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TABLE OF CONTENTS

The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School whose main office is at 3495 Richmond Road, Staten Island, New York, 10306. We welcome comments on the articles included in this issue and suggestions for future issues. They should be sent to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York 10977.

Manuscripts that are submitted for consideration must be typed, double-spaced and on one side of the page and sent in duplicate hard copy to Rabbi Cohen. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles that concern contemporary halachic issues.

More generally, it is the purpose of this Journal to study through the prism of Torah law and values major questions facing us as Jews in the twenty-first century. This encompasses the review of relevant biblical and talmudic passages and the survey of halachic literature, including recent responsa. Most importantly, the Journal of Halacha and Contemporary Society does not present itself as the halachic authority on any question. Rather, the aim is to inform the religious Jewish public of positions taken by respected rabbinic leaders over the generations.

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A New Set of Genes: Halachic Issues in Genetically-Engineered Foods

Michael I. Oppenheim, MD

Introduction

Rapid advances in the biochemical and biomedical domains have provided our generation with tools and techniques to manipulate and recombine the most basic building blocks of life. Barely 30 years after the discovery and description of DNA, the basic components of genetic material, scientists were able to develop genetically engineered products by transferring genes from one biologic entity into a different biologic entity causing the recipient to express some new, desirable trait. This technology has been applied in numerous constructive ways in the agricultural domain, such as the production of transgenic crops that are resistant to pesticides, which repel predatory insects, and are unharmed by extremes of temperature. Additionally, genetic engineering has enabled the production of transgenic animals with specific diseases or defects (for the purposes of scientific research into cures for those diseases) as well as the production of animals whose milk contains biologically useful proteins which are difficult to produce synthetically.

While clearly offering great benefits to humanity, the potential and application of this technology raises a number of

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halachic questions that will be addressed in this essay:

1) If the source of the transferred gene is a different species than the recipient, does this constitute *kilayim* (the prohibition against mixed species produce or creatures)?

2) If the source of the transferred gene is not kosher, does the resulting product automatically become non-kosher?

3) If a genetically-engineered animal either gains or loses *simanei* kashrut (biblically-defined signs associated with animals whose consumption is permitted), does the kashrut status of the animal change?

Please note that this article is intended as a scholarly analysis of potential issues. Obviously, all specific practical questions should be addressed to an appropriate rabbinic authority.

It should also be noted that, at the time of this writing, there are no transgenic animals in the food supply of the United States of America.[1] While transgenic produce is approved by the United States Food and Drug Administration, none of the approved products include genes from a different species of produce.[2]

Kilayim

The Torah explicitly forbids the creation of hybrids from different plant or animal species in the verse "… your animals you should not mate as *kilayim*, your fields should not be sown as *kilayim*…"[3] The question arises, therefore, whether a gene derived from one plant or animal retains sufficient identity of the source plant or animal to render a recipient plant or animal (of a different species) or its progeny as *kilayim*.

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1. http://www.fda.gov/cvm/transgen.htm.

2. http://www.cfsan.fda.gov/~lrd/biocon.html; all transgenic produce is currently developed by introduction of a gene from another strain of the same species or using DNA from bacteria, viruses, or fungi.

3. Leviticus 19:19.

It is important to note that the prohibitions of animal hybrids and plant hybrids are enumerated separately in the verse, and that the parameters of the prohibitions are somewhat different. With regard to animals, the Torah limits the prohibition only to the act of mating two species of animal. In contrast, the prohibition of agricultural *kilayim* includes sustaining the mixed-crop field or hybrid product rather than being limited only to the act of creating the hybrid.

This difference is codified in the laws of *kilayim* in the *Shulchan Aruch*. With regards to livestock, the *Shulchan Aruch* states "One does not receive lashes [as punishment for violation of the prohibition of *kilayim*] until one [physically mates the animals] with his hands",[4] but "he who violated … may derive benefit from the resulting offspring".[5] In contrast, the agricultural prohibitions include the statements "One who sows two types of plants together in *Eretz Yisrael* receives lashes",[6] "It is prohibited to allow [*kilay zeraim*, prohibited agricultural hybrids] to remain in his field, he must uproot it",[7] and "One is prohibited from preserving that which is grafted as *kilayim*, although the fruit which emanates from it is permitted. Additionally, it is permitted to take a leaf from it and plant it elsewhere".[8]

Based on these statements, there would appear to be significant differences between the creation of transgenic animals and transgenic plants. The creation of a transgenic animal would clearly not violate the prohibition of creating *kilayim* (as one is only liable for directly causing the mating of two animals), and would also not require disposal of the product.[9] On the other hand, creation of transgenic plants may

4. *Shulchan Aruch, Yoreh Deah*, 297 Part 2:2.
5. Ibid, 297 Part 2:5.
6. Ibid, 297 Part 1:1; regarding *kilayim* in plants.
7. Ibid, 297 Part 1:2; regarding *kilayim* in plants.
8. Ibid, 295:7; regarding grafting of trees.
9. *Responsa Minchat Shelomo*, Addendum volume, #97.

or may not violate the prohibition of creating *kilayim*, and may also require destruction of the resultant product.[10]

The *Chazon Ish* is the primary source which is cited to address the question of whether transfer of a gene from a certain plant species into another plant species is sufficient to render the resultant plant a prohibited hybrid. The Mishnah relates that the residents of Jericho did a number of things on the day before Pesach, three of which were sanctioned by the sages while three were not approved. One of the activities which was approved was that they "grafted their palm trees". The Talmud[11] goes on to explain that they would combine and cook myrtle branches, liquid from the berry of a laurel, and barley flour and pour the resultant mixture into the hollowed trunk of the palm tree. From this statement, the *Chazon Ish* derives a series of parameters for the prohibition of *kilayim*, stating that adding something which "does not have '*koach ha'tzemicha'* (power of growth)" to another plant does not create a prohibited graft or hybrid. In contrast, adding a substance, even a liquid, which has '*koach ha'holadah*' (power of procreation), would create a prohibited graft or hybrid.

The exact application of these terms is the subject of discussion among contemporary *poskim*. Rav Eliyahu Bakshi-Doron opines that since a gene does not have the power of independent growth and because it mediates its impact on the resultant plant indirectly through a series of biochemical steps, there is no prohibition of creating *kilayim*, nor is there a requirement to destroy the product (if a gene is added to a plant).[12] Rav Chizkiyahu Yosef Cohen disagrees, arguing that

10. It should be noted that while a hybrid agricultural product may be prohibited and must be destroyed, this prohibition may be limited to only the actual hybrid created; subsequent generations may be permitted based on the statement in the *Shulchan Aruch* (295:7) allowing the replanting of a cutting or seed from a tree which is illegally grafted.

11. *Pesachim* 56a.

12. *Binyan Av* 4:43.

the grafted substance need not have the capacity for completely independent growth; rather, the fact that it materially impacts and improves the plant to which it is "grafted" is sufficient to define it as having "*koach toladah*" and therefore prohibit such grafting.[13] Rav Shelomo Zalman Auerbach offers what appear to be conflicting opinions on the matter. His nephew, Rav Yechiel Michel Stern, quotes his uncle as having stated that if a bee pollinates an *etrog* tree with pollen from another plant, it is not considered as having grafted two species since pollen does not have the independent ability to grow into a plant.[14] In contrast, in a responsum specifically addressing creation of transgenic produce and livestock, R. Auerbach explicity states that even though the transferred material is not a full-fledged plant, one cannot avoid the issue of *kilayim* since "ultimately, the 'field' is planted using two species".[15] Rav Chizkiyahu Yosef Cohen suggests that the statement with regard to pollination of the *etrog* tree is referring to the prohibition of **creating** *kilayim*, while the statement addressing genetic engineering is referring to the requirement to eliminate (not "preserve") hybrid plants.[16] This would presume that the requirements for violation of the prohibition of actively creating *kilayim* are different than the parameters which define a hybrid product which requires destruction. That is, one can have a product whose creation did not violate the prohibition of creation of *kilayim* yet still requires destruction as an illegal hybrid.

Rav Bakshi-Doron adds an additional note to this issue, citing a responsum of the Chatam Sofer[17] who opines that the prohibition of "preserving *kilayim*" is only applicable as long as the individual grafted components are individually

13. *Ateret Shelomo*, "*Handasa Ganatit*", Volume 5, p 134.
14. *Kashrut Arba'a Minim*, page 182.
15. *Minchat Shelomo*, op cit.
16. *Ateret Shelomo*, op cit.
17. *Responsa Chatam Sofer* 6:25.

recognizable; once the components have fused to the point where the original components are not individually distinct, there is no requirement to eliminate the resultant product. As a transgenic plant does not appear as two distinct items joined together, but rather appears as a single unified plant, no prohibition would apply to the product.

Ta'arovet

Another question which is discussed with regard to transgenic products is whether the insertion of a gene from a non-kosher source (e.g. a pig gene) would render the ultimate product into which it is inserted as inedible, because it is a mixture (*ta'arovet*) containing a non-kosher element.

Professors Goldschmidt and Maoz suggest that there is no issue with regard to a gene derived from a non-kosher source, since, prior to being used in the creation of a transgenic product, the gene is amplified in a chemical reaction which ultimately produces many synthetic copies of the source gene.[18] Thus, the gene(s) which are actually utilized to create the transgenic product are synthetically derived and therefore would not have any non-kosher status.

Rav Bakshi-Doron enumerates further reasons why an inserted gene from a non-kosher source would not render the resultant product as non-kosher, stating that the genes do not have a status of "food;" as they have no taste, they are intrinsically not considered as food appropriate even for a dog.[19] He goes on to address the hypothetical possibility that the gene **should** have significance and should not be considered nullified (even if it constitutes less than 1/60th of the total mixture) given that the impact of the gene is potentially visible in the final product. He draws parallels to cheese produced using rennet from a non-kosher animal,

18. *Assia*, Vol 17, Page 59, 5759.
19. *Binyan Av*, op cit.

noting that the rennet can never be nullified, no matter how small the quantity, since the impact of hardening the cheese (‘*ma’amid*’) is visibly obvious. However, he ultimately rejects this hypothesis, pointing out that any visible impact in the final product is not a direct effect of the actual item (the gene) which was added, but rather an indirect impact of the presence of the gene;[20] therefore, the gene itself does not get the status of a "*ma’amid*" and can be disregarded within the larger mixture.

The suggestion that a gene-produced protein (rather than the actual gene) mediates any visible physical changes and therefore the gene itself can be considered nullified may not be agreed upon by all *poskim*. In the context of discussing genetically-altered kosher fowl which have been made to show signs of a non-kosher bird presumably through introduction of genetic material from a non-kosher bird (which we shall discuss in more detail later), Rav Natan Gestettner opines[21] that one cannot apply the halachic principal of *zeh ve’zeh gorem muttar* (something impacted by multiple elements [one of which is forbidden] is permitted) since the non-kosher components (i.e. the genes which led to the change in the bird) cannot be nullified since they visibly impact the offspring.[22]

The Orthodox Union, a prominent kashrut organization in the United States of America, addresses this issue:[23]

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20. Genes serve as templates for cells to utilize to manufacture proteins. It is those manufactured proteins which ultimately impact on the physical characteristics of the organisms which harbor those genes. Thus, it is not the inserted gene which creates a change in the product, rather it is the protein produced using that gene which actually causes the visible change.

21. Responsum printed in Rav Chizkiyahu Yosef Cohen’s *Responsa Avnei Chen* 1:44.

22. Rav Gestettner applies the understanding of the Ran that *zeh v’zeh gorem* is based on the principal of *bittul*, nullification.

23. http: // oukosher.org / index.php / learn/article / genetically_ engineered_ food/.

> The second issue is as follows. If non-Kosher [sic] genetic material is introduced into a Kosher product, does that render the genetically altered material as non-Kosher? For example, if a new strain of tomatoes is developed by introducing genetic material from a pig cell, is the tomato a Kosher entity?
>
> In our opinion, the genetic engineering does not affect the Kosher status. This is the case for two reasons: Firstly, the genetic material is generally microscopic and is not significant enough to change the Kosher status.[24] Secondly, the genetic material is only introduced in the initial stage. Subsequently, the genetically altered item produces new offspring, which has not been the recipient of non-Kosher genetic material. The presence of a non-Kosher gene in a tomato does not render as non-Kosher all subsequent tomatoes that are "descendants" of the genetically altered tomato."

Simanei kashrut

Background

The Torah states that only certain animals, fish, and birds are permitted to be eaten.[25] Permitted animals are identified as ruminants with cloven hooves, while permitted fish are those possessing fins and scales. In contrast, signs (*simanei* kashrut or *simanim*) through which to identify permitted species of birds are not provided in the Bible; rather, 24 species of forbidden birds are enumerated, and all other birds are permitted.[26] The sages, however, described signs by which the

24. Rav Shelomo Zalman Auerbach disputes this suggestion in *Minchat Shelomo*, arguing that anything which is being deliberately manipulated cannot be ignored on the basis of being invisible to the naked eye.

25. Leviticus 11:1-32; Deuteronomy 14:3-20.

26. *Shulchan Aruch*, *Yoreh Deah*, 82:1.

forbidden and permitted birds could be identified.[27] The questions which arise, therefore, are regarding the permissibility of animals whose signs have been altered through genetic engineering. What if a kosher fish is genetically-altered such that it no longer has scales? What if a kosher bird were genetically altered to express characteristics ascribed by our sages to non-kosher birds? What, fundamentally, determines the species' identity and its associated status as permitted or forbidden?

There are three halachic principles which may be relevant to a discussion of the nature of species identity in halacha.

1) Yotzeh: The Mishnah in *Bechorot* (1:2) discusses the cases of "a kosher animal which gives birth to [an animal appearing to be] a non-kosher animal [the offspring] is permitted to be eaten, while a non-kosher animal which gives birth to an animal that [appears to be] a kosher animal [the offspring] is forbidden to be eaten, because that which comes out of a non-kosher animal is not kosher, and that which comes out of a kosher animal is kosher" (a principal known as "*yotzeh*").[28] These sources would suggest that the permissibility of an animal is solely maternally-derived.

Rabbi Abraham Tzvi Hirsch Eisenstadt notes that there are two possible ways to understand this dictum.[29] One possibility is that the permanent species identity is determined by the mother, regardless of the appearance of the offspring, and that species identity is passed along to subsequent generations despite the presence or absence of *simanim*. Alternatively, one might understand this

27. Mishnah *Chullin* 3:6.

28. Note that the Gemara is not assuming a mixed parentage, as the Gemara in *Bechorot 7a* explicitly asserts that a non-kosher animal can never impregnate a kosher animal and a kosher animal can never impregnate a non-kosher animal.

29. *Pitchei Teshuva* to *Shulchan Aruch, Yoreh Deah* 79, Note 2.

dictum to be a specific rule applying to this offspring (the actual *yotzeh*) only; fundamentally, the animal is what it appears to be based on its appearance and *simanim*, but is subject to a special prohibition against or allowance for consumption based on the status of its mother.[30] This distinction would obviously have a profound impact on the applicability of the principal of *yotzeh* to livestock which produce genetically-altered progeny, especially as it relates to subsequent generations of offspring.

2) Chosheshin le'zerah ha'av: The Talmud in *Chullin* (79b) discusses an argument between Rabbi Eliezer and the Rabbis with regard to applicability of the prohibition of slaughtering mother and son from certain species on the same day.[31] The Gemara eventually determines the disputed case to be when a goat (subject to the prohibition) impregnates a doe (not subject to the prohibition) and a doe is born. The daughter doe subsequently has a son (fathered by a deer). Can the daughter doe and its son be slaughtered simultaneously? The Rabbis opine that the daughter doe and its son cannot be slaughtered the same day, since the daughter doe has a goat father, and we take into consideration the "seed" of the father (c*hosheshin le'zerah ha'av)*; therefore, the daughter doe has some status of goat, and is subject to the prohibition of slaughtering it and its son on the same day. Rabbi Eliezer disagrees, stating that we do not consider the "seed" of the father (*ain chosheshin le'zerah ha'av*), thus the daughter doe has no status of "goat" and the prohibition does not apply.

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30. There are practical ramifications of this distinction, such as the use of the offspring's hide for the writing of a *sefer Torah*. If the non-kosher appearing offspring is truly fully kosher by virtue of its mother being kosher, the hide would be permitted to use. If the animal was fundamentally a non-kosher animal with a special dispensation allowing consumption, the hide would not be usable for a Torah scroll.

31. Leviticus 22:28.

Clearly, if one accepts that we do not consider the genetic contribution of the father in determining the species identity of the offspring, one would certainly not assume that the presence of a foreign gene inserted into an animal would in any way alter the species identity of the recipient animal and its progeny. In contrast, if one assumes that we **do** consider paternal genetic contribution, one can question whether an artificially-inserted single gene would or would not impact the species identity of the recipient.

3) Zeh ve'zeh gorem: There are numerous discussions in the Talmud dealing with the question of a product with multiple contributors to its creation. If one of the contributors is permitted and one forbidden, is the final product considered as permitted or forbidden? This discussion comes up in a number of contexts, including the case of an animal and its offspring. The Talmud in *Temurah* (30a) discusses the case of an animal which has been rendered ineligible to be brought as a sacrifice, which is impregnated by an eligible animal. Rabbi Eliezer suggests that the offspring is forbidden to bring as a sacrifice since the product of a permitted and forbidden item is forbidden (*zeh ve'zeh gorem assur*). Conversely, the Rabbis allow the offspring, assuming that z*eh ve'zeh gorem muttar* (the product of forbidden and permitted is permitted). It bears mentioning that Rav Nissin Gerondi (Ran*)* believes that the Rabbis' allowance of z*eh ve'zeh gorem* is based on the principle of nullification (*bittul*).[32] The assumption that *zeh ve'zeh gorem muttar* is based on *bittul* may limit the applicability of this principle to genetic engineering, as, in general, we do not allow nullification based on quantity when the item one wishes to nullify is deliberately added to the mixture.[33]

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32. *Rabbeinu Nissim* to *Avodah Zarah*, Chapter 3, page 52.

33. *Shulchan Aruch, Yoreh Deah* 99:5.

Fish/Animals

Rav Eliyahu Bakshi-Doron was presented with an eel (generally accepted as a non-kosher fish because of its lack of scales) which was found in the Kineret. This eel had grown larger than the typical eel. This particular eel was shown to have scales, and Rav Bakshi-Doron addresses the permissibility of eating that eel.[34] He cites precedent from the Talmud (*Avodah Zarah*, 39a) which describes Rav Ashi being brought a fish which was "like an eel"; after examination in the light and determination of the presence of scales, Rav Ashi permitted the fish. While a straightforward reading of this Gemara implies that Rav Ashi permitted the eating of that particular eel-like fish (not an actual eel), Rabbeinu Chananel assumes that the creature was an actual eel.

Rav Bakshi-Doron writes that the fundamental issue is whether an unusual member of a species (e.g. one which has grown larger than the normal adult size) has any significance in determining the kashrut of either itself as an individual or the species as a whole. He suggests that the question hinges on the nature and role of *simanim* in determining the kosher status of an animal or fish. One possibility is that the *simanim* are simply visible markers of the species which are kosher, though the actual permissibility or lack thereof is a function of the species, which has been divinely determined to be intrinsically permitted or forbidden. Conversely, the *simanim* may be the actual direct cause of the permissibility or non-permissibility of the animal/fish; there is nothing intrinsic to the species itself, but rather the presence or absence of *simanim* confers a permitted or forbidden status.

Rav Bakshi-Doron goes on to write that the same fundamental question regarding the role of *simanim* is relevant to determining the permissibility of animals or fish that have

34. *Binyan Av* 2:42.

been genetically altered to change their *simanim*.[35] If one assumes that *simanim* are the fundamental cause of kashrut, an animal previously lacking *simanim* would become permitted if s*imanim* are added, and animals whose *simanim* are artificially removed change from permitted to forbidden. However, if *simanim* are merely a sign that the species is permitted, addition or removal of *simanim* would not intrinsically change the fact that the species is fundamentally forbidden or permitted.[36]

The question of the role of *simanim* is discussed by many *Rishonim* and *Acharonim*.[37] For example, in his discussion on *parshat Shemini*, Abravanel states that *simanim* are merely a sign indicating that a specific species is permitted. Similarly, Rabbi Jacob Toledano equates *simanim* regarding kashrut to the indicators (also referred to as *simanim*) used to determine that a minor has achieved maturity.[38] He writes that just as the presence of pubic hairs is not the cause of maturity, but rather an indicator of it, similarly *simanim* of animals are mere indicators. In contrast, Rabbi Yom Tov ibn Asevilli and Rav Aryeh Lev state that the *simanim* are, in fact, the actual cause

35. *Binyan Av* 2:42 and 4:43.

36. This distinction may be coupled to the two possibilities raised in the *Pitchei Teshuva* regarding the understanding of the *din* of *yotzeh* in the cases of a kosher animal giving birth to non-kosher animal and vice versa. In those cases, the offspring automatically gets the kashrut status of the mother despite the offspring's appearance by virtue of the principle of *yotzeh*, but it is unclear whether that status is passed along to subsequent generations. If one understands that *simanim* are the fundamental cause of kashrut, then one has a conflict between the offspring's *simanim* and the principle of *yotzeh*, necessitating one to understand *yotzeh* to be a special ruling applied just to this offspring but not to subsequent generations which would be judged by their *simanim*. In contrast, if one assumes *simanim* are merely a sign but that actual kashrut is innate in the species, the principal of *yotzeh* can apply the mother's species identity to all subsequent generations irrespective of the offspring's *simanim*. See *Responsa Avnei Chen* 2:132

37. For extensive discussion of these opinions, see *Binyan Av* 4:43 and *Responsa Avnei Chen* 2:132-133

38. *Responsa Maharit* 1:52.

of the kashrut of an animal.[39]

Rabbi Elchanan Wasserman suggests[40] that perhaps this issue is at the root of two opinions in Tosafot. The Gemara in (*Niddah* 50b) states that the Swamp Rooster (*tarnegol d'agma*) is forbidden while the Swamp Hen (*tarnegulta d'agma*) is permitted. The simplest understanding of this statement is that the male of the species is prohibited while the female of the same species is permitted. Tosafot note that the male of the species does not manifest the *simanim* of kashrut [while the female does]. Tosafot then go on to address two problems: (1) if the female is permitted, then any male must be permissible as well, since its mother would be permissible, and the principle of *Yotzeh* (described above) should render the offspring permissible, and (2) if the male is forbidden, any female born would be forbidden according to the opinions that *zeh ve'zeh gorem assur* since the female's father is forbidden. Tosafot offer two approaches. The first approach suggests that the principles of *yotzeh* and *zeh ve'zeh gorem* are not relevant to fowl, since the mother lays an egg which develops externally, and the offspring is considered as if it has "grown from the ground" (i.e. somewhat disconnected from the parents). The second approach (which Tosafot suggest is the preferred approach) is that *tarnegol d'agma* and *targengulta d'agma* are actually two distinct species, and that the male and

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39. *Chiddushei Haritva*, *Niddah* 51b; *Lev Aryeh*, *Chullin* 66b; The rationale for their opinion is based on the Gemara in *Niddah* which states that any fish which have scales also have fins. The Gemara then poses the question that if that is the case, why does the Torah need to specify the presence of fins and scales to render the fish kosher? The presence of scales alone should be sufficient to identify the fish as permissible, since per the statement of the Gemara, any scaled fish has fins. The Gemara responds with the cryptic statement *"yagdil Torah v'ya'adir"* (the Torah should be made greater and glorified). Ritva and *Lev Aryeh* suggest that the answer to the question is that since the scales and fins are elements which are required to *make the fish kosher* – not just identifying marks – the Torah needs to mention both items as they are both critical elements to making a kosher fish.

40. *Kovetz He'arot*, *Chullin* 62b.

female of the former are both forbidden, while the male and female of the latter are permitted. As part of the rationale, Tosafot state that "it seems unlikely that there would be a distinction between male and female of a single species".

Rav Wasserman suggests that these two approaches are driven by a difference of opinion regarding the role of *simanim*. The first approach of Tosafot is based on the premise that *simanim* are the cause of the permissibility (or lack thereof) of any given animal; thus, it is entirely possible to accept the premise of a discrepancy between the status of two animals in the same species provided you address the technical problems of *yotzeh* and *zeh ve'zeh gorem*. However, the second approach assumes that *simanim* are merely a marker for an animal whose species is intrinsically either forbidden or permitted. The fact that the egg is gestated externally may bypass the problems of *yotzeh* and *zeh ve'zeh gorem*, yet does **not** fundamentally alter the species of the offspring and would therefore not impact the kashrut of the species being transferred from the female mother to the male offspring. Additionally, it would seem that if *simanim* are merely a sign of an intrinsically kosher or non-kosher species, it is difficult to understand a discrepancy between genders within a single species.

Rav Bakshi-Doron writes that since the question regarding the role of *simanim* is unanswered, one cannot permit a non-kosher fish to which fins/scales are added, nor allow a previously kosher fish whose scales are removed.[41]

Rav Shelomo Zalman Auerbach discusses the impact of the alternation of *simanim* (addition or removal) with regards to the kashrut of fish.[42] Rav Auerbach suggests that even if one accepts the premise that the *simanim* are the direct cause of the permissibility, when the *simanim* are artificially added halacha

41. *Binyan Av* 4:43.

42. *Responsa Minchat Shelomo*, op cit.

would not consider those as *simanim* to render the fish (or animal) as kosher. He further goes on to apply the principle of *yotzeh*, stating that if a camel were to give birth to a cow, that cow and all the subsequent generations which emanate from that cow have the halachic status of a camel, and therefore would be forbidden despite appearance as a cow.[43] As such, if such animals were to proliferate, ultimately *simanim* of kashrut would cease to be of value and determination of kashrut would be problematic.

Rabbi Shemuel HaLevi Wosner[44] and Rabbi Natan Gestettner[45] were questioned regarding a carp whose scales were diminished through some scientific alteration, to the point where they were nearly absent (raising the theoretical possibility of an ultimate state of complete absence of scales). In their discussion of this possibility, both state that artificially produced or eliminated *simanim* may not have any halachic impact. Ultimately, Rav Wosner cautions against this activity because of the potential impact on determination of kashrut. Rav Gestettner forbids fish from previously-permitted species whose scales are removed as well as previously-forbidden species with scales added. He cites *Bechorot* (7b) which suggests that kosher species of fish emit eggs which gestate externally while non-kosher species gestate internally. Therefore, with regards to previously-permitted fish whose scales are removed from the offspring, there is no maternally-derived permissibility based on the principle of *yotzeh* since the progeny is externally gestated (similar to what was previously discussed by Tosafot regarding fowl). Additionally, even if you assume that *yotzeh* applies to an egg gestated externally, "who will testify that this fish came from this mother?" With regard to a non-kosher parent fish to

43. Rav Auerbach does not discuss the case of a kosher animal giving birth to a non-kosher animal, e.g. a cow giving birth to a camel.

44. *Responsa Shevet HaLevi*, *Yoreh Deah* 121.

45. *Responsa Lehorot Natan*, *Yoreh Deah* 56.

whose progeny fins and scales are added, since non-kosher fish gestate internally, the principle of *yotzeh* **does** apply, thereby rendering the offspring forbidden.

Birds

As discussed earlier, there may be a fundamental difference in the role of *simanim* with regards to birds based on the biblical enumeration of specific forbidden species rather than the description of *simanim*. The identities of all of the 24 enumerated forbidden species are not known, and therefore the Mishnah and Gemara describe signs that help identify forbidden and permitted species. It is very clear, though, that species identity is the key factor in the permissibility of birds. Maimonides writes that a bird born from the egg of a mother bird who is a *treifa* (has sustained a wound rendering it forbidden to be eaten) is permissible because "it is not of a non-kosher species".[46] Rabbi Avraham ben David (Ra'avad) asks why Rambam does not offer the more commonly discussed reason of the separation between the mother and offspring by virtue of the offspring being gestated externally. The *Magid Mishnah* suggests that Rambam specifically utilized species-based reasoning as it is more fundamental, and can serve to inform other cases (such as that of an egg laid by a bird from a non-kosher species that was sat upon by a bird of a kosher species, the hatchling of which would be forbidden because it ultimately stems from a non-kosher species). Rav Ya'akov Betzalel Zolti[47] uses this explanation (along with other proofs) to show that, for birds, the determinant of permissibility is purely on a species basis, and that the principle of *yotzeh* applies to determine the permissibility of the hatchling and eventually its offspring.[48]

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46. *Mishneh Torah, Ma'achalot Assurot* 3:11.

