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With abiding gratitude
we dedicate this issue of the
Journal of Halacha and Contemporary Society

In loving memory of
Mrs. Leila Applebaum
A woman of intelligence, grace and modesty
who for three decades
maintained and extended the noble legacy
of her beloved husband
JOSEPH APPLEBAUM
of blessed memory
their devotion to charitable giving
to the poor and needy
and their lifelong support of the
Rabbi Jacob Joseph School
constitute a glorious and perhaps unequaled
chapter in American Jewish philanthropy

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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 Dovid Cohen at editor@journalofhalacha.org.

Manuscripts submitted for consideration should be in Word format and sent via email 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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Deactivating a Total Artificial Heart: A Preliminary Halachic Analysis

Rabbi Jason Weiner

While Jewish law is certainly able to address any new circumstance that arises, it requires being intimately aware of the new issues as they develop. Today, an incredible device that could transform cardiac treatment is becoming increasingly refined and popular. This technology, known as a "Total Artificial Heart," carries with it wonderful potential as well as perplexing ethical dilemmas. The questions that this innovation presents are largely unprecedented and have not yet been thoroughly dealt with by rabbinic authorities.[1] I will therefore attempt to provide a medical introduction to this technology, a brief summary of some of the current debate about it in the secular medical ethics literature, suggestions as

1. For example, Rav Asher Weiss, who is known for having a mastery of all of rabbinic literature, wrote to us, in an-as-yet unpublished responsum on this topic (detailed later in this paper), "this is a specific technology which our ancestors have never imagined" and concludes by saying that since the issue of deactivating an artificial heart is such a new question, he will not firmly establish his answer unless another recognized expert authority in Jewish law agrees with him. Regarding the permissibility of having an artificial heart implanted in the first place, see *Nishmat Avraham YD* 155:2(4), pp. 86-7 in 3rd ed. It should be noted that the technology has improved considerably and become much safer in recent years, but many other questions have arisen related to the propriety of putting certain patients on a TAH. These questions are beyond the scope of this paper.

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to how Jewish law might respond to these debates, and summaries of the initial responsa that I have received from leading rabbinic authorities on this matter.

The goal of this article is merely to serve as an introduction to the subject by putting these issues before the observant Jewish community. We will then rely on our learned rabbinic authorities to lead us with proper halachic approaches to this issue. This article should by no means be seen as an attempt at a ruling in Jewish law for any specific situation.

Background Information[2]

Heart disease has been the leading cause of death in the United States for many decades, with many heart failure patients eventually in need of a new heart. Every year there are over 4,000 patients on the heart transplant waiting list. Unfortunately, only about 2,200 hearts are actually donated annually, and nearly 25% of the people on the list die each year while waiting.[3] To fill the gap, various types of cardiac assistive devices have been developed to serve as a bridge to maintain a patient's cardiac function while they await a new heart. Still, many patients with end stage heart failure, a condition in which the heart cannot pump enough blood to meet the body's needs, are ineligible for a heart transplant. Cardiac assistive devices are thus increasingly being developed as a permanent "destination therapy" to support or completely replace the function of the heart, so that many individuals won't even need a transplant. These devices are becoming increasingly sophisticated, and their use has increased six-fold since 2006.[4]

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2. I would like to thank Drs. Jaime Moriguchi and Francisco Arabia, of the Cedars-Sinai Heart Institute, for their input on this section.

3. Katrina A. Bramstedt, "Contemplating Total Artificial Heart Inactivation in Cases of Futility," *Death Studies*, 27: 295 (2003).

4. Courtney Bruce et al., "Challenges in Deactivating a Total Artificial Heart for a Patient with Capacity," *CHEST Journal* 145(3):625 (2014).

One common technology currently used for such patients is a "ventricular assist device" (VAD), which is essentially a mechanical pump. A VAD is usually connected to a ventricle (chamber of the heart that pumps blood out) on one side, and the aorta (the body's main artery) on the other. A VAD assists the function of a failing heart by helping to pump blood from the lower chamber to the body and vital organs, just as a healthy heart would.

A "Total Artificial Heart" (TAH), on the other hand, is used for patients whose entire heart is failing. Whereas a VAD is connected to, and assists, one of the ventricles (usually the left), a TAH completely replaces both of the lower ventricles and serves as a mechanical substitute for the entire heart. A typical TAH is roughly the size of the heart that has been almost completely removed from the patient's body. It is attached to the heart's upper chambers (atria) inside a patient's chest and has mechanical valves controlling the flow of blood in the heart, in addition to pumping the blood. A TAH thus differs from a VAD in that a TAH requires the removal of most of the patient's heart and is designed to completely take over cardiac function, unlike a VAD that simply attaches to the existing diseased heart and only assists its pump function.

There are times when a change or decline in a patient's clinical outlook may cause reevaluation of his or her situation and lead to a decision to deactivate the device without recovery or a transplant. VAD deactivation usually leads to circulatory arrest within several minutes to hours, whereas TAH deactivation results in immediate circulatory arrest and death.[5] Not deactivating the device could eventually lead to a patient's entire body decomposing while blood is still being pumped throughout the decaying body. These decisions involve excruciating ethical dilemmas.

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5. Mohamed Y. Rady, Joseph L. Verheijde, "Ethical Considerations in End-of-Life Deactivation of Durable Mechanical Circulatory Support Devices," *Journal of Palliative Medicine* 16 (12): 1498 (2013).

TAH Deactivation and Euthanasia

One of the concerns related to TAH deactivation is determining if it should be considered euthanasia. Some secular ethicists conceptualize deactivation of artificial life support into two categories: 1. *Supplementing*, such as removal of ventilation, which simply supplements the patient's existing respiratory capacity but does not replace it, and 2. *Replacing*, such as transplantation, in which the patient can rely only upon the new organ to survive. Therefore, some argue, if a cardiac assist device both supplies cardiac function that is essential to maintaining life, and the surgery to implant it includes permanently disabling the patient's own ability to carry out that function, then discontinuing the device would constitute euthanasia, since the patient could not survive without it.[6] Many cardiac assist devices are supplemental, (i.e., pacemaker, defibrillator, VAD), but a TAH replaces cardiac function, and many argue, therefore, that deactivating it would fall under a strict definition of euthanasia.[7] Since a TAH is a perfect substitute for the heart that has become integrated into the patient's body, it might be analogous to a new transplanted heart. If so, just as removal of a heart would be seen as euthanasia, so would deactivation of a TAH,[8] which does not just allow death to occur, but assists in its process.[9]

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6. Orentlicher, 1291. Others have framed this distinction as "regulative therapies" vs. "constitutive therapies." Regulative therapies are those that coax the body back towards homeostatic equilibrium, while constitutive therapies take over a function that the body can no longer provide for itself, and for which discontinuation would be more problematic. See: Daniel P. Sulmasy, "Within You/Without You: Biotechnology, Ontology, and Ethics," *Journal of General Internal Medicine* 23: 70 fn. 56 (2008).

7. Ibid., 1292

8. David Orentlicher, "Deactivating Implanted Cardiac Devices: Euthanasia or the Withdrawal of Treatment?," William Mitchell Law Review 39:4:1287 (2013); For more on trying to determine which is the better analogy for a TAH, a ventilator or transplanted heart, see Lars Noah, "Turn the Beat Around?: Deactivating Implanted Cardiac-Assist Devices," *William Mitchell Law Review* 39:4:1229-30, 1250-52 (2013).

9. Rady &Verheijde, 1500, fn. 16 & 17. Some focus on the fact that TAH

However, many secular ethicists rebut the charge of euthanasia by claiming that euthanasia requires administering a new pathology or drug with the intention of terminating the patient's life. TAH deactivation, on the other hand, simply returns the patient to his/her preexisting cardiac failure.[10] Furthermore, it is claimed, as with all other life-sustaining therapies, American law has clearly established the right to have artificial medical treatment discontinued, and patients have the autonomous right to informed refusal,[11] which may even include the "right to die."[12]

In Jewish law, however, the above distinctions are largely irrelevant, as any manner of active euthanasia (hastening of death) is antithetical to Jewish values and strongly prohibited by Jewish law. This is because Judaism teaches that our lives are needed not just for utilitarian purposes, but that each person is sacred, having been created in the image of God, and life thus has value regardless of one's relative quality or usefulness.[13] Furthermore, not only is human life itself sacred,

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deactivation is problematic because it is not simply an act of omission, but is an act of commission.

10. Green, 6 fn.2; Paula S. Mueller et al., *Ethical Analysis of the Withdrawal of Pacemaker or Implantable Cardioverter-Defibrillator Support at the End of Life*, 78 Mayo Clinic Proc. 959, 959-962 (2003). Another argument offered by secular ethicists is that although removing a patient's heart would certainly kill them, perhaps a TAH cannot be considered a perfect replacement for a heart. After all, every intervention involves benefits, burdens and detriments, and patients have the right to decide which burdens they are willing to endure. As long as risks exist, one has the right to avoid or reduce them, if that is what is better for the patient, without being guilty of euthanasia (Orentlicher, 1292-1294; Veatch in *Lahey Medical Ethics*, 2.).

11. Bruce et al., 626; Rady &Verheijde, 1500; Timothy E. Quill, "Physician-Assisted Death in the United States: Are the Existing 'Last Resorts' Enough?," *Hastings Center Rep*, Sept.-Oct. 2008, 17, 19.

12. Rady &Verheijde, 1500 fn. 3. Some of these thinkers do not conceptualize a TAH as an actual replacement of the heart because it doesn't become physiologically integrated into the body and can't function without its battery source (Bruce et al., 626 fn. 12-13).

13. Mishnah, *Sanhedrin* 4:2; *Rambam, Mishneh Torah*, Laws of Murder &

but every moment of life is valued, and there is thus an obligation to attempt to save all life, regardless of how much time a person may have left to live.[14] Similarly, in Jewish law, hastening death is considered murder even if the victim is about to die anyway.[15] This is true even if a person wants their life taken from them,[16] because of the belief that God owns us[17] and that we thus have very limited autonomy.[18] Judaism also prohibits most forms of bodily damage,[19] suicide,[20] and assisted suicide.[21] Causing death indirectly is also a biblical prohibition.[22] Even "passive euthanasia" is prohibited when it

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Guarding the Soul, 2:6-7; *Shulchan Aruch, OH* 329:4 & *Biur Halacha* s.v."*Ele Lefi*."

14. See *Nishmat Avraham YD* 339:4.

15. *Rambam, Mishneh Torah, Hilchot Rotzeach* 2:7; *Minchat Chinuch, Mitzvah* 34; *Gesher HaChaim* 1:2(2) note 3; *Aruch Hashulchan YD* 339:1; Jakobovits, *Jewish Medical Ethics* (New York: Bloch, 1959), 123-125.

16. The *Tzitz Eliezer* 9:47 (5) argues that even if a patient begs not to be saved because his suffering makes him feel that death is preferable to life, everything must nevertheless be done to save and treat such a patient. Similarly, see Rabbi Nathan Friedman, *Responsa Netzer Matta'ai* 30.

17. See for example: *Shulchan Aruch HaRav, Choshen Mishpat*, Laws of Bodily Damages, 4; *Radbaz, Sanhedrin* 18:6.

18. See for example: *Mor Uktzia, OH* 328.

19. *Rambam, Mishneh Torah, Hilchot Chovel U'Mazik,* 5:1.

20. *Rambam, Mishneh Torah, Hilchot Avel*, 1:11; *Tur, YD* 345. For more discussion see *Gesher HaChaim* 25. Regarding the prohibition to take one's own life even if one is in severe pain, see Responsa *Besamim Rosh* 348; Responsa *Chatam Sofer EH* 1:69.

21. This can be inferred from the prohibition against suicide. A person who convinces or enables someone to commit suicide violates the biblical rule against placing a stumbling block before the blind, *"lifnei iver."* If the person actively ends another's life, they would be guilty of murder. Additionally, there is an obligation to try to rescue another whose life is endangered, "*Lo Ta'amod."* A person who sees another drowning has an obligation to try to save him or her -- either by swimming in after the person or by hiring somebody else to do so (*Rambam, Mishneh Torah, Hilchot Rotzeach* 1:14). According to many authorities, this duty to rescue even applies to the saving of someone who is attempting to commit suicide (*Iggerot Moshe*, YD 2:174 (3); *Minchat Yitzchak* 5:8.

22. R. Goren, 77 & Steinberg, *Encyclopedia of Jewish Medical Ethics*, 1057

involves the omission of therapeutic procedures or withholding medication, since physicians are charged with prolonging life.[23]

Although Jewish values are certainly sensitive to pain and suffering, instead of ending life Jewish law encourages aggressive use of sophisticated pain relief,[24] even if it involves some risk.[25] However, even if pain and suffering cannot be completely managed, rabbinic authorities prefer life with suffering over the cessation of life with concomitant elimination of suffering.[26] The only gray area in Jewish law when it comes to passive euthanasia is refraining from painful lifesaving therapy, or therapy that will prolong great suffering, in an imminently dying patient (*Gosses*), under a very specific set of conditions, as will be discussed in the following section.

Comparison between Deactivating a TAH and a Ventilator

Many ethicists approach TAH deactivation as akin to removing a terminal patient from a ventilator (extubation), and claim that when a TAH is deactivated, the patient can still be considered to have died naturally of the underlying heart disease, because they only required the TAH as a result of how

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Based on *Rambam, Hilchot Rotzeach U'shmirat Hanefesh*, 2:2.

23. Bleich, *Bioethical Dilemmas* I, 72.

24. Responsa *Minchat Shlomo* 2-3:86; Responsa *Teshuvot V'Hanhagot* 3:361.

25. *Nishmat Avraham YD* 339:1 (2a); Responsa *Tzitz Eliezer* 13:87.

26. R. Shlomo Zalman Auerbach (*Teshuvot Minchat Shlomo* 1:91:24) writes that one should explain to a patient that Torah philosophy advocates living as long as possible even if one experiences pain, as is indicated in the Talmud, *Sotah* 20a (and *Rambam, Hilchot Sotah* 3:20) and the Mishnah (*Avot* 4:22) that states, "One hour of repentance and good deeds in this world is better than all of the World to Come." One should not infer from this that R. Auerbach encouraged patients to endure pain, but simply that one who must do so is laudable, and that it must be selected over actively killing a patient, which is prohibited.

all-consuming their illness became.[27] Many of these thinkers thus claim that TAH is an artificial intervention and its removal is simply "allowing natural death."[28]

However, since death is immediate when a TAH is deactivated, and because a TAH does not just assist the heart but completely replaces it, TAH deactivation is unlike withdrawing other artificial interventions, such as a ventilator, dialysis or artificial feeding.[29] This makes it more difficult to argue that the patient is dying from the underlying organ failure and not the deactivation itself.[30] The fact that death is immediate upon deactivation may also make it experientially seem more like actively killing the patient than simply "ceasing aggressive support."[31] This is why some secular ethicists argue that deactivating a TAH is akin to an execution, where a drug is injected to paralyze the heart muscle, or a switch is thrown to cease the function of a patient's heart.[32]

How does Jewish law guide us in this debate? Jewish law

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27. Bruce et al., 626. Some point out that the presence of TAH does not necessarily mean that the cardiac disease process has stopped, as even after TAH implantation there can be symptoms of heart disease (e.g., valve calcification and vegetation, hemodynamic instability, etc.), so despite TAH deactivation, they see the cardiac disease process as causing natural death (Katrina A. Bramstedt, "Replying to Veatch's Concerns: Special Moral Problems with Total Artificial Heart Inactivation," *Death Studies*, 27: 319 (2003).

28. Rady &Verheijde, 1500.

29. Robert M. Veatch, "Inactivating a Total Artificial Heart: Special Moral Problems," *Death Studies,* 27: 309. For example, a person with severe kidney disease can live for several days after stopping dialysis, and legally the AMA considers this person to have died a natural death. However, TAH may be different because the original organ is gone, unlike the case of dialysis, during which the kidney is still there but bypassed.

30. Bruce et al., 626; Bramstedt, 299.

31. Ronald M. Green, "When is Stopping Killing?" *LAHEY Clinic Journal of Medical Ethics* (Fall 2011): 6, fn. 1.

32. Veatch, 309; Robert M. Veatch, "The Total Artificial Heart: Is Paying for it Immoral and Stopping it Murder?" *LAHEY Clinic Journal of Medical Ethics* (Fall 2011): 2.

regards the provision of oxygen as a basic human necessity,[33] but often distinguishes between withholding (sometimes permitted) and withdrawing (often forbidden) interventions.[34] Therefore, although it is not always required to intubate (place on a respirator) a terminal patient who is suffering,[35] once the patient has already been intubated, Jewish law generally prohibits extubation (removal from the respirator) if the patient may die shortly thereafter as a result. While the various rulings on the matter are complex and many cannot be neatly categorized, for the sake of clarity and simplicity the halachic opinions can be divided into two categories: those who view terminal extubation as murder and those who see it as not saving a life. Murder is forbidden and saving a life is obligatory, but the prohibition against murder is much more stringent and saving a life is not always obligatory. The majority view[36] is that terminal extubation (sometimes also called "compassionate extubation" or "palliative extubation") is tantamount to killing the patient, and that it is thus always prohibited to remove a respirator that is maintaining life.[37]

This perspective is not necessarily advocating that the life of

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33. This is based on the ruling of Maimonides (*Rotzeach* 3:1) that walling a person in so that he cannot breathe is a capital offense because it is like strangling him (*Iggerot Moshe* CM 2:73a; *Minchat Shlomo* 1:91 (24); A. Steinberg, "The Halachic Basis of The Dying Patient Law" *Assia* 69-70, pp. 23-58; *Assia* 71-72, pp. 25-39 & *Encyclopedia Hilkhatit Refuit* 5, 147).

34. Steinberg, *Encyclopedia Hilkhatit Refuit* 5, 155 (pg. 1059 in *Encyclopedia of Jewish Medical Ethics* English edition).

35. *Nishmat Avraham YD* 339:(4), pgs. 503, 509-10 (3rd. edition).

36. Steinberg, *Encyclopedia Hilkhatit Refuit* 5, 148 (pg. 1058 in *Encyclopedia of Jewish Medical Ethics* English edition).

37. *Tzitz Eliezer* 17:72; *Iggerot Moshe* YD 3:132; *Teshuvot Vehanhagot* 1:858 also writes that extubation is categorized as killing, so one can't even remove a patient who can only live for a short time (*"chayei sha'ah"*) for the sake of one who can live a normal life span *("chayei olam")*. See also R. Shlomo Zalman Auerbach in *Assia* 53-54 (5754), p. 5; Rabbi Yitshak Isaac Liebes, Resp. *Beit Avi* 153; R. Ben Zion Firer, *Techumin* 7 (5746), pp. 219 f.; R. Yitshak Yedidya Frankel, *Assia* 3 (5743), pp. 463 ff. See also R. Yisrael Meir Lau, Resp. *Yahel Yisrael* 2:87.

a suffering dying patient be prolonged at all costs, but is based on concerns related to any human intervention in terminating life. According to these authorities, Jewish law conceptualizes extubation as killing the patient because of a Talmudic principle that one may not do any action that directly results ("*koach rishon*") in another person's death, if the process begins immediately upon a human action (even if that action simply removes an impediment).[38] Even though some secular ethicists might not see deactivating a respirator as being the cause of the patient's death, many authorities in Jewish law have indeed categorized death after extubation as a "direct result," because of the proximity of the deactivation and the patient's death, and that it is therefore as if *causing* the death of the patient, not merely *allowing* it to happen, in the eyes of Jewish law.[39]

Although it is generally not followed, there is also a more lenient minority opinion based on a ruling of the *Ramo*[40] in the Code of Jewish Law. The *Ramo* writes that it is forbidden to do an **overt act** that hastens death, and although a dying patient is treated as fully alive in all regards, one may **remove an external impediment** to the death of a patient who is already almost certainly in the process of dying imminently (*Gosses*)[41]

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38. *Tzitz Eliezer* 17:72 (13) citing *Talmud Bavli, Sanhedrin* 77b, *Rambam, Hilchot Rotzeach U'Shmirat Hanefesh* 3:13 and *Yad Ramah Sanhedrin* 77b.

39. *Tzitz Eliezer* 17:72 (13). Another reason that has been given for this prohibition is that the Mishnah teaches "against your will you are born… against your will you die" (*Avot* 4:22). Therefore, life is not in our hands but based only on the will of God, and so we should not be determining when people die (*Masechet Avot "Oz Vehadar" Hamevoar Metivta* vol. 4, *Aliba D'Hilchata,* 9).

