

Bikurey HaPardes



Volume 1/ *Tammuz* 5769

**A Journal of the Pardes Institute of Jewish Studies
Advanced Scholars Program (*Kollel*)**



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ביכורי הפרדס

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Advanced Scholars Program (*Kollel*)

Daniel Roth, Editor

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Foreword

Bikurey HaPardes is a yearly journal of the Pardes Institute for Jewish Studies. Its primary goal is to enable the reader to peer into the classroom, or *Beit Midrash* of Pardes in order to share and learn from some of the discussions that took place over the course of the year. All the articles published in this volume are based on classes taught in the Pardes Kollel (Advanced Scholars Program) during the academic year 5769 (2008-2009).

The primary subject studied this year in the Kollel was the Babylonian Talmud, Tractate Baba Batra. Baba Batra deals with many pressing issues regarding the formation of a civil and just society, such as relationships between neighbors, caring for the poor and weak, conflicting claims over land and much more. The contributors to this journal are the teachers in the Pardes Kollel, as well the Kollel fellows. Towards the end of the academic year, each fellow was asked to submit an article on one sugya from either the first or second chapters of Baba Batra. The material was taught by Daniel Roth, who taught the in-depth Talmud class during the second semester, and Rachel Furst, who taught a complementary class on Rabbinic Responsa related to the topics studied. In addition to transcribing many of the discussions from the original classes, each fellow researched and expanded extensively upon the topics in her or his own creative manner. What are presented to the reader of this journal are truly the fruits of many minds working together to understand and bring clarity to eternal Talmudic discussions and dilemmas, as the Talmud states "Torah is only acquired in a group" (T.B. Berachot 63b). In addition to the articles based on classes taught on Baba Batra, this volume also includes an article submitted by Rav Elisha Ancselovits, the advanced Halachah instructor.

I would like to thank each member of the Pardes Kollel: Raphael Dascalu, Ales Koukal, Joshua Schwartz, Haggai Reznikoff, Debbie Jacobson-Maisels, Yosef Rosen, Noah Moline, William Friedman, Livia Levine and Sophie Rapoport, who not only contributed their own articles to this journal, but also worked hard in assisting their peers over the course of the year in studying together as a group and editing each other's articles.

Special thanks to Rabbi Daniel Landes, the Rosh Yeshiva of Pardes, *magid shiur* of the in-depth Talmud class to the Kollel for half of the year, and to Libby Werthan, former Pardes Chairwoman and writer, who reviewed the articles submitted in this journal. Deep gratitude is also offered to Dr. David Bernstein, Dean of Pardes, Louise Szczerb, Pardes Director of Communications who assisted in bringing this new project to fruition.

Daniel Roth
Tammuz 5769

Peering Between the Lattices
The Composition of the Opening Passage of Baba Batra
And the Problem of Visibility
 [Baba Batra 2a-3a]

Raphael Dascalu

A careful reader of the Talmud will notice a number of unusual features in the opening passage of Baba Batra (2a-3a). These features have led scholars to offer various explanations that aim to trace the historical development of this *sugya* and the motives of its redactors.¹ By identifying the fundamental building blocks of the discussion and mapping their relation to one another, I hope to shed light on the logic of this passage's composition. I believe that what emerges from such an approach is a clearer reading of the discussion, and a deeper understanding of the methods and reading strategies of the redactors of this elegant Talmudic passage.

The two *lishnot*/formulations of the opening passage are not, as many have suggested,² two discussions with an initially parallel structure that then veers away from commonality into two profoundly different discussions that vary both in content (i.e. the *tannaitic* and *amoraitic* sources that are cited) and structure. Rather, the two *lishnot* are the common core of each side of the argument. So our first question is, why are the two *lishnot* separated? Why are they not juxtaposed directly with one another, as is usually the case when two formulations are presented in the Talmud?

In addition to this observation, we can clearly identify a secondary layer within each formulation – a kind of *stamaitic* aside, without which the dialectic reads even more smoothly. Visually, we might represent this as follows (with the secondary 'aside' in italics in the Hebrew, underlined in the English):

First Formulation	לישנא קמא
<p>They presumed: What is a <i>mehitzah</i>? A wall, as it is taught: <i>A mehitzah</i> of a vineyard that has been broken down – [one party may] say to [the other], <i>fence it!</i> And [if] it broke down again, [the same party may] say to [the other], <i>fence it!</i> [If the owner of the fence] neglects it and does not fence it, he causes the [the produce to] become forbidden and is obliged [to compensate] its loss. <u>The reason [that they build the wall] is that they agreed to [build the wall] – but if [either party] did not agree, we do not oblige [the other to contribute to the construction of a wall], therefore</u></p>	<p>סברוה: מאי "מחיצה" גודא. כדתניא: מחיצת הכרם שנפרצה אומר לו גדור חזרה ונפרצה אומר לו גדור נתיאש הימנה ולא גדרה ה"ז קידש וחייב באחריות. 'טעמא דרצו הא לא רצו אין מחייבין אותו אלמא היזק ראייה לאו שמיה היזק. ואימא "מחיצה" פלוגתא, כדכתיב (במדבר לא) ותהי מחצת העדה. וכיון דרצו בונין את הכותל בעל כרחו אלמא היזק ראייה שמיה היזק. אי הכי, האי "שרצו לעשות מחיצה" – "שרצו לחצות" מבעי ליה! אלא מאי? גודא. "בונין את הכותל" – "בונין אותו" מבעי ליה! אי תנא "אותו", הוה אמינא במסיפס</p>

¹נגן, ג. (2004). מבוא לסוגיית היזק ראייה. מתוך גלת יג (תשסד) עמ' 341-351. גליצברג, ש. (2005). *איכות הסביבה (אקולוגיה) במשפט העברי: הרחקת מטורדים*. חיבור לשם קבלת תואר "דוקטור לפילוסופיה". אוניברסיטת בר-אילן, המחלקה לתלמוד. רמת גן. תשנ"ה. עמ' 177-188. וינגרט, ש"י (תשס"ו) "סוגיית הפתיחה למסכת בבא בתרא" (טיוטא למאמר). הלבני, ד. (תשס"ח) *מקורות ומסורות: ביאורים בתלמוד מסכת בבא בתרא*. ירושלים: הוצאת מאגנס. עמ' א-ב. פוקס, ע. (2008). "עריכתה ומגמתה של סוגיית הפתיחה למסכת בבא בתרא". *סידרא* כג. עמ' 83-105. הוצאת אונ' בר-אילן, רמת גן. קליין, ש. (תשס"ח) "מאי מחיצה"? מסע מושגי, מן המחיצה ועד מערכת השכנות. מתוך *השכנים ומה שביניהם: עיון בסוגיות מבוא במסכת בבא בתרא*. הוצאת בית מדרש רעוא. עמ' 31-71.

² Cf. Naggan, 2004, p.2.

<p><i>hezzeq re'iyah</i> is not a tort. But [let us] say [rather that] <i>mehitzah</i> means 'subdivision', as it is written (Numbers 31 find), <i>And half of the community</i> [mehetzat ha'edah] was... <u>And since they agreed [to subdivide] they build the wall against [each others] will, therefore <i>hezzeq re'iyah</i> is a tort.</u> If that is the case, this [formulation] <i>who want to make a subdivision</i> should be [phrased as] <i>who wanted to subdivide</i>. Rather, what [is the sense of the word <i>mehitzah</i>]? A wall. <i>They build the wall</i> – [if the sense of the word <i>mehitzah</i> is 'wall'] it should [say] <i>they build it!</i> If it had taught 'it', I might have thought that [one fulfills one's duty] with a simple screen. This is what [the redundant formulation] teaches us [- that one builds a wall in accordance with local custom, and a simple screen is not enough].</p>	<p>בעלמא קמ"ל כותל.</p>
<p>Second Formulation</p> <p>They presumed: What is a <i>mehitzah</i>? A subdivision, as it is written, <i>And half of the community</i> [mehetzat ha'edah] was... <u>And since they agreed [to subdivide] they build the wall against [each others] will, therefore <i>hezzeq re'iyah</i> is a tort.</u> [But let us] say [rather that] <i>mehitzah</i> means 'wall', as it is taught: A <i>mehitzah</i> of a vineyard that has been broken down – [one party may] say to [the other], <i>fence it!</i> And [if] it broke down again, [the same party may] say to [the other], <i>fence it!</i> [If the owner of the fence] neglects it and does not fence it, he causes the [the produce to] become forbidden and is obliged [to compensate] its loss. <u>The reason [that they build the wall] is that they agreed to [build the wall] – but if [either party] did not agree, we do not oblige [the other to contribute to the construction of a wall], therefore <i>hezzeq re'iyah</i> is not a tort.</u> If that is the case, [the mishna's formulation] <i>they build the wall</i> should [be phrased as] <i>they build it!</i> Rather, what [is the sense of the word <i>mehitzah</i>]? A subdivision. <i>Who wanted to make a subdivision</i> – [if the sense of the word <i>mehitzah</i> is 'subdivision'] it should [say] <i>who wanted to subdivide!</i> [The mishna adopted popular idiom,] as people say: "Let's make a division.</p>	<p>לישנא בתרא</p> <p>סברוה: מאי "מחיצה"? פלוגתא. דכתיב (במדבר לא) ותהי מחצת העדה . וכיון דרצו בונין את הכותל בעל כורחן אלמא היזק ראייה שמיה היזק. אימא, מאי "מחיצה"? גודא , <דתנן> [דתניא] מחיצת הכרם שנפרצה אומר לו גזור נפרצה אומר לו גזור נתיאש הימנה ולא גדרה הרי זה קידש וחייב באחריותה . וטעמא דרצו הא לא רצו אין מחייבין אותו אלמא היזק ראייה לאו שמיה היזק. אי הכי, "בונין את הכותל" - "בונין אותו" מבעי ליה! אלא מאי? פלוגתא. אי הכי, "שרצו לעשות מחיצה" - "שרצו לחצות" מבעי ליה! כדאמרי אינשי, "תא נעביד פלוגתא".</p>

What we see here is the common core of each *lishna*/formulation, which is totally focused on a simple textual problem in the *mishna*. The problem is that if we understand the term *mehitzah* to mean 'wall', the mishna's use of the term *kotel*/wall appears redundant; but if we understand it to mean 'subdivision', we have to explain the use of the awkward formulation 'to make a subdivision' as opposed to 'to subdivide'. These are very minor textual problems (based on the assumption that the *mishna* is phrased in the most concise way possible), and the two *lishnot* come to opposite conclusions, offering a simple explanation for the remaining textual incongruity. Why then does the Talmud bring in the issue of *hezzeq re'iyah*, which is apparently not addressed in the *mishna*?

Before we find an answer to the first question, which is bound up in the structure of our *sugya* as a whole, we must answer the second. The secondary layer, which weaves *hezzeq re'iyah* into the discussion, is akin to a response to the often-posed Talmudic question: *Mai ikka beynayhu* or *lemai nafqa minnah* - What are the differing practical implications of the each formulation? What is at stake? Whereas initially it seemed that there were no real-life implications for the different readings of this *mishna*, each possibility is now connected to a concrete approach to the parameters of the right to personal privacy on one's property.

The *hezzeq re'iyah* layer of each *lishna* is grounded in each reading's understanding of the phrase *sheratzu*/'who wanted'. According to the assumption that *mehitzah*='wall', we would translate the phrase *hashutafin sheratzu la'asot mehitzah* as 'joined owners who wish to make a wall', in which case the building of the wall appears completely voluntary and thus if one party does not desire a wall, the other cannot enforce her/his right to personal privacy. However, if we assume that *mehitzah*='subdivision', the clause *bonin et hakotel ba-emtza*/'they construct the wall in the middle' appears to be the standard method of subdivision, and thus *hezzeq re'iyah shemeh hezzeq* – exposure to the prying eyes of neighbors is a true nuisance from which one has the enforceable right to be free.

The object of the verb *ratzu* ('agreed') in our *mishna* has already been a subject of discussion prior to the final composition of our *sugya*. In the light of *mishna* Baba Batra 1:6, which states that one party may only enforce a subdivision on the other if the courtyard is of a minimal size, fixed as four cubits by four cubits, the Talmud Yerushalmi (1:1 [12:4]) anonymously offers two ways of reading the *mishna*: Either the parties are voluntarily subdividing a small courtyard; or they are subdividing a large courtyard – in which case it may be willing (i.e. *sheratzu*) or may be imposed by one party on the other:

<p>Assuming that this <i>mishna</i> refers to a courtyard of any size,] how is it that we have learned elsewhere (<i>mishna</i> B.B. 1:6): <i>They do not subdivide a courtyard unless there are four cubits for this party and for cubits for this [the other party]</i>? They respond: There [in the <i>mishna</i> just cited, we are referring to a case] in which they do not both agree. But here [in our <i>mishna</i> we are referring to a case] in which they both agree. And even if you say that [our <i>mishna</i> speaks of a case] in which they do not both agree, [we can say that the <i>mishna</i>'s sense is not so narrow, and that] if one party wants [to subdivide] they force the other, if the other party wants [to subdivide] the can force the [first party].</p>	<p>היך תנינן תמן אין חולקין את החצר עד שיהא ארבע אמות לזה וארבע אמות לזה. אמרי תמן בשאין שניהן רוצין ברם הכא בששניהן רוצין ואפילו תימר הכא בשאין שניהן רוצין רצה זה כופין לזה רצה זה כופין לזה</p>
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The above Yerushalmi, however, does not appear to be discussing the construction of a wall per se, but rather the mere subdivision of the property and in which case this may be imposed by one party on another. This is no less true of the discussion which is appended to the second *lishna*, in which Rabbi Yohannan offers the solution presented in the Yerushalmi (that the *mishna* is speaking about a small courtyard). Even this, however, appears not to be a discussion pertaining to *hezzeq re'iyah*, but rather to subdivision itself. In order to illustrate this, we should bracket

the question concerning *hezzeq re'iyah* found later in the discussion in the Babylonian Talmud (3a):

<p>But if <i>hezzeq re'iyah</i> is a tort } what does [the fact] that they agreed [teach us]? Even if they do not agree [the law stated in the mishna should still apply]! R' Assi said in the name of R' Yohannan: Our mishna [refers to a courtyard which due to its small dimensions] has no right of division – and [they still subdivide if] they wish. - What does the mishna teach us? That when there is no right of division they may [still] subdivide. [But] we have already learned (mishna B.B. 1:6): When [does the law apply that each party may not force the other to subdivide, if there is not a minimal area available to use after the division]? When they do not both wish [to subdivide] – but if they both wish [to subdivide], even if there is less than this [minimal area left to each party after subdivision] they may divide [the property]. [Thus the formulation of our mishna appears redundant, for we have learned the same law from another mishna!] If we had learned this law [only] from there, I might have thought that even [if the courtyard is] smaller [than prescribed in mishna 1:6, it would be sufficient to divide] with a mere screen. [Therefore] it teaches us: 'wall'. - So teach us this [mishna (1:1)] and not the other! [Mishna 1:6] is necessary for its final clause: But scriptural scrolls may not be divided even in both parties agree. - How then [have we] interpreted the mishna? As [referring to a courtyard] which has no right of division. If it [refers to a courtyard] with no right of division, what does it matter? They may retract [their consent to subdivide if either party does not wish to build a wall]! R' Assi replied in the name of R' Yohannan: [Our mishna refers to a case] in which they acquired the property from each other. - And even if they acquired it from one another, what does it matter? Acquisition is only a verbal agreement [and they may still retract]! - [We are speaking of a case] in which they performed a formal act of acquisition to take different parts [of the courtyard]. R' Ashi said: [The effective acquisition takes place if] for example each one entered their section and took actual possession.</p>	<p>{ ואי היזק ראייה שמיה היזק } מאי איריא רצו? אפי' לא רצו נמי! א"ר אסי א"ר יוחנן : משנתנו כשאין בה דין חלוקה, והוא דרצו. מאי קמ"ל? דכי לית ביה דין חלוקה כי רצו פליגי. תנינא : אימת? בזמן שאין שניהם רוצים ; אבל בזמן ששניהם רוצים אפילו פחות מכאן חולקין ! אי מהתם, הוה אמינא אפילו פחות מכאן במסיפס בעלמא קמ"ל הכא כותל. וליתני הא ולא ליתני הך! סיפא איצטריכא ליה : וכתבי הקדש אע"פ ששניהם רוצים לא יחלוקו. במאי אוקימתא למתני ?"בשאין בה דין חלוקה -אי בשאין בה דין חלוקה, כי רצו מאי הוי ? נהדרו בהו ! א"ר אסי א"ר יוחנן שקנו מידן. וכי קנו מידן מאי הוי ? קנין דברים בעלמא הוא ! בשקנו מידן ברוחות. רב אשי אמר : כגון שהלך זה בתוך שלו והחזיק וזה בתוך שלו והחזיק :</p>
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The above appears to have nothing to do with the question of *hezzeq re'iyah* – it is concerned solely with the question of voluntary subdivision versus the ability of one party to force the other to subdivide. But in this discussion we have a possible source for the discussion of *hezzeq re'iyah*: Why should it not be enough to simply delineate the boundaries between each party's properties without building a wall? By offering a solution to the problem of why the *mishna* would repeat laws that we know from elsewhere, the Talmud focuses upon the construction of a wall as something of *value*. Apparently there is some specific gain in subdividing a courtyard with a wall, which may be the desire for privacy from one's neighbors. Though this is conjecture, I

would like to suggest that this may be the original point of entry of *hezzeq re'iyah* into our *sugya*. *Hezzeq re'iyah* then becomes the practical difference between the two *lishnot*. And as the redactors of the *sugya* launched an attack on the conclusion of the first *lishna* – that privacy from the prying eyes of one's neighbor is *not* an enforceable need – they placed the second *lishna* after their series of objections as a preferable alternative to the first.

I would like to visually map out the three distinct layers in our *sugya*. In regular font are the original two *lishnot* which focus on the basic textual problem that arises from the mishna; underlined is the independent *sugya* on the meaning of the phrase *sheratzu*'who agreed' as reflected also in the Yerushalmi; and in italics is the final layer, the discussion of *hezzeq re'iyah* that functions as the glue between the various building blocks of the *sugya*, identifies the deeper implications of the originally arcane question concerning the meaning of the word '*mehitzah*', and presents a series of demonstrations (using the formulation *ta shema*'come and hear') that *hezzeq re'iyah* is a tort.

סברוה, מאי "מחיצה" גודא. כדתניא: מחיצת הכרם שנפרצה אומר לו גזור חזרה ונפרצה אומר לו גזור נתיאש הימנה ולא גדרה ה"ז קידש וחייב באחריות. טעמא דרצו הא לא רצו אין מחייבין אותו אלמא היזק ראייה לאו שמיה היזק. ואימא "מחיצה" פלוגתא, כדכתיב (במדבר לא) ותהי מחצת העדה. וכיון דרצו בונין את הכותל בעל כרחו אלמא היזק ראייה שמיה היזק. אי הכי, האי "שרצו לעשות מחיצה" - "שרצו לחצות" מבעי ליה! אלא מאי? גודא. "בונין את הכותל" - "בונין אותו" מבעי ליה! אי תנא "אותו", הוה אמינא במסיפס בעלמא קמ"ל כותל.

{בונין את הכותל באמצע וכו': פשיטא לא צריכא דקדים חד ורצייה לחבריה מהו דתימא מצי א"ל כי איתרצאי לך באוירא בתשמישתא לא איתרצאי לך קמ"ל} ³

והיזק ראייה לאו שמיה היזק? <סימן גינה כותל כופין וחולקין חלונות דרב נחמן>

ת"ש וכן בגינה גינה שאני כדר' אבא דאמר ר' אבא אמר רב הונא אמר רב אסור לאדם לעמוד בשדה חבירו בשעה שהיא עומדת בקמותיה והא וכן קתני אגויל וגזית ת"ש כותל חצר שנפל מחייבין אותו לבנות עד ד' אמות נפל שאני ודקארי לה מאי קארי לה סיפא איצטריכא ליה מד' אמות ולמעלה אין מחייבין אותו ת"ש כופין אותו לבנות בית שער ודלת לחצר ש"מ היזק ראייה שמיה היזק הזיקא דרבים שאני ודיחיד לא ת"ש אין חולקין את החצר עד שיהא בה ד' אמות לזה וד' אמות לזה הא יש בה כדי לזה וכדי לזה חולקין מאי לאו בכותל לא במסיפס בעלמא תא שמע החלונות בין מלמעלה בין מלמטה ובין מכנגדן ד' אמות ותני עלה מלמעלן כדי שלא יציץ ויראה מלמטן כדי שלא יעמוד ויראה מכנגדן כדי שלא יאפיל הזיקא דבית שאני תא שמע דאמר רב נחמן אמר שמואל גג הסמוך לחצר חבירו עושין לו מעקה גבוה ד' אמות שאני התם דאמר ליה בעל החצר לבעל הגג לדידי קביעה לי תשמישי לדידך לא קביעה לך תשמישתך ולא ידענא בהי עידנא סליקא ואתית דאיצטנע מינדך

³This piece, which I have put in brackets, is not structurally a part of the *sugya*. It is, rather an independent question on the mishna, which is then inserted into our discussion before it moves past that particular clause of the mishna. *Where* it is inserted is informative, however. Its location marks a fault-line in the *sugya*, and the Tosafot (s.v. *בונין את הכותל באמצע*) identify this piece as the first of the series of challenges posed to the position of the first *lishna*, i.e. that *hezzeq re'iyah* is not a substantial tort. Note that the same reading is used in order to settle the problem of the redundancy of our mishna's formulation in the final piece of the *sugya*.

סברוה: מאי "מחיצה"? פלוגתא. דכתיב (במדבר לא) ותהי מחצת העדה . וכיון דרצו בונין את הכותל בעל כורחן אלמא היזק ראייה שמייה היזק . אימא, מאי "מחיצה"? גודא , <דתניא> [דתניא] מחיצת הכרם שנפרצה אומר לו גזור נפרצה אומר לו גזור נתיאש הימנה ולא גדרה הרי זה קידש וחייב באחריותה . וטעמא דרצו הא לא רצו אין מחייבין אותו אלמא היזק ראייה לאו שמייה היזק . אי הכי, "בונין את הכותל" - "בונין אותו" מבעי ליה! אלא מאי? פלוגתא. אי הכי, "שרצו לעשות מחיצה" - "שרצו לחצות" מבעי ליה! כדאמרי אינשי, "תא נעביד פלוגתא.h.

ואי היזק ראייה שמייה היזק , מאי איריא רצו? אפ' לא רצו נמי! א"ר אסי א"ר יוחנן: משנתנו כשאין בה דין חלוקה, והוא דרצו. מאי קמ"ל? דכי לית ביה דין חלוקה כי רצו פליגי. תנינא: אימתי? בזמן שאין שניהם רוצים; אבל בזמן ששניהם רוצים אפילו פחות מכאן חולקין! אי מהתם, הוה אמינא אפילו פחות מכאן במסיפס בעלמא קמ"ל הכא כותל. וליתני הא ולא ליתני הך! סיפא איצטריכא ליה: וכתבי הקדש אע"פ ששניהם רוצים לא יחלוקו. במאי אוקימתא למתני? בשאין בה דין חלוקה - אי בשאין בה דין חלוקה, כי רצו מאי הוי? נהדרו בהו! א"ר אסי א"ר יוחנן שקנו מידן . וכי קנו מידן מאי הוי? קניו דברים בעלמא הוא! בשקנו מידן ברוחות. רב אשי אמר: כגון שהלך זה בתוך שלו והחזיק וזה בתוך שלו והחזיק:

By laying out the *sugya* as above, we can clearly see how the redactors have taken two distinct discussions – the question of how to read the awkward formulation of the mishna, and the object of the phrase *sheratzu*/'who agreed' – and woven them together by reading both through the lense of *hezzeq re'iyah*. *Hezzeq re'iyah* functions as the real-life, practical import of the two *lishnot*, and as the fullest unfolding of the discussion of coerced subdivision.

From a rhetorical viewpoint, the composition of our *sugya* is masterful. After first presenting the case for reading *mehitzah* in the lease counterintuitive fashion, the reader/transmitter is presented with the conclusion that one cannot enforce the construction of a wall, as *hezzeq re'iyah* is not considered a real tort. Then the reader/transmitter is presented with a challenge: Does that conclusion really fit with what we know from other mishnayot from our tractate? What follows is an onslaught in which the reader/transmitter is shown that exposure to the prying eyes of others is considered harmful in virtually every case that one is not actually in public – the only case left undetermined being that of a courtyard. Now the reader is presented with the second *lishna*, with its (somewhat counterintuitive) conclusion that *mehitzah* means 'subdivision', and that *hezzeq re'iyah* is therefore a true tort. Now more receptive to that conclusion, even *desiring* it, the reader is happy to accept the second *lishna* as authoritative. This rhetorical device, as a result of which the reader is made more receptive to a forced reading, is identified by the Tosafot (B.B. 2b s.v. ואימא מאי) as the justification for offering the second *lishna*, which would in and of itself be considered a forced reading.

Other than its legal implications and literary mastery, our *sugya* is informative in another sense: It sheds light on the dispute among the *rishonim* as to whether, when the Talmud presents two *lishnot*, the law is determined in concordance with the first or second version. Whilst a number of *rishonim*⁴ suggest that the Talmud views the first version that it presents as primary and the second as an appendix of sorts, others⁵

⁴Cf. Riva, quoted in Tosafot Tractate Shabbat 42b s.v. והיינו דר"נ.

⁵ Cf. Rabbenu Tam, on our *sugya* BB 2a s.v. סברוה מאי מחיצה גודא; R. Isaac ibn Giat, quoted by the

suggest that the second *lishna* is to be viewed as the Talmud's conclusion. Though the *poskim* are trying, understandably, to standardize the process of rendering authoritative legal decisions, it seems that both approaches are attested in the Talmud. Our *sugya* is a powerful example of the *lishna batra* as a conclusion. A further piece of evidence for this deliberate construction in our discussion here is the use of the term *fourcomposer* of the implying that *sugya* have an opinion on the matter (and that those posing the solution were mistaken).⁶

The question that must be asked at this point is then, why did the composer/s of the *sugya* prefer the position of *hezzeq re'iyah* as a true tort over the alternative? What is at stake here? The clearest formulation of why one may not adopt the position of *hezzeq re'iyah shemeh hezzeq* is stated in the *hava amina* (a hypothetical option that is subsequently rejected) inserted at the end of the first *lishna*: *כי איתרצאי לך* – the party upon whom the building of the wall is enforced loses space (half of the thickness of the wall). In addition, they must cover half of the cost of the construction of the wall. We know, in general, that the rabbis do not take the removal of property lightly. The most famous expression of this is the dictum *המוציא מחברו עליו הראיה*,⁷ though examples abound. In addition, in our tractate (7a) we find that the construction of a wall – even on the one's neighbor's property – is recognized as an annoyance and constricting, even if it is not prohibited by law. So why does the Talmud accord such weight to the principle of *hezzeq re'iyah* that it outweighs these other concerns?

We can begin to find an answer to this if we turn to Mishna Baba Batra 2:3, which discusses the circumstances under which one may object to disturbances created by one's neighbor:

<p>If there is a shop [in one's residential courtyard], one may object and say to [the shop-owner]: "I cannot sleep because of the traffic of customers (lit. Those coming and going)." But [a resident of the courtyard] may make goods [to sell], and go out and sell them in the marketplace, and one may not object and say to him: "I cannot sleep because of the sound of the hammer, and the sound of the mill, and the sound of the children."</p>	<p>חנות שבחצר--יכול למחות בידו ולומר לו איני יכול לישן לא מקול הנכנסין, ולא מקול היוצאין. אבל עושה כלים, ויוצא ומוכר בשוק; ואינו יכול למחות בידו ולומר לו איני יכול לישן, לא מקול הפטיש, ולא מקול הריחיים, ולא מקול התינוקות.</p>
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Though Abbaye (on this mishna in the Bavli, 20b) reads this mishna differently, all the other sources appear to reflect very clearly the understanding that according to this mishna, one may not object to *domestic noise*. A legitimate objection is the effective violation of the courtyard's residential quality – bringing the market into the courtyard and turning it into a commercial zone. The Talmud Yerushalmi (2:3) and the Tosefta (1:4) both make explicit that the claim against the *נכנסין ויוצאין* is one of being inconvenienced by crowding – *מרבין עליו את הדרך*. The illegitimate claim, made in the first clause of the *mishna*, is one that *limits the basic domestic use of one's home*. One's full domestic freedom, in this *mishna*, is given more

Ran on Tractate Avodah Zarah 7a.

⁶ Though the term appears also at the beginning of the second *lishna*, the Tosafot (2b s.v. *סבריה מאי*) explain that as the second formulation is conclusive, the first uses *סבריה*, while the second formulation mimics the structure of the first and thus adopts this term.

⁷BM 100a, BK35b, BB...

consideration than the neighbor's right to be free of annoyance due to noise.⁸

What emerges from the above is that *full domestic freedom* is closely defended in rabbinic sources (with the exception of Abbaye as noted). The courtyard/*hatzer* an interesting case, as it is a midpoint between the private and public domain. A clear explication of the boundaries of the private/public domains in the context of Sabbath practices is found in the opening passages of Tosefta Shabbat. According to these definitions (cited also in Talmud Bavli Shabbat 6a, and stated explicitly in Mishna Eruvin 9:2), a courtyard is a midpoint between the private and public domains. Even more striking an illustration of the use of the courtyard as an extension of one's private domain is the statement in our *sugya* Baba Batra (2b), which (at least theoretically) limits the reading of Rav Nahman's statement in the name of Shmuel: דאמר ליה בעל החצר לבעל הגג לדידי קביעה לי תשמישי לדידך לא קביעה לך תשמישתך ולא מינך – "For the owner of the courtyard can say to the owner of the roof: 'My use of the courtyard is regular, your use of the courtyard is irregular, and I do not know at which time you may ascend [to the roof] and come so that I may make myself modest [*or*: remove myself from your sight].'" Here, the courtyard is being used as a private domain in its fullest sense, so that the unannounced arrival of another is a serious intrusion.

Now we understand that after subdivision, the exposure of one party's courtyard space to the gaze of on looking neighbors severely limits the use of *the entire portion of privately owned courtyard*. In order to allow one to use one's courtyard in the usual manner – in its full capacity, as an extension of one's domestic space – the composer/s of our *sugya* were willing to prevent another party from using a small portion of their own space, and to impose a monetary payment on the latter party.

By identifying the individual building blocks of the opening *sugya* of Baba Bathra, we can begin to see how the redactor/s of the passage elegantly wove a literary piece out of purely legal discussions. The intention of this composition is to lead the reader to the conclusion that exposure to the prying eyes of one's neighbors – *hezzeq re'iyah* – is a true tort, one that must be taken into account when determining the scope of a party's ability to insist on the construction of a wall that is situated partially on their neighbor's property. It takes the reader beyond the simple questions of how to read redundant expressions in the *mishna*, and into the realm of real legal consequence and *mitzvot beyn adam lahavero*.

The ultimate message that emerges from this *sugya*, the destination to which it leads us, is that if one party's insistence on full, expansive use of their domain severely limits the freedoms of another, that expansive use must be limited. This sense of the necessity of the limitation of oneself in order to facilitate a fuller life for others is reminiscent of the kabbalistic concept of *tzimtzum* – according to which the Godhead limits itself in the ultimate expression of willingness to generate space for another. In our *sugya*, when the concerns of two neighbors come into conflict, the necessity to impose very real limitations on one in order to facilitate the full freedom of another within the boundaries of their property becomes enforceable law.

⁸Abbaye, by reading the *seyfa* (final clause) as applying to the neighboring courtyard, effectively balances these concerns in the reverse manner. According to him, one may indeed object to the noise disturbance produced by one's neighbor.

Creation and Destruction:

[Baba Batra 3b-4a]

Aleš Koukal and Joshua Simon Schwartz

I. Introduction

The following discussion of Baba Batra 3b-4a, is divided into two sections, the first deals with the historical aspects of the Herod tale, and the second with the relationship between the halakha and aggada in the sugya. We bring the Talmudic text first, together with an original translation.

Baba Batra 3b-4a⁹

R' Hisda said, “One should not tear down a synagogue before they build another one.” There are those who said that [the reason is] fear of neglect [of rebuilding the synagogue], and others said it is prayer [being interrupted]. What is the [practical] difference between them? If there is a [nother] place to pray (following the version from *mesorat hashas*).

Mareimar and **Mar Zutra** tore down and built a synagogue for the summer in the autumn and for the autumn in the summer.

Ravina said to **R' Ashi**, “If the money [for building a new synagogue] has been collected and is ready, what [is the law? i.e. Can we tear down the current synagogue to build a new one?]” He responded, “Perhaps [the money] must be donated for redemption of captives.” “What if the bricks are piled, and the lathes trimmed, and the beams ready?” “It is possible that they must be sold to fund redeeming captives.” “If so, then it could apply to when they have already built it!”

[**R' Ashi**] said, “People’s houses are not sold [to redeem captives].”

All this does not apply if one does not see cracks [in the structure]. If one does see cracks, then tear it down and build [a new one], as when **R' Ashi** saw cracks in the synagogue of Mata Mehasia and tore it down. He brought in his bed and did not leave until they fixed even the gutters.

Bava b. Buta provided counsel to **Herod** to tear down the Temple [in order to expand and renovate it]. But did not **R' Hisda** state, “One should not tear down a synagogue before they build another one!?”

One could say it is because he saw cracks in [the structure]. One could say [his counsel was valid] because a situation involving the government [lit. monarchy], since they do not renege, as **Samuel**

בבא בתרא ג ע"ב-ד ע"א

אמר **רב חסדא**: “לא ליסתור איניש בי כנישתא עד דבני בי כנישתא אחריתי.” איכא דאמרי משום פשיעותא, ואיכא דאמרי משום צלויי. מאי בנייהו? איכא בנייהו דאיכא (בי כנישתא אחריתי) [דוכתא לצלויי].

מרימר ומר זוטרא סתרי ובנו בי קייטא בסיתווא, ובנו בי סיתווא בקייטא.

אמר ליה **רבינא לרב אשי**, “גבו זוזי ומחתי מאי?” אמר ליה, “דילמא מיתרמי להו פדיון שבויים.” “ויהבי להו שריגי ליבני, והדרי הודרי ומחתי כשורי מאי?”

אמר ליה, “זמנין דמתרמי להו פדיון שבויים מזבני ויהבי להו!” “אי הכי אפילו בנו נמי?”

אמר ליה, “דירתיה דאיניש לא מזבני.” ולא אמרן אלא דלא חזי בה תיוהא, אבל חזי בה תיוהא סתרי ובני, כי הא **דרב אשי** חזא בה תיוהא בכנישתא דמתא מחסיא סתריה, ועייל לפורייה להתם, ולא אפקיה עד דמתקין ליה שפיכי.

ובבא בן בוטא היכי אסביה ליה עצה להורדוס למיסתריה לבית המקדש, והאמר **רב חסדא**, “לא ליסתור איניש בי כנישתא עד דבני בי כנישתא אחריתא!?”

אי בעית אימא תיוהא חזא ביה, איבעית אימא מלכותא שאני דלא הדרא ביה, דאמר **שמואל**, “אי אמר מלכותא, ‘עקרנא טורי, עקר טורי ולא הדר ביה.”

⁹ The Talmudic text is taken from the Vilna printed addition, with some textual variants based on ms. Escorial.

said, "If the government says, "I will uproot [these] pillars, it will uproot the pillars and not renege.

{The Tale}

Herod was a slave of the house of the Hasmonians, and he spied upon a certain **maiden** [of the Hasmonian house]. One day, he heard a *bat kol* [revelatory voice]¹ saying, "Any slave who rebels today will be victorious." He arose and killed all [the members of the Hasmonian house] but left safe that certain **maiden**.

When that **maiden** saw that he desired to marry her, she went up to the roof, raising her voice saying, "Anyone who comes and says that he is a slave of the house of Hasmonia is [truly] a slave! Since there are none left except for this **maiden** [referring to herself in 3rd person], and this **maiden** fell from the roof to the ground!" [She jumps.]²

He preserved her in honey for seven years. There are those who say that he had sex with her, and there are those who say that he did not. To those who say he had sex, [he preserved her] to satisfy his desires. And to those who say he did not, [he preserved her] so that it would be said that he married the princess.

[**Herod**] said, "Who expounds the verse, 'From within your brethren you will place a king...' (Deut 17:15) [focusing on the exclusiveness of brethren]? The Rabbis!" So he arose and killed them all save **Bava b. Buta** from whom he could take advice.

He [**Herod**] gave him [**Bava b. Buta**] a wreath of thorns and tore out his eyes. One day, [**Herod**] sat before him, saying, "See, sir, what this disgraceful slave [referring to himself] does?" [**Bava b. Buta**] replies, "What shall I do to him?" He says, "Curse him, sir." He says, "It is written, 'Never curse a king, even in your thoughts...'" (Ecc. 10:20) [**Herod**] replies, "He's not really a king!" [**Bava b. Buta**] says, "Even if he is only a rich man, it is written, 'And in your bedchambers do not curse the rich.' (ibid) And even if he is only a prince, it is written, 'And a prince in your people do not curse.'" (Ex. 22:27) He says, "This only applies to one who acts in your ways, but this one does not act in your ways!" [**Bava b. Buta**] responds, "I am afraid of him [i.e. that someone will hear and tell Herod]."³ [**Herod**] says, "There is no one to go and tell him, since it

{המעשה}

הורדוס עבדא דבית חשמונאי הוה, נתן עיניו באותה **תינוקת**. יומא חד שמע הוה גברא בת קלא דאמר, "כל עבדא דמריד השתא מצלח." קם קטלינהו לכולהו מרותיה ושיירה להיא **ינוקתא**.¹⁰

כי חזת ההיא **ינוקתא** דקא בעי למינסבה, סליקא לאיגרא ורמא קלא אמרה, "כל מאן דאתי ואמר מבית חשמונאי קאתינא, עבדא הוה! דלא אישתיירא מינייהו אלא ההיא **ינוקתא**, וההיא **ינוקתא** נפלה מאיגרא לארעא!"¹¹

טמנה שבע שנין בדובשא. איכא דאמרי בא עליה; איכא דאמרי לא בא עליה. דאמרי לה בא עליה, הא דטמנה ליתוביה ליצריה. ודאמרי לה לא בא עליה האי דטמנה כי היכי דנאמרו בת מלך נסב.

{**הורדוס**} אמר, "מאן דריש, 'מקרב אחיך תשים עליך מלך' (דברים יז: טו) רבנן!" קם קטלינהו לכולהו רבנן שבקיה **לבבא בן בוטא** למשקל עצה מניה. אהדר ליה כלילא דיילי, נקרינהו לעיניה. יומא חד אתא ויתב קמיה. אמר, "חזי מר, האי עבדא בישא מאי קא עביד?" אמר ליה, "מאי אעביד ליה?" אמר ליה, "נלטייה, מר." אמר ליה, "נכתב" גם במדעך מלך אל תקלל." (קוהלת י: כ) אמר ליה, "האי לאו מלך הוה!" אמר ליה, "וליהו עשיר בעלמא. וכתב, 'ובחדרי משכבך אל תקלל עשיר', (קוהלת י: כ) ולא יהא אלא נשיא, וכתב, 'ונשיא בעמך לא תאור'. (שמות כב: כז) אמר ליה, 'בעושה מעשה עמך, והאי לאו עושה מעשה עמך!' אמר ליה, 'מסתפינא מיניה'¹². אמר ליה, 'ליכא איניש דאזיל דלימא ליה דאנא ואת יתיבנא." אמר ליה, "כתב, 'כי עוף השמים יוליך את הקול ובעל כנפים יגיד דבר'. (קוהלת י: כ) אמר ליה, 'אנא הוה!'¹³ אי הואי ידענא דזהרי רבנן כולי האי, לא הוה קטילנא להו. השתא מאי תקנתיה דהוה גברא?" אמר ליה, "הוה כבה אורו של עולם, דכתב, 'כי נר מצוה ותורה אור'. (משלי ו: כג) ילך ויעסוק באורו של עולם,

10 This is made explicit only in the printed ed. Ms. Escorial leaves this out.

11 It is unclear whether the line, וההיא **ינוקתא** נפלה מאיגרא לארעא, is a continuation of the princess' suicide speech, or whether it is an editorial note. We have chosen to translate it as a continuation of the speech, since it appeared to us that it completes the princess' thought regarding no Hasmonian being left.

12 Ms. Escorial reads, מסתפינא דילמא (א) איגלי, making explicit what Bava b. Buta was afraid of.

13 Ms. Escorial does not contain this explicit identification.

is only you and I sitting here.” He replies, “It is written, 'For a bird of the skies will carry the utterance, and a winged creature shall report the matter.'” (Ecc. 10:20) **[Herod]** says, “I am he!⁴ Had known that the Rabbis were so cautious, I would not have killed them. Now, what can this man do to fix it?” He says, “He extinguished the light of the world [the Torah], as it is written, 'For a commandment is a candle and the Torah light.'” (Prov. 6:23) He should go and busy himself with the light of the world [the Temple], as it is written, “And all the nations shall be illumined by it.” (Is. 2:2)

There are those who say: **[Bava b. Buta]** said, “He blinded the eye of the world [the Torah], as it is written, 'If it was done away from the eyes of the community,' (Num 15:24) He should go and busy himself with the eye of the world [the Temple], as it is written, 'I am going to desecrate my sanctuary, your great strength, the delight of your eyes.’” (Ez. 24:19)

[Herod] says to him, “I am afraid of the government.” He replies, “Send them a messenger, who will travel there for a year, stay for a year, and return for a year. Until then, tear [the Temple] down and build it up. He did so, and [the government] send to him, “If you have not begun tearing down, do not start; if you have started, do not build; if you have torn down and built, you are a wicked slave who asks for permission after he has completed the task! Even though you bear your weapons, your book [of your genealogy] is here. You are not a *rakha*⁵ nor the son of a *rakha*. **Herod** is a slave who made himself a free man.

What is a *rakha*? A king, as it is written, “Today I am weak [*rakh*] and an anointed king.” (2 Sam 3:39) If you wish, you could say it derives from here, “They called before him *abrekhl!*” (Gen. 41:43)

They say that if one has not seen the building of **Herod** has not seen a beautiful building in his life. With what was it build? **Rabbah** said, “With stones of alabaster and white marble.”

There are those who say: with stones of black [or blue] marble, alabaster, and white marble.

Rows alternated in and out so they could be plastered.

[Herod] considered gilding it with gold, but the **Rabbis** said, “Leave it, since this is much better, looking like the waves of the sea.”

How could **Bava b. Buta** act thusly, since **R'**

דכתיב, 'ונהרו אליו כל הגוים.'” (ישעיהו ב: ב) איכא דאמרי הכי: אמר ליה, 'הוא סימא עינו של עולם, דכתיב, 'והיה אם מעיני העדה.' (במדבר טו: כד) ילך ויתעסק בעינו של עולם, דכתיב, 'הנני מחלל את מקדשי גאון עוזכם מחמד עיניכם.' (יחזקאל כד: כא)

אמר ליה, "מסתפינא ממלכותא." אמר ליה, "שדר שליחא, וליזיל שתא, וליעכב שתא, ולהדר שתא. אדהכי והכי סתריית [ליה] ובניית [ליה]."

עבד הכי. שלחו ליה, "אם לא סתרתה, אל תסתור; ואם סתרתה, אל תבני; ואם סתרתה ובנית, עבדי בישא בתר דעבדין מתמלכין! אם זיינך עלך, ספרך כאן. לא רכא¹⁴ ולא בר רכא.⁴ הורדוס [עבדא] קלניא מתעביד."

מאי רכא⁴? מלכותא, דכתיב, 'אנכי היום רך ומשוח מלך.' (שמואל ב ג: לט) ואי בעית אימא מהכא, 'ויקראו לפניו אברך.' (בראשית מא: מג)

אמרי מי שלא ראה בנין הורדוס, לא ראה בנין נאה [מימיו].

במאי בנייה? אמר רבה, "באבני שישא ומרמא."

איכא דאמרי: באבני כוחלא שישא ומרמא. אפיק שפה ועייל שפה כי היכי דנקביל סידא. סבר למשעייה בדהבא. אמרו ליה רבנן, "שבקיה דהכי שפיר טפי דמיחזי כי אידוותא דימא."

ובבא בר בוטא היכי עבד הכי, והאמר רב יהודה, אמר רב, ואיתימא ר' יהושע בן לוי, "מפני מה נענש דניאל? מפני שהשיא עצה לנבוכדנצר, שנאמר, 'להן מלכא מלכי ישפר עלך

14 Ms. Escorial reads רבא instead of רכא, though it too makes use of the same proof text with the word רך as the midrashic linchpin.

<p>Judah said in the name of Rav, though some say R' Joshua b. Levi, “Why was Daniel punished? Because he gave counsel to Nebuchadnezzar, as it is said, ‘Therefore, O king, may my counsel be acceptable to you: Redeem your sins through justice and your iniquities but giving to the poor; then your serenity may be accepted...’ (Dan. 4:24), and [then] it is written, ‘All this befell Nebuchadnezzar,’ and then it is written, ‘Twelve months later...?’” (Dan. 4:26) [i.e. Daniel's advice was effective for 12 months!]</p> <p>One could say [postulating why Bava b. Buta was right to do what he did] that the case of a slave is exceptional, since he must obey [the king's] commands, or one could say that the case of the Temple is exceptional, since without the government, it could not have been built.</p> <p>And Daniel, from where [do we know that] he was punished? Perhaps from where it was written, “Esther called to Hatakh,” (Es. 4:5), and Rav said, “Hatakh is Daniel.” This [proof] is satisfying for the one who says that he was cut down from his grandeur, but for the one who says that [Hatakh's name implies that] all matters of state were decided from his mouth, what can one say? That he [Daniel] was cast into the lions' den.</p>	<p>וחטאיך בצדקה פרוק ועויתך במיחן עניין הן תהוי ארכא לשלותך וגוי" (דניאל ד: כד), וכתבי, כולא מטא על נבוכדנצר מלכא, ' (דניאל ד: כה), וכתבי, 'ולקצת ירחין תרי עשר וגוי, ' (דניאל ד: כו)?</p> <p>איבעית אימא שאני עבדא, דאיחייב במצות, ואיבעית אימא שאני בית המקדש, דאי לא מלכות לא מתבני.</p> <p>ודניאל מנלן דאיענש? אילימא משום דכתיב, 'ותקרא אסתר להתך. ' (אסתר ד: ה) ואמר רב, "התך, זה דניאל." הניחא למאן דאמר שחתכוהו מגדולתו. אלא למאן דאמר שכל דברי מלכות נחתכין על פיו, מאי איכא למימר? שדיוהו לגובא דארייות.</p>
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II. An Historical Analysis of the Herod Tale in Baba Batra 3b-4a

In our first discussion, we will deal with the question of our sugya's connection to other outside information about Herod, which has been preserved to us mainly in the works of Josephus Flavius; specifically in *The Jewish War* and *The Antiquities of the Jews*. There are many elements to our story which can be interpreted as records or hints to the data we know about Herod from Josephus' works. In the first part of this section, we will bring the passages which were interpreted so by various scholars, regardless of our own opinion about their direct or indirect historical connection to the information we can derive from our *sugya* (Talmudic discussion). In the second part, we will attempt to cover the possibilities of interpretation of this data based on the research of historical researchers as well as our own study of the sugya and its related historiographical material. The following list of points builds on the articles of three scholars who address our sugya and its historical context: Daniel Schwartz¹⁵, Jonathan Wingurt¹⁶, and Israel Ben Shalom¹⁷.

These four historical facts are derived from broader historical evidence, meaning we are not dependent only on the account of Josephus, but we can rely on other ancient historiography as well:

- 1) Herod began his career in the subordinate position to the Hasmonaeans, he did rise

¹⁵ Schwartz, Daniel. “Herod in Jewish Sources.” *King Herod and his Time: Sources, Synopses, Selected Interpretations, and Helpful Material*. Jerusalem: Yad Ben-Zvi [Heb.].

¹⁶ Wingurt, Jonathan. “The Tales of the Rabbis and the Sugyot which Include Them.” [M.A. Thesis] Ramat Gan: Bar Ilan University, 2004 [Heb.].

¹⁷ Ben-Shalom, Israel. *The School of Shammai and the Zealots' Struggle against Rome*. Jerusalem: Yad Ben-Zvi, 1993 [Heb.].

to power by replacing them, and he did so through initiating death of many of them.

2) Herod's ancestors were converted Idumeans three generations back on his father's side and Nabateans on his mother's side.

3) He married a Hasmonaean princess, Miriam, who died in the result of confrontation with him.

4) He rebuilt the Second Temple.

All subsequent points are preserved solely in the works of Josephus Flavius. Due to spatial considerations, we did not bring the passages from Josephus in their full; however, in order to appreciate their similarity to our story, it is preferable to read them in their source. Their account follows the progression of the story in our sugya:

5) Herod was forced to deal with Jewish critics, who feared he would only manage to destroy the Temple but not to rebuild it¹⁸.

