

## שְׂדֵרְכָן לִילְךָ וּלְהִזִיק: 2 Daf Ditty Bava Kamma



ארבעה

\*אבות נזיקין\* השור יזהבור והמבעה וההבער  
לא הרי השור כהרי המבעה ולא הרי  
המבעה כהרי השור ולא זהוה שיש בהקרוח  
היים כהרי האש שאין בו רוח חיים ולא זה  
וזה שדרכן לילך ולהזיק כהרי הבור שאין  
דרט לילך ולהזיק הצד השעה שבהן שדרכן  
להזיק ושמירתן עליך וכשהזיק יחב המזיק  
לשלם תשלומי נזק יבמיטב הארץ :

## ארבעה אבות נזיקין

The Torah mentions four primary causes of damage, for which the owner is liable for תשלומין, reimbursement.



וההבער

Fire

*If he failed to guard his fire from spreading and it caused damage*

והמבעה

Refers either to an DTR

or to שן his ox's eating, that caused damages

והבור

A hole in the ground

*If one digs a pit in the public domain and fails to cover it, and an animal fell in and was injured.*

השור

An ox

*If one's ox caused damages*

וכשהזיק

חב המזיק לשלם תשלומי נזק במיטב הארץ

*If one of these four אבות caused damage, the owner is liable to reimburse the נזק with his most superior fields.*

*The Mishnah points out that the Torah needed to specifically teach all four אבות.*

*Had the Torah mentioned only one אב, we could not have derived the others from it.*

מתני' ארבעה אבות נזיקין: השור, והבור, והמבעה, וההבער.

**MISHNA:** There are **four primary categories of damage:** The category of **Ox**; and the category of **Pit**; and the category of **Maveh**, which, based on a discussion in the Gemara refers either to the tooth of an animal that causes damage or to a person who causes damage; **and the category of Fire.**

## ארבעה אבות ניזקין

וההבער	והמבעה	והבור	השור
Fire	Refers either to an DTR or to שן his ox's eating, that caused damages	A hole in the ground	An ox

לא הרי השור פְּהָרֵי הַמִּבְעָה, וְלֹא הָרֵי הַמִּבְעָה פְּהָרֵי הַשּׁוֹר; וְלֹא זֶה וְזֶה שְׂיֵשׁ בְּהֶן רוּחַ חַיִּים, פְּהָרֵי הָאֵשׁ שְׂאִין בּוֹ רוּחַ חַיִּים;

Each of these categories is unique; therefore, the *halakhot* of one cannot be derived from another. The defining characteristic of **the** primary category of **Ox is not similar to** the defining characteristic of **the** primary category of **Maveh**, and the defining characteristic of **the** primary category of **Maveh is not similar to** the defining characteristic of **the** primary category of **Ox**. And the defining characteristics of **this** category of Ox **and that** category of *Maveh*, **in which there is a living spirit** that causes damage, **are not similar to** the defining characteristic of **the** category of **Fire**, **in which there is no living spirit**.

▼  
**אבות**  
 מכלל דאיכא תולדות  
▼  
**תולדותיהן כיוצא בהן**  
**או לאו כיוצא בהן**  
?  
**שבת**  
 אבות מלאכות ארבעים חסר אחת  
▼  
**תולדותיהן כיוצא בהן**  
 לא שנא אב חטאת - ולא שנא תולדה חטאת  
 לא שנא אב סקילה - ולא שנא תולדה סקילה  
*The only difference between אבות and תולדות*  
**שתי אבות בהדי הדדי**  
**אי נמי שתי תולדות בהדי הדדי**  
**מחייב אכל חדא וחדא**  
*If a person violated two אבות, or two תולדות of different אבות, simultaneously, he is liable for each and every מלאכה. However,*  
**אב ותולדה דידיה**  
**לא מחייב אלא חדא**  
*If a person violated one אב and its own תולדה, or two תולדות of the same אב, simultaneously, he is liable for only one מלאכה.*

ולא זזה וזזה שדרבן לילף ולהזיק, פהרי הבור שאין דרבן לילף ולהזיק.

The mishna continues: **And** the defining characteristics of **this** primary category of Ox and *Maveh* **and that** primary category of Fire, **in which** the **typical manner** of their components is **to proceed** from one place to another **and** cause **damage**, **are not similar to** the defining characteristic of **the**

primary category of **Pit, in which** the **typical manner** of its components is **not to proceed** from one place to another **and** cause **damage**; rather, it remains in place and the damage is caused by the injured party proceeding and encountering the obstacle.

הַצֵּד הַשְּׂוֹה שְׂבָהוֹן – שְׂדֵרְכוֹן לְהַזִּיק, וְשִׁמְרִיתוֹן עָלֶיךָ; וּכְשֶׁהַזִּיק – הָב  
הַמִּזִּיק לְשֵׁלֵם תְּשֻׁלוּמֵי גֻזָּק, בְּמִיטֵב הָאָרֶץ.

**The common denominator** of the components in all of **these** primary categories is **that** it is **their typical manner to cause damage, and** the responsibility for **their safeguarding** to prevent them from causing damage is incumbent **upon you**, the owner of the animal or generator of the fire or the pit.

**And when** a component of any of these categories **causes damage, the** owner or generator of the component that **caused** the **damage is obligated to pay** restitution **for damage with best-quality land.**



פרשת משפטים

*We are responsible for damages done  
either directly by us  
or caused by our belongings.*

*Those that are explicitly mentioned in the  
Torah are what the Mishnah refers to as*

**אבות**

*And those that are not mentioned in the  
Torah, but are similar in nature, are  
referred to as*

**תולדות**

נזיקין Halachos of

**נזקי גופו**

**נזקי ממונו**

גמ' מדקתני "אבות" – מפל דאיפא תולדות; תולדותיהן פיוצא  
בהן, או לאו פיוצא בהן?

**GEMARA:** From the fact **that** the mishna **teaches** its ruling employing the term: **Primary categories, by inference, there are subcategories** of those primary categories. The Gemara asks: Are **their subcategories similar to them**, i.e., to their respective primary categories, so that the same *halakhot* apply to them, **or** are they **dissimilar to them?**

גבי שבת תנו: אבות מלאכות – ארבעים חסר אחת. "אבות" –  
מכלל דאיכא תולדות,

The Gemara cites additional areas of *halakha* where there are primary categories and subcategories and considers the relationship between them: **With regard to Shabbat we learned** in a mishna (*Shabbat 73a*): **The primary categories of labor** prohibited on Shabbat number **forty-less-one**. There too, from the fact that the mishna teaches its ruling employing the term: **Primary categories, by inference, there are also subcategories.**

תולדותיהן פיוצא בהן; לא שנה אב – חטאת, ולא שנה תולדה –  
חטאת; לא שנה אב – סקילה, ולא שנה תולדה – סקילה.

With regard to the primary categories of labor prohibited on Shabbat, **their subcategories are similar to them, as it is no different** if one unwittingly performed labor that is **a primary category**, for which he is liable to bring **a sin-offering, and it is no different** if one unwittingly performed labor that is **a subcategory**, for which he is liable to bring **a sin-offering**. Likewise, **it is no different** if one intentionally performed labor that is **a primary category**, for which he is liable to be executed by **stoning, and it is no different** if one intentionally performed labor that is **a subcategory**, for which he is liable to be executed by **stoning**.

ומאי איכא בין אב לתולדה? נפקא מינה, דאילו עביד שתי אבות  
בהדי הדדי, אי נמי שתי תולדות בהדי הדדי – מחייב אכל חדא  
וחדא; ואילו עביד אב ותולדה דידיה – לא מחייב אלא חדא.

**And what difference is there between a primary category and a subcategory?** The Gemara explains: The practical **difference is that if one** unwittingly **performs two** labors classified as different **primary categories together**, during a single lapse of awareness, or, **alternatively**, if one unwittingly performs **two** labors classified as **subcategories** of two different primary categories **together**, during a single lapse of awareness, **one is liable** to bring a sin-offering **for each and every** labor that he performed. Each primary category of labor is an independent transgression. **While if one** unwittingly **performs** a labor that is **a primary category and** another labor

classified as **its subcategory** during a single lapse of awareness, **he is liable** to bring **only one** sin-offering.

וְלִרְבִּי אֱלִיעֶזֶר – דְּמַחְיִיב אֶתְוֹלָדָה בְּמִקּוּם אָב; אִמְאִי קָרִי לִיָּה אָב,  
וְאִמְאִי קָרִי לֵה תוֹלָדָה? הֵךְ דִּהְוָה בְּמִשְׁכַּן חֲשִׁיבָא – קָרִי לִיָּה אָב,  
הֵךְ דְּלֵא הֵוִי בְּמִשְׁכַּן חֲשִׁיבָא – קָרִי לֵה תוֹלָדָה.

The Gemara asks: **And according to Rabbi Eliezer, who deems one liable** to bring two sin-offerings even if one performs a labor classified as a **subcategory together with** a labor that is **its primary category, why is** one labor **characterized as a primary category and why is** the other labor **characterized as a subcategory?** The Gemara explains: Of the labors prohibited on Shabbat, **that which was a significant labor in the Tabernacle**, the Sages **characterized it as a primary category**, and **that which was not a significant labor in the Tabernacle**, the Sages **characterized it as a subcategory**. The labors prohibited on Shabbat are derived from the labors employed in the construction of the Tabernacle; therefore, their classification is also based on their significance in its construction.

## Summary



## 2) Defining **אב** and **תולדה**

It is noted that from the reference to general categories (אבות נזיקין) it would seem that there are subcategories (תולדות) as well. The Gemara inquires whether the subcategories are treated the same as the general categories.

