MOTION DETECTORS ON SHABBAT

To The Editor:

In his typically erudite discussion on the use of motion detectors on Shabbat (Tradition 35:3, Fall 2001), Rabbi J. David Bleich writes (in the name of Rabbi Eliezer Falk of Jerusalem, in Or Tisrael, Sivan 5757) that even according to the position of Rabbi Akiva Eger (Teshuvot R. Akiva Eger, no. 8) walking past a motion detector on Shabbat is "entirely innocuous" due to the lack of melekhet mahashevet involved.

However, as I point out in the Tishrei 5759 issue of Or Tisra'el (pp. 208-210, and as Rabbi Falk so honestly admits in his response to my comments, ibid., pp. 210-213), this is an incorrect reading of the words of R. Akiva Eger. As this teshuva explicitly states, the lack of melekhet mahashevet merely changes the status of the transgression from being biblical (as is the case with mitasek elsewhere), to merely rabbinic in nature. Furthermore, it is clear from the teshuva that even if the person is "ignorant of the very nature of the act" (as is the case in the Talmud and Tosafot, Shabbat 11a, brought by R. Aldva Eger), a rabbinic prohibition still exists. Therefore, according to R. Akiva Eger, one should be cautioned not to walk past a motion detector on Shabbat due to the rabbinic prohibition involved (see also Mishnat Ray Aharon, Shabbat, pp. 89-90).

It should also be noted that although Rabbi Bleich (n. 32) writes that Aglei Tal is in agreement with the position of R. Akiva Eger, it is not clear that this is so—see Eglei Tal, Kotser, no. 12, sec. 24:12.

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Rabbi Oratz' comments focus upon the question of whether an act of *mitasek* with regard to activity ordinarily forbidden on *Shabbat* that is also lacking in *melekhet mahashevet* is entirely permissible or is rabbinically proscribed. That issue is addressed in the exchange of correspondence between Rabbi Oratz and Rabbi Falk published in the Tishri 5759 issue of *Or Yisra'el. Lehem Mishneh, Hilkhot Shabbat* 1:8, asserts that, contrary to the view of *Tosafot, Shabbat* 11a, Rambam's position is that such an act is entirely permissible. That analysis of Rambam's position is challenged by R. Aharon Kotler, *Mishnat Ray Aharon, Shabbat*, no. 11.

Rabbi Oratz is quite correct in pointing out that *Teshuvot R. Akiva Eger* was inaccurately cited by Rabbi Falk. R. Akiva Eger does indeed regard such an act as forbidden by rabbinic edict. Although I am grateful to Rabbi Oratz for clarifying this point, I must disagree with his conclusion. Rabbi Oratz writes: "Therefore, according to R. Akiva Eger, one should be cautioned not to walk past a motion detector on *Shabbat* due to the rabbinic prohibition involved . . . ." That conclusion was explicitly rejected by the late R. Shlomoh Zalman Auerbach as cited in the final paragraph of my article. For purposes of clarity, these are the words of Rabbi Auerbach: "Even though R. Akiva Eger is stringent with regard to a *mitasek* in deeming it to be a shogeeg, nevertheless, it is possible that a pesik reisha de lo niha kih that is also in the form of a *mitasek* is permissible." Such an act would be permissible according to *Tosafot, Shabbat* 1 la, as well. A person who is intent only upon walking in a certain area and is unaware of the presence of a motion detector is a *mitasek* and the unintentional effect of the light being turned on is a pesik reisha de lo niha leih of that *mitasek*. Rabbi Falk, in disagreeing with Rabbi Oratz, permits such an act even by a person who is aware of the presence of a motion detector.

Moreover, as demonstrated by Rabbi Falk, and contrary to Rabbi Oratz' assertion in his letter to the editor of *Or Tisra'el*, it is evident that, according to R. Jacob of Lissa and those who espouse his view that an act of *mitasek* is entirely innocuous, that is the case with regard to *Shabbat* prohibitions as well. R. Ovadiah Yosef, *Tehaveh Da'at*, V, no. 28, cites R. Elchanan Wasserman, *Kovez Shi'urim, Pesahim*, sec. 215; *Teshuvot She'ilot Shmu'el, Orah Hayyim*, no. 1; and *Avnei Nezer, Orah Hayyim*, no. 251, as regarding an act of *mitasek* to be entirely permissible. That also appears to be the position of *Teshuvot Erez Zevi*, no. 76. Rabbi Falk asserts that this is also the view of *Taz, Orah Hayyim* 316:3;
Shulhan Arukh ha-Ray, Kuntres Aharon, no. 278; and Avnei Nezer, Yoreh De'ah, no. 220, sec. 10. Rabbi Yosef clearly assumes that those authorities regard an act of mitasek with regard to activities prohibited on Shabbat to be innocuous as well.

