Responding to the Informer in Medieval Spain

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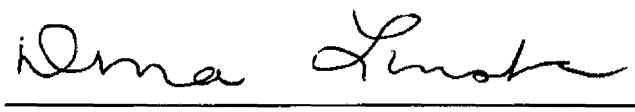

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Thesis Abstract

Title: Responding to the Informer in Medieval Spain

Author: Carey A. Brown

Contribution of this Thesis:
This thesis examines the responsa of three Medieval Spanish rabbis answering to the issue of informers within the Jewish community. While the Talmud addresses the phenomenon of *m'sirut* (informing) directly, the punishments directed against informers do not easily adapt to a Diaspora context. Therefore, the respondents had to search for creative methods within the context of the halakhic tradition in order to confront the informers in their midst. While much of our codes literature as well as secondary sources describe the harshness with which Spanish rabbis reacted to informers in their communities – including sentences of death for well-known informers – this thesis attempts to show that some of the prominent rabbis of Medieval Spain were cautious in their reactions to the informer.

Layout:
Chapter 1: Introduction
Chapter 2: The Ritba; Responsum §131
Chapter 3: The Rashba; *HaMeyuchasot L'Ramban* §240
Chapter 4: The Rosh; Responsum §17:6
Chapter 5: Conclusion

Materials Used:
The focal texts of this thesis are the three responsum of the Ritba, the Rashba, and the Rosh, noted above. In addition, primary Talmudic sources include: Bava Kama 117a, Bava Kama 62a, Bava Kama 119a, Sanhedrin 58b, Avodah Zara 26b, Pesachim 49b, and Bava Kama 117b.

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This thesis is dedicated to my parents, Don and Cindy Brown, whose love and support has nourished me in all that I do.

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II. Historical overview

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IV. Biographical information on respondents

Introduction to the thesis

In several Jewish communities in medieval Spain, unscrupulous and violent men imposed dread on the public and disrupted communal life and judicial procedure. These people, known in Hebrew as *mosrim* (informers) or *malshinim* (slanderers), endangered individual Jews and the Jewish community on a whole. Because of these threats, community leaders took preventative measures and imposed heavy legal sanctions in order to eradicate the threat these criminals presented. Yet their reactions to these men varied depending upon the situation and the perspectives of the individual rabbis. This thesis will examine the reactions of several of prominent rabbinic leaders of 13th and 14th century Christian Spain to the phenomenon of informing in an attempt to understand the ways in which communal leaders were willing to punish the offenders in order to protect the communal welfare.

Historical overview

Informers, within the Jewish community, are those Jews who denounce the Jewish community or individual Jews to a non-Jewish authority for reasons of money, power, or prestige. Beginning with the Talmud, rabbinic opinions are very hostile toward informers. According to BT *Berachot* 28b, one of the reasons the *beit din* of Rabban

Gamliel needed to add the prayer *birkat haminim*[1] in the *amidah* was because informing had become such a problem after the destruction of the Temple.[2] The gravity of the problem of informers was magnified during the Middle Ages because of the social and political conditions under which Jews were living. Especially in Spain, the phenomenon of "Court Jews," beginning in the previous period of Islamic rule, created a situation in which people naturally were enticed to acts of informing for the benefit of their own status and their ascendancy in the country's affairs.[3]

Throughout Christian Spain, Jewish communities were not immune to the plague of violence known throughout the larger society. This was not limited, of course, to the cases of informing. In the Middle Ages, Spanish Jewry dealt with physical "in-fighting" that left the leadership of the *aljamas*[4] in need of greater control over its constituents. We know from responsa literature of many cases of physical coercion and interactions between opposing groups within each community. For example, R. Yehudah b. Asher[5] described a situation during the weekday recitation of *k'riat shema*[6], in which two opposing groups of Jews went to fisticuffs, hitting each other and pulling beards, not

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[1] "For the slanderers let there be no hope: and may all wickedness instantly perish, and all your enemies quickly be destroyed. May you quickly uproot, smash, destroy, and humble the insolent speedily in our day. Blessed are you, Adonai, who smashes His enemies and humbles the insolent."
[2] *Encyclopedia Judaica*. "Informers." CD-ROM Edition. Keter Publishing House, Ltd. Jerusalem. 1997.
[3] *Ibid.*
[4] "Self-governing Jewish or Moorish community in medieval Spain. The appellation also denotes the quarter inhabited by Jews or Moors. Other forms of the word are *aliama* and *alcama*; in Aragonese documents it sometimes appears as *yema*. The term was also used regularly in Sicily, and sometimes in south Italy, to designate the Jewish community. It was declined as a Latin noun, and still appears in Spanish dictionaries." [*Encyclopedia Judaica*. "Aljama."]
[5] Son of R. Asher b. Jehiel [the Rosh], head of the Toledo Jewish community, 14th century.
[6] The portion of the *shacharit* (morning) service in which the *shema* ("Hear O Israel, Adonai is our God, Adonai is One") is read.

stopping until after the reading of the Torah.[7] In addition, it was known in the second half of the 14th century that Jews from Navarre would draw their swords upon leaving the synagogue in order to defend themselves from violent Jews in the community.[8] With such a preponderance of violence, the presence of informers in the community made the situation all the more precarious.

Despite the violent trends that plagued the internal Jewish life in medieval Spain, the Jewish community thrived with regard to their own communal autonomy. During the 13th and 14th centuries, the various Spanish crowns provided the Jewish communities with the ability to partake in decision making with the royal courts and enabled the Jewish communities to adjudicate and sentence their communal members according to Jewish laws and customs. As Yitzhak Baer wrote in his major work, *A History of the Jews in Christian Spain*,

> "The organization of the Jewish communities offered a wide field for independent inner political activity. The national-religious character of the Jewish community in Spain, as well as the specific aspects of its economy, caused the community to assume the functions of a virtually autonomous political body. It was charged with the regulation of the religious, social, juridical and economic life of its members. In matters of jurisprudence the laws of the Torah prevailed. The decisions of the Jewish judges were recognized, confirmed and executed by the Christian kings and officials. The *aljamas* had at their disposal effective means for the enforcement of their ordinances and the maintenance of religious law and order within their confines."[9]

In many of the Spanish states, the king was willing to support the Jewish community in the prosecution and conviction of a Jewish informer. The kingdoms of Aragon and

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[7] Asis, Yom Tov. "Crime and Violence in Jewish Society in Spain." (Heb) *Zion* 50 (1985). pp. 227-228.
[8] *Ibid*, p. 229.
[9] Baer, Yitzhak. *A History of the Jews in Christian Spain*, Vol. 1. (Philadelphia: The Jewish Publication Society, 1961). p. 212

Castile were especially known to give wide jurisdiction to their *aljamas*. "The powers of criminal jurisdiction vested in the Jews of Castile seem to have reached their widest extent in the fourteenth century and exceeded those granted Jews in any other country. They were empowered to impose a sentence of death, not only on informers, but on murderers and adulterers as well."[10] In fact, the preponderance of Jewish informers within Spanish society was so well known that the Hebrew term *malshin* was adapted into the Spanish language as "*malsin*," "*malsindad*," and "*malsineria*."[11] A system of fines and forfeitures was elaborated by the crown for a series of listed offenses. For example, it was recorded that "one who swears falsely must pay one hundred *sueldos* to the king." Violations of Jewish law, even of religious ceremonies, were punished by the royal authorities. Through his officials, the king kept a close watch over the conduct of his Jewish subjects for the purpose of collecting any fines for which they might be liable.[12]

While the Jewish community often received the tacit support of the crown to adjudicate punishments upon their informers, the *aljamas* were faced with the challenge of their own Jewish legal tradition because of the *halakhic* (legal) difficulties adjudicating capital punishment. As a general rule it was assumed that the accused person would have the

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[10] *Ibid.* p. 315.

[11] Epstein, Isidore. The "Responsa" of Rabbi Solomon Ben Adreth of Barcelona (1235-1310) As a Source of the Hisotry of Spain. (New York: KTAV Publishing House, Inc., 1968). p. 111.
Also found in an entry of a dictionary of Castillian Spanish: "MALSÍN, 'delator', 'cizañero', del hebreo *malsin* 'denunciador', derivado de *lasón* 'lengua', 'lenguaje'. [Corominas, J. Diccionario Crítico Etimológico de la Lengua Castellana, Volumen III L-E. (Bern, Switzerland: A. Francke AG. Bern, Switzerland, 1954). p. 208.]

[12] Neuman, Abraham A. *The Jews in Spain – Their Social, Political and Cultural Life During the Middle Ages*. Vol. 1 and 2. (Philadelphia: The Jewish Publication Society, 1942). p. 129.

privilege of being present during his hearing. But in the case of an informer, a trial could be conducted and the verdict pronounced in the absence of the accused.

General procedural features of penal law in the Talmud proscribed that every precaution was taken to "exclude the possibility that by condemning an innocent man, the witnesses and the judge should themselves incur the guilt of the judicial murder."[13]

> "At the opening of the court a solemn charge was given to the witnesses, cautioning them against testifying to anything that is their own inference, or that they know only at second hand, however trustworthy they believe the informant to be. They are bidden to remember that where only property is at stake, errors can be redressed, but when a man's life is involved his blood and that of his posterity sticks to the author of his death to the last human generation; but are urged not to be deterred by this reflection from giving testimony."[14]

Although it was difficult to carry out Jewish law against these informers, especially where it involved capital punishment, it was regarded as important to "cleanse away every *malshin* and informer who will be found in any one of the cities or to pour out evil on him in accordance with his wickedness in the judgment of the commissioners and to make him known as a *malshin* and drive him forth."[15] It was a known practice within these communities to sentence *mosrim* to the death penalty. We know from the responsa of R. Judah ben Asher (the son of the Rosh) that there is a memory in Spain of the rabbi from Lucena who had an informer stoned to death during *neilah* of Yom Kippur that fell on Shabbat.[16]

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[13] Horowitz, George. *The Spirit of Jewish Law*. (New York: Central Book Company, 1973). p. 640.
[14] *Ibid.* p. 641.
[15] Finkelstein, Louis. *Jewish Self-Government in the Middle Ages*. (New York: The Jewish Theological Seminary of America, 1924). p. 339.
[16] Kaufman, D. "Jewish Informers in the Middle Ages." *Jewish Quarterly Review*. Vol. VIII. (1896): p. 218, footnote #2.

> "Authorities in the halakha, in expounding the effective law, sought a basis for it [capital punishment] in Talmudic jurisprudence. Scholarly personalities whom we are wont to regard as leading a life of piety and erudition, far removed from the affairs of the world, found it in their hearts to wield this cruel weapon against delators. The execution of the sentence was left to the officers of the crown, but depended upon the political powers of the place and the influence of the particular individuals involved in the affair. The *aljamas* were generally required to pay a sum of money to the crown as a wergild for the life of the executed, a fact which in itself impugns the legality of such trials."[17]

The degree to which the informer endangered the Jewish community, however, often necessitated that the rabbinic authorities to find creative solutions to their halakhic predicaments. As the historian Isadore Epstein wrote,

> "Informers were the plague and canker of Jewish medieval society. Their sinister activities endangered Jewish life and property... To eradicate this evil it was, therefore, necessary to adopt the strictest measures against unprincipled *delatores*. They were to be regarded as pariahs and outlaws. Their life was to be forfeit. They were to be treated with utmost severity, no pity was to be shown to them, no quarter to be given them; no penalty was to be too great for these culprits. Even the death sentence was to be passed on these wretched miscreants without hesitation, without compunction, and even without affording them the privilege accorded to ordinary murderers, to defend themselves."[18]

Outside of the death penalty, the traditional and perhaps strongest sanction available to Jewish authorities was the *herem* or excommunication ban.

> "The character and severity of the ban varied from place to place and according to the type of transgression and the extent of the sanction deemed necessary. At times, the severity of the ban extended to complete severance of relationships with the transgressor: no one was permitted to speak to him, to engage in any business dealings with him, or to marry him or any member of his household. The use of this sanction was necessary because the Jewish authorities lacked the typical enforcement powers associated with sovereignty. It was an effective measure and a strong deterrent, in view of the conditions of life and society of the Jewish population. The Jewish community lived as an autonomous body, an island unto itself, with all the members of that body dependent upon one another, and frequently even earning their livelihood from one another. One upon whom a ban was pronounced was excluded from the communal Jewish religious and civic

[17] Baer, Vol. 1, p. 233.
[18] Epstein, pp. 49-50

life. The far reaching effects of this sanction led many halakhic authorities to refrain from using it except for the most serious and extreme cases."[19]

The punishment of excommunication was used frequently by the rabbis involved in ruling on cases of informers. In later communities (15th century), formal *takkanot* were even established to prevent the plague of informing from spreading any further into the *aljama*. In 1432, a synod of Castilian Jews gathered at the capital, Valladolid, to frame a constitution for the conduct of the Jews of the land:

> "In previous times there were ordained in the holy communities of the dominion of our lord) the King, general *takkanot* and regulations which were to be observed by all the communities and those who were at their head, so that they might establish *takkanot* and choose proper paths in which all the people of the communities might walk, thus was the Torah established on its proper foundation and every community was settled in quiet. For some time past, however, for various reasons no general *takkanah* has been enacted by means of which the communities might be led, as a result of which much harm has befallen the communities and there has come about disorder in their management. Therefore have we, the aforementioned delegates by virtue of the authority give by our lord, the King to the worthy Rabbi, Don Abraham, and by virtue of the authority given is by our Sages to attend to the arrangements of our own communities, we have established this ordinance and agreement.
>
> "If any Jew or Jewess is alleged to have caused the apprehension of another or the seizure of his property by some Gentile man or woman, but the matter is not substantiated by witnesses being merely supported by the weight of circumstantial evidence, the judge shall have the duty with the counsel of the Rabbi, to order the defamer apprehended and punished bodily in accordance with what seems proper to the scholars so far as they may (legally).
>
> "If the alleged defamation is confirmed by one witnesses (*sic*) as well as incriminating circumstances, or if he confesses to it, there shall be branded on his brow the word *Malshin*.
>
> "If the crime is proven through the testimony of two witnesses, the defamed shall receive for the first offense one hundred lashes, and be driven from the city in accordance with the decision of the Rabbi and the judges and the leaders of the city above-mentioned. If he is guilty of a third offense, as established by the

[19] Elon, Menachem. *Jewish Law: History, Sources, Principles* (HaMishpat Halvri). Translated by Bernard Auerbach and Melvin J. Sykes. (Philadelphia: The Jewish Publication Society, 1994), pp. 11-12.

> testimony of two proper witnesses, the Rabbi of the Court may in accordance with Jewish law, order his death through the judiciary of our lord, the King.
> If he cannot be put to death, or branded on the brow, or flogged in the above-mentioned manner, they shall denounce him in every place as an informer and a defamer so that all Jews may keep aloof from him. He shall be declared in all Israel as the 'Man of Belial, the man of blood,' no one shall permit him to marry his daughter nor shall he be accepted in the Congregation of Israel for any religious matter so long as he resists the execution of justice as here ordained.
> This punishment shall not apply to one who gives information to our lord, the King, for his benefit even though that bring (*sic*) harm on some Jew. Such a one is not to be called either a defamer or an informer since it is the duty of all Jews to look after the service of the King.
>
> "If however the informer of the King makes false accusations against another Jew, he is to be punished severely because he lied to the King, and he is a false witness and a defamer. For this reason every possible punishment should be inflicted upon him."[20]

Interestingly, however, Finkelstein noted that there is a strong possibility that these *takkanot* were never put into effect. "Perhaps the government was averse to them, or it may be that the communities whose plenipotentiaries had agreed on them, refused to accept them. In any case, we do not hear anything more of these ordinances."[21]

The challenges faced by Jewish communities in dealing with the *moser* (singular of "*mosrim*") were not solely a Sephardic reality. The problems extended to Ashkenaz during the same time period and we know of correspondence between R. Solomon b. Adret (the "Rashba")[22] and R. Meir of Rothenburg[23] as the Rashba was attempting to find rabbinic support from his eastern colleagues in dealing with this issue. The case[24] presented before the Rashba dealt with an informer in Barcelona. The king wanted this

[20] Finkelstein, pp. 348-354.
[21] *Ibid.* p. 103
[22] Barcelona, c. 1235-1310.
[23] Meir ben Baruch of Rothenburg, 1215-1293.
[24] This case was discussed in the Kaufman article in *JQR* and is cited as having been found in a manuscript from "The Codex Pococke 280b" in Oxford (No. 2218), not the Rashba's standard compendium of responsa.

informer sentenced to death, based upon the recommendations of two brothers, Joseph and Moses Abrabalia, who were court Jews. Both brothers had the ear of the king, and they drew his attention to the machinations of the "evil-doer of Barcelona,"[25] who was deserving of death. At the king's command he was suddenly seized, and proceedings instituted against him. The rabbi who had been put in charge of this case, R. Jonah of Girona,[26] asked the Rashba to help him in the investigation, but the Rashba "would only consent on the condition of an amicable arrangement in the matter: he saw but too clearly the fatal denouement of the proceedings, should justice be allowed to run its course."[27] The rabbis tried to stall the case over time, but the King forced them to come before him with their decision.

> "...Rabbi Jonah Girundi and Rabbi Solomon Ibn Adret felt themselves compelled with heavy hearts to allow justice to run her course, and to deliver up the guilty one, who had long forfeited his life, to the king and his judges. Even the death of the chief judge was unable to save him, for the king appointed a successor, who had the sentence carried out. Upon the square in front of the Jewish burial ground in Barcelona the informer was executed, the veins of his two arms having been opened."[28]

The Rashba placed the matter before the Rabbis of northern France, questioning whether the sentence of death passed upon the informer of Barcelona was justified according to the Talmud. The only preserved answer is that of the respected German scholar and

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[25] "Out of Barcelona came the miserable man who, evidently towards the close of King James' life, became a source of danger, by reason of his informations, to the community of Catalonia. Descended from a respected family, of a wealthy house, and having lost his possessions early in life, he betook himself to the declining road of criminal ambition, the object of which is to gain power as the prize of wickedness, and to inspire terror when it is no longer possible to command respect... King James I died... As soon as the Jewish communities of his three kingdoms, Catalonia, Valencia, and Aragon, were suddenly bidden to the presence of the new king, they got scent of the treachery which could have proceeded from no one but the informer in Barcelona." Kaufman, pp. 221-222

[26] Rabbi Jonah ben Abraham Gerondi. c. 1200-1263

[27] Kaufman, p. 223

[28] *Ibid*, p. 224

communal leader. Rabbi Meir of Rothenburg, who ranked himself clearly and decidedly on the side of Ibn Adret:

> "Your decision is correct. A person who turned informer against his neighbor, and repeated this nefarious practice on three different occasions, according to the testimony of witnesses, should be put to death, and he who hastened to execute him is to be commended. Although Maimonides ruled that we might not put an informer to death after he has already committed his nefarious deed, this law applies to a person who turned informer only on a single occasion. A habitual informer, however, one who repeated his criminal practice on three different occasions, should unquestionably be put to death even after the criminal deed was committed. Your words, therefore, are correct in every respect."[29]

In addition, we know that as the problem extended into other locations in Europe in the late Middle Ages, specifically into Poland, the Polish rabbis looked to the Spanish responsa literature of the 13th-15th centuries as a guide to deal with their own internal problems. Jacob Katz describes this situation, in which the social realities of the Jewish community required that the rabbis look in new directions.

> "In order to protect the community from lawless individuals, confirmed criminals, and government informers, who all endangered the existence of the community and the life and property of individuals, Polish Jewry reinstated the law of *moser* (informer) as it had existed in Spain. Though there may have been cases of death sentences issued by Jewish authorities in medieval Ashkenaz, almost no trace of these had survived in the halakhic literature. But socio-political conditions similar to those that had applied in Spain now led the sages of Poland to turn to the Sephardic sources in which the practical aspects of such matters had been discussed. And indeed, the death sentence as well as corporal punishment was decreed by communal leaders in secret, and sometimes even with the acquiescence of the authorities. Now, recognized rabbinical figures ruled that a *moser* could be subjected to corporal punishment, maimed, or even executed. We have clear evidence of such sentences being carried out with the approval of the great rabbis, although there was also a certain recoil from this and an attempt to arrange for gentile courts to carry out the despicable deed. In any case, a formalized judicial procedure for capital cases never developed anywhere. It may also be noted here that by their very nature, the laws of *moser* were applied not by a regular court, but by a sort of "underground" court in which the accused was

[29] Kaufman, p. 225.

judged in absentia and without the wealth of fine safeguards that the theoretical judicial tradition of the Halakhah had developed."[30]

It is difficult for us in the 21st century to understand the full extent to which the rabbis of the *aljamas* we able to control their communities through the prescribed sanctions and punishments because we do not know how often these sentences were carried out. The best clue that we have to understanding the historical realia of Jewish life in medieval Christian Spain comes from the responsa literature. "This complex and glorious legal edifice... concentrating especially on economics, trade, and society, was an important expression of the autonomy of the Jewish community of the Middle Ages and a demonstration of the intellectual prowess of its leaders. This autonomy enabled the Jewish community to exist apart from the surrounding hostile Gentile environment until the modern period."[31] Yet, of course, the reliance on responsa literature cannot give us a complete understanding of the period with certain historical accuracy. Edward Fram made this point in his book on Jewish life in Poland in the 16th and 17th centuries: "...even when a text has been reconstructed to represent what left the hand of an author, the historical use of responsa remains fraught with problems. The entire genre of responsa literature is dedicated to dealing with exceptions. There was little need to ask a prominent rabbi about well known customs that had been practiced for generations. Even if a rabbi were asked such a question, he had little reason to include it in a collection for posterity. The unfamiliar was noteworthy. Yet what was novel may not have pervaded

[30] Katz, Jacob. *Tradition and Crisis: Jewish Society at the End of the Middle Ages.* Translated by Bernard Dov Cooperman. (New York: Shocken Books, 1993). pp. 83-84

[31] Ta-Shma, Israel. "Rabbinic Literature in the Middle Ages: 1000-1492." *The Oxford Handbook of Jewish Studies.* (New York: Oxford University Press, Inc, 2002). p. 221.

society."[32] Nevertheless, the responsa literature is what we have to glean from in our study of Jewish communal life in the Middle Ages.

Principal Talmudic sources on informers

Each of the respondents relies on his own collection of Talmudic and codes texts to support his arguments. Before we begin the examination of their responsa, however, it is critical that we become familiar with the basic Talmudic principles to which the rabbis refer in their works. Below are summaries of the principle Talmudic texts used by the three respondents. The full Hebrew text of each *sugya* can be found in the Appendix.

Sugyot specifically involving informers:

Bava Kama 117a

In this *sugya*, an informer comes before Rav to tell him that he is going to show his fellow's property to the officers of the king. Rav tells him not to show it, yet the informer remains steadfast. Rav Kahana, who overheard the conversation, killed the informer on the spot.

Bava Kama 62a

Here a question is asked whether the Rabbis applied *takkanat nigzal* (the remedy for the victim of a theft) in the case of an informer. Within their discussion, they rule that although an informer can be corporally punished, his money cannot be given to the court as a punishment for the sake of his worthy offspring who merit its inheritance.

Bava Kama 119a

This *sugya* presents a disagreement between Rav Huna and Rav Yehudah regarding the permissibility of destroying the property of an informer. Rav Huna says that it is permitted to destroy his property for the reasoning that just as it is permitted to kill an informer, so too it must be permitted to destroy his property. Rav Yehudah says that one cannot destroy his property because it is possible that he will have righteous descendents.

[32] Fram, Edward. *Ideals Face Reality: Jewish Law and Life in Poland, 1550-1655*. (Cincinnati: Hebrew Union College Press, 1997), p. 9.

Sugyot not specifically involving informers, but used frequently by the respondents and the codifiers as parallels:

Sanhedrin 58b

In this case, Rav Huna cuts off the hand of a man who was constantly striking other people. It is an example of the principle whereby the court has the authority to impose harsh penalties in order to enforce the law when there is an extraordinary need.

Avodah Zara 26b

A *baraita* about distinguishing between *mumrim* ("renegade" Jews) and *minim* (heretics). As a punishment, these people would be lowered into pits and not raised back up. If one of these criminals was trapped in a pit, he should not be rescued.

Pesachim 49b

This *sugya* mentions a statement from R. Elazar who says that it is permissible to stab an *am ha'aretz* to death, even on Yom Kippur that coincides with Shabbat. This *am ha'aretz* is specifically someone involved in violence. It is necessary to kill him at any time in order to protect the lives of future victims.

Bava Kama 117b

Here the Gemara relates an incident about a man who was holding a silver cup for his fellow. Theives came upon him and stole the cup. He gave it to them to save himself and Rabbah exempted him from paying while Abaye said that he was liable because he "saved himself with the property of his fellow."

Biographical Information About Respondents

The main focus of this thesis is an examination of selections from the responsa literature of three of the major respondents of Spanish Jewry in the 13th and 14th centuries: Rabbis Yom Tov ben Abraham Ishbili – "The Ritba," 1250-1330, Solomon ben Abraham Adret – "The Rashba," 1235-1310, and Asher ben Jehiel – "The Rosh," 1250-1327. Each of these rabbis, because of their leadership positions within the Spanish Jewish communities, was faced with the serious problem of informing. The different ways in which these men reacted to the situations created by these *mosrim* is the focal point of this thesis. However, before jumping in to analyze the respondents' rulings, let us briefly acquaint ourselves with their biographies.

Rabbi Yom Tov ben Abraham Ishbili – "The Ritba"

The Ritba lived from 1250 to 1330. He was known in the Kingdom of Aragon as a *hakham* (sage) and a *dayan* (judge) in the community of Saragossa, according to an official document of the kingdom from the year 1280.[33] As a young man he studied in Barcelona under the rabbi Solomon Ibn Adret (the Rashba). After the death of his teacher he was regarded as the spiritual leader of Spanish Jewry.[34] "Even during the lifetime of his teachers, questions were addressed to him for he was regarded as among the leading Spanish rabbis. When the king's bailiff in Saragossa asked his opinion about the protests of the local Jews against the excessive privileges of the wealthy families Alconstantini and Eleazar, he, despite his youth, condemned their domineering behavior

[33] *Encyclopedia Judaica*, "Ritba"
[34] *Ibid.*

and abuses, whereupon they attacked and seriously injured him."[35] In addition to his responsa collection, The Ritba is perhaps best known for his *novellae*[36] to the Talmud called *Hiddushei HaRitba*.

Rabbi Solomon ben Abraham Adret – "The Rashba"

The Rashba was born to a wealthy family in Barcelona c. 1235 and studied principally under R. Jonah b. Abraham Gerondi as well as under Nahmanides. While young, he was active in financial matters and even included the king of Aragon among his debtors.[37] He withdrew from the business world and held the position of rabbi of Barcelona for over 40 years. "Adret was recognized as the leading figure in Spanish Jewry before he was 40 and his opinions carried weight far beyond the frontiers of Spain. He was a man of great accomplishments, strong character, and incorruptible judgment. Not long after he entered upon his office as rabbi, he vigorously defended an orphan against leading court Jews and the powerful Christian nobles who supported them. Yet, he was a humble man, with a warm, sensitive heart. Pedro III of Aragon submitted a number of complicated cases to him for adjudication that had arisen between Jews of different communities."[38] His responsa are significant both in number (3,500 have been printed)[39] and in the breadth in which they describe Jewish life in Spain in the 13th century. He died around 1310.

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[35] *Ibid.*
[36] A method of study of the rabbinic literature, focusing on contradictions within the Talmud, in order to derive new meanings from the Talmud and other rabbinic texts to clarify *halakha*. It began as a movement in 12th century Franco-Germany and spread to Spain in the 13th century.
[37] *Encyclopedia Judaica*, "Rashba"
[38] *Ibid.*
[39] *Ibid.*

Rabbi Asher ben Jehiel – "The Rosh"

The Rosh, who lived from 1250-1327, began his life in Ashkenaz. He spent time in France, Cologne, Koblenz, and Worms, where he studied with his teacher R. Meir of Rothenburg. When R. Meir was imprisoned, the Rosh became the acknowledged leader of German Jewry.[40] In 1303 he left Germany for Barcelona, where he was welcomed by the Rashba, and subsequently made rabbi of Toledo in 1305. "He had been invited to come to Toledo by the pietists of Castile, who realized that their country needed a teacher and leader of his stature. R. Asher brought with him Ibn Adret's ban on secular learning and on those who treated the teachings of the sages with levity. Utterly different though he was from the Spanish Jews, R. Asher soon made himself at home in Castile, and within a short time was recognized not only formally but in fact as the leading religious authority of the entire country."[41] He is regarded as one of the finest halakhic authorities for his work in joining the German and French codifiers to Spanish halakhah.

[40] *Encyclopedia Judaica*. "Rosh"
[41] Finkelstein, p. 317.

Chapter Two – The Ritba; Responsum §131

I. Summary of the responsum

II. Translation of the responsum

III. Interplay between Jewish and Secular Courts in medieval Spain

IV. Phenomenon of *takkanot* and *haskamot* – communal enactments

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Summary of the Responsum

The case of the informer, "Shaul," in the Castilian town of Bejar presented in the Ritba's responsum (§131) sheds an interesting light on the Ritba's perception of Jewish relations with the secular government and its influence on the Jewish law of the Middle Ages in Spain. The editor of the critical edition (1959) of this responsum, the 20th century Israeli-scholar Yosef Kafah, understood the importance of the interplay between the king, Ferdinand IV of Castile, and the rabbi, when he inserted the following note in the beginning of the responsum:

> "This responsum indicates that our Rabbi was the most authorized in the eyes of the government of the kingdom of Spain. For Shaul under discussion complained before the King regarding the judge who passed judgment upon him. And the King handed over the matter to the opinion of our rabbi. Thus we learn that the judges of Israel had complete authority to adjudicate according to the laws of Torah, even up to death."

The Ritba is presented with the case of the defendant, Shaul, who was originally tried in the rabbinic court of the town of Bejar.[42] In his original case, he was sentenced to the corporal punishment of having his hand and tongue cut off, his invalidation as a witness,

[42] A Spanish city in Western Castille

as well as expulsion from the town. Shaul appealed directly to the King, claiming that the court did not follow proper halakhic procedure. His complaints included: a lack of a sufficient number of witnesses, the use of inadmissible witnesses – such as relatives or biased parties, and the sentencing of inappropriate corporal punishments. Shaul submitted his appeal to the king, who in turn looked to the Ritba for advice on how to rule on the appeal. The first thing that the Ritba did in his direct response to the King (beginning with the words, "And now, lord King, his majesty..."), was defend the ruling of the original judge. This seems to be an appeasement of the king by supporting his appointment of this rabbinic judge, for the Ritba could not very well reject the authority of the King's justice system and expect to maintain his leadership status. Thus we find the Ritba's description of the judge as "a man held to be in this land as a wise man, and a man of truth, in whom the judges in our land trust." It is also plausible that the Ritba was interested in defending his fellow Jewish judge to the King, to whom his own reputation was inextricably tied. However, the Ritba is quick not to disqualify Shaul's legal claims; rather, he supports the judge's ruling by focusing on the importance of making an example of Shaul's case. The Ritba writes, "... we adjudicate a case for reasons of setting an example, sometimes without warning, when we see a man who is accustomed to sinning and he is prepared to return to sinning."

While in the end the Ritba does justify the judge's ruling because it serves as a warning to others in order to set an example, he conveys his displeasure with the judge for expelling him from the city. The Ritba shows concern for Shaul's family, who will be affected by this harsh decree, and even commands "the community that gave him life to

provide for his family after he already accepted these rulings." The Ritba looks to the possibility of repentance as the best possible outcome in Shaul's case.

Translation: Ritba Responsum §131

Note: Any footnote text appearing in [brackets] is from an external editor.

*After this introduction,[43] I now return to the law and say that I heard the complaints of the above mentioned Shaul. The details [of his case] have eight parts:

1. The first [claim] is that he was judged without the complainants appearing with him [in court]. They summoned him and made charges against him. [He believes this is wrong], for no man can be tried unless the litigants hear his claims.
2. The second [claim] is that none of the testimonies that came out about him were read before him [in court] so that he might reply to them and invalidate them.
3. Third, he claims that there was an acceptance of disqualified testimony, since the people were related to one another. Moreover, these people [the relatives] were among the complainants and involved parties. This is invalid according to the law of our Torah.
4. Fourth – They accepted testimony by people who did not complain about him at the time that the excommunication was cast, so that all who complained about him would see it.
5. Fifth – Within this testimony that came out regarding him, there is wicked [libelous] testimony about what he did to the people who already forgave him for those beatings.

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* [This responsum indicates that our rabbi {the Ritba} was the most authorized in the eyes of the government of the kingdom of Spain. For Shaul, [the man] under discussion, complained before the King regarding the judge who passed judgment upon him. And the King handed over the matter to the opinion of our rabbi. Thus we learn that the judges of Israel had complete authority to adjudicate according to the laws of Torah, even up to death.]

[43] The introduction to which the Ritba refers here is missing from the manuscript.

6. Sixth – Even if these testimonies were true, according to such testimonies, the law does not prescribe that one would have to cut off his hand and punish him corporally. And all the more so, there was a *takkanah* in "Bejar" regarding the punishment of one who hits or pulls, etc. He was only obligated according to this [specific] *takkanah*.
7. Seventh – Our law does not allow a man to be punished by two [separate] laws or be liable for two evil deeds.[44]
8. Eighth – After the ruling, he asked the judge to give him an appeal, either to approach his majesty (the King) or the rabbi, Don Ashtrok, and the judge did not want this.

The judge responded to the first and second claims, [saying] the only place that the complaints of a community can be brought to justice is [before a judge] of their [own] city. It was enough that they showed the rabbi, Don Ashtrok, their complaints. The aforementioned rabbi said to him that if he [Don Ashtrok] had an answer to give to them, he should respond, but he did not want to. Also, the judge said to him [Shaul] before the ruling, when the complaints were read before him, that if he has a claim against them [the witnesses], he should organize his claims and [then] he will judge them. But, did not want to answer anything until the complainants came before him. After this how could they read the testimony before him?

[44] [And the judge ruled that he must cut off his hand, be disqualified as a witness, and be expelled from the district.]