47. *Mishnat Ya'avetz, Yoreh Deah* 7.

48. Rambam's opinion is inconsistent with the first of the two opinions of Tosafot in *Niddah*, discussed earlier, which presumes that the external

Because of the uncertainty about the identities of the 24 forbidden species, Rabbi Moshe Isserles states that one should only consume bird species for which there is a definitive tradition (*masorah*) that it is not one of the 24 non-kosher species.[49] The question arises, though, in the case of birds with a tradition of being kosher which have been genetically altered to express the characteristics that the sages have described as indicative of a non-kosher species: Do we assume that the presence of the signs of a non-kosher bird supersede the tradition and knowledge that it does not descend from the 24 enumerated non-kosher species? Or do the *simanim* only serve as convenient indicators for questionable cases, but if the species identity is known, the birds are permitted despite *simanim* associated with non-kosher birds?

Rabbi Eliezer of Metz writes "any bird which is *dores*[50] is forbidden and the reason given by the rabbis is because any bird which is *dores* is an eagle[-like bird] which the Torah forbade… and even though it lacks other signs of being an eagle, it has changed since the time of creation".[51] Rav Shemuel HaLevi Wosner[52] quotes the Chatam Sofer who understands this cryptic statement to imply that a kosher bird which develops the trait of *dores* becomes forbidden, and, should it subsequently lose the trait, reverts to being permitted. Rav Wosner disagrees with this interpretation, suggesting that the statement in the *Yereim* applies only to a case of a bird of unknown identity; in such a case, the

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gestation of the egg causes the "*yotzeh*" link to be severed and allows the male offspring to be forbidden despite hatching from a permitted mother.

49. Ramo on *Shulchan Aruch, Yoreh Deah* 82:3.

50. The exact definition of *dores* is the subject of dispute, but refers to how the bird secures and eats its prey. The action of *dores* is considered the hallmark of "eagle-like" birds which are forbidden (*Chullin* 61a). The other enumerated signs are described as indications that the bird is *dores* (*Shulchan Aruch, Yoreh Deah* 82:2).

51. *Sefer Yereim* 121.

52. *Responsa Shevet HaLevi*, *Yoreh Deah* 29.

determination that it is *dores*, even in the absence of other signs, renders it forbidden. In contrast, Rav Wosner argues, a bird of known origin and a tradition as a permitted bird would not be rendered forbidden by acquisition of the *dores* trait.[53]

Rabbi Yisroel Meir Levinger opines that a change affecting only an individual bird would not impact its permissibility, but if the change is one that is transmitted to progeny of that bird, one needs to be concerned about requiring a separate tradition as a new species.[54]

Rav Bakshi-Doron, in a scholarly discussion of this issue, indicates that for a bird to be permitted, the only requirement is to know that it is not from the 24 forbidden species. Therefore, if one knows that the bird in question is the offspring of a kosher bird, the *simanim* are irrelevant. However, in the practical summation of the discussion, Rav Bakshi Doron leaves consumption of a bird from a kosher species with *simanim* of non-kosher birds as questionable.[55]

This issue arose in *Eretz Yisrael* when some poultry was noted in the slaughterhouse exhibiting some of the signs of non-kosher birds, and rumor circulated that changes were brought about through the introduction of genetic material from non-kosher birds. While it was ultimately determined not to be the case, some interesting halachic literature emerged from the incident. The event is described and literature is extensively reviewed by Rabbi J. David Bleich.[56]

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53. Rav Chizkiyahu Yosef Cohen quotes a verbal communication from Rav Wosner and Rav Yosef Shalom Eliyashiv (*Responsa Avnei Chen* 2:25) stating that while a "non-kosher bird" born from a kosher mother is allowed according to strict halacha, one should avoid these birds as a precaution because of the opinions which would forbid the offspring based on their *simanim*.

54. *Mazon Kasher Min HaChai*, page 46.

55. *Binyan Av*, op cit.

56. *Tradition*, 2003; 37:2, p 72.

A number of *teshuvot* around that case have been published by Rav Chizkiyahu Yosef Cohen in *Responsa Avnei Chen*. Rav Moshe Shternbuch academically suggests a number of reasons to be lenient: (a) addition of some genetic material from a forbidden animal is not equivalent to actual parentage by a forbidden animal, so *chosheshin le'zerah ha'av* does not come into play (unless the offspring manifests all the signs of a forbidden bird), (b) the signs in question were meant by *chazal* only to be applied in cases of a bird of unknown species. However, in his final *pesak*, he does not allow the prospective slaughtering of fowl with any signs associated with prohibited birds.[57]

Dayan Fisher suggests[58] that one might be lenient on the basis of the fact that there are two uncertainties coupled together: first is the possibility that *ain chosheshin le'zerah ha'av*, and, secondly, even if we assume *choseshin le'zerah ha'av* we might rule according to the opinion that *zeh ve'zeh gorem* is permitted. Additionally, we might utilize the first approach of the Tosafot in *Niddah* which suggests a severing of the linkage between the daughter female and the non-kosher father by virtue of the external gestation of the egg. However, he closes by stating that these leniencies would only be applicable after the fact, as one may not prospectively rely on *zeh ve'zeh gorem* (similar to the dictum precluding application of the principle of nullification (*bittul*) to purposeful actions). Therefore these birds would be forbidden if they were identified prior to slaughter and/or consumption.

Rav Natan Gestettner rejects the use of *zeh ve'zeh gorem muttar* on the basis of the fact that the effects of the forbidden contributor are visible in the final product.[59] As discussed earlier, he assumes *zeh ve'zeh gorem* is based on nullification (*bittul*), which cannot be applied if the contributor one wishes

57. *Responsa Avnei Chen* 1:42.

58. *Responsa Even Yisrael* 55. Also printed in *Avnei Chen*, Volume 1.

59. *Responsa Avnei Chen* 1:44.

to nullify has visible effect in the final product. Additionally, he points to the first approach of the Tosafot in *Niddah* – which states that the male child of a permitted mother is forbidden if it lacks *simanim* of a kosher bird – to support the contention that the presence of *simanim* of non-kosher birds would render these birds forbidden.

Ethical Issues

The primary focus of this essay has been on the halachic issues surrounding the products of genetic engineering. It bears mentioning, however, that there is uncertainty from Jewish ethical and philosophic perspectives regarding the appropriateness of engaging in this type of scientific endeavor altogether. Nachmanides states that the rationale behind the prohibition of *kilayim* is that it is a fundamental denial of G-d's creation, as it suggests that the creation was incomplete and that G-d needs our assistance in perfecting the world.[60] This approach could logically be extended to include the creation of genetically-engineered produce or livestock. Rashi, however, disagrees with Nachmanides, stating that the prohibition of *kilayim* is a *chok*, "an edict of the king which has no reason".

Other approaches suggest that there is not simply an absence of reason to forbid, but rather there is constructive value to engaging in such endeavors (when performed within the parameters of halacha). Maharal, in discussing the talmudic account of Adam's creation of a mule through cross-breeding, suggests that while there are certain technical prohibitions of *kilayim*, the actual creation of a "new" species is part of the laudable completion (*hashlama*) of the world.[61] This is because all the creative powers and raw materials to produce everything which can be produced were programmed into the world as part of the divine creation; man

60. Commentary to Leviticus 18:18.

61. Maharal, *Be'er HaGolah*, *Pesachim* 2:3, commenting on *Pesachim* 54a.

merely accesses and actualizes that which G-d, in His infinite wisdom, has already anticipated. Thus, man is provided an opportunity to partner with G-d in the perfection of the world, as required in the biblical exhortation (Genesis 1:28) to "fill the world and conquer it" ("ומלאו את הארץ וכבשוה"), explicated by Rabbi Yehuda Leib Alter: "שהאדם נברא לכבוש הארץ לתקנה לצאת מתוהו ובהו לבא לידי ישוב" – that man was created to conquer the world, **to improve it** in order to leave a state of chaos and promote civilization.[62]

62. *Commentary Sefat Emet*, *Parshat Behar*, 653.

May a *Kohen* Enter a Museum?[1]

Rabbi Mordechai Millunchick

Male *kohanim* are prohibited from being in a situation that would make them *tamai meit* (impure from the dead).[2] A *Kohen* becomes *tamai* even if he is unaware that he was in contact with a corpse. If a *Kohen* is faced with a situation of *tume'at meit* he must immediately leave the premises.[3]

This article will investigate if a *Kohen* may visit museums that contains human remains, what problems may exist and how one can determine if a museum is "safe" for a *Kohen*.[4]

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1. The author extends his gratitude to the Chicago Rabbinical Council (cRc) for their material support regarding this research. A sample listing of museums in the Chicago area can be viewed on their website at www.crcweb.org/community/kohanim.

2. This prohibition applies only to male *kohanim*; see *Sotah* 23b on the choice of wording, *Bnai Aharon* (sons of Aaron) in *Vayikra* 21:1. A non-*kohen* is not allowed to make a *kohen tamai*; to do so would violate the prohibition of *lifnei iver (*causing another to transgress) – Rambam *Avel* 3:5. This applies to making a minor *Kohen tamai* as well. A non-*kohen* must also warn the *kohen* of areas and situations that would cause the *kohen* to become *tamai*.

3. Rambam, *Avel* 3:4.

4. As regards to *tume'ah*, a museum, has the status of a *reshut harabim* (public area), that in cases of doubt, is considered *tahor* (pure) (Mishnah, *Taharot* 4:11). It can be assumed that zoos, aquariums, planetariums, and arboretums as well as certain types of art museums are free from remains. However, museums, in which there are typically remains, may have the classification of *itchazak issura* (presumption of a prohibited situation). In such a case an investigation must be done to remove that status. Remains have been found at museums that cover the areas of natural history, anthropology, and zoology, as well as those museums that have exhibits on the human body, Egyptology, and other areas. There have also been human

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Principles: Transference of *tume'ah*

Tume'at meit can be transferred to a person in three ways: touch, movement, or *ohel* (tent defilement).[5] Touching a corpse or other *tamai* items will make one *tamai* even if the item is not moved. If there is any interposition between the item and the person the *tume'ah* is not transferred by touch.[6] Moving a corpse will also transfer *tume'ah*, even if one does not touch it.[7] T*ume'ah* is also transferred by means of an *ohel*. *Ohel* can be broadly defined as a tent or roof. The areas directly above and below the corpse or other item convey *tume'ah* as well. This *tume'ah* goes directly down to the center of the earth and above till the heavens, and doesn't spread to the side. This is also known as *tume'ah resusa*.[8] A person directly over a corpse or a corpse directly over the person, renders the person *tamai*.[9] This is even if only a small part of the person is over a small part of the corpse.[10]

The main applications of *ohel* (and the general usage of the term) refer to when both the person and the corpse are under the same roof.[11] An *ohel* is not only an official roof, but rather any item that is at least a square *tefach* (handbreadth) and has an airspace of a *tefach*, even if there are no walls. Examples include a beam, a thick tree branch, even animals or people that could create an *ohel* that can spread *tume'ah*. An *ohel* spreads *tume'ah* that fills the entire room even if the area is very large and the person who is under the same roof is very distant from the *tume'ah* source. The *tume'ah* continues to spread *tume'ah* throughout the building, adjoining buildings

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remains found at art museums, nature museums and children's museums.

5. Rambam, *Tume'at Meit* 1:1.
6. Ibid halacha 3.
7. Ibid halacha 6-7.
8. Ibid 7 :5, from Mishnah *Ohalot* chapter 15 Mishnah 7.
9. Ibid 1:11.
10. Mishnah *Ohalot* chapter 16 Mishnah 1.
11. Rambam ibid, halacha 10.

and roofed areas indefinitely until sufficiently blocked and contained.[12] In general, for *tume'ah* to travel from one room to the next, there needs to be an opening of at least one square *tefach*.[13] *Tume'ah* not only travels laterally between rooms, but also vertically between floors, with an opening of a *tefach*.[14] The spread of *tume'ah* is immediate and instantaneous.

Just as an *ohel* spreads *tume'ah* to everything under it, it also can block the *tume'ah* from spreading outside of it.[15] Therefore if there is a corpse in a room, the *tume'ah* spreads throughout the room but does not defile one who may be standing on the roof, even directly over the location of the body.

Sof tume'ah latzait

Exits and passageways through which one will remove the corpse, even if they are currently not exposed to the *tume'ah*, are considered as if the *tume'ah* is currently exposed to that location. This rule is known as *sof tume'ah latzait*.[16] An example of this principle is a corpse in a closed room; any room outside of that room is not exposed to direct *tume'at meit*. However, since the corpse must be removed from the room, any area that is open to the exit of the building is considered *tamai* due to *sof tume'ah latzait*.

Graves

12. *Shulchan Aruch Yoreh Deah* 371:1.

13. Mishnah *Ohalot* chapter 3 Mishnah 7, chapter 13 Mishnah 1.

14. Mishnah *Ohalot* chapter 10 Mishnah 4.

15. Mishnah *Ohalot* chapter 3 Mishnah 7, Rambam ibid chapter 12 halacha 1. (There are times when an *ohel* will not block *tume'ah* from spreading beyond it).

16. It is a matter of dispute if this rule is Torah law or rabbinic. *Shach* (371:8), *Mishnah Berurah* (128:8), *Chatam Sofer* (340) among others are of the opinion that this rule is a rabbinic decree, while *Chochmat Adam* (159:8), *Aruch Hashulchan* (382:2), *Iggerot Moshe* (*YD* 1:230:5), among many others, opine that the rule is a Torah law.

An occupied grave is *tamai* from the Torah. This is learned from the verse (*Bamidbar* 19:16) "Any one who touches one slain by the sword, or one that died, or a human bone, or a grave shall be contaminated for seven days." We will discuss later some particulars of *tume'at ohel* as they relate to graves. A *kohen* must also stay four *amot* (cubits) away from any corpse or grave. If the corpse or grave is separated from the *kohen* by a partition of at least ten *tefachim*, he need only distance himself four *tefachim*.[17]

Examples of *tume'ah*

The Mishnah (*Ohalot* chapter 2 Mishnah 1) delineates items that convey *tume'at ohel*:

> אלו מטמאין באהל: המת וכזית מן המת וכזית נצל ומלוא תרוד רקב, השדרה והגלגלת אבר מן המת ואבר מן החי שיש עליהן בשר כראוי, רבע עצמות מרב הבנין או מרב המנין ורב בנינו ורב מנינו של מת אף על פי שאין בהם רבע טמאין.
>
> The following cause *tume'ah* in an *ohel*: a corpse, an olive-sized piece of a corpse, an olive-size of *netzel* (liquefied or jelled flesh), a shovel-full of corpse rot, the spine and skull, a limb from a corpse and a limb from a live person that has on it enough flesh [that it may heal], a quarter *kav* of bones from the majority of the form of the person or the majority of numbers of bones, the majority of the form of a person, the majority of a person's bones even if there isn't a quarter *kav* (of bone) are *tamai*.

In a museum setting, *tume'ah* concerns to the *kohen* revolve around *tume'at ohel.*

- A corpse includes not only a complete corpse,[18] but also

17. *Shulchan Aruch* 371:5 from *Sotah* 44a.

18. Many museums have full skeletons on display. One museum had a full skeleton on display and when asked, the curator stated that the skeleton was

mummies[19] and fetuses.[20]

• The opinion of *poskim* is that a quarter *kav* of bone is *metamai b'ohel*.[21] The quarter *kav* of bone must be from one body and is *metamai* even if ground up.[22]

• The spine and skull[23] are *metamai* even if they are not a

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a replica. When asked how one can tell the difference between a real skeleton and a replica, she responded that one can look at the dentition, as well as certain manufacturing marks on non-visible areas of the skeleton. Per our request she looked at the skeleton and to her surprise the skeleton was in fact authentic. Her mistake was that the skeleton was purchased from Wards Scientific, a company that no longer sells human parts but did in the past.

19. The *Mishneh Lemelech Avel* 3:1 discusses the propriety of a *kohen* trading in mummies. He concludes that a mummy remains *metamai b'ohel* and must be avoided. See Responsa *Radbaz* no. 548. See also Responsa *Ateret Paz Chelek* 2 no. 10 note 1, who discusses the issues of mummification in Jewish literature.

20. The Gemara in *Nazir* 50a explains that a fetus exudes *tume'ah* even if it does not have an olive's size amount of flesh, nor is fully developed enough to be classified as having limbs. In order for the fetus to be *tamai* it must be at least 40 days old, *Pitchei Teshuva YD* 369 no. 2. Some museums display preserved fetuses in various stages of gestation.

21. Rambam *Tume'at Meit* 4: 4; *Chinuch* mitzvah 263. See *Sidrei Taharot Ohalot* chapter 2 Mishnah 3, who gives six opinions among the *rishonim* how to explain the Mishnah's term of '*Rova atzamot merov habinyan oh merov haminyan*'.

22. Rambam *Tume'at Meit* 4: 1 and 4.

Many museums have bones on display. Aside from full skeletons, and bones in their natural state, some museums have objects that are made from human bones. Especially notable are Tibetan objects, horns made from femurs, and drums made from skulls. There are also bowls made from skulls used in service of their idols. Typically these items are not large enough to be *metamai b'ohel*. Some museums have collections of bones that are not on display, which are used many times for research. For example, the Smithsonian Museum of Natural History in its physical anthropology collection has a series of human anatomical specimens, primarily osteological, of nearly 33,000 specimens. In addition, the museum houses one of the premier anatomical research collections, consisting of over 1,700 complete human skeletons from known individuals. These might be a problem if they are used or kept in the area open to visitors.

23. The Gemara *Nazir* 52a,b questions if the spine and the skull together

quarter *kav*. A skull that is missing a piece larger than a *sela* coin is no longer *metamai b'ohel*. The *Minchat Chinuch* says that even if the skull is crushed but all of its bones are present it is still *metamai b'ohel*.[24]

• An olive-size of flesh from a corpse is *metamai b'ohel*. Two pieces of flesh, even from two separate individuals, can join for the requisite olive-size.[25]

• A complete limb, regardless of size, either from a corpse or from a live person, is *metamai b'ohel*. A limb must have flesh and bone to be considered a limb. Thus, internal organs (heart, liver, spleen) or other organs that do not have a bone (tongue, eyes) are not *metamai* unless they originate from a corpse and

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are *metamai* or each alone, and does not reach a conclusion. The *Chinuch* mitzvah 263, according to the understanding of *Minchat Chinuch* note 9, understands that both the skull and the spine are needed. The Rambam *Nezirut* 7: 2 decides that either the skull or the spine are *metamai* separately. See *Kesef Mishneh* and Frankel index for sources why the Rambam decides in this way.

24. *Minchat Chinuch* mitzvah 263 note (12)[13] s.v. *vehinai*. This is also stated by *Chazon Ish*, *Ohalot* Chapter 21 paragraph 7. However the *Sidrei Taharot Ohalot* chapter 2 Mishnah 3 p. 122 s.v. *k'detanya*, opines that if a majority of the skull is broken it is no longer *metamai b'ohel*.

This question is relevant to skulls that had an autopsy performed, where the calivarium was removed, and then articulated. Such skulls are commonly used for teaching, props, and can even be purchased on e-bay. There is a case of a Shakespearean theatre that is in possession of the purported skull of a former actor to be used as Yorick. There are also disarticulated skulls available. These skulls have been cleaned and sterilized but are otherwise unprepared. The cranium is not cut and the mandible is unattached.

The *Tosefta Ohalot* 1:3 says that the lower jaw is included in the nine bones of the head. This implies that for a skull to be whole, the mandible is included. However, there may be a difference between a skull (*galgolet*) and head (*rosh*) as the *Tosefta* is discussing the numbers of bones in the head not what the skull is concerning *tume'at ohel*.

25. Rambam *Tume'at Meit* 4: 3.

Some museums have a human lung or brain as well as other body parts on display.

are one olive-size.[26]

• Any part of the body that one was not born with (e.g., teeth) are not *metamai* at all. Also, anything that if removed another will regenerate in its place isn't *metamai* (e.g. hair, nails, feces). This is only when these items are detached from the corpse, but when they are attached they are *metamai*.[27]

Non-Jewish *tume'ah*

The principle of "anything that comes from a mixture is assumed to have come from the majority" tells us that the bodies and *tamai* items in a museum are from non-Jews. The Gemara says that Rabbi Shimon Ben Yochai says non-Jewish graves are not *tamai b'ohel*. [28] This opinion is quoted by Eliyahu when approached by Rabba Bar Avuha as to why he was in a cemetery.[29]

The Rambam[30] says the halacha follows Rabbi Shimon Ben Yochai, and non-Jewish graves are not *tamai b'ohel*; they are however *metamai* to the touch and with carrying.[31] Tosafot,[32] however, say that the halacha is like Rabban Shimon ben Gamliel as brought in the Mishnah in *Ohalot*.[33] That Mishnah

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26. Rambam, *Tume'at Meit* 2: 3.

27. *Bechorot* 7b, Ramban *Tume'at Meit* 3: 12.

Some museums house reliquaries. A reliquary is a container used to house relics, many times containing items that pertain to important religious people. The items that are typically found in a reliquary are not *metamai b'ohel* (examples found were a tooth and small bone fragments, some human, some animal).

28. *Yevamot* 61a.

29. *Bava Metzia* 114b.

30. Rambam *Avel* 3: 3, *Tume'at Meit* 1: 13.

31. The *Sefer Yerayim* says that since non-Jews are not *metamai b'ohel* their corpse is similar to that of a *nevailah* that a *kohen* need not be concerned with. All other *poskim* refute this innovative ruling.

32. Tosafot *Yevamot* 61a s.v. *mimaga* quoting the opinion of the Ri.

33. *Ohalot* Chapter 18 Mishna 9.

discusses how *kohanim* should avoid certain homes of non-Jews, for concern of burial of stillborns in them.

The *Shulchan Aruch* writes concerning non-Jewish graves that it is proper for the *kohen* to avoid walking on them.[34] The Ramo writes that though there may be lenient opinions, it is correct to be stringent.[35]

The *Avnei Nezer* and Rabbi Moshe Feinstein both say that though the base halacha is according to the lenient opinions, one should be concerned for the strict opinions.[36]

Display cases

Typically, items in a museum's collection are displayed in protective cases.[37] There are many possible types of display units. Variables in the construct of the case may determine if *tume'ah* will be contained within the unit or will extend beyond it. Such variables include whether the unit is attached to the building or is self contained, from what material the unit is constructed, is the unit entirely sealed and how, if at all, the unit is opened.

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34. *Shulchan Aruch YD* 372:2. See *Chochmat Adam* 159:18, that even according to the lenient opinions one should avoid walking over non-Jewish graves as there are Jews buried in non-Jewish cemeteries and once it is known that there is a Jewish grave the principle of *rov* cannot be applied. [Employees of cemeteries have stated that it is not uncommon to have Jewish graves in non-Jewish sections of cemeteries.].

35. Ramo 372. The *Teshuvot Veshav Hakohen* (quoted in *Pitchei Teshuva* 372:6 and quoted by Rabbi Akiva Eiger marginal notes to *Shulchan Aruch*) says that the halacha in practice is that non-Jews are *metamai b'ohel*.

36. *Avnei Nezer YD* 468:18, *Iggerot Moshe YD* 1:230:3. Many *poskim* will join other minority opinions in deciding leniently in cases involving *tume'ah* from a non-Jew. See for example *Avnei Nezer YD* 468, 470, *Maharsham* 2:273, *Minchat Elazar* 1:67, *Minchat Yitchak* 4:31-31.

37. Not all items in a museum are in cases. Exemptions include materials used for workshops and classes and larger items that are out of the reach of the public. Items in the storage areas of museums are many times stored on open shelving units, but if the storage areas are not open to the public areas, they may present no problems.

Kever Satum (closed graves)

One of the main source texts that discusses the spread of *tume'ah* is in *Brachot* (19b):

> ת"ש דאמר ר' אלעזר בר צדוק מדלגין היינו ע"ג ארונות של מתים... דאמר רבא דבר תורה אהל כל שיש בו חלל טפח חוצץ בפני הטומאה ושאין בו חלל טפח אינו חוצץ בפני הטומאה ורוב ארונות יש בהן חלל טפח וגזרו על שיש בהן משום שאין בהן...
>
> Rabbi Elazar Bar Tzadok said "we would jump over caskets of the dead …" Rava said "according to Torah law concerning tents, anything that has an airspace of a *tefach* will interpose against *tume'ah* and a tent that does not have an airspace of a *tefach* does not interpose against *tume'ah*; most caskets have an airspace of a *tefach,* but there is a rabbinic decree concerning those [caskets] that have [the airspace] because of those that do not [have the airspace]."

The Gemara quotes Rabbi Elazar Bar Tzadok "we would jump over caskets to greet kings." Usually *tume'ah* travels upwards and a *kohen* is obviously prohibited from walking on a casket. The Gemara explains that if there is a *challal tefach* (airspace of a *tefach*) the *tume'ah* will be stopped. Many caskets have this airspace and will thus stop *tume'ah* from extending upwards. However, even with the airspace, there is a rabbinic decree that nevertheless prohibits stepping over a casket. In the case of a mitzvah discussed in the Gemara, the rabbinic prohibition does not apply.[38]

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38. In certain mitzvah situations a *kohen* can become *tamai* via rabbinic *tume'ah* [*Shulchan Aruch* 372:1]. The Gemara *Avoda Zara* 13a says that a *kohen* can enter a *beit hapras* (a field that had a grave and was subsequently plowed over) in order to learn Torah and to find a wife to marry. Tosafot say that this dispensation is only for mitzvot that are very important. However, the *Sheiltot* [*Emor*, 103, pg 32b sv. *Barom*] says that this rule applies also to other mitzvot. The halacha follows the opinion of the *Sheiltot*. This dispensation applies only if this is the only path one can take to perform the mitzva.

Tosafot say the casket discussed in the Gemara must have been open at least a *tefach* at one end.[39] This is because if the casket were completely closed the *tume'ah* would spread out of the casket. Also, the *tume'ah* would extend to the entire casket even the parts that are not directly over the corpse. This is because the casket has the halachic status of a *kever satum* (closed grave) which spreads *tume'ah* in all directions.[40] Many *rishonim* understand this halacha similarly to Tosafot, that *tume'ah* cannot be completely sealed within an object,[41] rather it must have an outlet of a *tefach* or it will travel upwards.[42] Other *rishonim*[43] explain that if there is a completely sealed unit with an air space of at least a cubic *tefach* over the corpse, that space will block the *tume'ah* from extending outwards. A closed grave would only be if there is an airspace of *tefach* including the corpse itself. The *Beit Yosef* and *Taz* both decide like Tosafot that if there is an airspace of a *tefach,* the *tume'ah* leaves the sealed casket.[44]

Does a museum display case have the halachic status of a *kever satum*? The *Maharsham* discusses this question as posed to him by Rabbi Chanoch Ehrentreu from Munich. The question was regarding a museum that had an Egyptian

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39. Tosafot in *Brachot* 19b s.v. *Rov*, *Nazir* 53b s.v. *Satum*, *Bava Batra* 100b s.v. *veruman*.

40. See Mishnah *Ohalot* chapter 7 Mishnah 1. See also Mishnah *Ohalot* chapter 3 Mishnah 7, and chapter 6 Mishnah 5.

41. See Ramban *Bava Batra* 100b s.v. *veruman* and *Beit Yosef YD* 372. *Tume'ah* within a room can be sealed, as long the door frame has not been removed *(Bava Batra* 12a).

