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# The Journal of Halacha and Contemporary Society

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# A Review of the Recent *Sheitel* Controversy

*Rabbi Joshua Flug*

## Introduction

On May 13, 2004, the Orthodox Jewish community was in turmoil as word came from Jerusalem that human hair wigs (*sheitels*) are prohibited. The commotion was caused by a letter citing Rabbi Yosef Shalom Elyashiv that human hair whose source is from the temple in Tirupati, India, should be considered *tikrovet avodah zarah*, an idolatrous offering, that renders the hair *assur b'hana'ah* (prohibited to derive benefit from the hair). The letter was written by R. Yosef Efrati, R. Elyashiv's personal secretary.

The question of the permissibility of the hair from the temple in Tirupati is not a new question. This question was previously addressed by some *Poskim*, including R. Elyashiv himself.<sup>1</sup> There have also been numerous responsa written on the topic since R. Elyashiv's ruling, which will be discussed hereinafter. The purpose of this article is not to render any halachic decision but to present the basic facts underlying the question and the halachic discussions presented by the various responsa that are relevant to the question.

There is a Hindu temple in Tirupati, India, that is visited by 40,000-60,000 people per day. For many, part of the pilgrimage includes tonsuring (shaving) of their hair. To accommodate the needs of the pilgrims, the temple employs 600 barbers to

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1. Rav Y.S. Elyashiv, *Kovetz Teshuvot*, Vol. 1, no. 77.



cut the hair of 15,000-20,000 pilgrims on a daily basis. The hair is cut in a four-story building in close proximity to the temple. The hair never enters the temple, but instead is placed in a vessel called a *hundi*. The hair is then brought to a temple warehouse and sold at auction to wholesalers who then distribute the hair to those in the wig-making industry.<sup>2</sup>

The permissibility of wigs that may have hair that originated from an Indian temple raises several questions. 1) Is this practice of tonsuring considered an act of idol worship? 2) If it is an act of idol worship, what is the status of the hair? 3) To what extent does one have to be concerned that a wig may have hair from the temple?

First, one must address the various categories of *avodah zarah* and the rules that apply to each category. One must then address the nature of this particular practice. Finally, one must address the rules of mixtures in general, and specifically mixtures containing *avodah zarah* materials.

### ***Tikrovet Avodah Zarah***

There are four categories of *avodah zarah*. The first category includes objects that are worshipped as an actual idol.<sup>3</sup> The second category is *tikrovet avodah zarah* and includes objects that are sacrificed to an idol.<sup>4</sup> The third category is *noy avodah zarah*, which includes objects that are used to enhance the *avodah zarah* ceremonies.<sup>5</sup> The fourth category is *meshamshei avodah*

2. Beit Din Tzedek Bnei Brak, "Reshimat Tochen Eidut Shaliach Shenishlach L'Tirupati Hodu," *Ohr Yisroel* 36 (2004):13-21.

3. See Mishnah, *Avodah Zarah* 40b.

4. See Gemara, *Avodah Zarah* 51a. A significant portion of this article will be devoted to precisely defining *tikrovet avodah zarah*.

5. See Gemara, *Avodah Zarah* 51b. See also, Tosafot, *Avodah Zarah* 50a s.v. *Ba'inan*, and Shulchan Aruch, *Yoreh Deah* 139:3.

*zarah*, which includes devices that serve as accessories for the idol.<sup>6</sup>

There is a stringency apparent in *tikrovet avodah zarah* that is not apparent in the other categories of *avodah zarah*. There is a concept known as *bitul avodah zarah*, nullification of the *avodah zarah*, which means that a non-Jew can declare an object as void of any *avodah zarah* properties. After the Gentile has done this, a Jew is permitted to derive benefit from the object.<sup>7</sup> This nullification does not have to be explicit; even if the non-Jew performs an action indicative of the fact that the object has no *avodah zarah* properties, the idolatrous aspect is considered nullified, and it is no longer considered an *avodah zarah*.<sup>8</sup> However, *bitul avodah zarah* does not apply to *tikrovet avodah zarah*.<sup>9</sup> Even if a non-Jew explicitly nullifies the object, the object

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6. See Gemara, *Avodah Zarah* 52a.

7. See Mishnah, *Avodah Zarah* 52b.

8. Ibid. 53a. The Mishnah quotes a dispute between Rabbi and the other rabbis whether sale of the object is considered a form of *bitul avodah zarah*. Although the normative opinion is that of *Chachamim*, that sale is not a valid form of *bitul avodah zarah*, there is a dispute among the *Rishonim* whether the inability of sale to nullify an object applies to all categories of *avodah zarah* or only to the actual idol. Tosafot, *Avodah Zarah* 50a s.v. *Ba'inan*, quote Ri that sale is not a valid form of nullification for any category of *avodah zarah*. Ramban, *Avodah Zarah* 51a, as understood by *Beit Yosef* 139, is of the opinion that sale of *noy avodah zarah* or *meshamshei avodah zarah* constitutes a valid form of *bitul avodah zarah*. *Shulchan Aruch*, *Yoreh Deah* 139:12, quotes both opinions, but seems to rule in accordance with the opinion of Ramban.

9. *Avodah Zarah* 50a. R. Chanoch Henach Eiges, *Marcheshet* Vol. III, *Shemen HaMishcha* 10-11, suggests that while *bitul avodah zarah* does not apply to *tikrovet avodah zarah*, that is only with respect to its *issurei hana'ah* status (i.e., no benefit may be derived from it). However, *bitul avodah zarah* will remove its *avodah zarah* status. If *tikrovet avodah zarah* undergoes *bitul avodah zarah* it is considered generic *issurei hana'ah*



remains *assur b'hana'ah*.<sup>10</sup>

In determining the status of the hair from the temple in Tirupati, it is important to determine whether the hair is considered *tikrovet avodah zarah*. If it is *tikrovet avodah zarah*, there is no way to nullify the *avodah zarah* status. It is therefore necessary to determine what the criteria are for *tikrovet avodah zarah* in order to determine if *bitul avodah zarah* is applicable.

There are three different types of idol worship that are significant in determining whether an object is considered *tikrovet avodah zarah*. The first is an act of idol worship performed in a manner consistent with the practices of that particular idol. The second is an act performed in a manner of worship atypical of that particular idol, but the object of worship is an object offered in the *Beit HaMikdash*. The third is an act performed in a manner of worship atypical of that particular idol but the method of worship is one of four intrinsically prohibited acts of worship. These four acts are slaughter, pouring/sprinkling, sacrificing, and bowing.<sup>11</sup>

The Gemara, *Avodah Zarah* 51a, gives two examples of actions that would render an object *tikrovet avodah zarah*. The first is where a stick is broken in the presence of the idol. The second

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rather than *issurei hana'ah* of *avodah zarah*. Therefore, the stringencies normally associated with *avodah zarah* do not apply to this generic *issurei hana'ah* and one can entertain the possibility of this generic *issurei hana'ah* becoming nullified in a mixture.

10. Taz, *Yoreh Deah* 139:4, opines that the reason why *tikrovet avodah zarah* is not subject to *bitul avodah zarah* is because by nature, the offering has no intrinsic significance. *Bitul avodah zarah* is a process that removes the significance from an object. This is possible with respect to the actual *avodah zarah*, *noy* and *mishamshim* because idolaters treat these objects with respect and as significant items. However, items that are offered are not treated with respect, and therefore one cannot remove their significance for there is no intrinsic significance to these items.

example listed in the Gemara is where a cluster of grapes (or stalks of wheat) is found on the altar of the idolatrous temple. The Mishnah, *Avodah Zarah* 51b, states that a cluster of grapes found on the altar of an idolatrous temple is considered *tikrovet avodah zarah*. The Gemara qualifies this to an instance where the grapes were cut specifically for the purpose of idol worship.

The *Rishonim* have various criteria to establish something as *tikrovet avodah zarah*. Rashi (as understood by *Nimukei Yosef*, *Avodah Zarah* 23a s.v. *Garsinan*) is of the opinion that in order for something to be considered *tikrovet avodah zarah*, two conditions must be met. The first condition is that the object either is offered in the *Beit HaMikdash* or is an object normally used for that particular idol worship. The second condition is that one of the four intrinsically prohibited acts (or an act that resembles one of these acts) is done to the object. The case of the broken stick meets these two conditions, as the particular idol mentioned in this case is worshipped with a stick, and the breaking of the stick is a *zerikah hamishtaberet*, a tossing that causes the object to break. Ordinary tossing of the stick would not be similar to sprinkling of blood, as the sprinkling of the blood has an added element of the blood droplets "breaking apart from one another." Therefore, the only type of tossing that resembles sprinkling of blood is a throwing that causes the object to break.

*Nimukei Yosef* questions Rashi based on the case of the grapes. The grapes are not part of any sacrificial order, nor are they assumed to be part of the rituals of the idol discussed in the Gemara. Why then are the grapes considered *tikrovet avodah zarah*? *Nimukei Yosef* answers that since grapes are placed on the Altar in the *Beit Hamikdash* as part of the *Bikkurim* ceremony, they are considered an object offered in the *Beit HaMikdash*.

Rosh, *Avodah Zarah* 4:1, claims that any object that is offered in the *Beit HaMikdash* is automatically considered *tikrovet avodah zarah* if it is given as a gift to the idol. There is no requirement that one of the intrinsically prohibited acts be done to the object.



However, if the object is not offered in the *Beit HaMikdash*, it cannot be considered *tikrovet avodah zarah* unless one of the intrinsically prohibited acts (or an act that resembles one of these acts) is done to the object.<sup>12</sup>

Rosh explains that the reason the broken stick is considered *tikrovet avodah zarah* is because the case is one where sticks are part of the idol-worshipping ritual for that particular idol. The reason the grapes are considered *tikrovet avodah zarah* is because wine is poured on the Altar of the *Beit HaMikdash*. Although the grapes themselves are not part of the sacrificial order, they are a raw material in producing wine, and therefore are considered an object offered in the *Beit HaMikdash*.<sup>13</sup>

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12. Rosh does not explicitly require that the object in this case be an object normally used to worship that particular idol. However, his son, Rabbeinu Yaakov, *Tur Yoreh Deah* 139, does say that this is a prerequisite for the object to be considered *tikrovet avodah zarah*.

13. Rosh seems to ignore the conclusion of the Gemara that the case of the grapes is one where the grapes are cut specifically for the purpose of *avodah zarah*. According to Rosh, the reason why the grapes are considered *tikrovet avodah zarah* is because they are an object that is used for worship in the *Beit HaMikdash*, and any such object is considered *tikrovet avodah zarah* if it is brought as a gift to the idol. *Chazon Ish*, *Yoreh Deah* 56:9-11, resolves the apparent discrepancy between the conclusion of the Gemara and the reason given by Rosh by distinguishing between objects that are actually offered in the *Beit HaMikdash*, and objects that are raw materials that can be transformed into an item of worship. Regarding the former, there is no requirement for a *zerikah hamishtaberet*. Even if it is merely brought as a gift, it is considered *tikrovet avodah zarah*. However, regarding the latter, the object does not become *tikrovet avodah zarah* unless a *zerikah hamishtaberet* is performed onto it. An object that is a raw material that can potentially be offered in the *Beit HaMikdash* is only significant in eliminating the requirement that the object be an object normally used for that particular idol. It should be noted that the simple reading of Rosh's comments seem to indicate that there is no requirement for a *zerikah hamishtaberet* even in the latter instance.

Ramban, *Avodah Zarah* 51a, claims that there is a dispute among the *Amoraim* as to the criteria for *tikrovet avodah zarah*. Rav maintains that *tikrovet avodah zarah* can be created either through an intrinsically prohibited act or through worship using an object that is offered in the *Beit HaMikdash*. However, Rav Yochanan is of the opinion that only objects offered in the *Beit HaMikdash* can become *tikrovet avodah zarah*. According to Rav Yochanan, the broken stick is not considered *tikrovet avodah zarah*. Nevertheless, Ramban claims that while grapes are not offered sacrificially in the *Beit HaMikdash*, they are considered an object that is offered in the *Beit HaMikdash* as they are placed on the Altar as part of the *Bikkurim* ceremony.<sup>14</sup>

Rambam, *Hilchot Avodah Zarah* 3:4, rules that if a *zerikah hamishtaberet* is performed on an object that is normally offered to that particular idol, or on an object that is offered in the *Beit HaMikdash*,<sup>15</sup> that object is considered *tikrovet avodah zarah*.

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14. Ritva, ad loc., concurs with Ramban's position. However, he differs with Ramban regarding the explanation as to why the grapes are considered *tikrovet avodah zarah*. While Ramban considers the grapes to be something offered in the *Beit HaMikdash*, and therefore subject to becoming *tikrovet avodah zarah*, Ritva claims that in principle they are not objects that can become *tikrovet avodah zarah*. Nevertheless, since grapes are brought into the *Beit HaMikdash* as part of the *Bikkurim* ceremony, they are easily confused with other things that are actually part of the sacrificial order. Therefore, the rabbis decreed the grapes to be considered *tikrovet avodah zarah* on a rabbinic level.

15. Rambam does not explicitly state that an object offered in the *Beit HaMikdash* becomes *tikrovet avodah zarah* through a *zerikah hamishtaberet*. However Rambam does say that if an animal that is missing a limb is slaughtered, the animal is not considered *tikrovet avodah zarah* unless that particular idol is normally worshipped with animals that are missing limbs. Rambam's distinction between healthy animals and blemished animals can only be attributed to the fact that blemished animals are not offered in the *Beit HaMikdash*, as Rambam implies that if the animal were to be free of any blemish, the slaughtering of the animal would render it *tikrovet avodah zarah*.

However, Rambam, *Hilchot Avodah Zarah* 7:16, adds that any object that is found in the temple of the idol is automatically considered *tikrovet avodah zarah* regardless of whether the object is actually offered in the *Beit HaMikdash* or whether it is an object normally used in the service of that particular idol, and is considered *tikrovet avodah zarah* even though no *zerikah hamishtaberet* was performed on it.<sup>16</sup>

Ra'avad, *Hilchot Avodah Zarah* 3:4, contends that the only condition required for an object to be considered *tikrovet avodah zarah* is that it undergo a *zerikah hamishtaberet*. The object need not be an object offered in the *Beit HaMikdash* or an object normally used for that particular idol.

*Shulchan Aruch*, *Yoreh Deah* 139:3, codifies Rosh's opinion as normative. *Shach*, *Yoreh Deah* 139:3, writes that a *ba'al nefesh*, a person who is very meticulous, should show deference to

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regardless of the fact that animals are normally offered to that particular idol. Thus the defining feature of a blemished animal is that it cannot be offered in the *Beit HaMikdash*, and not whether it is normally offered to that particular idol. Therefore, it is apparent that animals, or anything else offered in the *Beit HaMikdash* will become *tikrovet avodah zarah* if a *zerikah hamishtaberet* is performed on that object.

16. This is how *Beit Yosef*, *Yoreh Deah* 139, understands Rambam's opinion. See however, *Chazon Ish*, *Yoreh Deah* 56:11, who disagrees with *Beit Yosef* and contends that objects found in the temple of the idol lacking a *zerikah hamishtaberet* are considered *noy avodah zarah* and not *tikrovet avodah zarah*. See also *Sha'ar HaMelech*, *Hilchot Lulav* 8:1, who suggests that objects found in the temple and lacking a *zerikah hamishtaberet* are considered *tikrovet avodah zarah* for classification purposes only. However, the laws of *tikrovet avodah zarah* do not apply to these objects and *bitul avodah zarah* would be effective in removing the *avodah zarah* status from these objects. Rashi, *Yevamot* 103a s.v. *Shel Tikrovet*, also seems to be of the opinion that anything brought as a gift to the idol is considered *tikrovet avodah zarah*. *Sha'ar HaMelech* explains that Rashi is of the same opinion as Rambam.

Rambam's opinion that any item found in the temple of the idol is considered *tikrovet avodah zarah*.

If one were to consider the cutting of the hair in the temple in Tirupati as an offering, this practice is then similar to the grapes that are cut for the purpose of *avodah zarah*. According to Rashi and Rosh, the hair would be considered *tikrovet avodah zarah* as the cutting is considered a *zerikah hamishtaberet*, and the hair is an object which is normally offered to that particular idol. According to Ramban, who claims the only reason the grapes are considered *tikrovet avodah zarah* is because grapes are brought on the Altar of the *Beit HaMikdash*, the hair would be permitted since hair is not an object offered in the *Beit HaMikdash*.<sup>17</sup> Since *Shulchan Aruch* rules in accordance with Rosh, the hair should be considered *tikrovet avodah zarah*.

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17. Some have claimed that perhaps hair is actually an object offered in the *Beit HaMikdash*, as a *nazir* who completes his *nezirut* shaves his head and burns the hair in the fire in which his *shelamim* sacrifice is cooked. Rambam, *Hilchot Nezirut* 8:3, based on the Mishnah, *Middot* 2:5, writes that this ritual takes place in the *Ezrat Nashim* of the *Beit HaMikdash*. One can argue that hair should be similar to the grapes brought as *Bikkurim*, see R. Elijah Matosov, "B'Din HaSe'arot HaBa'ot MeHodu," *Ohr Yisroel* 37 (2004): 73-81. However, this argument is questionable for two reasons. First, the *Bikkurim* ceremony can be considered an offering due to the fact that the fruits are placed on the Altar. This is not the case for the hair of the *nazir* as the *Beraita*, quoted in *Nazir* 45a, states that one may not bring the hair into the *Ezrat Yisrael* (the main sanctuary that houses the Altar) as that would constitute a desecration of the Temple. It is therefore difficult to equate the hair of the *nazir* to the grapes of the *Bikkurim* ceremony. Second, Rashi, *Sotah* 40b s.v. *Ezrat Nashim*, states that the *Ezrat Nashim* has absolutely no *kedushat hamikdash*, sanctity of the Temple. While the *Ezrat Nashim* is physically part of the *Beit HaMikdash*, halachically it is not part of the *Beit HaMikdash*, rather part of *Har HaBayit*, the Temple Mount. Therefore, the hair of the *nazir* is not considered to be offered in the *Beit HaMikdash* proper, and one cannot deduce from the hair of the *nazir* that hair is an object offered in the *Beit HaMikdash*.

### Rav Elyashiv's Opinion

Despite the aforementioned argument to prohibit the hair from the temple, R. Elyashiv, in a 1989 responsum, permitted the hair. He gave four reasons to rule leniently.<sup>18</sup> First, Hinduism does not consider the hair an offering. In fact, the hair is considered impure and the hair may not even enter the temple.<sup>19</sup> Therefore, it is not considered an object that is normally offered to that particular idol, and cannot become *tikrovet avodah zarah* even if the worshippers intend to offer their hair.

Second, Rav Elyashiv argued that even if the worshippers intend to offer their hair to the idol, one should not assume that the barbers have intent to offer the hair to the idol as they are fully aware of the fact that the hair is sold and not offered to the idol. The Mishnah, *Chullin* 38b, states that if a Jew slaughters an animal of an idol worshipper with intent to eat the animal (or with no intention at all), even if the idol worshipper intends that the slaughtering be done for the idol, the animal is nevertheless permitted, and is not considered *tikrovet avodah zarah* as the intent of the slaughter is defined by the slaughterer and not the owner. Similarly, the intent of the haircut is defined by the barber and not by the customer.<sup>20</sup>

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18. This responsum can be found in a collection of his responsa titled *Kovetz Teshuvot*, Vol. I no. 77. The responsum was written based on information the questioner collected through an interview with a Hindu scholar. All references to Hindu practices in this section are attributable to the information presented in the responsum unless otherwise cited.

19. The fact that the hair is considered impure is not included in this first argument, but it is mentioned in the responsum as one of the important facts that relate to the question. The 2004 ruling does address this fact as being one of the grounds for leniency in the 1989 responsum.

20. R. Elyashiv questions this leniency based on the principle of *echad hamakif v'echad hanikaf* (*Makkot* 20b). This principle means that if

Since the barber's intention is not to offer the hair, the hair is not considered *tikrovet avodah zarah*.

Third, the Gemara implies that if the breaking of the stick is not done in the presence of the idol, the stick would not be considered *tikrovet avodah zarah*. While the grapes were ostensibly not cut in the presence of the idol, there is room to distinguish between grapes that are objects offered in the *Beit HaMikdash* as *Bikkurim* and a stick that is not intrinsically prohibited, but rather prohibited because that particular idol is worshipped with a stick. The requirement that the offering must be performed in front of the idol might only apply to objects that are not offered in the *Beit HaMikdash*. The hair is comparable to the stick and not the grapes, as the only reason to consider the hair as an object of worship is to claim that the hair is normally offered to that particular idol.<sup>21</sup>

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one shaves the *pe'ot* of another, both the shaver and the one receiving the shave are equally culpable. The implication is that if a prohibited act is performed on one's body, culpability lies with the one who allows his body to be used for the prohibited act as well as the one who performs the act. The receiver is considered an active participant in the process. Based on this principle, *Taz*, *Yoreh Deah* 198:21, rules that one who employs a non-Jew to cut one's fingernails on Shabbat is in violation of a biblical prohibition. However, *Shach*, *Nekudot HaKesef Yoreh Deah* 198, claims that this principle is exclusive to the prohibition of shaving one's *pe'ot* and is not applicable to other areas of halacha. According to *Taz*, if the worshipper has intent for idol worship at the time of the haircut, the hair would be considered *tikrovet avodah zarah*. However, R. Elyashiv rules in accordance with *Shach*, and therefore the principle of *echad hamakif v'echad hanikaf* does not apply. Furthermore, he claims that while *Taz* extends this principle to other areas of halacha, it is nevertheless difficult to apply this principle to consider the passive person an "idol worshipper."

21. Rav Shlomo Kluger, *Avodat Avodah* to *Avodah Zarah* 51a, questions the possibility that the *zerikah hamishtaberet* must be done in front of the idol from the case of the grapes. It does not seem logical that the cutting of the grapes is performed in front of the idol. R. Kluger



Fourth, based on the information presented to Rav Elyashiv, Rav Elyashiv felt that this entire practice should not be considered idol worship at all. It is merely a sacrifice of the ego in order to stand in the presence of the idol with a lesser physical self.

Based on these four reasons, R. Elyashiv ruled that using the hair from the temple in Tirupati is permitted. However, he qualified his ruling by stating that everything is subject to change as the whole responsum is based on the facts presented to him, and should the facts change, the law may change as well.

At the time, R. Shlomo Zalman Auerbach, R. Moshe Feinstein, and R. Tuvia Goldstein also ruled leniently on this issue.<sup>22</sup> However, R. Moshe Shternbuch, *Teshuvot V'Hanhagot* 2:414, had a different opinion. He was under the assumption that some of the hair was burned as an offering, and as such, the act itself is an intrinsically prohibited act that renders the offering *tikrovet avodah zarah*. Furthermore, since *Shach* recommends following Rambam's stringent opinion that anything brought as a gift is considered *tikrovet avodah zarah*, this hair should be treated as *tikrovet avodah zarah*.<sup>23</sup>

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suggests that one would have to conclude that the case of the grapes is a case where the idol is actually brought into the vineyard. R. Kluger also suggests that if at the time of the cutting the cutter states explicitly that his actions are for the purpose of *avodah zarah* there is no need for the act to be performed in front of the *avodah zarah*. R. Elyashiv sides with R. Kluger's first answer that performance of the act in front of the idol is critical to render an object *tikrovet avodah zarah*.

22. See R. Gavriel Tzinner "K'Sheyesh Chashash," *Ohr Yisroel* 36 (2004): 88-96.

23. See note 17. R. Shternbuch also notes that the breaking of the stick must be done in the presence of the idol in order to consider the stick *tikrovet avodah zarah*. However, he suggests that this requirement only applies to a case where that particular idol is not worshipped

Over time, people knowledgeable in Hinduism, as well as *ba'alei teshuva* (repenters), who partook in these ritual practices in Tirupati, started to question the facts presented in the 1989 responsum. In 2004, at the behest of R. Elyashiv, R. Aharon D. Dunner was sent to Tirupati to examine the practices and to interview some of the worshippers.<sup>24</sup>

Upon investigation, R. Dunner made six observations:

1) The worshippers claimed that the reason why they are cutting their hair is because "the idol likes hair." They did not mention anything about self-sacrifice. Furthermore, there were some who only cut part of their hair. When questioned why they only cut part of their hair they answered that the least one can do is cut part of the hair. This was interpreted to mean that the purpose is not to bald oneself but to give hair to the idol. 2) The worshippers did not consider hair to be impure. In fact, some of the worshippers even brought hair into the temple and nobody stopped them. 3) When the barbers were asked about their intentions, they responded that they have in mind to do whatever the customer has in mind. They did not consider their job to be an ordinary job, but rather considered it religious in nature. 4) The worshippers were asked why they specifically come to Tirupati to receive a haircut and do not cut their hair at home. They responded that this place has a connection to the idol. 5) The worshippers at the time of their haircut recite the name of the idol. 6) The building that houses the barber shops has an idol in the lobby. Additionally, one is prohibited

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by breaking a stick. If the idol is normally worshipped by cutting hair for the idol, it does not have to be in front of the idol in order to be considered *tikrovet avodah zarah*.