This was not all. He mentioned and showed [Shaul] the signatures of the witnesses [testifying that] before the judgment, they had agreed that he would be deliberate not to judge him until the man, *Ploni*, returned the ledger from the King. However, he didn't want to wait and requested that he be judged immediately. Shaul was of the opinion that [the judge] only wanted to judge him on the issue of the false charges of murder by which he had been captured.

Regarding the third complaint, he said that the *mukdamin*[45] commanded [the judge] to excommunicate him and to take the [invalid] testimony as law. They sent him to the judge according to the testimony that was given and he ruled on those testimonies according to what they sent him. And he [the judge] did not have to be careful about the *mukdamin* as if they had done something invalid. In addition, there is a *takkanah* from Bejar [saying] that the whole community accepts the testimony of the *mukdamin*. All [the people] near and far signed on all of these things and they do not need to reconsider this matter after they have accepted it.

Regarding the fourth and the fifth, he said that he commanded the *mukdamin* to accept these testimonies, as we said, regarding the evil that they [the complainants] said about him, to clarify his evilness, and he [the judge] accepted the testimonies that they [the *mukdamin*] sent him.

[45] Literally, those who preceeded. The communal leaders who often carried out judicial tasks.

Regarding the sixth and the seventh, he said that one who is accustomed to doing such evils is obligated to be punished by these punishments, even death, according to the view of the judge. This is not all. Rather, whatever was done in the council of the sages and [according to] the customs of the Rabbis, even if these counselors erred, he has no complaint for he must trust them. All the more so when they did not err.

And regarding the eighth, he said that he did give an appeal on his judgment and this can be seen from the witnesses' signatures. Thus their words were weakened.

And now, lord King, his majesty, I say that even had there been an error in this judgment, there is no guilt regarding the judge's punishment to cut off his hand and tongue[46] or to invalidate his testimony. This is because of the spoken claim and what was exhibited in writing, for what he did was based on the advice of a man known in this land as a wise man, a man of truth, in whom the judges in our land trust. Besides this, I speak of the essence of the law, for [regarding what] Shaul says – that the complainants did not come before him nor give testimony before him, that there was testimony [given] without complainants, that many of those who were hit forgave him beforehand, and regarding the beatings and deceit, there is no corporal punishment in our Torah – for all of these things are [within the] law, that is strict law, in order to appease and judge between man and his fellow, either individual or many.

[46] [It seems for this case that they did not cut out his tongue because no complaint (of this sort) was mentioned]

But [in such] cases in which the judge creates a warning example to compel many to correct the majority and remove wickedness from the land and make a fence around the Torah, none of this is prevented in our law, for the purpose of the law is not for the sake of those who were injured that we should be strict about it.[47] Rather, it is for the rest of the people so that those who are accustomed to doing evil do not become habituated to doing this and the remainder [of the people] will hear and become frightened. If he sins and they forgive him and he continues in his oppression[48] he becomes obligated and made an example. The judge is allowed to adjudicate in such a manner, without any complainant, because he is the father of the public and he is obligated to correct this [situation], just as he is obligated to "correct any impediments in the roads,"[49] so that people will not become damaged. And we have already found this with a certain judge, one of our sages, *z"l*, who cut off the hand of a man who is accustomed to hitting people.[50]

The public *takkanah* that Shimon[51] claims, [regarding] the punishment of flogging, has no place in this situation, because the situation was done to set an example for those who are accustomed to repeat these evils two or three times, for the reason that I said [above].

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[47] [It is possible that our rabbi intended this to hide the claim of Shaul, that there were no testimonies put before him. And had it not been for this reason, he would have needed to accept the testimony before a litigant despite it being from a relative. Perhaps we have evidence of this from "*Hacham Tzvi*" ch. 11 and "*huva b'sha'ar hamelech*" ch. 37. For also, according to custom, to accept witnesses from the community, you need to accept testimony before the litigant.]

[48] [Perhaps he needs to say in his capriciousness, and it is possible from the language of I Samuel 12:3, "Whom have I defrauded?"]

[49] Mishnah Shekalim 1:1

[50] BT Sanhedrin 58b

[51] This seems to be a manuscript error. It seems to me that it should read "Shaul."

And regarding what he said about not punishing a man [simultaneously] for two laws, this cannot be, because we judge [here] for two transgressions.[52] Also, when the adjudication is for the reason of setting an example, as we said, it should be ruled. And we ruled in a number of cases to [punish in order to] set an example for the people. Furthermore, according to what they testified about him that he was held to be a *moser* and a *malshin* according to what was written in the testimony and what the community wrote, the *halakha* gives room to our hands even to kill[53] one who is held to be a *moser* or a *malshin* or a trouble to the community. How much more so this one who had testimony given against him that associates him with other transgressions – taking a bribe or giving false testimony – as were written by the community, and hits people, etc... One whom it is permitted to kill, how much more so it is permitted to judge him on one of his limbs according to [his] transgressions, because killing is the harshest of all [punishments].

And [regarding] what Shaul said, accepting the testimonies and the decree of the community they made concerning him, [that this was invalid] because it was signed by relatives and involved parties: Here the judge brought out the written agreement, which the entire community accepted upon themselves: the *mukdamin* could accept relatives [as witnesses] in all matters. In addition, in a case such as this, where there is a communal complaint and we set an example, if we were to invalidate the testimony of involved parties like other courts – that invalidate any involved party or biased witness – the

[52] BT Kettubot 32b

[53] [See Beit Yosef – Hoshen Mishpat 2; in the name of *n'mukei yosef:* only the Sanhedrin is able to try capital cases. -Rav Huna in "*ketz yado*" (BT San. 58b) – this was a lesser punishment, but it was not to kill him. -Rabbi Elazar in BT Bava Metziah 83b – teaching not to kill.]

community would never be able to punish any informer or oppressor among the community because everyone is a biased party. Thus it has become custom to do these things regarding witnesses from the community, sometimes even with relatives.[54]

For this reason, we adjudicate a case for reasons of setting an example, sometimes without warning, when we see a man who is accustomed to sinning and he is prepared to return to sinning. He does not receive a warning.

Regarding Shaul's complaint that the judge invalidated his testimony after the community legally presumed him in informing: The informer's testimony is invalid according to our law,[55] more so if it became clear that he gave false testimony.

Regarding his complaint that he was not give an appeal, the judge showed him the signed testimony that was given him. I also asked people in the kingdom of Castile and they said that it is not the custom of the rabbi to give an appeal in these cases, because the king already gave his power and authority and he stands in his place.

From all of these angles there is no guilt and punishment upon the judge if he gave this warning as a way of setting an example for fear of heaven, *tikkun haolam*, and [making] a

[54] [The Rosh wrote similarly in his responsa (5:14) and Rabbeinu Yeruham (2:1), and in the responsa of Rashba – brought in the Beit Yosef and Shulchan Aruch (Hoshen Mishpat 37:24). The Ramban wrote in his responsa (240) – appearing in Beit Yosef (Hoshen Mishpat 2) that you only need complete witnesses in cases of Torah law, but for the sake of *tikkun haolam*, communal welfare, if it is a pressing time, you can rule, even by means of relatives or hearsay.]

[55] [Thus the Rambam wrote in *Hilchot Eidut* 11:10 (and the gleanings of Ashri).]

fence around the religion.[56] For if he did it in heartlessness and not for the sake of God in heaven, who sees into the heart – He will extract from him. And woe to his soul, if he recompensed his soul with evil to be a sinner with the blood of his soul.

However, lord King, his majesty, I see that the judge has done more than the counsel of the sage that advised him, and that is to expel him and his family from the country in which he dwells and allow his blood to those who find him.

This is an additional evil. Being that he wanted to let him live and not kill him according to *din moser*, if we expel him from the land in which he dwells and from his family and those who know him, what will this one do whose hand was cut off? He will be made idle at his work. We cut off his livelihood. Also, I have heard that there are dependents hanging upon him. Thus it seems that it is fitting to cancel this decree, and also to command the community that gave him life to provide for his family after he already accepted these rulings. He should also live in a "place of evil" so that those who remain will always see and be afraid.

Thus, indeed they should give him a warning that he should guard himself from all evil things, and that he should have no dealings with anyone who might be suspect in *malshinut* and *m'sira*, and that he will walk in humility in all of his dealings. If he transgresses in this, continue to punish him. Perhaps from this he will come back in repentance, for God's actions are merciful, for He is merciful and gracious.

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[56] The Rambam wrote this in *Hilchot Sanhedrin* 24:10.

Interplay between Jewish and Secular Courts in Medieval Spain

Shaul appealed to the King after his conviction by the *beit din* of Rabbi Ashtrok. As a sign of his recognition of Jewish autonomy, the king appealed to the Ritba for advice. The Ritba was thus placed in an interesting situation. On the one hand, he wanted to be a faithful subject to the king and was concerned about communal relations between the Jewish community and the Castilian government. On the other hand, he had to stay faithful to the *halakha* and protect Jewish individuals and the Jewish community on the whole. The tension between these two legal realities was something that many of the Spanish rabbis had to deal with, and a concern that we see clearly in this responsum of the Ritba. Yitzhak Baer describes this paradox:

> "Due process of law, as known in Spain, could find little support in Talmudic halakha. It was influenced rather by the inquisitorial procedures of Roman and Canon law as adopted for use in the courtrooms of Christian Europe in the 13th century. The expansion of the prerogatives of the *aljamas* into the field of criminal jurisdiction paralleled the growth of the juridical authority of the cities."[57]

Phenomenon of communal enactments – *takkanot* and *haskamot*

Shaul made eight claims regarding the inadmissibility of the case against him. Most of these claims revolved around technicalities regarding the fitness of the witnesses used in the case. Most of these witnesses, he claimed, were *p'sulei eidut*, unfit to testify, based upon their status as relatives or interested parties. However, the original judge in the case disqualified Shaul's claims of their inadmissibility, relying on *haskamot*, communal enactments, legislated by the Jewish community of Bejar.

[57] Baer, Vol. I, p. 233.

The phenomenon of communal enactments, quite common in the Middle Ages, first came to be a feature of Jewish communal life in the 10th century. At this time, when the centrality of the Jewish community in Babylonia was in decline, the individual power of each community to create its own laws and enactments was greatly increased. The rise of the *kehillah*, the organized, local Jewish community, caused a shift in the jurisdiction of matters of civil and administrative law, as well as criminal law in some circumstances. Each community made this adjustment by creating enactments to police its own members. In Ashkenaz, these enactments were known as *takkanot hakahal* and in Sepharad, they were known as *haskamot*.

The most interesting characteristic of these *haskamot* is that they could be inconsistent with Talmudic law, yet were accepted by both lay and rabbinic leadership within the communities as binding upon the members of the *kehillah*. The leaders found it necessary to "sidestep" the *halakha* in certain situations, often described as *tzorech hasha'ah* (the need of the time), in order to prosecute those who were endangering the community, such as informers. These changes were necessary because the *halakha* that they inherited had no specific response to many of their contemporary legal situations. Menachem Elon wrote of this situation: "The task facing the halakhic authorities in this period was to fashion a standard of halakhic judicial review – based on general principles designed to protect the fundamental and essential character of Jewish law – that would be applicable even when legislation enacted to meet and immediate pressing need conflicts with the existing rule of law."[58]

[58] Elon, *Jewish Law*, p. 684.

This case of Shaul is a good example of this general problem. The witnesses in the case were technically all *nogei b'davar*, biased parties. Yet, in such a small and insular Jewish community, it would be impossible to find someone to serve as witness who was not an interested party. This is because all members of the community were affected by the actions of the informer, and therefore were technically inadmissible witnesses. Witnesses possessing knowledge of the facts pertaining to the communal affairs were generally members of the community concerned. This is the reason why Rabbi Ashtrok was unwilling to try the case, per Shaul's request, in a different town.

The Ritba's teacher, the Rashba, wrote extensively on the validity of these *haskamot* as legally binding enactments. In one of his responsa, he wrote that the public may erect safeguards and enactments as they deem appropriate. He wrote that the enactments have the same status as a "law of the Torah" and that sanctions may be imposed on anyone who violates them.[59] According to Menachem Elon, the legislative authority of the "townspeople" to create these enactments is based on the principle of "*hefker beit din hefker*" (the power of the court to reissue property rights). In fact, in one of the Rashba's responsa, he makes use of the expression, *hefker tzibbur hefker* (the power of the community to reissue property rights), as a parallel to the authority of the *beit din*. "The halakhic authorities went further than simply drawing a parallel between the court and the community: they asserted that the community functions as a court, and every member of

[59] Responsa Rashba IV #185

the community acts as a judge."[60] This was indeed a revolutionary idea in terms of allowing the involvement of the community in such matters.

The original rabbinic discussion of *hefker beit din hefker* was essentially about declaring an individual's property forfeit to the court. The *tannaim* first discussed this in the case of agents of the courts pronouncing hybrid plants (*kilayim*) forfeit. (Tosefta *Shekalim* 1:3). The *hakhamim* (sages) made the connection between this principle of *hefker beit din hefker* and a passage from the Book of Ezra regarding those who return to Jerusalem from exile: "Anyone who does not come in three days, as required by the officers and elders, will have his property confiscated and himself excluded from the congregation of the returning exiles." (Ezra 10:8) Thus, any of the exiles who did not return would have their property forfeited and the "officers and elders" would divest that individual of his rights as owner of the property.

Later, the *amoraim* expanded this notion of *hefker beit din hefker* from simply divesting an individual of his property to transferring such property to other individuals. "In this way, the principle of *hefker beit din hefker* became a legal doctrine permitting legislation not only to extinguish existing legal rights, but also, as is the nature of legislation generally, to confer new rights."[61] [Emphasis mine]

As communal enactment became a more common form of legislation, this principle became even more important in Jewish law and it was stretched and pulled to be used

[60] Elon, *Jewish Law*, p. 700, *footnote* #88. (Responsa Rashba IV §142)
[61] *Ibid*, pp. 509-510

more broadly than ever in Jewish law. In fact, *Tosafot* (*Yevamot* 79b) mentions how powerful this injunction had become. They declared that "the rule that 'one court may not overturn the legislation of another court unless greater than the other in both number and wisdom' does not apply to the principle of *hefker beit din hefker*."[62]

The Rashba then went on to expand this notion through the comparison of the majority of the people in a town to the Sanhedrin. "The majority in each town is to each of the townspeople as the High Court is to the entire Jewish people."[63] In creating this analogy of the majority of the people to the High Court, in essence, the Rashba is allowing the public to have the same power of extinguishing legal rights as does a proper court. Here we find the introduction of the notion of *hefker tzibbur hefker*, the power of the community to reissue property rights.

As the contemporary circumstances necessitated that these enactments be increasingly integrated into the communal enforcement, the halakhic leaders of the community were faced with the challenge of remaining loyal to the corpus of existing Jewish law. Menachem Elon lists two ways in which this balance was achieved: First, the enactments were approved by a distinguished person[64] in the community before they we deemed acceptable. This person was a halakhic scholar and/or an official chosen to lead the community. Secondly, the communal enactments had to be consistent with the principles of justice and equity inherent in Jewish law. These principles contain five requirements:

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[62] *Ibid*, p. 514, footnote #89.
[63] Responsa – Rashba V, #126.
[64] Based upon the Talmudic concept of the *adam hashuv* found in BT Bava Batra 9a.

1. The enactment must improve, not impair or breach, the social morality and discipline of the community.
2. A majority of the community must be able to conform to the enactment.
3. The enactment cannot prejudice minority rights. The minority should only be expected to fulfill the requirement(s) of the *haskamah* if the majority could likewise be able to fulfill the obligations.
4. The enactment must apply equally to all members of the community and cannot be written with the intention of prosecuting one specific individual.
5. The enactment must apply prospectively and not retroactively.[65]

Talmudic argumentation in this responsum

Within this Responsa, the Ritba makes use of various halakhic principles to make his case to the king.

Mishneh Shekalim 1:1:

> "On the first day of Adar, they make proclamation regarding the half-shekel tax, and regarding the *kilayim*. On the 15th day they read the *megillah* (scroll) in those cities surrounded by a wall, and they repair the roads and highways and *mikveot* (ritual baths), and they carry out all public requirements and they mark out the graves, and they also go forth regarding the *kilayim*."

Here the Ritba uses this text to explain why the judge is allowed to make these rulings and from where he derives his authority. The Ritba writes, "The judge is allowed to rule in this way, without any complainants, because he is the *father of the community*,[66] and he is obligated to correct [this situation], just as he is required to *fix any impediments in the road*, so that people will not damage other human beings." It is understandable that a communal leader would feel a sense of responsibility for safe and free movement on the roads and to establish an overall atmosphere of public safety for his citizens. Just as the

[65] Elon, pp. 758-777. Elon himself admits that the term "general principles of justice and equity" is very ambiguous and "cannot be defined abstractly but only through examples of their application and through study of the legal system as it actually operates." (p. 760) In establishing these categories, therefore, he uses concrete examples from responsa to support his paradigm.

[66] An allusion to Bava Kama 36b-37a, in which Rabban Gamliel and his court were known as the "fathers of the orphans."

leader must protect the public from dangerous obstructions on the roads, so too must he protect them from dangerous people in the community.

BT Sanhedrin 58b

A case is established in this *sugya* in which a person who was constantly striking other people has his hand cut off as a fine. This *sugya* is presented in the context of a discussion of three rulings made by Reish Lakish on the subject of one who strikes another man. One of the opinions presented on this subject is of Rav Huna:

> "Rav Huna said, 'His hand should be cut off, for it is stated, "A raised arm shall be broken. (Job 38:15)"' Rav Huna cut off the hand."

Here, he uses this *sugya* to refute Shaul's claim, referring to the *takkanah* in Bejar, that he should not have been punished by corporal punishment. The Ritba says that in this situation, the corporal punishment was done in order to set an example to other people. This is a major theme within his responsum – that much of this ruling was done in order to set an example to others so that they would be discouraged from doing similar actions. The *takkanah* that Shaul cites from Bejar is unacceptable in this case, according to the Ritba, because setting the example was of the utmost importance here.

BT Ketubot 32b

The Gemara begins with R. Yohanan's opinion:

> "Whenever there is [liability to both] money and lashes, and he was warned, he receives lashes and does not pay money."

This principle is challenged with the case of *zommemin* witnesses:

> "As R. Ila'a said, 'The Torah has explicitly included *zommemin* witnesses [in the obligation] to [make] payment: here too the Torah has explicitly included one who wounds his fellow [in the obligation] to [make] payment."

The Gemara continues by citing a *mishneh* regarding witnesses who were found to be *zommemin*:

> "They receive lashes [for their false testimony] and they pay [their victim the amount they conspired to make him lose]; for the scriptural verse that makes them liable for lashes is not the one that makes them liable for payment."

Then the opinion of R. Meir is brought forth:

> "But the sages say, 'Whoever pays does not receive lashes.'"

It is resolved in the *sugya* that the *zommemin* witnesses should make payment and not receive lashes.

The Ritba gives this issue of double punishment a cursory glance here by bringing up the issue of *zommemin* witnesses. He uses the *zommemin* witnesses to refute Shaul's claim (#7) that "the law does not allow a man to be punished by two laws." There are two reasons why this is a weak argument on the part of the Ritba. First, this responsum is not a case of *zommemin* witnesses and the Talmud is careful to point out that the issue of dual liability for monetary and bodily fines applies only in the case of *zommemin* witnesses. Secondly, in the end, the Talmud seems to exonerate *zommemin* witnesses from being liable for both penalties and only holds them to paying the monetary fine. It is possible that the Ritba is placing the *zommemin* witnesses in a similar category as *mosrim* because they are punished not for what they actually did, but because of what they schemed to do. Nevertheless, it is not an airtight argument for the purpose of justifying the judge's decision to give him a dual punishment. Perhaps this weak argument by the Ritba is an admission of his discomfort with this ruling.

In the end, the Ritba concludes on a lenient note, asking the king to annul the decree against Shaul. It is interesting that after all of his halakhic argumentation used in order to support the original ruling, he comes down on the lenient side, looking out for Shaul's best interests. It seems that the reason he supported the verdict of Rabbi Ashtrok was in

order to appease the king, who certainly sanctioned the court that provided the original ruling. Had this method of defense not been used and the royal court not accepted it, it is unlikely that the Ritba would have included it among his responsa.[67] However, his leniency seems to reveal his discomfort with Ashtrok's ruling and his commitment to protecting the individuals within his community.

It is unclear what the rationale was behind the Ritba's final words of defense for Shaul. Was it a sense of compassion that he felt for this Jew and his family who would suffer so terribly as a result of this decree? Or, perhaps, was his sense of attachment to the law, of which Shaul made clear in his eight claims against the court, appealed to? The Ritba wrote in the responsum, "I also asked people in the kingdom of Castile and they said that it is not the custom of the rabbi to give an appeal in these cases, because the king already gave his is power and authority and he stands in his place." Whatever the reasoning may have been, it is clear from this responsum that the Ritba was unwilling to allow the Jewish defendant to be punished beyond his own sense of necessary justice.

[67] Baer, Yitzhak. *A History of the Jews in Christian Spain*, Vol. 2, P. 452.

Chapter Three - The Rashba: *HaMeyuchasot L'Ramban* §240

I. Summary of the responsum

II. Outline of the responsum[68]

III. Translation of the responsum

IV. Categories of violence

V. Phenomenon of "Exempt under laws of man, liable under laws of heaven"

VI. Talmudic argumentation in this responsum

Summary of the Responsum

Rabbi Solomon Ibn Adret, the Rashba, is presented in this responsum with the case of a man, Reuven, who had disgraced the communally appointed property collectors who came to seize his money from him. The manner in which he embarrassed the collectors was by raising his voice in the streets before the Gentiles and making accusations that the Jews were lending more than the King allowed. Knowing that in previous rulings it had been decided that it was permissible, presumably, to punish an informer beyond the scope of the law, the questioner asked the Rashba's opinion on what to do in this situation. The questioner presented many Talmudic examples to make his case, including some which were not included in the available manuscript of the responsum, but were obviously present in the original question, seeing as the Rashba addresses these questions directly in the body of his response.[69]

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[68] Because of the complexity of this responsum, I have included an outline in this chapter to help clarify the presentation of the Rashba's argument in this case. For the point of clarification, I will present a summary, followed by the outline, and then the translation of the responsum.

[69] The original question the rabbi received presumably included mention of the following details:

1. A mention of payments for which Reuven may or may not be liable. "*And with regards to the payments of which you spoke, there are many sides.*"

The Rashba answers the question in a very thorough and detailed manner. Using various Talmudic *sugyot*, he takes the reader on a journey through Talmudic principles and relates abstract principles to his own concrete contemporary situation. His final decision is that Reuven should be excommunicated until he is able to settle the financial dispute. Yet the method by which he arrives at this conclusion is perhaps more interesting than the decision itself.

He begins by presenting Talmudic precedents showing that it is permissible to punish someone outside of the normative parameters of the law. There are two situations that he must deal with in relating the case of Reuven to the Talmudic principles. First, there is the fact that Reuven's case takes place in the Diaspora and there is much rabbinic law limiting capital cases to adjudication in the land of Israel. He uses the case of Bar Hama killing someone and being punished as an example of a capital sentence being carried through outside of the land of Israel. The second situation is punishment for a crime when there has technically been no ruling of guilt in a court. He uses the example of whiplashing as a permitted form of punishment when the word on the street about a person "does not sound good" – "*lo tova hashmuah.*" This means that there is a general understanding among the people within the community that such a person is no good.

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2. An understanding of "mumbling of the lips" constituting an action as found in Bava Metzia 90b. "*Now I return to what you said that the mumbling of the lips is an action as is learned from the case of R. Yohanan.*"
3. Details describing how the tax collectors put Reuven in a situation of duress. "*This one [Reuven] who disgraced and blasphemed those who seized [money or property from him], even though they afflicted him...*"

His reputation is tarnished by his actions, even though he has not been found guilty by a court.

The Rashba then quickly knocks down Reuven's defense of his behavior being the result of provocation by the communal property collectors. Although this perspective does give Reuven a bit more credibility, in the end, the Rashba rejects this line of reasoning as a legitimate excuse for his behavior. The Rashba explains that even in a situation in which there is affliction, it is forbidden to inform on a Jew to the Empire, or in this case, the Aragonese government.

The next section of the responsum is focused upon the possible punishments that would be appropriate for Reuven. The first issue is the permissibility of physical vs. monetary punishments. The Rashba rules that an informer may be punished physically, but not monetarily because this may impact his innocent offspring who are entitled to inherit from their father.

Focusing on the physical aspect of the punishment, he first makes a distinction between a well-known informer (*masor gamur*) and a one-time perpetrator. It seems that he is attempting to put Reuven in the second category. He must make this distinction because of the ruling that it is permissible to kill an informer. He uses both Talmudic and codes literature to make this point, but is sure to raise Maimonides' point that an informer is only killed for repeated behavior and only as a preventative measure, not if he has already

done the action. Therefore, at this point, Reuven can be punished physically, but not with death.

The following section of the responsum is devoted to the determination of payments for which Reuven might be liable. In this section he gives an overview of the Talmudic concepts of *garma b'nizikin* and *dina d'garmi*. In cases of *dina d'garmi*, or other types of loss other than direct damage to a physical object, there is dispute among the rabbis whether or not a person is liable for damages. In cases of *garma b'nizikin* the person is generally thought to be exempt. However, the Rashba gives examples of cases in which someone might technically be exempt under the laws of man, but liable under the laws of heaven. Here he makes his analogy with Reuven's case, likening his case to one who damages his fellow's lien. He follows the opinion of the Rabad[70] and declares such a person liable. He makes an analogy between one who damages his fellow's lien with one who burns his fellow's documents – in which case he is liable.

The Rashba then returns to the issue of informing under duress. While in the beginning of the responsum, he was determined to show that Reuven was still responsible for his actions regardless of duress, here he tries to explain some of the subtleties of situations of duress. We find the Rashba attempting to make a decision whether or not a situation of duress mitigates the severity of the liability for the damages. The Rashba explains that there are many differing opinions on this subject. In the end, the Rashba rules (again) on

[70] Rabbi Abraham ibn Daud, 1125-1198. He was a Talmudic authority in Provence. The Rashba said of him, "Abraham revealed unfathomed depths of the law 'as if from the mouth of Moses, and explained that which is difficult' (Torat ha-Bayit, Beit ha-Nashim, introduction)." [*Encyclopedia Judaica*, "Rabad."]

this notion that Reuven is exempt under the laws of man, but liable under the laws of heaven. Here he uses the case of someone placing a lion down next to his fellow's beast, thereby causing indirect damage. In this case, the owner of the lion is exempt, but he is punished first with excommunication until payment is received for the damages ensued.

The next section of the responsum seems to be a response to a statement posed by the questioner (although missing from the manuscript) in which he states that the "mumbling of the lips" is an action, as is learned from the case of R. Yohanan (Bava Metzia 90b). Legally speaking, "mumbling of the lips" may or may not be deemed an action. If it is considered an action, one is liable for lashes. However, if it is not considered to be an action, one does not incur lashes. In this Gemara, Rabbi Yohanan says that it is considered an action, while Reish Lakish does not believe that "mumbing of the lips" constitutes action. The Rashba notes that some forms of speaking are not considered actions through which someone can be liable, but that mumbling of the lips is considered such an action. He also makes a distinction here between *zommemin* witnesses and Reuven. The voice of the *zommemin* witnesses does not constitute action.

Following his discussion of the mumbling lips, he continues to address one of the questions presented directly by the questioner: What is the proper punishment for the humiliation that he caused toward the property collectors? What is the proper amount to compensate for human dignity? He first gives examples of fines found in the Talmud for humiliating a sage. But he is left again with the same quandary of the ability to fine for such cases outside of the land of Israel. The Rashba resolves this problem by presenting

eight cases of Talmudic incidents in which damage ensues and compensation is collected in Babylonia.

He then returns to the issue of humiliation to determine if humiliation is compensatory. If compensation is required for humiliation, the question is raised whether it is considered to be a primary damage, for which the compensation is greater than for indirect damage. The Rashba gives an example (Bava Kama 27b) in which it is compensatory, but only in Israel. Yet, he gives quotes from the Rif who wrote that in the two *yeshivot* in Babylonia, it was custom to excommunicate someone until he settles with the litigant. It is from the Rif that the Rashba makes his final ruling, that in this case, Reuven should be excommunicated until he settles, because this was the practice in the two *yeshivot*.

Outline of Rashba Responsum

I. Question
1. Reuven "disgraced and blasphemed" communal appointees who came to collect his money and spoke badly about the Jews to the Gentiles.
2. The questioner mentions the possibility of punishing outside of the parameters of the law.
    a. Gives three proof texts for punishing outside of law: Sanhedrin 58b, Sanhedrin 45b, Moed Katan 16a

II. Answer
1. Punishing outside of the law. Here the Rashba states the law generally, but with great nuance.
    a. Sanhedrin 27a: Bar Hama kills someone – adjudicating capital cases outside of Israel.
    b. Kiddushin 81a: We give whiplashing – because the word on the street "doesn't sound good."
    c. Rashi to Sanhedrin 26b: One is deserving of lashes, even without a warning.
    d. Ketubot 86a: One can be lashed even for transgressing a rabbinic commandment.
2. Knocking down Reuven's "defense" of provocation by the *anasim*
    a. Gittin 7a: Even when there is affliction, it is forbidden to inform on a Jew to the Empire.
3. What happens to the money/property/person of the informer?
    a. Bava Kama 62a, 119a: We can punish him physically, but not monetarily, because he might have worthy offspring.
    b. Rif and Rabbeinu Hananel: The informer is invalidated to give testimony.
4. Distinction between a well-known informer and a one-time informer
    a. Rav Paltoi Gaon: Both are invalid to give testimony.
5. Permission to kill informer
    a. Bava Kama 117a: An informer shows his fellow's straw to an officer of the king.
    b. Mishneh Torah: Only kill him with repeated behavior and warning not to do it again.
        i. If he has already informed, cannot kill him – only precautionary
6. Exemption or liability for payment
    a. *Garma vs. Dina D'Garmi* (laws of damages)
        i. *Dina D'Garmi*: Doing something to the physical substance of an object. There is dispute among rabbis about if a person is liable for this damage.
            1. Bava Kama 100a: Relying on the quality of a dinar sent by Resh Lakish.
            2. Bava Kama 98b: Dispute about exemption in case of burning his fellow's lien.

3. Ketubot 86a: Sending a promissory note and waiving repayment.
4. Bava Kama 100a-b: A breached vineyard.

ii. *Garma b'nizikin*: Indirect damage to the property done by neither a person nor his own property. Usually he is exempt.
1. Bava Batra 22b: Propping up a ladder and a marten climbs to his fellow's property.
2. Gives cases in which someone is technically exempt, but liable under laws of heaven.
3. Bava Kama 33b: Damaging his fellow's lien.
a. However, the Rashba follows the R. Shimon ben Gamliel (Gittin 40b-41a) and adjudicates *dina d'garmi* in this situation; thus he is liable.

7. Informing under duress
a. Geonim - exempt such a person, both one who was forced to show or bring money.
b. Rif – anyone who handled the money is liable (saving own money by means of his fellow)
c. Rabad – one who was forced through compulsion of money, is liable - (saving own money by means of his fellow). But, one who is threatened with violence is exempt.

8. Ruling on the case
a. Exempt under laws of man [if he himself did not say something to the *sar* (minister)], liable under laws of heaven [if his words somehow caused damage to his fellow].
i. Bava Kama 114a: Compare to case of placing a lion down (indirect damage)
1. He is exempt, but we punish him first and excommunicate until receive payment for damage
ii. Moving of the lips – does this constitute an action?
1. Bava Metzia 90b: Action through speech is not liable, but moving of lips is considered an action.
2. Sanhedrin 65b: Comparison with zomemin witnesses, they are different because their voice does not constitute action.
3. *Tosafot*: Example of saying "*ayeh*" – this is an informer

9. Behavior toward the tax collectors
a. Talmud Yerushalmi Bava Kama 8:6: Example of adjudication of fines for humiliating a sage

10. Long list of Tamudic incidents about adjudicating *g'zeilot* and *chaveilot* in Babylonia, despite m. Sanhedrin's prohibition.
a. Bava Kama 32b: No rule in Babylonia for robbery and injury.
b. Gittin 88b: Permitted to rule on common cases outside of Israel, but not theft or injury.
c. Bava Kama 21a: Rav Nachman takes a mansion away from a man who built it on orphans' property.
d. Bava Kama 98b: Rafram exacted amount from burned loan document.

e. Bava Kama 96b: Man stole oxen, plowed, then returned them – R. Nachman charged him the amount he gained in improvement of his land.
f. Bava Kama 96b: Man borrowed an ax and it broke – Rava exempts if others can testify that he used it normally.
g. Bava Kama 84a: An ox chewed off child's hand – assess like a slave even though it is outside of Israel.
h. Bava Kama 15b: Dog that ate a sheep – don't collect in Babylonia – but there are ways for the parties to collect.
i. The Rashba closes this section by saying that for damages inflicted on one person by another or by an animal on a person, we do not adjudicate.

11. Humiliation of his fellow
    a. Bava Kama 5a: Humiliation is compensatory and taught as primary damages – but it seems only in Israel.
        i. Bava Kama 27b: R. Nachman was mad at R. Hisda for collecting penalties in Babylonia.
12. Custom in *yeshivot* in Babylonia to excommunicate a person until he settles.
13. Final ruling : Excommunicate him until he settles, no *beit din* involvement.

Translation: Rashba Responsum: *HaMeyuchasot L'Ramban* §240

Question: [71]

Reuven, who disgraced and blasphemed the [communal] appointees who imposed a lien as to [money or property] on him, and raised his voice in the streets before the Gentiles, saying that Jews were transgressing the King's decree and lending more than his (the King's) command. As to this case, you brought forth that it is necessary to punish him, even outside of the parameters of the law, like that [case] in Ch. *Nigmar HaDin* (Sanhedrin 58b) in which R. Huna ruled to cut off the hand (of a man who is accustomed to hitting people);[72] and from the case of Shimon ben Shetach (Sanhedrin 45b);[73] and in Ch. *V'Eilu M'galchin* (Moed Katan 16a).[74]

Answer:

As to this case you do not need [a proof], for we strike and punish even outside of the [parameters of the] law, as it is brought in Ch. *Ze Borer* (Sanhedrin 27a) in which Bar Hama kills someone, and they said: "For one who takes a life, take his eye." [This is the case] even though we do not adjudicate capital cases outside of the land of Israel.

