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**Rabbi Dovid Cohen,  
Editor**



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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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# Tearing *Keriah* in the Presence of Death

*Rabbi Sariel Malitzky*

While many people are familiar with the halacha which requires an individual who experiences the loss of one of the seven close relatives to tear their clothing (*keriah*), there are numerous other situations, which are not as well known, when one might need to tear *keriah* as well. One such case occurs when someone personally witnesses the death of an individual. This halacha is true irrespective of any relationship between the two parties. In this essay we will discuss the particulars of this halacha.

While the halacha of tearing *keriah* pertains to everyone,<sup>1</sup> it

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1. A Jewish individual who experiences the loss of one of the seven close relatives (father, mother, son, daughter, wife, brother, sister) is obligated to tear his/her clothing. While a minority opinion maintains that this obligation is biblical, the majority of halachic authorities maintain that this obligation is rabbinic in nature. In truth, while the obligation to tear *keriah* for one of the seven close relatives should be performed immediately upon witnessing or hearing of the death, this is not done in practice. Most perform the *keriah* either as the body is being taken out from the house or at some point during the funeral.

It is somewhat unclear why the *keriah* is not performed immediately. See *Gesher Hachaim* 4:6 who offers numerous suggestions. 1) Since not everyone is familiar with all of the specific requirements of *keriah*, it is delayed to a time when the *chevra kadisha* or a *Rav* is present to help a mourner fulfill the obligation. 2) Since it is better to have someone else begin the tear (see *Pitchei Teshuva* 340:1 and the comments of *Rav Efraim Zalman Margolies* in the back of the *Shulchan Aruch*), the *keriah* is delayed to a time when someone else who is knowledgeable in the laws of *keriah* can begin the tear. 3) The *keriah*

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applies most commonly to individuals who work with the sick. Doctors, nurses,<sup>2</sup> and members of Bikur Cholim (visiting the sick) societies will almost inevitably encounter a situation when they are present at the time of death of a patient. This essay will address the applicability of this halacha to such individuals.

## I. Source

The Gemara records the following *Baraita*:<sup>3</sup>

"רבי שמעון בן אלעזר אומר העומד על המת בשעת יציאת נשמה חייב לקרוע למה זה דומה לספר תורה שנשרף חייב לקרוע"

Rabbi Shimon the son of Elazar said, "A person who is standing over the deceased as his soul departs is obligated to tear his clothing. To what situation is this comparable? To a burning Torah scroll, where the onlooker is obligated to tear their clothing."

is delayed to a time when all of the mourners are present to enable them to tear *keriah* together. 4) Rav Chaim Binyamin Goldberg, in *Pnei Baruch* Chapter 1 footnote 26, suggests an additional reason. Halacha requires that the *keriah* upon the passing of a parent be done in public. Therefore, we delay the *keriah* to a time where the mourner can do so in public. Even in situations when the above conditions can all be met at the time of death, halacha does not distinguish between different cases.

Therefore, one who witnesses the passing of one of the seven close relatives would delay his *keriah* to a later time when he can fulfill both obligations: the obligation to tear upon witnessing a death and the obligation to tear upon losing one of the seven close relatives. (See *Shulchan Aruch* 340:23 who rules that one who loses two close relatives at once needs to do only one *keriah*.).

2. There is no mention in the commentators about the applicability of this halacha to women who witness a death. Seemingly, there should be no difference between a male and female witness. Indeed, Rav Gavriel Zinner, in his work *Nitei Gavriel*, Chapter 4 note 14, quotes from responsa *Shem Mishimon* who rules that this obligation is incumbent on both men and women.

3. *Moed Katan* 25a and *Shabbat* 105b.

This Gemara is brought as normative halacha by *Rambam*<sup>4</sup> and codified in *Shulchan Aruch*.<sup>5</sup>

## II. Reasons<sup>6</sup>

How are we to understand this comparison? Death is no doubt tragic, but in what way is it similar to the burning of a Torah scroll? *Rashi* writes that both a Torah and a *neshama* (soul) are referred to as a *ner*, a candle.<sup>7</sup> Therefore just as those who witness the destruction of a Torah scroll are obligated to tear their clothing, the individual who witnesses the leaving of the *neshama* must also tear his clothing.<sup>8</sup> *Rashi* writes elsewhere that one must tear *keriah* when they witness a death for the loss of Torah and mitzvot that was possessed by the deceased. *Rashi* then quotes the sages who observe that there is not a person, even amongst the “empty” of the Jewish people, who does not have within himself Torah and mitzvot.<sup>9</sup> *Rashi* offers yet a third explanation. He writes that one must

4. *Hilchot Aveilut* 11:9.

5. *Yoreh Deah* 340:5.

6. Numerous explanations are offered to explain the obligation of *keriah* which is incumbent upon one who loses one of the seven close relatives. 1) The act of tearing one's garment is a manifestation of the pain and anguish that the mourner is experiencing. This act will surely add an additional dimension to the mourner's suffering, which is appropriate at this moment. 2) The mourner, who is in such a precarious mental state, is encouraged to do something to take his mind away from the pain. The mourners thus tear their clothing to give a momentary reprieve of their anguish. 3) The tearing of the mourner's clothing is done to awaken the crowd to cry and mourn. See *Gesher Hachaim* 4:1 who alludes to other kabbalistic reasons.

7. Regarding Torah it is written “בַּיְמֵד מִצְוָה וְתֹורָה אָוֶר” and regarding the *neshama* it is written “בַּיְמֵד נְשָׁמָה אָדָם”.

8. *Moed Katan* 25a s.v. *Lisefer Torah*. While these words are found in the commentary of *Rashi* in our editions of the Gemara, it is unclear whether it is actually *Rashi* who wrote this commentary. If one looks at the commentary of *Rashi* printed alongside the *Rif* and in *Ein Yaakov*, one will see very different explanations. Additionally, *Rashi* quoted by the *Rishonim* is often different than what is written in the *Rashi* in our edition of the Gemara.

9. *Shabbat* 105b s.v. *Lisefer Torah*.

tear *keriah* for the potential Torah that will now never be learned.<sup>10</sup>

*Ramban* questions the last explanation of *Rashi*, pointing out that we mourn for what was and not for what will be. Additionally, the *Ramban* points out that one is only obligated to tear *keriah* upon witnessing the burning of a Torah scroll if the burning was done in a forceful and destructive manner. If so, tearing *keriah* when witnessing a death should be limited to cases when a person is murdered (because murder is forceful and destructive).

For these two reasons *Ramban* offers two additional explanations. He writes that this comparison to the burning of a Torah scroll is not to be taken literally. It is a *dimyon bialma* (merely a comparison). Just as a Torah burning is a serious catastrophe which requires the onlooker to tear *keriah*, the loss of human life is equally as tragic, requiring an onlooker to tear *keriah*. *Ramban*, however, offers a second explanation: If one is obligated to tear *keriah* upon witnessing the loss of a Torah scroll, certainly there should be an obligation to tear *keriah* for the loss of the individual who has performed the actions prescribed by that very same Torah.<sup>11</sup>

Having seen five different ways of understanding the comparison between a Torah's burning and a person's death, we will now attempt to analyze for whom one must tear *keriah*. Does every person's death carry with it an obligation to tear? Does a child's death mandate *keriah*? What about the death of a woman? Would the death of a non-observant Jew obligate the onlooker to tear his clothing?

### III. Women

*Ramban* points out that the applicability of this halacha when

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10. *Rashi's* commentary printed alongside the *Rif* in *Moed Katan* 16A s.v. *Lisefer Torah*. This opinion of *Rashi* is also quoted by the *Ran* in his *chidushim* to *Moed Katan* 25A and by the *Ramban*.

11. *Torat HaAdam Inyan HaKeriah* Page 51.

dealing with the death of a woman should depend on the various explanations of the comparison of the Gemara of loss of life to loss of the Torah. *Ramban* writes that according to *Rashi*'s comparison of death to a Torah's burning because of the potential Torah that could have been learned, one would not tear upon witnessing the death of a woman because women are exempt from the study of Torah.<sup>12</sup> Therefore, the death of a woman would not be tantamount to the burning of a Torah.<sup>13</sup> Similarly, if one tears *keriah* because of the loss of the Torah that the deceased possessed, the death of a woman would not warrant the onlooker to tear *keriah*.

The *Ramban* writes, however, that according to both of his understandings of the comparison, one would certainly have to tear *keriah* upon witnessing the death of a woman. If one assumes that the comparison of the Gemara was just a *dimyon bialma*, then the death of a woman is no less tragic than the death of a man. Similarly, if one understands that tearing *keriah* is done because of the loss of the individual who performed the actions of the Torah, one would also tear *keriah* upon witnessing the death of women, as she too performs mitzvot.<sup>14</sup> Presumably, according to the other reason offered by *Rashi*, one would also need to tear *keriah* upon witnessing the death of a woman, as a woman's *neshama* is also compared to a *ner*.<sup>15</sup> The *Shulchan Aruch* rules that this halacha applies equally for the loss of men and women and, therefore, someone who witnesses the death of a woman must tear *keriah*.<sup>16</sup> This is the normative halacha.

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12. *Kiddushin* 29b.

13. Seemingly, *Rashi* could counter that women are indeed obligated to learn the halachot that apply to them and that it is considered a fulfillment of Talmud Torah, and not just a preparation to know how to fulfill those halachot.

14. *Ramban ibid.*

15. See *Beit Yosef Yoreh Deah* 340:5.

16. *Yoreh Deah* 340:2.

#### IV. Children

The *Bach* writes that the applicability of this halacha to the death of a child is also dependent on the explanations mentioned above. Inasmuch as both the *neshama* and Torah are referred to as a candle, and according to the reason that we tear *keriah* based on the individual's potential, one would certainly need to tear *keriah* upon witnessing the death of a minor. Additionally, if the reason for tearing *keriah* is that the death of an individual is no less tragic than the destruction of a Torah scroll, one would certainly need to tear *keriah* as the death of a minor is equally as tragic as that of an adult.

However, according to the reason that every Jew possesses Torah and mitzvot, a child's death would not warrant *keriah* because a minor is not obligated in Torah or mitzvot until he or she becomes an adult. Similarly, according to the reason that we tear *keriah* over the loss of the individual who performs the actions that are written in the Torah, one would not tear *keriah* because the actions of a minor are not recognized halachically.<sup>17</sup>

The *Bach* concludes that despite the fact that the majority of the reasons would mandate *keriah* on the death of a child, the custom is not to do so. He quotes the *Maharshal* who rules this way as well. However, the *Bach* qualifies this *minhag* by writing that a child who has begun to learn Torah would indeed require the onlooker to tear *keriah*. This qualification of the *Bach* is quoted by the *Taz*<sup>18</sup> and the *Shach*.<sup>19</sup>

While it seems that we follow the ruling of the *Bach* regarding the death of a minor, the *Radvaz* rules that tearing *keriah* would be limited to one who witnessed the death of a boy, so that one who witnesses the death of a young girl would not be obligated to tear *keriah*. In this regard, the *Radvaz* notes that there are three main reasons why one is obligated to

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17. *Yoreh Deah* 340:7.

18. *Taz Yoreh Deah* 340:2.

19. *Shach Yoreh Deah* 340:7.

tear *keriah*. One tears because of the loss of potential Torah learning (*Rashi* on the *Rif*), the tragic nature of death (*Ramban*), and the loss of the individual who performed those actions prescribed by the Torah (*Ramban*). Two of these reasons would obligate *keriah* for the death of a young boy. As mentioned above, the reason of the loss of potential Torah learning and the reason of the tragic nature of death would obligate *keriah* upon witnessing the death of a young boy. However, only one reason would be applicable to the death of a young girl. While the reason offered that death is a tragedy would certainly apply to the death of a young girl, the reason of the loss of potential Torah learning would not apply, as women are exempt from Torah study.<sup>20</sup>

Therefore, it would seem that while the death of a young boy above the age of six or seven would obligate a witness to tear *keriah*, the death of a boy who is younger than six or seven or the death of a girl under the age of twelve would not obligate the witness to tear *keriah*.

## V. Non-Observant Jews

Rabbeinu Meir Mirutenberg relates that he heard that Rabbeinu Yona maintains that the death of a wicked person would not warrant *keriah*. However, Rabbeinu Meir writes that, based on the reason offered by *Rashi*, even the “empty ones” of the Jewish people have within them Torah and mitzvot. Therefore, he holds that one would need to tear *keriah* for any Jew other than an idol worshipper or one who sins in order to make G-d angry. Therefore, the death of an individual who occasionally sins out of a desire for pleasure or for other such reasons would nevertheless obligate the witnesses to tear *keriah*.<sup>21</sup>

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20. This opinion of the *Radvaz* is brought in the *Be'er Haitev Yoreh Deah* 340:5. It is unclear why the *Radvaz* quotes only three of the explanations mentioned by the *Rishonim*.

21. *Rosh Moed Katan* Chapter 3:59. See *Pitchei Teshuva* 340:4 who rules that

The *Shulchan Aruch* rules in accordance with Rabbeinu Meir that one tears *keriah* over any individual, even if they occasionally sin.<sup>22</sup> The *Rema* adds that this is only true regarding an occasional sinner; however, the death of one who is accustomed to sinning, even for reasons of pleasure, would not warrant *keriah*.

While it would seem that based on the *Rema*, the death of an individual who lives a totally non-observant lifestyle would not warrant *keriah*, there are numerous exceptions. The death of an individual who expresses remorse over his lack of religious commitment and repents would warrant *keriah*.<sup>23</sup> The death of someone raised by non-observant parents who never had the opportunity to learn about religious life would also warrant *keriah*.<sup>24</sup> Additionally, an individual whose death would normally not warrant *keriah*, even one who converts to another religion, but who is murdered by non-Jews would warrant *keriah*.<sup>25</sup>

## VI. Someone who witnesses a death

The Gemara writes that the obligation of *keriah* is applicable to anyone who is “standing over the deceased”. What exactly

this would be true even if one violated one of the “serious” sins (excluding idol worship).

22. *Shulchan Aruch* 340:5.

23. *Shach* 345:5.

24. *Rema* 340:5. Additionally, see *Dagul Mirvavah* 345:4 and *Divrei Sofrim* 340:38. This individual would have the status of a *tinok shenishba* (one raised in a non-observant home and, therefore, his misdeeds can be considered accidental).

25. *Rema* 340:5. The assumption is that the punishment of being murdered serves as atonement for the individual’s sin. Rav Siraya Dabritzki, in his comments printed in the back of *Sefer Pnei Baruch*, quotes Rav Chaim Greineman who writes that the same would be true for such an individual murdered by Jews. Additionally, he is unsure what the halacha would say in a case when such an individual died in an abnormal way, such as a traffic accident.

is the definition of “standing over the deceased”? Is being in the same room sufficient to obligate *keriah* or does one need to actually see the body as its *neshama* leaves the world?

The *Gilyon Maharsha* writes that one who has the ability to see the deceased must tear *keriah* even if he does not actually see the deceased. However, one who cannot actually see the deceased does not tear *keriah*, even if he is in the same room.<sup>26</sup>

Based on this, the *Sdei Chemed* writes that an individual who is blind would not have to tear *keriah* if he is present when someone passes away because he does not have the ability to see the deceased.<sup>27</sup> Similarly, a person visiting a hospital patient in a room which is split in half by a curtain, would not have to tear *keriah* if the other patient dies, because that patient is not visible.<sup>28</sup> However, one who merely turns his head to the side to avoid seeing the death would still have to tear *keriah*, because he has the ability to see the deceased as the *neshama* leaves this world.

## VII. One who witnesses a death on Shabbat or Yom Tov

The Gemara states that a person is not allowed to tear *keriah* on Shabbat,<sup>29</sup> and one who does so violates a Torah

26. *Yoreh Deah* 340:5 s.v. *HaOmed BiSh'at Yetziat Neshama*. See also *Pitchei Teshuva* 340:3 who writes that this is also the opinion of the *Radvaz*.

27. *Maarechet Aveilut* 172.

28. See footnote 38 regarding a hospital patient whose roommate passes away while he is present.

29. Regarding one who witnesses a death on *Chol Hamoed*, see the *Pri Megadim* (comments on the *Magen Avraham* 547:4) who rules that one would need to tear *keriah*. However, the *Chayei Adam* 152:20 rules that the *keriah* should be done on *Chol Hamoed*. Rav Gavriel Zinner, in his work *Nitei Gavriel* 4:14, rules that one can be lenient in such a case. He reasons that since there are those who are lenient completely regarding this obligation (as will be explained later in this article), one can rely on the opinions that do not require one to tear on *Chol Hamoed*.

prohibition.<sup>30</sup> Based on this, the Gemara rules that one who witnesses a death on Shabbat should not tear *keriah* on Shabbat.

The *Acharonin* disagree whether an individual would need to tear *keriah* after Shabbat or after Yom Tov. The *Chatam Sofer* writes that one would not tear *keriah* after Shabbat.<sup>31</sup> He quotes a Gemara that rules that if a person did not tear *keriah* at the moment of intense grief (*Sha'at Chimud*), he has lost his chance to tear *keriah* unless he feels grief again. The most intense feelings of sorrow occur at the time of death. If *keriah* was not done at that point, one cannot tear *keriah* unless a new death occurs.<sup>32</sup> Therefore, the *Chatam Sofer* rules that the same would be true on *Motzaei Shabbat*: By the time Shabbat has ended, the initial feeling of grief has subsided and the individual who witnessed the death would thus not tear *keriah* after Shabbat. Rav Shlomo Zalman Auerbach rules in accordance with the *Chatam Sofer* that one who witnesses a death on Shabbat would not tear *keriah* after Shabbat.<sup>33</sup>

The *Tiferet Limoshe*,<sup>34</sup> however, writes that a person is

30. *Shabbat* 105b.

31. *Responsa Chatam Sofer Yoreh Deah* 323. See also the *Radvaz* vol. 2:838.

32. Similarly, the Gemara (*Moed Katan* 25a) relates that when Rav Safra passed away, his students did not tear *keriah*. When they were told that they had erred in judgment, they incorrectly assumed that their mistake was irrevocable. Therefore, Abaye proceeded to tell them that while they are still involved with the eulogies, they are considered to be experiencing a new moment of grief and are therefore able to tear *keriah*. The underlying point is that if one missed the chance to tear *keriah* at the time of death, they should not tear later (unless there is a new moment of grief, such as during eulogies).

33. As quoted in *Nishmat Avraham Yoreh Deah* chapter 339.

34. *Hilchot Keriah* and quoted in *Pitchei Teshuva Yoreh Deah* 340:3. While he does not address the proof of the *Chatam Sofer*, he cites the Gemara which teaches that one who witnesses a death on Shabbat and tears his clothing violates the Torah prohibition of tearing. Normally, one who tears an object in a destructive way on Shabbat does not violate a Torah prohibition because he is destroying the object, a process called *mikalkel*. But tearing to fulfill an obligation would violate the Torah prohibition of *metaken* because

obligated to tear *keriah* after Shabbat if the burial did not yet take place.

The *Chatam Sofer's* and *Tiferet Limoshe's* opinions have another practical difference: If a person did not tear *keriah* at the time of death, either because he forgot or because he was preoccupied, would he be able to tear *keriah* later that day? Seemingly, while the *Chatam Sofer* would not allow the individual to tear *keriah* because the time of grief has passed, it would seem that the *Tiferet Limoshe* would require one to tear as long as the burial did not yet occur.<sup>35</sup>

### VIII. Doctors, Nurses, and other Health Professionals

The earliest authorities who discuss the question of caregivers tearing *keriah* are Rabbi Yoseph Molcho<sup>36</sup> and Rav Chaim Chizkiya Medini.<sup>37</sup> Both rule that the custom in such cases is not to tear *keriah*. Otherwise, doctors, nurses, and

such an action is considered constructive, and not destructive. The *Tiferet Limoshe* proves from this Gemara that there is a real obligation to tear *keriah* for one who witnesses a death on Shabbat, because otherwise tearing upon witnessing the death would not be considered constructive and the one who tears would not violate the Torah prohibition. Therefore, since one cannot tear *keriah* on Shabbat, he must do so on *Motzaei Shabbat*.

35. This disagreement might have ramifications in another area of halacha as well. There is a halacha that one who visits the *kotel* must tear *keriah*. One who visits the *kotel* on Shabbat obviously cannot tear his clothing on Shabbat. Additionally, there is a custom quoted by Rav Shternbuch in *Teshuvot Vihanhagot* vol. 1:334 not to tear *keriah* on *erev Shabbat* after *chatzot* (midday). There is discussion in the *poskim* whether an individual who visits the *kotel* after *chatzot* on *erev Shabbat* or on Shabbat would have to tear *keriah* after Shabbat. Rav Shlomo Zalman Auerbach, responsa *Minchat Shlomo* vol. 1:73, rules that such an individual would not have to tear *keriah* on *Motzaei Shabbat*. Others disagree and are of the opinion that *keriah* would be required after Shabbat. (See *sefer Piskei Teshuvot* volume 6: 561:3 in the name of *Sefer Har HaKodesh*). Rav Shternbuch writes that this question might be dependent on the dispute between the *Chatam Sofer* and the *Tiferet Limoshe*.

36. *Shulchan Gavoha Yoreh Deah* 340:15. His opinion is quoted in the *Kaf Hachaim Orach Chaim* 647:25 as well.

37. *Sdei Chemed Maarechet Avelut* 17.

members of Bikur Cholim societies would constantly need to tear *keriah*, which, unfortunately, would be impractical. These authorities reason that if medical staff would be required to tear their clothing whenever they are present at the time of death, they would refrain from doing this type of work for economic reasons (destruction of clothing), and the sick would be neglected because the medical staff would leave before the patient's death to avoid the obligation of tearing *keriah*.<sup>38</sup>

This ruling is echoed by some of the great contemporary *poskim*. Rav Yechiel Michel Tukachinsky<sup>39</sup> as well as Rav Ovadia Yosef<sup>40</sup> both quote this opinion as being the accepted halachic ruling. One could potentially reason that this leniency would be limited to those in the medical profession or to members of the *bikur cholim* and *Chevra Kadisha* in the normal performance of their duties. However, when an individual is walking on the street and witnesses a death or a murder, he would indeed have to tear *keriah*. Clearly, we are not worried that people will refrain from leaving their houses to spend their entire lives indoors.

However, Rav Eliezer Waldenberg appears to be of the opinion that this leniency applies in all cases. He writes that no one tears *keriah*, "not doctors who are religious, not the *Chevra Kadisha*, and not other people". It seems that the phrase "and not other people" refers to any other individuals, even those not regularly in the role of working with and helping the sick.<sup>41</sup> Rav Ovadia Yosef explains the rationale for applying the leniency in all cases: All living people stand to gain should this obligation be abolished. If the obligation to tear *keriah* would

38. See *Beit Yosef* 339:4 and *Shulchan Aruch* 339:4 who writes that one is not permitted to leave one who is on the brink of death alone, lest they pass away with no one present. *Rema* writes that it is a mitzvah to be present with an individual as their soul departs. See *Nitei Gavriel* 3:8 who writes that this mitzvah would even override praying with a *minyan*.

39. *Gesher HaChaim* chapter 4:9.

40. *Responsa Yabia Omer* 4:35.

41. *Responsa Tzitz Eliezer* 14:84 and 13:35.

apply to all witnessing death, then sick people run the risk of being neglected. People would not want to tear *keriah* and would, therefore, avoid the sick. Therefore, all people would benefit and would therefore decide that we would rather people not perform the *keriah*.<sup>42</sup>

However, Rav Moshe Feinstein takes issue with this leniency. Rav Moshe writes that the obligation of *keriah* is a bona fide obligation.<sup>43</sup> Furthermore, Rav Moshe finds it hard to believe that people would stop involving themselves with the sick in fear of a minor loss of money via *keriah*. Rabbinic literature is replete with instances when *Chazal* are sensitive to loss of money, while in the case of *keriah*, *Chazal* were not worried. Rav Moshe concludes that medical staff must tear *keriah*, while the earlier authorities who exempt medical workers from tearing *keriah* probably only meant to say that one should not argue against those who do not tear *keriah*.<sup>44</sup>

Rav Moshe takes this ruling a step further, adding that if a doctor were to witness the death of two individuals in one day, he would have to tear *keriah* twice in that day. However, the doctor would not need to tear a second or third piece of clothing; it would suffice to add a small amount to the size of the initial tear.<sup>45</sup>

## IX. Other Potential Considerations

Other considerations pertain to the possibility of doctors tearing *keriah*. Rav Waldenberg observes that a doctor's outermost garment is often a hospital coat, which, more often

42. *Responsa Yabia Omer* *ibid.*

43. He argues that if it were not, then the act of tearing a garment upon witnessing a death would not be considered constructive, and would therefore not violate a Torah prohibition of performing *keriah* on Shabbat. See above in footnote 34.

44. *Responsa Iggerot Moshe Choshen Mishpat* 2:70:10

45. *Ibid.*

than not, is owned by the hospital. The *Shulchan Aruch* rules in all cases that an individual who is wearing someone else's garment would not be allowed to tear *keriah*.<sup>46</sup> Therefore, a doctor or nurse wearing a hospital coat or scrubs that do not belong to them would not tear *keriah*.<sup>47</sup>

While at face value this argument is quite logical, a further look will reveal that it is not so simple. Rav Yehoshua Neuwirth questions Rav Waldenberg's leniency. Rav Neuwirth writes that while ideally one should only tear an outer garment, another opinion states that if one tore an inner garment they will also fulfill their obligation.<sup>48</sup> In fact, Rav Naftali Zvi Yehuda Berlin writes that regarding this particular halacha one does not need to tear an outer garment at all.<sup>49</sup> Furthermore, it is also possible that a hospital coat is not considered a garment regarding this halacha. Therefore, tearing a garment beneath a hospital coat would actually be halachically considered tearing an "outermost garment".<sup>50</sup>

Regarding the obligation to tear clothing for a close relative, the Gemara writes that one who tears their garment on the

46. *Yoreh Deah* 340:34. This prohibition of tearing *keriah* exists if the one who owns the garment does not know what a person plans on doing with the garment. However, if one were to say to his friend, "My father is sick and I plan on going to visit him. Can I borrow your shirt?" there would be an obligation to tear the garment. In such a case it is assumed that the garment was loaned with permission to tear it.

47. *Responsa Tzitz Eliezer* 13:35. See *Nitei Gavriel* chapter 4 footnote 15 who uses this logic to exempt a patient in a hospital whose roommate passes away while they are present in the room. Since the patient most likely does not own the gown that he or she is wearing, they would not be able to tear it. Additionally, the *Shulchan Aruch* 347:1 rules that one who is ill does not tear *keriah*, even for the loss of one of the seven close relatives, lest it have a negative effect on his health.

48. Quoted in *Nishmat Avraham Yoreh Deah* chapter 339. See *Pitchei Teshuva* 340:8 and the glosses of Rav Akiva Aiger on the *Shulchan Aruch* 340:9.

49. *Responsa Meishiv Davar* 2:109.

