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This issue of the
JOURNAL OF HALACHA
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is dedicated in memory of

SHLOMO (SALO) STEPER, ע"ה

A truly humble and charitable man who lived a life of total commitment to Torah and Mitzvos. He was generous to an extent that can scarcely be described and his modesty masked both his extraordinary giving of tzedakah and his learning. Shlomo led a Daf Yomi group for more than eight years, never missing a day until his final illness.

May his wife Johanna and family and all who knew him and cared for him be comforted by the knowledge that this was a good man and we were blessed by our relationship with him.

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**Rabbi Dovid Cohen,
Editor**

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

Manuscripts submitted for consideration should be in Word format and sent via email to Rabbi Cohen. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles that concern contemporary halachic issues.

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

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Transgenders in Jewish Law and Thought

Rabbi Alfred Cohen

Introduction

Two persons recently came to the Haifa Rabbinical Court about a divorce. They had been married a number of years and raised their children together. However, the previous year the husband had undergone a sex-change operation, and they had separated. When the wife asked for a Jewish divorce (*get*), the husband demurred, claiming that he is now a woman, and a woman cannot grant a *get*. Thereupon, the wife asked the rabbinical court to annul the marriage, but they said they could not do that either, since the man is still a man halachically. Finally, when threatened with imprisonment (as allowed by law in Israel), the husband granted the divorce.¹

While this case was bizarre enough to come to the attention of the news media, it is a harbinger of things to come. The world is changing rapidly, and challenges to traditional values, mores, and lifestyles abound and will undoubtedly increase.

The question of transgenders has quite recently, and rather suddenly, taken center stage in the public's awareness with, among other things, constitutional issues being raised concerning their use of public restrooms. Discrimination is charged in the treatment of transgenders, and many rally to their support, urging boycotts and retaliation against those who do not respect their rights.²

1. As reported on *Arutz Sheva* 3/20/2017.

2. On June 29, 2017, Yeshiva World Online reported that several religious

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In general, the term 'transgender' is applied to people who feel that they were born as the wrong sex, and want to look like and live as the opposite gender. They might take medication and/or have surgery to change their bodies.³ In order to 'transition' the person will need to take certain hormones to induce or repress certain signs of their gender, as well as undergo surgery to make them look like the desired gender.

Undergoing the 'transition' from male to female or female to male has been declared forbidden (*assur*) by all the leading rabbinic authorities of this and the previous generation,⁴ and to this writer's knowledge, no competent rabbinic authority has sanctioned it. The purpose of the present study is certainly not in any way to contest that ruling.⁵ Rather, we will try to explain why and how this rabbinic decision was arrived at. Moreover, in the following pages, we will undertake to explore, define, and understand several halachic and/or *hashkafic*⁶ issues which may arise if a person seeks to, or actually does 'transform' himself or herself to another gender.

schools (Viznitz) in London had been threatened with closure by the government, due to refusing to teach their students – ages 3 to 8 – about the rights of homosexuals, transgenders, and others. "Gill Robbins of Christians in Education, a pro-religious campaign group, wrote that despite school having a stellar reputation, a well- rounded staff, and enthusiastic students, the Ofsted test proves that British laws for schools are "hierarchical," with homosexuality and transgenderism at the top, and religious belief taking a back seat."

3. It is claimed that transgender is not the same as homosexuality, which means a person is attracted to people of the same sex. Transgenders also differ from transvestites (cross-dressers). The main symptom is the feeling that the person has of being born the wrong sex. www.uptodate.com.

4. Someone who has surgery to change into a female is universally described by halachic authorities as committing a sin, and some even categorize him as having "abandoned Judaism, and is not a Jew, and he is to be considered as an apostate to the entire Torah." Rav Yigal Shafran, *Techumin* Volume 21, p. 117; and *HaMaor*, Kislev 5763.

5. Although the transgender question is relatively new, it has been discussed in this generation in a number of scholarly venues; see *Shu't Veshav Verapeh* II, 79; *Techumin* 21; *Assia*, part I; *Hamaor*, Kislev 5733 (1973); *Tzitz Eliezer* XXII,2; Eidan ben Efraim, *Sefer Dor Tahapuchot*, *Shu"t Ya'avetz* I, 171.

6. *Hashkafa* refers to values and belief concepts in Judaism.

The present study is primarily an halachic exposition and inquiry; however, halacha, the letter of the law, is only one facet of the situation. It is important also to explore the *hashkafa* ramifications of transgender issue. *Hashkafa* is a term that is difficult to define precisely – it embodies outlook, attitudes, principles, and value judgments. Our philosophical principles do not arise in a vacuum or in a separate sphere from the halacha. Rather, the legal principles of the Jewish law, the halacha, should inform and inspire our *hashkafa*. If something is forbidden or mandated by Jewish law, we should try to incorporate these directives into our thinking and build on them to mold our values and shape our attitudes. Judaism encompasses the entire human experience, and the do's and don'ts of Torah life are the building blocks which help construct the values and ethics for the entire edifice of Judaism.

Consequently, in these pages we will examine not only halachic issues but also social, personal, philosophical and communal areas which may be impacted by the phenomenon of people who have – or who want to – change their sexual identity. And we will find that a number of the challenges arising from this new problem have resonance in other areas of our community life as well. The issues we have to confront in this situation are not unlike others which arise in our complex society, so that a better understanding of options in one case can be helpful in other situations as well.

Some people may conclude that this 'new' phenomenon of people feeling that they are somehow misidentified is a product of the modern lifestyle, where gender lines tend to get blurred. Nevertheless, the distress transgender individuals feel is quite genuine. It is difficult to say to someone that their feelings and desires don't matter; if a child wants to go to the park and his parents can't or won't take him, rather than simply refusing, it would be better if they explained that since it's cold, the park would not be a good idea. Without some kind of explanation, the child is likely to feel resentful, hurt, and angry. All the more so an adult who is contemplating sex change deserves to

understand why Judaism is opposed. That is the purpose of the present undertaking. Judaism is a religion based on the Torah. In order to arrive at an authentic understanding of Torah, it is necessary to be well versed in biblical and rabbinic scholarship over the millennia. This study will endeavor to explore and explain these sources.⁷

Preliminary considerations

When in the course of his sojourns, Avraham *Avinu* came to the land of the Philistines, he told people that Sarah *Imeinu* was his sister, rather than his wife. After the king Avimelech took her to his palace and subsequently suffered terrible pains sent by G-d due to her abduction, Avimelech complained to Avraham: why did you try to fool me, why didn't you say right away that she was your wife? After all, he complained, we are a civilized society, what made you think your wife's chastity would not be respected? The answer he received is a telling one: Avraham responded, yes, you are indeed a civilized country, "but there is no fear of G-d in this place," *Rak ein yir'at elokim bamakom hazeh*.⁸

The *Malbim* ponders the import of this response: "Avraham informed him that even if it appears that an individual or a nation is philosophical (i.e. lover of wisdom), and they have legislated upright customs and accustomed themselves to act in good character

7. Writing in *Techumin* XXIII, p. 245, Dr. Avraham Steinberg cites numerous sources to indicate that someone who wants to oppose an undertaking, it is up to him to bring proof. He notes that *Tiferet Yisrael* (Mishnah *Yadayim* 4,3) writes that 'anything for which we cannot find a reason to forbid – is permitted, without having to bring a reason'. And if someone labels something as forbidden – the burden of proof is on that person to prove it. He cites numerous instances where *poskim* dealt with this concept. See *Rashi's* comment that it is easy for someone to say "no", to say that something is forbidden, but it takes real knowledge to be able to declare that something is *muttar*. In the present study, the aim is indeed to explain why Judaism finds transitioning from one sex to another unacceptable.

8. *Bereishit* 20:11.

according to their intelligence*nevertheless, one cannot be confident that this person, when he is overcome by lust, will not do bad things, nor can one trust that his intellect will always rule his desires.*"⁹ (emphasis added)

It is unfortunately true that people are almost always able to rationalize their cravings, and bend their beliefs to conform to what they want to do. Thus we see throughout human history that norms and values fluctuate, that people can justify actions in one generation that are abhorrent in other times. "This is the craftsmanship of the *yetzer hara*, the 'evil inclination': today it tells him, do this, and tomorrow it tells him do that..." (getting him to do greater sins by the day).¹⁰ Many examples come readily to mind: Forty years ago, abortion was outlawed in America as murder; a doctor performing one lost his license and went to jail. Nowadays, abortion is a 'woman's right', and if a doctor refuses, he may have his license suspended. Thousands of years ago, euthanasia was considered moral in ancient Greece and Rome, then for centuries it was condemned. Nowadays, it has again become legal in various states. For years, drugs were outlawed, there was even a 'war against drugs'; nowadays, it is legal in many states.

Judaism differs from other societies in that our norms and our values are permanent; we view them as absolute truth, as fixed by the Word of G-d in the Torah. The Word of G-d is what it is, and is not subject to change. Our beliefs are not susceptible to the current wishes of people and do not respond to majority vote nor commonsense solutions. People are easily moved to change their opinions about right and wrong, in order to secure their innermost yearnings. Judaism, however, has a fixed set of

9. *Pirush haMalbim*, ibid. Rabbi Elchanan Wasserman delivered a lecture on the same theme – about not relying on "civilization" to keep people acting civilized – at the Hildesheimer Rabbinical Seminary in Berlin shortly before the outbreak of World War II. Many at that time criticized his lack of appreciation for the advances of European culture – but he was right, tragically so.

10. *Niddah* 13b.

G-d-given rules, to insure that we do not let our desires justify that which is wrong. Our interest is to find out what Hashem wants, not to be moved or swayed by every new phenomenon that the winds of change blow our way.

The Torah warns the Jewish people “do not act in the way the people of Egypt act...nor follow the way of the people in Canaan.”¹¹ The *Sifra* explains – “What did they used to do? A man would marry a man and a woman would marry a woman.....” The *Minchat Chinuch* 188, note 1, extends this prohibition, writing that any act of physical intimacy is also forbidden by this verse, such as kissing or romantic touching.

The Midrash targets the underlying causes for Hashem’s decision to destroy the world by Flood: ‘when they wrote marriage contracts, a man for a man and a woman to marry a woman. “Signing a marriage contract” is a much more blatant sin than ‘simply’ engaging in homosexuality. As *Rambam* explains in *Moreh Nevuchim*,¹² there are four categories of sinners: a person may sin because of error, or inadvertently, or because he is too weak to resist temptation, or in defiance. When he signs his name to an official document, it is a blatant expression of “This is what I want to do, and I’m right.” In doing that, there is a much greater rebellion against G-d.

There is a world of difference between people who find themselves too weak to observe all the strictures of Sabbath observance, and those who desecrate the Sabbath because they won’t accept it as applicable to them.¹³ But a major feature of our society is to tell every person that he is right to follow whatever he wants, that he can make his own standards of right and wrong.

Rav Ovadia Yosef warned that the mentality nowadays is for

11. *Vayikra* 18:26

12. *Moreh Nevuchim* III:48.

13. This is comparable to the attitude of the idolatrous people in the *ir hanidachat* (a city whose people have turned to idolatry), *Devarim* 13:14.

‘every person to do what he thinks is right – *ish hayashar be’ainav ya’aseh*’ and therefore one must be cognizant of this attitude and try to approach each situation with delicacy and not cause further destruction of the edifice of faith.¹⁴ Nevertheless, even in today’s *laissez-faire* mentality, there are still certain actions which virtually all agree are wrong. Does Judaism distinguish between ‘ordinary’ transgressions and those that still engender anger or disapproval?¹⁵ Perhaps an action that is universally considered sinful needs a different response than ‘ordinary sinfulness.’

Let us therefore proceed to determine the features of Jewish thinking which preclude gender change.

Determining Gender¹⁶

Despite the reality that there have always been a small minority of children born with sexual anomalies, this is not the case with transgenders. A transgender person was born as either male or female, but has an abiding feeling that (s)he is actually the wrong sex. Even though transgenders do not generally have physical sexual ambiguities, we will briefly mention the Jewish laws which apply to persons who are born with ambiguous sexual identities – *albeit they are not the subject of our inquiry* – which may give us insight into how the halacha might regard the issue of transgenders.

The Talmud discusses individuals who are termed ‘*tumtum*’ or ‘*androgynous*’.¹⁷ A *tumtum* is born with the genitals “covered” so that it is not possible to see whether this child is male or female.¹⁸ In order to determine gender, it was necessary at the

14. Yabia Omer, IV Yoreh Deah 7:4.

15. See Dor Tahapuchot who discusses this topic at length.

16. See Nishmat Avraham III, p. 134.

17. Yevamot 82b.

18. Bach, Shulchan Aruch Even HaEzer 44. There is a difference in the halacha of marriage as it pertains to these two categories of individuals. If a *tumtum* gets married to a woman, and ‘uncovering’ the genitals reveals that

time to “tear” the covering and visually see a sexual organ. Rabbi Shlomo Zalman Auerbach writes that when the Gemara says that one should “tear” (*korea*) to determine whether the child is male or female, it means that since the organs are covered it is necessary to perform surgery in order to discover the reality.¹⁹ However, in the opinion of Rav Auerbach surgery is not mandatory, it is only an option permitted if the parents (or the individual) so choose.²⁰

There are four opinions in classic rabbinic literature concerning how to classify an “*androgynous*” (loosely, a hermaphrodite) – a person who has both female and male genital characteristics (nowadays sometimes termed an intersex person).²¹

- There is doubt whether the person is male or female.
- This is a separate entity, neither male nor female.
- The person is partially male, partially female.²²

the *tumtum* is a male, then it is a valid marriage. However, if she is female, then obviously they are not married. An *androgynous*, on the other hand, has signs of both male and female gender, and therefore halachically is neither but rather *safek* – maybe male, maybe female – and therefore cannot contract a halachically valid marriage.

19. *Nishmat Avraham, Even HaEzer* 44.

20. Based on *Tosafot* to *Pesachim* 28b, s.v. “*arel*”; reported in *Nishmat Avraham* III, p. 134. However, the *Meiri* disputes the ruling of *Tosafot*, but *Chemdat Shlomo* opines that surgery can be declined because it entails danger. Rabbi Akiva Eiger in *Yoreh Deah* 262:3 states his agreement with the position of the *Tosafot*.

21. See *Encyclopedia Talmudit, Androgynous*.

22. The *Magen Avraham* discusses whether an *androgynous* can blow the shofar on behalf of a congregation. (Only a person fully obligated in a mitzvah can discharge the obligation for others; halachically, only an adult man can discharge the obligation to blow shofar for others.) The *Magen Avraham* rules that an *androgynous* can discharge the mitzvah for others like himself, but not for others – males or females. He then quotes the *Rif* that, “even if the fellow *androgynous* is at that time female, he cannot discharge her obligation.” This implies that a sex change can occur. But the *Be’er Heitev* writes that he could not find such a statement in the copy of the *Rif* in his possession. Furthermore, he writes that the way the *Rif* is being cited indicates that an *androgynous* is at times male and other times female, “but this does not seem to be the case, not (as mentioned) in the Gemara or in the *poskim*.”

- The person is definitely male.

In Jewish practice, we rule that an *androgynous* is to be considered of doubtful gender.²³ An *androgynous* is obligated in all mitzvot as a male, since possibly he is a male. Thus, a *brit milah* must be performed, although no *beracha* is made since there is doubt whether it is required; also, the *milah* cannot take place on Shabbat, for the same reason.

In the case of a child born with ambiguous or multiple sexual signs, doctors often advise removing or altering the genitalia in order to render the child one or another gender at least in appearance. However, Rav Waldenberg maintains that no surgery should be performed on the baby, inasmuch as it may constitute violation of the prohibition of *sirus* – castration – by removing the reproductive organs (see more on this topic hereinafter). This is particularly relevant to a situation where the doctors want to turn the *androgynous* baby into a functional female (apparently that is easier to effect surgically), which will mean that a child who might actually be a boy, with all the mitzvot incumbent upon a Jewish male, will now be removed from that category, becoming a female with less mitzvot to perform. It may also cause complications later on concerning the prohibition of *yichud* – being sequestered alone with a member of the opposite sex.²⁴

However, if most of the signs indicate that the child is probably a female, (together with chromosomal evidence which may also fortify this conclusion), then Rav Waldenberg would permit surgery. The rationale is that the ambiguous sexual sign may simply be an enlarged clitoris rather than a penis.

In another responsum,²⁵ Rav Waldenberg discusses the case

23. Rambam, *Hilchot Milah* III:6; *Yoreh Deah* 194,8. However, see also *Even HaEzer* 44, which discusses whether the individual should dress as a male or a female, and how this situation relates to the question of *yichud* (being alone with a member of the opposite sex).

24. *Tzitz Eliezer* XI:78.

25. *Tzitz Eliezer* XI:75.

of a child who was born with external indications of being female – and was actually given the name Yarona; however, due to some ambiguities, a chromosome test was performed and indicated that the baby was genetically a male. The physician informed the family that medically and surgically it was easier to make the child into a female. In his responsum, Rav Waldenberg notes that it is only possible to categorize someone as an *androgynous* (hermaphrodite) if that person has both male and female organs. Here, only female organs were visible, and therefore halachically the child is definitely female, regardless of tests. Furthermore, the child would never be able to have children anyway (apparently, internally the baby did not have all the female organs), so there is no problem of *sirus* in removing certain extraneous genitalia.²⁶

Sirus

In *Vayikra* 22:24, the Torah forbids rendering any living creature incapable of reproduction (such as castration of people or ‘neutering’ an animal). Based on this, the Talmud forbids a person from drinking a potion that would render them sterile, even for medical purposes.²⁷ Furthermore, the Gemara posits that even if the person’s reproductive organs are already mutilated and inoperative, it is forbidden to drink.²⁸ *Rambam* incorporates this into his code of law:²⁹ The biblical prohibition of *sirus* obviously represents a major obstacle for transgenders because that is part of the transition process.

אסור להפסיד אברי הזרע בין באדם בין בבהמה....בין בארץ בין
בחוץ לארץ...וכן המסרס לוקה מן התורה בכל מקום ואפילו מסרס
אחר מסרס לוקה.

26. See *Rambam*, *Hilchot Avoda Zara* 12:1, and *Sefer Hachinuch* 291:1. However, see *Chazon Ish Even HaEzer* 13, s.v. *vehaRashba*.

27. *Shabbat* 110b.

28. *Ibid*.

29. *Hilchot Issurei Biah* XVI:10, 11. See *Minchat Chinuch* 291 whether this rule applies to a person who is *treifah* (dying) or sterile.

*It is forbidden to remove (or destroy) the organs of reproduction, whether for a human or for an animal...both in the Land (of Israel) and outside the Land...and one who castrates is punished, even if he castrates after (the person was already) castrated.*³⁰

Elsewhere, *Rambam* rules that one who does this to a woman or a female animal is *patur*,³¹ which means that for a woman, it is forbidden rabbinically, but not from the Torah. Many *poskim* agree with this position,³² with the exception of the *Gra* (Vilna Gaon), who considers it a biblical violation in the case of a woman as well.³³ Furthermore, it is also forbidden to ask a non-Jew to perform this procedure upon a Jew or upon his animal.³⁴

30. The question arises whether the prohibition of *sirus* applies to the person performing *sirus* or to the person for whom it is done, or both. In arriving at a halachic decision, the Rabbis extrapolate from similar rulings.

In *Makkot* 21b there is a debate about the prohibition *lo takifu pe'at roshecha* – not to 'round out' the hairline and not to shave with a razor (*Vayikra* 19:40). Two sages disagree: Rava said, the prohibition applies to a person 'rounding out' (*makif*) his own hairline; Rav Ashi said, it applies to the one making it possible. The Gemara unequivocally declares that both the doer and the object (or either) are liable: *echad hamakif ve'echad hanikaf, lokeh*, because even if a person is not cutting his hair himself, he is turning his body and his head and 'helping' in the process, and therefore guilty. (The same principle applies to one having a tattoo imprinted or one who pulls his hair out, or has it pulled out to create a bald spot.)

Rambam rules that castration (*sirus*) is forbidden (*Hilchot Avoda Zara* 12) and the *Shulchan Aruch Even HaEzer* 5 succinctly rules, "*assur lehafsid eivarei hazera*, it is forbidden to diminish (damage or remove) the reproductive organs." Both these rulings, however, seem to imply that the prohibition is on the person doing the action, not the one to whom it is being done. Based on the Gemara, the *Rambam* writes that a person whose head or beard is being shaved in a forbidden manner "does not receive punishment unless he assists the one doing the shaving." However, the *Ra'avad* comments that 'inasmuch as it is being done with his acquiescence, that is "assisting" and he is transgressing a negative commandment.'

31. *Rambam*, *ibid*, end of *halacha* 11. For an explanation of why the *Rambam* permits a woman to drink such a potion, see comments of *Shach* and *Taz* at the end of *Even HaEzer* V and *Chatam Sofer Even HaEzer* I: 2 and 13, as well as *Minchat Chinuch* 291:3.

32. *Otzar HaPoskim* V, *Yabia Omer* VIII, *Even HaEzer* 14 and IX,11.

33. *Otzar HaPoskim*, *ibid*, note 25.

34. *Rambam*, *ibid*, 13. *Rambam* adds that if a Jew manipulated a gentile into

Mental anguish

Very few biblical prohibitions are absolute, as the Talmud itself proclaims that all but three are set aside in a life-or-death situation (they are idolatry, sexual immorality, and murder).³⁵ In approaching the issue of a transgender person and what may or may not be done, it is important to know whether the person's mental anguish at his/her situation is a legitimate factor to be taken into account in determining the proper halachic course? The short answer is 'yes – but...'.

There are indeed instances in halachic literature where *poskim* have factored in a person's concerns or anxiety in arriving at a decision:

Rav Moshe Feinstein was asked whether it would be permissible for a man to ride with his wife on Shabbat in a taxi taking her to the hospital to give birth.³⁶ Since the husband is not really doing anything for her, why should it be permissible? On the other hand, his presence may alleviate her anxiety, and since childbirth is a *pikuach nefesh* situation, Rav Moshe allows it. But the dispensation to transgress Shabbat law ceases when she is in the hands of the medical staff.³⁷

The discussion concerning alleviating anxiety refers back to a Talmudic discussion about a blind woman in labor.³⁸ The

neutering his (the Jew's) animal, the Jew is fined by the court and forced to sell his animal. If a Jew turns to a gentile to perform *sirus*, he may be violating 2 biblical *issurim* – *sirus* and *lifnei iver*. And if the gentile is not prohibited from *sirus*, there is no concern about *lifnei iver*.

35. *Sanhedrin* 75a.

36. *Iggerot Moshe Orach Chaim* I:132. Rav Moshe mentions that he is not totally positive why it should be forbidden.

37. *Nishmat Avraham* V:522. The same conclusion is expressed by the author of *Sh"ut Az Nidberu* I:29. Both of these authors reason that the person accompanying the woman in the taxi causes more fuel to be burned on Shabbat, and is therefore forbidden. See also *Teshuvot veHanhagot* II:177.

38. *Yabia Omer* IX *Orach Chaim* 108; *Shemirat Shabbat Kehilchata* 36, n. 17; *Yesodei Yeshurun* IV, p. 251.

Gemara³⁹ discusses the case of a doctor tending to a blind woman in labor on Shabbat. He is confident that he has enough illumination to see what needs to be done, but the woman is anxious and wants him to light a candle so that he can see better. Although the doctor does not need the light, and the blind woman certainly cannot use the light, the Gemara allows it anyway in order to calm her down.

The same rationale permits a doctor who lives far from the hospital to drive there on Shabbat to deliver a baby, even though there are other doctors there who could do it. Since she is more comfortable and confident with her own doctor, it is permitted.

These precedents raise the question – is mental anguish comparable to ‘danger to life’? Should the Rabbis consider the possibility that a person might be so distraught that they would take their own life, or possibly, that the anxiety might kill them?⁴⁰

In addressing this issue, numerous *poskim* cite a well-known precedent in a responsum of the *Chatam Sofer* (early 19th century), who was approached by a family whose child had psychological issues; her only hope for living a normal life was in receiving treatment in a distant facility where they would not be able to visit her and where she would be fed non-kosher food. Her family wanted to know if they were allowed to put her there.⁴¹ The *Chatam Sofer* mulls over the question whether this child’s mental condition is one of *sakanat nefesh*, danger to life (which might permit transgression of kosher laws if necessary) and cites an incident recorded in Gemara *Berachot* 23a where a person became so depressed, he committed suicide; ultimately, however, the *Chatam Sofer* did not allow her to enter the facility, primarily because of “*timtum halev*” (“dulling the soul” due to eating non-kosher food).

39. *Shabbat* 118b.

40. *Sanhedrin* 75a.

41. *Shu"t Chatam Sofer, Orach Chaim* 83.

When Rav Waldenberg was asked about surgery for a mentally deranged person, he referred to the precedent of the *Chatam Sofer* (above), but seemed reluctant to accept it in its entirety. Rav Waldenberg writes that “it appears in my humble opinion that there is room to permit such an operation... for a dangerously mentally unhinged person (such as his patient was), who has to be tied up with restraints (to prevent her harming herself), and her life is constantly in danger.”⁴² Clearly, there is a strong case to be made for considering mental instability or depression as a life-threatening factor which needs to be taken seriously when arriving at a halachic decision.

Nevertheless, it would be erroneous to assume that emotional distress is sufficient grounds for setting aside a biblical commandment. In *Sanhedrin* 56a, the Gemara relates the case of a man who was dying of a broken heart over a certain woman; despite his desperate situation, the rabbis would not allow him to engage in any non-halachic relationship with her. While mental anguish is definitely a factor taken into account in *psak* halacha, it is not the only factor.

When the author of *Minchat Yitzchak* was asked to rule in a case where a woman was told by her doctors that having children would put her life in danger, he noted that “since pregnancy would only be a danger to her psychologically (*tiruf hada’at*), is that even considered life-threatening danger?” After exploring the issue, he did allow her to practice birth control, with restrictions, but “only for one year, and after that she must ask the doctors if her situation has changed.”⁴³

Rav Moshe Feinstein also permitted birth control for a woman who had a serious nervous condition and wanted to prevent further pregnancies, reasoning that “it is clear that mental

42. *Tzitz Eliezer* IV, 13.3. Rav Waldenberg indicates that it is necessary to get input from the family or the legal guardian, and also to seek the best medical advice available. See also *Tzitz Eliezer* XIV 69, *Teshuvot VeHanhagot* I, 883, *Shu”t Minchat Asher* 47.2.

43. *Minchat Yitzchak* I, 115.

sickness [insanity] is a danger, both to her and to her children... one must be concerned lest she kill herself or her child, G-d forbid...."⁴⁴

Even in situations which are less than life-threatening, moreover, Jewish law recognizes that a person's mental or emotional turmoil needs to be taken into account. Thus, the author of *Minchat Shlomo*, in the case of a couple who had terrible concerns that they might have a hemophiliac child, allowed them to employ a diaphragm in order to prevent pregnancy.⁴⁵

When dealing with a person's state of mind, Jewish law does not only factor in emotional pain; intense preoccupation or deep concern can at times also affect application or suspension of rules. We can see this rationale in effect in a halachic ruling concerning a bridegroom on his wedding night. The halacha is that a bridegroom is not obligated in recitation of *keriat shema* on his wedding night. Since he is preparing to fulfill the mitzvah of *p'ru u'revu*, he may find it impossible to concentrate fully on the words of the prayer.⁴⁶ His mental preoccupation with fulfilling his mitzvah obligations as a groom precludes his reciting *shema* with the needed concentration, and therefore he is exempt. In the words of the Gemara, he is '*tarid*', preoccupied.

