

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

VIDEO SURVEILLANCE

Regrettably, contemporary conditions have enhanced threats to human security. But “the Holy One, blessed be He, does not afflict Israel unless He has previously created a cure for them” (*Megillah* 13b) and accordingly He has provided us with the means to mitigate the danger through use of electronic monitoring systems. Live video cameras are capable of recording activity in public areas of a bank and of capturing the image of an actual or potential bank robber. Video monitors enable a single doorman to monitor many entrances simultaneously and thereby avoid the need for multiple security guards. Enduring images captured on video tape are in some ways superior to visual observers.

The availability of this technology poses intriguing questions concerning halakhic cognizance of facts ascertained by means of video surveillance. Are images of sexual acts recorded on video tape dispositive proof of adultery? Can a *bet din* impose capital punishment on the basis of testimony of witnesses to an act they observed over a video monitor or on the basis of an act that the members of the *bet din* themselves witnessed on a video monitor? Is the presence of a video monitor tantamount to the presence of a third party serving to render seclusion with a person of the opposite gender halakhically permissible? Does either live or recorded surveillance serve to satisfy the requirements of *kashrut* supervision and hence constitute an acceptable substitute for the physical presence of a *mashgiah* or *kashrut* supervisor?

It is readily acknowledged that many surveillance systems may be evaded by a technologically sophisticated malfeator. Nor is every system tamper-proof. For mundane purposes, less than full effectiveness may be satisfactory; nevertheless, means are available to guarantee impossibility of evasion with near certainty and to assure that tampering has not occurred. All are in agreement that, when economically feasible, video surveillance offers an additional level of protection.¹ The issue is whether it may be used independently as a substitute for the physical presence of a human observer.

¹ See R. Moshe Sterbuch, *Teshuvot ve-Hanhagot*, V, no. 255.

TRADITION

I.

The most extensive discussions addressing the possible role of video surveillance in matters of Halakhah concern use of electronic devices as a means of satisfying the need for the presence of a Jew at the milking of cows. It is estimated that in the State of Israel alone compensation of supervisors at every milking site would add 1,520,000 *shekalim* monthly to production costs.² Those costs would, of course, be passed on to the consumer.

The Tishri 5772 (no. 63) and Nisan 5772 (no. 64) issues of the American rabbinic journal *Or Yisra'el* feature symposia presenting competing views with regard to this question. The issue is also briefly addressed by R. David Lichtenstein in a recently published monograph titled *Ha-Internet be-Halakhah* and by R. Samuel Eliezer Stern, *Kovez Sha'arei Hora'ah*, vol. I, (5761). An earlier responsum addressing this topic by R. Moshe Sternbuch, published in his *Teshuvot ve-Hanhagot*, V, no 255, also discusses use of video cameras on *Shabbat* on Jewish farms in Israel for the purpose of assuring that the milk is not forbidden because it was obtained by means of labor forbidden on the Sabbath. All of these writers accept two basic halakhic premises, each of which has been the subject of earlier disagreement:

- 1) Government supervision and penalties imposed upon individuals found guilty of adulterating the milk are not halakhically sufficient.³
- 2) Milking carried out by, or under the supervision of, secular, non-Sabbath observant Jews does not satisfy halakhic requirements.⁴

II.

Although electronic technology is a product of the contemporary era, artifacts of various types have long been available to assist in visual perception and their halakhic impact has been the subject of earlier analyses. As recorded by Gemara, *Rosh ha-Shanah* 24a, testimony with regard to observation of the image of the new moon reflected in a mirror is not

² See R. Dov Landau, *Or Yisra'el*, Tishri 5722, p. 34.

³ See Endnote.

⁴ See R. Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yizhak*, X, no. 25 and *Teshuvot ve-Hanhagot*, I, no. 480. *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 46, makes the perfectly obvious point that even if the Sages did not equate a Sabbath-violator with a non-Jew in their various edicts designed to restrict social intercourse, milk purveyed by a Sabbath-violator is nevertheless forbidden because such an individual might not hesitate to adulterate his product with non-kosher milk.

acceptable for proclamation of the day as *Rosh Hodesh*. Following R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, I, no. 126, R. Chaim Joseph David Azulai, *Birkei Yosef, Hoshen Mishpat* 35:11, points out that the concern may have been the possibility that the witness actually saw the reflected shadow of the moon rather than a reflection of the moon itself. Accordingly, those authorities express doubt with regard to whether testimony of witnesses to an illicit act observed by means of a mirror is acceptable.⁵ However, R. Isaac Elchanan Spektor, *Teshuvot Ein Yizhak*, I, *Even ha-Ezer*, no. 31, asserts that direct visual perception of the nascent moon is a statutory requirement for sanctification of the New Moon unrelated to establishing the veracity of the phenomenon of its appearance. If so, the statement of the Gemara, *Rosh ha-Shanah* 24a, has no bearing upon the issue at hand.

