

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

106 - ARCHEOLOGY - PART 2 OU ISRAEL CENTER - FALL 2018

In Part 1 we saw a number of potential precedents for the use of archaeology in determining halacha. Since the growth of the science of archeology over the last 100 years, how have the poskim weighed the archeological evidence as part of the halachic process?

A] ARCHEOLOGY AND THE HALACHIC PROCESS

A1] THE CHAZON ISH

1. חזקוני רבי יהושע בן זורזו בן חמיו של רבי מאיר לפני רבי על ר"מ שאכל עלה של ירק בבית שאן, והתיר רבי את בית שאן כולה על ידו

Rabbi Yehuda HaNasi ruled that Beit She'an was exempted from terumot and ma'aserot on a Rabbinic level as it was (for these halachot) just outside the borders of Eretz Yisrael.

2. ... ורבינו הקדוש התיר בית שאן מאותם המקומות שלא החזיקו בהם עולי בבל. השגת הראשונים – א"א: לא הסיר רבי אלא מעשר ירק ופירות האילן שכן מדרבנן אף בא"י

רמב"ם הלכות תרומות פרק א הלכה ה

The halacha follows this position and Beit She'an is technically exempted from taking (at least Rabbinic) terumot.

Does this mean that the residents of contemporary Beit She'an can eat their salad without taking any terumot? The Chazon Ish clearly rules (Shevi'it 3:18-19) that modern Beit She'an is fully obligated in terumot and ma'aserot and that any associations of modern Beit She'an with the ancient city based on archeology are simply 'umdenot' - conjectures.

3. I am not acquainted with the endeavor of excavations and studies of antiquities, and I oppose this enterprise because of the many uncertainties¹ involved.

Collected Letters of the Chazon Ish 3:19

The Chazon Ish was unimpressed with the archeology of the time and unwilling to bring it into the halachic process.

A2] RAV KOOK

ע"ד לביעות קריאת המגילה להמשכות בפרטיות איני מוצא לי חומר לספק להוציא מיד רובא דעלמא. כי כל התעסקה הזו של חקירת מוצא א"י מלאה היא רק השערות. שאמנם ראויים הם לחבה וכבוד החוקרים והדורשים בזה מצד חבת הקודש, אבל סוף-כל-סוף, א"א לקבוע מסמרות, על סמך השמות השגורים בין הערבים. ומ"מ אם יש לו על איזה מהם ספיקות והערות יסודיות. יואיל נא בטיבו להמציאם לי, ואנלה בלי"ג לכת"ר את דעתי ע"ז.

אגרות הראי"ה תכ"ג

Rav Kook (in a letter written in 1912) was more open to understanding and respecting the science of archeology, but was unwilling to rule in halacha that a modern Jewish village should read Megilla on 15th Adar on the basis of an Arab name² for the town which connects it to the ancient walled city from the time of Yehoshua. He IS however willing to hear more information if it becomes relevant.

1. The large-scale excavation of ancient Beit She'an only began in 1980, long after the death of the Chazon Ish in 1953. The archeological analysis is thus much more advanced now, although it cannot be known if the Chazon Ish would take a different position because of this.
2. It is well known that many old Arabic place names in Eretz Yisrael mark the locations of the ancient Jewish towns. Consider: Beit Jalla = Gilo, Jenin = Ein Ganim, Silwan = Shiloach, Sellun = Shilo, Tequa = Tekoa, Anata = Anatot, Batir = Beitar, Beitin = Beit El, Jaba = Geva, Mukhmas = Michmash, El-Jib = Giv'on.

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Note that, in this case, there is an established 'rov' - majority (ie most places were NOT walled at the time of Yehoshua) which must be overridden to change the halacha. The archeological evidence that Rav Kook was presented with then was simply not strong enough to do so.

5. הנני חושב שאע"פ שהתכונה המדעית בחקירות כאלו בנ"ל היא ע"פ רוב על היסוד של ה'איחור הקיצוני', ו'לא ראינו' היא מהראיות היותר גדולות. בכ"ז א"א להשמיט השערות תמוכות נמסורת ...

אגרות הרא"ה תקע"ד

In a 1913 letter dealing with ancient coinage and its impact on halacha, Rav Kook restates his view that scientific determinations cannot simply displace established assessments based on mesora.

B] MODERN APPLICATIONS OF ARCHEOLOGICAL EVIDENCE IN HALACHA

B1] TECHELET

One of the arguments against the modern innovation of wearing techelet from the murex trunculus³ is that we have no unbroken mesora for wearing such techelet.

• R. Yosef Ber Soloveitchik of Brisk - the Beit HaLevi - opposed the Radziner techelet on those grounds. There are two versions of his letter to the Radziner Rebbe.⁴ The version quoted by the Soloveitchik families in the US and Israel is that a positive mesora is required to begin wearing murex Techelet. Since there is no mesora, EVEN if the murex techelet is authentic, we still may not use it.