24. R. Yosef Efrati, "B'Inyan HaPe'ot HaMeyuva'ot MeHodu," lecture presented on May 20, 2004, on an audio telephone recording system titled *Kol HaLashon*. R. Efrati is R. Elyashiv's personal secretary and the author of the May 13th rulings.

from wearing shoes in the barber shop.<sup>25</sup>

Based on these newfound facts, R. Elyashiv observed that the worshippers and barbers do not perform this practice in a manner consistent with the understanding of the Hindu priests and experts in Hinduism as per the 1989 ruling. He felt that one should classify this practice based on the way the worshippers practice and not based on the way the experts claim it should be practiced, especially since the experts may have something to gain by portraying the religion in a different light. Based on the perspectives of the worshippers, R. Elyashiv concluded that the haircut itself is considered an offering to the idol. Furthermore, since the barbers themselves have the same intentions as the worshippers, there are no grounds for leniency based on the fact that the barbers have no intention to offer the hair.<sup>26</sup>

The only ground for leniency that remains is that the cutting is not done in the presence of the idol. To address this issue, R. Elyashiv quoted R. Shlomo Kluger<sup>27</sup> who claims that if the action is done explicitly for the purpose of the *avodah zarah*, there is no requirement that the action be done in the presence of the idol. Here too, since the worshippers recite the name of the idol, there should be no requirement that the cutting be performed in the presence of the idol. R. Elyashiv also suggested that the presence of the idol in the building might lead one to the conclusion that the haircut is done in the presence of the idol.<sup>28</sup>

On May 13, 2004, a letter was posted by R. Yosef Efrati, the personal secretary of R. Elyashiv, stating that R. Elyashiv ruled

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25. Ibid.

26. Ibid.

27. See note 20.

28. R. Efrati, op. cit.

that the hair from the temple in Tirupati is considered *tikrovet avodah zarah*. This letter received instant publicity and marked the beginning of the controversy.

### The Opposing Viewpoint

Since this ruling, numerous *Poskim* have claimed that the hair should not be considered *tikrovet avodah zarah*. The primary argument is that the facts gathered by R. Dunner do not accurately represent this particular practice. Many of the worshippers perform this ritual in accordance with the opinion of the priests as described in the 1989 responsum.<sup>29</sup>

Furthermore, even those worshippers who don't consider this practice as merely an act of self-sacrifice don't necessarily consider the cutting of the hair as an act of worship. There are those who consider the cutting a mundane act, and only subsequently offer the hair as a gift to the idol.<sup>30</sup>

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29. R. Yisroel Belsky, "*B'inyan Se'arot HaPe'ot*," *Ohr Yisroel* 36 (2004): 27-29, R. Dovid Yitzchaki, "*Tikrovet Avodah Zarah B'Sei'ar Pe'ot Nachriyot*," *Ohr Yisroel* 36 (2004): 113-116, R. Menashe Klein, "*B'Inyan HaPe'ot HaNachriyot HaBa'ot MeHodu*," *Ohr Yisroel* 37 (2004): 31-45.

30. See Beit Din Tzedek Bnei Brak, loc. cit. The agent of the *beit din* interviewed many people and some considered it an "offering," while others considered it a "sacrifice." "Offering" implies that cutting of the hair is not an act of sacrifice but rather a gift. See also, R. Menashe Klein, loc. cit., who spoke to an expert who told him that in the native language of many of the worshippers (Tamil), this practice is called "balding" and not "sacrifice" or "offering." It should be noted that the conflicting evidence should not be attributed to false information. Rather, some people perform this practice differently than others. To accurately determine the percentage of people who "sacrifice" their hair as opposed to those who consider the cutting a mundane act requires a survey of many people over a long period of time. It is unlikely that the administration of the temple would allow such a survey to take place. Therefore, each *Posek*, in deciding whether

The status of an object that was cut in order to be offered to an idol at a later point in time is alluded to in *Chullin* 39a. The Gemara cites a dispute between R. Yochanan and Reish Lakish regarding an animal that was slaughtered with the intent of sprinkling its blood or sacrificing its fat to *avodah zarah*. R. Yochanan rules that the animal is considered *tikrovet avodah zarah*, while Reish Lakish rules that it is not. Rashi ad loc., s.v. *lizrok*, notes that even Reish Lakish will agree that if the slaughtering itself was performed as an act of *avodah zarah* the animal is considered *tikrovet avodah zarah*. This case highlights a situation where the slaughterer did not consider the slaughtering an intrinsic act of *avodah zarah*, but rather a means to perform the actual act of *avodah zarah* through sprinkling of its blood or sacrifice of its parts.

While this case is very similar to hair that was cut in a mundane manner in order to be given as a gift, there is one major difference. The case in the Gemara deals with a situation where the intent was eventually to perform one of the intrinsically prohibited acts of idol worship. In fact, the Gemara says that the basis of the dispute between R. Yochanan and Reish Lakish is whether *avodah zarah* has a concept of *mechashvin me'avodah l'avodah*, whether intent can be transposed from one activity to another. This concept is applicable only when the act intended for *avodah zarah* is one that is intrinsically prohibited.<sup>31</sup> Therefore, if an

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temple-hair is considered *tikrovet avodah zarah*, will base his decision on his own assessment of the information available to him, and the halachic principles involved in determining the weight of each piece of evidence. Inevitably, there will be various conclusions amongst the *Poskim* based on varied assessments of the information.

31. Rashba, *Chullin* 39a, and Ran, *Chullin* 8a, state that if the animal is slaughtered with the intent to subsequently perform any act of idolatry other than the intrinsically prohibited acts, the animal is not considered *tikrovet avodah zarah*. See, however, *Tevu'at Shor*, 4:3, who states that while in principle the opinions of Rashba and Ran should

animal was slaughtered with the intention that it will subsequently be given as a gift to the idol, the animal is not considered *tikrovet avodah zarah*. Similarly, if one would cut hair with the intention of subsequently giving it as a gift to the idol, the hair would not be considered *tikrovet avodah zarah*.

Another argument is that hair is not an object normally used for worship of that particular idol. Since the founders of this practice as well as the Hindu priests of today do not consider this practice an act of offering the hair, the fact that worshippers and barbers might erroneously be thinking that they are offering the hair to the idol is irrelevant. Objects of worship are defined by the priesthood and not by the lay people, regardless of how many worshippers consider the practice an offering of their hair to the idol. If the hair is not considered by the Hindu priesthood as an object normally used for service to that idol, the hair cannot be considered *tikrovet avodah zarah* as it lacks the necessary conditions for becoming *tikrovet avodah zarah*.<sup>32</sup>

Some argue that nowadays, worshippers of idolatry do not intend to actually worship the idol. Rather they perform these ceremonies as a matter of tradition.<sup>33</sup> The Gemara, *Chullin* 13a, states that idolaters in the diaspora are not considered idolaters, rather they follow the traditions of their ancestors. Rambam, *Commentary to the Mishnah* ad loc., explains that there are two types of idolaters. The first group includes people who are

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be considered normative, in such a situation, one must investigate the possibility that the actual slaughtering was performed as an act of *avodah zarah*.

32. R. Belsky, loc. cit., R. Chaim Dovid Weiss, "Im Yesh Issur Tikrovet Avodah Zarah B'Peah Nachrit Asuyah Mise'arot HaBa'in Me'erezt Hodu," *Ohr Yisroel* 36 (2004): 58-64.

33. R. Menashe Klein, loc. cit., R. Yitzchak Raitport, "B'Din HaPe'ot HaNachriyot HaMagiyot MiMedinat Hodu," self-published article mailed to subscribers, June 2004.

knowledgeable in that particular form of idol worship and are able to adapt their actions based on the situation. The second group of people includes those who are not knowledgeable in that particular form of idol worship and practice idolatry based on what they learned from those who are knowledgeable. The second group of people is what the Gemara refers to when stating that the idolaters in the diaspora are not considered idolaters. Their actions would not render an object *tikrovet avodah zarah*.

It would seem logical to include in this second group those who consider cutting the hair in Tirupati an act of sacrifice. After all, these worshippers are not only ignorant of the standard practice, but the tradition that they received is an incorrect tradition. Therefore, one should argue that the hair is not considered *tikrovet avodah zarah* because the worshippers are not knowledgeable in idolatry.

The principle that idolaters in the diaspora are not considered idolaters is quoted by Rosh, *Avodah Zarah* 1:1 citing Rashbam. Rashbam's ruling is mentioned in *Shulchan Aruch, Yoreh Deah* 148:12. It is also quoted in a different context by *Mordechai, Avodah Zarah* no. 847, citing Rabbeinu Tam. This ruling as well is cited as normative by Ramo, *Yoreh Deah*, 124:24. Nevertheless, application of this principle to the Tirupati haircutting ritual is somewhat questionable. Both citations of this principle do not refer to questions of actual *avodah zarah*. The leniencies presented in applying this principle are leniencies regarding rabbinic prohibitions that were enacted to safeguard violation of *avodah zarah* prohibitions.<sup>34</sup> In those situations, the *Rishonim* saw more

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34. The first application relies on this principle to conduct business with an idol worshipper during the holiday seasons of idol worshippers. While the Mishnah, *Avodah Zarah* 2a, states that it is prohibited to conduct business with idol worshippers during these

grounds for leniency by relying on the principle that idolaters in the diaspora are not considered idolaters. However, this principle is not mentioned anywhere in the context of permitting any of the four categories of *avodah zarah*.

Other sources were presented as secondary grounds for leniency to be used in combination with the primary grounds for leniency presented above. First, while *Shulchan Aruch* rules in accordance with the opinion of Rosh that an object can become *tikrovet avodah zarah* even if it is not offered in the *Beit HaMikdash*, Ramban, as well as others do require that the object be an object offered in the *Beit HaMikdash* in order for it to become *tikrovet avodah zarah*. This opinion may be employed as a mitigating factor with respect to the use of temple hair, as hair is not an object offered in the *Beit HaMikdash*.<sup>35</sup> Second, *Bach, Yoreh Deah* 139, suggests that the rule that *bitul avodah zarah* does not apply to *tikrovet avodah zarah* is limited to food items. Non-food items that undergo *bitul avodah zarah* lose their *avodah zarah* even if they are *tikrovet avodah zarah*. If one assumes that sale of the hair is a form of *bitul avodah zarah*,<sup>36</sup> the temple hair

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seasons out of concern that this will trigger additional idol worship, *Shulchan Aruch* rules that one may be lenient nowadays because the idol worshippers are only practicing out of tradition, and do not have a real desire to worship *avodah zarah*. The second application is with regards to wine that was handled by a non-Jew. Normally, wine that was handled by a non-Jew is prohibited out of concern that perhaps the non-Jew had intent to pour the wine for the purpose of *avodah zarah*. Ramo employs certain leniencies in cases where the wine was not handled directly to permit the wine based on the principle that idol worshippers only practice out of tradition, and do not have a real desire to worship *avodah zarah*.

35. R. Belsky, loc. cit., R. Yitzchaki, loc. cit., and Rabbi B.Z. Wozner, "B'inyan Pe'ot Nachriyot Haba'ot Mimekom Avodah Zarah," *Ohr Yisrael*, Vol. 36, (2004) pp. 65-74.

36. See note 8.



is permitted according to *Bach*.<sup>37</sup>

### Wigs That May Contain Temple Hair

Assuming that the hair from Tirupati is considered *tikrovet avodah zarah*, what are the ramifications for use of wigs made with Indian hair that may or may not be from the temple? Economic data indicate that the majority of human hair exported from India is not from temple hair.<sup>38</sup> However, there are those who question reliance upon such data.<sup>39</sup>

There is a concept of *rov* (majority) which dictates that if there is a mixture<sup>40</sup> of permissible items and prohibited items, any individual item taken from that mixture is assumed to be from the group that makes up the majority of that mixture.<sup>41</sup> If

37. This leniency is recorded by R. Wozner, *ibid*.

38. In 1998, temple hair contributed only 20% of human hair export revenue from India. The actual amount of hair measured in tonnes was less than 20%. See "Hair Raising Facts Behind the Wig Business," *Businessline* (Chennai) Dec. 26, 1998: pg. 1.

39. See R. Elyashiv, "Teshuva B'inyan HaPe'ot MiSe'arot HaBa'im MeEretz Hodu," *Ohr Yisroel* 36 (2004): 30-31, who was told that most hair does come from the temple. Furthermore, the economic data do not detail the quality of the hair. Temple hair may be a major source for the higher quality hairs. See "Hair Raising Facts," *loc. cit*. It is not sufficient to group the higher quality hairs with the rest of the hairs as these hairs are easily recognizable to an expert, and are therefore a separate mixture for halachic purposes.

40. A mixture for these purposes is not necessarily limited to items that are physically mixed together. See *Pri Megadim*, M.Z. 109:1, who observes that there can be three pieces of meat in three different places, if one is not sure which of those three pieces are kosher, the three pieces are considered a mixture for the purposes of *rov*.

41. The Gemara, *Chullin* 11a, states that the source for the principle of *rov* as it applies to mixtures is the verse "*acharey rabbim l'hatot*," one should follow the majority in adjudicating a dispute (*Shemot* 23:12).

the majority of Indian hair is truly not from the temple, the principle of *rov* should dictate that all hair exported from India is non-temple hair. Nevertheless, there are two exceptions to the principle of *rov* that might preempt application of this principle. These are the concept of *kavua*, and the exclusion of *avodah zarah* from the standard principles of *rov*.

### ***Kol Kavua K'Mechtza Al Mechtza***

The Gemara, *Ketubot* 15a, states that if there are ten stores, nine of which sell kosher meat and one that sells non-kosher meat, and someone bought meat from one of the stores and does not know from which one he bought the meat, the meat is prohibited. If, however, the meat was found in a location outside of those ten stores, the meat is permitted. The rationale<sup>42</sup>

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While this verse seemingly does not relate to majorities regarding mixtures, R. Chaim Soloveitchik, *Chidushei HaGrach Al HaShas*, "*B'Din Ain Holchin B'Mamon Achar HaRov*," explains that the Torah, in mandating that the judges follow the majority opinion, is also establishing the principle of *rov* when it comes to mixtures. He explains that following the majority opinion is not based on a simple "majority rules" principle. Rather there is a requirement that the decision be a unanimous decision. The verse *acharey rabbim l'hatot* is really employing the use of nullification in establishing a unanimous decision. The judges who are of the minority opinion are nullified by the majority, and thus all judges are *de facto* of the majority (now unanimous) opinion. Based on this explanation, nullification of the minority opinion is no different than nullification of one item that is mixed with two others of the opposite status.

42. The principle of *kavua* is arguably not based on the laws of probability, but rather serves as a limitation to the principle of *rov*. See R. Shimon Shkop, *Sha'arei Yosher*, no. 4, who explains that the principle of *kavua* is an innovation of the Torah to treat *kavua* items as part of the larger category to which they belong rather than as individual entities. When an item is considered *kavua*, the focus is on possibilities, not probabilities. A piece of meat from an established location can either be categorized as kosher or non-kosher. When the

is that when the *leidat hasafek*, the origination of the doubt, is in a location that relates to the matter of doubt, one may not follow the 90% probability that he bought from a kosher store. Rather one must treat the meat as having a 50/50 possibility that it is not kosher. Therefore, the meat is prohibited, as one must be stringent on questions of Torah law. This principle is known as *kol kavua k'mechtza al mechtza*, any mixture of permitted and prohibited items, whose origination of doubt relates to an established location, is considered to be a mixture of equal proportion regardless of its actual composition. However, if the meat was found in a location outside of those ten stores, the meat is permitted, as the *leidat hasafek* was not in a location that relates to the origination of the doubt, and the regular *rov* principle is followed.

Rigorously defining which mixtures are classified as *kavua* and which are not is beyond the scope of this article. Nevertheless, for the purposes of this article, we will focus on one aspect of *kavua*. There is a concept called *pireish lifanenu*, the item was removed in our presence.<sup>43</sup> *Pireish lifanenu* defines the time and place of the *leidat hasafek*. If a person buys from a store and doesn't check or forgets whether the store is kosher or not, the *leidat hasafek* is considered to have occurred in the store. Although the doubt didn't actually occur until a later point in time, the *leidat hasafek* is projected back to the point where he was expected to determine if the store is kosher. However, if a non-Jew buys from a store, this does not constitute *kavua* since he has no interest in knowing whether the store is

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piece in question is only subject to these two possibilities rather than the probability that it originated from a non-kosher store, the principle of *rov* is no longer applicable as the possibilities are equal. If the piece is not subject to *kavua*, the probability that the meat originated from a kosher store will determine whether the piece is permitted.

43. This concept is cited by Ramo, *Yoreh Deah* 110:3, based on Tosafot, *Chullin* 95a, s.v. *Hacha*.

kosher or not. Yet, if a Jew was watching the non-Jew, the meat is considered *pireish lifanenu* and the *leidat hasafek* is said to have occurred at the established location since there was a Jew watching who has an interest in knowing whether the meat is kosher or not.

Suppose a wigmaker decided to buy human hair from a wholesaler. Nine of the wholesalers sell non-temple hair and one sells temple hair. The wigmaker never inquired whether the hair came from the temple. This would be a classic case of *kavua*, as the *leidat hasafek* occurred in an established location. However, this case does not conform to the *sheitels* in question.

First, in the classic case of *kavua*, there are nine stores that sell kosher items and one that does not. At the time of purchase, the buyer had the possibility of knowing whether the items were kosher or not. However, regarding the *sheitels*, the whole question of whether temple hair is prohibited didn't arise until May 13, 2004, which was after the time of purchase.<sup>44</sup> The *sheitel* case is similar to a case where there are ten stores that sell kosher meat, someone bought meat from one of the stores, and only later was it discovered that one of the stores was actually selling non-kosher meat. This concept is called *kavua limafreya*, retroactive *kavua*, and is the subject of a dispute between Rashba, *Mishmeret HaBayit* 4:2, and Ra'ah, ad loc. *Pri Chadash*, *Yoreh Deah*, 110:13, rules leniently on *kavua limafreya*.<sup>45</sup> According to *Pri Chadash*, the rules of *kavua* would not apply

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44. Although R. Shternbuch had already prohibited the *sheitels*, one would have to assume that any observant Jew who was involved in buying or selling *sheitels* either did not know about the issue, or knew about it and decided to rely on the lenient opinion. Therefore, one cannot apply *kavua* without employing the concept of *kavua limafreya*, retroactive *kavua*.

45. See however, *Pri Megadim*, S.D. 110:14, who is less inclined to rely on this leniency.

to the *sheitels* in question.

It should be noted that if one permits the use of hair based on the concept of *kavua limafreya*, the leniency only applies to hair in which the *leidat hasafek* occurred prior to May 13, 2004. Any hair that was called into question subsequent to R. Elyashiv's ruling would be subject to the classic rules of *kavua*. Thus, any wig that is newly purchased will be held to a higher standard than those purchased prior to R. Elyashiv's ruling.

Second, the people involved in the initial stages of distribution are non-Jews.<sup>46</sup> Since they are non-Jews, and there were no Jews present to observe the purchase, the mixture should not be considered *kavua* as the *pireish lifanenu* condition is absent.<sup>47</sup>

### **The Exclusion of *Avodah Zarah* From the Principle of *Rov***

Another possible exception to the concept of *rov* is the

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46. There may be some non-observant Jews involved in the initial wholesale and distribution of hairs. See *Chazon Ish, Yoreh Deah* 37:13, who states that if a non-observant Jew buys the item and knows which sellers sell permissible items and which sell prohibited items, one may assume that the item is from the majority (if he is unwilling to disclose that information). However, if he is unaware of which sellers are selling permissible items and which are selling prohibited items, the rule of *kavua* applies to the item taken from the mixture.

47. R. Chaim Tzanzer, *Teshuvot Divrei Chaim, Yoreh Deah* 2:53, states that if one purchases an item from a wholesaler (a non-Jew or one who is unaware of the issue) who buys that item specifically for his customer, that item is treated as if it were removed from the *makom kavua* by the purchaser and is subject to the rules of *kavua*. Rav Elyashiv, *Ohr Yisroel* loc. cit., quotes the opinion of *Divrei Chaim* as the reason why *kavua* applies to the question of the Indian hair. See however, R. Shlomo Kluger, *Teshuvot Tuv Taam VaDaat, Tlita'ah*, 2:14, who disagrees with *Divrei Chaim*. See also R. Ovadia Yosef, *Teshuvot Yabia Omer, Yoreh Deah*, 6:12, who sides with the opinion of R. Kluger.

exclusion of *avodah zarah*. The Gemara, *Zevachim* 74a, states that if a ring that was worshipped as *avodah zarah* fell into a mixture of other rings, the entire mixture is prohibited. According to Rambam, *Hilchot Avodah Zarah* 7:10, the reason why all the rings are prohibited is because *avodah zarah* cannot be nullified in any mixture, i.e., *rov* does not apply to *avodah zarah*. Therefore, one must assume the possibility that any ring from that mixture is the *avodah zarah* ring, and they are all prohibited.<sup>48</sup>

The *Ba'alei HaTosafot* disagree with Rambam.<sup>49</sup> They maintain that the reason why *rov* does not apply to a ring that fell into a mixture of other rings is because rings are items that are sold by unit rather than by weight or volume. The Mishnah, *Orlah* 3:6, cites R. Meir that any prohibited item sold by the unit has no nullification, and the principle of *rov* does not apply to it.<sup>50</sup> Therefore, one cannot deduce from the case of the ring that the principle of *rov* does not apply to *avodah zarah*.

*Shulchan Aruch*, *Yoreh Deah* 140:1, rules that items of *avodah zarah* are not nullified in a mixture. This ruling is in accordance with the opinion of Rambam. However, *Ramo*, *Yoreh Deah*, 134:2, and *Shach*, *Yoreh Deah* 110:4, rule in accordance with

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48. See note 9.

49. See *Tosafot*, *Avodah Zarah* 74a, s.v. *Ailu*, *Tosafot*, *Yevamot* 81b s.v. Rabbi Yochanan; and *Tosafot*; *Zevachim* 72a s.v. *Ela*.

50. The term used to describe these items is *davar sheb'minyan*, an item that is counted. The implication is that there is a distinction between items that are sold by the unit and those that are sold by weight or volume. *Terumat HaDeshen*, 1:103, explicitly draws this distinction. See, however, R. Shraga Feivel Cohen, *Badei HaShulchan*, 110:25, who suggests that perhaps any item that is sold by unit, volume, or weight is considered a *davar sheb'minyan*. The only items that are not considered *davar sheb'minyan* are items that are sometimes sold based on estimation.

Tosafot that *avodah zarah* items can be nullified as long as the item is not sold by the unit. *Pri Megadim, Siftey Da'at*, 110:4, rules that one should accept the opinion of Ramo and *Shach* as normative.

Human hair is sold on the wholesale level by weight, and not by the hair.<sup>51</sup> Therefore, according to Tosafot, the principle of *rov* is applicable to a mixture of temple hair and non-temple hair. According to Rambam, one cannot apply the principle of *rov* to such a mixture if one assumes that the hair is considered *tikrovet avodah zarah*.

However, according to Rambam there still exists a possibility for the hair to become nullified in a mixture. Rambam rules that while a ring of *avodah zarah* that falls into a mixture will prohibit the entire mixture, if one of those rings falls into another mixture, all of the rings in that second mixture are permitted. Likewise, if temple hair is mixed with non-temple hair, and then a portion of that mixture is mixed into another mixture containing no temple hair, that second mixture is permitted.<sup>52</sup> Nevertheless, it is difficult to determine that a given package of Indian hair is the product of a double-mixture of non-temple hair, inasmuch as the wholesalers have been caught lying on these matters.<sup>53</sup>

## Conclusion

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51. See "Hair Raising Facts," loc. cit.

52. It should be noted that this is true only if the temple hair is the minority portion of the first mixture, and only a minority portion of that first mixture is mixed into the second mixture. If however, a majority of the first mixture or its entirety is mixed into the second mixture, the second mixture is prohibited.

53. See Beit Din Tzedek Bnei Brak, loc. cit.

Many of the wigs owned by Orthodox Jews, including those that were burned,<sup>54</sup> were found to be devoid of Indian hair and thus posed no question. Many of those who did own a wig of questionable status resolved the issue one way or another. While there are those who are waiting for a resolution to the issue, the *sheitel* controversy is no longer the brouhaha it once was. Nevertheless, the controversy provides an opportunity to learn about topics such as *tikrovet avodah zarah* and *kavua*. These are intricate topics that are not usually studied in the context of practical halacha. This article focuses on the various opinions in the *Rishonim* as to the definition of *tikrovet avodah zarah* as well as the practical application to the *sheitel* controversy. Additionally it leads to a discussion of the basic background of the laws of *rov* and its application to the current question.

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54. There is a mitzvah to destroy items of *avodah zarah*. Additionally, all items that are *issurei hana'ah* require disposal. What type of disposal is required? The Mishnah, *Temurah* 33b, lists two types of *issurei hana'ah*: those that require incineration (*nisrafim*) and those that require burial (*nikbarim*). *Avodah zarah* items are noticeably absent from the list. Rambam, *Sefer HaMitzvot*, *Aseh* no. 185, explains that the mitzvah of destroying *avodah zarah* demands that the item be destroyed in a manner most conducive to its destruction. This is why the verse (*Devarim* 12:3) lists various methods of destroying *avodah zarah*: "you shall break their altars and smash their pillars and burn their *asheira* trees in fire, and cut down their idols." It seems that burning a wig is the most conducive form of its destruction and would therefore explain why many people who thought that their wig contained *tikrovet avodah zarah* burned the wigs expeditiously.







# Copepods in NYC Water: A Scientific and Halachic Background

*David Shabtai*

In June 2004, after hearing much discussion and reading about it in the national media, many in the New York City Jewish world began worrying about tiny creatures known as copepods in their drinking water, and turned to their rabbis for guidance. While not rendering an opinion, this article will attempt to provide important background information for tackling this important question of how the presence of copepods in New York City water impacts upon halacha. It will first provide the physical details of the nature of the New York City reservoir and water distribution system as they relate to this query and then highlight some of the important halachic analyses on this issue and how the current *poskim* rule on the matter. As will be explained below, this problem is unique to the New York City water distribution system resulting from unique exemptions from federal filtration requirements.