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[71] The Rashba's answer to this question reveals that part of the text of the original inquiry is missing. The Rabbi refers throughout the responsum to Talmudic citations that the questioner raised in the original inquiry.

[72] See Chapter Two, p. 36

[73] Here we find a *mishnah* about capital punishment regarding whether a corpse should be hung after it has been stoned. R. Eliezer relates that in one day Shimon ben Shetach hung eighty women in Ashkelon. The Sages reply that he did in fact do this, but that in normal circumstances a court cannot judge even two criminal cases on the same day. Clearly this was an extra legal measure brought forth by Shimon ben Shetach. Rashi explains that it was done to create a warning against the practice of witchcraft that had become widespread.

[74] "From where do we know that we [the court] may, [at our discretion], contend [with disobedient individuals] and curse and strike [them], and tear out their hair and compel them to swear that they will not repeat their transgressions in the future? For it is written, 'So I contended with them and I cursed them. I beat some of their men and tore their hair out. I placed them under oath.'(Nehemiah 13:25)"

And we say in the first chapter of Kiddushin (28a): one who calls his fellow, "slave," will be excommunicated; "*mamzer*", will be given 40 lashes. And we say (in Kiddushin 81a) to give lashes in the case in which something "doesn't sound good" and to one who disrespects the messenger of the court. (Kiddushin 12b). And regarding one who is suspected of sexual transgressions, we say, "he is whiplashed." And [this whiplashing] is the rabbinic [category] of giving lashes for rebellion. As we learn there: (Sanhedrin 26b) "Answer, Master, 40 lashes on his shoulder, and he is kosher?!" Rashi explains that "he is deserving of the lashes even though there was no warning to tell him (what he was doing). He is lashed because it 'doesn't sound good.'" And he can even be lashed for [transgressing] a rabbinic commandment up until the point of death. Just as it is said in (Ketubot 86a), "When does this apply? For negative mitzvot. But for positive mitzvot, such as building a sukkah or [holding] the lulav, if he doesn't [do them], strike him until the point of death. And similarly for one who does not want to pay the debt of his [dead] father [for which] he is obligated, according to the opinion of Rabbeinu Hananel, *z"l*.

This one [Reuven] who disgraced and blasphemed those who seized [money or property from him], even though they afflicted him, he [still] did not act in accordance with the law. For as we say in the first chapter of Gittin (7a):

> "Mar Ukva sent [a question] to R. Eleazar: '[There are those] people who attack me, and I have it within my power to hand them over to the Empire. What is [the law]?' [R. Eleazar] scored lines [on paper] and wrote to [Mar Ukva]: 'I resolved I would watch my step lest I offend by my speech; I would keep my mouth muzzled while the wicked man was in my presence.' (Psalms 39:2) [Mar Ukva] sent to [R. Eleazar]: 'But they torment me greatly and I will not be able to withstand their [attacks].' He sent to [Mar Ukva]: 'Wait silently for the Lord and long for Him.' (Psalms 37:7)."

We hear from this that even where there is affliction, it is forbidden to inform on a Jew to the Empire, neither for his body or his money, as the Rif, *z"l*, wrote [in his commentary] on the latter chapter *HaGozel*.[75]

And the law of the informer is given over[76] into our hands, even in the Diaspora.[77] And despite that, it is forbidden to destroy [the informer's property] actively, regardless of the fact that R. Huna and R. Yehuda disputed regarding the money of an informer (Bava Kama 119a), as to whether it is permitted to actively destroy his property. There is one who says it is permitted to destroy it, but we hold according to the one who said it is forbidden. And the proof is from that which we learned in Ch. *HaKones Tzon Ladir* (Bava Kama 62a):

> [*Amemar* inquired]: "Did the Rabbis apply 'the remedy for the victim of a theft (*takkanat nigzal*)' in the case of an informer, or not? And this surely came like the one who said it was forbidden since the issue was unresolved, *teiku*.

And despite the fact that his body is permitted [to the court for punishment, his] money is forbidden, for the reason that perhaps he will have a worthy offspring, for 'He [the *rasha* (the evil one)] may lay it up, but the righteous will wear it, [and the innocent will share the silver.]'" (Job 27:17).

Thus the Rif, *z"l*, and Rabbeinu Hananel, *z"l*, rule, indeed, that he is called a *rasha*, evildoer, and invalidated to give testimony.

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[75] Bava Kama 43b, in the Rif's pages.

[76] The Rashba makes use of a clever word-play here with the Hebrew words for "informer" and "given over": "*din masor masur b'yadeinu*"

[77] The term "Diaspora" is, of course, laden with many implications in modern discourse in relation to the modern settlement of Israel. Here I use it simply as a synonym for "outside of the Land of Israel."

As they wrote in the name of Rav Paltoi Gaon,[78] the head of the Yeshiva, an informer is invalid to give testimony. And it is not necessary to say this about a full and well-known informer (*masor gamur u'm'fursam*). Rather, even a person who quarreled with his fellow and says, "I am leaving and going to inform about [your] money." Since he has been so brazen in public, he is considered as a *rasha* and invalid for testimony, and the law is the same for oaths. Thus the law was decided in the two *yeshivot* for one who hands over [Jewish property] to a person who obtains property by force [an "*anas*" or "compeller"].

And if this is so, we should not believe him in what he said, that they transgressed the command by lending more than what was written in the document, for he was invalid to give testimony. It is permitted to kill an informer, even in the Diaspora if they warned him, and if our hands have power over him, like in Castile.

[And this is] just like [an incident] in *HaGozel Batra* (Bava Kama 117a). [There was a certain man who wished to show his fellow's straw (to the officers of the king). He came before Rav. Rav said to him: Do not show it and do not show it! He said to Rav]: I will show it and I will show it! Rav Kahana was sitting before Rav. [Upon hearing the informer's reply] he dislocated his neck from its place [thus killing him].[79]

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[78] Rabbi Paltoi bar Abbaye, *Gaon* of Pumbedita from 842-857.

[79] It is unclear if this man was well known as an informer or if the Rashba just makes him out to be for the purposes of this case. The Schottenstein (Art Scroll) footnote on the sugya refers to another of the Rashba's responsa (Vol. 3, §367) and says, "Rashba explains that although the man had no previous record

With respect to what situation was this said? When they warned him and said that he should not inform and he continued in his evil ways and hardened his face to [continue to] inform, in this manner, he did not do an action. But if he already informed, do not kill him. Thus the Rambam, *z"l*, wrote (*Hilchot Hovel u'Mazik* 8:11): "If the informer schemed to inform, it appears to me that it is forbidden to kill him, unless he has made it an established pattern to inform. In the cities of the West [Spain] it is the custom to kill the informers."[80]

And with regard to the payments of which you spoke, there are many sides and I must speak at length. First, you must know why he is exempt if it a case of *garma* and liable if it is a case of *dina d'garmi*, and what the difference is between the two.[81]

Know that there are the four main categories of the laws of damages, said in four terms, and their laws. In my opinion, there are really only two. These are *dina d'garmi* and *garma b'nizikin*. The law of the two others are included under these categories, which

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of informing, his emphatic, disrespectful rejection of Rav's warning was proof positive that he would not hesitate to carry out his threat." (Bava Kama 117a, footnote #30)

[80] Later manuscripts replace the word *yehareg* (will be killed) with *yeanesh* (will be punished). The ruling of the *Shulchan Aruch* (*Hoshen Mishpat* 388:11, 15) reflects the harsher ruling of killing the well known informer. This first came to my attention in reading the footnote of the Touger edition of the *Mishneh Torah* (*Hil. Chovel u'Mazik* 8:11, p. 497, footnote #38). In later research, I found that the standard edition of the *Mishneh Torah* does use the word *yeanesh*, while the Yemenite manuscript (Machon Mishnat HaRambam, Jerusalem 5754) uses the word *yehareg*. Presumably, the Yemenite edition was not affected by the censorship of Christian Europe and maintained the original language.

[81] Most commentators on the Talmud and the codifiers of Jewish law distinguish between cases of *garma* and *dina d'garmi*. The former are definitely not subject to payment in court, whereas in the later case (*dina d'garmi*) there is a controversy among *tannaim* as to whether a court imposes payment for damages. {From Frank, Yitzhak. *The Practical Talmud Dictionary*. (Jerusalem: Ariel United Israel Institutes, 1991). p. 64}

are something that causes [damage to someone's] money and one who damages his fellow's lien.

Dina d'garmi is when someone does something to the physical substance of a thing such as [the case of] one who has sent a dinar (Bava Kama 100a). [Resh Lakish showed a dinar to R. Eleazar]. R. Eleazar said: "It is good." Resh Lakish said to him, "See, I am relying on you." Alternatively, [*dina d'garmi*] is if someone burned a document of his fellow and he lost his lien (Bava Kama 98b). And similarly [*dina d'garmi*] applies if [a creditor] sells a promissory note to his fellow and [the creditor] then waived [the debtor's repayment of the debt]. (Keutbot 86a). As to all of these we say that one who adjudicates *dina d'garmi* will collect as to that like a beam fit for decorative moldings (Bava Kama 98b).[82] And similarly, the vineyard wall that was breached. That occurred through his doing, for he had to [build a] fence and he did not, [causing his] fellow's money to be forbidden. He is liable because of *dina d'garmi*, as we said (Bava Kama 100a-b): "If a wall of a vineyard was breached, [the owner of the field] says to [the owner of the vineyard, 'Wall up the breach.' If [after it was repaired] it was breached [again], he says to him, 'Wall up the breach.' If [the owner of the vineyard] abandoned [the breach in the wall] and did not wall it up, he has therefore rendered [the grain] unfit and is responsible for any loss [incurred by the owner of the grain]. We stand with R. Meir who adjudicates *dina d'garmi*."

[82] Meaning from the best property that he owns.

The second [case] is *garma b'nizikin*. They said in Ch. *Lo yachpor* (Bava Batra 22b) he is exempt.[83] And this [*garma*] is that one who does anything to the physical thing, neither he nor his property, like one who props up a ladder and a marten climbs up it to the dovecote of his friend, but not when [the ladder] is at rest. Or else, the "crowing" of R. Yosef.[84] As to these [sorts of cases], they are exempt (*patur*) but also forbidden (*asur*). He calls this causative damage *garma – asur*.

Included in this category is what they said at the beginning of Ch. *HaKones* (Bava Kama 55b): It was taught in a *baraita*: R. Yehoshua says: There are four cases [of monetary loss] for which the perpetrator is not liable under the laws of man, but he is liable under the laws of heaven. They are: One who breaches a wall before his fellow's animal; one who bends his fellow's standing grain toward a fire; one who hires a false witness to testify; and one who knows testimony [beneficial] to his fellow but does not testify on his behalf. And included within this category are things that cause the outlay of money, that our rabbis exempted in Ch. *Merubeh* (Bava Kama 74b, 71b)[85] and Ch. *Shvuat HaEidut* (Shvuot 33a).[86] And this is the third [case] that is included in the category of *garma b'nizikin*.

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[83] This *sugya* of Bava Batra is about placing a ladder four *amot* away from a neighbor's dovecote. If one's neighbor has a dovecote near the wall that divides their properties, one may not prop up a ladder on his side of the wall within four *amot* of the dovecote, lest a marten jump into the dovecote and kill the doves. (Rashi)

[84] Here the Gemara relates an incident about R. Yosef: "Rav Yosef had these small [date] palms that bloodletters would come and sit under [while they drew blood]. Now, crows would come and consume the blood, and would fly up onto the palms and ruin the dates."

[85] This sugya focuses on the ruling that no payment is made for a consecrated animal for which he bears responsibility.

[86] Here, one who admits guilt in a penalty case is not liable for damages.

The fourth [case] is one of damaging his fellow's lien. According to the opinion of the Rif, *z"l*, he is exempt. And according to the opinion of the *Tosafot* (Gittin 41a) and the Rabad, *z"l*, in his commentaries (Bava Kama 100a), he is liable. And their words make sense from that which is taught in a *mishnah* in Ch. *Ha Maniach et HaKad* (Bava Kama 33b):

> "The Rabbis taught in a *baraita*: [Concerning] an ox that is a *tam* that did damage: [If] before the owner stood [before the court] for judgment, he sold it - it is sold. If he consecrated it, it is consecrated. If he slaughtered it or gave it away as a gift, what he has done is done. R. Shizvi said, '[The *baraita's* ruling] is necessary only in regard to the depreciation caused by *nevela*'[87]. R. Huna, son of R. Yehoshua, said, 'This tells us that one who damages his fellow's lien is not liable.'
> The *gemara* asks: Isn't this obvious?
> And we resolve: What would you have said: [in the case of slaughtering the ox, that the slaughterer is exempt], he can say to the lien holder, 'I did not deprive you of anything at all.' For he can say to him, 'I took mere wind away from you.'
> The *gemara* asks: Hasn't Rabbah already said this? 'One who burns his fellow's documents is not liable.'
> The *gemara* answers: What would you have said: that it is only there [in the case of one who burns his fellow's documents, that he is exempt] because he can say to the owner, 'I burned a mere paper of yours, [which contained evidence of the lien, but did not touch the property itself.]' But in a case where one dug pits, trenches or vaults, he should be liable. [Rav Huna] teaches us that one who digs trenches and vaults is exempt."

Consequently, we can derive that one who damages his fellow's lien is like one who burns [his fellow's] documents. And one who burns his documents, it has been established in Ch. *HaGozel Kama* (Bava Kama 98b) that he is liable.

And even though it is a difference of opinion in Ch. *HaSholeach* (Gittin 40b-41a) regarding a slave whose master designated him as an *apotiki*[88] to another [his creditor] and then emancipated him, Rabbi Shimon ben Gamliel {RaSHBaG} makes him liable

[87] The Talmud text says *shechita* - slaughtering
[88] A pledge or property placed under obligation.

and the Sages exempted [him], which is the case of one who damages his fellow's lien. Here the *halakha* follows the Rashbag [that he is liable], for we rule in Ch. *HaKotev* (Ketubbot 86a) and Ch. *HaGozel* (Bava Kama 98b,100a), like the one who adjudicates *dina d'garmi*. The one who damages his fellow's lien is even a stronger case than this and is liable, just as I brought forth [in the example in Ch.] *HaManiach et HaKad*.

Regarding one who informs on his fellow's money under duress, there are differing opinions. The Geonim agree that whether he is forced to show or forced to bring [the money], [he is exempt.][89] And the Rif, *z"l*, wrote that anyone who handled the money physically is liable. Any case in which the *anas* could not take it except by this one's hand, for he showed him the way, [he is liable] because he is like someone who saves his own money by means of his fellow's. And the words that the Rabad, *z"l*, wrote are compelling, that if he was forced through a compulsion of money to bring [the money to the *anas*] and he brings it, then he is liable because he saved his own money by means of his fellow's. And this is the *baraita*: If an extortionist said to someone, "Extend to me this bundle of straw or extend to me this cluster of grapes, and he extended it, then he is liable." (Bava Kama 117a-b) But one who is threatened with violence and brings the money, he is exempt. For this is like the silver cup of R. Ashi. (Bava Kama 117b)[90]

[89] Rashba Responsa *HaMeyuchasot L'Rambam*, Kafah edition, in footnote #63

[90] A case in which a man was made custodian of a silver cup. Robbers came upon him and he gave them the cup to save his life. He came to be judged regarding his liability for payment. Rabbah exempted him. R. Ashi explains this rationale: "If the custodian is a wealthy man, [we assume that] the thieves came with him in mind [and he is liable to pay]. If, however, he is not [a wealthy man], [we assume that] the thieves came with the silver cup in mind [and he is not liable to pay].

Now, I return to the case that is before us and say that the *malshin* in this case is exempt from the laws of man if he himself did not say it to the minister, despite the fact that he is liable according to the laws of heaven, if in fact a financial loss comes to his fellow because of his words. This is because he himself is not the speaker of the information, and behold, this is less [legally compelling] than placing a lion down before his fellow's beast, in which case the person does not actually cause damage [to the beast]. And if the lion did damage, the one who lay him down is exempt, but we punish him first and then excommunicate him until we receive from him the payment for the damage that was caused by his action, just like that case in Ch. *HaGozel Batra* (Bava Kama 114a).[91]

> "Rav Ashi said, 'This Jew who sold an idolater land that boarders on [land belonging to] his fellow Jew, we excommunicate him.' What is the reason? If you say it is because [he violated] 'the law of the adjoining property owner,' but master has said, 'If one buys from an idolater or sells to an idolater, the sale is not subject to "the law of the adjoining property owner."' Rather, [the reason is] that he [the owner of the adjacent property] can say to him [the seller], 'You have placed a lion at my boarder.' [Therefore], we excommunicate him [the seller] until he accepts upon himself any harm that might result from the new owner."

And from the fact that we excommunicate him from the get-go, hear from this that if he did damage before he accepted it on himself, he is exempt. And thus did the Rabad, *z"l*, write. And even though case of the actual informer is worse [than lying a lion down] and he transgresses with his words, and, "A dullard vents all his rage."[92]

Now I return to what you said that the "mumbling of the lips" is an action as is learned from the case of R. Yohanan. (Bava Metzia 90b) This is when an action is done through his speech, like that which we said in Ch. *HaSocher et HaPoalim* (Bava Metzia 90b), that

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[91] A case of a Jew being excommunicated for harming another Jew.
[92] Proverbs 29:11. The Rashba is making the point here that even though the case of an actual informer (*masor gamur*) is more serious, the same principle can be applied in this case.

by means of the voice, the cow tramples. But whatever does not come to the point of being an action, [he is not liable].

Know from that which we said in *Shvuot* (21a): R. Idi bar Avin said in the name of [R. Amram who said in the name of R. Yitzhak who said in the name of] R. Yochanan: [R. Yehudah said in the name of R. Yossi HaGlili, "[Concerning] all prohibitions in the Torah: A prohibition that involves an action is subject to lashes and a prohibition that does not involve an action is not subject to lashes – except for one who takes an oath, one who substitutes [an animal for a sacrificial animal], and one who curses his fellow with the Name of God." Consequently, substitution and cursing are considered a "prohibition that does not involve action" even though there is mumbling of the lips. And if so, Rabbi Yohanan disagrees with himself; [but] rather, it is as we said.

And if you should say that here the substitution comes to an action, like it says in Temurah 3b: "Said R. Yohanan to the *tanna*: 'Do not repeat the language, "And one who effects an act of substitution," because by his very act of speech he has done a deed." And the one who takes an oath as well, it is established [that the oath is like an action, as in the phrase] "I [swear that I ate]" and [he] did not eat.[93]

According to the explanation of Rashi, *z"l* in the Ch. *Arba Mitot* (Sanhedrin 65b): "R. Zeira challenged this [with the following Baraita]: Excluded are *zommemin* witnesses, because their sin involves no action. And it was resolved: [But why does their (speaking)

[93] Sh'vuot 21b

not constitute action? Their sin is not committed in their heart, but with their lips. Rava said]: *zommemin* witnesses are different because their sin is in their voice [and sounding one's voice does not constitute action].

The Rabbi [Rashi], *z"l*, explains that the principle aspect of their liability is that they cause their voice to be heard before a court. And question is raised: Isn't voice an action to R. Yohananm, etc., *zomemmin* witnesses are different, etc.

The Tosafot raised a difficulty with this, and in the end, the point is that there is someone who said, "*ayeh*" and really said, "I am like him." [Saying "*ayeh*" is only using the voice, without really doing anything with the organs of speech (Rif)] He is kosher [for testifying] in capital and monetary cases. Therefore, at times he makes himself liable without moving his lips, for if one gave testimony and they afterwards said to the second [witness], "Do you speak like him?" and he says, "*ayeh*," he is liable. Even though this is a moving of the lips, it is not considered an action since he cannot be liable without an action. And this is if he informs and they say to his fellow, "Are you are like him?" [and he says "*ayeh*"], behold, this [the one who said "*ayeh*"] is an informer.

[Regarding] what you said that he behaved insolently towards the tax collectors who are old and honorable. We learn in the Yerushalmi [Bava Kama 8:6]: "R. Qarni taught, '[The fine for kicking] with the foot is one sela, for kneeing, three, for a hard blow with the fist, fifteen selas.' Someone taught in the name of Reish Lakish, 'He who humiliates a sage pays him the full compensation to be paid for his humiliation.' Someone lost his

temper with R. Judah b. Hanina. The case came before Reish Lakish. He imposed on him a fine of a litra of gold."

The Rif, z"l, brings this example in from Ch. *HaHovel* [Bava Kama 32b]. Know that there are many arguments and not all of the fines are collected, and I will write to you some evidence, from the beginning of Sanhedrin [2b-3a]. The plain sense is that we do not rule in cases of robbery and injury in Babylonia because we require *mumchin*.[94]

In Ch. *HaMigaraish* [Gittin 88b]: "[Abaye] said to him, 'But we are lay people'... [Rav Yosef] said to [Abaye], 'We are carrying out the charge of [the ordained sages of Eretz Yisrael] just as we do in [monetary cases involving] admissions and loans.' He said to him, 'If it is so [that we act on behalf of the ordained sages of Israel, let us judge cases involving theft and personal injury as well]. When are we empowered to carry out their charge?' 'Only in a matter that is commonplace [such as a loan or divorce]. However, in a matter that is not commonplace [such as theft or personal injury] we are not empowered to carry out their charge.'"

We must be very precise, for we found that they used to adjudicate [thefts and private injury] in Babylonia. In Ch. *Keitzad* [Bava Kama 21a]: "There was a man who built a mansion on a dump site owned by orphans. Rav Nachman took his mansion from him."

[94] A term used in the Bavli to mean 1) experts; or 2) scholars ordained in the direct line of the Land of Israel. Here the Rashba refers to the later.

In Ch. *HaGozel Kama* [Bava Kama 98b]: "There was an incident [involving the burning of a loan document]. Rafram pressured Rav Ashi and exacted for the [burning of the] loan document [the amount written in it from his most superior properties] like the beam fit for decorative moldings."

It is also mentioned [Bava Kama 96b]: "There was a certain person who stole a pair of oxen from his fellow. He went and plowed with them and seeded with them. In the end he returned the oxen to the owner. He came before R. Nachman [to be judged]. R. Nachman said to them, 'Go appraise the improvement [to his land] that he improved [with the oxen].'"

Also, in Ch. *HaShoel* [Bava Metzia 96b]: "There was a certain man who borrowed an ax from his fellow. [While the borrower was using it] the ax broke. The borrower came before Rava [for judgment]. [Rava] told him, 'Go and bring witnesses [who can testify] that you did not deviate [from the stipulated work] and you will be exempted.'"

There are those [*Tosafot*] who say that all of these [cases occurred in the situation in which the injured party] seized [property from the injurer in compensation]. This is proven in Ch. *HaHovel* [Bava Kama 84a]: "There once was an ox that chewed off the hand of a child. The case came before Rava. He said [to the parties]: 'Go assess [the child] like a slave.'[95] They said to [Rava], 'But isn't Master the one who said that in any [case where] one is assessed like a slave, we do not collect for it in Babylonia?' Rava

[95] The owner of the ox would then pay half of the damages.

said to them, '[This assessment] is needed only if [the victim] seized [the owner's property].'"[96]

And in Ch. *Keitzad* {*Arba'ah Avot*} [Bava Kama 15b], "A case of a dog that ate sheep... it is the case of unusual [damage – for which one only pays half] and we don't collect it in Babylonia... [These are ways in which the damaged party can collect ½ damages]: If the damaged party seized [property form the owner of the dog] we do not take it away from him." Indeed, for the damages of man to man and man to ox, we do not adjudicate in Babylonia, as it is written in Ch. *HaHovel*.

Regarding the matter of embarrassing his fellow, we have to be exact. For in the beginning of Bava Kama [5a], we read that humiliation and depreciation are compensatory in nature and should be taught as primary damages. And in the beginning of Ch. *HaManiach* [Bava Kama 27b] we said, "Rav Hisda sent [the following inquiry] to R. Nachman: '[The sages] said the payment (for striking someone) with a knee is three (*selaim*), for a kick – five, and for [striking with a donkey's saddle] – thirteen. But what is the payment for the handle of a shovel or the blade of a shovel?' R. Nachman replied, 'Hisda! Hisda! Are you collecting penalties in Babylonia?!'"

It seems to me that there this humiliation was not "common." This is to say that something was not common like a fine, you [R. Hisda] are collecting in Babylonia. But with humiliation, which is common, we collect. It is possible that this is the opinion that

[96] Or, as Rashi explains it, if the injured party should in the future seize property, he will be allowed to keep it.

the Rif who brought forth [an example] from Ch.*HaHovel* from the *Yerushalmi*, in which there was a man who boxed his fellow's ears [and subsequently had to pay a fine of a Tyrian *maneh*].

And even as to a matter that we don't adjudicate in Babylonia, the Rif, *z"l*, wrote in Ch. *HaHovel* that it was the custom of the two *yeshivot* [in Babylonia] to excommunicate a person until he settles with the litigant. And when he [the party paying the fine] gave him a measure, he saw [as appropriate] that he released him [from his excommunication] immediately, whether or not the other party was appeased.

And in a responsum of Rav Shalom [Gaon], [it says that we] excommunicate him until he settles, without any *beit din* [involved], for this is the practice of the two *yeshivot*.
Peace be upon you forever.

Categories of violence

The case of Reuven is interesting because the Rashba is never comfortable calling him an informer, especially not a well-known informer (*masor gamur*). For certainly the evidence shows that Reuven cannot be classified as an informer; rather his actions show that he was someone who ran off at the mouth. Instead, the Rashba seems to focus his responsum on punishing Reuven according to the appropriate category for which he has committed a crime. An interesting categorization of violent crime in Jewish law developed by Stephen Passamaneck serves as a helpful lens through which to view the Rashba's decision-making process. Passamaneck devotes an article in *The Jewish Law Annual* to the taxonomy of Jewish law on issues of physical violence.[97] Using the *Shulhan Arukh* as his primary text, Passamaneck presents a paradigm of five categories of violence "based upon the attitude which the law takes toward them."[98] His five categories are: 1) Assault; 2) Battery; 3) Legitimate acts of self-defense; 4) *Rodef*, a pursuer intent on murder; and 5) *Moser*, an informer.

The category of assault is limited to threats of violence, without actual physical battery. Passamaneck defines assault as "a menace or threat of violence, which places a person in fear of bodily harm, provided that there appears to be a clear intent and ability for the assaulter to carry through with his threat."[99] The reaction to the law toward acts of assault is a declaration of their wickedness and reprehensibility. Passamaneck presents here some of the same rabbinic texts as the Rashba regarding punishment for such an

[97] Passamaneck, Stephen M., "Aspects of Physical Violence Against Persons in Karo's Shulhan Arukh," *The Jewish Law Annual*, Vol. 9, (1991): pp. 5-106.
[98] *Ibid*, p. 10.
[99] *Ibid*, p. 14.

assailant. For example, he brings in Rav Huna's instruction to cut off the hand of an assailant (Sanhedrin 58b) who raises his hand against another. He also raises the classification of assault as punishable under the laws of heaven, but not under human law. There are a number of situations in the Talmud in which a person is declared exempt from human punishment, yet guilty under divine law. This rule generally applies in cases of indirect harm or injury.

> "There are some assaults, which are held to be punishable under the laws of heaven: the human court is not charged to impose a penalty. There are two Talmudic examples of such assaults: first, one person shouts into the ear of another person, thus causing deafness or one person frightens another (by a shout or by some other means) so that the other person suffers illness or injury thereby. These arts are clearly assaultive and they are intentional, just like the act of raising one's hand against another. These acts involve no physical contact with the victim – only a frightening sound or shout or an act to which the victim reacts in terror... The assaulter may reasonable claim that he never intended to injure the person... In the case of deafness as a result of the shout, harm was caused, but, one may reasonably argue, harm was not really intended... Yet injury was done, harm did follow, indirectly or without physical contact, and that harm was reserved by the rabbis for redress by divine punishment; the assaulter is culpable under divine law apparently because the necessary intent to injure is not readily evident – but the assaulter is guilty nonetheless."[100]

Passamaneck's second category is that of battery. This he defines as "the intentional and unlawful touching or striking of another, battery with injury, mayhem, defined as intentionally injuring another so severely that the person is unable to defend himself, and homicide, unlawful killing."[101] Within the category of battery, however, are subcategories requiring different levels of corresponding punishment. Briefly, the first is the least severe, punishable by flogging; the second is for minor injury, degradation, and pain, punishable by fines; the third is battery with injury, and the fourth, mayhem.

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[100] *Ibid.* pp. 15-16
[101] *Ibid.* p. 19

The second degree of battery, of "minor injury, degradation, and pain," is punishable by the levying of fines or "*kenasot*." These fines cause a problem in practice within Diaspora communities, as only rabbis ordained in the Land of Israel are allowed to levy these fines. For the Rashba, this is a major challenge in this responsum because he is faced with the difficulty of punishing Reuven with penalties specifically prohibited for use outside of the Land of Israel. However, the maintenance of public order required that rabbis deal with the situations of battery within their communities, even while looking the other way at Talmudic infringements. "It was held that the rabbinical court had the power to impose criminal penalties, i.e., fines, on an emergency basis in order to curb criminal outrages against a person. This power was held to apply even though the evidence in the mater did not satisfy the classic Talmudic rules of evidence."[102] At the same time, however, it seems that the Rashba is willing in this responsum to admit to the possibility that his reasoning goes beyond the *standard* Talmudic rules of evidence, but does show by showing that the Talmud itself gives support for the permissibility of exceptions to the standards of the law. His long list near the end of the responsum of incidents of exceptions in levying fines for crimes committed outside of the Land of Israel is a sort of intertextual gleaning which provides evidence of the permissibility of exceptional circumstance to allow for the levying of these fines. Within the Talmud's flexibility for the necessary changes to the law, the Rashba finds permission for his own openness in creating a solution to the problem presented in the responsum.

Passamaneck's third category of violence – self-defense, in which a Jew has the well-established right to use violence under proper circumstances – does not have much

[102] *Ibid*, pp. 22-23

applicability here in the Rashba responsum. However, the fourth and fifth categories do apply directly to the issues presented by the Rashba. The fourth category is that of the *rodef*, or pursuer, who is intent on murder. Here we find a more proactive form of violence, as opposed to the reactive method of self-defense (from the previous category of violence) in which the perpetrator is the one who initiates the violence. With a *rodef*, it is permissible for the victim to anticipate the action of the pursuer and be the first to strike against him. "Reactive violence need not be reaction to physical violence: it may also be reaction to a situation or circumstance that in the event appears to call for violence as the only effective means of preventing or terminating some unlawful act."[103] The difference, however, between the case of a *rodef* and a *moser* (an informer) is that the preventative nature of the violence in the case of a *rodef* is in order to prevent problems internally within the Jewish community, and with a *moser*, it is to prevent outside interference from the non-Jewish community into the Jewish community itself. "[The informer] appears to stand ready to summon the forces of gentile authority, and thus to expose all Jews in the community to danger that could be potentially disastrous to the unity and peace of his follows."[104] Another difference between the category of informer and the other four categories of violence is that for the case of the informer, mere intent is enough to allow the community to use force against him, even without having actually committed the deed.

The Rashba, of course, does not make any specific differentiation within this responsum between Passamaneck's modern notions of five categories of violence. However, it is

[103] *Ibid.* p. 65
[104] *Ibid.* p. 68

clear from his use of Talmudic and codes sources that he is quite conscious of a differential in the degree of violence and applicable punishment allowed in various circumstances. It is quite possible that his hesitation in classifying Reuven as a true *moser* stems from this understanding of a stratification of violence within Jewish law. The focus on battery and its related fines (*kenasot*), on the "lighter" end of the spectrum of violence, is perhaps a step in the direction away from the category of *moser*. Also worth noting is that the Rashba does not make any mention of the category of *rodef*. We will see how the Rosh used the concept of *rodef* in his ruling in the next chapter.

Phenomenon of "Exempt under laws of man, liable under laws of heaven"

One of the most fascinating aspects of the Rashba's argumentation in this responsum is his use of the Talmudic dictum "*patur midine adam, vehayav bedine shamayim* – one who is exempt from human punishment yet culpable under Divine law." Taken from Bava Kama 55b-56a, it is a phrase explained in a *baraita* for which there are four situations in which a person is liable under the laws of Heaven, but not under the standard laws of man.[105] It is an interesting compromise position for the Rashba to take. Here he finds a Talmudic situation in which someone can be punished, even if he has not technically transgressed the law.

Passamanek devotes a separate article to this very phrase.

> "Divine justice, for the rabbis, was not some vague and remote realm. Divine justice was an ever-present factor in all human affairs. These acts, unpunishable

[105] These situations include: One who breaches a wall before his fellow's animal; one who bends his fellows standing grain toward a fire; one who hires a false witness to testify; and one who knows testimony [beneficial] to his fellow but does not testify on his behalf.

