

“You Can’t Milk a Chicken! But God Said So:”

The Chicken Parmesan Dilemma
as a Paradigm for Understanding the Rabbinic Method
and Assessing its Modern Validity

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Thesis Digest:

According to Jewish law, Chicken Parmesan is not kosher. The separation of milk and meat, a hallmark of keeping kosher, is based on the Biblical phrase, “You shall not cook a kid in the milk of its mother.” The question then arises as to why this applies to chicken, or any fowl, since they have no mother’s milk. This thesis will trace the development of the laws of fowl and dairy in an attempt to understand the process of Jewish law.

The study begins with a brief summary of the system of Jewish law (*halakhah*). From there, the Biblical commandment is analyzed and supported so as to be able to take the Torah at its word. This is a necessity when operating in the rabbinic system. Next, the study moves on to examine the various Talmudic debates regarding the role of fowl within the laws of milk and meat. This examination reveals that the rabbis were conflicted in their approach to determining the status of fowl (meat or not meat) as well as how to apply the laws of milk and meat to fowl. After the Talmudic debates, the major post-Talmudic codes will be investigated, showing that the debate over fowl never found solid resolution. The emphasis will then shift to an assessment of *marit ayin* (the appearance of the eye), one of the popular reasons given for prohibiting the eating of fowl and dairy. Concluding the formal study of the laws will be a presentation of the ways in which Jewish law is flexible and able to conform to the needs of modern times.

This thesis will end with a proposed solution to the Chicken Parmesan dilemma, as well as with an assessment of the validity and applicability of Jewish law in modern life.

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Introduction:

“You Can’t Milk a Chicken! But God Said So:” Setting Forth the Dilemma

During high school, as my friend Scott and I became more involved in youth group, and as our enthusiasm about Judaism grew, we began to discuss many of the finer aspects of our tradition. The more we learned, the more our perspectives towards Judaism and Jewish practice diverged. Throughout our high school and college years, while Scott grew more traditional in his beliefs and practices, I grew more attuned to the contradictions between religious practice and modern thought. This divergence spurred many conversations concerning various aspects of Jewish life. One of the discussions that we would always find ourselves engaged in was that regarding chicken and cheese: what I have termed “The Chicken Parmesan Dilemma.”

When discussing the laws of kashrut and how Jews keep kosher, one of the first prohibitions that is generally taught is that of mixing milk and meat, *basar b’chalav*. We teach that this means that you cannot have a cheeseburger, drink milk with a steak, etc. When asked why Jews cannot eat Chicken Parmesan, we quite often respond that this is due to the prohibition of mixing milk and meat. As this prohibition is studied further, we are taught that the mixing of milk and meat is forbidden due to the repetition of the phrase, “You shall not cook a kid in its mother’s milk.”

I would constantly challenge my friend Scott by asking him, “Why don’t you eat Chicken Parmesan? You can’t milk a chicken, so there is no way to cook a chicken in its mother’s milk!” Scott’s response was always “That’s just the way it is; you can’t mix milk and meat. God said so!” Neither of us was ever satisfied with that answer, and,

consequently, I made it a goal of mine to discover the real reasoning behind this seemingly irrational law.

In reality, no Jewish legal issue is simple or clear-cut, resulting in the fact that neither the phrase “You can’t milk a chicken,” nor the phrase “God said so,” is powerful enough proof to sway a decision. Rather, a great deal of rabbinic discourse is aimed at solving the dilemma created when the two ideas are seemingly at odds with each other. As we shall see in the following pages, the ancient rabbis discussed the matter of fowl and dairy with similar viewpoints and similar intensity.

While only one of the rabbis was concerned with the fact that birds do not lactate, the other phrase, “God said so,” was of vital concern to the legal discourse of the rabbis. The rabbis’ pedagogue was that the Torah was revealed to us in its entirety at Sinai and that the role of the rabbi is to elucidate Torah’s meaning and teaching.¹ Their role as interpreters of Torah led the rabbis to ask primarily which “kids” were intended by the scriptural passage, and then, which others were forbidden by rabbinic decree. This process led to a debate of how to relate the various types of animal meat to the Biblical law, and with what level of stringency to apply to those relations. As our study will show, the rabbinic enterprise of deciphering the role of fowl in the laws of milk and meat was an intricate and convoluted task. Further, we will see that this task was not merely confined to the ancient rabbis, but it was also carried through to the medieval period, and, to a degree, can still be raised as an issue today. The regulations regarding fowl and dairy compose an anomaly within the already anomalous rabbinic category of *basar b’chalav*.

¹ Schechter, Solomon. “Some Aspects of Rabbinic Theology: The ‘Law.’” in *Jewish Quarterly Review*. 8,1 (1895). p. 15

Before engaging in the study, I find it necessary to discuss why such an analysis is important. The institution of kashrut is a reality that all Jews must relate to on a variety of levels. Regardless of whether or not one keeps kosher, the dietary laws are an integral and inseparable part of the Jewish people. Even by actively not keeping kosher, one interacts with the laws through making the choice to reject them. Determining the level of adherence to the laws of kashrut is an active part of establishing one's Jewish identity.

Take, for example, the Jewish community in Denmark. In a study published in 1999,² Andrew Buckser reveals the realities of Jewish identity through the lens of keeping kosher. Buckser acknowledges the changing role of ethnic food in the modern day, especially in the West, while also acknowledging that a hallmark of modernity is related to the concern for individual identity. "Individuals must define for themselves what it means to be a member of a particular group," he states, but then goes on to assert that this individuality creates an intriguing role in determining relationships with an ethnicity.³ For the Jews, individual practice is a personal manifestation of their connection to the tradition.

Buckser describes the Danish Jews as a diverse community that faces the reality of blurred boundaries surrounding identity and community. With high intermarriage rates, and even higher rates of integration into the greater Danish community, the dietary laws provide a paradigm for assessing Jewish identity among the Danes. Instead of becoming irrelevant, kashrut, Buckser says, is one of the most important vehicles for expressing contemporary Jewish identity.⁴ Kosher meat is expensive and inconvenient to

² Buckser, Andrew. "Keeping Kosher: Eating and social identity among the Jews of Denmark", in *Ethnology* 38,3 (1999). pp. 191-209

³ *ibid* 192

⁴ *ibid* 193

come by, as is the reality of purchasing and using separate dishes and utensils. Most public functions defer to Danish dietary customs, which are highlighted by pork dishes and dishes that mix milk and meat. Just as anti-Semitism is almost nonexistent in Denmark, so too is public awareness of the extent of keeping kosher. Whether it is in the home, within the Jewish community, or in the secular, “non-Jewish” contexts of neighborly and state affairs, the Jews of Denmark are constantly faced with the necessity of assessing their own policy with regard to kashrut. The Danish Jews have to decide between being active members of the community, or being singled out at events. Buckser describes a variety of ways the Jews of Denmark go about this balancing act, either by rejecting kashrut entirely, creating a bifurcated system of keeping kosher at home and being lax in public, or maintaining “stealth” kashrut by claiming to be vegetarians or to have allergies in public, while still following a rather strict form of eating.⁵ Either way the Danish Jews choose to practice, Buckser reminds us, “one cannot evade the necessity of choosing.”⁶ Due to this necessity, he labels the act of choosing as “an affirmation of the relevance of Jewish law to personal life.”⁷ Buckser thereby confirms the centrality and importance of the dietary laws, even for the most non-adherent of Jews.

In the interest of full disclosure, I must admit that whether or not Chicken Parmesan is or should be kosher has no bearing on whether or not I will eat it. I personally do not keep kosher, and, therefore, this study should not be seen as a personal justification for a specific practice. I, too, have a personal relationship to kashrut, grounded in memories of my grandma’s kitchen, and manifested in my insistence that a corned beef sandwich tastes better when it comes from a kosher deli.

⁵ *ibid* 195-198

⁶ *ibid* 197

⁷ *ibid* 195

This study should rather be viewed initially as an elucidation of the various traditions regarding the place of fowl in the corpus of laws regarding *basar b'chalav*: milk and meat. Secondly this study should be seen as a presentation of the flexible nature of Jewish law. Rooted in the past, the methodology of Jewish law allows it to relate to current conditions.⁸ As such, we will see that Jewish law has changed as a “result of deeper inquiry into and reinterpretation of older texts, employing the rules and principles—themselves enshrined in [Jewish law]—by which the Torah is expounded.”⁹ Finally, our own inquiry will lead to a proposed argument for permitting the eating of a mixture comprised of fowl and dairy.

For those who keep kosher, this study can serve as either a support or a challenge to their beliefs and practices regarding kashrut. For those who do not keep kosher, this work might also serve as challenge or support, as well as possibly an encouragement to explore the laws or practices of Judaism in greater depth. Regardless of one’s level of adherence to the laws, let us keep in mind the notion put forward by Howard Eilberg Schwartz who “take[s] as axiomatic that individuals are not aware of all the interconnectors between their practices and the various strands of thought that exist in their culture.”¹⁰ This work will certainly serve to illustrate a variety of these strands of thought, leading, most importantly, towards an understanding of the rabbinic method, as well as the sustained effort, of Jewish law.

We will begin first by briefly summarizing the system of *halakhah*, Jewish law. Then, the study will move on to analyzing the Biblical commandment prohibiting milk

⁸ Zemer, Moshe. *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law*. Woodstock, VT: Jewish Lights Publishing. 1999 p. 38

⁹ *ibid* 39-40

¹⁰ Kraemer, David. *Jewish Eating and Identity Through the Ages*. New York: Routledge, 2007. p.19, cf. note 12

and meat. The purpose of that analysis will be to assess the plausibility of taking the Torah at its word. This does not mean necessarily as the word of God, but rather the notion that there was an issue with the mixing of flesh and dairy in the ancient Israelite community. Only by accepting the credibility of the scriptural text can we then proceed into a discussion of the rabbinic treatment of the issue of milk and meat.

After affirming the Torah's statements, our study will continue on to a "chronological" study of the rabbinic sources. As dating is difficult for the composition of the various statements by the sages, we will work in order of compilations, first analyzing the relevant passages in the Mishnah, and then moving to the later material in the Talmud. From there we will study a selection of the post-Talmudic law codes and commentaries. The study will then focus on one specific rabbinic device that has become a popular explanation as to why fowl and dairy are prohibited. From there, we will closely review the notion of flexibility in the legal system, leading to the proposal of a possible solution of the Chicken Parmesan Dilemma.

Chapter 1:

The Halakhic System (Abridged)

The Judaism of today, in all of its various forms, is truly a product of the rabbinical system developed after the fall of Jerusalem and the destruction of the Second Temple by the Romans in 70 CE. With the loss of the Temple came the loss of the priestly sacrificial system, leaving a vacuous hole in the regulation and administration of Jewish religious life. The scholars and sages who came to be known as rabbis would fill this hole.

In the midst of foreign rule, the rabbis took upon themselves the task of revising, renewing, and innovating Jewish practices to fulfill the religious needs of their fellow Jews. Religious life had, until that point, been centered around the sacrificial cult. The inability to perform those sacrifices, therefore, required a shift in thought and procedure that would yield what we know today as prayer. Yet prayer was not the only religious innovation of the rabbis. They also had to find a way to keep the Torah¹ prevalent in the minds of the scattered Jews. As the rabbis had seemingly assumed the role of leaders of the communities, they also charged themselves to undertake the role of autonomous secular governance within the constraints of foreign rule. The combination of the need to fulfill both the religious and secular regulation, as well as the desire to keep the Torah as a central source, led to the rabbis development of *halakhah*, “the way.”

¹ For the purposes of our study, we will make no claim or quantification regarding the dating and nature of the Torah to Sinai, exilic times, post-exilic times, or any one of the theories of its authorship. We will simply acknowledge that the Torah was a crucial source that had an established role within the Jewish community.

Halakhah is the normative system of Jewish internal regulation that combines that which we would call both the religious and the secular spheres into one set of divinely accountable “laws.”² Professor Jacob Neusner provides a concise and comprehensive description of *halakhah*:

Judaism makes its authoritative statements through the medium of normative rules of conduct, laws that instruct the faithful on the sanctification of everyday life. These are called Halakhah, the pattern or way things are to be done, and represent the authoritative system of behavior and belief for Judaism...Hence any account of Judaism will pay close attention to its norms of behavior, as much as to its norms of belief.³

The “norms of behavior” that developed out of the rabbinic system are our primary focus for this study. In particular, we will concentrate on the rabbinic eating practices that were innovated and developed slowly over generations.⁴ In order to study this development in its various stages, we must first explore the processes and methodologies employed by the rabbis.

Let us begin with a description of who the early rabbis were and where they came from. The beginnings of the ancient rabbinate are difficult to pinpoint. Tradition dates

² We use the term “law” to connote that *halakhah* cannot precisely be defined by our common, secular notions of law. Rather, we use “law” more in the sense of ‘common law,’ that is to say a set of common customs that, over time, became a fixed corpus requiring adherence.

³ Neusner, Jacob. *The Halakhah: Historical and Religious Perspectives*. Boston: Brill, 2002. p. vii.

⁴ Kraemer 46

Hillel and his contemporary Shammai⁵ to the late First Century BCE. There are also a variety of *zugot*, pairs of scholars who are also traditionally thought to have been active while the Temple was still standing. One opinion is that these pairs, and their future heirs, came from the circle of scribes whose primary function was to study and interpret holy writings.⁶ These scribes were not ‘rabbis’ per say, but they do allow us to discuss the general theory of where the rabbis came from. The rabbis are also seen as having developed from the circles of scribes and of Pharisees of the late Second Temple period. As heirs to the Pharisees, the rabbis would have begun their work from the policy of extending holiness beyond the walls of the Temple and out of the sole hands of the priests and Levites.⁷ As part of the Pharisaic tradition, the rabbis would not have had complete knowledge of the complex rituals in which the Temple cult engaged.⁸ Yet, as we shall see later on, a great deal of the rabbinic material emphasizes laws related to Temple service, most importantly, in the realm of priestly purity.

With a grasp of the roots of the rabbis, we are still left with the question of when the rabbinic period really began. A common historical marker that is chosen to signal the beginning of the rabbinic period is the destruction of the Temple and of Jerusalem, and the subsequent establishment of the rabbinic academy at Yavne. Tradition tells the story that as the Romans were sacking Jerusalem, R. Yochanan b. Zakkai’s disciples smuggled

⁵ Hillel and Shammai are famous for their debates, Hillel generally ruling more leniently on an issue and Shammai more stringently. The same characteristics applied to their disciples, Beit Hillel and Beit Shammai. In matters of halakhic concern, the rulings of Hillel or Beit Hillel are generally followed.

⁶ Goldenberg, Robert. “Talmud.” in *Back to the Sources: Reading the Classic Jewish Texts*. Barry W. Holtz, ed. New York: Simon and Schuster, 1984. p. 130

⁷ *ibid*

⁸ Neusner 89

him out of Jerusalem in a casket as if he were dead.⁹ Zakkai struck a deal with the Roman governor Vespasian, allowing the Jews to live and study in the Galilee. He would then come to found the rabbinic academy in the city of Yavne. This story has a dubious factual and historical basis, but nonetheless serves as a distinctive point to define as the beginning of the rabbinic period.

Our task now shifts towards discussing the nature of the rabbis' work; their methodology, theology, and praxis. The rabbinic academies followed a particular process of study based on masters and disciples. Song of Songs Rabbah, a later rabbinic source, provides a brief description of the basic activity that took place in the academies:

When the persecutions of Hadrian were over, our Sages gathered at Usha: R. Judah, and R. Nehemiah, and R. Meir, and R. Yose, and R. Simeon ben Yohai, and R. Eliezer the son of R. Yose the Galilean, and R. Eliezer ben Jacob. They sent a message to the elders of the Galilee, saying, 'Let whoever has learned come and teach, and whoever has not learned come and learn.' They gathered together, learned and taught, and did as the times required.¹⁰

While this account describes to us the idea of communal learning, and the gaining of disciples, we are still left wondering about what exactly the teachers had learned, how they would teach it, and what doing "as the times required" meant.

As we mentioned already, the rabbis took to the task of creating regulations for the Jews' secular lives. These regulations took on the form of common-law and were linked to, if not rooted in, prior Jewish tradition. The "times," therefore, required both

⁹ B. Gittin 56a

¹⁰ Song of Songs Rabbah 2:16 (as translated in Goldenberg 129)

that Jewish rituals and traditions be reshaped to fit the new reality of life, as well as that the new realities of life be interpreted as relating to life as a Jew. The combination of these two reshaped realities allowed the rabbis to turn life into an “inexhaustible” set of possibilities for sanctifying life by fulfilling divine law.¹¹ One of the hallmarks of the rabbinic system is how the rabbis were able to assert a divine law where there had previously not been one. Said in a different way, the process by which the rabbis crafted *halakhah* was a process of manipulating the written word of the Torah to apply to situations beyond the original context, as well as through the usage of a second, Oral Torah, of which the rabbis were qualified students and teachers. The Oral Torah, therefore, contains all of the knowledge of God’s will that is not derived from the text of the written Torah.

The purview of the Oral Torah was, therefore, meant both as a supplement to aid in interpreting the text of the written Torah¹² as well as handling matters that find no consideration in the laws and stories of the written Torah. We see the Oral Torah in two formats; *midrash* and *mishnah*. *Midrash*, which can be translated as “searching the scripture,” is a deductive rabbinic method of interpreting scripture¹³ which is divided into two categories. One usage of *midrash* is for *aggadah*, simply translated as storytelling. Aggadic *midrash* uses either the stories of the Bible itself, or a variety of other rabbinic devices to convey a message of God’s plan for a just world.¹⁴ The other usage is to determine *halakhah*. Halakhic *midrash* will either draw a set of laws out from the text, or

¹¹ Goldenberg 130

¹² For the rabbis, Torah included both written and oral, as well as all of the other scriptural books outside of the Pentateuch.

¹³ Gordis, Robert. *The Dynamics of Judaism: A Study in Jewish Law*. Bloomington, IN: Indiana University Press, 1990. pp. 86-87

¹⁴ Neusner 74

will use the text to support an existing behavioral norm. The second form in which we see the Oral Torah conveyed is through the medium of *mishnah*. A *mishnah* is a generally stated law, usually without scriptural support or, for that matter, any other explanation. Translated as “study” or “repeating,” *mishnah* is an inductive method of instruction, in which the laws derive from “life-situations.”¹⁵ These laws are viewed as authoritative as they are attributed to at least one, and often more than one, rabbi. Since the authority of these laws comes from the same people who are the authority in matters of religious concern, a *mishnah*, even if it is regarding a secular matter, takes on a religious tone. In these various ways, the rabbis merged studiousness with lawfulness,¹⁶ combining all aspects of Jewish life, secular and religious, into a unified and sanctified system.

Before moving on to the formal rabbinic compositions, we must pause to discuss the historical reality of the rabbis. Modern scholarship has shown that rabbis originally operated in small, insular circles. As such, in their early incarnation, they were quite ineffective at creating a sweeping halakhic overhaul of Jewish life.¹⁷ Further, the concept of “Jewish life” was a fluid one. The Galilee was a hub for populations of foreign traders, each residing for varying amounts of time, and each bringing with him distinct cultures, in addition to the Hellenistic-Roman culture of the ruling power.¹⁸ As the most prevalent written record of Jews in the second and third centuries CE, the rabbinic corpus does not provide a reliable source for learning about the lives of the ordinary Jew in the period. We are left to either take the rabbinic laws at their word as being the true norm or to

¹⁵ Gordis 87

¹⁶ Goldenberg 130-131

¹⁷ Kraemer 7

¹⁸ *ibid* 39-40

doubt their relevance to anyone outside of the rabbinic circles.¹⁹ The Jews of the time, exposed to the variety of people and cultures, were certainly in a state of flux. That the rabbinic system eventually emerged as the normative Judaism attests to its success. However, we must be ever cognizant of the dubious historical reality of the early rabbinic times.

The concept of historical reality is one that takes on an entirely new dimension within the rabbinic system. Neusner labels the rabbinic system as one that operates within “paradigmatic time.”²⁰ This concept refers to the preference of the rabbis towards a non-linear approach to time and events. Whereas modern scholarship tends to view certain events within their historical and cultural context, the rabbis see an event as fitting into a paradigm of other, similar events;²¹ a system of associative logic. In this system, time is taken as a non-factor. It does not matter for the rabbis when something occurred; rather, just that it did. Even the facts of an event having historically taken place, or of an accurate report of that event, is a non-issue as well. We saw this earlier in the assertion that the rabbis had never fully experienced the rituals of the sacrificial cult. This knowledge gap did not stop the rabbis from expounding multiple laws related to Temple worship and sacrifice. In the larger picture, this was not a problem as these laws were completely irrelevant to life without a Temple.²² For the rabbinic paradigm, “shared memory (fabricated or otherwise) forms the medium for the social message.”²³ That collective memory belies an air of eternality for an episode, regardless of historical fact. The rabbis then “subverted” the historical nature of both scripture and events, by

¹⁹ *ibid* 40

²⁰ Neusner 116

²¹ *ibid* 129-130

²² *ibid* 88

²³ *ibid* 127

employing instead their paradigmatic thinking.²⁴ The rabbinic compositions are organized by theme and idea rather than by chronology. For example, the British Empire would not be included in a chapter about the 19th and 20th centuries, but rather a chapter devoted to world powers since “great empires do not make history; they fit a pattern.”²⁵ This idea can be summarized in two sentences by Neusner, “Israel lives in accord with an enduring paradigm that knows neither past, present, nor future... To be ‘Israel’ means to conform to a pattern of actions and attitudes set forth for all time and without distinction in time.”²⁶ The *halakhah*, therefore, is not only a set of overarching and far reaching rules, but is also intended to exist outside of time. Further, the halakhic system is one based upon the distinct hermenutical methods²⁷ of the small group of Galilean rabbis who claimed that their authority to proclaim laws was based on their assertion that “their interpretations were the new and only way in which God spoke to humankind.”²⁸ This intention of creating a system separate from, yet applicable to, world events, crafted out of the paradigmatic thinking of the rabbis, yielded the vast literature and compilations of Jewish legal material that is still studied and practiced today.

The Mishnah, a compendium of laws of the earliest rabbis, is the founding compilation of the vast category of rabbinic and, therefore, halakhic literature. Attributed to R. Judah haNasi circa 200CE, the Mishnah is a collection of various *mishnayot*²⁹ speaking to a wide range of subjects. The Mishnah is based upon the teachings of the *tannaim* (plural of *tanna*), who were the first set of rabbis to expound laws within the

²⁴ *ibid* 153

²⁵ *ibid* 129

²⁶ *Ibid* 127-128

²⁷ These methods will be described in the following chapters as needed.

²⁸ Dorff, Elliot N. *For the Love of God and People: A Philosophy of Jewish Law*. Philadelphia: The Jewish Publication Society, 2007. p. 193

²⁹ Plural of *mishnah*

land of Israel. The compilation is divided into six sections, each called a *seder* (order), with each *seder* being divided into smaller units called a *maseket* (tractate). Spanning a wide range of topics from priestly purity, to agriculture, to dietary laws, and to all other laws in between, the Mishnah looks like a Jewish law code, though many scholars do not believe that to be the original intention. For example, Robert Goldenberg notices that the work is “liberally sprinkled with non legal materials (stories, interpretations of scripture, and so on)” while also pointing out the variety of unresolved legal issues.³⁰ Goldenberg deduces from this observation that the Mishnah might have been meant as a teaching text, the minimal amount of rabbinic law and argument that a student had to know.³¹ While we will never be quite sure what the intent of the work was, we do know that the Mishnah became the basis for future works of Jewish legal concern.

The final construct and content of R. Judah haNasi’s Mishnah raises many questions and leaves other questions unanswered. If the Mishnah is to be taken as a law code, the question of which rules and which rabbis to adhere to remains a mystery. We are also left to ponder why one manner of interpretation was followed instead of another. The Mishnah also leaves open the questions regarding the decision-making process, support for a ruling, the prevalence of adherence, and detailed descriptions of many of the practices.

These questions, among many others, were to become the subject of debate and interpretation of a second layer of rabbis, the *Amoraim*. An *amora* (expounder),³² is one of the various rabbis responsible for taking up the study of Torah, in its multifaceted

³⁰ Goldenberg 131

³¹ *ibid*

³² Gordis 88

form, between the close of The Mishnah and the final redaction of the Talmud.³³ The Talmud is a misnomer, as there are really two compositions known as Talmud: the Palestinian Talmud (Talmud Yerushalmi) and the Babylonian Talmud (Talmud Bavli). The Yerushalmi was composed and compiled by the rabbinic academies in the land of Israel, and focuses more on agriculture and legal matters connected with living on God's holy land. It is, as Goldenberg describes it, a jumble of textual elucidation; a loose commentary on select material from the Mishnah, replete with multiple parallel passages, duplicates, and contradictions.³⁴ The Bavli, on the other hand, is a more complete and refined work, with a broader scope of concerns. When we speak of "The Talmud" without labeling which one we are referring to, the accepted practice is that the unlabeled Talmud refers to the Bavli. Further, to be more accurate, the commentary of the *Amoraim* within both Talmuds is known as *gemara*, further study and teaching.

The Talmud, which literally means learning or teaching, is a commentary and explication of R. Judah haNasi's Mishnah. The task of the *Amoraim* in studying and interpreting the Mishnah was to clarify obscure passages, extract general rules, expand the record of proofs and precedents, and apply those ordinances to their daily lives.³⁵ Further, the *Amoraim* were not seeking to contradict the opinions of the *Tannaim* as expressed in the Mishnah. As a rule, "an Amora does not take issue with a Tanna in matters of *halakhah* unless he can find support for his opinion in a statement by another Tanna."³⁶ When an Amora seeks support for a position, or seeks to take issue with one *tanna*, he looks to other Tannaitic material. Quite often, however, the sufficient material

³³ circa 200-500CE

³⁴ Goldenberg 135

³⁵ *ibid*

³⁶ Jacobs, Louis. *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law*. New York: Oxford University Press, 1984. p. 25

does not appear in the Mishnah. In these cases, the *amora* will turn to a *mishnah* that was not included by R. Judah haNasi in his compilation. Each *mishnah* external to R. Judah haNasi's Mishnah is called a *baraita*. Many *baraitaot*³⁷ were compiled into a separate volume of tannaitic material called the Tosefta. As a collection, the Tosefta mirrors the organization of orders, tractates, and chapters as found in R. Judah haNasi's Mishnah. These same orders, tractates, and chapters form the organizational structure of the Talmud as well.