The technical information in this article is derived from a report commissioned by the Orthodox Union on the question of the copepods in New York City water, compiled by Rabbi Yaakov Dovid Lach. Unless otherwise noted, all facts herein presented are based on Rabbi Lach's report (version 3.5) and the DEP (Department of Environmental Protection) information that he obtained.

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**What are copepods?**

Copepods are aquatic crustaceans (they have an exoskeleton that covers their bodies). They are the most prevalent organisms found in most water reservoirs in the United States. Copepods are an integral part of the food web and vital in maintaining the health of the water system. They are usually translucent or pale gray, but they can be quite colorful due to ingested plant pigments. They have a distinctive pair of swimming antennae and a single anterior eye.

There are three species of copepods in the New York City reservoir system that appear in tap water: 1. *Diacyclops thomasi*, 2. *Mesocyclops edax*, 3. *Skistodiaptomus pygmaeus*.

**Background on the New York City water distribution system:**

The New York City water delivery system is a dynamic network of engineering ingenuity. The details of the system are rather complex; only an outline relevant to the halachic parameters of the copepods will be discussed. The phenomenon of copepods in tap water is limited to cities such as New York City that are exempt from federal Safe Drinking Water Act's filtration requirements since its water meets certain health quality standards (a rather unique stature).

New York City has three major water systems, each consisting of numerous reservoirs and controlled lakes. The oldest, the Croton system, supplies water exclusively to parts of upper Manhattan and the Bronx and accounts for approximately 10% of the total water distribution. Unlike the other two systems, however, the Croton system's water quality has not been meeting federal standards. Water conditions in Croton occasionally require that the Croton system be taken out of service completely, especially during the summer and fall. The federal government therefore has ordered New York City to

build a filtration plant for its Croton water supply, with the City deciding to build this plant on the Mosholu Golf Course in the Bronx in the very near future.<sup>1</sup> At that point in time, the *poskim* will have to consider how the new filtration system impacts the distribution of copepods for halachic analysis.

The two other water systems are the Catskill and Delaware systems, with the Catskill providing about 40% and the Delaware 50% of the total water distribution. These systems are fed by rivers and creeks that derive their sources from rainwater and melting snow that sink through the ground to form aquifers (underground rivers) that emerge later as natural springs. The Delaware system contains four main reservoirs that drain into the Delaware aqueduct that continues to the Kensico reservoir or the West Branch reservoir of the Croton system. The Catskill system contains two main reservoirs, Schoharie and Ashokan. Legal regulation controls the water travel between these two reservoirs through the Shandaken tunnel by dictating the number of open and closed gates at the intake gate-chamber of Ashokan. From Ashokan, water travels to the Kensico reservoir where it mixes with water from the Delaware system (both systems can bypass Kensico but only in instances of extreme emergency). Hillview reservoir accepts the water flow from Kensico via an aqueduct and acts to equalize the difference between the steady flow in the aqueducts and the varying water usage in the city. From Hillview, water is delivered through the city through two enormous tunnels for distribution. All water leaving Kensico and Hillview reservoirs is chemically treated upon exit with chlorine (among other things) to kill inhabiting zooplankton and meet disinfection requirements

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1. See "Why New York City Needs a Filtered Croton Supply," at <http://www.nyc.gov/html/dep/html/press/03-25pr.html>.

Most of the city derives its water from one of these two tunnels. In Staten Island, water collects in one of the world's largest underground water tanks before delivery, while in certain parts of Queens, water delivery is complemented by local natural springs.

## Halacha

The issues are presented in a 'pseudo-sequential' order – that is, from the bottom up. The question of the status of the copepods in halacha, their source from the reservoirs and their function in various mixtures (*ta'aruvot*) will be discussed first. The need for filtration depends not only on whether the copepods present a valid halachic problem, but also on their frequency of occurrence and concentration at the faucet. It must be kept in mind that while there are *poskim* who argue that the copepods in fact should be prohibited, this may not have bearing on the need to filter. The criteria of concentration and frequency will be discussed at the end of this section. The Torah (*Vayikra* 11: 9-13) explicitly forbids the consumption of creeping creatures without fins and scales (*sheratzim*), whether they live on land or in the sea. Unlike other prohibitions regarding food items the consumption of a *sheretz* entails the violation of four separate prohibitions, entailing four sets of punishments.<sup>2</sup> The Gemara in *Bava Metzi'a* 61b even goes so far as to declare that *yetzi'at Mitzrayim* would have been worthwhile if its only result was *Bnei Yisrael* receiving the prohibition against forbidden *sheratzim*! It is therefore not taken lightly by the *poskim* and is cause for serious concern.

## I. Creature Size in Halachic Criteria:

### a. Visibility

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2. *Makkot* 16b.

As noted above, the copepods in question range in size from 500 to 1,200 uM. They should not be defined as microscopic, as the average person, when looking closely can see objects larger than 40 uM.<sup>3</sup> Actual identification of such small objects, however, requires substantially larger sizes. Their lack of immediate visibility in a glass of water led many people to assume that they are indeed microscopic and therefore not halachically prohibited.<sup>4</sup> The chlorination process intended to kill the copepods leaves them as dead, translucent creatures that take a bit more time and focus to ascertain and distinguish.<sup>5</sup> Identifying these creatures as such does indeed take some getting used to; those who have been doing so for longer can usually find them rather quickly. They are simplest to see in a pool of shallow water over a dark background. However, it must be noted that those "experts" trained in identifying these creatures do not have special visual capabilities – they have merely learned how to look at water properly. While almost anybody can be taught to find them in the water, the positive identification of copepods as creatures is far more difficult and most easily undertaken with the aid of a microscope.

#### **b. Visible but not identifiable as a *sheretz***

R. Shmuel Wozner discusses the status of similar creatures

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3. At a distance of about a meter, a person can see objects larger than 100uM, slightly smaller than half the size of a period at the end of a sentence in a newspaper (see [www.madsci.org/posts/archives/feb2000/951008843.Gb.r.html](http://www.madsci.org/posts/archives/feb2000/951008843.Gb.r.html)).

4. Many *poskim* have already discussed this issue at length – all agreeing that microscopic creatures are not within the realm of halachic prohibitions. See *Binat Adam* (38:8 ff 34), *Aruch HaShulchan* (84:36), *Shu"t Tuv Ta'am va-Da'at* (2:53, 3:1:160), *Iggerot Moshe* (YD 2:146), *Yechaveh Da'at* (6:47) and the sources cited therein.

5. In reality, only a tiny percentage of copepods make the journey from reservoir to faucet while avoiding their demise.

found on citrus fruits (where the creatures are visible but not identifiable as creatures).<sup>6</sup> He claims that visibility alone does not entail prohibition; the creature must be identifiable as a creature to pose a problem. He argues that in such cases “it is not the person’s vision that brings about the prohibition, but rather the microscope [allowing for the creature identification].”<sup>7</sup> This also seems to be the initial assumption of R. Shlomo Zalman Auerbach.<sup>8</sup> R. Hershel Schachter noted that, based on the Chazon Ish’s position regarding the history of halachic development, there is further room to rule leniently.<sup>9</sup> The Chazon Ish explained the Gemara’s declaration that the “world experienced 2000 years of Torah” to mean that all of halacha was established during that time period and that it can no longer change.<sup>10</sup> R. Schachter argues that the halachic definition of vision was established then as well. Since during that time period these creatures were not identifiable as *sheratzim* (mechanical visual aids had not yet been perfected), our contemporary superior visual ability has no relevance as regards these creatures’ status; thus ingesting them should be permitted.

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6. *Shu”t Shevet ha-Levi* 7 (YD 122).

7. It is not perfectly clear that R. Wozner would rule similarly in our case. At the very end of the responsum he explains that even the movement of the creatures in question could not be seen without visual aids. Copepod motion in the reservoirs is easily viewed by the unaided human eye and therefore it is not entirely clear what R. Wozner would rule concerning copepods.

8. Cited in *Shemirat Shabbat ke-Hilchetah* (chapter 3, note 105). A parallel idea is recorded by R. Hershel Shachter in the name of R. Kalman Epstein who cites it from R. Yisrael Gustman *zt”l* who quoted it in the name of R. Chayim Ozer Grodzinsky *zt”l*.

9. R. Schachter penned two separate responses to this issue, the first lenient and the latter strict. The second responsum can be read in translation in *Kashrus Magazine* 25:1 (2004), 199.

10. *Chazon Ish* YD (5:3), EH (27:3).



The Chazon Ish himself, however, rejected such an idea.<sup>11</sup> If something is visible and we know that it is a *sheretz*, then it is prohibited whether or not we can visually identify it as such. It is not a person's vision that "causes" the *issur* as R. Wozner claimed, but rather the fact that the object in question is in fact a *sheretz* that brings about the prohibition. R. Yehoshuah Neuwirth relates that upon hearing that the Chazon Ish had been stringent in this matter, R. Auerbach reversed his previous opinion and agreed to the Chazon Ish's position.<sup>12</sup> Furthermore, when news of this story broke in June 2004, R. Feivel Cohen relates that he asked R. Yosef Shalom Elyashiv about this specific matter and R. Elyashiv cited the Chazon Ish's stance and ruled stringently.<sup>13</sup> Furthermore, R. Elyashiv co-signed a *pesak*<sup>14</sup> issued by R. Dovid Feinstein, requiring filtration, further identifying himself with this approach.<sup>15</sup>

### c. Visibility when alive

While the copepods are difficult but nonetheless possible to locate when dead, when alive they present little challenge. Water samples from the reservoirs reveal creatures that can be seen swimming through the water in seemingly random directions;

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11 *Shemirat Shabbat ke-Hilchetah*, *ibid*.

12. Some point out that this may not be the only way to read the *Shemirat Shabbat ke-Hilchetah*. They note that R. Neuwirth never actually states that R. Shlomo Zalman reversed his opinion but only that after some time he had heard that the Chazon Ish was stringent.

13. *Shiur* given on Sunday June 6, 2004 at the Agudath Israel of Madison. *Bedikat ha-Mazon ka-Halacha* cites this same opinion in the name of R. Elyashiv as well.

14. The *pesak* was published in *Yated Ne'eman*, on September 15, 2004 and is co-signed by R. Elyashiv and R. Hayyim Pinchas Sheinberg.

15. It is possible to argue that R. Ovadiah Yosef may indeed agree with R. Wozner and R. Auerbach's initial assumption. See *Shu"t Yabi'a Omer* YD (4:21).

it is quite clear that these specks are living beings. Rashi in fact defines a *sheretz* as a creature that is so small that it can only be detected by its movement.<sup>16</sup> The *Ben Avraham* (50:42) adopts this definition wholeheartedly and claims that whether or not such a creature is identifiable as such after death – it is nonetheless prohibited based on its definition as a *sheretz* when alive.<sup>17</sup> He assumes that once a prohibited status is applied to a creature during its lifetime, it cannot be removed upon death. R. Hershel Schachter adopts this position and argues that the copepods should be prohibited, since even though they are not identifiable as creatures at this stage, they are nonetheless visible.<sup>18</sup> R. Yisrael Belsky, however, notes that the *Ben Avraham* discusses a case in which the prohibited *sheratzim* are **certainly** in the water.<sup>19</sup> Since one cannot be certain that there are indeed copepods in New York City water without checking, R. Belsky concludes that the *Ben Avraham's* discussion is irrelevant to our situation.

#### **d. Complete copepods versus exoskeletons**

However, it is important to note that not all of the copepods that appear at the faucet are intact; a small percentage are merely the exoskeletal remains with very little or no "insides" remaining. Many *poskim* were unaware of this phenomenon

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16. *Eruvin* 28a, s.v. *zir'ah*. The halacha does use the term *sheretz* to refer to larger creatures as well, such as the *shemonah sheratzim* (*Shabbat* 107a). It appears that Rashi is simply referring to the smaller types and not making linguistic generalizations.

17. Cited by *Darchei Teshuvah* (84:45).

18. His second responsum on the issue. Apparently R. Schachter assumed that the criteria of the *Ben Avraham* outweigh the apparent conclusion based on the Chazon Ish's interpretation of halachic development, especially in light of the fact that the Chazon Ish himself was stringent in this regard.

19. *Sha'ashu'ei Oraita* 3 (2004), 152.

and therefore did not respond to its ramifications. The halachot regarding *sheratzim* themselves are distinct from those governing the bones of *sheratzim*. Even if one concedes that the copepods are indeed prohibited, their bones and exoskeletons may not be. These halachot regarding the status of bones of *sheratzim* will be discussed later. It seems that something happens to these creatures during their tortuous travel that allows their muscles and viscera to disintegrate and seep out of their outer shell. It is unclear at this point what mechanism is responsible for this occurrence. Therefore, even if one were to see a speck in the water, one could not be certain that it is indeed an intact copepod; it may perhaps be only the molten exoskeleton or even dust. It would seem that in this situation the logic of the *Ben Avraham* does not apply. He assumes that all the unmoving specks are simply dead *sheratzim* that are indeed visible and identifiable when alive. However, it is simply not the case that every speck that appears in the tap water to be a creature actually was a forbidden creature when alive – a certain percentage are merely the exoskeletons.

#### **e. Questions from the past**

Lastly, it should be noted that questions of insect infestation are not modern phenomena and were probably more frequently problematic in the past. Many *poskim* discuss the status of a certain creature known as a *milbin* often found in flour. Regardless of their conclusions pertaining to the specific question at hand, they all agree that *milbin* are prohibited creatures. R. Yitzhak Bistrisky cites *Bedikat ha-Mazon ka-Halacha* as claiming that *milbin* are smaller than 200uM – smaller than most of the copepods in question. It would seem, therefore, that all these *poskim* would argue that the copepods indeed present an *issur de-oraitah*.<sup>20</sup> However, the identification of *milbin*

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20. *Ohr Yisrael* 36 (2004), 203 – 204.

as a specific species seems somewhat speculative. Many *poskim* from all over the world discuss the existence of these creatures and it seems highly unlikely that they all had the same specific creature in mind. It may be that the *poskim* simply used the term *milbin* to refer to crawling creatures found in flour and did not mean to identify a specific species. If so, it is highly likely that these *milbin* were significantly larger than the copepods in question, as it seems from the responsa literature that many people found them in their produce, in contrast to the copepods that hardly anybody noticed before June 2004.<sup>21</sup>

## II. Where do they come from?

### a. *Sheratzim she-be-keilim*

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21. As an important corollary, one should note that many of the *poskim* addressing the problems of ‘un-filterable’ water *sheratzim* counsel their questioners to first boil the water, then filter it again. For some reason they assumed that dead *sheratzim* are more easily caught by the filter. Some suggest that it might be because they assumed that the live *sheratzim* crawled through the very fine pores of their filters and when dead this would not happen. This seems highly speculative since the major force pushing the *sheratzim* through the filters is the falling water. Assuming that they were only filtering a jug or a cup at a time, the filtration itself should only take a few seconds. As such, even if the *sheratzim* could migrate to more porous areas of the filter (or even spread apart the fine fibers of the filters to create larger pores) their movement would have to be very fast (especially considering their minute size). Secondly, the locomotion of zooplankton on dry surfaces is highly questionable. Moreover, the *sheretz* would have to travel horizontally through an intense vertical gravitational force of falling water, making this movement rather difficult. Perhaps one could suggest that boiling the water killed off all the creatures and they still made it through the filters. However, since they were immobile they were not identifiable as creatures but merely as specks of dust. Since they could not identify any *issur*, they permitted the water.

The Mishnah in *Chullin* 66b discusses the halachot of permitted fish and explains that while fish require fins and scales to be deemed kosher, there are certain water *sheratzim* that are kosher even though *sheratzim* have neither fins nor scales. The subsequent Gemara (citing *Torat Kohanim* *ibid.*) explains that these *pesukim* refer to *sheratzim* that reside<sup>22</sup> in vessels (*keilim*) and rules that *sheratzim* that reside in pits, ditches and caves are kosher despite their lack of fins and scales, since the water in these containments derives from rainfall and melting snow (these water bodies have similar characteristics to water found in *keilim*).

The Gemara continues to define two other bodies of water: *yamim u-nehalim*, seas and rivers, as well as *haritzim ve-ne'itzim*, canals and ducts. All *sheratzim* found in the former are prohibited. The water body classification of *haritzim ve-ne'itzim* is divided into two categories, *nove'im* and *moshechim*. *Haritzim ve-ne'itzim ha-nove'im* transport water from an underground water source or a spring; all *poskim* agree that *sheratzim* found therein are prohibited. *Haritzim ve-ne'itzim ha-moshechim* transport rain water or melted snow, whose flow changes with the seasons. The status of creatures found in these waters is subject to a dispute: Rambam (*Ma'achalot Assurot* 2:18) prohibits ingesting them and Rosh (*Chullin* 9:68) permits.<sup>23</sup> The *Mechaber*

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22. The plain meaning of the Gemara seems to refer to spontaneously generated creatures. It is important to note, however, that the Gemara never actually makes this claim outright. The Rambam (*Ma'achalot Assurot* 2:18), however, uses the verb "created." The *Mechaber* refrains from this language and says *gedeilim* – the place where the creatures germinate or grow. It is beyond the scope of this paper to discuss the halachic view of spontaneous generation will be discussed only briefly later on regarding the position of the Chazon Ish.

23. The disagreement stems from a question of *kelalei ha-pesak*, of deriving principles from the Gemara. Cf. *Maggid Mishnah* (*ibid.*) and *Taz* (84:1) who use different approaches to this matter to explain

(84:2) cites the two positions by stating that “there are those who prohibit and those who permit” the ingestion of *sheratzim* found in *haritzim ve-ne’itzim ha-moshechim* without rendering a deciding opinion. *Shach* (84:8, as well as *Pri Megadim*, *ibid*) argues that since the prohibition in question stems from the Torah, we must be strict; R. Dovid Feinstein cites these *poskim* as the norm. However, the *Pitchei Teshuvah* (84:1) notes that the *Shu”t Mishkenot Ya’akov* (YD 27) disagrees and argues that the correct approach is to follow the Rosh and permit ingesting these creatures. Moreover, there is a longstanding “rule” that when the *Shulchan Aruch* presents two opinions in this manner (“some say ... and some say ...”), we always follow the latter opinion (the Rosh in this case ,who permits ingesting these specific *sheratzim*).<sup>24</sup>

Before examining the various opinions regarding the reservoirs themselves, it should be emphasized that many scientific experts have agreed that the copepods breed exclusively in the reservoirs themselves and could not survive to germinate in the waters entering or exiting the reservoirs.<sup>25</sup> Therefore, the body of water in question is the reservoir; the copepods do not enter these waters from an outside source. Similarly, the only copepods found in the aqueduct system arise from the reservoirs as well, with no possible germination

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Rambam’s position.

24. Cf. *Shu”t Yechaveh Da’at* (2:33) in the footnote as well as *Shu”t Yabi’a Omer CM* (6:2) for an extensive analysis of the application of this rule in several areas of halacha.

25. Dr. Edward B. Reed (communication to R. Lach cited as an appendix to his report). Dr. Reed has taught courses dealing with and conducted research on copepods for nearly fifteen years at Colorado State University. He specifically dismisses the notion that the copepods breed on biofilms growing on the inner surfaces of aqueducts, pipes and the like. Dr. Janet Reid, a research associate with the Virginia Museum of Natural History, concurred with this

along the way.

**b. *Ha-yoztei min ha-tamei, tamei***

The Chazon Ish (YD 14:6) has an interesting position on the question of *sheratzim she-be-keilim*. He claims that the rules of permitted *sheratzim* cannot override the rules of *ha-yoztei min ha-tamei, tamei* – that which comes from an impure object is impure itself.<sup>26</sup> Chazon Ish argues that any *sheratzim* that are the product of reproduction of a prohibited *sheretz* are also prohibited, regardless of where they were born, reside or germinate. Since today we know that all creatures are the products of reproduction and not spontaneous generation, it seems that all *sheratzim*, even those born in vessels, should be prohibited. Many *poskim* however, dismiss this assertion categorically. They ask that according to the Chazon Ish's logic, what creatures fall under the rules of permitted *sheratzim*? There are no spontaneously generated creatures and therefore none meet these criteria; yet, it is clear that the halacha intended to discuss real phenomena (at least in this case).<sup>27</sup> However, it seems safe to assume that the Chazon Ish was aware of this problem and nonetheless thought the way he did – perhaps he had an answer to it that he did not record, or the question simply did not bother him, we will never know. While it seems a rather weighty position to ignore, such has been its fate.

**c. *Ma'ayanot* and comparison to *hilchot mikva'ot***

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conclusion.

26. Chazon Ish, *Hilchot Tola'im* 14(1):10.

27. Several answers have been suggested for this question. Many *poskim* believe that since halacha is unconcerned with subvisual phenomena, if the newborn *sheretz* is so small that it cannot be seen, the adult has the status of germinating from nothing (visual = halachic). Others claim that perhaps at another historical period there were

Assuming the Chazon Ish's position is indeed ignored, the major question facing the *poskim* is how the reservoirs fit into this picture. Various positions have been proposed spanning the entire spectrum of options. The seemingly simplest approach is to recognize that the rivers and creeks that feed the reservoirs stem from natural springs (*ma'ayanot*) and as such have the status of *nehalim*, with all *sheratzim* growing therein prohibited. With respect to this approach, R. Dovid Feinstein notes that the reservoirs should not be considered *borot*, (cisterns, that have the same halachic status of *keilim*), since they have both an inlet and outlet.<sup>28</sup> Second, R. Feinstein posits that although the movement of water within the reservoir cannot be perceived (only determined) and the great majority of the water seems immobile, nonetheless, since it originates from springs and is destined to leave, it must qualify as *yamim u-nehalim*.

In the context of *mikva'ot* as well, halacha differentiates between naturally occurring springs, *ma'ayanot*, and collected rainwater. *Shu"t Mishkenot Ya'akov* (YD 45) and others use parallel definitions of water bodies in both these areas, using the more elaborate and heavily discussed *mikva'ot* definitions and applying them to the rules of ingesting *sheratzim*. As in *mikva'ot*, the source of the water is one of the deciding factors in determining the status of a subsequent body of water, giving the reservoirs the status of *ma'ayanot* and prohibiting the copepods.

Although all springs ultimately derive their water from rainfall and melting snow absorbed by the mountain, transported via aquifers, collected and ultimately projected as a spring, halacha distinguishes between these two bodies of water. *Shu"t*

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28. R. Feinstein's ruling as noted previously. *Shu"t Chatam Sofer* (EH 2:30) claims that a body of water that has only an outflow is still considered to be as *yamim u-nehalim* despite the incomplete parallel to actual rivers.



*Mishkenot Ya'akov* (ibid) explains that once the water is absorbed by the mountain and transported some distance it loses its definition as rainwater and is "reborn" as a spring.<sup>29</sup> The Netziv<sup>30</sup> quantifies the distance that water must travel to be reborn as a spring as at least four *amot*, while the *Tzemach Tzedek* (Lubavitch) requires a distance of at least 100 *amot*.<sup>31</sup> Ramban (*Bereishit* 26:17) claims that this was the very disagreement between Yitzhak Avinu and the shepherds of Gerrar.<sup>32</sup> Since the lion's share of the reservoir contents derives from these sources,<sup>33</sup> it would seem that all copepods residing within are forbidden.<sup>34,35</sup>

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29. If we do not accept this proposition then there is no such real *ma'ayan* in the world today since all springs ultimately derive their water from rainfall. While *Darchei Teshuvah* YD (201:215) cites many authorities that argue on the conclusion of the *Mishkenot Ya'akov* in this particular case, they all agree to this premise at least on some level.

30. *Shu"t Meishiv Davar* 41.

31. *Shu"t Tzemach Tzedek* YD 176.

32. Also see Ramban to *Devarim* (8:5) where he explicitly defines *ma'ayanot*.

33. There is some contribution by direct rainfall into the reservoir itself, but it pales in significance to the contribution from the rivers flowing into it.

34. Some have cited *Shu"t Meishiv Davar* (2:28) in opposition to this proposition. He states the halacha that if the *sheratzim* (in the river in question) derived from snow or cisterns, they are permitted even when they enter the river. If he meant that the water in question originally derived from rainwater – then he has effectively included every single body of water on earth and eliminated the halachot of *ma'ayanot* and of forbidden *sheratzim*. Thus, it seems more likely that he simply referred to snow that melted directly into the water without first travelling underground and in effect did not add anything new with this line.

35. For a comprehensive treatment of this topic, see *Sefer Tahorat Mayim* by R. Nissan Telushkin, pp. 7 – 9.

#### d. *Sheratzim* as components of the water

R. Yitzhak Raitport argues and assumes that all *sheratzim* should take on the status of the substance from which they derive.<sup>36</sup> He tries to prove this from the Gemara in *Avodah Zarah* 12b that explains that a person should not drink water from *neharot* (rivers) at night since there is a danger of swallowing leeches (that he may not be able to see).<sup>37</sup> The obvious question is that a person should not drink from *neharot* at night since he might consume *sheratzim* – even those that are not dangerous! Why is the prohibition merely explained as a safety feature and not as a problem of consuming forbidden *sheratzim*?<sup>38</sup> *Shu"t Maharam Shik* (OH 134) explains that the Gemara is referring only to rivers in which creatures are not prevalent and there is little or no possibility of ingesting any *sheratzim*.

R. Raitport claims that it is unlikely that the Gemara in *Chullin* (that explains that *sheratzim* in *keilim* are permitted whereas those in *neharot* are forbidden) refers to *neharot* where creatures are prevalent while the Gemara in *Avodah Zara* refers to *neharot* without a significant creature population. He prefers to explain

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36. *Kuntres*, pp. 20 – 22. He actually makes several other points as well regarding this matter, based on the mistaken notion that the reservoirs derive entirely from rainfall. As discussed earlier, each reservoir has rivers that lead into it and as such these arguments will not be analyzed.