6. It is well known what happened between my grandfather, R. Yosef Dov HaLevi and the Gaon of Radzin The Rebbe tried to prove, based on much evidence, that this dye was the true techelet. R. Yosef Dov objected, saying that conjecture and proofs cannot prove anything concerning matters which rely upon tradition handed down from generation to generation. In such a case, argumentation cannot be the deciding factor, only tradition itself can determine it.⁵ That was the way our fathers saw it, and acted thereon, and that is the way the sons have to continue acting.

R. Joseph B. Soloveitchik - Shiurim le-Zekher Abba Mori z"l p228

• However, the version of the Beit Halevi's letter which appears in the Radziner Rebbe's sefarim is very different⁶! According to that version, the Brisker opposition was on the grounds that the Radziner Techelet was made from cuttlefish. Since all generations had been aware of that fish and STILL not used it as techelet, this constitutes a 'negative mesora' ie a mesora NOT to use it. But the Beit Halevi accepted that if a good candidate could be found that earlier generations did not know about, he would be happy to consider it and if it proved to be true, we would be obligated to use it!⁷

• Rav Joseph B. Soloveitchik of YU spoke about Techelet many times and was opposed on the grounds of mesora. This is the practice of most in the Soloveitchik family.

• Rav Aharon Lichtenstein was opposed, as were his halachic mentors - Rav Hunter, Rav Yosef Soloveitchik, Rav Aharon Soloveitchik and Rav Shlomo Zalman Auerbach⁸. However, many of the Lichtenstein children DO wear techelet.

• Rav Hershel Schachter rules that the argument from mesora is invalid. Previous generations did not use it because they did not have it.

• Rav Eliyashiv (Kovetz Teshuvot 1:2) also says that one should not wear murex Techelet due to the lack of mesora.⁹ He writes that just as previous scientific understandings of the correct fish - the cuttlefish by the Radziner and the Janthina by Rav Herzog - were proved wrong, so too future science may prove the murex trunculus to be incorrect.

• Rav Shlomo Zalman Auerbach did not rule in favor of the murex techelet.¹⁰

3. For a fuller treatment of the topic of techelet see <http://rabbimanning.com/wp-content/uploads/2017/05/Techelet-Part-1.pdf> and <http://rabbimanning.com/wp-content/uploads/2017/05/Techelet-Part-2.pdf>

4. Note that the letter in question was NOT written by the Beit HaLevi but someone else on his behalf.

5. An extreme example of this is a debate which took place some years ago between Prof. Zvi Yehuda of Telz in Cleveland and Prof. Shneur Leiman (in articles cited below). Prof. Yehuda grew up close to the Chazon Ish and quoted the Chazon Ish as saying that even if we were to find the original Sefer Torah of Moshe it would be invalid if it did not fit with our mesora! R. Leiman disagreed - see further below on the question of manuscripts.

6. This raises the question of why Rav Soloveitchik did not understand the Beit Halevi the same way. Did the writer of the letter misunderstand the Beit Halevi's position? Did the Radziner Rebbe misunderstand the Beit Halevi? Did the Beit Halevi say one thing to the Radziner and something else to his family?

7. Rav Eliyashiv is quoted by R. Hershel Schachter as having stated that the Radziner version of the letter makes more sense. For more on the issue of mesora and Techelet, see *Identifying Tekhelet: Masoret and Yedi'ah*, R. Moshe Tendler, Tekhelet: The Renaissance of a Mitzvah (MSYU 1996) p39.

8. But see below on Rav Shlomo Zalman's position.

9. Rav Eliyashiv's position is complex. Rav Hershel Schachter recounts how Rav Eliyashiv's opposition to techelet came about. The Ptil Techelet organization presented the murex techelet to him. He asked how much techelet would cost if he started wearing in and all the Charedi world followed suit. The answer was that, due to the intense demand, the price would sky-rocket and be prohibitive. On that basis, Rav Eliyashiv said that he would not wear it. This exchange was then published without authorization and Rav Eliyashiv asked someone to publish in his name that he actively opposed the murex techelet. The result was the publication of a teshuva in Kovetz Teshuvot, which Rav Eliyashiv later confirmed that he had not personally written!

10. But his position is also nuanced. Rav Menachem Borstein, an expert on techelet (and author of the 450-page book on the issue - *HaTechelet* (1988)) told me that he discussed the matter at length with Rav Shlomo Zalman, who was unwilling to rule in favor of the murex techelet. However he felt that if people began to wear it this would create a new halachic reality (maybe even a regenerated mesora - see the following note on turkey) which would be relevant in future psak.