> under human law, were for all that, no less prohibited, no less wrong, and no less sinful. But they had to be so labeled as more than merely wrongful, and they were: the offender was guilty under Divine law. The rabbis, so to speak, presumed these offences as part of some divine law code and took it upon themselves to speak of guilt for those who committed them. The acts were no doubt also held punishable as sins under divine law; but the harm was after all done on earth, between one human being and another; and the human court did not allow itself to be frustrated in its tasks of dispensing justice on earth. Thus the rabbis, faced with an offence committed at one remove, invoke a punishment at one remove. Just as the offender had created conditions almost certain to cause hurt, so too the rabbis created a situation in which the offender stood as guilty – yet punishment would come at a remove from the court itself, it would be, so to speak, indirect, even as the damage cause by indirection."[106]

Bernard Jackson takes a different approach to the subject in his article[107] on the *sugya*, Bava Kama 55b). He deals specifically with one of R. Joshua b. Hananiah's categories of one who is exempt under the laws of man, yet liable by the laws of heaven: the person who breaches a wall before his fellow's animal. He rejects the idea that this liability under the divine law is strictly because of a rabbinic decree of moral guilt. He mentions that a literary analysis of the chapter reveals that there are different versions of the formula "*patur midine adam, vehayav bedine shamayim.*" "The Talmudic *sugya* in which the *baraita* is found adds further cases, and considers objections of two kinds – that the offender should have been liable by the laws of man, and, contrariwise, that he should have been exempt even by the laws of heaven."[108]

> "It remains to consider why the fence-breaker, exempt as he was by human law, was threatened with divine judgment. The simple answer, that the threat of divine punishment if the offender did not pay up simply reflects his moral guilt, is not entirely satisfactory. Whatever the later situation, the tannaitic sources are careful in their use of the concept of divine justice. It was applied sparingly, and was not

[106] Passamaneck, Stephen M. *Jewish Law Annual* Vol. 8 "Man Proposes Heaven Disposes," p. 97. 1989
[107] Jackson, Bernard S. "The Fence-Breaker and the *actio de pastu pecoris* in Early Jewish Law." *Journal of Jewish Studies* Vol. 25. (1974): pp. 123-136.
[108] *Ibid.* p. 123.

> yet given the function of a residual sanction wherever human justice was, for some reason or other, barred."[109]

It seems that Passamanek's theory holds more closely to the Rashba's situation than Jackson's article. Although the Rashba is all together careful in his adjudication, it does seem that he is using the "Divine law code" to speak of Reuven's guilt. He wants Reuven to be punished for what he did, not because he wants to hold him to the true standard of the law, but rather, because he wants to have some sort of authority to declare his actions wrong. In addition, perhaps designating the jurisdiction outside of the hands of men, and in the court of God, the Rashba is able to deal with the earthly issues presented in the Talmud by which a rabbi ordained outside of the land of Israel is not allowed to hand out a fine. Reuven will have to appease the officials, but his ultimate punishment is in God's hands.

Talmudic argumentation in this responsum

This responsum is saturated with Talmudic sources used by the Rashba as proofs to back up his argumentation. He is very thorough with his explanations and uses this responsum as a teaching opportunity, moving well beyond a simple function of decision-making. This pedagogical approach is most apparent in his extensive explanation of the concepts of *garma* and *dina d'garmi* during his discussion of liability for payments. He begins the section about these damages with the following opening: "And with regard to the payments of which you spoke, there are many sides and I must speak at length. First, you

[109] *Ibid*, pp. 134-135.

must know why he is exempt if it a case of *garma* and liable if it is a case of *dina d'garmi*, and what the difference is between the two."

Garma is very indirect damage and is agreed upon by the rabbis that such adjudication is not subject to payment in court. Whereas in cases of *dina d'garmi*, there is a difference of opinion among the *tanaim* as to whether the court imposes payment. The term *dina d'garmi* refers to various types of loss, other than direct damage to property. An example that is used frequently in this responsum is that from Bava Kama 98b in which a promissory note is burned and the only direct physical damage is to the paper – which itself is of minimal value, but the loss to the owner is the amount symbolized by that note. Biblical law imposes no liability on the person who caused the harm to the note, but rabbinic law generally declares the person liable. If the person is found liable for such damages, then the compensation should be recovered from that person's best property – i.e., "a beam of wood used for decorative purposes." (Ketubot 86a)

The Rashba brings up many cases in which the rabbis debate back and forth about whether certain cases merit an adjudication of *dina d'garmi*, thereby creating liability. He combines the findings in the *sugyot* in which someone who burns documents is liable (Bava Kama 98b) and the Rashbag's ruling (whom the *halkcha* follows, even though the sages exempt him) that one who damages his fellow's lien is liable (Gittin 40b-41a). This weaving together of the Talmudic sources is the means by which the Rashba determines that indeed Reuven should be adjudicated as *dina d'garmi*.

It is within the context of his explanation of *dina d'garmi* that he introduces the concept of being exempt under laws of man and liable under laws of heaven. It is as if he is creating an intertextual web of proof. It shows a certain amount of flexibility on the part of the Rashba and certainly a vein of creativity, to combine the flexibility inherent in the rabbinic understanding of damages with his interpretation being liable under the laws of heaven. Yet, at the same time, he is being rather conservative by adjudicating *dina d'garmi* in this case.

The responsum is bookended with a discussion regarding the ability to punish outside of the land of Israel. Beginning and ending with the same concept is an effective rhetorical device that the Rashba uses to provide a sense of completeness to his response. Effectively, the major problem presented both by the questioner and the Talmudic texts themselves is the permissibility of Diaspora courts to punish outside of the parameters of the law. The first text that he introduces is Sanhedrin 27a, in which Bar Hama kills someone and is punished, even though capital cases are not adjudicated outside of the Land of Israel.

From the Bar Hama case, the Rashba makes the transition to a discussion of the severity of the prohibition against informing. He uses both Talmudic and codes sources in order to make this point. In regards to the laws of informers, he begins by giving proof (Bava Kama 62a) to the invalidation of their testimony. Interestingly, he is careful to point out that the property of the informer is not destroyed (Bava Kama 119a) for the sake of his

offspring, who still merit their inheritance.[110] He then continues to discuss the laws, specifically as ruled in various codes, regarding capital punishment for informers. All of these rulings are based upon Bava Kama 117a, in which Rav Kahana killed a man in order to prevent him from showing his fellow's straw to the officers of the king. It is here that the Rashba makes a differential between one who is accustomed to informing (a *masor gamur*) and one who is doing it for the first time, for it is forbidden to kill someone who has not made it an established pattern to inform. However, he does take note that it is the custom in Spain to kill informers. It is unclear whether this is an unofficial nod to that practice.

Another of the Rashba's rhetorical techniques in this responsum is the long list of incidents in the Talmud in which the rabbis rule on cases of damages even while living in Babylonia. This seems to be the manner in which he transitions from the issues of *dina d'garmi* back into the possibilities of ruling cases outside of the parameters of the law, beyond those who were ordained in the Land of Israel.

In the end, the Rashba's decision is to excommunicate Reuven until he settles with the litigant. Interestingly, he basis this decision upon the practice of the *yeshivot* in Babylonia. This is an interesting admission that the practice of the Babylonian *yeshivot* is paramount in *halakha*. It is also a statement on what practice is ultimately authoritative for the Diaspora – the practice of Diaspora *yeshivot*. As a respondent, it is especially

[110] This concern for the offspring of the informer is also found in the Ritba's responsum (§131) in which the Ritba pleads that the informer (Shaul) should not be excommunicated for the sake of his family, who will then be unable to find any source of livelihood.

notable, for he is linking himself to that line of succession, with the ability to create legal precedent.

Finally, it is important to mention that the shear density of the responsum is a notable phenomenon in itself. Why did the Rashba feel it was necessary to go into so much detail in order to make his decision? On the one hand, it is possible that he felt that the complexity of the situation required a thorough examination of the sources in order to properly make a decision regarding Reuven. Yet, another posture is that his method was an exercise of sorts, an attempt to sew together a Talmudic tapestry that would override the difficulties presented by the limitations of Diaspora life. What is most interesting is that no other responsum surveyed in research for this paper was nearly as detailed as this responsum of the Rashba.

Chapter Four – The Rosh: Responsum §17:6

I. Summary of the responsum

II. Translation of the responsum

III. Phenomenon of "*Ta'asu K'hokhmatchem*"

IV. Rhetorical style of the responsum

V. Talmudic argumentation in this responsum

Summary of the responsum

The initial situation presented to the Rosh in this responsum is the divorce case of a man, Abraham, whose wife wanted a divorce based upon her claim that she no longer desired him. Town notables had made the decision to force Abraham to give her a *get* by means of torture, but Abraham escaped from their hands. As the community chased after him again, Abraham decided to catch this pursuer and stop the pursuit after him. In this mission, the pursuer lost 14 gold coins. The Rosh is asked whether this man is obligated to pay him [the pursuer] back the amount lost.

His answer to this question, interestingly, is not a direct solution to the payment of the lost money. Rather, it is a statement regarding the practice of allowing a woman to divorce her husband solely for the reason that she no longer desires him. The Rosh is firm in his disapproval of this practice and makes a note of his own decision in Castile that, "from the day I came to this land, I have prevented in all of Castile that any man should be forced to divorce because his wife said that she no longer desires him." He

then defends the action that Abraham took to protect himself, for he was being punished unfairly, outside of the parameters of the law.

Interestingly, the aforementioned situation of the divorce case seemingly has little to do with a case of informing. However, the bulk of the responsum continues, as it were, as a footnote regarding the character of this man, Abraham. Here, the Rosh divulges that Abraham is a well-known informer in his town of Bejar. He is known to partake in such disgraceful acts as "to cause loss and inform on the finances of the Jews to the idolaters, to raise crosses in the sanctuaries of the king, and speak the words of [our] sages in mockery and derision before the ignoramuses in order to putrefy the spiced oil of our religion before the masses." He expounds in the rest of the responsum about whether it is permissible to kill such an informer.

Using some Talmudic backing (Bava Kama 117a, Avodah Zara 26b) as well as historical precedents brought from the regions of Germany and France, the Rosh answers that indeed it is permissible to kill an informer. However, he continues, not only is it permissible to kill the informer, but it is mandatory and someone who has the opportunity to do so and does not has neglected to fulfill this *mitzvah*. Indeed, he continues to say that the person who fails to kill the *moser* is then guilty of the sins that the *moser* commits in the future. He encourages the community to adjudicate a death sentence if the testimony supports such sentencing and in a situation in which there is not appropriate testimony, he encourages the community to do whatever else is necessary, and according to their own wisdom (*ta'asu k'hokhmatchem*), in order to prevent future problems.

Translation: Rosh Responsum §17:6

You asked a question [regarding] one who caused his fellow to be caught by the town notables in order to force him to grant a *get* [to his wife] without any claim other than that she said that she no longer desires him. It is their evil custom to force him immediately [to give the *get*] by torturing him with chains until he is close to death. In the end, [this man] escaped from their hands and they chased after him in order to seize him just as in the beginning. The man being pursued had idolaters {non-Jews} catch the pursuer in order to cancel the pursuit after him and he [the pursued] caused the pursuers to lose 14 gold [coins].

You asked if the pursued man is obligated to pay them back the 14 gold [coins]. You must know that it is an evil custom to force a man to divorce, unless it is for those [reasons] taught by our sages for which they do force them to divorce.[111] I have written much about this in a ruling.[112] And from the day I came to this land, I have prevented in all of Castile that any man should be forced to divorce because his wife said that she no longer desires him. And it was contrary to law that they seized him. But if God helped him to leave and run away, and they wanted to catch him illegally a second time, he did good in saving himself.

[111] In Ketubbot 77a, the Rabbis discuss a Mishnah regarding cases in which a man may be forced to give his wife a divorce. These include a man with major defects, such as a man infected with boils, one with polypus (either an odor of the nose or an odor of the mouth), one who gathers excrement (as his occupation), a copper refiner, or a tanner. Also included is a man who refuses to feed his wife or provide for her.

[112] Rabbi Asher ben Yehiel, Responsa §43

All who are reading this should know and understand that this same man, Abraham Achlor[113] is his name, lives in Bejar, where already for many days there have come before me cries, complaints, and grievances, which have caused the ears of anyone who heard it to tingle.[114] For they said that he informed several times about the finances of individual or many Jews to the idolaters. His hands were involved in the misuse of the damage of the liabilities. And thus all day he threatened to cause loss and inform on the finances of the Jews to the idolaters, to raise crosses in the sanctuaries of the king,[115] and speaks the words of [our] sages in mockery and derision before the ignoramuses in order to putrefy the spiced oil of our religion before the masses. Like these [examples], there are many others that I cannot remember at this time to write them all. There were many times when the leaders of the land sought my counsel [as to whether] it is permissible to lower him into a pit [to kill him] and I replied that I have not received testimony as to all of these [situations]. But when the matter was made clear to us, it is possible to stab him [to death], even on Yom Kippur that falls on Shabbat,[116] because you do not need witnesses or warning for [a case of] an informer. Rather, only the one who hears from his mouth that he threatens to cause financial loss to the Jews or inform [on Jews] to the idolaters is obligated to punish him, as is brought in Ch. *HaGozel Batra* (Bava Kama 117a): "There was a certain man who wished to show his fellow's straw [to the officers

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[113] Both editions of the responsum that I read said his name was "*Avraham* or *Alot*." However, the critical edition included in a footnote that another manuscript containted his name as *Avraham Oklor* or *Achlor*.
[114] I Samuel 3:11.
[115] In an alternate manuscript of this responsum, the word "*anasim*" or "terrorists/thugs" is used rather than "*umot ha'olam*" or "Gentiles/idolaters." In addition, the statement about raising crosses in the palaces of the King (*heichalei hamelech*), in the alternate manuscript it is referred to as the palaces of the idolaters [churches] (*heichalei ovdei elilim*). Presumably, the churches were under the jurisdiction of the crown, so there is little difference in the connotation. However, the language difference is worth mention.
[116] This idea of killing someone on "Yom Kippur that falls on Shabbat" (seemingly, the holiest of days) comes from BT Pesachim 49b in which several teachings are recorded about *amei ha'aretz*. "R. Elazar said, 'It is permitted to stab an *am ha'aretz* [to death] on a Yom Kippur that falls on the Sabbath."

of the king]. He came before Rav. Rav said to him, 'Do not show it!' He said to Rav, 'I will show it and I will show it!' Rav Kahana was sitting before Rav. [Upon hearing the informer's reply he dislocated his neck from its place [thus killing him]. Rav applied the following verse to his action: 'Your sons lie in a swoon at the corner of every street – like an antelope caught in a net [drunk with the wrath of the Lord with the rebuke of your God.]'[117] What is this antelope? Just as it falls into the net, they have no pity on it. So too with the money of a Jew. Once it falls into the hands of idolaters, they have no pity on him."[118] Today they will take a little and tomorrow all of it. In the end they will torture him until death in order for him to admit whether he has more money. He is a pursuer [*rodef*] and it is permissible to save him [the pursued] by the life [of the pursuer].

Thus the sages said, "The apostates and the informers they would lower into a pit and not raise them up."[119] This I saw in Germany and I heard in France, that a few times they allowed spilling the blood of an informer. If not so, there would be no standing or endurance for this degraded generation, for in our transgressions the unruly ones have increased and this matter needs a fence surrounding it.

All of these things I replied to the questioner regarding the same informer because he was saved one time only to threaten to inform [again]. A great man such as Rav Kahana rose up and killed him. How much more so regarding this man who several times you told me informed on the property of Israel to the idolaters and moreover, opened his mouth every

[117] Isaiah 51:20
[118] Inferring that since they would kill a Jew for his money, it would be better to kill this informer than to have other Jews eventually be killed.
[119] Avodah Zara 26b

day without limit and threatened to uproot everything. I say that [if] anyone gave testimony of these things or heard it from his mouth [directly], it is a *mitzvah* to kill him. And if it is in one's hands to kill him and he does not, he will be punished for all of the evil things the informer does to the Jews, from then and on, as if he did it himself, for it is a *mitzvah* to destroy him from the world and he did not do it.

And now, the honored R. Yosef HaLevi, whose spirit was raised up by God and put on the zeal of God, may He be blessed, and brought this matter to action... and now, all of the great ones of this generation for whom stick and lash is in their hand... they will place upon their hearts the words which I have written. For this is not an empty matter,[120] for these are the words of the living God.[121] And they will consider the actions of this informer and be deliberate with the testimonies that came out regarding him. If they see that they are sufficient for testimony of *moser*, do not hide from it. And if it seems to you that there is not sufficient testimony to adjudicate a death sentence, do as your wisdom[122] [tells you] so that he will not continue to do such things. May this bring [you] peace.

-Asher ben HaRav Yehiel, *ztz"l*

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[120] Deuteronomy 32:47: "For this is not a trifling thing for you: it is your very life; through it you shall long endure on the land that you are to possess upon crossing the Jordan."
[121] Jeremiah 23:36: "But do not mention 'the burden of the Lord' any more. Does a man regard his own word as a 'burden,' that you pervert the words of the living God, the Lord of Hosts, our God?"
[122] An allusion to I Kings 2:6: "So act in accordance with your wisdom, and see that his white hair does not go down to Sheol in peace." This is a verse from David's instructions to Solomon upon his deathbed.

Understanding the phrase: "*Ta'asu K'hokhmatchem*"

It is evident through the use of the words "*ta'asu k'hokhmatchem,*" that the Rosh is uncomfortable giving the community of Bejar a ruling about what to do in a case in which there is not sufficient testimony to adjudicate a death sentence. By giving the community the permission to "do as their wisdom" sees fit, he in essence removes the limits of the legal system from being the determining factor in the ruling. He admits through this statement that he, as an outsider, cannot be the final decision maker in this case. Such an example of the respondent keeping his distance from the particular case is not unusual. Berachyahu Lifshitz writes regarding the tension that was present amongst respondents who were unwilling to make a formal ruling on a case presented in a *she'ela.*

> "The nature and scope of responsa, it seems, are not determined by jurisprudential reasoning, but rather, by the complex network of pressures and interests to which the respondents are subject, and by their subjective understanding of their role. The responsum could be regarded as either a judicial ruling or merely an opinion, depending on how the respondent chose to define it. Had the status of the responsa literature been unequivocal, it is doubtful whether the various considerations mentioned by the respondents for and against rendering opinions would have been considered relevant at all."[123]

Yet, what is most interesting is that the Rosh earlier in this responsum made his decisive powers very clear in regards to his ruling on sufficient cause for divorce, whereas here, at the end of the responsum, he is unwilling to make such a claim.

[123] Lifshitz, Berachyahu. "The Legal Status of the Responsa Literature." *Authority, Process, and Method: Studies in Jewish Law.* (1998): p. 85.

The phrase *ta'asu k'hokhmatchem* does not occur in any of the Rosh's other responsa, nor do any grammatical variants take place. [124] While it is not uncommon for a respondent to remove himself from a final decision in a case, this wording does appear to be unique and its Biblical source can perhaps give us a clue as to why the Rosh chose such phrasing. The response is a Biblical allusion to I Kings 2:6: "So act in accordance with your wisdom, and see that his white hair does not go down to Sheol in peace." In this chapter, David gives advice to Solomon upon the elder's deathbed about how to rule the kingdom after David's death. The Rosh's choice in making this allusion is very interesting and quite deliberate. David reminds Solomon of the actions of Joab son of Zeruiah, who killed two of the commanders of Israel's forces, "shedding the blood of war in peacetime." (I Kings 2:5) His instruction to his son to do as his wisdom tells him so that "his white hair does not go down to Sheol in peace" seems on first read to be a measure of revenge. When Joab heard of David's instructions to kill him, he "fled to the tent of the Lord and grasped the horns of the altar." However, despite the assumption that one who holds the horns of the altar is safe from punishment, King Solomon ordered Benaiah to kill him nonetheless. Solomon says to him, "Do just as he said; strike him down and bury him, and remove guilt from me and my father's house for the blood of the innocent that Joab has shed." (I Kings 2:31) Solomon is effectively saying that the execution will remove the taint for past crimes. Perhaps the Rosh sees that the execution of an informer would also remove the stain on the community caused by his past actions. Another possibility is that the Rosh is invoking the wisdom of Solomon, known in Jewish

[124] According to my search on the Bar-Ilan University Responsa Project CD-ROM. Of course, this search is limited both by the completeness of my choices of grammatical variants entered as well as the accuracy of the search engine itself.

tradition for his decision making abilities, upon the community of Bejar. Jewish communities are wise and able to make their own decisions that are appropriate for the situation at hand. Each community knows the details and circumstances of its individuals better than the Rosh, and more intimately than the general *halakha*. He trusts them to do what is appropriate in the situation and is enabling them by using this language here.

Rhetorical style of the responsum

a. *Divrei Elohim Hayim*

The end of the responsum concludes with the Rosh's instructions to the community to do what he has written because "these are the words of the living God." The phrase *divrei elohim hayim* is Biblical in origin, and can be found in Jeremiah 23:36. However, in the Talmudic understanding, the idea of *divrei elohim hayim* comes to be associated with the phrase "*e'lu ve-elu divrei elohim hayim*, both of these are the words of the living God." With this understanding of *divrei elohim hayim*, it is acknowledged that the "words of the living God" are multifaceted.

Moshe Sokol[125] develops a three-pronged typology to examine the Rabbinic understanding of the *elu v'elu* principle: contextual, epistemological, and ontological approaches. The contextual school has two main objectives: to insist upon the context-sensitivity of halakhic decisions; and to insist upon a distinction between the halakhic decision itself, and the reasons for the decision.[126] The epistemological school, on the other hand, understands that both of the two conflicting decisions are the word of the

[125] Sokol, Moshe. "Theories of Elu Ve-Elu Divrei Elohim Hayim." *Da'at* 32-33 (1994): pp. XXIII-XXXV
[126] *Ibid.* p. XXV

living God. "Nevertheless, the *e'lu ve-elu* principle does not violate the Law of Non-Contradiction because the decisions are each assertions about the case in question *in different respects*."[127] The ontological school finds something intrinsic about Torah itself that allows for the legitimacy of multiple perspectives.[128]

Yet, the Rosh seems to be asserting, in using the phrase "*divrei elohim hayim*," that the emphasis should be placed on the word *hayim*. He, in his contemporary context, has the ability to make these rulings because the word of God lives in each and every generation. Therefore, he and the members of the community have the authority to make these interpretations. Another interesting rhetorical device is his connection between *divrei elohim hayim* and the preceding Biblical allusion in saying, "this is not an empty matter."[129] Here, in this verse from *parashat ha'azinu*, Moses instructs the Israelites not to take the matters of the Torah lightly and continues by telling them, "*ki hu hayeichem* - it is your very life." It is a subtle connection between the two verses and the focus on the word *hayim*. The combination of these two Biblical verses emphasizes the permission and the importance that is involved in following his ruling and punishing the informer to the necessary degree.

It is possible that the Rosh is making a subtle connection here to martyrdom themes. Alyssa Gray analyzes the "silent martyrdom" of the Yerushalmi in her article about

[127] *Ibid*, p. XXVI
[128] *Ibid*, p. XXXI
[129] Deuteronomy 32:47

martyrdom and identity in the Yerushalmi.[130] She mentions four citations[131] in which R. Yose b. R. Bun comments in the name of R. Levi that *halakha* has been reestablished by later generations after being forgotten by the rabbis.

> "Now, R. Yose b. R. Bun may in fact mean what he says literally; that is, rabbinic courts will only succeed in sustaining those commandments for which they laid down their lives (or that courts in the past had in fact died for those commandments). But even if R. Yose b. R. Bun in the name of R. Levi meant what he said to be taken literally, the Yerushalmi editor in each of these places gives his words a figurative interpretation. In each place, the editor adds: '*and this* [statement of R. Yose b. R. Bun in the name of R. Levi] *is consistent with that which R. Mana said* [R. Mana quoted Deut. 32:47], "for it [the Torah] is not an empty thing for you" – and if it is an empty thing for you, why is that? Because you do not wear yourselves out over it.' By connecting R. Mana's interpretation of Deut. 32:47 to R. Yose b. R. Bun's 'give its life for it', the editor has effectively redefined martyrdom language to refer to deep, fully engaged, physically wearying study of Torah."[132]

Gray's connection between Deuteronomy 32:47, "It is your very life," and martyrdom also makes sense in the context of the Rosh's responsum. The Rosh is essentially commanding the Jew to take this action into his own hands, just like R. Mana does in the Yerushalmi, as an example of quasi-martyrdom. He turns the community into the "martyr" in this situation, for they are doing what needs to be done under these circumstances.

b. The Harshness in His Tone

The Rosh is very unforgiving in his willingness to use the death penalty against Abraham in this case. Earlier we saw an effort to lessen the communally prescribed punishment in the two previous responsa of the Ritba and the Rashba, whether it is for the sake of

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[130] Gray, Alyssa. "A Contribution to the Study of Martyrdom and Identity in the Palestinian Talmud." *Journal of Jewish Studies*. Vol. LIV, No. 2. (2003): pp. 242-272.
[131] Talmud Yerushalmi Ket. 8:10, 32c, y. Pe'ah 1:1, 15b, y. Shev. 1:7, 33b, and y. Suk. 4:1, 54b.
[132] Gray, p. 262.

remaining offspring or because of the severity of the sentence. Instead, the Rosh is consistent in his direct and forceful tone in recommending the punishment for this informer. Some examples of this harsh style include:

- "But when the matter was made clear to us, it is possible to stab him [to death], even on Yom Kippur that falls on Shabbat."
- "This I saw in Germany and I heard in France, that a few times they allowed spilling the blood of an informer. If not so, there would be no standing or endurance for this degraded generation, for in our transgressions the unruly ones have increased and this matter needs a fence surrounding it."
- "A great man such as Rav Kahana rose up and killed him. How much more so regarding this man who several times you told me informed on the property of Israel to the idolaters and moreover, opened his mouth every day without limit and threatened to uproot everything."
- "And if it is in one's hands to kill him and he does not, he will be punished for all of the evil things the informer does to the Jews, from then and on, as if he did it himself, for it is a *mitzvah* to destroy him from the world and he did not do it."
- "...and now, all of the great ones of this generation for whom stick and lash is in their hand... they will place upon their hearts the words which I have written."

There is no sense of compassion or regret in the Rosh's tone for the harshness of this penalty.

Talmudic argumentation in this responsum

Unlike the previous two respondents studied in this thesis, the Rosh relies very little on Talmudic argumentation to reach his decision in this responsum. Three Talmudic *sugyot*, Bava Kama 117a, Pesachim 49b and Avodah Zara 26b, are at the core of his argumentation as well as the additional halakhic principle regarding the *rodef*, in which it is permissible to save the pursued (*nirdaf*) with the life of the pursuer (*rodef*).

Perhaps the reason for his terseness was that he felt that this was a clear-cut case, therefore a detailed textual analysis was unnecessary. This man, Abraham, was a *masor gamur*, a well-known informer, who had habitually put the community in danger by way of his relations and dealings with the surrounding Gentile world. Or maybe he felt that he could not justify the killing of this man if he went too deeply into the Talmudic argumentation, so he kept it simple for the sake of dealing with the situation at hand. Nonetheless, it is important to analyze the *sugyot* he does focus upon for the sake of understanding the strategy of his arguments.

Bava Kama 117a

The Rosh uses this *sugya* similarly in the fashion of the Rashba, as a prooftext for a case in which it is permissible to kill an informer. However, the Rosh takes it one step further by showing that this case makes it known that it is an imperative to kill the informer.

Pesachim 49b

The Gemara here is listing several teachings about *amei ha'aretz*. One of these teachings is said by R. Elazar:

> "It is permitted to stab an *am ha'aretz* [to death even] on Yom Kippur that falls on Shabbat. His disciples said to him, 'My teacher! Say [instead, one is permitted] to kill him through *shechitah*.' He answered them, 'This [*shechitah*] requires a blessing, whereas this [stabbing] does not require a blessing.'"

Tosafot explains[133] that this *am ha'aretz* is referring to someone who frequently engages in acts of violence and is suspected of murder. In view of his evil ways, it is necessary to kill him whenever the opportunity arises in order to save the lives of future victims. Surely the Rosh is thinking along the same lines of *pikuakh nefesh* and worrying about the lives of all of the other Jews in the community who are endangered by this informer. He sees a parallel between the informer, Abraham, and the *am ha'aretz* in the *sugya*.

Avodah Zara 26b

Here the Rosh quotes a *sugya* that is discussing a previous *baraita* regarding the definition of a 'renegade' Jew [*mumar*], and the distinction between a *mumar* and a *min* [heretic]. The Gemara reads:

> "The Master said [in the *baraita*], 'They used to lower [them into pits] and not raise [them] up.' Now, if [they would] even lower them [into pits], is it necessary [to say they would not] raise them up?
> "Rav Yosef bar Hama said in the name of R. Sheshet, 'It is necessary only [to teach] that if there was a ledge [of earth] in the pit [that he could ascend], one would scrape it away and provide a reason [for his deed], saying, "[I wish to ensure my] animals do not descend [into the pit] by way of this ledge [and die]."'"

Interestingly, there is no mention of the *rodef* or *moser* in this *baraita* – only the *mumar* and the *min*. The Rosh himself draws this parallel and finds it to be a fitting analogy for punishing a *rodef* or a *moser* who is endangering the community.

Rodef

The Rosh draws on the Talmudic concept that it is permissible to save the pursued with the life of the pursuer. This phrase – *niten l'hatzilo b'nafsho* – is found many times in the

[133] s.v.: *v'yesh omrim*

Talmudic text, including: Pesachim 2b, 25b; Yoma 82a, 85a; Sanhedrin 72b-74a. For example, in Sanhedrin 73a, the *sugya* reads:

> "The Rabbis taught in a *baraita*: 'From where do we know that [if] someone pursues (*rodef*) his fellow to kill him, [that] the fellow should be saved at the cost of his [the pursuer's] life? Scripture teaches, "Do not stand by the blood of your neighbor."'"

It is telling that the Rosh chooses to define Abraham here as a *rodef* rather than a *moser*. A *rodef*, according to halakha, can be killed even without the standard criminal procedure limited to the land of Israel. This change in definition allows the Rosh to more easily allow a death sentence for Abraham without the difficulties presented by geographical jurisdiction.

Chapter Five – Conclusion

I. Comparison of the three respondents

   a. Categorization of *m'sirut*

   b. Concern for the offspring

   c. Focus on the communal vs. individual

II. The "well-known" policy of killing informers

III. Codes synthesis

IV. Summary

Comparison of the three respondents

We have seen that the decisions made by these three rabbis and the rhetorical devices used by each of them are unique, as can be expected from the differing circumstances of the individual cases with which they were presented. To oversimplify the decisions, one could say that the Ritba and the Rashba were lenient in their concern for protecting the legal rights of the alleged *moser* and the Rosh was harsh. I might speculate that the reasons for this split are because of the Ritba's allegiance to his teacher's (the Rashba) understanding of the subject, whereas the Rosh was of another school. Such allegiance highlights the differences established by the Ritba and the Rashba's training in *Sepharad* vs. the Rosh's Ashkenazic bent. Both the Ritba and the Rashba developed their rabbinic practices in Spain, at a time when there were "Crown Rabbis" of the various Spanish kingdoms. They were well aware of how this power could lead to an out of control situation and therefore they have reticence about ruling harshly. Perhaps, too, the Rosh, as an outsider moving to Spain from *Ashkenaz*, felt the need to be strict on this issue because it was how he assumed the Spanish communities dealt with the situation or

because he knew from his experience in *Ashkenaz* that such a situation required strict measures (as can be seen by the reply of R. Meir of Rothenburg to the Rashba). However, this is just speculation and rather than jumping to conclusions based upon historical guesswork, I find it more appropriate to analyze the textual nuances and underpinnings of their responsa to best understand their motivations for their decision making.

Categorization of *m'sirut*

Perhaps the most central problem common to these three cases is the issue of whether or not the person under question can be defined as a *moser*. For if he is defined as a *moser*, various *halakhic* principles must be faced. Namely, that a *moser* who is known to regularly put the community in danger through his informing is to be killed because of *din moser*. Each of the respondents makes mention of this fact in his responsum, thus highlighting an understanding of the severity of the problem of *m'sirut*. The Ritba mentions that even the original judge in the case, Rabbi Don Ashtrok, did not adjudicate the death penalty for Shmuel, "...being that he wanted to let him live and not kill him according to *din moser*."[134] The Rashba notes, "It is permitted to kill an informer, even in the Diaspora if they warned him, and if our hands have power over him, like in Castile."[135] He cites the Talmudic example of Bava Kama 117a in which Rav Kahana kills an informer and quotes the Rambam (*Mishneh Torah Hovel u'Mazik* 8:11), who rules that it is permitted to kill a well known informer, specifically noting the practice to adjudicate the death penalty in Spanish communities. The Rosh mentions this fact three

[134] See p. 29
[135] See p. 51

times, using two Talmudic precedents as well as his own knowledge of historical occurrences of killing *mosrim*. He mentions Bava Kama 117a as well as Pesachim 49b. "But when the matter was made clear to us, it is possible to stab him [to death], even on Yom Kippur that falls on Shabbat, because you do not need witnesses or warning for [a case of] an informer."[136] Historically, he mentions what he saw in Germany and France, "that a few times they allowed spilling the blood of an informer."[137]

In the end, each of these rabbis deals with this issue in a unique manner. For the Ritba, the matter is really a non-issue, because the previous rabbi, Don Ashtrok, already rejected a decision of *din moser*. This allows the Ritba to virtually ignore death as a form of punishment and focus on the validity of bodily punishment (the cutting off of his hand and tongue) and excommunication. The Rashba attempts to raise the possibility of bypassing *din moser* by first focusing on the problems of geographical jurisdiction, since capital punishment can only be carried out in the land of Israel. However, he quickly rejects this position by giving evidence to cases in which we "strike and punish outside of the parameters of the law."[138] Instead he relies on the Rambam who ruled in the *Mishneh Torah* that the informer must be a well-known informer in order to be sentenced to death. Reuven does not fit into this category, and therefore, the Rashba is able to focus on his liability for payment instead of his transgression as a legally defined *moser*. He uses the concepts of *garma* and *dina d'garmi* as a way of finding liability for Reuven's actions. The Rosh, on the other hand, is responding to a case of a man who is certainly well-

[136] See p. 78
[137] See p. 79
[138] See p. 48

known to be an informer. Yet, the way in which he avoids the geographical pitfall of adjudicating death outside of Israel is quite different than the Rashba. He does not make specific mention of this problem, but his solution nonetheless, enables him to sidestep the issue. He changes Abraham's label of *moser* to *rodef*. It is a very subtle transition and although he continues to use the language of *m'sirut* throughout the responsum, by placing Abraham in the category of *rodef*, he enables him to be killed regardless of his location. For, it is permissible via the laws of *rodef* to kill a pursuer in order to save the life of the pursued. The Rashba did not make mention of this category of *rodef* in his responsum. Perhaps by bypassing this legal category all together, the Rashba is intentionally protecting the accused, Reuven, from excessive punishment.