37. Quoted by the Rambam in *Rotzeach u-Shemirat Nefesh* 11:16 and *Shulchan Aruch Choshen Mishpat* 427:9.

38. It is important to note that the *Issur ve-Heter* (41:7) cites the Rambam differently as referring to *bereichot*, enclosed bodies of rainwater and not *neharot*. As mentioned above, the creatures residing in the former are permitted and therefore at night there is only a problem of danger and not prohibition. This variant text does not appear in any modern edition of the Rambam nor is it cited as an alternate version in the Shabtai Frankel edition.

that there are two types of water *sheratzim*: those that are created from the water and those created from the land or air and that later migrated into the water; the former are permitted and the latter clearly prohibited. The only problem of water creatures in *mayim ha-nove'im* is that we suspect that they may have been created on (from) the land and migrated into the waters. He claims a parallel structure in *Chullin* 77b regarding *sheratzim* that grow on (from) animals and fish, that have the same status of the animals and fish at that moment. Lastly, he argues that this logic is found in *Shu"t Tzemach Tzedek* (YD 62) where he raised a separate possible leniency for some type of *sheretz* found in a river, but nonetheless concluded stringently, since he was concerned that the *sheratzim* were created on (from) the ground or air and later entered the water. R. Raitport contends that from this language, we can conclude that the *Tzemach Tzedek* would agree that if the *sheratzim* were created from the river itself they would be permitted, as per his previous contention.

This approach is rather novel and does not seem to have any precedent in the *poskim*. Secondly, it is unclear who is the "speaker" at this point in the responsum of the *Tzemach Tzedek*. The text in question appears in the question segment (before the words "here ends the question") but in parentheses, raising the possibility that it was the *Tzemach Tzedek* himself who added this possible leniency into the question. For this reason alone, it would not seem prudent to base leniencies on this logic. Lastly, it seems at best to be an attempt to provide a coherent logic behind a somewhat obscure Torah law – *doresh ta'ama de-keri*. The halacha, however, follows R. Yehudah that we do not attempt to provide such reasoning, let alone use it as a basis for leniencies.<sup>39</sup>

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39. *Bava Metzia* 116a. Both Rambam (*Malveh ve-Loveh* 3:1) and *Mechaber* (CM 97:14) rule like R. Yehudah who denies this

### e. Non-*mikva'ot* definitions of water

There is an alternate approach to the notion that denies the continuous definition of a *ma'ayan* from *hilchot mikva'ot* to *hilchot tola'im* (insects). R. Yehoshuah ha-Kohen Perachyah<sup>40</sup> claims that still waters collected in a cave should have the status of *mayim she-be-keilim* even though water flows into this area from a natural spring. Since the water is currently not in a *ma'ayan* but rather in a collected reservoir, the halacha should categorize all creatures within that water as arising from *mayim she-be-keilim*, since the connection to the spring is irrelevant. In contrast, in *hilchot mikva'ot* the source of the water and the manner in which it arrives at its final destination are of utmost importance. R. Perachyah further claims that since it is unlikely for flowing water to contain small creatures, we can assume that they germinated and grew only in the collected waters of the reservoir.<sup>41</sup>

The previously mentioned experts adamantly reject the notion that the copepods in the New York City water system live in the rivers that feed the reservoirs, but maintain that they exist solely in the reservoirs themselves. Accepting his position would therefore posit categorically that the copepods are permitted. R. Yisrael Belsky independently arrived at a similar conclusion, noting that the water outflow from the Hillview reservoir is under human control. As such, it should be considered a *bor*, since the water does not freely flow through it. He ultimately

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rationalization process. *Shu"t Chatam Sofer* (YD 254), however, is willing to use such rationales to establish a stringency.

40. *Sefer va-Yikra Yehoshu'a*, YD Hilchot Tola'im 2.

41. While he concludes that it is nonetheless appropriate to act stringently, it seems that it is out of concern that the *sheratzim* actually originate in the *ma'ayan* waters.

declares that the copepods present no halachic concern.<sup>42</sup>

**f. The status of *sheratzim* once they leave their original habitat (*sheratzim she-pirshu*)**

Even if we assume that the waters in the reservoirs are of the type that spawn permitted *sheratzim*, the Gemara in *Chullin* (67b) explains that this permission applies only to these *sheratzim* in their original habitats. Once the *sheratzim* leave their original permitted habitat and enter a body of water whose inherent *sheratzim* are forbidden, the migrating *sheratzim* also become forbidden. The Rashba explains that the original habitat is limited to the *kli* in which they germinate as well as its inner surfaces; migrating to the outer surface of that same *kli* renders them forbidden.<sup>43</sup> Therefore, once the *sheratzim* leave one permitted water body, such as a *bor*, and enter a *kli* (where the *sheratzim* would be permissible to eat if they had originated and remained there) they are nonetheless forbidden. The *Beit Yosef* argues that a *sheretz* going from one *kli* to another should not create any difference in halachic status, and the only change in status should arise when they are migrating between two different categories of water.<sup>44</sup>

**g. The status of *sheratzim* in their new environment**

There is a three-way disagreement as to the status of the inside of the new *kli*. The *Shach* (84:4) claims that while the

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42. *Sha'ashu'ei Oraita*, 155 – 156. He notes that there are many gates that control the outflow of water from this reservoir, with each independently controlled. There are therefore no gates that are open continuously for longer than a specific given period.

43. *Torat ha-Bayit ha-Katzar* (3:1) [67b in the Warsaw edition], see *Shulchan Aruch YD* 84:1.

44. *Beit Yosef YD* (84) s.v. *kataav ha-Rambam*, also see *Taz* (84:5) and *Shach* (84:4, 10).

*sheratzim* are in the water of the *kli*, they are permitted. However, once they migrate to the walls of the vessel (*kli*), they become forbidden. The *Taz* (84:5) argues that the insides of the new *kli* are exactly parallel to the water inside the *kli*, and therefore if the *sheratzim* migrate to the walls they are still permitted. The *Issur ve-Heter* (as understood by the *Pri To'ar*) argues that once the *sheratzim* enter the *kli* they are forbidden, whether or not they migrate anywhere. (The fact that these *sheratzim* are dead at this point will be discussed below.) Regarding an aqueduct leading from a *bor* to a *kli* (under an open faucet), R. Shmuel Wozner claims that the *Issur ve-Heter* will clearly prohibit and the *Taz* will permit all of the *sheratzim*.<sup>45</sup> He explains that the *Shach's* position would depend on whether or not the aqueduct is filled with water or whether there is space within the tube for the *sheratzim* to migrate to the sides of the walls. He posits that if the water reaches only half the vertical height of the aqueduct, then we must be concerned that the *sheratzim* migrated onto the walls and the *Shach* would prohibit these *sheratzim*.<sup>46</sup>

R. Chayim Oberlander points out, however, that there is additional room for leniency in our case since almost all of the copepods are killed before they enter the aqueduct systems.<sup>47</sup> The Rambam (*Ma'achalot Assurot* 2:16) claims that postmortem "migration"<sup>48</sup> is considered regular migration and the *sheratzim*

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45. *Shu"t Shevet ha-Levi* YD (7:123:4).

46. R. Wozner posits that since the prohibition in question is from the Torah we should adopt the *Issur ve-Heter's* stringent position. He points out, however, that the *Pri Megadim* (*Mishbetzot Zahav* YD 84:5) attempts to prove that the *Issur ve-Heter* really has a similar logic as the *Taz* and is not quite as extreme as the *Pri To'ar* attempted to show. Therefore, ideally we should follow the *Pri To'ar's* approach, but he is readily willing to be more lenient in certain situations.

47. *Ohr Yisroel*, p. 178.

48. "Migration" means any movement of *sheratzim* from their natural habitat, be it by voluntary motion or water currents.

are therefore forbidden, while the Rosh (ibid 3:68) disagrees and concludes more leniently.<sup>49</sup> The *Mechaber* (84:4) cites the Rosh as the standard opinion and mentions that "some say" (*yesh omrim*) to follow the Rambam. R. Oberlander argues that there are several reasons to conclude leniently in this matter. Firstly, there is a longstanding rule that when the *Mechaber* quotes one nameless opinion and the second opinion as *yesh omrim*, we always follow the former opinion.<sup>50</sup> The *Shach* (84:12) independently arrives at the lenient conclusion as well.<sup>51</sup> Secondly, the impetus for stringency in the previous question is the position of the *Shach*. He himself, however, is of the opinion that postmortem migration is meaningless! Therefore, even if we are to follow the *Shach's* strict approach above, it is not relevant to our case because of the *Shach's* lenient opinion with regard to ingesting *sheratzim* that migrated postmortem. R. Oberlander notes, however, that the *Minchat Ya'akov* (46:13) and *Pri Megadim* conclude strictly in this latter issue (like the Rambam) and therefore there is little room for lenient maneuvering.<sup>52</sup>

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49. The *Maggid Mishnah* explains that they disagree about the text of the Gemara in question, which seems to conclude that we should act strictly. The Rambam read "*pirshah meitah*," meaning that the *sheretz* migrated post mortem, while the Rosh read "*pirsha u-meitah*," it migrated and, upon impact, died.

50. For a thorough and rather extensive treatment of this issue see *Yalkut Yosef* 9, pp. 5 – 44, and the opinion of R. Benzion Abba Sha'ul quoted therein.

51. Although the Ramo does not comment on this point in the *Shulchan Aruch*, the *Shach* does quote the Ramo's opinion in *Torat Chatat* (46:5, 47:2) as concluding like the Rosh.

52. While R. Oberlander does not cite a source for the *Pri Megadim*, it seems to be *YD Sifte Da'at* (84:12, 24, 45). It seems unclear whether the *Pri Megadim* is endorsing the *Minchat Ya'akov's* opinion or simply mentioning his approach and explaining how it applies.

### **h. Application**

The application of these regulations hinges upon the halachic definition of the reservoirs and the aqueduct system. If both are considered *keilim*, then there is no question of migration at all if we assume that the copepods are considered *sheratzim she-be-keilim* and therefore permitted. If the reservoir is considered a *bor* and the aqueducts considered *keilim*, the status of the copepods is subject to dispute between the *Issur ve-Heter* and the *Taz*. R. Yitzhak Raitport adopts the former approach and contends that the reservoirs and the entire water delivery system, including all aqueducts, tunnels, pipes and passages, have the status of one tremendous *kli*; thus, the copepods cannot be deemed to have migrated from one category of water to another and accordingly, ingesting them should be permitted.<sup>53</sup> R. Yitzhak Bistrisky counters that this assertion is simply fantastic requiring a large stretch of the imagination!<sup>54</sup> On a more halachic plane, *Shu"t Remet"z* (YD 30:5) argues that a *kli* that is firmly attached to the ground (such as the aqueducts) receives the status of the ground itself, giving the creatures inside this *kli* a status of *sheretz ha-aretz* that are always prohibited regardless of migration. Further consideration is needed regarding the status of the water in Staten Island, due to the tremendous water tank that temporarily holds the water before it is distributed.

### **III. Bones of a *sheretz***

As mentioned previously, experiments have shown that sometimes what at first appear to be copepods are in fact only

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53. The status of a *sheretz* that exits one *kli* to enter another is permitted (as per *Shach* YD 84:4). Therefore, there are no problems with the water exiting the faucet and entering any other vessel.

54. *Hasagot*, no. 5.



the exoskeletal remains ('ghosts') of these creatures. *Torat Kohanim* (*Shemini* 3:4:10) explains that bones and fins of *sheratzim* are not forbidden, unlike their fleshy substance, *basar*. Later, however, the *Torat Kohanim* expounds that a *kelipat ha-sheretz* is forbidden, a term that does not occur often in halacha and is somewhat ambiguous; normally *kelipah* means shell or peel (such as of a fruit). A likely physiological structure of *sheratzim* that fits this description seems to be the exoskeleton, which would render both intact copepods as well as their exoskeletal remains prohibited. As noted above, *poskim* have generally not yet addressed this issue and will have to analyze this question as well.

Even if we assume that the exoskeleton qualifies as bones, it is not immediately apparent that it should be permitted. Although the question of *sheratzim* bones similarly does not occur frequently, a parallel question concerning eating bones of non-kosher animals does play prominently in halachic analysis. While the *Torat Kohanim* (*ibid*, 2:4:8) makes a similar permissive claim regarding the consumption of non-kosher animal bones, the Rambam (*ibid* 2:18), as understood by R. Yechezkel Landau, explains that they are nonetheless rabbinically prohibited.<sup>55</sup> R. Chayim Ozer Grodzinsky claims that this rabbinic prohibition applies only to soft bones containing marrow; hard, dried bones are entirely permitted.<sup>56</sup> This permission flows from the *Shibbolei ha-Leket's* claim(2:34, quoted in Ramo *YD* 87:10) that a dried-out stomach of a cow loses its status as meat regarding prohibitions of mixing it with milk. While R. Landau tries to differentiate between the status of a properly slaughtered cow's stomach (permitted on its own and only prohibited when mixed with milk) and an

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55. *Tzelach*, *Chullin* 89b, s.v. *sham ve-noheig* (first entry). Also see *Shu"t ha-Bah* 137.

56. *Shu"t Achi'ezer* 3:33.

intrinsically prohibited stomach, R. Ovadiah Yosef (*Yabi'a Omer* YD 8:11) explains that the *Shibbolei ha-Leket* explicitly rejects such a distinction and that R. Landau perhaps did not have access to an actual copy of the *Shibbolei ha-Leket*.

R. Ovadiah Yosef points out that the *Mechaber* (YD 99:1) does not distinguish between different types of bones, and therefore we are to assume that all are permitted regardless of their rigidity.<sup>57</sup> R. Aharon Kotler, however, contends that the *Mechaber* concludes as does Rambam, that the bones are rabbinically prohibited.<sup>58</sup> The *Mechaber* seems to categorically permit all bones since he is only referring to cases of bones in mixtures (where the bones of an *issur* are added to the volume of permitted substances to calculate the total quantity of *heter*). R. Kotler claims that even the *Mechaber* admits that eating non-kosher bones by themselves or when added deliberately to a kosher mixture to derive benefit from them, is rabbinically forbidden. R. Eli'ezer Yehudah Waldenberg agrees with R. Ovadiah Yosef's analysis (in rejecting a similar prohibitive argument by R. Yehezkel Abramsky) to permit these bones.<sup>59</sup>

#### **IV. Do the copepods form a mixture with the water (*ta'arovet*)? If so, what is its status?**

##### **a. *Hilchot Ta'arovet***

Halacha postulates the concept that one object can become nullified, *batel*, in a larger quantity of another. Therefore, if a spoonful of milk fell into a pot of meatballs cooking on the

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57. As per the Rashba's opinion in *Torat ha-Bayit ha-Aroch* (4:1) [109a in the Warsaw edition].

58. *Shu"t Mishnat Rabbi Aharon*, YD 17:17 (also 16:9).

59. See *Shu"t Tzitz Eli'ezer* 4 where R. Abramsky's position is recorded along with R. Waldenberg's disputing comments.

fire, but there were 60 times more meat than milk in the pot, the mixture is permitted.<sup>60</sup> There are different sets of halachic rules governing different types of mixtures. Our present discussion will deal primarily with cases of liquids mixing with liquids, *lach be-lach*, and solid objects mixing with liquids, *yavesh be-lach*, which require 60 times more of the permitted item to permit the mixture.<sup>61</sup> In most of the discussed cases, the halacha describes situations in which the *issur* item is entirely lost within the permitted substance and, therefore, the *entire* mixture is permitted. But what is the status of a mixture (*ta'arovet*) in which the *issur* is still identifiable, *nikkar ha-issur*?

#### **b. Nikkar ha-Issur**

The standard assumption is that when the *issur* is identifiable, there is no *ta'arovet* proper, since the substances are not really mixed. Many *poskim* claim that when an *issur* is *nikkar* in a *ta'arovet*, it is never *batel* even on a Torah level, presumably since it is not considered a *ta'arovet*. This is the approach of the *Taz* (104:1) as explained by *Minchat Kohen* (*Sefer ha-Ta'arovet* 2:3) and adopted by *Pri Chadash* (104:3) and *Minchat Ya'akov* (22:23, 85:57). The *Minchat Kohen* provides an alternate reading of the *Taz* that would hold that even if the *issur* is not *nikkar* at all, but can nonetheless be removed, it is not *batel* even on a Torah level. This opinion is endorsed by *Shulchan Aruch ha-Rav* (*ibid*).

Nevertheless, other *poskim* address this question differently. The *Ramo* (*YD* 98:4) says that if forbidden fat fell into a large quantity of food (where there was 60 times as much food as fat), one must first add water to the mixture so that the fat will rise to the top and be removed.<sup>62</sup> Only after doing so is the flavor of the fat *batel* in the rest of the mixture.<sup>63</sup> *Pri Megadim*

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60. *Shulchan Aruch*, *YD* (92:2).

61. *Shulchan Aruch*, *YD* (98:1).

(YD *Mishbetzot Zahav* 98:7) explains that the fat is not *batel* because it is considered to be identifiable and therefore, the prerequisite for *bitul*, namely the creation of a mixture, *ta'arovet*, has not been satisfied (even) on a Torah level. The *Kreiti u-Feleiti* (ad loc.) "argues" and explains that the fat is not *batel* because the mixture has a method of becoming permitted, a *davar she-yesh lo matirim*. Since if a person would simply remove the fat, the mixture would be permitted anyway, the halacha does not allow *bitul* to occur in such cases.<sup>64</sup> The concept of *davar she-yesh lo matirim* is of rabbinic origin, implying that on a Torah level, even if the *issur* is still visible within the *ta'arovet*, it is nonetheless *batel*.

### c. *Sha'arei Yosher's* approach

The *Sha'arei Yosher* (3:19) explains that this fundamental disagreement regarding the status of a *ta'arovet* where the *issur* is visible is prevalent in other contexts. The Rashba (*Torat ha-Bayit ha-Katzar* 4:4 [38a in the Warsaw edition]) discusses a case in which a pot in which something non-kosher was cooked forms a *ta'arovet* with other kosher pots (the person does not

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62. R. Belsky (*Sha'ashu'ei Oraita*, 153) argues that the Ramo's position is entirely irrelevant to the question of copepods since the Ramo refers to a case where the forbidden fat is **certainly** in the *ta'arovet*. The certainty that the *issur* is present results in certain consequent stringencies. As noted earlier, since the copepods are only **questionably** in each glass of water, the Ramo's conclusion is irrelevant to our discussion.

63. The Gemara *Chullin* 97b (recorded *Shulchan Aruch* YD 98:4) explains that since we cannot ascertain how much flavor is given off by any item, we always assume that the maximum possible exuded flavor equals the volume of the item in question.

64. This logic follows the reading of Rashi in *Beitzah* 3b, s.v. *she-yesh*. The Ran in *Nedarim* 52a, s.v. *ve-kashya*, however, provides an alternate and fascinating approach to the concept of *davar she-yesh lo matirin*.

know which pot is forbidden, but is certain that there is one such pot). Each pot is *nikkar* on its own and instead of permitting the entire stock, the person can merely "*kasher*" all of them. R. Shkop argues that the Rashba presumes that a *ta'arovet* where the *issur* is *nikkar* is only prohibited qua *davar she-yesh lo matirim*. Therefore, since there is much toil and expended effort required to "*kasher*" the entire supply of cookware, the halacha renders the entire *ta'arovet* permitted. The Ra'ah however (*Bedek ha-Bayit*, ad loc) argues that since the forbidden pot is *nikkar* (since whichever pot is forbidden, it is clearly visible) the entire *ta'arovet* is forbidden until every pot is "*kashered*." R. Shkop explains that the Ra'ah believes that a *ta'arovet* in which the *issur* is *nikkar* can never become *batel* even on a Torah level. Therefore, he is unconcerned with the amount of effort required to bring about a permissive situation. While this case is somewhat different than the status of copepods in the water (the pots are *yavesh be-yavesh, min be-minoh*, while the copepods in the water are *yavesh be-lach, min be-she-eino minoh*), it seems that R. Shkop assumes that these two approaches are valid in all realms of *bitul be-ta'arovet*. R. Chayim Oberlander (ibid, p. 152) argues that since the *Shulchan Aruch* (YD 102:4) follows the opinion of the Rashba, it must be the halachic conclusion that a *ta'arovet* in which the *issur* is *nikkar*, is *batel* at least on a Torah level. This would mean that the copepods are considered *batel* in the water as far as the Torah is concerned and we are left with the rabbinic strictures of *davar she-yesh lo matirim* and possibly of *biryot* (to be discussed later), both inhibiting *bitul* on a rabbinic level.<sup>65,66</sup>

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65. The *Shulchan Aruch*, however, may not be quite that unambiguous. The *Mechaber* says that although normally a *davar she-yesh lo matirim* prevents *bitul* (albeit on a rabbinic level), when application of the *matir* requires a *tircha yeteirah* (extra expended effort), the rabbis suspended their decree and allowed *bitul* to proceed as it would have normally. This does not outwardly contradict the opinion

#### d. *Divrei Chayim's* approach

When asked about the permissibility of a certain bug-infested water source, *Shu"t Divrei Chayim* (YD 54) cited an alternate paradigmatic case to prove that whenever the *issur* is *nikkar*, it is never *batel*. The Rambam (ibid 3:15) and Rashba (*Torat ha-Bayit ha-Aroch* 3:6 [90b in Warsaw edition]) disagree regarding the permissibility of semi-solid butter obtained from a non-Jew, since the Gemara postulates that milk from non-kosher sources cannot form butter (the concern is that the *kum she-ba-chem'ah* (semi-liquid accompaniment) contains both kosher and non-kosher milk). The Rambam is strict despite this limitation, because the *kum she-ba-chem'ah* is *nikkar* on its own and therefore cannot form a functional *ta'arovet*. The Rashba is lenient as he claims that even solid objects that are individually identifiable can become *batel* amongst other solids in an appropriate volume. The *Beit Yosef* (YD 116) reads these two opinions as claiming that since nothing can be positively identified as *assur* – the *issur* is *batel* nonetheless.

The *Divrei Chayim* posits that the disagreement between the Rambam and Rashba involves cases where the *issur* is *nikkar* but cannot be identified and removed (such as creatures that flowed through "contemporary" filters) and even in such cases the Rambam is stringent.<sup>67</sup> The *Divrei Chayim* proceeds to

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of the Ra'ah since he will claim that the *Mechaber's* argument is correct, albeit limited to cases where the *issur* is not *nikkar*. Since the *Mechaber* did not openly contend that the *issur* was indeed *nikkar* in this case, it seems difficult to conclude what his position is on this matter.

66. The *Sha'arei Yosher* also brings proofs from a certain halacha relating to a *ta'arovet* of permissible and forbidden *sechach*, in which the *Mechaber* also seems to adopt the lenient position. However, the rest of the piece in *Sha'arei Yosher* is devoted to explaining why the case of *sechach* may not be paradigmatic for the rest of halacha. It seems difficult to conclude from these cases that the *Mechaber* actually held this lenient position.

prohibit the water he was questioned about and goes so far as to say that if a person could move to a location that is free from these troubles and does not do so, he is considered to be intentionally violating the prohibition, *meizid*, and prohibited from drinking the water even for *pikuach nefesh*!<sup>68</sup>

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67. He cites a *Shu"t ha-Rashba* (84 [unclear which responsum he refers to]) who says that regarding a *chatichah ha-re'uyah le-hitkabad bah*, one must search for the *chatichah* and remove it in order to permit the *ta'arovet*. The *Divrei Chayim* explains the disagreement between the Rambam and Rashba in this way so as to insure no inconsistencies between the Rashba in this responsum and his opinion in *Torat ha-Bayit*.

68. There are two points however, that require clarification before applying the *Divrei Chayim's* approach to the copepod question. The Rambam does not unequivocally adopt the position attributed to him; he cites some of the *Geonim* (*miktzat Ge'onim*) who were stringent and some who were lenient, although the *Divrei Chayim* assumes that Rambam adopts the former position. In the next halacha, the Rambam claims (*yir'eh li*) that if all the milk were boiled off then the butter would be permitted – indicating that he follows the stringent opinion. Since the Rambam does not explicitly make this claim, it is quite possible that he is saying that even for those who are stringent, boiling off the excess milk should alleviate the problem, without offering his own opinion on the matter. A rabbinic decree (*gezeirah*) is enacted to protect people from a possible violation of Torah law. Perhaps the disagreement among the *Geonim* revolves around the disagreement between the Rambam and the Rashba. Those who favor the Rashba's opinion (an *issur* that is *nikkar* is *batel* on a Torah level) will not enact a *gezeirah* to "protect" violation of another rabbinic prohibition. Uncharacteristically, the *Mechaber* (*Shulchan Aruch* YD 115:3) is similarly ambiguous. He states that one should not protest against the lenient practice in this matter; however, if the majority of the community acts stringently, then one should not deviate from the common practice. The normative decision does not seem to be in accordance with the stringent opinion but rather dependent on local custom. Moreover, the *Tzemach Tzedek* (*Shu"t Tzmach Tzedek* YD 70, arguing on his grandfather in *Shulchan Aruch ha-Rav* (466:9)), argues that the Rambam's opinion is an extreme stringency (*chumra gedolah*)

### e. *Torach Gadol*

The question according to R. Shkop's approach turns on how to define *torach gadol*. Based on *Chazon Ish* (YD 14:6), R. Vaye points out that the term *torach* is defined as difficulty in actually identifying the *issur*, as opposed to difficulty in merely finding it – as is the case by the copepods. He concludes that (aside from the question of *biryah*) such creatures should be *batel*.<sup>69</sup> Furthermore, it seems logical to assume that whether or not one object can become *batel* in a mixture is independent of advances in modern technology. The impression given by the halachot of *Issur ve-Heter* is that *bitul* is not a scientific phenomenon, but rather one mandated by the Torah. As such, it seems reasonable to assume that if in the past an object could not be removed and was deemed *batel*, the same criteria

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and is not necessarily halachically mandated.