50. *Nishmat Avraham* above. See *Shulchan Aruch* 340:16 and the comments of the *Taz* 340:5.

bottom or on the side has not fulfilled their obligation.<sup>51</sup> The *Beit Yosef* quotes the *Semak* who brings a different text from *Masechet Semachot* citing R. Yehuda, who permits a tear on the bottom of the garment.<sup>52</sup> The *Semak* writes that even though R. Yehuda rules this way, the halacha follows the opinion of the Rabbis who do not allow a tear on the bottom of the garment.

The *Semak* notes that a custom developed that one who witnesses a death would tear on the bottom of the garment. He questions the origins of this custom, and says that perhaps the authorities who validated the custom were relying on the opinion of R. Yehuda for such a *keriah*. The *Beit Yosef* writes that in his time this custom did not exist, so one who witnesses a death should tear on the upper part of the garment as in every other case of *keriah*. The *Shulchan Aruch* rules in accordance with his view in the *Beit Yosef*. However, the *Rema* rules that except for the *keriah* for a close relative, all cases of *keriah* can be done on the bottom of the garment.<sup>53</sup> Rav Avraham Danzig<sup>54</sup> and Rav Shlomo Ganzfried<sup>55</sup> follow this opinion.

Based on this, Rav Nachum Yavruv writes that there is no basis for a doctor to be lenient regarding this obligation. If one adopts the position of the *Rema*, then one can tear the bottom of their shirt and continue to wear that same shirt without anyone seeing the tear. Therefore, all of the concerns mentioned by the *poskim* in developing their lenient ruling would not be applicable.<sup>56</sup>

51. *Moed Katan* 25b.

52. *Yoreh Deah* 340:2.

53. The *Rema* in *Darchei Moshe* brings the *Mahari Weil*, *Kol Bo*, and *Agudah* who all hold that one can be lenient when dealing with the *keriah* for one who witnesses a death. See *Shach* 340:4 as well.

54. *Chochmat Adom* 152:4.

55. *Kitzur Shulchan Aruch* 194:6.

56. *Divrei Sofrim Hilchot Aveilut* #29.

## X. How Much to Rip

There is a dispute in the Gemara regarding how much one must tear his garment for the loss of a close relative other than a parent. R. Meir rules that the initial rip needs to be a *tefach* (3-4 inches) while R. Yehuda holds that the tear must be the length of three fingers. The *Shulchan Aruch* rules in accordance with R. Meir, that one must rip a *tefach*.<sup>57</sup>

While authorities rule in accordance with R. Meir regarding the obligation to tear *keriah* for a loss of a close relative, there is no mention of the size of the *keriah* for someone who witnesses a death. The *Rambam* writes that this *keriah* must be a *tefach*,<sup>58</sup> while the *Meiri* quotes an opinion allowing this *keriah* to be of the slightest amount.<sup>59</sup> Rav Shlomo Ganzfried follows the opinion of the *Meiri* that the tear can be of the slightest amount.<sup>60</sup>

## XI. Conclusion

Death of a loved one is certainly tragic, often leaving family members with a deep sense of grief. Even the death of someone who is not a close relative can and should profoundly affect all those present. *Chazal*, in their infinite wisdom, provide us with a step, albeit small, to begin the healing process. With the help of *Hashem*, this halacha will remain in the realm of theoretical and not enter into the world of the practical.

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57. *Yoreh Deah* 340:3.

58. *Hilchot Aveilut* 9:11.

59. Commentary to *Moed Katan* 25a.

60. *Kitzur Shulchan Aruch* 194:6.

# Shabbat Morning Kiddush over Schnapps in a Plastic Shot Glass

*Rabbi Ari Z. Zivotofsky*

One of the most familiar Jewish rituals is the recitation of Kiddush to welcome Shabbat and Yom Tov. In some communities, it is common for the morning Kiddush to be recited at a “Kiddush” well before the second Shabbat meal and for this Kiddush to be recited over “schnapps” (whiskey) in a plastic shot glass. This occurs both in shul and at private homes. This article will give some background to Kiddush and then discuss the halachic acceptability of this manner of making Kiddush.

The obligation to verbally proclaim the sanctity of Shabbat is derived from the Ten Commandments, where it is stated “*Zachor et yom ha-Shabbat lekadsho* – Remember the Shabbat to sanctify it” (*Shemot* 20:8). *Chazal* (rabbinic Sages) derived that this “remembrance” must be done verbally and not merely mentally,<sup>1</sup> and thus most authorities view the recitation of Kiddush on Friday evening as a biblical obligation<sup>2</sup> that is incumbent on all men and women.<sup>3</sup>

There is an additional component to the Kiddush, namely the requirement that this declaration be said in the presence of wine (*Pesachim* 106a). Whether this component is also a Torah

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1. *Torat Kohanim*, first verse of *Bechukotai*.

2. *Rambam*, *Hilchot Shabbat* 29:1; *Chinuch* 31; *Tosafot*, *Pesachim* 106a s.v. *zachrehu*.

3. *Shulchan Aruch* OC 271:2.

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requirement is the subject of a debate. *Rashi*, *Ran*, *Ra'avan*, and *Aruch Hashulchan*<sup>4</sup> say it is biblical, while *Tosafot*<sup>5</sup> and *Rambam*<sup>6</sup> contend it is a rabbinic enactment.

The core of the Friday night Kiddush consists of the *bracha* (blessing) on wine followed by a longer *bracha* about Shabbat and the uniqueness of the Jewish people. These *brachot* are usually preceded by the verses describing the first Shabbat of Creation (Genesis 2:1-3).

Kiddush is recited again on Shabbat morning. According to almost all opinions this daytime Kiddush is not of biblical origin, but rather a rabbinic obligation<sup>7</sup> known euphemistically<sup>8</sup> as "*Kiddusha Rabbah* – the great Kiddush" (*Pesachim* 106a). This too is required for both men and women.<sup>9</sup> In its most basic form, the daytime Kiddush consists of just the *bracha* over wine – "*borei pri hagafen*."<sup>10</sup>

The Friday night Kiddush usually poses few halachic questions – it is almost always recited at the dinner table promptly after returning from synagogue. The one issue

4. *Orach Chaim* 271:2.

5. *Nazir* 4a s.v. *mai hee*; *Pesachim* 106a, s.v. *zochrayhu*.

6. *Hilchot Shabbat* 29:1, 6.

7. The *Magen Avraham* (OC 597:3) understood that the *Maharam* held the daytime Kiddush is biblically mandated (*d'orayta*) although he disagreed (OC 289:1). The *Mishnah Berurah* (*Sha'ar Ha'Tziyun* 597:7) disagrees with this interpretation of the *Maharam*.

8. *Maggid Mishneh*, *Hilchot Shabbat* 29:10; *Mishnah Berurah* 289:3; *Aruch Hashulchan* OC 289:3. See *Rashbam Pesachim* 106a, s.v. *kiddusha*; *Ramban* to *Shmot* 20:8; *Daat Torah* (*Maharsham*) 289:1 for other explanations of the name.

9. See *Mishnah Berurah* 289:6; cf. *Maharam Chalava* to *Pesachim* 106a, *b'yom mai*.

10. Many precede the *bracha* with verses from *Shmot* 31:16-17 and 20:8-11. Others felt that only the *bracha* should be recited and verses should not be said. Rav YD Soloveitchik reported that his paternal grandfather, Rav Chaim Soloveitchik, felt that only the *bracha* should be said. He, nonetheless, recited the introductory verses following the tradition of his maternal grandfather, Reb Elye Pruzhaner (see Rav Hershel Schachter, *MiPnenei Harav*, 2001, 71-72).

discussed is what to do if one does not have wine, a not infrequent occurrence in pre-20th century eastern Europe, but rare today. Because the role of that Kiddush is to transition from the weekday to Shabbat, it is unique amongst mitzvot that require a *kos shel bracha* (literally, a cup of wine upon which a blessing is recited), e.g. *bentching* (Grace after meals), *brit milah*, and weddings, in that the wine may be substituted with bread if necessary, in which case the Kiddush is recited after washing the hands and the *borei pri hagafen* is replaced with the blessing over bread, *hamotzi*.

Shabbat morning Kiddush often raises more issues, especially, although not only, when it is made at what is known as a "Kiddush" in the US and UK, or a "Bracha" in South Africa. The questions there generally arise because there are actually two halachic components to the Kiddush – a prohibition to eat once the obligation to make Kiddush devolves with the recitation of the morning prayers (*shachrit*) and the requirement of "*Kiddush b'makom seudah*", that to fulfill one's obligation the Kiddush must be recited as part of a meal, usually defined as including bread.<sup>11</sup>

Various halachic explanations have been proposed for the common practice of reciting Kiddush and eating at the social gathering before the formal meal, most authorities requiring<sup>12</sup> that at least a *k'zayit* (olive-size piece) of "*mezonot*" (e.g. cake) be eaten<sup>13</sup> at the Kiddush and that Kiddush be repeated at the "real" meal later.<sup>14</sup> Halachically it would seem that there is a

11. See the rather lengthy responsum of Rav Moshe Feinstein on this subject, *Iggerot Moshe* OC:4:63.

12. Cf *Yabia Omer* 2:19.

13. Or a second glass of wine (but not beer or schnapps) be drunk, *Mishnah Berurah* 273:25.

14. Whether Kiddush needs to be repeated is not discussed in the classic sources, most likely because it was not common in earlier times to have a "Kiddush" in shul and then to return home and have another meal. However, due to changing communal practices, some significant 20th century rabbis do discuss it. Rav Yosef Chaim Sonnenfeld (*Shalmat Chaim*

preference to recite *Kiddusha Rabbah* while sitting, especially if one person is reciting it for many others.<sup>15</sup> While these common Kiddush practices are acceptable to most authorities,<sup>16</sup> it is the other deviations from the baseline practice that raise more concerns.

The normative practice is to recite Kiddush using wine in a

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255) rules that it is proper to repeat Kiddush before the actual meal. Rav Avigdor Nebenzahl (*Yerushalayim B'moade'ha, Shabbat*, vol. 2, 124) assumes that the standard practice is not to repeat Kiddush, but in footnote 110 he relates that Rav Shlomo Zalman Auerbach in his later years told a questioner that it is worthy to repeat the Kiddush and that that was indeed his practice. Rav Hershel Schachter (*Eretz Hatzvi*, 5:8 [p. 46-47; cf *Beit Yitzchak* vol. 22, page 206]) says that according to Rav YD Soloveitchik it is proper to make Kiddush again at the meal. Rav Moshe Shternbuch (*Tshuvot V'hinagot* 1:264) explains that the meal requires Kiddush and thus he repeats Kiddush at home. He says that he has a basis for this in the *Shiltei HaGibborim*, and he thinks this is the proper procedure (*Moadim U'zmanim* 3:243 [p. 107]). Rabbi MD Tendler (telephone conversation July 27, 2016) summed up Rav Moshe Feinstein's position as "there is *kiddush b'makom seudah*, and the *seudah bemakom kiddush*", i.e. that the Shabbat meal should be introduced with Kiddush, and that indeed Rav Moshe's practice was to repeat Kiddush. Rav Betzalel Stern (*B'tzeil HaChochmah* 5:117) concludes that even if one fulfilled their Kiddush obligation at a "Kiddush", they should repeat Kiddush with the verses at the meal.

Rav Zvi Ryzman (*Ratz K'Zvi*, (5765) vol. 1, 11:7 [p. 162-3]) assumes that the standard practice is not to repeat Kiddush before the afternoon meal, and he explains the halachic justification. It is possible that many other contemporary *poskim* who do not mention this halacha also subscribe to this position and simply do not mention that there is no need to repeat Kiddush because they treat that as the default assumption. For example, there are several places in *Shmirat Shabbat K'hilchatah* and *Yalkut Yosef* where this halacha could have been inserted and yet is absent. They, like Rav Ryzman, might have simply held that once one fulfills his Kiddush obligation, irrespective of how, there is no need to repeat it and that there was no need to explicitly write that. They simply described in great detail how one fulfills the obligation.

15. *Rema*, OC 271:10; *Mishnah Berurah* 271:46; *Shmirat Shabbat K'hilchatah* 50:8)

16. Some follow the stricter interpretation of "seudah" as found in many of the *Rishonim* and the *Gra* and will not eat at a "Kiddush" unless they wash over bread. This was the practice of Rav Aharon Lichtenstein.

silver<sup>17</sup> or other ornamental Kiddush cup (*becher*) that is whole and contains at least a “*reviit*” of wine,<sup>18</sup> and after the recitation drinking at least “*m'lo lugmav*” (a cheekful). There are three fundamental deviations from those standard practices that are sometimes seen at a Kiddush (and sometimes at home as well) and these are: 1) the use of whiskey in lieu of wine, 2) using less than the requisite amount (i.e., a cup that holds less than a *reviit* and/or drinking less than a *m'lo lugmo*), and 3) using a paper or plastic disposable cup instead of a reusable, respectable utensil. Each of these changes raises halachic issues that have been addressed by halachic authorities in recent centuries.

The first question is whether wine is always the preferred beverage and what may be used in lieu of wine.<sup>19</sup> Ameimar (*Pesachim* 107a) teaches that “*chamar medinah*” – “wine of the province”<sup>20</sup> may be used for *Havdalah* in a locale where there is no wine. Based on the follow-up Talmudic discussion regarding whether the same is true for Kiddush, the *Rishonim* differ regarding the halacha. *Rambam*,<sup>21</sup> *Ran*, and others say that unlike *Havdalah*, beer may never be used for Kiddush even in a place with no wine.<sup>22</sup> On the other hand, *Rosh* says that *chamar medinah* may be used for Kiddush.<sup>23</sup> The *Shulchan Aruch* (OC 272:9) quotes both opinions regarding Kiddush on a non-wine beverage and then brings the *Rosh* in detail, stating that when there is no wine available, at Friday night bread

17. See *Kaf Hachaim* 472:11 and *Shu"t L'horot Natan* 4:25.

18. Minimally around 3.3 ounces; see footnote 32 herein for specifics.

19. *Da'at Torah* (289:2) cites the opinion of *Nachlat Shiva* that because the Shabbat morning Kiddush is not biblically mandated, even borscht may be used!

20. This is locale dependent and is defined as a beverage one would serve to a respected guest (see *Iggerot Moshe* OC:2:75) or the common drink served at a meal (*Shulchan Aruch Harav* OC 182:2).

21. *Hilchot Shabbat* 29:17.

22. See *Beit Yosef* OC 272.

23. *Pesachim*, ch. 10, siman 17.

should be used and in the morning of Shabbat, *chamar medinah*. The *Rema* (*ibid*) says this is the common practice. This all seems clearly to be discussing the use of an alternative if there is no wine available. Similarly, regarding the daytime Kiddush (OC 289:2), he mentions the other options “in a place where wine is not available”. Indeed, the *Prisha*<sup>24</sup> understood that the *Rema* advocated that even a person who vowed not to drink wine should nonetheless preferably make Kiddush on wine and have others drink it.

In the seventeenth century, the *Bach*<sup>25</sup> expresses wonderment at the widespread custom, even of great rabbis such as the *Maharshal*, to make Kiddush Shabbat morning on beer even though they had wine in the house. He says that he can, with difficulty, justify it by the fact that they want to exempt the beer that will be drunk during the meal with the *bracha* said at Kiddush. However, this only works for those continuing to drink the non-wine beverage during the meal, as they did hundreds of years ago. Today, many of the people who make Kiddush on schnapps do not drink more schnapps during the meal.

The *Taz*<sup>26</sup> too seems to have been troubled by the question that bothered his father-in-law, the *Bach*, i.e. the common use of beer for the Shabbat morning Kiddush. He writes that if there is wine available it is certainly preferable to use that instead of beer. However, he posits that if wine is very expensive, it is as if it is not available; that is the reason, he proposes, that in 17th century Poland and Russia even the great rabbis used beer. Even so, he concludes, if one uses wine it is superior.

The *Magen Avraham*<sup>27</sup> says schnapps (whiskey) should not be

24. OC 272:13.

25. OC 272 s.v. *v'al*.

26. OC 272:6.

27. OC 272:6.

used for Kiddush unless it is in a locale where that is the daily drink of the masses. The *Mishnah Berurah* echoes these sentiments.<sup>28</sup> He adds (272:30) that if a person particularly enjoys schnapps, he can even use it *l'chatchila* (*ab initio*), in those lands where it is *chamar medinah*, although elsewhere (182:13) he notes that the *Rema* advocates using wine even when expensive. The *Shulchan Aruch Harav* (272:11) rules that in places where wine is expensive one may be lenient to use *chamar medinah*, but nonetheless it is *mitzvah min hamuvchar* (the best way to perform the mitzvah) to always use wine for Kiddush.

The *Aruch Hashulchan* was also bothered by this question. He first (OC 272:13) summarizes and then rejects the previous answers on the basis that, bottom line, wine is preferred. He then (OC 272:14) offers his explanation of the phenomenon. He says that the earlier generations lived in Babylonia, Spain, France, and Germany, where grapes grow, while he and his contemporaries live in the northern climates (e.g., Lithuania) where grapes do not grow and thus they use either imported wine which is expensive and has questionable *hashgacha* (kosher supervision) or raisin wine, for which the *bracha* “*hagafen*” is questionable. Thus, when there is no halachic choice (such as Friday night) they use it, but during the day they opt for other drinks. Clearly, according to the *Aruch HaShulchan*, for most people today the situation is such that wine is the only acceptable option for daytime Kiddush.

Rav Ovadia Yosef<sup>29</sup> discusses what may be used for Kiddush, cites a litany of those who permit and those who prohibit non-wine, and concludes unequivocally that in a city in which there is wine, daytime Kiddush may be said only on wine.

Rav Chaim Elazar Spira (the Munkaczer Rebbe; d. 1937)

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28. OC 272:29.

29. *Yabia Omer* 3:OC:19.

explained that in his region in Hungary where wine is produced and is available, none of the explanations that applied in Poland, Russia, and Galicia applies, and there was no excuse to use anything but wine.<sup>30</sup> He says that those who want to rely on the *Divrei Chaim* (Rav Chaim Halberstam of Sanz, d. 1876) should know that he only used schnapps in Poland but when he was in Hungary he had someone recite Kiddush for him on wine and then he would say a *bracha she'hakol*<sup>31</sup> on the schnapps and drink it. He wanted to maintain his standard practice of drinking schnapps, but he held that in a place with wine, only wine could be used for Kiddush. He therefore fulfilled his Kiddush obligation with someone else's recitation and then did his usual thing. Thus, the Munkaczer reiterated, in a land in which wine is available, one should not make Kiddush on schnapps on Shabbat morning.

For those who choose to use something other than wine, in particular schnapps, the next question is how big must the cup be and how much must be drunk. In general, a Kiddush cup must hold a *reviit*, and *m'lo lugmav*, a "cheekful",<sup>32</sup> should be drunk. While for wine, beer, or most other *chamar medinah*, drinking this amount does not pose a challenge, clearly, for schnapps it can be difficult.

30. *Nimukei Orach Chaim* 272:1; note that today Munkacz is in the Ukraine.

31. Note that if he had drunk the Kiddush wine he would not have made a *bracha* on any other drink because just as the *bracha* on bread covers all other foods in the meal, so too the *bracha* on wine covers all drinks. See: Ari Z Zivotofsky, "Legal-ease: What's the Truth About ... Making *berachot* after kiddush?" *Jewish Action*, Winter 5763/2002, Volume 63, no. 2, pages 48-50.

32. Contemporary poskim differ as to the exact size of these rabbinic measures, and thus are willing to use smaller quantities for rabbinic obligations. A *reviit* is between 3.2 (Rav Chaim Na'eh), 4.4 (Rav Moshe Feinstein), and 5.1 (*Chazon Ish*) ounces (95, 130, 150 ml) for Friday night when Kiddush is biblical and 3.0 to 3.3 ounces (89-97 ml) for the rabbinic daytime Kiddush (see *Radiance of Shabbos*, p. 44, 101). A cheekful is drinker dependent, but for the average person a *m'lo lugmav* is a little more than half a *reviit* (SA OC 271:13). See however *Biur Halacha* 271 s.v. *shel*.

The general principle is that when using *chamar medinah* the same rules apply as for wine. Thus, the *Mishnah Berurah*,<sup>33</sup> Rav Chaim Kanievsky,<sup>34</sup> and *Shmirat Shabbat K'hilchatah*<sup>35</sup> all rule that when using whiskey for Kiddush one must use a standard *reviit* cup and drink a cheekful. If this is difficult, they recommend relying on what is otherwise viewed as a questionable practice-- combining the drinking of the others listening to add up to the required amount.<sup>36</sup>

The source of any possible justification for using less than the usual amount (*shiur*) is a position taken by the *Taz* (OC 210:1) in an entirely different context, the rules regarding a *bracha* after eating or drinking. The general principle is that for any small quantity of food or drink a *bracha* is made prior to ingesting, but if less than a *kezayit* of food or a *reviit* of liquid is consumed no *bracha* is recited afterwards.<sup>37</sup> On this, the *Taz* presents his novel position regarding whiskey. He observes that it is difficult to drink a *reviit* of whiskey and hence in his land, 17th century Poland, the rule should be based on the drinking practice of the majority of people and that on that smaller quantity a *bracha acharona* (blessing at the conclusion of eating) should be recited.<sup>38</sup> The *Magen Avraham* (190:4) and *Mishnah Berurah* (190:14) strongly rejected this novel position and argued that just as the *shiur* is constant for wines of different strengths and various other beverages of varying qualities, it is a constant established by *Chazal* and does not vary with the drink. Rav Ovadia Yosef (*Yabia Omer* 3:19) also rejected the opinion of the *Taz* and is emphatic that for both Kiddush and *bracha achrona* the *shiur* for schnapps is the same as for every other drink.

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33. 272:30.

34. *Shoneh Halachot* 272:2.

35. 53:19.

36. Based on the “*yesh omrim*” in *Shulchan Aruch* OC 271:13-14.

37. *Shulchan Aruch* OC 210:1.

38. *Chatam Sofer* (commentary to SA 272) rejects the position of the *Taz*. But see his *Responsa* OC 49 where he finds a support for the position of the *Taz*.

The logic the *Taz* used regarding a concluding *bracha* has been extended and applied by some to Kiddush (although the *Taz* himself never made that leap). Thus, the *Maharsham* (1:175:1) cites several examples of important rabbis who made Kiddush using a small cup of whiskey and then suggests that it is possibly justifiable because even a small quantity of whiskey is significant, and rules that those individuals are worthy of relying upon. *Eishel Avraham* (Butschatz OC 272: Magen Avraham 6) suggests that the position regarding *bracha acharona* can possibly be used to justify those who use a small cup for Kiddush on schnapps, but says that nonetheless it is proper to use a full sized cup even for schnapps.

Rabbi Ephraim Zalman Margaliot of Brodt (d. 1828) in the *Mateh Efraim* said one should use wine, but in his *Ktzeḥ Hamateh* (597:2) noted that many people in his time relied on the lenient opinion to use schnapps, and he even cited the justifications for a small cup. But he included a comment that for sweet or weak schnapps, called liquor, Kiddush must be made on a usual amount (*shu'ur*). He was criticized for defending using a small cup; nevertheless, he reiterated (625:99) his position by saying that if so many outstanding rabbinic figures acted as such, we cannot simply discount it. Of course, he also said that those who use a proper *shu'ur*, and even more so those who use wine, are to be commended.

*Minhag Yisrael Torah* (289:5 [p. 108]) observes that although most authorities reject the novel position of the *Taz* regarding the concluding *bracha acharona*, some do accept it for the less significant Shabbat morning Kiddush. *Minhag Yisrael Torah* (289:5, p. 109) cites an interesting variant (from *Imrei David*) that even according to those who follow the *Taz* and rule that only a small amount of schnapps need be drunk, that does not change the fact that a cup that holds less than a *reviit* is not called a *kli*—a vessel--and is like an incomplete utensil that is not usable for Kiddush (see below). Hence, they would say that a full size cup must be used, albeit drinking less than a *m'lo lugmav* suffices.

## The Kiddush Cup

When making Kiddush at shul, often the most convenient cup is a disposable plastic cup or a small plastic shot glass. That too raises a concern. The concept of disposable utensils was not widespread in the pre-modern era and was thus not addressed by earlier authorities. Contemporary authorities differ in their approach to the use of plastic or paper cups for Kiddush.

The *Shulchan Aruch* rules that the same requirements that govern the cup used for "bentching" (Grace after a meal) apply to the cup used for Kiddush, and one of those requirements (OC 183:3) is that it be a "complete cup."<sup>39</sup> It can have no cracks, not even in the base.<sup>40</sup> Based on those rules, Rav Moshe Feinstein wrote in 1968 that Kiddush requires an aesthetically pleasing cup, and in his opinion a disposable cup is worse than a cracked cup, is not dignified, and certainly may not be used for Kiddush (or *bentching*).<sup>41</sup> He begrudgingly wrote that if there is no other cup, maybe one can be lenient. The great Sephardi *posek*, Rav Benzion Abba Shaul (d. 1998) ruled similarly, without explanation<sup>42</sup> and that was also the position of the "Steipler".<sup>43</sup>

Another argument against using disposable cups for Kiddush was raised by the former head of the *Beit Din* of the

39. OC 271:10. If nothing else is available, a less than perfect cup may be used for *bentching* (*Mishnah Berurah* 183:10, 11; *Sha'ar Ha'tziyun* 183:14).

40. *Magen Avraham* 183:5.

41. *Iggerot Moshe* OC 3:39. Rav Moshe Feinstein does not distinguish between a paper cup and a hard plastic one that is easily rinsed and could be used several times (see Rabbi Simcha Bunim Cohen, *The Radiance of Shabbos*, 1986, Artscroll, ch. 9, note 5 [p. 44]).

42. *Ohr Le'tzion*, vol. 2, 47:12 [p. 314].

43. Rav Yaakov Yisrael Kanievsky; *Orchot Rabbenu*, p. 110. Those who rule that disposable cups should not be used do not distinguish between one or multiple cups and there seems to be no basis for the popular practice of stacking two such cups.

*Eida Chareidit*, Rav Yitzchak Yaakov Weiss. In 1986 he was asked about paper cups.<sup>44</sup> He first noted that according to Rav Moshe Feinstein a disposable cup may truly be worse than a cracked cup and although the latter is acceptable if there is no choice, the former may not be. He then raised an additional concern: He explained that a disposable utensil is not halachically a *kli*, a utensil. (Hence, as he explained in two previous responsa, disposable pans do not require immersion in a mikvah.) Similarly, because of this, disposable cups should preferably not be used for Kiddush, *bentching*, or washing the hands prior to a meal (*netilat yadayim*). He suggests that if there is nothing else available, one can have intention to re-use it and thereby imbue it with the status of a *kli* and use it for Kiddush. In conclusion, he quotes sources that the Satmar Rebbe was careful not to recite Kiddush using a disposable cup, and that, he opines, is how one should act.