But not all situations are the same, and mitzvah obligations are not suspended just because someone has a problem or is preoccupied with worry about a personal agenda. In debating the above-mentioned ruling, the Gemara voices a challenge: "Does that imply that whenever someone is preoccupied (*tarid*), it means he is exempt from fulfilling mitzvot? How about a person who sees his entire fortune going down on a sinking ship – about which he is certainly deeply concerned! – is he

44. *Iggerot Moshe*, *Even HaEzer* III,22 . See also *Idem*, *Even HaEzer* I,63 and IV 69 and 36; *Idem*, *Even HaEzer* I, 65; *Idem*, *Yoreh Deah* I,235.

45. *Minchat Shlomo* III:103, 1.

46. *Succah* 25. This rule no longer applies, since most people do not recite *keriat shema* with the proper intent on any day.

also exempt from reciting *shema*?!" After considerable debate, the Gemara rules that even if a person sees his fortune sinking in the doomed ship, he is nevertheless obligated in *shema* and all other mitzvot.

The groom in the original situation is involved in fulfilling a mitzvah, a commandment from G-d that he must do, and it rightfully occupies his attention. Thus, he cannot be expected to concentrate properly on recitation of *shema*. The businessman whose money is sinking, on the other hand, is involved in an optional endeavor, making money at his discretion. His responsibility to perform mitzvot is not suspended because of his concern with his financial situation, although it is undoubtedly severe. His greater and primary obligation is to perform mitzvot; his financial problems – well, he just has to learn to handle them. *Jewish law does not excuse someone from performance of mitzvot just because he has some personal issues which make it difficult.*

The particulars of this Talmudic debate have direct relevance to the issues under discussion here: what the Gemara is saying is that mental anguish, no matter how genuine, is not sufficient reason to suspend Torah law.⁴⁷ Even if you are horrified that your life savings are being lost in the sea – that does not exempt you from mitzvah obligations. Only a person actively involved in performance of a mitzvah may *at times* be excused from partaking in another mitzvah. Mental pain, even if genuine, cannot be a rationale for permitting transgressions or suspensions of Torah law. No one is discounting the unhappiness of a person who feels, for whatever reason, that (s)he is somehow trapped in the wrong body. But the halacha remains the halacha, and the

47. *Nishmat Avraham*, writing about Rav Shlomo Zalman Auerbach's rulings on people of questionable gender, notes that the question of a transgender has nothing to do with identifying the true gender of an individual such as a *tumtum* or *androgynous*. "Rather, due to some mental aberration (*Machala shigyonit*), there are people who want to change their gender, but it is clear that it is not sufficient through the behavior or inclinations of the person that one can change their gender." See also the *Tzitz Eliezer* X, chap. 26, note 6.

individual's distress cannot be used as a lever to displace Torah prohibitions.

Rav Yigal Shafran writes that he received a letter in Israel from an American Rabbi, asking for guidance: there was a young woman who for 27 years had been brought up and lived as a female. Her physical structure conformed to the definition of female. This woman now wanted permission to undergo surgery for a sex change: to have her breasts removed and to undertake a hormone regimen for 21 days; she already dresses and 'passes' as male, and only when she is undressed is it evident that she is female. Furthermore, she has changed her name from Chana, and now goes by 'Reuven'.⁴⁸

The Rabbi asking for guidance expressed his belief that the woman's actions are not motivated by malice against anyone or against the religion, but arise rather from psychological pain that she found unbearable. The Rabbi asked for help in resolving how to treat this person in shul – should she sit with the men? With the women? Alone? In short, what is the halachically mandated attitude towards this person?

In his response, the author of the article cites the Ibn Ezra,⁴⁹ who brings the opinion of Rabbeinu Chananel, concerning a man who had his body altered to look like a woman. The author does not make light of the emotional anguish of the woman mentioned in the Rabbi's letter; nevertheless, he does not sanction her actions. He proceeds to cite the opinion of Rav Ovadia Hedaya that notwithstanding all the efforts and all the surgeries, the individual remains a female.⁵⁰ She should continue to recite the daily blessing "*she'asani kiretzono*" (Who has made me as He wishes) and observe mitzvot as a woman.⁵¹

48. *Techumin*, XXI, p.118, "*Nituach lehachalif hamin.*"

49. *Vayikra* 18:22. It is interesting that the reference cited by Ibn Ezra is a teaching of Rabbeinu Chananel – which the Ibn Ezra ultimately rejects!

50. *Sh"ut Yaskil Avdi* VII. Others concur with this ruling – see *Asia* I, p.144 and *Noam* 416, p. 152.

51. There are also spiritual dimensions which the Kabbalah addresses. We will discuss them hereinafter.

The author of the article quotes the opinion of *Tzitz Eliezer*⁵² that if the child had been born with both male and female organs, it is permissible to perform surgery to render the child a specific gender; this is not actually a sex 'change'.⁵³ But he terms it an abomination (*to'evah*) to put into a male body organs resembling a female. Ultimately, the conclusion of the one writing this article is that the sex 'change' is not effective in transforming this "Chana" into "Reuven". Her testimony is not accepted in a Jewish court since she is female; she should sit in the women's section in shul, and she is not allowed to 'marry' a female, nor can she be called up to the Torah.

*Sakana*⁵⁴

When presenting laws which regulate conflicts between people, the Torah writes that if a person caused bodily harm to another, he has to pay for that person to be healed: "*verapoh yerapeh*", he has to pay for the doctor.⁵⁵ Based on this verse, the Gemara comments that "from here [we learn] that it is permitted for the doctor to heal."⁵⁶ *Tosafot* explain that absent this biblical provision, one could well argue that since G-d made him sick, it is up to G-d to heal him.⁵⁷

But how far does this permit go? Does the doctor have license to engage in all kinds of intervention? How about plastic surgery when it is not a question of healing something broken but rather an esthetic procedure to conform to society's picture

52. *Tzitz Eliezer* XI:78.

53. *Ibid*, XXII:2 is of the opinion that if 'miraculously' the person's gender was changed, the person would be considered an *androgynous*.

54. *Avnei Nezer Yoreh Deah* 321 considers all surgical procedures inherently dangerous. *Minchat Yitzchak* VI, 105 only permits surgery for someone whose life would be in danger without it. *Tzitz Eliezer* XIII:87; *Yabia Omer* VIII *Choshen Mishpat* 12.

55. *Shemot* 21:19.

56. *Bava Kamma* 85a.

57. *Rashi*, *ibid*. See also *Tosafot Rosh* to *Berachot* 60a; *Ramban* to *Vayikra* 26:11; *Medrash Shmuel* IV, 1; *Tur*, *Yoreh Deah* 336.

of beauty? One may ask, well, why not? What's wrong with it? Actually, there is lively rabbinic debate on this question.⁵⁸

Furthermore, since the Torah admonishes us "be very careful to guard your lives" (*Devarim* 4:15) Jewish law forbids putting one's life in danger (*sakana*). Traditionally, that might preclude optional surgery, especially if it entailed anesthesia. Nowadays, however, the risks of dying from anesthesia are greatly reduced. Rav Eliashiv reportedly maintained that "only very heavy and prolonged sedation is to be considered dangerous", but routine surgery of an hour or so is permitted.⁵⁹ Rav Waldenberg however protests that "prolonged general anesthesia always carries a risk."⁶⁰

Moreover, by Jewish law, it is forbidden to cause oneself bodily harm (*chovel be'atzmo*), and the Talmud debates whether this applies to someone who willingly causes himself to be 'wounded'.⁶¹ Delineating the law, *Rambam* writes: "It is forbidden for a person to cause bodily harm, whether to himself or to another person. And not only is wounding forbidden, but also whoever strikes a 'kosher' Jew, be he a child or an adult, be it man or woman, in a *derech nitzayon*, in an adversarial manner, is transgressing a negative commandment."⁶²

Rav Ovadia Yosef permits surgery to correct a perceived defect that a person was born with, although he notes that Rav Waldenberg did not.⁶³ According to Rav Yosef, Rav Waldenberg

58. Rav Moshe Feinstein was asked whether extreme dieting to achieve a desired bodily image was permitted, since the dieter experiences the pain of food deprivation. He did permit it. *Iggerot Moshe Choshen Mishpat* 65 and *Choshen Mishpat* I, 103.

59. Quoted in *Yabia Omer* VIII *Choshen Mishpat* 12,2.

60. *Tzitz Eliezer* XIV, 85.

61. *Bava Kamma* 91a. The *Rif*, *Rosh*, and *BeHag* and others forbid.

62. *Hilchot Chovel Umazik* V,1. Many have raised the question that if the 'wounding' is not done in an 'adversarial manner', but with consent, then it should not be forbidden; that seems to be the rationale for permitting optional surgery. See *Chazon Ish Choshen Mishpat* 19,5, *Turei Even Megillah* 27, *Shulchan Aruch HaRav*, *Nezikei Guf* 3, *Iggerot Moshe Orach Chaim* III 78.

63. *Yabia Omer* VIII *Choshen Mishpat* 12,3. The *Ibn Ezra*, in his commentary

maintained that a doctor is only permitted to alter a defect that arose at some time in a person's life, but not one that (s)he was born with which causes no pain. He disagrees and maintains that surgery to correct an inborn problem is "not contravening the will of the King."

Many *Rishonim* forbade any optional surgery.⁶⁴ *Rashba* did not permit optional surgery even if the person would get much satisfaction from it. Absent a compelling reason, for many authorities optional surgery is out.⁶⁵

Just what constitutes a 'compelling reason', however, is subject to debate. The *Ba'ale Tosafot* consider pain a sufficient reason to permit surgery to remove the pain. And then they add, "and if the person has no other pain (from his condition) other than that he is embarrassed to go out among people – it is permitted [to have surgery to fix the problem] – for there is no greater pain than that."⁶⁶

In the same vein, when Rav Ovadia Yosef was asked by a young woman whether she was allowed to have cosmetic surgery, he wrote that "...the woman very much wants to beautify herself by this procedure, and the operation is performed under anesthesia, and at that time she will not feel any pain at all; and afterwards, she will get so much pleasure from it, that the benefit exceeds the loss and the pain..." Discounting any danger from anesthesia unless it is very heavy and prolonged, Rav Yosef permits her to do it, as long as she is in the hands of a competent physician.⁶⁷ There are numerous rabbinic authorities who concur with this rationale.⁶⁸

to *Shemot* 21:18, is of the opinion that a doctor only has license to heal an external wound, not an internal one.

64. Rif, *Rosh* to *Bava Kamma*, *ibid*.

65. *Minchat Yitzchak* VI, 105 and *Tzitz Eliezer* XIII, 83. They agree that surely one cannot endanger life for an optional surgery. See also *Sefer Chassidim* 676.

66. *Tosafot*, *Shabbat* 50b, s.v. "bishvil".

67. *Yabia Omer* VIII *Choshen Mishpat* 12,1. See also note 1.

68. *Iggerot Moshe Choshen Mishpat* I, 66; *Halacha uRefuah* I, p. 343; *Chelkat Yaakov* III, 11; *Nishmat Avraham* III, p. 214.

Beyond ‘healing’ and ‘wounding’, however, there is another potential problem with permitting plastic surgery or – and this is directly relevant to our topic – making changes in the body so as to transition from one sex to another. That is the question of implicitly ‘improving’ or ‘correcting’ what G-d wanted. We will address this issue in the following section.

Changing what Hashem made

Inherent in our discussion is the issue of whether or to what extent it is acceptable to try and change what Hashem has created. In *Gur Aryeh*, the *Maharal* addresses a statement of the *Ramban*,⁶⁹ that it is forbidden to cross-breed animals or plants, because it is an attempt to contravene the will of G-d in His creation.⁷⁰ *Maharal* maintains that, on the contrary, man was mandated by divine decree to ‘finish’ or ‘improve’ the primeval condition of the world: thus, we grind wheat to make flour and produce bread, we perform a *brit milah*, etc. These human actions enhance and improve the world, and that is part of man’s ‘assignment’. Nevertheless, certain ‘improvements’ are forbidden, such as cross-breeding different species.

One could speculate that there is a difference between making improvements to an existing feature of the world Hashem

69. Commentary of *Ramban* to *Vayikra* 19:19. *Ramban* is reacting to *Rashi*’s observation that the prohibition to crossbreed species is a *chok*, a Divine decree whose rationale is beyond human understanding. *Ramban* maintains that it is not a *chok* at all; rather, ‘inventing’ new species by crossing two species is ‘insulting’ to the Deity, implying that Hashem made the world incomplete and in need of improvement. *Ramban* considers only the prohibition of mixing wool and linen to be a *chok*.

70. *Gur Aryeh*, *Vayikra* 19, note 35, s.v. *elah she’kashah li*. *Sefer Hachinuch mitzvah* 244:

The fundamentals of the mitzvah [prohibiting mixing various kinds of seeds] is that Hashem created the world with wisdom, insight, and understanding, and made and formed all the objects according to what is necessary ...as it says, “and Hashem saw all that He had made and behold, it was very good....” (*Bereishit* 1:31).

created, which is permitted, and creating a new species,⁷¹ such as the mule, which is forbidden.⁷² Grinding grain and kneading it into bread is improving the grain for human use, which is not the case with creating new species which alter and repudiate G-d's plans for creation.

Sefer HaChinuch writes that "at the beginning of Creation, Hashem implanted in every part of the world a nature which can benefit the people of the world He created, and commanded everything to function according to its category (species), as it is written in the *parsha Bereishit* – 'lemineihu' – 'according to its kind'." This means that everyone has some strengths, something that he or she can contribute, and they should use it for good.

Spiritual considerations

Beyond all the technical halachic issues we have raised, there is another dimension to be considered, and that is the individual's *neshamah*, his spiritual essence. Judaism comprises a great deal more than the do's and don't's of halacha. There are also philosophical principles (*hashkafa*) and esoteric concepts (*kabbalah*). A Jew is on this earth to fulfill mitzvot, to elevate his *neshamah*. We believe, as Rav Waldenberg put it so beautifully, quoting the *Rambam*, that "a human being is nothing but a container made of dust, and within this container is the essence" – the soul.⁷³ Each individual is a unique combination of body and soul, and the obligations of mitzvot derive from the soul, not from the body. A feminine soul achieves its perfection via fulfillment of mitzvot incumbent upon women, and a masculine one attains consummation through the divine commandments given to men. Regardless of any physical changes to the body,

71. It is interesting to note that *midrashim* seem to indicate that originally the world was created not to need any 'improvement' by man. *Adam HaRishon* was served already cooked food (by the angels) and had no need to process any product.

72. See Artscroll *Ramban Chumash Vayikra*, p.537, note 111.

73. *Tzitz Eliezer* X 25, 26. For insights into the 'tug of war' between the body and soul, see *Likutei Amarim Tanya*, especially chapters 17, 18, 19.

the *neshamah* remains what it was when Hashem put it into the body, and the person's destiny is determined by his or her *neshamah*, the soul.

Sinners within the community

Over the years, the observant Jewish community has grappled with the problem of the correct way to relate to those who are non-observant. Should a non-Sabbath-observer be given an *Aliyah* to the Torah? Can he be allowed to *duchan*? Over time, the specific patterns of non-conformity have changed, and so have the halachic issues – how to treat someone married to a non-Jew, for example. Should this person be shunned by the community? Should we be concerned that communal rejection might push the Jew into apostasy or conversion? Or should we insist that the Jewish community must demand adherence to (at least minimal) standards or else be in danger of losing its moral compass altogether?

This is not a new problem, and for centuries rabbinic authorities have struggled with it.⁷⁴ Early in the 16th century, the *Rema* wrote “and we shun someone who deserves shunning, even if we are concerned that thereby he will go out upon a bad way; but we cannot be concerned with this.”⁷⁵ Later in the century, however, the *Taz* disagreed, expostulating, ‘how can we be concerned with the prohibition that this person is transgressing – and then push him into doing even worse things?’⁷⁶

74. What is new, however, is the insistence of those who are acting contrary to the norms of society that their errant behavior be legitimated and approved. As an example, homosexuality has been going on for millennia, but other than in Sodom, there was no demand that society approve such behavior as equally acceptable. ‘Gay pride’ parades are a modern phenomenon. As far as Judaism is concerned, there is the danger that approving aberrant behavior precludes a return to the dictates of the Torah.

75. *Yoreh Deah* 334:1, based on a Talmudic text in *Kiddushin*.

76. *Ibid*, in his commentary. Further in his commentary, the *Taz* challenges the practice of barring the wife and children of a sinner from attending the synagogue or the communal school, which was done to pressure the recalcitrant father/husband. He feared the effect such shaming might have

Rambam similarly disapproves of “pushing away Sabbath transgressors and to reject them”, but rather urges “to draw them near and encourage them in performance of mitzvot.”⁷⁷

The *Rivash* echoes this sentiment, “and this is what we do too....when those who cast off the ‘yoke of heaven’ became more numerous....”⁷⁸

The *Rivash* was asked by a questioner to approve his reaction to a certain situation of non-compliance: the community had issued a severe prohibition (*cherem*) about something, but there was a person who violated the *cherem*. Thereupon, the questioner in this case stopped attending the shul when the violator was there, since he was in *cherem*. The questioner was now asking *Rivash* whether this was the right response to the sinner’s non-compliance with the *cherem*.

In his responsum, *Rivash* proceeds to articulate a comprehensive approach to the phenomenon of disregard of Jewish law. First of all, he reprimands the questioner that his reaction of not attending shul in the presence of the sinner ‘is an excessively strict response.’ Citing a precedent related in the Talmud⁷⁹ (well over a thousand years previously!) that Rav was aware that people routinely disregarded the severity of vows, *Rivash*

on them.

Many years ago, the Rabbinical Council of America instituted ‘round table’ discussions to address current communal problems, and the first question they dealt with was how shuls should relate to persons married to non-Jews. It was suggested that nowadays, intermarriage should no longer be considered as a rebellion against the religion and consequently should not result in the same total rejection of the sinner as had been the norm in the past. That question was the first and last question the ‘round table’ ever addressed, so loud was the protest!

The *Shulchan Aruch Orach Chaim* 128:40 rules that a Kohen married to a *gerusha* (divorcee), which is forbidden, cannot be called up to the Torah as a Kohen; apparently, however, he can be called up as an ordinary Jew. This shows that a sinner should be disciplined, but not expelled from the community.

77. *Iggeret HaShmad*.

78. *Shu"t Rivash*, 371.

79. *Gittin* 35a.

acknowledges the reality that ‘times have changed’ and that people do not take Jewish law as seriously as they should. Consequently, he opines that Rabbis and the community have to come to grips with that reality and realize that it may be beyond their power to enforce all Jewish rules. It might be more important to keep the sinners within the community and try to help and encourage them to find their way back.

The *Rivash* was writing some 700 years ago; what was true then about society’s lacking universal commitment to Torah and halacha is certainly far more prevalent today. The reality is that today there are people who have ‘transitioned’ to another sex, and undoubtedly some of them are Jewish. It is not presumptuous to assume that more of this will happen in the future, and therefore the Jewish community needs to think about how to relate to such persons. On the one hand, there is a rabbinic principle ‘*mutav sheyiheyu shogegim v'al yeheyu maizidim*’ – don’t admonish people to warn them that an action is forbidden, because they won’t listen anyway, ‘so let them at least sin in error or ignorance, and not deliberately.’⁸⁰ (*It is important to note that this advice applies only to rabbinic enactments but never to a direct biblical prohibition. In that case, one is required to object strongly to the desecration, at least once.*)⁸¹ But when the Reform movement first started attracting Jews in the late 18th and early 19th centuries, the Rabbis did publicize numerous essays warning about the evils of that movement, in the hope of dissuading many from joining.⁸²

There is no ‘one size fits all’ solution to this dilemma, for

80. The *Biur Halacha* 608,2 opines that this stratagem should be followed when it is apparent that people will not listen to the reprimand and will not stop doing the wrong thing; furthermore, perhaps one should not reprimand if that is going to arouse hatred.

81. As per *Orach Chaim* 508,2.

82. Twenty-two of these responsa were then printed in a book, *Eileh Divrei HaBrit*; R. Tzi Hirsch Chajes also wrote *Minchat Kenaot* in the same vein, and the *Chatam Sofer* was very vocal in his opposition. See also *Iggerot Moshe Orach Chaim* II, 41, 42 and *Orach Chaim* 28; *Iggerot Moshe Even HaEzer* II, 20; *Binyan Tzion* 23.

it is a complex problem with many components; there is concern for the sinner and how to bring him back into the fold; there is the need to weigh how the rabbinic reaction to his behavior (or lack of reaction) will impact upon others in the community; and there is also the concern for his children, who may be altogether pushed out of identifying with the Jewish community. The author of *Pitchei Teshuva* articulated his advice very succinctly:

The leader of the generation needs to be circumspect and deliberate in matters such as this, inasmuch as not all people are the same, and not all sinful transgressions are the same....⁸³

In more recent times, the *Chazon Ish* indicates that the only time to readily utilize the strict approach is when “Hashem’s providence is clearly seen....and since all our efforts are to repair, the law [to push away a sinner] is not to be employed, when it brings no improvement [in the situation]. It is up to us to bring them back with chains of love....”⁸⁴ It is interesting to note that when he knew people were going to eat a certain cheese anyway, the *Chazon Ish* preferred to issue a *heter* (lenient ruling) which wasn’t entirely warranted rather than let them continue to eat food that they thought was not kosher.⁸⁵

Others echo this modification of strictures;⁸⁶ Rav Waldenberg writes about a girl who was getting married and refused to go to the mikveh beforehand, that one should be lenient, for fear

83. *Yoreh Deah* 334.

84. *Chazon Ish*, *Shechita* II, 16.

85. The ruling of the *Chazon Ish* is cited in *Divrei HaRav*, by R. Herschel Schachter, p. 193. According to *Tosafot*, cheese owned by a non-Jew can be considered kosher; however, Orthodox Jews do not eat this kind of cheese, but technically it is not *treif*. Therefore, the *Chazon Ish* permitted it for them.

86. See *Yabia Omer* IV *Yoreh Deah* 7:4, who cites numerous rabbinic sources advocating an attenuated reaction to transgressors, in light of the moral laxity of modern society. He cites the *Radbaz* (*Shu"t* 187) who, back in the 16th century, acknowledged that “it is not in our power to establish the laws of the Torah in their rightful place....and therefore it is proper for the leaders of the generation to be moderate in such instances.” *Emphasis added*

of pushing her further away and maybe abandoning Judaism altogether.⁸⁷

There are those, however, who take a harder line, saying that a public sinner “should not be allowed to enter the synagogue.”⁸⁸ In an article in *HaMaor* about sex change, R. Chananya Teitelbaum writes that if the government would allow us (the observant Jewish community) to put the sinner in *cherem*, then it would be a mitzvah to shun him and to set him apart and to evict him totally from the Jewish community.⁸⁹

Perhaps this very strong suggested reaction is a response to the realities of today’s society. In the past, people and society generally had an idea of what was right and what was wrong, and if they did do something wrong, at least they knew that it was wrong. There is a world of difference between people who find themselves too weak to observe all the strictures of Sabbath observance, and those who desecrate the Sabbath because they don’t accept the Torah laws of Shabbat as applying to them. And this tendency is precisely the *zeitgeist* nowadays; a major feature of our society is the popular conviction that every

87. Tzitz Eliezer XIX 39,1. When Dinah was raped by Shechem (*Bereishit* 34), her brothers Shimon and Levi reacted violently, killing all the people of the town; but Yaakov their father counseled a more restrained response.

88. *Shu’t Shev Verapeh* II,79.

89. *HaMaor*, Year 25, *kuntres* 2. For further insights as to how our sages have advised dealing with people who are doing the wrong thing, whether through ignorance, obstinance, passion, or wickedness, see the following: Gemara and *Tosafot* to *Chagigah* 22a [perhaps not to follow the strict measures against ignorant people (*am ha’aretz*) lest they abandon the religion altogether, and similarly to accept their testimony in court and to include them in a *zimun* (quorum) despite the fact that the Gemara had said differently]; *Mishnah Berurah* *Orach Chaim* 199 [about how to deal with wicked people]; the rabbinic dictum that “just as it is a mitzvah to reprimand someone by saying words that will be ‘heard’, so it is a mitzvah not to say words that will not be listened to”; *Minchat Shlomo* I, [discussing the prohibition not to put a stumbling block in the path of the ‘blind’, which includes not doing something which might cause another person to sin even more]; Gemara *Beitzah* 30, [discussing the limits of the mitzvah to reprimand (*tochacha*)] and also *Orach Chaim* 608:2, on that topic.

individual is entitled to live as they want. Not only that, [s]he insists that society at large accept and approve whatever alternate lifestyle is chosen. Disapproval is not acceptable; to disapprove is to be labeled as 'retrogressive', 'cruel' and just plain wrong. The tragedy is that when there is no such thing as a negative reaction, there is no incentive for a person to reconsider his actions and perhaps contemplate *teshuva*.

P'ru ur'vu

There are numerous references in Torah to the great mitzvah of having children, which was the first commandment from Hashem to Adam and Chava: *p'ru ur'vu*, be fruitful and multiply (*Bereishit* 1:28). The *Navi* Yeshayahu elaborates, *lo tohu bera'ah, lashevet yetzarah* – "Hashem created it [the world] not to be chaos, but to be inhabited."⁹⁰

Our Rabbis declare "it is a great mitzvah, and whoever adds even one person to Israel, it is as if he built a world."⁹¹

In *Megillah* 27a, the Rabbis teach that it is forbidden for a person to sell a Torah scroll that he owns except if he needs the money in order to learn Torah or to marry a wife.⁹² And in *Kohelet*⁹³ the wise King Solomon counseled, even if you had children when you were young, make sure to have children too when you are old.

When King Chizkiyahu refused to get married because he didn't want to father children, knowing prophetically that he would have a son (Menasheh) so wicked that it would lead to the destruction of the Beit Hamikdash,⁹⁴ he was told by the

90. *Yeshayahu* 45:18.

91. See *Minchat Chinuch*, mitzvah 1, for specifics – at what point has one fulfilled this obligation, is it sufficient to get married and have relations with one's wife or is the mitzvah not fulfilled until they have children?

92. See also *Even HaEzer* I,2. And *ibid*, I,3, that the Jewish court forces a man to get married.

93. 11:6.

94. See *Berachot* 10a.

prophet Isaiah, *meit ata velo ticheyeh* “you will die in this world and your soul will not merit to live in the World to Come” (see Rashi, *ibid*).⁹⁵ Chizkiyahu, who was a famously pious individual, was shocked at this announcement and asked why he deserved such a severe punishment. Isaiah told him, because he refused to have children. As the *navi* remonstrated, *behai kavsha deRachmanah lamah lach* – why are you getting involved in matters that are the province of the Almighty, not for ordinary human beings? A person’s obligation is to populate the world, his is not to worry about what those children might one day do. By not having children, King Chizkiyahu was liable for death, for causing G-d’s Presence to withdraw from the Jewish people. A person undergoing sex change, aside from all other considerations, will not be able to procreate, thus nullifying a major mitzvah obligation.

The mitzvah of *p’ru ur’vu* is not optional, it is a biblical commandment. In former times, the Beit Din would pressure a man to get married by the age of 20; they also prevented marriage to an under-age girl who was too young to have children.⁹⁶ In the Gemara, we find the opinion that someone who does not marry and try to raise a family, is ‘expelled from Heaven’.⁹⁷

In previous times, if a couple was married for ten years without having children, they were pressured by the Jewish court to get divorced.

There is a tradition that *mashiach* will not come until ‘all the *neshamot* that are in the “*guf*” are finished’, meaning that all the souls that were created in the six days of Creation need to be born before the End of Days.⁹⁸ Thus, every child born can be seen as advancing that glorious agenda.

95. *Yeshayahu* 38:1.

96. *Rambam, Hilchot Issurei Biah*, XXI:18.

97. “*Minudeh min hashamayim*.” *Pesachim* 113b.