Second, the proof from the *Shu"t ha-Rashba* does not definitively apply to the copepods. By a *chatichah ha-re'uyah le-hitkabel bah*, the *issur* is identifiable as such – you can look at the piece in question and state that this piece is pork. As mentioned previously, the copepods are not [easily] identifiable as such. Often a microscope is needed to positively distinguish a copepod from a speck of dust and is definitely required to specifically distinguish full copepods from their exoskeletal remnants. R. Moshe Vaye (*Bedikat ha-Mazon ka-Halacha*, chapter 7 footnote 1) cites both R. Shlomo Zalman Auerbach and R. Yosef Shalom Elyashiv as positing that something that is not a *biryah* and cannot be positively identified without much toil (*torach gadol*) is *batel* in a *ta'arovet*. While the intact copepods do present a problem of a *biryah* (to be discussed) that would only prevent *bitul* on a rabbinic level, having already become *batel* on a Torah level. Moreover, a careful reading of the *Shu"t Tzemach Tzedek* (YD 70) reveals that he indeed agreed to this proposition as well. The question he dealt with concerned fragments of creatures that could not be filtered. After rejecting the Rambam's opinion as unnecessarily stringent, he claims that these creatures should be *batel* because they are not recognizable as *biryot*. He could have, but does not say, that they are *batel* because they are not *biryot*, but rather because they are not **recognizable** as *biryot*. This also seems to be the position of *Iggerot Moshe* YD (4:2).



should apply today. R. Vaye seems to be pointing out that *torach* fits into this very scheme – it is the ability to identify the *issur* that is determining, not the technical ability to remove it. This also seems to be the thrust of the *Tzemach Tzedek's* argument (ibid) as well.

R. Bistrisky takes the opposite approach and argues that *torach* is defined as the amount of physical effort needed to remove an object from a *ta'arovet*.<sup>70</sup> There is no more effort required to turn on a faucet running through a filter than to turn on an unfiltered faucet. As such, even according to the *poskim* cited above, this is a case where there is no *torach* required at all and therefore the copepods are not *batel*.<sup>71</sup>

## V. Bitul of a Biryah

### a. Bavli

The Gemara in *Chullin* 100a (as explained by Tosafot ibid.

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69. *Bedikat ha-Mazon ka-Halachah*, ibid.

70. *Ohr Yisrael*, p. 212.

71. The *Avnei Nezer* (YD 81) offers an additional interesting point of leniency. When a person knows that water may contain *sheratzim*, drinking that water and ingesting those *sheratzim* is not categorically considered to be *mit'asek* (a prohibited action committed in the midst of a permitted one with no intention of committing the prohibited action), but rather willful violation (discussed by R. Shlomo Zalman Auerbach in *Shu"t Minchat Shlomo* 2:61:1). The *Avnei Nezer*, however, notes that perhaps one could argue that the water surrounding the *sheretz* prevents the *sheretz* from actually coming in contact with the person's throat (*chotzetz*). Although one food item cannot act as a *chatzitzah* for another food item, he suggests that perhaps a liquid in fact can act as such a *chatzitzah* (he claims to be unsure as to this last point and as such will not rely on it entirely). Since the probability of a *sheretz* actually coming in contact with the throat is remote, the water should be permissible. He claims that even if one were to ingest a *sheretz* in this matter (that it would touch the throat), since it is only a remote possibility that it will do so (not a *pesik reishei*), it is

s.v. *biryah*) posits that an *issur* that is a complete creature, a *biryah*, cannot be *batel* in any mixture regardless of the quantity (codified in *Shulchan Aruch* YD 100:1). A priori, this hindrance to the normal rules of *bitul* exists because a *biryah* is considered an entity unto itself, an object whose identity cannot be negated among other items and hence never *batel*.<sup>72</sup> Most *poskim* assume that this *bitul* prevention is of rabbinic origin but that the item could be considered *batel* on a Torah level.<sup>73</sup> The Maharil, however, attempts to prove that Tosafot may have assumed that a *biryah* is not *batel* even on a Torah level.<sup>74</sup> The *Pri Chadash* (100:3) notes, however, that this seems to contradict Tosafot's position in many places in the Gemara. Moreover, the "proof" from Tosafot is a rather forced interpretation, and he notes that the general consensus in fact is that Tosafot also held that the prevention of *bitul* by a *biryah* is of rabbinic origin.

### **b. Yerushalmi**

The *Yerushalmi Terumot* (10:5), however, as understood by R. Shimshon of Shantz (ibid) argues that a non-kosher fish can be *batel* in 960 kosher fish, despite its status as a *biryah*.<sup>75</sup> This claim is in apparent contradiction to the Gemara (*Bavli*) in *Chullin*. The *Ohr Zaru'a* (4:264) cites an explanation by R. Nissim Gaon that reinterprets the *Yerushalmi* to refer to the exuding

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considered an unintended action (*davar she-eino mitkaven*).

72. An alternate, subtler, approach is to argue that a *biryah* cannot even form a *ta'arovet* with other substances. Since its identity is always retained, the mixture of the *biryah* with other substances is not defined as a mixture but as two unmixed separate objects.

73. Cf. Rambam ibid. (16:6).

74. *Shu"t Maharil* (76), based on Tosafot, *Bava Metzi'a* 6b, s.v. *kafatz*.

75. The *Shu"t ha-Rashba* (1:271) already notes that he does not understand the requirement of specifically 960. While it mathematically comes out to be 16 x 60 (60 being the "magic" number in *Hilchot ta'arovet*), this function does not seem to have any other

flavor, *ta'am* of the non-kosher fish. He claims that the non-kosher fish as a *biryah* is never *batel* (as per the Gemara *Chullin*), but its *ta'am* can be *batel*, but only in 960. The *Ohr Zaru'a* himself, however, disagrees with this claim and argues that even for the *Bavli*, while the fish itself is never *batel*, if it were removed, its *ta'am* would be *batel* in 60 like the *ta'am* of any other *issur*. This opinion is agreed to by *Shulchan Aruch* YD (100:2).

The Ra'ah<sup>76</sup> cites the Ramban for a similar but more limited application, that although the *ta'am* of "regular" *issurim* is *batel* in 60, certain sharp *te'amim* require a larger quantity. He argues that the *Yerushalmi* is referring not to the fish itself, but to the juicy substance of the fish, *tzir dagim* – a sharp *ta'am* that is not *batel* in 60. The Rashba<sup>77</sup> agrees with R. Shimshon of Shantz and the *Ohr Zaru'a* and explains that since the halachot of *biryah* are only of rabbinic origin, he will not be stringent in an apparent disagreement between the Talmuds.

While this opinion is not cited by the *Shulchan Aruch*, many *poskim* are willing to incorporate the Rashba's opinion in forming decisions in association with other criteria as well (e.g. using this as a *safek* to form a *sfek sfeika*). There are *poskim* who are even willing to create *sfek sfeikot* even when both presumptions are against the normative position of the *Shulchan Aruch*.<sup>78</sup> Moreover, the *Ketav Sofer* argues that when the *biryah* is *pegumah me'atzmah*, inherently foul, perhaps similar to the chlorinated copepods, even the *Shulchan Aruch* would agree that it can be *batel* in a mixture of one to 960.

### c. Intact and identifiable creatures

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correlation in halacha.

76. *Bedek ha-Bayit*, *Bayit* 4, *Sha'ar* 1 (14a), s.v. 'od.

77. *Torat ha-Bayit*, *ibid*, and *Shu"t ha-Rashba* *ibid*.

78. Cf. *Machazik Berachah* (52:5), *Shu"t Mishnat Rabbi Eliezer* YD (2:1) and sources cited in *Shu"t Yechaveh Da'at* 5:54.

While the added chlorine manages to kill almost all copepods before they reach the faucet, it also helps keep them intact – making them classic examples of *biryot*.<sup>79</sup> However, as mentioned earlier, some of what appear to be copepods are merely the exoskeletal remains and therefore are not entirely intact. The halachot of *biryah* apply only to entirely intact creatures (YD 100:1) and a *ta'arovet* reverts to the standard regulations of *bitul* when the creature is incomplete (YD 100:1), even if the missing component is not necessary to maintain life (“*eiver she-ein ha-neshamah teluyah bah*”).<sup>80</sup> This detail is relevant in two respects. First, as previously noted, a small percentage of the white specks in the water are only the molten exoskeletons

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79. Another interesting ramification of adding the chlorine is rendering the copepods somewhat destroyed – *nifsedu legamrei*. The *Shulchan Aruch* (YD 84:17) states that a person may eat a “burned *sheretz*” (*saruf*) for medicinal purposes since it is considered like dust. The *Minchat Ya’akov* (46:9) cites several *poskim* as permitting such a person to “burn” a *sheretz* for this purpose and that even a healthy person may eat such a *sheretz* as long as he does not “burn” it for this purpose (cited by *Pri Megadim* (MZ 84:23)). The *Yad Avraham* (YD 84), however, explains that a healthy person may not eat such a *sheretz* because the very act of specifically eating this *sheretz* shows that he does not consider it to be as dust but rather as something desirable (*achsheveih*). R. Raitport argues that the chlorination process is entirely parallel to the “burning” discussed by the *Mechaber* (*Kuntres*, 33). There is clearly no problem of *achsheveih* here since nobody actually desires to eat the copepods and, furthermore, R. Chayim Ozer Grodzinsky claims that *achsheveih* only applies when eating independent *issurim*, i.e. not as part of a *ta'arovet* (*Shu”t Achi’ezer* 3:33). While both burning and chlorination leave part of the *sheretz* intact (not just a pile of ash) it would seem that fire is more thoroughly destructive than chlorine; burning leaves the *sheretz* charred, while chlorination keeps most of their bodies intact. The *poskim* must determine whether the copepods are indeed considered sufficiently “burned” and how that relates to the question of *achsheveih* (as well as possible ramifications for questions of *tum’ah*).

80. *Shach* YD (100:6).

of copepods, not considered *biryot*, and the regular rules of *bitul be-ta'arovet* should apply. Moreover, many of the actual copepods that make it to the faucet are no longer completely intact, missing antennae, legs or other appendages. Second, it relates to the status of cooked copepods. Very preliminary studies have shown that most of the copepods present in agitated (mixed or otherwise disturbed), boiling water are no longer completely intact.

It is important to note that even regarding the intact copepods, *Shu"t Mishkenot Ya'akov* (YD 36) limits the halachot of *biryah* only to creatures that are recognizable as such, but are too difficult to find in their current mixtures ("*omedet be'einah u-bifnei atzmah ve-nikkeret, rak she'eino yadu'a eizeh ha-asurah*") and when they can exist on their own outside the *ta'arovet*.<sup>81</sup> Since the copepods are arguably recognizable only as specks and not as creatures, they should be exempt from *hilchot biryah*.<sup>82</sup>

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81. He proves this from *Beitzah* 3b.

82. There are several other criteria that are required for an *issur* to count as a *biryah*. One is that it must be *assur mi-techilat beriyato*, forbidden from the time of its creation (*Shulchan Aruch* YD (100:1). R. Yonatan Eyebeshutz (*Kereit u-Feleiti* YD (100:4)) argues that creatures that grow from (in) fruits no longer connected to trees should not count as *biryot*, since the creatures only become *assur* when they exit the fruit and as such are not *assur mi-techilat beriyatan*. See R. Shlomo Kluger (*Shu"t Tuv Ta'am va-Da'at* (3:1:160), and *ibid* (2:162). This position is also suggested by *Yeshu'ot Ya'akov* (YD 84:1) and accepted by R. Betzalel ha-Kohen of Vilna, cited by *Mateh Yehonatan* YD 100) who extends this position to apply to creatures that grow from (in) water since they too only become forbidden once they leave their original water source. Many *poskim* however reject this approach. The *Tur ha-Even* (26) argues that *assur mi-techilat beriyato* means to say that nothing physical must take place to make this *issur* into a *biryah*. Since these water creatures are unaffected by their journey into different waters and are then considered to be forbidden, they are within the realm of *assurim mi-tichilat beriyatan*. A similar stringent

## VI. Deliberately nullifying an *issur* (*bitul issur*)

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approach is offered by the *Chavot Da'at* (100:5) as well as Chida (*Machazik Berachah* 84:10). Both the *Pri Megadim* (*Siftei Da'at* 84:31) and R. Ovadiah Yosef (*Shu"t Yechaveh Da'at* (6:47) in the footnote; R. Yosef has a lengthy discussion there about this issue and cites numerous positions on this issue) claim that none of the *poskim* seriously entertain R. Eyebeschut's approach and it is ultimately rejected in halachic decision-making.

A second criterion cited by many *poskim* is that if an *issur* was created as part of a *ta'arovet*, then it is more amenable to *bitul*. The *Mechaber* (OC 320:2) states that although juice that comes out of grapes on Shabbat is forbidden, nonetheless if the juice comes out directly into already prepared (from before Shabbat) juice, the mixture is permitted for use on Shabbat. The *Magen Avraham* (320:5) explains that although the *issur* (juice that came out on Shabbat) is a *davar she-yesh lo matirin* (it will be permitted after Shabbat anyway), since it was never *nikkar* on its own outside of the *ta'arovet*, it is *batel*. The *Mordechai* (*Chullin* 737) takes the diametrically opposed approach; *bitul* can only occur when the *issur* existed independently before becoming mixed in the *ta'arovet* (quoted in *Shulchan Aruch*, EH 169:40). R. Raitport (*Kuntres*, p. 23) explains that the *Mordechai's* logic only applies in the very limited case of concomitant creation of both the *issur* and the *heter*. However, when the *heter* existed previously, and the *issur* was created into a *ta'arovet* with that *heter*, the *Mordechai* agrees that *bitul* is possible (see however, *Shach* YD (14:12), *Sha'ar ha-Melech*, *Hilchot Yom Tov* (5:20), *Shu"t Avnei Nezer* YD 81 and *Shu"t Noda' bi-Yehudah* YD (2:54 – 55)).

The *Avnei Nezer* (YD 79:1) explains that usage of the leniency of *noldu be-ta'arovet* is limited, however, to cases where the prohibition is one of *davar she-yesh lo matirin*. The applicability of these criteria would depend on the aforementioned disagreement between R. Eyebeschut and the *Pri Megadim* as to the reason that an *issur ha-nikkar* is not *batel*. Even if we are to assume like R. Eyebeschut that it is only because of *davar she-yesh lo matirin*, the *poskim* need to determine whether or not this leniency is valid since the copepods also present a problem of *biryah*. It is unclear whether or not *noldu be-ta'arovet* is sufficient grounds to remove only part of a potential *issur* – meaning that even if we alleviate the problem of *davar she-yesh lo matirin*, we are nonetheless still left with the question of *biryah*.

*le-chatchilah*)

The deliberate negation of an *issur*, *bitul issur le-chatchilah*, in any manner, is prohibited. Regarding already created mixtures (when the *issur* was not deliberately placed in the *ta'arovet*) the *Mechaber* limits *bitul issur le-chatchilah* to Torah prohibitions while the *Ramo* assumes that the accepted practice is to include rabbinic prohibitions as well (YD 99:6). Therefore, if boiling water were to render copepods no longer completely intact, this practice would be permitted by the *Mechaber* and forbidden by *Ramo*. However, the boiling may also render the copepods no longer *nikkar* and, therefore, the permissibility of this action for the *Mechaber* would depend on the aforementioned disagreement of whether *nikkar ha-issur* presents a Torah or rabbinic prohibition.

The *Ran*, however, explains that the prohibition applies only to a person who intentionally negates an *issur* so that he may benefit from that *issur*, when he actively desires that the *issur* add some flavor or substance to this *ta'arovet*.<sup>83</sup> If the presence of the *issur* adds nothing to the benefit derived, there is no prohibition of *bitul issur le-chatchilah*. The *Mechaber* (84:13) uses this logic to permit heating honey that has pieces of bees in it so that it may become less viscous and amenable to sifting; the *Tzemach Tzedek* (41) extends this to permit making liquor out of infested fruits for this very reason.<sup>84</sup> According to the *Tzemach Tzedek*, drinking boiled copepod-infested drinking water should also be permitted, if boiling the water were to entirely eradicate

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83. *Avodah Zarah*, 12b (*Hilchot ha-Rif*) s.v. *iba'aya*, also in *Maharam* of *Rothenburg* (190) and *Shu"t ha-Rashba* (1:467).

84. Cf. *Shu"t Yabi'a Omer* YD (1:6:5, 1:8). Also see *Yalkut Yosef* 9, p. 245 who notes that although the *Kenesset ha-Gedolah* argues that *bitul issur le-chatchilah* applies to objects that are certainly infested (as opposed to those only questionably so), his opinion is rejected by the later *poskim*.

any visual sign of copepod presence in the water (so there would be no question of *nikkar ha-issur*).<sup>85</sup> Precise studies with adequate controls are necessary, however, to determine precisely what temperature and how much agitation is necessary to render all the copepods no longer intact.

## VII. Prevalent minorities (*mi'ut ha-matzui*)

### a. Types of mixtures

The halacha defines two types of mixtures, each with its own set of very intricate regulations, using two paradigmatic cases.<sup>86</sup> Many *poskim* have discussed these issues at great length, especially regarding the applicability and distinction between these cases. The following will merely be a simplistic outline of this intricate, complex issue. The first case is where a piece of meat is found on the street in a locale that has nine kosher butchers and one non-kosher butcher. Since the piece was not found inside any of the stores, we assume that it came from the majority of stores (*holchin achar ha-rov*) and hence is kosher. However, if a person in the same locale bought a piece of meat but cannot remember from which store he bought it, we are stringent and prohibit the meat. Since the uncertainty relates to which store the person entered, which is permanent (the store cannot be found anywhere else), the halacha states that *kol kavu'a ke-mechtzeh al mechtzeh dami*, loosely translated as, when we are dealing with permanent factors, we ignore the

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85. It is important to note that in the *Mechaber's* case, the purpose of the boiling is to remove the bees entirely from the mixture; the only question is regarding the *ta'am* that the bees have exuded into the honey. The *Tzemach Tzedek*, however, goes farther and is even willing to permit the liquor, even though the insects have not been removed. The *Tzemach Tzedek's* case is entirely parallel to our water even if the *Mechaber's* might not be entirely so.

86. *Pesachim* 9b, *Ketubot* 15a, *Chullin* 95a, *Niddah* 18a.



simple majority and assume that the chance of incidence is 50% (thereby prohibiting the meat).

**b. *Pirash min ha-rov***

R. Hershel Schachter argues that since only some glasses of water contain copepods, drawing water from the reservoir is parallel to finding a piece of meat outside of the stores, since in both cases there is a certain likelihood that the piece (water) in question is permitted. The question that must be addressed is the status of this cup of water that has been drawn (and hence removed) from the water distribution system. As such we should follow the majority principle and not categorically prohibit the water. Since there are no distinct entities in the reservoir system that are copepod infested and others that are not, the principles of *holchin achar ha-rov* should apply.

From the Torah's perspective, a person must only concern himself with the incidence of *issur* when that frequency exceeds 51%, and at that point we can say *holchin achar ha-rov*. If a certain fruit is bug infested most of the time (more than half), then the Torah prohibits consuming that fruit if it is not first checked and determined to be bugfree. However, if the incidence of *issur* is less than 51%, there is no checking requirement. However, by rabbinic decree, if the incidence of *issur* is less than half but more than a "prevalent minority" (*mi'ut ha-matzui*), one must check that produce before consumption.<sup>87</sup> For example, although there are various pathologies that render an animal a *tereifah*, we do not check each slaughtered animal for all of these signs, since their frequency is less than the required threshold (less than a *mi'ut ha-matzui*). Pathologies of the lung, however (*sirchot ha-rei'ah*), are determined to constitute a *mi'ut ha-matzui* and as such must be checked by rabbinic decree.<sup>88</sup>

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87. *Pri Megadim YD, Sifte Da'at* (84:28).

The same regulations apply to checking produce (and water) for insect infestation.

### c. Determining *mi'ut ha-matzui*

The precise frequency that determines prevalence (*metzi'ut*) is a matter of dispute among *poskim*. The Rivash (*Shu"t Rivash* 191) posits that the necessary frequency is close to one half (*karov le-mechetzeh*) as well as being a normal occurrence (*ragil li-hiyot*). This is only slightly less than the 51% frequency that the Torah requires for checking. The *Mishkenot Ya'akov* (YD 17) goes to great lengths to prove that *mi'ut ha-matzui* is defined as a 10% occurrence, and R. Shlomo Zalman Auerbach is oft quoted as endorsing this opinion.<sup>89</sup> R. Schachter frequently cites R. Yosef Dov Soloveitchik's opinion that *mi'ut ha-matzui* should be approximately 14.5%.<sup>90</sup> R. Shemuel Wozner adopts a more subjective approach.<sup>91</sup> Rather than the halachic definition of *mi'ut ha-matzui* being dependent upon specific percentages, the halacha looks to whether the prevalence of the incidence of the *mi'ut* in question is "rather prevalent" (*matzui harbeh*). He vaguely defines this requirement that if in a random sampling of mixtures, most mixtures will have the *mi'ut* accompany the *rov*, it is considered *matzui*.<sup>92</sup> R. Yosef Shalom Elyashiv is also

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88. *Torat ha-Bayit ha-Aroch* (3:2) [33b in the Warsaw edition], *Shach* YD (39:8), more forcefully in *Aroch mi-Shach* YD (39) and *Gr"a* YD (1:4).

89. *Bedikat ha-Mazon ka-Halacha*, p. 181. Also see *Shu"t Beit Ephrayim* YD 6 on the issue of a *safek issur*.

90. Based on what he determined was the actual incidence of *sirchot* in cow lungs in his time.

91. *Shu"t Shevet ha-Levi* YD (4:81).

92. It seems that he is trying to say that in five groups of one hundred items each, each group has at least 10 instances of the *mi'ut* and not that four groups have 15 each and the fifth has none at all (even though in the larger picture the latter scenario has a higher

quoted as defining *matzui* as less than 10%.<sup>93</sup>

The most important element of this equation is to determine the functional unit of these calculations; we must determine the sample size before calculating frequencies. R. Hershel Schachter has argued that the unit should be defined by the normal amount of water drunk at a meal by a single person, assumed to be approximately 16 ounces. Therefore, according to the *Mishkenot Ya'akov*, if copepods are found in one out of every 10 glasses of water (1 copepod in 160 ounces), checking is required before drinking. Other *poskim* have defined other units to be used for this purpose and the conclusions should be drawn appropriately.

#### d. Reality

Testing conducted for the Orthodox Union, as well as DEP testing in response to consumer complaints, revealed varying concentrations. The DEP checked various complainants' homes as well as various water mains throughout the five boroughs of New York City. They claim "the number of Cyclops [*D. thomasi*] in the samples varied from 0 to 22 per liter, with an average value of 9 per liter. The number of copepods present in these samples varied for each borough. Although the Brooklyn samples contained the largest number of copepods, no conclusion can be drawn about the distribution of copepods through the city because of the small sample size and the bias in sampling locations."

As of now it seems that no conclusion can be drawn about the absolute concentration of copepods at the faucet. It is clear, however, that studies of copepod populations and their seasonal cycling in the reservoirs has little to do with their presence in

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percentage of *issur* in the entire sample).

93. *Bedikat ha-Mazon ka-Halacha*, *ibid.*

tap water. First, the independent studies performed by and for the Orthodox Union were scientifically imprecise, with no proper protocol for obtaining, analyzing or quantifying the finds. Second, the DEP analysis used 500uM mesh filters to obtain their samples; the human eye can distinguish between objects much smaller than that and copepods smaller than 500 uM are also halachically meaningful. Last, it must be understood that various communities will have various degrees of infestation. Testing conducted at several homes within one block of each other displayed highly varied results. Even at faucets where copepods were present at specific times, none could be found two months later. Different water currents at various points in the system, as well as having no dead ends between terminal branches of the system, vary the flow of water throughout the distribution. It is furthermore unclear how the changing weather affects this distribution. One of the largest water holding tanks in the world is under Staten Island, greatly altering the distribution of copepods within those waters. Pipes to different parts of the Island stem from different areas of this tank and the copepod distribution at all parts of the tank is not equal. Parts of Queens receive some components of their water from natural springs found within the borough, further altering the distribution. Lastly, it is important to note that nothing can be concluded regarding the seasonal variability of the incidents of copepods in tap water since people have only begun to look for them since June 2004. It will take several years of extensive testing in very many areas of the city to be able to precisely analyze the frequency of incidence of copepods in the tap water throughout the year. For all of these reasons, the frequency of copepod infestation at the tap is highly variable. In certain places it definitely reaches beyond the threshold of *mi'ut ha-matzui* (perhaps even as defined by the Rivash) while in others the incidence is almost nonexistent.

**e. Possible halachic considerations**

It may be the case that the rabbinic decree of requiring checking for an *issur* occurring at as small an incidence as *mi'ut ha-matzui* applies only to Torah prohibitions. With regard to uncertainty in Torah prohibitions, even when there is less than a 50% frequency (*safek de-oraita*), the rule is that we are stringent. Therefore the rabbis instituted checking for a *mi'ut ha-matzui* as well. However, since uncertainty in rabbinic prohibition, *sfeika derabbanan*, is ruled leniently, perhaps there is no requirement to check even for a *mi'ut ha-matzui*. The various proofs brought by all the *poskim* (except for one<sup>94</sup>) to prove the precise frequency of *mi'ut ha-matzui* all deal with Torah prohibitions. If we are to assume that the copepods present only a rabbinic prohibition, either because they are *batel* on a Torah level (because they are not identifiable) or for any of the aforementioned reasons, there is nonetheless no reason to obligate checking.