*Shmirat Shabbat K'hilchatah* rules that a disposal cup should preferably not be used, but if there is no other cup it is permissible.<sup>45</sup> He notes (note 51) that Rav Shlomo Zalman Auerbach told him that because disposable cups are such that important people do use them for important meals, one should not be too concerned if there are no other cups available. If this condition is no longer accurate, and it is likely that state dinners do not use paper or plastic cups, it is not known what Rav Auerbach would have said. On the other hand, many of today's disposal cups are made sturdier and "classier" than 40 years ago and possibly even Rav Moshe would not object to their use.

Not everyone agrees that disposable cups are not a *kli*. One of the earliest to rule on this in 1956 was Rav Moshe's colleague at the helm of defining halacha in the US at that time, Rav Yosef Eliyahu Henkin. He stated that it is self-evident that it is a mitzvah to use a nice cup for Kiddush.

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44. *Minchat Yitzchak* 10:23.

45. Vol. 2, 47:11.

However, in his opinion, paper cups are *kelim* and thus if one has no other or is poor, a paper cup may be used.<sup>46</sup>

Rav Ovadia Yosef, in his typical style, cites a long list of authorities on both sides of the issue and concludes that because the cup is complete as it was made, it is considered whole. Furthermore, it is capable of being used multiple times and it is only because it is so cheap that it is thrown out. Hence, he says that from the basic halacha there is nothing wrong with using it; however, because of *hiddur mitzvah* (the principle that a mitzvah should be performed in the best manner possible), one should be stringent and use a different type of cup.<sup>47</sup>

After reading Rav Moshe's responsum on the issue, Rav Eliezar Waldenberg responded very similarly to what Rav Ovadia Yosef said.<sup>48</sup> He opined that as long as the paper cup is complete as it was manufactured, it is considered whole. And he asserts that these cups definitely have the status of a *kli*<sup>49</sup> and thus may be used even *ab initio* for Kiddush.

Rav Binyamin Zilber initially wrote in 1973, having not yet seen Rav Moshe's responsum, that he saw no halachic source that a disposable cup is not a *kli*, but nonetheless if a different cup is available it should be used because of *hiddur mitzvah*.<sup>50</sup> After being shown the responsum in *Iggerot Moshe*, he added an addendum to his own writing (pages 144-5) and said that he, too, wrote that ideally a different cup should be used and thus there is little difference between his position and Rav

46. *Kitwei Harav Henkin* [5749] vol. 2, 17:2.

47. *Journal Beit Hillel*, (8:5) 31, Tevet 5768, pages 16-17; cf. *Yalkut Yosef* 271:41.

48. *Tzitz Eliezer* 12:23.

49. Those who rule to treat disposable cups as a "kli" would presumably have another explanation as to why disposable pans do not require immersion in a mikvah (*tevillah*). Or maybe they would rule that they indeed do.

50. *Az Nidberu* 6:48.

Moshe's. He further added that he disagreed with Rav Moshe's proof, was not sure that *hiddur* even applied to the Kiddush cup, but that if the "gaon" [Rav Moshe] said as such, it is proper to ideally follow his ruling.

In conclusion, the Shabbat morning Kiddush can have several issues:

- The first issue is the use of a beverage other than wine. The *Rambam* never permits another beverage. Most other authorities approve of *chamar medinah* under specific circumstances. Nonetheless, an objective reading of the sources reveals a clear preference for wine when it is available. Kosher wine is today abundantly available in all countries with sizable Jewish communities.

The definition of *chamar medinah* is the source of much controversy. It seems that wine, even in places where it is not the primary drink at all meals (i.e. contemporary Israel and the US as opposed to France or Israel during the Roman period), always maintains its role as the honored and preferred beverage, because of its properties of satiating and gladdening, and that it is served to honored guests. Thus, it maintains pride of place as the ideal beverage for Kiddush and *Havdalah*.<sup>51</sup> Schnapps is both alcoholic and served to guests and would thus seem to qualify as *chamar medinah*. Because of that, some opinions permit its use for Kiddush even if it is not drunk regularly and even if wine is available, while others sanction its use only in a place where there is no wine or it is a common drink. Nowadays, wine is readily available in endless varieties and prices in both the US and Israel.

Rabbi Simcha Rabinovitch<sup>52</sup> concludes his discussion of the use of whiskey with "there are holy congregations that even today, when wine is readily available in all places, make Kiddush Shabbat morning on whiskey or liquor, and because

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51. See *Aruch HaShulchan* OC 272:14.

52. *Piskei Tshuvot* [5771], 289:11.

they have such a tradition from their ancestors, Kiddush on whiskey is more special to them than over wine, and is acceptable. However, someone who does not have such a tradition should certainly not make Kiddush on whiskey but rather over wine, unless he hates wine or it is injurious to him or it is in a place where there is no wine.”<sup>53</sup>

- Regarding using a small cup, the halachic issues seem even more significant. The halachic sources all seem to mandate using a standard volume, and regarding this, Rabbi Rabinovitch writes “in this too we find a tradition of great and holy rabbis who made Kiddush on small cups of whiskey and tasted only a little... nonetheless, here too someone who does not have a clear tradition should not be lenient.” The halachic sources are almost unanimous in requiring a standard volume irrespective of the drink used.
- Those who use disposable cups certainly have *poskim* on whom to rely, but 40 years ago Rav Moshe Feinstein emphatically opposed their use.

Kiddush serves to sanctify the Shabbat meal<sup>54</sup> by

53. As for example, the practice of Rav Elazar Mayer Teitz, who relates that when he first entered the rabbinate in 1958 *yayin mevushal* was not available and it was impossible to restrict access to *shomrei Shabbat*, so he did not permit wine in his shul. He had limited tolerance for alcoholic beverages so would be unable to drink the proper amount of other alcoholic beverages. Thus, based on a ruling of his *roshei yeshiva* from Telshe, he made Kiddush for the shul on soda, and continued to do so until grape juice became prevalent. While soda (called by some pop) would certainly seem to be *chamar medinah* in America, it is worth noting that there are opinions that reject the use of soda for Kiddush or *Havdalah*.

54. Because the Kiddush is what defines the meal as a “Shabbat meal”, the food should not be brought to the table until after Kiddush, and the food that is there (the *challah*) is covered. Rav Hershel Schachter (*MiPninei HaRav*, 2001, 69-70) quotes a story in which Rav YD Soloveitchik reluctantly attended an RCA conference at a hotel and upon seeing the food on the tables before Kiddush insisted that the waiters clear it all and only return it after Kiddush. He held that one should be careful about this both Friday night and Shabbat day.

distinguishing and separating it from weekday meals. Its recitation before bringing the food to the table establishes the meal as a holy convocation. That recitation is steeped in meaning and tradition, and the manner in which the short oration is said should be given the appropriate halachic consideration.

# Bourbon Owned by a Jewish Company over Pesach

*Rabbi Dovid Cohen*

## A. Introduction

### Overview

Food production in the modern age is a far more complex undertaking than it once was, particularly food prepared for mass commercial distribution and sale. The following article seeks to enlighten the public about an ancillary area of Jewish law which impacts upon the decision whether to certify a product as acceptable for use. Jewish law and Jewish life constitute a seamless garment, and it is not possible to separate the question of whether a product is technically kosher as far as its ingredients, from the larger question of whether the product may be used by a Jew concerned with following Torah law. The author apologizes in advance for the unavoidably technical nature of this discussion, which is nevertheless necessary in order for one to appreciate the multi-faceted complexity of kosher certification in the modern age.

In December 2009, a bourbon<sup>1</sup> company applied for kosher certification. During the initial visit to the company we (the kashrut-certifying organization) learned that the company is

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1. The company produces a wide range of alcoholic beverages but since their primary products are bourbons, we will focus on that item.

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completely owned by one Jew, who is so estranged from religious practice that he has never performed a *mechirat chametz* – he has never sold his *chametz* to a non-Jew for the duration of Passover. *Chametz*, of course, is totally forbidden to be owned by a Jew during Passover. In order to make sure that people would adhere to this most stringent biblical requirement, the Rabbis attached a penalty, a *k'nas*, to that transgression: any *chametz* owned by a Jew over *Pesach* (*chametz she'avar alav hapesach*) is forever forbidden from use.

Consequently, finding out the realities of ownership immediately raised the question of whether all bourbon produced by this company should be forbidden as *chametz she'avar alav hapesach*, since (a) bourbon is typically made from approximately 30% *chametz*,<sup>2</sup> and (b) it is always aged for at least two years. Thus, every retail bottle of bourbon from this company contains *chametz* which was owned by a Jew for at least two *Pesachs*.<sup>3</sup> Moreover, it was felt that there was a need for a uniform rabbinic policy on this matter, and therefore other major kosher certifiers were asked to participate in deliberating on this question and arriving at a policy decision.

After investigating the practical and halachic issues and consulting with numerous American and Canadian *Poskim*, the *Poskim* for the largest *hashgachot* unanimously agreed to publicize the information in May 2010 so that the public would refrain from purchasing these bourbons in the future.<sup>4</sup>

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2. Bourbon is typically made from approximately 70% corn, 20% rye (or wheat), and 10% malted barley; of course, rye, wheat or barley which mix with water create *chametz*.

3. The whiskey produced by most other companies does not pose a concern of *chametz she'avar alav hapesach* because those companies are either owned by non-Jews or the companies agreed to sell their *chametz*. Therefore, the issue seems limited to the multiple layers of this one company.

4. See <http://bit.ly/r1ImVc>. [The discussions and publicizing of the information were performed under the aegis of AKO, the Association of Kashrus Organizations.] The following is a list of *Poskim* who participated in the discussion and the name of the *hashgachah* which they represent: Rabbi

At the same time, some of the *Poskim* involved were of the opinion that there might be sufficient grounds for people to be lenient if they already owned significant amounts of these beverages, disposing of which would entail considerable financial loss.

This article will discuss some of the major points suggested by the aforementioned *Poskim* and by others who have participated in the ongoing halachic discussion. The general question of whiskey owned by a Jew over *Pesach* is a well-worn set of halachot and there is limited value in repeating those details. Instead, many of those points will merely be referenced in the footnotes, and our discussion will focus on the issues that were unique to this case and/or have a particularly modern angle or application.

This article is based on confidential discussions held between *Poskim*, in the presence of this author. The names of those *Poskim* are recorded in footnote #4, but due to the private nature of those discussions, the positions quoted in this article will not be attributed to any specific *Posek*.

## Bourbon Production

The following brief description of how bourbon is produced will be useful in understanding some of the points made in subsequent sections of the article.

- Barley is soaked in warm water until it releases a particular enzyme (beta amylase) which causes the starch molecules in the barley and other grains to break down into smaller sugar molecules.
- Into a syrupy mixture of the aforementioned sugars

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Yisroel Belsky *z"l* (OU), Rabbi Shlomo Gissinger (Kof-K), Rabbi Moshe Heinemann (Star-K), Rabbi Shlomo Eliyahu Miller (COR), Rabbi Herschel Schachter (OU), Rabbi Gedalia Dov Schwartz (cRc), Rabbi Avraham Shlomo Teichman (Heart-K), Rabbi Hillel Weinberger (Hisachdus), Rabbi Yonason Binyamin Weiss (MK), and Rabbi Menachem Meir Weissmandel (OK).

and some water, the company adds yeast which converts the sugar into alcohol, thereby creating a “beer” which is approximately 9% alcohol.

- The “beer” is distilled until it is approximately 62.5% alcohol. Distillation is the process of heating an alcoholic beverage to above the boiling point of alcohol (173° F) but below the boiling point of water (212° F) so that the alcohol and flavor boil out, and most of the water is left behind. The vapors created during this heating pass through a pipe towards another vessel where they are cooled and condensed into a liquid which has a relatively high concentration of alcohol.
- The distilled beverage is put into new oak casks where it ages for a few years, after which the matured bourbon is watered down to 40-50% alcohol, bottled, and sold to consumers.

The possible reasons to permit the whiskey will be divided into three sections – ownership, whiskey, and *bitul*.<sup>5</sup>

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5. One discussion that does not fit into any of these categories is whether the people who became aware of the Jewish ownership of the *chametz* were required to publicize the information, as follows. *Nesivot HaMishpat* (234:3) holds that someone who accidentally consumed an *issur d'rabbannan* (rabbinically prohibited item) does not have to perform *teshuvah* because he did not knowingly rebel against the commands of *Chazal*. Accordingly it was suggested that maybe there is no need to inform the public that specific bourbons are *assur mid'rabbannan* (as *chametz she'avar alav hapesach*) because people who do not know they are eating an *issur d'rabbannan* are in fact not doing anything wrong! The reasons this was rejected was because (a) many/most *Poskim* disagree with *Nesivot HaMishpat*, (b) *Nesivot HaMishpat* is discussing someone who already consumed the food, but he may agree that people – and especially *kashrut* agencies who are charged with protecting consumers from eating forbidden foods – must try to prevent someone from eating it in the future, and (c) there are those who reconcile *Nesivot HaMishpat* with *Rema* YD 123:3 by suggesting that *Nesivot HaMishpat* agrees that his principle does not apply to foods which are *assur b'hana'ah* (forbidden to have pleasure from) such as *chametz she'avar alav hapesach*.

## B. Ownership

As noted above, there is a particular Rabbinic penalty attached to *chametz* which was owned by a Jew over Passover; to avoid this penalty, Jews have traditionally “sold” their *chametz* and “bought it back” after the holiday. If the bourbon company was not owned exclusively by a Jew, there might not be a problem; therefore, it became necessary to determine whether the owner is indeed a Jew according to Jewish law (Halacha). Considerable efforts were made to determine whether in fact the company<sup>6</sup> is owned by just one person who has never performed *mechirat chametz*.<sup>7</sup> Multiple sources, including family and friends who have known him for decades or from birth, confirmed that the owner was born to Jewish parents and has always considered himself Jewish.<sup>8</sup>

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6. It is noteworthy that the Jewish person did not buy all of the whiskey companies at once, such that someone who purchased a bottle more than a few years ago may have bourbon which was sold before the Jew owned it. The public letter on this issue (referenced in footnote 4) contains information on this.

7. Subsequent to the discovery that this Jewish person owns a whiskey company, he was asked if he would consider performing *mechirat chametz* in the future. Thus far, he has not agreed to the suggestion, and that raised the question of whether one could perform *mechirat chametz* for him even if he does not give permission. Some suggested, based on *Shulchan Aruch* 443:2, that one could sell the *chametz* based on the principle of *zachin le'adam sheloh b'fanav* (one may perform beneficial acts for someone even without his permission), but others suggested that this is not valid if the owner has specifically stated that he does not want his *chametz* sold. For more on this see *Sdei Chemed*, *Chametz U'matzah* 9:2, and *Mikraei Kodesh*, *Pesach* I:71.

8. Some suggested that the penalty of *chametz she'avar alav hapesach* should not apply because (a) the company is set up as a corporation, (b) the owner is not religious and might therefore qualify as *mumar dino k'akum* (a Jew who rejects the Torah's commandments has the same status as a non-Jew) and (c) the penalty might be limited to situations where the threatened fine could possibly encourage the person to destroy or sell his *chametz* but not to people who completely disregard all halachot. For some discussion of these points and why they are rejected by most *Poskim*: see *Journal of Halacha and Contemporary Society*, Volumes 4 and 8 (starting on pages 62 and 88 respectively) (for Point A) and *Sheilat Dovid OC* 4, *Zecher Yitzchak* 8, *Magen*

While it is clear that the person (and his family) considers himself Jewish, he is technically not fit to provide testimony in a Jewish court to that status, due to his not being religious. If one traces all of the evidence to its original sources it becomes clear that all of the primary sources attesting to his Jewishness are themselves irreligious people, and there is actually no religious person who has firsthand knowledge that the owner is Jewish. For example, a religious man who has known the owner since childhood, only “knows” that the owner is Jewish because he has always been told that by the owner and his irreligious family members.

Accordingly, one *Posek* suggested that maybe this type of evidence is insufficient to determine with certainty that the owner is Jewish, and since *chametz she'avar alav hapesach* is a Rabbinic restriction, we can rely on the principle that one may be lenient when there is an issue of doubt regarding questions of Rabbinic law (*safeik d'rabannan l'kulah*)!

To support this suggestion, the *Posek* pointed to a responsum (*teshuva*)<sup>9</sup> in which Rav Moshe Feinstein allowed a *ba'al teshuva* (penitent) not to believe his irreligious father's declaration that he is a *Kohen*. Just like that father does not have the halachic credibility to determine his son's status, so too we might posit that the irreligious family cannot establish with certainty that the owner in question is Jewish. If so, anyone who owns whiskey produced by this company would be permitted to continue to consider it kosher.

However, others argued that our case is different from the rather unusual case related in the *teshuva* of Rav Moshe, because there the father had only made one statement in his life that he was a *Kohen* and there was other evidence to contradict the claim, while in our case the owner and his entire

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*HaElef* 448:7, *Minchat Yitzchak* 3:1, and *Iggerot Moshe* EH 1:7 (for Points B and C).

9. *Iggerot Moshe* EH 4:21.

family have always professed to be Jews.<sup>10</sup> The *Posek* who originally suggested this point appeared to accept the arguments of the others and retracted this possible reason to be lenient.

### C. Whiskey

When the process of distillation to make whiskey was first discovered, it was suggested that maybe the condensed alcohol does not have the same halachic status as the liquid/beer it was distilled from, because it was in a vapor-state in between. If this would be true, bourbon (or other whiskey) made from *chametz* grains would not be forbidden on or after *Pesach*. At the time this suggestion was made many centuries ago, this position was rejected by *Rivash* and *Rosh*,<sup>11</sup> and their strict ruling is codified in *Shulchan Aruch*.<sup>12</sup> Nonetheless, there are some *Acharonim*<sup>13</sup> who hold that one may rely on the lenient view on this question – known colloquially as “whiskey is *zei’ah*” – and some *Poskim* considering this issue were willing to rely on that position in cases where that would save a person from a great financial loss (*hefsed merubah*).

In addition, one *Posek* suggested a reason why all whiskey would essentially never be *chametz she’avar alav hapesach*.<sup>14</sup> He

10. Additionally it was noted that our situation is different because (a) there are religious Jews who have known the owner most or all of his life and can “testify” that he is Jewish, and (b) the parties involved all understand that as relates to this issue it would be “better” to say the owner isn’t Jewish and yet they continue insisting that he is.

11. *Responsa Rivash* 255 and *Responsa Rosh* 20:26.

12. *Shulchan Aruch* YD 123:24 and 92:8.

13. See the many opinions cited in *Sha’arei Teshuvah* 442:2, and see also *Mishkenot Yaakov* YD 34, *Achiezer* YD II:11:a (end), *Chok Yaakov* 442:4, *Pri Megadim* (A.A.) 442:9, *Aruch HaShulchan* 442:20, and *Mishnah Berurah* 442:4.

14. Another mistaken suggestion along these same lines was that alcohol is created by a combination of grain **and** water, and that the alcohol created in this manner has the status of a “*yotzeh*” (derivative) rather than a mere by-product. Although a *yotzeh* is forbidden, the prohibition is less serious than

posed that the first time the grain comes into contact with water, the water is already so hot that the process might qualify as *chalitah* / scalding, which permanently prevents the grains from becoming *chametz*.<sup>15</sup> The error with this was that the water is specifically only 120-140° F so as to encourage the enzymatic activity required to break-down of the starches into sugar, and such a process is obviously not *chalitah*.<sup>16</sup> In fact, grains put into water which is warm in this manner will become *chametz* in less than 18 minutes.

### D. *Bitul*

By far the most attention was paid to the fact that the question revolved around bourbon which, as noted, is only partially made from grains that can become *chametz* (rye and barley) and is primarily made from corn (non-*chametz*). The central issue which might be a factor in permitting the bourbon is an issue called *bitul*. *Bitul* means “nullified”; i.e., if there is only a relatively small amount of a forbidden substance included in a finished product, Jewish law considers

against one who eats the actual forbidden food (see Rambam, *Hil. Ma'achalot Asurot* beginning of Chapter 3) and therefore would not be forbidden as *chametz she'avar alav hapesach*. The mistakes with this suggestions are that (a) the grain sits in warm water for an extended time long before it is fermented into alcohol, so that actually the grain becomes *chametz* before it becomes alcohol, and (b) the changeover is just sugar turning into alcohol and does not involve the water or any other item. (The chemical formula is C6H12O6  $\square$  2C2H5OH + 2CO2). The water's presence merely allows the solution to be more hospitable to the yeast's functioning, but is not involved in the actual fermentation; when apprised of these facts, even the Rav who proposed this logic agreed that it does not qualify as a *yotzeh*.

15. *Chalitah* is discussed in Gemara, *Pesachim* 39b, and is described in *Mishnah Berurah* 454:11. Although nowadays we may **not** rely on *chalitah* even *b'dieved* (see *Shulchan Aruch* 454:3 and commentaries ad loc.), the suggestion was that possibly one could rely on it as relates to the *issur d'rabannan* of *chametz she'avar alav hapesach*.

16. After this process, the grains are brought to a higher/boiling temperature to stop enzymatic activity, but by that time the grains are already *chametz*.

it as “*batel*”, negligible, and effectively its presence is nullified. However, the essential point to clarify is — how much or how little of the forbidden substance must be present in order for its presence to be irrelevant? Specifically, it has to be determined how much percentage of *chametz* must there be in a food in order for it to be considered forbidden as *chametz she'avar alav hapesach*? Following are the reasons why the fact that bourbon is only partially *chametz* (and primarily corn) might be sufficient to somehow render the *chametz* as *batel*/nullified, and therefore permitted post fact (*b'dieved*).

### 1 – *Bitul b'rov* before *Pesach* – *Magen Avraham*

*Shulchan Aruch*<sup>17</sup> rules that *chametz* which was mixed into non-*chametz* before, during, or after *Pesach* is forbidden as *chametz she'avar alav hapesach* unless the *chametz* was diluted in 60 times its volume (*batel b'shishim*). However, *Magen Avraham*<sup>18</sup> says that many argue that the food is permitted even if it there is just more non-*chametz* than *chametz* (*batel b'rov*).

In the view of one *Posek*, *Magen Avraham* is lenient regardless of whether the *chametz* was mixed into the other food before or after *Pesach*. According to this understanding (and if we accept *Magen Avraham*)<sup>19</sup> bourbon made from more than 50% non-*chametz* grains would be permitted. The *chametz* grains (barley, wheat, and rye) are *batel* in the corn as relates to the halacha of *chametz she'avar alav hapesach*, and therefore the bourbon would be permitted. [See also Point #4 below.] However, the issue with this suggestion is that the Vilna Gaon and *Mishnah Berurah*<sup>20</sup> both assume that *Magen Avraham* is only lenient if the

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17. *Shulchan Aruch* 447:11.

18. *Magen Avraham* 447:44.

19. The suggestion in the text was made bearing in mind the ruling of *Mishnah Berurah* (447:105) that one may rely on *Magen Avraham* in cases of significant loss or a pressing need (*hefsed merubah* or *sha'at hadchak*).

20. *Gr"a* ad loc. s.v. *bein*, and *Mishnah Berurah* 447:105.

*chametz* was mixed into other food *after Pesach*, but if it was mixed in before *Pesach* then all agree that the *chametz* must be diluted in 60 times its volume.<sup>21</sup> Therefore, most *Poskim* rejected this possible leniency.

## 2 – *Min b'mino b'shmah*

The following reasons to possibly be lenient all revolve around a difference in halacha between mixtures which involve two or more similar substances mixed together *min b'mino* (like mixtures) and those resulting from unlike substances being mixed together – *min b'shaino mino*. Those terms will be defined and discussed in more detail below, but the halachic difference between them is that generally, on the Torah level, non-kosher (or *chametz*) which falls into kosher is nullified when it is less than half (*batel b'rov*) if the mixture is of two like substances – *min b'mino*,<sup>22</sup> but if it is a mixture of unlike substances – *min b'shaino mino* – 60 times more of the acceptable substance is required in order to nullify the presence of the forbidden ingredient.

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One *Posek* suggested that *Chok Yaakov* 447:48 supports the lenient reading presented earlier in the text. However, the fact that *Chok Yaakov* considers whether the *chametz* is a *davar sheyesh lo matirim* indicates that the *chametz* was *batel b'shishim* (which is when the question of *yesh lo matirim* is relevant). See also *Chok Yaakov* 447:51 who seems to clearly state that *chametz* which was *batel b'rov* into other food before *Pesach* may not be eaten. (He does, however, appear to permit one to have benefit from such a mixture, and this may be a meaningful *heter* for a storeowner who would like to sell his stock of bourbon.)

21. What is the difference whether it is *batel b'rov* before or after *Pesach*? *Gr"a* explains that any food which a Jew may not own on *Pesach* (*mid'oraitah*) becomes forbidden as *chametz she'avar alav hapesach*, and this includes all foods into which *chametz* was *batel b'rov* before or during *Pesach*. However, *chametz she'avar alav hapesach* is itself only forbidden if it is in its "pure" state. Therefore, if the *chametz* was mixed into food before or during *Pesach*, it is forbidden for the Jew to own the entire mixture, and if he does it is *chametz she'avar alav hapesach* even though less than 50% of the food is *chametz*. If however, *chametz* was *batel b'rov* in other foods *after Pesach* that is the case where *Magen Avraham* is lenient.

22. In that case, *bitul b'shishim* is only a Rabbinic requirement.

As a general rule, the Rabbinic penalty forbidding use of *chametz she'avar alav hapesach* applies only if the Jew owned *chametz* in a manner that the Torah forbids (*bal yeir'ah mid'oraitah*). Accordingly, if a mixture of *chametz* and non-*chametz* was kept over *Pesach*, the food is permitted if either (a) it is a mixture of like substances (*min b'mino*) and the *chametz* is less than half (*batel b'rov*)<sup>23</sup> or (b) it is an unlike mixture – *min b'shaino mino* – and the *chametz* is nullified if it is less than 1/60th of the admixture (*batel b'shishim*).

The Gemara<sup>24</sup> cites a disagreement as to how to determine if a mixture is *min b'mino* or *min b'shaino mino*. Is a “like” mixture determined by whether the items in question have a similar name / title (*sh'ma* שְׁמָה) or by whether they have a similar taste (קָנָעַ, *ta'ama*)? One of the Gemara's examples is different types of vinegar which share the same title (vinegar) but taste different from one another. The halacha follows the opinion of Rava that “title” or “name” is the criterion, but there is a debate between the classical *Poskim* as to which situations this halacha applies. *Rema*<sup>25</sup> says that it applies to the standard case of forbidden food mixed into kosher, but *Shach*<sup>26</sup> argues that it is limited to certain very specific cases where even nullification by 60 times is insufficient. He reasons that since we are of the opinion that *ta'am k'ikar* (even the mere taste of a forbidden food is also forbidden), the taste of the forbidden item is the most important issue in determining if it is *batel*, and not the similarity of name. Most *Acharonim* find *Shach*'s argument very convincing and typically we accept that approach. However, it is noteworthy that *Chavat Da'at*<sup>27</sup> and others defend *Rema*'s

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23. In this case, there is an *issur d'rabbannan* to keep the *ta'aruvot* (mixture) over *Pesach* (since the *chametz* is not *batel b'shishim*) but on the *d'oraitah* level there is no *bal yeira'eh* and therefore the *ta'aruvot* is permitted after *Pesach*.

