# Journal of Halacha and Contemporary Society

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

Manuscripts which are submitted for consideration must be typed, double-spaced on one side of the page, and sent in duplicate to the Editor, Rabbi Alfred Cohen, 1265 East 108th Street, Brooklyn, New York, 11236. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles which concern halachic practices of American Jewish Life.

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# TABLE OF CONTENTS

# The Laws of Eruvin - An Overview

*Rabbi Hershel Schachter*

## The Rabbi's Obligation

The Gemara in *Eruvin*[1] relates an incident concerning a *Brit Milah* performed on Shabbat in the city of the sages Abaye and Rabba. On that occasion, the hot water needed for the baby could not be obtained without violating the prohibition against carrying on Shabbat, and the Gemara discusses whether one may ask a non-Jew to perform the necessary carrying for the purpose of the *Milah*. After the episode, Abaye is asked why, in a city of two great *Amoraim*, had neither he nor Rabba seen to the making of an *Eruv*. He answers that it is beneath Rabba's dignity to go collecting the requisite matzot from door to door, and that he, Abaye, is so absorbed in his learning that he has no time to supervise the *Eruv* of the city. The two Rabbis were therefore excused from their duty. The Mordechai[2] infers from this Gemara that under normal circumstances, when the Rabbi of an area is not similarly exempted, he has an obligation to make an *Eruvei Chatzerot* for the community, even as he must prepare an *Eruv Tavshilin* to enable those who forgot to make their own to cook on a Friday Yom Tov for the Shabbat to follow.[3]

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1. *Eruvin* 67b-68a
2. *Eruvin*, no. 515
3. See *Beitzah* 16b

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*This article was transcribed and arranged by Rabbi Moshe Rosenberg, based on a lecture delivered by Rabbi Schachter*

Following this reasoning, Rabbeinu Asher (Rosh), in a famous responsum,[4] sharply critizes the leadership of a city whose official policy it was *not* to make an *Eruv*, despite the halachic permissibility of doing so. In this area, writes the Rosh, if the *Tannaim* and *Amoraim* saw fit to be lenient, it is sheer nonsense to be strict; unnecessary strictness can only lead to profanation of the Sabbath by people who carry in a city with no *Eruv*.

Establishing an *Eruv* is then not only permissible but obligatory, with the obligation devolving upon the Rabbi. First, though, the Rabbi must determine whether, under the prevailing conditions,it is possible to make an *Eruv* in his community. In this respect, every case is unique, and must be decided based upon principles developed in the Gemara. This essay will outline those principles and briefly discuss the related halachic issues which must be dealt with in the planning of any potential *Eruv*.

## Reshut Hayachid

The biblical prohibition against carrying on Shabbat includes only the transporting from one domain to another — from public domain *(Reshut harabim)* to private domain *(Reshut hayachid)* or vice versa — and the moving of an object four cubits *(Amot)* in a *Reshut harabim*. Rabbinically the prohibiton was extended to forbid carying four *amot* in a *carmelit*,[5] carrying from a *carmelit* to a *Reshut harabim*, etc. Only carrying in a *Reshut hayachid* remained permissible.[6] Thus, a primary concern in the planning of an *Eruv* is the determination that the area under question is, indeed, a *Reshut hayachid*.

Roughly defined, a *Reshut hayachid* is an area of certain

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4. *She'elot Utshuvot HaRosh, Klal* 21 *Siman* 8. See also *Tshuvot Chatam Sofer, Orach Chaim*, 89. Rabbi Joseph Moskowitz (Admor of Shotz) developed at *mechitza* is not a disqualifying factor, at least on a biblical level. לענין הדין sefer *Kuntres Tikunei Eruvin of Manhattan*. (New York, 5719).
5. A *carmelit*, for our purposes, may be understood as a place which is neither a *Reshut hayachid* nor a *Reshut harabim* halachically.
6. Even such carrying will require first the setting aside of a box of matzot, etc., to blend together all the co-users of one *Reshut hayachid*, but that aspect is not the focus of the present essay.

dimensions (minimum of four by five *tefachim*) enclosed by walls called *mechitzot*. These *mechitzot* can take on different forms. The *Chacham Tzvi*[7] categorizes three types of *mechitzot:* 1. An actual wall ten handspans *(tefachim)* high. Such a *mechitza* is subject to various rules concerning the presence of breaches, their size and location. 2) A mound or other elevated area measuring at least ten *tefachim* tall (four *tefachim* in length and width) and located in a *Reshut harabim*. In this case, the *mechitzot* are the walls of the mound, and, by virtue of their being said to extend halachically to the sky, they succeed in enclosing the top of the mound, thus making it a *Reshut hayachid*. 3) A canal, surrounding a piece of land. Here, the *mechitzot* are formed by the drop below ground level, and are said to extend to the sky, thereby granting the enclosed area the status of *Reshut hayachid*.

It is the existence of this third form of *mechitza* which leads the Gemara to ask why all the continents may not be classified as *Reshut hayachid*, dropping as they do at least ten *tefachim* off their coasts, to form the continental shelf.

Tosafot[9] provides a somewhat cryptic explanation of the Gemara's answer why this cannot be. The *Chazon Ish*[10] understands Tosafot to be stating that if three conditions are simultaneously fulfilled, then the otherwise acceptable *mechitzot* are disqualified. If the *mechitzot* 1)are the product of natural phenomena, rather than man-made, 2)enclose a very large area (here the *Chazon Ish* cites the *Knesset Yechezkel* as setting 100 x 50 *amot* to be the cut-off point), and 3)do not hinder maritime

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7. *Tshuvot Chacham Tzvi*, 5. The *Chacham Tzvi* was very involved in his day in the practical aspects of *Eruvin*, having been consulted about building an *Eruv* around The Hague, in Hamburg, Furth, and in England.
8. *Eruvin* 22b. From this discussion, we see that the presence of water covering the *mechitza* is not a disqualifying factor, at least on a biblical level. לענין הדין מדרבנן עיין תוס' פ"ק דעירובין יב: ד"ה הבא.
9. Ibid.
10. *Orach Chaim* 108:11. The *Chazon Ish's* analysis is borne out by a later-discovered manuscript of the *Tosafot HaRosh*. In general, it is amazing how many of the *Chazon Ish's* original explanations of cryptic passages have been similarly proven correct.
11. This measurement, called a *Beit Satayim*, was the size of the Mishkan, and was

traffic, but instead allow the passage of ships above the point of the sudden drop forming the continental shelf,[12] then such demarcations are not considered valid *mechitzot* for *Eruvin* purposes.

According to this Tosafot, only the natural walls of the continent would be considered invalid, but if one would erect *mechitzot* around an entire continent, it would be converted into a *Reshut hayachid.*

The Ramban, however, is quoted by the Ritva[13] as ruling out this possibility. In his opinion, the reason for invalidating the natural *mechitzot* at the point of the continental shelf would apply as well to invalidate the *mechitza* status of walls erected around an entire continent. Once an area is so vast that, even when it is enclosed by *mechitzot,* the people inside have no sense of being in an enclosed area, then the *mechitzot* are not effective.[14]

The *Mishnah Brurah,*[15] however, writes that he saw the actual words of the Ramban[16] and that in fact his statement was limited to naturally-occuring *mechitzot* and would not apply to *mechitzot* put up by man.

But it is a fourth kind of *mechitza* which has the most practical application to the construction of an *Eruv.*[17]

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later designated as the size of a *Karpef,* a large enclosed area in which it is rabbinically forbidden to carry. From this Tosafot as explained by the *Chazon Ish,* we then see that the rabbinic enactment of *Karpef* was not a new idea, but rather a *Ki'ein d'oraitha,* an extension of the biblical prohibition of carrying in such an area when all three conditions are fulfilled.

12. This condition, too, can be seen as the biblical source for the rabbinic rule that traffic negates a *mechitza (Atu rabim umevatli mechitzta).* According to Rambam, this opinion is of rabbinic origin.
13. To *Eruvim* 22b.
14. The *Chayei Adam* (in *Nishmat Adam* 49, no. 2) suggests, based on a Mishnah in *Bechorot* (54b), that the maximum size for an enclosure according to the Ritva should be sixteen mils. The Maharsham, in his responsa (vol. 4, no. 1), accepts this suggestion. According to *Iggerot Moshe* (*Orach Chaim* vol. 1, pg 241), this means that the distance from the center of the enclosure to any one of the *mechitzot* should not exceed sixteen mils, i.e., the length of the enclosure should not exceed 32 mils.
15. סי' שמ"ו ס"ג בה"ל ד"ה קרפף
16. חי' הרמב"ן לעירובין
17. Constructing an *Eruv* is only a colloquialism; in fact, the *Eruv* itself refers to

## Tzurat Hapetach

The Gemara in *Eruvin* (11b) is the source of the *mechitza* which is formed to resemble the frame of a door and is called *Tzurat hapetach*. The rationale behind this type of *mechitza* is as follows: since a house is most certainly a *Reshut hayachid*, even with its door(s) wide open, and even when it has several such doors, why shouldn't an enclosure surrounded totally by doorways (even when the doors are missing and only the doorframes remain) be considered a *Reshut hayachid* as well? All that is needed for such a doorframe *mechitza* is "a pole on one side, a pole on the other side, and a pole running across the two from above."[18] Strictly speaking, there is no limit to the number of such *Tzurot hapetach* which may be employed.[19]

## Possible Limitations

Some authorities, however, severely limit the practical use of the *Tzurat hapetach*. The *Pri Megadim*[20] claims that this form of *mechitza* is a rabbinic enactment, geared merely to remind a person of where an enclosed area ends, and, as such, can only be used to permit carrying in areas whose original prohibition was rabbinic in

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the matzot later set aside. In Yiddish, however, the *Tzurat hapetach* is referred to as an *Eruv*.

18. Actually, whether several doorframes, one next to the other, may be used is a matter of dispute between the *Sha'arei Teshuva (Orach Chaim* 363:9 quoting the responsa of *Ohel Ya'akov)* and R. Shlomo Kluger
(טוב טעם ודעת, עמוד קיז, סימן ב' בהשמטות השניות בסוף חלק א').
The *Ohel Ya'akov* argues that according to the Gemara (*Eruvin* 11), *mechitzot* are valid only if they are made in the same fashion in which people normally erect walls, and people do not normally construct several consecutive doorways. R. Shlomo Kluger counters this argument by saying that, in determining the viability of *Tzurot hapetach*, we only examine each doorframe individually and not in relation to its neighbors. People *do* normally construct single doorframes, and we need not consider the fact that one doorframe is placed next to another. It should be noted, however, that even according to R. Shlomo Kluger, it is still essential that each individual frame be a viable structure for a door, able to sustain a very light door for at least ten *tefachim* from the ground up.
19. The various rules concerning the exact construction, which are found in *Eruvin*, are not our present concern.
20. Quoted in *Mishnah Brurah* to 362:10.

nature. Thus, *Tzurot hapetach* would allow one to carry in a *carmelit*, but not in a *Reshut harabim*.[21]

The *Chazon Ish* opposes this school of thought,[22] and insists that the *Tzurat hapetach* works on a biblical level, and not only on a rabbinic one. As proof, he cites a case from the Gemara[23] concerning the biblical prohibition of *Kil'ayim* (forbidden crossbreeding) in Eretz Yisrael. In order to avoid the *Issur d'oraitha* of *Kil'ayim* one must either leave four *amot* of spaces between his wheat and grape seeds or erect a fence between the two types of seeds. The Gemara states explicitly that the "fence" may be a *Tzurat hapetach*. In this way, says the *Chazon Ish*, the *Tzurat hapetach* functions on the *d'oraitha* level, to remove the biblical prohibition of *Kil'ayim*. Several *Acharonim*[24] who sided with the *Pri Megadim* anticipated this proof and refuted it by distinguishing between the types of *mechitzot* needed for *Kil'ayim* and for *Eruvin*. While for *Kil'ayim* purposes a *mechitza* need only *separate*, for Shabbat purposes it must *enclose* as well. The proof of the *Chazon Ish* shows only that a *Tzurat hapetach* is a *mechitza hamafseket*, a *mechitza* which separates, but does not prove it to be a *mechitza hamakefet*, one which encloses an area. Despite the refutation of his proof, it is the opinion of the *Chazon Ish* which is widely accepted today.

## Atu Rabim

But leaving aside the *Pri Megadim*, there is yet another reason why the *Tzurat hapetach* may only permit one to carry in a *carmelit*, but not in a *Reshut harabim*. The Gemara[25] raises the problem that when traffic passes constantly through a *mechitza*,

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21. Based on this calculation the *Pri Megadim* claims that although we allow the lintel of the doorframe not to touch the two doorposts, nevertheless, if it is more than twenty *amot* high, it disqualifies the *mechitza*, because, as we find in *Hilchot Sukkah*, anything above twenty *amot* can no longer serve as a *Heker*, a reminder. See *Orach Chaim* 630: *Eshel Avraham* סק"ב.
22. *Orach Chaim* 70:13
23. *Eruvin* 110.
24. See *Minchat Yisrael* to *Eruvin* 110.
25. *Eruvin* 22a.

we sometimes say *"Atu rabim umevatli mechitzta"* — the public comes and nullifies the *mechitza.* This principle would not do away with the entire *mechitza,* but would effectively negate it in those places where it is pierced by the traffic. Whether or not we apply this constricting rule depends upon two factors. First, Tosafot explains[26] that if the whole need for the *mechitza* is rabbinic, as in the case where there are already three other *mechitzot,* then we do not apply *Atu rabim* to the fourth *mechitza.* Furthermore, the Ritva points out based on the Gemara in *Eruvin* 21a, if the *mechitzot* are especially strong *(mechitzot briot),* we likewise do not say *Atu rabim. Tzurot hapetach,* however, are generally assumed to be *mechitzot gru'ot* — weak *mechitzot.*[27]

For practical purposes, Tosafot's lenient provisions do not often help us, for we don't normally have cases where only the fourth wall needs to be made as a *Tzurat hapetach.* Here, though, it is the Maharam Rotenburg who comes to our aid. Quoted by the Mordechai,[28] the Maharam Rotenberg extends Tosafot's leniency, and rules that even if there are no previously existing *mechitzot,* if the area under question is not considered a *Reshut harabim d'oraitha,* we do not say *Atu rabim.* In other words, one must merely find some reason to declare an area not to be a biblical *Reshut harabim* in order to remove the problem of *Atu rabim,* and create a situation where *Tzurot hapetach* can be ereted to make the area a *Reshut hayachid.* It remains to be seen, however, what precisely are the conditions required to constitute a *Reshut harabim d'oraitha* and which of these factors, if any, can be the basis of leniency today.

## Reshut Harabim

There are, at most, six conditions which must be met for an area to be declared a *Reshut harabim d'oraitha.*

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26. Ibid, ד"ה קשיא.
27. This is the opinion of the Rashba, and is subscribed to by the *Chazon Ish.* The Ritva disagrees, labeling *Tzurot hapetach* as *mechitzot briot.* The *Chavatzelet HaSharon* (ח"ג כלי י"א) explains the lenient opinion at length, saying that doorframes are *made* to be traversed, unlike regular walls. Therefore the passage of traffic through it does not render the *Tzurot hapetach* a *mechitza gruah.*
28. ר"פ הדר, סי' תקט, quoted by רמ"א דרכי משה או"ח שס"ד סק"א

a) The area must be owned by the public, and may not be the private property of any individual.[29]

b) It may not have a ceiling.[30]

c) It must be at least sixteen *amot* wide.[31]

d) If we are discussing a city, the street must go straight through the entire city, without a detour. *(Mefulash misha'ar lisha'ar b'li shoom ikum klal."*[32]

e) It must be accessible to the public twenty-four hours a day. The Gemara states[33] that Jerusalem would have been considered a *Reshut harabim d'oraitha* were it not for the fact that the doors to the city were locked every night. Consequently, even during the day Yerusalayim lacked *Reshut harabim* status. Rashi and Tosafot assume that the practice was to make an *Eruv* for Jerusalem.[34]

f) The area must be traversed daily by 600,000 people. In fact, whether this condition is necessary or not is a dispute between

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29. *Eruvin* 59a. For this reason, Rockefeller Plaza, despite meeting the other requirements, is not a *Reshut harabim,* because it is privately owned.
30. *Shulchan Aruch Orach Chaim* 345:7.
31. Ibid.
32. This is the phrase the *Mishnah Brurah* quotes from the Ramban. Rav Moshe Feinstein, however, in *Iggerot Moshe, Orach Chaim* 140, writes that he doesn't know of any Talmudic source requiring the lack of *any* detour whatsoever. He therefore refuses to base a leniency on this point.
33. *Eruvin* 6b.
34. See Rashi to *Eruvin* 6b, Tosafot *Pesachim* 66a תוחב ד"ה. Rabbenu Ephraim (referred to by some early sources as a student of Rif) is quoted as disagreeing with Rashi and Tosafot. In his opinion, although the streets of Jerusalem did not constitute *Reshut harabim d'oraitha,* still there never was an *Eruv* made there. Rav M. Feinstein, in *Iggerot Moshe* Vol. I, p. 240, suggests that the reason for this might be that an *Eruv* should never be allowed in any central metropolis. People coming from far and near to visit the large city will carry there on Shabbat, relying on the *Eruv;* however, when they return to their small towns, they might continue to carry there on Shabbat too, not realizing that their community might not have an *Eruv.* Accordingly, Rav Feinstein opposed the erection of an *Eruv* in Manhattan, which is a central metropolis like Jerusalem of old. The fact that so many towns in Europe did have an *Eruv* does not indicate that the opinion of Rabbenu Ephraim has been rejected, for these towns are not considered centrally located metropolitan areas.
See, however, "Rabbenu Ephraim" by Rabbi Israel Shepansky, Mossad HaRav Kook 1976. pp. 352-356, where the early sources quoting Rabbenu Ephraim seem to indicate an entirely different understanding of his view.

Rashi and Tosafot on one side, and the Rambam on the other.[35] As we will soon see, later *Poskim* disputed the point as well.

## Highways

It must be noted, however, that the above conditions are only required when we wish to declare that a *street* be labeled as a *Reshut harabim d'oraitha.* The *Magen Avraham*[36] rules that a highway *(derachim haovrim me'ir le'ir)* is a *Reshut harabim d'oraitha. Orchot Chayim*[37] quotes *poskim* who say that what the *Magen Avraham* means is that, in fact, the highway is the model *Reshut harabim,* the litmus test by which we determine whether any other area is public domain. Therefore, if a city street is *mefulash misha'ar lisha'ar* 24 hours a day and traversed daily by 600,000 people, we no longer consider it merely a street, but declare it, too, to be a "highway," and a *Reshut harabim.* It is the *street* which must fulfill these additional three conditions; but a highway itself, being the paradigm of a *Reshut harabim,* need not be accessible at all times to the public,[38] nor need it have traffic consisting of 600,000 people.

With the six conditions of the *Reshut harabim* in mind, we can now examine the different approaches as to why it is sometimes possible to construct an *Eruv* around a city. Each approach is based upon the assumption that some required conditions is not present, thus rendering the city in question a non-*Reshut harabim d'oraitha,* or maybe even a *Reshut hayachid.*

## (A) Shishim Ribo

As mentioned previously, whether traffic of 600,000 *(shishim*

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35. On *Eruvin* 59a.
36. סי' שמ"ה סק"ה
37. אורחות חיים (ספינקא) שם ע"ש תשובת בית יעקב
38. According to this understanding of the status of a highway, it would not be possible to render a highway a non-*Reshut harabim* by placing collapsible doors at the beginning of it. One might have thought that the highway now has דלתות הראוין לנעול and is no longer a *Reshut harabim,* but in fact, we see that a highway is a *Reshut harabim* even if it is not accessible at all times to the public.

*ribo)* people is a requirement for a *Reshut Harabim* is disputed among the *Rishonim.* For many years, it was accepted *psak* in Europe that the view of Rashi and Tosafot represented the majority opinions in requiring 600,000 people before labeling the area a *Reshut harabim d'oraitha.* Therefore, rabbinic authorities permitted the establishing of *Eruvin* in cities lacking *shishim ribo,* declaring that the cities were not *Reshuyot harabim d'oraitha,* and as such, could be enclosed by *Tzurot hapetach* according to the Maharam Rotenburg's approach.

In the early 1800's, however, Rabbi Ya'akov of Karlin,[39] the author of *Mishkenot Ya'akov,* challenged the very foundation of this leniency. It is only Rashi and Tosafot, he claims, who say that a *Reshut harabim* must be *traversed* by *rabim,* (multitudes) and that *"rabim"* is defined as the number of Jews in the desert at the time of the Tabernacle, from which period these laws are derived. The Rambam, though, denies such a requirement, saying merely that the area must be owned by the public. The *Mishkenot Ya'akov* contends that the majority of the *Rishonim* agree with the Rambam against Rashi and Tosafot, thus effectively depriving us of the basis for many of our *Eruvin.* The *Beit Ephraim,* in a letter to Rabbi Ya'akov of Karlin later published in *Mishkenot Ya'akov,*[40] defends the original approach against the attack of the Karliner Rov, contending that the majority of *Rishonim* do, in fact, agree with Rashi and Tosafot. Nevertheless, the strict opinion of the *Mishkenot Ya'akov* is cited by the *Mishnah Brurah*[41] and *Aruch Hashulchan.*[42]

## (B) Aruch Hashulchan

A novel, if highly questionable, leniency is suggested by the *Aruch Hashulchan,* Rabbi Yechiel Michel Epstein of Navardok.[43]

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39. *Mishkenot Ya'akov* 120 חלק או"ח
40. *Orach Chaim,* no. 106.
41. לס' שס"ד ס"ב בה"ל ד"ה ואחר
42. *Orach Chaim* 345:17
43. Ibid 345:19-24 See however דברי מלביאל Vol. III p. 267, by Rabbi Tannenbaum of Lomze, who feels that one may not rely on this "new" leniency as it is not found in the earlier classical sources.

In his opinion, only during the times of the Talmud was there actually a real status of *Reshut harabim d'oraitha* for streets of cities, because, for a street to be a *Reshut harabim* (with a *He hayediah* — a definite article) it must be *the* main thoroughfare of the city, with all other streets being minor. Nowadays, however, our cities have several such large streets, and, claims Rav Epstein, each one cancels out the importance of the others.

## (C) Mefulash

R. Shlomo Dovid Kahana was once asked why the *Eruv* in Warsaw was still relied upon. In the days of the *Chidushei HaRim*, when the *Eruv* was originally established, Warsaw did not have a population of 600,000, but since then, the city had grown and, before the Second World War, had well over that size population. He responded[44] with yet another suggested leniency. The larger a city grows, he said, the less of a chance there is for any one street to go *straight through* the whole city, with no digression. Since one requirement for *Reshut harabim d'oraitha* is *mefulash misha'ar lisha'ar*, our cities are therefore not *Reshuyot harabim d'oraitha* and we may erect *Eruvim* according to the Maharam Rotenburg, as cited above.[45]

## (D) Chazon Ish

A totally new idea is advanced by the *Chazon Ish*.[46] He claims

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44. Quoted by R. Kasher in *Noam* referred to above.
45. Rabbi Moshe Feinstein (*Iggerot Moshe Orach Chaim*, Vol. 1, page 242) claims that this leniency is a very shaky one. Even if we assume that lack of *mefulash* means that an area is not a *Reshut Harabim d'oraitha*, nevertheless, Rav Moshe argues, such an area is a *Reshut harabim mi-d'rabbanan*.
46. *Hilchot Eruvin* סימן 43 especially אות 7. See also אורחות חיים Vol. I, p. 139, quoting earlier *poskim* who say the same. These *poskim* add that in such a situation, even according to the view of Rambam one would be allowed to carry. The *Mishnah Brurah* (# 362, note 59) recommends that Bnei Torah follow the stringent view of Rambam not to carry in an *Eruv* consisting of *Tzurot hapetach* spanning a gap of more than 10 *amot*. אורחות חיים points out that if there are actual walls enclosing the majority of the area (עומד מרובה על הפרץ) then, although there are gaps in the *mechitzot* of more than 10 *amot* for which there are constructed *tzurot hapetach*, the *Eruv* would be acceptable even according to the view of Rambam.

that not only are many of our cities not *Reshyuot harabim d'oraitha*, but, in fact, they can be proven to be *Reshuyot hayachid* on a biblical level. His calculation run as follows: since city blocks consist of rows of connected buildings, we automatically have two *mechitzot* bordering any street. (The fact that the *mechitzot* were originally intended only to enclose their respective houses is irrelevant, because the Gemara rules that a *mechitza* can create a *Reshut hayachid* even if they were not erected with that intention in mind). Then if anywhere along the course of the street we run into a dead end (and here a dead end need not be an absolute barrier — it must only impede forward traffic, but can allow one to turn left or right) we thus have our third *mechitza*. Since only three *mechitzot* are required biblically, we now have a street which is a *Reshut hayachid min haTorah*. (see diagram 1)

At first glance it would seem that the street crossings should present a problem, for we know that a breach of more than ten *amot* in a *mechitza* serves to disrupt the *mechitza*.[47] The crossings, being at least that large, should prevent the original two *mechizot* from being halachically connected to the third *mechitzot*. But in reality, the *Chazon Ish* shows how this is no problem. Assuming that the disqualifying effect of a breach of ten *amot* is only a rabbinic law,[48] the *Chazon Ish* points out that when only a rabbinic issue is involved, we do not say *Atu rabim umevatli mechitzta*.

Moreover, not only don't the crossings detract from the *mechitza*, but they even become part of it. We visualize the street as if imaginary lines were drawn extending from the two parallel *mechitzot* to the *mechitza* running in the opposite direction, and the space of the crossings is said to be enlosed as well. Once this is so, the crossings actually help us, for they become the third *mechitzot* of all the streets that intersect this particular street (see diagram 2). In this way, with one dead end street, an entire city can become a *Reshut hayachid d'oraitha*.

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47. משנה עירובין

48. Whether indeed this disqualification is only rabbinic in nature is a point of controversy between the *Mishkenot Ya'akov* (109) and the *Beit Ephraim*. The *Chazon Ish* concurs with Rav Ephraim Zalman Margaliyot in labeling it only *d'rabbanan*. Rav Moshe Feinstein makes the same tacit assumption in *Iggerot Moshe Orach Chaim*, 139 ס' ח"ב, without spelling it out.

**Diagram 1**

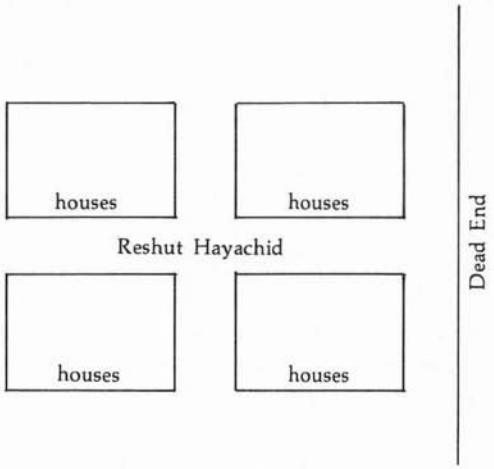
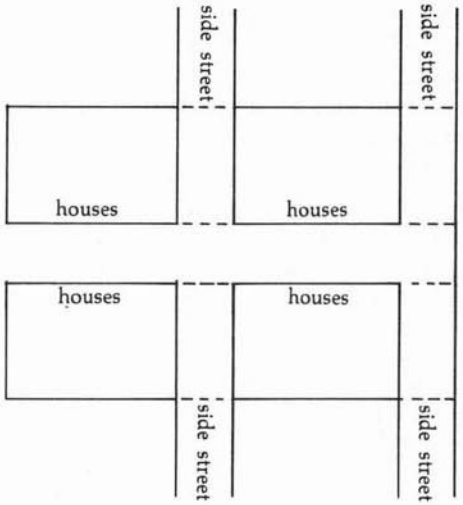



**Diagram 2**




— — — represents the imaginary part of mechitza which serves as third mechitza for side streets.

The *Chazon Ish* was very much involved in establishing several *Eruvin*. He himself would personally check the *Eruv* around Bnei Brak every Friday morning, even in the most inclement weather. Nevertheless, he himself did not carry in the *Eruv*, even to the extent of not wearing his watch, and recommended to "Bnei Torah" to do the same. Various reasons have been suggested by his followers for this behavior.[48A]

This ruling of the *Chazon Ish* is highly questionable. One point which can be disputed concerns the crossings which become, according to the *Chazon Ish*, *mechitzot* for the intersecting streets. It can be contended that while these crossings do not damage the *mechitzot* of the first street (because we assume that when there is more *mechitza* than breach, a gap larger than ten *amot* is only a rabbinic disqualification, and on rabbinic problems we do not apply *Atu Rabim*), nevertheless, they cannot serve as *mechitzot* for any side street, because with respect to that side street they are not just filling in a gap, but are being used as an entire *mechitza (Nifratz bemilu'o)*. Such a use is not permitted.[50]

The *Chazon Ish* did not formulate his opinion on the purely theoretical level; he actually applied the approach in response to a practical problem referred to him by Rav Chaim Ozer Grodzensky of Vilna. In 1938, Rabbi Elie Munk of Paris turned to Rav Chaim Ozer for a ruling on whether it was possible to make an *Eruv* for the Jewish section of Paris. At first Rav Chaim Ozer, due to his failing health, did not want to get involved in the serious question. Only after repeated requests from Rav Munk did Rav Chaim Ozer pursue a halachic answer. He conferred with the Dayan in Vilna

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48.a פאר הדור Vol. II, pp. 136, 285

49. This account is reconstructed from the letters we have which were sent by Rav Chaim Ozer to Rav Munk and the *Chazon Ish* concerning an *Eruv* in Paris. The letter sent to Rav Munk can be found in Rabbi M.M. Kasher's article in *Noam*, Vol. 6, pp. 34-65. In it Rav Chaim Ozer explains his initial reticence in deciding the question, his conferring with his colleagues, and the conclusions reached. The final *psak* does not mention the *Chazon Ish's* claim regarding city streets, but Rabbi Kasher suggests that it was this opinion of his which influenced the *Chazon Ish* in his counsel to Rav Chaim Ozer. In a second letter, also reproduced in *Noam* from *Kovetz Igrot (Chazon Ish)* v.2 p187, Rav Chaim Ozer writes to thank the *Chazon Ish* for his collaboration on the Paris question.

who was in charge of *Eruvin* and wrote a letter seeking the advice of the *Chazon Ish*, who by then was already living in Bnei Brak. The *Chazon Ish* replied by letter, apparently depending heavily upon his unique approach as outlined above. In the end Rav Chaim Ozer informed Rav Munk that, under certain conditions, carrying could be made permissible in Paris. Rav Munk, realizing that under the circumstances the conditions could not be met, sent a copy of Rav Chaim Ozer's letter to all the Rabbis of Paris, to inform them that carrying would be forbidden.[49]

## Gaps in the Eruv

Assuming the reliability of one or a combination of the above approaches, the problem of gaps in the *mechitzot* still remains. Most assuredly, our *mechitzot* should not have breaches larger than ten *amot* long. In Rabbi Yosef Eliyahu Henkin's letter urging the Rabbis to go through with the Manhattan *Eruv*,[50] he stressed that all gaps be closed up with *Tzurot hapetach*. This, however, has never been taken care of.

But there is an opinion that even a breach of four *tefachim* is not allowed. The Ramo rules that our cities no longer have a status of *mavuy*.[51] The *Magen Avraham*,[52] however, understands this to mean that our cities are not entitled to the leniencies of a *mavuy*, but are subject to a *mavuy's* strictures nonetheless. One such stricture declares that a gap of only four *tefachim* is enough to disqualify a *mechitza* when there is some traffic passing through the gap. The *Even HaOzer* disagrees, saying that the Ramo's statement exclude our cities from the strictures of a *mavuy* as well.[53] The *Mishkenot Ya'akov*[54] takes the side of the *Magen Avraham* in this dispute.

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50. See אור המזרח ניסן תשמ״א
50.a A facsimile of the letter appears in Rabbi M.M. Kasher's *Sefer Divrei Menahem*, part 2, page 2.
51. או״ח שס״ג סכ״ו
52. או״ח שס״ה סק״ד
53. Ibid.
54. חלק או״ח ס׳ קכ״ד

## Karpef

Even if we have determined our area to be a *Reshut hayachid* or *Carmelit*, and have enclosed it with *Tzurot hapetach*, not allowing any gaps larger than four *tefachim*, an additional problem may arise. The Rabbis have declared that an enclosed area of more than 100 x 50 *amot* over which the owner wishes to prevent people from walking (such as a planted field) is designated a *Karpef* in which one may not carry.[55] Additionally, there is a rabbinic law that when a *Reshut hayachid* is contiguous to another area where one may not carry, then one may not carry even in the *Reshut hayachid* itself.[56] By combining these two rabbinic laws we emerge with a stringency concerning cities which have (as many European cities do) a public park in their center. This park will often have a large flower bed or similar area, where people are careful not to walk. Logically, such an area should constitute a *Karpef* in which carrying is forbidden. Moreover, since the city is connected to the park, it should then be forbidden to carry even in the city. The *Chacham Tzvi*[57] cites the lenient ruling of the *D'var Shmuel* that the flower bed is not a *Karpef* because it is for the beautification of the city and the enjoyment of the citizens, rather than being someone's private, off-limits farm. The *Mishnah Brurah*,[58] however, writes that this leniency, which is advanced by several *Acharonim*, has no basis in *Rishonim*. It would be best, therefore, to find a way in which we could build an *Eruv* without relying on the opinion of the *D'var Shmuel*. The *Chazon Ish*[59] suggests that one might build *mechitzot (Tzurot hapetach)* around the park to separate it from the city proper; thus it would be permitted to carry in the city, but not in the park. The *Mishnah Brurah*[60] was aware of this possibility and rejected it, writing that even if we accept the leniency of the *D'var Shmuel*, building such *mechitzot*

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55. או״ח סימן שנ״ח
56. משנה ערובין דבי, ומשנה ערובין דדי, ועין גאון יעקב ריש ערובין ב׳ על המשנה הראשונה שבמס׳.
57. ס׳ נ״ט
58. שנ״ח ס״ט בבה״ל לס׳ ד״ה אבל
59. פ״ח: כ״ה
60. Referred to above in note 58.

would actually exacerbate the situation, making it forbidden to carry even according to the lenient view.[60A]

## Nifratz LeMakom HaAssur Lo

In modern cities care must also be taken that the enclosed area not be touching an area where carrying is forbidden. If a highway or a thruway (which constitutes a *Reshut Harabim)* cuts through the city with entrances to or exits from the highway contiguous to the enclosed area, not only may one not carry on the highway, but even in the rest of the city carrying would no longer be allowed. *Tzurot hapetach* would have to be constructed at the points of contact between the roads leading from and to the highway and the city.

## Two Ground Levels

There is, furthermore, another problem which must be avoided. The Gemara[61] records a dispute between Rav and Shmuel regarding *mechitzot she'einan nikarot — mechitzot* which aren't discernable. If, for example, two adjacent houses share one wall, but that wall does not extend ten *tefachim* over the houses to separate the two roofs, can we say that the *mechitza* which separates the two houses below extends up halachically[62] to the sky

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60.a A second type of *karpef* which has practical ramifications today is discussed in *Shulchan Aruch* (*Orach Chaim* 358:11). This *karpef* is a river or lake covering an area larger than a *Beit satayim* and ten *tefachim* deep, which is located within the enclosed area. Such a body of water is a *karpef* and makes it forbidden to carry in the entire city contiguous to it, unless the water serves some purpose for the people of the city. Thus, if, for example, the local fire department uses the river or lake as a source of water for extinguishing fires, then it is no longer classified as a *karpef*. See also *Mishnah Brurah* 358:85. Regarding the minimum depth of the water in ponds or rivers which might pose a problem, there are several opinions. According to *Shulchan Aruch* (# 358:1) if the water is less than 11 *tefachim* deep, there is no problem. According to *Mishnah Brurah* (ביאור הלכה ד״ה והיא) one ought to consider it a problem if the water is ony 3 *tefachim* in depth. The *Chazon Ish* writes (סי׳ פ״ט אות ד) that even if the water is less than 3 *tefachim* deep there exists a problem. Rabbi Feinstein recommends that one follow the view of *Chazon Ish* on this point.

61. *Eruvin* 89a

62. This would be based on the Talmudic principle of *gud asik mechitzta* which

to separate the space on top of the roof as well? Or perhaps, since the roof is a new ground level, at which level the *mechitza* is not discernable, we cannot use the *mechitza* of one ground level — the street — for another level — the roof.

The *Chazon Ish*,[63] based on another Gemara,[64] points out that the dispute of Rav and Shmuel is limited to the case where the two families' roofs are adjacent to each other, with no separation between the two above the new ground level of the roofs. In *this case only*, Shmuel is lenient and relies on the *mechitzot* from the lower level. Since the only reason there is a problem is due to the fact that two different families are living in the two houses below, and thereby the houses with their roofs are designated as two different types of *Reshut hayachid, miderabbanon;* and on the ground level below, the houses are clearly separated with a wall serving as a perfect *mechitza;* therefore we do not declare either roof to be *"nifratz lemakom ha'assur lo."* But, basically, even Shmuel would otherwise agree that *mechitzot* relating to one ground level would not be effective for any new ground level above.[64A]

Based on this assumption, the *Chazon Ish* agrees with other *Poskim* who disqualify the following *mechitza:* if an *Eruv* is made in a city, using a cliff as one of the four *mechitzot*, but that cliff has a bridge leading from it which allows people to continue travelling along the same ground level, then we declare the top of the cliff to be the new ground level at the point of intersection with the bridge. Consequently, the previously-used *mechitza* — the drop of the cliff itself — can no longer be used as a *mechitza* for the place where the bridge meets the cliff because, with reference

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entitles us to consider a *mechitza* as rising to the sky. (*Sukkah* 4b) and elsewhere.)

63. *Orach Chaim* 108:1-2

64. *Eruvin* 90a

64.a Rabbi Moshe Feinstein (in *Iggerot Moshe Orach Chaim* no. 139) does not subscribe to this claim of the *Chazon Ish*. He maintains that although *mechitzot* for under the ground may not serve as *mechitzot* above the ground, nevertheless, *mechitzot* above the ground may indeed serve another ground level, also above the ground.

to that spot, the cliff is a *mechitza she'eina nikeret.* If the bridge is more than ten *amot* wide, we are left with a gap of more than ten *amot* in the *mechitza,* totally negating it. And even if the bridge is less than ten *amot* wide, the *Noda Bi'Yehuda*[65] disqualifies the *mechitza* nevertheless. The *Mishnah Brurah*[66] has accepted the view of the *Nodah Bi'Yehudah.*

Also, according to the *Chazon Ish, Tzurot hapetach,* or for that matter even actual *mechitzot,* constructed on one ground level, would have no effect for a different ground level directly above. Bridges or highways crossing above existing *mechitzot* would not be affected by these *mechitzot* since they only related to their own ground level.

It is highly questionable, also, whether one may construct a *mechitza* or a *Tzurat hapetach* in such a way that it extends from one ground level to another.[66A]

## Conclusion

The *Aruch LaNer* in his preface to *Niddah* quotes the Zohar's interpretation of a verse in Zechariah.[67] There the Mashiach is described as an *Ani verochev al chamor* — a humble man riding upon a donkey. Instead of using the usual word for denoting humbleness — *Anav* — the verse chooses to use *Ani* to convey the same meaning. The Zohar[68] explains that the word *Ani* is an acrostic, standing for *Eruvin, Niddah* and *Yevamot;* it is through the conscientious study of these complex but essential laws, says the prophet, that the Jewish people can hasten the arrival of the *rochev al chamor,* Mashiach ben David.

It is based on this comment of the Zohar that these three *masechtot* are known in the yeshivot as *"masechtot Ani",* and are considered more difficult than most others. The laws relating to *Eruvin* are especially complex and require more concentration than

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65. או"ח קמא (ס' מ"ב)
66. ס' שס"ג שעה"צ ס"ק צ"ה. A careful reading of Ramban in *Milchamot* (to *Eruvin* 22) would seem to indicate that he too agrees with *Noda Bi'Yehudah.*
66.a See בית יצחק שנת תשמ"ג בהערה למאמר בנדון מקום הדלקת נר חנוכה.
67. 9:9
68. *Raya Mehemna* to Ki Teitzei.

most other areas of halacha. This paper is intended only as an introduction to this vast topic. The details of different situations are never identical and must be studied carefully in light of many other halachic details not covered by the present paper.

# Inflation Issues in Jewish Law

*Rabbi Dr. Aaron Levine*

## Introduction

In recent times, inflation has been widely recognized as a menacing social problem. While the rate of inflation in 1982 has considerably abated, its scourge wrenches recent memory. For the years 1980 and 1981, the widely followed measure of inflation, the consumer price index (CPI) increased at 12.8% and 8.9% respectively.

Inflation is decidedly injurious to anyone whose money income does not keep pace with the rising price level. Especially hard hit on this account are pensioners and other people who subsist on a fixed dollar income.

Unanticipated inflation redistributes income from creditors to debtors as the latter group pay back dollars of less purchasing power than they received.

Still another impact of inflation is to create an unwillingness on the part of market participants to enter into long term contractual agreements.

Inflation creates various issues for Jewish law. It will be the purpose of this paper to explore these various issues.

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## Real vs Nominal Interest Rates and the Ribit Interdict

One area of Jewish law profoundly impacted by the phenomenon of inflation is Judaism's prohibition against interest charges *(ribit)*. Helping to focus on one aspect of this impact is the distinction between the *real* and the *nominal* interest rate. The real rate of interest is the percentage increase in purchasing power that the borrower pays to the lender for the privilege of borrowing. It indicates the increased ability to purchase goods and services that the lender earns. In contrast, the *nominal* rate is the percentage by which the money the borrower pays back exceeds the money that he borrowed, making no adjustment for the fall in the purchasing power of this money that results from inflation. Does *ribit* law merely prohibit the lender from realizing a *real* return on his loan; or is he interdicted from even earning a *nominal* return on his loan? Should the former view be taken, legitimacy would be found in the practice of indexing the repayment of a loan to the consumer price index.

Bearing directly on the *real-nominal* interest rate issue is an analysis of the following Talmudic text in *Bava Kamma* 97b:

> Raba asked R. Hisda: What would be the law where a man lent his fellow something [on condition of being repaid with] a certain coin and that coin meanwhile was made heavier? He replied: The payment will have to be with the coins that have currency at that time. Said the other: Even if the new coin be of the size of a sieve? — He replied: Yes ... But in such circumstances would not the products have become cheaper? — R. Ashi therefore said: We have to look into the matter. If it was through the [increased weight of the] coin that prices [of products] dropped, we would have to deduct [from the payment accordingly], but if it was through the market supplies [increasing] that prices dropped, we would have not have to deduct anything. Still would the creditor not derive a benefit from the additional metal? [We must] therefore [act] like R. Papa and R. Huna the son of R. Joshua who gave judgment in an

> action about coins, according to [the information of] an Arabian market commissioner that the debtor should pay for ten old coins [only] eight new one.

Classic rabbinic interpretation of the above Talmudic text understands the case to refer to the circumstance where subsequent to the loan the government removed from circulation the coin that was lent. In addition to not circulating domestically, the old coin was not used as a medium of exchange elsewhere, or if it was so used the creditor did not enjoy ready access to merchants from the country where it did circulate. Prohibiting the old coin from being used as a medium of exchange, the government replaced it with a new one of greater metallic content. Given the obligation to make payment of a debt with a medium of exchange, the debtor must make payment with the new circulating medium.[1]

With the new monetary unit embodying greater purchasing power than the defunct unit, avoidance of *ribit* law violation apparently calls for the debtor to return *fewer coins* than he borrowed. A blanket downward adjustment on this basis is, however, rejected by the Talmud. Such an adjustment is not appropriate when the supply of commodities simultaneously increased in the relevant interval. Here, the debtor would be obligated to return the *same* number of coins he borrowed, notwithstanding the increased purchasing power embodied in the new coins. To be sure, a simultaneous increase in supply of commodities does not automatically rule out favorable treatment for the debor. Since a coin has intrinsic value, aside from its value as a medium of exchange, downwardly adjusting the payment obligation of the debtor is in order when the increase in metal content of the new coin was at least 20%. Here, melting down the new coin and selling it for its metal content will surely fetch a higher price in the marketplace than the current value of the coin as a medium of exchange. No such advantage would presumably

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1. R. Samuel b. Isaac Sardi (Spain, ca 1185-1255), *Sefer Ha-Terumot, sha'ar* 46, *helek* 8, *ot* 2; R. Asher b. Jehiel (Germany, 1250-1327), *Rosh, Bava Kamma* IX-12; R. Solomon b. Abraham Adret (Spain, ca. 1235-1310), *Rashba Bava Kamma* 97b.

accrue to the coin holder when the increase in the metal content was less than 20%. Here, the cost of converting the coin into bullion as well as the loss of metal involved in the melting down process combine to make the melting down process unprofitable.[2]

The above formulation sheds light on the halachic treatment of the converse case involving currency debasement. Suppose the monetary unit A lent B was declared defunct by the government at the time repayment was due and was replaced with a monetary unit containing less metal than the old unit. Suppose further that the new monetary unit commands less real goods and services than the old unit. Does halacha require an upward adjustment in the debtor's payment obligation? Application of the above rules led decisors to call for such an adjustment only if the supply of commodities did not decrease in the interim. Under conditions of stable supply, such an adjustment would not be in order unless the metal content of the monetary unit decreased by 20%.[3]

R. Ashi's distinction requires an explanation. With inflation eroding the purchasing power of the monetary unit lent out, why is the debtor's obligation upwardly adjusted only when the exclusive cause of the inflation is an increase in the monetary unit but not when its exclusive cause is a decrease in the supply of commodities?

The distinction, in our view, can be rationalized on the assumption that given the stability of the community's consumption pattern, an increase in the monetary unit, other things equal, will only cause the *absolute* price level to rise, while leaving the *relative* price structure intact. In contrast, when the supply of commodities is reduced, other things equal, only the *relative* price structure will change, while the *absolute* price level

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2. *Rosh*, loc. cit. R. Abraham b. David of Posquires (1125-1198), quoted in *Shittah M'kubezet*, Bava Kamma 97b), however, advances a different rationale for the 20% rule.
3. R. Isaac b. Jacob Alfasi (Algeria, 1013-1103), *Rif*, Bava Kamma 98a; Maimonides (Egypt, 1135-1204), *Yad*, Malveh IV:11; *Rosh*, loc. cit.; R. Jacob b. Asher (Germany, 1270-1343), *Tur*, *Yoreh De'ah* 165; R. Joseph Caro (Turkey, 1488-1575), *Shulhan Arukh Yoreh De'ah* 165. A dissenting view is advanced by R. Abraham b. David. In his view no accommodation is made for the lender in case of currency depreciation.

wil remain intact. What brings about the change in relative prices in the latter case is the competitive bidding for the commodities in short supply. More money is now spent on the commodities in short supply and less money is spent in other areas. This change in the community's spending pattern will change the relative price structure.

Why the absolute-relative price distinction should prove decisive in determining whether an upward adjustment in the debtor's obligation is in order requires explanation. Examination of the nature of the debtor's obligation to the creditor is here critical. Bearing directly on this issue is the following Talmudic passage in *Bava Kamma* 94a:

> It was stated: If a man lends his fellow [something] on condition that it should be repaid in a certain coin, and that coin became obsolete. Rab said that the debtor would have to pay the creditor with the coin that had currency at that time, whereas Samuel said that the debtor could say to the creditor, "Go forth and spend it in Mishan." R. Nahman said that the ruling of Samuel might reasonably be applied where the creditor had occasion to go to Mishan, but if he had no occasion [to go there] it would surely not be so .....

Tosafot et alia understand the dispute between Rav and Samuel to refer to the circumstance where A bought merchandise from B on credit or borrowed money from him, *with the stipulation that repayment should be made with the medium of exchange.* In the absence of this stipulation, all disputants agree that payment is made with the medium of exchange that existed at the time the loan was entered into, notwithstanding that the original monetary unit is now declared defunct and does not even circulate in a foreign country at the time payment is due.[4]

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4. *Tosafot Bava Kamma* 97a; *Rosh*, IX:11; *Tur, Choshen Mishpat* 74:9; R. Moshe Isserles (Poland, 1525-1572), *Ramo, Sh. Ar. Choshen Mishpat* 74:7; R. Jehiel Michel Epstein *Byelorussia*, 1829-1908, *Aruch ha-Shulchan, Choshen Mishpat* 74:8. R. Solomon b. Isaac *(Rashi, Bava Kamma* 97a), however, draws a

Extension of the non-stipulation case to the instance where the monetary unit consists of fiat money, apparently leads to the startling conclusion that the debtor discharges his obligation with the original medium of exchange, notwithstanding that its defunct status renders it literally worthless. Rejecting this extension, R. Jehiel Michel Epstein et alia posit that returning what was lent is an appropriate course of action only when the original medium of exchange was metallic and hence had intrinsic value. Here, despite its becoming defunct, the monetary unit retains its intrinsic value. Discharging the debt with it can hence be viewed as a form of "payment." Discharging a debt with defunct fiat money, however, amounts to *no payment at all.* Hence, the debt must be discharged with the new monetary unit.[5]

Proceeding clearly from the above understanding of the dispute between Rav and Samuel is a rejection of the notion that the debtor's responsibility consists of an obligation to restore to the lender the purchasing power he gave up at the time of the loan. What the obligation consists of is merely to return what was loaned out. When a *stipulation* is made to make payment with currency, Rab and Samuel dispute the obligation of the debtor. Talmudic decisors follow Samuel's view.[6] Accordingly, payment is made with the original medium of exchange, even if it was declared defunct at the time of repayment, provided, of course, that it continues to circulate *somewhere*, e.g. in Mishan.

With the debtor's obligation essentially consisting of a duty to return what was lent to him, discharging the debt with the original monetary unit satisfies the stipulation as long as it *minimally*

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distinction between the legal treatment of a monetary loan and a credit sale. It is only in the former case, in his view, that non-stipulation allows the debtor to discharge his debt with the defunct original medium of exchange, though at the time of repayment it circulates nowhere in the world. R. Mordechai b. Hillel (Germany, 1240-1298,) *Mordechai Bava Kamma* IX:110 asserts that toward the end of his life, R. Solomon b. Isaac recanted this view and subscribed to *Tosafot's* view.

5. *Aruch Ha-Shulchan*, op. cit.; R. Abraham Isaiah Karelitz (Israel, 1878-1953), *Chazon Ish, Bava Kamma* 17:31 and *Likkutim* siman 19 at *Bava Kamma* 89b.
6. *Yad*, op.; cit.; R. Israel of Krems (fl. mid 14th cen.), *HaGahot Asheri, Bava Kamma* IX:11; *Tur*, op. cit. 74:9; *Sh. Ar.*, op. cit. 74:7; *Ar. hash*, op. cit.

retains its identity as a medium of exchange. Minimal identity retention obtains when the medium of exchange retains its purchasing power in respect to one or more of the *entire* set of commodities previously available, albeit now available only in a foreign country. Since the original medium of exchange still circulates in Mishan, it may reasonably be assumed that it retains its purchasing power in respect to at least one or more of the entire set of commodities previously available.

Rav, in our view, may very well also subscribe to the principle that minimum identity retention allows the original medium of exchange to be used to discharge a debt. Retaining its purchasing power in respect to one or more commodities available only in a foreign country does not, however, suffice. Minimum identity retention obtains only if the monetary unit retains its purchasing power in respect to one or more of the entire set of commodities available *domestically*. With the government declaring the original monetary unit defunct, payment must be made with the new monetary unit.

Proceeding clearly from the above is a rationale of why inflation induced by a commodity shortage, other things equal, does not call for an upward payment adjustment for the debtor. Since the money supply is assumed to remain constant, the monetary unit can well be expected to retain its original exchange value in respect to one or more of the entire set of commodities available domestically. Given that the medium of exhcange retains its identity, a nomalistic approach is adopted for the payment obligation of the debtor, despite the loss in real terms this approach causes the lender.

In sharp contrast, when the inflation is caused by an increase in the money supply, other things equal, the *absolute* price level will rise. With the medium of exchange losing its identity, a nomalistic approach is rejected in favor of a payment obligation that would effectively restore for the lender the purchasing power he gave up at the time of the loan.

When both commodity shortage and money supply growth are simultaneously operational, the monetary unit could very well maintain its purchasing power in respect to one or more of the

entire set of commodities, despite the rise in the absolute price level occasioned by the monetary growth. Should the medium of exchange maintain its identity despite the monetary growth, the nomalistic approach recommends itself.

Within the framework of a modern economy, monetary expansion invariably impacts on the relative price structure as well as the absolute price level. What brings this about is the workings of the fractional reserve system.

A fractional reserve system requires a bank to hold as idle cash only a fraction of a deposit it receives. To illustrate, a legal reserve requirement of 20% would require a bank to hold as idle cash only $200 of a $1000 deposit received.

Within the framework of a fractional resreve rule, monetary expansion is accomplished when holders of cash assets decide to exchange these cash assets for demand deposits or bank credit. Creating for a cash asset holder a demand deposit does not in itself expand the money supply as the increase in the money supply occasioned by the creation of the demand deposit is exactly counterbalanced by an equal reduction of currency in circulation. While the initial deposit changes only the composition but not the size of the money supply, the stage is set for monetary expansion. Meeting the 20% reserve requirement allows bank A to lend out $800 of the $1,000 deposit. This process of monetary expansion continues as the loan is spent and its proceeds are redeposited in another bank. Successive rounds of expansion eventually come to a halt when the entire original cash deposit of $1,000 is held as idle cash by the banking system as a whole.

Monetary expansion occurs also in consequence of expansionary federal reserve credit policy. Financing a deficit by selling bonds to the federal reserve illustrates such an expansionary policy. Let us suppose, for instance, that for the purpose of financing a $20 billion deficit, the treasury sells $20 billion of bonds to the federal reserve. The federal reserve pays for the bonds by increasing the treasury's account with it by $20 billion. Given its newly created demand deposit, the treasury can now write $20 billion of additional checks against its account at the federal reserve.

What the above description of commercial bank and federal reserve credit expansion indicates is that monetary expansion profoundly impacts on the relative price structure. Farmers, consumers and businessmen compete for the available credit. Each of these groups is by no means homogeneous. The spending pattern of the recipients of the bank credit impact upon the relative price structure. Similarily affecting the relative price structure is the spending pattern of recipients of federal spending, financed by means of monetary expansion.

Inflation in a modern economy is rooted in causes other than an increase in the monetary unit and a reduction in the supply of commodities. Phenomena exerting an inflationary impact on the economy include: a general loosening of credit conditions; increased government deficits; a breakdown of the competitive structure of the economy and an increase in the population. Besides exerting an upward pressure on the price level, these phenomena effect the relative price structure as well. The set of goods and services in a modern economy is indeed enormous, including commodity prices, consumer goods, the fees of professional services, financial assets and the country's foreign exchange rates. While inflation generally exerts an upward pressure on prices, some prices, such as bond prices and foreign exchange rates, actually decline. Moreover, within the framework of normal economic progress, industries rendered obsolete by technological advance experience price declines. Since the medium of exchange in a modern inflationary economy can be expected to maintain its exchange value in respect to one or more of the entire set of available goods and services, the nomalistic approach recommends itself in the treatment of loan transactions.

## Commodity Loans

Inflationary times often create an incentive for market participants to substitute barter transactions for cash transactions. Commodity loans calling for payment in kind instead of a cash payment guarantee for the lender that the same purchasing power he gave up in making the loan will be restored to him when repayment is made.

Out of fear that the market value of the commodity may increase at the time of repayment, the Sages prohibited commodity loans in kind *(se'ah be'se'ah)*. Such a transaction violates the rabbinic extension of *ribit* law, called *avak ribit*.[7] The prohibited agreement places the creditor at a disadvantage: Should the commodity appreciate at the time of repayment, the debt may not be discharged by means of payment in kind. Instead, a cash payment is required, with the debtor's obligation set equal to the value the commodity had at the time the loan was entered into. Depreciation of the commodity, on the other hand, disallows a cash payment. Here, payment must be made in kind.

Legitimacy is, however, given to a commodity loan when repayment is to be made in cash based on the market value of the commodities at the time the loan was entered into. Since the commodity serves here merely as the medium of the loan and the debtor's obligation is fixed in cash, the possible appreciation in the value of the commodity at the time of repayment is immaterial.[8]

Since the *se'ah bese'ah* transaction is prohibited only by dint of *avak ribit* law, the Sages suspended their interdict under certain conditions.

One qualifying circumstance occurs when the debtor is in possession of the commodity he borrows at the time the loan was entered into *(yesh lo)*. To illustrate, suppose the loan consisted of a ton of wheat and the debtor had this amount of wheat in his possession at the time he entered into the or loan. Given the above correspondence, the amount of wheat the borrower has is regarded as if it were given immediately to the lender as payment at the time the loan was entered into. Any appreciation of the commodity subsequent to the loan is therefore regarded as having occurred while the commodity was in the domain of the lender.[9]

The *yesh lo* point of leniency in *se'ah bese'ah* law extends

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7. *Hochmat Adam* 134:1.
8. *R. Sheshet Bava Mezia* 75a; *Rif* ad locum; *Rosh*, op. cit. V:74; *Tur*, op. cit.; *Sh. Ar*, op. cit.; *Hochmat Adam*, op. cit.
9. *R. Isaac, Bava Mezia* 75a; *Rif* ad locum; *Yad*, op. cit., X:2; *Rosh*, op. cit. V:75; *Tur*, op. cit. 162:2; *Sh. Ar.*, op. cit. 162:2; *Hochmat Adam*, op. cit. 134:2.

even to the instance where the amount of the commodity in the debtor's possession at the time of the loan amounts to only a small portion of the commodity loan. Since the *se'ah bese'ah* interdict is *only* prohibited by dint of *avak ribit* law, the *yesh lo* loophole is valid even when its rationale is not entirely applicable.[10]

When a *se'ah bese'ah* transaction is legitimized by means of the *yesh lo* mechanism, both parties must be aware that the debtor has some amount of the loan commodity at the time the transaction was entered into and that this circumstance is what *halachically* validates their agreement. Nevertheless, ignoranace on the part of the parties of these facts does not disallow the debtor to return the loan commodity, even if it appreciated in value.[11]

Under the *yesh lo* circumstance the transaction may call for the commodity to be repaid at such time when it is expected to appreciate in value. This clause, according to R. Shabbetai b. Meir ha-Kohen (ש"ך), is valid even when the contract disallows early payment.[12]

Another circumstance that may suspend the *se'ah bese'ah* interdict obtains when the commodity involved trades at a definite market price *(yaza ha-sha'ar).*[13] With repayment in kind possible at any time, the borrower is regarded as being capable of discharging his debt by making the requisite commodity purchase before it appreciates above its value at the time of the loan.[14] Rambam et alia legitimize the above mechanism even when the borrower lacks the necessary cash to make the commodity purchase. Though lacking cash the borrower is regarded as capable of securing the necessary commodity purchase by means of establishing a line of credit.[15]

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10. *Responsa Rosh, K'lal 108 sief 16; R. Yom Tov Vidal of Toloso (fl. 14th cen.), Maggid Mishneh, Yad, Malveh* X:2
11. R. David b. Samuel ha-Levi (Poland, 1586-1667), *Turei Zahav, Sh. Ar. Yoreh De'ah* 162 note 38; R. Shabbetai b. Meir ha-Kohen (Poland, 1621-1662), *siftei Kohen, Sh. Ar., Yoreh De'ah* 162 note 7 R. Jacob Blau, *B'rit Yehudah* (Jerusalem: Akiba Yosef, 1976), p. 317 note 37.
12. *Siftei Kohen, Sh. Ar.,* op. cit. 162 note 11.
13. *Bava Mezia* 72b; *Yad,* op. cit.; *Rosh, Bava Mezia* V:61; *Tur,* op. cit., *Sh. Ar.,* op. cit.; *Hochmat Adam* 134:5.
14. *Hochmat Adam,* op. cit.
15. *Yad,* op. cit. X:1; *Siftei Kohen,* op. cit. 162 note 10; *Hochmat Adam,* op. cit.

The *yaẓa ha-sha'ar* mechanism is subject to several restrictions. Calling for the commodity loan to be repaid at a particular time is, according to Rambam, prohibited. Such a stipulation indicates an expectation on the part of the lender of price appreciation at the specified date.[16] Disputing this position, R. Abraham b. David of Posquires (ראבד) et alia legitimize the *yaẓa ha-sha'ar* mechanism even if the lender sets a date for repayment.[17]

A variation of the specified date of repayment case occurs when the *se'ah bese'ah* transaction disallows early repayment. Since early repayment cannot be made, the borrower cannot be regarded as capable of making repayment before the commodity appreicates in value. The transaction is hence prohibited.[18]

Another restriction for the *yaẓa* ha-sha'ar mechanism, according to Rambam, is that it is invalid when either the lender or the borrower is unaware that the loan commodity is traded at a definite price when they entered into their *se'ah bese'ah* transaction.[19] Unawareness creates a presumption of intention to make repayment at such time that the commodity will appreciate in value.[20] Apparently equating the rationale of the *yaẓa hasha'ar* mechanism with the *yesh lo* method, R. Asher b. Jehiel (ראש) legitimizes the former procedure even if one or both of the parties was unaware that the loan commodity was traded at a definite price.[21]

Taking a stringent view in this matter, R. David b. Samuel ha-Levi (טז) rules in accordance with Rambam.[22]

Requiring parties to a *se'ah bese'ah* arrangement legitimized by means of the *yaẓa hasha'ar* mechanism to be aware of the market price at the time they enter into their agreement, the *Shach* does not prohibit repayment in kind with an appreciated

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16. *Yad*, op. cit.
17. R. Abraham b. David of Posquires, *Rabad* at *Yad*, loc. cit.; *Ramo*, *Sh. Ar.*, op. cit. 162:3; R. Isaac b. Sheshet Perfet (Spain, 1326-1408), *Responsa Ribash* 19.
18. *Siftei Kohen*, *Sh. Ar.*, op. cit. note 11.
19. *Yad*, op. cit.
20. R. Joseph Caro, *Beit Yosef*, *Tur*, op. cit.
21. *Responsa Rosh* quoted in *Beit Yosef*, loc. cit;
22. *Turei Zahav*, Sh. Ar., op. cit. 162 note 3

commodity in the absence of the awareness condition.[23]

Adavancing a middle ground view in this matter is R. Jonathan Eibschutz. Requiring the awareness condition, he does not prohibit repayment in kind with the appreciated commodity in the absence of this condition unless the ignorant party was the lender.[24]

Still another restriction the *se'ah bese'ah* transaction is subject to is that it must be structured in a manner that it would not be regarded as "near to profit and far from loss" from the standpoint of the lender. The following ruling of R. Isaac b. Sheshet Perfet (ריבש) provides a case in point: A sold several measures of wheat on credit to a Jewish community, with the option of demanding at the due date either a payment in kind or a cash payment equal to the value of the wheat at the time of the sale. Since such an arrangement hedges for the seller against the possibility of price depreciation of the commodity, the stipulation violates *avak ribit* law. The *se'ah bese'ah* arrangement is legitimized only when the lender is willing to absorb the risk of commodity depreciation. When he is unwilling to do so the arrangement amounts to "near to profit and far from loss."[25]

Currency may also be subject to the *se'ah bese'ah* interdict. This occurs when the currency involved is not the economy's main ciruculating medium of exchange. Providing a case in point is R. Yohanan's prohibition against a loan transaction calling for A to lend B a gold dinar and to be repaid in kind at a latter date. Given that silver coins were in his time the main circulating medium of exchange, a loan in kind consisting of a gold dinar must be treated in the same vein as a *se'ah bese'ah* transaction.[26]

Currency loans taking on the legal character of commodity loans may nevertheless be arranged so as not to violate *avak ribit*

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23. *Siftei Kohen*, Sh. Ar., op. cit. note 9
24. R. Jonathan Eibschutz (Prague, 1695-1764), *Kereti-u-Feleti, Sh. Ar. Yoreh De'ah.*
25. R. Isaac b. Sheshet Perfet, *Responsa Ribash* 19.
26. *R. Yohanan, Bava Mezia* 45a; *Rif* ad locum; *Rosh Bava Mezia* 45a; *Tur*, op. cit. 162:1.

law. Use of the mechanisms described above accomplishes this end.[27]

Proceeding from the above discussion is the legitimacy of denominating loans in a foreign currency. This technique is frequently employed as an inflation hedge when the lender fears that during the term of the loan the domestic currency will depreciate in value more than the foreign currency. Since foreign currency is not the main medium of exchange of a country, it must legally be treated as a form of *perot* (commodity) and hences subject to the *se'ah bese'ah* interdict. Nonetheless, given that foreign exchange today is freely traded in a well-organized market and, in addition, the borrower can obtain the foreign exchange in question, both the *yaza hasha'ar* and *yesh lo* mechanisms readily apply.

## Reciprocal Labor Agreements

Inflation, especially when it is accompanied by recession, produces a marked substitution of barter transactions for market transactions. Barter allows a person, in some measure, to maintain his accustomed standard of living despite his loss in income and the higher price level he faces.

Reciprocal work agreements may violate *avak ribit* law. This occurs when A commits himself to compensate B for his labor services by rendering him, *at some future date,* a labor service either enjoying a higher market value[28] or requiring greater physical exertion than the service B provided A. Since the arrangement confers A a delay in performing his end of the agreement, the differential value or effort involved in his service amounts to compensating B for *tolerating the delay* in the payment due him *(agar natar).* No infringement of *avak ribit* law is, however, involved when the time delay element is absent from the agreement.[29] Legitimacy is therefore given to reciprocal labor

27. R. Hiyya Rofe (Safed, d. 1620), *Ma'aseh Hiyya* 17.
28. *Yad,* op. cit. VII:10; *Tur,* op. cit. 176:7; Sh. Ar., op. cit. 176:7; *Hochmat Adam,* 136:3.
29. *Mishnah Bava Mezia* V:10; *Rif* ad locum; *Yad Malveh* VII:11; *Rosh Bava Mezia* V:78; *Tur,* op. cit. 160:9; *sh. Ar.,* op. cit. 160:9; *Hochmat Adam,* loc. cit.

agreements calling for simultaneous or consecutive performance of the respective services committed.[30]

Interpreting R. Joseph Caro's view, R. Mordechai Dov Twersky[31] (Hornestopol, 1840-1903) understands the essence of the prohibition to consist of the stipulation between the two parties, rather than the actual reciprocation of a service of higher value or one entailing greater physical exertion than the sevice initially rendered. Hence, should A perform a service for B, and at some future date, A agrees to allow B's higher valued service or service entailing greater physical exertion to constitute compensation for his service, the agreement does not violate *avak ribit* law when the transaction does not violate the biblical injunction against *ribit (ribit kezuzah).* While the mere payment of a premium without prior stipulation violates *avak ribit* law when the transaction involved takes on the character of a loan, no prohibition is violated when the transaction represents payment for service or product rendered. The above point of leniency would not, however, proceed according to the school of thought that regards payment of a premium without prior stipulation as violating *avak ribit* law even when the transaction does not take on the character of a loan.[31]

R. Jacob b. Asher[32] (טור), on the interpretation of R. Joshua ha-Kohen Falk (פרישה) advances a very stringent view in respect to the reciprocal labor agreement interdict. Reciprocal labor agreements, in his view, may be prohibited even when the committed sevice is not assessed at the time of the stipulation to entail either greater exertion or be of a higher value than the service initially rendered. This occurs when there is merely concern that the committed service may entail greater exertion at the time it will be rendered in reciprocation.[33]

R. Abraham b. David of Posquires understands the prohibited cases of reciprocal work agreements to fall under the rubric of the *se'ah bese'ah* interdict, discussed above.[34]

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30. R. Joshua ha-Kohen Falk. *Perishah, Tur,* op. cit. 160 note 14.
31. R. Mordechai Dov Twersky (Hornestopol, 1840-1903), *Turei Zahav, Yoreh De'ah.*
32. Tur, op. cit. 160.
33. *Perishah, Tur.* loc. cit. note 15.
34. R. Abraham b. David of Posquires quoted in *Shittah M'kubezet, Bava Mezia* 75a.

Proceeding from the above rationale is the applicability of the interdict even when the committed reciprocal service is not assessed as a definite matter to be of greater value than the service already performed.

A point of leniency also proceeds from the *se'ah bese'ah* rationale of the reciprocal work agreement by assessing the market value of A's initial service and agreeing that should B's service prove to be of a higher market value, A will make the necessary monetary compensation.

R. Jacob Blau posits, however, that R. Abraham b. David's rationale of the reciprocal work agreement interdict represents a minority view and should therefore be rejected. The majority view, posits R. Blau, regards the reciprocal labor agreement interdict as separate from the *se'ah bese'ah* prohibition. Given the distinctiveness of the reciprocal labor agreement interdict, concern that the committed service might entail *greater physical exertion* as well as it might be more valuable than the service already rendered forms the basis of the prohibition. Consequently, the assessment monetary compensation procedure described above would not be valid when the labor services involved are different, even if they are assessed to be of equal value.[35]

## The Charity Obligation and Inflation

Judaism's charity obligation consists of a duty to devote one-tenth of net income toward the needs of the poor. Falling within the income base against which the tithing obligation is calculated is the profits earned from the sale of an asset.[37]What is included in the base, according to R. Moshe Feinstein, is the *real* profit rather than the *nominal* profit earned. To illustrate, suppose A purchased an asset for $1,000 and sold it two years later for $2,000. Suppose

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35. *B'rit Yehudah*, p. 208-209.
36. *Yad, Mattenot Aniyim* VII:5; *Tur*, op. cit. 249:1; *Sh. Ar.*, op. cit. 249:1; *Ar. hash., Yoreh De'ah* 249:1. R. Ezra Basri's survey of the responsa literature concludes that the majority of the Talmudic decisors regard the 10% level as an obligation by rabbinic, as opposed to biblical, decree. *See* R. Ezra Basri, *Dinei Mamonot*, vol. 1 (Jerusalem:Rubin Mass, 1974) p. 403.
37. For a detailed discussion of the *maaser* base, *see* Cyril Domb, ed, *Ma' aser Kesafim* (New York Philipp Feldheim Inc., 1980), p. 41-54.

further that the rate of inflation in this interim period was 100%. Taking into account the 100% inflation rate, the nominal profit of 100% on the sale is reduced in *real* terms to zero. Consequently, the nominal profit earned here would not be subject to any tithing obligation. R. Feinstein further posits that the difference in the purchasing power of the monetary unit in the relevant periods of time hold take into account only changes in the prices of necessities. Changes in the price of residential homes and luxuries, however, do not enter the index.[38]

## Religious Ministrants and Inflation

Compensation for a religious ministrant hired by the community to devote his time exclusively[39] in the rendering of his service must be in accordance with his need.[40] Need takes into account both family size and the cost of living. This formula may very well allow the religious ministrant to command a salary *above* what he could earn outside communal religious service. With need serving as the criterion for his compensation, the religious ministrant's salary must be automatically increased when either his family size or the cost of living increases. Contracts of religious ministrants are hence subject to automatic escalator clauses.[41]

## Delinquency in the Payment of Wages and Inflation

Proceeding from the legal principle that wages are due at the end of the wage period is the interdict against labor agreements calling for the worker to receive a premium in wages in the event the employer is delinquent in paying him on time. Since wages are

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38. R. Moshe Feinstein, *Iggerot Moshe*, vol. 5, *Yoreh De'ah* 114.
39. See Tosafot *Ketubbot* 105a.
40. The Talmud in *Ketubbot* 105a records this formula only in respect for the publicly appointed judges of Jerusalem who preside over cases of robbery. Maimonides (Yad, Shekalim VII), however, extends the need rule to public proof readers of holy books. Maimonides' extension, by R. Moshe Sofer, leads to the generalization of the need formula to all religious ministrants hired by the public.
41. R. Moshe Sofer (Hungary, 1762-1839), Responsa Chatam Sofer, Choshen Mishpat 166; R. Leopold Winkler, (Hungary, b 1844) *Levushei Mordechai, Choshen Mishpat*. Part II.

due on the last day of the wage period, the premium offered in the event of delinquency amounts to an *avak ribit* payment to the worker for tolerating the delay in receiving his wages.[42]

A mutually-arrived-at agreement between a worker and an employer calling for a premium wage in the event of delinquency in payment violates *avak ribit* law even if the agreement was not made at the outset of the labor contract. Accordingly, should the worker, upon demanding his wage at the end of the wage period, acquiesce to the employer's offer to pay him a premium wage at some later time, the agreement violates *avak ribit* law. Since an employer's holding wages in arrears violates the wages delay interdict *(halanat sakhar),*[43] the worker's acquiesce to the delay in payment amounts to an agreement on his part to treat the balance due him as a loan. The higher wage called for at the later date therefore amounts to a premium for tolerating *delay* in payment and consequently violates *avak ribit* law.[44]

A variant of the above case occurs when the employer is in default of the wages due to the worker, and the worker, in consequence, exerts a claim for the income he could have realized from the wages had he been paid on time. The legitimacy of the worker's claim here is disputed among Talmudic decisors. While R. Eliezer of Toul et alia validated the compensation claim,[45] R. Isaac b. Moses of Vienna et alia regarded the payment as constituting *avak ribit.*[46]

Supporting R. Eliezer's view, R. Joel Sirkes (ב"ח) offers the following rationale of why meeting the worker's compensation demand does not violate *avak ribit* law: Since the wages are held in arrears against the worker's wishes, the worker cannot be said to

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42. *Tur*, op. cit. 173:21; *Sh. Ar.*, op. cit. 173:12; R. Joel Sirkes, Bach, *Tur*, op. cit. 161;
43. *Leviticus* 19:13.
44. *Bah*, op. cit.
45. R. Eliezer of Toul, quoted in R. Meir ha-Kohen, *Teshuvot Maimuniyyot, Sefer Mishpatim* 15; R. Meir b. Baruch of Rottenburg, quoted in R. Jeruham b. Meshullam *Toledot Adam ve-Havvah*, n'tiv 29 pt. 3; Bah, op. cit., R. Moshe Sofer.
46. R. Isaac b. Moses of Vienna, *Or Zaru'a, Bava Mezia* V:21; R. Israel of Krems, *Haggahot Asheri, Bava Mezia* V:21; *Beit Yosef, Tur*, op. cit. 160.

have allowed the balance due him to take on the character of a loan for the duration of the delinquency period. With the loan character absent here, the extra payment the worker seeks can in no way be characterized as a premium for tolerating delay in the payment of his wages.[47]

Noting the indirect link between the worker's foregone earning and the action of the employer, R. Judah Rosanes (Turkey, 1657-1727) posits that while meeting the worker's compensation demand does not violate *avak ribit* law, the employer is under no legal obligation to honor the demand. Responsibility for meeting the worker's extra compensation demand proceeds as a definite matter only when the employer invested at a profit the wages due the worker and the worker expressed an investment intent at the time he demanded his wages.[48]

In the context of the current inflationary spiral, holding wages in arrears generates a definite loss for the worker in the form of reduced purchasing power. Noting this phenomenon, R. Nahum Rakover posits that legislating a penalty on the employer for delinquency in payment of wages is entirely appropriate.[49] In a similar vein, R. Jacob Blau concludes from his survey of rabbinic literature that the majority view would find no objection to the employer accommodating the worker for holding his wages in arrears.[50]

## Theft Liability and Price Changes

Another instance where price change is a matter of *halachic* concern occurs in connection with the liability obligation of a thief. As long as the article of theft remains intact and was not materially changed, the thief must return it, rather than make monetary

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47. Bach, op. cit. For alternative rationalizations of R. Eliezer of Toul's view, *see Novellae Hatam Sofer, Bava Mezia* 73a, and *Beit Yizhak, Yoreh De'ah* 11:2 ot 2.
48. R. Judah Rosanes, (Turkey, 1657-1727) *Mishneh la-Melech, Yad, Malveh* VII:11.
49. R. Naham Rakover, "Pizuyim al Ikkuv Kesafim," in I Raphael, ed., *Torah she-be'al Peh* (Jerusalem:Mosad haRav Kook, 1977). p. 216.
50. *B'rit Yehuda,* op. cit., p. 35.

compensation.[51] Should the article of theft no longer be in the culprit's possession, i.e., it was stolen or lost, a monetary obligation is imposed on him. This payment is set equal to the value of the article at the time of the theft.

An exception to the above rule obtains when the thief damages or consumes his pilferage. Here, in the event the article appreciated above its value at the time of the theft, liability for the thief is set in accordance with the article's value at the time when the damage was comitted.[52] Nevertheless, in the event the article depreciated in value in the interim, liability is set in accordance with the higher value prevailing at the time of the theft.[53] Imposing the higher penalty on the thief is justified on the ground that it would be morally reprehensible to allow him to gain when he compounds the theft with the commission of a tort.[54]

The above criteria for theft liability apparently apply whether or not the change in the price of the subject article was accompanied by a general change in the price level in the same direction.

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51. *Bava Kamma* 66a; *Yad, Gezelah* I:5; *Tur, Choshen Mishpat* 360:1; *Sh. Ar. haSh. Choshen Mishpat* 360:1; *Ar haSh. Choshen Mishpat* 360:1. Provided the article of theft has not been materially changed, the thief must return it intact even if doing so would involve the extraordinary inconvenience of removing it from a structure he subsequently built. Nevertheless, to encourage evildoers to make amends, the Sages suspended the obligation in this instance, and instead, required the thief merely to make restitution monetarily (see *Mishnah* Gittin V:5)
52. *Bava Mezia* 43a; *Rif* ad locum; *Yad*, op. cit. 111:1; *Rosh, Bava Mezia* 111:27; *Tur*, op. cit. 362:7; *Sh. Ar.*, op. cit. 362:10; *Ar. haSh.*, op. cit. 362:15.
53. *Bava Kamma* 5a; *Rif* loc. cit.; *Yad*,op. cit. 362:11; *Ar. haSh.* loc. cit.
54. R. Joshua ha-Kohen Falk, *Sma, Sh. Ar.*, op. cit. 362 note 21; *Ar haSh*, loc. cit.

# Halachic Aspects of Organ Transplantation

*Rabbi Reuven Fink*

Over the past twenty years, modern medicine and medical technology have made great and exciting strides in extending life and improving the conditions of life for ill and infirm people. Perhaps the most daring innovation has been that of transplantation surgery. This new technique has given people who were heretofore unable to see because of defective corneas the ability to see the light of day by the use of corneal transplants. People suffering from renal dysfunction who could not bear the rigors and complications involved in hemodialysis have been given a new lease on life afforded them by the possibility of kidney transplants. People plagued with heart disease, the number one killer in the United States, have new hope, given the ever-increasing success of heart transplants.

The question dealt with in this presentation is the permissibility according to Jewish law of these new surgical techniques. Are these surgical procedures in harmony with the halacha?

We will attempt to present the rabbinic rulings and writings on the question of transplants in the hope of clarifying the position of the halacha on these new and monumental inroads in modern medicine.

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In discussing surgical transplantation, an immediate distinction must be made between cadaver transplants and live donor transplants. Each of these categories presents its own peculiar problems. Cadaver transplantation is the process by which an organ from a dead person is transplanted onto a live patient. Live donor transplants involve the grafting of an organ from a live person to a patient who is in dire need of that organ.

The problems presented by cadaver transplants are the following:

1. *Nivul Hamet* — Mutilation of the dead.
2. *Issur Hana'ah* — The prohibition against deriving any benefit from a dead body.
3. *Kevurat Hamet* — The requirement to bury a dead person and all his parts intact.

## 1) Nivul Hamet

The source for the prohibition against mutilation or desecration of the dead is from a biblical verse. "And if a man has committed a capital crime and was executed, you shall hang him upon a tree but do not allow his body to remain on the tree all night."[1] The Talmud expands the definition of this stricture, stating that any act which can be construed as desecration of the dead is included in this prohibition.[2]

The Talmud offers a number of illustrations of what is considered *nivul hamet.* In reference to executing a murderer, the Talmud asks:

> "Perhaps the victim was a *treifah,* a person with a fatal organic disease, which would make the offense unpunishable? [Technically, if someone kills a person

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1. Deuteronomy 21:22,23. The *Sifrei* at the end of *Pesikta* 11, states that the *nivul hamet* implied in the injunction of *lo Talin* is not only hanging the dead on a tree, but all forms of desecration are included in the *issur Torah.* However, Rabbi B. Epstein in his *Torah Temimah* learns that it is merely an *asmachta,* because the verse refers only to executed criminals. Still, from the passage in *Hullin* 11b it is clear that *nivul hamet* is *min ha-Torah.*
2. *Sanhedrin* 47a.

> who was dying anyway, a *treifah,* then he cannot be executed as a murderer.] If you should say, examine the victim's body [to see if he had a fatal disease] — that would be desecrating the dead and, hence, forbidden. Should you then say that since a man's life is at stake, desecration of the dead is allowed, then one could answer that the possibility exists that the murderer struck the victim in a place where he had been suffering from a fatal wound and thus removed any trace of that wound."[3]

Clearly, the procedure under discussion was a post-mortem examination of the victim by checking his internal organs for wounds. This procedure the Talmud rejects as *nivul,* mutilation. Accordingly, it would seem that the removal of an organ from a dead body is precluded by Jewish law, for there could be no greater desecration of the dead than to remove body parts. Obviously, this question must be given major consideration in arriving at a halachic decision.

## 2) Issur Hana'ah

In reference to *issur hana'ah,* the Talmud states that deriving any "benefit" from the dead is prohibited.[4] Most of the rabbis consider this prohibition to be a Torah law. Whether the body of a gentile is included in this prohibition is disputed among the *Rishonim.*[5] Using cadaver organs for the purpose of transplants

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3. *Hullin* 11b.
4. *Sanhedrin* 47b. The Talmud uses a *gezerah shavah* from the burial of Miriam and *eglah arufah, sham - sham.* Rashi *loc. cit., s.v. mekomo tahor* says specifically that the *issur hana'ah* is *mi-d'oraita.* Most of the *Rishonim* hold that the *issur hana'ah* is *mi-d'oraita.* However, Rabbi Jacob Emden in *She'eilat Ya'avets,* no. 41, proves that the *gezerah shavah* is only an *asmachta* and therefore the *issur hana'ah* in only *mi-d'rabbanon.*
5. The *Shulchan Aruch* Yoreh Deah 349:1, states clearly that the *issur hana'ah,* the prohibition against deriving benefit from the dead, is extended to gentiles as well as to Jews. There are, however, rabbinic authorities who disagree and maintain that there is no injunction against deriving benefit from a gentile corpse.

   *Bet Yosef* in his commentary on the *Tur* brings the *Bedek ha-Bayit* who

would thus seem to be forbidden under the restriction of *issur hana'ah.*[6]

### 3) Kevurat Hamet

There is a positive commandment to bury the dead, "Thou shalt surely bury him."[7] In addition, there is also a negative commandment associated with burial,[8] and that is not to omit from

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quotes *Teshuvoth ha-Rashba* that a gentile corpse is also *ossur be-hana'ah.* However, see the *Bi'ur ha-Gra loc. cit.*, note 1, which cites three separate statements in Rashba's novellae that gentile dead are *muttar be-hana'ah.* Rashba writes that since we learn the *issur hana'ah* from Miriam (see above note 5), then just as Miriam was a Jewess the *issur hana'ah* applies only to Jews and not gentiles. Also cited in the *Gra* is the *Yerushalmi (Shabbat,* chapter 10, *halacha* 6) that a gentile corpse is *muttar be-hana'ah.* See also *Tosafot, Bava Kamma* 10a. See also *Pitkhei Teshuvah, Yoreh De'ah* 349, note 1, who cites *Be'er Heiteiv* of *Ma'harit* that the Jewish dead are *assurim be-hana'ah mi-d'oraita* while gentile dead are only *issurei mi-d'rabbanon. Mishneh le-Melech* in a lengthy essay, *Hilchot Avel,* chapter 14, *halacha* 21, proves that Rambam also holds that *meitei akkum muttarim be-hana'ah.*

6. There is some question about organ transplants being considered *ke'derech hana'ah,* the normal mode of deriving benefit. *Mishneh le-Melech, loc. cit.,* holds that *she'loh ke'derech hana'ah be-met* is not a Torah violation. *Radbaz,* part 3 no. 548 is in agreement. That transplants are *she'loh ke'derech hana'ah,* see *Iggerot Moshe, Yoreh De'ah* volume 1, no. 229. But he agrees with Rabbi Akiva Eiger that *she'loh ke'derech hana'ah be-met* is *assur.* Others maintain that transplants are indeed *hana'ah ke'derech* (see *Teshuvoth Ziz Eliezer,* volume 14, no. 84).
7. Deuteronomy 21:23. The Talmud *Sanhedrin* 46b asks, "Where is burial alluded to in the Torah? In the verse 'Thou shalt surely bury him.' " *Tur,* 362:1 agrees that burial is a Torah law. *Radbaz,* volume 2, no. 780 also holds that burial is a Torah law. However, Rabbenu Hannanel in his comments on the *Gemara loc. cit.* states explicitly that burial is a Rabbinic law. Rambam, *Mishneh Torah, Hilchot Avel,* chapter 14, *halacha* 1, writes that burial is a *mitzvah mi-d'rabbanon.* Also see *S'dei Chemed, ma'arechet kuf kellal* 39 for further discussion of Rambam's thesis.
8. *Sanhedrin* 46b. Non-burial of the dead carries with it the stricture, *lo talin.* Organs transplanted to a living person may not be a violation of *lo talin.* In the case of the *Gemara* often quoted by the *Poskim, Erchin* 7b, where the *Gemara* asks in astonishment, "If a person says, 'I hereby bequeath my arm to my daughter,' would we allow it?" It is understood that the arm is never to be committed to burial. In transplantation, however, the organ will eventually be buried upon the death of the recipient. See Rabbi M. Steinberg, *Noam* vol. III pg. 94, also *Noam* vol. IV pg. 202.

interment any limb or organ of the body.[9] Cadaver transplants involve the removal of a body organ from the corpse. In this way, the organ is not brought to burial, in apparent violation of the Torah's directive.

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## Corneal Transplants

With these basic problems in mind, let us first turn our attention to corneal transplantation. The cornea is a thin membrane that covers the lens of the eye. Being clear, it allows light to enter the lens. In some cases of defective vision, the cornea becomes clouded and interferes with the passage of light through the lens, thus often causing blindness. In a corneal transplant the cornea of a cadaver is used to replace the patient's defective one.

In a classic responsum on corneal transplants, Rabbi I.Y. Unterman permits them for people who are blind. He maintains that the prohibition of deriving benefit from the dead, of desecrating the dead, and the requirement of burial are all waived because there is before us the matter of *pikuach nefesh*, saving a life. Rabbi Unterman asserts that a blind person is constantly confronted by life-threatening situations; he may fall down a flight of stairs or into a pit or be hit by a car and die. To restore his sight to him is tantamount to saving him from death. On this basis alone, Rabbi Unterman holds that corneal transplants should be permitted.[10] His reasoning is based on the first major decision on this topic by Rabbi Ezekiel Landau two centuries ago.[11]

Rabbi Landau was confronted by the following case: A person died during the surgical removal of a kidney stone. The question

9. The *Tosafot Yom Tov, Shabbat,* chapter 10, *mishnah* 5 writes that the requirement of burial is even for *ke-zait min hamet.* The *Minhat Chinyuch mitzvah* 537 states that there may even be a requirement to bury less than a *ke-zayit.* This point of view is based on a statement in the Talmud *Yerushalmi, Nazir* chapter 7 *halacha* 1, *"tik'be-renu — kullo ve-loh mik-zato."* This is also the view of Ramban, *Torath ha-Adam,* page 43a. However, *Mishneh le-Melech* at the end of *Hilchot Avel* avers that there is no requirement of burial once the head and the trunk are buried. Rabbi Isaac Liebes, *Noam* volume 14 has a lengthy discussion on this matter.

10. Rabbi I. Yehudah Unterman. *Shevet mi-Yehudah, Jerusalem 1955, pp. 313-322.*

11. *Rabbi Ezekiel Landau. Nodah bi-Yehudah,* part 2, *Yoreh De'ah,* no. 210.

then was posed whether an autopsy could be made to ascertain the exact nature of the malady, so that in the future, others similarly afflicted might be saved. Is there a violation of the prohibition against desecrating the dead in a situation where lives may be saved in the future? Rabbi Landau responded that an autopsy could be performed in such a case only if there is a *choleh lefoneinu*, a patient with the same condition presently awaiting surgery. When there is indeed such a patient before us, it becomes a question of *pikuach nefesh*, an endangered life, and an autopsy should then be permitted.[12] The reasoning is that although the corpse is violated, by saving a life the autopsy enhances the dignity of the deceased and is accordingly permissible.[13] Rabbi Landau maintains that if not for the fact that a post-mortem examination of a murder victim would not be conclusive, the rabbis in the Talmudic discussion cited previously would have required it in an effort to preserve the life of the condemned murderer. However, the criterion of *choleh lefoneinu* had to be met before *nivul hamet* would be permitted by Rabbi Landau.[14]

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12. It must be pointed out that the two cases are not completely analagous. Rabbi Landau does not discuss the problem of burial because he understood the case to be that the entire body is interred after the autopsy. This is not the case in the transplantation process where, by definition, the grafted organ is not buried with the deceased.

13. It must be understood that this responsum contains within it two speakers. The original question was asked of Rabbi Leib Fisheles, a rabbi from London. He responded that the autopsy is permitted. He based his decision on the *Gemara* in *Hullin* 11b that maintains that an autopsy is theoretically allowed to save a murderer from the death sentence. Rabbi Landau agrees with that logic. However, he has a different interpretation of the *Gemara*. He learns that *nivul hamet* of the victim would be permitted because it is *le-kavodo shel met* to have his slaying avenged. This same logic must enter into his acquiescence of Rabbi Fisheles' proof. Moreover, Rabbi Landau's proviso that there be a *choleh le-foneinu* is based on that same passage where the murderer's imminent death is "before us."

14. Rabbi Landau explains the need for a *choleh le-foneinu*. He argues that if we were to suspend laws in anticipation of some future need for a person who is not yet endangered, then no prohibition would be meaningful. For example, cooking on the Sabbath could then be justified on the grounds that perhaps someone will take ill and be in the need of hot food. For a law to be suspended, a clear connection must be discernible between the act and the elimination of an existing danger.

Rabbi Unterman extends the above reasoning to the other two violations of *issur hana'ah* and *bitul mitzvat kevurah*. However, his thesis would seem to apply only to a person blind in *both* eyes, since a person with unilateral blindness cannot be considered in mortal danger *(pikuach nefesh)*; accordingly, a corneal transplant should not be permitted for him. Rabbi Unterman counters with the following solution:

When the cornea is transplanted onto the eye of the recipient, it ceases to be dead but is transformed into a living organ. Hence, all of the restrictions against deriving benefit from the dead and not burying the dead cease to be problems since no dead organs are involved. Furthermore, writes Rabbi Unterman, the violation of desecration of the dead *(nivul)* where there is no *pikuach nefashot*, as in the case of blindness in one eye, does not apply. Since the eyes of a dead person are always to be closed, the incision needed to remove the eye is not considered *nivul*, a mutilation. Only a *visible* incision into the body or the removal of externally visible or internal organs constitutes true desecration. Once the eye is removed from the socket, the eyelids are closed.

Among the *Poskim* there are many who take exception to Rabbi Unterman's line of reasoning.[15] Rabbi Isaac Glickman shows that the *issur hana'ah* comes about because the deceased is given automatic and immediate posession *(kinyan)* of his body and the clothes he is wearing. He cites the Talmudic statement that when a robe is spread over a corpse, the deceased automatically acquires it.[16] Thus, regardless of the fact that an organ may be revived through the transplant, he argues that the *issur hana'ah* remains in place.

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15. Rabbi Isaac Glickman objects to the premise that the prohibition against deriving benefit from the dead is a result of the lost life-force of the limbs and organs of the body and so, when they are revived subsequent to the transplant surgery, the prohibition is then removed. Rabbi Isaac Glickman, *Noam*, volume 4, Jerusalem, 1961, pp. 206-217.

16. *Yevamoth* 66b. Rashi comments that the burial shrouds of the dead are *assurim be-hana'ah*, as is *hekdesh*. Therefore, even if the deceased expressed his desire while alive, it is meaningless, for there is a new *kinyan*, right of acquisition given the dead which is in no way associated with his possession during life.

Rabbi Glickman considers a further element in this discussion. The Jerusalem Talmud says that there was an old Jewish custom of burying the dead in limestone or tar, so that the flesh would decompose more quickly. The idea is that the sooner the body of the deceased decomposed, the sooner he was saved from the pain of judgment.[17] Also, the atonement of a dead person is complete only when the body has fully decomposed.[18] When organs are grafted from the dead, the deceased's atonement is delayed until the recipient is dead and buried. This causes great pain to the soul of the donor. Rabbi Glickman therefore posits that even in the event of *pikuach nefesh*, using cadaver organs is prohibited. However, if a person gives permission for his organs to be used,[19] he has the right to waive his atonement for the good of another human being. But he concludes that the prospective donor must be apprised of the great evil he causes his own soul, and only if he does not relent may his organs be used.

Other objections to Rabbi Unterman's approach are raised by Rabbi Shmuel Heubner.[20] He asserts that the prohibition against deriving benefit from the dead cannot be changed even if the organ is brought "back to life." Once a person has died, the *issur hana'ah* is unalterable and irrevocable.[21] Moreover, the contention

17. *Jerusalem Talmud, Moed Katan*, chapter 1, *halacha* 5. *Korban ha-Eidah* explains that with the total decomposition of the flesh the punishment of *chibbut ha-kever* is eliminated.
18. The Talmud in *Sanhedrin* 46b postulates that the purpose of burial is in order for atonement to be realized. Rashi explains that the agony experienced by the body is in part expiation for the sins committed during a person's lifetime.
19. Most of the *Poskim* agree that use of cadaver organs is dependent on permission from the donor before his death. This is based on the view posited by Rabbi Ya'akov Ettlinger *(Binyan Zion*, no. 170) who maintains that even in the event of *pikuach nefesh*, desecration of the dead is forbidden. He cites the decision of the *Shulchan Aruch (Choshen Mishpat* 359:4) that appropriation of another's property for purposes of saving a life is justifiable only when full restitution is possible. Since no restitution can be made for the physical desecration of a corpse, it is forbidden. However, asserts Rabbi Ettlinger, when permission is given by the deceased prior to his death to allow dissection of his body, he thereby waives any dishonor to his body, and it is thus permitted.
20. Rabbi Shmuel Heubner. *Hadarom*, volume 13, New York, 5721, pp. 54-64.
21. He cites Rashi, *Avodah Zarah* 46b who writes that although a change in a

that a blind person is in constant mortal danger is incorrect, avers Rabbi Heubner. Observation shows that blind people are able to avert danger by using seeing-eye dogs and canes. His conclusion is that under no circumstances are corneal transplants permissible.

Rabbi Meir Steinberg deals with the question of bequeathing eyes to an eye bank.[22] In analyzing Rabbi Unterman's position, he raises the point that life is not returned to the cornea when it is transplanted; it merely facilitates sight in the recipient within his own ocular system.[23] Another objection raised by Rabbi Steinberg is that although only the cornea is actually needed, nonetheless the entire eye is removed. These problems notwithstanding, he permits corneal transplants with the proviso that after the cornea is removed, the eyes must be buried. He also permits the donation of eyes to an eye bank if the donor stipulates that they are earmarked for an individual suffering from bilateral blindness.[24]

Rabbi Yekutiel Greenwald approaches the problem from a different vantage point. He writes that if we were dealing only with the corneas, it would not be problematic. The Tosafists hold that skin is not included in the prohibition against deriving benefit from the dead.[25] Rabbi Greenwald maintains that the cornea is skin and not flesh. Although most *Rishonim* maintain that there is no difference between flesh and skin in the prohibition, he writes that we may rely on the minority opinion of the Tosafists when confronted by the possibility of restoring a person's vision.[26] However, since standard procedure calls for the removal of the

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forbidden foodstuff removes the prohibition, *shinui*, a change in an *issur hana'ah* remains prohibited. He explains that even though a change occurs benefit is still derived from the original item.

22. Rabbi Meir Steinberg. *Noam*, volume 3, Jerusalem, 1960, pp. 87-96.
23. According to this line of reasoning, there should be no problem of violating the *issur hana'ah;* if the cornea serves no tangible purpose, no benefit is then derived from the cornea.
24. Because in this situation there is *pikuach nefesh.*
25. Rabbi Yekutiel Y. Greenwald. *Kol Bo Al Aveilut*, volume 1, pp. 45-48.
26. *Niddah* 55a, s.v. *she'mah ya'aseh.* However, the majority of *Rishonim* maintain that *or hamet* is included in the prohibition of deriving benefit from the dead. See Rambam, *Mishneh Torah, Hilchot Avel,* chapter 14:21 and Rashba, Me'iri and Ran in their respective commentaries on *Niddah, loc. cit.*

entire eye for a corneal transplant, it renders his argument moot.

Rabbi Yechiel Weinberg analyzes Rabbi Unterman's opinion and refutes it point by point. Yet his final decision is that a person who is totally blind is in mortal danger of "falling into a river or stumbling into a fire." In addition, the fact that many rabbis of great stature allow the procedure plus the existence of a minority view that the skin of the dead is not *ossur be-hana'ah*, gives Rabbi Weinberg the backing to allow corneal transplants.[27]

Rabbi Michael E. Fuhrshleger permits corneal transplants even in cases of unilateral blindness.[28] In discussing the story of Elisha's resurrection of the son of the Shunamite woman, the Talmud asks, "Was the boy capable of conveying *tum'ah*, ritual impurity?" The answer given was, "Only a corpse is *me'tameh*, not a live person."[29] The formulation articulated here is that even after the cessation of the original life-force, when the body is reanimated, the corpse is once again considered a living organism. The same holds true for the cornea. Once it becomes "alive" again in the body of the recipient, the prohibitions associated with the dead as well as with *tum'ah* are removed.[30]

Rabbi B.Z. Abba Shaul finds it difficult to permit transplants that use organs from Jewish cadavers, but does allow the use of gentile cadavers for this purpose.[31] Rabbi Moshe Feinstein also permits the use of non-Jewish cadaver organs.[32]

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27. Rabbi Yechiel Y. Weinberg, *S'ridei Esh, Yorah De'ah*, volume 2, no. 120, *Mossad ha-Rav Kook*, Jerusalem, 1962.
28. Rabbi Michael E. Fuhrshleger. *Torath Michael*, no. 56. *Machon ha-Talmud*, Jerusalem, 1967.
29. *Niddah* 70b.
30. In an interesting aside, he rebuts an argument of one who objects to corneal transplants on the ground that the eyes of the blind cannot be considered endangered organs because they are already insensible. Rabbi Fuhrshleger quotes the Tosafists who ask, "How was Elijah, who was a priest, permitted to resurrect the son of the widow — in the process he defiled himself?" They answer that for *pikuach nefesh*, in order to save a life, the *issur tumah* is pushed aside *(Bava Mezia* 114b). We see that bringing life back is also in the category of *pikuach nefesh*, with the same holding true for restoring sight to the blind. Rabbi Fuhrshleger maintains that this rationale applies even for unilateral blindness.
31. Cited in *Yabbi'ah Omer*, volume 3, *Yoreh De'ah* no. 20.
32. Rabbi Moshe Feinstein. *Iggerot Moshe, Yoreh De'ah* volume 1, no. 229.

In an exhaustive discussion of the matter, Rabbi Ovadiah Yosef concludes that corneal transplants are considered *sheloh kederech hana'ah*, not the normal way of deriving benefit from the dead, and it is therefore permissible to use Jewish donors.[33] Regarding burial, he maintains that since the cornea is returned to its original function, there is no requirement of burial, especially since Rambam is of the opinion that it is only a rabbinic requirement to bury the dead.[34] Dealing with the problem of desecration of the dead, he cites Rabbi Saul Nathanson who posits that *nivul hamet* is only prohibited when it is done wantonly with the intention of desecrating, but when there is a pressing reason or goal to achieve by the apparent *nivul*, it is allowed.[35] To restore vision to an individual blind in even one eye certainly cannot be considered wanton desecration, writes Rabbi Yosef; rather it is *kavod haberioth*, a humanitarian undertaking. However, using gentile organs is preferable. He adds that the donor must express his willingness to have his eyes used. Furthermore, a Jewish doctor may not remove eyes from a Jewish cadaver when gentile cadavers are available.

At the other end of the spectrum, Rabbi Eliezer Waldenberg takes the most stringent position.[36] He asserts that it is forbidden for a person to donate any of his organs after death for the purpose of transplantation. There is no mitzvah involved in doing so because the dead are free of all obligations, even saving another's life. Secondly, it is imperative that the body of the deceased be returned in its *entirety* to its "place of origin in accordance with G-d's decree."[37] Moreover, he writes that were a person to donate his eyes after death, at the time of Resurrection he would be revivified without eyes.[38] Rabbi Waldenberg is also

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33. Rabbi Ovadiah Yosef. *Yabbi'ah Omer*, volume 3, nos. 21 and 22.
34. *Mishneh Torah, Hilchot Avel*, chapter 14:1.
35. Rabbi S. Saul Nathanson. *Sho'el u-Meshiv*, part 1, volume 1 no. 231.
36. Rabbi Eliezer Waldenberg. *Ziz Eliezer, volume 13, Yoreh De'ah*, no. 91. For a discussion of why unilateral blindness should be considered *pikuach nefesh*, see *Torath Michael*, no. 56.
37. He alludes to the fact that there are metaphysical reasons that are beyond human comprehension that preclude donation of organs after death.
38. He argues for this point not based on any early sources; rather, it is his own

fearful that in their haste to retrieve the eyes while still "warm and fresh," there is the strong possibility that the doctors will remove the eyes before the patient is actually dead and the procedure will hasten or bring about his death.[39]

Rabbi Waldenberg's final point is that "the paths of the Torah are pleasant" and must be applicable to all Jews equally. And since it is inconceivable to him that we would remove the eyes of the leader of the generation or those of a great Torah scholar for the purpose of transplantation, then it must be as absurd a notion for the common man as well. He asks rhetorically of those rabbis who allow transplants, "Which one of them would be willing to donate one of his organs after death?"[40] However, in a recently published responsum, Rabbi Wadenberg does permit the use of corneas from an eye bank even in the case of unilateral blindness.[41]

## Kidney Transplants

The *halachic* principles relating to corneal transplants are equally applicable to cadaver kidney transplants. All authorities agree that renal disease constitutes an immediate threat to the life of the patient and is considered *pikuach nefesh.*

The problems presented by live donor kidney transplants are far more complex than those of cadaver transplants. Foremost is

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intuitive feeling. He does cite the same notion from the work *Yismach Le'vav* whose author he identifies as a Moroccan rabbi.

It should be noted, however, that if an individual loses a limb, by sickness or accident, or if G-d forbid a person was cremated by the Nazis ימח שמם, he certainly rises fully at the time of Resurrection. It is only a person who willingly allows a limb to be detached from his body that is punished at the time of Resurrection.

39. In virtually all of his writings on medical questions that involve the necessity of determining the patient's death, Rabbi Waldenberg exhibits a wariness and distrust of doctors' ethics in establishing the true time of expiration.
40. He explains that his rejection of the notion of organ donations, in addition to logical considerations, is a result of a feeling that comes from deep within the Jewish soul which is the soul's awareness that just as the soul will return to her original abode in Heaven, so, too, must the body return to its source on earth. Furthermore, one should not pretend to be wiser than G-d and attempt to bring back to life that which has already died.
41. Rabbi E. Waldenberg. *Ziz Eliezer* volume 14, *Yoreh De'ah,* no. 84, Jerusalem 1981.

the problem that although a person can live and function normally with one healthy kidney, there is always the possibility that the donor may lose his life from the major surgery involved. Is the donor permitted to expose himself to the hazards of the surgical removal of his kidney for the sake of another individual?

The Jerusalem Talmud is quoted as saying that one is obligated to save another's life from certain death even in the face of danger to his own life.[42] The commentaries explain the logic of this thesis: Without intervention, the victim will surely die, *vadai met,* while the intervener is only a *safek met,* his death is only a possibility.[43]

The major *Poskin* and the *Shulchan Aruch* omit the principle set down by the *Yerushalmi.* An explanation offered for the omission is that the Babylonian Talmud argues and maintains that one is not obligated to jeopardize his life to save another.[44]

This position is reflected in the ruling of Radbaz, who writes that it is not obligatory to lose a limb in order to save a person's life.[45] If one does so, he performs a supererogatory act and is considered to be a *chassid,* a righteous individual. But one who puts his life in jeopardy to save another is a *chassid shoteh,* a foolhardy individual.

Rabbi Eliezer Waldenberg, after citing the ruling of the Radbaz, asserts that in a situation where a person will be in danger, he is forbidden from donating an organ. In a case that presents no danger, a person is permitted, although not obligated, to donate his organs. He notes that after consulting many doctors,

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42. *Bet Yosef, Tur Choshen Mishpat* 426:1, note 2, brings the *Hagahot Maimoniyot* who quotes the *Yerushalmi* but does not point out its source. Rabbi Zvi Y. Berlin in his *Ha'amek She'elah, she'ilta* 129, note 4, identifies the *Yerushalmi* in question as the statement of Resh Lakish in *Terumoth,* chapter 8, *halacha* 4. "Rav Ami was in a precarious situation. Rav Yonatan said, 'Forget about him; all hope is lost.' Resh Lakish said, 'I will rescue him and in the process I will kill or be killed.' "
43. *S'ma,* in the name of the *Bet Yosef, Choshen Mishpat* 426:1, note 2.
44. *Pitchei Teshuvah, loc. cit.,* in the name of the *Agudath Ezov.* The actual *Gemara* in question is *Niddah* 61a. See *Ziz Eliezer* vol. 10, no. 25, chapter 7 who analyzes the thesis of the *Agudath Ezov.*
45. *Teshuvoth Radbaz,* volume 3, no. 627.

he found their opinion to be that removal of a kidney from a healthy person is a life-threatening procedure. He does leave open the possibility, however, that when a group of reliable doctors decides in an individual case that no life-threatening danger exists, then and only then is the person permitted to donate his kidney.[46] In a later responsum he adds that since there is the possibility that the transplanted kidney may be rejected, there can certainly be no obligation to donate one's kidney. Only when a life will surely be saved can there be any obligation to put oneself in jeopardy.[47]

In a different twist, Rabbi Moshe Meiselman questions the permissibility of a person's *receiving* a kidney transplant. Is the patient himself permitted to undergo transplant surgery? He answers that if the prognosis for the patient's life expectancy is not enhanced by the transplant and he can live as long using dialysis, he cannot undergo the transplant procedure. This remains the halacha even if the patient wants to forego the higher life expectancy in order to spare himself the extreme unpleasantness of dialysis therapy. If, however, a new kidney would prolong the patient's life longer than if he were to continue with dialysis therapy, he is permitted to have a kidney transplant.[48]

## Heart Transplants

In essence, the problem of heart transplants poses no theoretical problems different from those of cadaver kidney transplants. However, peripheral problems do arise.

While a person can donate one of his kidneys and still live, no person can live without his heart. Therefore, in order to actualize a heart transplant, the donor must be dead. In addition, unlike other cadaver transplants, the heart must be removed immediately after death if any chance of success can be expected. We are thus forced to address ourselves to the question of the time of *halachic* death,

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46. *Ziz Eliezer*, volume 9, no. 45.
47. *Ibid.*, volume 10, no. 25, chapter 7. For further discussion of this point, see Rabbi Yitzchak J. Weiss. *Minchat Yitzchak*, volume 6, no. 103 and Rabbi Isaac Liebes. *Noam*, volume 14, pp. 28-111, Jerusalem, 1971.
48. Rabbi Moshe Meiselman. *Halacha and Medicine*, volume 2, pp. 114-121, Jerusalem, 1981.

which is the earliest time the heart of the deceased may be removed.

Conceptually, death is defined as the separation of the soul from the body. Indeed, the Talmud often refers to death as *yetziat neshamah,* "departure of the soul."[49] Understandably, there is no methodology to enable the empirical observation of this phenomenon. Observable criteria using reliable indicators are needed to determine that the soul has indeed left the body, i.e., death has occurred.

The primary source for the establishment of criteria of death in Jewish law is the Talmudic discussion that assumes death has taken place upon the cessation of all respiration.[50] The case in point concerns an individual trapped under the rubble of a fallen building on the Sabbath. Since desecration of the Sabbath is waived for the preservation of human life, the debris of the fallen building may be cleared away in order to save the person trapped beneath it, even if his survival is doubtful. However, once the expiration of the trapped victim is assured with certainty, no further suspension of the Sabbath laws is sanctioned. How is such a conclusion reached? Of the two opinions offered, the first is that when the victim's nose is uncovered and no sign of respiration is found, the person is pronounced dead. The second opinion is that once the chest has been uncovered, examined, and no trace of any heartbeat is found, death may be assumed. The Talmud explains that the second opinion does not disagree that cessation of breathing is a crucial determinant of death. *Rather it maintains that cessation of heartbeat can also* be considered a determining factor in determining time of death.

Rambam[51] and the *Shulchan Aruch*[52] both cite the first opinion as the halachic norm. But this by no means excludes cardiac activity as an effective tool in the detection of life. The

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49. This concept is found in the verse "...all in whose nostrils is the breath of the spirit of life" (Genesis 7:22).
50. *Yoma* 85a.
51. *Mishneh Torah, Hilchot Shabbat,* chapter 2, *halacha* 19.
52. *Orach Chayim* 329:4.

renowned authority, Rabbi Zvi Ashkenazi *(Chacham Zvi),* notes that in some cases no heartbeat will be perceptible even though the person is still alive. A weak beat may be present but inaudible since the ribcage and layers of muscle intervene, thereby muting the vibrations. Respiration is more readily detectable; hence the reliance on respiration as the definitive indicator. However, it is most clear, maintains Rabbi Ashkenazi, there there can be no respiration unless there is life in the heart, for respiration's source is from the heart and for its benefit.[53] Rabbi Moshe Sofer accords with this view, adding that cessation of respiration is a definitive sign of death only if the body lies as inanimate as stone and there is no pulse whatsoever.[54] Rabbi Sofer maintains that death occurs only upon cessation of both cardiac and respiratory functions. All other vital signs are not considered halachic criteria for determining death.[55]

A person who is moribund, *goses,* is considered by the law *ke-chai le-chol davar,* as a fully living person.[56] Accordingly, nothing may be done to curtail the life of a *goses* in any way; even moving a part of his body is absolutely forbidden. This is one of the greatest obstacles to heart transplants.

In a diatribe against many doctors, Rabbi Eliezer Waldenberg prohibits heart transplants under all circumstances. He says that doctors summarily declare a patient dead although he is still alive. They do this only because they want to remove the heart quickly for the purpose of transplantation. This, he declares, is unadulterated murder, even though the patient would die shortly.[57]

Moreover, even if a heart could be made available in a halachically permissible fashion, a transplant would still be

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53. Rabbi Zvi Ashkenazi. *Teshuvoth Chacham Zvi,* no. 77.
54. Rabbi Moshe Sofer. *Teshuvoth Chatam Sofer, Yoreh De'ah* no. 338.
55. However, see *Ramo Orach Chayim,* 330:5 who says that we are incompetent in ascertaining with exactitude when all respiration has ceased. There exists the possibility that the person has actually fainted and spontaneous repiration will resume.
56. Tractate *Semachot,* chapter 1, *halacha* 1. Also see *Shulchan Aruch, Yoreh De'ah* 339:1.
57. *Ziz Eliezer,* volume 13, no. 91, section 7.

forbidden. He makes the point that in many cases the person slated for the "new" heart can continue to live, often for many years, albeit in great distress, without the transplant surgery. To allow an operation which fails two out of three times is unconscionable. And even though a terminal patient may undergo dangerous surgery if there *exists a fair chance for* recovery, Rabbi Waldenberg concludes that with heart transplants the percentages of success are too low to warrant the forfeiture of the few years the patient may have with his natural heart. Also, heart transplants cannot as yet be considered sound medical practice and therefore are not included in the biblical allowance *ve-rapoh ye'rapeh*, "the doctor may heal."[58]

Rabbi I.Y. Unterman takes a rather unique approach to the problem.[59] He says that when the "old" heart of the recipient is removed, he automatically loses his *chezkat chayim*, his status of being presumed alive. While even the most seriously ill patient never loses his *chezkat chayim*, once the heart is removed a person is automatically considered to be dead. Therefore, the recipient is prohibited from allowing himself to be "killed" by undergoing the transplant surgery.

Rabbi Unterman bases his statement on the famous case of the chicken that was slaughtered and found to have no heart. Two renowned authorities, Rabbi Zvi Ashkenazi and Rabbi Yonatan Eibschutz, disagreed as to the ruling. The former held that the chicken was kosher, because without a normal heart there is no possibility of living and, since the chicken did live, there must have been a heart but it must have been snatched away by a cat after the chicken was slaughtered and opened. Rabbi Ashkenazi also cited the *Zohar* that says that without a heart life cannot exist for even a moment.[60]

Rabbi Eibschutz ruled the chicken unkosher. He said that the physicians in Prague claimed that there might have been an organ that did not appear to be a heart but was indeed a malformed heart

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58. *Ibid.*, volume 10, no. 25, chapter 5, section 5.
59. Rabbi I.Y. Unterman. *Noam*, volume 13, pp. 1-9, Jerusalem, 1970.
60. Rabbi Zvi Ashkenazi. *Loc. cit.*

that functioned, keeping the chicken alive. Thus, without a normal heart the chicken was rendered *treifah,* unkosher.[61]

In any event, concludes Rabbi Unterman, we see from both sages that the heart is essential to life and when the heart is removed the person automatically loses his *chezkat chayim.* This is why he argues heart transplants cannot be sanctioned.[62]

It is interesting that Rabbi Unterman does not extend his ruling to open-heart surgery. Open-heart surgery involves the stopping of the heart in order to provide a stationary field for surgery, while the functions of the heart are taken over by a heart-lung machine.

Rabbi Menachem Kasher argues with Rabbi Unterman's basic premise.[63] The mere fact that people have survived heart transplants shows that when the heart is removed, life can continue. Rabbi Kasher maintains that when the heart is removed the status of the patient is a median state between life and death. He has "left the state of the living but has not yet died." However, Rabbi Kasher concludes that even when an artificial heart is developed, which would obviate the problem of "murdering" a prospective heart donor, and the percentage of successful heart transplants rises, no blanket license can be given to permit this type of surgery. It will depend on the gravity of the illness and hope for survival in each individual case. It will call for the consultation of three religious, expert physicians and an expert rabbi who will have to make the final determination.

Rabbi Chaim D. Regensberg takes the most lenient stance and feels that "the time has come to allow heart transplants."[64] He differentiates between two types of terminal patients. First, there is the *goses* who, although he will die shortly, is totally alive; one

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61. Rabbi Yonatan Eibshutz. *Kereti u-Peleiti,* 40:4.
62. He maintains this view notwithstanding the rabbinic opinions permitting extremely risky surgery when there is only a slight chance of success.
    Rabbi Yaakov Reischer. *Shevut Ya'akov,* part 3, no. 75.
    Rabbi Chaim Ozer Grodzinski. *Teshuvoth Achi'ezer, Yoreh De'ah,* no. 16.
63. Rabbi Menachem Kasher. *Noam,* volume 13, pp. 10-20, Jerusalem, 1970.
64. Rabbi Chaim D. Regensberg. *Halachah and Medicine,* volume 2, pp. 3-8, Jerusalem, 1981.

who kills him is guilty of murder. The second type is one who is so far gone that even the slightest movement of his body will kill him. If one does touch him or close his eyes, and he expires as a result, that individual is guilty only of murder *mi-d'rabbanan,* a rabbinical injunction, and has not transgressed the biblical *issur.* Furthermore, Rabbi Regensberg feels that with "brain death" a person is halachically dead, although there is respiration and the heart is still beating.[65] If a prospective donor has reached this state of "death," Rabbi Regensberg would allow removal of his heart, although he cautions that we cannot trust the doctors in this matter, nor is the encephalogram sufficiently definitive in indicating when brain function ceases altogether. Moreover, he concludes that since heart transplants have not been very successful statistically, a Jewish doctor should not perform the transplant, nor should a *Rav* take upon himself the responsibility of advising any patient to undergo this type of surgery.

Thus, the consensus of opinion among modern *Poskim* is that although theoretically heart transplants might be permitted, at this point in time it cannot be sanctioned because it is not medically sound. As the procedure is perfected in cardiac transplantation, perhaps a different halachic view will evolve.

Twelve years after the performance of the first human heart transplant, the probability of survival for a prolonged period after such an operation has increased markedly. It should be understood that acceptance of a patient as an active transplant candidate is predicated upon the failure of all other medical and surgical treatment alternatives to provide an outlook for survival of more than a few months.[66] Only such end-stage cardiac diseased patients

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65. The majority of *Poskim* reject the idea that "brain death" is equivalent to decapitation. For a full discussion of this topic see the article by Rabbi J. David Bleich, "Neurological Criteria of Death and Time of Death Statutes," *Jewish Bioethics,* edited by F. Rosner and J.D. Bleich, Sanhedrin Press, New York, 1979. Rabbi M.D. Tendler maintains that "brain death" as defined by the Ad Hoc Committee of the Harvard Medical School is acceptable under Jewish law in declaring a patient dead. *(Practical Medical Halachah,* edited by Rabbi M.D. Tendler and F. Rosner, New York, 1980.) He writes that Rabbi Moshe Feinstein agrees with this view.

66. P.E. Over, E.B. Stinson, B.A. Reitz C.P. Bieber, S.W. Jamieson, and E.

are selected. Statistics from the Department of Cardiovascular Surgery at the Stanford University School of Medicine, which has performed 188 out of the 450 world-wide heart transplants, or 42% of all heart transplants, are more than encouraging. Improvements in matching, immunosuppression, patient selection and early diagnosis and treatment of rejection have all increased survival of patients.

Current probablities for survival after cardiac transplantation for the period of January 1974 until May 1980 show that 65% of all patients undergoing heart transplants may be expected to survive for one year and between 45% and 50% for at least five years. By comparison, the survival of patients who met all criteria as transplantation candidates, but for whom an appropriate donor organ could not be found, was substantially lower. More than 90% died within three months after selection, which emphasizes the severity of illness in those accepted for transplantation.[67] Therefore, it is the feeling of this writer that when these new data will be reviewed by the *Poskim,* in a situation where there is no halachic problem of obtaining a donor, as in severe accident cases or according to those Rabbis who maintain that "brain death" is equivalent to death, a heart transplant would be halachically feasible. This situation is no different that those cases where dispensations for surgery have already been given by major *Poskim.*

May it be the will of Him who heals all flesh and performs wonders, that it shall come to pass, "If thou wilt hearken to the voice of G-d, then all of the diseases I have put upon the Egyptians I will not put upon thee, for I, G-d, am thy healer."[68]

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Shumway. *Cardiac Transplantation: 1980,* "Transplantation Proceedings," volume 13, no. 1, March, 1981.

67. *Ibid.*

68. Exodus 15:26

# Opening Containers On Shabbat: A Halachic Review

*Rabbi Joseph Stern*

Modern technology has afforded twentieth-century society many conveniences which have revolutionized our lifestyle. For observant Jews, the new technology has further concomitants — new situations requiring halachic elucidation. In the area of Sabbath observance, it is often necessary to employ deductive reasoning, to define the *melachot* (forbidden activities) of Shabbat, and then to "work backwards" by examining the individual components of each prohibited category, and then to attempt to generalize.

This article will consist of three segments, an exegesis of halachic opinion and Responsa considering the very contemporary issue of opening cans on Shabbat, a compilation of authoritative opinion regarding the theoretical parameters as well as the practical applications of מלאכת קורע (tearing), and finally a brief discussion of a related issue, assembling (and taking apart) appliances consisting of several parts. Such practical concerns as removing bottle caps, tearing open snack food wrappers, opening packages, opening the mail, use of diapers and pampers, and converting a baby carriage into a stroller will be addressed. The customary disclaimer common to halachic articles should be underscored here. The purpose of this piece is merely to consider issues and to

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present a framework for analysis (and possibly to enlighten the reader as to the complexity and multi-faceted nature of *hilchot Shabbat).* Under no circumstances should *halacha lemaaseh* (normative rulings) be derived from the article. Our goal is to enhance the reader's ability to *pose* a *Shealah* (halachic query), not to *answer* his *Shealah.* All *Shealot* must be considered by the local orthodox, G-d fearing rabbinate.

## Opening Cans on Shabbat

### Theoretical Framework

In accordance with the admonition of the Talmud severely criticizing those who glibly decide halachic question by delving only into primary sources[1] and especially the severe comment of מהרש"א[2] condemning those who *pasken* (rule on halachic issues) on the basis of the *Shulchan Aruch* alone, this paper will trace this contemporary issue from its original source, the Talmud, until the *Shulchan Aruch.*

Frequently, the basic outline of a halachic decision is derived from two dichotomous Talmudic statements. Here, too, an apparent contradiction between the Gemara cited in the tractate of *Shabbat* and that quoted in *Beitza* (dealing with the laws of Yom Tov) forms the basis for much of the controversy about opening cans on Shabbat. In addition, a Talmudic passage cited in *Eruvin* is also pertinent.

The Talmud in *Shabbat*[3] *apparently* permits cans or other receptacles (containers) to be opened without exception שובר אדם חבית לאכול הימנו גרוגרות "One is permitted to break open a barrel in order to obtain some figs." ובלבד שלא יתכוין לעשות כלי However, the Talmud stipulates that his primary purpose must be to retrieve the figs, not to create a hole, a new opening for the barrel. (Boring a hole would constitute a violation of מכה בפטיש, the prohibition against "creating a new vessel)."

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1. סוטה כב
2. ד"ה ירא
3. שבת קמו.

The Vilna Gaon[4] and other commentators suggest that breaking open a barrel would not be considered to be מלאכת סותר (demolishing, a category of work performed during the construction of the Sanctuary and thus prohibited on שבת) inasmuch as a barrel or any portable, movable object is halachically defined as a כלי (a vessel) and we maintain אין בנין וסתירה בכלים[5] the injunction against "building" or "demolishing" on Shabbat is restricted to real property, objects connected to the ground. Rashi's[6] comment on the above Gemara suggests that it is the *destructive* nature of the act — מקלקל destroying a receptacle — that explains the suspension of the prohibition against demolishing, סותר. However, according to the Vilna Gaon,[7] Rashi, too, agrees, with the principle of אין בנין וסתירה בכלים. The *Mogen Avrahom*[8] however interprets Rashi literally, that מקלקל is permitted in order to obtain food for Shabbat. Whatever Rashi's intent, normative practice (הלכה למעשה) does *not* permit "destruction", מקלקל,[9] to be performed even to enhance the pleasure of Shabbat, עונג שבת, contrary to a rather popular misconception that almost anything is permitted for the Sabbath meal.

The Gemara in *Eruvin*[10] seems to offer a contradictory ruling: the *Eruv Techumin* (עירוב תחומין) (a meal placed before Shabbat some 2,000 cubits beyond the city limits for the purpose of allowing its owner to walk *another* 2,000 cubits) must be accessible on Shabbat. Suppose the *Eruv Techumin* was securely locked in a chest (or cabinet) and the key has been misplaced נתנו במגדל ואבד המפתח. The Gemara suggests that under most circumstances the *Eruv Techumin* is not valid since it is not accessible at the beginning of Shabbat. The *Eruv Techumin* could be obtained only

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4. ביאור הגר"א או"ח שי"ד ס"ק ג, ד
5. שבת קכב.
6. קמו רש"י ד"ה שובר
7. חזו"א נ"ח ס"ק ח'
8. מגן אברהם שי"ד ס"ק א'
9. בבה"ל שם ד"ה אסור לשברה ועיין מהרש"ם (דעת תורה) שי"ד סעיף א ד"ה אבל (בסוף דבריו) שהביא דיעות המתירין מקלקל לכתחלה אם אין לו מה יאכל
10. עירובין לד:

by demolishing the chest and this would violate the prohibition of סותר — "demolishing." Only if the food was placed in a chest built from uncemented bricks (מגדל של לבנים) or if it can be obtained by cutting open a string is the *Eruv Techumin* valid. Evidently, this Talmudic excerpt maintains that the prohibition of demolishing applies to movable objects (כלים) as well as to buildings.

According to rules of Talmudic exegesis,[11] the apparent contradiction of two Talmudic segments is resolved by resorting to a third piece of evidence. שני כתובים המכחישין זה את זה עד שיבוא הכתוב השלישי ויכריע ביניהם. In *Beitza*,[12] The Talmud prohibits peeling a piece of aromatic bark (or a twig) for the purpose of making its smell more pungent. Our concern is that the bark may eventually be shaped into a small utensil (e.g. a toothpick), a violation of מכה בפטיש (finishing an article). The Gemara differentiates between this case and breaking open a barrel of figs by suggesting that only a receptacle that had been broken *previously* may be opened again מוסתקי (or broken into) on שבת. To open a container for the first time is prohibited, שמא יתכוין לעשות כלי, for we are concerned that the individual really intends to create a new vessel (or a spout for an old one), a violation of מכה בפטיש (finishing) or of סותר[13] (demolishing).

This subtle but critical distinction between opening a new barrel and reopening an old one is sanctioned by Tosafot[14] as well as the Rosh.[15] The *Shulchan Aruch*[16] seemingly follows this distinction as well.

> אין בנין וסתירה וה"מ שאינו בנין ממש אבל אם היא שלימה אסור לשברה "A vessel that has not been opened previously, may not be broken into on Shabbat."

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11. בהקדמה לתורת כהנים
12. ביצה לג:
13. עיין בחוו"א סימן נ"א ס"ק ב' ובשו"ת מנחת יצחק ח"ד סימן פ"ב שהאריך בזה
14. ועיין שם במהרש"א שבת קמו. ד"ה שובר
15. רא"ש פרק כ"ב סימן ו'
16. שו"ע או"ח שי"ד סעיף א'

However many authorities, among them Rif,[17] Rambam,[18] Rashi[19] (apparently), one opinion cited in Tosafot[20] and the Vilna Gaon[21] reject this distinction. They maintain that the rule of אין בנין וסתירה בכלים is an absolute. Without exception one is permitted to open a barrel, a vessel, any container not connected to the ground on שבת. (In his marginalia to *Shulchan Aruch*,[22] the Gaon demonstrates that this dispute among *Rishonim* (medieval commentators) is in reality a controversy of *Amoraim* (sages of the Talmud), The *Aruch Hashulchan*[23] voices sympathy for this approach, "One shouldn't rebuke those who follow a lenient ruling (to open a barrel on Shabbat). Five pillars of the faith[24] permit it." אין לגעור ביד המקילין לסמוך על חמשה אבות העולם.

In an impassioned argument, Rav Nathanel Wiel[25] defends the practice of breaking open containers on Shabbat. He refutes the arguments of Tosafot and argues that even if one were to open up the barrel of figs with the express purpose of creating a vessel (מכה בפטיש) no violation of *biblical* law would be involved. The קרבן נתנאל reasons that to create a vessel by breaking is an unusual case of מלאכת שבת, a שינוי, and at most a rabbinic prohibition. He concludes that if mitigating circumstances exist (e.g. the food is needed for the Shabbat meal), it is permitted to break open a utensil for the purpose of obtaining food.

The Ramo[26] cites the opinion of *Ohr Zarua* that the prohibition of breaking open a vessel is based on the assertion of Rabbi Yehuda[27] that an unintentional, totally unpremeditated violation of Shabbat law is also considered to be a transgression, דבר שאינו מתכוין אסור. Thus, we are concerned that while breaking

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17. רי״ף מסכת שבת פרק כ״ב סא: בדפי הרי״ף
18. רמב״ם פרק כ״ג הלכות שבת הלכה ב׳
19. עיין בביאור הגר״א שי״ד ס״ק ד׳ שהאריך בביאור שיטת רש״י
20. שבת קמו. ד״ה שובר (בסוף דבריהם)
21. ביאור הגר״א שי״ד ס״ק ג
22. שם ס״ק ד
23. ערוך השולחן שי״ד סעיף ח׳
24. דהיינו רש״י, רמב״ם, הר״ן, הרע״ב, והרשב״א
25. קרבן נתנאל שבת פרק כ״ב ס״ק ה׳
26. דרכי משה שי״ד ס״ק א׳
27. שבת כב

open a barrel one might unintentionally create a new vessel (by opening a spout or boring a hole). However, we who follow the practice of Rabbi Shimon, that an unintentional violation of Shabbat law is not culpable, permit opening barrels to extract food. In conclusion, the authoritative verdict *(psak)* of the *Mishnah Brurah*[28] should be noted. He suggests that all opinions allow a Gentile to break open a vessel on behalf of a Jew, in case of a severe loss.

## Empirical Halacha

With the advent of modern technology traditional halachic norms have been applied to novel situations. Instead of concerning themselves with opening barrels, *Poskim* (specialists in normative halacha) began to discuss the use of cans. Seemingly, sardine cans were popular already at the turn of the century. Both the מנחת שבת[29] (circa 1897) and the תהלה לדוד[30] prohibit opening these cans, reasoning that doing so would constitue סותר, demolishing. A major contribution to the discussion was made by the *Chazon Ish*[31]

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28. שו״ד ס״ק ל״ו - ל״ז
29. מנחת שבת סימן פ׳ של הקיצור שולחן ערוך ס״ק קס״ד
30. תהילה לדוד סימן שו״ד ס״ק י״ב
31. חזון איש או״ח סימן נ״א ס״ק י״א. The same question is discussed by Rav Avraham Chaim Naah in his major commentary on the *Shulchan Aruch HaRav* (סימן קי״ט סק״ז). His concern is not with מלאכת מכה בפטיש but rather with סותר. He argues that this form of building a new vessel from the ruins of an old one is prohibited according to all opinions. (According to him, even those who maintain אין בנין וסתירה בכלים and permit opening barrels would contend that cans are prohibited). The קצות השולחן and many following commentators cite an instance where the Talmud permits breaking open a container. חותלות של תמרים מתיר ומפקיע וחותך (שבת קמו). It is permitted to untie, to cut open or to unravel a rope surrounding a package (made of reed matting) used to enclose dates since the package serves no purpose other than to preserve the dates. Here, too, the can is nothing more than a wrapper, a sophisticated shell for its contents. However, he concludes the analogy is spurious, for the package of reed matting is never kept beyond the lifespan of its contents. Cans (as the חזון איש suggested) outlive the food items contained within them. As such, the קצות השולחן finds no justification for the practice of opening cans on Shabbat.

He argues further that the close link between a can and its contents, (the can is made expressly to preserve the foodstuffs inside and is usually discarded shortly after its content have been used) may justify its being opened on Shabbat.

(חזון איש) who suggested that the contemporary can is almost the halachic "mirror image" of the Gemara's barrel. While the Talmud concerns itself primarily with סותר, demolishing, (and the issue of אין בנין וסתירה בכלים) on the assumption that the barrel already constitutes a vessel (כלי) and by cracking it open he is destroying a vessel, the modern day food storage device is exactly the opposite. Today's vacuum sealed air tight can in the words of the חזון איש, is nothing more than גשם חלול וסתום מכל צד, a hollowed out form. It only *becomes* a usable vessel through the process of opening. According to the חזון איש, no longer is destroying a vessel (סותר) the relevant activity to be considered but rather מכה בפטיש, *creating* a כלי is of greater concern. Opening up a can, he asserts, converts a sealed, useless substance into a usable utensil. He proves his contention by suggesting that thrifty housewives may reuse the cans to store nails or soaps. Clearly, a vessel or container has been created by opening the can. Even if this particular individual intends to immediately discard the can, the mere action of transforming a sealed substance into a כלי constitutes a מלאכה, a prohibited activity, regardless of his intentions.

Other recent rabbinic writers look more favorably upon this practice, citing some of the arguments first advanced by the חזון איש. The Sephardic authority Rav Yaakov Chaim Sofer (כף החיים)[32] permits opening fish cans if it was not feasible to open them prior to Shabbat. Rav Tzvi Pesach Frank[33] considers the possibility of permitting cans to be opened when a כלי will not be formed but does not definitely rule on the issue. Rav Yaakov Yitzchak Weisz[34] in his responsa מנחת יצחק urges that cans be opened prior to Shabbat. If one forgot to do so, it is advisable to destroy the can while opening it so that it will not be suitable for future use, thus avoiding creation of a vessel. For example, he suggests opening both the bottom and top of the container. He concludes that one can't rebuke those who open cans since many *poskim* maintain that today's throwaway cans are similar to the

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32. כף החיים סימן שי״ד ס״ק ה׳ וס״ק ל״ח
33. שו״ת הר צבי, טל הרים מלאכת מכה בפטיש סעיף י״ג
34. שו״ת מנחת יצחק ח״ד סימן פ״ב

חותלות (reed mattings) in which dates were packaged, permitted by the Talmud to be opened on Shabbat.

Rav Weisz's colleague, Rav Yaakov Mordechai Breish,[35] (שו״ת חלקת יעקב) strongly supports the *Chazon Ish's* contention that opening cans constitutes a violation of מכה בפטיש. He demonstrates that a much earlier commentator, the ריטב״א,[36] already accepted this reasoning. He further questions the analogy that many *poskim* draw to the חותלות permitted in the Talmud. According to the מגן אברהם,[37] חותלות are permitted because they are not truly sturdy vessels — לאו כלים גמורים — thus opening them would not constitute סותר or מכה בפטיש. Cans, while admittedly not permanent vessels, are more formidable receptacles than reed mattings. Rav Breish concludes that sardine cans in particular are rarely kept once they have been opened. Any food preserved in an open sardine tin would oxidate rapidly and be inedible if not dangerous. He argues, thus, that opening sardine cans is less likely to violate מלאכת מכה בפטיש. He recommends opening only a part of the can enough to extricate the food in order that it not be usable in the future.[38] In an interesting display of the disparity between halachic theory and practical halachic policy, Rav Moshe Feinstein[39] in a lengthy responsum considers various extenuating factors *but* concludes that even if these arguments have theoretical validity, they are of no practical value.

Rabbi Moshe Feinstein arrives at his halachic decision based upon a principle enunciated by R. Menashe in the Talmud.[40] The Jewish law is that under certain circumstances, burial of the dead is permitted on Yom Tov. However, R. Menashe did not allow the people of the town Bischar to conduct funerals on Yom Tov לפי שאינן בני תורה since they were not learned, and he feared that due to their ignorance, they might go beyond the parameters permitted

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35. שו״ת חלקת יעקב ח״ג סימן ח׳
36. ריטב״א מבות ג: ד״ה מתקיף
37. מג״א שי״ד ס״ק י״ג
38. Rav Gedaliah Felder in his יסודי ישורון leans towards a more lenient view. He argues that even the Chazon Ish would permit opening today's disposable cans.
39. שו״ת אגרות משה או״ח סימן קכ״ב וע״ש שהתיר כמה דברים לת״ח בצנעא
40. שבת קלט:

by halacha and desecrate Yom Tov. Rav Moshe argues that if the people of Bischar were branded as *Am Ha-arez*, how much more so that our greatly assimilated generation should be labeled thus! He voices his belief that no wrapper (even of cloth or paper) may be torn apart on Shabbat, no cartons or cans should be opened, nor should strings or ropes tying food packages be cut. Under emergency circumstances, a Gentile's services may be employed. On Yom Tov, he permits opening a can if doing so before Yom Tov poses health hazards or if there was insufficient time. Rav Binyomin Silber in *Bris Olam*[41] chastises those whose concept of עונג שבת (Shabbat delight) consists of eating canned food and proposes that at the very least they should exert themselves to open their cans before Shabbat.

## Variant Cases

Clearly, opening metal cans on Shabbat poses serious halachic problems. It is a controversial procedure at best and categorically forbidden according to many *poskim*. However, other, somewhat similar procedures are often permitted and may serve as an alternative method of utilizing canned food.

Destroying a can, opening it up so that it no longer is functional, is clearly preferable to the customary approach. The *Chazon Ish* and other authorities differ whether this procedure may be done only in the instance of unexpected guests.[43]

Similarly, it is permitted to remove a cork or a stopper from a bottle for the first time.[44] This is not creating a vessel but simply separating one כלי from another (the bottle top is being removed from the bottle itself). The חזון איש[45] suggests that the contemporary bottle cap is analogous to the מגופה (cork) of the Talmud. Two substances are being separated, the cap is being detached from the bottle but no new utensil is being created. He

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41. ברית עולם מלאכת בונה ס״ק כ״ט ועיין חידושי בתרא על מסכת שבת קמו.
43. עיין בחזו״א סימן נ״א ס״ק י״ח ובמ״ב שי״ד ס״ק כ״ה
44. סימן שי״ד מ״ב ס״ק כ״ג
45. חזו״א סימן כ״א ס״ק י״א (סוף דבריו)

argues that a bottle opener may even be used. The קצות השולחן[46] cites the תפארת ישראל[47] who maintains that use of an opener would constitute עובדא דחול (an ostentatious act that is prohibited because it violates the spirit of Shabbat). Our custom is to follow the ruling of the חזון איש.

The שמירת שבת כהלכתה[48] prohibits the removal of bottle caps that leave a metal ring on the bottle's neck. Under certain circumstances a hole may be punched or drilled into a vessel's surface. The Gemara[49] concludes it is permitted to drill a hole through a stopper (or a cork's) top surface (but not through the side — that would be tantamount to creating a new vessel or a spout).

Often in the hectic atmosphere of Erev Shabbat one forgets to open sealed wine bottles. May one break a seal open on Shabbat? The Talmud explictly permits this חותמות שבקרקע מתיר אבל לא מפקיע.[50] However, great care must be taken not to tear through any writing (a violation of מלאכת מוחק, erasing).[51] Some wine processors have now taken the commendable step of specifying "tear here," pinpointing an area free of any labels or other written material.

Often food is enclosed in a paper disposable wrapper or in a plastic bag. Sometimes, these items are packaged into cartons. Many Rabbis suggest that mitigating circumstances exist here, factors that would account for a more lenient ruling than in the case of metal cans. Firstly, the prohibition of סותר may not apply to wrappers or cartons (made of soft, pliable material) but only to cans.[52] Even if the concept of סותר is pertinent, one could argue that those easy to remove wrappers are similar to מוסתקי, previously-opened cartons, where according to all opinions we

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46. קצות השולחן קי"ט ס"ק י"ז
47. תפארת ישראל כלכלת שבת סעיף ל"ה (ומלאכת סותר) אולי יש לומר דאף לדעת התפא"י פותחן מותר ורוקא כעין מקדח הוא דאסור.
48. שמירת שבת כהלכתה פרק ו סעיף א'
49. שבת קמו.
50. ביצה לא:
51. עיין ביסודי ישורון ח"א רכ"ב
52. עיין באגרות משה או"ח סימן קכ"ב

invoke the lenient rule of אין בנין וסתירה בכלים.[53]

Rav Shlomo Zalman Auerbach, quoted in the שמירת שבת כהלכתה[54] argues that the prohibition of מכה בפטיש does not pertain to paper or plastic bags which are easily opened by tearing along a perforated line. He maintains that this situation is analogous to pulling out a stopper or a cork (מגופת החבית), not creating a new vessel.[55] Nonetheless care must be taken not to create a spout. Others argue that those wrappers that are made solely for the purpose of protecting food items and are immediately discarded once the food has been obtained, are comparable to the חותלות (reed matting) discussed previously and are exempt from the מכה בפטיש prohibition. However, other *poskim* make no distinction between items packaged in soft materials and cans.[56] Thus, it is preferable to open all wrappers and cartons prior to Shabbat. If this is not possible, these receptacles should be destroyed, made unfit for future use while they are being opened. Milk containers pose more serious problems, inasmuch as a spout is being formed immediately, after opening.[59] It is best to open fully both sides of a milk container, thus preventing the emergence of a spout. Under no circumstances should the writings (letter stamped on the carton) be torn.

## מלאכת קורע — Tearing

Thus far the paper has focused on two closely related prohibited activities, מכה בפטיש (completing a new article) and סותר (demolishing). However, other considerations also come into play. Many of the above cases seem to involve also infringement of another prohibited *melacha*, קורע, tearing. and yet, not only does a centuries-old tradition permit the tearing of at least some types of packages, but the Tosefta (a halachic compendium edited at

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53. עיין בשמירת שבת כהלכתה פרק ט ס״ק י״א
54. שם ס״ק י״ב
55. ודעתו דגם החזו״א מודה בזה

approximately the same period as the Mishna and of similar status) explicitly permits tearing food wrapper.[56]

> קורע אדם עור שע״פ החבית ובלבד שלא יתכוין לעשות זינוק. One may tear a leather cover suspended over a barrel provided that a spout not be formed.

Evidently, קורע, one of the most difficult to define forbidden activities, applies only under limited circumstances. The *Shulchan Aruch HaRav* [59] deduces that קורע applies only to a multipartite substance (a material woven or sewn from several components, e.g. cloth garments), thus excluding leather or paper goods. The *Mishnah Brurah*, however, in his commentary ביאור הלכה, rejects this contention, noting that the Yerushalmi[61] explicitly rules that קורע pertains to leather goods. ואות דמחלפן קריעה בעורות וחיתוך בבגדים. [However, the קצות השולחן[62] defends the assertion of *Shulchan Aruch HaRav* and suggests that the Yerushalmi text, in its proper context, can be interpreted differently. Essentially, the Gemara means that one who tears leather has violated מלאכת מחתך — precision cutting — not that he is liable for tearing.]

The *Mishnah Brurah*[63] proposes a different delimitation of קורע. Tearing a garment (or any substance) in the middle, intending to use both pieces, constitutes קורע. (We find similarly Elisha rending his garments into two ויחזק בבגדיו ויקרעם לשנים קרעים.[64]) On the other hand ripping a piece of tissue paper off an entire roll, with the intention of using only the fragment, does not fall within the parameters of קורע. Under certain circumstances, where the original substance is improved through the removal of a fragment (for example, tearing off a piece of a cloth dangling from

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56. עיין בשו״ת מנחת יצחק ח״א סימן ע״ז ובחזו״א סימן ס״א סעיף ב׳ ובספר קיצור הלכות שבת מלאכת בונה אות ט״ז
57. קיצור הלכות שבת שם
58. תוספתא שבת פרק י״ז הלכה ט׳
59. שו״ע הרב סימן ש״מ ס״ק י״ז
60. סימן ש״מ בה״ל ד״ה אין שוברין
61. ירושלמי שבת נב
62. קצות השולחן קמ״ה ס״ק ד׳
63. משנה ברורה בה״ל ד״ה אין שוברין
64. מלכים ב פרק ב פסוק י״ב

a garment), the person would be liable for מלאכת (מתקן מנא) making a substance usable. Again, the קצות השולחן[65] מכה בפטיש differs with this distinction.

The שביתת שבת[66] also rules on a similar question. Granted one may tear paper wrappers — but what is the justification for the Tosefta's permission to rip off a *leather* cover? Again the שביתת שבת[67] uses a novel approach, suggesting that wrappers or packaging lose their own identity and become an integral part of their contents, almost equivalent to a shell. Removing a wrapper would be little different than cutting food. Rav Yechezkel Abramsky[68] in his magnum opus חזון יחזקאל adopts a similar approach, suggesting that a leather cover placed alongside a barrel is viewed halachically as merely an outer lining of the barrel wall, not as a separate layer. If authorities sanction breaking open a barrel, they implicity permit tearing open its leather cover as well. The *Chazon Ish*[69] proposes that removing a wrapper solely for the purpose of extricating its contents can not be construed as קורע. (This concept is relevant to any discussion of opening envelopes on Shabbat. Tearing, קורע, implies a concern with the substance being torn, not merely with a package snuggled inside).

Another factor militating in favor of opening packages wrapped in paper is the contention of many authorities that tearing only pertains to a תפירה של קיימא,[70] a substance that was intended to remain glued to its surface on a semi-permanent basis. A temporary wrapping may be removed on Shabbat. However, some authorities maintain that only a wrapper that will be removed within 24 hours is exempt from the laws of קורע.

In summation, tearing open "soft-cover" packages, cartons, food wrappers should, if at all possible, be done prior to Shabbat. If these items must be opened it is advisable that the package be

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65. קצות השולחן קמה ס״ק יד
66. שביתת שבת מעשה חושב דף י״ב ד״ה ולישב
67. הובא בקצות השולחן סימן קמ״ה ס״ק
68. חזון יחזקאל תוספתא מסכת שבת בהשמטות
69. חזון איש או״ח סימן ס״א ס״ק ב׳
70. עיין בשו״ע שי״ז סעיף יג ברמ״א ובקצות השלחן סימן קמ״ה ס״ק ב׳ ובסימן ש״ם ס״ה במ״ב

opened so that is is not usable.[71] All these precautions help obviate halachic concerns about מכה בפטיש. Tearing, קורע, is of lesser concern for the reasons cited above.

## Other Issues in מלאכת קורע

*Safety Pins* — More than two centuries ago the קרבן נתנאל[72] wondered aloud about the custom prevalent then (as well as now) for women to clasp together their kerchiefs with pins. The קצות השולחן [73] justifies the custom citing those opinions who maintain that תפירה שאינה של קיימא sewing (or any act of fusing together two substances) done for temporary use is not considered a prohibited category of work. He reasons that safety pins are easily removed and as such do no more than תפירה שאינה של קיימא. The שערים המצויינים בהלכה[74] argues that pinning diapers would be analogous to the קרבן נתנאל's case, if not better. Whereas clothing may remain pinned together for hours, diapers are constantly being changed. He also suggests that the use of safety pins may constitute even less of a trangression than a תפירה שאינה של קיימא (sewing for temporary use). R. Feinstein states that pinning together two ends of a garment does not enter under the rubric of sewing — rather it is called פריפה, pinning.

*Pampers* — The advent of modern technology allows traditional halachic principles to be adapted to new situations. Gluing together substances (e.g. two pieces of paper) according to the Rambam[75] would certainly constitute מלאכת תופר "sewing". Similarly, separating substances glued together is a violation of קורע, "tearing." Why would the use of Pampers (disposable diapers) be different? Again we invoke the rule of תפירה שאינה של קיימא. Pampers are taped, and then almost immediately detached.

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71. עיין בשמירת שבת כהלכתה פרק ט סעיף ג ובקיצור הלכות שבת מלאכת בונה אות ט"ז
72. קרבן נתנאל פ"ז הלכות שבת אות נ (על הרא"ש)
73. אבל דעת כמה אחרונים שאין לתחוב סיכת בטחון שתי פעמים עיין בברית עולם קצות השולחן סימן קמ"ו ס"ק כ"ב
74. שערים מצויינים בהלכה חלק ב סימן פ' ס"ק מ"ה
75. רמב"ם פרק י' הלכות שבת הלכה י"א

In addition, the ease in utilizing Pampers classifies it as a מעשה הדיוט a non-professional act, a further mitigating factor.[76]

*Opening Mail* — The issue of opening envelopes on Shabbat is particularly interesting, not only because virtually all major authorities have taken a position on this issue but because many of the principles cited above (as well as some new concepts) converge here. In addition, several closely related prohibited categories are pertinent here. The following are some of the issues involved in determining this question:

a) In general, if an act is destructive only, this is called מקלקל and one is technically *potur* (the act is forbidden, but he is not liable). The Mishna teaches that in order to be liable for the *issur* of קורע, tearing, he has to קורע על מנת לתפור, tear with the intent of sewing up later. Since this is so, tearing an envelope open would not be forbidden biblically (מדאורייתא) since the envelope is not being torn with the intent of patching it up afterwards. Hence it would not fall into the category of קורע. However, the *Mishnah Brurah*[77] demonstrates that virtually all *poskim* (except the Ritba) maintain that *any* constructive purpose which would ensue from the tearing (and not only re-sewing as the constructive purpose of the tearing) suffices to render the act forbidden.

There is a further question whether the "constructive" act which follows the destruction needs to be in and of the same substance (see the חיי אדם[78] and משנה ברורה.[79]) The individual who is reading the contents of the letter is receiving a psychic satisfaction which is constructive for him; however, it was destructive to the envelope.

b) קורע דרך השחתה. The חזון איש[80] distinguishes between an ordinary letter (where the letter itself is enclosed in an envelope) and an airmail letter. The first instance is little different than the case cited previously, removing a leather container from a barrel.

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76. עיין בשערים המצויינים בהלכה בקו״א סימן פ׳ ס״ק מ״ה
77. סימן ש״מ בה״ל ד״ה ולא
78. בנשמת אדם כלל כט ס״ק ב׳
79. ש״מ בה״ל ד״ה הנייר
80. חוו״א סימן ס״א ס״ק ב׳

The purpose in tearing is not to benefit from the substance being torn but rather to extricate something beneath the surface. He reasons further that מלאכת סותר is not relevant here either. He is not demolishing an existing vessel but rather creating a new one. He concludes that, nevertheless, it is rabbinically prohibited to open mail enclosed within an envelope. We are concerned that the individual may desire to keep the envelope for future use. If so, by opening the envelope he has created a new vessel, a prohibition of מכה בפטיש. To open an airmail letter would possibly constitute a violation of the biblical injunction of קורע, according to the איש חזון.

c) אין קריעה בְּנְיָר "There is no prohibition of tearing paper." Several of the opinions cited previously may mitigate the *issur* of opening mail on Shabbat. The *Shulchan Aruch HaRav*[81] suggests that any substance not consisting of several components may be opened on Shabbat. תפירה שאינה של קיימא A substance that has been sewn or closed together on a temporary basis only may be torn open on Shabbat. Despite all these mitigating factors, the prevalent custom is not to open mail on Shabbat.

