Rabbinic Legal Loopholes: Formalism, Equity and Subjectivity

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Submitted in partial fulfillment of the
requirement for the degree of
Doctor of Philosophy
in the Graduate School of Arts and Sciences

COLUMBIA UNIVERSITY
2014

ABSTRACT

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Rabbinic law is particularly well known for its use of legal dodges and technical circumventions. This dissertation focuses on three main questions about such loopholes: 1) Why is rabbinic law so replete with them? 2) Are they always permitted, and if not, what are the parameters of their use? 3) What does the use of legal loopholes reveal about rabbinic views of the relationship between intention and action?

We attempt to answer these questions by analyzing a particular subset of rabbinic legal loopholes known as *ha'arama* (cunning). Tracing the history and use of *ha'arama* from tannaitic to amoraic sources, this work places rabbinic legal loopholes in context of Biblical and Ancient Near Eastern worldviews, Greco-Roman perspectives, and later contemporaneous Zoroastrian approaches. Working with both tannaitic and amoraic materials, with Palestinian and Babylonian sources, we observe a progression within rabbinic thinking on this front: from rigid legal formalism to a concern for the inner spirit of the law, and from emphasis on the inner spirit of the law to an interest in the inner spirit of the individual legal agent.

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Note: Most MSS and Printed Eds. in this dissertation are cited in shorthand. For full MSS and Printed Ed. Titles, see the Bar Ilan Torat Ha-Tannaim Project (online), *Synopse zum Talmud Yerushalmi*, and the Lieberman Institute's Sol and Evelyn Henkind Talmud Text Databank.

Acknowledgments

Thinking about, researching and writing this dissertation has been a labor of love, and it indeed took a village. My sincere thanks goes to Professor David Weiss Halivni, who I have known for over a decade: he introduced me to the field of academic Talmud study as a Columbia College undergraduate, believed in my capacity to achieve and always insisted on excellence. I can never repay those kindnesses. I am honored to call myself his student. My second debt is to Professor Barry S. Wimpfheimer of Northwestern University who has been a mentor and guide in so many ways. He pushed me never to accept facile distinctions or false dichotomies, always to challenge conventional thinking – in short, to problematize and thus to lay issues bare as they are, leading to greater intellectual honesty and insight. He gave of his time, energy and wisdom completely selflessly, and I am blessed to consider him my teacher and friend. And to another friend and teacher, my incredible husband Yonah, who gave up countless vacations, innumerable Sundays, took on so much more than his share in our family, and showed undying interest and enthusiasm for my work even as it cost him so much of his own and our time, I say only that I am speechless at his devotion and love. Professor Suzanne Last Stone created an intellectual framework for me and so many of my fellows students, teaching us the fundamentals of legal thought, comparative jurisprudence and making us feel part of an intellectual movement. She has been a constant source of inspiration, encouragement and a font of resources, information and sagacity. Professor Jonathan Milgram not only helped sharpen my understanding of the academic approach to Talmud study, he was always happy to comment on features of my work and to suggest avenues to explore. Professor Beth Berkowitz has been an incredible source of penetrating insight and true support from the moment her tenure began at Columbia University.

Professor Tzvi Novick of the University of Notre Dame was also quite helpful in sharing resources as well as his own thoughts about legal theory as it relates to Jewish law.

Beyond the content of the dissertation, there are several people within the university proper who I wish to, and indeed must, thank for support. As a young graduate student, it was Professor Michael Stanislawski who took it as his mission to ensure that I would have the opportunity to advance in my work despite the difficulty of having an adviser living across the ocean. The late Professor Alan Segal, of blessed memory, was always an advocate; the various administrators in the Religion Department office served as excellent resources as well. I feel so fortunate to have had wonderful friends and colleagues in my fellow students, Ari Bergman and Josh Eisen. And it was Professor Jeremy Dauber and his administrative team at the Institute for Israel and Jewish Studies – Sheridan Gayer, Susan Allen – whose commitment to students made the last year and a half of this process possible.

Outside of the university, I am also blessed to have people and institutions to thank: my niece Lital Sussman with whom I so enjoyed looking over German footnotes; my friend and *hevruta* Rabbi Dr. Moshe Sokolow with whom I pored over endless *sugyot* in order to lay the groundwork for my thinking about the topic of legal loopholes; The Jewish Center of Manhattan where I taught a course a decade ago entitled, "Legal Loopholes in Jewish Law," a course which planted the seed for this dissertation; the various lay leaders, colleagues, and friends at Lincoln Square Synagogue who always did their best to encourage and to provide a framework for me to continue to pursue my doctoral work even in my capacity as a clergy member there; to my family – both original and current – always a source of encouragement and support. I single out for special mention my brother-in-law Rabbi Shmuel Hain for his support in this endeavor, both in discussing the content of the dissertation as well as in advising me about my career

throuughout this process. And finally, thanks goes to all of my friends who read and commented on excerpts of my dissertation, who accepted my absence and scatter-brained schedule, and who drank champagne with me when all was complete.

The best expression of my thanks to all of these people is my commitment to continue to refine my work, my research, and my thinking, and to share the wisdom and encouragement that I have received from them with others in the future.

For my Dove,

You are my resting place, and you are my wings. May we be together always.

To my darling son, Azzan

Thank you for turning me into Dr. Mom.

Introduction

Designed to frustrate the intentions of a law while preserving its letter, legal dodges are as old as law itself. They are in evidence in the Bible and other Ancient Near Eastern corpora. Yet the rabbis of Antiquity and their Roman counterparts must be credited with beginning to discern which circumventions may be considered licit, and which illicit. Rabbinic law contains innumerable legal circumventions. And while there is no term for the category of rabbinic loophole as a whole, there is a term which is used in several dozen cases of such technicalities: הערמה (and its active forms: הערים, תערים, יערים, מעירימין, מערימים, etc.). The term itself literally means "cunning" from the Hebrew root *ʿ.r.m.*, playing off the Biblical use of the term for both positive resourcefulness and negative chicanery. And while all instances of הערמה involve subtlety, some are viewed negatively, while others are permitted or even encouraged. This dissertation analyzes the use of the term *haʿarama* in its nominal and active verb forms as it evolved within ancient rabbinic literature.

Though rabbinic literature is indeed full of examples of formalistic mechanisms, there is reason to use the term *haʾarama* specifically for our inquiry. First, terminology generally offers a starting point for the vast project of understanding rabbinic approached to legal loopholes. Thus, we view this work as the beginning, as a concrete basis for further research. Second, the consistent use of this terminology indicates a conscious connection between the disparate cases which easily allows for comparison and contrast. Third, *haʾarama* is categorically interesting in that it is by and large is not about evasion of punishment *ex post facto*, but rather it is a loophole suggested *ante factum* by the rabbis themselves. While the rabbis may not have been completely

consistent with their terminology[1] we believe that the majority of cases can help paint a picture: by following *ha'arama* chronologically and geographically, we are able to paint at least a partial portrait of the legal-intellectual development of the rabbinic project.

This dissertation is divided into four chapters which comprise two distinct, but complementary, sections. The first two chapters analyze the relationship between *ha'arama* and legalism, an approach that values adherence to the literal prescriptions of the law as the highest priority. In chapter 1, by focusing on individual cases of legal dodges in the Bible and the rabbinic commentary thereupon, we reveal that the rabbis did not develop their theory of loopholes based on the Bible. In fact, in most cases, the rabbinic material completely ignores Biblical precedents for exploiting loopholes. On the other hand, the actual term *ha'arama*, echoing both the cunning serpent of Genesis and the Wisdom herself in Proverbs, does indeed stem from the Bible. In chapter 2, we posit that the rabbis' inspiration for their schema regarding legal dodges stems from Roman law. We argue for a significant correlation between *ha'arama* and the Roman legal concept of "legal fraud" (*fraus legi*) which had taken the Roman legal world by storm during the first three centuries of the Common Era. The significance of *fraus legi* is that, for the first time, a legal system would not suffice with rigid formalism, an anything goes policy so long as the law was technically followed. This was part of a larger conversation about the letter of the law and its spirit, or *ius strictum* and *aequitas*, taking place among Roman jurists.

The innovation of Roman law in this regard was the recognition that some dodges must be rejected. And we find the rabbis of the Palestinian Talmud (PT) following suit; the preoccupation in PT is not with permitting *ha'arama* but with outlawing those exploitations

[1] Moscovitz, Leib. *Talmudic Reasoning, From Casuistics to Conceptualization*. Tübingen: Mohr Siebeck (2002) 25

which the rabbis deem inappropriate. Furthermore, given the historical and geographical proximity of these two cultures, it is sensible to apply the Roman legal concept of equity, doing what the lawgiver would do if he himself were present, as the deciding factor in whether the rabbis would allow a particular dodge or not. If *ha'arama* is used towards an end disapproved of by the law such as profit, or to shirk the law for mere convenience, it must be rejected. If, however, it ultimately serves ends of Jewish law[2] itself, such as protecting a person from financial harm or from transgression not of his/her own doing, it is acceptable and even advisable. While the *Mishnah*, the *Tosefta*, and pockets of *Midrash Halakha* begin moving in this direction, it is the Palestinian Talmud which evinces this approach most clearly. Contrary to the stereotype, these late antique rabbis were not preoccupied with finding new loopholes, but, inspired by *fraus legi*, were preoccupied with developing an approach about which loopholes to close and which to leave open.

The contextualization of *ha'arama* within its Roman milieu puts this dissertation in conversation with the work of Boaz Cohen and David Daube, both of whom compared Rabbinic and Roman legal phenomena, and the latter of whom was especially intrigued by shared notions of loopholes and legal formalism. Moreover, our particular focus on the relationship between Roman law and PT follows in the footsteps of the recent work of Catherine Hezser, Peter Schafer, Leib Moscovitz, and Hayim Lapin, *et al*., in this area.

Beyond placing *ha'arama* in its Roman context, we also employ contemporary legal theory in order to enrich the discussion. Offering universal constructs that move beyond the particular casuistic case of the rabbis' own world has been the project of many scholars over the

[2] What we mean by "Jewish law" is how the rabbis themselves perceived the corpus of law which they inherited and innovated.

last twenty plus years. Its charge has been led by Bernard Jackson, Suzanne Last Stone, Hanina Ben-Menahem, Yair Lorberbaum and others. This dissertation is a contribution to this incredibly active field of comparative jurisprudence.

Section two of the dissertation, chapters 3 and 4, deal with seems to be a wrinkle in the *ha'arama* discussion, but actually proves to be a touchstone for a current academic debate about rabbinic views of intention. In chapter 3, we propose an interpretation of a type of *ha'arama* which deals not with action but with intention. We view this variation of *ha'arama* as reflecting a more externalized and ritualized understanding of intention among the *tannaim* and early *amoraim*. At present, Ishay Rosen-Tzvi and Mira Balberg, among others,[3] are engaged in a debate about the rabbis' views on the subjective self. Based on the consistent coupling of intention with action in early rabbinic literature, Rosen-Tzvi challenges Balberg that the rabbis did not speak of the contemplative self; Balberg counters that the best way to understand the role of individual intention in ritual im/purity law is as encountering the "subjective I." Based on the use of *ha'arama* in defining action in Sabbath and Festival law, and its rejection in the realm of ritual im/purity law, we conclude that the premise of their argument is mistaken: the question is not whether the rabbis conceived of a subjective self but what role it played in different legal arenas. This seems to be the case at least in the early tannaitic and amoraic material.

In chapter 4, we observe that the Babylonian Talmud (BT) demonstrates more of the internal subjectivity perspective across the board, that is, even in cases of Sabbath/Festival law. We observe this specifically in BT's treatment of *ha'arama:* a discomfort where actions and subjective intentions noticeably do not correspond to one another; shying away from the use of

[3] Joshua Levinson, "From narrative practice to cultural poetics: literary anthropology and the rabbinic sense of self," *Homer and the Bible in the Eyes of Ancient Interpreters,* Ed. Maren R. Niehoff. Leiden: Brill (2012) 345-367

ha'arama; comparing *ha'arama* to sin; using the root *'.r.m.* to refer to lying; and changing earlier *baraitot* so that intentions and actions indeed correspond. This trend begins with the third generation of BT *amoraim* and continues through the redactional layers of BT. We understand this as part of the newly refreshed discussion in those late amoraic strata about intention, an intention that is qualitatively different from tannaitic versions thereof, more subjective and more natural. As in Part 1 of the dissertation, we enrich this discussion by adding the overlay of another contemporary theoretical field: in this case, we look to moral theory, specifically to virtue ethics, to support the significant difference between act-based morality and agent-based morality.

And so the two parts of the dissertation are indeed distinct: the first regarding one type of *ha'arama* and its parallel to the Roman notion of *fraus legi*, the second regarding another type of *ha'arama* and what it reveals about the role of subjective intention in determining actions. However, the two come together as a study in the development of legal thinking from rigid Biblical formalism to an understanding of the significance of equity, and ultimately to the import of moving beyond law as object to emphasize the legal actor as subject. This development, we argue, is impacted along the way by intellectual currents found in surrounding groups and can be traced most obviously from the Palestinian Talmud to the Babylonian Talmud.

Extant Literature

Generalizations

As mentioned above, David Daube takes an interest in formalism within both Biblical literature and Roman law, and discusses legal loopholes as part of his studies. He does not, however, address the rabbinic material on loopholes in any detailed or systematic manner. And among those who do study legal loopholes within rabbinic law, there is a tendency to group all

loopholes together, regardless of whether the *ʿ.r.m.* is present. For instance, both Haim Tchernowitz[4] and Moshe Silberg[5] connect *haʿarama* loopholes to *taqqanot* such as *prosbul*, which are never labeled *haʿarama*. While the phenomena of *haʿarama* and some *taqqanot* may be based on similar methodology, by isolating the *ʿ.r.m.* terminology, it is useful to study the conscious rabbinic category of loopholes, as we have found that this subset of loopholes to specifically parallel the Roman concept of *fraus legi*. Furthermore, the aforementioned scholars do not offer anything close to the diachronic development of rabbinic loopholes.

Boaz Cohen likewise speaks only in broad strokes and without any longitudinal perspective. In his seminal article, "Letter and Spirit in Jewish and Roman Law," he sets out to show that Paul the apostle appropriated a Greco-Roman dichotomy between the letter of the law and the spirit of the law. In so doing, he discusses how the rabbis, like their Roman counterparts were interested in the spirit of the law as well as its letter. He cites the closing of loopholes[6] as but one example among many different types of rabbinic concepts that show this same interest. He does not isolate the subject of loopholes itself more narrowly or the term *haʿarama* in order to trace its evolution in tannaitic and amoraic material.

[4] Haim Tchernowitz, *Toldot ha-halakhah: kolel shalshelet ha-Ḳabalah ṿe-hitpathut ha-Torah shebaʿal peh, mi-tokh shorasheha ve-ṃeḳoroteha mi-reshitah ʿad ḥatimat ha-Talmud* Vol.1 New York: *ha-Vaʿad le-hoṣaʾat kol kitvei Rav Ṣaʿir* (1950) 182-3

[5] Moshe Silberg, *Kakh darko shel Talmud* (*Principia Talmudica*). Jerusalem: Aqademon (1984) 40-41

[6] Boaz Cohen, "Letter and spirit in Jewish and Roman Law," *Jewish and Roman Law: A Comparative Study*. New York: Jewish Theological Seminary of America (1966) 45 esp. n. 92. (We only noticed his use of an example of *haʿarama* proper in his footnotes after theorizing about the relationship between the Palestinian Talmud and Roman Law on this issue.)

Legal Fictions vs. Legal Loopholes

The paucity of material on legal loopholes is easily contrasted with the more recent work by scholars on legal fiction.[7] Leib Moscovitz,[8] for example, offers a thorough analysis of the progress of legal fictions from tannaitic times to amoraic and post-amoraic material, observing increasing conceptualization over time. In her own comparison of earlier and later legal fictions by the rabbis, Christine Hayes has noted increasing discomfort with bald legal fictions among Babylonian *amoraim* and beyond:

> Leib Moscovitz notes that legal fictions…gain wide acceptance among the Romans and the rabbis. Nevertheless, despite the widespread presence of legal fictions in the talmudic corpus, there is good evidence that: (1) some rabbis were discomfited by the gap between a legal fiction and reality, and (2) this anxiety lies behind efforts by later talmudic authorities either to eliminate or to provide more credible, realist-based rationalizations for some of the anxiety-inducing legal fictions of earlier authorities. [9]

Tzvi Novick has observed the same reluctance with regards to implausible legal presumptions,[10] but he challenges Hayes' argument, suggesting that the Babylonian *amoraim* were not anxious,

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[7] In his work on legal fictions, Samuel Atlas makes it quite clear that he has no interest in studying legal loopholes:

> אנו מוצאים בתלמוד הרבה דוגמאות של מעשה הערמה, שבהן התירו החכמים להערים את הדין. כגון…בביצה לז. אותו ואת בנו שנפלו לבור ביום טוב...כל ההערמות האלה שיש לקראן בשם מעשיות תכליתן היא להראות את הדרך בה יכול האדם לילך סביב ההלכה בדרך עקיפין ואין לנו ענין בהן כאן. כי מטרתנו בזה המאמר היא לדון בסוג אחר של הערמה השונה לגמרי מזו שלפניה. וזו היא כשהמשפט עצמו מערים ואמר שחזיון ידוע יהא חשוב כאילו דומה הוא בכל פרטוי לחזיון משפטי אחר ומתוך כך הוא נכלל בתוך חוג החזיונות והתופעות שהצורות המשפטיות הקיימות חופפות ומקיפות אותם

> We find in the Talmud many examples of *ha'arama*, wherein the rabbis allowed one to employ cunning regarding the law. For example…in *bBeṣa* 37a, the case of the parent and child steer which fell into the pit on the holiday…These cases of *ha'arama* which involve concrete practice, their purpose is to teach the way around the law in a circuitous route, and we are not interested in those here. Our purpose in this essay is to deal with a completely different type of *ha'arama*: when the law itself treats one case which is not analogous to another, as though it is.

(Samuel Atlas, "Fictions in the Talmud," *Louis Ginzberg: Jubilee Volume on the Occasion of his Seventieth Birthday.* New York: The American Academy for Jewish Research (1945) 1-2. See also Samuel Atlas, *Netivim b'mishpat ha-ivri*." New York: American Academy for the Science of Judaism (1978) 265)

[8] Moscovitz, *Talmudic Reasoning*, Chapter 4; *idem*, "Legal Fictions in Rabbinic and Roman Law: Some Comparative Observations," *Rabbinic Law in its Roman and Ancient Near Eastern Context*, Ed. Catherine Hezser. Tübingen: Mohr Siebeck (2003) 105-132.

[9] Christine Hayes, "Rabbinic Contestations of Authority," *Cardozo L. Rev. Vol. 28:1* (2006) 134

but found legal fictions "inelegant" and "a violation of the rules of argumentation."[11] Moreover, he makes the important observation based on a passage in Lev. Rabbah that sometimes *amoraim* themselves are condemned for not using a legal fiction that might bring justice to an unjust situation caused by the law.[12]

Legal loopholes are distinct from legal fictions. Originating in Roman law, legal fictions are presumptions about reality made by the legal system[13] that are partially or fully known to be false – e.g., a corporation is a person, a non-citizen is actually a citizen[14], etc. Such presumptions generally are used to make new situations "thinkable" by analogizing[15] them to familiar legal paradigms.[16] In other words, the law has rules for the "person" category, but it

[10] Tzvi Novick, "The 'For I Say' Presumption: A Study in Early Rabbinic Legal Rhetoric," *Journal of Jewish Studies* Vol. LXI, No. 1 (Spring 2010) 61; Pierre J.J. Olivier explains the difference between legal fictions and legal presumptions as follows: Fiction differs from presumption in that the former makes a presumption which is known to be untrue. A presumption does not make a deliberately false assumption, nor is the latter maintained after its falsity has been proved. (Pierre JJ Olivier, *Legal Fictions in Practice and Legal Science*. Rotterdam (1975) 42)

[11] Tzvi Novick, "'They come against them with the power of the Torah': rabbinic reflections on legal fiction and legal agency," Ed. Austin Sarat, *Studies in Law, Politics, and Society, Vol. 50*, Emerald Group Publishing Limited, (2009) 10

[12] Novick, *ibid*.

[13] Pierre JJ Olivier, *Legal Fictions in Practice and Legal Science*, Rotterdam: University of Rotterdam (1975) 4

[14] See Alan Watson, *The Spirit of Roman Law.* Athens: The University of Georgia Press (1995) 80 – *si civis Romaus esset* (if he were a Roman citizen)

[15] Leib Moscovitz explains how legal fictions are distinct from ordinary comparisons of two cases (referential classification): "Now, it might appear that there is no practical difference between these two possibilities, for while legal fictions state that we should assume that the facts in case A are those of case B, what these statements really mean is that the law in case A is the same as that of case B. Legal fiction, in short, seems to be little more than a flowery way of formulating the legal 'bottom line.' In fact, however, there are important substantive differences between legal fictions and referential classification. Referential classification generally occurs where the law as initially formulated entails a classificatory hiatus – the law governing B is known, but the law governing A is not. Hence we are told as a sort of legal shorthand that A should be treated like B. By contrast, legal fiction is often employed where the law as originally formulated does apply to cases such as A, although this law – the *base law*, as we shall term it here – differs from the law which actually applies to A. Thus, legal fictions usually attempt to account for deviation from a particular base law by asserting that we treat the facts of case A as if they were the facts of case B." (Moscovitz, *Talmudic Reasoning*, 164-5)

[16] Lon Fuller, *Legal Fictions*, 72. According to some, their utility is hiding judicial activism, while for others legal fictions afford simple ways for discussing new applications of existing law. For more on the development of legal

may not have rules for the new entity known as the "corporation." Therefore, by analogy, a corporation is said to "be" a person for purposes of knowing how to view it, a new innovation, under the law. Loopholes, on the other hand, make no counterfactual assertions; in fact, they eschew analogies altogether.[17]

Black's Law Dictionary defines a loophole as, "An ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements." Such omissions are produced, or uncovered, by literal reading: defining a law most narrowly, without use of analogy or extrapolation. For instance, a law that prohibits the sale of an item, when read literally, does not forbid other methods of exchange which may accomplish the selfsame result, such as gift-giving. And one may turn this gap into the loophole should one desire to transfer ownership of an object to a person to whom s/he legally may not sell that object. Thus, while fictions tend to extend the law from one known case to a new unknown case, loopholes tend to take a case out of the ambit of a law which would, in the ordinary courses of events, apply to it by resisting analogy and by reading most narrowly and technically instead.[18] Lastly, while individuals have recourse to loopholes, legal fictions tend to be the province of institutions.[19] Thus our study is confined to loopholes rather than fictions.

fictions in general jurisprudence, see Lon Fuller, *Legal Fictions*. Stanford: Stanford University Press (1967); Pierre JJ Olivier, *Legal Fictions*. For Legal Fictions in Jewish law, see Leib Moscovitz, *Talmudic Reasoning*, Chapter 4.

[17] Moscovitz, "Legal Fictions", 106-107; regarding rabbinic law, Haim Tchernowitz referred to loopholes and legal fictions as *ha'aramat ha-din* (conning the law) and *ha'aramat ha-ma'aseh* (conning the action), respectively. (Tchernowitz, *Toldot ha-halakhah* Vol. 1,182-183.)

[18] Shmuel Shilo, "Circumvention in the Talmud," *Israel Law Review* Vol. 17, No. 2 (1982) 153

[19] See Novick, "'They come against them," 1-17

Consequently, we do not discuss rabbinic legal fictions such as *'eruv*,[20] *dofen 'aquma*[21] or the like, though colloquially some might refer to these as loopholes. However, of the aforementioned observations about legal fictions will certainly be relevant to our study of legal loopholes. In particular, the following observation by Leib Moscovitz is instructive:

> Fictions tend to develop and flourish in a particular type of legal and intellectual climate, which seems to have been shared by the Romans and rabbis – a frequently rigid and formalistic approach to law, at least insofar as explicit formulation and justification of the law are concerned. To be sure, such systems, Roman law in particular, might tacitly seek to further functionalist goals, although such motives might not be articulated or otherwise acknowledged…Thus, the shared use of legal fictions by Roman and rabbinic law seems to reflect a common cognitive-linguistic approach, a sort of 'formulational formalism,' whereby seemingly anomalous law is presented in terms of, and indeed as a sort of extension of, existing law, rather than as an exception to such law.[22]

Legal Theory

The suggestions offered to explain the use of legal loopholes have been creative, but unsatisfactory. The following is Moshe Silberg's account of why *all* legal dodges *are* permissible:

> Regarding this perfect evasion, the evasion of one law by another, the law sees no transgression whatsoever, for it itself is 'guilty' because it itself provides the

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[20] '*Eruv* literally means "combination." It refers to the sharing of a common space by means of the symbolic enclosing of a space (such as by a string) and shared foodstuffs which are set aside to represent that joint ownership. According to the rabbinic interpretation of Exodus 16:29 and 36:6, one may not carry items in the public space on the Sabbath. To prevent confusion as to what exactly was to be considered a public space, the rabbis forbade carrying in any common space without walls. The religious court of Solomon expanded the prohibition to any space shared by residents of more than one home, even a space surrounded by walls. However, if the various tenants were to symbolically become joint owners of the space, carrying would become permissible as though this were a personal space (*b'Eruvin* 21b). There are other rabbinic ordinances known as *eruv* which are likewise grand public evasions- such as '*eruv teḥumin*, a machination allowing a person to travel farther than 2000 cubits outside their city limits, *eruv tavshilin*, a machination which allows a person to cook on the holiday for the Sabbath which immediately follows it, an act which is ordinarily forbidden by rabbinic law.

[21] This fiction involves viewing the intersection of the walls and the roof of a *sukkah* as though the walls merely extend in a curved fashion to the roof. Thus, up to four *amot* of the *sekhakh* on the top of the *sukkah* contiguous to the wall be invalid *sekhakh* withouth invalidating the entire *sukkah.* (*bSukkah* 4a)

[22] Moscovitz, "Legal Fictions," 131-2

> evader with the tools for the evasion. It is an assumption that the Lawgiver sees all, and all 'escape routes' are clear to him. And if He did not close the gap [in the law]…it is a sign that He does not mind it…In summary: When the legal norm is wide, non-specific and inclusive, it is certain that even those who do not act for the right reasons will find haven in it…[23]

Silberg's premise is simply inacurrate. As we illustrate in chapter 2 (below), the rabbis are perfectly willing to outlaw evasions that meet the letter of the law.

In the nineteenth century, Haim Tchernowitz offered an explicitly theoretical model taken from the field of Historical Jurisprudence, a popular movement in his day:

> They [the rabbis] were concerned with the shell and the guise just as they were concerned with the content and the seed, because sometimes the outer garb too expresses the *Volksgeist*, so it is also important to maintain for the existence of the nation, and therefore the maintenances of outer images of the life of the nation is of independent importance so that it will not be uprooted and forgotten from Israel.[24]

The Historical School of legal theory was founded in Germany by Friedrich Carl von Savigny and had its roots in Hegelian idealism, which had fostered a strongly metaphysical ideology.[25] Historicism applied Hegel's (1770–1831) notion of *Volksgeist* –"the separate spiritual essences of the diverse nations that characterized the present stage of human history"[26] – to law. Historicism understood the law to originate in the life of the people and was thus a reaction to mid-eighteenth century Legal Positivism which understood legislation by an institutional body as the ultimate source of law.[27]

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[23] Silberg, *Kakh Darko*, 30-31 (translation, E.S.)

[24] Tchernowitz, *Toldot Ha-Halakhah*, II, 180

[25] Roscoe Pound , "The Scope and Purpose of Sociological Jurisprudence: I. Schools of Jurists and Methods of Jurisprudence," *Harvard L. Review*, Vol. 24, No. 8. (1911), 592, 600

[26] *The History of Ideas Volume 6, "Volksgeist"*

[27] See HLA Hart, *The Concept of Law*. Oxford: Clarendon Press (1997) Chapter 5.

Savigny's writings reflect this posture: "Stated summarily…[the correct] view is that all law arises in the manner which the prevailing (though not entirely adequate) usage calls 'customary law;' that is, it is produced first by custom and popular belief, and then through course of judicial decision, hence, above all, through silent inner forces, and not through the arbitrary will of a law-maker."[28] "Silent inner forces," "inner life," *Volksgeist*- these are all related terms, and according to Historical Jurisprudence, are the mother of all law. [29]

The second central element of the Historical approach is that law changes continuously, reflecting the ever-evolving spirit of the nation.[30] Savigny writes:

> For law, as for language,[31] there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people…[32]

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[28] Friedrich Karl von Savigny, *Vom Beruf unsrer Zeit fur Gesetzgebung und Rechtswissenschaft* (*The Vocation of Our Age for Legislation and Jurisprudence*). Frieburg i.B: Mohr (1892) 6-7, 13-14. This essay was Savigny's response to German professor of Roman Law AFJ Thibaut when the latter suggested in 1814 that Germany adopt a civil code similar to that of France in 1804. (See Harold Berman, *The Historical Foundation of Law*, Vol. 54, 16)

[29] See Hermann Klenner, "Savigny's Research Program of the Historical School and its Intellectual Impact in 19th Century Berlin," *The American Journal of Comparative Law*, 37:1 (1989), for more on the connection between the Historical School and *Volksgeist.*

[30] It is for this reason that Savigny bitterly opposed suggestions in his time to draft a Civil Law Code for Germany: he simply did not wish for the law to become static.

[31] As an aside, yet another element of *Volksgeist* is to be found in the use of language as a model of law. In his *Imagined Communities*, Benedict Anderson writes that the printing press was significant for the development of nationalism: because of it "speakers of the huge variety of Frenches, Englishes, or Spanishes…gradually became aware of the hundreds of thousands, even millions, of people in their particular language-field, and at the same time that *only those* hundreds of thousands, or millions, so belonged. These fellow readers, to whom they were connected through print, formed, in their secular, particular, visible invisibility, the embryo of the nationally imagined community. (44)

[32] Ibid., 27

But Savigny's method of change is subtle and gradual; it is organic. As Karl Mollnau writes, "Savigny pleaded only for changes *in* the law, not for changes *of* the law."[33] Rather than expressly overturning older laws, or writing new legal codes, it is the job of the legislators and the jurists to introduce "new elements…into existing law by the same internal, invisible force that originally created law."[34] And this more tactful and natural way of modifying law, mirroring the silent inner forces of the nation, is, like many dimensions of Historical Jurisprudence, learned from Roman Law:

> What indeed, made Rome great, was the quick, lively, political spirit, which made her ever ready so to renovate the forms of her constitutions, that the new merely ministered to the development of the old- a judicious mixture of the adhesive and progressive principles…In the law, consequently, the general Roman character was strongly marked- *the holding fast by the long-established, without allowing themselves to be fettered by it*, when it no longer harmonized with a new popular prevailing theory. For this reason, the history of the Roman law, down to the classical age, exhibits everywhere a gradual, wholly-organic development. If a new form is framed, it is immediately bound up with an old established one, and thus participates in the maturity and the fixedness of the latter.[35]

Gradual progression of law, a synthesis between the well-established and the original would lend more credibility to the more recent emendations to the law. Tchernowitz explicitly discusses his use of this school of legal philosophy:

> Against this school[36] which sees in legislation the essence of law…in the last century, the Historical School, whose main proponents are Savigny and Fichte,[37] has arisen. This school favors the analogy between law and language:…there is an organic connection between law and the identity and the character of the

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[33] Karl A. Mollnau, "The Contributions of Savigny to the Theory of Legislation," *The American Journal of Comparative Law*, 37:1 (1989) 89.

[34] Savigny, *The Vocation of Our Age*, 41

[35] Ibid., 48

[36] The reference is to Legal Positivism, which maintains that a legal system is defined by its stipulated (=posited) or written law.

[37] Johann Gottlieb Fichte (1762-1814) was a German idealist philosopher

> nation, which always exists. And in this way, it is similar to language- likewise, law does not have one moment of complete stasis. Even the law giver, who emerges from the nation- whether it is a lone ruler or a democratic institution- its acts (of legislation) is only formal, but it draws the legal content directly from the spirit of the nation. [38]

While Tchernowitz offers an interesting parallel, it is simply too anthropocentric for a religious system of law. Thus, we offer our own legal theoretical model in chapter 2.

Loopholes and Intention

Moving on to literature which is relevant to the second half of our dissertation, there has been very literal concrete theory about what role intention plays in *ha'arama*. Shmuel Shilo for instance identifies two distinct types of *ha'arama*

> Investigation of the question of circumvention in Talmudic law leads one to the conclusion that avoidance of the law may be classified under two principal categories, each with its sub-groups. The first is the use of a rule of law in order to by-pass another rule that would have applied if one proceeded in the normal manner. A sub-group of this category consists of cases in which ownership is transferred (particularly to a non-Jew) in order to avoid the law. The second principal category involves a situation where the determinative element as to the permissibility or otherwise of an act is subjective intention, the actor claiming that his intention was such as to render what he did legitimate when in fact his intention was quite different. It is difficult to define this category since it is very close to deception and fiction (though not legal fiction).[39]

We believe Shilo's dichotomy to be anachronistic, as it assumes a dichotomy between action and intention that is anachronistic.

Samuel Atlas contends with the issue by positing the insignificance of intention: "A person acts licitly and transgresses *only in thought*. [40]" Moshe Silberg is on the same continuum

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[38] Tchernowitz, *Toldot Ha-Halakhah*, I, 129-130

[39] Shmuel Shilo, "Circumvention of the Law in Talmudic Literature," *Israel Law Review* Vol. 17, No. 2, 1982, 153

[40] Samuel Atlas, "Ha'arama Mishpatit Ba-Talmud," *Louis Ginzberg Jubilee Volume on the occasion of his seventieth birthday.* New York: American Academy for Jewish Research (1945) 2 n3.

in suggesting that the justification for *ha'arama* as "No one truly knows a person's inner thoughts.[41] " In other words, *ha'arama* is based on doubt rather than on concrete theories of intention. Our study, on the other hand, withdraws the assumption that action and intention are completely distinct and in order to reconstruct the relationship between them; instead we note changing attitudes overt time about the degree to which the action and intention are or must be related for purposes of rabbinic law.

Thus, our study of *ha'arama* makes several contributions to the current literature: a) a diachronic analysis of the term *'.r.m.* to reveal trends and evolution in rabbinic thought; b) a proper jurisprudential paradigm for *ha'arama*; c) a more robust understanding of the role of intention in rabbinic thought, as reflected in cases of *ha'arama*; d) a contextualization of these phenomena within the cultures which surrounded the development of both PT and BT.

[41] Silberg, *Kakh Darko*, 30

Chapter 1 Biblical Loopholes and their (Non-) Impact on Rabbinic Thinking

The climactic court scene in Shakespeare's *Merchant of Venice* portrays a vengeful Shylock approaching the beleaguered debtor Antonio to remove a pound of the latter's flesh as interest on a defaulted loan. Most serendipitously, Portia enters, disguised as a lawyer, and offers the most literal reading of the loan contract, a reading which undoes Shylock's plans:

> Tarry a little; there is something else.
> This bond doth give thee here no jot of blood;
> The words expressly are 'a pound of flesh:'
> Take then thy bond, take thou thy pound of flesh;
> But, in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are, by the laws of Venice, confiscate
> Unto the state of Venice. (Act IV, Scene i)

Portia reads the agreement for a pound of flesh as excluding blood. Surely Shylock had intended to include bloodletting in the agreement. Yet, a very literal interpretation of the contract excludes it; this reading saves Antonio's life and marks the beginning of Shylock's steep and total decline.

While this instance of literal reading narrows Shylock's options, the same type of reading can and has been used throughout history to expand a legal actor's options: the Spartan King Cleomenes, for example, signed a treaty with Argos for thirty *days*, and managed to maintain his treaty by warring with Argos only at *night*.[42] While Cicero already bemoaned this as a prime example of *summum ius summa iniuria*, "More law, less justice"[43] legal systems today still struggle with the very same exploitation of gaps in the law, known popularly as legal loopholes. Black's Law Dictionary offers the following definition of legal loopholes:

[42] David Daube, *Studies in Biblical Law*. Cambridge: Cambridge University Press (1947) 190

[43] Cicero, *De Officiis*, 1.10.33 (Translation by Walter Miller, Loeb Edition. London: William Heinemann Ltd. (1913))

> Without violating its literal interpretation, an allowed legal interpretation or practice unintentionally ambiguous due to a textual exception, omission, or technical defect, evades or frustrates the intent of a contract, law, or rule.

As exemplified by Cleomenes and Portia, often the use of literal reading ignores the most logical or straightforward reading of a law, and even the intention of the law's author(s). What the actor does is technically legal, but even to the unaided eye seems out of sync with the aim(s) of the law.

Legal Loopholes in Jewish Law

Jewish law, whether in ancient Palestine and Babylonia, or among traditionally observant Jews today, is replete with such loopholes. As folklorist Alan Dundes writes, there exists simultaneously in Judaism a "strange combination of rules and means of avoiding those same rules.[44]" David Daube's work on fraud in Biblical and Roman law includes a personal reflection upon his upbringing in a Jewish household:

> …my earliest memories of the flash in the pan dodge date from age 5 or 6. They are linked to Passover...The sages took very seriously the biblical ban on leaven during Passover[45]…You might neither eat it nor have it in your possession nor derive any benefit from it; and their definition of 'leaven' was extremely wide. However, in certain circumstances, they did condone a pre-Passover sale to a non-Jew, to be followed by a post-Passover resale. How the dodge developed, who spooned it, and who disliked it, is not here material. My father and his youngest brother carried on an important trade including goods which were, or conceivably might be, classifiable as leaven. So regularly, two or three days before the Festival, they made over their business to a non-Jew, with all the traditionally requisite formalities; and, of course, kept strictly aloof from it until re-acquisition. For the buyer, it was just a rigmarole, except that he received a gratuity. Let us pray that the heavenly academy will approve of the construction.[46]

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[44] Dundes, Alan. *The Shabbat Elevator and Other Sabbath Subterfuges: An Unorthodox Essay on Circumventing Custom and Jewish Character*. New York: Rowman & Littlefield Pub Inc. (2002) 88.

[45] Ex. 12:19; 13:7

[46] David Daube, "Fraud No.3," *Collected Studies in Roman Law*, Eds. David Daube, David Cohen, Dieter Simon. Frankfurt am Main: V. Klostermann (1991) 1426

Daube cites the institution of selling one's *ḥameṣ* (leaven) before Passover, which is permitted in urgent situations in *tPesaḥim* 2:6-7, and was institutionalized as common practice by noted halakhists (legal decisors) in the beginning in the fourteenth century[47]; the institutions has been debated, qualified and expanded upon ever since by traditional Jewish decisors.[48] But Daube might have cited any number of entrenched practices of dodging still in use today in Jewish communities around the world. The example of *prosbul* readily comes to mind. Shortened from πρὸς βουλῇ βουλευτῶν, "before the assembly of counselors,"[49] this innovation attributed to Hillel the Elder[50] of the first century, allows a creditor to collect debts owed to him/her during the Sabbatical year, circumventing the injunction of Deut. 14:3 which waived such debts, by involving a Jewish court in the process.[51]

This is not to say that the rabbis were always sanguine about loopholes, as expressed in the following passage:

תלמוד בבלי גיטין פא.
אמר רבה בר בר חנה אמר ר' יוחנן משום ר' יהודה בר אילעאי: בוא וראה שלא כדור הראשונים דורות האחרונים. דורות הראשונים מכניסין פירותיהן דרך טרקסמון כדי לחייבן במעשר דורות האחרונים מכניסין פירותיהן דרך גגות ודרך קרפיפות כד לפוטרן מן המעשר

[47] E.g., R. Israel Isserlein, *Terumat ha-Deshen* 1:120; the practice was further popularized in the sixteenth century when Jews brewed beer made of barley grains - see R. Yoel Sirkis, *Baḥ* 448

[48] E.g., R. Joseph Saul Nathanson, *Sho'el U-Meishiv, Tinyana* 2:7; R. Moses Sofer, *Responsa Oraḥ Ḥayyim* 113.

[49] "פרוזבול, פרוסבול," Marcus Jastrow, *Sefer Milim: Dictionary of the Targumim, Talmud Babli, Yerushalmi, and Midrashic Literature*. New York: The Judaica Press (1996)

[50] *bGit.* 36a-b

[51] For an overview of the mechanics of *prosbul*, see David Henshke, "How Does Prosbul Work? A History of the Explanation of Hillel's *Taqqanah*," *Shenaton Ha-mishpat Ha-ivri* 22 (5761-4) 71-106; Elisha S. Anscelovitz, "The 'prosbul': a legal fiction?" *Jewish Law Annual 19* (2011) 3016; Hillel Gamoran, "The 'Prozbul': accommodation to reality," *Jewish Law Association Studies* 22 (2012) 103-111; "Prozbul: Was Hillel true to tradition?" *S'vara* 2, 2 (1991). For further study, see also David Bigman, "Halakhic Problem or Society Solution: On the Meaning of *Prosbul*"; Ludwig Blau, "*Prosbul im Lichte der griechischen Papyri und der Rechtsgeschichte* (*Prosbul* in light of the Greek papyri and legal history)," *Festschrift zum 50 jaehrigen Bestehen der Franz-Josef-Landersrabbinerschule in Budapest*, Ed. Ludwig Blau, Budapest 1927.

> Rabbah b.b. Ḥannah said: R. Yoḥanan said in the name of R. Judah b. ’Ilai: Come and see that the current generations are unlike the earlier generations. The earlier generations would bring their produce in through the main gate in order to obligate themselves to tithe it. The current generations bring their produce in through the roofs and backyards in order to exempt themselves from tithing it.[52]

Because Deuteronomy 26:12 specifies that one eat one's tithes within one's "gates," one is only required to tithe food that enters through the front door, as opposed to food brought in through a skylight or a back door.[53] People clearly realized that they might bring their produce in through other entrances in order to avoid the requirement to tithe. Rabbah b.b. Ḥannah cites earlier authorities lamenting how widespread the practice had become. The tone is clearly one of disapproval.

While the Talmud is well known for its hair-splitting logic, one which is rather conducive to developing resourceful means around challenging laws, the *tannaim* and *amoraim* were not the first to introduce or to notice the use of loopholes. In Chapter 2, we will explore the parallels between Roman Law and rabbinic law on this score, but we begin here with an exploration of the Biblical legacy of loopholes. The Hebrew Bible itself contains illustrations of such evasions, sometimes performed by heroic actors for heroic ends, in both legal and narrative sections. Below, we offer nine examples of loopholes used in Biblical accounts and rabbinic attitudes toward such examples.

Ancient Near Eastern Context

Before delving into the Biblical material, we must say a word about other Ancient Near

[52] *yMa'aserot* 3:1, 50c, offers a parallel passage.

[53] *bBM* 87b-88a (Interestingly, A1 Palestinian R. Jannai is cited as the trident of this law. If Rabbah b.b. Ḥannah and R. Yoḥanan are quoting R. Judah b. ’Ilai faithfully, it seems that this law had been derived earlier than R. Jannai.

Eastern[54] material with regards to this issue. No study to date has been done on loopholes in Ancient Near Eastern corpora,[55] but some examples do suggest that the work-around concept existed and was deemed acceptable. The *mārūtu*, or adoption, contract presents just such a case. Certain categories of land could only legally be transferred to the closest relative of a landowner. However, using a *mārūtu* contract a landlord could adopt a non-relative in exchange for a "gift"[56] equal to the estimated value of the land.[57] Once "related," the landlord would transfer the land to his now adopted child.

A second example comes from Ancient Near Eastern myth, the Gilgamesh epic. In the myth of Atrahasis, the gods are sworn to secrecy about the impending flood: swear not to reveal the coming doom to any mortal, lest he or she escape. The god Ea circumvents his oath by revealing the secret to the walls of Utnapishtim's house in the latter's presence rather than speaking directly to Utnapishtim himself:[58]

> Far-sighted Ea swore the oath (of secrecy) with them,
> So he repeated their speech to a reed hut,

[54] The ANE refers to what we today call the Middle East, from Iran to Egypt, and as such encompasses a number of different legal systems, based on different languages, cultures, and political regimes. However, Raymond Westbrook has argued that the various systems exhibit a tendency for continuity in "fundamental juridical concepts." (See Raymond Westbrook, *A History of Ancient Near Eastern Law*. Boston: Brill (2003) 4. Israel Finklestein, however, points out significant differences in the cosmological assumptions of Israelite and Mesopotamian Law respectively. (Israel Finklestein, *The Ox That Gored.* Philadelphia: The American Philosophical Society (1981) 39-46.)

[55] The whole notion of "the letter of the law" is different in an environment in which law was more customary than letter. (Samuel Greengus, correspondence)

[56] called *qīštu*

[57] Morris Silver, "Karl Polanyi and Markets in the Ancient Near East: The Challenge of the Evidence," *The Journal of Economic History* Vol. XLIII, Number 4 (Dec. 1983), 826-7. See also: Dorothy Cross, *Movable Property in the Nuzi Documents* (New Haven, 1937), p. 5; Jonathan Paradise, "A Daughter and Her Father's Property at Nuzi," *Journal of Cuneiform Studies* 32 (Oct. 1980), 189-207; Carlo Zaccagnini, "The Price of Fields," *Journal of the Economic and Social History of the Orient* Vol. XXII, Part I, 2-3. Sometimes adoption transactions were used for debt settlements rather than outright sales. (See Maynard P. Maidman, *A Socio-Economic Analysis of a Nuzi Family Archive* [Ph.D. diss. University of Pennsylvania, 1976] 96).

[58] I thank Professor Samuel Greengus for directing me to this source.

"Reed hut, reed hut, brick wall, brick wall,
Listen, reed hut, and pay attention, brick wall:
(This is the message:)
Man of Shuruppak, son of Ubara-Tutu,
Dismantle your house, build a boat.
Leave possessions, search out living things.
Reject chattels and save lives!
Put aboard the seed of all living things, into the boat.
The boat that you are to build
Shall have her dimensions in proportion,
Her width and length shall be in harmony,
Roof her like the Apsu."
I realized and spoke to my mast Ea,
"I have paid attention to the words that you have spoken in this way,
My master, and I shall act upon them…"[59]

Clearly, though not named or found often in ANE accounts, the loophole phenomenon

[59] Gilgamesh XI (Stephanie Dalley, *Myths From Mesopotamia: Creation, the Flood, Gilgamesh, and Others.* Oxford: Oxford University Press (1989) 110.)
A parallel recounting in the myth of Atrahasis, casts Enki as Ea, and Atrahasis as Utnapishtim:
[Enki] opened his mouth
And addressed his slave
You say, 'What am I to seek?'
Observe the message that I will speak to you:
Wall, listen to me!
Reed wall, observe all my words!
Destroy your house, build a boat,
Spurn property and save life.
The boat which you build
…] be equal [(. .)]...
Roof it over like the Apsû
So that the sun shall not see inside it.
Let it be roofed over above and below.
The tackle should be very strong,
Let the pitch be touch, and so give (the boat) strength.
I will rain down upon you here
An abundance of birds, a profusion of fishes.
He opened the water-clock and filled it;
He announced to him the coming of the flood for the seventh night
W.G. Lambert and A.R. Millard, *Atrahasis: The Babylonian Story of the Flood.* Oxford: Clarendon Press (1969), Tablet III, lines 15-25, 26-37 (pps. 88–89). William L. Moran suggested that earlier in Atrahasis, Enki uses a different loophole – a message in a dream - in order to inform Atrahasis of an earlier plague: My god speaks to me, but being under oath, He must inform me in dreams" (Atrahasis II, iii) (See W.L. Moran, "Some considerations of form and interpretation in Atrahasis," in Ed. F. Rochberg-Halton, *Language, Literature, and History: Philological and Historical Studies presented to Erica Reiner*. CT.: American Oriental Society (1987) 251.)

certainly existed.

Loopholes in the Bible

An apocryphal story is told of early-twentieth-century comedian W.C. Fields: at the end of his life he was seen reading the Bible, a new practice for him. When asked why, he responded, "I'm looking for loopholes." Indeed, in the legal sections of the Bible, there is ample precedent for completely legal mechanisms used to upend presumed legal status or consequence:[60] e.g., a) the process of *ḥaliṣah*[61] used to release a woman who is bound to her deceased husband's brother; b) the city of refuge[62] which affords a buffer zone to an accidental murderer who otherwise may be killed with immunity by relatives of his victim; c) the institution of Second Passover[63] for those who, due to ritual impurity, were ineligible to offer the Passover sacrifice in its proper time; d) the Hebrew indentured servant[64] who wishes to remain with his master past seven years of service; by piercing his ear, somehow, he may stay on longer, though the original injunction seems to disallow perpetual slavery. In each of these situations, the new legal rule offers an exit ramp from existing legal concerns.

We choose, however, not to dwell on these examples in detail for two reasons. The first is that the cases of *ha'arama* in the rabbinic corpora generally arise in an ad hoc fashion rather than as institutionalized laws. Aside from the example of Second Passover, the aforementioned Biblical examples, however, are presented as part and parcel of the original law itself. The

[60] My thanks to Beth Berkowitz for this observation.

[61] Deut. 25:5-10

[62] Ex. 21:13; Numbers 35; Deut. 19

[63] Numbers 9:1-14

[64] Ex. 21:5-6; Deut. 15:16-17

second reason is related to the first: a loophole involves reading an existing law narrowly in order to circumvent it which is how the rabbinic examples of *ha'arama* appear to work. The aforementioned Biblical examples, however, do no such thing.

They do not involve reading a binding law in a particularly forced way in order exempt or obligate a person. The two reasons are related because it is generally the *ad hoc* situation that necessitates the forced reading of a statute; on the other hand, the statute that is originally presented with exceptions generally does not rely on a forced reading but on an additional legal mechanism. Thus, the Biblical loopholes which we explore below are found in narrative portions of the Bible, as they describe where rules and life meet – the application of law in complicated, real life scenarios. As in the case of Ea, oaths and other binding agreements in the Hebrew Bible are fertile ground for the use of legal evasion because of the open texture of words and conversation.

Judges 19-21 – Reconciling with Benjamin: A Temporary Solution

Judges 19 relates the story of a Levite man whose concubine is gang-raped to death while the two are being hosted in the Benjaminite town of Gibe'ah. In an act of dramatic desperation, the Levite cuts her body into pieces and sends the piece throughout the tribes of Israel for all to bear witness to this great atrocity. When the Benjaminites refuse to hand over the concubine's murderers, the other tribes declare war against them. After decimating Benjamin, the other tribes take what seems a wise oath, given Benjamin's most recent symbolic treatment of women: "There shall not any of us give his daughter unto Benjamin to wife." (Judges 21:1)

In time, the tribes come to regret their oath, appreciating that it ultimately dooms the tribe of Benjamin to extinction.[65] And so the Israelites look for a way out of their treaty (21:3). Ironically, their first approach is to kill off one of their own cities – Jabesh Gile'ad – for not going to war against Benjamin in the first place, and to deliver their virgin women to Benjamin as wives.[66] But this does not solve the problem: hundreds of single men in Benjamin remain. The elders offer a new plan:

> **21:16** Then the elders of the congregation said: 'How shall we do for wives for them that remain, seeing the women are destroyed out of Benjamin?' **17** And they said: 'They that are escaped must be as an inheritance for Benjamin, that a tribe is not blotted out from Israel. **18** Howbeit we may not give them wives of our daughters.' For the children of Israel had sworn, saying: 'Cursed be he that giveth a wife to Benjamin.' **{S} 19** And they said: 'Behold, there is the feast of the LORD from year to year in Shiloh, which is on the north of Beth-el, on the east side of the highway that goeth up from Beth-el to Shekhem, and on the south of Lebonah.' **20** And they commanded the children of Benjamin, saying: 'Go and lie in wait in the vineyards; **21** and see, and, behold, if the daughters of Shiloh come out to dance in the dances, then come ye out of the vineyards, and *catch* you every man his wife of the daughters of Shiloh, and go to the land of Benjamin. **22** And it shall be, when their fathers or their brethren come to strive with us, that we will say unto them: Grant them graciously unto us; because we took not for each man of them his wife in battle; neither did ye give them unto them, that ye should now be guilty.' **23** And the children of Benjamin did so, and took them wives, according to their number, of them that danced, whom they carried off; and they went and returned unto their inheritance, and built the cities, and dwelt in them.

While the Israelites had originally intended their break with the tribe of Benjamin to be complete and lasting, they find recourse using the language of the oath itself: none may *give* a daughter to Benjamin. The elders interpret "give" most literally. Thus, if the Benjaminites were

[65] Many of the women from the tribe of Benjamin had been killed in the civil war.
[66] Judges 21:12. It is unclear whether these women were thought suitable because a) their fathers could not "give them away," as their fathers were dead, or b) their city had never been part of the oath in the first place, having not gone to war against Benjamin.

to seize the women themselves, there would be no violation of the oath.[67] The irony is palpable. Men who in the past took a woman by force (and raped her) are now being reintroduced into Israel by seizing wives for themselves without proper consent (from the maidens' fathers [68]). It is a clever loophole, one which reveals a debased society – where elders fancy corrupt solutions to solve problems caused by those very same societal ills. One wonders whether the motive of preventing a tribe from being "blotted out" is sufficiently strong for such methods. Do nobler ends justify more ignoble means?[69] Or were these means not considered ignoble at all, so long as

[67] Theodor Gaster suggests that "It is possible…that our Biblical story is…an etiological legend told originally to account for an ancient practice of mass-mating at seasonal Festivals." (See Theodor Gaster, *Myth, Legend and Custom in the Old Testaments*. NY: Harper (1969) 445)

[68] Robert S. Kawashima argues that in ancient Israel it was the father whose consent mattered, not the girl herself. (See Robert S. Kawashima, "Could a Woman Say 'No' in Biblical Israel? On the Genealogy of Legal Status in Biblical Law and Literature," *AJS Review* 35,1 (April 2011) 14.)

[69]Josephus (Josephus *Antiquities of the Jews V.169)* tells the story slightly differently in his *Antiquities*. He suggests that the elders did not look directly to formalities in order to circumvent their oath, but instead some suggested that the oath be canceled all together due to the state in which it was made:

…some advised them to have no regard to what they had sworn, because the oath had not been taken advisedly and judiciously, but in a passion, and thought that they should do nothing against God, if they were able to save a whole tribe which was in danger of perishing; and that perjury was then a sad and dangerous thing, not when it is done out of necessity, but when it is done with a wicked intention. But when the senate was affrighted at the very name of perjury, a certain person told them that he could show them a way whereby they might procure the Benjaminites wives enough, and yet keep their oath. They asked him what his proposal was. He said, "That three times in a year, when we meet in Shiloh, our wives and our daughters accompany us: let then the Benjaminites be allowed to steal away, and marry such women as they can catch, while we will neither incite them nor forbid them; and when their parents take it ill, and desire us to inflict punishment upon them, we will tell them, that they were themselves the cause of what had happened, by neglecting to guard their daughters, and that they ought not to be over angry at the Benjaminites, since that anger was permitted to rise too high already." So the Israelites were persuaded to follow this advice, and decreed, That the Benjaminites should be allowed thus to steal themselves wives…And thus was this tribe of the Benjaminites, after they had been in danger of entirely perishing, saved in the manner aforementioned, by the wisdom of the Israelites; and accordingly it presently flourished, and soon increased to be a multitude, and came to enjoy all other degrees of happiness. And such was the conclusion of this war.[69]

The Israelites were not blind to the notion that perhaps the oath should not hold; they searched for a loophole in order to be excessively careful! As Louis Feldman points out:

Josephus is very concerned that the plan suggested by the elders appears to be a ruse; and so he carefully says that the elders protested at the mere mention of perjury (Ant. 5.170), whereupon someone suggested a plan to provide wives for the Benjaminites without breaking their oaths. Whereas in the Bible the elders actually direct the Benjaminites on how to obtain wives (Judges 21:20), Josephus, realizing that this was a way of aiding and abetting the violation of the oath, says that the plan was to let the Benjaminites "be permitted" to capture their brides "without either encouragement or hindrance on our part" (*Ant.* 5.171) (Louis H. Feldman, "Josephus' Portrayal of Judges 19-21," *Jewish Quarterly Review* 90, 3 (2000) 285)

no women were injured or killed? While the Bible does not pronounce a direct verdict on these actions, there is implicit judgment, as the chapter ends with the refrain: "And there was no king in Israel; each man did as was right in his own eyes."[70] Rather than celebrating the redemption of an Israelite tribe, the author(s) focus on how anarchic a time it was, a time rife with civil war and (sexual) violence.

The rabbis of Late Antiquity do not make their views about this circumvention explicit. Genesis Rabbah[71] offers that Jacob's deathbed blessing of Benjamin as a "tearing wolf" (Gen. 49:27) alludes to the Judges 21 loophole:

> זאב יטרף מה הזאב הזה חוטף כך היה שבטו שלבנימן חוטף שנאמר וראיתם והיה אם יצאו בנות שילה וגו' וחטפתם לכם (שופטים כא כא), מלמד שהיו חוטפין נשים לבניהן משום שבועה שנשבעו עליהן ישראל שלא ישיאו להם נשים .
>
> Will tear like a wolf: Just as this wolf seizes [its prey], so shall the children of Benjamin seize, as it is said: And it shall be should the daughters of Shiloh come out…and you shall seize for yourselves…. This teaches that they would grab wives for their sons *due to the oath that Israel had sworn about them not to marry off women to them.*

Though Benjamin is not called a wolf for ravaging the concubine at Gibe'ah in the first place, a wolf seizing its prey is not a very flattering image for marriage. On the other hand, the *midrash* indicates that the Benjaminites were forced into this position because of the oath. Perhaps the midrashic authors appreciate what has brought Benjamin to this situation. However, what does stand out is that the rabbis do not directly comment on the validity or scruples of the elders' oath.

Feldman suggests that perhaps this is meant to parallel the story of the rape of the Sabine women as told by Livy, as the Romans were permitted to seize the Sabine women by king Romulus, and the Israelites are given permission by the elders to proceed with their own plan, which entails seizing Israelite women. (*Ibid.* 286)

[70] Judges 21:24

[71] Gen. Rabbah (Theodor-Albeck) *Vayeḥi* 97

They do not extrapolate from it to any other legal scenarios, whether because the rabbinic practice of nullifying oaths made such precedent unnecessary, or for some other reason.

Amoraic elaboration on R. Simon b. Gamaliel's[72] statement, "There were no better days for the Children of Israel than the Day of Atonement and the fifteenth of Av," makes the omission of the loophole in rabbinic writing even clearer. The Palestinian and Babylonian Talmuds each offer various explanations, among them that on the fifteenth of Av the Benjaminites were permitted to marry women from the other tribes:

ירושלמי תענית ד:יא, סט עמוד ג' (ליידן)

ורבנן אמרי שבו הותר שבטו שלבנימן לבוא בקהל דכתיב ארור נותן אשה לבנימן מקרא קראו וקירבוהו מקרא קראו וקירבוהו אפרים ומנשה שראובן ושמעון יהיו לי מקרא קראו וריחקוהו גוי וקהל גוים יהי ממך ומלכים מחלציך יאו ואדיין לא נולד בנימין

And the rabbis say: That is when the tribe of Benjamin was permitted to enter the community, as it is written, "Cursed be her who gives a wife to Benjamin." (Judges 21:18) They read a verse of Scripture and drew Benjamin near; they read a verse of Scripture, and they put Benjamin away. They read a verse of Scripture and drew Benjamin news: "Ephraim and Manasseh shall be mine, as Reuben and Simeon are." (Gen. 48:5). They read a verse of Scripture and put Benjamin away: "a nation and a company of nations shall come from you, and kings shall spring from you." (Gen. 35:11)

What is the meaning of הותר שבטו של בנימין לבוא בקהל? Does this refer to the date of the seizure of the women, or does this refer to some later generation? [73] If this refers to some later generation, perhaps this is a greater joy than the temporary seizure solution, or perhaps the seizure solution was anathema. If this refers to the seizure solution itself, speculating on what convinced the elders to innovate the seizure loophole. Moreover it is quite unclear what the significance of the verses is for drawing near and alienating Benjamin, respectively.[74] In the Babylonian version,

[72] *mTa'anit* 4:7

[73] This latter reading seems more likely, given the language of הותר לבוא בקהל, which indicates permissibility for men to give their daughters' hands in marriage to men from Benjamin rather than permissibility for the Benjaminites to seize women from other tribes.

which completely excludes the verses referring to distancing or bringing close, Rav offers a significant clarification:

בבלי תענית ל:
מאי דרוש אמר רב ממנו ולא מבנינו

What is the derivation? Rav said: From among us, not from among our *sons*.

Rav indicates that the joyous scenario of fifteen Av refers to another generation rather than the seizure plot of Judges 21. Yet his explanation of how the leaders of the following generation extricated themselves from the oath of their predecessors does not differ markedly from the type of loophole recorded in Judges 21 itself! Again, a close reading of the oath, *we* will not give our daughters to Benjamin, but *our sons* may. Thus Rav's statement endorses the use of a loophole in this situation without even making mention of the same type of loophole made by the elders in the first place.[75] Again, the rabbis do not seem particularly interested in the elders' own use of literal reading.

I Kings 2 – Inheriting a Vendetta

Rav's suggestion that an oath taken by fathers may not be binding on their sons offers the perfect segue to the story of King David and Shim'ei son of Gera. During a vulnerable time, when King David was on the run from his mutinous son Absalom, he was taunted and cursed by Shim'ei son of Gera.[76] When David ultimately defeats Absalom and regains his throne, Shim'ei

[74] The classical commentators were confounded by this. Firstly, they contend that the verse regarding Ephraim and Manasseh refers to distancing Benjamin, whereas the verse about kings refers to bringing Benjamin close. This is consonant with the Gen. Rabbah (81) version. Secondly, they do not explain the connection between the verses and the ability to permanently allow Benjamin back in as one of the tribes. (See *Pene Moshe* and *Qorban Ha'edah ad loc.*)

[75] We may suggest a simple difference between the two loopholes: for those who had themselves promised not to marry into Benjamin, literal interpretation rings hollow. For the next generation, however, who were included in the oath only by proxy, perhaps there is more room to maneuver.

[76] II Samuel 16:5-13

wisely pleads with King David for immunity, and the king grants it[77]: he swears not to kill Shim'ei. On David's deathbed, described in the second chapter of the first Book of Kings, David looks to remedy this situation. He instructs Solomon, his son and heir:

> **8** And, behold, there is with thee Shim'ei the son of Gera, the Benjaminite, of Baḥurim, who cursed me with a grievous curse in the day when I went to Maḥanaim; but he came down to meet me at the Jordan, and I swore to him by the LORD, saying: I will not put thee to death with the sword. **9** Now therefore hold him not guiltless, for thou art a wise man; and thou wilt know what thou oughtest to do unto him, and thou shalt bring his hoar head down to the grave with blood.'

While David may not kill Shim'ei, his son Solomon may. In fact, the Lucianic versions of the Septuagint on this verse read: ואתה אל תנקהו – "but *you* should not grant him amnesty" as opposed to ועתה, "and *now* you shall not grant him amnesty."[78] Calling Solomon wise,[79] David suggests that Solomon complete this task by finding some new pretext for putting Shim'ei to death.[80] And Solomon does so:

> **36** And the king sent and called for Shim'ei, and said unto him: Build thee a house in Jerusalem, and dwell there, and go not forth thence any whither. **37** For on the day thou goest out, and passest over the brook Qidron, know thou for certain that thou shalt surely die; thy blood shall be upon thine own head.'

[77] Some suggest that he actually had wished to kill Shim'ei and did not promise immunity out of royal charity but out of fear of the entourage of 1000 Benjaminites with which Shim'ei "came out to greet" him (2 Samuel 19:16-24). Mordecai Cogan, *The Anchor Bible: I Kings*, Vol. 10. New York: Doubleday (2001) 174

[78] Cogan, *ibid*.

[79] In 2:6 David likewise tells Solomon to kill the former general Yoav for murdering two innocent men, but to do so "in his wisdom," which, from 2:32, Solomon interpreted as not letting on to Yoav that David had even known about Yoav's crimes. Mordecai Cogan is very clear that David is asking Solomon to use guile in both instances. (Cogan, *A I Kings*, 173) For an argument about the use of this story in the Septuagint to highlight Solomon's unique wisdom and shrewdness, see David W. Gooding, "The Shim'ei Duplicate and Its Satellite Miscellanies in 3 Reigns II," *Journal of Semitic Studies* 13 (1968) 76-92.

[80] It seems clear that Solomon killing Shim'ei based on a direct order from David would be a violation of that oath, as it would amount to David killing Shim'ei by proxy.

Though Shim'ei agrees to the terms of his house arrest, three years later he violates those terms to retrieve some escaped slaves.[81] Solomon confronts Shim'ei:

> **42** And the king sent and called for Shim'ei, and said unto him: 'Did I not make thee to swear by the LORD, and forewarned thee, saying: Know for certain, that on the day thou goest out, and walkest abroad any whither, thou shalt surely die? and thou saidst unto me: The saying is good; I have heard it. **43** Why then hast thou not kept the oath of the LORD, and the commandment that I have charged thee with?' **44** The king said moreover to Shim'ei: 'Thou knowest all the wickedness which thy heart is privy to, that thou didst to David my father; therefore the LORD shall return thy wickedness upon thine own head. **45** But king Solomon shall be blessed, and the throne of David shall be established before the LORD forever.' **46** So the king commanded Benaiah the son of Jehoiada; and he went out, and fell upon him, so that he died. And the kingdom was established in the hand of Solomon.

While Solomon maintains that Shim'ei will be put to death for violating their agreement, he does mention Shim'ei's just deserts for his transgressions against the late King David.

The Biblical narrative indicates that Solomon's actions were helpful for stabilizing his administration.[82] After all, leaving one's father's enemies alive upon advancing to the throne leaves open the potential for insurrection. Likewise, perhaps David's reasons were superstitious:, once Shim'ei died, his curse on David would lose its efficacy, making Solomon's rule more secure.[83] And so the story ends with the summation: "And the kingdom was established in the hand of Solomon." Furthermore, the following chapter tells of Solomon's love and obedience to God,[84] as well as the story of God's speaking to Solomon in a dream, offering Solomon whatever

[81] I Kings 2:40

[82] It seems that this was David's intention as well, as opposed to mere personal vendetta, as the commands to kill Yoav and Shim'ei are juxtaposed to David's directive to Solomon to follow God so that God would uphold the promise of לא יכרת לך איש מעל כסא ישראל– There shall not fail you a man on the throne of Israel (I Kings 2:4). For a discussion of King David's motivations in light of beliefs about "blood" and innocence in the contemporary culture, see Benjamin Edidin Scolnic, "David's Final Testament: Morality or Expediency?" *Judaism* 43,1 (1994) 19-26.

[83] See ANET 214b, in which a similar contrast is suggested: [crimes] "come down upon the heads (of the guilty), whereas I (Ramses III) am privileged and immune until eternity)." (See Cogan, *I Kings*, 179-180)

he desires.[85] Unlike the preceding case of Benjaminites seizing wives, the Biblical account seems neutral to positive about Solomon's actions towards Shim'ei.

But as in the case above, the rabbis do not discuss the ruse against Shim'ei b. Gera, though they do discuss the matter of his death. Some *amoraim* in *bBerakhot* 8a, lament the death of Shim'ei, as he had apparently been Solomon's teacher:

> ואמר ר' חייא בר אמי משמיה דעולא: לעולם ידור אדם במקום רבו שכל זמן ששמעי בן גרא קיים לא נשא שלמה את בת פרעה
>
> R. Ḥiyya b. 'Ami said in the name of 'Ulla: A person should always live near his teacher, for as long as Shim'ei b. Gera was alive, Solomon did not marry Pharaoh's daughter.

R. Ḥiyya b. 'Ami and 'Ulla do not critique David's command or Solomon's method of killing Shim'ei, though they easily could have while describing the deleterious effects of the death of his teacher and guide. Perhaps the comment "a person should always live near his teacher" should be read sarcastically, indicating that had Solomon been thinking for himself, he would not have, he should not have, killed Shim'ei.[86] He only killed Shim'ei because of David's command. And yet David's command is not referenced. Again, the rabbis choose to ignore the loophole mechanism.

Joshua 9 – Qualifying a Treaty

After the Israelites sacked both Jericho and 'Ai, the Gibeonites, members of a Hivvite tribe indigenous to Canaan, realized that the Israelites mean the natives harm. To trick the Israelites into making a treaty, the Gibeonites dress up as wilderness travelers, complete with worn out shoes and dress, claiming to be from outside of Canaan: "We are come from a far

[84] I Kings 3:3

[85] 1 Kings 3:5

[86] Though the *stam* in *bGit.* 59a observes that Solomon killed the great luminary Shim'ei with no such condemnation.

country," they declare, "Now therefore make ye a covenant with us.'[87] Following a sob story about meager supplies, along with praise for God's handiwork on behalf of the Israelites against the Egyptians, Joshua takes the bait and enacts a treaty: "And Joshua made peace with them, and made a covenant with them, *to let them live*; and the princes of the congregation swore unto them.[88]" Upon realizing their folly several days later, the Israelite elders are in a bind. They cannot go back on their treaty, but they do not wish to sustain it either:

> **16** And it came to pass at the end of three days after they had made a covenant with them that they heard that they were their neighbors, and that they dwelt among them. **17** And the children of Israel journeyed, and came unto their cities on the third day. Now their cities were Gibeon, and Ḥephirah, and Be'eroth, and Kiriath-jearim. **18** And the children of Israel smote them not, because the princes[89] of the congregation had sworn unto them by the LORD, the God of Israel. And all the congregation murmured against the princes. **19** But all the princes said unto all the congregation: 'We have sworn unto them by the LORD, the God of Israel; now therefore we may not touch them. **20** *This we will do to them, and let them live; lest wrath be upon us, because of the oath which we swore unto them*.' **21** *And the princes said concerning them: 'Let them live'; so they became hewers of wood and drawers of water[90] unto all the congregation, as the princes had spoken concerning them.*

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[87] Joshua 9:6

[88] Ibid., 9:15

[89] Throughout this narrative, there are different designations for the people on the Israelite side making this treaty – "the princes," "the congregation," "the men of Israel," and Joshua himself. It is unclear who actually makes the original treaty. For this reason, many recent Bible scholars have suggested a documentary approach to the story. K. Mohlenbrink, *Zeitschrift für die alttestamentlich Wissenschaft* (*ZAW*) NF 15 (1938) suggested that this is an amalgam of two separate narratives, one in which Joshua concludes a treaty with the Gibeonites and subsequently curses them when he realizes his folly, and the other in which the "men of Israel" make the treaty. W. Rudoph suggests the original story is that of Joshua mistakenly making the treaty, told by the E and J sources, but the P source subsequently adds the princes to the story in order get absolve Joshua of any blame (W. Rudoph, *Der "Elohist" von Exodus bis Josua* (The "Elohist" from Exodus to Joshua), 1938, 200ff). M. Noth, on the other hand, suggests that the original story is that the princes made the treaty, but Joshua is added in later (M. Noth, "Josua," *HAT*, 1953, 53ff). Jehoshua Grintz, however, that it was an essential element of ancient Hivvite treaties that two different elements take place – the making of the treaty and the taking of the oath. He suggests that Joshua was responsible for the former, while the princes were responsible for the latter, just as the text in Joshua 9:15 suggests. (See Jehoshua M. Grintz, "The Treaty of Joshua with the Gibeonites," *Journal of the American Oriental Society* 86,2 (1966) 123). Irrespective of this textual challenge or its potential solution, we treat the story as a unified whole as it would have been viewed through the ancient rabbinic lens, as ultimately we are interested in how this and other biblical stories may have served as precedent for their own views of loopholes and circumventions.

The Israelites manage to stay within the bounds of the treaty, even as they alter its contours: they reduce the Gibeonites to servility. While not breaking the covenant, this action does redefine it quite narrowly as only granting life to the Gibeonites.

Robert Boling observes that the designation of water carriers and hewers of wood is a "most telling inversion of the covenant motif" in Deut. 29:10, where the Divine covenant is presented as inclusive of all, erasing distinction between the highest members of society and the lowest – even the water carriers and hewers of wood. Israel's covenant with the Gibeonites, on the other hand, was to be marked by social stratification, and clear boundaries between the two.[91] Indeed, according to Sumerian epics, serving as a hewer of wood and carrier of water amounted to true slavery.[92] Likewise, the *nethinim* of the First Temple period, the descendants of the Gibeonites according to the Bible, are included with the "children of Solomon's servants" (Ezra 2:58, Neh. 7:60) and are descended from "royal slaves" (I Kings 9:21). Despite this dramatic change, the Biblical text condemns only Gibeonite trickery (Joshua 9:22).

Unlike the first two scenarios, regarding this episode, the rabbis raise the possibility of nullifying the original vow:

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[90] Some have theorized that the status of hewers of wood and drawers of water amounted to the regular tax offered by the protégé state to the superior state in other Hivvite treaties of the time, and that therefore, the notion of this being some sort of punishment for fraud would be a later and incorrect interpretation. (e.g., R. Kittel, *Geschichte des Volkes-Israel I* (1923). Others argue that the lack of military aid provisions promised in this treaty indicates its *sui generis* nature (e.g., Jehoshua M. Grintz, "The Treaty of Joshua with the Gibeonites," *Journal of the American Oriental Society* 86,2 (1966) 120). (For a summary of the various positions, see Joseph Blenkinsopp, *Gibeon and Israel: The Role of the Gibeonites in the Political and Religious History of Early Israel*. Cambridge: Cambridge University Press (1972) Chapter 3.) Regardless of the historical findings or evidence, the ancient rabbis were committed to the veracity of the Biblical account, and we approach this text through their lens.

[91] Robert G. Boling, *Anchor Bible Joshua: A New Translation with Notes and Commentary*, Garden City, NY: Doubleday & Co. (1982) 269

[92] S. N. Kramer, *History Begins at Sumer*: *Thirty-Nine Firsts in Man's Recorded History*. Philadelphia: University of Pennsylvania Press (1958) 113-114.

בבלי גיטין מו.[93]

רבי יהודה אומר כל נדר שידעו בו רבים לא יחזיר ושלא ידעו בו רבים יחזיר: אמר רבי יהושע בן לוי מ"ט דר' יהודה דכתיב (יהושוע ט) ולא הכום בני ישראל כי נשבעו להם נשיאי העדה ורבנן התם מי חלה שבועה עילוייהו כלל כיון דאמרו להו מארץ רחוקה באנו ולא באו לא חיילה שבועה עילוייהו כלל והאי דלא קטלינהו משום קדושת השם :

R. Judah says: Any oath that was known by the masses, one should not nullify, but if it was not known by the masses, on may nullify. R. Joshua b. Levi said: What is R. Judah's reasoning? As it is written: And the Children of Israel did not kill them, for the princes of the congregation had sworn to them. And the rabbis [would explain]: In that case, did the oath ever truly apply? They (the Gibeonites) told them, "We have come from a faraway land," but they did not, so the oath did not apply to them. The reason they did not kill them (the Gibeonites) was for the sanctification of God's name.

According to R. Judah, Joshua and the Israelites have no other recourse but to qualify their treaty; according to the Sages, however, the Israelites have no requirement to uphold the treaty, as it had been made under false pretenses. Consequently, the kindness that the Israelites show by making the Gibeonites water carriers and wood hewers rather than killing them is purely for the purpose of representing the God of Israel well. This debate is very telling. The argument is not actually about whether Joshua is right or wrong in changing the content of the treaty; it is presumed that he did right.[94] Rather, the argument is whether an oath made on false pretenses is binding if it made publicly. The issue of making changes to an existing agreement is secondary, if even that.

Exodus 2:18 – The Exodus from Egypt

At first blush, the Israelites' exodus from Egypt is predicated upon a lie. In Exodus 3:18, Moses is instructed to ask of Pharaoh that the Israelites travel for three days to the wilderness to

[93] The parallel *sugya* in *yGittin* 4:7, 46a (Constantinople Ed.) does not elaborate on R. Judah's reasoning.

[94] In fact, elsewhere, the rabbis emphasize how lacking in character the Gibeonites proved themselves to be in II Samuel 21, when demanding the death of seven men as compensation for Gibeonites, leading King David to alienate them more than Joshua ever had. (*yQid*.4:1, 65b; an echo of this story appears in *bYeb.* 79a, with the explanation as to why David chose to alienate the Gibeonites.)

worship their God. And throughout Moses and Aaron's dealings with Pharaoh, they never say otherwise; they never proclaim, or request, permanent freedom. Pharaoh too understands their request as limited to three days, for once three days have passed, Pharaoh wonders why they have not returned. He surmises that they must be lost in the desert, that is, until he is informed, "that the nation had fled.[95]" Is there some legal technicality in use here which relies on autonomy once the Israelites are beyond Pharaoh's reach?

Several midrashic passages broach the discrepancy between the three-day request and the complete escape. Exodus Rabbah,[96] of medieval provenance, is very clear about this: The Israelites lied in order to lure the Egyptians to the Reed Sea after three days; there they would drown just the way they had drowned Israelite babies. It was deceptive behavior, but it was for the purpose of punishing the Egyptians measure for measure. Earlier midrashic material, however, is less equivocal. The two *Mekhiltot* - of R. Ishmael and R. Simon b. Yoḥai – offer two versions of the following story: at Pharaoh's behest, Egyptian officers accompany the Israelites on their three-day journey to the wilderness to worship their God and to ensure that they would return. On the fourth day, the officers demand that the Israelites return to Egypt, but the Israelites refuse. When the officers continue to press, the Israelites beat them and kill several of them. The variation between the two *Mekhilta* versions consists in the Israelites' verbal response to the Egyptian officers prior to the beating. According to *Mekhilta d'R. Ishmael*,[97] they respond with a rhetorical question: וכי יצאנו ברשות פרעה יצאנו? Did we leave with Pharaoh's permission? The *midrash* continues with a citation of Numbers 33:3, "On the morrow of Passover, the Children of

[95] Exodus 14:5

[96] Ex. Rabbah (Vilna) *Shemot 3*

[97] *Beshalaḥ Masekhta Vayeḥi 1*

Israel left with a raised hand," that is, brazenly. In other words, the exodus has nothing to do with their original request of Pharaoh. They have left of their own accord. And they communicate this to their Egyptian chaperones. In the *Mekhilta d'R. Shimon bar Yoḥai*[98] version, however, the Israelites respond differently, offering a savvier perspective. They declare: Once outside of Pharaoh's domain, we are are outside of his jurisdiction as well – כיון שיצאנו ממצרים יצאנו מרשות פרעה. This is subtler: "Yes, we applied for a three day journey, but technically once we have crossed state lines, we are no longer subject to Pharaoh's will." And Pharaoh cannot complain; after all, he had given permission in the first place.

Clearly, the rabbis noticed the discrepancy between what Moses requested – namely, three days in the wilderness – and what the Israelites took – full freedom. They are divided on how to view this discrepancy. One view suggests that the ends justify the means: Moses lies in order ultimately to punish the Egyptians. One a second view, the Israelites are not beholden to Pharaoh at all; they leave indignantly, unrelated to Pharaoh's request/permission. But on the third view, there is indeed a clever loophole in use: leaving the borders of Egypt, which the three days allowed them to do, puts them under different jurisdiction. They cannot be extradited. Unlike the other cases, in this case the rabbis seem to be in touch with technical circumventions, yet they still do not use it as a model or precedent for their own rulings.

Numbers 27, 36 – Daughters of Zelophehad

In Numbers 27, Moses commits the land of Zelophehad as inheritance for his five unmarried daughters. In Numbers 36, the issue arises again, as the clan leaders of Manasseh, the

[98] 14:5

late Zelophehad ‘s tribe, raise the worry of losing tribal land should Zelophehad ‘s daughters marry outside of their own tribe.

> The family heads in the clan of the descendants of Gilead son of Makhir son of Manasseh, one of the Josephite clans, came forward and appealed to Moses and the chieftains, family heads of the Israelites. They said, “The Lord commanded my lord to assign the land to the Israelites as shares by lot, and my lord was further commanded by the Lord to assign the share of our kinsman Zelophehad to his daughters. Now, if they marry persons from another Israelite tribe, their share will be cut off from our ancestral portion and be added to the portion of the tribe into which they marry; thus our allotted portion will be diminished. And even when the Israelite observe the jubilee, their share will be added to that of the tribe into which they marry, and their share will be cut off from the ancestral portion of our tribe. (36:1-4)[99]

Moses validates this challenge and obligates the daughters of Zelophehad to marry within their own tribe:

> This is the thing which the LORD hath commanded concerning the daughters of Zelophehad, saying: Let them be married to whom they think best; only into the family of the tribe of their father shall they be married. So shall no inheritance of the children of Israel remove from tribe to tribe; for the children of Israel shall cleave everyone to the inheritance of the tribe of his fathers. And every daughter, that possesseth an inheritance in any tribe of the children of Israel, shall be wife unto one of the family of the tribe of her father, that the children of Israel may possess every man the inheritance of his fathers. So shall no inheritance remove from one tribe to another tribe; for the tribes of the children of Israel shall cleave each one to its own inheritance.' (ibid. 6-9)

Michael Fishbane notes the problematic result of this new ordinance:

> What is extraordinary about the case in Num. 36:6-9 is not simply that the new divine ordinance of Nu. 27:6-11 also proved insufficient. The remarkable fact from a legal standpoint is that this second responsum, requiring the daughters to marry a paternal relative, produces a veritable legal fiction. For if the daughters of Zelophehad must marry into their father’s family – in this case their cousins, for paternal uncles were forbidden by law (cf. Lev. 18:14) – the inheritance would necessarily revert to precisely those males who would be next in line if the father had no children whatsoever (*per* Num. 27:9-11). Accordingly, the ruling in favor of female inheritance provided by the first adjudication (Num. 27:8) is

[99] The family heads of Manasseh are particularly concerned about losing land, which is consistent with the decision in Numbers 32:33 that half of Manasseh was to be on one side of the Jordan River and half on the other side. Loss of any land may be critical.

> functionally subverted by the responsum in Num. 36:6-9 – *even though* its specific provisions remain valid (27:9-10).[100]

Evidently bothered by just this point, the rabbis interpret the requirement to marry endogamously as applicable only to future female heirs, not to the daughters of Zelophehad themselves. Thus, Numbers 36 does change the law but not for the daughters of Zelophehad who had already been the beneficiaries of the ruling of Numbers 27:

> **בבלי בבא בתרא קכ.**
> אמר רב יהודה אמר שמואל :בנות צלפחד הותרו להנשא לכל השבטים ,שנאמר:
> לטוב בעיניהם תהיינה לנשים ,אלא מה אני מקיים
> דאך למשפחת מטה אביהם תהיינה לנשים ?עצה טובה השיאן הכתוב ,שלא ינשאו אלא להגון להן.
> מותיב רבה "אמור אליהם" (ויקרא כב) לאותן העומדים על הר סיני "לדורותיכם" אלו דורות הבאים. אם נאמר אבות למה נאמר בנים ואם נאמר בנים למה נאמר אבות? מפני שיש באבות מה שאין בבנים ויש בבנים מה שאין באבות באבות הוא אומר "וכל בת יורשת נחלה"...הוא מותיב לה והוא מפרק לה לבר מבנות צלפחד.
>
> R. Judah said in the name of Samuel: The daughters of Zelophehad were permitted to marry into any tribe, as it says, "Let them be married to whom they think best." So can I uphold, "only into the family of the tribe of their father shall they be married"? Scripture is giving them good advice to marry only one who is proper for them. Rabbah challenged with a tannaitic source: "Say to them" – to those standing at Sinai, "for your generations" – these are the future generations. If the parents are indicated, why mention the children, and if the children are indicated, why are the parents indicated? Because some laws are mentioned regarding the parents but not regarding the children, and some laws are mentioned regarding the children but not regarding the parents. [For instance], regarding the parents it says, "And every daughter who inherits land…" He questioned it, and he answered it: [this verse is] excluding the daughters of Zelophehad.