24. Gemara, *Avodah Zara* 66a.

25. *Rema* YD 98:2.

26. *Shach* YD 98:6.

27. *Chavat Da'at* 98:3.

position; therefore there is a basis for relying on that opinion in specific situations.

One *Posek* suggested that this controversy is directly relevant to our situation. As noted, bourbon is a mixture of approximately 70% non-*chametz* alcohol and 30% *chametz* alcohol. Just as in the case of vinegars cited above, the two different alcohols are considered to have a common title (alcohol) but different tastes. According to *Shach* the different tastes means that the mixture is considered as being of two kinds, *min b'shaino mino*, which on a Torah level requires nullification by 60 times – *bitul b'shishim* – which of course does not exist here. However, since the *chametz* and non-*chametz* alcohols have a similar title, *Rema* would maintain that since the mixture is of like kinds on a Torah level the *chametz* is nullified by the preponderance of non-*chametz* (and only on a Rabbinic level will 60 times more be required). [See also Point #4 below.]

The very practical difference between these opinions is that according to *Shach*, bourbon owned by a Jew over *Pesach* is forbidden as *chametz she'avar alav hapesach* (since it was not *batel* before *Pesach*) but according to *Rema* the *chametz* portion was *batel* (on a biblical level) before *Pesach* and therefore, although it was Rabbinically forbidden for the Jew to own it over *Pesach*, the bourbon remains permitted after *Pesach*.

Although, as noted, the general practice is to follow the opinion of *Shach*, in this case where the question is limited to not more than a Rabbinic restriction of *chametz she'avar alav hapesach*, this *Posek* suggested that it is acceptable to rely on *Rema* and permit the bourbon at least in cases of substantial financial loss.

In summary, this *Posek* held that since barley alcohol, rye alcohol, and corn alcohol all share the title “alcohol”, one can follow the opinion of *Rema* that these are considered as a mixture of like substances, *min b'mino*. Consequently, the *chametz* becomes nullified before *Pesach* and the bourbon is not *chametz she'avar alav hapesach*.

Others argued that, on the contrary, corn and rye alcohol in fact do not share the title “alcohol” since in common vernacular they are referred to as “bourbon” and “rye”, respectively, and not as “alcohol”. If so, even *Rema* should agree that this mixture is not of one kind and it needs sixty times as much to nullify it, even on the biblical level.

However, the one who supported the lenient line of reasoning presented a defense of his argument, based on a deeper understanding of the art of bourbon production. Each of the three grains used in bourbon changes into alcohol, but they each have different primary roles – corn’s main function is to provide alcohol, rye is used to contribute taste, and barley is an enzyme source.<sup>28</sup> Accordingly, the terms “bourbon” and “rye” (without the “alcohol” suffix to their title) are reserved for the finished products which are blends of different alcohols, and the individual alcohol raw materials would, in fact, be referred to by the titles “corn alcohol”, “rye alcohol”, and “barley alcohol” (much as the different vinegars all share the title “vinegar”). Thus, in considering the ingredients used in producing bourbon, it is accurate to treat them as sharing a common title (alcohol); we can then posit that according to *Rema* they constitute a mixture of like kinds, which would render the *chametz* halachically nullified, as it is less than half the mixture. Consequently, it would not be forbidden after *Pesach*.

### 3 – *Min b'mino b'ta'amah*

One *Posek* thought to take this even one step further, based

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28. Thus, although the grain used in bourbon must be between 51% and 100% corn, in practice it is very rare for anyone to produce bourbon from 100% corn because such a product would be severely deficient in taste. Similarly, it is not common for a “rye whiskey” to be produced from 100% rye because then the beverage would be missing the standard enzyme source.

on *Minchat Baruch*<sup>29</sup> who says that as relates to distilled alcohol even *Shach* agrees that a mixture of alcohols is considered *min b'mino*. The reason for that may be that although (for example) rye and corn alcohols taste different from one another when they are first fermented into "beer", the distillation process separates and purifies the alcohol from the (water and) unique flavor of the original grain. Accordingly, the finished mixture of rye alcohol and corn alcohol is essentially a mixture of two alcohols which – at this point – taste similar enough to one another to qualify as *min b'mino* even according to *Shach*. Of course, there is a certain amount of flavor carryover into the alcohol, and the rye alcohol does taste somewhat different from the corn alcohol, but that difference in taste is so minimal that the two liquids still qualify as having the "same" taste. This is different than a pre-distillation alcohol mixture or the Gemara's example of a mixture of (non-distilled) vinegars where the taste of the forbidden vinegar is significantly different from that of the permissible one.<sup>30</sup>

According to this approach, even *Shach* would agree that distilled bourbon owned by a Jew over *Pesach* is not forbidden as *chametz she'avar alav hapesach*, and it may be appropriate to rely on *Minchat Baruch* in situations where the person will otherwise have a significant loss (*hefsed merubah*).

Others, however, strongly disagreed with this line of reasoning, for the following reasons:

- Personal experience indicates that there is a significant difference in taste between rye whiskey and corn

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29. *Minchat Baruch* 63.

30. One might ask that if the mixture was *min b'mino* before distillation and the *chametz* was therefore not *batel* (according to *Shach*), it should never become *batel* much like a case of *hishbe'ach v'achar kach pagum* (*Shulchan Aruch* YD 103:2)? *Minchat Baruch* answers that in our case the mixture is already distilled before *Pesach* and therefore at the time the *bitul* must occur (and one must decide if it is permitted to retain over *Pesach*) it is already *min b'mino*.

whiskey, and (as noted earlier) industry experts concur with this understanding.

- *Minchat Baruch* cites *Chatam Sofer* and *Nodah B'yehudah*<sup>31</sup> as supporting his position. However, a more careful reading of those sources shows that although these *Poskim* do mention such a possibility, they themselves appear not to accept that conclusion. Thus, *Minchat Baruch*'s position seems far from unanimous.
- It is also not clear exactly which type of alcoholic beverage *Minchat Baruch* is referring to. It is possible that he only intends his statement to apply to vodka, which is produced from grain neutral spirits (i.e., alcohol distilled to 95% purity before being diluted) and does, in fact, have no carryover of taste from the original grain. But it does not follow that he would say the same for bourbon or other beverages where distillation is stopped at 62.5%, and the taste of the original grain is quite perceptible in the finished product.

#### **4 – *Bitul of the ma'amid***

One last consideration concerning the leniencies suggested above is the role which malted barley plays in producing the finished bourbon – and it is a critical one in that it converts the starch into sugars which are suitable for fermenting. The barley's critical role qualifies it as a "*davar hama'amid*" which means that on a Rabbinic level it can never be *batel*. *Mishnah Berurah*<sup>32</sup> rules that although from a Torah perspective, a *davar hama'amid* can be *batel*, if a Jew owns a food over Pesach which

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31. *Chatam Sofer* 108 and *Nodah B'yehudah* OC 2:66.

32. *Mishnah Berurah* 442:27 and 447:106. He rules that one can only be lenient in situations of *hefsed merubah* if they also sell the *chametz* to someone else and reduce the price by the value of the *chametz* portion, such that they aren't having any "benefit" from the *chametz*.

contains a *ma'amid* of *chametz*, the food is forbidden after *Pesach*. If so, even if the alcohol produced by the rye and barley can be considered as nullified (*batel*) on a biblical level (as above), should we not say that the bourbon should still be forbidden because the malted barley acted as a *ma'amid*?

The following rationale was suggested to overcome this difficulty: Malted barley is *ma'amid* corn and rye (by converting their starches into sugars) and therefore the corn and rye cannot nullify the barley. However, the barley itself has no effect on water used in the production (before distillation) or dilution (before bottling); therefore those waters are perfectly suitable to nullify the barley. An educated, estimated calculation shows that the amount of barley in the distilled bourbon is not more than 2%<sup>33</sup> (and possibly even less) and then 40-50% more water is added to dilute the bourbon before bottling.<sup>34</sup> If so, the barley which was owned by the Jew over *Pesach* and was not considered as being nullified by sixty times as much non-*chametz* at that time, does become nullified by sixty times after *Pesach*.<sup>35</sup> (As noted, this answer only explains if/why the *ma'amid* can be *batel*, and one must still rely on one of the earlier answers to

33. Earlier in the article it was noted that malted barley is typically 10% of the **grain** portion of the whiskey, and the lower number given here in the text reflects that considerable amounts of water are added to the grain.

34. Bourbon is typically aged at 62.5% alcohol (the legal maximum) and is often bottled at 40% alcohol (the legal minimum) or somewhat higher. The amount of water required to dilute a 62.5% mixture to 40%, 45%, or 50% strength is 56.25%, 38.9% or 25% respectively.

35. The text makes the assumption that the water used in production is *chametz*-free. In fact, there is a possibility that the water itself is partially or completely *chametz*, as follows: The water "left behind" during distillation is called "backset" and it is used in the production of future batches so as to salvage the considerable flavor and alcohol left in that water. Of course, if *chametz* backset was used in the production of bourbon, that water would not be suitable to be *mevatel* the barley (or other *chametz*) in the bourbon. Further research is required to understand exactly how much of a concern this is and how it affects the logic noted in the text.

explain why the rye and barley themselves are *batel*.)<sup>36</sup>

## 5 – *Bitul b'rov after Pesach*

The above discussion presented reasons why the *chametz*-based alcohol is nullified before *Pesach* (either because it is a mixture of items which have the same title or because it qualifies as a mixture of items having the same taste) and also clarified why the *chametz ma'amid* does not present a concern. There is yet another reason to consider permitting the bourbon, and this rationale apparently has no need to resort to any of the aforementioned lines of reasoning.

We have seen that approximately 30% of the grain used in producing each type of bourbon is *chametz*, and we have also seen that 40-50% extra water is added to the aged whiskey just before bottling. Thus, if a barrel contains 50 gallons of bourbon, for example, 15 of those gallons are *chametz*;<sup>37</sup> when another 20-25 gallons of water are added,<sup>38</sup> there is more of that water than there is *chametz* (20-25 gallons to 15 gallons). Accordingly, even if we reject the aforementioned leniencies

36. The answer noted in the text presupposes that the reason a *davar hama'amid* cannot be *batel* is because its role is so pronounced that it is as if it can still be seen in the food, such that it is viewed as not being mixed in. It is therefore missing the prerequisite for *bitul* – that the foods be mixed together. Thus, the *ma'amid itself* is not *batel* and is forbidden but the rest of the food (so to speak) remains permitted. Accordingly, a future *bitul* (i.e., one in which the *issur* serves no *ma'amid* role) must only contain 60 times the volume of the *ma'amid*-portion and not 60 times the entire food. In turn, that position is the basis for the previously mentioned leniency (in cases of *hefsed merubah*) to sell the mixture less the value of the *chametz* portion; it is only the *chametz ma'amid* portion which is forbidden and therefore if one does not derive any benefit from the *chametz* the food is permitted. See *Badei HaShulchan*, 92:4 *Biurim* s.v. *Chatichah*, pages 165-166 who cites numerous *Poskim* (many of whom are based on *Mishnah*, *Terumot* 5:6) who agree with the text that only the *ma'amid* itself must be *batel b'shishim* and not the entire mixture (and *Badei HaShulchan* himself accepts this position).

37. 30% of 50 gallons is 15 gallons.

38. I.e. the barrel contains 50 gallons and 40-50% extra water is added, which is equivalent to 20-25 gallons of extra water.

and consider that the aged bourbon is *chametz she'avar alav hapesach* – yet the *chametz*-portion of the bourbon is nullified after Pesach since it constitutes less than the majority of the product. Could that be a sufficient basis for permitting the bourbon?

As we have seen, *Shulchan Aruch*<sup>39</sup> rules that *chametz* which was in the possession of a Jew for the duration of *Pesach* and which was subsequently mixed into a non-*chametz* mix, is permitted only if the *chametz* is outnumbered 60 to 1 (*batel b'shishim*). Nevertheless, *Magen Avraham*<sup>40</sup> argues that as long as the *chametz* is less than half, it can be considered as nullified, and *Mishnah Berurah*<sup>41</sup> rules that in cases of significant loss or a pressing need (*hefsed merubah* or *sha'at hadchak*) one can rely on this lenient opinion. If so, someone who owns a considerable amount of the questionable bourbon may well qualify for the leniency of *Magen Avraham* and would be permitted to consume (or at least sell) it, even though the undiluted whiskey was owned by a Jew over *Pesach*.

## E. Conclusion

Upon discovering that a large bourbon company is owned by a Jewish person, a group of *Poskim* considered the halachic status of products held by that company over *Pesach*, and unanimously agreed to publicize to consumers that they should avoid those products. At the same time, some of those *Poskim* advanced reasons why consumers who already own some quantities of the affected beverages may be permitted to consume or at least sell the bourbon and not be required to throw it out.

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39. *Shulchan Aruch* 447:11.

40. *Magen Avraham* 447:44.

41. *Mishnah Berurah* 447:105.

A secondary purpose of writing this article was to illustrate that certifying a product as "kosher" entails a great deal more than just examining a list of ingredients. As shown, there are any number of factors which inform the ultimate rabbinic decision, which is arrived at after considerable analysis not only of the scientific realia but also by taking into account other halachic variables which impact upon the acceptability or disapproval of a product. It is hoped that the review and analysis of these factors will assist readers in appreciating the complexity of the issue. As always, however, the final step is for the concerned consumer to ask his Rav what to do.

# The Halachic Status of Genetically Engineered Meat

*Rabbi Yehuda Spitz*

Recently, BBC broke an exclusive story;<sup>1</sup> one that many claim has potential to change the world. Professor Mark Post of Maastricht University in the Netherlands had done the impossible: he had created the world's first laboratory grown hamburger. While news of this \$325,000 hamburger was welcomed by environmentalists, animal rights activists, and doom-and-gloom predictors alike, and others defining it as "just plain weird", our concern is how such a creation would be viewed through the lens of halacha.

## **Frankenburgers?**

This hamburger was created by extracting stem cells (the body's master cells; templates from which specialized tissue develop) from a cow's muscle tissue. These stem cells were cultured and multiplied with nutrients and growth promoting chemicals, and later coalesced, forming tiny strips of muscle fiber. Approximately 20,000 of these strips were needed to create just one hamburger.

It is important to note that currently, with the price tag of test tube beef being in the six figures, its production unrealistic in the foreseeable future, and the exact scientific process kept

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1. BBC: <http://www.bbc.co.uk/news/science-environment-22885969>.

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under wraps, this halachic discussion is primarily academic, firmly entrenched in the realm of theory. If and when lab-grown burgers become affordable and mainstream, its status would need to be appraised by the expert *Rabbanim* of the time, based on the actual facts on the ground, of how these burgers are made.

Several rabbis addressed the issue of whether or not such a burger should be considered kosher and even possibly pareve, yet, based on different precedents cited, their theorized conclusions were quite diverse.<sup>2</sup> Would this man-made and modified meat be considered kosher or *treif*? Pareve or *fleishig*? This article sets out to address the different potential halachic possibilities.

## Magical Mystery Meat

Truthfully, meat created from non-traditional sources has a tradition and precedent, and is already mentioned in the Gemara,<sup>3</sup> once regarding meat that came down from the heavens, and again concerning meat that was created using the “*Sefer Yetzira*”, “the Book of Creation” attributed to Avraham *Avinu*.

The *Malbim* writes that meat created using the “*Sefer Yetzira*” is essentially pareve. That is why Avraham *Avinu* was able to give the visiting angels a meal containing both milk and meat;

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2. See Jerusalem Post article: <http://www.jpost.com/Jewish-World/Jewish-News/Orthodox-groups-debate-kashrut-of-lab-grown-meat-322642>.

3. *Sanhedrin* 59b and 65b. Although this author has not seen a discussion of what the proper *bracha* would be, and if a *bracha* is even mandated regarding this “magical meat”, there actually is such a discussion regarding the manna that came down from Heaven for forty years in the desert. The *Rema M’Fano* is even quoted as mandating “*Hamotzi lechem min hashamayim*” (...Who brings bread from heaven). Certainly, *Birkat HaMazon* was mandated for eating the *munn* (manna) [see *Gemara Brachot* (48b)]. However, it must be noted that on a practical level there are differences between these two rabbinic teachings. Meat that came down from the Heavens and man-made meat via “*Sefer Yetzira*” may not necessarily share the exact halachic status.

the meat was truly pareve, as Avraham created it that day!<sup>4</sup> The *Cheshek Shlomo*, *Av Beit Din* of Vilna in the nineteenth century, extrapolates further. He averred that ergo, milk from a cow that was created via the “*Sefer Yetzira*” is not truly ‘*milchig*’, rather pareve too.<sup>5</sup> If so, some opine that our test tube burger should be considered not only kosher, but pareve as well, due to this halachic precedent.

However, even according to this theory, in order for the burger to receive this halachic status, the cow that the stem cells were harvested from would need to have had a proper *shechita* (slaughter), precluding a biopsy from a live cow. Although meat created utilizing the “*Sefer Yetzira*” should not technically need ritual slaughter, as it was not truly alive,<sup>6</sup> nevertheless, *shechita* still would be mandated, due to the

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4. *Malbim (HaTorah V'HaMitzva, Parshat Vayera Ch. 18: verse 8)*. A similar explanation can also be found in the *Pirkei D'R' Eliezer* (cited in *Yalkut Reuveini* on *Parshat Vayera*) and by the *Chessed L'Avraham* (ancestor of the *Chida*; *Ein Mishpat, Nahar* 51). The *Pardes Yosef* cites this as well (*Parshat Vayera* Ch. 18, pg. 115, end 1st paragraph and *Parshat Vayeishev* Ch. 37, pg. 268, end 1st paragraph). See also *Darchei Teshuva* (87: 29). There are many other interpretations of how to understand Avraham *Avinu*'s actions.

5. *Cheshek Shlomo* (end YD 98, s.v. *v'da*). He is attempting to resolve the *Kreiti U'Pleiti*'s question (81: 7; at length) on the Gemara *Bechorot* (6b), why it did not cite Avraham *Avinu*'s serving of milk as proof that milk is not considered ‘*Aver Min HaChai*’ (see *Shulchan Aruch* YD 81: 5), which would be prohibited even for non-Jews as it is one of the Seven Mitzvot of *Bnei Noach* (see *Rambam Hilchot Melachim* Ch. 9: 10 and *Aruch Hashulchan* YD 62: 4 & 5). A similar solution is offered by Rav Yitzchak HaLevi Horowitz of Hamburg in his ‘*Metaamei Yitzchak*’ (glosses on the *Kreiti U'Pleiti*, ad loc).

6. *Shlah (Shnei Luchot HaBrit* vol. 2, *Torah Shebiktav, Parshat Vayeishev*), explaining that this was what the sons of Yaakov were eating that Yosef *HaTzaddik* wrongly assumed was *Aver Min HaChai* (meat cut from a living animal). See also *Shu"t Lehorot Notton* (vol. 7: 11) who cites this *Shlah* as indicating a precedent to be followed: that an animal created via “*Sefer Yetzira*” would be exempt from many related mitzvot. Interestingly, the *Shlah* continues that when Yosef suspected his brothers of immoral behavior (*Giluy Arayot*), it was really a female *Golem* they created ‘*letayel imah*’. Even more interesting (at least in this author's opinion), is that the *Chafetz Chaim*, in his *sefer Shemirat Halashon* (vol. 2, Ch. 11, end s.v. *vayavei Yosef*), cites this as the plain meaning of the verses.

Rabbinic injunction of *Marit Ayin*.<sup>7</sup> The basic definition of *Marit Ayin* is the prohibition of taking actions which strictly speaking, are permitted according to halacha, but nevertheless give onlookers **the impression** that we are doing something halachically forbidden.<sup>8</sup> Accordingly, the same would

7. *Pitchei Teshuva* (YD 62: 2). A similar assessment is given in *Mili D'Abba* (on *Sanhedrin* 65b), that strictly following the letter of the law (*me'ikar hadin*) such an animal would not need *shechita*, and only does due to *Marit Ayin*. See also *Darchei Teshuva* (ad loc. 6). However, see *Shu"t Riveivot Efraim* (vol. 7: 385; in a responsum from Rav Yosef Binyamin Tzarfati of Antwerp) at length, who posits that such an animal created with 'Sefer Yetzira' would have the full status of a real animal and would need *shechita* based on Jewish law. He explains that the main reason why a man-made *Golem* would not be able to be counted for a *minyan*, according to the majority consensus, is that it lacks the ability of speech. In order to be considered having a *neshama*, a creation needs to have the potential for speech [see, for example, the *Ramban*'s commentary to *Parshat Bereishit* (Ch. 2: 7; based on *Targum Onkelus* ad loc.)], an attribute a *Golem* sorely lacks. Accordingly, in layman's terms, a *Golem* is technically considered 'an animal in human form' and therefore in practice cannot be counted for a *minyan*. [This was discussed at length in an article titled "Of Elul, L'Dovid, and Golems" (*Yated Ne'eman* 10 Elul 5774 | September 5, 2014; [http://ohr.edu/this\\_week/insights\\_into\\_halacha/4886](http://ohr.edu/this_week/insights_into_halacha/4886))]. However, conversely, an animal never has the potential for speech, and therefore a man-made animal should intrinsically have the same status as a regular animal; ergo, *shechita* would be mandated. Obviously, this logic would not be in concurrence with the *Shlah* and those who rule like him (see previous footnote).

8. This will be further addressed at length. The *Mishnah* in *Shekalim* (8a, Ch. 3: Halacha 2) regarding the emptying of the charity boxes in the *Beit Hamikdash* treasury, bases the prohibition on the *pasuk* in *Parshat Mattot* (Ch. 32: verse 22) "V'hayitem Nekiyim MeiHashem U'meiYisrael", "And you shall appear clean (sinless) before G-d and before the people of Israel". This requirement is cited several times throughout the Talmud. The *Chatam Sofer* (*Shu"t* vol. 6: 59) stressed the importance of this verse requiring behavior which is above reproach and above suspicion, even if technically permitted, and lamented that he is not sure if anyone could possibly fulfill it properly! Although some commentators describe this prohibition using the terms *chashad* (suspicion) and *Marit Ayin* (appearance) interchangeably, Rav Moshe Feinstein (*Shu"t Iggerot Moshe* OC vol. 4: 82) explains that *chashad* is a biblical prohibition while *Marit Ayin* is Rabbinic in nature, and explains the subtle differences between them. See also *Shu"t Minchat Asher* (vol. 1: 65 & 66), who defines them a bit differently. The *Divrei Malkiel* (*Shu"t* vol. 4: 61), however, explains at length that *Marit Ayin* actually contains six different

apply to our home grown hamburger, and *shechita* would be required.

## Gelling Together

Another possible precedent posited was to compare the lab burger's status to that of gelatin, which is a whole separate discussion in itself. Already controversial when cited in halachic literature over a century ago, gelatin's kashrut status is still being debated.

Gelatin is a translucent, colorless, and flavorless solid substance, derived from collagen obtained from various animal by-products, mainly the bones and skin of cows and/or pigs. It is the gelling agent that makes marshmallows and 'gummy bears' gummy.

The process to make gelatin is an interesting one: the collagen in the bones and skin of the animals is converted into ossein by soaking them in hydrochloric acid. Then it is soaked in lime for about a month, followed by a wash in sulfuric acid.<sup>9</sup> (Do not try this at home!)<sup>10</sup>

Contemporary authorities debate gelatin's halachic status. Although Rav Chaim Ozer Grodzinsky *zt"l* and Rav Simcha Zelig Rieger *zt"l*, *Dayan* of Brisk, permitted gelatin made utilizing hard cow bones, and Rav Ovadiah Yosef *zt"l* even allowed gelatin made from cow skins,<sup>11</sup> nevertheless, when

classifications. For further treatment of the categories of these prohibitions, see the commentary of the *Talmidei Rabbeinu Yonah* (*Brachot* 3b), and *Encyclopedia Talmudit* (*Erech – Chashad – Marit Ayin*).

9. As per Rabbi Eliezer Eidelitz's "Is It Kosher?" pg. 122.

10. I still remember the poem my high school Chemistry teacher, Mr. Ezra Roberg, drilled into us regarding the potential dangers of sulfuric acid: "Johnny was here yesterday; today he's here no more. For what he thought was H<sub>2</sub>O, was H<sub>2</sub>SO<sub>4</sub>."

11. *Shu"t Achiezer* (vol. 3: 33, 5) and *Shu"t Yabia Omer* (vol. 8: YD 11). Rav Simcha Zelig's responsum, dated 5698, was well known, but was only first published in *Kovetz Moriah* (*Elul* 5775; issue 400 – 402, pg. 76 – 77). One of the

this question arose in the 1950's – 60's most *Gedolim* based in America, including Rav Aharon Kotler *zt"l*, Rav Eliezer Silver *zt"l*, Rav Moshe Feinstein *zt"l*, and Rav Yosef Eliyahu Henkin *zt"l*, [as did most later *Poskim* in Eretz Yisrael], all unequivocally prohibited gelatin, unless it was derived from properly slaughtered kosher animals.<sup>12</sup> Nowadays, although

primary points for permitting is that of “*panim chadashot*” (a “new entity”). The source for this leniency is the opinion of Rabbeinu Yonah, cited by the *Rosh* in *Brachot* (Ch. 6: 38) regarding the status of musk. During the process of producing gelatin, the original bones are completely destroyed by the various acids et al., and the inedible gelatinous results bear no resemblance, not even by taste nor form to the original, and would therefore be considered a completely new item. This would be similar to the rule of ‘*or hakeiva*’ (the lining surrounding the animal stomach) that has become as hard as wood losing its status of meat (see *Rema* YD 87: end 10). However, Rav Chaim Ozer's and Rav Simcha Zelig's allowance for gelatin was based on certain processes of the day (processed from hard cow bones, as they wrote, which are not intrinsically prohibited). It is highly doubtful that if they had seen gelatin produced from pig flesh they would have still maintained the same *hetter* (see footnote 13). The issue of “hard” versus “soft” (edible) bones is based on a dispute between the *Minchat Yaakov* (*Shu"t* 15) and *Pri Megadim* (YD 87: S.D. 22) how to understand the *Shulchan Aruch*'s choice of words (YD 87: 7) defining bones' halachic status, as well as the *Shach* in *Hilchot Taaruvot* (YD 99: 1).