42. The difference between where there is an airspace of a *tefach* and where there isn't, is that without the airspace the *tume'ah* travels upwards from the source only, while if there is an airspace the *tume'ah* first spreads throughout the entire covered area before continuing upwards.

43. Raavad *Hilchot Tume'at Meit* 7: 4. See Rashi to *Succah* 21a s.v. *mipnai*, and Rashbam to *Bava Batra* 100b s.v. *veruman,* who both imply that they are also of this opinion. This opinion is also discussed in *Pnei Yehoshua* to *Brachot* 19b s.v. *rov*.

44. *Beit Yosef YD* 372, *Taz YD* 372:1.

mummy. The mummy was displayed within a large glass box that contained an airspace of a *tefach*. Rabbi Ehrentreu suggested that the case should be considered a *kever satum* as the mummy was intended to stay there and will therefore be *metamai* through the case. The *Maharsham* notes that though there are opinions that argue that the *tume'ah* does not go beyond the case if there is an airspace of a *tefach*, nevertheless it appears that the halacha is with the strict opinions. The *Maharsham* concludes that in a case of great need, since this situation involves *tume'ah* of a non-Jew, we can take into account even a minority opinion and permit it based on those who say the *tume'ah* is stopped by a completely closed case with a *tefach* airspace. [45] Other *poskim* opine that we can rely on the lenient opinions even *ab initio*.[46]

Others do not even consider the museum display case to be a *kever satum*. They explain that this law is only in effect when it is the intention to leave an item in its location forever, a final resting spot. Museums, however, retain their right to move and remove an object. This is attested to by the various methods to ensure the case is not permanently sealed but rather a way to open it remains.[47] The display case may then be considered a room, which according all opinions contains

45. *Maharsham* vol. 1 no. 215.

46. This lenient position is based on that the *tume'ah b'ohel* of non-Jews is just a (mandated) stringency (see above), to which one can join the position of the Raavad that this situation is not considered a closed grave and those opinions who say that a closed grave is not *metamai beohel* but only by touching (Raavad and Rosh).

47. This is based on *Bava Batra* 12a, that once the door frame has been removed the room has the status of a closed grave. In our situation the hinges and lock on the case represent a clear opening. This would seemingly be true for cases that are opened by unscrewing a molding that surrounds a glass pane which is then removed.

Others, however, disagree, even though the item has not been left there forever, its placement in the museum is not of a temporary nature. Here the corpse is not on a transitory stop on its way to burial but rather has become the property of the museum.

the *tume'ah*. Others explain that a display case will only be considered a room if it is built into the building. Otherwise the unit will have the status of a utensil that will not block *tume'ah*.[48]

Blocking *tume'ah* with an item that is *mekabel tume'ah*

The Gemara states that any item that is *mekabel tume'ah* (susceptible to *tume'ah*) cannot block *tume'ah*.[49] The *Mishneh Lemelech* questions if an item that is *mekabel tume'ah* only on a rabbinic level can block *tume'ah*.[50] He writes that both Tosafot and Rash support the idea that such an item will block *tume'ah*.

The *Maharsham* discusses this issue in relation to a glass case in a museum and concludes that in his case the issue is moot as the display has the status of a large utensil and is not susceptible to *tume'ah*.[51] The law of a large utensil, also referred to as a *kli habah b'middah*, is sourced in Mishnah *Olahlot* (Chapter 8 Mishnah 1). Such a utensil can block *tume'ah* from underneath.[52] A large utensil is different than a regular utensil, described in *Vayikra* (11:32), as it cannot be moved both empty and when full.

Not every large object has the status of a *kli habah b'middah*. This rule only applies to objects made of wood, leather, or

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48. Many *poskim* note that a simple screw will not create a complete connection as it can easily be removed by a layman. See *Shu"t Ktav Sofer YD* 101 s.v. *vealeh*, and *Maharsham* 4:114 s.v. *Sof davar*; for a more complete listing see *Sefer Mikveh Mayim* vol. 3 p. 168.

49. *Bava Batra* 12b, Rambam *Tume'at Meit* 13:4.

50. *Mishneh Lemelech Tume'at Meit* chapter 12 Halacha 2.

51. *Maharsham* vol. 1, no. 215; this is based on a ruling of the Rambam *Keilim* 3:3.

52. Rambam *Kelim* 3:1. See however *Minchat Shlomo Kama* 72 *anaf* 2 who notes that not all opinions agree that a *kli haba b'mida* blocks *tume'ah* from within, especially when the *kli haba b'middah* is within a building.

certain other materials.[53] If the object is made of metal it may not be subject to the dispensation of *kli habah b'middah* and will therefore not block *tume'ah*.[54]

Sof tume'ah latzait

Though the *tume'ah* itself may be contained, there remains the issue of *sof tume'ah latzait*. There are a few reasons to assume that in the case of a museum, *sof tume'ah latzait* is not in effect. First, there is no active intention to remove the item from the museum.[55] Secondly, there are numerous opinions who say that there is no *sof tume'ah latzait* by a non-Jew.[56] Nevertheless, there are opinions who maintain that there is *sof tume'ah latzait* even in this case.[57]

Investigating a museum

In light of the above mentioned, it is prudent for a *kohen* to have a museum investigated before he enters. The investigation should uncover if there are any items that are *metamai b'ohel* and how are they displayed.

There are various ways that a museum can be investigated. A *kohen* can have a non-*kohen* physically inspect the museum. Most museums have thousands of items making such an inspection prohibitively time consuming, and most probably will be incomplete. A more efficient method is to call the museum and speak to a curator or collections manager.[58]

One should discuss the issue of *tume'at meit* with the

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53. See Mishnah *Ohalot* chapter 8 halacha 1, *Keilim* chapter 15 halacha 1.

54. *Minchat Shlomo kama siman* 72 *anaf* 4 section 2 paragraphs 3 & 4.

55. *Maharsham* vol. 1 no 215.

56. *Tiferet Yisroel Ohalot Boaz* chapter 16 note 5; *Gesher Hachaim* chapter 6 para. 3ג, Responsa *Nefesh Chaya YD* no 98; *Petach Haohel* section 1 chapter 6.

57. *Minchat Yitzchak, Likutim* no. 139:2; *Tzitz Eliezer* vol. 14 no. 86.

58. One should note that typically the switchboard operators are not fully knowledgeable concerning items in the museums and cannot be relied upon.

museum official, stressing the importance and sensitivity of the issue.[59] It may be common for the museum official to be sensitive to such issues due to NAGPRA (Native American Graves Protection and Repatriation Act).[60] This discussion should lead one to discover any and all items in the museum's collections that may prove problematic for the *kohen*.

Many museums have fully documented and computerized their records. However, many do not, and one may need to speak to different curators who have knowledge in the different departments of the museum.[61] The term "human remains" may be understood in different ways by different people and certainly may be understood by the curator in a way that does not include all of the items that are *tamei meit*. One should therefore ask as many questions regarding specific items that may or may not be in their collection.[62] It is also necessary to discuss the storage and display of such items. It is important to keep in mind that many museums may display temporary exhibits.

At this point, a visit to museum may be in order. The visit will be directed at specific items and areas, preferably

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59. Concerning relying upon a non-Jew to ascertain facts see *Iggerot Moshe YD* 1:55, *YD* 2:41,69 and *YD* 4:17:17.

60. Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq. [Nov. 16, 1990] This act applies to institutions that receive federal funding (barring the Smithsonian Institution).These institutions must prepare summaries of their collections of human remains and funerary objects that may have originated from culturally affiliated Native American (Indian or Native Hawaiian) tribes. These tribes may request the return of such items or allow the institution to retain and care for the items.

61. One large museum has an inventory of several million separate items. Thankfully, the curators are extremely knowledgeable and helpful and were able to isolate those items that were on display to a more manageable list of forty items. The items that were not on display are in a completely separate area of the museum.

62. One should also ask about items not on display. Many museums have on-site storage or research areas. These areas may or may not be physically separated from the main museum areas. Many times these areas are behind a series of locked doors and are not accessed during public museum hours.

accompanied by a member of the museum's staff who can answer any questions that may arise.

Many modern museums today have an open architectural style without closed doors between rooms.[63] This provides a more open environment for the visitors. This set-up also means that if there a source of *tume'at ohel* in one part of the museum it will spread throughout the entire museum.

Summary

Visiting museums is both educational and entertaining. Nevertheless, the higher level of sanctity of *kohanim* mandates them to closely guard this level and avoid *tume'at meit*. Therefore a *kohen* may not enter a museum that has a corpse (and certain other items) on display, unless it is sufficiently contained as to block all *tume'ah*.[64] Many *kohanim*, nevertheless, for various concerns avoid, if possible,[65] any building that contains a corpse.[66] Concerning this and similar issues some

63. See *Pitchei Teshuva YD* 371:7 that double doors, where either one of them is always closed, will block *tume'ah*. *Taz* 371:3 writes at length to show that any item that is susceptible to *tume'ah* that has a part in the blocking or maintaining an item that blocks *tume'ah* (e.g. a door hinge) will not block the *tume'ah* even if that item is connected to the ground. *Shach* (*Nekudat Hakesef*) however argues that if this were to be true, this fact would have been mentioned in the Mishnah. In the opinion of the *Shach*, any item that was produced for the explicit purpose of being attached to the ground or a building, regardless of its material construct, is not susceptible to *tume'ah*. This difference of opinion manifests itself regarding metal doors and hinges. According to *Taz* they would not serve functionally to block *tume'ah* while according to *Shach* they would. Most *Acharonim* conclude like *Shach* that a door even with hinges will block *tume'ah*.

64. See Rabbi J.D. Bleich in *Tradition* 40:1 (2007) pp. 87-97, concerning the permissibility of viewing corpses on display.

65. In cases of great need (especially those involving a mitzvah), the lenient approach is agreed upon by almost all opinions. According to *Maharsham* this would include education or research that will lead one to an advanced degree.

66. Many major *poskim* stress that a *kohen* should avoid entering any museum that has **any** items that are *tamai*, whether on display or otherwise.

have applied the adage of "why should the *kohen* enter a cemetery,"[67] especially as there are typically many other recreation areas that are free of any concern to the *kohen*.

The *kohen*, being chosen from among his brethren, has been given extra *kedusha* (sanctity). When a *kohen* is in a situation where he must avoid tarnishing his *kedusha*, he should use the opportunity to express his gratitude for his special position and for the opportunity to fulfill an additional mitzvah by avoiding areas that to others are permitted.[68]

The wisdom of this advice has been shown by the discovery of items that are *tamai* at a museum the author had personally investigated and previously deemed permissible for the *kohen.* This is especially true due to the inability to properly monitor and completely verify the accuracy of information given.

67. See *Bava Metzia* 114b.

68. See *Yesod V'Shoresh Ha'avodah shaar* 8 chapter 9.

Heating Food on Shabbat

Yosef Wagner and Binyamin Silver

Throughout the ages the Sabbath day has served as an anchor for the Jewish family and the axis upon which Jewish life revolves. Specifically, the Sabbath meals occupy a prominent role in Jewish life. The Sages even inform us that God made a covenant that all monies spent for Sabbath meals will be reimbursed.[1] Additionally, we are taught that one who delights in the Sabbath with sumptuous meals is promised a great portion in the World to Come. It is no wonder then, that the Sabbath meals are widely celebrated with exceptional devotion. Indeed, Rosh even bases certain lenient rulings (to be discussed later) upon the fact that "the Jewish people are especially attached (*adukin*) to the mitzvah of delighting in the Sabbath."[2] With this in mind, this article will attempt to elucidate many of the laws regarding heating food for the Sabbath meal, particularly as they pertain to the many contemporary heating devices in the modern kitchen.

The Talmud records a Tannaitic dispute regarding leaving food on an open flame (*sheheya*) as the Sabbath comes in.[3] Chanania insists that it is permissible to leave food on an open flame as long as it is *ma'achal ben drosai*, a talmudic reference to

1. *Beitza* 15b.
2. *Shabbat* 3:1.
3. *Shabbat* 36b-38b.

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food cooked to a minimally edible degree.[4] The Rabbis, however, maintain that *sheheya* is prohibited unless additional cooking is actually detrimental to the food (*metzamek v'rah lo*). They felt that if partially cooked food were left on an open flame, one might accidentally come to stoke the coals to accelerate the cooking, thereby desecrating the Sabbath.[5] Chanania, however, was only concerned if the food was cooked less then *ma'achal ben drosai*. Once the food is already minimally edible, one is no longer intent on cooking it further, and accidental stoking is unlikely.

The majority of *Rishonim* rule leniently, following Chanania's view.[6] A minority opinion,[7] however, renders the final halacha like the Rabbis and this seems to be the view of *Shulchan Aruch*.[8] Ramo, on the other hand, clearly rules that

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4. The *Rishonim* dispute precisely how cooked a food must be in order to constitute *ma'achal ben drosai*. Rashi (*Shabbat* 20a s.v. *ben drosai*) writes that *ma'achal ben drosai* is one-third cooked, while Rambam (*Hilchot Shabbat* 9:5) maintains that the food must be half cooked. *Shulchan Aruch* (*O.C.* 254:20) rules stringently like Rambam. *Mishnah Berurah* (253:38) writes that in cases of need, one may rely upon the opinion of Rashi. *Chazon Ish* (37:6) explains that the calculations of one-half and one-third are based on the total cooking time of the food after it has reached *yad soledet bo*. According to Rabbi Moshe Feinstein (*Iggerot Moshe O.C.* 4:74:3), the temperature of *yad soledet bo* is between 110-160° degrees Fahrenheit. See also *Kaf Hachaim* 253:28. Regarding liquids, Rabbi Moshe Feinstein (*Iggerot Moshe O.C.* 4:74:24) writes that once a liquid reaches the temperature of *yad soledet bo* it is considered *ma'achal ben drosai*.

5. It is prohibited to kindle a flame (*havarah)* and to hasten the cooking process (*kiruv bishul).*

6. Tosafot s.v. *amar rav sheshet*, Rashba s.v. *psak h'halacha*, Ra'avan 338, Raaviah 187, *Ohr Zaruah* (2:8), *Sefer Hatrumah* 231. *Yabea Omer* (*O.C.* 6:32:1) lists more *Rishonim* who rule in favor of Chanania.

7. Rif, Rambam *Hilchot Shabbat* 3:4.

8. *Shulchan Aruch* (*O.C.* 251:1) cites both opinions. The opinion of the Rabbis is cited as an anonymous opinion (*stam*), whereas the opinion of Chanania is cited as a "some say" (*yesh omrim*). Following the rule of *Shach* (*Y.D.* 84:12) and *Yad Malachi* (chapter 10), in such a case, the *stam* opinion is to be considered the final halacha. *Minchat Kohen* (*Mishmeret Shabbat* 5 s.v. *henae yesh)* points out that *Shulchan Aruch* (253:4) elsewhere seems to render

the custom is to rely on the more lenient opinion of Chanania.[9]

While both Chanania and the Rabbis rule that it is prohibited to leave uncooked food on an open fire, two instances where it is deemed permissible are if the food is raw (*kidra chayta)* and if there is a smothered or scraped flame *(garuf v'katum).* These cases will be elaborated upon below.

Kidra Chayta ("Raw Pot")

The Talmud states,[10]

> A pot containing raw food is permissible to put upon a fire immediately before the Sabbath: Why [is this permitted]? Since it will not be ready to be consumed at night, one will forget about it, and will not come to stoke the coals. [Additionally] if the food is completely cooked[11]

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the halacha in favor of Chanania, thus contradicting himself. Therefore, even Sefardim who generally follow the *Shulchan Aruch* (as opposed to Ashkenazim who generally follow the Ramo) can rely on Chanania, for perhaps this is indeed the opinion of *Shulchan Aruch*. See also *Kaf Hachaim* 253:23 and *Yalkut Yosef* 253:5.

9. *O.C.* 253:1. *Biur Halacha* explains that this ruling of Ramo is merely citing the common custom, but ideally one should follow the stringent opinion of the Rabbis. *Biur Halacha* justifies this more stringent ruling based on the wording of Rosh (*Shabbat 3:1)* upon whom *Beit Yosef* partially based his own opinion. Rosh writes "since the Jewish people are very much attached to the commandment of enjoying (*oneg*) the Sabbath, and will not heed the more stringent opinion, it is better to allow them to continue to rely on the more lenient opinion of Chanania." Based upon the apologetic tone of Rosh, *Biur Halacha* explains that essentially Rosh renders the halacha like the stringent opinion of the Rabbis and that ideally one should act according to this more stringent ruling. *Chazon Ish* (37:3 s.v. *Mishnah Berurah*), however, maintains that despite the tone of Rosh, the final halacha is in accordance with Chanania.

10. *Shabbat* 18b.

11. *Ma'achal ben drosai* is considered completely cooked in this case (see footnote 4). Additionally, most authorities maintain that the food must reach the level of *ma'achal ben drosai* by sunset. *Chazon Ish* (*O.C.* 37:27 s.v. *dinim ha'olim)* opines that as long as the food reached *ma'achal ben drosai* status by nightfall, it is permissible to leave it on the flame.

> it is permitted, but if the food is only partially cooked[12] it is prohibited to leave the pot on the fire. If one added in a raw piece of meat to the pot, it also permitted [to leave the food on the fire].

The *Acharonim* present two understandings of this passage. The first approach, taken by *Shulchan Aruch Harav,* is that raw food cannot become fully cooked until the next morning, even if one were to stoke the coals. Since stoking would be useless in this case, the Rabbis did not prohibit the placement of raw food on the flame.[13]

Biur Halacha explains otherwise.[14] He asserts that so long as the food is meant to be served the next day, the Rabbis felt that it was unlikely that one would come to stoke the coals even if stoking would indeed render the food edible Friday night.[15]

Rabbi Yosef Henkin rules that, at present, this leniency no longer applies. His ruling is primarily based upon two rationales.[16] First, since modern cooking appliances can fully prepare food within a short amount of time, the concern that one might "stoke the coals" exists even with raw foods. Second, the leniency of *kidra chayta* applies only when the food

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12. Concerning the definition of partially cooked food, see *Chazon Ish* (*O.C.*37:24) who rules that once the food reaches *yad soldet bo*, it is considered partially cooked. *M.B.* (237:11), however, seems to rule that the food is not considered partially cooked until a small level of cooking has taken effect, and not by merely reaching the temperature of *yad soledet bo*. See *Minchat Shlomo* (2:12:3) for further elaboration of this topic.

13. 253:8.

14. 253:1 s.v. *l'hashot aleha*.

15. *Biur Halacha* is discussing whether mere intent to designate the food for the Sabbath day is sufficient to allow one to leave a partially cooked food on an open flame. Although he concludes that one may rely on this only on an infrequent basis (see *Chayei Adam Hilchot Shabbat* 2:5), it remains clear that he maintains that even if stoking the flames would allow for the food to be ready Friday night, the leniency of *kidra chayta* still applies. *Biur Halacha* seems to contradict himself in *M.B.* 257:36.

16. *Kitvei Rav Henkin,* volume 2 pp.19-21.

is completely raw as the Sabbath comes in. Nowadays, however, we are no longer proficient in determining the precise time of halachic sunset, and it is likely that the food will already be partially cooked at the true time of the Sabbath's arrival. Thus, this leniency would not apply.

Rabbi Henkin's first reason seems to be based on the approach of *Shulchan Aruch Harav*. If the leniency of *kidra chayta* is because the food cannot become edible regardless of stoking, then it is reasonable to assert that if faster cooking methods do allow food to become ready Friday night, this leniency would not apply. According to *Biur Halacha,* however, even in the times of the Rabbis food that might be ready Friday night was permitted, so long as it was intended for consumption on Sabbath morning. It follows that, according to *Biur Halacha,* the leniency of *kidra chayta* would still be applicable today.

Concerning Rabbi Henkin's second point, that the food would likely not be completely raw at halachic sunset, no other contemporary authorities mention this as a problem. Additionally, one could circumvent this issue by accepting the Sabbath immediately after placing the raw food on the flame; thereby ushering in the Sabbath at that time irrespective of halachic sunset.[17] Some authorities maintain, however, that the start of Sabbath for this law is always determined by sunset, leaving room for Rabbi Henkin's concern.[18]

The halachic authorities also discuss if the leniency of *kidra chayta* applies to food that will become fully cooked after the Friday night meal. *Biur Halacha* maintains that if one does not

17. *Pnei Shabbat* 237 as cited by *Piskei Teshuvot* 253:16 footnote 16.

18. See *Minchat Shlomo* (2:12:4), where Rabbi Shlomo Zalman Auerbach asserts that if one accepted the Sabbath before sunset and the food on the flame would only become *ma'achal ben drosai* at sunset, it is permissible to leave the food on the open flame. Rabbi Auerbach justifies this ruling by establishing that it is only sunset which determines the start of the Sabbath for the laws of *sheheya*.

plan on eating the food at that time, then the leniency does apply.[19] However, if one plans on partaking of the food after the Friday night meal (i.e. *cholent*), then it would be prohibited. *Chazon Ish*, however, rules that even the aforementioned case is permissible.[20] He holds that the Rabbis' rule encompasses all cases and applies across the board.

Garuf V'Katum

In talmudic times, a consistent optimal cooking temperature was achieved by periodically stoking the coals. Due to the common nature of such stoking, the Rabbis felt that permitting the use of these ovens on the Sabbath would almost certainly lead to accidental stoking.[21] To prevent this, the Rabbis established that only an oven that has had its coals scraped (*garuf*) or covered (*katum*) may be used on the Sabbath; thereby establishing a reminder (*heker*) that will prevent one from inadvertently stoking the coals.[22]

The *Rishonim* debate the precise nature of *garuf v'katum*. Regarding *garuf*, Ran cites the Talmud *Yerushalmi*[23] that insists that one must remove all of the coals from the oven to constitute *garuf*.[24] Ran himself, however, sides with the

19. 253 s.v. *masiach da'ato mimena ad l'machar.*

20. 37:22.

21. One who stokes a fire on the Sabbath to hasten the cooking process transgresses the biblical prohibitions of kindling and cooking.

22. Ran (15b, *Rif* pages) says explicitly that the rationale behind *garuf* and *katum* is to provide a visual reminder (*heker*). Rashi 36b s.v. *oh ad shyiten et hafer*, commenting on the Mishnah, writes, "to cover [the coals] and to cool them off." Rashi seems to maintain that *katumah* is not merely a visual reminder, but it also must practically cool off the coals. Ritva s.v. *matneten* elaborates on Rashi's position, explaining that only through reducing the heat of the flame does one clearly demonstrate that one is not intent upon maintaining a specific temperature; only this provides a sufficient reminder that it is prohibited to stoke the coals on the Sabbath. For a possible practical difference, see *Shemirat Shabbat K'hilchata* 1:63 footnote 185.

23. *Shabbat* 3:1.

24. See Rambam, *Hilchot Shabbat* 3:6.

opinion of *Ba'al Hamoar*, that piling the coals into a corner of the oven is sufficient. *Shulchan Aruch* rules in favor of the *Yerushalmi*, requiring one to remove all of the coals from the oven.[25] The modern application of *garuf* to a gas or electric oven would seem to be completely turning off the oven.

When describing *katum*, Ran writes that although all of the coals must be covered with ash, they do not need to be smothered.[26] Rather, as long as the coals are slightly covered, it is enough to serve as a reminder.[27] Rashi, however, argues that the covering of the ash must actually cool off the coals.[28] It would seem that Rashi requires much more of a covering than Ran. In deciding the final halacha, *Shulchan Aruch* writes "one must cover the coals to reduce their heat."[29] At first glance, it would appear that *Shulchan Aruch* rules like Rashi, yet many commentaries cite Ran as the basis for his ruling.[30] This presents a complication, as Ran never mentioned the necessity of cooling the coals. A possible resolution to this dilemma would be that a slight (*kol dahu)* covering does cool the coals. Thus, although *Shulchan Aruch* rules in favor of Rashi, he does not contradict the ruling of Ran. Therefore, as long as the covering is apparent, it is halachically acceptable as a *heker*.

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25. 253:1

26. Rabbi Shlomo Zalman Auerbach (*Shulchan Shlomo* 237:4) understands that it is primarily the act of placing the *heker* as opposed to the existence of it that provides proof of one's intentions not to stoke. Although the wording of Ran does not necessarily support this view, basis for such an opinion can be proven from the talmudic case of *kitma v'huvara (Shabbat* 37a-37b).

27. Ran never meant to propose that an insignificant, unrecognizable amount is acceptable; he simply negates the necessity of covering the entire flame. According to Ran, as long as the *heker* is noticeable to the casual observer, it is legitimate.

28. *Shabbat* 36b s.v. *oh ad sheyiten et hafer*. See footnote *22* for explanation.

29. *O.C.* 253:1.

30. *Ba'er Heitev* 253:2 and *M.B.* 253:14.

Blechs

The contemporary equivalent of covering the fire with ashes is a *blech* (Yiddish for sheet metal). Indeed, a *blech* seems to fulfill all the requisite functions of *katum*, as the *blech* both cools the heat of the fire and serves as a visual reminder that adjusting the flame is prohibited.[31] In fact, the concept of the *blech* is already alluded to by Maharil.[32] However, *Chazon Ish* asserts that a *blech* does not constitute *katum*. He reasons that a metallic covering does not sufficiently reduce the heat from the oven or stovetop. Additionally, he maintains that cooking on top of a *blech* is not a great enough departure from normative cooking, and therefore is not considered a *heker*.[33]

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31. Due to the nature of modern oven mechanics, latter day authorities dispute which part of the oven or stovetop need the *blech* cover. Indeed, Rabbi Moshe Feinstein (*Iggerot Moshe O.C.*1:1:93) writes that preferably, the *blech* should cover both the heating element and the knobs since "stoking" is accomplished via the knobs. At the very least, however, the heating element should be covered. On the other hand, Rabbi Aharon Kotler (cited in *Halachot of Shabbat* by Rabbi Shimon Eider) maintains that covering the knobs alone is sufficient since adjusting (stoking) the heat of the fire is accomplished through the knobs and not through stoking the heating element. Rabbi Yosef Elyashiv and Rabbi Shlomo Zalman Aurbach (cited in *Orchot Shabbat* p. 65 footnote14) assert that, even ideally, it is only necessary to cover the heating element, adhering to the general rule established by the Rabbis that only the heat source must be covered. Rabbi Moshe Heinemann, *posek* of Star-K, only relies upon the opinion of Rabbi Aharon Kotler in case of necessity such as a glass top electric stovetop, where the manufacturer says that placing a metal sheet upon the stovetop will break it (Star-K 2008 Passover Directory p. 26). An additional method to permit the usage of an oven for *sheheya* purposes (putting food on the fire before the Sabbath) is by completely removing the knobs from the oven. While this does not constitute *garuf,* it satisfies an additional scenario called *tuach b'tit* (Rabbi Shmuel Wosner cited in *Orchot Shabat* p. 69 footnote 27, based on Ramo 254:5 and *M.B.* ibid: 37). Other authorities are uncertain if this method helps. See *Minchat Shlomo* 2:34:21.

32. See *M.B.* 253:81.

33. *Chazon Ish* (*O.C.* 37:9) infers this from the language of *Tur* 253:1, who writes that even if the oven has its cover upon it, one must still scrape or smother the flame. *Chazon Ish* concludes that any metallic covering is insufficient to create *katum.*

Many authorities strongly disagree with the strict ruling of *Chazon Ish*.[34] Firstly, they maintain that placing a *blech* upon the stovetop is indeed an extreme departure from normative cooking, which does create a valid *heker*. Secondly, they raise the point that the entire need for *katum* at all on a modern oven is questionable and perhaps unnecessary.[35] These authorities conclude that a *blech* constitutes *katum*, and is permissible for Sabbath use.[36]

Hot Plates

Another appliance commonly used to heat food for the Sabbath is a hot plate. A hot plate is essentially a nonadjustable covered burner. *Poskim* debate whether the hot plate is considered *katum*. Some argue that since there is no way to adjust the heat, it is considered *katum* even though there is no *heker*.[37] Other authorities, however, maintain that the Rabbis instituted a blanket prohibition upon all flames regardless of whether or not they are adjustable.[38]

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34. *Iggerot Moshe* (ibid), *Shevet Halevi* (1:71), *Yabia Omer* (6:32).

