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A TRANSLATION OF TOSEFTA MAKOT

WITH COMMENTARY

by

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Thesis submitted in partial fulfillment of the
requirements for the Degree of Master of Arts
in Hebrew Letters and Ordination.

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DIGEST

As the title Makot implies, this section of the Tosefta includes material about punishment by stripes. However, the scope of the laws in this Tosefta, as in the Mishnah and Gemara of Makot, is much broader. The first section of my thesis contains a translation of the five chapters of Tosefta Makot.

The first chapter defines and discusses the zomem witness, one who is a false witness because he was not present to observe that which he said he observed and about which he testified. The first chapter continues with a discussion of the extent to which the general rule applies that a zomem witness receives the punishment which would have been given to the person he testified against, had that person been found guilty.

Chapter two concerns the person who kills someone accidentally. Normally, he goes into exile to a city of refuge for protection from the blood avenger, as well as for atonement. Special cases are discussed with the purpose of indicating what is and what is not considered a case of accidental killing.

The third chapter is about the cities of refuge themselves. This section explains how the accidental murderer gets there and what his rights are in the city,

as well as the nature of the cities of refuge.

Chapter four finally brings us to the material from which the Tractate took its name, Makot, stripes. Here one learns of the offenses punishable by flogging.

A continuation of the discussion concerning the types of offences which require flogging is found in the fifth chapter. The chapter goes one step further and discusses the nature of the stripes themselves and the manner in which they are to be administered.

Following the translation is my commentary on the five chapters. Within this commentary I have indicated parallel passages in the Talmud.

To my father,

Jacob B. Klensin,

may his memory be for a blessing,

יעקב בן אברהם, זכרונו לברכה

whose love of learning has inspired me
throughout my education and whose love
for the practice of law has motivated
me in my study of this phase of rabbinic
justice.

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INTRODUCTION

Flogging, as the punishment for certain crimes and transgressions has its basis in Scripture, as we find in Deuteronomy 25:2-3:

"Then it shall be, if the wicked man deserve to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to the measure of his wickedness, by number. Forty stripes he may give him, he shall not exceed; lest, if he should exceed, and beat him above these with many stripes, then thy brother should be dishonoured before thine eyes."

The Rabbis developed the specifics concerning which transgressions would result in floggings and the manner in which those floggings would be administered. The tractate Makot derives its name from this discussion of punishment by stripes.

It has been my purpose to attempt an understanding of the literature involved as it relates to other rabbinic literature on the same topic. Examination of the material from a historical perspective or in an attempt to determine how rigidly these laws were upheld was not a concern of this study.

My translation has been made from the Zuckerman edition of the Tosefta. I have referred to his notes for information on other editions, as well as the printed edition included in the Talmud and the commentaries of Mitspeh

Shemuel and Minhṭat Bikurim. In certain difficult passages, I have also referred to such commentators as Meiri, the Ritbah and Nachmanides. In any case where my translation varies from the Zuckerman text, an explanation of the variation will be found in my commentary. In an effort to remain true to the Hebrew text, I have attempted to keep my translation as literal as possible, enclosing all explanatory additions in parentheses.

In quoting parallel passages, I have indicated the Babylonian Talmud with the letter "B" before the name of the tractate (e.g., B. Sanhedrin) and the Palestinian Talmud with the letter "P" (e.g., P. Sanhedrin). Citations from the Mishnah are indicated by the letter "M" and from the Tosefta by the letter "T", followed by the name of the tractate. Any citations from the Gemara or the Mishnah which do not indicate the name of the tractate refer to the Gemara of Mishnah of Makot.

The transliteration of Hebrew words has been done in accordance with the Table of More Exact Romanization found in the pamphlet "Romanized Hebrew" prepared by Dr. Werner Weinberg, Hebrew Union College, 1971, and as later amended by Dr. Weinberg.

Unless otherwise indicated, all quotations from the Bible are taken from The Holy Scriptures, Jewish Publication Society, 1962.

With the completion of this thesis and the approach of ordination, my thoughts turn with gratitude to all those who have influenced me and helped me in achieving these aspirations. I am particularly grateful to Dr. Alexander Guttmann, my referee, who has made my study at Hebrew Union College a tremendously more enlightening and enjoyable experience; and without whose wisdom, guidance and patience I could not have completed this thesis. My thanks also to Mrs. Deborah Kaplan for proofreading the manuscript.

A TRANSLATION OF

TOSEFTA MAKOT

CHAPTER I

Tosefta 1:1

A zomem witness¹ is not sold² due to his false testimony. R. Akiba says: "Also he does not pay through his own admission because this would be a fine,³ and whenever there is a case of a fine, one does not pay through his own admission."⁴

Tosefta 1:2

The witnesses who said: "We testify regarding such and such a man that he borrowed from such and such a man two hundred zuz on such and such a day in such and such a place,"⁵ and others came and said to them, "How can you testify (thusly) since the borrower or the lender was with us on that same day in such and such a place (i.e., another place)," these are not zomemin witnesses,⁶ but their testimony is void. But if they said to them, "How can you testify (thusly) since you were with us in such and such a place," behold these are zomemin witnesses and they pay⁷ because of their testimony.⁸

They were signed on the document "on the first of Nisan⁹ of the Sabbatical year"¹⁰ and others came and said to them, "How can you be signed on the document (on the first of Nisan) since you were with us on that same day in such and such a place," their testimony is valid,¹¹ and the document is valid for I say perhaps the time of the document was post-dated¹² and they (i.e., the witnesses) wrote it.¹³

Tosefta 1:3

A document¹⁴ which is dated on a Sabbath¹⁵ or on the tenth of Tishri,¹⁶ R. Judah holds it is valid¹⁷ and R. Jose holds it is invalid.¹⁸ R. Judah said to him: "It happened that one (i.e., a postdated document) came before you in Sepphoris and you held it to be valid." R. Jose said to him: "I did not hold it to be valid, but if I held it to be valid, I held it to be valid."¹⁹

Tosefta 1:4

The witnesses who said, "We testify that such and such a man blinded the eye of his slave²⁰ and afterwards he knocked out his tooth,²¹ for thus the master says"; and they are found to be zomemin witnesses, they²² pay²³ to the slave.²⁴ (If witnesses testify:) "He (i.e., the master) knocked out his (i.e., the slave's) tooth and afterwards blinded his (i.e., the slave's) eye, for thus the slave says," and they are found to be zomemin witnesses, they pay²⁵ to the master.²⁶ (If witnesses testify:) "He (i.e., the master) blinded both of them (i.e., the slave's eyes) at once or knocked out two of them (i.e., the slave's teeth) at once,"²⁷ and others came and they said, "It was not thusly, but rather the two of them, one after the other,"²⁸ and they (i.e., the first set of witnesses) are found to be zomemin witnesses, they pay²⁹ the servant.³⁰

Tosefta 1:5

(If witnesses testify): "He blinded both of them (i.e., the slave's eyes) one after the other or he knocked out two of them (i.e., the slave's teeth) one after the other,"³¹ and others came and said, "It was not thusly, but rather at the same time,"³² and they (i.e., the first group of witnesses) are found to be zomemin, they pay³³ to the master.³⁴

(If witnesses testify:) "He blinded the eye of his slave and behold he is (still) under him³⁵ and serving³⁶ him," and they are found to be zomemin³⁷ they pay the value of the blinded slave to the master.³⁸

Tosefta 1:6

The witnesses who say, "We testify concerning such and such a man that he divorced his wife and did not give her her marriage settlement,"³⁹ for thus the wife says,"⁴⁰ and they are found to be zomemin witnesses, they pay the value of her marriage settlement to the man.⁴¹ (If they say, "We testify) that he divorced his wife and gave her her marriage settlement for thus the man says,"⁴² and they are found to be zomemin witnesses, they pay (the value of)⁴³ her marriage settlement to the woman.⁴⁴ (If they say, "We testify) that he divorced his wife and gave⁴⁵ her a marriage settlement and behold she is under him and serves him,"⁴⁶ and they are found to be zomemin witnesses, we do not say that they pay her⁴⁷ her (full) marriage settlement,⁴⁸ but rather the satisfaction of the benefit of her marriage settlement.⁴⁹ And

what is the satisfaction of the benefit of her marriage settlement? We estimate⁵⁰ how much a man would be willing to pay for the marriage settlement of this one (i.e., this woman) for if she dies during the lifetime of her husband, her husband inherits her,⁵¹ (but) after the death of her husband, she will inherit her marriage settlement, and they inherit her.⁵² According to this they pay.⁵³

Tosefta 1:7

The witnesses who said, "We testify concerning such and such a man that he stole⁵⁴ the helev⁵⁵ belonging to another and he ate⁵⁶ it,"⁵⁷ he stole⁵⁴ the non-kosher carcass of an animal belonging to another and he ate it,"⁵⁷ and they are found to be zomemin witnesses, they are flogged and pay⁵⁸ because for that they had testified: in order that he should be flogged⁵⁹ and he should pay.⁶⁰ (If they say, "We testify that) he stole the helev belonging to another and he did not eat it,"⁶¹ he stole the non-kosher carcass of an animal belonging to another and he did not eat it," behold this one is flogged and is obligated for payment,⁶² for concerning matters of property Scripture states:⁶³ "Then shall ye do unto him as he had purposed to do unto his brother."⁶⁴ And concerning matters of stripes: "Thou shalt not bear false witness against thy neighbor."⁶⁵ (These are) the words of R. Meir.⁶⁶ The Sages say, "According to the measure of his wickedness."⁶⁷ (This means, just as) he who dies does not pay,⁶⁸ (likewise) he who is flogged does not pay.⁶⁹ But the Sages do agree with R. Meir that if they

testified that he is the son of a divorced woman or the son of a halutsah⁷⁰, Natin,⁷¹ or bastard,⁷² they are flogged with the forty (stripes).⁷³

Tosefta 1:8

From what time⁷⁴ are zomemin witnesses obligated to pay?⁷⁵ From the time their testimony decided the case before the court⁷⁶ he (i.e. the accused) is liable according to the law;⁷⁷ therefore he pays.⁷⁸

Tosefta 1:9

Just⁷⁹ as in the case of two⁸⁰ where one of them is found to be a relative⁸¹ or (for any other reason) disqualified (from testifying), their testimony is void, in the same way in the case of three where one of them is a relative or (for any other reason) disqualified, their testimony is void. And from where do we know (this applies) even if they are one hundred? Scripture says: "witnesses."⁸²

Tosefta 1:10

(If witnesses say): "We testify⁸³ concerning such and such a man that he killed the person,"⁸⁴ and others came and showed that they are zomemin witnesses, the accused is innocent,⁸⁵ (and) the first group (of witnesses) is liable. And (if) others came and showed that they (i.e., the last group) are false witnesses, the accused is liable and the first group is exempt and the second group is liable. One group goes in (to testify) and one group goes out,⁸⁶ even if they

are one hundred, (sets of witnesses) all of them are liable.⁸⁷ R. Judah⁸⁸ says: "This is a conspiracy, only the first group alone is executed."⁸⁹ R. Jose says:⁹⁰ "Concerning what is this said?"⁹¹ In capital matters,⁹² but in property matters, the testimony is established by the remainder of the witnesses."⁹³ R. Meir says:⁹⁴ "Even in laws of property.⁹⁵ But if he⁹⁶ did not know that they had a relative⁹⁷ or (other) disqualified (witness)⁹⁸ the testimony is established by the remainder of the witnesses." R. Dostai b. Judah says: "Zomemin witnesses, (after which) there came others who showed to be zomemin witnesses the ones who showed them to be zomemin witnesses, are exempt."⁹⁹

Tosefta 1:11

"A zomem witness¹⁰⁰ is disqualified from all testimony on matters in the Torah," (these are) the words of R. Judah. R. Jose said to him: "Regarding what is this said? In a case where he was shown to be a zomem witness in testimony in a capital case, but if he was shown to be a zomem witness in testimony in a property case, he is not disqualified except for that same type of testimony alone."¹⁰¹

CHAPTER II

Tosefta 2:1

These¹ are the ones who go into exile:² (If) one intended to strike the tree and struck a man and killed him, (or if one intended to strike) the log and struck a man and killed him, behold this person goes into exile.³ (If) a chip flew out from the wood while being split,⁴ (and killed a person) behold, this person does not go into exile, (these are) the words of R. Judah. Rabbi says: "For this he does go into exile."

Tosefta 2:2

If he was lowering vessels⁵ from above to below and the rope broke or slipped away (and killed a person), behold this person goes into exile.⁶ If he was drawing up (water) in a jug (and the rope broke or slipped away) and hit (and killed a person) in the course of descent, he goes into exile,⁶ if not in the course of descent, he does not go into exile.⁷ R. Judah says: "In either case he does not go into exile unless all the rope falls from his hand."⁸

Tosefta 2:3

If one was rolling⁹ (down a plastered roof) with a roller and if it fell onto a man and killed him, behold this person goes into exile. But R. Simon says: "He does not go

into exile unless all the loops of the rope attached to the roller fall from his hand."¹⁰

Tosefta 2:4

A butcher who was chopping (meat) and he smote behind him¹¹ (while swinging, the chopper backwards) and he killed (a person), behold he goes into exile.¹² If one did not know that there was a baby in the cradle¹³ and he sat on it and he killed it, (or if) one did not know that there was a man in a pit and threw a rock into the pit¹⁴ and it hit a man and killed him,¹⁵ behold this person goes into exile.