40. Rabbi Moshe Isserles, classic 16th century Ashkenazi commentary on the Code of Jewish Law.

41. *Yoreh Deah* 339:1. For in-depth analysis of this ruling and how it relates to contemporary medical dilemmas, see Dr. Avraham Steinberg, *Assia* 69-70 pg. 23-58 & *Assia* 71-72, pg. 25-39; David Shabtai, "End of Life Therapies," *The Journal of Halacha and Contemporary Society,* (LVI, Fall 2008) 25; R. Bleich, *Bioethical Dilemmas* 1 pg. 77, *83*.

and cannot be restored to good health.[42] Based on this, some rule that a respirator can be categorized as an artificial impediment to dying, and it is thus not only permitted to remove it from such a dying patient, but it can be required in certain cases to relieve suffering.[43] These authorities see extubation not as killing the patient, but as simply failing to save them, which can at times be permitted, or even obligatory.[44]

However, those who forbid terminal extubation argue that even if it had not been obligatory to put a patient on a ventilator, doing so fulfilled the Divine commandment to treat the patient, and since it is vital and can be considered attached to the patient in a physiological manner such that it is keeping

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42. *Teshuvot Beit Yaakov* (59) rules that we can violate Shabbat labors to save the life of a *Gosses* only when there is expert medical opinion that there is something that can be done to heal the individual, but if they are certainly dying we are not permitted to violate Shabbat labors. Even on a weekday we would be obligated to allow the soul to depart without causing an impediment (See also R. Goren, 73; R. Bleich, *Bioethical Dilemmas*, 77, 81-83).

43. R. Hayyim David Halevi, *Techumin* 2 (5741) pg. 304 & *Ase Lecha Rav* 5:30; R. Zalman Nechemya Goldberg (*Moriah* 4-5:88-89, Elul 5738, 48-56; For extensive discussion and back and forth with R. Helperin see *Halacha U'Refuah* 2, pgs. 146-184); *Shut Maasei Choshev* 3:4-5; R. JD Bleich, *Bioethical Dilemmas* 2 pg. 106 fn. 36; *Shiurei Torah L'rofim* 3 pg. 317. In more recent guidelines, R. Goldberg has added that not only must death be preferable to life for this patient, but also that the therapy to be stopped cannot fulfill a natural need of the patient, and it can't be of a routine nature (*Assia* 16:3-5 [63-64] 5759:6-8); R. Menashe Klein, *Mishneh Halachot* 7:287; R. Baruch Rabinowitz *Assia* 1 (5736) pg. 197-198; R. Shlomo Goren, *Torat Herefuah* [reprinted from *Meorot* 2, 5740]; R. Pinchas Toledano, *Barkai* 4 5747 pg. 53-59.

44. Many authorities base this on the story of R. Yehudah Hanasi in Babylonian Talmud, *Ketubot* 104a, as well as the permission of the *Ramo* (YD 339) for a woodcutter in the vicinity of a dying patient to stop chopping wood in order to provide the quiet that will allow a dying patient who is suffering to die (see discussions of this in *Iggerot Moshe* CM 2:73,74(1); *Shevet Halevi* 6:179; Responsa *Minchat Asher* 1:116). Interestingly, some secular ethicists have suggested that Orthodox Judaism would accept deactivation of a cardiac assistive device based on this principle (Ronald M. Green & response by Mohamed Y. Rady, Joseph L. Verheijde, "When is Stopping Killing?" *LAHEY Clinic Journal of Medical Ethics* (Fall 2011): 7).

the patient alive, its removal would be considered actively causing death, not just removing the impediment to the departure of the soul.[45] Moreover, some of the most prominent of the above rabbinic authorities who permit extubation as "failure to save" do so only with the explicit caveat that the patient not die immediately.[46]

Since TAH deactivation results in immediate death, even the "removing an impediment" argument would not work according to them. Indeed, many authorities explicitly rule that any action that may lead to the immediate death of a patient is always prohibited.[47] Additionally, it is usually difficult to determine with certainty if a given patient can be classified as a *Gosses*, and with modern medical technology few dying patients can be put into this category.[48] Therefore, since there is debate on the matter, with some arguing that deactivating a ventilator falls under the severe prohibition of murder, rabbinic authorities are usually unable to be lenient on the matter.[49]

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45. Steinberg, "Halachic Basis for Dying Patient Law," see *Assia* 69-70, pp. 23-58; *Assia* 71-72, pp. 25-39.

46. R Z.N. Goldberg (*Moriah* 4-5:88-89) & R. Goren (*Torat Harefuah*, 57, 76). Although R. Goren categorizes extubation as an issue of removing an impediment and failure to save, rather than killing, he compares actively turning off a machine (which may be seen as having become part of the person) that results in a dying patient's immediate demise to snuffing out a flickering flame, which is forbidden (*Shach* YD 339:5 based on *Masechet Semachot*).

47. R. Shlomo Zalman Auerbach and R. Shmuel Wosner, as outlined by Prof. Avraham Steinberg in *Assia* 63-64 (5729), pp. 18-19. Even if it is only possible that the action will immediately kill the patient, it is prohibited. If the physicians maintain that the patient's respiration is wholly dependent on a ventilating machine, it is prohibited to switch it off. R. Zilberstein (*Shiurei Torah L'rofim* vol. 3 pg. 413) writes that even if a patient is a *Gosses*, if stopping the ventilator hastens death, it is completely forbidden, as the *Tzitz Eliezer* writes in 14:85.

48. Rav J. D. Bleich demonstrates that any patient whose life can be prolonged, even by artificial means, cannot be classified as a *Gosses* (*Bioethical Dilemmas*, Treatment of the Terminally Ill, 78-79).

49. *B'mareh Habazak* 8:39 fn. 35.

Moreover, the *Ramo*'s permission to remove an impediment to death seems to be only if that impediment is external to the patient's body, but it is likely that many would not see a TAH as external, since it has replaced internal cardiac function and is located within the body.[50] Indeed, an argument can be made that a TAH not only replaces, but effectively becomes a patient's heart, and deactivating it would thus be tantamount to killing someone by removing their beating heart.[51]

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50. Many understand the *Ramo*, with the explanation of the *Shach* (7) and Taz (2), to permit removing only an *external* factor that holds back the death, as long as one does not also thereby touch the *Gosses* and thus hasten death (R. Goren, 68, 76).

51. See David Shabtai "End of Life Therapies," *Journal of Halacha and Contemporary Society* LVI (Fall 2008), 42-43. R. Shabtai points out that R. Shlomo Zalman Auerbach ruled that we may not withdraw basic human needs from a dying patient, and since he includes hemodialysis, once initiated, as a basic human need, we can infer that the machine essentially becomes the patient's kidneys, just as a respirator may become a patient's lungs. There is a similar debate regarding deactivating a defibrillator, in which R. Elyashiv is quoted as ruling that the defibrillator is considered like a limb or organ of the patient's body (just like a ventilator) and thus may not be deactivated (R. Zilberstein, *Shiurei Torah L'Rofim* 3, 340; See also Rosner, *Selected Medical-Halachic Responsa of Rav Yitzchak Zilberstein*, 33). R. Asher Weiss (Responsa *Minchat Asher* 2:132-3), disagrees and argues that whereas a natural limb or organ that is transplanted becomes a part of the recipient's body, an artificial/mechanical object does not become a part of the body (though he notes that perhaps an artificial heart should be considered part of the recipient because it replaces cardiac function). Perhaps support for the contention that a TAH effectively becomes a patient's heart can also be brought from the ruling of the *Binat Adam* (*sha'ar issur veheter* 11) that as long as there is a functional circulatory pump in an animal's body, regardless of whether or not it appears to be "normal," it qualifies as a heart in halacha, rendering an animal containing such an organ to be kosher and not a *treifah*. Furthermore, some have suggested that in cases of surrogate motherhood, the surrogate mother should be considered the mother according to halacha, not the biological mother, because once a body part (or in that case a fetus) becomes integrated into another body, it is seen as part of that body (*B'mareh Habazak* 9:46 fn. 8 based on *Moreh Nevuchim* 1:72).

Definition of Death and Practical Suggestions

Modern ethicists and medical professionals debate how death should be defined, generally arguing either for cessation of breathing, cessation of heart function, or brain death. What impact will the definition of death have on this topic? Some secular ethicists have gone so far as to argue that this issue should actually force us to revisit the definition of death. Death is currently defined in America by the irreversible cessation of *either* brain or heart function. However, those who strongly believe that the essence of a living human is related to their brain function have argued that changing the definition of death to focus *only* on neurologic criteria would make TAH deactivation less ethically problematic. Stopping a TAH would then conceptually be like removing a ventilator, which does not directly or immediately kill the patient, since although circulation would immediately stop with deactivation, some brain function would continue for a brief time.[52]

One situation in which many rabbinic authorities do permit extubation is in a case in which the patient shows definite clinical signs of already being deceased, and the respirator is the only thing keeping the body "alive."[53] In such a case it can be argued that the respirator is preventing the soul from leaving the body, and it may thus be seen as an impediment that may be removed.[54] Therefore, those rabbinic authorities

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52. Veatch, 309-310; Veatch in *Lahey Medical Ethics*, 2.

53. *Iggerot Moshe* YD 3:132; *Tzitz Eleizer* 14:80-81 requires that the patient no longer have any independent brain or cardiac function since they are actually considered irreversibly dead, but only show signs of life because of an external machine. He assumes that this is the type of patient the *Ramo* was referring to, as he does not allow removing a respirator from a *Gosses* who is in the dying process, but only one who has no independent life force left. By contrast, R. Shlomo Zalman Auerbach permits extubation once a patient is brain dead, because even though we are no longer certain which patient can be classified as a *Gosses*, he assumes that a brain dead patient can be considered a *Gosses* (*Minchat Shlomo Tenina* 2-3:86; *Assia* 5754 (53-54), pg. 5-16 #6-8).

54. R. Shlomo Zalman Auerbach quoted by Dr. Steinberg in *Assia* 5754

who accept neurological criteria of determining death (brain death), would likely permit TAH deactivation once a patient is declared brain dead.[55] Even some of those authorities who do not accept brain death as a valid halachic definition of death may still permit deactivation once the patient is declared brain dead[56] because at the very least such a patient may be considered a *Gosses* and the TAH could be seen as an impediment preventing the soul from leaving, as some rule regarding ventilators.[57] Others might not permit actually deactivating the TAH upon brain death, but would then argue that there is no more obligation to save such a patient and might therefore allow other medications – such as anti-coagulants or vasopressors that maintain blood pressure[58]--- to

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(53-54), pg. 5-16 #6-8; in *Minchat Shlomo Tenina* 2-3:86 R. Auerbach argues that since the brain dead patient cannot breathe on his own, and since this machine was placed on him by the physicians, it can be seen as prolonging the dying process and may thus be removed. R. Waldenberg makes a similar argument in *Tzitz Eliezer* 14:80.

55. Personal correspondence with Dr. Abraham Steinberg (August, 2014).

56. Indeed, Professor Avraham Steinberg reported to this author that R. Shmuel HaLevi Wosner ruled that although he opposed the brain-death criteria, in case of an artificial heart the combination of brain death with lack of a natural heart could be defined as the moment of death.

57. R. Shlomo Zalman Auerbach rules that if there is certainty that the brain and brain stem are destroyed, thus making the patient a possible *Gosses*, one may stop the ventilator since it is simply holding back the soul (*Shulchan Shlomo Erchei Refuah*, Vol. 2 pg. 18; *Nishmat Avraham YD* 339, pg. 467 in 2007 edition). Some have challenged this view, arguing that R. Auerbach must have been given misinformation; since a brain dead patient can survive for longer than three days on a respirator, they can't be defined as a *Gosses* (personal correspondence with Rabbi J.D. Bleich, 8/12/14). Furthermore, achieving certainty that each and every cell in a patient's brain has died has become exceedingly rare with sensitive modern technology, R. David Shabtai, MD, *Defining the Moment*, (New York: Shoresh Press, 2012), 339-44. Moreover, determining the death of every cell to R. Auerbach requires radiographic imaging, which is achieved using intravenous contrast, which involves invasive contact with the body in a way that he forbids in a *Gosses* (Ibid., 335 & 344).

58. However, it should be noted that most patients with a TAH do not need vasopressors unless they have concomitant sepsis or bleeding because

passively run out, and not refill them,[59] or perhaps allow the TAH's battery to die, without recharging it.[60]

However, those who require cessation of cardiac function to determine death, as do most contemporary Orthodox rabbinic authorities, face a dilemma in this situation because there will always be a heartbeat (even though it is not the patient's actual heart) unless the TAH is turned off. Therefore, even those who allow a respirator to be shut off when a patient no longer has an independent heartbeat, may not permit deactivation of a TAH as long as it continues to pump blood through the patient's body.[61] This perspective views the patient as being fully alive despite the fact that machines are artificially sustaining him , and that he may not be declared dead until the patient is incapable of any spontaneous motion whatsoever. As Rabbi J.D. Bleich has ruled, a patient whose own heart has been removed and replaced with an artificial heart, and is sustained on a ventilator and incapable of spontaneous respiration, is considered dead by halacha only when incapable of any spontaneous motion whatsoever,

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the TAH itself regulates blood pressure. Stopping blood pressure medication in such a patient may drop their pressure slightly but the patient will usually survive.

59. Comparable to R. Shlomo Zalman Auerbach's ruling regarding a patient who had suffered an extensive irreversibly damaging heart attack, was comatose, in kidney failure, with extremely low blood pressure and no hope of recovery and was now defined as a *Gosses*, that there was no obligation to refill or change the bag of vasopressor medications when the present one ran out, for this would come under the category of "removing the impediment to dying" (*Nishmat Avraham*, YD 339:7).

60. This may be similar to the permission given by some authorities in certain circumstances in the days when ventilators were connected to an oxygen tank, to not replace the tank when one ran out (R. Moshe Hershler, *Halacha Urefuah* 2, 30-49; *Iggerot Moshe CM* 2:73(1); R. Goren, 77). When this happens in a TAH, a very loud alarm sounds to warn caregivers of the failing battery. Presumably it would be permissible to deactivate or muffle such an alarm in this case.

61. This is likely especially true for those *poskim* who define death based on circulation.

including motion of internal organs, e.g., peristaltic action of the small intestine. Until then, such a patient must be treated, and it would be forbidden to deactivate their TAH.[62] Similarly, Rav Yitzchak Zilberstein prohibits deactivation of a TAH until the patient's body begins to decompose, though precisely what this means requires clarification.[63]

Others have suggested that while heartbeat is normally the determinant of life, when it comes to a patient with a TAH, we simply have to look for other criteria. Rav Asher Zelig Weiss has suggested that as long as a person is alert and able to function, despite not having a natural heart, they are obviously still to be considered alive according to Jewish law. On the other hand, if a person is completely unresponsive and shows all other signs of death, it seems that it should be permissible to deactivate the TAH.[64] The specific guidelines and criteria for this determination are yet to be worked out.

Conclusion

As various types of TAH are utilized for longer periods of time and become more common, perhaps even more common than transplantation, these questions will become all the more challenging and pressing. Most secular writers on this topic contend that TAH deactivation should be permissible in most situations,[65] but as we have seen, it is often problematic in

62. Personal correspondence with this author, 8/12/14.

63. Currently unpublished responsum written to this author in September of 2014.

64. R. Asher Weiss in a currently unpublished responsum written to us in May of 2014. R. Weiss points out that there are people who live normal lives with an artificial heart, and despite not having a natural heart, they are obviously completely alive. On the other hand, there are people who are hooked up to a heart bypass machine during surgery, yet if their heart doesn't restart after the surgery they are removed from the machine. However, we don't consider this to be murder even though had they not been hooked up to this machine they would still be alive.

65. Bruce et al., 626 fn. 12-24; Rady &Verheijde, 1500, fn. 7, 20-22.

Jewish law, even for those *poskim* who take a more lenient approach to passive euthanasia, and it requires much fine nuance and case-by-case analysis. There is tremendous grappling with this issue in the world today, but the Torah and *poskim* can provide us with clarity and guidance.

Although therapies are often initiated without truly considering ending them, discussion about TAH deactivation should be part of the informed consent process prior to implantation of a TAH, so that patients and families are given the choice and made aware from the outset of the potential moral dilemmas about how life could end. This should be part of the conversation when any therapy is begun, and hopefully some of the perspectives provided in this paper can assist patients and families in framing those discussions and making difficult decisions.

This paper has presented only an initial look at some of the challenging questions and complex resources that can be marshaled to help us approach this technology. It must be emphasized that each rabbinic ruling quoted in this paper related to one specific case, and it is frequently impossible to make some of the intricate cross-category comparisons that have been suggested or theorized in this paper. We must therefore leave it up to the greatest rabbinic minds of our generation to provide pathways for us to properly navigate these crucial life and death questions, and in the meantime pray for the time when "I will give you a new heart and put a new spirit within you; I will take the heart of stone out of your flesh and give you a heart of flesh" (Ezekiel 36:26).

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Camels, Cows and *Chalav* Certification

By Rabbi Yona Reiss

I. Introduction

It has become customary for kashrut agencies to accept the leniency of Rabbi Moshe Feinstein allowing kosher certification of commercially manufactured milk in the United States despite the absence of a *mashgiach* (kosher supervisor) at the milking facility or production site. However, the recent introduction of camel milk to the commercial market, and its ancillary issues, have raised concerns regarding the continued viability of his ruling from both a factual and halachic perspective.

This article will explore the impact of recent changes in factual circumstances with respect to four different areas of halachic analysis: (a) the certification of milk in the United States according to Rabbi Moshe Feinstein; (b) the certification of milk in the United States according to the *Pri Chadash*; (c) the reliance upon the opinion of Rabbi Moshe Feinstein with respect to the production of kosher cheese from non-certified milk; and (d) the issue of milk pasteurization from the standpoint of *bishul yisrael* (the requirement that foods be cooked by Jews in order to be considered kosher).

II. The Halachic Background

According to the Mishnah in *Avodah Zarah*, one of the rabbinic enactments forbidding food produced by non-Jews is

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with respect to milk.[1] The Talmud explains that the reason for the prohibition is because of the fear that a non-Jewish farmer may mix the kosher milk with non-kosher milk. The Talmud elsewhere derives from scriptural sources that milk from kosher animals, such as cows, is considered to be kosher, while milk from non-kosher animals, such as camels, is not kosher.[2] Although kosher milk and non-kosher milk have different coloring and therefore cannot be switched without detection, a small bit of admixture might escape notice in the absence of supervision.[3]

However, the Talmud indicates that the nature of supervision varies based on the level of concern. In the event that there are no non-kosher animals in the flock, it is sufficient for a Jewish watchperson to sit outside the farm area in order to ensure that no non-kosher animals are transported inside. In the event that there are non-kosher animals in the flock, the Jewish watchperson can still sit outside, but needs to be able to see the milking of the animals upon standing up. Even if the Jewish watchperson sits most of the time (or comes and goes),[4] the fact that the watchperson can stand and watch at any time creates a sense of "*mirsas*" – of fear – on the part of the gentile farmers so that they will not mix together the kosher milk with the non-kosher milk.[5]

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1. *Avodah Zarah* 35b.

2. *Bechorot* 6b. This article does not address the issue of cows which are *Trayfot* (wounded or sick, in a way that would render them non-kosher), whose milk would be similarly non-kosher. For a detailed analysis of that issue as it relates to the growing number of cows which have received a punctured abomasum due to surgery, see Rabbi Michoel Zylberman, "The Kashrut of Commercially Sold Milk", *Journal of Halacha and Contemporary Society* 54:93-113 (2007).

3. *Avodah Zarah* ibid.

4. See *Shach, Yoreh Deah* 115:4.

5. *Avodah Zarah* 39b. See *Yoreh Deah* 115:1. The Rema notes that the Jewish watchperson should also observe the beginning of the milking process and check the container that is used for the milking as well.

Milk which is supervised in this manner by a Jewish watchperson is considered "*Chalav Yisrael" ("Jewish milk")*."[6] Milk produced by gentiles which is not supervised by Jews and is therefore prohibited for consumption according to rabbinic law is considered "*Chalav Akum*." However, rabbinic authorities wrestled with a third category of milk, generally described as "*Chalav Stam*" (regular milk) which is a reference to milk that has not been supervised by a Jewish watchperson but which also does not contain a realistic concern that there has been an admixture of non-kosher milk.