Rabbi Oratz also correctly notes that Eglei Tal, Kozer, no. 12, sec. 24:12, cites R. Akiva Eger's view regarding mitasek in a somewhat critical vein. However, later in the same volume, Ofeh, no. 16, sec. 33:3, Eglei Tal not only cites R. Akiva Eger's responsum in order to illuminate his own comment but en passant also adduces talmudic evidence in support of R. Alciva Eger's position.

RATIONAL RABBIS

To THE EDITOR:

Menahem Fisch, in Rational Rabbis, demonstrates that the Talmud presents a debate about the nature of halachic development. According to one extreme in this debate, the opinion of Rabbi Eliezer the Great, the teacher transmits what he knows to his students. The student tries to preserve accurately as much as he can of his teacher's Torah. At the other extreme, we find rabbis who believe that they evaluate the material they have received from their teachers, sometimes modifying or even rejecting it, and put forward their own opinions in a tentative way, knowing that others might challenge or revise them.

Moshe Koppel, in his generally unfavorable review of Rational Rabbis (Tradition 35:4, Winter 2001), rejects Fisch's characterization of the entire debate. Koppel declares on the one hand that no talmudic rabbis every try to rule based on "some recorded, pristine, ancient" teachings, and on the other that no talmudic rabbis try to evaluate or "troubleshoot" earlier teachings in the light of the goals of the system. The talmudic rabbis do sometimes modify or reject earlier teachings, according to Koppel, but they do so to harmonize the teachings with currently accepted halakhic practice.

I find Koppel's description of the process of talmudic debate unconvincing at several key points.

First, his claim that no talmudic rabbis try to follow the ancient texts unchanged. He describes the idea that a student must always try to rule according to the pristine, ancient, teachings as a "caricature."
The Talmud itself, however, declares of Rabbi Eliezer that he "never said anything which he had not heard from his teacher" (Toma 66b).

Second, in a claim that seems far more important to Koppel, he denies that any talmudic rabbis conceive of new opinions in Jewish law as "troubleshooting," as offering tentative improvements when confronted with difficulties in the ancient opinions. Koppel accuses Fisch of "subtly subverting" the Talmud by arguing that some talmudic rabbis decide halakhic issues in this way. Koppel presents as his trump card the observation that "there is no halakhic 'reality' against which to test halakhic hypotheses in the way that there is a physical reality against which to test scientific hypotheses." Since the intended goals of halakha remain obscure, the rabbis cannot reject positions for inconsistency with these goals.

Indeed, this looks like a strong question against Fisch. The question, however, cuts just as strongly against Koppel himself. Let us look at a most challenging situation: Sometimes, as Koppel concedes, the Talmud audaciously accepts the opinion of an amora, even when that means rejecting all the opinions of the earlier tannaim, including the opinions recorded in the Mishna. How can the later rabbis justify doing this?

Rabbi Eliezer the Great would have no explanation for such audacity on the part of the later rabbis, unless they have somehow discovered a more authoritative early teaching.

Fisch explains this audacity by saying that the later rabbis find something unsatisfactory in the rulings of the earlier rabbis, and then offer their own decisions in a tentative way, as possible improvements.

Koppel explains the audacity by saying that, while the rabbis often prefer to distort earlier texts to make them accord with current practice, they sometimes just follow current practice in preference to the earlier text. Thus, according to Koppel, the rabbis follow an unsupported amora when the accepted ruling in their community agrees with the amora. If we have no evidence of this community practice, we can just assume that it existed.

This line of reasoning begs the question of how a practice not in line with ancient teaching ever became accepted. It seems to me that there exist roughly two possibilities: either rabbinical scholars instituted the new practice, or the common folk did so.

If Koppel posits that rabbinical scholars instituted the new practice, then his rabbis look exactly like Fisch's rabbis, willing and able to introduce new rulings even against the ancient texts. Koppel, no less than Fisch, needs to explain by what principles the rabbis decided to overrule an earlier text.
If Koppel posits that the common people have instituted the change, he still must explain how the rabbis decided whether to accept the common practice.