Tosefta 2:5

An agent of the court who smote by authority of the court (and accidentally killed), behold he goes into exile.¹⁶ A skilled physician who healed by authority of the court (and accidentally killed his patient) behold he goes into exile¹⁷ and one who cuts up the embryo in the insides of a woman¹⁹ by authority of the court and kills (the mother), behold he goes into exile.¹⁹ The one²⁰ who threw a rock in the public domain and killed (someone) behold he goes into exile.²¹ R. Eliezer b. Jacob says: "If after the rock left his hand he (i.e., another person) put his head out this window²² and he received it,²³ he is exempt,²⁴ as it is written in Scripture:²⁵ "And lighteth upon his neighbor that he die."²⁶ (This means he is guilty) only if the other person was there at the time he killed him.²⁶

Tosefta 2:6

These are the ones²⁷ who do not go into exile: If one was cutting the tree and smote a man and killed him, (or if one was cutting) the log and smote a man and killed him, behold he does not go into exile.²⁸ If the iron chip-ped a piece off the wood which was to be split²⁹ behold this person goes into exile, (these are) the words of R. Judah. Rabbi says: "For this he does not go into exile."³⁰

If he was drawing up from below to above and the rope broke or slipped away, behold this person does not go into exile.³¹ If he was drawing up with a roller and it fell on a man and killed him, behold this person does not go into exile.³² If he was chopping (meat) and smote³³ (a person) and killed (him) behold this person does not go into exile.³⁴ If he knew that there was a baby in the cradle and he sat on it and killed him, (or) if he knew that there was a man in the pit and he threw a rock in the pit and it hit the man and killed him, behold this person does not go into exile.³⁵ An agent of the court who smote (someone) without authority of the court and killed (him) behold he does not go into exile.³⁶

Tosefta 2:7

All³⁷ go into exile on account of an Israelite³⁸ and an Israelite goes into exile on account of (any of) them,³⁹ except on account of a ger toshav.⁴⁰ A ger toshav goes into exile⁴¹ and is flogged on account of another ger toshav.⁴²

An Israelite⁴³ goes into exile⁴¹ and is flogged⁴⁴ on account of a slave and a Samaritan.⁴⁵ And a slave⁴⁶ and a Samaritan go into exile⁴¹ and are flogged⁴⁴ on account of an Israelite.

Tosefta 2:8

A slave⁴⁷ who went into exile to a city of refuge,⁴⁸ his master is not obligated to support him, and not only that, but also, the work of his hands⁴⁹ belongs to his master.⁵⁰ The woman who went into exile to a city of refuge, her husband is obligated to support her, and if he says, let her take the work of her hands in place of her support, permission is in his hands (to do so).⁵¹

Tosefta 2:9

"The blind person⁵² does not go into exile," (these are) the words of R. Judah.⁵³ R. Judah had exempted him from (the sentence of) death and from stripes⁵⁴ and the Sages say: "Behold he is like a seeing person regarding all that concerns him."

Tosefta 2:10

The⁵⁵ enemy⁵⁶ does not go into exile⁵⁷ and is not killed except by testimony of witnesses and having been warned.⁵⁸ R. Jose ben Judah⁵⁹ said: "He is killed immediately and this is his warning."⁶⁰ R. Simon said: "There is an enemy who goes into exile and there is an enemy who does not go into exile."⁶¹ If you would say that he is flogged in a case where he killed willingly,

you would say that he would not be flogged in a case where he killed unwillingly.⁶² If the rope broke,⁶³ behold this person goes into exile; the rope slipped, behold he does not go into exile.⁶⁴

Tosefta 2:11

If the axe head slipped off from its handle or from his hand, even if not in a downward movement, (and killed someone) he does not go into exile.⁶⁵ To where does he go into exile? To the cities of refuge.⁶⁶ (If) he killed (accidentally) and (then) he killed (accidentally, again),⁶⁷ behold this person goes into exile.⁶⁸ Just as you find that there are two (classes of) inadvertent killers, there are also two (classes of) willful killers. A willful killer according to the testimony of witnesses and warning⁶⁹ is liable.⁷⁰ If not, according to the testimony of witnesses and warning, he is exempt.⁷¹

Tosefta 2:12

(In the case of) an inadvertent act (of killing) by way of a downward movement, he goes into exile.⁷² (In the case) not in a downward movement, he does not go into exile.⁷³ To where does he go into exile? To the cities of refuge. And (while still) in the wilderness⁷⁴ (the accidental killer would) go into exile to the camp of the Levites. And a Levite⁷⁵ (who accidentally killed someone) goes (into exile to) another district⁷⁶ (within the camp of the

Levites) and if he goes (into exile to) his (own) district⁷⁷
behold, this is his refuge.

CHAPTER III

Tosefta 3:1

Moses set aside¹ three cities (as cities of refuge) across the Jordan (i.e., on the eastern side), and after they came to the Land,² they set aside another three,³ but even so, neither of these (sets of cities) were refuges until they conquered and divided (the Land). After they conquered and divided (and) they became obligated for tithes and the Sabbatical year,⁴ both of these (sets of cities) became refuges.

Tosefta 3:2

Joshua set aside⁵ three cities (as cities of refuge) in the Land of Canaan which were aligned corresponding to the three cities on the other side of the Jordan like two rows in a vineyard:⁶ Hebron⁷ in Judah corresponding to Bezer⁸ in the wilderness, Shechem⁷ in Mount Ephraim corresponding to Ramoth⁸ in Gilead, Kedesh⁷ in Galilee corresponding to Golan⁸ in Bashan. And even though they set aside Shechem in Mount Ephraim,⁹ it was not (yet) a refuge, (so) they set aside Kiryat Yearim in its place until they conquered Shechem. And even though they set aside Kedesh⁹ in Galilee, it was not (yet) a refuge, (so) they set aside Gamlah in its place until they conquered Kedesh.¹⁰

Tosefta 3:3

"And thou shalt divide (the border of thy land) into three parts,"¹¹ that they should be thirds, that (the distance) from Hebron to the South (i.e., the Southern border) be equal to (the distance) from Hebron to Shechem and (the distance) from Hebron to Shechem be equal to (the distance) from Shechem to Kedesh.¹²

Tosefta 3:4

(If) one of them collapses,¹³ we build it up in its place. Whence (is the scriptural proof that it can be rebuilt) also in another place? Scripture teaches: "Six cities of refuge."¹⁴ In the (territory of the) same tribe. Whence (is the scriptural proof that it can be rebuilt) also in (the territory of) another tribe? Scripture teaches: "there shall be,"¹⁴ meaning that they should be aligned and serve to protect as the first ones.

Tosefta 3:5

R. Eliezer b. Jacob says,¹⁵ we write "Refuge, Refuge" at the cross-roads in order that they should see and go into exile to the cities of refuge. And we appoint for him two disciples of scholars¹⁶ so no one will kill him on the way and they will speak to him (i.e., to the avenger): "Do not treat this man as is the custom of murderers (i.e., do not kill him), for by error the deed came to his hand." R. Meir says: "He should speak for himself, as it is written in

Scripture: "And this is the word of the murderer."¹⁷ They say to him: "The agencies (i.e., the agents of God) do much."¹⁸

R. Simeon says, (If) he (i.e., the High Priest), annointed for battle (dies), they do not return the murderer.¹⁹ Even if he is a Nazarite, he cannot go out from there forever, but he cuts all his hair²⁰ and throws it under the cauldron.²¹

R. Eliezer b. Jacob says,²² "Why does Scripture say 'There,'²³ three times?²⁴ - There shall be his dwelling place, there shall be his death, and there shall be his burial."

Tosefta 3:6

And they build him a house and he shall dwell in it as it is written in Scripture: "And he shall dwell in it,"²⁵ and not within its boundry.²⁶ If the blood avenger found him within the boundry of the city, behold he is like all (other) men,²⁷ and is liable for his smitting and for his cursing and is liable for damages, whether a man or a woman, and one who kills him (i.e., the manslayer living in the city of refuge) intentionally is killed, (one who kills him) unintentionally goes into exile to the cities of refuge.²⁸

R. Jose says: "He is never killed until he stands before judges,"²⁹ as it is written in Scripture:³⁰ That the

manslayer die not until he stand before the congregation for judgement.'"

Tosefta 3:7

R. Akiba says,³¹ (If) a court saw him that he had killed, behold he does not go into exile.³² (If) the Great Court (i.e. the Sandredrin) saw him that he had killed, behold he does not go into exile, and they do not execute him immediately,³³ but rather bring other judges and they testify before them, as it is written in Scripture:³⁰ "that the manslayer die not. . ."³⁴

R. Elazar says, "Concerning the murderer who went outside of the boundary, outside the border of his city of refuge, Scripture speaks, as it is written: ³⁵ ". . . and the avenger of blood slay the manslayer; there shall be no bloodguiltiness for him."³⁶ (He is) as all (other) men.³⁷

Tosefta 3:8

A murderer who went into exile to a city of refuge and the men of the city went to honor him,³⁸ he should say to them: "I am a murderer." He should not make the statement (that he is a murderer) and then repeat it, as it is written in Scripture:³⁹ "And this word⁴⁰ of manslayer." You only have the first statement.⁴¹

The one who (unintentionally) kills (someone)⁴² in that same city,⁴³ he goes into exile from (one) district to

(another) district⁴⁴ and a Levite⁴⁵ goes into exile from (one) city to (another) city. Rabbi says, "I say half the city shall be to him⁴⁶ as the whole⁴⁷ city."⁴⁸

These cities (of refuge), they do not build them⁴⁹ not large cities,⁵⁰ nor small villages,⁵¹ but rather medium sized towns, they do not build them except in a place where there is water. If there is no water for them, they bring⁵² them water.⁵³ They do not build them except in a place where there is a (large) population.⁵⁴ If the population decreased, they bring others and put them in their places. If their dwellers⁵⁵ decreased, they add to them Priests, Levites and Israelites.

Tosefta 3:9

"They do not make⁵⁶ them (into places of) olive presses or wine presses,"⁵⁷ (these are) the words of R. Nehemiah. But the Sages permit. They do not make in the midst of them ropes and they do not make in them vessels of glass so that the blood avenger will not go there frequently.⁵⁸

Tosefta 3:10

Moses set aside three cities across the Jordan and after they came to the Land, they set aside further three others. And in the time to come⁵⁹ they will set aside "three" more. Unto⁶⁰ the three, behold six, and three "more," behold nine, "unto these three," behold twelve. Abba Saul says: "three," unto three, behold six and "three more" behold nine, "unto three," twelve, unto "these" three, behold fifteen.

CHAPTER IV

Tosefta 4:1

The one who eats from the Passover sacrifice raw, an amount the size of a olive, (or) half-done, an amount the size of an olive, (or) seethed, an amount the size of an olive, (or) cooked, an amount the size of an olive, is liable.¹ The one who takes from it (i.e., the Passover sacrifice) an amount the size of an olive from house to house or from company² to company at the time of eating, behold this person is liable,³ as it is written in Scripture:⁴ "Thou shalt not carry forth aught of the flesh abroad⁵ out of the house." And if he cooked it, he committed a transgression because of it for making a dedicated object unfit.

Tosefta 4:2

The one who mixes incense according to the (prescribed) composition thereof, behold this person is liable.⁶ And the one who smells it is exempt⁷ and is not liable except for the unlawful use of sacred property alone.

Tosefta 4:3

The one who anoints (himself) with anointing oil which Moses made in the desert, behold this person is liable for Karet.⁸ (If) he poured it over his head, over his body,

(or) over one of his limbs, even though he did not rub (it in), he is liable. And how much does he have to pour to become liable? The amount the size of an olive. It is the same for the one who anoints and the one who is anointed. In what case does this apply? This applies to the case when both of them acted intentionally, but if they both acted unintentionally, they are (both) exempt. (If) one acted unintentionally and one intentionally, the one who acted unintentionally is exempt and the one who acted intentionally is liable.

Tosefta 4:4

The one who eats tevel-produce,⁹ even if it is only wanting the terumah gedolah¹⁰ alone, the first tithe,¹¹ the second tithe,¹² or even (wanting only) the poor tithe,¹³ behold, this person is liable.

Tosefta 4:5

Rabbi Jose said: "A priest who happened to have in his hand a fig¹⁴ of tevel-produce in the year of the second tithing (and he is) in Jerusalem, (or) in the year of the poor tithe (and he is) in the "borders,"¹⁵ (and) he (i.e., the priest) said, 'its priest's share¹⁶ is in its peduncle' and he ate it, 'its first tithe is in its southern part' (i.e., he specified the exact location), and he ate it, 'the second tithe¹⁷ (or its poor tithe)¹⁸ is in its northern part' and he ate it, he is exempt."¹⁹ And if he was a non-priest

he is liable for each and every one,²⁰ but if he had eaten it at first (without saying which part was for terumah, first tithe, etc.) he is not liable except for one (count).²¹

A non-priest who eats meat of the first born (animal) even after sprinkling (of the blood on the altar),²³ behold this person is flogged with the forty (stripes).²⁴

Tosefta 4:6

"The second tithe and the first produce are counted together outside the wall (of Jerusalem)²⁵ to receive for them forty stripes,"²⁶ (these are) the words of R. Meir. And the Sages say: "They are not counted together."²⁷

Tosefta 4:7

The one who cooks meat in milk, behold this person is liable.²⁸ What quantity (of the combination) does he have to cook to become liable? An amount of meat one half the size of an olive and an amount of milk one half the size of an olive, so that the two together will equal the amount of an olive; and just as they are liable for cooking it, so they are liable for eating it.²⁹ How much does it have to be cooked (for the person) to become liable? (Enough) in order that if it should be edible because it is cooked.³⁰

The one who eats from the sciatic nerve³¹ an amount the size of an olive, behold this person is liable.³² (If) he ate (all of) it and there was not in it an amount the

size of an olive, behold he is liable,³³ but R. Judah exempts until there is in it an amount the size of an olive.³⁴ (If) he ate two (sciatic) nerves from two thighs³⁵ from two animals, he receives eighty (stripes), but R. Judah says, he only receives forty (stripes)³⁶

Tosefta 4:8

The one who slaughters it (i.e., an animal) and its young, for the first, he is exempt, and for the second he is liable.