A Mishnah in Shabbos is cited that discusses general categories and it is demonstrated there that the subcategories are similar to the general categories.

Tangentially, the Gemara explains the difference between general categories of melachah and subcategories of melachah.

A Mishnah regarding the laws of tum'ah is cited that discusses tum'ah and it is clear that subcategories are not similar to the general categories.

The Gemara thus asks whether subcategories of damages are similar to the general categories.

R' Pappa answers that some subcategories are similar and some are not.

A Baraisa is cited that enumerates three categories of damages that could be caused by an animal.

## **Introduction to Bava Kamma<sup>1</sup>**

Tractate Bava Kamma was originally the first section of a large tractate named Tractate Nezikin, which comprised what are now the first three tractates in the Order of Nezikin. From this placement it derived its name, Bava Kamma, the first gate. The remaining part of this super-tractate was divided into Bava Metzia, the middle gate, and Bava Batra, the last gate.

These three tractates generally address monetary cases and incorporate within their chapters almost the entire range of Jewish civil law, while punishments for criminal offenses and religious transgressions are addressed only tangentially.

Tractate Bava Kamma treats one specific area of law, the law of torts, in the narrowest meaning of the term. This means that it deals with the range of responsibility and compensation for which one is liable after causing damage to another's body or property, both when the damage was caused by an

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<sup>1</sup>[https://www.sefaria.org/Bava\\_Kamma.2a.1?lang=bi&with=Introduction%20to%20Bava%20Kamma|Essay&lang2=en](https://www.sefaria.org/Bava_Kamma.2a.1?lang=bi&with=Introduction%20to%20Bava%20Kamma|Essay&lang2=en)

individual and when it was caused by his possessions, in a direct or indirect fashion.

The principles of these halakhot are founded on the passages of the Torah appearing in the portion of Mishpatim (Exodus 21:18–37, 22:1–14). The Torah does not present these halakhot in a dry exposition of abstract legal principles but in the form of lively examples drawn from everyday life. In order to be able to apply these examples to other cases, it is necessary to first determine which facets of the cases provided by the Torah are essential elements that define the halakha and which facets are just incidental details of the provided example. This is done with the help of the authoritative traditions of the Oral Law and with the tools of legal exegesis.

Tractate Bava Kamma is subdivided into two sections. The first section (chapters 1–6) covers the topic of damage caused by one's property or by actions that he initiated. The second section (chapters 7–10) concerns damage caused by a person with his own body.

The laws of torts also include a religious aspect. Many cases involve the transgression of the halakhic prohibitions against robbery, theft, and injury. Nevertheless, one's liability to pay damages is not limited to cases where there was a willful transgression of a prohibition. Rather, even when the damage was caused with no purposeful intent to harm or through neglect, one is liable to pay restitution to the injured party.

In the first section of Bava Kamma, which concerns damage caused by one's property, the key issue is that of the owner's responsibility. It is clear that an owner is responsible for the damage caused by his possessions; what requires clarification are the exact limitations of his responsibility. Does this responsibility extend to include any damage that results from his property or does it include only certain kinds of damage? Does taking the proper precautionary measures exempt one from liability for the damage that occurs despite one's efforts? Is there any difference between compensation payments made for actions performed with premeditation and purposeful intent and actions that were performed unintentionally, through neglect, or as a result of insufficient precautionary measures?

One's liability for damage depends on the nature and the form of the damage. For this reason, acts that cause damage are classified as being subcategories of various primary categories of damage.

From the verses in the Torah it is readily apparent that a distinction exists between damage to property caused by one's animals, since, in the words of the opening mishna, they have a living spirit, and damage caused by one's

inanimate possessions. With regard to damage caused by one's animals, a difference exists between cases where the animal's objective was to cause damage and cases where the damage was a consequence of the animal's typical behavior. Damage of the former type is classified as being of the category of Goring. This includes damage caused by goring, kicking, or biting done for the purpose of damaging. Cases of such damage can be further subdivided into instances in which the belligerent animal was innocuous and cases where the animal had already repeatedly caused that form of damage, and the owner had been warned about it, in which case the animal is considered forewarned. Once an animal is forewarned, the level of the owner's responsibility for any damage caused by it is intensified in terms of the extent to which he is required to safeguard his animal to prevent it from causing damage, the amount of restitution he is liable to pay, and the form of payment. Furthermore, the owner incurs liability for such damage in almost every place, whether on private property or in the public domain.

By contrast, in cases where the damage was a consequence of the animal's typical behavior, the animal's owner is liable only if the damage took place on the property of the injured party and only if such behavior is considered typical for that animal. One category of damage of this type is Eating, in which an animal's actions are motivated by the pleasure it receives in the course of the damage that it causes. Another category is Trampling, where the damage is caused by the animal's typical movements, such as by trampling on items while walking. As liability is incurred only when such behavior is considered typical for that animal, if an animal eats something it does not normally eat, or moves in an atypical manner, the owner is not liable to pay for the damage.

Furthermore, in these cases, if the owner took the standard precautionary measures to prevent damage from occurring, he is also exempt from liability. In cases of damage caused by one's movable property, a distinction exists between damage caused by one's property when it remains stationary, classified as damage in the category of Pit, and damage caused when a person initiates a hazardous situation that then moves to a different location by itself or due to an additional force such as the wind, classified as damage in the category of Fire. In cases classified as Pit, liability is incurred only where one placed his property in a domain not his own, whether in the public domain or someone else's private property. Furthermore, liability is limited to damage caused to animals and people but does not extend to damage caused to vessels. In cases classified as Fire, one is liable wherever damage is caused, although in some cases one is not liable for the full extent of the damage. Also, with regard to these primary categories, one who took standard precautionary measures to prevent damage from occurring is exempt from liability.

An additional primary category of damage, Man, includes damage caused directly by a person. One is liable for any damage that is a direct result of his actions or his force. One bears an extensive level of responsibility for his actions and therefore is liable for the full cost of the damage even if it was caused unwittingly and without awareness. The only exceptions to this are damage caused by those of limited intellectual capacity, who in general are not responsible for their actions, and damage caused by one's Canaanite slaves. In the latter case, the exemption applies to the master and is the result of an enactment for the betterment of the world, as it prevents a slave from maliciously causing damage in order to cause his owner great loss. The slave himself, if he is emancipated, will then be liable to pay for the damage he caused.

The second section of Bava Kamma deals with damage caused by one person to another and by one person to the property of another. This topic is generally subdivided into the laws of bodily injury and the laws of robbery and theft.

As the Gemara derives from verses in the Torah, one that injures another is liable for one or more of five types of indemnity payments. These are the payments:

Cost of the damage: For all types of irreversible harm, such as severing an arm or a leg, which reduces the injured party's market value.

Pain: For pain inflicted.

Humiliation: For embarrassment caused by the injury that was inflicted, such as in the rape of a woman or by causing a blemish that humiliates the person.

Medical expenses: For all medical expenses incurred as a consequence of the injury.

Loss of livelihood: For missed work and loss of income due to the injury.

These indemnities are not automatically paid for every injury caused; rather, each case is judged individually. At times one may have to pay all five types of indemnity payments, and at other times one may have to pay only some of them. Here too, there is a distinction between one who injured another willfully and purposefully, who is liable to pay all five indemnity payments when they apply, and one who injured another unintentionally or because of neglect, who is liable to pay only for the cost of the damage but not the other four types.

Injuring another person is a violation of a Torah prohibition although one is rarely punished with lashes for doing so. Accordingly, one who injures another

is required not only to compensate the injured party, but he must make amends by placating him as well.

Robbery and theft differ from cases of damage in that not only does the victim suffer a loss, but the perpetrator benefits from the property he took. The talmudic discussion about these concerns two central issues.

First, the fines imposed by the Torah on the thief, and to a lesser degree, on the robber, obligate him to make a double payment to the victim of his crime, and in cases where the crime of theft is followed by the slaughtering or sale of the stolen ox or sheep, he is required to pay four or five times the value of the stolen animal. Because these payments are fines leveled by the Torah, only a court of ordained judges, an institution that lapsed over the course of time, is authorized to collect them. Even then, the fine is imposed only in limited circumstances. For example, guilt must be confirmed on the basis of testimony from two witnesses and not based on a confession of the guilty party, and in some cases a fine is imposed only after the guilty party has taken a false oath that he is not guilty.

The second issue involves the requirement for the thief and the robber to return the item that they stole or to pay restitution for its value. Should they not do so willingly, the court is authorized to coerce them. The Gemara enters into a detailed discussion as it attempts to define this obligation. When are a robber and a thief obligated to return the very item, they stole and when are they required only to pay restitution? How is the amount one has to pay determined in cases where the value of the item changed over time? Is there a difference in this regard if the change was due to fluctuations in the item's market value or due to a physical change in the item itself?

How the stolen item should be returned is also the subject of much discussion. Can he just return the item to its owner or must he inform him that he has done so? To what lengths does he need to go to find the owner? The Sages enacted that in order to facilitate a thief's full repentance he does not always need to return the item itself. It needs to be clarified when that enactment applies and when it does not apply. Furthermore, is the requirement to return the item an obligation on the thief alone, or does the victim retain rights of ownership to the item so that even if the thief dies, he may continue to claim it back from the thief's heirs?

These are the principal discussions contained in this tractate, although Bava Kamma also includes discussions about other types of payments and fines as well as false claims made with regard to instances of theft and robbery. Very little aggadic material appears in this tractate, and what does appear is mainly



related to the tractate's primary subject, the responsibility one bears for the damage he caused.

Tractate Bava Kamma contains ten chapters. Some chapters deal with a single subject, while others address several.

Chapter One focuses on defining the essential characteristics of each of the four primary categories of damage and the liability incurred for damage caused.