35. *Iggerot Moshe* (ibid) reasons that on a gas oven the flame is intensified by increasing the gas flow. Therefore, it is not a question of stoking the flame, but rather, one of adding fuel to the flame, something that the Rabbis never mentioned and perhaps were not concerned with. However, *Shevet Halevi* (ibid) offers an even simpler explanation. He writes that stoking in the classical sense is ineffective on a gas flame, and therefore, is not subject to the prohibition if the knobs are covered. See *Yabia Omer* (ibid 3) for additional lenient considerations.

36. It is noteworthy that none of those who argue with *Chazon Ish* address the issue of a *blech* failing to sufficiently reduce the heat. In truth, this concern of *Chazon Ish* is his own assertion, and no additional sources back his argument.

37. *Har Tzvi* (136) cites a novel proof from *Biur Halacha* (318 s.v. *afeelu b'toldot chama*) who permits *sheheya* upon an item that was heated on a fire but is no longer on the fire (*toldot ohr*), due to the fact that it physically cannot be stoked. See also *Shemirat Shabbat* 1:25 footnote 71.

38. Rabbi Yosef Elyashiv as cited in *Orchot Shabbat* 2:13 footnote 20.

Crock Pots

A crock pot that allows for various settings should require an additional covering according to all opinions. The fact that the metal heating element in the crock pot is already covered is not sufficient to create *katum*, as this covering is not irregular, and therefore not a *heker*. [39]

The simplest method of covering the heating element in a crock pot is with tin foil since it is both flexible and heat resistant.[40] Nonetheless, some authorities contend that tin foil is only acceptable as a *heker* if it is folded over a number of times.[41] They argue that a single piece of tin foil cannot serve as a *heker*, because it is commonly used to line various kitchen appliances in order to keep them clean. Additionally, they maintain that a single layer of foil can burn up and will not remain visible.[42]

However, it is apparent that tin foil in a crock pot does not get burned up, rendering this concern applicable to ovens only. As for the first issue concerning the general usage of tin foil, it would seem that it depends upon the individual. If one regularly uses tin foil to cover appliances for cleanliness, it would not serve as a *heker*.

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39. See footnote 26. *Or L'tzion* (17:3) avers that if the knob is set to the highest setting, then no covering is needed. The rationale for this position is that the Rabbis were only concerned that one may stoke the flame to make it hotter. If, however, the flame is already at the highest setting, there no longer exists any room for concern. Rabbi Moshe Feinstein (*Iggerot Moshe O.C.* 4:74:25), however, argues that there is a blanket prohibition (*lo plug*) on all flames. For more information regarding the general usage of crock pots on the Sabbath see article by Daniel Rabinowitz in this Journal, "Crock Pots;" XXXIV, p. 103.

40. *Or L'tzion* (17:1 footnote 1).

41. *Meor Shabbat* volume 2 letter 32:2 p. 616, citing Rabbi Shlomo Zalman Auerbach and *Pnei Shabbat*.

42. At first glance, it does not seem that this should present an issue. It is clearly stated in the Talmud (*Shabbat* 37a) that even if the covering was subsequently burned off, it is still valid. These *poskim*, however, make the distinction that in the case of tin foil, it is inevitable that it will burn up, whereas in the Talmud's case, it was mere happenstance.

There are two additional concerns regarding crock pots in particular. Firstly, since the foil is generally left in place without removing it even when cooking during the week, it should loose its *heker* status.[43] Additionally, the crock pot is frequently adjusted after the foil has already been put in place. These adjustments clearly demonstrate that one's mind is still on the food, and the tin foil *heker* becomes meaningless.[44]

Returning Food to a Fire on the Sabbath (*Chazara*)

Thus far, we have discussed the laws of maintaining food upon a fire as the Sabbath comes in (*sheheya*). We will now expand upon the laws that pertain to the prohibition of replacing food upon a flame after it was removed on the Sabbath.[45] The reason for this prohibition is disputed among the *Rishonim*. Rashi[46] and Ran[47] assert that it is prohibited

43. Oral ruling to this author from Rabbi Aharon Felder, *posek* of Kof-K, and Rabbi Moshe Heineman. See also *Am Mordechai* (Rabbi Mordechai Willig) 6:1. In order to avoid this problem, one can simply remove the tin foil on a weekly basis, thus clearly establishing it as a *heker*.

44. See *Shulchan Shlomo* 253:1:5 who discusses this issue at length, as well as *Hilchot Shabbat B'shabbat* (Rabbi Moshe Mordechai Karp) 5:6. Some authorities have also argued that tin foil should be unacceptable in a crock pot, as the air space between the heating element and the insert gets filled with the foil and cooks the food faster since there is more heat. It seems to this author that this claim should not present a problem, as the foil still cools the fire as the Rabbis required (see footnote 22), even though the food might get cooked faster.

45. It is interesting to note that *chazara* is also applicable immediately before the Sabbath is ushered in. See Ramo 253:3, and *Orchot Shabbat* p. 93 footnote 97, citing *Chazon Ish*, who explains why this issue is generally non-existent in the modern oven.

46. *Shabbat* 36b s.v *lo machzerim*. See Maharam, ibid, who maintains that Rashi is merely explaining the position of *Beit Shamai*, while *Beit Hillel* maintain that *chazara* is prohibited due to a concern of *shema yichateh*. Barring the opinion of Maharam, however, the consensus among *poskim* seems to be that Rashi is explaining both the position of *Beit Shamai* and *Beit Hillel*. See *Sha'ar Hatzion* 253:37 and *Shulchan Aruch Harav* 253:15.

47. 17b (*Rif* pages) s.v. *lo shanu elah.*

because it resembles cooking (*mechze k'mivashel*).[48] Rabbenu Tam, however, maintains that the prohibition is due to a concern of accidental stoking (*shema yichateh*).[49]

Shulchan Aruch lists four conditions that must be met in order to return the food on the Sabbath:[50]

1. *Garuf v'katum.*[51]
2. The food must be fully cooked [52] and hot.[53]

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48. Several explanations are offered as to the underlying concern of *mechze k'mivashel*. *Ohr Sameach* (introduction to chapter 3 of *Hilchot Shabbat*) writes that activities which are *mechze k'mivashel* are prohibited due to the concern that the doer himself, in other circumstances, may come to perform a prohibited act of cooking. Rabbi Moshe Feinstein (*Iggerot Moshe O.C.* 4:82) writes that it is prohibited to perform an act which resembles a prohibited act since this act will cause others to transgress a real prohibition through imitating the doer's actions. Alternatively, others will come to think that the doer is performing a prohibited act. The bystanders will ultimately come to speak negatively of the doer, and thereby violate the prohibition of *lashon hara (*forbidden speech*).*

49. *Shabbat* 38b s.v. *pina* Even though *garuf v'katum* is sufficient to satisfy the concern of accidental stoking in regard to the prohibition of *sheheya*, for the prohibition of *chazara* the concern is greater and is not satisfied by *garuf v'katum* alone. The greater concern is due to the fact that the food may have cooled off while removed from the flame, and hence, the desire to heat the food is greater.

50. The purpose of these conditions is to ensure that returning the food to the flame be a continuation of the original placement that was done before the onset of the Sabbath. The Rabbis felt that if the replacement was viewed as an independent act, it would either be *mechze k'mivashel,* according to Ran, or there would be concern for accidental stoking, according to Rabbenu Tam.

51. See above for details.

52. This is not a *chazara* issue; rather, one cannot return raw food to the fire because doing so would violate the prohibition of cooking. Chicken bones which are not fully cooked are subject to a dispute between *Iggerot Moshe* (*O.C.* 4:65) and *Minchat Shlomo* (1:6). See also *Shemirat Shabbat Kehilchata* 1:56.

53. The reason for this is somewhat nebulous. *Magen Avraham* (253:9) writes that it must be hot in order to avoid cooking on the Sabbath. This view follows the position of Ramo (318:15) who avers that as long as a liquid remains hot, it is permissible to recook it. Seemingly then, this condition is only necessary for liquids, as solids may be re-cooked even when completely

3. The pot must still be in the hands[54] of the individual[55] and not on the ground.[56]

4. One must have intention to return the food to the flame.[57]

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cooled off. *Magen Avraham* (ibid 36), however, asserts that even solids must be hot to allow *chazara*. He reasons that if the food has completely cooled off, then the *chazara* is no longer considered a continuation of the original placement of the food but an initial placement which is prohibited once the Sabbath has begun. *Machzit Hashekel* (ibid) attempts to resolve the apparent contradiction between the two positions of *Magen Avraham*. *M.B.* (ibid 68) cites the opinion of *Magen Avraham* who maintains that even solids must be hot in order to perform *chazara*. *Biur Halacha (*ibid s.v. *u'bilvad shelo nitztanen),* however, sides with the opinion of GRA who disputes *Magen Avraham* and maintains that only liquids are subject to this restriction as it is simply a *bishul (*cooking*)* issue. Additionally, see *Chazon Ish* (37:10) who also rules like GRA. Interestingly, *Iggerot Moshe* (*O.C.* 4:74:31) upholds the stringent view of *Magen Avraham*. To determine which foods are considered liquid (i.e. chicken with gravy), see *Pri Megadim*, *M.Z.*. 253:13; *Shulchan Aruch Harav,* ibid, *Kuntrus Acharon* 11; and *Iggerot Moshe* ibid 7.

54. The *poskim* dispute whether this condition mandates that one hold the pot the entire time and support it with one's hands, or simply keep a hand touching the pot but not necessarily supporting it. *Iggerot Moshe* (*O.C.* 4:74:33) maintains that it is sufficient to merely have a hand touching the pot the entire time. *Maharam Shick* (*O.C.* 117) seems to concur with this position as well. However, it seems clear from *Biur Halacha* (*253* s.v. *v'lo heneecha al gabay karka)* that one must actually support the pot while it is removed from the flame. Rambam in his *Commentary to Mishnah, Shabbat* chapter 3, also maintains that the pot must be supported and not merely have a hand placed upon it.

55. *Mekor Chaim* (ibid, authored by *Chavot Yair*) argues that the pot must remain in the hands of the individual who removed it from the flame and may not be passed to another person's hands.

56. See *Hilchot Shabbat B'shabbat* (chapter 11) who discusses the status of kitchen counter tops.

57. *Biur Halacha* 237 (s.v. *v'lo heneecha al gabay karka*) writes that *ex post facto* (*b'dieved*), as long as one either had intent to return the food to the flame or kept the food in his hands, it is permissible to return the food to the flame. The food must certainly be fully cooked (and warm in the case of a liquid) in order to circumvent cooking on the Sabbath.

The View of Ran

Ran maintains that the above restrictions are necessary only when the food was removed prior to the onset of the Sabbath.[58] If, however, the food was taken off the flame after the Sabbath had already begun, the food may be returned to the flame without meeting the above conditions.[59] The food may even be replaced the next morning directly from the refrigerator if it was on the fire at the onset of the Sabbath. Ramo states that, although the halacha is essentially in favor of Ran, it is nonetheless proper to act in accordance with the more stringent position of the majority of *Rishonim* (*tov l'hachmir*).[60] According to those *poskim,* the above conditions must be met in all cases, even when the food was removed from the flame after the start of the Sabbath.

The simple understanding of Ran is that none of the conditions listed above need to be met. Indeed, *Aruch Hashulchan* asserts this view in his understanding of Ran's position.[61] *Mishnah Berurah*,[62] however, argues that even Ran never meant to permit a *chazara* on an open flame, and even he requires that the flame be *garuf v'katum*.[63]

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58. It goes without saying that the food must be fully cooked even according to Ran.

59. For the rationale behind Ran's position, see footnote 63. Rabbi Hershel Shachter explained to this author that Rabbi Joseph B. Soloveichik personally ruled in accordance with the stringent opinion of Ramo; but he told people that they may rely on the lenient opinion of Ran if he thought that they would place the food directly on the *blech* anyway.

60. 253:2.

61. Ibid:19.

62. Ibid: 63, citing *Taz.*

63. The rationale behind Ran's position is as follows: if food is on the flame after the Sabbath has begun, then by definition, any replacement of the food onto the flame will be viewed as a continuation of the original placement, and not as a new act. Therefore, since the entire purpose of the conditions is to connect the replacement with the initial placement, here, when the replacement is by definition considered a continuation of the first act, the conditions need not be fulfilled. It seems that *Aruch Hashulchan* and *Mishnah*

Initial Placement (*Netina Lechatchila*)

Absent the fulfillment of the aforementioned conditions, it seems that it would certainly be prohibited to initially place food on the fire[64] on the Sabbath.[65] In certain scenarios, however, it is in fact permitted.

Shulchan Aruch writes that, even on the Sabbath day, one may place a fully cooked solid food on top of a pot that is on the flame, as this is not the ordinary method of cooking.[66] Earlier, however, *Shulchan Aruch* seems to contradict himself, as he writes that it is only permissible to do so if the food was on the flame before the onset of the Sabbath.[67]

Pri Megadim offers a possible solution to this dilemma.[68] He suggests that the case permitting an initial placement onto the pot is where the pot contains food, and therefore, placing food

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Berurah argue as to the precise function of *garuf v'katum* and as to what purpose they serve. *Aruch Hashulchan* feels that *garuf v'katum* also serves to connect the replacement to the initial placement; so long as the flame is covered, the replacement appears to be a continuation of the original placement. This is because one does not generally cook on a covered flame, and a placement on top of such a flame must be a continuation of a previous act. *Mishnah Berurah*, however, avers that *garuf v'katum* prevents the act of placing food on the flame to be viewed as an act that is *mechze k'mivashel*. Indeed, he maintains that *garuf v'katum* serves a fundamentally different purpose than the other conditions that serve to connect the two acts. Therefore, according to *Mishnah Berurah*, even in Ran's view, *garuf v'katum* would still be required. According to *Aruch Hashulchan*, however, *garuf v'katum* is no different than any of the other conditions and in the event that the pot was on the flame after the Sabbath came in, it is unnecessary.

64. For a discussion regarding if one may put cooked food directly next to the *blech* or crock pot (*semichah*), see *Shulchan Aruch* 253:1, *M.B.* 15, and *Biur Halacha* s.v. *mutar lismoch*.

65. Indeed, if one placed the food on the flame without following the prescribed conditions, the food may be prohibited. See Ramo 253:1 and *Biur Halacha* ibid, s.v. *im hechziro yisroel*. Additionally, see *Chazon Ish* 37:27 with understanding of *Am Mordechai* 8:4.

66. 253:5.

67. Ibid:3.

68. Ibid, *Eshel Avraham* 33 quoted in *Biur Halacha* s.v. *yizaher shelo yasim*.

on top of it does not resemble an act of cooking (*mechze k'mivashel*). However, where the pot is empty, it accomplishes no more than the classical *garuf v'katum* in which only *chazara* is permitted. This scenario would not allow for an initial placement.

Chazon Ish offers a novel interpretation of *Pri Megadim*.[69] He proposes that when the pot contains food, the heat no longer comes from the coals, but rather from the food within the pot. Therefore, placing food onto such a pot cannot resemble cooking because normative cooking is accomplished through coal heat and not through the heat of other food items.[70] Thus, according to *Pri Megadim*, it seems that the only permissible method of initial placement of food onto the flame (*netina lechatchila*) is on top of a pot that contains food. Placement upon an empty pot would be *mechze k'mivashel* and would not be permitted.

Nonetheless, common practice is to position an overturned pot onto a *blech* and to initially place food upon it. Notwithstanding the aforementioned, basis for this custom can be found in primary halachic sources, as elaborated upon below.

Machzit Hashekel proposes an additional solution to the

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69. *O.C.* 37:9 s.v. *hikshah.*

70. It would seem that, according to *Chazon Ish,* it would be permissible to do an initial placement onto a slab of meat that is on the *blech,* as the heat source is the meat and not the flame. This application of *Chazon Ish*, however, requires further research. The understanding of *Chazon Ish* lends credence to permitting usage of a *kedeirah blech*, which essentially is a thicker *blech* with water inside. Rabbi Yisroel Belsky, *posek* of Orthodox Union (OU), relayed to this author that it is not permitted to use a *kedeirah blech.* He reasoned that it does not resemble a pot because the water inside is not used for drinking. In addition, it looks like a *bona fide blech,* and not a pot, and therefore, it would be *mechze k'mivashel*. These two issues did not bother Rabbi Hershel Shachter, who told this author that one may do an initial placement onto a *kedeirah blech*. For further information about this subject see *The 39 Melochos* by Rabbi Dovid Ribiat pp. 622-5.

previously-mentioned contradiction in *Shulchan Aruch*.[71] He suggests that *Shulchan Aruch* permits the initial placement of solids and prohibits the initial placement of liquids. Therefore, he establishes that the passage which prohibits initial placement is referring to liquids; whereas the passage that permits initial placement is dealing with solids.[72] According to this solution, it is permitted to do an initial placement of solid food onto an empty pot that is on the fire. Although *Biur Halacha* cites *Pri Megadim* who argues with *Machzit Hashekel* and maintains that the pot must contain food, in multiple places in *Mishnah Berurah* he seems to adopt the lenient position of *Machzit Hashekel*. [73]

Shevet Halevi[74] suggests a basis for permitting this common custom even according to the more stringent view of *Pri Megadim*.[75] He opines that a pot on top of a *blech* is comparable to a pot that contains food, and that neither is *mechze k'mivashel*. He further reasons that the underlying logic determining that a hot surface is not *mechze k'mivashel* is that the surface should be viewed not as an extension of the oven, but rather as an independent entity. Therefore, just as a pot that contains food is clearly not an extension of the oven, as the pot is clearly servicing the food inside of it, so too, an empty pot placed upon a *blech* is equally viewed as an independent entity and not an extension of the oven. Therefore, he maintains that in both cases, the issue of *mechze*

71. 237:34.

72. *Machzit Hashekel* (ibid) cites *Magen Avraham* (318:26) to explain the reasoning behind this distinction. He writes that since a cold liquid may not be returned to the flame under any circumstances, the Rabbis prohibited the initial placement of hot liquids lest one come to place a cold liquid as well. However, solids, which may be returned to the flame once they are fully cooked even if cold, are not subject to this concern, and as long as the initial placement is not *mechze k'mivashel,* it is permissible.

73. 318:41, 44, 59, 94, and 101.

74. 1:91.

75. This understanding of *Pri Megadim* clearly differs from *Chazon Ish*'s understanding.

k'mivashel is resolved, and it is permissible to do a *netina lechatchila* upon a pot on a *blech.*

Rabbi Moshe Mordechai Karp offers an additional basis for a lenient ruling, even according to *Chazon Ish's* position. [76] He argues that the air space in an empty pot is comparable to the food in the pot as in the case of the *Pri Megadim*.[77] In both cases, the primary heat source is not the flame below the pot, but the contents within the pot, whether it is food or surrounding hot air.[78] Other halachic authorities dispute this ruling. They argue that the overturned pot is merely viewed as part of the *blech* and is not an improvement over a *blech* alone.[79]

Initial Placement (*Netina Lechatchila)* Onto a *Blech*

Rabbi Ovadia Yosef avers that based on the ruling of *Machtzit Hashekel,* it is even permissible to do an initial placement onto a flame covered by a *blech*.[80] He maintains that there is essentially no difference between a flame covered by a pot and a flame covered by a single layer of metal, as neither are *mechze k'mivashel*. Therefore, he rules that one may do an initial placement onto a *blech*,[81] provided that the food is a

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76. *Hilchot Shabbat B'shabbat* 5:35 footnote 101.

77. Although this logic would seem to apply even to an empty pot that is directly on the flame and not on top of a *blech*, *Hilchot Shabbat B'shabbat* clearly maintains that it is only applicable to a pot on top of a *blech*.

78. See also *Shemirat Shabbat Kehilchata* volume 3:112, *Meor Hashabbat* p. 530, *Even Yisrael* (Rabbi Yisrael Yaakov Fisher) 9 p. 74, who also maintain that it is permissible. Rabbi Aharon Felder told this author that Rabbi Moshe Feinstein ruled that one may even place food on an overturned cookie sheet that is on top of a *blech*. See also *She'eilot Aharon* (authored by Rabbi Aharon Felder) chapter 21.

79. *Az Nidbaru* 3:14, Rabbi Yosef Shalom Elyashiv cited in *Orchot Shabbat* p. 100 footnote 101.

80. *Yichaveh Da'at* 2:45.

81. Although the primary purpose of the *blech* is to create a flame that is *katum*, and certainly, a standard *katum* flame does not permit a *netina lechatchila*, Rabbi Yosef maintains that the *blech* also creates a scenario that is

precooked solid.[82] While Rabbi Yosef does permit this, he stands alone on this issue.[83] [84]

Hot Plates and Initial Placement (*Netina Lechatchila*)

At first glance, it would seem that placing food upon a hot plate should be permitted, as it is an appliance not designed for cooking, and placing food upon it would not resemble the act of cooking (*mechze k'mivashel*). Additionally, a hot plate should not be subject to a concern of accidental stoking,[85] for it is inherently non-adjustable.[86] Indeed some contemporary authorities cite Rabbi Moshe Feinstein as explicitly permitting an initial placement onto a hot plate.[87] A careful reading of the text that cites his ruling, however, yields a different conclusion. He writes,

Concerning a hot plate: if it is not possible to cook there, it

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not *mechze k'mivashel*. He, therefore, permits an initial placement on a *blech*.

82. This is necessary in order to avoid cooking on the Sabbath.

83. Although most *poskim* do not specifically discuss this case, their silence is testimony to their stringent opinion. See *Iggerot Moshe* O.C 4:61.

84. *Or L'tzion* (30:13) does permit an initial placement onto the area of the *blech* that is not directly above the flame even if that area is *yad seledot bo*. He reasons that *mechze k'mivashel* is only applicable to the area directly over a flame. Rabbi Moshe Feinstein (*Iggerot Moshe* ibid 1:94 and 4:74:32), however, maintains that since the *blech* is heated through the flame, the entire area of the *blech* which is *yad soledet bo* is considered to be directly above the flame and is subject to *mechze k'mivashel* restrictions. Rabbi Yosef Elyashiv rules stringently even on an area that is not *yad soledet bo* (cited in *Orchot Shabbat* chapter 2 footnote107).

85. *Sha'ar Hatzion* (253:37) writes that it is necessary to satisfy both concerns, accidental stoking and *mechze k'mivashel*. (See earlier for the dispute among the *Rishonim* for the reason behind the prohibition of *chazara*). *Shemirat Shabbat K'hilchata (*1 footnote 71) implies this as well. See, however, *Chazon Ish* (37:26) who seems to adopt the opinion of Rabbenu Tam that the prohibition is due only to the concern of accidental stoking. For further elaboration, see *Am Mordechai* 7:2.

86. See footnotes 37 and 38.

87. *Piskei Teshuvot* 253:16.

> is then permissible to do an initial placement upon it, provided that the hot plate is non-adjustable…however, a steam table, where it is **possible** to cook, is considered normative cooking [and is therefore subject to *mechze k'mivashel* restrictions]. [88]

It is clear that Rabbi Feinstein maintains that if it is theoretically possible to cook on a surface, then that surface is subject to all restrictions of *mechze k'mivashel*.[89] Apparently, the hot plate that Rabbi Feinstein is discussing is not hot enough to allow for any type of cooking.[90] Rabbi Reuven Feinstein[91] reported in the name of his father that it is even prohibited to do *chazara* onto a non-adjustable hot plate. [92]

Although basis for this leniency cannot be found in *Iggerot Moshe*, nonetheless, it can be argued that since hot plates are generally not cooked upon, placing food upon such an appliance would not be *mechze k'mivashel*, and even an initial

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88. *Iggerot Moshe* (*O.C.* 4:74:35).

89. Although Rabbi Feinstein (*Iggerot Moshe* 4:74:34) does permit an initial placing upon a radiator, there must be a distinction between an appliance that was designed for heating food and an appliance that was designed for a different use. See also *Az Nidbaru* 1:25 and 2:22.

90. In light of this, it is difficult to understand what *Iggerot Moshe* was permitting, as it is an undisputed axiom that it is permissible to place food upon any surface that is not *yad soledet bo*. See *Am Mordechai* 7:2 who suggests a possible explanation.

91. *Am Mordechai* ibid.

92. See footnotes 37 and 38 for further explanation. *Shemirat Shabbat K'hilchata* (1:25), however, permits *chazara* onto a hot plate. Additionally, see *Hilchot Shabbat B'shabbat* 5:28. It is important to keep in mind that there is a stricter definition of *mechze k'mivashel* for *netina lechatchila* than for *chazara*. While it is difficult to pinpoint the precise degree of distinction, it remains clear that *netina lechatchila* requires a greater *heker* then *chazara*. This is clearly demonstrated by the fact that *garuf v'katum* allows for *chazara* and not for *netina lechatchila*.

placement should be permitted.[93] [94]

Initial Placement *(Netina Lechatchila)* via *Akum*

It is generally prohibited for a Jew to ask an *akum* (gentile) to do prohibited labor on the Sabbath.[95] However, one is allowed to ask an *akum* to do prohibited labor which is only rabbinically prohibited if it is necessary in order to fulfill one of the mitzvot of the Sabbath.[96] Therefore, it would seem that one should be allowed to ask an *akum* to place precooked food or liquids[97] on the *blech*, or even in the oven, on the Sabbath, since the prohibition of returning food to the fire is only rabbinic, and it is a mitzvah to have hot food on the Sabbath.[98] Indeed, *Biur Halacha* says that perhaps (*efshar*) one may ask an *akum* to put food on the fire if he has no other option, as long as the food is being heated for the sake of the Sabbath.[99] *Am Mordechai* rules that one must not (*lechatchila*) rely on this leniency, but in an *ex post facto* (*b'dieved)* situation it would be permissible.[100] Thus, one would not be allowed to intend to

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93. *Am Mordechai* (ibid). A strong proof to this comes from the language of Rashba cited in *M.B* 318:92. Rabbi Yehoshua Neuwirth (in the approbation to *Am Mordechai*), however, argues that since Sefardim do in fact use a hot plate for normative cooking, it is bound by *mechze k'mivashel* restrictions. One wonders if the cooking habits of Sephardim in Israel can affect the definition of *mechze k'mivashel* for Jews in the Diaspora.

94. *Am Mordechai* (ibid) only permits an initial placement upon a hot plate but not onto a *blech* even though the majority of people do not cook on *blechs.* It seems that, although practically neither are generally cooked upon, a *blech,* which is merely a cover for a fire that is generally cooked upon, is worse.

95. 307:5. See *Encyclopedia Talmudit* volume 2 pages 42-45 for the reason behind this prohibition, if it is of Torah or rabbinic origin, and for many applications of this law.

96. Ibid.

97. *Iggerot Moshe O.C.* 4:74:2.

98. As mentioned above.

99. 253 s.v. *lehachem kedeirah. Aruch Hashulchan* 253:34 agrees.

100. 2:3. While *Am Mordechai* does not explain his opinion, *Shulchan Aruch*

ask an *akum* to put his food for him in the oven on the Sabbath. One may only ask an *akum* to heat foods that one forgot about. Additionally, one may only have necessary foods warmed up and not food that one can do without.[101]

Chazon Ish disagrees with the lenient ruling of *Biur Halacha*.[102] He argues that, although one may generally ask an *akum* to do rabbinically prohibited activity on the Sabbath, returning food to the fire is an exception, because the Rabbis prohibited not the action of returning food upon a fire, but having the food on the fire, regardless of how it was put there. Therefore, one may not create such a situation, even through an *akum*.[103]

In conclusion, this article has discussed in depth many different ways of keeping food hot for the Sabbath. It is our hope that by clarifying and keeping these laws, we will delight in the Sabbath in the truest sense and merit an infinite inheritance in the World to Come.[104]

Harav (303 *Kuntrus Achron* 1) writes that generally, the leniency of asking a gentile to do forbidden labor is only permitted after the fact (*b'dieved*).