Tosefta 4:9

The one who has sexual intercourse³⁸ with his sister or with his father's sister or with his mother's sister or with his wife's sister or with his brother's wife or with his father's brother's wife or with a menstruant, behold this person is liable; and just as he is flogged, so she is flogged.³⁹ And he transgressed against every single count which is in it.⁴⁰

If a high priest had married a widow, who was also a divorcee and also a ḥalalah⁴¹ and also a harlot,⁴² he is liable for each and every count.⁴³ (If the priest marries) a widow of five husbands or a woman divorced by five husbands, he will not be liable except for one count.⁴⁴

The one who eats a limb (severed) from a living animal, (is liable, whether it be) from a domesticated animal or a wild animal or a bird (if it is) a clean animal

(i.e., kosher species) in any quantity (i.e., the least bit, if it is) an unclean animal (i.e., non-kosher species) if he ate of it, the equivalent of the size of an olive.⁴⁵

(If) he ate (part of) a clean domesticated animal, and a (part of) clean wild animal and (part of) a clean bird while they were alive, they are counted together.⁴⁶ While they are dead, they are not counted together.⁴⁷ An unclean domesticated animal and an unclean wild animal and an unclean bird, whether alive or dead, behold these are counted together.⁴⁸

Tosefta 4:10

One who dresses another in Kila'im,⁴⁹ one who causes a Nazarite to become defiled, even though he dressed (the other person in Kila'im) intentionally and caused (the Nazarite) to become unclean intentionally, he is exempt.⁵⁰ If he dressed (in Kila'im) intentionally, or if he became defiled intentionally, he is liable.

The one who rounds the (hair) corners of the head⁵¹ of another, both of them⁵² are liable.⁵³ In what case does this apply?⁵⁴ This applies to the case in which both of them acted intentionally, but if both of them acted unintentionally, they are exempt. If one acted unintentionally and one intentionally, the one who acted unintentionally is exempt and the one who acted intentionally is liable. And he is liable for two (counts),⁵⁵ one for his head at the

temple on one side and one for his head at the temple on the other side.⁵⁶ And he is not liable unless he rounds it with a razor.⁵⁹ And the one who rounds (the hair corners of the head) of a woman or of a minor is exempt.

And the one who rounds the corners of the beard of another,⁵⁸ both of them are liable. In what case does this apply? This applies to the case in which both of them acted intentionally, but if both of them acted unintentionally, both of them are exempt. If one acted unintentionally and one acted intentionally, the one who acted unintentionally is exempt and the one who acted intentionally is liable.

And he is liable for it for five (counts), two for the one side and two for the other side, and one for below.⁵⁹

R. Elazar says: "If he took all of it at once⁶⁰ he is not liable except for one (count)." (If) he raises it (i.e., the shaver) up and takes (i.e., cuts), raises it up and takes,⁶¹ he is liable for each and every one.⁶² He is not liable unless he takes it⁶³ (off) with a razor.⁶⁴ (If) he took it (off) with scissors or pinchers, he is exempt.

Rabban Simeon b. Gamaliel says in the name of R. Elazar: "If he plucked it out (singly) with tweezers, behold this person is liable."⁶⁵

Tosefta 4:11

(If) one made a baldness⁶⁶ on the head of another,⁶⁷ both of them are liable. In what case does this apply?

This applies to a case in which both of them acted intentionally, but if both of them acted unintentionally, both of them are exempt. If one acted unintentionally and one intentionally, the one who acted unintentionally is exempt and the one who acted intentionally is liable.

Tosefta 4:12

(If) one made a single baldness for five dead,⁶⁸ he is liable for each and every dead person. R. Jose says: "He is not liable except for one." (If one made) five baldnesses for one dead, he is liable for each and every baldness.⁶⁹ And he is not liable unless he makes a baldness for the dead.⁷⁰ And how much must he make bald in order to be liable?⁷¹ So that one can see a bald spot.

Tosefta 4:13

(If) one makes an incision (for a dead person) in the flesh⁷² of another, both of them are liable.⁷³ In what case does this apply? This applies to a case in which both of them acted intentionally, but if both of them acted unintentionally, both of them are exempt. (If) one acts unintentionally and one intentionally, the one who acted unintentionally is exempt and the one who acted intentionally is liable.

Tosefta 4:14

(If) one makes one incision for five (dead), he is liable for each and every one.⁷⁴ R. Jose says: "He is not

liable except for one." (If one makes) five incisions for one dead, he is liable for each and every incision.⁷⁵ And he is not liable unless he makes an incision for the dead.⁷⁶ And how much must he cut to be (considered) liable? (Enough) in order that one can see one incision.

Tosefta 4:15

(If) one writes an etched inscription in the flesh⁷⁷ of another both of them are liable.⁷⁸ In what case does this apply? This applies to a case in which both of them acted intentionally, but if both of them acted unintentionally, both of them are exempt. If one acted unintentionally and one intentionally, the one who acted unintentionally is exempt and the one who acted intentionally is liable. And he is not liable unless he writes and etches an inscription with ink or with eye-paint for (the purpose of) idolatry.⁷⁹ The one who scraped it with a surgeon's knife is exempt. The one who marks on his slave in order that he will not flee, is exempt.⁸⁰

Tosefta 4:16

The one⁸¹ who makes an incision on his own body for the dead, if with (his) hand, he is exempt, but if with an instrument he is liable. If for the purpose of idolatry, whether with his hand or with an instrument, he is liable.⁸²

Tosefta 4:17

A high priest who disarranged his hair or tore (his garments, as a sign of mourning), or who became unclean from one of the relatives, behold, this person is liable.⁸³ This is the general rule: Every uncleanness from the dead for which the Nazarite⁸⁴ shaves, he (i.e., the high priest) is flogged the forty (stripes) because of it. And every uncleanness from the dead for which the Nazarite does not shave, he is not flogged the forty (stripes) for it. But an ordinary priest who became unclean for other dead (i.e., not relatives) or who entered a cemetery is liable. (If) he entered a field (in the midst of) which a grave was lost, he is not liable unless he walks (over) all of it. (If) he entered an unclean field⁸⁵ or to a land of foreigners or if he went outside of the Land (of Israel)⁸⁶ they flog him with stripes of rebellion.⁸⁷ (In the case of) Biblical stripes, (the basic number is) forty less one; they estimate concerning him (how many stripes he can bear), if he can bear flogging, he is flogged, and if not, he is not flogged, but stripes of rebellion are not thus, rather they flog him until he accepts (i.e., promises to observe the law he wants to neglect) or until he dies.

CHAPTER V

Tosefta 5:1

The one who muzzles the ox¹ (or) who mixes (i.e., harnesses together) two heterogeneous animals² is exempt. You do not find that one is liable except the driver (of the muzzled cow) or the driver of the heterogeneous animals only.³

R. Eliezer says: "A Nazarite that puts his mouth on the wine jug and drank it⁴ all after one warning is not liable except for one (count).⁵ (If) they warn him and he drinks, they warn him and he drinks, he is liable for each and every one.⁶ And so R. Eliezer said: "(If) he took a bunch of grapes and ate them⁴ after the (one) warning he is not liable except for one transgression. (If) they warn him and he eats, they warn him and he eats, he is liable for each and every one. (If) he ate from it fresh or dried (grapes, if) he ate from it two pressed grapes and the kernel⁷ or (if) he squeezed out from it an amount of wine equal to the size of an olive, and he drank it, he is liable for each and every one.⁸

Tosefta 5:2

The one who offers up an offering in an amount the equivalent of the size of an olive from the two loaves

of bread⁹ for the sacrificial service (i.e., in the Temple court) or outside (the Temple court), behold this person is liable, as it is written in Scripture:¹⁰ "As an offering of first-fruits¹¹ ye may bring them unto the Lord; but they shall not come up for a sweet savour on the altar."

Tosefta 5:3

The altar and the inclined plane (leading to the altar)¹² are the same for this (which follows).¹³ The one who makes an offering from the flesh of the sin offering, or from the flesh of the guilt offering, or from the flesh of the most holy sacrifice,¹⁴ or from the flesh of the less holy sacrifice,¹⁵ or from the remainder of the omer-offering, or from the two loaves of bread, or from the show bread (on the table of the Sanctuary), or from the remnant of the meal offering, or from leaven, or from honey,¹⁶ transgresses a negative commandment, as it is written in Scripture:¹⁷ "For any leaven and any honey, ye shall not burn of it¹⁸ as an offering made by fire unto the Lord." R. Jose says: "(If one says, when pledging a blemished animal to the Sanctuary): '(For) a sin offering, a burnt offering, a peace offering,' he is not liable, except on one (count), but if (he said): 'a sin offering and a burnt offering and a peace offering,' he is liable for each and every one."

Tosefta 5:4

The one¹⁹ who dedicates a blemished animal to the altar²⁰ transgresses five negative commandments: "do not slaughter," "do not dedicate," and "do not sprinkle its blood," and "do not cause its fat to (go up in) smoke," and "do not cause its parts to (go up in) smoke", as it is written in Scripture:²¹ "It shall be perfect to be accepted, there shall be no blemish therein." R. Jose b. Judah says: "Also he is violating the prohibition: "do not receive its blood."²²

If he dedicated it but did not slaughter it, he is not liable except for one count. (If) he dedicated it and slaughtered it, and sprinkled its blood, he is liable for each and every count.

The one who dedicates²³ an animal that covered (a woman)²⁴ or an animal that was covered (by a man,²⁵ or an animal which is) muqtseh,²⁶ or (an animal which is) ne'evad,²⁷ (or an animal which was) a (harlot's) hire,²⁸ or the price (of a dog),²⁹ transgresses against all these counts. And behold, they are like blemished ones whose dedication preceded their contracting their (temporary) blemishes, and they do not leave (their state of being dedicated) and become secular (animals) except on account of a permanent blemish alone.³⁰

Tosefta 5:5

The one who exchanges dedicated animals,³¹ and the one who shears dedicated animals, and the one who works dedicated animals or slaughters them (intending to eat or offer them) later than their (prescribed) time, or slaughters them (intending to eat or offer them) outside their (proper) place (i.e., the Temple court),³² transgresses a negative commandment.

There can be one who plucks out two hairs and (thereby) transgresses against four things (i.e., four commandments):³³ against (the laws of a) Nazarite,³⁴ against (the laws of) leprosy,³⁵ against (the laws of) a holiday,³⁶ and against (the prohibition of) rounding (the corners of one's head).³⁷

Tosefta 5:6

The one who charms³⁸ a man or a domesticated animal or a wild animal or a bird, whether big or small, whether male or female, it is one and the same whether one charms much or a little,³⁹ he transgresses a negative commandment as it is written in Scripture;⁴⁰ "(There shall not be found among you). . . a charmer." It is one and the same whether he charms the snake or whether he charms the scorpion.

The one who takes away the sexuality⁴¹ of a person or a domestic animal or a wild animal or a bird, whether big or small, whether male or female, behold this person is liable. R. Judah says, the one who emasculates males is

liable, but the one who sterilizes females is not liable.⁴²

Tosefta 5:7

The one who makes an idol, carves it, or sets it up, or the one who anoints it, or the one who wipes it, or the one who scrapes it, transgresses a negative commandment.⁴³

Tosefta 5:8

The one who tears down one stone from the Hall (leading to the interior of the Temple), from the Temple (the Holy, i.e., the Hall containing the golden Altar), from between the Holy and the Altar, or from the Altar, transgresses a negative commandment as it is written in Scripture:⁴⁴ "And ye shall break down their altars and dash in pieces their pillars. . . Ye shall not do so unto the Lord your God."

Tosefta 5:9

R. Ishmael says: "The one who erases one letter from the Name (i.e., the Divine Name, the Tetragrammaton) transgresses a negative commandment, as it is written in Scripture:⁴⁴ '. . . and ye shall destroy their name out of that place. Ye shall not do so unto the Lord your God.'"

Tosefta 5:10

The one who is tardy with dedicated things and the one who leaves (as remnants) dedicated things,⁴⁵ the one who retains leaven during Passover and the one who preserves

diverse kinds in a vineyard,⁴⁶ transgresses a negative commandment but is not flogged with the forty (stripes) since there is not in these an action. This is the general rule: (For) every (negative commandment⁴⁷ which one transgresses) in which there is an action, one is flogged, and (for) every (negative commandment) in which there is not an action one is not flogged, except for the one who exchanges (one dedicated animal for another)⁴⁸ and the one who curses another by the Name (of God).⁴⁹

Tosefta 5:11

(If) one takes the mother (bird) with the young,⁵⁰ R. Jose says in the name of R. Jose the Galilean,: "All transgressors of negative commandments, who transgressed against a negative commandment which has in it (the command) arise and do (i.e., a positive command),⁵¹ if they fulfill the positive⁵² commandment, they are exempt, but if not, they are liable.

Tosefta 5:12

(If) he committed a transgression which has in it two prohibitions, we do not estimate⁵³ for him one estimation for both of them, but rather he is flogged (for the first transgression) and (when he) recovers, he is flogged again (for the second transgression.)⁵⁴ If they estimated

that he could only bear forty (stripes),⁵⁵ they do not add for him even one, but they deduct from him one.⁵⁶ (If) they estimated that he was able to bear only twenty, they do not add for him even one,⁵⁷ but they deduct from him two.⁵⁸ Therefore if the sexton of the synagogue (the one administering the lashes) added to him even one lash and he died, behold this person (i.e., the sexton) goes into exile on his account.⁵⁹

Tosefta 5:13

If they estimated that he could only bear three, even if he stands and is defiant, they do not add for him even one. Therefore, if the sexton (the one administering the lashes) added for him even one lash and he died, behold this person (i.e., the sexton) goes into exile on his account.

