daka*.

The Chazon Ish uses this principle to issue a very important halachic decision. He was asked regarding a man who had undergone prostate surgery. During the course of surgery, the vas deferens, (the tube which transports the sperm from the testes, through the prostate gland and out through the urethra) was damaged or cut. The man thus became infertile. The question was, does this render him a *patzua daka*, i.e. can he now have sexual relations with his wife? The following are the words of the Chazon Ish:[28]

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27. מסכת יבמות ע"ה ע"ב ד"ה בכולן.

28. אהע"ז סימן י"ב סעיף ז'.

והנה כפי הידוע ע״פ הרופאים השבילין נכנסין לעומק בגוף ועוברין כמו חצי קשת עד שנכנסין לגיד ועוברין דרך הגיד וזורמין לחוץ, ומדלא הוזכרו בגמ׳ ובפוסקים משמע דבמקום שהשבילין בפנים אינם בכלל פצוע דכא ואינו נפסל אלא אם נפצע ונדך בגיד וביצים וחוטין שבהם, אבל לא החוטים הפנימים שבאמצע הגוף, ואף אם מסתרס ע״י כריתת השבילים בתוך הגוף מ״מ אינו נאסר בקהל ודינו כשאר עקר וכסריס חמה וכו׳ וע״ד הנתוח בחולי עצירת השתן ע״י סתימת שביל השתן הבא מנפיחת הבשר הידוע [the prostate] ולוחץ על צנור השתן וסותמו, ובשעת נתוח מוכרחים גם שביל השכבת זרע המובלע בגוף, למש״כ אין בזה איסור סירוס דאורייתא רק דרבנן כמו שתיית כוס עיקרין, ובכל אופן הניתוח מותר משום ספק סכנה, ואינו נאסר לבוא בקהל.

...and behold, as it is known from the doctors that the pathways go deep into the body and they pass like half a bow [an archway] until they enter the penis and they pass through the penis and they spill [their contents] outside, and since they are not mentioned in the Gemara or the *poskim*, it seems that in the area where the pathways are within [the body] they are not included in [the laws of] *petzua daka* and one does not become invalidated [if they are damaged] unless they are ruptured or crushed within the penis or the testicles and the strings within them, but not the inner strings which are inside the body. And even if he becomes infertile by the cutting of the pathways within the body, nevertheless he is still not prohibited from sexual relations and his status is equal to that of any other infertile man or "*sris chamah*" [one who becomes infertile as a result of illness] and in the course of the operation when one has urinary blockage due to blockage of the urethra which comes from the hypertrophy of the "known flesh" [the prostate gland] and it puts pressure on the urethra and closes it and during the operation they are forced [to cut] also the pathway of semen which is within the body, according to what we have written this does not involve

> a sterilization which would be prohibited by Torah law only by a rabbinic law, similar to the drinking of a cup of roots. Anyway [even if it were prohibited by Torah law], the operation would be permitted because of possible life-threatening danger, and he would not become prohibited from sexual relations....

The Chazon Ish thus establishes a basic principle in the halachic definition of a reproductive organ in the male. Only those portions of the חוטי הזרע which are "outside the body" (i.e. in the scrotum) are considered אברי הזרע. Those portions contained within the body are not considered אברי הזרע. Therefore, an operation performed on the prostate gland, through which runs the ductus deferens, would not be prohibited on the grounds of the *sirus* prohibition, nor would he be prohibited to have sexual relations on the basis of the rules of *patzua daka*. Rather it would be similar to a man drinking a potion that makes him infertile, something which the majority of *poskim* (including the Chazon Ish himself) hold is a rabbinic prohibition.[29] Therefore, it would be permissible in a case of danger, even if it may not be life threatening.

The modern *poskim* have overwhelmingly accepted the interpretation of the Chazon Ish. R. Moshe Feinstein, R. Eliezer Waldenberg, and R. Yitzchok Yaakov Weiss have all written responsa that use the *Chazon Ish* as their rationale for permitting a man who underwent prostate surgery to have sexual relations with his wife.[30]

Interestingly, the *Chelkat Yaakov* also came to the same conclusion as the Chazon Ish, albeit from a slightly different

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29. שו"ע אהע"ז סימן ה' סיעף י"ב.

30. אגרות משה אהע"ז ד' סימן כ"ח-ט'; ציץ אליעזר חלק י' סימן כ"ה פרק כ"ד; מנחת יצחק חלק ה' סימן י"ב.

angle.[31]He was asked the same question regarding a man who underwent prostate surgery. His major point is that the Rambam also agrees with Rashi's principle that only those portions of the vas deferens that are contained within the scrotum are considered reproductive organs. This is why the Rambam uses the language "the pathways within which the sperm matures." This indicates that the difference between the two portions of the vas deferens is a *functional* one, i.e. that only within the scrotum does the sperm mature. However, outside of the scrotum the vas is only a conduit for the sperm, which is why it is not considered a reproductive organ that would render someone a *patzua daka*.

He quotes a physician who demonstrated that a woman can become pregnant from sperm extracted from the epididymus which had never traversed through the vas deferens. The epididymus, within which sperm maturation occurs, consists of tiny ducts that lead from the testes into the vas deferens, and it is contained within the scrotum. The exact boundary where the epididymus ends and the vas deferens begins is not clearly delineated (see note 35).

Based on this principle, he equates the damage of the vas deferens outside the scrotum to the damage of any other organ that may cause infertility in the male, such as spinal cord or brain injury. Although such an action would be prohibited due to the general prohibition of passive *sirus* (for a male even passive sterilization through medication is prohibited), no one would suggest that they would be considered an active *sirus* causing someone to become a פצוע דכא. In the same way, we should consider damage to the vas deferens outside the scrotum as if it were any other nonreproductive organ that indirectly

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31. חלקת יעקב חלק ב׳ סימן כ״ב.

causes one to become infertile.[32]

Let us now attempt to apply these rules to the female reproductive organs. It is logical to assume that the same rules used to identify the male reproductive organs should be applied to the female organs. It is also important to remind ourselves of the relative strengths of the prohibitions of *sirus* for a male vs. a female. We recall that according to many *poskim*, there is no prohibition of female sterilization per se, and according to others it is only a rabbinic prohibition, whereas for a male it is of Torah origin. Even according to the most stringent opinion, that of the Gra, who holds that for a female it is of Torah origin – it is still not quite as strict as by the male where it carries the punishment of *makkot*. From this one is forced to conclude that we certainly cannot give the female a more strict definition of "reproductive organ" than the definition we use for the male.

In the male, we make the anatomical distinction between those organs that are "בתוך הכיס", within the scrotum, and those that are "בתוך הגוף", within the body. In the female, we obviously cannot make this distinction, because all of her reproductive organs are within the body. However, if we compare the *functional* aspects of the male organs to the female organs, we have a lot to learn. The first major lesson is that we cannot simply assume that all organs that somehow are involved in making someone fertile are necessarily considered "reproductive organs". As we have clearly seen, even organs through which the sperm actually travel are not halachically considered reproductive organs. Rather, they are considered just as any other organ (such as the brain or spinal cord), which may in some way be related to male fertility. Therefore, when

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32. Interestingly, in an addendum to the responsum, the *Chelkat Yaakov* mentions that someone showed him the *Chazon Ish* and he writes, "ושמחתי מאד..., שתלי"ת, שכוונתי בשאלה חמורה הלזו, לדעתו הגדולה, והאמת."

we define the prohibition of sterilization of a female we should also assume that only those organs which are directly involved in the creation of viable זרע and in its maturation into a viable fetus are considered איברי הזרע. (Bearing in mind our previous discussion, we may be lenient in a case of doubt as to which organs are included in this prohibition.)

If this is true, we can make an interesting conclusion. There is a strong similarity between the functions of the vas deferens and the Fallopian tubes. The testis in the male is the male gonad, i.e. it produces the sperm. It matures in the epididymus, and then is transported through the ductus deferens. The ductus is halachically not considered a reproductive organ, because it only functions as a conduit for the sperm. In the female, the ovaries are the gonads, i.e. they store and mature the ovum ("egg"). The ovum is then taken by the fimbria, becomes fertilized by the sperm in the ampulla of the Fallopian tube, and generally remains there for several days. It is then transported through the Fallopian tubes to the uterus for implantation.[33] Although the actual fertilization – the meeting

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33. See רמב"ם הלכות איסורי ביאה פרק ה' הלכה ד', where he seems to refer to the Fallopian tubes as "השבילין שבהן מתבשלת שכבת זרע שלה".This would lead one to conclude that the tubes in the woman actually are considered reproductive organs, and that they therefore would also be considered *sirus* in the female if damaged. However, it is unclear what the Rambam is really referring to, because he continues by saying that there is a נקב פתוח from the area where the tubes are located (the "עליה") and that this is called the "לול" and that the penis actually penetrates this hole during marital relations. It is clear that this cannot refer to the hole which opens from the tubes to the uterus, because the penis doesn't go anywhere near the inside of the uterus during sexual intercourse. See נשמת אברהם אהע"ז בהקדמה להלכות נדה for a full discussion of *chazal's* understanding of the female anatomy. However, by the male, it is clear that the *poskim* are referring to the tubes contained within the scrotum, and it is clear that the Rambam held that there was a functional difference between the tubes within

of the sperm and the ovum – usually happens in the tubes themselves, it can happen outside of the tubes. It can occur within the uterus itself, or even in a test tube.[34] If the halacha

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the scrotum and the tubes within the body. Furthermore, even if we assume that the Rambam really is referring to what we now call the Fallopian tubes, and he really would have considered it *sirus* to cut them because they are מבשל שכבת זרע שלה, we should remember that *sirus* is only a rabbinic prohibition by a woman, and the Rambam was basing this *psak* – that the tubes are איברי הזרע – on his own scientific understanding that these are the place where the "seed of the woman" matures. (Indeed , see the מגיד משנה on this רמב"ם where he explains the source for this ורבינו ביאר תכונתן כפי...וכו' משל משלו) ד"ה בקיאותו בחכמות הניתוח ע"ש-רמב"ם). There is no source in *chazal* (other than the Rambam) that identifies this as the purpose of the שבילין. In fact, there is no source in *chazal* that even mentions the existence of these שבילין. The *braitot* which we previously brought from the Tosefta and the Sifra, do not define exactly what constitutes *sirus* for females. Therefore, if we now know that this is not the purpose of the tubes, we can say that the Rambam was making an erroneous assumption based on the scientific knowledge of the time, not based on the rabbinic tradition. The question then becomes, are we obligated to be strict on an *issur d'rabbanan* based on the Rambam's understanding of anatomy?

34. Although it is true that the ampullary region of the Fallopian tubes secretes various substances which create an environment that is conducive to fertilization of the ovum and important for the development of the embryo's first few days before implantation, recent research has shown that the Fallopian tubes are not absolutely essential organs for the woman to become pregnant, even without in vitro fertilization. In the May 1998 issue of *Acta Obstetricia et Gynecologica Scandanavica*, pp. 475-86, in an article entitled "Have the Fallopian Tubes a Vital Role in Promoting Fertility", Dr RH Hunter brings four lines of evidence to demonstrate that "...the Fallopian tubes make no overwhelming contribution to human reproduction other than as a conduit for gametes and embryos." Three of these pieces of evidence are 1) When a woman's tubes are for some reason non-functional, doctors can, in an operation known as "Estes' operation" place the ovaries *within* the uterus itself, and successful pregnancy can be achieved, *without any Fallopian tubes!* 2) Early embryos transplanted after in vitro fertilization can successfully implant in the uterus *without*

of *sirus* does not apply to the tubes in the male,[35] then how can we say that it would apply to the tubes of a female? We certainly cannot be more stringent in the female than in the male![36]

Let me emphasize that although it is not considered *sirus* in the male to cut the ductus deferens within the body, it is still prohibited because of the rabbinic prohibition against

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ever being exposed to the special environment of the Fallopian tube! 3) The transfer of ova and spermatozoa directly into the uterus can achieve pregnancy, and fertilization occurs *within the uterus and <u>not</u> within the ampullary region of the Fallopian tubes!*

35. It is true that according to Rashi the portion of the vas deferens within the scrotum would be considered a biblical *sirus*, even though it is also only a conduit. This might lead one to prove that even conduits are considered איברי זרע. However, the junction between the epididymus and vas deferens is gradual, and it would be difficult to say that only the epididymus is *sirus* and not the vas. It is much easier to draw the line at the scrotum, which is an obvious point. To quote from Campbell's *Urology* 1998, p. 1269 "In the bulky cauda epididymidis, the diameter of the duct enlarges substantially, and the lumen acquires an irregular shape. Progressing distally, the duct gradually assumes the characteristic appearance of the ductus deferens." In addition, it is unclear where sperm maturation ends, and it is entirely possible that it continues in the beginning of the vas, again from Campbell's, p. 1280, "In an attempt to explain successful pregnancies achieved after high epididymovasostomy or efferent, Bedford (1994) suggested that the absorptive and secretory functions of the vas deferens may create a luminary environment capable of supporting the maturation of sperm fertility. Unfortunately, we were unable to find experimental results in the human that would confirm a secretory function in the vas deferens or support the idea of sperm maturation within the vas deferens."

36. Only according to the Gra, one might argue that since it is a Torah prohibition, that we should be more stringent, and consider this a case of doubt, i.e. are the tubes reproductive organs? This may then cause us to consider this a *safek d'oraitha* which would force us to be more stringent. However, the majority of *poskim* do not hold this way, see אגרות משה אהע"ז ד' סימן ל"ד.

passive sterilization of a male. Therefore, whatever laws apply to passive sterilization of a female, would also apply to a tubal sterilization. However, as we have stated, the prohibition of active sterilization would not be an issue.

Some *poskim* have suggested that tubal ligation might be permitted on different grounds, because it is a reversible procedure.[37] These *poskim* have generally relied upon this rationale only in cases of extreme need. This reasoning is problematic for two reasons. First of all, it is not clear that this can be considered a reversible procedure. Medical estimates are, that in the best of circumstances, there is only an 80% chance of a successful reversal. Most estimates, however, are lower than that.[38] It is therefore only considered as an option for someone who desires permanent sterilization.

The second problem with this *heter* is that many *poskim* hold that even if it were 100% reversible, it still would be considered *sirus*.[39] Their reasoning is that since it would require another operation to repair the tubes, and without another operation the individual is permanently infertile, this is considered a permanent *sirus*. Only if it would heal on its own would it be considered a temporary *sirus* according to these *poskim*.

Conclusion

Most recent *poskim* have ruled on the subject of tubal ligations as if it were a case of *sirus*. Therefore, they only permit this procedure in extreme cases where there was no other available method of birth control. After careful analysis of the halacha

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37. ציץ אליעזר חלק י״ד סימן צ״ו; מנחת יצחק ח״ג סימן כ״ו אות א׳, ח״ד סימן ק״כ.
38. See note 3.
39. אגרות משה אהע״ז סימן לב, שבט הלוי ח״ג סימן קס״ד.

and the anatomy, perhaps this fundamental assumption should be reviewed by today's *poskim*. If I am correct, then a tubal ligation procedure does not damage one of the איברי הזרע and it would be permitted whenever a בוס של עיקרין would be permitted for a female. Keep in mind though, that it is still medically considered a permanent procedure, and should be pursued only when permanent infertility is the desired outcome.

The Canvas Succah

Rabbi Yeshai Koenigsberg

Introduction

Due to its ease of construction and convenience of storage, the canvas succah has achieved widespread popularity in many Orthodox communities. Also known as the prefabricated succah, it is employed not only by individual families but by many shuls, hotels, and other communal institutions.[1] Typically, the canvas succah consists of a frame assembled from metal piping or poles onto which sheets of canvas or other material are tied. At first glance, it would seem that the canvas succah conforms to all the halachic requirements of a succah. However, a closer examination of the issues involved reveals a number of potential problems. This article will identify and address three specific issues. The first issue relates to the walls of canvas, the second relates to the *s'chach* supports, and the third relates to the sequence of construction. In addition, the halachic status of *s'chach* mats, often used in conjunction with the canvas succah as with its conventional counterpart, will also be explored.

I. Walls of Canvas

In general the walls of the succah may be of any type of material. Whereas the *s'chach* must be of something that both grows in the ground and is not a utensil which is subject to

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1. Actually a succah made of sheets is already mentioned by *Chazal*. See *P'sikta* (*Emor*) cited in *Moadim U'zmanim* I:84.

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ritual impurity (*mekabel tumah)*, no such restrictions apply to the walls.[2] However, the factor that does warrant consideration regarding succah walls is their sturdiness and stability. It is in reference to this that the type of material being used must be taken into account.

The Gemara (*Succah* 23a) states in the name of Abaye that any wall that will not remain standing when a normal wind is blowing has no halachic validity. It is evident from the context of the Gemara that this refers to a case where the wall will totally collapse as a result of the wind. This statement is repeated in the Gemara (24b) by Rav Acha Bar Yaakov but evidently has a different connotation. As an illustration of this requirement the Gemara describes a succah which makes use of trees for its walls. If the branches of the tree sway in the wind, the wall is invalid. The tree branches must be securely tied in a way that the wind will not cause them to move. Presumably, the wind will not actually knock over the unsecured branches. They will merely sway to and fro in the wind. Nonetheless, the Gemara deems this an invalid wall. Thus, whereas Abaye invalidates a wall if it will collapse in the wind, Rav Acha Bar Yaakov goes further and invalidates a wall that will merely move in the wind. *Shulchan Aruch* (630:10) cites the ruling of Rav Acha Bar Yaakov, and the *Mishnah Berurah* (no. 48) confirms the above explanation in the following comment:

> If the wind causes the trees to sway, even if the wind is not strong enough to cause them to fall down entirely but merely causes the wall to move back and forth, the wall is not considered a halachically valid wall.

Sha'ar HaTziun (no. 45) attributes this explanation to Rashi, Ran, Ritva and *Or Zarua*. The reason for this requirement is

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2. See Mishnah *Succah* 11a and 12a: *Shulchan Aruch O.C.* 629:1 and 630:1.

that the halachic definition of a wall is that which is positioned and fixed in one place. If the wall lacks stability and thus is capable of moving under normal circumstances, it does not qualify as a halachic wall.[3], [4]

Given this requirement, the status of a canvas wall tied in place needs to be examined. On the one hand, the middle area of the canvas tends to sway in the wind even when it is tied securely. Perhaps this movement, albeit slight, renders the wall unstable and thus halachically invalid. On the other hand, the wall never actually shifts position, by virtue of the edges of the canvas being tied to the frame. It could thus be argued that the wall is considered to be fixed and therefore constitutes a halachic wall. Interestingly, this very case is addressed by the early authorities. Although the above issue is resolved favorably, their actual ruling is effectively a restrictive one. *Tur* (630), quoting Rabbeinu Peretz, states the following:

It is improper to make the walls from sheets of flax…

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3. For a thorough analysis of this requirement, see *Emek Bracha* (R. Aryeh Pomeranzyck) *Succah* no. 19. See also *Iggerot Moshe O.C.* V no. 40b.