R. Zevi Orenstein, *Birkhat Rezeh*, no. 3, and R. Isaac Schmelkes, *Teshuvot Bet Yizhak, Even ha-Ezer*, I, no. 87, address a similar issue in discussing the reliability of photograph identification of a deceased person for the purpose of permitting his widow to remarry. Those authorities equate comparison of a photograph with remembered facial features to the comparison of two signatures for purposes of authenticating signatures on a legal document. *Kezot ha-Hoshen* 46:8 maintains that such handwriting comparison is valid only for purposes for which the presence of a distinctive *siman* or "sign" is acceptable as sufficient evidence, *viz.*, for purposes of religious law or when authentication of the signature is only rabbinically required, but does not, for example, satisfy the evidentiary requirement necessary to award a monetary judgment against a defendant. Disagreeing with *Kezot ha-Hoshen*, *Netivot ha-Mishpat* 46:8 asserts that comparison of handwriting constitutes a *siman muvhak*, i.e., a highly reliable sign, and is acceptable even for purposes of exacting funds from a defendant.⁶

⁵ See also Rambam, *Commentary of the Mishnah, Kellim* 30:2, who declares that a mirror image is unreliable because a mirror may distort details such as size and relative location. See also R. Isaac Schmelkes, *Teshuvot Bet Yizhak, Even ha-Ezer*, I, no. 87, sec. 5.

⁶ The responsa of *Birkhat Rezeh* and *Bet Yitzhak* as well as the latter's responsum published in *Even ha-Ezer*, II, no. 85, sec. 1, address identification of a corpse by means of a photograph for purposes of permitting the wife of the deceased to remarry. See also R. Isaac Elchanan Spektor, *Teshuvot Ein Yizhak*, I, *Even ha-Ezer*, no. 31; R. Naphtali Zevi Judah Berlin, *Teshuvot Meshiv Davar*, I, no. 23; R. Shalom Mordecai Schwadron, *Teshuvot Maharsham*, III, nos. 192 and 256 and VII, nos. 40 and 89; R. Mordecai Winkler, *Teshuvot Levushei Mordekhai, Mahardura Tinyana, Even ha-Ezer*, no. 5; R. Samuel Engel, *Teshuvot Maharash*, VII, no. 70; R. Meir Arak, *Teshuvot Imrei Yosher*, II, no. 30, sec. 3; R. Chanach Henoah Eiges, *Teshuvot Marbeshet*, II, no. 6, sec. 18; and R. Chaim Ozer Grodzinski, *Teshuvot Ahi'ezer*, III, no. 15, sec. 4.

TRADITION

The question of the adequacy of electronic surveillance to overcome the prohibition of *basar she-nitalemin min ha-ayin* (literally: “meat that is concealed from the eye”), i.e., meat that is entrusted to a non-Jew in the absence of a Jew, is not discussed in any of the published articles. That lacuna is probably due to the fact that a foolproof system suitable for this purpose may, at present, be unavailable. As recorded in *Shulhan Arukh, Yoreh De’ah* 118:1, the Sages prohibited wine, meat, and pieces of fish lacking fins and scales left in the care of a non-Jew for a significant period of time because of a fear that the non-Jew might exchange one of those items for a similar non-kosher foodstuff. They did, however, permit such food if the food bears two seals. Integrity of the seals constitutes evidence that substitution has not occurred. Seals are, however, not necessary if a Jew is present. As recorded by *Shulhan Arukh, Yoreh De’ah* 118:10, the presence of a Jew even if he “comes and goes” (*yoze ve-niklmas*), i.e., even if his presence is only intermittent, provided that his return may be expected at any moment, is sufficient to deter any attempt on the part of the non-Jew to effect an exchange.

It seems to this writer that the authorities who accept photographic evidence to substantiate the death of a husband would similarly approve video surveillance for avoidance of the rabbinic prohibition of *basar she-nitalemin min ha-ayin*. Of course, the images would have to be sufficiently sharp and the video cameras would have to be configured in a manner such that it would be impossible for a person to introduce any forbidden item without detection. Under such circumstances, the images would not necessarily require constant monitoring; intermittent monitoring would constitute “coming and going” so long as the non-Jew is aware that his actions are being monitored with regularity.

III.

Writing in *Or Yisra’el*, Tishri 5772, R. Menachem Meir Weissmandl presents a survey of the halakhic literature regarding the reliability of photographs and concludes that, according to *Bet Me’ir*, who requires a standard of proof establishing that there has been no admixture of non-kosher milk comparable to the standard of proof required in monetary matters, video surveillance is not acceptable. Rabbi Weissmandl’s assertion is predicated upon the factual presumption that no electronic system can be guaranteed to be tamper-proof.

Hatam Sofer’s view of the requirement for supervision of milk obtained from a non-Jew is even more restrictive. *Teshuvot Hatam Sofer, Yoreh De’ah*, no. 107, asserts that, although the prohibition was promulgated because of a fear that unsupervised milk might contain an admixture of

non-kosher milk, the prohibition is blanket in nature and encompasses even situations in which adulteration could not possibly have occurred. According to Hatam Sofer, the prohibition, from its inception, included drinking even milk obtained expressly for processing into cheese. Such milk was interdicted despite the fact that cheese cannot be made from non-kosher milk and hence milk intended for that purpose would perforce have been obtained only from a kosher source. The fact that cheese manufactured by a non-Jew was originally permitted, asserts Hatam Sofer, is not because successful conversion to cheese is proof of the kosher status of the milk from which it is made, but because a metamorphosis occurs in the conversion of milk to cheese: the forbidden milk no longer exists but has been replaced by an entirely different substance, *viz.*, cheese, which had not been banned. Accordingly, Hatam Sofer dismisses the view of *Pri Hadash* and rules that unsupervised milk is forbidden even when adulteration is factually impossible as is the case in a locale in which no lactating non-kosher animal is to be found.⁷ Both *Hazon Ish*, *Yoreh De'ah* 41:4, s.v. *u-mah she-katav*,^{7a} and *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 49, s.v. *ve-ayein be-Hatam Sofer*,^{7b} concede that, according to Hatam Sofer, only the physical presence of a Jew at the time of milking renders the milk permissible with the result that government supervision is of no avail.