Tosefta 5:14

They do not estimate for him more than forty, (these are) the words of R. Judah. R. Jose said: "Regarding what is this said? Regarding one testimony, (and) one warning, but for two testimonies, (and) two warnings,⁶⁰ they estimate for him even fifty or even one hundred. Therefore, if he befouled himself⁶¹ from one of them, they shall flog him (for the second offense).⁶² (If) they estimated that if he is flogged he will befoul himself, they (do not) flog him.⁶³ (If they estimated) that when he leaves the court he will befoul himself, they flog him.⁶⁴ (If) he befouled himself

(from fear) before being flogged, they flog him as it is written in Scripture:⁶⁵ "And he shall beat (him), and he is dishonored." If it is after he is flogged (some) and he befouls himself, they do not flog him (further). And what is the disgrace (of the person being flogged)? "It is one and the same for a man and a woman, with feces,"⁶⁶ (these are) the words of R. Meir. R. Judah says: "A man with feces, a woman with urine." But the Sages say: "It is one and the same for a man and a woman whether with feces or urine (the person is) exempt."⁶⁷

Tosefta 5:15

Floggings (are administered) by three. One flogs, and one counts and one reads (scriptural verses).⁶⁸ And they do not change off for him (the sexton or the counting official); and the whip was not long, but rather short⁶⁹ in order that it should not reach the "bird of his soul" (i.e., the most vital part of the body, area of the heart), and (cause him to) die.

Tosefta 5:16

These are the ones who are flogged: All those who transgress negative commandments, who transgressed against a negative commandment which is in the Torah and transgressed in an active manner⁷⁰ even though they are liable for it (i.e., the transgression) to death by the hand of heaven or karet by the hand of heaven, they flog them.

Tosefta 5:17

(Someone who is liable to) death by the hand of the court, they do not flog him, as it is written in Scripture:⁷¹ "According to the measure of his wickedness" (i.e., for one act of wickedness only one punishment is in order). (If) he is executed he is not flogged, if he pays, he is not flogged.⁷²

A COMMENTARY ON

TOSEFTA MAKOT

COMMENTARY, CHAPTER I

1. 'Eid zomem is a technical term for a specific kind of false witness which will be discussed extensively. Zomem means to scheme or to plan evil. Referring to a lying witness, it is stated in Deut. 19:19 "Then shall ye do unto him as he had purposed to do (zamam) unto his brother." Thus, the 'eid zomem normally receives as punishment that which would have been done to the person he testified against had that person been convicted. The 'eid zomem is distinguished from other false witnesses in Tosefta 1:2 and Mishnah 1:4. The 'eid zomem is there explained to be one whose testimony has been shown to be false because he was not present during the commission of the act in question. (Not being present, he could not have had first hand knowledge of that to which he testified.)
2. Sold as a slave. For example, if the witnesses accused another of theft, the accused, if convicted, would have had to make restitution, and if unable to do so, would have been sold as a slave in accordance with Ex. 22:2, "He (a thief) shall make restitution; if he have nothing, then he shall be sold for his theft." Here we are told that the rule of

retaliation against an 'eid zomem does not require his being sold as a slave.

3. A punishment, above actual compensation. (Qanas comes from the Latin "census.")
4. Although as a result of a confession one may have to pay actual damages.
5. A similar explanation is given in Mishnah 1:4, except that there the example of a murderer is used instead of one who borrows money.
6. Although they are, in a more general sense of the word, "false witnesses," the technical term zomemim does not refer to them and so they would not receive the punishment of a zomem witness for their false testimony.
7. The first witnesses must pay the 200 zuz that they accused the defendant of borrowing.
8. The testimony of the second set of witnesses who said the first set of witnesses were with them elsewhere and so could not have seen the loan take place as they testified.
9. Halfway through the year.
10. The significance of the date "the first of Nisan in the Sabbatical year," according to B. Sanhedrin 32a is that we might think that it is unlikely to postpone the date (or the writing of the note) to the Sabbatical year, since debts are canceled in that year, as required by Deut. 15. We still make this

assumption, since only the end of the Sabbatical year cancels the debt. In this particular case it is established by other witnesses that the document was in fact not signed on the first of Nisan.

11. The testimony of the signators.
12. When this Tosefta is quoted in B. Sanhedrin, the wording is slightly different and Rashi takes it to mean that they witnessed the loan at an earlier date but delayed writing the document until the first of Nisan, thus antedating the document. The Tosefta, as it appears in Makot, is worded in such a way that it is made clear that the document was postdated:
"The time of the document was made late."
13. Later, not on the day of the actual loan.
14. This Tosefta is quoted in B. Baba Batra 171a with a few important differences.
15. When a document could not be written.
16. Yom Kippur, the Day of Atonement, when a document could not be written.
17. The B. Baba Batra version of this Tosefta gives the reason for R. Judah's position. The Baraita there reads: "it is (considered) a postdated document and valid, the words of R. Judah." According to B. Shevi'it 10:5 "Antedated documents are not valid, but if postdated, they are valid." According to Rashi in B. Baba Batra, R. Judah holds that all

postdated documents are valid whether there is proof within the document such as here, or if we only know it is postdated from sources external to the document. Of course here the document is valid since we have internal evidence that it is postdated, that is, since it is dated on a Sabbath or on the Day of Atonement.

18. This is R. Jose's general view on documents which are said to be postdated.
19. The version of this Tosefta quoted in B. Baba Batra 161a reads: "He (R. Jose) said to him, keshehekhsharti, bezeh hekhsharti - when I held it to be valid, in this (specific case) I held it be valid." In this version R. Jose does not deny that he held the document at Sepphoris to be valid. He explains that in this specific case, where it is clear from within the document itself that it must have been postdated, he held it to be valid; but his general position remains that a postdated document is invalid. The text in B. Baba Batra seems to be clearer and better, especially since Minḥat Bikurim on the Tosefta in Makot comments on the phrase bezeh hekhsharti, indicating that his text of the Tosefta did include the word bezeh - in this (specific case). Thus the dispute between R. Judah and R. Jose is that R. Judah accepts all postdated documents as valid while R. Jose accepts

as valid only those postdated documents which are obviously postdated since they had been dated on a day when documents could not be written.

20. For which the slave should go free according to Ex. 21:26-27: "And if a man smite the eye of his bondman, or the eye of his bondwoman, and destroy it, he shall let him go free for his eye's sake. And if he smite out his bondman's tooth or his bondwoman's tooth, he shall let him go free for the tooth's sake."
21. For which the master must pay compensation. Since the slave became a free man at the moment his master blinded him, the loss of the tooth is treated as an injury to a free man and the master must pay compensation. B. Baba Kama 8:1 tells us that he must pay for injury, for pain, for healing, for loss of time and for indignity suffered.
22. The zomemin witnesses.
23. The Tosefta as quoted in B. Baba Kama 73b has here the words "the value of the eye."
24. The meaning of this Tosefta is debated at length in B. Baba Kama. The problem is why the zomemin witnesses should pay the slave (to whose benefit they seem to have been testifying) instead of paying the full value of the slave to the master who would have had to release the slave if their testimony had stood. Abaye and Raba debate concerning this and

the following statement as to whether there were two sets or three sets of witnesses. Everyone agrees in the Gemara that there is no question that the master both blinded the slave and knocked out his tooth. The issue is the order of the injuries. That is why the zomemin witnesses are not compelled to pay the master the value of the slave. Since the slave is a free man by the time of the second injury, the only question is whether the master must pay the slave the value of the eye or the value of the tooth (which is less than the value of the eye). Thus we find that the witnesses who testified that the master first blinded the slave's eye and then knocked out his tooth were actually testifying to the advantage of the master and to the detriment of the slave (since the master would pay only the value of the tooth, not the value of the eye.) If these witnesses are proved to be zomemin, they must consequently pay the slave the value of his eye. This section ties in with Tosefta 1:3 above, due to the fact that we are here discussing the postdating or antedating of injuries. The law on which this Tosefta is based is: The master, who caused both injuries, has to free the slave for the first injury, but has to pay the freed slave for the second injury as he would have to pay any free man.

25. The version quoted in B. Baba Kama has here the words, "the value of the eye."
26. If we accept the B. Baba Kama addition that it is "the value of the eye" which the zomemin witnesses pay to the master, then it must again be the case that there is agreement that both injuries had taken place, since it is only as compensation for a second injury that a master would have to pay a slave. The question then is, once again, whether the second injury, for which the master would have to pay, was to the eye or to the tooth. Those witnesses who say the second injury was to the eye are testifying to the advantage of the slave and to the detriment of the master, saying that the master must pay the value of the eye (rather than the value of the tooth). When found to be zomemin witnesses, they must therefore pay the master the value of the eye.
27. For which the slave would go free but not receive any compensation. (P. Gitin 4:4; P. Baba Kama 8:4; Mechilta, Mishpatim 9).
28. Thus, again there is no dispute that the master has injured the slave and that he is to go free. If, however, the injuries were not simultaneous, the master would have to pay the slave for the second injury (P. Gitin 4:4; P. Baba Kama 8:4; Mechilta, Mishpatim 9). The issue, then, is whether the master

must pay for one eye or tooth.

29. The value of the second eye or the second tooth.
30. Because if their testimony had been upheld, he would have been deprived of compensation for the second injury.
31. Thus, requiring the master to pay for the second injury as well as granting the slave his freedom for the first.
32. So that no compensation is due the slave.
33. The value of the second eye or tooth. Other texts have here the words "the value of the blinded slave."
34. Since if their testimony would have been upheld, the master would have suffered the loss.
35. Still his slave.
36. The Zuckerman text reads meshamshin, but should read meshamsho.
37. The Zuckerman text is missing the zion in zomemin.
38. Because if their testimony had been upheld, he would have had to free the slave.
39. Her ketuba.
40. But the husband says he did give her her marriage settlement. This shows that there was no disagreement that he had in fact divorced her.
41. Since if their testimony would have stood, he would have had to pay that amount.
42. This shows there was no disagreement that he had

divorced her. The issue again is the marriage settlement.

43. "The value of" is included here in other texts.

44. For if their testimony had stood, she never would have received her marriage settlement.

45. This section is very similar to part of Mishnah 1:1. From this point to the end of the verse, there are several problems in the wording of our text. A very similar text is found in B. Baba Kama 88b - 89a which helps to clear up some of the problems. Whether we have here an exact duplicate of the section in Mishnah 1:1 or something slightly different depends on what emendations we make in the text. Our first problem is whether or not the witnesses who testify that the husband divorced his wife say that he gave her her marriage settlement. Our texts of the Tosefta read velo¹ natan - and he did not give (her the marriage settlement) which is parallel to the Mishnah. However, the B. Baba Kama text reads, venatan - and he gave (her the marriage settlement). Mitspeh Shemuel mentions this change in the text as does Liebermann in his Tosefeth Rishonim. I believe it is more logical to say the testimony was that the husband gave her the marriage settlement, since, when found to be zomemin witnesses, the issue is how much they pay her. If they are to pay her, their testimony must

have been to her detriment. Thus they must have testified (falsely) that the husband had already given her her marriage settlement. Had their testimony stood, she would have been deprived of her marriage settlement. Mitspeh Shemuel points out that the difference between the Mishnah and the Tosefta is that the Mishnah is concerned with a loss to the husband while the Tosefta is concerned with a loss to the wife.

46. She is still his wife. He has not divorced her.
47. Since she could suffer a loss by not receiving her marriage settlement. Minhath Bikurim has here "pay him." This version would go with the original version of the testimony, i.e., "He divorced her and did not give her her marriage settlement." According to this version, the Tosefta would be presenting the same case as the Mishnah.
48. Since she was not due her marriage settlement at this time anyway. In fact she would receive it only at such time as she became divorced or widowed.
49. Knowing that if she becomes divorced or widowed, but only in such event, will she receive the value of her marriage settlement.
50. Our text reads 'ein 'omrim - we do not say. The B. Baba Kama text as well as the version of the Tosefta text of Minhath Bikurim reads 'omdim - we estimate.

- This is consistent with the parallel text in the Mishnah. The way they estimate is arrived at in the same way as in the Mishnah.
51. That is, he would not have to pay the marriage settlement.
52. The ones who bought her marriage settlement from her earlier, while her husband was still alive, now, once she has inherited the marriage settlement, receive its value from her. Other texts say here 'ein instead of hein, i.e., they do not inherit her, but I believe our text is more logical.
53. The zomemin witnesses.
54. For which the penalty would be payment.
55. Fat used for sacrifice. Helev is fat which is surrounded by a membrane and can be peeled off the meat. A Jew is forbidden to eat helev.
56. There is a textual problem here. Although the Zuckerman text, as well as others, reads here "he did not eat" (the fat or the carcass) and in the second case that he did eat it; both Minḥat Bikurim and Magen Abraham say that "he did not eat it" should be changed to "he ate it" and vice versa. This emendation must be used for the sense of the passage and is reflected in the translation.
57. The penalty for eating it would be flogging.
58. To the accused.

59. As punishment for eating the forbidden foods.
60. As punishment for stealing the food.
61. This is the other part of the emendation discussed in note 56 above.
62. According to R. Meir, even though the only crime he testified to falsely was that of stealing the food.
63. The Hebrew text as we have it actually reads: "For concerning matters of property Scripture states: 'Thou shalt not bear false witness against thy neighbor.' And concerning matters of stripes: 'Then shall ye do unto him as he had purposed to do unto his brother.'" In my translation, however, I have reversed the placing of the two Biblical citations, following Leibermann's suggestion (quoting Ritbah) and the version of Minḥat Bikurim. As the verses stand in the Hebrew text, they do not serve as proof texts for that which they are trying to prove. The zomem witness does not receive stripes because that is what he had purposed to do to his neighbor. Rather, as appears in the rearrangement, he had purposed to cause financial loss to the accused, and so he must pay.
64. Deut. 19:19. He must pay as the accused would have had to do if his testimony had stood.
65. Ex. 20:16. For this R. Meir says he is to be flogged.