Chapter Two deals principally with details of the primary categories of damage caused by animals, namely Trampling, Eating, and Goring.

Chapter Three expands on damage in the category of Pit. It also addresses cases in which two people caused damage to each other, as well as cases where one cannot determine with certainty who is the one that caused the damage and who is the one that was damaged.

Chapter Four covers the subject of an ox that gored, including what defines whether an animal is considered to be innocuous or forewarned. It also contains a discussion of the forms of restitution payments and a case in which an ox kills a person.

Chapter Five concludes the discussion of a goring ox and in its latter half returns to a discussion of damage classified as Pit.

Chapter Six returns to a discussion of the categories of Trampling and Eating and presents a wide-ranging discussion of damage classified as Fire.

Chapter Seven begins the tractate's discussion of the laws of theft. It focuses primarily on the liability incurred by a thief, both with regard to the double payment and with regard to the fourfold and fivefold payments. At its conclusion, the chapter lists the enactments that were promulgated concerning Eretz Yisrael and Jerusalem.

Chapter Eight addresses cases of bodily injury and the methods of payment for the five types of indemnity.

Chapter Nine delineates when a stolen item must be returned and when the thief or robber pays restitution only. It also explores the methods of achieving atonement for the sin of robbery as it examines the case of one who steals from a convert.

Chapter Ten discusses the details of the laws of robbery, defining when an action is deemed to be a robbery as opposed to theft, and examining the methods of returning the stolen item.

## **Introduction to Perek I**

And when an ox gores a man or a woman, and they die, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall be absolved. But if the ox was a goring ox in time past, and warning has been given to its owner, and he has not secured it, and it killed a man or a woman; the ox shall be stoned, and its owner also shall be put to death. If a ransom is placed upon him, then he shall give for the redemption of his life whatsoever is placed upon him. Whether it has gored a son or has gored a daughter, according to this judgment shall it be done to him. If the ox gores a slave or a maidservant, he shall give to their master thirty shekels of silver, and the ox shall be stoned. (Exodus 21:28–32)

And if a man shall open a pit, or if a man shall dig a pit and not cover it, and an ox or a donkey fall therein, the owner of the pit shall pay, he shall recompense money to its owners and the carcass shall be for him. (Exodus 21:33–34)

And if one man's ox hurts the ox of another, and it dies; then they shall sell the live ox, and divide its monetary value, and the carcass they shall also divide. Or if it is known that the ox was a goring ox in time past, and its owner has not secured it, he shall pay an ox for an ox and the carcass shall be his. (Exodus 21:35–36)

If a man causes a field or a vineyard to be eaten and he set his animal loose and it consumed in the field of another, the best of his field and the best of his vineyard he shall pay. (Exodus 22:4)

If a fire breaks out and catches in thorns, so that a stack of grain, or standing grain, or the field is consumed, the one who kindled the fire shall pay compensation. (Exodus 22:5)

The Torah teaches that one is responsible for damage caused by the animals in his possession – by goring, eating, or trampling – or for damage caused as a result of his actions – by digging a pit or igniting a fire.

This chapter, which serves as a general introduction to the principles of damage caused by one's property, addresses one's liability to pay restitution in cases of damage. The chapter delineates in which cases one is exempt and

in which cases he is liable, and the extent of his liability; in some cases one is liable to pay the full cost of the damage and in others only half the cost of the damage. Included is a discussion of when the location of the damaged item is a factor in determining one's liability. Also considered is the form of payment, the way in which the cost of the damage is appraised, and how the payment is collected.

The opening discussion in this chapter concerns the four primary categories of damage. The cases presented in the Torah are paradigms from which the principles defining these primary categories are derived.

The Torah differentiates between two forms of payment that one can pay for damage caused. The first is a payment of restitution worth the full cost of the damage. The one liable for the damage makes the payment from the "best of his field" (Exodus 22:4). The other form is a payment of half the cost of the damage, which is made from the proceeds of the sale of the body of the belligerent animal. The chapter addresses the precise meaning of paying restitution from the "best of his field": How is this accomplished, and what is done in cases where it is not possible to do so?

Another issue considered is in which cases one is liable to pay the full cost of the damage and in which cases one pays for only half the cost of the damage. Accompanying this is a discussion of whether the payment of half the cost of the damage is considered to be monetary restitution or a fine imposed by the Torah.

During all these discussions, the Gemara also discusses the basic halakhic exegesis of the verses that detail the cases of damage caused by one's property. The Gemara also tangentially covers the subject of the payment for damage caused by a person willfully or due to negligence on his part.

## **Mishnah Bava Kamma 1:1<sup>2</sup>**

There are **four primary categories of damage: The category of Ox; and the category of Pit; and the category of *Maveh*, which, based on a discussion in the Gemara refers either to the tooth of an animal that causes damage or to a person who causes damage; and the category of Fire.** Each of these categories is unique; therefore, the *halakhot* of one cannot be derived from another. The defining characteristic of **the primary category of Ox is not similar to** the defining characteristic of **the primary category of *Maveh*, and**

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<sup>2</sup> [https://www.sefaria.org/Bava\\_Kamma.2a.1?lang=bi&with=Mishnah%20Bava%20Kamma&lang2=en](https://www.sefaria.org/Bava_Kamma.2a.1?lang=bi&with=Mishnah%20Bava%20Kamma&lang2=en)

the defining characteristic of **the** primary category of *Maveh* is not similar to the defining characteristic of **the** primary category of **Ox**. And the defining characteristics of **this** category of Ox **and that** category of *Maveh*, **in which there is a living spirit** that causes damage, **are not similar to** the defining characteristic of **the** category of **Fire, in which there is no living spirit**. The mishna continues: **And** the defining characteristics of **this** primary category of Ox and *Maveh* **and that** primary category of Fire, **in which** the **typical manner** of their components is **to proceed** from one place to another **and** cause **damage, are not similar to** the defining characteristic of **the** primary category of **Pit, in which** the **typical manner** of its components is **not to proceed** from one place to another **and** cause **damage**; rather, it remains in place and the damage is caused by the injured party proceeding and encountering the obstacle. **The common denominator of** the components in all of **these** primary categories is **that** it is **their typical manner to cause damage, and** the responsibility for **their safeguarding** to prevent them from causing damage is incumbent **upon you**, the owner of the animal or generator of the fire or the pit. **And when** a component of any of these categories **causes damage, the** owner or generator of the component that **caused** the **damage is obligated to pay** restitution **for damage with best-quality land**.

## Introduction <sup>3</sup>

The first mishnah in Bava Kamma serves as an introduction to the first six chapters of the tractate. As such, if all of the details are unclear now, they will hopefully become clearer as we continue to learn. The mishnah discusses four primary causes of injury, literary “fathers of injuries”. These are archetypal causes of injury mentioned in the Torah, from which we will learn many other types of injury and subsets of laws in the following chapters.

**1. There are four primary causes of injury: the ox and the pit and the crop-destroying beast and fire.**

**2. [The distinctive feature of] the ox is not like [that of] the crop-destroying beast, nor is [the distinctive feature of] either of these, which are alive, like [that of] fire, which is not alive; nor is [the distinctive feature of] any of these, whose way it is to go forth and do injury, like [that of] the pit, whose way it is not to go forth and do injury.**

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<sup>3</sup>[https://www.sefaria.org/Bava\\_Kamma.2a.1?lang=bi&p2=Mishnah\\_Bava\\_Kamma.1.1&lang2=bi&w2=English%20Explanation%20of%20Mishnah&lang3=en](https://www.sefaria.org/Bava_Kamma.2a.1?lang=bi&p2=Mishnah_Bava_Kamma.1.1&lang2=bi&w2=English%20Explanation%20of%20Mishnah&lang3=en)

### **3. What they have in common is that it is their way to do injury and that you are responsible for caring over them; and if one of them did injury whoever [is responsible] for the injury must make restitution [to the damaged party] with the best of his land.**

The four causes of injury mentioned in the first clause mishnah are all derived from the Torah: the ox (Exodus 21:35-36), the pit (Exodus 21:33-34), the crop-destroying beast (Exodus 22:4) and fire (Exodus 22:5).

The mishnah then raises a question generally asked in midrashic texts (texts that explain the Torah): why does the Torah need to mention all four types of injury? In other words, why couldn't the Torah have mentioned one, two or three primary causes of injury, from which we would have learned the rest?

The Rabbis believed that no law in the Torah was superfluous and therefore each must come to teach us something that we could not have learned from the other laws. The mishnah therefore explains that each "cause of injury" has its unique characteristic and therefore we would not have been able to derive the laws of the other causes of damages without all four examples in the Torah. Note how the mishnah is both dependent on, yet independent from the Torah. This is typical of Jewish oral Torah; it explains the Torah yet it can usually be understood on its own.

### **Questions for further thought:**

What type of injury does an ox cause? What therefore is the difference between an ox and a crop-destroying beast?

The Mishnah tells you things that you are obligated to watch and that if they are yours and they injure you will have to pay the damaged party. Is there anything you can already imagine for which a person will not be obligated if it causes damage? (We will learn the answers to these questions as we go on, but it is worthwhile to start thinking of them now).

**Rav Avrohom Adler** writes:<sup>4</sup>

### **Mishna**

There are four main categories of damages: An ox, a pit, maveh (will be explained in the Gemora), and a fire. The characteristic of an ox is not like

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<sup>4</sup> [https://dafnotes.com/wp-content/uploads/2016/06/Bava\\_Kamma\\_2.pdf](https://dafnotes.com/wp-content/uploads/2016/06/Bava_Kamma_2.pdf)



maveh, and the characteristic of maveh is not like an ox. They are both unlike fire in that they are alive, while fire is not.