Concern for offspring

Both the Ritba and the Rashba mention the prohibition against destroying the property of the informer for the sake of his worthy offspring. The Rashba mentions Bava Kama 62a as the proof text for this. "And despite the fact that his body is permitted [to the court for punishment, his] money is forbidden, for the reason that perhaps he will have a worthy offspring, for 'He [the *rasha*] may lay it up, but the righteous will wear it, [and the innocent will share the silver.]'" (Job 27:17)

The Ritba expands upon this notion by not only rejecting the destruction of his property for the sake of the offspring, but arguing additionally against excommunication for their sake. This seems to expand the Talmudic principle noted in Bava Kama 62a and 119a against destroying the informer's property. The Ritba does not even quote a textual

example to expand on the notion of protecting the offspring from excommunication, even though he is drawing on the same halakhic principle. It seems from the rhetoric of his language that this plea to the king to reconsider the judge's ruling of excommunication comes more out of the Rashba's sense of compassion toward Shaul than pure halakhic reasoning.

We see the concern for the inheritance of the worthy offspring of the informer in the codes literature.

> *Mishneh Torah* – "Although the punishment of an informer is permitted, it is forbidden to destroy his property, for it belongs to his heirs." - *Hil. Chovel U'Mazik* 8:11

> *Shulchan Aruch* – "It is forbidden to cause monetary loss to a *moser*, despite that it is permitted to cause him bodily loss. This is because his money is designated for his inheritors. [*Rama*]: *There are those who say that it is permitted to take his money from him, because it is only forbidden to destroy it.*" - *Hoshen Mishpat* 388:13

It is interesting that the Rambam and R. Karo share the same view that it is prohibited to take away the property of a *moser*, while the Rama is willing to take it away. He bases this on his narrow reading of the Talmud that it is forbidden only to destroy the property, not to take it away from him. Although they lived in different lands in different times, in contrast to the Rama, especially, we can see how lenient the Ritba is in his decision.

Community vs. Individual

Although the sense of concern for the worthy offspring of the informer comes from within the rabbinic tradition, I feel that it represents more than a legal concern for the halakhic integrity of the cases, but rather reflects each of these rabbis' concerns in

balancing the needs of the community with the responsibility to protect Jewish individuals.

The Rambam reflects this tension when he establishes a differentiation between the punishment for those who inform on the community and those who inform on another individual:

> "Similarly, if one oppresses the community and troubles them, it is permissible to hand him over to the heathen authorities to be beaten, imprisoned, and fined. But if one merely distresses and individual, he must not be handed over." (*Hil. Chovel u'Mazik* 8:11)

For medieval Jewish communities, the problems posed by informers were serious and demanded attention and consequence. The leaders of the communities, both rabbis and lay leaders, were responsible for the well-being of all of the members of the community. Yet, they were also held accountable to both the halakhic tradition and the protection of individuals defended by that Jewish legal system. The rabbis, especially, had to keep in check the reactionary tendencies of communal leaders to remove (through excommunication or death) suspected informers without due process. Although we read in some responsa literature as well as secondary sources about the prevalence of death and excommunication sentences levied against informers, the analysis of the three responsa in this paper reveals that not all of the rabbis, specifically the Ritba and the Rashba, were so quick to adjudicate so harshly.

<u>"Well-known Policy of Killing Informers"</u>

The Rosh was certainly harsh and the tone in his responsum reflects the codes and secondary source arguments that indeed this was an acceptable practice in Spain. However, the rhetoric and decisions brought in the decisions of the Ritba and the Rashba seem to point in a different direction. That the rabbis were not comfortable with adjudicating *din moser* (or finding alternative categories with which to sentence the accused men to death, i.e. *rodef*), points to a sense of compassion for the accused individuals often neglected in the telling of this history of medieval Spanish Jewish history.

It is presumptuous, to say the least, to make this sweeping overview about the Ritba and Rashba's intentions in dealing with accused *mosrim* based upon this analysis of one responsum from each of these rabbis' vast collections. However, additional information, mentioned earlier in this paper[139] about the Rashba relates his discomfort in sentencing these informers to their death. The Rashba tried for many years to disassociate himself from a case in Barcelona in which the king wanted the rabbi to adjudicate a death sentence. Eventually, the king had his way and the Rashba (along with R. Jonah Girundi) were forced to write this opinion. However, "Rabbi Jonah Girundi and Rabbi Solomon Ibn Adret felt themselves compelled with heavy hearts to allow justice to run her course, and to deliver up the guilty one... Upon the square in front of the Jewish burial ground in Barcelona the informer was executed..."[140] Even though R. Meir of Rothenburg supported the Rashba's decision in finally ordering the execution of this man[141] and

[139] See Chapter One, pp. 9-11.
[140] See p. 10
[141] See p. 11

admitted to its halakhic validity, nonetheless, we see the discomfort the Rashba felt in pursuing this action.

Codes interpretations

The responsa literature is not the only avenue in which we see changes in the rabbinic reactions to the *moser*. In the codes literature, we also see a change from the original Talmudic interpretations through the centuries of the Rambam's *Mishneh Torah*,[142] the *Tur* of R. Jacob b. Asher,[143] and the *Shulchan Aruch* of R. Joseph Karo,[144] with glosses by R. Moses Isserles.[145] Following a translation of the relevant codes material from the above codifiers, this final chapter will conclude with a look at the development of this topic within the *Mishneh Torah*, *Tur*, and *Shulchan Aruch*.

R. Moses b. Maimonides: *Mishneh Torah, Hil. Chovel U'Mazik* 8:1-11 [Translation from the Yale Ed.]

#1: "If one, acting as an informer, delivers another's property into the hands of a villainous person, he must pay compensation from his best property. If he dies, the compensation may be collected from his heirs as is the rule in the case of all others who inflict damage. Whether the villainous person is a heathen or an Israelite, the informer must pay for whatever the villainous person takes, even if the informer does not take the money with his own hand and surrender it but merely supplies information."

#2: "The above rule applies only when the informer points out the property voluntarily. If, however, he was compelled to do so by a heathen or a villainous Israelite, he is exempt from paying compensation. But if he takes the property with his own hand and

[142] Moses ben Maimonides, 1135-1204. *Mishneh Torah* compiled in 1180, Fostat [Cairo], Egypt.
[143] 1270-1340. Jacob b. Asher was the son of the Rosh. The *Arba'ah Turim* was compiled in Toledo in the beginning of the 14th century.
[144] 1488-1575. The *Shulchan Aruch* was based upon Karo's commentary to the *Tur* and compiled in Sefad in the mid-16th century.
[145] 1525-1570, also known as the *Rama*. Wrote his commentary to the *Shulchan Aruch* in Crakow, Poland, to include the customs of Ashkenazi Jewry in the code of law. It was first published in the Crakow edition of 1569-71.

surrenders it, he must pay even though he acts under constraint, for one who saves himself by appropriating another's money must repay it."

#3: "Thus, if a king decrees that wine or fodder or the like must be brought to him, and an informer comes forward and says that a certain person has a store of wine or fodder at a specified place and the king's men go and take it, he must pay compensation. If, however, the king applies constraint to the informer, compelling him to reveal stores of wine or fodder or to reveal the money of another who has fled from the king, and he does reveal it under such constraint, he is exempt. For if he did not reveal the property, the king would have beaten him or killed him."

#4: "If one takes another's money and gives it to a villainous person with his own hand, he must pay under any circumstances, even if the king compels him to secure it. This rule – namely, that if one is compelled to secure something and he does so, he is liable – applies only when the money has not yet come under the control of the villainous person. If, however, a villainous person compels an Israelite to reveal property and stands beside the property so that it comes under his control and he then compels an Israelite to take it for him to another place, even if the informer who reveals the property is also the one who takes it, he is exempt from paying compensation. For as soon as the villainous person stand beside the store of property, everything in it is deemed already lost, and it is regarded as if it had been burned."

#5: "If litigants are quarreling over real or movable property, each one claiming it as his, and one of them gives it to a heathen, we place him under a ban with orders that he must restore the property and remove any threat of intervention by a villainous person, so that the litigants may bring their case to an Israelite court."

#6: "If A is seized for B, and heathens take money from A on B's account, B need not repay A. The only cases in which, when A is seized for B, B need repay A are the following: If A is seized on account of a fixed tax payable annually by each individual or if he is seized on account of a requisition payable by each individual when the king or his army passes through. In each of these cases, B is obliged to repay A, provided that the money is taken from A specifically on account of B, in the presence of witnesses."

#7: "If there are witnesses that one has informed against another's property, either by pointing it out voluntarily or by taking it under constraint and surrendering it, but the witnesses do not know how much loss he has caused the other by acting as an informer, and the plaintiff says, 'He cause me such-and-such a loss,' but the informer denies this claim, the rule is as follows: If the plaintiff seizes property from the informer, it may not be taken away from him, but he must take an oath, holding a sacred object, and then becomes entitled to whatever he has seized. But if he does not seize property, nothing may be exacted from the informer without clear proof."

#8: "We do not administer either a stringent oath or an oath of inducement to an informer who has informed voluntarily, because he is deemed wicked and one can have no greater disqualification than this. But if an informer is compelled to inform or to secure, and he

takes the property with his own hand and surrenders it, then even though he is under obligation to pay, he is not deemed wicked but is merely one subject to a monetary penalty, and an oath may be administered to him as to any other law-observing person."

#9: "It is forbidden to give either another's person or his property into the hand of a heathen, even if the other is wicked and a sinner and even if he causes one distress and pain. If one gives another's person or his property in to the hand of a heathen, he has no share in the world to come."

#10: "An informer may be killed anywhere, even at the present time when we do not try cases involving capital punishment, and it is permissible to kill him before he has informed. As soon as one says that he is about to inform against so-and-so's person or property, even a trivial amount of property, he surrenders himself to death. He must be warned and told, 'Do not inform,' and then if he is impudent and replies, 'Not so! I shall inform against so-and-so,' it is a religious duty to kill him, and he who hastens to kill him acquires merit."

#11: "If the informer has carried out his intention and given information, it is my opinion that we are not allowed to kill him unless he is a confirmed informer, in which case he must be killed lest he inform against others. There are frequently cases in the cities of the Maghrib where informers who are known to reveal people's money are killed or are handed over to the heathen authorities to be executed, beaten, or imprisoned, as befits their crime. Similarly, if one oppresses the community and troubles them, it is permissible to hand him over to the heathen authorities to be beaten, imprisoned, and fined. But if one merely distresses and individual, he must not be handed over. Although the punishment of an informer is permitted, it is forbidden to destroy his property, for it belongs to his heirs."

R. Jacob b. Asher: *Tur, Hoshen Mishpat* 2 [Translated from the Hebrew by Carey Brown]

"Despite that there is no adjudication of capital punishment or penalties of whiplashing outside of the Land of Israel nor fines levied, if a *beit din* sees that the [pressing] hour requires [such adjudication] because the people are unruly in their transgressions, [the court] may adjudicate either death or monetary fines or any type of punishment. If he is a violent person who others fear, have gentiles beat him and say to him 'Do what the Jews say to you.' Rav Alfas wrote in Ch. *HaGozel* [Bava Kama 96b]: Rav Nachman gave a fine to a man who was a confirmed robber[146]. Learn from this that we adjudicate fines in a case like this, even outside of the Land of Israel. And it is only a great person of his generation such as Rav Nachman, who was the son-in-law of the *Nasi's* house, and who was appointed to judge by the authority of the *Nasi* or the important people of the city that the majority had appointed over themselves, but ordinary judges, no. It seems that even if this matter does not have complete testimony by which he would have been made liable at law at the time that they ruled on matters of capital crimes, rather, there is well-

[146] He stole a pair of oxen from his fellow.

founded suspicion and talk that doesn't cease. If it seems to the judge that the [pressing] hour requires that he should be adjudicated thusly, he is permitted to do so.

"And thus it seems from the words of the Rambam who wrote that a *beit din* has the ability to strike anyone who is not [technically] liable for lashes and to kill anyone who is not [technically] liable for death. This is not to transgress the words of the Torah, but rather to make a fence around the Torah since the *beit din* sees that the people have become unruly in this matter. They (the *beit din*) have the strength to make the fence and to strengthen this matter according to what seems right to them. It is all [for the sake of] a temporary order and not to be fixed as *halakha* for the generations.

"Thus they must [in every place and in every generation] lash people for whom there was a bad word [on the street] and the people complained loudly about him that he had committed sexual transgressions and this is a situation in which there is a voice that would not stop and in which he did not have any enemies that were spreading around any terrible slander. And similarly, we scorn those about whom there is a bad word and scorn his parents before him. They [the *beit din*] also have the ability to forfeit the money that he possesses and lose what they see in order to create a fence for this unruly generation, and [they may] fine this man, expel him, excommunicate him, curse him, flog him, pull out his hair, incarcerate him in jail, and cause him to take an oath on the name of God under duress that he will never do and that he never did any of these things. All of these things are according to what the judge sees as appropriate, that this man needs it and the [pressing] hour requires it. And in all this, may his actions be for the sake of heaven and may not the honor of creatures be light in his eyes, for he is pushing away a rabbinic mitzvah. And all the more so, the honor of the children of Abraham, Isaac, and Jacob who hold fast to the Torah of truth, he should be careful not to destroy their honor, rather to add to the honor of God alone.

R. Joesph Karo: *Shulchan Aruch, Hoshen Mishpat* 388:2-16 [Translated from the Hebrew by Carey Brown]

#2: One who informs on money by means of an *anas*, either gentile or Jewish, is obligated to pay from the best of his property, whatever the *anas* took, even though the *moser* did not do the action or take it in his hand, but only slandered. If he dies, collect from his inheritors like all other damages. [*Rama*]: *There are those who say that this is only if he stood trial, but if he didn't stand trial, the inheritors are not obligated to pay. A woman who informed, we excommunicate her and if she has any money that her husband does not control, she must pay. If she has "plucked property"*[147]*, the husband can eat fruits all the days of her life. If she dies, he must pay to the person who was informed upon, and likewise to pay other damage. The husband has no role in this, other than [to be like] an inheritor who is obligated to pay.* This applies only to a situation when the *moser* did it on his own. But if he was forced by gentiles or Jews and was forced to show it, he is exempt from payment. [*Rama*]: *And if they forced him to show his own and he showed his fellow's [instead], he is obligated [to pay].* If he [gave over

[147] A wife's estate of which the husband has the income without responsibility for loss or deterioration.

the property to the *anas*] himself, despite that he was forced, he is obligated to pay, for one who saves himself by the money of his fellow is liable. How is this? Behold a king made a ruling to bring him wine and straw and such things, and a *moser* said, "Hey, *Ploni* has a treasury of wine or straw in such-and-such a place." If they went and took from him, he is liable. [*Rama*]: *Even if they jailed him and did not tell him why and he shows the money of his fellow, he is liable. And duress is only beatings and afflictions, but not the duress of money. If he sees damage coming to him, he is permitted to save himself, despite that this causes damage to happen to another.*

#3: If the king forced this informer until he showed him the money of his fellow who ran from him and he shows him because of the force, he is exempt, because if he had not shown him he would have been flogged or killed.

#4: Someone who took his fellow's money himself and gave it to an *anas* is liable to pay in any situation, even if the king forced him to bring it. [*Rama*]: *Two partners who had an obligation together and an* anas *permitted one of them to be exempt, the obligation is exempt, for this is not called "giving."* This applies only to a situation when he was forced to bring it and he brought it that he is liable, since the money didn't come to the domain of the *anas*. But if the *anas* who was threatening the Jews to show him and the *anas* stood on the money and it was done in his domain, [*Rama*]: *which means he can rule over it and take it.* And he threatens the Jews until they bring him [the *anas*] to another place, and even if the one who takes him is this *moser* who showed him, he is exempt because since the *anas* was standing on the side of the warehouse, what was there had already been destroyed, as if it had been burned.

#5: Litigants who had a quarrel about fixed or moveable property. One says, "It's mine." And the other says, "It's mine." One of them stands and informs by means of an *anas*, we excommunicate him until he returns the situation to the way it was previously. Sever connections with the *anas* from the two of them and do justice in Israel. [*Rama*]: *In any case, there is no* din moser *despite that he caused his fellow great loss because* moser *is only where he intends to do damage, not where he intends to extract his own [property]. There are those who disagree and explain that he is a* moser *and is obligated to pay him all of his damages, provided his fellow had not been stubborn. And how much more so if they warned him from the beginning not to adjudicate before the gentiles and he transgressed, is this a case of* moser.

#6: One who was seized on account of his fellow and gentiles took his money because of his fellow, the fellow is not obligated to pay. There is no situation of a person who is seized by his fellow in which the fellow will be obligated to pay, except for a case in which he is seized because of the tax fixed for each person annually, or for a case in which he is seized because of the gift that every citizen gives to the king when he or his soldiers pass by them, he is obligated to pay. And this applies to one who took from him explicitly because of *Ploni* before witnesses, we have explained already in *siman* 128.

#7: One for whom there are witnesses [who say that] he informed on the money of his fellow, for example that he showed it himself or that he was forced to give it himself and

the witnesses did not know how much [money] he had caused people to lose with his informing. And the one who was informed upon says, 'thus and thus he caused me to lose.' And the informer denies what they claimed. If the one who was informed upon seizes [the money?], we do not take it away from him. Rather, we have him take an oath [while holding an object] and he is entitled to whatever he seized. [*Rama*]: *There are those who say that in a doubtful case seizure doesn't work.* If he did not seize it, we only take from the *moser* if there was clear evidence. [*Rama*]: *If these things were well known, and all that is needed is to compromise with the minister in this situation in such and such [an amount], the one who was informed upon takes an oath and lifts up [the object].* There is one who says that if the *moser* says, 'I did not know how much was lost on my account,' the one who was informed upon will take an oath and collect. [*Rama*]: *All of the [preceding] was in regards to one who informs on [his fellow's] money, but one who informs on the body of his fellow to* anasim, *the one who was informed upon will take an oath and collect. Likewise, if he caused a seizure, that is like damage by hand and he is obligated to pay him all that he damaged. One who says to his fellow, 'You informed on me' and he denies it, he will swear to him an exemption oath. There are those who say that he needs to take an oath before the minister that he did not inform upon him. He only needs to do this sort of 'cleansing' before one witness who testifies that he informed, however a non-Jew is not believed in this. [If] two people informed together, each one has to pay half. If they informed one after the other, the last is exempt, because as long as the [victim] wasn't exempted from the first informing, the damage was caused by the first. Even if they did not inform, but only saw an* anas *or an idolater who spoke to the minister. There are those who say that if a man is struck by his fellow, he can go and complain before the idolaters even though causes the hitter great damage.*

#8: We do not impose an oath on a *moser* who showed the property himself – neither a heavy oath nor an oath of exemption – because he is evil and there is no one more *pasul* than this. [*Rama*]: *Even if he did not inform yet, but only said, "I will go and inform." If he said this in public, he is invalid as a witness. And we do not say of this "avid inesh d'gazim v'la avir" – "A man exaggerates [for effect] but will not do it." There are those who say that we don't say that unless he is held out as doing this, even if they don't know whether he regularly does it or not. In any case, the one opposite him can stand and save himself by means of idolaters even though this will cause damage to this one.* But, the *moser* who was forced to show [something] or bring and give [something] by hand, even though he was obligated to pay, he is not evil. He is only a person with an outstanding debt. We have him swear an oath like other fit people. [*Rama*]: *Likewise, if he admits that he informed and there are no witnesses to this fact, even though he is not invalidated by his own admission, he is obligated to pay.*

#9: It is forbidden to inform on a Jew by means of an idolater, either physically or with his money, even if he was evil and a sinner, even if he caused great trouble and suffering to him [the *moser*]. [*Rama*]: *This only applies to regular matters. But if they informed, it is permitted to inform on him, because it is permitted to kill*

him according to the law in a place where there is a fear that he will return and inform or if it is not possible to save him in another way. But, if it is possible to save him in another way, this is like two who informed on each other, and any one who caused more loss to his fellow is obligated to pay the extra as "complete damages." The one who is permitted in damage paid. (?) Anyone who informs upon a Jew by means of an idolater, whether physically or monetarily, he has no share in the world to come.

#10: It is permitted to kill a *moser* in any country, even in this day and age. And it is permitted to kill him before he informs. Rather, when he says, "Hereby I am going to inform on *Ploni* with his body or with his money," even if it is with a small amount of money, he permits himself to be killed, and we warn him and say to him, "Do not inform." If he 'hardens his face' and says, "No, I am going to inform," it is a *mitzvah* to kill him. Whoever hastens to kill him is meritorious. [*Rama*]: *If there was no time to warn him, there is no need for a warning. There are those who say not to kill an informer, unless it is impossible to escape from him with one of his limbs. But if it is possible to escape from him by [damaging] one of his limbs, for example, to cut off his tongue or to take out his eyes, it is forbidden to kill him. For surely he is no less than any other* rodef.

#11: [Regarding] an informer who schemed and informed, it is forbidden to kill him unless he is legally presumed to be an informer. Surely he should be killed, lest he informs on others.

#12: Anyone who informs on the public and [causes] them suffering, it is permitted to inform on him by means of the idolaters to strike him, to imprison him, and to fine him. But, because of the suffering of an individual, it is forbidden to inform on him. [*Rama*]: *One who engages in fraud and such things and we assume that he will cause damage to many, we warn him not to do it, and if he does not pay attention, you can inform on him to say that nobody else can engage with him except this one alone. One who wants to run and not pay the idolaters what he owes and someone else reveals this, it is not considered* din moser, *for he did not cause a loss. He only needs to pay what was owed. In any case, it was bad what he did for it is like returning lost property to idolaters. If he caused him damage, he must pay him what he cost him.*

#13: It is forbidden to cause monetary loss to a *moser*, despite that it is permitted to cause him bodily loss. This is because his money is designated for his inheritors. [*Rama*]: *There are those who say that it is permitted to take his money from him, because it is only forbidden to destroy it.*

#14: A *moser*: we take testimony [about him] outside of his presence. [*Rama*]: *And there are those who say that we don't need to make sure the testimony is that consistent.*

#15: One who is presumed to have informed three times on a Jew or on their money to idolaters, we request counsel and tactics to eliminate him from the world. [*Rama*]: *By means of* garma *even though it is forbidden to kill him by hand. One who speaks before*

the community and speaks words of informing and through this he is heard by the minister and he causes damage, despite that he does not have din moser. *In any case we punish him according to the view of the judges. One who sent a* shaliach *to inform, if the* shaliach *is accustomed to informing, the one who sent him is liable. He cannot say that "there is no agency in matters of sin," since he [the agent] is presumed to do this. Also, if he gave a paid-off-note to an idolater and he knows that he gave it to the minister and that the Jew will be forced to pay it a second time, he is obligated to pay.*

#16: [Regarding] outlays [of money] that are taken to eradicate a *moser* - all of the people living in a town are obligated to pay for them, even those who already paid a tax in another location.

There is much overlap in the content of the laws because each of the codifiers derives his materials from his predecessors, as well as the original Talmudic material. However, slight differences are notable especially in the laws regarding the ability of Diaspora rabbis to adjudicate fines, bodily punishment, and even death. The *Mishneh Torah* and the *Shulchan Aruch* in particular are quite parallel in their structure of the discussion, specifically in *simanei* 1-11. Yet the differences between them, as well as the differences in practice apparent from internal discussions in the *Shulchan Aruch* between Joseph Karo and Moses Isserles, are significant. For example, in *siman* #9 (of both texts), the Rambam and Karo say essentially the same thing. Yet the Rama adds another layer by advocating the permissibility of informing on an informer. He says, "But if they informed, it is permitted to inform on him, because it is permitted to kill him according the law in a place where there is a fear that he will return and inform or if it is not possible to save him in another way."

The development of the Rambam's ruling in which he states that it is permissible to kill an informer before he informs (upon which the other codifiers, as well as the respondents

featured in this thesis rely) is based largely on the Talmudic text Bava Kama 117a. He writes in *halakha* #10:

> "An informer may be killed anywhere, even at the present time when we do not try cases involving capital punishment, and it is permissible to kill him before he has informed. As soon as one says that he is about to inform against so-and-so's person or property, even a trivial amount of property, he surrenders himself to death. He must be warned and told, 'Do not inform,' and then if he is impudent and replies, 'Not so! I shall inform against so-and-so,' it is a religious duty to kill him, and he who hastens to kill him acquires merit."

This is a direct reference to the case in the Bavli when Rav Kahana kills the informer who told Rav that he was going to inform on a fellow Jew to the King's officials. We already read how the Rosh placed Rav Kahana on a pedestal for hastening to kill this man; most likely he made this association with the assistance of the Rambam's writings in the *Mishneh Torah*. One of the slight differences between the language of the *Mishneh Torah* and *Shulchan Aruch* in #10, is that only the *Mishneh Torah* mentions that it is permitted to kill "even at this time when we do not adjudicate capital cases." It seems that the problem of Diaspora communities would be adjudicating these punishments outside of Israel is of less concern a few centuries later for Karo and Isserles. This perhaps may be a nod to the practice and a reflection of the reality that faced Jewish life in the 16th century.

Another major difference between the *Shulchan Aruch* and *Mishneh Torah* texts is the additional material found in *simanei* 14-16 of the *Shulchan Aruch* that is missing from the Rambam's code. A summary of these additional laws includes:

#14: We can take testimony about a *moser* without his presence.

#15: If someone is presumed to have informed three times, "we request counsel and tactics to eliminate him from the world." The Rama adds that this should be done by means of *garma* even though it is forbidden to kill him by hand. "One who speaks before the community and speaks words of informing and through this he is heard by the minister and he causes damage, despite that he does not have *din moser*,. In any case, we punish him according to the view of the judges." This language is similar to the direction that the Rashba took in utilizing *garma* as a way of punishing Reuven in his responsum.

#16: Finally, Karo says that any costs incurred to eradicate a *moser* must be paid by the people of the town. It is a very practical mention, perhaps an attestation to the fact that the punishment of *mosrim* was a reality happening in their communities. It is also important to note, however, that Karo tends in his codification to focus on communal responsibilities and prerogatives.

Tur

Because the form of presentation of the *halakha* in the *Tur* is different from the other two codes, it is worth examining this work on its own to understand how it served as a bridge on this topic between the *Mishneh Torah* and the *Shulchan Aruch*. A major focus of the *Tur* is the issue of adjudicating fines outside of Israel. R. Jacob b. Asher rules that such adjudication can be done in a pressing time. He gives the proof of Rav Nachman who gave a fine outside of land of Israel to a man who was a confirmed robber. He puts the decision in the hands of the judge and reminds the reader that this is done to make a fence

around the Torah because of the unruly times, but not to be considered as *halakha* for the generations.

> "They [the *beit din*] also have the ability to forfeit the money that he possesses and lose what they see in order to create a fence for this unruly generation, and [they may] fine this man, expel him, excommunicate him, curse him, flog him, pull out his hair, incarcerate him in jail, and cause him to take an oath on the name of God under duress that he will never do and that he never did any of these things. All of these things are according to what the judge sees as appropriate, that this man needs it and the [pressing] hour requires it."

He takes his understanding of the need to adjudicate thusly for the sake of setting up a fence around the Torah from the Rambam's *Mishneh Torah*:

> "It seems from the words of the Rambam who wrote that a *beit din* has the ability to strike anyone who is not [technically] liable for lashes and to kill anyone who is not [technically] liable for death. This is not to transgress the words of the Torah, but rather to make a fence around the Torah..."

Also interesting are his words of warning to the judge, "And in all this, may his actions be for the sake of heaven and may not the honor of creatures be light in his eyes, for he is pushing away a rabbinic mitzvah. And all the more so, the honor of the children of Abraham, Isaac, and Jacob who hold fast to the Torah of truth, he should be careful not to destroy their honor, rather to add to the honor of God alone." Such a statement serves as a warning to the judge that he has a big responsibility and should not take it lightly.

Summary

The phenomenon of informing within the Jewish communities of medieval Spain confronted the leadership of the *aljamas* with a severe crisis of communal stability. While a strict reading of the *halakha* made it difficult to adjudicate harsh penalties against these *mosrim*, a creative reading of Talmudic sources and codes literature allowed for difficult punishments, including death. It was therefore dependent upon the determination of the individual rabbis within each of the communities to determine whether or not they wanted to hand these accused informers severe punishments.

A close reading of the featured responsa of the Ritba, the Rashba, and the Rosh reveals that while the Rosh was willing to grant a harsh sentence upon an informer, the Ritba and the Rashba were less willing to do so. Whereas much secondary historical literature as well as the codes point to a generally harsh response to informers, especially in Spain, we find in this thesis evidence of prominent Spanish rabbis who were hesitant to use such severe measures to combat the problem of *m'sirut* within their communities.

Each of the three rabbis was faced with the need to look creatively at the *halakha* in order to create the best possible outcome for the local Jewish community while protecting the corpus of *halakha*. The different ways in which the Ritba, the Rashba, and the Rosh attempted to reach this balance points to the multiplicity of ways in which these different rabbis approached the same subject, yet by using different Talmudic sources and unique perspectives of history, reached different conclusions about the proper way in which to react to the informers amongst them.

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Appendix

Principal Talmudic Sources

Bava Kama 117a

ההוא גברא דהוה בעי
אחוויי אתיבנא דחבריה אתא לקמיה דרב א"ל לא תחוי ולא תחוי א"ל מחוינא
ומחוינא יתיב רב כהנא קמיה דרב שמטיה [ח]לקועיה מיניה קרי רב עילויה
[א] בניך עולפו שכבו בראש כל חוצות כתוא מכמר מה תוא זה ביון שנפל
במכמר אין מרחמין עליו אף ממון של ישראל כיון שנפל ביד עובדי כוכבים אין
מרחמין עליו

Bava Kama 62a

• עשו תקנת נגזל במסור דמשתבע ושקיל או לא [ז]תיקו

Bava Kama 119a

ממון מסור רב
הונא ורב יהודה חד אמר מותר לאבדו ביד
וח"א אסור לאבדו ביד מ"ד מותר לאבדו ביד
[ג] לא יהא ממונו חמור מגופו ומ"ד [ד] [ה]אסור
לאבדו דלמא הוה ליה זרעא מעליא וכתיב
[א] יכין [ס] רשע וצדיק ילבש:

Sanhedrin 58b

רב הונא אמר תיקצץ יד שנאמר °וזרוע רמה תשבר *רב הונא קץ ידא

Avodah Zara 26b

אמר מר היו מורידין אבל לא
מעלין השתא אחותי מחתינן אסוקי מיבעי
אמר רב יוסף בר חמא אמר רב ששת לא
נצרכא שאם היתה מעלה בבור מגרדה
דנקיט ליה עילא ואמר לא תיחות חיותא
עלויה רבה ורב יוסף דאמרי תרוייהו לא
נצרכא שאם היתה אבן על פי (נ) הבאר מכסה
אמר לעבורי חיותא עילויה

Pesachim 49b

אמר רבי אלעזר עם הארץ
מותר לנודרו ביום הכיפורים שחל להיות
בשבת אמרו לו תלמידיו ר' אמור לשוחט
אמר להן זה טעון ברכה וזה אינו טעון ברכה:

Bava Kama 117b

ההוא גברא דהוה מפקיד ליה
כסא דכספא סליקו גנבי עילויה שקלה יהבה
להו אתא לקמיה דרבה פטריה א"ל אביי האי
מציל עצמו בממון חבירו הוא אלא אמר רב
אשי א"חזינן אי איניש אמיד הוא אדעתא
דידיה אתו ואי לא אדעתא דכספא אתו:

מתני' ומכולהו מתנייתא, וכל שלא הכשירם כדרך הכשרם הראוי להם הרי הין הכנוס בהם אסור כאלו לא הכשירם כלל. וסתם יינם לפי דעת התלמוד אוסר הוא בין במשתוא כדברי הרמז"ל[12] כמו שתוכיח בראיות ברורות. והיה בזמן הזה דכל דבר שבמנין צריך מנין אחר להתירו. מעתה אם הכלי, הללו כלי הנת הם הרי היין שבתוכם מותר מחמת העירוב[ין] (מיחת). ואם הקנקנים או שאר הכלים המכניסן לקיום אין העירוי ההוא מכשירם. אבל [אם] נגררו יפה מכל צד הרי היין מותר, אבל אם לא נגררו גם הצדדין הגורידה כמי שאינה והיין אסור בשתיה, אבל בהנאה מותר. דהא קי"ל כרבנן[13] בנאדות הגוים וקנקניהם ויין ישראל כנוס בהם שאין אסורין איסור הנאה:

קל

עוד שאלת כי ראובן ושמעון ולוי היו דרים בפראגה קם ואבותיהם מגדולי פורעי המס, ואחר שנפטרו האבות הלכו הבנים לעיר אחרת. ועתה מקרוב עשה גוי אחד השבה לקהל פראגה מאונאות ורביות שנטל מן הקהל. ועכשיו ראובן שמעון ולוי תובעין לקהל פראגה לתת להם חלקם מן ההשבה והיא כפי שבת ממון שהיה לאבותיהם בעת ההיא כי כן דעת הגוי לעשות השבה לכל אותן שפרעו חלק ברבית ובפרט לאלו שפרעו בו יותר מן המחצית. והקהל וכו'[1]...

כאן חסר

קלא

ואחרי: ההקדמה הזאת אני חוזר על הדין ואומר כי שמעתי תלונות שאול הנדון על הדין, ופרטיהם שמנה תלונות. הא' שדן אותו מבלי שיבואו המתרעמין עמו ויתבעו לו ויטענו טענותיהם, כי אין לדון לשום אדם עד שישמעו טענות בעלי הדין. והשני שלא קראו לפניו העדויות שהוציאו עליו כדי שישיב עליהם אם יוכל לפוסלם. והג' כי קבלת העדות פסולה יען היתה באנשים שהם קרובים זה לזה. וגם שיש מהם שהם מן המתרעמין ובעלי דבר, שזה פסול בדין תורתנו. והד' שקבלו המקבלים ההם עדיות על אנשים שלא נתרעמו ממנו בשעה שהשילו חרם שיראה כל א' תרעמותו. והה' שיש בעדויות שהוציאו עליו עדיות מרעות שעשה

12 תיכה זו מסושטת בכה"י ונדמה לי שכתוב "הרי"ם ז"ל". אך הרמב"ם לא הוכיח בראיות ברורות, אמנם כן כתב בהלכות מאכלות אסורות פט"ו, הל' כט. ועיין תוס' עבודה זרה עג, א, ד"ה יין, בשם ר"ת, שבטל בששים, והמרדכי שם כתב בשם ר"ת, שהוא להלכה ולא למעשה וזולתי במקום הפסד מרובה. ועיין בחידושי רבינו לעבודה זרה לג, א, ד"ה הא דקתני.