66. In the same way in Mishnah 1:3 the zomem witness should receive forty stripes for false testimony in addition to the punishment equal to that which the accused would have received.
67. Deut. 25:2. (The measure of wickedness of the person accused.) The single crime of stealing, and for this the zomem witness must pay but is not flogged.
68. If he is executed he does not also have to pay.
69. Mishnah 1:2. "Anyone who pays is not flogged."
70. A woman who has been released from leviratical marriage by the ceremony of halitsah.
71. A descendant of the Gibeonites. Netinim are not allowed to marry Jews.
72. The child from an adulterous relationship between a Jewish man and a married Jewish woman or incestuous relationship or of a bastard.
73. As is pointed out in Mishnah 1:1, the zomemin witnesses cannot be made into children of divorced women or of as halutsah, etc., as punishment. Thus the punishment cannot here be "as he had purposed to do. . . ."
74. At what point.
75. In retaliation for their testimony which would have caused the accused to pay. Mishnah 1:6 contains a parallel passage (although in the Mishnah the example of punishment is execution and not payment).
76. They have testified and the trial has ended. If they

are found to be zomemin witnesses before the end of the trial and sentencing, they do not receive retaliatory punishment.

77. Has been sentenced.
78. The payment required of the accused by the sentence.
79. This passage parallels word for word the beginning of Mishnah 1:8.
80. The minimum number required for testimony.
81. Who would therefore be disqualified from testimony.
82. Deut. 17:6. "At the mouth of two witnesses or three witnesses shall he that is about to die be put to death." "Witnesses," in the plural - any number above one. "Two or three" implies any number above one. It is established in the Gemara 6a that these witnesses are disqualified together because they are all one group - they testify one immediately after the other.
83. This passage is parallel to Mishnah 1:5 although depending upon interpretation of the Mishnah, possibly not saying the same thing.
84. Hanefesh - the soul.
85. Kasher. Other texts have paṭur (exempt) which is probably a better version.
86. Each one testifying that the previous group were zomemin witnesses. It seems clear from the wording here that this must be the interpretation. The

parallel Mishnah passage is not as complete and there is disagreement as to its meaning. Nahmanides interprets the Mishnah in accordance with the Tosefta, as does Albeck, that is, that each successive set of witnesses shows the previous set to be zomemin. Rashi, Bartenora and others, however, interpret the Mishnah to say that the same group which showed the first group of witnesses to be zomemin, returned after the next group which testified against the accused, and after the next group (and after every group which testified against the accused), showing each successive group to be zomemin.

87. The Tosefta actually has here "All of them are exempt," but I have translated in accordance with Minhag Bikurim who has kulan hayavin - all of them (all of the ones who are at the end of the testimony held to be false witnesses) are liable. This version is much more logical and is consistent with the Mishnah which says "they are all put to death." Since in the next sentence R. Judah objects to what has been said and states that only the first group is executed, it would not make sense to say here that they are all exempt. The last set of witnesses is believed as is the case with all those previous witnesses whose testimony is confirmed by the last set. The next to the last set and all sets whose testimony was consistent with theirs

are considered zomemin.

88. This sentence is an exact parallel to the Mishnah 1:5. Or Haganuz suggests that the text should say: "Rabbi says."
89. Since so many other sets of witnesses testified, it is clear that there is a conspiracy and only the second group of witnesses, which showed the first group to be zomemin, is believed. In the Gemara there is difficulty in explaining R. Judah's position.
90. This statement by R. Jose is an exact parallel to his statement in Mishnah 1:8.
91. This is not in reference to the statement immediately above. Rather, it refers to Tosefta 1:9 above where a relative or other disqualified witness voids the testimony of the whole group of witnesses. This statement by R. Jose should probably follow immediately that discussion as it does in Mishnah 1:8.
92. Where every effort is made to save the accused. Rashi quotes Num. 35:25, "And the congregation shall deliver the manslayer. . . ."
93. Tosafot brings up the problem that if in property matters one of two witnesses is disqualified, the testimony of the remaining one would seem to be useless (since the testimony of two witnesses is necessary). However, in B. Shevu'ot 40a, it is stated that one witness can make a person liable for an oath.

94. This is similar to the position of Rabbi in the Mishnah. In fact, other editions attribute this statement to Rabbi, although the "Versions of Manuscripts" notes in the printed edition corrects it to read R. Meir.
95. Disagreeing with R. Jose, he holds that in property cases, as well as in capital cases, one disqualified witness disqualifies the entire group.
96. This could either refer to the accused or to the proper witness.
97. Of the accused.
98. Among the group of witnesses.
99. If group A testifies and then group B shows group A to be zomemin and then group C shows group B to be zomemin, group A is exempt.
100. This passage is quoted as a Baraita in B. Sanhedrin 27a.
101. I.e., property cases. Although he has shown himself untrustworthy in a property case, in a capital case, which is much more serious, he can be trusted.

COMMENTARY, CHAPTER II

1. This entire second chapter, as contained in Zuckerman, is completely missing from the printed texts. However, sections of this chapter are quoted in the Gemara, introduced by "tanya" indicating a Baraita, but since this chapter was missing later, the source of the Baraita is not indicated in the margin. Because this chapter is not included in the printed texts, there are no Mitspeh Shemuel, Minhag Bikurim, etc., commentaries for it. Consequently, many of my notes for this chapter have been taken from suggestions made by Liebermann in his Tosefeth Rishonim. The problem of understanding this chapter is compounded by the fact that the various traditional commentators may not have been aware of the contents of this chapter when they commented on parallel passages.
2. This chapter, like the second chapter of the Mishnah, discusses those who are to flee to the cities of refuge. These are the cities set up in accordance with Numbers 35:11: "Then you shall appoint you cities to be cities of refuge for you, that the manslayer that killeth any person through error may flee thither." The "exile" is for the protection of the accused, as

well as for atonement. When we read that someone does "not go into exile," it can mean either that he is not given the benefit of asylum, and although he may not be proven guilty which would require witnesses and warning, he must escape the avenger the best he can; or it can mean that there was no negligence on his part (as is the case below with the man who throws a rock and then a person puts his head out the window and is hit by the rock) and he need not go into exile.

3. As this passage stands, it directly contradicts Tosefta 6 below which states: "These are the ones who do not go into exile: if one was cutting the tree and smote a man and killed him, behold he does not go into exile." Liebermann ad. loc. (pp. 163-64) suggests that we may solve the contradiction by understanding our text to say "If a man struck a tree and the tree struck (i.e., fell on) a man and killed him or if he struck a log and if a chip hit a man and killed him, behold this person goes into exile. This explanation is in accordance with Sirfe, Shoftim, Ch. 187¹²³ which says: "If one intended to chop a tree and it fell on a man and killed him, behold this person goes into exile." The passage in Tosefta 6 should read, following this suggestion: "If he intended to strike the tree and struck a man, etc., he does not go into exile."

4. This is the way Rashi explains the last part of Mishnah 2:5. Rabbi's position is consistent in the Tosefta and Mishnah while R. Judah's position here is represented by the position of the Sages in the Mishnah.
5. This passage is parallel with Mishnah 2:1 where the general rule is given: "In every case where the death occurred in the course of descent, he goes into exile, but if not in the course of descent, he does not go into exile."
6. Since we assume negligence, although not intent.
7. He does not have to go into exile since he is not considered at all liable.
8. If the rope slipped completely away, he goes into exile, but if it broke, he does not. See note 10 below.
9. Parallel to Mishnah 2:1.
10. This statement by R. Simon seems to say the same thing as the statement by R. Judah in the previous Tosefta. (In P. Makot 2:1, these statements by R. Judah and R. Simon are quoted, but because of a slightly different wording, R. Simon's statement there is taken to mean "if the rope broke.") The statements of R. Judah and R. Simon seem to be in direct contradiction with the statement of R. Simon in Tosefta 10 below where he says that "If the rope broke, behold this person goes into exile, if the rope slipped, behold he does not

go into exile." This contradiction is brought up in the Gemara 9b, where this seeming contradiction is explained. Yet, even here we encounter further confusion when Rashi introduces a different version of the Gemara text, switching the words "break" and "slip." Following Rashi's version and explanation, we find that regarding slipping, the version in Tosefta 10 refers to a case in which the man he killed was his enemy. Since they were enemies, we might suspect that he killed him willfully, and therefore he does not go into exile. R. Simon's statement in Tosefta 3 refers to a case in which the man he killed was a friend. Since we have no reason to suspect foul play, he may go into exile if the rope slipped from his hand. The contradiction in the two statements of R. Simon over whether one goes into exile if the rope slipped is explained in the Gemara by saying that in the one case he is taking the position of Rabbi and in the other he is taking the position of the Sages in the dispute over what happens to the killer when the iron slips off the wood. (Mishnah 2:1) The iron coming off the wood is taken to be similar to the rope breaking since the loops of the rope, like the haft, remain in his hands. In Tosefta 10 where he goes into exile if the rope broke, R. Simon is following the opinion of the Sages. In Tosefta 3, he is following the position of Rabbi.

11. By a downward movement.
12. This is one of several cases which is discussed by R. Johanan in Gemara 7b of what happens to the butcher who kills someone while chopping meat. In each case, he goes into exile if he kills a person in a downward motion, but not if he kills in an upward motion. This follows the general principle stated above. The issue of which movements by a butcher, resulting in a death, require his exile is debated in P. Makot 2:2.
13. And if there was no reason for him to expect a baby to be in the cradle. In P. Makot 2:4 it is explained that if he sat on the baby in the cradle during the day, and if it is customary for the baby to be in the cradle during the day, he does not go into exile.
14. Where he had no reason to expect anyone to be.
15. In each of these cases the killing was done unwittingly.
16. This passage is problematic, first in that it contradicts the statement by Abba Saul in Mishnah 2:2 and second, that there is not even uniformity of understanding of that Mishnah. Generally, the Mishnah is understood in accordance with Rashi's explanation that this refers to an agent who is administering the forty stripes, in the same way that Mishnah 3:14 refers to the one administering the stripes. Abraham ben David, in his comments on the Mishneh Torah, Hilkhot Rotseah 5:6, explains that this refers to the

agent who, while administering stripes, adds to the number ordered by the court. Liebermann feels that our Tosefta is not referring to such a case, and insists that the Tosefta and the statement by Abba Saul in the Mishnah refer to the same case, with the position of the Tosefta being that the killer does go into exile while Abba Saul holds that he does not. Rambam's interpretation in Hilkhoh Rotseah is that this refers to a case in which the agent of the court smote and accidentally killed a man who refused to come to court. Me'iri questions the position of Rabad and Rashi since Mishnah 2:14 makes clear what happens to the one administering the stripes. He accepts the explanation of the Rambam. The basic issue is what happens to one who strikes and accidentally kills in the fulfillment of a command. Liebermann, who accepts Me'iri's position, concludes that part of the problem may be that Rashi and Rabad may not have had this Tosefta when they explained the Mishnah.

17. This seems to be a case where the doctor was acting in good faith and killed through error. He killed unwittingly and therefore is permitted to escape into exile. If he would have killed purposely, he would not have been given the benefit of exile. This seems to follow from T. Gitin 4:6: "A skilled physician who healed by authority of the court, and caused injury, if by accident, he is exempt, if on purpose, he is liable - for

the sake of the social order." In our case, where not injury but death has occurred, the physician is still exempt from punishment and is allowed to escape into exile. This also follows from T. Baba Kamma 6:17:

"A skilled physician who healed by authority of the court and caused injury is exempt from the punishment of men and his punishment is delivered to heaven."

Some of the commentators who seem not to have been aware of our Tosefta argue that the doctor would not even go into exile since he killed while fulfilling a commandment.

18. In order to save her life. If saving the fetus would require allowing the mother to die, the fetus is considered a pursuer whose life may be taken in defense of the pursued person.
19. As in note 17, the surgeon is acting in good faith and kills by accident, since if he would have killed the woman on purpose, he would not have been given the benefit of exile. As in note 17, this explanation follows from passages in the Tosefta of Gitin and Baba Kamma. T. Gitin 4:7: "The one who cuts up the embryo in the insides of a woman by authority of the court, and caused injury, if by accident, he is exempt, if on purpose, he is liable - for the sake of the social order." T. Baba Kamma 6:17: "The one who cuts up the embryo in the insides of a woman by authority of the court and caused injury, is exempt from the

punishment of men and his punishment is delivered to heaven."

20. This Tosefta, from here until the quotation of the scriptural verse as a proof text, is the same as the beginning of Mishnah 2:2 with the exception of a few minor differences in wording and grammar.
21. This refers to someone who was not a deliberate murderer, for if he were, he would not benefit from refuge, and also to someone who killed not merely by mischance, for which he would not even have to go into exile. There was some degree of negligence. In the Gemara it is suggested that this refers to one throwing a stone from the debris of an unsafe wall he was demolishing onto a rubbish heap, which R. Papa suggests was used at night, but not during the day, by people to ease themselves.
22. The words "out of the window" are not in the Mishnah version, but would be implied there.
23. It hit him in the head and killed him.
24. From having to escape into exile, since he was to no degree to blame. This was a matter totally of mischance and not negligence.
25. Deut. 19:5; the verse continues: "he shall flee to one of these cities to live." In context this refers to the head of an axe slipping from the helve. This proof text is used in the Gemara, although not in the

Mishnah, for R. Eliezer b. Jacob's statement.