Just as the question was posed of the Mishnah, we must also discuss whether or not the Talmud is to be taken as a law code. With all of the disagreements and conflicting opinions prevalent in the Talmud, as well as the multitude of episodic anecdotes, the idea of labeling the work as a code is dubious at best. With “much evidence of the use of contrivance and literary device,”³⁸ the *Amoraim* discuss and debate, trying to clarify relationships between previous rabbis' opinions and those of their contemporaries. This same task is mirrored by the commentaries present on the Talmudic page itself. The 11th century commentator from France, Rabbi Shlomo Yitzhaki (Rashi) presents clarifications of the Talmudic passages based on a wide variety of Biblical and rabbinic sources. His work is also aimed at clarifying the *halakhah* while presenting actual practices.³⁹ Rashi's disciples and sons-in-law, the *Tosafot*, also continue this trend, as well as adding in comments based on the Ashkenazic halakhic routine of their day along with a degree of “critical analysis.”⁴⁰ Yet, as the chief concern of the Talmud is preserving a clear and organized record of earlier generations' opinions in a clear and consistent manner, the

³⁷ Plural of *baraita*

³⁸ Jacobs 27

³⁹ Lewittes, Mendell. *Jewish Law: An Introduction*. Northvale, NJ: Jason Aronson inc., 1994. p. 123

⁴⁰ *ibid* 124-126

work is not directed at “actually choosing one operative rule.”⁴¹ This task would be left up to later generations.

These later halakhists are divided into three generations: *Geonim*, *Rishonim*, and *Achronim*. The Geonic period, which began approximately with the close of the Talmudic period in the 7th century, lasted until the death of Hai Gaon in the early 11th century.⁴² The *Geonim* were the heads of the academies of Sura and Pumpedita in Babylonia. As the masters of these academies, all questions regarding *halakhah*, and all concern for teaching and disseminating halakhic knowledge ultimately fell upon them. As such, they are known for creating two distinct forms of halakhic literature; responsa and halakhic digests.

When a ruling rabbi or other chief figure from an outlying town did not know how to rule on a halakhic matter, the question (*she’elah*) would be sent to the *Gaon*. The *Gaon*, in turn, would consult all of the halakhic texts and would then craft an answer (*teshuva*) that would be sent back to the town. This exchange of question and answer (*she’ela u’teshuva*) is known as responsa literature, and is a practice that has been engaged in up to the present day. The various responsa from the past and present have been fundamental to the development of halakhic practices.

In their concern for teaching *halakhah*, the *Geonim* also produced halakhic digests. These condensed forms of the *halakhah* would provide easier access to the rulings of the rabbis as well as the earlier *Geonim*. However, the digests were met with a certain degree of opposition. Critics insinuated that digests were a “diminution of

⁴¹ Goldenberg 156

⁴² Lewittes 130

Torah,”⁴³ since Torah, most specifically the Talmud when discussing *halakhah*, also contains narrative, folklore, gossip, and certain theological speculations.⁴⁴ Further, there was always a fear that a digest, or later a code, would present a threat to tradition. The fear was that either a code would freeze a law, or also that it would replace the need to study the vast corpus of Jewish texts.⁴⁵ This criticism of condensing traditional sources would continue into, though it would not hinder, the next generation of halakhists.

After the Geonic period was the period of the *Rishonim*, between the 11th and 16th centuries. The period of the *Rishonim* began with the closing of the academies, and, therefore, the elimination of the official position of *Gaon* as it once was. The role of the *Gaon* was not replaced by institutions or new academies, but rather by individual scholars who themselves had been granted a degree of authority.⁴⁶ The *Rishonim* were the heirs to the Geonic role of teaching *halakhah* and rendering halakhic rulings. However, their context had changed. The *Rishonim* were no longer in the academies, and were no longer bound to a distinct area. The *Rishonim* were spread out amongst Northern Africa, Spain, and the Northern and Western European communities. In these contexts, the Jews of various lands lived under governments that granted judicial autonomy to their small communities. The role of the halakhist, therefore, was at the forefront of daily life, rendering decisions that applied to the governance of towns.⁴⁷ In this context, the need for a digest or code of halakhic rulings became ever more apparent and necessary.

⁴³ *ibid* 117

⁴⁴ Goldenberg 170-171

⁴⁵ *ibid* 163

⁴⁶ Lewittes 130

⁴⁷ Shochetman, Eliav. “Jewish Law in Spain and the Halakhic Activity of its Scholars Before 1300.” in *An Introduction to the History and Sources of Jewish Law*. N.S Hecht, B.S. Jackson, S.M. Passamanek, D. Piattelli, and A.M. Rabello, eds. Oxford: Clarendon Press, 1996. p. 272

These codes came in two distinct forms; *sifre halakhot* or *sifre pesakim*. *Sifre halakhot*, the books of *halakhah*, consisted of analyses of the sources and development of the laws, leading to a declaration of what the proper *halakhah* was. Books of rulings, *sifre pesakim*, present the final ruling of laws without any study of the sources.⁴⁸ While there were a myriad of *Rishonim* at work during the period, we will study two of the major codes, as well as reference other works of different *Rishonim*. In particular, we will focus on the codes of R. Isaac al Fasi (Rif) and R. Moses ben Maimon (Maimonides, Rambam). Also, we will focus on the halakhic work of one of the later *Rishonim*, R. Jacob ben Asher, the son of another one of the *Rishonim*, Rabbeinu Asher (Rosh). R. Jacob ben Asher created a hybrid work,⁴⁹ the Tur. In this work he abandoned the idea of quoting Talmudic sources directly, but also did not simply posit anonymous halakhic rulings. His work also serves as a compendium of the bulk of the rulings of the *Rishonim*.⁵⁰

Marking the transition between the period of the *Rishonim* and the *Achronim* (post 16th century) is R. Josef Karo. Karo offers two great works of halakhic literature that we will study. The first is his extensive commentary on the Tur of R. Jacob ben Asher, the Beit Yosef, recognized as Karo's "most erudite and intricate contribution" to the field of Jewish law.⁵¹ Feeling the need to "spread a feast of information" on practical law,⁵² Karo created for the laymen a handy comprehensive digest version⁵³ of his work called the Shulchan Arukh, the set table. One of Karo's contemporaries, R. Moshe Isserles, also

⁴⁸ *ibid* 276-277

⁴⁹ *ibid* 279

⁵⁰ Lewittes 146

⁵¹ Passamaneck, Stephen M. "Toward Sunrise In the East 1300-1565." in *An Introduction to the History and Sources of Jewish Law*. N.S Hecht, B.S. Jackson, S.M. Passamaneck, D. Piattelli, and A.M. Rabello, eds. Oxford: Clarendon Press, 1996. p. 339

⁵² *ibid*

⁵³ Lewittes 152

wrote a commentary to the Tur, and, consequently, crafted his own *mapah* (tablecloth) to offer an Ashkenazic gloss within Karo's mostly Sephardic based Shulchan Arukh. The first editions of the Shulchan Arukh appeared in 1564-1565 with just Karo's words, and again in 1580 with the glosses of Isserles.⁵⁴ A century later, the complete Shulchan Arukh became the preeminent code of Jewish law,⁵⁵ a prominence that the work enjoys to our present day.

Still in the period of the *Achronim*, the *halakhah* of today is, by and large, rooted in the codified practices of the Shulchan Arukh, and there are certain stringencies to that policy. While the fear of freezing tradition has, in a way, manifested itself as reality, the *halakhah* still has an element of fluidity and the possibility to be flexible, as it had in the debates between the Talmudic rabbis. While *halakhah* generally follows the majority opinion in the Talmud, minority opinions are retained as valid halakhic principles and, at times, can be called upon for rendering new or revised rulings. Also, the customs and practical norms of the people, *minhag*, have always had a profound influence on *halakhah*. From Talmudic times through the period of the *Rishonim* and the early *Achronim*, *minhag* was an important deciding factor in halakhic ruling. *Minhag* was to serve as the default position when sages or halakhists could not come to a decision. Further, rendering a halakhic ruling contradictory to a *minhag* is a futile effort.

Throughout the Talmudic and post-Talmudic literature, the rabbis have had to identify from where the variety of laws are derived. At the core of Jewish law are the five books of the Torah, as well as the rest of scriptures. Laws that are accepted as deriving directly from scripture are called *d'oraita*, literally meaning from the Torah. These laws

⁵⁴ Passamaneck 340

⁵⁵ *ibid* 341

are privileged above all others. Transgressing a law of the Torah, traditionally, results in the divine punishment of *karet*, a shortening of life. One of the jobs of the rabbis was to ensure that Israel did not, and does not, violate these laws. Tractate Avot in the Mishnah, chapter 1, *mishnah* 1 speaks of this:

Moses recieved the Torah from Sinai and transmitted it to Joshua; and Joshua transmitted it to the elders; and the elders transmitted it to the Prophets; and the Prophets transmitted it to the men of the Great Assembly. They said three things: Be deliberate in judgment, raise up many disciples, and make a fence around the Torah.

The first two rulings of the men of the Great Assembly we have already spoken about. We have discussed how the rabbis make decisions and teach them and their method to disciples. The idea of making a fence around the Torah is the substance of the rabbinic and halakhic enterprise. Rabbis create laws in order to make that protective fence, and those laws are labeled as *d'rabbanan*, from the rabbis. Laws developed by the rabbis, even those specifically intended to protect the laws of Torah, are seen as more malleable and less severe than laws *d'oraita*.

The tension between laws *d'oraita* and those that are *d'rabbanan* characterizes the Chicken Parmesan dilemma. As we shall see in the proceeding chapters, the rabbis continuously debate the nature of the prohibition of mixing dairy products with the meat of fowl. They must decide whether or not fowl is included in the Biblical prohibition against mixing milk and meat, and then must decide on *halakhah* accordingly. However, the entire process is moot without first accepting the milk and meat commands of the

Torah as valid. Therefore, we begin our study with an analysis of the thrice-repeated phrase, “You shall not cook a kid in the milk of its mother.”

Chapter 2:

In Defense of the Biblical Prohibition

The Jewish prohibition of cooking and eating meat with milk comes from the thrice-repeated Biblical phrase, “You shall not boil a kid in the milk of its mother.” Twice in the book of Exodus and once in the book of Deuteronomy, this phrase appears tacked on to the end of a verse, seemingly out of nowhere. In both Exodus 23:19 and 34:26, the command is imbedded in an identical verse; “The best of the first fruits of the earth you shall bring to the house of the Lord your God. You shall not boil a kid in the milk of its mother.”

In the first instance, the phrase comes immediately after an exposition of the three festivals¹ that include laws prohibiting leaven from sacrifices and forbidding leftover fat the morning after the sacrifice. The second instance follows in a similar context, in the midst of Moses on Mt. Sinai writing God’s commandments. In this case, the three festivals are described in greater depth, and again the prohibitions of leaven and leftovers of sacrifices are recounted. In the midst of laws related to sacrifice, a service performed by the priests in the “house of the Lord,”² the mentioning of first fruits follows rather coherently as they too were to be brought to the “house of the Lord.”

The question that remains is how the prohibition of boiling a kid in its mother’s milk fits into this context. Referring to sacrifices in conjunction with the festival laws calls to mind meat, while the account of first fruits connotes the idea of newborns, or, more colloquially, kids. With these aspects highlighted, we can see how the kid and milk

¹ Sukkot, Pesach, and Shavuot

² The “house of the Lord,” is labeled as such, and in quotation marks as we recognize that all of these functions were meant to be done in the Temple. However, no temple had been built in the time frame during which the Torah story recounts.

phrase might have found its way into these contexts. Additionally, we know from both Biblical and rabbinic accounts that of all of the foods and other elements associated with the sacrificial system of ancient Israel, dairy had no place in those practices.³ This lack of association also provides a reason for the explicit mention of a prohibition of a kid cooked in milk.

When the kid and milk phrase appears in Deuteronomy, the context is drastically different. Whereas it had previously accompanied laws regarding the sacrificial cult, in this instance, the phrase is imbedded within the Deuteronomic re-hashing of the dietary laws. “You shall not eat any *nevelah*,⁴ give it to the stranger within your gates to eat, or you may sell it to a foreigner because you are a holy people to the Lord your God. You shall not boil a kid in the milk of its mother.” Here, the kid and milk prohibition (as we typically associate it with the Jewish diet), seems to fit quite nicely. In fact, the contents of this verse in Deuteronomy will later give the rabbis fodder for extrapolating the prohibitions of *basar b’chalav*.

For the purposes of our study, that is, a study of the tradition of *basar b’chalav*, we will focus mainly on the development of this category of Jewish law beyond the Biblical text. The rabbinic laws and extensions thereof require that the Torah be taken at its word. In our modern world, critical academic study of the Bible, prior to an analysis of rabbinic proceedings, is often a preferred exercise among scholars of Jewish religion. As the milk and meat issue is one of great concern for varying degrees of halakhically adherent Jews, as well as an issue that occupies a great percentage of halakhic thought, these three Biblical verses have come under great scrutiny from the academic world.

³ Kraemer 49

⁴ Something died of natural causes. Commonly translated as “died of itself.”

While it is neither our charge to prove nor disprove the historical accuracy of the Biblical text, we must be aware of some of the challenges the text has faced. In doing so, we must also view supporting evidence that will allow us to accept the Torah as it is traditionally understood.

For centuries, scholars have questioned why the law even appears in the Torah. The classic answer to the question of why the law appears comes from a decidedly medieval source. That answer is the idea that the combination of milk and meat was of Canaanite cultic origin, and was, therefore, something the Israelites should avoid as a means of separating themselves from their neighbors. Maimonides raised the issue in *The Guide of the Perplexed* part III, chapter 48:

As for the prohibition against eating *meat [boiled] in milk*, it is in my opinion not improbable that—in addition to this being undoubtedly very gross food and very filling—*idolotry* had something to do with it. Perhaps such food was eaten at one of the ceremonies of their cult or at one of their festivals. A confirmation of this may, in my opinion, be found in the fact that the prohibition against eating *meat [boiled] in milk*, when it is mentioned for the first two times, occurs near the commandment concerning pilgrimage: *Three times in the year, and so on*. It is as if it said: When you go on a pilgrimage and enter *the house of the Lord your God*, do not cook there in the way they used to do. According to me this is the most probable (strongest) view regarding the reason for this prohibition.⁵

⁵ Maimonides, Moses. *The Guide of the Perplexed*. vol 2. Shlomo Pines, trans. Chicago: The University of Chicago Press, 1963. p. 599

Maimonides' suggestion is that since two occurrences of the milk and meat prohibition occur in the midst of sacrifice and pilgrimage laws, the intent was to delineate Israelite cult sacrifice from that of their idolatrous neighbors. Maimonides, however, offers no tangible proof to support his circumstantial reasoning, and he essentially admits this saying that he has "not seen this set down in any of the books...[he has] read."⁶ Though Maimonides is hardly what one would call a modern scholar, his assertion has certainly entered into the modern discourse. In fact, perhaps the closest evidence to support Maimonides' claim comes from Nelson Glueck,⁷ who observed that the Bedouin people in and around the State of Israel serve a combination of milk and meat to their distinguished guests.⁸ Yet even this observation only bespeaks of hospitality, without any pagan overtones.

Stefan Schorch, among others, is not convinced of Maimonides hypothesis. He finds no proof for the cultic claim in either Jewish or external sources.⁹ The only external proof that scholarship has had to look to is an Ugaritic tablet *KTU 1.23, Line 14*. Most commonly known as "Birth of the Gracious and Beautiful Gods," this text has, for decades, been used to prove the Canaanite cultic nature of cooking a kid in milk.¹⁰ The text fragments that have survived centuries of burial and erosion read (transliterated), *tb[h g]d bhlb annh bhmat*, usually translated as "coo[k a k]id in milk, a ? in butter."¹¹ The sound of the Ugaritic words closely parallels that of the Biblical text, which has led

⁶ *ibid.*

⁷ Archaeologist and former President of Hebrew Union College

⁸ Klein, Isaac. *A Guide to Jewish Religious Practice*. New York: Jewish Theological Seminary, 1979. p. 360

⁹ Schorch, Stefan. "A Young Goat in its Mother's Milk?: Understanding an Ancient Prohibition." in *Vetus Testamentum*. 60,1 (2010). pp. 119-120

¹⁰ Ratner, Robert and Bruce Zuckerman. "A Kid in Milk'?: New Photographs of KTU 1.23, Line 14." Hebrew Union College Annual 57 (1986). 16

¹¹ *ibid*

many to translate it similarly. Robert Ratner and Bruce Zuckerman, however, studied the tablet upon which the text was carved from multiple photographed angles. They concluded that in the context of the greater text, line 14 does not mention a ‘kid in milk,’ and, Ratner and Zuckerman are more convinced, there is not even an expression of cooking or boiling.¹² The context they deciphered was indeed one of a cultic or ritual action. However, it was one which had young men singing a poem that, likely, was not about a kid in milk or another animal in butter.

Additionally, returning to a key element of the verse, we are still puzzled by the element of cooking the kid in the milk of its mother. Jack M. Sasson takes issue with this precise idea as he mentions that “there is never an insistence in any literature that milk and meat be the product of the same animal.”¹³ If indeed the idea was to create a separation from neighbors, why employ the wording of a kid in the milk of its mother when, apparently, the surrounding cultures did not engage in that explicit act in the first place?

There is certainly a high degree of doubt surrounding the idea that the milk and meat verses were in place to create a separation for reasons of religion and ethnic identity. Maimonides’ determination has been, and is continually facing a reduction in its impact and plausibility. For our purposes of tracing and engaging with the centuries long Jewish tradition, the idea of separation from an idolatrous practice does little to convince us of why we, as moderns, should relate to this issue in the first place. Gershom Scholem summarizes this idea eloquently:

¹² *ibid* 52

¹³ Sasson, Jack M. “Ritual wisdom? : On ‘seething a kid in its mother's milk.’” in *Kein Land für sich allein*. Freiburg, Schweiz: Universitätsverlag, 2002. p. 298

If the prohibition against seething a kid in its mother's milk and many other irrational commandments are explicable as polemics against long forgotten pagan rites...how [would this persuade someone] to remain faithful to practices of which the antecedents have long since disappeared?¹⁴

There must have been some other compelling reason, beyond the doubtful premise that it was meant to avoid idolatrous practice, not only for the Biblical authors to write this, but additionally for the rabbis to have exerted so much time and effort into developing all of the *basar b'chalav* laws. An extant letter from the Second Century BCE, the "Letter of Aristeas," also mentions the Torah's eating laws in general, referencing their impact of separating the Jews from their neighbors.¹⁵ Such a late comment, however, can only lead us to acknowledge the effect of the laws, not their underlying cause. Noteworthy as well is the fact that the letter's testament to separation does not mention cultic differences as a reason for the laws.

With the non-Israelite cultic nature of milk and meat in a state of enormous doubt, there are still lingering questions as to why the verse appears in the Bible. One of the most basic critiques of the Torah's account of *basar b'chalav* is precisely in the word *chalav* (milk). The Hebrew word for fat, *chelev*, has the identical root letters of the word milk, 'chet' - 'lamed' - 'bet'. This similarity has led certain scholars, among them Jack Sasson,¹⁶ to question whether or not the traditional rendering of *chalav* is the accurate

¹⁴ Scholem, Gershom. *Major Trends in Jewish Mysticism*, 3rd revised edition, New York: Schocken Press, 1961. pp. 20-30 (as quoted in Welfield p.86)

¹⁵ Kraemer 34

¹⁶ While the majority of this analysis focuses on Jack M. Sasson's assertion that the Hebrew text should be read as "*chelev*," "fat," it should also be noted that Sasson does not portray a monolithic approach to solving the question of why the milk and meat verse exists and how it is

one. According to Sasson, at one point in time “there might have been reason to vocalize the crucial word [of the phrase] <<in the fat of>>.”¹⁷ Citing multiple examples of the use of the word ‘fat’ in Biblical literature¹⁸, Sasson presents a strong case for the fact that, in certain instances,¹⁹ the traditional vocalization is incongruous with the greater Biblical pattern.

In the case of our three verses, the Septuagint, the Greek translation of the Torah completed between the third and second centuries BCE, renders the Hebrew word ‘*chet*’-‘*lamed*’-‘*bet*’ as we have traditionally translated it; milk. Sasson questions the Greek translation by citing an example in Ezekiel²⁰ where the Hebrew version renders ‘*chet*’-‘*lamed*’-‘*bet*’ as ‘fat’, while the Septuagint records it as ‘milk.’²¹ He also cites the juxtaposition of ‘*chet*’-‘*lamed*’-‘*bet*’ in the Exodus texts with the commandments regarding the ‘fat’ of sacrifices to further advance his point.²²

This reasoning for the translation of ‘*chet*’-‘*lamed*’-‘*bet*’ as fat is directly opposed by Stefan Schorch. Whereas Sasson cited Biblical passages of similar contexts in which ‘fat’ is the common translation, Schorch turned to the variety of extant materials dating from ancient times. In particular, he views the consistent rendering of ‘milk’ in our three verses across the Masoretic text of the Hebrew Bible, the Septuagint, and even the Samaritan Bible, which not only developed independently from the Hebrew Bible, but is itself also a Hebrew text. Based on the agreement of these sources, and the prevalence of

to be interpreted. His is an inclusive study of various approaches, all aimed at trying to reconcile everything to find a suitable solution.

¹⁷ Sasson 294

¹⁸ *ibid* 300

¹⁹ the three milk and meat verses

²⁰ Ezekiel 34:3

²¹ Sasson 299

²² *ibid* 301

the translation ‘milk’ in broader Jewish tradition, Schorch makes a convincing case for accepting ‘milk’ as the appropriate reading of ‘*chet*’-‘*lamed*’-‘*bet*’.²³

Sasson offers more support for the vocalization of ‘fat,’ through an argument rooted in an observation of both the economy and compassion of the day.²⁴ First, cooking an animal in its mother’s fat would require the slaughter of the breeder, a valuable commodity in the ancient world. Logic dictates that one would not want to waste resources so callously, and, as such, the law would be quite practical. Focusing on Biblical compassion, Sasson cites instances²⁵ where the law imposes humanitarian concern for the relationship between mother and child in the animal world. The same tragedy is not to befall either the mother or the child at the same instance. His analysis of these occasions where compassion is elicited by the Biblical text leads Sasson to the conclusion that cooking a kid in fat would be less than ethical as well as less than logical for the ancient Israelite.

While the humanitarian aspect of Sasson’s assertion that the proper translation is to be read as ‘fat’ is certainly compelling, again, it is not without strong opposition. Both Stefan Schorch²⁶ and David Kraemer²⁷, based on the writings of modern scholars²⁸ and even the ancient writings of Philo, posit the argument that in many cultures today, as in the past, meat is associated with death while milk is associated with life. As food, meat necessarily derives from a deceased animal. Milk, however, is viewed as the life giving substance that a mother supplies to her children. Thus, a defense of the vocalization

²³ Schorch 121-122

²⁴ Sasson 305

²⁵ Leviticus 22:27-28, Deuteronomy 22:6-7

²⁶ Schorch 117-119

²⁷ Kraemer 47

²⁸ Milgrom, Haran, Carmichael

‘milk,’ is the concept of not mixing, associating, or confusing death with life. Here we see another strong argument to believe that ‘milk’ is an accurate rendering of the word ‘*chet*’- ‘*lamed*’- ‘*bet*’. Abraham Joshua Heschel speaks to the humanitarian aspect of the prohibition as well:

The goat—in our case the cow—generously and steadfastly provides man with the single most perfect food that he possesses, milk. It is the only food which, by reason of its proper composition of fat, carbohydrates, and protein, can by itself sustain the human body. How ungrateful and callous we would be to take the child of an animal to whom we are indebted and cook it in the very milk which nourishes us and is given us so freely by its mother.

Here we can clearly see that Heschel’s analysis requires the rendering of the word as milk. While we certainly cannot be sure that the humanitarian aspect of the laws served as the basis for their development, we can reasonably accept that the verses do intend ‘milk’ as the substance in which to avoid cooking meat.

Another issue to question is the one brought by the rabbinic category, and our usage of it to this point in the discussion, of *basar b’chalay*; milk and meat. The clear, simple reading of the verse would lead us to believe that the injunction applied merely to a child and it’s mother’s milk. Even the use of the term ‘kid,’ has led many to question why the law applies to animals other than young goats. It is clear from Philo’s writings, that in his time,²⁹ at least in Alexandria, the Torahitic command specifically referred to a

²⁹ Late First Century BCE to early First Century CE

child in the milk of *its* mother. Philo's rationally minded approach to scriptures³⁰ led him to the conclusion that:

If any one should desire to dress flesh with milk, let him do so... There are innumerable herds of cattle in every direction, and some are milked everyday... So, that, as there is a great abundance of lambs, and kids, and all other kinds of animals, the man who seethes the flesh of any one of them in the milk of its own mother is exhibiting a terrible perversity of disposition...³¹

In Philo's reading, as is the traditional reading, 'kid' refers to any child and that said child should not be cooked in the milk of its own mother. However, "*there is no problem with cooking flesh in milk*—let alone with eating meat and dairy together."³² This does not mean, however, that the cooking of flesh in milk, and eating thereof, was a widely permitted and practiced phenomenon.