98. *Yevamot* 62a, based on *Yeshayahu* 57:16.

It is a mitzvah to have children, but there are some who say that the mitzvah is not fulfilled unless one has children capable of having children as well.⁹⁹ In *Even HaEzer* I:5 we find “when a person has (fathered) a male and a female, he has minimally fulfilled the mitzvah of ‘be fruitful and multiply’ – but that is only if the son is not a eunuch and the girl is not incapable of having children.”¹⁰⁰ The *Minchat Chinuch* (I:5) goes so far as to rule that even if the son is perfectly healthy but thereafter becomes incapable of fathering a child – the father has not fulfilled the mitzvah. Moreover, even if a person fathered a boy and a girl, it is still a mitzvah to have more children.¹⁰¹

Zera levatala

Another halachic issue requiring attention is the extremely serious transgression called ‘*zera levatala*’, ‘wasting semen’, for which the sinner is ‘liable to death’ and ‘brings a flood upon the earth’ (i.e., comparable to the wickedness which caused Hashem to destroy humanity in the Flood).¹⁰²

Briefly, it is forbidden for a man to waste seed ‘*levatala* – for no purpose’, which would include among other acts, premature withdrawal (the sin of Er and Onan).¹⁰³ There are numerous rabbinic writings condemning *zera levatala*.¹⁰⁴ A doctor wrote to Rav Eliezer Waldenberg asking for religious guidance in the following situation: he had a patient, a woman born without visible sexual organs, and she wanted him to construct a

99. See *Rabbeinu Chananel's* commentary in *Shabbat* 135a, about a man whose reproductive organ was mutilated and he prayed for death, since he would not be able to perform this mitzvah.

100. *Even HaEzer* I:5.

101. *Yevamot* 62b.

102. *Niddah* 13a.

103. *Bereishit* 38:7, *Yevamot* 34b. However, sexual intimacy with a woman in the usual manner is permitted even if there is no possibility of pregnancy ensuing, such as if the woman is pregnant, or post-menopausal, or has had a hysterectomy.

104. *Shu't Pnei Yehoshua* II, 44; *Even HaEzer* 23:5; *Otzar HaPoskim* I, 77; *Melamed LeHo'il* 17; *Iggerot Moshe Even HaEzer* I,3; *Yabia Omer* III,4.

“vagina” so that “she” would be able to function as a female, although definitely not able ever to bear children. The doctor wanted to know whether he was obligated to inform the man she was dating about her situation. Besides responding to all the other issues raised by the questioner, Rav Waldenberg forbade any man to have relations with this person, since she is not really a female. Thus, any sperm would be *zera levatala*.

There are few specific responsa dealing with transgenders, but we may extrapolate from rabbinic writings on related topics: In *Kovetz Teshuvot* I:152, there is again a question about a person born without sexual organs for whom the doctors constructed a ‘vagina’. Here again the opinion is expressed that it would be forbidden for a man to have sex with this person, because it would be ‘*zera levatala*,’ wasted seed, since she is not really a woman.

There is an additional very serious problem with a person who has transitioned from male to female having sexual relations with a man. As we have seen, Jewish law considers a person to be the gender they were born with, regardless of any interventions, surgeries, or medications. Thus, in Jewish law such intimacy would be considered homosexuality, which is forbidden in the Torah on pain of death.

Crossdressing

The Torah is quite explicit in forbidding cross-dressing:

A man’s garment shall not be on a woman and a man shall not wear a woman’s garment; it is an abomination to G-d whoever does these.¹⁰⁵

According to the Talmud, the intent of this commandment is to prevent a man or a woman from dressing in the clothes of the opposite gender in order to be able to ‘pass’ among

105. *Devarim* 22:5

them for immoral purposes.¹⁰⁶ In this view, the impetus for the prohibition of cross-dressing was very clear: "There is no doubt that if men and women's clothing were the same, they would mingle with one another constantly, and the world would be full of immorality."¹⁰⁷

Moreover, this prohibition was rabbinically extended to include not only clothing – Rav Eliezer ben Yaakov says that "women should not don armor and presume to go to war,"¹⁰⁸ and the Targum asserts that *tallit* and *tefillin* should also not be donned by women, inasmuch as they are essentially designed for men. In essence, they are saying that even absent any illicit intent, just acting like members of the opposite sex, or doing actions that only women/men do, was proscribed.¹⁰⁹ It is necessary to qualify the nature of the *issur*: Is it wrong to mimic clothing or actions of the other sex, is it wrong to want to be like the other sex – or is it only acting out of immoral intentions that is forbidden?¹¹⁰

Rav Moshe Feinstein, citing the *Tzemach Tedek*, expresses the opinion that a man's shaving (his body or his underarms) is violating the stricture against a man's wearing women's clothing. He explains the rationale that "in my humble opinion....the prohibition refers to things that women do to

106. *Nazir* 59a.

107. *Sefer HaChinuch* 542.

108. *Nazir* 59a.

109. Such as a man shaving his legs or his underarms, see *Rambam, Hilchot Avoda Zara* 12:9 (although with changes in society, that may no longer apply). For a man to shave other body parts may not be biblically forbidden, although it is prohibited rabbinically. See *Shulchan Aruch Yoreh Deah* 182.

110. The entire discussion is based on the principle *darshinan ta'amei d'kra* – trying to discern the rationale of the verse and thereby understand how to apply it correctly. In *Sdei Chemed* III p.21, numerous sources are cited which discuss if and when it is appropriate to rule in accordance with the spirit of the verse. In arriving at a conclusion, it is important to note the words of Rav Ovadia Yosef where "the reasons for the mitzvot are known only to the Blessed G-d Who gave the Torah." See *Devarim* 24:17, *Bava Metzia* 115a, and *Sanhedrin* 21. For further discussion of this topic, see *Bava Metzia* 115; *Rambam, Hilchot Loveh Umalveh* 3; *Noda Biyehuda Even HaEzer* I,80; *Yechave Da'at* I,55.

adorn or beautify their bodies, such as the clothing mentioned in Scriptures.”¹¹¹ Perhaps for that reason he permitted a man to dye his hair, since there his intention was to look younger so that he could get a job.

Intent seems to play a major role in the application of the *issur* of wearing a garment intended for the opposite sex. Thus, when Rav Ovadia Yosef was asked about the permissibility of a woman performing guard duty in the Israeli army, and carrying a gun (which we have seen is considered a woman wearing men’s clothing), he refers to the precedents cited above, but then he adds, “...but if these garments (of the other sex) are being worn to protect one from the sun or the cold, it is permitted.”¹¹²

Tallit and tefillin

If a person is born female and undergoes procedures to become male – should (s)he put on *tallit* and *tefillin*? As we have seen, as far as Jewish law is concerned, this individual remains halachically a female.¹¹³ Is there any prohibition in her

111. *Iggerot Moshe Yoreh Deah* II, 61. The same is found in the *Shulchan Aruch Orach Chaim* 696:8, about people “cross-dressing” in costumes for Purim, which he approves, but the *Mishnah Beruriah* disapproves (*ibid*).

112. *Yechave Daat* V, 55. Rabbi Yosef was addressing only the propriety of a woman carrying a gun, not other issues which might be ancillary, such as *tzeniut* (modesty). In *Yabia Omer* X,14, he elaborates on a question that was raised about women wearing pants or mini skirts. After detailing the prohibitions in wearing a mini skirt, Rav Yosef concludes that pants raise less of a problem. He concludes that the intention of the person wearing the garment of another sex plays a significant role in determining the halacha.

For extensive coverage of this negative commandment, see *Encyclopedia Talmudit*, volume 34, pp. 1-58, which includes issues dealing with *tumtum* and *androgynous* and whether the prohibition applies only to clothing or to actions as well, and whether it applies only in situations where the intent is for immoral purposes.

113. In the morning prayers, there are certain blessings recited, among them some which raise a question. For example, may a convert to Judaism make the blessing “Blessed art Thou....who has not made me a gentile”, when in fact Hashem did make him a gentile originally? Or should he thank Hashem

wearing *tallit* and *tefillin*?¹¹⁴ We have noted that the Targum writes if a woman wears *tallit* and *tefillin* she violates the prohibition of wearing men's clothing.¹¹⁵ However, this opinion is certainly not accepted universally. The rationale is as follows: the Gemara takes the position that, technically, a blind person is exempt from all positive mitzvot,¹¹⁶ but if he wants to, he has the option to perform the mitzvah, receiving reward as 'someone who is not commanded but does it.'¹¹⁷ The same

for making him a Jew, when in fact Hashem did not make him a Jew? The same question can be raised as regards a person who has undergone a sex change – can a transformed woman who is now a 'man' make the blessing "...Who has not made me a female" when indeed that is what Hashem did? It seems to be making a mockery of the *beracha*.

But the two situations are not really comparable. A person who was born non-Jewish and decided to convert has done something admirable, as far as Judaism is concerned. However, a woman makes the blessing thanking Hashem "for making me as He wished", yet a transgender patently has rejected the will of Hashem and chosen to be something else. That is problematical, but not specifically part of our topic.

114. *Iggerot Moshe Orach Chaim* IV 49 writes that if a woman wants to put on *tefillin*, it would depend on her motive: if she thinks Hashem made a mistake in making her a female or she wants to show off, it would be forbidden. However, if there are positive reasons, then it would be like any other positive mitzvah which is time dependent (only in the daytime), which Ashkenazi women are permitted to perform and recite a *beracha*. Sefardi women would follow the ruling of *Rambam* and would not make a *beracha*. It is interesting to see that R. Zalman Nechemiah Goldberg, cited in *Techumin* XVIII, p.122, is of the opinion that if a woman strongly wishes to observe a mitzvah that she is not commanded to do, if she were to do it in her room, it would be acceptable...but all those who do it publicly, it is obvious that it is being done to make a statement and not out of religious conviction, and therefore it is forbidden.

115. *Targum Yonatan ben Uziel*, *Devarim* 22:5. But in *Eruvin* 97a, the Gemara reports that Michal, the daughter of Shaul, put on *tefillin*, and the sages did not try to stop her. Others claim the Rabbis did try to stop her, or else that she was different from all other women.

116. *Kiddushin* 30a. The halacha nowadays is that he is indeed obligated.

117. A person who performs a mitzvah that he is not obligated to do receives a reward, but one that is less than a person who is commanded, and does. *Tosafot* explain that the one commanded has a *yetzer hora* inciting him against performance of the mitzvah; by overcoming this negative pull, he merits a greater reward.

applies to a woman who chooses to sit in a sukkah, or goes to hear the shofar on Rosh Hashanah. Does the same principle apply to *tzitzit*?

Rambam writes that women are biblically exempt from *tzitzit* but if they want, they may don them, without a *beracha*.¹¹⁸ However, the *Beit Yosef*, citing the *Agur*, rules that women should not wear *tzitzit*, and if they do, it is *mechezei k'yehora*, 'showing off that they are superior'.¹¹⁹ The *Rema* concurs with this ruling.¹²⁰ The *Ra'avad*,¹²¹ commenting on the *Rambam*, offers another reason (or exception) to when women can wear *tzitzit*.

Rav Goldberg, in the aforementioned article in *Techumin* XVIII, p. 120, discusses the phenomenon of a woman praying in a public place, wrapped in a *tallit*. He cites the opinion of the *Magen Avraham* that if she walks with it in the public domain on Shabbat, she will be transgressing the prohibition of carrying on Shabbat; based on the *issur* of a woman wearing a man's garment, she would not be allowed to walk in a public place with it on Shabbat.

There are similar issues with a woman donning *tefillin*. The *Shulchan Aruch* specifically notes that women are exempt from this mitzvah "because it is a positive mitzvah which is affected by time" (i.e. it only applies by day).¹²² Thus, one would think it would have the same rules as sitting in a sukkah or taking the lulav, where a woman can perform these mitzvot if she so wishes. However, the *Rema* in his gloss writes, "but if women want to be strict with themselves [and don *tefillin* even though not commanded to] – they should be prevented."¹²³

118. *Hilchot Tzitzit* 3:9; since they are not commanded, they cannot make the blessing "Who has commanded us....." See also *Orach Chaim* 17:2.

119. *Beit Yosef* to *Tur*, *Orach Chaim* 17:2.

120. *Orach Chaim*, *ibid*. For a full discussion, see *Yabia Omer* I *Orach Chaim* 39-42.

121. *Hilchot Tzitzit* 3:9.

122. *Orach Chaim* 38:3.

123. Gloss of the *Rema*, *ibid*.

Burial

Even in death, Jewish law prevails; there are regulations about who can or cannot be buried in a Jewish cemetery, and about burying people in certain vicinities. As an example, 'wicked' people cannot be buried near those who were Torah-observant.¹²⁴ Traditionally, men and women were buried separately, which is the source of new questions in the modern age.¹²⁵ In 1954, Rav Moshe Feinstein wrote that the accepted protocol nowadays is to bury people in rows, one row of men next to a row of women; however, "since it is customary not to bury a man next to a woman who is not his wife, it is a great disgrace [to do so]..."¹²⁶

Thus, the question arises where to bury a transgender person; one cannot readily refer to the 'common custom' since this is a relatively rare and new phenomenon.¹²⁷ The burial locale of a transgender may raise a number of problems, including the distress it might cause the relatives of those buried alongside, to find their father buried next to a woman.¹²⁸

We live in a rapidly changing world; what was unheard of previously, has now become commonplace. Politically, the divide in society grows wider and wider, and so does the religious divide, including in the Jewish community. We don't talk to each other, we talk at each other, and no one listens.

124. *Iggerot Moshe Yoreh Deah* 2.

125. See *Kol Bo al Aveilut* II:11, who writes that "there is no concern [about this] in a place where it is customary to bury a man next to a woman....and this is the custom in a number of communities."

126. *Iggerot Moshe Yoreh Deah* 241; *Yabia Omer* X,49, finds a discrepancy in R. Feinstein's responsa on this topic.

127. *Rambam* has ruled that "something which doesn't occur commonly cannot be considered a custom," *Hilchot Shechita* 11:13; this principle is cited also in *Kovetz Teshuvot* I:101, based on *Rema Choshen Mishpat* 331.

128. *Sefer Chassidim*, 705 and 223, tells about a Torah scholar who was buried adjacent to the grave of a sinner. It was reported that he appeared to a number of the townspeople in a dream and complained that the situation was intolerable. Finally, the people of the town erected a barrier between the graves, and the dreams ceased.

Where every person feels he is right, there is no openness to other points of view. On the other hand, not all points of view have validity in Judaism, regardless of how strongly one might feel that they should.

The present study was undertaken in order to explain not only what Judaism teaches, but also to elucidate why and how the halacha has arrived at those conclusions. Hopefully, the insights gleaned herein will help us respond with sensitivity and clarity to a problem which is proliferating. Given the severity of the issue, I hope I have accomplished my task.

*Techum Shabbat** and the Airport

Rabbi Mordechai Millunchick

This article is concerning a hypothetical delayed traveler who has arrived at the airport on an airplane exceedingly close to Shabbat such that he is unable to arrive home or even leave the airport before the onset of Shabbat. Once Shabbat arrives he wishes to walk to his home. We are going to discuss this question primarily from the perspective of *techumin*, which is typically very far from the thoughts of most city dwellers.

Travelling on Erev Shabbat

It is important to stress that *Chazal* greatly frown upon one who travels on Shabbat, let alone so close to Shabbat as to pose a halachic question if one may even arrive at home. The Gemara (*Sukkah* 44b) adjures one not to travel on *Erev Shabbat* more than three *parsaot*.¹ The *Rishonim* explain the reason for this is to allow one to ensure that one's Shabbat meals and needs are properly taken care of. This halacha is codified in *Shulchan Aruch*.² *Magen Avraham*, quoted by *Mishnah Berurah*,³ says that

1. The three *parsah* limit appears to be limited to one who is walking; however, travel by wagon, train, car or plane is not limited by distance.

2. *Shulchan Aruch* O.C. 249.

3. *Mishnah Berurah* 249:3.

* *Techum[in]* is the limited physical area in which a Jew is permitted to walk on foot on Shabbat and Jewish holidays.

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today, because people prepare for Shabbat in abundance,⁴ this halacha is not carefully adhered to.

Mishnah Berurah concludes “nevertheless one needs to be careful not to travel too close to the evening because many times there are obstacles in one’s path and one can easily come to desecrate the Shabbat. ... including traveling beyond the *techum* [permitted distance]... Therefore, one should hasten to establish his lodgings for Shabbat even in a (remote) village and not succumb to one’s *yetzer* [evil inclination] who is telling you ‘there is still yet time in the day.’” In the words of the *Aruch HaShulchan*⁵ “in general the *Satan* accuses⁶ more on *Erev Shabbat* and therefore one needs to be extra careful regarding this and his reward will be doubled from heaven. He will be from among those who sanctify the Shabbat and not those who desecrate it.”

Nevertheless, there are often circumstances beyond one’s control that may cause this question to become practical.⁷

***Techum Shabbat* and defining a city**

Some basics of the laws of *techum Shabbat* are needed to properly discuss this question. The halachot of *techumin* are sourced in a *pasuk*⁸ in *Parshat Beshalach* (16:29) “**שָׁבוּ אִישׁ תַּחְתּוֹ**”

4. *Aruch HaShulchan* notes that if one informed his hosts of his impending arrival one is allowed to travel beyond the third of the day noted in the *Shulchan Aruch*. Aside from the concern about having one’s Shabbat needs with regards to food and lodging, one should also endeavor to arrive with enough time to rest from his travels before Shabbat.

5. *Aruch HaShulchan* 249:3.

6. *Ketzot HaShulchan* (69 note 5) adds that one needs to be especially careful with the newly created cars as they often break down creating delays. An obvious extension of this is that it is not uncommon to have delays and cancellations when travelling by plane. *Aruch HaShulchan* also reminds us to be sure to calculate the trip from train station or the airport when considering the timing of the *Erev Shabbat* trip. *Piskei Teshuvot* (249 note 4) brings from unnamed *gedolei Yisrael* that one should plan to arrive at one’s destination with enough time before Shabbat in an equal amount to the length of the trip.

7. See *Beur Halacha* s.v. *Ein Holchin*.

8. The Rabbis of the *Mishnah* debate if the halacha of *techumin* is based

שבו איש *pasuk* “אל יצא איש ממקומו ביום השביעי תחתיו”, “Let every man remain in his place” refers to the halacha that each person has his own space. This space is referred to as the four *amot* of a person (one *amah* is between 21 to 24 inches, according to most calculations). As we shall see further the “place” of each person may be much more than four *amot*. The second part of the *pasuk* “אל יצא איש ממקומו ביום השביעי” “no man shall leave his place on the seventh day” tells us that each person is allotted an additional distance, 2,000 *amot* beyond his place.

The 4 *amot* of a person are determined by where the person is during the onset of Shabbat. By default a person has four *amot*; if one were outside (not in a city) then one’s place is simply 4 *amot* in each direction. One then has a *techum* Shabbat of 2,000 *amot* from this central point that he can walk in each direction.⁹ Not only is the person restricted by his *techum* boundary but also his personal possessions as well.¹⁰

on Torah law (*d’oraitah*) or Rabbinic in nature (*d’rabannan*) (*Eruvin* 35b). The general consensus among *poskim* (*Rif*, *Rosh*, *Rambam* and others) is that *techumin* is *d’rabannan*. See *Tikun Eruvin* Chapter 1. Most *poskim* assume that the *techum* of 12 *mil* is considered as a *d’oraitah*. The distance from JFK Airport to Flatbush and from O’Hare airport in Chicago to West Rogers Park and Peterson Park is more than 12 *mil*.

9. *Shulchan Aruch* O.C. 397:1 and 401:1. The *poskim* have differing opinions with regards to the measurement of distances. The approach of Rav Avraham Chaim Naeh produces shorter measurements and the *Chazon Ish* measurements are longer. While in general the *Chazon Ish*’s measurements are more stringent, with regards to *techumin* they generally produce leniencies. Larger measurements create a longer *techum*, and larger distances between homes and buildings to join cities and areas. In America the practice of many is to follow Rav Moshe Feinstein’s measurements both when they create stringencies and leniencies. According to Rav Moshe, the *shiur* (amount) of 70 $\frac{2}{3}$ *amot*, 141 *amot*, 2,000 *amot* and 12 *mil* are respectively 125 feet, 250 feet, 3,543 feet and a bit over 8 miles. According to Rav Naeh, the *shiur* of 2,000 *amot* is about 3,150 feet, while the *Chazon Ish* would measure it as 3,800 feet.

10. *Shulchan Aruch* O.C. 397:1. This has applications to one’s luggage as well. Even if one arrived home before Shabbat, if his luggage was delayed and arrived at the airport after Shabbat began and was delivered to his home, it would under many circumstances be considered to have arrived from outside the *techum* and be limited in movement to four *amot*.

A house or other area that is *mukaf l'dirah*, surrounded for dwelling, is also considered as four *amot*. Thus, if one is inside a house at the onset of Shabbat, the house is considered as four *amot* and the *techum* (permitted distance of travel) is measured from the walls of the house. If the house has a fenced-in yard the *techum* is similarly measured from that fence.¹¹

Cities

An additional area that can be considered as four *amot* is a city. While the term *עיר*, city, typically refers to a full-fledged city, with regards to *techumin* the term may be more appropriately applied to a neighborhood. It is quite possible that an area that people consider a city, based on municipalities or other qualifications, may not be a city at all in halachic terms, or may be divided into multiple cities. In addition, a city with regards to *techumin* may traverse what we consider to be separate cities or towns.

The smallest city is one that consists of six homes. These homes must be within $70 \frac{2}{3}$ *amot* one from the next. Additional homes that are within $70 \frac{2}{3}$ *amot* of these homes continue to extend the size of the city. Two adjacent "cities", groups of homes, if they are less than $141 \frac{1}{3}$ *amot* from each other join together to form one city. The city can be extended in this way even if there is only one home that is within the 70 *amot* of the other part of the city. An empty strip of more than 141 *amot* across an entire city will divide a city.¹²

While most roads do not have the 141 *amot* distance, many highways and train tracks do. In addition, we have found that high-voltage power lines cut an open strip of land through some cities for many miles, often dividing what is perceived as one city into many smaller ones, as far as Jewish law defines them. As one moves to more and more suburban areas the

11. See further in this article for more on *mukaf l'dirah*.

12. See *Sefer Midarkai Hatechum*.

distances between homes increases and one may not even have an עיר, shrinking the needed distance to 70 $2/3$ *amot*. Depending on the types of buildings one considers to be *mukaf l'dirah* (see below), even an industrial area that has buildings can divide a city.

Mukaf L'Dirah

Any house, even if no one lives in it now, is considered a home (*mukaf l'dirah*) and becomes part of the city. The *poskim* discuss which types of buildings and areas can be considered as *mukaf l'dirah* and thereby included as part of the city. Homes of non-Jews are also considered part of a city. Any building that has an apartment or place for someone to live is considered *mukaf l'dirah*.¹³ A factory with offices and lunch room for its workers is considered as *mukaf l'dirah* according to some *poskim*.¹⁴

The halacha is that a fenced-in area can also be considered as four *amot* with the caveat that it is open and connected to a place of dwelling, thereby making the fenced-in area supplementary to the dwelling.¹⁵ One can then not only measure the *techum* Shabbat from the fenced-in area, but one can also measure the 70 or 141 *amot*, depending if the area is a single home or between cities. This is most applicable to fenced-in yards and other areas. Similarly, if a city were to be surrounded by a wall or *eruv*, the entire area surrounded would be considered as part of the city, even those places with no homes.¹⁶ If one were to begin Shabbat in a fenced-in area that is not *mukaf l'dirah*,

13. See *Shulchan Aruch* 398:6 with *Mishnah Berurah*.

14. *Chazon Ish* 110 28. See also *Shevet Halevi* 1:59. Considering industrial and commercial areas a *mukaf l'dirah* in many situations will greatly increase the area considered as part of a city. It is quite common for these types of buildings to be on the periphery of the residential areas and they can be used to connect one city to the next. See *Kiryat Ariel* chapter 4, *Machazeh Eliyahu siman* 79, *Tikun Eruvin* 5:60.

15. *Shulchan Aruch* O.C. 396:2.

16. *Magen Avraham* 401:1. *Minchat Shlomo* 2:59 and *Shevet Halevi* 6:46:1. See also *Netivot HaShabbat* chapter 42 note 1 regarding the opinion of the *Chazon Ish*.

one can also consider the fenced-in area as four *amot* but only if the fenced-in area is less than a 5,000² *amot*.¹⁷

While airports are fenced in, it is quite difficult to consider them as *mukaf l'dirah*. In order for a location to be considered *mukaf l'dirah* aside from being opened to a dwelling place, it needs to have some viable usage that is considered as an extension of dwelling. Since the tarmac of the airport is a dangerous restricted area it cannot be considered as *mukaf l'dirah*.

Squares

Once the exact boundaries of the city have been determined, an additional leniency is applied before the 2,000 *amot* are measured. *Chazal* (*Eruvin* 55a) have told us that a city must be 'squared off' before the *techum* is measured.¹⁸ With a small group of homes this can be done quite simply by marking the furthestmost home on each of the four directions¹⁹ and drawing a square. Once the city becomes larger things become slightly more complicated. In order to draw the square of the city, all four boundaries of the city must be determined first, a formidable task that increases exponentially in difficulty with the size of the city. The square of a city can add a significant amount of area to a city.²⁰

There are some limitations to the halachot of squaring a city. The Gemara tells us that a city shaped like a קשת – bow

17. Rashi to *Eruvin* 15a s.v. *v'hu*. *Shulchan Aruch* O.C. 396:2.

18. The squaring of a city is derived (*Eruvin* 51a) from the cities of the *Levi'im* (*Bamidbar* 35:5). The term square is more colloquial as the term *ribua* refers more precisely to a rectangle or box. The *poskim* do in fact discuss how and if a city shaped like a trapezoid or parallelogram are squared.

19. The square is typically drawn parallel to the directions of the world, but there are instances when this is not the case. *Shulchan Aruch* O.C. 398.

20. See *Chazon Ish* 110:26 that a city shaped like a circle is squared off even if the area gained in each corner is more than 4,000 *amot*. Cities of other shapes may have the halacha of *keshet* and *gaam* and would be limited to 4,000 *amot*. See *Sefer Tikun Eruvin*, Chapter 5, note 13.

(U shaped) or like a **גא**, *gamma* (L) is considered to be full of homes as long as the distance between the two ends is less than 4,000 *amot* and the depth of the curvature is not more than 2,000 *amot*. If the distance is greater than this amount, one becomes unable to walk across from one end to the other and we no longer can consider the area inside to be filled with houses.²¹ Even part of the side of a city can have the halacha of a *keshet*.²²

Overlapping squares

What is the halacha regarding two cities close to each other in such a way that their squares overlap, or if part of one city is situated such that it is inside the square of another city? Are these two cities joined because their overlapping squares?

There are two main approaches to this question that are centered on the understanding of what the square of a city is:

1 - Squares do not join: The squaring of a city is only to simplify the measuring of the *techum* Shabbat and does not affect the size of the city at all.²³ Accordingly, two cities with overlapping squares remain two separate cities.²⁴

21. *Eruvin* 55a. *Rema* 398:4. See *Tikun Eruvin* Chapter 5, numbers 8-17.

22. See *Tikun Eruvin* chapter 5 note 17. See also *Machazeh Eliyahu siman* 82. The opinion of the *Rashba* and the *Ritva* is that a city is only considered a *keshet* if the entire side of the city is shaped like a bow and it is clear from its shape that additional homes will not be built within the bow maintaining its distinctive shape. *Beur Halacha* 398:6 s.v. *v'im* says that in extenuating circumstances we can be lenient like the *Rashba*.