Rabbis sometimes bless current practice, even though the old texts do not support it, and sometimes demand that people change their practice to accord with the ancient texts. Koppel does not offer any explanation for how rabbis decide when to follow the ancient text and when to accommodate for current practice. Calling the practice "generally accepted" does not answer this question. Even if change comes from the common folk, Koppel needs a theory for the criteria by which folk practices contrary to the texts do or do not become accepted.

In effect, in either case, he needs a theory of the purposes of halakha (or some parallel criteria) just as much as Fisch does.

I think that Koppel has not demonstrated that he has a coherent and convincing reading of these rabbis. I think that he has not demonstrated that we should dismiss Fisch's reading. I especially think that he has not come near to demonstrating that he has grounds for calling Fisch "subversive."

Fisch's *Rational Rabbis* seems a dispassionate attempt to assess the talmudic debates about relative weight of text, tradition, and policy in decision-making. However, as we read the book we may reasonably think of acrimonious debates in our times about the permissibility of acknowledging the role of policy in halakha. Koppel's objections to *Rational Rabbis* appear as an attempt to enlist all the talmudic rabbis in the modern struggle to deny that policy has any role in halakha. Not, to my mind, a very successful attempt.

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MOSHE KOPPEL RESPONDS:

My argument to which Eliezer Finkelman takes exception goes like this:

Menachem Fisch shows that halakha does not evolve merely by accretion, and concludes that therefore it must be that halakha is "troubleshot" to make it accord with some goals. I argue that Fisch does not make his case because (among other things) he fails to eliminate an intermediate possibility: that halakha develops through a process of harmonization between legal traditions and actual practice. Thus it may be
that legal traditions are sometimes undone but not necessarily "troubleshot" in Fisch's sense. For my objection to hold it isn't necessary to prove that the harmonization approach is correct; it is enough to show that it is prima facie possible and that Fisch failed to eliminate it.

Finkelman points out rather triumphantly that even harmonization in my sense requires some theory regarding what makes good halaldia. Well, sure. But granting that the rabbis applied some (usually implicit) theory to best harmonize legal traditions with actual practice (or to circumscribe the applicability of a legal tradition under circumstances in which no entrenched practice existed) is far from granting what Fisch, and now Finkelman, appear to argue: that a major school of rabbis consciously applied "policy" that runs counter to both legal tradition and halakha-as-practiced in order to override them.

Finkelman also claims that I present as my "trump card" the observation that (here is Finkelman quoting me) "there is no halakhic 'reality' against which to test halakhic hypotheses in the way that there is a physical reality against which to test scientific hypotheses." If this were indeed my "trump card," I'm a lousy pinochle player since in the original the quoted observation is preceded by the words: "Fisch is aware that..." The fact that Fisch does not specify the goals of halakha against which he believes some rabbis measured certain legal traditions simply renders the analogy with science more subtle and makes his case harder to prove. I did not claim, and I certainly do not believe, that the fact that the goals are unspecified renders Fisch's case unsustainable. In fact, had Fisch gone one step further and asserted that the goals of halakha "can't" be specified, I would have found his thesis much more attractive.

IS THE GIRAFFE KOSHER?

To THE EDITOR:

In his column "Is the Giraffe Kosher?" (Tradition 35:1, Spring 2001), Rabbi J. David Bleich analyzes the question of the kashrut of the giraffe with his trademark rigor and thoroughness. But he also makes a comment with which I must respectfully disagree.

In the course of his analysis, R. Bleich discusses the relatively recent suggestion that a mammalian species bearing the two biblical signs of
kashrut—a split hoof and chewing its cud—is not to be treated as kosher in the absence of a tradition confirming its kosher status. The requirement of a tradition is universally applied to fowl, but historically was not required of mammals.

For obvious reasons, the requirement of a tradition for mammals is central to the issue of the kashrut of the American bison (commonly referred to as the buffalo), and I was gratified to find that R. Bleich had extensively cited a recent article of mine on the subject ("Kashrut of the Exotic Animal: The Buffalo," Journal of Halacha and Contemporary Society, no. 38, Fall, 1999). As an animal native to the New World, no tradition could have developed regarding the kashrut of the American bison. My article suggested that the absence of a tradition might be outweighed by the "hybridization principle" mentioned in Behorot 7a. This principle holds that kosher species cannot mate with non-kosher species; hence, the fact that a suspect species can interbreed with a known kosher species confirms the kosher status of the first species. I note that the American bison interbreeds with domestic cattle, a conclusive sign that the American bison is a kosher species.