*Gluing Substances* — תפירה, contrary to popular misconception, does not only pertain to sewing. According to the Rambam any act of linking together two materials through a fusing substance (e.g. glue, paste) is considered to be תופר.[82] Similarly, separating these materials is a violation of קורע "tearing." The ברית עולם[83] suggests that inserting papers in a looseleaf notebook is a clearcut case of תופר; similarly, removing those papers would be considered קורע. Finally, a comment should be made about the distinction between קורע and מכה בפטיש. Several instances in the Talmud would seem to involve קורע but in reality are מכה בפטיש. For example, one who opens a collar on Shabbat (that had previously been sewn or stitched together) is liable.[84] According to Rashi he is liable for מכה בפטיש,[85] creating a utensil, not קורע.

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81. שו"ע הר"ב סימן ש"מ ס"ק י"ז
82. רמב"ם פרק י הלכות שבת הלכה י"א
83. ברית עולם מלאכת תופר
84. שבת מח.
85. שם רש"י ד"ה חייב חטאת

Why not? The *Mishnah Brurah*[86] suggests that קורע is by definition a two-phased activity, commencing with a קלקול (destructive act) succeeded by a תיקון (something constructive). If the תיקון occurs immediately, as in the case of opening a collar, מכה בפטיש, "creativity" is the relevant מלאכה, not קורע "tearing." Similarly the Talmud in ביצה לב' rules that tearing paper is a subset (תולדה) of מכה בפטיש. Why not קורע? From here the *Mishnah Brurah*[87] deduces the assertion that one is liable for קורע only if both the substance torn and the surface from which it was torn are improved through the act. In this instance, the roll of paper is not measurably improved by ripping a piece.

## Theoretical Framework

### Assembling Multi-partite Appliances

The *Shulchan Aruch HaRav*[88] suggests that even according to those authorities who hold יש בנין וסתירה בכלים (movable objects are subject to the prohibition of building and demolishing), this only applies to a vessel built for permanent use. A vessel that is easily dismantled (בנין עראי), or any vessel that is created for temporary use only is at most only אסור מדרבנן[89] (a rabbinic prohibition). Others do not accept this contention. The קצות השולחן, however, cites שיטות (authorities) who maintain that under certain circumstances, even a temporary בנין is prohibited מן התורה.

The Gemara[90] in *Shabbat* discusses the permissibility of assembling a "do it yourself" bed and permits assembling the bed, but only if it is done in a loose, nonpermanent way. אם היה רפוי מותר. Later authorities take note of another Talmudic excerpt[91] that seems to prohibit assembling anything (even in a loose, makeshift manner) that is usually put together in a snug, tight-fitting way.

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86. סימן ש"מ בה"ל ד"ה ולא
87. סימן ש"מ בה"ל ד"ה אין שוברין ולענין קריעת נייר בה"כ עיין בשערים המצויינים בהלכה
88. סימן שי"ג ס"ק י"ט כ"א
89. סימן קי"ט ס"ק ט
90. שבת מז
91. שבת קכב:

Our Rabbis were concerned that if a loose fit were permitted, one might come to violate a biblical prohibition of בונה by assembling the utensil tightly. There is much discussion of this topic in the halachic literature.[92]

## Practical Applications

The *Shulchan Aruch*[93] prohibits reinserting the leg of a bench that has broken off on Shabbat, since customarily this component is screwed in a tight-fitting way. The קצות השולחן[94] extends this *issur* to even tightening screws that have begun to loosen.

The Debreciner Rav[95] (שו״ת באר משה) permits changing a baby carriage into a stroller and vice versa, but only if this procedure is done by slipping the stroller into the frame and latching into place. No screws may be used. Similarly it is permissible to add on a seat to a baby carriage as there is no loosening or tightening of screws involved; rather the seat is held to the carriage by way of springs.[96] A portacrib, too, may be set up or folded together. It is even permissible to lock the latches on the side of the crib. Again no screws may be tightened or loosened.[97] This same principle applies to changing the height of a crib mattress (the frame may be unhooked from its rung but no screws or knobs may loosened or tightened). In a related question קצות השולחן[98] reasons that adjusting binoculars or a telescope would pose no problems, since it is virtually impossible to totally dismantle any of the lenses. Merely adjusting a focus is not called בונה or סותר.

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92. משנה ברורה שי״ג בה״ל ד״ה הרכה משנה ברורה סימן תקי״ט ס״ק י״א מג״א סימן שי״ג ס״ק י״ב ט״ז שם ס״ק ז
93. שו״ע סימן שי״ג סעיף ח׳
94. קצות השולחן קי״ט ס״ק י״ב
95. הובא בפסקי הלכות שבת ח״ג פי״ו סעיף ב׳
96. שם סעיף ג׳
97. שם פרק ב סעיף ל״א ועיין כ״ז בשו״ת באר משה קצות השולחן סימן פ״ה ד׳
98. קצות השולחן סימן קי״ט ס״ק י״ב

## Conclusion

The primary purpose of this article is not to present הלכה למעשה (normative halacha) but rather to stimulate the reader towards a greater awareness of the complexity of the laws of Shabbat. Midrash Rabbah[99] promises us that *Mashiach* will arrive as the just reward for one Shabbat observed properly. יה״ר שנזכה לכך

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99. מד״ר בשלח פכ״ה פסוק ט״ז

# Induced Labor

*Rabbi Israel Poleyeff*

## Introduction

For several centuries medical practitioners already knew that some chemical agents can be used to "quicken childbirth."[1] It was not, however, until the 1940's that chemical agents were developed for the specific purpose of inducing the start of labor, not merely to "quicken childbirth" once labor had begun. The availability of these agents has led to discussions, both in medical and in religious circles, as to the desirability, advisability and permissibility of inducing labor.

There are essentially two reasons for the induction of labor: 1) indicated induction when either the mother or fetus or both are in danger, and 2) elective induction for patient or physician convenience or, to be fair to both, on occasions that might be beneficial to the mother and to her family, though no immediate danger exists.

An example of this kind might be when the mother's regular doctor cannot be present at the expected time of birth and the mother does not have complete confidence in his replacement. Is the mother's mental well-being resulting from this circumstance a

1. All the medical information in this introduction was taken from an article by Dr. Ric' ard Bernstine entitled "Uterotonic Agents" in the periodical "Principle and Practice of Obstetrics and Perinatology", 1981, pp. 801-811.

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significant enough factor permitting an early birth through induced labor?

Another instance might be in order to avoid the possibility of rushing to the hospital in the middle of the night when it may be more difficult and when, some suggest, the obstetrics division of the hospital may not be as fully-staffed and alert as in the daytime.[2] Still another example, from a purely halachic point of view, might be the induction of labor in order to avoid *chilul Shabbat,* the desecration of the Shabbat, both at the time of birth and a week later at the possible *brith milah.* Would avoidance of *chilul Shabbat* be preferable to the application of the permissive principle of *pikuach nefesh*?

Medical records indicate that the vast majority of incidences of induced labor are a result of immediate, physical danger to the mother and/or child. When, indeed, this is the case, there is no halachic question as to the permissibilty of inducing labor. A determination on the part of the doctor that there is a present and immediate danger to mother or child is sufficient to permit inducing labor prematurely.[4] The rule that *pikuach nefesh* (mortal danger) takes precedence over all *mitzvot* is clearly applicable.[5]

The only time any halachic question exists at all is on those few occasions when the induction of labor is suggested for the convenience of the mother or of the doctor. This author found that virtually all *poskim* who dealt with this question responded in the

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2. Walker, Morton, Yaffe, Bernice, and Gray, Dr. Parke H., *The Complete Book of Birth,* p. 245.
3. One correspondent who asked R. Moshe Feinstein about induced labor used this reason to suggest that induced labor is prohibited. Had it been permitted, he argued, surely the rabbis would recommend its practice in order to avoid the desecration of the *Shabbat* and *Yom Tov.* The fact that the rabbis have not been forthcoming with this advice indicates that induced labor is prohibited. R. Moshe, though agreeing that induced labor is prohibited for reasons that we shall mention, nonetheless discounted his correspondent's argument by declaring that the Torah does not require unusual and artificial means in order to avoid such *chilul Shabbat* that in the end would be permitted anyway. אגרות משה, תשל״ג, סי׳ ע״ד
5. אין לך דבר שעומד בפני פקוח נפש (יומא פב)

negative. Seemingly cogent reasons to the contrary, inducing labor on occasions other than the existence of extreme danger to mother or child is not permitted. Discussions relating to this question ranged from the midrashic-halachic to the purely halachic.

## Midrashic-Halachic

A rather interesting, but not purely halachic, reason for prohibiting birth by induced labor is suggested in the Gemara *Shabbat:*[6]

> It was recorded in R. Joshua b. Levi's notebook: He who is born on the first day of the week (Sunday) shall be a man without one thing in him. What does "without one thing in him" mean? Shall we say "without one virtue"? Surely, R. Ashi said, "I was born on the first day of the week!". . . Rather it means either completely virtuous or completely wicked . . . He who is born on the second day of the week will be bad-tempered . . . On the third day of the week will be wealthy . . .

The Gemara continues to enumerate the personality traits and potentials of individuals born on the various days of the week. It is fair to say that these qualities based on the day of birth have been determined by the Almighty. Does any human being, therefore, have any justification for tampering with the choice of G-d by altering the day of a child's birth by unindicated induction of labor? Clearly the answer should be "no."[7]

Still another intriguing reason may be derived from another Gemara that relates a familiar *midrash:*

> It (the fetus) is also taught all the Torah from beginning to end, for it is said: "And he taught me and said to me, 'Let your heart hold fast my words, keep my commandments and live' . . ."[8] As soon as it sees the light, an angel approaches, slaps it on its

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6. דף קנ"ו ע"א
7. ר' מנשה קליין, שערי הלכות חלק ט'
8. ט' ד':ד'

> mouth and causes it to forget all the Torah completely . . .[9]

Causing a birth by inducing labor has the rather obvious effect of decreasing the total time that the fetus will be in its mother's womb. Consequently, its learning time is similarly decreased. One may then ask: Does anyone have the right to deliberately withhold valuable learning time from anyone, even a fetus, and even though the latter will shortly be forced to forget all the Torah he learned? There are those who answer in the negative.[10]

## Halachic

Several halachic reasons have been offered prohibiting unindicated induction of labor, the primary one involving the question of placing someone, in this case the mother, into a position of *sakanah* (danger).

In its most simple definition, *sakanah* is a situation that is presently life-threatening. At that moment the principle of the Talmud *"vechai bohem*[11] *ve-lo sheyomus bohem*[12]*"* (they shall live by the *mitzvos* of the Torah, and not die because of them) is universally and unhesitatingly applied. But what of childbirth? Is it also classified as *sakanah?* It would seem so from a medical point of view. A great deal of medical and surgical preparations are made and emergency equipment readied for the various dangerous situations that may arise at childbirth. The fact that most births take place without the need of employing all this emergency equipment is to the credit of the medical profession, but does not diminish the danger that exists at the time of birth.

Almost all *poskim* agree with this view, and halachic support can be drawn from several sources. For one, the Shabbat may be violated without hesitation for childbirth.[13] In addition, do we not

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9. נדה דף ך' ע"ב
10. ר' מנשה קליין: שערי הלכות חלק ט'
11. ויקרא י"ח - ה'
12. יומא דף פ"ה ע"ב
13. שבת דף קכ"ח ע"ב, שו"ע או"ח סי' ש"ל סעיף א'

offer the prayer for the recovery of the sick for every mother after childbirth?[14] Further, there is the very familiar Mishna that is recited every Friday evening in Ashkenazic congregations:

> For three transgressions women die in childbirth: for having been negligent in regard to the laws of *niddah*, the separation of *challah*, and the lighting of Shabbat candles.[15]

What connection is there between the three *mitzvot* and death at childbirth? Why should the punishment for the failure to be careful in fulfilling these *mitzvot* be meted out at childbirth? In response to this question the Gemara[16] and the commentaries[17] declare that childbirth is a moment of extreme danger for the mother, who thus requires the intercession of G-d in performing a miracle effecting her survival. To be worthy of such a miracle the mother's deeds and merits are presented for examination before the Almighty. If she is found wanting in any of these three *mitzvot*, such a miracle might not be performed on her behalf.[18]

This view is further supported by Tosafot in *Ketubot*[19] who declare that in the majority of cases a woman is in *sakanah* at the time of childbirth.[20]

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14. It may be argued that the *misheberach* is offered for the mother's recovery from the dangers resulting immediately *after* childbirth, and not the childbirth itself.
15. שבת דף ל"א ע"ב
16. ibid.
17. The רע"ב on the *mishna*, for example.
18. Why these three *mitzvot*, in preference to any other *mitzvot*, is an interesting question dealt with by the commentaries, but has no bearing on this discussion.
19. דף פ"ג ע"ב ד"ה מיתה
20. Some have raised the general question that if in fact childbirth is a *sakanah*, why should it be permitted altogether? Surely one has no right to place oneself in *sakanah*, thus violating the command of protecting and preserving one's life, in favor of the *mitzvah* of פריה ורביה, similar in concept perhaps to the prohibition of violating תחום שבת (a *derabbonan*) in order to hear the shofar on Rosh Hashonah (a *d'oraitha*). All the more so since the woman who is endangering herself is not required (according to the majority of *poskim*) to fulfill the *mitzvah* of פריה ורביה. However, there appear to be varying degrees of *sakanah*. Since the Torah ordained the population of the earth (פרו ורבו ומלאו את הארץ) the *sakanah* of childbirth is of a natural kind and thus permitted, though this does not diminish the introduction of any applicable halachic rules pertinent to this *sakanah*.

This is not, however, the opinion of Hagaon R. Moshe Feinstein, שליט"א. R. Moshe maintains that a natural, full-term birth is not in itself a dangerous occurrence.[21] The punishment for Eve's consuming fruit from the *eitz hadaat* (Tree of Knowledge), he declares, was not death at childbirth or even the danger of death, but rather *pain* at the time of childbirth.[22] This applies, however, only to a natural, full-term birth. Birth through the induction of labor, coming as it does at a time other than "natural", does not fall within G-d's declaration in this passage in ***Braishit***. Therefore, such a birth should be treated, even in R. Moshe's opinion, as a full-fledged *sakanah*.

It was initially assumed by some[23] that all births induced before full term were delivered by Caesarian section. If that were the case there would be no question at all that induced labor would be prohibited. Every operation, however minor and however common, carries with it some element of risk, and birth by Caesarian section is classified as an operation. Thus no one, not even the individual involved, has a right to place one's life in jeopardy by agreeing to an unnecessary operation.

From the point of view of fact, however, babies born as a result of induced labor are delivered either "naturally" or by Caesarian section, just as babies delivered at full term. Now the question that must be answered is: Is one permitted to enter into a dangerous situation (childbirth) at a time chosen by that individual, knowing that she would have to face the very same danger at a later time anyway? Must a person wait for an unavoidable *sakanah* to arrive, or can she advance the time and, for whatever reason, "get it over with"?

The response of the *poskim* is that she does not have that right.[24] R. Moshe phrases his response by saying that life without illness even for a short period of time is deemed sacred and cannot

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21. לידה בזמנה לא נחשב לסכנה כלל where he states איגרות משה, חשל"ג, סימן ע"ד
22. בעצב תלדי בנים (בראשית ג':ט"ז
23. איגרות משה, חשל"ג, סימן ע"ד
24. חו"מ סי' תכ"ז סעיף יו"ד, though it may be argued that this *halacha* refers to where the individual will not face the same *sakanah* at a later time.

be curtailed.[25] The phrase used consistently is אקדומי בורעניתא לא מקדמינן,[26] we do not advance the time of troubles. R. Menashe Klein adds that the benevolent protection of G-d extended at the time of childbirth is true only of a full term birth (*bizmanah)* and not of one which occurs at a different time, i.e. through induced labor (*shelo bizmanah).* Rabbi Klein[27] also adds that the introduction of the medication designed to induce the labor may in itself be a dangerous act and one cannot be sure of its effectiveness. Some women, he declares, may become disabled as a result. There is some medical support for this view. Dr. H. Fields in an article in *Obstetrics and Gynecology* outlined these risks in detail.[28]

A number of additional reasons have been offered prohibiting birth through induced labor, all involving the fetus. Medical statistics indicate a higher than normal rate of deaths among babies born through elective induction. In New York City in 1974, 160 babies were born through induced labor with a weight indicating pre-maturity. Of these, twelve died. Bad medicine, as Rabbi Moshe Tendler succinctly put it, is halachically *assur.*[29]

In addition, in spite of the tremendous medical strides made in recent decades, no system has yet been devised to determine with absolute accuracy the exact day of the completion of the nine months of pregnancy. Even mothers and fathers themselves quite often err in their calculations, sometimes overestimating, sometimes underestimating, the nine-month period. As a result, inducing labor at a time when the fetus is thought to be full-term, may in fact result in the birth of a child in its eighth month. The consequences of this occurrence are stated in the Gemara: "An eight-month infant is (from a halachic standpoint) like a stone and may not be handled (on the *Shabbat).*"[30] Rashi variously explains the statement

25. איגרות משה, תשל״ג, סימן ע״ד
26. מגילה דף ה׳ ע״א
27. שערי הלכות חלק ט׳
28. Vol. 15, pp. 476-80, "Complications of Elective Induction."
29. Letter to author.
30. שבת דף קל״ה ע״א *et al.*

by declaring that it is as if the child were born dead,[31] or is a non-viable birth.[32] Certainly no one has the right to risk such a birth by inducing labor at a time that might in fact be earlier than the ninth month.

## Conclusion

Halacha is not alone in looking askance at the practice of unnecessary induced labor. A widely publicized editorial in the medical journal Lancet, dated Nov. 16, 1974, declares that "...induction on the grounds of social convenience is a pernicious practice which has no place in modern obstetrics."[33] Morton Walker, Bernice Yaffe and Dr. Parke H. Gray in their book "The Complete Book of Birth" declare that the "vast majority of doctors don't want to induce labor."[34]

From a halachic point of view, two conclusions seem to be indicated from our brief discussion:

1) Inducing labor when the mother or child is in a life-threatening situation is not only permitted but even required.

2) Inducing labor when no such danger exists is not acceptable.

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31. רש"י שם ד"ה בן
32. רש"י יבמות דף פ' ע"א ד"ה בן
33. pp. 1183-4.
34. p. 244.

# Chalav Yisrael

*Rabbi Alfred S. Cohen*

The concept of food as having a particular or special status within the framework of religious values is a notion which is peculiarly Jewish. Even gentiles who are quite ignorant of Judaism are aware that observant Jews are particular about what they eat. Despite the attempts of apologetic literature to find nutritional or health concerns as the basis for the religious restrictions upon food, the classic Jewish understanding has always been that certain foods, for reasons which may elude us, do have a detrimental spiritual effect upon the soul[1]. Therefore, the Torah warned us to avoid those food which could becloud the purity of our spiritual status.

Non-kosher food, to the Jew, is a "taboo" strictly avoided. In the Gemara[2] we find the expression גנאי לצדיק שאוכל דבר איסור, "it is repugnant to a righteous person to eat forbidden food," and Tosafot considers eating non-kosher food as a more despicable act than eating on Yom Kippur[3]. Little wonder, then, that Jews are traditionally so careful about what they ingest, so careful to "keep a kosher kitchen". It comes as no surprise to find that there exist numerous rabbinic enactments to guard against the inadvertent or thoughtless ingestion of forbidden foods. Among these enactments

1. רמב"ן ראה י"ד ג
2. תי"ס חולין ה: ד"ה צדיקים
3. תו"ס גיטין ז ד"ה השתא

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is the *issur* of using milk produced by a non-Jew, and that is the topic of this paper: whether, or to what extent, the strictures of *Chalav Yisrael* apply today.

As early as the writing of the Mishna, we find the following dictum:[4]

> ואלו דברים של עכו"ם אסורים ואין איסורן איסור הנאה, חלב שחלבו ע"ז ואין ישראל ראוהו.
>
> The following items of a gentile are forbidden, but it is not forbidden to derive benefit from them: Milk which was milked by a gentile, and a Jew did not see him . . . [5]

The *Amoraim* in the Gemara were curious — what was the problem with milk? Since milk (certainly at that time in history) went from the cow to the table, what question of kashruth could be involved? After a brief discussion, the Gemara concludes that we must be concerned lest the gentile intermingle some milk from a non-kosher animal with the milk from the kosher one.[6]

Since the interdict was applied for fear that non-kosher milk might be mixed in, the Gemara permits use of milk which a gentile milked under the supervision of a Jew. Even if the Jew took no active part in the milking process, it may be used. The Talmud goes even further and adds that we may rely upon the Jew's presence even if he did not actually witness the milking process; for example, if he were sitting and thus could not see it, but had he stood up he would have been able to see what was going on, then in such a case we may still drink the milk, for we assume that the gentile, fearing that the Jew might stand up and be able to see

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4. משנה עבודה זרה לה.
5. Usually we consider a מומר לחלל שבת to be the same as a gentile as far as reliability is concerned. Whether this rule holds true in the case of *Chalav Yisrael* is disputed among the Rabbis. אגרות משה יו"ד מ"ו rules that the milk of a מומר מחלל שבת is not considered *Chalav Akum*, but the Talmudic Encyclopedia cites ספר שבלי דוד יו"ד קט"ו סק"ק who does consider milk of a מומר לחלל שבת to be the same as that of a non-Jew, since he is equally likely to add non-kosher products to it. דרכי תשובה קט"ו אות ד' concurs.
6. ע"ז שם

what he is doing, would be afraid to adulterate the milk in any way.[7]

On the surface, we may wonder what there is to discuss in this *din:* it seems clear that all milk which a Jew drinks must be under the supervision of a Jew.[8] The *Shulchan Aruch*[9] cites the talmudic text discusssed above and rules that milk from a cow which was not produced under the watchful eye of a Jew may not be ingested. The Ramo[10] adds that any utensils which "absorb" the forbidden milk are similarly forbidden, until they have been purged according to halacha.

However, despite the ruling of the *Shulchan Aruch*, a complex controversy exists concerning this halacha: if we posit that the reason for prohibiting use of milk not produced under the watchful eye of a Jew is the fear lest some non-kosher product may be added thereto — then if we are certain (for whatever reason — that we will explore later) that nothing has been added, may we use such milk? Or do we say that, regardless of our certainty, the law

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7. ע"ז שם
8. An ancillary question discussed by rabbinic decisors is how much one is obligated to spend for *Chalav Yisrael.* There is an accepted halachic guideline that a person must spend only up to one-fifth of his wealth to fulfill a positive biblical mitzva — for example, to buy a lulav and ethrog. However, there is no limit to how much he has to spend in order to avoid transgressing a negative biblical command. For example, since the Torah forbids non-kosher meat, a person would have to pay whatever it costs if he wanted to eat kosher meat. The Rabbis debate whether or to what extent this principle applies to *rabbinic* mitzvot. In חלק ב קמ"ה, the Radbaz maintains that there is no difference between a biblical prohibition or a rabbinic one — a person would have to spend whatever it costs in order to avoid transgressing even the rabbinic command " . . . since (if he transgresses the rabbinic decree) he violates the biblical *issur* which bids us 'Do not stray from the words (of the Rabbis)'." In his resumé of the question, *Pitchei Teshuva* יורה דעה קנ"ז אות ד' quotes the view of the Radbaz, but mentions that *Pri Megadim* wasn't sure. In his encyclopedic overview of halachic problems, *S'dei Chemed* חלק ג' p. 316 also comes down on the side which would be more lenient regarding rabbinic dicta, and quotes *Zera Emet* that "for a rabbinic decree, a person is not required to spend all his money (to avoid transgressing)." Rav Yosef Engel similarly rules in *Otzrot Yosef* בעניני שביעית.
9. יורה דעה קט"ו
10. Ibid.

states that milk requires supervision and therefore non-supervised milk is always forbidden?

This controversy touches upon our fundamental understanding of the nature of the rabbinic enactment. If the Rabbis required supervision for milk because of the fear of adulteration, but we live in a situation where there is no need to have such fear — for example, no animal other than a cow is *ever* milked in this country, or the gentiles themselves are filled with loathing at the suggestion that any other animal's milk might be added to cow's milk — then the rabbinic edict might become void since there is no need to have any suspicion of adulteration. This would be our conclusion if we see the original edict as merely a *control* over the consumption of non-kosher milk; howsoever we certify that no non-kosher product is added, that is sufficient. On the other hand, one might argue that although the *impetus* for the edict came from the rabbinic suspicion that a gentile might possibly add something to cow's milk, nevertheless, their decree is a blanket ban, which is functional regardless of the viability of the suspicions which fueled it *ab initio*. This would be similar, for example, to the *issurim* of יין נסך (wine handled by a non-Jew) or גבינת עכו"ם (cheese manufactured by a non-Jew) which are still universally observed even though the situations which originated the *issurim* no longer obtain. In such a case, the edict can only be nullified by a Beth Din greater in number and stature than the original Court which enacted the decree.[11] Since that is not possible until the coming of the Messiah, the decree is effectively permanent.