26. Only if the person killed was there (Matsa' indicates Matsui, present from before) at the time the killer acted by throwing the rock, is the killer liable. The value of this proof text is debated in the Gemara since in context it is talking about the axe head finding (lighting upon) someone who was already there.
27. This whole Tosefta is a repetition of, although often differing in position from, earlier sections of this chapter.
28. This seems to be in conflict with what was said in Tosefta 2:1 above. See note 3 above.
29. And the chip flew out and killed a person.
30. This is parallel to Tosefta 2:1 above except that there the positions of Rabbi and R. Judah are reversed.
31. Since one goes into exile only if the injury takes place in the course of lowering. Since here he was raising the objects, he need not go into exile. See Tosefta 2:2 and Mishnah 2:1.
32. This differing from the case in Tosefta 2:3 since here it is clear that the death took place in the course of raising the roller.
33. In an upward movement.
34. See note 12 above.
35. Both these cases, where the assailant knew what he was doing, are in contrast to the examples in Tosefta 2:4 where he did not know. Since he knew that the baby

was in the cradle or the man in the pit, it is a deliberate murder and, therefore, he is not afforded refuge by going into exile.

36. In contrast to Tosefta 2:5 where the agent acted by authority of the court. Since he had no authority to smite the man, he is not afforded refuge.
37. All classes of people including Samaritans and non-Israelite slaves, but excluding idolators. The first part of this Tosefta parallels the Mishnah 2:3 and is discussed in the Gemara 8b-9a.
38. If they accidentally kill an Israelite.
39. If he should accidentally kill a Samaritan, non-Israelite slave or another Jew.
40. A sojourning stranger, sometimes referred to as a half proselyte. One who lives among Jews and although he has not converted to Judaism, does not practice idolatry, but observes the seven Noahide commandments. See Maimonides, Yad, Issure Biah 14:7.
41. For an unintentional killing.
42. Literally: "on account of the ger toshav his fellow."
43. This statement is quoted (with the two clauses in reverse order) as a Baraita in the Gemara 8b-9a and discussed at length there.
44. It is explained in the Gemara that this could refer to a case in which he had struck one of them resulting in damages of less than the value of a perutah.

Normally, one makes restitution for injuries, but in cases where the damage is valued at less than a perutah, the assailant is flogged.

45. Kuti. Who are questionable proselytes.
46. Non-Israelite (Canaanite) slave who was circumcised and did not practice idolatry.
47. This Tosefta is quoted and discussed in B. Gitin 12a.
48. For accidentally killing someone.
49. Whatever he earns.
50. In B. Gitin 12a this is explained to mean, whatever he earns above his maintenance.
51. B. Gitin 12a explains that this applies where she is able to earn enough to support herself.
52. Who accidentally killed someone.
53. This first statement of R. Judah is the same as in Mishnah 2:3. He bases his position on the words "seeing him not." from Numbers 35:22-23 - "But if he thrust himself suddenly, without enmity . . . seeing him not . . . so that he die." R. Judah argues that since the blind person can not see at all, he is exempt from going into exile.
54. R. Judah's reasoning is explained in B. Baba Kamma 86b.
55. This Tosefta in part parallels Mishnah 2:3.
56. B. Sanhedrin 3:5 defines enemies as those who have not spoken for three days because of hatred.
57. Since we might assume he killed intentionally. This phrase is identical with the Mishnah.

58. Even though as an enemy he is suspected of having acted intentionally, he is still not executed unless convicted in the usual manner, including the testimony of witnesses and prior warning.
59. The Mishnah, as it is contained in the Talmud, contains a similar statement in the name of R. Jose, but the Gemara explains that this really refers to a statement by R. Jose b. Judah.
60. According to R. Jose, prior warning is required for conviction only in order to assure that an accidental offender will not be convicted. (Gemara 6b) Therefore, he holds that prior warning is not necessary in the case of an enemy, since it is assumed that he acted intentionally.
61. This statement by R. Simon is identical to his statement in the Mishnah.
62. This sentence really makes no sense as it stands. Punishment for the intentional killer is not flogging. Liebermann suggests that it possibly should read, similar to the Mishnah: "When you find that he killed willingly he does not go into exile, but if he killed unwillingly, he goes into exile."
63. And an object on the rope fell and killed a person.
64. This refers to the case of an enemy. If it broke we assume even though he was an enemy it was accidental. However, if the rope slipped, since he was an enemy

we assume it may have been on purpose and so he does not receive the benefit of exile.

65. Although this seems to parallel a similar statement in Mishnah 2:1, according to Lieberman this is still referring to the enemy discussed immediately above. The slipping of the axe-head off the handle is seen as more likely to have been intentional than the breaking of the rope, so while in the case where the rope breaks the enemy is allowed to go into exile, if the axe head slips off the handle, the enemy is not given the benefit of exile and must escape the avenger as best he can. If the accident happens in an upward movement to someone who was not an enemy, the killer would not go into exile and would bear no guilt. We might assume that the man who killed his enemy by an upward movement would go into exile, but we are told that even in the case of an upward movement he is not given the benefit of exile. In Hilkhot Rotseah, 6:3-4, the Rambam explains that there are some inadvertent killings which are so close to unavoidable accidents that one need not go into exile while there are other inadvertent acts which are so close to deliberate acts, that one is not given the benefit of exile.
66. Literally: "to the cities of his refuge." This seems a little out of place here, and belongs in Tosefta 12 where it is repeated.

67. Literally: "And he killed and he killed." The first "and" is probably a mistake.
68. Even though it happened twice, it is not considered deliberate.
69. The killer must have been warned before he killed in order to be convicted of murder.
70. For punishment.
71. Unless he had been warned and there are at least two witnesses, he cannot be punished by the court as prescribed by the law of the Torah.
72. Although this begins Tosefta 12, it really belongs with the previous matter.
73. The general rule explained in Mishnah 2:1: "In every case where the death occurred in the course of descent, he goes into exile; but if not in the course of descent, he does not go into exile."
74. The passage from here on appears as a Baraita in the Gemara 12b.
75. Who lives in one of the Levitical cities of refuge.
76. The parallel in Mishnah 2:7 reads: "from one city (of refuge) to another city (of refuge)."
77. For accidentally killing someone elsewhere.

COMMENTARY, CHAPTER III

1. This Tosefta is similar to Mishnah 2:4. P. Makot 2:6 quotes this Tosefta almost word for word.
2. The Land of Canaan, i.e., the Land of Israel.
3. The parallel passage in the Mishnah bases this on Num. 35:14: "Ye shall give three cities beyond the Jordan, and three cities shall ye give in the land of Canaan, they shall be cities of refuge."
4. Tithes and the observance of the Sabbatical year are required only in the Land of Israel.
5. Part of this Tosefta is quoted in the Gemara 9b.
6. These cities of refuge are specified in Deut. 4:43 and Joshua 20:7-8.
7. Which is west of the Jordan.
8. Which is east of the Jordan.
9. Even before it was conquered.
10. The Zuckermandel text here reads "Shechem," but this is obviously incorrect and should read "Kedesh," as it does in other texts as well as in P. Makot where this Tosefta is quoted.
11. Deut. 19:3: "Thou shalt prepare thee the way, and divide the borders of thy land, which the Lord thy God causeth thee to inherit, into three parts, that every manslayer may flee thither."

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12. In the Gemara 9b, where this Tosefta is quoted, the sentence is completed, "and (the distance) from Shechem to Kedesh is equal to (the distance) from Kedesh to the North (i.e., the northern border).
13. Or is destroyed.
14. Num. 35:13: "And as to the cities which ye shall give, there shall be for you six cities of refuge."
15. This sentence, like the first section of Mishnah 2:5 which mentions the direct roads, concerns reaching the city of refuge. (This statement is quoted in slightly different words in the Gemara 10b).
16. This next section parallels Mishnah 2:5 and the discussion thereof, Gemara 10b.
17. Deut. 19:4. In context the quotation means, "this is the case of the manslayer, but here, "davar" is taken to mean "plea."
18. You do not need to kill him. If he should be killed, God has many agents to take care of it.
19. Upon the death of this priest. Normally, when the High Priest dies, the murderer who had been exiled to a city of refuge, is allowed to return home as explained in Mishnah 2:6. R. Simon's statement here is in disagreement with R. Judah's statement in the Mishnah: "Even if he (i.e., this High Priest) is the one annointed for battle, (i.e., not the High Priest, but only the

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- 'Chief Chaplain') (at his death) they return the murderer."
20. See Numbers, Chapter 6; cf. Tosefta Nezirut 4:5 and Mishnah Nazir 1:2,4.
 21. Which the peace offering is in. This is in accordance with Num. 6:18: "And the Nazarite shall shave his consecrated head at the door of the tent of meeting, and shall take the hair of his consecrated head, and put it on the fire which is under the sacrifice of peace offerings." (See B. Nazir 45a-b).
 22. Although it is not quoted there in the name of R. Eliezer b. Jacob, a parallel passage is found in Mishnah 2:7.
 23. Num. 35.
 24. The words "flee there" occur three (actually four) times in Num. 35. The three occurrences cited by Mitspeh Shemuel are: 35:11: "the manslayer may flee there," 35:25: "that he fled there," and 35:26, "that he flees there." The phrase is also found in 35:15: "to flee there."
 25. Num. 35:25.
 26. Although Mishnah 2:7 states that just as the city (affords) refuge, so its boundary (surroundings) (affords) refuge; we are told here that he shall live

COMMENTARY, CHAPTER III

within the city itself and not on the outskirts of the city. This is in accordance with B. Arakin 33b which says that one may not turn the outskirts of the city into the city. According to Num. 35:4-5, the outer boundaries of the city are set at 2000 cubits from the wall on each side of the city. "Within the border of the city," refers to this area, as opposed to within the city proper.

27. Since the boundary serves as a refuge (Mishnah 2:7).
28. This seems to be the meaning of the text. One who kills him is treated just like any other killer. If he killed intentionally, he is executed; if unintentionally, he goes into exile. The last part of this sentence is quoted as a Baraita in the Gemara 12a where the meaning is construed quite differently. In the Gemara the Baraita is understood to be referring to a murderer living in the city of refuge who goes outside the border of the city of refuge. According to this explanation, the translation would be: If (the murderer goes outside the boundry) intentionally, he (i.e., the murderer) may be killed (by the blood avenger). (If he goes out) unintentionally, he (i.e., the one who kills him) goes into exile."
29. Even the blood avenger does not have the right to kill

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the murderer until after the murderer has stood trial. The murderer, immediately after the murder, and before the trial, is taken to the city of refuge. He leaves the city of refuge to go back for the trial. At the trial he is either freed, returned to the city of refuge, or executed. R. Jose's statement ties in with what has been said, by making it clear that if before having been convicted, the murderer leaves the city of refuge, to return for his trial, the blood avenger is not permitted to kill him. (Gemara 12b).

30. Num. 35:12.
31. A parallel passage is found in the Gemara 12a.
32. A regular court of less than 23 members, cannot sentence to death, but only to go into exile. Here, however, since witnesses cannot be judges, he does not even go into exile.
33. Since witnesses cannot be judges. In B. Rosh Hashanah 26a, it is explained that as witnesses they will not be able to find any defense for him.
34. In the Gemara version of R. Akiba's explanation, the quotation from Num. 35:12 is followed by the clarification that this means, "until he stands before another court."
35. Num. 35:27. The context in Numbers makes the discussion clear. Numbers 35:26-27: "But if the manslayer

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shall at any time go beyond the border of his city of refuge, whither he fleeth; and the avenger of blood find him without the border of his city of refuge, and the avenger of blood slay the manslayer; there shall be no bloodguiltiness for him."

36. In the Gemara 12a, it is suggested that this refers to the case in which he went out intentionally. If he went out unintentionally, his slayer goes into exile. (See note 28 above).
37. The Zuckerman text actually reads here "In all men," but should read, as it does in other texts, "like all men." According to Mitspeh Shemuel, this means that it is a mitzvah of the blood avenger, (i.e., to kill the killer who left the town). However, if there is no blood avenger, everybody may kill him. Minhag Bikurim suggests that this is a separate statement by an unnamed Tana who is in disagreement with R. Elazar's interpretation of "and the avenger of blood slay the manslayer, there shall be no bloodguiltiness for him." "There is no bloodguiltiness for him," refers to the original murderer (who has gone out of the city of refuge before the trial). He has not yet been convicted and, therefore, he is just like any other man, and anyone who kills him intentionally is killed.

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38. This is parallel to Mishnah 2:8.
39. Deut. 19:4.
40. The J.P.S. translation has: "And this is the case . . ." but here the text is used to show the single statement of the murderer.
41. He is only to announce once that he is a murderer.
42. This is parallel to the end of Mishnah 2:7.
43. To which he had been exiled for unintentionally killing someone.
44. Since, if he left that city of refuge to go to another city of refuge, he would be subject to death at the hand of the blood avenger. as soon as he left the bounds of his present city of refuge.
45. Who lived in the city of refuge and unintentionally killed someone there. (All cities of refuge were Levitical cities.)
46. "To him" is missing in the Zuckerman text.
47. The Zuckerman text has here sheloshah (three), but I have translated in accordance with other texts which read shelemah (whole).
48. Thus, he goes into exile from one half the city to the other half of the city.
49. This section is quoted, with slight differences in wording, in the Gemara 10b.

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50. Since the blood avenger, unnoticed, might enter and search for the murderer.
51. Since those who go there for refuge cannot leave for supplies.
52. Other texts have here, they "dig" for water.
53. Other texts, as well as the Baraita in B. Makot 10a have here, "they do not build except in a place where there is a market, if there is no market, they make for them a market."
54. Pene Moshe explains (P. Makot 2:6) that this means the city shall be located in a populous area, to protect the unintentional murderers, so that blood avengers should not attack the city.
55. Of the city itself.
56. This Tosefta is almost identical to the Baraita in P. Makot 2:6. A similar Baraita is found in B. Makot, but refers to arms and traps rather than olive and wine presses.
57. So that the blood avenger will not come there for olive oil or wine. (The Zuckerman text has vetsedah, but I have translated according to the other texts which read vitsirah.)
58. To buy this attractive merchandise and meet and kill the killer who went there to save himself.