6) When Antigonus objected Herod's appointment before the Romans he also used an objection that Herod was only an "Idumean", i.e. a half Jew¹⁹.

6) Herod was believed by the people to be favored and elected by God, which came as a result of the prophetic prediction of his kingship and his miraculous survival from a life-threatening accident²⁰.

7) The wife of Herod's brother, Pheroras, killed herself by jumping from a roof²¹.

8) After killing Aristobulus II, the head of the Hasmonean dynasty which opposed his rise to power, Herod placed his body in honey as a means of preserving it²².

9) Herod expressed desire for Miriam's presence in extraordinary ways even after he had her killed²³.

10) Herod would perambulate in a disguise and listen to his subjects in order to find what they say about him²⁴.

11) After Herod conquered Jerusalem and killed his adversaries, some members of the Hasmonaean clan known as the Sons of Baba managed to survive in hiding, until they were later discovered and killed²⁵.

12) When Herod killed all the members of Sanhedrin, he spared only the sage Sameas, who impressed him with his lack of fear and righteousness.

Another tradition brought in Josephus has its parallel in *Sifra Behukotai 1:2*.

13) During Herod's building of the Temple the rains were falling only at night, as a sign of God's favor²⁶.

What importance should we ascribe to all those elements in the interpretation of our story? To what extent can we see them as the remnants of real historical

¹⁸ *Ant.* 15.388

¹⁹ *Ant.* 14.403

²⁰ *Ant.* 14.454-455; 15.365-378

²¹ *Ant.* 17.71

²² *Ant.* 14.124

²³ *Ant.* 15.229-242

²⁴ *Ant.* 15.367

²⁵ *Ant.* 15.260-266

²⁶ *Ant.* 15.425

occurrences which were creatively utilized by the author/s of this *agaddah*? Is a proper understanding of the meanings they bear conditioned by the author/s historical knowledge? And lastly, should we derive any consequences regarding the historicity of other information in this *aggadah* which were not preserved for us in other texts?

Before we attempt to answer the above listed questions, we must look at the parallel rabbinic sources which contain many elements of our *aggadah*. Below is a brief summary with comments, relating their content to our sugya which is brought in the left column.

Baba Batra	Parallels in Rabbinic Literature
He arose and killed all [the members of the Hasmonean house]	The information about Herod as a successor of Hasmoneans is mentioned in <i>Seder Olam Rabah</i> , chapter 30. It does not mention any killing.
...she went up to the roof, raising her voice saying, “Anyone who comes and says that he is a member of the house of Hasmonea is [truly] a slave! Since there are none left except for this maiden [referring to herself in 3 rd person], and this maiden fell from the roof to the ground!”	In Babylonian Talmud, tractate <i>Kiddushin</i> 70b we have this story brought in the name of Shmuel. However, it does not mention Herod.
He preserved her in honey for seven years. There are those who say that he had sex with her, and there are those who say that he did not.	In <i>Sifrei Dvarim</i> 241 ²⁷ we have a mention of "Herod's act" (מעשה הורדוס) in the sense of an abhorrent sexual act.
[Herod] said, “Who expounds the verse, 'From <i>within your brethren</i> you will place a king...' (Deut 17:15) [Focusing on the exclusiveness of brethren]? The Rabbis!” So he arose and killed them all...	In the <i>Scholion</i> of <i>Megilat Ta'anit</i> ²⁸ there is a tradition of not fasting on the fourth of <i>Kislev</i> , because that day died Herod who hated/killed the rabbis.
[Herod] says, “I am he! Had known that the Rabbis were so cautious, I would not have killed them. Now, what can this man do to fix it?” He says, “He extinguished the light of the world [the Torah], as it is written, 'For a commandment is a candle and the Torah light.' (Prov. 6:23) He should go and busy himself with the light of the world [the Temple], as it is written, “And all the nations shall be illumined by it.” (Is. 2:2)...	In <i>Sifra Behukotai</i> 1:2 there is a tradition that during Herod's building of the Temple the rains were falling only at night, as a sign of God's favor.

At this point, we will move on to consider the various possibilities of interpretation of the historical data and the account of Josephus with their seemingly overlapping passages in our *agaddah*.

²⁷ ספרי דברים רמא (מהדורת פינקלשטיין 271, כ"י וטיקן 32)

²⁸ For all citations of *Megilat Taanit* and the *Scholion*, we referred to *Megillat Ta'anit: Versions, Interpretation, History*. Jerusalem: Yad Ben-Zvi Press, 2003 [Heb.].

There are a number of ways to interpret the similarities between Josephus' histories and rabbinic literature. We can say that both drew from the same tradition and used it in different ways. This approach is taken by Schwartz, who suggests that what we have in our story are the „memoirs of Palestinian tradition,“ which predated the rabbinic literature and Josephus, and which both were acquainted with and drew from. This leads him to the conclusion that the data in rabbinic literature which are not paralleled in Josephus may nevertheless have historical information to share. Thus, says Schwartz, perhaps it befits us to be more open to the possibility that Augustus was not happy about Herod's renovation of the Second Temple. Perhaps the notion that the rulers of Rome had misgivings from the outset should be given more historical weight.

Additional information we can derive is that the general agreements between Josephus and the rabbis allow us some renewed confidence concerning Josephus' familiarity with popular Jewish tradition. Some Josephus' statements are introduced with words referring to such a tradition. Those contain an information about rains during Herod's building of the Temple and Herod's incognito trips. In this perspective the rabbis did not relate consciously to the material preserved in Josephus.

Another approach can be based on the assumption that the rabbis knew either directly or indirectly of Josephus' historiographical account of Herod's life and used it as the background for their own recounting of the story. If this were the case, the contrasting data from the rabbinic account need not be interpreted as a different or distorted historical tradition deriving from the same core, but they may be carrying special meaning and creating a substantial message of their own. The assumption that rabbis knew the historical account and were creatively reworking it, at times plays an important role for Wingurt. Thus he assumes that the rabbis knew the real story of Miriyam and when they call her "a maiden" they want to show her lack of emotional maturity as well as her blind desire.²⁹

A third, and to us, the most convincing option is to say that the similarities between Josephus and our sugya exist predominantly in our imagination, which does the work of relating them so seamlessly. We know that Herod was not perceived as a, "slave." Jumping of the roof can be easily used as a general image for suicide, as we see it in Maimonides's Mishnah Torah³⁰. The Sons of Bava or Sameas are not, in the end, so similar to the rabbinic hero of our story, Bava ben Butta. The author had to keep some of the rabbis alive; otherwise there would be no rabbinic story at all. The notion of kings walking about incognito amongst their subjects, striving to hear what the people think about the government is very common in folk tales, such as stories about Harun ar-Rashid and various European kings, up to the contemporary Jordanian King Abdullah. It is a commonly held fact that immersing a dead body in honey for the purpose of preservation was a common practice amongst Persians, Babylonians, and Syrians. Interestingly, in addition to Aristobulos II, the body of Alexander the Great was also preserved in honey whilst in transit to his homeland³¹.

In conclusion, we find it to be very difficult to proclaim any definitive

²⁹ Wingurt, p. 24

³⁰ Mishne Torah Hilchot Sanhedrin 18:6.

³¹ Robert G. Mayer, *Embalming: History, Theory, and Practice*. New York, London: McGraw-Hill, Medical Pub. Division, 2006, 464.

evidence that our story is reacting to traditions preserved by Josephus and/or data derived from other ancient historiographical sources. The author would be able to construct the story only from the independent traditions we outlined in the parallels in the rabbinical literature. It is impossible to exclude the possibility that parallels contain some historical elements, but it does not appear to be provable. This very much depends on our assumptions about the historical knowledge of the rabbis as well as on our imagination regarding which themes and images in the sugya we are going to see as reflecting on the data we know from Josephus.

III. The Relationship between the *Halakhic* and *Aggadic* elements of the *Sugya*

The appearance of the long *aggada* (rabbinic tale) depicting Herod's slaughter of his Hasmonean and Rabbinic rivals and renovation of the Jerusalem Temple in the midst of the first few folios of tractate Bava Batra in the Babylonian Talmud is has been surprising for many readers. First of all, the *halakhic* (Jewish legal) lemma which introduces the *sugya* (textual section) itself only has an oblique relation to the greater *halakhic* context of the section, since the *mishnah* that begins the discussion deals with cases in which people have the right to compel their neighbors to contribute to construction for the courtyard. Following a complex discussion on the nature and makeup of the building materials listed in the *Mishnah*, the *Gemara* provides a statement from R' Hisda regarding how one enters into the renovations and building of a synagogue,

R' Hisda said, "One should not tear down a synagogue before they build another one."	אמר רב חסדא: "לא ליסתור איניש בי כנישתא עד דבני בי כנישתא אחריתי."
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There does not appear to be a direct connection between the *halakhic* material preceding R' Hisda's statement and the statement itself. Rather, the stronger connection between these two segments is located, rather, in the narrative section. In the *denouement* of the tale, there is an elaboration on how exactly Herod renovated the Temple, including which building materials were used. Specifically, the *aggada* reports that Herod terraced the rows of marble in order to allow them to be plastered (סידא), and the section immediately preceding the story discusses plaster (סידן). In addition, issues regarding the construction and components of the Temple, specifically the Second Temple, arise in the *sugya*.³²

If it is indeed the case that the textual link in the flow of the fragments of the Talmud stitched together by the anonymous editors is between the previous *halakhic* segment about building materials and Herod's elaborate Temple renovation, then the *halakhic* ruling that introduces the *aggada* becomes all the more out of place.³³ The oddness of this *halakhic* prologue is highlighted in Jonathan Feintuch's master's thesis in which he says that the connections between the *halakhic* and *aggadic* sections are only "weak associations." There he refers to the story and the *halakhic* discussion on the preceding page, but he does not address the connection between the immediate *halakhic* frame and the torrid narrative. Given these considerations, R' Hisda's

32 See page 3 in Feintuch, Jonathan. *Ma'asei Chachamim VeHaSugyot HaMechilot Otam: Bava Batra Perakim 1-3*. M.A. thesis Bar Ilan University, Ramat Gan, 2004 [Heb.].

33 R' Hisda and his ruling are mentioned once more, but this too falls in the introductory segment which precedes the story itself, which appears to be a discrete segment.

statement and the following legal discussion appear more and more to be odd insertions.

Talmudic scholar Saul Wingurt sees two themes as uniting factors between the surrounding *halakhic* material and the narrative. Namely, Wingurt identifies the relationship between outer appearance and inner reality and destruction and building. Wingurt sees the earlier material (folios 2a-3a) treating the issue of damage, specifically violation of privacy caused by invasive sight, relating to the scene in which Herod has Bava b. Buta's eyes torn out,³⁴ as well as Herod's larger aim to passing as something he is not, namely, the just inheritor of the Hasmonean throne. Wingurt sees the dialectic between destruction and building as the main textual link, connecting the preceding *halakhic* discussion with the tale, since the topic of R' Hisda's ruling is the precaution surrounding damaging sacred space (or at least space used for sacred activities) in order to build a new space or to renovate an old one. This, strictly speaking, applies to synagogues, and the juxtaposition of the *halakhic* and the *aggadic* section relates the discussion to the Temple and Herod's building project.³⁵ The *Gemara* itself frames this connection as a textual problem saying,

<p>Bava b. Buta provided counsel to Herod to tear down the Temple [in order to expand and renovate it]. But did not R' Hisda state, "One should not tear down a synagogue before they build another one!?"</p>	<p>ובבא בן בוטא היכי אסביה ליה עצה להורדוס למיסתריה לבית המקדש, והאמר רב חיסדא, 'לא ליסתור איניש בי כנישתא עד דבני בי כנישתא אחריתא!?!'</p>
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It appears fairly clear that this short *stammaitic* discussion was written to forge the link between the discussion regarding renovating a synagogue and the tale about Herod's massive killing spree, which closes with him expanding the Temple in Jerusalem. Thus, even Wingurt's thematic elaborations, while adding great insight into the *sugya* as a literary whole, do not answer the question of what the *halakhic* segment adds to the meaning of the story to a satisfying degree.

Rabbi Daniel Roth, in his seminar on the first chapter of Bava Batra at the Pardes Institute in Jerusalem, proposed a thicker understanding of the thematic linking of *beniyah* and *setirah* (building and destroying). Namely, Roth saw the story of Herod's attempt to secure his power as the uncontested monarch of Judaea as dialectic between building and destroying. Herod's initial and even default mode of relating to rivals was one of violent contest, which ended in great destruction. On page 3b, Herod slays all living members of the Hasmonean dynasty, save a young woman whom he desired to marry, and all rabbis save Bava b. Buta in order to rid himself of all who could invalidate his claim to the Judean throne. Since, as the tale presents Herod as the slave of the Hasmoneans, the royal family could sully his lineage, undermining his legitimacy. The Rabbis, by explicating the Deuteronomy verse, "From *within your brethren* you will place a king," (Deut 17:15) could claim that his Idumean lineage was not enough to situate him as being "within [the] brethren" of the

34 It is beyond the scope of this brief study to investigate the significance of Herod's choice to remove Bava b. Buta's eyes as the method of establishing dominance, as in the Oedipal myths, etc.

35 While the anonymous editor/s pose the difference between the Temple and the synagogue as a justification for Bava b. Buta's providing advice to the wicked king, the reason given rests in the authority of the government, who are the only ones with the available resources and power to take on such a massive project. Nevertheless, the narrative as well as the posed *halakhic* problem clearly serve the function of relating the two building projects to each other.

people Israel. Herod's intuitive solution to these challenges was to rid himself of such risks by slaughtering those around him. However, in his discussion with the blinded Bava b. Buta, the surviving sage helps him realize his mistake (specifically in killing the Rabbis) and learns from him a more diplomatic way of relating to those who threaten his absolute power, in this instance the Roman Empire. Through utilizing more political tactics, Herod is able to accomplish what he wished, to build the Temple as penitence for his wicked deeds without destroying as he did before.³⁶

Roth's reading adds much to a nuanced and synthetic understanding of the tale especially in relation to its *halakhic* neighbor. However, we would like to offer a similar reading containing several important nuances of difference. We agree that the major relation between the tale and the legal discussion initiated by R' Hisda's statement is the dynamic between building and destruction. Instead of linking it to Herod's method of behaving alone,³⁷ we believe that the stronger connection is to the paradoxical yet inescapable reality of the wicked Herod being the builder of the glorious Temple in Jerusalem.

The main problem the Gemara is facing (as that is the form of the Gemara, posing problems to be solved) is the contradiction between the holy work of building the Temple in Jerusalem and the evil character of King Herod. After all, the later Biblical book of 1 Chronicles depicts the righteous King David (minor dalliances aside) petitioning God to allow him to build the Temple, but he is refused his request due to his blood soaked hands.³⁸ Even though he fought wars approved by the Lord, to conquer the land for the Israelites and to subdue the Philistines, the violent nature of his reign precluded him from becoming a contractor of the sacred. What our *sugya* illustrates in terms of Herod's massive killing spree does not appear to be historically accurate; still, these two instances of mass murder appear to be Rabbinic adaptations of the very real historical recounting of Herod eliminating familial competition through assassination, as well as his persecution of the Pharisees.³⁹ The tension is apparent: How could God justify giving Herod permission to build the holy Temple when one much greater than he was not allowed?

This tension between acceptance of the positive nature of Herod's building the

36 Specifically, we would like to note that Roth claims rightfully that the way through which Bava b. Buta was able to himself model a non-destructive way of behaving and persuade Herod's imitation was through Torah, as expressed in his use of citations from the Biblical wisdom book of Ecclesiastes.

37 This nuance is largely based on what we perceive as the lack of advancement in terms of Herod's status in the body of the story. While Bava b. Buta's suggestion of building the Temple is successful in terms of effecting penitence for the murderous king, by the end of the story, Herod has been knocked back down to the lowly status of a slave which he occupied at the start of the tale. King Herod goes on his murderous rampage to forcefully liberate himself from his status as a slave of the Hasmonean dynasty. "That slave" is the term utilized by the editor/s to refer to his character. His killings of the rabbis and royals serves to wipe out all those who could affix such a libelous claim to his glory. However, by the *denouement*, the Roman Empire declares to the Jewish king that he has been a slave, and he can never escape being a slave. The Romans even have it in writing, which means he can never escape this lowly state no matter how hard he tries.

38 1 Chronicles 22:7-8, "David said to Solomon, 'My son, it was in my heart to build a House for the name of the Lord, but the word of the Lord came upon me saying, "You have spilled much blood, and you have waged great wars. You shall not build a House for My name, for you have spilled much blood to the earth before Me.'"

39 This may be the discrete source for the Talmudic telling of Herod's murder of all of the Rabbis.

Temple and the disapproval of his wicked acts plays out in many other places in the rabbinic corpus. Perhaps the most explicit is found in the Scholium on Megillat Ta'anit, a later supplement to this Second Temple period text.⁴⁰ The Scholium lists the seventh of Kislev as the date of Herod's death and declares it a day of joy and celebration upon which fasting and mourning were prohibited. MS Paris provides the reason: the wicked King hated Israel and the Sages in particular. MS Oxford says explicitly that the reason is due to Herod's murder of the Rabbis, the day Herod died being a "celebration before the Lord when the wicked are taken from this world." Here, we have a clear reference to Herod as a murderer and a wicked man, whose death is a proper reason for great joy. We also have a text in the Tannaitic midrash Sifrei (on Deuteronomy, *parshat Ki Teztei* 241), in which there appears a reference to an "act of Herod" clearly used in a negative manner. The text discusses the laws surrounding adultery which appear in Deut. 8:22. In explicating the section of the verse that reads, "both of them [shall die]," the midrash notes that this excludes the possibility of the crime being "the act of Herod." While the reference is not clear, and one cannot argue conclusively that this Tannaitic text had the notion of Herod having sex with a woman preserved in honey in mind in making this reference, we can confidently assert that the midrash at least had some sort of association between the wicked Herod and sexual depravity.⁴¹

Following the tension fraught in the problem outlined above, Rabbinic literature has a place of acceptance for Herod as well. Specifically, this more charitable attitude is located in texts which deal with Herod's project of building up the Second Temple. The earliest of such sources appears in the Tannaitic midrash of Sifra (on Leviticus, *parshat Bechukotai* 1:2), which tells of the rain patterns in the time of Herod's building. The rain would come at night, and the sun would shine all day. These were ideal conditions for building, provided by divine Providence, and the workers were confident that "their work was for the sake of Heaven." In BT Taanit 23a, we find an adaptation of the earlier midrashic source, telling of the same divinely ordained weather patterns to assist in the holy task Herod took upon himself in expanding the Temple. Clearly, in the general Rabbinic corpus there appears a tension between the portrayals of Herod as a degenerate murderer and sex offender and the divine approval of his holy construction. And it is this exact tension which animates the driving narrative force behind our *aggada*.

It is this exact tension and ambivalence that the *aggada* in our sugya is trying to (re)solve, though it does not appear to be the case on the surface. The Talmudic editors ask,

<p>Bava b. Buta provided counsel to Herod to tear down the Temple [in order to expand and renovate it]. But did not R' Hisda state, "One should not tear down a synagogue before they build another one!?"</p>	<p>ובבא בן בוטא היכי אסביה ליה עצה להורדוס למיסתריה לבית המקדש, והאמר רב חסדא, 'לא ליסתור איניש בי כנישתא עד דבני בי כנישתא אחריתא!?!'</p>
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40 It is well noted that this text being a later commentary, basing itself on the Talmud, is not to be used as a historical source with any amount of confidence. However, our intention in using this source is not to make a historical claim but rather to show the extent to which Herod's reputation as a murderer and degenerate was prevalent in rabbinic literature and thus the rabbinic imagination.

41 We can also derive from this text that the sexual depravity of Herod seemed to involve one and not two parties, which places the idea of him raping the dead Hasmonean princess preserved in honey squarely in the realm of possibility, in terms of being in the midrashic creators' mind in explicating this verse.

It appears that the motivating factor is the *halakhic* problem of, “How could Bava b. Buta give advice to Herod that violated the legal standard of never destroying public space in order to renovate it without the proper precautions?” Indeed, in the *stammaitic halakhic* coda after the close of the proper narrative section, the editors posit solutions to the above problem:

<p>One could say [postulating why Bava b. Buta was right to do what he did] that the case of a slave is exceptional, since he must obey [the king's] commands, or one could say that the case of the Temple is exceptional, since without the government, it could not have been built.</p>	<p>איבעית אימא שאני עבדא, דאיחייב במצות, ואיבעית אימא שאני בית המקדש, דאי לא מלכות לא מתבני.</p>
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Both solutions find Bava b. Buta's actions problematic, and both make excuses justifying his behavior.⁴² However, we find both to be solutions the *aggada* cannot adopt without reservations. The first, since it was Bava b. Buta who suggested the building of the Temple; hypothetically, he could have suggested something else so Herod could repent his past misdeeds. Regarding the guarantee of the government, Herod's plans to go ahead building the Temple *go against* the Imperial dictum! If anything, by going forward with this rebellious project, Herod may have put the Temple into danger.

Though one could very well read this Rabbinic tale as seeking to solve a technical *halakhic* problem,⁴³ following Roth's example, we prefer to understand the appearance of R' Hisda's statement in a more thematic manner. We propose that the theme within the law posited by R' Hisda is reflected in the central tension of the story, as outlined above. Namely, the problematic R' Hisda's *halakhah* suggests are present in our tale of Herod's building the Temple as well. Simply put, the Rabbis are stuck by the problematic regarding the irreducible complexity of building, which are intensified when the building taking place involves sacred space, as in a synagogue and even more so the Temple. R' Hisda's requiring intensive precautions for renovating a synagogue, and thus rendering it damage, stem from the problematic of needing to destroy in order to build. Violence must be done to instigate growth. This is a necessarily distressing, even disturbing, reality with which the Rabbis (and we) are forced to grapple.

But still, what is the link to our tale? Obviously, the same dialectic between destruction and growth occur/red in Herod's building project. However, the other texts which reference Herod's Temple construction see it as a source of blessing. Also, that exact connection appears too simple to generate the narrative tension found in this *aggada*. Instead, we propose that the dialectical dynamic between destruction and creation in R' Hisda's statement play out in the troubling unavoidable reality of the wicked King Herod's role as the builder of the holy Temple in Jerusalem. The

42 In addition, the *sugya* concludes with a short discussion of the biblical Daniel's counseling of the wicked Babylonian king Nebuchadnezzar and the problematic thereof. An important topic of further thought lamentably excluded from this paper due to its limited scope would be the challenges posed by the rabbis in regards to how to relate to power and authority, as typified by Bava b. Buta.

43 In this way, Feintuch is very much correct in his arguing that the link between the *halakhic* and the *aggadic* components are weak.

setirah (contradiction) here is less physical than moral, namely, the moral destruction Herod wreaks. How could such a wicked and destructive man be the source of the beautified and improved Temple of the Lord? R' Hisda's statement comes before our tale to introduce this irreducible tension, underlining this theme which animates the narrative.

As previously suggested, we believe that this thematic problem could not be solved in the fashion of the technical *halakhic* issue outlined above; it could only be moderated. Thus the role of Bava b. Buta: in providing counsel to Herod, the germ of the idea and the manner of its execution are due to the activism of this last surviving rabbi. The rabbinic storyteller/s confront/s the troubling and inescapable reality of the Second Temple as Herod's lasting legacy but manages to redeem it as their own.

One Who Surrounds his Neighbor on Three Sides...

[Baba Batra 4b-5a]

Haggai Reznikoff

I. Mishnah and Talmud

המקיף את חברו משלוש רוחותיו. גדר את הראשונה ואת השנייה ואת השלישית
אין מחייבין אותו. ר' יוסה אומ'. אם עמד וגדר את הרביעית מגלגלין עליו את
הכל.⁴⁴

The *peshat* of this *mishnah* seems straightforward although not definitive. The *mishnah* deals with a landholder whose field or fields surround the field or fields of his neighbor on three sides. For reasons of his own, the outside landholder builds fences between his fields and the fields of his neighbor. Although the inside landholder benefits from these fences to some degree (either for reasons of privacy⁴⁵ or security) he is not required to assist in defraying the cost of these fences. Rabbi Yose adds⁴⁶ that if the inside landholder stirs himself and fences the remaining side of his fields we require him to pay his share of the other three as well. Other interpretations are possible, particularly concerning the word עמד, however, it seems to us that this interpretation of the *mishnah* is the best by far.

Although the above interpretation may be *peshat*, the *gemara* takes the *mishnah* in another direction entirely:

מתני'. "המקיף את חברו" וכו'.
איתמר רב הונא אמ' הכל לפי מה שגדר וחייא בר רב אמ' דמי קנים בזול.

תנן "המקיף את חברו משלוש רוחותיו. גדר את הראשונה ואת השנייה ואת
השלישית אין מחייבין אותו".
הא רביעית מחייבין אותו.
אימא סופא "ר' יוסי אומ' "אם עמד וגדר את הרביעית מגלגלין עליו את הכל".

בשלמא לרב הונא הינו דאיכא בין תנא קמא לר' יוסי. דתנא קמא סבר דמי קנים
בזול אין מה שגדר לא. ור' יוסי סבר הכל לפי מה שגדר.
אלא לחייא בר רב מאי איכא בין תנא קמא לר' יוסי?
איכ' ביניהו דמי קנים בזול. דתנא קמא סבר אגר נטורא אין דמי קנים בזול לא.
ור' יוסי סבר דמי קנים בזול.⁴⁷

It is certain that the Talmud understands Rabbi Yose to be referring to the *outside*

⁴⁴ All rabbinic quotations are taken directly from the Historical Dictionary on the site of the Academy for The Hebrew Language: <http://hebrew-treasures.huji.ac.il/>. I will not identify the manuscript copied unless I choose for some reason to make use of a manuscript other than that chosen by the creators of the site. Essential punctuation of the sources is taken from the site and adjusted by me.

⁴⁵ If the inside landholder benefits for reasons of increased privacy (*hezek reiyah*), we could propose that this is the reason this *mishnah* is included in this chapter at all. If this is the case, then this *mishnah*, the only one from our chapter not brought by the *gemara* as a proof for *hezek reiyah*, is in perhaps the only convincing evidence that the first *mishnah* of the chapter does indeed deal with *hezek reiyah* in some form. See the positions of Rabeinu Hananel, Rashi, and the Ba'al HaMaor below.

⁴⁶ It appears to me that Rabbi Yose does not necessarily disagree with *Tanna Kama* but rather adds information that the *Tanna Kama* omitted.

⁴⁷ There is some disagreement in the manuscripts as to the order of the three alternative explanations offered by the Talmud to explicate the position of Hiyya bar Rav. However, in the essentials, there is no significant difference between the different versions. See Sabato pp. 196-197.

landholder fencing the fourth side and not the inside landholder. According to this interpretation, the gemara is able to claim that even the first, anonymous position (*Tanna Kama*) agrees that if the outside landholder were to *stir himself* (עמד) and fence the fourth side, the inside landholder would be required to pay his part of all four sides.⁴⁸ For this reason the Talmud explains that the disagreement between *Tanna Kama* and Rabbi Yose is based on the *rate* at which the inside landholder must pay his part and not the *fact* that he must pay at all. According to Rav Huna, *Tanna Kama* only requires him to pay at the price-rate of a minimal fence (made of reeds) and Rabbi Yose requires him to pay at the rate of whatever materials the outside landholder chooses. According to Hiya bar Rav the *Tanna Kama* requires the inside landholder to pay no more than at a rate of what a temporary watchman would cost while Rabbi Yose requires him to pay at the rate of a minimal fence.

The Talmud is not satisfied with this explanation and proceeds to offer two alternatives⁴⁹ both of which require reinterpretation of the *mishnah* itself:

ואיבעיתא ראוונה שנייה ושלישית איכא ביניהו.
 דתנא קמא סבר דרביעית הוא דיהיב ליה דראשונה שנייה ושלישי לא יהיב ליה.
 ור' יוסי סבר דראשונה שנייה ושלישית נמי יהיב ליה.

ואיבעיתא ניקף ומקיף איכא ביניהו.
 דתנא קמא סבר לא שנא ניקף ולא שנא מקיף אם עמד וגדר את הרביעית מגלגלן
 עליו את הכל.
 ור' יוסי סבר טעמא דעמד ניקף מגלגלן עליו את הכל אבל מקיף אין נותן לו אלא
 דמי רביעית.⁵⁰

אמ' רב יהודה אמ' שמואל הלכה כר' יוסי.
 ואליבא דרב הונא דאמ' הכל לפי מה שגדר.

According to the first alternative, *Tanna Kama* and Rabbi Yose disagree on the extent of the inside landholder's payment. *Tanna Kama* requires him to pay only for the fourth wall (still built by the outside landholder) while Rabbi Yose requires him to pay for all four walls. The second alternative suggests an interpretation of the *mishnah*

⁴⁸ Rashi's explanation differs slightly here from mine. According to Rashi, the Talmud understands Rav Huna's statement "הכל לפי מה שגדר" as a linguistic explanation of Rabbi Yose's "מגלגלן עליו". This is also the explanation of the ר"י מגאש. Therefore, according to Rashi, in the situation outlined above, the inside landholder is required to pay his part of the fourth fence alone and *not* the other three *even* according to Rabbi Yose. I consider my interpretation more consistent with the *peshat* both of Rav Huna and Rabbi Yose, however, Rashi's understanding is certainly brilliant and may be *peshat* in the gemara.

⁴⁹ All *three* explanations offered are preceded by the term "איבעיתא" indicating that none of the explanations are preferable to any other.

⁵⁰ There is some variation in the version as to how to understand this alternative. The Escorial manuscripts holds the opposite of what appears above, that is, *Tanna Kama* says that when the inside landholder fences the fourth side, we require him to pay for all four sides, but if the outside landholder does it, we only require the inside landholder to pay for the fourth side. And Rabbi Yose says that regardless, of who fences, we make the inside landholder pay for all four sides. However, only the printed editions give an interpretation that approaches the *peshat* I outlined above. As the first edition (Pizarro) puts it :

ת"ק סבר אם גדר מקיף את הרביעי נמי יהיב ליה. ור' יוסי סב' אם עמד ניקף וגדר את הרביעי
 הוא דיהיב ליה דגלי דעת' דניח' ליה אבל אם גדר מקיף לא יהיב ליה מידי.

This is still not identical to my *peshat*. According to my framing, the *mishnah* does not tell us what happens when the outside landholder fences the last side of the inside landholder's fields according to either position. I believe that it is significant that this interpretation appears only in the printed editions and in none of the five manuscripts available. See Sabato pp. 197-201.

that admits the possibility that the inside landholder might be the one to *stir himself* and build the fourth wall. According to this interpretation, *Tanna Kama* requires the inside landholder to pay for all four walls solely when the inside landholder builds the fourth fence. Rabbi Yose holds that regardless of who builds the fourth wall, the inside landholder will be required to pay. It is worth notice that none of the Talmud's explanations consider the interpretation presented as the *peshat* of the *mishnah* above.⁵¹

II. Discussion of the Mishnah in Baba Kama

The Talmud deals with this *mishnah* in one other place, in the second chapter of *Baba Kama* (20b):

תנן "המקיף את חברו משלש רוחותיו וגדר את הראשונה ואת השנייה ואת השלישית אין מחייבין אותו".
הא רביעית מחייבין אותו.
שמי מינה זה נהנה וזה לא חסר חייב.
שאני התם דאמי ליה את גרמת לי הקיפה יתירא.

תא שמע מסופי "רי יוסי אומי אם עמד ניקף וגדר את הרביעית מגלגלין עליו את הכל"
טעי דגדר הניקף הא מקיף פטור.
שמע מינה זה נהנה וזה לא חסר פטור.
שאני התם דאמי ליה לדידי סגי לי בנטירא בר זוזא.

The sugya here largely agrees with our sugya in *Baba Batra* with one fundamental difference. The Talmud agrees that we can learn by inference that when the outside landholder fences the fourth side of his neighbor's fields, the inside landholder must pay his part at least of the fourth side (and possibly of all four sides⁵²). However, a new consideration is introduced here; that is the issue of "זה נהנה וזה לא חסר". The first statement indicates that, despite the fact that the outside landholder loses nothing by fencing the fourth side of his neighbor's fields, the inside landholder, because he benefits, is required to pay part of the costs, demonstrating that "זה נהנה וזה לא חסר" is *חייב*.

The Talmud answers what it answers and goes on to bring the statement of Rabbi Yose as an opposing proof. Here, in contrast to our sugya in *Baba Batra*, the Talmud understands the subject of Rabbi Yose's statement to be the inside landholder.⁵³ The Talmud claims that when the inside landholder "stirs himself" and builds, according to Rabbi Yose, he is required to pay. By inference we can learn therefore that if the outside landholder builds the fence, we cannot require the inside landholder to pay anything and therefore, "זה נהנה וזה לא חסר" is *פטור*. This is in

⁵¹ It is obviously possible to interpret Rav Huna and Hiyya bar Rav apart from the sugya—that is, according to Rabbi Yose, at what price-rate must the inside landholder pay his part? Rav Huna says he pays at the rate of the construction costs whatever they may be, and Hiyya bar Rav says he pays at the rate of a minimal fence. However, reading the sugya synchronically undoubtedly indicates acceptance of the explanation of these positions and the interpretations associated with them.

⁵² Depending whether we prefer my interpretation of the sugya in B"B or the interpretation of Rashi there (see footnote 5).

⁵³ So much so that most of the manuscripts, like the Paris manuscript above give as the language of Rabbi Yose, "אם עמד ניקף וגדר" instead of "אם עמד וגדר" as we find in the manuscripts of the Mishnah and Bavli B"B (except for the Munich manuscript). The exception is the Vatican manuscript of *Baba Kama* (Ebr. 116-117) which goes along with the Mishnah and B"B manuscripts. See Sabato p. 192-193.

direct contradiction to every interpretation offered in the version of Baba Batra⁵⁴. There, no one disagrees that when the outside landholder fences the fourth side, the inside landholder is absolutely responsible for his part at least of the fourth fence.

III. Medieval Responses to the Contradiction between Baba Batra and Baba Kama.

The *Rishonim* have different responses to the contradiction between the sugyot. The *Tosafot* explaining the position of Rabbi Yose write in Baba Batra:

כולהו לישני דגמרא קאי אמקיף בר מלישנא בתרא דקאמר מקיף וניקף איכא
ביניהו והא דדייק בפרק כיצד הרגל טעמא דניקף הא מקיף פטור היינו לההוא
לישנא.

The *Ba'al Ha-Maor* adds his voice to theirs in הגדול⁵⁵:

ואע"פ שאין סוגיא זו כאותה שבבבא קמא אין אנו חוששין בכך כי הרבה מן
הסוגיות מתחלפות בחלוק המסכתות... וכמו כן תמצא חלוק הסוגיא במקומות
אחרים.

Rashi's makes no comment on the contradiction between these sugyot; but the contradiction is reproduced in his explanation of each sugya. In Baba Batra he writes:

ליכא למימר דת"ק דוקא אם גדר מקיף את הרביעית הוא דמחייבין אותו אבל
אם גדר ניקף לא דכ"ש הוא. השתא היכא דלא גלי דעתיה דניחא ליה בהיקיפא
קא מחייב ליה כ"ש היכא דגלי. ולר' יוסי נמי קס"ד השתא דתנא ניקף וה"ה
למקיף אלא בגלגול דהכל הוא דפליגי.

That is, both *Tana Kama* and Rabbi Yose agree that regardless who fences the fourth side, the inside landholder is always responsible to pay *something*. In contrast to this, Rashi writes on Rabbi Yose in Baba Kama:

אם עמד ניקף וגדר את הרביעית גלי אדעתיה דניחא ליה בהקיפו של ראובל
ומגלגלים עליו את הכל לתת את חלקו בגי מחיצות פנימיות... הא מקיף: הא אם
קנה מקיף עוד שדה רביעית⁵⁶... וגדרה פטור [הניקף].

We might attempt to harmonize Rashi's commentary between the two sugyot but the simplest solution seems to be that Rashi simply explains each sugya in its own context and is untroubled by the contradiction between them.

The Ramah goes further in discussing the contradiction between these sugyot. He writes on Baba Batra⁵⁷:

ואע"ג דסוגיא דפרק כיצד הרגל איפכא סליק, דרבי יוסי אם עמד ניקף קאמר הא
עמד מקיף פטור מכלל דתנא קמא סבר אפילו עמד מקיף נמי חייב, על כרחיך
סוגיא [דהכא] אפיק בין מדרב הונא בין מרבי חייה בר רב, דתרווייהו סבירא
להו דרבי יוסי מחמיר עליה דניקף טפי מת"ק. וממילא שמעת דההוא סוגיא
דכיצד הרגל לאו אליבא דהלכתא איתמר אלא לצדדן הוא דניחא ליה למידק.
ניחא ליה למידק מרישא דזה נהנה וזה חסר חייב ולמידק מסיפא דפטור
ולתרוציניהו לדברי הכל. דאילו סוגיא דהכא כולה מתני' אליבא דמאן דאמר זה
נהנה וזה חסר חייב הוא דסלקא. וקיימא לן כי סוגיא דהכא, חדא דאיתמר
בדוכתיה ועוד דסליק אליבא דהלכתא...

That is, although we have a contradiction, the sugya in Baba Kama should be regarded as simply manipulating text for rhetorical reasons while the sugya in Baba

⁵⁴ Except for one mentioned in footnote 7, which appears only in the printed editions.

⁵⁵ Page 2b in the *Rif* section of the Vilna edition.

⁵⁶ This is a slightly different interpretation of the mishnah than what Rashi gives in Baba Batra. We will discuss its ramifications below.

⁵⁷ Yad Ramah, "Tomchei Teshuvah" edition, p. 20.

Batra should be regarded as legally binding. In other words, the mere fact of the contradiction doesn't bother the Ramah so long as he can distinguish which sugya is authoritative and which is inconsequential.

Other *Rishonim*, however, are deeply troubled by this contradiction and attempt, as much as possible, to harmonize the two sugyot. The Ramban in response to the Ba'al HaMaor writes:

אמר הכותב יש לי להשיב א"כ היאך אמרו בפרק כיצד בב"ק הא רביעית מחייבין אותו ש"מ זה נהנה וזה אינו חסר חייב? ואמרי נמי התם לר' יוסי הא מקיף פטור ש"מ זה נהנה וזה לא חסר פטור. ואם הגדר בינו לבינו ומשום היזק ראייה, היאך זה נהנה וזה אינו חסר⁵⁸? והרי הוא מחסרו ומזיקו שלא גדר זה אלא מפני שהוא מזיקו... ומשנתנו סתם נשנית אסתם בקעה שהוא מקום שנהגו שלא לגזור וכן העמידוהו כל המפרשים ועל דרך אחרת ועיקרא שעל גדר החיצון שבין רה"ר למקיף נאמרו הדברים. שעמד מקיף וגדרן לסלק מעליו רגל הרבים ונמצא זה נהנה בשלו והוא חסר שהלה גרם לו הקיפא יסירא טפי משאם היו שדות שלו זה בצד זה רצופין.

The substance of the Ramban's interpretation will be discussed below. It is enough for now to see that the Ramban refuses to acknowledge the possibility of two contradictory sugyot and constructs his interpretation deliberately with the aim to harmonize the two texts.

Rabeinu Yonah also deals with the contradiction. In his commentary on Baba Batra he writes⁵⁹:

ואי קשיא לך סוגיא דפי' כיצד, דדייקין מדברי ר' יוסי, טעמא דעמד ניקף, ומי"ש דהכא מוקמינן איפכא. יש להשיב, כיון דהשתא בסוגיא זאת אליבא דחייא בר רב מתרצתא, ע"כ חייא בר רב סבר דר' יוסי במקיף קמחייב... ובסוגיא דפי' כיצד, ס"ל לתלמודא דבניקף ומקיף פליגי. ר"י בניקף קמחייב, והכל לפי מה שגדר הניקף, כלומר לפי מה שגלה בדעתו... ומילתא דת"ק במקיף, דהכי דייקי מילתא, הרביעית מחייבין אותו, משמע הא אם גדר המקיף את הרביעית, דבמקיף קיימי... ולפום סוגיא דהתם, הלכה כת"ק דמחייב במקיף, ועולה למשפט אחד עם המסקנא דמעתין דפסקין כר' יוסי, ומוקמינן מילתא דר"י במקיף.

That is, despite a *perceived* contradiction between the sugyot, Rabeinu Yonah explains that essentially they are the same in terms of their final *legal* decision. The insistence that the sugyot are identical in law crosses the line from simple acceptance (as we see in the Ramah, despite his explanation that one is authoritative and the other is merely rhetorical) to enforced harmonization of the sources.

IV. Modern Academic Discussions of Contradictory Sugyot

A number of modern, academic scholars have also written on the issue of contradictory sugyot in general and these two in particular. The discussion was first addressed by Jacob Nahum Epstein in his *Mavo LeNusach HaMishnah*. He writes⁶⁰:

בב"ק שם מצטט התלמוד: אמר ר' יוסי אם וכו', והוא העיקר, וכולה ר' יוסי, בניגוד לבבלי ב"ב ד ע"ב. והנכון: גדר את הראשונה, כנוסח מי"ר וכי"י, וכך פירושו: המקיף את חבירו משלש רוחותיו ("כך דינו":) גדר וכו' אין מחייבין אותו—אמר ר' יוסי—אם עמד ("אחר כך") וגדר את הרביעית מגלגלין עליו את הכל, ויעמד" מקיף הוא.

⁵⁸ The BH"M claims that the reason for the fences is the privacy of the outside landholder from his neighbor. See below.

⁵⁹ Aliyot DeRabeinu Yonah, pp. 21-22.

⁶⁰ MLN"H, p. 720. All emphasis is original to the author.

Epstein asserts that there a clear differentiation can be made between the two sugyot; one is according to the *peshat* of the *mishnah* and the other is based on a mistaken understanding (and possibly even a mistaken version) of the *mishnah*. The sugya in Baba Batra is according to the *peshat* of the *mishnah* (that is, even when the outside landholder fences the fourth side, the inside landholder is required to pay) while the sugya in Baba Kama is based on a mistake. This is directly contrary to the interpretation we offered as the *peshat* above⁶¹.

The next to tackle our sugyot in his interpretations and explanations to Baba Kama was Avraham Weiss. Weiss asserts:

מכל זה הרושם ואולי יותר מרושם שגם הבירור הסתמי שבסוגית ב"ק נעוץ במקורות האמוראיים שע"י משנת ב"ב. זאת ועוד אחרת, אף שהבירור הסתמי שבסוגית ב"ב עצמו הוא כנראה מאוחר לא מן הנמנע שהוא כבר שימש מקור לסתמא שלנו בב"ק. אלא שלפ"י לפני בעלי הסתמא שבב"ק שם עדיין רק: מקיף וניקף א"ב, ולא יותר, ואת תירוץ זה הם פירשו כבעלי ל"א. ולהם בנדון זה גם טעמם הם. כי רק לשיטת פירוש זה יש מקום לנסיון מן הסיפא: ת"ש א"ר יוסי וכו', והרי נסיון זה הוא כל מבוקשם⁶².

Weiss's claim is essentially different from Epstein's. Instead of dealing with the *Mishnah*, its correct wording and interpretations, he deals solely with the relationship between the sugyot. Based on this consideration, he is convinced that the sugya in Baba Batra is the original sugya and that the sugya in Baba Kama is based on one of the alternative interpretations (he thinks it is the original one) offered there: מקיף וניקף. The appearance of "נטירא בר זוזא" in Baba Kama and "אגר נטירוטא" in Baba Batra would tend to support the assertion that the sugya in Baba Kama is based, to some degree, on the sugya in Baba Batra or vice versa. Weiss, however, claims that he knows the directionality of this relationship. Furthermore, he bases this claim on the "לישנא אחרינא" in Baba Batra which, as noted before appears only in the printed editions and not in any of the manuscripts.

Dr. Yonatan Etz Hayim is the next to address the contradiction between these sugyot. His analysis is similar to Weiss's but he goes a significant step further in his explanation of the sugya in Baba Batra. As opposed to Epstein and Weiss who dismiss the Munich manuscript which gives in the *mishnah*, "אם עמ' ניקף", Etz Hayim embraces this version as the key to explaining the sugya in Baba Batra. He writes:

נראה אפוא לענ"ד, כי בסוגיה בבבא בתרא השתלבו זו בצד זו שתי סוגיות, הנובעות משתי שיטות המבוססות על נוסחים שונים שהיה להן במשנת בבא בתרא. השיטה האחת מבוססת על הנוסח שעל-פיו לא הכללה משנת בבא את המלה "ניקף" בדברי ר' יוסי. שיטה זו כללה את דברי רב יהודה בשם שמואל, את דברי רב כהנא⁶³ ור' חייא ב"ר ואת ה"אב"א". השיטה האחרת מבוססת על הנוסח שעל פיו כללה משנתנו את המלה "ניקף" בדברי ר' יוסי. שיטה זו כללה את דברי רב כהנא ודברי ר' חייא ב"ר, את ה"לישנא אחרינא" ואת סיפור המעשה ברוניא. הסוגיה בבבא קמא תואמת אפוא את השיטה שגרסה "ניקף" בדברי ר' יוסי במשנתנו ולפיכך היא מוחלפת לשיטה האחרת.⁶⁴

Etz Hayim's methodology is flawed in the extreme. He favors the reading of a

⁶¹ It may be that Epstein is simply attempting to justify the sugya in B"ב and not to give it precedence, but this does not appear to be what he is saying.

⁶² Weiss, p. 294. Compare this final statement to the position of the Ramah mentioned above.

⁶³ I have not succeeded in understanding why רב כהנא is replaced here with רב הונא.

⁶⁴ Etz Hayim pp. 201-202.

single⁶⁵ (and not outstanding) manuscript over the version agreed upon by all of the other manuscripts without any *philological* reason for doing so. In addition, he duplicates Weiss's fallacy by again using the "לישנא אהרינא" as his interpretive guide despite the fact that it is insufficiently represented in the manuscripts.

The last modern scholar to deal with these sugyot is Dr. Mordechai Sabato. Employing impeccable philology, Dr. Sabato analyzes the structure of the sugya in Baba Batra considering interpretations both of the *mishnah* and of the Talmud. He writes:

הנתונים המצויים בידינו כיום מובילים למסקנה שאמנם נוסח המשנה הוא 'עם עמד'. כל עדי הנוסח של סדר המשנה, לרבות שני קטעי גניזה, אינם גורסים במשנה 'ניקף'... נראה אפוא שהגרסה במשנה היא 'אם עמד' בלבד, וזו הגרסה שעמדה גם לפני סוגיית בבא קמאץ הציטוט בסוגיה שם 'אם עמד ניקף' איננו ציטוט מילולי, אלא ציטוט בתוספת לשון הסבר... הסוגיה שם הניחה, ולדעתי בצדק, שלשון 'אם עמד' פירושה עמד ניקף...⁶⁶

Considering the interpretations we've seen before, it is by no means trivial to notice that Dr. Sabato's interpretation of the *mishnah* here is based on philological and textual considerations *in the text of the Mishnah itself*.⁶⁷ With regard to the redaction of the sugya he writes:

מהי סיבת החילוף בין הסוגיות? וליתר דיוק, מדוע פירשה סוגיית בבא בתרא את המשנה בניגוד גמור לפשט לשונה?... הסוגיה פותחת כאמור בפסקו של רב יהודה בשם שמואל, עוברת למחלוקת רב הונא וחייה בר רב, מאריכה בבירור המחלוקת במשנה לדעתו של חייה בר רב, ומסיימת בסיפור על רוניא ורבינא ובפסקו של רבא. כל הפסקאות הן נקובות שם למעט הפסקה השלישית, העוסקת בבירור המחלוקת במשנה לשיטת חייה בר רב על שלוש האוקימתות שבה. נראה אפוא שפסקה סתמית זו מאוחרת ושבתחילה היה הסיפור על רוניא ורבינא סמוך למחלוקת רב הונא וחייה בר רב... ייתכן אף שפסקה סתמית זו נבנתה, לפחות בחלקה, על פי הסיפור של רוניא ורבינא... נקל להבין כעת מדוע הנחת היסוד של סוגיה זו היא שר' יוסי מחמיר שהרי כך משמע מלשון האיום שנקט רבא 'זיל פייסיה במאי דאיפייס ואי לא... דאיננא לך כרבי יוסי אליבא דרב הונא'. ולא עוד אלא שמשמע מפסקו של רבא שר' יוסי מחייב גם במקיף, שהרי רבינא מקיף היה.⁶⁸

Sabato's language is careful and precise. He assumes no more than can be justified by the text as it appears in its various versia. In addition, he doesn't go so far as to claim that either the sugya in Baba Kama or the sugya in Baba Batra interpreted the *mishnah* according to the *peshat*. He only says that the sugya in Baba Kama seems closer to the *peshat* of Rabbi Yose as far as can be determined by close reading of the *mishnah* itself.