4. Chazon Ish (*Hil. Eruvin* 77:6) disputes this interpretation and maintains that the rule of Rav Acha Bar Yaakov (and the *Shulchan Aruch* as well) only invalidates a wall moving in the wind when that movement causes the wall to lose the dimensions required for a halachic wall (e.g. the wind will cause the branches of the tree to separate from each other, thereby creating gaps of three *tefachim,* or the branches will bend below the minimum height of ten *tefachim* [see below]). But if the proper dimensions will be maintained, then movement in and of itself is not grounds to invalidate the walls. Chazon Ish acknowledges that the later authorities have not specified this. See, however, *Kiryat Sefer* (*Succah* 4:5) who adopts this interpretation. (See also *Pri Megadim* (*Eshel Avraham*) 363:4 and Tosafot *Shabbat* 363:9 in reference to *eruv*. Whether this has bearing on the halacha of a succah wall is debatable. See *Iggerot Moshe* ibid.)

> even if he tied them securely [because] sometimes they become unfastened, without his being aware, and the result is a wall that does not stand in the wind.

It is clear from this ruling that in and of itself a canvas wall is acceptable. Apparently the minor movement caused by the wind does not affect its essential status of being fixed in place. There is concern, however, that at some point the wall may become untied, causing it to move in the wind and thus rendering it invalid. A person may not realize this and will continue to make use of this succah. Based on this concern, Rabbeinu Peretz rules that one should not make use of a succah of canvas walls. This concern is shared by Maharil and *Kolbo* and is codified in the *Shulchan Aruch* (630:10). It should be noted that this concern is not voiced by the Gemara[5] and thus does not have the binding force of a rabbinical decree (*gezerah*) nor the consequence of invalidating the succah.[6] Nonetheless, as this stringency is adopted by the *Shulchan Aruch,* it is to be treated as normative halacha and demands full compliance.

The widespread acceptance of the canvas succah is puzzling in light of this explicit directive that it be avoided. In such cases, when common practice seems to be at odds with halachic norms, the authorities often attempt to discover a basis to justify such a practice. In this particular instance, Rabbi Moshe Shternbuch suggests a possible justification.[7] The ruling of the *Shulchan Aruch* is referring to sheets that are not secured on all sides. Thus the possibility of their becoming disconnected is a

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5. See commentary of *Bach* (*Tur* ibid.) who finds support in the Gemara for the ruling of Rabbeinu Peretz. The *Bach* would agree, though, that this is not a formal *gezerah.* See also source quoted in note 1.

6. See *Eliyahu Rabbah* 630:19, *Hilchot Chag B'Chag-Succah* (R. Moshe M. Karp) Chap. 4 note 16.

7. *Moadim U'zmanim,* ibid.

real one. However,when the canvas is secured on all sides as is the common practice, the possibility of becoming disconnected is remote. As such, even the *Shulchan Aruch* would concede that such a succah is entirely acceptable. Rabbi Shternbuch notes, however, that there is no indication in the *Shulchan Aruch* or in any other source to support such a distinction.[8] At best then, this argument may serve as a justification for a de facto practice (*limud zechut*). Ideally though, Rabbi Shternbuch advocates that one abide by the ruling of the *Shulchan Aruch* and avoid using a canvas succah.

Another possible justification is based on the method of securing the sheets. In the case of the *Shulchan Aruch,* the sheets in question may not have been designed to be fastened or tied in place. Therefore the means used to secure them may not have been reliable. Canvas walls which are fitted with metal rings and are designed especially to be tied in place are more reliable and arguably not subject to this ruling.[9] The reservations expressed by Rabbi Shternbuch would presumably apply to this distinction as well. Therefore, in compliance with the stringent ruling of the *Shulchan Aruch,* a canvas succah is best avoided.[10]

With some modification in design, it is possible to construct a canvas succah that would satisfy this stringency. The basis of

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8. See also *Iggerot Moshe* (ibid.) where Rav Moshe Feinstein dismisses a similar distinction on the grounds that there is no basis for it in any source "even in the works of the latest authorities such as *Mishnah Berurah* or *Aruch HaShulchan*."

9. *Hilchot Chag B'Chag* (ibid.), *Succah Kehilchata* (Rabbis Y. Shvartz and S. Gelber) Chap. 4 note 2.

10. See ruling of Rav Moshe Feinstein (ibid.) that one should not use a canvas succah unless there is no alternative. The commercial availability of the canvas succah, cautions Rav Moshe, does not imply halachic endorsement.

this solution, which is actually recorded in *Shulchan Aruch* itself and has its source in the original comment of Rabbeinu Peretz, is the concept of *lavud*.[11] *Lavud* is an allowance that provides that a halachic wall need not be solid. Gaps are permitted as long as the width of each gap is less than three *tefachim*.[12] From a halachic standpoint such gaps are considered to be filled. Conceivably, a wall consisting of a series of poles each being within three *tefachim* of the other would constitute a halachic wall. Installing such a configuration of horizontal poles in the frame of the canvas succah would create halachically valid walls entirely independent of the canvas sheets. As the height of the succah wall need not be more than ten *tefachim*[13] (regardless of the actual height of the succah) it would only be necessary to add enough such poles as to achieve that height. A canvas succah incorporating this relatively simple modification would rate ideal in the eyes of halacha.[14]

II *S'chach* Supports

The Mishnah (21b) discusses the case of a succah supported on the legs of a bed. This refers to a bed that has boards affixed to the bed frame that rise above the mattress and thereby surround it. A succah can be constructed by simply placing

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11. The source for *lavud* is *Halacha L'Moshe MiSinai.* (*Shabbat* 97a, *Succah* 6b).

12. See Mishnah *Eruvin* 16b and *Succah* 7a. For this purpose three *tefachim* is approximately nine inches.

13. Approximately 30-40 inches depending on the various opinions of the size of a *tefach*.

14. It should be noted that *lavud* is not always to be relied upon for the walls of a succah. See *Mishnah Berurah* 630:7. However, in this instance it is the tied canvas that strictly speaking forms the walls. The *lavud* wall merely serves as a backup in the event that the canvas becomes untied. See *Sha'ar HaTziun* 630:49.

s'chach on top of the boards (provided they reach a height of ten *tefachim*). The Mishnah records an anonymous view (*Tanna Kamma*) that this is a valid succah. According to Rabbi Yehudah, however, being that the *s'chach* is incapable of remaining standing independent of the bed, the succah is not valid.

The Gemara records two opinions to explain the view of Rabbi Yehudah. One opinion is that this succah is unacceptable because it is portable. Rabbi Yehudah requires that a succah be *keva* – a permanent, fixed structure. A succah that can be moved from place to place lacks *keva* and is invalid.[15] A second opinion in the Gemara explains Rabbi Yehudah's view entirely differently. According to this opinion Rabbi Yehudah accepts the principle known as *ma'amid* (literally, support). This principle states that the same restrictions which apply to the *s'chach* apply to the supports of the *s'chach* as well. Therefore, any material that may not be used for *s'chach* may not be used to support the *s'chach* either. The logic behind the *ma'amid* principle is that the rabbis were concerned that confusion may arise and people may mistakenly use the material of the *s'chach* supports for the actual *s'chach*. In order to safeguard against such an error, the rabbis demanded the same standards for the supports as required for the *s'chach* itself.[16] This explains why Rabbi Yehudah does not allow supporting the *s'chach* on a bed. A bed is subject to ritual impurity (*mekabel tumah*) by virtue of being a utensil. As such it is unfit for use as *s'chach*. Accordingly it may not be used to support the *s'chach* because of the *ma'amid* principle.

Most authorities reject the *ma'amid* restriction. Some of these

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15. Rashi (*s.v. sh'ein lah keva*). See, however, Ran quoting Ra'avad for a different explanation.

16. See Ran, Ritva, and others who identify this as a *gezerah*. Rashi (*s.v. sh'mamida*), however, explains that it is considered as if the *s'chach* itself is *mekabel tumah*. See commentary of *Bach* (*Tur* 629).

authorities rule in accordance with the view of the anonymous *Tanna Kamma* and allow supporting the *s'chach* on a bed.[17] Others rule in accordance with Rabbi Yehudah[18] but adopt the first explanation of the Gemara, that of *keva*.[19] Accordingly, no restrictions are imposed on the type of materials allowed for the supports of the *s'chach*. There is a minority view, held by some, which rules in accordance with the second explanation of Rabbi Yehudah and adopts the restrictive *ma'amid* principle.[20]

This view, however, is not accepted by the *Shulchan Aruch*, as is evident from the statement of the *Shulchan Aruch* (630:13) that allows the above-mentioned case of using a bed to support *s'chach*. *Mishnah Berurah* (no. 59) explicitly elaborates that although the bed is subject to *tumah* this is of no consequence, as this restriction only applies to the *s'chach* itself and not to that which supports the *s'chach*.

However, *Shulchan Aruch* elsewhere (629:7) expresses reservation about the use of a ladder to support *s'chach*. A ladder, by virtue of being a utensil and thus subject to *tumah*, is unfit for *s'chach*. It may not be used to support *s'chach* because of the *ma'amid* principle. This would appear to be an endorsement of the minority view which adopts the *ma'amid* restriction. This is problematic in light of the *Shulchan Aruch's* lenient ruling in the case of the bed. *Magen Avraham* (629:9) suggests that essentially the *Shulchan Aruch* rejects the *ma'amid*

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17. Among them are Rabbeinu Zerachia HaLevi, Rambam (*Commentary to Mishnah*), Rabbeinu Yeshaya (in *Shibolei Haleket*), and Maharil (no. 83) who cites this as the view of most Geonim. Rabbi Yehudah's view is rejected because it is a minority view. See *Piskei Rid*. (For an additional reason see Rambam ibid. and Meiri.)

18. The discussion in the Gemara devoted to explain the reasoning of Rabbi Yehudah is evidence that his view is accepted. (See Ran.)

19. Among them are Rosh, *Tur* (630), and *Terumat Hadeshen* (no. 91)

20. Ran and Ritva.

restriction. Strictly speaking, a succah is valid even if the supports of the *s'chach* are of a material unfit to be used as *s'chach*. However, in deference to the minority opinion, the *Shulchan Aruch* rules that ideally the *s'chach* supports should conform with the *ma'amid* restriction. This is the conclusion of a number of other authorities as well.[21] Thus the view of the *Shulchan Aruch* is that *l'chatchila, s'chach* supports should be of a material that is fit to be used for *s'chach. B'dieved*, the succah is valid even if this requirement is not satisfied. *Mishnah Berura*h (ibid.) adopts this ruling as well.[22]

The canvas succah is a case in point, since the *s'chach* is supported by a metal frame. Metal, as it does not grow in the ground, is unfit for use as *s'chach*. Likewise it may not be used to support the *s'chach* according to the *ma'amid* restriction. Strictly speaking, the succah is certainly valid and one fulfills the mitzvah of succah. Nonetheless, it fails to meet the ideal standard (*l'chatchila*) as outlined by the *Shulchan Aruch*.

However, with a slight modification the problem of *ma'amid* in a canvas succah can be resolved. This is based on the notion that the *ma'amid* restriction applies only to that which is directly supporting the *s'chach*. That which indirectly supports the *s'chach* (*ma'amid d'ma'amid*) is not subject to the restriction.[23]Therefore, simply placing wooden slats to act as

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21. *Pri Megadim* (*Eshel Avraham*) 629:9, *Chaye Adam* 146:30, *Bikurei Yaakov* 629:13, *Chazon Ish* 143:2, and others.

22. See also *Mishnah Berurah* 629:22; *Biur Halacha* 630:1, and *Shaar HaTziun* 630:60.

23. See *Mishnah Berurah* 629:26. *Shaar HaTziun* (51) cites *Magen Avraham*, Gra, and the "other *Acharonim*" as the source of this halacha. Chazon Ish (143:2) disagrees with this view and holds that there is no difference between *ma'amid* and *ma'amid d'ma'amid*. Accordingly, *l'chatchila*, one should not make use of any material that is unfit for *s'chach* to support the *s'chach* even indirectly. (This includes nails

supports across the succah from one side of the metal frame to the other and then placing the *s'chach* on those wooden supports would solve the *ma'amid* issue.[24] Since the metal frame is merely providing indirect support for the *s'chach*, it satisfies the *l'chatchila* standard as well.[25]

II Sequence of Construction

The halacha requires that at the time that the *s'chach* is set in place it must be in a valid state of being. If at the time it was set into place it was invalid and subsequently something was done to render it valid, the succah is unacceptable. This principle is derived from the verse "The holiday of Succot you shall make (*ta'aseh*)" (*Devarim* 16:13). The Gemara (*Succah* 11b) explains *"Ta'aseh – v'lo min ha-asui"*, meaning that you shall make the succah in a state of validity as opposed to making it

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which hold together the walls, which in turn support the *s'chach*. Those who follow the rulings of Chazon Ish employ wooden pegs in place of nails.)

24. *Succah Kehilchata* Chap. 5 section 5:2. Placing wooden slats to lay on the metal poles themselves (so as to separate between the *s'chach* and the metal) is a questionable solution. Removing the wooden slats will not cause the *s'chach* to fall but rather to rest on the metal frame. Ultimately it is the metal frame that is supporting the *s'chach*. When the wooden slats are placed across the metal frame, however, the *s'chach* would fall if not for the slats. Thus it is the slats which support the *s'chach* and not the metal frame (ibid. note 20.) In any event, wrapping the canvas around the top of the metal frame, in order that the *s'chach* not come in contact with metal, clearly accomplishes nothing.

25. See, however, *Kehilot Yaakov* (*Succah* – new edition no. 18) where the Steipler Gaon points out that the wooden slats which serve as support for the *s'chach* also partly cover the area of the succah. Thus, he argues, in addition to supporting other *s'chach* they themselves are *s'chach*. As such, the *l'chatchila* standard has not been satisfied, being that these wooden slats are *s'chach* supported by metal.

when it is invalid and its subsequently becoming valid.

Based on this, the Ramo (635:1) cites the ruling of *Hagahot Maimoni* that at the time that the *s'chach* is set in place the walls of the succah must be erect. To first set the *s'chach* in place and only afterwards to erect the walls would violate the *Ta'aseh v'lo min ha'asui* rule. In the case of the conventional succah this presents no problem, as the *s'chach* is supported by the succah walls and thus cannot be set in place until the walls are first constructed. However, this is not the case regarding the canvas succah. Once the metal frame is constructed, one has the option of either first proceeding with the construction of the walls (i.e. tying the canvas to the frame) or with the placing of the *s'chach*. Mindful of the ruling of the Ramo, one should make sure first to complete the walls and only then place the *s'chach*.

In the event that one failed to do so, it is questionable what the status of the succah is. *Mishnah Berurah* (ibid. no. 10) records the view of the *Bach* who maintains that *b'dieved* the succah is acceptable. *Aruch HaShulchan* (ibid. no. 5) argues strongly in favor of this position. However, *Mishnah Berurah* notes that many authorities disagree and hold that the succah is invalid.[26] It appears that *Mishnah Berurah* concurs with this view. As such, it is necessary to reset the *s'chach*. In addition, what emerges is that it is questionable whether one may use a canvas succah built by someone else unless it can be ascertained that the proper sequence was followed. Failure to do so may involve transgressing the Torah violation of eating in a non-valid succah. Furthermore, reciting the succah *bracha* in such a case may well be a *bracha l'vatalah* (a *bracha* in vain), a serious violation in its own right.

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26. *Shaar HaTziun* (635:12) identifies these authorities as *Levush*, *Taz*, *Eliyahu Rabbah*, and *Bigdei Yesha*.

IV *S'chach* Mats

The use of mats for *s'chach* is mentioned already in the Mishnah in *Succah* (19b). The Mishnah and the ensuing discussion in the Gemara refer to different types of mats made of reeds and other fibers. A distinction is drawn between a mat manufactured as a cushion to be used for sitting and lying (*l'shechiva*) and one manufactured for the purpose of providing shade (*l'sichuch*). The former, being a utensil, is capable of becoming impure and therefore may not be used as *s'chach*.

It would appear then that the conclusion of the Gemara is that a mat made specifically for the purpose of *s'chach* is acceptable. However, there are two considerations that potentially could disqualify even such a mat. The first consideration is that of *Mar'it Ayin* and the second is that of *Gezerat Tikrah*. Each of these will now be examined in detail.

A. *Mar'it Ayin*

As mentioned, the conclusion of the Gemara appears to be that a mat made specifically for the purpose of *s'chach* is acceptable. The Rosh, however, based on his interpretation of a statement in the Gemara, qualifies this conclusion. The Rosh argues that a mat made for the purpose of *s'chach* is acceptable only when there is no local practice to use mats predominantly as cushions. When there is such a practice, then even a mat made for *s'chach*, and not as a cushion, may not be used. The reason for this provision, explains the Rosh, is because other people may be unaware that this particular mat was made specifically for *s'chach*. They will assume that it is a mat like all others and made as a cushion. This will lead them to conclude erroneously that cushion mats may be used for *s'chach*.

This is an application of the well-known halachic principle

of *Mar'it Ayin*.[27] People may draw incorrect conclusions based on the situation as it appears, without investigating and ascertaining the facts.

The Rosh cites an opposing view held by R. Yeshaya of Trani (author of *Piskei Rid*) who is not concerned about *Mar'it Ayin*. According to R. Yeshaya, as long as the particular mat in question was made[28] specifically for *s'chach* it is acceptable, regardless of local practice. This is the position held by Rambam as well, who rules that a mat made specifically for *s'chach* is acceptable (*Hilchot Sukkah* V:6). Rambam makes no mention of local practice. Clearly, Rambam rejects the provision which the Rosh adopts and holds there is no concern of *Mar'it Ayin*.[29]

The halacha regarding this dispute is recorded in *Shulchan Aruch* (*O.C.* 629:6). *Shulchan Aruch* rules in accordance with the view of R. Yeshaya and allows a mat made specifically for *s'chach*. Ramo, however, adopts the stringency of the Rosh and disallows such mats if the local practice is to use mats predominantly as cushions.[30] Thus, the Ashkenazic community must take into account local practice out of a concern for *Mar'it Ayin*, whereas the Sephardic community need not.

Consequently, for Ashkenazic Jews it is necessary to ascertain local practice in order to determine the permissibility

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27. Neither the Rosh, *Tur*, nor *Shulchan Aruch* identify this concern as *Mar'it Ayin*. The term is found in later sources when discussing the view of the Rosh. See, for example, *Bikkurei Yaakov* 629 no. 6.