All of these three are unlike a pit, in that they normally damage as they move while a pit does not normally move while damaging. The common characteristics of all of them are that they normally damage, and a person must watch them (to ensure that they do not damage). If they damage, their owner is obligated to pay for the damages from the best of his land.

## **Sub-categories**

The Gemora asks: The Mishna's terminology of "main categories" implies that there are sub-categories. Do the sub-categories have the same laws as the main category?

*[The Gemora is now going to discuss Shabbos, where the laws are the same, and impurity, where the laws are different, before answering the question.]*

For example, we see regarding Shabbos that the Mishna states: There are thirty-nine main categories of melachos (that are forbidden to perform according to Torah law) on Shabbos.

This implies that there are subcategories as well. Regarding Shabbos, we say that the sub-categories are like the main categories. Whether one transgresses a main category or sub-category unwittingly, he must bring a korban chatas. Whether one transgresses a main category or sub-category willfully, he is liable to be stoned.

What difference, then, does it make that one is called a main category and one is called a sub-category? The difference is that if one performs two main category prohibitions or two sub-category prohibitions, he is liable twice. However, if he performs a main category prohibition and its subcategory prohibition at the same time, he is only liable for transgressing Shabbos once (and would only bring one korban chatas).

The Gemora asks: According to Rabbi Eliezer who says that one would be liable twice if he performs a main category and sub-category sin of Shabbos at the same time, why is one called a main category and one called a sub-category?

The Gemora answers: Any work done in the building of the Mishkan that was important is called a main category, and any work done in the building of the Mishkan that was not important is called a subcategory.

Regarding impurity, the Mishna states: The main categories of impurity are sheratzim (certain crawling creatures that have died), semen, and someone who has come in contact with a dead person. Their sub-categories do not have the same laws as them.

This is evident from the law that a main category of impurity defiles a person and vessels that come in contact with them, while their sub-categories transmit tumah to food and drink, but not to people and vessels. The Gemora reiterates: What, then, is the law regarding damages? *[Do the sub-categories have the same laws?]*

Rav Pappa answers: Some have the same laws as the main categories, and some do not. [The Gemora will later explain this answer further.] The braisa states: There are three main categories of damages said regarding an ox. They are: Keren (the horn), shein (the tooth), and regel (the foot).

The Gemora asks: Where do we see that one is liable for keren (the horn)? The Gemora answers the question from a braisa. The braisa states: "When it will gore." Goring is done with a horn, as the verse states, Tzidkiyah ben Kenaanah made for himself iron horns, and he said, "Hashem said, 'With these, you will gore Aram.'"

Additionally, the verse says: The firstborn, his ox, is a glory for him, and the horns of a large animal are his horns, with them he will gore nations. *[These verses prove that the word "yigach" in the torah refers to goring.]*

The Gemora asks: Why did the braisa say, "Additionally etc.?" *[What was it needed for?]* The Gemora answers: If someone would claim that we cannot derive Torah laws from the verses in the books of Prophets, there is additionally a proof from the Torah itself.

The Gemora asks: There is no claim that we cannot derive Torah laws from the verses in the books of Prophets in this case, as here we are just deriving the definition of a word!?

The Gemora answers: Rather, one might think that when the Torah differentiates between a tam (an ox that did not yet gore three times; the owner only pays for half the damage) and a mu'ad (an ox that gored already at least three times; the owner pays the full amount of the damage), it is only when the horn is disconnected from the animal (in a case where the animal took its uprooted horn in its mouth and gored; as the case of Tzidkiyah was of an unattached set of horns).

However, when an animal would normally gore with its horns attached to its head, it should always pay full damages. This is why the braisa quotes the additional verse from the Torah. The Gemora asks: What are the sub-categories of keren?

The Gemora answers: Pushing intentionally, biting, pouncing, and kicking. The Gemora asks: Why is goring considered a main category? It must be because the verse says, "When it will gore." Doesn't the verse similarly state "When it will push?"

The Gemora answers: That verse actually refers to goring (pushing with its horns), not pushing. This is as the braisa states: The passage started with the term "pushing" and finished with "goring" to teach that the "pushing" it had referred to actually meant "goring."

The Gemora asks: Why did the Torah use the term "goring" when the victim was a person, and "pushing" when the victim was an animal (when in both instances it was actually discussing goring)?

The Gemora answers: A person who has mazal is termed as being gored, while an animal that does not is termed being "pushed." [*A person, who has intelligence, must be forcibly attacked, and therefore it is more fittingly described as "gored," than an animal, which can be a passive victim, who is described as being "pushed."*]

This teaches us that a mu'ad for attacking people is automatically considered a mu'ad for attacking animals, while the opposite is incorrect. The Gemora asks: Isn't biting a sub-category of "shein" (teeth)?

The Gemora answers: No. The main characteristic of shein is that it derives physical pleasure from that which it damaged, not that the animal merely damages with its teeth.

The Gemora asks: Aren't pouncing and kicking subcategories of "regel" (feet)?  
The Gemora answers: No. The main characteristic of regel its damages are common (it tramples things while it's walking), and these (pouncing and kicking) are uncommon.

The Gemora asks: What are the cases where (Rav Papa said) the sub-categories are unlike the main categories? If it is "keren," both the main category and sub-category are the same in that they are intentional damage and the money and obligation to watch the animal is that of the owner.

The Gemora answers: Rather, it must be that the main category of “keren” and its sub-categories are the same. Rav Papa must have been referring to “shein” and “regel.”

## **An Av and its Toladah**

The Gemora notes: We see regarding Shabbos that there are thirty-nine main categories of melachos (that are forbidden to perform according to Torah law) on Shabbos. This implies that there are sub-categories as well.

Regarding Shabbos, we say that the subcategories are like the main categories. Whether one transgresses a main category or sub-category unwittingly, he must bring a korban chatas.

Whether one transgresses a main category or sub-category willfully, he is liable to be stoned. What difference, then, does it make that one is called a main category and one is called a sub-category?

The difference is that if one performs two main category prohibitions or two sub-category prohibitions, he is liable twice. However, if he performs a main category prohibition and its subcategory prohibition at the same time, he is only liable for transgressing Shabbos once (and would only bring one korban chatas). Rashi explains that when one performs an av (main category) together with its toladah (sub-category), he is liable for the av, and not for the toladah. For example, if one planted a tree (av) and watered a plant (a toladah of zore’a), he is liable for the av, and not for the toladah.

The commentators ask: What practical difference does it make if he is liable for the av or the toladah? The bottom line is that he is required to bring one korban chatas!?

Reb Tzvi Pesach Frank suggests the following: The Gemora in Shabbos (71b) rules that if one eats two olive-sized pieces of cheilev (forbidden fats) in one state of unawareness, and he is apprised of the first and he brings a korban. If subsequently, he becomes aware of the second, he is now required to bring another chatas for that one (for the bringing of one korban cannot exempt one from bringing a korban for a violation that he did not know about at the time).

Accordingly, if one would perform an av and its toladah together, and he would be apprised of the av, but not the toladah, he would bring a korban for the av. If afterwards he is made aware of the toladah, he would be liable to bring a korban for it, for according to Rashi, one is not liable for a toladah when it is done together with its av.

## Why Are We Beginning to Study Bava Kamma?

With Hashem's help, the many Jews who study the Daf HaYomi are about to begin Seder Nezikin, which starts with Bava Kamma. The Mishnah and the Talmud Bavli are divided into six sedarim [orders]: Zeraim, Moed, Nashim, Nezikin, Kodoshim and Taharos.

The Gemara (Shabbos 31a) also enumerates the six sedarim in this same order, based on the verse, "The faith of your times will be the strength of your salvations, wisdom and knowledge; fear of Hashem—that is [man's] treasure" (Yeshayahu 33:6). "Faith" is Zeraim, "your times" is Moed, "strength" is Nashim, "salvations" is Nezikin, "wisdom" is Kodoshim and "knowledge" is Taharos.

The Tosofos Yom Tov (in Kaf HaNachas, his introduction to Zeraim and Nezikin) writes that sometimes Nezikin is counted as the last of the six sedarim. This order follows the verses (Tehillim 19:8-10), "Hashem's Torah is perfect, restoring the soul...The judgments of Hashem are true, altogether righteous", which allude to the six sedarim. The last is Nezikin, which is hinted at in the words, "the judgments of Hashem." The abovementioned verse in Yeshayahu alludes to Nezikin as the third order while the verse in Tehillim refers to it as the last.

The Tosofos Yom Tov explains this is actually not a contradiction. During the time of David HaMelech, when the Jewish Nation lived in Eretz Yisrael, it was fitting to begin with the halachos of Kodoshim and Taharos, which were actually in practice then.

But Yeshayahu was prophesying for the Diaspora period, and since the halachos regarding Kodoshim and Taharos are not practiced outside of Eretz Yisrael, these sedarim were pushed to the end of the list. Why is Bava Kamma the first maseches? In the opening to his Commentary on the Mishnah (s.v. hachelek hashishi), the Rambam points out that Bava Kamma is the opening tractate of Nezikin to teach us that "a judge is not allowed to do anything else before removing the potential damage from the people."

Before attending to other matters, dayanim must remove and safeguard against anything harmful and damaging.



## Primary and Secondary Categories of Damages<sup>5</sup>

Bava Kama is the first Masechet of Nezikin, Damages. We begin with a Mishna that teaches us some of the very basic concepts, which is perfect for beginners. In fact, today's daf had me wishing that Daf Yomi began with Masechet Bava Kama. Some of the concepts that I have been learning for years are suddenly explained with clarity and simplicity.