13 כט, ב. ועיין חידושי רבינו שם לג א.

קל 1 כאן מסתיים עמוד ב מדף סד בכה"י, והסופר העיר בשתי מלים: "כאן חסר", וכנראה חסר דף אחד, המשך השאלה, וכל התשובה והתחלת שאלה קלא.

קלא 1 מתשובה זו משמע, שרבינו היה המוסמך ביותר בעיני השלטונות במלכות פפרד, כי שאול הגדון התלונן לפני המלך על דיין עירו שהעביד עליו את הדין, והמלך מסר את הדבר לחוות דעתו של רבינו. כן למדים אנו, שהיתה לדייני ישראל עצמאות מוחלטת לדון במשפטי התורה אשילו עד כדי הריגה.

לאנשים שמחלוהו כבר מן ההכאות ההם. והו' כי אפי' היו העדיות ההם אמת. מפני העדיות ההם לא היה לו לקצוץ את ידו ולהעבישו בגופו מן הדין, וכל שכן כי תקנו היתה בביגרי* 1 על המכה או המורם או העושה הדברים ההם מה יהיה עונשו, ולז היה חייב אלא כפי התקנה ההיא. והז' שאין דיננו נותן להעניש אדם בשני דיני ולחייבו שתי רשעיות 2. והח' ששאל מן הדיין אחרי הדין שיתן לו סלקא אלין האדון יר"ה או אל האדון הרב דון אשתרוק ולא רצה:

והדיין משיב על הראשונה והשנייה כי בתרעומת קהל אין דרך שיבאו לדיי לפניו(ו) [דיין] חוץ לעירם, ודי כי הראו תרעומותיהם לרב דון אשתרוק ואמ' ל הרב הנז' שאם יש לו עליהם תשובה שישיב עליהם ולא רצה. וגם הדיין אמ' ל קודם הדין כשקראו לפניו התרעומת שאם יש לו טענה עליהם שיסדר טענותי וידון עליהם ולא רצה להשיב כלום עד שיבואו המתרעמין לפניו, ומאחר שהוכן כן היאך יקראו העדיות לפניו. ולא עוד אלא שהוא אומ' ומראה אחם עדים כ קודם הדין פייסו שיתן לו מתן שלא לדון אותו עד שישוב פלו' פנקס מן המלן ולא רצה להמתי' ובקש ממנו שידין אותו מיד, אלא ששאול אומ' כי הוא היה סבור שלא היה רוצה לדונו אלא על ענין עלילת ההריגה שנתפש עליה. ועל הג' אומ כי הוא צוה על המוקדמין להחרים ולקבל עדיות כדין, והם שלחו לו בעדיות שיצא ודן על אותן העדיות שיצאו בפי מה ששלחו לו(מ'), ולא היה לו לדקדק את המוקדמין שיעשו דבר שלא כשורה. ועוד כי תקנה יש בביגרי* 1 שקבלו כל הקה עליהם עדות המוקדמי' וחתימתן בכל הדברים בין בקרובים בין ברחוקים ואי להרהר אחר קבלתם. ועל הד' זה' אומ' כי הוא צוה על המוקדמין לקבל העדיו כמו שאמרנו על הרעות שאמרו עליו לברר רעותיו, והוא קבל מהם העדיות ששלד לו. ועל הו' והז' אומ' כי מי שמרגיל לעשות הרעות ההם שיצאו עליו חייב הי תעונשי' האלו ואפי' הריגה כפי ראות הדיין, ולא עוד אלא כי כל מה שעש בעצת חכמים כמנהג הרבנים, ואפי' טעו היועצים ההם אין עליו תלונה כי הו עליהם סמך, כ"ש שלא טעו. ועל הח' אומ' כי הוא נתן סילקא על דינו והראה מ חתם עדים. ע"כ תורף דבריהם:

ועתה אדני המלך יר"ה אני אומר שאפי' היה טעות בדין הזה אין אשמה ועונ על הדיין על מה שדן אותו לקצוץ ידו ולשונו 2 ולפוסלו לעדו

מפני הטענה שאמ' והראה כתוב כי מה שעשה בזה עשה בעצת איש מוחזק באר כחכם ואיש אמת שסומכין עליו הדייתים אשר בארצו. ומלבד זה אני אומר על עיק הדין במה שאומ' שאול שלא באו המתרעמין לפניו, וכי לא קראו לפניו העדיו וכי יש עדיות בלא תרעומת, וכי הרבה מן המוכים מחלוהו קודם לכן, וכי ש (ההוראות) [התכאות] והמרמות אין עונש גוף בתורתנו, כי כל הדברים האלו ז בדין שהוא בשורת הדין להפיס ולדון בין אדם לחברו יחיד או יחידים, אבל בדברי שהדיין עושה דרך (איסור) [ויסור] לתרעומת הרבים לתקן את הרבים ולבער הרעו

* 1 שם עיר, ועיין במבוא.

2 והדיין דן אותו לקצוץ ידו ולפסול עדותו ולגרשו מן המחוז.

ה נראה, שלמעשה לא קצצו לשונו, כי לא נזכר בתלונות.

מן הארץ ולסייג לתורה, אין כל זה מעכב בדיננו, כי אין הדין מפני תנחבלים, כדי שנדקדק בזה, אלא מפני שאר העם ולא ירגילו עושי הרעות לעשות כן, והנשארים ישמעו ויראו, ואם חטא ומחלותו והוא עודנו שב במרוצתו, כ"ש שהוא חייב ויסור, והדיין יכול לדון בכיוצא בו בלא מתרעם כי הוא אביהם של צבור וחייב לתקן זה, כמו שחייב לתקן מכשולות הדרכים, וכיוצא בהם שלא יזוקו בני אדם, וכבר מצינו בדיין אחד מחכמ(י)נו ז"ל, שקצץ יד איש אחד שהיה רגיל להכות בני אדם, ותקנת הקהל שטוען שמעון בעונשי ההכאות אין לה מקום בכיוצא בזה שהוא נעשה דרך ויסור למורגל להיות שונה ומשלש ברעות מן הטעם שאמרתי, ומה שאומ' שאין דנין לאדם בשני דיינין, זה אינו, כי על שתי עבירות דנין, ועוד שבדין שהוא דרך היסור שאמרנו דנין ודנין בכמה דיינין לייסר את העם, ועוד כי כפי מה שהעידו עליו שהוחזק במוסר ומלשין כפי שכתוב בעדיות וכתב הקהל והלכה רווחת היא בידינו להרוג, מי שהוחזק להיות מוסר ומלשין או מצער את הצבור. וכ"ש זה שמעידין עליו שנתחברו לו עבירות אחרות מקבלת שוחד ועדות שקר כפי הכתוב בכתב הקהל, ומכה בני אדם וכיוצא בזה, ומי שהותר להורגו כ"ש שמותר לדונו באחד מאיבריו כפי העברות, כי ההריגה קשה מן הכל. ומה שאמ' שאול כי קבלת העדיות וגם כתב הקהל שהוציאו עליו מסולים לפי שהוא חתום בקרובים ובעלי דבר:

הנה הדיין מוציא כתב חסכמה (שיקבלו) [שקיבלו] כל הקהל עליהם למוקדמין לחתום בקרובי' ועל הקרובי' בכל עסקיהם, ועוד כי דבר כזה שהוא תרעומת קהל ונעשה דרך ויסור, אם היינו פוסלים עדות בעלי דבר כמו בשאר דיינין שאנו פוסלים כל בעל דבר והנוגע בעדות לא יוכלו הקהל לייסר שום מוסר ושום מצר אצל הצבור כי כולם נוגעים בדבר, לכן הורגלו לעשות דברים אלו בעדים מן הקהל ופעמים אפי' בקרובים[10]. ומן הטעם הזה אנו דנין דין ויסור לפעמים בלא התראה כשאנו רואים אדם שמורגל בעברות והוא מוכן לחזור (ולתבוע) [ולעבור] ושלא יקבל התראה. ומה שמתרעם שאול על שפסל הדיין עדותו מאחר שהקהל החזיקו אותו במוסר הנה המוסר מסול הוא לעדות בדיננו[11], וכ"ש אם התברר להעד עדות שקר. ומה שמתרעם על שלא ניתן לו סילקא, הנה הדיין מראה חתם

א אפשר, שרבינו כיוון בזה לסתור הסענה שטען שאול, שלא קבלו העדויות בפניו, ומשמע שלולא נמוק זה היה צורך לקבל את העדות בפני בעל דין על אף שהיא בקרובים. ואולי יש מכאן ראיה ל"חכם צבי" סי' יא הובא בשער המלך סי' לו, שגם לפי המנהג לקבל עדים מהקהל צריך לקבל העדות בפני בעל דין.

2 אולי צ"ל: במשובתו. ואפשר מלשון "את מי רצותי" (שמואל"א יב, ג).

3 שקלים פ"א, מ"א. 7 סנהדרין נה, ב. 8 ראה כתובות לב, ב.

9 עיין ב"י חו"מ סי' ב בשם נמוקי יוסף, שאין לדון דיני נפשות אלא בסנהדרין; ורב הונא דקץ ידא, היינו לעושו קצת, אבל לא להרגו. ומתא דרי אלעזר, בכבא מציעא פג, ב, משמע אף להרגו וכדברי רבינו.

10 וכן כתב הרא"ש בתשובה כלל ה, סי' יד ורבינו ירוחם נתיב ב, ח"א. ובתשובת הרשב"א, הובאה בב"י וב"ש סי' לו, סכ"ב: עכשיו נהגו לקבל וכו'. וכתב הרמב"ן בתשובה סי' רמ, הובאה בב"י חו"מ סי' ב, שלא הצריכו עדים בפורים אלא בדיני התורה, אבל לתקן את העולם לצורך שעה דנים אפילו על ידי קרובים ועד מסי עד וכו'.

11 וכן כתב הרמב"ם בהלכות עדות פי"א, הלי' י והנהות אשרי כפרק זה בורר,

עדות שנתן לו, ועוד כי שאלתי מאנשים ממלכות קשטליא ואמרו לי שאין מנה חרב לתת סילקא בדברים אלו, לפי שכבר נתן לו המלך כחו ורשותו ובמקומו הוא עומד בזה. והנה מכל אלו הצדדים אין אשמה ועונש על הדיין אם עשה היסור הזה דרך ויסור ויראת שמים ותקון העולם וסייג לדת[12], כי אם עשה באכזריות ושלא לשם שמים האלהים שהוא רואה ללבב יתפרע ממנו, ואוי לנפשו אם גמ' לנפשו רעה להיות חוטא בדם נפשו. אמנם אדוני המלך ירי"ה אני רואה כי עשו הדיין יתירה על עצת החכם היועצו והוא לגרשו מארץ מגורתו וקרוביו (ולוותר) [ולהתיר דמו למוצאו, והנה זה תוספת רעה, ואחר שרצה להחיותו ולא להורגו כדין מוסר אם אנו מגרשין אותו מארץ (מסרותיו) [מגוריו] ומכיריו וקרוביו מה יעשה זה שנקצץ ידו ונתבטל(ה) ממלאכתו ואנו פוסקים חיותו. ועוד כי שמעתי דתלו בי[ה] טפלי לכן נראה שראוי לבטל ממנו גזרה זו, וגם לצוות על הקהל שיתנו לו חיות לפרנסת גחליו אחר שכבר קבל דינים אלו, ולא עוד אלא שיהיה דר במקום הרשע כדי שהנשארים יראו תמיד ויראו. אכן אחרי שיעשו עליו התראה שישמר מכל הדברים הרעים, ושלא יהיה לו משא ומתן עם שום אדם שיוכל להחשד במלשינות או במסירה, ושילך בהכנעה בכל ענייניו. ואם יעבור בזה שיוסיפו ליסרה אותו, ואול מתוך כך יחזור בתשובה וירחמהו עושהו כי חנון ורחום הוא:

קלב

שאלתם ראובן נפטר ואלמנתו תבעה כתובתה מיתומים קטנים, ואין להם אל קרקעות שמשכנם אביהם לשמעון במנה. והב"ד מכרו הקרקעות לפרוע לאלמנה. ויש להם לכתוב במעשה הב"ד שקבלו דמי הקרקעות מיד הלוקח ופרעו מהם לשמעון המנה בחובו והשאר בכתובתה. ועל ענין המנה של שמעון נפל הספק בין הב"ד יש מי שאומ' דכיון דאין ליתומי' לפרוע במנה עד שיגדילו ואין ב"ד נוקקין לנכסיהם, שאין הב"ד רשאין לפרוע המנה (אלא) [ולא] לכתוב כן. ויש שאומ' שכיון שאין ליתומים נכסי בני חורין לפרוע לאלמנה ויש להם למכור ואין לה לסלק לבעל המשכונה עד (שיפרענו) [שיפרעוהו] שרשאין ב"ד לפרוע לשמע המנה ולכתוב במעשה [הב"ד] כן שפרעו לשמעון המנה מטעם זה. ע"כ לשון שאלתכם.

תשובה: מלשון שאלתכם נראה שזמן כתובתה של לאה קודם לזמן שטר המשכונה שמשכן ראובן לשמעון והוא הקודם לגבות לפי לשון השאלה. אך לא נתבר בשאלתכם אם מת ראובן הממשכן תוך זמן פרעון המשכונה אם לאו, ואם י בשטרו נאמנו על יורשי ראובן ואם לאו, ואם יש לו זכות לאבול פירות המשכונ לאחר זמן שקבעו עד שיפרעו לו מעותיו אם לאו, ועיקר הנדון הזה תלוי ביני על מה שאין נוקקין לנכסי יתומי' קטנים. והנני צריך לבאר, שאם מת ראובן הממש תוך זמן פרעון המשכונה דודאי נוקקין וגובה בלא שבועה ואפי' במלוה על פ

12 וכן כתב הרמב"ם בהלכות סנהדרין פכ"ד, הלי' י.

קלב 1 תשובה זו הביאה ב"י חו"מ סוף סי' קי בשם רבינו בשינויים קלים.

2 בבא בתרא קעו, א, ועיין בחידושי רבינו, שם ה, ב ד"ה ואפילו יתמי.

סימן רלח

שאלה ספר מנוקד אם מותר לברך עליו אם הוא פסול[1].

תשובה נראה לי דפסוק פסוקים והנקוד פוסלין[2], שאין לנו אלא כנתינתו מסיני[3]. ובודאי נראה שאין ס"ת מנוקד ואם נקד פסול, שכמה דורשין חכמים המקרא והמסורת, ואם אתה מנקדו אין כאן מסורת[4]. ועוד שנינו במסכת סופרים[5] ספר שנקד ראשי פסוקים שבו אל יקרא בו. ואף על פי שאמרו רז"ל[6] ויקראו בספר תורת האלהים זו מקרא מפורש זה תרגום ושום שכל אלו הפסוקים ויבינו במקרא אלו פסוקי טעמים, [לאו למימרא הפסוקים ופסוקי הטעמים מנוקדים בס"ת, אלא][7] לומר שהיו מקובלים ממשה בסיני על פה, כמו שאמר מפורש זה תרגום, ובודאי לא היה תרגום כתוב בספר תורה.

סימן רלט

שאלה להר"ם ז"ל

ספר תורה שאינו עשוי כהלכתו או ספרים של קלף[1] שהם ודאי פסולים, אם מותר לברך בהן הקורא או אסור לברך.

והשיב ח"ל מותר לברך. ואין הברכה על הקריאה בספר, כמו הברכה של[2] נטילת לולב או ישיבת סוכה, [שאם היתה סוכה פסולה או לולב פסול נמצאת ברכה לבטלה, שהמצוה היא נטילת הלולב או ישיבת הסוכה][3], שעליהן הוא מברך, ואם היו פסולים לא עשה מצוה. אבל הקריאה מצוה[4] היא קריאת התורה, בין שקרא בספר כשר בין שקרא בספר פסול, ואפילו קרא על פה [יברך כן][3] עצמה של קריאה היא המצוה שעליה מברכין. הלא תראה שהקורא בשחר קודם שיתפלל משנה או תלמוד או הלכה או מדרש מברך ואחר כך קורא או דורש[5], הנה למדת שההגדה[6] בתורה היא המצוה שעליה מברכים. וזהו הפרש שלא הרגישו בו רוב חכמי תורה, ודמו שהמברך והקורא בתורה בספר פסול הרי זו ברכה לבטלה. וראיה לדבר זה, הא דאמרו[7] אין קורין בחומשין מפני כבוד הציבור, [וכי יש בעולם פחיתות כמו פחיתות חומש, אפילו היה ספר תורה חסר אות אחת פסול, וכל שכן חומש, ולמה נתנו הטעם מפני כבוד הציבור][3] והיה להם לתת הטעם מפני שהוא פסול [שנמצאת ברכה לבטלה][3]. וא"ת שקריאה זו בלא ברכה, למה נאמרה[8], וכי יש בעולם מי שעלה בדעתו לאסור קריאה בלא ברכה אפילו על פה. אלא ודאי שלא אמרו בציבור, אלא על קריאה שחייבים עליה בציבור שהם ז' או ג' וכיוצא בהם, הוא שאין קורין בחומשין מפני כבוד ציבור, לא מפני שהוא ברכה לבטלה. ועל דוקיא זו סמכו כל אנשי המערב והיו קורין בספרי קלף בלא עבוד כלל ומברכים לפניה ולאחריה בפני גאוני עולם כרבינו יוסף הלוי ורבינו יצחק [אלפס][3] ז"ל וכיוצא בהם, ומעולם לא נשמע בזה פוצה פה ומצפצף, לפי שכולם בעלי בינה [היו וחכמתם מיושבת][3] וידעו שאין הברכה תלויה בספר אם כשר אם פסול, אלא בקריאה עצמה בין שקרא בספר כשר או פסול כמו שביארנו.

ואף על פי כן ראוי לכל ציבור להיות להם ספר כשר כהלכותיו, ובו ראוי לקרות לכתחלה בציבור. ואם אי אפשר להם קורין אפילו בפסול ומברכים מן הטעם שאמרנו, אבל בחומשין לאו. וכן הורה רבינו מנוך הספרדי. ע"כ[9]. וכן הורו חכמי נרבונא[10].

סימן רמ

שאלה ראובן שחרף וגדף הממונים הממשכנים אותו, והרים קול ברחובות לפני גוים כי יהודים עוברים

רלח. ב"י יו"ד רעד ושו"ע ס"ז. 1 בכת"י, ספר מנוקד אם יש בו בית מיחוש אפילו לברך ולקרות בו לכתחילה. 2 בשו"ת ריב"ש רפו העתיק, פוסלין בס"ת. וכ"ה בכת"י. 3 וכ"כ רב האי גאון, ראה בתשו"ר ח"ב עמ' 40. וגם שם כתב הטעם שכך כתב משה לישראל את התורה שאינה מנוקדת, וכו'. אבל המאירי בקרית ספר מ"ב ח"ג כ' בשם קצת מהגאונים שאם נקד ס"ת פסולה לפי שהנקוד עושה אותה כמנומר. ורבינו האי שם כ' שאין מועיל אף שימחוק הנקוד, והטעם כ' הלבוש לפי שנכתב לשם הנקוד ולא לשם המסורת, ובלחם חמודות הל' ס"ת סי' עד כ' לפי שעי"י התיקון נעשה כמנומר, ובשו"ת מקור ברוך סי' לז כ' לפי שהניקוד פוסל האות, וכשמוחקו הוי כחק תוכות, כיון שאין התיקון בגוף האות. והנה רבינו פסל גם פסוק פסוקים, ובפסוק פסוקים לכאורה אין שייך מה שכתב רבינו משום המסורת, אלא מש"כ כאן שאין לנו אלא כנתינתו. ועי' ט"ז סק"ז שכ' שלפ"ז ודאי מועילה מחיקת סימני הפיסוק. אבל הלבוש כ' שנ"ל כי גם בפיסוק פסוקים שייך ענין מסורת. ועי"ע בנוב"י יו"ד מהדו"ק סי' עד ומהדו"ת סי' קעב. 4 בכת"י, שהרי בכמה מקומות שהכתוב נדרש במקרא ובמסורת, כמ"ש יש אם למקרא ויש אם למסורת, כההיא דחלב אמו (שמות כג, יט) דדרשינן (סנהדרין ד, א) חלב וחלבו (כאן יש תיבה לא ברורה) והרבה כיוצא בהן, ואם אתה מנקדו הרי שפסלת את המסורת ואין כאן מסורת אלא מקרא. 5 פ"ג ה"ז. 6 נדרים לז, ב. 7 נוסף עפ"י כת"י.

רלט. שו"ת הרמב"ם בלאו סי' רצד ופאר הדור סי' ט, ב"י או"ח קמג. 1 בשו"ת הרמב"ם נוסף, שאינן מעובדין לשמן. 2 שם, על. 3 נוסף עפ"י שו"ת הרמב"ם. 4 באבודרהם סדר שחרית של חול העתיק, אבל בקריאת התורה המצוה. 5 ברכות יא, ב. 6 בשו"ת הרמב"ם, שההגיה. 7 גיטין ס, א. 8 בשו"ת הרמב"ם, נאמרה. 9 עי' ארחות חיים הל' קריאת ההגדה סי' ה שהביא תשובת הרשב"א שתמה על הרמב"ם, ודעתו שודאי פסול ועדיף חומש דלא חסר במלתיה מספר תורה פסול. וכ' שדבריו סותרים לחבורו עד שהוא אומר שתשובת הרמב"ם בילדותו שגאה וחזר בו בזקנותו. ועי"ע לעיל קפז וקצט ובח"א רכז ורל ועי"ע שו"ת רשב"ש סי' יא ושו"ת הרא"ם סי' י. 10 הובאה תשובתם בארחות חיים שם, ועי"ש שמדבריהם נראה שאין דעתם כהרמב"ם המכשיר מעיקר הדין, אלא משום עת לעשות לה'.

מאמר המלך ומלוין יותר ממלותו. והבאת על זה שיש להענישו ואפילו שלא כדין, כאותה שבפרק נגמר הדין[1] דרב הונא קץ ידא, ומשמעון בן שטח[2], ואותה דפרק ואלו מגלחין[3].

תשובה בזה איני צריך[4], שמכין ועונשין אפילו שלא מן הדין, כדאיתא פרק זה בורר[5] בגר ממא דקטל נפשא ואמרו אי ודאי קטל נפשא ליהוא לעיניה, ואף על פי שאין דנין בח"ל דיני נפשות[6]. ואמרינן פרק קמא דקדושין[7] הקורא לחבירו עבד יהא בנדוי ממזר סופג הארבעים, ואמרינן[8] מלקין על לא טובה השמועה, ולמאן דאתפקר בשליחא דבי דינא[9], וגבי חשוד על העריות אמרינן לוקה, ומכת מרדות מדרבנן היא וגרסינן[10] התם עני מרי ארבעים בכתפיה וכשר, ופירש רש"י ז"ל[11] חייב מלקות הוא אף על פי שאין בו התראה דאמר מר מלקין על לא טובה השמועה, ע"כ. ומלקין אפילו על מצות דרבנן עד שתצא נפשו, כמו שאמר[12] במה דברים אמורים במצות לא תעשה אבל במצות עשה כגון עשה סוכה ואין עושה לולב ואין עושה מכין אותו עד שתצא נפשו, וכן כמי שאינו רוצה לפרוע חוב אביו וחייב כדעת ר"ת ז"ל[13].

וזה שהעיז פניו וסרף וגדף המשכבים, אף על פי שאין מנערין[14] אותו עשה שלא כדין, כדאמרינן פרק קמא דגיטין[15] שלח ליה מר עוקבא לרבי אלעזר בני אדם העומדים עלי ובידי למוסרם למלכות מהו שרטט וכתב לו אמרתי אשמרה דרכי מחטוא בלשוני אשמרה לפי מחסום וכו' שלח ליה קא מצערו לי טובא ולא מצינא דאיקום בהו שלח ליה דום לה' והתחולל לו, שמעינן[16] מינה דאפילו במקום צער אסור למתסר בר ישראל למלכות לא שנא גופיה ולא שנא ממוניה כדכתב הרי"ף ז"ל פרק הגוזל בתרא[17]. ודין מסור תמסור בידנו אפילו בח"ל[18], ואף על פי[19] שממונו אסור לאבדו ביד, ואף על פי שנחלקו בה רב הונא ורב יהודה[20] בממון מסור אם מותר לאבדו ביד איכא מאן דאמר מותר לאבדו וקיימא לן כמאן דאמר אסור, והראיה מדגרסינן פרק הכונס צאן לדיר[21] עשו תקנת גזל במסור או לא, חזו ודאי אתי כמאן דאמר אסור כיון דסלקא בתיקו, ואף על פי שגופו שרי ממונו אסור מטעם דזימנין הוה ליה זרעא מעליא ויכין [רשע] וצדיק ילבש, וכן פסקו הרי"ף[22] ור"ם[23] ז"ל, אמנם רשע מיקרי ופסול לעדות. וכתבו בשם רב פלטוי[24] גאון ראש ישיבה, מסור פסול לעדות. ולא מיבעי מסור גמור, אלא אפילו אדם מפורסם[25] ומריב עם חבירו ואומר אלך ואמסור ממונך, הואיל ומעיז פניו בפרהסיא נחשב רשע ופסול לעדות, והוא הדין לשבועה, וכן נפסק הדין במסרו לאנס בשתי ישיבות. ואם כן אין לשר[26] להאמינו במה שאמר שעברו על המלוה להלות יותר ממה שכתוב בשטר כי הוא פסול לעדות. ומותר להרוג המסור אפילו בח"ל אם התרו בו, אם היתה ידנו תקפה עליו כמו בקסטיליאה[27]. וכמו ההיא דהגוזל בתרא[28] דההוא דאמר מחוינא מסוינא ושמטיה רב כהנא לקועיה מיניה. במה דברים אמורים כשהתרו בו ואמרו שלא ימסור ועודנו מחזיק ברשעו ומעיז פניו למסור אבל לא עשה מעשה, אבל אם מסר כבר אין ממיתין אותו. וכן כתב הרמב"ם ז"ל[29], עשה המוסר אשר זמם יראה לי שאסור להורגו אלא אם כן הוחזק למסור ומעשים בכל יום בערי המערב להרוג המוסרים, עד כאן[30].

ולענין התשלומין אשר אמרת יש בו נדון לנו[31] יש לי להרחיב קצת הדבור. ומאלה יש לך לדעת למה

רמ. הובאה בשו"ת מהרי"ק שורש קעט. ב"י חו"מ שפח ס"ג ושפת סי"ב. 1 צ"ל ארבע מיתות. סנהדרין נח, ב. 2 שם מה, ב. 3 מו"ק טז, א. 4 במהרי"ק נוסף, ראיה. 5 סנהדרין כז, א. 6 בח"ג שצג כתב על ראיה זו, ואע"פ שאין קציצת אבר בדיני התורה. והלשון לפנינו מוקשה, שאין כאן נטילת נפש, ושמא הכוונה בדיני נפשות דין על נטילת נפש דהיינו דין רוצח. או שדעת רבינו כאן לפרש ליכיוהו לעיניה, שיהרגוהו, וכמו שפי' המאירי שם. ומ"מ משי"כ בח"ל הוא לרווחא דמילתא, דבזמן האמוראים כההיא דסנהדרין אף בא"י לא דנו, ובזמן שדנין בא"י אף בחו"ל דנין אם היו סמוכין כמש"א במכות ז, א. 7 כח, א. 8 קידושין פא, א. 9 שם יב, ב ראה בהג' הב"ח שם. 10 צ"ל דגרסינן. סנהדרין כו, ב. 11 שם ד"ה ארבעין בכתפיה. 12 כתובות פו, א. 13 הביאוהו הרמב"ן והר"ן בכתובות שם. וס"ל לרבינו דבהניח האב מטלטלין דאמרינן מצוה על היתומים לפרוע, היינו מצוה דרבנן. 14 במהרי"ק, אע"פ שמצערין. 15 ז, א. 16 מכאן הוא לשון הרי"ף כמו שמסיים רבינו. 17 ב"ק סי' רכב (מג, ב). 18 ראה רמב"ם פ"ח מחובל ומזיק ה"י ופ"ה מסנהדרין הט"ז, ועי' להלן ד"ה ומה שאמרת. 19 לכאורה כוונתו דאע"פ שאסור לאבד ממונו מ"מ ראשין לקונסו. אך ממש"כ בסמוך אמנם רשע מיקרי, משמע דקאי על הא דמיקרי רשע. וצ"ב מה ענין זה לזה. 20 ב"ק קיט, א. 21 שם סב, א. 22 ב"ק סי' רלג (מו, א). 23 הביאו רבי' בחי' ב"ק שם. 24 צ"ל פלטוי. ובאו"ז סנהדרין פ"ג סי' כג הביא שכן כתב בהלכות גדולות של אספמיא בשם רב פלטוי. ודברים אלו הובאו גם בשערי צדק ש"ז סי' מב. 25 כ"ה גם בכל בו (קט ע"ג), אבל נראה דט"ס הוא, וצ"ל כמש"כ באו"ז ולא מבעיא מסור גמור ומפורסם, אלא אפילו אדם המריב כו'. ושם באו"ז הלשון, אפילו אינש דסני לחבריה ואמר ליה בפני רבים כו' ע"ש. 26 במהרי"ק, לנו. ומשמע מד"ו שבמוסר מי שהוא עובר כנגד דינא דמלכותא לא חשיב מוסר, ועי' ש"ך שפח סק"כ ובשו"ת מהרש"ם ח"ג סי' רעג. אלא שקשה, דאם אנו מאמינים אותו אינו מוסר וא"כ אינו פסול לעדות. אלא בע"כ גם בכה"ג הוא מוסר ופסול לעדות, וא"כ מאי נפק"מ לנו במה שנאמינו. וצ"ל דודאי מוסר הוא ופסול לעדות, אלא שאין חייב לשלם מה שהזיקו כיון דדינא דמלכותא הוא. וצ"ע. 27 בתשו' מכת"י כ, וכן עושים מעשה בכל יום בארץ קסטיליא ונהגו לעשות כן בפני גדולי הדור שהיו שם, וכן במלכות אראגון גם מעשים היו בקאטלוניא בדור שלפנינו גם בדורנו זה. 28 ב"ק קיז, א. 29 פ"ח מהל' חובל הי"א. 30 מומותר להרוג עד כאן הנשמט בדפוסים האחרונים. 31 אצ"ל לכן.

פטרו גרמא בנזיקין ואמרו דינא דגרמי חייב, ומה הפרש יש בין זה לזה[32].

דע כי הם ד' אבות נזיקין באומ'[33] ד' לשונות ומשפטיהן כפי דעתי אינם אלא ב', והם דינא דגרמי וגרמא בנזיקין. והב' האחרים דנם בכלל אלו, הם דבר הגורם לממון ומזיק שעבודו של חבירו. דינא דגרמי, כשעושה מעשה בגוף הדבר, ומראה[34] דינר לשולחני ואמר ליה מעליא הוא ואמר[35] ליה אפסדתן דעלך קא סמיכנא[36], אי נמי שורף שטרותיו של חבירו ונאבד השעבוד[37], וכן המוכר שטר חוב וחזר ומחלו[38], על זה אמרינן מאן דדאין דינא דגרמי מגבי ביה כשורא נגלמא. וכן מחילת הכרם שנפרצה, שבגרמתו שהיה לו לגדור ולא גדר אוסר ממונו של חבירו, וחייב[39] משום דינא דגרמי, כדאמרינן[40] מחילת הכרם שנפרצה אומר לו גדור וכו' עד הרי זה קדש וחייב באחריותו, ואוקימנא כרבי מאיר דדאין דינא דגרמי.

השני גרמא בנזקין שאמרו פרק לא יחפור[41] פטור, והוא שאינו עושה מעשה בגוף הדבר לא הוא ולא ממונו, כגון זקף הסולם וקפלה הנמייה מאליה לשובכו של חבירו אבל לא[42] בשעת הנחתו ואי נמי בקורקור דרב יוסף[43], כגון אלו פטור אבל אסור. ובכלל זה מה שאמרו ריש פרק הכונס[44] א"ר יהושע ד' דברים העושה אותם פטור מדיני אדם וחייב בדיני שמים אלו הן פורץ גדר לפני בהמת חבירו והכופף קמתו של חבירו לפני הדליקה והשוכר עדי שקר והיודע עדות לחבירו ואין מעיד. ובכלל דבר זה דבר הגורם לממון, דפטרי רבנן פרק מרובה[45] ובפרק שבועת העדות[46], וזהו השלישי שהוא בכלל גרמא בנזקין. והרביעי והוא[47] מזיק שעבודו של חבירו, ולדעת הרי"ף ז"ל[48] פטור, ולדעת בעל התוספות[49] והראב"ד ז"ל פירש[50] חייב, ונראין דבריו[51] מדתנן פרק המניח את הכד[52] שור תם שהזיק עד שלא עמד בדין מכרו מכור הקדישו מוקדש שחטו ונתנו מה שעשה עשוי ואמר רב שיזבי לא נצרכה אלא לפחת נבלה[53] ואמר רב הונא [בריה דרב יהושע] זאת אומרת המזיק שעבודו של חבירו פטור, ואקשינן פשיטא, ופרקינן מהו דתימא דאמר ליה לא סבריתך מידי זיקא הוא דקא שקלי מיניה, ואקשינן הא נמי אמרה רבה השורף שטרותיו של חבירו פטור, ופרקינן מהו דתימא התם נמי ניירא בעלמא קלאי מינך אבל הכא[54] שמפר גרום סימן ומערות לא קמ"ל דהכא נמי[55] שמפר סימן ומערות ופטור. אלמא מזיק שעבודו של חבירו כשורף שטרותיו[56], ושורף שטרותיו הא קי"ל פרק הגוזל קמא[57] דחייב. ואף על גב דפלוגתא היא פרק השולח[58] גבי עשה עבדו אפותיקי ושחררו רשב"ג מחייב וחכמים פוטרים, והיינו מזיק שעבודו של חבירו, הכא הלכה היא כרשב"ג, דפסקינן פרק הכותב[59] ופרק הגוזל[60] כמאן דדאין דינא דגרמי, ומזיק שעבודו של חבירו עדיפא מיניה וחייב כמו שהבאתי מההיא דהמניח את הכד.