28. In fact R. Yeshaya rules that a mat made for no particular purpose but purchased to be used as *s'chach* is also acceptable. On this point the Rosh is in agreement (provided there is no concern for *Mar'it Ayin*).

29. See *Beit Meir* (*O.C.* 629:6) who notes this and further demonstrates that Rashi and Ran are of this opinion as well.

30. See *Mishnah Berurah* ibid. no. 17 and *Sha'ar HaTziun* no. 26.

of *s'chach* mats. Referring to his own times, the *Mishnah Berurah* (ibid., no. 18) comments that "in these places [i.e. Eastern Europe] all mats are made for cushions [literally, lying] and thereby even if he made it for *s'chach* it may not be used as *s'chach*." Accordingly, Rav E.Y. Waldenberg (*Tzitz Eliezer* X:29) disapproves of any type of mat. Rav Binyomin Zilber (*Az Nidberu* II:66) however notes that nowadays the observation of the *Mishnah Berurah* is rarely the case. It can no longer be said that the predominant use of mats is for cushions, and therefore there is no issue of *Mar'it Ayin*.[31] Many other contemporary authorities[32] share this view as well and accordingly allow *s'chach* mats.[33]

B. *Gezerat Tikrah*

The second problem that arises regarding *s'chach* mats is based on a disqualification instituted by the rabbis known as *Gezerat Tikrah* (literally, the Ceiling Ban).

Since ceilings of homes are constructed out of wooden boards, the Rabbis expressed concern that using these boards as *s'chach* would create a misconception. People may be tempted

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31. See also *Aruch HaShulchan* (629:13) who writes that mats are no longer used for cushions but rather for packing merchandise. Such usage also qualifies a mat to be a utensil and unfit for *s'chach*. As such, *Aruch HaShulchan* concludes that *Mar'it Ayin* remains an issue. Nowadays, however, mats are not used for packing either. (See also comments of Rav Tzvi Pesach Frank in *Mikraei Kodesh Sukkot* I:16).

32. Note the authorities cited in the next section. Even Rav Shalom Y. Elyashiv, who objects to mats on grounds of *Gezerat Tikrah* (see later), concedes that there is no concern for *Mar'it Ayin*. (See *Az Nidberu* XII:35.)

33. See *Hilchot Chag B'Chag* 6:24 (based on *Beit Meir* as cited in *Biur Halacha* 629 s.v. *omedet l'shchiva*) for an additional reason why *Mar'it Ayin* does not apply to the type of *s'chach* mats available nowadays.

to simply sit in their home instead of a succah. Therefore the Rabbis banned the use of wooden boards as *s'chach*. The width of the boards which are subject to this *gezerah* is debated in the Mishnah and Gemara (*Succah* 14a). The halacha follows the view that only boards which are four *tefachim* wide are prohibited (see *Shulchan Aruch* 629:18).[34]

The significance of four *tefachim* is subject to a dispute among *Rishonim*. The Ritva and others suggest that since boards of that width are sturdy, they are seldom used for *s'chach*. Thus, they resemble more closely the ceiling of a home. Those which are less than four *tefachim* wide are commonly used for *s'chach* and less likely to be confused with home ceilings. Therefore, these are not included in the *gezerah*.

Rashi, however, offers a different explanation.[35] Rashi maintains that the width of four *tefachim* is significant because the majority of home ceilings are constructed from these size boards. Being that this is the case, the rabbis banned their use. Boards of less than four *tefachim* are not usually found in ceilings and are permitted. This observation, that the majority of home ceilings are constructed from boards not less than four *tefachim*, is challenged by the Ritva and other *Rishonim*.[36] The Gemara (*Bava Metzia* 117a) states explicitly that it is quite common to construct ceilings using boards narrower than four *tefachim*. Accordingly, these boards should have been banned as well. Therefore, these *Rishonim* reject Rashi's contention that *Gezerat Tikrah* is on account of the majority of home ceilings.

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34. Four *tefachim* is equivalent to approximately 12-16 inches. It is debatable whether the prohibition nowadays applies to even narrower boards as these are used in ceiling construction. See *Hilchot Chag B'Chag* 6:31.

35. Ibid. s.v. *machloket b'nesarim sheyesh bahem arba.*

36. See Ramban and *Re'ah.*

The Ran, however, defends the view of Rashi. The Ran explains that while it is true that narrow boards are used in home ceilings, prior to their being installed they are joined together to form a wider board. Since at the time of installation the narrow boards form one wider board of four *tefachim*, Rashi is correct in stating that the majority of ceilings are constructed from boards of four *tefachim*. On account of this majority, the Rabbis banned this size board. Thus, according to Rashi, boards of four *tefachim* width which are formed by joining together two or more narrower boards are also included in the prohibition of *Gezerat Tikrah*. The Ritva and others disagree and hold that *Gezerat Tikrah* does not apply since the actual width of the individual boards is less than four *tefachim*.[37]

Rashi's view is shared by an opinion recorded in *Teshuvot HaRashba* (vol. 1 no. 213) and may in fact be the view of the Rashba as well. The question was raised as to whether it is permissible to nail together narrow slats of wood to form a lattice frame upon which leaves of *s'chach* would be placed. The Rashba responds by quoting "one of our rabbis" who prohibited this because once nailed together, the slats of wood are considered as one large board of four *tefachim*. The Rashba cites other authorities who allow such a frame and he himself is inclined to agree with this position in light of the fact that this is the common practice. Clearly, the position of "one of our rabbis" is that of Rashi, as explained by the Ran. The ban

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37. The Ritva views the onlooker as the source of concern that prompted *Gezerat Tikrah.* Therefore, the method of installation is immaterial. Rather, it is the resulting ceiling that is the determining factor. As such, as long as the individual boards are less than four *tefachim* it is permitted. See *Ritva* 14a. Rashi, however, maintains that the source of concern is the one constructing the succah. Therefore, boards joined together to form one large board may lead to confusion in his mind. Thus a *gezerah* is necessary in this case as well. See Rashi 15a s.v. *b'bitulei tikrah* and Meiri thereon.

of *Gezerat Tikrah* includes narrow boards that, when combined together, form what is considered one wide board.

The position of the Rashba, however, is unclear, as the Rashba does not offer any explanation as to why such a frame is allowed. Presumably, the Rashba adopts the view of the Ritva and others who disagree with Rashi. Wooden slats, even when nailed together, are to be viewed and measured individually. They do not constitute one board measuring four *tefachim* wide and thus *Gezerat Tikrah* does not apply. However, it is conceivable that in principle the Rashba agrees with the view of Rashi and, once nailed together, the narrow slats are indeed considered as one wide board. The Rashba holds though that this is only the case when the slats are adjacent to one another. In this particular case of the lattice frame there are gaps between the slats where the *s'chach* leaves are placed. Therefore it cannot be viewed as one wide board. Otherwise, where one continuous board is formed, *Gezerat Tikrah* would apply. Both *Magen Avraham* (632:1) and *Chaye Adam* (146:31) adopt this interpretation of the Rashba when recording this ruling.[38]

Thus, what emerges is that the status of narrow boards joined together to form a wide board of four *tefachim* is subject to a debate among the *Rishonim*. One school of thought, namely Rashi, "one of our rabbis" cited by the *Teshuvot HaRashba*, and apparently the Rashba as well, views narrow boards nailed together as constituting one wide board and therefore prohibits their use because of *Gezerat Tikrah*. The other school of thought, held by the Ritva and others, allows their use as the narrow slats are viewed individually.

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38. See also *Bach* (626) who implies the same. *Beit Yosef*, however, is inconclusive as he quotes the ruling of the Rashba but fails to provide a rationale.

While no clear ruling appears in *Shulchan Aruch* regarding this issue, it appears that the halacha follows the stricter view. This is evident from the above-mentioned ruling of *Magen Avraham* and *Chaye Adam*. Slats joined to form a lattice are permitted on the grounds that there are gaps between them. This implies that slats joined together adjacently would be prohibited. Once joined they are viewed as one wide board and subject to the prohibition of *Gezerat Tikrah*.

It is this conclusion that has a bearing on the issue of *s'chach* mats. Many *s'chach* mats are made by joining together thin strips of wood. Based on the above halacha, such a mat is viewed as one unit constituting a wooden "board". Being that the width of the mat exceeds four *tefachim,* it should be prohibited because of *Gezerat Tikrah*. Indeed this is the position taken by Rav Shalom Y. Elyashiv on this issue.[39] Other authorities, however, disagree and allow such mats. Rav Shlomo Zalman Auerbach argues that since a mat is thin and flexible, it does not constitute nor resemble a board which is thick and sturdy. As such *Gezerat Tikrah* does not apply.[40] *Teshuvot Avnei Nezer*[41]

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39. See letter of Rav Elyashiv in *Az Nidberu* (Rav Binyomin Zilber) II:66. Rav Elyashiv raises an additional problem with *s'chach* mats based on the *ma'amid* principle. The strips of wood are joined together by string. Without the string the wooden strips would not stay in place. Thus, the string is serving to support the *s'chach*. As mentioned, the halacha requires that *l'chatchila* that which supports the *s'chach* be of a material fit for *s'chach*. If the string may not be used as *s'chach* then using it as a *ma'amid* does not satisfy the *l'chatchila* standard. See also *Hilchot Chag B'Chag* Chapter 6 note 33 and *Succah Kehilchata* Chapter 5 note 15.

40. See *Sefer HaSuccah* (R. Eliyahu Weisfish) p. 449 no. 7. Presumably this distinction would not be apparent to an onlooker viewing the *s'chach* in place but rather to the one constructing the succah. This is consistent with Rashi's view – see above note 37.

41. *Orach Chaim* 443:5.

offers a distinction based on the method of joining the wooden strips. In the above case they are nailed together and therefore the result is one large board. But a mat is made of wooden strips which are strung or woven together. Therefore, it does not constitute one board and is not subject to *Gezerat Tikrah*.

Even according to Rav Elyashiv it is only those mats made of wood which are problematic. A *s'chach* mat made of strips of bamboo or reed bears no resemblance to a board of wood. *Gezerat Tikrah* applies only to boards of wood and thus mats of these other materials are not included in the prohibition.[42]

Conclusion

The canvas succah has many advantages making it an ideal choice from a practical standpoint. Halachically speaking, though, it presents a number of problems. An awareness of these problems and their appropriate solutions will insure that the canvas succah is an ideal choice in the eyes of halacha as well.

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42. Such *s'chach* mats, known as "canes" mats, are commercially available and reportedly are endorsed by Rav Elyashiv.

The debate concerning *s'chach* mats centers around the following question. According to the view of Rashi, which the halacha evidently follows, *Gezerat Tikrah* includes wide boards that are combined from narrower ones. Mats then should be prohibited as well. Yet the Gemara mentioned above explicitly allows those mats made specifically for the purpose of *s'chach*. Why are mats different? At least one of the following three distinctions must be acknowledged.

1) A board is sturdy while a mat is flexible.

2) Only when nailed or glued together are narrow boards viewed as one wide board. When tied or woven they continue to be viewed individually.

3) The mats which the Gemara permits are made of material other than wood.

Those who allow *s'chach* mats adopt one of the former distinctions. Rav Elyashiv adopts the last. (*Hilchot Chag B'Chag* ibid.)

Blood Spots in Eggs

Rabbi Michael Broyde

Introduction

Farming questions are among the most interesting in modern Jewish law in America because we have grown farther and farther away from the reality of the farm, and thus we find keeping a firm grasp on the reality to be exceedingly difficult. Such is clearly true in the case of egg production, which has changed considerably in the last twenty years, and changed dramatically in the last century.[1]

A. Chicken Farms

Until relatively recently, chicken eggs were laid on a farm that was an integrated farm; besides chickens, there were other animals on the farm, and birds (both kosher and not) were part of the farm environment. Three distinctly different activities would occur on a farm with the chickens. Chickens would lay eggs which the farmer intended to sell as table eggs; chickens would lay eggs that would be hatched to produce chicks; chickens would be raised to be slaughtered for their meat. The same chickens frequently would be used for all three activities,

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1. For more on egg technology, see William J. Stadelman and Owen J. Cotterill, editors *Egg Science and Technology* (Fourth edition, 1995, Food Products Press, New York).

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with short term economic needs determining whether any particular egg would be sold as a table egg or hatched, and when any given chicken might be slaughtered.

About a century ago chicken farms became common; on a chicken farm only chickens were raised, and all other animals were excluded. In the last twenty years this trend of farm specialization has continued even more dramatically. In America since 1970, separate and distinct chicken farms exist to produce only table eggs.[2] No chickens are raised on this farm for slaughter and no chicks are hatched. Thus unlike the chicken farms of even fifty years ago, these hen coops have absolutely no roosters on the farm at all, and sometimes will have as many as one million hens producing eggs, seven days a week, throughout the year. The feed given these hens and the lighting conditions are uniquely suited to egg production only.

B. Blood Spots in Eggs

In talmudic times, blood spots occurred in eggs because of two distinctly different reasons. The first was that the egg had been fertilized and a chicken embryo was in formation. The second was that a tissue irregularity in the hen caused a small

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2. In a different era there was a considerable amount of concern that an egg might come from a non-kosher bird, and be used in liquid form as an addition to other foods; see *Shulchan Aruch, Yoreh Deah* 86:10 and the comments of *Shach, Yoreh Deah* 86:30. However, since in the United States there are absolutely no non-kosher eggs used in the manufacturing process, very few non-kosher eggs are sold generally, and there is intense governmental inspection designed to prevent a company from using anything other than chicken eggs, the actual species of egg used is no longer a halachic concern in the United States. Less than one in every 100,000 eggs sold are other than chicken eggs (and most of those are duck or turkey eggs, which are also kosher).

amount of blood to be deposited in the egg. In America in modern times, since there are no roosters in the egg-laying coop, only the latter occurs, and incidence of that is relatively low (markedly less than 1% of all eggs will have a blood spot).

In addition, United States government regulations require that Grade A and grade AA table eggs be checked for blood spots in a process commonly referred to as candling (although it is now done with an infrared light) before eggs can be sold to the consumer as grade A or AA. Thus the incidence of blood spotting in grade A or AA table eggs is very, very small in the United States (perhaps as low as one in 1,000). Eggs with blood spots (or other deformities) are marketed as grade B eggs, which are then sold to commercial manufacturing plants to be used as ingredients in manufactured items. The incidence of blood spotting in grade B eggs varies based on a number of factors, and is not regulated by the government. Neither grade A nor grade AA eggs are ever produced in a chicken coop with roosters present, and it is improper to take an egg intended for hatching and sell it as a table egg; it is also very difficult to do, as chicken hatching farms are not licensed to sell eggs commercially to the public.[3] Such eggs would never be found in a supermarket as a grade A or AA egg, although if one buys eggs from a roadside stand or a farmers' market, such eggs might be included in the eggs sold.

Blood Spots and the Classical Halacha

A. Blood Spots in Eggs that Might be Fertilized

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3. Free range and organic eggs are subject to much less regulation, but must be sold with a notation that they are such. Free range eggs might actually be fertilized. Such eggs constitute less than one tenth of one percent, and perhaps as little as one thousandths of one percent of the 67.3 billion egg market in the United States.

The Talmud addresses the question of blood spots in eggs a number of different places, and the *Rishonim* disagree on the exact contours of the halacha.[4] Most *Rishonim* adopt the view that any blood in an egg that is present because of the fertilization process, and is the result or the by-product of such, makes it biblically prohibited to eat the whole egg.[5] These same *Rishonim* generally agree that all other blood in an egg is rabbinically prohibited to eat, although some *Rishonim* assert that there are places in an egg where blood can be such that it is permitted to eat the egg and the blood spot too.[6] A small group of *Rishonim* assert that it is never a biblical violation to eat blood in an egg, and that Torah law is violated only if one eats an egg after the embryo actually begins to form.[7]

There is an intricate literature about how to determine what type of blood spot is a biblical prohibition and what is a rabbinic prohibition.[8] This distinction is of significant halachic importance as, in cases where the blood spot resulted from fertilization, *the whole egg must be discarded*, whereas when the blood spot is merely a result of a tissue formation accident in the hen, the blood spot must be removed, *but the rest of the egg may be eaten*.[9] There are no less than five views found in the *Rishonim* and among the commentaries on the *Shulchan Aruch* as to when a blood spot causes the whole egg to become unkosher, or when just the blood spot needs to be removed or when just the blood spot plus the surrounding area need to be

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4. See *Chulin* 64b.

5. *Tur* and *Shulchan Aruch Yoreh Deah* 66:1-2.

6. *Tur* in the name of the Ri, and *Beit Yosef* in the name of Rashi on *Yoreh Deah* 66:2.

7. *Beit Yosef Yoreh Deah* 66:1.

8. *Tur* and *Shulchan Aruch Yoreh Deah* 66:2-5.

9. *Shulchan Aruch Yoreh Deah* 66:2, and there are some blood spots that some *Rishonim* rule can even be eaten.

discarded.[10] These opinions focus on where the spot is located -- in the yolk, on the yolk, in both the yolk and the albumin, in just the albumin, or floating clear, and there is no absolute consensus as to what the halacha is.[11]

Because of the complexity of these rules, and from the fact that an error can easily lead to one's eating an egg which is prohibited according to Torah law, Rabbi Moshe Isserless (Ramo) states:

> From this derives the common custom in our community to prohibit all eggs with blood spots, and not to distinguish between blood spots in the yolk or in the albumin[12] ....and this has always been the practice.[13]
>
> However, Ramo notes that this custom is limited to cases where the egg has not yet been added to a food mixture. Once the egg is added to a mixture, there are many more grounds to be lenient, and Ramo permits the food stuff to be used if an egg with a blood spot is mixed into a food product.[14]

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10. See *Shulchan Aruch Yoreh Deah* 66:1-4, with particular focus on the lengthy dispute found between *Shach* and *Taz*, as well as the listing of opinions found in *Tur* 66:2. In addition, it is worth noting that while *Beit Yosef* (*YD* 66:2) does cite a small number of *Rishonim* who are of the view that eating the blood in an egg is a biblical violation related to *sheretz*, *Tur, Shulchan Aruch, Aruch Hashulchan* and every other modern decisor rejects this view.