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- But how strong does mesora need to be? Consider the fact that most people eat turkey without a clear mesora¹¹, even though the down-sides are very significant if indeed turkey is treif!
- Rav Kook (Da'at Kohen 140) rules that science can create a 'safek', which may or may not be relevant in halacha. Eg the opinion of a doctor that someone needs to eat on Yom Kippur does not ipso facto override the prohibition of eating. It creates a safek pikuach nefesh consideration and THAT permits eating. Sometimes a safek may not be sufficient to override an existing rov or chazaka.
- In the case of techeilet, Rav Eliyahu Tavger understands that the modern science at least creates a safek and there is then a halachic requirement to wear the safek (min haTorah) techelet, which overrides the halachic downsides.

B2] MEZUZAH

7. אמר רב יהודה אמר רב: עשאה כמין נגר - פסולה

מנחות לג.

The Gemara states that a mezuzah placed 'like a door bolt' is invalid.



8. עשאה כמין נגר - שקבעה ותחבה בסף כנגר שתחצין הנגרין זכותל כזה. פסולה - דמנח' לתחב' באורך בסף כזה ...

רש"י שם

Rashi explains (with a diagram) that this prohibits placing a mezuzah horizontally, but vertically is fine.

9. הא דעבידא כסיכתא הא דעבידא כאיסתורא - פי' בקונטרס ... ומעומד הוא כשירי ... וקשיא לר"ת דמעומד לאו דרך כבוד הוא ... וספר תורה ולוחות שבארון מושבז ולא מעומד כדמשמע בפ"ק דזבא בתרא (דף יד.) אף על פי שהיו יכולין להניחו מעומד דארון רומו כרחצו ... אלא לפר"ת הוי"ו מיושב ולפי' בקונטרס מעומד ואומר ר"ת לא ולמד דהא מעשה בכל יום כשספר תורה עומד על הכימח הכל עומדין וכששליח ליבור מושיבו הכל יושבין ...

תוספות שם

Rabbeinu Tam rules that the mezuzah may NOT be placed vertically, but should be horizontal.

10. צריכה להיות זקופה - ארכה לאורך מזוזת הפתח. כגב: וכן נהגו (נ"י). אבל י"א שפסולת בזקופה אלא לריכה להיות שכובה - ארכה לרוחב מזוזת הפתח (טור וכפוסקים בשם ר"ת). ובמדקדקין יולאין ידי שניהם ומניחים אותה בשפוע וזאלכסון (טור וכפוסקים מיימוני ומכרי"ל ות"כ סי' נ"ב) וכן ראוי לנהוג, וכן נהגין במדינות אלו. ...

שולחן ערוך יורה דעה הלכות מזוזת סימן רפט סעיף ו
The Mechaber rules like Rashi - to fix the mezuzah vertically - and the Rema agrees that this is the minhag in many places. However, since there is a view that the mezuzah may NOT be vertical, the Rema suggests that the mezuzah should be fixed on a slant, in order to avoid both potential prohibitions.

All notches on door uncovered by archeology indicate either a vertical or slanted placement. None have been found with a horizontal placement. Does this categorically disprove Rabbeinu Tam's position, meaning that we should now all follow Rashi and fix our mezuzot vertically? There are a number of reasons to argue that it does not:

- Maybe we have not yet found the ancient homes with horizontal mezuzot.
- Maybe Ashkenazim now have a mesora NOT to place the mezuzah vertically, but on a slant.
- Maybe there was always a machloket (as with Rashi and Rabbeinu Tam tefillin) and for that reason we find ancient mezuzot on a slant.

B3] MIKVEH

Hundreds of ancient mikvaot have been unearthed in archeological digs (including on Massada and in Yerushalayim). Most are constructed so as to render the water kosher through *zeriah*¹² or *hashakah*¹³. Does that mean we should now design mikvaot in that way, rather than with all the extra chumrot which go into mikveh design today? Most would answer no, because

- Perhaps the ancient mikvaot were designed in that way because that was all they could do. Today, we have the ability to design mikvaot with more halachic exactitude due to cost and technology considerations.
- Maybe we should be more machmir today due to yeridat hadorot!

11. On the other hand, the Netziv (Meishiv Davar 2:22) felt that we DO have a mesora for turkey now that Jews have been eating it for hundreds of years.

12. Pouring a large amount of non-kosher water into a pre-existing kosher pool, which makes the whole pool kosher.

13. Placing a pool of non-kosher water next to a kosher mikveh and opening a small hole between them to allow the water to mix freely. This makes all the water kosher.

B4] PURIM

It appears that Beit El was a walled city at the time of Yehoshua.¹⁴ Some archeologists (including Yoel Elitzur) take the view that the modern town of Beit El is located on the site of the ancient town. So do the residents of Beit El read Megila on 15th or 14th Adar?¹⁵

- R. Shaul Yisraeli ruled that they should read on 14th since archeological evidence was insufficient.
- R. Ovadia Yosef ruled that the archeological evidence at least raised a safek which meant that it was appropriate (although not required) to read again on 15th without a beracha.
- R. Mordechai Eliyahu ruled that Purim should really be observed in Beit El on 15th if Rabbinic consensus could be reached on the matter.