### VIII. Filtration

Should the *poskim* conclude that drinking copepod-infest water is indeed forbidden, filtering the water is a rather straightforward method of avoiding this problem. There are various models and varieties that can remove various substances from the water. The simplest type, a particle filter, is sufficient to alleviate the copepod concern, while other filtering elements such as activated carbon are added for aesthetic reasons. Some filter all water entering the home, some under the sink, and some on the faucet. Care must be taken when choosing a specific model in that not all models can filter hot water. The most important criteria of filters for these purposes is the pore size of the filter itself, measured in microns (uM). While many filters

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94. The one case that deals with a rabbinic prohibition is checking for *chametz*, *bedikat chametz* in *Pesachim* 4b. (See *Maggid Mishnah*, *Hilchot Chametz u-Matzah* 2:12 and *Gra* (YD 1:4).

advertise a specific pore size, closer examination reveals that this is more often than not a claim of nominal pore size, not absolute pore size. This means that a 50uM filter will catch most, **but not all** 50uM objects. However, as object size increases, so does the filtration rate of these units. Since the average person cannot distinguish objects smaller than 50uM, a filter with such a pore size should suffice, as the vast majority of the copepods found at the tap are adults of much larger dimensions.

The permissibility of filtration on Shabbat is very complex, as it relates to the prohibitions of *borer* and *meraked* and is beyond the scope of this paper, but a rabbi should be consulted by people who install filtration systems on their water supply.

## IX. Conclusions

The issue of copepods is an issue that touches the very practical core of many people's lives and is of tremendous importance. Water is a basic necessity and must be respected as such. This is not only a question about single faucets, but also how people will relate to neighbors and friends who do not filter their water. It will reflect kashrut policies in restaurants as well as food production factories. It will also have a heavy impact during the hot summers, especially on the very young and the very old whose hydration needs increase dramatically with the outside temperature. It will also impact on hospitals and old age homes, where patients and residents may not have as much say in the food they eat. This is one of the more profound and influential *piskei halacha* of our time. Hopefully this article has served as a background to understanding some of these complex ideas.









# Machine-Baked *Shmurah* Matzoh for the Seder

*Rabbi Israel Botnick*

## Introduction

The introduction of automated machinery in the process of baking matzoh has raised a number of questions regarding the kashrut of these matzot for Pesach, and regarding their use for the mitzvah of eating matzoh on Pesach at the Seder.

Until the 19th century, the matzoh baking process had remained essentially the same, kneading the dough, rolling the dough, and all other activities up to the point where the dough is put in the oven were all done by hand. This changed in 1838 in France, when a machine was invented which assisted in the baking process. These and similar machines were first used in France and Western Europe, and eventually spread to Eastern Europe, Israel, and America.<sup>1</sup>

The first machines were useful only for limited parts of the baking process and were operated manually, requiring

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1. *Hachashmal Behalacha*, pp. 84 and 102; *Otzar Yisrael*, "Matzoh". Matzot began to be baked by machine in Jerusalem in 1863. Matzot were not baked by machine in America until close to the end of the 19th century. Rabbi Dov Ber Manischewitz came to America in the mid 1880's and opened a matzoh bakery in Cincinnati in 1888. Aron Streit opened the Streit's Matzoh Bakery on the Lower East Side in 1916.

a person to turn a hand crank. Over time, however, the machinery was improved, incorporating alternate sources of energy such as electricity, and requiring less human intervention. Today, the entire process of baking matzoh can be fully automated and computer sequenced, with human intervention necessary only to start the machinery.

The introduction of these machines for baking matzoh generated a great deal of discussion regarding their permissibility. When matzot began to be baked by machine in Eastern Europe in 1857, a group of rabbis led by Rabbi Shlomo Kluger of Brodie printed a compilation of responsa entitled *Modaah Le-vait Yisrael*, detailing their arguments against this innovation.<sup>2</sup> Soon afterwards, another group of rabbis led by Rabbi Yosef Shaul Nathanson of Lvov printed *Bitul Modaah*, to counter the arguments raised in the *Moda'ah Le'vait Yisrael*.<sup>3</sup>

Many arguments against the machine-baked matzot were related to potential problems of the matzot becoming *chametz*. Some of the concerns were for pieces of dough getting caught in the machinery, or the heat of the machinery causing the dough to ferment faster. Another concern with the earlier machines was that they worked by kneading and rolling out large square pieces of dough, from which round matzot would be cut out. The dough which

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2. Rabbi Shlomo Kluger is the author of *Responsa Ha'elef Lecha Shlomo*. Others who joined him include Rabbi Chaim Halberstam of Sans, author of *Responsa Divrei Chaim*, and the Gerrer Rebbe, Rabbi Yitzchok Meir Alter, author of *Chidushei HaRim*.

3. Rabbi Yosef Shaul Nathanson is the author of *Responsa Shoel U'meishiv*. Among the others who joined him were Rabbi Yisrael Lifshutz, author of *Tiferet Yisrael*, Rabbi Avrohom Shmuel Binyamin Sofer, Author of *Responsa Ktav Sofer*, and Rabbi Ya'akov Ettlinger, author of *Aruch La-ner* and *Responsa Binyan Tzion*.

was left over after the cutting was mixed in with the next batch of dough. The argument against this practice was that this leftover dough may have already begun to ferment. The resolution to this problem was to change the shape of the matzot, making them square instead of round, in order to minimize the amount of dough left over after each batch. This is the reason why machine-baked matzot today are square, whereas hand-baked matzot have the traditional round shape.<sup>4</sup>

After many years, the machine-baking process became standardized, and the consensus of *poskim* was that, if proper machinery is used, with adequate and competent supervision, then the matzot are free from concerns of *chametz*.<sup>5</sup> In some ways the machine-baked matzot can be superior in this regard, as machines can overcome some of the problems of the hand-baking process. Baking matzot by hand on a large scale requires workers to knead dough for extended periods of time, which can lead to poorly mixed dough. The machine-baking process solves this and other potential problems of human error.

One very substantive issue related to machine-baked matzoh is whether machine-baked matzot, even if free from *chametz*, can be used at the Pesach seder to fulfill the mitzvah of *achilat matzoh* (eating matzoh). The mitzvah

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4. Some *poskim* maintain that it is preferable to use round matzot on Pesach since the use of round matzot on Pesach is an ancient *minhag* with various reasons behind it (*Responsa Mahari Assad, Orach Chaim* # 157). Others argue that the square shape is acceptable, and is reminiscent of the *mizbeach*, and the *batim* of the *tefillin*, which are square.

5. Rabbi Shlomo Yosef Zevin, *Ha-Moadim Behalacha* pg. 245; *Responsa Dvar Avrohom* Vol. 3 # 27; *Responsa Maharsham* Vol. 2 # 16.

of eating matzoh is a biblical mitzvah which applies on the first night of Pesach (and again on the second night outside of Eretz Yisrael). The matzoh that is used to fulfill this mitzvah must be guarded against fermentation from the time of the harvesting of the grain, and is referred to as matzoh *shmurah* or *shmurah* matzoh.<sup>6</sup> The issue is whether matzoh that is baked by a machine can be considered as *shmurah* matzoh.

Since the literature on this topic spans many decades and refers to various types of machinery, any discussion of this topic is valid only for the specific machinery that it refers to. This article will address issues related to matzot that are baked with electrically powered, automated machinery that is controlled by a manual switch which starts the baking process.

### **The Obligation to Guard the Matzoh**

The commandment to guard the matzoh production is found in *Parshat Bo* (Exodus 12:17), "You shall guard the matzot."

The simple explanation of this verse is that the matzoh shall be guarded against any possibility of becoming *chametz* (fermentation).

The Rambam writes,

The Torah says that you shall guard the matzot, which means be careful with the matzoh and guard it from any possibility of becoming *chametz*.<sup>7</sup>

The Gemara in *Pesachim* 38b adds that when guarding

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6. *Shulchan Aruch, Orach Chaim* 453:4.

7. Rambam, *Hilchot Chametz U'matzoh* 5:9.

the matzoh, one must have the proper intention. The Mishnah (*Pesachim* 35a) states that if one were to bake matzot to bring with a *korban todah* (an offering of thanksgiving),<sup>8</sup> these matzot cannot be used to fulfill the mitzvah of eating matzoh on Pesach. The Gemara explains that although they are free of *chametz*, these matzot were not produced with the proper intention.

Rashi explains (*Pesachim* 38b),

The guarding of the matzoh from becoming *chametz* should be done with the intention that it is for the mitzvah of eating matzoh on Pesach.

According to Rashi, the matzot must be guarded specifically for the purpose of the mitzvah of eating matzoh on Pesach. Matzot produced without this intention cannot be used for the mitzvah of eating matzoh. That is why matzot which were baked with the intention that they will be brought with a *korban todah* cannot be used. The *Shulchan Aruch*, following this explanation of Rashi, rules that matzot used for the mitzvah of eating matzoh on Pesach must be guarded for the purpose of the mitzvah.<sup>9</sup>

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8. A *korban todah* was brought after going through a dangerous situation. The *korban* is brought together with 40 loaves of bread, 10 of *chametz* and 30 of matzoh.

9. *Shulchan Aruch*, *Orach Chaim* 460:1. Other *rishonim* who follow this explanation include Rashi to *Gittin* 10a and *Chulin* 12a; *Sheiltot d'Rav Achai Gaon Parshat Tzav Siman* 76; *Teshuvot Ha-Rashba* 1:26; *Ran* and *Ritva* to *Pesachim* 40a. Many authorities are of the opinion that this is a biblical requirement (*Bi'ur Halacha* 460:1).

There is some disagreement regarding the opinion of the Rambam. According to *Aruch Ha-shulchan* (*Orach Chaim* 453:20), the Rambam holds that matzot do not need to be guarded specifically for the purpose of the mitzvah. The guarding is purely as a safeguard

The mitzvah of matzoh is similar to the mitzvot of *tzitzit* and *tefillin*. The *tzitzit* strings must be made *lishmah*, specifically for the purpose of the mitzvah. The parchment used for the *parshiot* of the *tefillin* must be prepared *lishmah*, and the *parshiot* must be written *lishmah*. Being made for the purpose of the mitzvah makes the *tzitzit* and *tefillin* valid for mitzvah use. So, too, the matzot used for the mitzvah of eating matzoh on Pesach require the intention of *lishmah*. The only difference is that whereas the actual production of the *tzitzit* and *tefillin* requires the intention of *lishmah*, it is the guarding of the matzot, not the production, which must be done for the purpose of the mitzvah.

### When Must the Guarding of the Matzoh Begin?

There is a difference of opinion regarding when the supervision of the *shmurah matzoh* must begin. According to Rabbeinu Alfasi, (*Pesachim* 40a), it must be guarded *misha'at ketzira*, from the time that the grain is harvested. The opinion of Rabbeinu Asher is that it can begin to be guarded *misha'at techina*, from the start of the grinding of the grain. The *Shulchan Aruch* rules according to the first opinion, but adds that if this is not possible, the guarding can begin with the grinding of the grain.<sup>10</sup> In a case of great need, the guarding can begin *misha'at lisha*, at the time of the kneading of the dough.

Guarding the matzot for the purpose of the mitzvah is

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against *chametz*. According to Rabbi Mordechai Berkowitz, *Nof Mordechai* Vol. 1 (pg. 233), the Rambam agrees that the matzot used for the mitzvah must be guarded specifically for the purpose of the mitzvah. See also *Beit Yitzchok*, Vol. 17 pp. 108-110, and *Mikraei Kodesh*, Pesach, Vol. 2 Sec. 1-2.

10. *Orach Chaim* 453:1.

necessary only for matzoh that is used to fulfill the mitzvah of eating matzoh. Matzoh that is eaten during the remainder of Pesach does not have to be guarded for the purpose of the mitzvah. It must, however, be verified as being non-*chametz*.<sup>11</sup> It is preferable however, that all matzoh eaten throughout the entire Pesach be guarded for the purpose of the mitzvah, at least from the time of the kneading of the dough.<sup>12</sup>

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11. Rashi, *Pesachim* 40a. *Mishnah Berurah*, *Orach Chaim* 453:25.

12. Matzoh eaten during the remainder of Pesach does not have to be *shmurah*, but must be verified as being non-*chametz*. The Gemara states (*Pesachim* 40a), "Rav Huna stated: 'One may fill oneself up on the first night of Pesach with matzoh that was baked with dough purchased from non-Jews, as long as an olive's bulk of [*shmurah*] matzoh is eaten afterwards [in order to fulfill the mitzvah of eating matzoh]'. " Rashi explains that the dough purchased from non-Jews is examined before baking to ensure that it has not fermented. It does not qualify as *shmurah*, however, since it was not guarded even from the time of kneading (see also commentary of Rabbeinu Chananel).

The prevalent custom, however, is to have all matzoh that is eaten during the remainder of Pesach be guarded from at least the time of kneading the dough (*Mishnah Berurah*, *Orach Chaim* 453:25 and 460:2). Today, machine-made matzoh that is baked for use during the remainder of Pesach is guarded from the kneading of the dough, or from the grinding of the grain.

Additionally, the opinion of the Vilna Gaon is that all matzoh eaten throughout the entire Pesach be guarded from the time of the harvesting of the grain, as an extra safeguard against becoming *chametz* (*Chayei Adam* 128:30). The *Maggid Mishnah* and the *Aruch Ha-shulchan* write that this is also the opinion of the Rambam. Many families follow this opinion and will therefore not eat any matzoh on Pesach that is not guarded from the time of the harvesting of the grain.

Today, the majority of the large matzoh companies do not produce machine-baked matzoh for Pesach that is guarded from the harvesting of the grain. There are only a small number of



### Matzoh Baked by a Minor

We have seen that *shmurah* matzoh requires supervision beginning with the harvesting of the grain, and that the supervision must be done *lishmah*, specifically for the purpose of the mitzvah.

It is this requirement which presents a potential problem for machine-baked matzoh. In order to guard the matzot *lishmah*, one must have knowledge of the mitzvah of eating matzoh, and have the intention that one's supervision be for this purpose. This intention must also be stated out loud. For this reason, the *Shulchan Aruch* rules that matzot that are baked by a minor are invalid for the mitzvah of eating matzoh, since a minor is incapable of achieving the proper intention.<sup>13</sup>

Matzot baked by a non-Jew are also invalid because it is assumed that a non-Jew will not have the proper intention.<sup>14</sup>

This being the case, it is certainly true that an inanimate

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companies that do so. The majority of machine-baked matzoh produced for Pesach is guarded from the kneading of the dough, or from the grinding of the grain. These matzot are not labeled as "*shmurah* matzoh", because they are not guarded from the time of the harvest.

13. *Shulchan Aruch Orach Chaim* 460:1; *Maggid Mishnah*, *Hilchot Chametz U'matzoh* 5:9; *Teshuvot Ha-Rashba* 1:26; *Rashba*, *Chulin* 12a; *Sheiltot d'Rav Achai Gaon*, *Parshat Tzav Siman* 76.

14. *Shulchan Aruch* *ibid*; *Maggid Mishnah*, *ibid*. This is due to the principle of *nochri ada'ata de-nafshei ka-avid* (*Gittin* 22b). The simple explanation of this phrase is that we do not trust a Gentile to have the proper intention, no matter how much coaching he is given (*Rashi*). Rabbi Chaim Soloveitchik explains that according to the Rambam, this phrase means that a non-Jew is by definition incapable of achieving the intention of *lishmah*, since the mitzvah is not relevant to him.

piece of machinery is not capable of baking matzot with the proper intention. It would seem, therefore, that matzot baked by a machine cannot qualify as *shmurah* matzoh, and would not be valid for the mitzvah of eating matzoh.<sup>15</sup>

### The Opinion of the Ra'ah

A possible resolution to this problem is found in the commentary of the Ritva to *Pesachim* 40a. The Ritva quotes his teacher the Ra'ah, who says that matzot baked by a non-Jew can be considered to be *shmurah*, if a Jewish person watches over the matzoh production. This type of supervision is referred to as *yisrael omed al gabov*. The Ra'ah's reasoning is that the *shmurah* matzot do not have to be baked for the purpose of the mitzvah, but rather they must only be guarded for the purpose of the mitzvah. This is evident from the words of Rashi on *Pesachim* 38a who says:

The guarding of the matzoh from becoming *chametz* should be done with the intention that it is for the mitzvah of eating matzoh on Pesach.

The Ra'ah therefore claims that as long as a Jewish person supervises the baking of the matzoh, even if a non-Jew does the actual kneading and baking, the matzot would be considered *shmurah*.<sup>16</sup> This principle of the Ra'ah can be

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15. Although computers can now be programmed to have an artificial intelligence, it is human knowledge and intent that is required and not artificial knowledge.

16. This argument would not apply to the spinning of wool for the purpose of *tzitzit*. Since the *tzitzit* have to be made *lishmah* (and not simply guarded *lishmah* as is the case with matzoh) the Ra'ah would agree that the person who is spinning the wool must have intention that it is for the purpose of the mitzvah.

applied to machine-baked matzot as well. If a Jewish person supervises the machine production of the matzot, and has the proper intention, then the matzot can be considered *shmurah*.

Although there are a number of other authorities who agree with the Ra'ah,<sup>17</sup> there are also many who do not agree with this analysis.<sup>18</sup> They claim that in order for the matzot to be considered *shmurah*, the guarding of the matzot for the purpose of the mitzvah must be done by the person who does the kneading and baking. The roles of baking and guarding cannot be split between 2 people (or between man and machine).<sup>19</sup>

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17. *Teshuvot Maharach Or Zarua* #35 and #143; *Teshuvot HaRadvaz* Vol. 3 # 581.

18. Rav Kohen Tzedek, quoted in *Tur, Orach Chaim, Siman* 460; *Maggid Mishnah, Hilchot Chametz U'matzoh* 5:9; *Teshuvot Ha-Rashba* 1:26; *Responsa Chatam Sofer Orach Chaim* # 128; *Minchat Chinuch mitzvah* # 10; *Taz, Orach Chaim* 460:1; *Shulchan Aruch Harav, Orach Chaim* 460:3; *Responsa Torat Rephael, Orach Chaim* # 73.

19. Since the reasoning of the Ra'ah is very convincing, a number of explanations have been offered to explain the opinion that the matzoh must be guarded by the same person who is doing the baking.

The *Minchat Chinuch* (mitzvah #10) explains that this opinion is based on Gemara *Chagiga* 20a which says as a general rule that one cannot effectively guard something that is in another person's possession. Therefore only the person doing the baking, who has the dough in his possession, will be able to guard the matzot. An observer would not be able to guard the matzot properly. See also *Gittin* 78a.

It is possible that this explanation applies only to matzot baked by a minor or a non-Jew, but not to matzot baked by a machine. Since matzot baked by a machine are not in another person's possession, they can be effectively guarded by an observer (*Responsa Da'at Sofer Orach Chaim* #62).

The Ritva also points out that the Ra'ah stated his opinion *lehalacha ve-lo lema'aseh*; despite the fact that he felt it was correct, he would not rely on this in practice. Perhaps he did not want to rely on any possible leniency for the mitzvah of eating matzoh, which is a biblical mitzvah.

### Is "Machine-Baked Matzoh" Machine Baked?

Following the consensus of opinion cited above, *shmurah* matzot must be baked by an adult Jew. Matzot baked by a non-Jew or a machine, even if supervised by a Jewish person, cannot be used for the mitzvah of matzoh (i.e., at the Seder).

There is a fascinating discussion in the works of many *poskim* about whether matzot baked by a machine are really considered "machine baked". That is, do we consider the machine to be actually baking the matzot, or is the person who operates the machine considered to be baking the matzot. Logically, it would seem that the machine should be credited, since the machine is doing all the work. However, since the machine cannot operate without a human to start

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The Chatam Sofer (*Teshuvot Orach Chaim* # 128) offers another explanation. He explains that from the point of kneading the dough, the flour and water are already mixed together and if left alone will ferment. Only the person who is kneading the dough can guard against fermentation at this point, since the act of kneading itself is what prevents the dough from becoming *chametz*. The person kneading the dough is then by definition considered to be guarding against *chametz*, and he must therefore knead the dough for the purpose of the mitzvah.

The Chatam Sofer adds that harvesting and grinding of the grain can be done by a non-Jew, with a Jew supervising. This is because the only concern at this time is that water may come in contact with the grain, and an outsider can guard against this just as well as the person doing the actual work.

it, perhaps all the work should be attributed to the person who starts the machine.

Many *poskim* are of the opinion that in reality it is the machine that is baking the matzot.<sup>20</sup> This is based on comparison to a discussion in Gemara *Chulin* 16a.

### ***Sarna De-Maya* (Waterwheel)**

The Gemara *Chulin* 16a discusses the use of a device called *Sarna De-Maya* (waterwheel). The waterwheel is a large suspended wheel that is powered by the force of flowing water. It is operated by removing a barrier from in front of an adjacent water supply, allowing water to flow towards the wheel.<sup>21</sup> The water collides with spikes or buckets which protrude from the wheel, forcing it to rotate. In the time of the Gemara, waterwheels were used for industrial purposes such as milling wheat. However the Gemara discusses a very non-standard use: A situation where someone attaches a knife to the wheel, and each time the wheel revolves, he moves an animal in place so that the knife will slaughter the animal. The Gemara discusses whether this can be considered a valid *shechita* (ritual slaughter).

The question revolves around the fact that *shechita* is valid only when done by a human being. If an animal were to be slaughtered by a knife that is blown by the wind, or if the animal were to slaughter itself, it would not be a valid *shechita*. The Mishnah derives this rule from the verse *Ve-zavachta Ve-achalta*, you shall slaughter and

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20. *Responsa Divrei Chaim* (Tzanz) Vol. 2 # 1; *Moadim U'zmanim Hashalem* Vol. 3, # 264; *Responsa Minchat Yitzchok* Vol. 2 # 96. This opinion is also quoted in *Responsa Har Tzvi* Vol. 1 # 10 and *Responsa Yechave Da'as* Vol. 1 # 14.

21. Rashi, *Chulin* 16a.

[then] you shall eat," which is taken to mean that an animal can be eaten only when slaughtered by a human.<sup>22</sup>

The question then is, if a person starts a waterwheel (that has a knife attached), by removing the barrier from in front of the water supply, do we attribute the rotation of the wheel and the slaughtering of the animals to this person, in which case the *shechita* is done by a human, or is the wheel considered to be operating on its own, in which case the *shechita* is not valid.

The Gemara resolves this question by distinguishing between the initial gush of water, which flows immediately when the barrier is removed, and the subsequent continual flow of the water. The initial gush of water is viewed as the *Koach Rishon*, the primary force of the person who lifted the barrier. The work done by this flow of water is attributed to this person, as if he did it with his own hands. An animal that is slaughtered by a revolution of the wheel which is powered by this flow is viewed as slaughtered by a human. The Rambam writes that this amounts to only one revolution.<sup>23</sup>

The continual flow of the water, however, subsequent to the initial gush, is *Koach Sheini*, the secondary force of the person who lifted the barrier. The work that is done by this flow of water is considered only as "caused" by his action, and technically is happening on its own.<sup>24</sup> All animals which are slaughtered by the force of this flow of water have been slaughtered by a self-running machine and not by a human.

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22. *Chulin* 31a; Rambam, *Hilchot Shechita* 2:12; *Shulchan Aruch*, *Yoreh Deah* 3:1.

23. Rambam, *ibid.*

24. This is the understanding of the Rashba, *Bava Kamma* 4b. Also see sources quoted in note 19.

A comparison between the waterwheel and the machinery used for baking matzoh can be made, since both are systems that are started through human intervention and continue then to operate on their own. Viewing the process step by step shows that the two are analogous. The machinery used for baking matzoh is started by closing a switch, which completes an electrical circuit. This allows electric current to flow through the circuit past the switch, causing an electric motor, which is attached to the circuit, to operate. The motor has a shaft which rotates, driving the machine to do work such as the mixing, kneading and processing of the dough. The completion of the electrical circuit, which allows current to flow, is analogous to the removal of a barrier which allows water to flow. Whereas the flow of water causes a waterwheel to rotate, the electric current causes a motor to rotate.

It would follow then that, just as we can only attribute the initial flow of the water to the person who released it, so too, only the initial flow of electric current (past the switch), can be attributed to the person who completed the circuit. Only the first few seconds of the machine's operation would be considered as done by a human and the rest attributed to the machine. Therefore, matzot baked by such a machine are considered machine baked, and not valid for the mitzvah of eating matzoh.

This comparison is the basis of the opinion that machine-baked matzot cannot be used for the mitzvah of eating matzoh at the Pesach seder.

### **Distinction Between a Circuit and a Waterwheel**

The *poskim* who permit machine-baked matzot for the Seder point to a distinction between the waterwheel and baking matzoh. A waterwheel is started by removing a barrier from in front of a water supply. Removing this

barrier allows the water to flow on its own, without applying any direct force to the water. Because of this indirect method of releasing the water and starting the waterwheel, we attribute only the initial flow of water to the human.<sup>25</sup>

They argue that the completion of an electrical circuit is not comparable to the indirect method of starting a waterwheel. Connecting the wires of a circuit actively creates a path of conductive material for electric current to pass. This is a direct action, an integral and lasting part of the continual flow of current. It is therefore not comparable to the removal of a barrier, which releases a flow of water in an indirect manner and has no persistence.