According to the *Pri Chadash*,[7] the stringency of requiring a Jewish watchperson only pertains to a situation where there are some non-kosher milking animals in the city which could conceivably be brought into the milking facility. However, when there is no realistic chance of non-kosher milk being mixed with the kosher milk, either because there are no non-kosher milking animals in the city, or because the non-kosher milk is considerably more expensive than the kosher milk, no Jewish supervision is required in order for the milk to be kosher. He brings a proof from the fact that the Talmud allows a lesser standard of supervision when there are no non-kosher animals in the farm, in which case the Jewish watchperson situated outside does not even need to have the potential of watching the actual milking process. Since a lesser standard of supervision is allowed when the concern of the admixture of non-kosher milk has been reduced, an even lesser standard can be countenanced when there is no concern whatsoever.

The opinion of the *Pri Chadash* was roundly rejected by the majority of later authorities, primarily based on two different

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6. Technically, "*Chalav Yisrael* " is shorthand for "*Chalav*" (milk) that is watched by a "Y*israel*" (Jew), based on the language of the Mishnah in *Avodah Zarah* 39b: ואלו מותרין באכילה חלב שחלבו עובד כוכבים וישראל רואהו. It does not mean *"Chalav*" that is milked, owned or manufactured by a "*Yisrael*".

7. *Pri Chadash, Yoreh Deah*, 115:6.

rationales. The first rationale, articulated by the *Chatam Sofer*,[8] was that once the rabbis decreed that *Chalav Akum* was prohibited, it became a "*davar hane'esar be'minyan*" – a rabbinic decree that remains in effect until rescinded by another rabbinical court, even if the original reason for the prohibition is no longer in effect.[9] In this sense, the *Chatam Sofer* effectively equated the rabbinic prohibition regarding non-Jewish produced milk to the rabbinic prohibition regarding non-Jewish produced cheese (*Gevinat Akum*) concerning which the Rambam quoted the *Geonim* as having ruled that irrespective of the applicability of the original reason for such decree, the prohibition (absent Jewish supervision or participation)[10] remains in effect.[11]

The second rationale, advanced by the *Chochmat Adam*,[12] is that the Talmudic passage requiring a Jewish watchperson even when there are no non-kosher animals in the farm actually proves the opposite of the *Pri Chadash*'s deduction – namely, that supervision is required to address even the most infinitesimal of concerns, including the far-fetched concern that without supervision a farmer might sneak in non-kosher milk to the farm even when there are no non-kosher milking animals in the entire city.

Perhaps the most interesting rejection of the opinion of the *Pri Chadash* was expressed by the *Aruch Hashulchan*[13] who, after having cited the opinion of the *Pri Chadash* in the name of "one of the giants among the *Acharonim*" (but without

8. *Shu"t Chatam Sofer, Yoreh Deah*, responsum 107.

9. See *Beitzah* 5a, Rambam, *Mamrim* 2:2.

10. See *Rema*, *Yoreh Deah* 115:2 (watching the cheese-making is sufficient), and *Shach s.k.* 20 (requiring that the Jew physically add the rennet in the cheese-making process unless the cheese belongs to a Jew).

11. Rambam, *Ma'achalot Asurot* 3:14; the *Maggid Mishneh* (ad loc.) explains the reason that the prohibition remains in effect regardless of circumstances is because *gevinat akum* was instituted by the Rabbis as a *davar she'be'minyan.*

12. *Yoreh Deah, Klal* 67, paragraph 1.

13. *Aruch Hashulchan, Yoreh Deah* 115:4-6.

mentioning him by name), proceeded to recount a story regarding a wealthy merchant, from a town in which the *Aruch Hashulchan* briefly served as the rabbi, who used to travel frequently. This merchant, in the course of his travels, became enamored of a certain inn where he and his cronies would be served a special hot milk drink every morning. On one occasion, he inquired of the non-Jewish innkeeper regarding his recipe for this delicious "cappuccino" type beverage. The innkeeper proudly responded that he would travel to the local meat market and purchase animal brains which he then cooked together with the milk in order to concoct this tasty drink. At this point, the Jewish merchant cried and proclaimed כמה גדולים דברי חכמים – how great are the words of the sages, and realized the error of his ways in relying upon those opinions that permitted the consumption of *Chalav Stam*. After describing this powerful anecdote, the *Aruch Hashulchan* added that he had a tradition from his teachers that the Sages often have additional reasons beyond that which is stated in the Talmudic texts as to why they chose to forbid a particular item.[14]

However, despite the widespread rejection of the opinion of the *Pri Chadash*, the reality was that in the United States many observant Jews regularly consumed *Chalav Stam*. In the 1950s, Rabbi Moshe Feinstein penned a groundbreaking responsum in the *Iggerot Moshe* on this subject,[15] in which he argued that there was room for leniency even without relying upon the opinion of the *Pri Chadash*. Rabbi Feinstein's argument was that the same way that it is sufficient according to the Talmud if the Jewish watchperson sits outside the farm as long as the gentile farmer is fearful (*mirsas*) that the watchperson might stand up at any moment to watch the milking process, so too

14. For good measure, the *Aruch Hashulchan* then appended a final comment noting that he heard that in "America" there are multitudes of people who drink pig milk, because of the abundance of swine in that country.

15. *Iggerot Moshe, Yoreh Deah* 1:47.

in the United States where there are governmental regulations prohibiting the admixture of non-cow milk with cow milk, the gentile farmers are similarly fearful of being caught if they should mix together non-cow milk, in which case they could be fined or even lose their license. Therefore, argued Rabbi Feinstein, there is an "*anan sahadi*," the presence of "virtual witnesses," based on the universal knowledge that the farmers are fearful of violating the law, in the same way that it is considered sufficient supervision according to Jewish law for a Jewish watchperson to sit outside the dairy farm even though the supervisor never actually stands up to watch the milking process.

It should be noted that although Rabbi Feinstein noted that his leniency does not require reliance on the *Pri Chadash*, he did utilize *Pri Chadash* type considerations in other responsa. Thus, in response to a questioner who asked why his leniency should be applicable in light of the fact that a milk manufacturer could conspire with his employees to hide the infraction, Rabbi Feinstein answered that due to the tremendous expense of having to bribe all of the employees, it simply would not be worthwhile to violate the statute.[16] Similarly, the *Chazon Ish* in his writings implied that reliance upon governmental supervision is tantamount to relying upon the opinion of the *Pri Chadash*.[17]

Although Rabbi Feinstein did add certain caveats to his position, such as that a "*ba'al nefesh*" (person who is extremely scrupulous in his observance) should nonetheless strive to

16. *Iggerot Moshe, Yoreh Deah* 1:48. It is instructive that in explaining his conclusion, Rabbi Feinstein cited the same Talmudic passage from *Avodah Zarah* 34b (with respect to *muryas*, a fish brine prohibited based on the concern that wine might be mixed in by the non-Jewish merchants, but permitted by *Chazal* in places where wine was expensive and it was therefore impractical for the merchants to add wine) that is cited by the *Pri Chadash* to justify his leniency.

17. *Chazon Ish, Yoreh Deah* 41:4.

consume only *Chalav Yisrael* ,[18] and that yeshiva day schools should only serve *Chalav Yisrael* as a matter of inculcating in young students the message that they should distance themselves from transgressions,[19] he continued to maintain strongly that there was no prohibition for those who wished to consume *Chalav Stam*. In a separate responsum, he came to the conclusion that although there is scant governmental supervision with respect to the actual farms and that the main supervision is with respect to the milk plants, the requirement for supervision according to halacha only begins at the moment in which the milk is prepared for Jewish consumption (*"ke'she'ba leyad yisrael"*), which would be at the milk plant itself.[20]

Despite Rabbi Feinstein's provisos, he noted that even a "*ba'al nefesh*" need not adopt a "double stringency" with respect to insisting upon *Chalav Yisrael* for Jewish cheese production. Since the Talmud indicates that only kosher milk curdles to become cheese, and the *Rema*[21] writes that it is therefore only a stringency to require *Chalav Yisrael* milk for the cheese-making process, Rabbi Feinstein ruled that it is certainly not necessary for one to be strict in terms of requiring kosher cheese to be manufactured solely from *Chalav Yisrael* milk.[22]

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18. *Iggerot Moshe, Yoreh Deah* 1:47, s.v. "*Ve'Lachen*".

19. *Iggerot Moshe, Yoreh Deah* 2:35.

20. *Iggerot Moshe, Yoreh Deah* 1:49.

21. *Yoreh Deah* 115:2.

22. *Iggerot Moshe, Yoreh Deah* 3:16. Rabbi Feinstein was referring to hard cheese. With respect to soft cheese, it was his opinion that fundamentally it is not included in the prohibition of *Gevinat Akum* altogether (similar to the more lenient stance in halacha towards butter, as set forth in *Shulchan Aruch Y"D* 115:3) since it does not require the introduction of rennet (which may not be kosher) in order to curdle, although he stopped short of issuing an unequivocal lenient ruling on this subject. See *Iggerot Moshe, Yoreh Deah* 2:48. Rabbi Gedalia Dov Schwartz *shlit"a* informed this author that Rabbi Yosef Eliyahu Henkin was even more conclusively lenient regarding soft cheese. Others, however, are of the opinion that *Gevinat Akum* applies even to soft

Nonetheless, there are many who are stringent to require both milk and cheese to be purely *Chalav Yisrael*, with Jewish supervision on site.[23] In fact, there are some who argue that in this day and age of increased availability and quality of *Chalav Yisrael* milk, even Rabbi Feinstein would possibly be of the opinion that it is required of everyone to purchase *Chalav Yisrael* milk in the United States.[24] However, many kashrut agencies do not work with this assumption and routinely rely upon the lenient ruling of Rabbi Feinstein in certifying milk products that are *Chalav Stam*.[25]

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cheeses. See, e.g., the unequivocal language of the *Aruch Hashulchan* Y"D 115:16 that even cheeses that do not require rennet are prohibited. It should be noted, however, that the question as to whether *Chalav Yisrael* must be utilized for cheese production (or whether there is an exemption since non-kosher milk does not curdle) is separate from the question as to whether the cheese production itself must be *Gevinat Yisrael* – i.e., involve Jewish participation in the process.

23. See *Chelkat Binyamin, Yoreh Deah* 115:16. In a modern day version of the *Aruch Hashulchan*'s nameless citation of the opinion of the *Pri Chadash*, the author cites the opinion of Rabbi Feinstein in the main text of his work as "*Yesh Mi She'Omer*" ("there is someone who says"), although the *Iggerot Moshe* is referenced explicitly in his footnotes.

24. See *Halachically Speaking – Cholov Stam and Cholov Yisroel*, [sic],compiled by Rabbi Moishe Dovid Lebovitz, note 32, in the name of Rabbi Yisroel Belsky. The *Chelkat Binyanim* (*Tzionim*, note 55) also cites a responsum of Rabbi Feinstein that is not published in the *Iggerot Moshe*, but rather appeared in the book *Pitchei Halacha*, in which he seems to indicate that in places where *Chalav Yisrael* is readily available at prices that are not significantly higher than regular milk, it is not appropriate for anyone to exercise leniency. It has also been noted that the quality of *Chalav Yisrael* milk seems to have improved significantly in recent years. At least in those locations where *Chalav Yisrael* has become more competitive in terms of price, availability and quality, there may be more of a basis for overall stringency even according to Rabbi Feinstein's viewpoint. However, the fact is that Rabbi Feinstein explicitly wrote that even his stringency relating to "*ba'alei nefesh*" was only applicable in locations where *Chalav Yisrael* could be obtained בלא טירחא ובלא חלוק בהשיוי *(if there is no greater hassle or price difference)*, implying that those who are not *"ba'alei nefesh*" do not need to be strict even under such circumstances. See *Iggerot Moshe Y"D* 3:16, s.v. "*Ve'zeh*".

25. Another rationale for leniency in connection with *Chalav Stam* cited in

III. Here Come the Camels

Based on the strict governmental laws regulating the production of milk and prohibiting the admixture of any non-cow milk into milk products, Rabbi Feinstein's leniency held sway for many decades. However, in the past several years there has been a major change in terms of the manufacture of milk in the United States. Based on a movement championed by Dr. Millie Hinkle from North Carolina, camel milk has now been introduced to the milk market.[26] Dr. Hinkle and her cohorts have expended significant energies touting the health benefits of camel milk, based on its "powerful, immune-system components" which can "potentially benefit disorders including diabetes and autism."[27] In fact, a company called "Camel Milk USA" was created under Dr. Hinkle's leadership, associating camel milk in its promotional materials with a feel-good naturalistic way of approaching and enjoying nature and its myriad benefits.[28]

As a result of the considerable efforts of Dr. Hinkle, several years ago the federal government revised its Grade "A" Pasteurized Milk Ordinance to include camel milk in the definition of milk, broadening its definition to include, in addition to "cattle's milk," "goat, water buffalo and other hooved mammal milk."[29] Given that "milk" now can mean not

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the name of Rabbi Yosef Dov Soloveitchik is that the prohibition of *Chalav Akum* is only applicable when the milking is performed by human beings, as opposed to commercial milk production nowadays when milking is performed by machines. See Rabbi Chaim Jachter, *Gray Matter*, Volume 3, pages 186, 191-192 (Kol Torah Publications, 2008). However, the author is unaware of any major kashrut organizations that rely on this rationale in certifying *Chalav Stam*.

26. See the article "Getting Over the Hump" in *Mishpacha* Magazine, May 13, 2015, pp. 28-29. According to the Wikipedia entry on "camel milk," there are approximately 5,000 imported camels in the United States.

27. Jan Millehan, "Health Benefits of Camel Milk," LiveStrong.com, April 16, 2015

28. See www.camelmilkusa.com.

29. See Section 4, paragraph 3 of the Grade "A" Pasteurized Milk

only milk from kosher animals such as cows and goats, but even milk from "other hooved animals" such as camels, the premise of Rabbi Feinstein's leniency is clearly brought into question. No longer does it seem to be a crime or offense for a milk manufacturer to mix together camel milk with cow milk and then sell the product on the market as "milk" to the general consumer.

Fortunately, the ability of kashrut agencies to continue to certify *Chalav Stam* is preserved through a different feature of the federal statute. Although the definition of "milk" was expanded to include camel milk, the statute continues to impose strict labeling requirement upon milk, requiring that any milk product containing milk from an animal other than a cow be conspicuously labeled in terms of the other animal providing the milk.[30] While the language of the statute is somewhat murky in terms of whether the labeling requirement is applicable only to milk products that are derived completely from other animals or even from milk products with an admixture of milk from other animals (which is the case according to the Talmud that triggers the halachic concern in the first place),[31] the Department of Health officials and kashrut field experts emphatically insist that since milk is amongst the most heavily regulated of food products,

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Ordinance, and the Definition of "Hooved Mammals' Milk" in Section 1 of the Ordinance. Until 2009 it was a felony to sell camel milk in the United States. See the article describing Dr. Hinkle's successful efforts to change the law at www.camelmilkusa.com. The bill was signed into law by the governor of Illinois on August 6th, 2015.

30. See *Ibid*.

31. The exact language of the statute states, in relevant part, "All bottles, containers and packages, containing milk or milk products, except milk tank trucks, storage tanks and cans of raw milk from individual dairy farms, shall be conspicuously marked with: …3. The common name of the hooved mammal producing the milk shall precede the name of the milk or milk product when the product is or is made from other than cattle's milk. As an example, "Goat", "Sheep", "Water Buffalo", or "Other Hooved Mammal" milk or milk products respectively."

even the most minute admixture would be subject to the terms of the labeling statute.[32] Thus, the fact the manufacturers would still remain fearful that any admixture not conspicuously labeled could result in penalties and even forfeiture of their license qualifies as sufficient basis to continue to apply Rabbi Feinstein's leniency with respect to *Chalav Stam*.

These changes on the ground recently resulted in a legislative quagmire in the State of Illinois. For years, the Illinois Milk Statute (officially, the Grade A Pasteurized Milk and Milk Products Act) had defined milk solely as "the milk of cows or goats and includes skim milk and cream." However, following the amendment of the federal statute, Department of Health officials in Illinois moved to change the language of the Illinois Milk Statute to be consistent with the federal statute, and thus changed the language to read that "'milk' means the milk of cows, goats, sheep, water buffalo, or other hooved mammals and includes skim milk and cream."

When the Chicago Rabbinical Council, under the watchful eye of its kashrut administrator Rabbi Sholem Fishbane, discovered that the statute had been changed, it feared that the expansion of the definition of "milk" could indeed raise questions regarding the applicability of Rabbi Feinstein's leniency to *Chalav Stam* because, at least on a state level, there was no balancing language in the statute that made it clear that it would be a violation to mix together cow milk with camel milk and still sell the product as "milk." While camel milk is much more difficult and costly to produce, and it would therefore be highly undesirable for a manufacturer to mix together camel milk with cow milk and then sell it as regular milk,[33] such considerations of impracticality would

32. Verbal communications with Illinois Department of Health officials and with Rabbi Avrohom Gordimer.

33. See Rabbi Avrohom Gordimer, "Milk from non-Kosher Species," in *Torah Musings*, February 15, 2015 (available on line at http:/

only hold sway according to the opinion of the *Pri Chadash*, while the goal of most kashrut agencies is to provide certification according to the opinion of Rabbi Feinstein.

Accordingly, the Chicago Rabbinical Council asked this author to argue the case in front of the Illinois legislature in Springfield, Illinois. Initially, the goal was to change the statute back to the original language that would have confined the definition of milk to cow or goat milk, or at least to eliminate the reference to "other hooved animals" in the new legislation.[34] State Senator Ira Silverstein graciously agreed to sponsor the legislation. However, Department of Health officials insisted that it was imperative that the language of the statute track the federal definition of milk in order to ensure that to the degree that it was now permissible to manufacture and sell camel milk, such milk would be subject to the same regulations (such as inspection tests for contaminants) as other milk under the statute. In response to this concern, I requested that language be added to the statute making it clear that milk suppliers needed to comply with the federal labeling requirements, so that kosher certification could be preserved. After a presentation in front of the relevant legislative committee and several rounds of drafts, the language that was ultimately agreed upon states that "'milk' means the milk of cows, goats, sheep, water buffalo, or other hooved mammals, provided that it must be labeled in accordance with the current Grade "A" Pasteurized Milk Ordinance as adopted by the United States Public Health Service – Food and Drug Administration, and includes skim milk and cream."[35]

But that is not the end of the story. The raw (unpasteurized)

/torahmusings.com/-2/milk-from-non-kosher-species/) noting that camel milk sells at $80-$130 on the Western market.

34. The insertion of water buffalo does not appear to raise a similar problem since it is presumed to be a kosher animal. See *Yoreh Deah* 28:4.

35. As of May 31, 2015, the amendment (SB 1228) had passed both houses of the Illinois General Assembly. On June 29, 2015 it was sent to the Governor for final approval, and it was signed into law on August 6th, 2015.

milk lobby then came upon the scene. It is important to note that the Federal statute requires pasteurization of all milk that is commercially sold in order to safeguard public health. However, in recent years, in addition to the emergence of the camel milk hawkers, there has been a rise of the raw milk lobby consisting of individuals who have petitioned for formal acceptance of the production and sale of unpasteurized milk. A number of states, including Illinois, have passed statutes allowing for the sale of unpasteurized milk, provided that such sales take place on the dairy farms.[36] Unlike with respect to pasteurized milk, there is no federal labeling statute regarding the sale of raw milk. Accordingly, the raw milk advocates in Illinois insisted on inserting language making it clear that the labeling requirements are not applicable to the sale of raw milk. Fortunately, since the milk that is certified by kashrut agencies is pasteurized milk that is sold commercially, the carve-out clause for raw milk does not compromise kosher certification of *Chalav Stam*. It does, however, limit the applicability of Rabbi Feinstein's lenient considerations to pasteurized milk alone, since a milk producer on a farm would presumably not be fearful of being caught mixing together raw camel milk with raw cow milk to the extent that unpasteurized milk production for sale on the dairy farms is not yet subject to the same labeling laws pertaining to pasteurized milk.

IV. Introducing Camel Cheese

Although the *Rema* assumes,[37] in accordance with the

36. See Section 8 of the Illinois Milk Statute: "After the effective date of this Act, no person shall sell or distribute, offer to sell or distribute any milk or milk product for human use or consumption unless such milk or milk product has been pasteurized and has been produced and processed in accordance with rules and regulations promulgated by the Department…The pasteurization requirement of this Section shall not be applicable to milk produced in accordance with Department rules and regulations if sold or distributed on the premises of the dairy farm."

37. *Yoreh Deah* 115:2.

Talmudic presumption,[38] that non-kosher milk cannot be curdled into cheese, and that therefore milk that is used in the manufacture of cheese does not absolutely need to be *Chalav Yisrael*, it is noteworthy that there have been numerous efforts to turn camel milk into cheese, some of which have apparently met with success.[39]

In fact the global bioscience company of Chr. Hansen has developed a camel milk coagulant (FAR-M) that produces a variety of cheeses from camel milk.[40] According to recent research, this coagulant can also turn donkey milk into cheese.[41] However, it appears that the vast majority of cheeses produced from camel milk or donkey milk are of the soft cheese or semi-hard cheese variety.[42] The ramifications of these developments will be explored in Section V(C) of this article.