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59. In the time of the Messiah.
60. The remainder of this Tosefta attempts to arrive at the number of cities of refuge from the number of times "three" is mentioned in Deut. 19: Verse 2: "Thou shalt separate three cities for thee in the midst of the thy land. . . ." Verse 7: "Wherefore I command thee saying, 'Thou shalt separate three cities for thee.'" Verse 9: ". . . then thou shalt add three cities more for thee, unto these three."

COMMENTARY, CHAPTER IV

1. Since it must be roasted in accordance with Exodus 12:8-9: "And they shall eat the flesh in that night, roast with fire . . . Eat not of it raw, nor sodden at all with water, but roast with fire . . ." T. Pesahim 3:7 explains that if the Pesach is slaughtered on the fourteenth, before the proper time, it is permissible to eat it half cooked, or seethed or cooked, and in T. Pesahim 6:10 it is stated that if he eats of it half cooked or if it is cooked before dark, he is not liable and only becomes liable if he eats of it after dark. The Gemara 41b also states that if he ate half cooked an amount the size of an olive while it was still day (on the fourteenth) he is exempt, but if he ate half cooked an amount the size of an olive after dark, he is liable.
2. A group gathered together specifically to eat the Passover sacrifice.
3. The Exodus passage only forbids taking it out of the house. The liability of the one who took it from company to company as well as the status of the Passover sacrifice which has been taken from company to company is debated in B. Pesahim 85-86.
4. Ex. 12:46.

5. In B. Pesahim 85b, the word "abroad" is said to show that one may not take it from company to company.
6. For karet, divine punishment through premature or sudden death, and later changed by the rabbis to flogging. This is learned from Ex. 30:34-38: ". . . And the incense which thou shalt make according to the composition thereof ye shall not make for yourselves, it shall be unto thee holy for the Lord. Whosoever shall make like unto that, to smell thereof, he shall be cut off (venikhrat) from his people." This is among the 36 transgressions listed in M. Keritot 1:1 for which the punishment is karet. In M. Makot 3:2 we find the making of incense listed among the transgressions for which one is flogged. One receives the punishment of karet if he acted intentionally, but without warning from witnesses. If he acted intentionally following the warning by witnesses, depending on the crime he may be executed or flogged. The making of incense and anointing oil is discussed in B. Keritot 5a. There the words, "ye shall not make for yourselves," from Ex. 30:37 are taken to indicate that one is liable only if he made it for himself, but if he made it to hand over to the community, he is not liable. Other texts continue here: "whether he mixes the full (amount) or mixes half (the quantity), but if he was busying himself (in an effort) to learn about it or to turn

it over to the community, (or) if he left out one from all the ingredients of the incense he is not liable except for unlawful use of sacred property alone. The one who mixes anointing oil, behold he is liable, but the one who anoints with it is exempt, he is not liable except for unlawful use of sacred property alone."

7. From karet. (See B. Keritot 6a.)
8. Divine punishment through premature or sudden death. According to B. Keritot 5a, the one who anoints with other anointing oil is exempt, since one is not liable for anointing with anointing oil except for the anointing oil which Moses made.
9. Produce from which the prescribed priestly, etc., dues were not set aside. This is parallel to a discussion in the Gemara 16b and in B. Yvamot 86a.
10. "The great offering." The first levy on the produce of the year given to the priest. $1/40$, $1/60$ or $1/50$ (i.e., about 2%) of the produce.
11. Given to the Levites.
12. Which the owner of the crop has to eat during the 3 pilgrim festivals in Jerusalem.
13. "Which is not even sacred, it being regarded as mere alms." (Soncino Talmud, Yevamoth, p.591, note 3.) It is "levied in the third and sixth years of the Septennial or Sabbatical cycle." (Soncino Talmud, Makot, p.117, note 9.)

14. Who picks a fig. Gemara 19b has a different version of R. Jose's statement.
15. I.e., the land of Israel outside of Jerusalem.
16. Terumah.
17. Which must be eaten in Jerusalem. Thus, if it is in the year of the second tithe and he is in Jerusalem, he says the northern part is the second tithe.
18. Which may be eaten outside Jerusalem. Thus, if it is the year of the poor tithe, he says the northern part is the poor tithe.
19. The version in the Gemara 19b tells that he is flogged on one count because he did not specify the location of Terumat Ma'aser. Had he done this, he would not have been flogged. (See Rashi 20a.)
20. Of the portions he ate which were forbidden to him. The exact number of counts is discussed in the Gemara.
21. For eating tevel produce.
22. The Zuckermandel text reads, "the one who eats . . ." I have translated in accordance with the printed edition of the text of the Tosefta in the Talmud. In any case, the sense of the statement requires that this refer to a non-priest. This same statement is made in the Gemara 17a.
23. As required before the fat can be burned as an offering and the meat eaten.
24. Since only the priests are allowed to eat the first

born animal in accordance with Num. 18:15-19: "they (the firstlings) are holy, thou shalt dash their blood against the altar and shalt make their fat smoke for an offering made by fire, for a sweet savor unto the Lord. And the flesh of them shall be thine . . ."

25. Both the second tithe and the first produce could be eaten only in Jerusalem. (See Gemara 19a, where the relationship between the second tithe and the first produce is discussed.)
26. In the Gemara 19a it is explained that outside the wall of Jerusalem, the first fruits are considered like ordinary fruits while inside the wall of Jerusalem they are considered dedicated objects. Thus, outside the wall, they are subject to no restriction aside from the normal tithing, and, therefore, R. Meir holds that one who eats of the second tithe and the first produce outside the wall is guilty on only one count and receives forty stripes. According to Minhag Bikurim, this is based on Deut. 12:17 where the firstlings are taken together with the tithes: "Thou mayest not eat within thy gates the tithe of thy corn, or of thy wine, or of thine oil, or the firstling of thy herd or of thy flock . . ."
27. To equal the culpable amount of the size of an olive, and, therefore, one must eat an amount the equivalent of an olive of one or the other to be liable. And

since they are not counted together, if one eats more than an amount the size of an olive of each one, one is liable on two counts.

28. Based on Ex. 23:19 "Thou shalt not seethe a kid in its mother's milk."
29. In Hulin 108b, where a similar discussion takes place, a Baraita is quoted in the name of Levi which reads, "Just as he is flogged for eating it, so he is flogged for cooking it."
30. The parallel passage in B. Hulin 108b reads: "So that others (i.e., non Jews) would eat it because of its having been cooked." Rashi explains there that this means that it was cooked all it needed to be.
31. Which is forbidden in Gen. 32:33: "Therefore the children of Israel eat not the sinew of the thigh vein which is upon the hallow of the thigh, unto this day." The prohibitions regarding the sciatic nerve are discussed extensively in Hulin Ch. 7.
32. The Zuckerman text actually continues here: "but R. Judah exempts him until he eats from both of them. (If) he ate it and there was not in it an amount the size of an olive, behold this person is liable and R. Judah exempts until he eats from both of them." This is obviously repetitious and an erroneous reading. This section is missing in the printed version of T. Makot as well as in an otherwise identical

passage in T. Hulin 7:6.

33. This statement is made in M. Hulin 7:3 and R. Judah's disagreement is found in the discussion thereof in B. Hulin 96. There the rabbis hold that if he ate the whole thing, even if it was less in quantity than the size of an olive, the person is liable, since it is a complete entity in the same way that R. Simon points out in M. Makot 3:2 that if one eats an ant (which is smaller than an olive) one is liable.
34. In B. Hulin 96b R. Judah's position is explained to be based on the fact that "eating" is mentioned and eating refers to an amount the size of an olive.
35. A similar passage is found in M. Hulin 7:3: "If one eats of it the amount the size of an olive from one (thigh) and from the other (thigh) an amount the size of an olive, he receives 80 stripes, R. Judah says he receives only 40 stripes." There the difference of opinion is based on R. Judah's position that only the sciatic nerve of the right thigh is forbidden.
36. An identical passage is found as a Baraita in B. Hulin 91a. There it is explained that since we are concerned with the sciatic nerve from two animals, the dispute is not over the prohibition of the sciatic nerve in the left thigh. Rather it is a case in which in one of the nerves there was not an amount

the size of an olive, in which case the rabbis hold that he is nevertheless liable, while R. Judah holds he is not. Thus the rabbis find him liable on two counts and therefore he receives 80 stripes. Since one of the nerves contains less than the equivalent of the size of an olive, but the two together did equal the size of an olive, R. Judah holds him liable on only one count.

37. This prohibition is discussed extensively in B. Hulin, chapter 5. The Biblical basis of the prohibition is Lev. 22:28: "And whether it be cow or ewe, ye shall not kill it and its young both in one day."
38. This is parallel to Mishnah 3:1.
39. Since men and women are equal regarding punishments.
40. For each count according to which the woman relative is prohibited.
41. The daughter of certain forbidden priestly unions or a priest's wife illegitimately married to him, e.g., a divorcee.
42. In B. Kidushin 77a this is explained as referring to one woman who was widowed then remarried and was divorced, then married a priest and became a halalah and then became a harlot. The prohibition is based on Lev. 21:14: "A widow, or one divorced, or a profaned woman, or a harlot. These he shall not take."
43. For transgressing each prohibition.

44. Though he (the high priest) married a woman who was divorced by five husbands, this counts for him only as one transgression. The same is true if he marries a woman widowed five times.
45. In B. Hulin 101b the Sages hold that the prohibition of eating a limb from a living animal applies only to clean animals. According to the Sages, where you are not permitted the flesh of an animal, you are not forbidden the limb severed from it. Thus one is liable not under the prohibition of a limb of a living animal (which requires only the smallest amount), but for eating the flesh of an unclean animal, for which one becomes liable only upon eating an amount the size of an olive.
46. If he ate parts of a limb from each of the animals, they are counted together making him liable on one count.
47. Since the transgression involves eating nevalah, flesh of an animal improperly slaughtered.
48. To equal the size of an olive of prohibited unclean flesh.
49. The forbidden junction of wool and linen.
50. The Zuckerman text is clearly incorrect here. It actually reads: ". . . he is liable, exempt. If he dressed (in kila'im) intentionally or if he became defiled intentionally, he is liable, exempt." From

Zuckerman's notes, as well as the comments of Mitspeh Shemuel and Minhag Bikurim, there seem to be many different versions. It is clear here from the words, "'af 'al pi, even though (he acted intentionally)," that he must be exempt. This follows from B. Nazir 44a which says that one who defiles a Nazarite is not liable.

51. Which is forbidden according to Lev. 19:27: "Ye shall not round the corners of your head . . ." According to the Gemara 20b, this refers to leveling the hair at the temples. In the Mishnah 3:5, we are told that one who rounds the corners of his own head is liable.
52. The one who cut the hair and the one whose hair was cut.
53. This is stated in the Gemara 20b. R. Ashi suggests there that this refers to one who helps the barber.
54. That both of them are liable.
55. And thereby two sets of floggings, if he had been properly warned.
56. Parallel to Mishnah 3:5.
57. In the Gemara this is stated in reference to the beard, but not the corners of the head.
58. This is also forbidden in Lev. 19:27: ". . . neither shalt thou mar the corners of thy beard."
59. This is parallel to the Mishnah 3:5. The commentators debate the exact place of the five corners.

60. With one movement.
61. Making each cutting a separate action.
62. If he is warned each time.
63. The corners of the beard.
64. Parallel to Mishnah 3:5.
65. This statement, which is made in the name of R. Eliezer in the Mishnah, is discussed in the Gemara 21a. The issue concerns whether or not pulling out the hairs is destroying them in the way that shaving destroys them. The prohibition in Lev. 27:19 states: "do not destroy (lo' tashhit) the corners of your beard."
66. For the dead. See below, Tosefta 4:12.
67. This is based on Deut. 14:1: "Ye are the children of the Lord your God; ye shall not cut yourselves, nor make any baldness between your eyes for the dead," and on Lev. 21:5: "They (the priests) shall not make baldness upon their head . . ." In the Gemara 20a it is explained that just as the priest may not make a baldness anywhere on his head, so the non-priest also may not make a baldness anywhere on his head. In the Mishnah the prohibition is stated against making a baldness on one's own head.
68. As a sign of mourning.
69. If he is warned before each one.
70. The prohibition only applies to one who makes a baldness as a sign of mourning. If done for other reasons,

one is not liable.

71. This is debated in the Gemara 20b. There answers such as the following are given: "enough to show the scalp," "the size of a bean," and "the removal of two hairs."
72. Which is forbidden according to Lev. 19:28: "Ye shall not make any cuttings in your flesh for the dead."
73. In Mishnah 3:5 it is stated that the one who makes an incision in his own flesh is liable.
74. In the Gemara 20b this is proved from the use of the word lanefesh (for a soul) in Lev. 19:28, i.e., for each individual dead person for whom he made the incision.
75. In the Gemara 20b this is proved from the use of the word seret (a cutting) in the singular in Lev. 19:28. Thus one is liable for each individual incision.
76. One is not liable if he makes an incision for other reasons, for instance, as is suggested in the Gemara 20b, if his house collapses or if his ship is lost at sea. In the Gemara this is derived from Lev. 19:28 and Deut. 14:1: ". . . ye shall not cut yourselves nor make any baldness between your eyes for the dead."
77. Which is forbidden according to Lev. 19:28: "Ye shall not make any cuttings in your flesh for the dead, nor imprint any marks upon you; I am the Lord."
78. Mishnah 3:6 states that one is liable if one etches

- an inscription in his own flesh.
79. Mishnah 3:6 also says that one is not liable unless he etches in an inscription with ink or eye-paint, but does not include the words "for idolatry." Just as the idolator cut his flesh for the dead, so he made etched in inscriptions in his flesh with ink. These laws are to prohibit idolatrous practices. In the Mishnah, R. Simeon b. Judah says in the name of R. Simeon that one is not liable unless he has inscribed the Name. One suggestion made in the Gemara is that this refers to the name of a false god. Thus again the avoidance of idolatrous practices.
80. For a clearly non-idolatrous purpose.
81. This Tosefta probably should follow Tosefta 4:14.
82. This Tosefta is in conflict with the Gemara 21a where it is suggested that if one makes an incision in his flesh for the dead with either his hand or an instrument he is liable. If for the purpose of idolatry, if by hand he is liable, if with an instrument he is exempt. I Kings 18:28: "And they cut themselves after their manner with swords and lances," is quoted to show that it should be the other way around: if by hand he is exempt, if with an instrument, he is liable. This however seems to be talking about the death penalty for idolatrous practices while the Tosefta is talking about flogging.

83. In accordance with Lev. 21:10-11: "And the priest that is highest among his brethren, upon whose head the anointing oil is poured, and that is consecrated to put on the garments, shall not let the hair of his head go loose, nor rend his clothes; neither shall he go in to any dead body, nor defile himself for his father, or for his mother."
84. M. Nazir 7:2 lists the uncleannesses for which a Nazirite must cut his hair.
85. A field declared unclean on account of crushed bones carried over it from a ploughed grave. (This is explained in detail in Oholot, Ch. 7.)
86. Both of which cause him to become unclean. See M. Ohaloth 18:6.
87. Rabbinical stripes. Punishment for disobedience, left to the discretion of the court, as opposed to Biblically ordained punishment.

COMMENTARY, CHAPTER V

1. To prevent it from eating while at work, which is forbidden according to Deut. 25:4: "Thou shalt not muzzle the ox when he treadeth out the corn."
2. But does not actually plow with them himself. The prohibition is from Deut. 22:10: "Thou shalt not plow with an ox and an ass together."
3. I.e., only the actual driver is liable. The Tosefta to this point is identical with T. Kila'im 5:11 and is quoted as a Baraita in B. Baba Mitsia 90b. In the Baraita, the second sentence reads that the driver is flogged.
4. Which is forbidden according to Numbers 6:3: "He (a Nazarite) shall abstain from wine and strong drink; he shall drink no vinegar of wine, or vinegar of strong drink, neither shall he drink any liquor of grapes, nor eat fresh grapes or dried."
5. Since he was only warned once.
6. Each time he drinks following a warning.
7. The exterior and the interior, i.e., the whole grape, as is specifically prohibited in Num. 6:4: "All the days of his Nazariteship shall he eat nothing that is made of the grape-vine, from the pressed grapes (mehartsanim) even to the grape-stone (zag)."

8. In B. Nazir 38b, it is debated how many times he is to be flogged (i.e., how many counts he has against him).
9. Lev. 23:17: "Ye shall bring out of your dwellings two wave-loaves of two tenth parts of an ephah; they shall be of fine flour, they shall be baked with leaven, for first fruits unto the Lord."
10. Num. 6:3.
11. The two loaves are for first fruits. (See note 9 above.)
12. Zuckerman has: "the one who enters the amount," but I have translated in accordance with other texts and Lieberman's suggestion.
13. One is liable for offering the part of the offering on the ascent just as one is liable for offering it on the altar itself. This is the position of R. Johanan in B. Menahot 57b. R. Elazar holds that one is not liable for offering it on the ascent. The inclusion in the prohibition of the ascent leading to the altar is based on Lev. 2:12: "But they shall not come up for a sweet savour on the altar." The debate continues in B. Menahot.
14. M. Zebahim 5:1-5.
15. M. Zebahim 5:6-8.
16. In B. Menahot 57b where this Tosefta is quoted, leaven and honey are not included.

17. Lev. 2:11. The J.P.S. translation actually reads:
"For ye shall make no leaven, nor any honey smoke
as an offering unto the Lord." However, it is necessary to translate the verse more literally for it to serve as a proof text.
18. The words "or it" seem superfluous in the verse and therefore are taken to mean that once the proper portion of an offering has been offered, the rest may not be offered on the altar. Each of the offerings listed in this Tosefta are to be burnt in part, but not totally, i.e., the fat of the animal sacrifices, the handfuls of the meal offerings, the fat parts of the two lambs which accompanied the two loaves, and the incense which was with the show bread.
(Soncino Talmud, Menahot, p. 342, notes 4-5.)
19. A Baraita which is similar is found in Temurah 6b.
20. And offers it up.
21. Lev. 22:21. In the parallel passage in Terumah 6b, Lev. 22:20 is used as a proof text. That is actually a better proof text since it states the prohibition in its negative form: "But whatsoever hath a blemish, that shall ye not bring." By transgressing this prohibition, one transgresses all five listed.
22. The blood has to be collected in a vessel as part of the sacrificial act.
23. Parallel to M. Temurah 6:1.

24. Copulated with a woman.
25. In B. Temurah 28a, the prohibition against dedicating the animal who copulated with a man or woman is based on Lev. 1:2: "When any man of you bringeth an offering unto the Lord, ye shall bring your offering of the cattle, even of the herd, or of the flock."
"Of the cattle" indicates that not all cattle may be offered and is taken to exclude the animal which copulated with a person.
26. An animal which was set aside, as explained in M. Terumah 6:1, for idolatrous uses. In B. Temurah 28b, the prohibition of dedicating the muqtseh is based on the words "of the flock," in Lev. 1:2. "Of the flock" excludes some of the flock.
27. That which has been used for idolatry as explained in M. Temurah 6:1. The Scriptural basis for the prohibition against dedicating the ne'evad also comes from Lev. 1:2, in this case from the words, "even of the herd." It is also suggested in B. Temurah 28a that all three of these prohibitions may be derived by analogy.
28. An animal which was the hire of a harlot, as explained in M. Temurah 6:2: If one says to a harlot, "take this lamb for your payment." Exceptions are discussed in B. Temurah 29-30.
29. As explained in M. Temurah 6:3, if one says to another

person: "take this lamb in place of this (i.e., your dog)." The Gemara there (B. Temurah 30a) states simply: this refers to that which is taken in exchange for a dog. The prohibition against the price of a dog, as well as against a harlot's hire, are based on Deut. 23:19: "Thou shalt not bring the hire of a harlot, or the price of a dog, into the house of the Lord thy God for any vow; for even both of these are an abomination unto the Lord thy God."

30. The wording of this section is difficult and for clarity Minhag Bikurim refers to the version of the parallel passage in B. Temurah 28b: "They are like dedicated animals that before their dedication, they (received) a temporary blemish, and they require a permanent blemish to redeem them."
31. Which is forbidden according to Lev. 27:9-10: "And if it be a beast whereof men bring an offering unto the Lord, all that any man giveth of such unto the Lord shall be holy. He shall not alter it, nor change it, a good for a bad, or a bad for a good; and if he shall at all change beast for beast, then both it and that for which it is changed shall be holy." Exchanges of offerings are discussed in Temurah. M. Temurah 1:1 states that if one does make an exchange, he is liable to forty stripes.
32. See B. Zebahim 29b.

33. This is similar to Mishnah 3:9 which states that one can transgress eight prohibitions by ploughing one furrow. If he is a Nazarite with leprosy who pulls the hairs from the side of his head on a holiday.
34. In B. Nazir 40a it is debated whether the Nazarite is equally culpable for pulling out his hair and for cutting it with a razor. To show that the prohibition is to removing hair and not just to a razor, R. Josiah brings the second part of verse 5, Num. 6: ". . . he shall be holy, he shall let the locks of the hair of his head grow long."
35. Two white hairs are a sign of leprosy. ^{Lev}~~Num.~~ 13:3: "And the priest shall look at the plague in the skin of the flesh, and if the hair in the plague be turned white . . . it is the plague of leprosy." Deut. 24:8 states: "Take heed in the plague of leprosy." Thus, one is not allowed to remove its signs. In fact, if he has only two leprous hairs, if he pulls out only one of them he is liable. (See B. Shabbat 94b.)
36. In B. Shabbat 94b it is debated how much hair one must pluck out on Shabbat to be liable.
37. As prohibited by Lev. 20:27: "Ye shall not round the corners of your heads." Minhag Bikurim explains that if one only has forty hairs (at his temple), and pulls two out, afterwards there will not be a corner (of hair). He cites Maimonides in Hilkhhot Avodat Kokhavim

12:6, who suggests that the corner requires forty hairs.

38. The Zuckerman text has: "one who kills . . ." but I have translated "one who charms . . ." which makes much more sense in context and is in accordance with other versions of the Tosefta.
39. See Sanhedrin 65a.
40. Deut. 18:10-11.
41. Castrates a male or sterilizes a female. This is based on Lev. 22:24: "that which hath its stones bruised, or crushed, or torn, or cut, ye shall not offer unto the Lord; neither shall ye do thus in your land." Although the verse seems to refer to animals of the kind which might be sacrificed, in Hagigah 14b it is stated that one may not even castrate a dog, since the verse concludes, "neither shall ye do thus in your land," i.e., to none that is in your land.
42. The issue, which is debated in Shabbat 111a, is whether or not a woman is commanded to procreate. If she is not, she may be sterilized.
43. For doing anything with an idol.
44. Deut. 12:3-4.
45. This reading is based on the suggestion of Mitspeh Shemuel. Other texts have here, "who exchanges dedicated things," but this would be in conflict with Tosefta 5:5 above as well as with the last part of

this Tosefta itself.

46. He does not uproot them, as opposed to sowing diverse kinds of seeds for which he would definitely be liable. Whether or not one is flogged for preserving diverse seeds is debated in the Gemara 21b. R. Akiba holds in T. Kila'im 1:15 that even one who preserves them transgresses a negative commandment.
47. This same statement is found as a Baraita in Shebuot 21a. There the text actually reads, "for every negative commandment which is in the Torah . . ."
48. Which does not require an action since the exchange can be considered made when one says he is exchanging them. (See Tosefta 5:5 and note 31 above.)
49. Other texts of the Tosefta as well as the Baraita in B. Shebuot include "swearing" as an exception along with exchanging and cursing by the Name.
50. This is parallel to Mishnah 3:4 as well as the identical Mishnah in M. Hulin 12:4. There R. Judah says he is flogged and does not have to let the mother bird go, while the sages say he has to let her go, but is not flogged. The prohibition comes from Deut. 22:6: "Thou shalt not take the dam with the young ..."
51. Which can repair the wrong done by breaking the negative command. For example, if he lets the mother bird go. Deut. 22:6-7 states: "If a bird's nest chance to be before thee in the way, in a tree or

on the ground, with young ones or eggs and the dam sitting upon the young, or upon the eggs, thou shalt not take the dam with the young; thou shalt in any wise let the dam go . . ."

52. The Zuckermandel and other texts actually read: "if they fulfill the negative commandment," but that does not make sense since if he fulfills the negative commandment, there is no need to talk about the connected positive commandment. The intention of the Tosefta as well as Mishnah 3:4 is clearly that if one fulfills the positive commandment, he is exempt even though he transgressed the negative commandment. An asterisk and marginal note in the printed text of the Tosefta indicated that it should read "a positive commandment."
53. How many stripes he is able to bear and should receive.
54. Mishnah 3:11 gives the rule that one estimation for the transgression of both prohibitions is given if the man is strong enough to take more than 40 stripes at one time.
55. Which is the maximum number in accordance with Deut. 25:3: "Forty stripes he may give him, he shall not exceed."
56. To make the total number divisible by three, as is specified in Mishnah 3:11. The Gemara 22b explains

that in Deut. 25, the end of verse 2 and the beginning of verse 3 combine to say "by number forty." This is taken to mean "close to forty." Thus the maximum number is really 39.

57. Once the estimate has been made, the number cannot be increased.
58. To make the number divisible by three.
59. This is parallel to Mishnah 3:14.
60. The text actually means, "for two or three or more."
61. Zuckermandel has gilah. Other texts read galgel.
62. If a man was convicted for two offenses, but befouled himself while being flogged for the first offense, we do not exempt him from the flogging for the second offense. We exempt him only from the remaining stripes due for the first offense.
63. The text actually reads, "they flog him," but the text seems to be corrupt. In the printed edition of the Tosefta, the reading is "they flog him," but a marginal note suggests hein should read 'ein, "they do not flog him." This seems to be in accordance with the parallel passage in the Gemara 23a.
64. This is parallel to Rashi's understanding of the Gemara 23a.
65. Deut. 25:2-3: "... that the judge shall cause him to lie down and be beaten . . . forty stripes shall he give him, he shall not exceed, lest if he should

- exceed . . . then thy brother should be dishonored in thy eyes." The Gemara explains this to mean that he is excused if he became dishonored after the flogging began, but not before the flogging began.
66. But not with urine.
67. This discussion appears as a Baraita in the Gemara 23a.
68. The specific verses he recites are given in Mishnah 3:14.
69. Mishnah 3:3 says it was long enough to reach his abdomen.
70. The text seems to read, "All those who transgress negative commandments, who transgressed against a negative commandment which is in the Torah which has in it 'arise and do' even though they are liable for it to death by the hand of heaven or karet by the hand of heaven, they flog them." This however makes little sense and would be in direct contradiction with Tosefta 5:11 above. I have translated gum va'aseh here as "in an active manner" rather than as "arise and do" (i.e., a positive commandment) as it was translated in Tosefta 5:11. Minḥat Bikurim suspects that the word "not" might have been omitted. The translation then would be: "which does not have in it 'arise and do.'" Or Haganuz suggests adding the word "not" elsewhere, so that the text would read:

COMMENTARY, CHAPTER V

"they do not flog him."

71. Deut. 25:2.

72. See parallel passage Tosefta 1:7 above.

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