One point needs to be mentioned in connection to Sabato's claim (and my own) that the *peshat* of the *mishnah* is according to one specific interpretation. That is that the *mishnah* certainly *can* be interpreted as it is in the sugya in Baba Batra. Dr. Sabato's question, "מדוע פירשה סוגיית בבא בתרא את המשנה בניגוד גמור לפשט לשונה?" is mildly over-stated. It is not absurd to claim that Rava himself, in his ruling to Runia

⁶⁵ Etz Hayim claims that the Vatican manuscript agrees with the Munich manuscript here. Although he is correct with regard to the version of the *mishnah* quoted at the beginning of the sugya, the sugya itself in the Vatican manuscript omits the word "ניקף".

⁶⁶ Sabato p. 203.

⁶⁷ It is, of course, to his added benefit that his interpretation of the *mishnah* agrees with mine.

⁶⁸ Ibid. pp. 203-204.

interpreted the *mishnah* in the way that the sugya suggests⁶⁹. This being the case, we would have to claim that both sugyot interpret the *mishnah* according to a certain bias. The interpretation in Baba Kama is probably based on the motivations suggested by the Ramah and (to a lesser degree) Weiss⁷⁰. The interpretation in Baba Batra is probably based on the ruling of Rava to Runia (as proposed by Sabato). In any case, it seems to me that the interpretation of Baba Kama approaches more closely the *peshat* of Rabbi Yose, than the interpretation of Rava in Baba Batra.

V. Medieval Interpretations of the Mishnah

The *Rishonim* diverge on three separate points in interpreting the details of our *mishnah*. The first is the exact situation of the outside landholder: the number of his fields and the precise location of his fences. The second is his reason for building these fences in the first place. And finally, the third, what about the conjunction between these first two points allows the gemara in Baba Kama to associate our *mishnah* with the issue of *זה נהנה וזה לא חסר*?

The first to present his opinion on the subject is Rabbeinu Hananel. In his interpretation to Baba Batra⁷¹ he writes:

פירוש מתניתין בבקעה במקום שלא נהגו לגדור... ודייקין מדקתני תנא קמא
דמתניתין המקיף את חבירו משלש רוחותיו אין מחייבין אותו, מכלל שאם
הקיפו מארבע רוחותיו חייב...

We can infer from this Rabeinu Hananel's position on two of our issues. He expressly states that the Talmud's statement "הא רביעית מחייבין אותו" refers to the case where the outside landholder surrounds the inside landholder entirely and fences the fourth side between himself and his neighbor⁷². Furthermore by associating this *mishnah* with the previous *mishnah* in the chapter:

שותפים שרצו לעשות מחיצה בחצר בונים את הכותל באמצע... וכן בגנה מקום
שנהגו לגדור... אבל בבקעה מקום שנהגו שלא לגדור אין מחייבין אותו.

Rabeinu Hananel indicates that the reason for the fencing here is the same as the reason for that *mishnah*, that is privacy (*הזק ראייה*)⁷³. In our third consideration, the

⁶⁹ We should also note that Raba's "ruling" is not actually a ruling as such. It is, as Dr. Sabato correctly presents it, a threat to Runia if he refuses to compromise with Rabina. The fact that Raba uses the possibility of a certain ruling to impel a litigant to compromise suggests support for the claim of Professor Talia Fishman (UPENN) and my own teacher Professor Daniel Boyarin that court rulings in the Talmudic period were more based on the inclination of the judge and less on some abstract, absolute code.

⁷⁰ Weiss p. 294.

⁷¹ I quote from the edition of משה יהודה הכהן בלוי (year unknown) as it appears on the following website: www.Hebrewbooks.org pp. 5-6. For references regarding the editions of Rabeinu Hananel see Sabato p.196 footnote 18.

⁷² This seems to be additional to the case we postulated above, where the outside landholder owns only three fields and voluntarily fences the fourth side of his neighbor's field with no obvious benefit to himself. However, it is possible to say that the inside landholder is required to pay *only* when he is surrounded on four sides. If he is surrounded on only three sides on the other hand and the outside landholder voluntarily fences his fourth side, he could claim that the fourth fence was built without his consent or interest and without any reason on the part of his neighbor. For this reason he might demand that the outside landholder remove the fence (at his own expense) rather than require him to pay for it. See the comparison of the Ramban in ספר מלחמות ה' of this case to the case of one who plants in his friend's field without permission. See also the interpretation of our sugya by Rabeinu Yonah below.

⁷³ Rabeinu Hananel doesn't say this last part explicitly, however, it seems a likely interpretation. The Tosaphot certainly understood this to be the position of Rashi when he said virtually the same thing.

connection to חסר, Ra" H gives no hint to his opinion. Considering that this is his explanation of Baba Batra, it seems legitimate that he doesn't take the trouble to explain the sugya in Baba Kama.

Rashi's explanation in Baba Batra is virtually identical to Rabeinu Hananel's. In his explanation of the *mishnah* he writes:

המקיף את חבירו משלש רוחותיו - שקנה ג' שדות סביב שדה חבירו לשלש מצריה וגדר את שלשתן ונמצא שדהו של אמצעי זה מוקף משלש רוחותיו. אין מחייבין אותו - לתת כלום כדאמר ר' דסתם בקעה מקום שנהגו שלא לגדור הוא...

And in his interpretation of the *gemara*:

ה"ג תנן המקיף את חבירו מג' רוחותיו אין מחייבין אותו הא רביעית מחייבין אותו אימא סיפא ר' יוסי אומר כו' וגדר את הראשונה כו' אין מחייבין אותו - דהא לא אהני ליה מידי שהרי גלוי הוא מצד רביעית הא אם גדר עוד מקיף את הרביעית מחייבין אותו דאהני ליה.

This language certainly corresponds with the interpretation of Rabeinu Hananel although it cannot be confirmed that Rashi holds with Rabeinu Hananel without considering his interpretation of the sugya in Baba Kama:

משלש רוחותיו - שהיה לו לראובן שלש שדות אצל שדה שמעון משלש רוחותיו. וגדר - ראובן את הראשונה סמוך לשדה שמעון לבד מחיצות חיצונות שהיו לו בינו לשאר הבקעות... אין מחייבין אותו - אין מחייבין את שמעון כלום דמאי אהני ליה הרי שדהו פתוחה מצד רביעית. הא רביעית - הא אם היה לו לראובן ד' שדות מארבע רוחות של שמעון וגדרן מחייבין את שמעון לתת את חלקו במחיצות הפנימיות שבינו לראובן. זה נהנה - שמעון. וזה לא חסר - ראובן שהרי יש לו לגדור שדהו. הקיפא יתירא - דאי לאו שדה של שמעון בין שדותיו הוי סגי ליה במחיצות חיצונות והווי כל שדותיו גדורים והלכך חסר הוא בשבילו.

We can see from here that Rashi agrees with Rabeinu Hananel that the inference of the Talmud: "הא רביעית..." refers to the fields *owned* by the outside landholder and not to the fence specifically. There is, however, a slight contradiction between the interpretation of Rashi in Baba Batra and his commentary on Baba Kama; and in truth, this contradiction even appears within his interpretations of the *mishnah* and the *gemara* in Baba Batra itself. In the first he indicates, like Ra" H, that the reason the inside landholder is not required to pay for the first three fences, is that a "בקעה" is a "מקום שנהגו שלא לגדור"⁷⁴, suggesting that the fences were originally built for reasons of privacy. In the second interpretation he seems to say that the inside landholder escapes obligation for the first three fences because the fourth side is still open and therefore he has yet to receive any benefit from these fences. This is inconsistent with the claim that the purpose of the fences is privacy⁷⁵.

This reason for this contradiction seems to be the difficulty in understanding the *gemara* on the basis of this interpretation of the *mishnah*. An anonymous

See below.

⁷⁴ Notice that Rashi's language is "שנהגו שלא" and not "שלא נהגו".

⁷⁵ The contradiction between Rashi's commentary on the *mishnah* versus that on the *gemara* suggests that Rashi may have interpreted the *mishnah* without reference to the Talmud. This example should be examined in detail therefore in any analysis of Rashi's commentary on the Talmud in general.

objection to Rashi's interpretation of the *mishnah*⁷⁶ makes this explicit:

הג"ה - תמ"ש ולי"נ טעמא משום דאכתי לא מהני ליה מידי שהכל יכולים ליכנס מרוח רביעית אבל אם גדר רביעית מחייבין אותו כדאמרינן בגמ' ואע"ג דאמרינן לעיל דסתם בקעה מקום שנהגו שלא לגדור הוא ה"מ בין בקעה לבקעה וכותל גבוה ד' אמות לשם הוא דלא בעינן מ"ט דליכא היזק ראייה אבל בשביל היזק בהמות שלא יכנסו לשדה צריך לגדור גדר שלו עשרה טפחים המונע מליכנס הבהמות.

If the reason for the fences is privacy, why does *Tanna Kama* excuse the inside landholder when he is only surrounded on three sides, and yet obligate him to pay when he is surrounded on all sides? In order to reasonably understand the Talmud, we must understand that when the inside landholder is fenced on three sides he receives no benefit because he is still open on the fourth. When he is fenced in from four sides, however, he benefits and therefore is required to pay.

The interpretation helps us understand Rashi's interpretation of *זה נהנה וזה לא חסר* in *Baba Kama*. The benefit or lack thereof to the inside landholder is obvious according to the explanation of the *הג"ה*. However, it is still not clear why the outside landholder is considered to be *לא חסר*. Rashi, as we have seen above, simply explains here:

שהרי יש לו לגדור שדהו.

Using the explanation of the *הג"ה*, we can expand on this and say that since the purpose of the fences is to keep out roving animals, the outside landholder has an interest in building fences between his fields and the fields of his neighbor. Therefore he can well be considered "לא חסר".

The last and most explicit to claim that the reason for the fences is privacy is the *Ba'al HaMaor*. In *המאור הגדול* he writes:

מתני' המקיף את חבירו משלש רוחותיו וגדר וכו'. פי' כגון שגדר החיצון שהוא המקיף בינו ובין הפנימי הניקף. ובמקום שנהגו לגדור בבקעה וקמ"ל במתני' שאין מחייבין אותו לגדור בינו ובין חבירו עד שיהא שמור מארבע רוחותיו. כלומר שלא יהא פרוץ לרה"ר משא"כ בחצר שמחייבין אותו בכל ענין לבנות כותל באמצע ואע"פ שפרוץ לרה"ר סתם חצר עשויה היא לצניעות לבנות לה כותלים מארבע רוחותיה משא"כ בבקעה שיש הרבה בני אדם שאין מקפידין לסתום מכנגד רה"ר. ואע"פ שהוא מקום שנהגו לגדור ביניהם משום שאסור לאדם שיעמוד על שדה חבירו בשעה שעומדת בקמתה אפ"ה משום רה"ר לא איכפת להו כולי האי שאין דרך בני אדם שיתעכבו ברה"ר ויסתכלו בשדה חביריהם. ואילו מתחלה תבעו לגדור עמו דכ"ע מודו דמחייבין אותו אלא לפי שהקדים המקיף וגדר מדעת עצמו לפיכך באה משנתנו להודיענו שאין מחייבין את הפנימי לתת חלק במה שגדר החיצון בינו לבינו עד שיהא שמור הפנימי מארבע רוחותיו. ואם עמד וגדר את הד' מצד רה"ר או שהקיפו מד' רוחותיו וגדרו מד' רוחותיו מגלגלין עליו את הכל בין לת"ק בין לר' יוסי.

The *Maor* here confirms that the purpose of the fences is privacy and yet, there is a good reason for *Tanna Kama* to excuse him so long as his field is not fenced on four sides. There is a fundamental difference between a *חצר* and a *בקעה*, according to the *Maor*, which explains why one assumes bilateral responsibility in the case of a single wall of a *חצר* but not until all four sides are fenced in a *בקעה*.

⁷⁶ This objection appears within Rashi's commentary on the *daf* under the label "הג"ה", and most likely belongs to the *Rashbam*.

The Ramban in מלחמות attacks the Maor as we have seen for inconsistency with the sugya in Baba Kama. The Tosaphot however bring another objection. In response to Rashi's interpretation of the sugya in Baba Kama they write:

מתוך פירוש הקונטרס משמע דמייירי בגדר שבין שדהו לשדה ניקף וקשה דהכי חשיב ליה זה נהנה וזה אין חסר הואיל שכל אותו הגדר לא נעשה אלא להפסיק בין שדותיו לשדה ניקף ועוד דהוה ליה למימר את גרמת לי כל זה ההיקף דהקיפא יתירתא משמע שגרם ליה להרבות אלא נראה שמבחוץ סביב לד' רוחות הקיף והקיפא יתירא משום שמחמת שדה האמצעי ההיקף גדול יותר מדאי⁷⁷.

This is an objection solely with regard to the location of the fences in the *mishnah*. Rabeinu Hananel, Rashi, and the Ba'al HaMaor (and our own interpretation above) all state that the fences are located between the fields of the outside and the inside landholders. This is problematic for the Tosaphot because the whole purpose of the fences according to this interpretation is to divide between the fields of the outside landholder and his neighbor. If the inside landholder did not hold those fields, there would be no need for the outside landholder to fence at all. Therefore, this can hardly be considered a case of חסר לא נהנה וזה! The Ramban states this even more clearly in מלחמות⁷⁸:

ואם הגדר בינו לבינו ומשום היזק ראייה היאך זה נהנה וזה אינו חסר? והרי הוא מחסרו ומזיקו שלא גדר זה אלא מפני שהוא מזיקו...ועיקרא שעל גדר החיצון שבין רה"ר למקיף נאמרו הדברים. שעמד מקיף וגדרן לסלק מעליו רגל הרבים ונמצא זה נהנה בשלו והוא חסר שהלה גרם לו הקיפא יתירא טפי משאם היו שדות שלו זה בצד זה רצופין.

That is, because the outside landholder must fence between his own fields and his neighbor's, the inside landholder is considered not merely a passive obstruction but an actual source of damage. Therefore, the Ramban and the Tosaphot claim, the fences in question must be the fences around the perimeter of the outside landowner's fields. This perimeter must be fenced regardless of the presence of the inside landowner in order to protect the fields from trespassers. In this case, the only loss to the outside landholder is "את גרמת לי הזק יתירא". The Ramban explains this to mean that if the inside landholder's field did not exist at all the perimeter of the outside landholder's fields would be less and therefore cost less to fence. This interpretation, though possible is not definitive in the Tosaphot⁷⁹.

The מגאש ר"י interprets the *mishnah* identically to the Tosaphot and the Ramban. However, in explaining the connection to חסר לא נהנה וזה he takes a slightly different tack. He writes:

ודוקא במקיף את חבירו הוא שמגלגלין עליו את הכל משום דהא איתנהי בהווא היקף וקא חסיר האיך דאמר ליה את גרמת לי היקיפא יתירא כגון זה... אבל היתה שדהו סמוכין לרשות הרבים ושדה חבירו סמוכין לה ועמד וגדר בינו ובין רשות הרבים אע"פ שחבירו הרי נהנה באותו גדר אין מגלגלין עליו כלום משום דזה נהנה וזה לא חסר הוא שהרי אין כאן לומר את גרמת לי הקפה יתירה. ואפילו במקיף את חבירו נמי דוקא לאחר שגדר הוא שמגלגלין עליו את הכל אבל לחיבו מתחילה לגדור עמו ולהוציא עמו בבנין אינו יכול לכופו על כך מפני שיכול לומר לו אנא לא איכפת לי בעוברי דרכים שהרי אפי' אם גדר ראשונה ושנייה ושלישית אין מחייבין אותו כלום לפי שעדיין לא נכנס עד שיגמור את הרביעית

⁷⁷ This is also the position of the Yad Ramah.

⁷⁸ I have chosen to quote the Ramban in this paper from מלחמות ה' because it seems a succinct summary of his position. He explains his opinion in greater depth in his חדושים on B"ב.

⁷⁹ According to the Tosaphot, it is possible to interpret that the loss to the outside landholder is based on the fact that in order to insure the security of his fields, he must partly fence property that is not his own.

וכ"ש להוציא עמו בבנין מעיקרא שאין מחייבין אותו בכך.

It would appear from this language that the מגאש ר"י obligates the inside landholder to pay specifically in a case where he is surrounded by three sides, and therefore when the outside landholder fences the fourth side, he is forced to fence property that is not his own. However, if the outside landholder surrounds his neighbor on all sides, this is a true case of חסר וזה נהנה וזה לא חסר⁸⁰. It is of interest to note that although the מגאש ר"י harmonizes significantly between our sugya and the sugya in Baba Kama, he ignores the deflection of the Talmud there: לדידי סגי לי זה נהנה וזה לא חסר. This presumably may be attributed to his ruling there that חסר פטור.

The last commentator I would like to address is Rabeinu Yonah. In his עליות on Baba Batra he writes:

פי', כגון שגדר בינו ובין חבירו כעין מה ששנינו למעלה מזה מקום שנהגו לגדור ושלא נהגו לגדור. ואבקעה קאי... ובפ' כיצד הרגל מדקדק ממשנה זו הא רביעית מחייבין אותו שמעת מינה זה נהנה וזה לא חסר חייב. פי', הא הקיפו מד' רוחותיו וגדר את הרביעית, ואין לפרש הא גדר את הרביעית ולא הקיפו אלא מג' רוחותיו. שא"כ לא הוה דייק מינה תלמודא, זה נהנה וזה לא חסר חייב, שהרי חסר הוא בגדר רוח רביעית, דלא מהניא ליה להיא מקיף ולא מידי, אלא לניקף הוא דמהניא לשומרו מבני רשות הרבים...אפילו למ"ד זה נהנה וזה לא חסר פטור, היכא דחסר מקצת מרוחות חברו, חייב חברו על הכל, כך פי' רש"י שם.

We can already see from this that Rabeinu Yonah does not object to Rashi on the same grounds that the Ramban and the Tosaphot did. That is, he does not think that the inside landholder, by virtue of existing, is considered to be doing damage to the outside landholder who must now fence between his own property and his neighbor's. Therefore, if the outside landholder surrounds his neighbor on four sides, one could entertain the idea that this is a case of חסר וזה נהנה וזה לא חסר but if he surrounds him only on three sides, it is certain that it is not. Rabeinu Yonah, however, continues:

ולי נראה שאין צריך לכל זה, אלא אע"פ שלא הקיפו אלא מג' רוחותיו וגדר גם את הרביעית, אין לנו לחייבו למ"ד זה נהנה וזה לא חסר פטור, דכי אמרינן דהיכא דחסר מקצת חברו חייב על הכל, ה"מ היכא דחסר בגרמת חברו, כי ההיא דאמרינן בהאי סוגיא, שאני התם דאיכא שחרורא דאשיתא, דאמרי' מעיקרא לא איתיהיבא אותה הנאה למחילה כיון דאית בה חסרון. אבל זה שלא היה זקוק לגדור את הרביעית, ולא גרם לו חברו לגודרו, אלא שגדרו לחייב את חברו בהוצאתו, ודאי זה נהנה וזה לא חסר הוא בראשונה שניה ושלישית...וההיא דיוקא דייק ש"מ זה נהנה וזה לא חסר חייב, דחי לה תלמודא וקאמר, שאני התם דאמר ליה אתה גרמת לי הקיפא יתירא, ולא קאמר אתה גרמת לי היקף זה. לפי שסתמו של דבר כבר גדר המקיף בינו ובין רשות הרבים קודם שגדר בינו ובין חברו שאם על חברו הקיף, כ"ש על רשה"ר והיינו דקאמר אתה גרמת לי כל היקף זה שביני לבינך מלבד ההיף הראשון.

In other words, in order to be obligated in a case of חסר וזה נהנה וזה לא חסר according to Rabeinu Yonah, one must actually cause some kind of loss to his neighbor and simple existence is not considered a cause of loss. However, when the outside landholder has either fenced territory that doesn't border his own, or fenced between himself and his neighbor when he has already fenced his own perimeter, he is faced with an extra

⁸⁰ On this point there is an ongoing disagreement between myself and my colleague and teacher Rabbi Daniel Roth. The position presented above is his. I believe that the operative clause in the statement of the מגאש ר"י is "שהרי אין כאן לומר את גרמת לי הקפה יתירה" and the ר"י only exempts the inside landholder when he is *not surrounded at all* and therefore there is no room to claim את גרמת לי הקפה יתירה.

expense that is undoubtedly caused by his neighbor. This is implied, according to Rabeinu Yonah, by the language: את גרמת לי היקפא יתירא. That is, the outside landholder has already fenced his own perimeter and is complaining about the extra fencing he must do between himself and his neighbor. In summary, Rabeinu Yonah defends Rashi (with some interpretive adjustments) against the attacks of the Tosaphot and the Ramban. This is confirmed in his final and conclusive interpretation:

עלה בידינו המקיף את חבירו מגי רוחותיו בבקעה שאין מחייבין אותו לגדור, וגדר אי' בי' גי' בינו לבין חבירו, אין מחייבין את הניקף בכך, לפי שלאנהנה בגדרים אלו להשמר מבני רשה"ר, שעדיין יכולים ליבנס בשדהו מרוח רביעית. אבל אם עמד המקיף וגדר את הרביעית לאחר זמן, אי"פ שכבר פטרוהו בית דין בגי' אלו, מגלגלין עליו את הכל כיון שעכשיו הוא נהנה בכולן, ע"י גדר הרביעית שהוא משתמר מבני רשות הרבים... וככשאנו מחייבין את הניקף, דוקא בששתק בשעה שגדר חבירו. אבל אם ימחה בשעת הגדר, ויאמר לדידי סגי לי בנטירא בר זוזא, טענתיה טענה.

There can be no doubt that Rabeinu Yonah adopts this position *even* when the inside landholder is only surrounded on three sides (in possible contrast to Rashi).

VI. Conclusion

We have attempted in this paper to summarize and critique as much as possible the different positions regarding the third *mishnah* in Baba Batra: המקיף את חבירו משלוש רוחותיו. We began by offering a reading of the *mishnah* and Talmud that appeared to us the closest possible reading of the text. The positions that we presented as *peshat* are merely our opinions about the correct way to read the text. As we commented above, other readings are certainly possible, the ones we present appear to us to be the best. We compared this reading with the sugya in Baba Kama and demonstrated where we believe the essential disagreement between the two sugyot lies. We attempted to represent the reactions of both the medieval and modern scholars on these two sugyot and demonstrate how the contradiction between the sugyot led different scholars down different interpretive paths. Finally, we presented the positions of the medieval scholars regarding the details of the *mishnah* and its connection to the question of וזה נהנה וזה לא חסר. Although other areas of inquiry remain on this topic, it is our opinion that this paper covers the main body of material regarding the interpretation of this *mishnah* and its sugyot.

The Poor vs. The Law

[Baba Batra 5a]

Debbie Jacobson-Maisels

I. Introduction

The sugya of המקיף את חבירו - 'the one who surrounds his neighbor' concludes with two *aggadot* regarding Ravina and Runia. The first is directly connected to our sugya: the Talmud recounts a dispute between the two regarding payment for a fence surrounding their properties constructed by Ravina.

<p>Baba Batra 5a Runia was surrounded by Ravina [by a fence] on all four sides. He (Ravina) said to him (Runia), "Give me what I have fenced (your portion of the cost of the fencing)". He (Runia) didn't give it to him. "Give me the value of cheap palms". He didn't give him. "Give me the cost of a guard". He didn't give him. One day he (Runia) was cutting (fencing off) his palm trees. He (Ravina) said to his tenant "Go and bring me a date branch". He went to bring it to him. He (Runia) raised his voice against him. He (Ravina) said to him, "You have revealed your view that it is good for you (to have protection)". "There would only be random goats. A random goat doesn't require protection". He (Ravina) didn't listen to him. He (Ravina/ Runia) went before Rava. He (Rava) said to him, "Go and appease him with that which appeases/ which he was appeased, and if not, he/you will be judged like Rabbi Yossi according to Rav Huna who said "Everything (should be paid) according to (the cost of) the fencing).</p>	<p>סיפור א': ב"ב ה'ע"א (כ"י פרנציה) רוניא, אקפיה רבינא מארבע רוחותיה. אמ' לי הב לי מאי דגדרי. לא יהב ליה. הב לי דמי קנים בזול. לא יהב ליה. הב לי אגר נטרא. לא יהב ליה. יומא חד הוה ג(ד)ז(ר) דיקליה. אמ' לי לארישיה זיל אייתי לי קיבורא דאהינא. אזל לאיתויי. רמא ביה קלא. אמ' לי גלית דעתך דמינח ניח' לך. לא יהא אלא עיזא בעלמי עיזא בעלמא [מעיזא בעלמי מין] לא בעיא נטירותא. לא אשגח ביה. אתא לקמיה דרבא אמ' לי זיל פייסי במאי דפ(א)י(ס) ואי לא (פייס) דייננא כר' יוסי ואליבא דרב הונא דאמ' הכל לפי מה שגדר</p>
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In the second *aggadah*, Runia purchases land adjacent to Ravina's fields and Ravina seeks to evict him based on his prior right of acquisition as a *bar metzra*. Rav Safra⁸¹, in an ambiguous phrase: "*Arba letzala, arba letzlala*", seems to rule that Runia has the right to remain on his newly purchased field, despite Ravina's apparently valid legal claim.

<p>Baba Batra 5a Runia bought land bordering Ravina. Ravina thought of evicting him on the basis of the 'law of bordering person'.</p>	<p>בבא בתרא ה'ע"א (כ"י פרנציה) רוניא זבן ארעא אמיצרא דרבינא סבר רבינא לסלוקיה משוי דינא דבר מיצרא. אמ' רב פפא [רב ספרא] בריה דרב ייבא לרבינא</p>
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⁸¹ In the Florence Manuscript this is recorded as Rav Pappa.

Rav Pappa [Rav Safra], son of Rav Yevea, said to Ravina: "People say, 4 for a large skin, 4 for a small skin / 4 for the skin and 4 for the tanner".	אמרי אינשי ארבעי לצלא ארבעי לצל[ל]א
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What emerges from this second *aggadah* is a debate amongst the Rishonim as to the meaning of Rav Safra's phrase, in an attempt to understand why Runia was granted this right. This debate, while starting as a philological analysis, ultimately touches the heart of legal theory. The Rishonim are split into two camps – those seemingly in favor of strict legal formalism – protecting the letter of the law in all circumstances and at all costs, versus those with an instrumentalist or consequentialist approach, to law – namely prioritizing the value underlying the law, or the reason for the law, and where necessary being flexible regarding the application of each specific law in order to ensure that the value is expressed in a particular case.

II. The Debate

According to Rashi's first interpretation, a *tzala* is a poor leather worker, whereas a *tzlala* is a wealthy leather worker. Rav Safra, according to Rashi, rules that poor workers need just as much sustenance to do their work as the rich (*arba kikarot tzrichin le retzaan ani lemelachot beito*), similarly Runia was a poor man who needed the field for his livelihood, and he should be allowed to stay on the field because of the principle of *veasita hayashar vehatov*. Rashi indicates that since the reason given for the rule of *bar metzra* was also *veasita hayashar vehatov*⁸², it is overruled in this case by presumably a greater demand for this principle in cases regarding the poor. Rashi refers to Rabbenu Gershom (10th- 11th Century, France) who also interprets Rav Safra's ruling in this way. This interpretation in a sense constitutes a non-formalistic, approach to *halakha* – focusing on the values underlying the relevant rulings. The original reason given for *dina debar metzra* in Baba Metzia was *ve asita hayashar vehatov*. From this perspective, it makes sense to override the particular practice when it conflicts with another application of this same principle, since ultimately it is the principle of *veasita hayashar vehatov* which is the supreme value, not the specific instantiation of *dina debar metzra*.

Rashi seems to take for granted that in the case of the two conflicting practices – *dina debar metzra* and granting a poor person special privileges to assist his livelihood, treatment of the poor is the more compelling instantiation of *veasita hayashar vehatov*. This assumption is not justified or explained in his commentary. One could argue that in a case of conflict between instantiations of a particular value such as in this case, the correct practice is determined on the basis of other relevant values. Perhaps in this case, the other value at stake in the case of the poor person is the interest in helping him emerge from poverty into greater self sufficiency. While Rashi himself doesn't address this explicitly in his first interpretation, he does in his second interpretation, which has been attributed to his grandson, the Rashbam - 'ונמצא רוניא משתכר' – [and the ultimate outcome will be] that Runia will become wealthier'. Similarly, the Ri Migash (11th-12th Century, Spain) introduces another value into the

⁸² See Baba Metzia 108a –

נהרדעי אמרי: אפילו משום דינא דבר מצרא מסלקינן ליה, משום שנאמר +דברים ו'+ ועשית הישר והטוב בעיני ה'. רש"י: ועשית הישר והטוב - דבר שאי אתה נחסר כל כך, שתמצא קרקעות במקום אחר, ולא תטריח על בן המצר להיות נכסיו חלוקין.

equation – recognizing and respecting the hard work that the poor man, Runia, had to do to acquire the field, whereas wealthier Ravina, had plenty of fields at his disposal and did not need this one in particular. It seems that these additional values are what grants the case of the poor priority over the *bar metzra*.

In the other legal theory camp lays Rabbeinu Tam (12th Century, France), quoted in Tosfot (c.v. arbah letzala), who has a radically different interpretation of Rav Safra's ruling.⁸³ For him, presumably, it would be inconceivable to resort to a consequentialist read of the *mitzvah* of *dina debar metzra*. From a formalistic perspective, the *din* must apply in all cases, and the presence of a poor person with an interest in the same field is irrelevant, regardless of the principle of *veasita hayashar vehatov*. Indeed, he introduces his interpretation with the statement: אין מרחמים בדין - 'We do not sacrifice the law for mercy'. Since there is no possibility of an interest such as *veasita hayashar vehatov* overriding a law such as *bar metzra*, there must be another reason why Runia is entitled to the field.

ואומר ר"ת דזבן ארעא אמיצרא דרבינא היינו אמיצר אותם שדות דאקפיה רבינא מארבע רוחות והיה רבינא מצרן מגי רוחות ורוניא מרוח אחת ואף על גב דאמר בהמקבל (ב"מ דף קח:) הני ארבע בני מצרא דקדים חד מינייהו וזבן מאי דזבן זבן מ"מ סבר רבינא לסלוקי משום שהיה מצרן מגי צדדין ורוניא רק מרוח אחת

According to Rabbenu Tam, therefore, Runia must also be a *bar metzra* to be entitled to the adjacent field. In other words, in Rabbenu Tam's interpretation, Runia must actually also have bordered the field in question, the field was surrounded on three sides by Ravina, and on one side by Runia, who himself was surrounded by Ravina on all three sides except for the field in question. The *din*, according to Baba Metaia 108b, is that the first *bar metzra* to acquire the bordering field is entitled to keep it. However, according to Rabbenu Tam, Ravina mistakenly thought that since he bordered the field on three sides, he had greater entitlement to the field. This follows from Rabbenu Tam's understanding of *arba letzala*, *arba letzlala* – one has to pay a leather worker the same four zuzim for work on either a big piece of leather or a small piece, similarly, both the *bar metzra* who only borders on one side, is just as entitled as the one who borders on three sides. Tosfot explains that according to Rabbenu Tam's interpretation, the second Runia story precedes the first, and it was as a result of his purchase of the disputed field that he became surrounded on all four sides by Ravina.

Rabbenu Avraham (a student of Rabbenu Tam, son of R Yosef of Orleanse)⁸⁴ also holds a similarly formalistic read of Rav Safra's ruling in favor of Runia. In his interpretation Runia was an *aris* - a share cropper or tenant on Ravina's land. For this reason, Runia also had the right, according to the *din*, to purchase the adjoining land, as an equal *bar metzra* to Ravina.⁸⁵ Rabbenu Avraham supports his interpretation on the basis of another *aggadah* regarding Runia and Ravina found in Baba Metzia 109a which states that Runia was Ravina's gardener or planter (*shatla*).

⁸³ See also Rabbenu Tam in Sefer HaYashar 616 (p. 362-363 in Shlezinger edition).

⁸⁴ See E. E. Urbach (1954) *The Tosaphists: Their History, Writings and Methods* Bialik Inst. Jerusalem. p. 141 n. 58.

⁸⁵ וה"ר אברהם פירש דהך ארעא דזבן רוניא אמיצרא דרבינא היינו אמיצרא דאותן שדות שהיה רוניא אריס בהן כדאמר ר' רוניא שתלא דרבינא הוה וה"ק ליה רב ספרא לרבינא אע"פ שאין לרוניא בגוף הקרקע כלום מכל מקום הואיל שהוא עובדן הרי הוא מצרן כמו דאמר ר' אינשי ארבעה לצלא נותנין ד' זוז על העור וכמו כן צריך ליתן לצללא לאומן המעבד את העור.

<p>Baba Metzia 109a Runia was Ravina's gardener. He (Runia) lost. He (Ravina) kicked him out. He (Runia) came before Rava. He said to him, "Sir, look at what was done to me." He said, "What was done to you was good." "But I wasn't warned." "You didn't need to be warned."</p> <p>Rava ruled according to his opinion, as we see Rava said "Teachers, gardeners, butchers, craftspeople and sofrim of the town are all considered warned and are similarly responsible". This is a rule. Any irreversible loss caused is considered as though the worker had a warning and he is held responsible.</p>	<p>בבא מציעא קט"א רוניא שתלא דרבינא הוה. אפסיד. סלקיה. אתא לקמיה דרבא. אמי ליה חזי מר מאי עביד לי. אמי ליה שפיר עבד לך. והא לא אתרי בי. לא צריכת לאתרויי בך.</p> <p>רבא לטעמיה. דאמי רבא מקרי דרדקי ושתלא וטבחא ואומנא וספר מתא כולהו כמותרינ ועומדין דמו. כללא דמלתא. כל פסידא דלא הדר כמותרה ועומד דמי.</p>
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In addition, Rabbenu Avraham supports his interpretation with a different reading of *tzala* and *tzlala* – "Just as people say four for the *tzala* – the leather store owner - who gets four zuzim for leather, similarly the *tzlala* – the craftsman who works the leather - also gets four zuzim for the leather. In the same way the worker (or gardener in this case) is also a *bar metzra* (with priority rights to purchase the field) and has equal rights as the owner of the field.⁸⁶

III. Conclusion

In examining these *aggadot* in the context of the *sugya* and of the first chapter of Baba Batra, several themes emerge. In the light of the overall topic of *hilchot schechim*, laws between neighbors, it seems that the *aggadot*, at least according to Rashi and the instrumentalist read, indicate that even when the letter of the law allows neighbors to make certain demands of each other, in the light of other considerations, it is sometimes best not to follow the letter of the law. Although the reason for flexibility in the case of the *aggadah*, according to Rashi, is *veasita hayashat vehatov* for the benefit of the poor person, perhaps in the light of the rest of the chapter, one could read another relevant value as being prioritizing the neighborly relationship. The interpretation of the Yad Ramah (Spain, 12th-13th Century) lends weight to this read. He says that according to the letter of the law, Ravina was entitled to demand repayment of half of the value of the fence from Runia, however, Rav Safra was encouraging Ravina to act "*lifnim mishurat hadin*" beyond the strict letter of the law,

⁸⁶ Ritva (13th Century, Spain) also holds the same interpretation:

בכאן מפני שבאותן שדות שעל המצר דהיו דרבינא היה רוניא אריס של בתי אבות בהן וחולק עמו בפירות וכיון שכן הרי הוא חשוב ג"כ בן המצר כמו רבינא

Explaining that since Runia, as an *aris* shared the crops of the field with Ravina, he was similarly considered a *bar metzra*.

The Rosh (brought in the Shita Mekubetzet) quoting Rabbi Meir (most likely, Rabbi Meir of Rutenberg), also explains our story along the lines as Rabbenu Tam and Rabbenu Avraham, yet he interprets our story in light of the story above. Namely, Runiya already has one field in the middle of Ravina's fields (based on the first story in B.B.) he therefore also has the rite of passage through Ravina's fields. As a result of this rite of passage he is considered a *bar metzra* to the new field found on the other side of Ravina's fields, as described in the second story in B.B. As he writes:

"דקאי אדלעיל דאקפיה רבינא מארבע רוחותיו והיה לו דרך לצאת לבא לשדהו דרך שדות רבינא וכן ארעא אמצרא דרבינא מבחוץ סבר רבינא לסלוקיה משום שלא היה מצרין... הוא מצרין כמו רבינא כיון שיש לו דרך..."

and in consideration of Runia's position not demand the full amount. Perhaps these *aggadot* are indicating the tension extant in the chapter as a whole, between maintaining a clear legal system with fixed laws, while at the same time allowing flexibility for exceptions.

These kinds of ambiguities are often more easily expressed through *aggadah*. According to the halachic discussion earlier in the *sugya*, it seems that Runia, as a co-beneficiary of this fence, even without consenting to its building, is responsible for paying a portion of its costs. The first *aggadah* rules in favor of Ravina and requires Runia to pay, apparently serving as a conclusion of the *sugya* by providing an unequivocal *psak* from Rava. However, while this first *aggadah* appears to conclude the *sugya*, the second one serves as its foil, potentially undermining its weight by ruling on the side of Runia against Ravina and presenting Ravina as an unkind, rich land owner attempting to evict his poor neighbor Runia and prevent him from rising up the financial ladder. In a sense, this second story highlights Ravina's questionable behavior in the first story, tormenting Runia to the extent of sending his tenant to steal from him. Ravina emerges from both tales as a less honorable character, committed to following the letter of the law for his own financial benefit, even when it results in significant losses for his poor neighbor.

We emerge from these *aggadot* with questions raised about the tension between the conflicting values of preserving the law and the subsequent need to maintain a clear and consistent, formalist, legal system versus the importance of remaining sensitive to the overall needs of society and of the original intent of the law. It remains a matter of debate which approach more faithfully maintains the integrity of the law itself.

Porous Borders:
An Examination of the Social Tension between
Privacy and Social Responsibility
[Baba Batra 7b]

Yosef Rosen

I. Introduction

The Talmud is a rich dialogic text layered in inner conversation, both among contemporary Rabbinic colleagues and between textual layers of tradition always reflecting and adjusting their received traditions. The former tends to be explicit in the Talmud; as any reader knows, not a page goes by without multiple positions stated in *makhloket* over any topic. But the latter tends to hide itself from the reader's untrained gaze. So good were the anonymous editors/composers of the Talmud, who we now refer to as the *Stama*, at interspersing their own opinions between the lines of earlier material, and at creatively constructing a text that has clear compositional intention and direction that one often forgets to differentiate between textual strata within the Talmudic page. The gravest conclusion of this methodological oversight is the inability to study the *purpose* of each composite textual unit, for purpose is only revealed here once thematic alteration and compositional history become explicit.

In this paper we examine a Talmudic text that is solely *Stamaic*, which is to say that it contains no earlier material and is an autonomous and late textual creation. Instead of the *Stama* being in constructive dialogue with earlier Amoraic teachings, in our text the *Stama* is only in dialogue with the Mishna. It seems that hundreds of years of assumed commentary on the Mishna are pushed aside via omission, and in their place the *Stama* constructs an unmediated critique of the Mishna. In the following pages we explore the way that this critique was constructed in its rhetorical structure, its usage of narrative as a method of legal disputation, and its attenuated adjustments of the Mishnaic value of privacy/safety.

II. The Normative Rhetoric of Testimony and Cries

In this study we will reflect on the following *Stamaic* text found in Talmud Bavli *Baba Batra* 7b:

<p>Our Mishna states, “One may be forced to help build a guardhouse.”</p> <p>Is this to say that a guardhouse is really of value? But there was that pious one that Elijah would converse with, he built a guardhouse for his home and Elijah stopped coming/conversing with him.</p> <p>This is no question; one is built on the inside and one on the inside. And if you wish to say that they are both on the inside, it is still no question, for one has a door and one does not. And if you wish to say that they both have doors it is still not a question, one door has a handle and one does not. And even if you wish to say that they both have handles, it still remains not a question since one (door) opens towards the inside and one (door) opens to the outside.</p>	<p>מתני' כופין אותו לבנות בית שער' למימרא דבית שער מעליותא היא? והא ההוא חסידא דהוה משתעי אליהו בהדיה. ועבד ליה בית שער לביתיה ולא אשתעי אליהו בהדיה. לא קשיא הא מגואי והא מאבראי. ואיבעית אימי' הא והא מאבראי, ולא קשיא הא דעבד ליה דלת והא דלא עבד ליה דלת. ואיבעי' אימי' הא והא דעבד ליה דלת. ולא קשיא, הא דעבד ליה פותחת, והא דלא עבד ליה פותחת. ואיבעי' אימי' הא והא דעבד ליה פותחת, ולא קשי' הא דפותחת דידיה מגואי והא דפותחת דידיה מאבראי.⁸⁷</p>
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For a comprehensive understanding of our text it is vital to first analyze the rhetoric used by the *Stama*. The rhetorical locution “Is this to say that...is really valuable?” appears multiple times in the *Stamaic* strata of the Talmud Bavli,⁸⁸ and never in earlier *Amoraic* layers. Its rhetorical force is meant as a means of propelling critique against an earlier stated ruling. Typically, the locution is followed by a quote of a later stage that is brought to undercut the monolithic value of the critiqued ruling by introducing a negative consequence of that law. It can be seen as a thinly masked means of destabilizing earlier codified laws by placing their value in question via introducing new opinions, a method Moshe Halbertal has referred to as decanonization.⁸⁹ Obviously the goal of the *Stama* is not primarily to critique, but to form a (new) coherent normative world; these critiques are means towards constructing that world. This form of critique is unique in its method of subjection. It differs from other forms of critique that base their claims in legal reasoning, formalistic claims, proof texts, or stated common sense. Here, the critique arrives from a later stratum that sees a particular earlier law as contradicting or undermining a different value that is disregarded by that critiqued law. Our case is a unique and extreme application of this rhetorical frame.

Two features aggrandize the severity and power of this locution in our text. First, the critique is directed against a canonized Mishna, and second the critique arrives from a narrative, as opposed to a second legal ruling. The narrative that is brought is anonymously recited and its character goes named anonymously as well. It is hence not the status of our character – even though he is named a pious one – that gives his narrative value or power, but rather the local result. This is a story about one person, one anonymous person, and that suffices here to question the value of a canonized law; an individual local narrative is here validated as testimony against the universal norm of the Mishna.⁹⁰

⁸⁷ Ms. Hamburg.

⁸⁸ See T.B *Brakhot* 54b, 55a, 55b, *Rosh Hashana* 4a; and in a slightly different rhetorical frame: T.B *Brakhot* 14b, *Shevuot* 45b, *Ketuvot* 21a.

⁸⁹ Moshe Halbertal, *People of the Book: Cannon, Meaning and Authority*, Cambridge: Harvard University Press 1997.

⁹⁰ Though indemonstrable, it is possible that the *Stama* is reflecting a concern already voiced in our Mishna by R. Shimon b. Gamliel who argues with the main voice in our Mishna by stating that not

How can narrative critique law, and how does narrative function when it does critique law? Narrative here functions as testimony, where testimony is the ability of narrative to have normative effects.⁹¹ Hence it can be claimed that narrative has the ability to critique law when it is treated as testimony. But how does narration become testimony? One can only give testimony to someone, before someone, who is willing to act upon the narrative. In a testimony the narrative is understood as an appeal for empathy, for others to understand the plight or dangers they underwent, and to feel called to responsibility in order to act to prevent further violence. Therefore the possibility of testimony must be constructed, the context must be built in which we will allow ourselves to have claims made of, and on, us.

Typically we testify so that the law may be properly applied, but at other more serious times one testifies against the law. The former form of testimony must occur in the courthouse, but it is unclear if the latter can occur in the courthouse at all. Does every system of law have a site where witnesses may protest the harms that the law has performed and inflicted upon them? Where then is our place of testimony against the law? We believe we can view the Talmudic text as a unique site where we find both forms of testimony. Often narratives are brought within the legal contexts of a Talmudic *sugya*, textual unit, in order to indicate how the law ought to be properly applied to the nuances of human situations,⁹² but in a few rare cases, and perhaps nowhere as explicitly as in our text, a narrative is stated in order to critique the value and ethic of the law itself. The Talmud thereby raises narrative into the domain of testimony by bravely allowing it to carry bold normative consequences.

The normative import of our narrative stems from Elijah's protesting absence once the pious student builds a guardhouse outside his home. Elijah's refusal, or perhaps inability, to enter into a home that is enclosed by such an isolating structure is taken by the *Stama* to indicate the disapproval of such architectural endeavors. This is a stance that runs clearly against the grain of the Mishna, which indicates that such a structure is so important that one householder may coerce another to financially participate in its building. The fantastical element that surrounds this narrative indicates that it is a constructed rhetorical device used to subtly, and humanely, convey the problem of the Mishnaic law.

all courtyards are "worthy" of guardhouses, a critique that already raises the possible inappropriateness of a guardhouse. It would appear that the *Stama* was not deriving his/their critique from aggrandizing R. Shimon b. Gamliel since in the following section of our *sugya* the *Stama* takes R. Shimon b. Gamliel's words to a completely separate direction. Yet the possibility stands.

⁹¹ On the complex relation between law and narrative see: Robert Cover, *Narrative, Violence and the Law: The Essays of Robert Cover*, ed. M. Minnow, M. Ryan, and A. Sarat, University of Michigan Press 1993; Jack Balkin and Sanford Levinson, 'Law and the Humanities an Uneasy Relationship,' *Yale Journal of Law and the Humanities*, vol.18: 155-187; and Joseph Singer, 'Normative Methods for Lawyers,' Harvard Law School Public Research Paper 08-05 (2008), especially p.55-63. For an important study on the narrative aspects of testimony see Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalyses, and History*, Rutledge, 1991.

⁹² For discussions relating to the relationship in the Talmud between narrative, law and culture see Jeffrey Rubenstein, *Talmudic Stories: Narrative, Art, Composition and Culture*, Johns Hopkins University Press 2003; and Yair Lorberbaum, *Tzelem Elohim*, Schocken Publishing House, Tel Aviv 2004 (Hebrew).

Similar narratives concerning Elijah's disappearance as a consequence to a disciple committing an ethical deviance are found in two other Rabbinic texts. These three narratives follow similar linguistic structures and even have a few important locutions in common, a factor that strengthens the claim that this narrative structure was a known rhetorical device within the Rabbinic period used to indicate a subtle ethical problem. In *Genesis Rabbah* (94:27) the following narrative appears⁹³:

<p>Ulla the son of Kosher was wanted by the government. He arose and fled to R. Joshua b. Levi at Lydda, whereupon officers were dispatched after him. R. Joshua b. Levi argued with him and urged him [to surrender], saying, "better that you should be executed rather than that the whole community should be punished on your account." He allowed himself to be persuaded and surrendered to them. Now Elijah used to speak to with him, but when he acted thus he ceased to visit him. He fasted thirty days, after which he returned to him; he asked him "why did you not come?" He replied, "am I the friend of informers?" "But is this not a Matnita: 'If a company of people,' etc." "But is that a teaching for the pious, this should have been done through others and not through you!"</p>	<p>עולה בן קושר תבעתיה מלכותא, קם וערק לגבי ר' יהושע בן לוי ללוד, שדר פרדיסקי בתריה, איטפל ליה רבי יהושע בן לוי ופייסיה, ואמר ליה מוטב דלקטול ההוא גברא ולא ליענשו ציבורא על ידיה, איפייס ליה ויהביה ניהליהו, הוה קא משתעי אליהו בהדיה, כיון דעבד הכי לא אתא לגביה, צם עלוי תלתין יומי ואתחזי ליה, אמר ליה מאי טעמא אפגר מר, אמר ליה וכי חבר אני למוסרות, אמר ליה ולא מתניתא היא סיעה של בני אדם וכי, אמי וכי משנת חסידים היא? מבעי להאי מלתא מתעבדא ע ידי אחריני ולא על ידך.</p>
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The narrative context for Elijah's absence is a quoted story of how R. Yehoshua b. Levi once convinced a wanted local, Ulla, to surrender to the government, lest they crusade against the whole Jewish population. We then learn that while Elijah used to frequent R. Yehoshua b. Levi, after he acted this way Elijah stopped visiting him. He then fasted for 30 days until Elijah reappeared to him. Elijah justified his disappearance by stating that he does not visit informers. And when he then replied that he had only acted in accord with a known law, Elijah replied that such behavior was inappropriate for someone of his moral stature, and should have been done by another and not by a pious one like him. The key phrase, "and is it a law for the pious", indicates that Elijah's absence does not necessarily indicate a breach of the law and can signify a subtler misdemeanor.