Discussing the requirement of a tradition for mammalian species, R. Bleich quotes Hazon Ish to the effect that: "It is not incumbent upon us to seek reasons' for this stringency, but that it probably arose in order to prevent error. . . and to prevent transgression with regard to the prohibition of treifot that is attendant upon certain anatomical anomalies." R. Bleich adds, in footnote 10: "Thus, on the basis of the reasons for the prohibition spelled out by the Hazon Ish, the fact that the zebu can hybridize with cattle is entirely irrelevant. Rabbi Zivotofsky, "Kashrut of Exotic Animals," pp. 126-127, seems to have missed this point." I humbly disagree.

R. Bleich places great weight on the fact that Hazon Ish suggested reasons for the requirement of a tradition for mammals, so much weight that R. Bleich believes that they make the hybridization principle irrelevant. Indeed, if the reasons suggested by Hazon Ish were the true reasons for the tradition requirement, I would agree with R. Bleich that hybridization would be of no avail. But, even Hazon Ish himself did not claim that his suggested rationales represent the true reasons for the extension of the tradition requirement to mammals. To the contrary, Hazon Ish stated that we do not know the reason and we do not need to know it. He merely engaged in open speculation, offering some possible explanations why the requirement arose. He then concluded his halakhic ruling: "she-anu nohagim be-behemot minhag ofot," or "we apply
to animals the customary rule for birds." Whatever the reason(s), it is our practice to apply the tradition criterion for birds to animals as well.

In the case of fowl, the reason for requiring a tradition is clear, and the obligation, certainly for Ashkenazic Jews, is absolute. Yet, many authorities have been willing to rely on the hybridization principle to rule that a bird species is kosher even in the absence of a tradition (see the discussions in, e.g., Hatam Sofer, Torch De'a 74; Netsiv, Meshiv Davar, Torch De'a 22; Avnei Nezer, Yoreh De'a 1:75; Maharsham, Da'at Torah, Yoreh De'a 82:3). That being the case, it would seem that, kal va-homer, the hybridization principle should govern in the case of animals, for whom the tradition requirement is less certain and generally considered a stringency of recent vintage.

Even if a contemporary posek would accept the requirement for a tradition for animals, as per Hazon Ish, the ability of an animal to cross-breed should obviate the need for a tradition. After all, Hazon Ish never spelled out reasons for the tradition requirement—he merely tendered some speculative possibilities. In the final analysis, he ruled that a tradition is required for animals for no reason other than communal practice. That practice calls for applying to mammals the tradition criterion for fowl. It seems certain that the rules governing this requirement for mammals are no stricter than those that govern the tradition requirement for birds—it would be absurd for them to be more stringent. Ergo, if hybridization is sufficient for establishing the kashrut of birds, it should be sufficient for establishing the kashrut of mammals as well.

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J. DAVID BLEICH RESPONDS:

Quite apart from my comment amplifying the reasons spelled out by Hazon Ish in explaining reasons for Shakh's stringency, Rabbi Zivotofsky's argument seems to me to be entirely counterintuitive. Shakhly and those who follow his ruling declare that, in the absence of a mesorah, the biblical criteria of a kosher species, i.e., a split hoof and chewing of the cud, cannot be relied upon in establishing the kashrut of a species. [The comment of Bet ha-Levi cited in the recently published Netivot Rabboteinu le-Bet ha-Levi Brisk, II (Jerusalem, 5762), p. 102, also serves to illuminate Shakh's position.] If biblically prescribed criteria
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that tautologically define kosher species are for some reason unacceptable, how could a rabbinically recognized criterion that is merely emblematic of the presence of defining criteria be acceptable?

The rationale underlying Shakh’s ruling is far from clear. Hazon Ish suggests reasons that R. Zivotofsky candidly concedes serve to render the hybridization principle irrelevant. However, R. Zivotofsky argues that Hazon Ish also concludes that the rule for birds is to be applied mutatis mutandis to animals. Citing sources, he then argues that the hybridization principle is valid with regard to birds and hence he concludes that ipso facto the hybridization principle applies to animals as well.

Let me state at the outset that neither Shakh nor any authority following in his footsteps indicates that the hybridization phenomenon serves as a substitute for a mesorah. Nor, to my knowledge, is there any authority who accepts the hybridization phenomenon as a substitute for a mesorah with regard to birds. In arguing to the contrary, R. Zivotofsky has read into the first three sources that he cites much more than they contain. The fourth source, Da’at Torah of the Maharsham, contains nothing of relevance to this discussion.