Aversion to the combination of meat and milk could be seen in other cultures as well. There was a longstanding Hellenistic prejudice against "eaters of meat and drinkers of milk" attested to in the writings of Homer and Herodotus.³³ Homer is classically ascribed as dating around 1100 BCE, and even conservative estimates place the works of Homer around the Ninth Century BCE. Herodotus dates to around 450 BCE. The dates of both Homer and Herodotus fall within accepted parameters for the dating of various

³⁰ Sandmel, Samuel. "The Rationalist Denial of Jewish Tradition in Philo." in *A Rational Faith: Essays in Honor of Levi A. Olan*. Jack Bemporad, ed. New York: Ktav Publishing House, Inc., 1977. p. 137

³¹ Kraemer 36

³² *ibid*

³³ *ibid* 52

Biblical compositions,³⁴ leaving us to wonder whether or not those Greek traditions influenced the Biblical authors. In later history, we can certainly assume that the Hellenistic disposition, equating meat eaters and milk drinkers with barbarians,³⁵ influenced Israelite society under Greek and Roman rule. We have no reason to doubt that Hellenism influenced aspects of Jewish culture as Rabbinic tradition reflects many Greek and Roman themes.³⁶ Regardless of whether or not, or how, this aversion influenced Jewish society, we can acknowledge that the issue of milk and meat was not solely limited to Israel.

Further support that the combination of milk and meat was an avoided practice comes from the studies of ethno-archaeologist Gloria London. In her examination of the people living in the Trodos Mountain Villages of Cyprus, London found that they still employ the use of hand made, unglazed, clay pots in their cooking. She asserts that the method that these villagers use for crafting their pots is “reminiscent of ancient pottery.”³⁷ Whether or not the process is exact, it is safe to assume that natural clay has not changed in the six thousand years since mankind first began to use it for tools.³⁸ In the daily procedures of these villagers, pots are delineated between those used for dairy and those used for meat. Pots used for fermenting yogurt are never, unless re-fired in a

³⁴ Conservative estimates give the latest date for Biblical composition as circa 586-560 BCE, exilic times

³⁵ Kraemer 52-53

³⁶ The elevated nature of bread and wine and their need to be blessed (Kraemer 5, 52), and the Passover Seder mirroring the Symposium

³⁷ London, Gloria Anne. “Why Milk and Meat Don't Mix: A New Explanation for a Puzzling Kosher Law. in *Biblical Archaeology Review*. 34,6 (2008) pp. 67-68

³⁸ dating for the use of pottery during the Pottery-Neolithic age ranges from 6000 BCE-4800BCE. cf. *The Archaeology of Ancient Israel*. Amnon ben-tur, ed., page 2, table 1.1

kiln for at least 12-hours, used for storing or cooking milk. The sour milk of the yogurt sticks to the inside walls of the pot, and would thereby sour any meat that touched it.³⁹

These pots are never used for meat. Nor are cooking pots ever used for dairy. The shape of a pot says it all-milk or meat. Rather than a dietary restriction limited to a single group of people, it was common practice to keep all ceramic pots used for milk versus meat separate.⁴⁰

London's conclusion is that perhaps the Israelite commandment for separating meat and milk was not rooted in an anti-cultic bias, and certainly did not mean to say 'fat,' but rather "boil[ed] down to good housekeeping."⁴¹

We will never be able to say with certainty what the reasons were behind the inclusion of the phrase "you shall not boil a kid in the milk of its mother," in the Torah. Nor will we ever know why it was written three times, in two very different contexts. What our discussion above presents us with, however, will allow us to accept, with considerable support, that we are able to take the Torah at its word. We can trust that there was an issue in the ancient world concerning the combination of milk and meat and that the problem was not limited just to young goats and their mothers. Proceeding through the rabbinic handling of *basar b'chalav*, we can be confident that the sages were not inventing something out of thin air.

As we move into our study of the rabbinic treatment of the issue and the role of fowl in the *basar b'chalav* regulations, we must note that the rabbis were acutely aware

³⁹ London 68

⁴⁰ *ibid* 69

⁴¹ *ibid*

of a variety of the possible criticisms and explanations of the Biblical text that we have just discussed. The rabbis raise the issue regarding clay pots in Tractate Hullin, page 111b of the Talmud. Here they affirm the idea that un-glazed vessels may impart the flavor of one food into another. Imparting of flavor from dairy to meat, or vice versa, is one of the prohibitions of *basar b'chalav*. The humanitarian aspect is also prevalent on page 114a of Hullin as the rabbis mention the prohibition of killing a kid and its mother on the same day. Turning to tractate Sanhedrin, we see that the rabbis were also keenly aware of the possible rendering of *chet-lamed-bet* as fat, *chelev*.

R. Isaac b. Joseph said in the name of R. Johanan: Rabbi and R. Judah b. Ro'ez, the Shammaites. R. Simeon and R. Akiba, all hold that Mikra is determinant in Biblical exposition...R. Aha b. Jacob inquired into this statement of R. Isaac b. Joseph — Is there no one⁴² who does not accept the *Mikra*⁴³ as determinant? Has it not been taught in a *baraita*: “In the milk (*chalav*) of its mother,” where you might read it (*ch-l-v*) as *chelev*. It must be said that this is unacceptable, as *Mikra* is determinate— Thus all agree that Mikra is determinant...⁴⁴

Here we see that the rabbinic defense of the proper rendering of “*ch-l-v*” as milk is quite similar to the one put forward by Schorch, and that the determining factor is to go with the accepted tradition.

Besides these three points, we will continue by analyzing the rabbinic methods for extending the laws of *basar b'chalav* to cover a greater scope of practice. Whether

⁴² Apart from those listed just above

⁴³ The text of the written Torah

⁴⁴ B. Sanhedrin 4a-4b

looked at from the humanitarian issue of literally cooking a child in the milk of its mother, or viewed through the lens of previous historical practice, our main concern will be addressing and elucidating the question of when or if fowl became categorized as meat. However, one thing remains clear and unchanged; “You cannot milk a chicken!”

Chapter 3:

Tracing the Chicken Parmesan Dilemma Through the Talmud

In the previous section we examined the Biblical commandment against boiling a kid in the milk of its mother and sought an approach that would allow us to accept the Torah at its word. Accepting the plausibility that the thrice-repeated phrase is accurate, as we traditionally receive it, is a necessity when entering into a study of the rabbinic system of legal development. The rabbis took the word of Torah, as well as the rest of the Hebrew Bible, as non-negotiable truths. In their system, the Torah is an efficient document, which means that any questions, incongruities, or repetition serves an exegetical purpose.¹ From these textual anomalies, the rabbis were able to, and in halakhic circles today continue to derive a profuse amount of laws from the obscure nature of the Biblical text.

The rabbis were scholars in their own right, and, therefore, were not blind to the glaring textual problems that modern scholars have elucidated and continually endeavor to explain. Whereas our modern approach to scripture is to notice the variety in the source material, see where text and laws contradict each other, and try to dissect the text to determine the origins or its various components, for the rabbis, the meaning of the Torah and its laws is not determined through an analysis of historical context or literary functions.² Additionally, rabbis read the Biblical text “neither literally nor on the surface level.”³ For the milk and meat prohibition, this deeper reading manifests itself in

¹ Greenstein, Edward L. “Bible: Biblical Law.” in *Back to the Sources: Reading the Classic Jewish Texts*. Barry W. Holtz, ed. New York: Simon & Schuster Paperbacks, 1984. p. 99

² *ibid* 98-99

³ Welfeld, Irving. “You Shall Not Boil a Kid in its Mother's Milk: Beyond Exodus 23:19.” in *Jewish Bible Quarterly*. 32,2 (2004). p. 84

explaining the repetition of the verse three times, expanding the prohibition beyond the implied mother child relationship, and addressing the issue of which animals are included in the prohibition.

The entire category of *basar b'chalav* is recognized by Abaye as a *chiddush*,⁴ an anomaly within the laws of kashrut. This is due to the fact that *basar b'chalav* prohibits two otherwise permissible items from being cooked together. As we shall see in the course of our study, fowl presents an anomaly within the laws of *basar b'chalav*. The most crucial question in the Talmud regards the question of whether or not fowl is to be categorized as meat. That is to say, the rabbis are trying to figure out if the term *basar*, when employed generally, includes within it fowl. The anomaly of fowl is, in fact, not limited to the laws of milk and meat. Fowl is an anomaly within the greater scope of *kashrut* as well. When the Torah puts forward the lists of permitted and prohibited animals, it labels certain identifying marks by which we can determine the cleanliness of the various mammals that are fit for eating. In the case of birds, the methodology of the Torah shifts. Instead of listing identifying marks, the Torah instead lists types of birds that are permitted, as well as types of birds that are forbidden.⁵ The anomaly is continued within the laws of *shechitah*⁶ as there is a different set of requirements for mammals as there are for birds.⁷ In this case, many of the differences in the slaughtering laws are, rightly so, due to anatomical differences between mammals and birds. This is an interesting fact to note, as here the biological differences between the animals are

⁴ Literally “innovation.”

⁵ Klein 304-305, cf. Deuteronomy 14:4-21

⁶ Kosher Slaughtering

⁷ Klein 341-345

acknowledged and accounted for, but when the rabbis broach the issue of *basar b'chalav*, the biological differences are mostly ignored.

Our proceeding study will trace the development and debate of the laws of *basar b'chalav* as they relate to fowl. We will begin with an analysis of the relevant sections of R. Judah haNasi's Mishnah. From there, the study will shift to the continued debate spurred by the Mishnah in the *gemara* and greater Talmudic literature. Our primary concerns will be to notice the various way that the rabbis answer the question of whether or not fowl is to be counted generally as *basar*, as well as to notice the continually evolving anomalous nature of fowl within the corpus of milk and meat laws.

Maseket (Tractate) Hullin, in Seder (Order) Kodashim presents the “first” official, Jewish testimony of a blanket prohibition of cooking meat in milk.⁸ Hullin chapter 8, *mishnah* 1 not only covers all meat in the prohibition with milk, but also, for the first time, raises the issue of fowl with respect to the milk and meat prohibition. The *mishnah* reads:

All *basar*⁹ is forbidden to be cooked in *chalav*,¹⁰ with the exception of the *basar* of fish and locusts; and it¹¹ is forbidden to be served¹² with cheese upon the table, with the exception of the *basar* of fish and locusts. The one who vows to refrain from *basar*, is permitted the *basar* of fish and locusts. Fowl may be served with cheese upon the table, but it may not be eaten [together]; these are the words of Beit Shammai. Beit Hillel says, it may not be served and it may not be eaten

⁸ Kraemer 41

⁹ body, flesh, meat

¹⁰ milk

¹¹ *basar*

¹² lit. brought up to

[together]. R. Yosi says this is one of the cases where Beit Shammai takes the lenient position, and Beit Hillel takes the stringent position. On what kind of table were they speaking? [Not] a table on which one eats, but¹³ on a table that food is placed upon, where this is placed next to that, and there is no scruple.

This *mishnah* is teeming with a multitude of halakhic issues. First and foremost, the placement of the *mishnah* within the chapter creates the appearance that the prohibition against the cooking of any *basar* in *chalav* is to be taken *a priori*, that is without the need for justification, as this *mishnah* comes without another source to corroborate the law. The anonymity of the teacher of the first part of this *mishnah* raises the question not only of who “wrote” this statement, but also of when it was written. Other sources in this chapter, as well as in other places in rabbinic literature, corroborate the existence of a blanket prohibition against milk and *basar*. As a compilation of a rabbi in the late Tannaitic period, we can safely assume that R. Judah haNasi studied and taught in a culture¹⁴ where the issue of milk and meat was accepted without much doubt.

Another issue raised by this *mishnah*, the heart of our study, is the question of which *basar* actually counts within the *basar b'chalav* prohibitions. The *mishnah* begins by saying all *basar*, and then excludes the *basar* of fish and locusts. This exemption raises the questions of not only why fish and locusts are specifically excluded, but also calls into question the nature and use of the word *basar*. Someone who swore off meat,¹⁵ according to the rabbis, is allowed to eat the “meat” of fish and locusts. If fish and locusts do not count as ‘*basar*’ then what does?

¹³ *aval*, also translatable as ‘yes’ or ‘indeed’

¹⁴ A culture within the rabbinic circles

¹⁵ *basar*

Further, and most importantly, the *mishnah* begins to ask the question regarding fowl. The mere need to mention fowl explicitly, as well as the debate over it, tells us that the inclusion of fowl within the confines of *basar b'chalav*, as of the writing of the Mishnah (and, as we shall see, the time of the writing of the *gemara*) was not a solidified issue. We also find ourselves pondering the question: if fish and locusts do not count as meat, what is it about fowl that, in at least some opinions, has it categorized it as meat?

The latter part of Mishnah Hullin 8:3 teaches us that “The one who serves fowl with cheese on the table, has not transgressed a negative commandment.” This statement raises even more questions with respect to the place of fowl within the context of *basar b'chalav*. Specifically, what is the negative commandment to which the rabbis are referring? Here (as mentioned in the *gemara* and clarified by Rashi), the negative commandment is the one found in the Torah, “You shall not cook a kid in the milk of its mother.” Serving, therefore, has already been added as a rabbinic precautionary measure. The serving of fowl with cheese upon the same table, is then not a transgression of any commandment. Still unclear, however, is the issue of whether or not cooking or eating fowl with dairy comes under the Biblical prohibition.

The milk and meat conversation, especially the issue of fowl, is heightened as the rabbis then turn their attention to M. Hullin 8:4:

[Concerning] the *basar* of a *behema tahorah*¹⁶ in the *chalav* of a *behema tahorah*, it is forbidden to cook [them] and it is forbidden to derive benefit [from them]. [Concerning] the *basar* of a *behema tahorah* in the *chalav* of a *behema*

¹⁶ clean/pure, domesticated animal

tameiah,¹⁷ [or] the *basar* of a *behema tameiah* in the *chalav* of a *behema tahorah*, it is permitted to cook [them] and it is permitted to derive benefit [from them].

R. Akiva says, “*chaya*”¹⁸ and fowl are not [prohibited] from the Torah, as it is written, ‘you shall not boil a kid in the milk of its mother,’ three times, [once each] to exclude *chaya*, *ohf*, and *behema tamei’h*.”

R. Yosi haGalili says, “it says,”¹⁹ ‘you shall not eat any *nevelah*.’²⁰ And it says ‘you shall not boil a kid in its mother’s milk.’ That which is prohibited because of *nevelah* is prohibited to be cooked with milk. Fowl, which is prohibited due to *nevelah*, it might be thought that it would be prohibited to be cooked in milk. Therefore, scripture says, ‘in the milk of its mother,’ to exclude fowl, because it has no mother’s milk.²¹

We see in this *mishnah* a slightly different tannaitic delineation for what may or may not be cooked together. In contrast to M. Hullin 8:1 above, we see here less of a blanket prohibition regarding “all” *basar* and instead see the *basar* forbidden to be mixed labeled as the *basar* of a *behema*. Specifically, we see that the only prohibited combination is the one that otherwise would be permitted. That is to say that meat of an impure²² animal, regardless of what it is mixed with, would be prohibited for consumption. The same applies to the mixture of anything involving impure milk. Since these combinations are prohibited for consumption anyway, there is, in the rabbis’ eyes, no doubt or worry that

¹⁷ unclean/impure, domesticated animal permitted for consumption

¹⁸ undomesticated animals

¹⁹ Deuteronomy 14:21 - “You shall not eat any *nevelah* give it to the stranger within your gates to eat, or you may sell it to a foreigner because you are a holy people to the Lord your God. You shall not boil a kid in the milk of its mother.”

²⁰ Flesh of an animal that died of natural causes, that is without proper slaughtering

²¹ or, said differently, “You can’t milk a chicken!”

²² not kosher

one would mistakenly eat the combined product. Cooking and deriving benefit from the mixture is, therefore, permissible.²³

In concert with the issue of defining which *basar* fit the prohibition of milk and meat, Rabbi Akiva mentions two other categories of permitted animals. To this point these categories have not been dealt with specifically regarding the cooking of them in milk. These categories are *chaya*, which we categorized just above, and fowl.

We must, therefore, turn our attention for a moment to the term *behema* and its relationship with the word *chaya*. The issue that arises for the rabbis is the determination of which animals fit the category of *behema*, and which are to be considered *chaya*. Yet, even more basic, is developing an understanding regarding the differences between the categories.

In the same chapter where the milk and meat phrase is used in Deuteronomy, the Torah explains the distinction between the various types of permitted and prohibited animals. Of *behema* the Biblical text says

These are the *behema* that you may eat: the ox, the sheep, and the goat; the deer, the gazelle, the roebuck, the wild goat, the ibex, the antelope, the mountain sheep, and all *behema* that have true hoofs which are cleft in two and brings up the cud—such you may eat.²⁴

This represents a condensed equivalent to the dietary laws found in chapter eleven of Leviticus.

²³ cf Hullin 115b

²⁴ Deuteronomy 14: 4-6

The striking difference between the Deuteronomy and Leviticus versions of the dietary laws, relative to our mishnah, is that in Leviticus 11:2 the list of permitted animals begins “these are the *chayot*²⁵ that you may eat from among all *behema* that are on land.” This duplicity of generic terms for ‘animal’ cannot be merely extraneous, as, for the rabbis, there is nothing superfluous in scripture. The two words must, then, each connote a specific and different set of animals.

For the rabbis, the issue of delineating between *chaya* and *behema* comes in two ways. First they seek to understand the ways in which scripture relates to the words. Second, the rabbis understand that the two words were used for a specific reason, and they resolve the issue by attributing a specific category to each.

As for the scriptural usage, the rabbis notice that both words seem to be used interchangeably throughout the Hebrew Bible. They conclude from this that, in essence, *chaya* and *behema* connote the same types of animals,²⁶ so that there is an overlap between them. Therefore, when scripture uses only one of the words, the animals that would otherwise be included in the other category are also seen as included by virtue of the one word. That is, if scripture speaks of *chaya*, the rabbis read this as including *behema*, and vice versa.²⁷

The task of deciding what characteristics determine which category a four-legged animal belongs in, *chaya* or *behema*, also falls to the rabbis. In their definition, the rabbis narrow the category of *behema* to those quadrupeds that are raised and live among human habitation. *Chaya*, then, refers to animals that were either raised in or live in the wild.

The distinctions are inferred from the rabbis’ debate in M. Kilayim 8:6 which depicts the

²⁵ lit. ‘animal’ or ‘living creature’

²⁶ Quadrupeds/Mammals

²⁷ B. Hullin 71a

rabbis debating whether or not animals such as an ox or a dog count as *behema* or *chaya*, domestic or wild,²⁸ respectively. The rabbis also come to a consensus in this *mishnah* that the pig, although impure, is a domestic animal, while the wild donkey, elephant, and monkey are all wild animals. The argument over the status of the ox, since there are both wild oxen and domesticated ones, mirrors the later comment by Rashi²⁹ that *chaya* is excluded from the Biblical command by virtue of the term ‘kid,’ even though *chaya* could be domesticated.

Fowl, as we have already seen, is an anomaly within the laws of *basar b’chalav*. The dispute recorded in this *mishnah* is one of the earliest³⁰ regarding the nature and categorization of fowl. R. Akiva interprets the repetition of ‘kid’ to exclude fowl from the Biblical command as well. Therefore, in concord with R. Akiva’s line of reasoning, the prohibition of mixing fowl and dairy is one only imposed by the rabbis.

R. Yosi haGalili approaches the issue of which *basar* is prohibited from being mixed with milk from a different perspective. Using the rabbinic principle of *smuchin*,³¹ R. Yosi haGalili notices that in the Deuteronomy account, the commandment regarding milk and meat is found in the same verse as the prohibition against eating *nevelah*. He therefore reasons that anything to which the *nevelah* prohibition applies, so too does the prohibition of milk and meat apply.

One issue not raised explicitly in each *mishnah*, but rather of subtle note, is the question of how the rabbis made the jump from prohibiting the cooking of *basar* and

²⁸ Undomesticated.

²⁹ B. Hullin 113a

³⁰ If truly argued by R. Akiva and R. Yosi haGalilli, as attributed to them here and in numerous other sources (Mekhilta d’Rabbi Ishmael, Mekhilta d’Rabbi Shimon bar Yochai, Sifre to Deuteronomy)

³¹ lit. Touching

dairy together to prohibiting the eating thereof. Though for our discussion we will focus mainly on the concepts of cooking and eating, for the rabbis there are three prohibited acts regarding *basar b'chalav*: cooking, eating, and deriving benefit. Various rabbis offer solutions to this question in the course of the *Gemara*. Page 114a teaches that the use of the term 'cooking' extends to the idea of eating as well. R. Ashi offers another explanation on page 114b, where he cites Deuteronomy 14:3 as saying "you shall not eat any abominable thing." Since the mixture of meat cooked together with milk is an "abominable thing" it is, therefore, a mixture forbidden to be eaten. R. Abbahu follows immediately here by explaining how the prohibition of cooking, and thereby of eating, follows into the other category of deriving benefit. His proof is that in Deuteronomy 14:21, where milk and meat is mentioned for the third time, *nevelah* is permitted to be sold. However, in other places with a "you shall not eat" prohibition, the selling of the prohibited item is not mentioned. The absence of a discussion of selling, therefore, supports the idea that benefit may not be derived from the forbidden foods.

R. Shimon b. Lakish³² cites the prohibition of eating as deriving from Exodus 12:9, "Do not eat any of it raw, or cooked in any way with water." Whereas the verse would work just fine by merely saying, "or cooked with water," the seemingly unnecessary use of the words "in any cooking," for R. Shimon b. Lakish, refers to flesh cooked in milk. The school of R. Ishmael³³ attributes the prohibition of eating to the three repeated uses of "you shall not cook a kid in the milk of its mother:" once each to exclude cooking, eating, and deriving benefit. Issi b. Judah attributes the prohibition of eating to

³² B. Hullin 115a

³³ *ibid* 115b

the juxtaposition in the same verse of the eating laws regarding *nevelah* in Deuteronomy with the milk and meat law.

The eighth chapter of Hullin in the Mishnah raises many questions regarding the structure and process of the *basar b'chalav* prohibitions. First and foremost is the question of what counts as *basar*. The term *basar* is, in itself, difficult to define. *Basar* literally means flesh; the flesh of an animal. When used in the context of food, we generally associate *basar* with the term 'meat;' the meat of an animal. This is the context through which the rabbis approach defining *basar*. *Mishnah* 8:1 included the exemption of fish and locusts from the types of *basar* that are forbidden to be cooked with milk. The *gemara* to that *mishnah* took upon itself the task of explaining the exemption of the *basar* of fish and locusts by relating it to a discussion in Nedarim 54a-b. The *mishnah* and accompanying *gemara* in Nedarim are focused on one who vowed to abstain from vegetables as well as the question of what items were included or excluded from that vow. The issue that the rabbis undertake is defining what, in common parlance, is to be included when one says vegetables. In the *mishnah*, the scenario arises of a messenger that is sent to the market to obtain vegetables, and all he can find are gourds. Will the messenger be successful in his mission if he brings back gourds? The issue is whether or not the messenger should have asked if gourds were acceptable or not. The generic 'rabbis' hold that if an agent must inquire about something, then that item does not count in the same category. R. Akiva, on the other hand, says that whatever needs to be inquired about is in the same category.

For a modern example, let us take the case of tomatoes. To use a stereotypical scenario, if a wife sent her husband to the store and asked him to pick up fruit, would the

husband be correct in buying a tomato? Vice-versa, if the task were to buy vegetables for a salad, would the purchase of tomatoes be in line with the assignment? The tomato is technically a fruit, as it grows above ground, on a tomato plant. However, in general terms, we tend to think of a tomato as a vegetable because it is used in salads as well as in other dishes as such. Also, tomatoes are generally not as sweet tasting as other fruits. Is a tomato to be counted as a fruit or a vegetable? Odds are that most often it will be grouped as a vegetable, and so to buy tomatoes as part of a vegetable order would be correct, according to the view of R. Akiva. Furthermore, even though tomatoes are not generally accepted as fruits, to buy tomatoes in a fruit order would, technically, be correct as well.

Though confusing, the tomato scenario mimics the one painted by the rabbis. Their discussion continues by entering the category of meat, and attempting to answer the question of what counts when one is ordered to serve meat. Do heads, feet, windpipes, livers, hearts, and fowl count as meat? The anonymous *stam*³⁴ Talmud forbids these, while R. Simeon b. Gamliel permits them, implying that they are not what are generally referred to as meat. All are in agreement that fish and locusts do not count as meat, because there is no confusion that when one says meat, this does not imply fish and locusts. Fowl is, as usual, an anomaly in this scenario.

An agent is surely apt to inquire about the purchase of fowl when meat is not available. Does fowl then count as meat when spoken of in general terms? This is a tricky question to ask, as, again, in Hebrew *basar* is an all-encompassing word to include the flesh of animals. Obviously the *basar* of fowl is *basar*, just as our *mishnah* in Hullin labeled the *basar* of fish and the *basar* of locusts. The better question to be asked is

³⁴ Simple or plain

whether or not *basar*, when asked for without specification, includes within it the *basar* of fowl. In the opinion of R. Akiva, both in Nedarim and in Hullin,³⁵ fowl counts as meat.

The *gemara* on Hullin 104a sees this as a contradiction in the rulings of R. Akiva. If fowl is to be included in the general category of ‘meat,’ then it would, therefore, be included in the Torahitic prohibition of meat and milk. This runs counter, as we have seen,³⁶ to R. Akiva’s assertion that fowl is one of the categories prohibited rabbinically to be cooked with milk. Instead, R. Ashi offered a new way to read the *mishnah*,³⁷ “All *basar* is forbidden to be cooked in *chalav*, [some being forbidden from the Torah and others by the sages] with the exception of the *basar* of fish and locusts [which are neither forbidden from the Torah nor the Sages].”³⁸

Immediately following, on page 104b, is a supporting example of fowl not being included generally in the term *basar*:

In the case of this *mishnah*, however, if one is permitted to serve fowl and cheese, one might even serve *basar* and cheese, and so come to eat *basar* with milk which is prohibited by the law of the Torah.³⁹

This passage is evidence that the rabbis have a practice of referring to both fowl and *basar* in the same sentence, with clear delinations between the two terms. Whereas, just above, we saw a case made that the general mention *basar* can signify fowl, here we see the separation of fowl as an anomaly.