This passage discusses the very crux of the question, Numbers 36:9, the command that every female heir must marry within her tribe, and concludes that the daughters of Zelophehad remained unaffected by it. Essentially, the Babylonian Talmud reads Numbers 36 not as a way of circumventing the dispensation in Numbers 27 to the daughters of Zelophehad but as emending the ruling of Numbers 27 for other women in the future. This accords quite well with the

[100] Michael Fishbane, *Biblical Interpretation in Ancient Israel.* Oxford: Clarendon Press (1985) 105

comments of the *Sifri* that the ruling in Numbers 27 is only temporary (לשעה).[101] Relatedly, further in the same *Sifri* passage, R. Ishmael learns the law of a husband inheriting his wife's land from Numbers 36:8, rather than from the daughters of Zelophehad themselves.[102]

On the other hand, another *Sifri* passage resolves the tension not by reinterpreting Numbers 36 but by suggesting that both Numbers 27 and Numbers 36 are simultaneous from the Divine perspective:[103]

ספרי דברים כי תצא פיסקא רלג

(יב) לא תלבש שעטנז גדילים תעשה לך ,שניהם נאמרו בדבור אחד ,זכור ושמור שניהם נאמרו בדבו
ר אחד (שמות לא:יד) מחלליה מות יומת (במדבר כח:ט) וביום השבת שני כבשים
בני שנה שניהם נאמרו בדבור אחד , (ויקרא יח:טז) ערות אשת אחיך לא תגלה (דברים
כה:ה) יבמה יבא עליה שניהם נאמרו בדבור אחד,(במדבר לו:ח) וכל בת יורשת נחלה (במדבר
לו:ט) ולא תסוב נחלה ממטה אל מטה שניהם נאמרו בדבור אחד מה שאי איפשר לבשר ודם לומר שנ
י דברים כאחת שנאמר(תהילים סב:יב) אחת דבר אלהים שתים זו שמענו

"Do not wear *sha'atnes*", "Make fringes for yourself," were both said in one utterance; "Remember" and "Guard" were both said in one utterance; "Its desecrators shall be put to death," "And on the Sabbath day two year-old unblemished sheep" were both said in one utterance; "Do not reveal your brother's wife's nudity," "Her brother-in-law shall sleep with her," were both said in one utterance"; "Any daughter who inherit land," "And land shall not pass from one tribe to another" were both said in one utterance, which someone of flesh and blood cannot do – to say two things as one, as it is said: God spoke one, yet we heard two."[104]

[101] As opposed to לדורות, for future generations. This possibly alludes to their special dispensation to marry whomever they wished.

[102] *Sifri* Numbers *Pinḥas* 134

[103] *Qorban Ha'edah* (*yNed.* ibid. s.v., *ve-lo tisov*) reads this differently. He suggests that it refers to the question of whether the law was only such for the wilderness generation, as suggested by the introduction to verse 8 זה הדבר, or whether it is always applicable. This is a clear Babylonianization of the text on the basis of Rava's comment in *bBB* 120a that זה הדבר refers only to the current generation in the case of female inheritance and marriage. It is unclear whether Rava's position about זה הדבר was espoused by the author of this passage; likewise the quotation of the clause כל בת היורשת rather than זה הדבר indicates that this is not the meaning of the statement

[104] *Sifri* Deut. *Ki Teṣe* 133. *YNed.* 3:2, 37d, and *yShevuot* 3:10, 34d, contain the same passage, with a change in the placement of *sha'atnes* to last rather than first, with the addition of the different modifiers of testimony in the Decalogue as recounted in Exodus and Deuteronomy– "false" and "vain," respectively, as well as with the claim that a person would be incapable of physically reciting or hearing two phrases simultaneously.

The *midrash* here gathers a number of statements that either complement one another – such as remembering the Sabbath as well as guarding it – or directly contradict one another – such as the prohibition to marry one's sister-in-law, and the commandment to off one's hand in levirate marriage to one's brother's childless widow – and offers that they are inextricably linked. Whether the human mind can conceive of them as simultaneous notions, it is the divine intention that the two be considered as one, without contradiction. This addresses the underlying question of how Numbers 36 could qualify Numbers 27: it was the Divine plan all along. It is not a mistaken gap in the law, a loophole of sorts; it is rather a pre-planned exception. It is no different from the built-in exception of wearing wool and linen mixtures in one's fringed garments or marrying one's levir.[105] The fact that the tribal leaders had their epiphany about the need to address exogamy and land is only the narrative context of the law, though it is not the origin thereof.

In both sources, the rabbis try to erase any sense of backtracking or discovered dodge on God's part. Whether they do so for theological reasons (Divine decision-making cannot be so capricious and short-sighted), for ethical reasons (how unfair to promise the daughters of Zelophehad only to ultimately take it away or at least minimize it), or simply to protect the Bible from scorn, they confront their discomfort head on. In this regard it is fascinating to consider that perhaps for the rabbis, people may use loopholes, but God may not.[106] Yet, there still is no loophole language suggested here. They talk around the issue rather than giving it a name.

[105] We do not deal here with the fact that the Sabbath example seems different from the others.

[106] This relates back to the source cited above regarding Abraham accusing God of using a loophole to destroy Sodom.

Genesis 30 – And Everywhere that Jacob Went, the Sheep Were Sure to Go

Jacob wishes to leave Laban's house, but not empty-handed. He offers to take only the "speckled and spotted sheep, and every dark one among the sheep, and the spotted and speckled among the goats." [107] To Laban's surprise, even after Laban removes all such sheep, Jacob manages to manipulate the breeding patterns of the flock (vv. 37-42),[108] which produces צאן רבות – "large flocks" (v. 43) of such spotted and speckled animals. Though Laban had agreed to the plan without preconditions or an upper limit of how many animals Jacob could take and with no limitations on the methods Jacob could use, chapter 31 reveals Laban and his sons as upset about the results:

> **1** And he heard the words of Laban's sons, saying: 'Jacob hath taken away all that was our father's; and of that which was our father's hath he gotten all this wealth.' **2** And Jacob beheld the countenance of Laban, and, behold, it was not toward him as beforetime.

Jacob rationalizes the outcome to his wives by arguing that his success was due to Divine intervention punishing Laban for having cheated Jacob on wages in the past:

> **7** And your father hath mocked me, and changed my wages ten times; but God suffered him not to hurt me. **8** If he said thus: The speckled shall be thy wages; then all the flock bore speckled; and if he said thus: The streaked shall be thy wages; then bore all the flock streaked. **9** Thus God hath taken away the cattle of your father, and given them to me. **10** And it came to pass at the time that the flock conceived, that I lifted up mine eyes, and saw in a dream, and, behold, the he-goats which leaped upon the flock were streaked, speckled, and grizzled. **11** And the angel of God said unto me in the dream: Jacob; and I said: Here am I. **12** And he said: Lift up now thine eyes, and see, all the he-goats which leap upon the flock are streaked, speckled, and grizzled; for I have seen all that Laban doeth unto thee. [109]

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[107] Gen. 30:32

[108] For a discussion of just how this complex manipulation is to be understood, see Scott B. Noegel, "Sex Sticks and the Trickster: A New Look at an Old Crux," *Journal of Ancient Near Eastern Society* 25 (1997) 7-17, which includes both a general survey of interpretations as well as the author's own innovative suggestion. See also, Schneir Levin, "Albinism and Genetics in the Bible," *Jewish Bible Quarterly* 31 (2003)

[109] This episode is included in Shakespeare's *Merchant of Venice* as evidence of Jewish cunning. Shakespeare places the following pithy statement in the mouth of Shylock: "This was a way to thrive, and he was blest/And thrift is

Unsurprisingly, Josephus completely skips this story in Book 1 of his *Antiquities of the Jews*.[110] And while the Book of Jubilees includes the agreement between Jacob and Laban that Jacob would take "each of the lambs and kids which were born (and) on which there were black or spots or white," it omits Jacob's initiatives or any surprising changes in hibernation patterns. (vv. 28:27-29) His activities were legal but cunning.

How are Jacob's actions understood by the rabbis?[111] Dealing devilishly with the devil? Within his technical rights?

בראשית רבה (וילנא) פרשת וישלח פרשה פב

וירא אלקים אל יעקב ,כתיב (תהלים פו) עשה עמי אות לטובה ,מדבר בדוד ומתקיים ביעקב ,אות על שם שנאמר (בראשית לא) אם כה יאמר עקודים יהיה שכרך וגו'...

And God appeared to Jacob- It is written, "Make with me a sign for goodness." (Psalms 86) It speaks of David, but is fulfilled through Jacob. A sign, regarding what was said, (Gen. 31) "If he would say [The speckled shall be your wages, then all the flock will bear speckled; if he would say:] The streaked will be your wages [then all the flock will bear streaked]."

בראשית רבה עד:ג

צפה הקב"ה מה עתיד לבן לעשות ליעקב אבינו והיה צר צורה כיוצא בה "אם כה יאמר וגו'"

God saw what Laban would do to our patriarch Jacob in the future, and would draw a picture of it: "If he would say [The speckled shall be your wages, then all the flock will bear speckled; if he would say: The streaked will be your wages, then all the flock will bear streaked]." (Gen. 31:8)

בראשית רבה עג:י

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blessing if men steal it not." *The Merchant of Venice*, Ed. John Russell Brown, *The Arden Shakespeare*, London: Methuen (1969) I.iii.71-85. To understand the connection between the Jacob-Laban story and usury, see Joan Ozark Holmer, "When Jacob Graz'd His Uncle Laban's Sheep: A New Source for Merchant of Venice," *Shakespeare Quarterly* 36,1 (1985) 64-5.

[110] He writes instead that "Jacob, moreover, took with him one half of the cattle without the knowledge of Laban." (1.311a) Some offer this as reworking the biblical verse about Jacob "stealing Laban's heart" (MT, LXX, *Tgs. Ps.-J.* and *Neof.* Gen 31:20).

[111] E.A. Speiser suggests that there are two accounts of the narrative. In J's version (30:25-31:1), Jacob performs this feat of his own initiative because Laban himself had acted cunningly by removing any grown animals that could potentially have yielded the animals which Jacob sought. In E's version (31:2-18a), however, no such actions by Laban are recorded, and instead Jacob is told in a dream to do this in order to teach Laban a lesson. Thus, in each version, Jacob's cunning is justified. (E.A. Speiser, *The Anchor Bible: Genesis, Introduction, Translation and Notes.* Garden City: Doubleday & Company, Inc. (1964) 238)

היה אבינו יעקב נותן את המקלות בשקתות המים והיתה בהמה באה לשתות, ורואה את המקלות ונרתעת לאחוריה והזכר רובעה והיתה יולדת כיוצא בו. אמר ר' הושיעא נעשו המים זרע במיעיהם ולא היו חסרות אלא צורת הולד.

> Our patriarch Jacob would place the sticks in the water troughs. An animal would come to drink, see the sticks and jump backwards in fright, and the male would have intercourse with her, and she would birth one like him. R. Hoshaya said, "The water became semen within them, and all they needed was the form of the fetus."

According to the rabbis, as according to Jacob himself in the Biblical account, this is not clever human manipulation but Divine intervention, full of wonder and miracle.

Genesis 38 – Judah and Tamar

After his first two sons, both married to Tamar, die, Judah refuses to marry off a third son to her. Rather than declare these intentions, Judah has her languish in her widowhood, ostensibly waiting for his third son to come of marriageable age. Tamar devises a plan. She dresses as a prostitute and sets up shop in Judah's path; he sleeps with her, unaware of her true identity. When Tamar shows signs of pregnancy several months later, and Judah demands the capital crime for her adulterous behavior, Tamar proves to Judah that indeed she is pregnant with his seed. The story ends with Tamar giving birth to twins who are considered full-fledged children of Judah.

Are Tamar's actions adulterous or merely a loophole to achieve levirate union with Judah? According to Ancient Near Eastern Law, a widow's brother-in-law or father-in-law could perform levirate marriage.[112] Thus, though she has to dress as a prostitute, her union with Judah is fully legal – ethically questionable, but fully legal. She tricks him into performing his levirate

[112] See Middle Assyrian Law no.33, *ANET* 182, and Hittite law no. 193, *ANET, 196*. For a discussion of other cultures' similarities in this regard, see Millar Burrows, "The Ancient Oriental Background of Hebrew Levirate Marriage," *BASOR* 77 (1940) 8-9. Based on Ruth 3-4, it seems that in Israelite culture it became common for any male family member to act as levir, not only fathers-in-law or brothers of the deceased.

duties.[113] Perhaps this is why Tamar is validated at the end of the narrative. Indeed, the story ends with Judah admitting צדקה ממני– "She is more righteous than I," (Gen. 38:26),[114] and Scripture treats the children of the union of Tamar and Judah as legitimate.[115] Elsewhere in the Bible, Tamar is even listed as the direct ancestor of King David himself and is held up as a model for Israelite women.[116]

While the reality of Ancient Near Eastern Law may render Tamar's actions completely licit - and her ruse simply a loophole - Second Temple and rabbinic literature retroject post-Sinaitic law onto the Judah and Tamar story. The Book of Jubilees chapter 41, for instance, cites the general prohibition of sleeping with a daughter-in-law or a mother-in-law:

1. …And for that reason she was not given to Shelah, and he did not again approach her…
4. And Judah acknowledged that the deed which he had done was evil, for he had lain with his daughter-in-law, and he esteemed it hateful in his eyes, and he acknowledged that he had transgressed and gone astray, for he had uncovered the

[113] The following sources maintain the sexual encounter between Judah and Tamar as a fulfillment of levirate duties: E. Neufeld, *Ancient Hebrew Marriage Laws*. London: Longman, Green & Co. (1944) 34-39; Harry A. Hoffner, Jr., "Incest, Sodomy and Bestiality in the Ancient Near East," *Orient and Occident: Essays Presented to Cyrus H. Gordon on the Occasion of His Sixty-Fifth Birthday*, Ed. Hoffner; *Alter Orient und Altes Testament* 22 Kevalaer: Butzon & Bercker; Neukirchen-Vluyn: Neukirchener Verlag, (1973) 81-90, especially 82; Raymond Westbrook, "Biblical Law," in Ed. N.S. Hecht, B.S. Jackson, S.M. Passamaneck, D. Piattelli, A.M. Rabello, *An Introduction to the History and Sources of Jewish Law*. Oxford: Clarendon Press (1996) 12. Moreover, GW Coats suggests that levirate duties may have entailed only intercourse and conception, not marriage. If so, Judah's sexual act of impregnating Tamar would fulfill this obligation, as she bears two children as a result. This would answer Von Rad's famed question about the Tamara story, namely that the audience is never told of her marriage to either Judah or Shelah at the end of the story. (See GW Coats, "Widow's Rights: A Crux in the Structure of Genesis," *CBQ* 34 (1972) 461-66, esp. 464, and Gerhard Von Rad, *Genesis: A Commentary*. Philadelphia: Westminster (1961) 356.) Esther Marie Menn disagrees with the Judah-as-levir position on the basis that: a) Ancient Near Eastern Law may not predict the actions of Biblical characters; b) the children of the union are listed in Biblical genealogies as the sons of Judah rather than the sons of 'Er or 'Onan. (See Esther Marie Menn, *Judah and Tamar (Genesis 38) in Ancient Jewish Exegesis: Studies in Literary Form and Hermeneutics* (Supplements to the Journal for the Study of Judaism v.51). Leiden: Brill (1997) 60)

[114] Both *Targum Onqelos* and *Neophyti* split the clause in two: צדקה- she is innocent of the charges against her, and ממני- the child she bears is from me. (See James Kugel, *The ladder of Jacob : ancient interpretations of the biblical story of Jacob and his children*. Princeton University Press: Princeton (2006) 170-1, for further discussion.)

[115] Gen. 38:28-30; Ruth 4:18. Most significant, I Chronicles 1:3-4 lists Judah as having five sons, equating his two sons from Tamar to the three sons he fathered with his original wife.

[116] Ruth 4:12, 17 ff.

skirt of his son, and he began to lament and to supplicate before the Lord because of his transgression.

5. And we told him in a dream that it was forgiven him because he supplicated earnestly, and lamented, and did not again commit it.
6. And he received forgiveness because he turned from his sin and from his ignorance, for he transgressed greatly before our God; and every one that acts thus, everyone who lies with his mother-in-law, let them burn him with fire that he may burn therein, for there is uncleanness and pollution upon them, with fire let them burn them.
7. And do thou command the children of Israel that there be no uncleanness amongst them, for everyone who lies with his daughter-in-law or with his mother-in-law hath wrought uncleanness; with fire let them burn the man who has lain with her, and likewise the woman, and He will turn away wrath and punishment from Israel.
8. And unto Judah we said that his two sons had not lain with her, and for this reason his seed was established for a second generation, and would not be rooted out.

Once she sleeps with Judah, Tamar is no longer eligible to marry his son Shelah; Judah is forgiven only upon repentance; furthermore, the children born to Tamar and Judah remain part of the family only because Judah's own two sons had never actually consummated their respective marriages with Tamar. The protestations contained in this passage, asserting several contradictory facts at once, reflect difficulty with the seeming happy ending to a sinful arrangement.

The *Testament of Judah* too judges Tamar and Judah's intercourse as illicit:

> …and I could not slay her, because it was from the Lord. *For I said, Lest haply she did it in subtlety, and received the pledge from another woman: but I came near her no more till my death,* because I had done this abomination in all Israel. Moreover, they who were in the city said that there was no bride in the city, because she came from another place, and sat for a while in the gate, and she thought that no one knew that I had gone in to her.[117]

This source is bold: Judah only lets Tamar live because perhaps he doubts the evidence! Though several chapters later, Judah does recount his guilt at having "uncovered the covering of my

[117] *Testament of Judah* 12.108

son's shame" (ibid. 14), a clause patterned after the language of the Holiness Code (Lev. 18:15, 20:12). In sum, Second Temple literature does not present Tamar's actions as a loophole, and instead either ignores her role or hopes that she is not truly guilty.

While Second Temple literature damns the sexual act, the rabbis support it. Though the rabbis never refer to Judah and Tamar's as a levirate union, some clearly recognize their relationship as completely legal: in *bSotah* 10b, Samuel Sabba, father in-law of Samuel b. 'Ami says in the latter's name: Once he (=Judah) slept with her, he did not stop sleeping with her. In other words, they kept an ongoing physical (probably marital) relationship. Contrary to how others might read the phrase ולא יסף עוד לדעתה – "he did not continue to be intimate with her,[118]" R. Samuel b. 'Ami reads the term יסף as "stop", as it is used in II Samuel 14. A few lines later, R. Samuel b. Naḥmani quotes R. Jonathan that Tamar was the paragon of modesty in her father-in-law's home (prior to their incident), and was rewarded therefore with descendants who were kings and prophets. Though clearly R. Jonathan's comments refer to Tamar before ever donning her harlot's disguise, it is difficult to imagine that Tamar's actions with Judah were perceived by those same rabbis as true harlotry or adultery. Otherwise, her promiscuity should offset any rewards for modesty.[119]

Even those who do claim sexual impropriety here, perhaps even adultery, with regards to Tamar's actions, view her as a role model. In *bHorayot* 10b, 'Ulla wonders why Tamar acted wantonly (זנתה) and was rewarded with royal and prophetic lineage; in response R. Naḥman b.

[118] Gen. 38:26

[119] Other sources are not clear about the issue. For instance, the *stam* in *bMeg.* 25b explains that although one would have thought that the communal Torah reading which includes the section of Judah and Tamar should not be translated into Aramaic in synagogue, for fear of humiliating the character of Judah, it is nonetheless read due to his righteousness admission of guilt. It is striking that this source does not condemn Tamar's actions. However, it is unclear whether this source approves of Tamar's actions as a valid loophole or because despite breaking the law, she had a legitimate claim.

Yiṣḥaq (ostensibly[120]) learns from her the paradigm of, "A transgression performed for genuine ends is greater than a commandment performed for ignoble ends" - גדולה עבירה לשמה ממצוה שלא לשמה. This notion goes beyond accepting use of loopholes, as here the ends justify even completely illicit means.[121] Again, no mention of creative circumvention – just sin, but for the right means.

Genesis 20 – Leaving Out Information

Genesis 20 records a declaration that is misleading even if technically true. The second time Abraham asserts that his wife Sarah is actually his sister in order to protect himself from suitors' harmful intentions Abraham explains to Abimelekh that Sarah actually *is* his sister. After admitting that his primary motivation was to save himself from death in a godless environment, he further explains: And moreover she is indeed my sister, the daughter of my father, but not the daughter of my mother; and so she became my wife. (12) This is a strange argument. Even if she is technically his sister, Abimelekh should still be upset.[122] Yet, Abimelekh accepts Abraham's explanation. Perhaps these passages suggest that the two arguments in combination – both fear of death and the partial truth of their siblinghood - mutually reinforce each other and somehow answer the accusation against Abraham sufficiently. Indeed, as opposed to Pharaoh who is seen as simply kicking Abraham out when the same trick is foiled in Genesis 12:18-20 (where, admittedly, Abraham offers no excuse whatsoever), Abimelekh accepts Abraham's argument.[123]

[120] R. Naḥman does not explicitly reference Tamar in his remarks; the *stam* places his remarks in that context.

[121] For an analysis of this concept and its scope within Jewish law in the Talmud and throughout history, see Aharon Lichtenstein עבירה לשמה- הרהורים בהלכה ובמחשב, in Ed. H. Deutsch and M. Ben-Sasson, בין אדם לעצמו ולזולתו: האחר, Israel: Yedi'ot Aḥaronot (2001) 99-125; Nahum Rakover, "Violation of the Law in Order to Preserve It" in Eds. B.S. Jackson and S. M. Passamaneck, *JLAS* 6: *The Jerusalem 1990 Conference Volume* (1990)

[122] Significantly, there is a Hittite treaty which mentions a similar case of wife-sister and uses similar terminology (EA Speiser, *The Anchor Bible*: Genesis, Doubleday: New York, (1964) 149

After inviting Abraham to remain in his land, he tells Sarah: And unto Sarah he said: 'Behold, I have given thy *brother* a thousand pieces of silver; behold, it is for thee a covering of the eyes to all that are with thee; and before all men thou art righted.' (16) When speaking to Sarah, he calls Abraham "thy brother."[124]

According to E.A. Speiser this reflects the phenomenon of the sister-wife in Nuzi culture. He bases this on two parallel contracts, one in which a woman is given to a man as his wife, and the second, where she is given to that same man as a sister. "It follows," he says, "that a wife could have simultaneously the status of sister."[125] Samuel Greengus, however, disagrees, reading the same two contracts as a case of a mistaken draft that was not discarded and the true draft. Based on other sources regarding adoption as a sister, he claims that the sister was a designation for older women or manumitted slaves who had no family to provide for them. The adoptive brother would provide. For Greengus, the tale remains enigmatic.[126]

Far from being uncomfortable with Abraham's excuse, the Babylonian Talmud explains that Sarah was not even his half-sister, as the plain Biblical text suggests: she is his fraternal niece. Thus, Abraham's excuse to Abimelekh is that much weaker: we are related through my brother born of the same father.[127] Gen. Rabbah[128] indicates that Abraham speaks in

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[123]Tzvi Novick has pointed out the parallel between Abimelekh's "rhetoric of self-justification" and Abraham's. Both employ the term גם, also (Gen. 20:4-5,11-13). While Novick suggests that this is an indication that Abimelekh's rhetoric has turned "infectious," perhaps it also indicates a subtle critique of Abraham. (Tzvi Novick, "Almost, at Times, the Fool: Abimelekh and Genesis 20," *Prooftexts* 24 (2004) 280.)

[124] While it is possible that he simply is not letting on to Sarah that he knows the truth, or perhaps he is even being facetious, ours is an equally likely reading, given his positive treatment of Abraham and Sarah..

[125] E.A. Speiser, "The Wife-Sister Motif in the Patriarchal Narratives," *Biblical and Other Studies,* Ed. A. Altmann (1963) 19.

[126] Samuel Greengus, "Sisterhood Adoption at Nuzi and the 'Wife-Sister' in Genesis," *HUCA* 46 (1975) 5-31

[127] *bSan.* 58b

[128] Genesis Rabbah (Albeck) *Vayera* 52

Abimelekh's own cultural idiom rather than going into the specifics of Sarah actually being his niece:

> ויאמר אבימלך אל אברהם מה ראית וגו' וגם אמנה אחתי בת אבי וגו' אמר להן בשיטתן השיבן שבת אב מותרת להן ובת אם אסורה לפיכך השיבן כמנהגן
>
> And Abimelekh said to Abraham: 'Why did you, etc.? And she is truly my sister, the daughter of my father, etc.' He spoke to them according to their rule. He responded that one's paternal half-sister is permissible in marriage, though one's maternal half-sister is not. Therefore, he responded to them according to their own custom.

Abraham is aware that saying that Sarah is his sister leaves open the possibility that they are also married, as the Philistines allowed for marriage between a man and his paternal sister. In an effort to shift the emphasis to Abimelekh's actions, *bBava Qamma* 92a ignores any sense of Abraham's dishonesty and instead takes Abimelekh to task for not knowing better than to first ask a guest about the woman traveling with him; he should instead have offered food and drink! In this argument, the rabbis clearly see Abimelekh in the wrong and Abraham in the right. They do not, however, assert any precedent based on his clever word choice.

Exodus 2- Baby Moses on the Nile River

At a time when male Israelite babies are being drowned in the Nile River by Pharaoh's edict,[129] baby Moses' mother places him into the Nile in a basket. Pharaoh's own daughter finds him and raises him as her own. Is the salvation of baby Moses based on a loophole? William Propp writes:

> Our story is laced with ironies, both comic and tragic. Moses' mother complies with the decree of drowning - in a fashion. Reinterpreting the verb *hishlikh* 'throw,' she gently places Moses in a vessel and sets im among the rushes. Pharaoh's law, moreover, failed to say that a baby, once deposited in the Nile might not be extracted by another party [130]

[129] Ex. 1:22

[130] William H.C. Propp, *Anchor Bible, Exodus 1-8: A New Translation with Introduction and Commentary*. New York Doubleday (1999) 154. Propp also compares Moses in the ark to other ancient Near Eastern "floating

Pharaoh had decreed that baby boys be "thrown" into the Nile; Moses' mother places[131] him[132] there. Pharaoh's decree assumed that the babies would die in the Nile, but what of children who survive the Nile?

The rabbinic material goes in a different direction entirely, actually indicating that placing Moses into the basket *was* the equivalent of throwing him into the Nile. This was not a trick; it was simply the most humane way of doing the deed:

בבלי מגילה יד.

ותקח מרים הנביאה אחות אהרן ולא אחות משה אמר ר' נחמן אמר רב שהיתה מתנבאה כשהיא אחות אהרן ואומרת עתידה אמי שתלד בן שיושיע את ישראל ובשעה שנולד נתמלא כל הבית כולו אורה עמד אביה ונשקה על ראשה אמר לה בתי נתקיימה נבואתך וכיון שהשליכוהו ליאור עמד אביה וטפחה על ראשה ואמר לה בתי היכן נבואתך היינו דכתיב ותתצב אחותו מרחוק לדעה לדעת מה יהא בסוף נבואתה.

And Miriam the prophetess, the sister of Aaron [*took the timbrel in her hand*] (Ex. 15:20) – And not the sister of Moses? R. Naḥman said in the name of Rav: She prophesied [already] when she was only the sister of Aaron, and she would say, " My mother will birth a son who will save Israel." And when he was born, the entire house filled with light. Her father kissed her on her head and said to her, "My daughter, your prophecy has been fulfilled." And when *they threw him into the Nile*, her father hit her on her head and said to her, "My daughter, where is your prophecy?" That is what is meant when it is written, "And his sister stood from afar do know," to know what would become of her prophecy.

Contrary to what many children are taught about this story in primary school, Moses' mother does not leave Miriam to stand guard; rather, Jokhebed herself had *thrown him into the Nile* (apparently along with her husband) and walks away in defeat, and Miriam remains to see

foundling" stories, indicating another possible motive for this motif. Herodotus (*Histories 4.154*) tells a comparable tale of Themison: commanded to throw a princess into the seas, she merely immerses her briefly and thereby saves her life.

[131] Ex. 2:3 – the Hebrew verb ותשם is used.

[132] Herodotus (*Histories 4.154*) tells a comparable tale of on Themison: commanded to throw a princess into the seas, she merely immerses her briefly and thereby saves her life. (ibid.)

what might happen. This was far from a well-hatched plan. It is a capitulation to Pharaoh's decree.

The rabbis place the same perspective in the mouths of the handmaidens accompanying Pharaoh's daughter:

בבלי סוטה יב:

ותרא את התיבה בתוך הסוף כיון דחזו דקא בעו לאצולי למשה אמרו לה גבירתנו מנהגו של עולם מלך בשר ודם גוזר גזירה אם כל העולם כולו אין מקיימין אותה בניו ובני ביתו מקיימין אותה ואת עוברת על גזירת אביך בא גבריאל וחבטן בקרקע.

And she saw the basket in the rush: When they (=her maids) saw that they wished to save Moses, they said to her, "Our Mistress, generally when a king makes a decree, even if the whole world disobeys it, at the very least his children and members of his household uphold it, yet you are violating your father's decree?!" [The angel] Gabriel came and pushed them down into the ground.

It is only later, medieval collections that suggest a potential loophole: placing Moses in the Nile River is a deliberate tactic to throw Egyptian astrologers off his scent. And indeed, the *midrash* relates how well this strategy works:

שמות רבה (שנאן) פרשת שמות פרשה א

ולמה השליכתו ביאור ?שיהו חושבים האצטגנינין שכבר הושלך במים ולא יחפשו אחריו .

And why did she *throw* him into the Nile? So that the astrologers would think that he had been thrown into the river and would not search for him.

שמות רבה (שנאן) פרשת שמות פרשה א

מילדי העברים זה (שמות ב') מהו זה ?זה נופל ליאור .שכיון שהפילו ליאור למשה בטלה הגזרה , כההיא דאמר ר 'אלעזר :וכי יאמרו אליכם דרשו אל האבות ואל הידענים המצפצפים והמהגים (ישעיהו ח) ,צופים ואינם יודעים מה הוגים .ראו שמושיעם של ישראל במים נדון ,עמדו וגזרו :כל הבן הילוד היארה תשליכהו (שמות א') .כיון שהושלך משה ליאור אמרו :כבר הושלך מושיען במים . מיד בטלו גזירתם .והם אינם יודעים ,שעל מי מריבה הוא לוקה...

From the children of the Hebrews is this: What is "this"? "This" refers to the Nile, that once Moses was thrown into the Nile, the decree ended. As R. Elazar said: "And when they say to you: 'Seek the ghosts and the familiar spirits that chirp and mutter" – they chirp, yet they do not know what they mutter: They saw that the savior of Israel would be judged with water, so they decreed: Any son born, thrown hi into the Nile. Once Moses was thrown into the Nile, they said: their savior has already been thrown into the water. Immediately, they ended their decree. But they did not know that he would be punished for the waters of Meribah…

Once Moses was in the Nile, in one form or another, the astrologers thought he was dead and the threat of an Israelite savior was dead letter. It seems that Jokhebed trick had worked. But once again, this material is post-amoraic. The earlier rabbis took no interest in this loophole. There is even one opinion that suggests that Jokhebed placed Moses in a different body of water, perhaps simply in an effort to hide him.[133]

Imagined "Biblical" Loopholes

Though the rabbis themselves did not consciously use Biblical[134] loopholes as their model for legal loopholes, they did project use of such legal gaps upon Biblical characters. Most famously, David is said never to have truly sinned with Bathsheba because he was technically divorced at the time: The Book of II Samuel tells the story of King David spotting the beautiful Bathsheba bathing on her roof and taking her to bed despite her marriage to Uriah, a soldier away at battle. Following their affair, David invites Uriah back from battle and tells him to go home to consort with his wife. Uriah refuses, sleeping elsewhere instead, and is sent back to war, where David has sent a courier with the message to the general to place Uriah on the front lines to be killed. The outcome of the story involves David's marriage to Bathsheba, the death of their bastard child, a sharp scolding by the prophet Nathan and ultimately Bathsheba birthing Solomon, David's eventual heir. Yet, the rabbis refuse to accept David's adulterous relationship at face value, perhaps especially because of its ramifications for Solomon's genetic provenance:

בבלי שבת נו.
אמר רבי שמואל בר נחמני אמר רבי יונתן :כל האומר דוד
חטא אינו אלא טועה ,שנאמר דויהי דוד לכל דרכיו משכיל וה 'עמו וגו ,'אפשר חטא בא לידו ושכינה

[133] R. Samuel b. Naḥmani, *bSotah* 12a

[134] The potential balance to the Biblical preference for the letter of the law is found in the Prophetic books of the Bible in which the Prophets scold the people for remaining loyal to the letter of ritual law while ignoring the most important (legal and) moral values, such as courtroom justice and the sanctity of life. However, this does not necessarily take away from any of the legalism involved in maintaining contracts entered in a state of ignorance.

עמו ?אלא מה אני מקיים מדוע בזית את דבר ה'
לעשות הרע שביקש לעשות ולא עשה .אמר רב :רבי דאתי מדוד מהפך
ודריש בזכותיה דדוד ;מדוע בזית את דבר ה' לעשות הרע רבי אומר :משונה רעה
זו מכל רעות שבתורה ,שכל
רעות שבתורה כתיב בהו ויעש וכאן כתיב לעשות שביקש לעשות ולא עשה .ואת אוריה החתי הכית
בחרב - שהיה לך לדונו בסנהדרין ולא דנת .ואת אשתו לקחת לך לאשה
ליקוחין יש לך בה .דאמר רבי שמואל בר נחמני אמר רבי יונתן :כל היוצא למלחמת בית דוד כותב גט
כריתות לאשתו ,שנאמר ואת עשרת חריצי החלב האלה תביא
לשר האלף ואת אחיך תפקד לשלום ואת ערבתם תקח
מאי ערבתם ? תני רב יוסף :דברים המעורבים בינו לבינה

R. Samuel b. Naḥmani said in the name of R. Jonathan: All who say that David sinned is mistaken, as it is said: And David was successful in all ways, and God was with him." Is it possible that sin happened upon David and the Divine Presence was with him? So how can I uphold, "Why have you scorned the word of God to do bad"? Rabbi says: This "bad" is different from all other [uses of the term] "bad" in the Torah, for all [instances of] "bad" in the Torah are delineated by "And he did," yet here it is written "to do" – thus indicating that he wanted to do bad, but he did not do bad. "And you killed Uriah the Hittite by the sword"? That you should have judged him. "And you took his wife for yourself as a wife"? Indicating that your marriage to her is valid. As R. Samuel b. Naḥmani said in the name of R. Jonathan: All who went out to war in David's house wrote a writ of divorce to his wife, as it is said: "And take these ten cheeses to the general of the thousands, and bring greetings to your brothers, and take their pledge. What is "their pledge"? Rabbi Joseph said: That which is involved between him and her.

The passage protects David at every turn: Bathsheba was not really married, though this is unsubstantiated by the text. Uriah was deserving of death for not going home when David instructed him to do so, though the Bible does not describe the instructions as any sort of true royal command. But in order to save David's face, and perhaps to square David's activities with rabbinic laws regarding adultery, the rabbis find loopholes. Never mind Nathan's moralizing call, the rabbis find loopholes. Though David's actions may still have been inappropriate, they were not technically sinful.

A second pertinent example relates to an imagined conversation between Abraham and God in which Abraham accuses the Divine of using an illegitimate loophole to destroy Sodom and Gomorrah:

בראשית רבה (וילנא) פרשת לך לך פרשה לט -בראשית רבה (וילנא) פרשת וירא פרשה מט
אמר ר 'אדא נשבעת שאין אתה מביא מבול לעולם מה את מערים על השבועה מבול של מים אין אתה מביא ,מבול של אש את מביא אם כן לא יצאת ידי שבועה
R. Aḥa said: You swore and said that you would not bring a flood to the world – why are You acting with cunning against Your oath? It is a wonder: You may not bring a flood of water, but You may bring a flood of fire? If so, You have not fulfilled Your oath!

Abraham refuses to read God's post-deluvian oath of Genesis 9:15 narrowly. This example is significant, as Abraham rejects God's use of a loophole! In the end, the Bible relates that Sodom is indeed destroyed in a flood of fire (Gen. 19:24), but it is significant that the rabbis were against this loophole. It is significant because a rigidly formalistic system like that of the Ancient Near East would never have rejected a loophole. By definition, following the letter of the law is following the law.[135]

In a third case, Hannah of I Samuel bargains with God for a child, to the point of blackmail:

בבלי ברכות לא.
אם ראה תראה,אמר רבי אלעזר :אמרה חנה לפני הקדוש ברוך הוא :רבונו של עולם ,אם ראה מוטב ואם לאו תראה ,אלך ואסתתר בפני אלקנה בעלי ,וכיון דמסתתרנא משקו לי מי סוטה ,ואי אתה עושה תורתך פלסתר,שנאמר :ונקתה ונזרעה זרע.
If a seeing You shall see: R. Elazar said: Hannah said before God, "Master of the universe, if a seeing, good, and if not, You shall see: I shall go and seclude myself [with another man] before my husband Elqanah. And when I seclude myself, they will make me drink the *sotah* waters, and You would not wish to make Your Torah a joke, would You? As it says [regarding the innocently accused *sotah*], "And she shall be cleared, and she shall conceive a child."

R. Elazar turns Hannah's ostensibly innocent supplication into blackmail. The rabbis suggest that Ḥannah has read her Bible; she knows that the wrongly accused *sotah* is promised children as compensation for her ordeal. Taking advantage of this promise, Hannah threatens to turn herself

[135] Recall our theory above regarding the daughters of Zelopheḥad, that perhaps God may not use loopholes, while people may.

into a *sotah*. The *sugya* cites an objection by R. ʻAqiba from elsewhere, ultimately stepping back from R. Elazar's fanciful story:

> הניחא למאן דאמר אם היתה עקרה נפקדת שפיר ,אלא למאן דאמר אם היתה יולדת בצער יולדת בריו ח ,נקבות - יולדת זכרים,שחורים - יולדת לבנים ,קצרים -יולדת ארוכים ,מאי איכא למימר ?דתניא : ונקתה
> ונזרעה זרע מלמד ,שאם היתה עקרה נפקדת ,דברי רבי ישמעאל ;אמר ליה רבי עקיבא :אם כן ,ילכו כל העקרות כולן ויסתתרו ,וזו שלא קלקלה נפקדת !אלא :מלמד שאם היתה יולדת בצער - יולדת בר יוח ,קצרים - יולדת ארוכים .שחורים - יולדת לבנים ,אחד - יולדת שנים .מאי אם ראה תראה - דברה תורה כלשון בני אדם .
>
> This is acceptable according to the one who says that if the [wrong accused *sotah*] was barren, she would conceive, but according to the one who says that if the [wrongly accused *sotah*] had difficult labors she would have easier labors; if she had birthed girls, she would birth boys, if she had birthed black [babies], she would birth white [babies], what is there to so? As it was taught: And she shall be cleared, and she shall conceive a child – this teaches that if she was barren, she would conceive, according to R. Ishmael. R. Aqiba said to him, If so, let all barren women go and seclude themselves, and she who did not commit adultery would conceive! Rather, it teaches that had she birthed in pain, she would birth more easily, had she birthed short children, she would birth taller children, had she birthed black children, she would birth white children, had she birthed singletons, she would birth twins. So what is "A seeing you shall see"? The Torah speaks in human idiom.

R. Elazar imagines Hannah's shrewd use of a loophole in the *sotah* law: the absence of a stipulation preventing any woman from getting herself named a *sotah*. Though not discussing Hannah directly, R. Aqiba rightly notes that the hole is too gaping. It simply cannot be that the verse would offer such a shortcut. Hence, he claims that the promise for the innocent *sotah* is not to have children, but to change the nature of the labor and the children that she is meant to have. R. Eliezer and R. Aqiva see the potential loopholes and differ as to how to deal with them.

> **בראשית רבה (תיאודור-אלבק) פרשת נח פרשה לא**
> קץ כל בשר בא לפני] הגיע זמנם להקצץ ,הגיע זמנם להיעשות בוסר ,הגיע קץ קטיגוריה שלהם ,כל כך למה כי מלאה הארץ חמס ,אי זה הוא חמס ואי זה הוא גזל ,אמר ר 'חנינא חמס שוה פרוטה גזל פחות משווה פרוטה ,וכך היו אנשי דור המבול עושים היה אחד מהם מוציא קופתו מליאה תורמוסין , בא זה ונוטל פחות משווה פרוטה ובא כל אחד ואחד נוטל פחות משווה פרוטה שלא יהא יכול להוציא ממנו בדין ,אמר הקב"ה אתם עשיתם שלא כשורה אף אני אעשה עמכם שלא כשורה הה"ד הלא נסע יתרם בם]ימותו ולא בחכמה (איוב ד:כא) בלא חכמת התורה ,מבקר לערב יכתו מבלי משים לנצח

יאבדו (שם שם איוב ד:כ) אין משים אלא דין היך דאת אמר ואלה המשפטים אשר תשים לפניהם (שמות כא:א)

Because the earth is filled with violence (ḥamas) through them (Gen. 6:13). What is *ḥamas* (violence) and what is *gezel* (robbery)? Said R. Ḥanina: *Ḥamas* (violence) refers to what is worth a *perutah*. And this is what the people of the age of the flood used to do. When a man brought out a basket full of lupines [for sale], one would come and seize less than a *perutah*'s worth, and then everyone would come and seize less than a *perutah*'s worth, so that he hand no redress at law. Whereupon, the Holy One, blessed be He, said: "You have acted improperly (*she-lo ka-shurah*), so I will deal with you improperly (*she-lo ka-shurah*)."[136]

This final example is fascinating in that it takes notice of how unfair the use of loopholes can be and yet how difficult it is for an institutionalized legal system to prosecute such dodges. In this example, people would steal the worth of less than the lowest denomination of coinage to avoid prosecution. (Presumably the rabbis are projecting their own law interpretation that theft of less than a *perutah* is not covered by the prohibition not to steal.[137]) The rabbis are uncomfortable with the idea that one could use such a loophole to commit injustice, yet human courts were powerless. Consequently, they suggest, God Godself exacts the punishment.[138]

These imagined loopholes by the rabbis do not stem from a close reading of the Biblical text. Though the rabbis seem to anchor their suggestions in the Biblical text, the text is more a springboard for rabbinic ideas than as the reservoir from which the rabbis draw those ideas.

[136] Translation by Aaron Kirschenbaum, *Equity in Jewish law: Halakhic perspectives in law: formalism and flexibility in Jewish civil law*. Hoboken: Ktav Publishing House (1991) 22-23

[137] *bSan.* 57a. According to rabbinic law, stealing less than a *perutah* may still be prohibited, though it may not be punishable.

[138] In the rabbinic worldview, this concept is known as חייב בדיני שמים, bearing obligation in the Heavenly court, even when human courts do not prosecute. (*bBQ* 55b-56a; *tBQ* chapter 6; *tShevuot* chapter 3/*yBQ* 6:1, 5b)

Summary: Bible Does Not Shape Rabbinic Loopholes

Jane Kanarek has recently shown that even Biblical narratives served as,[139] or were presented by ancient rabbinic texts as having served as,[140] a legitimate basis for law in certain cases – e.g., the binding of Isaac in Genesis 22 serving as a basis for rules of ritual slaughter. She argues that this is merely exemplary of "the ways in which stories lie behind and shape norms" in general.[141] Yet our summary of Biblical loopholes and rabbinic responses reveals that the rabbis did not develop their approach to legal circumvention by looking into the Bible. Most often, they comment on everything in a narrative but the loophole aspect, or they efface the loophole by calling it a sin (as in the case of Tamar) or an exception (as in the case of the daughters of Zelopheḥad marrying within their tribe). Even when they mimic the very same form of loophole when discussing the very same story, as in the example of women and the tribe of Benjamin in the Babylonian Talmud, the rabbis do not acknowledge it. Likewise, they do not cite Biblical loopholes as precedent for rabbinic loopholes. On the contrary, they offer Biblical characters new loopholes that the rabbis themselves devise!

[139] For the debate as to whether the law came first or the interpretation of the Biblical source actually came first, see: David Weiss Halivni, *Midrash, Mishnah, and Gemara: The Jewish Predilection for Justified Law*. Cambridge, MA: Harvard University Press (1986); Jacob Z. Lauterbach, *Midrash and Mishnah: A Study in the Early History of the Halakhah, Rabbinic Essay*. New York: Ktav (1973) 163-256; and E.E. Urbach, "Ha-derashah ke-Yesod ha-halakhah u-vayat ha-soferim," *Me-olamam she hakhamim: kovets mehkarim.* Jerusalem: Magnes Press (1988) 166-82.

[140] Jane Kanarek, "He took the knife: biblical narrative and the formation of rabbinic law," *AJS Review* 34,1 (2010) 80 n. 49. (For a parallel discussion regarding halakhic *midrashim*, see Jay M. Harris, *How Do We Know This? Midrash and the Fragmentation of Modern Judaism.* Albany: State University of New York Press (1995) 3-5)

[141] See Robert Cover's storied article, "*Nomos and Narrative"* in Eds. Martha Minow, Michael Ryan, and Austin Sarat, *Narrative, Violence, and the Law: The Essays of Robert Cover*. Ann Arbor: University of Michigan Press (1992).

A Society Governed by Formalism[142]

This act of rabbinic omission is striking. The fact that the Biblical examples are taken from legal narratives, though, somewhat explains the gap. As Barry Wimpfheimer has noted (with regards to talmudic legal narratives):

> While legal statutes are generally articulated in present time in order to evoke a universality of temporal application, the legal narratives out of which they are drawn construct their tales using a diachronic sequencing that allows for character and plot development over time…If rabbinic legal codes mark issues of law through binary decisions tantamount to black and white, the legal narrative represents a far richer palette, allowing not only for legal shades of gray, but for a wide range of possibilities. These differences between legal narratives and other legal texts all for different modes of reading, indeed for a broader legal discourse…[143]

Given that stories are not to be read in a black and white fashion, it is difficult to extract clear legal precedent for law, especially the kind that loopholes reflect, from such material. And indeed, the rabbis do more often focus on the more dramatic elements of these stories – God's aid to Jacob, Benjamin's readmission to the body politic of Israel, Abimelekh's evil, Solomon's murder of his own teacher, etc., etc., rather than bottom line legal precedent.

But there is also a historically contextual explanation, one which related to the evolution of legal thought in the ancient world. David Daube theorized that Biblical dodges are part and parcel of a genuinely uncompromising formalism, emphasizing the significance of the letter of

[142] What we mean by formalism here is HLA Hart's definition thereof: "he has a verbal description which he can use to pick out what he must do in future and when he must do it. He has only to recognize instances of clear verbal terms, to 'subsume' particular facts under general classificatory heads and raw a simple syllogistic conclusion. He is not faced with the alternative of choosing at his peril or seeking further authoritative guidance. He has a rule which he can apply by himself to himself." HLA Hart, *The Concept of Law*. Oxford: Clarendon Press (1965) 125-6. Hart actually questions whether language can ever be so clear-cut, and in the following chapter, we will offer less mechanistic approaches to formalism in the wake of his critique.

[143] Barry Scott Wimpfheimer, *Narrating the Law: A Poetics of Talmudic Legal Stories*. Philadelphia: University of Pennsylvania Press (2011) 27

the law even at the expense of its spirit.[144] Whether in cases of contracts or oaths, a person may think s/he is agreeing to something based on certain facts, only to find out later that those facts are not true, and yet the contract stands.[145] This is why, for example, the Israelites, according to the plain meaning of the Bible were required to uphold their treaty with the Gibeonites, though it had been made based on false information.[146] It is why Jacob and Laban's agreement that Jacob would take only the spotted animals was upheld, though Jacob could not have anticipated that Laban would remove the spotted animals, and likewise Laban could not have anticipated Jacob's method for causing the flock to bear a multitude of such animals. It also explains some of the most perplexing ploys in the book of Genesis. Isaac's blessing of Jacob was done under false pretenses, and yet it is deemed valid.[147] He cannot take it away. Later, Jacob's marriage to Leah is deemed valid, again done without full knowledge of Jacob.[148] David Daube likewise argues that Esau's sale of the birthright was just such a case: he sold his birthright in exchange for what he thought was life-sustaining blood broth, and though it was not, the sale was still binding.[149] As Raymond Westbrook writes:

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[144] See Andrew Huxley, "Shylock's Bad Karma: The Buddhist Approach To Law," *Law and Critique* VII:2 (1996) in which Huxley argues that this is essentially a western phenomenon that did not plague the far east.

[145] David Daube, "Summum Ius Summa Iniuria," *Studies in Biblical Law*, David Daube. Cambridge: Cambridge University Press (1947) 190.

[146] Contrary to the talmudic view cited above that would relieve the Israelites of such obligation because of the false pretenses.

[147] Raymond Westbrook suggests that the validity of the blessing is based on the payment that Isaac had received for it, namely the meat. (Raymond Westbrook, "Good as His Word: Jacob Manipulates Justice," *Biblical Archaeology Review* 35:3 (2009) 55)

[148] Westbrook suggests that receiving conjugal privilege with Leah is what gives the legal obligation its force. He bases this on Ex. 22:16-17 (Westbrook, "Good as His Word")

[149] Daube, "Summum," 198. Westbrook here suggests that both the oath taken by Esau and the payment of the stew make the contract binding. (Westbrook, "Good as His Word")

> A legal obligation is not the same as a moral obligation. There is a formality in the law, especially the law of contracts, which sets it apart from the dictates of justice. The patriarchal narratives in Genesis derive much of their dramatic force – not to mention their instructive power – from this tension between legal and moral standards. That is one reason for their timeless appeal. The chasm between legal and moral responsibility has never been fully bridged. Legal forms, in the hands of the unscrupulous, can be an instrument of injustice in ancient times as today.[150]

The phenomenon continues even beyond the Pentateuch: Jephtah is meant to carry out his oath to sacrifice his daughter despite the fact that he did not mean for that to happen[151] at the time of his oath (Judges 11:30-40)[152]; Jonathan son of Saul violates an oath that Saul had foresworn his soldiers not to eat a morsel of food on the day of the great battle against the Philistines upon pain of death (I Samuel 14:24-28); and Saul plans to put Jonathan to death for it, though Jonathan had not known of the oath before he ate[153] (I Samuel 14:44); as David is being actively being pursued by Saul, despite the prophet Samuel's promise that Saul's reign would end and David's would begin, David still believes that he may not kill the "anointed of God with immunity."[154] Though the anointed of God is no longer behaving as such, and has even been rejected, his legal status remains, and he is untouchable.

Granted, the Bible does, at least in the Genesis narratives, portray a measure for measure punishment for those who have manipulated the law to their own benefit: the person using the law for his or her own purposes getting tripped up by his or her very own methods. Jacob dresses

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[150] Westbrook, "Good as His Word"

[151] Moshe Reiss makes the point that Jephtah specified that he would sacrifice something that came out of the "doors of my house (Judges 11:31)", which by definition implies a human being, as animals are not kept in the house. (Moshe Reiss, "Jephthah's Daughter," *Jewish Bible Quarterly* 37,1 (2009) 57)

[152] It is the rabbis who inject the possibility of nullifying the vow. See Gen. Rabbah 60:3.

[153] Though Saul's men prevent him from doing so.

[154] I Samuel 16:9

as Esau to trick his father into blessing, and so Leah dresses as Rachel to trick Jacob into marriage.[155] But regardless, the letter of the law triumphs:[156]

> It (=the Bible) is rooted in an epoch when the alternative to chaos was a body of inflexible norms on which, if you were shrewd and unscrupulous, you might easily take your stand while defeating their purpose. [157] As the slogan has it: *summum ius summa iniuria*, 'utmost law, utmost injustice'. [158]The community, though realizing what was going on, was powerless to stop it: that would have required a generally more advanced state of things.[159]

The rabbis, however, were not prone to this rigidly formalistic view of the law. Thus, the Bible (and Ancient Near Eastern law in general) does not offer precedent for how loopholes function in law. In the following chapter we will argue that instead, the rabbis were influenced on this score by their Graeco-Roman milieu, in which rhetoricians and jurists clearly recognized

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[155] As Westbrook points out, Jacob took advantage of Isaac's blindness, and Laban took advantage of Jacob's "blindness," namely his inability to see who he was sleeping with under cover of darkness. (Westbrook, "Good as His Word")

[156] Daube, "Fraud on Law for Fraud on Law," *Journal of Legal Studies* Vol. 1, No 1 (Spring 1981) 58. This is an appropriate place to say a few words the Prophetic books which deal with ritualism in a different sense. The prophetic ethos in the Bible has been, for good reason, associated with harangues against hypocrisy and distinction between the letter of the law and the spirit of the law in general. However, the guise that this distinction takes on within the section of Tanakh labeled Prophets points to following the letter of the ritual law while ignoring laws about justice and fairness, also laws, but representative of the spirit of God's command. It does not discuss loopholes the way that we have defined them – namely finding a technicality in order to evade a rule or commitment.

[157] Boaz Cohen locates a few terms that he believes correspond to equity, as opposed to strict law. He suggests, for instance, that the terms מישור (Isa. 11:4; Mal. 2:6 *et al.*) and משפט אמת (Ps. 19:10; 18:8) refer to the notion of equity, as in law that conforms to morality rather than simply a strict literal reading. Whether his reading is anachronistic is up for debate. Regardless, it does not impact the fact that contracts stood and loopholes were accepted, whether just or not. (See Boaz Cohen, "Letter and Spirit,"48-49)

[158] The later prophets were known to have argued the importance of ethics too. See Isaiah, Amos, *et al*. However, their words must be read as a scourge against prioritizing ritual between humanity and God while failing to deliver justice to, or behave ethically towards, other human beings. This is not a critique of ritual, but a critique of an imbalanced religious commitment.

[159] David Daube, *"Fraud on Law,"* 59. The rabbis too sometimes seek out that "measure for measure" type compensation in biblical stories – because one tricked, one gets tricked. Examples can be found regarding Tamar's duping of Judah as punishment for his tricking his father into thinking that Joseph had been mauled by a wild animal. Genesis Rabbah (Vilna) *Vayeshev* 85. In fact, here it the use of kid goats to accomplish the deceit in both instances – Joseph's brothers, including Judah, present Joseph's torn garment dipped in goats blood, and Tamar takes Judah's staff and signet ring as collateral for the kid goats that he must pay her in exchange for sleeping with her. It is through this collateral that Tamar actually identifies Judah as the father of her otherwise bastard child.

both the spirit and the letter of the law; the rabbis shared those dual concerns. Thus, not every commitment would be deemed binding if agreed to under false pretense (as evidenced by concepts such as nullification of vows,[160] mistaken transactions,[161] advance notice of duress (which prevents any later agreement from taking hold[162]) and more), nor would every loophole will be accepted[163]. Whether downplaying Biblical loopholes was a conscious choice or a subconscious move away from what was seen as too mechanistic, there are important differences between rabbinic loopholes and Biblical loopholes.

Wisdom Literature

Despite our protestations about the rabbinic conception of loopholes differing from the Biblical conception, the rabbis did adopt something incredibly significant from the Bible with regards to legal dodges, namely, terminology.

Wisdom Literature contains eleven words for wisdom, each with distinct connotations. Michael V. Fox discerns two terms for wisdom which dominate the Book of Proverbs in particular, both of which are relevant to loopholes a) *mezimmah*, shrewdness, and b) ʻ*ormah*, cunning.[164] The primary meaning of *mezimmah* is, "hidden, private thinking," while "the notions

[160] *bHag*. 10a

[161] *bGittin* 14a

[162] *bBB* 40a

[163] As evidenced by Abraham's midrashic accusation against God above, as well as the explanation for the generation of the flood

[164] There is a third term that is potentially relevant as well. The term *taḥbulot*, plans, Fox suggests sometimes refers to guidance, as in the navigation through life that is the metaphorical equivalent of the *ḥovel*, sailor who navigates the seas, while at other times "design" or "plan" is a better translation. Sir. 37:17 suggests that such *taḥbulot* may be used for good or evil, while Proverbs 12:5b suggests that *taḥbulot* are evil. (Michael V. Fox, *The Anchor Bible* Vol. 18a, Proverbs 1-9, Doubleday: New York (2000), 37.) We do not include *taḥbulot*, as the term itself does not necessarily imply anything secretive or shrewd.

of planning and scheming are extensions of the primary sense."[165] In some passages within Proverbs – *inter alia*, 12:2, 14:17, 24:8; Ps 10:2; 21:12; 37:7[166] - the term bears a negative connotation, referring to mischievous plans. For instance, Proverbs 24:8 explains מחשב להרע לו בעל מזמות יקראו– "He that devises to do evil, men shall call him a mischievous man." Elsewhere in Proverbs, however – *inter alia*, 2:11, 5:2, 8:12[167] - it carries the positive connotation of discretion.[168] To illustrate, Proverbs 5, begins בני לחכמתי הקשיבה לתבונתי הט אזנך לשמר מזמות ודעת שפתיך ינצורו- - "My son, attend unto my wisdom, incline your ear to my understanding; that you ay preserve discretion and that your lips may keep knowledge."

Mezimmah differs in its variability (within Proverbs) from '*ormah*. The term *'ormah* maintains a consistently affirmative character throughout the Book of Proverbs,[169] though it is used negatively elsewhere in the Bible - e.g., Genesis 3:1, regarding the cunning serpent; Exodus 21:14, regarding a premeditative murderer[170]; Joshua 9:4, about the sly Gibeonites; and Job 5:13, (variant form of עורם) about those who cause their own downfall through craftiness.[171] In contrast to such examples, the stated goal of the Wisdom character in the Book of Proverbs is to

[165] Ibid.

[166] Also Sir. 44.4,

[167] Also Job 42:2

[168] Michael V. Fox, *Anchor Bible* Vol. 18a, Proverbs 1-9, Doubleday: New York, (2000), 34

[169] Prov. 8:5a, 12; 12:16b, 23; 13:16a; 14:8a, 15b, 18b; 15:5; 17:2; 19:25a; 22:3; 27:12; LXX renders *'ormah* as πανουργία which is likewise used elsewhere in Greek literature as negative (e.g., Arist. HA 488b20 for the cunning of animals, Arist EN 1144a28 and Plu. 2.28a for clever) but positively in Proverbs. (Johann Cook, *The Septuagint of Proverbs: Jewish And/Or Hellenistic Proverbs*. Leiden: Brill (1997) 52.

[170] See Naphtali H. Tur-Sinai, חכם, חכמה, *Encyclopedia Mikra'it*, Vol. 3, 128

[171] See also I Sam. 23:22 – he is exceedingly crafty; Psalms 83:4 - they make crafty (their) counsel against Your people. Brown Driver Briggs's definitions of ערמה= n.f. craftiness, prudence; 1- בע' – craftily Ex 21:14 (E), Jos. 9:4 (JE), 2. ע' in Pr., in good sense, *prudence* Pr. 1:4, 8:5,12 (Eds. Francis Brown, SR Driver, Charles A Briggs, *A Hebrew and English Lexicon of the Old Testament: based on the lexicon of William Gesenius as translated by Edward Robinson*. Boston: Houghton, Mifflin and Company (1906))

teach the *peti*, the uneducated naïf,[172] the *'ormah* which he lacks. As Robert Alter explains, "Such usage fits with the pragmatic curriculum of Proverbs.[173] Intelligence of the most practical sort, involving an alertness to potential deceptions and seductions, is seen as an indispensable tool for the safe, satisfying, and ethical life, and a fool is repeatedly thought of as a dupe."[174] The book opens with:

> משלי שלמה בן דוד מלך ישראל לדעת חכמה ומוסר להבין אמרי בינה לקחת מוסר השכל צדק ומשפט ומשרים לתת לפתאים ערמה לנער דעת ומזמה
>
> The proverbs of Solomon the son of David, king of Israel; to know wisdom and instruction; to comprehend the words of understanding; to receive the discipline of wisdom, justice and right, and equity; to give prudence to the simple, to the young man knowledge and discretion.

And the theme recurs. (8:5, 9:25) It is only the *'arum*, and not the *peti*, who can truly recognize sin (22:3, 27:12) "Lady Wisdom attests to the respectability of '*ormah* by declaring her own proximity to it (8:12)…"[175], and lavishes praise upon the *'arum*: he is able to scheme to achieve

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[172] Robert Alter translates *peti* as "dupe," "because it derives from a verbal root associated with seduction and hence suggests gullibility. (Robert Alter, *The Wisdom Books: Job, Proverbs, and Ecclesiastes: A Translation with Commentary*. New York: W.W. Norton & Company 190.) LXX renders *peti* three different ways: 1) ἄφρων – with the negative connotation of fool, 2) ἄκακος – with the connotation of innocent, and 3) νήπιος – with its connotation of childlike innocence (Cook, *The Septuagint,* 52, 95)

[173] The same theme of becoming "prudent" is found in the Wisdom of Ben Sira 6:32: "My son, if you will, you shall be taught; and if you will apply your mind, you shall be prudent." The Rule of the Community also contains this language in discussing the point of view of the messianic figure known as the Master in 1QS 9.12 ff:

בעצת תושיה אסתר דעת ובערמת דעת אשוכ בעדה גבול סמוכ לשמור אמנים ומשפט עוז לצדקת א-ל

With the counsel of salvation I will conceal knowledge, and with prudent knowledge I will hedge (it) with a firm boundary, keeping faithfulness and strong judgment of God's righteousness. (1QS 24-25)

הביטה עיני תושיה אשר נסתרה מאנש דעה ומזמת ערמה מבני אדם מקור צדקה ומקוה גבורה עמ מעין כבוד מסוד בשר

My eyes beheld what shall be salvation which is hidden from humankind, knowledge and prudent discretion (which is hidden) from the Sons of Adam, a fountain of righteousness and a well of strength as well as a spring of glory (hidden) from the assembly of flesh. (1QS XI.6)

אל אהב דעת חכמה ותושייה הציב לפניו ערמה ודעת הם ישרתוהו

God loves knowledge. Wisdom and prudence He has set up before Him. Craft and knowledge shall serve Him. (CD MS A 2.3-4) (Joshua Brand uses the terminology as an indication of the ancient provenance of the Damascus Document. (Joshua Brand, "*Megillat brit Damesek u-zemana*," *Tarbiṣ* 28 (1959) 27-28.)
(All renderings and translations of Dead Sea Scroll material is taken from James H. Charlesworth, *The Dead Sea Scrolls Vol. 1-6b*, JCB Mohr (Paul Siebeck): Tübingen, 1994.)

[174] Alter, *The Wisdom Books,* 194 n4

[175] Fox, *Proverbs,* 35-36

his goals (14:8, 15); he is able to ignore insults (12:16); he looks where he is going (14:15); he sees and consequently avoids danger (22:3, 27:12). He acts with knowledge (3:16, 14:18) but does not show it off (12:23):

ח:יב אֲנִי-חָכְמָה, שָׁכַנְתִּי עָרְמָה; וְדַעַת מְזִמּוֹת אֶמְצָא.	**8:12** I wisdom dwell with prudence, and find out knowledge of devices
יב:טז אֱוִיל--בַּיּוֹם, יְוָדַע כַּעְסוֹ; וְכֹסֶה קָלוֹן עָרוּם.	12:16 A fool's vexation is presently known; but a prudent man concealeth shame.
יב:כג אָדָם עָרוּם, כֹּסֶה דָּעַת; וְלֵב כְּסִילִים, יִקְרָא אִוֶּלֶת.	12:23 A prudent man concealeth knowledge; but the heart of fools proclaimeth foolishness.
יג:טז כָּל-עָרוּם, יַעֲשֶׂה בָדָעַת; וּכְסִיל, יִפְרֹשׂ אִוֶּלֶת.	13:16 Every prudent man dealeth with forethought; but a fool unfoldeth folly.
יד:ח חָכְמַת עָרוּם, הָבִין דַּרְכּוֹ; וְאִוֶּלֶת כְּסִילִים מִרְמָה.	**14:8** The wisdom of the prudent is to look well to his way; but the folly of fools is deceit.[176]

While Alter defines *'ormah* as an ability to detect craftiness, Fox asserts that the *'ormah* itself means craftiness, as it does throughout the Bible, "the ability to devise clever, even wily tactics for attaining one's goals, whatever these may be." [177] It is only Proverbs that the noun and verb forms of *'.r.m.* are used for cunning that is considered legitimate.[178] He observes what "an audacious move," it is for Proverbs to appropriate '*ormah* as a virtue (1:4, 2:11, 5:2). In his words: "The Prologue wants the reader to know that the book of Proverbs (rather than, say, the

[176] There may be another mention of *'ormah*. According to the Septuagint, Proverbs 14:24 reads: "The crown of the wise is their shrewdness (*'ormah*)" whereas the received MT version reads: "The crown of the wise is their wealth (*'oshram*)." (See Alter, *The Wisdom Books*, 256 n. 24)

[177] Fox, *Proverbs*, 61.

[178] Michael V. Fox, "Words for Wisdom : "tevunah" and "binah"; "ormah" and "mezimah"; "ezah" and "tushiyah"" *Zeitschrift für Althebräistik* 6,2 (1993) 159

wise guys down the street) is the place to turn if you want the prestigious skills of cunning and shrewdness. As Proverbs sees it, the promised skills must be applied to worthy ends…"[179]

Fox's comments are enlightening, as the rabbis themselves use the terminology of *'ormah* in both its serpentine and solomonic senses. While there is no generic rabbinic term for "loopholes," the rabbis do use the term ערמה (pl. ערמות, and active forms: מערימים, מערימין, יערים, תערים, הערים, etc.)[180] in several dozen cases throughout both mishnaic and amoraic literature, to refer both the acceptable and rejected manipulation of law. In his talmudic dictionary, Marcus Jastrow defines the causative verb form – הערים as "to plan, act deliberately," but also "to act with subtlety."[181]

Conclusion

We have devoted this chapter to Biblical loopholes and rabbinic commentary thereupon. What emerges is that though loopholes were in use in the ANE, and are recorded in the Bible, the rabbis did not use such loopholes as their paradigm for their own legal system. We echo David Daube's assertion that Biblical loopholes are the product of an overarching and far-reaching formalism that recognizes the letter of the law even at the expense of its spirit. In the coming chapter we will show that rabbinic loopholes, on the other hand, are influenced by a Graeco-Roman milieu which recognizes other values besides for the letter of the law. And lastly, we have noted that while the rabbis did not craft their own legal circumventions based on Biblical examples, they did borrow the Biblical nomenclature of *'ormah* for their loopholes, both

[179] Fox, *Proverbs,* 61

[180] Though some usages in ancient rabbinic literature simply mean "deception"-e.g., *tMS* 5:11, *bSan.* 25a; *yMQ* 2:3 - most refer to a technical, definable legal circumvention.

[181] Jastrow, *Dictionary,* "ערם"

accepted and rejected. It is this rabbinical phenomenon of *ha'arama* that we will explore in the coming chapter.

Dissertation Chapter 2 –*Ha'arama* and Equity

In the previous chapter we examined the use of loopholes in the Biblical corpus and attendant rabbinic commentary; we argued that the rabbis did not shape their own use of loopholes on the basis of Biblical material. This is fitting, as the Biblical milieu was one of strict legal formalism, while the rabbinic worldview, as shall be shown below, was more nuanced. In this chapter, we will contrast the Biblical case with the loopholes offered by the rabbis and argue that the rabbis, like their Graeco-Roman counterparts, did not view law simply as mechanistic. Our focus is on are those measures of legal avoidance termed *ha'arama*, cunning, by the rabbis, vocabulary they seem to have borrowed from the Bible.

As relayed in the previous chapter, Black's Law Dictionary defines a loophole as "An ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements." Such omissions are produced, or uncovered, by literal reading: defining a law most narrowly, without use of analogy or extrapolation. For instance, a law that prohibits the sale of an item, when read literally, does not forbid other methods of exchange which may accomplish the selfsame result, such as gift-giving. And one may turn this gap into the loophole should one desire to transfer ownership of an object to a person to whom s/he legally may not sell that object.

In any survey of rabbinic loopholes, *prosbul* will be in the top five. A *taqqanah* attributed to the first-century *tanna* Hillel,[182] it attempts to make loans collectible even during the

[182] For a suggestion that *prosbul* was not originally instituted to solve sabbatical year problems, but instead is an exact parallel to the Greek term *prosbole*, see David Bigman, "Halakhic Problem or Society Solution: On the Meaning of *Prosbul*." The Greek *prosbole*, as reflected in papyri, meant approval from the court for a creditor to force collection of his debt upon the debtor, e.g., by publicly selling the debtor's possessions. (See Ludwig Blau,

Sabbatical year. Its methods are vague:[183] perhaps transferring one's loan deeds to the courts to avoid the Biblical ban on individuals to collect loans; perhaps turning one's loan deeds into a court document (*ma'aseh bet din*), thus placing it into a category of documents which the Sabbatical year does not nullify. Regardless, it is built on loophole strategies: [184] the prohibition to collect applies to X but not to Y, even where Y is quite similar to X.

Another tannaitic *taqqanah* which resembles *prosbul* is *oṣar bet din*, literally, the court's storage facility. During the Sabbatical year it is forbidden for the individual landowner to hire guards to watch over his produce, as the food is meant to be *hefqer*, ownerless, open to all for the taking. However, when the rabbis noticed that people were taking advantage and decimating one another's fields, they ordered the court to take over all fields and hire guards to watch over the produce. [185] Significantly each of the aforementioned examples relate to financial health.[186] As

"*Prosbul im Lichte der griechischen Papyri und der Rechtsgeschichte*," *Festschrift zum 50 jahrigen Bestehen der Franz-Josef-Landersrabbinerschule in Budapest*, Ed. Ludwig Blau, Budapest 1927.)

[183] See David Henshke, "How Does Prosbul Work? A History of the Explanation of Hillel's *Taqqanah," Jewish Law Annual* 22 (5761-4) 71-106.

[184] Moshe Silberg, *Principia Talmudica*, 40-41. Solomon Zeitlin disagrees: "The *taqqanah* of *Prosbol* has no relation to *Haarama*. *Haarama* is a matter of individuals. When the law is ambiguous an individual had the right to use a loop hole to circumvent it. A *takkanah* was introduced by the sages who sought support for it in the Pentateuch. With regard to the sabbatical year in relation to a loan the Pentateuch states שמט ואת אחיך ידיך, what is in our hand. However if the promissory note was deposited with the court the loan was in the hands of the court. This may be designated as a legal fiction but not *Haarama*. There is a vast difference between *Haarama* and *takkanah*. (*The Need for a New Code*, Solomon Zeitlin, printed in *The Jewish Quarterly Review*, New Series, Vol. 52, No. 3 - Jan. 1962, p 203) We disagree with Zeitlin's distinction because the Greco-Roman milieu in which the rabbis thought and taught emphasized the significant of equity, i.e., determining the intent of the lawmaker himself in order to determine whether a law should be read narrowly or expansively. As such, the permission for any permissible loopholes is based on the values of the law itself, whether or not a verse is cited.

[185] *Mekhilta d'Rashbi Mishpatim* 20; *tShevi'it* 8:1. For more on how *oṣar bet din* is used in Israel today, see *Teḥumin* Vol. 27. Alon Shvut: Tzomet (2007)

[186] There are also examples of later *taqqanot* that arise from the use of loopholes suggested by *Tannaim* –e.g., *tBM* 4:11, 14, where *heter 'isqa* is based on the suggestion that an investor who shares the profits with his working partner avoids the problem of usury. (See Hillel Gamoran, "From R. Judah bar Ilai to the Heter Iska," in Eds. Alyssa Gray and Bernard Jackson, *Jewish Law Association Studies XVII: Studies in Mediaeval Halakhah in Honor of Stephen M. Passamaneck*. UK: The Jewish Law Association (2007)

we shall see below, this theme remains significant in motivating many loopholes, especially *ha'arama.*

Beyond official *taqqanot*, the rabbis themselves recognized the private individual's ability to use loopholes. For example, *mShabbat* 16:4 offers that someone whose house is on fire on the Sabbath may wear layers and layers of clothes out of the house in order to rescue them, and may even do so many times over, and may even invite others to do the same;[187] a forerunner to the modern practice of selling *ḥameṣ* before Passover, *tPesaḥim* 2:6 offers that a Jew with *ḥameṣ* on a boat just before Passover may sell that *ḥameṣ* to a Gentile and re-purchase it following the holiday.[188] *MNedarim* 4:7[189] suggests that one who has foresworn (*madir*) benefit to another may enlist the help of a third party to indirectly buy food for the foresworn person

[187] One may wonder why this is not called *ha'arama* proper, as it parallels some of the examples below from the *Tosefta* (though there is no parallel to this case in the *Tosefta*). Of course, it is possible that the rabbis simply were not consistent in their use of the terminology. But there are other possibilities as well: a) this case is not quite a loophole but rather a *shinui* (change in method) to serve as a reminder. The rabbis forbade taking too much clothing directly outside even where there is an *'eruv* (we may speculate that it is to keep a person from being preoccupied with saving her/his possessions, which may lead her/him to extinguish the fire – see PT and BT *ad loc.*), but doing so with a *shinui* such as wearing the clothing, may remind the homeowner that it is the Sabbath and that s/he should not extinguish the fire. (See *Tiferet Yisrael ad loc.* s.v., וחוזר ולובש); b) this is indeed a loophole similar to other cases of ha'arama (which may be indicated by the *stam* in *bShab.* 65b), but the *Mishnah* only refers to major widespread cases as *ha'arama*, such as those enacted to help aid in post-Temple life, as we will see below. Without a parallel in the *Tosefta*, which, as we will see below, does refer to other phenomena as *ha'arama*, it is hard to tell.

[188] This is a very relevant example as there was a medieval version cited by the Ritba which adds the clause, ובלבד שלא יערים, so long as one does not practice cunning. Though this became the source for a rather unpopular approach of prohibiting the annual sale of *ḥameṣ* (see position attributed to R. Elijah of Vilna in *Ma'aseh Rav* 180-181), it seems that this was not a very popular version of the toseftan passage, so we do not consider it here.

[189] There is no parallel for this in the *Tosefta* either.

(*mudar*) [190] to keep him or her from starving.[191] None of these examples (or others, for that matter) is referred to by any special terminology; many of them revolve around financial trouble.

Rabbinic corpora do however contain specific language for acceptable[192] manipulation of the law. As early as tannaitic sources, beyond referring to someone mentally competent or smart, the word פיקח/ת refers to someone tactful enough to use the law to his or her own advantage.[193] The usage continues in amoraic sources as well. Consider, for instance, a later colorful illustration of its use in the Babylonian Talmud, as it reflects a discussion about such artifice between students and their teacher:

בבלי בבא מציעא צז.

אמר רבא האי מאן דבעי למישאל מידי מחבריה וליפטר נימא ליה אשקיין מיא דהוי שאילה בבעלים ואי פקח הוא נימא ליה שאיל ברישא והדר אשקייך:

Rava said: "A man who wishes to borrow something from his peer and yet be absolved of responsibility, should say to him, 'Give us a drink of water' (so that it constitutes a loan together with the owner's service).
"But if [the lender] is wise, he should answer [the borrower], 'First borrow it and then I will give you a drink."

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[190] The מדיר may encourage a shop owner to give the hungry מודר food, and the מדיר may pay for that food after the fact. Traditional commentators explain that this is not a case of the shop owner being considered the emissary of the *madir*, as the *madir* never promised to pay the bill, nor did he issue a command to the shop owner. In fact, the shop owner cannot force him to pay the bill. (See R. Obadiah Bertinoro and *Tiferet Yisrael*, *s.v.*, *זבא זה ונוטל מזה*) We are not sure why this is not called *ha'arama* unless perhaps: a) *ha'arama* is not something that one does for another person but only on behalf of oneself; b) *ha'arama* in the *Mishnah* is again limited to pervasive use for post-Temple accommodation rather than a general concept; c) the rabbis were inconsistent in their use of the terminology. Again, without a parallel in the *Tosefta*, which, as we will see below, does refer to other phenomena as *ha'arama*, it is hard to tell.

[191] R. Obadiah Bertinoro (*s.v.*, *יאין לו מה יאכל*) suggests that the *madir* may do this even if the *mudar* has enough to eat.

[192] There likewise are terms for using illicit trickery and con artists – e.g. רמאין (*mSheq*. 5:5; *tBM* 2:16 *et al*.)

[193] E.g., a husband who agrees to stipulate support for his wife-to-be's daughter from another marriage, but specifies the words "*while we are married*" in the *ketubah* (*mKet*. 12:2) rather than being tethered to a step-daughter for life; a Temple priest who is told הוי פקח ושתוק, to be wise by being not revealing that the two loaves offering of the Feast of Weeks had become impure (*tMen. 3:4*) so as not to undermine the sacrifice. See further examples in *mKet*. 13:9, *tMen.* 3, *Mekhilta d'Rashbi* 15; *Midrash Tannaim* Deut. 32; Gen. Rabbah *Bereshit* 12, 22; Gen. Rabbah *Vayeshev* 84; Lev. Rabbah *Vayiqra* 6. The terminology's use is found both in PT and BT. In PT, e.g., a woman who smoothes out her floors on the Sabbath day (something otherwise forbidden) by washing her dishes over the floors and coincidentally allowing the water drip (*yTer*. 2:3, 41c)

אמר רבא מקרי דרדקי שתלא טבחא ואומנא ספר מתא כולהון בעידן עבידתייהו כשאילה בבעלים דמו אמרו ליה רבנן לרבא שאיל לן מר אקפיד אמר להו לאפקועי ממונאי קא בעיתו אדרבה אתון שאילתון לי דאילו אנא מצי אישתמוטי לכו ממסכתא למסכתא אתון לא מציתו לאישתמוטי ולא היא איהו שאיל להו ביומא דכלה אינהו שאילו ליה בשאר יומי

Rava said: A teacher of children, a gardener, a butcher, a cupper, and a town scribe – all [if they lend something] while at work constitute a loan in the owner's presence.
The scholars said to Rava, 'You, Master, are in our service.'
He was enraged: "You wish to deprive me of my money! On the contrary, you are in my service! For I can change you over from one tractate to another, while you cannot change me!"
But it is not so. He is in their service during the *kallah* days, while they are in his service on other days.

Rava and his disciples are discussing the rules of שאלה בבעלים, borrowing an object while employing its owner, which would make the borrower exempt from any payment should anything happen to the object.[194] Rava perhaps looks to entertain his students by teaching them how they might use this law to their advantage, by nominally "employing" an animal's owner by asking him to bring over a drink of water. But if the animal's owner is פיקח, he will know how to emerge unscathed – namely by pushing off his "employment" until after the borrowing is done. In the continuation of the passage, the students try to deploy these tactics against Rava himself. The master outwits the students, though, as the true פיקח who is able to turn the tables back on them. Such back and forth testing the limits and uses of law could easily take place in any law school classroom today.[195] The פקח terminology, though, is still rather sparse. A term that is used more broadly is *ha'arama*, cunning.

[194] *mBM* 8:1

[195] For a thorough analysis of this story in the context of Rava's general views about bailees, see Wimpfheimer, *Narrating the Law*, Chapter 4.

While it literally means cunning or subtlety, *ha'arama* roughly[196] conforms to the classic legal loophole. Unlike the terms mentioned above, at times it is viewed approvingly (like the Proverbial version of *'ormah*) and at times negatively (like the serpentine *'ormah*).[197] Through our study of the phenomenology of *ha'arama* in the *Mishnah*, *Tosefta*, PT and BT, we will try to understand the underlying motivation of *ha'arama*, as well as what *ha'arama* reveals about rabbinic legal thinking in its Graeco-Roman environment, over and against earlier and more unyielding versions of formalism.

While analyzing all rabbinic dodges is a desideratum, it is a gargantuan task. But we may begin the process by analyzing the subset of those circumventions known as *ha'arama*. Using a term as guidance has both advantages and pitfalls. On the one hand, a label indicates a conscious, even if partial categorization. On the other hand, limiting a study to particular terminology relies heavily on an assumption that the term is used consistently. We will take all of this into consideration in our study, allowing it to qualify any absolutist thinking about the topic. Nonetheless, we hope that our study can serve as a point of departure for analyzing rabbinic legal loopholes generally.

Ha'arama in tannaitic literature

In the chapter 1 we cited the midrashic example of Abraham accusing God of exploiting a loophole (*ha'arama*) to destroy Sodom and Gomorrah.[198] While that loophole is painted in a

[196] As we will discuss in depth in the next chapter,, the rabbinic corpus contains more than one version of *ha'arama*, one of which diverges slightly from the classic loophole.

[197] See *Tiferet Yisrael* Commentary to *mTem.* 5:1 where he makes this observation.

[198] Gen. Rabbah *Lekh Lekha* 39/*Vayera* 49/Lev. Rabbah *Ṣav* 10/*Pesiqta d'Rav Kahane* 19 *Anokhi, Anokhi*. *Mekhilta d'Rashbi Mishpatim Masekhta d'Neziqin* 4 also refers to *ha'arama* negatively in discussing who is exempt from the category of a being a *horeg b'ormah*, a premeditated killer – namely the deaf-mute, the *shoteh* and a minor, none of whom are considered capable of premeditation.

negative light, in two places in the *Mishnah*[199] the rabbis legalize, and even advocate, the use of parallel loopholes.

משנה מעשר שני ד:ג (כ"י קאפמן)
מערימים על מעשר שני.[200] כיצד או' אדם לבנו ולבתו הגדולים לעבדו ולשפחתו העברים[201] הילך את המעות האילו ופדה לך[202] את המעשר הזה אבל לא יאמר כן לבנו ולבתו הקטנים לעבדו ולשפחתו הכנענים מפני שידן כידו

[We/they may] strategize[203] regarding the secondary tithe.[204] How? One says to his adult son or daughter or to his Hebrew man-servant or maid, "Take these coins and

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[199] Though we do not here involve ourselves in the question of which came first, *midrash* or *mishnah*, it might be quite relevant. Is *Mishnah* reclaiming a negative term, or is *Midrash* re-appropriating a positive term? For more on the debate regarding *Mishnah* and *Midrash*, see JN Epstein *Mavo Le-Nusaḥ Ha-Mishnah 728-747*, Epstein *Prolegomena* 403, Melamed, *ha-Yaḥas she-ben midreshe-halakhah la-Mishnah ṿela-Tosefta*, 182, Ginzberg, *'Al Ha-yiḥus she-bein ha-Mishnah ve-ha'Mekhilta* (esp. 68, 80, 94); Halivni *Meqorot U-Mesorot BQ*, 2, 61,152; *Halivni, Midrash, Mishnah, and Gemara : the Jewish predilection for justified law*, 52; Friedman, "The Baraitot in the Babylonian Talmud and their Parallels in the Tosefta" (Hebrew), *Atara L'Haim*, Studies in the Talmud and Medieval Rabbinic Literature in honor of Professor Haim Zalman Dimitrovsky, Jerusalem 2000 168, n. 14; Friedman, *First Pesaḥ* 76-77 (*midrash* preserves older and more raw material, *mishna*h is more redacted), David Henshke, *Mishnah rishonah be-talmudam shel tanaʾim aḥaronim : sugyot be-dine shomrim,* 144; Reichman *Mishna und Sifra;* Hauptman, *Rereading theMishnah*

[200] The parallel *tosefta* explicitly states לפוטרו מן החומש . *Tosefta* may preserve the older text that was shortened by the *mishnah*, or the *mishnah* may preserve the older text which was then clarified by the *tosefta*. For a discussion about which preserves more ancient text generally, *Mishnah* or *Tosefta*, see Shamma Friedman, *Tosefta 'Attiqta*. This will be quite relevant to our discussion of the following *ha'arama* regarding the animal firstling.