23. *Rashi* to *Eruvin* 53a and *Rabbenu Chananel Eruvin* 56b both say that the squaring of the city is to assist in the *techum* measuring process. See also *Nodah BeYehudah* (Tinyana O.C. 51) that squaring the city provides an even area for the *techum* but does not increase the actual size of the city.

24. The Gemara (*Eruvin* 55a) discusses a city whose wall was breached across the city from two sides, with each break equaling more than 141 *amot*. The Gemara considers this broken city to be two separate cities. The Gemara does not mention if the breaches are aligned with the directions of the world or if the city is square and the breach creates an open area perpendicular to the walls. Seemingly, such details do not matter; as long as the distance

2 - Overlapping squares create one city: The square of the city becomes part of the city. Anything situated within the square of a city is part of the city. In addition, as its square overlaps with the square of another city, the city is expanded and is redrawn according to the new borders of the city.²⁵ According to this, our cities would be quite large, making cities of such a size that they may even extend over multiple states in some instances.²⁶

It appears that the jury is still out as to a consensus on the halacha, as there are *poskim* on each side of this issue without an accepted resolution.²⁷ Rabbi Avraham

between the two sides is 141 *amot* the two sides would be deemed as two cities even though their squares may overlap. See *Kiryat Ariel* Chapter 6, note 31.

The Gemara (*Eruvin* 57b) discusses the cities of *Akisitofon* and *Ardisher* which were separated by the *Diglat* river. The Gemara says that if the width of the river was more than 141 *amot*, the river would have divided the city. The *Diglat* river does not follow the directions of the world, and therefore it seems that the only variable in determining the connection of two cities is the proximity of the two sides, not the overlapping of squares.

25. Rabbi Shlomo Miller is of the opinion that even though cities with overlapping squares join together, they do not have a new larger square redrawn.

26. *Tur* (O.C. 398) writes "after the city is squared, one does not begin the 2,000 *amot* from that point, rather a *karpef* of seventy (plus) *amot* is added and the *techum* is measured from there." *Rema* (398:5) quotes this as halacha. We see from here that the *karpef* is added outside the square of the city and if there would be a house within the square, even distant from the other homes of the city, it should be considered as part of the city.

Chazon Ish (O.C. 110:16) writes that when two cities' squares overlap they are considered as one city. In reference to the aforementioned Gemara (*Eruvin* 55a) regarding a breached city, *Rashi* writes that this is when the two breaches are parallel to each other. This implies, says the *Chazon Ish*, that if the breaches are not opposite each other the city would not be divided, even though there is no one place that is less than 141 *amot* from the other side. This is because the squares of the two cities meet and cause one city to be formed.

The *Chazon Ish* himself, loc. cit. in parenthesis, admits that there may be alternate explanations of this *Rashi*. In fact, it is not clear which way the *Chazon Ish* decided is the practical halacha.

27. See *Kiryat Ariel* chapter 6, *Gevul Binyamin* chapter 2, and *Kovetz Beit*

Steinberg,²⁸ *Dayan* Yitzchak Weiss,²⁹ and Rabbi Pesach Eliyahu Falk³⁰ all rule that two cities join to one if their squares overlap. In addition, Rabbi Shlomo Miller has said that it was common for people to walk from Manhattan to Brooklyn across the Williamsburg Bridge, relying on this *heter*.³¹ [These *poskim* are following the second opinion noted above].

However, Rabbi Yosef Shalom Elyashiv and Rabbi Nissan Karelitz³² both rule that one should not rely on overlapping squares, and any 141 *amot* break across a city forms the boundary of that city. Rabbi Yisroel Belsky has said that to consider overlapping squares to be one city is a big leniency that one should not rely on in practical instances.³³

It is unclear how the *Chazon Ish* concluded. In his *sefer* he explains both sides of the issue. Rabbi Ariel Bochwald of Bnei Brak writes that the *Chazon Ish* did not rely on the overlapping of squares to create one city. He based this on a ruling (*psak*) given in 1944 necessitating people who wished to walk from the Montefiore neighborhood to neighboring Tel Aviv to place an *eruv*.³⁴

A hole in a city

If we are to consider overlapping cities as one, most metropolitan areas are one very large city, but at the same time, some large airports may still not be considered as part of

Aharon V'Yisroel volumes 101 and 118.

28. *Machazeh Avraham* #70.

29. *Minchat Yitzchak* vol. 8:32.

30. *Machazeh Eliyahu* *ibid*.

31. The entirety of the Lower East Side can be considered situated within the square of Brooklyn. Here we may be discussing travelling in Manhattan beyond the Lower East Side.

32. Both are quoted in *Kovetz Beit Aharon V'Yisroel* Vol. 18 page 146.

33. Regarding the opinion of Rabbi Dovid Feinstein see *V'Dibarta Bam* 1:122 and 2:186. I have not seen any written record of Rav Moshe's opinion.

34. See *Kiryat Ariel* chapter 6 pages 145-153.

the city. The *pasuk*³⁵ says, *איש על דגלו באתת לבית אבתם יחנו בני ישראל*, “*Bnei Yisrael shall camp each man by his banner according to the insignia of their father’s household, at a distance surrounding the Ohel Moed [Tabernacle] shall they encamp.*” *Rashi* writes that the *Ohel Moed* was at a distance of a *mil* in a way that it is within the *techum* so they could go there on Shabbat. This is an interesting comment as the *Ohel Moed* was situated at the center of the encampment surrounded on all four sides.

*Zichron Yosef*³⁶ derives from this *Rashi* that an empty area within a city of more than 4,000 x 4,000 *amot* is not considered as part of the city.³⁷ He compares this to a city shaped like a *keshet* (bow). *Beit Yitzchok*³⁸ argues on *Zichron Yosef*, as a city shaped like a *keshet* is open on one side, however an area that is completely surrounded by one city is part of the city.³⁹

The *techum* status of some airports depend on this question.⁴⁰ Rabbi Pesach Falk⁴¹ writes that such an area is not part of the city and if one wishes to walk beyond 2,000 *amot*, an *eruv techumin* (a halachic maneuver which has the effect of extending the distance one can travel on Shabbat) would be needed. In contrast, Rabbi Shulem Weiss⁴² considers the entire city as one even with an empty space within.⁴³

35. *Bamidbar* 2:2.

36. *Zichron Yosef* 44.

37. See also *Amudei Ohr* 14:5 as quoted in *Dirshu* edition of *Mishnah Berurah* vol. 4 pg. 527 #20.

38. *Beit Yitzchok* O.C. 42:13.

39. One could perhaps argue to say that the halachot of squaring were only said in relation to the edges of the city and not to the areas within it. While not common, it is not unheard of to have one city or country completely surrounded by another.

40. This question is not applicable to Central Park in New York City as although it is 7,600 *amot* long, it is only 1,640 *amot* wide. Similarly, Forest Park in St. Louis, while it is 10,500 ft. long, it is only 5,500 feet across, less than 4,000 *amot*.

41. *Machazeh Eliyahu* 82:1.

42. *Tikun Eruvin* Chapter 5 note 38.

43. Rabbi Weiss brings support from the *Meiri* (*Beit Habaichira Eruvin* 55a),

Differences between landing on or before Shabbat

A person's *techum* Shabbat is determined by where one is at the onset of Shabbat. If one begins Shabbat within the 2,000 *amot techum* of a city, he can be considered as beginning Shabbat within that city and is able to walk the entire city. For the traveler who lands before Shabbat, as long as the terminal is within 2,000 *amot* of the city,⁴⁴ he is able to walk to his home.

The Gemara (*Eruvin* 43a) questions if there is a prohibition of *techumin* above 10 *tefachim* (a *tefach* is calculated as roughly between 3 and 4 inches). The question is if one is able to exit the *techum* by walking on a series of posts (each less than 4 *tefachim* in width). Similarly, one who is above 10 *tefachim* as Shabbat enters would only establish his place of Shabbat dwelling, *shivita*, once he is lower than 10 *tefachim*.⁴⁵ This question is not answered in the Gemara and is debated by the *Rishonim*. *Shulchan Aruch*⁴⁶ writes that "It is a doubt if there is *techumin* above 10 or not and that which is a *d'rabannan* we are lenient."

According to this halacha, one who lands on Shabbat would establish the place of his Shabbat residence at the place where the plane first touches down.⁴⁷ Runways for commercial planes

that a city surrounded by a wall, even those areas not filled with homes are considered part of the city. Rabbi Weiss extends this to include not only an actual wall but also any case where there is a complete circle of homes within 70 *amot* of each other. This final step may be beyond the intention of the *Meiri*.

44. As noted above, this would be 2,000 *amot* from the square of the city.

45. One who is in the upper floors of a building, even though he is above 10 *tefachim*, is considered to be standing on the ground. The most common application of this is one who is on a ship on Shabbat.

46. O.C. 404.

47. See the next section as it may be argued that one does not establish his *shivita* location until the plane comes to a complete stop or he has alighted from the plane.

It has been suggested (Rabbi Dovid Heber) that since the question of the application of *techumin* above ten *tefachim* is in fact unresolved, we should be strict when dealing with cases that are beyond 12 *mil*. He therefore suggests that one would need to consider all flights that were not already directly over the city at the onset of Shabbat to have come from beyond the *techum* and the traveler would be limited to staying within the airport even if the airport

are typically at least 10,000 to 12,000 feet long. This distance itself is much longer than a *techum* Shabbat. As such, in cases when the airport is not included in part of the city or it is square, even arriving at the terminal one would have been considered to have traveled outside of the *techum* Shabbat. While a traveler is unable to remain within the plane the entirety of Shabbat, he would be restricted to remaining inside the airport.

Should I stay in the Airport all Shabbat?

If the airport terminal is not within 2,000 *amot* of the city, the traveler who arrived just before Shabbat considers the entire terminal as his four *amot* and is able to walk inside the entire building and 2,000 *amot* from the building in all directions.⁴⁸ The 2,000 *amot* distance is only 3,543 feet, typically not even enough for him to exit the area of the airport. Some airports have hotels adjacent to the terminal building connected via a tunnel or elevated passageway to the terminal building. In such a case one may even bring his bags to the hotel and check in to a room, assuming he is able to explain to the staff his inability to properly pay before the conclusion of Shabbat. The traveler who arrived on Shabbat is similarly stuck inside the airport. He is not even allowed to venture out of the building a bit.⁴⁹

If the airport closes at night, and one is forced to leave the building, one is restricted to four *amot*.⁵⁰ In situations where it is unsafe to remain outside the airport, one may travel until he

is part of the city.

48. *Rashi to Eruvin* *ibid.* *Shulchan Aruch* 405:3. See *Tikun Eruvin* (Chapter 5 note 1) if one squares off a singular building.

If the terminals consist of multiple buildings, the building he is in at the onset of Shabbat is considered as his four *amot* and he may only walk 2,000 *amot* from that building. An example of this is terminals B and C in LaGuardia Airport.

49. *Shulchan Aruch* 405, 1.

50. *Shulchan Aruch* 405, 5.

has arrived at a safe location.⁵¹ Similarly, for instances of *kevod habriyot*, bodily needs, one may travel to a restroom. In the above two cases if one arrives at a place that is surrounded by a wall he may consider that area to be his four *amot*.⁵²

Kevod Habriyot

The halacha is that if one is outside the *techum* he is restricted to four *amot*; however for instances of *kevod habriyot*, e.g. bodily needs, one may travel to a restroom. One is also able to choose the direction his search for a bathroom takes him. Must one choose literally the nearest location that may have a restroom or may he walk until he finds a place that he is comfortable with, i.e. a Jewish home within the *techum*? *Mishnah Berurah*⁵³ quotes *Acharonim* in the name of the *Ra'avan* that one may walk to the Jewish neighborhood even if he is able to find another secluded place to avoid the scorn of non-Jews.

However, it appears this halacha will not be applicable in our case to allow our traveler to walk from the airport to his home, as the *Beur Halacha*⁵⁴ quotes *Beit Yosef* as saying that this halacha only applies to one who wishes to return to the *techum* he left, not enter a new *techum*.

Trains and *Techumin* Below Ground

At some airports (e.g. Chicago's O'Hare) the public transportation begins below ground. We could consider that

51. If necessary one may even travel by car. In conversations with a number of *poskim*, they have stated that it is not safe for a woman to remain alone at an airport or to walk alone for long distances especially at night. In such a case she may even take a taxi to her home. If the city does not have an *eruv* she would need to remain outside until such time as *kevod habriyot* (explained below) allows her to go inside.

52. As such, if one arrives inside a home he may walk throughout the home or building, even beyond four *amot*. Similarly, if one arrives within an area surrounded by an *eruv*, he may travel throughout the entire area.

53. 406:2.

54. Ad loc. s.v. *Ad techumo*.

just as we say there is no *techumin* above ten *tefachim*, similarly there is no *techumin* below ten *tefachim*. This could theoretically allow one to board a train just prior to Shabbat and only establish his place of Shabbat dwelling at the place the train emerges from the ground?

Mahari Assad,⁵⁵ while discussing the permissibility of using water that has flowed from outside the *techum*, says "just as there is no *techumin* above ten, certainly there is no *techumin* under the ground." Rabbi Shulem Weiss⁵⁶ extends this to subway trains: "The same can be said for our trains that travel underground. If one was in the subway during *bein hashemashot* and on Shabbat the train traveled to his city, one is able to traverse the entire city."⁵⁷

Interestingly, there is debate if riding on a wagon or in an above-ground train is prohibited due to *techumin*. *Beit Yosef*⁵⁸ suggests that while riding on an animal may be considered as being above ten *tefachim*, it is clear that a wagon-- being that it is larger than 4 *tefachim* wide-- is considered as the ground itself. *Magen Avraham*,⁵⁹ as well as a number of other *poskim*, consider even one who rides an animal above 10 *tefachim* to be as if he is walking on the ground.⁶⁰ There are *Rishonim*,⁶¹ however, who explain that with regards to a ship, since one is not actually walking, rather the ship is traveling and the person is stationary, it is not considered as if he is going out of the *techum*.⁶² According to this logic one can perhaps argue that one

55. O.C. 61.

56. *Tikun Eruvin* chapter 2 note 18.

57. Rabbi Weiss does admit that this is an arguable point. Nevertheless, he points out that in any event the subway tunnel is deemed a *reshut hayachid* such that the entire tunnel is considered as four *amot*.

58. O.C. 266.

59. 266:7.

60. *Shulchan Aruch Harav* (266:7), *Chayei Adam* (58:9), and *Aruch HaShulchan* (266:13).

61. *Rashbam* quoted in *Tosafot*, *Eruvin* 43a s.v. *halacha*, *Ramban* (*Eruvin* 43a)

62. *Chatam Sofer* (6:98) advances a similar argument.

See *sefer Nishmat Shabbat* 5:26 who permits one to travel from beyond the

has not established his Shabbat dwelling until the train makes its first stop or until he actually alights from the vehicle.⁶³ One would seemingly then be able to remain on the train until a stop that is closer to his home.

It does appear that the general consensus of *poskim* is that riding on a wagon or train, even if it is above ten *tefachim*, is no different than traveling by foot and would be prohibited due to *techumin*.⁶⁴

Can we be lenient?

The Gemara⁶⁵ says “the halacha follows the lenient opinion in matters of *eruv*in.” Rashi says that the halachot of *techumin* are included in this rule. The Mishnah⁶⁶ says that if two people measured the *techum* and their measurements differ, it is assumed the larger distance is correct and the shorter is inaccurate. The Gemara explains that all of *techumin* is in essence a *chumrah* (a strict opinion, because according to Torah law one can walk 12 *mil*), and therefore leniencies are permitted.

Are we able to apply this rule to our case to allow us to decide according to the various lenient opinions mentioned above, to

techum in a vehicle driven by a non-Jew. He bases his *psak* on *Tosafot* and *Rosh* who opine that there is no prohibition of traveling outside the *techum* if one is being transported by a non-Jew, as the individual himself is not doing any action. These *Rishonim*, as well as the *Maharik* who is of the same opinion, are quoted in *Magen Avraham* 305:10. The *Magen Avraham* himself however does not seem to fully subscribe to this opinion. See also *Haga'ot V'heorot* to Friedman edition of *Shulchan Aruch*, that the *Maharik* only agrees with *Tosafot* that there is no Torah prohibition, but it would still be forbidden rabbinically.

63. See *Emek HaTeshuva* (Rabbi Yechezkel Roth) 1:20. One could conceivably advance that this would also apply to one who lands on Shabbat, that he would not acquire his Shabbat “dwelling” until the plane stops. However, most *poskim* consider one’s *techum* to begin when the plane’s wheels reach 10 *tefachim* from the ground.

64. See for example *Shearim Metuzyanim B'Halacha* Kitzur *Shulchan Aruch* 96 note 7.

65. *Eruvin* 46a.

66. *Eruvin* 58b.

allow our traveler to reach home on Shabbat? The *Rosh*⁶⁷ cites the *Maharam* that this rule of following the lenient opinion only applies to a disagreement (*machloket*) among Rabbis of the Mishnah (*Tana'aim*) and not those of the Gemara (*Amoraim*). *Chazon Ish*⁶⁸ says "even if this rule would be true for *Amoraim*, it is not extended to later *poskim* since this is not an issue pertaining to leniencies of a rabbinic rule (*d'rabannan*); rather it is just one of the rules of the Talmud and does not apply to any disagreement after the close of the Talmud. This was the practice of the *Beit Yosef* to decide according to the majority of *poskim* and not follow the lenient opinion."⁶⁹

Practical Applications

In this section we will apply the halachot discussed above to a number of airports. It is obvious that these discussions are for purely educational purposes and should not be relied upon for matters of actual halacha. For such purposes an intense survey must be provided for taking into account the factors mentioned below.

There are very specific guidelines regarding how to measure the *techum*.⁷⁰ *Shulchan Aruch*⁷¹ says "we do not rely on the measuring of the *techum* unless if it is done by an expert who knows how to survey land." *Tikun Eruvin* (p. 244) discusses measuring using a map. The concern is that the halacha provides for different methods of measuring sloped lands than for flat areas. It is possible for discrepancies of up to 9.1%. This is less of a concern in flat areas.

67. *Eruvin* chapter 2:4.

68. 112:10.

69. See, however, *Birkei Yosef* O.C. 358 who quotes the *Beit Yosef* in *Yoreh Deah* 396, who is lenient in matters of mourning even in a disagreement among *poskim*, in line with the similar dictum 'the halacha follows the lenient opinion in matters of mourning.'

70. See *Shulchan Aruch* O.C. *siman* 399.

71. O.C 399:7.

For the purpose of our survey, we employed Google Earth. We have found their measurements to be very accurate, especially when measuring from multiple angles.

Because the areas under consideration are exceedingly large, for our survey we considered almost any building or structure to be *mukaf l'dirah*. It would not be surprising if areas that we consider as a larger city are in fact halachically viewed as many cities as related to *techumin*.

O'Hare Airport, Chicago

Since the author lives in Chicago, this example will be discussed at greater length as we attempt to apply many of the halachot discussed above.

O'Hare airport is located on the far northwest side of Chicago, 17 miles northwest of downtown. The airport complex is ringed with highways on three sides and access roads on the fourth side. The tarmac and grounds of the airport form an almost square shape ~20,000 by 17,000 feet. The large terminal complex is situated at the center of the airport complex. The terminal buildings are shaped as an enlarged "U" shape. At the center of the "U" there is a hotel. The closest distance from any point of the terminals to a house is more than 6,000 feet.

Once out of the airport and its surrounding spaces, the airport is surrounded by homes and other buildings.⁷² An aerial survey of these surrounding spaces reveals that these areas have breaks⁷³ of more than 141 *amot*, such that they must be considered halachically as a number of distinct cities. There appears to be a minimum of five 'cities' that directly surround the airport. One of these cities⁷⁴ abuts the airport

72. The towns of Rosemont, Schiller Park, Bensenville, Elk Grove Village, and Des Plaines all border the airport.

73. These breaks are formed by a highway, a railroad line, a road with homes offset from it, high voltage power lines and a river.

74. This city consists of all or part of the towns/cities of Schiller Park, Franklin Park, Northlake, Stone Park, Melrose Park, Maywood, Bellwood,

area on two sides. If a simple square were drawn around this city, it would include the majority of the terminal buildings. However, in this case it appears that the shape of the city may create a *gaam* of more than 18,000 feet, and of a depth of 4,091 feet (more than 2,000 *amot*) not allowing that side of the city to be squared off.

If we were not to consider the shape of the city as a *gaam* and thereby assume that the square of the adjacent city was to include the airport terminal, our hypothetical delayed traveler who has arrived before the onset of Shabbat will have all of the halachot of one who has begun Shabbat in the city itself. He would then be allowed to walk out of the airport (assuming he can find a way to walk where the public roads do not leave the square by more than 2,000 *amot*) and the entire city.

This too, however, is not enough for our traveler, as the city one begins Shabbat in is not the same as the city that he wishes to walk to. This is because the Des Plaines river creates a break in the city. The Des Plaines River has a nearly continuous greenway through all of Lake County and the northern section of Cook County. Once one has passed the river one enters the large city of greater Chicago.⁷⁵

It is also important to point out that the distance from the airport to the main Orthodox Jewish communities is more than 9 miles, more than 12 *mil*, the amount that is considered the Biblical limit (*d'oraitah*) according to most opinions.

The best option for this traveler is to stay in the hotel adjacent to the airport for Shabbat. According to the majority of opinions, traveling on Shabbat from the hotel by any means would be in

Berkley and Hillside.

75. This large city seems to go as far north as portions of Highland Park and Northbrook and as far south as Oak Lawn and Blue Island, an approximate length (north/south) 57 miles of uninterrupted city. The width of the city is only approximately 10-14 miles due to the Des Plaines River. See *sefer Midarkai Hatechum* as to why the Edens/ Kennedy Expressway does not divide the city.

transgression of the prohibition of *techumin*. If he was able to begin travelling out of the airport complex before the start of Shabbat past the Des Plaines River, he would be allowed to continue to his home according to all opinions.

Other Airports

Dallas/Fort Worth International Airport

DFW airport serves the Dallas-Fort Worth metroplex area. This airport is the third busiest in the world; it is also one of the largest, being larger than the island of Manhattan. The airport is shaped in a rectangular shape that is more than 4 miles wide and 6 miles long. With the exception of Terminal E, all the terminals are connected. Thankfully for the Shabbat stranded traveler, there is a hotel located inside the airport's international terminal (C). This hotel is within the *techum* of terminal E.

JFK Airport, New York

The John F. Kennedy International Airport is located in the neighborhood of Jamaica in the south-eastern corner of the borough of Queens. The airport is an approximate rectangle shape 10,000 by 14,000 feet. There are six terminal buildings that are in the middle of the airport. The terminals are all more than 6,000 feet from any homes. There is an above-ground public transportation train that travels out of the airport. The JFK airport is 6.5 (road) miles from Far Rockaway and 14 miles to Flatbush. The question of being able to walk from the JFK airport depends primarily on how one determines the boundaries and squares of the city or cites of New York.⁷⁶

76. It is quite possible that New York City contains a number of "cities" with regards to the halachot of *techumin*. For example, the Howard Beach/Hamilton Beach neighborhoods adjacent to the airport are divided from the rest of Queens by the Belt Parkway. The Belt Parkway is more than 141 *amot*, seemingly creating a separate city. Nassau Expressway may divide Lawrence and Far Rockaway. In this last instance a site survey would need to be made

LaGuardia Airport, New York

LaGuardia Airport is located in the northwest corner of the borough of Queens. The airport currently has four terminals. Each of these are a separate building and there is no access between them without walking outside. There are no subway routes that service the airport directly. Not only are the terminals within 2,000 *amot* of the adjacent city, but also the majority of both runways are within 2,000 *amot* of the city. Depending on how the square of Queens/Brooklyn is drawn will determine how far into Manhattan island one can walk.

LAX, Los Angeles – The LAX airport is surrounded on three sides by the city of Los Angeles and is open on the fourth to the Pacific Ocean. The airport is shaped generally like a rectangle with its width being approximately 8,300 feet, more than 4,000 *amot*. Part of the airport terminal is within 2,000 *amot* of some of the homes and buildings in each of the three directions. However, it appears that one is only able to exit the airport on the east side of the airport complex. In addition, only half of the terminal building is within the *techum*. The delayed traveler would be permitted to walk to the city that is on this side. Depending if the other neighborhoods are considered as separate cities would determine how far one may walk from that point.

Midway Airport, Chicago

Midway Airport in Chicago is located eight miles from downtown Chicago. The airport is a square of approximately 5,400 feet on each side. It is surrounded on all sides with homes. Due to its compact size, it is unique among airports in that all parts of the airport are within the *techum* without question.

of the homes between Broadway and Rock Hall Rock Rd. The Long Island Expressway (495) may divide the entirety of Queens into two cities. These determinations are greatly dependent on how the halacha of overlapping squares is decided.

Summary

- Airports are often not part of a city due to their size and distance from other homes.
- An airport may be considered as part of a city if it is within the square of an adjacent city.
- There is a dispute regarding the status of cities with overlapping squares. Even if one does consider overlapping cities to be considered as one, an airport may not be considered as part of a city due to the application of the rules of *keshet* and *gaam*.
- Even if the entire area surrounding the airport is one city, a large airport of more than 4,000 *amot* may not be considered as part of the city as it is a very large empty space within the city.⁷⁷
- One who lands before Shabbat may walk to the adjoining city if the airport is within the city or if the terminal building is within 2,000 *amot* of the square of the city.
- One who lands on Shabbat should assume that he has traveled outside the *techum* and is required to remain inside the terminal building for the duration of Shabbat.
- If one is forced to leave the airport, his movements are limited to four *amot* unless there is a question of personal safety or *kevod habriyot*.
- Determining the exact boundaries of a city are extremely complex and a halachic city for purposes of *techumin* may be much smaller than previously thought.⁷⁸

⁷⁷. See footnote 2.

⁷⁸. It is similarly important to note that the addition or removal of even one building may significantly change the size and shape of a city.

- A break of 250 feet can divide a city. This is a common occurrence in most metropolitan areas.
- There are various solutions that, when joined together, may allow one to travel to one's home. One should consult with a *Rov* who is familiar with these halachot and the specific area in question.

To properly honor the Shabbat one should schedule all travel plans to factor in any possible delays and to arrive with ample time to prepare for Shabbat both physically and mentally.

Yom Tov *Sheini*

A person who lives in *Eretz Yisrael* who is outside the land (*Chutz La'aretz*) for the second day of Yom Tov is forbidden to do any *melacha*, similar to one who lives permanently in *Chutz La'aretz*.⁷⁹ However, this Israeli resident may walk outside of the *techum* and may then do *melacha* there--provided that the place he is in does not have a Jewish community.⁸⁰

A person who lives in *Eretz Yisrael* is permitted to travel on a flight that leaves at the expiration of the "first" day of Yom Tov (i.e., on *Motza'ei Yom Tov*, since there is no second day of Yom Tov in Israel) and arrives on the second day Yom Tov in *Chutz La'aretz*, provided the airport he arrives at is outside the *techum* of any city with a Jewish community.⁸¹

79. *Shulchan Aruch* 496:3. This halacha is sourced in the Gemara *Pesachim* 5a that one who is a visitor to a new locale has to act according to all the stringencies of that locale.

80. *Shulchan Aruch* 496:3. Any city with a Jewish community is calculated as including its square and *techum*. See *Iggerot Moshe* O.C. Vol. 5, 24:2 that even if only a few Jews live in this locale it is considered as a Jewish settlement (*yishuv*). Even if there are non-religious Jews one may not do *melacha*. See *Yom Tov Sheini K'hilchato* 3:9.