³⁵ 104a

³⁶ M. Hullin 8:4

³⁷ *ibid* 8:1, B. Hullin 103b-104a

³⁸ B. Hullin 104a

³⁹ B. Hullin 104b

Another instance of the anomalous nature of fowl can be seen within the discussion of the latter part of M. Hullin 8:1, regarding the issue of serving meat and dairy together on the table. According to the *gemara* of Hullin 104b-104a, it seems that during the days of Agra, or at least in his province, the separation between the eating of meat and dairy required a thorough cleansing rather than an allotted time period. This is supported by the dispute between Beit Hillel and Beit Shammai regarding washing between meat and dairy.⁴⁰ Agra, the father-in-law of R. Abba, teaches that fowl and cheese may be eaten consecutively, without washing or wiping in between. This is an odd comment for us, as the general practice of meat and cheese has been, to this day, to wait a certain amount of time between the eating of each. In the instance of Agra, however, fowl attains a status as “not meat.” He states that fowl and cheese may be eaten without wiping, but *basar* and cheese may not. Again here we see the Talmud refer to both *basar* and fowl as distinct terms. Further evidence that fowl once had a status separate from the label “meat” comes on page 112a of Hullin. R. Hinea son of Raba of Pashrunia rules regarding a case where a young pigeon fell into a pot of milk sauce. R. Hinea permitted the mixture of the fowl and milk in this case. He was even considered wise to do so! These episodes clearly show that at one point, or in the opinion of certain groups, fowl was considered as a category separate from meat.

Mishnah 8:3 is brought into the conversation of the *gemara* on page 113a. As we discussed earlier, M. Hullin 8:3 raises the questions of which negative commandment would or would not be transgressed if fowl was served with cheese. As the prohibition of “serving” is not a commandment found in Torah, the *gemara* tells us that only by eating a combination of fowl and cheese would one transgress the negative commandment. This

⁴⁰ *ibid* 104b-105a

line of reasoning, however, leads to the conclusion that the prohibition of cooking, and therefore eating, fowl and dairy together is a prohibition directly from Torah. The *gemara* offers a different reading of the *mishnah*, suggesting instead to read it as, “the one who serves fowl with cheese on the table does not approach the category of a negative commandment.”

Rashi comments that the line of reasoning which leads one to the conclusion that the prohibition against cooking dairy and fowl is *d’oraita* stands apart from the teaching of R. Akiva⁴¹ who says that fowl is a prohibition of rabbinic origin. As *halakhah* often follows R. Akiva,⁴² this contradiction is problematic. Rashi offers an alternative extrapolation of the *gemara*’s addition of “does not come under the category of a negative commandment,” by commenting, “That is to say that one should not fear that he may eat and transgress on this account, because even if it is the case that he ate it, he would not transgress.” The viewpoint from which Rashi reads this *mishnah* and *gemara* is one with hundreds of years of further halakhic development. Rashi knows all that the Talmud has to say on the subject of *basar b’chalav*, and from his perspective, we see that in time the standard halakhic approach was that the mixture of dairy and fowl, along with R. Akiva’s other categories, was a prohibition derived solely from rabbinic thought. However, Rashi’s explanation is also a plausible reading of the Talmudic text itself, as the *stam* Talmud is aware of the overall “conclusion” that serving fowl and cheese on the table is not *d’oraita*. The *mishnah*, in this view, would, therefore, be telling us this in order to avoid the erroneous interpretation that the mixture could freely be eaten.

⁴¹ cf. M. Hullin 8:4, and below B. Hullin 113a-116a

⁴² B. Eruvin 46b, When R. Akiva is in a debate with one of his contemporaries, the *halakhah* is in accord with R. Akiva’s view.

Finally, the *gemara* reaches its direct discussion of *mishnah* 8:4 in Hullin. From pages 113a to 116a, the Talmud posits a myriad of teachings related to the *basar b'chalav* issue. We have already discussed some of these teachings above as explanations for how the prohibition of cooking a kid in the milk of its mother extended to the prohibition of eating such a combination. This section of *gemara* adds significantly to the number and types of teachings regarding this legal category.

After restating the whole of M. Hullin 8:4, the *gemara* begins by addressing two questions that are implied in the *mishnah*, though not asked directly. The *gemara* realizes that the Biblical commandment, at face value, mentions both a “kid” and “the milk of its mother.” However, the laws of *basar b'chalav* take as axiomatic the concept that this includes all land animals and all milk. The mishnaic laws do not account for this discrepancy. Further, the *gemara* is aware of the fact that the term ‘kid’ often solely refers to a young goat. The first task of the *gemara* here, is to explain that, in “reality,”⁴³ the term ‘kid’ refers to any child of any *behema*,⁴⁴ or, more simply put, any *behema*.

The possibility of superfluous words is an issue that the rabbis take quite seriously. From their viewpoint, there can be no superfluous words in the Torah. If two words are used to connote the same thing, then there must be a special meaning for each of those words. Similarly, if the same word is used in more than one place, the rabbis find no problem in assigning the same meaning to each instance. This is a practice known as *gezerah shava*, or ‘equal cutting.’

⁴³ That is, the reality of the rabbinic system

⁴⁴ Specifically *behema* and not all animals because the *mishnah* outright forbids *behema*

Both *gezerah shava* and the issue of seemingly superfluous wording play into the rabbinic explanation that all children, all *behema*, are referred to by the word “kid.” R.

Eleazar explains the issue as follows:

A verse of Torah says “And Judah sent the kids of goats.”⁴⁵ Here it says “kids of goats,” but all places where it just says “kid,” even then that of a cow or ewe might be implied. But might we derive the rule from it (that anywhere “kid” is written it refers only to goats)? It is written further, “The skins of the kids of the goats.”⁴⁶ Here it says “kids of goats,” but all places where it just says “kid,” even that of a cow or ewe might be implied. But might we derive the rule from it?⁴⁷ There are here two verses that come as one, and every time two verses come as one, they do not teach.⁴⁸ This rests well for the one who says that two verses cannot teach.⁴⁹ But for the one who says that they can teach, what is there to say? There are two limiting words written, “goats” and “the goats.”⁵⁰

We see in this teaching the fact that in some places *gedi*, “kid,” is written alone, and in other places written with a specifying noun. The rabbis question that if ‘kid’ solely meant goats, why would it need to be specified “kid(s) of the goats” when just “kid(s)” would have sufficed? If *gedi* means kid-goat, then specifying “kid of goats” would be superfluous, and would essentially read ‘kid-goat of goats.’ This rendering obviously does not work for the rabbis. Therefore, *gedi* cannot always mean ‘kid-goat.’ The idea of

⁴⁵ Genesis 38:20, “And Judah sent the kid of the goats...”

⁴⁶ Genesis 27:16, “And she (Rebecca) put the skins of the kids of the goats...”

⁴⁷ That anywhere “kid” is written it refers only to goats

⁴⁸ ie. The same concept seen in these verses cannot be applied to other contexts

⁴⁹ About other cases

⁵⁰ B. Hullin 113a

gezera shava, then, does not apply to the word *gedi* as there are numerous types of ‘kids.’ The explicit association of *gedi* with ‘goats’ can be found in a myriad of other Biblical citations as well.⁵¹

Coming from a modern, critical perspective, one would notice that there are only two structures throughout the Hebrew Bible in which the word *gedi* is used: either as a stand alone⁵² or attached to the word ‘goats.’ This would then lead to the conclusion that *gedi* refers to an offspring of a goat. Literally, this usage would be ‘kid’ as it is commonly defined; a young goat. We must stress, however, that in the rabbinic system, since the word *gedi* is found in two structures, the repetition of the specific attribution to goats, leads the rabbis to determining that *gedi* refers to all kids, not just a single, common type of “kid.”

The *gemara* continues by also narrowing down what type of matter counts as ‘kid’ in the purview of *basar b’chalav*.⁵³ Samuel adds that forbidden fat (*chelev*),⁵⁴ *nevelah*, and fetus, the edible portions of non-living animals,⁵⁵ are all quantified as ‘kid.’ However, the blood, afterbirth, and the meat of an unclean animal do not count towards ‘kid,’ which makes sense, since they are otherwise forbidden.

The next seemingly limiting aspect of “you shall not cook a kid in the milk of its mother,” is the delineation of what kind of milk shall not be used.⁵⁶ First, certain milks were excluded: the milk of a slaughtered animal, the milk of an unclean animal, and the

⁵¹ To name a few: Genesis 27:9, 27:16, 38:17, Judges 6:19, 13:15, 13:19, 15:1

⁵² To name a few (besides the three milk and meat verses): Genesis 38:23, Judges 14:6, 1 Samuel 10:3, 16:20, Isaiah 11:6

⁵³ B. Hullin 113a-113b

⁵⁴ Although the text makes no explicit mention it, the fact that the rabbis here suggest *chelev* as an edible portion of an animal’s meat reinforces the rendering of the Biblical *ch-l-v* as milk, *chalav*.

⁵⁵ In Jewish Tradition, a fetus is not a living animal, until it emerges from the womb and takes its first breath

⁵⁶ B. Hullin 113b

milk of a male. A slaughtered animal no longer counts as a living being, and therefore could no longer be considered as a mother. Unclean animals are always forbidden, so too is their milk. And males do not have milk! Regarding the idea of “the milk of a male,” which is seemingly superfluous, Raba taught that “milk of its mother” meant milk of any animal that is eligible to become a mother, thereby establishing that *basar b’chalav* applies to all permitted milk. Teachings by the rabbis in the *gemara* of Hullin 113-114 further elucidate this conclusion. Of special note is the consideration of the humanitarian argument for not cooking a child in the milk of its mother. As we saw in the scholarly interpretations of the three milk and meat verses from Torah, here too,⁵⁷ the rabbis make a similar argument. In this case, the humanitarian element is that since the prohibition is against cooking the kid with its own mother, how much the more so with any of the kid’s sisters.

Eventually, the *gemara* returns to directly analyzing the *mishnah* of M. Hullin 8:4, namely the dispute between R. Akiva and R. Jose haGalili:

R. Akiva says, “*chaya* (undomesticated animals) and *ohf* (fowl) are not [prohibited] from (based on) the Torah, as it is written, ‘you shall not boil a kid in the milk of its mother,’ three times, to exclude *chaya*, *ohf*, and *behema tamei*.”

R. Yosi haGalili says, “it says, ‘you shall not eat any *nevelah*.’ And it says (right in the same verse), ‘you shall not boil a kid in its mother’s milk.’ That which is prohibited because of *nevelah* (anything that becomes prohibited if it dies of itself), is prohibited to be boiled (cooked) with milk (*chalav*). Fowl (*ohf*), which is prohibited due to *nevelah*, it might be thought that it would be

⁵⁷ B. Hullin 114a

prohibited to be cooked in milk. Therefore, scripture says, ‘in the milk of its mother,’ to exclude fowl, because it has no mother’s milk.”⁵⁸

Regarding R. Akiva’s assertion that *chaya* and fowl are rabbinically prohibited, the *gemara* asks how R. Akiva can make such a claim. The question relates to the fact that Samuel expounded a variety of prohibitions on the term ‘kid,’⁵⁹ and a rule of Talmudic thought (as applied in the discussion surrounding Samuel’s position) is that a prohibition cannot be imposed on another prohibition. Let us elucidate the train of thought of the *gemara* here.

As it relates to fowl in particular, the *gemara* has, until now, for all intents and purposes held a position that fowl was prohibited *d’oraita*.⁶⁰ When Samuel extended the meaning of the term ‘kid’ to include fetus, *cheilev*, and *nevelah*, the idea is that these prohibitions were instituted *d’rabbanan*.⁶¹ For R. Akiva’s position⁶² to make sense, it must mean that fowl, *chaya*, and impure *behema* were not Torahically prohibited. If this were the case, then the combination of R. Akiva and Samuel’s interpretations would impose rabbinic prohibitions on top of other rabbinic prohibitions. The *gemara* asserts that “according to R. Akiva’s interpretation, a prohibition can be imposed on another prohibition.”⁶³ Proving this possibility, the *gemara* makes a point of clarifying that the prohibitions of Samuel “do not require a verse.” This means that the *cheilev* and *nevelah*, as we have already asserted, are forbidden as food to begin with. Therefore, the laws of

⁵⁸ B. Hullin 116a

⁵⁹ Samuel rules *cheilev*, fetus, and *nevelah* prohibited to be mixed with milk (see above)

⁶⁰ Directly from the Torah’s commandment

⁶¹ From the legislation of the Rabbis, that is, the Rabbis enacted rules that expanded the sphere of the Torah’s prohibition.

⁶² That fowl, *chaya*, and impure *behema* are rabbinically prohibited

⁶³ B. Hullin 116a

the Torah already forbid *cheilev* and *nevelah* to be eaten when cooked in milk. Further, the *gemara* declares that a fetus is already counted as a ‘kid.’ Rashi clarifies this argument even further, stating that *cheilev* and *nevelah* come from animals that themselves also counted as ‘kids.’ Rabbinically prohibiting fowl, *chaya*, and impure *behema*, is not imposing a rabbinic prohibition on top of another rabbinic prohibition, because *cheilev*, *nevelah*, and fetuses decidedly do not require rabbinic prohibitions. Therefore, the position that the Torah verses exclude fowl, *chaya*, and impure *behema*, and that they are prohibited only by rabbinic decree, is upheld.

In further support of R. Akiva’s teaching that the Torah verses exclude fowl, *chaya*, and impure *behema*, Rashi added earlier that:

‘Kid’ excludes fowl because it is not a domesticated animal (*behema*) , ‘kid’ excludes *chaya* because it is not *behema*, despite the fact that *chaya* could be *behema*,⁶⁴ the phrase is repeated three times to exclude that possibility. ‘Kid,’ and not impure *behema*, but a pure *behema* that isn’t a kid, like a cow or an ewe.⁶⁵

Rashi is commenting here that ‘kid’ refers only to the category of *behema*, as asserted in the *mishnah* under examination.⁶⁶ The comment about a cow or an ewe shows that the term ‘kid’ does not refer solely to the young. More concisely, regarding the same matter, Rashi comments:

⁶⁴ See above, the categorizations of *behema* and *chaya*

⁶⁵ B. Hullin 113b

⁶⁶ M. Hullin 8:4, B. Hullin 113a-b

It could have been written in the Torah in all three places ‘you shall not boil a *behema*...,’ but ‘kid’ is written [instead]. We can learn from this the interpretation that it is meant to exclude impure *behema*, *chaya* and fowl.⁶⁷

At this point we see a dramatic change in the way the Talmud relates to the Torah verses. With the anonymous writer supporting R. Akiva’s view, after previously asserting that fowl was *d’oraita*, the later halakhic position is thus affirmed; the prohibition of eating fowl cooked together with dairy is of rabbinic origin. Refuted, therefore, is the notion that “God said so.”

Despite this abundance of rabbinic insights and observations, the issue of fowl as a non-lactating species was only addressed by R. Yosi haGalili. The *Gemara* seeks to understand the difference between the views of the contemporaries, R. Akiva and R. Yosi haGalili:

What [difference] is there between R. Yosi haGalili and R. Akiva? There is between them *chaya*. R. Yosi haGalili interprets: *chaya* is [prohibited] from the Torah.⁶⁸

Regarding *chaya*, the *gemara* holds that it is prohibited Torahitically according to R. Yosi haGalili, despite the fact that he is silent on the issue. Implicit in R. Yosi haGalili’s opinion is the idea that since *chaya* falls under the category of *nevelah*, so too does it come under the category of *basar b’chalav*. This is due to *smuchin*, the juxtaposition of the *nevelah* command in the same verse as the milk and meat law. And since *nevelah* is a Torahitic prohibition, so too is the prohibition of cooking dairy and *chaya* together. Either

⁶⁷ B. Hullin 116a

⁶⁸ B. Hullin 116a

way, for both R. Yosi haGalili and R. Akiva, *chaya* is ultimately included under the umbrella of *basar b'chalav*.⁶⁹

The striking difference between R. Yosi haGalili and R. Akiva, or between R. Yosi haGalili and any other rabbi for that matter, is the manner in which they classify fowl. As we have seen, the rabbis have consistently viewed fowl as an anomaly within the already anomalous *basar b'chalav* category. Yet, R. Yosi haGalili is the only rabbi who outright disqualifies fowl from the prohibition.

You may also say that fowl is [a difference] between them.⁷⁰ R. Akiva interprets: *chaya* and fowl are not [prohibited] from the Torah, thus the rabbis prohibited them (to be mixed with milk). R. Yosi haGalili interprets: Fowl is not even rabbinically prohibited.⁷¹

Tracing the debate back to the *mishnah*, let us remind ourselves of R. Yosi haGalili's interpretation:

That which is prohibited because of *nevelah*, is prohibited to be cooked with milk. Fowl, which is prohibited due to *nevelah*, it might be thought that it would be prohibited to be cooked in milk. Therefore, scripture says, 'in the milk of its mother,' to exclude fowl, because it has no mother's milk.

⁶⁹ cf. Rashi to the *gemara* B. Hullin 116a

⁷⁰ Rashi: "Fowl is [a difference] between them." R. Akiva expounds that it is not prohibited from the Torah, thus from this we learn that the prohibition is from the rabbis. But R. Yosi haGalili does not interpret it this way

⁷¹ B. Hullin 116a

Apart from what was determined by the later Tannaim and Amoraim of the Talmud, R. Yosi haGalili, one of the earliest Tannaim to comment on the issue, reads the Torah verses quite literally, while still within the framework of rabbinic thought. He employs *smuchin* in order to connect *nevelah* to milk and meat. By doing so, he thereby accepts the rabbinic aversion to superfluous words by broadening the scope of the term ‘kid.’ And yet, even by accepting the idea that all meat is included in the prohibition, R. Yosi haGalili is still able to admit, “You can’t milk a chicken!”

Not only did R. Yosi haGalili recognize the fact that chickens do not lactate, and therefore could never be cooked in the milk of their mothers, but the other rabbis seemingly agreed with him. Likely knowing that R. Yosi haGalili could not be proven incorrect, there is no direct rabbinic opposition to his interpretation of the verse. It is, so to say, halakhically sound. In fact, with one exception, the rabbis are quite silent regarding R. Yosi haGalili’s contribution to *basar b’chalav*, seemingly to the point of ignoring him. The one exception is the twice-employed *braitā*:⁷²

It was also taught in a *braitā*: In the place of R. Eliezer, they used to cut wood [on Shabbat], to make charcoal to make iron [tools].⁷³ In the place of R. Yosi haGalili, they used to eat the flesh of fowl [mixed with] milk.

Levi once visited the house of Yosef the fowler, and they served the head of a peacock [cooked in/mixed with] milk, and [Levi] did not say anything to them about it. When he came to Rabbi, Rabbi replied “Why did you not place them under a ban?” Levi replied, “It was the place of R. Yehuda b. Batyra, and I

⁷² B. Hullin 116a, B. Shabbat 130a (in a slightly different form than in Hullin)

⁷³ In reference to the need to make a knife for circumcision

thought that he has expounded to them the interpretation of R. Yosi haGalili who said, “to exclude fowl, because it has no mother’s milk.

First, we must address the issue regarding R. Eliezer and the production of iron tools on Shabbat.⁷⁴ When this *baraita* appears in B. Shabbat 130a, it comes to teach about the *mishnah* on that page. In that *mishnah*, R. Eliezer permits the cutting of trees, smelting of iron, and production of a knife for circumcision on Shabbat, if no knife is available.⁷⁵ The carrying of a circumcision knife on Shabbat would otherwise be prohibited, although R. Eliezer makes an exemption as long as the carrier identifies the knife for its purpose.

The *mishnah* regarding the production of a knife on Shabbat also includes a counter argument from R. Akiva, who holds that the knife could well have been made before Shabbat, therefore the production of the knife does not supercede the observance of Shabbat. This is upheld in the *Gemara* on Shabbat 133a , R. Judah in the name of Rav, explicitly states that the *halakha* is according to R. Akiva. The question left to decipher, though, is whether or not the same idea applies to the issue of fowl and milk, since it is in a position of *smuchin* to the *braita* about knife production on Shabbat.

Returning to the treatment of the *baraita* in Hullin, we see that it clearly comes as an example of how R. Yosi haGalili’s opinion had been followed in early rabbinic times. In, at least, both R. Yosi haGalili’s place and that of R. Yehuda b. Batyra, fowl was freely mixed with dairy, with no negative results. Even when Rabbi⁷⁶ suggested a punishment, the idea was dismissed since the people had been following the opinions of a *Tanna*.

⁷⁴ The activity described by R. Eliezer would, under normal circumstances, be prohibited on Shabbat. However, in the case of fulfilling the commandment of *brit milah*, the circumcision and all activities directly related to it supercede the observance of Shabbat.

⁷⁵ lit. If no knife was brought

⁷⁶ R. Judah haNasi

Further still, Levi, who reported the goings on to Rabbi, admitted that not only did he know of R. Yosi haGalili's opinion, as he was able to quote it quite exactly, but also that he respected R. Yosi haGalili's ruling as being just as valid as the practice he held of not mixing fowl and dairy.

The validity of a rabbi's halakhic ruling is not enough cause for it to attain position as standard *halakhah*. As the ruling principle of halakhic thought, the majority opinion sets the accepted practice. With the close here of the relevant Talmudic passages, and with the close of the Talmud in general, a uniform code of law has yet to be elucidated. While we have displayed and analyzed the opinions of the rabbis, we have not seen a definitive ruling on any matter. This job is left to the post-Talmudic halakhic thinkers and their literature, which is the subject of our study in the next chapter.

Chapter 4:

Fowl and Dairy in the Post-Talmudic Halakhic Literature

Taking over as the post-Talmudic expounders of *halakhah*, the *Geonim*, *Rishonim*, and *Achronim* faced the challenge of relating the legal debates of the Talmud to their contemporary lives. Condensing the vast amounts of rabbinic arguments into a clear, straightforward law code was neither an easy nor an uncontroversial task. However, the need for concise manuals led to the composition of the ever-expanding corpus of post-Talmudic halakhic literature, colloquially referred to as the “codes.” For our study, we will focus on three main medieval halakhic writers, and the treatment of *basar b’chalav* in their codes.

Rabbi Isaac al’Fasi (Rif)¹ addressed the issue of *basar b’chalav* in his halakhic work, *Sefer haHalakhot*, also referred to as either the *Hilchot* of the Rif, or, in our usage, as ‘Alfasi.’ The Rif’s process of compiling his halakhic digest was to incorporate direct, relevant quotes from the Talmudic sources into a coherent report describing the process. In his opinion, the Rif renders a final ruling for the specific laws that he traces. The format of the Alfasi follows closely that of the Talmud in that a summary or direct restatement of the *mishnah* is presented first, and is then followed by a cogent summary of the applicable *gemara* texts. His work regarding chapter eight of Hullin follows this same process, quoting from within the chapter, as well as from other Talmudic material that supports his decision.

The Alfasi begins where the Talmudic chapter begins, restating, in full, the *mishnah* of Hullin 103b. This *mishnah* tells us that all *basar* is prohibited from being

¹ Born in North Africa, settled in Fez, and eventually forced to flee to Spain, the Rif lived from 1013-1103 CE (Elon 1168)

cooked in milk with the exception of the *basar* of fish and locusts, and, further, that meat and dairy are not to be served together. The *mishnah* also continues by telling us that the person who vowed not to eat meat can still eat fish and locusts. It also relates the discrepancy between Beit-Shammai and Beit-Hillel regarding the serving of fowl and dairy upon the table together. The *mishnah* ends by describing what kind of table upon which placing meat and dairy is permitted or prohibited, as well as the kinds of people to whom the combination is permitted or prohibited.

When he relates the *gemara* material, the Rif begins with a strikingly different approach than the Talmud itself. We saw previously that the very first concern of the *gemara* was to point out that fowl must be prohibited *d'oraita* in relation to *basar b'chalav*. We also saw the shift in the Talmud to accepting the view of R. Akiva and others who espoused the opinion that fowl, *chaya*, and impure *behema* were prohibited *d'rabbanan*. By the time of Alfasi, the idea that fowl, *chaya*, and impure *behema* were prohibited rabbinically seems to have been the overriding viewpoint. The Rif, as he is wont to do, omits the debate as to whether or not, as well as any opinion affirming, that fowl was prohibited *d'oraita*, since those comments are, in his view, unnecessary for determining the *halakhah*. Instead, Alfasi begins by expressing the concept of the one who vowed to abstain from eating meat.

The Rif provides a concise summary of the points raised by both the *mishnah* and the *gemara*'s discussions of R. Akiva's teaching about the emissary who was sent to market to retrieve vegetables, and all he could find were gourds.² According to R. Akiva's opinion, since the emissary inquired as to whether or not gourds were acceptable in place of vegetables, means that gourds count in the category of vegetables. This same

² B. Hullin 103b-104a, B. Nedarim 54a/b

logic is then applied to fowl in the sense that it counts as *basar*, but still, as the *gemara* put it, fish and locusts did not count in the category of *basar*. Alfasi also makes specific note of the dispute between R. Akiva and R. Shimon ben Gamliel³ over the classification of the limbs and organs of an animal, as well as of fowl. R. Akiva declares them *basar*, while R. Shimon ben Gamliel does not, with the exception of organs. Regarding the organs, the Rif points out that organs do not count as proper *basar*, and those who eat organs do not count as proper human beings.⁴ As for the remaining disputed items, Alfasi employs the idea that if there are two conflicting opinions, the *halakhah* follows the *stam*, the general principle of the *mishnah* or *gemara*. In this case, neither opinion wholly reflects the *halakhah*. When there is a *makhloket*, a dispute between opinions, and the *halakhah* does not follow the *stam*, the Rif reminds us of the rabbinic principle to follow the most stringent ruling. In this case, since R. Akiva's ruling includes more items in the prohibition, Alfasi rules that we should label limbs and fowl as *basar*.

