Journal of Halacha and Contemporary Society

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We proudly dedicate this issue of
The Journal of Halacha
and Contemporary Society
In honor of

HERMAN CAHN

who for nearly a third of a century
served with great distinction as a judge
in New York State courts
where he earned the admiration of the
legal profession for his scholarship
and fidelity to the highest prinicples of the law,
exemplifying his faithfulness as well to
Torah and Mitzvos.

Anonymously dedicated by a devoted supporter of the Rabbi Jacob Joseph School
who requested that this issue be dedicated to a long-serving jurist who has
exemplified the application of ethical principles in the best spirit of Halacha.

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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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Confirming *Piskei Din* In Secular Court

Rabbi Yaacov Feit and Dr. Michael A. Helfand

Introduction

It is difficult to imagine a contemporary legal environment more hospitable to *battei din* (Jewish courts) than the current United States legal system.[1] Under both state and federal law in the United States, *piskei din* (decisions of Jewish courts) issued pursuant to binding arbitration agreements are

1. To be sure, recent legislative initiatives in some states may threaten this long-standing hospitality by prohibiting state judges from "consider[ing] . . . Sharia Law." H.J.R. 1056, 52nd Leg., 2nd Reg. Sess. (Okla. 2010); see also H.B. 2379, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) (prohibiting state court judges from "rel[ying] on any body of religious sectarian law" including "Halacha"); S. 1387, J. Res., 118th Sess. (S.C. 2010). Whether or not such legislation is held to be constitutional is yet another matter.

By contrast, for example, faith-based family arbitration is no longer enforceable in Ontario. See Press Release, Ministry of the Att'y Gen., Ontario Passes Family Statute Law Amendment Act (Feb. 15, 2006), available at http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20060215-famend.asp. In pursuing this legislation, the premier of Ontario – Dalton McGuinty – proclaimed "there will be no religious arbitration in Ontario. There will be one law for all Ontarians." AP, "Ontario Will Ban Shariah Arbitrations," Sept. 12, 2005, *The New York Times*, Late Edition, Section A, Page 6, Column 6.

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enforceable in court as arbitration awards. This process – typically referred to as confirming an arbitration award – allows parties to transform a *psak din* into a legally binding judgment. Accordingly, parties victorious in *beit din* can enlist the U.S. legal system's enforcement power to ensure that non-compliance with a *beit din*'s *psak din* will have legal consequences.

However, the availability of this option is not without halachic complications. Most notably, seeking the confirmation of a *psak din* in a U.S. court would appear, at first glance, to violate the biblical prohibition against submitting claims to a secular court for adjudication. Accordingly, the aim of the present inquiry is to evaluate the applicability of this prohibition – most frequently referred to as the *issur arkaot* – to the process of confirming arbitration awards.

Importantly, considering the halachic permissibility of submitting *piskei din* for confirmation in secular court has significant ramifications. As discussed below, the window to confirm a *psak din* – thereby making the *psak din* legally enforceable – is often time bound. As a result, in some circumstances, a party will have to decide whether or not to confirm a *psak din* long before it learns whether or not the opposing party will, in fact, comply with the decision of the *beit din*. Thus parties will, at times, have to decide whether or not to enlist the enforcement power of the U.S. legal system prior to learning whether or not the opposing party will follow the halachic decision of the *beit din*.

I. The Contours of the *Issur Arkaot*

The prohibition against submitting disputes for adjudication in secular court is as explicit as it is severe. In the opening verse of *Parshat Mishpatim*, the Torah states: ואלה המשפטים אשר תשים לפניהם, which translates as "And these are the statutes which you shall place before them."[2] The Talmud, sensitive to

2. *Shemot* 21:1.

the word לפניהם, before *them*, deduces that disputes can be submitted only before "them" – that is, before a *beit din* – and not before עכו"ם – that is, idol worshippers.[3] This prohibition, called the *issur arkaot*, is uniformly interpreted as applicable to any non-Jewish adjudicatory forum even if the non-Jews in question are technically not idol worshippers.[4] Accordingly, there exists a biblical prohibition against submitting disputes to non-Jews for adjudication,[5] and this prohibition applies even where both parties agree to submit the dispute to non-Jews for adjudication.[6] As a result of this unequivocal prohibition, one who wishes to adjudicate a private law dispute with a Jewish adversary generally must do so in the confines of a *beit din*.[7]

Importantly, the *issur arkaot* stands out in halachic literature for the severity associated with its violation. For example, Rashi writes that one who submits a dispute to a secular court "profanes the name of God and gives honor to the name of

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3. *Gittin* 88b.

4. See *Tashbetz* 2:290 and *Shu"t Yachin U'Boaz* 2:9 who state this explicitly as well as Rif quoted in *Beit Yosef* 26:3, who refers specifically to adjudicating before Muslims. This is accepted by all halachic authorities. See *Knesset Hagedolah* 26:glosses to *Tur*:1, R. Shmuel Wosner, *Shu"t Shevet Halevi* 10:263:1, R. Yitzchak Yaakov Weiss, *Shu"t Minchat Yizchak* 4:52:1, R. Ezra Batzri, *Dinei Mamonot* 5:5, R. Shmuel Y. L. Landesman, *Yeshurun*, vol. 11 pg. 708.

5. See *Tashbetz* 2:290 who understands this prohibition to be biblical in nature. This is also the implication of *Shu"t Radvaz* 1:172, *Chidushei HaRan, Sanhedrin* 2b, *Chidushei HaRamban, Sanhedrin* 23a, *Shu"t Ba'i Chayei, Choshen Mishpat* 158, *Birkei Yosef, Choshen Mishpat* 26:3 and *Kli Chemda*, beginning of *Mishpatim*. However, see *Shu"t Mekor Baruch*, 32 who concludes, based on Rambam and Rasag's omission of this prohibition from their list of mitzvot, that this prohibition is in fact rabbinic in nature. See R. Y.F. Perlow's commentary on *Rasag* 2:pg. 319, who attempts to explain the omission.

6. See, e.g., *Shulchan Aruch* 26:1.

7. See generally R. Simcha Krauss, "Litigation in Secular Courts", 3 *Journal of Halacha and Contemporary Society* 35 (1982); Rabbi J. David Bleich, "Litigation and Arbitration Before Non-Jews", *Contemporary Halachik Problems*, Vol. 5.

idols."[8] Rambam writes that one who submits a dispute to secular courts is considered to have "blasphemed and raised a hand against the Torah of Moshe."[9] The *Shulchan Aruch* uses nearly identical language, emphasizing that an individual who violates the *issur arkaot* is considered "an evildoer, as if he has blasphemed, and as if he has raised a hand against the Torah of Moses."[10] On the one hand, such analysis highlights the centrality of the *issur arkaot* to the maintenance of a robust system of Jewish civil law.

However, some *poskim* see such formulations as also providing the rationale driving the *issur arkaot*. That is, individuals who submit disputes to secular courts violate the *issur arkaot* to the extent that their submission of such cases, to use the words of Rashi, "gives honor to idols" and, to use the words of Rambam, "raise a hand against the Torah of Moshe." Put differently, a party submitting a dispute to secular courts demonstrates his preference for secular law over Jewish law, thereby denigrating halacha.[11] For those who adopt such an approach to the *issur arkaot*, the rationale also provides a basis for finding exceptions to the rule. Thus, in cases where submitting a matter to secular courts would not demonstrate a preference for secular over Jewish law, it would follow that the *issur arkaot* would not apply.[12] Similarly, in situations where a *beit din* is unable to adjudicate a particular case, it may make sense to provide some leeway in allowing parties to submit a claim in secular court.

Other authorities define the contours of the *issur arkaot* by parsing out the source of the prohibition. As noted above, the Talmud derives the *issur arkaot* from the phrase in *Mishpatim*:

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8. S*hem*ot 21:1.

9. *Hilchot Sanhedrin*, 26:7.

10. *Choshen Mishpat* 26:1.

11. See Rabbi J. David Bleich, *Contemporary Halachic Problems*, Vol. 5, pg. 26.

12. Id.

ואלה המשפטים אשר תשים לפניהם. While משפטים can be translated as "statutes," it is more appropriately defined in context as "judgments." Emphasizing the Torah's reference to "judgments," some *poskim* conclude that the *issur arkaot* prohibits looking to secular courts for judgment on pending matters of dispute; actions that do not involve judgment would thereby not be prohibited.[13]

The two perspectives on the *issur arkaot* – indicating preference for secular law or requesting judgment from secular authorities – serve as recurring themes in the halachic literature in which *poskim* have articulated various exceptions to the blanket prohibition against submitting disputes for adjudication in secular court. While a complete examination of these exceptions is beyond the scope of this article, highlighting a number of examples will help sketch a picture of how the origin of and rationale behind the *issur arkaot* frequently impact its application. In turn, we will then be able to consider whether or not confirmation of *piskei din* in contemporary U.S. courts violates the *issur arkaot*.

a. A Defendant Who Refuses to Appear Before a *Beit Din*

Halachic authorities are in universal agreement that where a party refuses to participate in proceedings before a legitimate *beit din*, the opposing party may – with the permission of a *beit din* – submit the case to a secular court for adjudication of the merits.[14] Typically, a plaintiff opens a file in a *beit din*, which then issues a *hazmana* (summons) to the defendant. If a proper response is not received, the summoning *beit din* sends additional *hazmanot* and, if the defendant fails to properly

13. See *Kesef HaKodshim*, *Choshen Mishpat* 26:2 who explicitly offers this rationale while discussing the topic of enforcing a *psak din* in secular court. He writes that the Torah only forbade "*mishpatim*" or judgments, but not actions in secular court that do not require judgment.

14. *Shulchan Aruch*, *Choshen Mishpat* 26:2.

respond to the *beit din*, a *heter arkaot* (permission to litigate in secular court) is issued to the plaintiff.[15] If appropriate, the *beit din* may also issue a *seruv* (document of contempt) against the recalcitrant defendant.

As the *Kli Chemdah* notes, this exception is somewhat peculiar. Generally, the mere fact that an individual will lose money as a result of complying with a biblical prohibition does not constitute an excuse for such compliance. While some *Acharonim* justify this exception by arguing that the secular court is merely acting as an agent of *beit din*,[16] the *Kli Chemdah* rejects this approach and suggests that the prohibition only applies in a case where one has the option of adjudicating a claim before *beit din*. However, in a case where one has attempted to go to *beit din* but the adversary refuses, appearing before secular court does not imply a rejection of Torah law and as such there is no prohibition.[17] Indeed, the process pursued – first submitting the claim to a *beit din* and only then reluctantly submitting the claim to a secular court – demonstrates that no preference is being given to secular law.

b. Appearance Before a Secular Court for Actions of Non-Judgment

As noted above, some of the exceptions to the *issur arkaot* flow from the particular procedural evolution of a case. By contrast, a number of other proposed exceptions are based on the substantive matter being submitted to secular court.

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15. *Sema, Choshen Mishpat* 26:8 writes that the custom of *battei din* is to only give permission after the adversary has refused to respond to three summonses by *beit din*. See also *Pitchei Teshuvah* 11:1 and *Netivot Hamishpat, Chidushim* 11:4 (referring to the custom of issuing three summonses). Nevertheless, some *battei din* may give permission earlier if it is clear that the adversary will not appear in a *beit din*. See R. Yitzchak Yaakov Weiss, *Minchat Yitzchak* 9:155.

16. See *Shu"t Chatam Sofer, Choshen Mishpat* 3 and *Beur HaGra, Choshen Mishpat* 26:2 as explained by *Be'er Eliyahu* and R. Moshe Feinstein, *Iggerot Moshe, Choshen Mishpat* 2:15.

17. *Kli Chemdah, Mishpatim*.

For example, Rabbi Moshe Sofer permits registering the statement of a witness in secular court where there is concern that the witness may not be available when needed at a later date to testify before a *beit din*.[18] His position follows other *poskim* who assume that the "המשפטים" which must be "placed before" *beit din* refers to judgments. As such, the nature of the prohibition of litigating in secular court is limited; actions in secular court which do not require judgments were excluded from the prohibition. Accordingly, Rabbi Sofer's conclusion permitting the registration of a witness's testimony in secular court is largely based upon his interpretation of the word "המשפטים."

Poskim, focusing on המשפטים, have suggested other structurally similar exceptions to the *issur arkaot*. For example, many contemporary authorities permit a party to file for injunctive relief in secular court. Since an injunction to prevent imminent loss is not dispositive of the underlying claims – and as such could be viewed as not submitting a case for "judgment" – obtaining such an injunction does not violate the prohibition.[19]

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18. *Shu"t Chatam Sofer*, *Choshen Mishpat* 3.

19. For example, R. Moshe Feinstein, *Iggerot Moshe*, *Choshen Mishpat* 2:11, writes that a defendant may not refuse to appear before *beit din* on the grounds that the plaintiff already filed for an injunction in secular court. By implication, this is because filing for an injunction does not violate the *issur arkaot* and therefore does not constitute grounds to refuse appearance before a *beit din*.

This is also the opinion of Ramah Mi'Panu 51 quoted by *Knesset Hagedolah* 73 (*Beit Yosef* 47) and R. Ezra Batzri, *Dinei Mamonot* 1:5:11. Ramah Mi'Panu writes that a plaintiff is permitted to file for a preliminary injunction in order to freeze assets – and thereby avoid imminent monetary loss – so that the case may be taken to *beit din*. Similarly, Rabbi Moshe Shternbuch, *Teshuvot Vehanhagot* 3:440, adds that no permission is required to file for a preliminary injunction in court, but that contemporaneously with emergency court filings the litigants must make it clear that they intend to bring the case before *beit din*. Rabbi Shternbuch reiterates this view in 3:445, where he writes that it is the prevailing custom to be lenient in not requiring permission to file for a preliminary injunction. In 5:362:2, he notes that if it is

Similarly, a plaintiff with an undisputed claim – such as where the defendant has signed a confession of judgment for the full amount being claimed by the plaintiff – may resort to secular court without attempting to litigate the matter in a *beit din*. Since the courts are not being asked to adjudicate competing claims, such an action could be characterized merely as a collection action; in turn, there may be no resulting violation of the prohibition against litigating in secular court.[20]

Likewise, non-adversarial proceedings – such as naturalization proceedings, probate of an undisputed will, and applications for name changes – are also permitted in secular court; such "ministerial" tasks simply do not fall within the ambit of the *issur arkaot* because the parties are not asking the secular court to exercise judgment – just exercise their authority.[21]

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possible to get permission from a *beit din* one should do so; and that if that is not possible, it is appropriate to ask permission from the rabbi of the area.

20. *Shu"t Maharsham* 1:89 quotes the position of the *Av Beit Din* of Butchatch who permits going to secular court in the case of a defendant who admits his debt. He argues that with the admission of liability, the case is viewed as if a decision was already rendered, and enforcement in secular court is akin to enforcing a decision of *beit din*, which does not violate the prohibition of appearing before secular courts (see section 3). Requesting permission prior to going to court to enforce such an obligation is merely a "*middat chassidut*." See 2:252, 3:195 where he reiterates this position. Similarly, R. Shmuel Wosner, *Shevet Halevi* 2:263:3 permits use of secular courts to collect a "*chov barrur*", or clear debt, provided basic halachic laws of debt collection (such as certain debtor protection laws enumerated in *Shulchan Aruch, Choshen Mishpat* 97:23) are not violated. See R. Yaakov Kamenetsky, *Emmet LeYaakov*, *Choshen Mishpat* 26, who suggests that secular courts may be utilized when one is merely coming to take what is clearly his and requires no decision from *beit din*. Similarly, R. Mordechai Eliyahu, *Techumin* 3: pg. 244, permits appearance before a secular court to collect a clear debt.

21. See, e.g. Rabbi J. David Bleich, *Contemporary Halachic Problems,* Vol. 5, pg. 26.

Thus far, we have outlined how the source of and rationale behind the *issur arkaot* limits the *issur*'s application. Accordingly, there are some claims or issues that can be submitted to secular courts without violating the *issur arkaot*; this is true in cases where the submitting party is not seeking a judgment from secular authorities and therefore is not demonstrating a preference for secular adjudication over halachic adjudication.

With this background, we turn next to the process for confirming *piskei din* in contemporary U.S. courts.

II. A Primer on Confirming *Piskei Din* in State and Federal Courts

In a nutshell, U.S. courts treat *piskei din* as arbitration awards, rendering them legally enforceable under both state and federal law. Arbitration is an adjudication of a dispute by a person or persons selected by the parties.[22]

Arbitrators' adjudication of a dispute includes ordering discovery, conducting hearings, and receiving evidence and testimony.[23] At the close of arbitration proceedings, arbitrators issue an award which details their determination regarding

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22. See generally Soia Mentschikoff, "Commercial Arbitration," *Columbia Law Review*, 61: 846-69 (1961); Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92: 353-409 (1978).

23. It is true that "by agreeing to arbitrate a statutory claim, a party . . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985). However, the statutory framework of each jurisdiction does demand adherence to certain basic procedures if the award is to be enforced. See, e.g., 9 U.S.C. §10 (allowing a court to vacate an award where the arbitrators "refused to hear pertinent evidence"); CPLR §7506 (requiring arbitrators to provide adequate notice to the parties in advance of a hearing, to allow parties to present evidence and cross-examine witnesses, and to allow each party to be represented by an attorney).

liability and damages.[24] Arbitrators are not required to provide any explanation for their award.[25]

The mechanism to have a claim arbitrated by a *beit din* is the same as it is for standard arbitration; the parties must either sign an arbitration agreement to have a religious arbitral panel resolve the relevant dispute or include such an arbitration clause in a signed contract.[26] In so doing, parties consent to exit the realm of standard legal adjudication and enter into binding arbitration.[27]

For a *psak din* to become legally enforceable, the victorious party must petition a court to "confirm" the award.[28] In some jurisdictions – including New York and under federal law – a party has only one year to confirm an arbitration award.[29]

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24. See 9 U.S.C. §9; CPLR §7507.

25. See ,e.g., United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award"); Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998); Salco Constr. Co. v. Lasberg Constr. Assocs., 249 A.D.2d 309, 309-310,671 N.Y.S.2d 289, 289 (2d Dep't 1998).

26. Tal Tours v. Goldstein, 808 N.Y.S.2d 920, 920 (2005) ("An agreement to proceed before a bet din is treated as an agreement to arbitrate"); see also Ginnine Fried, Comment, "The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts," *Fordham Urban Law Journal*, 31: 633-655 (2004).

27. Kingsbridge Center v. Turk, 469 N.Y.S.2d 732 (1983) (confirming the beth din decision because the parties consented, through a written agreement, to have the beth din panel adjudicate the matter); Kovacs v. Kovacs, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (confirming beth din award because parties "knowingly chose" to participate in the arbitration).

28. See, e.g., 9 U.S.C. § 9; CPLR §7510.

29. CPLR §7510; 9 U.S.C. §10. Other jurisdictions that have a one year statute of limitations include Ohio – one year, or even a reasonable amount of time after one year on a showing of good cause if no prejudice results, see Ohio Rev. Code Ann. § 2711.09; Georgia – one year, see Ga. Code Ann. § 9-9-12; Connecticut – one year, see Conn. Gen. Stat. Ann. § 52-417. Some jurisdictions, however, have no statute of limitations for confirming an arbitration award. Florida – no statute of limitations, see, e.g., Moya v. Bd. of Regents, State Univ. Sys. of Florida, 629 So. 2d 282, 284 (Fla. Dist. Ct. App. 1993); Illinois – no statute of limitations, see United Steelworkers of Am.,

Upon receiving such a motion, a court must confirm the award – thereby making it legally enforceable – unless there exists some reason to vacate – that is, reject – the arbitration award. A court can only vacate a *psak din* under very limited circumstances. As a general matter, such circumstances typically include, among others, "corruption, fraud or misconduct in procuring the award" or "partiality of an arbitrator appointed as a neutral . . . ."[30] Accordingly, courts will refuse to confirm an arbitration award where the award fails to represent the decision of a neutral arbitrator freely chosen by the parties.

Importantly, such grounds for vacating a *psak din* do not allow a court to revisit the merits of the underlying dispute when considering whether or not to confirm an award.[31]

AFL-CIO-CLC v. Danly Mach. Corp., 658 F. Supp. 736, 737 (N.D. Ill. 1987); Massachusetts – no statute of limitations, see Mass. Gen. Laws Ann. ch. 251, § 11; Tennessee – no statute of limitations, see Mass. Gen. Laws Ann. ch. 251, § 11; Texas – no statute of limitations, see Tex. Civ. Prac. & Rem. Code Ann. § 171.087. In addition, examples of other states that have adopted different statute of limitations include: California – four years, see Cal. Civ. Proc. Code § 1288; New Jersey – three months, see N.J. Stat. Ann. § 2A:24-7; Pennsylvania – 30 days, see 42 Pa. Cons. Stat. Ann. § 7342.

30. CPLR §7511(1) (listing the statutory grounds for vacatur in New York); see generally Amina Dammann, *Note: Vacating Arbitration Awards for Mistakes of Fact*, 27 Rev. Litig. 441, 470-75 (2008) (collecting state grounds for vacatur).

31. See, e.g., Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976) ("[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes."); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."). In fact, arbitrators are empowered to resolve disputes equitably, fashioning results to address the fact-bound circumstances before them. See, e.g., Reliastar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2d Cir. 2009) ("Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate."); Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement, 668 F. Supp. 267, 271 (S.D.N.Y. 1987) ("Arbitrators have broad discretion in fashioning remedies and may grant equitable relief that a

Indeed, "[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one."[32] Furthermore, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies."[33] In fact, "even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice."[34] Moreover – and of central importance to this article's conclusion – a court cannot vacate an arbitration award unless the losing party makes a motion to vacate the award.[35]

There are some limited exceptions to the general principle that a court may not vacate an arbitration award – and, in turn, a *psak din* – based upon the substance of the award itself. For some time under federal law, courts could vacate an award if they found the award to be made in "manifest disregard of the law,"[36] which is typically understood to cover

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Court could not." (internal quotation marks and citation omitted)).

32. TC Contr., Inc. v. 72-02 N. Blvd. Realty Corp., 39 A.D.3d 762, 763 (2d Dep't 2007).

33. N.Y. State Corr. Officers & Police Benevolent Ass'n v. State, 94 N.Y.2d 321, 326 (1999).

34. Id.

35. See, e.g., 9 U.S.C. §10 (empowering a federal court to vacate an award "upon the application of any party to the arbitration"); CPLR 7511(b); Boggin v. Wilson, 14 A.D.3d 523, 524 (2d Dep't 2005) ("Generally, an arbitration award may only be vacated upon a motion by a party seeking this relief. Indeed, the burden of proof that an award has been imperfectly rendered or is the result of fraud, or is subject to vacatur on any other ground enumerated within CPLR 7511 (b), rests upon the party moving to vacate."). But see Matley v. Matley, 234 Mich. App. 535, 537 (1999) (noting that "MCR 3.602(J)(1) provides that the court may vacate an arbitration award on application of a party" but allowing a court to *sua sponte* vacate an award in the limited circumstances "when the court becomes aware that the award was procured by fraud").

36. The manifest disregard of the law standard finds it origin in the dicta of *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953). It has subsequently been

cases where "the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it."[37] However, in 2008, the Supreme Court insinuated that this should not be considered a legitimate ground for vacating awards.[38] Since that time, a number of courts have expressed serious reluctance to apply the "manifest disregard of the law" doctrine.[39]

In some jurisdictions, courts can also vacate arbitration awards if they are deemed "wholly irrational." However, such an inquiry does not give a court free reign to reinvestigate the merits of a dispute; instead, it simply allows a court to confirm that the award is not, for example, based upon a factual predicate that both parties rejected during the arbitration.[40]

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referenced on a number of occasions by the Supreme Court. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting); Shearson/American Express v. McMahon, 482 U.S. 220, 259 (1987); First Options v. Kaplan, 514 U.S. 938, 942 (1995).

37. Cytyc Corp. v. Deka Prods. Ltd., 439 F.3d 27, 35 (1st 2006).

38. Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008).

39. Whether or not *Hall Street Associates* is read as a complete repudiation of the manifest disregard of the law standard is a matter of disagreement between the courts. Compare Ramos-Santiago v. UPS, 524 F.3d 120, 124 n.3 (1st Cir. 2008) ("acknowledge[ing] the Supreme Court's recent holding in *Hall Street Assocs*. . . . that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act."); Prime Therapeutics LLC v. Omnicare, Inc., 2008 U.S. Dist. LEXIS 41306, at *15 (D. Minn. May 21, 2008) with Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277 (9th Cir.2009) (concluding the manifest disregard of the law remains a valid ground for vacatur even after *Hall Street Associates*); Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008).

40. See, e.g., Loiacono v. Nassau Cmty. Coll., 262 A.D.2d 485,692 N.Y.S.2d 113 (2d Dep't 1999) (vacating an award as irrational where an arbitrator made findings contrary to facts agreed upon by all parties); see also Spear, Leeds & Kellogg v. Bullseye Sees., Inc., 291 A.D.2d 255,738 N.Y.S.2d 27 (1st Dep't 2002) (vacating an arbitration award as irrational where the arbitrator awarded damages for an already dismissed claim).

In addition, it would appear, notwithstanding the Supreme Court's decision in *Hall Street Associates*, courts may still vacate an award if it is

Below we address two questions: (1) is it halachically permissible to confirm a *psak din* in secular court, and (2) under what circumstances should parties be particularly vigilant in confirming a *psak din* in secular court.

III. Halachic Permissibility of Confirming *Piskei Din* in Secular Courts

Based on the foregoing, it would seem that confirmation of a *psak din* in secular court should not be considered a violation of the *issur arkaot*. The *issur arkaot* is limited to litigation of the underlying merits of a dispute before a secular court when such litigation requires the court to render judgment, thereby demonstrating a preference for secular adjudication over halachic adjudication. By contrast, courts considering a petition to confirm a *psak din* are barred – as a matter of secular

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contrary to public policy. See Chase Bank USA, N.A. v. Hale, 859 N.Y.S.2d 342, 351 (N.Y. Sup. Ct. 2008) ("Assuming that [the public policy exception] may be viewed merely as [a] judicial interpretation[] of section 10(a)(4) of the FAA . . . and not as establishing any additional common law grounds for vacation of arbitral awards, they would retain vitality for analysis post-*Hall Street*."); Alan Scott Rau, "Fear of Freedom," *American Review of International Arbitration*, 17: 469-511 (2006). This would especially appear to be the case according to courts that have already concluded that *Hall Street Associates* did not, in fact, reject the "manifest disregard of the law" ground for vacating arbitration awards. See supra note 39.