101. *M.B.* 325:62. See also *Kaf Hachaim* 325:113. Therefore, one would not be allowed to ask an *akum* to heat up many different types of food; only the main meal food would be permitted. This is especially relevant for caterers when they heat up food for Sabbath day events. See *She'eilot Aharon* 21 for a thorough analysis of this topic.

102. *O.C.* 37:21 s.v. *ve'lehamoar.*

103. *Chazon Ish*'s position is based upon his understanding of the prohibition of *chazara*. He maintains that the prohibition is primarily because of possible stoking, and this concern exists so long as the food is on the fire. See footnote 85.

104. Based on *Shabbat* 118a.

Pathways: Easements in Halacha

Rabbi Yosef Gavriel Bechhofer

Scenario: In a suburban Jewish neighborhood, for many years the residents have made use of a path between their neighborhood and the local synagogue. The path ran on the property of several of the neighbors, as well as of the synagogue itself. Over the years the path was improved – (primarily by the neighbors through whose property it ran and the synagogue, but with the participation of other neighbors as well) viz., it was paved, one of the neighbors installed lighting, etc.

As the synagogue grew, use of the path expanded as well. At a certain point, the synagogue began some new construction, but some of the neighbors who lived closest to the synagogue went to a *Din Torah* to try to halt the construction. At the same time, they tried to block the construction with the local zoning board. While the zoning board rejected the neighbors' case, it did rule that a fence should be put up to cut off access via the path to the synagogue. The *Din Torah* simply accepted the zoning board's ruling as *Dina d'Malchuta Dina* (the law of the land is law). The halachic question remains, however, whether the other neighbors, many of whom prayed at the synagogue, and were significantly inconvenienced by the closure of the path (and who were not party to the aforementioned *Din Torah*), have any recourse to compel the path to be reopened?

Rabbi Yitzchok Yaakov Weiss (*Teshuvot Minchat Yitzchak* 7:138) deals with a similar question. In that case, the residents of a neighborhood had become accustomed to cutting through a private open lot. Moreover, since the lot was on the side of a

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hill, the neighbors on their own initiative built stairs in the lot. Subsequently, the lot's owner sold it to another person, who built an apartment house, which he then sold. The new residents of the apartments decided to put up a wall to prevent passersby. Even though they had an alternative path, the neighbors complained that it was longer, and that therefore they wanted their access to the old path restored.

Several other contemporary *Poskim* deal with this issue, among them Rabbi Shmuel HaLevi Wosner (*Teshuvot Shevet HaLevi* 10:289).

What was the basis of their claim in the case considered in *Minchat Yitzchak*? It was the Mishnah (*Bava Batra* 99b), that states that if a path that has been used by the masses runs through a person's field (מיצר שהחזיקו בו רבים), he may not bar their access to it. Moreover, even if the owner prepares for them an alternative route, it is of no avail; not only do they retain their previous path, but are now *also* entitled to use the new routes as well.

What constitutes such a path? Rashbam (ad loc.) explains that it is either a byway on which people have assumed the right (שהוחזקו) to walk from time immemorial (i.e., no one remembers precisely how this situation first came about), or a pathway designated for public use by the field's owner.[1]

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1. *Darchei Moshe* (*Choshen Mishpat* #377) writes in the name of *Mordechai* that it is only forbidden to ruin a path that has been used by the masses if those masses were originally permitted to make use of it. Rabbi Weiss notes that this is also the position of *Tosafot* (*Bava Batra* 12a *d.h. Meitzar*). Ramo (*Choshen Mishpat,* ibid.) rules in accordance with this view that he cites in *Darchei Moshe*. On the basis of this explanation of Rashbam,*Teshuvot Pnei Yehoshua* (vol. 1, *Choshen Mishpat* #4) distinguishes between an individual and masses. He states that although an individual cannot establish a right of usage in another person's property merely by virtue of the latter's silence (see *Bava Batra* 41), the masses do establish a right of usage in this manner.

[*Pnei Yehoshua* (ibid. and 2:94; cited in *Pitchei Teshuvah, Choshen Mishpat* 377:1) goes even further, asserting that even if the owner's tacit acquiescence was based on a mistake, once the public has established its right of passage, he no longer may rescind that acquiescence (see *Bava Kamma* 28a; *Ba'al*

The Gemara (ibid., 100a) adds that the owner also may not "ruin" the path in any way. Rashbam (ad loc.) explains that if the masses smoothed and improved the path to make walking easier, and the owner was aware of their work and remained silent, he may not subsequently undo their improvements, as we take his initial silence to constitute acquiescence. The questioner in *Teshuvot Shevet HaLevi* (loc. cit.) infers from Rashbam that a right of passage may only be considered to have been established if the public actively "took possession" of that right in some way – viz., by leveling the ground and making it easier to walk. Rabbi Wosner responds that *Teshuvot HaRashba* (#1152) disagrees with Rashbam, and concludes that the right of way in such paths is established by the walking in and of itself (see also Rashba to *Bava Batra* ad. loc.). *Teshuvot Avnei Nezer* (*Choshen Mishpat* #13) rules in accordance with Rashba, and notes that this is, in fact, the simple meaning of the Gemara there. *Teshuvot Maharsham* 1:5 also rules accordingly, and also cites *Teshuvot Beit Ephraim, Choshen Mishpat* #22, who asserts that even Rashbam would concede that the right to use a path that is intended solely for walking is acquired by the masses merely by walking there.

Rabbi Wosner does make a different qualification – viz., that Rashbam's implication that the owner's simply remaining silent suffices to establish his acquiescence applies only to a case in which the masses did indeed make physical changes to the path. In cases in which the public establishes its right by walking alone, the owner's silence can only be taken to signify acquiescence if the access established by the masses in some way diminishes the value of his property or causes him a loss

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HaMaor and *Nimukei Yosef* to *Bava Batra* 99-100). *Teshuvot Beit Ephraim* (*Choshen Mishpat* #23; cited in *Pitchei Teshuvah* loc. cit. 377:2), however, distinguishes between an owner who definitively decided to allow the public to use his property as a path – albeit by mistake – and an owner who had only intended to let the public use his property for a specific amount of time.]

in some other manner.[2] If that is not the case, then it is only by the express permission of the owner that the public can acquire the right of passage through his property.[3]

The Mishnah's ruling, as elaborated by the Gemara, is accepted by Rambam (*Hil. Nizkei Mammon*, end of chap. 13) and both *Tur* and *Shulchan Aruch* (*Choshen Mishpat* #377; see also *Bava Batra* 60b and *Tur* and *Shulchan Aruch, Choshen Mishpat* 417:2). Moreover, the Gemara (*Bava Batra* 12a) and *Shulchan Aruch* (*Choshen Mishpat* 162:2) rule that this law applies even where there already exists an alternative path, so long as the path in question constitutes a shorter route.[4]

However, *Chochmat Shlomo* (*Choshen Mishpat* #377) writes that a path can only be considered a byway on which people have assumed the right to walk if *most of the city* have been using that path – and that the path's use by "two or three" people does not eliminate the owner's right to close off their access. Clearly then, it is incumbent upon us to determine the status of a case that falls somewhere in between "most of the city" and "two or three people." Rabbi Weiss is of the opinion that so long as most of the residents of that street (מבוי) use the path, that suffices to render it a byway on which people have

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2. Rabbi Wosner notes that *Teshuvot Maharshdam* (#238) infers this qualification from Rambam, and that *Teshuvot Maharsham* (loc. cit.) draws the same inference from *Aliyot d'Rabbeinu Yona* to *Bava Batra* loc. cit.

3. See the responsum in *Teshuvot Shevet HaLevi* for Rabbi Wosner's rejection of the position of *Teshuvot Chatam Sofer* (*Orach Chaim* #97) on the basis of *Aliyot d'Rabbeinu Yonah* to *Bava Batra* 100a. Rabbi Wosner notes that *Teshuvot Avnei Nezer* (loc. cit.) proves from *Sema* (377:2) that express permission is required.

4. Although Rambam (loc. cit) writes that a *Derech HaRabbim*, a pathway that is used by the masses, is one that is sixteen *amot* (cubits) wide (see *Be'er HaGolah, Choshen Mishpat* #377), *Teshuvot Pnei Yehoshua* (loc. cit., cited in *Pitchei Teshuvah, Choshen Mishpat* 377:1) writes that Rambam merely meant to define the parameters of a *Derech HaRabbim* for a case in which one person sold a path characterized as a *Derech HaRabbim* to another (see *Shulchan Aruch, Choshen Mishpat* 217:4), and that consequently this measurement is not relevant to our case.

assumed the right to walk.[5] This would certainly be the case if most of the residents of a neighborhood used the path.

Rabbi Weiss notes that regardless of the original circumstances, *Sema* (loc. cit. 377:2) rules that in any case in which the masses currently assume and exercise the right of a pathway through a person's property, the *Beit Din* assumes *a priori* (טענינן) that when the public initially began walking through the property, it was with the requisite acquiescence of the owner (see also *Pnei Yehoshua* loc. cit.).

The questioner in *Teshuvot Shevet HaLevi*, however, raised an important question, and in his response, Rabbi Wosner issued an important ruling. The questioner asked: Can we not make an assessment (אומדנא) that an owner in his right mind would never relinquish to the masses the right to walk in the middle of his yard, and that he was only silent either because he did not want to create a dispute, or because he was not concerned about the occasional walker? Certainly he did not have in mind to relinquish all rights in perpetuity?

To this inquiry Rabbi Wosner responded that although *Sema*, and even some *Rishonim*, are of the opinion that we assume that when the public initially began walking through the property, it was with the requisite acquiescence of the owner, nevertheless, it is reasonable to qualify that if the owner knows that in truth he never did give permission to use his property as a path, and if he is willing to take an oath to that effect, and especially if the *Beit Din* perceives the justice of his claim under the prevailing circumstances, that he is believed in his claim that he never acquiesced to a permanent path

5. He bases his position on the Gemara (*Bava Batra* 11b) that states that if the residents of one street want to close an opening, but in doing so will inconvenience the residents of another street, that the residents of the latter street may prevent the residents of the first street from building the wall (see Rashi, *Hagahot Ashri* ad loc., see also *Teshuvot Beit Ephraim* loc. cit. and *Sema, Choshen Mishpat* 377:1).

through his property.[6]

The final issue raised by Rabbi Weiss is very significant, and requires extensive additional research. This is the question whether the principle of *Dina d'Malchuta Dina* applies to this law. *Chochmat Shlomo* (*Choshen Mishpat* #377) writes that *Dina d'Malchuta Dina* does indeed apply to this area of halacha. It would seem that Ramo maintains a similar position, for he rules (*Choshen Mishpat* 162:1 and 417:1) that the marketplaces and streets are under the jurisdiction of the local authorities, and they may do with them as they please. Hence, we must also follow their rulings, determinations and customary practices. This is also the conclusion of *Aruch HaShulchan* (*Choshen Mishpat* 377:4 and 417:5). Albeit, continues Rabbi Weiss, there are some possible qualifications:

1. *Pitchei Teshuvah* (377:2) writes that Ramo's position only applies *ex post facto* – i.e., if the authorities have already intervened – but it is forbidden to approach them in order to obtain a determination that is not in accordance with Torah law.

2. *Pitchei Teshuvah* (417:1), in the name of *Teshuvot Beit Ephraim* (loc. cit.) writes that *Dina d'Malchuta Dina* only applies to cases that concern construction *under* a public thoroughfare.

3. The case in question in *Minchat Yitzchak* took place in Israel, and there is a question as to whether *Dina d'Malchuta Dina* applies in *Eretz Yisrael* (see *Minchat Yitzchak* in the preceding responsum (7:137).

Nevertheless, on account of the question of application of *Dina d'Malchuta Dina* to this area of halacha, Rabbi Weiss concludes his responsum inconclusively. Rabbi Wosner also

6. Of course, this distinction would be relevant in the case considered by Rabbi Weiss, where the original owner was completely passive, but not in the case with which we opened, in which the owners willingly participated in the improvement of the path.

concludes inconclusively for the same reason.[7] It is therefore essential to clarify the *Dina d'Malchuta* in this area.[8]

In American law, this right is called a *prescriptive easement*. The *Wikipedia* entry on *easement* contains the following information:

> Easements by prescription, also called prescriptive easements, are implied easements that give the easement holder a right to use another person's property for the purpose the easement holder has used the property for a certain number of years, which varies from state to state. Prescriptive easement is not the same as adverse possession, which allows a party to acquire title to real property by asserting possession over it for the statutory period... Prescriptive easements do not convey the title to the property in question, only the right to utilize the property for a particular purpose...
>
> Once they become legally binding, easements by prescription hold the same legal weight as written or implied easements. Before they become binding, they hold no legal weight and are broken if the true property owner acts to defend his ownership rights. Easement by

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7. He adds also the question of whether a right can only be established by a majority of the city's residents as we saw above, and the position of *Teshuvot Maharshdam* (loc. cit.) that only a path that is sixteen *amot* wide on which the masses can establish a right of passage, but he concludes that these are only additional factors that may be taken into account when the *Beit Din* is inclined to rule in favor of the owner.

8. However, Ramo's ruling may not be applicable to the case of the neighborhood path to the synagogue which opened our discussion. Ramo explains that *Dina d'Malchuta Dina* is applicable to right of way cases because roads and pathways are subject to the government's jurisdiction and its actions. In the case in point, the path was completely on the private property of individuals and of the synagogue. Moreover, although the local zoning board may have ruled that a fence be erected across the path, it is unclear that they would necessarily disallow an opening for the path.

> prescription is typically found in legal systems based on common law, although other legal systems may also allow easement by prescription.
>
> Laws and regulations vary among local and national governments, but some traits are common to most prescription laws. Generally, the use must be open (i.e., obvious to anyone), actual, continuous (i.e., uninterrupted for the entire required time period), and adverse to the rights of the true property owner. The use also generally must be hostile and notorious (i.e., known to others)...
>
> The period of continuous use for a prescriptive easement to become binding is generally between 5 and 30 years depending upon local laws (usually based on the statute of limitations on trespass). Generally, if the true property owner acts to defend his property rights at any time during the required time period the hostile use will end, claims on adverse possession rights are voided, and the continuous use time period resets to zero.
>
> In some jurisdictions, if the use is not hostile but given actual or implied consent by the legal property owner, the prescriptive easement may become a regular or implied easement rather than a prescriptive easement and immediately becomes binding. In other jurisdictions, such permission immediately converts the easement into a terminable license, or restarts the time for obtaining a prescriptive easement...
>
> Right-of-way for access is among the most common easement by prescription.

It would thus seem that if enough time (as per local regulations) has elapsed since the path was first established (and more so if the owners of the properties through which the path ran improved the path themselves), even *Dina d'Malchuta* would allow for the neighbors who were accustomed to use the path to attempt to regain their right of way.

Life-saving Duties on Shabbat: Switching Call with a Non-observant Jew

Rabbi Howard D. Apfel

> It is forbidden to delay in desecrating the Shabbat for a life-threatening illness, as it says "and you shall live by them" and not die by them. From this we learn that the dictates of the Torah are not vengeful in this world but rather bring mercy and kindness and peace to the world.
>
> (Rambam, *Hilchot Shabbat* 2:3)

Without hesitation, *Chazal* encourage and commend those who hasten to disregard various Shabbat prohibitions in order to address potential life-threatening situations.[1] Individuals committed to halacha are generally quite familiar with this elementary halachic principle, and of course it can never really be over emphasized. Perhaps less well known, however, are some of the details of application and potential limitations of this standard in various circumstances that arise.

One major source of complexity derives from the confusion over characterizing the halachic mechanism by which *pikuach nefesh* (the saving of a life in danger) operates as either *hutra* (unconditionally permitted) or *dechuya* (temporarily

1. See *Yerushalmi Yoma Perek* 8, *Yoma* 84b, *Aruch Ha'Shulchan* 328:1-2. See also *Tur Shulchan Aruch* 328, who states that even if a person's attempts are unsuccessful or not ultimately needed, he is still rewarded for his efforts.

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suspended).[2] In theory, the difference between *hutra* and *dechuya* can be quite significant. A primary point of distinction is regarding whether or not one is permitted to use one of these mechanisms to override a prohibition despite the availability of an allowable alternative that avoids the need for disregarding the prohibition in the first place. In general, in *hutra* cases a quest for permissible options can be ignored, while in *dechuya* cases it is imperative.[3]

Many hasten to point out that despite this potential *nafka minah* (legal difference) in theory, it may have little impact on decision-making in practice.[4] This is so for two basic reasons. To begin with, even if one holds that *pikuach nefesh* is merely *dechuya* one must still do everything possible to save the life in danger without delay. Similarly, (albeit from the opposite perspective) even if one holds that *pikuach nefesh* is *hutra,* when encountering a particular situation one must still do everything he can to minimize the degree of transgression.[5]

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2. See *Mishnah Berurah* 328:39 who notes the major disagreement among the *Rishonim* on this issue. For example the Rosh *Yoma* 8:14 citing *Maharam me'Rothenburg* and Mordechai, *Shabbat* #466 held it was *hutra,* while the Ran, *Beitza* 17a and Rashba in his *Teshuvot* # 689, held it to be *dechuya*. The Rambam seems somewhat ambiguous in *Hilchot Shabbat* 2:1-2 and his stance is the subject of a debate amongst the *Acharonim*. See *Magid Mishnah* for example, *Shabbat* 2:14.

3. *Yoma* 7b, *Sanhedrin* 12b.

4. See *Iggerot Moshe O.H.* 4:79 where Rav Moshe Feinstein points out that possibly the only *nafka minah* may be whether or not a physician must do everything he can to avoid being in a position requiring the use of *pikuach nefesh* to allow prohibitions on Shabbat. See also *Shulchan Aruch HaRav* 328:12, *Minchat Asher Shabbat* #87, Rav Yitzchak Isaac Liebes in *Halacha U'Refuah* 3:79-81 and *Nachal Eitan Hilchot Shabbat* 2:1.

5. The basic source for this concept is the text in *Yoma* (83a) that points out that even when forced to feed a Jew whose life is in danger on Yom Kippur, we maintain "*maachilin oto hakal hakal techila*" (feed him to the least halachically objectionable degree). Most do not limit this principle to the context of eating on Yom Kippur but apply it to other areas of halacha, such as Shabbat, as well. See for example Tosafot "*elah", Shiltei Giborim Yoma* 4b in the pages of the *Rif*. See however in contrast, *Shulchan Shlomo* 328:14:2 and Rav Elchanan Wasserman in *Kovetz Shiurim Ketubot* #13 and *Kiryat Sefer*

For that reason the Ramo codified that even when faced with a definitive danger, if the act of saving can be done by a non-Jew or with a *shinui* (done in an unusual manner) without any compromise to the patient, then that is preferable.[6] This is despite the fact that the Ramo himself in his responsa explicitly states that *pikuach nefesh* is *hutra*.[7] Therefore, in many situations of life-threatening illness, the accepted Ashkenazi approach is that if an equally competent and trustworthy non-Jew is available it is preferable that he be utilized.[8]

A far more complex question however will be the focus of this paper. What if a reliable non-Jew is not available, as is often the case in Israel? Does an observant Jew have the option of avoiding his own desecration of Shabbat by putting an equally competent non-observant Jew in his place? There are two major contemporary contexts in which this question typically arises: a *dati* (religious) Israeli soldier on guard duty

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Hilchot Maachalot Assurot 14:17; *Shulchan Aruch O.H*. 328:12. See also *Shemirat Shabbat ke'Hilcheta* 32:27-29 and particularly note 85*.

6. Ramo, 328:12. See, however, the *mechaber* there who does not codify the Ramo's strict approach, and the *Taz* 328:5 who also strongly disputes the Ramo on this issue. For a different perspective, see *Yabia Omer O'H* 37:12 and *Yechave Daat* 4:30 where Rav Ovadia Yosef does suggest that the difference of opinion between the Ashkenazi (Ramo) and Sephardi approach in this regard is rooted in the *hutra* vs *dechuya* controversy. See however the next reference.

7. *Sh"ut Ramo* #76.

8. *Shemirat Shabbat ke'Hilcheta*, 32:83. Some point out that it is important to differentiate between immediate direct patient-care-related situations and more preliminary, less urgent situations that nevertheless entail life-dependent actions. Many *poskim* will recognize this difference even within the stringency of the Ramo. Thus, while no extraordinary change in approach need be taken for direct patient interventions it might be appropriate to minimize through *shinui* in the initial acquisition of medical assistance or advice, the procurement of medication or the means by which one travels to the patient. Of course if any doubt exists concerning a compromise to patient survival, all would agree to treat the day like any other weekday at any point of intervention. See *Iggerot Moshe O'H* 4:80, *Tzitz Eliezer* 8:15:14, *Minchat Shlomo* 328:13:2.

or required for some other critical mission, and an Orthodox Jewish physician required to oversee critically ill patients. May or should the observant individual give over his spot on Shabbat to the non-observant Jew in order to avoid being "on" during the Shabbat, or are they selfishly sacrificing someone else's spiritual well being in order to enhance their own?[9]

Contemporary *Psak*

Fortunately, two of our generation's leading halachic authorities did record decisions on this difficult matter, although with diametrically opposed conclusions. In the context of an extensive discussion of general issues related to the observant physician on the Sabbath, Rav Moshe Feinstein records the following approach to our particular dilemma:

> There is great reason to allow [an observant physician to switch call] even with non-observant Jews because if they [the non-observant] remain at home they will deliberately transgress all *melachot* (prohibited work) that come their way, no less than the amount they would transgress were they to be in the hospital. Therefore, it is not a transgression of *lifnei iver* [placing a stumbling block before the blind]. Since they are just exchanging *melachot* for other *melachot*, and more likely of less severity, since there are many dangerously ill patients for whom it is permissible and many where it is only rabbinic prohibitions, and what they do at home is mostly on a biblical level.[10]

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9. In general, to the best of the author's knowledge, little has been written on this specific issue in the English language. Rabbi Chaim Jachter discussed it briefly in *Grey Matter* Volume II pp.6-7, without extensive elaboration upon the underlying reasoning for the various opinions. For related Hebrew essays see Rav Zalman Nechemia Goldberg in *Halacha u'Refuah* 4:181-191, Rav Eliyahu Schlesinger in *Techumin* 21:189-192, and Rav Shlomo MinHa'Har in *Techumin* 22:85.

10. *Iggerot Moshe O'H* 4:79.

In summary, according to Rav Moshe, not only is it permissible, it is actually preferable to have the non-observant Jew take the call, since by putting him on duty you will ostensibly be improving his overall Shabbat situation, not worsening it.

In contrast, Rav Shlomo Zalman Auerbach offered the following response to our question:

> It is forbidden to switch [call] with a non-observant Jew, for he [the observant Jew] does a mitzvah, while the transgressor according to his thinking is desecrating the Shabbat, only it just doesn't matter to him.[11]

According to Rav Shlomo Zalman it is unequivocally forbidden for the observant physician to switch his call under these conditions. Clearly, Rav Shlomo Zalman does not recognize Rav Moshe's positive evaluation of the non-observer's Shabbat experience under these conditions. How can we explain this dramatic and significant difference in opinion?

Neither Rav Moshe nor Rav Shlomo Zalman elaborated at length nor provided an extensive discussion of sources in their respective responsa. The objective of the remainder of this paper will be to explore the relevant sources in an attempt to develop a broader understanding of the related halachic concerns and perhaps a better appreciation of the respective conclusions drawn. Obviously, in the absence of explicit statements from these two halachic giants, any application to their ultimate decisions is purely speculative. Nevertheless, expanding one's understanding of an issue is always a worthwhile endeavor, at the very least for the purpose of introducing the reader to the potential fundamental roles of intent versus action in the creation of a prohibited action.

11. *Minchat Shlomo* 2:34:35.

Identifying the Prohibition

The first approach to tackling this complex issue is determining what particular prohibition is involved in an observant Jew's facilitating another Jew's desecration of the Shabbat within the context of *pikuach nefesh*. Despite his relatively brief comments, Rav Moshe did allude to what is probably the central issue of concern, the prohibition *of lifnei iver lo titen michshol* (not to place a stumbling block before the blind).[12] While Rav Moshe himself obviously dismissed that possibility, it appears that Rav Shlomo Zalman considered it, or a derivative of it, as the primary consideration.[13] Yet, what can possibly be wrong with prompting another to commit an act in a setting where it is normally fully permissible, and as noted earlier even encouraged by *Chazal*?

In a footnote to *Shemirat Shabbat Ke'hilcheta*, Rav Yehoshua Neuwirth related Rav Shlomo Zalman's personal comments on this issue with greater detail than he himself had offered in his original response.[14] Specifically, he noted that Rav Shlomo Zalman compared a non-observant physician's actions in the setting of *pikuach nefesh* to one who is *nitkaven le'echol basar chazir, ve'ala be'yado basar taleh* (intending to pick up and eat pork [unkosher meat] but ends up eating lamb [kosher meat] instead). That comparison is a reference to a discussion in the Gemara (discussed in more detail later) that deals with an individual fully intending to transgress a prohibition but incidentally or unintentionally ending up doing a completely permissible act in its place.[15] The Gemara concludes that one

12. *Vayikra* 19:14.

13. See note 17 below.

14. *Shemirat Shabbat Ke'hilcheta* 32:45, note #125.

15. This concept is alluded to, for example, in the Gemara in *Kiddushin* 81b.There the Gemara discussed the case of a rabbi who had contemplated suicide because he thought he was involved in illicit relations with a prostitute. After learning that it happened to actually be with his own wife and that he had actually done no wrong action, he nevertheless spent the rest of his life fasting because as he stated: "*ana mihah le'isura ikavnei*" (I

who does this despite having done no actual transgression (i.e., he ate kosher meat) nevertheless requires *selicha* (forgiveness) and *kaparah* (expiation).[16]

At first glance the requirement for forgiveness and expiation appears to be a clear indication of wrongdoing on the part of the individual involved that should never be promoted or even prompted by another Jew. Nevertheless, one might instead argue that forgiveness per se may only be needed to express regret for bad thoughts, but not as indication of transgression of an actual illicit action.[17] This seemingly technical point is important because the absence of any actual illicit action might eliminate the formal application of *lifnei iver* (as will be explained) to one who places another in such a position.[18]

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however intended to do wrong).

16. Importantly, this does not necessarily contradict the notion recorded in *Kiddushin* (39b). The Gemara there discussed the dilemma of a son immediately losing his life despite having just performed the mitzvot of honoring his father and *shiluach hakan* (sending away the mother bird when taking her young) for which the Torah promises long life. The Gemara attempts to answer this paradox by stating that perhaps despite his doing mitzvot on the outside, He had bad intentions on the inside, resulting in his ultimate demise. In dismissing that suggestion the Gemara responds: "The Holy One Blessed He does not regard a bad thought as a deed." Thus, while God gives us credit for meritorious thoughts, He does not punish us for contemplating sin if it does not culminate in bad action, This clearly refers to a situation where no action whatsoever takes place; but in our case the evil thoughts are manifest in an action, except that by total accident it happens to be a permitted one. The inverse, i.e., active sinning while intending to do nothing wrong, clearly requires expiation as indicated by the obligation to bring a *korban chatat* for a sin done *be'shogeg*. See *Kiddushin* (81b) that this is rooted in the verse in *Vayikra* 5:17, if a person sins "and he did not know, he is guilty and must bear his iniquity."

17. See Rashi *Nazir* 23a for example, who seems to suggest that the lashes are a form of "*tochacha"* (rebuke) as opposed to a direct *onesh* (punishment).