The underlying issue is whether the rabbinic edict was a *davar she-be-minyan*, i.e., formal in nature and divorced from the underlying rationale, in which case only the specifically enumerated forms of supervision suffice,

⁷ Hatam Sofer further argues that *Pri Hadash* recognized that there were opposing opinions among early-day authorities but that the Sephardic community of Amsterdam might properly rely upon the opinion of *Teshuvot Radvaz*. Ashkenazic communities, on the contrary, followed the more stringent view. Hence, regardless of which authorities are correct in their understanding of the original rabbinic edict, since the practice was adopted as a safeguard against transgression, it is, at the minimum, a "*minhag tov*," or "worthy custom," having the status of a vow that is not subject to nullification. See *Magen Avraham* 151:7. As such, asserts Hatam Sofer, he is inclined to conclude (*karov be-einai*) that reliance upon *Pri Hadash*'s leniency by an Ashkenazi constitutes, not simply transgression of a rabbinic edict, but transgression of a biblically binding vow. A similar view was earlier expressed by *Teshuvot Maharashdam*, *Yoreh De'ah*, no. 40 and is also espoused by *Teshuvot Rav Pe'alim*, II, *Yoreh De'ah*, no. 20 and appears to be reflected in the ruling of *Shulhan Arukh*, *Yoreh De'ah* 214:1 and *Teshuvot Halakhot Ketanot*, I, no. 103. See also, *Teshuvot Radvaz*, I, nos. 26 and 527. However, that view is questioned by *Teshuvot Levushei Mordechai*, *Mahadura Telita'i*, *Yoreh De'ah*, no. 167, who points out that the Gemara, *Nedarim* 15a, seems to indicate that failure to abide by a matter of custom constitutes only a rabbinic infraction. See also R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, III, *Yoreh De'ah* no. 11, sec. 3.

^{7a} See also R. Samuel ha-Levi Wosznier, *Teshuvot Shevet ha-Levi*, IV, no. 87, s.v. *ve-lo ne'elam*.

^{7b} See also *Iggerot Mosheh Yoreh De'ah*, I, no. 48.

or whether the talmudic statements reflect only a cogent fear of adulteration and specify acceptable means of ascertaining non-adulteration, in which case other, equally reliable methods would also be acceptable.

Pri Hadash's leniency is cogent only if it is accepted that the prohibition against consuming unsupervised milk is predicated solely upon the consideration advanced, *viz.*, a fear of adulteration with non-kosher milk. If, however, the edict is in the nature of a *davar she-be-minyan*, i.e., a formal edict not coextensive with applicability of the stated rationale upon which it was based, it remains in force even when the underlying consideration is not applicable.⁸ As stated by Rashba, *Torat ha-Bayit, bay-it shlishi, sha'ar vav*, the presumption is that the edicts recorded in the statements of the Mishnah in *Avodah Zarah*, including the prohibition against drinking unsupervised milk, are of that nature. Therefore, Rabbi Weissmandl concludes that, according to Hatam Sofer, electronic surveillance is insufficient, not because it is unreliable, but because the rabbinic edict as a *davar she-be-minyan* demands the physical presence of a Jew.

However, in instances not encompassed within the rabbinic edict, other forms of verification may well be acceptable. Rabbi Weissmandl cites a report in *Kovez Sha'arei Hora'ah*, I (5761), to the effect that R. Samuel ha-Levi Woszner permitted use of video surveillance on dairy farms owned by observant Jews but on which the milking was carried out by non-Jewish employees. Rema, *Yoreh De'ah* 115:1, permits non-Jewish servants to milk cows on premises owned by a Jew provided there are no non-kosher animals in the vicinity. Citing *Teshuvot Zemah Zedek, Yoreh De'ah*, no. 76, Rabbi Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yitzhak*, I, no. 138 and II, no. 21, explains that no edict was enacted forbidding unsupervised milk in situations in which the animals belong to a Jew and are milked on premises owned by a Jew. Nevertheless, the empirical possibility of adulteration remains, as indeed is also the case with regard to supervised milk entrusted to the care of a non-Jew. However, since there exists no all-encompassing rabbinic prohibition banning such milk, usual standards of evidence apply. Those standards are satisfied by the presence of an *umdena*, i.e., a presumption that under specific circumstances adulteration is extremely unlikely to occur. Electronic surveillance, rules Rabbi Woszner, meets that requirement. Nevertheless, he recommends that a *kashrut* inspector make periodic inspections of the site.