However, vacating an award on such grounds does not require a court to relitigate the merits of the dispute; the court continues to take the arbitration award as decided. Instead, the court simply must determine whether the award runs contrary to well-defined and dominant public policy, which has been "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)); see also United Paperworkers v. Misco, 484 U.S. 29, 43 (1987). Accordingly, "generalized and ill-defined" incantations of public policy are insufficient to support vacatur of an arbitration award. See, e.g., Matter of North Country Cmty. Coil. Ass'n of Professionals (North Country Cmty. Coll.), 29 A.D.3d 1060, 1062,814 N.Y.S.2d 770, 772 (3d Dep't 2006); County of Nassau v. Sheriff's Officers Ass'n, 294 A.D.2d 31, 37, 743 N.Y.S.2d 503, 509 (2d Dep't 2002).

arbitration law – from revisiting the merits of the underlying dispute; moreover, seeking confirmation of a *psak din* in secular court is merely a method to enforce a *beit din*'s judgment under Jewish law and does not demonstrate any preference for secular adjudication.

Given that Jewish communities have long contended with their minority status in the Diaspora, *poskim* have addressed a number of cases where Jews looked to non-Jews to help collect monies won in *beit din* proceedings. Indeed, *poskim* have frequently grappled with the permissibility of enlisting secular authorities' aid in the enforcement of *piskei din* in a wide range of circumstances – some of which were not as judicial as the contemporary process of confirming *piskei din* in U.S. court. Importantly, in addressing the larger category of enlisting the aid of non-Jews to "enforce" *piskei din*, *poskim* have provided useful parameters for considering the contemporary analog of confirming *piskei din* in secular court.

Indeed, much of this halachic literature revolves around an implicit tension between an individual enlisting the help of non-Jews to enforce a *psak din* and a comment of Ramo, in the context of the laws of *avid inish dina lenafshei,* "taking the law into one's own hands."[41] Ramo writes that although under certain circumstances an individual may seize property that he rightfully believes to be his own, he may not enlist the help of non-Jews when doing so.[42] In light of this view of Ramo, the *Urim* questions whether allowing parties to look to secular authorities to enforce a *psak din* violates this prohibition against parties deploying non-Jewish assistance when "taking the law into their own hands."[43]

In addressing the *Urim's* concerns, *poskim* have frequently focused on the source behind and rationale justifying the *issur*

41. *Choshen Mishpat* 4:1.

42. Id.

43. *Choshen Mishpat*, 26:5

arkaot. For example, the *Imrei Binah* responds to the *Urim*'s question by pointing out that enlisting the aid of non-Jews to enforce a *psak din* is no different than the principle in *Gittin*[44] that permits a non-Jew to coerce a Jew to "do as the Jews tell you" with respect to delivery of a *Get* (Jewish divorce paper).[45] Similarly, he suggests that since the secular authorities are merely telling the defendant to do as the Jewish courts have ruled, there is no *"mishpat"* or judgment implicated by enlisting non-Jews to aid in the enforcement of a *psak din*.

Imrei Binah focuses on the source of the *issur arkaot* and thereby limits its application to circumstances where secular authorities are being requested to render an independent judgment. When asking secular authorities to enforce a preexisting *psak din* on its own terms, the party is merely petitioning the secular authorities to enforce a decision of *beit din*, rather than adjudicate a dispute between parties.

Similarly, Rabbi Bentzion Yaakov Wosner[46] offers an answer to the *Urim's* question, which emphasizes that the reason behind the *issur arkaot* is, as articulated by Rashi and Rambam, to prevent "giving honor to the name of idols" and "raising a hand against the Torah of Moshe." In the case of a plaintiff who does all he can to resolve the case in *beit din*, enforcement via a secular court is not an insult to the Torah; on the contrary, enforcement by the secular authorities of a *beit din* decision honors the name of the Torah.[47]

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44. 88b.

45. *Imrei Binah, Hilchot Dayanim, Choshen Mishpat* 27.

46. *Divrei Mishpat* 3:197-200.

47. See R. Asher Weiss, *Minchat Asher, Devarim* 3:1 who makes a similar point.

Rabbi Wosner also provides two alternative methods of resolving the *Urim's* question. First, Ramo was concerned with non-Jewish involvement before a *beit din* decision was rendered, out of fear that the result would be incorrect or too harsh. Enforcement of a *beit din*'s decision already rendered does not present a similar concern. Second, even the *Urim*, who questioned the employment of non-Jews to enforce a *beit din* decision, permitted doing

Most halachic authorities agree with the opinion of Maharshach that a party who has been found liable by a *beit din*, but refuses to adhere to its decision, may be brought immediately to secular court to enforce the decision without permission of *beit din*.[48] A minority of authorities permit enlisting the assistance of non-Jewish authorities to enforce a *psak din*, but only after receiving permission from a *beit din*.[49] Generally, seeking permission from a *beit din* provides additional indication that the recourse to secular authorities is not in any way intended to "give honor to the name of idols."[50]

The halachic literature addressing the larger issue of enlisting secular authorities to enforce *piskei din* provides a clear blueprint for analyzing the contemporary process of confirming *piskei din* in U.S. courts. According to those who do not require permission from *beit din* to enforce a *psak din*, confirmation of a *psak din* in secular court would seemingly be permitted without permission of *beit din* as well. U.S. courts, when asked to consider a motion to confirm a *psak din* as an arbitration award, do not render a judgment regarding the merits of the dispute, nor does mere submission of an already decided *psak din* demonstrate any preference for secular

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so in the case of an "*alam*" or strong non-compliant individual. In the case of one who refuses to adhere to a *beit din* decision "there is no *alam* greater than this." See *Divrei Mishpat* 3:197-200.

48. *Shu"t Maharshach* 1:152, quoted in *Knesset Hagedolah* 26:14; see also Rabbi Shalom Shwadron, *Shu"t Maharsham* (1:89, 4:105) who concurs with the opinion of Maharshach. This is also the conclusion of Rabbi Shlomo Kluger, *Ha'eleph Lecha Shlomo, Choshen Mishpat* 3, *Kesef Hakodshim, Choshen Mishpat* 26:2, and Rabbi Shmuel Wosner, *Shevet Halevi* 10:263:2.

49. *Imrei Binah* cited above quotes Maharikash who requires permission; however, *Imrei Binah* writes that such an argument is not compelling. *Shulchan Aruch Harav*, *Hilchot Nizkei Mamon* 9, rules that permission from *beit din* is required to employ secular authorities to enforce a *psak din*. Rabbi Moshe Shternbuch, *Teshuvot Vehanhagot* 3:439 writes that it is not customary to follow the opinion of Maharshach who does not require permission.

50. See *Kesef Hakodshim*, *Choshen Mishpat*, 26:2, R. Moshe Shternbuch, *Teshuvot Vehanhagot* 3:441 and 3:445, R. J. David Bleich, ibid, pg. 27, and R. Chaim Kohn, *Divrei Mishpat*, 3: pg. 193.

adjudication over halachic adjudication. Thus, as in the case of enlisting secular authorities to enforce a *psak din*, making a motion to confirm a *psak din* in secular court would not run afoul of the *issur arkaot*. Along such lines, Rabbi J. D. Bleich writes that confirmation of a *psak din* in no way violates Jewish law, since "confirming the award of a *beit din* in civil court simply reserves the option of utilizing the power of the court to enforce the judgment of the *bet din* should that become necessary."[51]

According to those who require permission from *beit din* to enforce a *psak din*, the most natural conclusion is that confirmation of a *psak din* in secular court would be permitted only with permission of *beit din* as well. Such permission serves the additional function of demonstrating that it is the *beit din*'s judgment the party is seeking and that recourse to the courts is not the result of preferring secular adjudication, but is merely an attempt to confirm an already determined *psak din*.

However, even following the analysis that a party requires permission prior to confirming a *psak din* in secular court, such permission is typically granted in the *beit din* arbitration agreement between the parties. For example, the Beth Din of America, as part of its arbitration agreement, requires the parties to agree that the *dayanim*'s "judgment may be entered on the award in any court of competent jurisdiction . . . ."[52] Accordingly, the Beth Din of America's permission to confirm the *psak din* in secular court is built into the arbitration agreement between the parties.

Although confirmation of a *psak din* in secular court would appear halachically preferable – or at least equivalent – to enlisting secular authorities in the enforcement of a *psak din*, at least one *posek* has raised the possibility that the opposite may

51. *Contemporary Halachic Problems*, ibid, pg. 28.

52. See Beth Din of America Agreement to Arbitrate, *available at* http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf.

in fact be true. In considering the confirmation process, Rabbi Chaim Kohn queries whether confirmation presents halachic concerns above and beyond a general request for enforcement because, pursuant to a petition to confirm, a judge will allow the other party to contest the decision of the *beit din*.[53] In turn, confirmation could be viewed as requiring the exercise of judgment by the court as to the underlying merits of the dispute – or at least it opens up the possibility for such judgment.

To be sure, after his own thorough analysis, Rabbi Chaim Kohn permits confirmation in secular court primarily because the process – that is, first going to *beit din* and only then seeking recourse in secular court – indicates that the party is not attempting to "raise a hand against Moshe."

However, this emphasis on process neglects a more fundamental ground for permitting confirmation of *piskei din* in contemporary U.S. courts. Specifically, it is not merely the process that provides a basis for permitting confirmation, but the actual confirmation proceedings themselves do not entail the type of "judgment" prohibited by the *issur arkaot*. This is for two reasons. First of all, as a general matter, courts cannot reinvestigate the underlying merits of a dispute when addressing a motion to confirm a *psak din*. Thus, "[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one."[54]

Second, a court cannot, on its own, render a judgment as to a *psak din* and thereby decide to vacate the *beit din's* determination. Instead, a court can only engage in the limited

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53. *Divrei Mishpat* 3:188-189. To be sure, Rabbi Kohn analyzes this issue in the context of confirming an award issued by a dispute resolution forum in the diamond district.

54. TC Contr., Inc. v. 72-02 N. Blvd. Realty Corp., 39 A.D.3d 762, 763 (2d Dep't 2007).

substantive evaluation of a *psak din* allowed by law once the opposing party counters the motion to confirm the award with a motion to vacate the award.[55] Accordingly, the only motion before a state or federal court that would allow the court to render a judgment would be a motion to vacate a *psak din* – not a motion to confirm a *psak din*.

It would therefore appear – based on both the process of confirming a *psak din* and the substance of the court's inquiry in addressing the motion for confirmation – that making a motion to confirm a *psak din* before a secular court in no way violates the *issur arkaot*.

However, there is an important flipside to this analysis: making a motion to vacate a *psak din* would typically appear to violate the *issur arkaot*. Indeed, making such a motion to vacate a *psak din* would invariably "give honor to idols" and constitute "raising a hand against the Law of Moshe." Indeed, to understand how severe a violation of the *issur arkaot* filing a motion to vacate a *psak din* is, consider that a number of *poskim* have held that mere appearance before a secular court to request adjudication – even where the secular court has not made a decision – can violate the *issur arkaot*.[56] When making a motion to vacate a *psak din* on grounds of irrationality or the like, a party does not merely appear in court to request secular adjudication, but it argues to the secular court that the *beit din* was inadequate in its attempt to resolve the dispute.[57]

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55. See supra note 35.

56. See R. Bentzion Yaakov Wosner, *Divrei Mishpat* 3: pg. 195-197; R. Asher Weiss, *Minchat Asher*, *Devarim* 3:1. As noted by R. Wosner and R. Weiss, this conclusion is supported by Ramban, Rambam, and *Shulchan Aruch*, all of whom focus on *appearance* before secular court as triggering the *issur arkaot*. See Rambam, *Sanhedrin* 26:7; Ramban, *Shemot* 21:1; *Shulchan Aruch, Choshen Mishpat* 26:1.

57. See R. Y. E. Henkin, *Kol Kitvei Rav Henkin*, vol. 2, page 179 (including in his version of an arbitration agreement that the parties are prohibited from contesting the *beit din's psak* even in secular court). However, our analysis is not intended to foreclose the possibility that there may be some exceptional

IV. Importance of Confirming a *Psak Din*

In practice, the key issue in confirming a *psak din* is timing. In instances where a *beit din*'s *psak din* simply calls for a one-time payment, the victorious party may likely be able to avoid making a motion to confirm in secular court. If the losing party simply complies with the *psak din* – and makes the one-time payment in a timely fashion – resort to the secular legal system will typically be unnecessary.

By contrast, many *piskei din* require the losing party to make payments over an extended period of time. Examples of such *piskei din* include alimony payments by an ex-husband and salary payments to a reinstated employee. The concern in such cases stems from the possibility that the losing party will comply with the *psak din* only until the statute of limitations for confirming the *psak din* has not yet run.[58] Thus, for example, consider a case in New York where an ex-husband is required to make family support payments of $2000 per month. As an initial matter, the ex-husband may very well comply with the award for the first year, making his regularly scheduled payment of $2000. Under such circumstances, there may be an instinct not to bother confirming the *psak din*.

However, failing to confirm the *psak din* in New York Supreme Court under such circumstances could have very serious consequences. The statute of limitations for confirming

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grounds for filing a motion to vacate a *psak din* – such as alleged fraud – that would not constitute a violation of the *issur arkaot* because the *beit din* proceedings themselves do not represent valid halachic adjudication. In such circumstances, a party that believes they are the victim of fraudulent adjudication before a *beit din* may need permission from another *beit din* before filing a motion to vacate the *psak din*. Especially given the extraordinary considerations of *chillul hashem* in this context, an individual faced with such an issue should consult with appropriate legal and halachic counsel to determine the most prudent course of action.

58. See supra note 29 (listing the statute of limitations for various jurisdictions).

an arbitration award in New York is one year.[59] Accordingly, where after one year the ex-husband ceases making his required payments, if the ex-wife has failed to confirm the award, she may very well no longer be able to because the statute of limitation will have run.[60] Of course, in each jurisdiction the statute of limitations may be different. Therefore, the timing issues will largely depend both on the timing of the payments required by a *psak din* and the statute of limitations for confirming an award in the relevant jurisdiction.

Conclusion

The purpose of this article has been to consider the

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59. CPLR §7510. Moreover, the *beit din* cannot simply issue another *psak din* with a new date because "once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration." McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731, 734 (9th Cir. Cal. 1982); see also La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967); Mercury Oil Refining Co. v. Oil Workers Int'l Union, 187 F.2d 980, 983 n.1 (10th Cir. 1951).

60. There may be a possibility of raising equitable grounds for tolling the statute of limitations. For example, "a party may be equitably stopped from pleading the Statute of Limitations defense where he induced the petitioner by fraud, misrepresentation or deception to refrain from commencing the proceeding [to confirm an arbitration award] in timely fashion." Kilstein v. Agudath Council of Greater New York, Inc., 133 A.D.2d 809 (2d Dep't 1987). In addition, a party may still be able to use an arbitration award as part of a defense even after the statute of limitations on confirming an award has run. Allstate Ins. Co. v. Hartford Acci. & Indem. Co., 90 A.D.2d 781, 783 (2d Dep't 1982). Unfortunately, such arguments are far from dependable, and reliance on such arguments should be avoided. See Weinstein, Korn & Miller, *New York Civil Practice: CPLR*, 13: § 7510.01 ("After the award is made, the parties may voluntarily comply with it, thus rendering any court proceeding to confirm the award moot. However, if the award is left to stand alone, it is not directly enforceable against a recalcitrant party. Moreover, its efficacy in the context of res judicata or collateral estoppel is at best questionable. Accordingly, the arbitration winner has good cause to convert the arbitration award into a judgment . . . .) (footnote omitted). However, if someone does find themselves in such circumstances, they ought to immediately consult with an attorney.

applicability of the *issur arkaot* to the confirmation of *piskei din* in contemporary U.S. courts. As part of the analysis, we have outlined how both the source of and rationale behind the *issur arkaot* are frequently deployed by *poskim* in order to limit the scope of the *issur*. Accordingly, where submitting a dispute to secular court neither requires the court to exercise judgment nor does it demonstrate a preference for secular adjudication over halachic adjudication, in the view of many *poskim* the *issur arkaot* does not apply. As a result, submitting a *psak din* for confirmation in secular court may not violate the *issur arkaot*.

We have also argued against a common misconception: that there is no value in confirming an award once the losing party begins complying with a *psak din*. This is not the case, especially where the losing party is required to make payments over an extended period of time and the jurisdiction's statute of limitations for confirming *piskei din* is limited in duration. Indeed, parties who wait until after the statute of limitations has run to confirm an award on the presumption that the losing party will continue to make payments may find themselves without a legal enforcement mechanism in the event that the payments stop.

cRc Guide to Starbucks Beverages*

Rabbi Sholem Fishbane, Rabbi Dovid Cohen

A. Introduction

In the late 1980's Starbucks first began expanding out of their home base in Seattle, and the coffee world has not been the same since. Starbucks changed coffee-drinking from a personal pleasure into a social and cultural experience. Ever since there have been questions as to exactly what a kosher consumer can drink at a Starbucks store.

Most kosher consumers first approached the question with the simple principle of "you can buy a black coffee anyplace". They started to question this principle when they realized that the stores sell items as varied and unexpected as Cinnamon Dolce Crème Frappuccino, Espresso Macchiato, and Caramel Brulée Latte, and they became downright concerned when the chain introduced hot sandwiches such as "Turkey & Swiss Cheese" and "Chicken Santa Fe Panini". No longer was this a simple coffee shop, and it became clear that unless a given store was kosher certified, consumers would have to be selective about what they could drink.

This article – based on visits to multiple Starbucks locations,

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* This article is an internal memo of the Chicago Rabbinical Council on the subject of determining the kashrut status of Starbucks facilities and their products. The information is valuable in its own right and is simultaneously an important insight into the complexity of kosher certification in the modern world. Inasmuch as it is an internal memo of the cRc, their original spelling has been retained.

interviews with current and former company personnel, research of the halachic principles, and discussions of all of the above with experts in the field – will attempt to clarify the multiple issues involved, and will be divided into the following sections:

- **The Starbucks Store**
- **Inherent Kosher Status of Items**
- **Transfer of *Ta'am***
- **Practical Applications**
- **Certifying and Semi-Certifying a Starbucks**

The information presented in this article is current for Starbucks locations in the United States, but is subject to change and may be different in other countries.

B. The Starbucks Store

1 – Full Service vs. Kiosk

There are two models of Starbucks stores:

• Full Service stores are freestanding enterprises owned and staffed by the company, and serve a full menu of items. Of particular concern is that they (almost) always sell hot, non-kosher sandwiches and use a sanitizing dish-machine. This will be discussed in more detail in the coming sections.

• Kiosks are smaller stands which belong to and are operated by a chain store (e.g. Target) or other food service provider (e.g. airport restaurant) under license from Starbucks. These stores have a more limited menu; they typically do <u>not</u> sell hot sandwiches, and often do not have a sanitizing dish-machine. They operate according to the corporate standards of food preparation and cleanliness, but may have somewhat different procedures than the full-service stores.

2 – In Front of the Counter

Most Starbucks stores have packaged items on the customer side of the counter which are available for sale. Those include Starbucks branded utensils (e.g. mugs) and foods[1], and other snacks and drinks. The kosher status of those items is not the subject of this article.

3 – Behind the Counter

The Starbucks baristas (the title used for Starbucks employees who prepare beverages) prepare a dizzying variety of beverages, using the following four primary areas:

- **Coffee Brewer**

This is a simple coffee machine which brews plain, unflavored ground coffee beans (regular and decaffeinated) into drinkable coffee. The coffee grinds are placed on top of a filter paper which in turn is supported by a metal filter basket, and then hot water pours through the grinds and drips through the filter into the waiting insulated "pot" (a.k.a. urn). As needed, coffee is poured into cups through the spigot.[2]

The brew-pots are never used for flavored coffee; rather, flavor "syrup" is squirted into individual cups of coffee as per

1. For example, (a) unflavored VIA instant coffee is certified kosher but the flavored versions are not (yet) certified and are therefore not recommended at this time, (b) many – but not all – varieties of bottled frappuccino are certified by Rabbi Z. Charlop (and marked "KD") and recommended even though the frappuccino base used in the stores is not certified and not recommended.

2. During some hours of the day a kiosk (or a less-busy store) may choose not to maintain a pot of decaffeinated coffee because there aren't enough customers to justify it, and will instead brew individual cups when a customer asks for that beverage. In order to do this, the barista will put coffee grinds into a miniature (plastic) brew basket and (paper) filter directly above the customer's cup, and pour hot water through those grinds directly into the cup. [The equipment used for this is called a "pour over brew station".] The water used for that coffee will usually be carried from the hot-water spigot in a plastic pitcher; that pitcher and the pour over brew station may possibly be washed together with the other dishes (as will be discussed below).

the customer's request.

- **Espresso Bar**

This dual-purpose machine is used to produce espressos and steamed-beverages, as follows:

The espresso side of the machine is essentially a coffee brewer which uses pressure to produce individual cups of coffee (rather than whole pots), which are concentrated to fit into a small shot-glass. These "shots" of coffee are called espressos. Some customers drink espresso as-is, but most use them as part of some other beverage such as an Americano (a shot diluted into a full serving of hot water), or a Latte (a shot mixed into a cup of steamed milk).

The steaming side of the machine has one or two stationary, vertical steam "wands" which are each about 5 inches long and 1/3 inch in diameter, and are parallel to one another. Milk (or another beverage) is put into a special 5 inch tall metal cup which is slipped under the wands such that the wands reach down all the way into the milk, and steam blows through the wands into the milk. The steamer is used for milk, soy milk, cream, eggnog (during certain months of the year), and apple juice. Steamed beverages can be drunk as-is (e.g. steamed apple juice or milk), but are often combined with an espresso shot to create a latte.[3] Steamed milk is also put on top of a (reconstituted) cocoa base to create hot chocolate.

- **Oven**

Starbucks offers a variety of salads, pastries, baked goods, and sandwiches, all of which arrive at the store after being baked/prepared, and individually wrapped elsewhere. However, the stores do offer to warm sandwiches in a small warming oven which uses both microwave and standard heat simultaneously. Sandwiches are put onto a piece of wax paper

3. Espresso is added on top of steamed milk in a latte macchiato, and before/below the milk in a caffé latte.

which in turn is put onto a rectangular ceramic plate that remains in the oven (except when it is removed for cleaning), and once the sandwich is hot enough it will be put onto a smaller, round ceramic serving plate, cut in half (if the customer requests), and given to the customer.

- **Blender**

Every store has one or more blenders, each of which consists of a stationary base that contains the motor and a pull-down cover. In addition, they will also have a dozen or more large plastic/Plexiglas pitchers (each of which has a set of blades on bottom) that fit into the base.

The pitchers are used for blending cold or ambient temperature ingredients (concentrated coffee and tea, cream, Frappuccino base, fruit, ice, milk, smoothie mix, soy milk). A similar pitcher (not used in the blender) is the receptacle for storing double-strength coffee and tea (used in iced coffee and tea) which are typically made once a day; the beverages are hot when they are put into the plastic pitcher.

- **Miscellaneous**

Tea is brewed right in the customer's cup using a tea bag and hot water. Iced tea is usually made with an ambient temperature double-strength liquid tea blended with ice. If the customer asks for a flavor that the store did not prepare a double-strength concentrate for, the barista will prepare a single-serving of double-strength tea in the customer's cup or in the blender-pitcher.

All these beverages can be mixed and matched with a wide assortment of toppings and additives to create variations or entirely new items. The most famous of the latter category is "Frappuccino" which is a family of blends made with a base plus coffee, tea, milk, cream, ice, fruit and/or flavor.

4 – Cleaning

Equipment is cleaned and sanitized using the following four

basic methods:

• **Rag** In a few places in (most of) the stores there are small, shallow containers filled with sanitizing solution, and in turn there is a rag soaking in that solution. After a piece of machinery (e.g. the espresso bar) is used, it is wiped down with the rag. In principle, each rag is supposed to be dedicated to a given area or piece of equipment, but in practice many times a rag from one area may be used to clean elsewhere.

• **Sink** Just about all equipment gets washed in a three-compartment sink when it gets dirty (e.g. after a plastic pitcher is used to blend a smoothie), at given intervals during the day, and/or at the end-of-day cleanup. In the three-compartment sink, the dishes first soak in a hot soapy solution (in sink #1), are then dipped into plain hot water or hosed down with plain hot water (sink #2), and are then sanitized by being dipped into ambient temperature water mixed with sanitizing solution (sink #3). The wash-sink (sink #1) is currently configured so that soap is automatically blended into all hot water coming out of the sink's faucet, but hot water from the overhead sprayer (used in sink #2) does not have soap mixed in.

• **Dish-Machine** At the end of each day (or after considerable use), utensils which are already clean are put into a machine that looks like a dishwasher for a 2-minute sanitizing. [As noted, most kiosks do not use a dish-machine.] The dish-machines have a two-part cycle – first sanitizing solution is sprayed onto the dishes and then fresh water is sprayed on to rinse the dishes. In most Starbucks stores, they use a Hobart model LXiH dish-machine[4] which accomplishes

4. Baristas regularly refer to the dish-machine as "the Hobart", and the exact Hobart model is reported in passing at http://bit.ly/HobartID. [Hobart's other dish-machine (the SR24) is similar to the LXi series, but the cycle is somewhat longer.] There are reports that some Starbucks stores use the LXiC model which uses ambient temperature water and a different sanitizer to accomplish the same goals as the LXiH model. The use of such a dish-machine at a given store would be advantageous for kosher consumers,

both of the aforementioned cycles with 180° F water. We will see below that the use of the LXiH machine has a significant negative affect on the *kashrus* of products at Starbucks.

• **Clean in Place** The two parts of the (espresso) bar have built in cleaning protocols, as follows: The internal parts of the espresso side are never put into the sink or dish-machine; rather, a barista drops a special pellet into the top of the machine and runs a hot water cycle which cleans and sanitizes the equipment. Part of the cleaning of the wands on the steamer side involves blowing steam through the wand (with or without a cup there) which seems to remove residue by sheer force of heating the wand-walls. [In addition, the wands are regularly wiped with the rags, and may sometimes be taken off the machine and washed in the sink and dish-machine.] In addition, the brewed-coffee "pots" are cleaned in place and not put into the sink or dish-machine.