והמוסר[61] ממון חבירו מחמת אונס, יש דעות חלוקים, שהגאונים[62] מסכימים דבין אנסוהו להראות בין אנסוהו להביא[63], והרי"ף ז"ל[64] כתב דכל שנשא ונתן ביד חייב, כל שלא היה יכול האנס לקחת אותו אלא[65] שהראה לו הדרך, מפני שזה כמציל ממון עצמו בממון חבירו. ונראין דברי הראב"ד ז"ל[66] שכתב, שאם אנסוהו אונס ממון להביא והביא חייב, שזה מציל ממונו בממון חבירו, והיינו בדינא[67] דאמר ליה הושט לי פקיעי עמיר, אבל אנסוהו אונס גוף והביא פטור, דהיינו כפא דכספא דרב אשי[68].

ועתה[69] אני חוזר לנדון שלפנינו, ואומר כי מלשין זה פטור מדיני אדם אם לא אמר הוא עצמו לשר, אף על פי שחייב בדיני שמים אם הגיע מחמת דברו הפסד לחבירו, דכיון דהוא עצמו אינו המגיד הראשון[70] והרי זה פחות ממרביץ ארי לפני בהמת חבירו שאין מזיק ממש ולא[71] שמעניש אותו תחלה ומשמתין אותו עד שיקבל עליו הנזק שיבא ממון מעשיו, כאותה דפרק הגוזל בתרא[72] האי בר ישראל דחזין ארעא לגוי אמגרא דישראל משמתין ליה עד דמקבל עליה כל אונסא דאתי מחמתיה, ומדמשמתינן ליה מעיקרא שמע מינה שאם הזיק עד שלא קבל פטור, כן[73]

32 ע"ע ח"ב ער קו קז וקה ובח"ב נג. 33 כ"ה כדפו"ר, ובדפו"א פתחו, באומר. 34 צ"ל כמראה. וכ"כ בח"ג קז דחשיב כעושה מעשה בו. 35 בח"ג שם הלשון, דאמר. 36 ב"ק ק, א. 37 שם צח, ב. 38 כתובות פו, א. 39 צ"ל חייב. 40 ב"ק ק, א, ב. 41 ב"ב כב, ב. 42 נדצ"ל של חבירו אפילו. ועי' בחי' ב"ב שם שכ' שאף בכה"ג אינו אלא גרמא. 43 שם כג, א. 44 ב"ק נה, ב. 45 שם עד, ב וכדאמרו שם עא, ב. 46 שבועות לג, א. 47 צ"ל הוא. 48 לפנינו ברי"ף גיטין סי' תעא (כב, א) מבואר דהוה בכלל דינא דגרמי. אבל בר"ן שם כתב דבמקצת נוסחאות הרי"ף לא נמצאו דברים אלו. וכ"כ הראב"ד בהשגות הל' חובל ומזיק פ"ז הי"א ובהל' מלוה פי"ח ה"ו דהרי"ף פוסק כרבנן. ועי' ש"ך שפו סקי"ב. 49 גיטין מא, א ד"ה במזיק. 50 אצ"ל כפירושו, ב"ק ק, א ע"ש. אבל בהשגות פ"ז הי"א מהל' חובל פסק דפטור. 51 צ"ל דבריהם. 52 ב"ק לג, ב. 53 כ"ה גם בח"ג קח. ולפנינו, שחיטה. 54 היכא. 55 צ"ל כמי. וכגמ', דהא הכא כמאן דחפר. 56 וכ"כ ראיה זו בח"ג קח. 57 ב"ק צח, ב. 58 גיטין מ, ב מא, א. 59 כתובות פו, א. 60 ב"ק צח, ב וק, א. 61 ע"ע ח"א תתקפ וח"ה קצד. 62 בחי' ב"ק קיז, א הביא כן בשם ר"ח. 63 צריך להוסיף, פטור. 64 ב"ק סי' רכב (מג, א). 65 צריך להוסיף, על ידי זה. 66 בהשגות על הרי"ף שם, בהשגות על הרמב"ם פ"ח מחובל ומזיק ה"ד ובסוף פירוש ב"ק. ועי' בחי' רבינו לב"ק שם שכ' שדברי הרי"ן נוחין יותר. 67 צ"ל ברייתא. ב"ק קיז, א. 68 שם ע"ב. 69 ב"י חו"מ שפח מחו' א ושו"ע סט"ו בהג"ה. 70 הלשון צ"ת. 71 נדצ"ל ואם הזיק הארי מרביץ פטור אלא. וכן הלשון בח"ה רפת. 72 ב"ק קיד, א. 73 צ"ל וכן.

כתב הראב"ד ז"ל[74]. ואף על פי שהמסור חמור יותר[75] ועובר בדבריו וכל רוחו יוציא כסיל[76].

ועתה אני שב למה שאמרת דעקימת שפתים הויא מעשה מדרבי יוחנן[77]. זהו כשנעשה מעשה על פי דבורו, כההיא דאמרינן פרק השוכר את הפועלים דעל ידי הקול הפרה דשה, אבל כל שלא בא לידי מעשה לא. ומדע מדאמרינן בשבועות[78] אמר רב אידי בר אבין א"ר יוחנן כל לאו שבתורה שאין בו מעשה אין לוקין עליו חוץ מנשבע ומימר וכו', אלמא מימר ומקלל חשיב לאו שאין בו מעשה אף על גב דאיכא עקימת שפתים, ואם כן קשה דר' יוחנן אדר' יוחנן, אלא כדאמרן[79]. וכי תימא הכא במימר בא לידי מעשה, הא אמר פ"ק דתמורה[80] אמר ליה רבי יוחנן לתנא לא תתני מימר דעביד מעשה. ונשבע נמי אוקי[81] דאכלתי[82] ולא אכלתי. לגירסת רש"י ז"ל בפרק ארבע מיתות[83] דגרסינן מתיב ר' זירא יצאו עדים זוממים שאין בהם מעשה ומשני שאני עדים זוממים הואיל וישנן בקול, ופירש הרב ז"ל[84] שעיקר חיובם דמשמיעין קול בפני ב"ד, ופריך וקול לר' יוחנן לא הוי מעשה וכו' אלא שאני עדים זוממים וכו', והקשו על זה תוספות[85], וסוף דבר העיקר שכן ישנו במאן דאמר אם אמר[86] אני כמוהו כשר בדיני נפשות ובדיני ממונות, הלכך פעמים שמתחייב בלי עקימת שפתים, ואם[87] העיד האחד ואחר כך אמרו לשני ואתה אומר כמוהו ואמר א"י[88] חייב, אף על גב דליכא[89] עקימת שפתים לא חשיב מעשה הואיל ובלא מעשיו יכול להתחייב. וזה אם הלשין ואמ'[90] לחבירו ואתה כמוהו[91] הרי זה מלשין.

ומה שאמרת שהחליף פנין כנגד גופי העם שהם זקנים ונכבדים. גרסינן בירושלמי[92] חד וכו' עד בחד בר נש אפקיד[93] לרבי יהודה ברבי חנינא אתא עובדא קומי ר"ל וקנסיה ליטרא של זהב, והביאו הרי"ף ז"ל פרק החובל[94]. דע[95] שיש חלוקין רבים ולא כל הקנסות גובין, ואכתוב לך קצת ראיות, דגריס סנהדרין[96] משמע דאין דנין דיני גזלות וחבלות בבבל דהא בעינן מומחין, ובפרק המגרש[97] אמרינן והא אנן הדיוטות (תנן) [אנן] א"ל אנן שליחותייהו עבדינן מידי דהוה אהודאות והלואות אמר ליה אי הכי גזלות וחבלות נמי ומשני במילתא דשכיחא עבדינן שליחותייהו ואיכא[98] דלא שכיחא לא עבדינן שליחותייהו. ואיכא למידק דהא אשכחן שהיו דנין בבבל, פרק כיצד[99] ההוא גברא דבנא אפדנא אקילקלתא דיתמי אגביה רב נחמן לאפדניה מיניה, ובפרק הגוזל קמא[100] אכפייה רפרם ואגביה כשורא לגלימא, וכן התם נמי[101] ההוא גברא דגזל פדנא דתורי מחבריה אזל כרב בהו כרבא אתא לקמיה דרב נחמן א"ל זילו שיימו ליה שבחא דאשבח, ובפרק השואל[102] ההוא דשאיל נרגא מחבריה ואתבר אתא לקמיה דרבא א"ל זיל אייתי ראיה דלא שנית ואיפטר. וי"א[103] דכולן כשתפס, וכן מוכיח בפרק החובל[104] ההוא תורא דאלם ידא דינוקא אתא לקמיה דרבא א"ל שיימו ליה כעבדא, א"ל והא מר הוא דאמר כל השמין בעבד אין גובין אותו בבבל, א"ל נ"מ לתפס, ובפרק כיצד[105] אמרינן גבי כלבא דאכל אימרי דאי תפס לא מפקינן מיניה. אמנם נזקי אדם באדם ואדם בשור אין דנין בבבל כדאיתא פרק החובל.

ולענין המבייש חבירו יש לדקדק, כי גריס ב"ק[106] אמרינן בשת ופגם דממונא הוא ליתני, וגריס המניח[107] אמרינן שלח ליה רב חסדא לרב נחמן הרי אמרו לרכובה ג' לבעיטה ה' לסנוקרת וכו' לפנדא דמרא ולקופינא דמרא מאי שלח ליה חסדא חסדא קנסות קא מגבית בבבל. נ"ל דהתם בבשת שלא שכיח, והיינו דאמר דבר דלא שכיח בקנס[108] אתה גובה בבבל אבל בשת דשכיח גובין. ואפשר דזהו דעת הרי"ף שהביא הירושלמי פרק החובל[109] ועובדא דחנן בישא מקע להוא גברא[110]. ואפילו במידי דלא דיינין בבבל, כתב הרי"ף

74 הביאו רבינו בחי' שם, ועי"ע ח"ה קצר ורפח. 75 ר"ל דמסור ממש חמור מהמרבין ארי. 76 ע"פ משלי כט, יא. 77 ב"מ צ, ב. 78 כא, א. 79 וכ"כ תוס' ב"מ שם ושבועות שם. 80 ג, ב. 81 שבועות שם. 82 צ"ל באכלתי. 83 סנהדרין סה, ב. 84 ד"ה ה"ג. 85 שם ד"ה הואיל. 86 צ"ל ישנו במאן דאמר איה דאם אמר, והוא כגירסת הרי"ף ופירושו שם דאומר איה הוא כאומר אני כמוהו, וכאומר איה אין אלא קול בלבד בלא שעושה מעשה בכלי המכטא. 87 צ"ל דאם. 88 צ"ל איה. אמנם הרי"ף הביא שם גירסה ישנה באי, וכן גרס בחי' הר"ן ופירושה כפירוש הרי"ף. 89 צ"ל דאיכא. 90 ואמרו. 91 צריך להוסיף, ואמר איה. 92 ב"ק פ"ח ה"ז. 93 צ"ל איקפד וכ"ה בח"א קעט ותעה ח"ב קעט להלן רמה וברי"ף. 94 ב"ק סי' קסב (לב, ב). ועי' מהרי"ק שם דמשמע מד"ר שהיו זקנים תכבדים אבל לא בגדר ת"ח. ועי"ע שו"ת מהר"י לבית לוי סי' מח שהאריך לחייב מי שבייש ממתני הקהל. ועי' ח"ב סי' רצא שכ' רבינו טעם החיוב בת"ח הוא משום שמבייש תורתו ועוד שבשתו מרובה, וטעם שני י"ל דשייך בזקנים תכבדים אף שאינם ת"ח, אך טעם ראשון לכאורה אין שייך. ועי"ע ח"א קעט ולהלן רמה ששופט שאינו ת"ח הוא כשאר אדם, משמע דאין זקן תכבד אלא בתורה. וגם הריב"ש סי' פ כתב על הדיין הממנה מן הקהל, שהוא חייב נדוי או מכת מרדות ועובר בלאו של מקלל דיין, אבל ליטרא של זהב אינו אלא המבייש הזקן שהוא זקן שקנה חכמה ומפני כבוד התורה ידענו שאינו בגדר הזה אף אם הוא ידע ספר, וצ"ע. ועי"ע בח"א קעט ובריב"ש סי' רטז שת"ח סתם שמין לו בשתו ואינו חייב ליטרא דדהבא. 95 במהרי"ק, ודע. 96 ב, ב ג, א. 97 גיטין פח, ב. 98 צ"ל והיכא. ובגמ', במילתא. 99 ב"ק כא, א. 100 שם צח, ב. 101 צו, ב. 102 ב"מ צו, ב. 103 תוס' סנהדרין ג, א ד"ה שלא תנעול, ועי' רמב"ן בלקוטותיו שם. 104 ב"ק פד, א. 105 צ"ל ארבעה אבות. שם טו, ב. 106 ה, א. 107 ב"ק כז, ב. 108 צ"ל כקנס. ועי' בחי' שם. וצ"ע דהרי אמרי שם פד, ב דאף בושת דשכיח הא ליכא חסרון כיס. 109 ב"ק סי' קסב (לב, ב). ועי' רמב"ם פ"נ מחובל ה"ה שכ' קבלה בידינו שגובין קנס זה בכל מקום. 110 ב"ק לז, א. ולפנינו ברי"ף ליתא, וכ"נ מהנמו"י (לב, ב) שכ' גרסינן בגמרא, משמע שלא היה לפניו ברי"ף. ואולי ט"ס כאן וצ"ל עובדא דההוא דתקע ליה לחבריה שהביאה

ז"ל פרק המוכר[111] מנהג שתי ישיבות דמשמתין ליה עד מפייס לבעל דיניה, וכדיהיב ליה שיעור מאי דחזי ליה שרו לאלתר כי[112] מפייס מרי דיניה או לא מפייס. ובתשובה לרב שלום[113], מנדין אותו עד שמפייס בלא שום בית דין, וכך מנהג שתי ישיבות. ושלום לך עד בלי ירח.

סימן רמא

שאלה שהחרימו חרם בקהל[1] על דעת המקום ועל דעתם ולאחר זמן רוצים להתירו, הודיעני אם יכולים להתיר, לפי מה ששמעתי מפיך[2] שאין חרמי הקהל ניתרים עכשיו בלא פתחים ועל פי עצמו[3] אלא מפני שכיון שהורגלו בכך הרי אלו כאילו התנו מתחלה שיהא קיים עד זמן שירצו, ואם הקהל הזה אין יודעים בטיבו של תנאי זה ואדרבה תמהים ביום ששמעו כי חרם יש לו היתר, אי אמרינן לב בית דין מתנה עליהם ויש לו [התרה][4] או לאו.

תשובה שורת הדין אין נדרים ושבועות ניתרין אלא על פי אחרים ובפתחים, אלא שכבר נהגו בכל המקומות ששמענו שמעם, וישראל אף על פי שאין נביאים בני נביאים הם[5]. וכבר חקרו הראשונים לדעת סבה לענין זה, ומצאו טענה זו ששמעת ממני. והרי ענין זה כענין שאמר'[6] בהפרת הבעל כל הנודרת על דעת בעלה היא נודרת, ולקחו טעם זה בעיקר אמתי ושוו היא דעת התורה כדעת[7] הזה, עד שאמרו בנדה פרק יוצא דופן[8] גבי קטנה שנדרה בעלה מפר לה, ואי אמרת מופלא סמוך לאיש דאורייתא וכו', ופריקו אין כדר' פנחס [דאמר רבי פנחס] כל הנודרת על דעת בעלה היא נודרת, ואי לאו שזה עיקר הטעם להם היאך התירו נדר דאורייתא על ידי מי שאינו בעלה אלא מדרבנן. כיון שהדבר כן אף אנו נאמר כן בחרמי הקהל אם הטענה הזאת אמת. ואף על פי שמקצת הקהל אין יודעים בו, מכל מקום בכל מקום ומקום נודרים ומחרימים על דעת הנהוג. שאם אין אתה אומר כן, אף אנו נאמר נשאל האשה הנודרת אם נשבעה על דעת כן אם לאו, ואנן סהדי שאין כל הנשים יודעות בתנאי זה, וגם אין בכל קהל וקהל מחציתה[9] ואם תרצה אמור אפילו חלק אחד שיודעים בו, אלא שנודרים ומחרימים על דעת הנהוג, וכיון שנהגו הנח להם לישראל.

סימן רמב

שאלה בעל בנכסי אשתו אם יכול לאסור על אחרים. אי הוי בעל ואשתו כשאר שותפים דעלמא, שאין יכול לאסור זה על זה ולא על אחר מן השוק[1], דיכול לומר לו לא לתוך שלך אני נכנס אלא לתוך של חבירך.

תשובה אף על פי שכתבת שאין אחד יכול לאסור על חבירו ולא לאחד מן השוק, בידוע לי שלא היתה הכוונה כמשמעו של לשון[2], אלא שאין אסורין ליכנס לחצר ואפילו אחד מן השוק (בידוע לי) המודר הנאה ממנו מותר ליכנס בחצר, ונסתפק לך אם אסר הנאתו על אחרים אם מותר ליכנס בנכסי מלוג של אשתו או לא.

מסתברא שיכול לאסור. ואינו דומה לשותף, דשותף היינו טעמא משום ברירה[3], דכל שאין בה דין חלוקה[4] הוברר הדבר שכל שזה משתמש בו הרי הוא שלו, וכן השני, שעל דעת כן נשתתפו בחצר זו[5]. ודומה לבור של שותפין וכדאיתא בפ"ק[6]. ולפיכך אני אומר[7], דלא אמרו באחד[8] שיכול ליכנס אלא במי שנכנס לצורך חבירו, בין שחבירו צריך[9] בין שאותו אחר[10] צריך לחבירו, שעל דעת[11] שכל שיכנס הוא או אחרים בשבילו שיהיה שלו. וזהו שאומר לו לא לתוך שלך אני נכנס אלא לתוך של חבירך, דהוברר הדבר דשלו הוא כל שנכנס ומשתמש הוא בו[12] או אחר לצרכו. אבל אינש דעלמא ודאי אסור[13], דמשום שאין בו דין חלוקה לא הפקירו חברים לכל. ודומה לבור של שותפין, שזה דולה לעצמו וזה דולה לעצמו, ואין אחר מן השוק דולה ממנו לעצמו. ואין זכות שיש לו לבעל בנכסי אשתו דומה לזה ולא שייכא ברירה זו בנכסי מלוג. ועוד דחצר השותפין כל אחד יכול למכור חלקו לאחר ויהיה דין הלוקח כחצר[14] כדין המוכר, מה שאין כן בנכסי צאן ברזל[15] שאין האשה יכולה למכור חלקה ושישתמש בה הלוקח כמו שהיא משתמשת בו, וכל הנאות של פירות של בעל הן, ולפיכך מסתברא שהבעל יכול לאסור פירותיו על חבירו[16].

ולענין[17] משכיר ושוכר וממשכן חבירו ובעל משכונא, בזה נחלקו ראשונים ז"ל, דיש אומרים[18] המשכיר

הרי"ף בסי' עג (יח, א). אלא שק"ק די"ל שהביאה לענין מה שאמרו שם שאמר ליתנה לצדקה כו'. 111 סי' קמז (ל, ב). 112 ברי"ף, בין. 113 שע"ץ ח"ד ש"א סי' ג.

רמא. ח"ה רלד, ב"י יו"ד רכח (קמו, ב) ובבד"ה (קמו, א). 1 בת"ה, חרם שהחרימו הקהל. 2 עי' ח"א תרצה ושי"נ. 3 בת"ה, עצמן. 4 עפ"י ח"ה. 5 פסחים סו, א. 6 בת"ה, שאמרו. נדרים עג, א. 7 שם, בהתר. 8 מו, ב. 9 צ"ל מחציתם.

רמב. ב"י יו"ד רכא (קלה, ב) וס"ס רכו ושו"ע רכא ס"ז ורכו ס"ג. 1 נדרים מה, ב מו, א. 2 ר"ל דודאי יכול לאסור חלקו, והתר הכניסה לפי שלא משתמש בחלק האוסר. וראה להלן הע' 13 בשם הרא"ה. 3 ב"ק נא, ב. 4 נדרים מו, ב. 5 כמש"כ בחי' שם בשם הרשב"א ממונטפלייר. 6 צ"ל בב"ק. נא, ב. 7 וכ"כ בחי' נדרים שם ע"א. 8 צ"ל באחר. 9 צ"ל צריך לו. 10 צ"ל אחר. 11 צ"ל שעל דעת כן נשתתפו. 12 צ"ל בו הוא. 13 וכן הסכימו הר"ן בנדרים שם והנמו"י בשם הריטב"א, אבל דעת הרא"ה שלא חל איסור כלל כמש"כ במיוחס לריטב"א שם. ועי' ש"ך סק"ה. 14 צ"ל דין הלוקח בחצר. 15 נדצ"ל בנכסי מלוג, שעליהם דן בתשובה, אבל נצ"ב נראה שאין ספק שיכול לאסור. 16 וכ"כ הר"ן בתשובה סי' לה. 17 ע"ע ח"א תשמג ח"ז שפא וחי' כתובות נט, ב ונדרים מו, ב. 18 בחי' נדרים הביא כן בשם התוספות (שם ע"א ד"ה אם).

ענשו. ואין צריך לקבל עדות בפניו, ואף שלא בשעת כשדנין עליו לענשו ביד גוי אין צריך לקבל עדות כי הדבר ידוע מי שהוא מוחזק מסור ומלשין הגוים אותו בשביל הנאמן. ואלו הי' צריך לקבל העדות ולדרוש ולחקור כדינו לעולם לא יעשה ממנו דין כי [...]י גוים, כי אפילו כשאינו בסכנה הוא מוסר יחידים כל שכן כשיראה עצמו בסכנת גופו שימסור ויגלה סתרי הרבים ויסכן לכל ישראל.

נהגו בכל תפוצות הגולה כשיש מסור מוחזק בכך שלשה פעמים מסר ישראל או ממונם ביד גוי שמבקשים עצה [...]ה לבערו מן העולם משום מיגדר מילתא, ושיוסרו [...]ם ולא ירבו מוסרים בישראל וגם להציל כל ישראל [...]ין מתחת ידו. הילכך בנידון זה שהעידו העדים שהי' מסור ומלשין וגם היה בשעת מעשה יפה עשו שדנוהו [...]ת וכן יאבדו כל אויבי ה' ואוהביו כצאת השמש[13] וגו'.

נאום הכותב אשר בן ה"ר יחיאל ז"ל

ב

[שא]לת הא דאמר בגיטין פ"ק[1] גבי דום לה' והתחולל לו[2], קא מלעיזי ליה טובא. מהו פירוש מלעיזו ליה אם כמשמעו אפילו מלשין שהלשין אותו בכל יום לשקר שהלשינו וגרם לו היזק שגם זה אסור למסרו למשפט.

[תשו]בה אם הוא מלשין אותו אפילו בידים מותר למסרו למשפט כההוא דפרק הגוזל בתרא[3] דקם רב כהנא [א]פילו אדם אחר כל שכן הוא עצמו. ואחר שהלשינו כבר [ה]רשע הוא ומסר אותו כמוה מכמר וירא שמא ימסרנו [...]אחרת יש שאמרו[4] שמותר לשכור גוי להרגו, ויש שאסרו [...]עשה מעשה על ידי גוי. והביא ראיה מהא דאמרינן פ' [...] מקדש[5] על מנת שאני צדיק אפילו רשע גמור מקודשת [...]הרהר תשובה בלבו, ויש דוחין[6] אותה ראיה דהתם משום [...]א דעשת איש הוא דאמרינן הכי אבל לענין מסור לא. [...]ין ראיה מהא דאמרינן פ' השולח[7] ההוא דזבין נפשיה [...] וכו' עד לא שבקו לי דאיפרקינך ולא אמרינן דילמא עבד [...]ה. ואותו מעשה דגטין גניבא הוה ואדם גדול בתורה הי' ולא היה מסור אלא מלעזו ומקניטו בדברים אחרים.

ג

[ש]אלתם אדם שמוחזק במסירות אם הוא מותר להעיד עליו ויביא עדותו למשפט בדיניהם או אם מותר להשכיר גוי להרגו. דע כיון שהוא מוחזק במסירות מותר כי כך שמעתי[1] מרבינו מאיר ז"ל[2] אחר שעשה המוסר מסירה אין להרגו בידים אבל ע"י גוי כיון שהוא מוחזק במסירות מותר.

ד

שאלה ראובן אומר שיש לו תרעומת על שמעון שחייב לו מעות ועוד שעושה לו דברים שלא כהוגן והוציא עליו דבה רעה ואומר שרוצה להפרע ממנו בדיני אומות העולם. בא שמעון לבית דין והזמין לראובן ואמר לבית דין הנני מזומן לירד לפניכם לדין ולהתחייב בכל אשר תחייבו אותי ומעתה תתרו בו שלא יוציא עלי אלו הריבות ושלא יתבעני בדיני האומות. יראה כי ראובן אינו אלא כמוציא דבה ולעז על שמעון ועובר משום[1] לא תשא שמע שוא, וכן כל השומע דבריו. ואם יתרעם עליו בפני אומות העולם יש לו דין מסור להורידו בידים ואם יגזם ויאמר אלך ואומר לפני הגוים דבר שיוכל לבא ממנו הפסד לשמעון, משעת דיבורו יצא מכלל ישראל בני ברית ונתן רשות לכל יראי השם וחרד על דברו להצילו בנפשו.

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ה

וששאלת על לאה שטוענת על ראובן שמסרה ביד גוים ומה הפסידה הרבה, וקצת ברורה בעדים וקצת בהוכחות. וראובן השיב נפלה דליקה ובתוך כן גזלת ממוני [* ולא בעדות ברורה] ובקשתי מן הגוים לתפסך כדי להפחידך שתחזיר לי את שלי, ולא הפסדת כלום כי פטרתיך מן השר.

תשובה כל מה שתוכל לאה לברר בעדים שהפסידה באותה תפיסה יפרע לה, וישבע ראובן שאינו יודע שהפסידה יותר, כיון דסליק בתיקו אם עשו תקנת נגזל במסור לא מפקינן ממונא. אבל בהוכחות לא נראה לחיובי' ולאפוקי ממונא. ושלום.

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ו

וששאלת[1] באחד שהתפיס לחבירו על ידי זקני העיר לכופו ליתן גט בלא טענה אלא שאומרת שאינה חפיצה בו יותר. ומנהגם הרע לכוף אותו לאלתר, וענו אותו בכבלים עד כי קרבה נפשו למות וסוף דבר יצא מתחת ידיהם, והיו רודפים אחריו להתפיסו כאשר בתחלה. והלך הנרדף והתפיס את הרודף על ידי אומות העולם כדי לבטל רדיפתו מעליו והפסיד לו כמה י"ד זהובים.

[...]ים ה, לא.
[...] א. 2 תהלים לז, ז. 3 ב"ק קיז, א. 4 ע' לעיל
[...] הערה 8. 5 קידושין מט, ב. 6 ע' לעיל, סי' א.
[...]מו, ב.

ג 1 בהוצאת ויניציאה ב נדפס בגליון: "ס"א מקובלני". 2 שו"ת מהר"ם מרוטנבורג דפוס פראג סי' תפה ודפוס ברלין ע' 208 סי' קלז.
ד 1 שמות כג, א.
ו 1 תשובה זו נכפלה להלן כלל מג, ט.

[*ושאלת אם הנרדף חייב לשלם אותו הי"ד והודים].
דע לך כי מנהג רע הוא לכוף את האדם לגרש מלבד אותם שמנו חז"ל[2] שכופין אותם לגרש והרבה כתבתי מזה בפסק[3]. ומיום בואי ארץ הזאת מנעתי בכל ארץ קשטיליא שלא לכוף לשום אדם לגרש במאמר האשה שאינה חפצה בו. ושלא כדין תפשוהו, ואם עזרו השם שיצא ורצו לתפשו שנית שלא כדין, יפה עשה שהציל את עצמו.

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[*יכירו[4] וידעו כל רואי כתבי זה כי אותו האיש אברהם או אלות[5] שמו הדר במ"גרוט[6] אשר זה כבר ימים רבים באו לפני צעקות וקבלות ותרעומות אשר כל שומען תצלינה ב' אזניו, כי אמרו עליו אשר כמה פעמים מסר ממונן של ישראל ביד אומות העולם הן של יחידים הן של רבים, וידו היתה במעל קלקול החומות. וכן כל היום מגזם להפסיד ולמסור ממונן של ישראל בידי אומות העולם ולהעמיד צלמים בהיכלי מלך ומספר דברי חכמים בלשון לעג וקלס בפני ע"ה כדי להבאיש שמן רקח דתינו בפני המון העם, וכאלה רבות אשר איני זוכר עתה לכתוב כולה. וכמה פעמים נמלכו בי גדולי הארץ אם מותר להורידו לבאר שחת והשבתי אני לא קבלתי עדות מכל הדברים האלה. אבל כשנתברר לנו הדבר מותר לנוטרו אפי' ביוה"כ שחל להיות בשבת, כי אין צריך עדים והתראה למסור אלא רק השומע מפיו שהוא מגזם להפסיד ממון של ישראל ולמסור בידי ע"א חייב לענשו, כדאיתא בפרק הגוזל בתרא[7] ההוא גברא דבעי מחוי אחיזנא דחבריה אתא לקמיה דרב, א"ל לא תחוי א"ל מחוינא ומחוינא, הוה יתיב קמיה רב כהנא קם שמטיה לקועיה. קרי רב עליה[8] בניך עולפו שכבו בראש כל חוצות כתוא מכמר, מה תוא זה כיון שנפל למכמר אין מרחמין עליו אף ממון של ישראל כיון שנפל בידי ע"א אין מרחמין עליו ונוטלין היום מקצתו ולמחר כולו ולבסוף מייסרין אותו עד מות כדי שיודה אם יש לו יותר ממון, והוה ליה רודף וניתן להצילו בנפשו. וכן אמרו ז"ל[9] המינין והמוסרים מורידין ולא מעלין. וכן ראיתי באשכנז וכן שמעתי בצרפת שהמירו כמה פעמים לשפוך דמי המסור שאלמלא כן אין העמדה ותקומה לדור השפל הזה, כי בעונותינו רבו המתפרצים וצריך הדבר גדר וסייג.

כל הדברים האלה השבתי לשואל בענין אותו המסור כיון שניצל פעם אחת רק שגיזם למסור, אדם גדול כרב כהנא קם והרגו. כל שכן על זה האיש שכמה פעמים אתם אמרתם לי שמוסר ממונם של ישראל בידי ע"א ועוד כל היום פוער פיו לבלי חק ומגזם לעקור את הכל, אומר אני שכל מי שקבל עדות דברים האלו או שמעו מפיו מצוה להרגו, ואם בידו להרגו ולא הרגו נענש על כל הרעות שיעשה המוסר לישראל מאז והלאה כאילו עשאן בידו, כיון שהוא מצוה לאבדו מן העולם ולא עשאו. ועתה זה הנכבד ר' יוסף הלוי שהעיר השם את רוחו ולבש קנאת הש"י והביא את הדבר לידי הפועל, ועתה כל גדולי הדור אשר מקל ורצועה בידם ישימו על לבם דברי אשר כתבתי כי לא דבר ריק הוא כי דברי אלהים חיים הם ויעיינו בדברי המוסר הזה וידקדקו העדיות אשר יבאו עליו ואם יראו שהם מספיקין לעדות מסור אל יעלימו ממנו. ואם יראה לכם שאין בעדיות ממש לדונו משפט מות תענשו כחכמתכם שלא יוסיף לעשות ככה. והיה זה שלום.

אשר בן ה"ר יחיאל זצ"ל]

ז

ילמדנו אדוני, רחל היתה מעוברת מראובן. אחר כך קדשה וילדה בן ונתן הוא הבן למינקת. אחר כך הלך ממנה לעיר אחרת ונשא אשה אחרת, והיא השכירה עצמה להיות מינקת לבעל הבית אשר כדי לפרנס עצמה והוא בבית התינוק, וקבלה עליה להניקו עד זמן ידוע בקנס גדול. ועברו מזה כמו ח' או ט' חדשים שהתינוק מכירה ואינו רוצה לינק מאחרת, והמינקת שמניקה את בנה מושכת ידה ממנו מלהניקו מפני שהלך אבי בנה לעיר אחרת ואין מי שיפרענה, וב"ד אומרין לה שתניק את בנה. והיא אומרת שאינה יכולה כיון שהיא משועבדת להניק בן בעל הבית ובע"ה שלה אומר שלא יניחנה כי כבר פרע לה שכרה. וגם שבנו מסוכן שאינו יונק מאחרת ואין דוחין נפש מפני נפש. ועוד שאינה משועבדת להניק את בנה כיון שאינה אשתו בחופה וקידושין.

תשובה הדין עם אבי התינוק כי היא שעבדה עצמה להניקו ומחויבת להניקו כתנאי' שלא להמית התינוק, ואינה מצווה להניק את בנה ואפילו היתה נשואה, כיון שאבי הבן אינו מעלה לה מזונות [אין] אפשר לה למות ברעב, כ"ש זאת שאינה נשואה ואינה משועבדת להניק את בנו. ועוד שבנה כבר נתרגל לינק מאשה אחרת וזה התינוק נתרגל בחלבה ולא יינק מאחרת ואין דוחין נפש מפני נפש, אלא בית דין ישכירו לו מינקת ויכופו אבי הבן לפרוע השכר. ואם לא יוכלו בית דין לכופו יפרעו ב"ד השכר.