The second narrative in this cluster, found in T.B *Ketubot* 105b-106a, tells how Elijah stopped teaching Rav Anan after he was minimally responsible for a judge showing favoritism to an individual. He too fasted and prayed until Elijah began to reappear to him, but the story's ending makes clear that these latter revelations would always frighten and surprise Rav Anan, indicating that their student-teacher relationship was permanently damaged. The features that make our narrative stand out amongst these two other stories are:

1. Our story is much shorter, and indeed seems to be either a fragment of an earlier known story or a reference to a larger unmentioned episode (this latter possibility is reinforced by the language of "...and behold *that* pious man..." which strongly connotes some communal foreknowledge of a fuller narrative).
2. There is no mentioned attempt by the pious individual to fast and pray to arouse Elijah to return. The absence of this trope may be intended to indicate that his wrong could not be simply undone by the practices of personal

⁹³ בראשית רבה תיאודור-אלבק צד: כז

repentance but would actually require removing the guardhouse itself; the location of the wrong lays outside of the individual's body.

3. The two other stories have no consequential normative application; they are simply brought as isolated narratives that bespeak the ethical sensitivity of Elijah, and not necessarily the ethical sensitivity of the law.

Most Medieval commentators,⁹⁴ in reference to our narrative, claim that the detrimental aspect of a guardhouse is located in its ability to prevent the cries of the poor, who go from door to door looking for charitable donations, from being heard inside the home. While the guardhouse operates as a safety and privacy enforcer, shooing away peeking-toms and preventing burglars from penetrating into the domestic, it simultaneously acts as a sound barrier that isolates the home-owner from the needs of the destitute and unprivileged, which have no home to comfort in and must elicit sympathy from those fortunate individuals who do have homes. There is hence a clear, and seemingly mutually exclusive, conflict of social values: privacy/safety versus communal responsibility. It also seems that the more mechanisms one institutes to protect the human value of safety and privacy, the less attention will be paid to those who stand outside of these homes and seek to make claims upon their dwellers to help alleviate their sufferings.

The only chance the destitute have of effecting change is by calling out, by appealing through mediums of communication to others who have the power and the resources to effectuate liberation and assistance. Voice remains their sole resource of power. For these appeals to then be muted is equivalent to seizing their sole possibility to be empowered, and in this case, probably, to live. The cry, or the scream, is the extreme display of this condition; it is a performative act at the border of language. It seeks to communicate nothing other than the powerlessness of a person unable to remove suffering from their body and social condition. But it is no soliloquy, no poetic act to be viewed; it is rather a solicitation that asks for help from those that do have power to lift away the bondages that inflict and grant a charitable hand.⁹⁵ We must therefore be sensitive to the way the commentators read the muting of the guardhouse; the focus is not on its ability to cut away social dialogue, but rather on its inability to allow the plight and suffering of the poor to affect and solicit the insider.

If this trope of muting the screams of the poor is completely absent from the actual Talmudic text, where then did the commentators pick-up on this? We believe they were comparing the voice of Elijah, which crosses over the border between the heavenly and the humane, with the voices of the poor that seek to cross over the border of the doormat. The exact phrase the Talmud uses is "Elijah would regularly converse/teach with him." The commentators thus likely figure that the voice of Elijah no longer reached the pious one because the voices of the poor could no longer reach this "pious" one. This constructed parallelism, or even equation, between voices of the destitute and the voice of Elijah, conflates a horizontal entrance with a vertical entrance, and bespeaks an inseparable bond between the religious and the social.

Interestingly there is strong contrast constructed here between the

⁹⁴ See Rashi, Rabbenu Gershon, Meiri, and Ri Migash ad locum.

⁹⁵ For a different read of the trope of screams in our narrative, see Aryeh Cohen, "Why Textual Reasoning", *Journal of Textual Reasoning* 1,1 (2002).

undesirability of sight and the desirability of sound/voice to enter the borders of the home. An earlier *sugya* on 2b interprets the concern of our Mishna to be about *hezek re'iyah*, the damages of the gaze. That text even comments on the uniqueness of the damage in our case due to the identity of the gazers as public bystanders, a factor that makes this a stronger breach, of privacy than when one neighbor gazes into the home of another. This *Sugya's* read of our Mishna makes explicit that it understood the concern that building a guardhouse quieted to be a desire to be free from the peeps of the masses that swarm outside one's home. This Mishnaic concern for privacy is now placed in tension with the Stama's concern (or at least the way later commentators read this concern) for the voices of the poor to be heard by homeowners. We hence value the lack of others' gazes penetrating the borders of the home but devalue the lack of others' voices penetrating those same borders. This is due to a particular social orientation that credits privacy as a human right but simultaneously mandates that privacy not turn into isolation from the plights of the public and the moral issue of the other.

Until now we have posed these two relevant social concerns as mutually exclusive; it seems that one must trade one's safety/privacy for the sake of being sensitive to one's social responsibility to outsiders. And indeed, the beginning of our Talmudic text pits these as contradictory; the Mishna advocates building a guardhouse for the sake of safety/privacy while the quoted narrative advocates not building one for the sake of hearing the poor. But our *sugya* does not accept or end with this bind. It instead attempts to creatively mediate both values by constructing various architectural possibilities that would simultaneously be porous enough to allow the poor to have their voices heard, and firm enough to prevent burglars or peepers from violating the pastoral realm of the home. In fact, the Stama offers four different structural alternatives for how this balance can be constructed; the guardhouse can be either: inside/outside, with a door/with out a door, a door that can be opened without a key/ a door that cannot be opened without a key, a door that can be open on the outside/a door that cannot be opened on the outside.⁹⁶ The Stama here offers a proliferation of possibilities in a manner that sequentially imposes less and less of a requirement upon the homeowner to lower his protection in order to grant access to the poor. Thus it appears that the Stama is stating clearly the existence of a possibility, and indeed multiple possibilities, to combine and uphold both conflicting social values. This reframes the earlier Stamaic critique raised via the story as a desire to attune the canonic law, namely, the Stama's objective was not to obliterate the Mishnaic law but to expand it, to open it to a secondary value that was slighted by its norm.

While we have endeavored in this paper to understand how the normative import of the Elijah narrative functions within our *sugya*, not all later commentators saw this narrative as testimony that should affect the law. They rather saw it as a

⁹⁶ The Medieval commentators were regionally split about which of set of alternatives was the preferred one. The Ashkenazi commentators (see Rashi and Rabbenu Gershon ad locum) preferred the guard house on the outside, so that the poor person could enter into its chamber, while the Spanish commentators (see RI'Migash, Ritva and Yad Rama ad locum) preferred the guardhouse on the inside so that the poor could still come up till the original border. This dispute likely revolves around different social practices; in Ashkenaz it seems that anyone could enter a guardhouse if it exuded into the public domain, while it appears that in Spain individuals could not enter the guardhouse even if it was in the public domain.

“plain” story, or possibly, as we will see, as an exceptional story that like the other Elijah stories can only indicate how the pious should act, how those that wish to converse with Elijah should act, and not how everyone must act. Three early medieval commentators, Rabbi Isaac Alfasi (the RIF), Maimonides, R. Asher, and R. Joseph Caro in his *Shulhan Arukh* omit the narrative and the Stama’s subsequent reworking of the Mishnaic law in their super-commentaries. Only the Meiri and the Yad Rama include the Stamaic reformulation as normative. In regard to this surprising phenomenon, Rabbi Aaron ben Yosef Sason, a 16th century sage of the Ottoman empire, writes in his collection of reponsa, *Torat Emet* (191)⁹⁷ how he is puzzled how these commentators can ignore a whole Talmudic sugya. He meekly suggests that they believed that the Elijah story only indicates the expected standard for the pious, the *midat hassidut*, and not the law itself, an ethical suggestion and a normative demand. But he is unsatisfied with this approach since the Stama clearly did not see the normative import of this narrative to exist outside the realm of the law, as it is used to change the canonical law itself! It is possible that these later commentators were queasy about raising such a story to the status of testimony and preferred to see it as a pedagogic legend, a legend that cannot be used to affect canonized law. Indeed this would be counter-grain to the Talmud, but just as we have seen the Stama deviate from the Mishnaic sense, so too perhaps these medieval writers veered from the Stama and returned to the plain sense of the Mishna.

III. Conclusion

In this study we have looked at a Talmudic text that is completely Stamaic, composed by the anonymous “editors,” through and through. It lacks any quotes or references, except the anonymous narrative, which appears nowhere else. This absence of earlier material underscores its heavy critique of the earlier Mishnaic law, a critique that is generated from thin air, and has but a story to grant it normative force. But indeed this narrative is taken very seriously. We have tried in this paper to understand exactly what it means to take narrative seriously. In our case, it means to allow narrative to make claims, an allowance that we have termed as testimony. This ability for narrative to act as testimony against an earlier codified law bespeaks the severe moral unease the Stama felt in regard to our Mishna. It is, in conclusion, essential to understand both what generated the moral restlessness at play here, and the maverick ability to raise one man’s narrative to a generator of new law.

When we take account of those guardhouses – the architectural and existential structures constructed out a genuine desire for privacy and safety from some outside force/face – we have built or those we have been privileged to be placed/born within, can we testify that the destitute, those powerless ones who appeal to our assistance and charity, that dwell outside the borders demarcated by these guardhouses are heard, that they have not been “accidentally” muted? To what extent can the Talmudic text explored in this paper be allowed by the reader to make claims on her? What are these claims?

⁹⁷ Referenced in *Chevra U’Midinah: Sugyot B’Baba Batra*, Beit Midrash Yisodot, p.13.

Talmudic Mediation
Conflicting Interpretations of the Talmud as Conflicting Needs in Society
Baba Batra 5a, 7b-9a⁹⁸

Daniel Roth

I. Introduction

Gemara be-iyun, or the traditional in-depth study of the Talmud practiced in advanced Jewish learning institutes around the world, is widely regarded as the study of the Babylonian Talmud together with its Rabbinic interpretations (*Rishonim, Achronim*) not for the sake of understanding the *halakhah*. The question is: what is the purpose of such in-depth Talmud study? Or, put differently, how might the student of such in-depth Talmud study perceive his or her endeavor? Some students have perceived themselves as Talmudic mathematicians or physicists, seeking to define the underlying conceptual principles behind the Talmudic laws.⁹⁹ Others have perceived themselves as Talmudic historians or archeologists seeking to uncover the various layers of the Talmudic text and the development of the *halakhah* that was to follow over the course of history.¹⁰⁰ We would like to add a third perspective: That the student of the Talmud perceives him or herself as a mediator, seeking to understand the various needs and interests behind the conflicting interpretations of the Talmudic text, and to be able to relate those same eternal dilemmas back into her or his own reality.¹⁰¹

When the student, thinking like a mediator, opens up a page of Talmud and hears the conflicting voices of the Rabbis regarding how to read a particular line in the Talmud, he or she first attempts to listen carefully to how each side presents its case. Once all the possible positions have been presented and heard, she or he then proceeds to explore what may be some of the underlying interests or needs motivating each textual interpretation. Finally, the student attempts to translate these rabbinic

⁹⁸ I would like to extend my deep gratitude and thanks to to all the participants in the Pardes of Kollel of 5769 who helped assisted me in thinking through many of the ideas presented in this paper. In addition, I thank Livia Levine and Debbie Jacobson-Maisels, who carefully reviewed and submitted important comments to this paper. Very special thanks to my *ezer kenegdi* Leora Kesten-Roth, for all her hard work in editing this paper. I would also like to thank Rav Elisha Ancselovits who first inspired me to connect the principles of mediation together with the in-depth study of Talmud.

⁹⁹ See, for example, Rabbi Herschel Schachter's description of Rabbi Joseph Soloveitchik's method of in-depth Talmud study: "He (Rav Soloveitchik) would say that in physics, the physicist looks around in the world, and sees a number of phenomena. The physicist's job is to figure out the formula that will explain them. Similarly, in *halakha*, there are thousands of *dinim*. It's like a jungle full of *dinim*. The proper *derekh* is to try and figure out the underlying rule." From, Ari Lamm, "Torah is not Just a Collection of Dinim: An Interview with Rav Herschel Schachter", Kol HaMevaser Nov. 5th, 2007. The interview can be found at: <http://media.yucommentator.com/media/storage/paper652/news/2007/11/05/KolHamevaser/Torah.Is.Not.Just.A.Collection.Of.Dinim.An.Interview.With.Rav.Herschel.Schachter-3079257.shtml> See also Rav Soloveitchik's book *Halakhic Man* [at pp 18-19], where he also refers to the imagery of the mathematician.

¹⁰⁰ See, for example, Prof. Shamma Friedman. "The Talmud Today" http://www.atranet.co.il/sf/talmud_today.pdf

¹⁰¹ Regarding the importance of identifying needs and interests by the mediator, see John W. Cooley (2006). *The Mediator's Handbook*. The National Institute for Trial Advocacy. P. 223: "Many of the principles of good mediation are the same as those of good negotiation. Chief among them is the principle of identifying all party's underlying needs and interests."

debates over conflicting needs and interests back to his or her own society which may be dealing with similar conflicts. Therefore, the goal of in depth Talmud study, from this perspective, is both to understand the text through real life, and real life through the text.

This article seeks to present what "Talmudic Mediation" might look like through exploring five discussions of conflicting rabbinic interpretations of specific Talmudic lines from the first chapter of Babylonian Talmud Baba Batra. Each of these discussions will be analyzed by relating to the following questions: 1. what are the different rabbinic interpretations or positions regarding a particular Talmudic statement? 2. What might be some of the conflicting needs and interests motivating these different interpretations? 3. What might be considered similar conflicts in our society today?

II. The Needs of the Periphery versus The Needs of the Center:

The question of the needs of the periphery versus the needs of those in the center comes up in the Talmudic discussion on taxes, found in the Babylonian Talmud (B.B. 7b). The Mishnah (B.B. 1:5) there states:

One [who dwells in a town] is compelled [to contribute towards the cost of building] a wall for the town.	כופין אותו לבנות לעיר חומה
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The Talmud (7b)¹⁰², commenting on this Mishnah, cites two versions of R. Eleazar asking R. Yochanan how this tax for the town wall is collected:

<p>R. Eleazar inquired of R. Yochanan: "Is the tax for the town wall collected according to <i>shevach mamon</i> (the wealth of the individual) or according to <i>shevach beney adam</i> (a fixed tax on each individual)." He replied, "It is collected according to <i>shevach mamon</i>, and you my son, fix this ruling firmly in your mind.</p> <p>According to another version: R. Eleazar asked R. Yochanan, "whether the tax for the town wall was collected according to <i>shevach mamon</i> (the wealth of the individual) or according to <i>kiruv batim</i> (the relative proximity of the individual to the town wall)? He replied, "It is according to <i>kiruv batim</i>, and Eleazar my son, fix this ruling firmly in your mind."</p>	<p>בעא מיניה ר' אלעזר מר' יוחנן : כשהן גובין לפי שבח ממון הן גובין או לפי שבח בני אדם הן גובין? אמי ליה לפי שבח ממון הן גובין ואלעזר ברי קבע בה מסמרות.</p> <p>איכי דאמרי בעא ר' אלעזר מר' יוחנן כשהן גובין לפי שבח ממון הן גובין או לפי קרוב בתים הן גובין? אמי ליה לפי שבח (ממון הן גובין) [קרוב בתים הן גובין] אלעזר בני קבע בה מסמרות.</p>
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The Talmud raises three possibilities of how the tax for the town wall should be collected: 1. *Shevah mamon*, meaning that one pays according to their relative wealth; 2. *Shevach bney adam*, meaning that each person pays a flat rate; or 3. *Kiruv Batim*, meaning that each person pays according to their proximity to the town wall. The first two possibilities are recognizable within our society today ("progressive" and "regressive" taxes), and within other Rabbinic texts.¹⁰³ However, the third possibility, *kiruv batim*, which is also the position accepted as the *halakhah*, is unfamiliar. Three Rabbinic interpretations have been offered as to how to understand

¹⁰² The Hebrew text is from ms. Hamburg.

¹⁰³ See Tosefta Baba Metzia 7:13 (T.B. Baba Kamma 115b): שיירה שהיתה מהלכת במדבר ונפל עליה גייס. אם שלחו טייר לפניו אף מחשבין לפי נפשות ואין משנין וטרפה מחשבין לפי ממון ואין מחשבין לפי נפשות. אם שלחו טייר לפניו אף מחשבין לפי נפשות ואין משנין ממנהג הולכי שיירה.

how *kiruv batim* works.

Rashi (c.v. *kiruv batim*) explains:

A house that is closer to the wall needs the town's wall more than (someone who lives) further.	בית הקרוב לחומה צריך לחומת העיר יותר מן הרחוק.
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According to Rashi, the closer one lives to the wall, and the more he needs and benefits from its protection, the more he must pay for it. This interpretation, which suggests that the more one is in danger, the more he must pay for his protection, was contested by other *Rishonim*, and two alternative explanations were offered. Rabbenu Tam, (R. Yackov b. Meir, Rashi's grandson), is quoted as saying:¹⁰⁴

Rabbenu Tam interpreted: and poor inhabitants who live close (to the wall) give more (taxes) than poor inhabitants who live further (from the wall). And so rich inhabitants who live closer to the wall give more than the rich who live further away. However, rich inhabitants who live further away give more than the poor who live closer, since according to <i>shevach mamon</i> , they also collect.	פירש ר"ת ונותנין עניים קרובים יותר מרחוקים וכן עשירים קרובים יותר מעשירים רחוקים אבל עשירים רחוקים נותנין יותר מעניים קרובים דלפי שבח ממון נמי הן גובין.
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Rabbenu Tam here argues that the principle of *kiruv batim* is only a secondary consideration, while the primary one is *shevah mamon* (according to the wealth of each individual), and therefore a poor person will never end up paying more than a rich person.¹⁰⁵

A third explanation was raised by the Rama (Rabbi Meir HaLevi Abulafia). The Ramah rejects the explanations of Rashi and Rabbenu Tam and wrote in one part of his lengthy discussion on the topic:

Rather it is reasonable, that when we collect according to <i>kiruv batim</i> , it is not because of proximity to danger, for if it was for this reason, <i>shevach mamom</i> would be preferred. Rather, this is the reason, because the houses that are further out, closer to the wall caused the people of the town an extended circumference in the building of the wall, that since the proximity of to the wall, it will be further from the center of the town. And it is known, that according to the distance of the line from the center, the line that surrounds it gets larger, so it is that the house that is closer to the wall, according to the distance from the center more than his fellow resident, he is the cause of the city limits being larger than his friend. Because of this, we collect from the residents according to <i>kiruv batim</i> , and we are not concerned with <i>shevach mamom</i> or <i>shevach nefashot</i> .	אלא מסתברא דכי גבינן לקירוב בתים לאו משום קורבא דהיזקא הוא, דאי מהאי טעמא, שבח ממון עדיף. אלא היינו טעמא, משום דבתי בראי דמקרבי לחומה גרמי להו לבני מתא היקפא יתירא בבניין החומה, שלפי קירוב הבתים לחומה יהיה מרחקם מטבור העיר. והדבר ידוע, שעל פי מרחק הקו מן הטבור ירבה הקו הסובב אותו ונמצא שהבית הקרוב לחומה לפי מרחקו מן הטבור יתר מחבירו הוא גורם לעיר היקף מרובה יתר מחבירו. אמטון הכי, גבינן מינייהו לפי קירוב בתים, ולא חיישינן לשבח ממון ולא לשבח נפשות.
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The Ramah rejects Rashi's notion that *kiruv batim* means the closer one lives to potential danger the more one has to pay, for if this was the case, the only criteria

¹⁰⁴ Tosefot B.B. 7b c.v. *Lefi Kiruv Batim*:

¹⁰⁵ Similar interpretations were offered by several other *Rishonim*. See for example the comment of the R"Y Migash (R. Yosef Ibn Migash) that reads *kiruv batim* as "also" *kiruv batim*, but first we check to see how much money everyone has, as he writes "הא למדת ששבח ממון הוא העיקר" ("You learn that *shevach mamom* is the primary criteria.")

would be the wealth of the citizens of the town. He also rejects any possible reading combining *kiruv batim* with *shevach mamon* (Rabbenu Tam) since they are portrayed in the Talmud as two separate options. Rather, according to the Ramah, the reason why the person living closer to the wall must pay more is because he has caused the wall to be expanded in its circumference, therefore causing an increase in the wall's overall cost. The principle of *kiruv batim* is therefore that the more one causes an increase in expenses, the more one must make up for the difference. The problem with the Rama's interpretation is, however, that, in most situations the closer one lived to the wall, indeed the more one was exposed to danger, and therefore need the wall to protect them, and they should not be considered as causing additional unnecessary expenses to the town.

This difference of interpretation regarding *kiruv batim* may be understood in various ways. It may be understood as being motivated by possible differences in interpretive styles and historical realities¹⁰⁶, or as opposing conceptual understandings of the law¹⁰⁷, or, we may suggest, as reflecting conflicting group needs and interests in society. Understood this way, Rashi presents the principle of *kiruv batim* as promoting the interests and needs of the residents of the center of the community, who live further away from danger. The closer one lives to an area full of risks and dangers, the more one must pay for his own security.¹⁰⁸ It is unfair to obligate those who do not live in such an area of danger to contribute equally as those who do. For example, if one lives in an area that is hit by tornadoes, the residents of the area may be expected to pay more taxes for their protection than those who do not live there.

Rabbenu Tam agrees with Rashi's basic understanding of *kiruv batim* as the closer one lives to danger the more they must pay for their own protection, yet he seems to disagree with Rashi in seeing this principle as standing alone, and suggests it is secondary to the principle of progressive taxation. This position seems to be promoting the interests and needs of the poor and the weak in the society, those who have not chosen to live in a dangerous area. For example, a person who lives in an area where there are many tornadoes might be too poor to move to a less dangerous area, and it would be very unfair to obligate him or her to pay more for living in a dangerous area. This point is strengthened when combined with the possibility that

¹⁰⁶ Rashi is interested in the "simple" reading of the Talmudic text, therefore explains *kiruv batim* more literally. The R"Y Migash, who holds like Rabbenu Tam and other *Rishonim*, read *kiruv batim* as being a secondary criteria because they are interested in a more "global" interpretation, that take in to account the Talmudic discussion in B.K. 116a. The Ramah, who lived in the period of the Reconquista in Spain, may have been motivated by particular historical realities as a result of many new towns and cities being built.

¹⁰⁷ What is the nature of the tax for the town wall? The R"Y Migash and Rabbenu Tam might see it as more formal municipal tax, while Rashi and the Rama might see it as more of a private or neighborhood tax.

¹⁰⁸ A possible proof that this reading is the simplest reading of the Talmud was mentioned to me by my colleague Haggai Reznikoff, who pointed out that the same principle of those who need more security pay more than those who don't, is featured in the subsequent Talmudic discussion (7b-8a) relating to the principle of *רבנן לא צריכי בטירוחא* ("the Rabbis do not need security"), since the Torah protects them. This underlying assumption behind this principle, like that of *kiruv batim*, is that those who don't need security don't have to pay for it. See further Noah Moline's article "The Torah is their Protector", in this journal. Also, note that only R. Moses Feinstein, cited there, interprets the Torah of the Rabbis as not only protecting them but also the community at large. For further discussion on this idea see Talmud Yerushalmi Hagigah 1:7 (76:3) that identifies the Rabbis as the true protectors of the town.

the area in question is strategically essential to the welfare of the rest of the town, for if they did not live near the wall, and the dangers from outside, someone else would have to!

The Rama understands *kiruv batim* as having nothing to do with proximity to danger, but suggests that the further one lives from the center, the more it costs to include him in the wall, and that is why he must make up the difference. This principle may be found in a case where a person lives far away from the rest of the Jewish community, yet insists that he be included in the *eruv*; he may be expected to help pay for the difference of its expansion. The Rama here is promoting the interests of both the residents of the center and of the endangered periphery by differentiating between two cases. In a case where there is no danger to be spoken of, we protect the interests of the residents of the center, by charging more to those who chose to live further on the periphery. However, in the case when there is more danger to some than others, we do not apply the principle of *kiruv batim* at all, rather only the principle of *shevach mamon*, where the wealthier pay more than the poor.

In today's society we find similar disagreements in regards to the relationship between the periphery and the center. Are the residents of a periphery area, living in relative danger, perceived as a financial burden on the rest of society, and should they therefore be held more responsible for their own enhanced security needs, along the lines of Rashi's comments? Or, are they there because they cannot financially afford to leave and settle in the less dangerous center, and therefore should they be supported by the residents of the center along the lines of Rabbenu Tam or the Rama? Perhaps, they, by living where they do, are protecting the vital interests and needs of the center, and therefore should benefit from the support of the center, along the lines of *richuk batim* (the further one lives from the periphery the more they should pay)?

III. The Needs of the Orphans versus The Needs of the Community:

Two separate Talmudic discussions that relate to the question of the needs of orphans versus the needs of the community will be presented here. The first discussion, in Baba Batra (5a-5b), discusses whether or not we believe a person who claims to have repaid his debt within the allotted repayment period. The Talmud concludes this discussion with the following ruling:

<p>The law is as stated by Resh Lakish, and [the ruling applies] even to orphans, in spite of what has been laid down by a Master, that one who seeks to recover a debt from the property of orphans need not be paid unless he first takes an oath, because the presumption is that a man does not pay a debt before it falls due.</p>	<p>והילכתא כריש לקיש. ואפילו מיתמי. ואעייג דאמר מר. הבא ליפרע מנכסי יתומים לא יפרע אלא בשבועה. חזקה לא עביד איניש דפרע בגו זימניה.</p>
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The Talmud rules in favor of Resh Lakish, who held that one is not believed to have paid back his debt within the given time. However, the Talmud does not suffice with this ruling, and adds that if a man who borrowed money dies within the time allotted for repayment, the lender may collect his debt from the borrower's orphan children, even without the usually required oath, since there is no suspicion at all that the borrower paid back his loan within the time before he died.¹⁰⁹ The question debated by the interpreters of the Talmud was: which orphans is the Talmud referring to here?

¹⁰⁹ See Rashi ad loc.

The early codifiers of the Halakhah, such as the Rif and the Rambam (Hil. Malveh 14:1) make no distinction between types of orphans, and one may assume that the law applies to all types. This opinion, however, was challenged by Rabbenu Tam and his followers, such as his brother the Rivam (R. Yitzchak b. Meir), and their nephew the R"Y HaZaken (Rabbenu Yitachak bar Shmuel from Danfour).¹¹⁰ According to them, the Talmud here is referring to mature orphans only, however if the orphans are young, a lender is not allowed to collect his debt until they come of age. This opinion, while initially spreading to later Spanish scholars, such as Rabbenu Yonah of Gerondi, was later rejected by the Rosh (R. Asher b. Yehiel), whose opinion was codified into law by his son, the Tur (R. Yaaacov b. Asher), and the Shulkhan Arukh, leaving the Halakhah as it was initially understood, that one may collect a debt even from young orphans.

The roots of the debate over which orphans a debt may be collected from, may be understood in different ways. It may be as a result of textual questions over how to interpret our text in light of others¹¹¹, or over how to understand formal legal concepts¹¹², or, once again, over how to balance conflicting needs in society. On one hand, those who hold, like Rabbenu Tam, that one is not allowed to collect the debt from young orphans when their father passed away within the repayment period are promoting the interests of the orphans, who are undoubtedly a population that cannot speak up and protect its own interests. It is, therefore, the responsibility of the law to protect their interests and not to allow them to be oppressed, as the prophet Jeremiah (6:7) warns "גר יתום ואלמנה לא תעשקו" ("Do not oppress the stranger, the orphan and the widow"). On the other hand, those commentaries who hold that one is allowed to collect their debt even from young orphans, are not against protecting the rights of vulnerable orphans, but rather, are concerned for the general welfare of the lending market and society at large, or in Rabbinic terms "כדי שלא תנעל דלת בפני לווה" ("in order that the door shall not be locked in front of borrowers."). The more exceptions there are to the obligation to repay a debt, the less willing the lender will be extend another loan and society as a whole will suffer.¹¹³

A good illustration of the possible tension between the conflicting needs of the weaker orphan population and the community at large may be found in the Sefer HaTakanot (book of enactments) of the Spanish-Portuguese community in Morocco in 1494, just some two years after many of the community's members' expulsion from Spain.

<p>And so we continue to enact: In order that the door not be locked in front of borrowers, the lender may collect his full loan</p>	<p>וכן אנו מוסיפים לתקן : מפני שלא תנעול דלת בפני לווין, שיגבה המלווה כל חובו מן</p>
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¹¹⁰ See the discussion in the Ginzberg ms. of Tosafot brought in די. הוספות כתב יד. ליפשיץ, יעקב הלוי (1985). גינזבורג 186. למסכת בבא בתרא (אוסף). נסים – ראשונים ואחרונים (תשמ"ה) כז-סח.

¹¹¹ For a comprehensive summary of the textual considerations and proofs brought by the opposing *Rishonim*, see the Rashba ad loc, who cites the parallel Talmudic discussions in Baba Batra (174a), and Erchin (22a)

¹¹² Conceptual legal questions may arise regarding the nature and scope of the *chazaka* that one does not pay back his loan with in the given time, or in regards to the nature of the *shevua* (the oath) that the lender normally has to take before collecting from orphans.

¹¹³ See further the discussion in T.B. Gittin 50b that seems to imply that the principle of כדי שלא תנעול דלת בפני לווין, does not apply in regards to orphans.

from young orphans.	היתומים אפילו קטנים, ואף אם הגיע זמן הפירעון בחיי אביהם. ¹¹⁴
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From this historical accounting of enactments, we may learn two things. First, the tradition of the community, up until then, seems to have been not to collect the debt from young orphans. Second, given the extremely challenging times, this community was undoubtedly going through, there was a need to make a new enactment to protect the needs of the community at large, "in order that the door not become locked in front of the borrower."

A second example of conflicting needs between orphans and the rest of the community appears alongside the Talmud's (B.B 8a) discussion of the taxes levied on the Rabbis. Towards the end of the discussion the Talmud states:

R. Papa said: For the repair of the walls, for the city guard, and for the keeper of the armory, even the orphans have to contribute, but the Rabbis [do not, since they] do not require protection. The general principle is that even orphans have to contribute for any public service from which they derive benefit (security) ¹¹⁵ .	אמר רב פפא: לשורא ולפרשאה ולטרזינא - אפילו מיתמי, אבל רבנן לא צריכי נטירותא. כללא דמילתא: כל מילתא דאית להו הנאה מיניה - אפילו מיתמי.
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The orphans, according to the Talmud, only have to pay taxes for things from which they benefit security directly. The question debated by the interpreters of the Talmud is: which taxes provide orphans with security, and which do not? The R"Y Migash interprets the general principle in a very limited way, very much along the lines of R. Papa's statement above:

"The general principle is...": Like the repair of the walls, the city guard, and for the keeper of the armory, they derive security from, we obligate the orphans to pay. However, something that does not have any benefit (for the orphans) such taxes to the king (<i>poranot</i>) and extortions (<i>arnonot</i>), we do not obligate them.	כללא דמילתא: כגון- פרשא ושורא וטרזינא דאית להו בהו נטירותא רמינן עליהו [אבל מידי דלית בהו הנאה כגון פורעניות וארנונות לא רמינן עליהו].
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This interpretation of the R"Y Migash was soon contested by the next great Spanish scholar, the Ramah, who writes as follows:

"The general principle is..." And this is the case as well for other taxes and extortions (<i>arnonot</i>). For all taxes that (the orphans) derive security from (they are obligated to pay) as we explained above. And more so, (payments to the) King, are not any worse than a city watchman and the keeper of the armory, since for sure the protection of the Kings is preferred.	"כללא דמילתא: כל מידי דאית להו ליתמי נטירותא מיניה רמינן עליהו" והוא הדין למסין וארנונות וכיוצא בהן. דכולהו מידי דאית להו נטירותא מינייהו נינהו כדברירנא לעיל. ועוד דלא גרע מלכא מפרשא וטרזינא דודאי נטירותא דמלכא עדיפא.
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According to the Ramah, orphans are obligated to pay taxes not only for those services that provide immediate protection, but also for all taxes paid to the (non-Jewish) king, since his protection is the most important of all. A later formulation of

¹¹⁴ ש"י בר-אשר (עורך) יהודי ספרד ופורטוגאל במרוקו. ספר תקנות. ירושלים תשנ"א. Thank you to my teacher Prof. Moshe Rosman exposing me to this source.

¹¹⁵ Our translation (based on the Soncino translation) follows the printed edition of the Talmud. However, all other manuscripts and many other Rishonim read נטירותא (security) instead of הנאה (benefit). See *Dikdukey Sofrim* here note פ.

the same opinion as the Ramah was expressed by the Rosh (Piskey HaRosh 29), who seems to perceive taxes paid to the king as more of a protection from the king than protection by the king.¹¹⁶

<p>It seems to me that all types of taxes must be considered defense expenditures. For it is they that preserve us among the gentiles. For what purpose do some of the gentile nations find in preserving us and allowing us to live among them if not the benefit that they derive from Israel in that they collect taxes and extortions from them?¹¹⁷</p>	<p>מיני מסים מידי דנטירותא נינהו כי הם השומרים אותנו בין העכומ"ז. כי מה תועלת יש לקצת עוכמ"ז בנו לשומרנו ולהשיב אותנו ביניהם אלא בשביל הנאה שניאותין מאת ישראל לגבות מהן מסין וארנונות.</p>
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This debate regarding the interpretation of the Talmudic "general principle" that obligates orphans only on matters from which they benefit in personal security, does not have to be seen as strictly a matter of textual interpretation¹¹⁸, as a change in historical realities¹¹⁹, or as a conceptual legal question¹²⁰, but may reflect the tension between the need to protect the interests of the weak, in this case the orphans, versus the need to protect the interests of the society at large. The less the orphans pay in taxes (R"Y Migash), the more the rest of the community must bear the brunt; the more the orphans pay (Ramah, Rosh), the less the rest of the community needs to make up the difference. The question in debate is, therefore, how much financial responsibility should the community take upon itself in protecting the interests of the weaker orphans?

Similar debates to both of these Talmudic discussions on the needs of the orphans versus the needs of the community may be found in our society today. There are those who argue strongly for more tax exemptions (and financial aid) for the weaker segments of society (such as the elderly), and there are those who will argue in favor of limiting such exceptions, thereby strengthening the economic and physical security of the whole community.

IV. The Needs of the Poor versus The Needs of the Community:

The Talmud in Baba Batra (8a) brings a *beraita* that discusses the degree to which the townspeople can use money raised for the poor for purposes other than those for which it was originally intended:

<p>The townspeople, however are at liberty to use the soup kitchen like the charity fund and vice versa, and to apply them to whatever purpose they choose.</p>	<p>ת"ר...ורשאין בני העיר לעשות קופה תמחוי ותמחוי קופה ולשנותן בכל מה שירצו</p>
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According to the *beraita*, the townspeople can change funds for the soup kitchen into the charity fund and the charity fund into funds for the soup kitchen, but what exactly does the additional phrase "whatever purpose they choose" refer to?

¹¹⁶ See the discussion in B. Septimus (1982), *Hispano-Jewish Culture in Transition: The Career and Controversies of Ramah*. Cambridge, Mass. Pp. 12-13, who relates the change in tone to historical differences between the Ramah's time to the Rosh's time in Christian Spain.

¹¹⁷ Translation is by Septimus p. 13.

¹¹⁸ i.e. What is the exact relationship between R. Papa's statement and the general principle? Is the general statement simply 'defining' what R. Papa already said (R"Y Migash), or is it adding something new (Rama, Rosh)?

¹¹⁹ See the discussion in Septimus above.

¹²⁰ For example, what is the nature of the disputed taxes? What is the nature of the orphan's exemption from taxes?

Can they really use this money for any function, or are there certain limitations? This *beraita* is later quoted again later in the Talmudic discussion that brings a story about Abayeh's teacher, Rabbah:

<p>Abayeh said: At first the Master (Rabbah) would not sit on the mats in (of) the Synagogue, but when he heard that it had been taught that the 'towns people' can apply it to any purpose they choose', he did sit on them.</p>	<p>אמ"י אביי: מריש לא הוה יתיב מר א(צ)יפי דבי כנשתא. כיון דשמעה להא דתניא "ורשאין בני העיר לעשות קופה תמחוי ותמחוי קופה ולשנותן לכל מה שירצו" הוה יתיב.</p>
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The question the interpreters of the Talmud ask is: what was wrong with sitting on the mats in the first place? Rashi explains:

<p>Mats of the Synagogue: because they were purchased by money from the charity (raised for the poor).</p>	<p>מחצלות של בית הכנסת משום דמזבני להו ממעות הקופה.</p>
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Rabbenu Tam, following in his grandfather Rashi's footsteps, notes that the townspeople can even use the money raised for the poor for other community functions that might only be considered "optional".

<p>It seems to Rabbenu Tam that they can change it (the money raised for the poor) even for something which is only optional.... And so Rabbenu Tam used to give money raised for charity to the town's watchman, since the (the money raised for the poor) was given with the consent of the town's leaders (to do with it what they please).</p>	<p>ולשנותי לכל מה שירצו - נראה לר"ת דיכולים לשנותו אף לדבר הרשות.... וכן היה ר"ת נוהג לתת מעות הקופה לשומרי העיר לפי שעל דעת בני העיר נותנים אותם.</p>
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According to this interpretation, the townspeople can use money raised for the poor for just about whatever purpose they choose, because the donors contributed with the intention that the townspeople would distribute the money at their discretion. However, this opinion was contested by other medieval scholars, such as the Ramah, who argued that the money raised for the poor must only be used for the poor.¹²¹

<p>And this that we learned in the <i>beraita</i>: 'and to change it to whatever the townspeople want' – (means) it is for the needs of the poor. And this comes to teach us that you should not say for charity and for food, we can change one to the other, since both of them were collected for the purpose of food, and what is the difference if they are for the poor of the town or for poor from outside the town, however for clothing, a place to live, and a bed and sheets and the like, that are not for food, I may say no. This comes to teach us that we are allowed to change the money raised for the poor for whatever the (townspeople) want for the needs of the poor. However, for matters that are not for the sake of the poor, they do not have permission at all, because this is robbing from the poor.</p>	<p>דקתני "ולשנותן לכל מה שירצו" – לצורך עניים הוא. והא קמ"ל דלא תימא קופה ותמחוי. הוא דמשנין להו להדדי דתרוייהו לשם מזונות הוא דאיגבו ומה לי עניי העיר ומה לי לעניי עולם, אבל לכסות מדור ומטה ומצע וכיצוא בהן דלאו צורך מזונות הוא אימא לא. קמ"ל דרשאין לשנות לכל מה שירצו משאר צרכי העניים. אבל לדברים שאינן לצורך עניים לית להו רשותא כלל מפני מפני גזל עניים.</p>
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This disagreement between Rashi and Rabbenu Tam, on the one hand, and the Ramah, on the other, does not need to be understood as the result of textual

¹²¹ See also the R"Y Migash here who expressed the same opinion.

differences¹²², nor of conceptual legal differences¹²³, but possibly as a result of differing sets of priorities in dealing with conflicting social needs in society.

Today, similar debates may be found with regard to budget cuts. Should the government be allowed to use money allocated for the Ministry of Social Affairs in order to increase, or maintain, the defense budget, along the lines of Rabbenu Tam? Or perhaps, these special needs should be, to a certain degree, considered "untouchable", and any attempt to cut funds allocated to the poor should be regarded as stealing from them, as the Ramah writes.

V. The Needs of the Poor of the town versus the Needs of the Poor from outside:
The Talmud cites another recollection of Abayeh regarding his rabbi, Rabbah.

<p>Abayeh also said: At first the master (Rabbah) used to keep two purses, one for the poor from outside and one for the poor of the town. When however, he heard of what Samuel had said to R. Tahalifa b. Abdimi, 'Keep one [purse] and make a stipulation,' he also kept only one purse and made a stipulation.</p>	<p>ואמי אביי : מריש הוה עביד מר תרי כיסי : חד לעניי מתא וחד לעניי עולם. כיון דשמעה להא דאמי שמואל לרב תחליפא בר אבימי עביד חד (ט : א) ואתני , איהו נמי עביד חד ומתני .</p>
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According to Abayeh, Rabbah at first used to keep a separate purse for the poor of the town and the poor from outside the town, and later switched over to one purse for both, making a stipulation with the town's people that allowed him to do so. The question the *Rishonim* ask is: what is the relationship now between the poor of the town, and the poor from outside the town, once there is only one purse (or budget) for the two of them? Which group stands to gain, and which to lose? The commentary attributed to Rabbenu Gershom interprets this new reality as follows:

<p>"And made this stipulation:" If the town needs the money for the poor of the town, and if not, that (the money) left over from the poor of the town should go to any poor person.</p>	<p>ואתני : אם יצטרכו העיר שיהיו לעניי העיר ואם לאו שיותירו על עניי העיר שיהיו לעניי כל אדם .</p>
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According to this interpretation, the combining of the two purses into one, seems to play to the advantage of the poor of the town. They now have first preference over all money raised, and only after their needs have been met, can the poor from outside come and receive charity.

A seemingly alternative interpretation is offered by Rashi:

<p>"And made this stipulation:" He made a stipulation with the community to give the charity out to whoever comes.</p>	<p>"ואתני : מתנה עם הצבור לחלקם לכל הבא .</p>
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According to Rashi's interpretation, there is no preference to the poor of the town over the poor of the world, rather they are considered equal, and whoever comes

¹²² The Ramah, in his discussion on Abayeh, also seems to have had a slightly different version in his Talmud that read *אציפי דבי כנישהא בני מדרשא* (on the mats of the Synagogue in the Bet Midrash). From this he learns that, similar to changing the charity into the soup kitchen, one may also change mats for the Synagogue to be mats for the Bet Midrash, however not more of a change than this.

¹²³ For example, when does charity enter into the possession of the poor? Is it at the moment it is collected for the purpose of charity (Rama), or is it only at the moment it is distributed, since there is no such thing as a collective acquisition of charity, and therefore no concern of theft (Rashi, Ramah)?

first to the distributor of the charity may stand to benefit. This interpretation sees the transition from two separate funds to one fund as possibly playing to the advantage of the poor from outside the town, since their rights are now equal to those of the local poor, and there may even be more funds available to them than before.

Here too, the difference of interpretation between these two commentaries can be understood as the result of close textual readings or different conceptual legal understandings, yet it may also be understood as reflecting a difference in values. One interpretation (R. Gershom) promotes the interests and needs of the local poor, and the other (Rashi), promotes the interests and needs of the poor from outside the town.

In Today's society, for example, combining two charities into one may increase exposure and giving, cut out unnecessary overhead, and allow for more funds to go to the end recipients (along the lines of Rashi's interpretation). Alternatively, sometimes combining two separate charities may be to the detriment of the potential recipients, leaving less for them than had originally been prior to the merger (in line with Rabbenu Gershom's interpretation).

VI. The Needs of Poor Torah Scholars versus the Needs of Poor non-Torah Scholars:

Another Talmudic law that relates to the conflicting financial needs of various groups comes up as the result of the story told of Rabbi Yehudah HaNasi, mentioned earlier, amidst the discussion on taxes (8a).

<p>Rabbi once opened his storehouses in a year of famine. He proclaimed, "Let those enter who have studied the Scripture, or the Mishnah, or the Gemara, or the Halakhah, or the Aggada, however, the <i>amey ha'aretz</i> (the ignorant) shall not come in."</p> <p>R. Yonatan ben Amram pushed his way in and said, "Master, give me food."</p> <p>He said to him, "My son have you learned Scripture?" He replied, "No." "Have you learned the Mishnah?" "No." "If so," he said, "then how can I give you food?" "He said to him, "Feed me as the dog and the raven are fed." So he gave him some food. After he went away, Rabbi sat and mourned to himself, "Woe is me that I have given my bread to a man without learning?" R. Shimon the son of Rabbi, and said to him, "Perhaps it was R. Yonatan ben Amram, your student, that did not want to derive material benefit from the honor paid to the Torah. Inquires were made and it was found to be so. Whereupon, Rabbi said, "All may now enter."</p>	<p>ר' פתח אוצרו בשני בצרות. אמי יכנסו בעלי מקרא ובעלי משנה ובעלי תלמוד ובעלי אגדות והלכו ועמי הארץ אל יכנסו. דחק ר' יוחנן בן עמרם ונכנס. אמי ר' פרנסני. אמי לי קרית אמי ליה לאו אמי ליה שנית אמי ליה לאו ואלא במאי אפרנסך? אמי לי פרנסני ככלב וכעורב. פרנסיה. לבתר דנפק (אמי ר') יתיב ר' וקא מצטער אמי אוי לי שנתתי פתי לעם הארץ. אמי לפניו ר' שמעון ברי שמא יונתן בן עמרם תלמידך שאינן רוצה להתגאות בכבוד תורה. בדקו ומצאו כדבריו אמי ר' יכנסו הכל.</p>
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This story about Rabbi Yehudah HaNasi initially not wanting to give provisions to poor non-Torah Scholars in a time of famine, has been discussed and analyzed by several scholars, from historical¹²⁴, literary¹²⁵ and philological aspects.¹²⁶ The

¹²⁴ See E. Oppenheimer (2007). ר' יהודה הנשיא, מרכז זלמן שזר לתולדות ישראל, ירושלים. א. אופנהיימר (2007). "התמורה ביהסו של רבי לעמי הארץ". עמ' 93-103. He suggests that Rabbi was initially against the *amey ha'aretz*, and later this would change to a more positive attitude as a result of being connected to

question challenging the classic rabbinic interpreters of this story was of more of a legal nature: When do we give charity to a poor non-Torah Scholar, and when do we not? According to the Ramah, we give charity to a non-Torah Scholar, as long as he has good *derech erez*, but if he lacks even this, we do not give him charity at all.¹²⁷ Another opinion offered by the Ritvah proposes that we give him charity only if it is an absolute matter of life and death, however, if he could go to another town and receive charity there, this would be preferred.¹²⁸ A third interpretation was offered by R. Yosef Karo (Shulkhan Arukh Yoreh Deah 251:11), who cites our story in the context of the laws of whom to give charity to and who not to. He writes as follows:

<p>Rabbi, who was upset that he gave his bread to an <i>am ha'aretz</i>, because it was during a time of famine, and whatever an <i>am ha'aretz</i> would eat, would be lacking from the Torah Scholar. If this was not the case, it would be an obligation to feed him. If he comes before us dying of starvation, (we) are obligated to preserve his life, even if there is a doubt that this will come on account of a Torah Scholar later on.</p>	<p>רבי שהיה מצטער שנתן פתו לעם הארץ, משום דהיו שני בצורת ומה שהיה אוכל עם הארץ יחסר לתלמיד חכם, הא לאו הכי חייב להחיותו. אם בא לפנינו מת ברעב, חייב להחיותו אע"פ שהוא ספק אם יחסר לתלמיד חכם אחר כך.</p>
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The Shulkhan Arukh here presents the dilemma in a totally different light than the two previous commentaries. According to him the question of giving charity to a non Torah Scholar, is not dependent on what kind of *am ha'aretz* he is (Rama, one with good deeds or not) or only a matter of how desperate is he (Ritva), but rather, primarily a question of priorities when there are limited resources. He describes three different scenarios: 1. There are very limited resources, and one has to chose between giving to a Torah Scholar or giving to an *am ha'aretz*, one must give to the scholar. 2. There are no limits of resources; one must give also to the *am ha'aretz*. 3. There is only a doubt whether giving to an *am ha'aretz*, who is also dying of starvation, may come on account of the resources needed by a Torah Scholar later on, one must give to the *am ha'aretz*. This interpretation of the Shulkhan Arukh, seems to stem not only out of a close reading of the Rabbi Yehudah HaNasi story, which takes place in a time of famine, but also out of his understanding situations of conflicting needs between different groups in society. It is important to help Torah Scholars *and* non-Torah Scholars, but when there is a conflict between these two groups, one must prefer the needs of the Torah scholars.

many wealthy *amey ha'aretz*, as well as less of a chance that this would endanger the Torah in his time period, therefore there was less of a need for an antagonistic relationship. (He seems to understand that our story comes after the story immediately following it in the Talmud).

¹²⁵ Y. Frankel (1996). דרכי האגדה והמדרש Pp. 268-270. Frankel relates to the question of Rabbi's change in behavior from the beginning of the story to the end as being due to understanding R. Yonatan's criticism of him that Torah Scholars should not be benefiting from their Torah Knowledge. He also discusses the use of costume used by R. Yonatan in the story, disguising himself as an *am ha'aretz*. See also T. Fientuch (2004) תואר מוסמך, אוניברסיטת בר אילן. עמ' 106-121.

¹²⁶ Wald, S. (2006). "שנאה ושלום בתודעה הרבנית. עיונים בבבלי בבא בתרא ח ע"א." *שלום ומלחמה בתרבות היהודית* (תשס"ו) 35-65. Wald relates to the textual 'history' of this story and the story following it, claiming that in its original state Rabbi was not as antagonistic to *amey ha'aretz*, but, as a result of later redactors the story and its message changed.