There are some exceptions to the above cleaning methods. For example, some kiosks find it easier to use disposable paper towels instead of reusable rags, and some locations choose to merely rinse their brew baskets in a regular sink rather than put them into the three-compartment sink and dish-machine.

The significance of the cleaning information presented above will be clarified in later sections of this article.

C. Inherent Kosher Status of Items

In this section, we will discuss the inherent kosher status of the items used at a typical Starbucks. Clearly, items which are either not kosher or we cannot determine their kosher status, cannot be used by kosher consumers. The coming sections will discuss ways in which some of the inherently kosher items might lose that status as a result of their being prepared in proximity to the non-kosher items.

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because it would be one less place where kosher and non-kosher equipment might be washed simultaneously (as discussed in the text below).

Before discussing specific items, it is worthwhile to note that all shelf-stable ingredients used at Starbucks stores are uniform in every store in the USA. Thus, all stores use the identical coffee beans, flavor syrups, tea, soy milk, Frappuccino mix, and toppings. In contrast, all items that must be continually purchased fresh are bought regionally;[5] all stores in the Midwest might use the same milk and cream, but stores in the Northeast may have a different supplier.

The following is a list of the inherent kosher status of many items used at Starbucks. **As noted, (a) this information is current for January 2011 and may change, and (b) items listed as kosher on this list may become non-kosher during preparation in the store, as will be discussed.**

Item	Status
Apple Juice	Usually OU, check the package
Baked goods	Purchased regionally, likely not kosher
Breakfast meals	Not kosher
Caramel sauce (Brulée)	Not certified, and contains kosher-sensitive ingredients
Caramel syrup	OU certified
Coffee beans	Kosher (includes regular and decaffeinated)
Cream	Purchased regionally, check the package
Eggnog	Purchased regionally, check the package
Flavor syrups	Many are OU certified, check the package
Frappuccino base	Not certified, and contains kosher-sensitive ingredients
Half and Half	Purchased regionally, check the package

5. Items such as pastries, sandwiches, and salads might be bought even more locally than milk and cream.

Hot chocolate base	Not certified, but does not contain any kosher-sensitive ingredients
Ice	Kosher even without certification
Lemonade	Base is not certified and is processed in a way that requires kosher certification
Milk	Kosher even without certification (whole, skim and 2%)
Mocha	Cocoa portion is not certified, but does not contain any kosher-sensitive ingredients [this product also contains coffee]
Oatmeal	Unflavored is kosher even without certification (fruit and nut packs are not certified)
Panini Wraps	Purchased regionally, likely not kosher
Pastries	Purchased regionally, likely not kosher
Salads	Not kosher[6]
Sandwiches	Not kosher
Smoothie mix	Not certified and contains kosher-sensitive ingredients
Snack plates	Not kosher
Soy milk	UMK certified
Sugar	Kosher even without certification
Sugar substitutes	Usually bear certification, check the package
Tea	Many are KSA certified, check the package
Vanilla	OU
White chocolate mix	Not certified and contains kosher-sensitive ingredients

6. Most of the salads contain ingredients which are not kosher or require kosher certification, such as blue cheese or chicken. Some are pure vegetables, in which case their kosher status depends on whether the vegetables are of the type that might be infested with bugs and to which other ingredients are added (e.g. dressing, croutons).

Yogurt	Not certified and contains kosher-sensitive ingredients

D. Transfer of *Ta'am* (Flavor)

The previous list makes it clear that a kosher consumer cannot purchase certain items in a Starbucks (e.g. frappuccino, pastries, sandwiches), and cannot even consider using certain other items without first checking the individual packages to see if they are kosher (e.g. cream, flavor syrups, half-and-half, tea). What about purchasing items made with ingredients from the latter group or with ingredients that are surely kosher? How does the presence of non-kosher food in the establishment affect the otherwise kosher items? To answer these questions, we will first note some of the applicable principles of how and when *ta'am*/flavor transfers from one item to another, and see how they apply to our situation.

1 – Residue and *Bitul B'shishim*

The simplest way for a kosher item to become non-kosher is if non-kosher material gets mixed into it. Therefore, it is obvious that if the half-and-half in a given Starbucks is not kosher, one may not add any to their otherwise kosher coffee.

That said, is there a concern that residue from one product might accidentally end up in another one? Must I be concerned that some non-kosher frappuccino will remain in the plastic pitcher from a previous customer and get mixed into the iced coffee which I ordered? The answer is a resounding "no". The Starbucks cleanliness practices are so strict and well adhered to that all customers – kosher and otherwise – can be sure that there is no residue from one beverage to another.

In the rare case that there would be a tiny amount of residue, we would apply the general principle of *bitul b'shishim* which states that if a small amount of non-kosher gets mixed into a kosher material, the kosher material retains its status if there is

at least 60 times more kosher than non-kosher.[7] Thus, if 1 ounce of non-kosher is hopelessly dissolved into 100 ounces of kosher, the mixture remains kosher. For this reason, even though it is possible that a tiny bit of non-kosher grease might be on the rag used to wipe the steamer wands and that grease might therefore end up in my steamed milk, the milk remains kosher because the volume of the milk is more than 60 times the volume of the grease.[8]

One of the situations where *bitul b'shishim* does not permit the food is directly relevant to many Starbucks products, and will be presented below in subsection 4.

2 – Absorbed Taste *(B'lios)*

If food is cooked in a pot, some of the food's taste is absorbed into the pot walls, and that taste can later be absorbed into another food cooked in that same pot. Accordingly, we are all aware that a pot used to cook non-kosher food cannot be used to cook kosher food unless the pot first undergoes a procedure, known as "*kashering*", which removes all absorbed taste from the pot-walls.

As a general rule, flavor can only be absorbed and transferred if the food and pot are hotter than 120° F. Therefore, a plastic pitcher used for blending ambient temperature non-kosher drinks will not absorb any non-kosher flavor, and it can subsequently be used for the hot or cold parts of producing a kosher drink such as an iced coffee.

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7. See *Shulchan Aruch* YD 98:1; *bitul* is measured using the volume of the product (as opposed to its weight) (*Pischei Teshuvah* 98:2).

8. A calculation of the surface area of the wands showed that the entire surface area of both wands would have to be coated in a layer of grease as thick as a credit card (for a 12 ounce "Tall" drink) or a dime (for a 20 ounce "Venti" drink) in order for it not to be *batel b'shishim* in the beverage. Clearly, Starbucks cleanliness standards (and customer sensibilities!) would never allow for such thick grease, and we can therefore state with confidence that any residue on the surface of the wands would be *batel b'shishim*.

However, we have already seen that there are quite a number of non-kosher items which are either processed hot (e.g. sandwiches) or washed in hot water together with other dishes. Does this mean that any beverage prepared with heat at Starbucks is not kosher even if the ingredients are inherently kosher? In order to answer that question, we must investigate some of the detailed halachos of how flavor is absorbed and transferred, and that will be the subject of the coming few subsections.

Important Note

Before proceeding it is worth noting that the proper way of running a kosher kitchen is not to rely on leniencies and complicated reasons to justify the presence of non-kosher ingredients or the cross-using of meat and milk equipment. For example, no conscientious Jewish housekeeper would wash a plate used for ham in her kosher sink, regardless of all the reasons a Rabbi could present why it would not affect her dishes.

This proper attitude towards kashrus, coupled with the realities of a modern-day coffee house, leads many individuals not to drink anything at Starbucks or any other store unless it is kosher certified. We commend anyone who adopts this policy and encourage consumers to consult with their personal Rabbi before relying on any of the logic listed below.

3 – Dairy and *Chalav Yisroel*

Many of the items prepared at Starbucks contain hot milk products. Of course, those items cannot be consumed together with meat, and the dairy status of those items often transfers to other non-dairy items made on the same equipment. In addition to those items having a dairy/*milchig* status, they are also not *chalav Yisroel,* which means that consumers who are particular to drink only *chalav Yisroel* will not be able to have those products. For purposes of this discussion we will follow the position which holds that pareve items produced on clean *chalav stam* equipment <u>may</u> be consumed by people who are

particular to drink only *chalav Yisroel*.[9]

4 – Flavors

The rule of *bitul b'shishim* applies only if a 60:1 ratio is enough to dilute the non-kosher taste to the point that it is not detectable in the kosher food. If, however, the non-kosher taste is concentrated or particularly potent and is able to have an effect even beyond the standard rate of *bitul*, then it is not *batel* and the food is forbidden. Foods that qualify for this special status are referred to as being a *milsah d'avidah lit'amah*, an item "meant" to provide taste.

At first glance, it would seem that a commercially-produced flavor, such as the ones contained in a flavor syrup or in a flavored tea, would qualify as a *milsah d'avidah lit'amah*. "Flavors" are typically able to affect the taste of a food even if they comprise just 1/10 or 1/2 of a percent of the food, and one would therefore imagine that an uncertified flavor should not be *batel b'shishim*.

In fact, the standard at the cRc and most *kashrus* agencies is that (a) items made with uncertified flavors may not be consumed due to the serious concern that those flavors might contain non-kosher ingredients, but (b) if an otherwise kosher item that contains uncertified flavors was processed on kosher equipment, that equipment does not have to be *kashered*. [The exact rationale for this position is beyond the scope of this article, but some detail is given in the footnote.][10]

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9. See for example *Teshuvos Ivra* (Rav Henkin) #43.

10. The lenient position is based partially on the fact that most of the flavor-contributing chemicals are inherently kosher (see below), no single chemical's taste is perceived in the final chemical mixture (i.e. *zeh v'zeh gorem*), and the flavor is used in tiny proportions. Although almost all flavor-contributing components are inherently kosher, many of them are kosher-sensitive due to the concern that they were produced on non-kosher equipment. In that case, the foods are a classic example of מלח הבלוע מדם (*Shulchan Aruch* 105:14) after which one is not required to *kasher*. Other components are non-kosher because they are produced from *stam yayin*,

According to the lenient position, we can somewhat refine our concern that non-kosher foods will affect the kosher ones at Starbucks. Those items which are inherently non-kosher or which contain more than 1/60th non-kosher can potentially affect the kosher products, but those which are inherently kosher and "only" contain uncertified flavor (may not be consumed but) cannot affect the kosher items sold in the store.

Three other items used at Starbucks which have a similar status as uncertified flavors are cream, caramel sauce, and eggnog. These are primarily made from ingredients which are inherently kosher, but each may contain a small amount of ingredients which are not kosher (e.g. gelatin). Those non-kosher ingredients may have enough of an effect on the cream, caramel sauce, or eggnog to render them unacceptable to eat,[11] but not enough to require that equipment used with them be *kashered* before they are used for kosher foods.

This still leaves many items in a Starbucks full-service store that are non-kosher and might affect the other items. However, if one adopts this lenient position then there are truly very few items in a Starbucks kiosk (which does not sell hot sandwiches and pastries) that are non-kosher to the point that they affect other equipment.

5 – *Kli Rishon* and *Kli Sheini*

For purposes of the coming discussion we must define a few terms, and will use an example to do so. If someone heats up water in a kettle, pours the water into a tea cup, and then sticks a spoon into that cup, the kettle [even after it is removed from the fire] is referred to as the *kli rishon* (first utensil – pot that was on the fire), the cup absorbs via *irui kli rishon* (pouring from the *kli rishon*), and the spoon is considered to

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which is *batel b'shishah* and *b'dieved* would not render the foods non-kosher.

11. In this case the non-kosher ingredients are not *batel* due to their being a *davar hama'amid* (e.g. gelatin, diglyceride), as opposed to the case of the flavor where they potentially aren't *batel* because they are a *milsah d'avidah lit'amah*. But as to the discussion in the text, their status is equal.

have been affected only by a *kli sheini* (second utensil). [As noted earlier in subsection 2, the entire discussion is limited to cases where the food is hotter than 120° F.]

Each of these utensils has a different status in halacha:

• ***Kli Rishon*** Taste is thoroughly absorbed into and out of the full thickness of the utensil or food.[12]

• ***Irui Kli Rishon*** Taste is absorbed into a thin layer, known as a *k'dei klipah*.[13]

• ***Kli Sheini L'chatchilah*** It is assumed that taste transfers [into a *k'dei klipah*] and therefore (a) a kosher utensil put into a non-kosher *kli sheini* must be *kashered*[14] and (b) one is not allowed to put kosher food into a non-kosher *kli sheini*.[15] However, if food was used in the *kli sheini*, the food is *b'dieved* (post facto) kosher.[16]

We can logically understand that more absorption and transfer of taste occurs when food is hotter, but what difference does it make if the food is in a *kli rishon* or *kli sheini*? *Tosfos*[17] explain that although the temperature in these two *vessels* may be identical, the walls of the *kli rishon* utensil maintain or increase the heat of the food, while in a *kli sheini* the walls are colder than the food and draw heat away from it. It is this fact, that the walls of the *kli sheini* are actively cooling the food, which prevents taste from transferring. Two possible *chumros* (strict rulings) can be inferred from this:

• **Walls aren't cooling** – If the walls of the *kli sheini* are somehow heated to the point that they don't cool off the

12. *Shulchan Aruch* YD 105:2.

13. *Rema* YD 92:7. A *k'dei klipah* is defined as the thinnest layer of a utensil or food which can be peeled off in one piece (*Shach* YD 96:21).

14. *Shulchan Aruch* OC 451:5; see also *Mishnah Berurah* 451:11.

15. *Shulchan Aruch* YD 105:2.

16. *Shulchan Aruch* YD 105:2 and *Rema* YD 68:11.

17. *Tosfos*, *Shabbos* 40b s.v. *u'shmah minah*.

product, the *kli sheini* may possibly have the status of a *kli rishon*. *Taz* and *Shach*[18] appear to accept this line of reasoning, but *Chavas Da'as* and *Pri Megadim* do not fully agree.[19]

• ***Davar gush*** – If the food in question is a solid mass (*davar gush*) which retains its heat and is not affected by the temperature of the walls, the food should retain its *kli rishon* status even if it is moved into a *kli sheini*. The *Poskim* have considerable debate on this issue, with *Rema* and others being lenient, but *Mishnah Berurah* says one should be *machmir* (strict) for the opinion of *Shach* and *Magen Avraham*.[20]

The above principles will help us determine the status of the following pieces of equipment used hot in Starbucks:

• **Wands** The wands in the bar have the status of a *kli rishon* because that is the utensil in which the food is cooked. The wands and the metal cups used with them will be discussed in more detail in the coming subsections.

• **Oven** The oven and the ceramic oven plate[21] have the status of a *kli rishon* since they are used for cooking. Therefore, kosher pastries cannot be placed into the oven.

• **Serving plates** The hot sandwiches coming out of the oven

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18. *Taz* YD 92:30 and *Shach* 107:7.

19. *Chavas Da'as*, *Biurim* 92:27 and *Chidushim* 92:32, cited in *Darchei Teshuvah* 92:200; *Pri Megadim* OC (M.Z.) 451:9.

20. *Rema* YD 94:7 & 105:3, *Taz* 94:14 and others cited in *Pischei Teshuvah* 94:7 are lenient, while *Issur V'heter* 36:7, *Shach* 105:8 and *Magen Avraham* 318:45 are strict. *Chochmas Adam* 60:12 and *Mishnah Berurah* 447:24 rule that one should be *machmir* except in cases of *hefsed merubah* (great financial loss).

21. There is no direct contact between the oven plate and the non-kosher meat or cheese; rather the meat or cheese is (usually) sandwiched between slices of bread (although it might occasionally drip out), and a piece of (possibly greased) wax paper separates between the food and the oven plate. Although there are situations where such a separation can prevent taste from transferring, it would appear that this situation does not qualify for that leniency; the explanation why this is true is beyond the scope of this presentation, and readers are directed to *Badei HaShulchan* 92:8, *Biurim* s.v. *a'shtei*, page 210, for some detail on this issue.

are a *davar gush* and therefore the status of the (a) knives used to cut the sandwiches and the (b) ceramic plates that customers eat from, depend on the *machlokes* noted above. According to *Rema*, those utensils have the status of a *kli sheini* such that *l'chatchilah* (a priori) they may not be used but *b'dieved* would not pose a concern, but according to the stricter position, these utensils would be non-kosher even *b'dieved*.

• **Dish-machine** There are those who suggest that dishes washed in a standard dishwasher have the status of being washed in a *kli rishon*, because water is heated in the machine and then sprayed on the dishes for so long that the dishes no longer cool off the water (as noted above). Accordingly, if a kosher and non-kosher dish were washed in the same dishwasher, the kosher dish would absorb non-kosher taste. However, it would seem that this line of reasoning does not apply to the dish-machines used by Starbucks because the entire cycle takes a mere 2 minutes (when it must just sanitize and rinse, but does not clean the dishes) that it seems more appropriate to treat those dishes as having had contact via *irui kli rishon*. The dish-machine and its possible effect on other utensils will be discussed in more detail below.

• **Sink** The status of the three-compartment sink and everything washed/sanitized in it will be discussed below.

6 – *Nosein Ta'am Lifgam*

Another important consideration is that non-kosher taste can only affect a kosher food if the non-kosher taste improves the taste of the kosher food. If, however, the non-kosher food's taste ruins the flavor of the kosher food, then the food remains kosher even if the forbidden food is not *batel b'shishim*. One of *Shulchan Aruch's*[22] examples of this – known as *nosein ta'am lifgam* – is of a fly that was ground into a kosher food to the point that it is impossible to find and remove; flies are

22. *Shulchan Aruch* YD 104:3.

assumed to ruin the taste of food, but the food remains kosher even if the fly was not *batel b'shishim*.[23] Although we are not concerned that any flies fell into the coffee that we drink, the halacha of *nosein ta'am lifgam* is relevant to us in the following ways:

Firstly, non-kosher taste which has been absorbed in the walls of a utensil for 24 hours is automatically considered to be *nosein ta'am lifgam* into (just about) all foods.[24] One may not *l'chatchilah* use the utensil for kosher food without first *kashering* it, but if one did then the food remains kosher.[25]

Secondly, the soap and sanitation solutions used at Starbucks are assumed to have a sufficiently unpalatable taste[26] that any non-kosher taste which must pass through those solutions to reach a kosher dish is *nosein ta'am lifgam*. For example, if a non-kosher ceramic serving plate was soaked in hot soapy water together with a kosher plastic pitcher, the non-kosher taste must pass through the soapy water in order to get from the plate to the pitcher, and therefore the pitcher

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23. Some have suggested that the taste of (non-kosher) meat is always *nosein ta'am lifgam* into coffee (and even see some support to that in *Teshuvos Maharit Tzahalon* 60). However, it would seem that in order to apply such logic to a Starbucks store one would have to sample each combination of non-kosher (meat, chicken, cheese etc.) and kosher (coffee, milk, cream, chocolate, etc.) to see whether the non-kosher is, in fact, *nosein ta'am lifgam*. Since that has obviously not been done, we will assume that some or all of the non-kosher may have a positive effect on the kosher, and must therefore be reckoned with.

24. *Shulchan Aruch* YD 103:5.

25. *Shulchan Aruch* YD 93:1.

26. The line of reasoning presented here is based on *Shulchan Aruch* YD 95:4. See *Shulchan Aruch* YD 103:2 for the criteria of *nosein ta'am lifgam*. One of the authors tested two of these solutions (soap for sink and sanitizer for rags) by putting them into his mouth one at a time (in the diluted form as used in the store) and after holding them there for a few seconds concluded that they clearly qualified as *nosein ta'am lifgam*. [Presumably, so little of that solution is left on the equipment that it is not perceived by the customers.] It is assumed that the other solutions (the sanitizer used in the three compartment sink and dish-machine) also qualify.

remains kosher because any transferring non-kosher taste is *nosein ta'am lifgam*.

With this information, we can now discuss the status of dishes washed in the three-compartment sink and sanitized in the dish-machine:

• **Sink** We have noted that the hot water used in the first sink (which has the status of a *kli sheini*) is always automatically mixed with soap, and therefore the rule of *nosein ta'am lifgam* tells us that non-kosher dishes soaked in that sink cannot affect the kosher dishes washed there simultaneously.[27] However, this is not true of the second sink in which dishes are rinsed with plain hot water that does not contain soap, and non-kosher taste can possibly transfer.[28] Therefore, at first

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27. The same is true of the third sink where there is sanitizing solution mixed into the water (and the water is not hot).

28. Some have suggested that once the utensil has been washed with hot water which is mixed with something which is *nosein ta'am lifgam*, that *pagum*/unpalatable taste should become absorbed into the "walls" of the utensil thereby ruining the flavor of the absorbed taste. If so, if the subsequent washing was done without soap, it should still be impossible for palatable non-kosher taste to be absorbed into the kosher utensil. In fact, many followed this position until some 75 years ago when *Chazon Ish* YD 23:1 asked the following very logical question:

We are *machmir* to say that at *yad soledes bo* taste can be absorbed into a utensil, but in the above scenario we are being lenient to say that taste was absorbed at *yad soledes bo* (thereby ruining the taste of the previously absorbed taste). How can we be sure that the soapy-taste was absorbed into the utensil? Maybe none of the bitter taste was absorbed and the original absorbed taste is still fresh and pleasant tasting? The case where *Shulchan Aruch* is lenient is where someone is washing meat and dairy dishes together in soapy water. In that case, it makes sense to say that if taste transferred from the meat plate into the dairy plate it would have to pass through the soapy water and the taste would get spoiled as it passed through. But that is not a license to assume that a *pagum* taste can be pushed into a utensil by merely heating it together with soapy water.

Accordingly, *Chazon Ish* says that the only way one can be sure that the *pagum* taste was absorbed is if the soapy water was heated in the utensil at a *kashering* temperature, which is much hotter than a mere *yad soledes bo*. [The details of why and how that is effective is beyond the scope of this

glance it would seem that non-kosher taste can transfer from the non-kosher dishes to the kosher ones in the sink and one should not be allowed to use food made with/on those utensils.

On the other hand, we must consider that:

- When the dishes first come into the second sink they are still covered with soap, such that there may be some residual *ta'am lifgam* in the wash water.
- The status of the second sink is only that of an *irui kli rishon* (the hot water pouring out of the overhead sprayer) so that there is only a minimal, *k'dei klipah* transfer which may be *batel b'shishim* in the flowing water and multiple dishes being washed simultaneously.[29]
- Even if the "kosher" utensil absorbs a small amount of non-kosher taste, that taste may well be *batel b'shishim* in the subsequent beverage put into the utensil.[30]

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document.] The hot soapy water in the three-compartment sink is surely not at a *kashering* temperature. The cycles in the dish-machine may be at a baseline *kashering* temperature (of *k'bol'oh kach polto*) for certain items but would not qualify for items used in the oven (which need to be *kashered* with boiling water) or made of ceramic (which cannot be *kashered* via *hag'alah*), which in fact includes just about all of the most seriously non-kosher items at a Starbucks full-service store.

The text is based on the consensus of contemporary *Poskim* who accept *Chazon Ish's* line of reasoning.

29. See the coming footnote.

30. The ratio of beverage to metal in the metal cups used in the espresso bar steamer are approximately 6.3:1, 8.4:1, and 10.5:1 for a 12, 16, and 20 ounces beverage respectively. The ratio of water in a dish-machine cycle (0.74 gallons) to the full thickness of the ceramic oven plate (the most-seriously non-kosher item ever washed) is somewhere between 3:1 and 4:1, and the ratio is likely higher in the sink where more water is used. Accordingly, if a limited amount of non-kosher taste is drawn from a *k'dei klipah* of the non-kosher utensils, that taste is further diluted in the rinse-water, and then it is only absorbed into a *k'dei klipah* of the metal cup (whose thickness appears to be greater than a *k'dei klipah* which means that the

• Not all dishes can be washed simultaneously.[31] Therefore, no one knows if, in fact, dishes which were used for non-kosher items within the past 24 hours were washed with any given kosher dish.[32] This *safek*/doubt is even greater if one considers the ceramic serving plates as a *kli sheini*[33] which *b'dieved* is assumed not to absorb taste. If that is true, one of the only truly "non-kosher" utensils washed in the sink is the ceramic oven plate, which is typically only washed once a day and which many stores never put into the dish-machine for fear of breaking the plate.

Some Rabbis consider this combination of factors enough to permit the use of (otherwise kosher) utensils washed in a Starbucks three-compartment sink.

• **Dish-Machine** The points noted above regarding the sink all essentially apply to the dish-machine as well. The dish-machine's first cycle contains sanitizing solution but its second one does not, which potentially raises the same issue as was noted for the sink. However, the dish-machine has the advantages that there is no residue of non-kosher food in it, that some stores never put their ceramic oven plate into the dish-machine because they are afraid it might break, and that each cycle that is done without any non-kosher dishes may serve as a "self-*kashering*" at the baseline temperature of *k'bol'oh kach polto*..

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above ratios are actually greater), it is obvious that the non-kosher taste will be *batel b'shishim* in the kosher beverage.

31. Most stores have a relatively small three-compartment sink which can only hold a few dishes at a time. As relates to the coming paragraphs, it is noteworthy that the dish-machine is also quite small such that a busy store might have to run 10-20 cycles in order to sanitize all of their utensils at the end of the day.

32. It would appear that since there is a *safek* whether, in fact, non-kosher dishes were washed together with the kosher ones, one need not apply the principle of *ChaNaN* (see *Gilyon Maharsha* YD 98:34 to *Shach* 98:11).

33. I.e. Disregarding their use with a *davar gush*, as noted in subsection 5.

We have given reasons why some Rabbis are (*b'dieved*) not concerned about the transfer of taste in the sink and dish-machine from non-kosher to kosher utensils. Others take a more cautious approach due to the seriousness (*issur d'oraisah*) of the non-kosher foods being served in the stores and washed in the sink and dish-machine; they hold that almost every piece of reusable equipment in a Starbucks should be treated as non-kosher.[34]

cRc Recommendation

Due to the concerns outlined above, Rav Gedaliah Schwartz ruled that in a full-service Starbucks one should not consume any item which uses equipment that may have been washed together with non-kosher utensils, but one may be lenient in a kiosk-type store where (as noted) non-kosher items are much less common. In situations where this ruling presents a particular hardship to an individual, they should consult their local Rabbi.