V. Halachic Ramifications of the New Realities

This section will discuss four important halachic ramifications to the recent changes with respect to the sale of camel milk, production of camel cheese, and the emergence of the raw (unpasteurized) milk lobby:

A. Reconsideration of the Leniency of Rabbi Moshe Feinstein

As detailed in Section III, the introduction of camel milk to the United States milk market illustrates how the leniency of Rabbi Moshe Feinstein with respect to *Chalav Stam* constantly needs to be re-evaluated based on the facts.

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38. *Avodah Zarah* 35b.

39. See *The Technology of Making Cheese from Camel Milk (Camelus Dromedarius)* by J.-P. Ramet (Rome, 2001).

40. See "Chr. Hansen and Kenyan Enterprise Develop Camel Cheese Recipes," February 17, 2014, www.chr-hansen.com/news-media.

41. See "FAR-M camel milk coagulant clots donkey milk too, Chr Hansen finds," by Mark Astley, April 2, 2015, dairy reporter.com free newsletter.

42. See *supra* n. 39 at 28-31.

By way of example, it has been noted that certain milk products sold in the United States come from foreign countries which may not have the same amount of supervision as milk production in the United States, or the same amount of law enforcement. As a result, kashrut agencies have become more reluctant to certify milk products from certain other countries such as India where there is evidence that laws are not as strictly enforced; therefore, there may not be the requisite amount of "fear", which was a key requirement of Rabbi Feinstein's lenient ruling, with respect to the mixture of non-kosher milk with kosher milk.[43]

Similarly, even within the United States, the recent imbroglio involving camel milk illustrates how it cannot be assumed that what was true fifty years ago with respect to milk production in the United States will always remain true. The definition of "milk" has already been expanded beyond cow and goat milk to include milk of other hooved animals such as camels. While the leniency of Rabbi Feinstein remains operative due to strict labeling requirements, it will be necessary to ensure that the labeling requirements remain rigorous, both on a federal and state level, in order to safeguard kosher certification of *Chalav Stam* in the United States. It is instructive that under the current milk laws, even the labeling requirements only provide requisite supervision with respect to pasteurized milk, but not with respect to the growing sale of unpasteurized milk on the farms, which is not subject to the same labeling requirements. Accordingly, Rabbi Feinstein's leniency cannot be relied upon at this point in time with respect to the purchase of raw milk in the United States.

In fact, the lack of labeling requirements with respect to

43. A special AKO (Association of Kashrus Organizations) meeting was held in June 2013 to discuss the applicability of Rabbi Feinstein's leniency with respect to milk from other countries. As a result of continued research in this area, a kashrut administrator at a major kashrut organization recently informed me (verbal communication) that his agency has adopted a stricter policy towards certification of milk from India.

unpasteurized milk sold on the dairy farms highlights a different issue, which is that there are limitations with respect to the amount of reliable governmental supervision on the farms themselves. While Rabbi Feinstein ruled that it is sufficient to rely upon factory supervision alone, certain later authorities have questioned the basis of that conclusion.[44] Some experts in the kashrut field have argued that the point is moot because nowadays there is more rigorous supervision by the government on the farm level.[45]

However, to the extent that new statutes may not provide an incentive against mixing kosher milk and non-kosher milk for the production of unpasteurized milk sold on the farms, it is now less clear that the governmental supervision on the farms serves to assure that the kosher milk and non-kosher milk will be kept completely separate. The main reliance may still have to be upon the compliance of the milk plants with respect to the labeling requirements of the pasteurized milk ordinance, which appears to be a much less supervised process.[46]

Thus, we are left at this point with simply the "*anan sahadi*" understanding that despite the lack of either Jewish or governmental supervision, the milk manufacturers can be trusted not to mix together non-kosher with kosher milk without conspicuous labeling of such admixture based on the fear of penalties and other potentially dire consequences, despite the lack of on-site supervision. It will therefore be imperative to monitor the trustworthiness of the supervision process in the years ahead.

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44. See, e.g., *Chelkat Binyamin Y"D* 115, *Tzionim* n.54.

45. See Rabbi Gordimer, "Rav Moshe Zt'l's Heter of Cholov Stam Revisited," Kashrut.Com, Copyright 2011 by Orthodox Union, Reprinted from *Daf HaKashrus*.

46. As Rabbi Gordimer notes in his article, the main governmental inspection at the dairy plants is with respect to "bacteria count and the presence of antibiotics."

B. Resurrection of the Leniency of the *Pri Chadash*

Perhaps paradoxically, the advance in camel milk production may actually buttress applicability of the leniency of the *Pri Chadash*, to the extent that reliance on his opinion may continue to serve as a consideration for certification of *Chalav Stam*.[47]

According to the *Beit Meir*,[48] the *Pri Chadash* only intended to be lenient in a situation where there is actually a market for non-kosher milk. If there would be no such market, in the event that a farmer or milk supplier had some non-kosher milk lying around that would otherwise go to waste, there would be no incentive for them to refrain from mixing the non-kosher milk with the kosher milk. Only if there is the possibility of selling the non-kosher milk would the *Pri Chadash* maintain that one can rely upon the fact that it is impractical for the gentile to mix the more expensive non-kosher milk with the less expensive cow milk.

Accordingly, in the advent of Camel Milk USA and the official inclusion of camel milk as a marketable milk product pursuant to the revised federal statute, there may be more reason to apply the leniency of the *Pri Chadash* to milk production in the United States. While the rationale that there are no non-kosher milking animals in the city or the land is not applicable (and may have never been applicable especially given the hog industry in the country)[49] the rationale of the *Pri Chadash* that it simply would not be sensible for a gentile milk manufacturer to mix kosher milk together with camel milk

47. See *supra* notes 16-17 and accompanying text.

48. *Yoreh Deah* 115, s.v. "*Pri Chadash*".

49. See the anecdotal comment of the *Aruch Hashulchan supra* in note 14. However, the prevalence of pigs in the United States does not in reality seem to present a fatal impediment to the *Pri Chadash*'s leniency given the reality that pig milk is extremely difficult to produce and is not viewed as desirable for human consumption.

because of the greater economic cost (and value) of camel milk has become surprisingly more pertinent.

C. Cheese Curdling Considerations

With the introduction of cheese-making technology, including the FAR-M coagulant on the market, which enables camel milk and perhaps even donkey milk to be curdled into cheese, it may be appropriate to re-evaluate the premise that non-kosher milk does not have the capacity to turn into cheese. While there are certain fact-based statements of *Chazal* which are intended to serve as eternal truths,[50] it is not clear that the Talmudic statement regarding the impossibility of non-kosher milk coagulating into cheese falls into that category. Rather, it may be regarded as a true statement at the time – that since in the time of the Talmud, only kosher milk could be turned into cheese, this was a valid consideration in terms of the permissibility of utilizing non *Chalav Yisrael* for purposes of the cheese-making process. However, in light of changes in technology that now enables non-kosher milk to be turned into cheese, it behooves us to take this reality into consideration in connection with contemporary halachic decision-making.[51]

Of course, continued reliance on Rabbi Moshe Feinstein's

50. For example, the *Rambam*, *Shechita* 10:12-13, famously noted that the 18 conditions of *Trayfo*t listed by *Chazal*, which are premised on the expectation that the animal will die within the year, remain the only physiological conditions that give rise to the animal being treated as a *Trayfeh*, despite the fact that according to modern science some of these conditions no longer lead to death within a year and other non-listed conditions do lead to imminent death.

51. There are other *halachot*, for example, where halachic authorities have ruled that they are subject to modification due to changes in nature. See *Iggerot Moshe*, Y"D 2:4 with respect to *vestot* relating to pregnant and nursing women in the modern age where, unlike at the time of the Talmud, pregnant women tend to stop seeing blood immediately upon becoming pregnant (and not only after three months of pregnancy) and nursing women tend to see blood even prior to the passage of twenty four months from childbirth.

leniency with respect to *Chalav Stam*, based on the labeling requirements that are in effect, would enable kosher cheese manufacturers to utilize *Chalav Stam* in the production of kosher cheese (provided, of course, that a Jew was involved in the cheese-making process, as required by halacha). However, those who have chosen to be "*ba'alei nefesh*" who are stringent with respect to purchasing only *Chalav Yisrael* but more lenient with respect to purchasing cheese made from *Chalav Stam*, based on Rabbi Feinstein's ruling that it is not necessary even for "*ba'alei nefesh*" to be "doubly-stringent" since fundamentally the *Rema* accepts the premise that non-kosher milk cannot be made into cheese, may now have reason to re-consider that leniency.[52] Accordingly, those who do not rely on the leniency with respect to *Chalav Stam* may, at first blush, have more reason today to be stringent, even according to Rabbi Feinstein, to purchase cheese which is made solely from *Chalav Yisrael*.

However, it would seem that since the cheese that is produced from camel milk is primarily in the form of soft cheese, there would still be insufficient reason to adopt greater stringency in this case. With respect to soft cheese, Rabbi Feinstein was in any event inclined towards the position (adopted by Rabbi Yosef Eliyahu Henkin and others) that soft cheese is not subject to the strictures of *Gevinat Yisrael* since there is no need for the use of an agent to enable the milk to congeal to become soft cheese,[53] and therefore his comment

52. In fact, this concern was already noted by R. Chaim ben Atar (also known as the *Or Hachaim Hakadosh*) in the *Pri Toar* (*Yoreh Deah* 115:8) who reported that already in his time (early 1700s) scientists had figured out how to mix cow milk with camel milk in order to produce butter. He writes that the Rabbis in the time of the Talmud simply could not have contemplated that this type of technology would ever be developed. The *Pri Toar* concludes that any such product would have a yellow complexion that would be easily discernible, and thus would not cause other butter to be prohibited. However, see *Chaim Sha'al* (1:43) who expresses discomfort with the *Pri Toar*'s assumption that there were changes in cheese-making capabilities after the time of the Talmud.

53. See *supra* note 22.

regarding leniency in the context of *Gevinat Yisrael* was primarily directed towards hard cheese (although it should be noted that this statement was made in the context of whether or not there is a need for G*evinat Yisrael* supervision, rather than in the context of the stringency against using *Chalav Stam* in the production of cheese altogether). Additionally, the statement in the Talmud that non-kosher milk does not curdle into cheese is understood by certain rabbinic authorities as referring specifically to hard cheese.[54] Finally, and perhaps most importantly, the standard enzymes that are used to produce cheese cannot be used to produce cheese from camels, and thus in the standard cheese-making process it still remains a valid presumption that the milk is from a kosher animal unless it is known that the specialized rennet that has been manufactured specifically for the coagulation of camel cheese is being utilized.

Thus, until it has been demonstrated that there is a standard cheese-making enzyme that can produce hard cheese from camel milk, it would appear that Rabbi Feinstein's leniency for a *ba'al nefesh* in connection with cheese made from *Chalav Stam* should remain in effect.[55]

D. Milk Pasteurization – the Raw Milk Lobby to the Rescue

The milk pasteurization process involves the heating of the

54. See, e.g., *Radvaz* 6:2291, but see *Chaim Sha'al ibid*. See also *Ritva, Avoda Zara* 35b s.v. *Mah She-amru* (asserting that the Rabbis did not mean to say that non-kosher milk is incapable of curdling altogether, but rather that most of the milk would not curdle and would congeal to become a whey product). The author thanks Rabbi Dovid Cohen for identifying helpful source material for this part of the discussion.

55. Rabbi Avrohom Gordimer (communication to the author) has pointed out that there may be even more room to be lenient with respect to cheese produced from unpasteurized milk, because federal regulations continue to require that cheese from unpasteurized milk be produced only from cow, goat or sheep milk.

milk in order to destroy harmful bacteria. This heating generally takes place without the participation of a Jew in the process. Therefore, drinking pasteurized milk might be prohibited based on "*bishul akum*" – the interdiction against consuming foods cooked by a non-Jew.

The reason that this is not generally viewed as a concern[56] is because, as the *Rambam* writes,[57] milk can in fact be consumed raw, and the prohibition of *bishul akum* is inapplicable to foods that are "*ne'echal chai*" – edible in their raw state.[58] However, the *Minchat Yitzchak*[59] writes that nowadays when raw milk is considered to be harmful (which is the reason why all commercially sold milk must be pasteurized), it is questionable whether it is proper to rely upon this rationale to permit the consumption of pasteurized milk. Therefore, he provides a combination of other reasons to allow leniency: (a) in the process of pasteurization, the milk is actually steamed rather than cooked, and according to some opinions, the steaming process does not implicate *bishul akum* concerns[60]; (b) since pasteurization is performed at the milk plants, there is room to rely upon the opinion of the *Maharit Zahalon*[61] that factory-produced foods are not included in the prohibition of *bishul akum*. Nevertheless, the *Minchat Yitzchak* concludes that since both of these rationales are subject to dispute, it is

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56. See, e.g., *Chelkat Binyamin, Yoreh Deah* 113:7.

57. *Rambam, Ma'achalot Asurot* 17:14.

58. See *Yoreh Deah* 113:1.

59. *Minchat Yitzchak* 10:67. See Rabbi Lebovitz's article *supra* n.24, at pages 9-10.

60. See *Darchei Teshuva, Yoreh Deah* 113:16. In reality, as Rabbi Dovid Cohen has noted, the steam is generally only indirectly responsible for the heating process, so other than the *Minchat Yitzchak*'s second additional consideration for leniency, there is a genuine need to rely upon the notion that milk is edible in its raw state.

61. Cited by *Birkei Yosef, Yoreh Deah* 112:9. A similar reliance upon this combination of opinions can be found in *Yabia Omer Y"D* 5:9 in connection with the kosher certification of sardines which are steamed in a factory setting.

optimal not to rely on the lenient views, and to strive to purchase milk in which Jews have participated in the pasteurization process.

In this sense, the emergence of the raw milk lobby has actually reinforced the *Rambam's* leniency. Now that it has become more prevalent for people to drink raw milk, and even for state statutes to specifically provide for the manufacture and sale of raw milk on dairy farms,[62] there is a much stronger argument to maintain that milk is indeed in the category of "*ne'echal chai*," fit to be consumed in its raw and unpasteurized state. Thus, although the raw milk enthusiasts have created a challenge with respect to the kashrut of the milking process itself due to the lack of federal labeling requirements with respect to the production of raw milk from kosher and non-kosher animals, they have simultaneously bolstered the ability of kashrut agencies to certify the pasteurization process as kosher.[63]

Conclusion

Halacha is never stagnant. Although halachic principles are timeless, changes in technology and commercial practices constantly affect the application of halacha in the real world.

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62. The recognition by a state statute of a food as edible would seem to qualify it as a food which is "considered" as edible in its raw state from the standpoint of the majority of people in that region, (see, e.g., *Chelkat Binyamin* 113:5) even if most people in that region do not actually consume the food in its raw state. See *Birkei Yosef* 113:1 (s.v. "*VeRaiti*"), and *Shevet HaLevi* 5:93 citing the *Ritva, Avoda Zara* 38a (*s.v. Kol HaNe'echal*) that it is sufficient that a food be capable of raw consumption even if most people do not actually consume the food in its raw state.

63. Arguably, as Rabbi Dovid Cohen has suggested, the fact that some cheeses (such as certain blue cheeses and most English cheddars) are made from unpasteurized milk also supports the characterization of milk as "*ne'echal chai*." However, it is unclear if the ability of raw milk to become edible through being converted into cheese would be sufficient to qualify it as edible in its raw state. See *Darchei Teshuva* 113:4; *Chelkat Binyamin* to Y"D 113:12. s.v. "*she-malchan*".

The case of milk production is a paradigmatic example of this phenomenon. Due to the rise of the production of camel milk and raw milk, as well as the technologies that now enable non-kosher milk to be curdled into cheese, many halachic presumptions and applications need to be re-visited.

Lenient views relating to milk production, such as those found in the *Pri Chadash* and *Iggerot Moshe*, as well as stringent views relating to pasteurization found in the *Minchat Yitzchak*, are all dependent upon existing realities that require regular re-evaluation. Whether in the context of vigilance in connection with the changing language of milk legislation, such as in connection with the recent legislative revisions made to the Illinois Milk Statute, or with respect to recognizing differences between law enforcement of milk labeling requirements in different countries, the role of contemporary *poskim* and kashrut agencies is both dynamic and demanding. In this article we have sought to identify a number of halachic applications towards changes in milk production, and in the process, to stimulate further discussion, analysis and investigation.

Learning Halacha from *Aggadah*

Rabbi Immanuel Bernstein

Introduction

One of the fascinating areas of Torah is known as *Aggadah*. It is very hard to find an adequate English translation that will encapsulate the essence of *Aggadah*. The most accurate definition is probably a negative one, provided by R.Shmuel Hanagid,[1] which simply defines *Aggadah* as any non-halachic statement found in the Talmud. *Aggadah* deals with the aspects of Judaism that go beyond the specifics and parameters of the commandments, and instead focuses on areas such as Torah outlook, philosophy, values and ethical conduct. Our sages succinctly summed up the role of *Aggadah* with the statement: "Do you wish to know the One who spoke and created the world? Learn *Aggadah*, for through that you will know Hashem and cleave to His ways."[2]

Aggadah is an integral part of Torah. As a category within Torah, it was handed down from Sinai together with halacha,[3] it requires that *Birkat Hatorah* (blessing over the Torah) be recited before it is learned, and at times when it is not permitted to study Torah,[4] *Aggadah* may likewise not be studied. Nonetheless, the question still arises as to whether we

1. R. Shmuel ibn Nagrela (R. Shmuel HaNagid) *Introduction to the Talmud*.

2. *Sifrei Parshat Eikev* sec. 12.

3. *Yerushalmi Peah* 2:4. See also *Yerushalmi Megillah* 4:1, and *Vayikra Rabbah* 22:1.

4. For example on *Tisha b'Av*, or רחמנא ליצלן, during the week of *shiva*.

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may draw halachic conclusions from *Aggadic* statements. This is a question which has been discussed in many different settings in both earlier and later works. This article will endeavor to present and elucidate the primary approaches to this issue found in the *Rishonim* and *Acharonim*, while showing how resolution of this question is still very pertinent in today's world.

Contemporary Applications: Surrogate Motherhood

A very interesting example of this issue would be a question which has been discussed extensively in recent years, namely, the identity of a child's mother in a case of surrogate pregnancy. Briefly, this is when the ovum of one woman is transplanted into the womb of another, who then carries the pregnancy to term and brings the child into the world. The question arises: who is the mother? The donor of the ovum or the one who gave birth?

Not surprisingly, there is no discussion of this question to be found in the classical halachic sources, as the possibility of transplanting an embryo did not exist until recently. However, there is one early source which may help shed light on the matter.

The Torah tells us that after giving birth to six sons, Leah had a girl, and named her Dina.[5] An ancient source known as *Targum Yonatan ben Uziel*[6] explains the background to this name. It was known that there would be twelve sons born to Yaakov, and Rachel and Leah were both concurrently pregnant, with Leah carrying a boy and Rachel a girl. Leah had already borne six sons, and Bilhah and Zilpah had born two sons each, leaving only two sons left to be born. If Leah

5. *Bereishit* 30:21.

6. *Bereishit* ibid. The precise authorship of this *Targum* is beyond the scope of this article; for a classic discussion of this topic see, e.g., sources quoted in *Chida, Shem Hagedolim maarechet sefarim,* s.v. *Targum Yonatan*.

were to give birth to another son, that would leave Rachel with the possibility of having one son at most, less than even the two handmaidens. Leah reasoned that it was only just (*din hu*= Dina) that Rachel should have two sons as well. She thus prayed that she should have a girl, and Rachel a boy. The *Targum* continues:

> Hashem heard the prayer of Leah, and the embryos were switched in the wombs; Yosef was placed in the womb of Rachel, and Dina in the womb of Leah.

We essentially have before us a description of an embryo transplant. Yosef was conceived by Leah, but borne by Rachel. Dina, on the other hand, was conceived by Rachel, and borne by Leah. Who are the mothers of each? We see that the Torah considers Dina to be the daughter of Leah, and Yosef the son of Rachel.[7] Seemingly, we are being told that the mother is the one who brings the child into the world, not the one who conceives it.

The question is, could this *Aggadah* regarding the birth of Yosef and Dina provide the basis for determining the halacha regarding this matter? In order to answer this question, we need to consult the sources regarding the parameters of the halacha's relationship with *Aggadah*.