[201] Some point out that the idea of a Hebrew indentured maid redeeming secondary tithes is surprising, given that all Hebrew maids are minors (they are freed at age 12). Therefore, *Ra'avad* and the *meyuhas la'Rosh* suggest that there must have been a Sinaitic tradition that a person may redeem tithes from the age of 9 and 1 day; Maimonides (Laws of Secondary Tithes 5:8-9) suggests instead that even minors may redeem tithes according to rabbinic law.

[202] This term לך indicates that the recipient of the money was meant to keep it and in return be willing to allow the consecration of the fruit to devolve upon the money. Thus, the money would only be permitted to be used for Temple purposes. According to Lieberman, the word לך is absent in a *Geniza* MS of the *mishnah*; it is likewise absent from all extant Tosefta MSS, the parallel PT *sugya*, and *bGit. 65a.* Therefore, Lieberman argues that this word was not in the original version of the *mishnah* but was emended based on the discussion in the PT which clarifies:

מה נן קיימין, אם בשאמר לו צא ופדה לי שלוחו הוא. צא ופדה לך שלו הן. אלא כי נן קיימין: בשאמר לו פדה לך משלך, פדה לך משלי, ותני כן פדה לך משלך, פדה לך משלי אינו מוסיף חומש. א"ר יוחנן כל מעשר שאינו הוא ופדיונו משלו אינו מוסיף חומש.

(Lieberman, *Tosefta Ki-fshuta, ad loc.* 766).
Additionally, the parallel *tosefta* in all extant MSS adds בהן

[203] Translations of Palestinian rabbinic material are this author's variations on Neusner's English versions of *Mishnah*, *Tosefta* and *PT*.

[204] *tMS* is more explicit: "One may act with cunning regarding the secondary tithe in order to exempt it from the extra *ḥomesh*." In *bBM* 54a and elsewhere, the rabbis explain that *ḥomesh* does not refer to 20% of the original value; instead, the original value is divided by 4, and one who pays *ḥomesh* pays a fifth part, i.e., an added 25%.

use them to redeem this tithe." However, one may not say this to one's minor son or daughter, or to one's Canaanite man-servant or maid, for their hand is like his.[205]

A man who redeems his own *ma'aser sheni* (secondary tithe) produce rather than transporting it to Jerusalem pays 25% more than the worth of the produce,[206] but one who redeems someone else's does not. In order to avoid the price increase, this passage suggests that one give(s) his money to an economically independent adult to redeem the former's produce. So long as the person in possession of the money does not own the produce (and is not officially the emissary of the person who does),[207] there is no tax.[208] By changing the facts of the case – the ownership of the money – the legal agent avails himself of a literal reading of *ma'aser sheni* law: the Bible discusses a man and his produce or a man and someone else's produce. It does not, however, discuss the permissibility of actively moving from one situation to the other. This type of dodge, involving another party to accomplish what one cannot do independently, is akin to ancient Roman law's *interposita persona*, today known as a "man of straw" in Britain and Germany, a "front man" in the US, or a "dummy" in Australia.[209] Though one involves the other party simply to get around the law, the transaction is completely above board.

[205] Consequently, they cannot actually own the money independently, and no transfer of money has taken place.

[206] See Leviticus 27:31. For a very straightforward, explanation, see Maimonides *Mishneh Torah, Hilkhot Ma'aser Sheni* 5:1

[207] This is made clear in the *tosefta* version (*MS* 4:3) of this *ha'arama*: אבל לא יאמר לו פדה לי בהן את מעשר זה

[208] It is the equivalent of a second party buying the produce, though the produce will actually end up in the farmer's domain. (See Peter J. Haas, *A History of the Mishnaic Law of Agriculture: Tractate Ma'aser Sheni*. Ann Arbor: McNaughton & Gunn (1980) 129.

[209] David Daube, "Dodges and Rackets in Roman Law," *Proceedings of the Classical Association*, vol. 61 (1964) 29. Licinius Stolo, for instance, circumvented his own statute by emancipating his son and, together with him, holding more than the permissible acreage of public land.

Why do the rabbis accept, and even advocate, this loophole? Ephraim Elimelech Urbach reads this evasion simply as rabbinic capitulation to general laxity in tithing following the Bar Kokhba revolt (135 CE):

> …all the reasons offered [for *ha'arama* on the extra fifth of *ma'aser sheni*] only explain the fact that the practice of evasion existed but do not reveal the reason for the practice. It would appear that evasion of the payment of the one-fifth was widespread and the Sages realized that insistence on their part on the strict observance of the law could very well lead to the populace refraining altogether from bringing the redemption money to Jerusalem. The halakhic sanction they gave to the practice of evasion was, in a sense, a *takkanah* to prevent the development of a situation in which 'the people refrained from bringing' similar to that in which 'the people refrained from lending' and which led to the *takkanah* of the *prosbul* which Hillel adopted.[210]

Urbach's argument is unpersuasive, not only because he offers no concrete evidence that tithing had waned[211], but because of the parallel passage in the *Tosefta*. In keeping with the latter's character as more "anthropological" and "rooted in the concrete historical situations of ancient Palestine" than the *Mishnah,*[212] the toseftan passage paints this *ha'arama* in a more positive light:

> **תוספתא מעשר שני ד:ג (כ"י ערפורט)**
> אמ' ר' יהושע בן קרחה בראשונה היו (נר) נוהגין כך משרבו הרמאין אומ' אדם לחבירו הרי פירות האילו[213] נתונין לך במתנה וחוזר ואומר לו הרי הן מחוללין על פירות שיש לי בבית ובלבד שלא יאמר[214] הרי הן מחוללין על מעות שיש לי בכיס עד שיזכם[215] לתוך ידו או עד שישכיר[216] לו את מקומו

[210] E.E. Urbach, *The Sages*. Transl. Raphael Posner, Israel: Peli Printing Works Ltd. (1986) 252-3

[211] Instead he theorizes that the flight from Israel following the Bar Kokhba revolt produced similar laxity in tithes as the Hasmonean revolt had, at which time Yoḥanan the High Priest offered dispensations to make tithing less burdensome. (See *ibid*. 46-47)

[212] Shamma Friedman, "The Primacy of Tosefta to Mishnah in Synoptic Parallels," *Introducing Tosefta: Textual, Intratextual and Intertextual Studies*, Eds. Harry Fox and Tirzah Meacham, Ktav (1999) 106.

[213] Venice Edition: האלן

[214] MS Vienna, Venice Ed.: ובלבד שלא יאמר לו; MS HEB.C.16.2660 skips straight to: הרי הן מחוללין על מעות

[215] MS Vienna, Venice Ed.: שיזכם בעל הבית

> R. Joshua b. Qorḥah said: At first they behaved thus. Once the con artists increased, one would say to his fellow, 'Behold, these fruits are given to you as a gift,' and then he would say to him, 'Behold they are made mundane by fruits which I have in the house,' so long he does not say, behold they are made mundane on the coins that I have in my pocket until he places them (the fruit) in his hand, or until he rents the land to him.

This *tosefta* describes just how tightly people clung to this *ha'arama* when it became imperiled – twice. There is also an ironic pitting of the con artists portrayed as the villains, and those who are cunning yet find themselves on the right side of the law. The rabbis side with those who are cunning rather than the con artists who try to undermine the circumvention. In the Palestinian Talmud, in fact, the change in methodology to protect this *ha'arama* is initiated by the rabbis themselves:

> **ירושלמי מע"ש פרק ד הלכה ה, דף נה עמוד א (כ"י ליידן)**
> בראשונה[217] היו עושין כן במעות היו נוטלין אותן ובור{א}(ח)ין[218] התקינו שיהו עושין בפירות א'ע'פ'כ' היו נטלין אותן ואוכלין אותן התקינו שיהא מזכה לו אחד מעשרה לקרקע. ר' אינייא בר סיסי סלק גבי ר' יונה אמ' ליה אפרוק לך בהדא סילעא אמ' אי בעא מינם נסא חזר ונסתה מיניה אמ' ר' יונה כד שערית דעתיה דאילו נסתה לא הוה אמ' לי כלום לפום כן יהבת יתה לה.
> Originally they would do this with coins. But they (=the other party) would take [the coins] and run away [instead of returning them]. They *instituted* that they would do this with produce (=give the other party the *ma'aser sheni* produce), yet they would take the produce [following the redemption] and eat them [rather than returning them]. So they instituted that he would give him ownership[219] over one tenth of the land [where the produce was located].[220] R. Inya b. Sisi went to R. Jonah. He (R. Inya) said to him (R. Jonah): Would you like me to redeem for you with this *sela*? He answered: If you'd like, take it. [Afterwards, R. Jonah] went back and took it from him. R. Jonah said: because I understood R. 'Inya's attitude to be that he would not say anything if I took it (the money) back, therefore I gave it to him [in the first place].

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[216] MS Vienna, Venice Ed.: שישכור

[217] MSS Moscow and London cite this as a *baraita* in the name of R. Joshua b. Qorḥah

[218] All other versions clearly read ובורחים/ובורחין

[219] It is not clear whether this was a gift or a rental.

[220] The assumption was that the other party would not be so brazen as to go to the owner's land to take his produce. (See *Ridbaz s.v., בראשונה)*

All versions of this PT passage, whether printed or manuscript include the verb התקינו, they (=the rabbis) instituted. If this was a circumvention the rabbis were forced into, it is improbable that they would have gone to such great lengths to preserve it. Moreover, here it is two rabbis – R. Jonah and R. 'Inya – who are involved in using this *ha'arama*, excusing themselves for doing it the old way rather than the new way (presumably, like everyone else).

This is not to say that the rabbis did not have goals in mind that comported to their societal context. In fact, this dodge is quite reasonable in light a post-Temple reality. Shmuel Safrai shows convincingly that though *m'Eduyot* 8:6 cites R. Joshua's opinion that it remains appropriate to consume *ma'aser sheni* in Jerusalem even without a Temple or city walls, tannaitic sources generally reflect that this was not accepted as common practice after the fall of the Temple;[221] instead *tannaim* recommend (and are cited as doing so themselves) that one redeem his produce and keep the money somewhere secure until it could be used whenever the Temple would be rebuilt.[222] Hence, the need for *ha'arama*. Given that people would now always have to redeem *ma'aser sheni* rather than bring it to Jerusalem, people would lose an added 25% on their secondary tithe produce every time they set aside *ma'aser sheni* (namely the first, second, fourth and fifth years of each seven-year cycle)! To ease their burden, perhaps even at their behest, the rabbis offer a way to redeem the produce without the added expense.[223]

[221] See *tMS* 3:13. Significantly, the *tosefta* itself makes the point that *ma'aser sheni* was no longer being taken to Jerusalem; See also *Sifri Re'eh* 106; *tSan.* 5:6 (also *bMakkot* 19a; *bTem.* 21a)

[222] *tMS* 3:18, 4:4; *mMS* 2:7; See Shmuel Safrai, בימי הבית ובימי המשנה: מחקרים בתולדות ישראל כרך א'. Jerusalem: Magnes Press (1994) 379. Safrai there casts doubt on a *baraita* cited in *bBeṣa* 5a, and *bRH* 31b indicates that R. Eliezer actually did so based on the implication of R. Eliezer's own statements in *m'Eduyot* 8:6 regarding the status of Jerusalem without its Temple infrastructure. (Moreover, *baraitot* are not necessarily tannaitic in origin or in form.)

[223] The *stam* in *bGit.* 65a likewise suggests that the *mishnah* describes post-Temple times, though ostensibly for the purpose of understanding how a minor maidservant could make a full acquisition.

Reminiscent of Proverbs' declaration of אני חכמה שכנתי ערמה, "I am Wisdom; I dwell in cunning (Proverbs 8:12)," the rabbis exhibit prudence in easing a difficult situation.

All of *Mishnah* contains only one other explicit case of defined *ha'arama*, again affirming its use:[224]

משנה תמורה ה:א (כ"י קופמאן)[225]

כיצד מערימין על הבכור מבכרת שהיתה מעוברת, אומ' מה שבמעיה שלזו, אם זכר, עולה--ילדה זכר, יקרב עולה אם נקבה[226] זבחי שלמים ילדה נקבה[227] תקרב שלמים אם זכר עולה אם נקבה זבחי שלמים ילדה[228] זכר ונקבה זכר יקרב עולה והנקבה תקרב שלמים.

How do they/we practice cunning with regards to the firstborn? [When] an animal [is] pregnant with its first offspring, he says, "What is inside this, if it is male is a burnt offering." If she birthed a male, it shall be sacrificed as a burnt offering. "And if it is female, it is a peace offering." If she birthed a female, it shall be sacrificed as a peace offering. "If it is a male, a burnt offering, and if a female, a peace offering," - if she birthed both a male and female, the male shall be

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[224] The fact that both mishnaic instances affirm the use of *ha'arama* probably led to Maimonides' assertion in his *Commentary to the Mishnah, Temurah 5:1* that *ha'arama* is always permitted:

והתחבולה המותרת נקראת הערמה, ושאינה מותרת מרמה.

And the permissible strategy is called *ha'arama*, and that which it forbidden is called *mirma*. (It seems that his reference to *mirma* alludes to the term *rama'im* sometimes founds in *Mishnah*. The term "mirma" itself never appears in *Mishnah*.)

After all, nowhere in all of *Mishnah* does the term *ha'arama* appear to be prohibited, though *'arum* may be used negatively. The *Tiferet Yisrael* (*ad. loc.*) however suggests that while *mirma* always has negative connotations, *'ormah* is mixed, at times negative and at times positive.

[225] The *Sifra* passage which justifies the ability to consecrate a *bekhor* in the womb based on a verse is challenging:

ספרא בחוקותי פרשה ה (כ"י לונדון)

יכול לא יקדישנו בבטן תלמוד לומר אשר יבוכר לא יקדיש משנתבכר אינו מקדיש מקדישו בבטן מיכן אמרו מערימין על הבכור

Might one suppose that one may not consecrate the firstling while it is still in the womb? Scripture says, 'which is a firstling belongs to the Lord, no man may dedicate' – once the beast has emerged as a firstborn, you may not consecrate it, but you may consecrate it when it is yet in the womb. In this connection sages have said: they legitimately practice cunning in connection with the firstling.

While we have cited MS London which asserts permission for *ha'arama* (and MS Oxford concurs), MS JTS and Venice Ed. both read אין מערימין/ם, people may not use *ha'arama*. Furthermore MSS Parma and Vatican 31 read מעריכין, to promise the value of the animal, rather than מערימין. At any rate, the terminology of מיכן אמרו seems to indicate that the *midrash* is citing our *mishnah*. This is consistent with the perspective that the *midrashim* from R. Aqiva's school, *Mekhilta d.r. Ishmael, Sifra, Sifri Deut.*, post-date the *Mishnah*. (See Menahem Kahana, "The Halakhic Midrashim," *The Literature of the Sages* Part II, eds. Shmuel Safrai, Ze'ev Safrai, Joshua Schwartz, and Peter J. Tomson. Amsterdam: Fortress Press (2006) 56)

[226] As female eldest born do not have the status of *bekhor*, the female is included here for the benefit of the continuing *mishnayot* which deal with non-*bekhor* male and female animals which are consecrated in the womb. (See Albeck, *Shishah Sidrei Mishnah*, Vol.5, notes on page 235)

[227] MS Parma: ואם נקבה

[228] MS Parma: וילדה

> sacrificed as a burnt offering, and the female shall be sacrificed as a peace offering.

According to Biblical law, one must give one's firstborn *kosher* male animals to a priest. If the animal is unblemished, the priest sacrifices it and eats parts of the offering. [229] If, however, it is blemished, it is unfit for sacrifice; therefore, the priest may simply eat the food as mundane (*ḥullin*) without offering any upon the altar first.[230] In this passage it seems that the animal's owner would rather use the firstborn for his own private offering on the altar than as a gift to the priest. Consequently the *mishnah* suggests pre-empting the firstborn status by designating the animal as a private sacrifice while is it still in the womb, taking for granted that its status as a firstling does not take hold until it is born.[231] This preemptive change is considered a concrete change of facts, as according to mishnaic law, mere declarations of consecration are binding.[232]

Urbach again suggests that the rabbis here capitulate to a community which is already practicing this evasion: "It may be assumed that owners of cows bearing for the first time who felt an obligation to offer a Whole-offering in the Temple, used the evasion described to fulfill two obligations at once. The Sages accepted this state of affairs because it at least preserved the commandment of the Firstling of a clear animal."[233]Urbach mentions one who "felt an obligation," while classic medieval commentators describe one who had already verbally

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[229] Ex. 12:11; Numbers 18:18

[230] See *mBekh.* chapter 2. But he may not work it or shear it (*mBekh.* 3:3)

[231] As cited above, *Sifra Beḥuqotai 5* explains that declarations of *heqdesh* before the animal's birth indeed transforms its status based on Scripture:
יכול לא יקדישוהו מן הבטן? תלמוד לומר "אשר יבוכר לא יקדיש" משיתבכר אין אתה מקדישו מקדישו אתה מן הבטן.

[232] *mQid. 1:6*

[233] *The Sages*, 254

committed to giving a sacrifice.[234] But both are truly perplexing. Why would one wish to give the animal as a whole-offering, or a completely burnt offering rather than giving it to a priest? Moreover, can it be that one of the only two examples of permitted *ha'arama* in all of *Mishnah* refers to a situation as rare as someone who happened to have made a pledge to give an offering a few weeks before a firstling is going to be born? We have seen other mishnaic loopholes above which would seem more deserving of the title than this very rare example.

It is likewise curious that this *mishnah* exhibits a strange penchant for imprecision. The pregnant animal's owner stipulates: "If it is male, it shall be a burnt offering…If it is female, it shall be a peace offering…" But why would someone sanctify a firstborn animal in utero if it is female? The anonymous redactor(s) in *bTem.* 24b suggests that the beginning of the *mishnah* and its conclusion refer to different situations. The beginning of the *mishnah* refers to *bekhor*, while the part about the animal being female refers to consecrating any animal in the womb. Indeed, the parallel *Tosefta* passage discusses the possibility of sanctifying an animal while in utero but does not connect it to the case of the *bekhor* at all:

תוספתא מסכת תמורה (צוקרמאנדל) פרק ג הלכה א

האומר מה שבמעי בהמה זו הקדש מותרת בגיזה ואסורה בעבודה מפני שמכחיש את הקדשים שחטו[235] העובר אסור באכילה מתה העובר אסור בהנאה

One who says, "What is in the womb of this beat is consecrated" – it is permitted to be sheared but prohibited to be used for ordinary labor, because one thereby weakens the consecrated [beast in the womb]. [If] one slaughtered it, the fetus is prohibited to be eaten. [If] it died, the fetus is prohibited for benefit.

Therefore, we suggest that the original law that the *mishnah* was dealing with was consecrating any animal in utero,[236] and it was the redactor(s) who adds the whole issue of the *bekhor*

[234] *Rashi s.v., ma'arimin*, Maimonides, *Commentary to Mishnah ad loc*.

[235] MS Vienna: שחטה (See *Tosefet Rishonim ad loc.*)

circumvention. Like the *ma'aser sheni* example, the context of post-Temple life plays a significant role in the redactor(s)' choices.[237] The *Sifri* (*Re'eh* 106) and *tSanhedrin* 2:6 (3:3?) report:

> ר' יוסי אומר שלשה דברים משום שלשה זקנים...רבי ישמעאל אומר יכול יהא אדם מעלה מעשר שני לירושלם בזמן הזה ואוכלו...ואכלת לפני ה' אלוקיך במקום אשר יבחר, מקיש אכילת בכור למעשר שני. מה בכור אין נאכל אלא בפני הבית אף מעשר שני לא יהא נאכל אלא בפני הבית
>
> R. Jose says three statements in the name of three elders…R. Ishmael says, Perhaps a person should bring his secondary tithe produce to Jerusalem in these days and eat it [there]?... "And you shall eat before the Lord your God in the place that He shall choose" – it analogizes eating of the firstborn [animal] to [eating of] the secondary tithe. Just as the firstborn [animal] is not eaten except before the Temple, so the secondary tithe should not be eaten except before the Temple.

After the fall of the Temple, firstborn animals could only be eaten (by anyone, priest or otherwise) if they had become severely blemished.[238] Thus, giving one's firstborn animal to a priest meant that it would likely never even be eaten by that *kohen*, or by anyone else. The law of the firstborn had lost the practical value that it once had of supporting the *kohanim* (pl.) and had turned instead into an animal-sitting service where the *kohen* would have to hold onto an animal until it became blemished on its own or died. The animal would never be used for work and would probably never be eaten. It would literally be a waste.

And so the *tannaim* take prophylactic measures to avoid such needless financial loss, but he/they are not prepared to allow a person to maim the animal in utero (unlike R. Judah, who will

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[236] We again touch on the question of whether *Tosefta* or *Mishnah* preserves earlier information. In this instance, we follow Shamma Friedman's suggestion that indeed the *tosefta* here preserves the earlier material, and the *mishnah* reworks it. See n. 31 above and n. 72 and 73 below.

[237] It should be noted that *bTem.* 24b specifically asserts that this *mishnah* offers advice specifically for when the Temple stood. However, this is an interpretation offered by the *stam* to reconciling it with an *amora*'s (R. Judah) seemingly more effective ruling of allowing one to blemish the animal in its mother's womb in order to avoid the consecration of the animal all together. The *stam* suggests that R. Judah's ruling is for post-Temple times, while the *mishnah*'s ruling is for Temple times.

[238] We find in *mBekh.* chapter 5 that only certain types of serious blemishes would permit eating the animal without sacrifice.

suggest just that in the Babylonian Talmud's commentary on this *mishnah*).[239] They therefore offer at least something – whether in order to open the door to future *ha'aramot*, or to settle for the next best way to get out of giving away one's *bekhor*. This is how it works: if the animal's owner commits the animal as a sacrifice while in utero, s/he may keep it. And when it becomes blemished, the owner him or herself may redeem it with money and keep the animal for his/her own use. This ultimately saves the animal's owner money. (Alternatively, as offered on *bTemurah* 10b, the owner may make a sanctification of funds (*qedushat damim*)[240] only, which means redeeming the animals with money to begin with, even without any blemishes.) In this *mishnah*, the rabbis are not trying to do away with the law of *bekhor*; they are offering a more livable alternative after the destruction of the Temple. Later, the *amora* R. Judah goes one step further in permitting a person even to inflict a blemish on the *bekhor* while in its mother's womb, in order to obviate the need to wait for blemishes altogether.[241] This notion of the *Mishnah* revising material relayed in the *Tosefta* to accommodate a post-Temple period has been argued elsewhere by Tzvi Novick regarding Tractate *Bekhorot*. [242]

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[239] See *bTem.* 24b. The *stam* there tries to reconstruct R. Judah's comments as being for a post-Temple world, and the *mishnah* being relevant for when the Temple stood, but we are convinced otherwise based on the arguments above. In the middle ages, R. Jacob ben Asher records a new practice used to evade firstborn status: selling part ownership over the animal to a Gentile so that the animal's child would not become obligated in the requirements of the *bekhor*. (*Tur Shulḥan Arukh*, Yoreh De'ah, 320:6)

[240] i.e., the animal will be sold, and the money is consecrated.

[241] *bBekh.* 35a; *bTem.* 24b

[242] Novick makes a similar suggestion regarding the list of potential animal blemishes in *mBekh.* Chapter 6. That list, as opposed to its toseftan parallel (*tBekhorot* chapter 4) focuses on the major blemishes which allow an animal to be eaten as a non-sacrifice as distinct from the appended list of minor blemishes which bar the animal from both sacrifice on the one hand, and consumption on the other. *TBekhorot* chapter 4, however, focuses on the difference between blemishes both minor and major and non-blemishes. He explains that *tBekhorot* represents an earlier erstwhile Temple tradition, where the key factor is whether a person may sacrifice the animal, while *mBekh.* represents a post-Temple tradition in which, because sacrifice is no longer an option, the key practical question is whether one may or may not consume the animal on account of its particular blemish. While his article assumes that the priest himself would consume the animal, it is equally possible that the owner who has performed *ha'arama*, according to our *mishnah* might redeem and consume such an animal. (Tzvi Novick, "The Blemished First-Born

Granted, the *mishnah* sounds like it is describing a reality that is concurrent with a standing Temple – invoking sacrifice and sanctification – but this is indeed why the rabbis' approach here is to offer a subtle and incremental shift in their presentation rather than an explicit one. This suggestion is part of an important discussion among contemporary *Mishnah* scholars. How are the laws from Temple times to be understood within the *Mishnah*? Are they changed in any way, rhetorically or substantively,[243] to fit the post-destruction reality? Do they represent an idealized, even fictionalized portrait of what Temple life was like,[244] or are they true to the reality[245]? Ishay Rosen-Zvi summarizes a dominant approach: "According to the new studies, these narratives are by and large a result of second-century debates, fashioning and redaction, and should, accordingly, be taken to represent the concerns of that post-Temple era. The Temple and its worship were studied, reshaped, and even reinvented as part of the second

Animal: A Case Study in Tannaitic Sources." *HUCA* 76 (2005), 113-132.) It is important to note that Novick does not suggest that such a redactional relationship between *Mishnah* and *Tosefta* is ubiquitous, or that the *Mishnah* as a whole represents post-Temple traditions, while *Tosefta* on the whole represents Temple traditions. (ibid. 130) This will be significant in chapter three of this dissertation, as Mira Balberg's assessment of toseftan material regarding im/purity law, an assessment upon which we rely, is based on the assumption that it is post-Temple material.

[243] See Avraham Walfish's study on tractates *Rosh Hashanah* and *Tamid* ("Shitat," and idem, "Megamot ra'ayoniot bete'ur hamikdash va'avodato bemase-khet Tamid uvemasekhet Middot," Mehkerei yehuda veshomron 7 (1997): 79–92), Yair Lorberbaum, *Zelem 'Elohim* Tel Aviv: Shocken, 2004)), Beth Berkowitz (*Execution*) and Chaya Halberstam's (*Law and Truth*, Chapter 3) respective studies on capital punishments in tractate *Sanhedrin*, Daniel Stökl Ben-Ezra on tractate Yoma (*The Impact of Yom Kippur on Early Christianity* (Tübingen: Mohr Siebeck, 2003)) and Ishay Rosen-Zvi on Sotah. Each shows how the *mishnah* narrative relating to Temple ritual is changed to reflect a post-destruction reality.

[244] Jacob Neusner was challenged for regarding Temple law and narrative reflected in *Mishnah* as mere fictionalization (Jacob Neusner, *Ancient Israel after Catastrophe: The Religious World View of the Mishnah*. Charlottesville: University of Virginia Press, 1983) by Shaye Cohen ("Jacob Neusner, Mishnah and Counter-Rabbinics," *Conservative Judaism* 37 (1983) 48-63) and Seth Schwartz (*Imperialism and Jewish Society: 200 BCE to 640 CE*. Princeton, NJ: Princeton University Press (2004), 8-9).

[245] D.Z. Hoffman argued this about tractate *Yoma*, suggesting that it was "old *Mishnah"* preserved from Second Temple times. (David Hoffmann, *Die Erste Mischna Und Die Controversen Der Tannaïm: Ein Beitrag Zur Einleitung in Die Mischna* (Berlin: H. Itzjowski, 1882), 18–19); JN Epstein concurred. (*Mevo'ot*, 36–37) See also Christine Hayes, "What is (the) Mishnah? Concluding Observations," (*AJS Review* 32.2 (2008): 291-7) for a discussion of diachronic versus "thick" synchronic readings of *Mishnah*.

century's all-inclusive legal system, according to the academic needs and interests of its sages."[246]

Based on our understanding, the term "*ma'arimin*" in the *Mishnah* refers not to what people have decided upon themselves, but what the rabbis have provided as the new *modus operandi* to meet challenge in a post-destruction reality, to ensure that people are not financially disadvantaged by law that seems ossified. While, in typical mishnaic fashion, the *Mishnah* never provides explicit justification for *ha'arama*, but only casuistic[247] examples, the broader view of tannaitic attitudes towards the realm of *qodashim* after 70 CE reveals that these two citations of *ha'arama* are cut from the same cloth.[248] Not simply, as Urbach suggests, a capitulation to the reality, but rather a thoughtful accommodation of it.

The Cunning Serpent

As a legal phenomenon, the *Mishnah* presents *ha'arama* as prudent and solomonic thinking for a changed reality. However, the serpent cannot be ignored. *MSotah* 3:2 asserts that the רשע ערום, the cunning wicked person, erodes the world:

> **סוטה ג:ב (קופמאן)**
> ר' אליעזר אומר המלמד את בתו תורה מלמדה תיפלות. ר' יהושע אומר רוצה אשה בקב תיפלות מתשעת קבים ופרישות. הוא היה אומר חסיד שוטה רשע ערום אשה פרושה מכת פרושים הרי אלו מכליה[249] עולם.
> R. Eliezer says: Anyone who teaches his daughter Torah teaches her obscenity. R. Joshua says: a woman prefers one *qab* of/and obscenity to 9 *qab*s and continence.

[246] Ishay Rosen-Zvi, "Orality, Narrative, Rhetoric: New Directions in Mishnah Research" *AJS Review* 32.2 (2008), 242

[247] See Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization*, Chapter 2 –"Casuistics and Generalizations: Tannaitic Beginnings." Moscovitz defines casuistics as case law rulings that "are not sufficiently generalized to enable us to ascertain their full, though implicit, scope." (*Talmudic Reasoning*, 2)

[248] This is not to say that toseftan material represents a period contemporaneous with the Temple, but it is clear that *Tosefta* does not have the same interest in cataloguing law specifically tailored to a post-Temple community.

[249] MS Parma מכלי

He used to say: A foolish pietist, a cunning rogue, an abstinent woman[250] and the wound of celibate[251] [men] bring destruction upon the world.

Without explaining what exactly the רשע ערום does, it is clear that not everyone who is ערום is a רשע, but some are.[252] This is essentially where *Mishnah* leaves the issue: the rabbis use allow cunning under particular circumstances, but under other (or most?) circumstances cunning is the trait of a wicked person.

Also in the context of the *sotah,* the *Tosefta* refers to that very scheming serpent and his trait of *'ormah*:

תוספתא סוטה ד:ה

כשם שאסורה לבעל כך אסורה לבועל נמצאת אומר בסוטה שנתנה עיניה [בשאין ראוי] לה מה שבקשה לא ניתן לה ומה שבידה ניטל ממנה וכן אתה מוצא בנחש הקדמוני שהיה ערום מכל הבהמה ומכל חית השדה שנא' (בראשית ג) והנחש היה ערום מכל וגו' בקש להרוג את אדם ולישא את חוה אמר לו המקום אני אמרתי תהא מלך על כל בהמה וחיה [עכשיו שלא רצית] ארור אתה מכל הבהמה ומכל חית השדה אני אמרתי בקומה זקופה תלך כאדם [עכשיו שלא רצית] (שם) על גחונך תלך אני אמרתי תאכל מאכל אדם ותשתה [משתאו של אדם עכשיו שלא רצית] (שם) ועפר תאכל כל ימי חייך אתה בקשת להרוג את אדם ולישא את חוה עכשיו (שם) ואיבה אשית בינך ובין האשה נמצאת אומר מה שבקש לא ניתן לו ומה שבידו ניטל ממנו וכן אתה מוצא בקין [קרח] ובלעם ודואג ואחיתופל וגחזי [אבשלום] ואדוניה והמן שנתנו עיניהם [בשאין] ראוי להם מה שבקשו לא ניתן להם ומה שבידם [ניטל מהם]

Just as she is forbidden to her husband, she is forbidden to her [adulterous] sexual partner. Consequently, you say about the *sotah* who eyed something that was not for her, "That which she wanted was not given to her, and that which was already hers is taken from her." Likewise, you find regarding the original serpent who was more cunning than all domesticated and wild field animals, as it is said: "And the serpent was more cunning than all, etc." He wished to kill Adam and to marry Eve, so God said to him…"You wished to kill Adam and to marry Eve, so now, 'I shall place hatred between you and womankind.'" Consequently, you say, "That which he wanted was not given to him, and that which he had was taken from him." Likewise you find regarding Cain, Qoraḥ, Balaam, Do'eg, Aḥitofel, Geḥazi, Absalom, Adonijah, and Haman, who cast their eyes upon that which was

[250] According to *ySotah* 3:4, 19a, this is a woman who is celibate and mocks the sex lives of Biblical characters to show herself more virtuous than they.

[251] See Meir Minkovitz, "אשה פרושה וצבועים שדומים לפרושים", *Ha-do'ar* 54 (5735) 136

[252] According to *bSotah* 21b, it is indeed one who suggests doing legal but inequitable activities, such as offering a pauper just enough money to make him ineligible to take charity from the collection plate. According to *ySotah* 3:4, 19a, this refers to one who rules leniently for him/herself but strictly for others.

> inappropriate for them: that which they sought was not given to them, and that which they had was taken away from them.

This passage presents the serpent's cunning as problematic as it was harnessed to acquire things that the snake did not deserve.[253] And those who act in the same way – trying to acquire by trickery what is not theirs – will receive the selfsame punishment as the snake: never attaining what they sought to attain, and losing what they already had. And so *'ormah* is not a trait that is viewed completely positively by either the *Mishnah* or *Tosefta*, but it certainly has its sanctioned moments wherein it serves a vital, Proverb-like role of resolving difficult and even systemic challenges. We hope to develop why some *ha'aramot* are considered serpentine and others solomonic below.

Tosefta

With regards to legal uses of *ha'arama*, *Tosefta* cites two cases which do not appear in *Mishnah.* They relate to Sabbath and Festival Law, the arena which becomes most prominent in later talmudic discussions of *ha'arama*:

[253] In light of the singular usage of ערום in both *Mishnah* and *Tosefta* being in context of the *sotah*, tannaitic literature paints the picture of the *sotah* woman as cunning and sly in her betrayal of her husband. While Lady Wisdom in Proverbs is associated positively with *'ormah*, the above examples make a negative association between women and *'ormah*. This may be related to the rabbinic rereading of *'ormah* from Proverbs in the verse אני חכמה שכנתי ערמה (Proverbs 8:12) to suggest that *'ormah* in women, contrary to the very clear meaning of Proverbs itself, is a negative attribute rather than a positive one. (See *bSotah* 21b where this suggestion is made by Palestinian *amora* R. Abahu) For a suggestion that this is the correct reading of Proverbs proper, see Claudia V. Camp, "Wise and Stranger: An Interpretation of the Female Imagery in Proverbs in Light of Trickster Mythology," *Semeia* 42 (1988) 14-36. For more on the topic of women as tricksters and manipulators in rabbinic literature see *The Journal of the Society for Textual Reasoning* 6,2 (March 2011); Dvora Weisberg, "Desirable but dangerous: Rabbis' daughters in the Babylonian Talmud." *Hebrew Union College Annual* 75 (2004) 121-161. For a suggestion that tannaitic material about the *sotah* woman accentuates the dangers of women, see Ishay Rosen-Zvi, *The Mishnaic Sotah Ritual: Temple, Gender and Midrash*. Leiden: Brill (2012). This also may merely be reflective of an emerging link between *'ormah* and sexuality. See Genesis Rabbah *Vayeshev* 85, where the snake's character of *'ormah* is related to him seeing Adam and Eve copulating. This connotation is based on the linguistic similarity and Biblical proximity of ערום as cunning (Gen. 3:1) and the description of Adam and Eve as ערומים, naked (Gen. 2:25).

תוספתא שבת יד:ו (וינה)

מצילין[254]מיום טוב לשבת אבל לא משבת זו לשבת אחרת ולא משבת ליום טוב ולא משבת ליום הכפורים[255] ולא מיום הכפורים לשבת[256] ואין צורך לומ' מיום טוב לחול ולא יציל ואחר כך יזמין[257] אלא יזמין ואחר כך יציל הציל פת נקייה אין רשאי[258] להציל פת הדראה פת הדראה רשאי[259] להציל פת נקייה ואין (מערבין) מערימין בכך[260] ר' יוסה בי ר' יהודה אומ' מערימין בכך

One should not save [food from a fire on the Sabbath] and afterward call [guests to join in], but he should first call [guests to join in] and afterward should save [the food]. [cf. M. Shab. 16:3D]

[If] one has saved a loaf of bread of fine flour, he is not permitted to save a loaf of bread of coarse[261] flour. If he saved a loaf of bread of coarse flour, he is permitted to save a loaf of bread of fine flour. And one should not practice cunning in this matter. R. Jose b. R. Judah says, "One may practice cunning in this matter [by taking the loaf of coarse flour first and then going back for the one of fine flour]."

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[254] According to *yShab.* 16:3, 18d, the potential problem is saving food for a weekday on the Sabbath or holiday, in other words, preparation for post-Sabbath or post-holiday. According to *bShab.* 117b, the concern is becoming so swept up in saving one's food that one ultimately extinguishes the fire on the Sabbath or the Festival.

[255] For a discussion about whether this refers to food for minors on *Yom Kippur* or breakfast for adults after the *Yom Kippur* ends, see Lieberman, *Tosefta Ki-fshuta* Vol. 3, 210.

[256] *bShab.* 117b: ומצילין מיום הכפורים לשבת. This may be related to a debate between R. Aqiva and R. Ishmael in *mShab.* 15:3 about other preparation on *Yom Kippur* for the Sabbath.

[257] The parallel *mShab.* 16:2 does not mention inviting guests, but does mention asking others to take food for themselves (16:3). It is unclear whether this means that the *mishnah* is opposed to inviting guests in order to save more food, or if one is calling others to save food only in a situation in which s/he cannot save all of the food her/himself due to the rapidly spreading fire. *YShab.* 16:3, 18d, cites two opposing *baraitot* about inviting guests before saving the food and relates this question too to the argument between *tanna qama* and R. Jose b. Judah regarding the permissibility of *ha'arama*. And lastly, *BShab.* 117b cites the argument in the context of saving liquid spilling from a broken barrel on the Sabbath as opposed to this case (and the case in the relevant *mishnah* in BT) about a fire.

[258] MS Erfurt אין צריך – Lieberman suggests that the term צריך can mean רשאי, and does mean so here. (See Lieberman *Yerushalmi Ki-fshuto* 252, *Tosefet Rishonim* Vol. 1, 155, and *Tosefta Ki-fshuta*, *Shabbat*, 210.)

[259] MS Erfurt ואינו צריך לומר – probably a mistake.

[260] MS Erfurt בהן – This change probably reflects BT's reading of the *baraita*, in which אין מערימין refers to the section about inviting guests. By changing אין מערימין בכך to אין מערימין בהן, MS Erfurt suggests that the אין מערימין debate is about both inviting guests and saving coarse bread. *bMQ* 12b, however, cites only the end of this *tosefta*, using אין מערימין בכך and does not discuss which part of the *tosefta* this clause refers to. The comparison this clause is used for is a *braita* about making new wine on *ḥol ha-moed*, suggesting that it is for the holiday, though it is truly for afterwards.

[261] Based on Lieberman (ibid.) - מורסן (פת חזרא)

תוספתא ביצה ג:ב (וינה)

אותו ואת בנו[262] שנפלו לבור ר' אליעזר אומ' מעלה את הראשון על מנת לשוחטו ואינו שוחטו והשיני עושה לו פרנסה במקומו בשביל שלא ימות ר' יהושע אומ' מעלה את הראשון על מנת לשוחטו ואינו שוחטו ומערים ומעלה את השיני[263] רצה שלא לשחוט את אחד מהם הרשות בידו[264]

A dam and its offspring which fell into a pit R. Eliezer says, "One raises up the first on condition to slaughter it but does not slaughter it, and, for the second, one provides food while it is in its present location, so that it does not die." R. Joshua says, "One raises up the first on condition to slaughter it but does not slaughter it, and, practicing cunning, one then raises up the second. [If] he wanted to slaughter neither one of them, he has the right [to refrain]."

In the following chapter, we will analyze how these particular *ha'aramot* (*pl*.) function, as they represent a slightly different iteration than what we have seen thus far. Here we will only point out that, like the mishnaic examples, in both cases a person stands to lose money (=possessions) as a result of following the law – the law of not removing excess food on the Sabbath in case of a house fire and the law of not handling animals except for the purpose of consumption on the Festival. And in each case, one *tanna* offers a dodge to avoid this unfortunate reality. There is true conflict between a person's financial health and their religious commitment. Unlike the mishnaic cases, however, it there appears to be no connection between these *ha'aramot* and navigating post-Temple life. In fact, it is hard to see the societal urgency in these cases at all. Did animals often fall into pits on the holiday? Were house fires common?

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[262] There is no parallel in *Mishnah* (or *Midrash Halakha*) to this toseftan passage. Instead *mBeṣa* 3:4 deals only with the case of a *bekhor* animal that falls into a pit on the Festival (found also in the very next toseftan passage). There, the question surrounds whether the animal had been maimed prior to the Festival, which would render it appropriate for slaughter and thus for retrieval from the pit for the purpose of slaughter. Though the case of a "regular" animal falling into a pit on the Festival is not found in rabbinic, some assume that the ruling would be the same: because it is edible, it may be retrieved, but only to be slaughtered for that day's food. (*Or Zarua, Laws of the Festival*, 2:355), and thus assume that the case of a parent and its dam highlights R. Joshua's position. Others have argued unconvincingly that both the *bekhor* and the animal/dam cases are unique, and one would be permitted to retrieve a "regular" single animal from a pit on the Festival even without slaughtering or planning to slaughter it. (*Magen Abraham O.C. 498:10*).

[263] MS Erfurt, MS London and Venice Ed. add: על מנת לשחוט

[264] Thus, MSS Vienna and Erfurt, but MSS Leiden, London, Venice Ed. read: רצה לשחוט רצה שלא לשחוט אחד מהן הרשות בידו (See also '*Ittur, Laws of Festivals*, Part III, 140; *Shibbolei Ha-Leket Ha-Shalem* Laws of Festivals chapter 252). PT and BT both read differently, an issue that will be considered further below.

Perhaps this is why, while both the *Mishnah* and *Tosefta* discuss the case of a *bekhor* that falls into a pit on the Festival,[265] only the *Tosefta* brings up the animal/dam case invoking *ha'arama*. Likewise, while the *Mishnah* discusses how many meals to save from a burning home on the Sabbath,[266] it is only the *Tosefta* which raises the possibility of performing *ha'arama* by saving coarse bread first "by accident" in order to save extra bread. The *Mishnah*'s interest in *ha'arama* is rather narrow. It is not for solving problems caused here and there by a clash of *halakhah* and values but instead it is expressly for the purpose of working out a society need in a particular historical context.

Uniquely, the *Tosefta* also cites explicit instances of rejected *ha'arama*. For example, the *Tosefta* rejects use of *ha'arama* to avoid usury restrictions:[267]

תוספתא בבא מציעא ד:ב[268] **(ירושלמי ב"מ ה:א, דף י' עמוד א')**
יש דברים שהן רבית ואינן רבית לוקח אדם הלואתו של חבירו בפחות ושטרותיו בפחות[269] יש דברים שאינן רבית אבל אסורין מפני ערמת[270] רבית כיצד[271] א"ל הלויני מנה אע"פ שחזר ולקח הימנו עשרים וארבעה אינו רבית אבל אסורין מפני ערמת רבית. כיצ'? א"ל אין לי מנה טול לך

[265] *Beṣa* chapter 3 in both *Mishnah* and *Tosefta*

[266] *mShab.* 16:2

[267] The Venice Ed. of *tAZ* 7:7 mentions *'ormah* in connection with the prohibition of drinking wine handled by a Gentile, but the term is not used in any extant MSS. An interesting development in the Geonic period, Exodus Rabbah *Mishpatim* 31 offers a play on words: לא תנשכנו לא תהיה כנחש שהוא ערום לרעה

[268] We follow MS Vienna here, but with a slight variation by Lieberman.

[269] *yBM* 5:1, 10a cites this clause as follows: תני יש דברים שהן רבית ומותרין. כיצד לוקח אדם שטרות חברו בפחות ומלוותו של חבירי בפחות ואינו חושש משום רבית.
This is a problematic reading for the Tosefta, as *tAZ* 1:11: לא ישא אדם ויתן בהלואתו של חברו מפני אבק רבית
See *Tosefta Ki-fshuta* ad loc. And *Tosefet Rishonim* page 178 for a proposed reconciliation of the two by explaining *tAZ* 1:11 differently.

[270] MS Erfurt: הערמת רבית; Venice Ed.: ערמית רבית

[271] MS Erfurt and Venice edition skip this first passage beginning with כיצד and go straight to the second one.

מאה[272] שלחטין אע"פ שחזר ולקח ממנו עשרים וארבע אינן רבית אבל אסורין משום [ערמת][273] רבית

There are practices which are usurious but are not usurious:[274] One purchases the [right to collect] the loans of his fellow at a discount.[275] There are matters which are not usurious, but are nonetheless prohibited because of strategizing to collect usury. How so? [If] he said to him, "Lend me a *maneh*[276]," even though he bought it from him [for] 24 [*sela*], this is not usury, but is prohibited because of strategizing to collect usury. How so? [If] he said to him, "Lend me a *maneh*," [and the other] said to him, "I don't have a *maneh*, but take 100 [*seahs*] of grain." Even though he then bought it from him [for] 24 [*sela*], this is not usury, but it is prohibited because of cunning usury.

When a creditor receives a quantifiable financial perk beyond the actual value of the loan from his debtor, the two parties have transgressed usury. In one sense this happens in this passage: the creditor lends 100 *seahs* of grain, which is worth 25 *sela*. At some later point, the creditor makes a bid for the grain himself, offering only 24 *sela*. So, now, beyond the loan that the debtor owes, the debtor now becomes a salesman too. The debtor agrees to sell it because after all, he will only make 24 *sela* in the marketplace as well, assuming that those buying are interested eventually in selling at a profit. This seems like usury because the creditor pays less than the market value of the grain, which seems like a perk for having loaned the debtor in the first place. However, this really is not a perk at all because anyone in the market would have the paid the

[272] Lieberman changes the term סאה from the MSS and printed editions, to מאה, suggesting that such a switch occurs with regularity. (See Lieberman, *Tosefta Ki-fshuta*, 89, note 37) MS Erfurt: עשרים סאה של חיטין

[273] This is not found in MS Vienna, but because it is found in the otherwise identical line above, Lieberman adds it. (*Tosefta Ki-fshuta*, 196)

[274] This author has modified Neusner's translation to accommodate Lieberman's reading.

[275] There is an argument among the medieval commentators over whether this is permissible even if the seller of the deeds accepts responsibility to pay the buyer even if the debtor defaults. The Provencal authorities suggest that it is, while the Ashkenazic commentators suggest that it is not. (See *Or Zarua* ibid., Responsa *Maharin* Lev III:60) All agree, however, that the sale of deeds is legal even though the collection date has not yet arrived.

[276] 100 *zuz*

exact same amount: the debtor has not lost anything extra, nor has the creditor gained.[277] Nonetheless, the transaction is still outlawed.

It is difficult to know whether this example should be included in the illustrations of *ha'arama*. Perhaps the terminology of ערימה is similar to ערום in its negative connotation. Commentators have difficulty explaining what ערימת רבית is. According to some medieval glosses, this indicates that there is here אבק ריבית, a hint of usury, at least rabbinically.[278] According to others, this is suspect because it looks as though the creditor only loaned the grains in the first place in order to ensure this future transaction.[279] However, the plain meaning of the phrase is that this is a clever way to take interest without actually breaking the law. Perhaps the creditor was not planning to bother to go out to market to haggle with grain sellers about prices. But here is an easy way to make quick money.

This is an above-board interest scheme: a sly businessperson is trying to game the law. S/he makes a mockery of the usury prohibition, a prohibition which includes five separate transgressions split among all parties involved (*mBava Meṣia* 5:12) and is considered *middat resha'im*, a trait of the wicked, in *tBM* 4:9.[280] There is no *pathos* here suggesting that *ha'arama* be permitted. And perhaps the tannaitic understanding of commerce in general comes into play here. Jacob Neusner has painted a picture of Aristotelian economics within the *Mishnah* which appears relevant to the *Tosefta* as well:[281] money is a medium of exchange rather than

[277] See Lieberman *Tosefta Ki-fshuta ad loc*. 196

[278] See Naḥmanides *Novellae bBM* 62b

[279] See R. Solomon ibn Aderet *Novellae bBM* 68a

[280] It is not clear whether this passage is academic – dealing with a potential use of *ribit* – or is responding to some scheme that is already in use. The language of יש דברים can go in either direction.

[281] For a detailed analysis of the relationship between *Mishnah* and *Tosefta* regarding the laws of usury, see Hillel Gamoran, "The Tosefta in light of the law against usury." *Jewish Law Assoc. Studies* 9 (1997) 57-78.

intrinsically valuable. As he writes: "True value (in our sense) lies in the land and produce, not in liquid capital. Seed in the ground yields a crop. Money invested in maintaining the agricultural community from season to season does not. The bias is against not only usury but interest, in favor not only of regulating fraud but restricting honest traders."[282] The rabbis do not favor accumulation of coinage, even if no one is harmed in the process![283]

Also in the realm of transgressive *ha'arama*, the *Tosefta* outlaws such evasion in cases of ritual im/purity law, an issue which does not arise in the *Mishnah* at all.[284] We will take up these cases in further detail in chapter 3 below.

Mishnah* vs. *Tosefta

The relationship between *Tosefta* and *Mishnah* is hotly debated. On the one hand, there are those who argue for *Tosefta*'s inclusion of material which predates *Mishnah*; on the other hand, there are clearly attributions in *Tosefta* from rabbis who post-date *Mishnah*. It is therefore difficult to know whether the omission of toseftan material in *Mishnah* is purposeful or not. In our case of *ha'arama*, for example, regarding the toseftan arguments between R. Eliezer and R. Joshua, or by R. Jose b. Judah, perhaps the mishnaic redactors a) simply had no record of these arguments, b) knew of them but chose to leave them out, or c) the attributions in the *Tosefta* are mistaken or purposely changed and actually represent opinions from after the close of *Mishnah*.

[282] Jacob Neusner, "Aristotle's Economics and the Mishnah's Economics: The Matter of Wealth and Usury," *Journal for the Study of Judaism* XXI:1 (1990) 43. See also Robert P. Maloney, "Usury in Greek, Roman and Rabbinic Thought." *Traditio* 27 (1971) 79-109.

[283] He offers evidence to support his claim: the rabbis greatly expand usury law, and the homeowner is always the borrower of money, whereas the lender of money, a person with extra cash on his hands, is consistently viewed as other.

[284] We will discuss this in depth in chapter 3.

Moreover, the toseftan discussions about illicit *ha'aramot* are anonymous, so it is difficult even to guess whether the *Mishnah* was aware of them.

Regardless of the chronology and conscious decision-making, the *ha'arama* discussion is clearly more prominent in the *Tosefta*; it appears over a dozen times – and in varied legal arenas- compared to the *Mishnah*'s mere three uses of even the root *'.r.m.* Moreover, the *Tosefta* offers the precedent for rejected *ha'aramot*, a precedent which will become significant for the Palestinian Talmud.[285]

Palestinian Talmud

Over and over again, the Palestinian Talmud (PT) limits the use of *ha'arama*.[286] Beyond echoing the toseftan[287] prohibition of *ha'aramat ribit*,[288] PT offers more examples where *ha'arama* is mentioned only to be rejected:

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[285] As alluded to above, with the debates about *ha'arama*, *Tosefta* presents a new type of *ha'arama* (to be examined in the following chapter), new application to less pervasive systemic issues, and examples of rejected *ha'arama*. It entails a more robust treatment of the topic which allows one to begin to think about *ha'arama*'s parameters.

[286] This survey of PT *ha'aramot* skips one incident of *ha'arama* and deals with it instead in chapter 4 specifically in contrast to the parallel BT *sugya*:

נדרים ה:ו, לט עמ' ב - מתניתא כל מתנה שהיא כמתנת בית חורון שהיתה בהערמה שאינה שאם הקדישה אינה מקודשת אינה מתנה

[287] PT also includes toseftan arguments about *ha'arama*, such as the case of saving coarse bread first from a burning home on the Sabbath (*yShab.* 16:3, 18d ; it offers a different version of the toseftan text to account for people in different states of hunger).

[288] *yBM* 5:1, 10a-b

תני יש דברים שהן רבית ומותרין. כיצד לוקח אדם שטרות חברו בפחות ומלוותו של חבירי בפחות ואינו חושש משום רבית. ויש דברים שאינן רבית ואסורין משום הערמית רבית.

כיצד קיבל הימינו שדה בעשרה כור חיטין ואמר לו תן לי סלע אחד אמר לו אין לי אלא כור אחד חיטין טול לך וחזר ולקח ממנו בעשרים וארבע אין זה רבית אבל אסור משום הערמית רבית א"ל לית את צריך והב אגר כלים או אגר הכתפין אקולי וסב דינרך.

Many have pointed out that there is a conflation of *sugyot* in this situation and that the PT version should be read only starting from the words, אמר לו תן לי סלע אחד אמר לו אין לי אלא כור אחד חיטין. However, even so, the PT version is a bit different than the Tosefta's version. In this case, "A"'s suggestion that "B" sell him the wheat for 24 *dinar* (=96 *zuz*) is based on the money "B" will have to spend on labor to get the wheat to market. Thus, there really is no usury here! "B" probably even makes more than he would have otherwise, assuming that laborers cost more than 4 *zuz*, and "A" is getting paid an extra four *zuz* for saving "B" the labor costs! But it still has a common element with (and is perhaps quoting) the Tosefta: according to the plain meaning of the text, there is not true usury here, but only *ha'arama* which is completely technical legal; nevertheless, the activity is rejected. (See Yerushalmi *Neziqin* yotse

קידושין ג:ד, סד עמוד א' (כ"י ליידן)

משנה (כ"י פארמה) המקדש את האשה ואמ' סבור הייתי שהיא כוהנת והרי היא לוייה לוייה והרי היא כוהנת ענייה והרי היא עשירה עשירה והרי היא ענייה הרי זו מקודשת מפני שלא היטעתו:

גמרא... רבי בר אחא בשם רבי אימי ראובן חייב לשמעון סמכיה גבי לוי. אפירסן לוי. לית ראובן חייב לשמעון. הדא דאת אמר בשלא עשו בהערמה אבל עשו בהערמה חייב.

Mishnah: He who betroths a woman and said, "I was thinking that she is a priest, and lo, she is a Levite," "a Levite, and lo, she is a priest," "a poor girl, and lo, she is a rich girl," "a rich girl, and lo, she is a poor girl," lo, she is betrothed, for she has not deceived him.

...

R. Jacob bar Aha in the name of R. 'Immi, "If Reuben owed money to Simeon, and assigned to him what Levi was owing to him [Reuben], and Levi lost his money, Reuben does not owe Simeon money." That statement you made applies when they did not practice *ha'arama* [in a conspiracy against Simeon]. But if they practiced *ha'arama,* he remains liable.

Here is the perfect dodge: a debtor makes his destitute friend[289] his guarantor on a loan. The contract required a guarantor so he presented one who creditor thought had means,[290] while the debtor knew otherwise.[291] When the creditor comes to collect, there is nothing to collect, and the debtor is off the hook. As in the usury case, *ha'arama* is not acceptable for use in financial transactions. But more significantly, *ha'arama* may not be used to defraud a second party. The stammaitic addition of אבל עשו בהערמה indicates an interest in snuffing out even potential *ha'arama*, perhaps stimulated independently or in order to make the case parallel to the *mishnah*, which specifically mentions that the betrothal is effective under false pretenses so long as לא הטעתו, the woman did not trick him into any misconceptions about her.

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le-ʾor ʻal-pi ketav-yad Esḳoryal be-tseruf mavo ʻal-yade Eliʻezer Shimshon Rozental ; hosif mavo u-ferush Shaʾul Liberman; see also Saul Lieberman, *Talmuda shel Kisrin*)

[289] Alternatively, he knew that the guarantor would run away. See *Qorban Ha'edah s.v.* איפרסן לוי and *Shiyarei Ha-qorban ad loc.*

[290] Just as in the preceding *mishnah* the man had mistakenly thought that the woman he was to betroth was poor or rich. (see *Ridbaz s.v.,* איפרסן לוי)

[291] See *Pene Moshe s.v., בשלא עשו בהערמה*

Suspicion of *Ha'arama*

The aforementioned passage is but one example of the Palestinian Talmud's hunt for potential *ha'arama*. We find, in fact, the phrase חשש הערמה, suspicion of *ha'arama*, used explicitly in PT: some *tannaim* and *amoraim* are portrayed as actively look for potential *ha'arama* as a reason to prohibit certain activities. The notion of suspecting *ha'arama* takes for granted that if found, *ha'arama* is prohibited.[292] PT moves beyond simply outlawing *ha'arama* (at least in some cases), and begins to deal with it more prophylactically.

Case 1 – Indecent Proposal

משנה ערכין ו:א

שום היתומים שלושים יום, ושום ההקדש שישים יום; ומכריזין בבוקר ובערב. המקדיש נכסיו, והייתה עליו כתובת אישה--רבי אליעזר אומר, כשיגרשנה, ידיר הניה[293]; רבי יהושוע אומר, אינו צריך. כיוצא בו, אמר רבן שמעון בן גמליאל, הערב לאישה בכתובתה, והיה בעלה מגרשה--ידיר הניה: שמא יעשו קנוניה על נכסיו של זה, ויחזיר את אשתו.

The proclamation of the sale of goods of orphans evaluated by the court to meet the father's debt is for thirty days. And the proclamation of the sale of goods of

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[292] See, for instance, *yPe'ah* 6:1,19b:

ירושלמי פאה ו:א, דף יט עמוד ב' (כ"י ליידן)

אבל אם אמ' שדי מובקרת יום אחד שבת אחת חודש אחד שנה אחת שבוע אחד אם עד שלא זכה בין הוא בין אחר {אינו} יכול לחזור בו אבל משזכה בה בין הוא בין אחר אינו יכול לחזור בו הדא אמרה הוא זמן מרובה הוא זמן מועט [הדא אמרה] לא חשו על הערמה...

But if one said: My field is ownerless for one day, for one week, for one month, for one year, for one seven-year period, until someone acquired it he may {not} renege, but once he or someone else has acquired it, he may not renege. This teaches: a long time or a short time are equivalent [this teaches] they were not concerned about cunning [in order to evade *ma'aser*].

{אינו}: This is the rendering of both MS Leiden and the Venice Edition, though in MS Leiden it appears to have been added by a later scribe. However, MSS Vatican, Paris, London, and the Amsterdam ed. render: אם עד שלא זכה בין הוא בין אחר יכול לחזור בו. Additionally, the *braita* is quoted without the word אינו in BT MSS Munich, Moscow, Vilna and Venice Ed. of bNed. 44a. While in MS Vatican the entire sentence is reversed-

עד שלא זכה בה הוא ובין אחר אינו יכול לחזור בו מי שזכה בה בין הוא בין אחר יכול לחזור בו-

the argumentation found in the *sugya* works off of the version of the other BT MSS, indicating mere scribal error in transcription of the *baraita*.

[הדא אמרה] - Conspicuous addition by the scribe

לא חשו על הערמה- MSS Paris and London, Constantinople and Amsterdam ed.: הדא אמרה לא חשו להערמה The difference between להערמה and על הערמה may be the difference between not being suspicious that *ha'arama* may be taking place, and not caring even if *ha'arama* is actually taking place, respectively. However, in other *sugyot*, such as *yPes.* 2:2, 29a, להערמה is used in all versions.

[293] The parallel *t'Arakhin* 4:3 (MS Vienna) reads quite differently and becomes a debate about whether one who has foresworn his ex-wife from his assets may remarry her:

המקדיש את נכסיו ונתן עיניו לגרש את אשתו ר' ליעזר אומ' ידירנה הנאה וגובה כתובתה מן הקדש ואם רצה להחזיר יחזיר ובית הלל אומ' אם רצה להחזיר לא יחזיר ר' ליעזר או' כדברי בית שמיי ור' יהושע או' כדברי בית הלל

This question is likewise taken up in *mGit.* 4:7.

the sanctuary evaluated by the court is for sixty days. And they make an announcements morning and night. [He who sanctifies his property, and there was incumbent upon it the payment of the marriage settlement - R. Eliezer says, "When he divorces her, he imposes on her a vow not to enjoy any benefit from him." R. Joshua says, "He need not do so"] *Similarly, R. Simon b. Gamliel said: A guarantor of a woman's ketubah, if her husband divorced her, he (=her husband) must take an oath [not to give her any] benefit – for perhaps they will conspire against this [guarantor's] possessions, and he will remarry his wife.*

ירושלמי נזיר ה:א, דף נד עמוד א' (כ"י ליידן)

תמן תנינן שום היתומין שלשים יום שום הקדש ש(ל)[ש]ים יום ומכריזין בבקר ובערב אמ' ר' מנא ר' ליעזר חשש על הערמה רבי יהושע לא חשש על ה( )[ע]רמה

There we have learned: The proclamation of the sale of goods of orphans evaluated by the court to meet the father's debt is for thirty days. And the proclamation of the sale of goods of the sanctuary evaluated by the court is for sixty days. And they make an announcements morning and night. [He who sanctifies his property, and there was incumbent upon it the payment of the marriage settlement - R. Eliezer says, "When he divorces her, he imposes on her a vow not to enjoy any benefit from him." R. Joshua says, "He need not do so"] [M. Ar.6:1]. R. Mana said, "R. Eliezer takes into account the possibility of cunning [between the husband and the wife to defraud the Temple]. R. Joshua does not take account of the possibility of cunning. [The man will not divorce her so that she may get his property back in payment of her marriage settlement.]

The *mishnah* speaks of *qinunya*, conspiracy, but it does not speak of *ha'arama*; it R. Mana who filters the *mishnah* through that terminology. R. Eliezer and R. Joshua, who appeared in the *Tosefta* debating the permissibility of *ha'arama* in a particular case are here interpreted as debating the potential for *ha'arama* here too. A man who has consecrated money/possessions to the Temple is trying to get them back without paying the twenty-five percent tax required of those who redeem their own *heqdesh* items.[294] His strategy is to divorce his wife, so that she receives her *ketubah* payment from the consecrated money and then to remarry her. Unlike the cases of *ma'aser sheni*, *bekhor*, the burning house or the fallen animal, there is no pathos in this story. The man is trying to take from sacred funds. He is not caught between a rock and a hard

[294] See Lev. 27:13 ff; As in the case of *ma'aser sheni*, the Biblical term "one-fifth" is calculated as a fifth fourth, or twenty-five percent.

place not of his own making; he has made a vow to the Sanctuary and does not wish to keep it. Likewise, in R. Simon b. Gamaliel's case, the spouses may wish to conspire to cheat the *ketubah* guarantor out of money. This would be unacceptable, and measures must be taken to safeguard against such eventualities.

Case 2 – Making *Ḥameṣ* Homeless

The suspicion of *ha'arama* is again projected, this time onto an *amora* by the anonymous redactor(s), in the case of ridding oneself of *ḥameṣ* before Passover:

ירושלמי פסחים ב:ב, דף כט עמוד א' (כ"י ליידן)

הבקיר[295] חמ(ש)[צו][296] בשלשה עשר לאחר הפסח מהו ר' יוחנן אמ' אסור ר' שמעון בן לקיש אמ' מותר... אמ' ר' יוסה לר' פינחס נהיר את כד הוינן אמרין אתייא (ד)[ל]ר' יוחנן כר' יוסה ודר' שמעון בן לקיש כר' מאיר. אינה כן אלא ר' יוחנן חשש להערמה ור' שמעון בן לקיש לא חשש להערמה. מה נפק מביניהון נפלה עליו מפולת מאן דאמ' הערמה לית כאן הערמה והוא מותר מאן דאמ' זכייה לית כאן זכייה והוא אסור. הכל מודין בגר שמת וביזבזו יש' את נכסיו מאן דאמ' הערמה מותר ומאן דאמ' זכייה (אסור) [מותר].[297]

If [a person] renounced ownership of his leavened bread on the thirteenth, after Passover what is the law [regarding the status of the leaven]?[298] R. Yoḥanan said, "It is forbidden." R. Shimon b. Laqish said, "It is permitted."...Said R. Jose to R. Pinḥas, "Do you remember when we used to say that R. Yoḥanan is in accord with R. Jose [as in M. Nedarim 8:4, where he makes renouncing of property contingent on a second party's taking possession of the property], and R. Simeon b. Laqish is in accord with R. Meir [the assumed anonymous disputant of R. Jose in M. Nedarim 8:4, who claims that taking possession is not required]? This is not correct. Rather R. Yoḥanan is apprehensive of *ha'arama* and R. Simeon b. Laqish is not apprehensive of *ha'arama.*

What is the [practical] difference between them [the two rationales]? [If before Passover] a ruin fell on it [the leaven]. The one [Yoḥanan] who was apprehensive of *ha'arama* – there is no possibility of *ha'arama* here and [the leaven, when dug up after Passover,] is permitted. The one [Simeon b. Laqish] who says that possession [by a second party cause the renounced property to leave the owner's

[295] Lieberman notes that Rothner found a different version with the term *hifkid* among six medieval commentators, but he rejects this reading, as the entire sugya deals with *hefker* rather than *pikadon*. He disproves each of Rothner's citations one by one as being mere scribal errors. (*Ha-Yerushalmi Ki-fshuto*, 397)

[296] ( )indicates something which was erased, [ ] indicates the substituted word(s) or letter(s)

[297] MS Leiden: (אסור}(מותר

[298] i.e., is it considered *ḥameṣ* that was in the hands of a Jew over Passover and thus is off limits, or is it completely permissible?

> possession] – there is no possibility of possession here, and [hence the leaven] is forbidden [for it is considered to have remained the property of the Jew]. All agree regarding the case of a convert who died [before Passover without any Jewish relatives to inherit his property, which therefore became ownerless,] where an Israelite distributed the property [which may include leavened bread that remained over Passover,] that according to the one who said that possession [is necessary, her that requirement is not necessary either, since there is no doubt that the property has left the original owner's possession and, hence,] it is permitted.

A Jew who owns *ḥameṣ* on Passover may not eat it after the holiday as a penalty and deterrent for violating *bal yera'eh/yimaṣe*. But what if s/he does not destroy the *ḥameṣ* prior to Passover, sell it, or give it away, but instead simply declares it *hefqer*, ownerless, before Passover? Does this suffice as ridding oneself of leaven before Passover? May one eat this leaven following the holiday? Do the rabbis take such declarations seriously? After all, it is unlikely that anyone will take ownership of the "ownerless" leaven just two days before Passover, and the owner will be able to retrieve the food following the holiday.[299] R. Yoḥanan is presented as concerned about *ha'arama* lurking, while Resh Laqish is not. How the issue of *ha'arama* plays out legally is unclear: perhaps the declaration of *hefqer* itself is invalid,[300] as the agent does not truly want others to take his *ḥameṣ,* or perhaps the declaration itself is valid, but the rabbis discount it due to suspicion.[301] Again, it is a later layer of PT, here the redactional layer, explaining a dispute in *ha'arama* terms. While in later centuries, when Jews began to

[299] Menahem Meiri, *Bet Ha-Beḥira* 9:1 (18a). On the other hand, *Or Zarua* (1:748; 2:246) R. Asher b. Yehiel (*Piskei ha-Rosh, bPes.* 2:4) and R. Yeruham (*Toldot Adam ve-Ḥava*, 5:5) read it as a concern for lying: perhaps s/he will not even declare the food ownerless, but will merely lie and pretend to have done so. Their definition of *ha'arama* is "lying." We favor Meiri's reading, as it accords better with the plain meaning of *hifqir ḥemṣo*. Additionally, if declaring *ḥameṣ* ownerless is problematic because a person may lie about it, burning one's *ḥameṣ* should be problematic too – after all, a person may simply lie about it!

[300] See *Pene Moshe yPe'ah* 6:1, 19b, *s.v.,* לישנא דמתניתא

[301] *Pene Moshe,* s.v., אינה כן; *Qorban Ha'edah* , s.v., חייש להערמה, suggests that the *ha'arama* is lying about having declared *hefker* when one never in fact declared it. He may prefer this explanation because BT (*Qid.* 49b) rules that דברים שבלב אינם דברים which mitigates the role of intention in ownership-conferring transactions.

manufacture beer, and their very livelihoods were dependent upon owning leaven, circumventions around the violation of owning leaven would be found.[302] However, here there is no such worry. There is no suggestion here that the person in question is destitute or that s/he has inordinate amounts of *ḥameṣ* and stands to lose too much money. Instead, the motivation is simply to shirk the law. It seems that this person is simply trying to get around the law for his/her own benefit. R. Yoḥanan will not allow this. Resh Laqish's position here is interesting. It seems that he is not *looking* for *ha'arama*. He will not actively seek it out. After all, such probing may undermine the very believability of any declaration of *hefqer*. The very superficial version of what is taking place stands.

Case 3 – No Snacking!

In a third instance, the concern for *ha'arama* is addressed without the specific phrasing of חשש הערמה:

ירושלמי חלה ג:א, דף נט עמוד א' (כ"י ליידן)
משנה אוכלין עראי מן העיסה עד שתגלגל בחיטי' ותטמטם בשעורי'. גילגלה בחטים וטימטמה בשעורין האוכל ממנה חייב מיתה. כיון שהיא נותנת את המים מגבהת חלתה ובלבד שיהא שם חמשת רבעים קמח:
גמרא אוכלין עראי מן העיסה כול'. אמ' ר' חגיי לא שנו אלא עראי אבל קבע[303] אסור. מפני שהוא מערים לפוטרה מן החלה. אמ' ר' יוסי אי מן הדא לית שמע מינה כלום שאפילו שהוא נוטל ממנה שתים שלש מקרצות מכיון שהוא עתיד להחזירו לדבר שלא נגמרה מלאכתו מותר. דאמ' ר' יוסי[304] בשם ר' זעיר' < >[305] בשם ר' לעזר אף מה שבלגין לא נטבל מפני שהוא עתיד להחזירו לדבר שלא

[302] Unlike later centuries, there is little indication that ridding oneself of *ḥameṣ* prior to Passover in ancient times involved substantial financial loss, as one would not have had substantial amounts of *ḥameṣ* stored. This may be because milled grain that had not yet had contact with water was not considered *ḥameṣ*, and little grain was processed earlier than shortly prior to its consumption. In fact *tPes.* 2:6 discusses only the urgent situation of a Jew who finds himself in possession of *ḥameṣ* on a boat on the eve of Passover and suggests that in such a situation, the Jew may sell the *ḥameṣ* to the Gentile. This implies that this was not normative practice, at least for those not aboard ships on the eve of Passover. It was not until the sixteenth century when Jews began to own inns and produce liquor that ridding oneself of *ḥameṣ* prior to the holiday became financially prohibitive. See chapter 2 above for further discussion.

[303] MS Vatican: היה קבוע

[304] MS Moscow: דא'ר' יוסי בש'ר' זעירא ור' יונה בש'ר' אלעזר

נגמרה מלאכתו. והדא אמרה[306] מי שאינו יכול לעשות[307] עיסתו בטהרה[308] מפני[309] שאינו יכול. הא[310] אם היה יכול לא בדא. הדא אמרה שאסור לאדם [לעשות²] עיסתו קבין.

Mishnah: [People] may snack on dough [without first separating dough-offering from it] until she [i.e., the woman preparing the dough] rolls [the dough] in the case of [dough made from] wheat, or [until] she forms [it] into a solid mass, in the case of [dough made from] barley. [Once] she rolled [the dough] out, in the case of [dough made from] wheat, or formed [it] into a solid mass, in the case of [dough made from] barley, one who eats from it [without first separating *ḥallah*] is liable to death. As soon as she puts water [into the flour], she may remove her [portion of] *ḥallah*, so long as there is not five-fourths of a *qab* of flour [left unmixed with water].

Gemara: *People may snack on dough [without first separating the ḥallah…]* [M 3:1A]. Said R. Haggai, "This teaching applies only to a snack, but making a formal meal of it is forbidden [until one has separated *ḥallah*], because [if one does so] one may practice *ha'arama* so as to exempt the dough from the requirement of separating *ḥallah* [by taking so much dough away as to render the rest of the dough too small for the requirement of *ḥallah*][311]"

Said R. Jose, "If the reason is [what you have said], then there is nothing to be learned from this passage. For even if one take two or three pieces from the dough, since one is going to put the dough back into a mixture on which the processing has not yet been completed, it is permitted [to eat such dough without separating *ḥallah* at all]."[312]

As in the following: R. Jose said in the name of R. Ze'ira, and R. Jonah said in the name of R. Elazar, "Also [the wine in] the flagon is not placed into the status of what is ready for the separation of tithes and not yet tithed [=*tebel*] because the person is going to put any excess back into a batch on which processing has not yet been completed.

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[305] MS Vatican: בשם ר' זעיר' יונ' ור' זעיר' בן לעז- MS Vatican presents the end of the sugya as an argument between R. Jose in the name of R. Ze'ira Jonah and R. Ze'ira b. R. Elazar: according to one, a person who has work left to do on the dough, may eat from pieces of the dough, while according to the other, this is only in a situation in which one's *ḥallah* is ritually impure. Therefore, one may take pieces away so that there is no *ḥallah* requirement. But otherwise, this is not permissible.

[306] MS Vatican: וחד אמר

[307] MS Vatican excludes the word לעשות

[308] MS Moscow: (וכו')

[309] MS Moscow: מי

[310] MS Vatican: הא בדא

[311] See *Oṣar Mefarshei ha-Talmud, ad loc.*

[312] In other words, there is nothing wrong with taking the pieces away and eating them, even as part of a sit-down meal, because those pieces are not yet obligated in *ḥallah*, as the dough that they would be returned to has not been completely prepared yet.

> And this says [quoting Mishnah 2:2] "One who cannot separate *ḥallah* in purity [should separate the dough into several *qabs* rather than separating *ḥallah* which is ritually impure]"- One is only permitted [to break up the dough into smaller pieces so as not to require *ḥallah*] because one cannot [separate *ḥallah* in purity], but if one could, not in this [would we permit a person to take away small pieces of dough in order to exempt the dough from *ḥallah*. This teaches that it is forbidden for one to separate his/her dough into several *qabs*.

Two steps in the making of the dough are relevant to the requirement of removing *ḥallah*: the first is the mixing of the water and the flour, when one may already remove *ḥallah* in order to fulfill the commandment. Yet only when the flour and water have been fully integrated through kneading does eating from the dough without separating *ḥallah* become prohibited. Between these two steps, the *mishnah* allows one to snack on the dough before *ḥallah* has been taken but not to eat a full meal.[313]

R. Ḥaggai attributes this limitation to a fear of *ha'arama:* if one is permitted to eat a proper meal from the dough before separating *ḥallah,* perhaps one will remove hefty pieces of dough for the meal in order to exempt the rest of the basket of dough from the commandment of *ḥallah*, as it is now too minimal to require it. R. Jose suggests that potential *ha'arama* is not the reason for prohibiting the consumption of a proper meal of such dough; after all, it does not yet require *ḥallah* separation. Moreover, he argues, there are times when a person is actually permitted to remove large amounts of dough specifically in order to exempt the dough from the requirement of *ḥallah,* such as according to one opinion in the case of *ḥallah* which has become impure.[314] While it is unclear whether R. Jose is not concerned that a person would commit *ha'arama* or whether he simply does not mind if a person actually does commit *ha'arama* (after

[313] See *Oṣar Mefarshei ha-Talmud ibid.* for a discussion of what is considered snacking –whether it is measured quantitatively or by some other yardstick such as whether one had planned for a meal or not.

[314] This is the reading of the *Pene Moshe*, s.v., והדא אמרה. Of course, other readings are possible as well, but this is simplest for purposes of illustrating R. Haggai's concern for potential *ha'arama.*

all, the dough does not yet technically require that *ḥallah* be separated), R. Ḥaggai's position is clear: he understands the prohibition of eating a proper meal from dough that has yet to have *ḥallah* separated from it, even at its most initial stages, is a protective measure to guard against misuse of *ha'arama* in order to a evade a law.

Cases 4 & 5 – Mourning and Intermediate Festival Days

The Palestinian Talmud furthermore weighs the likelihood of *ha'arama* in different arenas of Jewish law, namely the laws of mourning and those of *ḥol ha-moed*, the intermediate days of a Festival:

ירושלמי מועד קטן ב:א, דף פא עמוד א' (כ"י ליידן)
משנה: מי שהפך את זיתיו ואירעו אבל או אונס או שהטעוהו טוען קורה ראשונה ומניחה לאחר המועד דברי ר' יהודה. ר' יוסי אומר זולף וגומר כדרכו.
גמרא:...ר' יודה או' יאבד דבר ממועט ואל יאבד דבר מרובה. ר' יוסה או' אל יאבד דבר כל עיקר. ר' יודה בר פזי בשם ר' יוחנן כשם שהן חלוקין כאן כך הן חלוקין בהילכות אבל: דתני אילו דברים שעושין לאבל בימי אבלו דורכין את עבטו וזולפין את יינו וגפין את חביותיו וזיתיו הפוכין ושנויין טוחנ(י)ן כדרכן ומשקין בית השלחין שלו בשהגיע זמנו לשתות וזורעין את נירו פשתן ברביעה דברי ר' יודה. אמרו לו אם אינה נזרעת פשתן תזרע מין אחר אם אינה נזרעת בשבת זו תזרע[315] בשבת אחרת. מנו "אמרו לו"? ר' יוסה. מחלפה שיטתיה דר' יודה תמן הוא אמ' יאבד דבר ממועט ואל יאבד דבר מרובה וכא אמ' הכין. שנייא [היא] תמן שדרכו להערים. וכל שכן מחלפה שיטתיה דרבי יודה[316] מה אית תמן שדרכו להערים את אמר מותר כאן שאין דרכו להערים לא כל שכן? אמ' ר' חיננא מנו "אמרו לו?" חכמ' שהן בשיטת רבי יודה במועד

Mishnah: He who [prior to the Festival] had turned his olives,[317] and then an occasion for mourning or some accident befell him, or workers proved unreliable [so that he could not complete the processing prior to the Festival], "[during the intermediate days of the Festival] applies the pressing beam [to the olives] for the first time, but [then] leaves it until after the Festival,[318]" the words of R. Judah. R. Jose says, "He squeezes out the oil entirely and seals it in a jar in the usual way."
...
Judah bar Pazzi in the name of R. Yoḥanan: "Just as they differ here, so they differ with respect to the laws governing the mourner." For it has been taught: "These are the things that they do for a mourner during the period of his mourning

[315] Constantinople Ed.:נזרעת

[316] Constantinople Ed.: מחלפא שיטתיה דרבי יוסה

[317] In order to prepare them for pressing (Albeck, *Shishah Sidrei Mishnah*, 379)

[318] In other words, one does not squeeze out the oil. (Albeck, *Ibid.*)

[in the intermediate days of a Festival]" "They press his olive-mass, empty out his wine, and seal it in jars. As to his olives, if they have turned over once and then a second time, they press them in the usual way. And they irrigate his field that requires it when its turn has come to receive water. And they sow his furrow with flax at the rains," the words of R. Judah. They said to him, "If it is not sown with flax, it may be sown with another species. If it is not sown this week, it may be sown in some other week [and hence, that may not be done for him]." Now who was it who said this to him? It was R. Jose. The opinions assigned to R. Judah are at variance with one another. There he has said that he may lose some small volume, but her should not have to a lost a large volume [of oil], while he here has said this [that to avoid any loss at all, others may on his behalf press olives in the usual way].
There is a difference between the two cases. There it is usual to practice cunning [and that is why, on the Festival, he has not permitted pressing the grapes in the usual way, while, with regard to the mourner it is permitted to do so]. All the more so are the opinions assigned to R. Judah reversed. Now if there [with respect to the Festival] it is usual to practice cunning, and yet you say that it is permitted [to apply the pressing beam], here, where it is not usual to practice cunning, is it not an argument a fortiori [that we should permit the work to be done in the usual way]? Said R. Ḥinenah, "Who are they who said to him what they said? They are the sages who concur with the thesis of R. Judah in respect to the intermediate days of the Festival.

Professional labor is restricted during both the intermediate days of the Festivals (*ḥol ha-moed)* as well as during the seven-day private mourning period. This passage draws a distinction between the two with regards to suspicion of evasion. During a period of mourning,[319] it is assumed that one will not be thinking about how to manipulate the law to get work done, presumably due to one's focus on his or her grief. This is not the case with regards to the holiday.[320] One may, for instance, find a way to "accidentally" fully press olives on the holiday even though only an initial pressing is permitted.[321] This characterization by the PT of arenas in

[319] It is likely that the mourning period in question here is only the seven days of *shiva*, as a comment follows questioning that one may get the work done בשבת אחרת, in a different week, rather than בחדש אחר, in a different month.

[320] Though, interestingly, the *Qorban Ha'edah* s.v. ומשני שנייא suggests that one specifically would be cunning during the period of mourning, more so that on a Festival. He claims that the ha'arama here is that one lies about wanting to plant flax in order to perform labor during *shiva*

[321] *Pene Moshe,* s.v.ומשני שנייא

which people are likely to be cunning versus those in which they are not proves more significant in light of the absence of such mention in the parallel Babylonian passage.[322]

The same concern about people employing *ha'arama* during the *ḥol ha-moed* recurs in the following chapter in the same tractate:

> **ירושלמי מועד קטן ג:א, דף פב עמוד א' (כ"י ליידן)**
> [שפם ונטילת צפורנים אית תניי תני ברגל מותר ובאבל אסור אית תניי תני ברגל אסור ובאבל מותר (מאן דאמ')] מאן דאמ' ברגל מותר בשיש שם רגל ובאבל אסור בשאין שם רגל מאן דאמ' ברגל אסור בשיש שם הערמה באבל מותר בשאין שם הערמה רב חייה בר אשי[323] בשם רב הל' כדברי מי שהוא מיקל כאן וכאן ר' שמעון בר אבא[324] בשם ר' יהושע בן לוי הל' כדברי מי שהוא מיקל בהילכות אבל
>
> As to trimming the moustache and cutting the nails, there is a Tanna who teaches that on the Festival it is permitted to do so, but in a time of bereavement it[325] is forbidden. And there is a Tanna who teaches that on a Festival it is forbidden to do so, but on the occasion of bereavement it is permitted. He who has said that on the Festival it is permitted to do so refers to a time at which there is a Festival, and in a time of bereavement it is forbidden to do so - at a time at which there is no Festival. He who has said that on the Festival it is forbidden to do so, deals with a case in which there is evasion and in the case of mourning it is permitted, when there is no intent to practice evasion.

Once again, the precise *ha'arama* in use is unclear. Is it pretending to not have had time to shave prior to the Festival,[326] or is it "accidentally" shaving one's entire beard rather than just trimming

[322] *bMQ* 11b takes them the same question as PT, namely differences between the laws for *hol ha-moed* and those for the *shiva* period. While BT asserts a distinction between the two, the question of whether people are prone to *ha'arama* in these two respective arenas is not discussed. In commenting on the next *mishnah*, *bMQ* 12b does discuss the debate over whether one may employ *ha'arama* on *hol ha-moed*, specifically in order to prepare wine for after the holiday ends, though it does make any indication about people's inclinations to do so. Moreover, the *braita* cited in BT as permitting such *ha'arama* is clearly at odds with this cautionary PT passage about the need to rein in potential *ha'arama* on *hol ha-moed*.