Our Mishna teaches us that there are three primary categories of damages: *Shor*, Ox; *Bor*, Pit; *Malveh*, Tooth, and *Hever*, fire. Each of these is distinct and separate from the other. Each of these categories causes damage in its own typical way. The owner is responsible for damages caused by these categories, and damages are paid through one's land - not just any land, but one's best quality land.

The Gemara walks us through the differences between primary and secondary categories. Each of these primary categories has subcategories that are similar to the primary categories. Sometimes it is difficult to determine why a subcategory is affiliated with one primary category rather than another. The rabbis ask why we separate categories as we do. Primary categories represent labour that was done within the Tabernacle, while subcategories reflect labours done primarily outside of the tabernacle.

Primary and secondary categories of impurities are compared with these primary and secondary categories of damages. For example, the primary sources of ritual impurity are contact with a creeping animal, contact with human semen, and contact with a corpse. Those primary sources can impart ritual impurity upon other people or vessels; impurity is transferred by tent, contact or carrying. In turn, those secondary people and vessels are called secondary sources of ritual impurity. They can impurify food or drink but no other people nor vessels. They can transfer impurity only through contact or carrying but not via a tent.

We then learn about the subcategories of Hashor are *Karen*, Goring; *Shen*, Eating; and *Regel*, Trampling. *Keren* has its own subcategories, which might be argued to be primary categories as well: *Negifa*, pushing; *Nesicha*, Biting; *Ravitza*, Crouching; and *Veita*, Kicking. Goring is thought to be

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<sup>5</sup> <http://dafyomibeginner.blogspot.com/2016/06/bava-kama-2-primary-and-secondary.html>

fatal. It is in an ox's nature to be tame, but it will gore in the right (or wrong) circumstances. An ox that hurts another ox is thought to have done so defensively, and not with the intent to harm or defend itself. An animal that has gored once should always be kept away from other people and animals; the owner is responsible for full damages if the ox should gore - or hurt - a second time.

Biting might be thought to be a subcategory of eating, but the rabbis note a difference. When an ox eats, it does so for pleasure. When it bites, there is no inherent pleasure in that act; it is instinctive. The rabbis engage in a similar conversation regarding crouching and kicking.

We end our first daf of Bava Kama with proof texts from our rabbis. Each describes where we find reference to the primary categories of damage in the Torah.

An interesting beginning to this new Masechet. It is particularly intriguing to hear the rabbis' considerations regarding the instinctive nature of animals. In much of what I have learned to this point, the rabbis are not sympathetic to the needs of animals; in fact, the needs of animals are hardly mentioned. ***Our daf*** offers insight into the rabbis' understanding of animal behaviour and why we cannot blame an animal for its actions, even if it does great damage to human bodies or our property.

## THE LIST OF THE FOUR "AVOS NEZIKIN"

**Rav Mordechai Kornfeld** writes:<sup>6</sup>

The Mishnah teaches that there are four "Avos Nezikin." **TOSFOS** and the Rishonim point out that the Mishnah does not use the term "Hen" ("it says "Arba'ah Avos Nezikin" and not "Arba'ah Avos Nezikin *Hen* -- "four Avos Nezikin *they are*"), as it normally does when it lists a number of items and introduces the list with a number and gives no descriptive terms for the items in the list.

Similarly, the Gemara later (4b) cites a Beraisa of Rabbi Oshiya that lists thirteen Avos Nezikin, and a Beraisa of Rabbi Chiya that lists twenty-four Avos Nezikin, and both of those Beraisos omit the word "Hen." The Rishonim

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<sup>6</sup> <https://www.dafyomi.co.il/bkama/insites/bk-dt-002.htm>

mention that the only other place where the Mishnah presents a numbered list without the word "Hen" is in Kerisus (8b), where the Mishnah says that there are "Arba'ah Mechusrei Kaparah" and it does not say "Arba'ah Mechusrei Kaparah *Hen*."

Why does the Mishnah here leave out the word "Hen"?

The Rishonim suggest a number of answers which complement each other.

(a) The **RASHBA** suggests that the Mishnah does not say "Hen" to allude to the fact that these are not the only Avos Nezikin. There actually are more Avos Nezikin, as Rabbi Oshiya and Rabbi Chiya list. The Mishnah does not count the other Nezikin because it chooses to present a limited list (see reasons on 4b). The same is true for Rabbi Oshiya's Beraisa which omits the Avos Nezikin counted in Rabbi Chiya's Beraisa. The Gemara asks, about Rabbi Chiya's Beraisa as well, what is it that he omitted, and it explains that he also chose to limit his list by omitting two items from it.

The Rashba explains that the way that the Gemara knew that Rabbi Chiya omitted something from his list is because he did not say the word "Hen." The Rashba, however, leaves unanswered the question of why the Mishnah in Kerisus does not say "Hen."

The **GILYON** cited by the Shitah Mekubetzes points out that the same answer might be applied to the Mishnah in Kerisus, according to **TOSFOS** in Kerisus (2b, DH la'afukei). Tosfos there explains that the Mishnah in Kerisus chooses to limit its list and not enumerate all of the cases of Mechusrei Kaparah just as the Mishnah here limits its list.

(b) The **MAHARI KOHEN TZEDEK** cited by the Shitah Mekubetzes answers that the word "Hen" is written to emphasize the differences between the items listed. He apparently means that the word "Hen" is used when one might think that some of the items in the list are identical and should not be counted independently. The Mishnah adds the word "Hen" to emphasize that this indeed is the number of different items that must be enumerated, and not less.

In contrast, in the Mishnah here (and in the Mishnah in Kerisus) it is obvious that the different Avos (and, in Kerisus, the Mechusrei Kaparah) should be listed separately because of their distinct qualities. The Mishnah writes "four" to exclude *more* than four and not less than four, and therefore it does not need to use the word "Hen."

This is also the answer of the **TOSFOS RID** cited by the Shitah Mekubetzes, and the answer of the **NACHALAS DAVID**.

*(Although the Mishnah continues and says "Lo Harei...", its intention is not to point out that the Avos are different, but rather that each Av has a Kula and therefore it cannot be derived from a combination of the others.)*

A similar concept is expressed by **TOSFOS** in Kerisus (2b, DH l'Me'utei), who says that when the Mishnah emphasizes the differences between the items in its list, it is not necessarily excluding other items from the list. That is, some Mishnayos teach the *minimum* number of items, and other Mishnayos teach the *maximum* number of items.

(c) Perhaps the Mishnah uses the word "Hen" when the list includes items that are not discussed explicitly in the Torah. "Hen" means that besides the ones in the list that are already known, there is another, specific number of items that should be included in this list. For example, the Mishnah in Shevuos (49a) says, "Arba Shomrim Hen," because one of them, the Socher, is not mentioned anywhere in the Torah explicitly (see Rashi 5a, DH Tachas Nesinah).

The Mishnah in Rosh Hashanah (2a) says, "Arba Roshei Shananim Hen," because those days are not described by the Torah as Roshei Shananim. The items -- the Avos Nezikin-- in the list of the Mishnah here, and in the lists of the Beraisos of Rebbi Oshiya and Rebbi Chiya, are written explicitly in the Torah, as are the Mechusrei Kaparah listed in Kerisus. They are mentioned in the Mishnah only to teach that they pay from "Meitav." (Although Rebbi Oshiya and Rebbi Chiya mention "Socher," they do not mean to teach anything new by that, since Socher is already listed in the Mishnah of the four Shomrim.)

(This answer is similar to the previous answer.)

## **DERIVING THE OBLIGATION TO PAY FOR DAMAGES THROUGH A "KAL VA'CHOMER"**

The Mishnah teaches that had the Torah not mentioned each one of the Avos Nezikin, the ones not mentioned could not have been derived from those that are mentioned through a Binyan Av.

(See Chart to 5b. The Rishonim point out that according to the Gemara's conclusion on 5b, this part of the Mishnah was written only "l'Hagdil Torah ul'Ha'adirah"; see also Tosfos here, DH v'Lo.)

It seems clear from the Mishnah and Gemara that had one of the Avos been more lenient than all of the others, the rest *could* have been derived from it through a Kal va'Chomer or Binyan Av.

**TOSFOS** (DH v'Lo) explains that although the normal rule is "Ein Onshin Min ha'Din," a punishment cannot be derived through an exegetical process such as a Kal va'Chomer or Binyan Av (rather, it must be written in the Torah explicitly or learned from a Hekesh), nevertheless a punishment may be given to the Mazik based on a Kal va'Chomer and he may have forced him to pay for the damage he caused, because *monetary* punishment *may* be learned from a Kal va'Chomer. It is only *physical* punishment that may not be learned from a Kal va'Chomer. This is clear from many Gemaras and Mishnayos that derive a monetary punishment through a Kal va'Chomer (see, for example, the Mishnah later on 24b; see also **RASHI** to Chagigah 11b, DH l'Vito).

There are a number of questions on this principle.

(a) This rule seems to contradict the Mechilta (cited by Tosfos) which teaches that the reason why the Torah writes that a person who "opens a ditch or who digs a ditch" (Shemos 21:33, "v'Chi Yiftach... O Ki Yichreh") is liable is to teach that had it not written explicitly that the digger is liable, he would have been exempt because of "Ein Onshin Min ha'Din" (**TOSFOS DH v'Lo**)!

(b) The basis (see **HALICHOS OLAM** 4:12) for the principle of "Ein Onshin Min ha'Din" is that a Kal va'Chomer is based only on logic, and thus it can be refuted by a logical disproof (Pircha). Since a logical disproof can counter the Kal va'Chomer, we can never be absolutely certain that the Kal va'Chomer is correct; perhaps someone later will come and find a logical disproof to the Kal va'Chomer. Therefore, we cannot rely on a Kal va'Chomer to administer a physical punishment but only to derive a prohibition against performing a certain act l'Chatchilah.