81. *Shu"t B'tzel Hachochma* 3:34 pg 148 and *Be'eir Moshe* Vol. 7, p. 265 #19. See *Yom Tov Sheini K'hilchato* chapter 3 note 28, in the name of Rav Eliyashiv, that this is only allowed on the condition that there are no Jews working in or living near the airport. *Poskim* note that well known and famous people should not arrive on Yom Tov *Sheini* even if the airport is out of the *techum*.

Some *poskim* allow this even if the airport is inside the *techum*. In this case one may not do any *melacha* once he has landed.⁸² There is concern for *marit ayin* –that people will see this Jew doing *melacha* on Yom Tov and either think he is a transgressor or else that, if he is doing it, it must be permissible for all Jews to act accordingly.

See also *Shu"t Yissa Yossef* Vol. 3, 123. Some *poskim* (Rav Vosner) do not allow anyone to arrive on Yom Tov *Sheini*, barring extenuating circumstances.

82. Rabbi Shlomo Zalman Auerbach as quoted in *Yom Tov Sheini Kilchato* 3:27.

Donating Milk and Meat Cooked Together

Rabbi Yaakov Jaffe

Jewish law considers many substances forbidden foods, which a Jew is enjoined from eating under all circumstances. Foods can be forbidden for many conceptual reasons – some are non-kosher by nature (e.g., non-kosher animals), some cannot be eaten for a specific time (like *chametz* on *Pesach*), some because they have not yet been prepared satisfactorily (such as untithed produce from Israel), and some because of something that happened to them (milk and meat cooked together); for whatever reason, they are all ineligible for consumption.

All forbidden foods fall into one of two sub-categories. Many foods cannot be eaten by a Jew, but one can derive benefit from them: animal fat can be used for any purpose, such as a fuel for lighting,¹ a sickly animal that was torn apart by a predator can be fed to one's dog,² and an animal that dies without slaughter can be sold to a gentile.³ Others foods are in a second category: they cannot be eaten by a Jew, and a Jew may also not derive any benefit from the substance. There are many foods in each category,⁴ with milk and meat which had been cooked together falling into the second category.⁵

1. *Vayikra* 7:24.

2. *Shemot* 22:30. The Biblical *Tereifa* referred to in this verse was torn by another animal, such that it is not likely to survive (*Rambam, Laws of Forbidden Foods*, 4:6-9), but the law is understood to apply to all cases in which the animal is sickly and not likely to survive.

3. *Devarim* 14:21. More precisely, it can be sold to a gentile, or given as a gift to a *Ger Toshav* (righteous Noachide) – see *Chulin* 114b.

4. See *Temurah* 33b.

5. The Mishnah is explicit (*Chulin* 113a) that one may not derive benefit

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These two categories are not in any way correlated with the severity of the prohibition; in fact, eating blood and forbidden fats carry the penalty of *kareit* (early death) but have no prohibition of benefit. Instead the two categories reflect the nature of the prohibition, wherein the focus for some foods is a prohibition of eating, and the others it is a prohibition of all benefit.⁶

For those foods which are forbidden from benefit, all types of benefits are included, and such a forbidden food normally needs to be buried or burned, for there is no other conceivable productive purpose for which the food can be used. Prohibited benefits include the sale of the item, or the feeding of the item to a pet – the very same two actions which the Bible explicitly permitted for foods in the first category and prohibited for foods in the second category.⁷ Thus, were one to accidentally cook milk and meat together or own *chametz* on *Pesach* – the forbidden item must be burned or destroyed, and not sold to a gentile or fed to one's pet. Nor can it be used as lamp fuel,⁸ or for firewood.⁹

from milk and meat that have been cooked together. However, the Mishnah is silent as to whether this rule is Biblical or Rabbinic in nature. *Rambam* implies in numerous places that it is non-Biblical: (a) In the *Laws of Forbidden Foods* 9:1, he writes that the mixture of meat and milk may not be eaten "according to Torah law," and that one cannot derive benefit, skipping the words that this is also Torah law; (b) there, too, in 16:6 he states explicitly that the prohibition is Rabbinic; (c) in the introductory list of mitzvot before *Laws of Forbidden Foods*, he notes that one cannot benefit from a *shor hanitkal* (ox which had to be stoned by *Beit Din*) but regarding milk and meat he merely records that it cannot be eaten. [However, see *Rambam's Book of Mitzvot* (Lo *Ta'aseh* 187) which implies that it is a Biblical prohibition, despite not being counted as a separate mitzvah]. The *Rambam in Commentary to Mishnah Kritot* (chapter 3) strongly implies it is Biblical. The Talmud in *Chulin* 114b-116a cites numerous Biblical sources for the idea that it is prohibited Biblically.

6. For example, the prohibition of vineyard mixtures is formulated with the word "*tikdash*" (22:9) which suggests that the substance has become removed from benefit, and there is not just a prohibition on the specific act of eating.

7. See above in footnotes 1-3.

8. *Pitchei Teshuvah* YD 87:4.

9. *Pesachim* 21b. Rabbi Akiva Eiger loc cit. cites *Tosafot* to *Pesachim* 5a who,

Forbidden Foods to Stray Dogs

A less common case concerns someone who might wish to give his forbidden food to a stray dog to eat. Here, the benefit is less clear: there is no financial benefit as in the case of a sale, no social grace gained as in the case of a gift to a human being. This question is never discussed by the Talmud in reference to milk and meat cooked together, but it is discussed in regards to *chametz* on *Pesach*, which is also prohibited from benefit.¹⁰ The discussion is found only in the *Yerushalmi* to *Pesachim* (2:1).

The translation of the *Yerushalmi* according to *Korban Ha-Eida* is as follows:

Mishnah: *Chametz* must be crumbled, winnowed into the wind, or thrown into the sea.

Gemara: Rabbi Bun the son of Chiya said before Rabbi Zeira, "This teaches that one may feed it to an un-owned animal". Rabbi Yirmiyah asked, "But did we not also learn that [in his view, large bread] is broken up and strewn into the air [so it cannot be eaten by animals]? Rabbi Yosa replied – "The reason the Mishnah requires 'crumbling' is not to prevent it from being eaten, but rather to ensure that it has been nullified."¹¹

What is a source that one may not give *chametz* to an ownerless dog? The verse states that, "*Chametz* should not be eaten",¹²

in their second answer, further expand that using *chametz* for firewood is an explicit violation of the injunction against benefit.

10. *Pesachim* 28b says that this matter is a debate between Rabbi Shimon and Rabbi Yossi. The consensus of the later authorities, *Pesachim* 21b, is that it is prohibited from benefit.

11. The degree of crumbling needed for *chametz* is hotly contested. See *Pesachim* 28a, *Ba'al Ha-Maor* to *Pesachim* 15b (Rif pages), and *Mishneh Lemelech Laws of Chametz and Matzah* 1:3

12. The verb in this verse, *Shemot* 13:3, is formulated in the future passive voice, that *chametz* not be eaten, and not in the future active indicative, that the Jew not consume *chametz*.

and this teaches that even a dog cannot eat it. This cannot be referring to feeding the *chametz* to one's own dog for that is surely forbidden in the 'regular' prohibition against having benefit. Rather, that verse is even speaking about an un-owned dog, and teaches that one may not feed *chametz* even to an un-owned dog.

The *Yerushalmi* begs the following questions: (1) does adducing a scriptural source to prove that it cannot be fed to a stray dog mean the *Yerushalmi's* conclusion is to adopt the stringent view? (2) If yes, would the *Bavli* agree to the stringent view, or does the *Bavli* use this verse to teach a different law and therefore would the *Bavli* rule leniently? (3) Even if we assume the *Bavli* to be silent on the issue, should we automatically accept the stringency of the *Yerushalmi* when the *Bavli* is silent, or did the *Rishonim* rule leniently accepting the silence of the *Bavli* as leniency against the *Yerushalmi*?

Conceptually as well, one could probe the *Yerushalmi* more deeply. What is the theoretical basis to prohibit giving *chametz* to a stray dog? The citation of the proof text "*chametz* should not be eaten" implies that there is a legal/formal rule limited to *chametz* that it is so vile and so excluded that it should be eaten by no creature; it does not imply that feeding stray dogs constitutes a derivation of benefit of any sort.

Tur (end of 448) answers the three questions above by determining that the *Yerushalmi* is indeed stringent while the *Bavli* is silent, and thus rules that *chametz* may not be fed to stray dogs. Yet, he also notes explicitly that the violation is not deriving benefit, but is rather having crossed the legal/formal prohibition of allowing *chametz* to be eaten. *Shulchan Aruch* rules similarly.¹³

Later authorities disagree as to the conceptual rationale for the prohibition. *Beur Ha-Gra*¹⁴ explicitly rules that the

13. 448:6.

14. 448:6-7.

prohibition is a special prohibition limited to *Pesach*. As we have seen, there is a special law on *Pesach* to forbid even external consumption of *chametz*, and this is what the *Tur* and *Shulchan Aruch* mean. However, *Mishnah Berurah*, basing himself on Rabbi Mordechai Jaffe in *Levush* (loc. cit.), understands the *Tur* and *Shulchan Aruch* not like the simple reading of the *Yerushalmi*, that the reason for the prohibition is “for he now has benefit, that his will has been achieved to satiate an animal” (448:28). Consequently, he rules that “it seems this is a Biblical rule and not a stringency of *chametz*, and thus this would apply even to other things where benefit is prohibited; though *Pri Megadim* is not sure about this matter.”

Rabbi Yaakov of Lisa (in his work *Mekor Chaim* loc cit.) agrees with the *Beur Ha-gra*, and also appends an important addition, “This only applies to *chametz*. But in other forbidden foods, one may feed it to a stray dog, or to a gentile he does not recognize.” He agrees that feeding stray dogs is not a concern, and adds that a gentile one does not know is similarly permissible.¹⁵

The debate between the Vilna Gaon (*Beur Ha-Gra*) and Chafetz Chaim (*Mishnah Beruruah*) is profound. To the Vilna Gaon and the *Mekor Chaim* it would be perfectly permitted to leave one’s milk and meat cooked together for consumption by stray dogs, because although milk and meat cooked together is a forbidden combination, it is not the same as the prohibition of *chametz*. To the Chafetz Chaim, feeding it to a stray dog would be a Biblical violation of the prohibition to benefit from forbidden foods.

Rabbi Yaakov Ettlinger¹⁶ presents the various grounds for the lenient argument of the Vilna Gaon in more detail in regard to

15. He also adds an important proof against the reading of the *Mishnah Berurah*: if indeed it applied to other forbidden foods as well, one would imagine *Shulchan Aruch* would have cited this rule regarding those foods.

16. *Responsa Binyan Tzion* 101-103.

Orlah, fruit grown in the first three years, which he later applies in theory to milk and meat together as well:¹⁷

- I. The *Yerushalmi* itself derived a special rule by *chametz*, and it is clear from the *Yerushalmi* that this should not be extended to other prohibitions.
- II. The *Bavli* is intentionally silent as to this particular rule because the proof-text used by the *Yerushalmi* is used by the *Bavli* for other purposes, and thus cannot be used for this reason; consequently, the *Bavli* does not agree with the existence of this prohibition.¹⁸
- III. *Rif* and *Rambam*, who do not cite the *Yerushalmi*, and *Rashi*, who explicitly disagrees with it, clearly felt that the *Bavli* rejected the view entirely even as regards *chametz*, and thus *Tur* and *Shulchan Aruch* should never have accepted the ruling of the *Yerushalmi*, even in regard to *chametz*.
- IV. The Mishnah in *Temurah* which required burial of forbidden foods¹⁹ only did so to ensure that a Jew would not come to eat it. Yet, there is no formal requirement to bury the food. If the *chametz* is given to stray dogs who would clearly

17. The first responsum was written on the 6th of Iyar, 1848. The response immediately created some controversy, and the later responsa follow later in the same year, responding to opinions which challenged him.

18. This problem is also developed, in more detail, in the *Responsa of the Beit Ha-Levi* 1:20.

19. According to *Temurah* 34a, *chametz* fundamentally needs to be destroyed, such as by burial, and there is no formal requirement to burn *chametz* per se, unless one followed the view of Rabbi Yehudah that burning of *chametz* is required (21b, 27b-28a) as a legal requirement, based on the comparison to *Notar*. *Rashi* and *Tosafot* engage in a further debate as to when exactly the *chametz* should be burned; Rabbeinu Tam (*Tosafot* to *Pesachim* 12b) was of the view that Rabbi Yehudah's burn requirement only applies after noon on the day before *Pesach*.

eat it before a Jew would – this totally achieves the requirements of the Mishnah in *Temurah*, and there is no violation.²⁰

Before concluding this section, we should note that *Rashi's* rejection of the *Yerushalmi* is of particular importance. Few of the *Rishonim* cite the *Yerushalmi*, leaving little evidence whether they accept it, reject it, or were possibly unaware of it. Two *Rishonim* do cite it: *Hagahot Maimoniyot* and *Hagahot Asheri*.²¹ But, *Rashi's* rejection of the *Yerushalmi* demonstrates that a significant one of the early authorities explicitly rejected the *Yerushalmi*.

The Talmud in *Pesachim* has a lengthy discussion of the timing for the mitzvah to rid oneself of *chametz* (4b-5b), concluding with a *beraita* sharing Rabbi Akiva's position, and a deduction of three positions of Rabbi Akiva: that *chametz* must be burned (and not disposed of using a different method), that burning is prohibited on Yom Tov, and that the permission of burning for the sake of food does not also permit burning for the sake of getting rid of *chametz*. In this context *Rashi* writes that if *chametz* could be disposed of using another method, one might consider getting rid of it on the first day of *Pesach* through a method that would not violate Yom Tov: "to feed dogs or throw it into the sea." Surely *Rashi* is not referring to feeding one's own dogs – doing so would be a clear violation of deriving benefit from *chametz* on *Pesach* – he must be referring to feeding *chametz* to stray dogs. *Acharonim* thus note that *Rashi's* comment made in passing shows a rejection of the principle of the *Yerushalmi*.²²

20. The only exception to this principle would be things that Biblically must be burned, like *chametz* on *Pesach* (according to Rabbi Yehudah only, see *Temurah* 34a), and impure tithes.

21. *Hagahot Maimoniyot*, *Chametz U-Matzah Chapter 3:20*, and *Hagahot Asheri*, in his second comment to the second chapter of *Pesachim*, a quote from *Hagahot Maimoniyot*.

22. See *Rashash* and *Pnei Yehoshua* loc. cit., who make this observation.

Rulings of Modern Halacha Guidebooks

Most modern guidebooks are stringent on this question, despite the confusion whether the rule applies at all to *chametz*, and, even if it does, the confusion whether the rule extends to other forbidden foods. Partially, this is because for every *Beur Ha-Gra* or *Torah Temimah* (*Shemot* 13:3) that limited the rule to *chametz*, there is a *Mishnah Berurah*, or *Chochmat Adam*²³ who extended it; for every *Mekor Chaim* who limited it to *chametz* there is a *Magen Ha-Elef* who extended it; for every *Binyan Tzion* who limited it, there is a *Tashbetz* (3:293) who extended it; for every *Taz*²⁴ who is stringent, there is a *Yad Avraham*²⁵ who is lenient.²⁶ This is the view of Rabbi Binyamin Forst,²⁷ and of the practical *Halacha Textbook* produced under the auspices of Rabbi Yosef Tzvi Rimon.²⁸

Rabbi Shimon Eider cites the stringent opinion in regard to the consumption of *chametz*, and is silent as to whether or not the law is expanded to other forbidden foods, given that his focus is the laws of *Pesach*.²⁹ In his footnote, he briefly references other forbidden foods, through a citation to *Yad Avraham* in *Yoreh Deah*, who was among the lenient opinions on this question.

23. *Chochmat Adam*, *Sha'ar Issur Ve-Heter* 40:2.

24. *Taz* 94:4, citing *Issur Ve-heter*.

25. *Yad Avraham* 94:3, citing *Rashi Menachot* 101b.

26. Rav Ovadia Yosef (*Yabia Omer Yoreh Deah* 10:58) cites the various opinions on all sides and is stringent in the end. He reads *Aruch Ha-Shulchan Yoreh Deah* 87:7 as being stringent, although it is possible that this source was only referring to one's own dogs.

27. Rabbi Binyomin Forst *The Laws of Kashrut* (Brooklyn NY: Mesorah Publications, 1993), 182. Rabbi Forst cites the dissenting opinions in the footnote, but the text itself indicates that the stringent opinion is normative, with the dissenters non-normative.

28. Binyamin Zimmerman and Eli Ozarowski, *From the Source; with Spirit: Hilchot Kashrut* (Alon Shvut: Halacha Education Center, 2014), {##}.

29. Rabbi Shimon Eider *Halachos of Pesach* 2nd ed. (Jerusalem: Feldheim Publishers, 1998), 78.

From Stray Dogs to Unknown Gentiles

Almost our entire conversation to this point has been in regard to stray dogs, as this was the scenario addressed by the *Yerushalmi*. There is much less discussion of gifting the forbidden foods to unknown gentiles in the sources, likely because the scenario was never particularly common. Giving forbidden foods to a gentile – whether through a sale or as a gift to garner good will – would generate a benefit towards the Jew, and is clearly forbidden. In small communities where everyone would know everyone else, it is hard to construct a case or system wherein a Jew would gift forbidden foods to a gentile without the gentile knowing who gave it, thereby avoiding any free good will.

With the exception of Rabbi Yaakov of Lisa (in *Mekor Chaim*), who equates stray dogs with an unknown gentile, all the sources we have seen so far are silent on the question. *Ohr Sameach*³⁰ develops a lengthy, creative proof that the Talmud *Bavli* must reject the *Yerushalmi* – agreeing with *Rashi* and Rabbi Ettlinger that *chametz* can be fed to stray dogs – but as an outgrowth of said proofs, limits his ruling to stray dogs, and says that all human beings – whether Jewish or Noachide, are enjoined from eating foods from which no benefit can be derived; thus permitting stray dogs but not gentiles.³¹

With the exception of *Ohr Sameach*, it seems that the other authorities who are lenient on the giving of forbidden foods to a stray dog would also be lenient upon the gifting of forbidden foods, such as milk and meat cooked together, to a gentile; but it should be done in a way that would not provide any

30. *Ohr Sameach, Laws of Forbidden Foods* 4:22, third entry.

31. Conceptually, however, this position is the most difficult of the ones we have encountered thus far. The stringent authorities all took an expansive view of benefit, to include the emotional benefit in seeing all of G-d's creatures satiated, and the lenient opinions said this was not included under benefit. *Ohr Sameach* believes a Jew receives a benefit when an unknown gentile eats the Jews forbidden foods, but not a stray dog; conceptually this is a difficult distinction to understand.

sort of benefit to the Jewish owner, such as by donating it anonymously to a food pantry or soup kitchen. To be sure, no tax write-off should be taken, as then the Jew would be receiving an actual benefit.

Weighing the Counter-Pressures

The process of issuing halachic rulings hinges not just on the conventional sources and the halachic issue at hand, but also on the counter-pressures, the sacrifices made when turning towards stringency. We would be remiss in our treatment of this topic if we did not at least mention the benefits achieved by being lenient on this question.

Jews are prohibited from intentionally destroying and/or wasting perfectly useful substances or foods.³² In the times of the Mishnah, milk cooked with meat was to be burned because there was no way to ensure a Jew would not derive benefit from the substance without totally destroying it. Today, with food pantries and soup kitchens ubiquitous in our communities, one who agreed with the view of *Binyan Tzion* might be required to donate the food, in order to avoid this prohibition. Obviously, if one followed the view that donating the food was absolutely prohibited, this would outweigh the prohibition of senseless waste. However, one should pause before reflexively being stringent on the question of forbidden foods, and at least note that it may carry a parallel opposite leniency on the question of waste.

From Ancient Law to Modern Application

One of the key challenges of halachic ruling is sometimes finding ancient parallels to more modern cases. The scenario of giving milk cooked with meat to a gentile food pantry was

32. See *Rambam, Laws of Kings*, 6:10.

never discussed in the Talmud, and thus we might be at a loss to determine what the law is. Amazingly, the closest parallel relates to the giving of *chametz* to stray dogs, and as the halacha moves forward, the most unexpected parallels sometimes provide the starting basis to consider modern questions.

Tevillat Keilim of Electrical Devices

Rabbi Dovid Cohen

When one acquires a metal or glass utensil from someone who is not Jewish, the utensil must be put into a *mikvah* before it can be used with food.¹ This mitzvah, to immerse vessels in a *mikvah*, is known as *tevillat keilim* and applies to pots, plates, cups, flatware, and anything else which is used in the preparation or eating of food.

There are many electrical devices which, at first glance, require *tevillah*, but people are in a quandary about performing that mitzvah because the manufacturer warns against submerging those devices in water. This article will discuss a number of aspects of that issue:

- Section A will explain why the manufacturers advise that these devices should not be placed into water, and this analysis will help in understanding why some approaches may or may not be successful.
- Section B considers two reasons suggested as to why one might be allowed to use the device in spite of its not having undergone *tevillah*.
- Section C evaluates a method for urns which some Jewish distributors have created so as to help avoid this issue completely.
- Lastly, Section D examines a creative way which may be used to resolve this issue for Keurig coffee-makers.

1. *Shulchan Aruch* YD 120:1.

A. Damage from *tevillah*

The types of damage which occur when an electric device becomes wet can be divided into two groups: electrical circuit issues and corrosion.

Electrical circuit issues²

Each electronic component – be it wire, coil, or other functional part – is designed to operate with a given amount of electricity (and amperage) flowing through it, and if the flow is greater than the rated amount, the component may melt, burn out, or otherwise fail permanently. To avoid this, the device is constructed so that the “right” amount of electricity flows to each component, and a common method of doing this is to add “resistors” at specific points to control the amount of electricity flowing to certain components.

This works well as long as the electricity flows in the designated paths. But if a “bridge” is created which allows the electricity to take a shorter path between two points (or a path with less “resistance”),³ the electricity will flow that way and not in the designated path. When this occurs, it is called a “short circuit”; if the short circuit allows the electricity to bypass the resistor (or otherwise allows a strong flow of electricity to reach a component which is only capable of handling a weaker flow), the component may melt, burn out, or otherwise fail permanently (as noted above).

One way to cause a short circuit is for water to get into the electrical parts of the device. Tap water conducts electricity,⁴

2. Mr. Yehuda Bider was helpful in directing the author to information that relates to the coming text.

3. That is to say, even if the bridge is physically longer than the original path, the fact that the original path contains an impediment (resistor) to the flow of electricity, is itself a reason why the flow will follow the bridge instead of its intended path.

4. Pure water does not conduct electricity, but tap water contains trace minerals and other components that cause it to be a good conductor.

and therefore if water gets into the “wrong” places, it will create the bridge that leads to a short circuit. Thus, if an electrical device is submerged in water when it is plugged into the wall or when it has a battery in it, electricity is “ready” to flow (even if the device is switched off) and the water may lead to a short circuit.

If there is no energy flowing through the device (i.e., it is not plugged in), no short circuit will occur, but if the device is subsequently turned on, any water that remains in the device can cause a short circuit. Bearing this in mind, some consumers have had success performing *tevillah* on electrical devices and then letting them sit for a few weeks until all of the internal components are thoroughly dried out. This resulted in a device with no “bridge” to cause a short circuit, and allowed the device to function perfectly well afterwards.

However, there are a few limitations to this approach. Firstly, it is based on the assumption that the internal components will thoroughly dry. Not only does this require patience on the part of the consumers, but in some cases, it never truly occurs. For example, for one reason or another, water does not seem to evaporate from digital (LCD) displays and certain other components (e.g., inductors, transformers), and devices that include these components are therefore not suitable for this suggestion.

In addition, just about every modern electrical device contains a number of “capacitors”, which (for our purposes) are like small batteries that hold electrical charge. Capacitors regulate the flow of electricity so that it proceeds at a constant rate. This means that if a device was ever plugged into the wall, there is a certain amount of residual “available” electricity sitting inside the device. If water gets into the “wrong” place, that electricity can/may leave the capacitor and flow to components which may be unable to handle the surge of electricity. Thus, even if the consumer plans not to plug the device in until it has thoroughly dried, those plans may be foiled because the device already has a “battery” inside it which can cause the same

damage as plugging it in. As noted, this concern would apply only if the device had once/ever been plugged in or tested, so as to “charge” the capacitors.⁵

Aside from the limitations noted above, allowing the device to dry out between *tevillah* and use does not address the concern of corrosion, noted below.

Corrosion

A second way that electrical items can be damaged by water is through corrosion, in the following ways:

- Relays, wiring, and solder which are made of steel, copper, or certain other materials, can rust or otherwise corrode as a result of being exposed to water. This can lead to short circuiting (described above) or to “open circuits” where the connection to a component is lost and therefore it can no longer function.
- Laminates on the control board (PCB), water-soluble coatings on screens or other components, and lubricants (such as in a motor), might be washed away by the water.
- Paper components (e.g., insulation), and strings may become brittle or lose their structure and functionality when they dry out.

In each of these different forms of corrosion, the device may function well after *tevillah*, but at some point in the future a

5. The point made in the text may also explain why many have not seen damage after *tevillah* (when they waited a few weeks for the device to dry off) yet the manufacturers warns that there will be; the manufacturer is referring to the standard case where the components became wet after they had been plugged into the wall at least one time (which, of course, is quite common) while *tevillah* generally happens before a device is ever used (or plugged in). That said, it may be that the consumer never plugged in the device, but it was tested by the manufacturer before being sold.

connection or component may fail or short circuit. Some high-end devices are specially sealed to prevent this type of water damage, but the average electrical component is not at all protected.

B. Use without *Tevillah*

We now move on to explain two possible reasons why it might be permitted to use the electrical device without *tevillah*.

עשוי לשמש עם הקרקע

In the Jerusalem Talmud (*Yerushalmi*)⁶ it says that the mitzvah of *tevillat keilim* is part of the process of elevating the item from the “*tumah*” (ritual impurity) of being owned by someone non-Jewish, into the *kedushah* (holiness) of Jewish ownership. A number of *Poskim* see in this (and other sources) an indication that the halachot of *tevillat keilim* are intertwined with those of *tumah* and *taharah*, and for purposes of this discussion, we will assume that, in fact, any object which cannot become *tamei*, is also excused from the need for *tevillat keilim*.

This has led *Poskim* to suggest that (a) any item which is meant to be used while attached to the ground (*asui leshamesh im hakarka*), might not require *tevillah* since such objects might not be able to become *tamei*. (There is a general assumption in Jewish law that items connected to the earth are not susceptible to becoming *tamei*. In this context, buildings, electrical outlets, and other items which are attached to the ground, have the halachic status of “ground” as well.) Furthermore, (b) this can be extended to include all electrical devices since they only operate when they are plugged into a wall outlet (i.e., while attached to the ground.) However, we will see below that a more careful analysis shows that there is little support for either of these suggestions, especially as relates to the

6. *Yerushalmi*, at the very end of *Avodah Zarah* (5:15), cited in *Beit Yosef* at the very beginning of 120.

common electrical devices for which people might need to perform *tevillah*.⁷

*Chochmat Adam*⁸ discusses point (a) at length, and his conclusion is that the only time an object qualifies as *asui leshamesh im hakarka* is when it is a completely non-functional utensil while unattached. But if, for example, a person has a large kettle which is meant to be used on the ground, but is also able to be used as a pot or container even when it is not attached, that kettle can become *tamei* and therefore must undergo *tevillah* before use. The same is true of an electric urn, coffee machine, or electric pot; they can hold water or food even when they are not attached to the ground, and therefore even though there are some uses that only work when the device is plugged in (i.e., attached), there is no way to consider that it renders the device *asui leshamesh im hakarka*, and consequently *tevillah* is required.