1. The Principle

The Talmud *Yerushalmi*,[8] in the course of discussing which areas of Torah are acceptable as a basis for deriving halacha, states:

> We do not derive halacha from *Halachot* [i.e. halachic rulings in the Mishnah], nor from *Aggadot*, nor from *Toseftot*, only from the Talmud.

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7. See also commentary of the *Tur* to the Torah (*Peirush haTur Ha'aroch*) *Bereishit* 46:10.

8. *Peah* chap. 2 halacha 4.

This principle has been echoed many times in the various halachic responsa throughout the ages.[9]

The *Noda bi'Yehuda*[10] explains the basis for this ruling as follows:

> When it comes to Midrash and *Aggadot*, their primary intention was to impart ethical lessons, through allusion and allegory, and indeed all of these constitute fundamentals of our religion. However, their main concern was never to render a halachic ruling; therefore, we do not learn from them regarding matters of halacha at all.

A similar, and slightly more elaborate, approach is found in the writings of the *Maharal*.[11] He begins by saying that we cannot rely on *Aggadah* for halachic guidance since we cannot be sure that *Aggadah* was meant to be taken at face value; perhaps it was meant to convey a more esoteric concept. He then proceeds to explain that this concern is also what lies behind a related, and prior, issue, which is known as *ain meshivin al ha'aggadah*, we do not raise questions on *Aggadah*. In order for a statement to be relied upon halachically, its exact parameters need to be ascertained: is it true in all circumstances, for all people, etc.? The way this is normally done is by raising questions on it from other halachic statements relating to that topic, which may contain contrary rulings to the first one. This process will lead to elucidating the precise circumstances to which each statement pertains. This is a crucial refining process for any meaningful halachic conclusion.

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9. In addition to the sources which will be discussed below, see, for example, the following *Teshuvot*: *Terumat Hadeshen (psakim)* 108, *R. Menachem Azaria mi'Pano* 36, *Chacham Zvi* 49, *Chavot Yair* 224, *Chatam Sofer Orach Chaim* 32 and *Gilyon Maharsha* of R. Shlomo Eiger to *Yoreh Deah* 240:24.

10. *Mahadura Tinyana Yoreh Deah* 161.

11. *Be'er Hagolah, be'er* 6.

However, in order to pose a contradiction between two statements, we need to be sure that we know exactly what they are both saying, and that they are indeed contradictory to each other. When it comes to *Aggadah*, we cannot know with certainty that any given statement means for its halachic ramifications to be taken literally, which makes posing a contradiction to it from somewhere else impossible. Hence, says the *Maharal*, the underlying reason why we cannot derive a meaningful halachic conclusion from an *Aggadah* is because we cannot ask a meaningful halachic question on it.

In order to get a clearer sense of "not raising questions on *Aggadah*", let us consider a case where we see this idea being invoked.

2. *Ain Meshivin al Ha'Aggadah*

A classic example of the approach of *ain meshivin al ha'Aggadah* can be found in the Gemara's discussion of Esther's relationship to Mordechai. Commenting on the verse which says that upon the death of her parents, "לקחה מרדכי לו לבת – *Mordechai took her as a daughter*", the Gemara[12] expounds, "Do not read לבת, [*as a daughter*] but rather, לבית – *as a house*," i.e., they were actually married. The Gemara further expounds in this vein on Esther's words to Mordechai before going to Achashverosh to intercede on behalf of her people, "וכאשר אבדתי אבדתי – *whatever I have lost, I have lost*." The Gemara[13] explains that she was saying she would no longer be permitted to Mordechai after going to Achashverosh of her own volition, a visit which may involve physical relations, albeit for the legitimate and critical purpose of saving her people.

Tosafot[14] raise the question: why did Mordechai not simply

12. *Megillah* 13a.
13. Ibid. 15a.
14. *Megillah* ibid. s.v. *k'shem*.

divorce Esther? This would not only render her permitted to him in the future, it would also save her from having relations with Achashverosh as a married woman! *Tosafot* respond that since a *get* (bill of divorce) needs two witnesses, the divorce could have generated unwanted publicity regarding Esther's marriage to Mordechai and endangered them both.

The *Rashba*[15] quotes this answer of *Tosafot* and claims that it is insufficient. He maintains that on a strict Torah level, a *get* which is written in the husband's own handwriting does not need any witnesses to validate it. That being the case, it would have been possible for Mordechai to divorce Esther without generating any publicity at all, by writing a *get* for her himself![16] The *Rashba* does not provide an answer to this question; indeed, it seems that in his opinion there is no answer. However, the *Rashba* concludes:

> Except these are words of *Aggadah*, *ve'ain meshivin aleyhen* – and we do not raise critical questions on them.

The *Rashba* is apparently saying that we don't necessarily know exactly what the Gemara means when it expounds the verse to say that Esther was married to Mordechai. As such, we cannot meaningfully raise critical questions on this statement. If this is the case, then certainly we could not draw any authoritative halachic conclusions from it.[17]

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15. Commentary to *Megillah* 15a.

16. Later commentators point out that in the opinion of *Tosafot* even a *get* written by the husband would require two witnesses upon its delivery, such that *Tosafot* would not accept the *Rashba*'s suggestion as an effective one in this regard; see *Iyun Yaakov* to *Ein Yaakov Megillah* there.

17. See *Responsa of Rashba* 1:50, where he is asked to resolve two *Aggadic* statements. On the one hand, the Gemara says (*Berachot* 6b) that if Hashem "comes to shul" and does not find a *minyan* of ten people there, He immediately becomes angry. Elsewhere (ibid. 6a), the Gemara says that whenever there is a *minyan* present in shul, the Divine presence arrives there before them. If this is so, then as per the first statement, Hashem should always get angry immediately, since He always arrives before the *minyan*! The *Rashba* opens his response by saying "*Ain meshivin al ha'Aggadah*",

That said, we note that the *Tosafot did* raise the question as to why Mordechai did not divorce Esther. Apparently, they felt that this issue needed to be resolved, even though it was in the realms of *Aggadah*. Moreover, not only do *Tosafot* in *Megillah* raise halachic questions on this exposition, elsewhere they actually draw halachic conclusions from it. The halacha states that if a married woman has consensual relations with someone else, she becomes forbidden to her husband. *Tosafot* in *Sanhedrin*[18] state that this is true even if the adulterer is not Jewish. They prove this from the Gemara's explanation of Esther's words to Mordechai that she would henceforth be forbidden to him on account of going to Achashverosh, even though the latter was not Jewish.[19] The position of *Tosafot* will need to be assessed in light of our principle that "we do not learn halacha from *Aggadah*."

3. Definition: Is Every Story an *Aggadah*?

While it is obviously inadequate, as well as inaccurate, to translate *Aggadah* as "stories", it is nonetheless true that accounts of various episodes in the lives of the sages do make up part of what *Aggadah* is. This then leads us to the converse question: Is every episode recounted in the Talmud considered *Aggadah*? The answer, clearly, is no. On many occasions, the Gemara will recount an episode where a rabbi in the Talmud acted in a certain way regarding a certain halacha. These episodes are known as "*Maaseh Rav*", (actions of the Rabbi), and they are recounted specifically for purposes of learning halacha from them. In fact they carry very great halachic

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before proceeding to then offer a possible resolution between these two statements. We see from these words of the *Rashba* that when we say *ain meshivin*, it does not only mean that we do not raise halachic questions on *Aggadah*; rather, we do not even raise critical question from another *Aggadic* statement.

18. 74b s.v. *veha*.

19. See also Responsa of *Maharik shoresh* 167, quoted in *Beit Shmuel Even Ha'ezer* 178:4.

weight, for they represent a practical expression of the halachic views of that sage.

Another type of story will focus more on the elevated spiritual and ethical level of the sage, and these episodes will be part of *Aggadah*. Nonetheless, even with these accounts, the distinction between halacha and *Aggadah* may not be total. Even an incident which is quoted primarily to teach an *Aggadic* idea may yet indirectly yield a precedent or support pertaining to a certain halachic question, if it can be properly assessed and quantified.

A fascinating example of this relates to a halachic question as to whether one is obligated, or even permitted, to place himself in possible danger in order to save others from definite danger. This question has been discussed in different works of *Rishonim* and *Acharonim*. According to the *Torah Temimah*,[20] evidence for this question can be drawn from the following account in the Gemara:[21]

> It once happened that there was a scorpion that was injuring people. They came and told R. Chanina ben Dosa. He said to them, "Show me its lair." They showed him the lair, he went and placed his ankle over the opening, the scorpion came and bit him, and the scorpion died. He took it and placed it on his shoulder and brought it to the study hall. He said to them, "See, my children, it is not the scorpion that kills, rather, it is sin that kills."

The *Torah Temimah* reasons: being accustomed to miracles, R. Chanina was only *possibly* placing himself in danger, and yet he did so in order to save others who were in definite danger. This is a support for the opinion that it is permissible to do so. He concludes by saying, "And it is obvious that it is not relevant to say here that 'we do not learn from *Aggadah*,' for this was an episode that occurred."

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20. *Vayikra* 19 sec. 110.

21. *Berachot* 34a.

There is no question that the reason the Gemara brings this story is to emphasize the damaging effects of sin, as well as the exalted level of R. Chanina ben Dosa, and as such it undoubtedly falls within the category of *Aggadah*. Nevertheless, being a factual account of R. Chanina's actions, halachic insight can still be gleaned from it. Of further interest is that in this particular case, the halachic message needs to be "translated" from R. Chanina's actions to ours. No one could rely on this story to actually imitate what he did, since, not being on his spiritual level, this would constitute placing oneself in *definite* danger. However, his action can be assessed in terms of what it represents, i.e., placing himself in possible danger, and that principle can then be applied to whatever constitutes "possible danger" for everyone else.[22]

4. Qualifying Considerations: Where the *Aggadah* is not in Conflict with Halachic Sources

As we have mentioned, the definitive statement on the matter of learning halacha from *Aggadah* comes from the *Yerushalmi*, which states simply that it cannot be done. The question is, is this rejection absolute? Are there ever any circumstances where *Aggadah* could be used as a basis for a halachic ruling?

Chazzan answering Amen to *Birkat Kohanim*

This issue has been widely discussed and debated among the later authorities. The Mishnah in the fifth chapter of *Masechet Berachot* says,

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22. However, this relies on the assessment of R. Chanina's actions being accurate. See, for example, *Teshuvot Tzitz Eliezer* 9:45, who argues that since R. Chanina was accustomed to miracles, as is recounted in numerous instances in the third chapter of *Masechet Taanit*, perhaps in placing his foot over the scorpion's lair he was not putting himself in danger at all, in which case there is no longer any support that can be drawn from that incident.

> One who goes before the ark [i.e. the chazzan] should not answer amen after the [blessing of the] *kohanim*. [Even] if there is no *kohen* present apart from him, he should not raise his hands [i.e., perform the priestly blessing]. However, if he is assured that he can raise his hands and then return to the *tefillah*, he is permitted to do so.

The Mishnah has presented two restrictive rulings, out of fear that the chazzan may become confused and his *tefillah* disrupted. It then attached a proviso to the second ruling, i.e., that if he is sure that he will not get confused, he may recite *birkat kohanim*. The Mishnah does not directly address the first ruling. In such circumstances, may he also say amen after the *kohanim*?

The Midrash[23] discusses this question and indicates that this proviso applies equally to the first ruling, and that if he is confident, he may indeed answer amen after the *kohanim*. Referring to this Midrash, the *Tosafot Yom Tov* comments:

> I originally took the viewpoint of this Midrash into account. But subsequently I revised my position, for we do not learn halacha from a Midrash… And similarly it is stated in the *Yerushalmi* that we do not learn halacha from *Aggadot*.

The author of the *Pri Chadash*, in his work *Mayim Chaim*,[24] takes strong issue with the *Tosafot Yom Tov*. He claims: when do we say that we do not learn halacha from Midrash? That is specifically when the Midrash is ruling regarding a dispute in the Gemara that was not resolved.[25] However, when it comes to a matter which has not been discussed in the Gemara at all, there is no reason not to rely on the *Aggadah*. A number of

23. *Devarim Rabbah Parshat Ki Tavo*.

24. Cited in *Tosafot R. Akiva Eiger* to *Mishnah Berachot* ibid.

25. I.e.–and certainly when it is in conflict with a ruling of the Gemara.

other authorities also adopt the approach of the *Pri Chadash*.[26] By implication, we see that the position of the *Tosafot Yom Tov* is to categorically refuse any entry of *Aggadic* sources into the halachic arena, even if they are not at all in conflict with any halachic sources.[27]

In the *Rishonim*: Counting a Child towards a *Minyan*

It is possible to enlist support for this qualifying approach from a comment of *Rabbeinu Tam*, quoted in *Tosafot Berachot* 48a.[28] The Gemara there cites the opinion of R. Yehoshua ben Levi that if there are nine adults, a child may count as the tenth member of a *minyan*. Opinions differ among the *Rishonim* as to whether the Gemara ultimately accepts or rejects R. Yehoshua ben Levi's position.[29] *Rabbeinu Tam* understands that this does indeed represent the final halacha, and thus he concludes, based on the Gemara's discussion, that a child can be the tenth member of a *minyan* both for purposes of *tefillah betzibbur* (communal prayer) and for purposes of saying Hashem's name in a *zimun* before *birkat hamazon*.[30] He then cites the Midrash[31] which states that R. Yehoshua ben Levi's words were only said regarding *zimun*, and not regarding *tefillah*. To this, *Rabbeinu Tam* responds:

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26. See, for example, *Be'er Yaakov* to *Even ha'Ezer* 119, *Sdei Chemed Klalim, ma'arechet aleph* sec. 95-96. More recently, see *Yabia Omer* vol.1 *Yoreh Deah* 4, and vol. 4 *Even ha'Ezer* 8.

27. One could argue that the basis for the *Tosafot Yom Tov*'s rejection of the Midrash's position is that he sees it as being at odds with the simple reading of the Mishnah which only made the proviso for purposes of *birkat kohanim*, so that it should not be completely neglected due to the only *kohen* being the *chazzan*. Nonetheless, the *Tosafot Yom Tov* did not phrase his objection this way, and his words seem to indicate a categorical refusal to accept the halachic ramifications of the Midrash.

28. S.v. *v'leit*.

29. See *Tur* and *Shulchan Aruch Orach Chaim* 55:4.

30. I.e., to say "*Nevarech Elokeinu*."

31. *Bereishit Rabbah* sec. 91.

> The halacha is not in accordance [with the Midrash], since it is in conflict with our Gemara, which clearly sees R. Yehoshua ben Levi's words as having been said regarding *tefillah* as well.

We see that while *Rabbeinu Tam* rejected the halachic conclusion of the Midrash, he explained that the reason he did so is because it is in conflict with our Gemara. The clear implication is that were there no such conflict, he would have been prepared to rely on the Midrash as a halachic source. This would seem to be a support for the words of the *Pri Chadash*.[32]

Tasting vs. Eating

This approach also seems to have been adopted by another of the *Rishonim*, the *Rokeach*. The Gemara[33] states that *matemes* – one who merely tastes food – is not required to make a *bracha* (blessing) beforehand. The Gemara doesn't specify exactly what "tasting" means in this regard, specifically whether any of the food is swallowed, or merely tasted and then spat out.[34] The *Rokeach*[35] cites a *Midrash Aggadah* from *Sefer Shmuel* to shed light on the matter. The Midrash relates to the episode described in *Shmuel* 1 chapter 14, where the Jewish people had gone into battle, and King Shaul had administered an oath forbidding anyone to eat any food until the battle was over. Yehonatan, Shaul's son, was unaware of the oath, and had tasted a small amount of honey during the battle. Shaul wanted to punish Yehonatan for violating the oath, but the people argued that he should not be punished, and "redeemed him" from Shaul. Commenting on

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32. Compare, also, the words of the *Ran, Nedarim* 40b (s.v. *ul'inyan*), "We do not push aside a halachic statement which served as the basis for practical halacha in the face of an *Aggadic* statement."

33. *Berachot* 14a.

34. See *Tosafot Berachot* ibid s.v. *to'aim*.

35. Sec. 209, quoted in *Magen Avraham Orach Chaim* 210:6.

this, the Midrash says, "The people redeemed Yehonatan from Shaul, for it is said, 'one who tastes does not need to recite a *bracha*.'"

The *Rokeach* is bringing an explanation from a Midrash into a halachic discussion, demonstrating that "tasting" can also involve swallowing some of the food.[36] How can this be? Does he not subscribe to the principle that we do not learn halacha from *Aggadah*? Apparently, the *Rokeach* feels that since the Gemara did not specify what *matemes* means, it is acceptable to adduce evidence regarding this question from the Midrash. This is similar to the position of *Rabbeinu Tam*, and further support for the position of the *Pri Chadash*.

Sefer Hayashar

There is room to say that this qualification regarding learning halacha from *Aggadah* is mentioned explicitly in the words of *Rabbeinu Tam*. In his work *Sefer Hayashar*,[37] he discusses various aspects of the Torah reading in shul which derive from Midrashim, and notes that some people rejected these practices since they were not sourced in the Gemara's discussions of these matters. To this, *Rabbeinu Tam* responds:

> We should not undo any of the words of the earlier authorities or their customs, for we may rely on these sources in matters which do not contradict the Talmud, but only add to it, and we have many customs that are based upon these sources.

These words explicitly make the distinction referred to above, that if the Midrash is not in conflict with the Talmud, we may rely on it. However, the phraseology of these words plus the context in which they were said indicate that *Rabbeinu Tam* may have been referring specifically to the realm of

36. For a full elucidation of this viewpoint, see *Magen Avraham* loc. cit.

37. Sec. 619.

minhagim – customs.[38] He does not mention there whether we could rely on similar statements from the Midrash in terms of what is acceptable or unacceptable in halacha.

From the Source

R. Yeshaya Pik[39] seeks to prove the veracity of the approach of the *Pri Chadash* by referring back to the words of the *Yerushalmi* which are the source of rejecting *Aggadah* as a source of halacha. The *Yerushalmi* reads:

> We do not derive halacha from *Halachot* [i.e. halachic rulings in the Mishnah], nor from *Aggadot*, nor from *Toseftot*, only from the Talmud.

The *Yerushalmi* has listed three areas from which we do not derive Halacha, one of them being the *Tosefta*. However, the consensus among the codifiers is that if a ruling of the *Tosefta* is not in conflict with that of the Gemara, then we do indeed rely on it. R. Pik reasons that since *Aggadah* has been mentioned together with *Tosefta*, we should employ a similar methodology regarding it, and likewise only refuse to rule based on *Aggadah* if it is in conflict with a halachic discussion in the Gemara. Barring that, we may rely on it.

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38. There are many *minhagim* we have which are based entirely on Midrash. Notable examples include the custom of blowing the shofar during the month of *Elul*, which is based on the Midrash (*Pirkei R. Eliezer* chap. 46) which states that when Moshe went up to Mount Sinai to receive the second set of tablets on the first day of *Elul*, the shofar was sounded. Similarly, the custom of reciting the words "*Baruch shem kevod malchuto*" out loud on Yom Kippur is based on the Midrash (*Devarim Rabbah* 2:36) that Moshe took it from the angels and told us to say it quietly so as not to arouse their criticism. Hence, on Yom Kippur, when we are ourselves like angels, we may say it out loud. See also *Tosafot Berachot* 18a (s.v. *l'machar*) who note that in certain areas of *minhag* our practice follows the Midrash and not as described in the Gemara. An example is the Torah reading for fast days. According to the Gemara the *tochacha* is read, whereas our custom, based on the Midrash, is to read "*va'yechal Moshe*".

39. Quoted in *Noda bi'Yehuda Mahadura Tinyana Yoreh Deah* 161.

Responding to the words of R. Pik, the *Noda bi'Yehuda*[40] refuses to recognize this equation, and asserts that even though *Aggadah* and *Tosefta* have been mentioned together in the *Yerushalmi*'s statement, the intent is not to disqualify them to the same degree. Rather, whereas the *Tosefta* will be ignored only if it conflicts with the Talmud, *Aggadah* may never be relied upon at all.

We should note that the question whether *Aggadah* can ever be relied upon for halacha will ultimately relate to the reason *why* it may not be relied upon in the first place. Earlier, we mentioned the explanation of the *Noda bi'Yehuda*, namely, that *Aggadot* were never intended to impart halachic rulings, rather foundations of Judaism and moral lessons. According to this analysis, it would stand to reason that *Aggadot* could never be relied upon for halachic rulings, regardless of whether or not there was evidence in the Talmud to the contrary; and this indeed is the position of the *Noda bi'Yehuda*. However, according to those who adopt the distinction of the *Pri Chadash*, we must explain the ruling of the *Yerushalmi* differently, namely, that like the *Tosefta*, *Aggadot* as a category simply carry less halachic weight than the statements of the Talmud.