¹²⁷ B.B. 7b הלענין הלכתא אפילו בידוע שהוא עם הארץ חייב לפרנסו.... ודוקא בעם הארץ שאינו לא במקרא ולא במשנה אלא שישנו בדרך ארץ ובמצות, אבל היכא דליתיה בדרך ארץ ולא מצות אסור לפרנסו כל עיקר

¹²⁸ ועמי הארץ אל יכנסו. אמרינן התם כל אדם שאין לו בינה אסור לרחם עליו, שנאמר כי לא עם בינות הוא B.B. 7b על כן לא ירחמו עושהו, ולפי שהפורענות בא לעולם בשבילם. ומיהו כשימצא במקומות אחרים ואפילו בעיר אחרת ולא ימות ברעב. הא לאו הכי מצוה להחיותו וקרי ביה יחי אחיד עמד', כל היכא שאינו מין או משומד.

In today's society, the topic of the "other", the one who does not share our common identity or values, yet is part of our society and dependent upon us, comes up often. The question is do we look at this other, whoever she or he may be, and decide whether they are deserving of our financial help based upon their basic loyalty to our values (they too have *derech erez*, even if they do not know Torah)? Do we begrudgingly agree to help him or her only when her or his situation is so dire that it is a matter of life or death, or do we try to help him or her as much as we can, so long as this help does not come at the detriment of our own primary interests and needs?

VII. Conclusion:

This article attempted to demonstrate a few brief examples of an approach to in depth Talmud study that may be referred to as "Talmudic Mediation." This approach seeks to challenge the student to relate to the vast number of Talmudic debates as a mediator would, first, listening to all of the various positions, and then seeking to identify the needs and interests behind those positions. This engagement with complex and conflicting group needs in the Talmudic text should assist in the student's transformation and growth in to being a more sensitive and capable mediator of similar conflicts in her or his society and lives today.

It is our belief that just as we attempted to demonstrate this approach on several topics, relating to matters of civil society as they are found in Baba Batra, we can apply it to other discussions throughout the Talmud. It is our prayer, that through serious in-depth study of the Talmud, we can come a little bit closer to fulfilling Rabbi Chanina's tall order that תלמידי חכמים מרבים שלום בעולם ("Torah Scholars increase peace in the world.")

The Torah is Their Protector

Baba Batra 7b-8a¹²⁹

Noah Moline

כל הדברים שצריכין לשמירת העיר לוקחין מכל אנשי העיר ואפילו מן היתומים חוץ מתלמידי חכמים שאין ת"ח צריכין שמירה שהתורה שומרתן...: --רמב"ם הלכות שכנים פרק ו

All matters which are needed for the protection for the city are taken from all the residents of the city. Even from the orphans. Except for scholars, for scholars do not need protection, the Torah is their protector... -- Rambam, Laws of Neighbors, 6:6

I. Introduction

An overarching theme of the first chapter of Baba Batra is the setting of different laws and statutes necessary for creating a working society. One of the messages that plays throughout is the special status the Rabbis grant to Torah Scholars. From the story of Herod and Bava ben Buta on 4b, we see that the renegade slave-turned-king Herod killed (almost) all of the Rabbis, eliminating his competition for ruling Israel. Also on 4b, the Rabbis are able to “see flaws” (*בה הזי בה תייוהא*) in synagogues, even in the Temple, to necessitate their destruction and rebuilding. In the second chapter, on page 22b, they are made exempt from anti-competition laws; a Rabbi who comes to a new city can set up any type of business that he wants at any time, regardless of the already existing businesses of the townspeople. On 8b, a story is told Rebbi refusing to help anyone other than a Torah Scholar during times of famine.

On 7b-8a, there is further debate on the role of the Torah Scholar in society, when "Rabbi Yehuda Neseia levied a tax for the maintenance of the city wall on the scholars of the city" (*רבי יהודה נשיאה רמא דשורא ארבנן*). Reish Lakish answers him with the statement The Rabbis do not need protection (*רבנן לא צריכי נטירותא*) as ordinary citizens of a city require. As the unit continues, the Gemara brings the ideas that Rabbis are exempt from taxes which are connected to the physical protection of the city and taxes imposed by the non-Jewish authorities, though they are required to pay for public works, such as the hiring of workers to bring water into the city. Even young orphans, generally made exempt from many taxes, are taxed for the defense of their cities, while the Rabbis are not.

There are a number of modern day issues which can be viewed using the lenses of this sugya. Among them, I will examine how two of them have played themselves out in the modern State of Israel; how much (if any) taxes should be collected from scholars, and the exemption of Yeshiva students from otherwise mandatory service in the Israeli Defense Forces (IDF). These issues have become relevant over the past 61 years for since the establishment of the State, Jews were able to form their own governmental agencies to collect taxes and form a Jewish army for the first time since before the recording of the Mishna. The conflicts between the Talmudic principle of "the Rabbis do not need protection" and a liberal democracy, as

¹²⁹ Special thanks to all of my peers and teachers, especially to my חברותא Livia Levine, without whom understanding the often difficult units in Bava Batra would have been much more difficult. Even when we did have a computer.

opposed to a theocracy, can be seen through some of the modern responsa dealing with these fascinating topics.

II. Who is a Torah Scholar?

One factor that will directly affect the discussion is the definition of who is a Torah Scholar. Rabbi Moshe Isserles, the Rema, in 16th century Poland, writes in his gloss to *Shulchan Auruch Yoreh Deah* 253:3 in favor of a broad definition of the Torah Scholar.

<p>It does not matter whether one attends a yeshiva or that he is only reputed to be a scholar... even though there is not in our times such a [lofty] scholar... nonetheless, as far as tax exemption is concerned, we are not picky providing he is a reputable scholar... there are some places where they would exempt the scholar from taxes, and some places where they do not.</p>	<p>אין חילוק בין שהוא תופס ישיבה או לא רק שהוא מוחזק לת"ח בדורו שיודע לישא וליתן בתורה ומבין... ואע"ג דאין בדורינו עכשיו חכם... מ"מ לענין לפטרו ממס אין מדקדקים בזה רק שיהא מוחזק לת"ח... יש מקומות שנהגו לפטור ת"ח ממס ויש מקומות שנהגו שלא לפטור (שם שמ"ב).</p>
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Even though the Rema provides for a very broad definition of the potentially tax exempt scholar, it seems that in his world, the tax exemption was not always a given. A contrasting opinion is brought by Rabbi Israel Isserlin ben Petahiah, of 15th Century Austria, in his book *Terumat HaDeshen*.

<p>The masses are not of the opinion to exempt a scholar [from the payment of communal taxes] unless he is the head of a yeshiva, and even this [exemption] is only in Austria... It is a widespread custom not to tax the head of a yeshiva... In Germany, however, it appears to me that I was not customary to exempt scholars... because it requires great meticulousness to resume one's learning upon release from other considerations, and nowadays, people are not so cautious.</p>	<p>ח. אמנם ההמון עם אינם סוברים כלל לפטור שום ת"ח אא"כ יושב בראש ישיבה, ואף זה דווקא באושטריי"ך ואגפיה. והיה כמעט מנהג פשוט שלא לחייב במס הרב היושב בישיבה בראש אפילו היה לו ממון הרבה. אבל בגבול דבני רינו"ס כמדומה לי שלא היו נוהגים לפטור ת"ח מן המסים, אם לא לפעמים ברצונם, אפשר משום דסבירא להו דהאידינא אין לנו מי שתורתו אומנתו אפ"ל באותו דרך שביאר אשירי לעיל, משום דצריך דקדוק יפה שיחזור תמיד לתלמודו כשיפנה מעסקיו ואין נזהרין יפה האידינא</p>
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If we were to simply follow the rulings of the *Terumat HaDeshen*, than our discussion would be simple; we would exempt the heads of various yeshivot from taxes and actions related to the defense of the city and from service in the army. However, following the broader definition of tax-exempt Torah Scholars brought by the Rema, we must now understand what the practical implications of this Halacha are in the modern State of Israel.

III. Do Torah Scholars have to pay taxes in Israel?

Rabbi Ben-Tzion Meir Chai Uziel was the Chief Sephardic Rabbi of British Mandate of Palestine and later of the State of Israel from 1939 to 1954. In chapter 39 of his work of responsa, *Mishpatei Uziel*, he is asked just before the inception of the State, how the coming Jewish state will tax Torah Scholars. Rav Uziel examines the various issues that go into taxation, and how they could possibly be played out in the halachic system. As mentioned about Torah Scholars are required to pay for the taxes that are necessary for the (non-security related) upkeep of the city. The example given in *Bava Batra* is the digging of a well for water, and Rav Uziel, citing many halachic authorities, including the Rambam and the *Shulchan Auruch*, drew the connection

between the wells, necessary for the *general* welfare of the city, and other important taxes, such as the fixing of roads. As he writes “*Scholars are exempt from doing the work themselves, so that they will not disgrace themselves before lay folk [עמי הארץ], and therefore, are exempt from hiring someone to do the work in their stead. However, they too are required to give their portion of money, like a normal person.*”

Rav Uziel does not only consider taxation to be akin to the fixing of roads and general necessities, but also to giving charity. Torah Scholars, just like normal people, are required to give their share to the charity fund. He goes so far as to cite the Tosfot in Ketubot 18a, which states that we are able to coerce someone to give charity, for one who does not give charity is negligent on the negative commandment of “You shall not harden your heart, nor shut your hand from your poor brother” (Deuteronomy 15:7). This coercion mentioned by the Tosfot, according to many medieval thinkers, including the Beit Yosef and the Ramban, comes from a requirement of each individual to give charity, not a desire to reach a certain monetary goal. Similarly, the commandment of the half shekel every Jew was required to give for the public fund was commanded to the Torah Scholars just the same as everyone else in the community.

To Rav Uziel, these factors seemed more similar to the national taxes that we all pay than to money required for defense. Also, he adds a point new to the coming Jewish autonomy. He brings ideas from the Shulchan Auruch Choshen Mishpat 241:27-28 that if an agreement is made among residents of a city to set a specific price on certain goods in the city market, *all* are required to hold to that price; Rav Uziel adds that this includes Torah Scholars. He writes:

<p>For this [rule stated above] obligates all, including scholars... and since all of our committees today are elected from the community in accepted, agreed upon elections, and since decisions are made only with the agreements with the city representatives... to obligate all, including scholars, that they must participate as much as they can with the community, for the sake of the peace of the community, and to them will come blessings of good, for every community in its place are considered to be geniuses of Torah, that they are able to make certain rulings that are established for all of Israel.</p>	<p>הרי היא מחייבת את הכל לרבות תלמידי חכמים... והואיל וכל הועדים שלנו היום הם נבחרים מן הציבור בבחירות מוסכמות ומקבילות, והואיל ומגביות אלו נעשו בהסכמת חבר העיר... לחייב את הכל לרב ות תלמידי חכמים שידם משגת להשתתף במדת יכולתם עם הציבור משום שלום הציבור, ועליהם תבוא ברכת טוב, דכל צבור במקומו כגאונים לכל ישראל שתקנו כמה תקנות לכל וקיימות לכל ישראל</p>
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Thus, Rav Uziel declares that for various reasons, Torah Scholars are required to pay regular city taxes.

Another of the Chief Sephardic Rabbis of Israel is Rabbi Ovadia Yosef Shlita. Rav Ovadia was born in Basra, Iraq in 1920, and was chief Rabbi from 1973-1983, and now is the spiritual leader of the Shas political party. In one of his books of responsa, *Yabia Omer*, Rav Ovadia is asked the same question regarding taxation that was asked to Rav Uziel. After spending most of his answer bringing proofs that Torah Scholars would be exempt from taxes; claiming that the exemption comes not from anything other than giving proper respect to the Torah. If Torah Scholars, either wealthy or poor, were required to pay the same taxes as normal people, they would not be as widely respected in the eyes of the community, and thus, the Torah that they teach would not be considered by them to be as important. However, in the very last

line of his responsa, Rav Ovadia switches course.

Nonetheless in our days, with the depreciation [of virtue] in the generations, one who is stringent on himself to give taxes, is worthy of a blessing. And all goes according to the place and the time.	ומ"מ האידנא אחסור דרי והמחמיר לתת מס תע"ב. והכל לפי המקום והזמן.
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So we see that according to major decision makers in the modern era, Torah scholars, or even, according to the Ramah, any yeshiva student, is not exempt from paying taxes.

IV. Do Torah scholars have to serve in the Israeli Army?

A greater controversy in Israel today revolves yeshiva students and mandatory service in the IDF. Israeli law includes mandatory army service for all Israeli non-Arab citizens. Following the founding of the State, David Ben-Gurion, the first Prime Minister, reached a compromise with ultra-orthodox sectors of the Israeli population where by 400 yeshiva students would be exempted from the otherwise mandatory army service. During the years, the number of young men requesting exemptions for the sake of Torah study grew, though only that same 400 were granted official exemptions. The others were not allowed to work or leave the country without special permission until they reached the age when they were not required to serve in the reserves. In 1974, 2.4% of the soldiers eligible to enlist in the IDF were exempt because they were yeshiva members. By 1999, this number reached 9.2%, or 30,414 young men. In 1999, then Prime Minister Ehud Barak formed the "Tal Committee" to attempt to come to a better understanding and solution to these issues. The committee eventually established the "Tal Law." According to the law, 18-year-old yeshiva students will be allowed to postpone their military service every year until the age of 22, when they will be allowed to work or study for a year outside the yeshiva without joining the army. After that year, each yeshiva student can choose between returning to the yeshiva or joining the workforce and serving in the army or perform national service for a year and a half.¹³⁰

However, as we have seen above with taxes, from a purely halachic standpoint, should these yeshiva students be required to serve in the army at all? If we follow the loose definition of the Ramah, that all those who are full time yeshiva students count as Torah Scholars, and perhaps they should not be forced to serve in the army. Remember that the reason brought above for exempting the Torah Scholars from protective taxes is that their Torah study will protect them. Also, we saw above that, while Torah Scholars are responsible for paying taxes connected to public works, such as the digging of wells, they are not required to assist in the physical labor, nor are they expected to hire someone else to take their place. Using those ideas, Rabbi Moshe Feinstein, one of the leading halachic authorities in 20th century America, came down with his ruling on the question of whether Torah Scholars should have to join the IDF. He wrote, in 1981, in his volume of responsa, Iggrot Moshe, Yoreh Deah 4:33¹³¹

¹³⁰ "Knesset extends Tal Law by 5 years," Amnon Meranda, July 18, 2007.

<http://www.ynetnews.com/articles/0,7340,L-3427136,00.html>

For the full Tal Committee report, see <http://www.knesset.gov.il/docs/heb/tal.htm>

¹³¹ This quote from Rabbi Moshe Feinstein is brought by The book *הברכה ומדינה*, an educational guide used in Israeli schools to teach portions of the Talmud using contemporary issues in Israeli society (p. 39). Of note is that Rabbi Feinstein only brings one proof for his answer, from our section in Bava Batra.

<p>For the idea of a defensive army is very important, however learning Torah is even more important than defending the State, as is explained in Chapter 1 of Bava Batra, 8a, “We collect from everyone for installing doors to enclose the city (for the gates of the walls, Rashi), even from orphans, however, Rabbis do not need protection. And it appears that the government [of the State of Israel] has also recognized this, and one who learns in yeshiva and studies Torah is exempt from the obligatory army draft. Therefore, all those who have the desire to study Torah and to become a great scholar, with great fear of G-d, should go to one of the great yeshivot, and will be a blessing to all of Israel, and in doing such, will protect all of Israel.</p>	<p>הנה אף שעניין צבא ההגנה הוא ענין גדול, אבל ענין לימוד התורה ללומדי תורה עוד יותר גדול גם מלהגין על המדינה כמפורש פ"א דבבא בתרא ח' ע"א הכל לאגלי גפא) לשערי חומות העיר להציב בהן דלתות - רש"י(אפילו מיתמי אבל רבנן לא צריכי נטירותא. וכנראה שהממשלה הכירה ג"כ את זה, ומי שלומד בישיבה גדולה ועוסק בתורה פטור מענייני חיובי הצבא. ולכן ודאי מי שיש לו תשוקה ללימוד התורה ולהעשות גדול בתורה ובהוראה וביראת שמים, יש לו לילך לישיבות הגדולות, ויהיה ברכה לכלל ישראל והגנה גדולה לכל ישראל.</p>
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The opinion brought by Rabbi Feinstein shows his belief that Torah Scholars are not exempt in general from aiding in the defense of the nation, just that they need to contribute in other ways. He is strong in his belief that Torah study and serious learning can serve for a protector for all of Israel, not something individually applicable to scholars. Standing contrary to Rabbi Feinstein's opinion, is Rabbi Shlomo Yosef Zevin. Rabbi Zevin lived in the 20th century in the Ukraine and in Israel, and was one of the founders of the *Encyclopedia Talmudit*, a Talmudic Encyclopedia. He vehemently disagrees with Rabbi Feinstein, in an article he wrote entitled “The Question of Drafting Yeshiva Students, (to the Rabbis and teachers, and heads of yeshivot).” In addressing those leaders who had come out against the drafting of yeshiva students, he writes¹³²:

<p>Where do you get these ideas that Torah scholars are exempt from participating in an obligatory war¹³³ against the enemy who is attempting to to destroy him, G-d forbid?! Where do you get these ideas, and proclaim them as halacha, that yeshiva students do not need to serve at all?! For did we not learn regarding the saving of a life – not lives, even just one life, “These actions are only done by the greats among Israel [the sages]” (B. Yoma 24b, Rambam Shabbat, 2:30) “In order to show practical law to the public.” Is there a differentiation [noted in the sources] if they are wasting time [which would otherwise be used] for studying Torah or not? And if this is to save only one life, to save the lives of thousands of Jews, how much more so!... “Rabbis do not need protection” (Bava Batra 7b). Master of the Universe! Are we to rely on miracles in a time of</p>	<p>זו מנין לכם, שבני תורה ותלמידי-חכמים פטורים מלהשתתף במלחמת מצווה של עזרת ישראל מיד הצר הצורך העומד עליו לכלותו ולהשמידו, חלילה?! זו מנין לכם, לפרסם בצורה של הלכה פסוקה ו"דעת תורה" שבני הישיבות אין להם לא להירשם ולא להיפקד ולא להתייצב ולא כלום?! וכי לא כך שנינו שבהצלת נפש - לא נפשות, אלא אפילו נפש אחת מישראל" - אין עושין דברים הללו אלא על ידי גדולי ישראל (יומא, כ"ד ב'; רמב"ם, שבת פ"ב ה"ל) וחכמיהם (רמב"ם שם) כדי להורות הלכה למעשה לרבים (ט"ז, או"ח, שכ"ח, ושו"ע הרב שם)? וכי הבדל יש בין שבאותה שעה הוא מתבטל מתלמוד-תורה או שאינו מתבטל? ואם בהצלת נפש אחת כן, בהצלת רבבות אלפי ישראל על אחת כמה</p>
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¹³² גיוס כהלכה, ירושלים תשנ"ג, עמ' 217-220.

¹³³ A *Milchemet Mitzvah*, obligatory war, is the term used for a war during the time of the Kingdoms of Israel/Judea necessary for self defense, the establishing of the borders of the kingdom as explained in the Torah, and for a specific mitvah, for example, the destruction of Amalek. Rabbi Zevin uses this phrase to refer to the battles of the modern IDF.

clear and present danger, and learn that scholars do not need protection? Hebron of 1929¹³⁴ (this should never happen again) will prove, have not the holy, young pure and holy people fallen as well, including yeshiva students and great scholars? Please rabbis, did these holy ones not “require protection” or not? And these same enemies, the Arabs, that rioted and murdered then, are the same ones that riot and murder now! And if we are to say that “protection” [mentioned in Bava Batra] is about building a wall and the like, in normal times, to prevent enemies from entering the city, what does this have to do with a time when lives are in danger, and we are fighting an obligatory war?

וכמה " !... רבנן לא צריכי נטירותא (ב"ב, ז' ב) רבש"ע, כלום מותר לסמוך על הנס במקום של סכנת נפשות ממש ולומד שאין רבנן צריכים שמירה? וחברון של תרפ"ט (לא תקום פעמים צרה) תוכיח, כלום לא נפלו לפני בני עולה צעירים קדושים וטהורים, כזוהר הרקיע מזהירים, מבחירי הישיבה וחכמיה? במטותא מינייכו רבנן, הקדושים ההם היו" צריכי נטירותא, "או לא היו" צריכי נטירותא?" והרי הם הם אותם האויבים-הערבים שפרעו ורצחו אז והם הם אותם הפורעים ורוצחים עכשיו! ואם אמרו על "נטירותא" של בנין חומה וכיוצא, ובזמנים רגילים, במטרת שמירה מפני שונאים העלולים לבוא (ראה רש"י, ב"מ ק"ח א) מה זה עניין לזמן של סכנת נפשות ולחובה של מלחמת מצוה?

Rabbi Zevin interprets the phrase of "The Rabbis do not need protection" (רבנן לא צריכי נטירותא) differently than Rabbi Feinstein. Rabbi Feinstein understood the quote from our sugya as a given fact, that Torah scholars not only do not need the same protection as regular people, but the fact that they are learning Torah creates protection for those who are a part of the physical defense of the state. Rabbi Zevin, however, only wants to look at the quote in its context. The Talmud does not seem to be talking about a time of extreme danger, nor does it in any way refer to the possible contradictions between the obligation to save lives and the objection of Rabbi Feinstein to yeshiva students breaking from their studies for that purpose. Later in his article, Rabbi Zevin adds that an added bonus to the army service of yeshiva students is the moral and religious support they would provide to the other, non-religious soldiers.¹³⁵

V. Conclusion

¹³⁴ In 1929, the Arab residents of Hebron rioted, murdering 67 Jewish residents of the city. Survivors of the riots fled Hebron; Jews were unable to return to the city until after 1967's Six Day War.

¹³⁵ For information on the *Hesder* program, which in this spirit combines yeshiva study and army service, see "The Ideology of Hesder, The View from Yeshivat Har Etzion," Rabbi Aharon Lichtenstein, article first appeared in *Tradition*, 19(3), Fall 1981. <http://www.vbm-torah.org/archive/ral2-hes.htm>. In this article, Rabbi Lichtenstein makes an argument not directly connected to our sugya, where he refers to the army service of yeshiva students as "acts of loving kindness (*gemilut chasadim*). He brings a powerful story from Avoda Zara 17b which illustrates the status of *gemilut chasadim* together with Torah study as being superior over only Torah Learning: "Our Rabbis taught: When Rabbi Elazar ben Prata and Rabbi Hanina ben Tradion were arrested [i.e. by the Romans], Rabbi Elazar ben Prata said to Rabbi Hanina ben Tradion, 'Fortunate are you that you have been arrested over one matter, woe is to me who have been arrested over five matters'. Rabbi Hanina responded, 'Fortunate are you that you have been arrested over five matters but are to be saved, woe is to me who have been arrested over one matter but will not be saved. For you concerned yourself with both Torah and *gemilut chasadim* whereas I concerned myself solely with Torah.' As Rav Huna stated; for Rav Huna said, 'Whoever concerns himself solely with Torah is as one who has no God. As it is written, "And many days [passed] for Israel without a true God" (*Divrei Hayamim II, 15:3*). What is [the meaning of] "without a true God"? That one who concerns himself solely with Torah, is as one who has no God"

The questions of the relationship between yeshiva students and the rest of Israeli society are important and difficult. In a culture that is in many ways built around army service, there is often resentment felt against members of society who exempt themselves from the otherwise mandatory military service. These important ideas and their real life implications stem from a very interesting portion in a series of units in Baba Batra which seek to set out the ideals for a fully functioning society. The Rabbis of the Talmud, followed by their heirs through the generations, found the differentiation of the Torah scholar and the lay person to be an important one for the betterment of Jewish communities. The importance of this separation, combined with a desire to promote Torah study as a physical protector, prompted the Rabbis to exempt themselves from protective taxes. The examination of the various background sources, as well as the more modern responsa and articles can help us understand the different positions on the matter. Through understanding these positions, different segments of Israeli society, both within the religious communities and outside, can better understand each other, work towards healing a sometimes fractured society, to help realize the vision of the Rabbis from the beginning of Baba Batra.

Universal Education:
Lessons in chasing a pipe dream...
Baba Batra 20b-22a

Sophie Rapoport

I. Introduction:

Within a chapter on neighbor relations and an immediate context of zoning restrictions, the sudden appearance of an extended Talmudic discourse on education appears out of place. While tangential discussions are common throughout Rabbinic literature, the reader is nonetheless left wondering - why here? Several points about the placement of the sugya are worth making, before we venture into the content of our discussion of the sugya's envisioning of ideal educational structures, classroom practices, and teacher qualities. Exceptions to normal Mishnaic zoning restrictions are described both for children's education and for scholars. This sugya thus ensures the flowering of Torah – both through widespread cultural literacy and through economic support of the learned elite.

As Yehoshua ben Gamla decreed that teachers must be placed in each and every city, it was of utter importance that zoning laws ensured the best implementation of such measures. In addition, the series of (deferred) challenges to Rava's explanation of the school zoning exception demonstrates that neighbors objected to the establishment of schools within close proximity to their living quarters. In extending the discourse about education, the editor of the sugya suggests strategies for best implementing education that fits the needs of all students – perhaps aiming to address the concerns of those who resisted schools in their neighborhoods. Informal schools were to become part of the fabric of a neighborhood – and without communal buy-in, the ideal of universal education is unachievable.

The sugya addresses the range of issues of education through three main questions:

- What societal structures are necessary to ensure education?
- What should a teacher do in his classroom to make students learn?
- What qualities does an ideal teacher possess?

In this paper we examine the Talmud's attempts to answer these questions. Through our discussion of the text itself and of the interpretations thereof (both medieval commentators and modern articles), we highlight the complex range of factors that affect a community's ability to ensure education for its members, and that impact the daily classroom practices that enable students attending school to learn¹³⁶.

II. Universalizing Education: From Parental obligation to communal responsibility

Rather Rava said The end [of the Mishna] ¹³⁷ regards	אלא אמר רבא סיפא אתאן לתינוקות של בית רבן
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¹³⁶ I extend my heartfelt thanks to Rabbi Daniel Roth whose shiur on this sugya informed much of the thinking that went into this paper, to Rabbi Aryeh Strikovsky who helped me learn the sugya, and to all the teachers and members of the Pardes Kollel for their insights over the course of the last two years and help in writing this paper are most appreciated. Special thanks to Raf Dascalu for his editing and contributions to this paper.

¹³⁷ Regarding the Mishna that on the one hand permits neighbors to prevent one another from doing business inconveniently due to the inconvenience of traffic-caused noise, yet simultaneously does

<p>schoolchildren And from the <i>takana</i> of Yehoshua ben Gamla onward As Rav Yehuda said in the name of Rav: Let us recall that man for good – Yehoshua ben Gamla is his name – for without him, Torah would have be forgotten from Israel.</p>	<p>ומתקנת יהושע בן גמלא ואילך דאמר רב יהודה אמר רב ברם זכור אותו האיש לטוב ויהושע בן גמלא שמו שאלמלא הוא נשתכח תורה מישראל</p>
<p>For originally, a child with a father – [the father] would teach him Torah, a child without a father would not learn! As explicated from the verse: 'And you shall teach them' (Deutoronomy 11) – and you [yourselves] shall teach them.</p>	<p>שבתחלה מי שיש לו אב מלמדו תורה מי שאין לו אב לא היה למד תורה מאי דרוש (דברים יא) "ולמדתם אותם" ולמדתם אתם</p>
<p>They decreed that teachers be established in Jerusalem As explicated from the verse: 'For Torah shall go out from Zion' (Isaiah 2:) And still – fathers would take their children up [to Jerusalem] where they would learn – Fatherless children would not ascend and learn!</p>	<p>התקינו שיהו מושיבין מלמדי תינוקות בירושלים מאי דרוש (ישעיהו ב) כי מציון תצא תורה ועדיין מי שיש לו אב היה מעלו ומלמדו מי שאין לו אב לא היה עולה ולמד</p>
<p>They decreed that teachers be established in every large city, and that students be admitted at the age of 16 or 17. But teachers would get angry at their students, and the students would respond violently and leave, Until Yehoshua ben Gamla came and decreed that teachers be established in each and every district and each and every city, and students be admitted at the age of six or seven.</p>	<p>התקינו שיהו מושיבין בכל פלך ופלך ומכניסין אותן כבן ט"ז כבן י"ז ומי שהיה רבו כועס עליו מבעיט בו ויצא עד שבא יהושע בן גמלא ותיקן שיהו מושיבין מלמדי תינוקות בכל מדינה ומדינה ובכל עיר ועיר ומכניסין אותן כבן שש כבן שבע</p>

This sugya poses questions of historicity. Was the 'historical' Yehoshua ben Gamla¹³⁸ responsible for the establishment of elementary schools in Israel? Researchers have addressed this question at length – some see Yehoshua ben Gamla as a reasonable if not likely candidate,¹³⁹ while others assert firmly that this narrative

not grant neighbors the right to issue noise complaint due to the 'voices of the children.'

¹³⁸ Here we assume this refers to Yehoshua ben Gamla who was known as the high priest at the time of Alexander Jannaeus and the Great Revolt (~60CE). Noted by Tosafot (21a – זכור אותו האיש לטוב) and Rashi (משות תקנת יהושע בן גמלא).

¹³⁹ Marc Hirshman suggests: 'Sensing the imminent danger to Jerusalem and the priestly stronghold, Yehoshua ben Gamla might very well have, in a prescient manner, put in place an educational system that could survive an attack on the Temple' (Hirshman, Marc. Education and accountability. Languages and Literatures in Jewish Education (2007). 179-193), 184. For a complete survey of this question, see D. Goodblat:
גודבלאט, דוד (תש"מ). המקורות על ראשיתו של החינוך היהודי המארגן בארץ ישראל. מתוך מחקרים בתולדות עם ישראל וא"י (כתב עת) כרך 5, תש"מ. עמ' 83-103.

contains not even a kernel of historical truth¹⁴⁰. Nonetheless, given the attribution of these descriptions to Rav and Rava and the pieces of educational advice attributed to them, it appears that some semblance of universal education system (or at least the ideal thereof) was in place by the end of the Tannaitic period.¹⁴¹ Furthermore, the location of this sugya itself in the context of a discussion of neighborhood noise concerns corresponds well to the model of schooling in private homes that is well documented in contemporaneous Roman sources.¹⁴²

Regardless of its historicity, Rav's narrative of an evolution¹⁴³ from home-based to school-based education, and from an individual father's obligation to educate his sons to a community-wide system of schools¹⁴⁴ functions as a vehicle for addressing the societal concerns that arise in implementing such sweeping changes. Father-based education led to glaring educational inequality – educated fathers could teach their children, and wealthy fathers could pay for private tutors.¹⁴⁵ Centralized education in Jerusalem may have had religious¹⁴⁶ and economic¹⁴⁷ advantages, but would also have favored the upper classes. As schools developed in more large cities, there was greater accessibility, yet schooling was available only to those able to children physically¹⁴⁸ and economically able to travel. Na'ama Seti further uses the historical context in which Rav locates this narrative to discuss factors that may have motivated educational expansion: strife between different Jewish factions demanded structures for immersing children in Pharisee culture and belief, and mounting tensions with the Romans demanded the spreading of these structures. cultural and religious strife demand inculcation with particular mores.¹⁴⁹

This narrative presents a step-by-step evolution toward universal education. Evidently, establishing schools throughout the country was not an overnight occurrence. While universal education was an ideal to strive toward – as it remains to this day - the process of getting there was slow.¹⁵⁰ The series of pieces of educational

¹⁴⁰ Daniel Goodblat's article provides a survey of a range of views on this question. He concludes: 'elementary education during the Second Temple Period was centered in the home and synagogue, and not in the school.' As such – Rava's attributing the universalizing of education to Yehoshua ben Gamla is entirely anachronistic.

¹⁴¹ Goodblat suggests that this description of *takkanat Yehoshua ben Gamla* is in fact Tannaitic (p. 87).

¹⁴² More on contemporaneous educational systems see I. Gafni:

גפני, ישעיהו. חינוך קטנים בתקופת התלמוד- מסורת ומציאות.

¹⁴³ Rav BenZion Meir Chai Uzziel suggests that the individual parental obligation stems from Shimon Ben Shatach's earlier takana that children must go to school, while the governmental structure for enforcing said obligation was established by Yehoshua ben Gamla. See Seti p. 6.

¹⁴⁴ This system is presented as a community based obligation on BT Shabbat 119b. These Gemarot are juxtaposed in the Rif (R' Isaac Alfasi, on Bava Batra 21a, and codified in Rambam Hilchot Talmud Torah 2:1 (Maimonides 1135-1204, Spain/Egypt).

¹⁴⁵ The private tutor (pedagogue) model of education was prevalent in Greco-Roman culture, and continued through the centuries. The Gemara's language of *מי שיש לו אב* is in fact taken to mean specifically an educated father – children not born into the learning aristocracy simply had no opportunity for education.

¹⁴⁶ Tosafot 21a (כי מציון תצא תורה) suggests that the reason for Jerusalem as the initial site of schools was to instill proper religious attitudes in students

¹⁴⁷ Hirshman (p. 184) suggests that the Temple cult focused Jerusalem had both the economic ability and the religious desire to develop educational systems to prepare young priests for service

¹⁴⁸ Tosafot 21a (בבביר מבר שית לא תקבל) notes that the variation in age reflected student health – healthy students were to commence school at the age of six, weaker students to commence at age seven.

¹⁴⁹ Seti p. 3.

¹⁵⁰ And though the ideal remained in Jewish consciousness, real-life educational systems in Jewish society continued to revert to aristocratic education through the medieval and even modern period.

advice that follow this narrative, together with the centuries of commentary accompanying them – fill in the complex portrait of the social and economic issues that prevent instant implementation of a particular educational ideal. The particular educational and economic concerns associated with these Talmudic educational aphorisms will be discussed in the following sections.

III. How to run a (Talmudic) classroom

<p>Rav said to Rav Shmuel bar Shilat Until six, do not accept [the student] From then on, accept the student and stuff him like an ox¹⁵¹</p> <p>And Rav said to Rav Shmuel bar Shilat When you scold the student, only use a small leather strap.</p> <p>One who reads will read One who does not read will be company for his fellow students.</p>	<p>אמר ליה רב לרב שמואל בר שילת עד שית לא תקביל מכאן ואילך קביל ואספי ליה כתורא</p> <p>וא"ל רב לרב שמואל בר שילת כי מחית לינוקא לא תימחי אלא בערקתא דמסנא</p> <p>דקארי קארי דלא קארי ליהוי צוותא לחבריה</p>
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R' Yehoshua ben Gamla was praised above by Rav, the great first generation Amora, for his placement of teachers in each and every city, without which 'Torah would have been forgotten from Israel.' Once the basic social phenomena and political structures that predated this decree and made universal education possible are described, the sugya moves into suggestions for educational practice - as given by Rav to Rav Shmuel Bar Shilat, who is known as a devoted teacher of children.¹⁵²

1. Preventing truancy and misbehavior

First, Rav suggests six¹⁵³ as the minimum age at which a student is to be accepted to school. As soon as children are physically capable¹⁵⁴ of attending school or able to pay attention to their lessons¹⁵⁵ they are to be required to attend school. Rishonim debate exactly how the children are to be coerced into becoming students. Rashi¹⁵⁶ suggests that students are to be forced to attend school even against their will – they are to be fed knowledge in a manner similar to a bull who has a 'yoke placed on his neck'¹⁵⁷, The Maharasha¹⁵⁸ disagrees in suggesting that for small children, forced school attendance must be made a more pleasant experience; in his reading the

See D. Taub:
'Establishment and Organization of educational institutions: Comparing the Rabbinic Period and Modern day Israel' (Heb) David Taub for further discussion.

¹⁵¹ 'Stuff 'em' idiom from Marc Hirschman's translation.

¹⁵² BT Bava Batra 8b

¹⁵³ Rav's description of Yehoshua ben Gamla's *takana* teaches that students are to be educated from the age of six *or* seven. Shimon ben Shatach suggests on BT Ketubot 51 that five or six is the age at which a child should begin to learn Scripture. These apparent contradictions motivate later distinctions made between different types of children and different types of learning (Shulchan Aruch Yoreh Deah 245:8, Rema ad loc.)

¹⁵⁴ Tosafot (21a – כבן שית) notes that a healthy child is to enter school sooner than a sickly child.

¹⁵⁵ Rabbenu Gershom (21a שות שנין) 'until six, students cannot suffer the bother of learning'

¹⁵⁶ R' Shlomo Yitzhaki 1040-1105, France

¹⁵⁷ Rashi (21a ואספי ליה)

¹⁵⁸ R' Samuel Eidels, 1555-1631, Poland

analogy of the bull is drawn because bulls are force-fed more gently than camels.¹⁵⁹

The second piece of advice given: when physically punishing students, do so cautiously and lightly. “When you scold a child, only do so with a sandal strap.” Rashi notes that the sandal straps are meant only to cause a “light wound, such that the child will not be damaged.”¹⁶⁰ This advice takes the utility and presence of corporeal punishment as a given. ‘When you punish a student’ – not ‘if.’ Thus, Rav’s advice is meant as a limitation on the severity of the punishment. The Perush Magentza¹⁶¹ further comments - ‘hit him with a strap, and do not hit him too much, because a student does not recover from many hits,’ suggesting awareness of the potential long-term repercussions of corporeal punishment. The Maharsha reads Rav’s limitation of force in the classroom to suggest that this light form of punishment is meant only for the same young students for whom school is to be pleasant. From the age of twelve, however, teachers should not hesitate to use more severe forms of punishment.¹⁶²

In the Poskim, this discussion is brought as permission and even encouragement for the teacher to lightly slap his students. As the Rambam writes¹⁶³ ‘the teacher should hit his students to instill fear in them. And he should not hit them as an enemy or cruel person hits his victims. Thus, he should not use whips or sticks – and rather, he should use a small strap.’ He accepts fear as the appropriate mode for instilling proper discipline and behavior in students, balancing this desire with the need to minimize potential harm. In the Shulkhan Arukh¹⁶⁴, however, the Rambam’s active encouragement of corporeal punishment is absent – as in the Gemara, only the ruling limiting the amount of force to be used is cited.

To the modern educational eye – corporeal punishment is decidedly off-limits. The permission granted to use even limited amounts of force to compel students to behave or learn seems cruel. An examination of contemporaneous Greco-Roman literature indicates that perhaps the rabbinic limitation on the use of force is a welcome introduction to the educational context of the Talmudic era.¹⁶⁵ However, the Halakhic permissibility of the use of force in the classroom cannot and should not be whitewashed – even as Chazal demanded that force be used only when it could be deemed pedagogically effective and minimally harmful.¹⁶⁶ The attitude toward the use of force in the classroom is intertwined with the question of the role and status of the teacher vis a vis his students. Traditionally, the teacher is meant to serve as a model for *yirat shamaim*. Part of his job is to instill proper fear in his students, so that they come to exemplify a similarly deferent attitude toward God and authority.¹⁶⁷

¹⁵⁹ Maharasha 21a – ואספי ליה כתורא

¹⁶⁰ Rashi 21a – לא תימחי אלא בערקתא דמסנא

¹⁶¹ This is the collective commentary of the students of the Yeshiva of Rabbenu Gershom (R' Gershom b' Judah, 960-1040, Germany) in Magentza Germany. See Ta Shma (כרך א) (הספרות הפרשנית לתלמוד: כרך א). The commentary is attributed to Rabbenu Gershom in the margins of the Vilna Shas, so we cite it as Rabbenu Gershom through the rest of the paper.

¹⁶² Maharsha 21a – לא תימחי אלא בערקתא דמסנא

¹⁶³ Rambam Hilchot Talmud Torah 2:2

¹⁶⁴ Yoreh Deah 245:10

¹⁶⁵ Gafni 5

¹⁶⁶ For further discussion of this issue see N. Gootel:

גוטל, נריה (תש"ס). 'חושך שבטו שונא בנו?' הכאת ילדים: בין 'הלכה' ל'הלכה למעשה'. לדרכה של מדיניות חינוכית הלכתית. בשדה חמד, גליון 3-2.

¹⁶⁷ Rambam Hilchot Talmud Torah 2:3, Sulchan Aruch 245:17 emphasize the importance of a teacher who is בעל יראה

Such an attitude toward authority may lead to a more permissive culture vis-a-vis the use of force with young children. While Israeli law bans the use of disciplinary force, both in the school and in the home, and most figures in the Jewish educational world speak loudly against it, there are subsets of the Yeshiva world where corporeal punishment is seen as halakhically acceptable and is not uncommon. This connection perhaps motivates modern educational theorists who advocate a classroom culture in which there is no room for hierarchy and see any hint of discipline as damaging to students.¹⁶⁸

2. Teaching the struggling student

The final piece of advice given by Rav discusses the role of the student who has difficulty reading in the classroom. The precise content is cryptic – 'one who reads will read, and one who does not will be company for his friends.' The ambiguity of this phrase lends space for a range of voices on how struggling students are meant to be incorporated into the classroom, and how they are to gain the cultural fluency that elementary education is to teach. Rashi suggests that a teacher need not chastise or expel the student who struggles – rather, such a student will eventually learn simply by being in the company of more successful students. The Nimukei Yosef¹⁶⁹ gives this idea legal force - a teacher is not allowed to “remove the struggling student from the book¹⁷⁰,” he must be granted learning opportunities even as he struggles. The Perush Magentza (Rabbenu Gershom) in its general manner of connecting the different pieces of advice given, reads this attitude toward the struggling student to mandate that particular care is to be taken to limit force with weaker students, who are even less likely to recover and continue learning. While these voices reflect the view that all young students must be encouraged in learning, the Maharsha attacks Rashi's read as grammatically inaccurate;¹⁷¹ he suggests that the role of the struggling student is to keep the rest of the students company and prevent the successful students from becoming distracted.¹⁷² Moshe Arend reads this Gemara as an early precursor to the

¹⁶⁸ Alfred Knohl. Beyond Discipline. Nel Noddings – Happiness and Education et al.

¹⁶⁹ Nimukei Yosef (Yosef Ibn Habib, Spain late 14th/early 15th century) on Rif Bava Batra 21b:
ודלא קארי: אין לך רשות לסלקו מן הספר

¹⁷⁰ Students would all gather around the one (or few) copy of the book in the school/teacher's home. Removing a student from the book would amount both to being taken away from other students, and to being unable to see the learning material.

¹⁷¹ The sentence seems to read that the student who struggles will be company FOR his fellows, not the other way around.

¹⁷² The mechanics of how the struggling student's presence helps the stronger student focus on his learning is unclear from the language of the Maharasha (21a – ליהוי צוותא לחבריה)
ההוא דלא קרי יהיה צוותא לחבריה דקרי שיותר יתן ההוא דקרי לבו על ידי צוותא ואם לא יהיה ההוא דלא קרי עמו שם ישים גם ההוא דקרי ללבו להוית הולך ובטל כמו חבריו
“The one who does not read will be company for his fellow who reads, that the one who reads should pay better attention with company, and if the one who does not read is not with him, the one who does read will put his heart to folly like his fellow”

A few suggestions (thanks to Raf Dascalu for helping me to flesh these out):

- a) The strong student may be needed to explain lessons to his weaker companion, and therefore will strengthen his own learning.
- b) The weaker students if isolated will get into misbehavior and lead their stronger fellows astray – so keeping them in check and in the classroom ensures better learning all around.

inclusive classroom,¹⁷³ where struggling students are to be granted learning opportunities and are not to become pariahs. The classroom described in the Gemara is a far cry from the modern ideal of differentiated classrooms, where providing for the learning needs of each individual student is the highest priority. Nonetheless, the emphasis on the obligation to provide education for all children grants that all children are to be included, even those who will not ultimately become the masters of the Talmudic academy.

While the Rishonim comment locally on each piece of advice given, it is worth noting the overall picture that emerges from the juxtaposed tidbits. As noted above, Rav views universalized education as a strong positive, and he describes classrooms meant to ensure that education is not only available, but that potential harm in the classroom is minimized, both in terms of disciplinary force and failing students. The Rishonim in the commentaries cited above thus reflect a range of views on how best to implement Rav's overall educational vision.

3. Teaching: The underappreciated profession

The context in which this advice is brought – as advice given by the Talmudic master Rav to the teacher Shmuel bar Shilat is itself of interest. One might think that the experienced teacher, who is described as never leaving his flock of students, would be the best person to lay out a vision for how a classroom is to function. However, in the Talmudic world, the social status of the teacher of young children was quite low. Shmuel bar Shilat is described on BT Ketubot 62a as making a living on a day-to-day basis.¹⁷⁴ Some suggest that he was in fact able to make a decent living as a teacher,¹⁷⁵ however it is likely that the Talmudic expression describes a position of poverty and economic vulnerability.¹⁷⁶ Furthermore, teachers were considered to be a mere rung above the *'am ha-aretz* (ignoramus) on the ladder of social significance.¹⁷⁷ This economic vulnerability continued through the middle ages, as teachers often were subject to the economic and educational whims of the parents who paid their salaries.¹⁷⁸ Teachers thus did not see significant economic or social benefit from the importance ascribed to children's education. This social problem is highlighted particularly by a view that teaching children is a profession for less qualified scholars.¹⁷⁹ Furthermore, Rashi's description of how neighbors may prevent 'teaching school' from operating due to noise complaints¹⁸⁰ suggests that educating teachers was a low priority and that teachers were viewed as a rowdy, undesirable bunch.

¹⁷³ Arend 126:

¹⁷⁴ He is described as a טייל.

¹⁷⁵ The view cited by the Shita Mekubetzet as that of the students of Rabbenu Yonah

¹⁷⁶ Rashi on BT Ketubot 62a suggests that teachers didn't pay taxes because they were too poor. Shita Mekubetzet (R' Bezalel Ashkenazi, 16th century Palestine) ad loc, who attacks the above cited position of Rabbenu Yonah as impossible, though he suggests that teachers did benefit from tax exemptions for doing God's work.

¹⁷⁷ BT Pesahim 49b. For in depth discussion of this gap between the educational ideal and the social reality, see Gafni p. 5– where he cites similar situations in contemporaneous Greek and Roman culture.

¹⁷⁸ The Teshuvot of the Rashba document this phenomenon: See Teshuva x, y, z.

¹⁷⁹ The Maharsha comments that קנאת סופרים (the jealousy of scribes, the principle that undergirds the permission for competition between teachers) applies specifically to teachers rather than scholars, as 'one who has reached the level of chacham will not be jealous of his companion [...], whereas for teachers, their jealousy of one another will increase their wisdom until they reach the level of sage'

¹⁸⁰ Rashi 21a:

בסופר מתא: מלמד תינוקות העיר ומושוב מלמדים תחתיו והוא מורה את כולם איך יעשו ויש שם קול גדול

Perhaps due to these factors, the great Rav is the best person to impart educational advice, despite his apparent lack of experience in the field. A culture that emphasizes the importance of high level learning would likely canonize the teaching of one of its most accomplished scholars, rather than that of a lowly teacher. The sugya thus ensures that sound pedagogic advice is passed on, even if the pedagogic professionals have little status.

IV. Education on a budget

<p>Rava said: From the <i>Takana</i> of Yehoshua ben Gamla onward, one does not transport children from city to city But from synagogue to synagogue, one transports But if there is a river on the way, one does not transport. And if there is a bridge, one transports, but if it is a narrow plank, one does not transport.</p>	<p>אמר רבא מתקנת יהושע בן גמלא ואילך לא ממטין ינוקא ממתא למתא אבל מבי כנישתא לבי כנישתא ממטין ואי מפסק נהרא לא ממטין ואי איכא תיתורא ממטין ואי איכא גמלא לא ממטין</p>
<p>And Rava said: For one teacher, we have twenty five students And if there are fifty, we place two [teachers] And if there are forty, we establish an assistant teacher¹⁸¹ and support him from the city.</p>	<p>ואמר רבא סך מקרי דרדקי עשרין וחמשה ינוקי ואי איכא חמשין מותבין תרי ואי איכא ארבעין מוקמין ריש דוכנא ומסייעין ליה ממתא</p>

This section of the sugya focuses on the educational advice given by Rava.¹⁸² While this piece of the sugya explicitly gives instructions for the implementation of local school systems, the economic and educational implications of Rava's advice are the concerns that dominate the interpretive conversation.

1. Transportation

The sugya opens with Rava's comment that with the advent of local schooling, students were no longer to be transported between cities. Children's safety was a paramount issue - young children were simply too young to be transported safely between cities (and sometimes within city limits – as crossing rivers and rickety bridges was dangerous). The Rambam¹⁸³ further reads this comment to legislate against individual parent decisions to take their child out of the classroom of a teacher they deem incompetent. A parent may decide to send his child to another school within the city, but is not allowed to send his child on a dangerous journey for the sake of a better teacher in a different school.