11. See sources cited in note 10.

12. Ramo *Yoreh Deah* 66:2.

13. See *Aruch Hashulchan* 66:15-16.

14. *Shulchan Aruch Yoreh Deah* 66:4. A second issue that used to be relevant to eggs was the possibility that the eggs sold were harvested from slaughtered chickens (called "ova eggs" by the USDA); such eggs are not kosher if taken from a chicken slaughtered other than in a kosher manner. There was a time when the UDSA appended a

B. Blood Spots from Coops with only Hens and the Halacha

All of the above discussion was applicable in a case where the blood spot in an egg might derive from a fertilized egg, and there is a possibility of violating a Torah prohibition by eating such an egg. However, *Shulchan Aruch* states clearly that "eggs from a coop where there are no roosters may be eaten, even if the hen sat on the eggs for many days, so long as one removes the blood spot."[15] Indeed, some *Rishonim* are of the view that when one has an egg with a blood spot from a hen that has been separated from a rooster, even the blood spot may be eaten, although the normative halacha appears to reject this view.[16]

Since table eggs in the United States never have blood spots that are the result of the fertilization process, there is a consensus

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"kosher statement" to eggs noting that no eggs were ova eggs, but change in the economics of egg farming has reduced the number of ova eggs to nearly none, making this issue no longer relevant. For more on the halachic issues raised by these eggs, see *Yabia Omer Yoreh Deah* 5:6.

15. *Shulchan Aruch Yoreh Deah* 66:7.

16. Rashi cited in *Beit Yosef Yoreh Deah* 66:7. This view is elaborated on at some length in the newly published *Aruch MeShach* on *Yoreh Deah* 66 found in the back of the *Machon Yerushalayim Tur* on *Yoreh Deah* 66. In light of the *Aruch MeShach*, one is inclined to interpret *Shach* (*Yoreh Deah* 66:14) which quotes Rashi's view as permitting not only the egg to be eaten, but even the blood spot itself. Indeed, *Shach* in *Aruch Meshach Yoreh Deah* 66 (page 5, s.v. *vehaTur*) seems to accept just this argument, and notes that there is a conceptual difference between prohibiting eating blood-spotted eggs from eggs raised with roosters and blood-spotted eggs from hens alone. By this argument, blood spots in hens raised with roosters are rabbinically prohibited, but blood spots in hens raised without roosters are either not prohibited or only prohibited because of *marit ayin*, which is inapplicable when all eggs are from coops with no roosters; see Ran cited in *Aruch*

among the halachic authorities of our day that there is no obligation or even custom to throw out the whole egg when one sees a blood spot. Rabbi Ovadia Yosef notes that the custom is to simply remove the blood spot and eat the egg; [17] Rabbi Moshe Feinstein agrees that one may simply remove the blood spot and eat the whole egg,[18] as does Dayan Yakov Weiss.[19] In cases where the blood spot from such an egg is mixed in with other food products, the food is kosher, and the utensils do not need to be made kosher again.[20]

Notwithstanding the halachic possibility of removing only the blood spot, most people simply find it too taxing or messy to actually remove just the blood spot when they see one, and thus simply throw out the whole egg rather than engage in the effort needed to remove a small portion of an egg and keep the rest of the egg.[21]

MeShach; but see *Biur Hagra Yoreh Deah* 66:12.

17. *Yabia Omer Yoreh Deah* 3:2.

18. *Iggerot Moshe Yoreh Deah* 1:36. This responsum was written in 1957. Writing in 1957, Rabbi Feinstein, states that he spoke to a farmer who told him that sometimes hatching eggs are actually mixed with table eggs by the farmer, and thus Rabbi Feinstein concludes that "it is proper to be strict and discard the whole egg, although this is not required according to Jewish law." The reality has changed considerably since the writing of this responsum, making it even less likely that such mixtures occur. It is no longer a statistically recordable possibility that a fertilized egg will be sold as a grade A or AA table egg. See also *Iggerot Moshe Orach Chaim* 3:61.

19. *Minchat Yitzchak* 1:106 and 4:56(3). The lone contrary voice seems to be Rabbi Avraham David Horowitz, *Kinyan Torah* 2:7, although it appears to me that his view is grounded in facts that are categorically not correct in America, as there are absolutely no roosters present in egg producing farms, a reality that perhaps was not present when *Kinyan Torah* 2:7 was written.

20. *Iggerot Moshe* 1:36; see also *Tiferet leMoshe* cited in *Pitchai Teshuva Yoreh Deah* 66:2 who discusses this issue also.

Checking Eggs for Blood Spots in America

Even in pre-modern farms, halacha did not require that one check eggs for blood spots before eating them. *Shulchan Aruch* states that one does not even have to check eggs generally and that "one can eat roasted eggs even though one cannot check them."[22] However, Ramo adds that:

> One does not have to check eggs to see if they have blood spots, as one relies on the fact that most eggs do not; nonetheless, people have the custom to be strict and check the eggs for blood spots when cooking during the day.[23]

The reason for this custom is obvious. First, if one does not check an egg for a blood spot, and one sees the blood spot during the cooking process or even later, one might have to discard all the food. Second, one might miss a blood spot and eat food which is prohibited to eat.[24]

The crucial question is whether the halachic custom to check eggs must still be observed or whether it is possible to be lenient on this matter and simply not check any eggs generally. The answer to this question is not simple. It might be that one does not have to check eggs for blood spots, but when one is seen, it is still required to remove it according to Jewish law,

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discard the blood spot and eat the eggs, as discarding an egg was considered a matter of some loss. A single egg in America now costs less than a dime, and thus is a negligible loss.

22. *Shulchan Aruch Yoreh Deah* 66:8.

23. Ramo, *Shulchan Aruch Yoreh Deah* 66:8. This is argued with by *Beit Yosef Yoreh Deah* 66:8 as well as by Maharil, *Issur Veheter, Sharai Durah dinai betzim*.

24. *Kitzur Shulchan Aruch* states it simply: "Blood in eggs is prohibited to eat and sometimes even the whole egg may not be eaten; thus when one cooks with eggs, one should check the eggs."

and thus, it is prudent to check the eggs before placing them in a situation where it is difficult to remove the blood spot.

Thus it is possible to conclude that Jewish law does not require that one check eggs for blood spots prior to their use if one purchases grade A or AA eggs from a supermarket in America, although there is a *minhag* to check eggs, and one who checks for such eggs is in the category of המחמיר תבוא עליו ברכה, (pious conduct for which one is blessed for being strict). No less than six different reasons can be provided to justify the practice of not checking eggs prior to using them:

1. The United States Department of Agriculture already requires that all eggs be checked for blood spots before they can be sold in a supermarket as grade A or AA eggs.[25] There was never a custom to check twice for blood spots.

2. There are virtually never blood spots found in eggs sold in supermarkets in America that are a result of fertilization; thus no biblical violation is ever present even if there is a blood spot in the egg. The custom to check all eggs was limited to a society where not checking might lead to a Torah violation.

3. There never was a custom to check for blood spots when all eggs derive from hens raised alone, in which case some authorities rule that even the blood spot itself can be eaten.

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25. One could question whether, according to Jewish law, the checking by the USDA is sufficient to satisfy the custom to check eggs, or maybe Jews have to check the eggs for blood spots, according to the custom. It would appear to this writer that this is a classical case of a professional being believed because of the rabbinic rule that a "professional does not undermine his livelihood" by lying about his product. The American public does not want eggs with blood spots, and that is why the companies do not sell such eggs. In addition, there is an explicit USDA regulation, which creates a situation of *dina demalchuta*, adding to the credibility given.

4. The incidence of blood spots in Grade A or AA eggs sold in the supermarket is less than one in a thousand, and generally one does not have to check for very infrequent rabbinic prohibitions.[26]

5. Halacha never required that one check for blood spots; it was a custom, and the custom itself did not apply when it was difficult to check, such as at night. Nowadays, given the way we cook, checking is more difficult in a variety of settings.[27]

6. If there is a blood spot in the egg, one will generally see it even after the egg has been opened, and one can remove the blood spot then.

This approach is fully consistent with other cases found in halacha where there once was a custom to check and changes in reality have diminished or even removed the obligation to check.[28] Indeed, it is possible that future changes in agricultural reality will require a change in the practices found in kosher homes on other matters (or even this matter).

The common practice in commercial settings, where large numbers of eggs are used and checking is expensive (but not impossible) is not to have a Jew check even grade B eggs,

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26. In free range eggs (as nearly all chickens were in the time of the Ramo) blood spotting occurs in nearly 4% of the eggs (E-mail communication from Professor Don Bell, Poultry Specialist, University of California).

27. Rabbi Moshe Tendler notes, in a letter to this writer, that "when eating hard boiled eggs, Rav Feinstein would peel off the 'white` and check the surface of the yolk for blood spots, which would appear as black spots."

28. Consider two other examples where checking practices have changes due to changes in reality; checking *tzitzet* (see *Yechave Da'at* 6:1 for a survey of this issue) and checking food for insects *(Iggerot Moshe OC* 1:91 and *YD* 2:25 note that changes in reality change the obligation to check for insects).

which have a markedly higher incident of blood spotting than grade A or AA eggs. [29] This is even more so true given the fact that once a blood-spotted egg derived from a chicken coop with only hens is actually mixed with other foodstuff, all the food, as well as the utensils, are permitted to be used.[30] Such nullification is commonly relied on in the commercial setting, as it would be extremely expensive to check every egg.

However, even though halacha does not require that one check every grade A or AA egg purchased in a supermarket prior to using it, there might be prudent reasons why a person might chose to do so, and this explains the common practice of checking eggs found in many Ashkenazi homes.[31] Most

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29. See Rabbi Zushe Blech, "Industrial Eggs" at www.star-k\articles\eggs.html. He notes that "The processing of eggs is monitored by factory workers, not the *mashgiach*, and with thousands of eggs being processed every hour, it is impossible to guarantee absolutely no blood [spots]." Rabbi Zushe Blech notes, in an e-mail to this author, that "liquid egg cracking companies occasionally use fertilized eggs. It seems that chicken breeding companies produce a substantial inventory of fertilized eggs, and depending on the market, may have no need to convert them into chickens. At this point – providing they have not sufficiently developed – they are sold to egg crackers." It would seem that even these types of eggs are kosher; however they are more closely governed by the custom of the Ramo that such eggs be checked, as a relatively high percentage of them (perhaps as high as 10%) will have blood spots. Rabbi Michael Morris, OU Rabbinic Coordinator for a number of egg companies in America, noted that while there is no *mashgiach* present when eggs are produced in a commercial setting, there is a key operator present at the egg cracking machine whose job is to examine every egg for blood spots and other abnormalities, and who can discard any given egg if a blood spot is found. The egg manufactures have a vested interest in insuring that no eggs with blood spots are used.

30. *Shulchan Aruch Yoreh Deah* 66:5.

31. Indeed, a claim could be made that even the *minhag* quoted by Ramo to check eggs no longer needs to be observed in America. As

significantly, if one sees a blood spot, one must remove it, and it is easier to remove a blood spot prior to adding the egg to food than afterwards. So, too, a person who purchases brown eggs, free range eggs, organic eggs, or eggs sold at a farmers' market, has to check those eggs, and thus it might simply be easier to check all eggs than to monitor what type of egg one is using at any given time. Finally, one who frequently travels abroad, where the economic conditions relating to egg farming might be different, will certainly have to check eggs before using them, and might find it easier to simply check all eggs.

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noted, in the time of Ramo 4% of all eggs had blood spots, and some of those blood spots were the result of fertilized eggs, creating a Torah prohibition. Even in that case, halacha did not mandate that one had to check eggs, but merely that the custom was to check *when one can*. Even Ramo admits that when one cannot check, one does not have too, and one should not refrain from eating eggs that one cannot check (such as at night). However, since the problem rate was close to 4%, the *minhag* was to check, and not rely on the majority of cases when one need not, as one in every twenty five cases was an exception. Presently, maybe even the *minhag* to check need not be followed, as the problem rate in grade A or AA table eggs is markedly lower (generally thought to be one in 1000 table eggs), and thus even the *minhag* is not applicable. Changes in reality can cause changes in customs; see Rabbi Daniel Sperber, *Minhagai Yisrael* volume 1, at pages 12-45.

Payment For Healing On The Sabbath

Fred Rosner, M.D., F.A.C.P.

Introduction

The Jewish physician, given divine license and biblical mandate to heal (based on Exodus 21:19 and Deuteronomy 22:2), is entitled to reasonable fees and compensation for his services.[1] In talmudic times, when physicians, rabbis, teachers and judges served the community on a part-time basis only and had other occupations and trades, their compensation was limited to lost time and effort. Nowadays, however, when physicians have to devote full attention to their medical occupation, they may charge for their expert medical knowledge and receive full compensation. Although excessive fees are discouraged, they are not prohibited if the patient agrees to the fee in advance. Indigent patients should be treated for reduced or no fees at all. These principles are applicable both to the salaried physician as well as to a physician in private practice who charges fee for service.

The subject of this essay concerns the right to be remunerated

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1. For the subject of physicians' fees in Jewish law, see Rosner and Widroff, "Physician's fees in Jewish law," *Jewish Law Annual*, 1997, vol .12, pp 115-126.

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for medical services rendered on the Sabbath or other Holy Days.[2]

Classic Jewish Sources

The Talmud states that one should not pay a hired worker or baby sitter for work performed on the Sabbath unless one hires them for a week, a month, or a year (*Baba Metzia* 58a). In such a case, the payment is considered to be included (literally: swallowed up) in the payment for the week or month or year's work. This rule is codified by Maimonides in his *Mishneh Torah* (*Shabbat* 6:25).[3]

A second talmudic source for this problem relates to a "rebellious" spouse who is fined (*Ketubot* 63a). A rebellious wife (who refuses to serve her husband or cohabit with him) has one *dinar* deducted daily from her marriage contract (*ketubah*). A rebellious husband (who neglects any of his three obligations to his wife; see Exodus 21:10) must add one and a half *maah* to the *ketubah* for six days of the week. The Talmud asks: why does a rebellious wife have money deducted daily including the Sabbath, whereas a rebellious husband is fined only six days of the week? The Talmud answers that in her case, since it is a reduction that is made, it does not have the appearance of Sabbath pay. In his case, however, since it is additions that are made, it would appear as if his wife is being paid on the Sabbath, which is presumably forbidden. Rashi there (s.v. *kisechar' Shabbat*) explains that the problem of receiving payment for work performed or services rendered

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2. Jakobovits I. "Payment for services on the Sabbath", in *Jewish Medical Ethics*, New York, Bloch, 1975, pp 228-229.

3. However Rabbi Joseph Karo's *Shulchan Aruch* states that a person who is paid for serving as a cantor or for blowing the shofar in the synagogue on Rosh Hashanah will not benefit from that money (*Orach Chaim* 585:5).

on the Sabbath is a decree which the rabbinic sages enacted prohibiting the conduct of business on the Sabbath.

The talmudic commentary *Mordechai (Ketubot* 63a #189) states that for this reason Rabbi Baruch claims that cantors are not allowed to hire themselves out solely for Sabbath services. On the other hand, Rabbi Shmuel (son of Mordechai) asserts that there is no prohibition involved because cantors are paid to perform the mitzvah of leading the communal prayers.

The prohibition of transacting business on the Sabbath is discussed elsewhere in the Talmud (*Beitzah* 37a) and is based on the verse of honoring the Sabbath by not engaging in one's usual business affairs (Isaiah 58:13).

Rabbi Jacob ben Asher, known as *Tur*, writes that his brother Yechiel stated that it was customary in Germany and France (literally: Ashkenaz) that the great rabbinic sages of each town would volunteer to blow the shofar on Rosh Hashanah (*Orach Chaim* 585). However, in Spain nobody wanted to blow, to the point where an ordinary Jew had to be hired and paid to do so. *Tur* decries this practice, asking: where did they find a permissive rabbinic ruling to do so? It is prohibited to pay someone for work or services rendered on the Sabbath or Holy Day, as discussed in the talmudic passage cited above (*Baba Metzia* 58b).

In *Bet Yosef,* his commentary to *Tur's* code, R. Joseph Karo, asks how, in view of this talmudic passage, can Rabbi Shmuel assert that there is no prohibition because cantors and other synagogue functionaries are performing a mitzvah? One cannot violate a prohibition in order to perform a mitzvah! *Bet Yosef* answers that there really is no prohibition. The Talmud in *Ketubot,* about a rebellious wife or husband, only says that adding money to a woman's *ketubah* on the Sabbath has the appearance of Sabbath pay. Furthermore, elsewhere (*Pesachim* 50b) the Talmud states that the wages of those who interpret the weekly Torah reading on the Sabbath will never contain a

sign of blessing because it looks like wages for Sabbath work. The Talmud does not say, however, that it is prohibited.

Bet Yosef, therefore, explains that the prohibition of Sabbath pay applies only if one hires someone on the Sabbath. If one hires a cantor or interpreter before the Sabbath, it only appears as payment for Sabbath work but is not prohibited. Therefore, Rabbi Shmuel rules that this concern is ignored if the hired person is performing a mitzvah, such as serving as a cantor or interpreter on the Sabbath or blowing the shofar on Rosh Hashanah. *Bet Yosef* agrees with Rabbi Shmuel that there is no prohibition. That is why in his *Shulchan Aruch* (*Orach Chaim* 585:5) he rules that a person who is paid for serving as a cantor or interpreter on the Sabbath will not benefit from that money because it has the appearance of Sabbath pay, but it is not prohibited.

The difficulty is that elsewhere in *Shulchan Aruch* (*Orach Chaim* 306:5), Rav Karo rules just the opposite when he states: "it is prohibited to hire cantors to lead the prayers on the Sabbath, but some rabbis permit it." This problem is discussed in detail by many latter-day rabbis (*Acharonim*) and current rabbinic authorities. At least two answers are offered. Firstly, wherever Rav Yosef Karo writes two apparently contradictory rulings, the latter is the one that is adopted (*Responsa Karnei Re'em* #234). Secondly, whenever he cites a prohibition followed by a permissive ruling (i.e., "but some rabbis permit it"), the prohibition usually stands. This case, however, is an exception in that the permissive ruling is adopted, since Rav Karo himself, in his *Bet Yosef* commentary (*Orach Chaim* 585), rules that there is no prohibition to pay people who perform a mitzvah such as cantors on the Sabbath. Additional reconciliations of these two seemingly contradictory rulings are offered by others (*Responsa Yabia Omer*, Part 5 #25).

The question still remains how cantors and interpreters who are paid for Sabbath services deal with the universal

statement in the Talmud and codes of Jewish law that such Sabbath pay does not contain any sign of blessing forever. Rabbi Moshe Isserles (Ramo), in his gloss to *Shulchan Aruch* (*Orach Chaim* 306:5) answers that if the payment is for monthly or yearly service, there is no problem, since the Sabbath pay is "swallowed" up in the monthly or annual salary. The *Mishnah Berurah* (ibid. #24) states that it is likely that the cantor also leads the prayers occasionally on a weekday. *Mishnah Berurah* also cites rabbinic authorities who state that it became customary for cantors to be hired solely for Sabbath services. Rabbi Yechiel Michel Epstein, in *Aruch Hashulchan* (*Orach Chaim* 306:11) states that cantors may also be obligated to sing at circumcisions and weddings as part of their monthly or annual duties. In fact, *Aruch Hashulchan* prohibits pure Sabbath pay even for the performance of a mitzvah and requires a cantor to perform some service during the week. Such service might include preparation time.