The same issue relates to point (b). The most prominent *Posek* who suggests that electrical appliances might be excused from *tevillah* because they are *asui leshamesh im hakarka* is

7. *Minchat Yitzchak* (2:72, 5:126 & 9:83), *Iggerot Moshe* (YD 1:57 & 3:24) and *Shevet HaLevi* (2:57:c) assume that electrical appliances require *tevillah*. Of these, only *Shevet HaLevi* directly discusses the point raised in the text, and dismisses it out of hand, stating that, "Do not be misled into thinking that since it must be connected to a power cord it is considered 'attached to the ground'...for the halacha does not view it this way, and there is no need to elaborate on that which is obvious."

8. *Binat Adam* 66 (85), cited partially in *Pitchei Teshuvah* 120:1. [His primary proof to this concept is from the question of *Tosafot Yom Tov* (*Mikvaot* 6:10) that the principle that *asui leshamesh im hakarka* appears to be contradicted by the Mishnah (ad loc.) that an *avik* (bathtub) is *tamei*; *Tosafot* *Tosafot Yom Tov* does not resolve the question, but *Binat Adam* says that the *avik* is different because it was a functional container before being attached.] However, see *Shev Yaakov* 31, cited in *Yad Ephraim* to *Rema* 120:5, who appears to be of the opinion that even a pan (i.e., something which has potential use while unattached to the ground) can be considered *asui leshamesh im hakarka* if its intended use is while attached to the ground. See also *Rivevot Ephraim* 2:172:10 who cites two approaches in *Dibrot Moshe*, *Bava Kamma* #44:B.

Chelkat Yaakov.⁹ His seminal responsum (*teshuvah*) on the topic discusses an immersion heater, which is basically a piece of metal attached to a wire that plugs into the wall, and when it is connected the metal heats up and can be used to boil water. The metal is clearly useless while unattached to the outlet (i.e., the ground), such that it is reasonable to suggest that it is considered *asui leshamesh im hakarka* and is excused from *tevillah*. But two *teshuvot* later, *Chelkat Yaakov*,¹⁰ in discussing an electric pot, makes the same point as *Chochmat Adam*: the electric pot is somewhat functional while off the fire (albeit not for its primary function of cooking), and therefore it does not qualify as *asui leshamesh im hakarka* and should have *tevillah*.¹¹ Thus, for the vast majority of electrical devices, *Chelkat Yaakov* himself would be of the opinion that *tevillah* is required. He is only lenient as relates to the immersion heater, and similar items (e.g., a sandwich maker, and possibly a toaster). In addition, many *Poskim* reject *Chelkat Yaakov's* extension of the status of *asui leshamesh im hakarka* to any electrical devices.

Thus, it appears that there few cases where the logic of *asui leshamesh im hakarka* will possibly excuse an electrical device from the requirement for *tevillah*.

Cannot be *toiveled*

We now turn to a second reason why electrical appliances might not require *tevillah*. In contrast to the first reason, this one was accepted – at least in principle – by *Minchat Shlomo* and other contemporary *Poskim*.¹² The source for this reason is

9. *Chelkat Yaakov* YD 41.

10. *Chelkat Yaakov* YD 43.

11. That said, it is noteworthy that after suggesting ways to avoid *tevillah*, *Chelkat Yaakov* suggests that in conjunction with certain other factors one can follow the approach that even the electric pot is considered עשוי לשמש עם הקרקע.

12. *Minchat Shlomo* 2:68; others have expressed a similar opinion in private conversations with the author. *Minchat Shlomo* also addresses *Beit Meir's* second question on *Rema*.

in *Rema*,¹³ who states that an item which is owned by a Jew and non-Jew in partnership does not require *tevillah*. *Darchei Moshe*¹⁴ says that the source of this halacha is *Issur V'Heter*,¹⁵ but does not explain why the halacha is true. Most people would imagine that it is because *tevillah* is not required until the item has completely come into the possession of a Jew, but *Shach* and *Gr"a*¹⁶ cite the actual reason given by *Issur V'Heter*, which states, "But if a Jew and non-Jew are partners in a utensil, *tevillah* is not required, because any sort of *tumah* will surely not leave with this *tevillah*, as the partnership of the non-Jew will remain." In other words, this opinion holds that *tevillah* is not required because the *tumah* will not be expunged by *tevillah*, since the partnership with the non-Jew remains.

Shach and *Gr"a* do not fully explain what *Issur V'Heter* is saying, but *Minchat Shlomo* et al explain that he means as follows: It is not that the non-Jew's partnership is a reason why *tevillah* is not required, but rather that as long as he is there and retains some ownership, it is not possible to perform *tevillah*. This is because, as noted from *Yerushalmi*, *tevillah* must complete the process of elevating the utensil into *kedushat Yisrael*, and as long as there is partial non-Jewish ownership that is not possible.¹⁷ Every time the utensil comes out of the *mikvah*, it requires a fresh *tevillah* due to the ongoing non-Jewish ownership.

13. *Rema* 120:11.

14. *Darchei Moshe* 120:11.

15. *Issur V'Heter* 58:91.

16. *Shach* 120:24 and *Gr"a* 120:31; see also *Shach* 120:26.

17. The text explains *Shach* (and *Gr"a*) as per *Minchat Shlomo* and the other *Poskim* noted in the text, and as appears to be the simple reading of *Shach*. This understanding leads to the question and answer in the coming text, which, in turn, have application to electrical appliances. However, it appears that this understanding is rooted in the way *Yerushalmi* is quoted in *Beit Yosef* (beginning of YD 120), and in all subsequent *Poskim*, but a more careful reading of the actual text of *Yerushalmi* (at the very end of *Avodah Zarah*) would lend itself to a different explanation of what *Beit Yosef*, *Issur V'Heter*, and *Shach* are saying. The details of that alternate explanation are beyond the scope of this article.

The obvious question on this is that if the utensil actually requires *tevillah*, but it is merely impossible to perform the *tevillah*, why is the person allowed to use the utensil? Why is he not required to refrain from using it until it is fully owned by a Jew, at which point the *tevillah* would be effective? In fact, as a result of this question, *Beit Meir*¹⁸ disagrees with the halacha stated in *Rema*! However, the majority of *Poskim* accept *Rema's* ruling, and their answer to this question begins with an understanding that although there is a Biblical-based mitzvah (*d'oraitah*) to perform *tevillat keilim* for metal utensils, the prohibition to use the utensil before *tevillah* is only Rabbinic in nature.¹⁹ *Chazal* created that prohibition as a way of "encouraging" people to *toveil* their dishes, but our halacha states that in cases where it is impossible to perform that mitzvah, the Rabbinic prohibition does not apply and the person may use the utensil without *tevillah*.

In other words, the Rabbis do not punish a person for failing to do something which is physically impossible; therefore, since *tevillah* cannot be done (due to the non-Jewish partner),

18. *Beit Meir* to *Rema* 120:11.

19. There are *Poskim* who are of the opinion that just as the primary mitzvah of *tevillat keilim* is *d'oraitah* (for metal), so too there is a *d'oraitah* prohibition to use a utensil before *tevillah* occurred. Such a position can be inferred from *Pri Megadim* MZ OC 486:1, *Sha'agat Aryeh* 56 (see *Minchat Shlomo* 2:68:2), and *Gra"z* OC 323:8. Similarly, *Minchat Shlomo* proposes that even those (such as he himself) who say that it is only *assur mid'rabannan* to use the utensil before *tevillah*, a person who uses the utensil before *tevillah* when a *mikvah* is readily available, has violated the positive mitzvah to perform *tevillah* (ביטל מצות עשה).

On the other hand, most *Poskim* assume that the prohibition against using the utensil before *tevillah* is only Rabbinic in nature, and was imposed by *Chazal* as a way of ensuring that people perform the mitzvah. According to this approach, the mitzvah *d'oraitah* of *tevillat keilim* is similar to *kisui hadam* or *ma'aser beheimah* where one has an obligation to perform a specific ritual, but if the person does not do so the food remains kosher and may be eaten. So, too, on a *d'oraitah* level, the ability to use the utensil is not affected by whether the person did or did not fulfill his *tevillah* obligation. *Yeshuot Yaakov* (120:1, *Aruch*), *Biur Halacha* 323:7 s.v. *muttar*, *Minchat Shlomo* ibid. 2:68:1-2, and *Minchat Yitzchok* 1:44 assume that this position is correct, based both on logic and certain proofs from the Gemara and other sources.

the *issur d'rabannan* not to use a utensil before *tevillah* does not apply.

Contemporary *Poskim* have applied this explanation to the case of electrical appliances. Those electrical appliances which will get ruined by *tevillah* are similar to the utensil owned by a Jew and non-Jew in that both cannot physically undergo *tevillah*. The utensil with a non-Jewish partner cannot have *tevillah* because *tevillah* is not effective, and the electrical appliance cannot have *tevillah* because the *tevillah* will render it useless, but the end result is the same: in both cases, it is not possible to perform *tevillah* before using the item. Therefore, since the mitzvah *d'oraitah* of *tevillah* is not possible, the *issur d'rabannan* to use an item before *tevillah* does not apply.

In summary, the first line of reasoning (*asui leshamesh im hakarka*) suggested that electrical appliances do not require *tevillah*, while the latter proposal says that *tevillah* is theoretically required but one may use the device even though *tevillah* was not done.

The significant limitation of this latter logic is that it applies only to devices which truly will not work if they undergo *tevillah*. This leads to the following:

□ We have noted that some people have had considerable success performing *tevillah* on all types of simple electronic devices (sandwich makers, immersion blenders, plain urns) if they waited many days (or weeks) after *tevillah* for them to dry out thoroughly, before using them. As noted, this may not be effective if the device had ever been plugged in before *tevillah*, and will also not work for more complicated devices and especially those with LCD screens and other parts which do not drain or dry easily. In that case, it is hard to defend the claim that the device will break if it is *toiveled*, and therefore the logic presented above does not apply.

□ The leniency is based on the assumption that

the device will not work if it undergoes *tevillah*. If however, there are no circuit-related issues and the device will work perfectly (e.g., if it can dry out thoroughly before any power is applied), and the only concern is for the long-term effects of corrosion, then the device cannot be used without *tevillah*. In such cases, *tevillah* is physically possible, and it will even be possible to use the device after *tevillah*; the fact that the device's useful life will be shortened does not seem to be a sufficient justification for using it without *tevillah*.

In spite of the noted limitations, it is noteworthy that some have ruled – based on the logic presented in the text above – that *tevillah* is not required for any electrical appliances. They reason that there may be some devices which are not broken by *tevillah*, but the average person cannot detect which those are, and therefore in practice people cannot expect that the device will work after *tevillah*. If so, they are not obligated to perform *tevillah* (and then not have a device to use), and it therefore follows that the *issur d'rabannan* to use the device without *tevillah* does not apply. Other contemporary *Poskim* follow the more nuanced (i.e., strict) approach noted in the earlier text.

C. Urns Manufactured for Jews

Basic Idea

Several Jewish distributors of pump pots and urns, who market specifically to the Jewish community, have started creating and selling urns and pump-pots²⁰ that claim that

20. Pump pots and urns are devices which hold a few quarts or liters of water, and use an electrical element to maintain the water's temperature at 160-200° F. These are popular with people who are *Shomer Shabbat* as it gives them a way to have hot water for coffee, tea, or other uses, during an entire Shabbat. The difference between pump pots and urns relates to how the water is removed from the device. In an urn, the water flows out of the pot

“*tevillah* is not required”. The claim assumes that the Jewish distributor owned the urn from the time it was created, such that the device has always been in the possession of a Jew, which means that *tevillah* is not necessary. This is a welcome development for Jewish consumers, and in this section, we will consider different aspects of that claim.

אומן קונה בשבח כלי

The first point we must consider is that of *uman koneh b'shvach kli*. That principle dictates that through the act of fashioning an object out of raw materials, the craftsman (*uman*) who performed that task acquires a limited ownership right in the improved object which he created. In general, the opinion of *Shulchan Aruch*²¹ is that the *uman* is not *koneh b'shvach kli*, while *Rema*²² rules that as relates to *tevillat keilim* one should be strict (*machmir*) and follow the opinion that the *uman* does obtain ownership through his work. In the case of “Jewish-owned” electrical devices under discussion here, the practice is generally that a Jewish contractor arranges with a non-Jewish *uman* to craft the item; the craftsman uses the raw materials supplied by the Jewish manufacturer. Therefore, if a non-Jewish *uman* creates a dish, for example, out of a Jew’s metal and then (after being paid for his work) gives the dish to the Jew, that Jew should perform *tevillat keilim* on the dish (since he has now acquired the dish which was previously partially owned by the non-Jewish *uman* due to the labor he contributed), albeit

via gravity, and water-flow is controlled by a manual spout located towards the bottom of the device. In contrast, in a pump pot, water is drawn from an opening near the top of the device, either via an electric motor/pump (during weekdays) or via pressing down on a “pump” (pressure-building device) located on the very top of the appliance. There is some halachic difference between pump pots and urns, but in general the issues and solutions apply equally to both. Accordingly, in this section, we will use the terms “pump pot” and “urn” interchangeably.

21. *Shulchan Aruch* YD 120:10 and *Shulchan Aruch* CM 306:2; one possible exception can be found in *Shulchan Aruch* EH 28:15.

22. *Rema* YD 120:10.

without a *bracha* (in deference to the opinion that the *uman* never owned any part of the dish).

Thus, according to *Rema*, even if the Jewish distributor was the owner of the urns from the very beginning, the factory employees who actually build the devices are not Jewish. If so, if we were to apply the principle of *uman koneh b'sh'vach kli* to this situation, then nothing would be gained, for the goal of using Jewish ownership to avoid a need for *tevillah* would be undermined by the "ownership" of the non-Jewish *uman*.

The seemingly obvious answer to this question is put forward by *Iggerot Moshe*²³ and many others, who are of the opinion that hourly employees in a factory do not qualify for the "ownership" rights bestowed upon a craftsman arising from the principle of *uman koneh b'sh'vach kli*. Consequently they opine that we need only care about the Jewish distributor who owns the materials used in creating the urn. However, upon further consideration, this may not be so clear.

Even if the individual employees are not treated as craftsmen as relates to this halacha, what about the overall factory? That is to say, in the classic cases discussed by the *Poskim*, a Jew owns a factory (and the materials), and the question was whether his employees should have the status of an *uman*. But our case is different in that the Jew only owns the materials and he "brings" those to a non-Jewish factory which fashions them into urns for him. Each individual non-Jewish employee may not qualify as an *uman*, but overall the factory is taking raw materials and fashioning them into urns, so might one say that the collective factory has contributed enough to qualify as the *uman* who is *koneh b'sh'vach kli*?²⁴

23. *Iggerot Moshe* OC 3:4, *Aruch HaShulchan* 120:58, *Ashrei HaIsh* YD 9:38, and the *Poskim* cited in *Darchei Teshuvah* 120:81.

24. It may well be that the logic presented in the text is part of the explanation for the seemingly questionable ruling of *Chochmat Adam* 73:4, cited in *Pitchei Teshuvah* 120:12, regarding items produced in a *huta* (metalworks shop). The explanation of that ruling, and how it relates to the text, is beyond the scope of this article.

Contemporary *Poskim* with whom the author consulted were unsure as to the resolution to these questions, and these issues require further consideration.

An alternate reason to ignore the concerns of *uman koneh b'shvach kli* is based on *Chazon Ish*,²⁵ who rules that if the civil law does not recognize any "ownership" of an *uman*, then all agree that one cannot apply the principle of *uman koneh b'shvach kli*. If that is an accurate description of the civil law in China (or wherever else these devices are manufactured), then according to *Chazon Ish* there would be no concern of *uman koneh b'shvach kli* in our situation.

Kinyanim

In order for the Jewish distributor to own the materials, he must perform a proper *kinyan* (act of acquisition) on them, and the typical way a Jew acquires movable objects (*metaltelin*) from a non-Jew is via performing two kinds of *kinyanim*: *ma'ot* and *meshichah*—via an exchange of cash or by dragging or physically moving the object.²⁶ One Jewish distributor does exactly that: there is a permanent supervisor (*Mashgiach Temidi*) at every production, and that person (a) gives money to the factory-owner to effect the *kinyan ma'ot*, and (b) uses a forklift

25. *Chazon Ish* YD 44:1.

26. Gemara, *Bechorot* 13a-b, explains that when a non-Jew purchases items from a Jew or vice versa, R. Yochanan is of the opinion that *meshichah* (lifting or moving) is effective and not *ma'ot* (money), while Reish Lakesh holds exactly the opposite. *Rabbeinu Tam* (cited in *Tosafot*, *Avodah Zarah* 71a s.v. *R. Ashi*) accepts the opinion of R. Yochanan, while *Rashi*, *Kiddushin* 14b s.v. *ho'il*, says that the halacha follows Reish Lakesh. This disagreement is cited in *Taz* YD 320:6, *Shach* 320:8 and *Mishnah Berurah* 448:17. *Shulchan Aruch/Rema* 320:6 rule, based on *Tosafot* *ibid.*, that in order to sell an animal to a non-Jew (in anticipation of its giving birth to a *bechor*) one should use both *ma'ot* and *meshichah*, thereby satisfying both opinions.

Many *Acharonim* state that the halacha primarily accepts R. Yochanan/*Rabbeinu Tam*, and *Shulchan Aruch* is merely being strict (*machmir*) for the opinion of Reish Lakesh/*Rashi* regarding *bechor*; the text is based on this opinion. [See also *Magen Avraham* 448:4 and *Pitchei Teshuvah* YD 320:4 & 6].

to perform *hagba'ah/meshichah* on the materials which will be used in the "special" production for the Jewish clients. Clearly, this is effective, and avoids any concerns.

However, other Jewish distributors do not have a Sabbath-observant person present at the production, and they therefore are not qualified to perform *meshichah*. (These productions generally take a few days or weeks, and occur in China, which makes it expensive and logistically-challenging to have a supervisor present for the entire production.) Seemingly, they also cannot perform *kinyan ma'ot* because actual money does not change hands; rather, the distributor merely wires money to the factory. This procedure is not effective for *kinyan ma'ot* which requires that "money" change hands between the actual buyer (Jew) and seller (non-Jew).²⁷ Similarly, other technical forms of acquisition in halacha, such as *kinyan sudar* and *kinyan agav*, are not possible, each for their own reason (see the footnote).²⁸

Accordingly, those distributors (and/or their *hashgachot*) are forced to try other halachic means of acquiring the merchandise, namely, *chatzer* and *dina d'malchutah/situmtah*. In order to effect *kinyan chatzer*, they draw up a document/*shtar* through which

27. See *Responsa Chatam Sofer* YD 134 (towards the end) and *Chazon Ish* CM 16:24-26.

28. Regardless of whether *kinyan sudar* is effective for the transfer of items (*metaltelin*) between a non-Jew and Jew (see *Mishnah Berurah* 448:17 and *Sha'ar HaTziun* 448:41-42), that *kinyan* is not practical if there is no *Shomer Shabbat* person present at the time when the *kinyan* happens. This is because *kinyan sudar* requires the buyer (Jew) or his *shaliach*/agent to give an object to the seller (non-Jew), and since the buyer is not present at the factory (and only a Jew may serve as his *shaliach*), this *kinyan* is not possible.

Kinyan agav is also potentially effective for the Jew to take possession of the *metaltelin* (see *Mishnah Berurah* 448:17 & 19, and *Sha'ar HaTziun* 448:39 & 42), but would require that the Jew acquire a piece of property (real estate) from the non-Jew after the non-Jew already has the *metaltelin* in his possession. Once again, in order to effect the *kinyan* on the property, the Jew and non-Jew must be in the same place at the same time, and – unless a *Shomer Shabbat* comes to China specially just before the production – this is unlikely to occur.

the Jew acquires possession of part of the non-Jew's factory building, and the non-Jew hands that document to the Jew. Once the Jew owns the land, the Jew can acquire any materials simply by having the non-Jew place them in the part of the factory which belongs to the Jew.²⁹

An alternative is that the Jew perform some *kinyan* which the civil law views as a method of transferring ownership (*dina d'malchutah*) or which merchants commonly consider as being a "*kinyan*" (*situmtah*). It is generally accepted that even if these *kinyanim* are only effective rabbinically/*mid'rabannan*, they can nonetheless be relied upon for a mitzvah *d'oraitah* such as *tevillat keilim*.³⁰ That said, when dealing with a transfer of ownership in China (or some other foreign country), it may take some research to determine which acts qualify as *dina d'malchutah* or *situmtah*.

Thus, the choice of *kinyanim* which are practical and effective is quite limited unless there is a *Mashgiach Temidi* (permanent supervisor) for the whole production or (at least) a *Shomer Shabbat* is present at the factory before the production begins.

29. The details of *kinyan chatzer* can be found in *Shulchan Aruch* CM 200.

30. There is a disagreement among the *Poskim* as to whether the concepts of *dina d'malchuta dina* and *situmtah* are *d'oraitah* or *d'rabannan* (see *Sha'ar HaTziun* 448:52 & *Biur Halacha* 448:3 s.v. *b'davar*). There is a further disagreement as to whether items transferred via a *kinyan d'rabannan* (or via *dina d'malchuta* and *situmtah* if they are *d'rabannan*) is effective as relates to the *issur d'oraitah* of *bal yeira'eh* (see *Biur Halacha* *ibid.*). [This presupposes that *kinyanim d'rabannan* works for transactions between Jews and non-Jews (and the question is just whether they are effective for *issurim d'oraitah*); this point is the subject of discussion in *Shach* CM 66:85, *SM"A* 66:1, *Ketzot HaChoshen* 66:32, *Netivot HaMishpat* 66:35 (*biurim*) and *Mekor Chaim* 448:5 s.v. *ul'inyan*.]

Mishnah Berurah 448:19 rules that *situmtah* is *d'oraitah*. That said, it is noteworthy that *Biur Halacha* (*ibid.*) seems uncertain about the two issues mentioned above (i.e., is *situmtah d'oraitah* and are *kinyanim d'rabannan* effective for *issurim d'oraitah*) and therefore recommends that one should be certain that any *chametz* which they sell before *Pesach* should be sold via a *kinyan d'oraitah*.

Oversight

These devices are produced in China for an importer who lives in the United States or *Eretz Yisrael*, and oversight/*hashgachah* is required to ensure that the urns which the distributor owns are the ones that actually get sent to him (and marked as not requiring *tevillah*). That is to say, the manufacturer produces identical urns for Jewish and non-Jewish customers, and without a *Mashgiach* present there is always a concern that the manufacturer might substitute an “identical” urn for the one which the Jew actually owns (or might use his own metal to produce the “Jewish” urns, instead of using the metal which was sold to the Jew). Due to this concern, some *hashgachot* will only certify urns as “not requiring *tevillah*” if a *Mashgiach* is present during the production and packaging, while others will be satisfied checking paperwork and other records which indicate that the special units are the ones shipped to the distributor.

Distribution

A final concern relates to the urns once they have left the manufacturing facility. *Shulchan Aruch*³¹ states that if a Jew sells a utensil to a non-Jew at 10:00 and then buys it back at 11:00, the utensil requires *tevillah* again. The non-Jew’s ownership of the utensil for an hour (or any other amount of time), is enough to require that when a Jew purchases the utensil he must perform *tevillah* before using the utensil. If so, Jewish ownership of the materials at the factory is only meaningful if the urn remains in the possession of Jews from that point forward. An example of this would be if the importer sells it to a *seforim* store who then sells it to the consumer. But if – as this author has personally seen – the importer sells urns to Sears, Bed Bath and Beyond, or to a non-Jew who sells via eBay – the Jews who buy urns from that middleman have bought the utensil from a non-Jew and the urn therefore requires *tevillah* even though it was originally built/owned by a Jew.

31. *Shulchan Aruch* 120:11.

Some are not concerned with this issue because they rely on the novel opinion of *Iggerot Moshe*³² that *Shulchan Aruch*'s ruling applies only in cases where the original owner of the utensil was a non-Jew (after which it was owned by a Jew, a non-Jew, and now is back in the possession of a Jew), but where the original owner of the utensil was a Jew (who subsequently sold it to a non-Jew and then bought it back) – such as in our case – the fact that a non-Jew temporarily owned it does not demand *tevillah*. According to that opinion, since the Jewish distributor was the original/first owner of the urn, the urn will not require *tevillah* even if a non-Jewish company (e.g., Sears) buys it from him to sell to Jewish consumers. This original idea of *Iggerot Moshe* is not shared by most other *Poskim*,³³ and those who follow the stricter approach must consider how they will address this issue.

One *hashgachah* which certifies a particular brand of urns is sensitive to this issue, and they therefore write on the box a Hebrew text which essentially states that, “*tevillah is not required as long as this device remains in the possession of a Jew*”. The obvious weaknesses of this approach are that many people do not understand Hebrew, do not read the “fine print”, sometimes have no real way of knowing if the store from which they purchased the urn is solely owned by Jews, and surely have no idea who the distributor was.



In summary: Attempts have been made to create urns and pump pots that do not require *tevillah* because a Jew owned them from when they were first created. In order to successfully accomplish this goal, the Jew will have to perform effective

32. *Iggerot Moshe* YD 3:21. He explains that if the utensil was originally owned by a non-Jew, the subsequent ownership by a non-Jew can reawaken the need for *tevillah*, but that does not apply if the utensil started off as a Jew's. It is noteworthy that even *Iggerot Moshe* concludes that due to the novelty of this approach, one should always perform *tevillah* but just not recite a *bracha*.

33. See *Chelkat Binyamin* 120:11 *Biurim* s.v. *Yisroel*.

kinyanim on the “right” materials, and do so in a manner that avoids the issues of *uman koneh b’shvach kli*. All of these details require appropriate oversight at the factory level, and in addition one must consider how they will ensure that the urns remain “Jewish-owned” until they are purchased by the consumer. Different *hashgachot* take varying approaches to satisfy these requirements, and one significant difference between *hashgachot* is whether they require a *Mashgiach* to be present at (part or the entire) production, or not.

D. Break and Repair a Keurig

Many consumers love the convenience of Keurig coffee makers, and a common question is whether they require *tevillah*, and, if yes, how to do it. As with the other electrical devices discussed above, the manufacturer warns against submerging the machine in water, which seems to preclude *tevillah* and the use of the Keurig. For purposes of this section, we will assume that it cannot be used without *tevillah*,³⁴ and will consider a specific method developed to avoid the need for *tevillah*. As an introduction to that discussion, we will first describe how Keurig machines operate.

Part 1 – Description of the Machine

Keurig coffee makers maintain a tank of hot water, so that

34. In addition to the reasons noted above in Section B as to why it may be permitted to use any electrical device without *tevillah*, an additional line of reasoning was suggested which is particular to a Keurig machine. Namely, *Chochmat Adam* (73:13 and *Nishmat Adam* 66 (85)) suggests that if food leaving a utensil requires additional filtration before it can be consumed, *Shulchan Aruch* 120:5 may be of the opinion that *tevillah* is not required. The Keurig machine might qualify for this same leniency, since the coffee brewed is not usable until it is filtered (in the K-cup) towards the end of the process. There are a number of weaknesses to this suggestion, including that *Chochmat Adam* himself rejects it, *Rema* argues on *Shulchan Aruch*’s ruling, Keurig’s are used in ways that do not require filtration, and there is a metal needle situated after the filter. A full discussion of this issue is beyond the scope of this article.

they can create a single cup of coffee any time someone puts a sealed mini-cup (called a “K-cup”) into the machine. The K-cup contains one cup’s worth of coffee grinds which are on top of a small coffee filter. When the K-cup is inserted into the brewing area of the machine, small needles puncture holes in the top and bottom of the K-cup; hot water flows through the top hole, extracts “coffee” as it passes through the coffee grinds and filter, and that coffee drips through the bottom hole and into the person’s cup.

In order for all of this to work smoothly, the machine consists of 4 parts – ambient water tank, pump, heating canister, and a brewing area – each of which is described below. These parts are found in just about every Keurig model, with minor variations.