The coming subsections will provide suggestions that may be acceptable even according to those who adopt the stricter approach noted above.

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34. The text suggests two extreme positions – all is *b'dieved* permitted, or all is forbidden – and the coming text presents the cRc position that differentiates between a full service store and kiosk-type store. In fact, some might adopt one of a few intermediate positions based on the way we have seen the equipment is used (after it absorbs taste in the three-compartment sink or dish-machine), as follows:

The plastic pitchers only contact kosher product as *irui kli rishon*, shot glasses are only used via *irui kli rishon* and are also made of glass (which some hold does not absorb taste), and the brew basket is used as a *kli sheini* (see below in the text). Thus, some *Poskim* may choose to be *machmir* regarding the metal cup (used as a *kli rishon*) but be lenient for some or all of the aforementioned other utensils.

In contrast, some might be more lenient regarding the metal cup because it is continuously used to steam beverages in a manner that qualifies as a pseudo-*kashering* (along the lines of Gemara, *Avodah Zara* 76a which states כל יום ויום נעשה גיעול לחבירו) such that all non-kosher taste has likely been purged before a drink is made for the kosher customer.

7 – Brew Basket

We have already noted that the transfer of taste depends somewhat on whether the utensil is a *kli rishon*. This is particularly relevant to the brew basket used in the coffee brewer. If the store washes their brew basket in the sink and dish-machine (practices that some stores do not do) and if one disagrees with the lenient position suggested in the preceding paragraphs, then the brew basket is not kosher and seemingly one would not be allowed to purchase a regular coffee made with that basket.

However, the truth is that even if the brew basket is not kosher, its contact with the kosher coffee is only as a *kli sheini*. [It isn't *irui kli rishon* because the water pouring into the brewer hits the grinds and paper, and only later trickles through to the basket.][35] Accordingly, non-kosher taste absorbed into the brew basket will (a) only be absorbed into a *k'dei klipah* of the filter paper/coffee grinds and (b) *b'dieved* one need not be concerned about taste extracted from a *kli sheini*.

8 – Items Which Are Free of Equipment Concerns

We conclude this section by noting a few items[36] which one

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35. Although the brew basket is continuously located above the hot reservoir of coffee (and in some stores the reservoir and brew basket are enclosed by one outer housing), only a minimal amount of heat escapes from the reservoir and therefore the brew basket cools down between uses. Accordingly, the brew basket's metal is able to cool the water pouring through it and therefore is not a *kli rishon*.

36. The following suggestions were not included in the text (and a reason is given for each):

- Iced tea and coffee are blended cold when the customer arrives, but the double-strength tea or coffee used in the beverage is brewed earlier in the day and is hot when it is put into a plastic pitcher for storage and cooling. This pitcher may be washed with non-kosher utensils.

- Frappuccino and smoothies are also blended cold, but the bases used for both of them are not certified (and Frappuccino also sometimes contains hot items such as espresso).

- The portable "pour over brew station" used to brew individual cups of

can purchase at Starbucks which are free of all possible contamination from non-kosher equipment.

• Espresso made directly into a disposable cup rather than in the shot glass.

• Caffé Americano (i.e. espresso diluted in a full cup of hot water) where the espresso and hot water are poured directly into the customer's disposable cup.

• Hot tea (using a kosher tea bag, of course) which is always made right in the customer's disposable cup.

E. Practical Applications

In this section we will review the conclusions we have come to, and then show their practical applications:

1 – Ingredients

• Kosher Ingredients

Caramel syrup (not sauce), coffee beans, hot chocolate base, ice, milk, mocha, oatmeal (unflavored), soy milk, sugar, vanilla, water.

• Possibly Kosher Ingredients (check the package)

Cream, eggnog, flavor syrups, half-and-half, salads, sugar substitutes, tea, toppings.

• Non-Kosher (or Non-Certified) Ingredients

Baked goods, breakfast meals, caramel sauce, frappuccino base, lemonade, Panini wraps, pastries, sandwiches, smoothie mix, snack plates, white chocolate mix, yogurt.

2 - Equipment

Reusable equipment used at a Starbucks can be divided into a number of categories, as outlined in this chart:

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coffee may be washed in the sink and dish-machine together with non-kosher utensils.

Item	Status
Coffee brewer	Minimal *kashrus* concern[37]
Cup, metal (used in steamer)	Possibly washed with non-kosher equipment
Dish-machine	Used to wash non-kosher equipment
Espresso machine	No *kashrus* concern
French Press[38]	Possibly washed with non-kosher equipment
Knives	Surely non-kosher
Oven	Surely non-kosher
Plastic pitchers	Possibly washed with non-kosher equipment
Plates (ceramic)	Surely non-kosher
Pour-over brew station[39]	Possibly washed with non-kosher equipment
Shot glasses[40]	Possibly washed with non-kosher equipment
Sink	Used to wash non-kosher equipment
Tongs	Surely non-kosher
Wands for steaming	Used with metal cup which may be washed with non-kosher equipment
Water (hot or cold)	No *kashrus* concern

3 - Status of Classes of Products

This table uses the following symbols:

37. See Section D:7.

38. For Clover-brewed coffee.

39. Used to brew single cups of coffee or tea directly into the customer's disposable cup.

40. The status of shot glasses is more lenient than other items possibly washed with non-kosher equipment because although *Rema* OC 451:26 is *machmir* that glass can absorb taste, he agrees that in certain situations of *b'dieved* one can rely on the opinion that it does not absorb (see *Mishnah Berurah* 451:155).

✓ Acceptable without any question

✪ Uses utensils which are possibly washed with non-kosher utensils

cRc recommends these items at kiosk-type stores but not at full-service stores

✹ Check package to see if the particular flavor is certified kosher

× Not recommended (may be non-kosher)

This list does not address toppings and other items added to beverages, and the information is subject to change.

Types of Drinks	Status	Note
Americano, using shot glass	✪	Shot glasses may have been washed with other items
Americano, using disposables	✓	Have espresso made in the customer's disposable cup instead of into the shot glass
Apple juice (steamed)	✪	Cup may have been washed with other items
Baked goods	×	
Breakfast (hot)	×	
Brewed Coffee	✪	Brew basket may have been washed with other items
Caramel Macchiato	×	Caramel sauce is not certified (caramel syrup is certified kosher)
Clover-brewed coffee	✪	French press may have been washed with other items
Espresso, using shot glass	✪	Shot glasses may have been washed with other items
Espresso, using disposables	✓	Have espresso made in the customer's disposable cup instead of into the shot glass

Flavor syrups	✹	
Frappuccino	×	Bases are not certified
Hot chocolate	⊙ ✹	Cup (for steamed milk) and plastic pitcher (for dilution of base into hot water) may have been washed with other items Cream is purchased regionally and must be checked for kosher certification
Iced coffee	⊙	Plastic pitcher used to brew double-strength coffee may have been washed with other items
Iced latte, using shot glass	⊙	Shot glasses may have been washed with other items
Iced latte, using disposables	✓	Have espresso made in the customer's disposable cup instead of into the shot glass
Iced tea	⊙	Plastic pitcher used to brew double-strength tea may have been washed with other items; can avoid by having it brewed right into customer's disposable cup
Latte/cappuccino	⊙	Cup and shot glass may have been washed with other items
Lemonade	×	Base is not certified
Milk, cold	✓	
Milk, steamed	⊙	Cup may have been washed with other items
Panini	×	
Pastries	×	
Salad	×	
Sandwiches	×	
Smoothie	×	Bases are not certified

Tea (hot)	✹	
Wraps	×	

The status of individual products is beyond the scope of this article, and will be made available on the cRc website.[41]

G. Conclusion

We have seen the multiple *kashrus* issues that can be present in seemingly innocuous products purchased at a coffee shop such as Starbucks. This article has presented different reasons why one might adopt a strict or lenient position on the halachic issues raised, and classified the status of the different items sold in the stores. Individual Rabbis will consider these options when determining what is the appropriate *kashrus* standard for their community. The cRc recommendation is that in a full-service Starbucks, one should not consume any item which uses equipment that may have been washed together with non-kosher utensils, but one may be lenient in a kiosk-type store. Due to printing constraints, cRc suggestions – on how a local Va'ad might certify or semi-certify a Starbucks location so that the community could consume beverages without *kashrus* concerns – will not appear in this Journal. Please contact the cRc or check their website for details.

41. www.crcweb.org.

Shabbat Brit Of A Child Conceived Through Medical Intervention

Rabbi Yonatan Kohn and Rabbi Gideon Weitzman

Introduction

Under usual circumstances a *brit milah* is performed on the eighth day even when this occurs on Shabbat, and Shabbat prohibitions are set aside in deference to the mitzvah of *brit milah* on the eighth day. However the Gemara itself brings various circumstances under which the *brit milah* will be pushed off until after Shabbat.

Since the advent of artificial insemination and in vitro fertilization, several *poskim* have questioned whether or not children conceived through medical intervention fit the criteria necessary to allow their *britot* to compromise the observance of Shabbat. This paper aims to review the relevant halachic literature and considerations, trying to define the exact halachic context of assisted reproductive technology (ART) in the modern world.

The Eighth Day and Ritual Impurity

One generally presumes that, barring infant illness, the mitzvah to circumcise a male is performed on the eighth day of the child's life. And, under normal circumstances, this presumption is quite well founded. When Hashem first commands Avraham to perform *milah*, He says,

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> "This is my covenant that you shall observe between Me and you and your children after you: circumcise for yourselves every male. The flesh of your foreskin shall be circumcised, and it will be a sign of covenant between Me and you. For your generations, at the age of eight days every male will be circumcised..." (*Bereishit* 17:10-12).

The necessity to perform the *brit* on the eighth day is explicitly stated in the Torah when the mitzvah is formalized; "And on the eighth day, the flesh of his foreskin shall be circumcised" (*Vayikra* 12:3).

However, although today we may take for granted that the *brit* is to be performed on the eighth day, the Gemara (*Shabbat* 135a-b) indicates that the matter is the subject of some qualification, if not uncertainty. The Gemara notes that the Torah's formulation of the mitzvah of *brit* is immediately preceded by the declaration that a woman becomes ritually impure when she gives birth. This context indicates that the timing of the *brit* may be hinged upon the mother's post-partum status of ritual impurity (*tum'at leidah*). The Gemara reports:[1]

> Rav Asi said, "Any whose mother is *temeiah betum'at leidah* is circumcised on the eighth day; and any whose mother is not *temeiah betum'at leidah* is not circumcised on the eighth day, as it is said, 'When a woman sows seed and gives birth to a male, she will be impure... and on the eighth day, the flesh of his foreskin will be circumcised' (*Vayikra* 12:2-3)." Abaye said to him, "Let the earlier generations[2] prove [that this is not so], for a [baby's] mother [was] not *temeiah betum'at leidah*, and [yet] he [was] circumcised at eight days!" He said to him, "The

1. This citation and the others in the next pages are all in the Gemara *Shabbat* 135a – 136b.

2. Rashi defines earlier generations: "from Abraham until the giving of the Torah, that [the mitzvah of] *brit* was given, and they did not practice [the laws of] ritual impurity."

> Torah was given, and the law [linking the date of the *brit* to the mother's ritual status] was innovated.'

Evidently, then, the law changed with the giving of the Torah. By juxtaposing the mitzvah of *brit* to the pronouncement of a mother's impurity, the Torah implicitly links the fate of the newborn boy with that of his mother. As a result, any boy born of a non-vaginal birth,[3] such that his mother does not assume the status of a *temeiah betum'at leidah*, need not be circumcised on the eighth day. But the Gemara is not yet convinced that the ancient institution of an eighth-day *brit* is so readily dispensable.

> But is this so? For we have the following dispute of *amoraim*: A child of non-vaginal birth and one who has two foreskins [were debated by] Rav Huna and Rav Chiya bar Rav. One said, "We desecrate the Shabbat for his [circumcision]," and one said, "We do not desecrate." And yet they argue only as far as whether or not to desecrate Shabbat for him, but regarding [a circumcision] on the eighth day [which does not fall on Shabbat] – certainly we would circumcise him!

The Gemara suggests that no one would challenge that the *brit* should be performed on the eighth day, which would effectively invalidate Rav Asi's position. But the Gemara counters with a possibility that defends Rav Asi; wherever conditions make it such that a *brit* does not supersede Shabbat, the *brit* really need not be performed on the eighth day at all:

> One [the license to desecrate Shabbat for a *brit*] is dependent upon the other [the urgency to perform this particular *brit* on the eighth day].[4]

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3. See ensuing discussion, and the sources cited in note 38 below, for what conditions render a new mother *temeiah*.

4. The operative principle in the Gemara here, that any *brit* that must be performed on the eighth day can be performed even if the eighth day is Shabbat, is derived by R. Yohanan (*Shabbat* 132a) from the verse, "and on the

Before moving to another discussion, the Gemara explains that Rav Asi's position actually relates to an earlier debate between *tannaim*. According to one position, a small number of boys, whose mothers are not subject to *tum'at leidah*, are actually circumcised at birth; and according to the second opinion, all boys are circumcised on the eighth day, regardless of their mothers' *tum'ah*.

After the discussion, there is no definitive conclusion on the matter of whether or not the date of the *brit* should depend on the mother's status. The Gemara does not demonstrate a clear preference for one side or the other, and a compromise position emerges from the *poskim*. Rambam rules that a child born of a non-vaginal birth is circumcised on the eighth day (*Milah* 1:7), but that such a *brit* must be delayed if the eighth day is Shabbat (*Milah* 1:11).[5] *Tur*'s formulation is most explicit, ruling,

> "... and any whose mother is not *temeiah betum'at leidah*, as in the case of a child born of a non-vaginal birth (*yotze dofen*) or a proselyte who converted and gave birth and (only) thereafter immersed, even though they are circumcised on the eighth, should the eighth come out on Shabbat, we do not violate Shabbat [to circumcise them]" (*Yoreh Deah* 266, and see *Orach Chaim* 131).

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eighth day, his foreskin shall be circumcised" (*Vayikra* 12:3). Rashi suggests that the verse could have simply stated, "On the eighth...." That the Torah says, "*On the* eighth *day*..." reflects an insistence that the *brit* be performed then, even if it entails the violation of Shabbat.

5. In the case of the *yelid bayit*, a child conceived by a gentile maid (*shifcha Kena'anit*) while in her master's home, Rambam rules explicitly that if she never immerses (immersion is required of servants and maids) until she gives birth, "although the child is circumcised on the eighth, it does not supersede Shabbat" (*Milah* 1:10). Raavad suggests that Rambam is unsure whether or not the halacha follows R. Chama, who links the date of *brit* to the mother's ritual status, so Rambam is stringent with regards to Shabbat. Evidently, the stringency regarding Shabbat is not enough to uproot the *brit* from the eighth day in general, for any other day of the week.

Beit Yosef refers to Rosh and Ran, who explain that this is a compromise position, being stringent to insist that the *brit* is normally performed on the eighth day, and also being stringent to protect the integrity of Shabbat. In the *Shulchan Aruch*, he follows the lead of the *Tur* and rules that although the child of a non-vaginal birth is normally circumcised on the eighth day, such a *brit* does not supersede Shabbat.[6] Therefore, the *poskim* adopt Rav Asi's position in part; if a woman does not become *temeiah betum'at leidah*, we do not insist that the *brit* be done on the eighth day, insofar that such a *brit* will not supersede Shabbat.

The "Bathtub" Conception

An extraordinary comment by Rabbeinu Chananel may widen the circle of those *britot* which cannot supersede Shabbat. The Gemara (*Chagigah* 14b-15a) records the following question:

> They asked Ben Zoma, "What is the status of a pregnant virgin with regards to [becoming married to] a *Kohen Gadol*?[7] Are we concerned for the possibility of Shmuel's [claim], as Shmuel said, 'I am able to have intimacy several times without [producing] blood',[8] or [do we

6. *Beit Yosef Yoreh Deah* 266:10, and see *Orach Chaim* 131:5.

7. A *Kohen Gadol* is permitted to marry only a virgin, as explicitly outlined in the Torah. "And he [the *Kohen Gadol*] will take [as a wife] a woman in her virginity. A widow, a divorcee, a *chalalah* [a woman of lineage disqualified from the *kehunah*], a *zonah* [a woman guilty of specific sins of promiscuity] – these he shall not take [as a wife], but only a virgin from his nation may he take as a wife" (*Vayikra* 21:13-14).

8. An alternative version of Shmuel's claim, reported in *Dikdukei Sofrim* (*Chagigah* 15a, with sources in manuscripts and a text quoted by Rashba in *Torat HaBayit*), reads, "I am able to be intimate with several virgins without [producing] blood." In any case, the Gemara wants to know if we take Shmuel's claim seriously, i.e. that there is a viable possibility that a woman may have intimacy in such a way that her hymen remains intact. And if this is possible, perhaps even this pregnant woman may indeed have the halachic status of a virgin, thus permitting her as a wife to a *Kohen Gadol*. For

> consider] Shmuel's [method] uncommon? He answered, 'Shmuel's [method] is uncommon, and [yet] we suspect perhaps she became pregnant in a bathtub.'"

Ben Zoma suggests a novel argument that would permit this pregnant woman as a wife for a *Kohen Gadol*. He asserts that she may very well have the status of a virgin, having become pregnant without any sort of contact with a man. According to Rashi, Ben Zoma suspects that a woman may conceive from the sperm that collects in standing water, even if the sperm was there before she entered the water.

Strikingly, Rabbeinu Chananel[9] takes the question at hand in a different direction:

> A pregnant woman [was] checked and found to be a virgin.[10] Do we say that she conceived through relations, in the manner described by Shmuel? In such a case, I would include her within the Scriptural description, "When a woman sows seed and gives birth to a male," and she would be considered *temeiah* and liable to offer a sacrifice for the birth. Or do we perhaps presume she conceived in a tub in the bathhouse? For instance, [perhaps] a man went into the same tub and released semen, she came upon that drop of semen, it entered her womb, and she conceived. This [latter scenario] is miraculous (*maase nisim*); and she would not be *temeiah betum'at leidah*, for I do not refer to her by the verse "When a woman sows...."

It is worth noting that Rabbeinu Chananel himself spells out the possible implications of the mother having become *temeiah*, namely that she would be responsible for offering a sacrifice.

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an alternative explanation of the Gemara's query, see Tosafot.

9. His comments on this Gemara appear only later, on *Chagigah* 16a.

10. The commentators debate whether our Gemara is discussing a woman who has been examined or who has not yet been examined. The examination in question is outlined in the Gemara on *Ketubot* 10b.

He does not indicate that her status would impact upon the date of the child's *brit*. Nonetheless, he contends that a woman's status of *tum'ah* and *taharah* as a *yoledet* does depend upon the nature of her child's conception. And as we will discuss below, in light of Rav Asi's position in *Shabbat*, recent and contemporary *poskim* have found this as a basis to question whether a child born of unconventional conception may have a *brit* on Shabbat.

Not insignificantly, Rabbeinu Chananel's claim appears to run far from the Gemara's discussion. On what basis does he presume that the woman's status of *tum'ah* is in any way related to her status as a virgin? Why bring in the question of birth at all, when the Gemara is concerned with evaluating her during her pregnancy? Most conspicuously, Rabbeinu Chananel ignores the immediate question of the woman's status of eligibility to a *Kohen Gadol* and redirects the discussion to the issue of her post-birth status. As a result, an editorial note[11] in the standard Vilna Talmud notes that Rabbeinu Chananel appears to have had a different text of the Gemara's discussion. It is possible that in his text, the Gemara asks generally of the status of the woman in question, without any mention of implications for a *Kohen Gadol*. Ultimately, Rabbeinu Chananel sees the relevance of such a question only with regards to her post-birth status.[12]

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11. See footnote *bet* just below the text of Rabbeinu Chananel on *Chagigah* 16a.

12. We may only speculate what Rabbeinu Chananel would presume regarding the status of her virginity. As his text of the Gemara does not raise the question, perhaps he takes for granted that she is considered a virgin either way. If she had relations in the manner described by Shmuel, her anatomy is still intact. And if she conceived in a body of water, the question does not begin. Alternatively, though such a position is harder to defend, perhaps Rabbeinu Chananel would take the other side for granted. She cannot possibly retain the status of a virgin once she is pregnant and certainly after having given birth. If she had relations with a man in the manner described by Shmuel, her anatomic situation notwithstanding, she has still had an intimate experience. And if she conceived in a bathtub, she no longer has a "virgin" womb.

Notably, his text is also different in another regard. In our text, the whole suggestion that she may have conceived in a bathtub only emerges from Ben Zoma's answer. He tells the questioners that this is indeed a viable possibility, and the pregnant woman may never have been intimate with a man at all. But according to Rabbeinu Chananel's text, the questioners take for granted that she is an anatomical virgin, and they want to know only if the manner of relations described by Shmuel is at all likely. If not, they can only presume she conceived in some body of water. And according to Rabbeinu Chananel's text, Ben Zoma offers no answer.[13] Nonetheless, Rabbeinu Chananel's analysis is crucial. Although the woman discussed in the Gemara may ultimately not have conceived in an asexual way, a woman who did conceive in this way would not assume the status of *temeiah betum'at leidah.*

Still, the entire question only arises based on the reading offered by the obscure text of Rabbeinu Chananel. Based on our text in the Gemara, there is no indication that the woman's *tum'ah* would depend on the manner of her conception. After all, the pointed question related only to the status of her virginity. And by default, we would normally presume that *tum'at leidah* is solely a function of the manner of birth. But Rabbeinu Chananel posits otherwise, namely, that the conception is just as crucial as the birth with regards to the mother's status as *temeiah betum'at leidah*. What, then, is the conceptual basis for Rabbeinu Chananel's position?

Rabbeinu Chananel spells out his stance in one line, "this [latter scenario] is miraculous (*maase nisim*), and she would not be *temeiah betum'at leidah*, for I do not refer to her by the verse 'When a woman sows....'" Her status hinges upon the exceptional nature of her conception, which fits neither traditional biological models nor the Scriptural qualifications

13. This alternate version of the text is also recorded in *Dikdukei Sofrim* (*Chagigah* 15a).

for the kind of birth that is subject to *tum'ah*.

Perhaps Rabbeinu Chananel's position hinges upon a unique reading of the verse *"Isha ki tazria veyalda zachar..."* (*Vayikra* 12:2). What is the meaning of the word *tazria*? Thus far, we have taken for granted the simplest understanding, "when she sows seed." If so, the word refers to the woman's "sowing seed" in the process of conceiving a child. Here, the seed in question is not literally "seed" but her egg, itself a necessary component of a fertilized zygote and in a certain respect very much like a seed. Thus, the verse describes how she first sows seed and only later gives birth.[14] Alternatively, but almost identically, *tazria* means when she produces seed, i.e. when she gives birth. Therefore the verse is read, "when she produces seed, when she gives birth to a male...."[15]

But, according to R. Shlomo Zalman Auerbach, *zt"l*,[16] Rabbeinu Chananel may be reading *tazria* very differently, understanding that the word refers to a woman's role in inducing **the man's sowing**. The word *tazria* assumes the *hif'il* verb form, which indicates that which one does to another.[17] As opposed to simply planting her own seed, which would be *tizra* ("she will sow"), *tazria* indicates the involvement of another.[18] If this is correct, the verse in question becomes

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14. This seems to be how the Gemara is reading the verse in a famous passage in *Nidah* 31a. "R. Yitzchak says in the name of R. Ami, if [the] woman sows seed first – she gives birth to a male. And if [the] man sows seed first – she gives birth to a female." Evidently, a woman's genetic contribution can be called *zera* (seed) at the level of conception.

15. There is basis for this kind of usage for the word *zera* as well. The Torah refers to the child of a woman by the word *zera* in *Vayikra* 22:13; a childless woman is described, *vezera ein la* (she has no child).

16. *Nishmat Avraham* v.3 p.9. He understands that Rabbeinu Chananel may be saying, she cannot be considered *tazria* when *"eina mesayat lehazra at haba'al*," she does not assist the husband's sowing.

17. For instance, "she will clothe another" is *talbish*. "She will feed another" is *taachil*. "She will make another produce seed", then, could be *tazria*.

18. Ibn Ezra (*Vayikra* 12:2) does not understand the word this way. To him, the causative connotation is simply that she will cause there to be seed, i.e.

radically different; "When a woman induces [a man's] sowing and gives birth to a male, she will be impure." The Torah dictates that **she cannot become** *temeiah betum'at leidah* **unless she causes another to sow** and consequently gives birth. When she induces him to implant his sperm into her,[19] therefore, she can become *temeiah betum'at leidah*; and when she receives sperm that was produced without her involvement, she has not fulfilled *tazria* and cannot be considered *temeiah betum'at leidah*. Under such circumstances, Rabbeinu Chananel argues that even a natural birth will not render her *temeiah*.

In considering the halachic status of fertilization through ART, it is worth noting the procedural differences between **intrauterine insemination** (IUI) and **in vitro fertilization** (IVF). In IUI, sperm is medically implanted in the woman's uterus. In IVF, the egg is fertilized outside the uterus, and the embryo is returned to the uterus. The critical halachic distinction between the two is that the simplest definition of *tazria* may apply to IUI and not to IVF. If *tazria* refers to the mother's role of "sowing" the egg, that may not apply when the egg is removed and fertilized outside her body. The egg is hers, but she may not have provided it for conception.

Still, one might suggest that *tazria* refers to the woman's role in the man's involvement. If *tazria* refers to her causing the man to produce sperm, that denotation may be applicable in instances of either IUI or IVF. In either procedure, sperm may often be collected through natural intimacy, even though it is later implanted only artificially. Under those circumstances, it might be argued that the woman meets the criterion of *tazria*;

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she will sow. As such, even those who read the verse most simply, "when she sows," can read the verb as causative.