Alfasi also uses the dispute to highlight that one of R. Akiva's defenses for counting fowl as *basar*, and, ultimately, to fowl counting in the prohibition of *basar b'chalav*, was that fowl needed to be salted as a preservative measure. Realizing an inconsistency in the Talmudic arguments, the Rif takes a more stringent stance on the salting issue. Fish, he cites, also needs to be salted, and therefore, taking R. Akiva's opinion to its logical end, Alfasi rules that fish counts as *basar*. Therefore, fish is prohibited to the one who vowed to abstain from eating meat, and, consequently, the prohibition of *basar b'chalav* extends to fish as well.

³ B. Nedarim 54b

⁴ B. Nedarim 18a & 54b, Tosefta Nedarim 3:5, B. Meila 20b (also cf. Rashi and *Tosafot*)

Alfasi then follows the brief interlude regarding fish with an even briefer interlude about when eggs are to count as *basar* and when they do not count as *basar*. The Rif quickly summarizes the rule regarding a butcher's finding of eggs inside of a bird. If the eggs are found complete, that is, with a hard shell, cooking them in milk is permissible.⁵ Although Alfasi does not mention it explicitly, if the egg does not have a hard shell, it counts as part of the meat of the bird and cannot be cooked with milk. The later codes will provide a more elaborate explanation for the status and uses of an egg.

The Rif next moves the exposition of the *basar b'chalav* laws to the notion of cleaning and/or waiting between meat and dairy. The discussion of cleaning and waiting is introduced, however, by the story of Agra and how he ruled that fowl and dairy could be eaten consecutively without cleaning or waiting.⁶ Alfasi relates the Talmudic episode to us more or less verbatim. However, whereas the *gemara* states that the eating of dairy and fowl consecutively without pause or cleaning is attributed to a haphazard way of eating, the Rif calls to mind an alternative reading. Instead of the word *afikorin*, haphazardly (lack of care), Alfasi mentions that there are some who say *afkolis*, wrapped in a thin towel or cloth. Permission to wrap meat and cheese in the same cloth, provided that a layer of cloth separates the two, comes from M. Hullin 8:2 and its brief *gemara* on Hullin 107b. The *gemara* states that while, indeed, wrapping is permitted, it is ultimately unnecessary as one would be wrapping cold flesh and cold cheese. Such a mixture is permitted seeing that no cooking, and therefore, no actual mixing would take place. The *gemara* suggests cleaning the spots where the meat and cheese touched, although not

⁵ Tosefta Beitza 1:2, B. Beitza 6b

⁶ B. Hullin 104b

much precaution beyond that. Not once, however, was the term *afkolis* used to describe this wrapping.

Nevertheless, the Rif repeats the *gemara* of Hullin 104b, acknowledging that in the case of fowl, cheese may be eaten after fowl without cleaning, but in the case of *basar*, both separation and cleaning are required. Noteworthy about this comment, both in the *gemara* and in the fact that Alfasi quotes it directly, is that the two contrasting items are ‘fowl’ and ‘*basar*.’ Based on the general trend of the Talmudic arguments, especially based on what had become the *halakhah* at the time of the Rif, we would have expected fowl to be analogous to *behema* or *chaya*. Further, we might have expected the comment to read as follows: “*basar* of fowl, yes; *basar* of *behema*, no.” Instead, we again see this clear example in the Talmud, as well as the un-altered, and un-commented upon reproduction of that Talmudic example in the Alfasi, of a scenario where fowl is unequivocally not *basar*.

The issue of fowl and dairy becomes even more complex for the Rif in his treatment of the debate between R. Akiva and R. Yosi haGalili.⁷ Alfasi repeats the *mishnah*, in part, and affirms that the *mishnah* itself is enough to stand alone without the supporting material from the *gemara*. What is interesting is that the Rif deletes, in its entirety, the comments made by R. Yosi haGalili. By completely ignoring the idea that “You can’t milk a chicken,” Alfasi affirms that the overriding position on *basar b’chalav* in the times of the Geonim and early Rishonim was to follow R. Akiva in saying that fowl, *chaya*, and impure *behema* were indeed prohibited rabbinically.

The exposition of the Rif on the matters of *basar b’chalav* related to fowl leaves us questioning many aspects of this code. First and foremost, if, as we saw both at the

⁷ M. Hullin 8:6, B.Hullin 113a

outset as well as at the end, the matter of fowl being prohibited rabbinically from being eaten with dairy is the set *halakhah*, why then does Alfasi spend a considerable amount of time discussing the issue of fowl? Instead of following the normal procedure of the work, that is, providing relevant support for the *halakhah* without extraneous comments, the Rif presents arguments that seemingly undermine the established rule. The inclusion of both the dispute between R. Akiva and R. Shimon ben Gamliel and the episode featuring Agra, presents, albeit minimally, evidence to support the idea that fowl is an anomaly regardless of the fact that it is to be understood as prohibited in much the same way as the *basar* of a domesticated animal. Maximally, the inclusion of these Talmudic examples may belie a suspicion that the Rif does not fully agree with the accepted *halakhah*. This is certainly a possibility as we saw that Alfasi added fish to the *basar b'chalav* prohibition, when the Talmud clearly states, and the accepted post-Talmudic *halakhah* affirms, that fish is excluded from the prohibitions. We can certainly infer from the Rif's unease, that the relation of fowl to the *basar b'chalav* prohibitions was still a fluid matter in the eyes of, at least some, post-Talmudic halakhic authorities.

In contrast to the Hilchot of the Rif, Rabbi Moses ben Maimon's (Maimonides, Rambam)⁸ Mishneh Torah is a halakhic code in the style of *sifre pesakim*, in that it presents only final halakhic rulings. Consequently, no source material accompanies the ruling. This style presents us with striking advantages and disadvantages. One of the advantages of this style is the elimination of doubt. Since we do not see the sources, nor the debates within the sources, we can accept Rambam's opinion at face value. However, not having those sources leaves us wanting insight as to Rambam's reasoning for decided

⁸ 12th Century CE, from Cordoba Spain

on the *halakhah* as he did. In some cases, the Rambam explains in brief how he arrived at his conclusion. Nevertheless, the Mishneh Torah is regarded as one of the great, and most complete works of halakhic codification. An analysis, limited as it is, of its treatment of *basar b'chalav* is indispensable to our present study.

Maimonides follows a logical structure in relaying the laws of *basar b'chalav*,⁹ progressively building on each previous law. He begins with the obvious, expressing the prohibition of cooking milk and meat and describing punishment for the violation of that prohibition. Next he reminds us that eating is a concept implied by the idea of cooking. Rambam's third *halakhah* reiterates the notion that the prohibition refers to the *basar* of a pure *behema* mixed with the milk of a pure *behema*. He also expresses the permission to cook and derive benefit from any combination of *basar* and dairy from pure and impure animals, as well as the combination of the items from two impure animals. Eating them, however, is still forbidden. Rambam also rules regarding fowl and *chaya* that the *basar* of those two categories mixed with the milk of a *chaya* or the milk of a *behema* is only prohibited rabbinically. As such, cooking and deriving benefit is permitted, while eating is still forbidden. The case of fowl and *chaya* provides us with an example of an instance in which the Rambam explains his reasoning, which we will discuss below. For our purposes, the last relevant piece of the Rambam's rulings comes as he permits the eating of fish, locusts, and completely formed eggs with milk.

Maimonides affirms the rabbinic nature of the inclusion of *chaya* and fowl in the *basar b'chalav* prohibition, but provides a seemingly innovative reasoning for that inclusion. Whereas the Talmudic arguments focused mainly on the nature and

⁹ Mishneh Torah: *Sefer Kedushah* (Book of Holiness), *Hilchot Ma'achalot Assurot* (The Laws Governing Forbidden Foods), Chapter 9:1-5

categorization of fowl and *chaya*, as well on the scope of the Biblical prohibition, Maimonides' concern is seemingly narrowed to the Biblical law. He offers the suggestion that the rabbis forbade fowl and *chaya* as merely a precautionary measure, a fence to protect the law against the mixing of the *basar* of pure *behema* with the milk of a pure *behema*. Rambam further explains that this precaution was based on the nuanced nature of the Biblical command. If a simpleton¹⁰ were to cook and eat fowl with milk, in Maimonides opinion, that same person would likely view the Biblical commandment in its literal meaning of "kid in the milk of *its*¹¹ mother." Since the Biblical command, according to both the Talmudic debate as well as Rambam's previous ruling, removes the need for the direct relationship between kid and mother, the danger is that one would mistakenly eat, for example, beef cooked in the milk of a goat. Maimonides posits that in order to avoid this, the rabbis forbade all *basar* from being mixed with dairy.

The halakhic anomaly of fowl is certainly continued by Rambam's ruling that the prohibition of fowl and dairy is merely a precautionary tactic. While one of the main questions throughout the Talmud is whether or not fowl counts towards the general category of *basar*, Maimonides is seemingly ambivalent to that question. In fact, he quite likely might have ruled, similar to Agra or R. Shimon ben Gamliel, that fowl does not count in the category of *basar*. Even further, it seems as though Rambam agrees with R. Yosi haGalili in both the scientific fact that "you can't milk a chicken," and in the idea that *basar b'chalav*, as we learn it from the Torah, does not apply to fowl. If the rabbinic prohibition was instituted as merely a precautionary measure, as Maimonides intimates, it follows that he would agree that, in principle, fowl cooked with dairy may be eaten

¹⁰ That is, one uneducated in Halakhah

¹¹ Emphasis added

without guilt or punishment. Further, it follows that fowl cooked in dairy would be permitted to those who were well educated in *halakhah*, as they would be aware of the nuances of the Biblical command. The idea of prohibiting fowl as a precautionary measure does not end with Maimonides or the Mishneh Torah. We shall see later on how this concept is revived in the commentaries to the Shulchan Arukh, in the guise of *marit ayin*, the appearance of the eye.

R. Jacob b. Asher,¹² son of the Rosh,¹³ was the author of the *Arba'ah Turim* (*Tur*); the four columns. The *Tur* explains the issue of *basar b'chalav* in the section called *Yoreh Deah*. For our purposes of tracing the role of fowl in the *basar b'chalav* prohibitions, paragraphs 87, 88, and 89 will be our focus.

Each paragraph of the *Tur* begins with a heading, from which a variety of laws will be addressed. In the case of paragraph 87, the heading asks the question, “For the prohibition of *basar b'chalav*, which *basar* and which milk are practiced.” This is a question that we have encountered time and again in this study. One of the hallmarks of our study of the Chicken Parmesan dilemma has been the issue of which *basar* count towards the prohibition. In its halakhic exposition, the *Tur* relays very familiar information and rulings. It begins by tracing the prohibition back to the three Torah verses, and incorporates the ruling that the three repetitions are meant to prohibit cooking, eating, and deriving benefit. The *Tur* goes further to remind us that any animal that is eligible to be a kid is included in the prohibition, along with the milk of any animal that is eligible to be a mother. The halakhic exposition continues by including the

¹² ca. 1270-1343 CE. Jacob ben Asher was born in Germany and eventually fled to Spain in 1303 where he served as judge of the Rabbinical court of Toledo. (Elon 1278)

¹³ Asher ben Jehiel (or Asheri) was a German and, later Spanish halakhist from the second half of the 13th to the beginning of the 14th Centuries. (Elon 1251)

distinction we saw in the *mishnah* on Hullin 113a¹⁴ regarding the mixture of pure *basar* with pure milk, and the subsequent permission of cooking and deriving benefit from the mixture of pure and impure *basar* and milk.

This description of the mixtures is immediately followed by a listing of the included animals, beyond the category of *behema*. The Tur here again affirms that *chaya* and fowl are prohibited rabbinically to be eaten with milk, but as such, they are permitted to be cooked with milk and that mixture may yield benefit. The issue of eggs is again raised, this time in more detail than what is found in the Alfasi and in Rambam's *Mishneh Torah*. Yet, the same conclusion is reached; a completed egg is no longer considered meat and an incomplete, soft shell egg, is counted as being part of the *basar* of the bird in which it was found. The Tur also maintains the ruling that fish and locusts are excluded from the prohibition entirely.

Moving to paragraph 88, the Tur covers the subject of serving cheese and *basar* side by side on a table. The common ideas regarding serving are repeated; avoid serving *basar* and cheese on the same table where two people who know each other are eating, but feel more at ease serving it on the table when the people do not know each other, as well as the permission of placing the two categories on a buffet-like table. The Tur here provides further explanation for these rulings. The permission for serving meat and cheese to two people who do not know each other, meat to one and cheese to another, is based on the idea that since they do not know each other, they will harbor a degree of hostility towards each other. This is not hostility in the sense of animosity or violence, but rather the idea that they will keep their guard up, not necessarily trusting in the other. In this case, each would presumably be very stringent in his eating habits, making sure to

¹⁴ also M. Hullin 8:4

check his food to see if a prohibited mixture had occurred. On the other hand, two people who are familiar with each other are more likely to let their guard down, which is why the prohibition of serving is stringently enforced in their case. The idea of serving, the Tur says, also has to do with whether or not the table of strangers will be sharing bread, or a single *hamotzi* blessing. If that is the case, then the two items, meat and cheese, cannot be served together on that table for fear of contaminating the bread.¹⁵

The exposition then moves to the subject of eating meat after cheese and eating cheese after meat. The first comment made by the Tur is that in this case, there is no difference between the *basar* of a *behema*, *chaya*, or fowl. If one were to eat *basar*, the ruling is that six hours must pass before cheese may be eaten. While this is certainly to ensure that meat and cheese do not mix in the body, the specific reason given by the Tur is to make sure that there would no longer be any meat stuck between the teeth that would impart the flavor of the meat to the cheese. Flavor is an issue that goes back to the Talmudic arguments regarding certain mixtures of meat and dairy. Conversely, if one were to eat cheese, the ruling, consistent with previous codes, is that *basar* may be consumed immediately. The caveat to this rule is that one must wash his or her hands to ensure that no residue of cheese remains.

The Tur then relates the ruling of Rambam; that washing only applies in the case of the *basar* of *chaya* and of *behema*. When cheese is eaten prior to fowl, however, no washing or cleaning is required. Rabbenu Tam¹⁶ is also referenced for his rulings that washing and cleaning is not necessary for any *basar* that is eaten after cheese, and that cheese may be eaten after meat with adequate cleaning and washing. Regarding Rabbenu

¹⁵ By the residue on each of their hands

¹⁶ Jacob ben Meir (Rabbenu Tam) was one of the *Tosafot* and a grandson of Rashi

Tam's latter opinion, if the issue of eating cheese immediately following *basar* is based on the idea that meat could be stuck between the teeth, or that the flavor of meat could be imparted to the cheese, then his ruling about washing makes perfect sense. This is especially so in our day as, with advanced dental hygiene technologies, we can be sure that all of the meat and its flavor will have been cleansed from our mouths. Despite both the convincing ruling of Rabbenu Tam and the fowl-lenient ruling of Rambam, the Tur also mentions the opinion of the Rosh, which it takes as a final ruling. The Rosh determined that the *minhag* of the world was not to eat cheese following *basar*, even the *basar* of fowl. In this case, the Tur rules that *minhag* overrides, and that we are not to change the *minhag*, even in the case of fowl.

We see in the Tur a set of laws that are mostly consistent with what we have come to expect in the corpus of the regulations relating to *basar b'chalav*. There are, however, a number of variations in the Tur's final rulings and in its methodology that are specifically worth noting. The exposition of the Tur includes other aspects of the *basar b'chalav* prohibition beyond those relevant to the case of fowl. One example of this is the comprehensive determination of the status of an egg, which goes beyond the mere completeness of the eggshell. Additional criteria, such as the yoke, white, and aspects of blood, are involved in the final determination. Although we have not delved into this section in much detail, we must note that this is one case where the Tur relies upon the responsa, codes, and other halakhic works of post-Talmudic sages. These sages include, but are not limited to, Rashi, Rashba,¹⁷ Rabbenu Tam, Rambam, and Rosh. What is

¹⁷ Solomon ben Abraham Adret (Rashba) was a halakhic authority in Spain during the second half of the 13th Century through the beginning of the 14th Century CE. (Elon 1273)

interesting, however, is that when the exposition shifts to the issue of serving, the Tur presents ideas without attribution.

As mentioned above, the reasoning in the Tur as to why two familiar people are not permitted to eat cheese and meat on the same table while two strangers may is related to the notion of being on guard with respect to inspecting the food. This reasoning, though inferred from the Talmudic arguments, seems to be an innovation of the Tur. Alfasi does not cite a ruling of any of predecessors or contemporaries on this matter. Yet, despite the lack of attribution, this line of reasoning regarding serving presents an interesting, and, we may add, familiar tone for the laws of kashrut in general, and milk and meat in particular.

The Tur's presentation of the laws of serving highlights, with greater emphasis than previous iterations of the law, the social nature of eating. In this framework, the prohibition of *basar b'chalav* becomes associated with a certain level of trust and familiarity. In our day we see this same approach to food in a social context. The proliferation of kosher certifications for grocery items and for restaurants attests to the fact that if there is a familiar and reliable symbol or signature, a Jew who adheres to the laws of kashrut will be more trusting in his or her eating habits. Conversely, if there is no certification, or if it is an unfamiliar certification, one tends to be more attentive to the details of the product.

Despite the fact that the laws regarding serving have been methodically divorced from the anomaly of fowl, the socialization of the laws does provide relevance for our study. The realm of the social concepts of familiarity can be seen as offering one solution to the dispute and anomalous nature of fowl. If the idea is trusting, letting ones guard

down, in the case of fowl we would likely expect the more stringent rulings to gain widespread preference. Preference, however, is a complex concept in relation to *halakhah*. Speaking about preference leads the discussion away from the clearly defined structure of *halakhah* and towards the blurred lines of *minhag*.

Such is case in regards to the role of fowl in relation to the ideas of sequence and waiting between the consumption of meat and dairy. As we have seen through the Talmudic arguments and their exposition in the Alfasi, Rambam's halakhic thoughts, and here in the Tur, answering the questions of in what order meat and cheese may be eaten and what precautions or length of time are required between the two is a complex issue. The final exposition offered by the Tur takes into account the ruling of the Rosh that even though eating cheese after fowl is halakhically acceptable; the final decision rests in the authority of *minhag*. The *minhag* of the world, according to the Rosh, was that eating fowl after cheese was to be avoided. We are left to ponder, however, from where the Rosh derived that *minhag*. We could posit that, based on our study of the Biblical and Second Temple periods, the custom of caution towards the separation of milk and meat had been pervasive for centuries. Yet we do not have any extant source specifically noting the *minhag* of avoiding eating cheese after meat, not even in the Talmudic episode of Agra. This question, among others, will be taken up further by R. Joseph Karo¹⁸ in both his Beit Yosef and in the final product of the Shulchan Arukh.

The Beit Yosef, Karo's commentary to the Tur, follows much of the same rulings as the Tur, and as such, we will focus more on the subtle differences between the two. Further, while the Tur was rather terse in its citations and explanations for its rulings, the

¹⁸ Joseph Karo was born in 1488. Originally from Spain, he and his family were forced out by the expulsion and eventually made their way to Safed, in the land of Israel. (Elon 1310)

Beit Yosef provides diverse and comprehensive explanations that lead to the final halakhic ruling. We will analyze a number of these explanations, tracing the authority of rulings back to specific sources, as well as exploring where and how a variety of earlier sources differed in their interpretations. These citations and variances will not only provide a window into the ever evolving nature of *halakhah*, but will also highlight the perpetual status of fowl as an anomaly within the laws of *basar b'chalav*. Our study of the Beit Yosef begins with its commentary to paragraph 87 of the Tur.

One of the lingering questions the Talmud asked was whether or not *chaya* and fowl were prohibited *d'oraita* or *d'rabbanan*. The general consensus moving forward from the Talmud was to accept R. Akiva's position that *chaya* and fowl were prohibited *d'rabbanan*. An intriguing aspect of the Beit Yosef is that it attributes that final decision not to the Talmudic rabbis, nor to Rashi or the *Tosafot*, but rather to Alfasi. We see here an acknowledgement that many pivotal halakhic decisions, traditionally thought to have been revealed at Sinai, in actuality came from mortal men less than 1000 years ago. While this is certainly an illustration of the more modern "finality" of Jewish Law, it does not resolve the anomaly of fowl.

The Beit Yosef continues with an explanation of the rulings that anything prohibited rabbinically can, nevertheless, be cooked with dairy and that benefit may be derived from the mixture. After a brief mention of the prohibition of cooking *basar* in *chalav islah* (human milk),¹⁹ the discussion moves to an even more detailed exposition

¹⁹ This determination is based on a responsum by Rashba, from which the Beit Yosef concludes that the prohibition of eating *basar* mixed with human milk is due to the concept of *Marit ayin* (appearance of the eye). *Marit ayin* both as a concept and its relevance to the study of the role of fowl in the *basar b'chalav* prohibition will be studied later on.

of the laws defining eggs as either counting as part of the *basar* of fowl or not. After the eggs, the Beit Yosef covers another set of items that may or not count as meat.

As with most of its predecessors, the Beit Yosef rules in favor of locusts, that is, that they may be cooked and eaten with milk. However, in terms of fish, even though Karo cites the Talmud on Hullin 103b, and shows support for the eating of fish and milk from both Rambam and Rashba, Karo holds that the mixture of fish and milk should be avoided for consumption. Karo claims that there is a danger in the combination of fish and milk, and cites the Tur in Orach Chayim paragraph 173. However, as R. Moshe Isserles²⁰ points out in his Darchei Moshe commentary to the Beit Yosef, that particular citation is nowhere to be found. Isserles could not find anything in *Tur* Orach Chayim 173 to support the danger of a fish and dairy combination. Interestingly enough, Karo did not comment on this combination at all in the Beit Yosef commentary to this section. Regarding the combination of fish and *basar*, we can see in Karo's Shulchan Arukh, Orach Chayim 173 that the intended danger of that mixture is leprosy, and that the safeguard against it is to wash between the two. However, Isserles, in his gloss to Shulchan Arukh Yoreh Deah 116, mentions that the washing was mostly ignored as many just tended to eat or drink something between eating fish and eating *basar*. The idea of a mixture of fish and milk as being prohibited due to a danger, then, is an innovation in the Beit Yosef. What this inconsistency, along with the Alfasi treatment of fish, can teach us is that as much as fowl is an anomaly within *basar b'chalav*, fish is not free of disputes regarding its status as well.

²⁰ Moshe Isserles (Rema) was born in Cracow and during his life (ca. 1530-1572 CE) was viewed a leading Ashkenazic halakhic authority. (Elon 1349)

The Beit Yosef continues a discussion of Yoreh Deah 87 that is mostly irrelevant to our study. We therefore move on to the Beit Yosef's treatment of paragraph 88. Karo here adds little to the idea of which items may or may not be served on the same table with meat, and what table they may be served upon. The Beit Yosef does not comment on the idea of serving meat and cheese to two familiar people, except to send us back to *Tur* Orach Chayim 183. This time, however, the intended comment is to be found in the citation. Paragraph 183 of Orach Chayim mentions the same concepts of sharing bread and the caution against the residue of meat or cheese touching the shared bread. Also, the *Tur* repeats the same ideas of hostility and letting one's guard down. The Beit Yosef seemingly agrees with the socialization aspect of eating regarding the separation of milk and meat. However, it is odd that Karo did not comment on this himself, but rather refers us to a passage quite parallel to the one he is commenting on here in Yoreh Deah.

Moving into paragraph 89, we see Karo discussing the concepts of order and waiting between cheese and *basar*, and vice versa. If ever we were to see an example of the anomalous nature of fowl within the laws of *basar b'chalav*, this is the paragraph to study. Karo's first comment is that all of the laws of this paragraph are clarified in paragraph 173 of Orach Chayim, as well as the Beit Yosef to that paragraph. Yet even as Karo gives us the citation, he continues with a concise explanation centered on the anomaly of fowl. The permitted sequence is one where the eating of *basar* follows the eating of cheese, with the prohibition ruling that cheese may not be eaten after *basar*. The question then arises as to which *basar* the prohibition applies, as well as what the procedure is between the eating of *basar* and the eating of cheese. Although The Beit Yosef makes clear that its preference is to follow a ruling of Maimonides, nevertheless,

we see Karo work through many opinions of his predecessors. We see in this explanation that at least half-a-dozen of the previous halakhic thinkers disagreed on the status of fowl, and that the disagreement can be traced all the way back to the Talmudic episode of Agra.

Before continuing with Karo's exposition, let us remind ourselves about the declaration of Agra. Agra allowed fowl and cheese to be eaten as long as the hands were washed and the mouth cleaned in between. Maimonides, Karo's preferred interpretation, said that *behema* and *chaya* are the types of *basar* referred to in the prohibition of not eating cheese after meat, unless a thorough washing and cleaning occurred. In the case of fowl, Rambam went back to Agra in allowing cheese to be eaten after fowl without washing and cleaning. In his interpretation of Agra, Maimonides defines *afikorin* slightly differently from the simple reading of previous interpreters. We have come to define *afikorin* as the process of one eating hastily and carelessly. In this definition, we see that although the preferred procedure would be to cleanse between fowl and cheese, when eaten in haste, the order is permissible without the step of cleaning in between. Rambam, however, reads *afikorin* as meaning *hefker*; negligence. Here Maimonides says that one who ate fowl and cheese without washing was not careful enough to wash his or her hands or mouth in between. He continues by saying that the Talmudic argument of Agra was intended for the order of eating cheese and then fowl, and that in the reverse, it is still prohibited to eat fowl first and then cheese. This assertion of the Rambam is rather nonsensical, as Agra not once defined an order to eating. The order of cheese and then meat was written with regard to R. Isaac's visit to the home of R. Ashi. We must assume that Maimonides takes his cue from this interaction and the fact that the opposite order is

not written into the Talmudic episode. The Beit Yosef goes further, telling us that Maimonides' interpretation is not in accord with the interpretation of the Ramban, as written by Rashba, and the Ran.²¹ These three earlier scholars all ruled that Agra also meant that cheese could be eaten after fowl without washing and cleaning.