It follows, according to this opinion, that all work done by an electrically-powered machine can be considered the action of the person who completes the electrical connection.<sup>26</sup>

The *poskim* who do equate the completion of an electrical circuit with the removal of a barrier argue that the completion of a circuit merely creates a path for electric current, without applying any direct force to it. The resulting current flow is the result of electric force, not human force. According to this opinion, only the initial work of the machine is attributed to the person who completes the electrical connection.<sup>27</sup>

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25. *Responsa Har Tzvi*, Yoreh Deah # 12, Orach Chaim # 133; *Chulin* 16a. If human force were to be applied directly to the water, such as if the water were thrown at the wheel, then we would attribute the entire flow of water to this force.

26. *She'alot U'Teshuvot Achiezer* Vol. 3 # 60; *Me'orei Eish*, Chapter 3; *Responsa Minchat Shlomo* # 11; *Ma'aseh U'grama Behalacha*, Section 4 Chapter 9; *Ma'alot BeShabbat*, Chapter 3.

27. *Responsa Har Tzvi*, Orach Chaim Vol. 1 # 10; *Mikraei Kodesh*,



### Distinction Between *Shechita* and Baking Matzoh

The authorities who permit machine-baked matzot for the Seder also point to a distinction between the slaughtering of an animal and the baking of matzoh.

This distinction is based on an alternate explanation of the Gemara in *Chulin 16a*. It can be argued that the continual flow of water to the waterwheel (*Koach Sheini*) is the action of the person who releases the water. The wheel movement resulting from this flow is considered an extension of his original action, and is not viewed as simply *grama* (causation).<sup>28</sup> Animals that are slaughtered by these revolutions of the wheel are invalid, not because of lack of human action, but because of a separate consideration which is unique to *shechita*.

In order for *shechita* to be valid, an animal must be slaughtered with *koach gavra*, human force.<sup>29</sup> This means that the cutting action must be powered by human force. It is not enough for the cutting to be attributable to a human, it must be powered by his direct force. If the direct

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*Pesach* Vol. 2 Sec. 2; *Hachashmal Leor Hahalacha*, chapter 2; *Encyclopedia Talmudit*, vol. 18, page 157.

28. *Encyclopedia Talmudit* vol. 18 pg. 161 ; *Responsa Divrei Chaim* #2; *Beit Yosef Shaul* vol. 1 pg. 73. *Chazon Ish*, *Bava Kamma* 22b, writes that watering plants on Shabbat by removing a barrier which was holding back water is a violation of the *melacha* of *zoreia* (planting), not only for the watering done by the initial flow of water (*koach rishon*), but possibly also for that done by the subsequent flow (*koach sheini*). This clearly implies that the *koach sheini* is considered the action of the person who released the water. See also Rambam, *Hilchot Chovel U'mazik* 6:10, who writes that one who releases a flow of water is liable for all damages done by the water, which implies even the *koach sheini*.

29. Ra'ah, *Bedek Ha-bayit Bayit Rishon*, end of *Sha'ar Rishon*; *Shulchan Aruch*, *Yoreh Deah* 3:3; *Biur ha-Gra*, *Yoreh Deah* 3:3;

force has dissipated, then the *shechita* is no longer valid.

This is why only the first *shechita* done by a waterwheel is valid. Only the initial gush of the water, which was pressing against the barrier, is considered to be the direct force (*koach gavra*) of the person who lifted the barrier. The subsequent flow of the water is not considered to be powered by human force, although it is still attributable to the person who lifted the barrier. The result is that the *shechita* done by the second revolution of the wheel is attributed to a human but is missing the requirement of *koach gavra*.

### The Requirement of Human Force

The requirement for *koach gavra* (direct human force) is also found in the prohibition of murder. The Gemara, *Sanhedrin 77b*, states that if a person throws a rock up in the air and it kills someone on its way up, he is liable to receive the death penalty. If, however, the rock kills someone on its way down (and it is falling straight down), then he will not receive the death penalty. The reason for this distinction is that while still ascending, and until it reaches its peak, the rock travels due to a (human) force that was applied to it. Once the rock reaches its peak, however, the velocity imparted by this initial force has dissipated, and the rock falls only due to the force of gravity. Since the death penalty is given only to a person who kills with human force, this will apply only when the rock is still ascending.<sup>30</sup>

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*Chidushei Rabbeinu Chaim Halevi* (Soloveitchik) *Al Ha-Rambam, Hilchos Shecheinim; Chazon Ish, Bava Kama 22b*.

30. It is important to note that if the rock were to injure someone on its way down, the person who threw the rock would be responsible to pay all 5 categories of damage (loss of value, pain, medical

Baking matzot for Pesach does not require *koach gavra* as *shechita* and murder do. Kneading and baking must be done by a Jewish person, but a constant direct human force is not necessary.<sup>31</sup>

The operation of a machine or of a waterwheel would therefore be sufficient, since all work done by the machine is attributed to the person who turns it on. Even though direct human force (*koach gavra*) is missing, the matzot are still considered to be baked by a Jewish person<sup>32</sup> and guarded for the purpose of the mitzvah.<sup>33</sup>

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bills, unemployment, and embarrassment). Unlike *retzicha* (murder), the payment for damages is not dependent on the damages being inflicted by human force. As long as the damages are attributable directly to a person's action, that person is obligated to pay. The same would apply to property damage done by the rock. (Ra'ah, *Shita Mekubetzet* to *Bava Kamma* 56b; *Chazon Ish*, *Bava Kamma* 22b.)

The unique distinction between *koach gavra* (direct human force) and *ma'aseh ha'adam* (an action that can be attributed to a person, but not a result of direct force) is also explained elsewhere by the Ra'ah. If a knife falls out of a person's hand, without his realizing, and it slaughters an animal, it is not a valid *shechita*. However if the knife were to damage someone's property, there would be an obligation to pay for the damage. The reason is that *shechita* is only valid if done with *koach gavra*, and this falling knife is not considered *koach gavra* since it fell without his knowledge. The payment for damages, however, is not dependent on the damages being done with *koach gavra*. As long as the damage can be attributed to a person's action, there is an obligation to pay. (*Bedek Ha-bayit*, *Bayit Rishon Sha'ar Rishon*).

31. *Chazon Ish*, *Orach Chaim*, *Siman* 6 section 10; *Responsa Har Tzvi*, Vol. 1 # 10; *Mikraei Kodesh*, Pesach, Vol. 2 sec. 2; *Responsa Chesed L'Avraham* # 3; *Responsa Achiezer* vol.3 # 69.

32. A similar approach is found in *Responsa Chesed L'Avraham* # 3. *Torat Rephael*, *Orach Chaim* # 73, also adds that if the flour and water are inserted manually into the mixing kettle, then the

### Computerized Sequence of Actions

A further consideration is that in some matzoh bakeries the baking process can include a number of independent steps, which are sequenced by a computer. Since the human interaction is limited to the starting of this computerized sequence, it must be determined if all of the resulting steps can be attributed to this person.

For example, the baking process may be started by initiating a computerized sequence, which begins by sending flour and water (which are stored in separate rooms) into a mixing kettle. The dough is kneaded in the mixing kettle and then transported to another section of the building. The dough is then rolled by rollers and is further flattened by a series of belts. It is then scored, and cut into individual square matzot, which are put onto a wire mesh and transported into the oven. Each step is performed by an independent piece of machinery and is controlled and sequenced by specialized computer software. Even if we can attribute the first step to the human, can we say the same for all subsequent steps?

The Chazon Ish writes that when using a steam-powered tractor, the person who starts the tractor is responsible for all actions that result.<sup>34</sup> This is despite the fact that this initial step results in a sequence of many steps including the generation of steam, distribution of the steam to activate the piston, and the plowing or harvesting that results. This is particularly true in the case of machinery that is built specifically for accomplishing a particular task. Since

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matzot are certainly considered to be baked by a human.

33. The amount of active supervision that is necessary depends upon the reliability of the machinery.

34. *Chazon Ish, Orach Chaim, Hilchot Shabbat, Siman 36.*

the machine has this complexity built in, and was designed to achieve a goal in a sequence of steps, the start of this sequence is considered to be initiating the entire process. It would not be viewed as simply starting the first step, with subsequent steps happening automatically.<sup>35</sup> This is only true, however, if there are no significant delays between the various steps.

### The Opinion of the Chazon Ish

The Chazon Ish offers an additional reason for machine-baked matzot to be considered *shmurah*. According to the Chazon Ish, for matzot to be considered *shmurah* it is only necessary that the baking process be started by a Jewish adult. Once the process is started for the purpose of the mitzvah, it continues to be for the purpose of the mitzvah, even if later stages occur without human intervention.

The Chazon Ish explains this based on a distinction between the writing of a *get* [Jewish divorce] and the preparation of parchment for a *sefer Torah*.<sup>36</sup> A *get* must

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35. *Ma'archei Lev* (Professor Ze'ev Lev), page 343. The specific example given is that of a print button on a computer. Invoking the print function results in a series of sequenced events, both in the computer CPU and the printer. The resulting document is considered to be the product of the person who pressed the print button. Despite the many steps involved, the result is not considered *grama* (causation) or *koach kocho* (indirect force).

36. The specific distinction is that the *get* cannot be written by a non-Jew, even if a Jewish person instructs him regarding the proper intention. The processing of the parchment, however, can be done by a non-Jew if he is instructed to have the proper intention. The Chazon Ish explains that in each case only the initial action of the non-Jew is considered to have been done with the proper intention (in that we attribute only the initial action to the instructor.)

be written *lishmah*, specifically for the woman that it is for. This intention is necessary throughout the entire writing of the *get*. The parchment for a *sefer Torah* must also be prepared *lishmah*, specifically for use as a *sefer Torah*, but this process needs only to be started with the proper intention.<sup>37</sup>

The Chazon Ish explains that this distinction exists because when writing a *get*, there is an inherent possibility of a change of heart. The proper intention at the outset does not automatically continue. The preparation of parchment for a *sefer Torah*, however, does not carry with it the inherent motivation for a change of intention. If the process is started with the intention that it be *lishmah*, that intention continues throughout, unless explicitly changed.

The Chazon Ish is of the opinion that the baking of matzoh and production of *tzitzit* are similar to the preparation of parchment, since one does not ordinarily change one's intention in the middle. Once a Jewish person begins any of these processes, the intention at this time will continue

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37. Chazon Ish, *Orach Chaim*, *Siman* 6 section 10. *Responsa Maharsham*, Vol. 2 # 16, also suggests this approach.

The Chazon Ish does not specifically extend this ruling to machine-baked matzot. His discussion focuses primarily on the production of *tzitzit* by machine. He mentions only that the same logic should apply to the baking of matzot. *Yechave Da'at* vol. 1 # 14 and *Mikraei Kodesh*, Pesach, Vol. 2 sec. 2, explicitly extend the ruling of the Chazon Ish to machine-baked matzot.

The Chazon Ish also does not specifically discuss a machine run by electricity. He mentions only a water-powered machine. However, *Har Tzvi* (1:10) and *Yechave Da'at* (1:14) say that the ruling of the Chazon Ish applies also to a machine that is powered by electricity.

throughout, even if the process continues automatically. By turning on the machinery, one has started the baking process; therefore it is sufficient for the matzot to be considered *shmurah*.<sup>38</sup>

The Chazon Ish points out, however, that the *Mishnah Berurah* (*Orach Chaim* Siman 11) and the *Noda Biyehuda* (*Yoreh Deah* # 175) disagree with this reasoning. They have a different explanation for the distinction between writing a *get* and processing parchment. Writing a *get* requires the intention of *lishmah* throughout because it is a long process, where the writing of each word is an independent action. The processing of parchment differs because it only involves a single act of placing the parchment into limewater. This act immediately encompasses the entire parchment, and no more interaction is necessary. The baking of matzoh and production of *tzitzit* would therefore require intention of *lishmah* throughout because, like the writing of a *get*, these are long multi-step processes where each action is independent of the previous one.

### Harvesting and Milling the Grain

The main issue of machine-baked *shmurah* matzot is whether the kneading and baking can be done by a machine. A related issue is whether earlier stages of *shmurah* matzoh production, such as harvesting and milling the grain, can be done by machine or by a non-Jew. Since the matzot need to be guarded from the time of the harvest, it would seem that all stages of production, starting from the harvest, must be done by a Jewish adult in order to be

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38. According to all opinions, the initial operation of the machine is attributed to the person who starts the machine. Only the continued operation of the machine is perhaps not viewed as such. See note 22 and accompanying text.

considered as guarded for the purpose of the mitzvah.

There are a number of factors, however, which would allow for harvesting and milling of the grain to be done by a Gentile or a machine. Firstly, the *Shulchan Aruch* (*Orach Chaim* 453,4) quotes one opinion that the matzot are considered *shmurah*, even if the guarding begins with the kneading of the dough. This would obviate the need for the harvesting and milling of the grain to be guarded altogether. This opinion cannot be relied on under normal circumstances, however, since the *Shulchan Aruch* rules that matzot must be guarded from the harvest when possible.

The *Taz* (*Orach Chaim Siman* 460) is of the opinion that only after the flour is mixed with water do the matzot need to be guarded for the purpose of the mitzvah. All prior stages, including the harvesting and milling of the grain, need to be guarded only as a safeguard against contact with water. There is no need to guard these stages specifically for the purpose of the mitzvah. This lower level of guarding can be done by a Jew, even if a non-Jew or machine does the actual work. It is only beginning with the kneading of the dough that the work must be done by a Jewish person in order that it be considered guarded for the purpose of the mitzvah.

The *Minchat Chinuch* (mitzvah # 10) and the *Chatam Sofer* (*Teshuvot Orach Chaim* # 128) disagree with the *Taz*. They maintain that the entire process, starting from the harvesting of the grain, must be guarded for the purpose of the mitzvah. The Chatam Sofer does agree, however, that harvesting and milling of the grain can be done by a non-Jew, with a Jew supervising. This is because the only concern during harvesting and milling is that water may come in contact with the grain. Guarding against this possibility is essentially a supervisory role, and can therefore be done



effectively by an observer. For this stage, only the supervision must be done for the purpose of the mitzvah. The kneading of the dough, however, is different, because at this point the mixture will ferment if left alone. The person who is kneading the dough is by definition "guarding" the dough from becoming *chametz*, and therefore the act of kneading itself must be done specifically for the purpose of the mitzvah.<sup>39</sup>

### Conclusion

The opinion that machine-baked matzoh cannot be used as *shmurah* matzoh is based on the assumption that the matzot are baked by a machine, which cannot achieve the intention necessary to guard the matzot specifically for the mitzvah of eating matzoh.

The opinion that machine-baked matzot can be considered *shmurah* is based on the following arguments:

1) The opinion of the Ra'ah, that *shmurah* matzot can be baked by a non-Jew (or machine), as long as a Jewish adult guards the matzoh production for the purpose of the mitzvah.

2) There is a great deal of evidence that the baking of the matzot is credited to the person who starts the machinery, even though the machine does the actual work. This person can have the intention necessary for baking *shmurah* matzoh.

3) According to the Chazon Ish, it is sufficient that the baking process be started by a Jewish person, even if it continues without any human intervention. Starting up the machinery is considered to be starting the baking process.

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39. See note 18 and accompanying text.

# ***Tzitzit – In or Out?***

*Jason Weiner*

Many people struggle with the issue of how to wear *tzitzit*. Some, especially those who live among non-Jews, feel awkward wearing their *tzitzit* untucked from their pants. However, tucking them in often seems to be missing the point, especially in light of biblical verses and halachic positions that strongly seem to indicate otherwise.

Taking a close look into the issue may provide enlightenment for a person struggling with this dilemma. There are various subjective factors and a multitude of opinions to help the reader make an educated decision about how to wear his *tzitzit*. We will begin our inquiry with the argument in favor of wearing *tzitzit* in an exposed manner, from biblical commentators to halachic authorities, then move to the case against wearing them out, and finally try to come to some conclusions.

## **THE CASE FOR:**

### **1. Biblical Commentators**

The case for wearing *tzitzit* on top of one's garments in an exposed manner begins with the very *pasuk* that requires the wearing of *tzitzit*. The Torah tells the Jewish people that they should "make themselves *tzitzit* on the corners of their garments, throughout their generations... that you may look upon it, and remember all the commandments of *Hashem* and do them" (*Bamidbar* 15:38). Because the primary commandment is to see them, many of the classic biblical commentators are of the opinion that *tzitzit* should be worn in a manner that they remain

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visible.<sup>1</sup> According to the Talmud, seeing the *tzitzit* leads to remembering the mitzvot, which leads to doing them.<sup>2</sup> Indeed, some commentators explain that the very word “*tzitzit*” is related to the verb, “*maitzitz*” which means to peer or gaze, implying that the purpose of *tzitzit*, and primary method of achieving this mitzvah, is that they be seen.<sup>3</sup>

The Abarbanel<sup>4</sup> uses different parts of these *pesukim* to bring about a most unique and powerful interpretation, which also implies the need to wear *tzitzit* out, in a visible manner. According to him, based on the *pasuk* which says, “*al kanfei bigdeiher*” we learn that *tzitzit* should be worn on the outer layer of one’s clothing because, he argues, in biblical times people wore a sort of four-cornered poncho over all of their clothing which covered them like the *tallit* of our day, and was clearly seen. The Abarbanel explains that the *pasuk* goes on to say “*l’dorotom*” in order to teach that in the future, when Jews no longer wear these four-cornered ponchos, they should nevertheless wear a four-cornered garment like the Jews used to wear over their clothing, in order to put *tzitzit* on them. Thus, as many *Rishonim* rule, even if one does not wear four-cornered garments, they should try to obtain one so that they can fulfill the mitzvah of *tzitzit*.<sup>5</sup>

Rather than the verse of “*u’reitem oto*”, the Abarbanel uses

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1. *Ohr Hachayim*, *Bamidbar* 15:38; *Sforno*, *Bamidbar* 15:39; *Ibn Ezra*, *Bamidbar* 15:39.

2. *Menachot* 38a.

3. *Rashi*, *Bamidbar* 15:38; *Rashbam*, *Bamidbar* 15:39; *Rabbeinu Bachyei*, *Bamidbar* 15:38.

4. *Perush Abarbanel Al HaTorah*, end of *Parshat Shelach*.

5. *Rambam*, *Hilchot Tzitzit* 3:11; *Smag*, *Positive Mitzvah* #26; *Rokeach*, *Hilchot Tzitzit* p. 247, *Tosafot*, *Pesachim* 113b s.v. “*v’ain*”; *Tur*, *OH* 24:1.

*“v’haya lachem l’tzitzit”* to teach that the very purpose of this garment is to hang off of one’s clothing so that the fringes will be able to slap one in the face, causing one to see them and remember all of the mitzvot of *Hashem*. The Abarbanel argues that the point is not just that they happen to see them, but that this is the very purpose of the garment, and because today most people can not stand up to the challenges of their desires and life styles, men thus have a circumcision to remind them of *Hashem* and His mitzvot when they are unclothed, and *tzitzit* on their clothing to remind them of *Hashem* and His mitzvot at all times when they are clothed.

The Abarbanel concludes that the goal is that we should eventually become trained to behave properly without this reminder, but even so the *pasuk* concludes, *“v’heyitem kedoshim”* to tell us that we should be distinguished in our dress with this special sign on our garments, like servants of a king, in order to be recognized as servants of *Hashem*. Thus, while he uses different *pesukim*, the Abarbanel’s understanding of this mitzvah is the same as that of most *meforshim*, that the primary purpose of *tzitzit* is that they should be seen.

## 2. Halacha

Among halachic works of *Rishonim*, one of the clearest and most stringent rulings comes from an early 12<sup>th</sup> century *teshuva* of Rabbeinu Yizchok Ben Marvan Halevi who, based on the verse, *“gedilim taaseh lecha”*, you shall make fringes upon the four corners of your clothing,<sup>6</sup> says that not only should one wear his *tzitzit* on top of his clothing, but those who cover their *tallit* under their clothing do not fulfill the mitzvah of *tzitzit* at all!<sup>7</sup>

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6. *Devarim* 22:12.

7. Cited by *Yechave Daat* 2:1.

In early 15<sup>th</sup> century Spain, the *Nimukei Yosef*, in the name of the Ritva, also says that the *tallit katan* should be worn on top of one's clothing in order to keep a person in line, in order to fulfill "*v'lo taturu achrei levavchem*," as well as to make a person look like he is wearing the seal of his master.<sup>8</sup> Similarly, though the *Shelah* of 16<sup>th</sup>-17<sup>th</sup> century Prague admits that he wore his *tallit katan* under his clothing because of mockers, he was still careful to wear his *tzitzit* strings outside his clothing in order to see them at all times, as he holds it is proper for all to do.<sup>9</sup>

The *Tur* in *Orach Chaim* 8 does not seem to rule that one must wear *tzitzit* out on top of the clothing, when he deals with the issue of how *tzitzit* should be worn. However, based on the fact that he writes in *simon* 24 that the main part (*ikar*) of the mitzvah of *tzitzit* is to remember the mitzvot at all times, the *Beit Yosef* infers that the true *ikar* must be to wear the *tallit katan* on top of one's clothing, so that it will be seen at all times.<sup>10</sup> Indeed, R. Yosef Karo goes on to decide in the *Shulchan Aruch* that, "the *ikar* mitzvah of the *tallit katan* is that it be worn on top of one's clothing."<sup>11</sup>

Many primary *Acharonim* similarly rule that it is proper to wear *tzitzit* on top of one's clothing, in a way that they are visible. For example, the *Levush* rules that since the reason for wearing *tzitzit* is to remember all of the mitzvot, those who tuck them in should be told to expose them in order to see them at all times.<sup>12</sup>

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8. *Nimukei Yosef*, *Hilchot Tzitzit*, 12.

9. *Shelah*, *Chulin*, *Hilchot Tzitzit*, no. 17.

10. *Beit Yosef Orach Chaim* 8:11, s.v. "*U'mitoch*."

11. *Orach Chaim* 8:11& 24:1.

12. *Levush*, *Orach Chaim* 8:10.

The *Magen Avraham*<sup>13</sup> and *Shulchan Aruch Harav*<sup>14</sup> also rule that while the *begged* may be worn under the clothing, the actual *tzitzit* strings should preferably be hanging outside one's clothing. They do, however, feel that it is permissible to tuck them in if one feels the need, and thus those who do so because they are in the midst of non-Jews have still fulfilled the mitzvah. They note, however, that one must at the very least say the *bracha* while the strings are exposed.

The *Aruch Hashulchan* similarly rules that *tzitzit* should be worn on one's clothing in order to be seen, though he also notes that one may still technically fulfill the mitzvah without seeing them. Nevertheless, the *Aruch Hashulchan* argues that the *chachamim* are not happy with those who tuck their *tzitzit* in, unless they tend to be around people who they fear will make fun of them. The *Aruch Hashulchan* goes on to say that one should simply wear his *tzitzit* out and not be embarrassed to do the mitzvot of *Hashem*.<sup>15</sup>

The *Mishnah Berurah* is also very demanding in his language favoring the wearing of *tzitzit* out, arguing that those who tuck their *tzitzit* inside their clothing are acting improperly, because they should be seen, and tucking them in shows contempt for *Hashem's* mitzvot. The *Mishnah Berurah* contends that a person should proudly adorn himself with *tzitzit* because they are a gift from *Hashem* on which His name is engraved.<sup>16</sup>

The *Tzitz Eliezer*<sup>17</sup> observes that in contemporary Israel there is no longer the fear of being made fun of by non-Jews. Though

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13. *Magen Avraham*, *Orach Chaim* 8:11(13).

14. *Shulchan Aruch HaRav*, *Orach Chaim* 8:18.

15. *Aruch Hashulchan*, *Orach Chaim* 8:17.

16. *Mishnah Berurah* 8:11(26).

17. *Responsa Tzitz Eliezer* 8:3.

there is now the fear of causing a *chillul Hashem* in front of non-religious Jews, the *Tzitz Eliezer* argues that one should simply behave according to the halacha, and wear the *tzitzit* out. The *Tzitz Eliezer* reasons that because doing mitzvot leads to doing more mitzvot, which is especially true regarding *tzitzit*, which are intended to cause a person to remember and do all of the mitzvot, doing this mitzvah of wearing one's *tzitzit* out should save a person from causing a *chillul Hashem*.

The *Tzitz Eliezer* goes on to point out that the *Shulchan Aruch* in *Orach Chaim* 8:11 says that the *ikar* of the mitzvah of *tzitzit* is to wear the *tallit kattan* on one's clothing, while in 24:1 it says that it is "*nachon*," implying that it is good, but not mandatory. The *Tzitz Eliezer* thus argues that even when the *Shulchan Aruch* said "*ikar*" it was simply stating that wearing *tzitzit* out is a "*mitzvah min hamuvchar*" (preferable), but not a *chiyuv* (requirement).<sup>18</sup>

The *Tzitz Eliezer* concludes that one who wears the *tzitzit* in is not doing a bad thing, and indeed there are many great rabbis and *poskim* to rely upon.<sup>19</sup> However, if a person wears *tzitzit* out *lishma*, in order to remember and fulfill Hashem's mitzvot, he is called "holy," and he argues that this has become the Ashkenazic custom. He thus feels that *bnei Torah* should make sure to accustom themselves to dressing with their *tzitzit* out, because even though this may not be a *din gamur*, it is proper to go beyond the letter of the law. As for great people, *talmidei chachamim* and *tzadikim*, who should accustom themselves to going beyond the letter of the law, the *Tzitz Eliezer* claims that wearing *tzitzit* out is like a "*din mamash* (mandatory)."

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18. Ibid.