19. R. Shlomo Zalman suggests that Rabbeinu Chananel is focusing on her not *mesayat lehazra'at haba'al*, not assisting him in sowing seed. Evidently, this means she does not help him deliver the sperm for fertilization in the uterus.

we are not aware of any authorities who define *tazria* this way. R. Shlomo Zalman approached the issue slightly differently, suggesting that perhaps *tazria* means that she must induce his actual direct fertilization of her egg. If this is the case, IVF and IUI retain the same status. The father does not play an active role in the ultimate fertilization in either procedure.[20]

Still, the applicability of the term *tazria* is not Rabbeinu Chananel's only consideration. In distinguishing the woman at hand from other mothers, Rabbeinu Chananel asserts that her giving birth constitutes *maase nisim*, a miraculous event. It is on this basis that she escapes the designation of *temeiah betum'at leidah*. In order to apply the categorization *maase nisim*, we must understand what is meant by the term. Does this designation refer to an event that supersedes known laws of nature, or does it simply indicate that an event occurs in an uncommon or unusual manner? Relating to *Chazal*'s own discussions of *maase nisim* should shed light on the matter.[21]

Defining Miracles and Miraculous Occurrences

Chazal

20. In a personal correspondence, Dr. Avraham explained that R. Shlomo Zalman did not distinguish between IVF and IUI in this regard. In his view, neither meets this definition of *tazria* because the man does not implant the sperm directly.

21. *Chazal* relate to *maase nisim* in various areas of halacha, with the guiding operative principle *ein mazkirin maase nisim*; extraordinary, miraculous considerations do not influence the halacha. This concept is explored at greater length below. However, general discussions about the halachic anticipation of miracles should be more or less irrelevant in deducing the status of the fetus conceived in a bathtub. Although we might never expect a woman to conceive without intimacy, we would still need to determine her status when such an event has actually happened. Still, even the dismissive discussions of public policy can be informative for the purposes of precisely defining the parameters of *maase nisim* as a halachic category. This may help us to determine what Rabbeinu Chananel means when he invokes the term, and how this may relate to contemporary instances of medical intervention in conception.

The Mishnah (*Berachot* 9:3, corresponding to 60a) relates to a man hoping that his pregnant wife will deliver a boy. "If [one's] wife was pregnant, and he said, 'May it be [Gd's] will that she deliver a son', this is a prayer in vain." The Mishnah decries such a supplication – as the gender is already determined in early stages of pregnancy, the prayer is for naught (*tefilat shav*). Although a *beraita* recounts that Dinah's gender was changed during Leah's pregnancy, the Gemara asserts that this incident cannot influence the halacha; it was an instance of *maase nisim*.[22]

Evidently, the Gemara is using the term *maase nisim* to denote something essentially impossible, something so unlikely that it is hopeless to even wish for it. The Mishnah sweepingly dismisses prayer to change a fetus's gender as futile, a categorization that would not be applied to an occurrence that is merely improbable. Therefore, by categorizing Dinah's birth as *maase nisim*, the Gemara clearly classifies *maase nisim* as that which cannot be accounted for.

Another instance of *maase nisim* is discussed in *Chulin* 43a. Rabbi Yosef bar Yehudah posits that a puncture to the gall bladder is considered a fatal wound and renders an animal *tareif* (terminally ill, and thus ritually unfit for consumption). An opposing view contends that damage to the gall bladder should not render an animal *tareif*, noting that Iyov (Job) continued to live despite losing his gall bladder entirely.[23]

In the course of the dispute, the Gemara dismisses the model

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22. The Gemara evaluates the Mishnah's position. "Does prayer not help? Rav Yosef presents a challenge from a *beraita*. 'And after, she gave birth to a daughter, and she called her name Dinah' (*Bereishit* 30:21). What is 'and after'? Rav says, after Leah adjudicated herself and said, 'Twelve tribes are destined to emerge from Jacob. Six came from me, and four from the maids comes to ten. If this [current fetus] is a male, my sister Rachel will be unequal to [even] one of the maids.' Immediately, she was changed to a girl, as it is said, 'And she called her name Dinah (adjudication)'."

23. *Iyov* 16:13.

of Iyov.[24] His survival without a gall bladder constituted *maase nisim*. Evidently, *Chazal* believed that it is impossible to live without a gall bladder and that the absence of the organ interrupts vital functions indispensable for any life. In that case, here too, *maase nisim* would seem to denote an event whose occurrence defies that which is presumed physically possible.[25]

The third instance of *maase nisim* appears in a discussion about a vanished husband. The Mishnah (*Yevamot* 16:4, corresponding to 121a) fleshes out the circumstances under which a woman may assume that her missing husband has died. The Mishnah posits:

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24. It is important to observe that the Gemara chooses to categorically dismiss Iyov's case as *maase nisim*, when there should be room for other distinctions between his case and that of the animal ruled *tareif*. 1) Perhaps there is a difference between the functions and necessities of certain organs in man and in animals. 2) In the case of Iyov, he speaks of losing his gall bladder entirely. The case of the animal is one of a punctured organ. It may be that the punctured organ is in fact more dangerous to the animal's life than living without the organ altogether. 3) The meaning of Iyov's declaration, "*yifalach kilyotai velo yachmol; yishpoch laaretz mererati*" (16:13) is far from certain altogether. The verbs he uses are written in the form of prosaic future tense, which may indicate that he is simply cursing himself that his tormentor should destroy his organs in the future (much like the Gemara understands in *Pesachim* 2b) or speculating about what his fate may be. In that case, although he believes he would suffer through it and yet live, there can be no proof from that which does not come about. Alternatively, the apparently future tense may be employed here as a kind of a poetic form, even referring to the past. In that case, he is reflecting upon the "splitting" of his kidneys and the "spilling" of his gall bladder. The precise meaning is not readily evident.

25. However, the Gemara's discussion might be understood otherwise. It may simply be that the absence of the gall bladder constitutes *maase nisim* because the absence of a gall bladder is highly unusual. As the Gemara continues, G-d allows the Satan to meddle with Iyov in any way so long as he does not take his life. As such, the entirety of Iyov's enduring existence is simply exceptional. Correspondingly, none of Iyov's individual ailments can be isolated and considered singly fatal. In this case, the rejection of Iyov's relevance is not necessarily a proof that the gall bladder is a vital organ, but Iyov's example cannot firmly demonstrate either that one is viable without a gall bladder.

> If he fell into water, whether the water has an end or whether it has no end,[26] his wife is prohibited.

Two *tannaim* cite anecdotes related to the ruling.

> Rabbi Meir said, "There was an incident with an individual who fell into the Great Cistern and emerged after three days." Rabbi Yose said, "There was an incident with a blind man who descended to immerse in a cave, and his aide [lit. 'puller'] descended after him. They [the court] waited long enough for their souls to depart, and they permitted their wives to marry."

According to a *beraita* cited in the Gemara (ibid.), the anonymous position of the Mishnah is actually that of Rabbi Meir, who does not distinguish between different bodies of water, ever suspecting that the husband is still alive. The Sages argue otherwise and differentiate. To them, a woman may remarry if her husband has disappeared into waters that have an end. In this case, it is unreasonable to think that he may still be alive. We suspect that he may have survived only if the waters "have no end", in which case he may have emerged from the water where we did not see him.

In any case, the Gemara understands that Rabbi Meir's extreme position, that a man might survive in an enclosed body of water and somehow emerge without our knowledge, is linked to the extraordinary story that he reports in the Mishnah. As such, the Sages rejected Rabbi Meir's stance out of hand. In the words of the *beraita* recorded in the Gemara (*Yevamot* 121b), "We do not mention miraculous events."

Most significantly, the Gemara seeks to pinpoint the exact nature of the "miraculous events" in question.

> What is [meant by] "miraculous event"? If one was to

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26. The Gemara (ibid.) cites Abaye's definition of "water that has an end": any body of water in which one can observe the surrounding land on all four sides.

> suggest that he didn't eat and didn't drink [for three days], but is it not written, 'Fast for me and do not eat and do not drink [for three days, day and night]' (*Esther* 4:16)?[27] Rather, that he did not sleep, as Rabbi Yochanan said, "[If one undertakes] an oath that 'I will not sleep for three days', we lash him and he may sleep immediately."[28] And what is Rabbi Meir's reason?[29] Rav Kahana said, "There were heaps upon heaps [upon which he could lie to sleep]". And the Rabbis?[30] "The [pillars] were of marble [Rashi: and were too slippery]". And Rabbi Meir?[31] "It is impossible that he couldn't grab on and doze at least a little."

Ultimately, Rabbi Meir and the Rabbis are debating whether or not we can suppose that a man could find a position that would allow him to sleep a minimal amount in the Great Cistern. But all are in agreement that without the opportunity to sleep, there would be nothing to talk about; survival for three days without sleep is considered physically impossible. Therefore, here too *maase nisim* appears to denote not that which is unlikely or unusual, but fundamentally untenable.

Therefore, it would appear from all the Gemara's discussions that *maase nisim* can be defined as the occurrence of something unimaginable, not simply that which is rare or

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27. From the fact that Esther demanded a communal fast, it is evident that one could even expect to survive without food and drink for three days when the situation calls for it.

28. It is considered simply inconceivable that one would last for three days without any sleeping. *Chazal* are so convinced of this impossibility that the mere venture to swear off sleep for three days is instantly treated as a vain oath, for which he is subject to corporal punishment. In any case, the Gemara is resolved that the miracle in question is indeed that a man would stay awake for so long and thus save himself from drowning.

29. Once it is established that man cannot endure for three days without sleeping, Rabbi Meir must have another justification for his position.

30. Why then were the Rabbis so sure he was unable to sleep?

31. According to Rabbi Meir, how could he then sleep on slippery pillars?

abnormal.[32] Were there any likelihood that a fetus's gender could be changed by prayer; that one might continue to live without a gall bladder; and that a man would survive for several days in the water, these possibilities would have figured into the halachic process. *Chazal* employ the designation *maase nisim* only for that which is naturally impossible.

Rabbeinu Chananel's special treatment of the bathtub conception derives, at least in part, from its status as *maase nisim*. To evaluate whether or not ART fits Rabbeinu Chananel's model, we must check by the barometer of what the Gemara categorizes as *maase nisim*, that which is ostensibly unfeasible. But before conclusively ruling one way or another, a survey of the *rishonim* is in order.

Rishonim

A discussion among the *rishonim* may reinforce our working definition of *maase nisim*. Although the Gemara unequivocally rules that miracles are irrelevant in determining halacha (*ein mazkirin maase nisim*), the *rishonim* paint a more nuanced picture. Tosafot (*Yevamot* 121b, *ein mazkirin maase nisim*) cite evidence that the halacha does indeed concern itself with the viable possibility of miracles.

> It is astonishing to Ri [that the Gemara asserts so firmly that the halacha does not consider miracles], for [the Gemara] says earlier [in an anonymous ruling in a

32. While there is some room to argue (see note 22 above), the plainest reading of *Chulin* 43 sounds this way as well. Iyov really should be unable to live without a (functional) gall bladder, and his ability to do so constitutes a miracle. The continuation of the Gemara supports this understanding; the verse in question refers to the splitting of Iyov's kidneys (*yifalach kilyotai*). If Iyov is indeed referring to the failure of both kidneys, even modern medicine does not indicate that one could survive without the functions performed by the kidneys. As such, the *maase nisim* of Iyov is clearly the occurrence of something ostensibly impossible.

> *beraita*],[33] "If he fell into a lion's den, we do not testify about him [since he may have survived]." And similarly, waters that have no end. [That we do not allow his wife to remarry presumes we take for granted he may have survived and emerged from another side of the body of water, although this, too, is a remote possibility. Evidently, then, halacha **does** account for miracles.]
>
> And there is [room] to [answer] that these are not quite miracles. We can attribute it [his survival] to [the fact] that they [the lions] are not hungry. And regarding the waters that have no end, we can attribute it to the board of a ship [a floatation device] or a forceful wave [pushing him to the shore].

If Tosafot are correct, then the principle remains intact. While we may be quite liberal in defining the parameters of what is expected and ordinary, anything that is nonetheless classified as miraculous remains irrelevant for halachic considerations. Still, Tosafot see a more serious problem from a position in the *Yerushalmi*.

> However, there is in the *Yerushalmi* (*Yevamot* 16:3, 83a) [the ruling] that if he fell into a lion's den, they do not testify about him [because] we suspect **perhaps a miracle was done for him**, like Daniel. If he fell into a furnace, they do not testify about him [because] we suspect **perhaps a miracle was done for him**, like Chananiah, Mishael, and Azariah.

Evidently, this is a direct contradiction to the *Talmud Bavli*'s position that miracles do not register any consideration. Here, the *Talmud Yerushalmi* says explicitly that we anticipate his possible survival, through **miraculous** means. Tosafot explain the apparent contradiction, claiming that the *Yerushalmi* intends to say, "he escaped from the fire in some way."[34] In

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33. *Yevamot* 121a.

34. The same interpretation is offered by *Korban HaEdah*, in his comments

other words, the *Yerushalmi*'s usage of the word "miracle" is not to be taken literally. As in the first cases addressed by Tosafot, they posit that these cases may be considered far-fetched possibilities, but nothing that violates the principles of nature. On the surface, Tosafot's distinction between the cases is particularly difficult, as the *Yerushalmi* invokes the examples of biblical figures whose escapes are categorically accepted as miracles.[35]

However, the distinction becomes sharper in light of Rambam's presentation of the same cases.

> [If] they saw that he fell into a den of lions or leopards or the like, they may not testify about him. It is possible that they would not eat him. If he fell into an excavation of snakes and scorpions, into a furnace, into a boiling vat of wine or oil, or that others completely or mostly severed [his trachea and esophagus]; even if he stood up and ran off, they may testify about him that he died. Certainly, [any of these] will end up dying. And the same is true of any of the like, in instances that it is impossible that he will live but will rather die immediately in a short interval, they may testify about him.[36]

Here, the different categorizations are quite sharp. In the case of the lion's den, although there is imminent danger, the witnesses do not see any contact between the man and the

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to this passage in the *Yerushalmi*.

35. Tosafot conclude, in the standard text, with the words, "And Rabbi Meir disputes the earlier *beraita*." The meaning of this clause is not readily apparent. Maharsha explains that Rabbi Meir, who is concerned for the possibility of miracles, disputes the earlier *beraita*'s position that one who falls into a furnace can be presumed dead. But a note on the margin of the standard Gemara presents, in the name of Rashal, an alternative text in Tosafot. That version reads, "According to this, the Sages argue." In other words, the Sages, who insist that miracles are irrelevant, dismiss the ruling that is concerned for remote possibilities of survival. It does not seem that either version departs from the framework Tosafot presented earlier.

36. *Hilchot Gerushin* 13:17.

animals. While his escape may be difficult or even unlikely, no naturally irreversible process of death has been set into motion.[37] In the other cases, he was seen absorbing fatal blows, even if he has not yet died. In the latter cases, his survival is not possible without the intervention of a profound miracle. And this possibility is simply discounted.[38]

To review, Rambam and Tosafot corroborate and sharpen our definition of *maase nisim*. *Maase nisim* refers only to those cases whose circumstances cannot be scientifically explained, events whose occurrences are not only unlikely but actually impossible.

Is ART Miraculous?

Superficially, it would seem that if we have correctly understood the Gemara and *rishonim*, the categorization *maase*

37. The same distinction is true of the man who disappears in a large body of water, as Rambam outlines in the immediately preceding halacha, 13:16. If the body of water is so large that its end is not in sight, they may not testify about him, considering the chance of his emerging on another side. But if the water is small enough that the witnesses can see its ends, waiting there long enough for him to die, then they may testify about him. In the larger body of water, his escape is improbable, but not impossible. And in the smaller body of water, his physical survival beyond a certain threshold of time is simply humanly impossible. He is therefore presumed dead.

38. The excavation of scorpions and snakes falls into the latter category, that of surely fatal encounters, when the space is very cramped. Here, he is seen falling *onto* the snakes and scorpions. See *Kesef Mishneh* (here) and *Yevamot* 121a-b, in particular, Rashi *agav itzetza*. Regarding the furnace, *Hagahot Maimoniyot* posits that Rambam is rejecting the ruling cited in the *Yerushalmi*, i.e. that he might escape from the furnace in a miraculous way. But *Kesef Mishneh* refers to Rashba, who distinguishes again between furnaces and fires of different sizes. Some may be escapable. In that case, perhaps Rambam is in line with the *Yerushalmi* as read by Tosafot. "Miraculous" circumstances may actually figure into our calculations when they refer to even highly unlikely events. But when it comes to possibilities that run contrary to nature and biological processes, the *Bavli* rules *ein mazkirin maase nisim*, such possibilities are halachically irrelevant.

nisim would not apply to in vitro fertilization or artificial insemination. While they are not natural or conventional means of conception, both are scientifically well-founded and demonstrably possible.

However, although our study strongly indicates that *maase nisim* refers specifically to the impossible, "impossibility" is a concept whose technical application is fraught with uncertainty. Hundreds or thousands of years of advances in technology and medicine have changed the parameters of what can be called impossible, and much of what *Chazal* saw as impossible may, in fact, be currently possible and executable. As such, our definition must be revisited. Is *maase nisim* something impossible or simply something naturally inconceivable? The difference, of course, is how to view that which is facilitated by artificial or external means.

There is little or no proof from our discussion whether *maase nisim* means that which is unnatural or impossible. One can only conjecture how Rambam would relate to a man falling into a vat of boiling oil wearing a specially designed heat-resistant suit, but reason dictates that we might expect him to survive. If a man disappeared in the water with specialized long-term breathing equipment, would he be presumed not breathing? Should we assume one cannot survive without a gall bladder when the surgical removal of gall bladders has become a common procedure? If we are primarily interested in knowing whether or not an individual might survive a particular ailment or threat, it is hard to imagine that halacha would not recognize the very real possibilities afforded by technology.

But Rabbeinu Chananel's case is not as clear. Based on our analysis above, it stands to reason that even if an unaided literal bathtub conception is *maase nisim*, a laboratory-controlled conception is not. After all, a laboratory conception has been proved to happen over and over again; the success of such a procedure is not at all surprising. R. Shlomo Zalman made just this point, "[Artificial insemination] is a natural

phenomenon and is not within the definition of a miracle at all."[39]

However, when we suggest that the Gemara **would** anticipate the effects of technology and medicine, that is because the Gemara is interested only in the bottom line; will the man survive or not? We won't likely ignore his chances to live. When discussing our unconventional instance of conception, the woman has already conceived. We want to know how to relate to that fact, which is an entirely different question. As such, maybe it is more critical that this conception is so unusual, and it would be considered *maase nisim*.[40] Much more significantly, we cannot even be sure that Rabbeinu Chananel understands *maase nisim* as we have understood it in its other applications.

Is ART "Unusual"?

We have thus far presumed that *maase nisim* is used by *Chazal* and *rishonim* to refer to the impossible or the inconceivable. But even if one argues that *maase nisim* also refers to those events that are merely highly unusual (and not "impossible"), one could still make the case that ART is not *maase nisim*. R. Elchonon Wasserman, *zt"l*,[41] argued that the label *maase nisim* might not be applied today as easily as it was applied by Rabbeinu Chananel. In principle, Torah's descriptions and regulations apply to common circumstances. But the "matter is simple," he says, that these definitions are completely dependent upon the time and place. While IVF and artificial insemination still account for only a small minority of births, they are hardly unheard of. It is therefore arguable that Rabbeinu Chananel's categorization might not preclude such *britot* from taking place on Shabbat. So long as it is reasonable

39. *Nishmat Avraham* v.3 p.9.

40. Ibid. The open-ended possibilities left R. Shlomo Zalman without a definitive ruling on the matter, as explained below.

41. *Kovetz Shiurim* v.1 *Ketubot* 60a *siman* 203.

to speak of viable conceptions by unconventional means, perhaps these can no longer be categorized "miraculous" *maase nisim*, and mothers bearing children from such conceptions may not have any unique status at all.

Analyzing Rabbeinu Chananel's position

Although we may argue that ART cannot be described as *maase nisim*, as indicated above, Rabbeinu Chananel's position takes into account the miraculous status as well as a biblical categorization. He does not indicate which factor is more critical, that 1) she has not "sown" or that 2) the conception is miraculous. Does one consideration automatically determine the other?[42] Even if the criteria are not causatively linked, the terms for the relationship between the two factors are not clear. It may be that both criteria are necessary to exclude her from *tum'at leidah*, or that either one remains enough. Rabbeinu Chananel's ultimate intention remains unclear, and consequently the matter must be determined on the basis of fitting the verse's categorization as much as on the basis of miraculous birth.

Halachic positions of some leading *poskim*

"Bathtub conception", as a paradigm of asexual fertilization, became important with the advent of artificial insemination, and later, in vitro fertilization. *Nishmat Avraham*[43] references R. Shlomo Zalman Auerbach, who was undecided on the matter of whether, in light of Rabbeinu Chananel, the *brit* of a child

42. Perhaps by virtue of being miraculous, a conception becomes necessarily outside the purview of cases described in the Torah. Alternatively, it might be that the failure to meet biblical standards renders the whole case miraculous.

43. *Nishmat Avraham,* v.3 p.9. This opinion is also cited in v. 4, p. 180, and in v. 2, p. 159. In this last reference, he cites *Sefer HaBrit*, who also leaves the matter unresolved. *Otzar HaBrit* (v. 2, p. 49) records the deliberation of *Sefer HaBrit* as well.

from artificial insemination would violate Shabbat. If the decisive factor in Rabbeinu Chananel's position is that conception in a bathtub is miraculous, then artificial insemination, which is "not miraculous at all," should not affect the mother's status or the date of the *brit*. But Rabbeinu Chananel may be more concerned with the paradigm of *tazria*, that the woman must induce her husband's sowing. In that case, ART would ostensibly resemble the bathtub conception.[44] Ultimately, he had no definitive ruling.

Remarkably, R. Shlomo Zalman Auerbach's original deliberation assumes that Rabbeinu Chananel's position holds firm only when the woman plays no role in the man's release of sperm. One might suggest that Rabbeinu Chananel would concede that the woman becomes *temeiah betum'at leidah* at birth so long as she was responsible for the man's producing sperm at the time of conception. This fine distinction would be relevant in cases of ART in which the sperm is captured through the course of regular intimacy and only later injected into the woman. Although the ultimate fertilization is facilitated through the medical introduction of the sperm into the woman, she is involved in originally drawing the sperm from the man. However, it seems R. Auerbach held that the mere initial drawing of the sperm is insufficient, so long as that drawing does not directly generate fertilization.[45] If this is so, any external medical intervention would suffice to disrupt the involvement necessary to render her *temeiah betum'at leidah* in Rabbeinu Chananel's definition.

While R. Shlomo Zalman did not conclusively side with Rabbeinu Chananel, R. Mordechai Eliyahu, *shlit"a*, definitively challenges Rabbeinu Chananel's position. While granting that

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44. Even this is not so simple. R. Shlomo Zalman Auerbach was unsure that *tazria* refers to anything other than the woman sowing seed, not to her inducing her husband. Admittedly, that reading cannot be resolved with Rabbeinu Chananel's position.

45. This point was clarified in an email from Dr. Avraham.

there may be a special category of *maase nisim*, in an oral ruling for Machon Puah, he argued that any conception in which sperm fertilizes egg constitutes a standard conception. Even with the assistance of medical intervention, the ultimate conception has this critical, conventional process. In his view, the category *maase nisim* would be reserved for cloning.

Other *poskim* are more hesitant to stray from Rabbeinu Chananel. *Nishmat Avraham* also cites R. Azriel Auerbach, *shlit"a*, who relays that his father-in-law R. Yosef Shalom Elyashiv, *shlit"a*, forbade ART-related *britot* on Shabbat. However, in a more nuanced ruling, R. Elyashiv told Machon Puah directly that he would permit the *brit milah* on Shabbat of a child born through IUI, but not through IVF. This distinction would seem to be a function of the distinction raised above, that conception through IUI occurs naturally in the uterus. Here, a woman may fit a conventional definition of *tazria*.

R. Ovadiah Yosef, *shlit"a*, does not side with Rabbeinu Chananel either, in light of the fact that no other *rishonim* mention the relationship of *tum'at leidah* to the conditions of conception. In his addenda to *Nishmat Avraham*,[46] R. Ovadiah Yosef rules that in cases of IUI, as in cases of IVF, all that matters is the course of the birth itself. Although Rav Asi demonstrated that the circumstances surrounding the **birth** weigh heavily, the nature of the **conception** has no bearing on her status as *temeiah betum'at leidah*.[47] In other words, so long as there is a vaginal birth, the *brit* can supersede Shabbat. The Gemara focuses on a continuum from birth to *brit*, but a continuum linking **conception** to birth and *brit* is not critical.

R. Ovadiah's lenient position would seem to be self-evident.

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46. V.4, p. 226.

47. Our verse may then be read in one of two ways. Either the verb *tazria* refers to the birth itself, or she is considered "sowing" under any circumstances that allow a fetus to develop in her womb. In any case, all that matters in rendering her *temeiah betum'at leidah* is that the fetus (and, by default, a certain minimal amount of blood) has issued from her womb.

Our impressions of *tum'at leidah* are that its sole determinant should be the conditions surrounding the birth itself.[48] A woman may contract *tum'at leidah* irrespective of the nature of the fetus's conception. Still, it might be argued that the stringent position is in line with the verse at the heart of our discussion (*Vayikra* 12:2): "When a woman sows seed and gives birth to a male, she will be impure..." We have already seen that *Chazal* understood that an eighth-day *brit*, commanded in the very next verse, is dependent upon the fulfillment of the terms outlined, i.e. that the woman becomes *temeiah*. As the commandment to circumcise on the eighth day directly follows the pronouncement that the mother is *temeiah*, the insistence of one term depends upon the fulfillment of the other term. If the birth does not render her *temeiah*, there is no insistence that the *brit* occur on the eighth day. If the entire verse is read in this manner, perhaps even the conception may come into account. As such, we would read, "When a women sows in conception and subsequently gives birth to a male, she will ultimately be considered *temeiah*. Thereafter, he will be circumcised on the eighth day." Should she give birth without the requisite proper conception, something fundamental to the process would be lacking; she would not assume the status of *tum'ah*. But such a far-reaching and dramatic conclusion is difficult, if not impossible, to sustain without explicit source material.