In practice, residents of Beit El read on 14th as the Rosh Yeshiva, R. Zalman Melamed does not consider the archeological evidence to raise a serious safek. Furthermore, most poskim rule that a resident of a walled city fulfills their obligation bedieved even on 14th.

11. ואמר רבי יהושע בן לוי: לוד ואונו וגיא החרשים מוקפות חומה מימות יהושע בן נון הוו.

מגילה ג'

The Gemara rules that ancient Lod was walled in the time of Yehoshua.

In the 1940s Rav Yechiel Michel Tukachinsky ruled in his luach that residents of Lod should read on 14th and 15th due to the safek. In the 1980s some archeologists (including Yoel Elitzur) took the view that the modern town of Lod is located on the site of the ancient town. So do the residents of Lod read Megila on 15th or 14th Adar?¹⁶

- Rav Eliashiv ruled that they should continue to act as directed by Rav Tukachinsky.
- R. Yitzchak Weiss ruled that, given the archeological evidence, residents should be especially careful to read again on 15th without a beracha. This is the practice of many people.
- No poskim rule that residents of Lod should read exclusively on 15th however some poskim¹⁷ rule that 15th is the main day.

B5] HUMAN REMAINS

The excavation¹⁸ of sites containing human bones or corpses raises a number of halachic problems, including: (i) the general prohibition against disinterring the dead; (ii) the proper procedure for disinterment and reburial where permitted; (iii) the prohibition against deriving benefit from a met or kever; (iv) restrictions on what activities are permitted in a beit hakevarot; (v) the problem of determining whether bones are those of a Jewish or non-Jewish met and what assumptions are to be made in cases of doubt.

12. אין מפנין המת והעצמות, לא מקבר מכובד לקבר מכובד, ולא מקבר בזוי לקבר בזוי, ולא מבזוי למכובד, ואצ"ל ממכובד לבזוי. ובתוך שלו, אפילו ממכובד לבזוי, מותר, שערב לאדם שיהא נח אצל אבותיו. וכן כדי לקבור בארץ ישראל, מותר. ואם נתנוהו שם על מנת לפנותו, מותר בכל ענין. ואם אינו משתמר בזה הקבר, שיש לחוש שמא יוציאוהו עובדי כוכבים, או שיכנסו בו מים, או שהוא קבר הנמצא, מצוה לפנותו

שולחן ערוך יורה דעה הלכות אבילות סימן שסד סעיף א

A Jewish body may be re-interred for only very limited reasons.¹⁹

13. קבר המזיק את הרבים, כגון שהוא סמוך לדרך, אפילו נקבר שם מדעת בעל השדה, מותר לפנותו ומקומו טהור. ואסור בהנאה אם קדם הקבר אבל אם קדם הדרך, מקומו מותר בהנאה.

שולחן ערוך יורה דעה הלכות אבילות סימן שסה סעיף ה

One of the justifications for moving a grave is if its location is causing damage to public needs.²⁰

14. See Shoftim 1:22-25

15. For more information see Techumin 1:109-134

16. For more information see Techumin 9:367-380

17. Such as Rav Samet of the garin Torani in Lod.

18. See the following article by R. Yitzchak Breilovitz - <https://www.jlaw.com/Articles/heritage.html>

19. See https://www.chabad.org/library/article_cdo/aid/281579/jewish/The-Grave-in-Judaism.htm which lists the reasons as follows:

Reinterment may be permitted, after consultation with a rabbi, in the following instances:

1. The removal of the remains from an individual plot to a family plot where other immediate members of the family are already buried.
2. If the deceased was not buried in his own gravesite, as for example: (a) He was mistakenly placed in someone else's grave. (b) He was placed in a stolen grave. (c) Part of the grave is on public land. (d) He was placed in a grave with the owner's permission, but it was never fully paid for. (e) If he is interred in a non-Jewish cemetery.
3. If the present gravesite is not guarded against destruction by vandals.
4. If it may be destroyed by water or other natural phenomena.
5. If the government appropriates the property for highways or other communal needs.
6. If the deceased is to be reinterred in Israel.
7. If the grave was considered temporary, and expressly so stipulated when the deceased was originally interred.
8. If it was discovered that the deceased expressly desired to be buried elsewhere.
9. War dead buried in national cemeteries may be reinterred in Jewish cemeteries at home.
20. This definition of what is considered 'damage to public needs' is often the key issue. A new road through on a safer route which will protect lives is clearly a public need, as is a new hospital. New housing may be a need, but could it be slightly re-located? New shops are unlikely to be considered a public need which would justify removing Jewish remains.