There were other *Poskim* who permitted gelatin over the years, including Rav Yosef Kanovitz (*Shu"t Divrei Yosef* YD 4), Rav Shmuel Aharon HaLevi Pardes (in several responsa over the years in his renowned *Pardes Torah Journal* and in his posthumously published *Shu"t Avnei Shmuel*, 19), the Tzitz Eliezer (in the preface to *Shu"t* vol. 4, published along with Rav Yechezkel Abramsky's original *teshuva*, and vol. 20: 34), and Rav Ben Tzion Abba Shaul (*Shu"t Ohr L'Tzion* vol. 1: OC 34, pg 90); yet, several of them, including the *Melamed L'Hoil* (*Shu"t* vol. 2, YD 35), Rav Tzvi Pesach Frank (*Shu"t Har Tzvi* YD 83), and Rav Yechezkel Abramsky (*Chazon Yechezkel, Zevachim, Shu"t* 5), qualified their permissive rulings, stating that only *b'dieved* (ex post facto) or for a sick person may dispensation be given.

12. Rav Aharon Kotler (*Shu"t Mishnat Rav Aharon* 16 & 17), Rav Moshe Feinstein (*Shu"t Iggerot Moshe* YD vol. 2, 27), Rav Yosef Eliyahu Henkin (*Eidut L'Yisrael* pg. 177). Rav Silver's position is well known; aside for publicizing a letter in 1950 against a *hechsher* (kosher supervision) certifying a well-known gelatin product, he has written at least two separate responsa on the topic: one to Rav Zelig Reuven Bengis of the *Eida HaChareidis* in Yerushalayim – reprinted in *Kovetz Yeshurun* (vol. 12, pg. 241), and another

the Israeli Chief Rabbinate permits gelatin as kosher and has a distinct designation, “*kosher l’ochlei gelatin*”, on the other hand, no *Mehadrin* kashrut agency or *Badatz* in *Eretz Yisrael*, nor any mainstream certifying agency in America considers real gelatin kosher,<sup>13</sup> unless it is produced from properly slaughtered kosher animals.

Back to our test tube burger, if it can be compared with gelatin, as it is essentially a meat-based product that has undergone extreme change via chemicals, its halachic status would depend on the above controversy. According to those who rule leniently with gelatin that is not kosher based, the same dispensation could be given to our Petri dish piece of meat, and the actual source of the original stem cells should not trouble us too much. Yet, according to the mainstream

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in *Kovetz Kerem* (Year 2, vol. 1 pg. 5, *Tishrei* 5713). Other *Poskim* in *Eretz Yisrael* who ruled this way include the *Chazon Ish* (YD 12: 7), the *Minchat Yitzchak* (*Shu”t* vol. 5: 5), Rav Yosef Shalom Elyashiv (*Kovetz Teshuvot* vol. 1: 73, 3), Rav Shmuel HaLevi Wosner (*Shu”t Shevet HaLevi* vol. 7: 135), Rav Moshe Sternbuch (*Shu”t Teshuvot V’Hanhangot* vol. 2: 381), and Rav Menashe Klein (*Shu”t Mishneh Halachot* vol. 3: 111). One of their main points of contention is questioning the application of “*panim chadashot*” – a “new entity” – to gelatin, as the collagen, which is the basis for the gelatin, was part and parcel of the original bones and skin the whole time. Additionally, the fact that one wants to use it as a food item might make it considered “*Achshevei* (the person’s actions indicate that he considers this to be edible, which halachically has the effect of rendering it forbidden)”, and return it to its original status, which would be *treif*. This means that one’s intention to eat it, although currently inedible, would halachically render it a food item; for an example of how this might work, see *Shu”t Shaagat Aryeh* (75). Moreover, nowadays pig byproducts (hides and skins, etc.) are often used in making gelatin, and the *Rambam* (*Hilchot Maacholot Asurot* Ch. 4: 21) states that the hides of domesticated pigs have the halachic status of meat, and are considered edible and are most definitely not kosher. Thus, even those who argued that gelatin made from the hides of (non-halachically slaughtered) beef or from bones is still technically kosher, nevertheless, would have a harder time defending that position as relates to porcine gelatin.

13. I used the term “real gelatin”, as nowadays kosher “gelatin” made from agar agar (seaweed) or from fish is quite commonplace, and does not have these same halachic issues as true gelatin made from possible carcasses or non-kosher animals.

opinion that kosher gelatin must originate from a *shechted* kosher animal, the same should apply to our lab created burger and be mandated for it as well.

Another interesting outcome of this controversy (*machloket*) is another issue. Even amidst the mainstream ruling, there are differences between the opinions. For example, Rav Moshe held that real kosher gelatin made from *shechted* cows is considered completely pareve, while Rav Aharon Kotler was of the opinion that *lechatchila* one should still consider it somewhat *fleishig* and not mix it with milk. If we use gelatin as our halachic springboard, the same debate should also technically apply to our home grown hamburger. Accordingly, those who follow Rav Moshe's *psak* regarding kosher gelatin being pareve (for example, the OU), should also assume that the lab burger is pareve as well. On the other hand, those who follow Rav Aharon's position should still ensure that no milk is mixed amid the man-made modified meat.

## Permitted Patties?

Recently, there have been those who would categorize all stem cell meat as non-problematic from a halachic standpoint due to several interesting precedents.<sup>14</sup> *Chazal* (see *Mishnah* in *Nida* 30a with accompanying *Gemara* and *Gemara Yevamot* 69b) regarding pregnancy, refer to a fetus prior to reaching forty days after conception, as "*maya b'alma*", just plain water; meaning it has not yet reached a stage where it is actually considered a living person. There are various *halachot* based on resolution of this question, but they are not relevant to our discussion.

It stands to reason, they maintain, that the same rationale

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14. See R. Zvi Ryzman's original essay in *Techumin* vol. 34 (5774) at length, as well as his rebuttals to both this author's and Rav Yaakov Ariel's refutations in *Techumin* vol. 35 (5775) and vol. 36 (5776).

should apply to the stem cell burger. At the time of removing the actual stem cell, it is still microscopic. Aside for the fact that halachically speaking, anything non-visible to the naked eye is not considered substantial or even as existing on a level to be able to cause prohibition,<sup>15</sup> a microscopic stem cell would certainly not be considered any more of an issue than a fetus at the first stages of pregnancy, which according to *Chazal* is deemed “only like water”. Yet, even at that early stage a fetus contains stem cells. Additionally, even if we would consider the actual stem cell if it was taken from a living cow as non-kosher, shouldn’t that minuscule cell be nullified in the final product – which has well more than the standard 60 times the amount of forbidden substance (i.e., the microscopic cell) needed? Therefore, they opine, that the source of the stem cell should be irrelevant, and the lab grown hamburger intrinsically kosher, and even pareve.

## Meaty Possibilities

On the other hand, although it would seem tenuous at best to consider microscopic cells removed from a cow’s shoulder and undergoing chemical treatment as a potential violation of the biblical prohibition of eating actual ‘*Aver Min HaChai*’, ‘a limb from a live animal’,<sup>16</sup> nonetheless, there still seems

15. See *Shu”t Tuv Ta’am V’Daat* (*Tinyana, Kuntress Acharon*, 53), *Binat Adam* (34; on *Chochmat Adam* 38), *Tiferet Yisrael* (*Avoda Zarah* Ch. 2: *Mishnah* 6, *Boaz* 3), and *Aruch Hashulchan* (YD 84: 36). This ruling, that anything non-visible to the human eye has no halachic bearing, was almost-universally accepted by later and contemporary authorities. This topic was addressed at length in recent articles titled “Leeuwenhoek’s Halachic Legacy: Microscopes and Magnifying Glasses in Halachah” (*Yated Ne’eman* 10 Shevat 5775 | January 30, 2015); [http://ohr.edu/this\\_week/insights\\_into\\_halacha/5043](http://ohr.edu/this_week/insights_into_halacha/5043) and “Bubby Didn’t Eat Bugs!” (*Ami Living* 10 Av 5771 | August 10, 2011; [http://ohr.edu/this\\_week/insights\\_into\\_halacha/5032](http://ohr.edu/this_week/insights_into_halacha/5032)), at length.

16. See *Tur* and *Shulchan Aruch* (YD 62 & 81) at length. See also footnote 5. Although there is some debate whether a limb that does not contain actual flesh – ‘*Bassar*’ – can be considered ‘*Aver Min HaChai*’ [see *Rambam (Hilchot Maachalot Asurot* Ch. 5: 2) and *Darchei Teshuva* (62: 2 s.v. *v’gam*)], nonetheless,

to be strong basis to consider our homegrown hamburger meaty.

The *Mishnah* in *Bechorot* (5b) teaches us that '*hayotzei min hatamei, tamei, v'hayotzei min hatahor, tahor*' – anything that comes out from a non-kosher animal is deemed non-kosher and anything that comes out of a kosher animal is deemed kosher. This is the reason why milk that comes from an animal that is rendered non-kosher is also halachically non-kosher. Although many might mistakenly assume that this halacha is only referring to actual secretions, such as milk and brine,<sup>17</sup> actually, the case the *Mishnah* began with was a kosher animal that was born from a non-kosher one -- and ruled that its own meat is still rendered non-kosher.

This being so, there certainly seems as if there might be room to classify this stem cell grown meat, that was extracted from an actual cow, as a '*Yotzei*'—a derivative. Consequently, if it was taken from a live or even a dead, but not properly slaughtered cow, it should be considered non-kosher.

However, even classifying a stem cell as a '*Yotzei*' might not

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it seems that either way, it would still not be applicable to our case of stem cells. The reason why it cannot be considered as such is that in order to be considered a limb – '*Aver*' – or even '*Bassar Min HaChai*'—flesh taken from a living animal – it would need to physically constitute at least a minimal amount. In fact, it would need to be at least a *kezayit*, [see *Rambam* (ad loc. 3 & 4) and *Sefer HaChinuch* (*Parshat Re'eh* Mitzvah 452; see also *Minchat Chinuch* at length)] and although for the *issur* itself even far less would still be considered '*Aver Min HaChai*' [see *Tur* and *Beit Yosef* (YD 62)], nevertheless, it still would need to have an actual physical presence. A microscopic stem cell would certainly not be considered any more of an '*Aver*' than a fetus at the first stages of pregnancy, which according to the *Gemara* is not considered as such, but rather '*Maya B'Alama*'. Yet, even at that early stage a fetus contains stem cells. Therefore, it seems abundantly clear that it would be quite a stretch to label our stem cell burger as actual '*Aver Min HaChai*', flesh of a living animal. For more on this, see R' Zvi Ryzman's recent essay in *Techumin* vol. 34 (5774) '*Bassar M'ta'i Geza*' (pg. 103).

17. See *Gemara Bechorot* (6b – 7a) and *Chullin* (112b, *Mishnah* -116b, 120a), and *Tur* and *Shulchan Aruch* (YD 81: 1).

be significant enough to rule that if it were extracted from a properly *shechted* animal that it be deemed actual meat. For example, the *Rambam* codifies that although it is forbidden to eat extraneous parts of a non-kosher animal (such as skin, bones, horns and hoofs), nevertheless, these same parts (of a kosher animal), even when cooked in milk, are not considered actual *Bassar B'Chalav* (a forbidden meat and milk mixture), as they are not considered actual meat.<sup>18</sup> Accordingly, as opposed to one who eats actual non-kosher meat, one who eats a non-kosher 'Yotzei' is not subject to the penalty of lashes – *malkot*.

On the other hand, Rav Chaim Soloveitchik of Brisk<sup>19</sup> makes an important distinction. He explains that although the *Rambam* distinguished between a 'Yotzei' and actual meat, that rule applied exclusively when the said 'Yotzei' was not actual meat (i.e. eggs, milk, skin, bones etc.). Yet, he avers, in a case such as the Mishnah's, a kosher animal that was born from a non-kosher one, where its meat is rendered non-kosher akin to the mother animal, certainly one who partakes of its meat would be liable for *malkot*, as it is still a type of actual meat, and is considered inherently prohibited (*issur machmat atzmo*). Similarly, several other *Acharonim* who explain the *Rambam*'s differentiation between a 'Yotzei' and actual meat, including

18. See *Rambam* (*Hilchot Maachalot Asurot* Ch. 3: 6; 4: 18, and 9:7) and *Shulchan Aruch* (YD 87, 7). Accordingly, as opposed to one who eats actual non-kosher meat, one who eats a non-kosher 'Yotzei' is not subject to corporal punishment. In fact, several *Acharonim* explicitly differentiate between a 'Yotzei' and actual meat, including Rav Yonason Eibeshutz (*Kreiti U'Pleiti*, YD 81: 1; who explains that for a 'Yotzei' to be forbidden it must be normally edible), the *Chelkat Yoav* (*Shu"t* YD 15), Rav Chaim Soloveitchik (cited in *Chiddushei HaGri"z* on *Nazir* 50a; see also *Chiddushei HaGri"z*, Stencils on *Bechorot* ad loc.), the *Ohr Somayach* (on *Hilchot Maachalot Asurot* Ch. 4: 20), Rav Aharon Kotler (*Shu"t Mishnat Rav Aharon* 16, 17 & 18), and the *Chazon Ish* (YD 12: 3). For more on this, see R' Zvi Ryzman's essay cited above (pp. 101 -102), the recent book *Headlines* (pp. 390-391), and this author's recent article in *Techumin* cited above.

19. *Chiddushei Rabbeinu Chaim HaLevi* on the *Rambam* (*Hilchot Maachalot Asurot* Ch. 3: 11).

the *Chelkat Yoav* and *Chazon Ish*, would seemingly agree to this understanding.<sup>20</sup>

In light of this theory, it stands to logic that regarding a harvested stem cell hamburger which was extracted and developed from the meat itself, and has the same physical and chemical properties as meat, these *Acharonim* would be of the opinion that this '*Yotzei*' would not be considered a standard '*Yotzei*', but rather still a type of actual meat, a '*min bassar*'. If so, even if it originated from a *shechted* kosher animal, and would be deemed kosher, it would still be considered *fleishig* ("meaty") and forbidden to be eaten or cooked with dairy products.

Moreover, regarding scientists grafting plants on a microscopic, genetic level, Rav Shlomo Zalman Auerbach avers that it still violates the prohibition of 'mixed species – *Kilayim*'. He explains that although the cells cannot be seen by the human eye, nevertheless, this fact is of negligible importance to scientists, who utilize instruments that enable them to see these tiny cells and are still able to graft under these conditions. Consequently, it is clear that in this case it is still halachically considered '*Nireh L'Anayim*', visible to the eye. A similar sentiment can be expressed regarding lab-grown meat which, although started from a microscopic stem cell, can nonetheless be manipulated by scientists to eventually form a complete hamburger.<sup>21</sup> Accordingly, the origin of the harvested stem cell should determine its final *Kashrut* status.

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20. Both the *Chelkat Yoav* (*Shu"t* YD 15) and the *Chazon Ish* (YD 12: 3), when explaining the *Rambam*'s position, write that a standard '*Yotzei*' is more lenient as it is not "*shayach l'guf habriya*" (an inherent part of the animal) and is not "*bassar gamur*" (true meat). Therefore, it seems that they would both agree to Rav Chaim's distinction by a '*Yotzei*' that is actual meat, that it would be *Assur D'Orayta* and *chayav malkut*.

21. *Shu"t Minchat Shlomo* (*Tinyana* 100: 7 s.v. *b'inyan*). Rav Yaakov Ariel (in *Techumin* 35) emphatically sets Rav Shlomo Zalman's generalized principle as precedent to this case to explain why microscopic stem cells are not grounds to be lenient by the lab grown burger.

## Growth Spurts?

Additionally, we find an enlightening rule regarding growths from a forbidden substance – *issur*. The *Mishnah* in *Terumot* (Ch. 9: *Mishnah* 6) and elucidated by the *Yerushalmi* (ad loc. Halacha 2), teaches that growths from actual *issur*, such as produce that is *Tevel*, *Terumah*, *Maasar*, or *Sheviit*, are intrinsically permitted, as they are not considered part and parcel of the original prohibited produce. Yet, there is an important exception: when referring to produce that is '*Aino Zaro Kala*', when the original prohibited item's essence is still extant in some form or another, then even "*Gidulei Gedulim*", the growths of the growths, are nevertheless prohibited.

Although this halacha in practice affects disparate types of *issur* differently, nonetheless, the rule holds true.<sup>22</sup> As such, it would seem quite tenuous to assume that the original prohibited cell (if taken from a non-kosher source) would be nullified by the end product, inasmuch as those cells and all subsequent cells are grown from the original prohibited stem cell. Ergo, it would make sense that they should instead be considered "*Gidulei Issur*", forbidden growths, as the *Mishnah* indicates. While immersion in the chemicals may create a temporary nullification of the prohibited substance in 60 times as much permissible material this ratio does not remain in the finished product. The final product does not contain 60 times as much permissible material (*hetter*), but rather, we seemingly simply have an *issur* that has grown thousands of times larger over the course of time, as the

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22. See *Mishnah Terumot* (ibid. as well as Ch. 7: *Mishnah* 7), *Yerushalmi* (*Terumot* ibid.), *Gemara Nedarim* (57b – 58a), *Gemara Pesachim* (34a), *Rambam* (*Hilchot Maaser* Ch 6: 6), *Merkevet HaMishnah* (*Hilchot Terumot* Ch. 11, Halacha 22), *Pe'at HaShulchan* (Ch. 23 or *Sheviit* Ch. 4: 4 and 5), *Aruch Hashulchan HaAtid* (*Hilchot Shemittah V'Yovel* 22: 11 and *Hilchot Terumot* 83: 9 – 16), *Kuntress Tosefet Sheviit* (pg. 36 s.v. *va"p*; printed at the back of the *Beit Ridbaz* version of the *Pe'at Hashulchan*), *Chazon Ish* (*Sheviit* Ch. 8: 1 and 2; especially brackets in s.v. *hachi*), and *Derech Emunah* (vol. 2, *Hilchot Terumot* Ch. 11: 132 and *Tziyun Hahalacha* 361 and 362).

minuscule meat cell just kept growing, magnifying, and splitting.

Furthermore, the comparison to a fetus prior to forty days does not seem compelling vis-a-vis the aforementioned precedents, as halachically, "*maya b'alma*" "just plain water" is not necessarily a statement that an item is not considered 'meat'; it is a statement that said fetus is not yet considered a living person. We do not find it being used to set halachic precedent for other issues not related to the establishment of viable human life, and not even for other creatures.

It also does not seem to preclude the possibility that a similar object may still be considered meat. More importantly, in our case, the originating cell is not a new creation created by the fusion of male and female chromosomes. It is a cell taken from a fully developed animal. As such, and in any case, even if the fetus analogy would be deemed accurate, our stem cell would certainly be considered more than 40 days after fertilization, and hence meaty.

## Catalyst Conundrum

Aside for these possibilities, there is an important additional factor to take into account which might render our in-vitro burger meaty as well.

Halachically speaking, as mentioned previously, something that is present in minute quantities in a mixture is generally considered nullified as long as there is at least a 60 to 1 ratio against it (*battel b'shishim*).<sup>23</sup> Although this would imply that the Petri dish patty would be considered kosher even if it was harvested from a non-kosher source, as the final patty has 20,000 muscle fibers grown from a few stem cells, on the other hand it is not so simple, as every rule has its exceptions.

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23. This is the standard rule of nullification in halacha: if there is present 60 times the amount of non-kosher, then it is considered nullified. See *Shulchan Aruch* YD 98.

One of the exceptions is a case of a '*Davar HaMaamid*', an essential ingredient in the makeup of a product that establishes its form. This catalyst impacts it tremendously, far greater than its size implies. A prime example of a '*Davar HaMaamid*' is the small amount of a calf's stomach lining (rennet) placed in a huge vat of milk that turns it to cheese.<sup>24</sup> The halachic status of a non-kosher '*Davar HaMaamid*' is that it cannot be nullified, no matter how infinitesimal it seems compared to the final product.<sup>25</sup>

It is entirely possible that the same rule should apply to our lab burger. Since the whole hamburger's essence, as well as the entire development of the meat, stems from those original minuscule meaty stem cells, it is highly feasible that they would have the halachic status of a '*Davar HaMaamid*'. If so, and they were harvested from a non-kosher animal, it might render the final product non-kosher as well. However, if these cells would be extracted from a properly slaughtered kosher animal, then the lab grown burger could be considered kosher. Although technically (*me'ikar hadin*) it should be considered pareve,<sup>26</sup> it still might possibly be deemed somewhat *fleishig* (meaning not to eat with milk) if the cells are reckoned substantial enough to be considered meat; similar to Rav Aharon Kotler's ruling regarding gelatin.

On the other hand, sometimes even the exceptions have exceptions. For example, a product produced via a non-kosher '*Davar HaMaamid*' can still sometimes be permitted. If there is another kosher catalyst involved in the production of an item, it can be considered that both substances – both the kosher

24. OK, one might ask, then how did they make kosher cheese before synthetic rennet was discovered, if the real rennet is never *battel* (nullified)? For a start, see *Shach* (YD 87: 30), *Shu"t Rabbi Akiva Eiger* (vol. 1: 207), *Shu"t Chatam Sofer* (YD 81), *Matteh Yonaton* (glosses to YD 87: 9), and *Pitchei Teshuva* (YD 87: 19).

25. See *Shulchan Aruch* YD 87: 11 and relevant commentaries.

26. See *Shulchan Aruch* YD 87: 11 and relevant commentaries. The basic rule is that a kosher '*Davar HaMaamid*' would indeed be *battel b'shishim* as opposed to a non-kosher one.

and non-kosher catalyst equally effected the outcome – “*Zeh V’Zeh Gorem*”. This terminology refers to a product that was not manufactured exclusively using a non-kosher ‘*Davar HaMaamid*’, but rather utilizing it as a combination catalyst complementing another kosher one. The halacha in such cases of “*Zeh V’Zeh Gorem*”, is that the basic rules of one-to-sixty nullification are back in effect, and only 60 times the original non-kosher catalyst in its makeup is mandated in order to permit the final product.<sup>27</sup> It is possible that there are additional kosher “*Devarim HaMaamidim*” used in the manufacture of the man-made burger. If so, and there is present a ratio of 60 times against the original meaty stem cells, it might be deemed pareve and possibly permitted.

Yet, to further complicate matters, many authorities maintain that in order for combination catalysts to qualify as a “*Zeh V’Zeh Gorem*”, the non-kosher catalyst must not have the strength to fully impact and establish the item’s form; only in tandem, as a ‘tag team’ of sorts, with the kosher catalyst. Otherwise, according to these decisors,<sup>28</sup> it would still maintain its ‘*Davar HaMaamid*’ status and render the final product non-kosher as well, due to its inability to be nullified. Additionally, to use a non-kosher ‘*Davar HaMaamid*’

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27. See *Shulchan Aruch* (YD 142: 11) and *Rema* (YD 87: 11), based on the *Mordechai* (*Chullin*, Ch. 8, 733 and 761).

28. Including the *Taz* (YD 87: 13), *Shach* (ad loc., 36; although he concludes that it needs further consideration – *tzarich iyun*), *Pri Chadash* (YD 87, 31), *Kreiti U’Pleiti* (ad loc. *Kreiti* 25 & *Pleiti* 21), *Ba’er HaGolah* (ad loc.), *Pri Megadim* (M.Z. ad loc., 13), *Mishnah Berurah* (442: 25 & *Shaar HaTziyun* ad loc. 45), and *Aruch Hashulchan* (YD 87: 42), citing *Tosafot* in *Avoda Zara* (68b s.v. *l’Rebi Shimon*) as proof. However, the *Yad Yehuda* (ad loc., *piha”k* 54 & *pih”a* 26) argues that “*Zeh V’Zeh Gorem*” applies even when the non-kosher catalyst has enough strength by itself to effect the required change. He maintains that since the whole issue of ‘*Davar HaMaamid*’ not being nullified is not so clear cut in the earlier *Poskim*, and that the *Mordechai* (who first makes this dispensation), and later the *Rema*, make no mention of such a proviso [he also gives several other halachic rationales], “*Zeh V’Zeh Gorem*” will even apply when the non-kosher ‘*Davar HaMaamid*’ can impact the item sufficiently by itself, as long as a kosher ‘*Davar HaMaamid*’ is present.

deliberately, (*lechatchila*), even if it is considered a “*Zeh V’Zeh Gorem*”, might nonetheless be prohibited.<sup>29</sup>

## Non-Jewish Nullification

Although some might justify the process, claiming that the intentional use of the forbidden catalyst should not be a factor, since the burger is currently being produced by non-Jews to whom the prohibition does not apply, it turns out that that is also not a simple solution. Already in the 1500s, the *Radbaz*<sup>30</sup> made a distinction between a scenario where a non-Jew nullifies non-kosher, where *Radbaz* holds that a Jew is allowed to eat of the mixture, as opposed to where a non-Jew is **selling** non-kosher, where he holds that it is forbidden for a Jew to purchase. He maintains that when a Jew is purchasing the item, it is as if **he himself** nullified it, and therefore it becomes forbidden for him to eat.

Many halachic decisors concurred to his reasoning and likewise forbade a Jew from purchasing items that contained non-kosher nullified substances.<sup>31</sup> However, the majority of *Poskim* disagreed with this rationale, concluding that

29. It is important to note that even if the item meets the requirements of “*Zeh V’Zeh Gorem*”, it is by no means a blanket *hetter*. The *Avnei Miluim* (vol. 2, *Shu”t* 6) explains at length (see also *Darchei Teshuva* 87: 153) that it is only a *hetter b’dieved*. To use a non-kosher ‘*Davar HaMaamid*’ ab initio, even if it is considered a “*Zeh V’Zeh Gorem*”, would nonetheless transgress the prohibition of deliberately diluting a prohibition (“*Ain Mevatlin Issur*”) and would be prohibited.

30. *Shu”t Radbaz* (vol. 3: 978; old print 547).

31. See *Chida* (*Shiyurei Bracha* YD 99:5), *Levushei Srad* (*Chiddushei Dinim, Hilchot Notein Taam Lifgam* 58: 153), *Zechor L’Avraham* (vol. 3: YD s.v. ‘*Bitul*’), *Beit Avraham* (YD vol. 2: 108, 13), *Beit Yehuda* (*Shu”t Minhagei Ar’jil* [Aljeirs] pg. 115, 3rd column, 68), *Shu”t HaMaharshdam* (53), and *Shu”t HaRashbash* (560). The *Bach* (*Shu”t* 123) implies this way as well, that purchasing from a non-Jew is considered ‘*lechatchila*’ (permitted even as a first-choice). The *Minchat Yitzchak* (*Shu”t* vol. 2: 28, 20) seems to be *choshesh* for this opinion as well.

it is improbable to make such a distinction,<sup>32</sup> as the *Rambam*<sup>33</sup> himself held that it is acceptable to procure such items, as long as it was done by a non-Jew, and is therefore suitable for purchase.