Conclusion

We have seen that the Gemara states that, under normal circumstances, an eighth-day *brit milah* is performed even on Shabbat. Among the exceptions to this rule are instances in which it is difficult to define which day is the eighth day and instances in which the birth does not render the mother *temeiah*, as in the case of a Cesarean section. The unique

48. See *Nidah* 5:1, the corresponding discussion in *Nidah* 40a, Rambam *Issurei Biah* 10:5, *Tur Yoreh Deah* 194, and *Shulchan Aruch Yoreh Deah* 194:14.

position of Rabbeinu Chananel in the case of a bathtub conception seeks to widen the circle of this latter category, that of mothers who do not become *temeiot leidah*.

For some, Rabbeinu Chananel's understanding of an unusual conception may prove a significant precedent for determining the *tum'ah* status of a mother who has given birth through contemporary medical techniques of fertility intervention. If such a woman cannot be considered *temeiah betum'at leidah*, then her son's *brit* cannot take place on Shabbat, even if that is the eighth day from his birth. Contemporary *poskim* debate whether or not Rabbeinu Chananel's position should indeed influence the date of the *brit*, and the customs vary in different communities.

As a postscript, we recently heard in the name of Rav Wosner, *shlit"a*, that while he holds the *brit* of a child conceived through ART does not push off Shabbat, the *mohel* is not obligated to ask the parents how the child was conceived. Only when they offer this information must he inform them of his unwillingness to perform the circumcision on Shabbat. This nuanced position avoids performing the *brit* on Shabbat and yet does not make absolutely certain that this child is qualified for a Shabbat *brit* in his view. Why can the halacha take this chance with a potential *chilul* Shabbat? Either 1) the dominance of ART-related Shabbat *britot* are so uncommon that the *mohel* need not be concerned for the chances of *chilul* Shabbat; 2) the *brit* of an ART-conceived boy does not conclusively constitute *chilul* Shabbat; or 3) it is a combination of these considerations. In any case, Rav Wosner's position reflects the enormous sensitivity that is called upon to rule in such cases.

Secular Music

Ezriel Gelbfish

The role of music as a means to *Dveikut Bashem* (closeness to G-d) and a medium for transcendence is almost innately clear to anyone who has experienced its profound pull and inexplicable influences on the soul and psyche. Because of its deeply metaphysical nature, music can be utilized to bring one closer to *Hashem*,[1] and conversely, if misused, can lead one away from the path of the righteous, G-d forbid. In this regard music must be treated with great caution. Here will be discussed some, but by no means all, of the issues that present themselves in the topic of secular music. In surveying the various rabbinic accounts on music, and specifically secular music, one must invariably come to the conclusion that some amount of rabbinic authority must be consulted as a supplement to any written rulings from responsa. This is due to the ambiguity with which most sources define the terms they use, and with which they categorize the diverse and various types of music available to them then (and even more so to us now).

Secular music may be objectionable for a number of reasons. Firstly, it may have problematic subject material: some songs

1. The *Zohar* (Volume II, 19a) writes that the name *Levi'im*, from the root word 'accompany', was appropriate for the orchestra/choir in the *Beit Hamikdash*, being that one who heard their songs would take company with, and cleave to, God. Moreover, Rabbi Baruch from Shklov, in the introduction to his *Pe'at HaShulchan*, quotes from the Vilna Gaon that music has many mystical and uplifting qualities, without which one cannot reach certain high levels of spirituality.

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contain references to *Avodah Zarah*, idolatry; other songs may be inappropriate because of thoughts which they may arouse; and still others may contain more general ideals that are antithetical to Judaism's system of belief (*Minut*). Aside from a song's lyrics, its tune or associations may be forbidden because of the context of *Avodah Zarah* in which it was composed, i.e. Christian liturgical music, etc. Finally, some other songs may be inappropriate by dint of their composers. [2]

Shirei Agavim

Shirei Agavim, roughly translated as "songs of love",[3] is a category of music that rabbinic authorities unanimously prohibit, because of its arousing and immoral nature.

Maimonides writes, "So should a person act, to distance himself from frivolity, from drunkenness, and from *Divrei Agavim*, because they are strong causes, and steps toward, *Arayot* (immorality)".[4] The Rif[5] writes: "A *Shliach Tzibbur* (prayer leader) who acts disreputably, as one who intones songs of the Arabs, is exhorted not to do this, and if he does not listen, is removed from his post; and about him and his fellows Scripture states, 'She raised up her voice against Me; therefore I hated her.'"[6,7]

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2. As a general rule, this exposition deals with the specific issue of secular music as opposed to Jewish music, and therefore does not deal with the issues of music in our post-*Churban* era, and music sung by women; for a discussion of those topics see *Journal of Halacha and Contemporary Society*, Volumes XIV and X, respectively.

3. What exactly constitutes a *Shir Shel Agavim* is not clear, whether it need be lewd, or even containing any reference to love at all, albeit "clean" by today's secular standards. Again, better judgment and halachic authority is necessary for more definite clarification.

4. *Hilchot Issurei Biah*, 22:21.

5. Responsa 281 .

6. Jeremiah 12:8. The Radbaz also mentions this verse in his disapproval of *Shirei Agavim*.

7. It is unclear whether a prayer leader is disqualified if he sings these

Similarly, Rabbi Yehuda HeChasid[8] notes: "He whose voice is sweet should be careful not to sing songs of Gentiles, as it is a sin."[9],[10] The *Ma'aseh Rokeach*[11] also has an extensive piece dedicated to *Shirei Agavim* and in no uncertain terms condemns any connection with them, citing the Rosh and Tosafot[12] that reading books that contain sensual material is unequivocally forbidden.[13] He concludes finally that even using the melodies of *Shirei Agavim* to praise G-d is prohibited by association, lest they trigger people to think about the original songs' lewd words.

Notwithstanding this, Rabbi Ovadiah Yosef[14] says that only singing such songs with their intended lyrics is objectionable; however, singing the music of the songs, either without words or with acceptable content, is consistent with the halacha.

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objectionable songs as part of *Davening* (prayer), specifically, or even if he sings them outside of the synagogue, in a non-religious context. The *Aruch HaShulchan* in fact says the former, in which case the Rif would be less relevant to our purposes; however the *Lev Ha'Ivri* and others say that this is referring to singing in a non-religious context, and by extension during prayers as well. The *Yechave Da'at* who is quoted below likewise interprets the Rif as such.

8. *Sefer Chasidim* 768.

9.Unlike the Rif, Rabbi Yehuda HeChasid is not necessarily referring to a *Shliach Tzibbur*. It is unclear what he would hold in regards to firing somoeone who sings songs of Gentiles.

10. Although what is referred to by "songs of Gentiles" and "songs of Arabs" in these texts is unclear, the *Tzitz Eliezer* (Volume XIII, 12) interprets both to mean *Shirei Agavim*. Accordingly, the sin mentioned by Rabbi Yehuda HeChasid would be in the same vein as Maimonides, something that leads to immorality. This sin would specifically apply to "one whose voice is sweet", being that such a person has the most opportunity to sing in front of others, and can negatively affect his audience by causing unwarranted thoughts through *Shirei Agavim*.

11.*Hilchot Tefillah* 8:11.

12. *Shabbat* 116b .

13. He is apparently equating reading inappropriate material with singing or listening to it.

14. *Yechave Da'at*, Volume II, 5.

Rabbi Yosef bases this ruling on the Chida[15] who allows the use of *Shirei Agavim* to sing to G-d, in turn based on the ruling of the *Sefer Chasidim* that in singing to G-d one should choose songs that one finds uplifting, which may include what has been composed through the talents of non-Jewish musicians. To this end, Rabbi Yosef writes an extensive list of Torah giants who were wont to sing their devotion to *Hashem* through whichever music they found pleasing, regardless of its prior immoral associations. His halachic conclusion is that one may sing *Kaddish* and *Kedusha* in *Davening* to the tune of non-Jewish songs (a practice which he says has in fact been in effect for some time already).

Rabbi Eliezer Yehuda Waldenberg,[16] however, decides against this opinion, and according to him, any songs that derive from *Shirei Agavim* may not be used during *Davening*. Though he brings many of the sources quoted by Rabbi Yosef and others, who even preferred non-Jewish songs for *Davening*,[17] Rabbi Waldenberg ultimately says that we may not do this in practice.[18]

Shirei Avodah Zarah

Some songs are composed for the purpose of serving *Avodah Zarah*. It goes without saying that these songs are forbidden with their words, being that they espouse *Avodah Zarah*, which of course is wholly inconsistent with Judaism and its core beliefs.[19] In this vein, the previously mentioned *Ma'aseh*

15. *Birkei Yosef* 560.

16. *Tzitz Eliezer,* Volume XIII, 12.

17. See *Crach Shel Romi*, Responsum 1.

18. Presumably his opposition is based on an understanding that the above sources forbade all songs in all cases, regardless of words and circumstance.

19. An exact prohibition for this is "*VeShem Elohim Acherim...Lo Yishama Al Picha*" – "And the name of other gods shall not be heard from your mouth" (Exodus 23:13), among others. This verse is quoted in *Iggerot Moshe* (*Even*

Rokeach says that one is prohibited from singing songs of *Avodah Zarah* even with words of spiritual worth, i.e. as part of *Davening*. Likewise, Rabbi Moshe Isserles[20] comments: "A *Shliach Tzibbur* who sings songs of Gentiles is urged not to practice as such, and is disqualified from *Davening* if he does not listen", which the *Magen Avraham* clarifies to mean *Avodah Zarah* songs, based on a statement by Rabbi Yehuda HeChasid.[21] The *Bach*[22] also says that one transgresses the negative prohibition of *U'Bechukoteihem Lo Teleichu* – "and in their statutes you shall not go" – by incorporating songs that stem from idolatry into Jewish prayer.

In his own elucidation of this matter, Rabbi Moshe Feinstein[23] strictly prohibits listening to songs of *Avodah Zarah*, even if the song's words are intrinsically permissible (i.e. the words are from Psalms), being that the songs were composed for *Avodah Zarah* and therefore implicitly approve of idols.[24] This applies even if the singer does not have specific intention to serve foreign gods with his singing. In regards to such a song without its words, Rabbi Feinstein maintains that, although it may not be strictly forbidden, it is still abhorrent, although it is purely music. The only case in which Rabbi Feinstein is lenient is where songs are without their words, *and* the current singer does not have in mind to sing for *Avodah Zarah* purposes. [25]

Ha'Ezer II, 56) in connection with listening to *Shirei Avodah Zarah*.

20. *Shulchan Aruch Orach Chayim* 53:25.

21. *Sefer Chasidim* 238.

22. *Teshuvot HaBach* 127.

23. *Iggerot Moshe Yoreh De'ah* II, 56 and 111.

24. Rabbi Feinstein even extends this ban to prohibit deriving benefit from the musical instruments that make these songs, likening them to any item (such as wine) that becomes off-limits to Jews when utilized for idol worship.

25. Though he permits singing these songs, Rabbi Feinstein does add that this practice is disgusting.

Shirei Yevanim

The Gemara in *Chagiga* 15b relates the story of Acher (Elisha ben Avuyah), who left the path of Jewish observance despite many years of devotion to Judaism. The Gemara there explains that Acher strayed "because Greek song did not depart from his mouth." The Maharsha (ad loc) expounds that these songs had negative influences on a scholar of such high caliber because they contained *Minut*, philosophy that is inconsistent with Jewish ideologies.[26] The Mishnah in *Sanhedrin*[27] also uses harsh words against any connection to "*Sifrei Minim*", as explained by Rabbi Ovadiah of Bartenura,[28] though not specifically in the context of music. Likewise, the *Sifri* says that the commandment "*VeLo Taturu Acharei Levavchem"* (you shall not stray after your hearts) in the Torah is an admonition against *Minut*, and the *Sefer HaChinuch* includes "any ideas contradictory to the ideological bases that the Torah is built upon" in this prohibition. Rabbi Moshe Feinstein[29] also mentions *Minut* as a problem with some contemporary music.

Mi She'yatza LeTarbut Ra'ah

Rabbi Moshe Feinstein[30] discusses whether Jewish music composed by one whose religious observance has faltered is suitable to be sung at a wedding. Rabbi Feinstein's conclusion

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26. See Rashi there for an alternative explanation of the Gemara; Maharsha, however, bases his own explanation of the Gemara on difficulties he has with Rashi's explanation.

27. 10:1.

28. As a corollary to the previous topic of romantic songs, Rabbi Ovadia Yosef also includes "*Shirim Shel Agavim*" in the Mishnah's ban on harmful material.

29. *Iggerot Moshe Yoreh De'ah* II, 56. In this responsum, Rabbi Feinstein terms what the *Maharsha* in *Chagiga* referred to as *Minut*, to be *Avodah Zarah*, which would mean that "*Shirei Yevanim*" are the same as "*Shirei Avodah Zarah*."

30. *Iggerot Moshe Even Ha'Ezer*, I, 96.

is that all such songs may be sung in accordance with halacha, provided that the songs are appropriate themselves, and that the composer's departure from observance is not in outright heresy, but in less central (albeit just as important) details of Jewish law.[31] From this would follow that music from a genuinely dissolute and degenerate source, even with censored lyrics, would not be allowed in Judaism, to prevent the halacha from giving credibility to those whose moral insouciance undermines our existence as guardians of spirituality. Alternatively, Rabbi Feinstein may allow such music, as he may in fact be referring only to one whose original outlook was consistent with Torah law and was altered subsequently, as opposed to one who has always been wicked.[32]

Rabbi Moshe Stern, however, is strict in this area and forbids any music, even Jewish religious music, that was written by degenerates.[33] Rabbi Stern in fact says that it is obvious and clear to him that such music is forbidden, and the question bothers him in being asked; we may certainly not have any association with even the products of immoral individuals, and their names should not stand in the canopy of Jewish lifestyle.[34]

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31. At first Rabbi Feinstein compares such songs to a Torah written by an apostate, which must be burnt (*Gittin* 45b). Then Rabbi Feinstein differentiates between a Sefer Torah, which is a *Davar SheB'Kedusha* (a holy object), and singing songs, which are not necessarily things of holiness. Accordingly, the above ruling of leniency may not apply to songs in a spiritual context; thus, someone who has "left the path" may be disqualified from *Davening* for the congregation.

32. This differentiation is tenable by the following logic: music made by an apostate is specifically objectionable because we give credence to the composer's change of heart by allowing his music in our halls and institutions. Others may then follow his path more easily. This would not apply to music written by a degenerate who has always rejected Judaism.

33. *Be'er Moshe,* Volume VI, 76.

34. Just like Rabbi Feinstein, Rabbi Stern may be specifically speaking about a Jew who turned against his roots; however, it seems from his strong terms and his general use of the term *Rasha* (evildoer) that he is referring to

Some Conclusions

From the above-mentioned sources we may come to conclusions as regards some forms of secular music. If a song contains lewd or arousing material, it is subsumed under the category of *Shirei Agavim* and is categorically prohibited by all. This may even apply to singing the songs without their words, because one associates the tune with the song. Even if one interprets *Shirei Agavim* to mean specifically lewd songs, as opposed to love songs per se (a translation which is debatable), one may still exclude many forms of contemporary music from the range of permissible music. (It must be added that if one feels any sensual arousal from listening to a song, it is prohibited, regardless of whether it is included in the category of *Shirei Agavim*.)

Additionally, a song that contains traces of *Avodah Zarah* is prohibited. This applies whether the singer has intent to worship foreign gods or not. The only permissible song of idolatry is one sung A) without its words and B) for a non-religious, purely musical intent. From this it may follow that certain pieces of classical music that were composed for Christian function are forbidden. Christmas carols may also be included in this halacha, even when sung without idolatrous intent.

Some other songs may be prohibited because they espouse beliefs that are inconsistent with the core values of Judaism (*Minut*), what is referred to in *Chagiga* as *Shirei Yevanim*, according to the Maharsha. (This scruple is probably less relevant to present-day secular music than others listed here.)

Finally, according to some opinions, one may not listen to music composed by *Resha'im*, wicked persons, regardless of its content. A rather large percent of today's secular music might fall into this category, but specific inquiry is most probably necessary on a case-by-case basis.

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anyone under this category, Jewish or not.

From the lack of sources discussing music in and of itself (that is, in a form that contains none of the problems listed above), it would seem that other categories of music (classical for example), pose no halachic problems to the discerning Jewish mind. Indeed, in a passing reference, Rabbi Shlomo Zalman Auerbach[35] says that classical music is not included in the ban on music during *Sefira*;[36] apparently he found no intrinsic issue with classical compositions and was unopposed to those who listened to them. Reason might also lead us to this conclusion of harmlessness. The fact that a Gentile made music would not inherently invalidate it, in the same way that a Gentile may make clothing which we may use, without our halachic concerns.

That said, extra caution must still be taken in determining the permissibility of specific music, due to the formative nature of almost all musical compositions. Though many types of music may not be against halacha in its strictly literal sense, they are not necessarily appropriate for the sensitive and genuinely spiritual person, one whose Torah-trained mind abhors all forms of profanity, subtle or otherwise. Thus the soul may feel a more general uneasiness with many types of music, though they may be permissible under the letter of the law. For this reason, Rabbi Yisroel Belsky[37] says that one should not listen to rock music and its sister genres, whose aggressive styles and rowdy undertones erode one's sense of morality and closeness to *Hashem*.[38] It is generally recognized, and even intuitive, that music can affect one's mood as such,

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35. *Halichot Shlomo*, *Laws of Sefirat Ha'Omer* 14,22.

36. This is because it does not lead to dancing and liveliness, and therefore is not inconsistent with the feelings of sorrow associated with the *Sefira* period.

37. Oral ruling from Rabbi Belsky.

38. Rabbi Efraim Luft, in his pamphlet *The Torah Is Not Hefker* discusses rock music's potential negative effects, both on a psychological and a physical plane. See *The Sound of Music and Plants*, by Dorothy Retallack, in which studies show that plants die from listening to rock music (quoted in *The Torah Is Not Hefker*).

and it is therefore suggested that one avoid music that promotes *Hefkerut* (a cross between frivolity and nonchalance) and other undesirable dispositions.

Halacha and Bioethics

Dr. John D. Loike and Rabbi Dr. Moshe D. Tendler

Abstract

Challenging bioethical dilemmas are emerging at a rapid rate as new biotechnologies are constantly being developed. In both halacha and secular bioethics, the need to conceptualize and delineate a set of bioethical guidelines can be extremely useful in resolving, defusing, or managing these bioethical challenges. In this article, we propose a comprehensive set of six bioethical guidelines that underscore a halachic approach to bioethics. Second, we highlight some fundamental differences in four common guidelines shared by halacha and secular ethics. Then, we propose two additional guidelines, *kevod haberiyot* and ethical relativity, that differentiate a halachic approach from a secular, Western approach. Finally, we use contemporary case studies to compare and contrast how bioethical issues are addressed from a halachic and secular approach.

In 1970, Van Rensselaer Potter proposed one of the earliest definitions of bioethics as "biology combined with diverse humanistic knowledge forging a science that sets a system of medical and environmental priorities for acceptable survival."[1]

1. Whitehouse, P. J. (2003). "The rebirth of bioethics: extending the original

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Today, we are witnessing an expansion and specialization of bioethics that encompasses new terminologies such as genethics, neuroethics, animal ethics, environmental ethics, biolegal ethics, and behavioral ethics. Thus, a broader definition that better fits contemporary biotechnological innovation is necessary. Bioethics is defined here as a broad field of study that examines the ethical issues emerging from medicine and biotechnologies that affect human society, the animal world, the plant kingdom, and the environment.

The formulation of specific guidelines in bioethics is designed to help resolve, manage, or defuse real-life dilemmas that occur in all bioethical arenas. While there is a vast literature on both the history and development of the basic guidelines of bioethics, Tom Beauchamp and James Childress in their landmark book, *Guidelines of Biomedical Ethics*, championed the formulation of four basic guidelines or principles of bioethics.[2] These four guidelines – non-maleficence ("do no harm"), beneficence ("do good"), justice (equal accessibility of treatment to all), and respect for autonomy (patients' rights to choose their health care options) – are taught in almost every university, medical school, biomedical research center, and hospital in the United States.

In halacha there is a long history of discussions concerning bioethical issues. While many bioethical issues are presented in the Bible, Talmud, and halachic responsa, there were very few works summarizing the halachic perspectives of bioethics. In 1953, one of the authors (MDT) began teaching a course at Yeshiva College on Medical Ethics that led to the publication of the Compendium of Jewish Medical Ethics. This book was distributed in 1969 to all the major hospitals that had support

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formulations of Van Rensselaer Potter." *American Journal of Bioethics*, 3(4): W26-W31.

2. Beauchamp, T. L. and J. F. Childress (1979). *Principles of Biomedical Ethics*, New York, Oxford University Press.

from Jewish Federation. In 1959, Rabbi Immanuel Jacobowitz published "Jewish Medical Ethics", a work based on his Ph.D. dissertation.[3] This comprehensive analysis of halachic medical ethics is one of the most referenced works in this area. This book also stimulated many others to subsequently write about specific aspects of Jewish/halachic medical ethics and bioethics.[4]

Despite the many current publications on halachic bioethics, there are few published articles describing the guidelines that determine Jewish/halachic bioethics. Most of the published works focus on either case studies or specific aspects of one of the four basic guidelines of secular bioethics. In this article, we present a comprehensive analysis of the underlying guidelines of halachic bioethics and propose two additional guidelines of Jewish bioethics, *kevod haberiyot* and ethical relativity, which we believe are critical in understanding how bioethical issues are addressed in halacha. Finally, we utilize challenging bioethical case studies to differentiate how the "secular" versus "Jewish" perspectives of bioethics may lead to different outcomes.

Secular Bioethical Guidelines

The first secular western guideline is nonmaleficence, which is that health care providers should not harm or injure patients, either through acts of commission or omission. This guideline is designed to prevent unreasonable risk or harm to the patient as defined by social law and custom. Procedures such as unnecessary blood tests and biopsies that are without benefit to the patient are a violation of the patient's right of

3. Jakobowitz, I. (1959). *Jewish Medical Ethics. A Comparative and Historical Study of the Jewish Religious Attitude to Medicine and Its Practice,* New York, Philosophical Library.

4. From 1970 until 12/15/10 there were 309 "Jewish medical ethics or Jewish Bioethics" publications listed in PubMed (the official site in the United States for medical related articles).

privacy. The second guideline, beneficence, is often linked to the first and describes the critical duty of health care providers in providing services that benefit patients. The third guideline, justice, is usually described as providing fair distribution of health care services to all strata of society, when goods and services are in short supply. The fourth and final secular guideline is respect for autonomy, allowing patients to make their own health care decisions. Respect for autonomy is based on the assumption that each patient is fully informed to act intentionally, with understanding, and without controlling influences that would restrict free and voluntary acts. This guideline of respecting autonomy also serves as the basis for the practice of "informed consent" in transacting health care options.

However, as health care providers and research scientists encounter challenging bioethical dilemmas in real life situations, they often discover that the fourth guideline, respect for autonomy, can dominate in the decision-making process at the expense of the first two guidelines, beneficence and nonmaleficence. Sometimes, the patient's autonomy in the decision-making process may even result in health outcomes that may not be medically sound.

The autonomy of a patient has evolved over the past 100 years, displacing paternalism or the caveat that "the doctor knows best". Until the late 20th century, withholding a fatal diagnosis from the patient was a common practice taken by many health care providers. However, as the study of bioethics began to develop in the 1960s and 1970s, opinions on the role of physician disclosure to the patient changed rapidly to support honest and complete disclosure of medical information. In 1972, the Board of Trustees of the American Hospital Association adopted "Patient's Bill of Rights", which states that patients have the right to obtain from their physicians complete current information concerning their diagnosis, treatment, and prognosis in lay, easily understood

terms.[5]

Currently, many modified models of autonomy have been proposed and many practicing bioethicists, physicians, and scientists adopt the libertarianism model of autonomy described by John Stuart Mill, Peter Singer, and Julian Savulescu. Briefly, this model of autonomy states that everyone has (or should have) a consciously drafted "life plan", and assumes that only the patient has the right to determine his/her health care blueprint. It is assumed that fully informed patients will choose the most appropriate medical intervention, therapy, or action to treat their illness.

Another issue in classical bioethics is whether there should be a hierarchy within these four guidelines. For example, beneficence may be given priority in deliberating ethical issues for the acutely suicidal patient, whereas autonomy may be given priority in dealing with those chronically suicidal patients that have some capability of resisting suicidal impulses.[6] These debates and discussions of how to improve bioethical guidelines permeate the current literature and continue to evolve.

Halachic Guidelines of Bioethics: Background

The Jewish or halachic approach to bioethics is based on a moral religious philosophy that incorporates basic elements of the four guidelines of secular bioethics outlined above. Yet, as will be noted below, there are significant differences in the halachic approach to these guidelines as compared to the secular approach. Moreover, within the Jewish perspective of bioethics two additional guidelines need to be recognized and elaborated in order to better understand the underlying rationale of how halacha deliberates bioethical dilemmas.

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5. Lee, A. L. and Jacobs, G. (1973). "Workshop airs patients' rights" *Hospitals*, 47(4): 39-43.

6. Rosenbluth, M., Kleinman, I., et al. (1995). "Suicide: the interaction of clinical and ethical issues." *Psychiatric Services*, 46(9): 919-21.

These additional guidelines are 1) respect for the sanctity of human life and human dignity (*kevod haberiyot*), and 2) ethical relativity, or the halachic perspective of what is commonly referred to as the "slippery slope" argument.

The subject of halachic bioethics is gaining a greater importance as it takes an important role in the legal system of the State of Israel. A recent example of how halacha has been incorporated into Israeli law relates to the legal definition of death.[7] Death is clinically defined in Israeli law when the patient exhibits no brain electrical activities, such as brainstem auditory evoked response, or has a nuclear scan which determines that there is no measurable blood circulating to the brain. According to Israeli law, the time of brain-respiratory death (brain stem cessation) is proclaimed by two certified doctors, according to fixed clinical parameters (no blood pressure, failure to breathe without need for life support, no pupillary reflex, and an absence of other reflexes). The law also states that the health provider team, authorized to proclaim a person dead in any hospital, must include at least two senior physicians who have no relationship or link whatsoever to organ transplant donors or recipients. The Israeli law is halachic in nature, with many of the rabbinate in Israel following the views of the Chief Rabbinate that accepts brain stem death as the indicia of halachic death. Yet, this law recognizes that many rabbinical leaders do not accept brain cessation as the definition of death and makes accommodations for those religious families who view cessation of cardiac function as the only criterion of death. Thus, this Israeli law states that the patient's family must be informed that their loved one is brain stem dead, but will honor the family's insistence that death be declared only at cessation of cardiopulmonary function.