Ambient water tank

This is a tank which holds the water that will eventually become coffee. The tank tends to be removable (so that it can be carried to the sink for refilling), somewhat external to the machine, and made of plastic.

In most cases, this tank does not require *tevillah* since it is made of plastic, but in some cases the halacha is more complicated than that. At the bottom of the tank, there is an opening through which the water exits the tank and goes to the inside of the machine (where it is heated up), and in some models there is metal in that valve which has direct contact with the water. The metal spring or cover controls the operation of the water-valve, such that it seemingly qualifies for the ruling of *Rema* (120:7) that *tevillah* is required if the metal is functional (rather than decorative) and has food contact.

Pump

As needed, water is pumped from the ambient water tank to the top of the heating canister (described below). Once the heating canister is full, any additional water pumped into the

canister forces other (hot) water out of the canister through other pipes to the brew-area. The tubing is all plastic, and it seems that the same is true of the internal components of the pump (i.e., the parts which have food contact). However, other parts of the pump are surely metal. The question of whether they require *tevillah* depends on the disagreement between *Shulchan Aruch* and *Shach* as to whether a critical component (*ma'amid*) that does not have food contact requires *tevillah*.³⁵

Heating Canister

The largest internal component of the Keurig machine is a hollow metal canister, which is a cylinder that is approximately 3 inches in diameter and 4-6 inches tall. The underside of the canister has two wire connections, through which electricity flows to the (metal) heating coil that is inside the canister. [A thermostat inside the heating canister turns on the coil whenever the water is not at the temperature needed for brewing coffee.] Towards the top of the canister there are three tubes; one is the inlet tube coming from the pump (see above), the other is the outlet tube through which hot water flows to the brewing area (see below), and the last is a steam-relief valve.

This is the part of the machine which seems most obviously to require *tevillah*, as it is basically a pot for cooking water. We will see below that its status is somewhat more complicated than this.

Brewing area

A K-cup is put into a receptacle and then the lid is closed over the K-cup. That receptacle has two metal needles in it, one on bottom and one on top, and when the person closes the lid onto the K-cup that pushes the needles into the bottom and top of the K-cup. In turn, the bottom needle is connected to a

35. See *Shulchan Aruch* 120:6-7, *Shach* 120:12-13, and the *Poskim* ad loc.

tube that leads down to the person's cup, and the top needle is connected to the heating canister's outlet tube.

When someone presses the button on the machine requesting a cup of coffee, the pump pushes water from the ambient water tank into the heating canister, which forces hot water out of the heating canister through the top needle in the brewing area and into the K-cup. In the K-cup, the hot water extracts flavor from the coffee grinds, flows through the filter out the bottom needles, into the person's waiting cup.

As was noted regarding the ambient water tank above, the two metal needles are a classic example of the ruling of *Rema* that when there is a functional metal part of a utensil and that part has food contact, all agree that *tevillah* is required, even if the overall device is made of materials (e.g., plastic) that would not demand *tevillah*.

In summary, the Keurig machine consists of four primary parts, and it appears that at least two of them should require *tevillah*.

Part 2 – Break and Repair by a Jew

Working with the assumption that Keurig machines require *tevillah*, but concerned that they would break if they were put into a *mikvah*, a person in Lakewood came up with an original solution, which is based on *Chochmat Adam*.³⁶ *Chochmat Adam* says that if a utensil was made by a non-Jew but then it broke to the point that it was not usable anymore, and it was fixed by a Jew, the utensil is considered to have been “made” by the Jew and *tevillah* is not required. It is understood that the *kli* must be so “broken” that only an *uman* (skilled craftsman) can fix it, but if the break is something simple – like the plug was pulled out of the wall – then the Jew's “fixing” is not enough.

36. *Binat Adam* towards the end of 66/85.

Based on this, someone learned how to open all types of Keurig machines in a way that still made it possible to reclose them, and also studied the internal workings of the devices so that he could “break” them appropriately and then fix them. The goal was to break them enough that it would need an *uman* to fix it, but not break them so much that it would be costly or difficult to do. That means that he could not break the heating canister, and he had to come up with something else.

He realized that if the electrical connections in the device were broken, the entire machine would not work – because a pump is needed to get water into the heating canister, and then from there into the cup – and therefore if he could sever those connections the machine would be “broken”. The connections are made via soldering, and since most people don’t know how to solder, that was deemed an action which requires an *uman*. Accordingly, he opens the machine, un-solders one of the important connections,³⁷ and then re-solders it. The whole process takes just a few minutes and the machine is then “ready” for use without *tevillah*.

He showed his process to R. Shmuel Meir Katz, a *Posek* in Lakewood, who was satisfied. R. Katz agreed that without the pump the heating canister is worthless (since the canister cannot even stand upright due to “pins” coming out of the bottom, and only works if it is part of the overall machine), and therefore breaking and fixing the pump is good enough. R. Feivel Cohen also agreed, saying that without the pump the tank is like a cup used for watering flowers; it can hold “food/water” but has no food use, and therefore does not need *tevillah*, and it is only with the addition of the pump (etc.) that it becomes *kli seudah* which need *tevillah*. Therefore, breaking and

37. Typically, he breaks (and then solders) the connections at the motor, but in some cases where this is not accessible or where the motor is connected with quick-clip connectors (rather than being soldered) he works with the K-cup receptacle’s control switch.

fixing the pump affects its status as a *kli seudah*, a vessel used for eating, and that suffices.³⁸

So far so good.

But then we noticed that the connectors are actually a metal loop/ring into which the wire fits and is then soldered on. It seemed to us that if one were to just put the wire into the whole/loop/ring without soldering, the machine would work just fine, and soldering is just a way to make it work better and more permanently. If so, it may be that only an *uman* can break the machine (and an *uman*-based action – soldering -- was actually done to fix it), but actually there was no need for an *uman* to make the repair, such that it was not sufficiently “broken”.



Pumb of Keurig showing wire (black) dangling near the ring that it used to be soldered to

We brought this point to the attention of one *Posek*, and he said that if the machine could make 10 cups of coffee with the wire just through the hole (without soldering) that would be considered that the device was basically functional, such that the breaking/fixing would not be deemed something that requires an *uman*. In fact, this was tested, and it was possible to make well more than 10 cups before the device failed. According to this approach, the person’s “breaking” of the machine is not sufficient, and he has not “saved” it from requiring *tevillah*.

38. That said, if one accepts this line of reasoning to leniently allow the machine to be used without *tevillah*, then you have to consider the pump, etc. as “part of the *kli*” as relates to discussion in Section C (above) as to what part of an urn a Jewish distributor must own to avoid a need for *tevillah*. There, viewing the pump as “part of the utensil” leads to a *chumrah* (that the Jew must own more), which it appears most of the agencies certifying urns as “no *tevillah* needed” are not fulfilling.

We presented this whole issue to another well-known *Posek* and he said that knowing to put the wire back into the right hole is also considered something that only an *uman* would know how to do, for most people would not realize where to put it. Therefore, he said that what the person in Lakewood is doing does suffice to avoid the need for *tevillah*. Others thought that just about anyone looking at the inside of the Keurig – remember, the Jew opened it up to “break” it – and seeing a dangling wire and a hole, would know where to put it, and that is not considered a task that requires an *uman*. Thus, in the final analysis, the decision as to whether this person’s action qualifies to excuse the Keurig from *tevillah* may depend on how sophisticated each Rabbi thinks people are.

*Chodosh in Chutz La'aretz**

Rabbi Yehuda Spitz

** Editor's note: Although the topic of chodosh has already been addressed in an article by Rabbi Alfred Cohen in Volume III of this Journal, this article is being printed due to its offering of different perspectives and details.*

Part I – Earlier Sources

During the fall, one might notice others in the local supermarkets, even in kosher ones, checking labels on products and looking at the packing dates printed on the packaging, even on products that are known to be reliable. No, they aren't worried that the product has expired. Rather they are checking as to its *chodosh* or *yoshon* (literally "new" or "old") status.

Contrary to popular belief, these terms do not mean ascertaining how old and possibly rotten a product is, but rather refer to which crop the grain used in the product comes from (for example, winter wheat or spring wheat). Before we ask why one should care how old the grain source is, some explanation is in order.

The Torah states "*V'lechem, V'kali, V'karmel* (Bread, sweet flour made from toasted kernels, or the toasted kernels themselves), may not be eaten until that very day – until you bring the offering to your G-d. This is a law that you must always observe throughout your generations **in all your dwelling**

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places".¹ "That very day" refers to the second day of *Pesach*, the day that the *korban omer*, the "offering" mentioned in the verse, is brought. (This is the same day that we begin counting the *omer*, a practice we continue until *Shavuot*.) The Torah is teaching that available grain that grew after the second day of *Pesach* the previous year, is prohibited to be eaten until the second day of *Pesach* of the current year, when it becomes permitted. This law applies to the same varieties of grain that can become *chametz*: wheat, barley, oats, spelt, and rye.²

"New" Grain versus "Old" Grain

Once *Pesach* passes, all grain that took root prior to that date is now called *yoshon*, old, even though it may have been planted only a short time before,³ and it is 100% permissible to be eaten. On the other hand, grain that took root *after* the second day of *Pesach* is categorized as "new" grain that may not be eaten until the second day of the next *Pesach*. The transition from *chodosh*-new to *yoshon*-old transpires automatically on the second day of *Pesach* – all the existing *chodosh* becomes *yoshon* grain on that day, even that which is still growing. The only requirement is that by then the grain has taken root. Thus, designating the grain as "old" does not mean that it is either wizened or rancid. Grain planted in the late winter or early spring often becomes permitted well before it even completed growing.⁴

1. *Vayikra* 23:14

2. See Mishnah in *Menachot* (70a) and accompanying Gemara (70b); *Rambam* (*Hilchot Ma'achalot Assurot* 10:1), *SMA"G* (*La'avin* 142-144), *SMA"K* (*Mitzvah* 217), *Sefer HaChinuch* (*Mitzvah* 303), and *Tur* and *Shulchan Aruch* (Y.D. 293:1).

3. The exact amount of time needed to be considered "old" grain is a matter of debate among authorities (*machloket haposkim*) with no clear consensus as to whether it takes three days or fourteen days after planting to have taken root. See *Terumat Hadeshen* 191; *Shach* Y.D. 293:2, *Pitchei Teshuvah* (ad loc 4 & 5), *Noda B'Yehuda* O.C. 2:84, *Chatam Sofer* Y.D. 284 & 286, *Sha'agat Aryeh* (*HaChadashot*, *Dinei Chodosh* Ch. 1 - 2), *Aruch Hashulchan* Y.D. 293:7 - 9), *Minchat Yitzchak* 6:43 and *Be'er Moshe* 8:255.

4. This elucidating explanation is excerpted from Rabbi Yirmiyohu Kaganoff's

Which Crop is Which?

There are two types of crops: winter crops and spring crops. In the Northern Hemisphere (ex. America) winter crops are planted in the fall, remain in the ground throughout the winter (including *Pesach*) and are harvested in early summer. Therefore, by the time this crop is harvested, all of it is already *yoshon*. Spring crops, however, are usually planted after *Pesach* and are harvested at the end of the summer. Consequently, from the time of their harvest until the following *Pesach*, they are considered *chodosh*.⁵ It generally takes a few months until the most recent grain “hits the stores”. That is why fall is usually when the “*chodosh* season” starts in earnest, as the spring crop starts being used commercially. As mentioned above, this lasts until *Pesach*, when all existing grain automatically becomes *yoshon*. And then the yearly cycle starts anew. This is what checking the packing code is for, since through it one can ascertain which crop the product came from, and accordingly, its *chodosh* / *yoshon* status.⁶

Although there is a general rule that agricultural mitzvot, *mitzvot hateluyot ba'aretz*, apply only in *Eretz Yisrael*, nonetheless, the fact that the Torah concluded the mitzvah with the phrase “in all your dwelling places” teaches that this prohibition of *chodosh* applies to *all your dwelling places* – even those outside *Eretz Yisrael* as well! Although there is some debate by the Rabbis of the Mishnah whether this mitzvah actually does apply outside the land of Israel,⁷ the conclusion of the

enlightening relevant article, “The Laws of Yoshon” <http://rabbikaganoff.com/the-laws-of-yoshon/>.

5. As explained in Rabbi Yoseph Herman’s essential authoritative annual publication, *Guide to Chodosh* (sec. 1.1).

6. There are certain products that are generally made from spring crop, such as many breads, pizza dough, pasta, high gluten flour, and cakes (such as bobka and danishes). On these products, checking the dating code would ascertain if flour from the new spring crop (*chodosh*) or the previous year’s spring crop (*yoshon*) is being used. Other products such as regular hard pretzels, crackers, matzah, and licorice generally always use winter wheat.

7. See *Kiddushin* 37a-39a.

Mishnah⁸ is “*HaChodosh assur Min HaTorah b’chol Makom*”,⁹ *chodosh* grain is Biblically prohibited to be eaten in all places, meaning even in *chutz la’aretz*. The Gemara (*Menachot* 68b) follows this as well, as we see that the *chodosh* prohibition was practiced in Babylonia, even though it is outside *Eretz Yisrael*. This is also how the vast majority of halachic decisors throughout our chain of tradition (*mesorah*) rule, including the *Rif*, *Rosh*, *Rambam*, *Tur* and *Shulchan Aruch*¹⁰.

8. *Orlah* 3:9.

9. See the commentaries of the *Rash* and *Tosafot Yom Tov* (ad loc.), who cite proof to this from the *Yerushalmi* (ad loc. *Halacha* 7) that the Mishnah at the end of the first chapter of *Kiddushin* indeed follows this opinion.

10. *Rif* (*Kiddushin* 15a and *Pesachim* 28a in his folios), *Shu”t HaRosh* 2:1), *Rosh’s* commentary to *Kiddushin* 37a (62 and *Pesachim* 121a, Ch. 10:42), *Rambam* (*Hilchot Ma’achalot Assurot* 10:2 and *Hilchot Temidin U’Mussafin* 7:11), and *Tur* and *Shulchan Aruch* Y.D. 293:2.

This ruling is also cited by *Ramban* (*Vayikra* 23:16), *Rashba*, *Ritva*, *Meiri*, and *Piskei Ri”d* (*Kiddushin*, 37a - 38a), *Mordechai* (*Kiddushin* 1:501), *Ba’al Hatur* (vol. 2 page 137a), *Ravayah* (*Pesachim* 527) *SMA”G* (*La’avin* 142-144), *SMA”K* (*Mitzvah* 217), *Orchot Chaim* (*Lunil*; *Hilchot Sefirat HaOmer*), *Rokeach* (294), *Agudah* (*Kiddushin* 34), *Rabbeinu Yerucham* (*Netiv Chamishi*, vol. 4), *Tashbatz* (*Zohar HaRakia*, *MI”s Tzaddik*), *Chinuch* (*Mitzvah* 303), *Bartenura* 1:9, *Shaarei Teshuva* 3:105), and *Kaftor Vaferach* (Ch. 56), as well as the *Noda B’Yehuda* O.C. 2:87.

Chatam Sofer (*Kiddushin* 37a) asserts that this is also the opinions of *Rashi* and the *Rashbam* in their commentaries to *Pesachim* 109a. *Rambam* (*Hilchot Ma’achalot Assurot* 15:10) even classifies *chodosh* grain as ‘*davar sheyeish lo matirin*’ and therefore has no nullification when mixed in with similar *yoshon* grain. A *davar sheyeish lo matirin* is the principle that if a food or action is *post facto* (*b’dieved*) permitted due to some halachic principle such as nullification, but there is a way to avoid that “prohibition”, one must take advantage of the possibility to avoid.

On the other hand, there were several *Rishonim*, including *Ohr Zarua* 1:328, *Maharil* (*Likutim* 26), and *Terumat Hadeshen* 191, who were more lenient, relying on opinions that *chodosh* in *chutz la’aretz* is essentially a Rabbinic prohibition (and/or other rationale to allow leniency). As such, since the exact time when the grain took root is uncertain, they rule that one may eat such grain as ‘*safek derabbanan lekula*’ – when in doubt about a Rabbinic ordinance, one should be lenient. However, even so, they did not rule entirely leniently with all *chodosh* grain in *chutz la’aretz*. As the *Terumat Hadeshen* himself averred at a time when the ground was frozen almost until *Pesach* one year, those who are scrupulous should be careful but should not protest the average folk who are lenient.

If so, a question remains: If all these great luminaries ruled that there is a Biblical prohibition against eating *chodosh* products in *chutz la'aretz*, why is *chodosh* observance not more widespread or even known about? In fact, it seems that the traditional approach was to permit the use of new grain. What is the basis to be lenient when most authorities rule that *chodosh* is prohibited even outside *Eretz Yisrael*?

There are several different approaches and leniencies that many authorities through the ages used in order to answer this longstanding question, especially in light of the difficulties that many had in procuring *yoshon* flour.

Part II – Reasons to be Lenient

Part I discussed the source and explanations of the prohibition of eating products containing *chodosh* flour or grain. The vast majority of *poskim* through the ages, from the Mishnah down, ruled that this prohibition is Biblical even in *chutz la'aretz*. Part II will attempt to explain why, even so, *yoshon* observance is not more widespread or even known about, as well as exploring several different approaches, rationales and leniencies offered by the authorities, allowing *chodosh* products to be eaten in *chutz la'aretz*.

1. Compounded Doubt

The *Tur* and *Rema*¹¹ permitted eating the new grain because the

11. *Tur* and *Rema* Y.D. 293:3. As the *Chayei Adam* notes (*Sha'arei Tzedek, Sha'ar Mishpetei Ha'aretz* 7:3), this was the basis for the widespread *hetter* in Ashkenazic countries, as there the new grain was planted before *Pesach*. Interestingly, in his responsa (*Rema* 132:15) he does not mention the *hetter* of *sfeik sfeika* but rather that *me'd'oraitah* the *chodosh* grain is nullified by the preponderance of old grain (*battel b'rov*) and all that is remaining is a *safek derabbanan*, and therefore one does not have to be too worried about the prohibition.

The *Aderet* (*Kuntress Over Orach*, 489:10; printed at the end of *sefer Orchot Chaim – Spinka* vol. 2) adds that certainly *chodosh* in *chutz la'aretz* would be *battel b'rov*, and is not considered a *davar sheyeish lo matirin*. Ergo, just as pots

new crop *may* have been planted early enough to be permitted, and, in addition, the possibility exists that the available grain is from a previous crop year, which is certainly permitted. This approach accepts that *chodosh* applies equally in *chutz la'aretz* as it does in *Eretz Yisrael*, but contends that when one is uncertain whether the grain available is *chodosh* or *yoshon*, one can rely on the assumption that it is *yoshon* and consume it. Because of this double doubt, called a *sfeik sfeika*, several major authorities permitted people to consume the available grain.

The issue with relying on this is as follows: Rabbi Akiva Eiger¹² questions the validity of this approach, and maintains that there is no compounded doubt. He explains that the *sfekot* (multiple doubts) of when the grain rooted are all really one *safek*, since planting before the cutoff date is considered as belonging to the previous year. Therefore, since the halacha states that *chodosh* is Biblical, we hold *safek d'oraitah l'chumra* – doubt about a law of Biblical origin requires that we be strict – and a single case of doubt should not be sufficient to allow it to be eaten. Additionally, even if one would rely on

do not need to *kashered*, (see *Tur* and *Shulchan Aruch* and main commentaries Y.D. 102:3), so would *chodosh* grain, especially as otherwise, people would simply not have what to eat for half of the year.

12. R. Akiva Eiger in his glosses to Y.D. 293:3, quoting the *Shu"t Mutzal Me'eish* (50). This question is also asked by *Kreiti U'Pleiti* and *Chavat Da'at* (Y.D. 110, *Klalei Sfeik Sfeika* 10 s.v. *uma"sh*, cited in *Shu"t Beit Avi* vol. 4, 138:7). Although the *Aruch Hashulchan* Y.D. 293:16 attempts to address this difficulty and explain how our case might still be a *sfeik sfeika*, Rabbi Akiva Eiger's challenges are not to be taken lightly. However, see *Yad Yehuda* (Y.D. 110, *Klalei Sfeik Sfeika* 18 & 19) for a different approach how *sfeik sfeika* here might still be applicable. A brilliant potential solution to Rabbi Akiva Eiger's question was posited by R. Aharon Yehuda Leib Shteinman (printed in *Kovetz Moriah* 388-390, Nisan 5774).

See also *Tiferet Yisrael Kiddushin* (1:9 #74) who writes simply that "the accepted halacha is that *chodosh* is permitted in *chutz la'aretz*" and references his commentary to *Challah* 1:1 #7. There he writes that since life itself is dependent on food, the Rabbis ruled leniently with *chodosh* due to the aforementioned *sfeik sfeika*. He adds that although it is not a true *sfeik sfeika* (as noted), nevertheless, the Rabbis included the minority opinion in the Mishnah, that *chodosh* does not apply at all in *chutz la'aretz*.

this leniency, it must be noted that this *hetter* is dependent on available information, and if one knows that the grain being used is actually *chodosh*, one may not consume it. Moreover, the *Rema* himself concludes that in this instance it is preferable that the masses transgress unwittingly (*shogegin*) than purposely (*maizidin*), which is an indication that he considers it actually forbidden

2. Taz's Take – Rely on Minority

The *Taz*¹³ offers an alternate rationale. He permitted the *chutz la'aretz* "new" grain, relying on the minority opinion that *chodosh* is a *mitzvah* that applies only in *Eretz Yisrael*. This is based on a *Gemara* (*Niddah* 9b) that states that when something has not been ruled definitively (and for *chodosh* the *Gemara* itself does not posit an outright rule), one may rely on a minority opinion under extenuating circumstances. The *Taz* wrote that in his time, due to lack of availability of *yoshon* flour, it was considered *Sha'at Had'chak* (extenuating circumstances) as apparently "let them eat cake" would not be a sufficient response to address the needs of the hungry masses with no bread to eat, and therefore maintained that one may rely on the minority opinion.

The issue with relying on this is as follows: The *Shach* emphatically rejects this approach, and concludes that one must be stringent when one knows that the grain is *chodosh*. The *Ba'er Heitiv*, as well as the *Beit Hillel*, likewise voice their rejection of this *hetter*, in the strongest of terms – that there are "clear proofs" against this logic¹⁴, and all *poskim* (*Rif*, *Rambam*, *Rosh*, *Tur*, *Shulchan Aruch*)¹⁵ effectively ruled against it – saying that *chodosh* in *chutz la'aretz* is prohibited Biblically, period.

13. *Taz* Y.D. 293:4.

14. *Nekudot HaKesef* Y.D. 293:1, *Ba'er Heitev* (ad loc. 4), and *Beit Hillel* (ad loc. 1).

15. Sources cited above in footnote 10.

3. Near, Not Far

The *Magen Avraham*,¹⁶ forwards a different approach. He maintains that it is not so clear cut that the halacha actually follows the opinion that eating *chodosh* is a Biblical prohibition, and therefore, “in order to answer for the *minhag* (custom) of the world, we must say that we follow Rabbeinu Baruch,”¹⁷ who was of the opinion that the prohibition of *chodosh* in *chutz la’aretz* is a *gezeira d’rabbanan* (Rabbinic enactment). Furthermore, he maintains that *Chazal* only prohibited *chodosh* products in countries nearby to Eretz Yisrael, and therefore it would not apply to countries further away. He concludes by saying that nonetheless, a “*ba’al nefesh*” (scrupulous person) should still be stringent as much as possible.

The *Aruch Hashulchan*¹⁸ ruled this way as well, explaining that in Russia where he lived and the land was frozen until past *Pesach*, there is no *hetter* of doubt – *safeik* or *sfeik sfeika* (compounded doubt - see #1) – to rely upon, for they knew there that the farmers were unable to plant until after *Pesach*. Rather, he wrote, the *issur* of *chodosh* is related to the *korban omer*, and only applies to places from where the *korban* could possibly be brought. Therefore, *Chazal* did not forbid *chodosh* in lands far away from Eretz Yisrael, for there would be no reason to do so, as those grains will never even reach Eretz Yisrael.¹⁹ He adds that since if one does not partake of the

16. *Magen Avraham* 489:17. He adds that seemingly this was the true intent of the *Maharil*, *Terumat Hadeshen*, and *Tosafot Yom Tov* (ibid.) who maintained that *chodosh* in *chutz la’aretz* was only prohibited *Mid’rabannan*.

17. Author of the *Sefer HaTerumot*; cited in *Shu”t HaRosh* 2:1.

18. *Aruch Hashulchan* Y.D. 293:19. He, and *Panim Meiros* 3:34, disagree in principle with *Magen Avraham*, but nonetheless conclude that those who are lenient may rely upon the fact that the *korban omer* could not be brought from *chutz la’aretz*. However, see *Aruch HaShulchan* in *Hilchot Rosh Hashana* (O.C. 603:2) who appears to take a stricter stand.

19. What if grains from *chutz la’aretz* are imported to Eretz Yisrael? Are they permitted according to this opinion? See *Minchat Chinuch* 301:19 and 303:1, *Chelkat Yoav* Y.D. 33, *Maharsham* 1:72, *Tzitz Kodesh* 1:17, *Beit HaLevi* 3:52, *Achiezer* 2:39, *Chazon Ish* (*Demai* 5:3 and 15:4), *Har Tzvi* (Y.D. 239 -240 and *Har*

chodosh grains, he would be unable to eat *any* grain product for at least six months of the year, *Chazal* would not have made a prohibition that the public would not be able to withstand, and especially about grain which is man's primary sustenance ("*chayei nefesh mamash*").

The issue with relying on this: Same as above, that the vast majority of halachic authorities through the ages effectively ruled against this, saying that new grain is forbidden by the Torah in all places – *HaChodosh assur Min HaTorah b'chol makom*, including *chutz la'aretz*. In addition, it can be debated that the *Aruch Hashulchan's* leniency would no longer apply nowadays, when many *yoshon* products are indeed readily available.

4. The Beer Necessities of Life (Yes, you read that right!)

Another *hetter* is that of the *Lechem Mishneh*²⁰ (cited by the *Shach*), and *Pnei Yehoshua*, to the effect that drinks which are made of derivatives of *chodosh* grain, such as beer – which seems to have been the mainstay drink in those days – should be permitted, as they are not the actual grain itself. Several

Tzvi al HaTorah, Parshat Emor), Tzitz Eliezer 20:40:a, Mizbeach Chodosh (Challah, vol. 3, Chapter 3, 54a), Kerem Avraham #25, Gevurot Eliyahu (vol. 2, Y.D. 151), Chelkat Yaakov (Y.D. 182-83), and Orchot Rabbeinu (4:70 page 30; and in new version vol. 3, pg. 200 #1), Aderet Shmuel (pg. 295 #288 and footnote 336).

Many of these *Poskim* cite precedent from the Rambam (*Hilchot Terumot* 1:22) who writes that fruits from *chutz la'aretz* that are brought into *Eretz Yisrael* are obligated in *terumot* and *ma'asrot*, with the *Kesef Mishneh* (ad loc.) adding that the same applies with separating *challah*. Some maintain that the same should apply regarding *chodosh*, while others disagree. R. Yaakov Blau, in his classic *Leket HaOmer* (1:4 and footnote 13), concludes that the opinion of *Kesef Mishneh* is the consensus of the other *Poskim*.

20. *Lechem Mishneh*, end of *Terumot*, cited by *Shach* Y.D. 293:6, and *Pnei Yehoshua* (end of *Kiddushin*, *Kuntress Acharon* 51, s.v. *din hashlishi*). See also *Shu"t Panim Me'ivot* (1:107) who maintains a similar *hetter* regarding mead that contains *chodosh* residue in its makeup.

authorities²¹ qualify this by saying that one may only be lenient in a case of whiskey or beer that was derived from a mixture (*ta'arovet*) of different grains – including *chodosh* grains, but not if the drink was made exclusively from *chodosh* grain.