ח

יודע למורנו שיחיה שאירע בכאן בקרטבא מאורע קשה עד מאוד אשר כל שומעו תצלינה אזניו. והוא, שנבל אחד מהנבלים נחבש על תביעה שתבעוהו גוים ונתפשר עמהם

2 כתובות עז, א. 3 ראה כלל מג. 4 תשובה זו היא מן הנוספות בדפוס ו"ב. אלא ששם (ועל פי זה גם בהוצאת ויל') הכניסוה בטעות בתוך התשובה הקודמת, בין השאלה לתשובה. 5 בכ"י במקום "או אלות": "אוקלור" או "אחלור" (א. ע' 134). 6 בכ"י: "באיגרי" (א. שם, וראה שם הערה 17). 7 ב"ק קיז, א. 8 ישעיה נא, כ. 9 ע"ז כו, ב.

אגרת להרש"בא ז"ל

Cod. Pococke 280 b, ff. 159 b–165 b (No. 2218).

זאת האגרת שלח רבינו הגדול מורנו הרש"בא זלה"ה על ענין מסור קרה בעיר ברצלונה בימיו והיה מן המשפחות המעולות אשר שם וקרוביו שלמים וכן רבים ודנהו הקהלות למיתה כי הוקן משתי זרועותיו ברחוב אשר לפני בית הקברות אשר בעיר ברצלונה · ואחר פמירת הפרנס הגדול השר ומעולה ה"ר יוסף אַבְרַאבַּאלְיָא נ"ע קמו אחבי המסור ההוא באמרם שלא כדין ושלא כהלכה דנוהו למיתה · וקם הרב הנ"ז ולה"ה ושלח את האגרת הזאת לרבני צרפת להודיעם דבר המשפט ואשמת המסור ההוא להשקיט ריבות קרוביו · ולחתום פיהם למען לא יהיה נדד כנף ופצה פה ומצפצף עליו ועל השרים האחים הפרנס הגדול ר" יוסף ור' משה בני אברבאליא העמדים על (פה) פקידות הממלכה אשר סָבבו השיגו מיתת

[1] Perles, *History of the Jews in Posen*, p. 97, n. 85. According to Jacob Emden, his father R. Zebi Aschkenasi had, as Rabbi in Lemberg, the right of sentencing to death ; cf. Ch. N. Dembitzer, כלילת יפי, I, 72 a.

[2] Perles, *ibid.*

[3] Cf. Kaufmann, in *Berliners Magazin*, 17, 291, and Samson Wertheimer, p. 67 n.

המסור ההוא בעצת הקהלות הקדושות אשר הסכימו כלם על דבר מיתתו ומשפטו :

אין הדור מתקלקל אלא לגדוליו · ואם יתנכר במעלליו · מי יחוש יותר מבעליו · ואם עלה שועל ופרץ אמרים לגדולי ישראל נדור ולנסיבי אדם בלא לב ולב לעדור · אין שעירים ירקדו שם · יקומו השרים ויעבור מלכם לפניהם וה' בראשם · ואל מי מקדושים נפנה כי אם אליכם · ומי יקום לנו עם מרעים כי אם יד עזרתכם · אם אתם בירכתי מדרש ובפאתי היכל קול מהיכל עובר בערים · ומוראכם ותתכם חקוקים בששר בשערים · כמה יפרצו ויעבורו · כמה יאכלו על ימין ועל שמאל יגוורו · לולי שם ומורא תעבור על ראשם · על כן מלבינו ושרינו אדירנו כל הפצינו מורינו ורבינו אם תראו שועלים מעפרים בעפר (כ)[ב]שעלים · עוקרים את התחומים · ומשיגים את הגבולים · אל תאמרו למוסרכם ומקלכם את החבלים אסוף ידיך · קראו למקלכם את נעם רבה צבאיך וצאת ונדודיך · זרוק מרה והכה גְּרֵבה כי עתה לולי אתם תחרישו ולא תבנו טירת כסף על החומה · ולא תרחצו הליכות בחמה · ירבו הפרצים · מקולות מחצצים · ועתה רבותינו שמעו אלינו וישמע אליכם אלי"ם · הארץ הזאת שלמה היתה ומקרוב חפרוה עכברים · צלולה היתה ועכרוה בערים · נדורה היתה ופרצוה מלשני סתרים · חוריה ואין שם פורץ בפניהם מוסרים · ואחרי מות הזקנים קמו הנערים · לאמר עצתנו חקום וכל חפצנו נעשה עד שקם אחד בארצנו ארץ קטלוניא נער היה ומקטנותו יצא לעורר מדנים לא נשא פני זקנים · ואיני מספר אחריו ולא אאריך בענינו · בשבבר קבל דינו · ואתם גם אתם תעמדו עליו מתוך העדות אשר העידו עליו בבתי דינים שבכל הארץ מקצה המלכות ועד קצהו ועלה עשנו בעיני הקהלות · כי לפי הנשמע יצאו להם מתחת [ידו] הרבה תקלות · ואם המכשלה לרבים בימי אדוננו המלך הזקן יר"ה · גם אחרי מלוך אדוננו זה יר"ה העמיק ועשה עד שגבה לבו להשחית הכל ולהיות הוא באפס יד דין ואדון בלי כסף כי ביתו ריקן · ובן עשיר היה ונתרוקן · וחשב לבוקע הארץ ולהכות אותה חרם והרבה קָצו בו הקהלות לתקלות הראשונות · ולא תביל הארץ את דבריו על האחרונות · והתרו בו לשוב מאחריהם פן מרה תהיה לו באחרונה על אשר חשב · ואמר לשוב ולא שב · ויהי היום נקראו כל הקהלות לפני אדוננו המלך יר"ה קהלות קטלונייא וקהלות מלבות ואלינצי"ה וקהלות מלבות אַרגון וחשבו באמת שהוא גרם להם והלשין כי איש לשון היה מאד וברר כל קהל וקהל אנשים מנדוליהם

ובלבתם קראו את זה ובקשו ממנו לבלתי לכת אחריהם והודה להם ·
וכמעט שעבר מהם שב במרוצתו והלך אחריהם והתרו בו פעם שניה ולא
נכנע מפניהם אך הקשה את רוחו ואמץ את לבבו כי פח יקוש על כל
דרכיו · גם שלוחי הקהלות ראו כי רודף היה ונועצו לב יחדו עם השרים
הגדולים האחים הפרנס הגדול הסוכן רבי יוסף אברבא״ליה ור׳ משה
אברבאליה אחיו העמדים על פקידות הממלכה ואמרו לאדוננו המלך יר״ה
כי בן מות הוא על מה שעשה הרבה פעמים · גם אדוננו המלך יר״ה אָהֵב
משפט ותפשו וענה בכבל רגלו · גם מתני הקהלות וברוריהם נאספו עליו
והרבה דנו עליו במצות הקהלות לפני אחד מחבמי המלך ויועציו ושפטיו
ובבל זה ידי לא היתה בו · יוצא ובא הייתי בין הקהלות ולא יכלו עמהם
שאכנם ביניהם כלל עד שירדו להם כמה קהלות עם אחי האיש וקרוביו
שיקחו חותם[1] מאת אדוננו המלך יר״ה שיבא הענין ביד החכם הגדול ר׳
יונה בנירונדא בן אחי אביו של מורי הרב ר׳ יונה זצ״ל · חקן ויושב
שישיבה הוא · גם אנכי הצעיר ברדו אותי להיות עמו אמרתי אני לא
לכנם לעולם לדון עליו מן הדין כי אם מדרך פשרה אם אוכל לפשר
והתריתי בקרוביו לפשר באותו חותם שיבא הענין לידינו בפשרה כי מדעת(ו)[י]
אם מן הדין בן מות הוא והם פרעו כל עצתי ולקחו חותם שנראה אם
עשה דבר שראוי למות עליו ונגד עצתנו · לאותו חכם דינו של אדוננו
יר״ה ואנכי לא ידעתי אשר בן עשו וקרוב אני לומר שגם הם היו רוצים
במיתתו מפני שאף הם הרבה שתו[2] מידו · סוף דבר שלח אדוננו המלך
יר״ה אחר החכם הגדול ר״ יונה הנ״ץ ובא בעמל גדול כי זקן האיש וכבד
מאד וצוה אותנו אדוננו לקבל עדויות וצוה לכל הקהלות להחרים שכל
מי שיודע עליו עדות שיבא ויעיד לפני כל ב״ד וב״ד שבכל עיר ועיר וישלחו
לנו ולפי מה שנראה נגיד עצתנו לו או לרינו הנ״ץ · ואנחנו דחינו חרבה
לעשות בן עד קרוב לשנים עשר חדש שחרים רצון מן הקהלות להמיל
פשרה ולא אבו שמוע ויראתם אם יחבל לקעקע כל הבירה · עוד השתחוינו
לפני המלך אדוננו יר״ה על הדבר הזה ולא קבל עד אשר בעם המלך וצוה
[ל]קחת ולתפוש אותנו ולשלוח אותנו אסורים לפניו והוא בקצה המלכות
או נשלח עצתנו על דינו · גם אחי האיש היה אותו בבנף מעילנו תמיד
לעשות כרצון אדוננו ולהניד אליו מה דינו כי טוב שימות הוא משימותו

[1] Comp. התלוץ, I, 29; להסיק החתם, להוציא החתם, 31, 32, 33; שטר בר ששה, Resp. 228; יש להם חותם מאדונינו המלך, and so often.
[2] Kethuboth, 8 b.

אחריו כל בית אביו ברוב יניעות והוצאות מרובות הוצרכנו להניד לאדוננו
יר״ה מה שנראה בעינינו · שיכול הוא לעשות כדינו וראינו כי בן מות
הוא אם יראה להמיתו לפי מה שאמר הוא בעצמו בפנינו ולפי מה שהעידו
עליו בבל ב״ד וב״ד מלבד מה שהוחזק בבך והנני שולח אליכם מופסי
העדויות שהעידו מקצתם בפנינו ומקצתם בפני מי שמנה תחתיו לדון בפנינו
ולקבל העדויות כי הוא היה אסור בזיקים · ומקצתם בפני שלוחיו ושלוחי
הקהלות בבל עיר ועיר · ואחרי כל זאת שלח אדוננו המלך יר״ה הַדַּיָן
הנ״ץ אשר לו לדון אותו על פי שיעצנו אנו · והוא חזר וטען כי עוד יש לו
טענות לטעון ונתן לו הדין הנ״ץ טיעון עם מורשי הקהלות וברוריהם ונפתלקנו
אנו · ובנתים מת הדין ה״נו אשר למלך ולקץ ימים שלח המלך וצוה
לפקידו להמיתו וכן עשה · ועתה אחר עבור ענין זה כשלש שנים נפטר
בעון הדור הפרנס הגדול השר העומד על בני עמנו בחצר אדוננו המלך
יר״ה הוא הפרנס הסוכן ר׳ יוסף אברבא״ליה נ״ע וחשבו אחי הנדון כי
לא ימצאו עוד הקהלות יד וחזקה בחצר ועמד אחד מאחיו וקם תחת אחיו
מלשני ואמר לאחר מַדִּיני המלך כי אנו יעצנו שלא כדין מפני שאין לנו
לדון דיני נפשות וכ״ש בח״ל ואף בכל זמן צריך ב״ד של כ״ג ושיקבלו
העדות בפנינו · ותהלה לא בוש ממעשיו כי חשב להגביר ללשונו ונפל ואמר
למעט קלונו וכפל · הפך את הגלל וקרע בגדיו מתוך השל · ואמנם שלא
יעמד מלשני אחר ויעמד ויערער ויחתור בכותל ובאו בו פריצים ושלא
יעשה אחד מהם כל המשפחה מוכסים ואני כותב מה שממכנו עליו ליתן
עצתנו לאדוננו המלך יר״ה על דינו:

ואתם רבותינו עליכם לגדור את הגדר בפני הארי פן יבאו וירשו ארץ
בינינו וביניכם בית המרי אם לא נקדם בפניהם במקלות ורועים · ירבו
הצבועים · אנא תנו עיניכם ב(כ)[ב]ירה[1] פן ירבו עוברי עבירה וראו ראיותנו
והתחכמו עליהם · אם ראיתם אותם ישרות כלם או מקצתם וידענו בי
אחרי הסכמתכם לא יהיה מורד ומפטפט · כי אין אחד מחכמי(ה)[כ]ם
נשפט אלא שופט · ויהי עד דובר שקר במתג ורסן בלום · שהטוען אחר
מעשה בית דין שלכם לא אמר כלום · תחלת כל הדברים אמרנו זה רודף
היה ורודף נהרג בבל זמן בין בארץ בין בח״ל וא״פי שלא בב״ד מורי״
שילא בפ׳ הרואה[2] ומראמר לו דוד לשאול מן התורה מותר להרגך מאי
טעמא רודף אתה והתורה אמרה הבא להרגך השכם להרגו ואם״י רודף
למסור ממון מדרב בהנא בפ׳ הנזל בתרא דאמר ליה לא תחוי ואמר

[1] Jer. Pes. VII, f. 38 a. [2] Berach., f. 58 a.

מחוינא [ו]מחוינא ושמטיה לקועיה[1] · ומי שאינו מוחזק בכך אין ממיתים אותו אלא אחר מעשה אבל מי שהוחזק בכך ממיתים אותו בין בשעת מעשה בין לאחר מעשה וכל הקודם זכה להרוג את המורגלים להזיק וכדתניא המינין והמסורות והמשומדין והאפיקורוסין מורידין ולא מעלין[2] ואפי' להרגן בידים שהרי הם כנחש ששני אלו מוקשין שנא" אם ישך הנחש בלא לחש ואין יתרון לבעל הלשון[3] שאין לשני אלו לחש ואינם בני תרבות כלל אחר שהורגלו בכך · וכדתניא במ' ב"ק[4] נחש מועד לעולם ולפיכך נחש כל הקודם להרגו זכה וכדר" עקיבא בפר' דיני ממונות קמא[5] א"ע דפליגי עליה דרבנן כותיה קי"ל מדקיימי מיהו ור' אליע" בחדא שיטת' וכן פסקו הגאונים ז"ל וכן עושים מעשה במסור מוחזק להרוג אותו בידים בהרבה מקומות שבישראל וכן כתב והעיד הרמ"בם ז"ל בחבורו[6] שכן עושים מעשה בכל ערי המערב · וכן עושים מעשה בכל יום באיר קסמיליא ונהגו לעשות כן בפני גדולי הדור שהיו שם · וכן במלכות אראגון · גם מעשים היו בקאסטלוניא בדור שלפנינו גם בדורנו זה · ואפי" היתה ההלכה רופפת בידינו היינו יכולים לעשות ע"פ מה שעשו הראשונים וגם מחזיקים בו האחרונים אע"פ שאינם נביאים בני נביאים הם[7] ואמרו בירושלמי[8] כל הלכה שהיא רופפת בידך ואינך יודע מה טיבה צא וראה היאך צבור נוהגים ונהוג כן · ואיהו מוחזק כל שנודע לרבים שהוא כן לא שהוחזק בב"ד של כ"ג · ושקבלו עדיו בפניו שא"כ אין לך מוחזק עכשו שאין לנו ב"ד מומחים · והרי החכמים מחברי הספרים שהעידו וכתבו שהמסור המוחזק הורגים אותו בכל זמן והנעשה ענותן ומרחם על או נעשה אכזר על דורו וכמ"ש בהנ(יז)[ין]קין בעו למקטליה כי היכא דלא ליכא א"ר יוחנן ענותנותו של ר" זכריה בן אבטולם שרפה ביתינו וחרבה היכלנו והגלתנו מארצנו[9] · עוד אחרת כי בעון הדור התחילו קצת אנשים ללמוד האומנות הנפסדת הזאת כי אין מדה מחזקת כל הרעות כואת כי היא היתה אם מיתת כל חי · וכל שהשעה צריכה לכך מכין ועונשין שלא מן הדין בכל מקום ובכל זמן לגדור את הדבר · כאותו שרכב על הסוס בשבת בימי יונים והביאוהו לב"ד ורגמוהו[10] · וכמעשה דר' שמעון בן שטח שתלה

[1] Baba K., f. 117 a.
[2] Eccles. x. 11; cf. Taanith, f. 8 a, and Arachin, f. 15 b.
[3] Baba K., I, 4.
[4] ה' חוגל ומזק, VIII. 11.
[5] J. Pea, VII, f. 20 c.
[6] Aboda sara, f. 26 b.
[7] Sanhedrin, f. 15 b.
[8] Pesachim, f. 66 b.
[9] Gittin, f. 56 a.
[10] Sanhedrin, f. 46 a.

שמונים נשים באשקלון[1] א "פ שאין תולים נשים ואין דנים שנים ביום אחד · וכן עושים מעשה בכל יום ובכל מקום וכן כתבו הגאונים מחברי הספרים ז"ל ובאלו ובכיוצא באלו אין משגיחין בב"ד של כ"ג וסמוכים ולקבל עדיו בפניו ולכלכל כל הדברים הצריכים בדיני נפשות שאין הולכים בכל אלו אלא אחר ידיעת האמת ולסלק הנזקים ולעשות נדרים בפני פרצות והם כעין הוראות אלו דרב הונא קץ ידא כדאיתא בפ" כל היד[2] וריש גלותא דא"ל לרב אחא בר יעקב פוק חזי אי ודאי קטל נפשא ליכהייו לעיניה כדאיתא פ" הבורר[3] · ומוסף על זה לענין מה שאמרו שאין לקבל עדים שלא בפני בעל דין אנו אומרים שאפ"י בדיני נפשות אין מקבלים לפעמים שהרי אמרו[4] היה הוא חולה או עדיו חולים או שהיו רצופים ללכת למדינת הים מקבלים שלא בפניו ואפ"י בשלא שלחו ולא בא היה המיסרא וכן פירשה הרא"בד ז"ל והוא הנכון וב"ש זה שהיה אסור בזיקים ואין לומר לעדים שילכו אצל העדים בכל עיר ועיר עם זה ושיקבצו כלם כאחד · ואם נפשך לומר שלא אמרו כן אלא בדיני ממונות אבל בדיני נפשות אין מקבלים אלא בפניו משום שנ"א והועד בבעליו והראיה מדאמרינן בשלחי שור שנגח ד' וה' בפלוגתא דר' יעקב אי מהדרת ליה ניהליה כשלא נגמר דינו הוה מע(קר)[רק]נא ליה לתורא לאגמא[5] · אלא אלו הוה באגמא לא הוה אפשר להו לגמור דיניה ולא היא דהתם מחמת דין קאמר ונמר דין שלא בפניו לא אפשר משום דדלמא אי הוה הכא הוה טעין ושור לאו בר מענתא הוא גזרת הכתוב הוא דאקשיה לבעלים וכמעמיהו דרבנן ור' יעקב אבל בקבלת עדות לא איכפת לן כל שיש צריך לכך במי שהיה חולה או עדיו חולים שהרי לאחר קבלתם יכול הוא למעון ולפסול עדיו · וכ"כ הרב רבינו יצחק בעל העטור משמן של גדולי ישראל[6] ותרע לך דהא בוראי דיני ממונות נמי מהועד בבעליו נפקא להו בדאית' בהדיא בפ" נזל בתרא[7] · וכיון דתרוייהו מקרא נפקא להו מאן פליג לך בין האי להאי ועוד דאפ"י במקום שצריך בפניו אפוטרופוס שלו כמהו דקא מוקמינן אפוטרופוס לשור של יתומים לשוייה מועד כראיתא בפ" שור שנגח ד" ו"ה[8] ושליח באפוטרופוס כדתני' בפ" נערה המאורסה[9] האומר לאפוטרופוס כל נדרים שתדור אשתי עד שאבוא ממקום פלוני הפר לה והפר יהיו מופרים ת"ל אישה יקימנו ואשה יפרנו א"ל ר" יונתן מציון

[1] Sanhedrin, VI, 6.
[2] Sanhedrin, f. 27 a, l. זה בורר.
[3] Ibid., f. 45 a.
[4] Baba K., f. 112 b.
[5] Nidda, f. 13 b.
[6] Ittur, ed. Venedig, 1608, f. 39 d.
[7] Ibid., f. 39 b.
[8] Baba K., f. 112 b.
[9] Nedarim, f. 79 b.

בכל התורה כלה ששלוחו של אדם כמותו וכן ב״פ השולח [.l השואל] [1] מוקמינן האומר לשלוחו צא והשאל על פרתו כפלוגתייהו משום דהתם נמי כתיב מעוט בעליו עמו בעליו אין עמו הא בכל התורה מודו ששלוחו של אדם כמותו:

זה איני מן הרש״בא זל · ואני תמה מה יעשה הרב ז״ל בההיא דשלהי החובל [2] · דתניא מועד שהמית והזיק דנים אותו בדיני ממונות וחחרים ודנים אותו בדיני נפשות ואי קדמי ודנוהו בדיני נפשות נסתלק דינו בדיני ממונות · וכי קדמי ודנוהו בדיני נפשות ניהדר ונידייניה דיני ממונות · ופריק רבא בגון שברח בעליו של שור ופרש״י ז״ל הילכך אי אפשר לחזור לדיני ממונות דאין חבין לאדם שלא בפניו · פ״ לפי דבעינן והועד בבעליו ר״ל יבא בעל השור ויעמד על שורו וליכא · ואקשינן אי כשברח מיירי מעיקרא היכי נרייניה בדיני נפשות ופריק כגון דקבילו סהדי בפניו וברח ושמעינן מהכא דקבלת עדות בעינן בפניו בדיני נפשות אע״פ שברח דיש צורך לכך · ואע״פ שא״א לומר לב״ד שילכו אחריו עם העדים · ואין מקבלים עדות שלא בפניו ולפיכך אי לאו דמסתפינא אמינא שאין מקבלין עדות בדיני נפשות שלא בפניו כדמשמע הכא וה״ה שאין דנין שלא בפניו והוא דנקט הכא [3] כגון דקבילו סהדי וברח דלא אמר״י נמי כגון דקבילו סהדי וגמרו דינו וברח הכי נמי קאמר ונקט מילתא דעבדי בקמיתא וה״ה לגמר דין דעבדי ליה בתר הכי · או אפשר דקבלת עדות עקר ובעינן בפניו בדיני נפשות ובגמר דין דשור לא איכפת לן אי דנין שלא בפני בעליו כיון דאיתיה לשור קמי דינא ע״כ:

עוד הגה״ה עליה · דברי הרב ז״ל מן המתמיהים בעיני מי דמי ואם אמרו שלוחו של אדם כמותו היינו שכל כה שיש למשלח יש לשליח כגון שעשאו שליח וכל מה שהוא יכול לעשות בשלו שלוחו יכול לעשות דשלוחו כמותו · אבל מה שהוא עושה בשל אחרים אין שלוחו יכול לעשות כן הילכך לענין קבלת עדות בפניו שאנו אומרים דטעמא דקרא כדי שיראה אותו העד ויתביש ממנו להעיד עדות שקר אין הכח הזה נתן לשלוחו דא״ע שאין אדם מעיז פניו בפני מי שיודע בו שהוא משקר מ״מ במי שאינו יודע מעיז ומעיז · ע״כ נחזור לדברים הראשונים שלוחו של אדם כמותו ואם תאמר מעשה דינאי מלכא בפ׳ כהן גדול [4] דעבדיה קטל נפשא ושלחו ליה עבדך קטל נפשא ושלחיה ושלחו ליה תא את נמי

[1] Baba M., f. 96 a.
[2] Baba K., f. 90 b.
[3] Ibid., f. 91 a.
[4] Sanhedrin, f. 19 a.

דכתיב והועד בבעליו אמאי לא שוייה שליח דהוא מקפד הוה קפיד כדקאמר ליה שמעון בן שטח עמוד על רגליך ויעידו בך · אמר ליה לא כמו שאתה אומר · יש לומר אין הכי נמי אלא מעשה שהיה כך היה · וה״נ [.l וא״נ] כל היכא דאיפשר לא משוה שליח משום כבוד ב״ד והיינו נמי שאמר ליה עמוד על רגליך אע״פ שאפשר לי למחול משום כבודו כדרך שמוחלים לתלמיד חכם אלא שכבוד ב״ד היינו כבוד שמים שנא״ ועמכם בדבר המשפט [1] · וזה שאמר לו שמעון בן שטח לא לפנינו אתה עומד אלא לפני מי שאמר והיה העולם · וגדולה מכל אלו בנדון שלפנינו שאנו לא דננו אלא נשאל נשאלנו מאת המלך יר״ה לראות בעינינו ולהגיד לו עצתנו לפי מה שעשה ואמרנו שהוא יכול להמיתו לפי שלא נאמרו כל הדברים הללו אלא בדיני סנהדרין מגזרת הכתוב אבל בדינא דמלכותא אין משגיחין בכל אלו:

הגהה · גם זה פלא והרי כיון שהמלך הרגו על פי עצתם ועל פיהם לא היה להם להעוד לפני המלך הואיל ובדיני ישראל לא היה ראוי למות בשביל עדויות אלו שהרי בממון הקל אמרו בפ״ הגזל בתרא [2] האי בר ישראל דידע בהאי דינא ואזיל ומסהיד בדיני הגוים לישראל חבריה משמתינן ליה מ״מ אינהו מפקי ממונא אפומא דחד סהדא כלומר הלכך כיון שהם מפיקים ממון על פי עד אחד ובדיננו אין מוציאין נמצא שעד גורם לגזול ממונו של ישראל חברו והכא נמי לא שנא · ע״כ אין משגיחין בכל אלו · שאין דינם אלא אחר ידיעת האמת ונהרג בדיני המלכות אף ע״פ קרובים ואפי״ ע״פ עצמו ושלא בהתראה ושלא ב״כג שאין דין המלכות אלא אחר ידיעת האמת · כי אם אין אתה אומר כן אלא שאתה מעמיד הכל על דין תורה בדין סנהדרין היה העולם שמם שירבו הרצחנים והבריחות · וכדר׳ עקיבא אלו הייתי בסנהדרין לא היה אדם נהרג מעולם [3] · ואמרו כל הסנהדרין שהרגו שני פעמים נק״ קטלנית · ותדע שהרי דוד והרג שתי פעמים על פי עצמן של נדונים ושלמה רק והרג את יואב אע״פ שלא היה נהרג בדיני הסנהדרין כשהרג שני שרי צבאות ישראל וכו״ אע״פי שאמרו ב״פ נגמר הדין [4] אלא ההוא נברא מורד במלכות הוה · למענתו השיבוהו שהיה טוען שהרג את עמשא ודנוהו כמורד במלכות · אבל דוד כבר פירש ענשו על אשר המית שני שרי צבאות ישראל ותדע דלאו מורד במלכות הוה שהרי לא מרד בדוד

[1] 2 Chron. xix. 6; cf. Sanhedrin, f. 6 b.
[2] Baba K., f. 113 b.
[3] Maccoth, I, 10.
[4] Sanhedrin, f. 49 a.

אלא שנטה אחרי ארוניה להמליכו אחרי מות דוד · ושלמה עדין לא מלך והמורד בו לאו מורד במלכות הוה באותה שעה · וגדולה מזו אמרה לו אביגיל לדוד עדין שאול קים ולא יצא מבעך בעולם והודה לה כרכתיב ברוך מעמך וברוכה את כדאיתא בפ״ק דמגילה[1] · ואלו היה מלך שואל אותנו יכולים היינו לומר שמן הדין יכול הוא להרגנו אחר שחטא באיזה דבר מהדברים שחייב עליהם מיתה · אחר שנודע זה באמת אע״פ שלא העידו עליו בפניו ושחיתה עדות מיוחדת ושלא בב״ד של כ״ג שכל דברים חללו לא מעלה ולא מוריד לידיעת האמת ואין דין המלכות רק אחר ידיעת האמת ממי שאמרו ואמי׳ הוא עצמו או אחרים שלא בפניו ושלא בפני ב״ד · עוד גדולה מזו שהרי ר׳ אלעזר ברבי שמעון תפס גנבי ורשיעי בהרמנא דמלכא ועניש וקטיל להו ובן ר׳ ישמעאל ב״ר יוסי ואע״נ דאמר ליה ר׳ יאושע ן׳ קרחה חומץ בן יין עד מתי אתה מוסר עמו של אלי״נו להרינה[2] · ובן אמר ליה אליהו נ״ב[3] מ״מ לא נשוי לר׳ אלעזר ולר׳ ישמעאל (ב)[כ]מועים גמורים בדינים מפורשים אלא שמחמת חסידותם היה להם להמנע מלהרוג על מה שלא חיבה התורה מיתה גמורה וכיוצא בה וזה שקראוהו חומץ בן יין לומר שלא היו נוהגים בחסידות כאבותיהם ואלו היו טועים גמורים ועושים שלא כדין לא קראוהו חמץ בן יין אלא טועים ורשעים גמורים · חלילה וחס לגדולי ישראל וחסידי עליון במותם ור׳ אלעזר בר שמעון בבר בדק עצמו וכזהב יצא[4] · ועוד תדע מדאמר ליה ר׳ ישמעאל לאליהו מאי אעביד הרמנא דמלכא ואהדר ליה אליהו אבוך ברח לעַסיָא ואת ברח ללוּדקיָא ואילו היה אסור נמור אמאי קאמר הרמנא דמלכא הוה היה לו ליהרג ואל יעבור כההוא דאמר ליה מאירי דוראי קטיל לפלניא ואי לא קטילנא לך[5] · ואליהו נמי ליטא ליה מאי חזית דדמך סומק מפי[6] אלא ודאי כדאמרנא · שכל שהוא ממונ׳ על כך מן המלך דן ועושה כאלו במשפטי המלוכה כי המלך במשפטים אלו יעמיד ארץ והא דתנן מלך לא דן ולא דנין אותו ואוקימנא במלכי ישראל אבל במלכי ב״ד דן ודנין אותו דכתיב בית דוד דינו לבקר משפט · והיינו דאלו רצה לדון בסנהדרין יושב ודן · ואינו נמנע והוא שאמרו בגבל שדן אותו דוד בסנהדרין והתחיל מן הצד כדאיתא בפ״ אחד דיני ממונות[7] · מיהו לאו לגמרי בדיני סנהדרין דנו שהרי דנו

[1] Megillah, f. 14 b. [2] Baba M., f. 83 b. [3] Ibid., f. 84 a.
[4] Ibid., f. 83 b. [5] Pesachim, f. 25 b. [6] Ibid.
[7] Sanhedrin, f. 36 a.

בלילה ומשום דחשיב ליה מורד במלכות כדאיתה בפ׳׳ק דמגילה[1] · ומה שכתוב באוריה ואותו הרגו בני עמון ואמרו בפ״ במה בחמה יתאות[2] היה לך לדונו בסנהדרין לאו למימרא שיהיה המלך צריך לדון דינו בסנהדרין וכ״ש המורד במלכות אלא מסתברא שלפי שלקח את אשתו והיו מרננים אחריו היה לו להביא דינו בסנהדרין ולדון אותו בפניהם כמורד מ״מ אין המלך צריך בדיניו לכלל הדברים המסורים לסנהדרין לדון עכ״פ בכ״ג · וכשקבל התורה וע״פ ערים · ולכל שאר הדברים · שלמה בן אדרת:

וזאת היא תשובת הרב הגדול המפולפל רבינו מאיר מרוטנ״בורק זלה״ה:

יצאותי ללקט אורות אמרות אדני אמרות טהורות · בעליל מזוקקות מחורות בעמקי סברות · לכל פנים מנהירות · בעשית ברים וחשלה מארות · אענדם לראשי עטרות · בפי כצפיחית יערות · מה לבאר מים חיים נובעים ממקורות · לשתות מי נהרות בורות נשברים מימי מערות ושל רבנו מקואות טהורות · על ענין המסורות מנהג אבות ותורות · בכל מקומות ישראל שראינו ושמענו פשוטה הוראה זו להתר שהמסורות שהחזקו למסירות והורגלו בכך עד שנעשה להם כהתר ויש עדים לדבר שכל הקודם זכה להורגו · ואע״פי שלא הועד בפניהם רק שהיה הדבר ברור בעדים · כי אע״פי שכתב הרמב״ם ז״ל ו״ל · עשה המוסר אשר זמם יראה לי שאסור להרגו עכ״ל · ולמדנו ממנו מה טעם שנתן להרגו על מסירת מעם ממון אלא דכי אמר מחוינא ומחוינא הוי רודף אחר תברו להרגו דכתיב כתא מבמר · מה התא הזה כשנופל למבמר אין מרחמים עליו אף ישראל ממונם כשנפלו ליד גוים אין מרחמים עליהם[3] וכאלו מסרו להרגו ותתן להציל הנרדף בנפשו של רודף וכאשר עשה אשר זמם תו לא חשיב רודף · הני מילי במי שלא החזק במסירות שלשה פעמים אבל אם החזק כך שלשה פעמים דאיתחזק בין לר׳ בין לרשב״ל ולא הרגשנו בו צד תשובה כל הקודם להרגו זכה · דגדולה חזקה הא אמרינן שורפין וסוקלין על החזקות והכל כמו שכתב רבינו נר״ו · ומדברי הר״ף ז״ל יש להביא ראיה שכתב בשלהי קמא דק״ל כמ״ד ממון מסור אסור לאברו ביד מדאבעיא לן בפ״ הבונם עשו תקנת גמל בממור או לא

[1] Megillah, f. 14 b. [2] Sabbath, f. 56 a.
[3] Baba K., f. 117 a.

ומסקינן בתיקו ואי כל מסור לאחר שעשה המסירות אסור להרגו מאי מייתי ראיה מהתם דלא קי"ל מותר לאבדו ביד · והא מאן דאמר מותר לאבדו ביד היינו מעמיה משום שלא יהיה ממונו חביב עליו מנופו · ואי איתא דלאחר שמסר אסור להרגו אף לפי שהוחזק במסירות מאי ראיה מייתי מהתם הא בההיא דפ" הכונס כבר מסר · אלא ש"מ דהיכא דהוחזק במסירות מותר לאבד נופו אבל לא ממונו · דמשמע עשו תקנת ננזל כמסור וכ" · אפ' במסור שכבר הוחזק במסירו' ודברי רבנו ישרים ונכוחים ברין המסורות ואין להאריך רק שלום לרבינו ושלום לתורתו ולכל ישיבתו · בנפש סר למשמעתו נאמן משרתו מאיר בר ברוך זל"ה: