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**Rabbi Alfred S. Cohen,
Editor**

The Journal of Halacha and Contemporary Society

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

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

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“Male and Female He Created Them¹:” Revisiting Gender Assignment and Treatment in Intersex Children

Jonathan Wiesen & David Kulak

Though a relatively infrequent biological occurrence,² the phenomenon of ambiguous gender, categorized by our sages as *tumtum* or *androgynous*, occupies significant space in halachic discourse. Discussion of the precise halachic status of these beings, as well as the numerous ramifications thereof, abounds in the Talmud and its later commentaries.³ The disproportionate mention of the *tumtum* and *androgynous* is no doubt a tribute to the weighty nature of their problem, i.e. lacking a clearly defined gender, and the prevalence of gender

1. The authors thank Dr. Edward Reichman for his guidance, insight and assistance in researching and composing this paper.

Although the most straightforward read of the Torah connotes simply that God created Adam and Eve as separate entities and genders, “male and female,” the *Midrash* (*Genesis Rabbah* 8:1) suggests that God actually created them as one androgynous being. See also *Brachot* 61a.

2. 1 in 2000 according to Preves, SA, *Intersex and Identity: The Contested Self*. Rutgers University Press: New Jersey.

3. There are over 100 references in Talmud *Bavli* to both.

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distinctions in Jewish law.⁴

Torah law divides those with unassigned gender into two broad categories. The *androgynous*, or Hermaphrodite in colloquial terms, is one in whom both male and female genitalia are discernable. The *tumtum*, on the other hand, has neither sexual organ, instead having a flap of skin which conceals the child's genitalia, preventing the true gender from being ascertained. Both of these developmental anomalies are referred to as intersex children in contemporary medical literature.

The categorizations, laws, and procedures relating to these sexually ambiguous individuals are becoming infinitely more complicated with the advent of highly sensitive and accurate genetic and hormonal testing batteries, as well as sophisticated and successful corrective surgical procedures. Currently, it has become possible to determine the exact genotype (genetic identity) of an intersex child, thus uncovering both its biologically precise gender, as well as the developmental anomaly responsible for its condition. Further, manipulation of both the external and internal characteristics of an individual to mimic the desired gender is routinely and successfully accomplished.

As such, the classical halachic approaches and procedures may need to be revisited to determine: 1) What means can be utilized to determine the exact status/gender of these individuals, i.e. can DNA or hormone testing be used? 2) Are there procedures that can and should be done medically/surgically to alleviate their ambiguous halachic situation? 3) Even if a resolution to their halachic status is not viable, are

4. The most obvious example is *mitzvot aseh she'hazman g'rama* (time-bound commandments), which covers many of the positive commandments, and applies only to males and not females. See BT *Kiddushin* 34a. Additionally, there are numerous examples of *mitzvot lo ta'aseh* (negative commandments) which apply to only one gender, such as shaving with a razor, which applies only to males.

there means to alleviate the social and psychological effects that their condition may cause, such as permitting elective surgeries and hormone treatments to normalize their external appearance?

Throughout the paper, we will make every attempt to unearth and underscore all possible mechanisms of resolving the social and halachic dilemma confronting intersex children.

Scientific Background

In the scientific literature, cases of ambiguous genitalia (or intersex children) have been divided into two categories: Hermaphroditism and Pseudohermaphroditism. Hermaphroditism is defined as the presence of both male and female primary sex organs, either as separate contra-lateral organs, or as ovatestes, an organ that has features of both the female ovary and male testes.⁵ It is seen in both people that are XX (genetic female) and those who are XY (genetic male). Many different physiological and genetic pathologies may be responsible for this condition. One common genetic cause of Hermaphroditism is mosaicism,⁶ the expression of different genetic alleles (variations) in different cells due to the fusion or infusion of foreign genetic material.

Pseudohermaphroditism is the presence of ambiguous genitalia, either internally or externally. However, unlike a "true hermaphrodite," the individual does not contain both male and female mature primary sex tissue.⁷ Pseudohermaphrodites are categorized as either male or female type based on the genetic character of the individual. Despite the fact that some vestige of his or her respective

5. Van Niekerk, William A. True, *Hermaphroditism: Clinical, Morphological, and Cytogenetic Aspects*. New York: Harper Row, 1974, p. 87.

6. *Ibid*, p. 161.

7. Jirasek, Jon, *Development of the Genital System and Male Pseudohermaphroditism*. Baltimore: Johns Hopkins Press, 1971, pp. 48-50.

primary genitalia is maintained, as determined by the individual's genotype, the genetic makeup of a pseudohermaphrodite does not necessarily define the sex that he or she is most closely linked to physically, physiologically, anatomically or psychologically. While some male pseudohermaphrodites are almost completely male, others are actually almost entirely female in appearance, attitude and sexual orientation. These attributes are dependent on the specific pathology responsible for the respective syndrome.⁸ Female pseudohermaphroditism – genetic females with XX chromosomes and ambiguous genitalia but lacking mature testicular tissue – is often caused by a dysfunctional enzyme or catalyzing agent resulting in altered levels of sexual hormones.⁹ Female pseudohermaphroditism can often be treated with relative success by using replacement hormones, often with minimal residual developmental anomalies.¹⁰

Gender assignment in these individuals is scientifically and socially challenging. Doctors and scientists, having been given the onus to assign a sex to the children born with these syndromes, have not reached a practical consensus in the management of these patients.¹¹ Traditional wisdom had been to turn these children into girls and raise them without informing them of their ambiguous past. However, recent studies have shown that this approach has disastrous effects

8. Ibid, pp. 66-89.

9. Simpson, Joe Leigh, *Disorders of Sexual Differentiation: Etiology and Clinical Delineation*, New York: Academic Press, 1976, pp. 157-164.

10. Ibid. pp. 166-170. The one major exception is sex-reversal, where a genetic female develops into a male in nearly every aspect. Often these people themselves do not know that they are genetically female. See pages 225-331.

11. See the recent NYT Magazine article (September 24, 2006) "What if it's (Sort of) a Boy and (Sort of) a Girl," which discusses the dilemma and presents the current position of some advocates of intersex children, that they should be left alone to decide their own fate when they become old enough to do so. See also the article Summary of consensus statement on intersex disorders and their management. *Pediatrics* 2006 Aug;118(2):753-7.

on many due to the fact that psychological sexual development begins early in fetal development, and, as such, the psychological sex of these children is embedded in their innate psyche and personality.¹² The decision of sex assignment, therefore, has become even more dependent on the exact causes and pathologies of each individual case, and can certainly not be decided based on any "rule of thumb." At this point science has yet to establish universally accepted guidelines for discerning the true sexual identity of hermaphrodite and pseudohermaphrodite individuals, nor recommended treatment modalities for them. Such an attempt may be impossible due to the complexity and variability of each individual case.

Halachic Background

Due to the abundance of literature, both classical and contemporary,¹³ dealing with the halachic definitions of the *tumtum* and *androgynous*, our background will be kept to a minimum.

A priori, we may formulate five viable possibilities in defining the nature of the *tumtum* and *androgynous*. Each formulation can be found in rabbinic literature:¹⁴

- 1) Male

12. Reiner, WG, Gearhart, JP, "Discordant sexual identity in some genetic males with cloacal extrophy assigned to females at birth", *NEJM*, 350(4), pp. 334-340. See later discussion for more details.

13. See Rabbi Alfred Cohen, "Tumtum and Androgynous," *Journal of Halacha and Contemporary Society* #38 (1999), pp. 62-85, for a contemporary article on the matter, as well as Dr. Abraham Steinberg, "Hermaphrodite" (Description of Hermaphrodites and their Status in Jewish Law), *Encyclopedia of Jewish Medical Ethics*, Feldheim Publishers: New York. A great resource is Ben – Ephraim, Edan, *Sefer Dor Tahapuchot*, a book which compiles halachic sources on the different issues in gender changes and ambiguous gender.

14. See *Encyclopedia Talmudit* s.v."Androgynous and Tumtum" for a thorough compilation of sources.

- 2) Female
- 3) Part male and part female
- 4) *Safek* – a distinct type of *safek* (doubt) which will never be resolved
- 5) *Berya bifnei atzma* – it is a unique creature with its own characteristics.

We will now discuss the two halachic categories, respectively, to highlight each one's unique halachic status.

Androgynous

The Mishnah in *Bikurim* (4:1) states:

"An *androgynous* [is] in some ways similar to a man, and in some ways similar to a woman, and in some ways similar to men and women, and some ways not similar to either men or women."

The Mishnah continues to elaborate the complicated nuances of the laws of the *androgynous*.

There are four main approaches taken in defining the true nature of the *androgynous* in rabbinic literature:

- 1) Male¹⁵
- 2) Part male and part female¹⁶
- 3) *Safek* (doubt)
- 4) *Berya bifnei atzma*, it is a unique creature with its own

15. R. Eliezer in the Mishnah *Yevamot* 81a. Also R. Yochanan explaining R. Yose and R. Shimon, as read by Rashi (81a *d"h "af"* and 82b *d"h "t'nan"*). Though R. Yehudah in the Mishnah in *Shabbat* 134b allows a *brit milah* for the *androgynous* to be performed on Shabbat, the Gemara (135a) learns that out from a special *limud* and not as a result of gender identification.

16. Ra'avad *Hilchot Shofar* 2:2 and *Hilchot Bikurim* 7:16.

characteristics.¹⁷ This may be based on its being a type of *safek* which will never be resolved.¹⁸

The majority of *Rishonim* and *Poskim* believe that the hermaphrodite has a status of *safek*, as we cannot ascertain if the being is male or female.¹⁹ Consequently, being a case of doubt, the most strict position in any situation is to be followed. This is the opinion of the Rambam (*Ishut* 2:24-25) who states:

One who has male organs and female organs is called an *androgynous, safek* if it is male or female, and there is no sign by which it would be known conclusively if it is male or female forever. And one who is lacking both male and female signs, rather [its organs are] covered, is called a *tumtum* and it is too a *safek*, but if the *tumtum* is torn and found to be male he is considered male and if found to be female is considered a female.²⁰

This also is the opinion of the *Shulchan Aruch*.²¹ According to

17. Ramban on *Yevamot* 83a. (*Kuntres Acharon*), and possibly the Rosh in *Bechorot* 6:8. Also one can infer from the distinction in B.T. *Bechorot* 42b between *safek* and *androgynous*, that *androgynous* is indeed its own entity.

18. Probably R. Yose in *Bikurim* 4:5. Though R. Yose calls it a “*beryia bifnei atzma*,” he continues to say “*v’lo yachlu chachamim l’hachria’ah alav im hu ish oh isha*,” indicating that the categorization of this “thing” is a status of *safek* between man and woman. See *Tosafot Nidah* 28a (*d”h amar*) who explains R. Yose like this. Additionally, see *Tosafot Yevamot* (81a *d”h v’ein* and 83a *d”h berya*), and *tanna kama* in the *Mishnah* in *Shabbat* 134b who groups *androgynous* with *safek*.

19. See the *Rif* on *Yevamot* (p. 26a). This is in contrast with the Rosh in *Bikurim* (on the *Mishnah* in chapter 4) who believes that there are actually three different *sefeikot* here: ¹⁾male ²⁾female and ³⁾*beryia bifnei atzma*.

20. See also *Shofar* 2:2, *Bikurim* 7:16, *Milah* 3:6, *Nezirut* 2:1, *Eidut* 9:3 for more examples of this opinion in the Rambam.

21. *Orach Chaim* 331:5, *Even Haezer* 44:5, 172:8, *Yoreh Deah* 194:8, 265:3, 315:3. It should be noted that even though he states in *Y.D.* 265:3 that it’s not a *zachar vaday*, he nevertheless quotes a *yesh omrim* in *E.H.* 172 that it’s a *vaday zachar*. It is unclear why he quotes that possibility (*yesh omrim*) in only one instance and not anywhere else.

this view, a hermaphrodite would be required to keep all laws pertaining to males and females. It would be required to have a circumcision (albeit without a blessing, and it could not be done on Shabbat).²² It would be prohibited from shaving with a razor, even though women are allowed to, and, if born to a *kohen*, would not be allowed to come into contact with the dead. Further, it would be required to keep all positive time-bound commandments, as do men. The *androgynous* would also be required to wear *tzitzit* and don phylacteries. It would be considered a *gadol* at the age of 12.²³

Some argue that an *androgynous* has a status as a “certain male.”²⁴ As such, the hermaphrodite would have the same circumcision requirements of a male (including having a blessing said) and would be allowed to perform *yibum*/*chalitza*.²⁵

The two laws most relevant to our discussion regarding an *androgynous* are: 1) it is generally considered to have a status of *safeik*. 2) There is no hope for resolution of this *safeik*.²⁶

It should be noted, however, that not all *androgynousim* are created equal. Although, practically speaking, any child born with both sets of genitalia would be halachically (and medically) considered a hermaphrodite, variances exist between an *androgynous* who is more female-like and one who is more male-like, particularly in those individuals who have undergone surgical procedures to reconstruct their genital

22. *Shulchan Aruch*, Y.D. 266:10.

23. *Rambam Ishut* 2:25.

24. Quoted as a *yesh omrim* in *Shulchan Aruch EH* 172. The Ramo includes this opinion in his gloss to *EH* 44:5. (It is unclear why he does not write this in every other place as well.) This is also the opinion of the *Tur*, as brought down in *YD* 265 and *EH* 44, 172.

25. *Tur*, *ibid*.

26. *Tosafot Yevamot* 83a, *d”h “Berya.”* (Also see *Tosafot Niddah* 28a *d”h Sh’ne’mar*.) *Rambam* above as well. This distinction between the *tumtum* and *androgynous* will be discussed in the proceeding section of this paper.

area. Though they are halachically considered as *androgynous* (despite their anatomical gender change due to the surgery), R. Elyashiv quotes a Responsum of the Ramah (#130),²⁷ who states that the prohibition of *yichud* (the prohibition of a male and female being alone together) does not apply to an *androgynous* who is predominantly one gender, with members of that same gender.²⁸ The prohibition of *yichud* in the Mishnah was dealing with an *androgynous* who was equally male and female;²⁹ if it is more similar to one gender over the other, a halachic distinction is possible. This ruling establishes a spectrum of hermaphrodites within halacha, which may be useful in achieving at least a partial resolution in some of these complicated cases. Perhaps this decision may be used as a halachic precedent for social normalization of *androgynous* in contemporary society. Though these individuals may ultimately be considered, broadly speaking, *androgynous*, perhaps they could participate in normative society as a pseudo-male or female.

Tumtum

Whereas the *androgynous* has both sexual organs, the *tumtum* has none which are discernable. The term *tumtum* originates from being hidden or covered.³⁰ The Rambam mentioned above states that a *tumtum*, too, has a status of *safeik*, much like an *androgynous*; however, there is one important difference, as he states:

And one who is lacking both male and female signs, rather [its organs] are covered, is called a *tumtum* and it too is a *safeik*, **but if the *tumtum* is torn and found to be**

27. *Bishvilei Harefua*, 5739, p. 15 (*nituach plasti l'kviat mino shel hanolad*).

28. Generally, since *androgynous* is a *safeik*, we assume that the prohibition of *yichud* would apply to both genders.

29. *Bikurim*.

30. The *Tiferet Yisrael* (*Yevamot* 88) explains that “the place of the male or females organs is covered by skin.”

male he is considered male and if found to be female is considered a female.³¹

The *tumtum* is assumed to have a specific gender, though it cannot be ascertained due to the tissue covering its reproductive organs. Were the covering removed such that the gender could be determined, the *tumtum* would be considered a full-fledged member of its respective gender.³² As such, every *tumtum* is, in actuality, a member of one gender, though it is unknown which one.³³ This marks a fundamental distinction from *androgynous*, who, according to most, has a status of *safek* which can never be resolved.³⁴

Within rabbinic literature there exist two basic possibilities as to the halachic status of a *tumtum*:

- 1) It is a *safek*³⁵
- 2) It is a *berya bifnei atzma*, a unique creature.^{36 37}

An issue pertinent to our discussion is whether a *tumtum* whose external covering was removed can be classified unequivocally as a member of the respective gender uncovered. Here we have a debate in the Talmud in a number

31. *Ishut* 2:25,

32. There is a debate whether this gender identification would apply retroactively, or would only count from the present day forward. See *Nishmat Avraham*, p. 202..

33. *Tosafot Nidah* 28a, *d”h “amar”*.

34. *Ibid.*, and *Yevamot* 83a, *d”h “berya.”*

35. R. Chisda *Bechorot* 42b (in understanding the Mishnah on 41a).

36. The opinion of the *Tana Kama* (42b in *Bechorot*) in the dispute regarding the intention of the Mishnah. These two respective formulations appear numerous times within the discussion of the Gemara there (see bottom of 42a). Also see *Rashi* (*d”h “lo savar lei”*) and *Tosafot* (*d”h “aval”* on 42a).

37. This opinion is most clearly seen through the statement “*ho’il v’ishtaneh, ishtaneh*,” that even were we to uncover the genitalia of the *tumtum* and find it to be male or female, the former *tumtum* would not be considered to be a member of the gender discovered, but rather would maintain its *tumtum* status.

of places, specifically *Bechorot* 42b, where the opinion of R. Yose b'R. Yehudah is quoted, that a “*tumtum shenikra v’nimtzachar...hu k’saris.*” R. Yose believes that even were male genitalia to be found, it would not suffice to declare the person a male. We instead assume that his status is of one who was castrated, since “*ho’il v’nishtaneh, hishtaneh,*”³⁸ that the original mutation (lack of genitalia) most probably indicates further aberrations, specifically in the reproductive capacity of the individual.

As with *androgynous*, normative *psak* (practical law) ascribes to a *tumtum* the status of *safek*.³⁹ However, if the ambiguity is removed, the *tumtum* would enjoy the complete status of the gender which was uncovered.⁴⁰

There is discussion as to whether the *tumtum* must make an attempt to uncover its true gender (“*koreyah*,” – lit. rip off its skin). Whereas the Rashba⁴¹ seems to imply that the *tumtum* should, Tosafot⁴² and R. Akiva Eiger⁴³ are of the opinion that such an operation is not mandatory. Interestingly, Tosafot qualify their position by stating that “even though it would seem reasonable” to necessitate a procedure which would reveal the gender of the individual in question, it is still not obligatory. Obviously this statement provides little clarity to our issue – if logically the *tumtum* should determine its gender, why is the operation elective? Perhaps Tosafot’s hesitation to require the procedure is due to the danger that an invasive surgical procedure of this nature posed at that time, a consideration which would not be as worrisome with today’s

38. *Bechorot* 42b.

39. *Shulchan Aruch, EH* 172:9. See all abovementioned sources re *androgynous*, as they are generally grouped together in the different halachot.

40. *Ibid.*

41. *Yevamot* 70a *d”h “arel.”*

42. *Pesachim* 28b (*d”h “arel”*).

43. *YD* 262:4.

medical proficiency.⁴⁴ Perhaps then, even according to Tosafot, it would be mandatory for a *tumtum* to discover its true gender nowadays.

For our purposes, the fact that gender assignment for a *tumtum* is possible, and that a procedure to establish its gender may be mandatory, is significant. Thus, any designation of *tumtum* would carry with it the ability for complete resolution of the *safek* using contemporary clinical and surgical means.

Summary of Part 1

Until this point, the classical sources have provided two viable options which, we may posit, could alleviate or resolve the complicated dilemma of children of ambiguous gender in contemporary society:

- 1) They may be maintained halachically as *androgynous* but be allowed to undergo surgical interventions to alter their physical appearance. Such a procedure would have both social and halachic utility, as they could function normally in society as a result of their corrected anatomy, and, further, they would not be constrained by all the laws of *androgynous* (though many would still apply).⁴⁵ This would be based on the position of R. Elyashiv who maintains that the prohibition of *yichud* would not apply to a surgically-altered *androgynous*. As mentioned earlier, perhaps this would create allowances in other areas of halacha for the social normalization of these children.
- 2) If they could be assigned a status of *tumtum*, their *safek* could be completely resolved, as is the standard rule of *tumtum*.

44. See *Nishmat Avraham*, p. 202.

Another issue which is discussed is whether the gender of the *tumtum* is determined retroactively or only prospectively. R. Akiva Eiger believes that it is retroactive. See *Encyclopedia Talmudit*, p. 183.

45. Later we will discuss the opinion of the *Tzitz Eliezer* who believes that contemporary surgery can resolve even the status of *androgynous*.

In the proceeding sections of this paper, we will enumerate other mechanisms utilized by contemporary *poskim* in resolving the predicament faced by intersex children, such as redefining/clarifying the manner in which gender and intersex status is determined, as well as the possibility that surgical procedures may affect the child's halachic status.

Contemporary Halachic Opinions

There are two major questions which must be asked in issuing a halachic ruling in cases of intersex children:

- 1) How does halacha determine gender, i.e. what specific criteria are necessary to label a child as male, female, or *androgynous*?
- 2) Given the determination of *androgynous*, what treatment and procedures could/should such a child undergo?

Most *poskim* determine gender based on the anatomical features of the child in question.⁴⁶ As such, practically speaking, there are two types of cases which must be discussed, that of a true *androgynous*, and that of a pseudo-*androgynous* (pseudo-hermaphrodite).

Cases of pure hermaphrodites are very rare, for they involve a completely developed set of both male and female genitalia.⁴⁷ Halachically, the designation of pure *androgynous*

46. *Shu"t Tzitz Eliezer* 11:78 (1); Ben-Ephraim, Edan, *Sefer Dor Tahapuchot*, pp.112 – 115, where a number of responsa on the issue are quoted: *Mishneh Halachot* (R. Menashe Klein) 6:47; *She'elat Shaul* (R. Shaul Breisch) EH 9. See also the responsa of R. Asher Weiss in the same book, pp. 280–282. This is also the opinion of R. Bleich, *Judaism and Healing*, p. 83, Dr. Abraham Steinberg, "Hermaphrodite," p. 465, and R. Abraham b. Abraham in *Nishmat Avraham*, *Yoreh Deah* 262:11.

47. Naito K. "True Hermaphroditism." *Nippon Rinsho* (article in Japanese) 2004 Feb 62(2): 300-4.

status follows the same medical/biological standard.⁴⁸ In such a case, the *poskim* are split as to what can be done for those children in our time. As discussed above, the classical sources maintain the halachic status of an *androgynous* to be permanent and unalterable. R. Asher Weiss and R. Bleich,⁴⁹ in line with the classical opinions, conclude that the child is rendered an *androgynous* for life, regardless of the medical/surgical treatment undergone. Surgery may be allowed to alleviate the emotional or psychological trauma of having two sexual organs, but the halachic status of the child would not change.

According to R. Waldenberg, however, modern medicine has provided a means of resolving the *androgynous*'s ambiguous status. He believes that, through surgery, even a true *androgynous* can resolve its status of halachic *safeik* and become a complete male or female. Because it is the external organs which determine gender in halacha, a surgical alteration to one's anatomy would transform his or her halachic status as well.⁵⁰

R. Waldenberg's *psak* involves four assertions which are contended by others. The first is his belief that there can be a resolution to the ambiguous or *safeik* status of the *androgynous*, going as far as comparing it with *tumtum* in this regard. He explicitly writes that, since that we have seen a change in nature from earlier generations, due to developmental variations and scientific advances, we can be secure in solving the puzzle of the *androgynous*. Additionally, his reliance on the novel opinions of the *Minchat Chinuch* and the *Magen Avraham*, which are not universally accepted, is questioned by critics of his approach. (The *Minchat Chinuch* [291:1] holds that the

48. This is based on a literal reading of the aforementioned Rambam, as well as his comments in *Perush Hamishnayot* (*Bikurim* 1:5). See R. Asher Weiss's response mentioned above.

49. See above.

50. R. Waldenberg's statement was in response to a case of pseudo-*androgynous*, but he extended it to a true hermaphrodite as well.

prohibition of castration (*sirus*) does not apply to organs which are infertile and, therefore, since a hermaphrodite cannot reproduce, castration would not apply to it. The *Magen Avraham* (OC 589:2) states that an *androgynous* switches back and forth between genders and we therefore find situations where the gender of an *androgynous* does actually change, allowing us to feel comfortable changing it ourselves through surgical means.) Furthermore, R. Waldenberg empowers the surgical procedure with tremendous halachic influence, as it is the surgery which can dictate the halachic gender of the child, not the reproductive organs it was born with.⁵¹ Finally, R. Waldenberg allows the physician to be the arbiter of the child's gender, allowing for a medical opinion to determine the nature of the surgical procedure that would be undertaken to establish the child's gender (though he suggests that it would be preferable to make it female to avoid the possibility of violating the prohibition of *sirus*, as stated by *Chatam Sofer* (EH 20) who disagrees with the *Minchat Chinuch*).

R. Moshe Steinberg disputes R. Waldenberg's opinion.⁵² He believes that R. Waldenberg's halachic leniencies are founded on questionable sources, the *Minchat Chinuch* and the *Magen Avraham*, neither of which has been accepted in normative

51. See R. Shapran's article in *Techumim* (#21) where there is a discussion of this *teshuva* in regards to sex-change operations. Some, such as Dr. Avraham Steinberg ("Surgery" (Transsexual Surgery), *Encyclopedia of Jewish Medical Ethics* (Eng), Feldheim Publishers: New York, p.1037), take R. Waldenberg as far as saying that any surgery performed on an individual has the capacity to change the gender of a person, including trans-gender operations, as the only determination of a person's gender is his or her ultimate anatomy. Thus, a man who undergoes a sex-change operation would then be exempt from all commandments that women are not obligated in. R. Shapran does not believe that R. Waldenberg's responsa implied such an extension, as he is dealing only with the particular case of an intersex baby who has dual or ambiguous genitalia. In the case of an adult who undergoes a surgical procedure, there is no evidence that R. Waldenberg would agree that his or her halachic gender has changed.

52. "Shinui Min B'Androgynous" in *Sefer Assia* #1, Dr. Abraham Steinberg, ed. Reuven Maas: Jerusalem, 1982, pp.142-6.

practice.⁵³ Additionally, the *androgynous* according to some is considered an actual male, making the prohibition of castration an even more serious concern.⁵⁴ Thus, there can be no resolution of the status of *androgynous*, nor, in keeping with its *androgynous* status, may its male reproductive organs be excised. He does conclude that, if a genuine need arises, the female organs can be removed to make the child into a male.⁵⁵ He does not clarify this final statement, leading the reader to assume that, though anatomically male, the child will retain the halachic status of *androgynous*, as opposed to R. Waldenberg who believes in the transformative power of the surgical procedure.

R. Elyashiv's opinion is that the reconstructive surgery performed on an *androgynous* to create an anatomical gender works only to alleviate the prohibition of *yichud*. All other halachot of the *androgynous* exist as though it is a normal *safeik*, and therefore sexual relations with a surgically-reconstructed *androgynous* female would be prohibited, and all mitzvot would have to be performed by the individual due to *safeik*. He, therefore, disagrees with R. Waldenberg as far as the degree of the halachic efficacy of reconstructive surgery, though he does empower it to a degree.

In sum, there are two possibilities for the utility of surgical

53. R. Asher Weiss believes that the *Chatam Sofer* holds the more tenuous position, and that the *Minchat Chinuch*'s opinion that *sirus* would not apply is certainly tenable, especially in a pseudo-hermaphrodite who is actually a female! He further assumes that the *Chatam Sofer* maintains his position only in a case of normal genitalia, and not in cases such as ours, where the genitalia are different and mutated to begin with. See also *Responsa Yaskil Avdi*, Part 7, *EH* #4.

54. He also draws a parallel to the prohibition of castrating bulls so that they will work better, which is not necessarily synonymous with our case, where the surgery is done to prevent the psychological anguish and halachic uncertainty of ambiguous genitalia.

55. See "Sefer Dor Tahapuchot" (p.260) where it is reported that R. Zalman Nechemia Goldberg also believed that the child could only be turned into a male.

intervention in a pure hermaphrodite:

- 1) Surgical intervention for either male or female reconstruction can create a de-facto gender determination (R. Waldenberg).
- 2) The status of *androgynous* can never change, although reconstructive surgery for psychological/emotional reasons is allowed, but only to make the child a male (R. Steinberg, R. Bleich).

Interestingly, none suggest the intermediate position: that while the *androgynous* status can never be resolved, surgical reconstruction can be allowed to either gender. This position assumes that there is no prohibition of castration (as per the *Minchat Chinuch* and *Tzitz Eliezer*) without going as far as R. Waldenberg in allowing complete resolution of the *safek*. This logical approach would allow the child to avoid the emotional and psychological trauma of growing up with unnatural sexual organs, and appears to be halachically viable.

More prevalent is the case of pseudo-hermaphrodite, where one set of genitalia is underdeveloped, or the child's reproductive organs do not match their secondary sex characteristics (voice, hair pattern, sexual affiliation, etc.) or genotype (genetic sequence – XX for female or XY for male). Unlike cases of pure hermaphrodites, where the gender (or lack thereof) is clear, in pseudo-hermaphrodite the gender is ambiguous, and therefore gender assignment plays an important role in determining the sex of the child. The means of gender determination in these individuals are disputed.

R. Waldenberg, in the responsum mentioned above, takes a literalist anatomical approach. That is, he believes that only the external physical features of the child should be taken into account, without investigating the scientific/biological gender (as determined medically, genetically or hormonally) of the child. As such, though the child in his *teshuva* was likely a

male pseudo-hermaphrodite,⁵⁶ as evidenced by the presence of an internal testicle and DNA testing, because it was (externally) anatomically feminine, he designated the gender as female. R. Waldenberg continued that, because of the ruling that the child was female, the testicle may be removed without concern about violating *sirus*. R. Asher Weiss,⁵⁷ too, maintains that one should follow the primary sex organs to determine gender, but he suggests using DNA testing as a means of confirmation.

Expanding the perspective of “anatomical gender,” R. Bleich notes that sometimes external genitalia are not functional (such as a blind vagina with no evidence of a uterus, etc.) and a thorough investigation is necessary to properly assess the child’s gender. Thus, even if the child has what resembles a small penis, if the child is predominantly female in both primary and secondary sex characteristics, it can be assumed that the penis is merely an outgrowth of skin (and not a functional sexual organ), and can therefore be excised.⁵⁸ Conversely, “the presence of testes, either external or internal, is an absolute indication that the child is not a female, and, therefore, the genitals cannot be removed.”⁵⁹ Dr. Steinberg it appears,⁶⁰ assumes an even broader definition of “anatomical gender.” In these cases, therefore, the complete anatomical makeup of the child must be considered, not just the external organs visible to the naked eye. In the case discussed by R. Waldenberg, despite the outward appearance of female reproductive organs, the presence of the testicle is evidence of a classical male pseudo-hermaphrodite (as determined

56. A male pseudo-hermaphrodite often has a complete set of external female genitalia and develops virility only during puberty. The maleness of the child can be determined by the presence of testicles. See Steinberg, DA, *Hermaphrodite*, in *Encyclopedia of Jewish Medical Ethics*, p. 464.

57. See above.

58. R. Asher Weiss, p.282.

59. *Judaism and Healing*, p. 84.

60. *Ibid.*, p. 462-472, especially page 464.

medically), and we could therefore conclude that the gender of the child is male. As such, the broader medical categories of developmental anomalies should be consulted to determine the gender of the child, not just what is visible to the naked eye.

R. Asher Weiss⁶¹ and R. Wozner⁶² allow the removal of sexual organs in a case of a pseudo-hermaphrodite whose gender is determined, though other authorities, such as R. Bleich, only permit the removal of a reproductive organ if it has been proven to be non-functional, and that only in females.

Social Development and the Ambiguous Child

Contemporary studies have shown that gender identification in children is nuanced and complex, and that the genetic sex of a child impacts numerous facets of its developmental and emotional makeup.

Until recently, the normative practice of pediatric surgeons with intersex children was to excise the male-specific organs and tissue, and reconstruct them as females, with sufficient hormone therapy to maintain their female sex characteristics.⁶³ Of late, however, it has been proven that the classical surgical solution has serious detrimental effects in many children, particularly in those who are genetically male (XY). In one of

61. See above.

62. *Responsa Shevet HaLevi, EH* 9:267.

63. Diamond DA, Burns JP, Mitchell C, Lamb, Kersten, Kartashov AI, Retik AB, "Sex Assignment for newborns with ambiguous genitalia and exposure to fetal testosterone: Attitudes and practices of pediatric urologists," *The Journal of Pediatrics*, 148:4 (April 2006), pp. 445-9. This contemporary article notes that, due to the recently published literature describing the potential hazards of improper gender assignment, the possibility of androgen brain imprinting is now more commonly being considered. The predominant assignment in cases of CAH (congenital adrenal hyperplasia), the most common sexual developmental anomaly, remains to the female gender.

the most famous published findings on the subject, the *New England Journal of Medicine* (Jan 22, 2004, pp. 333-341) reported that of 14 genetically male children who received female gender assignment, 8 declared themselves male upon maturation, and all 14 displayed attitudes and interests that were typical of males. The article concludes that "routine assignment of genetic males to female sex because of severe phallic inadequacy can result in unpredictable sexual identification." A number of similar studies reached the same conclusion.⁶⁴

It has become clear that there is a very significant role played by endogenous (innate) hormones, which are the product of the fetus's naturally occurring genotype (genetic code, XX or XY) and present in the womb, in the development of a child in-utero.⁶⁵ Though social and environmental factors are significant post-partum, they are not nearly as influential in the sex differentiation of the human brain as naturally occurring sex hormones.⁶⁶

64. Reiner WG, Kropp BP. "A 7-year experience of genetic males with severe phallic inadequacy assigned female," *Journal of Urology*, 172 (Dec 2004), pp. 2395-8 ("discussion 2398", 2004 Dec). They, too, conclude that "Those reared female have a realistic likelihood of recognizing male sexual identity and converting to male." Additionally, a study in the *European Journal of Pediatrics* (Volume 154, Issue 9, 1995, Pages 708-716) entitled "The quality of life in adult female patients with congenital adrenal hyperplasia: A comprehensive study of the impact of genital malformations and chronic disease on female patients life" describes that, while initially the quality of life is acceptable for intersex children who undergo surgical treatment, "problems regarding partnership and sexuality are present and might become more pronounced in later life." See also the discussion in *The Lancet* in April 12 (#9365) and July 19 (#9379), 2003 regarding the drawbacks to reassignment surgery to female in the area of sexuality.

65. Federman DD, "Three facets of sexual differentiation," *New England Journal of Medicine*, 350;4 (Jan 2004), p.323-4. See also Phoenix CH, Goy RW, Resko JA, "Psychosexual differentiation as a function of androgenic stimulation," In: Diamond M, ed. *Perspectives in Reproduction and Sexual Behavior*. Bloomington: Indiana Press, 1968: 33-49.

66. Kula K, Slowikowska – Hilczer J., "Sexual differentiation of the human brain," *Przegl Lek* (Article in Polish), 200; 57(1): 41-4. See also Mittwoch U,

The developmental issues faced by inappropriately categorized intersex children often results in severe social hardships throughout the child's life. A recent book, *Intersex and Identity: The Contested Self*,⁶⁷ portrays the immense social trauma that children with dual or ambiguous genitalia undergo as part of their ambiguous gender identity. Thus, particularly in these sensitive cases, the appropriate medical procedures must be conducted with the utmost concern for the affected patients and the lifelong ramifications of their treatment. In the future the halachic community may therefore decide to revisit treatment of intersex patients, in light of the published literature available chronicling the possible emotional and psychological trauma of improper gender assignment.⁶⁸

The issue in question is particularly significant in light of the possible tension between the halachic and medical/scientific norms. This tension is manifest in two distinct points alluded to in this paper:

- 1) Halacha insists on precedence. However, often the precedence is only true due to the means available at that time. The pre-existing opinion, therefore, may have been formulated based on inaccurate or incomplete information. In the case of ambiguous genitalia, we now have additional and more specific means of determining gender; can these methods be utilized even though they were unavailable to Rambam and other early scholars, or are their criteria exclusionary?⁶⁹

"Genetics of sex determination: Exceptions that prove the rule," *Molecular Genetics and Metabolism* 71, 405 – 410(2000).

67. Sharon E. Preves, Rutgers University Press.

68. As mentioned earlier (NYT magazine article), there is no unanimous agreement as to what the best care for these children would be. This paper merely seeks to find halachic flexibility for doctors to treat these children as they see fit.

69. See Dr. Edward Reichman, "Don't Pull the Plug on Brain Death Just Yet" (*Tradition* 38:4, 2004, pp. 63-4) where he eloquently states: "In the field

2) Halacha is concerned with official designation of status. Once the child has been properly categorized, the different possible resolutions may be discussed *for that particular species*. Medical scientists, however, do not concern themselves at all with the proper designation of the child, but rather what the most useful treatment for him or her would be. The gender classifications are only significant inasmuch as they help ascertain the best medical course of action for these patients.

DNA Testing: A New Frontier for Determination

As mentioned above, there is strong evidence correlating the genetic gender of intersex children with their ultimate behavior patterns and sexual identification. As such, perhaps DNA testing could be used in these cases to determine the most appropriate means of treatment for these children. The DNA testing could be utilized in one of three ways:

- 1) DNA testing can determine the sex of the child, allowing for proper gender determination and, ultimately, the performance of the requisite surgery.⁷⁰
- 2) DNA testing can be used as a diagnostic tool to determine the proper gender for which reconstructive surgery should be performed. The DNA will not identify the child's gender, but rather provide a guide for the surgery – which will impact the child's sex determination

of contemporary medical halacha, it is not only preferable, but mandatory, to reevaluate the state of medical science when practically applying any legal decisions of the past. Medicine is an evolving science, and our understanding of the human body is continually expanding...Had the authorities...been presented with the current medical literature, [would they] have decided differently [?]"

70. This is a logical possibility based on the information presented. It should be noted that R. Waldenberg (and many others) believes that genetic testing in these cases is not halachically acceptable.

(as per R. Waldenberg).⁷¹

- a. Hermaphrodites: The DNA could be a guide for the surgeons.
- b. Pseudo-Hermaphrodites: Using the “broad definition” of investigation suggested by Dr. Steinberg, it would be logical that DNA testing should be used as a means of determination (especially since R. Asher Weiss does allow it as a tool of confirmation).
- 3) The resolution of the intersex child’s status of *androgynous* is impossible; DNA testing, however, can be used to determine at least the surgical course to allow the child to live an anatomically (if not halachically) normal life and prevent emotional and psychological issues.⁷²

The plausibility of halachic allowance of DNA evidence has been discussed in a number of different contexts. In an article in *Techumin* (#21, p.121) R. Wozner (along with R. Karelitz and R. Moshe Klein) designates the areas where DNA evidence is acceptable. His position is that, generally speaking, DNA evidence is acceptable in situations where there is no counter-pressure to its ability to conclusively prove certain facts. For example, whereas it is accepted for *aveilut* and *kevurah*, and in certain situations for *yerusha* and even to free *agunot*, it is not in *mamzeirut* (because we try not to assign the status of *mamzeirut* in general) or *harsha'a* (because there is a specific requirement to have two individuals as witnesses). The acceptability of DNA and HLA testing in determining

71. There is little practical difference between the first two options. They differ only as to whether the DNA testing is what *establishes* gender in the first place, or is merely the *rationale* for a particular surgery, with the surgery itself being decisive in regards to the sex. It should be noted that R. Waldenberg allows the doctors to perform the surgery that *they* feel is best for the child, making this option a rational extension of his argument.

72. Here we can recall R. Eliyashiv’s position that there are differing types of *androgynous*, including those who are closer to males and those more similar to females (stated in regards to *yichud*).

paternity is discussed in a number of articles,⁷³ as is its utility in determining victims of the World Trade Center Bombing.

The question that must be asked here is, would the traditional opinions alter their positions had they been aware of today's medical knowledge? It is reasonable to suggest that Rambam's criteria for determining gender (i.e. anatomically, as supported by R. Waldenberg, R. Asher Weiss, and R. Bleich) was a result of the knowledge that he possessed at that time. Rambam was certainly not aware of molecular genetics and DNA typing, and we have no way of determining how, or if, his position would be altered if he did. The allowance of DNA testing in all cases of intersex children, both hermaphrodites and pseudo-hermaphrodites, would not only be halachically reasonable, based on the aforementioned sources, but also of great utility to the children whose medical situations require precise, sensitive and understanding care. However, based on the halachic opinions discussed herein, it would not be recommended to change the anatomical identity from the genetically established gender, particularly from a genetic male to an anatomical female, as that process involves the halachic problems mentioned above.⁷⁴

Conclusion

Over the course of the paper we have sought to provide a broad overview of the scientific and halachic issues at play in dealing with the question of intersex children. Like many of the emerging bioethical issues of our day, the application of traditional halachic norms to today's rapidly advancing

73. Steinberg, Avraham; "Establishing Paternity," *Journal of Halacha and Contemporary Society* #27 (Spring 1994), pp. 69-84; Haperin, R. Mordechai, "Kevi'at Avhut B'emtzaut Ma'arechet Te'um Harekamot Hamerkazit (HLA)," *Techumin* #4 and *Assiah* October 1982 pp. 6-19. For more on inheritance, see Ben Yaakov, R. Tzvi Yehudah, "Kviat Yoresh al smach bedikat DNA," *Techumin* #22, pp. 412 - 426.

74. Most notably *sirus*, castration.

medical technology is complicated and nuanced, requiring a comprehensive and complete understanding of both the scientific procedures as well as the spectrum of halachic assumptions and practices.

Regarding our issue in particular, the recent published scientific data confirming both the inaccuracy of conventional treatments and the serious psychological distress that mistreatment of intersex children causes, may inspire contemporary *poskim* to reevaluate the halachic designations of children with ambiguous genitalia as well as the possible halachic solutions to their problem. That is not to say that halachic views should be changed, but rather that the complex issue, at the very least, warrants another look in light of the published findings. A more flexible view of the halachic classification of pseudo-hermaphrodites may be achieved by utilizing a "complete" anatomical view with DNA testing. Further, surgical procedures may be a halachically feasible treatment, particularly in light of the opinion of R. Waldenberg and the proven social anguish and alienation faced by these children in untreated or mistreated situations. Regardless of the conclusions reached, this is clearly an important, evolving issue.

Contemporary Wedding Trend or Pagan Rite? Umbrella *Schtick* and Maypoles

Rabbi Gamliel Shmalo and Ms. Jackie Fast

I. Introduction

Any observer would agree that Jewish weddings are different from Gentile weddings in their multitude of unique customs, from the *badeken* to the *chuppah* to the *sheva brachot*, and in their unique spirit of the mitzvah of *simchat chatan v'kallah*. Nevertheless, since both Gentiles and Jews, across centuries and cultures, perform weddings in a similar manner, they have been recognized by halacha as high-risk locations for ritual assimilation. The Ashkenazic custom to perform the *chuppah* only outdoors has been attributed to a desire to distance the Jewish ceremony from those performed under the roof of a church.¹ Other customs seem to be shared without much protest, if any, from the halacha: from the white gown of the bride, to the practice of walking down the aisle, to the idea that the cake may be cut with much fanfare. This article will consider one custom that has become quite common at Orthodox Jewish weddings in the past two decades: the umbrella *schtick*, or maypole dance. Until now, this trend has received almost no attention, despite its questionability in light of the prohibition of *chukat akum*.

1. See *Teshuvot Chatam Sofer* 98, brought in *Pitchei Teshuvah Even HaEzer* 61:12; and see *Teshuvot Yehudah Ya'aleh I, Orach Chaim* 38.

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It may seem strange to suggest that a very popular – and uniquely Jewish – wedding custom, found at so many weddings of halachically-observant Jews, may potentially pose a problem. There are two unusual aspects to this case which may have allowed it to elude the attention of many rabbis for years. For one, many rabbis aren't familiar with the umbrella dance because they have never seen the dancing that takes place on the women's side of the *mechitzah*. Additionally, most Jews are not aware of maypoles in their contemporary sense, let alone of their pagan connotations.

II: The Umbrella Dance

Those who have never seen the dancing on the women's side may be unfamiliar with the "umbrella dance". Much as juggling has become a standard form of wedding *schtrick*, the *kallah*'s umbrella dance is an ever-present fixture of today's wedding entertainment. In this dance, the participants hand the *kallah* a lacy umbrella upon which many streamers or ribbons have been attached along its edge. The *kallah* stands up, holding the umbrella, and the guests each take hold of one streamer. Then they begin dancing around in a circle, leaving the *kallah* with the choice of either rotating the umbrella as the crowd revolves or getting tangled up in the streamers as they knot the pole in maypole fashion. In common parlance, many wedding *gemachim* actually refer to the umbrellas as "maypoles," and the visual similarity between this dance and actual contemporary maypole dances is unmistakable. At first glance, the obvious conclusion is that the former is a Jewish imitation of the latter.

Nevertheless, the origin of this relatively young Jewish custom is not at all clear. Extensive research of worldwide wedding customs has not found in Western wedding traditions any trace of dancing with umbrella maypoles. It seems most probable that Jews invented this trend, and fairly recently.

According to the wedding photographers consulted for this

article, umbrella dances at Jewish weddings were virtually never seen in the 1970's, and they were uncommon in most communities through the 1980's.² Then, sometime during the 1990's, all varieties of *shtick* at weddings were embellished and standardized to some degree, and at some point in the mid-1990's, the umbrella dance attained its status of near-ubiquity at Orthodox weddings, especially in Jewish population centers. According to one New Jersey-based wedding photographer, "Every single wedding I do, bar none, has the umbrella dance."³

Because they are similar to the springtime celebration of maypole dancing, umbrella dances are a potential violation of the prohibition of *chukat akum*. That judgment will hinge on the halachic status of the Gentile maypole itself, and on the Jewish dance's relationship to the Gentile analog.

III: A brief history of maypoles – are they pagan?

Maypoles are a traditional springtime celebration in virtually all regions that historically were agrarian societies under Germanic pagan influences,⁴ ranging from "the Pyrenees to Sweden to Russia" according to expert Dr. Ronald Hutton of the University of Bristol.⁵ In Germanic paganism, tree worship was common, and therefore many speculate that the maypole was a form of worship of a major tree-god known in Scandinavia as Attis,⁶ who was commonly represented as a tree.⁷ This speculation assumes that the maypole is associated with other known fertility cults surrounding this tree-god, and

2. Jerry Meyer Studios, New York, personal correspondence.

3. Aryeh Joseph of Simchavision, Lakewood, NJ, personal correspondence.

4. Dr. Ronald Hutton, personal correspondence.

5. Hutton, Ronald. *Stations of the Sun: A History of the Ritual Year in Britain*. Oxford University Press; London, 1997. p. 233.

6. Jones, Prudence. *A History of Pagan Europe*. Routledge, New York, 1997. p.113.

7. Matthews, John. *The Summer Solstice*. Quest Books; Wheaton, IL, 2002. p. 75.

therefore may have begun as a feature of a fertility cult as well. Others speculate that the maypole was a form of worship of the Roman goddess Flora, whose festivals were held on the first of May, and other equivalent fertility goddesses. It is generally assumed that the ancient pagan maypole is a development of one, or perhaps both, of these traditions of tree-worship.

Some speculate that the Torah's warnings against *Asherah* trees are related to the tree-worship that developed into maypoles. In Canaanite paganism, *Asherah* was the most respected fertility goddess, and her rites were celebrated through tree-worship and the erection of symbolic ritual poles. Excavated remains of a similar pole used in dancing rites have been found near Koblenz, Germany. Experts presume that the pole was meant to represent a tree, and Carbon-14 dating indicates that the site might be as old as the 6th century BCE.⁸ However, no concrete evidence links the traditions of Canaanite paganism with the Roman and Germanic traditions, and thus the connection is merely speculative.

The first real evidence of the maypole celebration as we know it dates from the medieval era, and the dancers involved were Christian. The first references to it are in the fourteenth century, although it is clear that maypoles themselves are much older.⁹ According to a surviving record from the 1430's, one English town "Provided a platform and ribbons" for their long-established traditional maypole.¹⁰ Other maypole-related traditions in England included the designation of a "May Queen," a young woman who would be selected to lead the dancing. She would be dressed up in white to symbolize purity and fertility, and some sources call her the "Bride of Spring."¹¹

8. Jones, p. 81-2.

9. Hutton, personal correspondence.

10. Hutton, p.226.

11. Matthews, p.79.

In these Christian towns, the celebration was not overtly pagan – after all, the celebrants didn't believe in pagan pantheism. Nevertheless, the associations of the maypole celebration with springtime fertility were apparent, and the Christian onlookers sometimes looked upon them with displeasure. In an account by Philip Stubbes in the 1580's, maypole revelry is described as immoral to a shocking degree, that "forty-three score maidens, or a hundred [would participate]...and scarcely a third of them would return home undefiled."¹² Puritan observers continued to criticize the licentiousness of unbridled springtime revelry around the maypole. In the sixteenth century, they began to compare the maypole with the idolatrous trees (*Asherot*) mentioned in the Bible and attacked the dancing as a pagan survival.¹³ Prior to the Puritan backlash against maypoles, no Christians had ever before considered the pagan origins of the maypole.¹⁴ In any case, by the 1630's maypoles had attained "a cliché of scandal and titillation alike,"¹⁵ and in 1644, they were banned in all of England and Wales. Despite this, they remained popular in the British Isles as well as the rest of Northern Europe.

Authentic pagan inscriptions do not mention maypoles or similar customs at all, meaning that the evidence for the pagan origin of the maypole is reduced to these medieval Christian writings and general speculation. However, although documented evidence is scant, experts tend to agree nonetheless that the maypole is based on pagan worship, based on the links to tree-worship explained above. With the existing information about the widespread pagan trends of tree-goddess worship and fertility celebrations on the first of May, it is highly likely and widely accepted that maypoles are derived from these rites, even though actual direct evidence is

12. Hutton, p.228. See also Frazer, James, *The Golden Bough*. New York; Touchstone, 1996. p. 142.

13. Matthews, p.74.

14. Hutton, personal correspondence.

15. Hutton, p. 229.

lacking.

It is similarly unclear whether traditional maypoles looked like the maypoles that exist today. Although a few surviving accounts, like the one above, mention ribbons, none of the surviving early illustrations include them, which seems to indicate that for the most part they are a modern addition.¹⁶ This point may have significant consequences, as the umbrella *schtrick* at Jewish weddings hardly resembles the maypoles in the medieval and early-modern illustrations.

To this day, Midsummer and May Day celebrations across the western world include dancing around the maypole; the practice is especially widespread in the areas across Northern Europe where it traditionally existed. The vast majority of countries who include May Day on their list of national holidays celebrate it in a purely secular manner, and the maypole is similarly not affiliated with any religious practice. At least, that is, for most of its modern-day celebrants.

But the religious and symbolic elements of the maypole are far from forgotten. For one thing, in Scandinavia to this day, the maypole is celebrated for its connection to human and agricultural fertility. After dancing around the maypole, young Swedish women sleep with its wreathed tree boughs under their pillows in the wishes of finding a suitor. Experts note that pagan beliefs remained widespread in Scandinavia until the eleventh century, so it is not surprising that the traditional elements of May celebrations have been retained there more strongly than in other regions of Europe, where Christianity was more firmly entrenched several centuries earlier.

In addition to the select regions where Christians continue to carry the fertility symbolisms of the maypole in their folklore, the maypole is also a feature of genuine fertility cults in the modern era practiced by contemporary Wiccans and

16. Hutton, personal correspondence.

neopagans. Although modern-day pagans comprise only a slight minority of contemporary maypole-celebrants, their numbers are quite large. According to a study in 1997, there are about one million practicing neopagans worldwide today.¹⁷ The majority of them practice some reconstructionist form of European pre-Christian paganism, which safely implies that maypoles are a part of their worship. May Day, or “Beltane,” is the second most important day in the pagan calendar, and neopagans consider it to be a special day for goddess worship. Modern-day pagans read vulgar symbolism into the shape of the maypole itself, claiming that all of the symbolic elements of the pagan maypole are a received tradition from the ancient pagans.¹⁸ Although their position is viewed with skepticism by the academic community, neopagan views are widely propagated in nearly all literature available on the subject of maypoles.

IV: Is the umbrella dance *chukat akum*?

The halacha prohibits us from adopting any Gentile custom that has no intuitive utility, since such a custom likely derives from pagan ritual.¹⁹ A custom whose pagan origin has been demonstrated should be beyond discussion. It is therefore clear that dancing deliberately around a tree, or a representation of one such as a maypole, with or without ribbons, would be interdicted by the halacha as an imitation of this pagan fertility rite. Even were the contemporary practice of maypole dancing to be completely secularized, as is today’s Jack-o-Lantern on Halloween, the non-utilitarian nature of the Gentile custom would continue to point to the pagan source and forbid its practice.²⁰

17. See “Covenant of the Goddess,” at www.cog.org.

18. Grimassi, Raven. *Beltane: Springtime Rituals, Lore, and Celebration*. Llewlyn Worldwide; St. Paul, 2001.

19. Ramo, Y.D. 178:1.

20. See Michael J. Broyde, “Thanksgiving at the End of November, A Secular or Religious Holiday? (With an Appendix about Halloween)” http:/

Whether the umbrella *schtick* is itself a form of maypole dancing or not is unclear, and it may be possible to distinguish umbrella dancing from maypoles to the point where the latter can not be considered as the direct source of the former. Although this distinction carries halachic weight and is worth discussing – see the end of this article – it is nonetheless possible to judge the potential halachic permissibility of the umbrella *schtick* dance even if one wishes to accept that the trend developed directly from maypole dancing. The halacha may consider permitting umbrella-dancing around our brides for two basic reasons. Firstly, dancing is not a custom without reason; it is a natural expression of joy. Secondly, when performed around a bride it is a sign of honor and affection.

Based on the opinion of Rabbenu Nissim, Rav Moses Isserles (the Ramo) concluded in his glosses to the *Shulchan Aruch* that any custom of showing respect – even if it might seem analogous to a Gentile custom – is permitted. This is based on the Tosefta in *Shabbat*,²¹ brought in the Talmud *Bavli* in tractates *Avoda Zara*²² and *Sanhedrin*: “One may burn [the garments of Jewish] kings, and this is not ‘the way of the Amorites’.”²³ According to Rabbenu Nissim, the Talmud in *Avoda Zara* concludes that since this is an act of respect (“*chashivuta*”) it is not considered a non-utilitarian *chok*, and is therefore permitted, despite the clear similarity to pagan funeral rites. The Tosefta mentions that Unkelus, the famous proselyte and translator, burned the clothes of Rabban Gamliel upon the latter’s death. One might have suspected that Unkelus had imported this custom from his former culture; but the Talmud records no such protest. Following the Ran, the Ramo applies this ruling to other purposeful Gentile

[/www.tfdixie.com/special/thanksg.htm](http://www.tfdixie.com/special/thanksg.htm). The original article was published without the appendix in *Journal of Halacha and Contemporary Society* 30:42–66 (1995).

21. 8:9.

22. 11a.

23. 52b.

customs, such as the special uniform of the physician.²⁴

Many wedding customs common to Jews and Gentiles can logically be included in this ruling, from marching down the aisle to cutting the cake.²⁵ This principle continues to be applied to new customs that find expression in contemporary Jewish life.

There are many parallel aspects that invite one to consider the pagan maypole and the umbrella *shtick* analogous; indeed, they suggest that the maypole dance influenced the umbrella dance on some level. The central pole, the maidens, the white-clad "Bride of Spring" and visual parallel of the circular dancing – especially with ribbons that knot the pole, but even without – all point to a potentially forbidden analogy. The circumstances of the dance also have considerable commonality: the maypole was and remains a fertility rite. Nevertheless, the opinion of the Ramo would seem to permit the umbrella dance. After all, the dancers hardly consider any pagan connotations or vulgar symbolism. Our celebrants dance *b'tzniut*, without elements of flirtatiousness, and obviously return home safely. The one intention of the dance is to make the bride the center of joyous attention, the focus of the array of ribbons. This is both utilitarian and a sign of honor, and therefore appears to be permitted according to the Ramo.²⁶

One might argue that the opinion of Ramo is not applicable at all to our case. According to the Ramo's source, Rabbenu Nissim, the Talmud concluded that the "honor" test reveals

24. See also *Teshuvot Rivash* 158.

25. Regarding these practices, the widespread custom appears to permit them. A detailed discussion of their permissibility, however, is beyond the scope of this article.

26. One may prefer to say that dancing around the bride serves the function of "rejoicing" her but does not "honor" her per se. However, this distinction does not affect the halachic conclusion that the dance serves an intuitive utilitarian function and therefore stands to be permitted.

whether the custom ever had pagan connotations at all. A custom that the Gentiles performed for honor may then be adopted by Jews. In our case, the maypole was – and remains – a pagan rite, performed not for honor, but for religious reasons; in our hands it is transformed into a dance of celebration and affection. Even if the Ramo permits the adoption of a custom of respect, he may not permit the transformation of a religious custom into a custom of respect.

This reading of the Ramo is valid, and may well exclude the umbrella *schtick* from the Ramo's permissive ruling. There is, however, reason to believe that the leniency of the Ramo *does* apply to the umbrella *schtick*. Another source of the Ramo is the Maharik, brought by Rav Yosef Karo in the *Beit Yoseph*. According to Maharik, a Gentile custom is only prohibited for one of two reasons, which we bring in reverse order. 1) Libertine customs are always forbidden, for obvious reasons; and since the umbrella *schtick* takes place on the women's side of the *mechitzah*, we believe this reason to be irrelevant. 2) Customs with no apparent utility. This second reason is the same one mentioned above, but the particular formulation of the Maharik is worth citing, because it may shed light on our uniquely ambiguous case:

One should not prohibit [an act] as a *chok* unless one of the two conditions is fulfilled. One is a matter whose reason is not evident, as is implied by the term "chok," as it is explained by Rashi and the Ramban in *Parshat Kedoshim*, because since he acts in a way that is bizarre, that has no evident reason other than the fact that they [i.e. the Gentiles] act this way, it definitely appears that he is attracted to them and believes in them; otherwise, why would he act in these nonsensical ways?²⁷

According to this formulation of the Maharik, it seems that for the act to be permitted, the utility of the act must be

27. Maharik, *Shoresh* 88, brought in *Beit Yoseph* Y.D. 178.

evident at the time it is performed by the Jew, and for it to be prohibited it must appear without reason at the time of the action. This would imply both a stringency and a leniency. This formulation may forbid the adoption of an ancient Gentile custom that was once believed to be rational and useful, but that is now believed to be useless. On the other hand, it may permit a Gentile custom that was once “bizarre,” but which has been sufficiently transformed so that the outside observer would recognize the utility of the action done by the Jew. After this transformation, the Jewish actor would not be suspect of mindlessly aping the Gentile, while tacitly testifying to the attractiveness of the Gentile culture. One could compellingly argue that the utility of the umbrella *schtick* is so evident that the pagan connotations are hardly considered, and often remain wholly unnoticed. They would therefore be permitted according to the Maharik. Rav Ovadia Yosef has given a similar reading of the Maharik, and on that basis concluded that one may use the Gregorian calendar, despite its religious origins and connotations.²⁸

It should be noted that the Gr”a of Vilna disagreed with the lenient conclusion of the Ramo. Based on the opinion of Tosafot in *Avoda Zara*, the Gr”a developed stricter criteria for permitting questionable customs. According to Tosafot and the Gr”a, the halacha must be understood in light of the Talmud in *Sanhedrin*. In *Avoda Zara* the Talmud is first concerned to distinguish between customs that are non-utilitarian (and therefore suspect of Gentile origin) and customs that are purposeful. But even after we establish that the custom has intuitive utility, such as giving honor, the Talmud in *Sanhedrin* demands that the Jewish bona fides be established by some relevant biblical verse. Only after such a verse is found can we say that even reasonable customs are authentically Jewish and that “we did not learn it from

28. See *Yabia Omer* III Y.D. 9.

them.”²⁹

These stricter criteria of the Gr”a are the reason for his forbidding the decoration of synagogues with vegetation on Shavuot. This ruling is repeated by the *Chochmat Adam*,³⁰ who often follows the rulings of the Gr”a, and is maintained to this day by followers of the Gr”a, particularly in Israel. Such decoration is both utilitarian and based on a Midrash, but since the Gr”a found no biblical support for the custom, he could not permit it, in light of the Gentile similarities.

For the Gr”a then, our tentative conclusion that the umbrella *schtick* serves an intuitive purpose of giving honor and pleasing the *kallah* only takes us half the way. In order to permit this custom we would still need to find a biblical support. As Rav Henkin points out, this support can be somewhat loose, indicating only that ribbons and umbrellas and circle dances are in the spirit of celebration and honor. Even so, we are not fully convinced that such verses are forthcoming, and we leave it to more creative experts in *Tanach* to try to find them.

Even if the Gr”a might forbid the umbrella *schtick*, the mainstream opinion seems to be that of the Ramo, and based on our reading of the Maharik above, we can rely on this opinion to honor our brides with umbrellas, just as so many rely on him to decorate their synagogues with vegetation. There is certainly room for individuals to be strict with themselves like the Gr”a, or perhaps according to a different reading of the Ramo, but one must always act in a manner that is sensitive to the bride and her *simcha*. Clearly this is a matter in which community standards should be set by each *Moreh D’Atra*.

Even according to the strict opinion of the Gr”a, the

29. See *Tosafot A.Z.* 11a “*V’ei Chuka Hi*” and the glosses of the Gr”a on *Y.D.* 178:7.

30. *Chochmat Adam* 89.

umbrella *shtick* may be different enough from the Gentile maypole to give it an independent, and permissible, identity. Several distinctions should be noted.

Firstly, the timing of the customs is disparate. The Gentile custom was generally agricultural and therefore celebrated in the spring or at the midsummer solstice, and it was also outside the context of a wedding. In contrast, the Jewish umbrella *shtick* can be found at any time of the year and is reserved for weddings alone.

Secondly, the dances have completely opposite foci. In the case of the Gentile ritual, the focus is on the tree. Even in those descriptions that describe the appointment of a "May Queen," she was always secondary to the main object of the ritual, the maypole itself. Here, the contrast could not be greater, since the focus of the Jewish custom is entirely on the bride. Her role is not to draw attention to the umbrella; rather the entire purpose of the umbrella is to draw more attention to her.

Finally, the umbrella dance alters all of the visual motifs of the maypole dance, removing those that would peg it as pagan. The Gentile agricultural fertility rite always used a garlanded pole in representation of a tree. The symbol was one of organic growth from the earth. Tree symbolism in the umbrella *shtick* dance is conspicuously lacking. In contrast, the contemporary Jewish custom uses only an umbrella and the main symbol, if any can seriously be ascribed to an article of *shtick*, is that of the umbrella's canopy. This is a symbol that might recall the *chuppah*, or that possibly represents the protective wings of the Divine Presence. Even if its design is purely entertaining and lacks any symbolism, at the very least it does *not* evoke the symbolic shape of the tree or its representations of organic growth and fertility. In addition, the fact that the umbrella *shtick* copies the ribbons of the maypole is not problematic, because the ribbons may not be connected to the pagan worship at all, as discussed above. The pagan symbols of ancient and modern maypoles are downplayed to a degree of non-existence.

The importance of these distinctions in light of the umbrella dance's striking parallels to maypole dancing enumerated above must be weighed by contemporary *poskim*. We suggest, however, that since the *Ramo* would most likely permit the umbrella *schtick* regardless of its similarities to maypoles for reasons of *kavod*, a mere suspicion that the *Gr"a* might have found the Jewish trend analogous to the Gentile custom may perhaps not deter us from rejoicing our brides in this manner.

Reading Options on Shabbat

Rabbi Howard D. Apfel

If you restrain your foot because it is the Sabbath; refrain from accomplishing your own needs on My holy day; if you proclaim the Sabbath a delight, and the holy [day] of *Hashem* honored, and you honor it by not engaging in your own affairs, from seeking your own needs or discussing the forbidden—then you will delight in *Hashem*, and I will mount you astride the heights of the world.¹

Chazal saw in the words of the prophet Isaiah the ultimate expression of the biblical command to guard the Sabbath day.² The Gemara (*Shabbat* 113a) underscored four major manifestations of that expression: “*v'chibadeto*” (you honor it) through wearing special attire, “*me'asot derachecha*” (literally, abstaining from doing your own affairs) interpreted as, your

1. Isaiah 58:13-14, Stone edition translation.

2. In his classic essay “*Kevod ve'Oneg Shabbat*” in *Shiurim Le'Zecher Avi Mori*, Rav Yosef Dov Soloveitchik demonstrates how the mitzvot of *kevod ve'oneg* Shabbat (respect and pleasure of Shabbat) serve as a completion to the fulfillment of the biblical commandments of *shamur ve'zachor et yom hashabbat le'kadsho* (“Guard the Sabbath day to sanctify it.”) As will be discussed later in the text, the underlying thrust of these mitzvot is to assure a *shvita ha'nikeret* (a clearly recognizable distinction between Shabbat and the other six days of the week). The Rav further describes how towards this end, the rabbinic commandments involve both passive (refraining from even non-*melacha* weekday activities) and active (*kavod ve'oneg*) components, parallel to the passive (prohibition from forbidden *melacha*) and active (*kiddush ve'havdala*) components of the biblical commands.

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way of walking should be different, “*mimtzo cheftzecha*” (avoiding the seeking of your own needs) where specifically preparing for your needs is forbidden but *cheftzei shamaim* (Heaven’s needs) are permitted, and finally, “*vedaber davar*” (discussing the forbidden) where inappropriate discussions are prohibited, but mere thoughts are allowed.³ The common denominator for all four facets is a determined effort by our rabbis (*Chazal*) to guarantee a “*shvita hanikeret*” (a “recognizable rest”) that distinguishes the Sabbath day from the other days of the week.⁴

Within this general framework, *Chazal* also instituted weighty, yet at times somewhat neglected, Shabbat reading guidelines designed to eliminate certain items that may contravene the holy spirit of the day. This restriction on reading material includes not only the obvious, such as business-related items (payment receipts, accounting records, bills and the like) but also according to many opinions, personal correspondence, newspapers and general literature, and according to some, even secular subject matter such as scientific journals and school textbooks. This paper will attempt to examine the origins and contemporary parameters of these enactments.

3. The *issur* of *mimtzo cheftzecha* is defined as an action on Shabbat that is in some way related to, or preparatory for, weekday pursuits that are themselves prohibited on Shabbat. It includes all business-related activities. *Daber davar* is defined similarly, albeit specifically referring to verbal expressions of such actions.

4. See Rambam (*Hilchot Shabbat* 24:12-13) where he explains the rationale behind the halacha of *muktza* as facilitating a *shvita ha'nikeret*, and Ramban (*Vayikra* 23:24) who espouses a similar notion. Both *rishonim* allude to this being on a biblical level. See also the halacha *le'maaseh* application of this idea in a Response by the Chatam Sofer (*Sh'ut Chatam Sofer Hashmatot* #195). Finally, see the Gemara *Shabbat* (69b) where a situation arises in which the prohibition from forbidden *melacha* is necessary on all seven days of the week, thereby discounting the *issur melacha* per se as a *shvita ha'nikeret*. Nevertheless, the Gemara stresses, a *shvita ha'nikeret* must still be accomplished through some other means.

Sources and Rationale of the Law

To a large degree the halachic restrictions on Shabbat reading are rooted in the rabbinic enactment (*gezera de'rabbanan*) against reading "common documents" (*shitrei hedyotot*). This *gezera* is found in the Gemara *Shabbat* in two contexts. First, the Mishnah (*Shabbat* 115a) describes the striking halacha that at times, even certain types of *kitvei hakodesh* (Holy Scriptures) may not be read on Shabbat.⁵ The accepted reason for this surprising prohibition (already noted in the Mishnah itself) is to prevent an individual from slacking off from attending important public Torah discourses taking place in the communal study hall.⁶ Later, the Gemara notes that aside from that reason, another possible reason for outlawing the reading of *kitvei hakodesh* was to strengthen the established prohibition against *shitrei hedyotot*.⁷ Although this certainly is a minority view, it is quite revealing that the *gezera* of *shitrei hedyotot* was considered so significant that some held that other *gezerot* were actually introduced to support it.

5. Rashi points out that this prohibition was limited specifically to *Ketuvim*, and did not include *Chumash* or *Neviim*, which were already established parts of the Shabbat synagogue service.

6. The prohibition was therefore limited to the time period for those lectures, which was generally in the morning before the morning Shabbat meal. Both Rashi and Meiri explain that *ketuvim* are riveting works (see Mishnah *Yoma* 1:6) that the reader is drawn to and hence might come to neglect the more useful, practical study going on in the study hall. It was especially important that those preoccupied with making a living during the week be available for the communal Shabbat learning. Alternatively, the *Maggid Mishneh* (*Hilchot Shabbat* 23:19) suggested that *Chazal* aimed simply to bolster overall attendance at the lecture, on the assumption that a large crowd itself would serve as a means of providing greater inspiration for learning.

7. This is the view attributed in the Gemara (*Shabbat* 116b) to R. Nechemia. The *rishonim* explain that by promoting the notion that if even certain *kitvei hakodesh* are not allowable, then certainly, actual *shitrei hedyotot* must not be. *Tosafot* (116b, "ve'kol she'ken") point out that strengthening the *gezera* of *shitrei hedyotot* is also the reason suggested by the Talmud *Yerushalmi*.

Furthermore, while the *Baal Ha'Meor*⁸ and others⁹ point out that although the *gezera* specifically on *kitvei hakodesh* no longer applied,¹⁰ nevertheless, the general message that Shabbat should be reserved for purely spiritual pursuits (including what one chooses to read) remained,¹¹ as will be developed further, below.

The *gezera* on *shitrei hedyotot* is noted in a second context as well. The Mishnah (*Shabbat* 148b) maintains that in a case where a person is preparing a *seuda* (festive meal) for a specific number of guests and hence wishes to make sure that he has an equal number of desserts, he may count them off by heart but may not read off a written list he had prepared prior to Shabbat. The Gemara (149a) offers two possible reasons for this prohibition. According to one opinion (Rav Bibi) *Chazal* were concerned that if one is reading the prepared list they might come to erase from it.¹² Abaye, on the other hand, understood the objective to be again to prevent one from coming to read from *shitrei hedyotot*.¹³ Importantly, in either case, as is obvious from the ensuing talmudic discussion, no one argued over the validity of the basic prohibition against reading *shitrei hedyotot*. Nor was there any contention with the broadening of that prohibition to include seemingly innocuous activity, such as reading a guest list. In summary, one gets the

8. *Shabbat* 43a in the pages of the *Rif*.

9. For example see *Meiri* 116b, *Ran* 43b in pages of the *Rif* and *Beit Yosef* (*Orach Chaim* #307).

10. Since we no longer have a set *beit midrash* (study hall) time as they did at the time of the original *gezera*.

11. As the *Baal Ha'Meor* (*ibid*) adds, “ain lanu hayom limnoa atzemenu likro bekol *kitvei hakodesh*, u’vekol sefer she yesh bo serach kedusha, kol hayom kulo” (we are not to hold ourselves back for the entire day from any of the Holy Writings nor from any book that has a degree of holiness).

12. *Rashi* and others explain that should the *baal haseuda* (meal organizer) discover an insufficient number of desserts, he may come to erase some names to avoid the embarrassment of having them called for the meal.

13. The guest/dessert list was considered analogous to other commonly used weekday documents.

impression from the talmudic sources that the *gezera of shitrei hedyotot* is a significant one, universally accepted, and evidently open to expansion.¹⁴ In fact, the *issur* to read *shitrei hedyotot*, as well as the expansion of it, was accepted as normative by all commenting *rishonim*.¹⁵

Defining *Shitrei Hedyotot*

Obviously, to begin delineating the full extent of this *takana* (edict), we first need to understand exactly what the expression *shitrei hedyotot* means. Unfortunately, its precise definition is somewhat unclear. The word "*shitrei*" can be defined simply as "documents" and in many talmudic contexts it clearly connotes an official (i.e. *beit din*-approved) or business-related document. On the other hand, "*hedyotot*" is a relative term used at times to contrast with *hekadesh* (sanctified

14. The issue of *ain gozrin gezera le'gezera* (the limitation on *Chazal* to enact *gezerot* only on biblical commands and not rabbinic ones) is discussed in our context by several *rishonim*. For example, the *Ritva* comments that because the erasure here is not for the purpose of writing, it is only a *melacha she'aina tzricha le'gufa*, and therefore only rabbinically proscribed. Thus, even according to *Rav Bibi* (who understood the *gezera* to be lest one come to erase) it appears to be a case of *Chazal* making a *gezera le'gezera*. The *Ritva* explains however, that since it is "*shikiach*" (i.e. a very likely consequence) the rabbis were empowered to authorize the *gezera* nevertheless. The *gezera* lest one come to read *shitrei hedyotot* is also not a problem since it is considered by the *Ritva* as "*kulo chada gezera he'*" all part of a single broad *gezera*.

15. As will be discussed later, there certainly are differences among the *rishonim* as to the extent of the expansions. For example, unlike many other *rishonim*, *R''i* and *Rabbeinu Tam* (*Tosafot Shabbat* 116b, "Ve'kol she'ken") did not extend the ban on reading material to include routine social correspondence between individuals. *Tosafot* explain that letters that had been previously read no longer constitute going after your own needs, and new letters whose content is unknown are allowed because they might contain critical life-saving information. Similarly, the *Ritva* notes that he heard in the name of *Ra'ah* that letters arriving on Shabbat itself were permissible because they perhaps have life-saving information or involve issues of public safety. He adds the additional concern that if the person is not allowed to read the letter, he may worry about it throughout Shabbat.

objects)¹⁶ or to convey a sense of “commoners” or “private people.” In that sense, perhaps here it can be understood to allude to any secular or non-Torah related documents.

The *rishonim* appear to be divided between these two divergent approaches. Rashi,¹⁷ Tosafot,¹⁸ Ramban,¹⁹ Rashba²⁰ and Rosh²¹ understood *shitrei hedyotot* to refer specifically to business-related documents. In contrast, the *Geonim*,²² Rambam,²³ Meiri²⁴ and Ritva²⁵ included “*iggerot shalom*” (general correspondence) under the same expression, implying that it refers to secular reading material in general. At first glance, the debate appears to become somewhat less critical (if not moot), when one notes that even those *rishonim* who limited the definition of the phrase “*shitrei hedyotot*” to purely business-related issues, nevertheless acknowledged that the talmudic sources definitely expanded the prohibition to the other areas as well.²⁶ Nevertheless, we will attempt to

16. See for example *Bava Kama* (37b).

17. Actually Rashi's definition is somewhat controversial. In one place (*Shabbat* 116b) Rashi defines it as “*kagon shell cheshbonot oh iggerot hashluchot limtzoh chefetz*” (like accounting documents or correspondence sent to find an item) suggesting he did not limit the phrase to business documents. However, in another place (*Shabbat* 149a) he comments that *shitrei hedyotot* specifically means “*shell mekach u'memkar*” (business-related documents) Tosafot (*Shabbat* 116b “*Ve'kol she'ken*”) point out that Rashi apparently retracted the former position in favor of the latter. Tosafot base this on an extant emendation of Rashi's comments by hand. Others explain that each version of Rashi can be properly understood as written in context. See Netziv, *Meromei Sadeh Shabbat* 116b.

18. *Shabbat* 116b “*Ve'kol she'ken*”

19. See *Sh'ut Rashba Chelek* 7, #346 and *Chidushei Ramban Shabbat* 151a.

20. *Sh'ut Rashba Chelek* 7, #346 and *Chidushei Rashba Shabbat* 149a.

21. *Shabbat*, 23:1.

22. Brought by Ritva *Shabbat* 149a.

23. *Perush haMishnah Shabbat* 23 and *Mishneh Torah Hilchot Shabbat* 23:19; see in particular comments of the *Maggid Mishneh*.

24. *Shabbat* 166b.

25. *Shabbat* 149a.

26. For example see Rosh, Rashba and Tosafot, op cit. See however

demonstrate that the particular definition one accepts at the onset does make a practical halachic difference. To some degree the respective definitions reflect the divergent views of the various *rishonim* as to the underlying objective of the original *gezera*. This will then ultimately play a role in delineating the full normative scope of the *takana*.

To best appreciate this, we need first to examine in detail the underlying reasons suggested by the *rishonim* for the original *gezera*. Once again, two basic approaches emerge that parallel the definitions noted above. Those *rishonim* who limited the definition of *shitrei hedyotot* to business documents only, understood the *gezera* to be no more than an application of the already well-established *issur* of *mimtzoh cheftzecha*.²⁷ In other

reference 15 above for an exception to this generalization.

27. See reference 3 above. It logically follows then that all the rules pertaining to that *issur* such as making exceptions by *cheftzei shamaim* and *hirhurim* should apply as well. Thus, some authorities (see *Darchei Moshe Tur Orach Chaim* 307:7) allowed the reading of correspondence that were known to contain *divrei Torah* (words of Torah, i.e. *cheftzei shamaim*). Furthermore, see *Hagahot Maimoniyot* (*Hilchot Shabbat* 23:9) citing Rabbenu Baruch of Magentza who had suggested allowing letters delivered on Shabbat itself and held by a non-Jew to be read by a Jew silently on the basis of *hirhurim mutarim*. *Beit Yosef* (307, "ve'Kol") notes that the *Mordechai* had earlier espoused the same position. Nevertheless, most *rishonim*, for various reasons, conclude otherwise. They maintain that despite being part of the general *issur* of *mimtzoh cheftzecha*, the principle of *hirhurim mutarim* does not apply in this particular context of reading written material. For example see in the same *Beit Yosef* (citing *Shibolei ha'Leket*) and the *Mishnah Berurah* (307:53, citing the *Levush*) that it is unlikely that individuals will merely peruse actual business documents passively without getting more involved in the business dealing itself. As we will see, non-business related correspondence may be different in this regard. Alternatively, the *Meiri* explains (*Shabbat* 113b) that the *heter* of *hirhurim mutarim* can be understood on the basis of the principle "*lo nitna ha'torah le'malachei hasharet*" (as mere mortals [unlike angels] we are not expected to completely control our thoughts). Presumably, this reasoning would not apply to reading (even silently) written material. See also *She'elat Yavetz* (#162) and the comments of Rav Shlomo Zalman Auerbach in *Shulchan Shlomo* (307:12) quoting *Shaarei Teshuva* 316:3, who also contend that reading from forbidden written material is forbidden. Finally, incorporating the *gezera* of *shitrei hedyotot*

words, reading such documents is in effect an example of a preparatory action for weekday activities that are forbidden on Shabbat. Any expansion of this *gezera* to other neutral types of documents is an ancillary *gezera* intended purely to prevent an individual from exchanging those “neutral” documents for business related ones.²⁸

In contrast, the second group of *rishonim* noted above suggested a related but clearly different underlying agenda consistent with their wider definition of the phrase *shitrei hedyotot*. For example, in the *Mishneh Torah* (*Shabbat* 23:17), the Rambam explains the reason that *shitrei hedyotot* are not to be read is lest a person treat the day as any other day of the week and ultimately come to erase. The Meiri reiterates that reason as well, but adds further that these documents are outlawed because “ain bahem toelet kriyah velo shum tzorech yom tov oh Shabbat” (they have absolutely no use whatsoever for Yom Tov or Shabbat) thus rendering them *muktza*. In a similar vein, the Ritva expounds that it is forbidden to peruse such documents (*shitrei hedyotot*) “u’lehotzih shaat Shabbat” (and squander even a moment of Shabbat time).²⁹ What these latter explanations seem to share is an understanding that this *gezera* is more than just another example of the well-known *takana* of *mimtzoh*

within the broad *issur* of *mimtzoh cheftzecha* may also help explain the adding on of additional *gezerot* to a rabbinic enactment. It is well established that *dinim derabbanan* (rabbinic laws) *al pi kabala* (rooted in *Tanach*) are considered in some respects *ke’ain deoraita* (similar to biblical halachot). See *Peticha ha’kollelet* by the author of the *Pri Megadim* (*Orach Chaim*, #18-19) and *Shmirat Shabbat Ke’hilcheta* (Chapter 29).