18. Rav Shlomo Zalman appears to make note of this possibility and consequently attempts to dispel it by pointing out that Tosafot (*Kiddushin* 32a, "*de'maichil*") clearly imply the contrary. The Gemara established that a Rav or a father can at times be *mochel* on their *kavod* (decline the honor due to them) by their students and children respectively. Tosafot point out that

Lifnei Iver

To more thoroughly assess this contention we need to elucidate a more detailed understanding of the parameters of *lifnei iver*.[19] The Gemara in *Nazir* (6a to 6b) qualifies the biblical prohibition of *lifnei iver* by limiting it to cases where the ultimate transgression could not have taken place without the input of the facilitator or, as the Gemara puts it, "*be'trei avrei de'naharah"* (literally, two sides of the river). There is a major debate among *Rishonim* on the halachic implications of this conclusion. Tosafot (*Avodah Zarah* 6b) suggest that in a case of "*chad avra de'naharah"* (same side of the river) facilitation is completely permissible, while the Rambam, who does not codify this leniency at all, appears to maintain that it is still biblically forbidden.[20] Therefore, it would seem that since clearly the non-observant Jew is fully capable of transgressing Shabbat prohibitions without the assistance of the observant physician in our case, at least according to Tosafot (*Avodah Zara* 6b) no transgression of *lifnei iver* is taking place.

Nevertheless, the Ran and Tosafot (*Shabbat* 3a) maintain that there is definitely a rabbinic prohibition of "*mesayeah le'ovrei aveira*" (aiding a sinner) that remains.[21] While the *Shulchan Aruch* seems to reflect the Rambam's strict approach, the Ramo and major commentaries on the *Shulchan Aruch* uphold the leniency of the Ran and Tosafot, reducing such cases to a

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the Rav (and presumably the father as well) should be careful to inform his student (and children) beforehand that he is *mochel,* lest they express a lack of respect and it become a situation of *nitkaven le'echol basar chazir ve'ala be'yado basar taleh*. The clear implication is that should the Rav fail to do so he might be transgressing *lifnei iver* despite the student or child actually doing no transgression.

19. The reader is referred to a very thorough review of this topic by Rabbis Michael Broyde and David Hertzberg in the *Journal of Halacha and Contemporary Society* Vol. XIX, "Enabling a Jew to Sin: the Parameters".

20. See *Minchat Chinuch* Negative Commandment 232:2 and *Melamed Le'Hoil* 1:34.

21. *Avodah Zara* 6b.

rabbinic transgression.[22]

It is important to point out that unlike the Ran who maintained the rabbinic prohibition in both the context of *Avodah Zarah* and *Shabbat*, Tosafot, as noted above, concluded differently in each setting (maintaining the rabbinic prohibition in *Shabbat* only).[23] Several approaches are offered to explain this difference.[24] The *Shach* attributes the difference to the *Avodah Zarah* case involving an idol worshipper or *mumar* (apostate) Jew, while in the *Shabbat* case it involved a non-apostate Jew.[25] He therefore concludes that one is not required to prevent an apostate from transgressing. The *Nodah be'Yehuda* finds some difficulty with this stance since an apostate Jew is still a Jew and should also be prevented from transgression whenever possible.[26] He therefore modifies the difference to be between an act committed *be'shogeg* (without intent) where *mesayeah le'ovrei aveira* does apply, and one done *be'maizid* (with intent) where it does not. Based on the respective elaborations of the *Shach* and *Nodah be'Yehuda,* one could speculate that the non-observant physician or soldier in our case likely falls into that category of apostate or at least deliberate sinner and therefore no prohibition should apply.

Despite the possible cogency of this line of reasoning, this conclusion may be faulty for two reasons. First, while some authorities do maintain like the *Shach,*[27] many do not.[28] For

22. *Yoreh Deah* #151:1.

23. See the comments of the *Shach* (*Yoreh Deah* 151:6) who noted that the Rosh and the Mordechai maintained this split as well.

24. For example the *Binyan Tziyon* (1:15) explained the difference to be whether the assistance took place directly at the time of the commission of sin or earlier.

25. *Yoreh Deah* 151:6.

26. *Dagul Mirvava Yoreh Deah* 151 on *Shach* #6.

27. For example, see *Birkei Yosef Yoreh Deah* 151. The *Pri Megadim* in *Aishel Avraham O'H* 163:2 appears to be lenient like the *Shach*, but only for rabbinic transgressions.

28. *Magen Avraham* O'H 347:4 and *GRA Yoreh Deah* 151:8. See also *Mishnah*

example the Vilna Gaon and *Magen Avraham* maintain like the Ran (against the Ramo) that the rabbinic prohibition is applicable in all cases. Secondly, it is possible that we view most non-observant people today not as apostates, but rather as a *tinok she'nishba* (literally, an infant taken captive). This would mean that to some degree they are not viewed as deliberate sinners, and that designation might obviate the relevance of the leniency of the *Shach* altogether. [29] Therefore, it is quite possible that in our case, despite the total lack of observance of the substitute, the rabbinic prohibition of *mesayeah le' ovrei avairah* does apply. This would lend considerable support to the position of Rav Shlomo Zalman.

Rav Akiva Eger and *lifnei Iver*

However, before accepting the applicability of *lifnei iver* or its derivatives unconditionally, one additional critical point needs to be noted. Rav Akiva Eger introduced a possible important halachic caveat regarding the practical application of *lifnei iver* to certain specific halachically complex situations. He suggested that when deciding issues of *lifnei iver* one might need to take into account the overall level of transgression taking place with and without the facilitator's input. It is possible that if one lessened the overall severity of the transgression committed by the other person, it may be permissible if not preferable to actually prompt a lower level transgression in the process.[30] One can understand the logic

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Berurah O'H 147:7.

29. See *Teshuvot Binyan Tziyon Ha'Chadashot* 2:23, *Melamed le'Hoil* 8:29, *Iggerot Moshe, E.H.* 2:20, *O.H.* 1:37, *Y.D.* 2:8.

30. The context of Rav Akiva Eger's comments is the prohibition of *Bal Takif* (cutting off one's *peyot*). A man who cuts his own *peyot* is guilty of being a *makif* (one who cuts) as well as a *nikaf* (one who has his *peyot* cut). While a woman in contrast is allowed to cut off her own *peyot*, the *Shulchan Aruch* (*Yoreh Deah* 181:6) rules that she should not cut off a man's. Although the specific prohibition involved is debated, Rabbi Akiva Eger pointed out that all would agree that a woman who does so should certainly be liable for

behind Rav Akiva Eger's suggestion to be a recognition that the entire thrust of *lifnei iver* and its derivatives is for one Jew (to the best of his ability) to maximize and certainly in no way minimize another Jew's overall level of observance. It is reasonable from that perspective, therefore, that the ultimate calculus of observance should determine the practical applicably of this particular prohibition.

Both Rav Shlomo Zalman and Rav Moshe in respective contexts appear to accept this concept and apply it to practical rulings.[31] Based on this addition we can now modify our original query as follows: by having a non-observant physician care for critically ill patients or a soldier placed on duty protect innocent civilians on Shabbat, are we thereby improving their overall level of adherence to halacha, or making it worse?

Prohibited Action

It seems that the answer to the preceding question regarding one's enhancing or detracting from the overall spiritual well-being of his neighbor will be dependent on the answer to a far more basic question. Does the fact that the non-observant individual is totally unconcerned with his violation of Shabbat prohibitions affect the *halachic* status (i.e. permissibility) of his

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facilitating the man's transgression. Nevertheless, he suggested that if one knows that the man will for sure cut off his own *peyot* it may be preferable (and not *lifnei iver* in any sense) for the women to do it for him. The reasoning is that she is thereby causing the man to be a *nikaf* but at least avoiding having him be both a *nikaf* and a *makif* were he to do the action himself.

31. Rav Shlomo Zalman (*Minchat Shlomo* 35:1) cites the comment of Rav Akiva Eger and applies the rationale to the case of an individual who feared inviting a non-observant individual for a meal since he would be causing him to eat bread without washing or making any *berachot* (blessings). Rav Moshe (*Iggerot Moshe Y.D.* 1:72) does not mention Rav Akiva Eger specifically, but appears to apply the same reasoning to a case of a caterer deciding on providing services for a mixed dancing affair when the alternative would be their using a possibly non-kosher caterer in his place.

life-saving activities? Putting it another way, does illegitimate intent alone convert a technically permissible action into a halachichally prohibited one? If it did, we would then have to view all of the non-observer's prohibited work actions as indisputable Shabbat desecration (and not just misguided thinking) despite their taking place in the setting of *pikuach nefesh*.

To explore this possibility further, we return to the topic introduced earlier in the name of Rav Shlomo Zalman: "*nitkaven le'echol basar chazir ve'ala beyado basar taleh*," which is discussed in several contexts in the Gemara. Our specific inquiry appears to be the exact subject of a debate among *Rishonim* and *Acharonim* on a related Mishnah found in *Masechet Nazir* (23a):

> A women who takes a vow to be a Nazirite and subsequently drank wine and became defiled by contact with dead bodies, receives lashes; **if her husband absolved the vow, but she did not know**, and then drank wine and became defiled by contact with dead bodies, she does not receive lashes. Rabbi Yehuda says she does get [rabbinic] lashes of rebellion.

Our focus will be on the second halacha noted in the Mishnah. It states that a woman whose Nazirite vow was absolved by her husband without her knowledge, who then "violated" her vow, does not receive the usual biblically-mandated punishment of lashes. The Gemara cites the biblical verse *"ishah hafera ve'Hashem yislach la"* (a women's husband absolved her and God will forgive her) as the source for this halacha. However, it is not clear from the verse itself exactly what it is teaching regarding this case.

There are actually two possibilities for understanding the Gemara's point here, that appear to parallel our analysis directly. On the one hand, it may be taken for granted that a woman who deliberately breaks even a non-viable Nazirite vow has definitely done a prohibited action. Her ill intent is

able to convert the technically legal action into an illegal one. However, because of extenuating circumstances (i.e., she actually did nothing wrong) she is exempted from punishment. According to this, the entire novel teaching of the verse "*ve'Hashem yislach la*" is that she is absolved from getting biblical lashes. Alternatively, the teaching of the verse may be implying something quite different. Perhaps it is revealing that from a *hilchot Nezirut* perspective both in practice and in principle, she certainly has done nothing wrong. On the basis of *"ishah hafera*" ("the women's husband absolved her") no prohibited actions have taken place. Nevertheless, the words "*ve'Hashem yislach la*" establish that for bad intentions alone there is a separate ruling that she must obtain forgiveness and expiation. This approach denies any notion that ill intent can convert legal actions into illegal ones. It merely adds the "novelty" that a woman as described needs forgiveness for having inappropriate thoughts in the first place.

From the continuation of the Gemara as recorded in the Babylonian Talmud and the comments of Rashi and others, it seems clear that the underlying assumption is like the latter possibility just described; basically she did nothing legally wrong but nevertheless still requires forgiveness from God based on the *gezerat ha'katuv* (bibilical verse).[32] According to this it would seem that in the absence of commission of an actual prohibited act, the halacha's negative view of the perpetrator (or in this case the non- perpetrator) is limited to having improper thoughts and no more.

In contrast the Rambam (*Hilchot Nedarim* 12:18) appears to disagree. First, the Rambam held that the woman (despite her

32. The Gemara (*Nazir* 23a) expresses this as follows: after first suggesting two other related cases that seem to teach a principle similar to ours based on other verses in the Torah, the Gemara questions why multiple examples are necessary. In answering that question twice (once for each additional verse), the Gemara clearly implies that at most, the novelty of our verse (*"ishah hafera ve'Hashem yislach la"*) is that forgiveness is necessary at all. See also Tosafot (*Nazir* 23a, "*be'isha*") that imply this as well.

husband's absolving the Nazirite vow) is guilty enough to deserve some degree of punishment; in this case like the view of Rabbi Yehuda she requires at least rabbinic lashes. Furthermore, Rav Yitzchak Zev Soloveitchik (*GRIZ*) pointed out that based on the Rambam's specific formulation of this halacha, (and like the first possibility noted above) a verse is required only in order to exonerate the woman from otherwise well-deserved lashes.[33] Moreover, the requirement of a biblical verse to accomplish this hints that a genuine prohibited action undoubtedly has taken place, and the women is merely relieved of the lashes because of a technicality. The *GRIZ* expressed this innovative approach towards prohibited actions in a very revealing manner: "according to this, the fact that she needs forgiveness and expiation is not because of the *machshava* (thoughts) of doing a transgression but because in reality having **done a** *maaseh issur*" (prohibited act). The *GRIZ* drives this point home by pointing out that if one had just the intent to transgress but never actually did any action at all to bring it to fruition, obviously no prohibited act can ever be said to have taken place. However, when a *maaseh* (action) was done (even a technically permitted one) but with the *machshava* (thought) that it was prohibited, it should be regarded fully as a prohibited action.[34]

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33. In *Chidushei Rabbeinu haGRIZ haLevi* on *Nazir* p.130. The Rambam (*Nedarim*12:18) records this halacha as follows: "if she makes a vow and her father or husband absolved it, and she did not know it was absolved and transgressed intentionally she is exonarated, even though she intended to transgress since her actions were absolved, and on this it states; "*ve'Hashem yislach la* etc."

34. One can speculate that the *maaseh heter* (non-prohibited action) here serves as a form of indicator that the perpetrator has passed the threshold of ill intent necessary to be considered fully culpable for the prohibited act regardless of the actual status of the act itself. This idea is reminiscent of a fairly well known explanation of the prohibition of *lo tachmod* (do not covet) suggested by Rav Yosef Dov Soloveitchik. He asked how the Rambam could consider *lo tachmod* a prohibition that is *ain bo maaseh* (passive) and therefore receives no penalty of lashes, when it is described as requiring the

Batar maasav or *batar machshavto*

In the previous discussion we analyzed the potential role that bad intentions alone may play in changing the halachic status of otherwise fully permissible actions. There appears to be viable support for both the lenient and strict approaches in that scenario. In truth, our specific dilemma on Shabbat may go beyond that discussion in a subtle yet possibly very significant way. Unlike the Nazirite case where all agree that in reality the woman never actually perpetrated a prohibited act, in our case, the actions are themselves unquestionably intrinsically prohibited (i.e. non-permissible biblical work and various other rabbinic prohibitions on Shabbat). They are only theoretically exceptional and legitimized in that they were committed in the context of *pikuach nefesh*.[35] Thus, the bottom line concern really is – does the fact that the non-observant individual has no sincere regard for the sanctity of Shabbat and its halachot undo the potential for *pikuach nefesh* to override the definitive prohibited actions he may encounter in that setting?

The Gemara in *Menachot* (64a) discusses the case of an individual who had intended to catch fish (the prohibited work of trapping) but unintentionally ended up "catching"

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individual to actually take the coveted object (clearly an action) to receive the punishment. The Rav explained that the taking of the object was not really part of the prohibition itself which is fully relegated to the individual's thoughts and intentions. Rather that action instead serves as a mere indicator (a *shiur* so to speak) that he had reached the threshold of coveting which is prohibited.

35. Rav Shlomo Zalman himself raised this exact possibility and determined that in fact it was halchically significant. Thus he considered the notion that we are dealing with definitive prohibited actions to be even more of a reason to be strict than in the *nitkaven le'echol basar chazir ve'ala beyado basar taleh* type case discussed above where no actual prohibited acts took place. This was noted by Rav Neuwirth in the footnote cited above from *Shemirat Shabbat ke'Hilcheta*. Unfortunately, he did not discuss the specific background for that determination. However, it is conceivable if not likely that the decision related to the Gemara discussed in the text above.

(and saving the life of) a drowning victim along with the fish. In deciding the guilt or innocence of this individual, the Gemara questions whether we go "*batar machshavto"* (according to his intent, which was to do the prohibited work of trapping) or "*batar maasav"* (according to his actions, which did save a life) in deciding his culpability. Clearly this case, with the actual perpetration of a prohibited act (trapping) in the unintentional setting of *pikuach nefesh,* very closely resembles our original case in question. It would seem that the resolution of this particular dilemma should impact most directly on the ultimate handling of our case.

In *Menachot* the ruling in this case is presented as a disagreement between two talmudic scholars, Rabah and Rava, with one holding that the fisherman is culpable and one holding that he is exempt. Not surprisingly in light of our ultimate dispute between Rav Moshe and Rav Shlomo Zalman, the *Rishonim* have variable views as to the final decision.[36] As above in the case of the almost-Nazirite woman, the Rambam would again require "*makat mardut*" (rabbinic lashes).[37] According to the *Or Sameach* the Rambam's reasoning is similar in both cases. If we again incorporate the earlier explanation of the *GRIZ*, here too we could understand the Rambam as maintaining that whether or not an actual *maaseh issur* (prohibited act) took place (and here as noted, there is more of a reason to assume one has) the fact that the person was "*nitkaven le'issur*" (intended to transgress) and then did an act (despite its being technically made permissible by saving the life) was enough to qualify those actions as a bona fide prohibited act. This of course would again lend strong support to the position of Rav Shlomo Zalman Auerbach.

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36. Because of *girsa* (textual) uncertainty it is unclear (a debate amongst the *Rishonim*) as to who says what and therefore how to decide the final halacha. See comments of the Raavad and *Magid Mishnah* in the Rambam's *Mishneh Torah Hilchot Shabbat* 2:16.

37. *Hilchot Shabbat* 2:16.

Other *Acharonim*, however, appear to have understood the Rambam differently. Interestingly, while the *Shulchan Aruch* itself does not explicitly offer a ruling in our particular case (of intending to do prohibited work and only accidentally saving a life in the process) the *Pri Megadim* does.[38] In fact, ironically, the *Pri Megadim* suggests that based on his reasoning even the Rambam (who was strict by the Nazarite woman) might decide leniently in this case of *pikuach nefesh*. Thus, referring to the Rambam's comments he notes:

> Then I saw that this may depend on the dispute between R. Yehuda and the Rabbis in *Nazir* (23a) … Therefore, [here] if he intended to catch fish and did not even hear that an infant fell into the water and caught fish along with the infant, **since he did no transgression, it is in fact just the opposite, he did a mitzvah**. It is possible to say that in such cases even the Rambam will admit that no rabbinic lashes will be given.[39]

Apparently, according to the *Pri Megadim*, despite a clear, even openly admitted intent to commit a transgression, in a case where the actual saving of a life takes place, the ill intent of the person becomes less relevant and prohibitions may be overridden by *pikuach nefesh*. Perhaps, even granting the stricter approach discussed earlier – that ill intent alone can convert an otherwise legal action into an illegal one outside

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38. As will be discussed below in the text, the actual focus of the *Shulchan Aruch* (328:13) and most of the commenting *Acharonim* is on a slightly different case than ours. They are dealing with the case of an individual knowingly attempting to save a life, while at the same time intending to accomplish a prohibited action for his own purposes. The major source for that discussion in addition to the Gemara in *Menachot* (64a) already cited, was *Yoma* 84b. There the Gemara gave several examples of individuals involved in saving a life but at the same time intending for some mundane personal gain from their prohibited actions. It may be argued that our case more closely mirrors those situations than the type of scenario dealt with in the text above, where we are assuming no intent at all or even knowledge that a life is being saved. This will be discussed further in the text below.

39. *Shulchan Aruch* (328:13) and *Aishel Avraham* (#8).

the context of *pikuach nefesh* – here the actual **act of saving** counts even more than the **intent to sin** in assessing the ultimate status of an individual's actions. In fact, the *Pri Megadim* is even willing to fully categorize the person's actions in this case as a mitzvah. Obviously this approach would fit far better with the approach of Rav Moshe. However, it appears to be a minority view, and it is unlikely that Rav Moshe hinged his ruling upon it.

Ruling of the *Shulchan Aruch* and *Acharonim*

In the previous discussion we focused on a scenario where there was active transgression in the context of *pikuach nefesh,* with no intention or even knowledge that a life was being saved. In contrast, the focus of the *Shulchan Aruch* in codifying this topic is on a case where the individual involved does fully intend to save a life, only at the same time manages to accomplish something else that serves his own purposes as well. In truth, our case more closely resembles that specific situation, as the doctor (or soldier) despite any other ulterior motives certainly does aim to save a life by his actions. While there is admittedly no sincere acknowledgement on his part that he is only allowed to desecrate the Shabbat because of *pikuach nefesh,* saving lives per se is certainly part of what is on his mind. It remains to be seen if that fact alone is enough to activate the absolution afforded in the setting of *pikuach nefesh*. The *Shulchan Aruch* formulates the halacha derived from the Gemara discussed above as follows:

> All who are eager to violate the Sabbath in order to save a life are praiseworthy, even if they correct something else with their actions; for example, someone who lays out a fishing net to save an infant from the water and traps with it some fish, and all similar cases. [40]

40. *O.C.* 328:13. As noted the major source for this halacha in addition to the Gemara in *Menachot* (64a) already cited, was *Yoma* 84b.

It would appear at first glance from the position of the *Shulchan Aruch* that despite the personal secondary gain (referred to as "something else") of the individual involved, as long as he is intentionally saving a life in the process, it is "praiseworthy". However, when analyzing the *Shulchan Aruch's* seemingly very favorable presentation, it is important to determine whether in his view the allowable secondary gain can be deliberate or not. Would the *Shulchan Aruch* permit "correcting something else" in a case where it was planned for all along as much as the saving of life? Perhaps the *Shulchan Aruch* would limit his praise in such cases to incidental secondary gain alone. This detail is critical because clearly in our case, while the non-observant doctor or soldier fully intends to save a life, they are also deliberately doing the prohibited acts involved for unrelated personal gain (for example, to receive their pay, or to avoid being fired or prosecuted) as well.

From the formulation of the *Mechaber* himself, it seems somewhat unclear where he stands on this issue. The *Mishnah Berurah*, however, does seem to take a stand on this issue. After noting other examples of ancillary personal benefits to life-saving actions that are allowed, he qualifies this seemingly broad dispensation by stating: *"keivan she'aino mekaven la'zeh"* (since he did not intend for this, i.e. the secondary gain).[41] Based on this alone one must conclude that in the final analysis, the *Mishnah Berurah* at the least held that prohibited work done intentionally for ancillary benefits is forbidden even in the context of simultaneously intended *pikuach nefesh*.[42]

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41. *O.H.*, 328:38.

42. However, in the *Shaar HaTzion* (#17) the Chafetz Chaim seems to leave the door open for an alternative view. After first noting that the strict view he mentioned in the *Mishnah Berurah* is based on the *Lechem Mishneh*, he added: "however, on the underlying principle here there is a difference of opinion among the *Rishonim"*. He goes on to cite several opinions that are lenient in this case. For example he cites Rav Akiva Eger who is lenient in the name of the Ran. Also mentioned as allowing the actions despite full

Obviously, this conclusion appears to lend very strong support to the position of Rav Shlomo Zalman.

The *Beit HaLevi*

As a further reason to rule strictly, Rav Shlomo Zalman cites the *Beit Halevi* (*Shmot*) as concurring with his approach. The *Beit Halevi* maintained that for the halachic claim of "*ones*" (exemption on the basis of being compelled against one's will) because of *pikuach nefesh*, one has to assume that one would not have done the same transgression anyway, even in the absence of the constrained circumstances. At first glance this too seems to lend strong support to Rav Shlomo Zalman's approach against Rav Moshe. However, with careful analysis one can possibly differentiate our case from that described by the *Beit Halevi*.

The *Beit Halevi* cited the *Haflaah* as a major source for his aforementioned principle. The *Halflaah* specifically dealt with the case of a couple unfortunately unable to conceive despite being married for over 10 years. Presumably, if the barren state was because of a physiological obstacle, it would be theoretical grounds for forcing the husband to divorce his wife since in that situation he is unable to fulfill his commandment of *pru u'revu* (be fruitful and multiply). However, the *Halflaah* pointed out, in cases such as this where the couple lived outside the land of Israel, this rule may not be applied since perhaps it is the sin of "*yeshivato be'chutz la'aretz l*" (living in exile) that was responsible for the inability of his wife to conceive in the first place. Importantly for our issue, the

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intent for the secondary gain are *BAHAG* and the *Rokeach,* who stated: "even though he intended both prohibited work and to save, still he is praiseworthy." On the other hand, the Chafetz Chaim also notes the following *Rishonim,* who conspicuously leave out the possibility of deeming permissible such actions even if there is intent for additional gain: Rif, Rosh, Rambam, Rabbeinu Yerucham and Meiri. In light of that impressive list it is understandable why the *Mechaber* (and probably the Ramo who does not dissent) and the *Mishnah Berurah* decided to rule strictly on this issue.

Halflaah added that even though in our time Tosafot (*Ketuvot* 110b,"*hu*") stated that we are theoretically exempt from punishment for staying in *chutz la'aretz* because of the practical and halachic difficulties of going to live in Israel, nevertheless because an individual probably would not have gone there anyway he can not necessarily use that exemption to explain away his sin. At first glance this appears to lend strong support to the notion that exceptions and exemptions that are normally operative when an individual's intentions are legitimate, fall away when appropriate conviction is lacking.

Even so, one could still argue that the *Beit Halevi's* concern applies only when one would have done the exact specific prohibited act anyway, and only because of that do we ignore the usual exemptions. For example, if a non-observant Jew planned to drive to a specific place on Shabbat and someone forced him at gunpoint to drive to that very same place, it is not surprising that he would still be considered a deliberate sinner. Despite the fact that he happened to be coerced to drive, because he intended to do the very same act of driving anyway even before he was threatened, we will not assume the coercion made him do it. By contrast, in our case a non-observant doctor is driving to a particular emergency not because he was going there anyway but only for the purpose of saving a life. Thus, even if the doctor might have driven elsewhere on Shabbat had he not been called to this emergency, the driving that he does now to the patient's home or to the hospital is definitely for the purpose of *pikuach nefesh*.[43] Therefore, there is far more reason to grant that any prohibitions that may arise under those conditions may be covered by the allowance of saving a life. [44]

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43. This suggestion, with the specific example noted in the text, was originally mentioned by Rabbi Jachter in *Grey Matter* (Vol.1, p.6, footnote 7) in the name of Rav Hershel Schachter, as a personal communication to Rabbi Ezra Frazer.

44. One important additional point that has not been discussed in this

Conclusions

At first glance many of the sources we have examined appear to support the strict stance taken by Rav Shlomo Zalman Auerbach on our original question. Particularly supportive is the conclusion of *Mishnah Berurah* that prohibited work done for ancillary benefits is forbidden even in the context of simultaneously well-intended *pikuach nefesh*. This *suggests* that individuals in these situations are involved in prohibited activities that should not be promoted nor facilitated by another Jew merely in order to avoid his own *chilul Shabbat*.

On the other hand, it is conceivable that even were Rav Moshe Feinstein to subscribe to what appears to be the majority view above (i.e. the conclusion of the *Mishnah Berurah*) that still does not necessarily contradict his overall lenient stance in our original dilemma. As noted at the onset of our discussion, our ultimate focus was on the applicability of *lifnei iver* to an observant Jew who places a non-observant Jew into a position where he will be violating the Shabbat for *pikuach nefesh* reasons in his place. We determined that according to the approach introduced by Rav Akiva Eger, if the individual will ultimately be doing less-prohibited actions or at least lower-level prohibitions than they would otherwise have done, it should not necessarily be proscribed. Thus, while prohibited actions for ancillary personal reasons in the setting

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essay but is worth considering, is the possible merit and therefore advisability for the observant Jew to avidly pursue his own opportunity to save a life despite its involving prohibitions on Shabbat. Rav Shlomo Zalman alluded to a similar notion by admonishing observant physicians against switching their calls and emphasized that they not be concerned with Shabbat desecration for they are involved in a true mitzvah. In truth this emphasis would have to be weighed against the equally strong notion focused upon by Rav Moshe (*Iggerot Moshe* 4:79) that a physician must *a priori* do everything he possibly can to avoid being involved in *pikuach nefesh* situations on Shabbat in the first place. It is interesting to speculate on the possible role their respective emphasis on this point might play in their overall disagreement.

of *pikuach nefesh* may be forbidden, it certainly can be argued that they are still preferable to random prohibited actions outside that context altogether.[45] Therefore, perhaps according to Rav Moshe, the scales weighing the degree of halachic prohibitions ultimately tilt in favor of prompting the non-Shabbat observer into the more halachically favorable setting of life-saving activities.

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45. Rav Eliyahu Schlesinger in *Techumin* 21 (5761) seems to concur with this reasoning as well. He states that in the case of soldiers, since their entire essence and purpose as soldiers on duty is to save and protect those in mortal danger, one can view any act they do within that context.