⁸ See *Sha'arei Dura*, no. 82; *Teshuvot Dvar Shmu'el*, no. 273; *Teshuvot Me'il Shmu'el*, no. 12; *Teshuvot Hari ba-Shamayim*, no. 215; *Teshuvot Zemah Zedek, Yoreh De'ah*, no. 76; *Teshuvot Maharsham* III, no. 269; *Arukh ha-Shulhan, Yoreh De'ah* 115:5-6; and *Teshuvot Arnei Nezer, Yoreh De'ah*, no. 101, sec. 7.

Minhat Yizhak's understanding of *Zemah Zedek's* position is reflected in *Teshuvot Anei Nezer*, *Yoreh De'ah*, no. 102. However, R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, V, no. 253, points out that *Zemah Zedek* did not permit drinking such milk; he permitted only consumption of butter and cheese made from such milk in a situation in which the milk was obtained without conscious violation of the prohibition. R. Isaac Elchanan Spektor, *Teshuvot Be'er Yizhak*, *Yoreh De'ah*, no. 13, similarly assumes as a matter of course that the milk of an animal owned by a Jew is forbidden when milked by a non-Jew without supervision. Rabbi Sternbuch notes that the Mishnah, *Avodah Zarah* 35b, in which the edict is recorded, reads: "Milk milked by a non-Jew [when] a Jew does not see him is forbidden." The text does not at all refer to the proprietorship of the cow. If so, even the milk of a cow owned by a Jew is included in the prohibition and requires observation of the milking by a Jew. Rema, *Yoreh De'ah* 115:1, does permit milk that is milked by a non-Jewish servant on the premises of a Jew but only when the non-Jew would fear being caught in the act of adulteration. No such fear exists when the Jewish owners are non-observant, as is the case with regard to many Israeli dairy farms.⁹

Since the acceptable supervision described by the Mishnah is supervision that is contemporaneous with the milking, it would also seem plausible to argue that if the prohibition is regarded as a *davar she-be-minyan*, the non-Jew's fear of discovery of his malfeasance only *after* the milking is completed does not satisfy the requirement. Thus, live video monitors manned by Jewish observers would render the milk permissible whereas a videotape preserved for later viewing would not be acceptable.

Nevertheless, R. Mordecai Gross, writing in the Tishri 5772 issue of *Or Yisra'el*, maintains: a) that electronic surveillance may serve in lieu of an actual supervisor and b) that a videotape is sufficient even if it is viewed after the milking has been completed. However, Rabbi Gross further requires that the video be in operation not only during the milking but that it also capture the empty containers immediately prior to commencement of milking. Presumably that requires either constant surveillance or a built-in clock recording the precise time of each frame. That requirement is based on *Shakh*, *Yoreh De'ah* 115:5, who, contrary to Rema, *Yoreh De'ah* 115:1, even *post factum* requires inspection of the utensils into which the milk is to be collected before milking is begun in order to

⁹ In *Teshuvot ve-Hanhagot*, I, no. 480, Rabbi Sternbuch makes the further point that Rema permits milk milked by a non-Jew "in the house of a Jew" only because of *mirtet*, or fear on the part of the non-Jew that he may be caught in the act of adulteration. That fear, asserts Rabbi Sternbuch, does not exist on a farm that is simply owned by a Jew but who does not reside on the farm unless there is adequate supervision.

ascertain that there was no unsupervised milk in the container. *Shakh's* position is accepted by *Pri Hadash* and *Bi'ur ha-Gra, ad locum*. Rabbi Gross, however, concedes that acceptance of electronic surveillance as a substitute for the physical presence of an observer¹⁰ is not compatible with Hatam Sofer's position regarding the nature of the edict.¹¹

Both Rabbi Weissmandl in his earlier cited article, and Rabbi Stern, in his contribution to *Sha'arei Hora'ah*, draw the distinction described earlier between milk of an animal owned by a non-Jew and milk of an animal owned by a Jew but milked by a non-Jew. They assert, in effect, that the edict requiring the physical presence of a Jew is limited to milking an animal belonging to a non-Jew and maintain that no similar edict was formally promulgated in instances in which a non-Jew milks the animal of a Jew. Hence, under such circumstances, any measure that serves to guarantee that adulteration has not occurred is sufficient. Thus, even according to Hatam Sofer, the physical presence of a Jew is not required if the animal belongs to a Jew and is milked on the premises of a Jew.¹²

IV.

Let us put aside Hatam Sofer's contention that the Sages specifically mandated actual visual observation of the act of milking as reflected in the terminology "and a Jew observes him," even though evidentiary requirements

¹⁰ The same issue would pertain to chemical analysis designed to show that there is no admixture of non-kosher milk carried out after the milking is completed. Rabbi Gross would accept such chemical analysis but for the fact that, as a practical matter, only samples, rather than the entire complement of milk, can be tested.

¹¹ R. David Lichtenstein, *Ha-Internet be-Halakhah*, p. 34, argues that a permissive ruling is not at variance with Hatam Sofer's thesis. Since electronic surveillance does indeed serve to establish the purity of the milk, the sole issue, even according to Hatam Sofer, is the technical requirement for an actual eyewitness as stipulated by the rabbinic edict. But, argues Rabbi Lichtenstein, since electronic devices were unknown at the time of the edict, they could not have been excluded. That argument, however, is specious. If, as Hatam Sofer maintains, the edict as a formal *davar she-be-minyan* provided for the physical presence of a Jew, all other forms of ascertaining the facts were excluded. If there was an exclusion, it encompassed even as yet unknown forms of confirmation.