28. See reference 26 above. As will be discussed later, this should limit any expansion of the *gezera* to only those documents that reasonably could be exchanged for business ones.

29. Not surprisingly, unlike those *rishonim* who related the *gezera* to *mimtzoh cheftzech* and thus considered *hirhurim mutarim* as a relevant issue for discussion, these *rishonim* did not. Ritva for example, had no inclination to differentiate between silent or audible reading, and therefore on his own and also quoting Rabbeinu Yona, stated that to even look at *shitrei hedyotot* is prohibited since even just pondering them takes away from irreplaceable Shabbat time.

cheftzecha, but rather an entirely independent *gezera* designed in its own unique way to protect the sanctity of the day. This suggestion and its significance will hopefully become more apparent as we explore further.

There is a third *Tannaitic* source that is also relevant to our discussion. Following the discussion of the prohibition of reading from the dessert list, the Gemara³⁰ next quotes a Tosefta (*Shabbat*, 18:1) that maintains that the descriptive writing found "*mitachat ha'tzura u'mitachat diyuknaot*"³¹ (underneath artistic depictions of various scenes) is also not to be read on Shabbat.³² It is somewhat unclear from the Tosefta itself how closely this prohibition relates to the overall *gezera* on *shitrei hedyotot*. As these writings underneath the pictures clearly do not relate in any way to business documents, why should they be prohibited?

Not surprisingly, the two approaches outlined above incorporate this halacha into their respective views accordingly. Rashi³³ and the Rosh,³⁴ (representative of the first approach)³⁵ again relate the ban on these writings directly to a concern lest one come to read *shitrei hedyotot*.³⁶ For them, the

30. *Shabbat* 149a.

31. Rashi (*Shabbat* 149a) explains that *diyuknaot* are pictures of animals or biblical scenes such as David's encounter with Goliath. The Ri (Tosafot 116b "vekol sheken") added that he did not know why they should be permitted even during the week as they constitute "*moshav letzim*" (foolish activities). The Maharsha explains that these stories tend to be lengthy and draw the heart into reading more, taking the person away from valuable Torah learning time.

32. The *diyuknaot* themselves are forbidden to be gazed at even during the week.

33. *Shabbat* 149a.

34. Rosh, op cit.

35. That had limited *shitrei hedyotot* to business documents alone.

36. This seemingly straightforward understanding, however, is somewhat difficult in one regard. Although as already noted (see reference 15), the *Baale Tosafot* did not include regular mail in the expanded *issur* of *shitrei hedyotot*, they did note (in the name of R. Yehuda) that war stories that are

issur to read *shitrei hedyotot* is simply an application of *mimtzo cheftzecha* and nothing more. Therefore, any ban on reading material that does not fit into that category directly, merely reflects a rabbinic concern that it later be confused and exchanged with such documents.³⁷ It follows then, that as long as the reading material did not raise that particular concern, it should be permitted even if it was of a totally secular nature. In fact, it was on this basis that both the Rashba and the Ramban allowed the reading of “*sifrei chochma*” (secular studies) on Shabbat.³⁸

In contrast, the *rishonim* from the second group³⁹ seem to express a very different understanding. For example, in explaining why the descriptive writings in the Tosefta were prohibited, the Meiri made no mention at all of the concern for

written in foreign languages (i.e. not Hebrew) are forbidden to be read, based largely on this Tosefta, presumably for the same reason as Rashi. The Maharsha raises the obvious difficulty as to why Rabbeinu Tam chose to be concerned with these types of writings being exchanged for business documents more than standard correspondence. In response, he mentions only that “*yesh lechalek*” (one can differentiate), but without elucidation as to what the point of differentiation might be. One could speculate that Rabbeinu Tam would have applied the prohibition to regular letters were it not for the possible extraneous issue of public safety. This however, would only apply to the unopened letters; why he allowed the previously read letters to be read on Shabbat remains difficult.

37. As discussed in the preceding note, it is somewhat challenging to pinpoint exactly where and how *Chazal* and the *rishonim* drew the line on what could be exchanged for business documents and what not. See *Shu't Az Nidbaru Chelek Rishon*:12, where the author attempts to understand the point of differentiation.

38. See *Shu't Rashba chelek 7*:#288. See also *Shmirat Shabbat Ke'hilcheta* 29:47 note 119, citing *Tyo Yehoshua*, *Perek Torat ha'Shevutim be'Shabbat* (3:19). See also *Beit Yosef Tur* 307: “*katav*”, who quotes the *Agur* stating that both Rashba and Ramban allowed medical textbook reading because it is “*chochma*” and therefore totally unlike *shitrei hedyotot*. The Ramban, like *Tosafot* above, apparently even allowed one to read *Iggerot Shalom* on Shabbat. See again *Shu't Az Nidbaru Chelek Rishon*:12, where the author discusses the possible point of differentiation between *Iggerot Shalom* and *sifrei chochma* in this regard.

39. Namely, the Rambam, Meiri, Ritva and possibly *Baal Ha'Meor*.

shema yachlif (lest one exchange). Instead he emphasized: "ain lecha shitrei hedyotot gedola mizu" (there is no greater example of *shitrei hedyotot* than this itself). Thus, according to the Meiri the writings underneath the pictures themselves are *shitrei hedyotot*. Moreover, in explaining why they are forbidden (according to some even during the week), the Meiri states, "because these works draw away a man's heart, towards aimlessness and away from *avodat bor'oh* (service of his Creator)." The clear message is that the ban on these religiously neutral writings was not because of fear of confusion with inappropriate business writings, but rather an attempt to eliminate anything that might distract a Jew from his primary Shabbat responsibility, *avodat Hashem*. It doesn't seem to matter what substitute fills the void, religiously neutral or otherwise, if it does not connect to *avodat Hashem*, it has no place on Shabbat *kodesh*.⁴⁰

Moreover, not just any *avodat Hashem*, but *talmud Torah* in particular, appears to be the exclusive activity for which Shabbat was expressly designated. This notion itself is not a new idea, as it is found explicitly in the Talmud *Yerushalmi* (*Shabbat* 15:3) "lo nitnu shabbatot vi'yamim tovim le'yisrael eleh kdei laasok bahem batorah" (the Sabbath and Holidays were given to Israel only so that they be able to be involved in Torah study).⁴¹ However, what may be somewhat innovative is the idea that this principle was also the ultimate objective of the *gezara* on *shitrei hedyotot*. Careful analysis of the Rambam's

40. This is very much in line with the Meiri's earlier noted understanding of the *gezera* on *shitrei hedyotot*, i.e. having no useful Shabbat purpose. It is also consistent with the implications of the *Baal ha'Meor*'s statement that we are only to read items with "*serach kedusha*" on Shabbat (see also *Beit Yosef Tur* 307, ""*katav*").

Finally, it also is reflective of the statement by the Ritva that it is forbidden to peruse such documents (*shitrei hedyotot*) "u'lehotzih shaat Shabbat" (and squander even a moment of precious Shabbat time).

41. See *Beit Yosef, Tur Orach Chaim* #288 and *Mishnah Berurah* 290:7. See also *Aruch Hashulchan* 307:11.

comments on our *sugya* seems to bear this out.

In the *Mishneh Torah*,⁴² the Rambam quoted the Tosefta above in a very revealing context. After first noting the general *issur* of *shitrei hedyotot*, (in the very same halacha) he continues as follows: "It is forbidden to read the writing underneath the *tzurot* and the *dyukni* on Shabbat. Even to read from *ketuvim* on Shabbat during the *beit midrash* time is forbidden, *gezera mishum bitul beit hamidrash*, lest anybody be found sitting at home and reading [as opposed to learning] and not be present in the *beit ha'midrash*." It is interesting that the Rambam chose to place the *din* of the Tosefta together with the *din* of *shitrei hedyotot* without any mention at all of *shema yachlif* (lest one come to exchange). It suggests again that the two halachot might relate in a more direct fashion.

Even more illuminating, however, is the Rambam's including in this same halacha the *issur* to read *kitvei hakodesh*, despite the fact that other *rishonim* felt that it no longer applied.⁴³ Obviously, despite the historical changes in the community's Shabbat schedule, the Rambam considered the *gezera*'s overall objective to preserve *beit midrash* time, as very much relevant.

Moreover, the implications of this intensify, when one makes note of the Rambam's own view on the proper Shabbat schedule. Elsewhere,⁴⁴ the Rambam described in detail the ideal way for a person to spend his time on Shabbat: "Thus was the custom of the earlier righteous people, first they would pray *shacharit* and *musaf*, followed by the *seudat Shabbat* at home, afterward they would go to the *beit midrash* and remain there until the *Mincha* prayer, followed by *seudah shelishit* until the end of Shabbat." According to the Rambam, aside from the mitzvah of *seudot Shabbat*, there really are only

42. *Hilchot Shabbat* (23:19).

43. See references 9-12 and related text above.

44. *Hilchot Shabbat* (30:10).

two other possible activities available on Shabbat: prayer, to be offered specifically at the appropriate set time, and *talmud Torah* at any other time. The fact that the Rambam placed this message directly together with the Tosefta suggests that for him, it shared the same inspiration. Furthermore, the fact that both halachot are presented in the context of *shitrei hedyotot* suggests that the same underlying message may have been part of that *takana* as well.⁴⁵

Perhaps the most unambiguous articulation of this intent was expressed by the Rambam in his *Perush Hamishnah*. Commenting on the *gezara* not to read off the dessert list, he states: "The reason one cannot count from a written list is lest they come to read secular correspondence on Shabbat. That is forbidden, because aside from works of the prophets and their commentaries,⁴⁶ it is forbidden to read on Sabbath and holidays, and even if the book was *chochma min hachochmot* (secular studies)."⁴⁷ In summary, according to this approach all secular reading material, including *sifrei chochma*, should be avoided on Shabbat, which is to be dedicated solely to the study of Torah.⁴⁸

45. Despite the fact that in the *Mishneh Torah* the Rambam explicitly relates the *gezera* of *shitrei hedyotot* to "lest a person treat the day as any other day of the week and come to erase," it would not be unusual to attribute to *Chazal* multiple reasons for *takanot*.

46. This likely refers to *limud be'iyun* or *Torah she'be'al peh*; see Netziv, *Meromei Sadeh, Shabbat* 116b.

47. This essentially eliminates the reading of any secular material on Shabbat. This position was also supported by the Ran. See *Shiltei Giborim* (43b in pages of Rif). See also *Hagahot Maimoniyot* (*Hilchot Shabbat* 23:19) who cites the *Or Zarua* (section 2) maintaining that even documents concerning mitzvah-related issues such as betrothals and children's education (considered in the context of *mimtzo cheftzecha* as *cheftzei shamaim*) should be avoided.

48. See *Shulchan Aruch* 307:1, *Mishnah Berurah* 4. As noted in the introduction, according to all interpretations, the general objective of the *takana* on *shitrei hedyotot* was to foster a *shvita hanikeret*. Perhaps one can relate the the fundamental point of argument between the two groups of *Rishonim* back to the point Rav Soloveitchik emphasized above (see reference

Halacha Le'Maaseh (Practical Rulings)

Based on the aforementioned discussion, the *Beit Yosef* draws several major halachic conclusions later codified in the *Shulchan Aruch* (307:13-16). Clearly, according to all opinions, actual business-related documents are absolutely forbidden and should not be perused even silently.⁴⁹ Previously read (non-business related) personal correspondence should also not be read.⁵⁰ However, newly arrived letters that may have immediate health or life-altering information may be, provided they are not read out loud.⁵¹

Secular literature, including "parables, war tales and romantic stories"⁵² and the like should also be avoided on

2). *Chazal* purposely enacted both passive and pro-active methods for demonstrating a *shvita hanikeret*, based on the model of *zachor ve'shamor*. For the first group who understood the *gezera* on *shitrei hedyotot* as merely reflecting the general *issur* of *mintzoh cheftzeka*, the focus was on abstaining from any weekday concerns. In contrast, the second group saw the best demonstration of *kedushat Shabbat* to be through the pro-active promotion of *talmud Torah*.

49. *Shulchan Aruch* 307:13, *Mishnah Berurah* (51-53). Such documents are considered *muktza* and should not be handled at all.

50. Based largely on a statement in *Tosafot* (*Shabbat* 116b "Ve'kol she'ken") seemingly limiting the prohibition of gazing at writings to *lashon laaz* (foreign languages), the *Ramo* (*Darchei Moshe* 307:#8 and in his gloss to *Shulchan Aruch* 307:16) introduced the innovative idea that if non-business related items are written in *lashon hakodesh* (Hebrew), even if of a totally secular nature, they have *kedusha* and therefore may be read on Shabbat. He even suggested that the *Rambam* and *Ran* only prohibited *sifrei chochmot* because in their time, all these works were written in foreign languages. This view is consistent with *Ramo*'s personal admission in a *Teshuva* (*Shu't Ramo* #7) that he himself read works of philosophy on Shabbat. The *Mishnah Berurah* (307:16:64) cites many *Acharonim* (including the *Gra*, *Bach*, *Taz* and *Aguda*, among others) strongly opposed to the *Ramo* on this point.

51. *Shulchan Aruch* 307:14, *Mishnah Berurah* (54). The *Darchei Moshe* adds if the letters are known to contain biblical verses or words of Torah or halacha, they may certainly be handled and read. Obviously, this is so, provided that they may be opened and accessed without any other *issurim* involved.

52. As an example in this category, the *Mechaber* mentions *sefer Emanuel*.

Shabbat.⁵³ The *Mishnah Berurah* points out that this prohibition does not include the works of Josephus, *Sefer Yuchsin*, *Divrei ha'Yamim* of R.Y. Cohen and *Shevet Yehuda* (and presumably other similar works of Jewish history and ethics), since one can learn from them *divrei musar* and *yirah* (moral lessons and fear of *Hashem*). He adds therefore, that even the non-Hebrew language versions are permissible.⁵⁴

Finally, after noting all of the above, the *Mechaber* concluded his discussion of these issues by stating plainly that it is forbidden to learn on Shabbat anything except for Torah. However, he qualifies this by noting that there is a dissenting opinion that disagrees, and allowed at least for the study of secular wisdom.⁵⁵ This double *psak* prompted the *Mishnah Berurah* to comment: "ve'chen nohagim lehakel" (and our custom is like the lenient view). However, he also added,⁵⁶ "di'yireh shamaim ra'ui lehachmir bazeh" (those who fear heaven will be strict in this matter).⁵⁷ The *Aruch Hashulchan* clarifies this somewhat by explaining that technically one can not absolutely prohibit the study of all secular material; however, it is certainly *midat chasidut* (meritorious) to honor the Shabbat by engaging solely in the study of Torah.⁵⁸ This also seems to be the conclusion of the author of *Shmirat Shabbat Ke'Hilcheta*.⁵⁹

Other Contemporary Applications

53. *Shulchan Aruch* 307:16.

54. See *Mishnah Berurah* (58). Moreover, based on the comments of the Ramo and the *Mishnah Berurah* (307:3-6) one might assume that *me'ikar hadin* it is even permissible to read a fictional novel (that is considered appropriate in content) and one derives *oneg* (pleasure) from on Shabbat. See also *Magen Avraham* 301:4 and *Shmirat Shabbat Ke'hilcheta* 29:47.

55. *Shulchan Aruch*, 307:17.

56. Citing the *Eliyahu Raba*.

57. *Mishnah Berurah* 307:65.

58. *Aruch Hashulchan*, 307:11.

59. *Shmirat Shabbat Ke'hilcheta* 29:47. He cites the *Gra*, mentioned by the *Mishnah Berurah* 308:124, as a source for the more lenient conclusion.

Contemporary *poskim* apply many of the principles and halachic conclusions noted above to specific situations commonly encountered in modern times.

Newspapers and Magazines

Obviously any work or business-related content such as advertisements or trade discussions are strictly forbidden. Therefore, papers such as The Wall Street Journal and stock market news letters are certainly off limits.⁶⁰ In contrast, reading about current events or other information vital to the Jewish community⁶¹ is permitted by many *poskim* on Shabbat.⁶² Newspapers that contain both important news items as well as business advertisements are more complicated. Some *poskim* forbid them on the grounds that allowing the permissible material may lead to inadvertent scrutiny of the forbidden material.⁶³ Others maintain that they are allowed as long as one is careful not to look at the advertisements.⁶⁴ Still others allow it provided that the reading is silent.⁶⁵

Catalogs

Obviously scrutinizing mail order catalogs for the purpose of buying something is prohibited. However, some *poskim* will allow perusing for the purpose of enjoyment or as a distraction for children.⁶⁶

60. *Sefer Tiltule Shabbat* p.140, note 20.

61. Provided that it is not particularly negative and does not thereby elicit unnecessary *tzaar* (emotional suffering) on Shabbat. *Ketzot Hashulchan* 107:143.

62. *Shmirat Shabbat Ke'hilcheta* 29:46:note 113. *Shu't Yavetz* #162.

63. *Mishnah Berurah* 307:63. See also *Shu't Az Nidbaru* (1:12).

64. *Shvut Yaakov* brought by *Mishnah Berurah* 307:63. *Shmirat Shabbat Ke'hilcheta* 29:46, in the name of *Daat Torah*.

65. *Shu't Az Nidbaru* (9:7).

66. See *The 39 Melachot*, compiled by Rabbi Dovid Ribiat, Section 32 (*kosaviv*) note 152.

Scientific Journals and Secular Studies Textbooks

The halacha for a layman wanting to read these items or any other *sifrei chochma* is dependent on the *machloket* (debate) between Rambam and Rashba described in detail above. It would appear to be permissible *me'ikar ha'din* but nevertheless a *midat chasidut* to learn only Torah. However, a medical professional reading for the purpose of patient care is considered to be performing a mitzvah and hence would be allowed to do so, *lechatchila*.⁶⁷ According to Rav Shlomo Zalman Auerbach a medical student, in contrast, should be discouraged from doing so, and is treated like a layman in this regard.⁶⁸

Studying for a Test

The question of studying for a test raises the additional halachic problem of doing *hachana* (preparation) on Shabbat for the purpose of *chol* (a week day).⁶⁹ Rav Shlomo Zalman Auerbach points out that it is certainly permissible to learn *limudei kodesh* for the purpose of a test during the week or for the purpose of writing *chidushei Torah* after Shabbat, since there is a definite *toelet* (accomplishment) achieved on Shabbat

67. See *Assia* vol. 2, 5741, p.16, "Be'Din Mitzvat limud haRefuah" by Dr. Abraham Steinberg. See also *Lev Avraham* Chapter 13:1,3. There Dr. Abraham S. Abraham initially considered reading medical books only permissible according to the lenient view of the Rashba. However, see the critique of this offered by Rav Shlomo Zalman Auerbach in part 2, p.18. Subsequently, in *Nishmat Avraham* 307:5, Dr. Abraham modified his presentation of this allowance to be without qualification in the case of a practicing physician.

68. See *Shulchan Shlomo* 307:17:27, where Rav Shlomo Zalman explains that this is so because a student is not presently involved with patients. This is probably based on the assumption that to study medicine per se is not a mitzvah. See *Iggerot Moshe* YD III, #155 and YD # 151. See also *Shu't Tzitz Eliezer* 9:17:9. For a possible contrary view see *Shu't Chelkat Yaakov* #84 and *Practical Medical Halacha* by Rabbi Moshe Tendler and Dr. Fred Rosner, pp.142-143.

69. *Shmirat Shabbat Ke'hilcheta* 28:69-70.

itself when the individual learns the material.⁷⁰ He is in doubt, however, whether or not that same reasoning applies to studying secular subjects for a test and not for the sake of the knowledge itself.⁷¹

70. *Shmirat Shabbat Ke'hilcheta* 28:84.

71. Ibid., note 206.

Segulot, Superstitions, and Darchei Emori

Rabbi Yitzchok Guterman

Walk to the *Kotel* (Western Wall) in Jerusalem at any time of the day and you will see people asking for money and handing out red strings to tie around the wrist as a sort of good luck charm. Step into many Jewish bookstores around the world and you can purchase special leaves laminated on to cards. These are meant to be kept in the pocket as a *segulah* (mystical charm) for health and prosperity. In our modern and materialistic society, more and more people are intrigued by mysticism. Not all mysticism, however, is in consonance with Torah ideals and laws.

Then there are what many call “superstitions”. Some are practiced only by Jews, such as not walking over a small child. Others are practiced by Jew and Gentile alike, such as not opening an umbrella indoors. And then there are some which come directly from the Gentile world, but have made their way into many Jewish homes, such as the practice of blowing out the candles on a birthday cake and “making a wish”.

All of the charms and practices mentioned above may involve serious Torah prohibitions. In this article, we will discuss the various issues and opinions involved in this complicated halachic matter.

Darchei Emori

The Torah prohibits us from following in the superstitious ways of the Amorites. This is known in rabbinic literature as

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"Darchei Emori". The source of the prohibition is from the verse, "And in their customs you shall not walk."¹ Rashi quotes the *Torat Kohanim* who says, "Rabbi Meir said, 'These are the ways of the Amorites that our Rabbis enumerated.' " Some quote the source as "Do not do like their actions".² In any event, it is clearly prohibited by Torah law to copy the ways of the *Emori*.

There are two full chapters of *Tosefta* which list some of the practices of the Amorites.³ Among them are the following:

Someone who puts thorns in the window [to protect a pregnant woman from destructive spirits] or ties iron to a bed [It is unclear what this was supposed to ward off]...this is the way of the Amorites. Someone who says, "do not sit on the plow [or it will be a bad omen that will] cause our work to be difficult; do not sit on the plow [or it will be a bad omen that will] cause the plow to break," these are the ways of the Amorites. However, if someone says "don't sit on the plow because [your weight] will surely cause it to break", this is permitted [as this is natural].

The common denominator of the aforementioned practices is that they are irrational. They have no root in logic or observable science. Rather, they are based on unnatural forces the Amorites believed to have existed. It is this type of practice that the Torah forbids.

1. *Vayikra* 18:3. This source is quoted by Rashi to *Shabbat* 67A, and by Ran. See also *Commentary of Ramban on the Torah*, *Shemot* 23: 24, who in the end agrees to the above opinions that this is the correct source.

2. *Shemot* 23:24. See Rashi to *Chulin* 77A who quotes this as the source. See also *Divrei Yetziv*, *Yoreh Deah* 1:54 who reconciles this Rashi with the Rashi in *Shabbat* quoted above. He says that Rashi in *Chulin* is coming to explain the source of the prohibition of *Darchei Emori* according to the view of the *Chachomim* (who argue with Rabbi Meir in the *braita* of *Torat Kohanim*), while Rashi in *Shabbat* is speaking according to the view of Rabbi Meir who cited the source of the prohibition as "In their customs you shall not walk".

3. *Shabbat*, chapters 7-8.

On the other hand, there are some supernatural devices that the Rabbis seem to condone. In *Shabbat* 67A, the Mishnah states, “A person may go out [to a public domain on the Sabbath] with the egg of a grasshopper [for ear pain], a tooth of a fox [for those who had trouble with sleeping], or a nail from a pole that a person was hung on [for a blistered wound] for healing purposes.”⁴

What is the difference between the permitted cases and the forbidden ones? “Abaye and Rava together said, ‘Anything that is done for healing is not *Darchei Emori*.’” The meaning of this phrase is disputed among the *Rishonim* (early decisors). The Rambam in one place seems to understand that a healing method that cannot be observed by medical science is forbidden.⁵ We must therefore say, says the Rambam, that the Mishnah in *Shabbat* that permits walking out with a fox’s tooth was thought to help in a physical way.

The Ran argues that one cannot say that the remedies that are permitted in the Talmud are all physical.⁶ Therefore, he concludes, the Talmud must be telling us there are two types of medicine. One type is completely physical. The other is non-physical. Both, however, work within the broader framework of “nature” in that they work within the normal system that *Hashem* set up in the world. What is forbidden are non-physical healing methods that are totally ineffective. They are the silly superstitions of the Amorites, and that is what the Torah forbade.

The Rashba⁷ expresses a similar idea to the Ran, but feels

4. Although the *Chachomim* disagree, since Abaye and Rava agree to the first opinion quoted above, the halacha follows their rule. *Beit Yosef, Orach Chaim* 301:52B.

5. *Moreh Nevuchim* 3,37. See Rashi to *Shabbat* 67A, who clearly agrees with this interpretation of Abaye and Rava’s statement. Rashi in *Chulin* 77B, however, takes a different approach which will be explained later.

6. *Drashot Haran* 12.

7. *Responsa* 413.

that the Rambam would agree with him.⁸ He explains that non-physical healing methods are similar to magnets. The eye cannot see why the metal is drawn to the magnet, but it is known to be a physical phenomenon. So it is with the tooth of a fox; although its ability to heal cannot be seen, it is still in the realm of the physical.

This general opinion that non-physical healing methods that work are permitted seems to be the opinion of most of the *Rishonim*. Indeed, it is brought by the *Chochmat Adam* as the final ruling in this matter.⁹ The question then becomes, what if one is not sure if a given "metaphysical" healing method works? On this the Ran writes that even if an amulet *might* work it is permissible, and it is only the ones that definitely do not work that are forbidden.¹⁰ Rabbeinu Yonah¹¹ writes, however, that any unproven amulet is forbidden,¹² because if it does not work, one will have transgressed the prohibition of *Darchei Emori* by using it. Rabbi Yosef Karo in *Shulchan Aruch*¹³ brings the Ran's opinion as the halacha, but then brings the stricter opinion of Rabbeinu Yonah as "Some say..." The general rule when this occurs in *Shulchan Aruch* is that one should try to follow the stringent opinion, but if there is a special need, then one can rely on the main ruling of the

8. See Rambam's *Commentary on the Mishnah*, *Yoma* 8:4 who seems to say like the Rashba. The Rambam limits this, however, to kosher food. He does not permit someone to eat non-kosher (in his case the liver of a rabid dog), even if it is a proven mystical healing method, despite the fact that the man's life is in danger. See *Shmirat Shabbat Ke'hilchata* 34:74, who explains this.

9. 89:3. See *Aruch Hashulchan*, *Orach Chaim* 301:80, who says that the Rashba was somewhat equivocal in his ruling, and that therefore people should stay away from all types of non-physical healing methods, even if they are proven to be effective.

10. *Shabbat* 30B (In the pages of the Rif).

11. *Shaarei Teshuva* 3:104.

12. Presumably following the rule of "Safeik D'oraita Lechumra" (one must act stringently when a doubt involving Torah law is involved).

13. *Orach Chaim* 301:27.

Shulchan Aruch which permits it.¹⁴ The Vilna Gaon¹⁵ and *Pri Megadim*¹⁶ strongly question Rabbeinu Yonah's ruling, since the Mishnah in the sixth chapter in *Shabbat* seems to be in contradiction to his opinion.¹⁷ Nonetheless, the *Mishnah Berurah*¹⁸ does not completely reject this opinion, and we would therefore go back to our previous rule of trying to avoid such devices, if possible.

Non-Physical Devices for Uses Other Than Healing

Until now we have discussed using amulets and charms for healing purposes. Using these methods for non-healing purposes, such as wealth, *even if they are known to be effective*, is a matter of dispute. Rabbi Yaakov Hillel David quotes the *Sefer Chassidim* that says that charms can only be used for protection and health, never anything else.¹⁹ The *Shiltei Gibborim*,²⁰ however, rules that charms can be used to help a person in other ways as well, such as to safeguard one from poverty.²¹

14. *Kaf Hachaim* 301:164. See *Shulchan Aruch Harav, Orach Chaim* 301:33 who rules according to this.

15. *Biur Hagra* to *Orach Chaim* 301:27.

16. *Orach Chaim* 301, M.Z. 16.

17. The Mishnah in *Shabbat* 60A says that one cannot go out in a public domain with an unproven amulet on Shabbat, as one would violate the prohibition of carrying on the Sabbath. The Gemara discusses at length what is needed to make an amulet proven to work, so that it can be carried. It would seem clear that the only prohibition is carrying on Shabbat, but that during the week it would be permissible to wear an amulet that might work. See *Levushai Serad* who explains that Rabbeinu Yonah will say that the Gemara wanted to determine if there would be an additional prohibition due to Shabbat, besides the prohibition of *Darhei Emori*.

18. *Orach Chaim* 301.

19. *Faith and Folly*, p. 61.

20. *Shabbat* 30B (in the pages of the *Rif*). This is also the opinion of *Tosafot, Bava Metzia* 27B, as will be explained later.

21. The *Shiltei Gibborim* further states that no amulets may be used for animals or trees, even if a man owns them. The *Ramo, Orach Chaim* 305:17, does not rule according to this view, and permits a person's animal to wear an amulet for protection.

Incidentally, the *Panim Meerot*²² quotes Rashi in *Chulin*²³ that states that any non-physical charm that is not placed *on* the sick person, but rather far away from them, such as hanging on a tree, is forbidden. The only charms that are permitted are those worn or placed *on* the sick people themselves. The *Pitchei Teshuva* disagrees with the *Panim Meerot*'s reading of Rashi, and says that even Rashi would agree that the charm does not need to be on the sick person.

Having said all that, we can now go back to consider the question of the red strings given out at the *Kotel* for wearing around the wrist. If these strings were known to be effective in protecting people from harm, it would be permissible according to most authorities. If they were known to be ineffective, it would be a violation of the prohibition of *Darchei Emori* to wear them. If we are unsure whether they work or not, (i.e., some reputable people claim that it works), then there would be a disagreement between the *Ran* and *Rabbeinu Yonah* whether it would be permissible. As concluded earlier, it would be better to not use them, but it would not be forbidden.

How are we to know if they work? It is amazing to discover that tying a red string around the finger is actually brought in the *Tosefta* in *Shabbat* as one of the genuine *Darchei Emori*.²⁴ In light of this, one would think it would be totally forbidden to put one on. The *Beit Yosef*,²⁵ however, states that *perhaps* any practice listed in the *Tosefta* as *Darchei Emori* that is not brought in the *Talmud*, is not *Darchei Emori* according to the *Talmud*. Accordingly, red strings would not be *Darchei Emori*, as they are brought only by the *Tosefta* and not by the *Talmud*.²⁶

22. 1:36, brought by *Pitchei Teshuvah* to *Yoreh Deah* 179:5.

23. 77B.

24. *Shabbat* 7.

25. *Yoreh Deah* 178.

26. See *Darchei Teshuva*, *Yoreh Deah* 179:24, who brings those who suggest

Rav Moshe Stern,²⁷ the Rav of Debrecin, states that there was a custom for hundreds of years in his family and in much of Europe to tie a red string around the crib of small children. He ends by saying that one ought not laugh at the customs of our grandparents, as they are surely rooted in the highest places. The *Chavot Yair* states that if there is a supernatural custom that many Jewish people have kept for many years, we can assume it had been checked out and known to help, and it is therefore permissible.²⁸

If all this is true and we would like to reconcile the Tosefta, we will have to say that there is a difference between tying a red string to the finger and tying one to a crib. According to this, of course, there may also be a difference between tying string to the wrist of a child and the wrist of an adult. In any event, it would seem that if there is a dispute among reputable people whether tying a red string to the wrist is effective or not, it would be best to avoid it but not forbidden. The same would be true for all other *segulot*. They should only be used if they are known to work from reputable authorities, or according to some, from a long-standing Jewish tradition.

Superstitious Practices

Until now we have been discussing charms and amulets. There is another type of *Darchei Emori*. This involves avoiding certain actions or phrases that are thought to cause harm, or doing certain actions in an attempt to find success. A classic example of this is not opening an umbrellaindoors. This is

that *any* superstitious practice that is not listed in the Talmud is not a violation of *Darchei Emori*. See *Yechaveh Daat* 6:50 who seems to give weight to this opinion. The *Bach*, *Yoreh Deah* 178:1, rejects this and says that all superstitious practices that are not proven to be effective are a violation of the prohibition of *Darchei Emori*. This seems to be the opinion of most the *Rishonim* as well as the *Shulchan Aruch*, *Orach Chaim* 301:27, as we have stated above.

27. *Responsa Be'er Moshe* 8:36.

28. *Responsa*, 234.

thought to bring bad luck. It is practiced by some Jews and some Gentiles. Being careful about such superstitions may involve two prohibitions. One, is *Darchei Emori*. The second is “*Lo Tinachashu*”(do not believe in omens).²⁹ Opening up an umbrella is believed to be a bad omen as it seems “there’s a storm cloud over your head wherever you go”.

To address this issue we need to know if the leniency of Abaye and Rava – “Anything that is done for healing is not *Darchei Emori*” – applies to practices and not just amulets, as well as whether it applies to the prohibition of *Lo Tinachashu* as well.

The Talmud states that people do not sell their first piece of land,³⁰ and that they do not lend out their wallets³¹ because it is a bad sign. Tosafot question why this is not a violation of believing in omens,³² and answers, “Abaye and Rava both said, “Anything that is done for healing is not *Darchei Emori*.’” Maharatz Chiyot explains that the intention of Tosafot is to say that any practice known to be effective is permissible. We see from here that there is no prohibition of *Darchei Emori*, nor of *Lo Tinachashu*, if the practices are known to be effective. Even when practices are known to be nothing more than superstitions, there are many who permit it if one is not obvious about it. The Tosefta states that slaughtering a chicken that cries out like a rooster is *Darchei Emori*.³³ The Maharil states that if one does not say why one is slaughtering the chicken but simply does it, it is permissible.³⁴ The Ramo brings

29. *Leviticus* 19:26. See Rambam, *Hilchot Avodat Kochavim* 11:4, who seems to say that the prohibition of *Lo Tinachashu* applies to all forms of superstitious practices, not just omens. See also *Divrei Yetziv*, *Yoreh Deah* 1:54.

30. *Kiddushin* 59A.

31. *Bava Metzia* 27B.

32. On the case in *Bava Metzia*.

33. *Shabbat* 7.

34. *Responsa* 111.

the Maharil and says that this is the custom.³⁵ The *Chavot Yair*³⁶ rules that if a person *passively* refrains from doing something, it is permitted.³⁷ Accordingly, if one simply did not open umbrellas indoors, but did not say to anyone, “Don’t open that umbrella indoors!” it would be permissible.

The Vilna Gaon disagrees vehemently with the Maharil’s leniency.³⁸ Rather, says the Gaon, the custom is based on a different text of the Tosefta, which states that this practice is permissible even if one actually said to slaughter the chicken because it called out like a rooster (presumably because the practice is known to be effective). The *Shach* agrees with this opinion.³⁹ According to this, one could intentionally refrain from opening an umbrella indoors only if one knew that it was a fully legitimate danger.⁴⁰

There are some “superstitious” practices that almost surely originate from Jews. One example is not walking over a small

35. *Yoreh Deah* 179:2.

36. *Responsa* 234.

37. The *Chavot Yair*’s proof is a little difficult to understand: he bases his ruling on the fact that the Ramo on *Yoreh Deah* 11:4 said that some slaughterers refrain from slaughtering geese during the months of *Tevet* and *Shvat*, for it is dangerous to slaughter geese on a certain day in those months. The problem is that he says that if they do slaughter during *Tevet* or *Shvat*, they eat the liver of the slaughtered goose, as this is supposed to protect them. That is an action and not something passive. Perhaps the *Chavot Yair*’s intention is really that of the Maharil, that as long as it isn’t obvious why you’re doing something, it is permissible.

38. *Biur Hagra* 179:8. He says “like vinegar to the teeth to say that one can ‘trick’ Hashem (*Chas Veshalom*)”.

39. *Yoreh Deah* 179:3.

40. One could ask whether the Ran’s leniency in *amulets* that are not proven applies to *practices* that are not proven. Perhaps medicines, physical or otherwise, are permissible since they are taken, as all medicines are, with the hope that they *might* help, since no medicine is guaranteed. Whereas superstitious practices, even if the rabbis *do* work, are still superstitious looking, and perhaps if we are unsure as to its effectiveness, it would be forbidden. It may be, however, that they permitted anything that might help, since if it does help, it is working within nature.

child. Rabbi Menashe Klein⁴¹ says that this is based on the law that it is forbidden to pass over bread, as this is a disgrace to the bread (not to pick it up). Certainly, he says in the *Mishneh Halachot*, one should not pass over a child who is made in the image of *Hashem*. Other reasons are also given for this.⁴²

The most famous form of Jewish “superstitions” is the Ethical Will of R. Yehuda Hechasd.⁴³ This is a collection of many things that seem like superstitions, which R. Yehuda Hachsid told his children to keep. Among them are not marrying a woman with the same name as one’s mother, not cutting hair on *Rosh Chodesh*, not to build on land never settled before, etc. All of these are traditions that were kept by numerous Jewish communities for many years,⁴⁴ and R. Yehuda Hechasd was certainly a person one could rely on. Therefore, according to the *Chavot Yair*, one would certainly be permitted to be careful about them. Additionally, most of them can be avoided passively since they require no action, which the *Chavot Yair* permitted as well (although others argue this point, as stated above).

It should be noted, however, that there were many who frowned upon keeping these customs. Most famously was the *Noda Beyehuda*⁴⁵ who said that R. Yehuda Hechasd was speaking only to his children, but for the masses it is forbidden to do so if it contradicts our Talmud. R. Yonatan Eyebshtitz, commenting on the practice of not slaughtering geese in *Tevet* and *Shvat*, says that even though he will not stop those who are careful about this, he certainly thinks one should not be

41. *Mishneh Halachot* 13:119.

42. See *Shmirat Hanefesh Vehaguf*, pg 91.

43. One of the *Baalei Hatosafot*, author of the *Sefer Chassidim*, and *Rebbe* of the *Ohr Zarua*, *Rokeach*, and *Smag*.

44. See *Be'er Moshe* 8:37B, who said that the custom of not walking over children was practiced in his family and all over Europe.

45. *Responsa Even HaEzer*, 79.

careful of such things.⁴⁶ The *Aruch Hashulchan* quotes this and agrees to him.⁴⁷ Rabbi Moshe Feinstein permitted following the dictates of R. Yehuda Hechasid, but said that one is not required to do so.⁴⁸

One could ask a fundamental question here. How could a Jewish practice originating from Jews be considered following the path of the *Amorites*?! The answer would be that the Torah forbids going in their *ways*, and doing superstitious practices in general is the *way* of the Amorites. We see this from Rabbeinu Yonah who forbids *any* charm that is unproven as *Darchei Emori*. See *Pleiti*, cited above, who seems to say this as well.

Finally, we have the truly pagan superstitions. The classic example of this is blowing out candles at a birthday party and making a wish. To fully appreciate this we must consider the source of this custom.

In Greek times, people on their birthday would try to find favor in the eyes of the moon goddess, Artemis.⁴⁹ In an attempt to do so, they would make round cakes (to symbolize the full moon) and light candles on top (to symbolize the light of the moon.) They would then ask the moon goddess to grant their requests.

In light of that, telling the birthday boy or girl to blow out the candles and “make a wish” seems problematic. In fact, one could ask about the permissibility of the candles being there at all! This, however, is permitted. The Maharik, quoted by *Darchei Moshe* (179:1), states that the violation of following in the paths of the Gentiles applies only when there is no *rational* reason for doing something other than to be similar to the

46. *Pleiti*, 11:5. See *Chatam Sofer*, Responsum 138, who seems to agree with this.

47. *Yoreh Deah* 11:15.

48. *Even HaEzer* 1:4.

49. G. Gibbons, *Happy Birthday*, (New York, 1986). Others disagree with this, but by almost all accounts, it is a tradition based on idolatry.

Gentiles. This would not apply to candles, as they make the birthday cake more exciting, and children appreciate the fact that there is one candle there for each of their years. Round cakes as well are the normal shape of most icing-type cakes, and are not made intentionally round for birthdays.

Simana Miltah

The Talmud states, “One should anoint kings by a spring, (as it is a sign) that their monarchy will flourish....Abaye said, now that you say signs are meaningful, a person should be careful to eat [the following] on the New Year: gourds, black-eyed peas, etc.”⁵⁰ This law is brought by the *Shulchan Aruch*.⁵¹

Many have questioned how this can be permissible, as it seems to be a superstitious practice, and would violate the prohibition of *Darchei Emori* as well as *Lo Tinachashu*? As far as the problem of *Lo Tinachashu*, as long as one is not *relying* on the black-eyed peas or the apple dipped in honey to bring him a good year, it would be permissible.⁵² As far as *Darchei Emori*, we see from here that there is a distinction between *signs* and *charms*. A *sign* is something whose properties inherently imply a certain outcome, such as eating *sweet* things for a *sweet* year. A charm, however, is not a *sign* for anything (e.g. a rabbit’s foot is not a sign for good luck in any way). *Signs*, therefore, are permissible, provided again that one is not *relying* on the sign.⁵³ Alternatively, the *Chayei Adam*⁵⁴ contends that the reason we are allowed to do it is based on the Ramban⁵⁵ who writes that if *Hashem* has made a decree on someone, once a

50. *Horayot* 12A.

51. *Orach Chaim* 583:1.

52. *Shach, Yoreh Deah* 179:4. See Maharsha to *Horayot* 12A who says that a sign for the *good* can be relied upon. The Talmud only forbids relying on a *bad* sign, as bad signs are unreliable since a person may repent.

53. See *Rishash to Tosafot, Bava Metzia*. 27B, *Smag*, brought by *Ramo, Yoreh Deah* 179:2.

54. 139:6.

55. *Commentary of Ramban on the Torah, Bereishit* 12:6.

hint of this decree has actually taken place, it will not be rescinded. This is the reason, says the *Chayei Adam*, that we eat things that hint to good things, in case today *Hashem* has decreed such a thing on us.⁵⁶

Conclusion

There is great dispute about which mystical charms and practices are permitted. The Torah in general did not want us engaging in superstitious practices unless they were known to be effective, as *Hashem* has chosen us to be an elevated nation, and to place our trust in him alone. The *Aruch Hashulchan* writes "The only thing that is clear in this is that one should walk perfectly with *Hashem*....and praying to *Hashem* and [giving] charity surely help."⁵⁷

There is a story told⁵⁸ of a *Chassid* who came to the *Sfat Emet*⁵⁹ and asked him for a *segulah* (charm or practice) to cure his ailment. He replied, "I know of no better *segulah* than *Ve'heyeetem Lee Segulah* (you will be for Me a treasure)."⁶⁰ There is no better *segulah* than loving *Hashem* with all one's heart, learning the Torah, and keeping the mitzvot. If one does this, he will surely receive *Hashem*'s protection, as the verse says, "*Hashem* protects those that love him," and "The feet of the pious [*Hashem*] protects."

56. There are other explanations given as well. See *Meiri* to *Horayot* 12B, and *Chochmat Shlomo*, *Orach Chaim* 583.

57. *Orach Chaim* 301:80.

58. *Kli Chemda* on the Torah, *Parshat Pinchas*.

59. Rabbi Yehuda Aryeh Leib of Ger, the second Gerrer Rebbe.

60. *Shemot* 19:5.

Finding an Error in a *Sefer Torah*

Rabbi Michael Merdinger

I. Introduction

It's not that common, but it happens often enough: On a Monday, Thursday or Shabbat morning during the reading of the Torah, in the middle of an *aliyah*, the Torah reader finds a mistake in the Torah scroll that would render it unfit. What should he do? Should he stop reading and have the one who received the *aliyah* make a closing *beracha*, and take out a new scroll? Should he stop reading immediately, take out a new scroll, and simply start reading where he left off? Or should he start with a new scroll at the beginning of the *parasha*?

What to do in this situation is the subject of significant debate among halachic authorities until our day. It is fruitful, therefore, to study the subject so that when it occurs, an appropriate procedure will be followed, which gives honor to God's Torah and to those who have come to the synagogue to hear it read.

Our search for the proper procedure entails looking generally at some of the mitzvot involving a *Sefer Torah*, such as the mitzvah to write a *Sefer Torah* and the mitzvah of *keriat haTorah*, reading the Torah. We will then be able to evaluate a famous dispute about the status of an unfit *Sefer Torah*, and finally approach an answer to our question as to how to proceed when a mistake is found in a Torah during Torah reading.

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II. The Mitzvah of Writing a *Sefer Torah*

The Torah tells us about the proper conduct of a king of Israel. One of the mitzvot incumbent upon a king is the obligation to write a *Sefer Torah* for himself:

And it shall be, when he sits on his throne, that he shall write a copy of this Torah... before the *Kohanim* of the house of Levi. It shall be with him, and he will read it all the days of his life in order for him to learn to fear the Lord his God, to keep all the words of this Torah and these laws, to do them; so that his heart will not be raised above his brothers, and so that he will not turn aside to the right or left from the commandment, in order that his days be long over his kingdom, for him and his children among Israel.¹

The writing of the *Sefer Torah* by a king of Israel is a mitzvah specifically for a king,² designed to emphasize humility and reverence of God to a person whose position could so easily lead him astray from these essentials of Jewish life.

But there is another mitzvah involving the writing of a *Sefer Torah*, one explicated in the Talmud. Near the end of the Torah, God tells Moshe to write the song which comprises the bulk of *Parashat Ha'azinu*. Our Rabbis teach us, however, that the mitzvah is far broader than the writing of *Ha'azinu* by Moshe:

Rava said: "Even though one's fathers left him a *Sefer Torah*, it is a mitzvah to write a *Sefer Torah* of his own, as it says 'Now write for yourselves this song.'" (*Devarim* 31:19)³

1. *Devarim* 17:18-20.

2. Besides the Torah scroll that everyone is supposed to write.

3. *Sanhedrin* 21b. The word "song" can be interpreted to mean the entire Torah.

The mitzvah, says Rava, is that every Jewish male⁴ write his own *Sefer Torah*. The Rambam explains that the injunction to write *Parashat Ha'azinu* necessarily entails a commandment to write the entire Torah. It is as if God said, "Write for yourselves the Torah which has this song in it, since we do not write individual *parshiot* in the Torah."^{5,6}

The mitzvah of writing a *Sefer Torah* is subject to complex and numerous halachic requirements which are beyond the scope of this short study. It should be noted only that many of the requirements are such that if they are not met, the *Sefer Torah* is considered *pasul*, or unfit.

III. The Mitzvah of *Keriat haTorah*

Unlike the mitzvah of studying Torah, which is an obligation that the Torah itself gives us, the mitzvah of *keriat haTorah*, reading the Torah, is not a *mitzvah d'oraita*, a mitzvah mandated by the Torah. The Rambam summarizes the conclusion of the Talmud (in *Bava Kama* 82b):

Our teacher Moshe established for Israel that they read the Torah in public on Shabbat and on Mondays and Thursdays in the morning so that they should not wait three days without hearing Torah. Ezra established that they likewise read at *Mincha* every Shabbat...⁷

4. According to most *poskim*, women are exempt from the mitzvah of writing a *Sefer Torah*, though there is some discussion in the *Shaagat Aryeh* on this point. See *Sefer Hachinuch*, Mitzvah 613, *Mishneh Torah*, *Hilchot Tefillin u'Mezuzah v'Sefer Torah*, 7:1, *Shulchan Aruch*, *Yoreh Deah* 270:1, *Shaagat Aryeh Siman* 35-36, *Iggerot Moshe*, *Yoreh Deah* 1 *Siman* 164.

5. *Mishneh Torah*, *Hilchot Sefer Torah* 7:1

6. There are other explanations of how Rava connects the verse about *Ha'azinu* to a mitzvah to write a *Sefer Torah*. See, e.g. *Torah Temimah* on *Devarim* 31:19. However, we are primarily concerned here only with the *existence* of such a mitzvah and the fact that it requires the writing of a *Sefer Torah* that conforms to the requirements of the halacha.

7. *Mishneh Torah*, *Hilchot Tefilah* 12:1.

The mitzvah of *keriat haTorah*, then, is a mitzvah of prophetic and/or rabbinic origin, and is not an institution of Torah law. It is thus distinct from the Torah commandment that each individual write a *Sefer Torah*.⁸

IV. Is it Permissible to Use an unfit *Sefer Torah* for a Public Torah Reading?

The Rambam⁹ was asked whether it was permissible to read publicly from an unfit *Sefer Torah* and to recite the *berachot* that our Rabbis established before and after such a reading. The Rambam responded permitting such a reading with *berachot*.

The Rambam's response has engendered no small amount of controversy. His arguments in support of permitting reading publicly, with *berachot*, from an unfit *Sefer Torah*¹⁰ are as follows:

1. Unlike other mitzvot like *lulav* or *sukkah*, where the mitzvah involves using a ritual object that fits certain requirements, the mitzvah of reading the Torah is not the *Sefer Torah*, but the reading, which can be done even from a scroll which is unfit.¹¹
2. Proof is from the Talmud in *Gittin* 60a, which says that we

8. There are other mitzvot as well which we have not dealt with in the main text. For example, the obligation to hear *Parashat Zachor* and, according to some authorities, *Parashat Parah*, is a Torah commandment. As another example, the *Kohen Gadol*, during his service on Yom Kippur, reads passages related to the day.

9. *Shut Harambam Pe'er Hador, Siman 9.*

10. The Rambam's opinion is most certainly that a kosher *Sefer Torah* be obtained, if possible. Some versions of his *teshuva* state this explicitly.

11. This first point seems not so much to be a proof, but a framing of the definition of the mitzvah of *Keriat HaTorah* as recitation of the words of the Torah, as opposed to the use of a *Sefer Torah* for reading. Indeed, the Rambam asserts in the responsum that the mitzvah is the recitation, "even if he read orally (*b'al peh*)."

do not read from a *chumash*¹² because of *kevod hatzibbur*, the honor of the congregation. The implication is that the reason we do not read publicly from a scroll of only one of the five books is *not* because the *chumash* is unfit for such reading, but rather because it dishonors the congregation (not to have a full *Sefer Torah*). And if one book only is technically acceptable to read from publicly, certainly an entire *Sefer Torah* with a mistake in one letter or one word is acceptable to read from publicly!¹³

3. Furthermore, tremendous scholars (*geonei olam*) have witnessed the practice of reading from an unfit *Sefer Torah* without objection.

The Rashba was asked the same question, and the Rambam's responsum was brought to his attention. The Rashba's objections are as follows:

1. What does "unfit" mean if it doesn't mean the *Sefer Torah* is unfit for public reading? What other use does a *Sefer Torah* have except public reading? It doesn't make sense to say that one should use a kosher *Sefer Torah* but, in the absence of one, can read from an unfit one.

2. The Rambam claims that the mitzvah is the public reading, and there are no requirements for the text being read from. But then why not read from a *chumash*? It must be that the edict of Ezra was to read from a *Sefer Torah*!

3. The Rambam's proof from a *chumash* is not a real proof—there, an *accurate* book of the Torah is being used. Here, an *inaccurate* *Sefer Torah* is being used, which is worse.

12. I.e., One of the five books of the Torah written according to the requirements of a *Sefer Torah*.

13. The Rambam notes that the technical permission (but for *kevod hatzibbur*) to read publicly from only one book of the Torah must be a technical permission to read *with berachot*, because what prohibition could there be against reading publicly *without berachot*?

4. In *Masechet Sofrim* (1,1) we find a statement that we should not read from an unfit *Sefer Torah*: “We write. . .one cannot change these things, and it is *halacha l’Moshe miSinai* (a law given to Moshe at Sinai) that if one changed these things it is unfit and we do not read from it.” Furthermore, there are many texts in the Talmud which talk about invalidating errors in a *Sefer Torah*, and they often state “*ein korin bo*,” we do not read from it. This is the bottom line.

5. The Rambam in the *Mishneh Torah*¹⁴ contradicts his own responsum, saying we do not read from an unfit *Sefer Torah*.¹⁵

Thus, the Rashba suggests, the *teshuva* of the Rambam reflects the Rambam’s opinion in his youth, an opinion which he changed, as seen in the *Mishneh Torah*. The Rashba concludes, therefore, that one cannot read publicly from an unfit *Sefer Torah*.

The vast majority of *Rishonim* agree with the Rashba, though some agree with the Rambam.¹⁶ It is our practice not to rely on the Rambam and the minority who agree with him. Accordingly, a community with only an unfit *Sefer Torah*

14. *Hilchot Sefer Torah* 10:1.

15. The contradiction between the Rambam’s view in his responsum and in the *Mishneh Torah* is the subject of much discussion. The Rashba’s suggestion that the Rambam changed his mind when he wrote the *Mishneh Torah* is not universally shared. For example, Rabbi Yosef Karo (in *Kesef Mishneh* on *Hilchot Sefer Torah* 10:1) rejects the Rashba’s view and explains that the Rambam’s responsum permits the reading, with *berachot*, from an unfit *Sefer Torah* only when there is no alternative, while the Rambam’s holding in the *Mishneh Torah* that we do not read from an unfit *Sefer Torah* applies when it is possible to find another scroll. Alternatively, in the *Beit Yosef* on *Yoreh Deah* 279, he explains that the Rambam’s prohibitive decision in the *Mishneh Torah* relates to the mitzvah of writing a *Sefer Torah*, while his permissive ruling in the responsum relates to the mitzvah of reading the Torah. (This explanation is also cited in the name of the Ran by the editors of *Shut Pe’er Hador* in the notes on the Rambam’s responsum, though I could not locate the Ran’s comment.)

16. See *Mishnah Berurah* Siman 143, *Se’if Kattan* 13.

should not read it publicly with *berachot*.¹⁷ As we will see, however, the opinion of the Rambam will be relied upon in certain circumstances that arise when a *Sefer Torah* is found to be unfit during a public reading.

V. When an Error is Found in a *Sefer Torah*: Varying Views

A. The Major Schools of Thought

There are two major schools of thought as to what to do when an error is found in a *Sefer Torah* during the service.

The first school of thought is that of the Rashba,¹⁸ the Rosh,¹⁹ the Rambam himself in the *Mishneh Torah*,²⁰ and many other *Rishonim* who hold that since the mitzvah of public Torah reading cannot be fulfilled through the use of an invalid *Sefer Torah*, whatever has been read already is of no value or halachic consequence, and therefore the entire Torah reading must be repeated using a kosher *Sefer Torah*.

The second school of thought says that even though we usually hold that an unfit *Sefer Torah* should not be used for public Torah reading, in the case of an error found in a *Sefer Torah* during public reading, we rely to some extent on the opinion of the Rambam in his famous responsum, who says that one may fulfill the mitzvah of public Torah reading from an unfit *Sefer Torah*. Within this school of thought, different authorities disagree about *when* one is entitled to rely on this view. The major opinions are those of the *Mordechai*,²¹ the

17. *Shulchan Aruch* 143:3. The *Mechaber* implies that they could (should?), however, read without *berachot* in order to preserve the memory of the mitzvah of public Torah reading.

18. In a responsum quoted verbatim, among other places, in the *Abudraham* (in *hotza'at machon Even Yisrael, Chelek 1*, p. 148), and in the *Beit Yosef Orach Chaim, Siman 143*.

19. In a responsum quoted in the *Beit Yosef Yoreh Deah, Siman 279*.

20. *Mishneh Torah, Hilchot Sefer Torah* 10:1.

21. In chapter 2 of *Masechet Megillah, Siman 393*.

Mahari bei Rav (followed by the *Shulchan Aruch*²²) and the Ramo.²³ All of these authorities agree that if one has finished an *aliyah* and the *beracha* after it, and sees an error before beginning the next *aliyah*, then we rely on the Rambam's opinion to say that all the previous *aliyot* were, *bediavad* (after the fact), a fulfillment of the mitzvah. A new *Sefer Torah* should be taken out for subsequent *aliyot*.

The Mordechai

The Mordechai's position is distinguished by the fact that in all cases where an error is found during Torah reading, a closing *beracha* ("asher natan lanu. . .") is made after reading from the unfit *Sefer Torah*, and a new opening *beracha* ("asher bachar banu") is made on the new scroll. He bases himself on the Gemara's discussion of the ruling of the Mishnah²⁴ that the *Kohen Gadol* reads from a *Sefer Torah* from *parashat Acharei Mot*²⁵ and "Ach ba'asor,"²⁶ but then reads from memory the passage relating to Yom Kippur, which is found in *parashat Pinchas*.²⁷ After rejecting the possibility of rolling the scroll to *Bamidbar*, the Talmud asks:

"Let them bring another (*Sefer Torah*) and let him read! Rav Huna bar Yehudah said [we don't do this] because of the *pegam* [aspersion cast on] the first [scroll]. Reish Lakish said [we don't do this] because of a *beracha sh'eina tzericha*, an unnecessary *beracha*."²⁸

The Mordechai's concern is that reading from a new *Sefer Torah* will require a new *beracha* which would be a *beracha*

22. *Orach Chaim* 143:4 and *Yoreh Deah* 279:1.

23. *Ibid.*

24. *Yoma* 7:1.

25. *Vayikra* 16:1-31.

26. *Vayikra* 23:26-32.

27. *Bamidbar* 29:7-11.

28. *Yoma* 70a.

sh'eina tzericha, because we have already fulfilled our obligation for an opening *beracha* with the *beracha* made at the beginning of this *aliyah*.^{29,30} Therefore, it is necessary to finish this *aliyah* at a permissible stopping point, even if it means reading further in the unfit *Sefer Torah*, so that a closing *beracha* can be recited.

Specifically, the *Mordechai's* opinion is based on certain rules in the reading of the Torah. Halacha requires that one must read a minimum of three verses in an *aliyah*.³¹ Furthermore, even if the Torah reader has read more than three verses, if he is within two verses of completing a section, he must read those two verses and complete that section.³²

Based on these requirements, the *Mordechai* says, that if an error is found at a time when three or more verses have already been read, and there are more than two verses before the end of a section, one should stop reading and the person who has the *aliyah* should make a closing *beracha* on the unfit *Sefer Torah*. A new Torah should then be taken out for the rest of Torah reading. A *beracha* should be made on the new *Sefer Torah*, and the reading continued.

If, however, an error is found before three verses have been read, or within two verses of the next section,³³ then there is an ongoing obligation to complete the reading of three verses (or up to the next section) in the unfit *Sefer Torah*, and we continue reading until three verses are read or the next section is

29. See the explanation of the *Biur Halacha*, d"h "im nimtza ta'ut."

30. He is not concerned with Rav Huna bar Yehuda's issue of casting false aspersions that the first *Sefer Torah* is flawed (*pagum*), because in this case it actually is.

31. See *Shulchan Aruch Orach Chaim* 137:2.

32. *Ibid.*, 138:1.

33. Not mentioned by the *Mordechai*, but included in this category by later *poskim*, are situations where an error is found in the last permissible *aliyah*, and a new *aliyah* may not be started. For example, *maftir*, the fourth *aliyah* on *Rosh Chodesh*, or the last *aliyah* on a public fast day.

reached. A *beracha* is then said at the end of the *aliyah*, and a new *Sefer Torah* is taken out for the continuation of the reading. A *beracha* should be made before continuing the reading in the new *Sefer Torah*.

Mahari Bei Rav

The Mahari Bei Rav,³⁴ a teacher of Rabbi Yosef Karo, had a different view. He held that if a mistake is found during the reading of an *aliyah*, to say a *beracha* at that point to end the *aliyah* entails an impermissible reliance on the opinion of the Rambam—it involves relying on the Rambam's opinion not to justify something that was already done, but actually to go ahead and make a *beracha*.

He therefore held that one should stop the reading in the unfit *Sefer Torah* at whatever point one finds the error. Everything read up to that point (including the *beracha* made at the beginning of the *aliyah* in which the error is found,) counts as a fulfillment of the mitzvah of public Torah reading. However, to read another word, or to make a *beracha* after the *aliyah*, a new *Sefer Torah* should be taken out and the reading continued from where it was left off. A *beracha* should not be made before this reading, as we rely, after the fact, on the *beracha* that was made at the beginning of the *aliyah* on the first *Sefer Torah*. At the end of the *aliyah* in the new *Sefer Torah*, a closing *beracha* is made.

The Ramo—the Conventional View

The opinion of the Ramo, Rabbi Moshe Isserles, is a matter of some contention. It is worthwhile, therefore, to cite the opinion of both the *Shulchan Aruch* and the note of the Ramo, as they appear in the treatment of this topic in *Orach Chaim*:

34. Cited in *Kesef Mishneh* on *Hilchot Sefer Torah* 10:1, *Beit Yosef Orach Chaim* Siman 143 and *Yoreh Deah* Siman 279.

If a mistake is found in a *Sefer Torah* during the time of [public] reading, we bring out another *Sefer Torah* and begin from the place where the mistake is found. We complete [the required number of *aliyot*] with the [subsequent] readers in combination with those who read from the scroll with the error. If the mistake is found in the middle of the reading, he finishes his reading in a kosher scroll and makes a *beracha* afterwards, but he doesn't make a *beracha* beforehand. Note: *If they have already read three verses and are able to stop, they stop there, make a beracha afterward, and complete the requisite number of aliyot in another Sefer Torah that they bring out.*³⁵

The *Shulchan Aruch* agrees with the opinion of the Mahari Bei Rav, holding that no matter where one is in the *aliyah*, a new Torah should be taken out and the reading should proceed from that place.

But what opinion does the Ramo agree with? If he agreed with the Mahari Bei Rav, he would say that one should never make a *beracha* after the reading from an unfit *Sefer Torah*. Rather, he should continue the reading from a different, kosher scroll. He holds, however, that if three verses have been read, one should make a *beracha* on the unfit *Sefer Torah* and only then continue in the new *Sefer Torah*. Thus, his opinion in this regard is like that of the *Mordechai*.

But the implication of the Ramo's comment is that if three verses have not yet been read, or it is not halachically possible to stop at the point where the error is found, one should not continue reading in the unfit *Sefer Torah*, as the *Mordechai* would indicate, but should instead continue his reading in a different, kosher scroll, before which he would not make a *beracha*. This seems consistent not with the *Mordechai's* opinion, but with that of the Mahari Bei Rav.

35. *Shulchan Aruch Orach Chaim* 143:4.

So the Ramo seems to have cut a strange compromise.³⁶ If three verses have been read and the reading can be completed, he holds like the *Mordechai*, ostensibly on the grounds that since the minimum requirements for a complete *aliyah* have been fulfilled (the reading of three verses), one should make the *beracha* after that *aliyah*. But if three verses have not yet been read, or if the reading must be continued because the mistake was found too close to the next section, then he holds like the *Mahari Bei Rav* that not a single extra word should be read in the *pasul Sefer Torah*—rather, the reading should continue in the new scroll.

The Ramo: Another View

The view of the Ramo just presented indicates that there are now three opinions within the school that relies on the *Rambam*: That of the *Mahari Bei Rav*, that of the *Mordechai*, and the hybrid opinion of the Ramo.

There have been some who understood the Ramo's ruling differently, however, for two major reasons:

First, if this is understanding of the Ramo is accurate, then his opinion differs from that of the *Shulchan Aruch*. But if this is true, then according to the conventions of his glosses on the *Shulchan Aruch*, the Ramo should have indicated that his comment was intended as a new opinion that the *Shulchan Aruch* did not cite by writing "Some say that . . ."³⁷ Yet the Ramo does not use this or any other language to indicate that his opinion disagrees with that of the *Shulchan Aruch*.

Second, there is another identical presentation of this halacha by the *Shulchan Aruch*, on which the Ramo does not indicate his opinion at all.³⁸ Surely if he disagreed with the

36. See *Mishnah Berurah* in his introduction to *Siman 143:4* who explains the Ramo in this way.

37. See *Taz, se'if kattan 1* on *Orach Chaim 143:4*.

38. *Shulchan Aruch Yoreh Deah 279: 1*.

Shulchan Aruch, the Ramo would not have misled a reader by omitting his dissenting opinion! Thus, the *Pri Megadim* explains the Ramo differently: The Ramo agrees completely with the opinion of the Mahari Bei Rav and the *Shulchan Aruch*. The Mahari Bei Rav, according to the *Pri Megadim*, agrees fundamentally with the *Mordechai* that if three verses have been read in an unfit *Sefer Torah* that an *aliyah* has been properly completed and a *beracha* should be made at the end. He disagrees with the *Mordechai* only if three verses have not been read or if there is an obligation to read further because of proximity to the next section. In such a case, while the *Mordechai* would instruct us to read on in the unfit *Sefer Torah* and say a *beracha* when finished, the Mahari Bei Rav would require us to continue the reading, without a *beracha*, in a new *Sefer Torah*.

The Ramo's gloss to the *Shulchan Aruch*, quoted above, is not a disagreement, and therefore is not preceded by the words "and some say." And because he doesn't disagree with the *Shulchan Aruch*, he was content not to comment at all on the *Shulchan Aruch*'s presentation of the halacha later. The Ramo, according to the *Pri Megadim*, agrees completely with the *Shulchan Aruch*. In summary, their view is that if three verses have been read, a closing *beracha* is made, and a new Torah is then taken out. If fewer than three verses have been read, or the error is too close to the end of the next section, then the unfit *Sefer Torah* is silently put aside, and the reading continued in the new *Sefer Torah*, without a *beracha*.

According to the *Pri Megadim*,³⁹ then, there are not three

39. The *Taz*, in *Yoreh Deah* 279:1 s"k 2, understands the Mahari Bei Rav and *Shulchan Aruch* the way the *Pri Megadim* does – that a *beracha* is made if three verses have been read and the mistake is at an appropriate stopping place. However, in *Orach Chaim* 143, he explains the *Shulchan Aruch* as never instructing that a closing *beracha* be said over an unfit *Sefer Torah*. This appears to be a contradiction in the *Taz*, and is noted by the *Shaarei Ephraim* in his introduction to *Shaar 5*. In any event, this issue applies only to the *Taz*'s view of the *Shulchan Aruch*, because in *Orach Chaim* 143, he – unlike the

opinions (Mahari Bei Rav, *Mordechai* and *Ramo*), but only two: That of the *Mordechai* and that of the Mahari Bei Rav, whose opinion is fully understood by reading the *Shulchan Aruch* and the *Ramo*'s explanatory gloss together.

B. The (Lack of) Consensus of the *Poskim*

Practically speaking, what should one do if an error is found in a *Sefer Torah* during an *aliyah*⁴⁰?

Sefardim follow the *Shulchan Aruch*, who follows the view of his teacher, the Mahari Bei Rav. Although we saw that the *Pri Megadim* understands that the Mahari Bei Rav and the *Ramo* in fact agree that a closing *beracha* should be said if three *pesukim* were read, many *poskim* disagree, and Sefardim simply bring out a new *Torah* and begin reading from the place of the mistake, without making a *beracha*.⁴¹

For Ashkenazim, the view is more complicated. Some communities hold like the *Mordechai*, others hold like the conventional understanding of the *Ramo* (which is also the *Pri Megadim*'s and the *Taz*'s understanding of the *Shulchan Aruch*). The *Bach*,⁴² the *Magen Avraham*,⁴³ and the *Aruch Hashulchan*⁴⁴ all hold explicitly like the *Mordechai*. The *Kitzur Shulchan Aruch* holds that in the absence of another *minhag*, one should follow the *Shulchan Aruch*, like the Sefardic practice.⁴⁵

The *Taz* holds a hybrid view—like his understanding of the

Pri Megadim – explicitly understands the *Ramo* as following the *Mordechai*.

40. Not discussed here are several more specific situations, such as an error found after an opening *beracha* but before reading, various permutations of errors found during *maftir*, or an error found during *Parashat Zachor* or *Parah*.

41. *Dinei Sefer Torah Shenimtza Bo Ta'ut*, Chapter 2, p.65.

42. In *Orach Chaim Siman 143* and *Yoreh Deah Siman 279*.

43. On *Orach Chaim 143*, *Se'if Kattan 2*.

44. *Aruch Hashulchan Yoreh Deah 279:5*.

45. *Kitzur Shulchan Aruch 24:8*.

Shulchan Aruch (not the *Ramo*) with a twist – that if fewer than three *pesukim* are read, a new Torah is brought out and the reading continued with no *berachot*; if three *pesukim* were read and the reading can be stopped, a closing *beracha* is made and a new *aliyah* begins in the new scroll. The *Taz* holds that in the last *aliyah*, or if the reading cannot be interrupted, we continue reading in the unfit scroll. Practically, this is like the *Mordechai*, but the *Taz* disagrees with the *Mordechai*'s reasoning, and institutes this practice based on *tircha d'tzibur*, concern not to overburden the congregation.⁴⁶

The *Torah Temimah* suggests that even those who do not follow the *Mordechai* should nevertheless adopt some of the characteristics of the *Mordechai*'s view.⁴⁷ The *Shaarei Ephraim*⁴⁸ and the *Mishnah Berurah* say that one should not change an existing *minhag*, but in the absence of an established *minhag*, one should follow the *Ramo*.⁴⁹ Rabbi Yitzchak Steiner and Rabbi Yitzchak Goldstein, in their work *Dinei Sefer Torah Shenimtza Bo Ta'ut*, follow the *Ramo*.⁵⁰ The *Mishnah Berurah*⁵¹ adds that it is preferable, if possible, to break up the remaining

46. *Taz, Yoreh Deah* 279, *Se'if Kattan* 2.

47. *Kitzur Dinei Keriat HaTorah v'ha'haftara*, printed in the back of the first volume of the *Torah Temimah*. I thank Rabbi Zevulun Charlop for bringing this source to my attention. The *Torah Temimah* introduces the classical understanding of the *Ramo* as well as of the *Mordechai*, and then writes that "in a place where they do not act according to the *Bach* (who follows the *Mordechai*), at least the practice should be that if [the Torah reader] begins even one word from the third verse, that he should finish it [the verse] and stop there; and if he is two verses from the end of the section, then he should read to the section and make a closing *beracha*." I do not yet understand the reasoning of this opinion, which seems to differ from the *Mordechai* only if the Torah reader *has not yet begun* the third verse, in which case the *Mordechai* would instruct him to continue until he has finished three verses, and the *Torah Temimah* would stop the reading immediately and read from a new scroll.

48. At the end of his introduction to *Shaar* 5.

49. *Biur Halacha d'h "Im nimtza tau't b'Sefer Torah"*

50. *Dinei Sefer Torah Shenimz'ea Bo Ta'ut*, Chapter 2, footnote 20 to the chart.

51. *Mishnah Berurah Siman* 143, *Se'if Kattan* 13.

reading following the error into seven additional *aliyot*. It seems to me that this would seem to apply regardless of whether one holds like the *Shulchan Aruch*, the *Mordechai*, the *Ramo*, or the *Taz*. Finally, the *Torah Temimah* strikes a compromise position

VI. Conclusion

The great debate on this topic throughout the generations continues to this day. What can be said is that virtually all the positions outlined in the earlier *poskim* have strong bases and contemporary adherents, and we must say that “*eilu v’eilu divrei Elokim chaim*,” these and those are words of the living God.

The Kashrut of Commercially Sold Milk

Rabbi Michael Zylberman

Introduction

In 1994, the observant community confronted a potential kashrut problem concerning milk extracted from cows that had undergone surgical procedures on their abdomens.¹ Recently, some halachic authorities have raised additional questions that might potentially challenge the kosher status of all commercially sold cow's milk.²

The Talmud³ establishes the permissibility of consuming the

1. For a discussion of the issues involved, see articles by R. J. David Bleich (*Contemporary Halachic Problems Volume V*, 2005, pp. 192-205), R. Yisroel Belsky and R. Moshe Heinemann (*Mesorah, Adar* 5755, pp. 62-78), R. Menachem Genack (*Tradition*, Winter 1995, pp. 44-48), R. Shlomo Gross (*Hapardes, Tishrei* 5755, pp. 23-24), and R. Eliyahu Ben-Chaim (*Beit Yitzchak* 5755, pp. 79-82).

2. The current kashrut question was featured in a front-page article in the *Five Towns Jewish Times*, November 17, 2006. The halachic aspects involved have been treated by the following authors: R. Gavriel Yehuda Illowitz (*Kovetz Beit Aharon V'Yisrael*, Kislev-Tevet 5763, pp. 66-76; Nissan-Iyyar 5763, pp. 124-136), R. Asher Ze'ev Schreiber (*ibid.*, Sivan-Tamuz 5763, pp. 156-159), R. Yosef Meir Feldman (*ibid.*, Av-Elul 5763, pp. 101-108), R. Zalman Nechemiah Goldberg, and R. Levi Yitzchak Halperin (*Habe'er*, Nissan 5763, pp. 140-156), R. Asher Weiss (*Minchat Asher, Shemot* pp. 305-307); R. Dov Weiss (*ibid.*, Adar 5764, pp. 76-85), R. Eliyahu Schlesinger (*Beit Hillel*, Av 5763, pp. 62-70), and R. David Landau (*Binativ Hechalav*, 5763, pp. 20-25). R. Menashe Klein (*Mishneh Halachot* 11:114 and 12:265) addresses the question tangentially.

3. *Bechorot* 6b.

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milk of a kosher animal and the prohibition of consuming the milk of a non-kosher animal.⁴ Not only is the milk of a non-kosher animal prohibited, but so is the milk of a *terefah*, an animal from a kosher species that developed a fatal organic disease or condition,⁵ the meat of which the Torah prohibits in the verse, “*Uvasar basadeh terefah lo tocheilu*” – “You shall not consume meat of a *terefah* in the field.”⁶ The Talmud⁷ records a *halacha l'Moshe MiSinai* (oral dictum given to Moshe at Sinai) that there exist eighteen *terefot* – organic diseases or conditions – and Rambam⁸ enumerates seventy specific instances of *terefot*.

Although the meat of a *terefah* is prohibited, the Talmud⁹ demonstrates that one need not establish definitively that a given animal is not a *terefah* in order to consume its meat, and by extension its milk. This is a function of the principle of following the majority (*rov*). The Talmud outlines two types of *rov*: *rub a deita kaman* – a majority involving a closed set –

4. According to one opinion in the Talmud, milk forms from blood, and without a Scriptural source to the contrary we would assume that a kosher animal's milk is forbidden just as its blood is. According to the other opinion, we would assume that the milk of a kosher animal is included in the prohibition of consuming a limb of a live animal (*eiver min hachai*). Once there is a Scriptural source permitting the milk of a kosher animal, one might have thought that milk is a *chiddush* – something that defies the usual rules – and even a non-kosher animal's milk may be consumed, contrary to the principle that that which is extracted from a forbidden substance is forbidden (*hayotzei min he'assur assur*). The Talmud therefore needs to prove that milk from a non-kosher animal is forbidden.

5. The term *terefah* can refer either to the condition of an animal or to the animal that has such a condition.

6. *Shemot* 22:30. While the Talmud does not explicitly prohibit the milk of a *terefah*, Rif (*Chulin* 19a), Rashba (*Chulin* 9a s.v. *v'chen Rabbeinu Shlomo*), and Rosh (*Chulin* 3:52) derive the prohibition from a Mishnah in *Chulin* (116b). Rambam (*Hil. Ma'achalot Assurot* 3:10) and *Shulchan Aruch* (*Yoreh Deah* 81:1) codify the prohibition.

7. *Chulin* 42a. All subsequent references to the Talmud and its commentaries refer to *Chulin* unless otherwise noted.

8. *Hil. Shechita* 10:9.

9. 11a –12a.

and *ruba deleta kaman* – a majority involving an open set. A classic instance of *ruba deita kaman* is that we decide the verdict of a *bet din* based on the opinion of a majority of its members. Similarly, if one finds a piece of meat in front of a shopping center housing ten meat stores, nine of which sell kosher meat, one may assume that the piece of meat in question is kosher.

While a *ruba deita kaman* governs items in a closed set, a *ruba deleta kaman* describes a natural phenomenon.¹⁰ One application of *ruba deleta kaman* is that the majority of animals from kosher species in the world do not harbor *terefot*. Since such a majority exists, we may assume that any individual animal came from the majority and we have the right to consume that animal's meat and milk without needing to check it for *terefot*.

Ramban¹¹ contends that one may not automatically rely on a majority involving a closed set (*ruba dileta kaman*) in a situation where there exists a significant minority (*mi'ut hamatzui*)¹² of *terefot*. For this reason, writes Ramban, given that a significant minority of animals harbor *terefot* in their lungs, one must check the lungs of an animal after it is slaughtered prior to

10. This is how *Shev Shmateta* (6:7 s.v. *u'lefi zeh*) characterizes a majority involving an open set (*ruba deleta kaman*). R. Elchanan Wasserman (*Kovetz Beurim, Shev Shmateta*, 3) notes by way of illustration that even if there were only a single cow left in the world, the majority involving an open set (*ruba deleta kaman*) of kosher animals would allow us to assume that it was kosher, since if there would be more animals in the world the majority of those animals would be kosher.

11. 3b s.v. *bodeik* and *Milchemot Hashem* 3b.