Such a concern would be relevant in the larger communities of medieval Spain – and perhaps also in the bustling Babylonian city of Mehoza where Rava lived,

¹⁸¹ Lit: head of the platform – See Sokoloff on ריש דוכנא

¹⁸² Rava was a fourth generation Babylonian Amora, who lived in the large city of Mehoza. Many of the concerns he cites are particularly relevant in larger communities, as noted by Hirshman (p. 186)

¹⁸³ Hilchot Talmud Torah 2:3.

where there could be multiple schools in the city from which parents could pick.¹⁸⁴ In Medieval Ashkenaz, however, where individual communities struggled to even afford one teacher – the question of transport became one of individual communities banding together when there were few enough students to be able to educate their children. Rava's comment about transportation between cities is thus read by many Ashkenazi Rishonim in conjunction with the succeeding statement that legislate maximum class size. Tosafot comments that when there are fewer than twenty-five students, members of the community cannot force one another to pay for the establishment of a school¹⁸⁵ - in which case, these students would need to be sent to a nearby city to be educated. The Rosh notes that while the economic constraints of a small community must be taken into account, there is a threshold size at which a community must fulfill the dictum of Yehoshua ben Gamla – he thus forbids transporting students across city lines when there are 25 students in a given city.¹⁸⁶

II. The Economics of Class Size

The issues of class size and teacher hiring are inextricable from their economic import – a link that plays out to this day, when average class sizes in different countries and school districts are correlated strongly with economic advantage. Here, this issue plays out in the interpretation of the limits of class size set by the sugya, and in the question of financial responsibility for teacher salary. The sugya indicates that 25:1 is the preferred student-to-teacher ratio, and that 40:1 high enough to demand hiring additional support for the classroom. That said, the sugya does not specify explicitly what should be done when there are fewer than 25 students.¹⁸⁷ As noted above, this was a prevalent concern in Ashkenaz, and the financial need of the communities there sometimes overrode the asserted value of having schools in every city.¹⁸⁸ In contrast – an emphasis on the importance of small class size, even when a small community faces the deep financial difficulty of paying for teachers, traces through the Spanish Rishonim.¹⁸⁹

This tension between communal economic needs and educational ideals is further highlighted by the range of views on financial responsibility for paying for education. These views are reflected both in *teshuvot* (responsa) and in interpretations of the language used by this sugya to describe the hiring of teachers. The Yad Ramah¹⁹⁰ in his *teshuva* notes that in small cities where individual parents cannot alone afford to pay for their children's education, that the community at large must

¹⁸⁴ Furthermore, the Rambam's idealization of the scholar and emphasis on the importance of high quality learning may motivate him to ascribe the discussion of transportation issues to parental desires for high quality education.

¹⁸⁵ Tosafot 21a מתקנת רבי יהושוע בן גמלא לא ממטיגין

¹⁸⁶ Rosh (Rabbenu Asher b' Yehiel, 125?-1328, Germany/Provence/Spain) מתקנת רבי יהושוע בן גמלא לא ממטיגין

¹⁸⁷ The Shita Mekubetzet here suggests that Rava's statements about transportation and class size are to be read in conjunction with Yehoshua ben Gamla's decree that schools be established in every city – even with fewer than 25 students, students are NEVER to be transported.

¹⁸⁸ As in the Tosafot discussed above. The emphasized importance of having schools in each city comes through most starkly in the Rif, where he cites a parallel Gemara from Shabbat 119b that demands that any city that does not have schools for its children is to be placed in *herem* or destroyed.

¹⁸⁹ Ramban (R' Moses b' Nahman, 1194-1270, Spain) notes that even for two or three students, a teacher must be hired – סך מקרי ינוקי עשרין וחמשה. Similarly Rabbenu Yonah (R' Yonah Gerondi, d. 1263, Catalonia). Ritva (R' Yom Tov ibn Asevilla, late 13th century Spain).

¹⁹⁰ R' Meir Abulafia, 1170-1244, Spain

support them through progressive taxation, as it is a communal obligation to provide for the education of young children.¹⁹¹ Even while articulating a communitarian ideal, the Yad Ramah here recognizes the reality that generally education was paid for by a parent pool rather than a community-wide tax.

Furthermore, while most commentaries on the sugya¹⁹² note that the community should in fact be responsible for paying the salary of the teacher and the teaching assistant, there is an alternate view that the teacher himself was primarily responsible for paying his assistant, and was given some support from the parent pool.¹⁹³ Cases cited in the *teshuvot* in the Rashba indicate not only that parents were responsible for paying teachers, but that education would be organized privately by groups of parents. In this situation, teachers were subject to the educational and financial whims of the wealthier parents¹⁹⁴, and the poor would be less likely to be educated.¹⁹⁵ While the ideal of having elementary education for all students might suggest that the community would provide the financial and structural support, this was evidently not the historical reality.¹⁹⁶

3. The Teaching Assistant: Supporting teaching with limited resources

In addition to the economic and social issues raised by the question of who pays for the teaching assistant, disputes about his role in the classroom highlight the educational angle of our sugya. The precise job description of the *Reish Duchna* is not stated in the Gemara, and opinions of the Rishonim vary as to both his specific duties and the qualities that qualify him for the position. He may be a less qualified and inexperienced teacher hired to generally support the head teacher in teaching younger students,¹⁹⁷ someone with no particular background paid to sit with the students and repeat what the teacher said for the students who didn't hear,¹⁹⁸ or even an advanced student whose job is to help the teacher in his learning and preparation.¹⁹⁹ These different perspectives on the role of the *Reish Duchna* presumably fall within particular societal contexts – and little is known about the classrooms of the time. Nevertheless, they shed light on the range of attitudes toward the assistant teacher, and reflect a general realization that effective education requires maintaining a reasonably low student-to-teacher (or adult) ratio in the classroom.

¹⁹¹ See also the Rama's commentary on Baba Batra 22a where writes explicitly of the importance of public education since this way "the poor children will learn just like the rich children." (והכי עדיף, כי) (היכי דלילפו בני עניים כבני עשירים)

¹⁹² Rashi, Rabbenu Gershom Yad Ramah – who notes the concern that the hiring of the teaching assistant might lower the teacher's salary, and suggests that the language of *ממתא ליה* supports this reading.

¹⁹³ This is the view of R' Yonatan, as described in the Shita Mekubetzet on 21a (וזה לשון הרב רבנו יהונתן) (ז"ל).

¹⁹⁴ Gafni (p. 7) comments about the complex relationship between the economic reality of parents paying for education and teacher social status.

¹⁹⁵ The Yad Ramah (ואמר רבא סך מקרי דרדקי) makes this concern for the poor children explicit – communal educational responsibility is preferable because 'that way, the children of the poor will learn as the children of the rich.'

¹⁹⁶ Yom Tov Asis, in his article 'Welfare and Mutual Aid' – further discusses this gap, and documents the development of communal funds for education in Medieval Spain.

¹⁹⁷ ואמר רבא סך מקרי דרדקי

¹⁹⁸ ריש דוכנא

¹⁹⁹ Meiri (Menahem Meiri, 1249-1310, Catalonia) – 21a: מצות עשה על האב

V. May the best teacher win!

<p>And Rava said: The teacher of students who is learned, and there is another more learned than he; We do not expel [the first], lest he come to be lax.</p> <p>Rav Dimi of Nehardea said: All the more so the one who is more learned – the jealousy of scribes will expand wisdom.</p>	<p>ואמר רבא האי מקרי ינוקי דגריס ואיכא אחרינא דגריס טפי מיניה לא מסלקינן ליה דלמא אתי לאיתרשולי</p> <p>רב דימי מנהרדעא אמר כ"ש דגריס טפי קנאת סופרים תרבה חכמה</p>
<p>And Rava said: If there are two teachers – one is learned but not precise, and one is precise but not as learned; We hire the one who is learned but not precise – the mistakes will disappear eventually.</p> <p>Rav Dimi of Nehardea said: We hire the one who is precise but not as learned – once a mistake arises, it has arisen!</p> <p>As it is written (I Kings 11) “For six months Yoav and all Israel stayed there until he killed every male (זכר) in Edom” When Yoav came before David, [David] said to him, “Why did you do this (ie: kill only the males)?” He said to him “As it is written - “Erase the males (<i>Zakhar</i>)²⁰⁰ of Amalek” David said “But I read <i>Zekher</i> (memory)”! [Yoav] went to ask his teacher: He said “How did you read to us?” He said “זכר”²⁰¹ [Yoav] drew his sword to kill him He said “Why?” Yoav said – as it is written (Jeremiah 48:10) “Cursed is he who is slack in doing the work of the Lord!”</p>	<p>ואמר רבא הני תרי מקרי דרדקי חד גריס ולא דייק וחד דייק ולא גריס מותבינן ההוא דגריס ולא דייק שבשתא ממילא נפקא רב דימי מנהרדעא אמר מותבינן דדייק ולא גריס שבשתא כיון דעל על</p> <p>דכתיב (מלכים א יא) "כי ששת חדשים ישב שם יואב וכל ישראל עד הכרית כל זכר באדום" כי אתא לקמיה דדוד אמר ליה מאי טעמא עבדת הכי? אמר ליה דכתיב (דברים כה) "תמחה את זכר עמלק" אמר ליה והא אנן זכר קרינן א"ל אנא זכר אקריון אזל שייליה לרביה אמר ליה היאך אקריתן אמר ליה זכר שקל ספסירא למיקטליה אמר ליה אמאי א"ל דכתיב (ירמיהו מח) "ארור עושה מלאכת ה' רמיה" א"ל שבקיה לההוא גברא דליקום בארור א"ל כתיב (ירמיהו מח) "וארור מונע חרבו מדם"</p> <p>איכא דאמרי קטליה ואיכא דאמרי לא קטליה</p>

200 This story relies on a textual ambiguity – while the plain meaning of the verse in Deuteronomy is that the entire memory (ie: existence) of the Amalekites is to be destroyed, the Hebrew word זכר can also mean males (when punctuated differently)

201 Rishonim debate whether the teacher read זכר incorrectly as male (Yad Ramah) or זכר correctly as memory (Rabbenu Chananel, Tosafot) – and the continuation of the story could be read either way. This debate thus becomes one of whether the teacher's mistake was one of active commission, or one of failing to ascertain whether students had learned correctly.

<p>He said “Let that man remain at <i>cursed!</i>”²⁰² Yoav said [citing the continuation of the verse] “And cursed be he who withholds his sword from blood!” Some say he killed him. Some say he did not kill him.</p>	
<p>And Rava said: Teachers, gardeners, butchers, and[] and city scribes – all are as standing warned [ie: liable to lose their job for a mistake without warning²⁰³] As a general rule: Any irrevocable loss is warned and standing</p>	<p>ואמר רבא מקרי ינוקא, שתלא, טבחא, ואומנא, וסופר מתא כולן כמותרין ועומדין נינהו כללא דמילתא כל פסידא לא הדר מותרה ועומד הוא.</p>

Rava continues with his educational tidbits by focusing on questions relating to what qualifies a teacher for a job, and to job dynamics. The sugya first asks the question – what happens when a new teacher with a greater knowledge base²⁰⁴ shows up in town? Rava teaches that the current teacher is not to be fired from his job – 'lest he become lax,' whereas Rav Dimi of Nehardea disagrees in that the 'jealousy of sages increases wisdom.' While the basic content of their dispute seems straightforward,²⁰⁵ the precise reading of their motivating concerns is subject to debate among the Rishonim and modern readers.

1. Teacher Competition

Commentaries focus here on the impact this decision has on the teachers, rather than on student learning,²⁰⁶ (perhaps in light of Rava's last statement in the sugya, which suggests that teachers are liable to be fired for making irrevocable mistakes – presumably if the first teacher's lack of knowledge adversely affects the students, he is liable to lose his job²⁰⁷). While Rava's statement in the Gemara *seems* to focus on the

²⁰² ie: Don't kill me!

²⁰³ Rashi 21b - כמותרין ועומדין נינהו

²⁰⁴ The word גירסא is generally taken to mean knowledge base. See Arend p. 120 footnote 20. Moshe Arend, however, suggests that גירסא may actually relate to content coverage in the classroom, thus focusing all the questions addressed here on how a teacher imparts knowledge to his students rather than his own knowledge (p. 120)

²⁰⁵ i.e.: Rav Dimi suggests replacing the old teacher with the one who is more knowledgeable – favoring the benefits of competition, despite the possible damage caused that concerns Rava. Marc Hirshman (p. 188) suggests that the adage 'the jealousy of scribes increases wisdom' may have originally derived from the similar adage of Ben Sira: 'the wisdom of sages increases wisdom' – in which case the second teacher is preferred due simply to his greater knowledge.

²⁰⁶ Yad Ramah (ואמר רבא האי מקרי ינוקי דגריס): 'We are not concerned for the loss to students – as long as the [first teacher] has sufficient knowledge, even though there is another who has greater knowledge than he, we do not care – for if we were to fire him on these grounds, there would be no end to the matter – rather we are concerned for his own loss, that if he should be fired, he will become lax with himself'

²⁰⁷ The Ri Migash (Joseph ibn Migash, 1077-1141, Spain) defines the failure for which the teacher in Rava's last statement is liable as one of laxity (מקרי ינוקא דאיתרשל) – which explicitly links the two statements. For further discussion of the relationship between these two statements of Rava, see below.

impact job loss would have on the first teacher,²⁰⁸ the Sheiltot's²⁰⁹ read of the sugya shifts both Rava and Rav Dimi's concern to the second teacher²¹⁰ - a focus reflected in Rashi²¹¹ and Rabbenu Gershom. Later Rishonim suggest a broadening of Rava²¹² and/or Rav Dimi's²¹³ positions beyond the scope of consequences for an individual teacher. This reading does not correspond well to the language of the Gemara, which is all in the singular. That said, it reflects a systems-oriented look at the impact of competition reminiscent of the sides of the teacher tenure debate today – Rav Dimi views competition as good for everyone involved²¹⁴, while Rava is worried about the damaging impact of the threat of job loss on all parties. Rav Dimi's position could also be bolstered by a view that suggests that having more knowledgeable teachers is good for the students themselves, while Rava's position that the teacher should be retained would be supported in that teacher stability is good for children.²¹⁵

2. Teacher Accountability

The debate between Rava and Rav Dimi about the qualities that are most desirable in teachers continues – once the question of content knowledge has been raised, an additional factor is added to the equation for determining teacher desirability: precision in teaching. Rava expresses a preference for the teacher with great content knowledge even if he is imprecise, whereas Rav Dimi expresses a preference for the teacher who is precise.²¹⁶ Each Amora justifies his position in terms of the everlasting impact of mistakes in learning – Rava asserts that mistakes will eventually correct themselves, whereas Rav Dimi asserts that once a mistake has arisen, it cannot be erased. Rav Dimi's view is supported by the story told of David's general Yoav and his mistaken read of a verse in Deuteronomy which led him to mistakenly kill only the male Edomites.²¹⁷

²⁰⁸ There is no explicit change of subject articulated by the Gemara. This perhaps motivates the Ri Migash's reading of both Rava and Rav Dimi's positions with regard to the first teacher's learning – while Rava is concerned that the old teacher will become lax in his own learning should he be fired, Rav Dimi suggests that he will be motivated to work hard after losing his job.

²⁰⁹ Sheiltot d'Rav Aha, 8th Century Babylonia

²¹⁰ The Shelita's explication of the sugya inserts into Rava's statement: 'the other will also say if they find better than me they'll remove me and he does not put his mind to it. Rav Dimi says: 'how much moreso he'll put his mind to it' – the jealousy of scribes increases wisdom'

²¹¹ Rashi (דילמא אתי לאיתרושולי), unlike the Sheiltot, reads Rava to implicate the pride that may arise in the newly hired teacher: 'Lest he become haughty and say 'there is nobody as great as me.'

²¹² An unknown position cited by the Shita Mekubetzet (והשיטה לא נודעה למי) reads most broadly – that both Rava and Rav Dimi are concerned not for one particular teacher's laxity or improved learning, but that Rava is concerned that the threat of job loss will cause both teachers to despair and thus fail in their learning, while Rav Dimi sees competition as a motivating factor for both teachers.

²¹³ Rabbenu Yonah (21a - ויאמר רבא האי מקרי ינוקי דגריס) reads Rava as concerned primarily for the laxity of the new teacher due to pride, but suggests that in Rav Dimi's view, competition will motivate both teachers to succeed. This corresponds well to Rabbenu Yonah's positive view of general economic competition as good for the consumer (21b - מרחיקין מצודת הדג - הדג), though his focus here is on the teachers themselves rather than on the student's learning.

²¹⁴ This explanation of Rav Dimi is further supported by the use of קנאת סופרים תרבה חכמה to support a blanket permission on (economic) competition between teachers on BT Bava Batra 22a.

²¹⁵ As noted above, Marc Hirshman suggests this as a possible original meaning of Rav Dimi's position based on the adage from Ben Sira. Rashi (דילמא אתי לאיתרושולי) suggests that Rava's concern is in fact for the students - the new teacher's haughtiness will lead him to have no concern for his students (יתרשל מן התנוקות).

²¹⁶ Moshe Arend (p. 131) suggests that both Rava and Rav Dimi refer to class coverage rather than teachers' learning – Rava prefers a class that covers a broad span of material, while Rav Dimi prefers an in-depth approach to less material.

²¹⁷ A parallel version of the story found in Yerushalmi Rosh Hashana 1:1 indicates that the real

The commentaries' varying reads of the precise nature and impact of the mistakes made by the teacher and his students reflect a range of views of teacher accountability for student learning and the long-range impact of misconceptions. General consensus among Rishonim is that the precision required is care in correcting student mistakes,²¹⁸ thus the sin is one of teacher neglect for students' learning. This corresponds to a reading of the story in which the teacher taught the verse correctly but failed to correct the mistaken read that Yoav eventually acted upon.²¹⁹ The *Yad Ramah*, however, suggests that the teacher in fact made the reading mistake²²⁰ himself – and the *Maharsha* validates this reading, suggesting that the teacher's grievous sin is failing to recognize that his imprecision in reading renders him unqualified for the job.²²¹

The story of Yoav illustrates clearly Rav Dimi's claim that lack of attention to detail in teaching can have everlasting import. In addition, it connects well to Rava's final statement in the sugya²²² – teachers are among the professions whose practitioners are liable for all mistakes. Just like the knife slip of a butcher that makes the meat *treif* or the smudge of the pen marking that invalidates a scribe's documents, a teacher's errors can cause irrevocable loss.

On the one hand, this statement of Rava meshes well with the import he places on the teaching profession throughout this sugya. However, Rava here seems to contradict his earlier preference for a teacher who has greater knowledge but is imprecise – there he suggests that mistakes will ultimately disappear! The ways in which the Rishonim solve this apparent textual contradiction further explicate their views on the most important qualities for teachers. The *Ri Migash* consistently values teacher job security and thus suggests that the sin for which a teacher is liable is relenting in his diligence.²²³ Many Rishonim allow for a teacher to make occasional mistakes, but demand that a teacher be accountable for actively misleading students.²²⁴ The *Ramban* clarifies that the situation in which Rava need not worry about occasional mistakes is one where the teacher has sufficient knowledge to avoid

problem is that Yoav should not have killed the Edomites at all. Further work comparing between the two stories will shed light on the ethical message being brought, but here we focus on the issue of mistakes in teaching.

²¹⁸ Rashi (21a - דגריס ולא דייק)

²¹⁹ Rabbenu Hananel as cited in *Tosafot* 21a - פירוש רבנו חננאל

²²⁰ The *Tosafot* (פירוש רבנו חננאל) note here that the possibility of the teacher himself making such a mistake is not a good read of the story – as if it is a mistake, the assertion 'cursed be one who is lax in doing the work of God' cannot apply!

²²¹ The *Maharsha* (21a - אמר לקה היכי אקריתון - א) assumes that teachers should not make such elementary mistakes in reading, and that such a mistake may reflect not only a lack of *דיוק* but also an incorrect *גירסא*. This assumption runs through most Rishonim, and the *Ritva* notes that when Rava claims that mistakes will go away of themselves, this must refer to *student* mistakes – as 'the teacher could not have taught a mistake, and everyone admits that such a mistake, once made, is made' [*Hiddushei haRitva* – חד גריס ולא דייק]

²²² Marc Hirshman (p. 190) in fact suggests that this story may have originally been brought as a support for this final statement, but that the final editing connected Rava's statement to Rav Dimi's claim of preference for a teacher who corrects mistakes.

²²³ *Ri Migash* (21a - אמר רבא מקרי דרדקי): He reads this in tandem with Rava's earlier claim that a less qualified (but competent) teacher is not to be fired, 'lest he become lax' – to suggest that the teacher who is *כמותר ועומד* is precisely the one who becomes lax.

²²⁴ *Rif* 21b, *Ramban* (21b - מקרי דרדקי). The precise meaning of the term *פשיעה* used here is subject to debate.

making the same mistake twice, but that a less knowledgeable teacher is in fact liable for making mistakes in teaching. The Ritva suggests that even Rava admits that an actively taught error will not disappear, but that an occasional student error will not have a long-range impact.²²⁵ For all these Rishonim, teachers' skill sets may enable them to offset the potentially disastrous impact of a mistake. Tosafot, however, suggests that the time spent teaching the mistake is a wasted minute – and even this small amount of *bittul Torah* is a loss that can never be restored.²²⁶

Rava and Rav Dimi both reflect high demands on teachers, and this common ground is taken to heart in the codes. The Rambam notes – it is only fit to hire a teacher who is 'deeply cautious and competent in both learning and precision.'²²⁷ Nonetheless, it is not always possible to demand across-the-board excellence, which may require deciding between teachers of varying strengths. The Yad Ramah and the Rosh both prefer Rav Dimi's position regarding student mistakes, citing both his positioning in the sugya as the final word, with the added benefit of an extended story brought in support of his position. The Yad Ramah notes that Rav Dimi's position is quite apparent – everyone knows that mistakes are ultimately damaging. He consistently demands that student learning must be the universal criterion in deciding who is best fit to teach, even as the particular priorities are disputed.²²⁸

VI. Conclusion

Looking at the sugya as a whole, a few major features are apparent. The sugya begins with Rava, who notes that communities may need to make quality-of-life sacrifices to ensure that their children learn.²²⁹ This assumption is grounded in the rulings and decrees of the great Yehoshua ben Gamla and Rav – who are credited respectively with the social structures that made elementary education universal and with the classroom practices that ensured education was a bearable if not pleasant experience for all the students. Rava then relates further limitations and decisions that become necessary only given widespread schooling – students are not to be transported beyond the limits of their safety, class size limits are to be imposed, and teachers are subject to high professional demands in both their own knowledge and in their accountability for student learning.

Ultimately, it is the weighing of economic, social, and personal concerns of communities, individual students and parents, and teachers, that leads to the range of views expressed in the Talmud, among Rishonim and in modern articles, about how best to implement the vision of high-quality education for all children.

²²⁵ This reflects a melding of Rava and Rav Dimi's positions, and also corresponds to Rabbenu Hananel's reading of the story. Moshe Arend (p. 131) reads these two positions similarly – suggesting that Rav Dimi demands 'checking for understanding' – a teacher is liable to ensure that students do not make mistakes, while Rava holds a teacher accountable primarily for his own learning and errors.

²²⁶ Tosafot 21b – כמותרין ועומדין ביניהו

²²⁷ Hilchot Talmud Torah 2:2

²²⁸ Note for example his read of Rava's earlier position that the only case in which Rava would allow the less qualified teacher to remain in his position is if students are not adversely affected by the teacher's less adequate knowledge base.

²²⁹ I.e. give up on the right to make noise complaints. The series of attacks on Rava's position further clarify the extent to which this would have inconvenienced neighbors, and also emphasize the view that education was important specifically for its local, cultural impact.

Similar concerns play out in modern educational discourse, both regarding policy-level structures and individual teacher practice. Universal education is the modern ideal, as expressed by the UN Declaration of Human Rights, even if it is couched in the contemporary language of individual rights. Some see education as the magical tool that will provide economic mobility, and offer unheard-of opportunities to each and every child – yet education is not universally received (and the question of what the curriculum for universal education should be is subject to much dispute), and the vision of social equality through education seems like a pipe dream.

There is a range of impediments to achieving this ideal. Families in Africa need every healthy child to work, making schooling an unaffordable luxury. Furthermore, attending school may be dangerous when students must walk miles to reach the nearest school. Teachers are consistently viewed as important, yet their salaries may not even suffice to make ends meet – a situation that contributed to the extended teacher strike that delayed commencement of the school year in Israel for months in fall 2008. In addition to these large-scale issues, there is also more localized debate over how best to accomplish education within the school and the classroom. Entrenched teacher unions push for strong tenure *a la Rava*, while other groups suggest that the competitive teacher market will improve educational quality. In the realm of legislation, the notorious No Child Left Behind attempted to codify uniform standards for ensuring that no student would suffer the fate of Yoav (granted, he was a high ranking general, but the school-induced mistakes of his childhood evidently cost him his boss' admiration), while those who crusaded against it suggested that we must also be concerned to prevent teachers from being subject to the sudden-death firing axe (or sword, as in the story).

These tensions span the scope of concerns, from the broad societal to the internal classroom tensions of how to ensure student learning, outlined by the sugya. While the sugya itself has very little controversy for a Talmudic sugya (interestingly the primary disputes noted here are the most teacher focused, and also the most closely connected to the broader context of economic competition), the layers of interpretation and discussion surrounding the sugya highlight the range of community and individual needs that make implementing even an ideal that is broadly accepted quite difficult.

A Little Competition Never Hurt Anyone?

Baba Batra 21b

Lidia Levine

Once upon a time, there lived a man named Yarden. Yarden loved making falafels. When he was a little boy, he would stand next to his mother in the kitchen and scoop up falafel mix and form it into little balls and hand them to his mother, who placed them in the sizzling pot.

When Yarden grew up, he opened a falafel store. He called it "Falafel Yarden." People came from miles around to eat Yarden's falafel, mostly because there were no other falafel stands around. Men, women, children, grandparents, rabbis, princesses, even KINGS! Everyone came to eat Yarden's fabulous falafel. They would sit under his red-checked umbrellas, eat their hot, greasy, falafel, and smile with content. "Yum," they would say, patting their stomachs.

One day, Michael announced his intentions to open a competing place offering lower prices and better quality falafel. What a hubbub in Sal City! Yarden was obviously concerned for his livelihood, afraid that Falafel Michael would run his business to the ground. Michael saw no reason he shouldn't be given the same rights to open a falafel stand as Yarden had for keeping his store open. Meanwhile the community was torn – on the one hand they were excited for cheaper and better falafel (nobody wanted to say anything before but the truth is that Yarden's falafel was not great.) But could they really abandon the falafel stand they grew up with?²³⁰

I. Introduction

The editors of the Babylonian Talmud deal with this circumstance – as well as a number of situations of economic competition – in Tractate Bava Batra 21b. This dialogue comes in the middle of a discussion of zoning issues, specifically in the context of a *Mishnah* regarding forcing businesses out of a shared alley because the patrons cause noise. After a discussion of the location and quality of schoolteachers, the Talmud relates a series of discussions on economic competition.

The placement of this discussion in the context of this *Mishnah* calls for significant analysis. Additionally, each of these cases originates in contexts other than economic competition.²³¹ However the Talmud often uses *Tanaitic* sources (1st-3rd century) for purposes other than the original intention of the author.²³² This paper focuses on the principles of regulatory and free market competition in the eyes of the authors and editors of the Talmud, who bring these passages in Bava Batra 21b. Therefore the paper will not discuss the historical framework of these passages, but rather will focus on the significance of their appearance as a unit within the context of economic competition.

²³⁰ I extend my gratitude to Daniel Roth and the members of the Pardes Kollel, especially Noah Moline, for helping me to understand and appreciate the complexities of this *sugya*. Thank you as well to Meira Levinson and Noah Moline for their help with the story. או הברותה או מתותה

²³¹ For more on the original literary and historical context of the individual passages, see Daniel Kenan קינן, דניאל (תשס"ו) תחרות מסחרית במשפט עברי. עבודה לשם קבלת תואר דוקטור, אוניברסיטה בר-אילן

²³² Kenan, page 57

The purpose of the rabbis' regulation is to focus individual sellers on the enduring strength of their industries. The Talmud then cites six cases where the socio-*halakhic* decision is based on this goal of ensuring long-term viability of industries.

III. Application²³⁸

1. Sustainability: *Gone Fishin'*

The Talmud continues:

<p>Shall we say that the following statement supports Rav Huna: [Other] fisherman must distance their fishing nets from the fish as far as the fish swims in one spell. (And how far is that? Up to a <i>parsah</i>.²³⁹) [This does not support Rav Huna because] fish are different in that they set up spies.</p>	<p>לימא מסייע ליה מרחיקים מצודת הדג מן הדג כמלא ריצת הדג וכמה אמר רבה בר רב הונא עד פרסה שאני דגים דיהבי סייארא</p>
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The Talmud attempts to support Rav Huna's statement using a case of competing fisherman. The response is that the fish industry differs from the mill industry, and therefore one cannot make any assumptions that the same rules would apply to millers and fishermen. Even though the latter are not allowed competing with each other, this may not dictate the rules for the former.

The confusing part of this passage is the reason given for the distinction between fishermen and millers. The Talmud says they put up סייארא – spies. Rashi²⁴⁰ explains the spying fish by describing a fisherman who has found a fish source. Since fish are adept at seeking out food, once that fisherman puts down the bait, the fish will surely be his.²⁴¹ In some sense, once the trap is laid, the fish already belong to the first fisherman; thus the competing fisherman in essence are stealing when they take the fish. In the falafel example, if the Sox family is hosting a party and placed an order for 100 falafels from Yarden, it would be unacceptable for Michael to appropriate that order. Rashi reframes this issue as stealing, and therefore it is different from Rav Huna's case of competing millers.

Ri Migash²⁴² maintains that the fish story is an issue of competition, but suggests that the type of competition is different from Rav Huna's case. He explains the fish spies as fish that go out to see if there are nets. When they see the first net, they figure that there are many nets and they go the other way. Then none of the fishermen will be able to catch fish. The concern here is not about fish going from one person to the other, but is instead a fear of the fish running away from all the fishermen. From the explanation of Ri Migash it seems that competition is unsustainable in the fish-catching business. This is not just the (relatively slight) infringement on livelihood that Rav Huna talked about, but rather that the first

²³⁸ Some of the applications in this paper utilize modern tools of understanding economics. Clearly the Sages of the Talmud did not think in these terms, however the ideas behind the terminology is not new, only the technique for understanding it is modern.

²³⁹ Approximately 2.5 miles

²⁴⁰ Rabbi Shlomo Yitzchaki, 1040-1105, France

²⁴¹ Rashi on Bava Batra 21b, שאני דגים דיהבי סייארא

נותנין עין בהבטם להיות נוהגים לרוץ למקום שראו שם מזונות הילכך כיון שהכיר זה חורו ונתן מזונות בתוך מלא ריצתו בטוח הוא שילכדנו דה"ל כמאן דמטא לידיה ונמצא חבירו מזיקו אבל הכא מי שבא אצלי יבא ומי שבא אצלך יבא

²⁴² Joseph ben Meir ibn Migash 1077-1141, Lucena

fisherman can claim, “You have *completely* stopped my livelihood.”²⁴³

This idea can be illustrated in the following way: Assume that there is a cost of five fish to put out bait and fishing nets, and the potential of 55 fish (for a total profit of 50) for the fisherman who gets all the fish. If both parties go fishing, the fish will be scared and run the other way. In this case, each individual will be incentivized to go fishing only if the other is not. As illustrated in the chart below, the only equilibriums (where one fisherman, knowing the other’s decision to fish or not, will not want to deviate from his choice whether to fish,) are when one party fishes and the other does not. The fact that there is no potential gain if there is a competitor makes this industry unsustainable in a competitive environment.

	A. Fish	A. Don't Fish
B. Fish	A: -5 B: -5	A: 0 B: 50
B. Don't Fish	A: 50 B: 0	A: 0 B: 0

Fisherman A thinks that if B fishes, it is not worthwhile for him to fish, but if B does not fish, then it is worthwhile. B thinks the same thing about whether A fishes. This results in two potential equilibriums – each of them having only one active fisherman. Competition here destabilizes the industry.

Additionally, if the costs of putting out bait and nets are high and the level of potential revenue is low, the potential that a competitor may enter could mean a high probability that fishing will result in negative profitability. In this case nobody would want to fish at all. Thus the rabbis want to forbid competition, because even the potential for competition could discourage fishermen from risking to go fishing at all.²⁴⁴

Ri Migash distinguishes between the fish case – where any competition could mean complete loss of revenue, and the millers’ case, where some people will go to one miller and some will go to the other. Although the first miller may lose clients, neither party will be financially destroyed. In the milling case, there is an incentive for both parties to mill, given the competition, because they can both be profitable.

	A. Mill	A. Don't Mill

²⁴³ ר"י מיגש עמ' סה ד"ה "ודחינן שאני דגים דיהבו סיארא" כלומר: משלחין שלוחין לראות אם יש שם מצודה אם לאו, וכשרואין מצודה הראשונה יודעין שיש שם מצודות הרבה ובורחין מאותו מקום כולו [ו]אין נכנסין אליו כלל, שנמצאת אותה מצודה מפסקת ליה לחיותיה לגמרי. אבל אלו לא הוו יהבי סיארא ולא הוו בורחין מאותו מקום, שנמצא שמי שלא נאחו באותה מצודה אפשר שילכו בו המצודה האחרת, כמו ברחיים שאפשר שיהיו מקצת אנשים טוחנין בו ומקצת טוחנין בו ולא מפסקת ליה לחיותיה כלל, יש לומר שאין מעכב עליו ואע"ג דהוה מפחית ליה לחיותיה מצי אמר ליה את מטי לך מאי דפסקו לך מן שמיא ואנא מטי לי מאי דפסקו לי מן שמיא.

²⁴⁴

	A. Fish	A. Don't Fish
B. Fish	A: -5 B: -5	A: 0 B: 5
B. DF	A: 5 B: 0	A: 0 B: 0

In the case above, there is a 50% probability that each fisherman will decide to fish. However if the fishermen are risk averse, which is especially likely if the cost of fishing is high, each fisherman may decide not to risk the loss of his original investment. Additionally, it is possible to construct a case where the probability that each participant will fish is less than half, (i.e. if the reward for fishing is lower or the cost is greater).

B. Mill	A: 5 B: 5	A: 0 B: 10
B. Don't Mill	A: 10 B: 0	A: 0 B: 0

Miller A will think that if miller B mills, he can either have a profit of 5 if he mills, or none at all if he doesn't. Also, if B doesn't mill A will surely do best if he mills. Miller B goes through the same thought process, and both end up milling.

As Ri Migash writes, if one of the millers is upset with the competition, the other can claim "You'll get what God gives you, and I'll get what God gives me." We can understand that the Ri Migash is indicating that if the second miller can claim that the milling industry can survive under competition.²⁴⁵

Perhaps this is the case in the falafel situation as well. If there is enough business for both Michael's and Yarden's stands to succeed, Yarden would not have a strong enough claim to ban Michael. When competition is sustainable in an industry and the producers will be able to continue their work in the long-term, there is no need for the rabbis to limit the free market.

2. Reaching a Profitable Marketing Equilibrium: Go Nuts

The Talmud continues to look for support for Rav Huna:

Ravina said to Rava: Are we to say that Rav Huna follows the view of Rabbi Yehudah in the following dispute: Rabbi Yehudah says: A storekeeper may not distribute popcorn or walnuts to children, for by doing so he accustoms them to come to him. But the Sages permit this practice... because he can say to the other storekeeper, "I am giving out walnuts, you give out <i>shiuski</i> !" ²⁴⁶	אייל רבינא לרבא לימא רב הונא דאמר כרבי יהודה דתנן רבי יהודה אומר לא יחלק חנוני קליות ואגוזין לתינוקות מפני שמרגילן אצלו וחכמים מתירין אפי' תימא רבנן עד כאן לא פליגי רבנן עליה דרבי יהודה התם אלא דאמר ליה אנא קמפלגינא אמגוזי את פלוג שיוסקי
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Most commentators discuss this passage in its original context as an issue of deception, explaining that the storekeeper is enticing the children to come to his store, tricking them into buying from him. However Meiri²⁴⁷ and the author of Prisha²⁴⁸ view this example in the context of the seller-seller relationship. Meiri explains that Rabbi Yehudah opposes this form of marketing because it deceives the other storekeepers. Presumably they would be surprised to hear that their customers have been taken away because of this nutty marketing scheme.²⁴⁹

²⁴⁵ If the cost of building a mill was prohibitively expensive, to the extent that under the competitive environment, it would not be profitable to build a mill, then the second miller would be discouraged from competing under the free market. This is called in economics a natural monopoly. (A modern example of this would be trains/train tracks.)

²⁴⁶ *Shiuski* could be almonds or plums. For a definition of שיוסקי, see Steinsaltz's commentary on this passage

²⁴⁷ Rabbi Menachem Meiri, 1249-1310, Catalonia

²⁴⁸ Rabbi Yehoshua Falk Katz, 1555-1614, Poland

In his Prisha commentary (Hoshen Mishpat 228:18:17) he writes that one is allowed to give out popcorn and nuts, despite Abba Shaul's concern for the livelihood of the other storekeepers. (Abba Shaul's concern is expressed in the *Mishnah* in Bava Metzia 60a.)

פרישה, חושן משפט רכה:ז

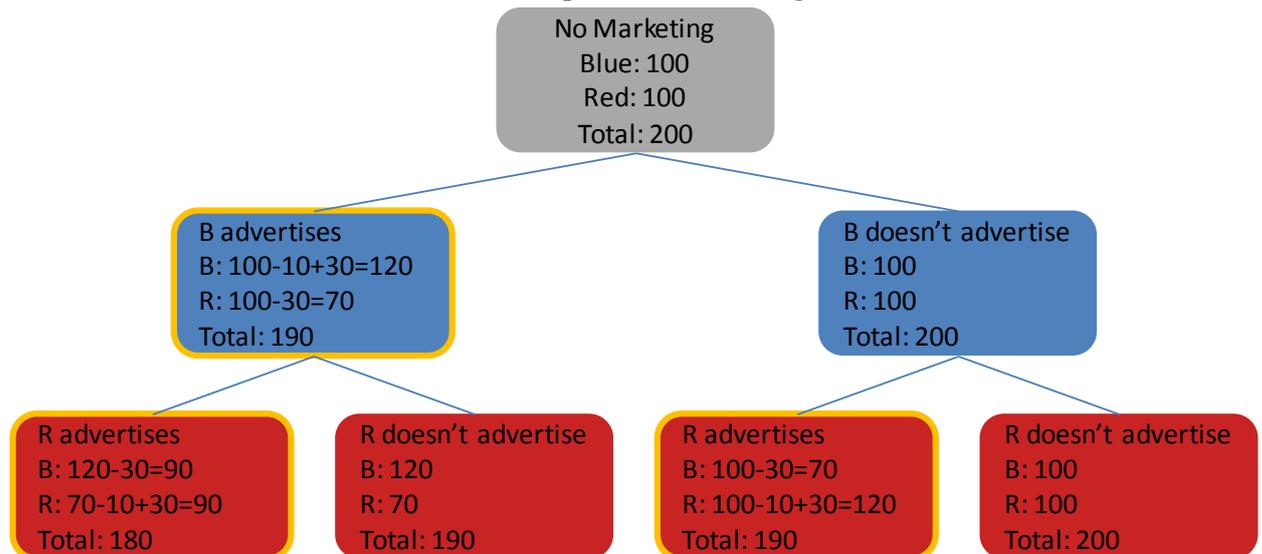
ואין בני השוק יכולין לעכב – אחילוק קליות ואמכירה בזול קאי ולאפוקי מאבא שאול שאסר שם מפני שמקפח בזה פרנסת חנוני חבירו עיי"ש

מאירי, בית הבחירה, בבא מציעא ס ²⁴⁹

ר' יהודה אומר לא יחלק חנוני קליות ואגוזים לתינוקות מפני שהוא מרגילן בכך לבא אצלו ונמצאת אונאה לשאר חנונים

The language of the Talmud²⁵⁰ suggests that this is an oligopoly (two storekeepers who control the market). In this situation marketing is likely to not increase demand, but will shift the constant demand from one store to the other. The children are not buying more stuff; they are just buying from a different seller as a result of the marketing scheme.

To illustrate, assume that the sellers Red and Blue are each making \$100 per month. Handing out treats to the children costs \$10, and there is a total of \$60 of business (\$30 from each store) that is susceptible to marketing.



Red's decision: If Blue advertises, it will cost him \$10, and he will get \$30 of Red's business, leaving Blue with \$120 and Red with \$70. Red faces a choice: either advertise or not. If Red advertises, he will have the \$70 he had before and the advertising will cost him \$10. He will gain an additional \$30, half of the business that is susceptible to advertising (because both Blue and Red are advertising together). This yields \$90 for Red. If Blue advertises and Red does not advertise, Red will have \$70. Red will choose to advertise (\$90 is better than \$70).

Let's say Blue does not advertise. Then Red must decide whether to advertise. If he does, he will profit \$120 (base \$100 from current customers - \$10 marketing cost + \$30 of Blue's business). If Red does not advertise, he will have the base \$100 from current customers. In this case Red will choose to advertise (\$120 is better than \$70).

Blue's decision: As shown above, whether Blue advertises or not, Red will choose to advertise. Thus blue is looking at a decision of either advertising himself, for a total profit of \$90, or not advertising, for \$70. Blue will choose to advertise. Thus in this case both Blue and Red will advertise.²⁵¹

Rabbi Yehudah notes the potential for loss in this circumstance and sees that if marketing is forbidden, both Blue and Red will be better off (with \$100 each instead of \$90 each,) and the industry will fare better because they will not be spending the

וחכמים מתירין שהרי יכול לומר אגא פליגנא אמגוזאי את פלוג שויסקי והם מיני פירות מעולים יותר מן האגוזים והלכה כחכמים

²⁵⁰ The language of the storekeepers talking to each other is in singular form. ...אלא דאמר ליה את...

²⁵¹ This is known as a sub-game perfect equilibrium, where the first party, (Blue,) makes choices based on the expected choices of the second party (Red).

money on marketing.²⁵² Thus Rabbi Yehudah prohibits the popcorn/walnut advertising.

It seems that Rabbi Yehudah's perspective assumes they will only play this game for one round – they will each give out nuts once, or not at all.²⁵³ However, if both sellers are concerned about the long-term, the game will change. Instead of one round, the nuts situation will occur more than once, and each time both parties will remember what their opponents did the last time. Thus both store owners are motivated to act together.²⁵⁴

The Sages recommend that the two sellers can negotiate with each other directly: “I am giving out walnuts, you give out *shiuski!*”²⁵⁵ If they talk to each other, they can reach an agreement which will be profitable for both, and where there is no incentive for either party to deviate from the agreement. They will be forced into the same situation again continually, and they do not want the other store owner to deviate the next time. Thus if they come to the decision that they will each give out certain treats, this practice must be profitable for both parties. It seems that the Sages believe that through negotiation, both sellers will reach an agreement that will ensure the long-term stability of their industry.

3. Negotiations: Will you be my neighbor?

The ability to negotiate plays a critical role in the following situation as well. The Talmud further discusses Rav Huna's ruling:

<p>They challenged Rav Huna's ruling from the following: A person may open a store next to the store of his fellow... and the established operator cannot prevent him from doing so, because the rival can say to the established operator, “You do inside your property and I do inside my property.”</p>	<p>מיתבי עושה אדם חנות בצד חנותו של חבירו ומרחץ בצד מרחצו של חבירו ואינו יכול למחות בידו מפני שיכול לומר לו אתה עושה בתוך שלך ואני עושה בתוך שלי</p>
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Similar to the marketing case above, the Talmud describes a claim that one store owner can bring to the other. The traditional reading of this passage sees this claim, “You do inside your property and I do inside mine,” as the rival's assertion against the contention of the established business owner. This challenges Rav Huna's view of restricting competition.

However, “You do inside yours” could also be the opening for a discussion, with one party suggesting to the other that they make rules and boundaries for themselves as to where/what/to whom to sell. You sell in yours, and I'll sell in mine, or instead - You sell falafel and I'll sell shawarma. This remains a challenge to Rav Huna, as he suggests that the rabbis need to make the rules for the industry, while this passage suggests that through negotiation, store owners can make their own rules.

The Talmud quotes another early source on this topic:

²⁵² If marketing increases demand, this is not necessarily true. However in the Talmud's case it seems the demand is steady but is shifted from one store to the other.

²⁵³ See Kenan, page 26

²⁵⁴ This is similar to an infinitely iterated prisoners' dilemma. For a good explanation of this theory see http://en.wikipedia.org/wiki/Prisoner%27s_dilemma#The_iterated_prisoner.27s_dilemma

²⁵⁵ According to Meiri, *shiuski* are better than walnuts, so it seems the first seller is being encouraged to negotiate with the second seller as to what each of them will offer the children. See note 249.

<p>Residents of an alley can compel one another not to allow the residence among them of a tailor, tanner, teacher or any other type of craftsman. But he cannot force his neighbor. Rabbi Shimon ben Gamliel says, He can force even his neighbor. Rav Huna son on Rav Yehoshua said: It is obvious to me that a resident of one town can prevent a resident of another town [from plying the same trade]. But if he pays the poll-tax of this town, one cannot prevent him from plying his trade in the town. A resident of an alley cannot prevent a resident of his own alley [from opening a competing business]. Rav Huna son of Rav Yehoshua asked, "What is the law regarding the resident of an alley who wishes to prevent the resident of another alley [from opening a competing business]? This question remains unresolved.</p>	<p>תנאי היא דתניא כופין בני מבואות זה את זה שלא להושיב ביניהן לא חייט ולא בורסקי ולא מלמד תינוקות ולא אחד מבני בעלי אומניות ולשכנו אינו כופיהו רשב"ג אומר אף לשכנו כופיהו אמר רב הונא בריה דרב יהושע פשיטא לי בר מתא אבר מתא אחריתי מצי מעכב ואי שייך בכרגא דהכא לא מצי מעכב בר מבואה אבר מבואה דנפשיה לא מצי מעכב בעי רב הונא בריה דרב יהושע בר מבואה אבר מבואה אחרנא מאי תיקו</p>
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Without getting into the specifics in these cases, it's interesting to take this mini-series as a unit, and to look at the overarching theme. The discussion here is about giving local business owners the power to prevent outside competition from coming in. What is the difference if the competition originates internally or externally? Would we have any reason to differentiate in the falafel case if Michael was from the same city as Yarden or even if both stands were on Rehov HaShor?

Kenan²⁵⁶ sees a tension in the decisions of the rabbis in this passage. As the group gets closer, (i.e. inside the alley,) the injury to the original seller becomes more immediate and obvious. At the same time, protecting the original business from another inside the alley also means removing more of the competitor's rights.

It's possible to read this passage without that tension. The closer people are geographically, (i.e. in the same alley as opposed to the same town,) the less we are interested in preventing competition. Perhaps people who are part of the community are assumed to have the community's best interests in mind. Additionally, if both businessmen are in the same community, they will be better able to communicate and therefore more able to negotiate faithfully.²⁵⁷

The discussion in the Talmud then is not about principle, but rather regarding the facts of life – how close do people need to be in order to be able to negotiate with trust? Rabbi Shimon ben Gamliel seems to believe that not even neighbors can negotiate with each other fairly. Rav Huna son of Rav Yehoshua seems to believe that residents of the same alley will be able to trust each other to the extent that they are able to negotiate successfully, but is unsure whether residents of neighboring alleys will have the same relationship.²⁵⁸

²⁵⁶ Kenan, page 53

²⁵⁷ Ramban (Rabbi Moshe ben Nachman, 1194-1270, Spain) suggests that people in the same city can negotiate with each other and find a price that works for everyone:

חידושי הרמב"ן מסכת בבא בתרא דף כב עמוד א
בני המדינה רשאיין להתנות שימכור בכך וכך, ואם לאו שיושיבו שם אחר ובלבד בשער בינוני שיפה לשניהם

²⁵⁸ The Talmud later discusses that some of the restrictions against those from outside the city are lifted on market days: הנהו דיקולאי דאייתו דיקלאי לבבל אתו בני מתא קא מעכבי עלויהו אתו לקמיה דרבינא אמר להו מעלמא אתו ולעלמא לזיבנו והני מילי ביומא דשוקא אבל בלא יומא דשוקא לא וביומא דשוקא נמי לא

We can imagine that if Michael and Yarden grew up in the same neighborhood and share the same friends, they will be motivated to negotiate an agreement that will work for both of them and will keep their customers happy. However if Michael is coming from out of town, he might be less concerned for the local customers or for Yarden on a personal level, and may be more motivated by greed to crush Yarden's business.