Payment for Healing on the Sabbath

The specific question of whether or not a physician or other health-care provider can be paid for diagnostic and/or therapeutic services on the Sabbath was first raised in the fifteenth century in Germany by Rabbi Yaakov Weil and Rabbi Yisrael Bruna (*Responsa Mahari Bruna* #114). They permit a midwife to receive payment for assisting a Jewess on the Sabbath to give birth, because it is absorbed in the total care provided throughout the pregnancy. Furthermore, if she were not paid, she might not come on a future Sabbath to care for other women in labor and might thereby endanger lives.

Rabbi Chaim Modai of Smyrna in the nineteenth century rules that it is permissible for a physician to be paid for Sabbath

work since it puts the patient's mind at ease.[4] Furthermore, if the physician were not paid, he might hesitate to see a patient on a future Sabbath and thereby possibly endanger the patient's life. He concludes by saying that "the patient is obligated to pay him his full fee... the custom is to permit it and nobody ever objected." Rav Modai suggests, however, that it is preferable to pay the physician for treating the total illness or to pay on a weekly basis.

Rabbi Chaim Yitzchak Algazi (*Responsa Derech Aitz Chaim* #2) also permits a physician to receive Sabbath pay, basing his opinion on the previous permissive ruling of Rav Bruna. Rabbi Joseph Chazan (*Responsa Chikrei Lev, Orach Chaim, Mahadura Batra* #9) concludes that a physician is prohibited from receiving financial compensation for his knowledge and expertise but is entitled to be paid for his effort in walking to and from the patient's house on the Sabbath. Otherwise he might not respond on a future occasion for another patient. Rabbi Joseph Teumim (*Peri Megadim, Mishbetzet Zahav, Orach Chaim* 306:4) limits the permissive ruling to a midwife who is hired before but not on the Sabbath or Holy Day. Rabbi Moshe Sofer (*Responsa Chatam Sofer, Choshen Mishpat* #194) suggests that Sabbath fees from non-Jewish patients should be given to charity, since one should not derive any benefit therefrom.

At the beginning of the twentieth century, Rabbi Elazar Loew (*Responsa Pekudat Elazar* #29) ruled that a physician may be paid for Sabbath work because healing is a mitzvah, not only for Jewish patients but for non-Jewish patients as well. His reasoning is that non-Jews nowadays observe the seven Noahide laws, and it is therefore a mitzvah to heal them. Rabbi

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4. Kahana I.Z. *Harefauh Besafrut Hahalachah Shelachar ha-Talmud*. Sinai, Jerusalem, Mossad Harav Kook, Year 14, vol 27, folios 7 (159) – 12 (164). Nissan – Elul 5710, (1950), pp. 233-235.

Sinai Schiffer (*Responsa Sitri Umagini* #15:2) prohibits physicians from collecting fees for Sabbath services since Rav Bruna's ruling was limited to midwives who might not come again if not paid. Conscientious physicians, claims Rav Schiffer, will not refuse to see a patient whether or not they receive payment. He agrees that if the physician also visits the patient a day or two before or after the Sabbath, he may receive all-inclusive payment for his services because his Sabbath payment is absorbed in the total fee.

Responsa Harei Besamim Part 1 #52, prohibits a Jew who walked a long distance on the Sabbath to help a patient from being paid for his effort because that constitutes Sabbath pay. Another *posek* (*Responsa Tzvi Tiferet* #32) disagrees and permits it, relying on the ruling of Rav Bruna that "in the face of danger, the rabbis do not enact prohibitive decrees." On the contrary, the physician is allowed to claim his fee in court, if necessary, so that he won't refuse to care for future patients on the Sabbath if not paid.

Rabbi Chaim Porush[5] discusses the case of a physician who was staying at a hotel far from home over the Sabbath, who was asked to care for a hotel guest who became sick. Is the physician, after the Sabbath, allowed to bill for his services? Rabbi Porush reviews in detail the classic Jewish sources discussed earlier in this essay and concludes that Mahari Bruna's permissive ruling for a midwife to receive payment for Sabbath services is based on two separate considerations. Firstly, the payment is include or "absorbed" in her overall fee. Secondly, possible danger to life might occur if she refused to treat patients on future Sabbaths were she not paid. He concludes that although the first reason is not applicable in the case of the

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5. Porush C. "Bedin sechar shabbat lerofeh." In *Halachah Urefuah* (M. Hershler, edit.). Jerusalem – Chicago, Regensberg Institute, vol 1, 5740 (1980), pp 184-189.

physician at the hotel, the second reason alone is sufficient to permit the Sabbath pay. He also cites Rabbi Azriel Hildesheimer, who also permitted the receipt of compensation for medical services rendered on the Sabbath, since healing on the Sabbath is itself permissible. Only for forbidden work on the Sabbath is it prohibited to receive payment.

Rabbi Isser Zalman Meltzer[6] and Rabbi Yitzchak Elchanon Spector[7] both permit a physician to receive payment for Sabbath services, provided he bills the patient and collects his fee after the Sabbath. Rabbi Yehoshua Yeshaya Neuwirth[8] cites the various rabbinic opinions and concludes that a physician or nurse called to provide medical services on the Sabbath may request payment for their Sabbath services but should not speak about the fee on the Sabbath itself. Rabbi Dr. Abraham S. Abraham[9] lists the numerous contemporary rabbis who permit physicians and other health care givers to receive payment for their medical services on the Sabbath, provided the payment is requested and obtained after the Sabbath. An extensive listing of rabbis who allow a physician to receive payment after the Sabbath for medical care rendered on the Sabbath is provided by Rabbi Dr. Abraham Steinberg in his *Encyclopedia of Jewish Medical Ethics*.[10] He also mentions the permissible arrangements for Sabbath compensation of a Jewish physician who has non-Jewish partners or associates.

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6. Ibid. Meltzer I.Z. "Be'inyan sechar shabbat lerofeh."

7. Ibid. Spector Y.E. "Sechar shabbat lerofeh."

8. Neuwirth Y.Y. *Shemirat Shabbat Kehilchatah*, Jerusalem, Moriah, new edition, 1979, chapt 28:67 (p. 369).

9. Abraham A.S. *Nishmat Avraham*, Jerusalem, Schlesinger Institute, vol 1, section *Orach Chaim*, 1993, pp 137-138.

10. Steinberg A. "Sechar harofeh beshabbat", E*ncyclopedia of Jewish Medical Ethics*, Jerusalem, Schlesinger Institute, vol. 6, pp. 394-396.

Summary

In Jewish Law, physicians are given biblical license and mandate to heal and are entitled to receive appropriate compensation for their services. Payment for Sabbath work is ordinarily forbidden because of a rabbinic prohibition against conducting business on the Sabbath. But public functionaries, such as pulpit rabbis, cantors, Torah interpreters and their like, are permitted to receive payment for the services they provide on the Sabbath and Holy Days because they perform a mitzvah. It is preferable that they be paid by the week, month, or year so that their Sabbath pay is absorbed or included in services also provided on weekdays.

Physicians who diagnose and treat illness on the Sabbath or Holy Days are certainly performing a mitzvah. So, too, midwives who assist in the delivery of babies on the Sabbath. Therefore, physicians, midwives and other health care givers are permitted to accept fees for their Sabbath services but should not bill nor collect their fees until after the Sabbath. It is also preferable that they visit their patient again either before or after the Sabbath visit so that their Sabbath payment is included in the total fee. Another reason for allowing Sabbath pay for midwives is not to discourage them from providing Sabbath services in the future were they not paid.

Relying on Kashrut Organizations for the Separation of Terumot and Ma'asrot

Daniel Stein

Introduction

There is quite a lot of literature pertaining to the institution of separating *teruma* and *ma'aser* relevant to the present situation in Israel. As the agricultural economy of Israel expands, the issues contained within this discussion become increasingly complex.

The basic law is that one is obligated to remove *teruma* and *ma'aser* from any produce grown within the boundaries of Israel that existed after the original conquest in the time of Joshua.[1] It

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1. The land at the time of Joshua was endowed with sanctity, which would obligate it in *teruma* and *ma'aser*. Even though that sanctity left when the first Temple was destroyed, nonetheless any subsequent settling of those lands will reawaken the dormant sanctity [See *Chiddushei Rabbi Chaim Soloveitchik* (Sec. 158) based on the Jerusalem Talmud (*Shevi'it* 6), and Mabit in *Kiryat Sefer* (*Hilchot Terumot* Chapter 1)]. The status of the lands conquered during the Hasmonean period is discussed by Rabbi Yaakov Emden, *Mor U'ketziah* (*Orach Chaim* Sec. 306). All modern conquests of new lands are discussed by

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is prohibited to eat from the produce prior to the removal of the proper *teruma* and *ma'aser*. This prohibition is referred to as *tevel*. The requirement of *teruma* is that one fiftieth of the harvest be separated and given to the *cohen*. Today, since the *cohen* is in a state of defilement (*tumah*), he may no longer eat the *teruma*, and any percentage will suffice.

The next required separation is the *ma'aser rishon*, which is an additional one tenth of the harvest apportioned for the *levi*. The *levi* must subsequently separate one tenth of the *ma'aser rishon* which he received (one hundredth of the total harvest) to be given to the *cohen*, this is referred to as *terumat ma'aser*. Lastly, on alternating years of the seven-year *shmita* cycle, either *ma'aser ani* or *ma'aser sheni* must be separated amounting to another one tenth of the harvest. *Ma'aser ani* is given to the poor, and *ma'aser sheni* is retained for use by the owner in Jerusalem.[2]

When separating *ma'aserot* (*ma'aser rishon*, *sheni*, *ani*, and *trumat ma'aser*) one must be careful not to remove more than one tenth of the produce, or less than one tenth. The Tosefta

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Rabbi J. David Bleich, *Contemporary Halachik Problems* (Vol. 2 Pages 169-188), and by Rabbi Ahron Soloveitchik, *Torah Shebeal Peh*, (Vol. 16, Pages 80-91).

2. The Ramban to the *Sefer Hamitzvot* (Mitzvah 1) writes that there is a positive commandment to eat *ma'aser sheni* in Jerusalem (see *Minchat Chinuch*, 442). Even though there is a mitzvah involved in the eating of *ma'aser sheni*, we no longer do so for three reasons. Firstly, the Gemara in *Zevachim* (60b) says that *ma'aser sheni* is only eaten at a time when the sacrificial altar is in existence. Secondly, we are all in a state of *tumah*, and one who is in a state of impurity can not eat *ma'aser sheni*. Thirdly, the *ma'aser sheni* itself is impure, and it too can only be eaten when it is in a state of purity. Therefore, the practice today is not to eat the *ma'aser sheni* in Jerusalem, but rather to redeem its value onto a coin [See *Chazon Ish* (*Demai*, Sec. 3 Part 10) for a practical description of this process].

(*Demai* 8:10) states that if one separated too much *ma'aser* he has rendered the rest of the produce permissible through the separation, but the *ma'aser* itself is not permitted to the *levi*. The amount separated as *ma'aser* over and above the required one tenth remains *tevel*, thus making it prohibited.[3] If too little is apportioned for *ma'aser*, then the original produce will only be permitted proportionate to how much *ma'aser* was separated.[4] Therefore the practice when separating *teruma* and *ma'aser* is to separate a little more than one hundredth. The amount over the one hundredth is declared as *teruma*.[5] The original one

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3. See *Afikei Yam* (Vol. 1 Sec. 12) who quotes Rashi to *Kiddushin* (51a) that the extra designated as *ma'aser* remains in the state of *tevel* (to the preclusion of the Tosafot Rid cited there). As to how to rectify such a situation, see Meiri to *Kiddushin* (51a) who writes that it can not be rectified; however he quotes Rashi who disagrees. See also Rashi and Tosafot to *Eruvin* (50a) and *Afikei Yam*, ad loc.

4. The Rambam and Ravad (*Ma'aser* 1:15, *Terumot* 3:7)) dispute, when too little was designated as *teruma* (less than 1/40,1/50, or 1/60) or *ma'aser*, whether or not it is effective proportionate to what was separated, or not at all. The Rambam is of the opinion that the whole separation is meaningless, and the Ravad disagrees, based on the aforementioned Tosefta, that such a separation is effective proportionally. The later authorities [Responsa *Pri Yitzchok* (Vol. 1 Sec 34), *Avi Ezri* to the Rambam (*Ma'aser* 1:15)] explain that the Rambam interpreted the Tosefta as referring to an instance when the owner does not plan to separate any more *ma'aser* than that which was already separated. The Rambam, however, is discussing when he does plan to continue separating, in which case the Rambam is of the opinion that what he already separated is not effective, until he has completed his separation of *teruma* and *ma'aser*. The Ravad argues that even in an instance where he plans to continue separating, what he has already separated is nonetheless considered *teruma* and *ma'aser* in the interim. [The Jerusalem Talmud states explicitly that *Pe'ah* is different in this regard; see *Torat Zeraim* (*Pe'eh* 1:1) who explains the difference].

5. This will not constitute a violation of the rule quoted by the

hundredth and nine others similar to it (from a designated portion of the pile of produce) are declared as *ma'aser rishon*. Then the original one hundredth is designated as the *terumat ma'aser*. By doing so all of the separations achieve their appropriate exactness.

There is a dispute amongst the *Rishonim* as to which species of produce are subsumed under the biblical obligation to separate *teruma* and *ma'aser*. The verse states in connection with *ma'aser*, "...the tithe of your grain, your wine, and your olive oil (*Devarim* 14:23)." The approach of Rashi,[6] Tosafot,[7] and the Ravad [8] has been to take this verse literally. They therefore limit the biblical obligation to remove *terumot* and *ma'aserot* to those three categories of produce, namely wine, olive oil, and the five grains (oats, rye, wheat, barley, and spelt).[9] The separation of all other produce is mandated only rabbinically.

Gemara in *Eruvin* (37a) that what serves as the *teruma* must be distinguishable from other produce, if we assume as does the *Chazon Ish* (*Demai* 11:10) that it suffices if it is partially distinguishable. See also Tosafot to *Kiddushin* (26a) and Ritvah to *Makkot* (19b) whether *ma'aser* must also be distinguishable when separated.

6. To *Berachot* (36a).

7. To *Rosh Hashanah* (12a).

8. *Hilchot Ma'aserot* (1:9).

9. The Ramban writes (*Devarim* 14:23) that grapes and olives are only rabbinically obligated in *terumot* and *ma'aserot*. If they are subsequently made into wine and oil they then acquire the biblical obligation. This opinion is cited by Rabbi Akiva Eiger (Comments to Mishnah, *Terumot* 2:6, Part 21), where he questions it based on the Mishnah there. However, he does find support for this opinion from the Jerusalem Talmud. The *Turey Even* (*Rosh Hashanah* 15b) also questions this opinion. The *Chazon Ish* (*Shevi'it* Sec. 7 Part 24) seems to assume practically like this opinion of the Ramban. He explains further the reasoning behind such an opinion, and he attempts to answer Rabbi Eiger's question from the Mishnah in *Terumot*.

This is in contradistinction to the position of the Rambam, who writes that all fruits are biblically obligated in *terumot* and *ma'aserot*.[10] The source for the opinion of the Rambam is the Jerusalem Talmud to *Ma'aserot* (Chapter 1). The Talmud derives from the verse, "All tithings of the land; whether of the seeds of the land, or of the fruits of the tree, belong to Hashem... (*Vayikra* 27:30)," that all fruits are obligated biblically in *terumot* and *ma'aserot*.

These are the two major propositions among the *Rishonim*; however there are other, less popular opinions. For example, the opinion of the *S'mag* and that of Rabbi Eliezer of Metz is that all fruits are obligated biblically only in *ma'aser sheni*.[11] The Ravad also has an original addition to his opinion that only the three categories listed by the verse are obligated biblically in *terumot* and *ma'aserot*. He adds that when one in fact declares *teruma* and *ma'aser* via the rabbinical obligation, it is considered as *teruma* and *ma'aser* even on the biblical level (*d'oraita*).[12] The

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10. *Hilchot Terumot* (2:1), and *Hilchot Ma'aserot* (1:9). The Rambam (*Terumot* 2:6) does, however, exclude vegetables from the biblical obligation of *terumot* and *ma'aserot*. The source for this distinction is found in the Jerusalem Talmud (*Ma'aserot*, 1). Rabbi David Rappaport, *Mikdash Dovid* (*Ma'aserot* Sec. 56 Part 1), points out that the Rambam is of the opinion that edible vegetable seeds, garlic, and onions, are indeed also obligated biblically in *terumot* and *ma'aserot* (see at length for his reasoning).

11. *S'mag* (Positive Commandment 136, 161). *Sefer Yeraim* (Sec. 173). This opinion is cited by the *Mishneh Lamelech* (*Ma'aser Sheni* 5:12). The *Turey Even* (*Rosh Hashanah* 15b) questions this opinion and believes he has disproved it entirely. However, see *Ohr Sameach* (*Terumot* 2:1) who writes at length in defense of this opinion.

12. The opinion of the Ravad is cited by the *Kaftor Va'ferach* (Chapter 3). The Netziv in his commentary to the Sifri (*Naso*, *Piske* 5) agrees fully with this opinion of the Ravad, and adds that he was prepared to suggest it on his own had the Ravad not preceded him. [See also Responsa *Har Tzvi* (Topics in *Zeraim*, Vol. 1, Sec 46)]. Both the Netziv

Chazon Ish, however, has ruled both of these opinions outside the pale of normative halacha. [13]

Regardless of the previous dispute, we assume as does the Rambam that the obligation of *teruma* and *ma'aser* in Israel today is only rabbinic.[14] This is because the institution of *terumot* and *ma'aserot* is dependent on the seven-year *shmita* cycle which itself functions only when the majority of the world Jewish population resides in Israel. Therefore, since at present the majority of the world Jewish population does not live in Israel, the *shmita* cycle is not functioning, hence *terumot* and *ma'aserot* are not obligatory.[15] *Chazal* instituted on a rabbinic plane that we should still be obligated in *terumot* and *ma'aserot* even though it no longer coincides with the functioning of the *shmita* cycle.

It should be noted as well that the Gemara in *Baba Metzia* (88b) states that any produce grown with the distinct intention to sell, and not for personal consumption, is only obligated rabbinically in *terumot* and *ma'aserot*.[16] This would presumably

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and Rabbi S. Z. Auerbach (*Ma'danei Eretz, Terumot* 2:11, Part 4) have understood that the Ravad's opinion is based on a different approach to the passage in the Jerusalem Talmud cited by the Rambam. [See also Rabbi Herschel Schachter, *Eretz Hatzvi* (Sec. 20)].

13. *Shevi'it* (Sec. 5 Part 25).

14. *Hilchot Terumot* (1:26), and Ramo (*Yoreh Deah* 331:2).

15. Rabbi Chaim Soloveitchik in his commentary on the Rambam, (*Shemita and Yovel* 12:16). This is the obligation of "ביאת כולכם" which is necessary to sanctify the land to the level required to be obligated in *shmita* and *yovel*, and thereby *terumot*, etc. This is to be distinguished from the need for "כל יושביה עליה" required in *Arachin* (32a) in order to maintain the *shmita* and *yovel* cycle. See also Rabbi Yaakov Konievsky, *Kehilat Yaakov* (*Zeraim* Sec. 21), who also makes the previous distinction. The Chazon Ish (*Shevi'it* Sec. 21 Part 5) discusses, based on these premises, what the halacha would be if the majority of the world Jewish population were to move to Israel in modern times.

16. Rambam, *Hilchot Ma'aser* (2:1).

include a large percentage of the produce sold in the present economy. In sum, it appears that the obligation to separate *teruma* and *ma'aser* in today's society is only rabbinical in nature.

Generally speaking, the obligation to separate *teruma* and *ma'aser* is limited to fruits grown inside Israel. The Mishnah in *Yadayim* (4:3) relates that the Prophets instituted a rabbinical obligation to separate *teruma* and *ma'aser* in Babylonia, which at the time was quite heavily populated by Jews. A later enactment was a rabbinical obligation to separate *teruma* and *ma'aser* in all areas surrounding Israel.[17] Tosafot write that included in the latter enactment was a rabbinical obligation to separate *teruma* and *ma'aser* in all the lands outside Israel, which would include America.[18] The Rambam and the *Shulchan Aruch* disagree with the assertion of Tosafot, and they limit this enactment to the areas immediately surrounding Israel. [19]

Our practice today, however, is not in consonance with the halacha as posited by the Rambam and *Shulchan Aruch*. The custom today follows the opinion of the Jerusalem Talmud (*Challah* 4:4) cited by Tosafot, that this later enactment was repealed in a subsequent generation.[20] Separating *terumot* and *ma'aserot* is nonetheless still pertinent in America with respect to produce imported from Israel, as we shall see later.

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17. Idem, *Hilchot Terumot* (1:1). The Rambam (*Terumot* 2:7) writes that this enactment also excluded vegetables. Rabbi Tzvi Hirsch Kalisher, in his comments to *Shulchan Aruch*, claims that all fruits besides wine, olive oil, and the five grains, should also be excluded. See also *Chazon Ish* (*Shevi'it* Sec. 6 Part 4).

18. To *Chullin* (6b), and *Avodah Zara* (58b).

19. *Yoreh Deah* (331:1).

20. See Tosafot ad loc. and comments of Vilna Gaon to *Yoreh Deah* (331:5). The major source for our practice today is the Responsa of *Ridvaz* (Vol. 3 Sec. 659). See also *Ma'danei Eretz* (*Terumot* 1:6, Part 4).

For the most part, the separation of *terumot* and *ma'aserot* is done by kashrut organizations. Even if fruits come from a reliable kashrut organization, there are those who choose not to rely on their separation and have the practice to remove *terumot* and *ma'aserot* themselves prior to eating Israeli fruits. Rabbi Yosef Sholom Elyashiv has been quoted as having said, that even though strictly speaking it is certainly not required (as the kashrut organizations may certainly be trusted), ideally one should attempt to re-tithe all produce which enters one's home.[21] Other authorities have echoed such a sentiment.[22] Their primary concern is that most *mashgichim* are prone to miscalculate or commit serious oversights while doing the separation.

There are others who question the separation rendered by kashrut organizations on halachic grounds, as they believe that even the most trustworthy kashrut organizations conventionally rely on a number of questionable decisions in halacha. The details of the leniencies that are generally relied upon and why they are questionable are not widely known and often confused. I would therefore like to briefly outline what these issues are, and to examine whether these issues independently are grounds for introducing a practice of re-tithing Israeli fruits, and whether such a practice has application to imported Israeli fruits in America.[23]

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21. See Rabbi Simcha Edelstein, *Mishpeti Eretz* (Pages 21-33), where he elaborates on this topic, and presents a letter from Rabbi Yosef Efrati recounting the opinion of Rabbi Elyashiv.

22. Rabbi Chaim Konievsky, *Derech Emunah* (*Ma'aser* 14:1) in *Biur Halacha* ad loc., Rabbi Yitzchok Weiss, *Minchat Yitzchok* (Vol. 9 Sec. 109).

23. See *Mishpeti Eretz*. If one chooses to be stringent and to re-tithe his produce, fruit juices and fruit juice based products might pose a problem. Rabbi Yitzchok Zev Soloveitchik has suggested that once a fruit has been made into juice, the prohibition of *tevel* can no longer

The *Heter* of the Chazon Ish

In general, *teruma* and *ma'aser* are separated by declaring verbally upon a designated pile of produce that it should serve as the *teruma* or the *ma'aser*. However there is a prescribed wording used to pronounce this declaration, and a frequent problem experienced when separating *teruma* and *ma'aser* on a farm is that the person doing the separation has either not memorized, or does not have available a written text of the required declaration. The Chazon Ish has suggested a possible solution that one may simply say at the time of the separation, "This separation of *terumot* and *ma'aserot* should take effect in accordance with the halacha as I have written somewhere else."[24] The use of the reference text can satisfy the requirement to declare the *teruma* and *ma'aser* through verbalization. This is a widely known opinion of the Chazon Ish, which can be found in most standard editions of the siddur in Israel.

The Chazon Ish brings two supports for his position. The first stems from the Ramo, who posits that in order to create a legal stipulation (תנאי) one need only recite "I am stipulating in accordance with the rules and regulations of creating a stipulation."[25] The Chazon Ish claims that we can evoke from here the principle that any instance that warrants regulated verbalization, can be substituted by saying "as is written somewhere else."

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be removed and the juice remains prohibited. [See *Chiddushei Hagriz* (*Menachot* 70a), *Shiurim* of Rabbi Dovid Soloveitchik (*Temurah* 31a), and Rabbi Moshe Shternbauch, *Moadim U'zmanim* (Vol. 3 Sec. 204)]. The *Chazon Ish* (*Ma'aserot* Sec. 7 Part 1) disputes this; he contends that it is impossible to have an instance of *tevel* which cannot possibly be rectified.

24. *Demai*, Sec. 15 Part 6.

25. *Even Ha'ezer* (38:3).

The second support the Chazon Ish marshals is from a Gemara in *Sanhedrin* (60a). The Gemara says that when a second witness is giving testimony in court, strictly speaking, he does not need to relate the entirety of his testimony, but rather can qualify by stating, "I saw the same thing as the first witness." The need for the second witness to verbalize his entire testimony is only a rabbinic enactment. Therefore, the Gemara says, in an instance where it is impossible for the second witness to recount his entire testimony, we can still accept his testimony if he says, "I saw the same thing as the first witness." It seems apparent that even in those areas that require verbalization, such as the testimony of witnesses or the declaration of a stipulation, this type of reference statement is enough to satisfy the requirement for verbalization.

Later authorities, however, have pointed out that the Chazon Ish's suggestion is difficult to maintain. The major proponent against the Chazon Ish is Rabbi Tzvi Pesach Frank,[26] whose basic claim is that the supports cited by the Chazon Ish are not parallel to the discussion at hand. The reason is that the need to verbalize the declaration of *teruma* and *ma'aser* is a higher caliber of requirement of verbalization than that required when making a stipulation or delivering testimony. When one separates *teruma* and *ma'aser*, he is in effect relabeling the fruits as *teruma* or *ma'aser* based on his speech alone, whereas testimony is only the discussion of facts, but no change is brought about based solely on the witness's testimony. This is true as well with regards to a stipulation. The stipulation is not the verbalization of the transaction about to take place, but is merely a detail that regulates its application. Therefore, claims Rabbi Frank, any separation of *teruma* or *ma'aser* relying on this opinion of the Chazon Ish is possibly not binding, and one would have to separate *teruma* and *ma'aser* a second time.

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26. *Har Tzvi*, (Topics In *Zeraim* Vol. 1, Sec. 48).

Even if we are to accept the Chazon Ish, there are those who have pointed out that the Gemara in *Sanhedrin* does limit the use of this tactic to the status of *bediaved* (*ex post facto*), and ideally we would not allow the second witness to use this method of delivering testimony. They proceed to claim that all instances of required verbalization, including declaring *teruma* and *ma'aser*, should be limited by this comment of the Gemara, and ideally we would not permit the use of a reference text at all, unless no other option is available.[27]

It is important to note that *teruma* can be effected simply by thought alone. The Gemara in *Gittin* (31a) derives this from the verse in *Bamidbar* (18:27) "Your *teruma*-gift will be considered." Meaning, if one concludes mentally to declare a certain pile of his produce as *teruma*, it is binding with this alone, and no form of verbal declaration is necessary.[28] [29] We

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27. See *Eretz Hatzvi* (Sec. 22 Part 7). Rabbi Schachter explains why we should distinguish between the use of a reference text with regards to a stipulation, which is clearly allowed even under ideal circumstances, as opposed to other instances requiring verbalization.

28. This is in consonance with the mainstream understanding of the statement in the Gemara that one can declare *teruma* through thought alone. The Tosafot Rid to *Shabbat* (142a), however, is of the opinion that a form of verbal declaration must supplement all mental declarations. The Rashba to *Kiddushin* (41b) also cites one opinion that in order for the mental declaration to be binding a supplementary physical separation is required. The *Dvar Avrahom* (Vol. 1 Sec. 16) discusses this at length with regard to the permissibility of declaring *teruma* mentally on Shabbat. See also *Achiezer* (Vol. 2. Sec 49 Part 4) and Rabbi S.Z. Auerbach in *Ma'danei Eretz* (*Terumot* 4:16, Part 4), who discuss this topic at length.

29. The *Rashash* to *Gittin* (31a) deduces that the position of Tosafot is that mental declaration is effective in separating *ma'aser rishon* as well as *teruma*, but he distinguishes as far as *ma'aser ani* and *ma'aser sheni* are concerned. The Meiri to *Shabbat* (127b) writes explicitly that mental declaration cannot be used when declaring *ma'aser rishon*.

can then question the position of Rabbi Frank. How is the *heter* of the Chazon Ish to rely on a reference text as sufficient verbalization, any worse than effecting *teruma* by mere thought? Do we not see that verbalization is not necessary at all in regards to the separation of *teruma*?

In response to this apparent conclusion, Rabbi Frank refers to the Mishnah in *Terumot* (3:8). The Mishnah states that one who intends to verbally declare a certain pile of fruits as *teruma*, but erroneously substitutes *ma'aser*, neither the *teruma* nor the *ma'aser* succeed in taking effect. The *Turey Even* observes that even the mental intention to declare *terumah* is also not effective. He therefore postulates a rule that any time one intends to declare *teruma* by speech, it can no longer be effected by means of thought, because when confronted with the intention of verbal declaration all mental declarations become meaningless.[30] This idea is echoed in the *Dvar Avrahom*[31] as well as by Rabbi Meir Simcha of Dvinsk.[32]

This leads Rabbi Frank to conclude that when one intends to declare *teruma* verbally, the declaration of *teruma* requires explicit verbalization, and any other form of declaration is meaningless. If so, then when one intends to use a verbal form of declaration it would not be sufficient to use a reference text,

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However, practically, the Vilna Gaon (*Yoreh Deah* 331:92) and Rabbi S. Z. Auerbach (*Ma'danei Eretz, Terumot* 4:16, part 3) side with Tosafot on this issue, as they see no reason that mental declaration should not be valid for the separation of *ma'aser rishon*. Nevertheless, our practice is not to separate mentally (see *Chazon Ish*, *Orlah* Sec. 5 Part 9).

30. *Chagiga* 10a (in the *Avnei Shoham*).

31. Ibid.

32. Vol. 1, Sec. 16 Part 13. See also addendum attached to the end of that section. This is in disagreement with the *Afikei Yam* (Vol. 1, Sec. 24 Part 7-11).

as that is not considered sufficient verbalization.[33] We can now grasp what has aroused certain individuals not to rely on a separation of *teruma* and *ma'aser* utilizing the suggestion of the Chazon Ish.

The *Takanah* of *Demai*

The Gemara in *Sotah* (48a) records that in the days of R. Yochanan Cohen Gadol a survey was taken among the ignorant (*amei haaretz*), and it was found that they were only meticulous to separate *teruma* but not to separate *ma'aser*. It was therefore instituted that approval be necessary in order to be trustworthy regarding *ma'aser*, as everyone was under suspicion of emanating from those not punctilious in the separation of *ma'aser*. They also instituted that any produce emanating from a suspicious source was to be labeled as *demai*, and would require a new separation of *ma'aser* before it would be permitted to be eaten. The Gemara and *Rishonim* regard this as only a rabbinic stringency, because even though the survey showed that *amei haaretz* were not careful to take *ma'aser*, nonetheless in reality the majority of *amei haaretz* did indeed separate *ma'aser*. Since the institution of *demai* is at most only a rabbinic stringency, the Gemara and the *Rishonim* have certain legal lenciences regarding it.

Tosafot ask what prompted *Chazal* to be concerned with

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33. Rabbi S.Z. Auerbach, *Ma'danei Eretz* (*Terumot* 4:16, Part 1) is in disagreement with the extension of Rabbi Frank. He proposes that in fact specific verbal expression is never required with regard to *teruma*. He explains that the intention of the *Turey Even* was that the mental declaration is invalid because it is confronted with another mental declaration, namely that everyone wants what they say to be valid. Therefore, this could not be used as grounds to disagree with the Chazon Ish that explicit verbalization is required when declaring *teruma* verbally.

the minority of *amei haaretz* who did not remove *ma'aser*.[34] We should instead rely on the assumption that the produce has emerged from the majority. Tosafot answer that here *Chazal* were more concerned because it was a fairly common occurrence that *ma'aser* would not be removed, and it affected a large number of people. It follows from this, that if the *ma'aser* were in fact removed, then there would be no prohibition of *demai*. However, Rabbi Elchonon Wasserman refers to an opinion cited by Tosafot in *Yevamot* (114a) that *Chazal* went so far as to say, that even if the *ma'aser* was indeed removed by the *am haaretz*, it would still require another separation of *ma'aser* as part of the institution of *demai*.[35]

The Rambam states that the approval process to be believed in the area of *ma'aser* consisted of a "public" approbation to meticulousness in the separation of *ma'aser*.[36] The Rambam adds that *talmidei chachamim* (Torah scholars) are believed even without such approval, as they are all assumed to be scrupulous in their separation of *ma'aser*. The *Kesef Mishneh* cites the Gemara in *Bechorot* (30b) as the source for this Rambam. The Gemara states that in order to be believed one must receive certification in the presence of three people who were already approved.

In modern application, the ramification of this would be that no one could be trusted in the area of *ma'aser*, because it is not the practice today to give such approval for trustworthiness with respect to *ma'aser*. We are also lacking anyone already certified who is in a position to certify others. That is why

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34. *Shabbat 13a.*

35. *Kovetz He'arot* to *Yevamot* (Sec. 75). See also Rabbi Yosef Engel, *Asvan D'oraita* (Sec. 6), as well as Rabbi Herschel Schachter, *Be'ikvei Hatzon* (Sec. 31), who also discuss at length the nature of the prohibition *demai*.

36. *Hilchot Ma'aser* (10:1).

some have claimed that all kashrut organizations cannot be trusted to have removed *ma'aser*, as no one is believed to have removed *ma'aser* since we all lack the approval necessary. The only option would be to declare the *mashgiach* as in the category of a *talmid chacham* who does not require any such approval status. The Chazon Ish discusses whether in modern times we have the concept of a *talmid chacham* or not. [37]

However, the Chazon Ish[38] and Rabbi Shlomo Zalman Auerbach[39] have taken a different approach. They assume that we have reverted to the status that existed prior to the rabbinic enactment of *demai*. The basis for this assumption is that presumably *Chazal* required approval only when it was the custom to confer such certification. However, since the reality has changed, and we no longer give such approval, the need for certification would not be applicable. Rabbi Auerbach adds that if we assume that the nature of the stringency of *demai* was that they demanded that all suspicious produce be tithed again even if it was in fact tithed originally, then it is logical to assume that *Chazal* enacted *demai* only under those specific circumstances. If the circumstances would indeed change, then the rabbinical decree of *demai* would no longer be applicable. Since at present we do not have a majority of *amei haaretz* meticulous in the removal of *ma'aser*, it stands to reason that *Chazal* did not extend their enactment to such a climate.

Therefore, Rabbi Auerbach and the Chazon Ish opine that

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37. See letter of Rabbi Elyashiv, *Mishpetei Eretz* ad loc.

38. *Shevi'it* (Sec. 10 Part 8). The opinion of the Chazon Ish is discussed at length in *Chiddushim U'viurim* (*Demai* Sec. 4 Part 2).

39. Responsa *Minchat Shelomo* (Vol. 1, Sec. 62 Part 3). He differs from the Chazon Ish in that he believes that the entire institution of *demai* is no longer relevant because the situation has changed and we no longer have a majority of people concerned with *ma'aser*.

anyone who acts in accordance with the halacha in general, and specifically with respect to *ma'aser*, can be believed even without formal public approval, as is the rule in general when dealing with the issue of trustworthiness.[40] This would presumably include a modern day *mashgiach* as well, thereby alleviating the problem mentioned before.

Rabbi Yosef Engel advances an alternative proposal.[41] He takes issue with the source quoted by the *Kesef Mishneh*. He claims that in truth the source of the Rambam is to be found in the Jerusalem Talmud (*Demai* 2:2-3), which states explicitly that in order to be believed to have separated *ma'aser*, approval is required in "public." The Rambam uses the wording that acceptance in "public" is required, whereas the Gemara in *Bechorot* says that the approbation must be conducted in front of three people. The fact that the Rambam uses the language of the Jerusalem Talmud and not that of the Gemara in *Bechorot* seems to indicate that he is quoting the Jerusalem Talmud. Furthermore, the Gemara in *Bechorot* states that even a *talmid chacham* must undergo this approval process, which is against the ruling of the Rambam in reference to *demai*. Rabbi Engel suggests that the Rambam is in fact quoting the Jerusalem Talmud, and the Gemara in *Bechorot* is specifically referring to certification with respect to *taharot*.

If so, the regulations listed in the Gemara in *Bechorot* would not apply to *demai*, and the approval would not have to be performed before three previously-approved people, but rather it would suffice to be done in "public." The Rambam writes that this must be done in public to properly publicize that this person is believed in the area of *ma'aser*.[42] If that is the case,

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40. See *Bechorot* 30a.