May the Jewish Daughter of a Gentile Man Marry a *Kohen*?

Rabbi Michael J. Broyde

Introduction

Jewish life in the United States is subject to two trends that seem to be pointing in opposite directions. The first is an astonishingly high intermarriage and assimilation rate,[1] so that the Orthodox community encounters families in their midst where the husband is not Jewish. The second phenomenon—pointing in the opposite direction—is the incredibly large number of *baalei teshuvah*, people who are returning to living a life committed to halacha.[2] This article examines one intersection of these two trends—whether the daughter of a relationship between a gentile man and a Jewish woman may marry a *kohen*. A *Kohen* is differentiated from other Jews in that he may not marry a convert, a divorcee, or a *chalala*,[3] (the offspring of a *Kohen* from a forbidden relationship.

This article is divided into four sections. The first section

1. According to data from the National Jewish Population Survey of 2000–2001, 47% of Jews who married in the last five years married non-Jews, up from a readjusted intermarriage figure of 43% from the previous survey (1990). The overall intermarriage rate has grown tremendously over the past 30 years, from an average of 9% before 1965 to 52% in 1990.

2. NJPS data indicates that about 19% of Orthodox Jews in America were not raised Orthodox.

3. *Vayikra* 21:7.

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surveys the single talmudic source on this topic and the presentation of this topic in the *Rishonim*. The second section examines the codification of this halacha in the *Shulchan Aruch* and its many different commentators. The third section examines this issue as the matter is understood among the post-*Shulchan Aruch* commentators, codifiers, and responsa writers. The final section surveys contemporary halachic authorities on this issue and reflects on the differences between inreach and outreach, and between the land of Israel and the United States.

I. The Talmudic Source and its Five Possible Explanations

The Gemara in *Yevamot* 44a–45b discusses at great length many different aspects of eligibility to marry. The Gemara reaches two separate conclusions to this topic that are somewhat at tension with one another, and this tension provides the basic framework for discussing this issue. On page 45a the Talmud recounts:

> When R. Dimi came [from Palestine to Babylonia], he stated in the name of R. Yitzchak ben Avudimi in the name of Rabbeinu [R. Judah the Prince], "If an idolater or a slave had intercourse with the daughter of an Israelite, the child [born from such a union] is a *mamzer*."
>
> R. Yehoshua ben Levi said: "The child is damaged (*mekulkal*)." With respect to what? If we mean ineligible to marry anybody, R. Yehoshua ben Levi had previously stated that the child was legitimate! Rather, [the child is ineligible] to marry a *kohen*, for even all *Amoraim* who declare the child legitimate agree that it is *pagum* (impaired, unfit).[4] This is inferred *a fortiori* (*kal vachomer*)

4. The word *pagum* can be understood in a number of different ways, from unfit to diminished or impaired to detested or distasteful (see *Sifri, Devarim* 320 for an instance of such, appearing in combination with the word *bazui*

> from the case of a widow. If in the case of a widow who was married to a *Kohen Gadol*—whose prohibition is not equally applicable to all—her son is impaired, how much more should the child of this woman [who had relations with an idolater or a slave] be tainted, where the prohibition is equally applicable to all.[5]

If the Talmud had ended its discussion here, one would have logically concluded that the daughter of a relationship between a gentile man and a Jewish woman is in fact *pagum* (unfit) to a *kohen*. But at the very end of its analysis, after discussing several personal inquires directed toward various *Amoraim*, the Gemara reaches a different, formal conclusion—one which makes no mention of any stigma at all. It states:

> R. Acha son of Rabbah said to Ravina: "Amemar once happened to be in our place and he declared [such a] child to be legitimate in the case of a married woman, as well as in that of an unmarried woman."
>
> And the halacha is that (*vehilcheta*) if an idolater or a slave cohabited with the daughter of an Israelite, the child [born from such a union] is legitimate (*kasher*), both in the case of a married woman, and in that of an unmarried woman.

The Gemara concludes that when a gentile man has a sexual relationship with a Jewish woman, the child is *kasher*. The central question all the commentators and decisors face—and this question will pervade our entire analysis of this topic—is whether the first ruling of the Gemara in passing, that the child is *pagum* to a *kohen*, is overturned by the concluding statement, that by Jewish law the child of a gentile man and a Jewish woman is *kasher*. As we analyze the various positions, it will become extremely important to note how each commentator understands *pagum* to a *kohen*, either implicitly

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[contemptible]). These distinctions will soon become extremely important.

5. *Yevamot* 45a.

or explicitly.[6]

6. While the passage in the Babylonian Talmud is ambiguous in its conclusion and employs the rare term *pagum*, the parallel text in the Talmud *Yerushalmi* (*Yevamo*t 4:15 (6c)) makes no mention of the word *pagum* but instead uses the term *pasul* definitively in its place and explicitly rules that the child of such a relationship may not marry a *kohen*. It states:

> Even though Rabbi Joshua rules that the offspring of a sexual relationship between a man and the sister of the woman [his late brother's wife] with whom he performed levirate separation is legitimate (*kasher*; i.e., fit to marry a Jewish woman), he admits that if the child were female, she would be *pesulah* and ineligible to marry a *kohen*. Even though Rabbi Simeon b. Judah rules that the offspring of a sexual relationship between a gentile or slave and a Jewish woman is legitimate (*kasher*), he admits that if the child were female, she would be ineligible (*pesulah*) to marry a *kohen*.

Many *Rishonim* simply ignore this *Yerushalm*i, and we will try to explain why that might be so. While the touchtstone document of halacha is without a doubt the Babylonian Talmud – see Rif (*Eruvin* 27a), Rambam (in his introduction to *Mishneh Torah*), and Rosh (*Sanhedrin* 4:5) all of whom note that the basic doctrine of Jewish law is the supremacy of the Babylonian Talmud – what is the status of the Jerusalem Talmud? There are two distinct schools of thought. One view in the *Rishonim* and *Acharonim* posits that the Jerusalem Talmud is a central document of halacha, and one should seek to interpret the *Bavli* in light of the *Yerushalmi*. As Rabbi Joseph Karo writes (*Kessef Mishneh, Gerushin* 13:18), "Any way that we can interpret the *Bavli* to prevent it from arguing with the *Yerushalmi* is better, even if the explanation is a bit forced (קצת דחוק)." To recast this in a slightly stronger way, it is well-nigh impossible to determine the halacha, in this view, without a firm grasp of the *Yerushalmi*.

Anyone who regularly learns Rashba, Ritva, Rambam, or Rabbeinu Chananel sees that these *Rishonim* were clear masters of the *Yerushalmi* as well as the *Bavli*. Such does not seem to be the case for Rashi and his disciples, who make almost no use of the *Yerushalmi*. Indeed, a common methodological insight of the mainstream Ashkenazic commentators is that they make almost no use of the *Yerushalmi* (except, perhaps, Ra'aviyah). Mordechai, *Yereim*, *Semak*, et al. nearly never cite the *Yerushalmi*. (For an example of the approach of Tosafot, see *B.Berachot* 11b, s.v. *she-kevar niftar*, where Tosafot state in response to a difficulty presented by a *Yerushalmi*: "And Ri answers that we do not accept this *Yerushalm*i since our Talmud does not quote it." According to Ri, sources not cited in "our Talmud" [the *Bavli*] are not binding.)

The *Rishonim*, in broad outline, take five different views of understanding the practical halacha derived from this talmudic discussion.

- One view is that the daughter of a gentile man and a Jewish woman may marry a *kohen*, as the conclusion of the talmudic source overrules the initial indication to the contrary.
- A second view is the exact opposite—even the conclusion of the talmudic source accepts that a woman whose father is a gentile may not marry a *kohen*.
- The third view is uncertain whether the first or second view above is correct and treats the matter as in doubt as a matter of Jewish law.
- The fourth view is that the Talmud uses the word *pagum* to denote that a woman whose father is a gentile is merely distasteful to a *kohen*, but not prohibited.
- The final view rules that when the Talmud concludes that the daughter of a sexual relationship between a gentile man and a Jewish woman is "kosher", the Talmud means that the child is a proper gentile, but not a Jew.

The next section explains these five views.

A. The View of Rambam: The Daughter of a Gentile Man May Marry a *Kohen*

The Rambam only codifies the concluding line of the Gemara and maintains that a child whose father is a gentile is eligible to marry a *kohen*. He writes (*Hil. Issurei Biah* 15:3):

> A gentile or a slave who has relations with a Jewish woman, the child is *kasher*, whether the woman was unmarried or married, whether they had relations forcibly or willingly.

The Rambam seems to insist that the accepted conclusion of the Gemara supersedes previous statements indicating stigma (*pegimah*) of any kind to this child. The plain wording of the final conclusion (*vehilcheta* ...) indicates that there is no stigma

of any type assigned to a child whose father is a gentile, and that this child is eligible to marry a *kohen*.[7] Indeed, according to the Rambam, no matter what was meant by *"pagum* to a *kohen"* in the context of the talmudic passage, it makes no difference as that ruling is ultimately rejected.

B. The View of Rosh: The Daughter of a Gentile Man May Not Marry a *Kohen*

The Rosh (*Yevamot* 4:30) maintains the exact opposite position. He writes:

> The Talmud plainly stated earlier, "All *Amoraim* who declare the child legitimate agree that he is *pagum*. This is inferred *a fortiori* (*kal vachomer*) from the case of a widow…" And since that *kal vachomer* is not refuted, there is no one who disputes it. The Talmud did not explicitly state in its conclusion that the halacha is that such a child is *pagum* simply because it was not necessary to issue such a ruling, as it had stated above that all *Amoraim* who declare the child legitimate agree that he is *pagum*, with no one who disputes this. The only matter that the Talmud still needed to rule upon was that such a child—even the offspring of a married Jewish woman—is in fact permitted to marry into the congregation of Israel.

The Rosh assumes that the conclusion of the Gemara stating that the child is *kasher* is limited to mean that the child is not a

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7. This understanding of the Rambam is nearly universally accepted, although the *Mishneh Le-Melech* seems to argue that the Rambam accepts the view of the Rosh (discussed below). A close examination of both the language of the Rambam and the deep consensus among commentaries on the Rambam, from the *Beit Yosef* to the *Maggid Mishneh* to the *Haghahot Maimoniot* to the *Migdal Oz* and many others, reveals that the *Mishneh Le-Melech's* position is not a correct understanding of the Rambam, and the simple understanding of the Rambam is the correct one, namely that the child is eligible to marry a *kohen* in the Rambam's view. The *Beit Yosef* quotes that view almost without any thought to the possibility that any other view could be correct. *Chinuch 560* also adopts this view of the Rambam.

mamzer and is considered Jewish. But everyone agrees, the Rosh says, that the child is in fact ineligible to marry a *kohen*. The statement that "all *Amoraim* who declare the child legitimate agree that he is *pagum*" was never meant to be superseded, and the *kal vachomer* advanced by the Gemara in support of that position creates an absolute obligation upon the child not to marry a *kohen*. In the Rosh's formulation, *pagum* is properly taken to be equivalent to *pasul*—unfit—and expresses a categorical prohibition against marrying a *kohen*. Indeed, the Jerusalem Talmud is clear that the word *pagum* is synonymous and interchangeable with *pasul*; this provides a clear support for the view of the Rosh. This approach seems to be the view of many *Geonim* as well.[8]

C. The View of Rif: It is Uncertain if the Daughter of a Gentile May Marry a *Kohen*

The third view is that of the Rif[9] The Rif quotes both sections of the talmudic discussion and says that some of his teachers ruled in accordance with the first part and some in accordance with the second. He then concludes:

> But we are uncertain as to whether this woman is *pagum* or not, from the fact that we see the Gemara, after much give-and-take, rules that "the halacha is that if an idolater or a slave had cohabited with the daughter of an Israelite the child [born from such a union] is legitimate (*kasher*)," but it did not say that the child is *pagum*.

The Rif writes that because of the difficulties in interpreting the flow of the Gemara, his teachers are uncertain which view is correct and the matter remains as a *safek* (doubt).[10] Again,

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8. See *Otzar Ha-Geonim* p. 106, in the name of *Baal Meitav* and *Bahag*.

9. *Yevamot* 15a in *Rif* pagination.

10. The view of the *Rif*, like the view of the Rambam, is subject to some controversy because the *Nemukei Yosef* apparently has a different textual edition (*girsa*) of the *Rif* and maintains that the *Rif* rules leniently on this

the tension seems to be between the Talmud's seemingly blanket conclusion that the child of a gentile man and Jewish woman is *kasher*, fully legitimate without any further limitation specified, and the Talmud's earlier assessment that the *Amoraim* who rule that such a child is allowed to marry a Jew agree nonetheless that she is not to marry a *kohen*. This ambiguity produces a ruling of doubt.

But how seriously are we to take that uncertainty? Although it might seem that we are dealing with a matter of doubt on a biblical law, which would require one to be strict in all instances and leave little room for flexibility, this may not be the only possible—or even likely—explanation. In fact, the doubt of the Rif can be cast in two fundamentally different ways, depending on whether one understands *"pagum* to a *kohen"* as categorically ineligible to marry a *kohen* or something else.

One possibility is as we have already presented: we have a tension between two diametrically opposed feasible rulings on a matter of Torah law. Some take the term *pagum* as does the Rosh, to denote a categorical prohibition against marrying a *kohen* – *pagum* is equivalent to *pasul*. Furthermore, the halacha follows that restriction, namely that the daughter of a gentile and Jewess is forbidden to marry a *kohen*. Others, notwithstanding any particular meaning of the term *pagum*, maintain that the child in question is not *pagum* to a *kohen*, as the conclusion of the Gemara seems to indicate that the child is completely *kasher*. Uncertainty as to which of these vastly different views is correct produces a ruling of *safek*, doubt, on a very serious matter that is biblical in nature, and one must rule strictly in both directions. Thus, not only would the offspring of a gentile man and Jewish woman not be able to

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matter and maintains that the child is permitted to marry a *kohen*. Notwithstanding, our text of the *Rif*, and the consensus text of the *Rif* found among the *Rishonim*, is that the *Rif* leaves the matter in doubt and does not resolve it.

marry a *kohen*, but were such a child to (improperly) marry a *kohen*, their offspring would also be forbidden to come in contact with a corpse. In fact, were one to take this position to a logical extreme, one might even be inclined to rule that if the granddaughter of a gentile man and a Jewish woman through a son were to marry a *kohen*, they ought to divorce, no different from any case of a *chalalah* who marries a *kohen*.

Indeed, the Ramban, in his commentary to *Yevamot* and even more clearly in his *Sefer ha-Zechut* on the *Rif*, stakes out this position. He maintains that there is a genuine *safek* (doubt) as a matter of Torah law whether this child may marry a *kohen*. The Ramban spells out several permutations of the *din*, giving us a clear indication that he took this stricture put forward in the name of the *Rif* as the normative halacha. According to the Ramban, the daughter that results from a relationship between a gentile man and a Jewish woman is a *safek chalalah* as a matter of Jewish law, and the son that results from this type of relationship is a *safek chalal*,[11] and they are to be treated as a matter of Torah law as residing in that state of doubt, both for the male children and female children.[12]

The Ramban assumes that the status of *pagum le-kohen* is a Torah status forbidding marriage to a *kohen*, and the resulting child is not allowed to marry a *kohen* as a matter of doubtful Torah law. He is, however, one of the first to note that if such child does in fact marry a *kohen* in contravention of the directions given, the couple need not divorce since the matter remains in doubt, and once they are married they may stay

11. Of course, one recognizes that this is not a classic case of *chalal*, as the child does not result from a sexually improper union involving a *kohen*.

12. Although this article will focus exclusively on the question of whether the daughter of a gentile man and Jewish woman may marry a *kohen*, according to the Ramban, if the son of such a union marries a Jewish woman and has a daughter, that daughter is also a *safek chalalah* and may not marry a *kohen*. Far-reaching permutations of the Ramban's view become apparent throughout the course of this article.

married.[13] A number of *Acharonim* explain that indeed according to this view of the severity of the underlying doubt, they ought to divorce, but were the courts to force them to do so, the problem of coerced divorce (*get meuseh*) might arise, so we have no choice but to allow them to stay married.[14]

D. The View of *Yam Shel Shlomo*: The Daughter of a Gentile Man is Merely Discouraged from Marrying a *Kohen*

Tosafot[15] imply, and the *Yam Shel Shlomo* states, that the word *pagum* (which the Rosh insists means *pasul* and which the Rambam rejects as not halachically normative) in fact means distasteful, rather than invalid. In this view, one would say that the daughter of such a relationship is discouraged from marrying a *kohen*, rather than prohibited from doing so. In fact, Tosafot seem to insist that this exact point is a dispute among the *Amoraim*, some of whom understand *pagum* to mean *pasul* but not a *mamzer*, as opposed to R. Yehoshua ben Levi who uses the terms *pagum* and *mekulkal* interchangeably, and that is the view which Tosafot seem to adopt *lehalacha*.[16]

In both his commentary to *Yevamot* (4:38) and his volume of responsa,[17] *Yam Shel Shlomo* maintains that the halacha is clear that the daughter of a gentile man who marries a Jewish woman is eligible to marry a *kohen*. The basic argument of the *Yam Shel Shlomo* is that the *kal vachomer* put forward in the initial part of the Gemara is ultimately not persuasive because the Gemara itself provides a refutation for the *kal vachomer*. This position is made even clearer by noting that it is conceptually impossible to label this child a *chalal* or *chalalah*

13. Why this is so will be explained below.
14. See *Pitchei Teshuvah*, *Even HaEzer* 4:3.
15. *Yevamot* 77a, s.v. *R. Yochanan amar kesherah.*
16. As noted *infra*, Ramo adopts this view.
17. Responsum 18. In some editions, 17.

because the essential characteristic of *chalal* children is that they themselves derive from a prohibited sexual relationship between a *kohen* and one prohibited to marry a *kohen*.[18] The prohibited sexual relationship between a Jew and a gentile, though status-oriented, seems not to be related to the prohibitions of a *kohen* at all. Thus the application of the term *chalal* or *chalalah* in this case seems incorrect. According to the *Yam Shel Shlomo*, *pagum* merely means distasteful or unattractive, and the statement in the Gemara that "all these *Amoraim* who declare the child legitimate agree that he is *pagum*" only means distasteful to the *kohen*, and not prohibited. After quoting the Rosh, he writes:

> But I say that I, too, see no room for doubt in this matter. Yet to me the opposite conclusion seems correct, that such a child is permitted to marry a *kohen*. I am surprised by the *kal vachomer* cited by the Rosh, for it certainly had been refuted: in the beginning of the passage, the Talmud attempted to derive *a fortiori* from the case of a widow that the offspring of a woman who has a relationship with a man in violation of a negative commandment [whose punishment is lashes rather than death] is considered *pagum*, but was refuted by the argument that one cannot draw a conclusion from the case of a widow who marries a High Priest, for she herself becomes profaned [and ineligible to all priests], etc. … Furthermore, from the fact that we are only attempting to derive [through this *kal vachomer*] that the daughter of a Jewish woman and gentile man is to be considered ineligible to marry a *kohen*, but were the child male, he would not invalidate either his wife or children as a *chalal* would, because the status of *chalal* results only from relationships where the individual himself is forbidden to marry a *kohen*, then the

18. Thus, for example, the daughter of a marriage between a *kohen* and a divorcee is a *chalalah*, and the child from a relationship between a *kohen* and a *Chalutzah* (levirate widow) is a *chalalah miderabanan*.

> *kal vachomer* is refuted by this very logic, for we can argue that the case of male offspring proves it invalid: in the case of the widow and High Priest, the resultant male offspring is considered to be a *chalal* forever. But a gentile or slave does not render his son a *chalal*, even as their prohibition is equally applicable to all. Rather, one has no alternative but to conclude that since the status of *chalal* results only from relationships where the individual himself is forbidden to marry a *kohen*, then she [the female offspring of a Jewish woman and a gentile man or slave] is not even considered to be *pagum* [i.e., forbidden to marry a *kohen*]. Thus we cannot infer a prohibition *a fortiori* from the case of a widow and High Priest, as that case contains a stricture [i.e., that the offspring is considered a *chalal*] inapplicable to our case.

Thus, according to *Yam Shel Shlomo*, Jewish law does not prohibit the daughter of a gentile man from marrying a *kohen* but merely discourages it.

Working along these lines, one could put forward a completely different approach to the doubt of the *Rif*. According to this view, *pagum* is only a rabbinic law in the first place. As opposed to the laws of *chalal* and *chalalah*, here the prohibition for the child of a gentile man and Jewish woman is not a categorical Torah prohibition that touches all offspring, but a rabbinic injunction against such a child marrying a *kohen*, as in some way inappropriate. *Pagum*, in this approach, does not mean categorically *pasul*, but something lesser—despicable or distasteful—and a different term is used to indicate a rabbinic prohibition. This unique prohibition would apply differently to daughters than sons, and would not transmit a status of ineligibility for several generations. Furthermore, such a rabbinic rule would itself dictate that if such a child were to marry a *kohen* no divorce would be needed, as rabbinic rulings of this kind are only devised *ab initio* (*lechatchila*).[19]

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19. Many *Acharonim* also maintain that the *pegam* (flaw) is only

If *pagum* is understood to mean distasteful to marry, but of lesser severity than *pasul*, then the *safek* between the two possible rulings takes on a very different cast. Rather than uncertainty as to whether or not the Gemara is indicating a severe biblical status for the child of a gentile man and Jewish woman, our doubt is whether or not such a child has a lesser, distasteful status. Even the position that rules that such a child is *pasul* believes that the prohibition is not severe, and has a degree of leniency already built in. That would also explain why the son of a gentile or slave and a Jewish woman is not considered a *chalal*, according to this view, but only *pagum*.[20]

While no single *Rishon* sets out this position as clearly as the Ramban does his, nonetheless, many aspects of this explanation can be found among a variety of commentators, all seeming to indicate that *pagum* is something quite different from *pasul*. Included in this list, to varying degrees, are the Ritva, the Rashba, Rashi, and the Meiri, each of whom insists that *pagum* does not create the status of *chalal*, but rather something different and less severe.[21]

E. The View of *Kitzur Piskei Tosafot*: The Daughter of a Gentile Man and a Jewish Woman is a Gentile

A novel approach to this topic is found in the name of Tosafot in *Kiddushin* 75b and cited explicitly in *Kitzur Piskei Tosafot* to *Kiddushin*, *Asarah Yuchasin*, no. 142. This view posits that the child resulting from a relationship between a gentile

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miderabbanan; see *Responsa of Rabbi Akiva Eiger,* No. 91; Commentary of *Beit Meir, Even HaEzer* 6:17; *Responsa Amudei Or* 3:8; *Responsa Beit Yitzchak, Even HaEzer* 26; and *Seridei Esh* 3:8.

20. See Meiri, *Yevamot* 45a and Ritva, *Yevamot* 45a. See also *Avnei Nezer 16* and Ritva, *Yevamot* col. 251, n. 18 (in vol. 2 of the Mosad Ha-Rav Kook edition).

21. Ritva, Rashba, and Meiri on *Yevamot* 45a; Rashi ad loc., s.v. *bitah*. It is worth noting that there are at least seven distinct problems with the *kal vachomer* put forth by the Gemara in *Yevamot* 44b. See Ritva, *Yevamot* col. 251, n. 18 (in vol. 2 of the Mosad HaRav Kook edition).

man and a Jewish woman is valid (*kasher*) but a valid *gentile* and requires conversion before being considered Jewish. As noted by *Pitchei Teshuvah, Even HaEzer* 4:1, this view is rejected by nearly all halachic authorities and is generally not even factored into the halachic calculus at all.[22]

II. The View of the Codes and Commentators

The *Tur* restates the halacha simply and straightforwardly in *Even HaEzer* 4:

> If a gentile or a slave has relations with a *mamzeret*, the child is a *mamzer*, and if he has relations with a Jewish woman, the child is *kasher*, whether the woman was unmarried or married, but is *pagum* to a *kohen*.

There is no mention of a contrary view or of any doubt. The *Beit Yosef* in his commentary explains that the *Tur*'s formulation is based on the understanding of the Rosh, the *Tur*'s father. In this view, *pagum* is identical to *pasul*, and such a child is categorically forbidden to a *kohen*.

However, the picture becomes slightly complicated when we turn to the *Shulchan Aruch*. The *Shulchan Aruch*, although employing language similar to the *Tur*, in fact codifies several rules of *pagum* to a *kohen* in a way that increases our uncertainty as to which interpretation among the *Rishonim* the halacha follows. In *Shulchan Aruch Even HaEzer* 4:5, he writes:

> If a Jew has relations with any of the above [prohibited] women, the status of the child follows the status of the mother. And if any of the above, except for a *mamzer*, has relations with a Jewish woman, the child is *kasher* to marry into the community, except that the child is *pagum* to a *kohen*.

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22. Rif, Rambam, Rosh, Ramban, Meiri, Ritva, *Beit Shmuel, Chelkat Mechokek, Shach, Taz, Aruch Ha-Shulchan* and *Nodah Bi-Yehudah* all reject this view.

Somewhat in contrast, the next section in the *Shulchan Aruch Even HaEzer* (4:6) states:

> If any one of these [prohibited individuals] converts and marries a Jewish man, or one such individual converts and marries a Jewish woman, the child follows the invalid parent. Thus, if an Ammonite or second-generation Egyptian convert marries a Jewish woman, the daughter is *kasher* even to a *kohen*…

Later in the same chapter, in *Even HaEzer* 4:19, the *Shulchan Aruch* states regarding a related case:

> If a gentile or a slave has relations with a *mamzeret*, the child is a *mamzer*, and if he has relations with a Jewish woman, whether the woman was unmarried or married, the child is *kasher* but is *pagum* to a *kohen*.

So too in *Even HaEzer* 7:17, the *Shulchan Aruch* repeats this formulation:

> If a gentile or a slave has relations with a Jewish woman, and she gives birth to a daughter as a result, that daughter is *pegumah* to a *kohen.*

Although the *Shulchan Aruch* seems to use language similar to the Gemara and the *Tur*, we know that the his general approach is to consider the views of the Rambam, Rif and Rosh as he formulates the halacha, and that rather than simply borrowing the language of his predecessors, he regularly rephrases the rulings of the Gemara and other authorities in order to convey his unique understanding of the halacha. Careful readers of the *Shulchan Aruch* are attentive to his nuanced but consistent use of terms, and would be surprised to see the *Shulchan Aruch* use words such as *pasul* and *pagum* interchangeably. This leads one to suspect that they in fact have different meanings. The use, then, of the term *pagum* across these various contexts in *Even HaEzer* deserves careful attention.

Indeed, another use of the term *pagum* in the *Shulchan Aruch*

inclines one to distinguish it from *pasul*. In *Even HaEzer* 4:13, *Shulchan Aruch* writes:

> Who is a *mamzer*? Any child resulting from any of the forbidden sexual relationships, whether they be punished by execution at the hands of the court or by *karet* (divine excision), except for a child born to a woman [who had intercourse while] still in a menstrual state, who, though *pagum*, is not a *mamzer*, even rabbinically.

Here, the term *pagum* seems to clearly indicate one whom it is distasteful but not forbidden to marry. From this particular source, one is inclined to say that the use of *pagum* throughout the *Shulchan Aruch* means distasteful to marry, and *pagum* to a *kohen* means distasteful for a *kohen* to marry but not prohibited for him to marry. And just as the child of a *niddah* is *pagum* but not *pasul*, so too the daughter of a gentile man and Jewish woman is *pagum* but not categorically forbidden to a *kohen*.

The view of the Ramo is important to note. Ramo is silent on this question in the *Shulchan Aruch*, but in his responsa he clearly sides with the view of the *Yam Shel Shlomo* and accepts that the child that results from a sexual relationship between a gentile man and a Jewish woman is not *pasul* or forbidden to marry a *kohen*, but only discouraged [*pagum umekulkal*] from doing so.[23] The Ramo, one could claim, does not think he is adopting a position inconsistent with the language of the *Shulchan Aruch*, but is instead doing so based on the view that the *Shulchan Aruch's* use of the word *pagum* does not in fact mean ineligible to marry a *kohen* but only distasteful to a *kohen*. Nowhere in the *Shulchan Aruch* is it clear according to this view that such a child may not marry a *kohen*. That would also explain why the Ramo in his glosses does not stop to disagree with the formulation found in the *Shulchan Aruch*.[24]

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23. See *Responsa of the Ramo*, No. 18; see also Nos. 61 and 69.