¹² Rabbi Rosner, *Or Yisra'el*, Nisan 5772, further suggests that even for Hatam Sofer actual physical presence of a Jew at the milking is mandated by the rabbinic decree only if a non-kosher animal is in the vicinity. Otherwise, the rule is that the Jew may "sit outside" and need not observe the milking directly. The requirement that the Jew "sit outside," he suggests, is not part of the formal ordinance but is designed simply to assure the purity of the milk. If so, he contends, video observation is sufficient to assure that no non-kosher animal is present, in which case physical observation of the milking is not required even according to Hatam Sofer.

might be satisfied in other ways. If *Pri Hadash's* position with regard to a city in which there is no non-kosher lactating animal is rejected, it must be assumed that the rabbinic requirement for observation of the milking was for the purpose of obtaining testimony establishing that there was no admixture of non-kosher milk. For that purpose, as with regard to other matters pertaining to the dietary code and the like, the testimony of a single witness suffices; hence, an observer must be present in order to provide such testimony.¹³

Thus, the requirement for an eyewitness is not necessarily rooted in the terminology employed by the Mishnah. The Mishnah speaks of observation of the milking because testimony of at least a single witness constitutes the minimum threshold of acceptable evidence. However, as R. Zevi Reisman, *Or Yisra'el*, Nisan 5772, points out, there is a controversy regarding the nature of the credibility of a single witness. The issue is whether a single witness is a "witness" in the same sense that two witnesses are "witnesses" or whether such evidence is of an entirely different category. The issue is the nature of the testimony of a single witness in matters in which the two-witness rule is suspended and a single witness suffices. Is the sole witness accepted as a "witness" or is the credibility of a single witness of a different nature entirely as is the case with circumstantial evidence? As pointed out by R. Chaim Soloveitchik, *Hiddushei ha-Grah al ha-Shas* (n.d.), pp. 116-117, one difference would be with regard to whether a single witness can recant his testimony. Two witnesses cannot recant or modify their testimony; hence, if a single witness has the standing of a witness he cannot do so either. However, if the words of the single witness are not regarded as testimony but as some other credible source of establishing a fact, he is not governed by that rule and may withdraw or contradict earlier statements. R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah*, *Mahadura Tinyana*, *Hoshen Mishpat*, no. 4, declares that the testimony of a single witness is not really "testimony" comparable to that of two witnesses but simply a credible manner of establishing facts.

However, R. Shimon Shkop, in a previously unpublished article that appeared in *Ve-Zot le-Yehudah* (Jerusalem 5737), pp. 396-398, maintains that a single witness is a "witness" in the full halakhic sense of the term. R. Chaim Soloveitchik, *Hiddushei ha-Grah al ha-Shas*, pp. 79-80, distinguishes between the role of a single witness with regard to matters of dietary regulation and the like and the credibility of a single witness to

¹³ The observer's silence is tantamount to testimony to the effect that the milk is kosher. That point is made by R. Joseph Dov Soloveitchik, *Bet ha-Levi*, II, no. 4, with regard to animals slaughtered by a *shohet*.

TRADITION

establish widowhood. The statement of a single witness with regard to permissible or forbidden food products, for example, Reb Chaim categorizes as testimony of a “witness” whereas testimony of a single witness establishing the death of a husband he regards as akin to circumstantial evidence satisfactory for that purpose.

It then follows that video evidence would be acceptable to establish the death of a husband but would not be sufficient in a situation in which actual testimony of an eyewitness or eyewitnesses is required. If the requirement for supervision of milking is regarded as a requirement for testimony of a witness, the acceptability of video surveillance should be contingent upon the controversy of *Noda bi-Yehudah* versus Reb Shimon and Reb Chaim; if the provisions of the edict require a “witness,” video surveillance does not qualify as a “witness.” If, however, the edict does not require a witness *qua* witness but requires a witness as a credible means of establishing the requisite facts, it would seem that video surveillance would suffice.

V.

Going beyond the position of the heretofore cited writers, Rabbi Stern, Tishri 5772, entertains the possibility that observation by means of a video camera is no different from direct visual perception. In effect, he suggests that a video camera is no different from a magnifying glass or a telescope. If so, the requirement that a Jew must observe the milking may be satisfied by means of electronic observation. Of course, such a position is cogent only if the electronic device produces a live stream of images that can be viewed contemporaneously. Nevertheless, Rabbi Stern makes the suggestion only tentatively while expressing doubt with regard to whether observation by means of a video camera can be equated with direct visual perception. However, Rabbi Stern reports that R. Joseph Shalom Eliashiv allegedly ruled that video surveillance is tantamount to physical presence. Rabbi Gross similarly regards video surveillance as the equivalent of direct visual observation.