[323] Const. Ed.: רב חייא בשם רב

[324] Const. Ed.: רשב"א

[325] It is unclear whether the time of bereavement refers here only to *shiva* or to *sheloshim* as well. The latter is more likely, as this section follows immediately after a section that contrasts the laws governing the 30 days of bereavement to those governing the intermediate days of the Festival.

[326] *Qorban Ha'edah* s.v. בשיש שם הערמה

one's moustache?[327] Or perhaps it is making oneself busy in order not to have time to shave before the Festival?[328] Regardless, there is an indication that one would use *ha'arama* on the Festival.[329] Again, unlike the mishnaic cases, it is difficult to find the motivation of the *ma'arim* other than trying to evade the law. What monetary benefit is there to shaving? Likewise, if a person truly had not had time to shave or to water the field prior to the holiday, doing so would be completely permissible.

A subtler symptom of PT's discomfort with *ha'arama* is its Biblical justification for the *ma'aser sheni* loophole:

> **ירושלמי מעשר שני ד:ד, דף נה עמוד א' (כ"י ליידן)**
> ר' אבון[330] אמ' איתפלגון ר' לעזר ור' יוסי בר חנינה חד אמ' למה מערימין עליו מפני שכתוב בו ברכה
> R. Avun said, "R. Elazar and R. Jose bar Ḥaninah disputed [over the meaning of Deut. 14:24's claim that secondary tithe produce constitutes a 'blessing,' as follows]: "One said, 'Why is it that "*People may practice ha'arama [regarding the added 25%]"* (M. M.S. 4:4A)? [We may infer that Scripture intends this money-saving leniency], because [second-tithe produce] is described [at Deut. 14:24] as a blessing."

Ha'arama is not to be used willy-nilly. It is not historical circumstances (as discussed above) but a Biblical verse that justifies it. Predictably, no such Biblical permission[331] appears in either *Mishnah* or *Tosefta*, or anywhere in legal midrashic collections. R. Avun, the fourth generation Palestinian amora, is seen quoting either R. Elazar ben Pedat[332]or R. Jose bar Ḥanina, both

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[327] *Pene Moshe* s.v. בשיש שם הערמה

[328] My own suggestion.

[329] Admittedly, here the question of whether one would do so during a bereavement period is less clear.

[330] MS Vatican: אבין

[331] Significantly, though, once this *ha'arama* is permitted, it gains complete protection. This *sugya* goes on to discuss how the procedure for enacting this *ha'arama* was changed not once, but twice, in order to protect the *ma'arim* from theft! It also mentions two rabbis, R. Inya b. Sisi and R. Jonah, who themselves utilize this circumvention.

[332] *Seder Tannaim ve'Amoraim,* 20

second generation Palestinian *amoraim*, regarding a justification of this *ha'arama* based not merely on the end goal of saving money, but based on a verse from the Torah itself.[333]

Parameters

In addition to its discomfort with many *ha'aramot,* PT offers the substantive contribution of the first examples of explicit parameters for when *ha'arama* should be permitted and when it should be outlawed. Once again, PT projects a discussion of *ha'arama* onto a mishnaic dispute between R. Eliezer and R. Joshua, using the opportunity to contrast it with the toseftan argument in their names regarding the animal and its dam that fell into a pit.

ירושלמי פסחים ג:ג , ל./ ביצה ג:ה, סב. (כ"י ליידן)
משנה (כ"י קאפמן) כיצד מפרישין חלת טומאה ביום טוב רבי אליעזר או' אל תקרא לה שם עד שתיאפה[334] בן בתירה או' תטיל לצונים אמר יהושע לא זה הוא חמץ שמוזהרים עליו בל יראה ובל ימצא אלא מפרשתה ומנחתה עד הערב ואם החמיצה החמיצה

גמרא...כיצד יעשה? על דר' אליעזר מערים ואו' (וזו אני רוצה לוכל וזו אני רוצה לאכול) ואופה את כולה וכשהוא רודה מערים ואו' זו אני רוצה ליישן זו א{י}ני[335] רוצה ליישן ומשייר אחת. אמר לו רבי יושוע לא נמצאת כשורף[336] קדשים ביום טוב?! אמ' לו ר' אליעזר מאיליהן הן נשרפין! אמ' לו ר'[337] יושוע לא נמצאת עובר על בל יראה ובל ימצא. אמ' לו מוטב לעבור מצוה בלא תעשה שלא באת לפניו ממצוה בלא תעשה שבאת לפניו[338]...אותו ואת בנו שנפלו לבור ר' אליעזר או' יעלה את הראשון על מנת לשחוט וישחוט והשיני עושין לו פרנסה שלא ימות. ר' יושוע או' יעלה את הראשון על מנת לשחוט ולא ישחוט ויערים ויעלה את השיני א'ע'פ' שחישב שלא לשחוט אחד מהן[339] מותר. ר' בון בר חייה[340] בעי מחלפה שיטתיה דר' אליעזר תמן הוא אמ' אסור להערים והכא הוא אמ' מותר

[333] Is a Biblical verse required here because the extra 20% for one's own *ma'aser sheni* is a Biblical law? Alternatively, it may be in order to suggest that the loophole upholds a value which is internal to the law as opposed to external to the law. (We will discuss further below.)

[334] MS Parma: תאפה

[335] Venice Ed.: אני

[336] *Or Zarua*: שורף without כ

[337] Lieberman, *Yerushalmi ki-fshuta*, 366: לר' יושוע

[338] MS Leiden and Venice Ed., *yEruvin* 10:13: מוטב לעבור על מצות לא תעשה שלא באת לידך ממצות לא תעשה שבאת לפניך

[339] MS Leiden and Venice Ed., *yEruvin* 10:13: א'ע'פ' שלא חישב לשחוט אחד מהן . Both *Ahavath Sion ve-Yerushalayim* and Lieberman (*Tosefta Ki-fshuta Beṣa* 3:4) consider the 'Eruvin version errant.

[340] R Avun bar Ḥiyya was in the time of R. Yoḥanan- see Albeck, 218-20

להערים? הכא משום בל ייראה ובל ימצא תמן מה אית לך? מחלפה שיטתיה דר' יהושע תמן הוא אמר מותר להערים והכא הוא אמר אסור להערים? אמ' ר' אידי כאן שבות וכאן חיוב[341] חטאת. א"ר יוסה ביר' בון תמן כדי לחוס על ניכסיהן שליש' הכא מה אית לך?!

Mishnah: How [on the Festival[342]] do they set apart the dough-offering [if the dough is in a state of] uncleanness? R. Eliezer says, "She should not designate [the dough=offering] before it is baked." R. Judah b. Betera says, "She should put it into cold water." Said R. Joshua, "This is not the sort of leaven concerning which people are warned under the prohibitions, 'Let it not be seen' (Ex. 13:7), and 'Let it not be found' (Ex. 12:19). But she separates it and leaves it until evening, and if it ferments, it ferments.

Gemara: How should [a person] act according to R. Eliezer [who says one can handle the dough until it is baked, when it is designated and then properly left till the evening for burning]?
[A person] acts with shrewdness and says: "This [portion] I want to eat and this [portion] I want to eat];" and one bakes all of it, and when he removes it [from the oven, one] acts with shrewdness and says: "This [portion] I want to store away and this [portion]" and leaves one [the last one which is then designated as *ḥallah*].
Said R. Joshua to him [R. Eliezer], "Do you not end up like one who burns holy things on the holiday [in leaving the dough offering to burn in the over after baking the dough, which is a distinct violation]?" R. Eliezer said to him, "They burn on their own accord [without a separate act of burning, for the dough-offering merely remains in the oven after it and the rest of the dough are baked]."
Said him to R. Joshua, "Do you not end up violating the ban on seeing and finding leaven [on one's premises by allowing it to rise]?" [R. Joshua] said to him, "It is preferable to violate a negative commandment passively [leaving dough which eventually will become leaven on its own] than actively [letting the dough offering forthwith burn on the Festival through one's action, be it indirect]." (T 3:7)
...
It [an animal] and its young that fell into a pit [on a Festival] - R. Eliezer says, "[One] should raise up the first with the plan to slaughter it, and the second; they feed it so that it not die." R. Joshua says, "[They] should raise up the first one with the plan to slaughter [it] but [need] not slaughter [it] and practicing *ha'arama,* should raise up the second. Even though [one] intends/decided not to slaughter either one of them - it is permitted.

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[341] MS Leiden and Venice Ed. *yBeṣa* 3:4: חייב. Certainly the *yPes.* version of חיוב חטאת, at any rate, is more accurate than the *yBeṣa* version of חייב חטאת, as a person incurs lashes for infractions on the Festival (*yBeṣa* 1:3) and must offer a *ḥatat* only for infractions on the Sabbath. But *ḥiyuv ḥatat* may simply refer to the status of the transgression – it has the status of a *ḥiyuv ḥatat* because if one did such on a Sabbath, one would bring a *qorban hatat*. (*Pnei Moshe s.v.* אמר ר' אידי simply states that the language is imprecise, and *Qorban Ha-'edah s.v.*וכאן חיוב חטאת offers a different explanation all together as a result of this difficulty.)

[342] of Passover

> R. Bun bar Hiyya asked: "Is not R. Eliezer's logic reversed? There he says it is forbidden to act with *ha'arama* and here he says it is permitted to act with *ha'arama."*[The different positions do not make up a contradiction:] Here [he so rules] because of the band on seeing and finding leaven [which justifies any necessary means to remove the leaven]. There, what can you say [is there any comparable justification]?
> "R. Joshua's logic is reversed. There [T. *Beṣa*] he says it is permitted to act with *ha'arama,* and here [M. Pes.] he says it is forbidden to act with *ha'arama.*" Said R. Idi, "Here [T. *Beṣa*, where the individual moves the animal] it is a matter of a *shevut* [an added prohibition on not doing certain activities on the Sabbath which, though not technically constituting prohibited labors, are a violation of the 'rest' appropriate for the Day of Rest] and here [M. Pes., where the individual bakes the unclean dough which is not for human consumption, if it were the Sabbath, it would be a violation entailing] a liability for a sin-offering." Said R. Jose b. R. Bun, "There [in the case of the animal caught in the pit, one can employ an artifice] so as to have compassion on the property of Israel; here [regarding the unclean Dough-offering which is to be burned and which benefits neither an Israelite nor a priest], what can you say [is there any such loss justifying the use of an artifice]?

This *sugya* compares the *ḥallah* case and the parent-child animal case to present criteria for when *ha'arama* is permissible and when it is forbidden, asserting that even R. Eliezer and R. Joshua do not choose for or against *ha'arama* every time the question comes up. The passage offers three variables: a) avoidance of sin, b) the severity of the transgression being circumvented, and c) financial loss. The first and third are sufficient conditions for the use of *ha'arama*, whereas the second variable is only a necessary condition, according to R. Joshua.

Let us begin with the sufficient conditions: sin and money. R. Eliezer allows *ha'arama* for the avoidance of sin, while R. Joshua allows it (even) for monetary loss. R. Joshua's position, as interpreted by R. Jose b.R. Bun has been implicit in a number of *ha'arama* examples –mishnaic concern about saving money on redemption of *ma'aser sheni* along with PT's observation that *ma'aser sheni* meant to bring blessing (a reference to wealth); toseftan suggestions for saving extra bread from a house fire, etc. One may circumvent the law either by action or by speech when said law will cause financial loss, placing *ha'arama* in the category of

a number of strategies employed to uphold the maxim התורה חסה על ממונם של ישראל.[343] This is the first instance, however, of *ha'arama* as justified only in order to circumvent otherwise unavoidable sin. On the one hand, this is a great comment on the legitimacy of *ha'arama*: it itself is not considered a sin. On the other hand, it is reserved as literally a last resort, only to save a person from definite sin.

R. Idi's suggestion, on the other hand, concerns what is necessary for *ha'arama* to work, at least according to R. Joshua. According to R. Joshua, he claims, *ha'arama* should work – after all, it is for the noble goal of saving one from sin. There is only one problem: *ha'arama* may not be used, or perhaps simply does not work "against" a law which requires a sacrifice when transgressed. Such clever machinations are reserved for laws which do not carry that heavy penalty. [344] Regardless of one's noble motivations to save money or to prevent sin, *ha'arama* is limited to circumvention of lighter prohibitions only.

Ha'arama as Widespread Problem

PT offers a good number of rejected cases of *ha'arama,* uses the *ha'arama* terminology consistently, begins to explicitly delineate when *ha'arama* is warranted and when it is not, and debates whether it should be suspected. Noting PT's preoccupation with, and generally negative

[343] *ySan.* 4:1, 22a, *yPes.* 1:8, 28a. Put differently, שלא להפסיד ישראל ממון - *yGit.* 1:5, 43d

[344] YD Gilat ("Issur Shevut be-Shabbat ve-hishtalshelutam," *Peraqim be-hishtalshelut ha-halakha,* 87-108) traces the development of the term *shevut*, which at some point becomes synonymous with rabbinic, as opposed to Biblical, transgression. He notes that in the earliest stages – specifically *midrash halakhah* - *shevut* simply refers to a Sabbath transgression that is not specifically indicated in the Torah text and thus does not carry the death penalty when does purposely – which is the default punishment for Sabbath desecration. Such more leniently punishable offenses take their label from the clause שבתון, a rest, which is how the Sabbath is described consistently (*Exodus* 16:23; *Exodus* 31:15; *Leviticus* 23:3; *Leviticus* 35:2) throughout the Pentateuch. (See *Sifra Aḥarei Mot* 7:9; *Mekhilta d'R. Shimon b. Yoḥai* (Epstein-Melamed) p20, p229; *Mekhilta d'R. Yishmael, Bo, Parsha* 9, p33; ibid. *Mishpatim, Kaspa, Parsha* 20, p332; ibid. *Ki Tisa, Parsha* 1, p340). However, according to Gilat, by amoraic times, the term *shevut* had already evolved from referring to a biblical prohibition which does not incur the death penalty to referring to a "mere" rabbinic prohibition. (Gilat, 105)

views of, *ha'arama* one gets the impression that *ha'arama* was becoming a problem. Within several generations within Palestine, a shift can be seen from advocating *ha'arama* as permissible behavior to trying to stamp out corrupt *ha'aramot.* PT expands the discussion exponentially from the *Tosefta* both in its many examples of *ha'arama* as well as in its willingness to reject *ha'aramot*.[345] Might this reflect a reality of people trying to take advantage of this clever method? Perhaps people had begun to abuse *ha'arama* strategies for inappropriate ends – to cheat others out of money, or to avoid nagging laws for no reason outside of their own convenience. Perhaps, people simply became accustomed to *ha'arama* strategy and decided to use it to evade the constraints of inconvenient laws, with no loftier goal in mind.

There is, however, a more compelling argument. In the previous chapter, we pointed out the early provenance of legal dodges; they had been acceptable practice in the ancient world. [346] In the Palestinian material, the fact that dodges are outlawed is innovative. This marks a major shift in Jewish intellectual history. And it is perfectly expected, considering contemporaneous developments in Roman law, as we shall explain below.

[345] It makes sense the PT would resemble *Tosefta* more than *Mishnah* on this score. JN Epstein's theory that PT was aware of some version of our current *Tosefta* is widely accepted. As Abraham Goldberg writes:
...just as the Tosefta will add to a topic taken up in the Mishna by a discussion of situations not brought up in the Mishna, so, too, will the Palestinian Talmud discuss situations not brought up in the Tosefta. The Tosefta serves the Palestinian Talmud as the prime source for the interpretation of the Mishna, and its interpretations of the Mishna are much closer, therefore, than those in the BT; and although the latter does make use of the Tosefta, it is not to the same extent. Questions in the Palestinian Talmud are often resolved by recourse to the Tosefta. (Abraham Goldberg, *The Palestinian Talmud*, in Safrai, *The Literature of the Sages* I:311-312)

[346] The notion that the more ancient a society, the more strictly formalistic it is, is well-worn. See Aharon Barak, *Parshanut Ba-Mishpat.* Jerusalem: Nevo (1994) 135 and sources there. Also, Benjamin Brown, "Formalism and Values: Three Models" (Hebrew), *New Streams in Philosophy of Halakhah*, eds. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press and Van Leer Institute (2008) 244)

Loopholes and *fraus legi*: (Greco-)Roman Context

Between 100 BCE and 250 CE, Roman jurists developed a very sophisticated legal tradition, marked by deductive and analogical reasoning. Prior to this time period, interpretation of law tended to be narrowly literal,[347] the way Daube describes the Biblical worldview: any literal reading passed muster, and so loopholes were used broadly for personal advantage.[348] David Daube in fact identifies three categories of dodges popular in ancient Rome: a) replacing prohibited transactions with nearly identical, but permitted, transactions - .e.g. a gift and counter-gift to replace a sale; b) involving an *interposita persona*, known today as a "straw man," who performs a transaction "on behalf"[349] of someone else where the latter is barred from doing so; and c) granting new legal status in name only (i.e. without substantive change) - e.g. marital status for two people who are not actually domestic partners.[350] Ranon Katzoff adds a fourth category: removing oneself from a particular legal category in order to avoid the restrictions attendant thereto - e.g. alienating some assets before tax season to move to a lower tax bracket.

In the first century BCE, however, a subtle shift emerged, one which challenged the hegemony of the letter-of-the-law orientation in the courtroom. First came the celebrated *Causa*

[347] See Fritz Schulz, *History of Roman Legal Science*. London: Oxford University Press (1946) 24-30. He describes this characterization in detail, asserting that there were some very liberal readings of the *Twelve Tables* at the very outset of their acceptance, but in time, the laws became more petrified. Moreover, he connects formalism in interpretation to formalism in court procedures. See also *Roscoe Pound*, "Common Law and Legislation," *Harvard Law Review, 21* (1908)

[348] See W.W. Buckland, *Equity in Roman Law*. London University of London Press (1911) who writes, "Attempts to evade the rules of law by keeping the letter while breaking the spirit were as common in Rome, as they have been in our courts." (112); See also Bertram B. Benas, "The Legal Device in Jewish Law," *Journal of Comparative Legislation and International Law*, Third Series, Vol. 11, No. 1 (1929), 75-80. See also Ranon Katzoff, esp.250

[349] As we shall see, sometimes there are limits on how explicitly such motives may be expressed if the dodge is to remain legal.

[350] David Daube, "Fraud No. 3," *Collected Studies in Roman Law*, Eds. David Daube, David Cohen, Dieter Simon, Frankfurt am Main: V. Klostermann (1991) 1410.

Curiana (92 BCE), in which the jurists chose to uphold the *intention* of a testator rather than his *declared statement*. The case went as follows: A Roman named Coponius, who died childless, had drawn up a will stating that: a) should he have a son, his son would be his heir, b) should that son die prior to adulthood, Manius Curius should succeed him as heir. When Coponius died childless, distant family members claimed their rights to the inheritance. Their pleader, Scaveola argued their rights based on the wording of the will: Manius Curius was to inherit only in the event of the death of Coponius' son. As Coponius had no son, the arrangement was irrelevant. Otherwise, the will should have read: "Let my son be my heir. If my son shall not be my heir, or, if he shall be my heir but die before reaching proper age, then let Curius be my heir." Cassus, the famed orator, pled Curius' case, delivering a speech which would become an important part of Roman legal heritage. The crux of his message was that the wording of a last will and testament must be understood not simply in a literal and decontextualized way, but on the basis of the testator's intention in writing those words. And the intention of the testator, he argued, was that Curius should be the heir in the event of no son coming of age at the time of Coponius' death. Cassus' argument won the day, and the case was decided by the spirit rather than by the letter of Coponius' stipulation.[351]

Following the *Causa Curiana*, a number of jurists began explicitly challenging the hegemony of the unqualified letter of the law: Cicero (106 – 43 BCE) famously cited the maxim "*summum ius summa iniuria*," extreme application of the literal law can lead to extreme injustice, into legal theory. [352] Using the literal interpretation rather than the most sensible interpretation could lead to applying law for immoral ends. We offer his remarks in full:

[351] John W. Vaughn, "Law and Rhetoric in the Causa Curiana," *Classical Antiquity* Vol. 4, No. 2 (Oct., 1985) 208-222.

> Injustice often arises also through chicanery, that is, through an over-subtle and even fraudulent construction of the law. This it is that gave rise to the now familiar saw, "More law, less justice." Through such interpretation also a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general/a went to ravaging their fields by night, because, he said, the truce stipulated "days," not nights. Not even our own countryman's action is to be commended, if what is told of Quintus Fabius Labeo is true — or whoever it was (for I have no authority but hearsay): appointed by the Senate to arbitrate a boundary dispute between Nola and Naples, he took up the case and interviewed both parties separately, asking them not to proceed in a covetous or grasping spirit, but to make some concession rather than claim some accession. When each party had agreed to this, there was a considerable strip of territory left between them. And so he set the boundary of each city as each had severally agreed; and the tract in between he awarded to the Roman People. Now that is swindling, not arbitration. And therefore such sharp practice is under all circumstances to be avoided.[353]

There are even a few examples of jurists outlawing dodges during this century. For instance, when a twenty-year old slave-owner, not yet of legal age to free a slave, gave his slave as a gift to someone of age to have him freed, Proculus invalidated the manumission, declaring "*quoniam fraus legi facta esset*."[354] More prominently, during the same century legislators[355] began the work of issuing edicts to close unwanted loopholes:[356] a senatusconsult under the

[352] See Tamás Nótári, "Summum Ius Summa Iniuria —Comments on the Historical Background of a Legal Maxim of Interpretation," *Acta Juridica Hungarica*, 42:1-2 (2004) 301-303. He finds earlier iterations of this concept in the works of Roman Terence (*Heautontimoroumenos* 792. *Sqq)*, Hieronymus (*Epistulae* 1, 44), and Columella (*De re rustica* 1, 7, 1. *Sq)* See also Johannes Stroux, "Summum ius summa iniuria—Ein Kapitel in der Geschichte der interpretatio iuris (A Chapter in the history of legal interpretation)", in J. Stroux, *Romische Rechtswissenschaft und Rhetorik*. Potsdam: Stichnote (1949) 7-66

[353] *De Officiis*, 1.33

[354] *Digest* 40.9.7.1. It should be noted that at the end of the Roman Republic and the beginning of the Roman Empire, manumissions were so many that they threatened the very socio-economic fabric of Rome. At the end of the first century BCE, in fact, the Emperor Augustus had passed a number of laws through the Senate to stem the practice. See Kathleen M.T. Atkinson, "The Purpose of the Manumission Laws of Augustus," *The Irish Jurist*, Vol. 1, new series, Dublin (1966)

[355] TAJ McGinn, "The 'SC' from Larinum and the Repression of Adultery at Rome," *Zeitschrift fuer Papyrologie und Epigraphik*, Bd. 93 (1992) 284 n59.

[356] In addition to closing loopholes, it was in this era that the praetor outlawed the enforceability of any contracts made under duress (*exceptio metus*) or by virtue of fraud (*exceptio doli*). This too, as mentioned in the Biblical material, is an indication of a relaxation of rigid formalism. (See Peter Stein, *The Character and Influence of Roman*

Emperor Tiberius (14-37 CE) removed immunity from women who became procuresses or actresses to avoid punishment for adultery[357] (D. 48.5.11.2); a senatusconsult in 62 CE declared that childless men could not avoid the political disadvantages attendant to their status[358] by "adopting" children (*Tac. Ann.* 15.19).[359] We must note, however, that the approach was not yet consistent. As Roman legal historian W.W. Buckland notes, "It seems true to say that in Roman, and indeed in all systems, after the primitive stage, the two tendencies, to rigidity and to equitable relaxation, will be found existing side by side."[360]

Significantly though, certain loopholes which clearly benefitted the society were upheld. For example, the *fideicommissum* is first documented in 200 B.C.E.[361], but it was the Emperor Augustus who legally enforced it in the first century B.C.E. According to Roman law, only Roman citizens (and, for members of the highest class, only male Roman citizens)[362] could inherit a testator. The *fideicommissum*[363]was set of instructions that a testator left for his heir to grant property to non-family or to women. Not binding, but perfectly legal, Augustus made the *fideicommissum* enforceable. In other words, if the heir refused to comply, the potential beneficiary might take him to court to recover the property. Likewise, Augustus proposed the

Civil Law: Historical Essays. London: The Hambledon Press (1988) 25-6. And see 27-8 for a nuanced description of the law where the contract was made in error.)

[357] called *lex Julia*

[358] called *lex Papia Poppaea*

[359] Ranon Katzoff, 249

[360] W.W. Buckland, *Main Institutions of Roman Private Law*. Cambridge: Cambridge University Press (1931), 9

[361] Terence, *Andria* 290–98

[362] Peter Stein, *The Character and Influence of Roman Civil Law: Historical Essays*. London: The Hambledon Press (1988) 23-4

[363] From the Latin *fides* (trust) and *committere* (to commit)

loophole in certain criminal cases (such as conspiracy against the emperor!) of selling a slave to a state agent because slaves were not permitted to testify against their masters.[364] In the first century C.E., the Emperor Tiberius availed himself of this loophole with the slaves of Libo Drussus, a Roman who he thought was conspiring against him.[365]

While the prior two centuries had clearly seen much progress in expanding the understanding of law from its technical meaning to its intended results, it was the second century C.E. which marked the most sweeping change to formalistic tendencies in understanding law. As a century assessed as both the golden age of the Roman Republic and its most creative period in writing[366] and interpretation of law,[367] ideas that had been germinating were coming of age. Celsus (67-130 CE) defined Roman Law by its moral values rather than simply its posited law, declaring: *ius est ars boni et aequi,* "Law is the art of the good and the equitable.[368]" He likewise asserted, "To know the laws is not to be familiar with their phraseology, but with their force and effect."[369] The mechanical enforcement of norms is not the sum total of what the law is. Regard must be given for the impact of applying the law. Significantly, however, Celsus himself

[364] *Dio Cassius* 55.5.4

[365] Tacitus, *Annals* 2.30.3

[366] It was in this century (160 CE) that Gaius' *Institutes*, for all intents and purposes a Roman law textbook for students, was written Later, towards the end of the fourth century the Theodosian Code was compiled and was the earliest codification of the entirety of Roman law. (Stephen A. Stertz, "Appendix" *ibid.*) It impacted the later and most prominent code, the *Digest*, a compilation of the writings of the classical Roman jurists ordered by the Emperor Justinian in the sixth century. (Boaz Cohen, *Jewish and Roman Law: A Comparative Study Vol. 1*. New York: Jewish Theological Seminary (1966) 15) It is from the *Digest* that we learn much of what we know about Roman law from the ancient period. (Ibbetson and Lewis, *The Roman Law Tradition*, *ibid.*)

[367] Stephen A. Stertz, "Appendix: Roman Legal Codification in the Second Century", in eds. Alan J. Avery-Peck and Jacob Neusner, *The Mishnah in Contemporary Perspective: Part I*. Leiden: Brill (2002) 149.

[368] *Digest* 1.1.1.I

[369] *Digest* 1.3.17

allowed at least one cast of technical circumvention of the law: a father could not legally collect debt against his own son. The father installed his son as the guarantor of the loan rather than as the debtor in order to work around the law, and Celsus abided it.[370] Perhaps he did so out of a sense of equity, some local reason, or because in reality he was softer on this issue than his words indicate.

It was also during this century that the Roman jurist Paul (exact dates unknown) officially defined the concept of *in fraudem legis*¸ a notion that would give all future judges (not only legislators) the vocabulary to challenge strict formalism.[371] His definition of *in fraudem legis* is preserved in Justinian's *Digest*: **"**To do what the law prohibits violates the law, and anyone who evades the meaning of the law without disobeying its words, is guilty of fraud against it."[372] As Ranon Katzoff points out, a jurist deciding a case based on the assertion of *fraus legi* is a more evolved stage past rigid formalism than trying to stamp out circumventions through legislation. The latter indicates that without the legislation, jurists would not have the right to declare an action illegal so long as it met the letter of the law. In the second century, jurists began using *fraus legi* for adjudication, rather than relying on legislators to close loopholes.

The jurist Julian (110-170 CE) is credited with consistent application of *fraus legi*:

[370] *Digest* 1.6.7.pr. 1. As we will see below, Julian outlawed this on grounds of violating the spirit of the law.

[371] Ranon Katzoff, "Judicial Reasoning in ' P. Catt – Fraus Legi,'" *Transactions and Proceedings of the American Philological Association*, Vol. 101 (1970) 249

[372] *Contra legem facit qui id facit quod lex prohibet, in fraudem vero qui salvis verbis legis sententiam eius circumvenit* (*Digest* 1.3.29), translation by S.P. Scott, *The Civil Law II.* Cincinnati: The Central Trust Company (1932). In an earlier formulation: *Lex non dubium est: in legem committere eum qui verba legis amplexus contra legis nititur voluntatem: nec poenas insertas legibus evitabit, qui se contra iuris sententiam scaeva praerogativa verborum fraudulenter escusat. Fraus enim legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit*.(Codex Th. I 14,5) For more on the topic, see G. Rotondi, *Gli atti in Frode Alla Legge Nella Dottrina Romana E Nella Sua Evoluzione Posteriore* (1911)

1. As mentioned above in context of Celsus' era, according to *SC Macedonianum*, loans made to *filiifamilias* (family members who are not the head of the household) may not be collected. A loophole was used whereby the *filiusfamilias* would be written in the document as a guarantor rather than the debtor, and a non-family member would be written in as the debtor. While Celsus had permitted such a ruse, Julian ruled against it as "*fraus senatusconsulto facta*." He ruled the same way for a *filiusfamilias* who brought in a second person as his co-debtor.[373]
2. According to the *lex Papia Poppaea* the patron of a freedman was entitled to a share of the freedman's estate equivalent to that of his children, so long as the freedman had fewer than three children and the estate was worth at least 100,000 HS. Julian wrote that an attempt by the freedman to alienate some of his property to get below 100,000 HS was considered *in fraudem legis* and was thus legally ineffective.[374]
3. A husband-to-be who tried to offer his undowered bride a gift which she would then return to him as a dowry, would not get away with it. In the event that marriage was terminated, she would not get receive the dowry money in return.[375]

Following Julian, the concept of *fraus legi* became more and more widespread among jurists. [376]

Greek Rhetoric of Equity

The development of the notion of *fraus legi* must be understood in the context of the debate between the letter of the law and the spirit of law, which the Romans inherited from their

[373] *Digest* 14.6.7.pr.,I

[374] *Digest* 37.14.16.pr.

[375] *Digest* 12.1.20

[376] Katzoff, 248. And by Justinian's time (6th c. CE), *fraus legi* had gone from being a term which cropped up in jurists' decisions here and there into an independent category of violation. (*op cit.*)

Greek predecessors. The discussion amongst the Greeks was not about circumventions but about the general relationship between law and justice. Though the distinction between letter and spirit was made most famous by the apostle Paul (II Corinthian 3:6; Romans 7:6),[377] Aristotle was among the earliest[378] and most influential to discuss λόγος (*logos*: word) and διάνοια (*dianoia*: intention, meaning). He understood that in exceptional cases,[379] or where the letter of the law would lead to injustice, one must try to decide as the lawgiver himself would have decided rather than simply following the letter of existing law.[380] Aristotle referred to this as equity:

> This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality…it is then right, where the law's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question. Hence, while the equitable is just...[381]

Would the lawgiver insist on the most expansive reading of a law if it would lead to financial detriment? Would the lawgiver allow the narrowest reading if it were used solely to upend the spirit of said law? The ability to interpret a law by its intention rather than having to change the law was helpful to the Greeks, who were attached to their laws out of a sense of religious

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[377] Boaz Cohen suggests that the terms "letter" and "spirit" probably come from Jewish sources, as Paul wished to preach to Jews as well. E.g. Isaiah 28:5-6 and rabbinic discussions about אותיות התורה. He cites rabbinic use of the letter of the law as: 1) the literal (as opposed to allegorical) interpretation of the law, 2) the ability of the omission of any a single letter to change an entire law, 3) the interpretive significance of each and every letter in a word. See Boaz Cohen *Jewish and Roman Law: A Comparative Study Volume 1*. New York: Jewish Theological Seminary (1966) 36-37.

[378] The person credited with inventing this antithesis is the pre-Socratic philosopher Protagoras (5th c. BCE) who contrasted διάνοια (meaning) and ὄνομα (word) (*Diogenes Laertius* XI.51) See Cohen, "Letter and Spirit," 38 n 41

[379] Aristotle, *Rhetoric* I.13 (1374b)

[380] *Rhetoric* I.15 (1375a)

[381] Aristotle, *Nichomachean Ethics* 5.10 trans. H. Rackham, Loeb Classical Library.

duty.[382] And so, Greek rhetoricians continued Aristotle's legacy by exploring the ῥητὸς καὶ διάνοια (spoken and intended) meaning of the law.[383]

Ultimately, Roman rhetoricians inherited this dichotomy from the Greeks.[384] The Roman rhetorician Quintillian (first century CE) cites early Greek rhetoricians in his *Institutes of Oratory* regarding this binary.[385] He uses the Latin *scriptum* (written) and *voluntas* (will) or *sententia* (thought).[386] For the Roman rhetoricians, the exercise was one in legal dialectics providing advocates with both sides of a debate (*utramque partem disputare*), so it was largely academic.[387] However, Quintillian does offer a few reasons to prefer the spirit to the letter. A major consideration is equity:

> questions in general regarding writings and the intention of the writer, depend on considerations of equity (*Inst. Or.* III.6.43)
>
> For every point of law which is certain rests upon something written or upon custom; whatever is doubtful must be decided on grounds of equity. (*Inst. Or.* XII.3.6)[388]

While rhetoricians argued for academic purposes, Roman jurists were interested in the final ruling. Nonetheless, the influence of Roman rhetoric on Roman law and procedure is well

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[382] See Cohen, "Letter and Spirit," 39; Robert J. Bonner and Gertrude Smith, *The Administration of Justice from Homer to Aristotle*. Chicago: The University of Chicago Press (1930) I, 75

[383] Cohen, "Letter and Spirit," 40

[384] Greek rhetoric was brought to Rome in the second century BCE. (See Cohen, *ibid.*)

[385] See *Inst. Or.* III.6.61

[386] See *Inst. Or.* III.6.46

[387] Cohen, "Letter and Spirit," 41ff

[388] He also mentions a preference for the *voluntas* over the *scriptum* for cases that must logically be considered an exception to a particular law. The following is his example: The law says, then, "Whatever son has not defended his father shall be disinherited." What? Whatever son, without exception? Considerations such as the following will then present themselves of their own accord: "Suppose that a son who was but an infant, or one who was sick, or one who was out of the country, or in the army, or on an embassy, did not defend his father. Would he be disinherited?" Something considerable has now been gained. A son may not have defended his father, and yet not be disinherited. (*Inst. Or.* VII.1.50)

established.[389] In the *Digest*, second-century jurist Ulpian is cited as referencing the Greek terminology ῥητὸς καὶ διάνοια itself:

> Fraud is committed against the law when something is done which the law did not wish to be done, but did not absolutely prohibit; and the difference between fraud against the law and violation of the same is that between ῥητὸς καὶ διάνοια[390]

And ultimately, the conflict between *scriptum* and *voluntas* became known as the conflict between *ius strictum* and *aequitas*.[391] While there is no comprehensive study as to why Roman praetors and emperors tolerated certain dodges[392] while rejecting others, based the general context in which the discussion of *fraus legi* took place, equity certainly played an important

[389] See Cohen, "Letter and Spirit," 45; Leopold Wenger, *Institutes of the Roman Law of Procedure,* translated by Otis Harrison Fisk. New York: Veritas Press (1940) 140 18a, 195 n 16; J. Himmelschein, "Studien zu der antiken hermeneutica iuris," in *Symbolae Friburgenses in honorem Ottonis Lenel*. Leipzig: B. Tauchnitz (1931) 398-417; Alvaro D'Ors Perez-Peix, "La Actitud Legislativa del Emperador Justiniano," *Orientalia Christiana Periodica*. Rome (1947) XIII nos. 1-2, 125-132; H. Schmidt, "Einfluss der Rhetorik auf die Gestaltung der richeterlichen Entscheidung in den Papyri," *Journal of Juristic Papyrology* IV (1950) 165-177.

[390] D.1.3.30

[391] Cohen, "Letter and Spirit," 47; Schulz, *Principles of Roman Law*. 210 n. 2; Westrup, *Introduction to Early Roman Law* III. 21-22; Wenger, *Canon in den roemischen Rechtsquellen* (1942) 18-24; Jonker, "Aequitas," *Reallexikon fuer Antike und Christentum*. Leipzig (1942)

[392] Why some dodges pass and others do not, or why the same dodge succeeds at a certain time and place and not at another, I leave unexplored." ("Fraud No. 3," 1417)

role.[393] Roman magistrates and jurists[394] rejected certain dodges because they undermined equity; following the letter of the law would violate its spirit.

The notion of *fraus legi* and the attendant debate regarding law and equity provides the proper framework and background for the rabbinic material, specifically in PT. Many have cited the pervasive influence of Roman legal thinking on the ancient world at large[395] as well as its shared concepts and terminology with rabbinic legal thinking in particular.[396] As Boaz Cohen

[393] Daube notes that a substantial number of attempted circumventions (some accepted, some rejected) were quite altruistic in nature, done on behalf of the elite's inner circle, as part of their understood extensive obligations to one another. (David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects*. Edinburgh: Edinburgh University Press (1966) 92ff) For example, an insolvent debtor (Daube assumes that this debtor too was a member of the elite – hence the stigma of infamy explained later in the paragraph.) who owed 100 *aurei* and only had 10 would do the following: he handed the creditor the 10 *aurei*, and the creditor accepted it and handed it back as a gift. The debtor again handed over the ten *aurei* to the creditor, who again accepted it, and again handed it to the debtor as a gift. This continued until the debtor had handed the ten *aurei* to the creditor ten times, and in the end (having left the ten *aurei* with the creditor on the final exchange), the creditor was considered fully repaid. (Digest 46.3.67) This was to save the debtor from the infamy attended not only upon not paying a debt but even upon getting the creditor to accept less money (In the original *cum eis pactus est se soldum solver non posse* (Tab. Heracl. 114g.)) than he owed. Another example tracks the loopholes found by masters who wished to release many or all of their slaves upon their deaths but were forbidden to do so due to a limitation placed by Augustus in 2 BCE (Daube, *Roman Law*, 94). An owner of four slaves who was permitted only to release two slaves, would bequeath the remaining two to a friend with instructions to free them. (Digest 35.1.37. Clearly, if the slave owner is interested in freeing his slaves upon his death, he considers them to be closer than mere lower classes) A third illustration is the origin of the *fideicommissa:* because a testator could not pass on his property to non-Romans (or women, if he was of the highest class), he would bequeath his land to a Roman male and instruct him in the will to hand the land over to whichever woman or non-Roman the testator had really wanted to inherit him. Augustus legalized this method, though there was strict oversight and local decision-making by the consuls over whether the non-Roman was worthy and should get the land. (Digest 18.1.36, Gaius 2.285. At the end of the first century, Hadrian outlawed the *fideicommissa* for aliens.) Equity in its Greco-Roman sense should not be confused with modern notions of equity. Even some altruistic dodges were rejected. The question was often when the final result was best for society as a whole rather than whether some individual would be aided by the loophole.

[394] Boaz Cohen compared the rabbis to both magistrates and jurists: "Henri Berr has called attention to the enormous influence exercised by great individuals upon the development of Roman Law. It was they who transformed the Law of Custom into a Science of Law. The magistrates at Rome formulated, adapted, corrected, extended and interpreted the Laws. The jurists organized and classified the means by which every legal problem could be brought to a solution. This applies with equal force to the Tannaim and Amoraim who were both magistrates and jurists. It was they who expounded, expanded and transmuted the Pentateuchal law into a theoretical and applied science of law. It may be truly said of the rabbis of the Talmud, that they resembled 'the Roman jurists who were admirable casuists and admitted neither a priori theses nor cumbersome generalizations, relying on their subtle genius to discover in each case the adequate, or as they called it, the 'elegans' solution' (Declaureuil, *Le Quatrieme Centenairs de Cujas*, 1922, 9)." (Boaz Cohen, "Some Remarks," 37)

[395] David Ibbetson and Andrew Lewis, "The Roman Law Tradition," in Eds. Lewis and Ibbetson, *The Roman Law Tradition*. Cambridge: Cambridge University Press (1994) 1.

writes, "…it is our feeling that there was an interchange of legal ideas[397] between Jews and Romans…The influence was subtle and indirect but none the less real. The rabbis were living in no intellectual ghetto, and were susceptible to the ideas current in the Graeco-Roman world."[398] As Bernard Jackson points out, *direct* influence is difficult to assess, even where there is access and even institutional relationships between two systems.[399] Nonetheless, we may confidently assert that there are real parallels between the Roman law and Rabbinic law that can at the very least be attributed to a share intellectual milieu.[400] This overlap may be expected to be most profound in the Palestinian Talmud, a product of Judaism in the Eastern Roman Empire.[401]

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[396] See Saul Lieberman, *Roman Legal Institutions in Early Rabbinic and in the Acta Martyrum*, *JQR 35* (1944-5) 1-57; David Daube, *Ancient Jewish Law: Three Inaugural Lectures*, Leiden: (1981) 26-7; Boaz Cohen, *Jewish and Roman Law. A Comparative Study*, 2 vols, New York, 1966; *The Talmud Yerushalmi and Graeco-Roman Culture, vol. 1*, ed. Peter Schafer, TSAJ 71, Tübingen 1988, 581-641; *The Mishnah in Contemporary Perspective*, ed. Jacob Neusner, Leiden 2002, 149-64; Bernard S. Jackson, *Essays in Jewish and Comparative Legal History.* Leiden 1975, 1-24; *Rabbinic Law in Its Roman and Near Eastern Context*, Ed. Catherine Hezser, Tübingen: JCB Mohr (Paul Siebeck) 2003. (For a most comprehensive bibliographical listing, see Hezser's *Introduction*.)

[397] Regarding *fraus legi*, we assert Roman influence on rabbinic thinking rather than the reverse, as the trend to outlaw loopholes among Roman jurists preceded the same trend among *amoraim*.

[398] Boaz Cohen, "Some Remarks on the Law of Persons in Jewish and Roman Jurisprudence," *AAJR* 16 (1947) 35-6

[399] Bernard S. Jackson, "On the Problem of Roman influence on the Halakhah and Normative Self-Definition in Judaism," *Jewish and Christian Self-Definition Vol. 2*, Eds. E.P. Sanders, A.I. Baumgarten and Alan Mendelson. London: SCM Press Ltd. (1981) 157-203; *idem.* "History, Dogmatics and Halakhah," *Jewish Law in Legal History and the Modern World*, Ed. Bernard S. Jackson. Leiden: E.J. Brill (1980) 1-26. Additionally, Seth Schwartz points out that the rabbis had reason to reject Roman influence: "It must finally be admitted that the culture of the Greco-Roman city and the Judaism of the rabbis contradicted each other both essentially and in superficial detail. As far as we can tell from the surviving literature, the rabbis, no less than their Christian counterparts, largely rejected high imperial urban culture and offered their followers a radical and coherent alternative to it." (Schwartz, *Imperialism,*163)

[400] See Moscovitz, "Legal Fictions," 132

[401] See Saul Lieberman, *Greek in Jewish Palestine :Hellenism in Jewish Palestine*. New York : Jewish Theological Seminary of America (1941) There are, in fact, entire volumes devoted to perceptible Greco-Roman influences in the Talmud Yerushalmi in particular, including legal thought See Eds. Peter Schaefer (and Catherine Heszer), *The Talmud Yerushalmi and Graeco-Roman Culture* Vol. 1-3. Tübingen : Mohr Siebeck (1998-2002) There could have been many reasons for the rabbis to have studied Greco-Roman law. Among those theorized: a) via friendships between rabbinic and Roman literati (Cohen, "Some Remarks," 36); b) to understand their own status: Jews, along with other aliens in the Empire, gained citizenship in 212 CE, thus rendering them subject to Roman law under a new status (Christine Hayes, "Genealogy, Illegitimacy, and Personal Status: The Yerushalmi in Comparative Perspective," *The Talmud Yerushalmi and Graeco-Roman Culture* Vol. II, Eds. Peter Schafer and Catherine Heszer.

Indeed, many of the *ha'aramot* we have seen and will examine mimic the methodologies of Roman loopholes.[402] There is even a near exact parallel between the attempted loophole mentioned in PT of divorcing one's wife and remarrying her for the purpose of acquisition of property. In the Roman system, gifts between husbands and wives were void. The circumvention arose as early as the first century B.C.E. whereby the husband would divorce his wife, give her a gift and then remarry her.[403] However, the deeper connection between the two is the PT preoccupation with outlawing certain *ha'aramot* and the basis on which decisions were made about which *ha'aramot* would be permitted and which prohibited. Outlawed *ha'aramot* are the parallel concept to *fraus legi*.[404]

The rabbis do not use the word equity; they likewise do not explain why they reject certain dodges. But they do explain why they accept several dodges, and the reader is left to observe the overall pattern. What the pattern reveals is that rabbinic decisions about which dodges to accept/advocate and which to reject are quite consonant with Greco-Roman equity. Does the lawgiver mean for this letter of the law to be used in this way or that? A person may

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Tübingen : Mohr Siebeck (1998-2002) 89); c) try a case in which one party was Jewish and one was Gentile or even to try a case between two Roman Gentiles who voluntarily chose adjudication in a Jewish court (Cohen, ibid. n 153); exposure to Roman law through urban life (Hayim Lapin, "Rabbis and Cities: The Literary Evidence," *JJS* 50 (1999) 187-207)

[402] E.g. the use of *interposita persona* in the *MS* case; the use of nominal status change in the R. Tarfon example below; declaring an animal sanctified purely for the purpose of evading *bekhor* status. Other loopholes too, not expressly labeled *ha'arama* such as wearing one's clothes out of a burning house on the Sabbath rather than carrying them, etc., are likewise parallel to the Roman dodges. While recent scholars such as Yaakov Elman and Shai Secunda have explored the relationship between Sassanian law and Babylonian talmudic law, no study has been done to date on the formalistic aspects of Sassanian law.

[403] Katzoff, "Judicial Reasoning," 251 n. 38. See D. 24.I.64 where a string of jurists are cited condemning this loophole. As the jurists listed who refused to uphold this circumvention are Trebatius (1st c. BCE) and Labeo (1st c. CE), this is among the earliest recorded instance of a jurist rejecting a loophole. It is noteworthy, though, that they do not use the *fraus legi* nomenclature.

[404] Many have noted that there is no rabbinic term for equity, but that need not concern us. (See Kirschenbaum, *Equity in Jewish Law*)The rabbis also did not use the term *in fraudem legis.* Instead, they devised their own terminology which could serve both negative and positive functions.

not use *ha'arama* to avoid the obligation to sell his/her leaven, to cheat *heqdesh*, to keep from following the laws of *ḥol ha-moed*, etc. However, one may use *ha'arama* to avoid sin, to keep from losing money, [405] etc. When R. Eliezer is said to oppose *ha'arama* in one situation because of insufficient pathos, while supporting it in another, where there is such pathos, we see echoes of the equity concept. Likewise, when PT explains the *ma'aser sheni* dodge with an appeal to the purpose of the secondary tithe being to bring blessing, it clearly references the intent of the Lawgiver. While E.E. Urbach has raised the importance of the needs of the reality in determining which *ha'aramot* were successful, the concept of equity[406] is a feature more endemic to the law, not simply the desire to put a finger in a dike which is already leaking. Indeed, "equitable interpretations of statute are not regarded as intrusions or 'reinterpretations' of the text based upon extrinsic considerations. On the contrary, many equitable interpretations are the products of the interpreter's search for the 'true,' original, and authentic meaning of the passage."[407] As Boaz

[405] *Ha'arama* is often aimed at the have-nots: those who do not have enough animals to give both a sacrifice and the gift of a *bekhor* to the *kohen*, those whose possessions and food are being decimated by a house fire on the Sabbath. Metaphorically speaking, *ha'arama* is not about eating one's cake and having it too; it is simply about having enough cake to eat. Interestingly, Daube has argued that many of the frauds which were outlawed were cases of the upper class elite that using loopholes, as the have-nots would simply break the law rather than being crafty. (David Daube, "Fraud No. 3," 1409, and "Dodges and Rackets in Roman Law," 1081-1082) For instance, a woman of high rank would place herself on the list of professional whores to exempt herself from punishment for adulterous acts (Tacitus, *Annals* 2.85. 1 ff.).; young men of senatorial or equestrian orders who were barred from competing in the arena would purposely bring upon themselves shameful defeat in a court case in order to be removed from their high orders and thus be admitted to compete in arena games (Suetonius, *Tiberius* 35.2). There are two parallels here to the rabbinic system: a) in the rabbinic system, while it is people who may financially suffer who are indicated in permissible *ha'arama* scenarios, it is those who seek only gain whose *ha'aramot* are rejected; and b) there is a certain elitism assumed in a person's interest in circumventing the law rather than simply breaking it; it assumes knowledge of the law and fealty to it. These were not characteristic of the average Jew in tannaitic/amoraic times. (See Seth Schwartz, "Rabbinization in the Sixth Century," *The Talmud Yerushalmi and Graeco-Roman Culture III*, Eds. Peter Schäfer and Catherine Hezser. Tübingen: Mohr Siebeck (2002) 55-72)

[406] There are other ways in which equity plays a broader role within rabbinic law: *lifnim mi-shurat ha-din, kofin 'al midat sedom/zeh neheneh ve-zeh lo ḥaser, middat ha-raḥamim (as opp. To middat ha-din), rabbinic takkanot, hora'at sha'ah.* (See Aaron Kirschenbaum, *Equity in Jewish Law*)

[407] Kirschenbaum, *Equity in Jewish Law*, 29

Cohen writes: "Paradoxically enough, the rabbis took deliberate advantage of the letter of the law to preserve its spirit…Often the rabbis resort to technicalities in interpretation."[408]

This point is further evidence by a stark example of *ha'arama* that PT accepts with open arms - that of R. Tarfon during a famine:

> **ירושלמי יבמות ד:י "ב, דף ו' עמוד ב' (כ"י ליידן)**
> אמ' ר' בא בר זבדא כת' (דברים כה) ונקרא שמו בישראל בית חלוץ הנעל. בית שהוא ניתר בחליצה אחת. אף בביאה כן. חליצה פוטר וביאה פוטר. כמה דאת אמר בחליצה כן את אמר בביאה. ומהו להערים? וכי ר' טרפון אביהן שלכל יש' לא הערים? קידש שלש מאות נשים בימי רעבון על מנת להאכילן בתרומה תמן אין[409] כל אחת ואחת ראויה לוכל בתרומה ברם הכא כל אחד ואחד ראוי לייבם. ר' יודן ביר' ישמעאל עבדין ליה כן
>
> Said R. Ba bar Zabeda, "It is written, 'And the name of his house shall be called in Israel, 'the house of him that had his sandal pulled off' (Deut. 25:10). It is a house that has been undone by a single rite of ḥaliṣah, [but this allows the co-wife to remarry.]"What is the law as to evasion*?* Did not R. Tarfon, the Father of all of Israel practice evasion? He betrothed 300 women during a famine in order to feed them *terumah*! There were not all of them fit to eat *terumah*, but here can he actually perform levirate marriage on all of them?[410] R. Judan the son of R. Ishmael did this for himself.

R. Tarfon was a *kohen*, and as such could feed *terumah* to a woman whom he betrothed, at least once the wedding date passed, even if the two did not marry.[411] Moreover, he was quite a wealthy *kohen*[412]. Consequently, during a famine, he betrothed 300 women, in order to feed them

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[408] Cohen, *Jewish and Roman Law, Vol 1,* 55

[409] MS Darmstadt 407 הן

[410] We have deviated here from Neusner's translation, a translation which follows the *Qorban ha-edah, s.v.* מהו להערים: May one trick a brother-in-law into performing *yibum* on the woman who is not yet forbidden to priests, or into granting *ḥaliṣah* to the woman who is already forbidden to priests, even if the brother-in-law would rather do so for the other woman? The reason to allow such deceit is to prevent a woman who may currently marry a priest from becoming forbidden from ever doing so, thus losing potential terumah privileges. While this is a creative reading, it is far from parallel to the R. Tarfon case, in which providing *terumah* is literally a matter of life and death. Therefore, our explanation follows that of R. Joshua Isaac bar Yehiel Shapiro in the *Noam Yerushalmi*, 8a.

[411] *mKetubot* 5:2; in *tKet.* 5:1, R. Tarfon opines that one may feed a betrothed woman completely from *terumah* food once twelve months have passed and the couple has not married. According to Saul Lieberman, this is a case in which the groom, R. Tarfon, had stipulated the condition to feed here once twelve months of betrothal passed. (*Tosefta Ki-fshuta ad loc.*)

[412] See *tḤag*. 3:33

produce which was otherwise off-limits. Though this story about R. Tarfon is originally found in *Tosefta*, it is PT that suggests using it as a paradigm for a parallel case of levirate marriage: if the deceased was a *kohen* and had multiple wives, leave each of the wives of the deceased in limbo as the possible recipient of *yibum*, in order to continue to provide them with *terumah* in a case in which the family is one of priests.[413] In terms of ultimate ends, these cases are similar: the women need food to eat! (A relevant factor in this discussion may be the economic downturn in Palestine which began early in the amoraic period and continued into the fourth century. Perhaps R. Tarfon's actions could serve as precedent.)

Yet the ruling diverges: while R. Tarfon could have married all three hundred women (i.e., there was no law against it), ultimately the levir may only marry one of the women, as ruled explicitly in the *Mishnah*. This case is significant because of both its ends - lives are saved – and its means – the ruse has potential to become a reality. This is a significant contribution to the *ha'arama* discussion, as it may be the underlying logic of *ha'arama:* it is permitted because it has the potential to be true. At the very least, it offers yet another requirement for permitting *ha'arama*.

A comparison of two cases of food preparation on Festivals illustrates the difference between *ha'arama* for the "correct" motivation and *ha'arama* used simply for the purpose of undermining law:

ירושלמי ביצה ב:א, דף סא עמוד א' (כ"י ליידן)
משנה ב:א יום טוב שחל להיות ערב שבת לא יבשל בתחילה מיום טוב לשבת אבל מבשל הוא לי"ט ואם הותיר הותיר לשבת

[413] While *mKetubot* 5:2 rules that a *shomeret yabam* from betrothal does not eat terumah, it says nothing of a *shomeret yabam* who was fully married to the deceased priest. (See *bKet.* 58a, *Tosafot*, s.v., ואפילו כולן

גמ: ׳ איתא חמי דבר תורה הוא אסור ועירובי תבשיליו מתירין[414] אמר ר' אבהו בדין היה שיהו אופין ומבשלין מיום טוב לשבת אם או' את כן אף הוא אופה ומבשל מיום טוב לחול. איתא[415] חמי מציעין את המיטות מיום טוב לשבת ואין אופין ומבשלין מיום טוב לשבת[416] אמ' ר' אילא ולמה מציעין מיום טוב לשבת? שכן מציעין את המיטות מלילי שבת לשבת. ויאפו או יבשלו מיום טוב לשבת? אין אופין ומבשלין (מיום טוב) מלילי שבת לשבת ר' כהנא בריה דר' חייה בר בא[417] אמ' ובלבד שלא יערים

Mishnah: One a Festival which coincided with the eve of the Sabbath [Friday] - a person should not do cooking to begin with on the Festival day [Friday] for the purposes of the Sabbath. But she prepares food for the Festival day, and if he leaves something over, he has left it over for us on the Sabbath.

...

Gemara: Now see here! Is there a matter which is forbidden by the law of the Torah, but rendered permissible by the preparation of a meal of commingling [that is, preparing food prior to the Festival for use on the Festival and on the Sabbath following]? Said R. Abahu, "In strict law people should be permitted to bake or cook on a Festival day food for use on a Sabbath. But if you should say so [and decide the law in that way], they a person will cook also on a Festival day food for use on an ordinary day. [For see here, people make beds on the Festival for use on the Sabbath. Should they not be permitted to bake or cook on a Festival day food for use on the Sabbath? R. Kahana b. R. Hiyya bar Ba said, "That is on condition that one not practice *ha'arama* [by baking or cooking a great deal of food, ostensibly for the Festival itself]."

Here, the Palestinian *amora* R. Kahana the son of R. Ḥiyya b. Abba rejects *ha'arama* for the evasion of the decree not to cook on the Festival day for a non-Festival day.

ביצה א:ה, דף ס' עמוד ג' (כ''י ליידן)

משנה ב"ש אומרים אין נוטלין את העלי לקצב עליו בשר ובית הלל מתירין ב"ש אומרים אין נותנין את העור לפני הדריסה ולא יגביהנו אלא א"כ יש עליו בשר וב"ה מתירין ב"ש אומר אין מסלקין את התריסין בי"ט ובית הלל מתירין אף להחזיר:

גמרא...שוין שלא ימלחנו תני אבל הוא מולח עליו בשר לצלי חברייא בשם רב מולח הוא אדם דבר מרובה א'ע'פ' שאינו יכול לוכל ממנו אלא דבר ממועט ר' אחא בשם רב מולח ומערים מולח ומערים מלח הכא ומלח הכא עד דו מלח כוליה

Mishnah: The House of Shammai says, "They do not take up a pestle to hack meat on it.[418]" And the House of Hillel permits [doing so]. The House of

[414] MS Darmstadt: אתא חמי מדבר תורה הוא שאסור לבשל ולאפות מיום טוב לחבירו ומיום טוב לשבת ועירובי תבשילין מתירין?

[415] MS Darmstadt: אתא

[416] MS Darmstadt: בלא עירוב

[417] MS Darmstadt: רב כהנא בר בא

[418] As during the week, it is used to crush non-Festival items, thus rendering it *muqṣeh*. (Albeck, *Shisha Sidrei Mishnah*, 288)

> Shammai says, "They do not place a hide[419] before the tread,[420] not may one lift it up, unless there is an olive's bulk of meat on it." And the House of Hillel permits. The House of Shammai says, "They do not remove shutters on the Festival." And the House of Hillel permits – even putting them back
> **Gemara**:…And they concur that they do not salt hides on the Festival day. But on it one puts salt on meat which is for roasting. Associates in the name of Rav: "A man may salt a sizable piece [of meat], even though he can eat only a small part of it." R. Aha in the name of Rav: "One may put on a little salt and practice *ha'arama* by [indicating that he wishes to eat only this spot, and then he may change his mind] and again put on salt and practice *ha'arama* until he salts the entire piece of meat."

The trouble in this case is not the interest in extra food for after the Festival, but the concern that one will lose valuable meat by eating any meat on the Festival. When one slaughters an animal, the excess meat must be salted in order to be preserved. However, it is forbidden to salt food on the Festival that is not for the Festival itself. The early Babylonian *amora* Rav suggests salting a large piece at once, even if one plans to eat only part of it. Significantly, R. Aḥa, a Palestinian *amora* cites Rav as allowing the *ha'arama* of salting each piece under the pretense of wishing to eat it. The fact that the Babylonian *amora* (Rav) does not mention *ha'arama*, whereas the Palestinian *amora* (R. Aḥa) does is consistent with an overall difference between PT's preoccupation with *ha'arama* as contrasted with BT's treatment. We will study this trend more in depth in chapter 4, below. For the moment, however, it is important to contrast the reasons for the *ha'arama* in the two aforementioned cases: the first, where *ha'arama* is rejected, is a case of simply trying to undermine the law for convenience: cooking on the Festival for afterwards. The second is a situation of making sure that food does not go to waste, thus

[419] Of an animal that was slaughtered and flayed for food on the Festival. (Albeck, ibid.)

[420] In order to keep it from getting ruined before one is able to properly treat it after the Festival. (Albeck, ibid.)

causing financial hardship on each and every Festival, and essentially making slaughtering and animal and cooking it for a Festival meal quite a costly undertaking.

A short passage earlier in *yBeṣa* 1:5, dealing with the last debate presented in the *mishnah,* shows R. Aḥa to be consistent in this:

> **ביצה א:ה, דף ס עמוד ג' (כ"י ליידן)**
> שמואל אמ' המלחם את התריסין ביום טוב חייב משום בונה וקשיא דבר שאילו עשאו בשבת חייב חטאת בית הלל (אומ') מתירין אף להחזיר? ר' חנניה בשם ר' יוחנן התירו סופו (משם) [מפני] תחילתו שאם אומ' את לו שלא יחזיר אף הוא אינו פותח. ולא יפתח? אף הוא ממעט בשמחת יום טוב אמ' ר' אחא מחזיר ובלבד שלא יחזיר כל צורכו
>
> Samuel said, "He who inserts the shutters on a Festival day is liable on the count of building." Now this poses a problem. In regard to doing something which, if one did it on the Sabbath, one would be liable for a sin offering, does the House of Hillel permit – even to put them back? R. Ḥananiah in the name of R. Yoḥanan: "They permitted the matter at the end because of the considerations at the outset. For if you tell someone that he may not put them back, then he will not open them to begin with." So let him not open them [at all, and what difference does it make]? [If you maintain that view,] you diminish the pleasure of the Festival day. Said R. Aha, "One may return them, on condition that he not put them back firmly…

R. Ḥananiah in the name of R. Yoḥanan offers, "They permitted the matter at the end because of the considerations at the outset" as a framing concept for leniency regarding the laws of the holidays. In particular, the situation cited herein is one in which a person will refrain from removing the shutters from a shop or a storage facility where food for the Festival is being stored[421] for fear of not being able to replace the shutters on the Festival. (After all, the food might spoil, be stolen, etc.) This is not unlike the salting issue raised in the *sugya* above. In order to eat any amount of meat, one must slaughter an entire animal, and if one may not preserve the extra meat by salting it, why would s/he even slaughter an animal for the Festival to begin with?[422]

[421] See Albeck, *Shishah Sidrei Mishnah*, 288

[422] R. Solomon ibn Aderet writes (Novellae, *bBeṣa*11b; translation E.S.):

R. Aḥa appears consistent in his application of the rulings of the House of Hillel in both the meat case and the door case. Whether R. Aḥa would have used R. Ḥanania's phrasing, he clearly values the significance of *simḥat yom tov,* though he seems more conservative about how to accomplish that goal. In the case of replacing doors, one will diminish enjoyment on the Festival by not opening the shutters in the first place if one may not replace them; likewise, we may presume that one would be reticent to prepare any meat on the Festival if all of the extra meat may not be salted but must be discarded. However, unlike the opposing opinions throughout the section, R. Aḥa is unprepared to give carte blanche permission either to replace the doors or to salt a bigger piece of meat than is necessary for the holiday simply because the ends are noble. Instead, he mandates that one not replace the doors too firmly. However, in both cases, he seems concerned with a financial threat posed by the laws of the Festival, and he is determined to prevent it.

Rabbi Hoshaya

To this point, we have suggested that a) the innovation of the rabbis was not employing loopholes, but like their Roman counterparts, rejecting some loopholes while accepting others; and b) that the rabbis decide which loopholes to accept based on some concept akin to equity, namely what the lawgiver himself would want the application of the law to be. Because of this pattern, the following teaching of R. Hoshaya is surprising:

ירושלמי ברכות ה:א, ח' עמוד ד' (כ"י ליידן)

תני ר' הושעיא מרבה אדם דגן בתבן ומערים עליו לפוטרו מן המעשרות[423]

And I may answer that the evasions here are only in situations in which the [financial] loss comes as a result of the enjoyment of the Festival (=the commandment to eat meat), not as a result of his negligence, like the case of salting a hide or salting piece by piece; for it is impossible for him to eat meat for the Festival without slaughtering, and he will lose all of the remaining pieces. Therefore, evasion is permitted. But regarding *'eruv tavshilin* (=mixture of foods, a case which we will deal with below in depth), where his own negligence caused it, either because he never set out an *'eruv tavshilin* or because it was lost or eaten due to his negligence, as they were not properly guarded, therefore, they forbade all evasion for him. Likewise for similar situations.

[423] MSS Paris and London add the words ומאכיל לבהמתו at the end of R. Hoshaya's teaching.

> R. Hoshaya taught: One may increase one's grain with straw and be crafty in its regard in order to exempt it from tithes.

Two things remain unclear: 1) what this evasion entails, and 2) why it is permitted. Regardless of what exactly the evasion is, it depends on the fact that grains that are brought into the house while (still) mixed with chaff are not subject to the laws of tithes. According to some, R. Hoshaya here refers to a situation in which one has not yet removed the wheat from its chaff, its straw.[424] According to others, this is a case of adding straw to already processed grain, thus returning it to a less processed state.[425] Likewise, there is an argument over whether the purpose of this activity is to allow people to eat the grains without tithing or to allow only animals to do so.[426] It is not clear what warrants the use of *ha'arama* here. Urbach would undoubtedly say the motivation was simply accepting an evasion already in use. The talmudic context here can be read either way: this law is mentioned as something for a person to recite prior to the private *'amidah* in order to pray following study. On the one hand, it is possible that this is the rabbis' way of trying to drill in the message that there is a licit way to avoid tithing, and it is preferable to simply transgressing the law. But the context may equally be read as support for this loophole as an indication that it was not mere capitulation to common practice but an *ante factum* rabbinic dispensation similar to how we read the mishnaic cases of *ma'aser sheni* and *bekhor*. The analysis that we have proposed thus far, as to what leads the rabbis to embrace some dodges and to reject others leads us to surmise that the rabbis believed that this circumvention was necessary,

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[424] See R. Elazar Ezkari, *Sefer Ḥaredim* s.v., *תני ר' הושעיא* who tries to interpret this passage in light of its BT parallels which read: מכניסה במוץ שלה, brings it inside in its chaff.

[425] See *Pene Moshe* s.v., *מרבה אדם דגן בתבן*, *Ḥiddushei R. Yonah* BT 22a in Alfasi

[426] Those who wish to reconcile PT and BT, such as *Pene Moshe*, assume that the purpose is to feed one's animals untithed foods, as BT reads: כדי שתהא בהמתו אוכלת ופטורה מן המעשר. MSS Paris and London add the words ומאכיל לבהמתו at the end of R. Hoshaya's teaching.

whether due to economic downturn or under an assumption that people would only use this dispensation when in economic straits..[427]

According to the Biblical conception, the letter is the law, regardless of the consequences. Even if that means marriages based on kidnapping, contracts based on ignorance and even sacrifice of one's daughter! Thus, what is most surprising about rabbinic loopholes is not that they are endorsed but that more often, they are outlawed. This is legally innovative and fits well within the rabbis' Graeco-Roman historical context. PT struggles with the issue of *ha'arama* being used for the wrong purposes, but where the ends are appropriate, *ha'arama* may be considered for the means, PT weighs heavily on the notion of serpentine *'ormah* and less on the side of Proverb-ial *'ormah.*

Babylonian Talmud:

We will focus on the role of *ha'arama* in the Babylonian Talmud in chapter 4, but here we offer a brief overview.

I. Parameters

Though not identical to PT's suggestions, BT offers variations[428] on relevant variables for when *ha'arama* may or may not be used: a) avoiding sin, b) saving money, and c) the category of transgression being circumvented. Paralleling *yPesaḥim* 3:3, for example, in *bShabbat* 117b

[427] Louis Ginzberg points out that the PT version is more lenient that the BT version in that it permits people to eat too. (See Louis Ginzberg, *Perushim ve-ḥiddushim be-Yerushalmi* IV. New York: JTSA (1961) 120-121) According to one opinion in R. Solomon ibn Aderet's Novellae (*bBerakh* 31a), restricting consumption to animals prevent a person from abusing the loophole. However, he also includes a second opinion that in fact people may eat of the food as well even according to BT. Others suggest the latter as well. See *bMen.* 67b *Tos. s.v.,* כדי

[428] This is consonant with the work of both Zvi Dor and Richard Kalmin, indicating that Palestinian material shows up among fourth century Babylonian *amoraim* and beyond. In our case, it is Abaye (d. 339) who offers the first PT parameters for *ha'arama*. The *stammaim* follow suit, as we shall see below. (Ẓvi Dor, *Torat Ereẓ Yisrael be-Bavel* (Tel Aviv: Devir, 1971), for example, pp. 11–84; Richard Kalmin, *Jewish Babylonia between Persian and Roman Palestine: Decoding the Literary Record*. Oxford: Oxford University Press (2006)

the anonymous redactor(s) posits respective boundaries for R. Joshua and R. Eliezer with regards to *ha'arama*.

בבלי שבת קיז: (כ"י מינכן)

גופה[429] נשברה לו חבית בראש גגו מביא כלי ומניח תחתיה ובלבד שלא יביא כלי אחר ויקלוט כלי אחר (ויצרוף ולא יקלוט)[ויצרוף נזדמנו לו אורחים מביא כלי אחר ויקלוט כלי אחר ויצרף ולא יקלוט ואחר כך יזמין אלא יזמין ואחר כך יקלוט] ואחר כך יקלוט[430] ואין מערימין בכך משום ר' יוסי בר יהודה אמרו מערימין לימא בפלוגתא דר' אליעזר ור' יהושע קמפלגי דתניא אותו ואת בנו שנפלו לבור ר ' אליעזר אומר מעלין[431] את הראש[ו]ן על מנת לשוחטו ושוחטו והשני עושה לו פרנסה במקומו בשביל שלא ימות ר' יהושע או' מעלין את הראשון על מנת לשוחטו ואינו שוחטו ומערים ומעלה את השני רצה זה שוחט רצה זה שוחט[432] ממאי דילמא עד כאן לא קאמ' ר' אליעזר התם[433] דאיפשר לפרנסה[434] אבל הכא דאפשר[435] בפרנסה לא אי נמי[436] עד כאן לא קא"ר יהושע התם אלא משום דאיכא צער בעלי חיים אבל [היכא[437] ד]ליכא צער בעלי חיים לא

The main text: If one's barrel is broken on the top of his roof, he may bring a vessel and place it underneath, provided that he does not bring another vessel and catch [the dripping liquid] or another vessel and attach it [to the roof.] if guests happen to visit him, he may bring another vessel and catch [the dripping liquid], but must first invite [them] and then catch [the liquid]; and one must not evade the law in this matter. In R. Jose son of R. Judah's name it was said: We may evade [the law]. Shall we say they argue the same argument as R. Eliezer and R. Joshua? For it was taught: If an animal and its young fall into a pit, R. Eliezer said: One may haul up the first in order to slaughter it, and for second he makes provision where it lies, so that it should not die. R. Joshua said: One may haul up the first in order to slaughter it, and not slaughter it; then he practices an evasion and hauls up the second and kills whichever he desires. Why? Perhaps R. Eliezer rules thus only here, because provisions can be made [to save the animal in its place], but not here, seeing that it is impossible [to make provisions]. And perhaps R. Joshua

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[429] MS Oxford: גופא

[430] MS Oxford and Soncino Ed. Lack the repetition of ואחר כך יקלוט

[431] MS Oxford: מעלה instead of מעלין (in both instances); Soncino Ed. changes to singular only in the first instance.

[432] MS Oxford: second רצה זה שוחט absent. Probably scribal error.

[433] MS Oxford makes the phrase more explicit: עד כאן לא קאמר ר' אליעזר התם [אלא] משם דאיפשר בפרנסה

[434] MS Oxford, Soncino and Vilna Eds.: דאפשר בפרנסה. MS Munich reflects the לפרנסה - to feed *it*, while בפרנסה leaves out the animal and just refers to the act of sustaining itself.

[435] MS Oxford, Soncino Ed.: אבל הכא דלא אפשר בפרנסה. Given that the sentence does not read logically without the word לא, MS Munich probably reflects a scribal error.

[436] MS Oxford omits the phrase אי נמי, and has instead ...ועד כאן

[437] MS Oxford, Soncino Ed.: הכא

rules thus only there because suffering of animals is involved, but not here where there is no suffering of animals.

Immediately prior to this passage, BT makes clear that carrying a vessel through the public thoroughfare (for the purpose of catching more of the leaking liquid) is the concern here. And the debate about *ha'arama* is about saving extra for guests: either a) inviting guests just to have reason to save extra wine,[438] b) inviting guests who likely will not drink the wine in order to save extra wine and have leftovers.[439] For R. Eliezer, monetary loss is significant, but only warrants *ha'arama* if there is no other way to protect the animal without resorting to it. For R. Joshua, on the other hand, monetary loss is not the relevant factor, but rather it is the suffering of the animal – either because it is against the letter of the law or because it is against the spirit of Jewish law. Though it riffs on some of the same issues as PT, money and sin, it is the *stam* who makes these proposals rather than an *amora*.

Likely, the distinction made by the *stam* between the possibility of sustaining the second animal in the pit without circumventing the law (both here and again on *bShabbat* 124a), is taken from the comments of Abaye in *bBeṣa* (37a). Abaye reacts to R. Joseph who suggests that a) *ha'arama* is identical to outright violation (though R. Joshua allows it anyway in order to avoid financial loss!), b) R. Eliezer never permits bending or breaking the law for the purpose of saving money, and c) R. Joshua permits *ha'arama* on the Festival only[440]:

בבלי ביצה לז. (כ"י מינכן)
כל אילו בי"ט אמרו ורמינהי משילין פירות דרך ארובה בי"ט אמ' רב יוסף לא קשי' הא ר' אל[י]עזר הא ר' יהושע דתניא אותו ואת בנו שנפל לבור ר' אליעזר או' מעלה את הראשון על מנת לשוחטו ושוחטו והשני עושה לו פרנסה במקומו בשביל שלא ימות ר' יהושע או' מעלה את הראשון על מנת

[438] *Bet Ha-Beḥira* ad loc.

[439] Rashi *ad loc*.; Ran *Novellae ad loc*.

[440] As opposed to the Sabbath (Rashi s.v., הא ר' אליעזר). Perhaps this comports with the view offered in *yPes.* 3:3, 30a, that *ha'arama* may not be used to circumvent a *ḥiyuv ḥatat* (such as the Sabbath).

לשוחטו ואינו שוחטו וחוזר ומעלה את השני רצה זה שוחט רצה זה שוחט א"ל אביי ממאי דילמ' עד כאן לא א"ר אליעזר התם דאיפשר בפרנסה אבל הכא דלא אפשר בפרנסה לא אינמי דילמ' עד כאן לא קא"ר יהוש' התם דאפשר בהערמה אבל הכא דלא אפשר לאערומי לא

All these things they forbade on a Festival: But the following contradicts this: One may let down fruit through a trap-door on a Festival but not on a Sabbath. Said R. Joseph: There is no contradiction: the one is according to R. Eliezer; the other is according to R. Joshua. For it was taught: If it and its young fell into a pit, R. Eliezer says: He may bring up one of them in order to slaughter it and must slaughter it; and as for the other, he feed it in the very place [it fell], so that it should not die. R. Joshua says: He brings up one in order to slaughter it but does not slaughter it, and he uses cunning and again brings up the second; and he may slaughter whichever he desires. Abaye said to him: Whence [do you know that this is so]? Perhaps R. Eliezer said so only where provisions can be made, but not here where no provisions can be made. Or R. Joshua rules thus only there, where one can make use of subtlety, but no here where it is not possible to make use of subtlety!

Abaye argues for the distinction presented in *bShabbat* 117b: financial loss notwithstanding, R. Eliezer does not permit *ha'arama* if there is a licit way to sustain the second animal. Moreover, he makes clear that there is truly a difference between *ha'arama* and outright violation. We will take up this second issue in following chapter, where we will study BT's motivations and analysis more in-depth.

As in this passage, Abaye is a central character in *ha'arama* debates within BT: he delineates who the mishnaic *rasha 'arum* is[441] and it is a query of his regarding *ha'arama* which the leads the *stam* to further define the exact borders of *ha'arama*'s permissibility:

בבלי שבת סה: (כ"י מינכן)

בעי אביי אשה מהו ש[תערים] תפרוף על האגוז ותוצי' לבנה קטן בשבת תיבעי למאן דאמ' מערימין בדליקה ותיבעי למאן דאמ' אין מערימין תיבעי למאן דאמ 'מערימין בדלק' התם הוא דאי לא שרית ליה אתי לכבויי אבל הכא דאי נמי לא שרית ליה לא קאתיא לאפוקי לא או דילמא אפי' למאן דאמ' אין מערימין בדליקה התם הוא דדרך הוצאה בכך אבל הכא דאין הוצאה בכך אימ' לא תיקו

Abaye asked: May a woman evade [the Sabbath prohibition] by weighting [her cloak] with a nut in order to carry it out to her infant child on the Sabbath? This is a problem on the view of both the one who maintains that an artifice may be used and one who maintains that an artifice may not be used. It is a problem on the view that artifice may be used in the case of a fire: that is only there, because if

[441] *bSan.* 76a; *bKet.* 95b/*bBB* 137a, 164b/*b'Arakhin* 23a

you do not permit it, he will come to extinguish it; but here, if you do not permit it, he will not come to carry it (=the nut) out. Or perhaps, even on the view that all artifice may not be used; there that is a normal way of carrying [clothes] out; but here this is not a usual way of carrying it, and therefore I might say that it is well. The question stands.

Abaye questions the use of *ha'arama* here. Why? Is this because it is Sabbath rather than the Festival? Is it because the need is not monetary or in order to avoid sin? By analogizing the situation to the case of a fire on the Sabbath in which *ha'arama* is permitted, the anonymous redactor(s) suggested that a) *ha'arama* is warranted as deterrent from sin but not otherwise (similar to *yPesaḥim* 3:3 concern for committing a sin[442]), and b) whether the *ha'arama* is similar to the way the transgression itself might be committed, which also may be related to the question of whether the circumvented law is a *ḥiyuv ḥatat* or simply a *shevut*.[443]

There is one more pericope which indicates BT's interest in keeping a person from sin through the use of *ha'arama*:

בבלי תמורה כד:
משנה: כיצד מערימין על הבכור?...
גמ: אמר רב יהודה מותר להטיל מום בבכור קודם שיצא לאויר העולם. תנן, אומר מה שבמעיה של זו עולה. עולה אין שלמים לא? ואת אמרת דמצית מפקעת ליה מקדושתה? אמר לך רב יהודה ה"מ בזמן שבית המקדש קיים כי קאמינא אנא בזמן הזה דלא חזי להקרבה. אי בזמן הזה מאי למימרא? מהו דתימא נגזר דלמא נפיק רוב ראשו וקשדי ביה מומא ואימא הכי נמי! אפילו הכי הא עדיפא מדאתי ביה לידי גיזה ועבודה.

Mishnah: How does one evade *bekhor* status?...
Gemara: R. Judah said: It is permissible to maim a *bekhor* before it exits [the womb] to the world's atmosphere. [But] we learn in the *mishnah*: He says, that which is in the womb of this one is a burnt offering. A burnt offering, but not a peace offering? Yet, you (=R. Judah) said that you can remove it from its sanctity [completely by maiming it]? R. Judah would tell you: That was when the Temple stood, but I am speaking about today, when the animal is not usable as an offering. And if this is about today, what does this add? What might you have

[442] Although, significantly, the sin mentioned in *yPes.* 3:3 of owning *ḥameṣ* is arguably out of the hands of the owner, while in this case, it would be up to a person to try not to get swept away by the need to save his or her possessions.

[443] Ran and Ritba novella ad loc.; See also *bKet.* 31b and *bShab.*102a where the term דרך הוצאה is used bearing the same connotation.

> thought? That we should decree [against it] lest the majority and the head of the animal comes out [first] and a person maims it [anyway]. And do say so! Even so, it is better than a person coming to use it for shearing or for labor.

R. Judah offers his own version of *ha'arama* – making an animal completely *ḥullin* before it ever becomes a *bekhor.* The *stam* indicates that the reason this is permitted, despite the fact that one might err and maim the animal once it already has the status of *bekhor*, i.e., it has mostly entered the world, is to keep a person from the transgression of using a *bekhor* for its wool or its milk, both of which are tempting options if the animal cannot be eaten and yet may not be used in any other way.

No Suspicion of *Ha'arama*

BT seems much less preoccupied with *ha'arama* as a phenomenon than either PT or *Tosefta*. Most of its citations of *ha'arama* are *baraitot*[444] rather than amoraic statements. Likewise, the terminology is scarcer. What PT labels *ha'arama*, BT does not.[445] And lastly, BT generally does not suspect *ha'arama* unless it is clear and present: there is no suggestion for instance that people are more likely to use evade the laws of labor on *ḥol ha-moed* than during bereavement. [446] There is likewise no discussion about making *ḥameṣ* ownerless just before Passover.

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[444] In addition to the aforementioned examples, see also *bMQ* 12a; *bShab.* 139b. *bBeṣa* 18a is not a *baraita* but is still an earlier amoraic source, cited in the name of Rab.

[445] See *bNed*. 44a where the PT concern for *ma'arimin* becomes a concern for *rama'in*. Or *bNed.* 48a-b, where the term *ha'arama* is completely left out of the *Bet Ḥoron* story. Likewise, *b'Arakhin* 23a-b discusses the PT case not as *ha'arama* but קנוניא על ההקדש. At one point in the *sugya*, however, the *stam* does suggest that Abaye would call such a person a רשע ערום, a cunning wicked person, but significantly Abaye does not mention this in his statement, where he gives the very advice to circumvent the law itself. The suggestion is then rejected in a situation in which such cunning is used to help a family member or to help a *ṣurva me-rabanan*. The distinction between a *ṣurva me-rabanan* and others will play an important role in our analysis of BT's portrayal of *ha'arama*

[446] In fact, *bMQ* 14a suggests that the rules for the Festival and one's bereavement period are identical. And even when the *sugya* challenges that assumption on 17b, the reconciliation is that one the law is identical to Festival law only in cases of *unanticipated* bereavement. There is no citation of a *braita* that indicates that the Festival law would ever be stricter than bereavement law. And thirdly, *bMQ* 12a cites an opinion that one may utilize *ha'arama* during intermediate days of a Festival in order to sell phylacteries to make a living!

It is interesting that a very rare case in BT that involves suspicion of *ha'arama* involves an early Babylonian *amora* who is a) answering a query from the land of Israel and b) using the terminology of *'.r.m.* more as trickery than as loophole:

בבלי ב"מ צ.-: (וטיקן 115)
דשלחו ליה לאבוה דשמואל[447] הנהו תורי דגנבין ארמאיי וגנחין[448] יתהון מהו שלח להו הערמת איתעביד בהו ערימי עליהו' ואיזדבנין
They sent [a question] to Samuel's father: These oxen that the Arameans steal and spay, what is the law regarding them? He sent to them: a trick has been done with them. Trick *them* and sell them.

In the context of the BT *sugya*, the discussion is about violations relating to animals that obligate only Jewish owners, not Gentile owners. Jews, for example, may not spay their animals, while Gentiles may. Thus, Gentile friends/employees of the Jews were "stealing" the animals and spaying them, and presumably returning them to the Jew. Abuha de-Shemuel, also known as Abba b. Abba disapproved of this practice as a simple trick and suggested that his questioners trick these Jewish people by putting their animals up for auction.

There is however an interesting phenomenon that begins in the fourth generation of Babylonian *amoraim*, which we will detail further in the coming chapter: the aramaicized term איערומי קא מערים/אתי לאיערומי begins to refer to lying about the past rather than to tricking about the future – e.g. that a litigant might lie[449] in order to avoid punishment. Beyond חשש הערמה in

[447] Significantly, MS Florence cites the Babylonian *amora* Shmuel as the recipient of the query. If this is the case, it does not fit as neatly with our theory. That said, it is possible that Shmuel is using the term in its sense of trickery rather than legal evasion per se. Likewise, MS Hamburg reads: שלחו ליה בני מערבא לא?ב?וה דשמואל. It is strange to suggest that Palestinians sent a question to a fellow Palestinian.