Beyond the order of eating, Karo notes discrepancies in his predecessors' opinions regarding which meats are permissible to eat without cleaning. The Ran wrote that *chaya*, since it too is prohibited *d'rabbanan*, should count the same as fowl in this regard. Maimonides, however, notes that *chaya* is similar to *behema*, especially in the case of taste. We know of this analogy between *chaya* and *behema* from both the Biblical sources and the Talmud. Biblically, the two words refer to the same sets of animals, and even though there is a rabbinic delineation between domesticated and undomesticated animals, there are, nevertheless, species that overlap those categories. The taste of those meats would then be very similar, if not identical. Both of these arguments still, however, leave fowl as distinct from *behema* in its relation to *basar b'chalav*.

The Rosh, in agreement with the Rif, posits that Agra agreed with R. Akiva regarding the rabbinic nature of *chaya* and fowl, and that Agra only stipulated fowl because it was the more common food. Rabbenu Tam opined that fowl was permitted in any order because the *basar* of fowl, he said, does not stick to the hands nor does it stick between teeth. Following Rabbenu Tam, the Beit Yosef cites an opinion of the Rashba saying that those who teach that it is permissible to eat cheese after *chaya* and fowl, without cleaning, do not make sense. His support for this is that the great rabbinic authors of the past had prohibited fowl and *chaya* as if they were *behema*. On the other hand, if

²¹ Rabbeinu Nissim Gerondi (Ran) was a leading 14th Century halakhic authority in Barcelona. (Elon 1175)

cheese was eaten first, Rashba ruled that *chaya* and fowl could be eaten immediately without washing.

After noting the myriad of diverse opinions regarding the nature of fowl (and *chaya*) and its status relevant to *basar b'chalav*, Karo tells us that his preference is, indeed, for the opinion of Maimonides. His reasoning is that since the interpretation of the *gemara* is so disputed, Rambam's reading creates a clear distinction between what is allowed to be eaten, in what sequence it should be eaten, and the required procedures between consumption. Karo states that Maimonides' opinion extracts this clear settlement of the issue.

More intriguing for us than Karo's final decision on the matter of the order of eating fowl and cheese is exactly that dispute to which Maimonides referred. This dispute of course raises our common questions regarding the anomaly of fowl: Is it *basar*? Is it treated as *basar*? If so, when is it like *basar* and when is it not? And, more importantly, why? We know that the Talmud leaves us without a clear answer, yet in the case of the *Rishonim* and *Achronim*, the leading post-Talmudic halakhic authorities, they too cannot agree on a common set of reasons or rulings. Even more interesting in this observation is that the authority to make the final decision has seemed to rest on the latest of all of the above sources, namely R. Joseph Karo. A common rule in rabbinic thought is that no later authority can overrule an authority of the previous generation due to the fact that rabbinic wisdom decreases as time moves forward. This leaves us with a new question: from where does the authority to dictate *halakhah* come, and to whom is it granted?

Many would answer the latter question with the name of Joseph Karo, as his codification of laws has become the basic standard for the *halakhah* in even today's

orthodox circles. Karo himself would not have made such a claim. As he asserts in the Beit Yosef, and as is carried forward to the Shulchan Arukh, Karo bases his halakhic decisions in accordance with the leading authorities of the past. Thus the rulings of the Rif, Rosh, and Rambam factor heavily into his decisions, as does the *minhag* of the Jewish people. The *basar b'chalav* section of the Shulchan Arukh relevant to our study²² more or less reflects the same opinions that we have come to expect after our analysis of the Tur and the Beit Yosef. Again, however, there are some minor alterations and innovations that must be called to our attention.

Of minor note are the differences in the paragraph headings between the Tur and the Shulchan Arukh. For paragraph 87, while the Tur is concerned both with the types of *basar* and the types of milk that are included in the prohibition, the Shulchan Arukh seems to be more concerned with the type of meat and also what is meant by the word “cook.” This shift in focus is intriguing because, as we shall see below, one of the most complex and characteristic changes between paragraph 87 of the Tur and the Shulchan Arukh is the consideration of human milk and almond milk. The rules pertaining to the cooking and mixing of *basar* with those milks and their relation to *marit ayin* adds to the intrigue.

The subject of paragraph 88 remains the same,²³ although the heading of the Shulchan Arukh intimates that the serving of *basar* is the critical issue as cheese is already being eaten on the table. Finally, paragraph 89 shifts from the Tur considering the possibility of both eating meat and then cheese and eating cheese followed by meat to the Shulchan Arukh, rather bluntly, saying “that cheese is not eaten after *basar*.” As far as

²² S.A. Yoreh Deah 87, 88, and 89

²³ The idea of serving *basar* and cheese on the same table

dramatic changes to the laws that we have already seen, for our purposes paragraphs 88 and 89 are no longer apropos for analysis.

Let us then turn our focus to Shuchan Arukh, Yoreh Deah 87. The first two laws of this paragraph are almost verbatim repetitions of what we saw in the Tur. *Halakhah* number three, though, leads into the intriguing complexity of this code's contribution to the *basar b'chalav* discussion, and, explicitly, to the further composition of the Chicken Parmesan dilemma. One of the first elements in *halakhah* three is a final codification of the fact that the permission regarding cooking and deriving benefit from *chaya* and fowl mixed with milk, even when mixed with pure milk, is one of rabbinic origin. Karo here further clarifies that fish and locusts do not have a rabbinic prohibition attached to them, regardless of the variances that we saw in Alfasi as well as in Karo's own treatment of the danger of fish and milk in the Beit Yosef. The sizable contribution of this paragraph, however, will originate in the form of Isserles' gloss appended to the end of *halakhah* three, as well as the ruling of *halakhah* four.

In these instances, Isserles introduces the question of what to do in the case of the milk of almonds. His concern is that if the *basar* of a *behema* were to be placed²⁴ in almond milk, people would mistake that for animal milk. Therefore, these same people might be confused and think that cooking or eating the *basar* of a *behema* was permissible. However, to believe and act that way would result in breaking a law of the Torah. Therefore, in order to avoid a case of *marit ayin*, Isserles rules that pieces of almonds must also be present to show that the milk is, indeed, almond milk. Regarding fowl, however, Isserles does not show concern since eating the mixture of fowl and milk is only prohibited rabbinically.

²⁴ rested in, cooked in, mixed with

Similarly, as we saw in Karo's citation of Rashba²⁵ in the Beit Yosef, *halakhah* four prohibits the mixing of *basar* and human milk by means of *marit ayin*. Isserles adds that this applies to both pure and impure *basar*, especially of a *behema*. Again, however, he reminds us that the stringency of *marit ayin*, in this case, need not apply to fowl as it is, still, *d'rabbanan*. Extending *marit ayin* to fowl is a concept taken up by the various commentaries to the Shulchan Arukh. The issue of *marit ayin*, its application to the various aspects of the *basar b'chalav* category, and an emphasis on its function in relation to fowl will be covered in greater detail in the next chapter.

Our review of the post-Talmudic halakhic works reveals that, even with the goal of making clear and concise sense of the rabbinic debates, certain issues remain in constant dispute. The anomaly of fowl had not been resolved until Joseph Karo's Shulchan Arukh became gospel. Even within his works, Karo openly admitted the variable nature of *halakhah* through citing the opinions of the Rif, Rosh, Rambam, and various others. This acknowledgment runs counter to today's often-heard opinions that the interpretations of the ancient rabbis can never be altered in any way. The tension between rigidity and flexibility in *halakhah* will be analyzed in a later chapter.

²⁵ We will study the responsum of the Rashba later in greater detail.

Chapter 5:

More Than Meets the Eye? Or Less?—The Issue of *Marit Ayin*

The rabbinic concept of *marit ayin* has gained the reputation as a popular reasoning behind the prohibition of cooking, and the subsequent eating of fowl mixed together with dairy. While commonly translated as “appearance of the eye,” *marit ayin* can also be interpreted, among other ways, as “appearance of impropriety”¹ or “appearance of wrongdoing.”² Joseph Polak goes further in defining the role of *marit ayin* as ensuring that an action is “beyond suspicion” of violating a law.³ Regardless of how one translates it, *marit ayin* is a concept that is focused on the way objects and actions appear to an outside observer. The classically cited root of the concept comes from tractate Beitzah, also known as tractate Yom Tov.

The *gemara* on Beitzah 9a elucidates the *mishnah* from M. Beitzah 1:3 which reads, “Beit Shammai says that one may not move a ladder from one dovecote⁴ to another dovecote, but may incline it from one window to another window. Beit Hillel permits this.” The prohibition here refers to the action of moving a ladder between dovecotes that is performed on Shabbat and Yom Tov.⁵ Beit Shammai’s proviso of leaning the ladder to different windows implies that one would not pick up and physically move the ladder, and that at least part of it would remain grounded. Beit Hillel adopts the lenient ruling that in the case of dovecotes, moving a ladder would be permitted. One question we

¹ Joseph A. Polak

² Artscroll-Mesorah Schottenstein Edition of Talmud Bavli- Beitzah

³ Polak, Joseph A. “Some Aspects of the Appearance of Impropriety (*Mar’it Ayin*) in Jewish Law.” in *Jewish Law Association Studies, XIV: The Jerusalem 2002 Conference Volume*. Hillel Gamoran, ed. Binghamton University (NY): Global Academic Publishing, 2004. pp. 191-192

⁴ A dovecote is an elevated “bird-house” that is intended for use by pigeons

⁵ Yom Tov is the designation for any other holiday that includes similar prohibitions of work.

might be wondering about is how or why the ladder was allowed to be brought to the dovecote in the first place. The cleaning of a dovecote, or feeding of the birds inside, is not a prohibited action on Shabbat and Yom Tov. Also, we may assume that, in some instances, the ladder would have stayed at the dovecote since the last time it would have been used. Even if the ladder had to be moved to a dovecote, we can also assume that this action would be permitted due to the fact that one's dovecote would likely be in the private domain of his home. Carrying, a prohibited act on Shabbat in the public domain, is allowed in one's own home. The laws of Eruvin increase the size of a private domain to include a set of homes that share a courtyard, or sometimes even extend the private domain to include whole neighborhoods and cities. As we shall see in the *gemara*, the issue here is not that of carrying, but that of the ladder and what its intended purpose might be.

As the conversation is taken up in the *gemara*, we see R. Hanan b. Ammi explain that if one saw another carrying a ladder, the former might conclude that the latter was about to engage in the work of plastering a roof,⁶ a forbidden action on Shabbat and Yom Tov. R. Hanan b. Ammi also states that this prohibition refers specifically to the public ground, where others would be around as witnesses. In R. Hanan b. Ammi's opinion, the private sphere, where uninformed observers would not see the person with the ladder, is a permitted location for moving the ladder between dovecotes. The *gemara* comes to also teach that both Beit Shammai and Beit Hillel took the same view as R. Hanan about the private sphere. However, the *stam* Talmud refutes this, quoting R. Judah, in the name of Rav, that if something is forbidden due to *marit ayin*, it is forbidden even in the

⁶ Rashi explains that roofs at the time of the Talmud were flat and required plaster to create an incline for drainage.

innermost chamber of one's home. The Ran comments that the reasoning behind this prohibition extending to the innermost chamber is to ensure that one would not be unknowingly observed as well as to guard against accidentally performing the act in public.⁷

The idea of prohibiting an act in the innermost chamber can also be seen in Shulchan Arukh Orach Chayim 301:45. Here, the Shulchan Arukh explains what the permitted and prohibited procedures are for a man whose clothes became soaking wet on Shabbat. The man is forbidden from wringing out the clothes, as well as from spreading the clothes out to dry. This is due to the fear than an onlooker might suspect that he was doing laundry, another prohibited Shabbat activity. The man is even prohibited from doing this in his inmost chamber. As the rabbis of the Talmud were debating between whether something prohibited due to *marit ayin* could be performed in private, this example of drying clothes on Shabbat was brought as support for prohibiting in private any action subject to *marit ayin*.

The commentary of the Mishneh Berurah⁸ to this section also elucidates some other aspects of the application of *marit ayin*. In comment 165, the Mishneh Berurah states that the idea of the innermost chamber is one that was set by the Talmudic sages; when they ruled concerning *marit ayin*, they did not distinguish between the public and private domains. The commentary adds that the *Tosafot*⁹ and the Rosh understand the detail of “innermost chamber” to apply only to *d'oraita* matters. In the case of an action

⁷ Artscroll-Mesorah Schottenstein Edition of Talmud Bavli: Beitzah 9a² note 12, cf. Mishneh Berurah 301:165

⁸ The Chatam Sofer's (Moses Sofer) commentary to and explanation of Shulcahn Arukh Orach Chayim.

⁹ to B. Ketubot 60a

that onlookers would suspect violates a law *d'rabbanan*, they performing this action in private is permitted.

The concept of *marit ayin* applies to a variety of other scenarios as well. Below is a diverse sampling of instances to which *marit ayin* is applied. In the case of *pe'ah*,¹⁰ the *baraita* on Shabbat 23a and 23b explains that one of the reasons why the corner of the field was chosen was to avoid suspicion. The feared suspicion is that passers-by might assume that the owner of the field had not left anything un-harvested. If, for instance, the un-harvested crops were deep within the center of the property, they would not be readily seen from the road. Therefore, the corners were chosen in order to, among other reasons, prevent the possibility that one might mistakenly assume that the field owner had not left crops for the poor.

This *baraita* regarding *pe'ah* also comes to augment the laws regarding the lighting of the Hanukah Menorah (*chanukiah*). Hanukah Menorahs are to be lit and displayed, ritually, in the outermost doorway of a home. If the *chanukiah* is lit and remains well within the home, a passer-by might assume that the family had failed to perform the mitzvah of lighting the candles. This also applies to a home with two outer doorways. A *chanukiah* should be lit in each outer doorway to ensure that any passer-by would not mistakenly assume a failure to light the candles. Rashi adds¹¹ that even if only one doorway has the *chanukiah*, a passer-by might assume that the house is split, and would, therefore, assume that only one of the families had fulfilled the commandment.

In the same line of thought as the need to fulfill commandments, *marit ayin* is also applied to Brit Milah, the covenantal circumcision of a newborn boy. Mishnah Shabbat

¹⁰ The commandment to leave the corners of the field unharvested so that the poor may find sustenance

¹¹ Rashi commentary to B. Shabbat 23a

19:6 assumes the case of a baby boy who is a *ba'al basar*¹² and has been circumcised. If the fat of this baby caused the flesh of his penis to cover up the circumcision, the *mishnah* rules that this covering up must be fixed¹³ in order to avoid the appearance that the boy is uncircumcised.

Although we have already spoken of the rabbinic treatment of the Temple Priests as being an irrelevant set of laws for Talmudic times, *marit ayin* is nevertheless applied to the priestly system as well. According to Misnah Tamid 5:6 and the *gemara* for Pesachim 82a, the purity of the Temple Priests was an issue of concern for outside observers. The *mishnah* and *gemara* both speak of instances where impure priests were lined up at the Eastern gate of the Temple while sacrifices were taking place. While R. Joseph explains this practice as one of punishment and embarrassment, aimed at keeping the priests from becoming impure again, Rava explains it in a different way. Rava suggests that the priests were on display to ensure that no one would think that an impure priest was taking part in a sacrifice. If such were the case, the sacrifice would be null and void, and the altar itself would become impure. Rava's explanation ensures that sacrifices were beyond the suspicion of impurity.

As we saw in the case of the ladder and dovecotes, one of the primary spheres where *marit ayin* applies is that of the public domain. No place is seemingly more public than the marketplace. Based on the discussion of Bava Batra 8b, Shulchan Arukh Yoreh Deah 257:1 speaks about those pious men selected to collect funds for the poor each Friday. Polak calls these men "charity collectors."¹⁴ When walking through the market, these collectors must be, in the very least, in pairs so as to be accountable to each other as

¹² lit. "Lord of Flesh," colloquially, "Fat"

¹³ i.e. more foreskin must be pared

¹⁴ Polak 189

well as to avoid the suspicion that a single collector would be taking money for his own causes. Similarly, if one of the collectors finds a coin on the ground, he may not pocket it, but must put it into the collection bin. He may retrieve it later, but must avoid the public appearance that he was accepting money in order to keep it for himself. When the collectors finish for the day and count the coins, they must count each coin separately to avoid the appearance of cheating the final count.

The marketplace is a location teeming with additional *marit ayin* restrictions. Men and women must be careful in their behaviors and actions as well. Avot D'Rabbi Natan 2:3 warns that a man should neither converse with, nor walk behind, a woman at the market, even if it is his wife. This is to ensure that he avoids public gossip; others drawing conclusions of the man's intent. The same applies at an inn; a man should not be seen alone with a woman, even if it is his sister or daughter, lest others draw inappropriate conclusions.

All of the above examples of *marit ayin* illustrate the notion of forming a judgment based on the way something appears to an observer. Polak notes, "what *halakhah*, in dealing with the laws regarding being beyond suspicion, is concerned with first and foremost, is the phenomenon of human scrutiny."¹⁵ In other words, "interpretation...happens."¹⁶ Throughout his study, Polak consistently questions the purpose of *marit ayin*. By examining various cases, Polak narrows the usage of *marit ayin* to two possible intents. First, he claims that *marit ayin* is aimed at protecting one's reputation in the eyes of others. He relates this purpose to the case of the charity

¹⁵ *ibid* 196

¹⁶ *ibid* 197

collectors,¹⁷ yet we can also see this applied to the cases of Pe'ah and Hanukah, the man in the market or inn, as well as, in a way, the Priests. Polak's second explanation is that *marit ayin* is aimed at protecting laws from being misunderstood, and, therefore, protecting others from transgressions due to misinterpretation. While we can apply this to many of the cases we have seen, we must also consider the consequences for transgressing laws.

As we have seen previously, there is a division in stringency between laws that are *d'oraita* and laws that are *d'rabbanan*. There are much less severe, if any, punishments for transgressing a law of rabbinic origin than there are for transgressing one of Biblical origin. The traditionally understood punishment for transgressing a law of the Torah is that of *karet*. *Karet* is a divinely imposed shortening of life. The seriousness of *karet* creates a seeming irrelevance regarding the goal of *marit ayin* as protecting ones reputation. While ones reputation is indeed important, *karet* as a punishment seems to highlight the idea that *marit ayin* is a tool for protecting a law and its observance. The punishment of *karet* can be applied to many of the above cases, particularly the cases of circumcision and of priestly service. *Karet* is also applied to violations of the Biblical dietary laws.

As we saw in the Beit Yosef and again in both Karo's main text of the Shulchan Arukh as well as Isserles' gloss, *marit ayin* is applied in certain ways to the *basar b'chalav* prohibitions. The first association of *marit ayin* with *basar b'chalav* that has already been mentioned is the responsum by Rashba where he addresses the idea of avoiding the mixture of meat and human milk due to *marit ayin*. Rashba's responsum goes further, however, to remind us that the prohibition of eating fowl and *chaya* with

¹⁷ *ibid* 189, Polak also notes that Rashi posits this same purpose in this case.

dairy is based on a decree of the rabbis and not based on *marit ayin*. Though not present in Karo's citation of Rashba, this fact will surface again as an issue in the commentaries to the Shulchan Arukh.

The text of the Shulchan Arukh, in its final form, touches on the issue of *marit ayin* with respect to *basar b'chalav* in paragraph 87, *halakhah* three and *halakhah* four. Isserles' gloss at the end of *halakhah* three speaks of the issue of almond milk; when and how it may be used in the cooking and eating of flesh. Isserles here relays a *minhag* that allows for the placing of the meat of fowl in almond milk for cooking and eating purposes. He reasons that since fowl is only prohibited to be eaten with dairy *d'rabbanan*, mixing it with almond milk is not an issue. For the meat of a *behema*, however, the practice is to place the meat alongside the almond milk, so as to avoid the appearance of meat cooked with animal milk. Isserles arrives at these rules through an analogy between the case of flesh mixed with almond milk and the case of fish blood.

The issue of fish blood, explained in paragraph 66 of Yoreh Deah in both the Tur and Shulchan Arukh, finds its roots in tractate Keritot of the Talmud. In a discussion of the *mishnah* from M. Keritot 5:1, page 20b of the Talmudic tractate asks the question regarding the relationship of fish blood to the blood of *behema*, *chaya*, and fowl. The *mishnah* instructs that one who consumes the blood of a *behema*, *chaya*, or fowl, even an amount as small as an olive, is liable for *karet*. This ruling is drawn from various Biblical citations prohibiting the drinking of animal blood.¹⁸ The *gemara* concludes that since fish is not mentioned, its blood is permitted. Particularly, the rabbis compare fish to both fowl and *behema*. They declare that since both have varying degrees of cleanliness dependant upon many factors, particularly that of proper slaughtering, and that since both fit in the

¹⁸ Leviticus 3:17, 7:26, 17:10-14 and Deuteronomy 12:15-16, 20-24

category of *basar*,¹⁹ the blood of fish holds a different status. This train of thought is continued through pages 21a and 21b until finally, on page 21b, *marit ayin* is applied.

For the application of *marit ayin*, Rav rules that a bowl of collected fish blood would look similar to a bowl of animal blood. The consumption of a bowl of collected fish blood is then prohibited due to *marit ayin*. In order for such consumption to be permitted, Rav allows for the labeling of the fish blood. This is to be done by visibly floating scales in the blood, to make it clear that it is indeed the blood of fish. In Karo's treatment of this case, he upholds the need for scales to avoid *marit ayin*.²⁰

Isserles, in his commentary to the Tur, cites Rabbi Shlomo Luria, the Maharshal,²¹ who declared that even the *basar* of fowl cooked or placed in almond milk is cause for the implementation of *marit ayin*. The Maharshal's caveat, just as in the case of fish blood, is that almond pieces must be placed in or next to the almond milk to label it as such. As read, the Maharshal's opinion links the issue of fish blood to the issue of almond milk. Isserles disagrees with the use of this analogy. The issue of fish blood, as we saw, is one of risking *karet*. If fish blood were to be mistaken for animal blood, one would transgress the law by assuming that animal blood may be consumed. In the case of fowl with any type of milk (almond or otherwise), Isserles points out that there is no risk of *karet* since the prohibition of eating fowl and dairy is only of rabbinic origin. The cooking of or deriving benefit from fowl and dairy is allowed regardless. For Isserles

¹⁹ Here fowl is counted as *basar*, though it should be noted that in context we should not conclude that this association was meant to relate to *basar b'chalav*, but rather to the rules surrounding the kosher slaughtering process.

²⁰ Polak notes (191 n9) that Karo in the Beit Yosef suggests that *Marit ayin* is applied more towards the protection of the law than of a man's reputation. Polak himself does not believe that the reasoning mattered to Karo, but since this is an issue of *karet*, we can assume that avoiding *karet* was of chief concern for Karo along with various *halakhists*.

²¹ The Maharshal (1510-1574 CE) a contemporary of Isserles was a Polish halakhist. (Elon 1385)

then, the real issue comes with the *basar* of a *behema* near something that looks like animal milk. Whereas the combination of fowl and almond milk is at least two steps removed from the Biblical prohibitions, the fear of mistaking almond milk for animal milk when the *basar* of a *behema* is involved is only one step away from a prohibition bearing the punishment of *karet*; cooking the *basar* of *behema* is, as we have affirmed within the rabbinic framework, a Biblical prohibition.

The above dispute in the Darchei Moshe is brought to the page of the Shulchan Arukh in the Turei Zahav (TAZ)²² commentary. The TAZ teaches further that what he learns from the dispute is that even though Isserles was lenient regarding fowl and almond milk's status vis-à-vis *marit ayin*, Isserles' preferred practice was that of placing almond pieces in the milk. If, however, no almond pieces were available, the mixture of fowl and almond milk would still be permitted. The TAZ discusses the issue of almond milk together with the issue of human milk, implying the same scenario for the mixture of fowl and human milk. In both cases, almond or human milk, some indicating marker is preferred to distinguish the milk from that of animals. The lacking of identifiers, though, is not taken to be a hindrance to the consumption thereof.

The dispute regarding mixtures of flesh with almond milk or human milk provides an opportunity to analyze the nature of the rabbinic device of *marit ayin*. Many questions are raised in the conflicting opinions of the Maharshal and Isserles. Whether or not pieces of almonds, or other markers need to be added to label the milk as being “not-dairy” raises the issue of the standard employed when applying *marit ayin*. In rabbinic terms, the need or preference to identify something ahead of time is an example of a *l'hatchil* standard. *L'hatchil*, literally meaning “at the start,” is a standard where the judgment is

²² Commentary of David ha-Levi

rendered before an activity takes place. When such a step has not taken place, however, the activity enters the standard of *b'diavad*. In our example, *b'diavad* is employed when there are no almond pieces to be found, and, nevertheless, the mixture of the meat with almond milk is permitted for consumption.

The determination of these standards, and their application to the scenario of meat with non-animal milk illustrates a rather fluidic nature to the application of *marit ayin*. In these cases, *marit ayin* is applied leniently, or even lifted altogether, if everyone knows that the 'milk' in question is not the correct type of milk to warrant a transgression. This applies even when the milk isn't labeled. As we saw earlier, the distance a certain action is from the *karet*-liable Biblical prohibition determines the type of leniency. The analogy between the application of *marit ayin* to fish blood and its possible application in the realm of meat and almond milk is not a tight analogy. The two cases present a discrepancy in the number of steps they are removed from the actual Biblical prohibitions. In the case of almond milk, Isserles' assertion of the *minhag*²³ of allowing the mixture of almond or human milk with fowl or *behema* overrides the Maharshah, even if no markers were available. Isserles, in fact, accuses the Maharshah of trying to change a *minhag*. The analogy works in the sense of the need to identify the substance (fish blood or non-animal milk), but beyond that, the analogy breaks down. Yet this is not the end of the discussion of *marit ayin* with respect to *basar b'chalav*.

²³ The commentary of the Shach (Siftei Cohein) tells us that cooking fowl in almond milk was a *minhag* for the celebration of Purim. This is reasonable as Purim is a holiday based upon coming close to crossing certain lines as well as misrepresenting oneself. So the mixture of fowl and almond milk can be seen as approaching a transgression without actually doing anything wrong. In order to ensure that the people know it is only a joke of sorts, almond pieces should be placed in or by the milk.

Fowl, the perpetual anomaly, creates a further discussion regarding *marit ayin*. In the opinions of both the TAZ and the Shach²⁴ commentaries, the cooking of fowl with dairy should be prohibited due to *marit ayin*. As we saw throughout the Talmudic debates, there are three positions in relation to the role of fowl in *basar b'chalav*. First, on what we will label the as far right, is the idea brought forward by a number of the Talmudic rabbis that the prohibition of cooking fowl with dairy is *d'oraita*. On the relative far left is the position held by R. Yosi haGalili, that the combination of fowl and dairy, in any form, is not prohibited rabbinically. In the middle, then, are the majority of the rabbis, Talmudic and post-Talmudic, who agree that the prohibition regarding eating fowl and dairy, as well the permissions of cooking and deriving benefit from fowl and dairy, are all *d'rabbanan*.

Both the Bayit Chadash commentary to the Tur, as well as the TAZ, raise the “what if” question regarding the possibility of fowl being included in the Biblical kid and milk prohibition. The thought here is that, just in case fowl really is prohibited *d'oraita*, steps must be taken to ensure that even fowl is not cooked or eaten with dairy. However, as the TAZ points out, if fowl were indeed prohibited *d'oraita*, *marit ayin* would not even apply. The Shach seemingly agrees, as he asserts that *marit ayin* does not apply to the *basar* of a behema, as the prohibition is *d'oraita*. Settling this concern, the TAZ accepts the rabbinic reading, reminding us that fowl is at least one step removed from a Biblical prohibition, and, reminiscent of the Rashba’s responsum, reminds us that rabbis made a decree regarding fowl and *chaya*. Therefore, *marit ayin* should not apply to fowl where it relates to the prevention of violating of a Biblical commandment through the mixing of fowl and dairy.

²⁴ Sifte Cohen, authored by Shabbetai ha-Kohen

As the suspicion of the Biblical origin of the prohibition regarding the combination of fowl and dairy has been decidedly dismissed, the second issue in relation to *marit ayin* is that of R. Yosi haGalili's position. The Maharshal, as reported in the Shach and TAZ, was worried, as we saw in the case of almond milk, that an observer would conclude that the meat of fowl had been combined with animal milk. The fear is that the observer would then conclude that fowl and dairy could be eaten together, which would violate the rabbinic decree. The TAZ comments regarding this issue that even though the cooking of fowl and dairy is rabbinically permitted, this is nevertheless an area where *marit ayin* should apply. His argument is that if one sees the items cooked together, one might assume that the act of cooking was meant as a vehicle towards eating. Thus, in order to prevent one from thinking and acting like R. Yosi haGalili, that there is no prohibition whatsoever regarding fowl and dairy, the conclusion is to prohibit cooking fowl and dairy due to the principle of *marit ayin*.

With the idea in place that the role of fowl in *basar b'chalav* is defined by rabbinic decree, *marit ayin* is still applied to the mixture of fowl and dairy. The TAZ reminds us that the prohibition of eating *basar b'chalav* is derived from rabbinic debate and legislation. Cooking is the only action that is explicitly mentioned in the Torah, and, therefore, is the only action that definitively yields *karet*. *Marit ayin* may then be applied to fowl and dairy in the aspects of cooking.

When it comes to the cooking aspect, the focus of the *marit ayin* issue shifts away from the "milk" and towards the *basar* in question. Within the commentary of the TAZ, a reference is made to an idea found in Levush Malkhut, a halakhic work of Mordecai B.

Abraham Jaffe (1530-1612),²⁵ a student of Isserles and the Maharshal. This idea is that sometimes the *basar* of fowl can be mistaken for the *basar* of *behema*. If this mistake occurs, that is to say if an observer sees fowl cooked with dairy, the observer might think that what he or she saw was the *basar* of *behema* cooked with dairy. The observer, therefore, might conclude that cooking *behema* with dairy is permissible. This would be a grievous mistake; transgressing a Biblical prohibition. While this is where the popular “chicken looks like steak” notion of *marit ayin* takes on the role of supporting the separation of fowl and dairy, we must acknowledge the differences between the meats of various birds. Birds such as ducks, geese, and ostriches are considered to be “red-meat” birds. They contain a higher fat content, as well as a distinct texture similar to beef and other red meats. Chicken and turkey, regardless of their “dark meat,” are different from these other birds in both their raw and cooked states. They are white meat creatures, and are quite distinguishable from other red meat animals, including “red-meat” birds.

These various illustrations are seemingly separate arguments for the application of *marit ayin* to the combination of fowl and dairy. Nevertheless, we can see how they might present a solution to the anomaly that we have, to this point, been unable to solve. The question of whether or not fowl counts in the general term “meat” is seemingly a non-issue in the *marit ayin* discussion. For *marit ayin* to apply, as we have seen above, fowl only has to be ruled out as being Biblically prohibited from being mixed with dairy. The majority opinion of the rabbis is, indeed, that fowl is not prohibited Biblically. Since fowl looks like meat, regardless of whether or not it *is* meat, the cooking of fowl with dairy is to be ruled out lest an observer think that meat and milk has been, and may be again, cooked together. Extending this logic, the previous rabbinic ruling prohibiting the

²⁵ Elon 1394

eating of fowl and dairy together, for all intents and purposes, would be irrelevant as the rabbis told us that the idea of eating is itself derived from the action of cooking.

The arguments relating to *marit ayin* demonstrate another issue in the thought process of the later halakhists. That is the fact that they were concerned about the practices and mindset of the common man. *Marit ayin*, as a rule, applies to an independent and often ignorant on-looker. The concern that the principle of *marit ayin* addresses is what this observer will interpret from an event, without asking questions of the participants, or otherwise coming to study the scenario and the laws associated with it. For the average Jew, the extent of his or her knowledge of the laws of *basar b'chalay* is the axiom, “you can’t eat milk and meat.” This is no secret to us, and, obviously, an aspect of Jewish tradition and culture that has remained constant for generations. Most Jews, most people in fact, do not know much, if any, of the rabbinic debates regarding milk and meat, let alone those pertaining to fowl. They only know that one does not mix milk and meat, and, therefore, when they see someone cooking or eating something that appears to the contrary, confusion may set in.

Avoiding confusion is, however, an arbitrary standard to apply to the law. This, too, is an issue that arises with the application of *marit ayin* as a principle. The leniency in the case of fowl and almond milk is due to the fact that it is two steps removed from incurring *karet*. That is, both fowl and almond milk are similar to, but not the exact items prohibited in the Biblical prohibition. While the preference is to label the almond milk as such, the combination is allowed regardless of label. Yet, when the case involves only one step removed from the Biblical command, fowl and dairy, *marit ayin* is applied with fewer leniencies. The TAZ comments that even though he recognizes that cooking fowl

and dairy together is *not* Biblically prohibited and that it *is* rabbinically permitted, one must still be careful in regards to this combination.

Yet, even more arbitrary in the application of *marit ayin*, is the reason that the TAZ applied strictness to the otherwise permitted cooking of fowl and dairy. In certain cases a “red-meat” fowl might look like *behema*. Therefore, why is that particular logic of *marit ayin* not applied to other food items that might look like something else? In our immediate case, why are the commentators concerned merely with the appearance of fowl? Fish can quite often be mistaken for meat by an uninformed observer. Related to the main case of our study, what is the visual difference, between a pounded-out, breaded cutlet of chicken and a similar preparation of fish, veal, or even tofu and vegetable patties. In the particular food preparation and presentation relevant to our study, what is the visual difference between Chicken Parmesan and its counterparts of Veal Parmesan and Eggplant Parmesan? These similarities are seemingly not an issue for the halakhists.

These same questions apply to a number of practices prevalent in today’s Jewish world. Non-dairy cheese can be regularly seen served with meat meals, either as a garnish or in the form of cheeseburgers. We can also speak about veggie burgers with cheese, or regular burgers with any non-dairy cheese as situations that logically should be avoided due to *marit ayin*. The same can be said for the myriad of vegetarian friendly “meats.” Soy, tofu, and other protein-carrying non-meats are processed, shaped, and marketed as if they were meat. There is even a practice in kosher restaurants of labeling these alternative meats on menus as distinctly non-kosher dishes. Using soy cheese a deli’s menu may advertise cheeseburgers, Ruebens, and even Chicken Parmesan. Also, a certified kosher vegetarian Chinese restaurant can proudly list non-kosher items such as “sweet and sour

pork” and “pineapple shrimp” on its menu, when in fact neither pork nor shrimp is actually being used. An ordinary on-looker cannot help but be taken aback with a kosher restaurant advertising a cheeseburger or sweet and sour pork. And yet, with all that we have studied about *marit ayin*, there is full rabbinic support of practices such as these.

One of the prime examples of the arbitrary application, or, for that matter, non-application of *marit ayin* comes in the form of the condiment known as Bac~os.^{®26} Bac~os[®] is a soy product that is made to look, smell, and taste like bacon. Most often we see Bac~os[®] used as a substitute for bacon on salads, but it can also serve the same purpose in omelets, baked potatoes, potato skins, and variety of other food combinations. Yet despite the outright appearance, and despite the highly suggestive name, Bac~os[®] carries a kosher certification from the Orthodox Union.

If the rabbinic authorities were serious about the implementation of *marit ayin*, we would certainly have expected them to apply it in each of these cases. Even beyond *marit ayin*, let us recall one of the concerns over *basar b'chalav* in the first place; that of taste. Meat and dairy cannot be cooked in the same pot, nor allowed to touch, for fear that one would impart its taste upon the other. The same issue of taste applies to the rule of waiting between the eating of meat and the subsequent eating of dairy. If taste is such an issue, how can the rabbis sanction these food products that are meant to mimic the taste of prohibited items and prohibited combinations?

This contradiction puzzled the Central Conference of American Rabbis Responsa Committee as well. In 1989, the committee responded to a question regarding a strictly kosher wedding at which fish was served in the shape of shrimp. In response to the question, the responsum reads:

²⁶ Bac~os[®] General Mills Inc.

The whole pattern of tradition has sought to keep clearly non-kosher items away from our people. Items which are kosher should not be made to look like non-kosher foods because of *marit ayin*... It would, therefore, be wrong as well as in poor taste to present any item in the form of shrimp or let us say a pig at a kosher dinner. Strictly speaking it would, of course, not be wrong to consume such an item, but it is in bad taste and contrary to the spirit of tradition.²⁷

In answering the question, the response recognizes the logic of *marit ayin* and applies it, as we would expect, to the present scenario. The fact that *marit ayin* was not applied by the kosher caterer leads to the oft repeated idea of the spirit of the law versus the letter of the law. The spirit of the law is clear; avoid items and actions that look like other prohibited items and actions. The letter of the law in this case is that fish is kosher, regardless of its appearance. Again, this calls into question the nature of *marit ayin*. If the “letter” of the principle of *marit ayin* is to avoid practices that may be confused with other practices, and if this “letter” is not applied in law, what then is *marit ayin*? By that, we mean to ask, is *marit ayin* a logical structure to be broadly applied, is it merely a precautionary measure to be employed arbitrarily as the rabbis see fit, or is it a binding legal principle?

In sharp contrast to what our modern western minds might hope for, *marit ayin* is, rabbinically, all three. Let us begin in the middle. We saw with the case of fowl and the variety of “milks” with which fowl may be cooked, that the rabbis do indeed arbitrarily

²⁷ Central Conference of American Rabbis. *New American Reform Responsa* 82. “A Fish in the Shape of a Shrimp.” April 1989

set the bounds for *marit ayin*. As mentioned earlier, one of the rabbis' chief concerns in the application of *marit ayin* was for the general Jewish public. With this in mind, the arbitrary boundaries by the rabbis can be seen as a way to ensure both acknowledgement of the law and protection from transgressing it. However, these boundaries also serve to not over-burden the everyday lives of the Jews. For example, the preference, *l'hatchil*, was to place almonds in the almond milk to label it as such, however, if there were no almonds, *b'diavad*, the mixture was still permissible to eat. The case of the fish shaped like shrimp, or, for that matter Bac~os[®] or any of the other similar scenarios mentioned above, where we would have at least expected a *l'hatchil* preference of labeling, each of those cases is simply *b'diavad*, after the fact. That is assuming that *marit ayin* was ever considered in those cases. Taken further, the logic of saying that one particular meat looks like another, could, and in many ways should, extend to the point where all meats resemble one another. If all meats resemble each other, then eventually at least one will resemble pork, leading to all edible flesh being rendered un-kosher. In this regard, the concern for not overburdening daily life can be appreciated. We are then left to acknowledge that the rabbis' apparent approach to applying *marit ayin*, reminiscent of baseball legend Yogi Berra's famous non-sequitor, is simply "*marit ayin* applies where *marit ayin* applies."

Yet the question remains; if the logic will not be applied to its fullest extent, why is it applied at all? For the rabbis, this is not an issue of concern. The broad logic of *marit ayin* does apply within the boundaries that a rabbi may set for each circumstance. As to the question of over whether or not *marit ayin* is a legally binding principle, this too is a case-by-case matter. In the case of fowl in almond milk, or any other situation where

there is a sense of *l'hatchil* and *b'diavad*, *marit ayin* seems to be more of a suggestion or preference rather than a binding rule. In the case of cooking fowl in dairy, *marit ayin* seems to be of real legal concern. Again, we must mention the idea of whether or not a rabbinic precaution can be placed on top of another rabbinic precaution, as well as the idea that a later authority may not make a claim contrary to that of previous generations. Does *marit ayin* violate these principles? Or, is *marit ayin* itself, one step removed from the legal status of other rabbinic devices? Based on its inconsistency in application, and its varying degrees of leniency, we must conclude that *marit ayin* is not as legally binding as other rabbinic principles, if, in fact, it is binding at all.

The issue of binding legal principles leads us to our next discussion; that of the flexible nature of *halakhah*. If one accepts *halakhah* as binding, and adheres to it as such, to what extent is *halakhah* bound to a rigid frame? Are the rulings of the rabbis permanent or are they time-bound? Can a law become obsolete, and, therefore, be set aside? These questions will help frame our proceeding study of halakhic flexibility.

Chapter 6:

“Like a Reed in the Wind:” The Flexible Nature of *Halakhah*

After studying the classical sources of the *basar b'chalav* prohibitions, and have focused on the ever-anomalous role of fowl throughout those sources, our present task is to examine how these categories are to be applied to our day. For all intents and purposes, even in the most liberal of halakhic movements, the debate over *basar b'chalav*, especially as it pertains to fowl, has remained sealed since the Shulchan Arukh achieved authoritative status. The very notion of this study, the very question upon which this study is based, proves that there is a modern concern; why, if it has no mother's milk, is fowl associated with the laws stemming from the Biblical command to not cook a kid in the milk of its mother?

In general, legal scholarship takes on two points of view; the external and the internal. The external view asks the questions of why a law turned out a particular way, the answers to which are, themselves, external to the law in question. Internal study looks at the law from the inside, from the standpoint of those whom are bound to the law. Our purpose in studying the rabbinic sources of the role of fowl in the milk and meat legislation has been to present a principally internal view. We cannot escape the fact, however, that we have certain external biases in approaching our study.

As acknowledged in the introduction, I am personally somewhat of an outsider to the world of *halakhah*. I do not adhere to *halakhah* as the determinate system of how to live my life. I do not keep kosher, freely eating blatantly non-kosher foods, especially milk and meat. One of my favorite entrée dishes is, obviously, Chicken Parmesan. My bias is certainly external to the halakhic system, coming from the more modern,

scholarly, and critical approach. Yet I am a Jew, and as such, the *halakhah* is an important part of my tradition that I seek to relate to and to understand. Further, I know of many Jews, Reform or otherwise, who *do* keep kosher and still ask the question of why the mixture poultry and dairy is prohibited. “You can’t milk a chicken” is, therefore, a true concern for a variety of modern Jews.

The issue of how to interpret the *basar b’chalav* laws in our present day is certainly a controversial one. On one hand is the mentality that sees *halakhah* in our day as a rather rigid system, defending itself against modernity, as it were. On the other hand, is the view that *halakhah* is a vibrant, dynamic, and flexible system, open to a degree of change to match the changing conditions of the world. Our purpose here is to illustrate, from an internal stance, that the halakhic system itself is open to change, and, as such, to reopen the debate concerning fowl mixed with dairy.

We begin by analyzing the debate regarding the flexibility of *halakhah*. As a rule, legal systems cannot be stringently rigid. As Elliot Dorff tells us, no legal system can survive without change, lest it become obsolete.¹ This thought yields the question of how much change is too much change. Legal systems create a “security,” allowing us to hold to certain expectations when dealing with people in our daily lives.² To change the form of that system too much would create a radical change in both form and expectation; the security would be lost. Louis Jacobs offers the simile that, unlike a cedar tree that will break in the wind, *halakhah* is to be viewed as a reed; it can bend in the wind, without being uprooted.³ While this simile is useful, defining the shape or flexibility of that reed

¹ Dorff 189

² *ibid*

³ Jacobs 127, cf also Gordis 128

is an almost impossible task. As Dorff labels it, a balance needs to be struck between changes introduced to a system and the continuity of the familiar form of the system.⁴

The modern Jewish condition, facing enlightenment, emancipation, and further exile (diaspora), has yielded a variety of approaches aimed at achieving this balance. Eliezer Berkovits calls the modern condition a “non-Jewish reality,” one in which there is no autonomous Jewish sovereignty.⁵ One halakhic approach to this reality has been a push towards being conservative. Thus, “because of the confrontation with an essentially non-Jewish reality, Halakha is forced onto the defensive.”⁶ There was a degree of fear that Jews would drift away from the traditions. This fear certainly had a basis, and, to a degree, continues to be based in reality in our day.

Today as religious loyalties have weakened, a countervailing tendency of considerable strength has made itself felt. It demands conformity to the law of God solely on the basis of its divine origin, which, it is argued, places it ‘beyond good and evil.’ ...In Judaism, with its thousand-year-old penchant for discussion and argument, such a stance would at first blush seem impossible; yet today, a parallel concept of rabbinic infallibility has arisen in right-wing circles...to differ with [the contemporary sages’ decisions], or even to ask for the grounds on which they have based their position, is heresy.⁷

⁴ Dorff xv

⁵ Berkovits, Eliezer. *Not in Heaven: The Nature and Function of Halakha*. New York: Ktav Publishing House, Inc., 1983 pp. 86-87.

Berkovits goes on to discuss the ramifications of halakhah within the State of Israel, however, his work fully acknowledges the continued “non-Jewish reality” for the majority of the world’s Jews.

⁶ *ibid* 87

⁷ Gordis 121-122

The seemingly extreme stance portrayed here by Gordis is not a new concept, but rather one that follows a trend set by previous reactions to “modernity.”

As the Jewish communities spread from the Galilee and later from Babylonia, the ability and penchant of students memorizing texts diminished. With the loss of the major academies and courts, *halakhah* found itself in exile along with the Jews whom it was meant to guide. The exile, as it was, imposed barriers on the development of the *halakhah*. In order to ensure that the traditions of the rabbis did not disappear, the texts of the Talmud, the Oral Torah, was transferred to a tangible written form. “A text solidifies a meaning” whereas “the spoken word of wisdom carries within itself the awareness of its situation-dependent validity as well as vitality of self-renewal.”⁸ This fixed text then took on a status of sacredness similar to that of scripture.

The rabbinic texts had become *the* tradition to be guarded and as such:

The defenders of tradition, with few exceptions, were either unwilling or unable to understand the nature of the modernist challenge. They threw down the gauntlet to the modern age: ‘either all or nothing.’ Modern Jews by the hundreds of thousands enthusiastically chose the latter alternative. Millions of Jews defected from the tradition or from the community or from both. The rabbis were unable to turn back the clock to a bygone age, and the rebels were left with bad consciences for not being ‘good Jews.’⁹

Although this shift to stringency was intended to preserve the tradition and the observance of it, the opposite reaction occurred. The law had become irrelevant and

⁸ *ibid* 88

⁹ *ibid* 8

obsolete to a degree. This rigidity was actually due in large part to external factors that did not arise from within the system.

Internally, the halakhic system was built upon the very notion of flexibility, especially in reacting to the “modern” conditions of the Jewish people. This flexibility can be seen as early as the Torah. Quite often, the instructions that Moses received from God were lacking, leading Moses to seek an oracle from God. This is also the case with the various prophets.¹⁰ Further, God instructs Moses that human judges or courts may alter the law at later times when necessary.¹¹ The rabbinic literature also acknowledges, and even insists upon, the notion of flexibility. The Jerusalem Talmud, in its Sanhedrin 22a, referring to God’s command to follow the rule of human judges, declares that a fixed Torah would be intolerable.¹² *Pesikta Rabati* also comments on this idea, stating that without distinct interpretation for each generation, Jews would come to disobey God’s laws.¹³ The very nature of the rabbinic process, as evident in the Talmudic debates and its extensions of laws, speaks to this inherent flexibility.

Flexibility and change are even proven, by the rabbis, to be permissible while still ensuring continuity. The famous *midrash* in B. Menachot 29a speaks to this. While Moses is up on Mt. Sinai he watches the Torah being transcribed, and questions the need for all of the jots and tittles, the decorative crowns on certain letters. God tells Moses that those crowns will be expounded upon by the rabbis, and as proof, sends Moses through a time warp to R. Akiva’s academy. Moses has absolutely no recognition of the teachings and discussions of the academy, but once he hears that it all goes back to a law of Moses

¹⁰ Dorff 190-191

¹¹ Exodus 18:3, Deuteronomy 17:8-13

¹² Dorff 195

¹³ *ibid* 196

from Mt. Sinai, he is at ease. This episode proves that rabbis were cognizant of and honest in insisting that the *halakhah* be open to interpretation.¹⁴

Another example of the rabbis allowing flexibility, even applied to a law of Torah, is the case of the heathen woman taken as a wife by an invading Israelite soldier.¹⁵ The rabbis point out that the act of taking a heathen for a wife is forbidden, and yet they permit it in this case. The explanation is that, in this case, the soldier's passion in the heat of battle would have led him to taking the woman as a wife anyway, therefore, the soldier is to be exempt from the law.¹⁶ The rabbis support this ruling based on the fact that the soldiers under Joshua's command, at times, had to set aside the laws of kashrut while conquering the land.¹⁷ Here is proof that the rabbis were open and accepting of circumstantial changes to the law when necessary.

These sources make clear the notion that the halakhic system has historically been open to and accepting of changes to meet the challenge posed by certain cases. However, as Louis Jacobs points out, "change is never engaged in for its own sake."¹⁸ The conditions of modernity, the viewpoints and reasoning of the people, and all of the specific needs that accompany those changes in reality, also call for changes in the law. These changes must always keep in mind the tension between tradition and the continuity of that tradition, while still addressing the needs of the people. Haym Soloveitchik, a modern orthodox rabbi and professor, admits that "some halakhists will see in the people's need a divine mandate for action, and in the course of time the intractable will

¹⁴ *ibid* 194

¹⁵ Deuteronomy 21:10-14

¹⁶ Kiddushin 16b

¹⁷ B. Hullin 17a

¹⁸ Jacobs 236

be rendered permissible.”¹⁹ Even if the needs of the people represent a divine decree, for halakhists, the system of debate and study is mostly an academic discipline, divorced in many ways from daily life.²⁰ Yet, as we have seen, the rabbis and halakhists were always cognizant of, and concerned with how to translate the academic nature of *halakhah* into a practical system. In applying the *halakhah*, Berkovits calls for a “wisdom of the feasible,”²¹ that is a ruling and application that actually relates to real life.

Halakhists are constantly having to respond to the changing conditions of human life, and, therefore, Jewish life. Thus, halakhic rulings tend to take into consideration certain external factors. Jacobs notes this fact:

In a number of areas halakhists throughout the ages allowed other considerations than those of pure legal theory to influence their decisions or, at least, that such influences were present even when they went unacknowledged.²²

Maimonides’ son, Rabbi Abraham, even acknowledged this by declaring that contemporary judges cannot rely solely on the sources alone, but rather use them as a tool that, combined with the judge’s own understanding, will develop branches out of the roots of the traditional sources.²³ Berkovits summarizes these notions by saying that “the decisions have to be made not by a text, but in full view and understanding of the situation at hand, by the student of the text on his own responsibility.”²⁴

¹⁹ Soloveitchik, Haym. “Religious Law and Change: The Medieval Ashkenazic Example.” in *Association of Jewish Studies Review*. 12 (1987). p. 219

²⁰ *ibid* 24-25

²¹ Berkovits 8

²² Jacobs 17

²³ Berkovits 91-92

²⁴ *ibid* 93

One of the devices through which halakhists have been open to instituting a change in the law is that of “nowadays.” The Rabad,²⁵ a critical commentator to the Mishneh Torah among other projects, affirms the rule that laws may be set aside if the conditions to which they apply no longer obtain.²⁶ This rule is also extended to alterations of laws due to current conditions. One example of this scenario is the case of French and German Jews and their praying habits. Due to the improbability of persuading them to attend synagogues three times per day, more specifically, twice in the latter half of the day, the afternoon and evening services were combined.²⁷ Further, as it relates to clapping hands for joyful music in prayer, since the people were no longer adept at crafting and fixing instruments (the acts which are forbidden on Shabbat), clapping hands will not lead to the use of instruments and is thereby permissible during Shabbat services.²⁸

Another example can be seen in the leniency with regards to washing after a meal. The *Tosafot* explain that they once feared that a residue of salt left on the hands after eating might cause blindness. However, in the present day, that salt was no longer in use. Therefore, the *Tosafot* ruled that the washing of hands after a meal was no longer required.²⁹ Along the same line of reasoning, external changes to conditions, the laws regarding the use of gentile milk, women’s rights as related to the marriage *ketubah*, and the enforcement of certain punishments were all curtailed due to various government regulations.³⁰

²⁵ Abraham ben David of Posquières

²⁶ Jacobs 126

²⁷ *ibid* 122-123

²⁸ *ibid* 125

²⁹ *ibid* 124

³⁰ *ibid* 127-130

The *Tosafot* were also responsible for another, even more radical change in *halakhah*. In a paper concerned with religious law and change, Soloveitchik analyzes the example of the medieval Jewish martyrs. In a context of varying strands of halakhic interpretation, the medieval Ashkenazic Jews were faced with the grim reality of the Crusades. As the Crusaders moved across Europe, they would raze many villages, especially if there were Jews to be found. Further, the crusaders would force conversion to Christianity, with the alternative option being death. The Jews were then forced to make an unenviable, lose-lose decision; either to forsake their tradition, and thus, Jewishly, incur death, or to forsake the *halakhah* and kill themselves. The common practice of the Jews was to accept martyrdom so as not to live as heretics and apostates. Soloveitchik's argument is that the *Tosafot*, as they were wont to do in more average situations, allowed for a radical change in halakhic enforcement. In this case, the *Tosafot* sanctioned the otherwise prohibited act of martyrdom. The scenario of the medieval Jewish martyrs is, therefore, a prime example of how external factors influenced the needs of the people, and, in turn, influenced Jewish law.³¹ Soloveitchik here asserts that the legitimacy of the interpretation by the *Tosafot* came from the need to justify the status quo; aligning the law to the needs and actions of the people rather than to theory.³² The extreme nature of this horrid scenario notwithstanding, the methodology of the *Tosafot* here speaks to both the plausibility and the acceptability of halakhic change.