According to this logic, a Kol v'Chomer also should not be able to teach a monetary punishment. As long as there is a possibility that the defendant is not liable, he should be exempt from paying based on the claim of "ha'Motzi me'Chaveiro Alav ha'Re'ayah." (**SEFER KOVETZ AL HA'RAMBAM**, Hilchos Avodas Kochavim 6:4)

(a) **TOSFOS** implies that the Mechilta perhaps disagrees with the Mishnah. Other Rishonim find this suggestion difficult to accept, since so many Mishnayos seem to take it for granted that a monetary punishment may be administered based on a Kal va'Chomer.



The **RASHBA** explains that the Mechilta means to say that with regard to Bor, a monetary punishment could not have been derived through a Kal va'Chomer had the verse not stated the punishment. The reason Bor is unique is that the law that a person is liable to pay for the damages caused by his Bor is a Chidush, since the damaged item (such as an ox) brought itself into the Bor, and the Bor did not approach the item and damage it. Also, the Torah teaches that although the Mazik does not own the Bor (for example, the Bor is in Reshus ha'Rabim), he still must pay as though it was his property that did the damage (see later, 29b). Since the law of Bor is a Chidush, one would have thought that a person can be obligated only for what the Torah itself obligates him and no additional obligation may be derived through a Kal va'Chomer; a Chidush of the Torah might not follow the dictates of human logic. (See Moed Katan 7a, Nazir 37a, Chulin 34a.)

The Rashba's point is not clear. It still seems that the Gemara does not agree with the Mechilta, since the Gemara (5b) proposes that the other Nezikin be derived from Bor through a Kal va'Chomer or Binyan Av. Moreover, if the rule of the Rashba is correct, why does the Mishnah and Gemara in Makos (5b) ask that Edim Zomemim should be liable for killing a person because of a Kal va'Chomer (the Gemara cites verses to prove that "Ein Onshin Min ha'Din")? Halachos of Edim Zomemim should be not able to be learned from a Kal va'Chomer because the law of Edim Zomemim is a Chidush (Bava Kama 72a)! Perhaps the Rashba means that the Mechilta learns from this verse that Bor *would* have been viewed as a Chidush and no Halachos would have been learned from Bor through a Kal va'Chomer had the Torah not said "Ki Yichreh."

Now, however, that the Torah says "Ki Yichreh," it teaches that Bor is to be viewed as the same as other Avos Nezikin (and other Avos Nezikin may be derived from it).

Why, though, does the Mechilta teach what *would* have been the Halachah in a case of Bor had it been a Chidush, if it is not a Chidush?

The answer is that the Mechilta wants to teach the way the logic of Kal va'Chomer is applied in other cases where a Halachah is indeed a Chidush. Perhaps such a case would be a case of Edim Zomemim who testified about a monetary obligation. The Mechilta would rule that in such a case no punishment may be derived through a Kal va'Chomer, unlike the view of Tosfos (4b, DH v'Edim) whom the Rashba himself cites (5a).

With regard to the Gemara in Makos which says that the rule of "Ein Onshin Min ha'Din" dictates that no punishment may be administered, based on a Kal va'Chomer, to Edim Zomemim who caused a person to be killed, the **RITVA** there writes that this is not the real reason why no punishment is

administered to Edim Zomemim who cause someone to be killed. Rather, the real reason is that Edim Zomemim is a Chidush, and a Kal va'Chomer cannot be derived from a Chidush. The Gemara mentions the rule of "Ein Onshin Min ha'Din" only because its discussion there revolves around Edim Zomemim who caused a person to be killed, in which case it does not need to point out that the law of Edim Zomemim is a Chidush; even if the law of Edim Zomemim would not be a Chidush, no punishment could be given to them because of the rule of "Ein Onshin Min ha'Din." However, even if it is not a matter of corporal punishment but of a monetary obligation, the obligation could not be derived from a Kal va'Chomer because Edim Zomemim is a Chidush.

(b) The **SEFER KERISUS** (1:17) suggests that the words "Ein Onshin Min ha'Din" as used by the Mechilta mean something completely different from what they normally mean. (This is a common occurrence in the Gemara; see **RASHBA** to Yevamos 108a, and Nidah 21b.)

The Mechilta means as follows. The Gemara (50a) asks the question of the Mechilta: why does the Torah need to teach that one must pay for damages if he digs a Bor, if the Torah has already taught that one is obligated to pay even if he merely opens a pre-existing Bor? Rabbi Akiva answers that had the Torah taught only that one is obligated for *opening* a Bor, one might have thought that if one *digs* a Bor he is obligated to pay for damages even if he covers it with a strong covering. One might have thought that one is exempt from damages caused by his Bor only when he fills up the Bor entirely. The Gemara later (55b) cites a Beraisa that teaches that based on this point, Bor is one of the four things for which the Torah does not require a strong Shemirah, and it lessened the degree of the Shemirah required (one is not required to fill in the ditch but merely to cover it).

This is what the Mechilta means to say. One would have thought that, logically, one who digs a ditch must fill it in and it is not enough to cover it. The Torah says "Ki Yichreh" to teach that "Ein Onshin Min ha'Din" -- a person is not punished *in the way that is befitting*, according to what he deserves; rather, it suffices for him to cover the pit without filling it in.

(c) The **MAHARI KOHEN TZEDEK** cited by the Shitah Mekubetzes explains that the Mechilta means to say that a punishment "b'Yedei Shamayim" is not derived through a Kal va'Chomer.

Anyone who harms another person due to negligence, through one of the Avos Nezikin, may also be liable b'Dinei Shamayim (see Rashi to Shemos 21:29). This is why the Torah needs to state explicitly that a person is liable for digging a Bor. Without the verse, however, one would have known the *monetary* obligation (because of the Kal va'Chomer). (See

also **TOSFOS** to Chulin 115b, DH Mah, who proves that the punishment of Kares cannot be derived from a Kal va'Chomer.)

## THE "TOLDOS" OF "NEZIKIN"

The Mishnah (2a) states that there are four "Avos Nezikin," implying that there are also Nezikin which are "Toldos." The Gemara shows that the Toldos of Melachos of Shabbos are "k'Yotzei ba'Hem"; the Toldos are similar to the Avos Melachos. It also shows that the Toldos of Tum'ah are *not* "k'Yotzei ba'Hem"; the Toldos do not have the same Halachos as the Avos ha'Tum'ah. The Gemara inquires whether the Toldos of Nezikin are similar to the Avos, "k'Yotzei ba'Hem," or not.

If the Toldah is like the Av, then the Halachos of the Toldah are learned from the Av. However, if the Toldah is not like the Av, then what determines its Halachos?

(a) **RASHI** (DH Hacha Mai; DH Mai Shena Keren; and 3a, DH Mai Shena Regel) explains that the Gemara's question is whether one is obligated to pay for damage when he inflicts it through a Toldah of one of the Nezikin, or whether one is completely exempt from compensating for the damage caused by a Toldah. If Toldos of Nezikin are similar to the Toldos of Tum'ah, then just as the Toldos of Tum'ah are not strong enough to be Metamei the same way as an Av, the Toldos of Nezikin are not strong enough to create an obligation for a person to pay.

If one is not obligated to pay for a Toldah of Nezikin, then in what sense is it a "Toldah"? It is not considered to be a Nezek altogether if one is not obligated to pay for it!

It seems that Rashi means that it is considered a Toldah insofar that one is obligated to *prevent* such damage from occurring. However, if one does not fulfill his obligation to prevent such damage from occurring and transgresses and causes damage to another person's property, he does not have to pay for it.

It is clear from Rashi that whenever a person damages someone else, or someone else's property, he also transgresses a prohibition, even if he fulfills his monetary obligation to compensate for the damage (or even if he is exempt from monetary obligation). What is the source for this prohibition?

1. **RASHI** in Gitin (21b) writes that the prohibition to cause damage may be derived from the law that the owner of an Eved is obligated to free his Eved if

he damages any of the Eved's Roshei Evarim. This obligation implies that the owner is *prohibited* from damaging the Eved in the first place. Rashi seems to understand that in any case in which the Torah teaches a monetary obligation, the Torah also prohibits doing the act which causes such an obligation.

(The **BIRKAS SHMUEL** cites **RAV CHAIM SOLOVECHIK** who suggests that since the Torah says "v'Lo Yishmerenu Be'alav" (Shemos 21:36), teaching that the owner of the ox must pay because he did not guard the ox properly, one may infer that the Torah expects a person to guard his ox properly.)

The **KEHILOS YAKOV** questions this logic. In the case of Regel, one's animal is simply walking in its normal manner through the marketplace when it causes damage (as the Gemara asks on 19b, "is the owner of the ox obligated to hold on to its tail [so that it does not wag it while walking]?"). One certainly is permitted to allow his ox to walk in its normal manner, and yet the Torah obligates him to pay if his ox does damage while walking.

Others point out that this is exactly why one is exempt from damages caused by Shen and Regel in Reshus ha'Rabim (see **ROSH** 1:1). When a person walks his ox through a neighbor's field, he indeed must be careful that it does not cause damage even in the normal manner of walking.

2. **RABEINU YONAH** (beginning of Avos) writes that the prohibition to damage another person's property is derived from the Isur of "Lo Sigzol." This is also the implication of the **TUR** (beginning of CM 378).

It is not clear how the prohibition to cause damage is learned from the prohibition against stealing, since that prohibition is transgressed only when the thief does an act of *Kinyan* on the other person's property (see Bava Metziah 26b). Perhaps he means that it is learned from a "Mah ha'Tzad" from Lo Sigzol and from the prohibitions of Ona'ah and Rivis (see 61a).