12. *Shu"t Rivash* (191 s.v. *gam*) writes that a "significant minority" is close to fifty percent ("karov l'mechezah"). However, the most widely accepted quantification of a significant minority is that of *Mishkenot Ya'akov* (*Yoreh Deah* 17 s.v. *vetarti*), who places the threshold at ten percent. See R. Hershel Schachter in *The OU Guide to Preparing Fruits and Vegetables* (New York 2004), pp. 78-80. See also *Bedikat Hamazon Kehalacha* (R. Moshe Vaye, Jerusalem 5765, Vol. I p. 116) for the opinions of various contemporary halachic authorities who advocate a lower threshold of a significant minority.

consuming its meat.¹³ This requirement is codified in *Shulchan Aruch*,¹⁴ who refers specifically to checking the lungs for adhesions (*sirchot*).¹⁵

This checking, however, is no more than a rabbinic mandate,¹⁶ and when it is difficult or impossible to perform, as in where the lung was lost before it could be checked, one may consume the meat anyway.¹⁷ Since we cannot examine a lung while an animal is alive, we may drink milk extracted from a live animal under the assumption that the animal came from the majority of animals that do not have *terefot* in their lungs.

Do a Majority of Dairy Cows Have *Terefot*?

Recently, anecdotal evidence has been cited to the effect that a majority of cows raised for dairy production harbor adhesions (*sirchot*). One rabbi involved in kashrut supervision

13. Ramban cites a passage in *Beitzah* 25b and *Tanchuma Shemini* 8 as evidence for his conclusion. Rashi (12a s.v. *Pesach*) also requires checking of an animal's lungs, but he does not articulate a general principle of not relying on a majority in the face of a prevalent minority. Rashba (9a s.v. *u'mah*) entertains other reasons for the requirement of checking lungs.

14. *Yoreh Deah* 39:1.

15. While Ramban and Rashi refer to checking lungs for *terefot* in general terms, Rashba (ibid. and *Torat Habayit, Bayit 2 Sha'ar 3*), Rosh (3:16, see *Ma'adanei Yom Tov* 8), *Tur Shulchan Aruch*, and *Shulchan Aruch* (*Yoreh Deah* 39:1) refer specifically to checking for *sirchot*, adhesions on the lungs. The biological definition of a *sircha* is "the adhesion of the folia of the rib membranes to the pulmonary membrane. These folia adhere as a result of pneumonia and of pleuritis" (*Mazon Kasher Min Hachai*, R. Israel Meir Levinger, Jerusalem, 1978, p. 503). *Shach* (39:2) claims that lungs must be checked for other *terefot* as well. *Pri Megadim* (*Sha'arei Deah* 39:2) quotes from *Tevuot Shor* that while we check lungs for all *terefot*, the requirement to check was instituted only because of adhesions. See *Darchei Teshuvah* (39:15) for a further discussion of this issue.

16. This is the opinion of, among others, Ramban, Rashba, Ramo (39:17), and *Shach* (39:3,8). The questioner in *Shu"t Rivash* 263 refers to *Orchot Chaim* who quotes a biblical source for checking the lungs.

17. According to *Shulchan Aruch* (39:2) the permissibility is unequivocal, whereas according to Ramo one may only consume the meat in a situation of significant financial loss (*hefsed merubah*).

in Johannesburg, South Africa, reported that 95% of dairy cows that are slaughtered contain adhesions. Another rabbi involved in kashrut supervision in the United States observed one dairy farm in which 80% of slaughtered cows had adhesions.¹⁸ While these two accounts do not necessarily reflect a representative sample (and a representative sample would be nearly impossible to procure as dairy cows are generally not slaughtered for kosher meat and thus are not posthumously examined for *terefot*) what would the halacha say if we were able to establish that a majority of dairy cows do contain *terefot*?

At first glance, absent a majority of kosher cows, we would no longer have the right to assume that any given cow is kosher. Following this logic, we would not be allowed to consume any milk until the cow that provided the milk was slaughtered and found to be kosher. However, there are numerous other factors that warrant a lenient conclusion.

*Shu"t Tiferet Zvi*¹⁹ addresses the question of how we can consume milk and butter in places where the number of *terefot* equals the number of kosher cows. He appears to present the following three distinct grounds for leniency:

1. How do we define a majority?

The only evidence that a majority of cows contain *terefot* comes from an analysis of cows that are slaughtered. This does not take into consideration living cows. It may well be the case, argues *Tiferet Zvi*, that a majority of all cows – when we consider both living and slaughtered cows together – do not contain *terefot*. In our situation, even were we to establish through a reliable sample that 80% of slaughtered dairy cows

18. Letter by R. Hershel Schachter to R. Nachum Rabinovitz, dated 13 *Tishrei* 5767.

19. *Yoreh Deah* 13, referenced in *Pitchei Teshuvah* 81:4 and *Darchei Teshuvah* 81:18.

contain adhesions, that would not necessarily indicate that a majority of *living* (i.e., milk-producing) cows contain adhesions. This is because according to Ramo (81:2), absent any contrary evidence, we need not assume that an adhesion existed for more than three days prior to *shechita*.²⁰

From a biological standpoint, R. Israel Meir Levinger²¹ points out that as *terefot* primarily develop due to diseases, the prevalence of *terefot* increases with the age of an animal. In a study involving over 8,000 cows in Israel,²² R. Levinger discovered an average *terefah* rate of 6.73% for calves (ages one and two) compared with 14.22% for cows (ages four and above).²³ As slaughtered dairy cows tend to be older, their *terefah* rates should not be considered representative of cows in their milking prime.

20. R. Yisroel Belsky (*Mesorah*, Adar 5765, p. 63), however, notes that if a cow's lungs are full of adhesions, as is often the case, it would be difficult to assume that all the adhesions developed in the last three days of the cow's life. Similarly, R. Dov Weiss (*Habe'er*, Adar 5764, p. 85) points out that if a high percentage of cows routinely have adhesions, we may not assume that all the cows developed their adhesions in the last three days of their lives. See also footnote 27.

21. *Mazon Kasher Min Hachai*, Jerusalem, 1978, p. 302, 505.

22. *Ibid.*, p. 304.

23. R. Levinger reported a 13%-16% overall *terefah* rate in Yugoslavia, and a rate of 25%-30% for oxen and 40%-50% for calves in other European countries. He notes that *terefah* rates tend to be lower in Israel because there is almost no market for non-kosher meat (*hefsed merubah*) and therefore greater effort is extended to attempt to rule leniently regarding questionable *terefot* (pp. 298-301, 506). R. Yisroel Belsky (*Mesorah*, Adar 5765, p. 63) refers to *terefah* rates of 40%-50%. R. Levinger also compared the *terefah* rates of cows raised for beef and cows raised for dairy in Israel. He discovered no statistically significant difference among older cows. However, the rate of *terefot* in calves raised for dairy was almost double that of calves raised for beef (15% to 5%). R. Levinger attributed the discrepancy to the prevalent practice of dairy farms to wean their calves in a drastic fashion. The change of diet leads to colds and coughing, which cause adhesions to develop (pp. 331-332, 500-501).

2. Presumption of Status (*Chazakah*)

Tosafot²⁴ assume that the presumption of permissibility (*chezkat kashrut*) of an animal is inoperative. Under the normal rules of presumption of status (*chazakah*), a permissible status that previously existed continues to exist until the point at which we can definitively prove otherwise. Thus, if we discovered a *terefah* in an animal, milk that had been extracted up until the point at which we could definitively prove that the animal developed the *terefah* would be presumed kosher. However, since there was never a point at which we had definitive knowledge that a given animal was kosher, as at any point in time the animal may have developed a *terefah*, Tosafot claim that the animal lacks a presumption of permissibility. *Rishonim* refer to the presumption of status (or lack of it) of such an animal as a *chazakah shel nitbarirah bisha'at*, a *chazakah* that was not clarified in its time. Tosafot rule that if someone produces cheese from the milk of a few cows and subsequently slaughters one of the cows and finds it to be a *terefah*, all the cheese becomes prohibited. Absent a presumption of permissibility, we must assume that the *terefah* was present in the animal prior to the milking, and thus the cheese contains milk from a non-kosher source.

Rashba²⁵ quotes R. Shimshon ben R. Shimshon, who argues with Tosafot and assumes that the majority of kosher animals creates a presumption of permissibility even in regard to *terefot*. *Shulchan Aruch*²⁶ partially adopts this opinion and presents three categories of *terefot*. Some *terefot*, like an extra digit, clearly existed from birth, and milk extracted from such an animal at any time is not kosher. Other *terefot*, like a hole in the membrane of the brain, may have developed at the moment before death, and any milk extracted from such an animal while alive is kosher, as we rely on the animal's

24. 11a s.v. *atyah*.

25. 11a s.v. *u'vishem*, see also Rosh, 1:16.

26. *Yoreh Deah* 81:2; see *Taz*, 81:3.

original presumption of permissibility. A third group of *terefot* takes three days to develop. If a slaughtered animal harbors a *terefah* of the third class, *Shulchan Aruch* holds that its presumption of permissibility is compromised, and any milk extracted, even prior to the last three days of its life, may not be consumed. Ramo, however, rules that while milk obtained during the last three days is prohibited, any milk extracted previously remains permissible. Ramo considers adhesions of the lung as belonging to the third category.²⁷ *Tiferet Zvi* writes that since every individual animal has a presumption of permissibility, as most of the *terefot* that exist were likely not present at birth, we may rely on that presumption of status (*chazakah*) to drink milk and assume that the *terefot* developed only after the milk was extracted.

3. Double Doubt (*Sefek Sfeika*)

Tosafot²⁸ who rule stringently about the milk extracted from an animal found to be a *terefah*, write that if the *terefah* discovered in the slaughtered animal is an adhesion, the cheese that was produced from its milk may be consumed because of a double doubt (*sefek sfeika*): First, there exists a doubt as to whether the adhesion is a genuine *terefah*, as we are stringent regarding adhesions due to our lack of competence in identifying what adhesions are authentic *terefot*. Secondly, even if it is a bona fide *terefah*, perhaps it developed only after the milk was extracted. *Shulchan Aruch*²⁹ records this comment of Tosafot. *Tiferet Zvi* notes that even if we were not to accept the previous grounds for leniency, we should permit milk based on this double doubt, as most of the *terefot* found in cows are adhesions.

27. *Darchei Teshuvah* (81:53) quotes *Pri Tevuah* (39:163), who notes that if an adhesion is so thick that it could not have formed in only three days, any milk extracted in the previous twelve months is prohibited.

28. *Ibid.*

29. *Yoreh Deah* 81:1.

4. The Status of Our *Terefot*

Other *poskim* have suggested additional grounds for leniency. *Sha'agat Aryeh30 provides a corollary to *Tiferet Zvi*'s last argument. *Or Zarua31 rules that one may not slaughter an animal on Yom Tov in a location where the majority of animals are *terefot*.³² *Sha'agat Aryeh* writes that although in his time (the work was published in 1756) a majority of animals had *terefot*, slaughtering on Yom Tov was still permissible. This was because the vast majority of *terefot* are found on the lung, and the later authorities adopted extra stringencies regarding the lungs, considering many permissible blemishes to be *terefot*. From a technical halachic perspective, many adhesions that we consider to be *terefot* are not really *terefot*.^{33,34}**

30. 64, cited in the aforementioned *Pitchei Teshuvah* and *Darchei Teshuvah*.

31. Quoted in *Hagahot Asheri*, *Beitzah* 4:15.

32. Strictly speaking, slaughtering on Yom Tov is permissible when meat is needed for consumption on that day. *Or Zarua* prohibits slaughtering when there is more than 50% probability that the slaughtered meat will not be kosher.

33. *Pri Chadash* (39:3), *Tevuat Shor* (39:2), and *Kiseh Eliyahu* (81:1), all cited in *Darchei Teshuvah* (81:18), make a similar observation about how we assess *terefot*. While *Tiferet Zvi* and *Sha'agat Aryeh* refer to locales where the number of *terefot* equals the number of kosher animals, *Kiseh Eliyahu* writes that in Alexandria, Egypt, in his day (1750's) more than 90% of animals had *terefot*. He nevertheless assumes that milk may be consumed because the majority of what they considered *terefot* were not authentic *terefot*. *Teshuvot Rashi* 62 (New York 1943, cited partially by R. Dov Weiss) records that half (according to a variant text: a majority) of all animals have adhesions, but not one in a thousand have other *terefot*. See also *Shu"t Chatam Sofer* (*Yoreh Deah* 19).

34. R. Ovadiah Yosef (*Yabia Omer* Vol. 5 Y.D. 3:3) invokes this argument in a different context. *Shulchan Aruch* (39:10-11) forbids *miuch u'mishmush*, removing or eliminating minor adhesions through applying pressure or smoothing them down. This is the basis of the widespread practice of Sephardic Jews (and some Ashkenazic Jews) to eat only "glatt ('smooth') *Beit Yosef*" meat. *Ramo* (39:13) allows the practice of *miuch u'mishmush* because he assumes that any authentic adhesion would not be removed by this process. R. Ovadiah Yosef addresses the question of whether a Sephardic Jew who adheres to *Shulchan Aruch*'s position may eat meat at a family "simcha" without knowing whether the meat is "glatt." He proposes that

5. The Status of a *Safeik Terefah*'s Milk

R. Ovadiah Yosef³⁵ notes that there is an opinion among *Rishonim* that consuming the milk of a *terefah* is only prohibited *miderabbanan*, rabbinically. *Mordechai*³⁶ quotes Maharam as holding that the juice (*tzir*) of a *terefah* is only prohibited rabbinically, and *Tosafot*³⁷ equate *tzir* with milk. R. Yosef observes that the Talmud itself implies that milk of a *terefah* is not biblically prohibited. The Talmud³⁸ asks how R. Meir, who does not hold of a majority involving an open set (*rub'a dileta kaman*), could ever eat meat, given that one could never establish definitively that a slaughtered animal did not have a *terefah*, as perhaps there was a preexisting hole at the point where the *shechita* knife cut the animal. If the milk of a *terefah* were biblically prohibited, reasons R. Yosef, the Talmud should have asked how R. Meir could ever drink milk.³⁹

According to this opinion, in a case of a *safeik terefah* one should be able to consume the animal's milk based on the principle of *safeik dirabbanan l'kula* – we rule leniently in a case of doubt concerning a rabbinic law. R. Yosef points out that the accepted opinion⁴⁰ is that the milk of a *terefah* is biblically prohibited. He is willing, however, to invoke the minority opinion in conjunction with other factors in certain cases of doubt.⁴¹

one may be able to rely on a double doubt (*sefek sfeika*): perhaps the meat is in fact "glatt" and even if there was an adhesion that was removed through *miuch u'mishmush*, perhaps the given adhesion was not an authentic *terefah*.

35. *Yabia Omer* Vol. 8, Y.D. 2:13.

36. *Chulin* 671.

37. *Bechorot* 6b, s.v. *le'esor*.

38. 11b.

39. There is an obvious rejection of this proof. The Talmud specifically asks about meat because, as the Talmud proceeds to observe, there are times when one is religiously obligated to consume meat (the Paschal offering and other *kodshim*). There is never a religious obligation to drink milk.

40. *Tosafot* 99b s.v. *shani*, *Rashba* 9a.

41. See also *Nefesh Chaya* (*Yoreh Deah* 4).

*Mishkenot Ya'akov*⁴² argues that one might prohibit the meat of a *safek terefah* while permitting its milk. Rashba⁴³ quotes the opinion of Rashi's teachers who prohibited the meat of an animal whose lungs were lost before being checked. Rashi disputed this practice, arguing that it would be hypocritical to have permitted the milk of such an animal and now to prohibit its meat. Those who argued with Rashi apparently were not bothered by his question and assumed that one could be more lenient regarding the milk of a *safek terefah* than with its meat.

Mishkenot Ya'akov suggests that this is because the presumption of permissibility of milk is stronger than that of meat. This is because the milk of an animal is permitted even when it is alive, whereas the meat of a live animal is included in the prohibition of eating the limb of a live animal (*eiver min hachai*). He proceeds to note that while the *Or Zarua* quoted above prohibited slaughtering animals on Yom Tov in a place where the majority of animals were *terefot*, there is no evidence that people in those locales refrained from drinking milk.

6. *Terefah Einah Chayah*

There may be another way of demonstrating that many of the adhesions that we disqualify are not authentic *terefot*. The Talmud⁴⁴ records a dispute whether an animal with a *terefah* is capable of surviving. We accept the position that *terefah einah chayah*, a *terefah* will not live for more than twelve months. Ramo⁴⁵ rules based on his understanding of Rashba⁴⁶ that if we observe a *vaday terefah* – a condition that is definitely a *terefah* – and the affected animal lives for more than twelve months, the animal remains prohibited. However, if we observe a *safek*

42. *Yoreh Deah* 17 s.v. *u'mah*.

43. 9a.

44. 43a, 57b.

45. *Yoreh Deah* 57:18.

46. *Shu"t* 1:98.

terefah – a condition the status of which is uncertain – and the affected animal lives for more than twelve months, we may treat the animal as kosher.^{47,48}

While Ramo's ruling, strictly speaking, applies to a case in which we observe an external condition and are unsure whether it qualifies as a *terefah*, we may nevertheless suggest the following argument regarding the question of how many dairy cows have adhesions on their lungs: If 80% of

47. Rashba addresses the question of how to relate to an animal with a *terefah* that lives for more than twelve months. He emphatically denies the possibility that an animal with a *terefah* could ever live for more than twelve months. If an animal with a *terefah* appears to have survived for that long, then it must be that we lost track of time or that we confused the animal with a different animal. The only exception is an animal with an extra digit that has the status of a *terefah* not because it will die within a year, but because of the halachic principle that something extra is the equivalent of something missing (*yetzer k'natul damei*). Since an animal that is missing a digit has the status of a *terefah* because it will die within twelve months, an animal with an extra digit is accorded the same status. Rashba does explicitly refer to a distinction between a *safek terefah* and a *vaday terefah* in his commentary on *Chulin* (42a s.v. *chayah*). Shach (*Yoreh Deah* 57:48) notes that according to Rashba, if an animal with a *terefah* lives for more than twelve months it must be because of a miracle. He quotes Maharshal (*Chulin* 3:80) who holds that *terefah einah chayah* is not an absolute principle but an indication of an overwhelming majority. Maharshal allows for the possibility that one out of every thousand *terefot* may live for more than twelve months. Meiri (42a s.v. *masoret*) writes that if an animal with a *terefah* survives for more than twelve months it is a fluke. His formulation would seem to allow for a more frequent instance of *terefot* that survive for twelve months than would Maharshal. *Tosafot HaRosh* (*Niddah* 2b s.v. *heicha*) appears to say that *terefah einah chayah* is no more than a simple majority. For a further discussion of Rashba's position, see R. Neriyah Gotel, *Hishtanut Hatevaim Behalacha*, Jerusalem 1995, pp. 32-39.

48. Shach (57:48) and *Chochmat Adam* (*Binat Adam, Issur V'heter* 26, quoted in *Pitchei Teshuvah* 48:2) contend that the twelve-month test can render an animal kosher not only in the case of a *safek* in *metziut* – a doubt as to whether a given blemish is indeed a blemish – but even in a case of a *safek* in *din* – a doubt as to how we rule regarding the status of a given blemish. *Pitchei Teshuvah* quotes others who dispute this position. See also R. Ovadiah Yosef (*Yabia Omer* 8, *Yoreh Deah* 2:3) who quotes over a dozen authorities who are of the former opinion.

slaughtered cows harbor adhesions, one of two explanations must hold true. If the adhesions all developed in the last year of the cows' lives, we may still assume that the majority of living cows in their prime are not *terefot*. If the adhesions developed earlier, the fact that a large number of cows do not drop dead every year⁴⁹ must indicate that most of what we treat as *terefot* are not authentic *terefot*.⁵⁰

One may object, however, that as modern medicine perceives many *terefot* as not being fatal, it would be difficult to arrive at any definitive conclusions from the fact that animals harboring adhesions generally live for more than twelve months. This is borne out by a comment of *B'chor Shor*⁵¹ regarding Rambam's position. Rambam⁵² writes that even if the medical knowledge of the time indicates that some *terefot* are not fatal, we must still follow *Chazal*'s list of *terefot*. Yet, Rambam also rules that if an animal with a doubtful *terefah* lives for more than twelve months, we may assume that the questionable blemish was not an authentic *terefah*. *B'chor Shor* asks how the twelve-month test could prove anything according to Rambam, if the list of *terefot* is binding even contrary to scientific realities. He is forced to answer that the twelve-month test only works for the type of *terefah* that even modern medicine considers fatal. If modern medicine does

49. According to the United States Department of Agriculture National Health Monitoring System Dairy 2002 survey, approximately five percent of dairy cows die on farms annually, as opposed to only one to one-and-a-half percent of beef cows. The same survey indicated that in 2001 approximately 25.5 percent of dairy cows left herds permanently, with 94 percent of those culled (sent for slaughter). About half of the cows culled were removed from dairy production due to disease or injuries and the other half were removed because of suboptimal productivity (Frank Garry, "Current Mortality Rates on U.S. Dairies," *Western Dairy News*, February 2006, pp. W-43-4).

50. R. Dov Weiss (*Habe'er*, Adar 5764, pp. 77-78) raises the possibility that the twelve-month test may prove something about the status of our adhesions.

51. *Chulin* 58a.

52. *Hil. Shechita* 10:13.

not view adhesions as fatal,⁵³ the twelve-month test should be of no value to us.

The Status of Milk Obtained from Large Numbers of Cows

Even if we consider a majority of dairy cows to be kosher, we must contend with a second potential problem. Until the mid-nineteenth century, milk production in the United States was dominated by family farm operations that owned only a few cows and milked them by hand, providing for customers in their immediate vicinity. As the technologies of refrigeration, transportation, and electric milking advanced through the first decades of the twentieth century, milk preservation techniques improved and production increased. Contemporary milk production is concentrated in large dairy farms⁵⁴ where cows are generally milked in assembly-line-like parlors, with milk flowing through pipelines from the milking machines to bulk tanks that typically hold tens of thousands of gallons of milk.⁵⁵

This modern method of milking cows raises the following question: Let us assume, for argument's sake, that 10% of dairy cows (*Mishkenot Ya'akov*'s threshold of *mi'ut hamatzui*) harbor authentic *terefot*. As we noted earlier, if we extract milk from any single cow we may drink the milk because of the

53. Professor Frank Garry of Colorado State University indicated (in personal correspondence dated December 20, 2006) that firm adhesions are scars from old inflammatory diseases that the animal survived, while adhesions of softer consistency represent inflammation of active diseases that could kill the animal. The implication of this description is that diseases, and not adhesions per se, kill animals.

54. The United States Department of Agriculture documented that in 2005, 8.4% of commercially marketed milk came from dairy farms of fewer than 50 cows, while 44.5% of milk came from dairy farms with over 500 cows (*Agricultural Statistics 2006*, VIII-5).

55. *Encyclopedia Americana*, 2005 edition, Vol. 8, pp. 428-429. Information about the size of bulk tanks was obtained from the Orthodox Union Kashrut Division.

majority involving an open set (*ruba d'leta kaman*) of cows that are kosher, and we do not have to be concerned that perhaps this cow is a member of the minority. However, if the milk of tens or hundreds of cows were mixed together in the same bulk tank, it is implausible that none of the milk came from cows that have *terefot*. Is a majority involving an open set (*ruba dileta kaman*) a halachic reality that allows us to view every individual animal as exhibiting a presumption of permissibility (*chezkat kashrut*) and permit all the milk, ignoring the larger statistical picture that would necessitate a contrary conclusion? Or does a majority involving an open set only operate on a small scale but not when it runs counter to a statistical reality? If the latter is the case, we would only be permitted to consume milk from a bulk tank if there are sixty times as many kosher cows whose milk was extracted as cows with *terefot*.⁵⁶ In other words, the *terefah* rate would have to be lower than 1.6%. Although biblically if a prohibited substance is mixed with a permissible substance the prohibited substance is nullified in a majority of the permissible substance, there is a rabbinic enactment that the nullification of liquids can only be effected with a 60:1 ratio.⁵⁷

1. The Stringent Opinion

R. Gavriel Yehuda Illowitz⁵⁸ contends that a majority

56. Even if there would be sixty times as many kosher cows as cows with *terefot* we would still have to contend with the problem of *ein mivatlin issur l'chatchila* – one may not prospectively nullify a prohibited substance. See *Har Zvi* (*Yoreh Deah* 36) regarding a similar application of *ein mivatlin issur l'chatchila*. *Taz* (*Yoreh Deah* 99:10) claims that the prohibition of benefiting from improper nullification does not apply where the beneficiary is unaware that nullification was effected on his behalf. R. Akiva Eger quotes *Shu"t Rivash* (498) as dissenting, prohibiting benefiting from nullification that was effected on behalf of any member of a large constituency. See. R. J. David Bleich (cited in footnote 1) for sources that address nullification effected by a non-Jew.

57. *Shulchan Aruch* 98:1.

58. *Kovetz Beit Aharon V'Yisrael*, Kislev-Tevet 5763, pp. 66-76; Nissan-Iyyar

involving an open set (*rub a dileta kaman*) cannot allow for a permissive ruling contrary to a statistical reality. He reasons that it is logically impossible that we would be allowed to consume a mixture that, based on the laws of probability, almost definitely contains prohibited substances.⁵⁹ R. Illowitz thinks that this is the assumption of *Mishkenot Ya'akov*.⁶⁰ The Mishnah⁶¹ records that according to Rabbi Yehudah, the *Kohanim* would fill a cup with the blood of the Paschal offerings that spilled on the floor of the Temple Courtyard. They would sprinkle the blood of this mixture so that in case the blood of any individual Paschal offering had inadvertently not been sprinkled, its owners would still fulfill their obligation through this sprinkling. The Talmud⁶² links this opinion to Rabbi Yehudah's general position that there can be no nullification of like substances (*min bimino lo batel*). Likewise, blood cannot nullify blood (*ein dam mivatel dam*). The blood of any single Paschal offering that fell on the floor and got mixed up with other blood would retain its identity,

5763, pp. 124-136.