[448] MS Munich substitutes גנחין with גזזין (shear); MS Vatican cites no verb whatsoever, which is probably a scribal error owing to the similarity of the terms גנבין and גנחין.

[449] Some interpret BT's version of the mixed grain case in this light. כדי שתהא בהמתו אוכלת...- One lies about one's grain…offering that it is mixed so that one's animals may eat, when truly the person him or herself intends to eat of it as well. (See Naḥmanides *Novellae bAZ* 41b; Tos. *bMen.* 67b s.v. כלי in the name of R. Ephraim)

PT,[450] this terminology marks a new and very negative meaning of the term.[451] The term הערמה itself has been removed from its original shrewd but licit connotation and has been transformed to simple lying. We will study this trend in depth in the upcoming chapter within the context of a broader understanding of BT.

We have observed four differences between PT and BT's respective treatments of *ha'arama*: a) comparing *ha'arama* to outright violation, b) visible ruse vs. undetected ruse, c) *ha'arama* terminology as outright lying, and d) a parallel case to the mishnaic institutions of *ha'arama*. We will place these in context of a broader understanding of *ha'arama* in the upcoming chapter.

Legal Theory

In concluding this chapter, we update our discussion by filtering *ha'arama* through the lens(es) of contemporary legal theory. In our Introduction, we cited Haim Tchernowitz's modeling of *ha'arama* on Historical Jurisprudence; and we discussed the strengths and weaknesses of the comparison. It should be obvious to any student of rabbinic law that it does not and cannot correspond perfectly to any one secular jurisprudential theory whether because rabbinic law is a religious system and is being compared to secular models, or simply because the models are relatively new.[452] However, the endeavor is still fruitful for at least three reasons: first, it is the natural continuation of the earlier parallels between Roman law and rabbinic law, as

[450] See chapter 2 of this dissertation.

[451] Excepting, of course, the example from *bShab.* 148b mentioned in the preceding paragraph.

[452] For a detailed explanation of the ways in which rabbinic law does not perfectly match any secular theory of law, see Bernard S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature," *Jewish Law Annual* 6 (1987) 3-44. We likewise cannot and should not ignore the religious motivations of Jewish law, the existence of a Divine Lawmaker, etc., which by definition sets it apart from Anglo-American theory. (See Suzanne Last Stone, "In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory", *Harvard Law Review* 106 (1993) 813-894)

Roman law served as the foundation for Western legal science. Second, the comparison offers a more systematic approach and a vocabulary for a diffuse phenomenon. And third, it presents rabbinic law as confronting the very same challenges that legal systems confront still today. Perhaps this is why the enterprise of comparative jurisprudence between Jewish and Western "secular"[453] legal systems has been both popular and successful.[454] Below, we will first sketch two theories of law that touch on significant dimensions of *ha'arama* but are inadequate for describing the phenomenon as a whole. We will then conclude with a theoretical model, corresponding to the Roman model that we have seen, that thoroughly captures the rabbinic phenomenon.

Two Inadequate Lenses: Realism and Formalism

Debate about the desirability of loopholes is as ubiquitous as loopholes themselves.[455] Until now, we have indicated that early (Biblical/ANE) use of loopholes is a result of a purely formalistic reading of the law, a preference for the letter over the spirit. But in the field of Anglo-American legal theory, there are other reasons to accept loopholes as well. For Legal Realists, for example, loopholes are acceptable because law is fundamentally instrumental.[456] As Oliver Wendell Holmes wrote, "A case is on one side of a statutory line or the other, and if on the safe side, it is none the worse legally because the full measure of what the law permits is availed of;

[453] Hanina Ben-Menahem compellingly points out that even secular legal system bear some of the same characteristics as religious legal systems, such as accessibility and formalistic considerations. (Hanina Ben-Menahem, "Is Talmudic Law a Religious Legal System? A Provisional Analysis," *Journal of Law and Religion* 24 (2008-2009))

[454] For a discussion of the pitfalls and the successes of this comparative enterprise, see Jackson, "Secular Jurisprudence…"

[455] Though the debate about acceptance of loopholes is generally about what lawyers and judges should do after the fact, we still consider this an apt parallel to the rabbinic suggestions of *ha'arama*.

[456] For further development to of this notion, see Katherine R. Kruse, "The Jurisprudential Turn in Legal Ethics," *53 Arizona Law Review* (2011) Part I, A, pps 6-14.

to condemn an act as an evasion it must be on the wrong side of the line as indicated by the policy, if not by the mere letter of the law."[457] The legal realist concept of law "stresses [law's]…manipulability over its certainty; and its instrumental possibilities over its normative contents." [458] As Judge Louis Brandeis famously said:

> I live in Alexandria, Virginia. Near the Supreme Court chambers is a toll bridge across the Potomac. When in a rush, I pay the dollar toll and get home early. However, I usually drive outside the downtown section of the city and cross the Potomac on a free bridge. This bridge was placed outside the downtown Washington, DC area to serve a useful social service, getting drivers to drive the extra mile and help alleviate congestion during the rush hour. If I went over the toll bridge and through the barrier without paying the toll, I would be committing tax evasion ... If, however, I drive the extra mile and drive outside the city of Washington to the free bridge, I am using a legitimate, logical and suitable method of tax avoidance, and am performing a useful social service by doing so. For my tax evasion, I should be punished. For my tax avoidance, I should be commended. The tragedy of life today is that so few people know that the free bridge even exists.

Use the law to your advantage. It is a tool. (Many are actually skeptical about the legality of loopholes because of this manipulative aspect.)

Legal realists likewise recognize the significance of equity, though they accord it the ability to override the law: "the law empowers courts to act as courts of equity"[459]; they must prevent an unfair result of the law's application. Realists deny that the law is complete and univocal and instead see choice where the law is over-inclusive or under-inclusive. On the

[457] Oliver Wendell Holmes, Bullen v. Wisconsin, 240 U.S. 625 (1916) He famously wrote: "if you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge entails him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." (Oliver Wendell Holmes, Jr. "The Path of the Law," *10 Harv. L. Rev.* (1897) 457, 459)

[458] Stephen Pepper, "Lawyers' Amoral Ethical Role: A Defense, A Problem and some Possibilities," *Am. B Found. Res. J.* (1986) 624-26

[459] David Lyons, "Formalism and Instrumentalism, A Pathological Study," 66 *Cornell Law Review* (1981) 872.

Realistic model – sometimes called a jurisprudence of ends,[460] the desirability of outcome – what is best for communal policy, what is most just, etc. – determines what the law should be. As Holmes writes:

> We must think things not words, or at least we must constantly translate our words into facts for which they stand, if we are to keep to the real and true. I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds.[461]

The significance of "bring[ing] about a social end which we desire" resonates with Ephraim Urbach's understanding of *ha'arama*; it is for social ends, specifically a response to pressure from the public in changing historical moments:

> The various methods of evasion discussed by the Sages were all connected with changes which occurred, and *their utilization was intended to make possible the observance of commandments and laws in changing historical conditions*. However, as we have already indicated, the sensibilities of the Sages and their evaluation of the various factors involved played a role in shaping their attitude towards evasion. Their attention was directed to the casuistry of life with all its complications as they were reflected in the confrontation between the specific case and the *Halakhah*. It is, therefore, not legitimate to conclude from the fact that a specific *tanna* sanctioned a specific evasion that he was in favor of evasion in principle or that, conversely, one who objected to a specific instance objected to the whole idea of evasion.[462]

We reject Urbach's claim that this was the rabbis' dominant reason for employing *ha'aramot*, but this does not mean that public policy does not matter to the rabbis: in fact, returning to the previous chapter's examples, when Rabbi Aqiva rejects the opinion that an

[460] See Hanoch Dagan, "The Realist Conception of Law," *University of Toronto Law Journal* 57 (2007) 607-660

[461] Holmes, "Law in Science and Science in Law*," 12 Harvard L. Rev.* (1899) 460.

[462] EE Urbach, *The Halakhah*, 255

innocent woman forced to drink the *sotah* waters will get pregnant, it is clearly for reasons of public policy: he worries that all women might take advantage of this loophole, thus rendering *sotah* a joke (*bBr*. 31a). Likewise, the passage in Genesis Rabbah (*Noaḥ* 31) which claims that the ancient deluge was punishment for people using a theft loophole en masse clearly reflects anxieties about the impact of legal dodges on society. However, as we wrote above concerning Aristotelian equity, considerations such as societal impact can be viewed as internal to the law rather than external to it.

While there is certainly a degree of legal manipulation that most people notice about rabbinic loopholes which certainly gives off the sense of "where there's a will, there's a way," similar to Realism, the rabbis clearly were not Realists in any true sense of the word: they did not favor any and all exploitations of the law; they did not broadly abandon the written law in pursuit of other interests; and, as we have mentioned above, their leading motivations were not truly external to the law.

The balance to legal Realism is Legal Formalism, which until now we have offered as somewhat of a mechanical caricature of itself. Legal formalists[463] view existing law as complete and argue that one must make decisions on the basis of limiting rules rather than other variables.[464] Frederick Schauer defends being a "slave to marks on a page,[465]" by arguing that a

[463] Frederick Schauer, "Formalism," 510 n1 offers an impressive array of definitions offered for the term over the years.

[464] S. Levinson, "What Do Lawyers Know (and What Do They Do with Their Knowledge)? Comments on Schauer and Moore," 58 S. Cal. L. Rev. (1985) 441, 445; Schauer points out (n. 42) that this definition has parallels in literary theory. See, e.g., W.B. Michaels, "Against Formalism: The Autonomous Text in Legal and Literary Interpretation," 1 Poetics Today (1979) 23

[465] Schauer describes two other versions of formalism in depth, both revolving around the denial of choice: either a) the denial of choice within the interpretation of a norm (about the language of that norm) – a la HLA Hart who attacks formalism for its refusal to acknowledge choice as it relates to the "open texture" of legal language. Hart offers that legal terms have a core of settled meaning but also a penumbra of debatable meaning that may be useful

rule is only a rule if it stands independent of reason: "If every application that would not serve the reason behind the rule were jettisoned from the coverage of the rule, then the decision procedure would be identical to one applying reasons directly to individual cases, with the mediation of rules. Under such a model, rules are superfluous except as predictive guides, for they lack any normative power of their own."[466] Thus, Schauer equates Formalism with "taking rules seriously."[467] While he realizes that rules may lead to unjust consequences, he lauds their ability to inject stability into a system and to condition decision-makers with modesty.[468]

Ernest Weinrib, however, sees Formalism differently. In his view, formalism is not primitive or simply about the rule of law, but it is about the internal coherence (intelligibility) of law: "The formalist's concern is not with whether a given exercise of state power is desirable, either in its own terms or in terms of the larger ends that it serves, but with whether it is intelligible as part of a coherent structure of justification."[469] The rationale for interpreting the law this way or that must come from within the law itself rather than on the basis of external politics or desiderata. As Suzanne Last Stone writes, "…the characterization of rule application as mechanical is a polemical term invented by formalism's opponents. Formalism is evaluative, but, crucially, its evaluative criteria are internal to law, reflecting law's inner morality."[470] And

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in questionable cases. Formalists simply refuse to acknowledge the penumbra in cases of questionable application of a word and instead remain pure literalists; or b) the denial of choice about whether to apply a norm.

[466] Schauer, 535

[467] Schauer, 537

[468] Also, he posits "presumptive formalism" in which decisions are made formalistically by a lower court but may be reviewed by a higher court taking "less locally applicable norms," including the reason behind the rule in question, into account, should there be a pressing reason to do so (Schauer, 547)

[469] Ernest Weinrib, "Legal Formalism: On the Immanent Rationality of Law," *Yale Law Journal* 97 (1988) 973

[470] Suzanne Last Stone, "Halakha and Legal Theory," *The Journal of the Society for Textual Reasoning*, Vol. 6, No. 1 (Dec. 2010)

Noam Zohar writes, "The formalistic image of deductive-technical interpretation is an image that is completely outdated, both concerning legal systems in general and with respect to the halakhic system in particular."[471] This second version of Formalism sounds a bit closer to the rabbinic project, in that there is consideration for rules and an understanding that one may not desert them in favor of certain ends, but there is likewise an inner morality guiding how these rules are read. Unfortunately, Weinrib does not posit a clear methodology of how to determine what that morality is.

On these definitions, were the rabbis Formalists or Realists? Daniel Statement suggests that both are simply polemical straw man positions: "The argument…that halakhic interpretation is non-formalistic, namely that it relies on human judgment or human discretion, in contrast to formalistic interpretation…is simply trivial. To be sure, halakhic interpretation is not 'a simple act of applying the written law to reality,' but this is the case with all legal interpretation, and, in fact, with *any* kind of interpretation…Whereas the claim that the halakhic interpretation is non-formalistic is trivial, the opposing claim which describes halakhic interpretation as a 'simple act of applying the written law to reality' is so embarrassing that it is hard to believe that anyone seriously uphold it."[472]

Although pharisaic and later rabbinic law has been famed for its formalism, the phenomenology of *ha'arama* suggests that the truth is more complex. The contours of *ha'arama*'s use suggests a curious nexus of Formalism and Realism. On the one hand, *ha'arama*

[471] Noam Zohar, "Developing a Halakhic Theory as a Necessary Basis for a Philosophy of the Halakha," *New Streams in Philosophy of Halakhah*, Eds. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press and Van Leer Institute, 2008), 48

[472] Daniel Statman, "Halakha and Morality: A Few Methodological Considerations," *The Journal for the Society of Textual Reasoning*, Vol. 6, No. 1 (Dec. 2010). Benjamin Brown has similarly suggested that rabbinic law is somewhere on the continuum between formalism and values-based jurisprudence. Benjamin Brown, "Formalism and Values," 253

generally entails a very literal reading of the law – give a gift and a counter-gift rather than a sale; on the other hand, the rabbis decide when to manipulate the law perhaps based on external considerations such as which loopholes were already widespread and which could have dire consequences if outlawed. It seems that literal reading is tolerated, for example, for certain ends, while it is rejected for others. For the good of public policy, literal readings of laws may be outlawed or advocated. While, for instance, it would not serve policy well for people to accomplishing what amounts to usury, even if it is technically legal, while it is certainly helpful to aid the post-destruction era in avoiding burdensome taxes. It would not serve policy well for ridding oneself of *ḥameṣ* to basically become dead letter because people can always rely on declaring such food ownerless a day before Passover and reclaiming it after the holiday, while it does serve public policy well to prevent people from losing animals to pits on the Festival. What our study of the rabbinic development of *ha'arama* reveals is that, its method shares elements of both realism and formalism and yet is not completely consonant with either.

Natural Law Theory

If we return to the context of Roman law, we find a path that leads us ultimately to a modern jurisprudential theory that does adequately describe the phenomenon of *ha'arama*, even if cannot explain other facets of rabbinic law. Our description of the Greco-Roman legal tradition as emphasizing equity as a counterbalance to the letter of the law (and sometimes as its fulfillment) has echoes in modern day Anglo-American theories of jurisprudence.

For Roman jurists, the concept of *in fraudem legis* was understood within the context of developing notions of equity and natural law:

> Some fifty years before Plato, a notion of natural law had already appeared in Euripides. It received its most active development among the Stoic philosophers. Roman philosophy, in its classical period, accepted the legal authority of this *jus*

> *naturale* as one of the major foundations of jurisprudence…The various "natural laws" constitute a common element in a large variety of codes and conventions, referred to by some Roman jurists as *ius gentium*, and this became the basis for the modern conception of international law."[473]

Cicero's original definition of natural law theory is as follows:

> True law is right reason in agreement with Nature...it is of universal application, unchanging and everlasting...Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.[474]
> Natural law theory asserts the significant of morality[475] in determining the

legitimacy of "true law."

Ronald Dworkin has offered a particularly appealing version of natural law theory.[476] He illustrates his view through the famed 1882 New York Supreme Court case of *Riggs v. Palmer*.[477] A certain Elmer Palmer stood to inherit most of his grandfather's estate. Concerned that his grandfather might change the terms of the will in light of his recent remarriage, Elmer murdered his grandfather before he could alter a word of the will. Should Elmer inherit his grandfather? Judge Gray, who wrote the dissenting opinion, argued that by literal interpretation of the statute of wills, which said nothing about restricting an heir's rights should she murder the

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[473] Norman Lamm and Aaron Kirschenbaum, "Freedom and Constraint in the Jewish Judicial Process," *Cardozo Law Review* 1 (1979) 107

[474] Cicero, *De Re Publica*, III, xxii.33 (trans. Clinton Walker Keyes (Cambridge, MA: Harvard University, 1928))

[475] In the ellipses section, Cicero claims that morality is universal and is determined by God. Among theorists of Jewish law, the question is still asked: Is morality dictated by the *halakhah* or does it exist in nature, independent of *halakha*? It is a restatement of the *Euthyphro* dilemma: "Is the pious loved by the gods because it is pious, or is it pious because it is loved by the gods?" (Plato, *Euthyphro* 10a) For full bibliographic information about this issue, see articles and footnotes in *The Journal of Textual Reasoning*, Volume 6,1 (Dec. 2010), dedicated to *Halakha and Morality*, which cite most of the relevant literature on this issue. For secular theorists of natural law, the question is somewhat different: Is morality universal and transcendent, or is it conventional, impacted by history and culture? William Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?" *143 U. Pa. L. Rev.* (1995) 1899.)

[476] For other applications of Dworkinian theory to rabbinic law, see Christine Hayes, "Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis," *Dine Israel* 25 (2008): 73-121.

[477] *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889)

testator, Elmer should inherit. However, the majority voted for Elmer not to inherit. Judge Earl, writing for the majority opinion, suggested two reasons not to simply read the statutes literally and contextually. The first, relates to the legislators' intentions: "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."[478] And second was the question of general principles of law. Rather than reading a statute in isolation from other legal texts, one must understand the statute in light of "principles of justice assumed elsewhere in the law"[479]: "Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong…These maxims, without any statute given them force or operation, frequently control the effect and nullify the language of wills." This is important both because the legislators probably did so as well, and because this takes the view of a legal corpus as coherent.

Dworkin explains: "the dispute about Elmer was not about whether judges should follow the law or adjust it in the interests of justice…It was a dispute about what the *law was*, about what the real statute the legislators enacted *really said*."[480] Dworkin suggests that the principles – the values woven throughout the legal corpus must be considered as part of one's interpretation

[478] *Id.* at 189

[479] Ronald Dworkin, *Law's Empire*. Cambridge, Mass: Harvard University Press (1986)19. Moshe Halbertal points out that finding out what a statute really says, according to Dworkin, does not mean what exactly the lawgiver had in mind when writing the legislation. Rather, it is a question of how the lawgiver would want it to be interpreted in light of his/her entire legal project. (See Moshe Halbertal, *Interpretive Revolutions in the Making* (Jerusalem: Magnes Press (1994) 186-7)

[480] Ronald Dworkin, *Law's Empire*, 20

of a given statute. As Bernard Jackson, explains: "Dworkin's legal theory attaches supreme importance to the value of rationality in the form of consistent application of the morality of the community, and thus implementation of the rights which that community morality confers."[481]

This schema is very fitting for *ha'arama*.[482] On the one hand, it takes into account the significance of the laws themselves; they are not to be abandoned simply in the face of other needs. On the other hand, he can do that is because he posits that the laws themselves, rather than being viewed in a vacuum, must be viewed as a system, which purports to serve moral ends. Thus, the law speaks for itself out of more than just its letter. Based on our study of what motivates *ha'arama,* saving money, preventing transgression – it seems that these goals are actually internal legal principles within rabbinic law. On the other hand, those *ha'aramot* which are rejected are rejected because they do not further the principles of the law overall. The rabbis want law that is "morally coherent."[483] Rules must be authentic, not simply valid.[484]

Conclusion

In this chapter we have discussed the developed of the *ha'arama* terminology from *Mishnah* through BT, tracing it from its mishnaic reference to post-Temple rabbinic strategies to keep people from losing money on rituals which were no longer practicable to a predominantly

[481] Bernard S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature." *Jewish Law Annual* Vol. VI, 22. He further points out that rationality is not equivalent to demonstrability – as only a herculean judge can figure out the correct answer – but cares more about the proper application of moral criteria than the utilitarian preference of predictability.

[482] Dworkin himself notes his perspective as a compromise position between "conventionalism" and "pragmatism." (See Ronald Dworkin, *A Matter of Principle*. Mass.: Cambridge University Press (1985) Chapters 4 and 5; See also See Moshe Halbertal, *Interpretive Revolutions,* 188)

[483] Michel Rosenfeld, "Dworkin and the One Law Principle: A Pluralist Critique," *Revue Internationale du Philosophie* (2004) 33; and there are, of course, other issues at play as well – how is the *ha'arama* being accomplished, what kind of law might it apply to, etc.

[484] While our comments are borne out by our study of *ha'arama*, we must not assume that this is the case for the remainder of rabbinic law. Each legal phenomenon must be studied separately.

rejectionist stance towards it in PT (perhaps because of abuse by its practitioners for ignoble ends), to the parameters for *ha'arama* as indicated in *Tosefta*, PT, and BT. Pathos plays a significant role. We have endeavored to show that it is not the use of *ha'arama* which is unique in this literature, but rather its rejection, as it reflects the Greco-Roman understanding of *in fraudem legis*. Thus, the rabbis move beyond the rigid version of formalism reflected in ANE sources and begin to consider equity, the element which ultimately determines which loopholes are accepted and which are spurned. To explain this phenomenon in modern theoretical terms, we have offered identified parallels with three jurisprudential schools, each emphasizing a different aspect of *ha'arama*.

Within this chapter we have also alluded to a slight variation on straightforward loophole *ha'arama*. In the coming chapter, we will explore this variation and identify what it contributed the overarching conversation of letter and spirit, not of the law, but of the individual.

Chapter 3 - *Ha'arama* and the Internal Self

The previous chapter dealt with ways in which the phenomenon known as *ha'arama* (literally, cunning), the term used for a subset of rabbinic loopholes,[485] does not reflect a simple and rigid formalism, but instead parallels contemporaneous Graeco-Roman considerations of equity, the inner spirit of the law. This parallel is most pronounced in the Palestinian Talmud. In this chapter, we will explore a subset of *ha'arama* cases which concern manipulation of inner thought rather than external, empirical fact. We will analyze how such *ha'arama* functions within the context of the earlier type of *ha'arama* discussed. The connection between the two types reveals much about how the rabbis understood the role of mental process, or intention, in defining actions.

Ha'arama of Intention

As mentioned above, *Tosefta*[486] offers what appears to be a new variation of *ha'arama*, somewhat different in method from that of *Mishnah*. This kind of *ha'arama* concerns not the

[485] As discussed at length in chapter 1 of this dissertation, the rabbinic term for *ha'arama* most probably derives from the use of the root ע.ר.מ in the book of Proverbs, in which Wisdom personified invites the simpleton to come learn shrewdness and cunning from her rather than from the wicked. And while there is no specific term used for all loopholes in rabbinic literature, the term הערמה or some variation thereof is used some several dozen times throughout ancient rabbinic corpora to refer to such phenomena. (See Chapter 2 for a full discussion of rabbinic terminology for loopholes, as well as for the general discussion as to whether *taqqanot* (decrees) such as *prosbul* and *'eruv* fall into the "loophole" category.) In addition to referring to legal dodges or to cunning, *'.r.m.* means wise or clever with a completely positive connotation: see Gen. Rabbah *Vayeshev* 86 and *Miqeṣ* 90. It can even mean wise in a profound way. See *bBerakh*. 17a.

[486] Whether *Tosefta* is viewed as an early commentary on *Mishnah* (JN Epstein, *Introduction to Tannaitic Literature: Mishnah, Tosefta, and Halakhic Midrashim* (Heb.; Jerusalem: Magnes Press, 1959), 242-62; Abraham Goldberg, "The Tosefta - Companion to the Mishna," in *The Literature of the Sages* Part I, Ed. Shmuel Safrai (Assen: Van Gorcum, 1987), 283-302.), as a competing free rendition based on the same text as the one stylized by *Mishnah* (Martin Jaffee, *Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism, 200 BCE-400 CE* (New York: Oxford University Press, 2001), 39-61; Elizabeth Shanks Alexander, *Transmitting Mishnah: The Shaping Influence of Oral Tradition* (New York: Cambridge University Press, 2006), 35-55.), as the earlier text and the main source of *Mishnah* (Judith Hauptman, *Rereading the Mishnah: A New Approach to Ancient Jewish Texts* (Tübingen: Mohr Siebeck, 2005), as an amoraic redaction. (Hanoch Albeck, *Studies in the Baraita and the Tosefta* (Heb.; Jerusalem: Mossad ha-Rav Kook, 1954), 87-8, 182-4; While Albeck dates the redaction of *Tosefta* to the end of the amoraic period (approximately to the fifth century C.E.), he too recognizes that toseftan materials are early and contemporaneous with the *Mishnah*), or as a pericope containing

external, physical facts of a case, but the (ostensibly) *internal, intangible* element: the agent's intended purposes in committing the action. Predictably, such *ha'arama* is specific to those areas of Jewish law in which such intention plays a definitive role, such as Sabbath/Festivals and ritual purity law.[487] As Michael Higger writes in his classic, *Intention in Talmudic Law*, "...in many cases in Jewish Religious Law where the commission of the act may involve purposes[488] which are permitted or prohibited, it is the purpose proper that decides the validity of the act."[489] In such situations, *ha'arama* entails (re)defining an action[490] or object[491] by representing and, presumably, by misrepresenting, one's subjective purposes with regard to said action or object.

The following illustration is paradigmatic:

materials both antedating and post-dating *Mishnah* (Shamma Friedman., "Mishna-Tosefta Parallels" (Heb.), *Proceedings of the 11th World Congress of Jewish Studies* (1994): 15-22; idem, "The Primacy of Tosefta to Mishnah in Synoptic Parallels," in *Introducing Tosefta: Textual, Intratextual, and Intertextual Studies*, eds. Harry Fox, Tirzah Meacham, and Diane Kriger (Hoboken: Ktav, 1999), 99-121), it is clear that the *Tosefta* is fundamentally relevant to the *Mishnah*.

[487] Surprisingly, it is not found in context of sacrificial law.

[488] He uses the term "purpose" as distinct from "intention," as intention is merely the *conscious* choice to act, whereas purpose is about *why* someone acts. (Higger, Michael. (1927) *Intention in Talmudic Law* (Doctoral Dissertation) Columbia University, New York, 18) In this paper, we use both terms to refer to "purpose."

[489] Higger, *Intention*, 35. He later presents an exception to this rule: acts that are *malum per se*, such as idolatrous actions, "disregard purpose entirely." (36)

[490] This will limit its scope basically to the realm of rabbinic laws regarding the Sabbath or Festivals such as marginalized objects (*muqṣeh*) or preparation for after the Sabbath/Festival (*hakhana*), Again, while might have expected the terminology therefore to emerge in rules regarding ritual sacrifice, where intention proves definitive, the term *ha'arama* is absent from such discussions.

[491] For instance, much in the realm of ritual im/purity, such as the status of certain objects as ritually defile-able, depends upon one's plans for that object. The term *mahshava* is used in rabbinic literature to refer to this type of purpose.

תוספתא ביצה ג:ב (וינה)

אותו ואת בנו[492] שנפלו לבור ר' אליעזר אומ' מעלה את הראשון על מנת לשוחטו ואינו שוחטו והשיני עושה לו פרנסה במקומו בשביל שלא ימות ר' יהושע אומ' מעלה את הראשון על מנת לשוחטו ואינו שוחטו ומערים ומעלה את השיני[493] רצה שלא לשחוט את אחד מהם הרשות בידו[494]

An animal and its offspring which fell into a pit R. Eliezer says, "One raises up the first on condition to slaughter it but does not slaughter it, and, for the second, one provides food while it is in its present location, so that it does not die." R. Joshua says, "One raises up the first on condition to slaughter it but does not slaughter it, and, practicing cunning, one then raises up the second. [If] he wanted to slaughter neither one of them, he has the right [to refrain]."

One may not handle animals on a Festival day.[495] One may, however, handle animals which one intends to slaughter, as food preparation is permitted.[496] Therefore, if two animals fall into a pit on a Festival day, one may only retrieve them for the purpose of slaughter for the day's meal. The case of a parent-child pair, however, presents further limitation: Leviticus 22:28, prohibits the slaughtering of both parent and child animals on the same day: אותו ואת בנו לא תשחטו ביום אחד – "It and its dam though shall not slaughter on one day." Though leaving either animal in the pit

[492] There is no parallel in the *Mishnah* (or *Midrash Halakhah*) to this toseftan passage. Instead *mBeṣa* 3:4 deals only with the case of a *bekhor* animal that falls into a pit on the Festival (found also in the very next toseftan passage). There, the question surrounds whether the animal had been maimed prior to the Festival, which would render it appropriate for slaughter and thus for retrieval from the pit for the purpose of slaughter. Though the case of a "regular" animal falling into a pit on the Festival is not found in rabbinic, some assume that the ruling would be the same: because it is edible, it may be retrieved, but only to be slaughtered for that day's food. (*Or Zarua, Laws of the Festival*, 2:355), and thus assume that the case of a parent and its dam highlights R. Joshua's position. Others have argued unconvincingly that both the *bekhor* and the animal/dam cases are unique, and one would be permitted to retrieve a "regular" single animal from a pit on the Festival even without slaughtering or planning to slaughter it. (*Magen Abraham O.C. 498:10*).

[493] MS Erfurt, MS London and Venice Ed. add: על מנת לשחוט

[494] Thus, MSS Vienna and Erfurt, but MSS Leiden, London, Venice Ed. read: רצה לשחוט רצה שלא לשחוט אחד מהן הרשות בידו (See also ʿ*Ittur, Laws of Festivals*, Part III, 140; *Shibbolei Ha-Leket Ha-Shalem* Laws of Festivals chapter 252). PT and BT both read differently, an issue that will be considered further below.

[495] *tBeṣa* 1:13 – Elsewhere, we will refer to the prohibition to handle such animals as *muqṣeh* (lit., marginalized), as this is the term used in classical Jewish law codes (e.g., Maimonides's *Mishneh Torah*, Laws of the Sabbath, Laws of Festivals, and *Shulḥan Arukh, Oraḥ Ḥayyim*, 308-334, 495-518) to refer to an item which may not be moved on the Sabbath or Festival.

[496] Exodus 12:16; This ruling is implicit in *mBeṣa* 1:1 and *tBeṣa* 1:1

exposes it to potential risks – inclement weather, injury, death by predators, or even poaching – one may not retrieve both for the day's meal. So says R. Eliezer.

In his epic *Eliezer ben Hyrcanus: A Scholar Outcast*, Yitzhak Gilat posits the R. Eliezer, as one who "never spoke a word which he had not heard from his master" (*tYeb.* 3:4) possessed an "excessive attachment and adherence to the earlier *halakhah*,"[497] which was stricter than later *Halakha*.[498] While this image is consistent with R. Eliezer's rigidity in this case, there may be yet an additional layer. R. Eliezer's opinion exhibits parallels to sectarian law, specifically the Sabbath Code of the Damascus Document:

> אל יילד איש בהמה ביום השבת ואם תפיל אל בור ואל פחת אל יקימה בשבת
> Let no man deliver (the young of) an animal on the Sabbath day. And if it falls into a pit or a ditch, let him not raise it on the Sabbath.[499]

While this citation refers to the Sabbath, a day on which one would not be permitted to slaughter the animals, and therefore there would be no permissible way to retrieve them, Matthew 12:11-12 and Luke 14:5 testify that the Pharisees found a way around the issue:

> 12:11And he said unto them, What man shall there be of you, that shall have one sheep, and if this fall into a pit on the Sabbath day, will he not lay hold on it, and lift it out? 12:12How much then is a man of more value than a sheep! Wherefore it is lawful to do good on the Sabbath day.

Jesus' accusation implies that the Pharisees (as opposed to the sectarians) would find a way to retrieve an animal even on the Sabbath. Perhaps R. Eliezer's position echoes that of the

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[497] Yitzhak Gilat, *Rabbi Eliezer Ben Hyrcanus: A Scholar Outcast*. Ramat Gan: Bar Ilan University Press (1984), 12. Jacob Neusner criticizes Gilat for taking the rabbinic allegation that R. Eliezer never said anything he had not heard from his teachers at face value. It is this assumption which leads Gilat to connect R. Eliezer to older Pharisaism, though there is little reliable evidence of what older Pharisaic law looked like and thus little basis for verifying such a thesis. (Jacob Neusner, *Eliezer ben Hyrcanus: The Tradition and the Man*. Leiden, EJ Brill (1973), 2:277ff)

[498] Gilat, *R. Eliezer*, 60

[499] CD 11:13-14; Gilat, *R. Eliezer*, 322-324.

sectarians. This is speculative, as perhaps even the sectarians would be more permissive on the Festival than on the Sabbath; likewise, the rabbis might be less permissive generally if the person owned more than one sheep. Perhaps if two animals have fallen into a pit on the Festival, saving one would be enough. Though speculative, viewing this example as a case of R. Eliezer advocating sectarian law belongs to a broader argument that R. Eliezer's perspectives generally evoke not simply stricter *halakha,* but specifically a non-Pharisaic form of *halakha*. Vered Noam, for instance, identifies[500] cases from legal arenas as varied as ritual purity, sexual ethics and Sabbath law that indicate parallels between R. Eliezer's positions and those preserved in the Dead Sea Scrolls. Furthermore, Aharon Shemesh suggests that R. Eliezer's very philosophy of *halakha* is reminiscent of such sectarian views: he views divine inspiration[501] as that basis for legal authority. This stands in marked contrast to the later and more daring rabbinic view that *halakha* is the result of "human exegetical activity."[502] Hence, R. Eliezer appears more rigid and linear in his legal interpretation.[503] For our purposes, whether R. Eliezer's positions or thought

[500] She writes, "The similarity between some of Eliezer b. Hyrcanus' *halakhot* and parallel sectarian passages may explain the hostility that he aroused and his problematic status in the tannaitic world." (Vered Noam, "Traces of Sectarian Halakhah in the Rabbinic World," in eds. Steven G. Fraade, Aharon Shemesh, and Ruth A. Clements, *Rabbinic Perspectives: Rabbinic Literature and the Dead Sea Scrolls. Proceedings of the Eighth International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature, January* (2003), 69.)

[501] Aharon Shemesh, *Halakhah in the Making: the Development of Jewish Law from Qumran to the Rabbis,* Berkeley/London: University of California Press (2009) 46.

[502] Shemesh, 39. The famous story of the "Oven of *Akhinai*" underscores this difference of opinion specifically between R. Eliezer and R. Joshua, as R. Eliezer summons God to offer proofs to support his *halakhic* position, while R. Joshua rises to his feet with the charge that "It is not in heaven" and thus not the province of Divine oracles.

[503] There is an interesting wrinkle here. Gilat argues that R. Eliezer and R. Joshua represent the schools of Shammai and Hillel respectively, especially regarding intention: for R. Eliezer, the deed is primary, whereas for R. Joshua intention plays a role. (Gilat, *R. Eliezer*, 44ff ; Gilat, "*Kavvanah u-ma'aseh be-mishnat ha-tannaim,"* Bar Ilan IV-V (1967) 104-116; others, such as Noam, echo this point (Noam, "Traces," 73) On the one hand, R. Eliezer focuses on the deed, namely that the animal must be slaughtered at the end of the process, whereas R. Joshua asserts that intent to slaughter is sufficient even if no animal is slaughtered. On the other hand, though, one must question what type of intention R. Joshua really demands here and whether that is consistent with one who emphasizes the significance of intention throughout tannaitic literature (E.g., *mKer.* 4:3; *tKer.* 2:13-14; *mShab.* 19:4; *mPes.* 6:5; *mTer.* 8:1). Jacob

process evince sectarian perspectives or simply a more inelastic approach to *halakha*, his position in this case of *ha'arama* is consistent with how he presents generally within rabbinic literature.

R. Joshua, however, is more willing to employ human ingenuity.[504] R. Joshua's position permitting *ha'arama* [505] is consistent what we have seen in chapter 2 above. *Ha'arama* is permitted (by at least one *tanna* or *amora*) in cases with evoke true pathos – where a person stands to lose money as opposed to where s/he seeks profit; where a person is forced into transgression, as opposed to where s/he seeks evasions of convenience. Likewise in this case, why consign a person to losing an animal due to a situation that was thrust upon him or her? Why should the Festival law cause a person to lose money through no fault of his or her own?

We return to R. Joshua's solution: raise one up in order to slaughter it, but do not slaughter it; raise the other, but do not slaughter it. How does this work? Ostensibly, this is quite different from the type of *ha'arama* that would have a person hand money over to his/her child to redeem secondary tithes, or packing produce in its chaff while bringing it indoors in order to exempt it from tithes. Those are empirical, verifiable, and even physical changes. R. Joshua's

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Neusner, on the other hand, challenges this, stating that "Eliezer's consistency with the House of Shammai in respect to intention… seems…well-established in some areas of law, not in others." (Jacob Neusner, *Eliezer ben Hyrcanus: The Tradition and the Man*, Leiden: EJ Brill (1973), 2:284) Furthermore, he argues that Eliezer was independent of the Houses of both Hillel and Shammai rather than a strict adherent of either. (Ibid., 309) And both H. Tchernowitz and Y. Baer argue that in fact the House of Shammai prized intention over action, whereas the House of Hillel held the reverse priorities. (See Tchernowitz, *Toldot Ha-halakhah* 4:307; Y. Baer, *Yisrael Ba-'amim*, 100). The whole issue of R. Joshua, R. Eliezer and intention, however, may take on a different valence according the nominalistic interpretation of *ha'arama* offered below.

[504] While there may be a temptation to cite the Talmudic Oven of Akhinai story (*bBM* 59b/ *yMQ* 3:1, 81c) as evidence as R. Joshua's belief that Torah "is not in Heaven," but is a result of human creativity, it is difficult to know what part of the story may be amoraic or stammaitic editorializing about R. Joshua and what part can be asserted as fact.

[505] Interestingly, though R. Joshua champions *ha'arama* in these two cases, he condemns the ערום רשע in *mSotah* 2:3. Cunning can be used for good or for bad.

example, however, seems simply mendacious. What true legal change has been made? Most extant versions of R. Joshua's opinion present a definitive purpose for raising both the first and the second animal from the pit, namely על מנת לשחוט - "*in order* to slaughter," yet sincerity seems improbable. Given the agent's ultimate objective of removing both animals from the pit, is not על מנת לשחוט truly על מנת להציל – in order to save the animal? Even the language of *ha'arama*, cunning, undermines presumptions of authenticity. It also should not surprise that R. Joshua does not use the term כוונה, intention, which may be used to denote true subjective mental processes regarding Sabbath (and by extension, Festival) law,[506] or *mahshava*, plan, the tannaitic term for one's intended plans for an object.[507]

Furthermore, according to versions in both *Tosefta* and PT, R. Joshua does not require that either animal be slaughtered. MSS Vienna and Erfurt both read: רצה שלא לשחוט אחד מהן הרשות בידו, "If he wishes to slaughter neither of them, he has permission." But this is

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[506] e.g., *mShab.* 22:3*:*

משנה שבת כב:ג

שובר אדם את החבית לאכל הימנה גרוגרות ובלבד שלא יתכון לעשות כלי

A person may break the barrel [on the Sabbath] in order to eat olives, so long as he does not intend to make a vessel.

tShab. 16:13:

ישב אחד על הפתח ונמצא צבי בתוכו אע"פ שמתכוין לישב עד שתחשך פטור מפני שקדמה צידה למחשבה [אין לך שיהא חייב אלא המתכוון לצוד אבל קדמה צידה למחשבה פטור] למה זה דומה לנועל את [המגדל] ונמצא צבי בתוכו ולמתכסה בטלית ונמצא צפורית בתוכה אע"פ שמתכוין לישב עד שתחשך פטור מפני שקדמה צידה למחשבה אין לך שחייב אלא המתכוין לצוד אם קדמה צידה למחשבה פטור.

If one person sat in the doorway, and a deer turns out to be inside, even if he plans to sit there until nightfall, he is exempt, because the trapping preceded the thought. The only one who is obligated is one who intends to trap, but if the trapping precedes the thought, he is exempt.

[507] e.g., *m'Ohalot* 7:3:

המת בבית, ובו פתחים הרבה--כולן טמאין; נפתח אחד מהן--הוא טמא, וכולן טהורין. חישב להוציאו באחד מהן, או בחלון שהוא ארבעה על ארבעה טפחים--הציל על הפתחים. בית שמאי אומרין, והוא שחישב, עד שלא ימות המת; בית הלל אומרין, אף משמת .

If one dies in a house, and it has many doorways – they are all impure. If one is opened, it becomes impure and the others become pure. If he intended to take the corpse out of one of them, or out of a window which is four by four handbreadths, he has saved the [other] doorways [from impurity]. The House of Shammai say: And that is only if he intended before the person died. The House of Hillel say: Even once he has died.

tToh. 9:7?:

חטין היוצאין עם גללי הבקר ושעורין היוצאין עם גללי הבהמה אע"פ שחשב עליהן לאוכלין אין מטמאין טומאת אוכלין.

Wheat that comes out with the cattle's manure, and barley that comes out with the animal's manure, even if one intends them as food, they do not contract the impurity of foods.

surmountable. While this can be read as exempting him from slaughtering *either* animal, it can also be read as exempting him from slaughtering *both* of them: even though one raised each one from the pit for the purpose of slaughter, it is sufficient that only one be slaughtered. But MSS Leiden and London, and the Venice printed edition, are unambiguous: רצה לשחוט רצה שלא לשחוט אחד מהן הרשות בידו – If he wishes to slaughter, he may, and if he wishes not to slaughter (either) one, he may. Surely, the option to slaughter does not extend to both animals, as this would constitute violation of Biblical law. Therefore, R. Joshua's position offers the option of slaughter one or neither of the two animals. [508]

YPesaḥim 3:3, 30a, expresses R. Joshua's suggestion even more radically, which supports the aforementioned readings of the *tosefta*:

> אותו ואת בנו שנפלו לבור ר' ליעזר אומר יעלה את הראשון על מנת לשחוט וישחוט והשני עושין לו פרנסה במקומו שלא ימות. ר' יהושע אומר יעלה את הראשון ע"מ לשחוט ולא ישחוט ויערים ויעלה את השני אע"פ שלא חישב לשחוט אחד מהן מותר
>
> An animal and its dam that fell into a pit [on the Festival], R. Eliezer says, Bring up the first on condition to slaughter it, and then slaughter it; care for the second one where it is so that it will not die. R. Joshua says, Bring up the first on condition to slaughter it, but do not slaughter it; and practice *ha'arama*, and bring up the second. Even if one did not think of slaughtering/plan to slaughter either of them, it is permitted.

Some traditional commentators[509] soften R. Joshua's position: although the owner had not thought of slaughtering the animals *before* they fell into the pit, once they have fallen into the pit he may retrieve both of them so long as he slaughters one of them.[510] Alternatively, the wording

[508] While it is possible that MS Erfurt is more authentic, it is equally likely that the scribe removed the first few words for brevity's sake or by error (Lieberman, *Tosefta Ki-fshuta*, Vol. 5, 965), or that MS Erfurt was made more compatible with the BT version of this *braita*, which reads: רצה זה שוחט, רצה זה שוחט – indicating that one must slaughter either of the two animals but not both. According to Louis Ginzberg, "there is no doubt that MS Erfurt was very influenced by BT" (Ginzberg, Louis. *Perushim ve-Ḥiddushim be-Yerushalmi*. New York: Jewish Theological Seminary of America (1941), 57.) Saul Lieberman makes the same observation in his introduction to *Tosefta Ki-fshuta Moed*, (1955) 14, and elsewhere.

[509] *Shitat Qadmonim, Shiyarei Qorban*, ibid.

is understood as in the *tosefta* above: even if he decided/thought not to slaughter either of them *after* removing them from the pit, the action is permissible.[511] The word חישב, however, generally carries the connotation of *planning* rather than deciding.[512] Hence, the simple reading, one may retrieve both animals through cunning "in order to slaughter" even though in truth one *plans* to slaughter neither of them. This is the most explicit presentation of the absence of genuine intention advocated by R. Joshua's position. While s/he may be raising the animal "on condition" to slaughter it, her/his *mahshava*, true plans, are otherwise!

In light of this close look R. Joshua's positions, it is understandable that scholars are confounded by this version of *ha'arama*. Shmuel Shilo, for instance, has posited a categorical difference between the *ha'arama* accomplished by physical action and the *ha'arama* accomplished using intention, understanding the former as more concrete and objective – the "use of a rule of law in order to bypass another rule," – and fearing that the latter may amount to mere fabrication: "It is difficult to define this category since it is very close to deception and fiction (though not legal fiction).[513]" Others, pressed by the same issue, have tried to downplay the role of intention within rabbinic law. Samuel Atlas does just this: "One is using it to follow the law and only transgresses in thought…[514]" This position would certainly complicate the

[510] *Shitat Qadmonim*, s.v., *af 'al pi*

[511] See *Qorban Ha'edah*, David b. Naftali Frankel, 18th c., ibid.

[512] See Michael Sokoloff, *Dictionary of Jewish Palestinian Aramaic* חשב where he translates it as "to think, to calculate, to plan."

[513] Shilo, Shmuel. "Circumvention of the Law in Talmudic Literature", *Israel Law Review* Vol. 17, No. 2, (1982) 153; See also, Shilo, Shmuel. "Evasion of the Law in the Talmud," Eds. Hanina Ben-Menahem and Neil Hecht, *Authority, Process and Method*: *Studies in Jewish Law*. Amsterdam: Harwood Academic Publishers, 1998. We will address the relationship of *ha'arama* to legal fictions in the first appendix to this chapter.

[514] Samuel Atlas, "Ha'arama Mishpatit ba-Talmud," *Louis Ginzberg Jubilee Volume: On the Occasion of his Seventieth Birthday*, New York: The American Academy for Jewish Research (1945) 2 n3.

mishnaic picture of *kavvanah,* given that the *tannaim* actually introduced the relevance of intention as an essential part of action.[515] Furthermore, R. Joshua himself is a major advocate of the significance of intention in defining sin.[516] Still others have suggested that because intention cannot be conclusively proven, it is *possible* that the person really does now want to eat one of the animals, and the rabbis use this ambiguity to the agent's benefit.[517] But this position too is difficult to understand. Ambiguity is a reason not to prosecute an agent after the fact; it is not something for judges themselves to encourage *a priori*. Thus, in order to handle the complexity of R. Joshua's position in particular, and this "version" of *ha'arama* in general, we compare two alternatives.[518]

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[515] See Higger, *Intention,* 15, and Howard Eilberg-Schwartz, *The Human Will in Judaism: The Mishna's Philosophy of Intention*. Atlanta: Scholars Press for Brown Judaic Studies (1986)

[516] *tKer.* 2:14

[517] Thus, Haim Tchernowitz, *Toldot Ha-halakhah*, n.3

[518] In his book on loopholes in the American legal system, Leo Katz discusses a similar problem regarding the Jesuits' loophole of "tinker[ing] with one's state of mind." For instance, the servant of a criminal may direct his/her attention to his/her own paycheck rather than to the crimes of his/her master. To explain this clever trick, Katz presents the distinction between killing someone intentionally versus just killing the person knowingly. According to the American Law Institute's Model Penal Code from 1962, he says, to kill intentionally is to have killing as one's "conscious object" whereas to kill knowingly is to be "aware that it is practically certain that [one's] conduct" will cause death. "Intentional acts," he writes "are judged to be morally worse than knowing acts." Applied to our case of the animals, R. Joshua's position can be explained as follows: While the owner knows that a *muqṣeh* animal may be removed from the pit, he *intends* for an animal which will be his food for the day to be removed from the pit. While this may seem like a perfectly reasonable justification for the loophole, Katz argues that it is self-defeating. To cite Katz's full argument:

Intentional acts are judged to be morally worse than knowing acts, which in turn are worse than reckless ones, which in turn are worse than negligent ones, which in turn are worse than accidental (and therefore not at all blameworthy) ones. Realizing all of this, the Jesuits recommend to a would-be criminal that he make sure he commits his bad act with a less rather than a more culpable mental state. Instead of killing intentionally, they recommend he try doing so only knowingly, recklessly, negligently, or, better yet, altogether accidentally. But how is one supposed to do that? If I try to kill accidentally – or knowingly, recklessly, or negligently – well, then I have really killed intentionally! It's like trying to deliver a well-planned spontaneous repartee. (Leo Katz, *Ill-Gotten Gains,* 35-6)

Katz's challenge strikes clear at the heart of R. Joshua's position. While R. Joshua identifies a clear intent or purpose for one's actions, namely על מנת לשחטו - "in order to slaughter it," the mental gymnastics are insincere. Given the actor's ultimate objective of removing the animals from the pit, does not the על מנת לשחטו activity become truly a case of על מנת להצילו – in order to save it?

Another way of framing the issue is that of willful blindness. The actor simply makes him or herself willfully blind to the fact of his/her need to save the animal and instead refocuses on a different goal. But, as political scientist Jon Elster has asked: How does one manage to *forget intentionally* what one "really" (somehow, somewhere) believes?

Living in a Social World: *Marit 'Ayin*

There is something quite performative about R. Joshua's suggestion. In fact, it is difficult to see the scenario with an audience – whether another party, the animal owner him or herself or God and/or the eyes of the law. The notion of מעלה על מנת לשוחטו for someone who did not have this intention a moment ago implies that someone is now being told of this new goal. If no one else is present as the animals' owner looks down forlornly into the ditch, must s/he say something aloud about wishing to slaughter the animal in order to be innocent in the eyes of the law, or before God? Alternatively, is one supposed to sit down and tell him or herself to "want" to slaughter one of the animals? Alternatively, if others are watching, is the performance truly for the audience?

Perhaps R. Joshua's *ha'arama* is not about dodging the law at all, but only about a performance that deceives (potential)[519] onlookers. Perhaps R. Joshua is being conservative rather than innovative: as indicated in the Matthew passage cited above, a person would be exempt from the laws of *muqṣeh* in cases such as this, where financial loss would ensue (or perhaps where an animal would be pained in the process).[520] In a more ideal world, where everyone watching would understand the nuance[521] of permitting *muqṣeh* only in such cases, and

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And having achieved this impossible feat, how does one achieve that of *believing at will* what one also believes that there are no adequate grounds for believing? (Jon Elster, *Sour Grapes*, 149) How would R. Joshua have his actor forget about the desire to save the animals and spontaneously decided to possibly slaughter one, or both, of them?

[519] It is unclear from the sources whether there is even an audience to the agent's actions.

[520] Both PT and BT discuss these motivations in their respective treatments of the issue. See *yPes.* 3:3, *bBeṣa* 37a, *bShab.* 117b, 124a. Moreover, *bShab.* 124a actually compares this case of *ha'arama* to another case of leniency on the Festival due to monetary loss, an instance which does not even require use of *ha'arama*.

[521] The logic of worrying that one individual's apparent "violation" of the law would have deleterious impact on the observance of others, is suspect. See Nahum Rakover, מבוא, מטרה המקדשת את האמצעים, *Jerusalem: Sifriyat Mishpat Ha-Ivri* (2000), 16, who distinguishes between cases in which an institution is flexible with the law and one in which an individual is. It is thus possible that *mareit 'ayin* is not as much about actual impact on others as it is about one's own performance and its appearance.

human nature were such that seeing the exemption applied would not erode at one's commitment to *muqṣeh* in general, the animals' owner would not need *ha'arama*. S/he could simply retrieve the animals at once, for obviously they do so only to save the animal. It is only because popular perception and human nature are not that way, namely because people might become lax in their commitment to *muqṣeh*, to find other reasons to override it; people might misunderstand the permissibility in this one case, and therefore the legal agent must hide his/her true deeds using a ruse. The *ha'arama* is not then about circumventing the law, but about keeping leniencies private.[522] This approach is reminiscent of the rabbinic concern for *marit 'ayin*, appearance of sin even where there is none.[523]

While this explanation bypasses accusations of deception, it has several critical weaknesses: a) the term *marit 'ayin* (appearance) is found at least eight times[524] in *Tosefta* and could easily have been mentioned here, yet it is absent from this passage; b) *ha'arama* does not read like a *marit 'ayin* case: *marit 'ayin* is generally introduced in the following manner: X is permissible, but the rabbis forbade it due to *marit 'ayin.* For example:

תוספתא יומא ד:א (וינה)
יום הכפורים אסור באכילה ובשתיה ברחיצה ובסיכה בנעילת הסנדל בתשמיש המטה אפי' באנפיליא של בגד קטנים מותרין בכולן ואסורין בנעילת הסנדל מפני מראית העין
On the Day of Atonement it is forbidden to eat, drink, bathe, anoint, put on sandal, [and] have sexual relations. It is not permitted to put on even felt shoes.

[522] The question of whether there is truly an implied human audience in the case of *mareit ayin* (as is assumed by the major commentators) is challenged by Rav's dictum that, "Every situation in which the sages prohibited due to appearance is prohibited even in the most private room." (*bShab*. 64b and 146b, *bBeṣa* 9a) While classical commentators suggest that the prohibition remains because it is still possible that a person may witness and misinterpret the deed nonetheless (viz. Maimonides, *Laws of the Sabbath* 22:20), or just to keep law uniform (*Mishnah Berurah* 301:165), there is a third possibility: for Rav, it is not about the onlooker at all but about the agent him or herself. S/he must keep the law in a manner which objectively is beyond scrutiny. (See Abraham Arzi, "Mipnei mareit ha-ayin," *Sinai* 74 (1974) 161-170, for a discussion as to whether Rav's dictum was accepted by medieval halakhists.)

[523] See *mBeṣa* 1:3 for the source of *mareit 'ayin* as a Jewish legal concept

[524] *tShevi'it* 2:2,2:11, 2:15, *tShab.* 4:9, *tYoma* 4:1, *tBM* 5:18, *tBM* 8:10, *tBekhorot* 5:2 (Zuckermandel*)*

> Minors are permitted to do all of them except putting on sandals, for appearance's sake. [525]

In this case, children *may* do any of the activities prohibited to adults in this passage, *but they may not* wear leather shoes because of how it looks. X is permitted, but then it is outlawed due to *marit 'ayin.* A phrase that encapsulates the prohibitive nature of *marit ayin* is found in *mKil.* 3:5 – כל מה שאסרו חכמים לא גזרו אלא מפני מראית העין, "All that the sages prohibited [here] is because of appearance to the eye." *Ha'arama* cases, on the other hand, are permissive: person A is forbidden to do X; therefore s/he should use cunning to accomplish X. In other words, *ha'arama* offers leniency, while *marit 'ayin* restricts. Moreover, in the particular case at hand, R. Joshua's leniency is placed in stark contrast with R. Eliezer's demands; c) if the term *ha'arama* truly is about being stricter than the letter of the law (that is, in the requirement to deceive onlookers), then the term has two completely different definitions – the one, a technical loophole that achieves leniency, and the other a covering up of special legal dispensation, essentially adding stricture. Though it is true that legal terms may not be used completely consistently within rabbinic texts, the *marit 'ayin* approach places the various uses of the term at odds with each other as completely different legal methods. A loophole specifically obviates the need for special dispensation, while a cover-up is contingent on such dispensation.[526] In light of the aforementioned challenges, we turn to a second possibility to explain R. Joshua's opinion.

[525] It should be noted that *bYoma* 78b cites this last sentence as a *braita* without mention of *marit 'ayin*. In fact, the *sugya* there begins with the suggestion of *marit 'ayin*, but concludes that there simply is a ban on adults putting leather shoes on minors on *Yom Kippur* because such shoes are not necessary for the latter's health (as opposed to feeding and washing minors on *Yom Kippur*, which are permissible because they are necessary for the children's health). In other words, according to the Bavli, minors may put leather shoes on for themselves on *Yom Kippur*. For a fuller discussion, see Lieberman, *Tosefta Ki-fshuta*, 808-811. Because people will think that an adult put the shoes on the minor on *Yom Kippur*, and directly giving something forbidden even to a minor is considered *halakhically* problematic. (See Rashi, *bYoma* 78b, s.v. אינשי עבדו ליה)

[526] There may yet be a point of contact between *mareit 'ayin* and *ha'arama* in that, in both, visibility is considered primary – causing stricture in *mareit ayin* and allowing for leniency in *ha'arama*. What is the relationship between

Intention: Organic or Constructed?

Adam B. Seligman advanced the opposition between the "ritual self" and the "sincere self." Seligman claims that ritual is "not necessarily concerned with what we term sincerity" and is not simply "the nonessential husk of something else that is 'more' real (the visible sign of an invisible grace, as it were).[527]" Rather, the performance of ritual is a world of construction in which one is defined by his or her outward performance. The world of ritual is by definition social, interactive – it is shared space.[528] This is in contrast with the "sincere" model of action which downplays social convention and emphasizes instead "individual soul-searching." In other words, the "self" need not be defined as what we moderns call the subjective self.

The concept of ritual self is very appealing in understanding R. Joshua's position. When an agent raises each animal "in order" to slaughter it and then "changes" his/her mind, the criterion for intention is more outward than inward; it is not about what is in his/her heart of hearts but about what intention s/he actively (and perhaps externally)[529] binds to the action. Intention is more mechanical than organic: *it is about defining the action rather than defining the agent*. This explanation of *ha'arama* differs from Atlas' position that it is accepted because,

these two phenomena, one in which the rabbis charge a person to go beyond the letter of the law in order to satisfy the external view(er), while in the other they allow a person to do something non-normative so long as the change is invisible?

[527] Adam B. Seligman, "Ritual, the Self, and Sincerity," *Social Research 76:4* (Winter 2009), 1073-1106

[528] As Ruth Anna Putnam puts it, "The relevance of intention to the fulfillment of religious obligations is itself part of a wider topic, that of the role of intention in religious ritual. Here I want to draw attention to the role of convention in religious ritual. Even if intention is required (at a minimum the awareness that one participates in a religious ritual), intention is not enough. Just as one cannot make one's words mean what one likes, so one cannot turn any behavior one chooses into a religious ritual. Religious Ritual is irreducibly social, even if it is practiced by oneself." (Ruth Anna Putnam, "Must We Mean What We Do?" *S'vara* 2,2 (1991) 55)

[529] It is unclear whether a person is meant to say something to this effect out loud, to indicate in some way, or otherwise.

"one…only transgresses in thought…[530]"; whereas Atlas claims that intention is not present, we suggest that perhaps intention is present, but it a ritualized intention.

This may be especially true regarding avoiding violation, in that, in exigent circumstances, even tipping one's hat to Jewish law even by projecting the proper intention, may be sufficient. Moreover, from what we argued in chapter two, for *ha'arama* to work, the entire scenario must be defined by being done for the right reasons, for the purpose of equity, of living up to the inner spirit of the law. Thus, there is indeed a "correct" purpose standing behind the agent's actions. Interestingly, even these second-order volitions are not determined by the inner world of the agent, but by the variables of the scenario itself. [531] The rabbis are not interested in the individual's subjective intentions – I love my animal and need to save it – but in objective situational characteristics – animals have fallen into a pit on the Festival, and that, by definition, creates a situation beset by pathos, whether I am rich and own thousands of animals, whether I care about my animals' pain or not, or whether I am impoverished and need this animal specifically; *ma'aser sheni* involves unnecessary financial loss, and therefore a dodge must be found; an animal in a pit necessarily involves potential loss or pain; a house fire by definition means financial forfeiture. Pathos and motivation are legally defined rather than subjectively defined. Thus, the scenario itself constructs equitable intentions, above and beyond which one's actions indications of lifting the animal out of the pit "in order" to slaughter further outline one's purpose as licit.

[530] Samuel Atlas, "Ha'arama Mishpatit ba-Talmud," 2 n3.

[531] This is quite different than the very subjective role that Eilberg-Schwartz posits for intention in defining sin: he suggests that whether the actor has repudiated God's authority depends upon the actor's intention. (Eilberg-Schwartz, "Intention," 57ff) Here the question of repudiation versus acceptance may be based on external factors rather than the person him or herself.

But perhaps there is a second layer to this perspective on *ha'arama*. It is specifically R. Joshua who suggests this *ha'arama,* a *tanna* who generally asserts that one's purpose in acting is a defining feature of sin; without it, one is exempt from punishment. [532] Recently, Ishay Rosen-Tzvi has argued that rabbinic notions of the "self" as reflected in *Mishnah* are more performative than one might expect: "Rabbinic 'thoughts' are subject to the laws of the external world; they are concerned with prohibitions and commandments, not with truth statements… intentions… [do] not only fashion subjects but create external reality.[533]" Thus, all intention, not all that which is countenanced in cases of *ha'arama* is not truly about subjectivity, reflecting the exclusive "I" of each individual person. Rosen-Tzvi observes that *kavvanah* is consistently defined in reference to external activity, such as the recitation of the *shema,* or the blowing of the *shofar*. Likewise, the categories of *mahshava* and *raṣon* in the realm of purity law indicate that the chief function of intention is to qualify and to define outward action. Contrasting his view of the rabbinic self with those of Mira Balberg[534] and Joshua Levinson,[535] he concludes that the rabbis did not conceive of the "self" as the subjective, self-reflective being that the Graeco-Roman world (based on Stoic thought) did,[536] but instead conceived of the self as the external world internalized, always within the context of outward action:

> The inner world does indeed rise in the Mishnah, but it is markedly different from the Platonic-Stoic one. This is not an 'inner person' or 'real self,' a soul or a *logos*

[532] See *supra* n491. See also YD Gilat כוונה ומעשה במשנת תנאים, *Bar Ilan Annual* 4-5 (1967).

[533] Ishay Rosen-Tzvi, "Realism and Nominalism in the Mishnah," Halakha and Reality Conference, NYU (Fall 2012)

[534] *Recomposed Corporealities: Purity, Body and Self in the Mishnah*, Doctoral Dissertation, Stanford University, 2011

[535] Levinson, "From Narrative Practise…"

[536] Lawrence Rosen argues that even the Greeks did not quite have that sense of the individual self: Lawrence Rosen, *Law as Culture* (Princeton: Princeton University Press, 2006) 53ff

> that stands in contrast to 'external' parts of 'me' such as body or appetites, as in Plato or Paul. This is also not a self that thinks itself into being, as in the Stoic asceticism studies by Pierre Hadot, or a confessional Christian self, celebrated by Foucault and Peter Brown as the birth of the subject. The Mishnaic truth cannot be found by looking inwards – as in Augustine – and there is no hidden 'inner truth,' known only to 'me,' of the type which created the modern radical dichotomy between inside and out…The inner world in the Mishnah…is a far cry from all these exotic inner realms. It is a 'primitive' world that merely replicates the outer world and is subject to its rules.[537]

Rosen-Tzvi's point about rabbinic views of intention parallels what Sacha Stern[538] has posited about rabbinic views of time. Rather than viewing time as "a reified abstraction" or "an entity that flows on its own, independently from the rest of reality" as the Greeks did, the rabbis (following most ancient Near Eastern cultures) viewed time as "concrete, embedded, and process-linked."[539] Hence, early rabbinic references to time in terms of human activity or natural phenomena such as when the sun sets, or when the priests eat their *terumah*.[540] Stern and Rosen-Tzvi picture the rabbis as very concrete thinkers and are wary of using modern concepts to understand ancient perspectives, even when such concepts may themselves be rooted in thinking that was contemporaneous with the rabbis.[541]

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[537] Ishay Rosen-Tzvi, ibid.

[538] I thank Professor Elisheva Carlebach for bringing Stern's work on time to my attention.

[539] Sacha Stern, *Time and Process in Ancient Judaism*. Oxford: The Littman Library of Jewish Civilization, 2003, 16-18.

[540] *mBer.* 1:1

[541] There are certain factors which support Rosen-Tzvi's thesis with regards specifically to intention to fulfill commandments. For example, the intention that is discussed in the *Mishnah*: is it intention of a personal, intimate variety? Some would argue not. In the case of the *shema* for example, Jacob Bazak points out that there is clearly a requirement (*mBer.*) to read with intention of fulfilling the commandment of reciting the *shema*, but perhaps there is no requirement to intend to understand or to identify oneself with the content of what s/he is reading. Jacob Bazak, "The element of intention in the performance of 'mitsvot' compared to the element of intention in current criminal law," *the Jewish Law Association Studies 14*: *The Jerusalem 2002 Conference Volume*, ed. H. Gamoran, Binghamton: Global Academic Publishing, 10-11; See also Shalom Albeck האם קיים המושג "כוונה" במשפט הפלילי בתלמוד (קובץ הציונות הדתית ה, תשסב, 460-71

This is very different from the picture that Howard Eilberg-Schwartz paints of intention, namely that it is indeed subjective, and that action is merely evidence thereof:

> …the Mishnah always takes account of an agent's purpose; but sometimes it appeals to the purpose the agent actually had in mind, whereas at other times it examines the nature of the action and imputes a purpose to the agent…therefore, we must distinguish between two types of purposes. First, we can speak about an actor's subjective intention, that is, how would he or she answer the question, "Why did you do that?" Second, we can speak about the purpose an observer would ascribe to an actor on the basis of observed behavior. That is, if a bystander were to observe the act in question, what would he or she think the actor was trying to accomplish? ... It turns out that all the cases in which the Mishnah takes account of an actor's subjective purpose have one thing in common: they involve situations in which the person's action supports alternative interpretations. For example, suppose a person were to break a bottle. From the action alone we would not know whether the individual intends to produce a weapon or merely to remove something stuck inside the bottle. In cases such as this, the Mishnah takes into account the purpose the actor actually had in mind.[542]

Only when an action cannot indicate one's intentions it is important to uncover an agent's subjective intentions. Rosen-Tzvi's theory of intention differs markedly. For him, the action and intention do not exist in two different realms: they are both in the realm of the performative.

While we disagree with the "hard" version of Rosen-Tzvi's thesis that the rabbis did not conceive of a reflective self, a "soft" version dealing specifically with purposive action is helpful in explaining the *ha'arama* that R. Joshua advocates. Action and intention are on a continuum: they are not completely dualistic, not completely disparate. Just as actions are constructed by the agent, so intentions may be constructed by the agent. When confronted with a difficult situation, such as potential loss of one's livestock, R. Joshua is willing to slide to the more objective side of the continuum to permit a more superficially constructed intention.

[542] Eilberg-Schwartz, *The Human Will in Judaism: The Mishna's Philosophy of Intention*, Scholars Press: Atlanta (1986), 57-58

***Ha'arama*: Unity in Superficiality**

There is an important advantage to this reading of R. Joshua's opinion. If *ha'arama* truly does rely upon a more fabricated (as opposed to natural and subjective) understanding of intention, then it is quite similar to the original type of *ha'arama* described in the previous chapters – one which requires concrete empirical change for the purpose of legal circumvention – e.g., the inclusion of a third party, release or acquisition of property, etc. *Ha'arama* of intention likewise relies on outer change – a change in one's external, ritualized intentions. If an action is only legal if the agent had X intention, then the agent must legally fulfill the requirement of having X intention for the action. It does not seem that legally having a certain intention necessarily is equivalent to subjectively having those intentions. Thus, having intention X in a superficial way is a loophole as well. After all, legally speaking, the agent has intention X.

Indeed there is a deep connection between these two versions of *ha'arama*: both rely on accepting a surface view of reality. When the father hands his adult son money to redeem his produce, does it matter that his first order desires amount basically to ulterior motives? Whether the rabbis' ideal transaction would involve a full heart or not is unclear, but there is clearly room, at least in cases of need, to rely upon outward projection. Likewise with *ha'arama* regarding intention – it is the motions themselves rather than underlying feelings that determine the classification of the agent's activity. At their core, both subsets of *ha'arama* rely upon a projection of the agent's performance rather than his or her inward feelings. It is for this reason that neither *Tosefta* nor PT make any explicit distinctions between the two versions of *ha'arama*. They are indeed of one type. And both are supported by the overriding second order desire for why this *ha'arama* is viable: in order to accomplish the true goals of the law. For this reason, and

for this reason only, is the complete appearance version of an action or purpose considered acceptable.

Other Examples

Several other *ha'aramot* should be read in light of this paradigm:

***Tosefta:* Coarse Bread**

תוספתא שבת יד:ו (וינה)
מצילין[543]מיום טוב לשבת אבל לא משבת זו לשבת אחרת ולא משבת ליום טוב ולא משבת ליום הכפורים[544] ולא מיום הכפורים לשבת[545] ואין צורך לומ' מיום טוב לחול ולא יציל ואחר כך יזמין[546] אלא יזמין ואחר כך יציל הציל פת נקייה אין רשאי[547] להציל פת הדראה פת הדראה רשאי[548] להציל פת נקייה ואין (מערבין) מערימין בכך[549] ר' יוסה בי ר' יהודה אומ' מערימין בכך
One should not save [food from a fire on the Sabbath] and afterward call [guests to join in], but he should first call [guests to join in] and afterward should save [the food]. [cf. M. Shab. 16:3D] [If] one has saved a loaf of bread of fine flour, he

[543] According to *yShab.* 16:3, 18d, the potential problem is saving food for a weekday on the Sabbath or holiday, in other words, preparation for post-Sabbath or post-holiday. According to *bShab*. 117b, the concern is becoming so swept up in saving one's food that one ultimately extinguishes the fire on the Sabbath or the Festival.

[544] For a discussion about whether this refers to food for minors on *Yom Kippur* or breakfast for adults after the *Yom Kippur* ends, see Lieberman, *Tosefta Ki-fshuta* Vol. 3, 210.

[545] *bShab.* 117b: ומצילין מיום הכפורים לשבת. This may be related to a debate between R. Aqiva and R. Ishmael in *mShab.* 15:3 about other preparation on *Yom Kippur* for the Sabbath.

[546] The parallel *mShab.* 16:2 does not mention inviting guests, but does mention asking others to take food for themselves (16:3). It is unclear whether this means that the *mishnah* is opposed to inviting guests in order to save more food, or if one is calling others to save food only in a situation in which s/he cannot save all of the food her/himself due to the rapidly spreading fire. *YShab.* 16:3, 18d, cites two opposing *baraitot* about inviting guests before saving the food and relates this question too to the argument between *tanna qama* and R. Jose b. Judah regarding the permissibility of *ha'arama*. And lastly, *BShab.* 117b, cites the argument in the context of saving liquid spilling from a broken barrel on the Sabbath as opposed to this case (and the case in the relevant *mishnah* in BT) about a fire.

[547] MS Erfurt אין צריך – Lieberman suggests that the term צריך can mean רשאי, and does mean so here. (See Lieberman *PT Ki-fshuto* 252, *Tosefet Rishonim* Vol. 1, 155, and *Tosefta Ki-fshuta*, *Shabbat*, 210.)

[548] MS Erfurt ואינו צריך לומר – probably a mistake.

[549] MS Erfurt בהן – This change probably reflects BT's reading of the *braita*, in which אין מערימין refers to the section about inviting guests. By changing אין מערימין בכך to אין מערימין בהן, MS Erfurt suggests that the אין מערימין debate is about both inviting guests and saving coarse bread. *bMQ* 12b, however, cites only the end of this *tosefta*, using אין מערימין בכך and does not discuss which part of the *tosefta* this clause refers to. The comparison this clause is used for is a *braita* about making new wine on *ḥol ha-moed*, suggesting that it is for the holiday, though it is truly for afterwards.

> is not permitted to save a loaf of bread of coarse[550] flour. If he saved a loaf of bread of coarse flour, he is permitted to save a loaf of bread of fine flour. And one should not practice cunning in this matter. R. Jose b. R. Judah says, "One may practice cunning in this matter [by taking the loaf of coarse flour first and then going back for the one of fine flour]."

If a house catches fire on the Sabbath, the homeowner may not save more bread than is needed for the day. However, if the homeowner happens to retrieve coarse bread first, s/he may go back for fresh bread, though this means saving extra food. While not specifying exactly how, R. Jose b. Judah allows the homeowner to act shrewdly to save extra bread. Presumably, s/he should "happen to retrieve coarse bread first" purposely in order to go in for more bread without making his/her true plans known. As in the immersion case presented above, it is possible that simply retrieving the coarse bread first without saying anything projects the proper intentions.

As an aside, R. Jose b.R. Judah descended from a family line that did not shy away from discussions about *ha'arama* in general. For instance, his father, R. Judah b. 'Ilai, is mentioned in a *baraita* in BT as advocating *ha'arama*: During the intermediate days of Festivals, a limitation is placed on the production of ritual objects such as *tefillin, mezuzah* or *ṣiṣit* for business purposes – that is, to sell them. R. Judah b. Ilai therefore suggests that one sell his own phylacteries, thus not producing the phylacteries for profit on *ḥol ha-moed*; he then is allowed to write new phylacteries for himself, even during *ḥol ha-moed*.[551] On the other hand, R. Judah bar Ilai also bemoans his son's use of *ha'arama* – taking food in via the rooftop rather than the door in order to exempt the food from the tithing requirement.[552] As R. Jose's grandfather, R. Ilai, was

[550] Based on Lieberman (ibid.) - מורסן (פת חזרא)

[551] *bMQ* 19a

[552] *yMa'aserot* 3:1, 50c; This story, ostensibly about R. Judah bar Ilai's own family is changed in BT (*Gittin* 81a) to the general statement about how wonderful the earlier generations were in terms of their commitment to tithing, as opposed to the current generation.

a student of both R. Eliezer and R. Joshua,[553] perhaps discussions about *ha'arama* were part of their family's intellectual heritage.

PT[554]: Salting Food

ביצה א:ה, דף ס' עמוד ג' (ליידן)

משנה ב"ש אומרים אין נוטלין את העלי לקצב עליו בשר ובית הלל מתירין ב"ש אומרים אין נותנין את העור לפני הדריסה ולא יגביהנו אלא א"כ יש עליו בשר וב"ה מתירין ב"ש אומר אין מסלקין את התריסין בי"ט ובית הלל מתירין אף להחזיר:

גמרא...שוין שלא ימלחנו תני אבל הוא מולח עליו בשר לצלי חברייא בשם רב מולח הוא אדם דבר מרובה א'ע'פ' שאינו יכול לוכל ממנו אלא דבר ממועט ר' אחא בשם רב מולח ומערים מולח ומערים מלח הכא ומלח הכא עד דו מלח כוליה

Mishnah: The House of Shammai says, "They do not take up a pestle to hack meat on it.[555]" And the House of Hillel permits [doing so]. The House of Shammai says, "They do not place a hide[556] before the tread,[557] not may one lift it up, unless there is an olive's bulk of meat on it." And the House of Hillel permits. The House of Shammai says, "They do not remove shutters on the Festival." And the House of Hillel permits – even putting them back

Gemara: And they concur that they do not salt hides on the Festival day. But on it one puts salt on meat which is for roasting. Associates in the name of Rab: "A man may salt a sizable piece [of meat], even though he can eat only a small part of it." R. Aḥa in the name of Rab: "One may put on a little salt and practice cunning by [indicating that he wishes to eat only this spot, and then he may change his mind] and again put on salt and practice cunning until he salts the entire piece of meat."[558]

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[553] *m'Eruvin 2:6; tPe'ah 3:1; tḤallah 1:6; tSukkah 2:1*

[554] The case of R. Aḥa is found in BT as well.

[555] As during the week, it is used to crush non-Festival items, thus rendering it *muqṣeh*. (Albeck, *Shisha Sidrei Mishnah*, 288)

[556] Of an animal that was slaughtered and flayed for food on the Festival. (Albeck, ibid.)

[557] In order to keep it from getting ruined before one is able to properly treat it after the Festival. (Albeck, ibid.)

[558] A short *sugya* earlier in *yBeṣa* 1:5 regarding the final debate in the *mishnah* sheds light on the position of R. Aḥa in the aforementioned passage:

ביצה א:ה, דף ס עמוד ג' (ליידן)

שמואל אמ' המלחם את התריסין ביום טוב חייב משום בונה וקשיא דבר שאילו עשאו בשבת חייב חטאת בית הלל (אומ') מתירין אף להחזיר? ר' חנניה בשם ר' יוחנן התירו סופו (משם) [מפני] תחילתו שאם אומ' את לו שלא יחזיר אף הוא אינו פותח. ולא יפתח? אף הוא ממעט בשמחת יום טוב אמ' ר' אחא מחזיר ובלבד שלא יחזיר כל צורכו

Samuel said, "He who inserts the shutters on a Festival day is liable on the count of building." Now this poses a problem. In regard to doing something which, if one did it on the Sabbath, one would be liable for a sin offering, does the House of Hillel permit – even to put them back? R. Ḥananiah in the name of R. Yoḥanan: "They permitted the matter at the end because of the considerations at the outset. For if you tell someone that he may not put them back, then he will not open them to begin with." So let him not open them [at all, and what difference does it make]?

R. Aḥa's *ha'arama* is quite like R. Joshua's *ha'arama*: preparing something for consumption and then deciding not to eat it; the purpose here is to preserve the extra meat on the Festival. Surely, the meat of an entire animal will not be eaten in one or two days. Here, as in the case of the house fire, there is no specification of "על מנת," salting each piece *in order to* eat it and then changing one's mind and deciding not to do so. Instead, one's salting of each piece and then putting it aside projects certain intentions which are deemed sufficient for evading transgression.

PT: *Ḥallah* on Passover?

ירושלמי פסחים ג:ג , ל./ ביצה ג:ה, סב.
משנה (כ"י קאפמן) כיצד מפרישין חלת טומאה ביום טוב רבי אליעזר או' אל תקרא לה שם עד שתיאפה[559] בן בתירה או' תטיל לצונים אמר יהושע לא זה הוא חמץ שמוזהרים עליו בל יראה ובל ימצא אלא מפרשתה ומנחתה עד הערב ואם החמיצה החמיצה

גמרא (ליידן)...כיצד יעשה? על דר' אליעזר מערים ואו' (וזו אני רוצה לוכל וזו אני רוצה לאכול) ואופה את כולה וכשהוא רודה מערים ואו' זו אני רוצה ליישן זו א{י}ני[560] רוצה ליישן ומשייר אחת.

[If you maintain that view,] you diminish the pleasure of the Festival day. Said R. Aḥa, "One may return them, on condition that he not put them back firmly…
R. Ḥananiah in the name of R. Yoḥanan offers, "They permitted the matter at the end because of the considerations at the outset" as a framing concept for leniency regarding the laws of the holidays. In particular, the situation cited herein is one in which a person will refrain from removing the shutters from a shop or a storage facility where food for the Festival is being stored (See Albeck, *Shishah Sidrei Mishnah*, Vol. 2, 288) for fear of not being able to replace the shutters on the Festival. (After all, the food would spoil or simply be unguarded.) This is not unlike the salting issue raised in the *sugya* above. In order to eat any amount of meat, one must slaughter an entire animal, and if one may not preserve the extra meat by salting it, why would s/he even slaughter an animal for the Festival to begin with?
R. Aḥa appears consistent in his application of the rulings of the House of Hillel in both the meat case and the door case. Whether R. Aḥa would have used R. Ḥanania's phrasing, he clearly values the significance of *simḥat yom tov*, though he seems more conservative about how to accomplish that goal. In the case of replacing doors, one will diminish enjoyment on the Festival by not opening the shutters in the first place if one may not replace them; likewise, we may presume that one would be reticent to prepare any meat on the Festival if all of the extra meat may not be salted but must be discarded. However, unlike the opposing opinions throughout the *sugya*, R. Aḥa is unprepared to give carte blanche permission either to replace the doors or to salt a bigger piece of meat than is necessary for the holiday simply because the ends are noble. Instead, he mandates that one not replace the doors too firmly and that one salt the meat, not outright, but via *ha'arama*. (It is interesting to note that *ha'arama* appears here as the stricter approach, rather than the more lenient approach.)

[559] MS Parma: תאפה

[560] Venice Ed.: אני

אמר לו רבי יושוע לא נמצאת כשורף[561] קדשים ביום טוב?! אמ' לו ר' אליעזר מאיליהן הן נשרפין! אמ' לו ר'[562] יושוע לא נמצאת עובר על בל יראה ובל ימצא. אמ' לו מוטב לעבור מצוה בלא תעשה שלא באת לפניו ממצוה בלא תעשה שבאת לפניו[563]...אותו ואת בנו שנפלו לבור ר' אליעזר או' יעלה את הראשון על מנת לשחוט וישחוט והשיני עושין לו פרנסה שלא ימות. ר' יושוע או' יעלה את הראשון על מנת לשחוט ולא ישחוט ויערים ויעלה את השיני א'ע'פ' שחישב שלא לשחוט אחד מהן[564] מותר. ר' בון בר חייה[565] בעי מחלפה שיטתיה דר' אליעזר תמן הוא אמ' אסור להערים והכא הוא אמ' מותר להערים? הכא משום בל ייראה ובל ימצא תמן מה אית לך? מחלפה שיטתיה דר' יהושע תמן הוא אמר מותר להערים והכא הוא אמר אסור להערים? אמ' ר' אידי כאן שבות וכאן חיוב[566] חטאת. א"ר יוסה ביר' בון תמן כדי לחוס על ניכסיהן שליש' הכא מה אית לך?!

Mishnah: How [on the Festival[567]] do they set apart the dough-offering [if the dough is in a state of] uncleanness? R. Eliezer says, "She should not designate [the dough=offering] before it is baked." R. Judah b. Betera says, "She should put it into cold water." Said R. Joshua, "This is not the sort of leaven concerning which people are warned under the prohibitions, 'Let it not be seen' (Ex. 13:7), and 'Let it not be found' (Ex. 12:19). But she separates it and leaves it until evening, and if it ferments, it ferments.

Gemara: How should [a person] act according to R. Eliezer [who says one can handle the dough until it is baked, when it is designated and then properly left till the evening for burning]?

[A person] acts with shrewdness and says: "This [portion] I want to eat and this [portion] I want to eat];" and one bakes all of it, and when he removes it [from the oven, one] acts with shrewdness and says: "This [portion] I want to store away and this [portion]" and leaves one [the last one which is then designated as *ḥallah*].

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[561] *Or Zarua*: שורף without כ

[562] Lieberman, *Yerushalmi ki-fshuta*, 366: לר' יושוע

[563] MS Leiden and Venice Ed., *yEruvin* 10:13: מוטב לעבור על מצות לא תעשה שלא באת לידך ממצות לא תעשה שבאת לפניך

[564] MS Leiden and Venice Ed., *yEruvin* 10:13: א'ע'פ' שלא חישב לשחוט אחד מהן . Both *Ahavath Sion ve-Yerushalayim* and Lieberman (*Tosefta Ki-fshuta Beṣa* 3:4) consider the 'Eruvin version errant.

[565] R Avun bar Ḥiyya was in the time of R. Yoḥanan- see Albeck, *Mavo le-Talmudim*, 218-20

[566] MS Leiden and Venice Ed. *yBeṣa* 3:4: חייב. Certainly the *yPes.* version of חיוב חטאת, at any rate, is more accurate than the *yBeṣa* version of חייב חטאת, as a person incurs lashes for infractions on the Festival (*yBeṣa* 1:3) and must offer a *hatat* only for infractions on the Sabbath. But *ḥiyuv ḥatat* may simply refer to the status of the transgression – it has the status of a *ḥiyuv ḥatat* because if one did such on a Sabbath, one would bring a *qorban hatat*. (*Pnei Moshe s.v.* אמר ר' אידי simply states that the language is imprecise, and *Qorban Ha'edah s.v.*וכאן חיוב חטאת offers a different explanation all together as a result of this difficulty.)

[567] of Passover

Said R. Joshua to him [R. Eliezer], "Do you not end up like one who burns holy things on the holiday [in leaving the dough offering to burn in the over after baking the dough, which is a distinct violation]?" R. Eliezer said to him, "They burn on their own accord [without a separate act of burning, for the dough-offering merely remains in the oven after it and the rest of the dough are baked]." Said him to R. Joshua, "Do you not end up violating the ban on seeing and finding leaven [on one's premises by allowing it to rise]?" [R. Joshua] said to him, "It is preferable to violate a negative commandment passively [leaving dough which eventually will become leaven on its own] than actively [letting the dough offering forthwith burn on the Festival through one's action, be it indirect]." (T 3:7)

...

It [an animal] and its young that fell into a pit [on a Festival] - R. Eliezer says, "[One] should raise up the first with the plan to slaughter it, and the second; they feed it so that it not die." R. Joshua says, "[They] should raise up the first one with the plan to slaughter [it] but [need] not slaughter [it] and practicing *ha'arama,* should raise up the second. Even though [one] intends/decided not to slaughter either one of them - it is permitted.

R. Bun bar Hiyya asked: "Is not R. Eliezer's logic reversed? There he says it is forbidden to act with *ha'arama* and here he says it is permitted to act with *ha'arama."*[The different positions do not make up a contradiction:] Here [he so rules] because of the band on seeing and finding leaven [which justifies any necessary means to remove the leaven]. There, what can you say [is there any comparable justification]?

"R. Joshua's logic is reversed. There [T. *Beṣa*] he says it is permitted to act with *ha'arama,* and here [M. Pes.] he says it is forbidden to act with *ha'arama.*" Said. R. Idi, "Here [T. *Beṣa*, where the individual moves the animal] it is a matter of a *shevut* [an added prohibition on not doing certain activities on the Sabbath which, though not technically constituting prohibited labors, are a violation of the 'rest' appropriate for the Day of Rest] and here [M. Pes., where the individual bakes the unclean dough which is not for human consumption, if it were the Sabbath, it would be a violation entailing] a liability for a sin-offering." Said. R. Jose b. R. Bun, "There [in the case of the animal caught in the pit, one can employ an artifice] so as to have compassion on the property of Israel; here [regarding the unclean Dough-offering which is to be burned and which benefits neither an Israelite nor a priest], what can you say [is there any such loss justifying the use of an artifice]?

We mentioned this case in the previous chapter, only to point out the developing parameters for *ha'arama*. Here, however, we are able to treat the methodology in full.

Ḥallah, a portion of dough set aside for priests, must be taken from both pure and impure dough,[568] but only ritually pure *ḥallah* may actually be eaten by the priest. Impure dough, however, is burned in order to keep anyone from eating it or making use of it. The *mishnah* here addresses taking *ḥallah* from impure dough on a Festival day[569] of Passover. The unstated assumption is that separating pure dough would pose no problem on the Festival,[570] as baking it is part of food preparation for the day.[571] Impure *ḥallah* which will not be eaten, however, may not be baked or burned on a Festival day.[572] On Passover, the complication arises that leaving dough aside, allowing it to rise, will result in the agent owning *ḥameṣ*, a distinct prohibition on Passover.

While R. Joshua is unconcerned about this dough rising, and Ben Beterah solves the problem by throwing the dough into cold water (so that the dough will not rise), R. Eliezer chooses *ha'arama*. In order to separate ritually impure *ḥallah* from the rest of the dough on Passover, R. Eliezer suggests holding off one's labeling of the *ḥallah* portion until the entire dough has been baked. While in past examples, *ha'arama* has been presented as the bolder *halakhic* position, here it is conservative relative[573] to R. Joshua's position. This is consonant

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[568] *mḤallah* 2:3, *tḤallah* 1:8. Shamma Friedman points out that R. Aqiva is the one who requires separation of *ḥallah* from impure dough, while the earlier law was to obviate the requirement for *ḥallah* from impure dough by preparing it in smaller quantities that those that would require *ḥallah* to be separated. As such, R. Eliezer, Ben Betera, and R. Joshua, all of whom predated R. Aqiva must be discussing a case in which the dough only became impure once it had already been kneaded; for if not, they would have simply suggested that one prepare the dough in smaller baskets in order to exempt it from the separation of *ḥallah* altogether. And, in fact, this PT *sugya* does say מתניתא בשניטמאת לאחר גילגולה, אבל אם ניטמאת קודם לגילגולה יעשנה קבין. (Shamma Friedman, *Tosefta 'Attiqta: Masekhet Pesaḥ Rishon – Maqbilot Ha-Mishnah We-Ha-Tosefta Perush U-Mevo Kelali*, Bar Ilan (2003), 278.

[569] As opposed to *ḥol ha-moed*, when one may directly burn it.

[570] See *mBeṣa* 1:6

[571] *tBeṣa* 1:14; It is unclear whether *Mishnah* permits separation of impure *ḥallah* on a Festival, though *Tosefta* does

[572] See *mShab*. 2:1, *tShab.* 2:1

with the picture we presented earlier in the chapter of R. Eliezer and R. Joshua's relative halakhic stances. While R. Joshua confidently asserts that there is no problem of *ḥameṣ* all together, presumably because the *ḥameṣ* belongs to the priest or to God[574] rather than to the agent in question,[575] R. Eliezer reflects the stricter and more ancient view of *halakha* that having even someone else's leaven in one's possession on Passover is a violation of *bal yera'eh* and *bal yimaṣe*.[576]

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[573] True, it is more liberal compared to B. Beterah, but the switch between R. Eliezer and R. Joshua is noticeable and significant.

[574] *Mekhilta d'R. Shimon b. Yoḥai* 13:7/*Sifri Devarim* 131 – ולא יראה לך חמץ רואה אתה לאחרים ולא יראה לך חמץ רואה אתה לגבוה ולא יראה לך מחץ רואה אתה לפלטיר (*Sifri* version uses the word שאר instead of חמץ.)

[575] See *bPes.* 46b, Rashi s.v. לא זהו. David Weiss Halivni observes that it is problematic to suggest that R. Joshua rejects any prohibition of *bal yera'eh* and *bal yimaṣe* in the *mishnah*, and yet both PT and *Tosefta* cite him as suggesting that there is a problem of *bal yera'eh* and *bal yimaṣe*, but at least the agent comes upon it passively. Ultimately, Halivni suggests that R. Joshua indeed offered both of these reasons as possible ways around the problem of *bal yera'eh* and *bal yimaṣe*. However, *Mishnah* cites one, and *Tosefta* cites the other. (One finds a similar phenomenon of R. Joshua offering two opinions (even contradictory opinions!) in *mZev.* 8:10). Halivni concludes that: מכאן שצריכים להיות זהירים כשיש סתירה בתשובה בין המשנה והתוספתא (או בין מקורות אחרים) שלא להסיק מיד שע"כ רק אחת היא מקורית. יתכן שכולן הן מקוריות אלא שכל מקור ומקור מסר רק תשובה אחת (עיין תוס' שבת יד. סוף דבור המתחיל תנא) "From here [we learn] that we must be careful when there is a contradiction in the answers between *Mishnah* and *Tosefta* (or between other sources) not to immediately assume that only one must be original [and the other copied from a different context]. Rather, it is possible that they are all original, but each source passed down only one answer. (See *Tos. bShab*. 14a s.v., *Tanna*, end)" (*Meqorot u-Mesorot*, Pes. 413) Shamma Friedman explains R. Joshua's position differently, asserting that it is only the *stam* in BT (see chapter 4) that discusses the issue of who owns the *ḥameṣ*, whereas the amoraic parts of the *sugya* do not discuss this at all. He asserts that R. Joshua actually does see the problem of *bal yera'eh* and *bal yimaṣe* here, but it is the better of the two options (the other option being to bake the impure *ḥallah*. He bases his argument on similar wording in *mTerumot* 8:11: אמר ר' יהושע לא זו היא תרומה שאני מוזהר עליה מלטמאה אלא מלאכלה ובל תטמאה. In that context, R. Joshua argues for the permissibility of actively making *terumah* impure if non-interference will cause great financial loss. He does not claim that there is no prohibition to do so, only that one is considered forced rather than willing to transgress: it is the lesser of two evils. Likewise, in our context: לא זה הוא חמץ שמוזהרים עליו does not mean that there is no prohibition of owning this *ḥameṣ*. It is simply the lesser of two evils to passively allow the dough to rise rather than actively placing it into the oven to cook/burn it. This reading is consistent with Friedman's general argument that *Tosefta*, which here (*tPes.* 3:7) assumes that R. Joshua does indeed apply *bal yera'eh* and *bal yimaṣe* here and simply sees passive/unwilling transgression as preferable to active transgression, represents the earlier sources, while *Mishnah* represents a later, more redacted version (Friedman, *Tosefta 'Attiqta*, 279-280, 288). Professor Lieberman, offers yet a third reading of R. Joshua, on the basis of PT: R. Joshua holds that one is not commanded to burn bread that leavens on the Festival itself, as it is forbidden to do so Therefore, the notion of *bal yera'eh* and *bal yimaṣe* simply does not apply to bread that has risen on the Festival. (*Tosefta Ki-fshuta, Beṣa,* 502)

[576] See YD Gilat, "Leaven Belonging to Gentiles or to the Sanctuary" (Heb.), *Tarbiṣ* 33 (1963) 20-27. This argument is problematic for two reasons: a) *mPes.* 2:2 records anonymously/unanimously that one may eat *ḥameṣ* that belonged to a Gentile over Passover after the holiday because of לא יראה לך חמץ, and b) excluding the leaven of a Gentile may be different from excluding the leaven of a fellow Jew from the prohibition of *bal yera'eh/bal yimaṣe*.

As the PT pericope progresses, it focuses on the exact workings of R. Eliezer's position. In the excerpt cited above, R. Joshua and R. Eliezer engage in an argument imported from *tPesaḥim* 7:3 about the relative weight of a) prohibition of owning *ḥameṣ* and b) the prohibition of burning *qodashim* on the Festival. Though the plain reading of R. Joshua in the *mishnah* is that *bal yera'eh/yimaṣe* simply does not apply,[577] R. Joshua is presented as preferring passive transgression by allowing the dough to rise over the active transgression of placing inedible *qodashim* into the oven.[578] R. Eliezer, on the other hand, allows one to place the food in the oven without violating anything: like the salting case above, or the parent-child animal case, simply claim to want each and every piece of dough and place it in the oven for baking; once the dough is fully baked, scrape off each piece of dough from the oven, again claiming to want it. At the very end, leave one piece as *ḥallah* in the oven. That final piece will be burned, but not due to any active transgression![579] In this case, as in the aforementioned, the method is an externalization of intention.

Hybrid Case

Also, apropos of the connection between intention and action, and the singularity of the two "types" of *ha'arama*, PT contains an example that is truly a combination of the two:

ירושלמי תרומות ב:ג, דף מא עמוד ג' (שבת ב:ז, ביצה ב:ב) (כ"י ליידן)
משנה ב:א:...המטביל כלים בשבת[580] בשוגג ישתמש בהן ומזיד לא ישתמש בהן המעשר והמבשל בשבת בשוגג יאכל מזיד לא יאכל הנוטע בשבת שוגג יקיים מזיד יעקור ובשביעית בין שוגג בין מזיד יעקור

[577] This is actually the way BT reads this *mishnah*, in contrast to PT.

[578] While this may soften R. Joshua's stance and make him seem less audacious, in the context of *tPes.* 7:3 he is still the more courageous one. There, R. Eliezer does not have the confidence of waiting to name the *ḥallah* until after the dough has been baked. Rather, R. Eliezer is seen asking, "Who can decide between the two prohibitions – owning *ḥameṣ* and not cooking non-Festival food on the Festival day?" R. Joshua confidently responds: אני אכריע, I will decide – and follows up with his distinction between passive and active transgressions.

[579] See commentary of R. Solomon Adani, *Melekhet Shelomo*, *mPes.* 3:3

הלכה ג׳...מתנית׳ בכלים גדולים אבל בכלים קטנים מערים עליהן ומטבילן. ותני ר׳ הושעיא[581] ממלא הוא אדם כלי טמא מן הבור ומערים עליו ומטבילו ותני[582] נפל דלייו בתוך הבור נפל כלייו לתוך הבור מערים עליהן ומטבילן . תרין אמוראין חד אמ׳ בכלים שניטמאו באב הטומאה וחרינה אמ׳ בכלים שניטמאו בולד הטומאה[583] מתיב מאן דאמ׳ בוולד הטומאה למאן דאמ׳ באב הטומאה ואפילו בחול טעון הערב שמש? אמ׳ ליה ברוצה להשתמש בהן חולין בטהרה. ר ירמיה[584] ר׳ זעירא בשם ר׳ חייה בר אשי אשה פיקחת מדיחה ( )[כו²][585]ס כן[586] קערה כן תמחוי כן נמצאת מרבצת ביתה בשבת

One who immerses vessels on the Sabbath out of ignorance may use them, but knowingly, one may not. One who tithes or cooks on the Sabbath out of ignorance may eat the food, but knowingly, one may not. One who plants on the Sabbath out of ignorance may retain the plant, but knowingly one must uproot it, and in the Sabbatical year, one must uproot it whether it was planted out of ignorance or knowingly.

…Our Mishnah refers to large vessels, but one may employ cunning for smaller vessels to immerse them. And R. Hoshaya taught: One may fill an unclean vessel from the pit and use cunning to [thus] immerse it,[587] and it was taught: If one's [unclean] pail fell into the pit [on *Sabbath*] one may employ cunning and [thus] immerse them. Two amoraic sages: one says this refers to vessels that were contaminated to a primary degree, while the other said this was about vessels that

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[580] Though one may not immerse vessels on the Sabbath to remove impurity, one may immerse oneself, as people immerse for more than just ritual purification; they immerse for pleasure too. (See Albeck, *Shisha Sidrei Mishnah, mShab. ad loc.*, 291; this accords with Rava's opinion in *bBeṣa* 18b, which outlaws immersion of vessels because it looks like a repair on the Sabbath or Festival.) According to *yBeṣa* 2:2, the reason is somewhat different: because a man may immerse for a seminal emission that occurred on the Sabbath, one may do the same for impurities that impacted him or her before the Sabbath.

[581] MSS Moscow, London: אושעיא

[582] MS London: ותני כן

[583] MS Vatican reverses the order of אב and ולד and likewise reverse the order of the two tannaitic statements

[584] MS Vatican: בעא ר׳ ירמיה

[585] [²] refers to letter(s)/word(s) added by a second scribe.

[586] MSS Moscow, London substitute כן with כאן, meaning in various locations

[587] It should be noted that the practice of finding evasions for this problem continued into the Middle Ages and beyond, not for impure vessels, but for new vessels which could not halakhically be used for food without being immersed, as per *bAZ* 75b, and could not be immersed on the Sabbath or the Festival just as a ritually impure vessel could not, by law, be immersed on those days. The evasion method suggested was to give the vessel as a gift to a Gentile, who need not immerse his/her vessels, and to borrow them for use on the Sabbath or Festivals. As the vessels belong to a Gentile, they need not be immersed even before a Jew uses them. (*Mordekhai Beṣa* 677; *Shulḥan Arukh* Oraḥ Ḥayyim 323:7, Yoreh De'ah 120:16

were contaminated to a secondary degree.[588] The one who said secondary degree questions the one who said primary degree: Even on a weekday, one requires the sun to go down [before using the vessel for any *qodashim*]?! He answered him, In this case one wishes to use them for *ḥullin* in purity. R. Jeremiah said in the name of R. Ze'ira in the name of R. Ḥiyya bar Ashi: A wise woman will wash a cup here, a plate there, and a platter there: she ends up leveling her home on the Sabbath.

One may not immerse impure vessels on the Sabbath[589] or Festival.[590] *BBeṣa*18b is the only pericope that offers a reason for this limitation: either so that one does not leave all immersing of vessels until the Festival or Sabbath, when one is free from other work, thus spending the Sabbath/Festival engaged in weekday work; or because immersing vessels makes them more usable and thus is similar to repairing a vessel, which is forbidden on the Sabbath.[591] However, the *baraitot*[592] cited in this PT passage suggest that one may in fact immerse small[593] contaminated vessels on the Sabbath/Festivals by using them to retrieve water from a well.[594]

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[588] Y*Pes. 1:6* and *ySheq.* 8:3 cite an argument between Bar Qappara and R. Yoḥanan over whether secondary contamination is Biblical or only rabbinic. As no amoraim are cited by name in our *sugya's* debate, it is impossible to know why one of them distinguishes between the two types of *tum'ah* as they relate to the use of *ha'arama.* Might it be the same distinction as in *yPes. 3:3, 30a* – a lesser status change versus a greater status change: *ha'arama* may be used to circumvent the former but not the latter?

[589] *mShab.* 2:7, *tShab.* 2:8

[590] *mBeṣa* 2:2-3, *tBeṣa* 2:5-6

[591] *mShab.* 7:4

[592] Based on *tBeṣa* 2:6 and *tShab.* 2:8

[593] Larger vessels are ineligible for this *ha'arama* as they cannot fit into the well.

[594] The act of immersing vessels by drawing water from a well is distinct from two other situations, both discussed in *Mishnah* and *Tosefta,* of a) submerging a stone vessel in a *miqveh* in order to purify the water that is already in the vessel, and b) immersing a non-stone vessel that is impure in a well ostensibly in order to purify the water that is in the vessel (see *mBeṣa* 2:2; *tBeṣa* 2:9; *yPes.* 2:2, 61b; *bBeṣa* 18b). *The* amoraim who discuss R. Hoshaya's permission to immerse a vessel surreptitiously on the Sabbath: bring up the distinction between vessels which are impure at a primary level, and those which are *ritually impure* at a secondary level. Y*Pes. 1:6* and *ySheqalim* 8:3 cite an argument between Bar Qappara and R. Yoḥanan over whether secondary contamination is biblical or only rabbinic. As no amoraim are cited by name in our *sugya's* debate, it is impossible to know why one of them distinguishes between the two types of *tum'ah* as they relate to the use of *ha'arama.* Might it be the same distinction as in *yPes. 3:3, 30a* – a lesser status change versus a greater status change: *ha'arama* may affect the former but not the latter? Or specifically circumventing rabbinic injunctions is permissible while circumventing biblical injunctions in this way is not? Or perhaps it is quite simply that it is of little value to immerse vessels which are contaminated to

This case is reminiscent of ambiguous images[595] that can be viewed as two different subjects, depending on one's perspective. Is it a rabbit or a duck?[596] Is it an elegant young woman or a haggard, aging one?[597] Is one immersing a vessel or fetching water? Because the vessel is full of water, the answer is both. There is evidence in both directions – that one is simply immersing the object and that one is drawing water. The same is true of the anonymous *baraita*: the fact that the vessel has fallen into the water is what allows one to remove it from the water while simultaneously immersing it.

Unlike the parent-child animal case, in which the two interpretations of the activity are mutually exclusive – saving an animal or slaughtering it - and one's presentation of his/her intention offers the choice between them, here the two activities are simultaneous and do not conflict. According to the presentation of the *baraita* in this PT passage, [598] one need not say anything, but merely draw the water, in order to indicate that one's primary goal is in fact protected by law, and the immersion is just a side benefit. While Eilberg-Schwartz suggests that *Mishnah* only probes one intention in ambiguous cases, in this PT passage, we have a most

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a primary degree, as they are not fully usable for sancta until sundown. Therefore, by definition they are not for Sabbath use, or the use of eating *ḥullin* in purity is insufficient to warrant such *ha'arama*.

[595] Some have challenged the use of "illusion" for these images, as illusions "illustrate the role of unconscious inferences in perception, while the ambiguous figures illustrate the role of expectations, world-knowledge, and the direction of attention (Long, G.M., & Toppino, T.C "Enduring interest in perceptual ambiguity: Alternating views of reversible figures," *Psychological Bulletin* 130 (2004) 748-768.)

[596] The duck-rabbit illusion has been attributed variously to the Austrian Logician Ludwig Wittgenstein and to American psychologist Joseph Jastrow. See Malach, R., Levy, I., & Hasson, U, "The topography of high-order human object areas." *Trends in Cognitive Sciences, 6*, 178-184, and Jastrow, J, "The mind's eye." *Popular Science Monthly 54* (1899) 299-312.

[597] British cartoonist WE Hill first published the Young Girl/Old Woman image in *Puck* humor magazine, though it was based on a concept that was popular throughout the world on trading and puzzle cards.

[598] Though some, such as the *Qorban Ha'edah*, suggest that one declares his/her intentions: ואומר שרוצה להעלותן – see s.v. ותני

ambiguous case and no one probes. Essentially, the action of collecting water is what defines the intention of the agent. What is intended and what is unintended is determined by what part of the action is primary and what part of the action is secondary. Action imputes, or defines, intention.

The potential that this affords is not lost upon the redactor(s), as R. Jeremiah and R. Ze'ira cite a parallel case which is not called *ha'arama* but has the same characteristics: [599] a woman washing dishes on the Sabbath and allowing the water to drip onto the floor, thereby smoothing out the floor, which technically is forbidden on the Sabbath as an act of *ḥoresh*, plowing. Here too, the agent accomplishes two actions simultaneously – washing dishes and washing down the dirt floor – and these actions are not mutually exclusive.

MS Vatican adds the word בעי to the beginning of the statement, turning the statement into a question: If one may immerse vessels while "drawing water," what is to stop someone from smoothing one's dirt floor by washing dishes? This certainly would be consistent with PT's general approach to *ha'arama:* Do not utilize *ha'arama simply* in order to take advantage of loopholes in the law. Only use it if it is truly warranted![600] Most MSS though, do read it as a statement.[601]

This example of redefining an act by physical "evidence" is an important bridge between the two "types" of *ha'arama.* On the one hand, it is very close to the concrete mishnaic *ha'arama* in that it attempts to change the facts of the case by adding the layer of drawing water.

[599] In terms of the term יון)(ת)פיקח), there are a few contexts within PT in which it appears as a person who outsmarts others or the law – See *yHor.* 3:2, 47b; *yKet.* 12:5, 35c; *yShab.* 16:3, 15d; *yNazir* 2:2, 52a (based on *mNazir* 2:2)

[600] The original context of this statement though, as a comment on a *mishnah* which specifies that one wash dishes on Friday night and Sabbath morning, but not on Sabbath afternoons, does not appear to be a question at all. Rather, it is presented as wise advice!

[601] As a separate issue, this may be indicative of a general disagreement between BT and PT. While BT prohibits what is called a *pesiq reishe ve'lo yamut* (*bShab.* 103a), PT contains no such prohibition. (See *yShab.* 13:6 for the illustrative scenario of trapping oneself and an animal in one's home on the Sabbath.)

On the other hand, this *ha'arama* simply cannot change the facts of the case without incorporating human intention. Even if this person is now drawing water s/he is still immersing a vessel at the same time, and these are not mutually exclusive acts. Which act takes precedence should be in the mind of the actor, or at least in how s/he presents the situation? And yet, it is not. Intention and action are not two different modes; rather, action defines, and even creates, intention.

Ritual Purity and *Ha'arama*

There are three main legal uses for intention in rabbinic literature: 1) evaluating potential violations, 2) determining whether a religious duty has been discharged, and 3) classifying objects.[602] *Ha'arama*, however, is deployed only with regards to the first category. There are no instances of using *ha'arama* to fulfill a ritual obligation, such as the recitation of the daily *shema*. This is most likely because *ha'arama* as a means of getting out of a bind created by restrictive circumstances simply is not relevant to the realm of fulfillment of *mitzvoth*. Regarding classification of objects, though, in the case of ritual im/purity law, *ha'arama* is consistently raised only to be rejected. We turn to these latter cases below:

1. **Is This Vessel Complete?**

תוספתא כלים מציעא ה:ט (כ"י וינה[603])

הסלין של גמלין התירן טהורין קשרן טמאין ומיטמאין ומיטהרין אפי' עשרה פעמים ביום כלי נצרין שלא קינבן ומשתמש בהן עראי טמאין היה עתיד לחסם ולקנב אע"פ שהוא משתמש בהן עראי ומשליכן טהורין ובלבד שלא יערים ואם הערים הרי אילו טמאין

The baskets of camels [which] one has untied are pure. [If] one has tied them, they are again susceptible to impurity. They may be made impure and purified even ten times in the day. Vessels of twigs which one has not smoothed and which one uses at random are susceptibility to impurity. [If] one was destined to make a rim and to smooth it (=the rim),[604] even though one may [nonetheless]

[602] Eilberg-Schwartz, *Introduction*, 3ff

[603] Venice Edition is identical.

make use of them at random and throw them away, they are unsusceptible to impurity.[605] And [this rule applies] solely [on condition that] one not practice cunning [falsely indicating that he plans to do more to finish off the vessel]. And if one has practiced cunning, lo, these are susceptible to impurity.

The context of this toseftan passage is defining at what point an item becomes a vessel from the perspective of *halakha*, such that it can contract ritual impurity. As described here, there is some subjectivity involved, in that, when it comes to baskets of twigs, people manufacture and use them in one of two ways: with a smoothed rim or without one. If one plans to make such a rim, an un-rimmed basket is not considered a vessel and thus is not yet susceptible to ritual impurity. Thus, using such a basket with ritually impure hands or ritually impure foods has no impact on its status. One can easily see how this might inspire *ha'arama*: why not claim that there are finishing touches yet to come (even if there are none) in order not to bother with purity law just yet? Clever, but the *tosefta* squashes it.

2. Is the Process Complete? (1)

תוספתא טהרות י:ג (כ"י וינה)

היתה לו אם של זתים ומבקש לעשותה בטהרה אע'פ שהוא עתיד להוסיף קב אחד או שני קבין הרי אילו טהורין ובלבד שלא יערים ואם הערים הרי אילו טמאין

[If] he had a clump of olives[606] and wants to prepare them in purity, even though he is going to add [only][607] a *qab* or two *qabs* of olives to the clump, lo, these are insusceptible to impurity; and on condition that he not practice cunning;[608] but if he practiced cunning [falsely indicating that he would add to the clump], lo, these are susceptible to impurity.

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[604] Based on the translation of R. Samson of Sens, *mKelim* 16:2, which Lieberman prefers (See *Tosefet Rishonim*, ibid.)

[605] The continuation of this passage, not cited here, points out that this leniency does not apply to reed baskets. Whereas reed baskets are considered susceptible to ritual impurity as soon as they are usable, baskets made of twigs are only susceptible to impurity when their user has determined that they are complete vessels.

[606] This refers to olives that clump together at the bottom of the vat or basket. (Lieberman, *Tosefet Rishonim*, 95)

[607] See Maimonides, *Mishneh Torah*, *Hilkhot Tum'at 'Okhlin* 11:8

[608] Neusner uses the term "deception" here, but we have chosen not to translate it in light of the question as to what type of *ha'arama* is being used here.

Olives become susceptible to impurity based on the oil that drips from them. However, there is debate as to at what point the dripping oil is considered to have that effect. This passage assumes that olives (even if they are sweating or dripping beforehand) only become susceptible to impurity once all of the olives have been picked and gathered, an opinion attributed to R. Gamaliel.[609] If, however, even just a few more olives are meant to be added to the clump, the olives are considered less than fully gathered and their sweat does not make them susceptible to impurity. According to this passage, one may not employ *ha'arama* as a method of creating such a situation. Saul Lieberman reads the rejected *ha'arama* as purposely leaving a few olives out of batch when processing the rest just in order to be able to handle the majority of the product while impure or with impure utensils or machinery.[610] Once again, the *tosefta* rejects such manipulation.

3. Is the Process Complete? (2)

תוספתא טהרות י:יב (כ"י וינה)

גרגר?ן?[611] שנשרו בסים[612] ונעשו [אם] ר' או' אינן חיבור ר' יוסי בר' יהודה אומ' חיבור אם עד שלא נגמרה מלאכתן חישב עליהן ורצה ליטול מהן בד אחד או שני בדין בית שמיי או' קוצה בטומאה ומחפה בטהרה ומוליך לבית הבדובית (א) הלל או' אף[613] מחפה בטומאה ובלבד שלא יעקר את כל האם אלא מקום שנהגו להניח בדי[614] בד מניח בדי[615] בד בידידה מניח ?כ?די בידידה קתכו מניח ?כ?די[616] קתכו ובלבד שלא יעקר את כל האם ואם עקר את כל האם הרי אילו טמאין ר' ישמעאל בר'

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[609] *mTaharot* 9:1, *tTaharot* 10:1

[610] Lieberman, *Tosefet Rishonim*, 95. Jacob Neusner, however, reads this as a prohibition to indicate a false desire to add more olives to the batch, similar to many of the "intention" *ha'arama* examples in this chapter. His interpretation may be a result of the false dichotomy between the "two types" of *ha'arama*

[611] Venice Ed.: גרגרין

[612] Venice Ed.: במים

[613] Venice Ed. omits אף

[614] Venice Ed.: כדי

[615] Venice Ed.: כדי

[616] Venice Ed.: כדי

יוסי אומ' משם אביו אע"פ שעקר את כל האם הרי אילו טהורין ובלבד שלא יערים ואם הערים הרי אילו טמאין

Shriveled olives which are soaked in water[617] and made into a mass, Rabbi says, "It is not connected.[618]" R. Jose b. R. Judah says, "It is connected." If thye have not yet been fully gathered, he gave thought to them, and he wanted to take from them [enough olives for] one pressing or for two – the House of Shammai say, "Let him set apart in impurity and cover[619] in purity[620] and bring it to the press." And the House of Hillel say, "Also: he covers in impurity." And on condition that he not uproot the whole clump. But in a place in which they are accustomed to leave a sufficient amount for a pressing, one leaves enough for a single pressing. In a place in which they are accustomed to leave a sufficient amount for a small olive press, one leaves sufficient for a small olive press. [If they are accustomed to leave enough for] a small olive press with a cylindrical beam, one leaves enough for a small olive press with a cylindrical beam. And on condition that one not uproot the whole clump. And if one has uprooted the whole clump, lo, these are susceptible to impurity. R. Ishmael b. R. Jose in the name of his father says, "Even though one has uprooted the whole clump, lo, these are insusceptible to receive impurity." And on condition that one not practice cunning [falsely indicating his desire for each small clump by taking each separately]. And if one has practiced cunning, lo, these are susceptible to impurity.

Given that olives do not become susceptible to impurity until they have been completely gathered for pressing,[621] the House of Shammai, the House of Hillel and R. Ishmael son of R. Jose argue. Supposed more olives are meant to be added to the already gathered clump, but some of the olives there are already being taken to be pressed for oil: according to the House of Shammai, the part that is removed is not yet susceptible to impurity because more is to be added to the clump, whereas the remaining olives that have not been taken are now susceptible to

[617] *Supra* note 600

[618] When foods are considered "connected," if one part of the mass becomes ritually impure, the entire mass becomes impure. The reason for the debate is that these olives became attached accidentally.

[619] the remainder.

[620] Beit Hillel considers the remaining olives susceptible to impurity because now that the others have been removed, the rest of the group seem complete.

[621] Our understanding of this *tosefta* is based on the comments of R. Ovadiah Bertinoro regarding its parallel *mishnah*, *mTaharot* 9:7.

impurity because it is considered as though all of the olives have been gathered. According to the House of Hillel, though, none of the olives become impure because more olives are supposed to be gathered. The House of Hillel, however, does qualify this leniency. If a person removes the whole clump of olives (presumably piece by piece), the olives are considered susceptible to impurity already, as clearly no more will be collected. R. Ishmael, though, in the name of R. Jose his father, says that one may indeed remove the entire clump without anything becoming susceptible to impurity, though he does not explain why. He does, however, specify that this leniency does not apply if one is simply trying to outsmart the system: namely, if the agent knows that the olives are completely gathered and plans to remove all of them for use, yet removes clumps bit by bit in order to suggest that the bunch is not yet complete, s/he is guilty of *ha'arama,* and the olives are susceptible to impurity.

4. Exit Strategy

תוספתא אהלות ח:ד (כ"י וינה[622])

המת בבית ולו פתחים הרבה כולן נעולין כולן טמאין. נפתח אחד מהן אף על פי שלא חישב עליו טיהר את כולן. היו בו חלונות הרבה וכולן מגופות כולן טהורות נפתחו כולן טמאות ולא הצילו על פתחים. פתח קטן בתוך פתח גדול המאהיל על גבי שניהם טמא. חשב להוציאו בקטן טיהר הקטן את הגדול. היו שניהם מתאימין המאהיל על גבי שניהם טמא. חישב להוציאו באחד מהן הרי חבירו טהור היה לו פתח אחד לצפון ופתח אחד לדרום וחישב להוציאו בצפונו ואחר כך באו אחיו או קרוביו ואמרו אין מוציאין אותו אלא בדרומו טיהר דרומי את הצפוני ובלבד שלא יערים ואם הערים הרי אילו טמאין

The corpse is in the house, and it has many doors – [if] all are locked, all are impure. [If] one of them is opened, even though one did not give thought to it, he has purified all of them. [If] there were in it many windows, [if] all of them are locked, all of them are clean. [If] they were open, they all are impure, and they have not afforded protection for the doors. A small door in the middle of a larger door- he who overshadows both of them is impure. [If] one gave thought to remove it through the small [door], the small one has purified the large one. [If] they were parallel to one another, he who overshadows both of them is impure. [If] one gave thought to remove it through one of them, lo, its fellow is pure. [If] it had one door to the north and one door to the south, and one gave thought to remove it through the northern one, and afterward his brethren or relatives came

[622] Venice Ed. offers minor variations that do not change the meaning of the text.

> and said that they [should] remove him only through the southern one, the southern one has purified the northern one. [And this is so] only on condition that one not practice cunning [to falsely indicate a plan to remove the corpse through a particular exit through which he does not truly plan to remove it]. But if one has practiced cunning, lo, these both are impure.

The general rule regarding the impurity of a corpse found in a building or tent is that the impurity must escape somehow: סוף הטומאה לצאת.[623] This is a very physical view of ritual impurity: if one door of the tent is open, the impurity is presumed to escape through it. If, however, no doors are open, the impurity bursts through, as it were, all of the closed doors, and anything found under the overhangs of those doorways becomes impure. If one of the doors is then opened, it alone again is presumed to be the exit for the impurity.[624] In context of this phenomenon, the *tosefta* offers further discussion about the significance of *mahshava*, one's plans for the removal of the deceased. If one originally plans to remove the deceased through one exit, even if s/he has not yet opened that door, the other doors are considered pure, and the impurity is presumed only to exit through the intended doorway. (This is so even with regards to two doorways standing side by side under the very same awning. Only the intended doorway becomes a passage for the impurity.) And the final scenario in the *tosefta* at hand offers the most complicated issue: when one intends to remove the body through door A (=the northern exit), but then one's family members suggest that door B (=the southern exit) be used instead. When that happens, door B becomes the new intended exit while door A is no longer in danger of impurity, at least from that moment forward.[625]

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[623] *m'Ohalot* 7:3

[624] The BT version of this ruling indicates that there is an argument over whether ultimately the doorways become purified for the future once a doorway is opened, or whether even retroactively the doorways themselves are considered pure from the moment of death. (See *bBeṣa* 10a)

[625] See *supra* n 614.

The final line of the *tosefta* – ובלבד שלא יערים ואם הערים הרי אלו טמאין – is taken by traditional commentators to refer to final case only,[626] though that is not clear from the *tosefta* itself. If it does refer to that last case, we believe the following to be the best explanation: the person knows that the proper exit door is the southern one and that eventually s/he will remove the body via that path, but s/he wishes to prevent the southern doorway from becoming impure in the interim. To do so, s/he "claims"[627] to wish to remove the body through the northern doorway. According to the *tosefta*, the result of such behavior is הרי אלו טמאין, in the plural, as in, both the northern and the southern doorways become impure! Alternatively, the final line may refer back to the entire *tosefta*: one may not misrepresent one's intention to take the body out a certain exit simply in order to keep the other exits from becoming impure. On this interpretation הרי אלו טמאין might simply mean that all of the other exits are impure then too, as the individual has not truly decided through which door s/he will remove the corpse.

5. How Do You Plan to Use This?

תוספתא חגיגה ג:י, תוספתא פרה ד:י[628]

[626] See *Ḥiddushei Ha-Ra'ah Beṣa* 10a, Maimonides, *Hilkhot Tum'at Ha-met* 7:6

[627] As in the other cases of *ha'arama* discussed, it is unclear whether any verbal declaration or physical indication of this plan is made.

[628] Our version of the Tosefta follows Lieberman's, which is based on R. Samson of Sens. (*Tosefet Rishonim, Parah*, 229) As this *Tosefta* passage appears twice, the notes will point out significant differences between the same MSS and Ed. in the passages two appearances.

עם הארץ שהביא כלים לחטאתו[629] חבר לוקח ממנו לחטאתו ולתרומתו הביא[630] לתרומתו אין חבר לוקח ממנו לחטאתו ולתרומתו.[631] הביא לחטאתו ולתרומתו של חטאת חבר לוקח הימנו לחטאתו ולתרומתו.[632] של תרומה[633] אין חבר לוקח ממנו לחטאתו ולתרומתו.

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[629] MS Vienna (*Ḥagigah)* omits the words כלים לחטאתו, but MS Vienna (*Parah*) includes them.

[630] MS London (*Ḥagigah*) omits the word הביא

[631] MSS Vienna (*Ḥagigah*), London (*Ḥagigah*) and Venice Edition (*Ḥagigah*): לא לחטאתו ולא לתרומתו. (But MS Vienna *Parah* and Venice ed. *Parah*: לחטאתו ולתרומתו). At this point, MS Vienna (*Parah*) and Venice ed. (*Parah*) skip straight to the cases of חבר שאמר לעם הארץ and include חבר לוקח ממנו לחטאתו ולתרומתו ושל תרומה אין as a new section (after ואם הערים הרי אלו טמאין) about an *am ha-'areṣ* who had originally planned to use a vessel for *hatat*, but then decided to use it for *terumah*. MS Erfurt (*Parah*) does not skip the line here, but does add it a second time in the same place as MS Vienna (*Parah*)/Venice ed. (*Parah*).

[632] Lieberman adds this clause based on R. Samson of Sens. Though the first line of the Tosefta established that an *am ha-areṣ* is believed regarding ritual purity of vessels used for the red heifer, but not of vessels used for *terumah*, this line still teaches something: though one may have thought that bringing both vessels may have made the *am ha-areṣ* believable regarding both or suspect regarding both, as they were brought together, instead, the same ruling as the first line obtains (Lieberman, *Tosefet Rishonim*, *Parah*, 229-30).

[633] Thus in MSS London (*Ḥagigah*), Erfurt (*Ḥagigah*) and Geniza fragments (*Ḥagigah*); MS Vienna (*Ḥagigah*) and Venice edition (*Ḥagigah*): (ו)לתרומתו rather than ושל תרומתו. This latter *girsa* seems to be a mistaken repetition of the final word in the phrase לוקח הימנו לחטאתו ולתרומתו/ממנו

חבר שאמר לעם הארץ הביא[634] כלים לחטאתו[635] חבר לוקח ממנו לחטאתו ולתרומתו.[636] הביא לתרומתו[637] אין חבר לוקח ממנו לחטאתו [638]ולתרומתו. הביא לחטאתו ולתרומתו[639] של חטאת חבר לוקח ממנו בין לו[640] ובין לאחר[641] ובלבד שלא יערים ואם הערים הרי אלו[642] טמאין.

An ordinary person who brought utensils for [use in connection with] his purification water- an associate purchases from him both for his purification offering and for use in connection with his heave offering. [If] he brought them for his heave offering, an associate does not purchase them from him either for his purification water or for his heave offering. [If] he brought one for his [an associate's] purification rite and one for his heave offering, that which is brought for use in connection with the purification offering an associate purchases from him for use both in his purification offering and in his heave offering. But that which he brought in connection with his heave offering an associate does not

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[634] MS Vienna (*Ḥagigah* and *Parah*) and Venice ed. (*Ḥagigah*) use the spelling of the past tense הביא rather than the command form הבא, though this may be a scribal error based on the word הביא from the opening of the Tosefta. Geniza fragments (*Ḥagigah*), MSS Erfurt (*Ḥagigah*), Vienna (*Ḥagigah*), London (*Ḥagigah*), Venice ed. (*Parah*) all use the proper spelling of the command form, הבא.

[635] MS London (*Ḥagigah*) skips this part of the scenario completely; MS Vienna (*Ḥagigah*) and Venice Ed. (*Ḥagigah*): לחטאתי, while MS Vienna (*Parah*) and Venice ed. (*Parah*): לחטאתו; Geniza fragments (*Ḥagigah*) and MS Erfurt (*Ḥagigah*): לחטאת

[636] One might have doubted this, as perhaps the *am ha-areṣ* is only trustworthy when he brings the vessels of his own accord, rather than when the associate asks him, thus indicating that the associate will believe what he says. (Lieberman, *Tosefta Ki-fshuta, Ḥagigah* (find the citation))

[637] This is the rendering of MS Erfurt (*Ḥagigah*), MS Vienna (*Parah*) (though MS Vienna (*Ḥagigah*) omits the word הביא), and Venice ed. (*Parah*). Other versions – Geniza fragments (*Ḥagigah*), MS London (*Ḥagigah*) and Venice Ed. (*Ḥagigah*) - though, use the term לתרומתי though. According to this latter reading, the clause is a continuation of the associate asking the '*am ha-'areṣ* to bring vessels to sell. Lieberman (*Tosefet Rishonim*, ibid.) rejects this, as the odds of an associate asking an *am ha-areṣ* to sell the former vessels for *terumah* is unlikely, as the associate knows that an *am ha-areṣ* is not generally diligent in that area of ritual purity. Instead, he suggests that the *haber* asked for vessels for *hatat* waters, but the *am ha-areṣ* admitted that he had none and instead offered vessels for *terumah*. One may have thought that the *am ha-areṣ* in this case would have been believed, as he admitted to not having *hatat* vessels, but in fact, he is still not believed. (Lieberman, *Tosefta Ki-fshuta, Ḥagigah ad loc*.)

[638] Venice Ed. (*Parah*) omits לחטאתו, probably a scribal error, as it retains the "ו" in ולחטאתו

[639] Thus, according to MS Erfurt (*Ḥagigah*), MS Vienna (*Parah*) and Venice Ed. (*Parah*). Other versions, however, are not as clear. Some make it seem like another request by the *haber* (See Geniza fragments, *Ḥagigah* and Venice Ed., *Ḥagigah*). Others appear unclear as to whether this is a request by the *haver* or the initiative of the '*am ha-'areṣ* in response to the *ḥaver* asking only for a *ḥatat* vessel (See MS Vienna, *Ḥagigah*). And MS London (*Ḥagigah*) skips this section all together and ends the *sugya* with the previous sentence.

[640] בין לו is absent in MS Erfurt (*Ḥagigah*)

[641] One may have thought that because the '*am ha'areṣ* is desperate to sell both vessels, even though the *ḥaver* only requested one, that the '*am ha'areṣ* be believed about neither vessel. However, the *tosefta* here rules that the '*am ha'areṣ* is still reliable regarding the *ḥatat* vessel. (Lieberman, *Tosefta Ki-fshuta* find citation, *Ḥagigah*)

[642] הרי אלו is absent from Geniza fragments (*Ḥagigah*) and MS Erfurt (*Ḥagigah*)

> purchase from him either for use in connection with his purification offering or in connection with his heave offering.
>
> An associate who said to an ordinary person, "Bring utensils for use in connection with my purification offering"- the associate purchases these utensils from him for use both in connection with his purification rite and in connection with his heave offering. But if he brought utensils for use in connection with his heave offering instead [despite the associate's request], the associate does not purchase them from him either for use in connection with his purification offering or for use in connection with his heave-offering. [Likewise, if] he brought them for his use in connection with both his purification rite and his heave offering, that which is brought in connection with the purification rite the associate purchases from him, whether he brought it for himself or for someone else, on condition that [an associate] not practice cunning [asking for utensils for a purification rite when he needs them for heave offerings]. And if one has practiced cunning [falsely indicating the use of the vessels for the purification offering], lo, these [utensils bought] are unclean.

Though the earliest strata of tannaitic literature do not use '*am ha-'areṣ* pejoratively, the main stratum generally uses it in contrast to *ḥaverim*. *Ḥaverim* observed food restrictions – concerning tithes and purities – scrupulously, while the '*amei ha-'areṣ* did not.[643] In order for such people to do business with one another the *ḥaver* must know what gaps to look for. Hence, *Mishnah* specifies that '*amei ha-'areṣ* are careful about the ritual purity of the red heifer ash mixture, but they are not careful about the ritual purity of *terumah*.

This *tosefta* takes this as a given in presenting a scene in which an *'am ha-'areṣ* has vessels for sale, and the *ḥaver* is buying. According to this passage it is the *ḥaver's* intended use for the vessels which determines whether or not the vessel should be presumed pure or impure: if either the *'am ha'areṣ* or the *ḥaver* specifies that the vessels are for the purification rite, the *ḥaver* may even use the vessels for his *terumah*.[644] If, however, there is any *ha'arama* involved,

[643] '*Am Ha-Areṣ*, Moshe Greenberg and Stephen Wald, *Encyclopedia Judaica Vol. 2, 2nd Ed.*, Eds. Michael Berenbaum and Fred Skolnik, Detroit: Macmillan Reference USA (2007) 66-70. For examples of this contrast, see *mDemai* chapters 2 and 6; *mTohorot* 7:4, 8:5; *mShevi'it* 5:9; *mGit.* 5:9; *tTaharot* chapters 8 and 9; *tDemai* chapters 2, 3 and 6

all vessels are presumed to be impure. It is once again unclear what the *ha'arama* is. Traditional commentators[645] have suggested that perhaps it is the *'am ha-'areṣ* who lies in order to sell his product. This is a problematic statement, as a) it is obvious that if the *'am ha-'areṣ* is lying, the vessels are ritually impure; and b) why not always assume that the *'am ha-'areṣ* is lying just to sell his product? Therefore, we prefer the following explanation: the *ḥaver* lies about his intended us of the vessels - he claims to be purchasing vessels for heifer ash water, something which will ensure that the *'am ha-'areṣ* will sell him only pure items, when really the *ḥaver* intends to us the vessels for *terumah*. The *tosefta* rejects the ploy and rules that the vessels are considered ritually impure even if the *'am ha-'areṣ* himself was duped.

In Summary: No *Ha'arama*

Human intention plays an important role for purposes of defining vessels, foods, and exits, and ultimately for purpose of determining susceptibility to impurity.[646] Each toseftan example cited above deals with this dimension of impurity law: human decision making. Will this food be processed further? Will something be added to perfect this vessel? What are the agent's plans for this vessel? In each case, the agent may be tempted to use artifice to keep an object, food or edifice from becoming impure or from becoming susceptible to impurity. However, the consistent terminology "And if one has practiced cunning, lo, these are susceptible to impurity[647]" makes the toseftan position on such attempts very clear: they are off limits.

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[644] Lieberman points out that *tOhalot* 5:9 contradicts this and instead would limit the use by the *haver* to purification water only. Maimonides, *Hilkhot Parah Adumah*, at the close of chapter 13, sides with the tosefta in 'Ohalot. (*Tosefet Rishonim, 'Ohalot* 602:37)

[645] R. Samson of Sens, *mParah* chapter 5

[646] For paradigmatic examples, see *mTohorot* 8:6 and *mKelim* 22:2

[647] Or, in the case of the doorway and the vessels purchased from the *'am ha-'areṣ*, "these are impure"

Regardless of the reason for attempting the *ha'arama*, whether out of pure laziness in keeping purity law, or even to preserve vessels for the good of priests or priestly foods, *ha'arama* is simply not an option.

Given that these toseftan examples do not distinguish on the basis the agent's motivations,[648] we are left to understand why the doors are completely closed to *ha'arama* in this arena. Perhaps the rabbis were animated by the potential (and actual) atrophy of purity law in their own day. As indicated both by archaeological[649] and textual[650] evidence, following the loss of the Temple,[651] observance of purity law had waned,[652] and perhaps the rabbis felt had to be preserved more strongly than those still relevant to the everyday. Another attack on the central meaning of purity and impurity may be traced to the Pauline epistles, which replaced concrete notions of this law with metaphorical uses such as purity and impurity of heart and mind.[653]

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[648] And one should not argue that there is no legitimate reason to dodge one's way to ritual purity; after all, the PT example of immersing a vessel on the Sabbath clearly indicates that there is a legitimate reason to want to do so.

[649] Ronny Reich, *Miqwa'ot (Jewish Ritual Immersion Baths) in Eretz-Israel in the Second Temple and the Mishnah and Talmud Periods* (Heb.; Doctoral Dissertation, The Hebrew University in Jerusalem, 1990) 143

[650] H. Birenboim, "Observance of the Laws of Bodily Purity in Jewish Society in the Land of Israel during the Second Temple Period" (Doctoral Dissertation, The Hebrew University of Jerusalem, 2006), 66-7; Yair Furstenberg, *Eating in a State of Purity during the Tannaitic Period: Tractate Taharot and its Historical and Cultural Contexts* (Doctoral dissertation, the Hebrew University in Jerusalem, 2010), especially 254-62.

[651]Regarding the centrality of the Temple for Biblical purity law, see Jacob Milgrom, *Leviticus 1-16: A New Translation with Introduction and Commentary*, Anchor Bible 3 (New York: Doubleday, 1991), 718-42.

[652] The extent to which it had waned was contested. According to Jacob Neusner, during the mishnaic period, purity practices were refocused from part of everyday life such as eating practices to overall abstract questions about reality. Yair Furstenburg, however, citing Ya'akov Sussman, maintains that purity practices remained relevant to everyday eating (in Palestine) even during the post-mishnaic period, though their observances were indeed decreasing. (Jacob Neusner, *A History of the Mishnaic Law of Purities* (Leiden: Brill, 1977); Yair Furstenberg, *Eating in a State of Purity*, 1 n2; Ya'akov Sussman, *Babylonian Sugyot for Zerai'm and Tohorot* (Heb.; Doctoral Dissertation, The Hebrew University in Jerusalem, 1969), 310 n16. Balberg, however, maintains agnosticism on the issue and maintains instead that rabbinic texts suggest more about what the rabbis thought than about what they actually did (Balberg, 11).

[653] Mira Balberg, *Recomposed Corporealities: Purity, Body and Self in the Mishnah* (Doctoral Dissertation, Stanford University, 2011), 3-4 esp. n14; Michael Newton, "The Concept of Purity at Qumran and in the Letters of Paul"

Mira Balberg offers another perspective. She has argued for the significance of *mahshava* in ritual im/purity law as a focus on the self. In her schema, it is precisely because of the fall of the Temple that the rabbis sought to make im/purity law relevant[654] by highlighting its relationship to the individual rather than the community or the Temple.[655] In line with Stoicism,[656] the dominant Greek philosophy during the tannaitic period, the underlying principle guiding tannaitic impurity law became, *"only what matters to me can affect me, and only what I can control can control me*."(123) This explains the need for human *mahshava* to determine whether an item is considered a vessel, or whether food is considered edible or waste (or, for that matter, which door one will use for removing a corpse), in order to determine susceptibility to impurity:

> By distinguishing between what matters and what does not matter to me, I can become less vulnerable to the world around me. The Stoics did not assume that a

(SNTSMS 53; Cambridge: Cambridge University Press, 1985), 52-116; L. William Countryman, *Dirt, Greed, and Sex: Sexual Ethics in the New Testament and Their Implications for Today* (Philadelphia: Fortress Press, 1988), 97-123. For Countryman's critique of Newton, see p.98, n2; Balberg notes that the metaphorical conception of impurity did not displace the concrete conception, but that does not mean that it did not cause the rabbis to hold tighter to their own conception.

[654] Eric Ottenjeim the interest in the self not with the fall of the Temple, but with Jesus' critique in Mark 7, 14-15: There is nothing outside the man (entering into him) which defiles him, but those things coming out of the man are what defile him. (Eric Ottenjeim, "Impurity Between Intention and Deed," *Purity and Holiness,* Eds. MJHM Poorthius and J. Schwartz, Leiden: Brill (2000) 129-148)

[655] The trouble with using Balberg's full thesis in support of *ha'arama* is that it is strange that *Mishnah*, which many believe recasts material specifically for a post-Temple reality, would not discuss *ha'arama* in cases of ritual im/purity law. If it is so important specifically for a post-Temple world that the self be a true subjective self, why not include the rejection of *ha'arama* to underscore that point? This is especially true if *Mishnah*'s cases of *ha'arama* are specifically post-Temple cases. On the other hand, one might argue that the very same point about the subjective self is made by not bringing up the possibility of *ha'arama* at all in this realm. And secondly, the two cases that *Mishnah* does discuss are clearly about *qodashim* and about financial loss. Ritual im/purity law does not fit that theme.

[656] Specifically the Stoic doctrine of *assent* (*synkatathesis*) – the principle that one may and should choose not to be moved by those things that are beyond one's control, though they are potentially destabilizing forces. See Pierre Hadot, *The Inner Citadel: The Meditations of Marcus Aurelius*, trans. Michael Chase (Cambridge, Mass: Harvard University Press, 1998), 101-27; Brad Inwood, *Ethics and Human Action in Early Stoicism* (New York: Clarendon Press, 1985), 40-101; Tad Brennan, *The Stoic Life: Emotions, Duties, and Fate* (New York: Oxford University Press, 2005), 51-80.

> person can go through life entirely unharmed: they simply maintained that by cultivating a knowledge of which harm is really germane to the self and which is not, the world can become less threatening. In a somewhat similar manner, the rabbis accepted the potential impurity of objects as a fact of life, and did not assume that people can do anything to change this fact; but they did think that *knowing* which objects are susceptible to impurity and how they become susceptible and insusceptible will make the management of impurity easier. Consciousness was not introduced to the mishnaic system in order to help *prevent* things from becoming impure, but in order to minimize the number of objects with which one needs to be concerned, so that one can manage the material world more efficiently and skillfully. If one can distinguish between things that are susceptible to impurity and things that are not, one can devote one's attention to a more limited number of objects. (Balberg, 126)

In other words, the role of intention in purity law is to *understand human subjectivity*. Thus, any intentions required must be truly internalized.[657]

While Balberg's offers Stoicism as the rabbinic model, Eilberg-Schwartz offers *imitatio dei*:

> From the sages' standpoint, 'being created in God's image' means being able to exercise one's mind in the same way that God exercises the divine will…Most

[657] Mira Balberg challenges the assumption that intentions are necessarily nominalistic. She observes that the dichotomy between nominalism and realism is based on Cartesian distinctions between the physical and natural, which are considered "real" and mental constructs, which are considered unreal. In the ancient world, however, both the physical and the mental were considered "real," as the physical existence was not the marker of what was real; rather, the *effect* that something had on the world determined its "realness." As Plato writes: "anything which possesses any sort of power to affect another (*to poiein heteronn otioun*), or to be affected (*to pathein*) by another, if only for a single moment, however trifling the cause and however slight the effect, has real existence" Therefore, Balberg follows the observations of Maurice Merleau-Ponty, which place body as both object "like any other object" and as subject which "experiences and reflects on the world." (Balberg, 96) It is intriguing in this regard, as Balberg points out, that the term *adam* is used throughout *Mishnah* to refer to both a person acting volitionally, intentionally, subjectively, as well as one who is being acted upon as an object akin to animals or inanimate objects. However, in all cases but one (*mMakkot* 1:10), the term *adam* is accompanied by references to animals or inanimate objects when referring to the human self as an object being acted upon, but never when referring to the human self as subjective subject. (Balberg, 100). (See M.F. Burnyear, "Idealism and Greek Philosophy: What Descartes Saw and Berkely Missed," *The Philosophical Review* 91:1 (1982): 3-40; R.W. Sharples, *Stoics, Epicureans and Sceptics: An introduction to Hellenistic Philosophy*, (NY: Routledge, 1996), 32-5; Dale Martin, *The Corinthian Body* (New Haven: Yale University Press, 2000), 6-14. See Rene Descartes, "On the Nature of the Human Mind, and how it is Better Known than the Body," *Meditations on the First Philosophy*. (In Rene Descartes, *Selected Philosophical Writings*, trans. John Cottingham, Robert Stoothoff and Dugal Murdoch (Cambridge: Cambridge University Press, 1988), 80-6); Plato, *Sophist*, transl. Benjamin Jowett, (Charleston BiblioBazaar, LLC, 2008), 98, 247D-E; Maurice Merleau-Ponty, *The Visible and the Invisible*, 137.) Balberg's claim, though, that the mind impact reality, however, is the definition of Nominalism as used in legal settings. Thus, we continue to utilize the Nominalist/Realist terminology.

> significantly, they ascribe to human intention the same characteristics that the priestly writer attributes to God's will in the Biblical story of creation (Gen. 1:1-2:4)…In the Biblical account God wills the world into existence. Likewise, in the mishnaic system, human beings have the power to transform the character of objects around them. Merely by formulating a plan to us an object for a particular purpose, an Israelite alters one of the most basic properties of that object, namely, its ability to absorb or withstand cultic contamination.[658]

Imitatio dei should be more than superficial, legal fact. According to both Balberg and Eilberg-Schwartz, there is something deeply real about the subjective element in ritual im/purity law.

Beyond Stoicism and *imitatio dei*, there is yet another reason why ritual im/purity law may concern one's intimate internal thoughts. Vered Noam argues that tannaitic *halakha* offers two basic and opposing tendencies in legislating issues of ritual purity: an immanent, naturalistic perception of impurity (which she calls Realistic) and a perception of impurity as ruled by human intention and awareness (Nominalistic).[659] The Nominalist conception revolves around the fact that human intention and awareness determine susceptibility to impurity as well as im/purity itself, as seen in the toseftan examples cited above. [660] (Noam points out that thought as a determining factor of ritual im/purity is first observed in tannaitic sources and has no precursor in the Bible.)[661] The Realist conception, however, is the view of impurity as a physical fact of

[658] Eilberg-Schwartz, *The Human Will*, 182-3

[659] Vered Noam, "Ritual Impurity in Tannaitic Literature: Two Opposing Perspectives," *Journal of Ancient Judaism* 1 (2010) 102-3

[660] This emphasis on subjectivity and human consciousness has led some, such as Eric Ottenheijm, to suggest that the rabbis turned the physical impurity described in the Bible into a subjective category dependent on personal dispositions. (Ottenheijm, "Impurity…") It has led others to suggest that the rabbis were basically nominalistic in their conception of impurity (See Jeffrey Rubenstein, "Nominalism and Realism"). For Eilberg-Schwartz, the significance of human subjectivity is in the human ability to imitate God by "naming" objects similar to how God named objects in the world when creating it. Balberg, however, sees a flaw in this suggestion, as it reflects usability more than controllability and it accounts for artifacts and food only, while neglecting body parts and human beings, both of which have susceptibility to *tum'ah* not determined by their "usability" to human beings. (Balberg, 122)

[661] Noam, *Ritual Impurity*, 97-98.

reality: "The tannaitic halakhah understands impurity as an entity in nature that bears quasi-physical characteristics of movement, spreading out, flowing, and the like."[662] In attempting to negotiate these two vectors within rabbinic thinking of impurity, Noam posits that the nominalistic applications of purity law are mere "footnotes" or "secondary" layers added to a primarily realistic conception.[663] In other words, impurity is primarily physical, though there are situations in which the human mind turns the impurity switch on and off, so to speak.

Noam relates the element of human intention to the nominalistic, or formalistic, strand of impurity, divorced from reality. Some have argued against such an anachronistic dichotomy between nominalism and realism;[664] it is based on Cartesian distinctions between the physical and natural on the one hand, which are considered "real," and mental constructs on the other, which are considered unreal.[665] In the ancient world both the physical and the mental were considered "real," as the physical existence was not the marker of what was real; rather, the *effect* that something had on the world determined its "realness."[666] Moreover, even among those

[662] Vered Noam, *From Qumran to the Rabbinic Revolution: Conceptions of Impurity* (Heb.; Jerusalem: Yad Ben Zvi Press, 2010) 226.

[663] Noam, *From Qumran*, 247-8 For example, the *tannaim* distinguish between the Biblical categories of אהל, which does not transfer impurity to someone who touches its walls on the outside, and קבר, which does transfer impurity to one who touches its walls on the outside, by defining the latter as a construction with no openings and the former as a construction with at least one opening. This, argues Noam, is a realistic conception, as in an אהל the impurity can drain to the doorway, while in a קבר, it bursts forth through the walls. However, on top of this realistic view, there is a nominalistic footnote: so long as there is a doorframe, even if the frame if completely plugged up, the architectural frame suffices as a doorway, and can render a construction an אהל.

[664] See Leib Moscovitz, *From Casuistics*, 170 n 28

[665] See Descartes, "On the Nature of the Human Mind…" 80-6

[666] Balberg, *supra* n. 645 – See Burnyear, "Idealism ,"; Sharples, *Stoics, Epicureans and Sceptics*,32-5;] Martin, *The Corinthian Body* (New Haven: Yale University Press, 2000) 6-14.) As Plato writes: "anything which possesses any sort of power to affect another (*to poiein heteronn* otioun), or to be affected (*to* pathein) by another, if only for a single moment, however trifling the cause and however slight the effect, has real existence" (Plato, *Sophist*, transl. Benjamin Jowett, (Charleston BiblioBazaar, LLC, 2008), 98, 247D-E)

who accept the use of the dichotomy[667] for analyzing the rabbinic corpus, there are some who clarify that nominalism does not mean that something does not exist in nature.[668] Rather, it means that one's mind, or even one's declaration, creates that reality.[669] Thus, if impurity is primarily a force in nature, it follows that when it depends upon human intentions, it depends upon the most subjectively "true" version thereof. Thus, the job of determining the identity of an object for the purposes of ritual im/purity cannot be defined superficially or artificially. If it is to rule a force of nature, *mahshava* cannot be defined by games or manipulations, but must be a product of the most sincere and subjective self.

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[667] For the thread of this discussion over the past several decades, see Y. Silman, "Halakhic Determinations of a Nominalistic and Realistic Nature: Legal and Philosophical Considerations," *Dine Israel* 12 (1984-85) 251 (Hebrew); Moshe Silberg, "The Order of Holy Things as a Legal Entity," *Sinai* 52 (1962), 8-18; Daniel Schwartz, "Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law ," Eds. D. Dimant and U. Rappaport, *The Dead Sea Scrolls: Forty Years of Research,* Leiden: EJ Brill (1992) 229-240; Jeffrey L. Rubenstein, "*Nominalism* and Realism in Qumranic and Rabbinic Law: A Reassessment," *Dead Sea Discoveries*, Vol. 6, No. 2, Studies in Qumran Law (Jul., 1999), 157-183; Christine Hayes, "Legal Realism and the Fashioning of Sectarians," Ed. Sacha Stern, *Sects and Sectarianism in Jewish History*, 121; (Yair Lorberbaum, *Halakhic Realism*, 4 (abbreviated version of "Halakhic Realism," Shenaton ha-Mishpat ha-'Ivri 27, 2010))

[668] See Jeffrey Rubenstein, "Nominalism and Realism," 158-161

[669] Christine Hayes explains: "Realism -- and here is the technical definition – asserts the mind-independent existence and reality of universals and it asserts the mind-independent existence and reality of abstract entities (like properties, numbers, propositions, etc.). By contrast, nominalism in its earliest version maintained that there are no universal forms (like whiteness or squareness) that exist outside particular things. There are only particular things and these particulars are not instantiations of universal forms; a slightly later version of nominalism maintains that there are no abstract objects because everything is concrete (not material but concrete). So nominalism is anti-Platonic. Platonism is a realism that asserts the mind-independent existence and reality of abstract entities…
So much for metaphysics or ontology (an account of what exists) – what about ethics and law? Ockham's view of ethics is instructive – his is a will-based ethics in which intentions count for everything and external behavior or actions count for nothing. In themselves, all actions are morally neutral. Abelard's morality is also radically intentionalist: the agent's intention alone determines the moral worth of an action. In themselves, deeds are morally indifferent and the proper subject of moral evaluation is the agent, via his or her intentions. Thus we see that for the nominalists Abelard and Ockham, thoughts "create reality" – this is the technical definition of what it is to be a nominalist about ethics …the Mishnah's assignment of various legal statuses based on mental events of various kinds are perfectly, precisely and efficiently described as examples of a legal "nominalism"…Thus, kavvanah in the case of shema, megillah and shofar …is a classic instance of nominalism. The case explicitly contrasts two cases – in both, the same action occurs – an act of hearing. In one case kavvanah is present and in the other it isn't and it is the presence or absence of the actor's intention or kavvanah that determines the status of the action as fulfilling a religious obligation or not…*ke'ilu*…legal fiction [is] a step-child of legal nominalism found first in Roman law and rabbinic halakhah. In legal fictions, we call things into legal existence by naming them as legally existent." (Response to Ishay Rosen-Tzvi, Conference on Halakha and Reality, NYU Fall 2012)

Summary: Problematizing a Neat Dichotomy

The tannaitic material indicates a strong dichotomy between the use of *ha'arama* in different realms. Perhaps this points to a general disparity in rabbinic views of intention in different arenas of law, which would indicate that neither Rosen-Tzvi nor Balberg is completely correct. Perhaps the question is not whether the rabbis understood the inner self concept but simply what role the mind was meant to play in different legal arenas. For the rabbis, action and thought are on a continuum, but the balance tips towards the internal in the realm of ritual im/purity law[670] and toward the external in Sabbath and Festival law. The balance changes, however, in the Babylonian material, as the emergence of self as subject becomes increasingly dominant. This will become clear in the upcoming chapter.

[670] Ishay Rosen-Tzvi struggles with this issue of intention impacting the physical world and suggests as a result that intention is really just "internalized action." He emphasizes the "materiality" of intention by showing how it is always connected to action: "'Thought,' just like 'intension' and 'will', is not an independent psychic phenomenon in the Mishnah, but a mental gesture which always *accompanies* an external act, and is judged as part of this same realm of actions." (Ishay Rosen-Tzvi, "Realism and Nominalism in the Mishnah: the Case of Thoughts, "NYU Halakha and Reality Conference, fall 2012, 16) We do not believe it is necessary to say this, as will be explained in the body of this paper.

Chapter 4 – The Babylonian Talmud and Interiority

In the previous chapter, we argued that the two types of *ha'arama* presented in the Palestinian material parallel one another. Just as the rabbis may accept externalized actions, despite internal intentions to evade the law, they may accept constructed intentions, despite internal intentions to evade the law. In this chapter, we will show that the Babylonian Talmud does not reflect the same tolerance for such ritualization of intention. On the contrary, the material regarding *ha'arama* in BT leans in the direction of the "sincere self" as definitive and expresses concern in cases of disparity between the sincere self and the ritualized self.

Parallel *Sugyot*

A most noticeable difference between the Palestinian and Babylonian Talmuds is simply the scarcity of *ha'arama* or suspicion thereof in BT. This expresses itself both in form and in content. Sometimes BT simply uses different terminology for *ha'arama*, while at other times, BT is not even interested in the circumvention phenomenon at all in its debate.[671] This becomes obvious when viewing parallel *sugyot* in PT and BT side by side. The following is a preliminary list of such parallels:[672]

- *BNed.* 48a does not use the term *ha'arama* in the *Bet Ḥoron* case, whereas *yNed.* 5:7, 39b does.
- Whereas *yNaz*. 5:1, 54a, understands R. Eliezer and R. Joshua's positions about making swearing off benefit when remarrying one's ex-wife in order to keep from conspiring to

[671] PT and BT have practically the same number of distinct *ha'arama*-as-loophole cases. This is astounding, considering their relative lengths.

[672] The lack of interest on the part of *amoraim* and the lack of interest on the part of the *stam* work together in a few ways: a) sometimes *ha'arama* is left out of a *sugya* simply because no *amora* included it; b) the fact that the *amoraim* were less interested in *ha'arama* as a particular concept paves the way for its treatment by the *stam*.

acquire consecrated funds (see chapter 2 above) as being about *ha'arama*, *bErkh.* 23a simply retains the mishnaic terminology of *qinunya*, conspiracy.

- Whereas *yPe'ah* 6:1, 19b, brings up *ha'arama* in a case of making one's field *hefqer* solely in order to avoid having to tithe its produce, *bNed.* 44a brings up the problem using the term רמאין (in all MSS and Ed.) rather than *ha'arama*.
- Whereas *yTer.* 2:3, 41c, refers to drawing water with impure vessels on the Festival as *ha'arama*, *bBeṣa* 18a suffices without any *ha'arama* terminology.[673]
- Whereas *yQid*. 3:4, 64a, in the context of betrothal based on misunderstanding, discusses a case of *ha'arama* (purposely appointing a guarantor who is be penniless), BT does not mention this case at all (*bQid*. 62a-63a).
- BT never mentions the *yPes.* 2:2, 29a, case of one who makes leavened foods *hefqer*, ownerless, just a few days before Passover in order to be able to eat them after the Festival.
- *YḤallah* 3:1, 59a, regarding snacking on unfinished dough has no parallel in BT, though that may simply be due to the paucity of Babylonian material from *Seder Zera'im.*[674]
- Whereas *yMQ* 2:1, 81a, and *yMQ* 3:1, 82a, offer distinct laws for a mourner and someone observing *ḥol ha-moed* respectively, because the latter is more likely to commit evasion, *bMQ* 14a suggests that the rules for the Festival and one's bereavement period should be

[673] To be fair, the terminology is missing from *tBeṣa* 2:3/ *tShab.* 17:8 as well. This may say more about PT's preoccupation with *ha'arama* than BT's lack thereof. However, Maimonides does suggest that BT is stricter than PT (*yPes.* 2:2, 61b) about this law: PT allows it both on Sabbath and Festivals, while BT, he argues, allows this only on Festivals and not on the Sabbath. (See Maimonides, *Mishneh Torah*, Laws of the Festival 5:18; *Mirkevet ha-Mishneh, Laws of the Sabbath* 23:8)

[674] There is, however, a passage in *bMen.* 67b indicates that a person might licitly evade the *ḥallah* requirement by baking less than the amount of dough that would obligate him/her to separate *ḥallah*.

identical. There is no citation of a *baraita* that indicates that the Festival law would ever be stricter than bereavement law for reasons of suspected *ha'arama*. Where BT does cite an instance of *ha'arama* (of selling phylacteries to make a living, *bMQ* 12a) on *ḥol ha-moed* it is a tannaitic citation rather than amoraic or stammaitic discussion.

- *BGittin* 65a raises the case of *ha'arama* for *ma'aser sheni* only tangentially, in order to prove a point about the status of children's acquisitions (though, again, this may simply be due to the paucity of Babylonian material from *Seder Zera'im*).
- R. Tarfon's heroism in feeding three hundred women *terumah* during a famine by betrothing them (*yYeb.* 4:12, 6b) is nowhere mentioned in BT.

For an in-depth comparison between a PT and BT *sugya*, consider the parallel Babylonian *sugya* describing the fate of impure *ḥallah* on the Festival of Passover, one which is considered the locus classicus in the Palestinian Talmud (*yPes.* 3:3, 30a) for establishing the criteria for when *ha'arama* may be used.[675]

פסחים ג:ג משנה (כ"י קאפמן) כיצד מפרישין חלת טומאה ביום טוב רבי אליעזר או' אל תקרא לה שם עד שתיאפה[676] בן בתירה או' תטיל לצונים אמר יהושע לא זה הוא חמץ שמוזהרים עליו בל יראה ובל ימצא אלא מפרשתה ומנחתה עד הערב ואם החמיצה החמיצה

Mishnah: How [on the Festival[677]] do they set apart the dough-offering [if the dough is in a state of] uncleanness? R. Eliezer says, "She should not designate [the dough=offering] before it is baked." R. Judah b. Betera says, "She should put it into cold water." Said R. Joshua, "This is not the sort of leaven concerning which people are warned under the prohibitions, 'Let it not be seen' (Ex. 13:7), and 'Let it not be found' (Ex. 12:19). But she separates it and leaves it until evening, and if it ferments, it ferments.

[675] See chapter 2, above.

[676] MS Parma: תאפה

[677] of Passover

Unlike the PT *sugya* which we analyzed in detail in both chapter 2 and 3 above, the Babylonian *amoraim* do not present R. Eliezer's position as *ha'arama* at all. Indeed, in the *mishnah*, R. Eliezer simply suggests declaring *ḥallah* after the food has already been baked; it is only PT which describes his elaborate piece by piece monologue about the bread. Thus, the Babylonian amoraic explanations of this *mishnah* do not discuss *ha'arama* at all,[678] but instead frames the issue in terms of the potential for guests:

תלמוד בבלי פסחים מח. (מינכן95)

...אמ' רמ' בר חמא הא דרב חסדא ורבה[679] מחלוק' ר' אליעזר ור' יהושע דר' אליעזר סבר אמרינן הואיל ור' יהושע סבר לא אמרינן הואיל אמ' רב פפא ודילמא לא היא עד כאן לא קא"ר אליעזר התם דאמרינן הואיל דבעידנא דקא עיילינהו לתנורא[680] כל חדא וחדא חזייא ליה לדידיה אבל הכא דלאורחים הוא דחזי הא לדידיה [לא] חזי הכא נמי דלא אמרינן הואיל אמ' רב שישא בריה דרב אידי ודילמא לא היא עד כאן לא קא"ר יהושע אלא דאיכא חדא דלא חזיא לדידיה ולא לאורחים אבל הכא דחזי מיהת לאורחין הכי נמי דאמרינן הואיל אמרוה קמיה דר' ירמיה ור' זירא ר 'ירמיה קיבלה ר' זירא לא קיבלה...

…Rami b. Ḥama said: This [argument between] R. Ḥisda and Rava[681] corresponds to the arguments between R. Eliezer and R. Joshua, that R. Eliezer held that we do say, 'Since [guests are coming to eat it, it may be cooked on the Festival]' and R. Joshua held that we do not say: 'Since […].' R. Pappa said: And maybe this not [correct]. Until now, R. Eliezer only said there that we say 'since' because at the time that he puts them into the oven, each one is possible for him [to eat], but here, as it is possible for guests to eat, but not for him to eat [all of it], here too we do not say, 'Since.' R. Shisha the son of R. Idi said: And may be it is not [correct]. Until now, R. Joshua only said [no to 'since'] because there is one [piece] that is not fitting[682] for him [to eat] or for guests to eat], but here where all of it is fitting for guests to it,

[678] *bPes.*48a – See Rashi s.v., *maḥloket R. Eliezer,* where he explains that one might take a small piece of each roll of bread as *ḥallah* rather than an entire roll. Thus, each roll has the potential to be eaten and may be baked on the Festival.

[679] MSS Munich 6, JTS 1608, 1623, Columbia, Oxford, Lunzer-Sassoon: רבא; MSS Vatican 109, Vatican 125, Vatican 134, Venice Ed., Vilna Ed.: רבה
We presume that רבה is the correct reading as Rabbah was R. Ḥisda's contemporary, while Rava was R. Ḥisda's student. It is more likely that two contemporaries will have a major legal disagreement like *ho'il* than that a teacher and student would.

[680] MS Munich 6, *et al.*: אפי להי rather than דקעיילינהו לתנורא

[681] See *supra* n718

[682] We change the connotation of חזי ליה from possible to fitting as it fits the context better.

here[683] too we say 'since.' They said it before R. Yirmiyah and R. Zera. R. Yirmiya accepted it R. Zera did not. [684]

As a fourth generation *amora* and student of R. Ḥisda, presumably Rami b. Ḥami is quite familiar with the concept of *ho'il*, which is discussed more fully earlier in the *sugya*, *bPes.* 46b. The full terminology is הואיל ואיקלעו ליה אורחים, because guests may come over.[685] As mentioned above, on the Festival, there is a prohibition to cook food which is not for that day's consumption. According to this concept of *ho'il* however, if a food may theoretically be eaten on the Festival day itself by guests, [686] even though it likely will not be eaten because the members of the household have already eaten[687] and no guests have been invited, cooking such food is not a punishable offense. (It is unclear whether according to Rabbah it is prohibited but not punishable,[688] or it is completely permissible.[689] Here, either may be possible, as the owner of the bread is in a bind not of his own choosing and is looking for any way out.)

[683] Though the Aramaic is הכי, we translate as הכא in order to parallel the earlier sentence.

[684] We exclude the part of the *sugya* that describes why R. Zera would not accept the *ho'il* interpretation because it is not germane to our discussion per se.

[685] Another application of הואיל regards ownership – namely if one has the potential to redeem an item or to take back the item after having designated it as belonging to someone else, the item is considered to be his/hers though s/he does not have full rights of ownership over it. Earlier in the *sugya*, our case is related to this: considering the *ḥallah* to be in the bread owner's possession, though s/he may not eat it, simply because s/he may rescind the *ḥallah* designation over a particular piece after having made it. Usually, the significance of ownership is not for the purpose of personal use but for the purpose of transgressing an ownership prohibition, or fulfilling a requirement of ownership for ritual purposes. In our case, the ownership over the *ḥallah* dough which had risen would cause a violation of *bal yera'eh*/*bal yimaṣe*, owning leaven on Passover.

[686] There must be enough time left in the day for guests to eat the food. If it is cooked just before sundown, even Rabbah does not allow it. See *Tos. bPes.* 46b s.v. Rabbah

[687] See Meiri, *Bet Ha-Beḥira bPes*. 46b, who cites on behalf of most traditional medieval commentators that even R. Ḥisda agrees that if the member(s) of the household has not eaten yet, there is no punishment for cooking the food because s/he himself may eat it! Rabbah's innovation is that he permits this even once the member(s) of the household has eaten.

[688] See R. Zeraḥiah Ha-Levi, *Ba'al Ha-Ma'or bPes. ad loc.*

[689] See *Shittah Mequbeṣet bBeṣa* 21a s.v., הואיל

Rami b. Ḥama makes the logic of *ho'il* to the case at hand: he suggests that for R. Eliezer, each piece of bread may potentially be eaten, as either a) each piece may or may not ultimately become *ḥallah*,[690] or b) perhaps the person baking will choose to break off a small portion of each separate piece of bread as *ḥallah* rather than designating any single piece as *ḥallah*.[691] Thus, all of the pieces may be baked before any *ḥallah* has been designated. This is quite different from PT's explanation of R. Eliezer's position, according to which a person must indicate an active interest in eating each and every piece: R. Eliezer requires a person to have a "conversation" that suggests that s/he wishes to eat each separate piece of bread. The fifth generation *amora* R. Pappa continues the discussion by challenging that R. Eliezer may suggest *ho'il* in one instance and not in another. Ultimately R. Zera rejects this reading of the tannaitic dispute (on the basis of a discussion between R. Joshua and R. Eliezer which is recorded in *Tosefta*). R. Yirmiyah, however accepts it.

Ho'il is not about a person's constructed intentions or monologues;[692] it is instead about the legal definition of an item. If the item may possible be eaten on the Festival, it may be cooked. If it will most certainly not be eaten on the Festival, it may not be cooked. This takes the discussion away from the actor him/herself and puts the emphasis on the food. The fact that Rami b. Ḥama, R. Pappa, and R. Yirmiyah all prefer a *ho'il* explanation to a *ha'arama* explanation may be a general symptom of discomfort with, or simply a disconnection from,

[690] See R. Samson of Sens cited in *Tos. bPes.* 46b s.v., הואיל

[691] See Rashi *bPes.* 48a *s.v.*, מחלוקת

[692] There is, however, a debate among traditional commentators over whether even Rabbah would punish a person who outright says that s/he is baking for after the Festival, despite the fact that there is still time for guests to arrive. See R. Menahem Meiri, *Bet Ha-Beḥira bPes.* 46b

ha'arama among BT *amoraim*. Unlike *fraus legi* in PT, *ha'arama* is not a pressing issue for these rabbis.

All this, of course, is not to suggest that the *amoraim* or the redactors were aware of and made active changes to Palestinian sources and positions that they alrady knew about, but only that the term, and perhaps even the notion of *ha'arama* as a significant phenomenon simply was not a prominent part of their analysis or thought process. This observation are is to be expected in light of the connection between the Palestinian material and the Roman material, the latter being quite preoccupied with the issue of *fraus legi*.

Language

But the omission of *ha'arama* terminology may also reflect a discomfort with *ha'arama* as a legitimate legal instrument, and perhaps specifically the type of *ha'arama* that relates to intention. To that end, there is an interesting phenomenon attributed to the third and fourth generation *amoraim* which continues into stammaitic strata: the aramaicized term אתי איערומי קא מערים/לאיערומי begins to refer to lying about earlier facts in order to avoid legal consequences. The term הערמה itself has been removed from its original connotation of shrewdness or cunning and has been transformed into mendacity.

I. Divorce and Compensation

בבלי כתובות עט:-פ.
משנה: (פרמה)[693] המוציא יצאות על ניכסי אשתו הוציא הרבה ואכל קימעה קימעה ואכל הרבה מה שהוציא הוציא ומה שאכל אכל הוציא ולא אכל ישבע כמה הוציא ויטול
One who spends on his wife's possessions: if he spent a lot and consumed only a little; spent a little and consumed a lot, whatever he has spent is spent, and whatever he has consumed he has consumed. If he spent and did not consume at all, he takes an oath as to how much he spent and takes [that amount in return when the couple divorces].

[693] As MS Kaufmann has spelling errors, I use MS Parma here.

גמרא:...**(כ"י מינכן)**
ישבע כמה הוציא ויטול: אמ' רב אסי והוא שהיה[694] שבח כנגד הוצאה למאי הילכתא אמ' אביי שאם הייתה[695] שבח יתר על הוצאה נוטל הוצאה בלא שבועה א"ל רבא[696] אתי לאיערומי אלא אמ' רבא שאם היתה הוצאה יתירה על השבח אין לו אלא הוצאה שיעור שבח ובשבועה

R. Jose said: And [he swears how much he spent and takes it] only when there is profit equivalent to what was spent. For what legal end [did R. Jose make his statement]? Abaye said: that if there was more profit than money spent, he can take back the money that he spent without an oath. Rava said to him: If so, he will lie [about how much he spent]! Rather, Rava said: if the money spent was more than the profit, he only gets the amount from what he spent up to the amount of profit.

It seems that Rava,[697] the fourth generation *amora*, uses '*.r.m.* here to mean perjury. According to David Weiss Halivni, Abaye and Rava's discussions are recorded and/or reconstructed by the *stammaim* fairly accurately.[698] Thus, Rava indeed may have used these very words. And though according to Richard Kalmin Rava and Abaye had very few face-to-face

[694] MSS Vatican 113, Vatican 487.11, Soncino Ed., Vilna Ed.: והוא שיש; MS Vatican 130: שיש בה

[695] All others: היה

[696] MSS St. Petersburg, Vatican 130, Vatican 487.11, Soncino Ed., Vilna Ed. add אם כן; all extant MSS and Eds. cite Rava rather than Rabbah as Abaye's interlocutor.