14. The problem of bones being found at construction sites has always existed but its prevalence greatly increased after 1967 with the dramatic proliferation of development in and around Jerusalem. The Asra Kadisha (the Committee for the Preservation of Gravesites), established under the leadership of Rabbi Yitzchak Ze'ev Soloveitchik (the Brisker Rav), Rabbi Eliezer Yehuda Finkel (Rosh Yeshiva of Mir), and Rabbi Yaakov Yisrael Kanievsky (the Steipler), came into being as a response to major excavations at Beit Shearim in 1957-1959. Over the past thirty years, this organization, comprised almost exclusively of Chareidim, has organized protests and demonstrations at a number of archaeological and construction sites including French Hill, Jaffa, Modein, and most recently, at a newly-discovered Hasmonean burial ground. Some of these demonstrations have resulted in pushing, shoving, rock throwing, some arrests, and allegations of police brutality, as well as chillul HaShem. Due to the composition of the demonstrators (largely-Chareidi) and to the occasional excesses in their tactics, many identify those gravesite desecrations as merely a "Chareidi" issue which can then be safely dismissed or ignored as are a variety of other issues significant to that community. It must be emphasized, however, that while the Religious Zionist camp may be less vocal and public in its protests, a number of its leading halachic authorities, such as Israeli Chief Rabbis Lau and Bakshi-Doron and Chief Rabbi Kulitz of Jerusalem, have joined the Asra Kadisha (in principle, if not in tactics) by unequivocally condemning these gravesite desecrations as serious violations of halacha. Many other rabbanim have expressed their concerns privately. The unprecedented scope of these excavations should be of great concern to every Jew faithful to the dictates of his/her religion or, for that matter, even to a non-religious Jew committed to the history of our people.

In this regard, mention should be made of an important ruling by R. Shaul Yisraeli, the recently-deceased Rosh Yeshiva of Mercaz HaRav, that any activity or project which adds beauty [*tiferet*] to the land of Israel is treated as a public benefit. Its cessation or removal is conversely regarded as a *nezek* to the public and in order to avoid such cessation, bones can therefore be removed. It is irrelevant whether the public need preceded the gravesite or the gravesite preceded the materialization of the public need - in either case, removal is halachically authorized. In some circles, R. Yisraeli's *psak* has been taken to provide a *carte blanche* for the indiscriminate exhumation of bones for virtually any type of construction activity on the grounds that the "needs" of the living take precedence over the needs of the dead and that the settlement and habitation of Eretz Yisrael is in itself a factor which adds *tiferet*. This school of thought regards all of the Asra Kadisha's protests as being over a non-issue. While R. Yisraeli's definition of *nizka d'rabim* is certainly quite broad and expansive, I am not sure if even he would regard one less parking garage as a *nizka d'rabim*. In any case, the overwhelming majority of rabbanim who have addressed this matter, including R. Yitzchak Kulitz (the Chief Rabbi of Jerusalem), have not been willing to go so far and would not permit the initiation of commercial development with the knowledge that bones are going to have to be removed. ...

The Desecration of Graves in Eretz Yisrael: The Struggle to Honor the Dead and Preserve Our Historical Legacy - Rabbi Yitzchok Breitowitz c.1996

15. Archaeologists, and occasionally some rabbis, have advanced the argument that in many cases bones that are found at construction sites are of non-Jewish origin, e.g., from the times of the Crusades and the like, and may thus be removed and disposed of with impunity. They further argue that based on the principle of *rov* (that when in doubt, all cases of unknown origin are assumed to come from the majority class), since there are many more non-Jews than Jews in the world all found bones should be assumed to be of non-Jewish origin unless there is direct evidence to the contrary. This position has been roundly rejected by the *gedolai haposkim*. Even assuming that the rules against *pinui kever* do not apply to the bones of non-Jews - which in itself is subject to controversy - in many cases it is crystal clear or at least highly probable that the excavated bones are those of Jews - either by markings on the graves (such as the recently discovered Hasmonean tombs) or by their proximity to well-established Jewish gravesites (such as a number of bones unearthed near the tomb of the Rambam in Tiberius). Thus, many of the archeological claims are simply disingenuous. Even if the matter would be a genuine 50-50 doubt, the dictates of *kavod hamet* would necessitate stringency. Moreover, as the great R. Yechezkel Abramsky noted almost 40 years ago, reliance on the principle of *rov* is misplaced and indeed cuts the other way. While a majority of the world population may be non-Jewish, a majority of the bodies buried in Eretz Yisrael over thousands of years may certainly be assumed to be Jewish. As such, the principle of *rov*, rather than allowing indiscriminate excavation, operates to prohibit it.

The Desecration of Graves in Eretz Yisrael: The Struggle to Honor the Dead and Preserve Our Historical Legacy - Rabbi Yitzchok Breitowitz c.1996

16. החשוד על השביעית אינו חשוד על המעשרות. החשוד על המעשרות אינו חשוד על השביעית. ... זה הכלל - כל החשוד על הדבר לא דנו ולא מעידו

משנה מסכת בכורות פרק ד משנה י

The Mishna lays down the basic principle that someone who does not keep a specific mitzvah cannot have credibility in that mitzvah.²¹

Gaining new archeological information is almost certainly not considered a relevant need.