Often there are laws that remain active, even though the practice of them has fallen into abeyance. We mentioned earlier that the rabbis spent considerable amounts of time and pages extrapolating the laws of Temple service, which had no applicability to

³¹ Soloveitchik 207

³² *ibid* 208

their lives. Solomon Schechter says that “even a superficial analysis will discover that in the times of the Rabbis many of these commandments were already obsolete.”³³ While those laws remain “on the books,” Schechter here acknowledges the idea that there are laws which are time-bound to certain contexts. We can think of these types of law within the framework of a “nowadays” scenario. One example of these laws was that one may not drink liquid that had been exposed. This prohibition was due to the fear that a snake may have injected venom into the liquid. While still an active law, the *Tosafot* ignore it, as they had determined that there were no poisonous snakes in France, where they lived. Generally, however, the setting aside of laws is a result of an overriding *minhag*.

While the rabbis are the primary deciders of *halakhah* in its theoretical or practical form, the laity also has a voice. “In Judaism the voice of the people is not the voice of God, but neither is it without influence.”³⁴ The idea of the power of the general Jewish public to determine *halakhah* is attributed in the rabbinic sources. When there is an unresolvable debate between scholars, they are to see how the community acts regarding that debate, and the *halakhah* is then to follow the common practice.³⁵ The idea of custom setting aside law, however, is only mentioned twice in the Jerusalem Talmud and not at all in the Babylonian Talmud, but the principle was actively followed in both lands.³⁶ With the input of *minhag*, we see that Jewish law is based on the interaction of what the rabbis say and what the people do.³⁷

³³ Solomon Schechter. “Some aspects of Rabbinic Theology: The Torah in its Aspect of Law.” *Jewish Quarterly Review*. 8,3 (1896). pp. 365-366

³⁴ Gordis 99

³⁵ Jacobs 27, 221; Gordis 105; cf B. Berachot 45a, B. Eruvin 14b, B. Pesachim 24a, B. Menachot 38b

³⁶ Gordis 105

³⁷ Dorff 198

Let us look at two examples of how *minhag* has set aside law. First, there is a law in the *halakhah* that sets the order of hand washing at right hand first followed by left. This law is not followed, nor is it enforced. Similarly, there is a law that as a memorial to the destruction of the Temple, a corner of one's house must go undecorated. Here, again, is a law that *minhag* just does not validate.³⁸ Both of these laws have been set-aside without causing any harm to the integrity of the halakhic system.

While a *minhag* can be prevalent throughout the Jewish world, *minhag* also differs between communities. These local customs are referred to as *minhag ha'makom*; the custom of the place. The rule regarding local customs is that when one travels from one town to another, *l'olam lo yishaneh adam min haminhag*; one should never deviate from the custom [of the town in which one finds oneself].³⁹ Customs alternating between locales has been a prominent aspect of Jewish law and practice since the beginning. In fact, the rabbis tell us that the idea of respecting *minhag ha'makom* was practiced by Abraham and Moses. During Abraham's encounter with the three messengers in chapter 18 of Genesis, he provided a feast of food for them to eat.⁴⁰ Tradition holds that these three messengers were, in actuality, angels of God and, as such, would neither require nor eat the food of humans. *Midrash* interprets this episode to suggest to us that the angels ate so as not to offend the customs of the lower plane of existence.⁴¹ Similarly, when Moses was atop Mt. Sinai for the forty days and nights of revelation, he neither ate nor drank,

³⁸ Jacobs 228-229

³⁹ B. Bava Metzia 86b; Also rendered in Aramaic in Genesis Rabbah 48:14 (Vayeira) as *alta l'qarta, haleikh b'nimosa*; "when you go up to and approach a place, follow its customs."

⁴⁰ Coincidentally, this feast featured both meat and dairy served side by side.

⁴¹ B. Bava Metzia 86b, Genesis Rabbah 48:14 (Vayeira). The Genesis Rabbah version of the *midrash* says that the angels pretended to eat, reminiscent of the "stealth kashrut" and other practices of the Jews of Denmark that we saw in our introduction.

for those are the ways of angels in the upper plane of existence.⁴² The rabbis also give a more concrete, practical example of how to respect *minhag ha'makom*. The scenario is of one who travels from one town to another on the eve of Passover. If the custom of the town the person departs from is to engage in work until midday, but the custom of the town he or she is arriving at is not to work until midday, the traveler should respect the custom of the other town and not engage in work, and vice versa. This is to ensure that the traveler will not cause controversy by acting differently than the other townsfolk.⁴³ The fluctuation between adherence to local customs shows that not only is *halakhah* open to flexibility, but also that it allows for alternate sets of laws between towns and that it supports a continual adjustment of an individual's legitimate Jewish practices.

Through the lenses of *minhag*, “nowadays,” and the general Talmudic propensity towards flexibility, we see the validity of Jacobs' comment:

It is clear that the Talmudic sources are open to a strict as well as a lenient interpretation. When we find, among post-Talmudic Halakhists, some favoring the more lenient interpretation, and others the stricter, it is fairly safe to conclude that they have arrived at their actual decisions, based on their interpretations of the sources, on sociological as well as on purely Halakhic grounds. Where the surrounding culture presented little danger to Judaism or where practices adopted from the non-Jewish environment had become too deeply rooted among the people to be easily eradicated, a lenient interpretation of the Halakhah becomes

⁴² Deuteronomy 9:9, B. Bava Metziah 86b, Genesis Rabbah 48:14 (Vayeira)

⁴³ Elon 935-936; cf. M. Pesachim 4:1, B. Pesachim 51b, and Mishneh Torah Yom Tov 8:20

evident. Where the danger was real or where practices could more easily be eradicated, the stricter interpretation tends to prevail.⁴⁴

When using *minhag* as a determinant for *halakhah*, one must always be cognizant of the idea that *minhag* cannot be decisive if it is contrary to the unanimous opinion of halakhists.⁴⁵ And yet, we know that unanimity is scarce in the corpus of *halakhah*, which leads us into a discussion of one final avenue by which a presently operating *halakhah* can be changed.

The *halakhah*, as we have discussed, is predominantly law by majority. The dominant theory is advanced, while the individual or lesser-espoused opinions fade to the background. The minority opinion is recorded as a memorial of sorts to the sages who posited them, as well as a notice that those minority views are not to be followed. The first chapter of Eduyot in the Mishnah takes on the task of explaining the inclusion of minority opinions in the rabbinic literature. The first four *mishnayot* of chapter five illustrate and explain why certain opinions of both Hillel and Shammai were preserved, even when neither one was followed. The explanation is that this was meant to dissuade future generations from being stubborn in maintaining their opinions.⁴⁶ *Mishnah* six in the same chapter further cautions adhering to a minority view, claiming that the view is cited in order to teach that it was the incorrect view.⁴⁷ Hanina ben-Menachem, however, believes that the perpetuation of minority views had a broader function.

⁴⁴ Jacobs 97

⁴⁵ *ibid* 221

⁴⁶ M. Eduyot 1:4

⁴⁷ *ibid* 1:6

As the *mishnayot* say, the purpose of recording the minority view is to preserve them. Hanina Ben-Menachem views this intent as a means of perpetuating their status as acceptable decisions achieved through halakhic reasoning. The fact that their normative nature is limited, he says, was a later concept.⁴⁸ Ben-Menachem accepts that rulings made by the sages all had some sort of institutional recognition.⁴⁹ This theory is also supported by Jacobs who says that:

The Halakhist obeys the rules and plays the game according to them. In order to arrive at his decisions the Halakhist must use the acceptable legal ploys. He has always to demonstrate that the law really is what he declares it to be and that his decision has been reached on Halakhic grounds.⁵⁰

Further, we can support the idea that individual opinions existed based on the reality of the various times of Jewish life.

Rabbis gain their authority in two ways. The first is through a course of study leading to what we colloquially call ordination. Secondly, an individual community grants a rabbi authority by the mere fact that the rabbi was hired or chosen to preside over the community.⁵¹ As the *mara d'atra*, the master of the place, the rabbi is entrusted with making decisive rulings, which the people will then follow. Even if the decision is not shared by a majority of rabbis, it is, nevertheless, a valid and binding one. The very

⁴⁸ Ben-Menahem, Hanina. *Judicial Deviation in Talmudic Law: Governed by Men, Not by Rules*. New York: Harwood Academic Publishers, 1991. p. 161

⁴⁹ *ibid*

⁵⁰ Jacobs 11

⁵¹ Dorff 197-198

nature of the opinions' viability precludes the possibility that the sole end of this practice of recording minority opinions was merely to compile a list.

As Ben-Menachem suggests, then, the inclusion of the minority opinion must have had some other purpose. This stance is supported both by another *mishnah* as well as by certain Talmudic precedents. *Mishnah* five of Eduyot speaks to this idea:

And why do they record⁵² the opinion of the individual against that of the majority, since the halakhah may only be according to the opinion of the majority? So that if a court approves of the opinion of the individual it may rely upon him, since a court cannot annul the opinion of another court unless it exceeds it both in wisdom and in number.⁵³

In this *mishnah* we see the realization of the idea that minority opinions are just as valid as majority opinions. This *mishnah* also gives future courts permission to make use of minority opinions when deciding halakhic issues. Further, the use of a minority opinion cannot be seen as *changing halakhah*, as that opinion is a valid halakhic instruction in and of itself.⁵⁴ In its treatment of Eruvin, the Talmud proclaims *eilu v'eilu divrei elohim chayim*; both this and that are the words of the living God.⁵⁵ This famous statement attests to the fact that the ancient rabbis were quite aware of and quite welcoming of diverse opinions; not seeking only one operative rule. In fact, the Talmud explicitly says this on Eruvin 10b, "Whoever wishes to conduct himself according to Beit Shammai may do so, and according to Beit Hillel may do so." The rabbis' permission of selecting

⁵² in Hebrew, *mazkirin*, from the root "to remember"

⁵³ M. Eduyot 1:5

⁵⁴ Berkovits 94

⁵⁵ B. Eruvin 13b

which opinion to adhere to, even a minority opinion, was a way of lessening inflexibility, while still not amending set laws.⁵⁶ In fact, the rabbis even instruct us to turn to the minority opinion in certain circumstances.

The Tosefta, in its version of Eduyot 1:4, permits the adherence to a minority opinion in emergency cases. Examples of these cases, scattered throughout the Talmud,⁵⁷ speak to the fact that use of the minority opinion, as expressed in Mishnah Eduyot 1:5, “was not purely a theoretical qualification.”⁵⁸ In other instances, the Talmud defers to the minority opinion when it is more convincing.⁵⁹ Such is the case with R. Yosi’s opinion on granting power of attorney through an emissary.⁶⁰ In this context, the majority ruled that one may use an emissary to grant power of attorney to another, and yet the Talmud states that R. Yosi’s minority opinion is to be followed. From our previous study of *marit ayin*, we can see how R. Yosi’s opinion is more convincing. An emissary is already, essentially granted power of attorney due to the idea that *sh’lucho shel adam k’moto*; a man’s emissary is like himself.⁶¹ For an emissary to then grant that same power of attorney to another would then be two steps removed from the source, which, as we know, is one step too many. The significance of the minority opinion, though debated, is thus a vital and active element in the flexibility of *halakhah* and the adjusting of it to meet current needs.

As this exposition has revealed, *halakhah* is not, nor has it ever been, a rigid and immutable system. Rather, “Halakhah is by nature and practice evolutionary, flexible,

⁵⁶ Ben-Menachem 159

⁵⁷ cf. B. Berachot 9a, B. Shabbat 45a, B. Gittin 19a, B. Niddah 6a, B. Eruvin 46a

⁵⁸ Ben-Menachem 159

⁵⁹ Berkovits 7

⁶⁰ Gittin 47a

⁶¹ M. Berakhot 5:5

ethical, and progressive.”⁶² The internal affirmation of the role of *minhag*, the retention of minority opinions, and the necessity of meeting the “nowadays” needs of the people, proves that *halakhah* is accepting of varying opinions within its decidedly non-monolithic system. This analysis is important especially in light of the frequently repeated rhetoric to the contrary.

In his campaign against the early reformers in Europe, Moses Sofer (the Chatam Sofer) made a number of assertions regarding the nature of *halakhah*. He proclaimed, “anything new is forbidden by the Torah in every place.”⁶³ This was followed by “the old and well-aged is better than the new,” and, “anyone who makes changes has the weaker position.”⁶⁴ Yet, as our study of the classical texts and of the flexibility of *halakhah* has yielded, Moses Sofer’s proclamations are not in accordance with the well-documented facts of Jewish history. While it is true that “there were periods of relative fossilization,”⁶⁵ *halakhah* was never meant to mimic an item that could be put on display at a museum. Its dynamism and fluidity have kept *halakhah* relevant for modern times, even for those who do not adhere to it.

For our purposes of examining the Chicken Parmesan dilemma, we must make sure to note that the broad concept of halakhic flexibility does not mandate change or prove that change is required for specific issues. Halakhic change has to be warranted in particular cases and must be in accordance with halakhic methodology. We have seen throughout the halakhic literature that “the complexity of the dietary rules allows for a wide variation in strictness, and plausible arguments can be made for different

⁶² Zemer 38

⁶³ *ibid* 39

⁶⁴ *ibid*

⁶⁵ *ibid*

interpretations of correct practice.”⁶⁶ If we have proper cause and support, we can “avail ourselves of the inherent flexibility of Halakhah” in attempting to solve the Chicken Parmesan dilemma. However, we must realize that such use of halakhic flexibility will only yield one of many possible interpretations.

⁶⁶ Buckser 198, Based on Isaac Klein’s *A Guide to Jewish Religious Practice*.

Conclusion:

A Proposed Solution to the Dilemma and an Assessment of the Modern Validity of *Halakhah*

Elliot Dorff said, “Every legal system periodically has to catch up to the actual practices of the people it seeks to govern.”¹ With our survey of the various rabbinic and halakhic writings complete, with the nature of halakhic flexibility established, and with the explanation of the various devices through which *halakhah* may be updated, we can now do just as Dorff suggests. We may finally come to provide a possible solution to the Chicken Parmesan dilemma. In approaching our proposal for a solution, we will follow the same sequence of ideas as the previous chapter. First, we will analyze the current conditions of “nowadays.” Then we will discuss whether or not the prohibition of cooking fowl and dairy together has either minimally fallen into abeyance, or, maximally, achieved a status as *minhag*. Finally, we will return to the idea of the minority opinion as a means for achieving our solution.

In terms of today’s conditions, we can see a variety of scenarios that call into question many of the explanations of the sages and halakhists, and therefore, suggest the need to reopen the debate regarding fowl and dairy. Let us call to our attention the status of the food industry today. For our concerns, we specifically see the three distinct categories of land animals: meat, pork, and poultry. A far cry from R. Akiva’s opinion where the way of humankind was to apply the term “meat” to the flesh of all land animals, today’s world has created distinct lines of separation, which are generally

¹ Dorff 252

adhered to, even in casual conversation.² “Nowadays,” therefore, the conditions that led R. Akiva to declaring that fowl was to be included in the general category of *basar* no longer applies, and, since *halakhah* follows the opinion of R. Akiva, a re-evaluation of the categorical status of fowl is necessary.

While speaking of the modern food industry, the issue of *marit ayin* also comes to mind. With the clear labeling of different “meats,” especially in terms of supermarket aisles and restaurant menus, the persuasiveness of *marit ayin* is seemingly diminished. Further, the principle of *marit ayin* requires an on-looker to assume that the people whom he or she observes are Jewish, and to assume as well, that they maintain a certain level of halakhic adherence. In today’s world where many who keep kosher can no longer be identified by their dress or demeanor, how is an observer to know if the people he or she observes are Jewish? If the observer is not expecting those he or she observes to be Jewish, *marit ayin* surely does not apply. Even if the observer knows for a fact, without any identifying marks, that the person being observed is Jewish, in our day the blanket assumption cannot be made that this particular Jew would be expected to keep kosher. Furthermore, if the observer knows that the person being observed is Jewish, the observer would likely know enough about the person to have certain expectations and would, therefore, make better-educated assumptions.

“Nowadays,” then, a variety of the factors that led to certain opinions of earlier sages and halakhists no longer apply. There is a clear notion in society of separate

² One of the few exceptions to this trend are vegetarians, who refer in broad strokes to poultry as meat, the opposite of fruits and vegetables. This practice does not apply to our study, as it is an artificial construction based on a dietary preference. It assumes that land animals (and sometimes even seafood) are not proper food, and therefore negates the need for specific distinctions between meat, pork, and poultry.

categories of meat and poultry. The issue of *marit ayin*, in the mainstream of Judaism, fails to convince us of its necessity. In many aspects, we can certainly see areas in which the debate over fowl counting as *basar* should most certainly be reopened.

The halakhic ramifications of *minhag* may also be useful in solving the dilemma. Scholars and halakhists have suggested that perhaps the idea of *minhag* no longer applies to open, less halakhically observant Jewish communities. The reasoning behind this is that there are essentially no distinct borders allowing to say, “such and such is the way of such and such set of people.” In today’s fluid community, this definition of *minhag* has a degree of merit. The decisive nature of *minhag* also might be seen as only applying to a community that already adheres to halakhic rulings. *Minhag*, custom, by definition, however, is “a set of norms that arise out of the practices of the people,”³ and we may make a strong case that the “norm” of the majority of Jews today is characterized by a small amount (if any) of halakhic adherence. Also, as we saw in the case of laws that had fallen into abeyance, despite the fact that a law was not adhered to in those cases, *minhag*, the “norm” of the people overrode the law.

If the kosher laws have fallen into abeyance, or if the prevailing practice is not to follow them, the obvious decision, if *minhag* dictated law in this case, would be to declare kashrut null and void. Yet, in the spirit of preservation and continuity, other slight changes to the law could be made with regard to the practiced norm of mixing flesh and dairy. If, as we have suggested, many question the wisdom of prohibiting fowl and dairy as a result of the idea of not cooking a kid in its mother’s milk, perhaps we might follow the methodology of the *Tosafot*. The needs of the people may be met by upholding the permissiveness of mixing fowl and dairy, thereby halakhically justifying the status quo.

³ Dorff 245

Amending the rabbinic law to allow such a mixture might even serve as a means of encouraging some Jews to individually take upon themselves a greater degree of halakhic observance.

As we looked at the history of the rabbinic stance on fowl and dairy, we have noticed that never once were all scholars and sages convinced of the prudence of the prohibition. There were always local customs that deviated one way or the other from the majority rabbinic opinion. Even as late as the commentaries to the Shulchan Arukh, we saw that the issue of fowl and dairy was never fully solidified. The debate may have ended, and the opinion of the majority that fowl is forbidden to eaten with dairy followed. However, there has never been a unanimous decision on the matter, nor has any court actually made a definitive decision regarding fowl and dairy. In this context of an open-ended debate, the issue can certainly be re-approached, and opinions of the minority may be consulted as well. In particular, a present day approach to the question of fowl and dairy can very well look to the valid, albeit singular, local custom of R. Yosi haGalili. We know that the minority opinion can be called upon in certain cases, especially when they present a convincing argument. Furthermore, since minority opinions count as valid halakhic decisions, employing the view of R. Yosi haGalili would neither constitute a change in law, nor would it require the annulment of a previous rabbinic ruling.

To review, R. Yosi haGalili interpreted that fowl should not be rabbinically prohibited from being mixed with dairy. His opinion was contrary to that of R. Akiva, who ruled that even though the Torah did not forbid fowl with milk it was, nevertheless, to be prohibited rabbinically. R. Yosi haGalili's opinion was based on the connection of the Deuteronomy 14:21 occurrence of the milk and meat verse to the prohibition of eating

the meat of an animal that died without slaughtering. He ruled that the flesh of any animal that is subject to the laws of slaughtering should also be prohibited from being cooked with milk, except for the flesh of fowl. His reasoning, as we noticed, was obviously because “You can’t milk a chicken.”

In relation to the idea that a minority opinion may overrule a standard halakhic practice due to a convincing argument, we cannot overlook the clearly factual view of R. Yosi haGalili. Scientifically, chickens, or any fowl for that matter, do not lactate. The question that we have concerned ourselves with in this study is over the logic of connecting fowl to the verse “do not cook a kid in the milk of its mother.” In light of this scientific fact there can be no clearer, halakhically sound, convincing opinion that would maintain the integrity and ensure the preservation of the tradition of *halakhah*. R. Yosi haGalili, who we know was the Mara d’Atra of at least one town in ancient times, decided upon a *halakhah* that was seemingly followed without opposition from his constituents. The people’s needs for interpretation and ruling were met by R. Yosi haGalili’s relatively lenient opinion.

For our day, we too may turn to R. Yosi haGalili’s authoritative halakhic ruling. Since we know that many Jews do not adhere to the laws of milk and meat anyway, specifically as they relate to fowl, we may conclude that a change in the scope of those laws would not present a danger to Judaism. When there is no danger, we know that leniency may be taken in rendering decisions. And, as there was never a unanimous ruling regarding fowl and dairy, we would not be overturning a previous court of greater wisdom. If the prohibition of fowl and dairy is indeed viewed as being irrational by a mainstream Jewish majority, the convincing wisdom of R. Yosi haGalili comes to teach

us that we may, in a manner aligned with the precedents of halakhic thought, mix fowl and dairy without being afraid of transgressing a commandment, divine or otherwise.

Yet, as much as we have focused on the point that “You can’t milk a chicken,” we have not lent as much credence to the counter point, “But God said so.” As we saw in the previous chapter, the Chatam Sofer’s assertions that nothing new is permitted by Torah, that the old is preferred over the new, and, especially, that the case for change presents the weaker argument belie the sense of the divine nature of *halakhah*. For those like Sofer who adhere so strictly to the tradition, the fact of “God saying so” and the fact of the rabbis merely reporting God’s intent is convincing enough to believe in the totality and eternity of *halakhah*. Sofer was certainly correct; those who hold to this belief do indeed have the stronger position in arguments. Once the framework of God’s revelation of *halakhah* is professed, any sense that *halakhah* is susceptible to human refinement will not be convincing.

Here we see the versatility of the halakhic system. Whether one approaches Jewish law from the stance of divine permanence or from the stance of human interface, *halakhah* remains relevant. Those who claim that *halakhah* is unyielding to contemporary needs, and believe that by adhering to *halakhah* they are performing God’s will, are constantly engaged with tradition, allowing their Jewish identities to be shaped by it. Those who approach *halakhah* open to the idea of contemporary adjustment, regardless of the degree of flexibility they are willing to allow, take on a sense of “the rabbis said so.” These people engage with *halakhah* by continually seeking to understand the evolution and direction of Jewish law and how it is to be applied to daily life. These people’s Jewish identities are then shaped by their constant re-evaluation of practice.

Finally, those who approach Jewish law seeking reconciliation with rational, scientific facts find themselves engaged in an impassioned relationship to *halakhah*. Seeking to justify their practices by stressing “you can’t milk a chicken,” these people might be surprised as they discover that *halakhah* is receptive to this approach as well.

With all of the points raised and discussed in this study, all but one aspect of its title have been explicitly addressed; the latter notion of assessing the modern validity of *halakhah*. Throughout the chapters of this work, we have analyzed the Chicken Parmesan dilemma. By the methodical steps of moving from the Bible, to the Talmud, and to the post-Talmudic halakhic compilations, we have shown the numerous levels of detailed debate and interpretation that are involved in the rabbinic method of legislation. The proposed solution to the dilemma above, as well as the various viewpoints from which to engage with *halakhah*, speaks to that assessment. For an aspect of Judaism to be valid in modern times, it must be able to speak to all Jews. *Halakhah* accomplishes that task, even for the most non-adherent, detached Jews.

Not only is the halakhic method valid, it also remains a valuable tool for understanding, relating to, and developing a sense of Jewish identity. While we might never gain consensus on a solution to the Chicken Parmesan dilemma, the mere fact that the Jewish legal system is readily open for debate ensures that even the most frivolous of concerns can find support in the Jewish tradition. And while I can appreciate the view of those who adhere to their stance that “God said so,” I, or for that matter any of us, can continue to embrace the other halakhically valid stance. With all of our research, discussion, analysis, and logic we will forever come back to the unequivocal truth, namely, “You can’t milk a chicken!”

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