59. R. Hershel Schachter in the aforementioned letter supports this position. In a letter dated 28 Kislev 5767 he explains that majority (*rov*) generally functions as a clarification of the facts (*birur*), as opposed to a presumption of status (*chazakah*), which instructs us how to act in a given circumstance (*hanhagah*). (See R. Elchanan Wasserman, *Kovetz Beurim, Shev Shmateta*, 4.) A *hanhagah* is only relevant in the absence of a *birur*. This is why a majority (*rov*) overpowers a presumption of status (*chazakah*) when the two suggest opposite conclusions (*rub a v'chazakah rub a adif*). This also explains the opinion of Tosafot (*Avodah Zarah* 41b s.v. *v'ein safek*) that a weak majority (51%) does not overpower a presumption of status, as weak majority cannot function as a clarification. (See R. Schachter in *Ginat Egoz*, New York, 2001, pp. 63-64.) In light of this explanation, asks R. Schachter, how can we rely on the presumption of kashrut of each individual animal when the milk of multiple animals gets mixed together, even if that presumption is based on a majority involving an open set (*rub a dileta kaman*), and ignore the stronger clarification provided by the statistical likelihood that there is a problematic percentage of non-kosher milk?

60. *Yoreh Deah* 16 s.v. *vira'iti*.

61. *Pesachim* 64a.

62. *Ibid.* 65b.

and the sprinkling of any mixture of blood would count for all the offerings whose blood had spilled.

Mishkenot Yaakov poses the following question: An animal with a *terefah* is disqualified from sacrificial use.⁶³ Thus, since Rabbi Yehuda holds that blood cannot nullify blood, the blood of any animal with a *terefah* would disqualify the entire mixture of blood. If a prevalent minority (*mi'ut hamatzui*) of animals harbor *terefot*, how could it be that not a single animal brought as a Paschal offering had a *terefah*?⁶⁴ *Mishkenot Yaakov* is forced to conclude that *terefot* in the time of the *Beit Hamikdash* were not as prevalent as they were in later times. R. Ilowitz claims that *Mishkenot Yaakov*'s question assumes that if there were a significant instance of *terefot*, we would have to view a mixture of the blood of multiple animals as including the blood of *terefot*.

It would seem, however, that a careful reading of *Mishkenot Yaakov* leads to the opposite conclusion. His question is that if there were a prevalent minority (*mi'ut hamatzui*) of *terefot* in the lungs, they would have checked all the lungs of the Paschal offerings and in all likelihood would have found some adhesions. Subsequently, they would not have been able to sprinkle the mixed blood, as the mixture would have contained blood from the animals with adhesions, and R. Yehuda holds that prohibited blood may not be nullified. *Mishkenot Yaakov* then suggests that the instance of adhesions in the time of the *Beit Hamikdash* did not reach the threshold of a prevalent minority (*mi'ut hamatzui*) and they did not need to check the lungs. Since they did not check the lungs, there was no positive knowledge that any *terefot* existed, and they were able to sprinkle the mixed blood.

63. *Bechorot* 57a and Rambam *Hil. Issurei Mizbe'ach* 2:10.

64. The Talmud (*Pesachim* 64b) records that on one occasion during the Second Temple period, King Agrippas commissioned a census of the number of Paschal offerings offered. That year they estimated that 1.2 million Paschal offerings were brought.

2. The Lenient Opinion

Ramo,⁶⁵ codifying a position of *Issur V'heter He'aruch*,⁶⁶ appears to hold that we may rely on a *rov* even in our situation. *Issur V'heter* addresses a case in which milk from sixty cows is made into cheese and subsequently one of the animals is slaughtered and found to be a *terefah*. He rules that we may assume that none of the live animals have *terefot* and consume the cheese without checking any of the other animals. If the only *terefah* is the animal that was slaughtered, there will be sixty times as much kosher milk as non-kosher milk and the non-kosher milk will be nullified. Even though a prevalent minority (*mi'ut hamatzui*) of animals harbor *terefot* in their lungs, and one would therefore expect (working with a 10% threshold for *mi'ut hamatzui*) that among sixty cows approximately six of them (much more than 1.6%) should be non-kosher, we can nevertheless assume that every individual cow is kosher until proven otherwise.⁶⁷ In our case as well, even if the milk of hundreds of cows gets mixed together, we may rely on the independent presumption of permissibility of each individual animal and permit all the milk.⁶⁸

65. *Yoreh Deah* 81:2.

66. 69:2.

67. If ten percent of cows in the general population have *terefot*, the probability that in a random sample of sixty cows none of them will have *terefot* is approximately 0.18% (.9⁶⁰). The probability that *bitul bishishim* would be operative (namely that one or no cows will have *terefot*) is approximately 1.38% (60(.9)⁵⁹(.1)+.18). (Thanks to Dr. Stanley Ocken of CCNY for providing the relevant mathematical formula.) If we accept that majority (*rov*) must take into account statistical realities, would we prohibit milk if there is merely a 51% probability that there are more than 1.6% of cows with *terefot* in the given sample? Assuming a 10% instance of *terefot* in the general cow population, in a mixture of milk from seven cows, there is only a 48% probability that none of the seven cows will have *terefot* (.9⁷=~48%). R. Schachter concedes that a 51% probability forms a weak majority (see footnote 58) and does not prohibit the milk. However, it is difficult to pinpoint the exact threshold at which a majority becomes strong enough to pose a problem (somewhere between 51% and 90%).

68. See *Shach* (81:6) and *Pri Megadim*. R. Levi Yitzchak Halperin (pp. 169-171) and R. Yosef Meir Feldman (*Kovetz Beit Aharon V'Yisrael*, Av-Elul

3. The Novel Leniency of *Marcheshet*

Even if we accept the stringent opinion regarding the mechanics of majority (*rov*), there may still be grounds for leniency.⁶⁹ R. Chanoch Henach Eiges⁷⁰ proposes a fascinating rationale for permitting milk extracted from an animal with an adhesion. Rashi⁷¹ and Tosafot⁷² argue about the nature of an adhesion. Rashi believes that an adhesion always contains a hole. (A hole in the lung is one of the *terefot* quoted in the Mishnah.) Tosafot hold that an adhesion need not contain a hole; the reason we treat an adhesion as a *terefah* is that we assume that it eventually will develop a hole.

Marcheshet contends that the classic *terefot* are only those that place the animal in a currently fatal condition. Only these *terefot* are subsumed under the *halacha l'Moshe miSinai* and the biblical injunction of “*Uvasar basadeh terefah lo tocheilu*” – “You shall not consume meat field of a *terefah* in the field.”⁷³ According to Tosafot, an adhesion does not fall into this

5763, pp. 107-108) cite this Ramo in addressing our question. R. Yosef Meir Feldman (*Kovetz Beit Aharon V'Yisrael*, Av-Elul 5763, p. 107) suggests another proof for this position from *Shulchan Aruch* 84:8-10. See also *teshuva* of R. Yisroel Belsky in the possession of the Orthodox Union Kashrut Division, dated 27 Tishrei 5767. R. Zalman Nechemia Goldberg and R. Asher Weiss (*Habe'er*, Nissan 5763, pp. 140-146) propose additional arguments to support this position.

69. R. Dov Weiss (*Habe'er*, Adar 5674, pp. 78-83) quotes *Acharonim* (*Chiddushei HaGrach al HaRambam*, *Hil. Maachalot Assurot* 3 et. al.) who claim that the forbidden derivative of a prohibited substance (*yotzei min ha'assur*) is not viewed as the source substance but rather as a member of a new prohibited category. Based on this understanding, he suggests that the new prohibition of *yotzei min ha'assur* may only be applied if we know definitively that a given animal is a *terefah*. Absent such knowledge, we could permit the mixed milk, even if statistically there are likely more than a problematic percentage of cows with *terefot*. R. Moshe Heinemann (*Mesorah*, Adar 5755, pp. 76-78) provides another original suggestion that would permit the milk even according to the statistical perspective of majority.

70. *Marcheshet* 1:29.

71. 46b s.v. *let*.

72. 47a s.v. *haynu*.

73. *Shemot* 22:30.

category, as it has not yet necessarily developed a fatal hole. However, since we know that an animal with an adhesion will eventually develop a fatal condition, it is prohibited based on the verse “*V’zot hachayah asher tochelu*” – “And this is the animal that you shall eat,”⁷⁴ from which the Talmud⁷⁵ derives that an animal that will live may be consumed and an animal that will not live may not be consumed. This latter prohibition is an *issur aseh*, a prohibition derived from a positive statement. *Maggid Mishneh*⁷⁶ writes that according to Rambam the principle that that which is extracted from a prohibited substance is prohibited (*hayotzei min ha’assur assur*) does not apply to prohibitions formulated as an *issur aseh*. Thus, according to Tosafot’s understanding of adhesions, the milk extracted from an animal with an adhesion should be permitted. *Marcheshet* is ultimately unwilling to rely on his suggestion because he notes that one could construct a counter double doubt (*sefek sfeika*). Perhaps the halacha is in accordance with Rashi’s opinion that an adhesion is a classic *terefah*, and even if the halacha is in accordance with Tosafot’s opinion, perhaps this particular adhesion had a hole.⁷⁷

Conclusion

In the contemporary situation, there appears to be no credible evidence that a majority of dairy cows harbor adhesions. It is, however, quite likely that a prevalent minority (*mi’ut hamatzui*) of cows have *terefot*, such that more than 1.6% of milk that gets mixed together comes from such cows. To date, while a few individuals have stopped drinking commercially

74. *Vayikra* 11:2.

75. 42a.

76. *Hil. Maachalot Assurot* 2:3.

77. R. Schachter, in the second letter, raises the possibility of relying on *Marcheshet*, since we are only dealing with a rabbinic prohibition, as biblically nullification is accomplished with a simple majority. He points out that we would still have to assume that there is less than a 1.6% instance of other *terefot* in cows.

sold milk, major kashrut organizations have endorsed the continued consumption of milk, following the implication in *Shulchan Aruch* that we may assume that every individual cow comes from the majority of cows that are kosher, even if such an assumption contradicts a statistical reality.

Letters

To the Editor,

The nature of the obligation for married women to cover their hair has been the subject of much discussion of late in the halachic periodical literature. One of the first articles regarding this topic was by Rabbi Mayer Schiller in the *Journal of Halacha and Contemporary Society* (Fall, 1995), titled "The Obligation of Married Women to Cover Their Hair". In the article, although Rabbi Schiller firmly rejects any valid halachic opinion permitting total hair uncovering, he nevertheless advances a theory based on the *Tur* and *Shulchan Aruch* that might possibly give validity to such an approach. I believe that this is based on a fundamental misreading of the sources.¹

1. Rabbi Schiller seeks to demonstrate from the wording of the *Tur* and *Shulchan Aruch* that the prohibition of completely uncovering one's hair is *Dat Yehudit* (Jewish practice). The article infers this from the fact that in their listing of what constitutes *Dat Moshe* (the rule of Moses), neither *Tur* nor *Shulchan Aruch* make mention of a woman's hair being fully uncovered. Indeed, they mention it in the lesser, possibly subjective category of *Dat Yehudit*.

The Mishnah in *Ketubot* (72a) states "And these [women can be] divorced without [receiving the amount stipulated in their] *ketubah* :

"One who transgresses *Dat Moshe* (the rule of Moses) or *Dat Yehudit* (Jewish practice). And what is *Dat Moshe*? She feeds him untithed produce or she cohabits with him as a *niddah* (in a ritually impure state), she does not separate *challah*, or she vows and does not fulfill her vow. And what is

1. See in *Techumin* (Iyar 5767) an article written by Rabbi Michael Broyde, who uses Rabbi Schiller's mistaken premise as the foundation for permitting uncovering the hair .

referred to by the words 'Jewish practice?' She goes outside with her hair uncovered, ...or if she speaks with every man, etc."

Seemingly, the Mishnah understands the issue of married women's hair covering not as *Dat Moshe*, but rather as *Dat Yehudit*. The Gemara (ibid) questions the Mishnah's categorization of women's hair covering as merely a "Jewish practice", asking:

"Is it not biblically ordained? As it is written, 'he shall uncover the head of the women' (*Bamidbar* 5:18)." A *tanna* in the Academy of R.Yishmael taught that "this is a warning to Jewish daughters that they should not go out with their heads uncovered."

The Gemara explains that biblically it is sufficient for women to partially cover their hair with a *kalatah* (a basket worn on the head, according to Rashi), whereas to go with her hair completely uncovered would indeed be in violation of *Dat Moshe*, a violation on a biblical level.

The *Tur* (*Even Haezer*, 115) follows the Mishnah in *Ketubot* (72a) in listing examples of what is considered transgressing *Dat Yehudit*: "One who goes outside even if her hair is not totally exposed, rather there is a basket on her head, since she does not have a *redid*." The *Tur* carefully added the word "*Elah*"(rather) emphasizing that only partially exposed hair falls under the category of *Dat Yehudit*.

This is further clarified in the *Shulchan Aruch* (ibid), "And what is [violation of]) *Dat Yehudit*? One who goes outside with her hair uncovered without a *redid* like all women, in spite of the fact that her hair is covered with a cloth."

The reason that the *Tur* and *Shulchan Aruch* do not mention this in the laws of *Dat Moshe* is obviously that the Mishnah itself does not list uncovered hair as one of the examples of *Dat Moshe*. Therefore, the *Tur* and *Shulchan Aruch*, following the text of the Mishnah, list *roshah paruah* (uncovered hair) in the category where the Mishnah listed it – that is, in *Dat*

Yehudit. However, as explained by the Gemara itself, *roshah parua* means with a *kalatah* – that is, covered partially – and this indeed is precisely how *Tur* and *Shulchan Aruch* rule.

This is where Rabbi Schiller erred: According to his understanding (that uncovered hair is only *Dat Yehudit*) a contradiction arises how this is consistent with the Talmud which clearly states that *roshah parua* (completely uncovered hair) is *deorayta* (a violation on a biblical level). Rabbi Schiller points out that indeed the *Beit Shemuel* (*Even Haezer* 115:9) addresses this difficulty and seems to argues with the *Tur* and *Shulchan Aruch*. In truth, however, a careful reading of the *Beit Shemuel* reveals his intention merely to clarify the words of the *Shulchan Aruch*, and not to question them: “The rule is: totally uncovered hair is a violation of *Dat Moshe*; if her hair is partially covered with a basket or something else, but not covered according to the custom of the daughters of Israel, this is in violation of *Dat Yehudit*.” Thus, it is quite simple why normative and accepted halachic practice has rejected that very justification.²

2. Rabbi Schiller makes mention in his article of Rabbi Yosef Messas’s theory that suggests that women’s hair covering is no longer a requirement in a society where married women no longer cover their hair [See *Mayim Chaim* vol. 2:110, *Otzar Hamichtavim* (3:884)]. I was rather surprised to see that in a letter to the editor of this Journal (Pesach, 1996), Rabbi Michael Broyde makes note that this leniency of uncovered hair was indeed the practice of the Algerian and Moroccan Orthodox communities from well before the 1900’s, and bases his statement on the above writings of Rabbi Yosef Messas.³ I

2. The premise that *Dat Yehudit* itself can be subject to change is not clear; see *Yabia Omer* 4(*Even Haezer* 3, 2).

3. It should be noted that Rabbi Yosef Messas’s approach is clearly not the view of any recognized *posek*, let alone a substantial minority of *poskim*. Rabbi Broyde himself writes in an essay in the *Edah* journal 4:2, “One cannot build a system of Jewish divorce law based on opinions of writers and scholars no one has heard of.” Following this logic, it is quite obvious that an

must protest this as a serious inaccuracy. Being of Moroccan descent and heavily invested in the research of *Magreb* laws and customs,⁴ I can say with full certainty (based on firsthand accounts) that throughout the generations, women were particularly meticulous in this matter – to the extent that it is well known that even while washing their hair in the bathhouses, they would have a towel covering their hair. Rabbi Shlomo Dayan (publisher of the *Mayim Chaim* and close student of Rabbi Messas) further informed this writer that it is quite possible that Rabbi Messas formulated this *limud zechut* (justification or explanation for leniency) only with regard to Telmeson, Algeria (where he was the *rav*) where the forces of Modern French civilization penetrated and threatened the very religious infrastructure of the community. As such it can hardly be seen as a negation of the long-standing Moroccan *minhag* (custom), as it was well known that all women in Morocco would don at least one hair covering, if not two. It is quite probable, therefore, that in an attempt to keep the last vestige of orthodoxy intact, Rabbi Messas defended the deviant behavior that plagued his city.

Rabbi Schiller makes mention of Rabbi Yosef Chaim in his work *Chukei Nashim*, who although rejecting the notion that women may uncover their hair, nevertheless offers a justification for European women who were lenient on this matter. Rabbi Schiller seems to translate the carefully worded "*hitnatzlut*" as a "justification", but a possibly more accurate translation would be "an excuse". Rabbi Yosef Chaim cannot be giving any validity to such a custom as he himself writes a couple of lines before, "according to our law it is forbidden."

3. Rabbi Schiller mentions that it would take us beyond the confines of his essay to explain why one should not rely on a

opinion that was clearly rejected by all *Acharonim* and is at the very least not in the mainstream, should not be relied upon even as a *limud zechut*.

4. The reader is referred to the letter writer's book on this subject entitled *Magen Avot*, published in Jerusalem 5765.

handful of isolated sources and, therefore, although it is well known that women in Lithuania were lenient on this matter, is probably best seen as an aberration which, when the time became more receptive, was quickly abandoned. Rabbi Schiller is to be commended on his assessment that distinguishes between aberrant practice and a minimally acceptable halachic custom. The parameters that define a halachically valid custom are a long and detailed subject, not suitable to the present venue. Nevertheless, it is universally acknowledged that a widespread flouting of halachic norms, unsupported by authoritative opinions, cannot be redefined as a *minhag yisrael*. See further *Kaf Hachaim* (135:40), *Chazon Ish* (O'H 39:8) that a *minhag* not supported by rabbinic authorities is not called a *minhag*. In fact, several contemporaneous Lithuanian scholars strongly condemned this aberration. See *Aruch Hashulchan* (*Orach Chaim* 75:7), stating that women in his generation are accustomed to uncovering their hair, "ba'avonotainu harabim [due to] our great sins." See *Shevilei David* (75) who condemns this practice as well.

Indeed, the *poskim* do not suggest a concession due to societal change that would permit women to uncover their hair totally.⁵ However, in regards to reciting the *Shema* in front of married women, several *poskim* rule that this is permitted, but this is not because they consider uncovering the hair as permissible. Rather, they are ruling about recitation of the *Shema*, which may not be recited in the presence of an *erva*, a part of the body which is customarily covered. In light of the reality that most women in today's world do not cover the hair, it can no longer be considered an *erva*, and for that reason, one may pray in the presence of a woman with

5. See *Yabia Omer* (*Even Haezer* 4:3,2). In regards to the parameters of laws and obligations that are subject to change, see *Iggerot Moshe* (*Even Haezer* 2:3,2) that a halacha for which the reason was not specifically revealed is not subject to change. See *Torat Chesed* (Lublin) quoted by the *Ketzot Hashulchan* (*Orach Chaim* 328) that only halachot for which the reasons were revealed are possibly subject to change.

uncovered hair. See *Aruch Hashulchan*(*ibid*), *Ben Ish Chai* (Bo,12).

One may suggest that the mitzvah for women to cover their hair is not merely a *gezeirat hakatuv* (decree written in Torah); rather, the Torah is revealing to us a standard as to how Jewish women, *benot Yisrael*, should conduct themselves. The verse "*Ufarah*" teaches us that the proper *derekh* (practice) for *benot yisrael* is to cover their hair.⁶ Indeed, Rashi (*Ketubot* 72a), writes about the verse "*Ufarah et Rosh Haisha*", "from here we learn that it is not the *derekh* (practice) of the daughters of Israel to go outside with uncovered hair." Rashi seems to suggest that the Torah is informing us what the *derekh* of *benot Yisrael* both was and should be. See *Responsa Vayeshev Yosef* (Berlau) Y"D 1,2, that this practice further developed into a *minhag Torah* (Torah custom), not subject to *hatara* (releasing of vows).

In light of the above explanation, we may also understand why there exists in the framework of this halacha a clear distinction between married women, who have the obligation to cover their hair and unmarried women, who don't. Indeed, the Torah revealed to us that it is the *derekh* for a married woman to go outside with her hair covered, whereas for unmarried women, it is not the *derekh*. The Torah's definition of *derekh* for married women is not subject to change, since this *derekh* is not based upon the norms of society, but rather the Torah has defined the proper behavior for Jewish women.⁷

6. See *Beit Shemuel* (115:1) regarding the parameters of *Dat Moshe*.

7. It is quite beyond the scope of this letter to discuss the topic of wigs in halacha: however, in light of the explanation given above, we can clarify an additional point that seems puzzling to many. If the whole purpose of a wig is to cover a woman's hair, shouldn't the wig be less attractive than her natural hair? And if this is not the case, is it not defeating the spirit of the law? Indeed, many *poskim* forbid wigs. Nevertheless, since the prevalent custom is to permit them, one may explain in the following manner: If the purpose of a woman's head covering is in order for her to increase *tzniut*, then indeed, most wigs do not accomplish this goal. However, if we

This is indeed why there is a distinction in the Gemara between a woman uncovering her hair in a public domain in contrast to within her own *chatzer* (courtyard) or *bayit* (home), as in a woman's home, the Torah does not view it as the *derekh* to have her hair covered.

Therefore, the leniencies mentioned in the *Aruch Hashulchan*, *Ben Ish Chai* (Bo,12), and others regarding *kriat shema* do not affect the obligation of women to cover their hair, as the former is dependent upon *hirhur*, (see *Responsa Yehoshua Even Haezer* 89, and *Divrei Chamudot Berachot* 3:37) whereas the latter is *derekh benot Yisrael*. Likewise, one cannot deduce from the *Maharam Alashkar* (35) (who permits hair which is protruding from a woman's head covering where this is the norm), that in places where women totally uncover their hair, this would likewise be permitted, the distinction being that the obligation of women's hair covering was already classified as *derekh benot Yisrael*. This is not the case with hair merely protruding from a women's hair covering, which was possibly never included in the original obligation.

To reiterate the points mentioned above:

1. Rabbi Schiller's claim that *Tur* and *Shulchan Aruch* understand that women's hair covering is rabbinic and therefore subject to change is unfounded. Women's hair covering is defined by the Gemara in *Ketubot* (72a) as *Deorayta* (See *Meiri*), in the category of *Dat Moshe*.⁸ No *Rishonim* or *Acharonim* seem to suggest otherwise. The Torah is indicating that proper behavior for a married woman is to go outside

understand that a woman's hair covering in a public domain is to adhere to *derekh benot Yisrael*, so long as it is known that a woman is not entering a public domain with uncovered hair, it is not a violation of *derekh benot Yisrael*.

8. Whereas the *Terumat Hadeshen* (242) says that uncovered hair is *derabanan*. He explains the Gemara that says that uncovered hair is *deorayta* as meaning merely an inference from a *passuk* or an *asmachta*. However, all agree that it is still categorized as *Dat Moshe*.

with her hair covered, and setting a higher standard of behavior for *Benot Yisrael*.

2. The authorities that argued that local custom did impact upon halacha only did so in regard to the amount of hair that had to be covered. None of them disagreed with the basic requirement of hair covering in general. In regards to a negligible minority that indeed lent credence to such a view, they have been rejected by the consensus of the halachic world. Although there were a few generations in which women found the prospect of covering their hair too burdensome, today many women are willing to be *moser nefesh* for what is still a difficult precept. It is important that we know that halachic thinking is on their side.

Respectfully,
RABBI MORDECHAI LEBHAR

Rabbi Schiller maintains that his remarks in his article were only meant as a suggestion how the *Tur* and *Shulchan Aruch* might be interpreted, and not as a definitive statement. Therefore, he does not feel that it is necessary for him to make any further response..

* * *

To the Editor:

I enjoyed Rabbi Aryeh Leibowitz's well-researched article "Kashrut for Children." One of the many points to which Rabbi Hershel Shachter agreed is that one can give flavored liquid medication to a child when there is no suitable alternative. However, this leniency is seldom applicable since in most situations there is a suitable alternative. Liquid medications are generally not certified kosher because they may contain glycerin. However, the kashrut status of glycerin is questionable because the source of the glycerin, whether from animal or vegetable, cannot be verified, and therefore, is considered a *safek issur* (*Shach YD* 98:9). Accordingly, many *poskim* have ruled that one may nullify a *safek issur lechatchila*

(*Shach YD* 92:8, *Har Tzvi YD* 36; however, see *Iggerot Moshe YD* 2:32) as opposed to something which is certainly not kosher and cannot be nullified *lechatchila* (*YD* 99:5).

Therefore, one can dilute the liquid medication at a 60:1 ratio since glycerin is a *safeik issur*. However, one need not dilute the whole spoon of medication by 60 times, but rather only 60 times 20% of the spoon, as the Star-K has concluded, based on their research, that the medicine has less than 20% glycerin. Mathematically, for every teaspoon of medicine one would only need to add 12 teaspoons of a kosher liquid. One does not need 60 times the whole spoon because we do not apply the clause of *chanan* (for explanation of *chanan* see Rabbi Daniel Feldman's article, entitled "Pareve Meat" p. 96, *Journal of Halacha and Contemporary Society* LIII) when the mixture is of kosher and non-kosher liquids and there is a great loss (Ramo *YD* 92:4). The Star-K has stated that the need for a sick person to take cough syrup or other such medicines, especially for children, is comparable to Ramo's leniency. Since Ramo was lenient in a case of great loss, he would likely be lenient when dealing with sickness.

Star-K spoke with various companies and determined that diluting cough medicine or other liquid medication, as described above, does not reduce its potency. Therefore, unless the child is unable or unwilling to consume a large volume of liquid (which admittedly can happen), there does seem to be a suitable alternative to permitting outright consumption of non-kosher medicine.

Lastly, the only point that can be concluded from *Beit Yosef* (*OC* 269) is that while there is no prohibition for an adult to give a child a non-kosher mixture, nonetheless there may be *timtum halev* for the child. It is explicitly stated in the Talmud that committing a sin causes *timtum halev* (damage to the spiritual capacities of the soul) (*Yoma* 39a). Since drinking non-kosher liquid medication is rabbinically prohibited, as Rabbi Leibowitz wrote in his article, a parent should be concerned about *timtum halev* for the child. *Darchei Teshuva* (81:88) is

lenient on *timtum halev* only when there is no other option. Thus, it is always better to dilute the medication.

It goes without saying that in a life-threatening situation, there should be no hesitation how to administer the medicine.

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