21. Someone who willfully and knowingly publicly breaks Shabbat may not have witness credibility in any area of halacha.

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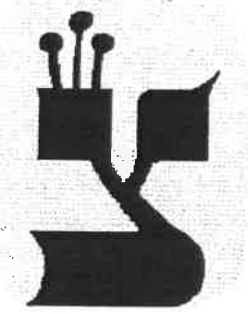
17. הלוקח טלית מצויצת מישראל, או מתגר א"י ואומר שלקחן מישראל נאמן כשר. דכיון דתגר הוא, חזקה שלקחה מישראל. דלא מרע נפשית. אבל אם לקח מא"י שאינו תגר פסולה.

שולחן ערוך אורח חיים הלכות ציצית סימן כ סעיף א
Professionals in a certain field are presumed to have a conscious interest in protecting their reputation and thus it is assumed that they will not lie on professional matters.

18. ... ובענין מה שכתב השו"ע אפילו הוא עכו"ם כתב בספר תפארת ישראל דהאידנא יש להחייש בדבר דבעיני ראייתו דשקלי להמנותיכו דלכל חולי קל אומרים תמיד שכשיתענה יסתכן. ... גם לענין רופאי ישראל שהרצב מהם השודים לעבור על ד"ת ולחלל שבת וגם הם אינם מתענים מלד אפקירותא ל"ע רב אם יש לסמוך עליהם ... ובאמת הדבר תלוי לפי ראות עיני המורה את הענין ...

ביאור הלכה סימן תריח סעיף א ד"ה * חולה שצריך
The Biur Halacha is concerned when dealing with non-Jewish and non-religious Jewish doctors on Yom Kippur. He much prefers to have the advise of a doctor who is shomer mitzvot.

B6] THE FORM OF LETTERS



Chasidic Tzadi



Ashkenazi Tzadi

R. Moshe Sternbuch reports²² that ancient tefillin from the time of Bar Kochba have been found which use the Ashkenazi tzadi. Although he is very reluctant to rely on the archeological evidence in areas of halacha, he urges Ashkenazim to ensure that they are using the correct ktav, and even hearing Parashat Zachor from a scroll written in the correct ktav!

So should Sefardim and Chasidim adopt the Ashkenazi script, based on the archeology? They are unlikely to, given their clear mesora. Also, we may yet find ancient scroll which use the non-Ashkenazi script!²³

C] NEW MANUSCRIPTS AND THE HALACHIC PROCESS

A closely related question²⁴ concerns the discovery of new manuscripts, many from the time of the Rishonim²⁵, which were not available to key poskim such as the Shulchan Aruch, Shach, Taz etc. Should the discovery of this new material impact on the practical psak?

19. יש נוסחאות מן הגמרא שכתוב בהן שהאומר לחבירו 'אל תפרעני אלא בעדים' ואמר לו 'פרעתיך בפני פלוני ופלוני והלכו למדינת הים' אינו נאמן. וטעות ספרים הוא ולפיכך טעו המודים על פי אותן הספרים. וכבר חקרתי על הנוסחאות הישנות ומצאתי בהן שהוא נאמן! והגיע לידי במצרים מקצת גמרא ישנה כתוב על הגוילים כמו שהיו כותבין קודם לזמן הזה בקרוב חמש מאות שנה. ושתי נוסחאות מצאתי מן הגוילים בהלכה זו ובשתייהם כתוב ואם אמר פרעתי בפני פלוני ופלוני והלכו להן למדינת הים נאמן. ומפני טעות זו שאירע למקצת הספרים הורו מקצת גאונים ... ועוד דברים של דעת הן וכי מה היה לו לעשות אמר לו אל תפרעני אלא בעדים פרעו בעדים וכי יש לו לאסור את העדים בבית הסוהר כל ימיהם שלא ילכו?!

רמב"ם הלכות מלוה ולוה פרק טו הלכה ב

The Rambam²⁶ used very old talmud manuscripts from hundreds of years before his time to prove that there was a mistake in the standard versions of the Gemara in his day. Based on these manuscripts AND on the fact that the change made sense, he altered the psak.

22. Shu't Moadim U'zmanim 2:166 footnote 2

23. In fact a Sefer Torah written by the Ran in the 14c was photographed and uses the non-Ashkenazi script.

24. Another related question is that of fixing girsat based on new manuscript information or simply based on analysis, logic and experience. ly'H this will be the subject of a different shiur.