The issue with relying on this: The *Shach* himself seems uneasy about using this leniency, as the *Rosh* implied that it should also be prohibited. The *Chacham Tzvi*,²² as well as *Minchat Yaakov*, *Chayei Adam*, and *Aruch HaShulchan* rule that one may not rely on this. The *Vilna Gaon* is reported as being so stringent on this that he classified someone who buys beer made from *chodosh* grain for someone else as transgressing on *Lifnei Iver* (the prohibition against misleading people).²³

There are those who took a middle of the road stance on

21. *Shulchan Aruch HaRav* (Shu"t 20; O.C. 489:30) and *Beit Lechem Yehuda* Y.D. end of 293. On the other hand, *Chochmat Adam* (Binat Adam 54 [73]) maintains that even a mixture is only permitted if there is at least 60 times the *yoshon* grain as compared to the amount of *chodosh* grain.

22. *Chacham Tzvi* 80, *Minchat Yaakov* (Chok Yaakov O.C. 489:22), *Chayei Adam* (131:12; see also citation in previous footnote), *Aruch Hashulchan* Y.D. 293:23), *Knesset Yechezkel* 51, and *Gr"a* (Maaseh Rav 89). Interestingly, in his *Sha'arei Tzedek* (Sha'ar Mishpetei Ha'aretz 7:2), *Chayei Adam* seems to backtrack somewhat, writing that it is impossible to argue against those who are lenient with drinking beer and whiskey made from *chodosh* grain, as they hold that a drink made from the grain is not the actual forbidden item; even so, he concludes that a scrupulous person should be stringent.

23. Similarly, see *Rivevot Efraim* 8:199 who quotes R. Chaim Kanievsky as ruling that if one is stringent on *chodosh* it is prohibited for him to feed *chodosh* food to someone who is not strict.

Minchat Yitzchak 8:113 proves that *Chatam Sofer* agreed with the *Chacham Tzvi* on this, that any derivative of *chodosh* still maintains the same status and is *assur mid'oraitah*. His own conclusion is that only one who relies on a *hetter* of *chodosh* in *chutz la'aretz* being *derabbanan* may rely on the *hetter* of beer, as it is improbable to make such a distinction. However, other contemporary *poskim*, including the *Beit Avi* 4:138:19, hold that one should be stringent on beer. See also *Emet L'Yaakov* on *Shulchan Aruch* (O.C. 489, footnote 461) who writes that even those who are lenient with the *chodosh* proscription on wheat due to various reasons should nevertheless be stringent with barley, implying that he would be of the opinion that beer, whose primary ingredient is barley, should be avoided as well.

beer, including *Mishkenot Yaakov*,²⁴ who although disagreeing with the *Chacham Tzvi*, nevertheless ruled that only for a *tzorech gadol* and *sha'at hadchak* (extremely extenuating circumstances) may one be lenient on beer and other drinks derived from *chodosh* grain. Similarly, the *Beit Hillel* also disagrees with this *hetter*, but adds that if someone is weak and sickly, and it would be a danger for him not to drink it, he may rely on this *hetter*.

5. The *Bach's Hetter* - Non-Jewish-owned Grain

The *Bach* advances a different halachic basis to permit use of the new grain.²⁵ He opines that *chodosh* applies only to grain that grows in a field owned by a Jew, and not to grain grown in a field owned by a non-Jew. Since most fields are owned by gentiles, one can be lenient when one does not know the origin of the grain and assume that it was grown in a gentile's field, and it is therefore exempt from *chodosh* laws. *Bach* notes that many of the greatest luminaries of early Ashkenazic Jewry, including R. Shachna (*Rebbi* of the *Rema*) and *Maharshal*, were lenient regarding *chodosh* use in their native Europe.

He shares his experience that as a young man he advanced this theory, that *chodosh* does not exist in a field owned by a gentile, to the greatest scholars of that generation, including the *Maharal* of Prague, all of whom accepted it. In fact, the

24. *Mishkenot Yaakov* Y.D. end of 68, and *Beit Hillel* (ibid.). See also *Yeshuot Yaakov* O.C. end of 489 who cites both sides of the beer debate, and concludes that "I personally am stringent with beer, and regarding actual *chodosh* grain, it is worthwhile for everyone to be stringent".

25. *Bach* (Y.D. 293, s.v. *uma sh"bein* and further). See also *Shu"t HaBach* (*Hachadashot* 42). The *Bach*, himself, further (ad loc. s.v. *ulfa"d*) contends that although the *Rosh* in his responsum (*Shu"t HaRosh* ibid) rejected this approach, *Rosh* subsequently changed his mind, as in his halachic code (*Kiddushin* ibid.), which was written after his responsa [see *Tur* (C.M. end 72)], while listing other *issurim* like *orlah* and *kelayim* that apply when grown by a gentile, the *Rosh* omits mention that the prohibition of *chodosh* applies to gentile-grown grain.

Ba'al Shem Tov is quoted²⁶ as having a dream revealing that when the *Bach* died, *Gehinnom* was cooled down for 40 days in his honor; when *Ba'al Shem Tov* woke up he exclaimed that he did not realize the greatness of the *Bach*, and ruled that it is therefore worthwhile to rely on his opinion regarding *chodosh*. Possibly based on the above, it is well known that most *Chassidim* worldwide are lenient with eating *chodosh* in *chutz la'aretz*.²⁷

The issue with relying on this: Even though there are several *poskim* who rule like the *Bach*,²⁸ nevertheless, the vast majority

26. *Ba'al Shem Tov al HaTorah* (Parshat Emor #6, based on *sefer Zichron Tov* pg. 12a, 11). This is also cited in *Pardes Yosef* (*Vayikra*, pg. 274) and Rabbi Eliezer Brodt's *Likutei Eliezer* (pg. 63 s.v. *yesh* and footnote 116).

27. There are potentially other reasons why this is so. See *Tzitz Eliezer* (20:40) who states that the *Bach* used to be the Rav of both Medzhibuzh and Belz, and posits that this is possibly why many *Chassidim* are lenient when it comes to eating *chodosh* products. However, the *Shu"t Beit Avi* (ibid. 2) quotes that the *Sar Shalom* of Belz was very stringent with the *issur* of *chodosh*, so it seems unlikely that Belzer *Chassidim* would be lenient based exclusively on the *Bach's* approach. He also cites (ibid. 19) a different precedent – that the *Darchei Teshuva* (of Munkasch) quoted that the *Divrei Chaim* (of Sanz) ruled leniently regarding *chodosh* in *chutz la'aretz*. This is also cited in *sefer Darkei Chaim V'Shalom* (of Munkasch; 873, *Likutei Dinim m'Y.D.*) writing about the famed *Minchat Elazar*, that he was of the opinion that “nowadays one need not be stringent with the prohibition of *chodosh* in *chutz la'aretz*, as he wrote in his *sefer Nimukei Yoreh Deah*, 293”, citing his father, the *Darchei Teshuva*, who heard from the *Divrei Chaim* to rule leniently.

Another possibility is that *Chassidim* relied on the homiletical interpretation of the *Chiddushei HaRim* (Rabbi of Gur; *Shu"t HaRim Y.D.* 19) who writes extensively to “turn the *sugya* around”, maintaining that the majority opinion is that *chodosh* in *chutz la'aretz* is truly only Rabbinic in nature. See also *Avnei Nezer* (vol. 4, C.M. 115) who, in a discussion regarding the permissibility of using Corfu Etrogim, adds that the reason “*Chassidim* in Poland” relied on the *Bach's* *hetter* regarding *chodosh* is due to the *Chozeh M'Lublin* publicly stating that once his ancestor, the *Bach*, permitted it, there was no need to be concerned further. [This author wishes to thank Rabbi Yaakov Nissan for pointing out this source.] The renowned Kamarna Rebbe (*Otzar Hachaim, Mitzvah* 306, *Vayikra*, pg. 220a-225a) wrote extensively on the topic, strongly defending the *Bach*, averring that this certainly was the accepted ruling by the “Heavenly Court”.

28. Including *Derisha Y.D.* 293:1, citing precedent from *Rabbeinu Avigdor Kohen Tzedek* and the *Maharam Metz*), *Be'er Hagolah Y.D.* 293:7, *Kneset*

of authorities categorically reject this logic and rule explicitly that the *chodosh* prohibition does apply to grain grown in a gentile's field, including the *Rosh*, *Rambam*, *Rashba*, *Ran*, *Tosafot*, *Mordechai*, *Tur*, and *Shulchan Aruch*;²⁹ as did many later *poskim*, including the *Shach*, *Taz*, *Gr"a*, *Chida*, *Pnei Yehoshua*, *Sha'agat Aryeh*, and the *Aruch Hashulchan*.³⁰ Additionally, although it is

Yechezkel 41 (although contending that the *chodosh* prohibition exclusively does not apply when it is in both in *chutz la'aretz* and a gentile's grain, but would apply to each factor individually), *Shev Yaakov* 61, *Chelkat Yoav* Y.D. 33 (based on a combination of factors), and the *Makneh* (*Kiddushin* 38, similar to *Knesset Yechezkel*).

There are others who try to justify the lenient position, including *Avnei Nezer* Y.D. 386 (writing at just 16 years of age!), *R. Meshulam Igra* (*Responsa* vol. 1, O.C. 40), and *R. Zalman of Volozhin* (cited in the appendix to the recent Weinreb edition of *R. Chaim of Volozhin's Ketter Rosh; Milu'im* to 149).

Minchat Chinuch 303:1 implies that he was inclined to accept *Bach's* leniency. *The Aderet* (*Oznei Yerushalayim* #26) and *R. Shmuel Salant* (*Aderet Shmuel* pg. 297: 289 and footnote 337) imply this way as well.

29. Most of these authorities were cited previously. *Tosafot* is in *Kiddushin* 36b s.v. *kol*; see also *Leket Yosher* 1:96). It is worthwhile to see the *Pnei Yehoshua's* (*Kiddushin*, *Kuntress Acharon* 51, *Psak B'Inyan Chodosh* s.v. *din hasheini*) related comment that in his opinion, the only possibility of being lenient regarding grain grown by non-Jews is according to those who are hold that *chodosh* in *chutz la'aretz* is only forbidden *mid'rabbanan*.

30. *Shach* Y.D. 293:6, *Taz* (ad loc. 2), *Gr"a* (*Biur HaGr"a* ad loc. 2 – who writes in very strong fashion against *Be'er Hagolah*), *Sheiltot* 82, *Chayei Adam* 131:12, and *R. Chaim Volzhiner's Ketter Rosh* (151) on how strict the *Gr"a* was with this halacha, including being stringent with dishes used for *chodosh*), *Chida* (*Birkei Yosef* ad loc. 1), *Pnei Yehoshua* (*Shu"t* Y.D. 34 ; also known as the *Maginei Shlomo*, he was the grandfather of the author of *Pnei Yehoshua* on *Gemara*), *Sha'agat Ayreh* (*Shu"t HaChadashot*, *Dinei Chodosh* Ch. 1- 2).

See also *Shoel U'Meishiv* (vol. 6, 38), who wrote a *pilpul* proving that *chodosh* should apply to grain owned by a non-Jew. *R. Akiva Eiger* (*Drush V'Chiddush, Maracha* 9) brings proofs to both sides of this *machloket*, but concludes that the proper halacha follows the opinion of the *Rambam*, that the prohibition of *chodosh* applies to non-Jewish owned grain as well. See also *Orchot Rabbeinu* (new edition; vol. 3, pg. 200: 1- 2) and *Pe'er Hador* (vol. 1, pg. 168) who describe how strict both the *Chazon Ish* and *Steipler Gaon* were with this prohibition, even with gentile *chodosh* grain.

Chazon Ish (*Orchot Rabbeinu* *ibid.*) quoted the *Chafetz Chaim* as saying that after someone passes on to the World of Truth, he will be asked why he ate *chodosh*. If he replies that he relied on the *hetter* of the *Bach*, then he will be asked why he spoke *lashon hara*, as the *Bach* did not allow that; implying that

seemingly not widely known, it is a fact that later on in his life, the *Ba'al Shem Tov* retracted his opinion and he himself became stringent after he found out that a certain *Gadol* in his time, R. Yechiel of Horodna, ruled stringently on this matter.³¹

Let Them Eat Bread

It should be further noted that even among those authorities who allowed consumption of *chodosh* based on the *Bach's* *hetter*, it is crucial to note that the vast majority gave that ruling only since it was *Sha'at hadchak* (extenuating circumstances) as otherwise there would be no grain products allowed to be eaten. Barring that detail, they averred that one should not rely on this leniency. This includes such renowned decisors as the *Pri Megadim*, *Chayei Adam*, *Shulchan Aruch HaRav*, *Kitzur Shulchan Aruch*, *Mishnah Berurah*, and the *Kaf HaChaim*.³² This is similar to the *Magen Avraham* and *Aruch Hashulchan's* approach (see # 3 above) of finding a *hetter*, in order that *Klal Yisrael* will be "clean of sin" for their actions.

in Heaven he will be labeled a hypocrite.

As noted, *Gr"a* ruled that dishes used for *chodosh* require *kashering*. On that topic, see *Chayei Adam* (ibid. and in *Shaarei Tzedek* ibid.) (who follows *Gr"a*), as opposed to *Rema* (*Shu"t HaRema* 132:15), *Magen Avraham* (ibid.), and *Mishnah Berurah* 489:48 who are lenient. In this context, it is noteworthy that all agree that when the prohibition of *chodosh* becomes lifted annually at the end of the 16th of Nissan, all *chodosh* absorbed into dishes become permitted as well, and there is no reason to *kasher* those dishes; see *Shevet Halevi* 10:183:2) and *Ashrei Halsh* (O.C. vol. 3 – *Moadim, Pesach* 69:8)] and the *Aruch Hashulchan* (ibid. 12).

31. *Ba'al Shem Tov* al *HaTorah* (Parshat Emor #7), based on *Imrei Pinchas* 3:201.

32. *Pri Megadim* O.C. (A.A.) 489:17, *Chayei Adam* 131:12, *Shulchan Aruch Harav* O.C. 489:30, *Kitzur Shulchan Aruch* 172:3, *Mishnah Berurah* 489:45 *Biur Halacha* s.v. *v'af*, and *Kaf HaChaim* O.C. 489:110-11.

Even the *Ohr Zarua* himself (1:328), on whom the *Maharil* (ibid.) and *Terumat Hadeshen* (191) base their similar lenient rulings, who was one of the early proponents of ruling that *chodosh* in *chutz la'aretz* is only a Rabbinic enactment, qualifies his position, stating that it only applies in a case where there is a question as to when the grain was planted (and therefore *safek d'rabbanan l'kula*), and only since it is *sha'at hadchak*, for it is impossible not to buy grain and bread, therefore one can rely on the lenient opinion.

Part III – *Ein Chodosh Tachat HaShemesh*

The first two parts of this article discussed the source and explanations of the prohibition of eating products containing *chodosh* flour or grain, as well as presenting five separate rationales for allowing leniency when eating *chodosh* grain in *chutz la'aretz*, and the issues and difficulties involved with relying on each of them. None seem to have the complete answer to the original question, "Why has the traditional approach seemed to be lenient when most authorities rule that *chodosh* is prohibited Biblically even outside *Eretz Yisrael*?"

Justification to Feed the Masses

The most important factor to note is that many *Gedolim* through the ages worked tirelessly to find any sort of justification to allow the masses to partake of *chodosh* products. The reason was (as was previously mentioned) that in many parts of the world where Jewry was located, if one would not eat the *chodosh* grain, he would be unable to eat any grain product for at least six months of the year, leading to possible starvation.

A prime example of one of these authorities is the *Mishkenot Yaakov*, who upon hearing from R. Chaim Volozhiner that it is proper to be *melamed zechut* (seek merit) for *Klal Yisrael* for eating *chodosh*, wrote a twenty-five page responsum³³(!) point by point, logical proof by logical proof, all in order to find rationale for the standard practice of allowing leniency about *chodosh* in *chutz la'aretz* and, consequently, "so Hashem should judge them meritoriously, and not *chas v'shalom* cause them to inadvertently sin". However, he explains many times throughout this monumental *teshuva* that the *hetterim* are all only regarding extenuating circumstances, as in many countries it was extremely difficult to obtain *yoshon* grain.

33. *Mishkenot Yaakov* Y.D. 67.

Several other authorities, including the *Pnei Yehoshua*³⁴ and *Tzemach Tzedek*,³⁵ write similarly, that after toiling to find sources for *hetterim* to be lenient and rely on *chodosh* in *chutz la'aretz* as only a Rabbinic enactment, that *chas v'shalom* as would they argue on all the *poskim* who hold it is a Biblical prohibition; rather, they stress that they are trying to find a *hetter* for those who are lenient, since not being able to eat *chodosh* products is considered an extenuating circumstance. The *Magen Ha'elef*³⁶ similarly writes extensively, bringing Talmudic theories and hypotheses, to be "*melamed zechut* (provide a meritorious explanation) on the Nation of Hashem", but even so, concludes that a "*ba'al nefesh*" should be stringent.

Universal Minhag?

There are also *Gedolim* who took the *melamed zechut* (merit seeking) a step further. The *Sdei Chemed*,³⁷ after citing many *poskim* and much logic on both sides of the issue, concludes with the words of the *Teshuot Chain*: "Since *Klal Yisrael* generally has been lenient in the issue of *chodosh* in *chutz la'aretz* for many generations due to the various *hetterim* and extenuating circumstances, it has developed into a "*minhag hakadmonim*" (long-standing custom), and even though it is against the standard halacha, one may not question those who keep it, for they have what to rely upon."³⁸ R. Yitzchak Shlomo Yoel, the *Av Beit Din* of Rovna³⁹ wrote extensively in this vein

34. *Pnei Yehoshua* *ibid.*

35. *Tzemach Tzedek* Y.D. 218. After bringing sources and proofs, he writes that "anyone with fear of Heaven should be stringent – like the *Rif*, *Rambam*, *Tur*, and *Shulchan Aruch* that *chodosh* in *chutz la'aretz* is of Biblical origin, and that there is no difference whether the grain was owned by a Jew or non-Jew."

36. *Magen Ha'elef* (O.C. 489, *Kuntress Shaim Chodosh*); see also *Meshivat Nafesh* 1:16 s.v. *v'yadati*, by the same author.

37. *Sdei Chemed* (vol. 8, *Kuntress Haklalim*, *Asifas Dinim*, *Maarechet Chodosh B'zman Haze*).

38. *Teshuot Chain* #25.

39. He wrote the second half of *Sdei Chemed's* extensive *kuntress* on *chodosh*.

“for it is a mitzvah to be *melamed zechut* where the majority of the population will be unable to eat grain for three quarters of the year. And if we would rule stringently, then we will have effectively disqualified every divorce documentation from *chutz la'aretz*, (for all the witnesses would be considered ineligible since they publicly transgressed a Biblical commandment).”

The *Chelkat Yoav*⁴⁰ writes similarly, that even according to those who rule leniently, *chodosh* in *chutz la'aretz* should still be a Rabbinic prohibition. However, he explains that everyone relies on a combination of the lenient opinions. Namely, that *chodosh* in *chutz la'aretz* is possibly only Rabbinic in origin, and furthermore may only apply to countries next to *Eretz Yisrael*. Additionally, most grain grown worldwide is by a non-Jew. Therefore, taking all these opinions into account renders it permitted to be eaten. The *Butchatcher Rav*⁴¹ likewise defends

40. *Chelkat Yoav* Y.D. 33 s.v. *v'af*. See also *Chok Yaakov* 489:22 & 24) who cites several of the reasons suggested to rule leniently, acknowledging that each of them is against the majority rule and although consequently *chodosh* should technically be prohibited, nevertheless concludes that due to the *sha'at hadchak* our custom is to be lenient. See a similar comment from *Korban Netanel* at the end of *Pesachim*, #5.

41. *Aishel Avraham* O.C. 489. s.v. *ode matzati*. On a more contemporary note, see *She'arim Metzuyananim B'Halacha* 172:3 and *Ba'er Moshe* vol. 7, pg 245.

On the other hand, it is known that several *Gedolim* were extremely particular regarding *chodosh*, including the *Maharam Ash* (*Zichron Yehuda* pg. 23) and R. Yisrael Salanter (*Tenu'at HaMussar* vol. 1: 343). It is told that the Rogatchover Gaon (who lived in Dvinsk) did not eat bread most of the year due to the concern of *chodosh* (see *Mishpacha* issue 500, March 05, 2014, “At the Rogatchover’s Knee”). Similarly, it is known that R. Eliezer Silver of Cincinnati, Ohio, who died in 1966, would never eat out, and instead carried a sandwich in his top hat. One of the reasons he did so was because he was particular about *yoshon* in *chutz la'aretz* (as heard from my father, native Cincinnati and renowned *kashrut* expert Rabbi Manish Spitz).

As a historical aside, this author has heard in the name of R. Moshe Heinemann of the Star-K, that in the *shul* of the *Chatam Sofer*, only a person meticulous in the fulfillment of this mitzvah was eligible to be called up to the Torah when the verses relating to *chodosh* were read. This author has also recently seen a letter of kosher supervision (*Hashgacha*) that R. Avraham Yitzchok Hakohen Kook gave for the flour used by the Manischewitz Matzah factory in 5683 / 1923, certifying that the flour used was indeed *yoshon*.

the “*minhag* to be *meikel*”, (custom to be lenient) stating that since all of world Jewry was lenient, it became a “*minhag l’halacha amitit*”, a halachically viable *minhag*, even though it is against the standard halacha!

However, it appears that it would not be so clear cut to rely on this, as historically this would not seem quite correct; there never was any prevalent “universal *minhag*”. The reason why people in Russia were lenient is not the same reason why others were lenient in Poland. For example, the *Aruch Hashulchan* and *Mishnah Berurah* (ibid.) both stated that there is no *sfeik sfeika* (compounded doubt – a.k.a. the *Rema’s hetter*) to rely upon in Russia where the farmers were unable to plant grain before *Pesach* due to the frozen ground, and had to rely on an alternative *hetter*; whereas *poskim* from Eastern Europe felt that in their periphery there was always a *safek* as to the grain’s status (not clearly *chodosh* or *yoshon*). Some places held according to the *Bach’s hetter*, others relied on the *Taz’s* and others on the *Magen Avraham’s*. So even though the end result was that many throughout Europe and Russia were indeed lenient in this manner, it does not seem compelling to say that all came from the same source, that everyone relied on the same “*minhag*”. Indeed, even the *Sdei Chemed* himself, a prime proponent of leniently classifying eating *chodosh* in *chutz la’aretz* as a “*minhag hakadmonim*”, nonetheless concludes that “anyone who fears Hashem should be stringent like the *Rif*, *Rambam*, *Rosh*, and the *Baalei Tosafot*”.⁴²

R. Moshe Sternbuch⁴³ addresses this issue and writes that

42. Similarly, *Shlah* (Shaar HaOtiyot, Kedushat Ha’achilah 17; cited briefly by the *Chok Yaakov* ibid.) bemoaned that many do not keep the mitzvah of *chodosh* in *chutz la’aretz* and commanded his children to be extremely vigilant with this mitzvah. Likewise, R. Yaakov of Lisa (a.k.a. the *Netivot Hamishpat* and *Chavat Da’at*) in his ethical will printed at the end of his *Derech Hachaim*, did the same, exhorting his children not to simply rely upon the lenient rulings of the *Acharonim*, that were given to justify the lenient custom.

43. *Teshuvot V’Hanhagot* 1:655. This concern is also echoed by other Rabbanim; for example, see *Gidulei Chodosh* by R. Shmuel Eliezer Stern (*Shevivei Aish* 1:29). This author has heard similar declarations in the name

"in our times, in places where there is no great difficulty to obtain *yoshon* flour, it is a strong prohibition to denigrate the ruling of *Shulchan Aruch* and *Gedolei Haposkim* that maintain that *chodosh* produce is prohibited." He continues that if it is easily obtainable, how can one rely on the *Poskim* who were only trying to find a merit for the Jewish people in times of extenuating circumstances? He maintains that if at all possible, it is obvious that one should not eat *chodosh* products.

Sof Davar Hakol Nishma...

In the final analysis, between the many rationales and differing authorities, there most definitely seems to be what to rely upon to permit partaking of *chodosh* products, and especially in places where *yoshon* flour is not readily available. However, what remains to be seen is the reason for the widespread use of eating *chodosh* products in *chutz la'aretz* nowadays in places where *yoshon* flour is easily obtainable.⁴⁴

of R. Yisrael Belsky and the Karlsruher Rav, R. Yechezkel Roth. See also R. Mordechai Eliyahu's *Darchei Halacha* glosses to the *Kitzur Shulchan Aruch* 172:1 who simply states that "we hold that *chodosh* is prohibited from the Torah, both in *Eretz Yisrael* and *chutz la'aretz*, whether the grain is from a Jew or non-Jew".

My father, renowned *kashrut* expert Rabbi Manish Spitz, a *talmid* of R. Aharon Soloveitchik (who was extremely particular regarding *yoshon*) related to me that the real starting point in America for *chodosh* issues was the Russian Wheat Deal of 1972. Until then, the United States had a major surplus of wheat, and therefore all flour used was older flour and thereby *yoshon*. But with the commencement of the wheat act (a.k.a. 'The Great Grain Robbery'; as U.S. grain prices shot up) the U.S. sent the surplus (*yoshon*) wheat to the U.S.S.R., and used the more recent wheat (*chodosh*) for themselves. That's when *chodosh* became a real problematic issue in America. It has been surmised that perhaps it is due to this somewhat recent application of this issue in America, that has resulted in the public's general non-awareness.

44. This author has heard from a certain esteemed Rabbinic personality who requested not to be named, that there are those who posit that since *yoshon* flour is older, it likely has a higher insect infestation rate than *chodosh* flour, and especially if it is not stored properly. Therefore, they maintain that it is preferable to eat *chodosh* products, which with all the *heterim* involved is at worst a questionable prohibition, as opposed to eating *yoshon* which has a

Even with the many reasons and logic given to find excuses, it must be stressed that the majority of *poskim* disagreed with each and every one of them. That said, although *Mishnah Berurah*⁴⁵ wrote extensively exhorting all to try to be stringent in this matter to the fullest of their abilities, he declared that one may not object to someone who is lenient, as that fellow does have what to rely upon, a *hetter* which some label a “universal *minhag*”.

greater chance of unwittingly eating a bug and thereby transgressing several definite Biblical prohibitions.

45. *Mishnah Berurah* (489:45, and *Biur Halacha* s.v. *v'af*). Even so, as related in *sefer Dugma M'Darchei Avi* (pg. 29), it is known that the *Chafetz Chaim* himself did not rely on any of the *hetterim* and did not partake of *chodosh* grain or *chodosh* beer. Likewise, it is said that R. Moshe Feinstein, in line with the reasoning of *Mishnah Berurah*, was very scrupulous about this and made sure to have at least *yoshon* oats and barley, since it was much easier to observe *yoshon* with them than with wheat. R. Yaakov Kamenetsky (*Emet L'Yaakov* on *Shulchan Aruch* O.C. 489, footnote 461) ruled similarly, that nonetheless one should be stringent with barley. See also *Iggerot Moshe* (Y.D. 4:46) where although there is what to rely upon, he maintains that still one should try to ascertain where to purchase *yoshon* flour, as it is still indeed preferable.

The author wishes to thank his father Rabbi Manish Spitz, for his assistance with all things Yoshon. Thanks are also due to Rabbi Yoseph Herman, for being on the forefront of spreading Yoshon awareness in his annual Guide to Chodosh, and to Rabbi Yirmiyohu Kaganoff, as his relevant article was the impetus for my interest and research on this topic.

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