This explanation also helps us understand why this discussion is brought in the larger context of neighborly laws. The rules behind limiting competition are intricately linked to the neighborliness of the business owners involved.²⁵⁹

4. Essential Competition: An apple for all the teachers

The Talmud continues the analysis of Rav Huna's views on economic competition with a discussion of the teaching profession:

<p>Rav Yosef said: Rav Huna himself concedes that with regard to those who teach children, he cannot prevent another teacher [from teaching in his area]. For master said: Ezra decreed for the Jewish nation that one teacher should be installed next to another. But should it be of concern that a teacher might become lax? He responded, "Jealousy between scholars increases wisdom."</p>	<p>אמר רב יוסף ומודי רב הונא במקרי דרדקי דלא מצי מעכב דאמר מר עזרא תיקן להן לישראל שיהו מושיבין סופר בצד סופר וניחוש דילמא אתי לאיתרשולי אמר ליה קנאת סופרים תרבה חכמה</p>
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In the case of teachers, the reason given for allowing, or even encouraging, competition is explicitly to ensure the long-term strength of the teachers. The more competition there is, the more each teacher will be jealous of the other, and the better each one will become.

5. Increasing market size: Caps for Sale

The Talmud describes another situation where the rabbis try to encourage competition. Returning to the selling of goods, the Talmud describes the peddlers' business model:

<p>Rav Nahman son of Yitzchak said: Rav Huna son of Rav Yehoshua agrees that when peddlers go from town to town, a merchant [already established in a particular town] cannot bar them. As master has said: Ezra decreed for the Jewish nation that peddlers should go from town to town, so that jewelry²⁶⁰ would be readily available to the daughters of Israel.</p>	<p>אמר רב נחמן בר יצחק ומודה רב הונא בריה דרב יהושע ברוכלין המחזירין בעיירות דלא מצי מעכב דאמר מר עזרא תקן להן לישראל שיהו רוכלין מחזירין בעיירות כדי שיהו תכשיטין מצויין לבנות ישראל</p>
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Similar to the teaching case above, there is a decree made explicitly to ensure the long-term continuity of the industry. It seems that Ezra thought that competition was necessary for the success of the jewelry business.

אמרינן אלא לזבוני בשוקא אבל לאהדורי לא
 Kenan (page 27) writes that the markets did not have good communication, and therefore one seller lowering prices would not change the price in the market. Gelbard (page 9) mentions that on market days there is higher demand and greater supply. One could imagine that the markets are more competitive and less an oligopoly. Then the ability to negotiate would be less critical.

²⁵⁹ Kenan, pages 28-34 and note 125

²⁶⁰ תכשיטין can mean either jewelry or cosmetics. Both translations fit this context. See Marcus Jastrow's Dictionary of the Talmud and Schottenstein for translations.

For items sold particularly to women, peddlers would go around to the area of the homes to protect the privacy of the female buyers.²⁶¹ It is conceivable that when there are more peddlers, more ground will be covered, and therefore more women will be able to buy. So encouraging peddling will enlarge the market in a particular community. As opposed to many of the cases above, where we discussed a constant demand and competition over market-share, it seems in the jewelry business that the competition strengthens the market itself. Thus Ezra's decree encouraging peddlers was not declared for the benefit of the peddlers, but rather for the benefit of the women (or their husbands, who appreciate their increased beauty,) who will now be buying more jewelry due to the proliferation of peddlers. When it comes to peddling women's jewelry, competition is good for both the buyers and for the continuity of the industry.

IV. The Missing Piece

Until now we have seen the Talmud's discussion of competition and long-term stability of industries, but conspicuously missing from this passage is a mention of the consumers. Surely the residents of Sal City are concerned about the price and quality of their falafel! There are two general approaches to this absence; either we can attribute the Talmudic discussion to circumstances when the consumers are not affected, or we can assume that the authors of the Talmud were silently taking the consumers into account.

Ri Migash takes the first approach, limiting the discussion of blocking competition to cases where the goods and prices of the perspective competitor are the same as the current seller. In these cases, we can discuss the sellers' interests in or opposition to competition, without concern for affecting the buyers:

<p>It makes sense to say that this discussion is all regarding a case when there is no loss to the consumers, like when the two sellers have the same prices and the same goods, so the consumers would not benefit from him, (the competitor,) that is when the rabbis made the enactment for the people of a town that they can prevent competition... It makes sense that they have no right to make an enactment for the sellers to the detriment of the buyers. Therefore when there is [the potential for competition creating] profit for the buyers, then there is no enactment for the sellers, because it would be an enactment for the benefit of one and the detriment of the other.</p>	<p>אלא²⁶² מיהו מסתברא לן דהני מילי כלהו היכא דליכא פסידא על הלוקחים הוא כגון דשוו דמים אהדדי ושויין עסקי נמי אהדדי דלא מרווחי לוחקים מידי, עבדו רבנן תקנתא לבני מתא... מסבתרא דלמעבד תקנתא למוכרים במאי דאיכא פסידא על הלוקחים לית לן רשותא, הלכך כיון דאיכא הרווחה ללוקחים לאו כל כמינייהו דמוכרים דמתקני לנפשייהו ומפסידי לאחריני...</p>
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Ramban disagrees with this distinction, and opines that the Talmudic enactments apply even in cases where the competitor would offer better prices. Perhaps this stems from an understanding that the sellers are also consumers, and therefore in certain circumstances, protecting their profit margins is critical in maintaining the economy. Or perhaps it is simply a concern for protecting the community's own businessmen even to the detriment of the consumers. Either way, Ramban develops the idea that if the market is controlled with the right foresight and understanding, both the buyers and the sellers can benefit from regulation:

²⁶¹ Kenan, note 68

²⁶² ר"י מיגש עמ' סז "אלא מיהו מסתברא...."

<p>...If the residents of the town want to lower prices, they should regulate the market [i.e. with a price ceiling,] or bring more people into the industry from the town. But here surely they can block someone from a different town. If you don't understand it this way, then there would never be a circumstance [discussed in the Talmud] where they could block [the competitor] because it's impossible that increasing the number of sellers won't affect prices. And this would be for the benefit of the consumers. Rather, [we are concerned for the seller] that if he will have a loss, it would not be acceptable for a competitor to come from a different town – then the consumers will benefit but the [local] sellers will lose! But the residents of the country are allowed to regulate prices, or set up another [third party] who will choose a fixed price that is good for both [the buyers and the sellers]. Still, [if the competing seller's goods] are better than the current seller, then it is like he is selling different goods and he cannot be blocked.</p>	<p>... ואי²⁶³ בעו בני מאתיה דלוזיל גביהו יתנו על השערים או יושיבו ביניהן אחד מעירן, אבל האי ודאי מצי מעכב אההוא בר מתא אחריתי, דאי לא תימא הכי לעולם לא יעכב שאי אפשר שלא יוזל השער כשיש שם הרבה בני אומנות זו ותקנת לוקחים ודאי היא, אלא ש"מ כיון דהאי אית ליה פסידא לאו כל כמיניה דליתי בר מתא אחריתי וליתקין להו ללוקחים ויפסיד למוכרים, אבל בני המדינה רשאיין להתנות שימכור בכך וכך, ואם לאו שיושיבו שם אחר ובלבד בשער בינוני שיפה לשניהם, ומיהו אי לא שוו עסקי אהדדי ודאי מודינא דמצו למימר ליה את עסקך גריעא והך עסקא שפירא וכעיסקא אחריתי דמיא דהא לית לך דכותה.</p>
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On the one hand, from the perspective of Ri Migash, over-regulation of the industries can negatively impact the consumers, specifically if it limits the goods offered or if it keeps prices artificially high. Therefore, Ri Migash needs to attribute the concept of regulation only to circumstances where the consumers will not be affected.²⁶⁴ On the other hand, as Ramban points out, the community's ability to control its markets is important. We could fathom situations where, from the community's perspective, it is desirable to limit competition even if it means higher prices for the consumers. Therefore Ramban recommends internal solutions to price-fixing, such as a third-party that will set prices that will profit both the producers and the consumers.

What happens with the falafel? When Michael comes from another city to compete, if...

	Michael's falafel tastes the same	Michael's falafel is more delicious
Michael's falafel is the same price	Everyone agrees: Yarden can block Michael	<p>Ri Migash: Michael is allowed to compete</p> <p>Ramban: Michael is allowed to open his stand because it is not considered competition – awesome falafel is a different product than Yarden's bland falafel</p>
Michael's falafel is cheaper	<p>Ri Migash: Michael can compete</p> <p>Ramban: Michael is not allowed to compete – if people want</p>	(see box above)

²⁶³ חידושי הרמב"ן מסכת בבא בתרא דף כב עמוד א

²⁶⁴ Ri Migash's perspective is embraced by later *halakhic* deciders. In the 16th century, Rabbi Moses Isserles applies the laws limiting competition only to cases where such a limit would not affect the consumers. See רמ"א חו"מ סי' קנו ז

	cheaper prices, they should get Yarden's brother to open a falafel stand or they should appoint someone to fix prices	
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If Michael is offering better or cheaper falafel, then according to Ri Migash it would be clear that we would allow him to open his stand. In this case Ri Migash would argue, "Why should we help out Yarden at the expense of the Sal City residents?" But, if Michael is coming from a far away land and the community wishes to protect its residents' businesses, we can imagine the members, or possibly even Yarden himself, appointing a committee to fix prices and set rules for falafel competition in Sal City. There is a way, (at least according to Ramban,) where everyone can happily eat delicious falafel at reasonable prices. Yum.

V. Conclusion

This passage of the Talmud focuses the businessman – whose tendencies are to pursue personal and potentially short-term goals – to consider the entire industry and its continuing success. Despite the focus in this unit on the business-to-business relationship, the objective is to provide for the entire community over the long-term. We have an obligation as individuals and as societies to ensure enduring strength of our economy. But at the end of the day, however we want to compete, we each receive קא דפסקו ליה מן שמיא ("whatever Heaven has allocated to him").

Capitalism in Light of the Injunction Against Taking Interest

Elisha S. Ancselovits

I. Introduction

In discussing the problem of loans and interest, we need to ask two very different questions: (1) Is lending money morally justifiable, even without interest, given that the borrower can end up in the red? (2) Why would anybody lend money to another?²⁶⁵

Regarding the first question of how we can morally justify loans, there are two possible answers:

1. Only an individual who is not poor can borrow; such an individual borrows because s/he has a cash-flow problem.
2. Even if one is not rich, it is worthwhile to risk worsening one's situation in order to improve it as long as one does not risk losing his/her ability to earn a living. In other words, the risk is sensible as long as the debt cannot destroy his/her basic necessities of shelter, food, and clothing and tool(s) of trade.

Both of these answers are played out in Judaic sources from the Tanakh through the *Aharonim*, and both can be addressed without entertaining the possibility of usurious loans.

Regarding the second question, why would anybody lend money, there are four answers:

1. One lends because one expects to share in the profits of one's fellow's venture.
2. One lends because one has surplus cash at the moment and by lending now, one's fellow will lend to him/her in the future.²⁶⁶
3. Similar to this last motivation, one lends out of an altruistic desire to help another.
4. Last, one lends because one hopes to make a profit *at the expense of the borrower's loss*.

According to the Torah, this last motivation is invalid. Therefore all forms of interest are forbidden and even some usurious business transactions are invalid.

At this point we are faced with a quandary: on the one hand, opportunities for all are increased if we provide an incentive for richer people to lend to others; on the other hand, we don't want people lending money to borrowers in the hope of gaining wealth

²⁶⁵ This article is an improved English version of a Hebrew article that I published in 2007 on the immorality and economic destructiveness of contemporary interest practices in the Western world. Now that this point of the destructiveness of irresponsible interest practices has become obvious, I am representing this methodological article in English in order to illustrate how Halakhah should be studied and applied - not as a process of legal discovery as much as a process of incorporating binding precedent insights in order to make wise decisions. I thank David Saiger for his editorial assistance

²⁶⁶ Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*, trans. W. D. Halls. New York and London: W. W. Norton, 1990. Cf. *Mishneh Torah*, "Hilkhot Avel" 6:6 and *Shulhan Arukh*, Even Ha-Ezer 60:1.

by the borrower defaulting and hurting both his self and others economically. This quandary leads to three options:

1. We, as a society, can limit the opportunities for economic growth via loans in order to decrease the frequency of loss of solvency. In other words, we can forbid guaranteed loans. As we will see, the prophet Ezekiel advocated that option.
2. Unfortunately, forbidding loans will not solve the problem for people who become destitute due to circumstances unrelated to loan indebtedness. They will still need to receive charity, work for others, or borrow in order to try to succeed on their own lands. If they choose the latter option, the lender will need to be guaranteed payment of the debt from the borrower's assets even if the lender is not provided the land permanently.²⁶⁷ This option would motivate people to lend without hope of economic gain instead of merely providing charity, but would not motivate people to part with money that they could invest for profit. Thus it is most appropriate for an agricultural society with few business opportunities. In such a society the lender may receive the borrower's land until the loan has been repaid via the produce grown on it. We will see that this option is tolerated in Leviticus.
3. We can allow profit-making loans in order to provide more money for temporarily cash strapped poor landowners or landless people wishing to improve their situations. After all, this money would otherwise be diverted into the acquisition of poor people's lands or persons or into other non-cooperative profit making ventures. However, in order to limit the downside of indebtedness, a potentially profit-making loan should: (1) have a fixed end sum, and (2) not include collection of the borrower's basic housing and income-generating resources. Thus, s/he should retain clothing and a roof over his or her head along with any tools necessary for the trade s/he practices. This option is the one adopted by the rabbis.

II. The Biblical Injunction Against Interest

Let us now begin examining the texts, beginning with sources discussing loans to the poor. Since poor borrowers have no property that can be transferred to the lender if the borrower defaults, the selfish lender is motivated by the profits of interest. This practice of lending with interest from the poor is attacked vehemently as wicked and is contrasted with humane charity:

<p>Ezekiel Chapter 18 11 ...He has eaten [sacrificially²⁶⁸] to the mountains and has defiled another man's wife. 12 He has oppressed the poor and the needy, - has robbed and not returned a pledge, and has raised his eyes to the fetishes; he has committed abomination. 13 He has lent at advance interest, or exacted accrued interest—shall he live? He shall not live! If he has committed any of these abominations, he shall die through his own guilt. 14 Now, behold, he has begotten a son who has seen all the sins that his father committed but has</p>	<p>יחזקאל פרק יח (יא) ...אֶל הַהָרִים אָכַל וְאֶת אִשְׁתּוֹ רָעָהוּ טָמֵא : (יב) עָנִי וְאֲבִיוֹן הוֹנֶה גְזֻלוֹת גְּזָל חֶבֶל לֹא יָשִׁיב וְאֶל הַגְּלוּלִים נָשָׂא עֵינָיו תוֹעֵבָה עָשָׂה : (יג) בְּנִשְׂדָּךְ נָתַן וְתַרְבִּית לָקַח וְחֵי לֹא יַחֲיֶה אֶת כָּל הַתּוֹעֵבוֹת הָאֵלֶּה עָשָׂה מוֹת יוֹמָת דָּמְיוֹ בּוֹ יִהְיֶה : (יד) וְהִנֵּה הוֹלִיד בֶּן וַיִּרָא אֶת כָּל חַטֹּאת אָבִיו אֲשֶׁר עָשָׂה וַיִּרְאָה וְלֹא יַעֲשֶׂה כִּהְיוֹ : (טו) עַל הַהָרִים לֹא אָכַל וְעֵינָיו לֹא נָשָׂא אֶל גְּלוּלֵי בֵּית יִשְׂרָאֵל אֶת אִשְׁתּוֹ רָעָהוּ לֹא טָמֵא : (טז) וְאִישׁ לֹא הוֹנֶה חֶבֶל לֹא חָבַל וּגְזָלָה לֹא גָזַל לַחֲמוֹ לְרַעֵב נָתַן וַיִּגְרוֹם כֶּסֶף בְּגָד : (יז) מִעֲנֵי הַשִּׁיב יָדוֹ נִשְׂדָּךְ</p>
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²⁶⁷ Of course the destitute borrower could also sell his or her land in order to pay the lender but that option would not help the borrower retain his or her income-generating resource.

²⁶⁸ Regarding the definition of eating as sacrificial eating, see: Exod. xxxii. 6; Judges ix. 27; 2 Sam. xv. 11 seq.; and Amos ii. 7.

<p>taken heed and not imitated them. 15 He has not eaten [sacrificially] to the mountains nor raised his eyes to the fetishes of the House of Israel. He has not defiled another man's wife. 16 He has not oppressed anyone; he has not seized a pledge or robbed anything. He has given his bread to the hungry and clothed the naked. 17 He has drawn his hand back from the poor; he has not exacted advance or accrued interest. He [who] has obeyed My rules and followed My laws shall not die for the iniquity of his father, but shall live</p>	<p>וְתִרְבִּית לֹא לָקַח מִשְׁפָּטֵי עֲשֵׂה בְּחֻקֹּתַי הַלֵּךְ הוּא לֹא יָמוּת בְּעוֹן אָבִיו חַיָּה יִחְיֶה :</p>
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As pointed out in Exodus, the practice of lending with interest causes the poor borrower to keep losing any money that s/he earns since the lender constantly returns to collect money.

<p>Exodus 22:24 24 If you lend money to My people, to the poor person among you, do not be as a creditor for him; do not exact interest from him.</p>	<p>שמות כב:כד אם כסף תלווה את עמי את העני עמך לא תהיה לו כנשה לא תשימון עליו נשך :</p>
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In fact, lending with interest can practically (and inasmuch as laws reflect social practices, eventually even legally) enslave the debtor:

<p>Nehemiah chapter 5 1 There was a great outcry by the common folk and their wives against their brother Jews. 2 Some said, “Our sons and daughters (are numerous) [we pawn] in order to get grain to eat so that we may live!” 3 Others said, “Our fields, our vineyards, and our homes we pawn in order to get grain to stave off hunger.” 4 Yet others said, “We have borrowed money against our fields and vineyards to pay the king’s tax. 5 Now our flesh is just like our brothers’ flesh and our sons are just like their sons, yet we enslave our sons and daughters; we have daughters enslaved and we are powerless. Our fields and vineyards belong to others.” 6 It angered me very much to hear their outcry and these facts.</p>	<p>נחמיה פרק ה (א) ותהי צעקת העם ונשיהם גדולה אל אחיהם היהודים : (ב) ויש אשר אמרים בנינו ובנותינו אנחנו {ע} רבים ונקחה דגן ונאכלה ונחיה : (ג) ויש אשר אמרים שדתינו וכרמינו ובתינו אנחנו ערבים ונקחה דגן ברעב : (ד) ויש אשר אמרים לוינו כסף למדת המלך שדתינו וכרמנו : (ה) ועתה כבשר אחינו בשרנו כבניהם בנינו והנה אנחנו כבשים את בנינו ואת בנותינו לעבדים ויש מבנותינו נכבשות ואין לאל ידנו ושדתינו וכרמינו לאחרים : (ו) ויחר לי מאד כאשר שמעתי את זעקתם ואת הדברים האלה :</p>
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In other words, lending in order to make a profit *at the expense of one's fellow* is absolutely forbidden. As the Torah points out poignantly, the borrower and lender are related:

<p>Deuteronomy chapter 23 20 You shall not deduct interest from loans to your kinsman, whether in money or food or anything else that can be deducted as interest; 21 but you may deduct interest from loans to foreigners. Do not deduct interest from loans to your kinsman...</p>	<p>דברים פרק כג (כ) לא תשיך לאחיך נשך כסף נשך אכל נשך כל דבר אשר ישך : (כא) לנכרי תשיך ולאחיך לא תשיך ...</p>
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Thus, one should lend to a poor person because of the poor person's need and not in order to exploit the poor person.

Given the potential loss on the borrower's side in all loans, one might ask why the Torah does not simply forbid loans and demand charity. An obvious answer would be that the good Biblical citizen has already paid the high taxes of agricultural

charity (Deuteronomy 14:22-29, 16:14). Although a lender may be willing to lend without interest in order that s/he may be able to borrow in return when s/he is cash-strapped, there is no reason for the lender to *lose* by not having his/her money when s/he needs it²⁶⁹. Accordingly, the Torah allows for loans in which one collects the sum s/he has temporarily extended. In other words, ideally – according to Nehemiah and Ezekiel - the lender should stand to gain no wealth from the borrower, but rather be lending for the benefit of the borrower. Thus not only must the desperate borrower be hopeful of repaying the loan, but the lender ought not to gain wealth from a defaulted loan. However, in spite of the fact that Nehemiah condemned lenders who collected the land of their debtors, some form of collateral is necessary.

In fact, if we truly wish to have more money (and thus economic opportunity) circulate, we may very well wish to allow loans from which the successful lender stands to increase his or her wealth by collecting land as payment. After all, the amount of land paid to the lender is estimated on the basis of its sale price while the production value of such land is greater. Thus in a non interest-based agrarian society, in which large sums of cash are not readily available and land speculation is relatively rare, monies will be reclaimed via production from the land. In line with this observation, the Torah's Holiness Code,²⁷⁰ in parshat *Behar*, on the one hand idealizes charity. On the other hand it recognizes that the rich agriculturists in a more developed economy (that includes cities²⁷¹) attempt to buy persons and land, and accordingly allows land to be sold or paid in debt but with a fixed end time that redistributes the income-generating resource (land) to all citizens every fifty years.²⁷²

III. Rabbinic Limitations on Debt Collection

However, the rabbis of a non-Jubilee based society in which land is permanently alienated, chose a third option (as implied in Deuteronomy 24:10-13) and ruled that the lender can collect permanently but cannot collect any money from the borrower's basic necessities of shelter, food, clothing and necessary tools of trade:

<p>Shulhan Arukh H.M. 97:23 (based on Mishnah Arakhin 6:3-4)</p> <p>When the date of payment arrives and [the lender] comes to collect his debt, arrangements are made for the debtor.</p> <ol style="list-style-type: none"> 1. Accordingly, the borrower is directed to bring all his movable property and is left with: <ul style="list-style-type: none"> • food for thirty days, • a year's clothing... as appropriate to him, • a chair, a bed with its bedding as appropriate to him, his shoes and his tefillin 2. If he was a craftsman, he is left with two 	<p>שולחן ערוך חו"מ צו:כג (על פי משנה ערכין ו, ג-ד)</p> <p>כשיגיע זמן הפרעון ובה לגבות חובו, מסדרין לבעל חוב.</p> <p>כיצד, אומרים ללוה: הבא כל המטלטלים שיש לך ונותנין { = משאירים } לו מהכל:</p> <p>מזון שלשים יום וכסות י"ב חדש... הראויה לו ... ומטה לישיב עליה, ומטה ומצע הראוים לו לישן עליהם ... ונותנים לו סנדלו ותפיליו. היה אומן, נותנים לו שני כלי אומנות</p>
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²⁶⁹ For a quick overview of the right of a lender to regain his or her money, see Tosafot B.M. 92b sv *iy de-leka* and Tosafot Ketubot 92a sv *Iy Pikeáh*.

²⁷⁰ This miniature code has been recognized as such and commented upon by various geonim and rishonim including Rav Saadya Gaon and Ramban.

²⁷¹ Leviticus 25:29.

²⁷² Leviticus 25:25-43 presents in a chiasmic form three options for a poor person. The first and the third is to sell one's land or oneself while the middle, ideal, option is to be supported. In any case if one is forced to sacrifice land or self, both are returned in the Jubilee year (*ibid* and verses 8-17)

<p>of each of his [necessary] utensils – as in two adzes and two saws for a carpenter... but if he was a boatman he is not left with a boat and even a professional Torah scholar is not left his [Torah] books...</p>	<p>מכל מין ומין, כגון שהיה חרש נותנין לו שני מעצדין ושתי מגרות.... היה... ספן, אין נותנין לו ספינתו.... ואפילו אם הוא תלמיד חכם ותורתו אומנותו, אין מניחים לו ספריו...²⁷³</p>
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Similarly, the rabbis qualified the rule that a landowning borrower in such a society does permanently lose the amount of land necessary to repay the loan. If the borrower's land's sale-value is greater than the sum of the loan, the borrower gets to keep the better portion of his land. In this way, he gets to waste as little time as possible on producing what he can from the smaller plot of land that he now owns. In fact, the richer lender will be less inclined to lend in the hope of the borrower forfeiting since the lender will receive land that could be farmed but would best be sold in order to regain the money that could be better invested elsewhere:²⁷⁴

<p>Gittin 49b Why is a debt collected from middle quality land? In order that a person should not see his fellow's beautiful field or house and say, "I will initiate lending him money so that I can collect it for my debt." Therefore, it was said that a debt is collected from middle quality land. That being the case let it be [collected from] poor quality land! If so you [will] lock the door in front of borrowers.</p>	<p>גיטין מט ע"ב מפני מה אמרו בעל חוב בבינונית? כדי שלא יראה אדם לחברו שדה נאה ודירה נאה ויאמר אקפץ ואלונו כדי שאגבנו בחובי לפיכך אמרו בעל חוב בבינונית אלא מעתה יהא בזיבורית! א"כ אתה נועל דלת בפני לוויין</p>
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Furthermore, if the lender keeps the land and does not sell it in order to regain his money, the borrower has the right to repurchase his/her land from the lender (if s/he somehow gets hold of the money). In this way, every lender knows that if the borrower defaults, the lender will definitely gain income from the land and regain his original capital, but we do not unnecessarily impose permanent poverty on the borrower and his or her descendants.

<p>Shulhan Arukh H.M. 103:9 If after time - and even years - the borrower or the one who has sold his land without a contract or their inheritors acquire money, they can pay the lender and remove him from the land... If the land was improved through</p>	<p>שולחן ערוך חו"מ קג,ט ...לאחר זמן השיגה ידו של לווה או של נטרף או של יורשיהם והביאו לבעל חובו מעותיו, מסלקין אותו מאותה קרקע, אפילו שהתה ביד הבעל חובו כמה שנים.... ואם השביח [הקרקע] מחמת הוצאה... [המלוה] [שהשביח] נוטל כדן היורד ברשות. ואם השביח מאליו, כגון שנתייקר, אינו נותן לו</p>
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²⁷³ At first glance this rule is problematic since it does not leave the borrower with his wife and children's food and clothing (ibid: 24). However, this is not actually the case since a lender has no right to any money and movables that the borrower has transferred to his own wife or children before the loan's due date (ibid: 25) and no right to the borrower's wife's real estate or income there from (ibid).

²⁷⁴ Some readers may question whether the quality of the land makes any difference since the fact that these lands have the same price (the smaller better parcel of land and the larger worse parcel of land) indicates that they have the same value. However, this is a basic error in economics. A larger poorer piece of land has a price that is very high in relation to the production value of the land since it is bought by desperate farmers who wish to own some land. This desperate farmer's time is more expensive (what does more expensive time mean?) on such land since he produces less profit for his time but he is willing to pay the higher price since he doesn't have access to other resources of production. (Compare the reality of higher prices for products sold in high poverty non-mobile inner city neighborhoods). The lender does not wish to be repaid in land for which he will have to find multiple poor buyers; he wishes a piece of land which can be sold to one buyer.

expenditure, the [lender] collects the expenses, but if it simply raised in value [t]he [repurchaser] pays only the sum of the debt [or the original sale price].	אלא דמי חובו בלבד.
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Unfortunately, this last rule would limit those who acquire such land from developing its long term potential and thus the wealth of the community. Thus non-agrarian Ashkenazi communities allowed the lender to keep the land once he had invested in it:

ReM" A H.M. 103:9 There are others who say that if [t]he [lender] invested and improved the land, it does not return [to the borrower].	רמ"א חו"מ קג, ט וי"א דאם הוציא עליה והשביחה, לא הדרא כלל.
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Although this Ashkenazi position is less protective of borrowers, it can be justified from a perspective that prefers to allow a borrower to choose to adopt risk in order to improve his or her economic conditions - as long as the borrower cannot sink below a certain minimal standard and cannot be enslaved by eternal interest payments. This option still blocks lenders from perennially investing money in economically destructive interest-drawing loans. In this position's reality, either the borrower succeeds in generating income from the land, or he leaves the lender with the need to either generate income from the land or sell it to other people who plan to productively generate income.

In light of this Ashkenazi position, it is not surprising that Rav Moshe Feinstein permitted even interest loans as long as the borrower's liability is limited to assets owned up to the collection date. His discussion revolves around a Jewish-owned bank in the USA whose owners are in essence borrowing money from the depositors - including Jews - and paying them interest. He argued that the injunction against interest does not apply to loans with limited liability:

Igrot Moshe, Yoreh De'ah 2:63 I have a novel interpretation of the injunction against interest, which is absolutely correct (in my humble opinion). The overwhelming majority of people in this country who deposit their money in banks, including Jewish-owned banks, [and receive interest] do not violate the injunction of lending [to the Jewish shareholders with] interest; a standard loan devolves into a personal debt from which the borrower is not exempt although he be peniless; he must work in order in order to pay the debt and is a sinner if he does not pay.... Ergo, interest is forbidden only as regards a loan that creates a personal obligation on the borrower. However, as regards a type of "loan" which creates no personal obligation to pay – just a lien on assets – there is no <i>issur ribbit</i> . Thus, there is no sin in Jewish-owned [incorporated] banks paying interest since the owners carry no personal liability. However, this reasoning does not permit an individual - who incurs personal liability - to borrow from a Jewish bank.	שו"ת אגרות משה יו"ד ב' סימן סג אבל הנה אני אמרתי חדוש בענין איסור ריבית והוא לדעתי ברור לדינא, בדבר זה שרובא דרובא דאינשי מניחין מעותיהן במדינותינו בהבאנק ונוטלין הריבית שנותנין בכל באנק ובפרט באלו שנקראו "סייווינג באנק" ויש גם באנק שהם של יהודים, שאין עוברין על איסורי ריבית דאיכא על המלוה והלוה, משום דסתם מלוה הרי איכא שעבוד הגוף שיש על גופו של הלוה - אף שאין לו כלום - חיוב לשלם... אבל מלוה כזו שאינו עושה שום חיוב על גוף האדם לשלם... וכן הוא ענין הבנקים שבמדינתנו באמעריקא שגוף הבעלים של הביינק אינם מחוייבין כלום לאלו שהניחו מעותיהם בהביינק אף אם יזדמן שלא יהיה בהבאנק מעות לשלם, שלכן ליכא איסור ריבית אף כשהבאנק הוא של ישראל... אבל טעם זה אינו מועיל להתיר ללוות מהבאנק כשהוא של ישראלים אם הלוה הוא איש פרטי שיש עליו שעבוד הגוף... לשלם.
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IV. The Rabbinic Alternative to Interest-bearing Loans

Although we have seen that one could defend interest-charging loans with limited liability, Rav Feinstein's position was attacked since it would be better to ensure that the borrower's risk is reasonable by having the moneyed party join in the risk²⁷⁵ of the venture via a partnership – an *iska*. In this scenario, the lender would lend the borrower half the capital and invest half the capital himself:

<p>Baba Mezi'a 104b The Nehardeans said: An <i>'iska</i> is a semi loan and a semi trust, the Rabbis having made an enactment which is satisfactory to both the debtor and the creditor.</p>	<p>בבא מציעא דף קד ע"ב אמרי נהרדעי: האי עיסקא, פלגא מלוה ופלגא פקדון. עבוד רבנן מילתא דניחא ליה ללוה, וניחא ליה למלוה.</p>
<p>Rashi idem Half the capital value of the stock is a pure loan for which the trader bears full responsibility; the other half is a bailment, so that the investor bears all risks of depreciation.</p>	<p>רש"י בבא מציעא קד ע"ב חצי אחריות אונסים עליו כמלוה, וחצי אחריותה על בעלים כפקדון {והם גם נחלקים חצי-חצי ברווחים}</p>

One might question why the lender would bother to lend half the capital (“safe deposit”) and only risk half the capital for profit. If this investment were worthwhile, wouldn't the lender invest all the money s/he is willing to free up for such a venture? One reason is that the loan guarantees that the borrower will act responsibly since if s/he loses the money, s/he will have to repay the money out of pocket. Another reason is that a project may require a specific sum of seed money but the investor does not want to risk that sum of money and prefers to get half of the profits in return for having half the capital guaranteed.²⁷⁶

R. Feinstein, however, was not the first to notice that limiting profit making loans to this arrangement of $\frac{1}{2} + \frac{1}{2}$ has its drawbacks inasmuch as many lenders may prefer to risk less of their capital in return for lower potential profits. While one might argue that such investments should be discouraged in order to discourage borrowers from engaging in risky ventures, medieval rabbinic authorities did accept such investments.²⁷⁷ Thus instead of investing equally with the borrower, the moneyed partner is allowed, for example, to lend $\frac{3}{4}$ of the sum (guaranteed capital) and invest only $\frac{1}{4}$ (earning the lender $\frac{1}{4}$ of the profits in case of success and losing the lender $\frac{1}{4}$ of the capital in case of failure).

In this medieval approach, the borrower is informed of the degree of risk that s/he is undertaking through the fact that no moneyed individual is offering him a

²⁷⁵ Leading sages, including R. Shlomo Zalman Auerbach, argued that the injunction against interest applies even when one borrows against his or her assets without personal liability – albeit to a lesser (i.e. rabbinic) degree (*Shu"t Minhat Shlomo* 1:28).

²⁷⁶ Naturally, if this money is the borrower's only source of income, there is less concern that the borrower will act irresponsibly, waste the money and end up with a debt that will be collected from his/her assets. In addition: the borrower whose venture fails, stands to end up in a worse situation than the lender; s/he ends up losing any income for the days which s/he spent on the venture. Therefore, in a situation where in the borrower works exclusively on this venture, there is a halakhic demand that s/he be paid minimally or else be responsible for less than his/her half of the money in a case where the venture fails. (For a clear presentation of this issue, see *Mishmash Torah*, Laws of Agency and Partnership 6:2-4.)

²⁷⁷ See *Mishmash Torah*, Laws of Agency and Partnership 6:5.

smaller loan and greater investment of say $1/2 + 1/2$ instead of $3/4 + 1/4$ (for if someone were willing to offer better terms, the borrower would find the better terms).²⁷⁸

Furthermore, the greater debt weeds out borrowers pursuing bad investments as opposed to brilliant overlooked investments since even the more risk-prone borrower knows that the project will not provide any profit for some time (due to the heavier debt). These considerations are all in addition to the earlier details we learned that protect the borrower from harming himself too severely. In other words, a poorer person now has a range of options. On the one hand s/he can access money that s/he will invest less profitably but more safely than other investment ventures and profitably enough in light of his/her other options. On the other hand, s/he can pursue potentially more rewarding but riskier ventures where more of the money is provided as a loan.

To summarize, Rav Moshe Feinstein's position, which allows people to lend and borrow with interest as long as the borrower cannot lose more than current capital (not including minimum necessities), models to some degree the medieval model that allowed a variable loan-investment partnership (*iska*). However, a significant difference is that the earlier rabbinic model forbade interest loans and only permitted combinations of interest free loans with invested capital. Thus in order to discover the roots of Rav Moshe Feinstein's position we must turn to a late medieval, or early modern, innovation - the *heter iska*.

V. 'Heter Iska'

In the medieval period, Western and Eastern European Jews earned guaranteed capital and guaranteed interest by pawn broking to non-Jews. Under such conditions, the richer Jew might not lend to an industrious poorer Jew seeking to improve his condition unless he could guarantee that he would not lose the money he would have earned had he lent to gentiles against valuable pawns. In other words, the lender wished to be provided with an investment opportunity that was equivalent to the lender's own lending opportunities. Accordingly, the Tosaphists permitted a Jew who lent to another Jew to stipulate that the capital would be guaranteed completely although the profits would be shared. This ruling provided the borrower with capital and did not drain even the most hapless borrower-pawnbroker of more than all the pawns that he had collected (which would ideally be worth much more than the sums lent). The Tosaphists accomplished this by stipulating that the partnership was dependent upon the borrower in turn lending only against valuable pawns. In other words, the richer Jew would be expected to help his fellow richer Jew and be helped in turn with cash flow problems as an investing partner; however, since the startup pawnbroker was going to be a greater risk, the richer lender had the right to guarantee his capital that was being lent out in a less than ideal fashion:

<p>Tosafot BB”K 102a sv “Ha-noten Maót” If a person provides money to another for half of the profits on the condition that “you shall lend them against gold and silver pawns that will be guarded [safely] in the ground, and if you act</p>	<p>תוספות בב”ק קב ע”א ד”ה הנותן מעות אם אדם נותן מעות לחבירו למחצית שכר ואמר ע”מ שלא תלוּם אלא על משכונות של כסף וזהב ותשמרם בקרקע ואם תשנה יהא ברשותך לחייב בכל דבר ואם פחתו פחתו לך... אין זה</p>
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²⁷⁸ Compare the position that understands the Rambam to be of the opinion that a condition in which one party agrees to forego a Halakhic right is valid only if the waiver is clear on what s/he will lose (*Novella of Rabbeinu Hayyim HaLevi on Mishneh Torah, Laws of Sales 13:3*).

<p>differently you will be completely obligated and any loss is yours"... this is not [considered] interest... because if [t]he [borrower] had not changed his mind, the monies would not all be his responsibility but [rather would have been] divided both as regards profit and loss as [an <i>iska</i>:] half-investment and half-loan.</p>	<p>רבי'ת... כיון דאם לא היה משנה דעתו לא היו כולן ברשותו אלא השכר וההפסד לאמצע כדין פלגא מלוה ופלגא פקדון.</p>
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Naturally, this arrangement is acceptable only as long as the borrowing Jew is trying to earn money from these monies by engaging in his more productive option of lending to poor gentiles instead of trying to break into the market of richer gentiles – and not for personal consumption.²⁷⁹

Even this option could be viewed as too ideal²⁸⁰ since the more self-interested individuals would prefer to lend against pawns (guaranteed capital and profit) instead of investing with fellow Jews and guaranteeing only the capital. Thus in the 10th century CE, R. Meshulam Bar Klonimus ruled that a Jew extending a commercial loan to his fellow Jew had a partial right to either the sums paid by the gentile pawnor or the gentile's pawn if the pawnor defaulted. This arrangement provided more capital and did not cause the defaulting borrowing Jew to lose more than his investments - his pawns or their related income:

<p>Geonic Responsa - Early Geonim chapters 119, 141 Responsa of R. Meshulam [b. Kalonymus]... Reuven... needed... money and said... to Shimeon... "I have a pawn from lending to a gentile with interest..." This is permitted because the pawn was from a gentile and Shimeon will receive his portion of the interest from the gentile... And if the pawn is not redeemed, Reuven and Shimeon will each collect their proportion [of the sale price].</p>	<p>תשובות הגאונים - גאונים קדמונים סימן קיט, קמא תשובות שהשיב ר' משלם... ראובן... הוצרכ... למעות ואמר... לשמע[ון]... יש בידי משכון שהילויתי לגוי בריבית... אין איסור בדבר לפי שהמשכון של גוי היה... ויקבל שמע[ון] מיד הגוי הריבית לפי שיגיע לחלקו... ואם משתקע המשכון ואין הגוי פודהו יטול ראובן לפי חלקו ושמע[ון] לפי חלקו.</p>
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Unfortunately, richer pawn broking Jews still preferred to lend to a rich gentile and against valuable objects instead of lending to a less well off pawn broking Jew and against the multiple cheaper objects that he would acquire, objects that would potentially need to find multiple customers. Thus one could argue that it would be best to let the poorer Jew borrow the whole sum that he desires against his own more valuable pawn. Furthermore, some Jews desired non-investment loans to cover short-term expenses (similar to gentiles who pawned objects). One could accordingly argue that medieval Jewry should simply recognize that pawning is 1) the selling of one's property to another for less money in return for a limited right of repurchase at market value, 2) is not an endless interest loan, and so should be permitted. In other words,

²⁷⁹ *Teshuvot Maimoniot*, "Mishpatim," chapter 29.

²⁸⁰ Of course this position could also be viewed as permitting an arrangement involving the sin of interest - if one were more concerned with avoiding the harm of interest loans than with providing more credit or if one were living in a situation in which Jews are investing money via fellow Jews and not gentiles. Both factors explain the R. Avrohom Yeshayahu Karelitz's (*Hazon Ish*, YD "Laws of Ribbit" 77:1) rejection of this hitherto accepted arrangement (as codified in Sh"A and ReM"A YD 177:5). The second factor explains the alternative position of R. Yaakov Yeshayahu Blau who understood both that this arrangement guarantees only the capital and not the estimated profits (Brit Yehudah 37:20) and that a *heter iska* (which we will discuss later) should be used for commercial loans exclusively (ibid, 40:1).

one could argue that although the borrower must pay back more money for the money extended if he decides to repurchase his object, that is a choice he can refuse to exercise if he prefers to let the object remain sold at the below market price.

Not surprisingly, since this argument for pawn broking does allow one Jew to lend to another at profit without concern over the soundness of the venture, many rabbis – including Rashi’s grandson, R. Shmuel b. Meir (Rashbam) - opposed it on the grounds that it does involve taking interest.

<p>Commentary of RaShBa”M to Bava Meziáh (as cited in the Responsum of the Maharam [L’vov edition]) ...Is... it forbidden for a Jew to direct his gentile slave to take an object and pawn it... by another Jew with interest?... <u>G-d forbid that one should act permissively in this matter</u></p>	<p>פירוש רשב"ם לבבא מציעא (המובא בשו"ת מהר"ם (לבוב) סימן תמד) ...אם... אסור לישראל לומר לעבדו עכו"ם קח משכון ולוה עליו מעות... מישראל ברבית... ח"ו אין לנהוג היתר בדבר</p>
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However, other rabbis focused on the limited liability aspect of the transaction and permitted such loans. These latter 11th and 12th century CE rabbis - who included Rashi, Rashi’s colleague - R. David Halevi, and Rashbam’s brother - R. Yaakov (Rabbeinu Tam), permitted pawn broking between Jews as long as the Jewish lender did not relate to the borrower in this uncharitable fashion personally or via a fellow Jew, but rather transacted this impersonal deal via a gentile intermediary. These rabbis permitted pawn broking between Jews although they recognized that such arrangements are not ideal:

<p>Responsa of Rashi chapter 49 [with additions from Rashbam’s commentary to Bava Meziáh] ...Is... it forbidden for a Jew to direct his gentile slave to take an object and pawn it... by another Jew with interest?... Our teacher [Rashi] asked this of R. David ha-Levi who permitted it... because the Torah only forbids interest paid from a [Jewish] borrower to a [Jewish] lender. Rashi [accordingly] acted permissively, but his conscience was unsure [and troubled] in this matter,</p>	<p>שו"ת רש"י סימן מט [עם הוספות מפירוש הרשב"ם לבבא מציעא] ...אם... אסור לישראל לומר לעבדו עכו"ם קח משכון ולוה עליו מעות... מישראל ברבית... דבר זה שאל רבינו את רבי דוד הלוי והתיר... משום דלא אסרה תורה אלא רבית הבאה מלוה למלוה ור' נהג בו היתר, ולבו מגמגם ונוקף בדבר</p>
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<p>Rabbeinu Tam (as cited in Or Zaruá, section 3, “Rulings from Baba Mezia” chapter 202) This is quote from Rabbeinu Tam of blessed memory: “It appears to me to be completely permitted and [even] a superior <i>mitzvah</i> to provide sustenance to [fellow] members of the covenant – that a borrower and lender [are permitted the following arrangement:] A borrower may provide a gentile, including his own slave or maidservant, with an object to pawn with an interest from a given Jew for any sum of interest as long as the pawn covers the whole debt as is the normal pawn broking practice.... The borrower will accordingly have no business with the lender because the gentile is the only one who can reclaim the pawn. ...</p>	<p>רבינו תם (כפי שמובא בספר אור זרוע ח"ג פסקי בבא מציעא סימן רב) לשון רבינו תם זצ"ל. נראה בעיני היתר גמור ומצוה מן המובחר לתת מחיה לבני ברית שמותר ללוה ולמלוה שיתן הלוה המשכונות ליד גוי ואפי' עבדו ושפחתו ויאמר לו לוה מפלוני ישראל על משכונותי בריבית בין רב בין מעט אלא שישוה המשכון כנגד החוב ויותר כדרך שמלוים על המשכון בריבית... ויהי מסולק הלוה מן המלוה שהגוי אם ירצה היה תובעם ופודם מן המלוה. והמלוה לא יוכל לתובעו ולפדותו מן המלוה. ... אין זו הערמה אלא דין גמור... שאין המלוה על הלוה כלום ואין כאן הערמה. אלא מסולק הלוה מן המלוה והמלוה מן הלוה. והרצה לגמול חסד גומל. והאכזרי לא חומל.</p>
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<p>This is not a deceit[ful circumvention of the law] but rather valid law for the lender has no claim against the borrower[‘s person], for the borrower and lender have no business with each other. Thus one who wishes to act kindly does so, while the cruel person [acting within the minimal requirements] does not pity.²⁸¹</p>	
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Inasmuch as the restrictive opinion limited credit for Jews, it is not surprising that the permissive opinion became the accepted one; it was permissible to pawn with interest as long as no payment could be demanded beyond the pawn.²⁸²

Later in 15th - 17th century Europe, most loans were extended on contract instead of merely against pawns. In that situation, Polish and Lithuanian rabbis followed R. David Halevi and Rabbeinu Tam in accepting the fact that there was little motivation for a moneyed Jew to invest and risk money with a fellow Jew when the moneyed Jew could acquire risk-free profits through a non-Jew. Accordingly, these rabbis adopted an existent general Christian model of contracting a business arrangement that explicitly posited a specific sum of profit that must be repaid to the investor. In this “partnership” success and profits are assumed so that the borrower is expected to return the capital and a set sum of profits. This blanket expectation was justified on the grounds that the lender had no means of determining whether the borrower’s venture has truly failed or the borrower had simply diverted and hidden the profits. In other words, loans on interest were structured as investments.²⁸³ However, the rabbis - including R. Shabbatai ben Meir ha-Kohen (ShaK”h) - added a critical modification. They structured this presumptive investment (*heter iska*) and arranged that only the capital is absolutely guaranteed while payment of the assumed profit depends on either the reality of profit or the borrower choosing to pay it in spite of the venture’s failure (in order to maintain a good credit rating):

<p>Siftei Kohen 167: 1 If the lender does not trust the borrower's word regarding loss of capital or even of [projected] profits, he may add a clause into the contract that the borrower will not be believed regarding the loss of the capital except through two renowned and reputable witnesses. Nor of the profits except through a severe oath. However, one may not write that the borrower will not be believed regarding the profits except through witnesses for that is actual <i>ribbit</i>.</p>	<p>ש"ך יורה דעה סימן קס"ז ס"ק א אם המלוה אינו מאמין ללוה על ההפסד בקרן או בריוח אזי יכתוב בשטר העיסקא 1. שאין הלוה נאמן בהפסד הקרן כי אם על פי עדים כשרים מפורסמים 2. ועל הריוח לא יהא נאמן כי אם בשבועה חמורה כרצון בעל השטר דלא כאותן שנהגו לכתוב בשטר שגם בריוח לא יהא נאמן כי אם בעדים שזהו רבית גמור</p>
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According to the rabbinic model, the borrower who lost money on the venture but cannot prove that fact (as was almost always the case) need only return the capital. Naturally, the borrower who wished to maintain a good credit rating would attempt to pay the interest, the “assumed profits”, too. However s/he need not do so. This

²⁸¹ Cf. R. Yisrael Meir Kagan’s comments against the permitted use of a *heter iska*, which we will discuss later (*Ahavat Hessed* 2:15).

²⁸² As Maimonides summarized the point of monetary laws in his Guide to the Perplexed 3:42, “The reason for monetary laws is clear and that is to be the measurement of the Good for the necessary dealings between people, for dealings should be mutually beneficial instead of one side intending to gain exclusively.”

²⁸³ This common Christian practice was attacked in 1524 by Martin Luther, “On Trading and Usury” (available on-line at Project Gutenberg).

model allows borrowers to enter high risk ventures and even provides lenders with a monetary motivation to lend money for such risky ventures since the borrower is likely to return the capital and interest even in the event of a business failure. However, inasmuch as the interest is not absolutely guaranteed there is both less motivation for the lender to lend money for ventures that are likely to fail, and a fail-safe for any overwhelmed borrower to extricate himself from an “eternal debt” of trying to pay off both the capital and the pre-set profit return.

It is this model which Rav Moshe expanded by allowing an economic transaction in which the borrower may lose most of what s/he owns in repaying capital and interest - except those assets necessary to continue to both live decently and practice one’s trade.²⁸⁴

VI. Summary:

To summarize, we have two models for halakhic profit-making loans. The first model requires that the lender stand to lose something if the loan fails and thus discourages loans made for the purpose of exploiting the borrower.²⁸⁵ The second, more *laissez faire* model, allows the lender to lose nothing as long as the loan does not affect the borrower’s ability to live and earn money too negatively. In other words, both of these halakhic models favor productive loans. Thus, both halakhically and economically, those banking practices which favor the debtor’s long term unproductive indebtedness and the concurrent perpetual interest payments should be forbidden.