However, to further complicate matters, the *Tashbatz*<sup>34</sup> made a further qualification to this permissible ruling, following the precedent of the *Rashba* and *Raavad*. They aver that although one may rely upon a non-Jew's nullification for purchase in infrequent circumstances, conversely, if the non-Jew is doing it for his job, or on a frequent basis, then certainly it is considered as if the Jew himself nullified it. Several *Poskim* agreed to this decision as well.<sup>35</sup>

32. *Shu"t Maharam Lublin* (104), *Minchat Yaakov* (35: 2), *Shu"t Noda B'Yehuda* (*Tinyana* YD 56 and 57), *Shu"t Beit Yitzchak* (YD vol. 1: 142, 8 and *Kuntress Acharon* 31), *Shu"t Chatam Sofer* (YD 82), *Shu"t Ktav Sofer* (OC 87), *Shu"t Imrei Binah* (*Dinei Bassar Bechalav V'Taaruot* 14; although he concludes that it is preferential to be *machmir* in both instances), *Aruch Hashulchan* (YD 99: 8), *Zivchei Tzedek* (ad loc. 36), and *Shu"t Beit Shlomo* (OC 97), that whatever was produced by a non-Jew is already considered as if it is a situation of *b'dieved* (ex post facto) and therefore permissible for purchase. Most contemporary authorities concur with this assessment.

33. *Rambam* (*Hilchot Maachalot Assurot* Ch. 3: 13). This is also the ruling of the *Ri Migash* (cited by the *Ran* in *Avodah Zarah*, 13b in the *Rif*'s pagination, s.v. *v'hisu' u ledavar achar*).

34. *Shu"t Tashbatz* (vol. 3: 10), *Shu"t HaRashba* (vol. 3: 214; cited by the *Beit Yosef*, YD end 134 s.v. *chometz*, and by the *Magen Avraham* OC 442: end 1), *Raavad* (cited by the *Ran* and *Beit Yosef* ibid). A case can be made for positing that this is also the *Ran*'s opinion, as he concludes his passage with the words of the *Raavad*.

35. *Shulchan Aruch HaRav* (OC 442: 6, *Kuntress Acharon* 5), *Shu"t Divrei Chaim* (vol. 2, YD 53), *Sdei Chemed* (vol. 1, *Klalim*, *Maarechet Ha'Alef*, 360, and in *Pe'at HaSadeh* 10), *Arugat HaBosem* (*Kuntress HaTeshuvot* 15), *Shu"t Atzei Halevanon* (YD 43 s.v. *ach da*), and *Shu"t Tiferet Shmuel* (17). Conversely, the *Pitchei Teshuva* (YD 134: end 8) concludes that the *ikar* follows the *Noda B'Yehuda* (ibid. s.v. *v'amnam*) who rules leniently based on the *Rambam* and *Ri Migash* over the *Rashba* and *Raavad*. The *Noda B'Yehuda* adds that the *Shulchan Aruch* himself implied this way [however, the *Minchat Yitzchak* (*Shu"t* vol. 2: 28, 9 – 18) questions this assessment, citing that the *Shulchan Aruch* in YD 134: 13 expressly rules like the *Rashba*. A similar assessment is given by the *Seridei Aish* (new print; vol. 2: 69 s.v. *ulam*)].

In fact, based on this debate, one of the most famous responsa in the annals of American history was written in 1935 by Rabbi Tuvia (Tobias) Geffen, Chief Rabbi of Atlanta, Georgia, in the 1930s and 1940s. He had to decide whether or not to grant Coca-Cola a kosher supervision *hashgacha*, as it turned out that there was a non-kosher ingredient in its makeup, but only present in minute quantities. Therefore, although technically it would be permitted to drink, since the non-kosher ingredient was less than one sixtieth of the product and therefore considered nullified, nevertheless, it was potentially a violation of “*Ain Mevattlin Issur*”—the prohibition to deliberately nullify a forbidden item, inasmuch as the Coca-Cola Company was obviously putting this non-kosher ingredient in the batch purposefully, since it was part and parcel of the Coke everyone knew and loved.

In the end, feeling uncomfortable by having to make such a decision, where *Gedolim* through the ages have taken stands on both sides of the matter, Rabbi Geffen did the only thing he felt he could do – he went to Coca-Cola and asked them to change their formula! Surprisingly, out of respect for him, the executives listened and the company removed the problematic ingredients, substituting them with kosher alternatives, making the soft drink kosher *lechatchila* for everyone, thus proving the adage, that “things”, including *kashrut*, “go better with Coca-Cola”.

Rabbi Geffen later published the whole account, as well as

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However, although there is undeniably what to rely upon, other contemporary authorities nonetheless advise caution, and especially *lechatchilla*. In fact, the *Melamed L’Hoil* (*Shu”t* vol. 2, YD 29) only allows one to rely on this in an emergency situation, when there is no other choice. Others, including the *Mahar”i Assad* (*Shu”t Yehuda Yaaleh* vol. 2: 122), maintain that one who chooses to be strict will be blessed. See also Rav Shmuel Chaim Yaakov Gruber’s article in *Kovetz Ohr Yisroel* (vol. 30, pg. 123) and Rav Yisroel HaLevi Belsky’s *Shu”t Shulchan HaLevi* (Ch. 22: 2 and 25:1). These issues were detailed at length in an article titled “The Coca-Cola Kashrus Controversy” (*Hamodia Magazine* 11 Tamuz 5770 | June 23, 2010; [http://ohr.edu/this\\_week/insights\\_into\\_halacha/4499](http://ohr.edu/this_week/insights_into_halacha/4499)).

the halachic reasoning behind his actions, in his response.<sup>36</sup>

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36. *Shu”t Karnei HaHod* (vol. 2, last responsum in the sefer, titled ‘*B’dvar Hamashkeh Ha-Coca-Cola*’). This *teshuva* has also been translated to English and can be found on the HebrewBooks website – <http://www.hebrewbooks.org/pdfpager.aspx?req=2379&st=&pgnum=122&hilite=>.

Interestingly, it is known that Rabbi Geffen was not actually the first to grant *hashgacha* on Coca-Cola. In certain regional markets, several rabbis had given *hashgacha* in the late 1920s and early 1930s, and the *Vaadei HaKashrut* of Buffalo, Chicago, and Rochester likewise followed. In fact, there were ads for kosher Coke published in the famed *HaPardes* Torah Journal. These ads contained a small letter from Rav Shmuel Aharon Halevi Pardes, the journal’s editor, that he visited the Coca-Cola factory in Atlanta, and that they ‘revealed to him all of their secrets, including their secret formula’, and he found it to be kosher – ‘*hamashkeh Coca-Cola kosher lishtoto al pi hadin*’.

These rabbis included Rav Yaakov ‘JB’ Bienenfeld of New York, Rav Avraham Meir Franklin of Buffalo, and Rav Shmuel Aharon Pardes of Chicago, who, aside for being well known scholars, were not exclusively relying on the lenient precedent of many *Poskim* [such as the *Noda B’Yehuda* and *Pitchei Teshuval*, who followed the *Ri Migash* and *Rambam*’s permissive positions over that of the *Rashba*, *Raavad*, *Tashbatz*, *Magen Avraham* and *Shulchan Aruch HaRav et al.*] regarding the nullification of *issur* performed by non-Jews, even on a steady basis. They also maintained that since in this case the potential non-kosher ingredients, which since added in such a minuscule amount were not being used for actual taste, originated from a laboratory that put them through a chemical change, they were no longer considered food and therefore permitted.

Not only is this approach supported by many *Rishonim* (such as Rabbeinu Yonah previously mentioned), but Rav Pardes wrote extensively on this topic, including a letter to the *Gedol HaDor*, Rav Chaim Ozer Grodzenski *zt”l*, who agreed that it is indeed permissible. [See, for example, *Shu”t Achiezer* (vol. 2 – YD 11: 5), *Shu”t Avnei Shmuel* (20), and *Shu”t Tzitz Eliezer* (vol. 6: 16, 9 – 11).] Certainly, combining these factors, there is and was ample support for these renowned *Rabbonim* to grant *hashgachah* to Coke. Still, Rav Tuvia Geffen’s actions, unheard of for the time, persuading the Coca-Cola Company to actually change their formula, a monumental contribution in upgrading the ingredients and ensuring that Coke had zero potential *kashrut* concerns to speak of and was permitted unequivocally, set a public precedent for later *Vaadei Kashrut* to follow as well: Even if an item is deemed halachically kosher, to try to go above and beyond the letter of the law, making certain that there is no question on the product. That encapsulated Rabbi Geffen’s greatness and is perhaps the reason that he is the one most commonly and closely associated with ensuring that “Coke is it”, even for the kosher consumer.

Later halachic authorities as well, have ruled similarly to Rabbi Geffen's sound logic and reasoning, and hold that although there is what to rely upon regarding purchasing, nevertheless, when it comes to granting rabbinic supervision, a rabbinic authority should not give a seal of approval to an item that contains nullified *issur*.<sup>37</sup> In fact, Rav Moshe Feinstein classified doing so (if that is the only justification they are relying upon to proclaim the product kosher) as "*mechuar hadavar*", utterly disgraceful or disgusting.

This is why the fact that the nullification is being performed by non-Jews may still not allow this man-made burger to be consumed as kosher.

### Kosher Cheeseburgers?

However, it is important to note that even if one were to follow the premise that lab-created meat would maintain pareve status, it still might not denote the permissibility of a kosher cheeseburger. The permissibility of such would depend on the laws of *Marit Ayin*.

As mentioned previously, the most basic definition of this law is the prohibition of taking actions which strictly speaking, are actually permitted according to halacha, but nevertheless give onlookers **the impression** that we are doing something halachically forbidden. In other words, although an observer has an obligation to judge others favorably (*dan l'kaf zechut*),<sup>38</sup> nevertheless every Jew still has an obligation not to do things that might raise an observer's suspicions. The common expression might be that "looks can be deceiving", but even so, one must make sure not to engage in questionable activities, or even questionable-looking ones.<sup>39</sup>

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37. See Rav Moshe Feinstein's *Shu"t Iggerot Moshe* (YD vol. 2: 41 s.v. *v'im*), Rav Moshe Sternbuch's *Shu"t Teshuvot V'hanhagot* (vol. 1: 440), and Rav Menashe Klein's *Shu"t Mishneh Halachot* (vol. 7: 113, 2).

38. See Gemara *Shabbat* 127b, Gemara *Shavuot* 30a, and *Rabbeinu Yonah's Shaarei Teshuva* (*Sha'ar* 3, 218 s.v. *v'heenay*).

39. See *Shu"t Iggerot Moshe* (OC vol. 1: 96) and *Shu"t Minchat Shlomo* (vol. 2:

Hence, it seems that even if this lab-grown burger would prove kosher, one may still not eat it with cheese, due to the proscription of *Marit Ayin*. In practice this halacha depends on how common an item is,<sup>40</sup> and with a \$325,000

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58, 29; *Tinyana* 53: 3) how the leading Torah masters actually define the prohibition. *Marit Ayin* does not include worrying that someone might mistakenly think something permitted is prohibited. (The example Rav Moshe gives is driving in a car on Friday afternoon after candle lighting time, that it is not *Marit Ayin*, even though some people mistakenly think that it is already considered Shabbat and might further assume that one would drive on Shabbat as well); one need not concern himself with others' mistaken notions of what is prohibited or allowed, only actual halachic concerns.

40. See *Rosh* (commentary to *Nidda*, Ch. 9), *Tur* / *Shulchan Aruch* / *Rema* (YD 298: 1), *Bach* (ad loc. 5), *Shach* (ad loc. 2), *Aruch Hashulchan* (ad loc. 4 & 5), *Kreiti U'Pleiti* (YD 87: 8). *Maharsham* (*Daat Torah* on YD 87: 3); *Yad Yehuda* (ad loc. *Pirush Ha'aruch* end 5), *Arugat HaBosem* (*Belchover*; *Kuntress HaTeshuvot* 13), *Shu"t Harei Besamim* (*Mahadura Chamisha'ah* vol. 4: 33) and *Shu"t Emek Halacha* (OC 134 s.v. *ode*). In fact, this basis for being lenient in cases of *Marit Ayin* has been widely accepted by contemporary authorities as well; the only issue being how common that item has to be in order to be entitled to this exemption.

There was a famous dispute recorded approximately a hundred years ago between the *Pe'at HaSadeh* (*Shu"t* vol. 1: 36) and the *Yigal Yaakov* (*Shu"t* YD 23) regarding some novel egg-based desserts served at a wedding that looked remarkably dairy-like. Although both agreed with the *Kreiti*'s approach, they disagreed as to whether such desserts were considered common enough in their day to negate the rule of *Marit Ayin*. In fact, nowadays, with popular and familiar daily staples such as margarine, soy schnitzel, burgers, and hot dogs, non-dairy creamers, pareve ice creams and whipped desserts so commonplace, the vast majority of contemporary authorities assert that technically there no longer is a *Marit Ayin* issue with these products at all. Who would suspect a religious Jew of using dairy butter, milk or ice cream after eating meat, instead of assuming that the pareve alternative is being used? Although some authorities maintain that it is still preferable to exercise caution since the dairy versions are presently more common, and maintain that one should keep the container or wrapper on the table at the time of eating, nevertheless, they agree to this halachic principle. That is why nowadays many do not even think twice about "buttering" their sandwich with margarine or having pareve "ice cream", or coffee with non-dairy "milk", even at a *fleishig* (meaty) meal. These issues were elucidated at length in a previous article titled: "Margarine, Misconceptions, and *Marit Ayin*" (*Yated Ne'eman* 20 Tammuz 5774 | July 18,

price tag, a potential kosher cheeseburger is still a long way off!

## Inconclusive?

So, which of these describes our lab grown burger? Although it seems the stronger of the arguments is that it retains the status of its source meat, practically, as stated previously, this whole cutting edge scientific discussion of genetically engineered beef is currently purely academic. This is due to the fact that until the whole process is made public knowledge, all we can do is conjecture as to the potential halachic possibilities.

It is fascinating to realize that such technological advances were foreshadowed thousands of years ago by the wisdom of our Sages, discussing meat created via unconventional means. Time and technology have once again proven wrong those who might scoff at our Aggadic traditions.

One final thought: The Torah declares that all sea creatures that have fins and scales are kosher. The Gemara in *Nida* (51b) and *Chullin* (66b) questions *Chazal's* rule that scales alone suffice to render a fish kosher, "Why then does the Torah mention fins altogether?" The Gemara answers in an extremely rare fashion: "*l'hagdil Torah ulha'adirah*", to magnify and enhance the Torah. The *Magen Avraham* in his commentary on the *Yalkut Shimoni* (*Parshat Shemini*) takes this a step further. He writes that *l'hagdil Torah ulha'adirah* was not limited to the topic of fins and scales. Rather, it was also referring to a specific poisonous 'fish' with legs whose status was debated (the *Stincus Marinus*).<sup>41</sup>

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2014; [http://ohr.edu/this\\_week/insights\\_into\\_halacha/5080](http://ohr.edu/this_week/insights_into_halacha/5080)).

41. This fascinating issue was addressed at length in a previous article titled "Fish with Legs?" (*Yated Ne'eman* 30 Tishrei 5775 | October 24, 2014; [http://ohr.edu/this\\_week/insights\\_into\\_halacha/4915](http://ohr.edu/this_week/insights_into_halacha/4915)).

This is similar to *Rashi*'s explanation to the famous last Mishnah in *Makkot*, that Hashem wishes to give *Klal Yisrael* extra reward and therefore added effortless Torah and mitzvot, such as refraining from eating repulsive creatures that one wouldn't want to eat anyway. So too, regarding this "fish", since it is poisonous, one wouldn't have any sort of desire to eat it, thus possibly taking it out of the realm of practical halacha. Nevertheless, this whole issue of finding out its kashrut status was meant for us to delve into exclusively to get rewarded in the Next World, an infinitely more appealing approach. One can certainly say the same with this stem cell hamburger, as it currently remains imbedded in the realm of theory and not practical reality.

**Postscript:** After completing this article, this author was notified by noted food scientist Arlene Mathes Scharf of Kashrut.com that an additional factor in the production of the lab grown burger was made public, that growing this "meat" involved using fresh calf blood as the growth medium. If so, it definitely might change the lab burger's potential kashrut status. First of all, if it is soaking directly in blood for more than 24 hours straight it can be considered *kavush k'mevushal* (if a food soaks in liquid for a long time it is as if it was cooked) and prohibited (at least rabbinically).<sup>42</sup> Additionally, if blood is used as an actual growth medium it would seem to be a '*Davar HaMaamid*' and would never be nullified. Furthermore, even if it might qualify as a situation of "*Zeh V'Zeh Gorem*", nonetheless, if it is considered such an integral part of the growth process, presumably at no time would there be present a ratio of 60 against it. Consequently, if proven accurate, use of blood as the growth medium can complicate matters, and would seemingly make production of the Petri dish patty highly problematic.

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42. For the parameters of the *halachot* of *kavush k'mevushal*, see *Tur* / *Shulchan Aruch* and main commentaries to *Yorah De'ah* 105:1 at length.

Just another excellent reason to ascertain the actual realities when viewing innovation via the lens of halacha.

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# ***Brit Mila Issues: Historical Controversies and Contemporary Halachic Issues***

*Rabbi Eliyahu Asher Prero*

## **What is the Basic Halachic Requirement of *Brit Mila*?**

The mitzvah of *brit mila* requires a *mohel* to remove all the foreskin that covers the glans ("atara").<sup>1</sup> As with other mitzvot, there is a minimum standard – a *shiur*<sup>2</sup> – by which halacha determines the validity of a *brit*. The baseline halachic standard which mandates the amount of foreskin cut is referred to as "*shiur hachituch*" (or the "measurement of cutting"). If less than the minimum amount of the foreskin is removed, residual foreskin will remain and the *brit* may be invalid.<sup>3</sup> The Mishnah refers to residual foreskin that invalidates a *brit* as "*tzitzen hameakvin et hamila*".<sup>4</sup> A Jewish male who has an invalid *brit* is an "*arail*"<sup>5</sup> (halachically

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1. *Rambam Hilchot Mila* 2:2; *Shulchan Aruch* YD 264:3.

2. "*Shiurin, chatzitzin u'michitzin halacha l'Moshe m'sinai.*" *Sukkah* 5b.

3. *Shulchan Aruch* YD 264:5. Poskim differ as to what exactly disqualifies a *brit*. Here are some significant points: The *mohel* should remove all the foreskin covering the *atara* (YD 264:2). The exact definition and boundaries of the *atara*, and whether one checks the kashrut of a *brit* while the *aiver* is erect (*aiver chai*) or while the *aiver* is flaccid (*aiver meit*), will be discussed in the text below.

4. *Mishnah Shabbat* 137a.

5. *Rambam Hilchot Mila* 2:3, "keitzad, im nishar mei'or ha'orla ohr hachofeh rov govah shel atara, harey ze arail k'mot shehaya".

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practicing Mohel.*

uncircumcised male), a transgression of Torah law punishable by premature death (*karet*).<sup>6</sup>

## Do All *Mohalim* Perform a Halachically Valid *Brit*?

There are *mohalim*<sup>7</sup> in the U.S. and elsewhere who regularly remove less than the required amount of foreskin<sup>8</sup> and thus leave the child an *arail*.<sup>9</sup> Many of these *mohalim* are accepted in the Orthodox or *charedi* communities, or both. This phenomenon is documented by many videos of the *mila* procedure. Many rabbinic scholars of note recently published letters regarding this phenomenon. Notably, Rav Moshe Shternbuch writes in his approbation to a book on *mila*, *Mila Shelayama*: “It is common that even accepted *mohalim* do not perform a *brit mila* as the halacha requires.” Rav Shternbuch issued a public proclamation regarding the current status of *mila*, and has written in his own responsa about the sorry state of *mila* within Orthodox and *chareidi* circles.<sup>10</sup> Indeed, much of

6. *Rambam Hilchot Mila* 1:1.

7. *Mohalim* is the plural form for *mohel*.

8. Although cutting too little foreskin is a halachic issue, I would be amiss if I would not mention the medical dangers involved in cutting too much skin from a baby. The results could be medically disastrous, with severe negative long term impact. The baby may bleed excessively, require a skin graft, or have an abnormally curved shaft for the rest of his life.

9. *Milah Shelayama* p. 13 “she’alot aylu metzuyot gam eitzel yeraim ushlaymim m’layda.” – Questionable *britot* are common even amongst those who are fearful of heaven and completely devout from birth.

10. *Teshuvot V’hanhagot* 5:289: Due to our great sins (*b’avonotainu harabbim*) there are *mohalim* who are presumed to be experts, that do not perform a *brit mila* according to basic halachic standards, both in regards to the cutting of the requisite *orla* and in regards to *p’riah*. Recently, many children required surgery (to remove *tzitzit hameakvin es hamila*). I have seen with my own eyes children whose *brit* has not been performed according to halacha, and the letter of the law requires that they undergo surgery to fix their *brit*. In addition, many *mohalim* testified before me, that they are also witness to this phenomenon, as parents ask the *mohalim* to correct their children’s *brit*.

Therefore, I come in this proclamation to propose that it is fit to decree, as did the “*Ktav Sofer*” in his time, that there should be an extra expert *mohel*

the discussion in the contemporary books, *Mila Shelayama*<sup>11</sup> and *Brit Eliyahu*,<sup>12</sup> addresses issues that arise from an invalid *brit*. Recently (2015), Hitachdut HaRabbanim of the United States and Canada, a rabbinic organization comprised of right-wing Orthodox rabbinic scholars, published a public declaration warning people of the dangers of choosing a *mohel* who is not properly trained, who can damage a child's health, and may not perform a *brit mila* in accordance with halacha.<sup>13</sup> In addition, R. Shlomo Amar, the former Sephardic Chief of the State of Israel and the current Chief Rabbi of Jerusalem, wrote a letter in which he decries the practice of many *mohalim* who disregard the most basic halachic and health guidelines.<sup>14</sup>

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present as a supervisor (*mashgiach*) at every *brit*".

Rabbi Shternbuch continues: "To my great dismay, my advice (to have another *mohel* present by every *brit* to ensure the kashrut of the *brit*) was not accepted in Eretz Yisrael or outside of it. This is because every *mohel* testifies about himself that he is a tremendous expert with great experience, and that they have performed *brit mila* for thousands, among them, great scholars and righteous people. However, I am personally aware, that also amongst those *mohalim* it is regularly found those who do not perform the *mila* according to halachic standards."

11. *Mila Shelayama* (Yerushalyim 2012),p.221.

12. *Brit Eliyahu* (B'nei B'rak 2013),p. 153. See also *Iggerot Moshe* YD 4:40.

13. The text of the public declaration begins as follows: "To our great dismay, it has recently come to our attention that there are men who perform *brit mila* on the children of Israel who have not learned the proper method of circumcising according to the laws of our holy Torah. There are also those who do not know the relevant laws of *mila* appropriately, and therefore there have been an abundance of children who have needed to be fixed (surgically), and there are children whose *brit mila* is only kosher after the fact (*b'dieved*), and there are also other stumbling blocks, may the Merciful One save us. Therefore, in order to remove a stumbling block from the house of Israel, we hereby reinstitute the historic decree, that one is required to bear a rabbinic license (*k'tav kabbala*) in order to practice *brit mila*, just like scribes and ritual slaughterers (*sofrim v'shochtim*)."<sup>15</sup> Among the signatories are: R. Asher Anshel Katz, R. Hillel Weinberger, R. Yitzchak Menachem Eichenstein, R. Tzvi Yissachar Dov Katz, R. Avraham Shlomo Bloom, R. Yitzchak Stein, R. Moshe Bransdorfer, R. Menachem Mendel Fuchs, R. Yechezkel Roth.

14. R. Shlomo Amar wrote: "There are many important things that *mohalim*

## ***Brit Mila: A Historical Hotpoint of Contention in the Halacha World***

Authorities throughout the ages observed that there were *mohalim* who did not follow, or even know, the basic halachic guidelines of *brit mila*. The authorities wrote their observations down in their commentaries to the Talmud, glosses on *Shulchan Aruch*, and halachic responsa.<sup>15</sup> In addition, there were leaders of communities who enacted various guidelines for *mohalim*.<sup>16</sup> Other communities required a *mohel* to practice

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disregard, some times because they lack the knowledge, and at times because they want to impress all that are present. They want to show their great skill and quickness. They search for any way that blood will not come out, and there are those who use a certain shield (i.e., the *Magen* clamp) that the wise men of the generation forbade to use, because it kills the skin before the *mohel* cuts it. They also disregard the performance of suctioning the wound, and perform it inappropriately. And there are those who disregard the proper placement of the bandage, and could, at times, damage the health of the child.”

15. Following are just a few examples: The *Taz* wrote (YD 264:9) I have seen *mohalim* who have made a mistake.” R. Alexander Sender Shur wrote (*Mesechet Shabbat “B’chor Shor”* 137a): “This is a warning to those *mohalim* who do not expose the entire ridge because they are unfamiliar with the relevant halachot.” R. Moshe Sofer wrote (*Shu”t YD* 248): “Woe is it to us, that the Torah has been forgotten that, heaven forbid, the children of Israel are not circumcised.” R. Shlomo Kluger wrote (*Tuv Ta’am V’da’at* 1:1:223): “The senses testify that a *mohel* does not know the laws of *mila*. He only learns the craft, and it is not relevant to say that he is an expert, for although he may see that the way of the *mohalim* is to completely reveal the crown, nevertheless he may think that there is no specific requirement to do so, and the only reason other *mohalim* do so is to be on the safe side, but it is not a requirement... and it is evident in the *Taz*, (264:9) that it is common for *mohalim* to make mistakes, and therefore we cannot assume that every *mohel* is an expert.” R. Yechiel Epstein wrote (YD 264:17): “The *Shulchan Aruch* writes, ‘One must remove all the skin that covers the *atara*,’ not like those who take only a little bit off from the top. Rather, one must remove all the skin until the *atara*.” R. Yaakov Kaminetzky wrote (*Emet L’Yaakov* 264:3 p. 361): “We require the entire *atara* to be revealed through the action of cutting, and not pushed down with the *p’riah*. It seems to me that the *mohalim* are not careful in this matter.”

16. See *Teshuvot Chatam Sofer* YD 248.

with a license from the town's rabbinical court, instituted basic standards of care, and called attention to the basic laws and principles of *brit mila* that were disregarded by *mohalim* of the locale.<sup>17</sup>

It is noteworthy that *Takanot K'tav Sofer* writes in article three: "It is common that fathers do not let a *mohel* return and fix their children's *brit*, and their children remain uncircumcised their entire life without the seal of a *brit kodesh* that G-d sealed in our flesh."

The State of Israel maintains a division of the Chief Rabbinate to regulate *brit mila*. The Israeli Chief Rabbinate oversees *brit mila* in Israel, and is a powerful government organization that is a union of the Ministry of Health and the Ministry of Religion.<sup>18</sup> It may surprise many that no such organization or supervision exists in the entire United States! In fact, all one needs to practice *brit mila* in America is... a knife!