The fundamental issue with regard to whether observation by means of direct video surveillance satisfies the requirement for observation of the milking by a Jew is whether halakhic obligations and responsibilities predicated upon observation of visual phenomena require direct optical perception or whether assisted, or perhaps even indirect, perception is sufficient. It is generally assumed that interposition of ordinary glass is of no significance. Thus, *Shulhan Arukh, Orach Hayyim* 75:5, rules that the restriction against reciting the *shema* in the presence of “nakedness” encompasses such utterances even if there is a glass partition between the

person and the “nakedness.” Similarly, *Teshuvot Halakhot Ketanot*, I, no. 274, rules that one must rise in the presence of a Torah scholar even if the scholar is seen only through an intervening pane of glass. Such rulings are not surprising since interposed windows or sheets of glass do not magnify or distort vision. Ordinary glass is invisible and non-distorting and, therefore, the intervening glass, to all intents and purposes, has no effect upon the optical phenomenon perceived. That position is recorded by *Sha’arei Teshuvah*, *Orah Hayyim* 426:1, with regard to recitation of the blessing upon sighting the new moon.

Whether or not perception of an object artificially magnified by means of a glass prism is the equivalent of “seeing” is an entirely different question. Some type of optical instrument designed to enhance vision seems to have been available as early as the talmudic period. The Gemara, *Eruvin* 43b, reports that Rabban Gamaliel possessed a “tube” through which he could see a distance of two thousand cubits.¹⁴ Nevertheless, the question of whether or not perception of an object artificially magnified by means of a glass prism is the equivalent of “seeing” is not discussed by any early-day authority.

Magnification by means of a telescope or other optical instrument is a quite different matter. R. Chaim Benjamin Pontremoli, *Petah ha-Dvir* 124:10, raises the question in the context of recitation of the blessing upon seeing a monarch and regards it to be a matter of doubt. Both R. Betzalel Ashkanazi, *Teshuvot Be-Zel ha-Hokhmah*, II, no. 18, and his brother, the late *Debreziner Rav*, R. Moshe Stern, *Teshuvot Be’er Moshel*, II, no. 9, sec. 3, rule that the blessing should not be recited.

Be-Zel ha-Hokhmah notes that, even if observation of a reflected image were to be found acceptable for purposes of sanctifying the New Moon or in criminal proceedings, the basis for such acceptance would be that some forms of circumstantial evidence serve as acceptable proof establishing that particular events have occurred. However, blessings pronounced upon visual experiences, such as upon seeing a scholar, a monarch, lofty mountains or deep canyons, etc., are recited not because the veracity of the existence of such persons or phenomena has been ascertained but because the experience of such perception elicits a psychological and emotional response of awe and wonder. Accordingly, it is understandable that an intense response is induced only by a direct natural experience.¹⁵

¹⁴ Cf., however, Me’iri, *Bet ha-Behirah* and *Hiddushei ha-Me’iri*, *ad locum*, who cites Rav Ha’i Ga’on as understanding the instrument to be either a tube *simpliciter* or an astrolabe.

¹⁵ *Magen Avraham* 224:6 rules that even a blind person must recite the appropriate blessing when a monarch passes by. His reasoning is that the blessing is occasioned by the honor accorded the monarch and such honor is perceived acoustically as well as visually.

The earliest source in which a discussion of artificial magnification is discussed seems to be *Dvar Shmu'el*, no. 242, cited by *Be'er Heitev*, *Orah Hayyim* 426:1, who declares that a person who sees the new moon through a telescope or glass instrument should not recite the blessing "for it is not a proper visual perception (*re'iyah gemurah*).” That view is challenged by R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, I, no. 126.¹⁶ *Shevut Ya'akov* addresses the question of whether the members of a *bet din* convened for purposes of *halizah* must be capable of seeing the performances of that rite without benefit of eyeglasses. Deuteronomy 25:9 prescribes that *halizah* be performed “before the eyes of the judges.” *Shevut Ya'akov* concludes that inability to see without eyeglasses does not disqualify a person from serving as a member of a *bet din* for that purpose.¹⁷ Eyeglasses correct a distortion caused by a malfunction of the eye and thereby restore normal vision to the wearer; magnification by means of a telescope or other instrument results in a visual phenomenon not perceived under normal conditions. Eyeglasses are designed to restore normal visual capacity; magnification gives rise to a visual perception quite different from the “normal.”

The distinction becomes even sharper if one is mindful of the fact that optical perception is a neural phenomenon that takes place in the brain;

¹⁶ *Sha'arei Teshuvah*, *Orah Hayyim* 126:1, notes that even a blind person is obligated to pronounce the blessing and hence it must be inferred that the moon need not necessarily be seen by the naked eye. The clear implication of *Sha'arei Teshuvah*'s discussion is that telescopic magnification does not constitute *re'iyah gemurah* for purposes of Halakhah.

¹⁷ *Bo'az*, *Tiferet Yisra'el*, *Nega'im*, *Bo'az* 2:4, initially asserts that a *kohen* who requires eyeglasses to in order to examine a *nega* is not disqualified from performing that function. *Tiferet Yisra'el* further points out that it is customary practice to recite the blessing upon reading the Torah while wearing eyeglasses. *Tiferet Yisra'el* inappropriately compares use of corrective lenses to interposition of a pane of glass in the presence of “nakedness.” However, *Tiferet Yisra'el* concludes that examination of a *nega* is subject to the same standard as sighting of the moon for purposes of sanctification of the New Moon. The implication is that the testimony of witnesses who wear glasses while observing the new moon would be unacceptable. Sighting of the new moon, asserts *Tiferet Yisra'el*, requires a “clear vision.” In context, however, the Gemara, *Rosh ha-Shanah* 24a, excludes only observation of the moon as reflected in a “glass.” The difference between eyeglasses and reflection in a mirror is obvious. Moreover, as noted by R. Isaac Elchanan Spektor, *Teshuvot Ein Yizhak*, I, *Even ha-Ezer*, no. 31, in the case of observation of the new moon there is also the possibility that the reflection is not of the moon itself but of the shadow of the moon whereas the requirement for sanctification of the New Moon is that the moon itself be observed. R. Joseph Rosen, *Teshuvot Zofnat Pa'aneah* (New York, 5714), no. 13, cites the Palestinian Talmud, *Niddah* 2:7, which declares that there is a similar rule with regard to examination of a *nega*.