[697] According to Shamma Friedman, originally the names Rava and Rabbah were spelled identically, and only over time (after the close of the Babylonian Talmud) did the suggestions for two different spellings arise to minimize confusion. (Shamma Friedman, "The Spelling of the Names רבה and רבא in the Babylonian Talmud," *Sinai* 110 (Spring 1992) 140-157, esp. 144-5)
See R. Hai Gaon's comments at the ends of *bAZ*:
"אלו כֻּלן ראבה נכתבין בהי והבֵּי דגש. אבל ראבא נכתב באלף, והבֵּי רפוי... ודעו כי ראבה אַבָּה שמו, וזה ריש שהוסיפו עליו - במקום רב. ורַאבָּא אָבָּא שמו, וזה ריש המוסיף עליו - כמו רב. ופירוש אַבָּה כמו שאומר אָבִי, ופירוש אָבָּא כמו שאומר אבא סתם".
(JTS MS, Abramson print); See also, Elyakim Weissberg, "The writing of the names Rabbah and Rava: Rav Hai Gaon's perspective and conflicting opinions," *Meḥqarim b'lashon* 5-6 (1992) 181-214; Aharon Shweka, "Studies in the *Halakhot Gedolot*: Text and Redaction," Doctoral Dissertation: Hebrew University of Jerusalem (2008) 71-73)
Here we are convinced that this is indeed Rava rather than Rabbah even simply because Abaye, Rava's older colleague, speaks first, whereas Abaye's teacher Rabbah would have spoken first. This is a relatively stable rule of thumb according to traditional commentators. (R. Isaiah di Trani *Responsum* #93; Naḥmanides, *Novellae BM* 52a)

[698] Due to chronological proximity. This is as opposed to the lost *havayot de-Rav u-Shmuel*, argumentation between Rav and Shmuel, which came much earlier than the late anonymous editors. During the amoraic period, a time characterized by interest in precise preservation of apodictic statements rather than such rigorous preservation of *shaqla v'taria*, dialectical debate, Rav and Shmuel's many conversations were lost, and there was little for the later editors to reconstruct: "the Amoraim did not deem it important enough to have the discursive material committed to the transmitters with the same exactitude and polish with which they committed the apodictic material…" (Halivni, *Midrash,* 77)

interactions,[699] and this conversation is probably not one of them, this only means that their comments were juxtaposed as a dialogue by *amoraim* or post-talmudic scribes. Thus, Rava's original language was likely preserved just as faithfully as any other attributed statement in the Talmud. Significantly, there is another *sugya* in which Rava uses this terminology when speaking to his student R. Naḥman b. Yiṣḥaq[700] to suggest that someone is lying about being religiously rehabilitated. Again, this may indicate that Rava actually "uses" such terminology, or that he used it once, so those seeking to construct or to reconstruct a conversation might insert it here.

II. A Watched Pot Will Not Boil

בבלי שבת לז:-לח. (ע"פ הגהות דוד הלבני, מקורות ומסורות מסכת שבת עמ' קג-קד)[701]
בעו מיניה מר' חייא בר אבא[702] שכח קדירה על גבי כירה ובשלה בשבת מהו אשתיק[703] למחר נפק ודרש להו המבשל בשבת בשוגג יאכל במזיד לא יאכל ולא שנא מאי ולא שנא רבה ורב יוסף דאמרי

[699] See Richard Kalmin, *Sages, Stories, Authors, and Editors in Rabbinic Babylonia*. Atlanta: Scholars Press (1994) 175-192. Also, Shamma Friedman has suggested that Rabbah and Rava spelled their names the same way and that the difference in spelling is a relatively late phenomenon See Shamma Friedman, "The spelling of the names רבה and רבא in the Babylonian Talmud," *Sinai* 110 (Spring – Summer 1992) 140-164.

[700] It is possible that the *stam* attributed this terminology to Rava because he is cited issuing a similar (though not the same) type of warning to a naïve R. Naḥman in *bSan.* 25a:

בבלי סנהדרין כה.
ההוא טבחא דאישתכח דנפקא טריפתא מתותי ידיה פסליה רב נחמן ועבריה אזל רבי מזיה וטופריה סבר רב נחמן לאכשוריה אמר ליה רבא דילמא איערומי קא מערים אלא מאי תקנתיה כדרב[700] אידי בר אבין דאמר רב אידי בר אבין החשוד על הטריפות אין לו תקנה עד שילך למקום שאין מכירין אותו ויחזיר אבידה בדבר חשוב או שיוציא טריפה מתחת ידו בדבר חשוב משלו

The butcher who sold *terefa* meat, R. Naḥman declared him [an] unfit [witness] and removed him [from his post]. He grew his hair and nails long. R. Naḥman thought to declare him a proper witness. Rava said to him: Perhaps he is being deceptive? Rather, what is the solution? Like R. Idi b. Avin, that R. Idi b. Avin said: One who is suspected of selling *terefot* has no repair until he goes to a place where no one knows him and he returns a lost object that is expensive, or he gives up an expensive *terefa*. In this example too, *ha'arama* bears a deceptive connotation. It is not, however, an example of perjury.

[701] MS Munich is very difficult to parse as it cites a practically nonsensical position for R. Naḥman b. Yiṣḥaq: רב נחמן בר יצחק אמ' לאיסורא מבשל להו דלא אית לאיערומי בשוגג נמי לא יאכל; likewise, MS Oxford is problematic, as it embellishes the suggestion that Rabbah, R. Yosef and R. Naḥman b. Yiṣḥaq argues about the content of R. Ḥiyya b. Abba's statement, which is highly unlikely, considering that R. Ḥiyya b. Abba lived in the same generation as they and probably fully explained his statement. Thus, there should be no debate about its meaning. Halivni prefers to read this as an argument between R. Ḥiyya b. Abba on the one hand and Rabbah, R. Yosef and R. Naḥman b. Yiṣḥaq on the other, as we shall explain in the body of the paper.

[702] MS Munich: ר' חייא בר אבין – It is unlikely that Rabbah and R. Yosef would argue about a statement by R. Ḥiyya b. Avin, given that he lived in the generation following them.

תרוייהו להיתרא מבשל הוא דקעביד מעשה במזיד לא יאכל אבל האי דלא קעביד מעשה במזיד נמי יאכל רב נחמן בר יצחק אמ' לאיסורא מבשל להו דלא אתי לאיערומי בשוגג נמי יאכל האי דאתי לאיערומי בשוגג נמי לא יאכל

They asked R. Ḥiyya b. Abba: If one forgot a pot on the fire, and it was cooked on the Sabbath, what is the law? He was silent and said nothing to them. The next day, he went out and expounded to them: One who cooks on the Sabbath out of error may eat it; purposely, he may not; and there is no distinction. What does "and there is no distinction" mean? Rabbah and R. Joseph, the two of them say it is for permission: one who cooks, who does an action, if purposely, may not eat, but this [person who left the pot on the stove] who did no action [on the Sabbath] even [when he does so] purposely, he may eat. R. Naḥman b. Yiṣḥaq[704] said: "For prohibition": one who actually cooked on the Sabbath who will not lie [about whether he did so purposely or in error], may eat if he cooked in error, but this [person, who left the pot on the stove] who will lie [claiming that he left it there in error] may not eat even when [he left it] in error.

R. Ḥiyya b. Abba asserts that the law is the same for one who forgot a pot on the stove on Friday, thus allowing its contents to boil on the Sabbath, and one who accidentally cooked on the Sabbath itself:[705] the offender may not eat the cooked food. Rabbah and R. Yosef, however,[706] think that even one who left a pot on the stove purposely on Friday to boil on the Sabbath should be allowed to eat from it, as s/he has not performed any act of violation on the Sabbath itself. R. Naḥman agrees that the one who leaves a pot on purpose and by accident should be judged the same way, but for him, this means stricture rather than leniency: If a person who puts the pot on the stove on Friday is permitted to eat its contents, there will be reason to do so on purpose and claim it was mere forgetfulness. There is no such concern for someone to do this on the Sabbath

[703] MS Oxford: אישתיק is absent.

[704] R. Naḥman b. Ya'aqov according to *Ḥiddushei Ha-Rashba ad loc.* (No MSS or printed versions confirm this reading.)

[705] Halivni points to the edition of the *Ba'al Halakhot Gedolot* (Jerusalem: Hildesheimer, 1972): ולא שנא שכח

[706] Halivni asserts that the question מאי ולא שנא is a later addition, based on the historically challenging suggestion that Rabbah/R. Yosef and R. Naḥman did not know what their contemporary, R. Ḥiyya b. Abba meant. Thus, he chooses to ignore it and suggestion that the following statements are not trying to elucidate R. Ḥiyya b. Abba's position but to oppose it, but suggesting that the law of one who forgot the pot or put the pot on purposely on Fri. should be the same, either for leniency (Rabbah/R. Yosef) or for stricture (R. Naḥman).

itself – place a pot on the stove purposely and lie about it – as a person would be willing to perform a lighter violation such as placing a pot on the stove before the Sabbath but not a more severe violation such as directly cooking on the Sabbath.[707]

The terminology of איערומי means lying in this case, but it is likely that the *amora* himself did not use it: perhaps, he simply said לאיסורא, and the *stam* chose to explain his words. Moreover, according to MS Oxford which reads רבה ורב יוסף להיתרא רב נחמן בר יצחק לאיסורא, even לאיסורא is not a direct quotation, but mere paraphrasing by the redactors.

III. *Ketubah* Collection

בבלי כתובות פז: (מינכן)

איבעיא להו פוגמת כתובתה פחות משוה פרוטה מהו מי אמרי' כיון (דאיכ') דקא דייקא כולי האי קושטא קאמרה או [708] דילמא איערומי קא מערמיא מאי תיקו

It was asked of them: If one collects her *ketubah* less than a *perutah* at a time, what is the law? Do we say that because she is so meticulous she is telling the truth, or perhaps is she is being crafty? The matter stands.

The context of this passage is a case in which a woman in possession of her marriage settlement contract admits that her ex-husband has already paid her half of what he owes, but the two parties argue over whether he has paid her the other half. The question posed has something to do with the woman's ability to identify the dates on which each penny was given to her, or perhaps to be able to name the amount she has been given even to the decimal place. The question is whether her exacting recollection of the money indicates that she is telling the truth, or perhaps she is lying in a convincing manner. Again, *ha'arama* here refers to lying. This time it is clearly the *stammaim* who employ the terminology.

IV. Lying Litigant

בבלי ב"מ ד: (מינכן)

סלעי' דינרי' מלוה או' חמש ולוה או' שלש ר' שמעו' (או') בן אלע' או' הואיל והודה מקצ' הטענ' ישב' ר' עקי' או' אינו אל' כמשיב אביד' ופטור... ר' עקי' או' אינו אל' כמשי' אביד' ופטו' טעמ' דא' שלש הא

[707] See *Rashi* and *Ritva Novellae ad loc.*

[708] MS Vatican 113 leaves out או

דא' 'שתי' חייב... לא לעול' אימ' לך שתי' נמי פטו' והאי דקתני שלש לאפו' מדר' שמעו' בן אלעז מודי' מקצ' הטענ' הוי וחייב קמ"ל דמשי' אביד' נמי הוי ופטו' הכי נמי מסתבר' דאי ס"ד שתי' חייב בשלש היכי פט' ר' עקי' האי איערומי[709] קמיערם סבר כי אמינ' שתי' בעינ' אשתבועי אימא שלש קא 'הוי משי' אבד' ואיפטר

[If a loan document says] "coins" [without specifying a number], and the lender says, "Five," while the borrower says, "Three," R. Shimon b. Elazar says: Because he (=the borrower) admitted to some of the claim, he must swear [that he owes that much and no more]. R. Aqiva says: He is nothing but one who returns lost property [for he could have claimed only two], and he is exempt [from swearing that he does not owe the remainder]…[710]

R. Aqiva says: He is nothing but one who returns lost property, and is exempt. This [exemption] is only because he said three, but [had he said] two, he [would be] obligated [to swear regarding the remainder]… No, I say to you that [had he said] two, he would also be exempt. The reason [the baraita] taught "three" is to exclude [his perspective] from [that of] R. Shimon b. Elazar who said the he is considered as one who admits to part of the claim and is obligated [to take an oath]. Instead, this teaches us that he is [according to R. Aqiva, even where he claims three] considered as one who returns lost property and is exempt [from taking an oath]. This is also logical, for if you thought that [for saying] two [the borrower] would be obligated [to take an oath], for three, how could R. Aqiva exempt him? [R. Aqiva reasoned that perhaps] He would be crafty, thinking: If I say two, I will have to take an oath, so I shall say three so that I can be considered like one who returns lost property, and I shall be exempt.

One whose true position is that s/he has been paid two *sela'im* or two *dinarim* may end up perjuring her/himself in court in order to abstain from taking an oath. Again, *ha'arama* indicates lying to avoid legal consequences.

[709] MS Vatican 114: ערומי

[710] The intervening segment regards the rabbinic issue known as *helakh* (composite of הא לך - "this is for you"), situation in which the creditor demands amount X while the debtor admits to owing half of X and offers it to the creditor on the spot.

While there have been earlier instances of *ha'arama* as deception:[711] *tMS* 5:11, for example, uses *ha'arama* to mean misrepresenting one's plans for a given vessel,[712] those instances referred to projecting one's future intentions rather than lying about what has already happened. אתי לאיערומי, however, deals with lying about past facts, such as whether a person *has* (past tense) placed a pot on the stove purposely or by accident; whether a person found two coins or three; whether a woman has received her *ketubah* payment or not, etc. In the stammaitic material and perhaps as early as the fourth century *amoraim*, the terminology of איערומי becomes a synonym for perjury about established fact.[713] Michael Sokoloff in fact, offer the connotation of the reflexive איערומי as "to deceive," while offering the connotation of the simple verb form ערם as "to beguile."[714] This terminology indicates an attitude not simply about these particular cases, but about *ha'arama* itself as something that involves a denial of facts rather than simply a construction of "new" facts.

[711] In addition to indicating anxiety about the overuse of *ha'arama*, PT also uses the term for situations of outwitting convention, often in a tricky way. For instance, PT says about the high priest Joshua b. Gamla who tricked a woman into marrying him –הערמה עשה (*yYeb.* 6:4, 7c); scholars who devise a method of invisible ink are known as ערימין סגין- "very clever people (*yShab. 12:4, 13d; yGit. 2:3, 44b)*," tricking a *mesit* into instigating others in front of witnesses is introduced by the question כיצד עושין לו להערים עליו? - What can they do to trick him (*yYeb.* 16:6, 15d; *ySan.* 7:12, 25d), and meat salesmen taking advantage of a prohibition to weigh *bekhor* meat and charging for how big the steaks look rather than for how large they actually are – מערימין עליו ומוכרין אותו ביוקר (*yMQ* 2:3, 81b) There are likewise sources in *midrash halakhah* which use *'.r.m.* similarly: *Mekhilta d'R. Ishmael Masekhta D'shira* 6; *Sifri Bemidbar Naso* 7

[712] Similarly, *bAZ* 14b describes how an idolater might specifically ask a Jewish vendor for a type of turkey not considered best for idolatry so that the Jew will sell it to him, not suspecting that he will use it for idolatry. See also *yMQ* 2:3, 81b, where a meat salesman takes advantage of a prohibition to weigh *bekhor* meat and charges for how big the steaks look rather than for how large they actually are – מערימין עליו ומוכרין אותו ביוקר .
See also Lamentations Rabbah 1 where the Zealots question whether R. Yoḥanan b. Zakkai's body in a coffin is a case of *ha'arama*.

[713] See also *bGit.* 54b; *bKet.* 52a and 80a

[714] Michael Sokoloff, *A Dictionary of Jewish Babylonian Aramaic of the Talmudic and Geonic Periods.* Ramat Gan: Bar Ilan University Press (2002)

This approach may be hinted to even earlier than the fourth generation *amoraim*, by the third generation *amora* R. Joseph. The following exchange between R. Joseph and Abaye is suggestive of a more skeptical view of *ha'arama*:

בבלי ביצה לז. (כ"י מינכן)

כל אילו בי"ט אמרו ורמינהי משילין פירות דרך ארובה בי"ט אמ' רב יוסף לא קשי' הא ר' אל[י]עזר הא ר' יהושע דתניא אותו ואת בנו שנפל[715] לבור ר' אליעזר או' מעלה את הראשון על מנת לשוחטו ושוחטו והשני עושה לו פרנסה במקומו בשביל שלא ימות ר' יהושע או' מעלה את הראשון על מנת לשוחטו ואינו שוחטו וחוזר ומעלה את השני רצה זה שוחט רצה זה שוחט א"ל אביי[716] ממאי דילמ' עד כאן לא א"ר אליעזר התם דאיפשר בפרנסה אבל הכא דלא אפשר בפרנסה לא אינמי דילמ' עד כאן לא קא"ר יהוש' התם דאפשר בהערמה[717] אבל הכא דלא אפשר לאערומי[718] לא

All these things they forbade on a Festival: But the following contradicts this: One may let down fruit through a trap-door on a Festival but not on a Sabbath. Said R. Joseph: There is no contradiction: the one is according to R. Eliezer; the other is according to R. Joshua. For it was taught: If it and its young fell into a pit, R. Eliezer says: He may bring up one of them in order to slaughter it and must slaughter it; and as for the other, he should feed it in the very place [it fell], so that it does not die. R. Joshua says: He brings up one in order to slaughter it but does not slaughter it, and he uses cunning and again brings up the second; and he may slaughter whichever he desires. Abaye said to him: Whence [do you know that this is so]? Perhaps R. Eliezer said so only where provisions can be made, but not here where no provisions cannot be made. Or, R. Joshua rules thus only there, where one can make use of subtlety, but not here where it is not possible to make use of subtlety.

The *mishnah* on which this section is commenting asserts that there is only one distinction between Sabbath and Festival law: the permissibility of cooking (on the latter). A *baraita* is cited to contradict: fruit that has been drying on a roof may be pulled into the house through the skylight on a Festival, but presumably not on the Sabbath. R. Joseph understands this as typical

[715] MSS Goettingen, London: שנפלו

[716] MS Vatican 134 does not attribute this comment to Abaye; MS Oxford skips the entire section distinguishing the cases on the basis of *ha'arama* being different from full exemption and moves directly to R. Pappa's explanation. On the one hand, in other places in BT (*Shab*. 117b and 124a), the *stam* offers the challenge of ממאי , so perhaps the same is true here too. However, we see no reason why Abaye would not have been responding to, and challenging his teacher, R. Yosef's comparison. Thus, we presume this to be properly attributed to Abaye.

[717] MSS London, Vatican 134: דאפשר לאערומי rather than דאפשר בהערמה

[718] MS Goettingen: אפשר בהערמה rather than אפשר לאערומי; MS Vatican 109: אבל הכא דלא איפשר בה פר<..>

R. Joshua, given his permissive stance regarding *ha'arama* on Festivals. R. Joseph's comparison is fascinating though: he equates a dispensation to disobey the law (in favor of avoiding financial loss) with using *ha'arama* (for the very same purpose). In R. Joseph's view, allowing one's to construct intention is the same as simply allowing one to override the law.

What does such a comparison imply? While one might try to strenuously argue that this is simply an indicator that R. Joshua would be lenient in both cases, the straightforward reading of R. Joseph's position is more troubling. Nowhere in the Palestinian material is *ha'arama* analogized to not having to follow the law in the first place. Perhaps then R. Joseph does not see *ha'arama* as constructed intention at all, on the model that we have proposed thus far. Perhaps he understands *ha'arama* as simply keeping one's exemption from the law hidden, whether from onlookers or from oneself, similar to the *marit 'ayin* understanding of *ha'arama* that we suggested and rejected in the previous chapter. What this would imply is that projected intentions are no true substitution for true organic intention; they are only a cover-up to allow for special dispensations in unique cases.

Nor does Abaye fully disabuse R. Joseph of this comparison: rather than arguing for an intrinsic difference between the two cases, he argues for what appears to be an incidental one. He agrees that R. Eliezer may approve of the dispensation for the drying fruits, but not for the animals because the latter can be cared for in the pit. On the other hand, R. Joshua may see a difference between using the dispensation without *ha'arama* and with *ha'arama.* The terminology of דאפשר בהערמה is intriguing. If Abaye truly believes that *ha'arama* is completely above board, he should ask incredulously: how can you even compare the two? Instead, he too assumes the comparison, and simply says that there is a difference between not following the law

openly and not following it, but being surreptitious about it. Does Abaye too subscribe to this perspective on *ha'arama*, that it is merely a cover-up?

In a similar vein, the sixth generation *amora* R. Ashi is quite harsh in his judgment about *ha'arama* in the case of cooking on a Festival in preparation for the Sabbath, asserting that this act is punished more severely even than purposeful transgression:

בבלי ביצה יז: (מינכן)

ת"ש מי שהניח ערובי תבשילין הרי זה אופה ומבשל ומטמין ואם רצה לאכל את ערובו הרשות בידו אכלו עד שלא אפה עד שלא בישל עד שלא הטמי' הרי זה לא יאפה ולא יבשל ולא יטמין לא לו ולא לאחרים ולא אחרים אופין לו ומבשלין לו אבל מבשל הוא ליום טוב ואם הותיר הותיר לשבת ובלבד שלא יערים ואם הערים אסור אמ' רב אשי הערמה קאמרת שאני הערמה דאחמירו בה רבנן טפי ממזיד

Come and learn: One who left "combined cooked foods" – may bake, cook and insulate, and if he wishes to eat his "combination," he may. If he ate it before baking or insulating, he may not bake, cook or insulate, neither for himself or others, and others may not bake or cook for him. He may, however, cook for the holiday itself, and if he had leftovers, he has left them for the Sabbath, so long as he does not practice cunning [to cook extra]. And if he did practice cunning [to cook extra], it is forbidden. R. Ashi said: You are comparing (the earlier case, not brought here) to *ha'arama*? *Ha'arama* is different, as the rabbis were stricter in its regard than in cases even of purposeful transgression!

The "combination of foods" is a rabbinically created mechanism[719] to permit cooking for the upcoming Sabbath on a Festival that falls out on a Thursday or Friday, while otherwise such cooking would be forbidden. It involves setting aside one cooked item and one baked item before the Festival begins as a representation of the beginning of the cooking process. If one eats the two items, s/he may no longer cook for the Sabbath on the Festival. One may, however, eat any food which happens to remain from the Festival days on the Sabbath. The *baraita* specifies that in such a case, one may not purposely cook excess food on the Festival in to create "leftovers" for the Sabbath. R. Ashi is cited here as polemicizing against *ha'arama*: it is worse to practice

[719] As discussed in chapter 2 above.

ha'arama (in this situation)[720] than it would be to purposely and obviously cook on the Festival for Sabbath without having ever made an *'eruv tavshilin* in the first place.[721] Thus, the rabbis are stricter about it. R. Ashi's comment, taken alone, may simply underscore the seriousness of the prohibition of *ha'arama* in this case – after all, the agent had an *'eruv tavshilin* and chose to eat it rather than to utilize it – there is no pathos here. Moreover, such use of *ha'arama* threatens to undermine the institution of *'eruv tavshilin* altogether.[722] But when compared to the parallel PT *sugya*, R. Ashi's comments may be seen more transparently as an emphatic stance against *ha'arama* as akin to breaking the law:

ירושלמי ביצה ב:א, דף סא עמוד א' (ליידן)
משנה ב:א יום טוב שחל להיות ערב שבת לא יבשל בתחילה מיום טוב לשבת אבל מבשל הוא לי"ט ואם הותיר הותיר לשבת
גמ: איתא חמי דבר תורה הוא אסור ועירובי תבשיליו מתירין[723] אמר ר' אבהו בדין היה שיהו אופין ומבשלין מיום טוב לשבת אם או' את כן אף הוא אופה ומבשל מיום טוב לחול. איתא[724] חמי מציעין את המיטות מיום טוב לשבת ואין אופין ומבשלין מיום טוב לשבת[725] אמ' ר' אילא ולמה מציעין מיום טוב לשבת? שכן מציעין את המיטות מלילי שבת לשבת. ויאפו או יבשלו מיום טוב לשבת? אין אופין ומבשלין (מיום טוב) מלילי שבת לשבת ר' כהנא בריה דר' חייה בר בא[726] אמ' ובלבד שלא יערים

Mishnah: On a Festival which coincided with the eve of the Sabbath [Friday] - a person should not begin cooking on the Festival day [Friday] for the purposes of the Sabbath. But he prepares food for the Festival day, and if he leaves something over, he has left it over for use on the Sabbath.
Gemara:...Now, see here! Is there a matter which is forbidden by the law of the Torah, but rendered permissible by the [rabbinic creation of] using the 'combination of foods' meachanism? Said R. Abahu, "In strict law people should be permitted to bake or cook on a Festival day for use on the Sabbath. But, if you should say so [and decide the law in that way], then a person will cook also on a

[720] R. Ashi's comments seem to reflect a general negative orientation towards *ha'arama* as opposed to a rejection in this case only.

[721] This is the context in which the redactors place R. Ashi's comments.

[722] Rashi *ad. loc.s.v., shahni ha'arama*

[723] MS Darmstadt: אתא חמי מדבר תורה הוא שאסור לבשל ולאפות מיום טוב לחבירו ומיום טוב לשבת ועירובי תבשילין מתירין

[724] MS Darmstadt: אתא

[725] MS Darmstadt: בלא עירוב

[726] MS Darmstadt: רב כהנא בר בא

> Festival day for use on an ordinary day. For, see here: people make beds on the Festival for use on the Sabbath. Should they not be permitted to bake or cook on a Festival day food for use on the Sabbath? R. Kahana b. R. Ḥiyya bar Ba said, "That is on condition that one not practice cunning [by baking or cooking a great deal of food, ostensibly for the Festival itself]."

Once again, the danger is that a person might choose to defraud the law by baking or cooking extra food on the Festival ostensibly for the Festival itself, but truly in order to have leftovers for the Sabbath. In contrast to R. Ashi's assertion in BT that *ha'arama* is more egregious than obviously flouting the law, R. Kahana does not polemicize against *ha'arama*; he merely states that one is forbidden to take advantage of it in this case. And, one might argue that R. Kahana had even more to polemicize about, as in this case, the agent had not even bothered to prepare an *'eruv tavshilin*.

Optics

A contribution of BT which strikes right at the heart of whether inner intentions matter is BT's discomfort when disparity between one's inner intention and external action is discernible when using *ha'arama*. Placing the PT and BT versions of the *Bet Ḥoron* incident side by side brings this into focus:

> **משנה נדרים ה:ו (כ"י פארמה)**: המודר הנייה מחבירו ואין לו מה יאכל נותן לאחר משם[727] מתנה והלה[728] מותר בה[729]מעשה בבית חורון באחד שהיה אביו מודר ממנו הנייה והיה משיא את בנו[730] אמר לחבירו הרי החצר והסעודה נתונין לך במתנה והן[731] בפניך עד[732] שיבוא אבא ויאכל עימנו

[727] MS Kaufmann: משום

[728] MS Kaufmann: והלא

[729] This has already been mentioned in *mNed.* 4:8, but it is here as well in order to provide the legal basis for the *Ḥoron* story. (Albeck, *Shishah Sidrei Mishnah*, Vol. 3, 164)

[730] MS Kaufmann: בתו

[731] MS Kaufmann: אין

[732] עד is absent from MS Kaufmann

בסעודה אמר לו אם שלי הם הרי הן מוקדשים לשמים אמר לו לא נתתי לך את שלי[733] שתקדישם לשמים אמר לו לא נתתה לי את שלך אלא שתהא אתה ואביך אוכלים ושותים ומתרצים זה לזה ויהא עוון תלוי בראשי וכשבא דבר לפני חכמ'[734] אמרו כל מתנה שאינה שאם הקדישה תהא מקודשת אינה מתנה

Mishnah:[735] One who is prohibited by vow from deriving benefit from another, and has nothing to eat, the person [from whom he is vowed benefit] gives [food] to a third party as a gift, and this [prohibited party] may partake of it. There was someone in *Bet Ḥoron* whose father was prohibited by vow from deriving benefit from him. And he [the man in *Bet Ḥoron*] was marrying off his son, and he said to his fellow, "The courtyard and the banquet are given over to you as a gift. But they are before you only so that father may come and eat with us at the banquet." The other party said, "Now, if they really are mine, then lo, they are consecrated to heaven!" Said he to him, "I did not give you want's mine so you would consecrate it to heaven!" He replied, "You did not give me what is yours except so that you and your father could eat and drink and make friends again, while the sin [for violating the oath] could rest on his [my] head"!

ירושלמי נדרים ה:ז, לט עמ' ב (ליידן)	**בבלי נדרים מח? (מינכן)[736]**
ואמר ר' יוחנן ניכר הוא זה שהוא תלמיד חכם. אמר ר' יוסי בירי' בון אכין הוה עובדא יונתן בן עוזיאל הדירו אביו מכנסיו ועמד וכתבן לשמי מה עשה שמי מכר מקצת והקדיש מקצת ונתן לו מתנה את השאר ואמר כל מי	מעש' לסתור חסו' מחסר' והכי קתני אם הוכי' סופו על תחיל'[737] אסור ומעש' נמי בבי' חורון באחד דהוה סופו על תחלתו א' רבא לא שנו אל' דא'ל ואינן לפניך אלא כדי[738] שיבא ( )[א]בא [אבל] א'ל והן בפניך כדי שיבא

[733] MS Kaufmann adds the word אלא here.

[734] MS Kaufmann skips וכשבא דבר לפני חכמים אמרו; instead אמרו חכמים כל מתנה...

[735] All PT translations are taken from Jacob Neusner, *The Talmud of the Land of Israel: Based on the English Translation of Baruch M. Bokser with Lawrence Schiffman*. Atlanta: Scholars Press (1998)

[736] MS Munich and the *editio princeps* offer the most cogent version. I have used MS Munich here, but translated based on a combination of the two versions.

[737] See *bGittin* 66a/*Ḥullin* 39b for a similar usage of הוכיח סופו על תחילתו to resolve a מעשה לסתור situation. David Weiss Halivni points out that one must have a particular version of the *Bet Ḥoron* story in order to view it as הוכיח סופו על תחילתו. The *madir* must have said והן בפניך עד שיבא אבא (as in *MS Parma*) and not והן בפניך (כדי) שיבא אבא (as in Rava's reading in the *sugya*). According to the first version, the gift only belongs to the third party until the father eats from the food. In other words, it is a מתנה על מנת להחזיר, a gift that is given only on condition that it is ultimately returned by the recipient. Halivni favors this reading because of the characterization that the *Bet Ḥoron* case is one of הוכיח סופו על תחילתו. If the *madir* had originally said, "This is yours *only* so that father may eat," this would be a case of הוכיח תחילתו על תחילתו. After all, the *madir* admits to his/her motivations at the outside. If, however, the *madir* simply stipulated that the gift should be returned once the father has eaten, it is only the comment that the *madir* makes after the third party tried to consecrate the food to *heqdesh* – namely, that he may not do so – that makes the *madir*'s motivations clear. And that statement is made not at the outset but later, which makes it a case of הוכיח סופו על תחילתו. It further explains why the *Bet Ḥoron* case and the line prior to it in the *mishnah* about feeding a *mudar* through a third party might be viewed as contradictory. (*Meqorot U-Mesorot* 315-316.)

[738] Although Halivni suggests that the *stam* was using the version of עד שיבא אבא, because on 48b Rava compares *Bet Ḥoron* to a case where one gives a gift only in order to the recipient to give it to someone else (קני על מנת להקנות), he must have the version of כדי שיבא אבא, which is indeed analogous to such a case. (*Idem*.)

שיבוא ויערער על המתנה הזאת יוציא מיד הלקוחות ומיד ההקדש ואחר כך יוציא מזה. ר' ירמיה בעי מעתה אין אדם נותן מתנה לחבירו על מנת שלא יקדישנה לשמים כיני מתניתא כל מתנה שהיא כמתנת בית חורון שהיתה בהערמה שאינה שאם הקדישה אינה מקודשת אינה מתנה	אב' מדעת' הו' דא'ל ל'א אמרי לה א' רבא לא תימ' טע' דא'ל ואינן לפניך הו' דאסור אבל א'ל והן לפני' כדי שיבא ויאכל אסור מאי טע' סעודתו מוכח' עליו
And R. Yoḥanan said: it is clear that he is scholar. R. Yose b.R. Bon said: So it was the case with Jonathan b. Uzziel. His father foreswore him from his possessions and wrote them away to Shim'ei. What did Shim'ei do? He sold some, he sanctified some, and he gave the rest [to Jonathan] as a gift. And he said: Anyone who comes to challenge this gift [to Jonathan] must also remove [the property that I sold] from the buyers and [the property I sanctified] from *heqdesh*. R. Yirmiyah asked: From here to we learn that one may not give a gift to a friend on condition that the latter not sanctify it? Yes, it is taught: Any gift which is like the gift of *Bet Ḥoron* which was done with cunning, that is not [a gift] that if he sanctified it is not sanctified, is not considered a gift.	Does [the *mishnah* bring] an incident [to] contradict [itself]? There is material missing [from the *mishnah*], and so it was taught: If the end proves [the motivations of] the beginning is prohibited. And there was likewise an incident in *Bet Ḥoron* with someone, where its ending [shed light][739] upon its beginning. Rava said: They only learned [that it is prohibited] if he said to him: And they are *only* yours so that my father will come. If [however] he said to him: And they are yours so that father may come, then it is from his own mind. They reported another version: Rava said: Do not say that the reason [this is prohibited] is that he said to him, "and they are *only* yours," etc., but if he had said: "So that he will come and eat [it is permissible."[740] Rather] it is forbidden. Why? Because his meal[741] sheds light upon him (i.e., his intentions).

A person who foreswears benefit from his/her property to another is called the *madir*; the one from whom benefit is foresworn is called the *mudar*. The *mishnah* cites two cases: one in which the *mudar* is hungry, the other in which a *madir* essentially tries to invite his *mudar* father to a family wedding. Only the BT version cites a contradiction between the two cases, whereas PT makes no such claim. Rather, the PT version is occupied specifically with the condition that

[739] Venice Ed.: ומעשה נמי בבית חורון באחד דהוה סופו מוכיח על תחילתו

[740] Venice Ed.:
אמר רבא לא תימא טעמא דא"ל והינן לפניך הוא דאסיר אבל אמ' ליה הן לפניך שיב 'אבא ויאכל מותר אלא אפילו אמר ליה הן לפניך יבא אבא ויאכל אסור מאי טעמא סעודתו מוכחת עליו

[741] According to Maimonides, it is the largesse of the meal that sheds light on his purpose for giving the food away (see Commentary to Mishnah *ad loc*.; *Mishneh Torah* 7:15); Halivni suggests that the fact that the *madir* handed the third party a ready-made meal for his *mudar* to eat is what proves that former's motives. (*Meqorot U-Mesorot Nashim* 315)

has been made on the gift, namely that the recipient may not consecrate it. This condition impacts the legality of the transaction. In the earlier case, there was no such condition made on the gift. R. Yirmiya then wonders about the final line of the *mishnah,* whether all gifts with such a limiting stipulation are not considered gifts. The redactor seems to provide the answer from the *mishnah* with the additional modifier of בהערמה: it is not that one may never give a gift with such a stipulation, but only that a gift done for the purpose of legal circumvention cannot have such a stipulation: any gift like that of *Bet Ḥoron* which was done with cunning, that is not truly a gift, for if one declared it sanctified, it is not sanctified, cannot be considered a gift.

The role of *ha'arama* in PT is not in distinguishing between the two cases in the *mishnah*, but in distinguishing among gifts given on condition that they not be consecrated: when such a gift is given for legitimate purposes, it is permissible, but when given as evasion, it is not permissible. Why is this? The redactors do not explain. According to some commentators this is because the *madir* has not true intention to give the food to the third party as a gift.[742] This seems to echo the discussion from the PT levirate marriage case, where R. Tarfon's skin deep betrothals may not be applied to a levir seeking to support both of his brother's widows because he cannot possibly marry both of them. Regardless of how noble[743] the motives are, the means are insufficient. As Moshe Silberg writes, "the *ha'arama* of *Bet Ḥoron* was…not forbidden, but

[742] *Pene Moshe, s.v.* ירמיה בעי ר'; *Qorban Ha'edah s.v.* בעי ר"י

[743] We are not sure what role equity plays here: the starving *mudar* is a clear question of equity. The purpose of the law of oaths is not for people to die of hunger. But is the case of a son ensuring that his father eats at a family wedding considered an issue of equity? On the one hand, one might argue that the law never wished for oaths to result in grandparents missing their grandchildren's weddings. On the other hand, is that result any worse that grandparents not being permitted on their grandchildren's property in general? Ultimately, this would uproot any laws of oaths between parent and child! And perhaps all *ha'aramot* should specifically be allowed between parents and children. Additionally, equity in the many other cases that we have seen related to money loss or to sin, never to emotional relationships.

ineffective."[744] The same seems to be the case here: one may not offer a gift which may not be used as fully as a gift would be.

BT has an entirely different focus. While the first reading of Rava echoes the perspective that focuses on the gift's limiting condition,[745] the second version of Rava reads differently. It is not the fact of *ha'arama* but that the ruse is obvious which causes the problem. The rabbis do indeed care about the internal intentions of the son, and if they become obvious, the *ha'arama* is rejected. It is this same concern which animates the BT *stam*. The *stam*'s interest is סופו מוכיח על תחילתו, the end of the story reveals the true intentions of the son from the beginning. In the Palestinian material, we had not seen such an interest in the "true motives" of the agent. The notion of one's "true intentions" being too obvious indicates that intention is viewed as internal rather than merely performative. If intention were merely performative, the performance would by definition delineate its own interpretation.

This same issue arises again in the context of a statement made by R. Ashi. He rather explicitly professes anxiety about *ha'arama*, specifically of the intention variety:

בבלי שבת קלט: (Vatican 108[746])
אמ' רבה בר רב הונא מערים אדם על המשמרת ביום טוב לתלות בה רמונים ותולה בה שמרים אמ' רב אשי והוא דתלה בה [רמונים]
Rabbah b. R. Huna said: One may be shrewdly [place] a strainer [on a barrel] on the Festival day to place pomegranates there, and place dregs there [instead]. R. Ashi said: And that is if he places pomegranates there.

According to the *mishnah* (137b), though one presumably may use a strainer which is already in place on the Festival, one may not first place the strainer on top of a barrel on the Festival. The

[744] Silberg, *Principia*, 37

[745] See Rashba Novellae *s.v.,* ואינן לפניך. The problem is that the *madir* has made feeding his father a condition on the gift.

[746] We diverge here from our general use of MS Munich because of MS. Vatican's reading of the final sentence of the *sugya*.

sugya that follows indicates that the issue is a rabbinic prohibition of performing weekday activities on the Festival (138a, top). Rabbah b. R. Huna then offers a way around the issue: put the strainer there not for straining purposes, but "in order to hold pomegranates," which is not a weekday use for a strainer. Indicate somehow that your intention is to use the cloth to hold pomegranates. Offer a projected intention rather than a true, subjective intention. But for R. Ashi, this is insufficient. He insists that the *ha'arama* be more concrete, that there be some actual change in empirical reality, in order to permit this: actually place pomegranates on the cloth, so that it *is* being used for holding pomegranates rather than for straining. R. Ashi's demand for physical action is significant, whether it is in order to hide one's true intentions or because one's intentions must perfectly align with one's actions. By either explanation, one's internal perspective counts.

Consistent with what we have seen to this point, the *stam* prefers the cover-up understanding of R. Ashi's opinion:

> ומאי שנא מיהא דתניא מטילין שכר במועד לצורך המועד ושלא לצורך המועד אסור אחד שכר תמרים ואחד שכר שעורים אע"פ (שלא) שיש לו ישן מערים לשתות ושותה מן החדש התא לא מוכחא מילתא הכא מוכחא מילתא
>
> How is this different from the following taught in a *baraita*: "One may produce beer on the intermediate days of the Festival for the purpose of the Festival, but if it is not for the purpose of the Festival, it is prohibited. Whether date beer or barley beer, even if he has old beer, he may be shrewd [and make beer for beyond the holiday] and drink from the new." There,[747] it is not obvious, here it is obvious.

[747] In a related *sugya*, *bMQ* 12b, the *stam* indicates that there is an entire tannaitic perspective that outlaws *ha'arama* all together by comparing the *baraita* which allows making new wine on the intermediate days of the Festival with a *braita* which prohibits doing so. It is, to my knowledge, the only source to definitively suggest that a *tanna* might outlaw *ha'arama* under all circumstances. Both *bShab.* 117b and 124a offer that possibility as an initial suggestion only to reject it.

The transparency of the ruse is definitive.[748] Our earlier explanations of *ha'arama* being about acceptance of a superficially constructed intention is insufficient here. One's inner intentions are "real," and threaten to undermine his or her actions. On this model, the whole notion of externalized intentions has vanished. As we have discussed, this is inconsistent with the earlier Palestinian material which does not express the same concern.[749] This is yet another indication of the significance of subjective intention and discomfort with disconnect between the inner subjective self and the outer world.[750]

Editorial Changes

While we have seen explicitly that the *stam* evinces concern for obvious ruses, there is more to say about the *stam*'s intervention in the topic of *ha'arama* in BT. Aside from the use of איערומי קא מערים as perjury, and the explicit concern for obvious versus tactful ruses, BT redactors do indeed make important changes to earlier *baraitot* dealing with *ha'arama*. Let us begin with the position of R. Joshua about the parent-child animal case, the very epitome of externalized intention *ha'arama*. BT consistently cites R. Joshua's position as requiring that the

[748] The distinction of מוכחא מילתא and לא מוכחא מילתא for determining whether an act is permitted or prohibited in other contexts is well-worn for the *stam*. See *b'Eruvin* 39a; *bBekh*. 31b; *bTem*. 8b

[749] The farthest the Palestinian material went was to suggest that a *ha'arama* must have the potential to come to fruition, as in the extrapolation from R. Tarfon's actions of multiple betrothals which could not be used in a regular levirate marriage case to allow a priest to betroth two sisters-in-law in order to feed them: in R. Tarfon's scenario, he could have married all three hundred women the levir may only actually marry one of the women. This, however, is not necessarily about the believability of the *ha'arama*, or intentions about it, but rather the question of what constitutes betrothal for the purposes of feeding the betrothed *terumah*.

[750] It is, however, significant to note that this view is possibly indicated in PT's example of immersing a vessel by drawing water (*yPes.* 2:2, 61b), as the dispensation is for small vessels only. Saul Lieberman understands this as being because using large vessels to draw water would be too obviously a ruse (*Tosefta Ki-fshuta*, *Shabbat* chapter 16). Though this is not the only way to read this (perhaps larger vessels would not fit down the well), it is a very probably read. It is possible that notions of the obvious ruse were in the air even earlier, but it was the stammaitic voice that gave it explicit vocabulary. This fits in with the general picture of the *stammaim* as giving explicit terminology to earlier concepts. This indicates that the concept had ripened, so to speak. (See Leib Moscovitz, *Talmudic Reasoning*, Chapter 8)

owner slaughter at least one of the two animals for the day's meal in order to justify the ruse of removing them from the pit: מעלה את הראשון על מנת לשוחטו ואינו שוחטו וחוזר ומערים ומעלה את השני **רצה זה שוחט, רצה זה שוחט**. Neither *Tosefta* nor PT required this. They were content with lifting the animals out "in order" to slaughter them without any slaughtering ever taking place. This is quite a significant development, in that it bars a situation in which one's subjective intentions and one's projected intentions are completely disparate. It is a major change in R. Joshua's position.[751]

BT changes a *baraita* about evading tithes in a similar manner. *YBerakhot* 5:1, 8d, cites a teaching of R. Hoshaya that, "One may increase one's grain with straw and be crafty in its regard to exempt it from tithes." As we explained in chapter 2, this strategy is used to exempt one from tithing by mixing processed grains with unprocessed grain when bringing the produce into one's home. This exempts the produce from the requirement to tithe, as only produce which has been fully processed when it "sees the face of the house" is subject too the laws of tithing. The straw makes the entire pile seem like animal food, which is perhaps why two of the manuscripts, Paris and London, specify that the food should be eaten by an animal. Strikingly, every[752] extant manuscript or printed edition of BT specifies some version of כדי שתהא בהמתו אוכלת, so that *his animal* will eat. By inserting or preserving this clause, the BT redactors indicate an

[751] Here I subscribe to Shamma Friedman's understanding that BT *baraitot* which differ from toseftan are not necessarily reflective of two different traditions; rather, BT actively expands, reworks and changes tannaitic material to suit its own assumption and theories. (See S. Friedman, "Uncovering Literary Dependencies in the Talmudic Corpus", S.J.D. Cohen ed., *The Synoptic Problem in Rabbinic Literature*, Providence, 2000, pp. 35-57; idem, "The Baraitot in the Babylonian Talmud and their Parallels in the Tosefta" (Hebrew), *Atara L'Haim, Studies in the Talmud and Medieval Rabbinic Literature in honor of Professor Haim Zalman Dimitrovsky*, Jerusalem 2000, pp. 163-201; idem, "Towards a Characterization of Babylonian Baraitot: Ben Tema and Ben Dortai", in: *Neti'ot Ledavid: Jubilee volume for David Weiss Halivni.* Y. Elman et al eds., Orhot Press, 2007, 195-274.

[752] This is true of all five instances in BT where the teaching of R. Hoshaya is cited: *bBrakh* 31a; *bPes.* 19a; *bAZ* 41b; *bMen.* 67b; *bNid*. 15b.

unwillingness to allow a person to present his/her produce as though it is animal food but to subsequently eat it him/herself. Rather, the intentions expressed through the action of bringing the food indoors in this way must be carried out in practice: *only an animal may eat the food*.[753]

In each of these examples, BT reduces the tension between a person's presumed or stipulated intention and the outcome of his/her actions. Indeed, this dovetails nicely with the concern on *bShabbat* 139b with obvious the ruse is on. Returning to an earlier portion of the *ho'il* passage from *bPesaḥim* 48a cited above, the *stam* indicates a similar insistence on actions which reflect true thoughts:

בבלי פסחים מח. (מינכן)[754]

איתמר האופה מיום טוב לחול רב חסדא אמ' לוקה לא אמרינן ליה הואיל ומקלעי ליה אורחין חזי ליה רבה[755] אמ' אינו לוקה אמרינן הואיל... איתיביה בהמה מסוכנת לא ישחוט אלא אם כן יכול לאכול ממנה כזית צלי מבעוד יום כדי שיכול לאכול ממנה אע"ג דלא אכל בשלמ' לדידי דאמרינן הואיל ואיבעי למיכל מצי אכיל משום הכי שחיט אלא לדידך דאמרת לא אמרינן הואיל אמאי שחיט א"ל משום הפסד ממונו ומשום הפסד ממונו שרינן איסורא דאורייתא אין משום הפסד ממונו גמר בלבו לאכול כזית מבעוד יום ואי אפשר לכזית בשר בלא שחיטה...

It was said: One who bakes on the Festival for a mundane day, R. Ḥisda says, He gets lashes; we do not say, 'Because guests come to him, it is [considered] fit [food for] him [to eat, and thus, to cook]. Rabbah said, He does not get lashes; we say, 'Because…'…A challenge was posed from a *baraita*: One may not slaughter [on the Festival] an animal in danger [of dying] unless one can eat an olive's worth of roasted [meat] from it during daylight. That is that one *can possibly* eat from it, even though [in the end] *one did not eat*. This is harmonious with my opinion, that we say, 'Because if he wishes to eat it, he can, therefore he may slaughter it.' But according to you[r opinion], that you say, 'We do not say 'Because,' why may he slaughter? He said to him, Because of his financial loss. And because of financial loss we permit a Biblical violation? Yes, because of his financial loss, *he decides in his heart* that he will eat an olive's worth of meat during daylight, and one cannot eat [even] and olive's worth of meat without slaughter[ing the animal].

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[753] See *supra* n. 437. The limitation on eating likewise may be related to the question of snacking versus eating a proper meal. Snacking, known as *akhilat 'arai*, is permitted for food that has not been tithed, whereas eating a proper meal is not. Animal food is defined as a snack, while human consumption would be defined as a proper meal. See *bMen.* 67b *Tos. s.v.*, כדי שתהא בהמתו אוכלת ופוטרת מן המעשר

[754] With the emendation of changing Rava to Rabbah.

[755] MS Munich 95 (and MSS Munich 6, JTS 1608, JTS 1623, Columbia, Lunzer-Sassoon) actually renders רבא, but given the analysis above, we have changed it to Rava.

Rabbah paints R. Ḥisda into a corner, offering a *baraita* which seems to rely upon *ho'il* – one may slaughter an animal that is in danger of (dying? Becoming a *terefa*?) on the Festival day if one will be able to eat at least an olive's worth from the animal on that day. This is the case even if one does not eat. For Rabbah, this indicates a reliance upon *ho'il*: because the agent can eat, the food is considered Festival food. R. Ḥisda retorts that this is only permitted because of money loss. Rather than simply leaving this as a dispensation to prevent financial loss, the *stam* offers the interpretation: "Because of his financial loss, he *concluded in his heart* that he would eat an olive's worth that day, and one may not eat an olive's worth of meat without slaughter[ing the animal]." The terminology of גמר בלבו, concluded in his heart, resonates as an internal "sincere-self" decision. This is not merely a performative intention, but a subjective, internal decision.

Who May Utilize *Ha'arama*?

The continuation of R. Ashi's comments (cited above) in *bShabbat 139b* adds yet another element which does not emerge in the Palestinian corpora: who may employ *ha'arama* to circumvent the laws?

> אמרו ליה רבנן לרב אשי חזי מר האי צורבא מרבנן ורב הונא בר ר' חוין שמיה ואמרי לה רב הונא בר' חלוון שמיה, דשקל ברא דתומא ומנח בברזא דדנא ואמר לאצנועיה קמיכוינא ואזיל ונאים במברא ועבר להך גיסא וסייר פירי ואמר אנא למינם קמיכונא. אמר להו הערמה קאמרת? הערמה בדרבנן[756] היא וצורבא מרבנן לא אתי למיעבד לכתחילה.
>
> Said the disciples to R. Ashi: "We would call the attention of the master to this young scholar, R. Huna bar Ḥivan or Ḥeluvan by name, who takes the clove of garlic and stops up a hole in a wine barrel with it, saying, that he intends merely to preserve the clove of garlic. He also goes and lies down on a ferry, presumably to sleep; in the meantime he is ferried across the river, and on the other side he watches his fields, saying, however, that he merely intended to sleep." Answered R. Ashi: "You speak of cunning. All the acts mentioned by you are prohibited by

[756] MS Oxford: הערמה מ(ד)רבנן היא

> rabbinical laws only, and in the case of a scholar, there is no danger that he will commit them *ante factum*.

R. Ashi's students question his strong stance mentioned above against intention oriented *ha'arama* using the example of a young scholar whose intentions are empirically suspect. R. Ashi allows it because he is a rabbinical student. While the exact nature of R. Ashi's comments is elusive - is R. Ashi is suggesting that *ha'arama* is only rabbinically prohibited,[757] that it is permissible only where circumventing a rabbinic law,[758] or that *ha'arama* is a tool offered by the rabbis themselves?[759] – the conclusion of his comments is clear. It is only the young scholar who has the scruples[760] and thus the right to use this type of shrewdness.[761] He is trusted not to use *ha'arama* when he does not need to, or alternatively he is trusted not to allow this to erode his respect for the law and ultimately to simply directly sail across the river with no ruse at all. A less learned person in the very same predicament would not be so trusted.

This is an important turn in the politics of *ha'arama*: it is meant only for a certain type of person with a certain level of commitment to the rules. In fact, in the several examples in which God was seen as the perpetrator of a *ha'arama* back in our opening chapter (above), God's actions were frowned upon. Is R. Ashi giving *carte blanche* permission for *ha'arama* to Torah

[757]Based on MS Oxford –הערמה מדרבנן היא- see *Sefer Ra'avya* chapter 296

[758] The language of MS Vatican הערמה בדרבנן היא became, for pre-modern and modern traditional commentaries, the source for a position that *ha'arama* is only permitted in cases of circumventing rabbinic laws. See, for instance, Rabbi Alexander Shor's commentary to *bPes.* 21b in *Bekhor Shor 'al ha-Shas*. (*BGit.* 65a offers similar support for *ha'arama* as a phenomenon used specifically to circumvent rabbinic, as opposed to Biblical, law.)

[759] MS Oxford: הערמה מרבנן היא– it is *from* the rabbis

[760]Less knowledgeable people, however, might not distinguish between the two situations. See *Rosh bShab.* 20:5.

[761]While some do suggest that the clause לא אתי למיעבד לכתחילה should be read as a denial that the young rabbinic scholar described in this very scenario is even practicing *ha'arama*, this is a very forced reading. (Sefer Ra'avya chapter 753).

scholars? Is this a local statement or a general dispensation?[762] Regardless of the precise parameters of R. Ashi's qualification, the more elite-oriented perspective, preferring the *ṣurva me-rabanan*[763] is characteristic of Babylonian amoraic perspectives in general, as secluding themselves from non-rabbis and looking down upon them. This is quite pronounced compared to Palestinian *amoraim* who were much more integrated into society.[764] As Richard Kalmin writes:

> Palestinian sources depict informal relations between Palestinian rabbis and non-rabbinic Jews: they casually greet one another in the street, dine together in each other's homes, and literally and figuratively touch one another. Babylonian sages, in contrast, are depicted maintaining social distance from non-rabbinic Jews, interacting with them in formal settings: issuing verdicts in court cases, answering halakhic questions, delivering lectures in public, and the like. Babylonian rabbis are wary even of casual relationships with non-rabbis, which they fear could lead to more intimate relationships and eventually to marriage, and tarnish their highly prized purity of lineage.[765]

And while Kalmin has recently suggested that the rabbis became more integrated beginning in the fourth century, as a result of influence from the Roman Empire, this does not

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[762] According to the medieval commentator, *Ra'avya*, R. Ashi's comments permit all *ha'aramot* to Torah scholars, even where forbidden for the *hoi polloi*. He thus assumes that R. Ashi's comments are not simply about this local case, but are a global statement regarding *ha'arama*. (R. Eliezer Yoel Ha-Levi of Bonn, *Laws of the Festival*, chapter 752; *Laws of the Ḥol Ha-moed*, chapter 827)

[763] The term צורבא מרבנן may also be used to indicate someone who is at the beginning of their studies rather than a full scholar (*bBrakh.* 33b; *bBeṣa* 16b; *bGit.* 37b, *et al.*). In such examples, it is used to denote the inferiority of a young scholar and can even be condescending in tone.

[764] See Richard Kalmin, *The Sage in Jewish Society of Late Antiquity*. London: Routledge (1999). He writes: "Babylonian rabbis resembled late antique monks and holy men, both Christian and pagan, who managed to be both dissociated from and part of the world, detached from society in certain contexts and capable of exercising a leadership role in others." (Introduction) Kalmin has recently suggested that the rabbis became more integrated beginning in the fourth century, as a result of influence from the Roman Empire, but this does not necessarily mean that they no longer distinguished between the religious commitments of rabbis and non-rabbis. It simply means that they were more willing to interact with non-rabbis socially, and even to marry them. (Richard Kalmin, *Jewish Babylonia between Persia and Roman Palestine: Decoding the Literary Record*. Oxford: Oxford University Press (2006) Conclusion, esp. 181ff.)

[765] Kalmin, "Sage," 27. He attributes this difference between Palestinian and Babylonian rabbis to several factors: a) cultural differences between a more egalitarian structure in Roman Palestine and a more hierarchical culture in Zoroastrian Babylonia, and b) the weaker station of Palestinian rabbis which led to their dependence on non-rabbis, as compared to the more stable and powerful position of Babylonian rabbis, allowing them to be aloof. (see *idem*., Introduction, Conclusion)

necessarily mean that they no longer distinguished between the religious commitments of rabbis and non-rabbis. It simply means that they were more willing to interact with non-rabbis socially, and even to marry them.[766] As Jeffrey Rubenstein writes, "there stands out a radical and hostile elitist streak unique to the Bavli. A number of Bavli traditions express a degree of contempt and disgust for non-rabbis that is completely absent from other rabbinic works."[767] After all, the distinction between the צורבא מרבנן and others is clear especially in the generation of Abaye and Rava,[768] R. Ashi himself,[769] as well as the anonymous editors.[770]

There is another example of the special *ha'arama* permissions for a *ṣurva me-rabanan*:

בבלי ערכין כג. (קאפמן)
משנה: המקדיש נכסיו והיתה עליו כתובת אשה ר' אליעזר אמ' כשיגרשנה ידיר הנייה ר' יהושע א אינו צריך כיוצא בו אמ' ר' שמעון בן גמליא' הערב לאשה בכתובתה היה בעלה מגרשה ידיר הניה שמא יעשו קינונוייא[771] על נכסיו של זה ויחזיר את אשתו
כג. גמרא (מינכן):... משה בר עיצוראי[772] ערבא דכתובתא דכלתא[773] הוה ורב הונא בריה צורב' מרבנן הוה ודחיקא[774] ליה מילתא א' אביי[775] ליכא דליסברה עצה לרב הונא וליגרשה לדביתהו [ו]תסב כתובתה מאבוה וליהדרה ניהליה א"ל רבא והאנן ידור הנא' תנן ואביי אטו כל דמגרש בבי דינא קמגרש איגלאי מילתא דכהן הוא א' אביי בתר עניי אזלא עניותא ומי א' אביי הכי והא' אביי איזהו רשע ערום זהו המשיא עצה למכור בנכסי' כר"ג בריה שני וצורבא מרבנן שאני

[766] Kalmin, *Jewish Babylonia*, Conclusion, esp. 181ff.

[767] Jeffrey L. Rubenstein, *The Culture of the Babylonian Talmud*. Baltimore: The Johns Hopkins University Press (2003) 124ff. Rubenstein attributes the phenomenon to stammaitic pseudepigraphs (130). We do not analyze this here in full but only take note of the elitism evinced here by R. Ashi.

[768] *bBB* 22a,168a; *bBerakh* 15a; (*bYoma* 26a – not about differences in attitudes, but about differences in lineage), *bTa'anit* 4a (about the צורבא מרבנן 's passion for Torah) *et al.*

[769] *bYeb*. 121a – but this is not about rabbinic elitism, just a difference in law based on realities within the culture; *bShevuot* 41a (interlocutor of R. Ashi)

[770] *E.g., bBM* 19a, 42a; *bBB* 168a; *bBer*. 19a; *bBekh.* 35a; *bKet.* 20a-b

[771] MS Parma: קינוניא

[772] Different MSS and Ed. offer different spellings of his name.

[773] All other MSS and Ed. use the possessive כלתיה, *his* daughter-in-law

[774] MSS London, Vatican 119: רחיקא, probably a scribal error

[775] MS Vatican 120 leaves Abaye out in this instances, but includes him in all other relevant places in the *sugya*. This was probably in error, as the MS here reads אמר without any attribution.

> **Mishnah*:*** If a man dedicates his possessions to the sanctuary while still liable for his wife's *ketubah*, R. Eliezer says: When he divorces her he must vow [that he will not derive any further] benefit [from her]. R. Joshua says: He need not do so. Likewise said R. Simeon b. Gamliel: Also if one guarantees a woman's *ketubah* and her husband divorces her, the husband must vow [to derive no] benefit [from her] lest he make a conspiracy against the property of that man and take his wife back again.
> **Gemara:**…Moses b. Aṣri was the guarantor for [the *ketubah* of] his daughter-in-law. Now R. Huna, his son, was a young scholar, and his financial circumstances became challenging. Said Abaye: Is there no one to advise R. Huna to divorce his wife so that she might claim her *ketubah* from her father-in-law, and he (=R. Huna) might take her back? Said Rava to him: But we learned, he must vow [that he will not derive any further] benefit [from here]? And Abaye [said/would say]: Does everyone who divorces his wife do so before a court? [Later] it was revealed that he was a priest (which is why he had not gotten such advice in the first place]. Abaye said: Poverty follows the poor. But did Abaye really say this? Did not Abaye said: Who is a cunningly wicked person?[776] He who offers advice to sell property in accord with R. Simeon b. Gamliel? His son is different, and a young scholar is different.

As we have explained in the previous chapter regarding the PT version of this law, there is a concern that a husband might divorce his wife in order to make her *ketubah* money available and then remarry her to get hold of it himself. In this BT *sugya*, Abaye suggests that R. Huna the young scholar in financial straits, and his wife, perform just such a ruse against his father, who

[776] There is another explanation for רשע ערום that is cited by some MSS/Ed. in the name of Abaye:
בבלי סנהדרין עו.-עו:
ואביי ורבא האי אל תחלל את בתך להזנות' מאי עבדי לי' א"ר מני זה המשי' בתו לזקן ר' עקי' או' זה המשה' בתו בוגר' א' רב כהנא משו' ר' עקי' אין לך עני בישר' אל' רשע ערו' והמשה' בתו בוגר' אטו המשה' בתו בוגר' לאו רשע ערום הו 'א' אביי הכי א' (קר') איזהו עני ורש' ערו' זה המשה' בתו
And Abaye and Rava, this: "Do not profane your daughter to cause her prostitution," what do they do with it? R. Mani said, This is one who marries his daughter off to an old man. R. Aqiva says, This is one who delays his daughter [from marriage] as an adult. R. Kahana said in the name of R. Aqiva, There is no poorer man in Israel than a cunning knave and one who delays his daughter as an adult. But is not one who delays his daughter as an adult not a cunning knave? Abaye said, This is what he says: "Who is a poor man? This cunning knave who delays his daughter as an adult."
Following Halivni, we do not believe this to be Abaye's statement for several reasons: first, he is cited in several places in BT asserting the *rasha 'arum* is about giving advice to a primary heir about how to fend off his secondary heir; second, this definition of *rasha 'arum* is excluded from the litany of explanations offered by *amoraim* on *bSotah* 21b. Hence, we exclude this from our discussion of Abaye's attitudes toward *ha'arama*. (See *Meqorot U-Mesorot Sanhedrin-Horayot*, 139) Indeed MS Jerusalem (Yad HaRav Herzog) excludes his name, preferring הכי קאמר with no attribution. It is possible that Abaye's name is there because he and Rava are the subjects of the beginning of the inquiry, and he is the one who has defined the *rasha 'arum* elsewhere in BT.

was the guarantor of the *ketubah*. Clearly it is because Abaye sympathizes with the man's plight, as is consonant with his statement, 'Poverty follows the poor." The *stam*, however, questions Abaye's statement, as he is specifically the person who condemns the *rasha 'arum* as a person who encourages such ruses.[777] Therefore, the *stam* posits a distinction between one's child and others, between a young scholar and others.

While the traditional commentators[778] distinguish the young scholar as a person who deserves financial support and has more right to such support than others,[779] in context of R. Ashi's comments about the permissibility of cunning for young scholars specifically, we can add a second layer to the preference of the young scholar. Though generally such conduct might be

[777] Significantly, Abaye's definition of the *rasha 'arum* meets our expectations – one who takes advantage of loopholes. It is cited elsewhere as well, in a pericope in which basically all of the definitions amount the too doing something that is within the letter of the law but not within its spirit.

בבלי סוטה כא: - כב.

(For the sake of clarity, we use Venice Ed. here; all MSS are riddles with blank spaces and difficulties)

היכי דמי רשע ערום אמ' ר' יוחנן זה המטעים דבריו לדיין קודˈ שיבא בעל דין חברו ר' אבהו אומ' זה הנותן דינר לעני להשלים לו מאתים זוז דתנן מי שיש לו מאתים זוז לא יטול לקט שכחה ופיאה ומעשר עני היו לו מאתים חסר דינר אפי 'אלף נותנין לו כאחת הרי זה יטול ר' אסי אמ' ר' יוחנן זה המשיא עיצה למכור בנכסים מועטין דאמ' ר' אסי א"ר יוחנן יתומים שקדמו ומכרו בנכסין מועטין מה שמכרו מכרו אביי א' זה המשיא עצה למכור בנכסים כרשב"ג דתניא נכסיי לך ואחריך לפלוני וירד הראשון ומכר ואכל השני מוציא מיד הלקוחו' דברי ר' רשב"ג אומ' אין לשני אלא מה ששייר ראשון רב יוסף בר חמא אמ' רב ששת זה המכריע אחרי' באורחתיו ר' זריקא אמר רב הונא זה המקיל לעצמו ומחמיר לאחרים עולא אמר זה שקרא ושנה ולא שימש תלמידי חכמי'

What is a cunning knave? R. Yoḥanan said: This is one who explains his case to the judges before the other litigant arrives. R. Abahu says: This is one who give a denar to a poor person in order to bring him to a total of 200 *zuz*, as we learn, "One who has 200 *zuz* may not collect the fallen [grain], forgotten [grain] or the corner [of the field] or the tithes of the poor. If he has 200 minus one denar, even if one thousand people give him [food/money] at once, he can take. R. Asi said in the name of R. Yoḥanan, This is one who gives counsel to sell one's few possessions. As R. Asi said in the name of R. Yoḥanan, Orphans who hastened to sell with few possessions, that which they have sold is sold. Abaye said, This is one who gives counsel to sell possessions according to the position of R. Simeon b. Gamaliel. As it is taught, [If a testator writes] "My possessions are yours, and after you, they will belong to so-and-so," and the first one went and sold and consumed [the inheritance], the second person may remove [the inheritances] from the hand of the buyers. These are the words of Rabbi. R. Simeon b. Gamaliel says: The second person has [rights] only [to] what the first person left over. R. Yosef b. Ḥama said in the name of R. Sheshet: This is one who judges others in his own way. R. Zeriqa said in the name of R. Huna: This is one who is lenient for himself but strict for others. Ulla said: This is one who read and repeated but did not apprentice with Torah scholars.

[778] See *R. Gershom ad loc.*; the Vilna Gaon argues that the exception is that R. Huna is *both* the son of the guarantor *and* a young scholar (*hagahot u-beurim me-rabbeinu ha-gadol ha-gra mi-vilna ad loc.*)

[779] See Kalmin, *Jewish Babylonia*, Conclusion, for a discussion of BT amoraim encouraging non-rabbis to support rabbis. Moshe b. Aṣri, R. Huna's father, is likely a non-rabbi!

viewed by Abaye as illicit trickery, a young scholar has permission to use it; he uses it judiciously and thus will not abuse the dispensation.

The other part of this equation is the concern about the average person's slippery slope, the erosion of his/her commitment to the law, which is also echoed elsewhere in BT by the *stam*:

בבלי ביצה יח.

ת"ש דאמר רב חייא בר אשי אמר רב נדה שין לה בגדים מערמת וטובלת בבגדיה ואם איתא נגזור דלא אתי לאטבולי ביענייהו שאני התם מתוך שלא הותרה לה אלא על ידי מלבוש זכורה היא.

Come and learn, as R. Ḥiyya b. Ashi said in the name of Rav: a menstruant woman who has no [pure] clothes, employs cunning and immerses [for purification] in her clothes [thus purifying the clothes as well].[780] And if this is so, let us decree [that she not do this] so that she will not immerse [the clothes] directly [which would be an infraction]? It is different there, because it is only permitted to her by way of wearing clothes, she will remember [not to immerse clothes directly on the Festival].

Neither *Mishnah,* nor *Tosefta*, nor PT brought up the possibility of forbidding a *ha'arama* practice for fear that one might do worse. The *stam* in BT, however, following R. Ashi's suggestion, does.[781] While this is different from the other manifestations of the importance of intentions in defining actions, it shares something in common: the turn to the subjective self. How will this affect the person's general observance of the law?

A Sampling of Non-*Ha'arama* loopholes

There is but one clear citation of a fourth generation *amora*, Rabbah b. 'Ulla who is described as מערים איערומי in order to retrieve a loan during the Sabbatical year. It is unclear who is characterizing his actions as *ha'arama* and what those actions actually entail, and no debate follows. There is also a tradition that R. Ada b. Ahava [782]מערים ומלח גרמא גרמא: when he

[780] For a discussion about whether this *sugya* refers solely to Festivals or to Sabbath too, see Halivni, *Meqorot u-Mesorot ad loc*, 298-300.

[781] The *stam* does the same for the suggestion of drawing water from a well with an impure vessel in order to purify it on the Sabbath, though, as noted above, the terminology of *ha'arama* is not used there.

slaughtered an animal on the Festival in order to eat it, rather than losing any of the meat that was not to be eaten that day,[783] preserved all of the meat by salting each piece individually as though it was for that day's meal and then "decided" not to eat it.[784] We do not, however, know if he is a fourth generation *amora* or a second generation *amora*.

But it is not our intention to say that the rabbis did not use loopholes. They certainly did. However, a) they did not use the *ha'arama* nomenclature as often as PT, b) and they were concerned with integrity in situations of inner intentions and outer intentions not corresponding to one another. We mentioned in our Introduction that a comprehensive analysis of all rabbinic loopholes, whether labeled *ha'arama* or not, is a desideratum. While this is beyond the scope of our project, below we offer a brief representative sampling of BT loopholes which are not labeled *ha'arama* but use the same or similar methodologies to the examples we have seen. In so doing, we may that some of the trends we have observed regarding BT's general approach to *ha'arama* are in evidence in these other examples as well.

I. Forced Consent

בבלי ערכין כא.-:

משנה: חייבי ערכין ממשכנין אותן חייבי חטאות ואשמות אין ממשכנין אותן חייבי עולות ושלמים ממשכנין אותן אע"פ שאין מתכפר לו עד שיתרצה שנאמר לרצונו כופין אותו עד שיאמר רוצה אני. וכן אתה אומר בגיטי נשים כופין אותו עד שיאמר רוצה אני

גמרא (מינכן): ואע'פ שאין מתכפר לו: תנו רבנן יקריב אתו מלמד שכופין אתו יכול בעל כורחו ת'ל לרצונו הא כיצד כופין אתו עד שיאמר רוצה אני...וכן בגיטי א' רב ששת האי מאן דמסר מודעא אגיטי מודעא מודע' פשי' לא צריכא דעשאה ואירצי מהו דתימ' בטולי בטליה קמ"ל א"כ ליתני עד שיתן מאי עד שיאמר עד דמבטל ליה למודעיה

Mishnah*:* Those obligated in donations of worth, [we may] take collateral. Those obligated to bring sin offerings or guilt offerings, [we] do not take collateral. Those

[782] *bBeṣa* 11b according to all MSS and printed editions

[783] Salting the meat for after the Festival would be considered preparing for after the Festival, and would be forbidden.

[784] The PT version (*yBeṣa* 1:5, 60c) is more explicit, though it names R. Aḥa rather than R. Ada. (Given that R. Aḥa is named as citing Rav, and R. Ada was actually Rav's student, R. Aḥa is probably an error.)

ר' אחא בשם רב מולח ומערים מולח ומערים מלח הכא ומלח הכא עד דו מלח כוליה

R. Aḥa in the name of Rav: salt and trick, salt and trick. He salts here, and he salts here, until he has salted all of it.

> obligated to bring burnt offerings and peace offerings, [we] take collateral from them. Even though one is not atoned for until he agrees [to it], as it says, "according to his will," [they] force him until he says, "I want." And likewise regarding writs of woman (=writs of divorce): they force him until he says, "I want."
> **Gemara**: And even though he is not atoned: The rabbis taught, "'he shall offer it,' teaches that they force him. Perhaps against his will? Hence, it says, 'according to his will.' How so? They force him until he says, 'I want.'"…And likewise regarding writs [of divorce]: R. Sheshet said, "One who declares a protest against his writ, his protestation stands." Obviously! No, it is necessary to explain this in a situation in which the write was coerced and he agreed to it. What might we have said? He nullified it (=the protest). This teaches, if so, let it say, "until he gives." What is "until he says"? Until he nullifies his protest [verbally].

The phenomenon of compelled consent parallels the externally constructed intention used in some *ha'arama* cases. Not surprisingly, it originates in tannaitic material. The concept is vindicated by Biblical verses in the *midrash*.[785] Leviticus in *Sifra Dibura de-nedava* 3:15, reads:[786]

> יקריב אותו מלמד שכופין אותו יכול על כרחו ת"ל לרצונו הא כיצד כופין אותו עד שיאמר רוצה אני
> "He shall offer it" – this teaches that they force him. Perhaps against his will? Therefore, it stipulates, "according to his will." How so? They force him until he says, "I want."

Predictably, BT expresses a similar discomfort about the vacuous quality of compelled consent as it does about *ha'arama*. First, in the *sugya* cited above, R. Sheshet teaches that the husband's coerced consent to give the writ of divorce is qualified significantly. It cannot overcome a formal protest that he had made beforehand. There is recognition that this statement of consent cannot compete with a person's own true desires expressed freely at some earlier point in time. Compelled intention is somehow deficient.

[785] See *supra* n. 132 for the literature regarding whether *Mishnah* or *Midrash Halakhah* is chronologically primary.

[786] For how this notion developed after the close of BT, see Yehiel Kaplan, "Kofin oto ad sheyomar rotzeh ani – the quality of the principle and its application in our time," Eds. Yaakov Habba and Amihai Radziner, *Iyun b'Mishpat Ivri U'vehalakha: dayan v'diyun*.Bar Ilan University Press: Ramat Gan (2007) 189-248

The *stam* in the *sugya* below grapples with compelled consent by moving in the opposite direction, suggesting that what stands behind the law must be an understanding that the person truly does want the result of his/her consent. This too emerges from a discomfort with constructed intention:

בבלי קידושין מט:-נ. (מינכן)

ההו' גבר' דזבין לנכסי' אדעת' למיסק לארע' דישר' בעידנ' דזבין לא א' ולא מידי א' רבא הוי דברי' שבלב ודברי' שבלב אינן דברים מנליה לרבא הא אילימ 'מיהא דתנן יקריב אותו מלמ' שכופין אותו יכול בעל כרחו ת"ל לרצונו הכיצד כופין אותו עד שיאמ' רוצ' אני ואמאי והא בלביה לא ניח' ליה אלא[787] לאו משו' דאמרי' דברי 'שבלב אינן דברי' דילמ' שאני הת' דאנן סהדי דניח' ליה בכפר' אל' מסיפ' וכן את' או' בגיטי נשי' כופין אותו עד שיאמ' רוצ' אני ואמאי הא בליבי' לא ניח 'אלא לאו משו' דאמרי' דברי' שבלב אינן דברי' דילמ' שאני הת'[788] משו' דמצו 'לשמוע דברי חכמי'

A certain man sold his property with the intention of immigrating to Palestine, but when selling he said nothing. Said Rava: That is a mental stipulation, and such is not recognized. How does Rava know this? Shall we say, from what we learn: [If his obligation be a burnt-offering of the herd, he shall offer it without blemish:] he shall offer it: this teaches that he is compelled. I might think, against his will. Hence it is taught: 'with his free will.' How is this possible? He is compelled until he declares, 'I am willing.' Yet why, seeing that in his heart he is unwilling? Hence it must surely be because we rule that a mental affirmation is not recognized! But perhaps it is different there, for we ourselves are witnesses that he is pleased to gain atonement. But [it follows] from the second clause: and you find it likewise in the case of women's divorce and slaves' manumission: he [the husband or master] is compelled, until he declares, 'I am willing.' Yet why, seeing that in his heart he is unwilling! Hence it must surely be because we say: A mental declaration is not recognized! But perhaps it is different there because it is a religious duty to obey the words of the sages!

In this passage, there is an attempt to derive the ruling that mental stipulations do not impact contracts from the case of forcing a person to say he is willing. In other words, that would be a suppression of his personal wishes because they are merely mental stipulations. However, the *stam* instead suggests that indeed the case where a person is compelled to say that he is willing truly represents his internal intentions, whether because he is happy to gain atonement, or

[787] MS Oxford adds: משום דניח' ליה. This is probably a scribal error due to the frequency of the phrase in this *sugya*.

[788] Spanish Ed. adds: דאנן סהדי דניחא ליה בלביה in order to make the two responses of the *stam* parallel.

because he truly wishes to obey the words of the sages. The *stam* softens the ruling of the *tannaim* out of a concern for internal intentions and stipulated intentions matching one another. The redactors cannot accept such substitutes for the truth.[789]

II. Vow Cancellation for the Future

בבלי נדרים כג.-:

משנה: ר"א בן יעקב אומר אף הרוצה להדיר את חבירו שיאכל אצלו יאמר כל נדר שאני עתיד לידור הוא בטל ובלבד שיהא זכור בשעת הנדר

גמרא (מינכן) : ר' אלי'ע בן יעק' או': וכיון דא' כל נדר שאני עתיד לידור יהא בטל לא שמע ולא אתי בהדי 'חסו' מחסר' והכי קתני הרוצ' שיאכל חבי' אצלו ומסרב בו ומדירו נדרי זירוזין הויין והרוצ' שלא יתקיימו נדריו כל השנ' כול' יעמד בראש[790] ויאמ' כל נדר שאני עתיד לידור יה' בטל ובלבד שיהא זכור בשע' הנדר אי זכור עקרי' לתנאי' וקיים ליה נדרי' א' אביי תני ובלבד שלא יהא זכור בשע' הנדר רבא א' לעול' כדאמרן מעיק'[791] והכ' במאי עסי' כגון שהתנ' ברא' השנ' ולא ידע ממה התנה והשת' קנדר אי זכור בשע' הנדר וא' על דע' הראשון אני נודר נדרי ליתּ בי' משש' לא א' על דע' הראשון אני נודר עקרי' לתנאי' וקיים ליה נדרי' רב הונ' בר חיננ' סבר למידרשי' בפירק' א'ל רבא תנא מסתי' ליה סתומי כדי שלא ינהגו בו קלת ראש ואת דרש' לי' בפירק'

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[789] Parallel treatment appears in *bMen.*47b-48a:

בבלי ב"ב מז:-מח. (המבורג)

אמ' רב הונא תליוה וזבין זביניה זביני מנא ליה לרב הונא הא אילימא כל דזבין איניש אי לאו דאניס לא הוה מזבין ואפלו הכי זביניה זביני ודילמ' שאני אונסא דנפשיה מאונסא דאחריני אלא מדתניא יקריב אותו מלמד שכופין אותו יכול אפלו בעל כרחו ת"ל לרצונו הכיצד כופין אותו עד שיאמר רוצה אני ודילמא שאני התם דניחא ליה דתהוי כפרה ואלא מדסופא וכן אתה אומ' בגטי נשים שכופין אותו עד שיאמר רוצה אני ודילמ' התם נמי מצוה לשמוע דברי חכמ' אלא סברא הוא אגב אונסיה גמר ומקני מתיב רב יהודה גט המעושה בישראל כשר בגוים פסול ואמאי [פסול] לימא אגב אונסיה גמר ומגרש הא אתמר עלה אמ' רב משרשיא דבר תורה אף בגוים כשר ואמאי אמרו פסול כדי שלא תהא כל אחת ואחת הולכת ותולה את עצמה בגוי ומפקעת את עצמה מיד בעלה

R. Huna said, "If a man consents to sell something through fear of physical violence, the sale is valid." Why so? Because whenever a person sells s/he is under compulsion, and even so the sale is valid. But should we not differentiate internal from external compulsion? Therefore [give another reason], as it has been taught: [From the superfluous words], 'he shall offer it,' we learn that a person may be force to bring an [offering which s/he has vowed]. Does this mean, even against his/her will? [This cannot be] because it says, 'of his own free will.' How then [are we to say]? Force is applied to him until he says, 'I consent.' But perhaps there is a special reason in this case, viz. that he may be well satisfied so as to have atonement for his sins? We must therefore [look for the reason in] the next passage [of the *baraita*]: 'Similarly in the case of divorces [where the rabbis have said that the husband can be forced to give a divorce] we say [that what is meant is that] force is applied to him till he says, 'I consent.' But there too perhaps there is a special reason, viz. that it is a religious duty to listen to the word of the Sages. What we must say therefore is that it is reasonable to suppose that under the pressure he really made up his mind to sell. R. Judah challenged: "A writ of divorce which is forced by Jews is valid, if forced by Gentiles, invalid." Why is it invalid? Say that because he is forced, he truly decides to divorce [her]? It was said about this: R. Mesharshia said, "Biblically, it is valid even [if coerced] by Gentiles. Why did they say it is invalid? So that every woman would not go and depend on a Gentile in order to removed herself from her husband's authority."

[790] Venice Ed. specifies בראש השנה

[791] MS Moscow: רבא אמ לעולם אימלך דלא מיחסרא והכא במאי עסיקינן. According to this MS, Rava is undermining the original *oqimta* of reading the *mishnah* as two different cases. (See *Meqorot U-mesorot*, ibid.)

> **Mishnah*:*** R. Eliezer b. Ya'aqov says, "Also one who makes an oath based on his fellow joining him for a meal." He should say, "Any oath that I make in the future is null [from now], as long as he remembers at the time of the oath.
> **Gemara**: R. Eliezer b. Ya'aqov says: And [just because] he said, "Any oath that I take in the future should be void" [it works]? But [the other person] did not hear [his nullification] and will not come to him [for a meal]. There is a lacuna in the *mishnah*, and this is how the *mishnah* should read: One who wishes for his friend to eat at his home, and he refuses, and he foreswears him, these are oaths for the purpose of rousing [only, and are thus not binding even if the fellow does not come for the meal]. And one who wishes that his oaths will not be upheld throughout the year should stand at the beginning [of the year] and say, "Anything that I will swear in the future is null [from now]," so long as he remembers at the time of the oath. If he remembers [at the time of his oath], [does that not] uproot the condition and uphold his oath? Abaye said, "It should read, so long as he does *not* remember at the time of the oath." Rava said, "It is as we said from the beginning, and what are we dealing with here? Where he made a condition at the beginning of the year and did not know what his condition was. And now he is taking an oath. If he remembers at the time of the oath and says, 'Based on the first [stipulation] I am swearing, the oaths have no standing. But if he did not say, 'I swear based on the first stipulation,' it uproots his oath, and this oath stands. R. Huna bar Ḥinena wished to teach this at the public learning session. Rava said to him: the *tanna* made it unclear so that people would not treat vows lightly, and you wish to teach this at the public session?!

Both here and in PT (*yNed.* 2:2, 37d) there is a way to keep any and all vows from being effective throughout the year. This is a very helpful loophole. However, only in BT is there a concern with what that loophole might lead people to do. Rava[792] here is concerned about people becoming lax about oaths because they know of a helpful loophole. As we have seen, BT cites anxiety over how the use of loopholes may impact a person's relationship to the law generally. In this case, Rava worries about the simple knowledge that a loophole even exists.

[792] See Halivni, *Meqorot U-mesorot, Nashim* 298-9. for the suggestion that Rava may be simply reading the *mishnah* as two separate cases: the first case is להדיר את חבירו, another instance of נדר זירוזין, continuing from the example in the previous *mishnah* – an oath made merely to convince someone of your conviction, such as I swear that I won't buy this for more than two dollars! The second case is אומר כל נדר שעתיד לידור , one nullifies oaths ahead of time. This is in fact the wording of the *mishnah* in *Oṣar Ha-Geonim* 118. Additionally, the version which includes the word אף before להדיר את חבירו connects the first case to the previous *mishnah*. *YNed.* 3:1 cites two different versions of the *mishnah*, one including אף and the other without it.

III. Selling Out

בבלי מנחות סז.-: (דפוס ונציה)

אמר רבא מאן דאמר מירוח הגוי פוטר גלגול הגוי פוטר מאן דאמר מירוח הגוי אינו פוטר גלגול הגוי אינו פוטר... ועוד איתיביה רבינא לרבא חלת גוי בארץ ותרומתו בחוצה לארץ מודיעין אותו שהוא פטור חלתו נאכלת לזרים ותרומתו אינה מדמעת הא תרומתו בארץ אסורה ומדמעת והא האי תנא דאמר מירוח הגוי אינו פוטר גלגול הגוי פוטר מדרבנן גזירה משום בעלי כיסין[793] אי הכי אפילו חלה נמי אפש' דאפי לה פחות מחמשת רבעי' קמח ועוד תרומה נמי אפשר דעביד לה כדר' אושעיא דאמר רבי אושעיא מערים אדם על תבואתו ומכניסה במוץ שלו כדי שתהא בהמתו אוכלת ופטור' מן המעש 'אינמי דעייל לה דרך גגות ודרך קרפיפו' התם בפרהסיא זילא ביה מילתא הכא בצינעא לא זילא בי' מילתא .