41. *Otzrot Yosef* (Vol. 4, Sec.1 Part 16) Beg. *Ulam*.

42. Commentary to Mishnah, *Demai* (2:2).

then Rabbi Engel raises the possibility that the licensing would have to be done in front of as many as ten people, as the Gemara in *Menachot* (40a) indicates, that in order to publicize a matter it has to have been told to ten people. However, since this process could take place without pre-licensed people present, it would be possible to restore this procedure today if necessary.

Rabbi Engel proceeds to maintain that the nature of the *takanah* of *demai* was that *Chazal* intended that we concern ourselves with the minority of people not watchful to remove *ma'aser*. Therefore, even in the modern context we should concern ourselves with those who do not take off *ma'aser* even if they be a majority, and we should suspect unrecognized individuals as having emanated from that group of people until they have been properly approved. It seems that, according to Rabbi Engel, there is no reason to accept the position of the Chazon Ish and Rabbi Auerbach, as there is no compelling proof to indicate that we should abolish the requirement for approval.

Disregarding the opinion of Rabbi Engel, there is a minority opinion which claims that the argument of the Chazon Ish and Rabbi Auerbach is not absolutely convincing. They assert that it is reasonable to assume that the requirement to attain approval is still intact, as well as the enactment of *demai*. In that case, there would be no way of believing anybody with respect to *ma'aser*, including a *mashgiach* or a kashrut agency, except to separate *ma'aser* oneself prior to eating produce. However, this does not seem to be the conventional position taken by the *poskim*.

Separation of *Teruma* and *Ma'aser* with Intention to Withhold

Rabbi Frank, in a different responsum, advances the most

compelling argument relevant to this discussion.[43] He questions the whole practice of separating *teruma* and *ma'aser* with intention never to give it to a *levi* or *cohen*. He suggests that if one never plans on completing the entire mitzvah of *teruma* and *ma'aser*, but rather intends to retain it, then his *teruma* and *ma'aser* might never take effect, leaving his fruits in the status of *tevel*. How can we label these fruits as *teruma* and *ma'aser* which, by definition is supposed to be given to the *cohen* and *levi*, when the owner never intends to relinquish them?

A proper understanding of this argument, and subsequently Rabbi Frank's response, warrants a number of introductory comments. Firstly, there is a well-known dispute between the Rambam and the Ramban as to how to count the mitzvot of separating *teruma* and *ma'aser* and giving it to the *cohen* and *levi*.[44] The Rambam counts it as one composite mitzvah with two parts, whereas the Ramban prefers to count these two steps as separate and distinct mitzvot.[45]

Secondly, the Ramo writes that today the *teruma* is in a state of defilement and may not be eaten by the *cohen*.[46] Nonetheless, the Ramo adds, it should still be given to the *cohen*, as *teruma* requires a "giving" to the *cohen* to complete the mitzvah. The *cohen* should then destroy it. The common practice, however, follows the opinion of the *Magen Avrahom*, that since the *cohen* no longer has witnesses to authenticate his priestly lineage, there is no obligation to give *teruma* and *ma'aser* to the *cohen*, as they are only assumed to be *cohanim*.[47]

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43. *Har Tzvi*, (Topics in *Zeraim* Vol. 1, Sec. 44).

44. *Sefer Hamitzvot* (*Shoresh* 12).

45. The *Maharitz Chiyut* (Gitin 20a) claims that the Tosafot Rid (*Kiddushin* 58b) is in agreement with this Ramban.

46. *Yoreh Daeh* (331:19).

47. *Orach Chaim* (457:9). See also *Shach (Yoreh Deah* 322:9), and *P'tchei*

The Vilna Gaon questions this practice. He points out that all *teruma* today is rabbinical in origin, and the Gemara states in *Ketubot* (24b) that with regards to rabbinical *teruma* we do rely on the assumed status of the *cohanim*.[48] The Chazon Ish writes in defense of the prevalent practice, that the reason we do not rely on the assumed status of the *cohanim* with respect to rabbinical *teruma* is because that will possibly instigate impostors prompted by the monetary gain involved.[49] He suggests that for the same reason there is no longer an obligation to give *ma'aser* to the *levi*, as that will also provoke impostors.[50] [51] This is mitigated by the fact that even a non-*levi* is permitted to eat *ma'aser* in contradistinction to *teruma* that is limited to the consumption of the *cohen*. Therefore, there is no problem

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Teshuvah ad loc.

48. *Orach Chaim* (457:16).

49. *Shevi'it* (Sec. 5 Part 4, 12). More recent authorities, with regards to the reinstitution of the sacrificial order, have discussed properly establishing the lineage of the priestly status. Rabbi Tzvi Kalisher writes in his compendium on the topic, *Drishat Tzion*, that proof for authentic priestly lineage is no longer necessary as that was only needed in the time of Ezra due to the circumstances that existed at that time. However, the majority of the other authorities on the topic have clearly not accepted his opinion; see *Binyan Tzion* (Sec. 1), *Sheilat Dovid* (*Kuntrus Drishat Tzion V'Yerushalyim*), *Chatam Sofer* (*Yoreh Deah*, Sec. 136), and Rabbi Akiva Eiger's response to Rabbi Kalisher.

50. Why then do we give *pedion haben* to the *cohen*, as that is also a monetary privilege of the *cohen*? The Chazon Ish responds that for that reason one should only give the *pedion haben* to the *cohen* with a stipulation that he will return the money [See also *Chatam Sofer (Yoreh Deah Sec. 291)* where he argues with other *Acharonim* about this issue].

51. Many do have the practice of giving the *ma'aser* to the *levi*, as the *Shulchan Aruch* (*Yoreh Deah*, 331:19) prescribes. Rabbi Shternbuch, *Tshuvot Ve'hanhagot* (Vol. 3, Sec. 340), records that his practice was to annually give *ma'aser* to Rabbi Yitzchok Zev Soloveitchik, and Rabbi Soloveitchik never protested, indicating that he saw nothing wrong with this practice. Others also record such practices.

with the owner's retaining physical possession of the *ma'aser* and eating it. The practice is also not to give *ma'aser ani* to the poor. However, this seems to be unfounded and might constitute stealing from the poor.[52] Since the routine is not to give *teruma* and *ma'aser* to the *cohen* or the *levi*, it seems that the act of separating *teruma* and *ma'aser* is meaningless, as the owner never intends to give it to the *cohen* or the *levi*.

Rabbi Frank suggests that this is dependent on the dispute between the Ramban and the Rambam as to whether there are two mitzvot subsumed in the separation of *teruma* and *ma'aser* or only one. If there are two distinct mitzvot, then one can be effective even in the absence of the other. However, if both the separation and the giving of the *terumot* and *ma'aserot* to the *cohen* and *levi* are one unified mitzvah, then it follows that one cannot be effective in the absence of the other. Nonetheless, Rabbi Frank demonstrates from a variety of sources that we presume that it is possible to have a separation of *teruma* and *ma'aser*, even if from the inception the owner has no intention of giving it to the *cohen* or *levi*.[53]

Rabbi Shlomo Zalman Auerbach raises a much more rudimentary issue. He asserts that most farm owners in Israel today are unaware of the financial ramifications of separating *teruma* and *ma'aser*:[54] namely, that if the *cohen* or the *levi* were to seize the *teruma* or *ma'aser*, they would be entitled to retain it, as the burden of proof would now fall upon the original

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52. See *Afikei Yam* (Vol. 1, Sec. 42) who discusses at length whether one who retains *teruma* and *ma'aser* is in violation of the prohibition against stealing. See also Tosafot to *Gittin* (25a).

53. His main support is drawn from an implication in Rashi to *Yoma* (83a).

54. *Minchat Shlomo* (Vol. 1. Sec. 53, and 62 Part 10).

owner to extract it from the *cohen* or the *levi*. [55]Rather, they are under the false impression that the separation process merely involves a *mashgiach* designating a small amount for *teruma* and reciting a short prayer, thereby permitting the remainder of the harvest. In actuality what has occurred is that ownership of approximately 1/5 of their entire crop has been transferred to the *levi* and the poor. After the separation by the *mashgiach*, the *ma'aser rishon* and *ma'aser ani* monetarily belong to the *levi* and the poor.[56] The reason we allow the owner to retain physical possession of them is because of the aforementioned reasons why we no longer give *ma'aser* to the *levi* or the poor.

Granted, Rabbi Frank concluded that separation of *teruma* and *ma'aser* with intention to withhold is valid. However, the problem created by this false impression of the separation process is that the owner never intended to appoint the *mashgiach* as his representative in transferring 20% of his harvest to the *levi* and the poor. The owner believes he has retained monetary ownership of the *teruma* and *ma'aser*. In this case, all the separations done by the *mashgiach* are unauthorized and thus void, leaving the produce as status of *tevel*. Rabbi Auerbach claims that the only solution to this dilemma would be to educate the farm owners in the laws of *teruma* and *ma'aser* separation and their ramifications. Until this plan is implemented, there remains some doubt as to the level of cognizance of the farmers

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55. If we assume that the right of the owner to give the *teruma* and *ma'aser* to whichever *cohen* or *levi* he chooses (*tovat hana'ah aina mamon*) does not make him the legal owner over the produce. According to the opinion of Tosafot to *Baba Metziah* (6b) this would be true even if we assume that the right of the owner to give it to whichever *cohen* or *levi* he chooses is a monetary right (*tovat hana'ah mamon*). [See Ritva to *Kiddushin* (58b) who cites both explanations, and see *Ketzot Hachoshen* (Sec. 275 Part 1)].

56. See *Ketzot Hachoshen* (243:4).

when appointing the *mashgiach* to do the separation.

Relying on a Representative

The Gemara in *Eruvin* (31b) asks, when a messenger is sent to accomplish a task, may the sender assume that his messenger has completed the assignment? The Gemara accepts the opinion of R. Nachman, who distinguishes between rabbinical laws and biblical laws. His opinion is that one can only assume that the messenger completed his task if he was sent to complete an assignment involving a rabbinic law, but if the assignment involves a *d'oraita* law, the sender may not rely on any such assumption. The *Shulchan Aruch* (*Yoreh Deah* 331:34), in accordance with this, rules that with respect to sending a messenger to separate *teruma*, one cannot assume that the messenger has done the separation. Even though *teruma* is only rabbinical today, nonetheless since it has its origins in the Torah itself, it is viewed as a *d'oraita* law.

The *Mishneh Lamelech*[57] claims that this is also the opinion of the Rambam.[58] The Chazon Ish also writes that one cannot rely on the assumption that a representative to separate *teruma* and *ma'aser* has fulfilled his task, as it is a *d'oraita* law.[59] The whole institution of kashrut organizations' sending a *mashgiach* to separate *terumot* and *ma'aserot* is predicated upon the assumption that the *mashgiach* will perform the separation. This process is now doubtful: since the institution has its origins in the Torah, one cannot rely on the assumption that the *mashgiach* has accomplished the separation.

There are, however, several ways to be lenient. Firstly, Rabbi

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57. *Bechorot* (4:1).

58. *Matnot Aniyim* (4:6).

59. *Ma'aserot* (Sec. 7 Part 16).

Shlomo Zalman Auerbach points out that many authorities disagree, that even a law which has its origins in the Torah is to be viewed as a rabbinic law if in practice it is only rabbinic today.[60] If that is the case, we can rely on the assumption that the *mashgiach* will complete the separation because we are only dealing with a rabbinic law. However, a law that has origins in the Torah but practically today is only rabbinic, is itself a difficult issue as to when it is to be viewed as a law *d'oraita* or only *derabbanan*. Rabbi Auerbach himself quotes opinions that this scenario is to be regarded as a law *d'oraita* and not merely rabbinical.

The second point for discussion is the Rambam, who quotes the Jerusalem Talmud (*Ma'aserot* 2:1), that even within R. Nachman's opinion there is a distinction between when the messenger approaches the sender, and when the sender is the one who approaches the messenger.[61] If the messenger is the one who approaches the sender, then the assumption that the messenger will properly fulfill the task at hand can be relied upon, even if the task involves a law *d'oraita*.[62] Therefore, since the *mashgiach* is probably the one who initiated the relationship with the kashrut organization and applied for the position of *mashgiach*, we can rely on the assumption that the *mashgiach* separated *teruma* and *ma'aser* properly.[63]

Rabbi Chaim Ozer Grodzenski writes along these lines in a

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60. *Ma'danei Eretz, Shevi'it (Kuntrus Le'Ifrushi Meissura* Sec. 1 Part 1, Sec. 6 Part 4*)*. See also *Avnei Neizer* (*Yoreh Deah* Sec. 458 Part 7) who discusses this topic as well with respect to *shevi'it* nowadays, which might only be rabbinical.

61. *Ma'aser* (1:8).

62. See *Torat Chesed* (Vol. 2, Sec 2 Part 6-11) who elaborates on this distinction.

63. See *Mishpetei Eretz* (Pages 29-30), where he has a full discussion of this issue and he raises this possibility.

responsum but adds an additional element.[64] He suggests that when a representative is being paid to perform a task, one can rely upon the assumption that he has completed this task, because if not, he would have returned the money. This would be applicable to our situation with the kashrut organizations, as a *mashgiach* is presumably paid to separate *teruma* and *ma'aser*. Also one can add that once the *mashgiach* is being paid, he becomes more reliable than a regular representative, because he would not want to jeopardize his job.

Application of "*Zachin L'adam Shelo Befanav*" when Separating *Teruma* and *Ma'aser*

Another issue raised is that the *mashgiach* who separates *teruma* and *ma'aser* for the owner is generally appointed even before the produce has grown. This is extremely questionable because the Gemara in *Nazir* (12a) states a rule that anything which the sender himself cannot do, his messenger also cannot be empowered to do. Simply stated, the representative cannot possibly have more power than the one he is representing. If so, then before the produce is in existence, at which point the owner himself is not in a position to remove *teruma* and *ma'aser*, his representative cannot be appointed a messenger to do so, making his designation as the representative of the owner useless. This means that even when the produce eventually

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64. *Achiezer* (Vol. 3 Sec 73). He discusses relying on the assumption that presumably a messenger has accomplished his assignment in the context of a rabbi selling *chametz* for the members of the congregation. He suggests that by paying the rabbi to sell the *chametz*, the owner has obligated the rabbi either to return the money or sell the *chametz*, in which case the assumption that he sold the *chametz* can be relied upon. He also discusses sending a messenger to give *mishloach manot* on *Purim*, whether that is considered to be a rabbinic law or a *d'oraita* law in reference to relying on the assumption that he has delivered the *mishloach manot* [see *Turey Even* to *Megillah* (5b)].

grows and becomes available for *teruma* and *ma'aser*, the messenger will have been lacking the appropriate appointment to separate *teruma* and *ma'aser* on behalf of the owner.[65] Presumably, the farm owner did not do a new appointment upon the maturation of the fruits, but rather relied on the appointment done originally, which was invalid. This would render all the *terumot* and *ma'aserot* done by the *mashgiach* as meaningless, thus prohibiting the rest of the harvest.

Tosafot in *Nazir* already realized this problem, to which they offer an answer in the name of Rabbeinu Tam; however, it covers only a limited amount of cases and precludes the case that is relevant to our discussion. More recently, others[66] have suggested a possible solution based on a ruling of the Ramo that allows the principle of "זכין לאדם שלא בפניו" (one can benefit another person even not in his presence) to be applied to the separation of *teruma* and *ma'aser*.[67] This principle is referred to in *Kiddushin* (42a). It means that even when not appointed as a representative, one can act as if he were the appointed representative of someone else, when it is advantageous to that person. Therefore, since it is advantageous to the owner to have *teruma* and *ma'aser* taken properly from his harvest,[68] the *mashgiach* can act as the representative of the owner under the rubric of "זכין לאדם שלא בפניו" to perform the declaration of *terumot* and *ma'aserot* on the owner's behalf.

The problem with this is that later *Acharonim* allege that

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65. The Rashba writes in his responsa (Vol. 4, Sec. 153) that since the original appointment did not take effect right away, it also can take effect at the time when the produce actually will grow [cited by *Avnei Neizer* (*Choshen Mishpat* Sec. 134)].

66. See Rabbi Herschel Schachter, *Be'ikvei Hatzon* (Sec. 30 Part 4).

67. *Yoreh Deah* (328:2).

68. As it is prohibited to sell *tevel*.

this opinion of the Ramo is not universally accepted and should not be relied upon.[69] They refer to *Ketzot Hachoshen* who points out that the Ramo's case is not the classical example of "*zachin*,"[70] when a person, not appointed as a representative, acts to **acquire** something on behalf of a second party when it is advantageous to the second party. Here, however, even though it is advantageous to the owner to have *teruma* and *ma'aser* separated, nonetheless it involves **taking** something from the original owner, namely the produce to serve as the *teruma* and *ma'aser*, which might not be covered under the purview of "*zachin*." The *Acharonim* conclude that it is a dispute among *Rishonim*, whether the institution of "*zachin*" can be applied when it is advantageous to take something from a second party.[71]

Therefore, practically, the custom of appointing a representative to remove *teruma* and *ma'aser* even before the fruits have actually grown is dependent on a dispute amongst the *Rishonim*. That is why some have chosen to be stringent in this regard, and demand that the *mashgiach* be appointed only after the fruits have reached full development.

Approximately fifty years ago, Rabbi David Baharan from Jerusalem suggested a possible solution to all the problems of *terumot* and *ma'aserot* in Israel. We all know that a certain percentage of every crop rots away or becomes spoiled. So Rabbi Baharan secretly adopted the practice of declaring *teruma* and *ma'aser* on those fruits that would in the future rot away.

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69. *Be'ikvei Hatzon* ad loc., *Nodah Ba'shearim* (Sec. 9), *Roshei Besamim* (Sec. 16), *Ma'danei Eretz (Kuntrus Leifrushei* Me'issura Sec. 1 Part 1*)*.

70. *Choshen Mishpat* (243:7-8).

71. For example, if a potential buyer comes to a store to buy a certain piece of merchandise at a good price and the storekeeper is absent from his store at that moment. May another person sell the merchandise to the buyer if he knows that the storekeeper would be happy to sell it for that price?

That means, that when those fruits will be destroyed, it will be determined retroactively that they were the ones designated as the fruits for *teruma* and *ma'aser*. He felt that he could consider himself as the representative of all farmers in Israel to take *teruma* and *ma'aser* for them, based on the Ramo's interpretation of "*zachin*." Since the fruits were going to rot away regardless, it certainly is in the best interests of the farmer to have that produce be used to satisfy the obligation of *teruma* and *ma'aser* rather than be destroyed. At first his practice was kept secret, but it later became well known. Many began to rely on his separation of *teruma* and *ma'aser* to eat from all the produce in Israel without any supplementary removal of *teruma* and *ma'aser*. Rabbi Shlomo Zalman Auerbach, in response to this suggestion, published a lengthy essay entitled *Kuntrus Leifrushei Me'issura*,[72] were he explores this suggestion.