Other Considerations: Conflict with *Sevara*

Another major authority among the *Acharonim* who allows for certain *Aggadot* to be relied upon for halacha is R. Yaakov Reisher in *Responsa Shvut Yaakov*.[41] Interestingly, he does not quote the *Pri Chadash*, and seemingly propounds this idea independently. Moreover, he adds an element not present in the distinction made by the *Pri Chadash*:

> When we say that we do not learn halacha from *Aggadah*, that is only when it is in conflict with *sugya* (halachic discussion) or *sevara* (reason).

40. Ibid.

41. Vol. 2, 178.

In addition to requiring that the *Aggadah* not contradict any halachic discussion on the matter, the *Shvut Yaakov* also requires that it be consonant with *sevara* – reason. As we can appreciate, this second consideration may be a little harder to quantify, as different people may consider different statements to be either reasonable or unreasonable. Let us see an example where a later authority sought to use this principle to explain a ruling of the *Shvut Yaakov* himself.

Defining a *Rasha*

The Torah states that it is forbidden to accept legal testimony from a *rasha*, a wicked person. [42] The halacha now needs to define what constitutes a wicked person in this context, and the details of this discussion are to be found in the *Choshen Mishpat* section of *Shulchan Aruch*.[43] In a responsum of *Shvut Yaakov*,[44] R. Reisher was asked whether someone who kills another person accidentally is in the category of "*rasha*" (wicked). He replies that in his opinion the person is not a *rasha*, as his sin was unintentional. He then refers to a source which would seem to indicate the contrary. The Gemara in *Makkot*[45] discusses the verse[46] which states "מרשעים יצא רשע – *From the wicked, wickedness will go forth*." The Gemara explains that this is referring to a scenario where one person killed someone accidentally without any witnesses being present, and another person killed someone intentionally, also without witnesses present. In order to ensure that justice is served, Hashem arranges for them to be in the same inn, and has the first person accidentally fall on and kill the second person, this time in the presence of witnesses. The unintentional killer will now need to flee to a city of refuge, as befits his crime, and the murderer has been killed. The pertinent point for our

42. *Shemot* 23:1.
43. Sec. 34.
44. Vol. 3, 147.
45. 10b.
46. *I Shmuel*, 24:13.

discussion is that this scenario was presented as an illustration of the words "from the wicked, wickedness will go forth." The Gemara is apparently saying that the accidental killer is a *rasha*, contrary to R. Reisher's assertion! To this, R. Reisher summarily replies, "We do not learn halacha from *Aggadah*."

The problem is, the *Ramo* in *Choshen Mishpat* seems to have done exactly that! In 34:4, the *Ramo* rules that "One who raises his hand against his fellow to strike him is called a *rasha* and is disqualified from giving testimony." The point of the *Ramo* is that this person is considered a *rasha* even if he has not yet hit the other person. The mere fact that he raised his hand to do so is enough to categorize him as a *rasha*. The source for this ruling is the Gemara[47] which comments on Moshe's words to the two Israelites whom he found fighting, "And he said to the *rasha*, why do you (תכה) strike your fellow?"[48] The Gemara notes that word תכה is in the future tense, and expounds this to mean that even if he hasn't hit his fellow yet, he is already called a *rasha* from the time he has raised his hand to do so. This is seemingly an *Aggadic* statement, and yet the *Ramo* considers it an acceptable basis for defining someone halachically as a *rasha*. Why, then would the *Shvut Yaakov* refuse to do similarly regarding the Gemara's characterization of the unintentional killer?

This question is raised in the *Teshuvot Meishiv Shalom*,[49] and he replies based on the formulation of the *Shvut Yaakov* mentioned above, according to which, in order for an *Aggadah* to be a basis for halacha it has to be in accord both with the *sugya* as well as *sevara*. He suggests that the *Shvut Yaakov* considers it to be unreasonable that one who killed by accident should be considered a *rasha*, whereas it is entirely reasonable that one should be defined as such for raising his hand to strike his fellow Jew.

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47. *Sanhedrin* 58b.
48. *Shemot* 2:13.
49. Quoted in *Pardes Yosef, Shemot* sec. 43.

This example should serve to illustrate that *sevara* is the more elusive of the *Shvut Yaakov's* two criteria for deriving halacha from Aggada. It is fair to say that if we heard the opposite argument made, we could not reject it out of hand as being unreasonable. The one who raises his hand has not yet inflicted any injury, whereas perhaps the accidental killer could have exercised more vigilance and prevented the loss of someone else's life. Practically speaking, those who distinguish between different *Aggadot* use the *Pri Chadash*'s single criterion, namely, that the *Aggadah* not be in conflict with any halachic discussion within the Gemara.

Disputes under Debate: Honoring Grandparents

Even those who are in agreement regarding the *Pri Chadash*'s distinction may still have specific disagreements regarding certain cases, as they may have differing views as to whether or not the Gemara poses a contradiction to the Midrash. A case in point is honoring one's grandparents. When Yaakov went down to Egypt, the verse says "He offered sacrifices to the God of his father, Yitzchak."[50] *Rashi*, citing a Midrash, notes that the verse does not refer to Hashem also as "The God of his father, Avraham." From here the Midrash concludes, "One is obligated to honor his father more than his grandfather." The implied message is that there exists an obligation to honor one's grandfather as well, just not on the same level as one's father.

Regarding this question, we find the following in the *Ramo*:[51]

> Some say that one is not obligated to honor his father's father (*Maharik* sec. 44), but this does not seem to me to be correct. However, one is obligated to honor his father more than his grandfather.

The source of the second opinion, which the *Ramo* prefers, is

50. *Bereishit* 46:1.

51. *Yoreh Deah* 240:24.

the Midrash mentioned above regarding Yaakov. The *Taz*[52] raises the question, how can the first opinion, that of the *Maharik*, rule out the words of the Midrash?

Commentators[53] explain that the *Maharik*'s position is based on a section of Gemara which seems to indicate that there is no obligation to honor a grandfather. The Gemara in *Makkot*[54] rules that if one accidentally kills his son, another of his sons cannot become the *goel hadam* (avenger), but one of his grandsons (i.e., a son of the deceased) can become the *goel hadam*. *Rashi* there explains the difference: the brother of the deceased has an obligation to honor his father; whereas the son has no obligation to honor his grandfather. Based on this, we have before us a situation where the Midrash is in conflict with the Gemara, and therefore the *Maharik* does not accept it as halacha.

And what of the second opinion, the one the *Ramo* prefers? Having established that the Gemara contradicts the Midrash, it should not be able to serve as a basis for halacha! *Zachor l'Avraham* explains that this second view does not see the Gemara as contradicting the Midrash. In the case of the Gemara, the grandson has no obligation towards his grandfather *because he is avenging his father*, to whom his obligation takes precedence even according to the Midrash. In the absence of conflict with the Gemara, the Midrash is accepted as halacha.[55]

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52. Ibid. sec. 20.

53. See *Commentary of Vilna Gaon* and *Gilyon Maharsha* of R. Shlomo Eiger to *Yoreh Deah* loc. cit.

54. 12a.

55. The *Tur* (*Yoreh Deah* ibid.) rules that one is obligated to honor his father-in-law. His source is the *Midrash Shocher Tov Tehillim* chap. 7, which derives this from David, who referred to King Shaul as "my father". The Midrash explains that he addressed Shaul in this way because he was his father-in-law (David married Shaul's daughter, Michal), and infers that this obligation applies to any son-in-law. Barring any contrary message from the Gemara, this Midrash becomes the basis for the halacha, which is codified by

Thus, we see that agreement in principle regarding the relationship between the Midrash and the Gemara still leaves room to discuss how the two actually relate to each other in any given case.

5. When the *Aggadah* describes Halachic Practice

Tosafot[56] discuss the procedure required to clean a cup that contained *stam yeinom* (wine that was moved by a gentile, which thereby becomes forbidden for consumption by a Jew), and render it permissible for use. *Tosafot* assert that it is sufficient to rinse the cup out three times, and adduce support for this ruling from the Midrash which describes Haman maligning the Jewish people before Achashverosh:

> If a fly should fall into their wine, they would simply remove it and drink the wine. But if my master, the king, should move the cup, they would spill the wine out on to the floor; moreover, they would rinse the cup out three times.

In a similar vein, the *Rosh*[57] discusses the concept of non-kosher foods imparting taste into kosher food, and asserts that there is no such transfer of tastes if the foods are cold. He refers us to the Gemara's presentation of Haman's words,[58]

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the *Shulchan Aruch* (240:24). Cf. however, *Teshuvot Shvut Yaakov* (1:76) who maintains that there is no obligation to honor an older sister (aside from the basic respect that one should always have for his or her elders). He quotes a Midrash which seems to indicate the contrary, for it says that Rachel was punished on account of speaking before her older sister, Leah. Regarding this, the *Shvut Yaakov* responds, "we do not learn from words of *Aggadah*." Barring any contrary evidence from the Gemara, why would this case be any different from the words of the Midrash regarding one's father-in-law? Perhaps the difference lies in the fact that the Midrash expressly formulated the obligation in the case of David and Shaul, but did not do so in the case of Rachel and Leah; see below.

56. *Avodah Zarah* 33b s.v. *kasei*.

57. *Avodah Zarah* 5:11.

58. See *Megillah* 13b.

where he states that if a fly would fall into their cup they would simply remove it and drink the wine. This indicates that no taste of the non-kosher fly was imparted into the wine.[59]

Both rulings of these *Rishonim* are drawing off *Aggadic* sources. R. Yeshaya Pik, in his correspondence with the *Noda bi'Yehuda*, cites the ruling of *Tosafot* and seeks to use it as support for the position that we may derive halachic rulings from the *Aggadah* where there is no contradiction from the halacha. The *Noda bi'Yehuda*, as we have seen, rejects this approach, and does not derive halachic rulings from an *Aggadah* at all. He therefore provides a different explanation for this ruling. Here, the *Aggadah* is not serving as *the source* for a halachic ruling. That would be inconceivable at any rate, for the one talking is Haman, and he would hardly qualify as a halachic source in any type of discussion! Rather, the *Aggadah* is merely quoting Haman *describing* halachic practice. In this capacity, we accept this as an accurate representation of the relevant halachot.[60]

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59. Commentators note that in reaching this conclusion the *Rosh* has discounted other factors such as *noten taam lifgam* or *bitul beshishim*. [The *Tosafot* adduced support for their ruling from the Midrash, and not from the Gemara, because the Gemara only mentions that if the king would move the cup they would spill out its contents. The Midrash adds that they would rinse the cup out three times to make it usable again.]

60. In a fascinating discussion of these rulings, the *Ktav Sofer* (*Al Hatorah, Megillat Esther*) observes that, based on the context of this *Aggadah*, there is room to conclude that these descriptions are not halachically reliable. The *Aggadah* begins by commenting on Haman's opening words to Achashverosh, "ישנו עם אחד – *there is a people*" (Esther 3:8). The king was reluctant to issue a decree against the Jewish people, for he was worried that their God would deal with him in the same way as He dealt with their earlier enemies. To this Haman replied ישנו, which the Gemara relates to the word ישן, meaning, they are "sleeping" in their performance of the mitzvot, and therefore you have nothing to fear, since under those circumstances their God will not protect them. If this is so, reasons the *Ktav Sofer*, it may be difficult to infer a leniency from their practice as subsequently described by Haman regarding the laws of kashrut, for he himself has prefaced by saying that they are lax in their performance of mitzvot!

Birkat Hamazon

This approach may help us explain a similar instance where our halachic practice seems to be based on an *Aggadic* teaching. In *Masechet Berachot*[61] we find the following:

> Rav Avira expounded: The ministering angels asked before the Holy One, Blessed be He, "Master of the world, it is written in Your Torah[62] 'He will not favor people, nor accept bribes,' and yet You favor the people of Israel, as it says,[63] 'May Hashem favor you'!" He [Hashem] replied to them, "How can I not favor the people of Israel? I wrote for them in the Torah[64] 'And you shall eat, and you shall be satisfied, and you shall bless Hashem, your God,' and yet they are particular [to bless over] the volume of an olive (*kezayit*) or an egg (*kebeitzah*)!"[I.e., they bless even if they have not eaten enough to "be satisfied"].

Based on this exposition of Rav Avira, most *Rishonim* conclude that the obligation to recite *birkat hamazon* on a Torah level exists only when one has had a full meal, whereas less than that amount (down to a *kezayit*), obligates *birkat hamazon* on a *derabbanan* (rabbinic) level.[65] Now, we should note that in addition to apparently relying on an *Aggadah* for halachic practice, this exposition of Rav Avira seems to be in *direct conflict* with a halachic discussion among *Tannaim* regarding this matter.

The Mishnah in the beginning of the Seventh chapter of *Berachot*[66] discusses the minimum amount of bread one needs

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61. 20b.

62. *Devarim* 10:17.

63. *Bamidbar* 6:26 (this is the third of the blessings in *birkat kohanim*, the priestly blessing).

64. *Devarim* 8:10.

65. See *Shulchan Aruch Orach Chaim* 184:4, and *Mishnah Berurah* sec. 15.

66. 45a.

to eat in order to be obligated in *birkat hamazon*. The first opinion [R. Meir] holds that the amount is *kezayit*, while R. Yehuda holds that it is a *kebeitzah*. The Gemara[67] explains that the background to their dispute revolves around the understanding of the Torah's words ואכלת ושבעת – *And you shall eat and you shall be satisfied*, as a prelude to *birkat hamazon*. The term "eating" in halacha generally denotes a minimum amount of a *kezayit*. R. Yehuda explains that the additional word ושבעת increases the amount to a *kebeitzah,* whereas R. Meir maintains that the word ושבעת refers to drinking, which means that the minimum amount of bread remains a *kezayit*.

A simple reading of the above explanation clearly indicates that the rulings of R. Meir and R. Yehuda relate to the obligation of *birkat hamazon* on a Torah level, for they are both expounding the relevant words in the Torah, ואכלת ושבעת. Now, however, based on the exposition of Rav Avira, we will be forced to reevaluate, and conclude that these opinions actually relate to the obligation on a rabbinic (*derabbanan)* level, and that the dispute regarding the words in the Torah is actually not a full *drasha* (Torah-level derivation), but rather an *asmachta* (attaching a *derabanan* law to a verse). This is not the intuitive assessment of their words, and actually represents a major upheaval, all of which has been generated by the *Aggadic* exposition of Rav Avira! How can this *Aggadah* have such halachic weight?

Based on the *Noda bi'Yehuda*'s approach, we may suggest that here, too, the *Aggadah* is not serving as the source for the halacha; rather, within the context of the *Aggadah* there is a description of the halachic practice among the Jewish people. This description is taken as a reliable portrayal of the halacha, and other halachic discussions of this matter must then be evaluated accordingly.

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67. Ibid. 49b.

6. *Aggadot* in the Talmud vs. *Aggadot* in the Midrash

A most noteworthy approach among the *Rishonim* regarding learning halacha from *Aggadah* emerges from the words of the *Rosh*. As we know, if one accepts upon himself a vow or an oath, it is possible to have it annulled by petitioning a *beit din*. This is known as *hatara*. The question arises, what if the oath was made at the behest of someone else, does that person need to be present in order for the annulment to be granted? The *Rosh*[68] rules that the one who instigated the vow does not need to be present, and adduces proof from the following source:

Toward the end of *Sefer Bereishit*,[69] Yaakov calls his son Yosef and asks him not to bury him in Egypt, but in the land of Canaan. Yosef agrees, whereupon Yaakov asks him to swear to this effect. When Yosef later approaches Pharaoh after Yaakov's passing, he prefaces his request by saying "My father made me take the following oath."[70] The Gemara elaborates:[71]

> Said Pharaoh to Yosef, "Go and get an annulment for your oath!" Yosef, replied, "Perhaps I will also get an annulment for the oath I swore to you [not to reveal that Pharaoh did not know the Hebrew language, which would have disqualified him to be the ruler]?" To this Pharaoh [reluctantly] responded, "Go and bury your father as he made you swear."

The *Rosh* asks, how could Pharaoh tell Yosef to get an annulment for his oath? That oath was administered to him by his father Yaakov, who was no longer alive! We may conclude from here, says the *Rosh*, that the one who administered the oath does not need to be present at the time of the annulment. The *Rosh* concludes by addressing himself to the fact that these

68. *Nedarim* 9:2.
69. 47:29-31.
70. Ibid. 50:5.
71. *Sotah* 36b.

words were not said in the context of a halachic discussion, but an *Aggadic* one:

> Were these words not halachically reliable, they would not have been recorded in the Talmud.

In the view of the *Rosh*, the principle of not learning halacha from *Aggadah* refers to halachot drawn from *collections of Aggadah*, e.g. *Midrash Rabbah* and *Tanchuma*. In contrast, the Talmud is the source of our halachic practice, and hence *everything* in it must be halachically cogent, including its *Aggadic* discussions.[72]

Women making *Tzitzit*

This position of the *Rosh* is echoed elsewhere in his writings, perhaps in an even more dramatic fashion. The Gemara[73] states that a woman is disqualified from writing *tefillin*. The basis for this ruling is the Torah's juxtaposition of the word וקשרתם – *and you shall bind them*, with the word וכתבתם – *and you shall write them*. Only one who is obligated in the mitzvah of binding *tefillin* to his arm is qualified to write them. Women, being exempt from putting on *tefillin*, are disqualified from writing them. *Rabbeinu Tam*[74] applies this idea to the question of whether women are eligible to make *tzitzit*, and states that

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72. We should note that in deriving halacha from this exchange between Pharaoh and Yosef, the *Rosh* is discounting some other considerations. Firstly, this exchange took place before the giving of the Torah. The specifics of halacha often undergo change from before that time to afterwards. Secondly, the one telling Yosef to get a *hatara* is Pharaoh, who was not Jewish even in pre-*Matan Torah* terms, and may have been demanding that Yosef annul the oath according to his – Pharaoh's – parameters, which might not represent the halacha as it applies to Jews. Finally, we are assuming that if halacha did not allow Yosef to get a *hatara* without his father present, then Pharaoh would have abided by that and not have asked him to do so. We are not considering that possibility that Pharaoh would bend the rules to get rid of an inconvenient oath.

73. *Menachot* 42b.

74. Cited in *Tosafot* ibid. 42a s.v. *minayin*.

the same will be true; namely, that only those who are obligated in the mitzvah of *tzitzit* are qualified to make them. The *Rosh*[75] takes issue with *Rabbeinu Tam* and rules that *tzitzit* are different than *tefillin* in this regard, and that a woman may make *tzitzit*. As a proof, he quotes the following Gemara:[76]

> R. Yochanan related: Once we were traveling in a ship and we saw a chest which had precious stones and pearls set in it, and there was a type of fish called *karsha* surrounding it. A diver went down to fetch the chest, but one of the fish sensed he was there and tried to bite him in the thigh. He threw a bottle of vinegar at it, and the fish swam away. A heavenly voice (*bat kol*) came out and said, "What business do you have with the chest of R. Chanina ben Dosa's wife, which, in the future will have placed within it *techeilet* for the righteous in the World to Come?"

We have before us a rather mysterious *Aggadah* that mentions something called "*techeilet* for the righteous in the World to Come," which could have any number of allegorical meanings. And yet, consistent with his opinion, the *Rosh* maintains that if this is recorded in the Talmud, it must also be reliable in a plain halachic sense, and thus concludes that women are eligible to make *tzitzit*![77]

It is possible to suggest that this position of the *Rosh* is shared by the *Tosafot*, mentioned earlier on, who were prepared to draw halachic conclusions from Gemara's comments regarding Esther's relationship with Mordechai. Although the Gemara's words are in the category of *Aggadah*, nonetheless, they have been recorded in the Talmud, and must therefore be halachically sound as well.[78]

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75. *Gittin* 4:46.

76. *Bava Batra* 74b. The entire section of the Gemara there is known as "The *Aggadot* of Rabbah bar Bar Chanah," which are notably esoteric, and have given rise to many interpretations among the commentators.

77. *Techeilet* was a component of *tzitzit*.

78. By the same token, we may infer the position of the *Rashba* who

Honoring Parents vs. Learning Torah

This idea may also explain to us a ruling which is codified by the *Tur* and *Shulchan Aruch*,[79] that the mitzvah of learning Torah supersedes the mitzvah of honoring parents. The source of this statement, as pointed out by the *Beit Yosef*, is in the Gemara in *Masechet Megillah*.[80]

> *Talmud Torah* is greater than honoring parents, since for all those years that Yaakov was in the house of Ever, he was not punished.