This responsibility does not lie merely on the shoulders of others - bankers or legislators. Halakhically, the responsibility to stop this situation lies on each one of us – bankers, borrowers, guarantors, notaries, and possibly even lawyers who draw up bank regulations and contracts:

<p><u>Mishnah Bava Mezi'ah 5:11</u> The following violate the injunction [against interest]: The lender, borrower, guarantor, and witnesses The sages say, even the scribe [who draws up the contract]</p>	<p><u>משנה בבא מציעא ה, יא</u> ואלו עוברין בלא תעשה [של ריבית]: המלוה, והלוה, והערב, והעדים וחכמים אומרים: אף הסופר</p>
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As the Tur explains, even the borrower who can afford to borrow under the present conditions is forbidden to do so, for his/her precedent sets up a market in which others will not be able to borrow except under the same onerous and nonproductive conditions:

<p><u>Tur, Yoreh De'ah, chapter 160</u> [The reason that] even the borrower, the payer of the interest, sins [in the injunction against interest] in spite of the general rule that one may destroy one's own assets, is because the sin [of lending at interest] is so common.</p>	<p><u>יר יורה דעה סימן קס</u> ופילו הלוה והנותנו עובר שא"כ בשאר דיני ממונות שאם אדם רוצה לזוק בנכסיו רשאי אבל מפני רגילות החטא מזהיר גם בלוה</p>
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²⁸⁴ ReM”A YD 168:9 and *Hagahot Maimoniot (Constantine Edition)*, Laws of Loans 5:3.

²⁸⁵ This model might allow a Central Bank to lend at interest and thus control the rate of interest and monetary policy inasmuch as no individual is attempting to gain continuous interest or even income-generating assets from another’s misfortune (cf. *Shu”T Har Tzvi* YD 126).

Is this demand from the borrower too high a demand? Very possibly, yes²⁸⁶ (unless people get organized and create community banks). In any case, there is a difference between one who sins complacently and one who sins, albeit consistently, under challenging conditions but strives to avoid those conditions.²⁸⁷ If we cannot create community banks, and therefore keep borrowing money from our banks, we can at least work to change the law. Both Halakhah and the theory of economic growth through the productive investment of money (capitalism), oppose the present banking practices as immoral.²⁸⁸

Methodological Addendum

This article has presented a traditional method of studying and applying halakhah via its insights (*Daas Torah*) instead of the more recent religious methods of legal scientism (Brisker formalism) that was developed in order to protect Torah against modernist hegemonic claims of the unethical tendencies and irrelevance of Torah. This article's method returns us to the best of pre-nineteenth century Talmudic learning, which strove to learn from the wisdom of the past. This method is once again necessary since relegating Torah to legalism has preserved Torah but left us humans without the wisdom to navigate reality and achieve goodness in G-d's world. Bereft of the traditional method of Talmudic and Halakhic study, we are left with modernist thought which is powerful in its monism but weak in the resultant blind spots or post-modernist thought which identifies the weaknesses in every argument, or evils that must be noticed, but leaves us unable to pragmatically make better decisions. We thus need to return to the traditional method of studying Torah, to a method of learning from the insights of our precedents instead of obeying or criticizing the precedents. The Divine words and insights are too significant to be stultified in conservative or liberal legal rigmarole (even if such be tantalizingly but falsely decisive and fun).

²⁸⁶ Thus *heter iska* loans are accepted in Israel for personal loans (such as overdrafts on accounts) but only as long as the interest is comparable to the interest a bank would charge for a commercial loan.

²⁸⁷ The first is considered an ideological "apostate" while the latter is merely labelled an "apostate from weakness" (*Beit Yosef* cited in ReM" A YD 2:5). Obviously, the former is worse (Sh" A HM 266:2 and 455: 5).

²⁸⁸ Obviously they are also immoral both under utilitarian ethics, inasmuch as they produce less common good, and under Kantian ethics, inasmuch as they treat a person as a means instead of a cooperative end in himself.

מנהג כהלכה :

עיון בתשובותיו של המהר"ם מרוטנברג בנושא חרם היישוב וחזקתו²⁸⁹

רחל פירסט

בבואה לעסוק בדיני שכנים, תחום הלכתי החסר בסיס מקראי מפורש, נשענת מסכת בבא בתרא במידה רבה על המנהג כמקור סמכות משפטית²⁹⁰. בנוסף לחילוקים הרבים שמניחה הגמרא בין סוגי נכסים, שטחים ונזקים המושרשים בתפיסות ובנהלים חברתיים ותרבותיים סוביקטיביים, חזרתן של המשנה והתוספתא על ביטויים כגון "מקום שנהגו" ו"מנהג המדינה" מעידים היטב על המרכזיות של מושג זה להשקפתה של המסכת²⁹¹. אמנם בדיני ממונות ככלל, מעניקה ההלכה מקום נכבד למנהג כגורם מכריע²⁹², אך נראה כי בהלכות שכנים נטייה זו בולטת עוד יותר.

במאמר זה, אנסה לבחון את מקומו ותפקידו של המנהג כמקור סמכות הלכתית באמצעות תשובותיו של ר' מאיר בן ברוך מרוטנברג (המהר"ם, 1215–1293)²⁹³ הדנות בתופעה החברתית-משפטית הידועה כ"חרם היישוב", שהיתה ייחודית לעולם האשכנזי, הן מבחינה היסטורית והן מבחינה הלכתית. דרך ניתוח זה, תקוותי להראות כיצד פוסק אחד התיחס לכוח המכריע של המנהג ושילב אותו במנגנון המשפטי הנורמטיבי.

רקע היסטורי-משפטי

חרם היישוב, ביטוי מובהק לכוחה של הקהילה כישות עצמאית, אפיינה את חיי הקהילה היהודית בימי הביניים בארצות שבהן שלטה המסורת האשכנזית. הנסיבות ההיסטוריות השונות האחראיות להתפתחותו של נוהג זה נידונו באריכות על ידי חוקרים במשך המאה האחרונה²⁹⁴. מדובר ככל הנראה בתקנת קהילה, לפיה החברים הוותיקים של מקום מסוים קבלו על עצמם למנוע את הצטרפותם של חברים חדשים אליהם על-ידי הטלת איסור מוחלט לשאת ולתת עם יחידים אלה. חרם זה מפתיע בניגודו לערכים יהודיים בסיסיים כגון צדקה, ערבות ועזרה לזולת, והמניע שלו לא ברור לגמרי: יש חוקרים הרוצים להסביר את החרם על רקע כלכלי, כמנגנון שמטרתו למנוע, או לפחות לפקח, על תחרות מסחרית המאיימת על פרנסתם של חברי הקהילה²⁹⁵. אחרים טוענים כי התייעוד המועט המתייחס לתופעה זו מצביע גם על מניעים אחרים,

²⁸⁹ מאמר זה נדפס גם בהוצאת לאור - טללים 3 יוני 2009 של חברותא - בית מדרש לתלמידי אוניברסיטה העברית בירושלים. המחברת לימדה את אותו נושא בפרד"ס וגם בחברותא באותה שנה.

²⁹⁰ על חוסר הבסיס המקראי לדיני שכנים בפרט, ולדיני הפרט ("private law") בכלל, ראו: David Daube, "The Civil Law of the Mishnah: The Arrangement of the Three Gates," in *The Collected Works of David Daube*, ed. Calum M. Carmichael, 257–304 (Berkeley: Robbins Collection, 1992–2003), especially 291–95.

²⁹¹ מעניין כי בטויים אלה מופיעים במשנה דוקא בתחילת המסכת (א-א-ב); באמצע המסכת (ה-יא); ובסופה (י-א). תודתי לזן ברא"ז על הערה זו.

²⁹² על הכוח הנרחב של המנהג בדיני ממונות (לעומת דיני איסור והיתר), הנובע מכך שבתחום הלכתי זה אדם וקהילה מתנים על מה שכתוב בתורה, ראו: מנחם אלון, *המשפט העברי: תולדותיו, מקורותיו, עקרונותיו*, מהדורה שלישית (ירושלים: מאגנס, תשנח), 733–734. לסיכום דבריו, כותב המחבר: "כשם שעניינים שבממון ניתנים לשינוי על-ידי הצדדים הנוגעים לעסקה מסוימת, כך הם ניתנים לשינוי על-ידי הציבור כולו, המתנה כאילו מראש, שהסדר זה וזה – בניגוד להסדר הקבוע בתורה – נוח ורצוי לכל אחד ואחד מיחידיו. ואם כן, הרי המנהג, המביע את הרצון הקולקטיבי של הציבור, כוחו לפעול לשינוי הלכה בתחום דיני ממונות – שבו מוכרת סמכות הרצון לשנות את הדין...". אך כדאי לציין כי לדעת חלק מן הראשונים, וביניהם הרא"ש, כוחה של הקהילה להתנות בדיני ממונות הוא דוקא בתקנת בית דין, ולא בנהג שאינו מושרש בחקיקה: "וכל זה בתקנה שבת דין מתקנים ומפקירים ממון זה ונותנין אותו לזה; אבל על פי המנהג, לא ידעתי איך יתנו ממונו של זה לזה? דבשלמא בענין איסור, מתפשט המנהג שנהגו כל בני המדינה לנהוג איסור בדבר אחד, אף על פי שבשאר מדינות נוהגין היתר... אבל ממון, מה שייך מנהג? דאי אפשר להוציא ממון אלא בתקנת בית דין!" ראו: שו"ת הרא"ש, כלל נה: סימן י.

²⁹³ על תיפקודו והשפעתו של המהר"ם בתור מנהיג ופוסק, ראו: אפרים א' אורבך, *בעלי התוספות: תולדותיהם, חיבוריהם, שיטתם*, מהדורה חמישית (ירושלים: מוסד ביאליק, תשמ"ו) 521–570; ו: Irving Agus, *Rabbi Meir of Rothenburg*, 2 vols. (Philadelphia: Jewish Publication Society, 1947).

²⁹⁴ לסיכום שיטותיהם של גדולי החוקרים בנושא, ראו: שמעון שורצפוקס, "השתלשלותו של חרם היישוב – ראייה מזווית אחרת", מתוך *ספר יובל לשלמה סימונסון: קובץ מחקרים לתולדות היהודים בימי הביניים ובתקופת הרנסנס*, אהרן אופנהיימר ואחרים, עורכים (תל-אביב: אוניברסיטת תל-אביב, תשנ"ג), קה-ק"ז.

²⁹⁵ ראו לדוגמה: "בער, היסודות וההתחלות של ארגון הקהילה היהודית בימי הביניים", ציון טו (תש"י): 36, הערה 295; S. W. Baron, "Rashi and the Community of Troyes," *Rashi Anniversary Volume, Texts and Studies I* (Philadelphia: American Academy for Jewish Research, 1941), 62–71; וכן ההפניות האחרות המופיעות אצל שורצפוקס, "השתלשלותו של חרם היישוב", קה-קו.

כגון הרצון לעכב דמויות לא רצויות מלהצטרף אל הקהילה והחשש שמא ריבוי תושבים יהודים יכעיס את השלטונות המקומיים, שהשתדלו לצמצם את גודלן של הקהילות היהודיות העירוניות²⁹⁶. נוסח החרם העברי היחיד שנשמר (בכתב יד מהמאה ה-13) מבהיר את תוכן החרם ואת המנגנון בו הוא פועל, אך אינו מתייחס למטרות החרם:

במותב זקנים בקהל עם גזרנו באלה חמורה על פי החרם, שלא יהא רשאי בר ישראל או בת ישראל לדור באותו ישוב פלוני ולא בקרוב לאותו ישוב פלוני בתוך פרסה או כך וכך בלא רשות פלוני ופלוני. וכל מי שיעבור חרם זה, שיבא בלא רשות פלוני ופלוני לדור באותה עיר או באותו כפר, שיהא בחרם ובנידוי. ולא יהא רשאי שום בר ישראל לישא ולתת עמו. ומה שעשינו וגזרנו בכך וכך בירח פלוני שנת כך וכך לבריאת עולם כתבנו וחתמנו ונתנו לידם²⁹⁷.

גם מקורותיו המשפטיים ותאריך תחילתו של מנהג זה שנויים במחלוקת. חלק מהחוקרים, ובעיקר אלה הרואים בחרם עניין כלכלי, טוענים ש"חרם היישוב" הוא בעצם דינא דגמרא, שהרי הוא מעניק לקהילה את אותם הכוחות שהגמרא בבבא בתרא כא ע"ב כבר העניקה לה²⁹⁸. בהקשר של דיון ארוך על תחרות במסחר, הסוגיה קובעת שתושבי עיר אחת יכולים למנוע מבעלי מלאכה הבאים מעיר אחרת לסחור ולעבוד במחוזם:

מיתבי: עושה אדם חנות בצד חנותו של חבירו, ומרחץ בצד מרחצו של חבירו, ואינו יכול למחות בידו, מפני שיכול לומר לו: אתה עושה בתוך שלך ואני עושה בתוך שלי! תנאי היא; דתנאי: כופין בני מבואות זה את זה שלא להושיב ביניהן לא חייט ולא בורסקי, ולא מלמד תינוקות, ולא אחד מבני בעלי אומניות, ולשכנו אינו כופיהו; רשב"ג אומר: אף לשכנו כופיהו. אמר רב הונא בריה דרב יהושע: פשיטא לי, בר מתא אבר מתא אחריתי מצי מעכב, ואי שייך בכרגא דהכא – לא מצי מעכב, בר מבואה אבר מבואה דנפשיה – לא מצי מעכב. בעי רב הונא בריה דרב יהושע: בר מבואה אבר מבואה אחרינא, מאי? תיקו.

אך חוקרים אחרים מתעקשים שעל אף הדמיון למושג חרם היישוב, דבריו של רב הונא בריה דרב יהושע אינם מהווים מקור למנהג האשכנזי בימי הביניים²⁹⁹, שהרי למרות הסבירות הגבוהה שחרם היישוב התפשט כתוצאה ממצב כלכלי קשה, ברור שיישמו את החרם כדי למנוע הצטרפותם של יחידים לקהילה גם במקרים שלא היו קשורים לענינים כלכליים כלל ועיקר³⁰⁰. בנוסף לכך, הופעתו הראשונה של חרם היישוב בתקופת ימי הביניים, מאות שנים לאחר חתימת התלמוד, העדרותו המוחלטת של החרם מהמנהג הספרדי, וקיומן של קהילות בעולם האשכנזי עצמו שלא נהגו להחרים, מטילים ספק גדול בטענה שמקור החרם הוא בספרות התלמודית.

האיזכור הקדום ביותר של התופעה מופיע באגרת ששלחו "חכמי רומי" ל"חכמי פריש" בשנת 1130 על אודות ראובן שרצה למנוע משמעון את מגוריו בעיר. ראובן טען שזכותו לגרש את שמעון נבע ממנגנון המכונה "גזירת היישוב":

הנני ראובן צועק על שמעון היורד לאומנותי ואני תובעו על פי הגזירה שיצא חוץ לעיר ולא ירד לאומנותי ולא יעמוד בעיר בנחלה אשר הורישני אבותי בגזירת

²⁹⁶ לדוגמה: ח"ה בן-ששון, פרקים בתולדות היהודים בימי הביניים (תל-אביב, 1962), 135–136.

²⁹⁷ ראו: א' גולק, אוצר השטרות (ירושלים תרפ"ו), 352–353.

²⁹⁸ ראו בארון ובן-ששון המוזכרים לעיל, וכן שורצפוקס, "השתלשלותו של חרם היישוב", קו-קז.

²⁹⁹ ראו לדוגמה: מאמרו של בער, המצוין לעיל; ורות גלדשטיין-קסטנברג, "חזקת היישוב, חרם היישוב והמציאות של ימי הביניים", תרביץ מז (תשל"ח): 216–229.

³⁰⁰ לדוגמה, לפי עדותו של ר' משה בר חסדאי, שנכללה באחת התשובות של המהר"ם בנושא, רבינו תם אישר הפעלת החרם רק במקרים שהוא ימנע הצטרפותם של אנשים "אלמים ומוסרים ושאנים רוצים לפנות לתקנת הקהל ושאנים רוצים לפרוע מס עמהם אבל על אחר אין חרם". ראו: ספר שו"ת המהר"ם ב"ר ברוך – דפוס לבוב, רפאל נתן רבינוביץ, עורך (לבוב: תר"כ), תשובה קיא. להלן: דפוס לבוב.

היישוב שנתגזרה פן יעמוד איש בעיר לבד בני העיר אשר היו באותם ימים וזרעם אשר יולד להם מאותו זמן, זכרים ולא נקבות. ואני בן עיר אנכי, ואתה בן עיר אחרת, ורוצה אני שלא תרויח בעיר עוד, אך צא מן העיר כי עד הנה הותר לך, מדעתי גזירת היישוב, ושאלתי [השאלתי?] לך ירושתי ונחלתי עד עתה, ואיני רוצה שתהיה עוד בעיר, ולא תהיה נותר [מותר?] עוד³⁰¹.

בתשובתם לחכמי פריש בענין הגזירה כתבו חכמי רומי שהם לא הכירו את מנהג היישוב או את תקנת הראשונים המצויינים:

ועל דבריכם תמהנו מאד, איך תזקיקונו להכניס ראשנו בין המחלקות, בין הרים גדולים, ובדבר שאין לנו נהוגים, ואין לנו בקיאים במנהג ההוא, וגם אתם לא כתבתם סדר תקנת הראשונים ולשונה כאשר כתובה אצלכם, ואפילו אינה כתובה היה לכם לימלך בזקני העיר ואף בבעלי הדין, ולכתבה מדעתם, גם להחתימם עליה, אולי מתוכה נבין ונבחין ונשיב לשולחנו אמרי אמת.³⁰²

מתגובתם של חכמי רומי משתמע שבמחצית הראשונה של המאה ה-12 חרם היישוב נחשב לתקנת ראשונים עתיקה מחד, ולמנהג מקומי לא ידוע מאידך. דבריהם מעלים את האפשרות שלנוהג הנידון עוד לא היה מקור בכתב. אפשרות זו מהווה קושיה על החוקרים המייחסים את חרם היישוב לפירושיהם של רבינו גרשום (גרשום בן יהודה, 960–1028) ורש"י (שלמה בן יצחק, 1040–1105) לבבא בתרא כא ע"ב³⁰³. לעומת זאת, חרם היישוב וחזקת היישוב מוזכרים באופן מפורש בתשובותיהם של רבינו תם ור' יצחק "אור זרוע", ולכן סביר להניח שנוהג החרם התקבל אצל קהילות אשכנז במשך המאה ה-11. בחלק מן הקהילות במזרח אירופה, שירשו מנהג זה, נהג החרם עד למאה ה-19.

בכדי להסביר את הטלתו של החרם, פיתחו חכמי אשכנז ואחרים את המושג "חזקת היישוב", המתייחס לזכות שיש לבני מקום מסויים לדור בו ולמנוע מאחרים להתיישב שם על-ידי החרם ומנגנוני פיקוח אחרים³⁰⁴. האפיונים של אותה חזקה – מי זוכה בה, מתי ומדוע, כיצד מעניקים או מעבירים אותה וכו' – היו מוקד למחלוקות נוספות לאורך הדורות, ועד היום אינם ברורים דים.

חרם היישוב וחזקתו בתשובות המהר"ם

בקבצי התשובות של המהר"ם מרוטנברג, מבין המשיבים האשכנזים הפורים והחשובים, נכללות כעשרים תשובות הנוגעות לענייני חרם היישוב וחזקתו³⁰⁵. פסקיו של המהר"ם נכתבו במחצית השנייה של המאה ה-13 בתגובה לשאלות מציאותיות שהוא נשאל, וכל תשובה דנה בנושא מזוית שונה במקצת. אין תשובה אחת בה המהר"ם מגדיר את התופעה ההלכתית בצורה יסודית ושיטתית, ומשום כך יש צורך לעיין במכלול תשובותיו בנושא בכדי להגיע לאמירה מאוזנת לגבי עמדתו והשקפתו בעניין. אפשר באופן עקרוני להבחין בין התשובות הדנות בחרם לבין אלה הדנות בחזקה (ויש כמובן, גם כאלה שנוגעות בשני העניינים). ברוב התשובות המתייחסות לחזקת היישוב דן המהר"ם בתחום החזקות, בעיקר בדינים הנובעים מהפרק השלישי במסכת בבא בתרא; כלומר, המהר"ם התייחס לחזקת היישוב כסוג של חזקת קרקעות³⁰⁶. כמו כן, בתשובות

³⁰¹ תשובת חכמי רומי לחכמי פריש פורסם על ידי ש' ד' לוצאטו, **בית האוצר** (1847), נה-נט. פיסוק הטקסט מופיע כמות שהוא אצל לוצאטו.

³⁰² לוצאטו, **בית האוצר**, נה.

³⁰³ אכן, הרוצים למצוא מקור לחרם היישוב בפירושיהם התלמודיים של גדולי ראשוני אשכנז הקדמונים מתקשים בכך שאין אף מילה בדבריהם המרמזת למנהג זה. בשני הפירושים הנזכרים חסרים איזכורים לחרם, חזקה, גזירה או למושג כל דהו המתאים למנהגים אלה. גם אם רבינו גרשום ורש"י הכירו את חרם היישוב בתור מנהג הקהילות, הם ככל הנראה לא קשרו אותו לגמרא הנידונה.

³⁰⁴ ראו ערך "חזקת היישוב" באנציקלופדיה התלמודית.

³⁰⁵ חלק מתשובות אלו מופיעות גם בכתביהם של תלמידי המהר"ם, כגון המרדכי והגהות מיימוניות.

³⁰⁶ תשובה מו בדפוס פראג (משה אריה בלאך, עורך, **ספר שו"ת מהר"ם ב"ר ברוך** – **דפוס פראג** (בודאפעסט: תרנה), תשובה מו. להלן: **דפוס פראג**, תשובה מו). מבהירה מעבר לכל ספק, שהמהר"ם תפס את חזקת היישוב כסוג של חזקת קרקעות בעלת תכונות מיוחדות. המהר"ם פסק שעל-פי המנהג המכריע, אפשר להעביר את חזקת היישוב מיחיד ליחיד בלי קניין פורמלי, מה שאין כן בקרקעות. למרות זאת, עצם השוואתו בין מחילת הקהילה על

המוקדשות לחרם היישוב דן המהר"ם בענייני נדרים ובכוח הכפייה וההכרעה של הקהילה.

אך למרות ההפניות הרבות לסוגיות תלמודיות המופיעות בתשובות אלו, אין ספק כי המהר"ם ראה את מקורותיהן האמיתיים של תופעות החרם וחזקת היישוב במנהגי הקהילות ובכוחה של הקהילה לכפות את תקנותיה על חבריה³⁰⁷. מתוך תשובותיו מתברר כי הוא סבר שעצם קיומם של המנהגים הנידונים וקבלתם כנורמות חברתיות על ידי הקהל הממוסד הוא מקור הסמכות לנוהגים אלה; אכן, הוא כתב בפירושו כי בקהילות שלא קבלו על עצמם את החרם אין לתושבים הותיקים את הזכות למנוע את הצטרפותם של חברים חדשים³⁰⁸. אם כן, מתבקשת השאלה: מדוע התייחס המהר"ם לחרם ולחזקת היישוב בתשובותיו השונות בעיקר על סמך טקסטים תלמודיים? מדוע טקסטים אלה רלוונטיים למנהגים שככל הנראה אינם מושרשים בספרות זו?

בדורות האחרונים, דנו חוקרים רבים בשאלת התמודדותם של חכמי אשכנז, ובעיקר בעלי התוספות, עם תופעות במציאות – או, ליתר דיוק, עם נוהגי קהילה מקובלים – שסטו מן ואף סתרו את ההלכה התלמודית³⁰⁹. מצד אחד, מהפכתם הלמדנית של בעלי התוספות, שהפכה את לימוד הגמרא מתרגיל אקדמי-פרשני לדיון הלכתי מעמיק ומעשי, פגעה בכוחו של המנהג כשיקול הלכתי מרכזי בקהילות אשכנז³¹⁰. מצד שני, בעלי התוספות עצמם העניקו מקום נכבד ביותר למנהג בהיררכיה ההלכתית, טענו שהמנהג מחוסן בפני טעות ושהוא מקור מהימן להלכה יותר מהחידוש הלמדני, ואף נטו למצוא הצדקות למדניות לנוהג המקובל בפילפוליהם³¹¹. עד היום, ממשיכים החוקרים להתוכח לגבי מידת המכוונות בדיוקו ובפסקיו, המקילים בהלכה לטובת המנהג, של גדול בעלי התוספות, רבינו תם, ושל חכמים אחרים.

לאור תפיסתו של המהר"ם את תפקיד המנהג בקשר לחרם היישוב, קיימת נטייה חזקה לשייך את עמדתו לתפיסתם הייחודית של חכמי אשכנז ובעלי התוספות באשר למנהגים. בהמשך מאמר זה, ברצוני לבחון את התייחסותו של המהר"ם למעמדו ותוקפו של המנהג במקרה הנידון ולדרכים בהן הוא הגדיר את תפקודו של המנהג בעולם ההלכתי.

מקורות תלמודיים בתשובותיו של המהר"ם: מטרה משפטית או רטורית?

בבואו לדון בשאלות שהופנו אליו בנושאי חרם וחזקת היישוב, בנה המהר"ם מערכת הלכתית שלמה מסביב לנוהג החברתי. אך על אף התנהלותם בצירים תלמודיים מוכרים, לא ברור שדיונים אלו מעידים דוקא על ניסיון לאמת את המנהג או לספק לו תוקף הלכתי. אכן, בתשובה הדנה בחכם ר' יהודה הכהן ובית דינו³¹², שמכוחם כמכריעי הלכה "החזיקו ליחידים את היישוב" דרך "טענין ליורש", כתב המהר"ם:

ואפשר שמורי לא בתורת ראי' ברורה הי' דן כן במקום אחר אלא בדיני ישוב התלויים במנהג ונהרא נהרא ופשטי' והרבה מנהגים יש בדבר זה שאין להם על מה שיסמכו כהררים תלויים בשערה כשמצא לדבר סמך כל דהו עשה לו יתד וקבע בו מסמרות וכדי הוא לנהוג זה המנהג על פיו ולהנהיג באותו מקום כאשר קבע

חזקתה ביישוב למחילתו של שמעון לראובן על קרקע מדגישה את תפיסתו הבסיסית. בנוסף לכך, המקורות שציטט המהר"ם מפרק חזקת הבתים וממסכת כתובות מתייחסים כולם לקרקעות, ומוכיחים ששיקוליו ההלכתיים של המהר"ם בקובעו ששמעון יכול "להחזיק ביישוב מכח מחילה שמחלו לו היישוב כל הקהל שהיו דרים שם באותה שעה", נבעו כולם מהעולם ההלכתי של חזקת קרקעות. החלטתו (מדעת או שלא מדעת) של המהר"ם לבחון את חזקת היישוב על פי פרמטרים הקשורים לחזקת קרקעות משמעותית ואינה מובנת מאליה.
³⁰⁷ כח חקיקה ואכיפה זה של הקהילה מוכרת כבר בספרות התלמודית – ראו: תוספתא בבא מציעא יא: כג; תלמוד בבלי בבא בתרא ח ע"ב.

³⁰⁸ ראו לדוגמה תשובה שפב בדפוס פראג: "לא ידעתי מה אשיב שולחי דבר על התשובה שמעבר... וכי אין זה מעשים בכל יום במקום שאין חרם של ישוב שאדם בא לגור ביישוב חבירו שלא ברשות ואף לכתחלה מותר ואין בו דין עני המהפך בחררה לפר"ת, ומזה אין להאריך."

³⁰⁹ לסיכום הדעות השונות, ראו: Efraim Kanarfogel, "Halakha and *Metziut* (Realia) in Medieval Ashkenaz: Surveying the Parameters and Defining the Limits," *Jewish Law Annual* 14 (2003): 193–224.

³¹⁰ ראו: Israel M. Ta-Shma, "Halakhah and Reality: The Tosafist Experience," *Rashi et la culture juive en France du Nord au moyen âge*, ed. Gilbert Dahan, Gérard Nahon, Elie Nicolas, 315–329 (Paris: E. Peeters, 1997), 318.

³¹¹ אין ספק כי המעמד שהועידו ראשוני אשכנז למנהג היה גבוה מזה שהועידו לו הגאונים וראשוני ספרד – ראו, בין היתר ישראל מ' תא-שמע, הלכה, מנהג ומציאות באשכנז, 1100–1350 (ירושלים: מאגנס, תשנ"ו), 27–35.

³¹² על ר' יהודה הכהן, ראו: אורבך, בעלי התוספות, 526.

וכן בכל המקומות שלא (נוגע) [נהיג] דבר זה יתכן לנהוג כן.³¹³

באמירה זו משתקפת מודעות בולטת לשימוש במקורות תלמודיים סמכותיים בתור אסמכתות בלבד. נראה כי המהר"ם טוען שבדיני היישוב תוקפו של הנוהג נובע מעצם המנהג, והמנהג על פי הגדרתו אינו "תורת ראייה ברורה" כדינים תלמודיים המוכתבים על-ידי מערכת הלכתית טקסטואלית. למנהג יש מערכת מנחה עצמאית. עוצמתה של אמירה זו מחזקת את השאלה: האם המקורות התלמודיים המובאים בתשובותיו של המהר"ם משרתים מטרה הלכתית-משפטית סטנדרטית או שמא יש להם פונקציה אחרת?

א. מטרה משפטית

מצד אחד, יתכן ששימושו של המהר"ם במקורות תלמודיים מצביע על כך, שהוא התייחס אל חרם היישוב בפרט, ואל מנהגי הקהילות בכלל, כביטויים הלכתיים נורמטיביים המשתלבים במערכת ההלכתית הרחבה, בדרך המקבילה להשתלבותם של דינים תלמודיים במערכת זו. נוהג הקהילה (כלומר, התנהגות הציבור בפועל) העניק צורה ל"מנהג", מושג מופשט שאליו אפשר להתייחס על פי כללים משפטיים, שהרי למנהג יש ערך הלכתי-משפטי, שבו הכיר התלמוד עצמו.³¹⁴ תהליך הנורמטיביזציה המשפטית, שבאמצעותו הפך הנוהג למנהג, איפשר לפוסק להתמודד באופן הלכתי רגיל – כלומר, דרך דיונים תלמודיים – גם עם מסורת, שמקורה בהתנהגות ולא בטקסטים. על כן, הדיונים ההלכתיים שערך המהר"ם בתשובותיו על החרם וציון המקורות התלמודיים בהקשר זה שימשו למטרה דומה למטרתם של דיונים כאלה בתשובות אחרות – למקם את המנהג במגרש ההלכה, להגדיר את אופיו ותפקודו ביחס להלכות אחרות מוכרות, ובכך להכריע בשאלות שעלו לגבי יישומו של המנהג במצבים שונים.

ההגיון העומד מאחורי הסתמכות משפטית על מסורות התנהגותיות, המסביר גם את הרלוונטיות של מקורות תלמודיים לדיונים על תופעות מסוג חרם היישוב, התבטא בדרכים שונות אצל חכמי ההלכה במשך הדורות.³¹⁵ לפי גישה אחת, מתפקד מנהג הקהילה כעדות לתקנת קדמונים שנשכחה למרות שתוצאתה המעשית נשמרה בתור מסורת פעילה. זאת אומרת, שעל אף חשיבותו של הנוהג, הסמכות האולטימטיבית היא חקיקה פורמלית.³¹⁶ על פי תפיסה זו, ההסתמכות על המנהג היא ביטוי לאמון ביכולתה של מסורת התנהגותית לשמר חקיקה קדומה, שהיא עצמה תקפה משום שהמערכת ההלכתית מעניקה לחכמים את הכוח לעצב את ההלכה באמצעות תקנות. כיון שמניחים שההלכה המקורית, כלומר התקנה הנשכחת, נחקה לפי כללים הלכתיים מקובלים, הניסיון לשחזרה דרך המנהג נעשה באמצעותם של מקורות תלמודיים. אך לפי גישה אחרת, שבה אוזחים רוב החכמים, הקהילה המסורתית השומרת באמינות את נוהגי אבותיה יכולה לקבוע הלכה על פי התנהגותה באופן עצמאי, מבלי לסמוך על מקורות הלכתיים נוספים.³¹⁷ כח היצירה של הקהילה, בהקשר זה, מבוסס על האמונה כי ניתן לסמוך על האינטואיציות של הציבור להנחות את חייו על פי רוח התורה, ועל יכולתם לתרגם ערכים אלה למעשה, כדברי הלל הזקן: "הנח להן לישראל: אם אין נביאים הן, בני נביאים הן".³¹⁸ למרות האופי הלא-טקסטואלי (והלא-מפוקח!) של מנהגי הקהילה לפי גישה זו, המערכת ההלכתית-משפטית מתייחסת לנוהגי הקהילה כאל תופעות המתאימות לקטגוריות הלכתיות קיימות, ולכן רלבנטי לדון בהם במסגרת כללים משפטיים ומקורות תלמודיים. לעניינינו, הצד השווה בין שתי הגישות היא שלפי שתייהן, המנהג מושרש במערכת ההלכתית, ועל-כן סביר להניח שהוא פועל לפי נורמות הלכתיות המבוססות בתלמוד.

התייחסות משפטית כזו למנהג חזקת היישוב מתועדת בתשובה של המהר"ם הדנה בטוען שהוכח שהוא מוסר:

³¹³ דפוס לבוב, תשובה ר"ג.

³¹⁴ כביטוי להכרה זו, אומרים האמוראים במקרה בו יש ספק לגבי הלכה מסוימת: "פוק חזי מאי עמא דבר" (צא וראה, כיצד העם נוהג), או: "צא וראה מה הצבור נוהג – ונהוג". ראו: ברכות מה ע"א; פסחים נד ע"א; ירושלמי פאה ז: ה (לד ע"ב); ירושלמי מעשר שני ה: ב (ל ע"א); וירושלמי יבמות ז: ג (מ ע"א). בנושא זה ראו: אלון, **המשפט העברי**, 714–715; ו- 724–725, שם הוא מביא דברי חז"ל המבקשים לטעון כי המקרא עצמו מעניק כח הלכתי למנהג.

³¹⁵ להצגת הגישות השונות, ראו: אלון, **המשפט העברי**, 714–715, ובמיוחד הערה 8. אלון מציג את ההבדל בין שתי הגישות שאתאר להלן כשימוש במנהג כמקור היסטורי מול השימוש במנהג כמקור משפטי. אני מעדיפה להדגיש את הפן המשפטי של תפקוד המנהג לפי שתי הגישות.

³¹⁶ ראו: אלון, **המשפט העברי**, 715–716. הוא מציין את דברי הרא"ש שניסח רעיון זה: "וכן אמרין בירושלמי: במקום שההלכה רופפת בידך, הלך אחר המנהג. פי': אם יש רפיון בהלכה, שאין ברור לך כמי נפסקה ההלכה, וראית שנוהגין, הלך אחר המנהג, דיש לתלות שנראה לגדולים שהנהיגו המנהג שהלכה כן" (שו"ת הרא"ש, כלל נה: סימן ט).

³¹⁷ ראו: אלון, **המשפט העברי**, 714–715, 717.

³¹⁸ דבריו של הלל בפסחים סו ע"א נאמרו בניסיון לבסס את ההלכה לגבי קרבן פסח על נהגיו של העם. ראו: אלון **המשפט העברי**, 715, 731.

ועל אודות היישוב אם שמעון ובניו טוענים חזקה שיש עמה טענה אז יש להם כח ביישוב לגור שם ולמחות לכל מי שבא לגור שם בלא רשותם. [ו]אם יביא ראובן עדים שהם מסורות דלפיכך לא היה רשאי למחות אז אין להם יישוב דגזלן אין לו חזקה (בבא בתרא מז ע"א) דאי לא דמודי ל"י הוה ממטי ל"י ולחמריי לשחזור. אבל אם שמעון הוא מסור ובניו אינם מסורות אז יש להם לבנים כח חזקה דבן גזלן יש לו חזקה היכא דאתא בטענת"י דנפשיי (שם) ולא מכח אביו הכא נמי כיון דבניו טוענין בחזקתם שיש עמה טענה יש להם חזקה. ושלומך יגדל לעד כנפש אוהבך נדבה. מאיר בר' ברוך שיחי,³¹⁹

בתשובה זו מתייחס המהר"ם לחזקת היישוב כאל חזקה תלמודית סטנדרטית, הפועלת על פי כללים קבועים. הגמרא קובעת שלגזלן אין חזקה, ולפיכך טוען המוכח כ"מוסר", אדם שניסה לזכות בנכסי חבירו על ידי הלשנה לסמכות המקומית, מוותר על חזקתו ביישוב. פסק זה, וכמו כן הקביעה שבני המוסר אינם מוותרים על חזקתם עבור פשיעת אביהם, הוא התוצאה של יישום דין תלמודי מקובל למנהגי היישוב. בכך מחזקת תשובה זו את הטענה, שהמהר"ם השתמש במקורות תלמודיים בתור ניסיון להכניס את מנהגי חרם וחזקת היישוב למערכת הלכתית נורמטיבית ולהתייחס עליהם כאל הלכות סטנדרטיות.

ב. מטרה רטורית

מאידך, מרמזות אמירות רבות של המהר"ם בנושא חרם היישוב לכך שהוא הכניס מקורות תלמודיים לתשובותיו בעיקר לצורך הרטוריקה ההלכתית שהם סיפקו ולא בגלל השלכותיהם המשפטיות. כמשפטן וכפוסק הלכה, התייחס המהר"ם למנהגים כתקני התנהגות המתפקדים במסגרת משפטית; אלא שלמרות האישור שסיפק התלמוד לגבי היוצרותם והפעלתם, מגרש המשחקים של מנהגים אינו זהה למגרש המשחקים של הלכות תלמודיות. על אף שהמנהגים תקפים מבחינה חוקית הודות למקום שהוקצה להם בהירארכיה ההלכתית על פי הגמרא עצמה, המנהגים בעצמם פועלים במערכת עצמאית שאינה מוכתבת על-ידי התלמוד³²⁰. אם כן, ההפניה לסוגיות והשימוש בלשון תלמודית ביחס למנהגי היישוב לא שירתו מטרה משפטית פרקטית; הם איפשרו למהר"ם לבטא את האופי המשפטי של המנהג ברמה העקרונית ולשייך את המנהג לעולם המשפט.

יכולתו של המנהג לפעול באופן עצמאי מחוץ למערכת ההלכתית הנורמטיבית מתבטא בצורה בולטת בתשובה קצרה שכתב המהר"ם על עדות בעניני היישוב:

וששאלת איך מנהגינו בישוב להחזיקו בעד אחד או בעד מפי עד. במקומינו אין לנו מנהג ברור בזה כי לא בא דין זה מעולם לכאן זה אומר ככה וזה אומר ככה מדעת הכרם ואם בא דין זה לפנינו היינו שואלים מן הקהילות מה משפטם.³²¹

האפשרות שהעלה המהר"ם, שדיני עדות המקובלים להלכה אינם יישומיים באשר ליישוב, אמורה להפתיע. למה יעלה על הדעת שדיני עדות בחרם היישוב יהיו אחרים מכללי העדות הבסיסיים בשאר דיני ממונות? אמירתו של המהר"ם, שמנהג הקהילות מכריע גם במקרים שקיים דין תלמודי ברור הקובע אחרת, מרחיקת לכת מבחינת הבנתנו את העצמאות של המנהג לעומת ההלכה התלמודית.

אין ספק כי המהר"ם לא ראה בחרם היישוב המשך של ההלכה התלמודית. יותר מזה, הוא טען שעל אף תוקפו כחקיקה עצמאית של בני העיר (קטגוריה הלכתית שנקבעה על-ידי הגמרא עצמה), השלכותיו של החרם נבדלים מדין התלמוד:

ראיתי שפי' ר"ת ואי שייך בכרגא שרוצ' להיות שייך בכרגא ולתת עמם ולישא בעול כמו בני העיר מכאן ואילך לא מצי מעכב ויהיה כבני העיר ולהכי נהגו לגזור

³¹⁹ דפוס לבוב, תשובה שסט.

³²⁰ כפי שצוין לעיל, כחה של הקהילה לקבוע נורמות התנהגותיות ולכפות אותן על חבריה הוא דינא דגמרא – ראו: תוספתא בבא מציעא יא: כג; ובבא בתרא ח ע"ב בתלמוד הבבלי.

³²¹ דפוס לבוב, תשובה ריד.

הקדמונים חרם של יישוב שעל ידיו כופין ולא מן הדין כדפירש"י (שם ת, עמוד ב)
ורש"י בני העיר להסיע על קיצתן כדלעיל ולעשות את התקנתן...³²²

על פי הגמרא רשאים בני העיר לעכב את מי שאינו שייך ליישובם, כלומר, מי שאינו משלם את מס הגולגולת ("כרגא") יחד עם התושבים, מלישא ולתת בעירם; אלא, שלפי ר"ת אם האחר מוכן להצטרף לתשלום המס, הוא נחשב כאחד מבני העיר ומותר לו להתחרות אתם מסחרית. על פי חרם היישוב זכותם של חברי היישוב למנוע מאחרים להצטרף לקהילתם קיימת גם אם אותם מצטרפים מוכנים להשתתף בחובות הכלכליים של בני העיר. זכות זו היא "לא מן הדין" התלמודי ונובעת אך ורק מן החרם שנהגו קדמונים. היכולת לתקן ולהחרים בעניינים פנימיים היא זכות בסיסית של כל קהילה, זכות המוכרת על-ידי ההלכה התלמודית. על כן יש לחרם היישוב תוקף הלכתי נורמטיבי בלי קשר לתוכן הממשי שלו. אך למרות תוקפו ההלכתי של חרם היישוב בהיותו חקיקה קהילתית מוכרת, תוכנו הסובסטנטיבי אינו כפוף לכללים ולנורמות הסטנדרטיים של ההלכה התלמודית. אם כן, הדיון במקורות תלמודיים ברוב רובן של תשובות המהר"ם המתייחסות לחרם היישוב הוא בגדר רטוריקה וחסר משמעות משפטית.

מעבר להנחתו שמנהג הקהילה מהווה מקור סמכות עצמאי לנהגים שאין להם מקור בספרות ההלכתית הקלסית (או שלפחות אינם נובעים ממקורות קנוניים אלה), טען המהר"ם שיש למנהג תוקף גם במקרים שבה

דקדקנו בטענותיהם ובשרש דבריהם שבה שמעון להחזיק ביישוב מכח מחילה שמחלו לו היישוב כל הקהל שהיו דרים שם באותה שעה. מכח התלמוד אין כח באותה מחילה... אמנם לגבי היתר יישוב נהגו בכל המקומות שמועיל לשון מחילה...³²³

בתשובה זו תאר המהר"ם את המנהג כמקור סמכות מקביל לתלמוד עצמו, שעליו אפשר לסמוך גם כשהוא הפוך לדין הגמרא. למרות שסוג הויתור על בעלות ("מחילה") הנידון אינו תקף על פי דין התלמוד, מנהג הקהילות קובע שהוא תקין ומועיל באשר לחזקת היישוב. מבחינה הלכתית, הדיון התלמודי המלווה את האמירה הזו בתשובה נראה מיותר וחסר משמעות משפטית. על אף שהמהר"ם עצמו אולי לא היה מבחין בכך, אפשר להגדיר את מטרתו כרטורית, כלומר, כנסיון לשלב את המנהג בשיח ההלכתי גם אם הוא אינו מתאים במדויק למערכת המשפטית.

סיכום

במאמר זה ניסיתי לבחון את התייחסותו של המהר"ם מרוטנברג לחרם היישוב בפרט ולמנהגי הקהילות בכלל. ליתר דיוק, ניסיתי להדגים כיצד פוסק הלכה מאמץ ממקורות תלמודיים ומפיק מהם תועלת בהתמודדותו עם מסורות התנהגותיות הרווחות בקרב ציבור בן-זמנו, שאינן מושרשות בהלכה הפורמלית. בהנחה שהקורא מקבל את טענתי כי המהר"ם אכן ראה במנהגי היישוב הלכה מחודשת הנובעת ממקור לא הלכתי, שאליה הוא בחר להתייחס בצורות משפטיות סטנדרטיות בכדי להעניק לה מעמד שווה להלכה התלמודית, הרי שיש לנו כאן תופעה מעניינת ביותר, הדומה במידה מסוימת לדרך בה מדרשי ההלכה העניקו לדינים החורגים מפשט הכתובים מעמד השווה להלכות "דאורייתא". תקוותי שדוגמה זאת וכווני הניתוח שהצעתי יעוררו הרהורים על מקומו ומשמעותו של המנהג בעולמות הדתיים והחילוניים שלנו גם היום.

³²² דפוס לבוב, תשובה עז.

³²³ דפוס פראג, תשובה מו.

Contributors to this Volume

Raphael Dascalu studied in the Pardes Kollel for three years (2006-2009). Prior to coming to Pardes he studied at Yeshivat HaKibbutz Hadati, and at the Havruta program in Hebrew University. He holds a BA in philosophy, comparative religion and classical Hebrew from Sydney University, and a MA in Comparative Religions from Hebrew University. Next year Raphael will be starting his PhD in Judaic Studies at the University of Chicago.

Aleš Koukal studied in Pardes for four years, the last three in the Pardes Kollel. Originally from the Czech Republic, Aleš holds a MA in Comparative Religion from the Prague Charles University, and is currently pursuing his PhD there as well.

Joshua Schwartz studied in the Pardes Kollel for the year of 2008-2009. Joshua grew up in Albany, New York, and graduated from the Joint Program at JTS and Columbia in 2008 with degrees in Religion, Bible and Talmud. Upon graduation Joshua studied over the summer at Yeshivat Hadar. Joshua has worked at various Jewish summer camps and served as an education intern at Jewish Funds for Justice. Joshua will start his doctoral studies at NYU in Hebrew and Judaic Studies.

Haggai Resnikoff studied in the Pardes Kollel for two years (2007-2009). He is a master's candidate at the Hebrew University Talmud department. He has a Yeshiva background from Yeshivat HaKibbutz Hadati in Ein Tsurim and a BA in History from U.C. Berkeley. He is presently interested in examining the halakhic attitudes and sources of Sefer HaSheiltot.

Debbie Jacobson-Maisels studied in the Pardes Kollel during the year of 2008-2009. Debbie is a graduate of the Pardes Educator's Program ('01-'03) and later taught at Chicagoland Jewish High School. Debbie is very interested in the intersection of Jewish learning, self reflection and healing, and has worked in several frame works that promote those values. Originally from London, Debbie and her husband, James (Pardes Faculty), made aliya, and live in Israel today.

Yosef Rosen studied in the Pardes Kollel during the year of 2008-2009. He received his B.A in Philosophy from Yeshiva University and is currently finishing a M.A in Jewish Thought at Hebrew University. His field of focus is medieval Kabbalah and its hermeneutical techniques of rereading Biblical and Rabbinic images. He is presently focused on finishing his thesis, "Constructions of the Feminine in Rabbinic and Zoharic Rain-Myths", and conducting manuscript research on the Zohar for Ronit Meroz at Tel Aviv University. He hopes to begin a PhD in 2010.

Daniel Roth teaches Talmud and directs the Pardes Advanced Scholars Program (Kollel). Daniel also is the coordinator and teacher of the Pardes Peace and Conflict Track. He holds an MA in Talmud from Hebrew University, a B.Ed in Jewish Philosophy and Talmud from Herzog Teachers' College, and is currently pursuing a doctorate in Bar Ilan University's Conflict Resolution and Negotiation Department on the topic of Rabbinic Models of Reconciliation. He is also in the process of training to become a court certified mediator.

Noah Molline studied in Pardes for two years, and this past year he was a Kollel fellow. Noah holds a BA in International Relations, Religion and Judaic Studies from George Washington University. Originally from Chicago, Noah, last year made aliyah, fulfilling a long time dream, next plans to serve in the IDF next year.

Sophie Rapoport graduated from the Pardes Educator's Program ('09), and next year will be teaching at the Heschel High School in New York City. Sophie also taught in the 2008 Pardes Summer Program. Sophie graduated in 2007 from MIT, where she studied mathematics, minored in music, and served as a two-term Hillel President. Sophie also studied for two summers at Yeshivat Hadar.

Livia Lavine studied in the Pardes Kollel during the spring semester of 2009. Born in Palo Alto, California, Livia Levine studied in Migdal Oz at the Stella K. Abraham Beit Midrash for Women. While attending the University of Pennsylvania, Livia taught introductory Talmud classes at Penn Hillel and Akiba High School. After receiving her B.A. in Philosophy, Politics and Economics she worked in management consulting in New York. Recently Livia has studied at the Graduate Program in advanced Talmud at Yeshiva University. Currently she is pursuing her PhD in Business Ethics and Legal Studies as a Class of 1939 Fellow at the Wharton School at the University of Pennsylvania.

Elisha Ancselovits

Rabbi Ancselovits teaches Advanced Halachah in the Pardes Kollel. He received an advanced rabbinic ordination from Yeshiva University, holds a MA in Modern Jewish Studies from Touro College, and studied Medieval Jewish History at Yeshiva University's Bernard Revel Graduate School.

Rachel Furst, teacher of Talmud and Rabbinic Literature, has taught at Torah institutions in Jerusalem, Bet Shemesh, and New York. She is a doctoral candidate in the Department of Jewish History at the Hebrew University of Jerusalem