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11. דבר שבמנין צריך מנין אחר להתירו "If something was forbidden by a duly constituted rabbinic group, it requires another rabbinic group, greater in number and wisdom, to release that prohibition. This talmudic principle is subject to a great deal of discussion, disputation, and conjecture. Although generally we understand it to imply that even if a regulation was instituted for a specific time or reason, and that reason no longer applies, nevertheless the regulation still obtains. However, we shall see that many halachic authorities indicate exceptions or limitations to this broadly-stated rule.

Rambam and Ravad disagree whether, if the situation which evoked the ruling is no longer in existence, there remains the requirement that a greater Beth Din must move to annul the law. Furthermore, some Rabbis teach that if, at the time they issued the prohibition, the rabbinic authorities specified what prompted them to take this step and that original cause is no longer operative,

The debate concerning the nature of the original rabbinic decree has continued unabated for centuries, because it is the pivotal point for deciding many halachot. On the one hand, the רדב"ז (Rabbi David ben Zimra) and the פרי חדש[13] maintain that the rabbinic ban on using milk not produced under Jewish supervision is purely functional in nature and that, if in fact we could be certain that no non-kosher milk was added, such milk could be consumed without any hesitation. The פרי חדש writes that not only does he approve this approach in theory, but that when he was in Amsterdam he did indeed drink such milk without qualms.

But as definitive as the Radbaz is in expressing his viewpoint, so too are the *poskim* on the opposite side of the argument. Based on a Rashi text in *Avoda Zora* 35, the *Chatam Sofer*[14] writes that

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then the regulation is void and there is no necessity for another Beth Din to be convened in order to annul it formally.

Also, the Meiri states that if a Beth Din forbade something for a specific time and they could have foreseen that in the future that circumstnace would no longer exist, then in their very act of legislating there is the implicit understanding that when or if the said condition no longer exists, the prohibition is not meant to apply.

Tosafot goes so far as to state that if the Rabbis acted in response to a specific condition or fear, the prohibition does not apply in a time or place where that fear or condition do not exist, and the Rabbis never intended it to apply. For example, there is a *gezeira* against using *mayim megulim*, uncovered water, because a snake might have deposited its venom in the water and the person drinking it might die. However, city dwellers, who obviously do not live in circumstances where this fear has any plausibility, need not be concerned with the *issur*.

Further limiting the scope of *davar shebe'minyan*, the Taz writes that if the Rabbis issued a cecree because there existed a doubt about a certain situation, then if there is no longer any doubt concerning the matter, the decree does not apply.

The status of a rabbinic ruling is thus of crucial importance in deciding whether the *issur* of *chalav akum* applies in our time and for our society. If we accept the principle that *davar shebe'minyan* . . . then *chalav yisrael* might well be required even now. However, since there are many authorities who severely limit that principle, it is not clear that the *issur* of *chalav yisrael* is in force today.

12. רדב"ז חלק ב' יורה דעה תשובה עה
13. פרי חדש קי"ד
14. יורה דעה חלק א' ק"ז

milk is a דבר שבמנין and even if one could be certain that nothing was added, it would still be forbidden.[15]

The argument of the *Chatam Sofer* is echoed by the *Aruch HaSchulchan*.[16] Also the חיד"א[17] writes that the Jews of Turkey

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15. The *Chatam Sofer* goes on to argue that even if the Radbaz were correct in his appraisal of the nature of the rabbinic edict of *Chalav Akum*, it would still be forbidden. He reasons that if the Radbaz is right, then we must assume that when the Jews accepted the decree to drink only "Jewish milk", they did so not because it was the law but because they consciously chose to adopt the stricter standard. In this case, their acceptance has the status of a biblical vow—נדר דאורייתא —which of course is of even greater weight than a rabbinic edict. In either case, argues the *Chatam Sofer*, it is forbidden to drink "non-Jewish" milk'—either it is in violation of the biblical vow or in violation of the rabbinic edict.

    Rabbi Tzvi Pesach Frank undertakes an elaborate study of what the prohibition would be if some non-kosher milk were mixed with a kosher product. He considers whether we consider the milk מין במינו or מין בשאינו מינו ; he further probes why the rule of "bitul" does not apply. See הר צבי יורה דעה שאלה ק"ג. Rabbi Frank also cites the Rashba and *Tashbetz*, who see the *issur* as aplying only to camel's milk, since these were animals that were commonly milked in the days the *gezeira* was enacted; however, since horses or pigs were never milked, their milk would be in the category of מלתא דלא שכיח and we know that in that case, the rabbinic edict would not apply to them: במלתא דלא שכיח לא גזרו רבנן. The Chief Rabbi Frank used this as a סניף היתר to permit the use of powdered milk imported from America, since there are (virtually) no camels in the U.S.

16. "And now I will clarify for you how all the words of our holy Rabbis are like fiery coals, which (fact) was admitted to me, with a broken heart, when I was serving as Rabbi of ... city, by one of the important members of the community. (He admitted to me) that he was customarily lenient about this matter whenever he was away from home, in the big city where he used to go to take care of his business.He and other guests there, when drinking their hot drink in the morning, used to buy "fat" milk (cream) from a certain non-Jewish store-owner near their hotel. One time they started asking, among themselves, where this small store's owner got so much cream. He went to the storeowner and asked him, and the man answered—I buy at the butcher store a lot of animal brains, and I crush them with a lot of (fat), and cook them up together, and this is the "cream" which I sell. When they heard this, they all fell on their faces for their great sin,that they ate non-kosher food, and milk and meat together. And this person confessed before me and cried out loud how great are the words of our Rabbis! And in truth, I have this as an accepted tradition, that all decrees of our Rabbis, aside from their obvious purpose also have many hidden purposes within them,which have not been revealed. And the one who hearkens to their words will derive much blessing from the Almighty, both here and in the world to come."

universally adhered to the stricter opinion; and the מהרש"א[18] counters that the Jews of Amsterdam, contrary to report, did not rely on the lenient ruling. Only with respect to children or to the infirm is the latter group of Rabbis willing to concede a lenient ruling (*heter*). Even so, Rabbi David Hoffman[19] adds that only קלי הדעת the light-minded are lenient.

## Government Inspection

Let us assume, for the sake of argument, that we may rely on the opinion that the rabbinic decree concerning *Chalav Yisrael* חלב ישראל does not apply if we have sufficient reason to believe that no non-kosher milk can be added to the kosher product. We then have to probe—what is the nature of that certainty which is sufficient to suspend the requirement for Jewish supervision. Is government inspection of dairy plants or government certification of dairy products enough to allay our fears?

In *Iggerot Moshe*[20] Rabbi Moshe Feinstein maintains that all Rabbis would agree that government inspection is a valid substitute for Jewish supervision.[21] Rabbi Feinstein reasons that something

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Yet, it is interesting to note that the author of *Aruch HaShulchan*, in או"ח קט"ו אות'א' comments that . . . "although certainly someone who eats a food forbidden by the Rabbis should not make a blessing on it, yet if it is a "light prohibition" . . . then he should make a blessing". Therefore, he rules, one should certainly make a 'brocha' before and after drinking *Chalav Akum*.

17. See שדי חמד מערכה חלב של נכרי אות א
18. Ibid.
19. מלמד להועיל יורה דעה לג
20. אגרות משה יורה דעה מ"ז
21. In an attempt to clarify this point I spoke with officials of the dairy industry. I was told that government inspectors visit the dairy plants three to four times a week, and take many samples of the milk to guarantee that the product offered to the public meets legal standards of purity, bacteria count, fat content, and the like. Although they do not check specifically for an admixture of other animal's milk with that of the cow, there are many tests and factors in other tests which would immediately indicate if the milk were adulterated. I was also told that, in this country at least, it would not be in the interest of the dairy producers to include pig's (or other animal's) milk with cow's milk. It seems that newborn animals cannot tolerate anything other than their own mothers' type of milk; therefore, if the farmer were to take pig's milk and add it to the cow's milk, he would be robbing his own livestock of necessary nutrition. On the other hand, a

which a person is quite certain has happened is halachically considered as if it had indeed happened. This is a logical procedure which is not foreign to Jewish jurisprudence. For example, in Gemara *Shavuot*,[22] we find the rule that if we observe a camel kicking something in the street and shortly thereafter we find a dead camel in the street, we are entitled to demand that the owner of the kicking camel pay the owner of the dead camel for the destruction of his camel. Even though circumstantial, the evidence is considered as valid as, if not identical to, first-hand knowledge. Similarly, a married woman has the status of an אשת איש, even if no one witnesses the consummation of her marriage. Something which is known is on the same level as that which is seen, argues Rabbi Feinstein. Therefore, since we are quite certain that dairy producers are fearful of governmental penalties if they adulterate their product, it is considered as if a Jew himself were watching the actual milking process; therefore, the milk is wholly acceptable. Yet, Rav Moshe concludes his responsum

> ולכן, הרוצה לסמוך ולהקל יש לו טעם גדול ורשאי כמו שמקילין בזה הרוב בני אדם שומרי תורה וגם הרבה רבנים, ח״ו לומר שעושין שלא כדין אבל מכל מקום לבעלי נפש מן הראוי להחמיר . . . וכך אני נוהג להחמיר לעצמי . . .

> "and therefore he who wishes to rely (on government inspection) and to be lenient, has good cause and is permitted to do so, as indeed most observant Jews do, as do many Rabbis; and it is forbidden to say that they are not acting in accordance with the *din*. Yet, for one who is a "spiritual" person (בעל נפש) it is appropriate to be strict . . . and I myself am strict in this regard. . . .[23]

calf can be weaned to a "formula" within two weeks of birth; the cows produce great quantities of milk which the farmers can readily and inexpensively collect for market use.

22. לד.

23. We should not take these last words of Rabbi Feinstein lightly, for elsewhere he follows this strict opinion. When asked by a yeshiva what policy they ought to

Although Rabbi Feinstein does give credence to government inspection, the matter does not end there. When the responsum was issued, many felt and still continue to feel that the fines which might be levied against an offender of the dairy purity laws are negligible compared to the profits which a company might earn by flouting the laws. How can a $25 fine be a deterrent to a company making millions of dollars? Furthermore, government inspectors have occasionally accepted bribes. This question is indeed the subject of the very next responsum printed in *Iggerot Moshe*, for the recipient of the first letter wrote a second question to Rabbi Feinstein.

In defending his original position, Rabbi Feinstein concurs that a small fine is hardly sufficient deterrent for a company determined to adulterate its product. However, he argues that we should not take into account only the amount of the fine which might be levied, but rather also calculate how much money it would take to effectively bribe all the workers who would necessarily be aware of the company's shenanigans, as well as all the government officials. Then, the net amount would be considerable, and since so many people involved would make a cover-up very unwieldy, we do not have to consider the possible bribe as a factor.[24]

Rabbi Feinsten is joined by the *Chazon Ish* in his reliance on government inspection as a permissive factor in *Chalav Yisrael*. ". . . since there is government supervision for milk to assure that non-kosher milk is not added, and [the producers] are subject to

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follow, he writes that although their budget is tight, they ought to expend the extra money to buy *Chalav Yisrael*, in order to give their youngsters the proper education in Jewish matters.

24. Rabbi Frank in הר צבי סי"ק"ג also relies to some extent on government inspection as a partial reason for being lenient. However, Rabbi Weinfeld לב אברהם after an exhaustive study of the subject, strongly opposes any yeshiva's serving non-*Chalav Yisrael* to its students. To his responsum he addends concurring letters from Rabbi Yonatan Steiff, Rabbi Yisrael Posen, Rabbi Yitzhak Greenwald, and Rabbi Hillel Lichtenstein. In an earlier comment on the subject, the author of *Aruch HaShulchan* [אות ה'] comments that he hears that in America many people drink pig's milk, since there is an abundance of pigs in America. . . .)

punishment for falsification . . . and it is like the case [in the Gemara] of a Jew's sitting nearby, and if he were to get up he would see [and therefore we consider it equivalent to his actually seeing] . . . and the *Pri Chadash* wrote that if non-kosher milk is more expensive, then we ought to be lenient . . .''[25]

However, the *Chelkat Ya'akov* disagrees vehemently with this conclusion, and undertakes a step-by-step refutation of the responsum of Rav Moshe permitting the use of government-inspected milk. When it was subsequently pointed out to him that the *Chazon Ish* himself accepted the line of reasoning which Rav Moshe followed, the *Chelkat Ya'akov* addressed himself to this point.[27]

In practical terms, the net result of the considerable variety of conclusions regarding the halachic status of *Chalav Yisrael* in America today has resulted, predictably, in a variety of standards in granting kashruth supervision for milk and milk products.[28] The rabbinic authority of the ''German'' community in Washington Heights is generally quite strict; they require that the machines used in processing milk and milk products under their supervision be ''kashered'' prior to use. The Lubavitch movement (חב״ד) has similar rules. They also do not give a ''hechsher'' on milk chocolate or other products using milk unless the milk is *Chalav Yisrael.* However, ⓤ does.

Rabbi Moshe Feinstein, in discussing whether machines have to be ''kashered'' prior to processing the *Chalav Yisrael,* requires that the machines have to have hot water (212°F) run through

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25. יורה דעה מא אות ד׳
26. חלקת יעקב חלק ב׳ סי׳ ל״ז ל״ח
27. For the somewhat strained reading which he gives to the *Chazon Ish*, see חלקת יעקב ח״ב סי׳ ל״ח
28. The information cited here regarding standards for Kashruth certification were reported orally to this writer in conversations with representatives of each of the groups. Standards for supervision of ''kosher'' milk vary. At one time in America the rabbinic supervisors relied on the ruling of ש״ך יו״ד קט״ו אות ד׳ that it is sufficient for a Jew to come and go during the manufacturing process (יוצא ונכנס) but not necessarily to be there at all times (משגיח תמידי). However, I am told that nowadays a permanent supervisor of kashruth is present throughout the manufacturing procedure.

twice in order to kasher them;[29] however, some companies producing *Chalav Yisrael* rely on other opinions, and only run hot water through once, and then only at the temperature which is usually used on those machines (relying on the principle כבולע כך פולטו).

It is interesting to note that a new brand of חלב ישראל milk has recently been made available to the public. It is produced in utensils which are not used for any other milk products.

## Cheese

The question of *Gvinat Yisrael* (cheese) is not the same as that of *Chalav Yisrael*, due to the accepted halachic hypothesis that only milk of kosher animals will curdle and make cheese. Obviously, then, the law ought to be that all cheeses are permitted, with or without supervision, since the cheese itself is proof positive that the milk source must have been from a kosher animal.[30] Nevertheless, in *Avoda Zara* 35a the Gemara forbids ingesting cheese made by a gentile. Why the Gemara should have made this statement is the subject of considerable discussion in the Talmud.

The traditional method for transforming milk into cheese was to let the milk sit for a long time in an animal-skin sac, מפני שמעמידין אותה בעור קיבת נבלה, which would render the cheese forbidden. (The modern version of this procedure is to include some rennet in the milk. Rennet is an enzyme found in an animal's stomach. Artificial rennet is also employed). Other reasons suggested for the talmudic *issur* include the possibility that, although milk of non-kosher animals would not curdle, it might still be included in the original mixture from which the cheese was made, and would remain in the finished product in its milk form.

לפי שאי אפשר לה בלי צחצוח חלב . . בין גומות של גבינה נשאר מן החלב ודלמא ערב בה חלב טמא

It was also suggested that (hard) cheese used to be smeared

29. אגרות משה
30. עיין ריטב"א שם

with animal fat on the outside, possibly as a preservative, מפני שמחליקין פניה בשומן חזיר. Yet another reason was the possibility that during the curdling process, the milk sac was left open and a snake might have gotten some of its venom into the mixture, which is therefore forbidden because it is potentially unhealthy to eat, משום ניקור גלוי.

The conclusion of the majority of *poskim*, including Rambam, is that cheese made by a non-Jew was forbidden by the Talmudic scholars because of the way in which it was made.

> בימי חכמי משנה גזרו על גבינת עכו"ם ואסרום מפני שמעמידין אותם בעור קיבה של שחיטתן שהיא נבלה

> "Cheeses made by gentiles are forbidden because they set them in skins of animals stomachs, which are forbidden. . .

This line of reasoning is the basis of normative halacha, as redacted by *Shulchan Aruch*.[32]

> גבינות של עובדי כוכבים אסרום מפני שמעמידים אותם בעור קיבת שחיטתם שהיא נבילה

Furthermore, the *Maggid Mishneh*[33] sums up, even if the admixture is very small, the rabbinic decree would still be in full force—because "in truth the Rabbis' motive for making such a decree, aside from all other factors, was to separate the Jew from the gentile and his foods."

> ומ"מ יש מן המפרשים ז"ל שפירשו שאין הולכין באיסורין אלו של עכו"ם אחר נתינת טעם שחכמים רצו להרחיק מאכליהם

However, the *gezeira* regarding cheese is not the same as that concerning milk, for even if the cheese would not now be made in

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31. רמב"ם מאכלות אסורות פרק ג' הלכה י"ג
32. יורה דעה קט"ו סק"ב
33. מגיד משנה שם

a forbidden manner, such as putting it in animal intestine sacs, it would nevertheless remain forbidden. . . .

> גבינה שמעמידין אותם העכו"ם בעשבים או במי פירות והרי הן ניכרין . . . הורו מקצת גאונים שהיא אסורה שכבר גזרו על כל גבינת עכו"ם בין שהעמידוה בדבר אסור בין שהעמידוה בדבר המותר
>
> . . . even cheese which gentiles set in grasses or fruit juice, and they are readily recognizable as such . . . some Geonim ruled that the cheese is forbidden, since our Rabbis had already ruled that all cheese made by gentiles, whether they set it in a forbidden container or whether they set it in a permissible thing are forbidden. . . .[34]

The *Shulchan Aruch* accepts this view,[35] ואפילו העמידה בעשבים אסורה.

However, that is not the end of the discussion. Ramo writes that even if no Jew is present at the time of the milking, nonetheless as long as the cheese is produced under the supervison of a Jew, it may be used בדיעבד, although actually the milking should also be done in the presence of a Jew. The *Schach*[37] explains that if it is known that the gentile is milking the cow for the purpose of making cheese, then it is permissible for the Jew to use it.

The polemic results in differing regulations *halacha le'ma'aseh*. For that reason, for example, the rabbinic authorities of the "German" community certify two types of kosher cheese—one which has kashruth supervision from the time the cow is milked, and one which is supervised only during the cheese-making process.

Cottage cheese, and similar types of cheese, are in a somewhat

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34. רמב"ם שם
35. יורה דעה שם
36. יורה דעה שם סק"ב
37. שם אות י"ח

different category halachically. Rav Moshe Feinstein does not come to a definitive conclusion whether the talmudic regulation regarding cheese ought to apply to cottage cheese. His reasoning is that the *gezeira* was intended for a variety of cheeses, including those which are produced through the introduction of rennet (an animal enzyme) into the curds. However, he writes, the rennet used in cottage cheese does not actually *cause* the milk to become cheese, it only *hastens* the process. If so, then perhaps cottage cheese is not classified as a product subject to the talmudic decree. His indecision is evident in his words:

> מ״מ למעשה איני אומר בזה היתר אבל גם איני מוחה בהמקילין מאחר שיש טעם להתיר והוא מלתא דרבנן

> In any case, in actuality I am not saying to be lenient but I also do not contradict those who are lenient since there is cause to be lenient. . . . But it is not proper to publicize that there is room here to be lenient. . . .

Based on the various opinions, there are those who allow cottage cheese only when it is derived from *Chalav Yisrael* but others certify the kashruth of non-*Chalav Yisrael* cottage cheese.

An offshoot of the discussion about cheese is the controversy as to the intention of the Rabbis in describing "Jewish" cheese: must it be made by a Jew or only manufactured under Jewish supervision? In this regard, the Ramo is lenient, insisting only that the Jew *see* the milking and see the processing of the cheese, but the *Schach* strongly contests his leniency.[40] *Schach* rules that the Jew has to participate in the actual manufacturing process. *Pitchei Teshuva*[41] records many *poskim* who agree with Ramo (see also שער הציון אות ד ס׳ ש״ז).

Rav Moshe Feinstein[42] rules that we rely on Ramo for this, yet

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38. אגרות משה יורה דעה חלק שני סמ״ח
39. יורה דעה שם סק״ב
40. שם אות ך׳
41. שם אות ו׳. See also שער הציון אות ד׳ ס׳ ש״ז
42. אגרות משה יורה דעה חלק ג ס׳ ט״ז

a *"baal nefesh"* may rightfully be strict in this respect and expend up to one/sixth more for the price of cheese which was manufactured wholly by Jews. However, he adds that if there is government inspecton of the cheese-making process, there is absolutely no basis even for a *"baal nefesh"* to be strict.

In making cheese, certain by-products result and there exists a halachic question whether they may be used or whether the same restrictions which apply to cheese would apply to them. Rav Moshe[43] permits the consumption of cookies and candy which have whey added to them, and the *Chelkat Yaakov*[44] allows the addition of milk sugar not supervised by a Jew. However, *Melamed LeHo'il*[45] permits the use of buttermilk only for a sick person. Of course, all these discussions are based on the assumption that there is absolutely no question that the by-product is kosher.

## Yogurt

Yogurt is a milk product which is produced from soured milk and milk cultures. Radbaz forbids yogurt[46] which is made by a gentile, without explaining why. Later Rabbis have sought to follow his reasoning. Some explain that yogurt, being a milk product, would have the same restrictions as milk, being a *davar shebe'minyan*. However, others maintain that Radbaz forbids non-Jewish yogurt not because of the milk, which they do *not* consider *davar shebe'minyan*, but because yogurt would fall into the same category as cheese, which is forbidden when produced by a gentile regardless of the original reason for its being prohibited.[47]

In practical terms, the Lubavitch organization is extremely strict regarding the eating of yogurt. Rabbi Feinstein treats yogurt in the same way as regular milk, and the ⓤ gives השגחה on yogurt produced from non-*chalav yisrael* milk, whereas the Kehillah in

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43. אגרות משה יורה דעה חלק ג ס' י"ז
44. חלק א ס' ק"י
45. יורה דעה ל"ג
46. חלק ה ס' שני אלפים רד"ה — see also שרידי אש חלק א ע"ה
47. See שדי חמד מערכה חלב של נכרי אות ב, who further writes that he saw a *takana* issued by the Rabbis of Jerusalem in the year 1814 forbiddng all milk and yogurt made by a non-Jew.

Washington Heights regards butter, heavy cream and yogurt as not being part of the גזרה of חלב עכו"ם.

## Butter and Powdered Milk

Does the *issur* of using milk of a non-Jew continue in force after the milk is no longer milk but has been changed in form? This question arises with regard to butter or powdered milk. Rambam writes:[48]

> חמאה של עכו"ם מקצת הגאונים התירוה שהרי לא גזרו על החמאה, וחלב הטמאה אינו עומד.
>
> Some Geonim permitted butter of a non-Jew, for the Rabbis did not legislate against butter, since non-kosher milk cannot become butter. . .

Ramo dissents sharply:[49]

> חלב של עכו"ם שנאסרה אינו מועיל אם יעשו אח"כ גבינות או חמאה ממנה אלא נשארה באיסורה וכל מה שנעשה ממנה אסור.
>
> Milk of a gentile, which was forbidden—it does not help if later he makes butter or cheese therefrom; rather, it remains forbidden and whatever is made from it is forbidden.

In a responsum, Rabbi Tzvi Pesach Frank cites Ramo,[50] yet he relies on other rabbinic decisors to permit the use of powdered milk and products including powdered milk, with the proviso that the milk was made into powder by a gentile and not a Jew.

On the other hand, the *Chazon Ish*[51] does not see any difference between powdered milk and regular milk, since

48. שם הלכה טו. See also הר צבי יורה דעה ק"ג
49. יורה דעה שם ס"ק א
50. הר צבי יורה דעה ק"ג
51. יורה דעה מ"א אות ד

powdered milk can come from any source. He does permit the use of powdered milk, relying on government inspection.[52] In his reasoning, however, he differs with Rabbi Frank.

When he wrote to a questioner on the subject, the *Chatam Sofer*[53] urged, "do not neglect the teaching of your mother", requiring that one continue to use *Chalav Yisrael.* However, he wrote that if a person ate bread baked with non-*Chalav Yisrael* milk, he might still be included in a *"mezuman"* for saying grace after the meal.[54]

## Conclusion

We have attempted a brief overview of the topic *Chalav Yisrael,* a halacha which is strictly adhered to by some while totally ignored by others. Let us at the very least know the rationale for the variety of traditions which have evolved in American society.

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52. See footnote 27
53. יורה דעה ק"ז
54. Seeking to justify the (apparently) common practice of using non-*chalav yisrael* in baking bread, the *Chatham Sofer* suggests that it *might* be argued that when the Sages forbade gentiles' milk, they did not intend to include in that *issur* anything other than the milk itself, and not any derivative or transformed state of the milk — פנים חדשות באו לכאן. After easily discrediting any such explanation, the *Chatam Sofer* adds that of course the dairy bread under discussion would have to be of a distinctive form which is immediately recognizable as dairy bread, for otherwise we know that it is forbidden to bake (ordinary-shaped) bread with any milk whatsoever.