25. A famous example is the Meiri but there are many others.

26. See also Hilchot Ishut 11:13

20. ... כל מקום שדברי הראשונים כתובים על ספר והם מפורסמים והפוסקים האחרונים חולקים עליהם, כמו שלפעמים הפוסקים חולקים על הגאונים, חוללים אחר האחרונים דהלכה כדברא מאזי ודברא ואלך. אבל אם נמצא לפעמים תשובה גאון ולא עלה זכרנו על ספר ונמצאו אחרים חולקים עליו, אין לריבם לפסוק כדברי האחרונים. שאפשר שלא ידעו דברי הגאון ואי הוי שמיט לכו הוי הדרי דכו. (מהרי"ק שורש י"ח/י"ד)

רמ"א שולחן ערוך חושן משפט הלכות דינים סימן כה סעיף ב

The Rema brings many of the klalei hapsak in this section²⁷ and rules that, although we generally favor the later authorities over the earlier, if an early minority opinion is found which the majority at the time did not know about, this can be re-introduced in the halachic discussion. It is possible that, had the earlier authorities know about it, they would have ruled like it!

However, over the last two hundred years as many new manuscripts became more available, poskim have taken different positions on whether these should be added to the halachic conversation.

C1] KIM LI

In monetary matters there is a halachic defense of 'kim li'. The defendant can assert that he wishes to rely on a minority halachic opinion, even if that goes against the majority established psak. R' Yonatan Eibenschutz²⁸ (18C Europe) asks whether a defendant could say 'kim li' even in reliance on an opinion newly discovered in a manuscript. He rejects this and insists that ONLY positions known to the Shulchan Aruch (even if rejected in the final normative psak) can be used for 'kim li'. A few reasons are given for this, including:

- the primacy of the Shulchan Aruch and *kaballah* that the Shulchan Aruch was accepted by the scholars of his generation as normative and binding.
- the logical question of what really constitutes a majority. We cannot every truly know what the majority position was in the time of the Rishonim. Many of poskim never left records or their psak. Those that did may not have been representative. Much that was written did not survive.

21. ... because many questions have been raised challenging them by later authorities and answered in a sharp and penetrating manner. Also they incorporated many laws with sweetness and conciseness of language, and without doubt they did not design all of this on their own for in light of the enormity of work, the work of heaven, that was incumbent upon them, how would that have been possible? And who is the man who can compose a work that encompasses the entire Torah, culled from all the words of the early-day and the latter-day authorities...? [This was possible] only because the divine spirit reverberated within them that their language might be precise in determining the Halakhah [even] without the intent of the writer and the divine wish was successfully accomplished through their hand.

Urim V'Tumum Kitzur Tokpo Kohen 123-124²⁹

C2] ERUVIN

22. **סעיף יז** וע"פ שיטה זו הוי כל היתר עירובין שבמדינתנו מפני שבכל הערים שלנו אין ס' רבוא עוברים ואינם כרשות הרבים. ולכן מועיל בהם צורת הפתח דלשיטה ראשונה כיון דרחובות שלנו רחבים ט"ז אמה אין שום היתר דהם רשות הרבים גמור וצריכים דלתות ושיהא ננעלות בלילה כמ"ש. והנה מפרשי הש"ע כתבו דרוב הפוסקים סוברים כשיטה זו וט"ז סק"ז ומ"א סק"ז **האמנם אחד מהגדולים בזר שלפנינו הרעיש העולם על העירובין שלנו והראה בעליל שהאוסרים הם הרבה יותר מהמקילים אך מפרשי הש"ע לא ראו כי לא נדפסו בימיהם.** המקילים חמה ספר התרומה והסמ"ג והסמ"ק והר"ם מרוטנבורג והרא"ש והטור העומדים בשיטת רש"י ז"ל והאוסרים חמה הר"ף והרמב"ם ור"ת ורשב"ם וראב"ן ורמב"ן ורשב"א והריטב"א והר"ן והמ"מ והריב"ש וכמה מבעלי התוס' הרשב"א הראשון וריב"א ור"י הלוי הר"מ ורי"א ז"ל [משכנ"י סי' ק"ט] וגם המהרש"ל ביש"ש ביצה [פ"ג ס"ח] הכריע דלא כשיטה זו:

סעיף יח אבל עכ"פ מה מועיל האריכות אחרי שהעירובין נתפשטו ברוב ערי ישראל הרבה מאות שנים מקודם ורק על סמך היתר זה. וכאלו בת קול יצא הלכה כשיטה זו! ואם באנו לעכב לא לבד שלא יצייתו אלא נראה כמשתגעים שדבר זה נתפשט בכל ישראל ובפוסקים דהאידנא אין לנו רשות הרבים רק בערים ספורות והגדולות בעולם, כמו ערי מלוכה שיש בהם ס' רבוא אבל לא בערים שלנו. ויען כי מצוה וחובה ללמד זכות על כלל ישראל לכן שמתי את לבי להמציא איזה היתר כמו שנבאר בס"ד:

ערוך השולחן אורח חיים סימן שמה

The Aruch HaShulchan writes that all urban Eruvin are constructed in reliance on the position of Rashi that a true Reshut HaRabim on a Torah level required 600,000 people passing through. The much stricter position - that any street more than 16 amot wide is a public domain - was rejected since the Shulchan Aruch and classic commentaries understood Rashi's position to be the majority position in the Rishonim.

27. Including the wording before this quote which I have omitted, but which is very important in understanding the meta-halachic principles of psak.