the eye is simply a medium that transports visual stimuli. "Sight" is what occurs when those stimuli affect optical receptors. Corrective lenses allow the compromised eye to do what a natural eye is capable of doing. Pushed to the extreme, this analysis would lead to a conclusion that, if medical technology succeeds in perfecting such a device, use of a functional prosthetic eye would result in "sight" cognized as such by Halakhah. In contradistinction, magnification distorts light waves so that the stimuli operating upon the optical center in the brain are not generated solely by the object perceived but are distorted by the interposed prism.

VI.

R. Zevi Reisman, *Or Yisra'el*, Nisan 5772, questions whether the requirement that testimony only be heard in the presence of the litigant may be satisfied by means of closed-circuit television by "skyping." Rashi, *Bava Batra* 28b, explains that the requirement is designed to assure that the litigants are fully informed of adverse testimony so that they may present other evidence in rebuttal. An electronic image, contends Rabbi Reisman, suffices for that purpose. However, *Teshuvot ha-Rashba*, II, no. 376, asserts that the rule is a statutory requirement of scriptural origin and, as such, is entirely divorced from any rationale. If so, it should be presumed that the actual physical presence of the witness is required.

As recorded in *Shulhan Arukh*, *Even ha-Ezer* 22:9, seclusion with a person of the opposite gender is permitted when a door to a public place is left open. A closed circuit television camera certainly seems to be the functional equivalent of a "door" open to a public place. Videotaping for later viewing by a third party would also seem to be comparable, although it might be argued that the rabbinic edict requires the possibility of contemporaneous observation of an illicit act. Nevertheless, Rabbi Lichtenstein in his monograph, *Ha-Internet be-Halakhah*, quotes Rabbi Eliashiv as being of the opinion that only situations involving an actual open door were excluded from the rabbinic edict prohibiting seclusion; other forms of surveillance that were unknown to the Sages, Rabbi Eliashiv is quoted as saying, were not recognized, despite the fact that they have an effect equivalent to that of an open door. It should, however, be noted that R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah*, *Even ha-Ezer Mahadura Kamma*, no. 71; R. Abraham Horowitz, *Dvar Halakhah* 3:10; and R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, IV, no. 65, sec. 2, as well as other authorities cited in *Ozar ha-Poskim*, IX, 22:9, sec. 4, rule that the presence of a window that allows observation by passers-by is the

equivalent of an open door. Although there are certainly grounds to distinguish between a window and a video monitor,¹⁸ the ruling of those authorities indicates that they did not understand the term “door” literally.

ENDNOTE

R. David ibn Zimra, *Teshuvot Radvaz*, IV, no. 75, and *Pri Hadash*, *Yoreh De'ah* 114:6, permit consumption of unsupervised milk “if there is no non-kosher animal within the city.” See also R. Abraham Danziger, *Hokhmat Adam* 67:1. *Pri To'ar*, *Yoreh De'ah* 114:2, permits such milk in locales in which milk of non-kosher animals is more expensive than milk of kosher species, provided that the milk is purchased rather than acquired as a gift. Cf., however, *Darkei Teshuvah* 114:7. The permissive view is strongly opposed by R. Moshe Sofer, *Teshuvot Hatam Sofer*, *Yoreh De'ah*, no. 107, and by R. Yechiel Michel Epstein, *Arukh ha-Shulhan*, *Yoreh De'ah* 156:4-6. *Arukh ha-Shulhan* enumerates a list of authorities who explicitly espouse a view at variance with that of *Pri Hadash*.

Hazon Ish, *Yoreh De'ah* 41:2, writes that “there is room to say” that government regulation is sufficient and adds that the *Pri Hadash*'s leniency with regard to a city in which a non-kosher lactating animal is to be found is cogent. See also R. Zevi Pesach Frank, *Teshuvot Har Zevi*, *Yoreh De'ah*, no. 113 and R. Jacob Kaminetsky, *Emet le-Ya'akov*, *Yoreh De'ah* 115:1. However, R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 441, reports that R. Israel Veltz, formerly *daiyan* of Budapest and author of *Teshuvot Divrei Yisra'el*, sought to confirm *Hazon Ish*'s position but was informed by the latter that his ruling applied only to serving such milk to a minor or to a *post partum* mother within thirty days of birth. See also *Teshuvot ve-Hanhagot*, I, no. 480 and II, no. 373. R. Jacob Mordecai Breisch, *Teshuvot Helkat Ya'akov*, II, no. 38, reports a conversation between the late R. Moshe Soloveitchik of Zurich and *Hazon Ish* in the course of which *Hazon Ish* vehemently denied having ever issued such a ruling exclaiming, “What else will they say about me? Soon they will say that, Heaven forefend, I permit adultery!” Another individual reported that *Hazon Ish* responded in the negative to his query regarding consumption of sweet cream and yet another reported that he forbade serving such milk to a five-year old child. Apparently, *Hazon Ish*'s employment of the phrase “there is room to say” was intended to introduce *Pri Hadash*'s leniency only as a tentative, theoretical possibility.