Similarly, the **RASHASH** in Kesuvos (18a) and the **KEHILOS YAKOV** (Bava Kama #1) suggest that the prohibition to cause damage is learned from the Mitzvah of Hashavas Aveidah. If one is obligated to return another's property, then one certainly is not allowed to harm another's property.

3. The **YAD RAMAH** (Bava Basra 26a, #107) writes that the prohibition to damage another's property is learned from "Lifnei Iver Lo Siten Michshol" (Vayikra 19:14) and from "v'Ahavta l'Re'acha Kamocho" (Vayikra 19:18), Mitzvos that teach moral obligations.

(b) The **RIF** explains that there are some Avos Nezikin for which one must pay Chatzi Nezek "Min ha'Aliyah" (Regel, Shen, and Keren Mu'edes), and there are some Avos for which one must pay Chatzi Nezek "m'Gufo" (Keren Tamah). Therefore, the Gemara is asking whether the Toldos of the Avos have the same Halachah as the Av, or whether they have the leniencies found in other Avos.

As the **BRISKER RAV** (beginning of Hilchos Nizkei Mamon) explains, the Rif was not satisfied with Rashi's explanation, because if a Toldah is completely exempt from liability, then it should not be called a Toldah altogether. Therefore, he preferred to explain that the Gemara's question is whether the Toldah has certain leniencies that the Av does not have.

Why did the Rif need to point out that the Av of Keren Tamah pays Chatzi Nezek? Even if there would be no Av that pays Chatzi Nezek, one still should question whether the Toldos are dealt with more leniently than the Avos and one only needs to pay Chatzi Nezek instead of Nezek Shalem for them?

The **ROSH** answers that had there been no Av that has these leniencies, one would not have questioned whether the Toldah has original leniencies of its own. Once the possibility that a Mazik must pay in such a manner is found, one may consider the possibility that a Toldah pays in such a manner.

*(The **NACHALAS DAVID** offers a similar explanation, although he does not understand this to be the intent of the Rosh.)*

(c) The **BRISKER RAV** interprets the Rif's words differently. He points out from a number of Gemaras and Rishonim that there are times when it seems that a Mazik which is learned from a Binyan Av *could* be more severe than the Avos from which it was derived. To explain this, he suggests (as the Gemara concludes on 5b) that the Torah did not write the various Avos in order to teach their basic obligation since it is possible to derive the basic obligation for all of them through a Meh Matzinu from Keren and Bor. Rather, the Torah writes the Avos in order to teach the specific leniencies that apply to each one (for example, that one pays Chatzi Nezek for Keren when it is a Tam, that one is exempt for Shen and Regel in Reshus ha'Rabim, that there is no liability for a Bor that damages Adam or Kelim, and that there is no liability for an Esh that damages items that are hidden, "Tamun").

The Brisker Rav suggests that according to this understanding, the specific exemptions and leniencies should apply only to a Mazik that bears the "Shem Av" of the Av for which the leniency was originally given. Therefore, if a Mazik is derived through a Meh Matzinu between Keren and Bor, since it does not have the title, or "Shem Av," of Keren nor the title of Bor, its laws will be stricter than the laws of both Keren and Bor and it will be liable in all situations.

This, he suggests, is the intention of the Rif. According to the Rif, the Gemara is asking whether the Toldos have the "Shem Av" of their respective Av, and therefore a Toldah of Keren, for example, pays Chatzi Nezek, or whether they do not retain the "Shem Av" and therefore a Toldah of Keren pays Nezek Shalem.

**Steinsaltz (OBM)** writes:<sup>7</sup>

The introductory Mishnah to *Masechet Bava Kamma* offers the four *avot nezikin* (literally "fathers," the term *avot* in this context refers to the primary types of damages according to the Torah) – *Shor* (an ox), *Bor* (a pit), *Mav'eh* and *Hev'er* (fire) – each with its own set of rules.

Of these four archetypes of damage, two are clear. A *Bor* is a pit that is dug in a place where someone or someone's property can fall in and become injured or damaged. *Hev'er* is fire that destroys property. The other two cases – *Shor* and *Mav'eh* – need explanation, and Rav and Shmu'el in the Gemara argue about how to define them. *Shor* clearly means damage done by an ox, but an ox can do damage in a number of different ways and it is not clear what types of damage the term *Shor* refers to.

According to Rav, the Mishnah has listed the four types of damages that appear in the Torah, and *Shor* is a broad term that encompasses *keren* (damage done with the animal's horns), *shen* (damage done with the animal's teeth, i.e. eating) and *regel* (damage done by the animal's hooves while walking). *Mav'eh* refers to a different type of damage mentioned in the Torah – a person who does damage.

Shmuel believes that the Mishnah is listing only those *avot nezikin* that are damage done by property that the owner should have expected. Thus *Shor* refers specifically to damage done by the animal while walking (*regel*) while *Mav'eh* refers to damage done by the animal when it eats (*shen*). According to Shmuel, the Mishnah does not deal with a person who does damage, as it is a different category of damage.

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<sup>7</sup> [https://www.ou.org/life/torah/masechet\\_bava\\_kama\\_2a4b/](https://www.ou.org/life/torah/masechet_bava_kama_2a4b/)

The *Talmud Yerushalmi* explains that *Shor* means *keren* and *Mav'eh* includes both *shen* and *regel*. Thus, according to the *Yerushalmi*, the Mishnah includes all cases of damage done by someone's property.

### *Man possesses מזלא*

אדם דאית ליה מזלא כתיב כי יגח, בהמה דלית ליה מזלא כתיב כי יגוף

Rashi explains that *מזלא* denotes that a human being possesses intelligence, and he is therefore able to guard himself that he is not injured.<sup>8</sup>

The appropriate expression to be used if an animal does manage to harm him is “כי יגוף” which indicates that the animal had intent for harm and came against the person and overpowered him.

An animal which gets injured, however, can be as a result of two animals standing together with one pushing or bumping against the other, who was oblivious to any danger. Here, the expression “כי יגוף” is used, indicating a push or shove, rather than an intentional act of aggression. Alternatively, Rashi explains that *מזלא* refers to the fact that a person is not killed easily with the animal simply pushing against him (נגיפה).

This is why the Torah uses the expression of *נגיחה* when describing an animal killing a person, as this term suggests a rough and intentional attack, where the animal gores with its horns and bears down on his human victim. This is where death would result.

In his *גלייון הש"ס*, Rabbi Akiva Eiger cites Rashi to Shabbos 53b, where he explains that the idea of *מזלא* is that man is accompanied by a guardian angel. This corresponds to the second approach which Rashi presented, in that this angel which watches over a person, serves to protect him, thus making it more difficult for an animal to kill him by just merely pushing against him.

Tosafos Yom Tov notes that according to the first explanation of Rashi, because injury to a person is a function of his intelligence, it would be more difficult for an animal to kill a person who is more alert and cognizant of his surroundings.

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<sup>8</sup> <https://dafdigest.org/masechtos/BavaKama%20002.pdf>



Therefore, if an animal has an established pattern ( חזקה ) of killing young children, this חזקה would not automatically mean that the animal has a pattern to kill adults, as well.

Children do not have a developed sense of danger and to be alerted to protect themselves. They are more vulnerable, and the animal will have an easier time attacking them, just as an animal has an easier time injuring its fellow animals.

We would not be able to assume that this same animal would be able to overcome the defensive nature of adults. However, according to the second approach of Rashi, where the מזל of a person is what protects him, we would say that children possess this same defensive nature as adults, and an animal that has a חזקה to kill children is automatically deemed to have a חזקה to kill adults, as well.

### *Paying for damages*

חב המזיק לשלם תשלומי נזק במיטב הארץ

### ***The damager must pay for the damages with the best land.***

The Mishnah states that the owner of the damaging animals must pay for the damages with the best land. This seemingly implies that it is incumbent upon the owner of the damage to pay with land rather than with movable objects.

Rashi (1), however, adds a comment that dramatically changes the meaning of the Mishnah. Rashi writes אם רוצה לפרוע לו –קרקע –If he [the damager] wants to pay for the damages with land. In other words, the damage is not required to pay for the damages from land; rather it is the damager's choice to pay from land or movable objects.

Shulchan Aruch (2) follows Rashi's approach and even takes the matter a step further. Shulchan Aruch writes, "When Beis Din addresses the issue of collecting for the damaged party from the damage they first collect from movable property and in the event that the damager does not have any movable objects or if he does not own a sufficient quantity of movable objects to cover the cost of the damages, he may collect the remaining amount from land."

This clearly indicates that the damage is not obligated to pay for the damages from his land if he does not choose to do so.

S"ma (3) infers even more than Shulchan Aruch. He maintains that when it comes to paying for damages, the damage has the upper hand to determine how he wants to pay. This contrasts with a borrower. When it comes to collecting encumbered property for a defaulted loan the lender has the privilege to decide whether he wants land or movable objects.

Regarding damages it is entirely in the hands of the damage to make the choice whether to pay with land or with movable objects.

Furthermore, notes S"ma, the language of Shulchan Aruch implies that we assume that he would prefer to pay with movable objects rather than land and if Beis Din is forced to collect property without the consent of the damager Beis Din will assume that he prefers to pay with movable objects.

In the event, however, that the damager expresses an interest in paying with land and the damaged party asks for payment from movable objects the damage has the stronger position and the choice is his to decide how he will make payment.

1. רש"י ד"ה במיטב הארץ.
2. שו"ע חו"מ סי' ת"יט סעי' א'.
3. סמ"ע שם סק"א. ■

### *The laws of damages*

"די אבות נזיקין...המבעה"

Rav Chaim Shmuelewitz, zt"l, recounted that when Rav Yisrael Salanter, zt"l, heard that a group of local businessmen planned to begin learning Masseches Shabbos, he commented, "They should first learn Bava Kama. That way, they will learn how to be vigilant in avoiding causing damage to others!"