28. Urim V'Tumum Kitzur Tokpo Kohen 123-124.

29. Translation in this and the following sources is taken from *Halachic Decision-Making: Hazon Ish, His Precursors and Contemporaries*, R. Moshe Beich, Tradition 27:2 p26
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However the *Mishkenot Yaakov* (early 19C Lithuania) challenged this on the basis of MANY newly discovered manuscripts which showed that a large majority of Rishonim that we are now aware of actually held the stricter view! On that basis most towns would require walls and lockable gates in order to carry on Shabbat and the classic urban eruv, which is built on tzurol hapetach doorpost structures, would not work at all. The *Aruch Hashulchan* rejects this approach, on both practical grounds but also on the basis of the hashgacha of history which led so many eruvin to be built, which makes it as if a 'bat kol' supported that view.

23. סוף דבר שלא הכריע הב"י בזה דבר מצד סברת עצמו, אלא מצד מנהגו בספרו להביא דעת חכמי ספרדים לדעה מוסכמת כפי מנהגם ודעת החולקים ל"א. והא קמן שהרמ"א ז"ל שאנו נמשכן בכל פסקינו אחר חזרתו דעתו כשיטת רש"י ודעימיה ... כי אלו הפוסקים הם רבים שאף אם ימצא שהר"ף והרמב"ם פוסקים כן מי יודע כמה חולקים וכמה מפוסקים אשר המה עודם בכתובים כו'. וקיימו וקבלו עליהם חכמי הדור לשמור ולעשות כהכרעת המחבר והרמ"א בהג"ה ז"ל

שו"ת בית אפרים אורח חיים סימן כ

The Beit Efraim (early 19C Poland) also rejects the use of manuscripts to change the psak! Our halachic process is not random, but based on a system which Klal Yisrael has adopted and accepted!

C3] THE CHAZON ISH

The position of the Chazon Ish is much debated³⁰. In principle he strongly rejected the use of manuscripts in the halachic process.³¹

24. I do not know whether it is possible to rely on (works that are) newly printed since the mesora has been interrupted among us and we do not know the identity of the copyists, for the work of copying is very difficult. Even when carried out by persons who are alacritous and meticulous many textual errors are commonly found. And if it transpires that there is even a slight laxity in scrutiny the (meaning of the) entire matter can be totally changed. Therefore, we must deem the words of the authorities from whom the transmission of the mesora to us was not interrupted throughout all the generations, and whose works were guarded assiduously by the scholars of each generation to preserve them and to correct them, to be more accurate. All the more so, it is difficult to rely upon any new text in instances in which it is not possible to make a determination on the basis of the import of the text but rather on the basis of inference from its terminology.

Chazon Ish Eruvin 67:12

25. You sought to explain a sugya and to emend a talmudic passage in accordance with the reading of the Munich manuscript. Do you suppose, then, that the true sense of the passage eluded all the leading scholars from the period of the rishonim until today? And all because of one scribal error that lead to a conflated text which mislead all scholars? I will have none of it. The rishonim would prepare to lay down their lives on behalf of their manuscripts. God's providence hovered over them so that Torah would not be forgotten in Israel. When they set about to publish the Talmud, the leading sages of that generation were prepared to lay down their lives in order to produce a correct text. If on occasion we benefit from the manuscripts in that they clear up errors that accrued throughout the generations, this provides no license to emend a text that was approved by all our sages without the slightest doubt being raised. Heaven forbid that we destroy!

Chazon Ish, Kovets Iggerot, I, no.32:56

26. . . . for we have received a tradition from the great Torah authorities of the [preceding] generations, of blessed memory, that the rulings of the Shulchan Aruch are not changed as a result of discovery of manuscripts, even those authored by the great early-day scholars. Their reason may be explained as follows: The Holy Spirit shined forth in the house of study of the author of the Shulchan Aruch and the acknowledged decisors according to whose rulings all of the house of Israel conducted themselves for many generations. Accordingly, it is incumbent upon us to continue in their path, even if we now find manuscripts of some early-day authorities whose path is not the same.

R. Moshe Sternbuch, Mo'adim u-Zemanim, IV, no. 274

Rav Moshe Sternbuch extend this precedence beyond the Shulchan Aruch to the key poskim of later generations.

30. See *Halachic Decision-Making: Hazon Ish, His Precursors and Contemporaries*, R. Moshe Beich, Tradition 27:2; *Hazon Ish on Textual Criticism*, R. Zvi Yehuda, Tradition 18:2; *Hazon Ish on Textual Criticism - A Rejoinder*, R. Shmayer Leiman, Tradition 19:4

31. In the articles ob cit, Rabbls Yehuda and Bleich argue strongly the the Chazon Ish took an uncompromisingly rejectionist approach to manuscripts. However, R. Leiman questions this and argues that the Chazon Ish was more open to adapt the halacha based on manuscripts in certain situations.