R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, I, nos. 47-49, asserts that government regulation is the functional equivalent of supervision of the milking by a Jew. *Iggerot Mosheh*'s grounds for leniency are entirely different from those of *Pri Hadash*. *Iggerot Mosheh* asserts that “knowledge” in the sense of absolute conviction is tantamount to eyewitness testimony. The *mirtet*, or “fear,” engendered by government supervision, argues *Iggerot Mosheh*, gives rise to absolute conviction that there has been no admixture of non-kosher milk. See also *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 54.

¹⁸ Cf., R. Nachum Yavrov, *Divrei Sofrim* 9:92, *Birur Halakhah*, s.v. *she-pitho*, who questions the ruling of these authorities regarding an open window. *Divrei Sofrim* contends that the Sages may have permitted seclusion only if there is an open door but not simply where there is a window facing a public place because the possibility of another person entering the room is a greater constraint than is the possibility of mere observation of intimacy. The constraint of electronic observation may well be less than that of direct visual observation.

In his earlier-cited responsum, *Helkat Ya'akov* also presents a vigorous point-by-point rebuttal of *Iggerot Moshel's* ruling. One crucial issue is whether there actually exists any meaningful government supervision and whether the prescribed penalties are sufficiently significant to serve as a deterrent. A collection of responsa dealing with those questions was published in *Netiv be-Halav*, Adar 5770.

It should be noted that *Iggerot Moshel*, *Yoreh De'ah*, II, no. 35, himself declares that it is proper to be stringent in this matter. He further comments that *yeshivot* and day schools should provide supervised milk even if such milk is more expensive and the schools find themselves hard-pressed for funds "because this, too, is a matter of pedagogy and education so that [the students] know that it is fitting and proper for students of Torah to be stringent even if there is only suspicion of a transgression."

Rabbi Sternbuch further cites the view attributed to R. Elijah of Vilna to the effect that reasons provided by the Sages for their enactments are not exhaustive in nature. The opinion of R. Elijah of Vilna was earlier recorded by R. Meir Simchah ha-Kohen of Dvinsk, *Meshekh Hokhmah*, *Parashat Bo*. See also *Teshuvot ve-Hanhagot*, I, no. 441, II, no. 373 and 385. *Arukh ha-Shulhan*, *Yoreh De'ah* 115:6, makes that point specifically with regard to the edict banning unsupervised milk. R. David Zevi Eliach, *Kol ha-Katuv le-Hayyim*, sec. 83, quotes "the *ga'on* of Leipnik," R. Baruch Frankel-Teumim, author of *Barukh Ta'am*, as having declared that there exists a tradition going back to Moses to the effect that, in addition to the stated grounds, milk acquired from a non-Jew is forbidden for reasons that were not disclosed. Rabbi Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 256, similarly reports that R. Chaim Halberstam, author of *Teshuvot Divrei Hayyim*, made the same statement in the name of his father-in-law, the author of *Barukh Ta'am*. In actuality, that position was formulated much earlier during the Geonic period in a responsum of Rav Ha'i Ga'on as recorded in *Teshuvot ha-Ge'onim*, ed. Mekizei Nirdamim (Lyck, 5683-5864), no. 1. See also this writer's "Spontaneous Generation and Halakhic Inerrancy," *Tradition*, vol. 44, no. 4 (Winter, 2011), pp. 61f.

Those who differ with *Iggerot Moshel* regarding government supervision as the equivalent of supervision of the milking by a Jew do so for one or more of the following reasons:

1) Government supervision is so lax and sanctions for adulterating milk so minimal as to render such considerations inconsequential.

2) R. Zevi Ashkenazi, *Teshuvot Hakham Zevi*, no. 135, asserts that we do not have license to posit an *umdena*, i.e., a presumption based upon contextual circumstances short of eye-witness testimony, unless such *umdena* has been expressly declared by the Sages.

3) *Beit Me'ir*, *Yoreh De'ah* 115, quoting *Teshuvot ha-Rashba*, no. 248, asserts that the formal edict banning unsupervised milk also prohibited reliance upon any presumption based upon an *umdena* or circumstantial evidence. As a result, only the type of evidence sufficient to effect financial recovery from a defendant, i.e., eyewitness testimony or its equivalent, is acceptable to render milk permissible, viz., actual witnessing of the milking; determination that there is no non-kosher animal within the milking area coupled with visual observation that no such animal entered the area during the course of the milking; or, if a non-kosher animal is present within the milking area, that the animal be observable to a Jew who is present were he to rise and look in its direction. Similarly, if the milk was made into cheese, the cheese was permitted because cheese cannot be made from the milk of non-kosher species. [Cheese manufactured by a non-Jew was later forbidden by promulgation of a separate decree.] That type of proof is acceptable in financial disputes as well. See *Shulhan Arukh*, *Hoshen Mishpat* 90:16, and *Sema*, *Hoshen Mishpat* 30:40.