Each of the sources deals with problems associated with one or more species of wild duck or wild goose. Although accepted by Zemah Zedek, Tomb De’ah, no. 60, as a member of the same species as the domestic duck or goose, the majority of rabbinic authorities of the day regarded the fowl under discussion as significantly different in its physical characteristics from the species recognized as kosher and, in the absence of a mesorah, refused to recognize the wild duck as kosher. [See, however, R. Yonatan Eibeschutz, Peleti 82:2 and Kereti 82:9, who refers to the bird as a "wild goose" and rules that it is a kosher species.]

Some ducklings of that species were permitted to mingle freely with domestic ducks. The question posed to Hatam Sofer was whether future born ducklings born to female domestic ducks were to be regarded as kosher since the fathers may well have been members of unacceptable species of wild duck. Hatam Sofer permitted those offspring on the basis of a combination of a number of considerations: 1) Zemah Zedek ruled that the wild duck was a permitted bird; 2) the ducklings had the physical characteristics of the mother duck, indicating that the father was probably of the same species; 3) the majority of male ducks having access to the females were of the kosher species; and 4) whether or not paternal status could render the offspring non-kosher (hosheshin le zera ha av) is itself a matter of halakhic doubt. For purposes of the present discussion, the crucial point is that Hatam Sofer did
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*not* rule that successful hybridization served to confirm *Zemah Zedek*’s ruling beyond cavil. *Hatam Sofer* regards the wild duck as a non-kosher bird despite the fact that it was capable of breeding with a kosher species. Indeed, *Hatam Sofer* explicitly affirms that hybridized progeny of that bird are also non-kosher; his lenient ruling is based in part upon the probability that the ducklings in question were not hybridized but sired by a kosher duck. Thus, *Hatam Sofer* clearly refuses to accept the hybridization principle as a substitute for the requisite mesorah.

*Meshiv Davar* addresses the status of an apparently different species of duck that had been accepted as kosher in some locales. His interlocutor points out that those ducks mate freely with species of duck accepted as kosher. Although *Meshiv Davar* accepts the species as kosher for a number of reasons, including the fact that it shows no preference whatsoever for its own species over partners from the domestic species, he explicitly rejects the hybridization principle as dispositive with the comment "... for we accept the wild duck as unclean [despite the fact that] it procreates from our duck."

R. Zivotofsky fails to cite *Avnei Nezer, Tomb De’ah*, no. 76, dealing with a particular species of duck or goose in which he notes that they breed with kosher species but nevertheless, without citing *Bekhorot* 7a, comments that, since the two species are housed together for breeding purposes, the fact that they mate does not establish the kashrut of the species. In the very next paragraph he then queries how any bird can be regarded as kosher since it may have a non-kosher progenitor and offers several resolutions to that problem. Quite obviously, *Avnei Nezer* does not accept the hybridization phenomenon as a substitute for a mesorah.

*Avnei Nezer, Yoreh De’ah*, no. 75, discusses an apparently different species of duck. It seems that the only physical characteristic of the species in question that gave *Avnei Nezer* pause in issuing a permissive ruling was that, unlike other ducks, its quack was "hoarse". *Avnei Nezer* points to the fact that the duck in question breeds with accepted duck species as indicating that they are truly the same species. In that responsum there is no evidence that he would have accepted the hybridization principle as independent validation of the kashrut of the bird in situations in which its physical characteristics were markedly different from an accepted species. Read together with the immediately following responsum, that conclusion is inescapable.

Parenthetically, *Hatam Sofer* and others express some reservation with regard to the applicability of the hybridization principle of *Bekhorot* 7a to birds. In context, the principle is formulated with regard
to animals and hence its extension to birds is a matter of at least some
doubt. Thus, logically, grounds for application of the principle to ani-
mals are stronger than for birds. However, methodologically, R. Zivotofsky is quite correct. Since Shakh's requirement of a mesorah to
animals is simply an extension of the rule accepted with regard to birds,
any alternative mode acceptable with regard to birds should therefore
be acceptable with regard to animals as well.

However, since no authority accepts the hybridization phenomenon
as an alternative to a mesorah with regard to birds, there is no evidence
supporting its acceptability with regard to animals. In light of both
Shakh's failure to regard the hybridization phenomenon as an alterna-
tive to a mesorah and Hazon Ish's formulation of the reasons underlying
Shakh's stringency which, as R. Zivotofsky himself candidly concedes,
apply with equal cogency in the presence of hybridization, there is sim-
ply no basis for concluding that, according to Shakh, hybridization is
other than an irrelevant phenomenon.