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7. Anonymous, "Brain Death/Respiratory Law"(2008). *The Journal of Medicine and Law*, 38:192–4, (In Hebrew).

Six Halachic/Bioethical Guidelines

Guidelines 1 and 2: nonmaleficence and beneficence:

The first two halachic bioethical guidelines, nonmaleficence and beneficence, are similar to their counterparts in secular bioethics. Halacha states that one is obligated to refrain from doing bad and must attempt to do good by being compassionate and charitable to fellow human beings. The sources for these guidelines include the verse in Psalms (34:15) "to turn from evil and do good", and the talmudic statement of Hillel that "what is hateful to you, do not do your neighbor" (*Shabbat* 31a). One might include another source from Ramban's innovative interpretation of Leviticus 18:15: "Thou shall love to thy neighbor like to yourself." Ramban focuses on the word *le're'echa* ("love to your neighbor" as opposed to the classical translation of "love your neighbor") and recognizes that it is impossible to command individuals to love another person as they love themselves. However, this verse teaches that the *chesed* (loving kindness) required in time of need or crisis is a societal obligation, not a voluntary act. Just as individuals should try to help themselves in times of need, they should also help others in their times of need.

Guideline #3: allocation of scarce resources (i.e. justice).

This guideline in halacha can be derived from several sources. They include the prohibition of taking or giving interest on loans (Exodus 22:24), protecting the weaker segments of the population (Isaiah 58:7), giving charity to the poor (Deuteronomy 15:7 and 8), and not standing idly by when your neighbor is suffering or in danger ["Thou shalt not stand idly by the blood of thy brother" (Leviticus 19:16)]. In each of these halachot there is a hierarchy in allocating scarce medical resources as detailed in Rabbi Rappoport's review article.[8]

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8. Rabbi Shabtai Rappaport, (1992), "Allocation of Medical Resources", *Assia* 51-52:46-53.

Halacha's interpretation of justice enables individuals to hire physicians to provide a wide range of health care options, from organ transplantations to infertility management. Yet, there are clear differences in how halacha deals with the guideline of justice as compared to secular bioethics. One classical example is the issue of allocating scarce resources. There are only a few talmudic sources that deal with the issue of allocating scarce resources.[9] One famous bioethical case is presented in *Baba Metzia* 62, where two people are in the desert and only one of them has sufficient water to survive. If both drink, both will die, unless they are rescued. If only one person drinks the water the other will surely perish. Rabbi Akiva argues with Ben Petura and states that the owner of the water need not share his water, based on the verse "and you shall live by them" [Torah statutes] (Leviticus 25:36) which R. Akiva says means "your life takes precedence over the life of your brother." Ben Petura states they should share the water equally even though both may die.

While there are varying views in interpreting this case,[10] one lesson that can be derived from this talmudic discussion revolves around the issue of justice. In many modern day situations, scarce medical resources are not owned by any patient, but rather are owned by an independent third party, the hospital, or health care provider. This is not analogous to the case disputed by Rabbi Akiva and Ben Petura where the water is owned by only one of the affected parties. In addition, Ben Petura may really be discussing a case where both parties have reason to hope that searchers will find them before they run out of water. Not providing water to one individual will surely lead to his death whereas allowing both to drink may provide enough time for them to be found by searchers. Ben Petura does not advocate the immediate death of both people.

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9. Sokol, M. (1990), "The Allocation of Scarce Medical Resources: A Philosophical Analysis of the Halakhic Sources," *AJS Review* 15, 69-93.

10. See Rabbi Chaim Ozer Grodzinski, *Achiezer, Yoreh Deah* 16:3.

Rather, he states that it is forbidden to let another person die, even passively, in order to save oneself, since spending a few days in the desert sharing water is not a case of imminent death. Ben Petura evokes the principle that one should accept the danger of possible death in order to save someone from certain death.[11]

The halachic decision supporting Rabbi Akiva affirms that significant risks to one's own life have priority over attempts to save another life. However, if health risks are minimal, then the principle of *areivut* [mutual responsibility] would encourage one to assume a modicum of risk to one's own life and share the resources. Thus, halacha, in contrast to secular bioethics, advocates the principle that "*kol yisrael areivim zeh la'zeh*"[12] as a critical consideration, where individuals are required to give up their health care resources to help others. It is important to emphasize here that halachic health care encompasses more than what is covered by health insurance as it provides additional psychological comfort that may not be available when a patient merely goes to the emergency room for medical treatment.

Nedarim 80b and 81a details another example of applying the guideline of justice, in the case where one community lacks sufficient water supply while another community has adequate water.

> With respect to a well belonging to townspeople, when it is a question of their own lives or the lives of strangers, their own lives take precedence; their cattle or the cattle of strangers, their cattle take precedence over those of strangers; their laundering or that of strangers, their

11. *Ha'amek She'elah,* Deuteronomy *Re'ah* no. 147. While *Talmud Yerushalmi* follows the opinion of Ben Petura, halacha follows the opinion of Rabbi Akiva as quoted in *Talmud Bavli*.

12. *"Kol Yisrael areivim zeh mizeh*" is found in the *Siddur of Rashi* 381, and the phrase "*Kol Yisrael areivim ze bazeh*" is found in *Shevuot* 39a. "*Kol Yisrael areivim ze lazeh*" only appears in rabbinic sources, not in the Talmud.

> laundering takes precedence over that of strangers. But if the choice lies between the lives of strangers and their own laundering, the lives of the strangers take precedence over their own laundering. R. Jose ruled: Their laundering takes precedence over the lives of strangers. Now, if to [merely refrain from] washing one's garment is a hardship in R. Jose's view, how much more so with respect to the body? — I will tell you: In R. Jose's opinion laundering is indeed of greater importance than bathing.[13] (Soncino translation)

Although the need for water is immediate, and future health concerns will develop due to a lack of personal hygiene, the "time clock" of a community is sustainable, unlike the previous case of the desert travelers. Moreover, the text in *Bava Kama* (80b-81a) states that Yehoshua proclaimed the halacha that availability of water is not in control by private individuals. In comparing the lessons from these two cases presented in *Baba Metzia* and *Nedarim*, it appears that Ben Petura's concerns in *Baba Metzia* are focused on the individual whose current "time clock" (*chayei sha'ah*) is ticking away and advocates that the two parties divide the water as a temporary relief. Rav Jose's concerns in *Nedarim* are focused on the health risks to the community whose future societal time clock sustainability is in doubt. In contrast to halacha, secular bioethicists might advocate that individuals must share one's own water supply with other communities as a major guideline of moral action.

The anthrax terror attack in 2001 brought into focus the ethical dilemma of allocation of scarce resources. The fear that some terrorist group may attempt to infect a large segment of the population with the anthrax bacteria became a reality. Since most cities only have a limited number of ventilators to treat those critically infected with anthrax, several bioethicists

13. This is not a case of *pikuah nefesh* because halachot related to *pikuah nefesh* apply only when there is an immediate threat of life.

have proposed that the first group of ventilators should be given to health care providers since they will risk their lives in battling this terrorist attack.[14] Halacha might adopt a different, first-come-first-served approach.[15] The first patients entering the emergency room in need of the ventilators should receive them irrespective of their occupation, gender, or age. This halachic guideline assumes that each of the patients coming into the emergency room exhibits an equal medical need for the ventilator and would benefit equally from this therapeutic intervention. Originally, the Sanhedrin [Jewish high court and legislature] had the power to judge the worth of an individual and to declare someone as less worthy of medical attention over another person in need. The decision by the Sanhedrin to determine whose life will be forfeited is tantamount to their capacity to decide corporal punishment. Currently, when there is no Sanhedrin, decisions of corporal punishment cannot be made and other accommodations, as described above, must be instituted.[16]

Guideline #4: Sanctity of human life, uniqueness of humanhood, or *kevod haberiyot*

While there are differences between secular and halachic views of the first three guidelines of bioethics described above, conceptually they share many common features. The fourth guideline, respecting autonomy, differs strikingly in its

14. Courtney, B., Toner, E., Waldhorn, R., Franco, C., Rambhia, K., Norwood, A., Inglesby, T.V., O'Toole, T., (2009), "Healthcare coalitions: the new foundation for national healthcare preparedness and response for catastrophic health emergencies."Biosecure Bioterrorism 2:153-63.

15. *Iggerot Moshe*, *Choshen Mishpat*, vol, II, responsum 73. Under the principle of *lo taamod al dam re'eicha* (Leviticus 19:16), the first patient who request medical assistance deserves the appropriate medical response.

16. Sokol, M. (1990). "The Allocation of Scarce Medical Resources: A Philosophical Analysis of the Halakhic Sources," *Association for Jewish Studies Review* 15: 63-93. *Tiferet Israel* (Rabbi Israel Lipschitz), *Mishnayot Yachin u'Boaz*, Tractate *Yuma*, Chapter 8, Mishnah 7.

formulation by secular versus halachic authorities. Before discussing autonomy, however, it is important to introduce a unique Jewish bioethical guideline, *kevod haberiyot* – respect for the sanctity of human life, the uniqueness of humanhood, or human dignity. *Kevod haberiyot* is a concise term that is really synonymous with the infinite worth of human life. The dignity element in *kevod haberiyot* reflects a divine value system in how God created human beings in His Image. According to Rabbi Yosef Dov Soloveitchik, *kevod haberiyot is* "implicit in the biblical concept that man was created in God's image."[17] This guideline extends beyond *kavod ha'adam* (human dignity) and reflects the dignity of all creatures uniquely fashioned by the Almighty. Thus, inflicting unnecessary animal suffering or wasteful destruction of animal life is prohibited. Nonetheless, there is the understanding that human beings' stature and worthiness stands out as a special characteristic from all other creatures and emanates from being uniquely created by God. Human beings deserve respect not only because of their characteristics and intelligence, but also, as beings who achieve uniqueness, significance, and spirituality when they follow in God's path of being just, merciful, and caring.

Kevod haberiyot also includes the dictum not to embarrass or disgrace the Divine Image borne by each human being. The Talmud[18] states that "Mar Zutra b. Tobiah said…: 'Better a man throw himself into a fiery furnace than publicly put his neighbor to shame. Whence do we derive this? – From [the action of] Tamar and Yehuda.' "

Kevod haberiyot differs from the secular formulation of respecting human dignity in two ways. First, from a secular perspective, the concept of human dignity is intrinsic and empowers human beings to be completely autonomous in establishing ethical standards of conduct. Different cultures

17. Besdin, A. R. (1979),*Reflections of the Rav*, Jerusalem: World Zionist Organization, pg 190.

18. *Kethubot* 67b – Soncino translation.

may thus formulate different ethical standards of conduct based on their understanding of human dignity.[19] In contrast, *kevod haberiyot* is extrinsic and emanates from God, such that ethical standards are established by halacha. Second, by viewing human beings as having been "created in the image of God", the Torah provides a direction and divine link that does not exist in secular humanism. The religious perspective linking human beings to the divine grants individuals unparalleled significance and infinite worth.

How does the guideline of *kevod haberiyot* apply to bioethics? Classically, euthanasia is prohibited in halacha based upon the biblical principle of the sanctity of life and the strict prohibition of murder.[20] However, issues related to the rights of patients to engage in specific therapeutic interventions are more complicated. The halachic axiom regarding the infinite worth of life also states that patients with chronic illnesses have the right to refuse further therapy when their quality of life will become unacceptable.[21] The sanctity of life does not necessarily imply that every patient must be treated aggressively, even if terminally ill. Despite the obligation to treat even the sickest patients, patients do have limited autonomy and may refuse treatment for terminal conditions if they are in intractable pain. Terminally ill patients who are in great pain have the right to refuse life-extending therapies, because of the unacceptable quality of life as evaluated solely by the patient. Often, cancer patients become unresponsive to standard chemotherapy. If such a patient is in intractable pain

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19. Tsai, D.F. (2005), "The bioethical principles and Confucius' moral philosophy."*Journal of Medical Ethics*, 3:159-63; Shih, F.J., (1996), "Concepts related to Chinese patients' perceptions of health, illness and person: issues of conceptual clarity." *Accident and Emergency Nursing*, 4:208-15; Gbadegesin, S., (1993), "Bioethics and culture: an African perspective."*Bioethics,* 7:257-62.

20. Shultziner, D. (2006). "A Jewish Conception of Human Dignity," *Journal of Religious Ethics* 34: 663-683.

21. *Iggerot Moshe*, *Choshen Mishpat* II, #73:5; Tendler, M.D., Rosner, F., (1993), "Quality and sanctity of life in the Talmud and the Midrash."*Tradition*, Fall, 28(1):18-27.

and new experimental therapy is offered, the patient may refuse the physician's offer of a "futile" therapy that prolongs life without a reasonable expectation of cure or relief of pain.[22] In the final analysis the quality of life is an essential component to *kevod haberiyot*.

Berachot 19b teaches that "great is human sanctity, so much so that it overpowers a prohibition of the Bible."[23] There are several classical situations where respecting the sanctity of human life prevail in halacha and serve as a basis for the following laws:

1. Withholding medical information: Halacha states that physicians are allowed to withhold medical information from a patient if the patient will react with extreme fear or depression.[24] Halacha has long recognized the medical impact of severe depression as documented by current medical research as well.[25] Patients, for example, who become depressed after coronary bypass surgery and are not immediately treated for their depression, will live a significantly shorter length of time than those patients that were

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22. *Iggerot Moshe*, *Choshen Mishpat* II, Volume 7, #74:1, p. 311-312. Eisenberg, D. (1996), "Futility of Treatment" *Maimonides: Health in the Jewish World* http://www.daneisenberg.com.

23. In fact, according to halacha this statement is primarily directed to rabbinical prohibitions. For example, in ancient times, people cleaned themselves with stones after defecating. *Shabbat* 81b concludes that one may carry the stones and use them for cleaning purposes on Shabbat because of human dignity. This is a case where a rabbinical prohibition is superseded by the concern for human dignity. *Moed Katan* 27a-27b elaborates procedures at the funeral ceremony in order not to embarrass the impecunious. Rabbis (Ramo *Responsa*, no. 125, pp. 448-495) permitted marriage on the Sabbath under certain conditions, such as an emergency, to avoid an embarrassing situation or for the preservation of human dignity.

24. *Shach* on *Hilchot Bikur Cholim*, #337:1-2. He notes that if patients become deeply depressed or assume a fear of death it may impact the quality of life.

25. *Iggerot Moshe, Even Ha-ezer III,* #46.

treated for their depression.[26] Thus, halacha is acutely sensitive to the issue that there may be times that it is prohibited to reveal medical information, such as the fact that a patient has a terminal illness, for fear that the ensuing depression may shorten the patient's life. In this situation, *kevod haberiyot* takes precedence over patient's autonomy, and quality of life extends to psychological well-being as well.

While many secular bioethicists favor full disclosure as a means of respecting patient autonomy,[27] medical ethics did not always stress cultural differences with respect to patient's rights and professional obligations to heal and treat the sick. For example, American Indians, several Asian cultures, and some Orthodox Jews will request from their physicians to withhold information that a family member has a terminal illness for fear that such information will trigger depression and impact the quality of life of the affected family member.[28]

2. Visiting a sick person whom he or she does not know is a specific *chesed* activity based on the recognition that all human lives are sacred and all members of the Jewish faith are as one family (*Kol Yisrael areivim zeh la-zeh – All members of Israel are responsible for one another).*[29]

3. Attending a wedding rather than a funeral in the situation when an individual who was planning to attend a wedding hears that a member of his community died and that the funeral will take place at the same time as the wedding. In this

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26. Dao, T. K., Chu, D., et al. (2010). "Depression and geographic status as predictors for coronary artery bypass surgery outcomes," *Journal of Rural Health*, 26(1): 36-43. Rothenhausler, H. B. "The effects of cardiac surgical procedures on health-related quality of life, cognitive performance, and emotional status outcomes: a prospective 6-month follow-up study." *Psychiatria Danubina*, 22(1): 135-6.

27. Katz, J., (1984), *The Silent World of Doctor and Patient,* New York, Free Press.

28. Nyman, D. J. and. Sprung, C. L., (1997). "International perspectives on ethics in critical care." *Critical Care Clinics*, 13(2): 409-15.

29. *Shevuot* 39a; *Hilchot Bikur Cholim* # 335:1.

case, there is a conflict of the mitzvah of *kavod hamet* with the mitzvah *l'smoach chatan ve'kallah*. The halachic directive in this case, is to attend a wedding over a funeral.[30] While the duties to share each other's joys and sorrows are an important aspect of *kevod haberiyot*, *kavod hachaim* (honoring life) takes precedence over the obligation of *kavod hamet* (respecting the dead).

4. The underlying rationale for the talmudic guideline "you shall choose for him a good death" is the halachic dictum that even a criminal sentenced to death has the right to die with dignity.[31]

The following modern case is a situation where *kevod haberiyot* applies to emerging biotechnologies. In this scientifically plausible scenario, stem cell technology could be used to engineer a mouse, cow, or sheep to produce either human sperm or human eggs. While transgenic mice have actually been created that produce human sperm or human eggs,[32] there has been no scientific report claiming success in using these animal-derived human sperm and egg to produce a human fetus. From a halachic perspective this type of biotechnology infringes upon *kevod haberiyot* and would not be allowed for the following reason: In halacha, human reproduction requires, whenever possible, the involvement of a man and a woman (*Niddah* 31). The use of animals to create human fetuses would therefore infringe upon the uniqueness of humanhood or *kevod haberiyot*. In contrast, secular bioethicists might argue that this type of experimentation, if demonstrated to enhance fertility and be free from medical harm, would <u>not</u> infringe on any of the four bioethical guidelines.

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30. *Hilchot Bikur Cholim* # 357.

31. *Sanhedrin* 45a.

32. Nagano, M., McCarrey, J. R., et al. (2001). "Primate spermatogonial stem cells colonize mouse testes" *Biology of Reproduction,* 64(5): 1409-16.

It should be noted, however, that the above scenario differs from classical in vitro fertilization (IVF) where the couple is infertile and want to have children. Most halachic decisors permit obtaining sperm and/or eggs from human beings and allow fertilization to take place in the laboratory with subsequent re-implantation into a woman for fetal development.

Another modern situation where *kevod haberiyot* may play a critical role emerges from the European Union's decision to grant limited social rights to chimpanzees, bonobos, gorillas, and orangutans. Based on the belief that non-human primates exhibit specific human-like characteristics, the European Union proposed that these animals should not be used in animal experimentation and should be granted special human-like rights. Thus, the sacrifice of these animals in order to study diseases that affect humans would be prohibited according to the EU proposed law.[33] While halacha prohibits causing pain to animals, it approves the sacrifice of any animal when there is a clear medical benefit, such as to develop new medical therapies.[34] Halacha would, in fact, favor the use of non-human primates in testing new anti-AIDS therapies if these animals were the best available animal models for this disease. Thus, *kevod haberiyot* for human beings takes precedence over the suffering of animals and views non-human primates naturally found in the animal kingdom as animals and not as pseudo-human beings.[35]

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33. Olsson, I. A. and A. Vitale (2010), "Legislation, social license and primate research", *EMBO Reports* 11(1): 9; Leviev-Sawyer, C. (2010), New EU rules on animal experimentation proposed.

34. Isserles, M. (1954). See *Shulchan Aruch, Section Even Haezer*, 5:14. New York, Grossman. ... רק נותנים לעובד כוכבים אחר לסרס, לכולי עלמא שרי (ג"ז שם). כל דבר הצריך לרפואה או לשאר דברים, לית ביה משום איסור צער בעלי חיים (איסור והיתר הארוך סימן נ"ט). ולכן מותר למרוט נוצות מאווזות חיות, וליכא למיחש משום צער בעלי חיים (מהרא"י סי' ק"ס /ק"ה/). ומ"מ העולם נמנעים דהוי אכזריות.

35. *Noda B'Yehuda* (*Yoreh Deah* # 10) clearly expresses his distaste for hunting animals since the Torah only mentions two hunters, Nimrod and Eisav, individuals that we should never emulate. Yet, he rejects applying the

Guideline #5: Autonomy

The imperative of *kevod haberiyot* influences the secular and halachic viewpoints of autonomy. There are times when the issue of autonomy conflicts with the halachic guideline of respecting the sanctity of human life and assessing the quality of life (see above on the issue of withholding medical information to the terminally ill patient). In halacha, the physician-patient relationship is not a voluntary-contractual arrangement but rather a divine commandment with limits and restrictions. Moreover, the patient does not always possess the right to decide autonomously to refuse treatments that might benefit or save his or her life, especially when these treatments do not infringe on the quality of life.[36] Thus, the patient does not have the right to engage in active or passive euthanasia. Halacha declares that the value of human life is supreme and overrules individual autonomy. Yet, halacha recognizes that there are special situations (patients undergoing cancer treatment, kidney transplantation, or liver transplantation) where the quality of human life issues are not absolute or well-defined.

One previously cited example considers the role of compassion towards human suffering and quality of life as vital in halachic medical philosophy and relates to the guideline of autonomy. A patient must be provided with food and water but under certain circumstances, where the quality of life is unacceptable, the patient has the absolute right to refuse receiving a feeding tube into his or her digestive tract.[37]

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possible prohibition of "*tza'ar ba'alei chaim*" (causing pain to live creatures) to hunting animals because hunting provides human benefits, as the skin of animals can be used for clothes and the meat can be used as food for dogs.

36. Ibid, notes #22, #25. Rabbi Zev Schostak, "Is There Patient Autonomy in Halacha", *Jewish Medical Ethics* (M. Halperin, D. Fink and S. Glick, editors), volume one, 98-108, (2004); *Avoda Zara* 18a.

37. *Iggerot Moshe*, *Choshen Mishpat* II, #72:2

Similarly, Rav Moshe Feinstein ruled[38] that a diabetic person with a gangrenous leg may refuse amputation (which could prolong the patient's life) because he does not want to live as a handicapped individual, a situation that impacts the quality of life.

The Talmud[39] describes how the great Rabbi Yehuda Hanasi was suffering terribly as a terminally ill patient. The rabbi's maidservant prayed for his demise and even interrupted the rabbi's students' prayers for a speedy recovery so that he could die. Rabbeinu Nissim cites this example and claims that only when the students of Rabbi Yehuda realized that their prayers were not preventing the death of their teacher, did they pray for the release of their teacher's soul.[40] Thus, there are times in halacha where one should pray for the sick to die and where extraordinary lifesaving measures need not be taken. Similarly, a terminally ill patient may not engage in euthanasia but may opt to refrain from painful medical procedures when there is no chance that he will actually recover.

With respect to the autonomous rights of a patient, halacha considers issues related to the quality of life and the principle that a person's body is not his own possession, but rather God's, as stated in the Talmud "better that He who gave the soul should take it, and a man do himself no injury".[41] Thus, in Jewish bioethics, the patient's autonomy is not the sole determinant, or the *sine qua non* of ethical behavior.

Guideline #6: Ethical relativity or concern for the "slippery slope".

The slippery slope principle refers to conducts that flirt with

38. As told to Rabbi Dr. Moshe Tendler.

39. *Ketubot* 104a.

40. Rabbeinu Nissim in his commentary to *Nedarim* 40b.

41. Rambam, *Mishneh Torah, Hilchot Rozeah* 1:4.

the unethical. Additional restrictions are sometimes instituted by secular bioethicists to prevent the unethical consequences from an approved act because it is prone to abuse. A classical example in secular medical ethics relates to euthanasia. If voluntary euthanasia were to become legal, it would not be long before involuntary euthanasia would start to happen. This issue has emerged again since the introduction of active euthanasia in the Groningen Protocol passed in the Netherlands in 2005.[42] Guidelines were proposed to allow active euthanasia for newborns suffering from incurable conditions in a protocol that permits doctors to actively euthanize them in a humane and legal way in order to spare them future suffering. Since 2005, the slope has become more slippery in the Netherlands.[43] The Dutch Pediatric Association's panel on neonatal ethics has asked the government to permit euthanasia for infants so damaged that their "quality of life" is low. Says Dr. Zier Versluys, chairman of the group: "It's not always good to prolong someone else's life, because life is not always good." Many secular bioethicists use this example to show how a seemingly proper ethical decision may lead to unethical consequences, especially when interpreted by individuals, whose value system is at variance with those who made the original decision.

Jewish law consists of both biblical and rabbinic legislation. Many rabbinic laws are based on the principle of "erecting fences" to protect biblical law from being violated; this can be viewed as a form of the slippery slope argument. Rabbinic decisors instituted laws to prevent Jews from slipping into forbidden practices. The laws of Shabbat (i.e., individuals

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42. Chervenak, F. A., McCullough, L. B., et al. (2009). "The Groningen Protocol: Is it necessary? Is it scientific? Is it ethical?", *Journal of Perinatal Medicine*, 37(3): 199-205. Jotkowitz, A. B. and Glick, S., (2006). "The Groningen protocol: another perspective." J. Med. Ethics 32(3): 157-8; Lindemann, H., Verkerk, M., (2008), "Ending the life of a newborn: the Groningen Protocol", *Hastings Center Reports*. Jan-Feb;38(1):42-51.

43. Ibid.

experiencing minor discomforts may not take medicine on Shabbat lest they violate the prohibition of preparing medication by either grinding or mixing raw materials together), kashrut (i.e., one may not consume or cook chicken with milk as a precaution that this might lead to the biblical prohibition of consuming or cooking beef with milk), and marital relations (i.e., physical contact between a husband and his wife who is ritually impure is forbidden since it may lead to marital relations) are enclosed by "legal fences" lest one err. In the case of medicine and science there are several examples where halachic restrictions are instituted to guard against the erosion of ethical principles by social relativity.

Rambam provides an excellent example of applying ethical relativity in medical ethics. In *Hilchot Yesodei Hatorah* (5:9) he states:

> If someone had his eyes on a particular woman and then developed a terminal illness, and the doctors said that he cannot be cured unless he has intercourse with that woman, then he may not do so and has to die, even if the woman was unmarried. We do not even allow him to speak to her through some sort of barrier [which does allow them to see each other], even if he will die, so that Jewish girls will not be casual [should be treated with dignity and not as objects] and [to prevent] these matters from leading to promiscuity.