24. See also *Darkei Moshe* on *Tur*, *Even HaEzer* 7, as well as the notes to *id*. published in the Machon Yerushalayim edition of the *Tur* which state clearly that Ramo adopts the view of the *Yam Shel Shlomo*.

Although none actually mention this explicitly or present the entire range of views in a single source, the commentators on the *Shulchan Aruch* fall into the similar categories of views as the *Rishonim* above.

The *Levush*, for instance, maintains across the board that *pagum* means *pasul*, and that even in the case of a man who has a sexual relationship with a woman who is a *niddah* where the resulting child is *pagum* but not a *mamzer*, the *Shulchan Aruch* means to say that the resulting child is in fact ineligible to marry a *kohen*. In this line of reasoning, the halacha follows the Rosh's understanding of the Gemara and his conception of *pagum*, although it is extended far beyond our original context. The view of the *Levush*, while providing a consistent explanation for the rulings of the *Shulchan Aruch*, presents great difficulty. Almost all other halachic authorities maintain that the term *pagum* used in *Even HaEzer* 4:13 in reference to the child of a relationship with a woman who is a *niddah* is to be understood merely as being distasteful but not actually forbidden to marry a *kohen*; the *Levush* is alone in insisting that such a child is prohibited to a *kohen*. Indeed the Rosh and *Tur* make no such explicit claim.

A view closer to that of the Rosh seems to be taken by the *Shach*, *Yoreh Deah* 268:11. There the *Shulchan Aruch* is discussing the requirements of conversion, and that although acceptance of the commandments (*kabbalat hamitzvot*) must take place before a *beit din* of three fit judges (*dayanim*) during the daytime, *a posteriori* (*bedeavad*), circumcision and immersion in a *mikvah* need not. The *Shach* applies that distinction to our case. If *kabbalat hamitzvot* does not take place in front of the three *dayanim*, the convert is still considered a non-Jew and the daughter he has with a Jewish woman is ineligible to marry a *kohen*, whereas if only the immersion in a *mikvah* or circumcision does not take place in front of a *beit din*, the child is *kasher*. The use of the term *kasher* by the *Shach* could be reasonably understood as the functional opposite of *pagum*, which according to the *Shach* would mean that he

maintains that the child of a relationship between a non-Jewish man and a Jewish woman is *pasul*, rather than *pagum*, to a *kohen*.

> However, if [one who immersed or was circumcised without three fit *dayanim* or at night] married a Jewish woman [a resultant child is not *pasul*]—even though we accept the view that the offspring of the sexual relationship between a non-Jewish man and a Jewish woman is *kasher*, [the immersion/circumcision without three proper *dayanim* or at night] would nonetheless make a difference as to whether such a child would be *kasher* to a *kohen*, as opposed to the child of a non-Jew (as discussed in *EH* 7). Alternatively, it could make a difference as to whether such a child is considered a first-born to be redeemed (above, *Yoreh Deah* 65:18).[25]

Other commentators on the *Shulchan Aruch* seem to differentiate *pagum* from *pasul*. They draw their interpretation of the term *pagum* as applied to the child of a gentile man and Jewish woman from the *Shulchan Aruch's* use of such a label in the case of *niddah*. In their understanding, the term *pagum* to a *kohen* denotes the same type of abiding distaste as a relationship between the child of an improper sexual relationship with a *niddah* and a *kohen*—but such a marriage, though not ideal, is ultimately valid in the eyes of halacha. Indeed, according to a number of these authorities, we would perform such marriages and not treat that status as one of generating formal, firm halachic prohibition.[26] This understanding of the word *pagum* is clearly stated by the *Chelkat Mechokek* in *Even HaEzer* 7:26:

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25. This view is also adopted by the *Baer Ha-Golah, Even HaEzer* 4:10.

26. Thus, throughout this article, in the absence of an indication in a post-*Shulchan Aruch* work that the term *pagum* explicitly means *pasul*, I will continue to render the term as *pagum*, because there is an uncertainty as to whether the term ought to be properly translated as distasteful or as ineligible.

> From the word *pagum*, it appears that only as an ideal (*lechatchila*) she should not marry a *kohen*, but she is not really a *chalalah* in actuality; see *Maharshal* 17.[27]

The *Beit Shmuel* in his commentary *Even HaEzer* 4:2 adopts the view of uncertainty, *safek*, as to whether this child may marry a *kohen*, but seems to do so as a stricture to accommodate all views when possible and not an absolute requirement due to a severe biblical mandate. He writes:

> As a matter of normative Jewish law, it appears that she should not after the fact be required to divorce the *kohen* if she marries one, since the Rambam maintains that she is permitted to marry a *kohen*, and according to the Rif and Ramban she would not be required to divorce after the fact.

He then adds, "See *Responsa of Maharshal*, No. 17 and *Shulchan Aruch*, *Even HaEzer*, end of chapter 7." (A similar view is put forth by the *Chelkat Mechokek* in *Even HaEzer* 4:3, also noting that if they marry, a divorce is not required.) *Beit Shmuel's* disagreement with the view of the Rosh (who rules that such a child may certainly not marry a *kohen*) is made clear in his comments on *Even HaEzer* 4:4, where he states:

> [T]hus the Rosh's position is difficult (*tzarich iyun*), for how could he have ruled that the child of a gentile or

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27. *Chelkat Mechokek* reinforces this understanding of the halacha with his comments (*Even HaEzer* 4:3), on the words, "except that the child is *pagum le-kehunah*":

Like every non-Jew who has sexual relations with a Jewish woman, as stated below, *Even HaEzer* 4:19. The Talmud (*Yevamot* 45a) derives *a fortiori* from the case of a widow that her daughter is forbidden (*pesulah*) to marry a *kohen* and is considered a *chalalah*. However, some (*Rif*; *Maggid Mishneh, Hil. Issurei Biah* 15[:3], citing Ramban) disagree and rule that this is only a ruling of doubt (*safek*) and thus if a daughter from such a relationship marries a *kohen*, they need not divorce and the child is considered a *safek chalal*.

Admittedly, the use of the term *safek chalal* is somewhat at tension with the wording of the *Chelkat Mechokek* in *Even HaEzer* 7:26.

> slave who has a sexual relationship with a Jewish woman is considered *pagum* for a *kohen* based on the logical reasoning (*kal vachomer*) derived from a widow who lives with a High Priest—this may be refuted by pointing to an Ammonite convert who has a sexual relationship with a Jewish woman, where such conduct is sinful (*she-pogem be-viato ve-yesh aveirah be-viato*) but the offspring is nonetheless permitted to marry a *kohen*…

It seems clear from this *Beit Shmuel* that he ultimately rejects the view of the Rosh. The point of the *Beit Shmuel* is hard to rebut. Since a sexual relationship between an Ammonite convert or a second-generation Egyptian convert and a Jewish woman violates Jewish law, one ought to say that the resultant child is also *pagum* to a *kohen*. The fact that the *Shulchan Aruch* does not do so is a clear indication that the view of the Rosh is rejected by the *Shulchan Aruch*, who must understand *pagum* to mean something other than *pasul*. Tosafot (*Yevamot* 77a, s.v. *R. Yochanan amar kesherah*) adopt that view.[28]

This understanding of the halacha is rejected by the *Baer Heitev, Even HaEzer* 4:5, who dismisses the view of the *Beit Shmuel*, stating:

> *Even though the sexual relationship was sinful, the daughter is nevertheless permitted to marry a kohen* – One need not ask that according to the ruling of *Shulchan Aruch* here, that in the case of an Ammonite convert who has a sexual relationship with a Jewish woman, their daughter is permitted to marry even a *kohen*—then the *kal vachomer* is thus refuted, for we infer that the child of a gentile or slave who has a sexual relationship with a Jewish woman is *pagum* to a *kohen a fortiori* from the case of a widow who was married to a *Kohen Gadol* where the prohibition is not equally applicable to all, [yet] her son is impaired, how

28. *Baer Heitev, Even HaEzer* 4:5 responds to this, but as *Pitchei Teshuvah* (4:4) notes, his response is not cogent.

> much more should the child of this woman [where the prohibition is equally applicable to all] be considered *pagum*. After all, one can respond by saying that the case of the Ammonite convert provides proof to the contrary: she is distasteful because she had this sinful sexual relationship, but the resultant daughter is nonetheless permitted to marry a *kohen*, as Tosafot asked in *Yevamot* (77a) without resolving the question. But if [the *kal vachomer* is refuted], why did *Shulchan Aruch* rule that the daughter of a gentile man and Jewish woman is *pagum* to a *kohen*? One may answer that we may infer a different *kal vachomer* from the case of a widow who was married to a *Kohen Gadol*: in that case, the marriage takes effect yet the resultant child is *pagum*, how much more should the child of a gentile or slave, where no marriage is effected, be considered *pagum*—and that *kal vachomer* is never refuted. It is for this reason that the *Bach* wrote that the case [of an Ammonite convert] bears no similarity to the case of a gentile or slave who has a sexual relationship with a Jewish woman, where the resultant daughter is considered *pagum* because no marriage takes effect; but *Bach* did not write that she has that status because of the *kal vachomer* inference from the case of a widow [married to a *Kohen Gadol*]. [29] Certainly he was not unaware of the question posed by Tosafot, thus his intent was as I have written. Know that upon careful investigation this must be the proper understanding, and the *Beit Shmuel* is incorrect.

This stands in contrast to the view of the *Pitchei Teshuvah*, who seems to be genuinely uncertain which view is correct. The *Pitchei Teshuvah* (*Even HaEzer* 4:3) writes:

> But here, where we unsure as to whom the halacha follows, we do not force them to divorce, for if the

29. Where the underlying reasoning is as the Talmud lays out, because the prohibition is not applicable to all.

> halacha indeed follows the lenient view, then the divorce is invalid due to coercion. That is why the Ramban specified that we do not force them to divorce, but did not in fact write that he ought not to divorce her, to indicate specifically that coercion should not be employed.

The *Pitchei Teshuvah* maintains, in defense of the position of the Ramban, that we are dealing with a serious doubt on a matter of biblical law (*safek deoraita*), and that the couple ought to divorce. It is only based on a technicality that we cannot force them to do so. However, if a *kohen* were to approach his rabbi and ask whether or not he should divorce such woman, the correct answer would be that it is proper for him to divorce her. Indeed, the *Pitchei Teshuvah* in 4:5 makes clear that he argues with the *Beit Shmuel*. In fact *Baer Ha-Golah* goes even further in his commentary (*Even HaEzer* 4:10) and states that if a *kohen* marries such a woman, he must divorce her.

III. The View of *Acharonim*

The *Aruch Ha-Shulchan* in *Even HaEzer* 7:35 adopts a formulation somewhat reminiscent of the *Chelkat Mechokek*. He notes that there is a dispute among the *Rishonim* about this matter and he notes that the term *pegam* is only *lechatchila*. After summarizing the views of the *Rishonim*, he adds:

> The view of the Ramban [that the *pesul* of this child applies to both men and women and is a biblical status] is a solitary view and is not to be accepted as the normative view within the halacha.

What does this mean? If the halacha is not in accordance with the Ramban, then this matter can only be a matter of doubt on a rabbinic rule. *Pagum* is a different term than *pasul*, and the reason the underlying halacha is different is because we are dealing with a rabbinic decree—one whose very existence is disputed by many *Rishonim*, at that.

Rabbi Menachem Azaryah (רמ״ע) da Fano (Rama Mipano) in his *Responsa*, No. 124, adopts the view that the *pegam* is only a

pegam miderabbanan and the term *pegam* denotes only a *lechatchila* prohibition of a rabbinic nature, and not only that he does not have to divorce her, but of course that this is somewhat analogous to the prohibition of a *bat niddah* marrying somebody, which is that the *pegam* merely notes something distasteful. The Rama Mipano is quoted by many others and can be readily understood as saying that a *kohen* marrying this person is no more problematic than a regular Jew marrying the daughter of a woman who had a sexual relationship while she was a *niddah*.

The view of the Gra is also worth noting. In his commentary on *Even HaEzer* 7:54, the Gra explains at enormous length why he is inclined to follow the view of the Rambam and think as the *Yam Shel Shlomo* does that this child is eligible to marry a *kohen* and just discouraged—but he concludes by saying that the bottom line is that we should follow the view of the Rosh, that this child is ineligible to marry a *kohen* at least as a matter of uncertainty.

The *Beit Meir*, *Even HaEzer* 4:4, focuses on what he thinks to be the central question: Is the underlying sexual relationship between a gentile man and a Jewish woman a violation of Torah law, in which case *pagum* could generate a Torah prohibition to marry a *kohen*, or is the underlying conduct only a rabbinic sin, in which case *pagum* would only indicate that marriage to a *kohen* is distasteful. He concludes that except in the case of a slave, the sexual relationship between the prohibited individual and a Jewish woman is not a Torah violation even according to the Rosh, and thus a *kohen* and the daughter of a rabbinically inappropriate relationship who is labeled as *pagum* need not divorce, and such cannot be a Torah-based status.

R. Akiva Eiger also adopts the view that the halacha is really like the view of the Rambam and the prohibition is only one *lechatchila*, and that a person whose mother is Jewish and

father is not Jewish may marry a *kohen*.[30]

An interesting example of this type of discussion is found in *Chelkat Yaakov, Even HaEzer* 32 where he discusses a related question: if a *kohen* marries a woman whose father was a gentile and they produce a son—is that son to be considered a *kohen*? After all, at the core of this question is whether this woman is, by the letter of the law, permitted to marry a *kohen* or not. If this woman is by Jewish law prohibited to marry a *kohen*, then this child is a *chalal* either biblically or rabbinically, and as such should not function as a *kohen*. The *Chelkat Yaakov* reviews the views among the *Rishonim* and concludes that the son born of the relationship between a woman whose father was a gentile and a *kohen* is a *kohen* and has what he calls a *chashash chalal*, but he says that the child ultimately is to be considered a *kohen*, indicating that the bottom-line halacha in this matter is that the *pesul* is not biblical, this woman is not a *chalalah*, and the resulting child is a *kohen*.

The exact opposite view to this question is taken by the *Minchat Yitzchak* 2:131 where he deals with this same question of the daughter of the sexual relationship between a non-Jew and a Jewish woman, who marries a *kohen*, and they have a

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30. See *Responsa of R. Akiva Eiger, Mahadura Kama*, No. 91. This has something to do with a lengthy discussion about whether casual intercourse between a Jew and a gentile, where the gentile is not one of the seven nations residing in the land of Israel and where no marriage is intended, violates Torah law or rabbinic law. The latter view is taken by Rabbi Akiva Eiger and others and represents a compromise as to whether the nature of the *pegam* is only for a slave or for others. In his Novellae to *Yevamot* 45a, R. Akiva Eiger writes:

Even according to those decisors who maintain that we rule as a matter of Jewish law that the child is *pagum* to a *kohen*, it is still possible to say that this prohibition is only rabbinic, as the *Yam Shel Shlomo* wrote. In my humble opinion it seems that this view is correct... One must therefore conclude that the main function of the *kal vachomer* is [to derive the *pagum* status] in the case of the slave, who is biblically prohibited to a Jewish woman. But for the gentile, the *kal vachomer* is meant only as a rabbinic association, that the Sages functionally equated a gentile and a slave.

child. Is that child a *kohen* or a *chalal* or a *safek kohen*? The *Minchat Yitzchak* concludes that this child is a *safek kohen* in accordance with the view of the Rif and Ramban, and he seems to indicate that this is a status of biblical origin, and this child is to be treated as a *safek kohen* biblically.

Among the more complete *teshuvot* on the topic is that of the *Seridei Esh*, 1:71 (in the new editions). He reviews the *Rishonim* and ultimately concludes that we should follow the view of the *Chelkat Mechokek*, that such a woman may not *lechatchila* marry a *kohen*, but if she does so may remain married, since the nature of the prohibition is rabbinic and there is a case of double-doubt—maybe this woman is allowed to marry a *kohen*, and maybe there is no obligation to divorce if they do marry. The *Seridei Esh* notes that there are ample grounds to take the view that even if this child is a daughter, she is permitted to marry a *kohen lechatchila*. He ultimately declines to take that step, but he lays out the grounds for contemplating that possibility.

IV. The Contemporary Halachic Issue: A *Kohen* Romantically Involved with the Daughter of a Gentile Man and Jewish Woman

The consensus as to the halacha is clear. Optimally the daughter of a gentile man and a Jewish woman should not marry a *kohen* and, of course, one should not become romantically involved with someone that one should not marry. However, in a situation where such a couple is already romatically involved, what is to be done?

Among contemporary halachic authorities this matter has generated a three-way dispute. All of them focus on the following question: A man and woman are already bonded together but not yet married according to Jewish law; they have now become religious and now they wish to be married according to Jewish law, but it turns out that the man is a *kohen* and the woman is the child of a relationship between a

gentile man and Jewish woman. Is it proper for a rabbi to perform the wedding?

The first authority to answer that question is the late Rav Moshe Feinstein *z"l*. Rav Moshe says that no rabbi should marry such a couple. The fact that they are not married already is an extremely important factor, because ultimately, since they are not married already this cannot be considered *im niseit lo tetze* (if they are already married they should not get divorced) as that category is limited to situations where they are already married according to halacha. Furthermore, he is of the view that according to many halachic authorities, a *kohen* is better off not being halachically married to a woman to whom it is prohibited for him to be married, rather than marry such a woman in a full Jewish marriage ceremony. So Rav Moshe takes the view that since ultimately this woman is forbidden *a priori* to marry a *kohen*, and the *a priori* prohibition applies even in a situation where they are living together but not married—the Rabbi should not perform such a wedding. Rav Moshe assumes that the halacha is as the *Chelkat Mechokek* put forward, that *im niseit lo tetze*, but this is not such a case because they are not yet married according to Jewish law.[31]

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31. *Iggerot Moshe EH* 1:15. For a detailed explanation of Rav Moshe's view, see *Iggerot Moshe*, *Even HaEzer* 1:19, s.v. *umah shehikshah*. I think Rabbi Feinstein's strict view here can be well explained in light of another relatively unique view of his. As explained above, the view of Tosafot (*Kiddushin* 75b) is that a child whose father is a gentile is a gentile, even if his mother is Jewish. Nearly all authorities categorically reject that view (as noted above). Such is not the view of Rabbi Feinstein. As he notes in *Dibrot Moshe* on *Yevamot* 45a, he is of the view that Tosafot maintain that only when the mother is herself an apostate is the child a gentile if the father is. Indeed, in *Iggerot Moshe*, *Even HaEzer* 1:8, Rabbi Feinstein accepts this view as a matter of reasonable doubt and rules that such a child requires a conversion. He states:

> According to what I explained in my novellae in *Yevamot*, it is the view of Tosafot (*Kiddushin* 75[a]) that if the mother was a Jewess who apostatized, then the child has the status of a gentile like his father. This stands in contrast to others who think that according to Tosafot, in every case of a sexual relationship between a gentile man and a Jewish woman

A contrary answer is put forward in works by two Sefardic authorities, *Shemesh UMagen* (*Even HaEzer* 3:58) by Rabbi Shalom Messas, and *Shema Shelomoh* (*Even HaEzer* 5:8) by the current Chief Rabbi of Israel, Shlomo Amar. Both of these halachic authorities advance the following argument: In any situation in which the couple is already connected to each other—either because they are living together or they are engaged or have set out to plan a wedding, and certainly in a case where if one refuses to perform their marriage ceremony they will get married civilly anyway—that is considered a *post facto* situation (or maybe a *shaat hadechak kemo bedeavad* – an emergency situation similar to post facto) and it is proper to perform such a wedding based on a multi-sided situation of doubt: perhaps the halacha is like the Rambam that such a marriage is permitted; if the halacha is not like the Rambam, perhaps *pagum* means just "distasteful" and not "prohibited," and since once the couple is connected and the halacha is "they need not get divorced," it is appropriate for a Rabbi to perform such a wedding.[32]

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the child is a gentile as well, and for that reason, the latter-day authorities are of the view that one need not take this opinion of Tosafot into account (see *Pitchei Teshuvah, Even HaEzer* 4:1). Yet according to my explanation that the ruling of Tosafot is limited to an apostate Jewess, one certainly should account for their view, though now is not the time to elaborate. Therefore, in such a case, a full conversion before a *beit din* in accordance with all the laws of conversion is required.

Once one is inclined to rule like Tosafot that there are cases where a child born to a gentile man and a Jewish woman is actually a gentile, then it is even more so logical to insist that in all cases this child is (as a matter of Torah law) certainly ineligible to marry a *kohen*. On the other hand, those who reject Rabbi Feinstein's view on this matter with regard to the child of an apostate Jewess and a gentile (and nearly all authorities reject his view) ought to be more inclined to consider this child as never having been a gentile and at most only rabbinically ineligible to a *kohen*. It might also be the case that Rabbi Feinstein, on a practical level, solved these types of cases by insisting that (as a general proposition) a man from a secular family who claims he is a *kohen* actually is not; see *Iggerot Moshe EH* 4:11(1). 4:12, 4:39.

32. See also *Yachel Yisrael* 96 & 97, who adopts a similar view.

R. Ovadia Yosef, in the ninth and tenth volumes of *Yabia Omer* (*Even HaEzer* 9:7, 10:14), adopts a compromise view. His view is that there are two distinctly different doubts *(sefekot)* here. The first *safek* is the question of whether the daughter of a gentile man and a Jewish woman may marry a *kohen*, and the second *safek* revolves around whether a person is actually to be considered a *kohen* merely because he claims to be a *kohen*. According to Rav Ovadia, in particular cases there are doubts to the status of one as a *kohen*, and more generally there are vast halachic doubts as to whether *kohanim* in our current era really have the status of being actual *kohanim*. Together with the broad systemic doubts about whether this person is really ineligible to marry a *kohen*, it gives rise to a case of double doubt in such a situation, and halacha permits this woman to marry a *kohen*.[33]

At the end of his second responsum dealing with this matter (*Yabia Omer Even HaEzer* 10:14), Rav Ovadia Yosef directly makes reference to R. Feinstein's position, and after quoting R. Feinstein's view, he notes the following counter-concern: In response to R. Feinstein's concern that they will sin less if they are not married, he says,

> In my opinion it appears that to the extent that we strive to accept people and arrange a marriage for them on the basis of those *poskim* who rule liberally, they too will see themselves as close to Judaism like every other Jew, and

33. As a general matter, there is a dispute among *poskim* as to the status of all modern-day *kohanim*. *Maharsham* (*EH* 235) and others rule that all *Kohanim* nowadays are not clearly *kohanim*, as there is a general doubt on a Torah level as to everyone's status when claiming to be a *kohen*. So, too, others note that in a situation where a person claims to be a *kohen* but lacks valid proof of such according to Jewish law (such as testimony from witnesses who are themselves Orthodox Jews), the claim of being a *kohen* is discounted. Finally, one finds many contemporary *poskim* who aver than in an immodest generation such as ours, women who are not known to be sexually modest prior to marriage may be assumed to be ineligible to marry a *kohen* due to sexual misconduct with a gentile, and subsequently their children are not *kohanim*.

> they will become meticulous in their observance of *taharat hamishpacha* (laws of family purity) and immersion in a *mikvah* and other matters of Judaism. But without this they will consider themselves distant from Judaism and will say in their hearts, "What good would it accomplish for us to keep the mitzvot of the Torah since we are already living in sin? And since we are lost, we are lost!" Thus it is better to rely on the authorities who permit this as a matter of halacha without any further strictures and bring them closer to God, Torah and mitzvot.

The concern Rabbi Ovadia Yosef articulates is not far fetched. There might well be situations of outreach where one of the first steps toward bringing people back into the fold occurs when the couple comes to get married. Nothing drives people away from Judaism faster than having their choice of a spouse rejected by their faith, and the rejection of their choice of a spouse by their rabbi may, in the end, drive them out of Orthodox Judaism. Thus, in an Orthodox society which views outreach as an important part of its mission and recognizes the need to bring people in to Torah and mitzvot regularly, Rabbi Ovadia Yosef's position offers grounds to be lenient.[34]

Conclusion

As a matter of normative halacha, all modern *poskim* agree that a woman whose father is a gentile ought not to marry a *kohen* since the *Shulchan Aruch*, Ramo, and the normative commentators all agree that such conduct is at the least

34. The compulsory nature of rabbinic authority in Israel, given the exclusive jurisdiction of the rabbinical courts in Israel governing matters of marriage, also increases one's sense that matters of doubt should be resolved leniently by the rabbinical courts of Israel, as it seems halachically problematic to compel anyone to follow one normative school of thought over another normative school of thought within the halachic tradition. Each has the right to seek out his own rabbinic guidance on matters in dispute, at least in the absence of a communal norm—which is certainly lacking in this case.

distasteful and, according to many, prohibited. So, too, certainly all *poskim* agree that such a woman should be told not to date *kohanim* and nearly all *poskim* also agree that if married, such a couple may stay married. Contemporary halachic authorities do not agree on whether, after a woman whose father is a gentile has already bonded to a male *kohen*,[35] but not yet married him in a halachic ceremony, it is proper to perform such a Jewish marriage. Some *poskim* rule that since they are not married yet, they should not marry. Others rule that since there are many doubts as to what the halacha really requires in such a case, in a situation where ruling strictly might drive this couple out of the Orthodox community and away from religious observance generally, it is proper for a rabbi to perform this wedding and bring this couple closer to Judaism.

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35. Either because they are engaged, living together or even civilly married.

Letters

To the Editor:

I recently read the *Journal of Halacha and Contemporary Society*, Vol. 55, Spring 2008. I have a question concerning the article entitled "Making *Berachot* on Non-Kosher Food." The recommendation of the article is that the not-yet religious should be encouraged to say *berachot* on non-kosher food in order to "affect and sensitize the character of those who recite them." My question is the following: *Berachot* in general are "only" a rabbinic enactment. The prohibition of non-kosher food is a biblical prohibition. Should one say a *beracha* on bread on Pesach or any food item on Yom Kippur or a ham sandwich on any day? Wouldn't it be far better halachically to sensitize people initially to refrain from Torah prohibitions? Then one can introduce the rabbinic enactment of *berachot.*

RABBI LARRY GOLDSTEIN

(Formerly Educational Director at the Young Israel of Fifth Avenue)

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The Editor responds:

Unfortunately, I was not able to contact the author of the original article, but I would like to respond to your letter:

1) In regards to your statement that *berachot* are rabbinic--that is not so clear. See Gemara *Berachot* 35a about a *beracha rishona*, and the questions of the Tosafot and others; although many *pasken* that *berachot* are rabbinic, there seems to be a talmudic opinion that they are biblical. Therefore, your statement that eating kosher takes precedence over b*erachot* is not so simple.

2) My understanding of the article is that the author was certainly not condoning eating non-kosher food, nor was he discussing making a *beracha* on non-kosher food for observant Jews. Rather, he was discussing the particular situation of a person who, at the moment, has no commitment to observing the mitzvot of the Torah, but is in the process of learning about mitzvot and considering adopting a Torah lifestyle. That individual is *already eating* non-kosher food. The author seems to feel that by enhancing that individual's observance and getting him to recite b*erachot*, we may be sensitizing him to the necessity of thanking G-d for our life and sustenance. I am not familiar with *kiruv* techniques, but it is possible that at times a non-observant Jew might be convinced to recite *berachot* but not yet ready to abandon his lifestyle of eating wherever and whatever he wants. In such a case, getting him at least to recite a blessing may have a positive effect in the long run.

I thank you for your interest in the article and offer my interpretation. If any of our readers would like to add their thoughts, we will be happy to share them with our readers.

The Editor

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TABLE OF CONTENTS

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