The Gemara is noting that although Yaakov spent a total of thirty six years away from his parents – fourteen in the Yeshiva of Ever, and twenty two in Lavan's house – he was only punished by being separated from Yosef for twenty two years. He was not punished for the years he spent learning Torah, as that mitzvah takes precedence over honoring parents.

This is clearly an *Aggadic* discussion, and yet it forms the basis of a halachic ruling! Based on the approach of the *Rosh*, we may say that since the *Aggadah* is in the Talmud, it may be relied upon for halacha.[81] In addition, it is worth noting that this conclusion regarding *Talmud Torah* and honoring parents was not reached by the codifiers *based on* the *Aggadah*, it was formulated by *the Gemara itself*. This could be said to represent a niche within halacha where the ability to derive a halachic principle from a particular *Aggadah* receives the stamp of approval from the Gemara, as opposed to other *Aggadot* where the Gemara expresses no such conclusion.

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responded to *Tosafot*'s question by saying "*Ain meshivin al ha'aggadah*." He seems to hold that we do not learn halacha from any *Aggadic* statements, even those mentioned in the Talmud.

79. *Yoreh Deah* 240:13.

80. 16b.

81. This ruling is codified by the *Rosh* in *Kiddushin* chap. 1 sec. 52.

Rambam's View

The approach of the *Rosh* seems to be the adopted by the *Rambam* as well. Regarding the level of evidence required in order to convict a gentile for violating one of the seven Noachide laws, *Rambam* writes:[82]

> A *Ben Noach* (gentile) can be convicted based on the testimony of one witness, and by one judge, without having been warned before the act, and through the testimony of his relatives.

The *Maggid Mishneh* identifies the source of this ruling as coming from the Gemara in *Sanhedrin*,[83] which says:

> R. Yaakov bar Acha found the following written in a book of *Aggadah* in the academy of Rav: "A *Ben Noach* can be convicted through one judge, with one witness, without warning, etc."

The Gemara explicitly states that this ruling came from "a book of *Aggadah*", and yet the *Rambam* codified it in his *Mishneh Torah*. It seems that the *Rambam* concurs with the *Rosh* that *Aggadot* which are mentioned in the Talmud may be relied upon for halachic rulings.

7. Halachot in the Talmud vs. Halachot in the Midrash

We have seen that the *Rosh* draws a distinction between *Aggadot* found in the Talmud and those in the Midrash; in his opinion, the former may be relied upon for halacha. In other words, the setting of Midrash vs. Talmud is decisive. This now raises an interesting counter–question. In the same way that there are *Aggadic* discussions in the Talmud, there are also halachic discussions in the Midrash. What is their status?

Actually, many of the examples which we have cited in this

82. *Hilchot Melachim* 9:14.

83. 57b.

article regarding "learning halacha from the Midrash" are halachic rulings found within the Midrash. As we have seen, the commentators have expressed a refusal to rely on these statements for halachic practice. Even though they are halachic in nature, their Midrashic setting makes them ineligible for use as authoritative sources.

This idea potentially transforms the entire discussion of "learning halacha from *Aggadah*." Now it seems the critical question we need to ask is not regarding the *nature* of the statement-- i.e., is it halachic or *Aggadic*-- but rather the *source* of the statement: is it from the Talmud or the Midrash?

However, we should not be so quick to relinquish the distinction between halachic and *Aggadic* statements, for two reasons.

Firstly, as we have seen, not all *Rishonim* subscribe to the position of the *Rosh* who accepts *Aggadot* that are recorded in the Talmud. For them, *Aggadot* may not be relied upon wherever they are recorded.

Secondly, although we do not accept even halachic statements from the Midrash, it is possible that we still differentiate between them and the *Aggadic* statements of the Midrash. We have seen that a number of authorities limit their objection to learning halacha from Midrash to cases where it is in conflict with the Talmud. All of those cases where this limitation is mentioned involve halachic statements in the Midrash.

For example, we quoted the position of *Rabbeinu Tam* regarding the Midrash which does not allow including a child as the tenth person for communal prayer (*tefillah be'tzibbur).* He stated that "We do not rely on these words of the Midrash, since they are contradicted by the Gemara." We inferred from these words that if the Midrash would not have been contradicted by the Gemara, we would have relied on it. This established *Rabbeinu Tam* as a support for the *Pri Chadash,* who explicitly makes this distinction regarding learning halacha

from *Aggadah*. Now, however, we must concede that it is possible that this inferred position of *Rabbeinu Tam* is not true regarding actual *Aggadic* statements, but specifically regarding halachic statements found in the Midrash, similar to the one he was dealing with.

The basis for this distinction is clear. *Aggadah* by nature is not necessarily meant to be taken as halachically viable. Halachic statements clearly are, and the only thing we would need to establish is whether these statements found in the Midrash are reliable, which would then be determined by whether they are in conflict with the corresponding halachic discussion in the Gemara.[84] If this is the case, then *Rabbeinu Tam* is no longer a support for the position of the *Pri Chadash*.[85]

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84. R. Tzvi Hirsch Chayut (*Darkei Horaah* sec. 2) explains that the basis for excluding certain halachic statements found in Midrash is that these represent halachic teachings which were transmitted in the context of public *drashot*, discourses. It was understood that sometimes, when speaking to the masses, the *darshan* would not present the halacha in its pure form, which may be misunderstood or mishandled by the unlearned. He may oversimplify in the direction of stringency in order to prevent a mishap. [See Gemara *Chulin* 15a for an example of this]. Alternatively, the ruling in the *drasha* may reflect some form of emergency situation which required him to transmit an unusually lenient approach on that particular occasion. [See also his glosses to *Nedarim* 40b *s.v. Ran*.]

85. In truth, even the *Pri Chadash* himself, who is considered to be the standard bearer for this approach, only expressed his dissent with the *Tosafot Yom Tov* in terms of learning from the Midrash, and as such may only have made his distinction regarding halachot found in the Midrash, not actual *Aggadic* statements. However, elsewhere we see that he adduces halachic support from *Aggadic* statements as well. In *Even Ha'ezer* 119:6 the *Ramo* discusses whether it is permissible for a husband to divorce his wife if he doesn't have enough money to pay her *ketuba*. The *Pri Chadash* in his commentary there cites two *Aggadic* statements which seem to indicate that it is not permissible. The *Be'er Yaakov* (ibid. sec. 5) objects to these proofs on the basis of the principle that we do not derive halacha from *Aggadah*. The *Pitchei Teshuvah* (sec. 4) defends the position of the *Pri Chadash* by pointing out that this is consistent with his approach to this question, namely, that if there is no conflict between the *Aggadah* and the halachic discussion in the Talmud, we will follow it. If this defense of the *Pri Chadash* is correct, as it seems to be, we see clearly that he will accept even actual *Aggadic* statements

8. Return to the Wombs

Taking the above discussions into account, let us return to our opening question regarding whether we can use the *Targum Yonatan ben Uziel*'s account of the birth of Yosef and Dina as a basis for establishing the identity of the mother in a surrogate situation. Firstly, we can clearly identify it as an *Aggadah*, and hence our natural initial response is to say *ain l'meidin min ha'Aggadot,* we cannot learn from an *Aggadah*. However, we have seen that there are authorities who will derive halacha from *Aggadah* if there is no conflict with a discussion of that matter in the Talmud. Could that be grounds for allowing us to rely on the *Aggadah* here?

Actually, although the Talmud does not discuss the halachot of a case like this, it does contain its own account of the episode with Rachel and Leah. The Gemara in *Berachot*[86] relates:

> Said Leah, "Twelve tribes are destined to emerge from Yaakov. Six have come from me, and four from the handmaidens, equaling ten. If this child [that I am expecting] is a male, then my sister Rachel will not be equal even to one of the handmaidens." Immediately, נהפכה לבת – [the fetus] *was changed to a girl*.

The Gemara's account, while no less miraculous than that of the *Targum*, seems to differ in one key respect. The Gemara does not say that the two embryos were switched; indeed, it makes no mention of Rachel's pregnancy at all. Rather, the child that Leah was expecting, which was a boy, became a girl. According to the Gemara's account, this episode cannot be viewed as a precedent for an embryonic transplant. In this sense, the *Targum is* in conflict with the Talmud, not with a halachic discussion contained therein, but with a contrary

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where there is no conflict with the halacha.

86. 60a.

Aggadic discussion. Subsequently, based on what we have seen, this *Targum* could no longer be relied upon as a basis for determining the halacha in this case, and the answer would need to be gleaned from other, pertinent halachic sources.[87]

9. Further Disputes – The Three Oaths

Another question related to this issue which has been the subject of much debate beginning in the last century is that of a national return to the land of Israel. The Gemara[88] states that Hashem administered three oaths:

> One that the Jews should not go up [i.e. take the land] by force, one that the Jews would not rebel against the nations of the world, and one that Hashem made the nations of the world swear that they would not subjugate the Jews excessively.

Based on the first of these oaths, certain authorities, among them R. Yoel Teitelbaum, the Satmar Rav, ruled that it is forbidden to be involved in the efforts to reclaim the land of Israel by force. However, others noted[89] that these oaths are not mentioned in the *Rambam*'s *Mishneh Torah*, which may be taken as an indication that they belong to the area of *Aggadah*, which can be interpreted in a number of ways, but which do not represent a halachic prohibition.[90]

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87. For a discussion of some of those sources see *Nishmat Avraham* vol. 4 *Even Ha'ezer* 2, *Teshuvot Ve'hanhagot* 2:689, and essay by R. Zalman Nechemiah Goldberg published in *Techumin* vol. 5.

88. *Ketubot* 111a.

89. See R. Menachem Kasher, *Hatekufah Hagedolah* p. 174 and p. 187.

90. This is apart from the numerous responses (mentioned in *Hatekufah Hagedolah* there) to this position even assuming that these oaths are meant to be taken in a literal halachic sense. For further examples of *Aggadot* that relate to contemporary halachic issues, see *Yabia Omer* vol. 2 *Even ha'Ezer* 1, which discusses whether the *Aggadah* regarding the birth of Ben Sira can have bearing on the halachic considerations regarding in vitro fertilization. See also *Mikraei Kodesh, Pesach* vol. 2 sec. 63 part 3 discussing the status of one for whom less than twenty four hours have elapsed between the

Conclusion

We have seen that whereas all authorities take their cue from the *Yerushalmi* which disqualifies deriving halacha from *Aggadah* as a rule, opinions differ as to the scope of this disqualification.

1. Some authorities see it as absolute [*Tosafot Yom Tov*, *Noda bi'Yehuda*].
2. Others allow halacha to be derived if there is no conflict between the *Aggadah* and the Gemara [*Pri Chadash*, *Shvut Yaakov*].
3. Some distinguish between *Aggadot* mentioned in the Midrash, and those in the Gemara [*Rosh*].

Let us conclude the way in which we started. Having established that *Aggadot* are not primarily there to teach us halacha, it is all the more important to remember what they *are* there for, to give us insight and inspiration regarding the fundamentals of Judaism. The words of *Aggadah* may not necessarily render a particular item halachically forbidden or permitted, but their mission statement should permeate the *entirety* of halacha – "To know Hashem and cleave to His ways."

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beginning of the previous day and the current one (for example, one who travels by plane from America to Israel), with regards to counting the *omer* and when to conclude a fast day. He discusses whether proof can be adduced from the *Yerushalmi*'s description (*Ketubot* 12:3) of the day of the funeral of R. Yehuda Hanasi, where sunset of *Erev* Shabbat was miraculously delayed for those involved in the funeral, resulting in there being less than twenty four hours between sunset on Friday and nightfall on *Motzaei* Shabbat.

Pidyon Haben Coins

Rabbi Mordechai Millunchick

Background

The mitzvah of *pidyon haben* is to redeem a first-born son with the sum of five *shekalim,* as the Torah (*Bamidbar* 18:17) writes, "From the age of one month you shall redeem with the value of five silver *shekalim*."[1] The *shekel* was a silver coin in use in ancient times, which was also called the *selah*. This article will trace the value of the required five *Shekalim* and convert that to the silver coins commonly available in the United States and Israel.

The letter of the law is that the "five *Shekalim*" given for *pidyon haben* do not have to actually be silver coins, and can also be just about[2] any item that has the market value of five

1. *Rambam*, *Bikkurim* 11:6.

A portion of this article has been digested from Rabbi Chaim Beinish's *Midot V'Shiurei Torah* as well as from other sources as noted in the footnotes. The interested reader is also directed to Rabbi Yaakov Gershon Weiss's *Midot U'Mishkalot Shel Torah,* where many additional opinions and discussions are cited.

2. Some exceptions are land and "documents" (*Shulchan Aruch* YD 305:3). Contemporary *Poskim* suggest that paper money, checks, and non-silver coins may well be examples of "documents" since they have no inherent value, and therefore they should not be used for *pidyon haben*. See *Midarchei Hapidyon,* pages 116-121.

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Shekalim.[3] In fact, *Shevet HaKehati* and *Mishneh Halachot*[4] rule that there is no advantage to using silver. However, *Minchat Elazar*, *Chatam Sofer* and others[5] posit that one should specifically use silver coins. The common custom remains to specifically use silver – and particularly silver coins – rather than other items with the same value as five *Shekalim*.

That said, most *Poskim* agree that there is no requirement that the person specifically give the *Kohen* five coins; rather, he must give the amount of silver which is equivalent to five *Shekalim* worth of silver.[6] Thus, if it can be determined that 4 silver coins contain the required amount of silver, it is entirely acceptable to give those four coins for *pidyon haben*.

Many people are not aware that most silver that is sold is not pure silver. For example, "sterling silver" is typically 92.5% silver with the rest being other metals, typically copper, added to make the silver more durable. Almost all jewelry and coins are made of this mix or a similar one. Therefore, whether one is using silver or silver coins he must know what level of purity the silver is and make sure to give the full amount of silver without including the amount of other metals mixed into the pieces or coins.[7]

In this context, it is worth noting that nowadays, silver is measured in "troy ounces" where each troy ounce has the weight of 31.1034 grams, such that 100 grams of silver is 3.22 troy ounces.

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3. *Shulchan Aruch* YD 305:3.

4. *Shevet HaKehati* 6:380:1 and *Mishneh Halachot* 5:199.

5. See *Minchat Elazar* 2:15, *Chatam Sofer*, *Likutei Teshuvot* #30, and others cited in *Otzar Pidyon Haben* 13:10 and there in footnote 14. See also *Yechaveh Da'at* 4:54 (end) and *Teshuvot V'hanhagot* 1:660. Some of these *Poskim* suggest that any advantage of "silver coins" is lost if the coin is no longer legal tender.

6. *Iggerot Moshe* YD 1:189. See also *Mishneh Halachot* 5:199, *Chochmat Adam* 150:1, and *Halichot HaGr"a* 208.

7. *Shulchan Aruch* YD 305:1. See also *Aruch HaShulchan* 305:17, *Gr"a* 305:4 (end), and *Chatam Sofer* YD 134.

Brief History of Money and Coins

Early in history, people traded or bartered items (such as food, cattle, and tools) in exchange for other items. As trade developed and transactions became more complicated, people chose precious metals, particularly silver and gold, as the most useful means of payment. These metals were both scarce and aesthetically pleasing, giving them a high value for a relatively small weight. They were durable, and could be melted or cut to convenient sizes. Originally metals were accepted based on weight in a crude lump form. Later, coins were made when a merchant, prince or king put his official stamp on a piece of metal. This certified its value without the need for further weighing.[8]

Coins were a convenient method to conduct transactions, as one did not need to weigh rough lumps of gold and silver at each location. Instead one could rely on the standard weight stamped on each specific coin. This is referred to as its 'face value'. Because coins are being constantly used, the metal in them slowly gets worn away. A somewhat worn coin might nevertheless be accepted at its face value as long as it was still close to its original weight. In this way coinage began to take on its own identity, apart from being simply a piece of pre-weighed metal.

Coins were commonly made out of silver, copper and bronze, with the most valuable coins made from gold. Coins were not made of pure metal, meaning that a silver coin was not 100% silver. Aside from the difficultly in smelting metal ore to purity, governments often would replace a fraction of the coins' precious metal (gold, silver) content with a cheaper metal (e.g., copper or nickel). This would be done because the alloy was harder than the pure metal, which would make the

8. *Encyclopedia International*, 1963 edition, volume 12 page 212. The value of a coin is slightly more than the market value of the amount of metal it contains.

coins more durable. Sometimes alloying was done to allow more money to be minted from a fixed amount of precious metal; this is known as debasing, and, while the face value of the coin was retained, debasing reduced its intrinsic value.

When coins were made of precious metals, the face value of a coin was normally the value of its metal by weight. Thus a one-ounce silver coin would have the same value as an ounce of silver on the metals market. If the coin were 100% silver (or if its value were fixed as the price of the silver that was in it) the government would have to absorb the cost of minting the coin, which gave officials another reason to mix other non-precious metals into the coin.

Just as each country has the power to mint coins, so it sets standards for common weights and measures: how much do an ounce and a pound weigh, how much do a pint and a gallon hold, and so on. These standards impact the value of coinage, since it was once the case that two coins from different areas, each with a face value of "one ounce" of silver, might not have the same worth. This was because an "ounce" often was defined differently in the two places where the coins were minted. That is, an ounce in one city might have a different weight than an ounce in a neighboring city or country.[9] These differences were typically minor, but could at times be quite significant.[10]

Standard, official, weights and measures are essential to promote commerce. With set measurements one is able to conduct business securely, since one knows how much merchandise we are talking about. For the consumer, too, set measures are essential, since they allow him to discern differences in prices between merchants for goods and services. In old times each local government maintained

9. A modern example of this is that an American pint contains 8 fluid ounces while a British pint contains 10 ounces.

10. See *Nachlat Shivah* 12:31:d & f.

official weights and measures for its area, and each merchant would need to make sure that his weights matched the official weights of that region.[11] Weights did not only change from city to city, they also would change over time even in one city or area. Therefore an ounce in one city in the year 1500 may be different than an ounce in the same city even a few decades later. Only in the 19th century was a uniform and universal system of weights and measures promulgated: the metric system, which for the first time ever made merchandise uniform all over the world.

These facts make an exact comparative study of the coins mentioned by *Poskim* throughout the ages rather difficult.

Mishnaic Money

Two types of coinage are documented in the Mishnah: the common, *kesef medinah,* state-issued money, and the more valuable, *kesef Tzori,* Tyrian money. Both of these sets of coins were available in five different denominations (in descending order of value): Gold *Dinar*, *Selah*, *Shekel*, Silver *Dinar* (a.k.a. *Zuz*), and *Ma'ah* (a.k.a. *Gerah*); in addition, *kesef medinah* was also available as a *Pundyon*, *Issar*, and *Perutah*.[12]

The *kesef medinah* coins and the *kesef Tzori* coins which went by identical names, were of the same weight. Thus, for example, a *Selah* of *kesef medinah* and a *Selah* of *kesef Tzori* weighed the same as one another. Their difference in value stemmed from their material composition: *kesef Tzori* was pure silver while *kesef medinah* was an alloy of one part silver and seven parts copper or bronze. Because of this *kesef Tzori* had

11. See for example *Keilim* 17:9 regarding the two official measuring rods in the *Beit HaMikdash*.

12. The relationship between these coins is as follows: 1 gold *dinar* = 6.25 *Selah* = 12.5 *Shekel* = 25 Silver *Dinar* = 150 *Ma'ah* = 300 *Pundyon* = 600 *Issar* = 4,800 *Perutah*. An alternate way of saying the same thing is that this many *perutot* were in each coin: *Issar* (8), *Pundyon* (16), *Ma'ah* (32), Silver *Dinar* (192), *Shekel* (384), *Selah* (768), Gold *Dinar* (4,800).

eight times the value of *kesef medinah*.[13]

The Torah (*Bamidbar* 18:16) tells us that for *pidyon haben* one should give the *Kohen* five *Shekalim* of "*shekel hakodesh*" which are each worth 20 *Geirah/Ma'ah*. This indicates that the *shekel* used for *pidyon haben* is actually worth twice the value of the Mishnaic *shekel*, and is thus equivalent to the *Mishnaic Selah* coin.[14] Accordingly, the Mishnah and Gemara refer to the amount required for *pidyon haben* as "five *Selaim*".

Although, as noted, the Torah says that the *shekel hakodesh* is 20 *Geirah*, by the time of the Mishnah the value of the *Geirah* had depreciated and there were actually 24 *Geirah* in a *shekel hakodesh*.[15] Accordingly, *Shulchan Aruch*[16] rules that the amount required for *pidyon haben* is 5 *Selaim* which is equivalent to 120 *Geiah/Ma'ah*.