## What is the Common Procedure Performed to Correct an Invalid *Brit*?

A Jewish male with an invalid *brit* due to residual foreskin, who seeks (or whose parents seek) to change his status from an *arail* to a *mahul* (from "uncircumcised to circumcised"), will require surgery to remove the residual foreskin. This surgery requires precise skill, has significant risks,<sup>19</sup> can be painful,<sup>20</sup>

17. See *Takanot Ihr Constantine*, published in *Yalkut Me'am Lo'ez, parshat Lech L'cha* p. 333. See Public Declaration of Hungarian Rabbis of Year 1847, published in Periodical "Machzikei Ha'Da'at" 20th Sivan 1905, and republished in "Zair Sofrim" p. 204: "Many *mohalim* do not know the basic halachot of *mila*." See *Sefer Zichronot R' Shmuel Abuhab*, Zikaron 9, *Ot Shalom* (Munkatz) 261:1 page 268, See *Shiyarei K'neset HaGedola*, *hilchot mila* 264, *Takanot R. C.E. Wachs, Av Beit Din Pietrekov*, published in "Yechabeid Av" p. 15, *Teshuvot Chatam Sofer* YD 248.

18. In truth, *brit mila* is a prime junction of health and religion.

19. *Mila Shelayama* p.240.

and protracted,<sup>21</sup> and causes anxiety to the individual and his loved ones (frequently, his parents).

The Israeli media recently reported that many immigrants from Shiraz, Iran, recently underwent surgery to remove residual foreskin, among them, a 92-year-old man. According to Israeli news sources, Rabbi Machpoud of B'nei Brak determined the 92-year-old man's original *brit* was invalid.<sup>22</sup>

### ***Brit mila* and *Geirut* (“Conversion”)**

Just as a Jewish male who has an invalid *brit* is an *arail*, a convert who does not receive a kosher *brit* before immersion in a mikvah (*tevila*)<sup>23</sup> is not Jewish.<sup>24</sup> In some cases, the conversion (*geirut*) has had to be repeated years later, after discovering that an individual's *brit* was not kosher. Often, there are already children born from the non-Jewish father. There are *Dayanim* who preside over a *geirut* who do not know the halachot of residual foreskin, but rely upon the *mohel* performing the *geirut*. In those cases, there is little to no supervision of the *mila* of *geirim*.<sup>25,26</sup>

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20. There are *poskim* who permit anesthetic during surgery to remove *tzitzit hame'akvin*. *Mila Shelayama* p. 239.

21. A *tikun hamila* is corrective surgery. Physicians have advised me in personal communications, that a corrective surgery is generally more complicated than an initial surgery.

22. <http://www.kikar.co.il/mobile/app/#news.123631>.

23. *Tevila* is translated as dunking in the mikvah, or ritual bath. It is the final stage of the Jewish conversion process.

24. YD 268:1. A potential convert is required to receive a kosher *brit mila* before conversion. There are two distinct ways in which a potential convert can receive a kosher *brit mila*. In a case where the convert was already circumcised properly as a non-Jew, the potential convert is required to undergo “*hatafat dam brit*,” a procedure in which a drop of blood is drawn from the shaft. In a case where there was no circumcision, or the original circumcision left residual foreskin, *hatafat dam brit* is not sufficient and the potential convert must undergo a full circumcision prior to conversion.

25. *Geirim*, plural of *Geir*, or convert.

26. From private conversation with a *Dayan* who presides over *geirut*. In a

## Why Would a *Mohel* Perform an Invalid *Brit*?

A *mohel* will leave residual foreskin for various reasons, including poor training or handiwork. Even after expert training and extensive experience, a *mohel* may misunderstand the halachic requirements for *brit mila*, and may deviate slightly from his training.<sup>27</sup> R. Moshe Feinstein wrote that many practicing *mohalim* do not know the specifics of the laws of *mila*.<sup>28</sup> As there is no ongoing supervision, a *mohel*'s error in this area may go unnoticed for years.

## The Basic Procedure – Bringing *Brit Mila* Out of the Shadows

At this point, it is worthwhile to describe what exactly happens at a *brit mila*. This description has two purposes. The first is to be able to explain the halachic disputes regarding *brit mila*. The second purpose, of equal or greater value, is to bring the *brit mila* process to light. The Jewish nation places great importance on the *brit mila*,<sup>29</sup> and it follows that one should become acquainted with the detailed nuances of this mitzvah.

Both the circumcised male and the uncircumcised male have

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recent conversation, Rabbi Gedalia Dov Schwartz, Rosh Beth Din of the Chicago Rabbinical Council (CRC), told me that he would always personally check the *brit mila* of a potential convert days before performing a conversion. He recalled one occasion where a *mohel* ruled the potential convert merely required “*hatafat dam brit*.” Upon his personal inspection, Rabbi Schwartz overruled the *mohel* and required the potential convert to undergo a full surgery to remove residual foreskin.

27. Videos are available of a well-regarded *mohel* who presides over many cases of *geirut*. This *mohel* received expert training, but now is seen performing questionable *britot*.

28. “There are many who are busy with performing this mitzvah (of *brit*), a mitzvah that is truly endeared to all of Yisrael. They accepted upon themselves with happiness, and are prepared to die for the sake of the mitzvah. But there are only a few who know the specific laws pertaining to *brit mila*.” R. Moshe Feinstein, approbation to *Sefer HaBrit* (New York, 1971).

29. See *Talmud Nedarim* 43b, *Shulchan Aruch* YD 260.

a shaft with the glans ("atara") at the end. The uncircumcised *atara* differs in that it is covered with two layers of foreskin. Halacha requires a *mohel* to removes both layers of foreskin, and thereby reveal the *atara*.

## How Does The *Mohel* Reveal the *Atara*?

### *Brit mila: the Two-step Process*

Classically, a *brit mila* was performed in two-steps. First, the *mohel* grabbed the outer foreskin<sup>30</sup> ("*orla*"), pulled it far away from the body and sliced it off with a knife.<sup>31</sup> The inner foreskin ("*ohr p'riah* skin"),<sup>32</sup> was still attached to the *atara*. The

30. In contemporary terms, the grabbing of the outer foreskin is known as "*tefisah*".

31. *Rambam* writes that although one may slice off the *orla* with any instrument, i.e., glass, a flint stone (a la Tzipporah the wife of Moshe), the custom is to use a knife. The use of a *Magen* clamp (which will be discussed later) seems to be at odds with the custom proposed by *Rambam*. In addition, a widespread custom exists for a *mohel* to use a double edged knife. This is based on practical reasons, as well as kabbalah. The verse says, "*romemot kail b'gronam, v'cherev pi'fiyot b'yadam* – The praises of G-d in their throat, and a double-edged sword in their hands." Some contemporary *mohalim* use a standard surgical single blade scalpel, which does not conform to the practice of the "double – edged knife." An additional contemporary issue, due to popular demand, one may purchase a single use (disposable) double – edged surgical scalpel. There are two benefits to this knife: it comes in a sterilized package, and it conforms with the kabbalistic concept of the double-edged sword. R. Elyashiv and R. Y Gross (*Av Beit Din*, Belz, B'nei B'rak) approve of the use of a disposable blade. Medically, the downside of a disposable scalpel blade is that they are not always as sharp as a non-disposable surgical-steel blade. The downside of a double sided surgical steel blade is that it a) is expensive, b) needs to be cleaned and sterilized after every *brit*, and c) the blade may dull during the heat of the sterilization process. R. Chaim Eliezer Shapiro (Munkatch) wrote in *Ot Shalom* (264:11:8) that a child does not feel the cutting of the knife, as long as the knife is sharp and the mitzvah guards and helps him.

32. In order to differentiate between the inner foreskin which is known as "*p'riah*" and the procedure used to remove the inner foreskin, which is also known as "*p'riah*," I use the term "*ohr p'riah*" (lit. *p'riah* skin) to refer to the inner skin, and not the procedure used to remove that skin.

*mohel* inserted his fingernails in a small space between the *atara* and the *ohr p'riah*, grabbed the *ohr p'riah* with both fingernails and ripped it in two.<sup>33</sup> Then, the *mohel* would pull back the *ohr p'riah* which once covered the *atara*, and attach it to the shaft. Once peeled back, the *ohr p'riah* would work as a skin graft and protect part of the shaft that has been cut off together with the *orla*. The *atara*, which was once covered, is now exposed. An important point: those who follow the classic method of *brit mila* do not wear gloves, as the method requires the *mohel* to rip the *ohr p'riah* with his fingernails.<sup>34</sup>

### **The Contemporary Method: *Mila* and *P'riah* at the Same Time (*B'vat Achat*)**

In the contemporary method, a *mohel* uses a metal probe<sup>35</sup> to separate the *ohr p'riah* from the *atara*. Then he grabs the *orla* and the *ohr p'riah*. The *mohel* pulls both foreskins far away from the body, slices them off, and immediately reveals the *atara*.<sup>36</sup> As the *ohr p'riah* has been removed, there is no longer a need to rip it, peel it back, and place it against the shaft. A

33. The outer foreskin is similar to the regular skin on the body, which must be cut with a sharp object; the inner foreskin consists of a mucous membrane, commonly found on the inside of the cheek, and may be ripped with fingernails.

34. A *mohel* who does rip the *p'riah* could indeed use a scissors to make a cut in the *p'riah*. Indeed, many *mohalim* carry special “*p'riah* scissors” which are used to cut, or trim the excess *p'riah*, if necessary.

35. The Hebrew word for probe is “*mafrid*,” (lit. separator.) As the purpose of the probe is to separate, the Hebrew term more accurately describes the tool’s purpose.

36. The use of a metal probe is mentioned in the *Siddur* of R’ Yaakov Emden. Although it separates the *ohr p'riah* from the *atara*, it does not guarantee a *mohel* will cut off both skins. Indeed, many *mohalim* who champion the two-step method will make use of the probe, in order to facilitate easier ripping of the *ohr p'riah*. In addition, even the use of a hemostat does not guarantee removal of all the *ohr p'riah*! The amount of foreskin excised from the body solely depends on how much of the outer and inner foreskins the *mohel* grabbed in his hand before he cut.

contemporary *mohel* may also utilize a hemostat, a medical tool that acts as a mini pliers. It crushes skin and locks it in place with tremendous force. A *mohel* uses a hemostat to crush the inner and outer foreskin together, and then pulls the foreskins away from the body. A *mohel* who removes all the *orla* together with the *ohr p'riah* may wear gloves, as there is no need to rip any *ohr p'riah*, as it has been completely excised from the body.

Whether one should follow the classic two-step method, or the contemporary one-step method, is the subject of one of the most heated halachic arguments of the twentieth century. It will be discussed later in the article. An important final note: regardless of how a *mohel* removes the *ohr p'riah* from the *atara*, the *mohel* should cut away the same amount of *orla*.

## Which Procedure is Better?

Many contemporary American *mohalim* remove both the *orla* and *ohr p'riah* at the same time (*b'vat achat*). R. Moshe Feinstein writes<sup>37</sup> that this method is just as halachically acceptable as the classic two-step method. In R. Feinstein's opinion, the central halachic requirement of *brit mila* is to reveal the *atara*. As long as the *atara* is revealed, either by cutting away the inner foreskin completely, or by ripping the inner foreskin in half, leaving it on the body and repositioning it on the shaft, the *brit* is kosher.

## The *Rambam's Brit Mila*

*Rambam* describes the performance of *brit mila* in the classic two-step procedure:

How should one perform a *brit mila*? Cut off all the skin that covers the *atara*, until you reveal the entire *atara*. Then rip the soft membrane underneath that skin with

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37. *Iggerot Moshe* YD: 155.

one's fingernail, and turn it this way and that way until the flesh of the *atara* is seen.

## Is The Talmud and *Rambam's* Description of *Brit Mila* Procedure Proscriptive Or Descriptive?

Many sources in the Talmud,<sup>38</sup> *Rishonim*,<sup>39</sup> and *Shulchan Aruch*<sup>40</sup> describe *brit mila* as the classic two-step method. The Talmud rules: One who merely cut off the outer foreskin but does not perform "*p'riah*," (tearing the inner foreskin) has left the child halachically uncircumcised. Many *Rishonim* explain the "*p'riah*" as ripping the inner foreskin (*ohr p'riah*). If one were to take those *Rishonim* literally, the Mishnaic dictum would read as follows: one who merely cut off the outer foreskin but did not rip the inner foreskin has left the child uncircumcised. If one were to take those *Rishonim* literally, the actually ripping of the inner foreskin is part and parcel of the mitzvah of *brit mila*. If taken literally, both a *mohel* who did not touch the inner foreskin and left it on the *atara*, and one who surgically removed the inner foreskin without ripping it, has left a child uncircumcised.

### R. Feinstein: The *Shulchan Aruch* is Merely Descriptive

*Shulchan Aruch* also codifies the rulings of *Rambam*, albeit with minor modification. If the *Shulchan Aruch* is proscriptive, and the method of *brit mila* described is exclusive of all other methods, then one who cut away the inner foreskin and did not rip the foreskin has not performed a kosher *brit mila*. R. Feinstein argues that although the *Shulchan Aruch* and *Rishonim* described *p'riah* as actually tearing the inner foreskin in half, these statements were only descriptive in nature.

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38. See *Masechet Shabbat* p. 137a.

39. *Rambam Yad Hachazaka Hilchot Mila*, and in *Perush haMishnah*, *Ohr Zarua*, *KLalei Mila L'R' Yakov HaGozer*, *Machzor Vitri*, and *Sefer HaEshkol*.

40. YD 264:3.

R. Feinstein's main proof: by Jewish law, a *brit mila* performed at night, by a non-Jew, or before the eighth day, is invalid.<sup>41</sup> To validate such a *brit*, it is therefore necessary later to perform "*hatafat dam brit*" – or the letting of a drop of blood from the shaft. Let us assume that an expert *mohel* performed a *brit mila* before the eighth day in the classic method of first cutting the outer foreskin and then ripping and peeling the inner foreskin. The *brit mila* is still not kosher and the child will not be allowed to eat sacrificial meat or *terumah*. However, when one performs "*hatafat dam brit*," which now "kosherizes" the *brit mila*, the child is now able to eat the sacrificial meat and *terumah*. R. Feinstein proves that all that matters for a kosher *brit* is to have the *atara* revealed. For one may not rely on the ripping of the inner foreskin that took place before the eighth day to make the *brit mila* kosher, as it was performed in a time that was not allowed! It follows, therefore, that as long as the *atara* is now revealed, the *brit* is one hundred percent kosher. R. Feinstein concludes, once we know that a one-step *brit* is kosher, who are we to assume that a two-step method is more kosher than another?<sup>42</sup>

### R. Feinstein's Concession: *Midrash Shocher Tov*

Although R. Feinstein concedes that the custom of *mohalim* throughout the generations was to perform a two-step *brit mila*, he posits that the classic *mohel* used his fingernails simply

41. YD 261. Another contemporary concern: One who received a *brit mila* in a hospital (generally a day or two after birth) may have to undergo the *hatafat dam brit* procedure in order to kosherize their *brit mila*.

42. R. Feinstein also relied upon the *sefer Shulchan Gavoha*, who writes that the custom of Saloniki, Greece was to perform the one-step method. In addition, a responsum of R. Hai Gaon indicates that the preferred method is the one-step method. The reliance on the local custom of Saloniki as a global precedent is quite novel. In addition, there are those who doubt the veracity of the authorship of "*Teshuvat R. Hai Ga'on*." See *Teshuvot Shevet HaLevi* 4:133. Finally, as R. Feinstein writes, the custom was from the time of the Talmud until modern times, to perform the two-step method. If so, why would R. Hai Gaon write that the one-step method is better?

as a convenient method to reveal the *atara*. If a different method existed to reveal the *atara*, one may use that method.<sup>43</sup> R. Feinstein concedes somewhat, because the *Midrash* describes a two-step method,<sup>44</sup> that it is better<sup>45</sup> for a *mohel* to use his fingernails to perform *p'riah*.

Although R. Feinstein ruled the one-step method to be just as good as the two-step method, some *mohalim* and rabbinic figures claim that in R. Feinstein's personal opinion, he did not advocate changing from the classic two-step *brit mila*. They claim whenever R. Feinstein sent one of his students to become a *mohel*, he only sent them to learn from a *mohel* who would perform *p'riah* with his fingernails. In fact, R. Reuven Feinstein, R. Moshe Feinstein's son, wrote that his father was always strict ("makpid") to hire a *mohel* to perform a two-step *brit mila*, according to tradition and as recorded in *Shulchan Aruch*.<sup>46</sup> In addition, R. Reuven Feinstein claims that his father never meant to truly permit such a *brit* "l'chatchilah" (at the outset).

## Fierce Opposition to the One-step *Brit*

Many contemporary *poskim* opposed R. Feinstein's<sup>47</sup> novel

43. In other words, the two-step method and fingernails are not specifically proscribed.

44. The *Midrash* writes that the purpose of the fingernails is to perform *p'riah*.

45. R. Moshe Feinstein wrote that it is "m'hyot tov" to perform *p'riah* with one's fingernails. Literally, "to be good." It is important to pay attention to the nuance, that R. Feinstein did not write "ba'al nefesh yachmir", "the one who is careful with his soul should be stringent."

46. Published in R. Reuven Feinstein's letter of approbation to *Brito Shel Avraham*.

47. R. Tuvia Goldstein (*Shu"t Emek Halacha* 2:8), R. Yitzchak Weiss (*Shu"t Minchat Yitzchak* 9:100), R. Moshe Stern (Debreczen) (*Be'er Moshe* 2:78, R. Shmuel Wosner 4:133, R. Chaim Pinchas Sheinberg (*Mila Shelayama* p. 419), R. Moshe Shternbuch (*T'shuvot V'hanhagot* 1:598, 2:486, 3:295, 296, 4:220, and 5:289).

ruling, some in a heated fashion.<sup>48,49</sup> They charged that R. Feinstein promoted a change in custom, which is not allowed.<sup>50</sup> In addition, many *poskim*, wrote years before R. Feinstein's ruling that the proper way to perform a *p'riah* is with the fingernails.<sup>51</sup> This created a halachic precedent.<sup>52</sup> Finally, if the *Rishonim* describe a two-step process, it would seem that that is the way that the procedure should be performed, regardless if a one-step *brit mila* is kosher after the fact ("*b'dieved*"). The most forceful and often quoted halachic precedent is set by R. Ettlinger,<sup>53</sup> who wrote that no proof that one must rip the inner foreskin with one's fingernails is needed, for ripping the inner foreskin with one's fingernails is a universally accepted custom and is a law transmitted to Moshe at Mount Sinai ("*Halacha L'Moshe m'Sinai*."). In addition,

48. R. Chananya Dov Kohn, an expert *mohel* and a *Dayan* in prewar Budapest wrote in a lengthy letter to R. Yonason Steif: "One may not perform a one-step *brit mila*, the custom of Israel is the law (*Minhag Yisrael Torah*) and in truth we see that only the light-headed *mohalim* ("*kalei ha'da'at*") use a hemostat. (*Maray Kohain* p. 198)." R. Menashe Klein wrote, "I am amazed that my good friend R. Moshe Feinstein did not have the time to analyze all the sources I presented in my responsa."

49. R. Menashe Klein wrote (in his book "*Mal V'lo Parah*") five main reasons why *mila* and *p'riah* should be separate. 1) The language of the *Rishonim* indicate that one should perform a two-step *mila*. 2) *Mila* and *p'riah* are two separate mitzvot, and one may not bundle mitzvot ("*ain osin mitzvot chavilot chavilot*"). 3) Kabbalah dictates *p'riah* should be performed with fingernails. 4) The one-step *brit* is a change in the custom of Israel. 5) If indeed one may perform a one-step *brit*, then one should not be allowed to perform a two-step *brit* on Shabbat, in order to minimize *chilul Shabbat*.

50. Although R. Feinstein writes that 1) according to his understanding such a custom did exist in the times of the Talmud *Yerushalmi*, and 2) The fact that such a custom existed in the times of the Talmud *Yerushalmi* proves that "*Teshuvat R. Hai Gaon*" is indeed of authentic authorship.

51. *Shu"t Zera Emet siman 132, P'ri Adama* – brought in *Birkei Yosef* 264:6, *Migdal Oz* (Ya'abetz) 11:5 and 12:21, *Zocher HaBrit* 11:13, 11:16, 13:8, *Koreit HaBrit* 264:17, R. Chaim Ozer Grodzinsky, *Achiezer* 2:65, R. Elchonon Wasserman *Koveitz Ha'arot Yevamot* 64, *Ot Shalom*, (Munkatch) 264:3:9, R. Meir Shapiro (*Shu"t Ohr HaMa'ir* 58) and others.

52. R. Feinstein, however, clearly did not feel bound to this precedent.

53. *Shu"t Binyan Tzion siman 88*.

R. Epstein<sup>54</sup> in *Aruch HaShulchan*, wrote that one must use the fingernails for *p'riah*, and it is forbidden to perform *p'riah* with scissors. Perhaps the greatest proof bought against R. Feinstein is from the laws of ritual mourning, in which *Rema* writes that a *mohel* may sharpen his fingernails during the seven days of mourning to perform *brit mila*. If there were no specific requirement for a *mohel* to use his fingernails as R. Feinstein claims, then a *mohel* in mourning could use scissors, rather than suspend the usual practice of a mourner.

In conclusion: almost all of the authorities mentioned above disagree with R. Feinstein as to the proper way to perform the mitzvah of *p'riah*. Nevertheless,, they agree that if one completely removed the *ohr p'riah*, the child is circumcised and may eat from the Pesach Sacrifice ("Korban Pesach").

### When to Recite the *B'racha*

There are two blessings recited upon the *brit mila*, one by the *mohel*, the other by the father of the baby. The *mohel* recites one *b'racha* before he cuts the foreskin. The *Rishonim* debate when the father of the baby should say his *b'racha*. Some *Rishonim* say the father should say his *b'racha* before the *brit*. This would follow the normative rule that *b'rachot* are recited before the performance of a mitzvah.<sup>55</sup> Other *Rishonim* posit that the father should say his *b'racha* after the *brit mila*. The *Rishonim* provide two reasons. First, the *b'racha* need not precede the *brit mila*, as the *b'racha*'s purpose is to praise Hashem, and is not a classic *b'racha* made before the performance of a mitzvah. Second, even if the *b'racha* is for the performance of the mitzvah, *brit mila* is different than other mitzvot. A regular mitzvah, like shaking a lulav, one performs himself, but one does not normally perform the *brit* himself, relying rather on the *mohel*. Many *Rishonim* posit that it is not proper to make a

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54. *Aruch HaShulchan* 264:19.

55. *Talmud (Pesachim 7b)*.

*b'racha* before the *brit*, because maybe the *mohel* may change his mind, walk away, and not perform the *brit*. Rather, the father should make his *b'racha* after the *brit* is performed.

*Rosh*<sup>56</sup> accommodated both opinions, and ruled that the father should make his *b'racha* between the cutting of the outer foreskin and the ripping of the inner foreskin. Since the Talmud rules that one who has cut away the inner foreskin but not ripped the inner foreskin has left a child uncircumcised, a *b'racha* recited before the ripping of the inner foreskin is indeed recited before the performance of the mitzvah. In addition, although many *Rishonim* were concerned a *mohel* may walk away without performing the *brit mila* procedure, *Rosh* wrote that as long as the *mohel* cut away the outer foreskin, one need not be concerned he would walk away without performing the second step, ripping the inner foreskin. *Shulchan Aruch* rules according to the opinion of the *Rosh*, that a father should make the *b'racha* between the *mila* and the *p'riah*.

### **When should the father make a *b'racha* if the *mohel* cuts off both foreskins at the same time?**

One of the most interesting differences between a one-step *brit* and a two-step *brit* is the proper time for a father to make the *b'racha*, as there is no in-between. R. Feinstein suggests<sup>57</sup> the father should make the *b'racha* between the beginning of the cutting of the foreskin and the end of the cut. As a practical matter, this seems difficult, as the cut usually takes a fraction of a second. R. Feinstein rules that although the opinion of *Rosh* is recorded as law in the *Shulchan Aruch*, since Rabbeinu Tam, *Rambam*<sup>58</sup> and *Ran* rule that one should make

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56. *Teshuvot* 26, *Shulchan Aruch* 265:1.

57. *Iggerot Moshe* 1:155.

58. *Hilchot Mila* 3:1 (according to the understanding of the *Kesef Mishneh*, but not according to other opinions in the *Rambam*. See *Teshuvot R. Avraham ben HaRambam Siman 2, MaHaRam Elshakar Siman 18*).

the *b'racha* after the entire circumcision, one may follow their ruling.<sup>59</sup>

## R. Feinstein's Leniency Prevents Halachic Issues with Remaining *P'riah* That Is Not Ripped

As discussed earlier, the *mohel* classically ripped the inner foreskin. Among *mohalim*, ripping the inner foreskin is known as the most difficult part of the *brit mila* procedure. Some *mohalim* find it so difficult to do, that they push down the inner foreskin under the *atara*. This creates a major halachic issue. As mentioned earlier, the inner foreskin is a thin mucous membrane that covers the *atara*. If a *mohel* only pushes the inner foreskin away from the *atara*, it retains its original circumferential force, and may easily be pushed back on top of the *atara*, thereby rendering the initial *p'riah* void.<sup>60</sup> If the inner foreskin is ripped in two, then it will not easily cover the *atara*. In addition, one has fulfilled the ruling of the *Shulchan Aruch*, to cut the outside foreskin and rip the inner foreskin. Even if the inner foreskin comes back and covers the *atara*, it is of little consequence.<sup>61</sup> However, one who has not ripped the inner foreskin, has not fulfilled the ruling of the *Shulchan Aruch*.<sup>62</sup> This ruling highlights the importance of ripping the inner foreskin. Those who follow the ruling of R. Feinstein and truly

59. I might add, that according to all opinions, if the father makes the cut himself, he should recite both *b'rachot* before making the cut. Therefore, a father who wishes to recite his *b'racha* according to all opinions may also make the cut himself, thereby avoiding any complication with the *b'racha*.

60. See *Takanot K'tav Sofer L'inyanei Mila* where the *Beit Din* of the *K'tav Sofer* ruled explicitly that such a child is uncircumcised.

61. See letter of R. Moshe Shaul Klein, printed in back of *Brit Eliyahu* (p. 274).

62. In a landmark ruling, R. Nissim Karelitz of B'nei Brak published an open letter in which he rules that one who has merely cut the outer foreskin but has not physically ripped the inner foreskin has not performed a *brit mila* in its proper fashion, and if one performs a *brit mila* in that fashion, may have desecrated the Sabbath.

remove the inner foreskin, have no *p'riah* left to rip, and in an ironic fashion, perform a more halachically acceptable *brit* than a *mohel* who follows the classic step method, but only pushes down, rather than actually ripping the inner foreskin.<sup>63</sup>

## R. Feinstein and Oral Suction

As mentioned earlier, it was the custom of *mohalim* to suck the blood from the wound with their mouths. Due to health concerns, there is much discussion of the halachic necessity to perform oral suction.<sup>64</sup> Some point to the fact that oral suction was always performed, and this custom alone would prevent a fastidious *mohel* from using a tube instead of oral suction. R. Romi Kohn, a veteran *mohel*, writes that R. Moshe Feinstein was adamant that oral suction be performed. According to him, R. Feinstein dismissed any health concerns and said, "One who keeps a mitzvah knows no harm."<sup>65</sup>

## How Much Outer Foreskin To Cut? Three Main Arguments

It is difficult to encompass in one article all pertinent opinions regarding a prime issue in *brit mila*: how much foreskin to cut. All agree it is incumbent upon the *mohel* to: (1) cut off all the *orla* (2) from the entire *atara* (3) in a flaccid state. The dispute among *poskim* is only as to *b'dieved* – after the fact – what to do when the *mohel* did not cut the requisite amount.<sup>66</sup> There are three pertinent debates: between the

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63. Public declaration of R. Yechezkel Roth.