If this situation were permitted, men would take advantage and ultimately a licentious atmosphere would prevail. Thus, this fear or caution is so great that it overrules one of the supreme mitzvot of saving another person's life. Here the medical situation is clear that unless the man speaks with this woman, his life will be in jeopardy. Nonetheless, the fear of a slippery slope situation prohibits the man from speaking to this unmarried woman even at the expense of his life.

Another example cited by Rambam[44] is the use of alternative

44. *Moreh Nevuchim* 3:37.

medicine. He states that a Jew who is ill should not engage in alternative medical treatments that have no scientific validity or no experimental evidence of success because this would lead people to transgress the prohibition against magic (*kishuf*). A final example, presented in *Yuma* 84b, instructs a Jew to transgress Shabbat laws in order to save another life, rather than asking a non-Jew for assistance to save a life. Our sages viewed this situation as a slippery slope and feared that permitting a Jew to ask a non-Jew to save a life on Shabbat might lead others to think that a Jew may not transgress Shabbat to save a life, thereby violating a fundamental law.

There is one major difference between the halachic concerns of a slippery slope and those generally used in medical ethics. In medical ethics, the concern of a slippery slope is that permitting a given situation sets up a dangerous or pernicious precedent that could lead to other situations which would be unethical. Termination of pregnancy is one issue where some secular bioethicists have argued that if one considers destroying a pre-implanted zygote to be acceptable, there is no reason to prohibit the destruction of an embryo fourteen days after conception or the destruction of a fetus of three months, and so on. These ethicists have used the slippery slope argument to prohibit the destruction of a zygote (fertilized egg), as it would lead to the permissibility of destroying a fetus at any stage of development in utero.[45]

In contrast, halacha has a different perspective on the use of slippery slope arguments. While there are different views on when, and at what period during gestation a pregnancy can be terminated, some decisors permit medically-based termination of a pre-implanted embryo that gestated for less than 40 days. The status of a pre-implanted human embryo (less than 40 days of gestation) is not considered as possessing full human status. These pre-implanted embryos may be donated for

45. Newman, S., (2002). "Cloning's slippery slope: how embryonic cloning leads to human cloning", Genewatch; 15(5):11.

embryonic cell research without the fear that permitting its destruction will eventually lead individuals to become lax on abortion or infanticide. Therefore, this is not a situation where halacha evokes a slippery slope argument. According to halacha, infertility is viewed as a serious medical condition. Rachel expressed her infertility as a condition that debases the quality of life.[46] Therefore, obtaining many pre-implanted embryos in the course of fertility treatments may be permitted and encouraged to allow woman to have healthy children.

While halacha prohibits the haphazard destruction of unused pre-embryos or semen, some say that it favors and encourages the donation of pre-implanted and unused embryos for embryonic stem cell research and the use of semen for infertility workups. Thus, halacha does not institute the proverbial "slippery slope" argument to ban stem cell research on embryonic stem cells as a dangerous encroachment on the sanctity of life. Rather, slippery slope may be employed as a conceptual reason for a rabbinic prohibition, but is only relevant when such edicts are actually issued.

Nishtanah hateva

Any discussion on bioethics or medical ethics must recognize that halacha respects new developments in scientific knowledge and technology. Rabbi Moses Isserles posits that halachic principles can adapt to new scientific procedures and discoveries. Applying unchanging halachic norms to new scientific realities can be termed *nishtanah hateva*, the "nature of things" has changed.[47] He interprets *nishtanah hateva* to mean that our knowledge of science or medicine has changed. Support for this position arises also from Rav Sherira Gaon who explicitly states that the sages of the Talmud were not

46. "Give me children, otherwise I will die" (Genesis, 30:1). Netziv, *Sheiltot,, Parshat Naso*.

47. *She'elot u-Teshuvot ha-Ramo*, Responsum #6.

physicians, but made their medical recommendations based upon the medical knowledge of their times. Rav Sherira Gaon further states that their advice should not be construed as law and therefore it is not necessary to rely on their medicine but rather rely on experienced physicians.[48] Similarly, the Rambam seems to have considered most of the talmudic remedies to be ineffective.[49] The Rambam's son, Rav Avraham ben HaRambam says that *Chazal* gave these instructions based on the medical knowledge of their time, and they need not be considered as a halachic ruling.[50]

The classical biomedical example of *nishtanah hateva* quoted by Rabbi Isserles is that in the time of the Talmud, Shabbat laws could not be transgressed to save a baby born in the eighth month of pregnancy because these babies were considered non-viable.[51] The Talmud states "for a child born in the eighth month, the Sabbath must not be violated … because he is like a stone" (that is, not viable).[52] But by the twelfth century, the school of Tosafot[53] was already aware that babies delivered during their eighth month could survive and ruled that the talmudic dictum that compared an eighth month fetus to stone (and could not be moved on Shabbat) was no longer applicable.[54] Tosafot state that it is permissible to care for an eighth month baby or to circumcise him on Shabbat as long as there are no developmental abnormalities (such as the absence of nails or hair) present on the baby. In contrast, Chazon Ish believes that the halacha to save the life of an eighth month premature fetus is derived from the fact that the biological

48. See *Otzar Hageonim Gittin* 68b, responsa section, no. 37b.

49. *Hilchot De'ot* 4:18.

50. Rav Avraham ben HaRambam, *Ma'amar Al Ha'agadot s.v. Da Ki Ata; Magen Avraham, Orach Chaim* 173:1.

51. *Shulchan Aruch, Even Haezer*, 166:4.

52. *Shabbat* 135a and Tosafot a.l.; *Yevamot* 80a; *Baba Batra* 20a.

53. *Shabbat* 135a s.v. *ben.*

54. Steinberg, A. (2003), *Nishtanah Hateva*, Encyclopedia of Jewish Medical Ethics. Feldheim, Jerusalem-New York.

nature of premature fetuses (rather than our knowledge) has changed (*shinuy hatevah*).[55] Another example quoted by the *Shulchan Aruch*[56] is that the law allowing water to be boiled on Shabbat[57] to care for a newly circumcised child no longer applies because of *shinuy hatevah*.

Rav Moshe Feinstein follows this philosophy of Ramo and adds an important dimension to this guideline of *nishtanah hatevah* by stating that under certain circumstances, we should follow the scientific knowledge of the times and rely on the assessment and rulings of the rabbis of every generation.[58]

Ramban's view on *nishtanah hateva* is fascinating when he states that biological changes noted in the times of the Bible may reflect environmental adaptation. In Genesis,[59] Ramban claims that the lifespan of human beings decreased dramatically because the air, water, and food quality were drastically altered after the flood. Similarly, Ramban explains the promise that in the future God will no longer inflict the diseases of Egypt on *Bnei Israel* is based upon the fact that He will improve the purity of the water, air, and food to improve human health and decrease the onset of diseases.

Conclusions

In summary, we propose six general bioethical guidelines or guidelines to help resolve, manage or defuse bioethical

55. *Yoreh Da'eh* 155:4.

56. *Orach Chaim* 331:9: "In the time of the Sages of the Talmud, if they did not wash the newborn in hot water before circumcision, after circumcision, and on the third day after circumcision, it was dangerous. Therefore, they thought it necessary to write down rules concerning this if it falls on Shabbat. Today, we do not wash the baby at all, and the law regarding washing it are the same as the laws of washing any man."

57. *Shabbat* 81a and 132b.

58. *Even HaEzer*, part 2#3:2 and *Choshen Mishpat* part 2 #73:4 and *Yoreh Deah* part 3, #36.

59. Genesis 5:4.

challenges. They are 1) beneficence, 2) maleficence, 3) respect for justice, 4) *kevod haberiyot*, 5) respect for limited human autonomy, and 6) the concern for an ethical or halachic slippery slope.

It is important to emphasize that halachic philosophy and its practical implications have profound effects in dealing with new and emerging bioethical challenges. For example, there are and will be situations where there are no halachic precedents in obtaining a solution. The issue whether a surrogate (e.g., gestational mother) is the halachic mother of the child or whether the genetic mother is the halachic mother is a controversial and complex issue without any explicit halachic precedence. This is why Rabbi Shlomo Zalman Auerbach rules[60] that in this situation we are in doubt how to determine the criteria of motherhood, and in practice we must be stringent. He ruled that both the surrogate and biological mothers have a status of halachic parents, and if one of these individuals is not Jewish, then she must convert. The above example highlights a case where it may be difficult to resolve the underlying halachic guidelines, and yet, practical and viable halachic solutions can nonetheless be established.

Jewish medical ethics and bioethics have had a great influence on many other cultures and religions. Currently, there is much debate whether the four secular or Western bioethical guidelines need to be modified or expanded to account for the rapid developments in biotechnologies, especially in the areas of reproductive medicine and synthetic biology. We offer here a consolidated elucidation of how halacha employs general bioethical guidelines in deliberating bioethical challenges. However, as in all aspects of *psak*, individual cases must be evaluated on their own merit and the principles discussed here reflect only general guidelines.

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60. Steinberg, A. (1997). "Medical-halachic decisions of Rabbi Shlomo Zalman Auerbach (1910-1995)", *Assia Jewish Medical Ethics* 3(1): 30-43.

Letters

Lich'vod Rav Avrohom Cohen, שליט"א

I very much enjoy the *Journal of Halacha and Contemporary Society*. In perusing the most recent issue, (#LX), I read in the piece from Rabbi Sukenik, on page 55, "A healthy person who simply wants to take some form of medicine [on Shabbat] for general strengthening... would be allowed to do so." I don't see how to reconcile this with the *Mishnah Berurah*, *siman* 328:120: אבל אם הוא עושה לרפואה דהיינו כדי לחזק מזגו כתב המ"א דאפילו בבריא גמור אסור. For purposes of fertility treatments, it may very well still be permitted as this may not be considered "for general strengthening" (לחזק מזגו), besides the other reasons mentioned in the article; I'm just commenting on that particular sentence, which is a general statement.

Once again, thanks for the Journal.

בנימין (בן הרב שרגא פייוול) כהן

Rabbi Binyomin Cohen

נ.ב. עוד אציין במה שכתוב בעמוד 82 אות 17 מקובץ אגרות חזו"א, שלכאו' אין נראה שם מה שיהא שייך לנקודה הנוכחית.

* * *

Rabbi D. Sukenik responds:

Dear Rabbi B. Cohen,

Thank you for your comments. I would like to clarify my statement by reviewing the halachic literature that serves as the background to your comment.

In the article, I wrote (p. 55): "A healthy person who simply wants to take some form of medicine for general strengthening or some other reason would be allowed to do so." You responded by quoting the *Mishnah Berurah* (*s"k* 120), which seems to reject this statement.

The *Tur* writes that anything that is not a *ma'achal* or *mashkeh beri'im* (food or drink normally consumed by a healthy person), is forbidden if consumed for *refuah* (health) purposes. It is, however, clear that the *Tur* permits ingesting something that is used to satisfy an appetite, provided that one is not sick. There is a dispute between the *Beit Yosef* and the *Magen Avrohom* concerning the understanding of this comment. The *Beit Yosef* assumes that the permission of the *Tur* is not limited to satisfying hunger or thirst but applies to any reason for ingestion, since the prohibition is simply not applicable to a healthy person. The *Magen Avrohom* understands the *Tur* to be speaking literally. According to the *Magen Avrohom*'s version of the *Tur*, a healthy person may eat or drink non-*ma'achal beri'im* food and drink only to satisfy hunger or quench thirst. It is, however, forbidden for a healthy person to ingest these foods or drinks for health purposes. The *Mishnah Berurah* records the opinion of the *Magen Avrohom*. This seems to contradict my statement that "a healthy person who simply wants to take some form of medicine for general strengthening or some other reason would be allowed to do so."

Although the *Mishnah Berurah* records the opinion of the *Magen Avrohom*, there is a dispute among the *Acharonim* whether or not the *Magen Avrohom* is accepted.

The *Mechaber* (328:37) disagrees with the *Magen Avrohom* (as mentioned in *Beit Yosef*), and his opinion is that a healthy person may ingest non-*ma'achal beri'im* even for *refuah* purposes. The *Eglei Tal* (*Tochein s"k* 47; see, however, his conclusion), *Torat Shabbat* (328:49), *Sh"ut Halachot Ketanot* (vol. 1 *siman* 101) and *Menorah Hatehora* (328:42) also disagree with the position of the *Magen Avrohom* and reject his various proofs (see *Iggerot Moshe Orach Chaim* vol. 3 *siman* 54 and *Tzitz Eliezer* 14:50).

Even assuming that the *Magen Avrohom* is accepted regarding this issue, it is still quite possible that a woman undergoing fertility treatments would nonetheless be permitted to take these medications.

When R. Moshe Feinstein (*Iggerot Moshe* ibid. *anaf* 1, see also *Toldot Shmuel* vol. 3 p. 85) discusses the opinion of the *Magen Avrohom*, he questions the entire premise of the case. If one is a *bari* (healthy person), how can such a person ingest non-*ma'achal beri'im* foods for *refuah* purposes? A *bari* should seemingly not have *refuah* purposes? R. Feinstein ultimately distinguishes between different types of healthy people. Some healthy people are *chalash* (weak) in nature and are therefore more susceptible to illness. Such a person would be included in the *Tur*'s prohibition according to the *Magen Avrohom*. Vitamins (the context of that responsum), however, which are not designed to change a person's nature in terms of strength, but rather are designed to prevent him from becoming ill, would be permitted even according to the *Magen Avrohom*. It seems from R. Feinstein's response that only a pill that will change the physical makeup of a person on a long-term basis would be problematic. One wonders if a pill such as Clomid would accomplish such a purpose.

R. Moshe Stern (*Sh"ut Be'er Moshe* 1:33:2) also addresses the position of the *Magen Avrohom*. He explains that there is, indeed, no dispute between the *Beit Yosef* and the *Magen Avrohom*. The *Beit Yosef* is speaking of a person who is healthy and, therefore, we are not concerned that someone might see him and think that he was taking medicine for health reasons. This is so even though the person himself is taking the medication so as not to be *choleish mizgo* (weaken his constitution). The *Magen Avrohom* is speaking of one who is ingesting the medicine in order to be *me-chazek mizgo* (strengthen his constitution). This is forbidden even if no one else would suspect him of taking medication for health reasons. It would seem that since a woman undergoing fertility treatments does not have the appearance of being ill and is not ingesting the medications *le-chazek mizgah*, such treatments would be permitted even according to the *Magen Avrohom*.

In hindsight, a footnote detailing the above discussion

would have been helpful by pre-empting your question. Thank you very much for taking note of that omission and allowing me the opportunity to clarify it. Once again, I appreciate your comment "*Le-hagdil Torah U'le-ha'adira*".

Thank you very much,

DOVID SUKENIK

* * *

Rabbi M. Walter responds (to Hebrew postscript of Rabbi B. Cohen's letter):

Dear Rav Binyamin Cohen, *shlita*

Thank you for your comment to footnote 17 where you question my citation of the Chazon Ish (*Kovetz Iggerot Chazon Ish* volume 3 # 28). Rav Cohen claims that the Chazon Ish makes no comment in that letter as to the methodology of the Gra in his commentary on the *Shulchan Aruch*. However if one understands the basis of the Gra's approach in his *Biur HaGra* in codifying Jewish law, the letter of the Chazon Ish can be easily explained.

The sons of the Gra and his closest disciples write respectively in their introductions to the *Biur HaGra* on the *Shulchan Aruch* that the Gra viewed the *Shulchan Aruch* as a powerful guide for Jews to keep *halachot* and *minhagim*. The Gra was not interested in writing a new commentary to *Shulchan Aruch*, but rather wanted to strengthen the rulings of the *Shulchan Aruch*. The best way to accomplish this objective was to bring earlier sources to solidify the conclusions made by Rav Yosef Karo. Based on this methodology, the Gra often found earlier sources to prove positions held by *Beit Yosef* and *Be'er Hagolah,* sources that they were not even aware of. The Gra's mission in his *Biur H'agra* was strictly to use the Talmud as a source of *psak halacha*, and the *Shulchan Aruch* should merely be an aid to remember the *halachot*. The earlier sources that the Gra brings to prove a halachic ruling are what his students refer to as *dina d'gemara*. Nonetheless when the Gra

finds earlier sources that opposed the rulings of the *Shulchan Aruch,* he does not stay silent. (See also introduction to *Sifra deTziniyuta* by Rav Chaim Volozhin, who further elaborates on this point).

Based on the testimony of the Gra's sons and his closest students, the letter of the Chazon Ish is clearly echoing the position of the above-mentioned sources. The Chazon Ish writes, "The Gra in his *Biur Hagra* is not satisfied with citing sources to the *Shulchan Aruch*, but rather consistently establishes to decide on a halachic matter. The Gra reveals always when he argues on the *Shulchan Aruch*, and if you find a place where the Gra does not argue on the *Shulchan Aruch,* there is a justified reason."

I also want to make a citation correction to footnote 17: *Kovetz Yishurun* volume 4 "The way of the Gra on his commentary to *Shulchan Aruch*", by Rav Moshe Patrover, *Kovetz Moriah,* year 21 issue 7-9, "A way of the Gra in his commentary to *Shulchan Aruch*", by Rav Chaim Gedalya Tzinbalist.

Sincerely,

MOSHE WALTER

* * *

Dear Editor,

In your Journal vol. LIX, you printed an article about the [halachic] validity of the oat matzos that are baked for Rabbi Kestenbaum under my supervision. The main contentious issue was the fact that the grain is heat processed prior to milling to get rid of any rancidity.

Although the above process was approved by senior *Poskim* at the time, we obviously find it preferable to bake oat matzos using oats that have not gone through this heat treatment. *B"H*, from this year onwards, we have managed to make sure that all the oats used for these oat matzos, both

hand baked and machine baked, will no longer be heat processed in any way. They are processed like regular grain. In addition, we have made sure that all the oats used are definitely *Yoshon*.

I trust that you will be able to publicize this in your forthcoming publication before Pesach.

If you wish to have any more information on this, please do not hesitate to contact me.

With very best wishes.

RABBI O. Y. WESTHEIM

* * *

To Rabbi A. Cohen,

I appreciate the voluminous amount of research and effort that you invested in composing your recent article, "Judging Transgression in the Absence of Witnesses" (vol. LX). However, I was considerably dismayed over several fundamental omissions of very critical dimensions that impact dramatically on the outcome determinations and guidance that was necessary to convey to your readership and others under their influence.

Probably the most effective and efficient means of demonstrating the deficient aspects of the article is to critique the 3 case-studies that you cited as examples on pages 45-47.

In regards to the first case, you state that you feel that the authority figures acted in laudatory fashion.

Unfortunately, that is grossly incorrect. Nowhere is it mentioned that in the initial confrontation ("the quiet, discreet one") that the rabbis in charge stipulated that the "rebbe" needed to submit to specialized psychological testing and treatment and that his engagement in the treatment protocols needs to be corroborated and verified. Nor was it mentioned that in the interim his movements need to be constantly

(electronically) monitored and that the monitoring would only be discontinued after receiving a "clean report" from the supervising therapist.

The "rabbis in charge" were completely unaware of the compulsive, addictive nature of pedophility. Nor were they aware of the extent of the injury and damage caused to the victim of molestation.

Therefore, even though they may have (perhaps) protected the children of the yeshiva, they did nothing to protect the children of the community at large. As is well documented and known, a pedophile's verbal assurances are of absolutely no value; nor are threats of punishment! The disease (and indeed, a disease it is!) is a compulsion that he cannot rationally control and it was only a matter of time before he would victimize another child.

The rabbis in charge, either out of neglectful ignorance or arrogance, ignored the medical scientific research on this condition and blundered egregiously. They did not discharge their responsibility of *Lo Ta'amod Al Dam Re'echo* (i.e., not to ignore harm done to a Jew). The subsequent victim's trauma ("….not abiding by the terms of the agreement") is their full responsibility.

And likewise the public denouncement thereafter was also a consequent miscarriage of justice. They never gave the perpetrator a proper chance at therapy to modify his psychological issues which underlie his disease. They basically set him up for failure and the subsequent public degradation. This is not laudatory at all.

Similarly in the case of the Hebrew school teacher that you cited as case study #2, the Rosh Yeshiva perhaps protected the children in school. How these same children were to be protected off school premises remains mystifying. The nature of the disease is that if one avenue of sating the craving is denied, then the addict finds another avenue to "soothe" the compulsion.

And exactly how was the Shul Rabbi going to protect the children in the Shul? Was he to appoint (discreetly, of course) a *shomer* (watcher) to watch the teacher's every action? Anyone who works in the field of addictions knows that it is absurd and impossible to expect another person to control externally the addict from engaging in his "drug of choice". And what about the children in the rest of the community? Again there was no interim electronic monitoring to keep the community safe. And there was no mandated treatment with corroborable compliance to ascertain that the perpetrator was engaged in the therapeutic process. All of these follies lay the groundwork for a subsequent disaster to happen.

Your referencing and comparing of these first 2 cases to your third case study of a Monsey butcher is a total non-sequitur. Even if we suspect the butcher of the compulsion of kleptomania, at most he is endangering people's money. The *Maacholot Asurot* (forbidden foods) factor is clearly an "*Ones Rachmona Patrei*" on the part of the customers and every responsible *rov* and *rebbi* will exonerate the consumers.

In no way does this compare to the severe emotional trauma and physical damage caused by molestation! A molester is a true *Rodef* ("pursuer") in every sense of the word as borne out by the research.

Until such time as Roshei Yeshiva, *Rabbonim* and *Dayanim* educate themselves in the following areas, a parent or other responsible adult has <u>no other recourse</u> than to go to the secular authorities and/or to the media, to protect his own children and those of others. And this is, indeed, mandated by halacha:

1 – The compulsion dimension of pedophilia; it is not a case that he can contain his "own evil urgings";

2 – The extensive damage done to the victims;

3 – That this is not a case of "judging transgression", but preventing profound injury by a public menace (*Rodef*).

If you would like, for your convenience I can send to you the corroboratory *Teshuvot, Mareh Mekomot* (rabbinic responsa) and resource material that is available upon these matters.

I believe it behooves you to recall the article as being half information and therefore inaccurate and misleading.

Sincerely,

RABBI KAGANOFF

* * *

Rabbi A. Cohen responds:

I am more than a little perplexed at your vehement protests concerning inadequate rabbinic responses to allegations of wrongdoing. As was made abundantly clear, both in the *title* of this article as well as frequent *mention in the text*—what is under discussion is the appropriate response in a situation where an allegation is made that cannot be substantiated!! Jewish law seeks to protect both the alleged victim and the alleged perpetrator—but in the cases under discussion there is *no way to verify the charges nor the protestations of innocence.*

To argue that the rabbis in the cases cited were oblivious to the addictive nature of pedophilia and therefore somehow naïve in their attempts to address the allegations—this misses the whole point of my article! The rabbis and the Jewish courts are well able to take drastic steps against evildoers, but the cases under discussion in my article were all about situations where the courts simply do not know and cannot determine whether the accused actually did what he is accused of doing. The rabbis in the cases cited were neither "neglectfully ignorant" nor "arrogant". On the contrary, they acted with wisdom and dispatch to protect those whom they were able and responsible to protect. That includes both possible victims and also alleged perpetrators, who cannot simply be dismissed from their jobs and have their lives destroyed when there is not a shred of evidence that they did anything wrong.

As for your concern that Jewish law (or rabbis) do not take seriously the continuous tendency of a pedophile or other abuser to engage in this behavior, please be aware that the *Journal of Halacha and Contemporary Society* has addressed this issue. In volume XLIV, there was an article on "Confronting Child Abuse", which clearly advocated calling in the police in such cases, or taking the child to be examined by a doctor, who is bound by law to report cases of suspected child abuse. Furthermore, in an editorial note to our readers in volume XLIX, p. 122, it was urged that each community require all women and vulnerable individuals to insist that someone else be in the room when they are being examined or treated by physical or mental health providers. (Rabbis and other counselors were also advised never to meet with any individual when there are no other people around.) Thus, I do not accept your contention that the rabbinic leadership in this country is oblivious or indifferent to the specter of abuse.

Both American law and Jewish law concur that an individual is entitled to a presumption of innocence until proof of guilt is adduced. Perhaps you remember the fate of the lacrosse players of Duke University who were pilloried for alleged rape—which later turned out to be fantasy.

As for your objection that including the case of the butcher selling *treife* meat with other examples of malfeasance such as child abuse was totally inappropriate, since unknowingly eating non-kosher meat is hardly a sin and does not affect the eater negatively—I beg to disagree. There are numerous *poskim* who rule that non-kosher food, even when ingested inadvertently, causes *timtum halev*, a "stuffing up of the soul". I am not sure just what that means in practical terms, and I am not in a position to equate it with the harm caused to the victim of abuse. On the other hand, it seems to be a serious offense against the victims, at least on a spiritual level. Thus, I believe it is quite appropriate to include it with other egregious "crimes".

RABBI ALFRED COHEN

P.S. In the subsequent material you sent me, you included material which you contend supports your point of view that leading rabbis advocate that suspected pedophiles and abusers be vigorously prosecuted. I was therefore quite amazed to find *that this material does just the opposite—it explicitly endorses the position I advocated in my article*: As an example, the material you sent cites Rav Eliashiv as writing: אבן כ"ז להודיע לממשלה הוא באופן שברור שאבן ידו במעל ובזה יש משום תיקון עולם...אך באופן שאין אפילו רגלים לדבר...הרס העולם יש כאן ויתכן שבגלל איזה מרירות של תלמיד כלפי המורה מעליל על המורה..... (Loose translation: To inform the government applies only in cases that it is clear that he has done the illicit deed, and by doing this it will "improve the world"….however, when there is no basis for the allegation…it is "destruction of the world". And it is possible that due to some bitterness on the part of the student against his teacher he makes up an accusation against the teacher…) Here Rav Eliashiv unequivocally says exactly what I said – without positive proof, one cannot prosecute the alleged perpetrator.

You also sent me material in the name of Rav Sternbuch that "if it is possible to protect the victim without causing any harm to others—then it is obligatory to use the more benign approach. The halachic imperative to save the victim simply means that the well-being of the victim is not sacrificed to protect the reputation or financial well-being of others."

Once again, I emphasize that that was exactly what I advocated in my article.

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