Tracing the *Mesorah* of *Pidyon Haben* Coins

The Gemara in *Bechorot* (49b-50a) discusses the value of the five *sela'im* of *Pidyon Haben*, and throughout the ages the *Poskim* have worked to define the specific value needed for *Pidyon Haben* in values applicable to each generation.[17] This was done either by evaluating the specific silver coins available in their days that could be assembled together into a

13. See *Rashi*, *Bava Kama* 36b.

14. See footnote 12 that there are 12 *Ma'ah* in a *Shekel*, and see the coming footnote that in the times of the Mishnah there were 24 *Geirah/Ma'ah* in a *shekel hakodesh*.

15. Although, as noted, the *Torah* says that the *shekel hakodesh* is 20 *Geirah*, by the times of the Mishnah the value of the *Geirah* depreciated and there were actually 24 *Geirah* in a *shekel* (Gemara, *Bechorot* 50a); see there and in *Chazon Ish* YD 152:6 as to how such a change was permitted after the Torah's clear valuation of the *shekel* at 20 *Geirah*.

16. *Shulchan Aruch* YD 305:1.

17. Rabbi Chaim Beinish, in the introduction to his *Sefer Middot V'Shiurei Torah* (page 14) explains that there are such extensive records and samples of coins from different eras that one can rely on secular numismatists to determine details of coins discussed by the *Poskim*.

weight equivalent to five *shekalim* in the time of the Gemara, or by finding other silver items that could be amassed to the correct weight.

Much of the discussion in the *Poskim* relates to the weight value of the Silver *Dinar*/*Zuz* coin. (From the silver *dinar* one can extrapolate the value of the *Selah* used for *pidyon haben*, because it is well known that there are four Silver *Dinarim* in a *Selah*.) As we will see below, there are two main traditions regarding the sizes of the (Silver) *Dinar*:[18] (1) *Rashi* (together with the *Ramban*), and (2) the *Geonim* (including *Rif* and *Rambam*) (with two variations within the opinion of the *Geonim*). There is an approximate difference of 15% between the two opinions.

Rashi

In two locations, *Rashi* provides the measure of a Silver *Dinar*/*Zuz*.[19] The first is in *Shemot* 21:32 where he states that "the *shekel's* weight is four *zehuvim* (gold pieces) which total half an *unkyah* (ounce) according to the official weights of Cologne".[20] This Colognian *unkyah*/ounce has been measured as averaging 29.2 grams,[21] such that the amount of pure silver

18. See *Middot V'Shiurei Torah,* chapter 22 note 11, who quotes the *Kaftor VaFerach* (chapter 16) who counts eleven separate opinions regarding the size of these coins. Nevertheless the two main opinions are those of *Rashi* and the *Geonim*.

19. This opinion is also mentioned by *Rabbeinu Gershom*, *Bechorot* 49b; *Rosh*, *Bechorot* 8:9; as well as other German *Rishonim* cited in *Midot V'Shiurei Torah,* chapter 22 note 24. Both *Tosafot* (*Bechorot* 49b s.v. *amar*) and *Rosh* comment that it is apparent that *Rashi* received this as a tradition from his teachers. See *Chazon Ish* YD 182:4 who suggests the possibility that the *zehuvim* mentioned by *Rashi* had the same weight as the gold and silver *dinar* of the Gemara.

20. Cologne, or Köln, is a German city on the Rhine river. Since it was a major port for commercial river traffic, it became a regional financial center.

21. *Middot V'Shiurei Torah* 22:4 s.v. *Unkyah.* He also comments (30:30) that seemingly *Rashi* holds that a *shekel* was slightly less than half an *unkyah*. This suggestion is based on R. Yehudah, the author of *Sefer Hadinim,* who writes

required for a *Pidyon Haben* is 73 grams.[22]

The second location is *Rashi* to *Bechorot* 49b, who says that "The *Zuz* (Silver *Dinar*) is…equivalent to the weight of 2.5 *Peshitim* of the official iron weights". This refers to the Norman silver pennies known as esterlins,[23] and 20 esterlins weigh the same as one *unkyah*/ounce from Cologne.[24] Thus, since there are four *Zuz* in a *Selah*, each *Selah* weighs the same as 10 *Peshitim* or half an *unkyah*/ounce, which is exactly what was noted above from *Rashi*.

Ramban moved to *Eretz Yisroel* towards the end of his life, and upon arriving in Akko he was shown a silver *shekel* coin from the time of the Second Temple. In a letter appended to his commentary on the Chumash,[25] *Ramban* describes this coin and notes that it lends support to the opinion of Rashi about the weight of the *shekel*.

Geonim

Rif[26] writes that the silver *Dinar* of the Gemara weighs the

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"the *dinar* is two and a half *Peshitim*, minus a bit." Rabbi Beinish suggests a number closer to 14.16 grams as the weight of the *shekel*.

22. In other words, if a *shekel* is half of a 29.2 *unkyah*, then each *shekel* is 14.6 grams, and five *shekel* are 73 grams.

23. These *Peshitim* were minted as coins known as esterlins. (The esterlin was a Norman silver penny first mentioned in 1085, while *Rashi* was still alive. The name 'esterlin' (a French word) appears never to have been used in Britain, where 'sterling' (a Saxon word) appears first in early Norman times; pennies were minted in Britain in Saxon times, centuries before *Rashi*.–ed.) These *Peshitim* are similar in weight to the English 'penny' minted in 1180, seventy-five years after the death of *Rashi*. (*Middot V'Shiurei Torah* 30:30).

24. *Middot V'Shiurei Torah* 30:29.

25. This letter is printed in some editions of the *Chumash* as an appendix to *Sefer Devarim*, and other editions print it at *Shemot* 30:13.

26. *Rif*, *Kiddushin* 6b, referring to this coin by the name *Sheshdana*, which probably means *six Dankas*, a Persian coin used in those times. See *Chazon Ish* YD 182:19.

same as the gold Arabian *Dinar*. This Arabian coin was well known, as it was used throughout the Arabian Empire for more than six hundred years from the year 698, and it weighed 4.25 grams.[27] If a silver *Dinar* is 4.25 grams and there are four silver *Dinars* in a *Selah*, then each *Selah* used for *Pidyon Haben* contains 17 grams of silver, and the full five *Selaim* is 85 grams of pure silver. This evaluation of the Arabian dinar, as equal to the Talmudic silver *Dinar*, is quoted by the *Geonim*, *Rambam* and other *Rishonim*.[28]

The *minhag* (custom) in the countries of Ashkenaz (western and central Europe) was originally in accordance with the opinion of *Rashi*. However, at some point the *minhag* changed to follow the opinion of the *Geonim*.[29]

Because coins change over time, the *Geonim* provided an alternative method to calculate the amount of silver needed for *Pidyon Haben*. *Rif*, among others,[30] writes that a *perutah* weighs half a *chabah*. The *chabah* was the weight of a carob seed, or, some say, of a dry barley grain taken from the middle of the ear of grain.[31] Both of these were standard weights at

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27. *Middot V'shiurei Torah* 22:3 & 30:7-9. He notes that contemporary sources note that in general the *Dinar* did have a consistent weight at its inception in the days of Caliph Abd al-Malik (698). There was a period of times when the Arabs were not careful to mint their coins with consistent weight. In fact Rav Hai Gaon writes against using the Arabian golden *Dinar* as a comparison to the silver *Dinar* of the Talmud as "the size of this *Dinar* varies depending on one's location."

28. *Halachot Gedolot* (*Kiddushin* 81a, *Hil. Bechorot* page 138b), *Rambam* (*Pirush Hamishnayot, Pe'ah* 8:5), *Responsa of R' Avraham son of Rambam* (82), *Sefer HaItur* (*Hil. Ketubot*), *Tashbetz* 10:226, *Rif* (*Shekalim* end of first chapter), and others cited in *Middot V'shiurei Torah* 30:8.

29. *Middot V'Shiurei Torah* 22:9.

30. *Rif*, *Kiddushin* 6a.

31. See *Middot V'Shiurei Torah* 22:7.

The word "*chabah"* generally refers to the weight of a carob seed; however, here the tradition is that it refers to the weight of a barley grain. *Chazon Ish* YD 182:10 explains the necessity and benefit of measuring using barley grains as opposed to using coins: "because standard weights are not derived

that time, and were surprisingly accurate.[32] This comparative measurement of the *perutah* to the *chabah* is mentioned by other *Rishonim* as well.[33] Since a *Selah* is 768 *perutot*,[34] the five *sela'im* of *Pidyon Haben* would equal the weight of 1,920 barley grains according to this method of measuring.

Thus, this is an alternate method provided by *Rif* for measuring the amount of silver required for *Pidyon Haben*. *Poskim* living in Europe in subsequent generations had no access or familiarity with the gold Arabian *Dinar* and therefore used this latter measure – using barley grains – to quantify the amount of silver required for *Pidyon Haben*, and there are two primary opinions on this matter, as follows.

Rabbi Menachem of Merseburg[35] wrote that he "weighed 1920 barleycorns, on two different occasions using two varieties of barley, and the weight each time was 5.25 *lot*."[36]

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from nature, being dependent on the consensus of every generation. Therefore the *Geonim* measured the *shekel* using a weight from the natural world." See also the comments of the *Chazon Ish* regarding the volume of a *mikvah* as to changes in the size of barleycorns in different eras and climates and the impact of this on halacha. Rabbi Avraham Chaim Naeh (*Shiur Mikvah*, Introduction Pages 9-10, Footnotes 16-17) disagrees with *Chazon Ish* and writes that the size of barleycorns should be computed as large as possible to conform to the likely size of barley in the times of the *Geonim*. See *Likutei Pinchas* #5 who writes that we need not be concerned about a change in barley size.

32. The weight of a carob seed, known as *carat,* is still used today to weigh jewelry.

33. See *Rach* (*Shevuot* 39b), *SMaG* (*Aseh* 144), *Rosh* (*Bechorot* 8:9), and *Ramban*, *Hil. Bechorot* Chapter 8.

34. See above in footnote 12.

35. Rav Menachem (מהר"ם מ"ץ) was one of *Chachmei Ashkenaz* who lived in the generation after the *Rosh* (c. 1430). He authored a *sefer* (nonextant) by the name of *Me'il Tzedek*. R. Menachem lived in the city of Merseburg, Germany. His opinion on this matter is cited in *Yam Shel Shlomo* (*Kiddushin* 1:54), *Bach* (CM 88), *Drishah* (YD 305:3), *Shach* (CM 88:1), and *Taz* (YD 305:1).

36. A *lot* is a unit of weight that was formerly used in many European countries; its value varied widely depending on time and place. Most commonly it was approximately half an ounce (between 1/30 and 1/32 of a pound). (*Midot V'Shiurei Torah* Chapter 22 Footnote 60).

Based on the assumption that he is referring to the *lot* of Cologne which weighed 14.6 grams,[37] the amount required for *Pidyon Haben* is 76.7 grams of silver.[38]

Rabbi Yom Tov Lipman Heller, author of *Tosfot Yom Tov*, writes that he weighed 96 grains of barley, the weight of a *Dinar*, and found its weight equal to one *quint* of Prague.[39] In the time and place of the *Tosfot Yom Tov*, a *quint* weighed 3.9625 grams,[40] which means that the weight of one barley is 0.041 grams, 2-3% larger than the previous estimates. These results are quoted by both *Shach* and *Noda B'yehudah*.[41] According to these measurements one would need 79.25 grams of silver for *Pidyon Haben*.[42]

Lastly, *Shulchan Aruch* provides a description of how much silver is required for *Pidyon Haben*, using a measure that is also indirectly related to the weight of barley. In one location, *Shulchan Aruch*[43] writes that one *ma'ah* equals the weight of a

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Taz ibid. suggests that the amount is slightly more than 5.25 *lot*, and *Nachlat Shivah* 12:4, a student of *Taz*, says that the exact amount is 5.33 *lot*, resulting in a 77.93 gram *shiur* for *Pidyon Haben*. *Chatam Sofer* YD 289 records a similar *shiur*, of 20 *tzvantzinger* coins.

37. *Middot V'Shiurei Torah* 22:9.

38. The text is based on *Middot V'Shiurei Torah* (ibid.). [Accordingly, we can extrapolate that the weight of a grain of barley is 0.04 grams. The significance of this will be noted below.] In contrast, *Minchat Elazar* 2:15 writes that the *lot* referred to by Rabbi Menachem of Merseburg was the Austrian *lot*, which weighs 17.85 grams. Accordingly the amount needed for *Pidyon Haben* would be 93.75 grams.

39. *Divrei Chamudot* (*Bechorot* 8:22), *Ma'adanei Yom Tov* (*Berachot* 3:30:80).

40. A *quint* is a quarter (*quint*) of a *lot*, and in the times of *Tosfos Yom Tov* a *lot* weighed 15.85 grams (*Middot V'Shiurei Torah* 22:10).

41. *Shach* CM 88:1, *Nodah B'yehudah* CM 14. See *Middot V'shiurei Torah* 22:10 who shows the conversion of amounts listed by *Tosfot Yom Tov* and these *Poskim*.

42. As noted, the amount of silver required for *Pidyon Haben* is equal to the weight of 1,920 barley grains. If a barley grain weighs 0.041 grams, then 1,920 barleys weigh 79.25.

43. *Shulchan Aruch* YD 294:6.

quarter *dirhem* which is 16 barleycorns. Then, as relates to *Pidyon Haben*, *Shulchan Aruch*[44] writes, "it is a positive mitzvah for every man to redeem his first-born son… with five *sela'im*, which are one hundred and twenty *ma'ah*, equaling thirty *dirhems* of silver". In other words, if each *dirhem* weighs as much as 64 barleycorns, then 30 *dirhems* is equal to 1,920 barleycorns, which as we have seen is *Rif's* definition of the amount required for *Pidyon Haben*. More on this below.

The Halacha

Although as noted, *Shulchan Aruch* provides an exact measure of how much silver is required for *Pidyon Haben* – the same weight as 30 *dirhems* – throughout the generations that ruling was not significant to most European *Poskim*. The *Rif* identified the amount using a specific coin, but the *dirhem* was not a familiar coin to later *Poskim* and therefore they could not translate that into a specific amount of silver. Instead, as noted, they made their own measurements of barley and thereby developed opinions on the matter.

However, in later generations, *Poskim* were able to identify the *dirhem* and convert that into a specific amount of grams of silver. Some assume that the *dirhem* in question was the Arabian Empire's silver coin which went by that name, and it is assumed to weigh 2.92 grams.[45] If so, 30 *dirhems* weigh 87.6 grams, and that is how much silver is required for *Pidyon*

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44. *Shulchan Aruch* YD 305:1. The words of *Shulchan Aruch* are based on *Rambam*, *Pirush HaMishnayot*, *Bechorot* 8:8 (see the proper wording in the edition of R' Kappach).

45. The *dirhem* has been in use in Middle Eastern countries since the times of the *Geonim*. Though its size and weight have changed numerous times, the U.A.E. continues to use the name *dirhem* for its coinage. Care must be taken to distinguish between the silver *dirhem,* introduced in 696 and weighing 2.92 grams, and the gold *dinar,* introduced two years later at 4.25 grams.

Haben.[46] However, Rav Avraham Chaim Na'eh[47] proves that in making this calculation one should use the Turkish *dirhem* which weighed 3.205 grams.[48] Based on that, (a barleycorn must weigh 0.05 grams and) the amount required for *Pidyon Haben* is 96.15 grams of silver.[49] Similarly, *Chazon Ish* rules that one should use 96 grams of silver.[50] That said, there are those who have a custom to use 100 or 125 grams of silver for the mitzvah (see footnote).[51]

Common Silver Coins in the USA and Israel

We have seen that there are 7 opinions as to how much silver must be given to the *Kohen* for *Pidyon Haben*.

Briefly, they are:

A. 73 grams (Rashi)

B. 76.7 grams (R. Menachem of Merseburg)

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46. *Middot V'shiurei Torah* 31:1 suggests a *dirhem* weight of only 2.83 grams, which would mean that thirty *dirhems* ought to weigh 84.9 grams. This is the same size as twenty gold *Dinars* mentioned above in the first version of the opinion of *Rif*/*Geonim*.

47. *Shiurei Torah* 1:3 (page 82).

48. The Turkish *dirhem* was in circulation in the time of Rav Na'eh. *Middot V'shiurei Torah* 31:1 writes that in his estimation the earlier *dirhem* of the *Rishonim* was lighter in weight than the Turkish *dirhem*. (The original Islamic *dirhem* weighed 2.92g, the late Turkish *dirhem* weighed 3.205g.) Although, as noted in an earlier footnote, *Middot V'shiurei Torah* suggested that a *dirhem* may weigh only 2.83 grams, his conclusion is that one should use the amount of silver indicated by Rabbi Na'eh, 96 grams. However, see *Yechaveh Da'at* 4:54 who argues that the *dirhem* of *Rambam* and *Shulchan Aruch* is identical to the ones used in the modern era.

49. *Shiurei Torah* 3:43 (page 286).

50. *Chazon Ish* CM 16:30.

51. See *Shiurim Shel Torah* Point #17, and *Otzar Pidyon Haben* Chapter 13 Footnote 11. In contrast to these *Poskim*, see *Edut L'Yisrael* pages 194-195 that Rav Eliyahu Henkin was of the opinion that one should give 125 grams of silver for *Pidyon Haben*, based on an alternate method of measuring. Rabbi Moshe Heinemann (personal communication with the author) recommends that people give this larger amount of silver for *Pidyon Haben*, and that is the common practice in Lakewood.

C. 79.25 grams (*Tosfot Yom Tov*)
D. 85 grams (*Rif*)
E. 96 grams (R' Na'eh & *Chazon Ish*)
F. 100 grams
G. 125 grams (Rav Henkin)

In the concluding section of this article, we will detail how much silver is in the American and Israeli silver coins minted in recent years, and show how many of each coin would be given for *Pidyon Haben* according to each opinion. (Though governments no longer mint silver coins for general circulation, these pure silver coins intended for investments and collectors are available.)

Coin #1 – Liberty Seated Dollar (1839-1873)

These coins are 90% silver and 10% copper and weigh 26.73 grams each. Five of these coins contain 120 grams of pure silver. The true value of these coins is as collector's pieces. Even in circulated condition the coins can be sold for $75-$200.

Coin #2 – Morgan Silver Dollars (1878-1904 & 1921)

These silver dollars are 90% silver and 10% copper. They weigh 26.73 grams each. Five of these coins contain 120 grams of pure silver. Under the Pittman act of 1918 many of these dollars were melted to help pay for WWI.

Coin #3 – Peace Dollars (1921-1935)

These coins also weigh approximately 26.73 grams each and are 90% silver. Five of these coins contain 120 grams of pure silver.

Coin #4 – Silver Eagles (1986-current)

In 1986 the American government began once again to issue "silver dollar" coins. These coins are known as "Eagles" and weigh one troy ounce (31.103 grams). Each coin contains a small amount of copper, so that it contains 31.072 grams of pure silver. Four of these coins contain 124.288 grams of pure silver. One can thus use four of these coins for the mitzvah.

Coin #5 – Walking Liberty Half Dollar (1916-1947) & Franklin Half Dollar (1948-1963)

These coins contain 11.25 grams of silver.

Coin #6 – Israeli Pidyon Haben Coin/Medallion (1970-current)

In *Eretz Yisrael* various special silver *Pidyon Haben* medallions are made by the Treasury and are available in stores and at government offices. In 1970 the government issued a special silver medallion for the purpose of *Pidyon Haben*, weighing 26 grams. Similar medallions have been minted by the Israeli government in subsequent years.

A set of coins with the *hechsher* of the Badatz Eidah Charedis was issued which contain 21 grams of silver per coin.

The following chart shows the number of coins needed for *Pidyon Haben* depending on the coin used (listed in the first row), and the different opinions (listed in the first column). Any result which calls for a fraction of a coin is rounded up to

the next whole coin. The amount of silver in each coin is listed in the row below the coin number.

Coin ➔ Opinion ➓	**Coins 1-3** **24.1 g**	**Coin #4** **31.1 g**	**Coin #5** **11.25 g**	**Coin #6** **26 g**	**Coin #7** **21 g**
A – 73 grams	3	3	7	3	4
B – 76.7 grams	4	3	7	3	4
C – 79.25 grams	4	3	7	3	4
D – 85 grams	4	3	8	4	4
E – 96 grams	4	4	9	4	5
F – 100 grams	5	4	9	4	5
G – 125 grams	6	4	12	5	6

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