Rava said, "the one who holds that the smoothing of the pile of corn belonging to a Gentile exempts it [from tithes], also holds that the rolling out of dough belonging to a Gentile exempts it [from *ḥallah*]; and one who holds that the smoothing of the pile of corn belonging to a Gentile does not exempt it, also holds that the rolling out of dough belonging to a Gentile does not exempt it…And Ravina challenged Rava [from a *baraita*]: the *ḥallah* separated by a Gentile in the land of Israel, and the *terumah* separated by him in the diaspora, they tell him that he is exempt. His *ḥallah* is eaten by non-priests; his *terumah* does not make its mixtures inedible. This indicates that his *terumah* in the land of Israel is indeed forbidden [to non-priests] and does render its mixtures inedible. But this *tanna* says that the smoothing of a Gentile does not exempt, yet the rolling of the Gentile does? That is only rabbinic [that the smoothing does not exempt], as a decree out of concern for the large landowners. If so, then, *ḥallah* should also not be exempt! They can [use a different evasion to get around the law:] cooking less that 5/4 [a *qab* of] flour. [As for] *Terumah* [they may] also [evade the law], they may do like R. Oshaya; as R. Oshaya said, "A person may practice evasion with his produce and bring it inside in its chaff, so that his animal may eat from it, and it is exempt from tithing. Likewise, he can bring it via the roofs and courtyards! There, it is public, and it is embarrassing for them to do. Here, it is in private, so it is not embarrassing.

The *stam* here show discomfort with various loopholes but with an understanding that the loopholes cannot be closed – e.g., baking less than the requisite amount of dough to require *ḥallah* to be taken, bringing food into the house in unconventional ways or in an unfinished state in order to evade tithing obligations. Moreover, the *stam* recognizes that people will use loopholes, but it assumes that the *amoraim* do not wish to be party to offering newly accessible

[793] MS Munich: בעלי ניסין; MS Vatican 120: simply בעלי without specification

loopholes where none were being used before. For example, though the dodges of bringing food into the house in an unprocessed state or in an unconventional way exist, the בעלי כיסין, the wealthy land magnates will not employ those methods, as they are too public. If, however, they were told that Gentile ownership could exempt them, they would begin using that more private method to shirk their obligations. Once again, there is a concern for how loopholes and knowledge thereof, will impact the average person.

IV. Salty

We have already mentioned that by the fourth generation of BT *amoraim*, *ha'aramot* involving intention may have been waning. R. Ada b. Ahava was the only fourth generation *amora* cited as employing it, as seen from this *sugya*. The entire context of this *sugya* is very telling:

בבלי ביצה יא.-:
משנה:...בית שמאי אומרים אין נותנין את העור לפני הדורסן ולא יגביהנו אלא אם כן יש עמו כזית בשר ובית הלל מתירין.
גמרא (אוקספורד):... ת"ר אין מולחין את החלבים ואין מהפכין בהם משום ר' יהושע אמרו שוטחן ב?רוח על גבי יתדות אמ' רב מתנה הלכה כר' יהושע איכא דאמרי אמ' רב מתנה אין הלכה כר' יהוש' בשלמא דלמאן דאמ' הלכה אצטריך סד"א יחיד ורבים הלכה כרבים קמ"ל הלכה כיחיד אלא למאן דאמ' אין הלכה כר' יהושע פשיטא יחיד ורבים הלכה כרבים מהו דתימ' מסתבר טעמיה דר' יהושע דאי לא שרית ליה[794] מימנע ולא שחיט קמ"ל ותנא קמא מאי שנא מן העור לפני הדורסן התם לא מוכח מילתא[795] הכא אתי למימר מאי טעמא שרו ליה רבנן כי היכי דלא ליסרח מה לי למשטחינהי מה לי ממלחינהי[796] אמ' רב יהודה אמ' שמואל מולח אדם כמה חתיכות בבת אחת אע"ג שאינו צריך אלא לחתיכה אחת רב אדא בר אהבה מערים ומלח גרמא גרמא

Mishnah:…The House of Shammai says: One may not place a hide for treading on, nor may one lift it up unless there is as much as an olive of flesh with it, but the House of Hillel permits it.
Gemara:…The rabbis taught: One may neither salt pieces of suet nor turn them about.[797] In the name of R. Joshua they said: one may spread them out in the air

[794] MS London adds: אתי לאימנועי משמחת יום טוב

[795] MS Munich: דחזי למיזגא עלייהו, Venice, Vilna Eds: משום דחזי למזגא עליה

[796] MS Munich reverses the order: למה לי למימלחינהו למה לי למשטחינהו. This translates as, "What is the difference whether I salt it or spread it?" The ordering in MS Oxford, however, seems more intuitive, as it moves from the permissible to the forbidden.

[797] To preserve them from decay.

on nails. R. Matenah said: The law is like R. Joshua. And some say, 'The law is not like R. Joshua.' It is harmonious according to the one who said, 'The law is [like R. Joshua].' I might have though the when there is a debate between an individual and the majority, the law is like the majority. Therefore, he teaches us that here the law is as the individual. But according to the one who says, 'The law is not like R. Joshua,' this is obvious; when an individual and the majority debate, the law follows the majority. What might you have said? R. Joshua's reasoning makes sense, that if you do not allow it, he will refrain from slaughtering [the animal on the Festival, and thus will not eat meat on the Festival]. He comes to teach [that the law does not follow R. Joshua]. And how is this different from placing a hide before a treading place [which is permitted by the House of Hillel on the Festival]? There, it is not obvious, for the hide may be used as a mattress. Here, however, one may come to say, "Why did the rabbis allow this? So that the food will not spoil. What is the difference whether I spread it out or I salt it?" R. Judah said in the name of Samuel, "One may salt a number of pieces at once even though he needs only one piece." R. Ada b. Ahava was cunning and salted one piece at a time.

Similar to the *stam*'s interpretation of R. Ashi's position on *bShabbat* 139b, the difference between a loophole which is obviously evasion and that which is not obvious is significant. Only here the *stam* gives a reason why: namely because people will come to violate the law outright. This is consonant with what we have observed above regarding R. Ashi and the *stam*.

V. Solving the Bastardization Problem

בבלי קידושין סט.

משנה: רבי טרפון אומר יכולין ממזרים ליטהר כיצד ממזר שנשא שפחה הולד עבד שחררו נמצא הבן בן חורין רבי אליעזר אומר הרי זה עבד ממזר :

גמרא: איבעיא להו רבי טרפון לכתחילה קאמר או דיעבד קאמר תא שמע אמרו לו לרבי טרפון טיהרת את הזכרים ולא טיהרת את הנקיבות ואי אמרת לכתחילה קאמר ממזרת נמי תינסיב לעבדא עבד אין לו חייס תא שמע דאושפזיכניה דרבי שמלאי ממזר הוה ואמר ליה אי אקדמתך טהרתינהו לבנך אי אמרת בשלמא לכתחילה שפיר אלא אי אמרת דיעבד מאי ניהו דמנסיב ליה עצה ואמר ליה זיל גנוב ואיזדבן בעבד עברי ובשני דר' שמלאי עבד עברי מי הוה והאמר מר אין עבד עברי נוהג אלא בזמן שהיובל נוהג אלא לאו שמע מינה רבי טרפון לכתחילה קאמר שמע מינה אמר רב יהודה אמר שמואל הלכה כר' טרפון

Mishnah: R. Tarfon says, "Bastards can purify [their line of descendants]. How? A bastard who marries a slave, their child is a slave. If he sets him free, the child becomes a free man." R. Eliezer says, "This [child] is a bastard slave."

Gemara: They wondered, Did R. Tarfon mean for this to be used *ante factum*, or simply that *ex post facto* it eliminates the bastard status? Come and hear, "They said to R. Tarfon, 'You have purified the males, but you have not purified the females!'" And if you say that he means this *ante factum*, a female bastard should

also marry a male slave. A male slave does not pass down his genealogical status. Come and hear: R. Simelai's landlord was a bastard, and he said to him. If I may precede you, I will purify your son.' If you say that it is *ante factum*, this statement is sensical, but if you say it is *ex post facto*, what does he mean? That he would give him advice and say to him, 'Go steal and be sold as a Hebrew slave.' And in the days of R. Simelai, were there Hebrew slaves? Did not Master say, 'The law of the Hebrew slave is not enforced except where the Jubilee year applies?' Rather, learn from here that R. Tarfon meant his comments *ante factum*. R. Judah said in the name of Shmuel, "The law follows R. Tarfon."

We have seen R. Tarfon, a rabbi from the priestly caste, involve himself in the plight of those less elite genealogical purity than his own. In chapter 2, we observed the story of R. Tarfon using his priestly status in order to feed hungry women of non-priestly descent during a famine. And in this *mishnah* too he is cited as caring for the bastard, the *mamzer*, who is forbidden from marrying any Jew who is not also a bastard. The trouble is that children of bastards are considered bastards too. R. Tarfon, however, has a suggestion: Jewish identity follows the mother. Thus, if a bastard marries a female Gentile slave and has a child with her, that child will be a Gentile himself and will be considered a slave. And when the son is freed, he will attain the status of a non-bastard Jew. R. Eliezer disagrees, suggesting that the father's impurity is passed down to his son.

In the talmudic discussion which ensures, there is debate over whether R. Tarfon advocates this loophole or simply recognizes the implications of the union of a bastard and a bondswoman after the fact. PT has no such compunctions:

ירושלמי ג:יג (?)

כיני מתניתא ממזר מותר לו לישא שפחה. רב יהודה בשם שמואל הלכתא כרבי טרפון. רבי שמלאי הורי באנטוכיא. רבי סימאי הורי כפר ספורייא הלכה כרבי טרפון.

Thus says a *baraita*: a bastard may marry a female slave. R. Judah in the name of Samuel [said], "The law follows R. Tarfon." R. Simelai taught this way in Antioch. R. Simelai taught this way in the village of Sipuraya, "The law follows R. Tarfon."

While the conclusion of the *stam* is that R. Tarfon wished to actively provide a solution for the future descendants of bastards,[798] it is still telling that BT even questioned this in the first place.

It is worth mentioning a relatively strong parallel to this concern about *ex post facto* versus *ante factum* in BT in the following passage:

בבלי כתובות צה: (מינכן)
אמ' אביי נכסייך[799] לך ואחרייך לפלוני ועמדה ונשאת בעל לוקח הוי ואין לאחריך[800] במקום בעל כלום כמאן כהאי תנא דתניא נכסיי ליך ואחרייך לפלוני ירד הראשון ומכר ואכל השני מוצי' מיד הלקוחות דברי ר' רשב"ג או' אין לשני אלא מה ששייר הראשון ומי אמ' אביי הכי והאמ' אביי איזהו רשע ערום זה המשיא[801] עצה למכור כרשב"ג מי קאמ' תנשא נשאת קאמ'

Abaye said: [If he wrote in her *ketubah*] "My possessions are yours, and after you [they belong] to so-and-so," and she got [re]married [after he died] the [new] husband is considered a buyer, and no one else has any right to possession in the face of the husband. Like whom [is this opinion]? Like this *tanna*, as it was taught: [If a testator wrote] "My possessions are yours [to inherit] and after you [they belong] to so-and-so," if the first person sold [the inheritance] and consumed, the second person may take the [inheritance] from the hand of the buyers. These are the words of Rabbi. R. Simeon b. Gamaliel says, The second person has only what the first person left over (=did not sell or consume). But did Abaye say this? Does Abaye not say, "Who is a cunning knave? One who gives advice to sell according to the opinion of R. Gamaliel [so that the second inheritor does not get anything]? Did he say, "She should get remarried"? He said, If she has remarried (i.e., *ex post facto*).

According to the *stam*, Abaye here is clearly against taking advantage of a loophole, yet he recognizes that the loophole is legitimate after the fact.[802] If this is the case, why not simply close the loophole, as Abaye advocates in *ha'aramat ribit*? We suspect that Abaye is willing to

[798] See Novick, "'They come against them…'" for a discussion about the significant responsibility placed on the rabbis for solving the intractable problem of bastardy.

[799] MSS St. Petersburg, Vatican 113, Soncino Ed.: נכסיי; MS Vatican 130, Vilna Ed.: נכסי; Later in the *sugya*, where Abaye's comments are repeated, MS Munich too reads נכסיי rather than נכסייך. Thus, the first is likely a scribal error.

[800] It is quite strange that every MS and every Ed. reads לאחריך rather than לאחרים. We assume that this is because it is simply repeating the stipulation made in the *ketubah*, "ואחריך לפלוני".

[801] MS St. Petersburg: ממציא instead of משיא

[802] A similar distinction appears in *bBB* 137a

abide by R. Shimon b. Gamaliel's ruling, not simply because it was *ex post facto*, but because it is a case of a woman getting remarried. There is certainly pathos here. The woman left as a widow should certainly get remarried, for stature, for consistent means of support, etc. And who knows what the reaction of potential suitors might be to knowing that they could lose what the woman brings into the marriage? Perhaps that would hurt her prospects. Thus, Abaye's original perspective echoes the breakdown we saw in the Palestinian material, that self-same *ha'arama* done in the name of equity is legitimate, while done an ignoble end is not. And yet, the *stam*'s proposal about Abaye's willingness in this arena rests on an assumption of the loophole having already been utilized.

VI. Lip Service

משנה שביעית י:ח

המחזיר חוב בשביעית יאמר לו משמט אני אמר לו אע"פ כן יקבל ממנו שנא' (דברים טו) וזה דבר השמטה כיוצא בו רוצח שגלה לעיר מקלט ורצו אנשי העיר לכבדו יאמר להם רוצח אני אמרו לו אעפ"כ יקבל מהם שנאמר (שם יט) וזה דבר הרוצח :

One who repays a debt to his fellow during the Sabbatical year, [the other party] says, "I waive [the compensation]." And if he answered him "Nonetheless [I wish to pay you], he should accept [the money] from him. As it says, "And this is the *word* of the Sabbatical." Likewise regarding a murderer who has been exiled to the city of refuge. If the people in the city wish to honor him, he must say, "I am a murderer." If they say to him, "Nonetheless [we wish to honor you]," he may accept [the honor] from them, as it is said, "And this is the *word* of the murderer."[803]

משנה ט

המחזיר חוב בשביעית רוח חכמים נוחה ממנו...

One who returns a loan during the Sabbatical year, the rabbis are proud of him.

The *mishnah* suggests (as does *Sifri*) a radically narrow reading of the requirement of for waiving loans during the sabbatical year. It does not preclude the possibility that a loan may be repaid; it simply must be repaid by as a volitional gift rather than a loan reimbursement. Both

[803] Cited in *Sifri* Deut. *Re'eh* 112

Talmuds offer quite animated versions of how this loophole should be used, with full awareness of its function

ירושלמי שביעית י:ג

המחזיר חוב בשביעית אומר לו משמט אני רב הונא אמר בשפה רפה והימין פשוטה לקבל אמר רבי יוסי הדא אמרה בר נש דתני חדא מיכלא והוא אזל לאתר ואינון מוקרין ליה בגין תרתי צריך מימר לון אנא חדא מיכלא אנא חכים:

One who returns a loan during the Sabbatical year, [the other party] says to him, I waive [the repayment]. R. Huna said, "[Do so] in a soft voice and with his right hand outstretched to receive [the payment]." R. Jose said, "This is similar to a man who studied one tract and comes to a place where they honor him for two tracts must tell them, "I only know one tract."

Rav Huna wants the creditor to take full advantage of the irony of his/her statement: say that s/he waives the loan in a barely audible whisper, while holding out his/her hand to receive payment. R. Jose compares it to a person who has to make an embarrassing admission and does not really want the results of this admission! In BT, Rabbah goes so far as to suggest coercing the debtor into saying, "Nonetheless":

בבלי גיטין לז:

המחזיר חוב לחבירו בשביעית -צריך שיאמר לו משמט אני ואם אמר לו אע"פ כן -יקבל הימנו , שנאמר :וזה דבר השמטה .אמר רבה :ותלי לי 'עד דאמר הכי .איתיביה אביי :כשהוא נותן לו ,אל יאמר לו בחובי אני נותן לך ,אלא יאמר לו שלי הן ובמתנה אני נותן לך .אמר ליה :תלי ליה נמי עד דאמר הכי .אבא בר מרתא דהוא אבא בר מניומי הוה מסיק ביה רבה זוזי ,אייתינהו ניהליה בשביעית ,אמר ליה :משמט אני ,שקלינהו ואזל .אתא אביי אשכחיה דהוה עציב ,אמר ליה :אמאי עציב מר ?אמר ליה :הכי הוה מעשה .אזל לגביה ,אמר ליה :אמטת ליה זוזי למר ?אמר ליה :אין . אמר ליה :ומאי אמר לך ?אמר ליה :משמט אני אמר ליה :ואמרת ליה אף על פי כן ?אמר ליה :לא . אמר ליה :ואי אמרת ליה אף על פי כן הוה שקלינהו מינך ,השתא מיהת אמטינהו ניהליה ואימא ליה אע"פ כן .אזל אמטינהו ניהליה ואמר ליה אף על פי כן ,שקלינהו מיניה ,אמר :לא הוה ביה דעתא בהאי צורבא מרבנן מעיקרא.

One who repays a debt to his fellow during the Sabbatical year, [the other party] says, "I waive [the compensation]." And if he answered him "Nonetheless [I wish to pay you], he should accept [the money] from him. As it says, "And this is the *word* of the Sabbatical." Rabbah said, "And one may threaten him physically until he says it." Abaye challenged him: When he gives him [the money during the Sabbatical year], he should not say, 'I give this to you out of debt,' bit rather, 'This is my [money], and I am giving it to you as a gift.' He said to him, "Physically threaten him until he says this." Abba b. Marta, otherwise known as Abba b. Mineyomei, owed Rabbah money. He brought them to him during the Sabbatical year. He told him, "I waive [the compensation]." He (=Abba B.

Mineyomei) took the money and left. Abaye came and found him (=Rabbah) upset. He asked, "Why is master sad?" He answered, "This was the story." He (=Abaye) went to him (=Abba) and asked him, "Have you brought money to master?" He answered, "Yes." He asked, "And what did he say?" He answered, "I waive." He asked him, "And did you say, 'Nonetheless [I wish to pay you]?'" He said, "No." He told him, "If you had said, 'Nonetheless,' he would have taken them (=the money) from you, so go to im now and say 'Nonetheless." He (=Abba) went to him (=Rabbah) and said, "Nonetheless [I wish to pay you]." He (=Rabbah) took the money from him (=Abba). He (=Rabbah) said [to himself], "This young student was clueless at first."

Rabbah goes one step further: he wishes to apply the compulsion here and to force the debtor who has started the process of returning the money to make sure that s/he is not turned away by the creditor. Moreover, though Abaye seems to disagree with Rabbah's approval of using force, he himself goes out of his way to tell protect his teacher's finances when a loan compensation during the Sabbatical year goes source. One cannot force a declaration of one's desire to pay.[804]

VII. R. Yoḥanan's vow

בבלי ע"ז כח. (פריש) =יומא פד.

ת'ש דר' יוחנן חש בצפדינא אזל לגבה דההיא מטרוניתא עבדא ליה חמשא ומעלי אמ 'לה בשבתא מאי אמרה ליה לא צריכת ואי מצטריכנא מאי אמרה ליה אשתבע לי דלא מגלית אשתבע לה לאלהי ישראל לא מגלינא גליא לי' למחר דרשה בפירקא והא אישתבע לה הכי קאמ' לה לאלהי ישראל לא מגלינא לי' הא לעמיה מגלינא והאיכא חילול השם דגלי לה מעיקרא

'R. Yohanan suffered from scurvy and went to a certain matron. She treated him on Thursday and Friday. He said to her: "What should I do tomorrow (=the Sabbath)?" She replied: "You will not need the treatment." Rabbi Yohanan said: "But what if I do need it?" She replied: "Swear to me that you will not reveal the remedy to anyone." R. Yohanan swore to her: "To the God of Israel I will not reveal it." She then disclosed the remedy to him and the next day he taught it in his public lecture.

But did he not swear to her not to reveal it? He swore that he would not reveal it to the God of Israel, but to His people, Israel, he would reveal it. The Talmud asks: But is this not a profanation of the name of God? From the beginning (=before he shared the recipe with the study hall attendees) he revealed to her [what he had done by using precise language for his oath].

[804] This story, as is often the case, introduces the human element of Rabbah's sadness and Abaye's protection of his honor even though the latter had not thought it necessary in the abstract

R. Yohanan constructs his vow quite carefully, planning to evade its understood meaning in favor of its atomistic meaning. Thus, he does not technically violate his oath. Interestingly, however, the *stam* is concerned with the moral-religious or socio-religious impact of this legalistic dodge. Does this chicanery not amount to a profanation of God's name before this Gentile woman, as she would assume that he simply broke his vow? The *stam*'s solution is that he told her about his little trick before revealing the secret recipe of her remedy the following day in public.

The parallel PT version of this story appears in *yAZ* 2:2 with no mention of the vow and with significant consequences for the woman herself.

> ר' אבהו בשם ר' יוחנן אהן צפדונא סכנתא ר' יוחנן הוה לי כן והוה מיתסי קומי דתימטיניס בטיבריא בערובתא נחת לגבה אמר לה מיצרך אנא למחר כלום אמרה לי לא ואין צרכת סב גרעינין דתומרים ואית דאמרי דנלביסין בפלגיהון יקידין ואור דשערין וצואת קטן נגובה ושחוק וטפול ולא תימר קומי בר נש למחר עאל ודרשה בבית מדרש שמעת וחנקת גרמה ואית דאמרין איתגיירת
>
> R. Abahu [said] in the name of R. Yohanan: Scurvy is [mortally] dangerous [and may be treated on the Sabbath[805]]. R. Yoḥanan had it and was being treated by [the daughter] of Domitian[806] in Tiberias. On Friday he asked her, "Will I need any [treatment] tomorrow?" She said: No. But if you do need something, put on seeds of date palms (and some say seed of Nicolaos dates), split in half and roasted, and pounded together with barley husks and a child's dried excrement, and apply that mixture. But do not reveal to anyone [this potion]." The next day, he went and expounded upon [the potion recipe] in the study hall. She heard, and she strangled herself. And some say, she converted to Judaism.

The Palestinian *sugya* records no loophole. In fact, R. Yoḥanan's dishonesty is responsible either for her death or for her conversion because of his perceived or true betrayal. It certainly is interesting that BT includes R. Yoḥanan's vow, and likewise it is interesting that BT's *stam* cares how R. Yoḥanan's cunning would be perceived by the woman. In our review of BT *ha'arama*, we noted that the *stam* is concerned with "how things look" – is the ruse obvious? Can people

[805] Based on context

[806] Jastrow renders this word דומיטיינוס , Domitian.

tell? Similarly, the *stam* here is concerned with how things look to the Gentile healer. This is not a linear comparison, but reflects the *stam*'s interest (and indeed some *amoraim* as well) in issues beyond the realm of the technically legal.

VIII. On the Fringe

בבלי מנחות מא. (מינכן)

דמלאכ(ח)[807] אשכחיה לרב קטינא דהוה מיכסי סדינא א"ל קטינא סדינא בקייטא[808] וסרבלא בסיתוא[809] ציצית[810] מה תהא עליה א"ל ענשיתו אעשה א"ל בזמן דאיכ' ריתחא ענשינן אי אמרת בשלמ' חובת גבר' הוא היינו דמיחייב דלא קא רמי אלא אי אמרת חובת טלית היא הא לא מיחייב' ואלא מאי חובת גבר' היא נהי דחייביה רחמ' כי מיכסי טלית דבת חיובא היא לכסוייה מי חייביה רחמ' הכי קא"ל טצדקי למיפטר נפשך מציצית

> For an angel once found R. Qatina [who was accustomed to] wearing a [linen] wrap in the summer and a cloak[811] in the winter. He exclaimed: Qatina, Qatina warp in the summer and a cloak in the winter, but what will happen with the fringes? (R. Qatina) replied: Do you punish a person for [neglecting] a positive precept? He said: In a time of wrath we do. Now, if you hold that the law of fringes is an obligation relating to the person – then that is why one would incur guilt for not wearing a garment with fringes; but if you hold that it is an obligation relating to the garment, then why [is any guilt incurred] given that these garments are exempt? What then might you hold? That it is an obligation incumbent upon the person? Although the Torah holds a person accountable when he wears a garment that is subject to fringes, but did the Torah also oblige him to cover himself [with a garment which requires fringes]? This is what [the angel] replied: [It is] a means to excuse yourself from the law of fringes!

In the context of a discussion as to whether *ṣiṣit* entails a requirement that every four-cornered garment must be affixed with proper fringes or that every person wearing a four-cornered garment must have fringes properly affixed to it. The *stam*, in the context of the angelic tale of R. Qatina suggests that there is one dimension that has been left unexplored: Even if a person has

[807] MS Paris, Vatican 118, Vatican 120, Venice Ed.: מלאכא

[808] MS Vatican 120:בקטינא, probably a scribal error based on the *amora*'s name.

[809] MS Vatican 118: בסיתרא

[810] Venice Ed. adds the words של תכלת

[811] M. Sokoloff, *A Dictionary of Jewish Babylonian Aramaic*, 829 - unclear what סרבלא means

a requirement to put fringes on his four-cornered garment, need he go out of his way to wear such a garment in the first place? It seems that the *stam* says that he need not do so. Yet, from the angel's comments to R. Qatina, he also may not go out of his way *not* to wear a four-cornered garment in order to evade the *ṣiṣit* requirement.[812]

While the Palestinian Talmud had used the terminology of חשש הערמה, suspicion of evasion, BT does not. However, this story evinces a similar concern. Moreover, the angel is prepared even to punish R. Qatina for such unwarranted behavior. The angel knows that R. Qatina means to evade the law of fringes.

Moral Theory: A Turn to Virtue Ethics

Before offering a contextual explanation for BT's discomfort with intention *ha'arama* and attendant interest in how things look, what an agent's true interest is, etc., we detour into the realm of modern moral philosophy to understand what underlying philosophy such discomfort indicates. As legal theory did for our analysis of *ha'arama* in chapter 2, moral philosophy offers vocabulary and systematization in order to capture these concepts.

University of Pennsylvania Law professor Leo Katz points out that use and acceptance of loopholes generally betrays a deontological perspective on morality, from the Greek root *deon*, meaning obligation or duty. As opposed to consequentialists (e.g., utilitarians) who will go to

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[812] The term used here to refer to evasion is טצרקי, and it appears only one other place in all of BT, in *bBQ* 56a:

> You should surely have realized that since you left it in a sunny place, it will use every possible means (טצרקי) for the purpose of getting out.

Both A. Kohut and J.N. Epstein, among others, have related the term to the Middle Persian word *čārag*. According to P.O. Skjaervo, this Pahlavi word means "a way out, a way to do." It would be interesting to know whether the term *čārag* was used to refer to loopholes generally, and what those contours were. I leave this question for future research. See Yishai Kiel, "Redesigning *tzitzit* in the Babylonian Talmud in light of literary depictions of the Zoroastrian *kustig*,"*Shoshannat Yaakov: Jewish and Iranian Studies in Honor of Yaakov Elman,* Eds. Shai Secunda and Steven Fine. Leiden: Brill (2012) *190*-2 for an extended discussion about the word and relevant bibliographic information.

any lengths to maximize the good, deontologists yield to constraints even when trying to achieve the best outcomes. In his words: "Simple consequentialism holds that good determines the right – the amount of goodness produced by an action is the sole determinant of its rightness – whereas the deontologist denies this, holding that other considerations are relevant."[813]

The classic scenario which exemplifies their debate is that of a terminally ill patient on a respirator. If there is only one respirator available, and a terminally ill patient is connected to it, should the hospital administrator demand that the respirator be disconnected and given to a more promising patient? According to consequentialists, the answer is yes: in save a person whose changes for survival are great (or simply superior to other patients), one may actively remove the necessary life sustaining resources from someone who shows little or no hope of recovery. For deontologists, however, there is a constraint: maximizing the good cannot come at the expense of moral behavior. Deontologists instead offer the following scheme. Ordering respirators that must be disconnected for servicing and repair every few weeks may solve the problem. When the respirator connected to the terminally ill patient is disconnected for servicing, the hospital staff would simply not reconnect it to that patient, but would connect it to a more promising patient. For deontologists, the passive process is more acceptable than the active removal of care, and so this may be done in order to maximize positive results.

The parallel to rabbinic legal loopholes is clear: while, occasionally, there are reasons to break the law, or even to change it, the rabbis basically feel constrained by legal process. Even in pursuit of the good, of values the rabbis (and, in their view, Jewish law) themselves cherish, one must be bound by technical statute. On this view, there is something inherently valuable and

[813] "Deontology," *The Oxford Handbook of Ethical Theory*, 426

moral about following the law. Thus, it is, indeed, in their estimation, more acceptable to reach the same ends by legal means than by illegal means.[814] This fits neatly within other rabbinic requirements for the significance of process and mode in defining and constraining outcomes, *inter alia*, not accomplishing a commandment by violating another one,[815] the distinction between passive transgression and active transgression, etc. A number of other core principles of ancient rabbinic which are likewise compatible with deontology: e.g., preferential treatment of certain relationships over others (as in the case of saving one's teacher's lost item before saving that of one's parent, the ruling of saving oneself before others, offering charity to co-religionists before others), the concept of supererogation (*lifnim mi-shurat ha-din*).[816] While these examples have yet to be analyzed through this lens in detail (including chronological and geographical stratification), as GEM Anscombe points out, it is quite natural for religious systems to sway toward the deontological, as they posit law as divine.[817]

One must be wary to conclude though that a deontological emphasis suggests that any technically licit path is legitimate, regardless of the end goal. After all, deontologists are

[814] See Michael Harris, "Consequentialism, Deontologism, and the Case of Sheva ben Bikhri," *The Torah u-Madda Journal* 15 (2008-09) 68-94, for a discussion of a deontological thread within rabbinic law. See also, Moshe Sokol, "Some Tensions in the Jewish Attitude Toward the Taking of Human Life," *The Jewish Law Annual* 7 (1988) 97-113, and "The Allocation of Scarce Medial Resources: A Philosophical Analysis of the Halakhic Sources," *AJS Review* 15 (1990) 63-93. Two rabbinic concepts/texts marshaled in evidence of a deontological orientation among the rabbis are 1) the ruling regarding not giving over one member of a city for rape or death even in order to save the entire city (*mTer.* 8:12, *tTer.* 7:23), and 2) the rabbinic concept of *lifnim mi-shurat ha-din* (e.g., *bBQ* 99b, *bBM* 24b), or supererogatory behavior. Both reflect an interest in rules over maximizing the good. Harris shows convincingly, though, that each can be read through a Consequentialist lens as well. What is unique about rabbinic loopholes is their need is certainly dependent upon a Deontological perspective.

[815] Regardless of which commandment seems more significant

[816] Two major distinctions between Deontology and Consequentialism generally are that the former recognizes the primacy of some relationships over others and that it recognizes that law is not infinite. Hence, the significance of special relationships in Judaism with other Jews and with one's teacher, as well as the concept of supererogation, which indicates that there is indeed a boundary to what law requires of a person.

[817] G. E. M. Anscombe, "Modern Moral Philosophy," Philosophy 33, No. 124 (January 1958)

themselves interested in achieving positive consequences (and even maximizing the good) though they are distinguished from consequentialists by rule-constraint. The end goal itself must be considered good in order for the discussion of constraints even to begin. This is easily contrasted with the Brandeisian perspective and returns us to the discussion of Dworkinian formalism in chapter 2, above.

Indeed, based on what we have seen in our study of rabbinic loopholes throughout the tannaitic and amoraic periods, the rabbis do not focus on process alone. After all, we have seen more examples of rejected loopholes than of accepted loopholes. True, some reasons offered for loopholes being rejected relate to constraints on the effectiveness or eligibility of loopholes in certain situations,[818] but the most obvious limitations on *ha'arama* is where the end goals are not desirable. Had the rabbis subscribed to a Brandeisian perspective, all would have been fair game. But, in truth, the consequences do become quite significant in determining whether even a completely licit process should be outlawed or not. This perspective is still cleanly within the rubric of deontological thinking; deontologists do not ignore the consequences of actions, but instead merely constrain one to achieve those consequences licitly.

In what we have seen in BT, however, there is something more than simply deontology at play. There are indications of Virtue Ethics being applied to *ha'arama*.[819] Re-popularized by G.E.M. Anscombe[820] and MacIntyre in the mid/late-twentieth century, virtue ethics was first

[818] e.g., against an infraction that requires a *qorban ḥatat*

[819] Deontology and virtue ethics do indeed often act together against consequentialism. (David McNaughton and Piers Rawling, "Deontology," *The Oxford Handbook of Ethical Theory*, 453) Walter Wurzburger has argued for virtue ethics as a part of rabbinic thinking in Walter Wurzburger, *Ethics of Responsibility: Pluralistic Approaches to Covenantal Ethics*. Philadelphia (1994). See David Shatz's review, "Beyond Obedience: Walter Wurzburger's Ethics of Responsibility," *Tradition* 30,2 (1996) 74-95.

[820] G.E.M. Anscombe, "Modern Moral Philosophy," *Philosophy* 33 (1958) 1-17; Alasdair MacIntyre, *After Virtue*. Notre Dame (1981). See also, Eds. Roger Crisp and Michael Slote, *Virtue Ethics*. Oxford (1997)

articulated by Aristotle and is more concerned with *agent* morality than with *act* morality. Succinctly stated: "Moral philosophy should focus more…on what kind of person it is best to be, rather than on what principles we should invoke to solve artificially constructed moral dilemmas."[821] Martha Nussbaum explains that though there are different variations of Virtue Ethics theory, there are some basic convergences:

> Insofar as there is any common ground among the defenders of 'virtue ethics,' it lies, I suggest, in these three claims:
> A. Moral philosophy should be concerned with the agents, as well as with choice and action
> B. Moral philosophy should therefore concern itself with motive and intention, emotion and desire: in general, with the character of the inner moral life, and with settled patterns or motive, emotion, and reasoning that lead us to call someone a person of a certain sort (courageous, generous, moderate, just, etc.)
> C. Moral philosophy should focus not only on isolated acts of choice, but also, and more importantly, on the whole course of the agent's moral life, its patterns of commitment, conduct, and also passion.[822]

Several sources in the Palestinian material may imply a virtue ethics perspective. Describing a person as a רשע ערום, for instance, indicates that cunning may be more of a character trait than an isolated activity. Likewise, R. Judah b. 'Ilai's lament that the דורות האחרונים are less virtuous than the דורות הראשונים because the former look for any and all loopholes to avoid tithing, indicates that what is at stake may be more of a personality flaw than merely any one action. In the Babylonian material, however, there is evidence of a much more agent-centered perspective. This is clear from R. Ashi's insistence that use of *ha'arama* be limited to scholars,[823] the *stam*'s concern that a woman who uses *ha'arama* to immerse her impure clothing

[821] David McNaughton and Piers Rawling, "Deontology," *The Oxford Handbook of Ethical Theory*. 453.

[822] Martha C. Nussbaum, "Virtue Ethics: A Misleading Category?" *The Journal of Ethics*, Vol. 3, No. 3 (1999) 170

[823] The other two sources defined the people themselves as bad because of their use of loopholes; R. Ashi defines the loophole as good because the agent performing it is deemed "good."

on the Festival might come to do so directly, and the citation above about not teaching people about the loopholes of canceling vows, lest they stop taking vows seriously. Beyond these things, perhaps the Babylonian Talmud's interest in the sincere self in general reflect the very same issue. One must not perform certain types of *ha'arama* not because of onlookers who may misunderstand, and not because of intentions not being "concretize-able," but because ultimately, it is the person's own duplicitous intentions that will serve to create a slippery slope for future actions of the agent him or herself. Indeed, concerns of this type may be most warranted in situations of projected intentions. If the rabbis are becoming more sensitive to the significance of the internal and the external self corresponding to one another, projecting an intention may not be good enough. There is still a concern that a person might change as a result – either mistakenly become more lax, or even purposely become more permissive.

Interim Summary

There is relatively much less *ha'arama* in BT than in the earlier Palestinian material. As early as the third generation of BT *amoraim*, evidence suggests that *ha'arama* is about cover-up rather than construction; as early as the fourth generation, the term אירומי is used to mean perjury; also in the fourth generation, *amoraim* seem less interested in discussing *ha'arama* (Abaye's potential interlocutors) and even ignore it in favor of interpretations that are less dependent on agent intentions (Rami b. Ḥama). Moreover, beginning with (at least one reading of) Rava, there is a discomfort with even concrete but obvious ruses, a discomfort which the *stammaim* echo. R. Ashi rails against *ha'arama* and tries to make actions and intentions correspond. The *stam* changes earlier *baraitot* for the very same reason, so that actions accord with stipulated intentions. All of these are indicative of a more internal approach to intention, a turning to the self to determine the validity of *ha'arama*. There is an unrest with saying one thing

and doing another, with one's internal intentions being obviously contradicted by one's actions. Moreover, we posit that this is an increased focus on the self in allowing *ha'arama*. This is consistent with R. Ashi's demand that only someone who will not be adversely affected by the use of *ha'arama* may avail him/herself of it.

Legal loopholes are a very ancient way of circumventing the law. They evince a simplistic and rigidly formalistic way of viewing a legal corpus. The Palestinian material, parallel to its Roman law counterpart, suggests a more internal view of the law, less rigidly formalistic, more in tune with the spirit of what the law is really trying to accomplish. Thus, *Tosefta* and PT mark one step towards a more internal view of the law. BT, however, makes a rather giant leap forward. Rather than simply looking inside of the law, BT looks inside of the individual, demanding that his/her actions comport with his/her intentions. This is an important new step. We have used the model of Virtue Ethics in order to exhibit the significant difference between act-centered ethics and agent-centered ethics.

The fact that this change begins in the third and fourth generations of *amoraim* is not surprising. There is renewed interest[824] in the topic of intention in rabbinic law among those *amoraim*, as reflected in arguments as varied as liability under tort law[825] and transgression of

[824] Shana Strauch-Schick, in her very comprehensive study of the evolution of intention in rabbinic law within the Babylonian Talmud, has suggested that while the early *amoraim* do not discuss intentionality, which had already been discussed in tannaitic literature, for the third generation of amoraim, and more explicitly in the fourth generation of amoraim, that intention becomes a critical part of defining action once again. As she asks, "if the early Amoraim were aware of the notion of intention…why, then, did they choose to disregard it?" Her focus is particularly on the significance of intention for tort liability, but as she argues convincingly throughout the paper, the question is equally applicable for other uses of intention as well. (Shana Strauch- Schick, (dissertation) 23); See also Alona Lisista, *'Intent' and 'Thought' as Halakhic Concepts in Talmudic Literature*, JTS, 2004

[825] Aharon Shemesh, "Shogeg karov l'meizid," Hebrew University Annual 20 (1995-1996), 342-399 ((cited in Shana Strauch-Schick *Intention in the Babylonian Talmud: An Intellectual History* (Doctoral Dissertation) Yeshiva University, New York (2011) 18 n63)

Sabbath law.[826] Perhaps this renewal included qualitatively different conversations from tannaitic conceptions of intention. Early understandings of intention were more externalized, more concrete. It is in the third and fourth amoraic strata that a more abstract, more intimate,[827] more subjective version of intention comes to the fore. The fact that Abaye and Rava become the champions of the intention[828] concept in BT,[829] and they are broadly recognized for ushering in major shifts in rabbinic thinking, both in their move towards greater conceptualization and

[826] Shaul Kolcheim *Davar She'ein Mitkaven b'Safrut ha-Tannait u've-Talmud* (Doctoral Dissertation) Bar Ilan University, Ramat Gan (Hebrew) (2002) 18. (cited in Shana Strauch-Shick (2011) *Intention in the Babylonian Talmud: An Intellectual History* (Doctoral Dissertation) Yeshiva University, New York, 14, n48)

[827] As Yohanan Muffs writes, "the later the literature – be it legal, religious, or literary – the greater the stress on inner states of mind, and in legal contexts in particular, the great constitutive importance of intent and volition" – Yohanan Muffs, *Love and Joy, Law, Language and Religion in Ancient Israel* (New York: Harvard University Press, 1992) 145. Annelise Riles, though, challenges him in Annelise Riles, *Rethinking the Masters of Comparative Law*. Oregon: Hart Publishing (2001). Regardless, we still must distinguish between intention to commit a sinful action and intention to perform a *miṣvah*. The latter may still require only the "ritual self." As Strauch-Schick writes regarding the fact that Rava requires intention for sin but not for the fulfillment of a *misvah*: "When it comes to rituals it is the performance which matters, regardless of the mindset that accompanies it. As recent theories of ritual studies have posited, the purpose of rituals is the creation of a "subjunctive universe" and a shared illusion of a potential ideal among its participants of which intention is not necessarily an essential component. The performance of the act and the illusion it creates are what matter since the *actions* of the ritual are what produce meaning. The inner states of the participants could, therefore, be completely irrelevant." (Strauch-Schick, 155) Though, it is likewise possible that Rava exhibits this inconsistency for a different reason: "Applying a model of legal theory may shed light on Rava's conflicting rulings. His insistence on proper intention in the case of torts and violations on the one hand and the lack thereof in the fulfillment of positive obligations on the other hand, demonstrates that he was consistently interested in protecting the actor." (Strauch- Schick 153)

[828] She summarizes: The fourth-generation Amoraim, Rava and Abaye evinced an increasing interest in the notion of intention in a variety of areas. In tort law, Rava required that one act with the intention of causing specific damage in order to impose liability. He also distinguished intentional tortious acts from negligent ones, imposing either no or lesser liability in the latter. He also discussed the need for intention in the violation of religious law. His rulings are often set in contrast to his contemporary Abaye's, who imposed liability even where there is no intent to violate. However, rulings of Abaye, in which he questioned his teacher Rabbah's positions which reflect a system of strict liability, signify that Abaye too did not impose liability without considering the actor's intention. His rulings indicate that he required a minimal intent to act as opposed to Rava's specific requirement of intent to violate. (Strauch-Schick, 172)

[829] Strauch-Schick notes that there is an important distinction between the positions of Abaye and Rava in terms of their respective requirements for intention in order to transgress: Rava consistently required that, to be culpable, one act with the intention of violating a commandment, while Abaye required that one merely perform an intentional act, regardless of purpose. (Strauch-Schick 109) Given that we do not know what Rava might have responded to any of Abaye's positions on *ha'arama*, we will not surmise if and how this debate between them would play a role.

abstract thinking.[830] Moreover, we cannot ignore[831] the fact that this trend echoes what Christine Hayes has observed regarding legal fictions, and Tzvi Novick has observed regarding implausible legal presumptions as well: Babylonian *amoraim*, especially of later generations, limit the use of constructions that do not reflect true reality. For Hayes, this reluctance on the part of BT *amoraim* is related to their anxiety about radical agency, and for Novick it is because of a more sophisticated rhetorical esthetic. For the particular application of this trend to *ha'arama*, however, we suggest a developing sense of the importance of interiority in defining one's actions.[832]

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[830] See *Tos. bQid* 45b s.v. *hava*, Ya'akov Sussman, *ve'shuv le'yerushalmi neziqin*, 101 n188, and Leib Moscovitz, *Talmudic Reasoning,* chapter nine.

[831] See Introduction (above)

[832] After analyzing what the significance of interiority may mean for the philosophy of the rabbis, there is still the question of what prompted this new emphasis. Just as the Palestinain Talmud's treatment of *ha'arama* relates strongly to its Roman cultural context, the Babylonian Talmud's treatment of *ha'arama* has parallels in its Zoroastrian cultural context.

> Yaakov Elman stresses how embedded Babylonian Jewry was within Persian culture:
> Jews and Persians had coexisted in Mesopotamia, mostly peaceably, for some 700 years by the time that the first generation of prominent Babylonian talmudic rabbis were born in the third quarter of the 2nd century…The Babylonian Jews would continue to live under Iranian rule for more than five centuries, including the entire period of the formation of the Babylonian Talmud (220-500 CE). The 1.8 million words of that Talmud, twice the size of the Code of Justinian, provides us with a rich source for understanding the intellectual, cultural, and social life of the Jews of southern Mesopotamia during those three centuries, thus presenting a picture of the community's close relationship with Middle Persian culture, and their social and intellectual contacts with their fellow citizens of the Persian Empire. (Yaakov Elman, "Talmud ii. Rabbinic Literature and Middle Persian Texts," *Encylopaedia Iranica*, online edition, 2010, available at http://www.iranicaonline.org/articles/talmud-ii)

Elman observes the many similarities as well between Judaism and Zoroastrianism, whether in particulars such as the status of the menstruant woman, or general theological principles such as reward and punishment or heaven and hell. Sassanian Babylonia was a ripe context for mutual influence.
It is well-documented that BT and Zoroastrian literature share an emphasis on the significance of intention. (See Shaul Shaked, "Religious actions evaluated by intention: Zoroastrian concepts shared with Judaism," *Shoshannat Yaakov* (2012) 403- 413: "The texts quoted leave little room for doubt that the Zoroastrian doctors regarded intention, either in the virtue of performing good deeds or in the sin which consists of desisting from such a performance, a meaningful factor, perhaps an essential one, in evaluating the religious merit of a person's ritual conduct." (413); See also Yishai Kiel, "Cognizance of Sin and Penalty in the Babylonian Talmud and Pahlavi Literature: A Comparative Analysis," *Oqimta* 1 (2013) 1-49; M. Macuch, "On the Treatment of Animals in Zoroastrian Law," in: *Iranica Selecta: Studies in Honour of Professor Wojciech Skalmowski on the Occasion of His Seventieth Birthday* (Silk Road Studies 8), Ed. A. van Tongerloo, Belgium: Turnhout (2003) 109-

129; Y. Elman, "Toward an Intellectual History of Sasanian Law: An Intergenerational Dispute in Hērbedestān 9 and Its Rabbinic Parallels"*The Talmud in its Iranian Context*, Eds. C. Bakhos and R. Shayegan. Tübingen: Mohr (2010) 21-57) In fact Shana Strauch-Schick argues that Rava's specific interest in intention may be a result of Zoroastrian influence. (Strauch-Schick, 18-20, 210ff. Yaakov Elman has made the case for Rava having been more impacted by Zoroastrian influences than Abaye, as the former lived in a *Meḥoza*, a suburb of the Sasanian winter capital of Ctesiphon, while the latter lived in Pumbedita, which was more rural and offered less contact with the Persian world. Regardless, presumably, once a discussion began in rabbinic circles, it would have ripple effects. (Yaakov Elman, "Ma'aseh be-Shtei Ayarot: Mahoza u-Pumbedita Ke-Metzayygot Shtei Tarbuyot Hilkhatiyyot," *Torah Li-Shemah: Mehqarim be-Mada'ei ha-Yahadut li-khvod Prof. Shamma Yehudah Friedman*, Ed. D. Golinkin. Ramat Gan: Bar Ilan University Press (2007) 3-38.) For the purposes of this study, however, it is significant to determine whether intention is a uniquely inner force or whether it is considered a mere legal fact, one which may potentiall be "externally constructed." Below are several examples from Zoroastrian corpora that indicate the significance of interiority:

> **AW** (Ayādgār ī Wuzurgmihr) **§84**
> The function of innate wisdom is to preserve the body from doing things that induce fear, from deliberate (nigerišnīg) sin, and from fruitless effort, to hold in mind the transience of the things of this world and the finality of the body, not to diminish from the things related to one's future existence, and not to increase those that are related to one's passing away.

There are a number of Zoroastrian texts which discuss deliberate action, (Ardā Wirāz nāmag (Awn) 37.4; Rivāyat of Āturfarnbag and Farnbag-Srōš (RAF) 57A.1; Šāyast nē Šāyast (ŠnŠ) 10.37; The Pahlavi Rivāyat accompanying the Dādestān ī dēnīg (PRDd) 18e; ŠnŠ 10.6; Herbedest*ān* 9.3; Dādestān ī dēnīg (Dd) 7.1; ŠnŠ Suppl. 14; ŠnŠ 8.4) and this passage specifically asserts an internal quality to wisdom: "innate wisdom," as opposed to "acquired wisdom" is connected to deliberations about sin.

> **WZ** (Wizīdagīhā ī Zādspram) **29.7**
> And the soul, the commander, which is the lord and administrator of the body, in which is its own chief and foundation, is similar to a fire-tender, who has among his functions (the duty) to keep the dome clean, proper and under supervision (pad nigerišn), and to kindle the fire.

Here, the mind supervises the body's activities. It is not the action which is primary, but the mind which directs the activity. This is significant, in that the intimate "I" of the person is meant to steer his or her actions.

Zoroastrianism further contends that subjective internal thoughts even without action are as impactful as action itself. Recently, David Brodsky has observed that Babylonian *amoraim*, as opposed to Palestinian rabbis, share this common view with their *Zoroastrian* contemporaries. (Brodsky also discusses Christian texts which likewise assert the equation of evil thought with evil deed: David Brodsky, "'*Hirhur ke-ma'aseh damei'* ('Thought Is Akin to Action'): The Importance of Thought in Zoroastrianism and the Development of a Babylonian Rabbinic Motif," forthcoming in *Irano-Judaica Vol.*7, 25ff) He writes: …while Rabbinic Judaism of tannaitic Palestine generally did not conceive of thought as being mitzvah or sin, some rabbis in amoraic Babylonia did conceive of it as such. In doing so, these Babylonian rabbis, notably Rav, R. Naḥman, Rava, and Ravina, were in line with the Persian cultural context of the time, and they are precisely the rabbis whom Yaakov Elman has shown generally to be the most culturally Persian (Yaakov Elman, "Middle Persian Culture and Babylonian Sages: Accommodation and Resistance in the Shaping of Rabbinic Legal Tradition," *The Cambridge Companion to the Talmud and Rabbinic Literature.* Eds. Charlotte E. Fonrobert and Martin S. Jaffee. Cambridge: Cambridge University Press (2007)165-197) This notion was entirely new in rabbinic Judaism. (Yaakov Elman, "Middle Persian Culture and Babylonian Sages: Accommodation and Resistance in the Shaping of Rabbinic Legal Tradition," *The Cambridge Companion to the Talmud and Rabbinic Literature.* Eds. Charlotte E. Fonrobert and Martin S. Jaffee. Cambridge: Cambridge University Press (2007)165-197) To be sure, the tannaitic Palestinian Rabbis did consider *intention* to fulfill good deeds and to commit sin as playing a role in the halakhic system, however, for them intention needed to be coupled with action to be sin or mitzvah. The Zoroastrians and some Babylonian Rabbis, on the other hand, considered simply *thinking* about sin as itself sinful. Brodsky, ""'*Hirhur…"* 1

(Bernard Jackson goes to great length to eschew the notion that early rabbinic law prosecutes for intention alone. (E.g. showing that the prohibition to covet was truly interpreted as the prohibition to steal (Ex. 20:17; Deut. 5:21); For further examples, see Bernard S. Jackson, "Liability for Mere Intention in Early Jewish Law," *HUCA* 42 (1971) esp. 197-207. As for the Palestinian *amoraim*, Brodsky believes they were had imported Babylonian ideas: "Although amoraic Palestinian sources rarely evince any knowledge of the ideology that thoughts could themselves count as sin or as mitzvah, three short passages do exist in amoraic Palestinian literature that contain such a notion. In two of the three passages (Gen. R. 19 and Lev. R. 7:3), a trail seems to have been left exposing that the notion was likely imported from Babylonia. The concept, therefore, seems to have originated in Babylonia, and to have subsequently been exported to the amoraic Palestinian community." (Brodsky, 32-33)

Dēnkard 6:227 He (every person—DB) should be contrite and repentant to the gods for every sin he thinks he was guilty of that day in thought, speech and action. *pad harw wināh ī menēd [ku] hān rōz pēšār (?) *būd pad menišn gōwišn kunišn az-eš abaxš ud andar yazdān pad-padīd *bawišn* (all transcriptions and translations of Dēnkard 6 are from Aturpāt-i Ēmētān 1979) **Dādestān ī Dēnīg 13.3** and in the future body, on the completion of all accounts, the Creator Ohrmazd himself does the account, (the Creator Ohrmazd) to whom the account of all the thoughts, words and deeds of the creatures...are known through his omniscient wisdom. *pad harw wināh ī menēd [ku] hān rōz pēšār (?) *būd pad menišn gōwišn kunišn az-eš abaxš ud andar yazdān pad-padīd *bawišn* (all transcriptions and translations of Dēnkard 6 are from Aturpāt-i Ēmētān 1979) **Dādestān ī Dēnīg 19.2** It is said that the souls of the dead and departed are on the earth for three nights. The first night they receive comfort as a result of their good thoughts and sorrow as a result of their evil thoughts. The second night they receive pleasure as a result of (their) good words and trouble and punishment as a result of (their) evil words; and the third night they receive help as a result of (their) good deeds and punishment as a result of (their) evil deeds. *widardān ud murdagān ruwān 3 šab pad zamīg hēnd. u-šān fradom šab az humat šnāyišn az dušmat bēš. dudīgar šab az hūxt rāmišn az duš-hūxt duš-xwārīh pādifrāh ud sidīgar šab az huwaršt frayādišn az dušxwaršt pādifrāh rasēd.*	**בבלי ב"ב קסד: (המבורג)** אמ' רב עמרם אמ' רב שלש עברות אין אדם ניצל מהן בכל יום הרהור עברה ועיון תפלה ולשון הרע R. 'Amram said in the name of Rab, "A person is not saved from three sins every day: thought of sin [*hirhur 'averah*], [the lack of] focusing on prayer, and gossip." **בבלי ב"ב טז.** בכל זאת לא חטא איוב בשפתיו אמר רבא בשפתיו לא חטא בלבו חטא "In spite of this, Job did not sin *with his lips* (Job. 2:10)" – Rava said: With his lips he did not sin, with his heart he sinned. **בבלי שבת סד.-:** ויקצף משה על פקודי החיל אמ' רב נחמן אמ' רבה בר אבוה אמ' להן משה לישראל שמא חזרתם לקלקולכם הראשון אמרו לא נפקד ממנו איש אמ' להם אם כן כפרה זו למה אמרו לו אם מידי עבירה יצאנו ידי הרהור לא יצאנו מיד ונקרב את קרבן יי'י And Moses became angry with the commanders of the troops […and Moses said to them, 'You let all the women live']" (Num. 31:14–15). Rav Naḥman said in the name of Rabbah bar Abuha: Moses said to Israel, 'Perhaps you have returned to your original sinning ways.' They said to him, 'Not one of us had intercourse' (Num. 31:49). (This is a play on the verse. For this nuance of *paqad*, see Jastrow, *Dictionary*, 1206, s.v. *paqad*. In its biblical context, it seems to mean, "and no man is missing.") 'If so, what is this sacrifice for?' They said to him, 'If we have escaped from the hands of sin, from the hands of [sinful] thoughts we have not escaped.' At which point they said, 'We have offered the sacrifice of the Lord' (Num. 31:50).(*bShabbat* 64a (MS Oxford). See also the parallel in *Masekhet Kallah* 7 and the analysis of this passage in Brodsky 2006: 52–66 and 124–29.)

The significance of this joint phenomenon is that thought is decoupled from action and is recognized on its own. Thus, it is perceived as much more innate, intimate, and internal. It is what God (and the person him or herself)

Conclusion

In this chapter we have seen a turn to integrity in the Babylonian material which requires that internal and external intention correspond to one another. This may be related to the observation that the third and fourth century of Babylonian *amoraim* renewed their interest in intention. Perhaps they also began to redefine it. This marks a development in rabbinic thinking from the Palestinian material, which was one step removed from legal formalism, in its interest in the inner life of the law, to a new step which involved recognizing the subjective actor as significant. This trend begins in the third and fourth generation of BT *amoraim* and becomes particularly pronounced for R. Ashi as well as the redactors.

alone knows. The permanent bond between thought and action which had convinced Rosen-Tzvi that intention is a type of action (See chapter 3, above) has been severed. Intention is not just about defining actions, nor is it simply defined by actions. The internal self is real. It is indeed possible that the Babylonian Talmud's perspective on *ha'arama* is another symptom of this shift in perspective about what role the mind plays in sin.

Dissertation Conclusion:

In this work, we have used our study of the changes in the use of *ha'arama* terminology to paint a portrait of evolving legal thought: progressing from an emphasis on formalism to an interest in equity, and ultimately to a concern for the subjective individual actor. Simultaneously, the material indicates a move from the more externalized notion of the ritual self to the more evolved notion of the sincere self. To be sure, these are not completely linear evolutions, and they do admit inconsistencies. But they are indeed broadly descriptive of the development of rabbinic law in this area. These developments are likely the result of a combination of factors which are both innate to rabbinic thought- a natural progression from earlier stages – as well as environmental or external factors.

Rigid formalism is typical of religious systems, as it does not take the individual into account. Its focus is the perfect law legislated by the perfect Lawgiver. Thus, regardless of unjust consequences for individuals or for society as a whole, a rule must be kept at all costs. An interest in equity, however, belies more nuanced expectations for the relationship between law and society. Sometimes considerations of equity are about consequences for people or society, but other times considerations of equity are about the impact of a given law on the environment or on the legal system itself. As Jonathan Wyn Schofer defines it, "The 'subject' delineates a rich and messy terrain, characterizing the self as it speaks, experiences, knows, chooses, and acts."[833]

This development is distinct from a liberalization of the law:

> Four stages in the development of law with respect to morality and morals may be recognized. First, there is a stage of undifferentiated ethical customs, customs of popular action, religion, and law; what analytical jurists would call the pre-legal stage. Law is undifferentiated from morality. Second, there is a stage of strict law, codified or crystallized custom, which in time is outstripped by morality and has

[833] Jonathan Wyn Schofer, "Self, Subject, and Chosen Subjection: Rabbinic Ethics and Comparative Possibilities," *The Journal of Religious Ethics*, Vol. 33, No. 2 (June, 2005) 270

> not sufficient power of growth to keep abreast. Third, there is a stage of infusion of morality into the law and of reshaping by morals, in which ideas of equity and natural law are effective agencies of growth. Fourth, there is a stage of conscious, constructive lawmaking, the maturity of law, in which it is urged that morals and morality are for the lawmaker, and that law alone is for the judge.[834]

According to his vision, one can move past the rules. The rabbis, however, are more reticent about this. Our discussion of loopholes indicates just how bound the rabbis themselves were by the law. They were not simply legislators, but with regards to their inherited law, they were judges. They could not just invent new rules and break old rules. That is, by definition, why loopholes come about as legitimate legal means. The rabbis in fact, never completely give up on formalism. They simply tweak it. As Christine Hayes has observed, the proclivity for radical rabbinic agency actually wanes over time. If anything, the rabbis' focus on the self leads to stricture rather than leniency.

However, though the rabbis are unwilling or see themselves as unable to change the law, whether as a result of their interaction with Roman legal culture, internal forces or probably both, they did indeed recognized the shortcomings of the positive law. They recognized that sometimes the values of the law itself cannot upheld by conventional legal interpretation. Sometimes such interpretation might cause terrible financial loss or even sinful behavior. However, rather than simply accepting this reality, they are willing to use an age-old method of evasion not to buttress what they see as the values of the law. This is reflective of their commitment to law in its current technical iteration as well as their determination to square *halakha*'s rules with its perceived morality. Despite the slippery slope invited by the use of legal dodges, the rabbis do their best to curtail the abuse of *ha'arama*. This too indicates either an

[834] *The Ideal Element in Law*, ed. Stephen Presser (Indianapolis: Liberty Fund 2002), chapter 3, *Law and Morals*

extreme emphasis on the values they seek to uphold, and/or an understanding that people will not accept anything less.

Simultaneously, the rabbis' explicit reference to their functionalist goals – e.g., preventing sin, preventing monetary loss – is at odds with other depictions of rabbinic, and especially amoraic and post-amoraic *modi operandi*:

> Rabbinic explanations of legal rulings – mainly, amoraic and post-amoraic explanations of tannaitic rulings – are frequently formalistic and conceptualistic in nature. Such explanations often focus on the formal legal status of particular actions of objects – for example, is a particular structure defined as a halakhically valid partition – rather than on the assumed goals of the law (e.g., promoting equity). By contrast, rulings in other legal systems are often based on functionalist considerations and explained in consequentialist fashion, in light of socioeconomic or moral considerations and the like. Contemporary historians of rabbinic law, too, are frequently inclined to explain rabbinic rulings in light of socioeconomic, historical, or political considerations rather than inner-halakhic, conceptualist considerations.[835]

This places *ha'arama* in a unique category of rabbinic interpretation.

Another question raised by *ha'arama* is that of trust in Jewish practitioners not to misuse these dispensations. On the one hand, the rabbis explicitly outlaw certain *ha'aramot*, yet they are willing to allow others, thus putting great faith in the individual. This, however, may begin to yield to cynicism and/or realism in amoraic times. We cited in our introduction a statement by early Palestinian *amoraim* in the name of the *tanna* R. Judah bar Ilai lament the exploitation of tithing loopholes. The late *amora* R. Ashi reaches a fever pitch with his qualification that only a *ṣurva me-rabanan*, a rabbinic scholar, may be trusts not to mishandle (certain) *ha'arama* leniencies. *Ha'arama* places the rabbis in the corner of both the law and the practitioner, playing both sides of the conflict – actualizing the law while offering insider information to those

[835] Moscovitz, *Talmudic Reasoning*, 27

impacted negatively by the law. Moreover, it places the law and the practitioner on the very same side, allowing the law to work on the practitioner's behalf. The rabbis are the agents of this matchmaking.

Within this study, both the continuity and the change that emerges from the Palestinian Talmud to the Babylonian Talmud are significant. Working off the tannaitic precedents, the two Talmuds inherit the tradition of *ha'arama* and add their own respective flourishes. Both Talmuds cite the tannaitic examples, use them as leverage against one another, and question whether to apply the tannaitic precedents to new circumstances. They likewise share some of the limiting criteria for determining which *ha'aramot* should be deemed acceptable and which must be overruled or rejected - e.g., the significance of monetary loss or of sin.

There are, however, two fundamental differences between how PT and BT speak about *ha'arama.* First, in PT, *ha'arama* is a pervasive concept, touching on so many areas of Jewish law; in BT, *ha'arama* basically becomes relegated to the Sabbath and Festival law. Thus, the presence of *ha'arama* in BT is both quantitatively more rare and also much less diversified. Second, PT and BT examine *ha'arama* from radically different angles. When PT seeks out *ha'arama* to prevent it, there is a sense that it is not necessarily the methodology which bothers the *amoraim* or the editors, but the fact of circumvention itself. Thus, suspicion of *ha'arama* is often about the equity of the situation. This stage of rabbinic thinking, indicative mostly in the Palestinian material, while it emphasizes the importance of the human agent, still views the practitioner as a mere subject which is impacted by the law. The only subject equity knows is the lawgiver him/herself. What would the lawgiver say if s/he were here? How would s/he want the law to be applied? There is no discussion addressing the subjective perspective of the agent; in

fact, there is moreover an acceptance of a constructed self. Agents may "fake" their intentions, creating legal or ritual reality that differs from their internal subjective selves.

In BT, however, the focus of weeding out *ha'arama* is on those cases which involve the legal actor's intention. It seems that the methodology of stipulating intention is under examination rather than the fact of circumvention generally. The distinction that Shmuel Shilo attributes to all of the rabbinic material - between "use of a rule of law in order to by-pass another rule" versus "the actor claiming that his intention was such…when in fact his intention was quite different" [836] only becomes truly noticeable in the later Babylonian material. Thus, in BT, we observe a move towards integrity, the inclusion of human being not only as object but as subject, a being who interacts dynamically with the law. This is evident in several ways. First, externally constructed intention becomes very circumscribed and limited in application: a person's actual subjective self matters: the distinction between obvious and inconspicuous *ha'arama* becomes a litmus test. Moreover, there is a concern with the impact of using loopholes on the individual him or herself. Will it lead him/her to be more lax with the law in the future? Also lurking in the background is the question of how the use of *ha'arama* may impact onlookers. No longer is the concern simply the black on white application of the law at issue but the impact of such application on the human psyche. Moreover, BT's discomfort with this method is evident in its use of the *'.r.m.* root in reference to lying, as well as distinctions made between different types of actors such as the young rabbis versus the less learned.

This development of probing internal intention relates to the current debate regarding the pervasiveness of Realism and Nominalism within rabbinic law. Realism and Nominalism[837]

[836] Shmuel Shilo, "Circumvention of the Law in Talmudic Literature," *Israel Law Review* Vol. 17, No. 2 (1982) 153

come to law from the realm of philosophy, and their distinction[838] finds its origins in twelfth century scholasticism. Peter Abelard was the original nominalist: he argued that "only individual substances exist outside the mind, and that universals (i.e., abstract notions – E.S.) are merely names *(nomina*) invented in the mind to express the similarities or relationships among individual things belonging to a class."[839] While three tables may each be white, by the idea of "whiteness" does not exist in reality; the abstract concept of "whiteness" is invented by the mind to categorize. The same may be said of notions that are more abstract – beauty, justice, courage, etc. Abelard's position ran counter to the Greek Platonic heritage, that reality as we perceive it with our senses is truly just derivative of universals or Forms, abstract notions which truly exist. Hence, Realists argue that universals do indeed exist and are not simply invented by the mind. The dispute between Realism and Nominalism is ontological in nature.

The Realism/Nominalism debate, however, is equally relevant to law: twelfth-century scholastics debated as they combed Roman law for underlying universal legal principles whether such universal principles actually existed in the world, or whether they were only categories imposed by the human mind.[840] And, in recent decades, this debate has become relevant to rabbinic law in Antiquity: were the rabbis Realists or Nominalists?[841] To begin the conversation,

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[837] "The view that all abstract notions (in philosophy: universals) are unreal and consequently fictitious is based on one fundamental premise, viz. that 'reality' exists only in the natural, perceptory, sensory world. Only those objects that can be perceived by the human senses 'really exist'. All others are chimera, fictions." (Pierre J. J. Olivier, *Legal Fictions in Practical and Legal Science Vol. 2*, Rotterdam: Rotterdam University Press (1975) 46)

[838] See Ed., DD Runes, *Dictionary of Philosophy*, London: Philosophical Library (1964), s.v., *Nominalism*, for a thorough discussion about the debate between nominalism and realism.

[839] Harold Berman, "The Origins of Western Legal Science," Eds. J.C. Smith and David Weisstub, *The Western Idea of Law*, London: Butterworths (1983) 919.

[840] Christine Hayes, "Legal Realism," 121

[841] While Jeffrey Rubenstein questioned Silman and Schwartz's uses of the terms Nominalism and Realism (Rubenstein, "*Nominalism*"158 n5), Hayes' definition of the terms is consistent with how these terms are used by Silman and Schwartz.

Moshe Silberg[842] suggested that rabbinic law was naturalistic, namely that "halakhah affected its objects by a type of 'physical causality' analogous to the ways in which the laws of nature operate upon the material world.[843]" His definition of naturalistic may not quite have meant what Realism itself means, but Silberg did spark discussion that did begin to speak in conventional Realist/Nominalist terms. Yohanan Silman balanced Silberg's picture by suggesting a tension between Realism (his equivalent of Silberg's "naturalism") and Nominalism within rabbinic law. In defining Nominalism and Realism for these purposes, Silman suggested a distinction between, "a view of the commandments as orders resultant from the will of the commanding God, on the one hand, and, on the other hand, a view of the commandments as guidelines based in independently existing situations.[844]" In other words, is an action wrong only because God commanded so, or has God commanded so because it is intrinsically, ontologically wrong? While some[845] have criticized this definition too, Christine Hayes has noted that it indeed parallels the debates among the Scholastics: do universals have ontological existence, or are universals being imposed by something besides for the natural world, such as the human mind?[846]

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[842] Moshe Silberg, "The Order of Holy Things as a Legal Entity," *Sinai* 52 (1962), 8-18

[843] Rubenstein, "*Nominalism*," 159

[844] Silman, "Halakhic Determinations," 251 (Hebrew)

[845] Jeffrey Rubenstein suggests that Silman and Schwartz's realism is more akin to natural law, while their nominalism parallels legal positivism. (Rubenstein, "Nominalism," n. 2, 5); Yair Lorberbaum counters Silman's binary with his own: reality-based *halakhot* vs. values-based *halakhot* (Lorberbaum, "Halakhic Realism," 4 (abbreviated version of "Halakhic Realism," Shenaton ha-Mishpat ha-'Ivri 27, 2010))

[846] Hayes, "Legal Realism," 121

Daniel Schwartz,[847] using this same definition of Realism vs. Nominalism, departs from Silman, suggesting that the rabbis were nominalists while the sectarians at Qumran were realists. He cites, for example, the sectarian ban on polygamy based on Adam and Eve being monogamous as an example of legal realism because it comports to the state of nature,[848] and the rabbinic permission for polyandry as an instance of legal nominalism, as it violates nature. In addition to challenging[849] Schwartz's specific examples, Jeffrey Rubenstein[850] does for Schwartz what Silman did for Silberg: he brings the other side of the debate back into the picture – offering that the rabbis have exhibit both nominalistic and realistic tendencies.[851]

It is important to note that the argument between Realism and Nominalism is not just about the origins and existence of universals, but it is likewise about epistemology, how the content of law is known or determined – whether solely by empirical knowledge of "the way things really are," as Realists would argue, or perhaps not. Realists and the Nominalists each gave different weight to the "role of epistemological certainty in determining the content of the law." For Realists, perceiving nature, "the way things really are," confirms or denies the existence of universals. For Nominalists, however, universals both exist in the specific acts or entities that they characterize and, as universals, are "qualities attributed to entities by the mind."

[847] Schwartz, "Law and Truth"

[848] CD 4:21; Schwartz, "Law and Truth," 250

[849] For instance, Rubenstein may suggest that Schwartz mistakes an exegetical issue for a Realism/Nominalism divide. (e.g., Rubenstein, "Nominalism," 163)

[850] Rubenstein, "*Nominalism*"

[851] He further suggests that nominalism is so prevalent in rabbinic law because of the distance of the rabbis from the society of the Bible; the more distant a generation is from the original law code, the more it must see those laws as constructions, as they no longer ring as realistic or as relevant as they could have been when they were first made. (Rubenstein, 182-3)

Therefore, empirical knowledge plays a more limited role, and the universals may be revised independent of "the way things are."[852] And rabbinic law certainly contains examples of both Realism and Nominalism in this regard. For example, in the famous story of R. Joshua and R. Gamaliel, when the latter instructed R. Joshua to appear on what he had calculated as the Day of Atonement with a staff and coins, R. Aqiva explains that the calendar is determined by human declaration, whether it conforms to empirical reality or not.[853] On the other hand, the preceding *mishnah* establishes that if the new moon is not attested to by witnesses on the night of the twenty-ninth of the month, the month is automatically considered thirty days long, and the thirty-first day becomes *rosh ḥodesh* with no declaration by the court; after all "they have already sanctified it in heaven."[854]

And there is yet another application of Realism versus Nominalism, which finds its expression in the realm of ethics. In the fourteenth century, the early nominalist William of Ockham, for example, argued for a will-based ethics in which actions themselves are morally neutral and are evaluated as good or evil based on the agent's intentions: "the goodness is only a name or a connotative concept, principally signifying the act itself as neutral and connoting an act of the will that is perfectly virtuous"[855] He offers the example of someone who begins walking to church with the intention to praise and honor God, but at some point continues the journey out of pride,[856] or someone who jumps off a cliff to commit suicide and genuinely

[852] Ibid; see also Berman, "Origins," 410-413.

[853] *mRH* 2:8-9

[854] Ibid. 2:7. This example is courtesy of Rubenstein, "Nominalism ," 175-6
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[855] *Sent. 3 q.*11 (OTh VI 388.18-389.5)

[856] Ibid., (OTh VI 360.8-16)

repents half-way down.[857] In each case, he argues, one's intentions change the activity mid-way from good to bad or from bad to good, respectively.[858] In legal terms, Ockham's perspective translates into whether or not it is the mind (intention) that determines reality for the purpose of law. One need only look to rabbinic im/purity law to find the combination of Realist and Nominalist perspectives: one the one hand, a person's decision that an object s/he has created is ready for use defines it as a vessel and thus renders it subject to ritual impurity. On the other hand, a person's decision no longer to use the item in question cannot render it pure again once it has been contaminated. Instead, the vessel must undergo a physical change that renders it unfit for use, it is not considered changed for legal purposes.[859] This evinces a more Realist conception.

Taken in sum, the three applications of the Realism/Nominalism debate, outside the realm of philosophy, ask whether legal reality or actions are to be determined based on the physical world as it is or based on the mind, whether human or Divine. What our study adds to this discussion in terms of rabbinic law is that it adds a new layer of inquiry. Our question is not whether the rabbis were nominalistic or realistic. Our question is whether in those situations in which the rabbis evidence nominalistic tendencies, what type of cognition is required? Need there be sincere internal feeling, or is ritualized mental construction enough? It seems that the Palestinian material sometimes suffices with the latter, while the Babylonian material requires

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[857] *Quodl.* 1.20 (OTh IX 103.83-95)

[858] I wish to thank Professor Christine Hayes for clarifying the connection between ontological nominalism and ethical/legal nominalism in her response to Ishay Rosen-Tzvi at the Conference of Halakha and Reality (NYU, Tikvah) in fall of 2012.

[859] *Kelim* 25:9

the former. As we have explained at length in chapter three, this is part of a larger debate about the development of the requirement for genuine subjectivity within rabbinic law.

Influence

The question of subjectivity relates closely to the question of outside influence. As detailed in chapter three above, the argument between Mira Balberg and Ishay Rosen-Tzvi about whether the early Palestinian rabbis required sincere internalized intention when committing an act has been deeply related to the early rabbis' understanding of Greek thought. Balberg argues for a Stoic understanding of the self, which is an intimate "I," while Rosen-Tzvi argues that this is not necessarily the case, regardless of the Hellenistic ideas known to the early rabbis. Our work complicates this further by suggesting that there may be a split – evidence of the intimate "I" in some arenas of law such as cultic im/purity, with a more legalistic and externalized understanding of intention in other branches of law, such as tithing or the Sabbath. The intimate self, we argue, does not become a more widespread criterion until the Babylonian amoraic period. Thus, we do not accept wholesale impact of Greek thought.

We do, however, assert Greco-Roman influence, specifically on the legal thoughts of the Palestinian *amoraim*. The limited degree to which Biblical material involving subterfuges seems to have influenced or even interested rabbis in both Palestine and Babylonia is surprising. As we detailed in the first chapter, aside from the very *'.r.m.* vocabulary, taken from Genesis and Proverbs, there is no real connection to speak of between the Biblical and rabbinic corpora. Moreover, rather than recalling Biblical precedent for the use of loopholes where such circumventions are plainly evident in the text, the rabbis read their own loopholes into the Biblical text, and on scant basis. Instead of working from within Jewish literary tradition, we find the Palestinian rabbis echoing the sentiments of their earlier Roman counterparts. Given

geographical and temporal proximity, as well as ample precedent for such borrowing in general, this is rather predictable. Like Roman jurists at the close of the classical period and beyond, the Palestinian rabbis were developing an interest in the damage that following the letter of the law might cause. As the second century Roman jurists emphasized the problems of *fraus legi*, legal fraud, the Palestinian rabbis suspected *ha'arama* and tried to put a stop to it in places where it undermined the law. Also, like their Roman counterparts, there were "legal frauds" that the Palestinian rabbis were willing to countenance. We argue that the most significant criterion is the question of equity, what the lawgiver himself would have wanted to see in application of his statute.

The perspective of later Babylonian rabbis also bear similarities to their own religio-intellectual milieu, the *Weltanschauung* of their Zoroastrian counterparts. While BT offers many fewer examples of *ha'arama*, as well as a limitation of its scope, its unique contribution is the question of the legal actor's innermost thoughts. It is possible that the significance of subjectivity correlates to a similar way of thinking found in Zoroastrian literature of the time.[860]

It is likewise possible that Roman material influenced the Babylonian rabbis. Even within the development of Roman law itself, the notion of *fraus legi* began to take on a more subjective valence as time went on. During Rome's classical period[861], the litigant's intent to evade was immaterial. "It did not matter to the classical jurists whether the party intended to evade the law[862]; they considered what was done to be a violation if the result accomplished seemed to be

[860] See footnotes at the end of chapter 4, above.

[861] The first two hundred fifty years of the Common Era

[862] This observation about the development of Roman law likewise impacts the Roman-Palestinian parallel: unlike early Roman jurists, for the PT intent to evade is already significant. Its significance is expressed in the PT's undertaking of "suspicion of *ha'arama*." For instance, in the case of declaring one's leaven ownerless two days before Passover, at issue is not whether the act itself is undermining the law but whether the person is using the tool

what the law wished to prevent." [863] By the time of Justinian, however, the sixth century C.E., the intent to evade is what determined an action as being *in fraudem legis*: "the post-classical law considered the intention of the party to evade the law as the touchstone of *fraus legi*."[864] In other words intention came to the fore in Roman tradition as well. However, the relationship between Roman law and the Babylonian Talmud is complex and is likely filtered through a Palestinian lens. While Boaz Cohen and others[865] argued that the Babylonian Talmud was indeed heavily influenced in its content and method by Roman law, more recent scholars are more critical of such comparison. As Catherine Hezser writes:

> The older studies often lack proper distinctions between Palestinian and Babylonian, tannaitic and amoraic texts. They quote Babylonian next to Palestinian texts, for example, and try to elucidate them on the background of Greco-Roman law. Roman law may be considered the proper framework for examinations of the legal traditions transmitted in Palestinian documents only. For the Babylonian Talmud, Persian law has to be consulted, as Yaakov Elman has repeatedly emphasized.[866]

And while Richard Kalmin has recently argued that the Jewish Babylonian gained an infusion of Palestinian conventions in the fourth century, his argument is limited basically to "literature,

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of declaring food ownerless to undermine the requirement to rid oneself of leaven for Passover. Alternatively, the fear is that others will use this legal machination to do so. Thus, the intent to evade is integral to defining whether the action itself undermines equity. Nonetheless, it is clear from the shared preoccupation with limiting *ha'aramot* and *fraus legi*, respectively, as well as their general shared intellectual milieu, that the Palestinian rabbis have much in common with Roman jurists in this respect.

[863] Katzoff, "Judicial Reasoning," 248-9. Katzoff bases these conclusions on the work of G. Rotondi, *Gli atti in frode alla lege*. Turin (1911); Franco Casavola, *'Lex Cincia': Contributo all storia delle origini della donazio romana*. Naples: Jovene (1960) 118-119, note 3; Lucio Bove, "Frode, Diritto Roman," *Noviss. Dig. Ital.* 7 (1961) 630-631; Max Kaser, *Das römische Privatrecht* (1955) 216,

[864] Katzoff, 248

[865] *supra* n384

[866] Catherine Hezser, "Roman Law and Rabbinic Legal Composition," *The Cambridge Companion to the Talmud and Rabbinic Literature*, 161-2

literary forms, and modes of behavior" rather than law. Kalmin attributes this "Palestinianization" of Babylonian rabbis to the increased exposure to Roman Palestine brought about by Persian King Shapur I's transplantation of thousands of residents of the eastern Roman Empire to Mesopotamia, eastern Syria and western Persia in the mid-third century, upon his conquest.[867] He writes:

> We have seen that in several respects, Babylonian Jewish society between the third and seventh centuries CE conformed to Persian models. At no time, however, was it sealed off from influences from the west, most recognizably in the form of traditions deriving from Palestinian rabbis, but also in the form of non-rabbinic and non-Jewish traditions deriving from Palestine, and perhaps from elsewhere in the Roman Empire. Mid-fourth-century Babylonia, however, appears to have witnessed the literary crystallization of processes accelerated by events of the mid–third century in Syria and Mesopotamia, with literature, literary forms, and modes of behavior deriving from the west attributed in the Bavli to Babylonian rabbis, perhaps to a greater degree than had been the case previously.[868]

His study advances parallels between Babylonian rabbinic thinking in its Persian context and motifs and Palestinian phenomena which emerge(d) in a Roman context, but this does not necessarily prove *direct* connection between Roman law and Babylonian rabbinic thinking. It is plausible that Palestinian rabbinic material, itself influenced by Roman law, was the filter through which the Roman material reached the Babylonian rabbis. Thus, similarities between the two Talmuds in their assessment of criteria for allowing *ha'arama*, for instance, may be the result of transplantation of rabbinic ideas from Palestine rather than Roman jurisprudential ideas.

[867] Kalmin, *Jewish Babylonia*, Introduction

[868] Kalmin, *Jewish Babylonia* , 173

Of course, we must not ignore the possibility that the Babylonian treatment of *ha'arama* simply reflects a natural progression within rabbinic thinking itself on this subject, parallel to, but not influenced by, outside counterparts.

Did the rabbis *like* loopholes?

In his book on the topic, Leo Katz writes of legal evasions:

> I have read somewhere, and I do not remember where, a shrewd bit of marriage advice credited to F. Scott Fitzgerald: 'Don't marry for money,' he is supposed to have said, 'go where the money is, then marry for love. What charmed me about this statement when I first read it was the whiff of unabashed immorality that surrounds it. What has come to fascinate me about it since then is that it seems to epitomize much of the advice that good lawyers give their clients, advice that consists of shrewd stratagems surrounded by the whiff of unabashed immorality. The question one wants to ask about such advice is whether it only seems immoral, or whether it really is. And if it is immoral, why isn't it illegal? Or *is it* illegal? But then how can good lawyers give it? What to make of such advice and such stratagems is one of the most enduring puzzles of the law.[869]

Indeed, this paragraph sums up the questions that the rabbis of the amoraic period themselves were asking. And their response(s) did not amount to simple acceptance of loopholes, but to examination and judiciousness about which circumventions would be permitted and which would be overruled by the rabbinic establishment. Exploitation of gaps in the law had been a fact of life since the Biblical age, yet the *tannaim* and *amoraim* were dissatisfied with either blanket acceptance or blanket rejection of the practice.

As for their orientation towards the methodology of technicality itself, this is unclear. In our introduction, we cited Haim Tchernowitz's use of German Historical Jurisprudence to explain the rabbinic penchant for circumventions: the rabbis understood using the letter of the law to make change as the best way preserve law as a manifestation of the will of the people

[869] Katz, 1

while maintaining its relevance to new generations. EE Urbach, however, makes a substantially different argument. On his theory, the rabbis were catering to the changes that people were already cleverly making on their own. Indeed, the tannaitic material is mixed. In some places, it is unclear whether the rabbis are founding a new dodge or simply ratifying one which is already in use. Likewise, as dodges are generally noted in the rabbinic corpus as the response to vexing situations, perhaps the dodge was merely the next best thing to outright transgression. Even where loopholes were getting out of hand, as in the citation regarding evasion of tithes included in our introduction, the rabbis seem powerless or unwilling to outlaw a common practice. On the other hand, the rabbis are very pleased that R. Tarfon makes use of a loophole to feed people during a drought. Surprisingly, they seemed to prefer his action to simply feeding the women priestly food outright but instead employing the subterfuge of betrothing them.

What emerges from our study, though, is that the *amoraim* are more interested in limiting use of legal subterfuge than in promoting it. They limit it where it conflicts with equity, where it obviously belies false pretenses. On the other hand, they were willing to admit several such tricks for valued purposes. Thus, where the letter preserves the spirit of the law, the rabbis are supportive, but where the letter undermines the spirit, the rabbis are uncomfortabel with the use of loopholes. Thus, while colloquially, the rabbis are known as purveyors of loopholes, our study emphasizes their role in qualifying such legal maneuvering.

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