This kind of retroactive determination utilized by Rabbi Baharan is called in talmudic language "*breira*." The normative halacha allows *breira* to be instituted only in regards to rabbinical laws, not biblical laws.[73] Since *teruma* nowadays is only rabbinic, the *Shulchan Aruch* permits the use of *breira* when separating *teruma*.[74] To rely on this ruling of the *Shulchan Aruch* is itself extremely questionable; as mentioned before, it is not clear among *poskim* that a mitzvah which has its origins in the Torah but today is only rabbinical, is to be viewed as a rabbinical law. Many authorities disagree and assume that such a law is to be viewed as a biblical law. For that reason the Chazon Ish has ruled against the *Shulchan Aruch,* that *breira* may not be relied upon when separating *teruma* and *ma'aser*.[75]

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72. Printed at the end of *Ma'adanei Eretz, Shevi'it*.

73. See *Chiddushei HaRan* to *Nedarim* (45b).

74. *Yoreh Deah* (331:11).

75. *Demai,* Sec. 9 Part 21.

The first obstacle raised by Rabbi Auerbach is that the ruling of the Ramo is contingent upon a dispute amongst the *Rishonim*, as previously noted. In defense of the Ramo he enumerates many *Acharonim* who accept the opinion of the Ramo that this type of "*zachin*" is acceptable, as opposed to *Ketzot Hachoshen* who rejected this position.[76] Based on Rabbi Auerbach's leniency there, we can certainly find room to be lenient here as well to allow the *mashgiach* to utilize "*zachin*" in the separation of *teruma* and *ma'aser* even when he is appointed before the produce has actually grown.

There is another issue raised in objection to Rabbi Baharan's suggestion, which bears relevance to our discussion as well. The *Acharonim* further attack the aforementioned Ramo based on a comment of the Rashba.[77] The Rashba concludes, based on *Baba Metziah* (22b), that "זכין לאדם שלא בפניו" cannot be applied to the separation of *teruma* and *ma'aser*. The Gemara notes that the Torah states regarding *teruma* "and you." Expounding on this verse,the Gemara derives that all separations of *teruma* must be similar to when the owner does it himself, in that the owner must always be aware that the separation is taking place. The Gemara means to exclude one from separating *teruma* on someone else's harvest without their consent. The Gemara does allow for the removal of *teruma* by means of a representative who is appointed by the owner. The Rashba understands the Gemara to be saying that there is a limited halacha associated with *teruma* and *ma'aser*, that the owner **himself** (or his

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76. See Rabbi Yitzchok Elchonon Spector, *Be'er Yitzchok* (*Orach Chaim* Sec. 1), where he disagrees with the entire analysis of the *Ketzot Hachoshen* in reference to selling someone else's *chametz* on the eve of Pesach [See also *Chatam Sofer* (*Even Ha'ezer* Sec. 1) who also discusses this]. The *Chazon Ish* (*Yoreh Deah* Sec. 199) also strongly rejects this position of the *Ketzot Hachoshen* in defense of the Ramo.

77. *Nedarim* (36b).

messenger) must do the separation, thus disallowing the use of "*zachin*" on behalf of a second party.[78] This is in disagreement with the position of the Ramo.

The *Acharonim* write in justification of Ramo, that in fact most of the *Rishonim* have not accepted the approach of the Rashba.[79] The Ramban reinterprets the Gemara in *Baba Metziah* and explicitly disagrees with Rashba.[80] He states that the second party does not have to be acting for the owner himself; rather, the owner's consent is all that is required, allowing "*zachin*" to be employed, and that was the intent of the derivation of the Gemara in *Baba Metziah*. The Ramban assumes that the separation of *teruma* is like any other transaction for which we allow the use of "*zachin*." The Ramban even implies that no representation of the owner is required when separating *teruma* and *ma'aser*, and the owner's acquiescence is merely required to validate the separation as it cannot take effect against his will.[81]

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78. The position of the Rashba is explained by Rabbi Baruch Ber Lebovitz, *Birkat Shmuel* (*Kiddushin* Sec. 19), and Rabbi Chaim Ozer Grodzenski, *Achiezer* (Vol. 2, Sec. 37 Part 4). The *Ketzot Hachoshen* previously cited had a different approach to understanding this Rashba.

79. See *Oneg Yom Tov* (Sec. 107-109) who discusses this Ramo.

80. Quoted by the Ran to *Gittin* (66a).

81. This is not the classical form of representation, where the representative to a certain extent acts with the legal power of the owner himself. Rather this is recognition of acquiescence on the part of the owner, because here no formal form of representation of ownership is necessary to perform this action. We find this concept in other areas as well, such as a representative to blow the *shofar* on *Rosh Hashanah* [*Avnei Neizer* (*Choshen Mishpat*, Sec. 65, *Orach Chaim* Sec. 431 Part 2)], as well as with respect to sending *mishaloch manot* on *Purim* by means of a representative [*Dvar Avrahom* (Vol. 1, Sec. 13 Part 4)].

In explanation of this distinction further, it seems that the dispute between the Rashba and the Ramban hinges upon an unresolved question posed in the Jerusalem Talmud,[82] which wonders if one may separate *teruma* on a harvest that is unowned. Should we assume that the reason why the Gemara stated in *Baba Metziah* that one may not separate *teruma* on produce belonging to someone else without his consent is because one has to own the produce upon which he is separating? Or is the reason that one may not separate *teruma* for someone else because the rights of ownership of the proprietor preclude anyone else from separating *teruma* on that produce, but not because ownership per say is required in order to do the separation? If we assume the latter possibility, then we can allow one to separate *teruma* on produce which is not owned by anyone, because there is no owner preventing him, and ownership is not specifically required.

It seems apparent that this dispute between the Rashba and the Ramban is contingent upon the answer to this question left unresolved by the Jerusalem Talmud.[83] [84] The Rashba assumes the first possibility listed above, (that one has to own the produce and for that reason the owner specifically must do the separation, precluding someone else) whereas the Ramban assumes that one does not have to own the produce upon which he is separating, and a second party may do the

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82. *Terumot* (1:1).

83. Rabbi Elchonon Wasserman, *Kovetz He'arot* (Sec. 72 Part 4, and addendum) elucidates this explanation of the Talmud Yerushalmi. Rabbi Isser Zalman Meltzer, in his letter to Rabbi Auerbach printed in *Ma'adanei Eretz*, also makes reference to this explanation of the *Yerushalmi*.

84. See *Ohr Samaech* (*Terumot* 4:2), and *Ma'danei Eretz* (*Kuntrus Leifrushei Me'issura* Sec. 1, Part 3) both write that the opinion of the Talmud *Bavli* is undoubtedly that one can separate *teruma* upon ownerless produce.

separation. The only obstacle is that the ownership rights of the proprietor are impeding him from separating the gifts of this produce. Therefore, when the owner consents that he is amenable to the separation done by the second party, it can take effect even without the need for explicit rights of representation.

Rabbi Auerbach attempts to prove that many *Rishonim* are in agreement with this opinion of the Ramban, and in disagreement with the Rashba. [85] This would surely allow the principle of "*zachin*" to be used for the separation of *teruma* and *ma'aser* even without explicit consent from the owner, as this is a form of representation of the owner himself. Thereby we can allay the problem posed with appointing the *mashgiach* before the produce has already grown.[86]

Applicability in America

I have attempted to explain the issues surrounding relying on the separation of *teruma* and *ma'aser* done by Israeli kashrut organizations. It is important to clarify whether this issue is only relevant with regards to Israeli produce in Israel, or even on exported Israeli produce in America. The most relevant source is the Mishnah in *Challah* (2:1) which records a dispute between Rabbi Akiva and Rabbi Eleazer whether produce that was grown in Israel and later exported retains its obligation in *teruma* and *ma'aser*. The normative halacha follows the opinion of Rabbi Akiva, that exported produce is not obligated in *teruma*

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85. Rabbi Auerbach interprets that to be the opinion of the Rambam (*Terumot* 4:3, 9).

86. The *Chazon Ish* (*Yoreh Deah* Sec. 199) writes emphatically that "*zachin*" may be practiced when separating *teruma* and *ma'aser* even within the position of the Rashba. Rabbi Auerbach (Sec. 1 Part 9) also entertains such a possibility, but for a different reason.

and *ma'aser*. The Rambam and the Ravad disagree whether they are at least obligated in *teruma* and *ma'aser* rabbinically.[87] The *Shulchan Aruch* only quotes the opinion of Rambam, that these fruits are not even obligated in *teruma* and *ma'aser* on a rabbinic level.[88]

The *Mishneh Lamelech*[89] and later Rabbi Tzvi Kalischer [90] both propose that even within the opinion of the Rambam, fruits that are produced completely in Israel retain their obligation in *terumot* and *ma'aserot* even upon exportation. They limit the application of Rabbi Akiva's opinion to when part of the processing was done outside of Israel, but when the entirety of the processing took place in Israel, the produce retains its *tevel* status even when exported. They view it as an impossibility to have a preexisting obligation in *terumot* and *ma'aserot* relaxed solely because it was exported.

Their position is challenged strongly by the *Bach* [91] and *Minchat Chinuch*.[92] Their counter claim is that it is entirely possible to maintain that produce once obligated in *teruma* and *ma'aser* can have that obligation waved completely through exportation. They cite as proof that Rambam writes regarding produce produced completely in Israel and obligated in *teruma* and *ma'aser*, if it is sold to another person it loses its obligation

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87. *Terumot* (1:22).

88. *Yoreh Deah* (331:12). The Rambam (*Terumot* 1:22) does say when quoting the converse, that if the produce was originally grown outside of Israel and then imported, it does becomes obligated in *teruma* and *ma'aser* rabbinically.

89. To the Rambam *Terumot* (1:22).

90. *Tzvi Latzadik* commentary to *Shulchan Aruch*.

91. *Yoreh Deah* (331:37).

92. Mitzvah 284.

in *terumot* and *ma'aserot*.[93] The *poskim* have generally adopted the opinion of the *Mishneh Lamelech*, that fruits which have completed their production process in Israel, do retain their obligation in *terumot* and *ma'aserot* even when exported.[94] In this case, if the Israeli produce being purchased in America was completely produced before leaving Israel, there would be room to be stringent and remove *teruma* and *ma'aser* again.

There is one other possibility that is discussed among the *poskim*, the suggestion of *Maharsham*,[95] that produce grown for the sole purpose of exportation never becomes obligated in *teruma* and *ma'aser* even if the production was completely done in Israel. The halacha views the produce as non-Israeli produce since it is grown with the intention to be exported. However, this too is a highly questionable *heter* as the Chazon Ish[96] and Rabbi Chaim Ozer Grodzenski[97] argue that his suggestion is totally unfounded.

Practically, there are *poskim* who do regard both of these suggestions, of *Maharsham* and of *Mishneh Lamelech*, as doubtful situations, and they discuss whether or not we can be lenient based on the fact that *teruma* and *ma'aser* are now only

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93. *Ma'aserot* (2:2).

94. Rabbi Moshe Feinstein, *Iggerot Moshe* (*Yoreh Deah* Vol. 3, Sec. 127). This is under dispute between Rabbi Aharon Kotler and his father-in-law Rabbi Isser Zalman Meltzer whether or not to accept the opinion of the *Mishneh Lamelech* or not. This correspondence is recorded in the responsa of Rabbi Kotler, *Mishnat Rabbi Aharon* (Vol. 1, Sec 40-41). There are however many *poskim* who entertain both possibilities and treat it as a doubt how to conclude. See *Journal of Halacha and Contemporary Society* (Vol. 27, Pages 85-112) for more details.

95. *Responsa of the Maharsham*, Vol. 1, Sec 72.

96. *Demai*, Sec. 15 Part 4.

97. *Achiezer* (Vol. 4, Sec. 43).

rabbinical.[98] In sum it appears that in America if one chooses to be lenient with regards to exported Israeli produce in America, he certainly has worthy opinions on which to rely. However, the general consensus among the *poskim* seems to be that one should try to be stringent like the *Mishneh Lamelech* and not rely on the *Maharsham* whenever possible.

With regard to all of the issues presented herein, there are more than satisfactory reasons allowing one to be lenient. Our purpose in this article was to clarify and elaborate on the issues behind a lot of the discussion that surrounds this topic. We conclude by citing the opinion of Rabbeinu Chaim quoted by Tosafot, that there is no longer a mitzvah to live in Israel because it is too difficult to observe properly the *mitzot hateluyot ba'aretz*.[99] Today, even though the situation has improved considerably, there are still many controversial issues relating to these mitzvot. We can only hope that we be granted the knowledge and foresight to properly observe these coveted mitzvot, and we eagerly await the day that they will no longer be rabbinic, but rather mitzvot *d'oraita*.

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98. See *The Journal of Halacha and Contemporary Society* (Vol. 27 Pages 85-112) for a further discussion of this topic, and practical solutions.

99. *Ketubot* (110b).

Letters To The Editor

To the Editor:

Rabbi Alfred Cohen's excellent article, "Scientific Evidence in Jewish Law", quotes the important letter from Rav I. Herzog, wherein he sharply disagrees with the position that one should disregard scientific evidence as a method of establishing certain halachic realities:

It is too bad that while science is progressing and conquering worlds, and revealing the deepest secrets, albeit they occasionally err... we stick our heads in the sand like that well-known bird.

Rav Herzog reports that he was "practically embarrassed" by what the other Rav had written, dismissing the credibility of basic science.

Rav Herzog then goes on to call for increased efforts to expose potential *Rabbonim* to sophisticated scientific thinking, so that the *Rabbonim* need not rely on others when it comes to these areas and be capable of applying this knowledge to their *Psak Halacha*.

It is therefore worth noting a less-known position of Rav Herzog's, regarding another intriguing scientific-halachic issue: The continued permissibility of killing lice on Shabbat, given that the Gemara's rationale for permitting it – that killing lice does not represent the taking of life, because lice do not reproduce (from male and female), but instead come from filth – seems to represent an outdated and discredited view of reproductive biology.

Modern science universally accepts that all living things must have a parent, lice no less than elephants. And lice do, in fact, reproduce sexually.

Would this knowledge, then, have a bearing on the halacha,

and cause the *Poskim* to forbid the killing of lice the same way they would forbid the killing of any other creature that reproduces bi-sexually, especially given the Gemara's statement that this would be the criterion that sets lice apart?

Rav Yitchak Lampronti, in his eighteenth-century *Pachad Yitzchak*, reports that he was initially inclined to recommend that we no longer be allowed to kill lice, given the scientific discrediting of *Chazal's* assumption of spontaneous generation.

Rav Herzog, the twentieth-century holder of an earned Ph.D. in the Life Sciences and obviously well aware of current scientific thinking, was asked about the permissibility of disinfecting milk containers on Shabbat:

שו״ת היכל יצחק או״ח סימן כט ד״ה (א) הספק
א) הספק שהתעורר והביא לידי השאלה הוא, כנראה, החשש של איסור נטילת נשמה. אבל לכאורה אין כאן שום חשש, כי הרי מותר להרוג כינה בשבת מפני שאינה פרה ורבה, כמבואר במסכת שבת דף ק״ז ע״ב, והיינו שהכינה כיון שאינה באה מזכר ונקבה אלא מן הזיעה, אינה חשובה בריה לענין זה לאסור הריגתה בשבת, ובנוגע לפרעוש, שחייב על הריגתה אף שגם היא אינה פרה ורבה, מכ״מ כיון שהוייתה מן העפר יש בה חיות כאילו נברא מזכר ונקבה, ולפיכך יש בהריגתה האיסור של נטילת נשמה בשבת. ואמנם המדע החדש כפי שידוע לי, איננו מודה בגינירטיו ספונטניא, אבל אנו אין לנו לענין ההלכה אלא דברי רז״ל. לפי״ז ודאי שמותר להרוג חידקים בשבת אפילו אינם מזיקים. ובפרט שבהם גם המדע מודה שאין ההתרבות שלהם באה בדרך פריה ורביה, במובן הרגיל של הביטוי הזה.

The doubt that has arisen and brought up a question is, it seems, the *issur* of the taking of life. However, it seems that there is absolutely no concern, as it is permitted to kill a louse on Shabbat because it does not reproduce, as is explained in *Masechet Shabbat* 107B, which says that the louse, since it does not come from male and female, but rather from filth, is not considered a significant creature to the extent that it would be permitted to kill it on Shabbat....Although modern

> science, as far as I know, does not accept spontaneous generation, we, when it concerns the halacha, don't have anything other than the words of our Sages. Therefore, it is certainly permitted to kill bacteria on Shabbat, even if they are not harmful, and especially with these, where even science agrees that they do not sexually reproduce, in the normal sense of this expression.
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> *Shu"t Heichal Yitzchok, Orach Chayim siman* 29.

DAVID HOJDA
Kiryat Sefer, Israel

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Rabbi Cohen responds:

Thank you very much for taking the time to read my article so carefully and for your insightful comments. As much as I can appreciate the question you raise, please realize that it is not truly pertinent to the subject I discussed: In my article I sought to investigate the question whether new scientific technology could/should have the status of *umdenah demuchach*, an overwhelmingly obvious assumption, in the eyes of Jewish law. Please note that it is not my argument that "obvious assumptions" should be accorded the status of evidence in the halacha. That is a conclusion which our *Chazal* legislated. Inasmuch as they decided that a Jewish court could accept "circumstantial" evidence, my article sought to investigate to what extent scientific technology could be taken into account by the halacha.

Your question, however, deals with the issue of changing the halacha which *Chazal* laid down, based on new information which seems to indicate that their stated reasons for reaching a halachic conclusion were based on faulty or inaccurate knowledge. The Chazon Ish (*Yoreh Deah* 5:3) and Rav Moshe Feinstein (*Iggerot Moshe, Even Haezer* 111:2), as well as others,

address this very important question. Their views, in turn, are based on the statement by Rambam; (*Hilchot Shechita* 10:12/13) as follows:

> And also those [animals] which they [*Chazal*] enumerated and declared to be *treifa* [i.e. that, based on their physical problems, these animals could not live twelve months] – even though we can see, with the medical abilities at hand, that some of these animals do not die [from their injuries within twelve months] and they may live – nevertheless,we can only enumerate [*traifa*] according to the way our rabbis enumerated, as it is written in the Torah, "according to the teaching which they teach you."

Your question, explaining why Jewish law continues to follow dictates of the halacha which seem to be based on erroneous premises, is one that is worthy of an in-depth study.

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This is a cumulative index of all articles which have appeared in the Journal since the beginning of publication. The issues originally numbered Vol. I, No. 1; Vol. I, No. 2; Vol. II, No. 1, have been renumbered I, II, and III.