64. For more on this, see *Medical Risk Taking in Halacha – A Case Study*, in *Journal of Halacha and Contemporary Society* Volume 51.

65. See R. A. Romi Kohn, *Brit Avraham Kohn*.

66. See *Brit Eliyahu* p. 42. For more on the issues and the rulings of contemporary *poskim*, see: *Mila Shelayama* chapter 2, *Brit Eliyahu* p. 39 and p. 153 at length, *Otzar HaBrit* volume 3 p. 305, *Sefer HaBrit* YD 264:5, *Teshuvot Chatam Sofer* YD 248, *Ot Shalom* (Munkatz) 264:5, *Teshuvot Dovev Meisharim* (Tzchebin) 3:98, *Teshuvot Minchat Yitzchak* 3:101, *Iggerot Moshe* YD 4:40, *Shevet HaLevi* 6:148, *Teshuvot V'hanhagot* 4:220. See also *Mishnah Berurah*

*Chochmat Adam* vs. *Divrei Chayim*, between the *Shach* and the *Chatam Sofer*, and *Chacham HaS'faradi* vs. the *B'chor Shor*.

## The *Atara* May Be Revealed Without Any Cutting

In the *brit mila* procedure described above, the *mohel* pulled away the outer foreskin from the body and cut it off. A feature of the unique stretchable nature of a newborn's foreskin, is that it is possible to reveal the *atara* without cutting off any foreskin! One need only press down on the sides of the foreskin until the foreskin is pulled close to the child's stomach, and the *atara* is visible. In fact, as the body matures, the foreskin may very well slide down on its own beneath the *atara* in a case of urination or an erection. If the purpose of the *brit mila* is to reveal the *atara*, would such a "brit" be kosher? What about a *mohel* who only cuts away a portion of the foreskin, and then pushes the rest down towards the body in order to reveal the *atara*? What if a minimal amount of outer foreskin was removed, and the *atara* is only visible when the shaft is in an erect state. Would that be kosher? In addition, is an *atara* allowed to be partially covered in outer foreskin?

## The Sock Example

To make the *brit* procedure a bit more understandable, it pays to contemplate the following parable. Imagine the Torah obligated every male to **cut away** all the sock that covered his toes. One could perform the procedure in two ways. One could mark exactly where the sock covers the toes, and where the toes meet the sole of the foot. Then, one could grab the sock at that mark, and pull it away from the body, and cut it off with a knife. The sock now would only cover the sole of the

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331:15 who rules unequivocally in accordance with the *Chatam Sofer*, that the state of *tzitzit hameakvin* is determined solely while the *aiver* is in a flaccid state.

foot, but not the toes. One could, however, **remove** the sock from the toes in a different manner. One could pull the sock a little bit forward, and cut a hole at the outer most point. Then, one could pull the sock away from the toes closer to the body, and the toes will be revealed. Albeit the part of the sock that once covered the toes still remains, it is just repositioned on the sole of the foot. In the removal method, the toes are revealed just the same.

### Debate #1 *Chochmat Adam* vs. *Divrei Chayim*

The Torah commands “*yimol lachem kol zachor*” “all males among you shall be circumcised”.<sup>67</sup> *Unkelos* translates the word “*yimol*” as “*yitgizar*” – you shall cut. R. Moshe Feinstein<sup>68</sup> derives from *Unkelos*’s translation, as well as the custom throughout the ages, that the mitzvah of *brit mila* is only performed if one actually cuts off the entire *orla*.<sup>69</sup> According to many contemporary *poskim*,<sup>70</sup> a *mohel* who cuts off part of the *orla* and pushes down the rest to reveal the *atara* has not performed the mitzvah of *brit mila*, and the child is an *arail*. Indeed, the *Pitchei T’shuva*<sup>71</sup> cites the “*Chamudei Daniel*” who wrote that he observed that there are *mohalim* who do not cut off the entire outer foreskin, but rather pull the outer foreskin down and reveal the *atara* when they rip and peel the inner foreskin. The *Chamudei Daniel* wonders from where these *mohalim* derive that this is the proper way to perform a *brit*. R. Avraham Danzig, author of *Chochmat Adam*,<sup>72</sup> argues vigorously that one who only has a partially cut away foreskin

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67. *Beraishit* 17:12.

68. YD 4:40.

69. R. Feinstein posits, that the custom of *mohalim* to cut off all the foreskin is due to the fact that it is a halacha received at Mount Sinai with universal acceptance.

70. R. Feinstein YD 4:40, R. Yosef Shalom Elyashiv, R. Chaim Pinchus Sheinberg, and R. Shlomo Zalman Auerbach, quoted in *Mila Shelayama* p. 45.

71. 264:13.

72. *Chochmat Adam* 149:16-17.

is uncircumcised according to Torah law (*arail min haTorah*). This opinion that one must cut away the entire foreskin is known as the position of the “*Chochmat Adam*.”

### The Opinion of the *Divrei Chayim*

R. Chaim Halberstam argued vehemently with R. Danzig. He claimed that although a *mohel* should initially cut away the entire outer foreskin, but if he only made a partial cut and then pushed down the outer foreskin to reveal the *atara*, the child is circumcised just the same.<sup>73</sup> In fact, R. Halberstam observes that the custom of *mohalim* was to make a partial cut, and the only opinion he ever heard disapproving it was R. Danzig’s.<sup>74,75</sup>

### Debate #2 – The *Shach* vs. The *Chatam Sofer*

At times, a partial cut of the outer foreskin leaves a child with an *atara* that is visible only when the child has an erection. In other instances, a child had a proper *brit*, but is chubby and the fat of his stomach covers the *atara*. The *Shulchan Aruch* rules that the *atara* of a chubby baby need only be visible in the state of an erection.<sup>76</sup> When describing

73. (*Divrei Chaim* YD 2:114-118).

74. A contemporary of R. Halberstam, *Nefesh Chaya*, writes that the custom of the *mohalim* was to make a partial cut in the outer foreskin and then to rip and tear both the outer and the inner foreskins, peel them away from the *atara*, and place them on the shaft. He writes, that one who follows the recommended *brit mila* procedure of the *Rambam* and *Shulchan Aruch* and cuts off all the foreskin that covers the *atara* will most likely endanger the health of the child. R. Berish Wiedenfeld (The Tzebiner Rav) wrote a responsum (*Doveiv Meisharim* 3:98) regarding a child who was supposedly circumcised properly but upon later inspection had residual foreskin on the *atara* that was causing his skin to become infected. Although R. Wiedenfeld declined to issue a final ruling on the matter, and did not decide between the *Chochmat Adam* and the *Divrei Chayim*, as part of his response, R. Wiedenfeld brings, as precedent, the lenient opinion of the *Nefesh Chaya*.

75. R. Elyashiv dismisses that claim, and rules one must cut away skin from the foreskin that was pushed down.

residual foreskin that invalidates a *brit* on a non-chubby baby, the *Shulchan Aruch* does not mention that leniency,<sup>77</sup> and it seems that only a *brit* where the *atara* is visible in a flaccid state is kosher. The *Shach* is puzzled, because the Talmud *Yerushalmi* indicates that one only checks a *brit* in the erect state. Later, the *Shach*<sup>78</sup> found a commentary on the Mishnah of the *Rambam* which he claims is a clear proof that one only checks a *brit* if the shaft is in an erect state. R. Moshe Sofer (*Chatam Sofer*)<sup>79</sup> vehemently disagrees with the *Shach*, and indeed, most contemporary *poskim*, including the *Mishnah Berurah*,<sup>80</sup> rule according to the stringent opinion of R. Sofer.

### Debate #3 – How Much of the *Atara* Must Be Covered?

According to all opinions, the entire *atara* should be visible at all times. However, at times the *mohel* did not cut away all the foreskin, and the *atara* remains partially covered. How much of the *atara* needs to be covered in order to invalidate a *brit*? The *Shulchan Aruch* rules that skin that covers the majority of the height of the *atara* invalidates a *brit*. The *Shach* adds, in addition, that skin that covers the majority of the circumference of the *atara* invalidates a *brit*. What are the exact parameters of the *atara*? That is a dispute among the *Rishonim* and *Acharonim*. The *Chacham HaS'faradi*<sup>81</sup> and others, maintain that the entire bulb, from the sulcus to the meatus is considered the *atara*. Thus, in order for residual foreskin to invalidate a *brit*, it must rest on the majority of the height of the entire glans. This is a lenient position.

*B'chor Shor*<sup>82</sup> and others maintain that the *atara* consists of

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76. *Shulchan Aruch* 264:6.

77. *Shulchan Aruch* 264:5.

78. In *Nekudot HaKesef* 264.

79. *Responsa Chatam Sofer* YD 248.

80. 331:15.

81. *Beit Yosef* 264.

82. See *Novella on Talmud, Shabbat* 137b.

merely the ridge that covers the base of the *atara*. Thus, if even a minute amount of residual foreskin is left on the height of the ridge, it will invalidate a *brit*. According to all, if the majority of the circumference of the *atara* is covered in foreskin, even if it does not travel very high on the *atara*, the *brit* is invalid.

### Limits of R. Feinstein's Leniency

Some contemporary *mohalim* claim they do not rip the inner foreskin as they perform a one-step *brit mila* ("*Mila u'P'riah B'vat Achat*"). However, they only cut off a minimal amount of outer foreskin, and push down the remaining inner foreskin. Although their use of a hemostat and probe aids in the removal of the inner foreskin, it is a far cry from the true one-step *brit mila* that R. Feinstein describes. R. Feinstein describes one who removes the entire outer foreskin, and the entire inner foreskin at the same time. He explicitly forbade leaving over outer foreskin and pushing it down; Rav Feinstein never wrote that one is allowed to push down foreskin. In fact, he wrote that even if one does perform a one-step *brit*, many times enough inner foreskin remains to rip with one's fingernails. In addition, R. Feinstein only permitted the use of a probe before a *brit mila* to facilitate the one-step *brit*, but he never wrote that he permitted the use of a hemostat. In fact, one may venture to say, that because the hemostat crushes the skin, it causes more pain to the child than necessary to perform a *brit*.<sup>83</sup> R. Feinstein writes explicitly that it is forbidden to cause more pain than necessary to a child during the *brit mila* procedure.<sup>84</sup> R. Elyashiv also showed tremendous opposition to the use of a hemostat.<sup>85</sup>

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83. R. Moshe Heinemann, a prominent rabbinic figure and *mohel* who uses a hemostat, wrote a letter in which he justified the use of a hemostat, "a child cries no more from the use of a hemostat than from the removal of his clothes." (Published in the book "*Brit Kodesh*," Lakewood) Although this may be true, a hemostat crushes skin and nerves, whereas the removal of clothes does not.

84. *Iggerot Moshe* YD 4:40.

## *Magen Clamp*

### **What is a *Magen Clamp*; How Does it Differ From a Traditional *Magen Shield*?**

A further issue that threatens the kashrut of a *brit mila* is the *Magen Clamp*. It is common practice that as a *mohel* performs a *brit*, he positions a shield (*magen*) on the baby which facilitates the even and proper cutting of the *orla* and protects the *atara*.<sup>86</sup> Approximately 60 years ago, an American *mohel* by the name of Rabbi Harry Bronstein invented a new device, the *Magen Clamp*. Unlike a conventional *magen* shield, which remains stationary and open for the duration of the *brit*, the *Magen Clamp* pivots on a hinge, and closes shut on the *orla*. When the *mohel* presses down on the lever, he locks the *Magen Clamp* shut on the skin, instantly severing all blood supply to the *orla*.<sup>87</sup> This creates, in medical terms, hemostasis.<sup>88</sup> Although extremely painful,<sup>89</sup> this method ensures there is no blood<sup>90</sup> and facilitates quicker healing. Herein lies the difference between the *Magen Clamp* and the *Magen Shield*. Whereas a clamp can lock shut and crush the foreskin, the plain shield cannot lock shut.

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85. For various reasons. The most obvious: pain caused to the child. See *Mila She'layma* p. 439.

86. *Brit Eliyahu* p. 63.

87. As the *Magen Clamp* is primarily a popular medical device, abundant medical literature is available for further research. For example, Reynolds, Ronald D. "Use of the *Magen Clamp* for neonatal circumcision". *Am Fam Physician*. V.54, July, 1996: pgs.177-182.

88. *Hemo*" denotes "blood", "stasis" denotes "not moving".

89. *Tzitz Eliezer* 8:29.

90. Some *mohalim* file the middle of the *Magen Clamp* and thereby create a space within which the *orla* rests. This modification is intended to ensure that even when the *Magen Clamp* is locked, the *orla* is not completely crushed, and there is some bleeding. I do not refer to that practice in this paper.

## The Halachic Perspective on the *Magen Clamp*

The use of the *Magen Clamp* is extremely problematic and may render a *brit* invalid. R. Moshe Feinstein<sup>91</sup> wrote in his *teshuvot* that the clamp is halachically forbidden,<sup>92</sup> and if there is no blood drawn, one must object to a *mohel* who uses a clamp.<sup>93</sup> The *Minchat Yitzchak*,<sup>94</sup> R. Yechezkel Abramsky,<sup>95</sup> *Tzitz Eliezer*,<sup>96</sup> and Rav Mordechai Eliyahu<sup>97</sup> (among others)<sup>98</sup> held that use of a *Magen Clamp* invalidates the mitzvah of *brit mila* even *b'dieved* (post facto). In 1951, the Agudas HaRabonim

91. See the coming footnotes, and text.

92. Rabbi Yosef Dovid Weisberg in *Otzar HaBrit* (3:279) notes that description of the method of a *Magen Clamp* in *Iggerot Moshe* (3:98 and 3:99) seems to differ greatly from the actual practice of *mohalim* and doctors when using the clamp. The actual practiced procedure of the *Magen Clamp* is potentially more halachically problematic than the one described in *Iggerot Moshe*. R. Feinstein wrote that the procedure of the clamp was to first perform a regular cut of the foreskin, perform suctioning the wound, then place the clamp. Therefore, R. Feinstein could not understand how there would be no blood when one would use the *Magen Clamp*. In reality, one first puts on a clamp, crushes the foreskin and closes all arteries, then cuts the foreskin off. In conclusion, R. Feinstein famously ruled that a *brit* performed by a clamp is kosher, and need not be redone. One may question if R. Feinstein's ruling was based on his understanding of how the clamp worked, or if he would rule leniently even if he knew how the clamp actually worked.

93. *Iggerot Moshe* YD 3:99 and 2:119. It is noteworthy that R. Moshe seldom uses the phrase "one must object." See, however, R' Chaim Jachter's differing conclusions regarding R. Moshe's objections to the use of a *Magen Clamp*. [www.yutorah.org/lecture.cfm/735880/Rabbi\\_Chaim\\_Jachter/\\_Modern\\_Issues\\_in\\_Brit\\_Mila\\_-\\_Part\\_Two](http://www.yutorah.org/lecture.cfm/735880/Rabbi_Chaim_Jachter/_Modern_Issues_in_Brit_Mila_-_Part_Two).

94. Open letter of the *Badatz Yerushalyim*, Tammuz, 5730. See *Minchat Yitzchak* 8:236.

95. Testimony of his grandson, HaRav Elimelich Abramsky, who was present at the time of the ruling.

96. *Tzitz Eliezer* 19:68.

97. Handwritten *teshuva* published with the open letter of the *Badatz Yerushalyim* Tammuz 5730, and reprinted in *Madrich L'avi Haben* (R' Asher Buchris, *Rechasim* 2007), page 46.

98. *Mishp'tei Uziel* YD 46, *Be'er Moshe* 2:72-81, See *Teshuvot V'hanhagot* 5:291.

forbade the use of a clamp, even concluding that the use of the clamp on Shabbat was a desecration of the Sabbath.<sup>99</sup> In 1970, and again in 2004, the Badatz Court of *Yerushalyim* forbade the use of the clamp.<sup>100</sup> In 2004, the Chief Rabbinate of Israel banned the use of the *Magen Clamp*.<sup>101</sup> Included in the signatories were Rav Elyashiv, Rav Ovadiah Yosef<sup>102</sup> and many other leading *poskim* of *Eretz Yisrael*.<sup>103</sup> In addition, the Chief Rabbinate mentioned other Rabbis who published a similar announcement.<sup>104</sup>

Despite the overwhelming opposition of these well-respected *poskim*, many prominent *mohalim* in the United States still use a *Magen Clamp* even in Orthodox *britot*. This phenomenon is documented by many videos, witnesses and even admissions of the *mohalim* themselves. Many *mohalim* who use the *Magen Clamp* claim that R. Moshe Feinstein told a certain now-deceased *mohel* in private conversation that he permits the use of the *Magen clamp*. Others maintain that the rabbinic objections to the clamp are merely political in nature

99. Published in *Hapardes* 25:5 p. 31.

100. Open letter of the *Badatz Yerushalyim*, Tammuz, 5730 and Adar 5764. In addition, the letters state *v'kol mi sheyaish b'yado limchot neged hamohalim hamashchitim hanal, mechuyavim limchot*, (whoever has the capability to object, must do so," pp. 46 and 47).

101. Letter sent to *mohalim* in Israel, March 18, 2004.

102. In addition, HaRav Ovadiah Yosef writes, "I also agree to unequivocally forbid the use of the *Magen Clamp*, or the *Gomco Clamp* for many reasons. A *mohel* who uses a clamp is "*pasul lamul*," and one must distance himself from him, and not allow him to perform a *mila* on the children of Israel. It is a mitzvah to publicize him – and condemn him in public. And those who listen to us will dwell in peace." Open Letter 23rd Shvat 5764, reprinted in *Madrich L'avi HaBen* p. 20.

103. In the order in which they were received: Harav Shmuel Halevi Wosner, Harav Nisim Karelitz, Harav Chaim Kanievski, Harav Yisrael Meir Lau, Harav Eliyahu Bakshi Doron, Harav Meir Mazuz, Harav Avraham Shapira, Harav Moshe Halberstam, Harav Mordechai Eliyahu, Harav Zalman Nechemia Goldberg, Harav Moshe Shlomo Amar.

104. Harav Yitzchak Tuvia Weiss, Harav Moshe Shternbuch, Harav Meir Brandsofer, Harav Moshe Halberstam, Harav Avraham Yitzchak Ulman.

and not halachic. It is noteworthy that R. Moshe Feinstein himself wrote in a *teshuva*, “I do not know why people say in my name I permit the clamp when I wrote that I forbid the clamp. I do not even go to a *brit* by someone who uses a *Magen Clamp*”.<sup>105</sup> In addition, when the inventor of the clamp, Rabbi Bronstein, introduced his clamp to a class of *mohalim*, he related that he spoke with R. Moshe Feinstein about it and that R. Moshe forbade the use of the clamp.<sup>106</sup> R. Moshe ruled that one should not perform a *brit* with a *Magen Clamp*, even if one must push off a *brit* until after the eighth day.<sup>107</sup> R. Yaakov Kaminetzky writes that rumors existed that R. Moshe permitted the *Magen Clamp* and when he personally asked R. Moshe regarding its use, R. Moshe responded that he forbade the clamp.<sup>108</sup>

### Why Did the *Poskim* Forbid Use of a *Magen Clamp*?

*Poskim* forbade the *Magen Clamp* for various reasons. The *Imrei Yosher*<sup>109</sup> wrote that the only method allowed in the excising of the foreskin is cutting. The *Magen* clamp crushes the foreskin, which is for all intents and purposes thereby disconnected from the body.<sup>110</sup> Others decry the tremendous pain of the crushing of the foreskin.<sup>111</sup> Yet the greatest claim is the lack of blood.<sup>112</sup> Why is blood such an integral part of a

105. *Iggerot Moshe* YD 3:99.

106. Heard from Rabbi Moshe Tendler, who attended the class.

107. *Rishumei Aharon* 1 page 63. Rabbi Aharon Felder was a rabbi in Philadelphia and close student of R. Moshe Feinstein. The sefer *Rishumei Aharon* is a collection of rulings he heard directly from R. Moshe.

108. *Emet L’Yaakov* 264:3 page 361.

109. Volume 2 *Siman* 140:2, quoted by R. Yitzchak Weiss (*Minchat Yitzchak* 8:89).

110. The Talmud (*Chullin*) rules that the limb of an animal that was severed and is now hanging by a thread is considered detached from a live animal and may receive ritual impurity.

111. *Iggerot Moshe* YD 3:99 R. Feinstein declared, “I don’t even go to a *brit* where they use a clamp!”

*brit*? Rashi writes, “*Dam brit mitzvah*” – i.e., the blood of the *brit* is [itself] a mitzvah. R. Feinstein<sup>113</sup> writes that one performs “*Hatafat dam brit*” –i.e., letting the blood of a *brit* for a convert who has already been circumcised as a gentile. This proves that letting of blood is itself a mitzvah.

In addition, the *Rambam* writes that although one may cut the foreskin with any sharp object, the custom is to use a knife. Certainly, the crushing action of the *Magen Clamp* is not a knife. There are other concerns as well. If all the arteries are closed shut, there is no opportunity to perform any type of suctioning of the blood. In addition, some authorities<sup>114</sup> point to the fact that a *brit mila* performed with a *Magen Clamp* is a one-step *brit mila*, and not a two-step *brit mila*, and that the fingernails should be used to rip the inner foreskin. Another question, if the crushing action of the clamp halachically severs the foreskin from the body, then the *b'racha* of the *mohel* should be before the application of the clamp, not right before the *mohel* cuts off the foreskin.<sup>115</sup>

## R. Moshe Feinstein: One May Not Change the *Brit Mila* Procedure

R. Feinstein, in his landmark responsum regarding the *Magen Clamp*,<sup>116</sup> wrote that he did not want to answer the question (whether it was permissible to use a clamp) because one may not change the *brit mila* procedure. There are *mohalim*

112. Some *mohalim* claim that there is blood in a *brit* with a *Magen Clamp*. However, what they fail to realize, is that the blood that they see on the knife came from the *orla*, and not from the body. The point where the *orla* connects to the rest of the shaft was crushed, and any blood that once flowed into the *orla* remained there, until the *mohel* cuts off the foreskin. In conclusion, is blood from the foreskin and not from the shaft considered “*dam brit*”?

113. *Iggerot Moshe* YD 3:99 2:119.

114. R. Eliezer Yehuda Waldenberg, *Tzitz Eliezer*, R. Moshe Stern, *Be'er Moshe*.

115. R. Waldenberg.

116. *Iggerot Moshe* YD 2:119.

who claim that the only reservation R. Feinstein had against the clamp was not based on law ("halachic"), but rather based on perspective ("hashkafik"). Therefore, if one were to perform a *brit mila* for a non-religious Jew, R. Feinstein's objection would not apply.<sup>117</sup> It is important to note that R. Feinstein did not write a long responsum on the matter, and chose to say, he does not wish to respond. R. Feinstein did not write that his decision was only "hashkafik".

A *mohel* will use a clamp for various reasons. A clamp reduces the bleeding and the required aftercare, and the *mohel* who uses the clamp does not need to return a day after a *brit* and change the bandage. This is especially beneficial for *mohalim* who travel far distances to perform a *brit* and do not have the time to travel back to properly remove the bandage the following day. In addition, although the general basic training of a *mohel* includes bandaging, some *mohalim* find it difficult to control bleeding through bandaging and will rely instead on the *Magen Clamp* to reduce the need for delicate bandaging.<sup>118</sup> (The *Gomco Clamp*, another popular clamp that yields the same practical benefits to a *mohel*, is also used by prominent *mohalim*, but not with the same frequency as the *Magen Clamp*. It is also forbidden, according to many).<sup>119</sup>

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117. It is not clear why even their understanding of R. Feinstein's ruling would change if parents are not ultra-Orthodox. Is a child non-religious? Is the pain of a child born to non-religious parents a non-consideration?

118. Rabbi Shlomo Machpud writes as a matter of fact, "*v'ayla shemitchadshim im kol minay kaylim, ze pashut choser miyumanut.*" "Those who use new utensils to perform a *brit mila*, simply compensate for a lack of skill and dexterity in performance of a *brit mila*." (*Madrich L'avi Haben* p. 26).

119. Agudas Harabbonim printed in *HaPardes* 25:5 p. 31 *Iggerot Moshe* YD 3:98, 3:99 2:119 Rav Ovadiah Yosef, open letter, 23rd Shvat 5764 (*Madrich L'avi Haben* p. 20). Rav Ahron Soloveichik, *The Warmth and the Light*, 1992, p. 26.

# Letters

To the Editor:

In Rabbi Nadel's article on *Korban Pesach* (Volume LXXI), he cites *Chatam Sofer* in footnote 33 as allowing *avodah* without *bigdei kehunah*. The *teshuvah* mentions that a *Kohen Gadol* (High Priest) is not required for *avodah*, and we can therefore deduce that the *Kohen Gadol*'s eight garments are not needed. But a perusal of the *teshuvah* does not show that the four garments of the *Kohen Hedyot* (ordinary *Kohen*) are not required. Can this point be clarified?

JACOB GELFAND

\* \* \*

Rabbi Nadel Responds:

Thank you for your comment.

While I appreciate your insight, I do not agree with your interpretation. Please review the *teshuva* (responsum) again. Here is an excerpt from the original Hebrew, followed by my translation:

...והנה מבגדי כהונה לא שאלו כי פשוט הוא שאין כה"ג מעכבר  
ונוכל להקריב בלא עדו...  
(שו"ת חתם סופר יו"ד סי' רלו)

And behold, [concerning] the priestly garments they did not inquire, for it is simple that the High Priest is not required, and they can offer [sacrifices] without him:

(*Chatam Sofer*, YD 236)

In this responsum, the *Chatam Sofer* is responding to R. Akiva Eiger's concern for the clothing of the *Kohen Gadol*. (See R. Akiva Eiger's correspondence with R. Tzvi Hirsch Kalischer, published in *Drishat Tzion*). But in doing so, the *Chatam Sofer* also dismisses the clothing of the *Kohen Hedyot* as

not being required. Hence, he writes, "concerning the priestly garments they did not inquire....":

Additionally, if he believed that, as you say, the 4 garments of the *Kohen Hedyot* are required, the *Chatam Sofer* would have addressed that explicitly. It is clear from his language that he is of the opinion that the absence of priestly garments – the *bigdei kehunah* – does not preclude the holy service.

I hope you find my answer satisfactory.

*B'virkat kohen b'ahavah,*

SHIMSHON NADEL

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