19. In the next section we will examine many of the opinions of these "great rabbis".

We have thus seen a very strong case from both *meforshim* and *poskim* in favor of wearing *tzitzit* out as proper fulfillment of their requirement. While there has also been some acknowledgment of reasons to allow people to wear their *tzitzit* in, according to the *Shulchan Gavoa*, the only reason that many have become accustomed to wearing the *tallit katan* under their clothing is merely because non-Jews will make fun of them, rather than an actual halachic stance that it is proper to wear them in.<sup>20</sup> As for the issue that we will soon see – that wearing *tzitzit* out may be considered arrogant, R. Ovadia Yosef argues that since many do in fact hold that the *ikar* mitzvah of *tzitzit* is seeing them, which is indeed the position of the *Shulchan Aruch*, then one who wants to fulfill all of the opinions and wear them out is no longer considered arrogant. R. Ovadia Yosef maintains that this is especially true today because so many yeshiva students now dress this way and are motivated by religious reasons.<sup>21</sup>

## THE CASE AGAINST:

### 1. Halacha

Despite the sources we have seen, a look into the other side of this issue will show that since the times of the *Rishonim*, there have been many who were not accustomed to wearing their *tzitzit* out, and indeed many who held that it is halachically proper to wear them in.

The *Itur* of 12th century Provence argues that *tzitzit* do not need to be worn out.<sup>22</sup> He disagrees with the *teshuva* of R.

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20. *Shulchan Gavoa*, *Orach Chaim* 8:17.

21. See also *Sefer Imrei Bina*, *Orach Chaim* 13:4. & *Pesach Ha'dvir*, 146:3.

22. *Itur*, *Hilchot Tzitzit*, end of the third *Perek*.



Yitzchok Ben Marvan Halevi quoted above, arguing that *chazal* used the *pasuk* that he quotes in *Devarim* for a different purpose, and that “*u’reitem oto*” does not imply at all times, but simply seeing them at the time that one puts them on. Similarly, according to some, the *Nimukei Yosef* we cited only applies during prayer, and for those who do not wear a *tallit gadol*.<sup>23</sup>

Furthermore, both Rabbeinu Yona<sup>24</sup> and the Radvaz<sup>25</sup> write that one should wear a “*tallit katan*” under the clothing at all times, because the main point is not seeing them, but *wearing* them, in order to remember them as one goes on his way. Similarly, the *Mordechai* of 13<sup>th</sup> century Germany writes in the name of his teacher, the Maharam Rothenburg, that one should wear a *tallit katan* under his clothing.<sup>26</sup> Indeed, he writes elsewhere that the Maharam did in fact wear a *tallit katan* under his clothing, and that it could not be seen at all.<sup>27</sup> We also know that the Vilna Gaon wore his *tallit katan* under his clothing.<sup>28</sup>

From these sources we see that since earliest times *tzitzit* were not necessarily worn over one’s clothing. Indeed, many *poskim* write that the custom throughout the centuries has been to wear both the *tallit katan* and *tzitzit* under one’s clothing, which is the reason one may wear the *tallit katan* into a cemetery.<sup>29</sup>

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23. *Yad Aharon*, *Maamer Mordechai* 8:11.

24. *Sefer Hayira*, os 16.

25. *Sh”ut Haradvaz* 5:2.

26. *Mordechai*, *Hilchot Tzitzit* 943.

27. *Taanit*, *Simon* 633.

28. *Maase Rav*, *Hilchot Tzitzit & Tefillin*, 17.

29. *Rosh*, *Brachot*, *Perek* 3:5; *Tur & Shulchan Aruch*, *Orach Chaim* 23:1, *Yoreh Deah* 267:4; *Beit Yosef*, *Orach Chaim* 23; *Prisha*, *Orach Chaim* 23; *Bach*, *Taz*, *Shach*, *Yoreh Deah* 267; *Chidah*, *Birchey Yosef*, *Orach Chaim* 23; *Aruch Hashulchan*, *Orach Chaim* 23.

and the bathroom.<sup>30</sup> It may also be inferred that the custom was to wear the *tallit katan* under one's clothing from the language used by the Ramo, when he says that one may wear *tzitzit* that are found to be *possul* on Shabbat, "even the *tallit kattan*, which is worn under one's clothing."<sup>31</sup>

Moreover, despite the firm language used in favor of wearing one's *tzitzit* out, the *Aruch Hashulchan*<sup>32</sup> notes that this was not the custom in his time.<sup>33</sup> According to some, the harsh language that the *Mishnah Berurah* uses against those who wear their *tzitzit* in is simply referring to one who wears the *begged* of his *tallit katan* out on top of his clothing, but nevertheless tucks the *tzitzit* strings inside his clothing, because this would show that he is embarrassed by doing *Hashem's* mitzvot.<sup>34</sup> According to this explanation, the *Mishnah Berurah* would not be opposed to those who simply wear their entire *tallit katan* under their clothing for various valid reasons. Others contend that the *Mishnah Berurah's* firm language was simply for those who allow their *tzitzit* strings to dangle down under their clothing against their bodies, but as long as they are wearing an undergarment below the *tzitzit*, they are doing nothing wrong.<sup>35</sup>

From the above it is still not entirely clear why so many authorities have ruled that *tzitzit* may be worn underneath one's clothing. However, from many of their statements it appears that fear of mockery from hostile non-Jewish neighbors

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30. *Taz, Orach Chaim* 21:3 (3).

31. *Orach Chaim* 13:3.

32. *Aruch Hashulchan, Orach Chaim* 8:17.

33. The *Mishnah Berurah* in *Beer Halacha* 10:8, s.v. "*La'asotah*" also seems to imply that it was not customary to wear *tzitzit* out in his time.

34. *Responsa Ohr Yitzchok, Orach Chaim* 11.

35. *Mishneh Halachot* 8:11.

was a primary factor. Such a position is in fact a valid halachic justification, as we see from the ruling that one may wear shoes on *Tisha B'av* when among people who are not Jewish,<sup>36</sup> so that they will not be ridiculed for their unconventional way of dress.<sup>37</sup>

Based on many of these sources, R. Ovadia Yosef concludes, in disagreement with the *Tzitz Eliezer*, that the common practice is that the *tallit katan*, including the *tzitzit*, are to be worn underneath one's clothing. R. Ovadia Yosef thus argues that while the general Ashkenazic practice may be to wear *tzitzit* out, the Sefardic practice is to wear them in.<sup>38</sup> As we have seen, this has not necessarily been the universal Ashkenazic practice either.

Furthermore, the Gemara does not understand the verse "*u'reitem oto*" as requiring *tzitzit* to be seen, as many of the biblical commentators do, but as exempting one from wearing *tzitzit* at night.<sup>39</sup> This, along with the fact that the Rambam does not count "*u'reitem oto*" as one of the 613 mitzvot, led R. Moshe Feinstein to conclude that there is no mitzvah of seeing one's *tzitzit*.<sup>40</sup>

## 2. Kabbala

Besides the fact that common practice for many has been to wear *tzitzit* in, the Ari z"l stands as the strongest argument among many *Acharonim* for keeping one's *tzitzit* in. As is quoted in many of the teachings of the Ari z"l, he wore his *tallit katan* under all of his clothing, (but over his bottom layer of clothing).

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36. *Tur*, *Orach Chaim* 554:17; *Ramo*, *Orach Chaim* 554:17.

37. *Beit Yosef*, *Orach Chaim* 554:17 (17); *Mishnah Berurah* 554:17 (34).

38. *Yaskil Avdi*, *Orach Chaim* 5:3; *Yechave Daat* 2:1; *Tzitz Eliezer* 8:3.

39. *Menachot* 43.

40. *Iggerot Moshe*, *Orach Chaim* 1:3.

He considered those who wore their *tallit katan* out, over their clothing, not only to be arrogant, but to be making a big mistake and acting in opposition to the truth.<sup>41</sup> The Ari z"l apparently wore his entire *begged* and *tzitzit* strings all under his clothing, exposing none of it.<sup>42</sup> Not only did this become the accepted kabbalistic practice, but the *Magen Avraham* quotes it as an important halachic position.<sup>43</sup>

Rav Yitzchak Palagi contends, in his *Yafe L'leiv*,<sup>44</sup> that besides fear of non-Jews, there is a reason for wearing *tzitzit* tucked in, namely that according to kabbala it is proper to wear *tzitzit* underneath one's clothing. In fact according to the Lubavitcher Rebbe, the different positions of the *Shulchan Aruch* and the Ari z"l are the basis for the difference in *minhagim*. When there is a dispute, those who are more wont to follow kabbala wear them in, while those more inclined to follow the *Shulchan Aruch* and *poskim* wear their *tzitzit* out.<sup>45</sup>

Indeed, R. Ovadia Yosef<sup>46</sup> explains that the Sefardic practice is to wear the *tallit katan* and *tzitzit* in, under all of the clothing, because they always follow the Ari z"l, even when the *Shulchan Aruch* disagrees. R. Ovadia Yosef assumes that Ashkenazim make the mistake of wearing *tzitzit* out because they either don't know about what the Ari z"l said, or that they hold the *Shulchan Aruch* to be more compelling than kabbala.

Thus, though the *Aruch Hashulchan* complains that people

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41. R. Chaim Vital, *Shaar Hakavanot*, p.76; *Pri Aitz Chaim*, *Shaar Hatitzit*, p. 16d; see also: *Shulchan Aruch HaAri*, *Orach Chaim* 8:6.

42. Based on *Yafe L'leiv*, *Orach Chaim* 8:21, quoting *Solet B'lula*, who says it in the name of *Mekor Chaim* (a student of R. Chaim Vital).

43. *Magen Avraham*, *Orach Chaim* 8:11(13).

44. Cited by *Yechave Daat* 2:1.

45. *Likutei Sichot*, Vol. 33 p. 95-103.

46. *Yechave Daat* 2:1.

should not be embarrassed by doing mitzvot and should therefore wear their *tzitzit* out, R. Ovadia Yosef argues that it is not because of embarrassment. Rather, he argues, it is because they hold like the legitimate opinion of the Ari z"l, that it is proper to wear the *begged* and *tzitzit* in, and are thus doing the right thing.

Even among Ashkenazim, rather than kabbalistic practices or fear of gentile persecution, there may have been a different reason that many in the yeshiva world of Eastern Europe were not accustomed to wearing their *tzitzit* out. It seems that in the Lithuanian yeshivot such as Mir, it was not customary for *bachurim* to expose their *tzitzit* outside their clothing, even while reciting *kriat shema*. The reason for this stems from the fact that in the neatly dressed *mussar* circles, it was seen as inappropriate to mess up one's clothing in this manner, especially for prayer.<sup>47</sup>

Moreover, in 15<sup>th</sup> century Germany/Czechoslovakia, the Mahari Bruna wrote that only rabbis wore their *tzitzit* out, in order to make a distinction between them and their students.<sup>48</sup> Thus, wearing *tzitzit* out can be seen as a sign of distinction within the religious community, and an act that is not appropriate for every Jew.

### Suggested Solutions

It becomes clear that this is no simple issue, with persuasive points on both sides. In fact, some have been so conflicted by the dilemma of how properly to wear their *tzitzit* that some great Jews throughout the ages have actually opted to wear two pairs of *tzitzit*, one on top of their clothing in accordance with the *Shulchan Aruch*, and another pair totally under their

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47. *Making of a Gadol* Vol.1, Nathan Kamenetsky (Jerusalem, Israel: Hamesorah Publishers, 2002) 528.

48. *She'elot u'Teshuvot Mahari M'Bruna*, 97.

clothing, following the directive of the Ari z"l.<sup>49</sup>

One major question that arises is why do Chassidim generally wear their *tzitzit* out, following the *poskim*, despite the kabbalistic idea of not wearing the *tzitzit* out? This is an especially perplexing question considering the fact that not only for Sefardim, but also according to the *Baal Hatanya* (Lubavitcher Rebbe), when there is a conflict between kabbala and halacha, a Chassid should follow kabbala.<sup>50</sup>

### **Solution # 1**

One of the ways to answer this dilemma, put forth by the Lubavitcher Rebbe, is the claim that the Ari z"l did not intend his wearing of *tzitzit* inside his clothing to be a public directive. The Lubavitcher Rebbe explains that the practice of the Ari z"l was that he wore a *tallit gadol* over his clothing, which he saw as representing *chitzoniut* (externality), which is simply doing mitzvot and not sinning. The *tallit katan* that he wore under his clothing was to represent *penimiut* (internality), which is the inner growth and transformation that comes from doing mitzvot and avoiding sin. However, the Lubavitcher Rebbe argues that this practice could not be taught to the masses because most Jews need to remember all of the mitzvot at all times, and in a basic way, which comes through actually seeing the *tzitzit*. On the other hand, the *begged* of the *tzitzit* may be covered as a sort of compromise. In this way one still has some of the aspect of internality and personal growth, while the strings are exposed so that one is always reminded of the mitzvot.

Thus, according to the Lubavitcher Rebbe,<sup>51</sup> only the Ari

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49. *Likutei Sichot*, footnote; *Mishneh Halachot* 8:11.

50. *Likutei Sichot*, p.98.

51. *Likutei Sichot*, Vol. 33 p. 95-103.

z"l was able to follow this kabbalistic practice of keeping his *tzitzit* under his clothing. Most of us, however, need to actually see the *tzitzit* in order to be reminded to fulfill all of the mitzvot. This explains the Lubavitch practice, which has also become widely accepted in the yeshiva world, of wearing the *begged* under the clothing but with the *tzitzit* strings out. Although this takes the kabbalistic approach into account, it is basically following the *Shulchan Aruch* in the style that is advocated by the *Shelah*, the *Shulchan Aruch Harav*, and the *Magen Avraham*.<sup>52</sup>

### Solution # 2

Not everyone accepts the claim that the Ari z"l's practice was not meant for the masses. After all, it is quoted as halacha by the *Magen Avraham*. Indeed, the opinion of the Ari z"l is actually the reason many Chassidim wear a vest over their *tallit katan*.<sup>53</sup> This way their *tallit katan* will be on top of their clothing, as the *Shulchan Aruch* rules, yet not totally exposed, in accordance with the Ari z"l. Furthermore, this is also the reason many Chassidim wear long coats, so that even if their *tzitzit* are exposed, it is still under their clothing.<sup>54</sup>

### Solution # 3

It is hard to say what the reason is for this third approach, but apparently Reb Chayim Brisker wore his *tzitzit* strings out, yet wrapped around his belt rather than dangling on the side of his pants.<sup>55</sup>

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52. All quoted above.

53. Levi, *Minhag Yisroel Torah*, *Orach Chaim* 8:6.

54. Ibid. The Chafetz Chaim also seems to mention a practice of wearing *tzitzit* strings out, yet under an outer coat; see *Mishnah Berurah*, *Orach Chaim* 23:1(3).

55. *Nefesh Harav*, *likutei hanhagot*, 105.

## Conclusion

The issue of how to wear *tzitzit* may come down to the fundamental question of their purpose. Are *tzitzit* primarily to be *worn*, or to be *seen*? It also depends upon how the verse “*u’reitem oto*” is understood. Even to those who hold that there is a mitzvah of seeing one’s *tzitzit*, we have seen that there are many factors that would still allow one not to expose the *tzitzit* in certain situations.

Further, from a historical perspective, it may be important to understand the history of the *tallit katan*, specifically if this garment was created as a result of persecution or because of changes in clothing styles. If persecution resulted in the need for this hidden garment, then maybe a lack of persecution should lead to wearing it out. On the other hand, if it simply began due to changes in clothing styles, there may be other factors involved.

It is important for a person to examine his lifestyle and make educated decisions. Luckily, the case of how to wear one’s *tzitzit* is a very pluralistic issue. Even R. Ovadia Yosef, who vehemently argues against wearing *tzitzit* out, agrees that those who do wear them out are still acting properly. Similarly, the *Tzitz Eliezer*, who strongly believes that it is correct for Jews to wear their *tzitzit* out, admits that those who wear them in are acting properly. While the issue may come down to different customs between kabbalists and *poskim*, or Sefardim and Ashkenazim, even an Ashkenazi Jew who generally follows *poskim* over kabbala, and who lives only among other Jews, has other dilemmas. While he cannot argue that he is scared to wear his *tzitzit* out, he may nevertheless appear to be arrogant if he decides to wear his *tzitzit* out while none of the Jews around him are doing so, and might thus be advised not wear



his *tzitzit* in this fashion.<sup>56</sup> We will thus conclude with the words of the Mahari M'Bruna, that regarding how to wear one's *tzitzit*, it all depends on the time, person, and local custom.<sup>57</sup>

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56. In addition to the fact that the Ari z"l brings up the issue of arrogance regarding those who wear their *tzitzit* out, see *Beit Yosef, Orach Chaim* 24:2, s.v. "*Katav*" in the name of many *Rishonim*, where he brings a general rule that any time a person does something in public that is not an obligation, but only a "*midat chassidut*" which no one else is accustomed to doing, then the person should refrain from doing this act because it would be considered arrogant. Regarding wearing *tzitzit* out, it thus depends on how one holds regarding the nature of its obligation and the way others in one's community wear their *tzitzit*.

57. *She'elot u'Teshuvot Mahari M'Bruna*, 91.



# A Public Letter to the Jewish Community

*Rabbi Alfred Cohen*

It is an unfortunate truism that Jewish society often apes secular society, thereby experiencing also many of its pitfalls. American society in the past few years has been rocked by exposures and allegations of gross sexual misconduct on the part of "authority figures", including clergymen, medical personnel, psychological counselors and therapists, even teachers and principals. Jewish society, even the most isolated and insulated segments thereof, has not escaped many of these modern horrors.

There is another dreadful area of fallout, one that does not receive as much publicity as the more sensational headline-grabbers of sexual misconduct. And that is the reality that many allegations of abuse turn out to be only that – allegations, not reality. Countless lives are destroyed and reputations ruined by accusations which, upon inspection, turn out to be wholly fictitious or the product of vindictive or sick minds.

Rather than only wring our hands in distress at the awful allegations and the dreadful disclosures, some rabbinic leaders in our community banded together to try and galvanize public action to forestall and prevent situations which could lead to abuse or false accusations. In a letter which was sent to all Jewish caregivers in our community (Monsey, N.Y.), and posted in public places, it was urged that all persons who might be in a position of dealing with vulnerable individuals who could become victims of abuse, take specific, publicized precautions

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*Rabbi Cohen is editor of this Journal and serves as  
Rabbi of Congregation Ohaiv Yisroel, Monsey, N.Y.*

to assure that even a whiff of scandal could not occur. These precautions might include installing glass walls or large windows in rooms where a teacher/counselor/therapist/dentist treats a patient; making sure there is always a female attendant in the room during a physical examination; never meeting someone in the home unless there is another person present, etc.

In banding together to try and AVOID problems rather than to manage damage control, this public letter was signed by a member of the local beth din, by a rabbi of the Chassidic community, and by myself as a pulpit rabbi in the Orthodox community. Moreover, its message was directed specifically to women in the community, urging them to (a) become aware of how vulnerable many women may be in a variety of real-life situations and (b) demand that those meeting with them or their children adhere to strict rules of precautions as outlined in our letter.

I am appending the letter so that other communities might consider whether it is not in their best interests to adopt similar standards and demand proactive measures to restore confidence and probity to our social relationships. Let me hasten to point out that these suggested measures serve not only to protect vulnerable individuals from being taken advantage of – but equally importantly, they protect care-giving professionals from having their names sullied or their probity called into question.

RABBI ALFRED COHEN

<b>Rabbi Avraham Cohen</b>	<b>Rabbi Cheskel Gold</b>	<b>Rabbi Leib Landesman</b>
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<b>Spring Valley NY 10977</b>	<b>Monsey NY 10952</b>	<b>Monsey NY 10952</b>

בס"ד

6 Cheshvon 5765 – October 21, 2004

Dear Sir:

You are no doubt aware of the many scandals which have unfolded on the American scene in the past few years, involving (alleged) abuse of children and susceptible women by doctors, therapists, clergy, and other counselors. We all know that the laws of *yichud* were formulated<sup>1</sup> to protect the Jewish community from this despicable behavior which has become pervasive in America. The laws of *yichud* are even more stringent in a case of increased acquaintanceship.<sup>2</sup> Additionally, even in cases where the technical letter of the halacha might permit a certain situation, our Rabbis were very much concerned that the spirit of the *issur yichud* be safeguarded.<sup>3</sup>

It is therefore evident that there is a need to protect our community from the effects of, or even the potential danger of, such behavior. We are therefore calling upon all parents of children in susceptible situations and especially upon Jewish women – and those who provide services to these children

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1. גמרא עבודה זרה דף לו:

2. קידושין דף פא. דבלבו גס בה אינו מועיל בעיר להנצל מאיסור ייחוד.

3. קידושין דף פא: מצינו לרבי מאיר שאמר לתלמידיו הזהירו בי (להיות עמי - רש"י) מפני בתי; שס"ל שאסור להתייחד עם בתו. ואף דלא קיימא לו כן, וכמו שנתבאר ברמב"ם הלכות איסורי ביאה פכ"א ה"ז ופכ"ב ה"א, עכ"ז הביאו הרמב"ם לדבריו שם בהלכה כ', והביא שעשו כן "כדי ללמודם שלא יתביישו בדבר זה ויתרחקו מן הייחוד". ובספר החינוך מצוה קפ"ח הביא בטעמו "כדי להרבות בשמירה יתירה".

and women – to voluntarily adopt standards of office practice which will protect both the patients/clients as well as themselves – the caregivers – from any threat or suspicion<sup>4</sup> of abuse. Unfortunately, we have often witnessed how false accusations can destroy individuals and families, and we all need to be protected<sup>5</sup>.

Consequently, we are advising all responsible persons in the community to ask that special precautions be taken in cases of a doctor, or therapist, or rabbi—anyone who meets in private with a child or woman and may be in a position to take advantage of their vulnerability, whether physical, emotional, or psychological. We suggest that there always be another person present in the room, or at least right outside the open door. (We realize that there are situations where this is unworkable; e.g., in certain counseling services. We ask for your input as to how to adhere to the letter and spirit of the laws of *yichud* in such situations.)

It is, unfortunately, a sad day when we have to ask all professional caregivers to take precautions so that there will not even be a risk (of appearance) of impropriety which might be alleged to them. It is also sad that children and women need to be warned not to trust people they need to trust. Nevertheless, we feel this is a necessary step which must, and should, be taken. We urge you to adopt such standards;

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4 כבר אמרו חז"ל בגמ' חולין דף מד: הרחק מן הכיעור ומן הדומה לו, וענין "דומה לו" הוא בפחות מכיעור ממש, דהיינו, שברור שבעצמיותו אין בו משום איסור, ועל כל זה, הורונו חז"ל להתרחק מזה מחמת שישנם שיחשבו ויחשדו אותו מחמת התנהגותו. ודבר זה מושרש בדין תורה, שנאמר (במדבר ל"ב) והייתם נקיים מזה ומישראל, ומפני זה כתב המאירי בשבת דף כג. שישנם דינים מסוימים כדי להוציא אדם מן החשד (וכגון, להניח פאה בסוף שדהו ולא באמצעו).

5 ומעשה יוסף עם אשת פוטיפר יוכיח (ובפרט למאן דאמר בסוטה דף לו: שבא "לעשות מלאכתו" ממש) ועיין בילקוט שמעוני פרשת וישב רמז קמ"ו שאשת פוטיפר אמרה לחברותיה בבקשה מכן שתאמרנה כל אחת ואחת [לבעליכן] שאף לכן תבע ועשו כן, ונכנסו כל השרים לחצרו של פוטיפר וספרו לו ורצה להרגו.

moreover, we ask that you contact all your patients/clients and advise them of this new policy, and that you post this policy in your office (or post this letter).

If you and your colleagues will meet this challenge, it will set a standard for accepted practice for all others, without casting the pall of suspicion upon anyone. Thereby, it is hoped, these standards will remove not only the temptation but also the reality of our people succumbing to the depraved level of secular society, and alternatively, the anguish and ramifications created by false accusations and similar gossip.

We invite your comments and suggestions regarding setting up such precautionary procedures.

(signed) RABBI A. COHEN      (signed) RABBI L. LANDSMAN

בס"ד

לאשר נדרשתי מתלמידי חכמים חשובים לעורר ולהזהיר על איסור קרבות ויחוד בפרט בטיפולי רופאים וטעראפיסטן למיניהם וקאנסאלירס שנוהגים להקל בזה, ובאמת אצלם חמור יותר, ובעוה"ר נכשלים בזה הרבה ביודעים ובלא יודעים. ע"כ, באתי בזה להוסיף על הדברים הנ"ל, שמוטל על כל אחד ואחד, הן הרופאים והקאנסאלירס והן הפעשינטס להזהר ולעשות הכל כדין המבואר בשלחן ערוך, ולישאל מקודם מרב מובהק הבקי בדינים האלה. והיות שאיני מכיר בלשון אנגלית אבקש לתרגם דבר זה בשפת אנגלית גם כן כדי שיוכל כל אחד להבין. ולמזהיר ולנוהר שלומים תן כמי נהר.

באעה"ח יום ה' לסדר התהלך לפני והי' תמים ו' מרחשון שנת תשס"ה לפ"ק.

הק' אלימלך יחזקאל שרגא גאלד

רב דקהל שערי חסד מאנסי יצ"ו

## Letters

To the Editor:

I very much enjoyed reading Rabbi Yeshai Koenigsberg's comprehensive article, "The Canvas Succah" (XL:27). I would just like to make a practical suggestion. After noting the ruling of the *Shulchan Aruch* disallowing canvas-like walls out of concern they will become untied, R. Koenigsburg devises a succah construction to satisfy this stringency. His model involves fastening a series of horizontal poles between the vertical metal poles that form the frame of the succah to provide a back-up for the canvas wall. Although the average consumer may find it rather demanding to modify and dismantle a prefabricated succah in such a fashion, the same halachic benefit can be achieved by stretching rolls of common duct tape between the metal poles and ultimately around at least 2-3 sides of the succah frame. The rolls would also have to be, as R. Koenigsberg notes, within 3 *tefachim* of each other to achieve the status of *lavud*.

ADAM FELSENTHAL  
New York, NY