Rav Chaim emphasized that when one learns Bava Kama he should toil to be sensitive to his friend by avoiding any word, action, or even gesture that may anger or trouble him.

But there is another lesson in the importance of learning this mesechta which we can learn from another incident with Rav Yisrael. When asked why children begin specifically with Bava Kama despite the fact that there are many other tractates that seem more relevant or appropriate for their age, he explained, "This is to inculcate within them at the outset their duty to ensure that they cause no harm to others.

This is hard to implant in one's heart since one naturally feels that if his property caused damage, he should not be personally obligated to pay since he himself caused no damage and meant no harm.

Therefore, it is worthwhile to learn this mesechta with children from a young age in order to instill Torah values regarding damages." (1)

Rav Shlomo Zalman Auerbach, zt"l, made a similar statement while resolving a seemingly difficult question on the first mishnah in Bava Kama. "Even according to the opinion that 'ma'aveh' refers to a man who caused damage, the Mishnah avoids using the more usual term adam to teach a very important lesson: the mishnah was unwilling to call a person who damaged his friend an 'adam'—a human being.

It would appear that learning Bava Kama is an essential element in fulfilling the mishnah, 'Derech erez kadmah laTorah.'" (2)

1. מפי השמועה

2. חכו ממתקים, חלק א', עמוד שס"ג

**Dr. Rachel Scheinerman** writes:<sup>9</sup>

Welcome to Bava Kamma, the first tractate in the fourth order of the Talmud, Nezikin, meaning damages. This is the first of three linked tractates, affectionately known as the Bavas: Bava Kamma (the First Gate), Bava Metziah (the Middle Gate) and Bava Batra (the Last Gate). Together, the Bavas lay the basis for Jewish civil law. The material we're about to study is not primarily concerned with crime (we'll get to that in Sanhedrin and beyond), nor does it contain much in the way of religious law, like holidays and kashrut observance, but with cases in which one person owes another compensation for damage to their person or property.

Together, the Bavas comprise over 400 pages and it will take us more than a year to study them. One might well wonder why the Talmud, a specifically Jewish body of legal writings, devotes so much energy to addressing what amount to largely secular legal concerns? Laws of Sabbath observance are of course particular to the Jews, but there is nothing uniquely Jewish about compensating someone when your ox gores theirs.

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<sup>9</sup> Talmud from my Jewish learning

There are several answers to this question. The most straightforward is that the rabbis address civil law because the Torah does, largely in the middle of the Book of Exodus, in what scholars call the Covenant Code. God's law, as suggested by the Torah and believed by the rabbis, is all-encompassing. Just because the law of the goring ox may feel less specific to the Jewish people than the requirements for erecting an eruv does not mean it is less of a Jewish concern. Ultimately, God's law is capacious, encompassing all aspects of Jewish life, both those that make Jews unique and those that stem from universal human concerns.

For those who like orderly taxonomies, the early material in Bava Kamma is for you, because the rabbis begin by defining the major categories and subcategories of damages. The mishnah that opens our tractate begins with this pronouncement:

**There are four primary categories of damage: the ox, the pit, the maveh and the fire.**

The mishnah goes on to start sketching the contours of these four categories. Damages that fall into the category of the pit are those that are caused by stationary property. For instance, if I dig a hole and you fall into it and break your leg, I owe you money. By contrast, damages in the fire category are those caused by property that moves. Damages caused by living beings fall into the ox category (animals) and maveh, the precise meaning of which is debated on tomorrow's daf. We'll have time to dive into all the specifics, but the common denominator, as the mishnah explains, is this:

**For all of these primary categories, their typical manner to cause damage, and the responsibility for safeguarding from them is upon you (the owner). When any of them causes damage, the owner is obligated to pay for damage with best-quality land.**

These four categories are just the beginning. As the Gemara notes on today's daf, there are subcategories of each. For instance:

**The sages taught: Three primary categories of damage were stated in the Torah with regard to an ox: goring (literally: horn), eating (literally: tooth), and trampling (literally: foot).**

The difference between these is that trampling refers to unintentional damage while goring refers to intentional damage on the part of the animal. Trampling is distinguished from eating in that the animal does not derive pleasure from the act.

There are many, many more fine points to parse, and that is why we will be here for a while. Welcome to Bava Kamma.

**Rabbi Johnny Solomon** writes:<sup>10</sup>

Today we begin Bava Kamma which is the first Massechet of Seder of Nezikin. In general, when I write a post for the opening daf of a Massechet, I explore an idea found within its opening Mishna. However, especially as we are in the midst of a war and hoping and praying that those who are kidnapped are found and that our men and women come home safely, I would like to share an idea relating to the broader function of Seder Nezikin.

We are taught in Shabbat 31a that Reish Lakish found an allusion to each of the six orders of the Mishna in a verse from Sefer Yeshaya (Isaiah) which reads: וְהָיָה אֱמוּנַת עֲתִידָךְ חֹן יְשׁוּעַת חֲכָמַת וְדַעַת יְרֵאת ה' הִיא אוֹצְרוֹ - 'He is faithfulness through time for you, strength, salvation, wisdom, knowledge; His treasure house is awe of the Lord' (Yeshaya 33:6). For Seder Zeraim, the word association is אֱמוּנַת - faithfulness. For Seder Moed, it is עֲתִידָךְ - time for you. For Seder Nashim, the word is חֹן - strength [that comes from holding onto something or someone]. For Seder Nezikin, it is יְשׁוּעַת - salvation. For Seder Kodshim the word is חֲכָמַת - wisdom. And for Seder Taharot it is וְדַעַת - 'knowledge'. Yet even with all the wisdom drawn from these six orders, Reish Lakish then adds that יְרֵאת ה' הִיא אוֹצְרוֹ - 'His treasure house is awe of the Lord', meaning that we must always maintain our awe of God.

Having explained this idea, I would like to return to the word which Reish Lakish understands to be describing Seder Nezikin which is יְשׁוּעַת - salvation, because salvation is most certainly what we are praying for. However, the question then needs to be asked: what is the connection between salvation and Seder Nezikin?

The Aruch (as quoted by Rav Moshe Tzuriel in his 'Leket Perushei Aggadah') answers by explaining that Seder Nezikin is about addressing injustices, so that those from whom something has been stolen are given back what has been taken from them.

Bringing all this together, beginning Seder Nezikin today, which alludes to 'salvation' and how we need to respond to injustice by restoring what was originally ours, is a powerful message, and one which I hope speaks to you as we continue our journey of learning.

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<sup>10</sup> [www.rabbijohnnysolomon.com](http://www.rabbijohnnysolomon.com)



**Heads of Two Oxen by Leon Augustin L'hermitte**

## **Four Categories of Damages**

**Mark Kerzner** writes:<sup>11</sup>

There are four primary categories of damages, and all other cases can be classified as belonging to one of these: the ox, the pit, the man, and the fire.

Liability for one cannot be deduced from the other. For example, a man is responsible in full for even accidental damage, while the owner of an ox is liable for half the damage the first three times; a fire isn't alive, and a pit doesn't move around.

However, since they can all cause damage, the owner is responsible for watching over them and paying damages from the choicest land.

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<sup>11</sup> [https://talmudilluminated.com/bava\\_kamma/bava\\_kamma2.html](https://talmudilluminated.com/bava_kamma/bava_kamma2.html)





## **I Love Animals:**

**Rabbi Jay Kelman** writes:<sup>12</sup>

"There are four primary categories of damages - the ox, the pit, the man and the fire...the common denominator of them is that their way is to cause damage, the duty to guard them is upon you and when they cause damage, the one who causes damage is obligated to pay from the best of his land." (Bava Kamma 2a)

One of the fundamental and innovative teachings of the Torah is that "fathers should not be put to death for sins of their children, nor children for the sins of their fathers, a man shall die [only] for his sins."(Devarim 24:16)

This may seem like basic justice to us but that is not how the ancients thought. Seeing children as an extension of and owned by their parents the children would often be the ones to suffer the consequences of the misdeeds or even mistakes of parents.

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<sup>12</sup> <https://torahinmotion.org/discussions-and-blogs/i-love-animals-bava-kamma-2>

Taking revenge for the actions of a father on a son was the norm, a norm the Torah was determined to change. In the worldview of the Torah children were independent beings created in the image of G-d, not chattel of their parents. Even the mitzva of *kivud av veim*, so fundamental to Judaism, was a service obligation only - clothing, feeding, and helping parents when needed. But a parent had no right to tell a child whom to marry, to dictate the choice of career[1] or to control their child's life in any which way.

Such is not the case with animals. They are the property of the owner and with the exception of causing them unnecessary harm one can basically do as one pleases with them. Lacking a divine image they can be used in the service of others.

Ironically it is this ability to control the animal that places greater responsibility upon the owner. If the animal is an extension of man, then man is responsible for the actions of his animals. Hence the opening Mishna of Bava Kamma quoted above.

Even before we record the obligation of man to make restitution for damages caused the Mishna lists the obligation to pay for the damage caused by our ox[2]. So much so that the Torah teaches that if an ox had killed someone and the owner did not ensure the ox be "put down" and the ox then kills again "the ox shall be stoned and also his owner shall also die." (Shemot 21:29)

Wow! And this law would apply even if the second death was accidental[3]. While a human who kills can only be put to death if it is premeditated murder our responsibility for our animals is apparently even greater. It took a second biblical verse[4] for our Sages to understand that this verse was not to be applied literally and one was put to death only if he himself killed. Yet the fact that the Torah chose to write it this way is most instructive. Man may not be killed but he deserves to be. Our Sages explain that his death is left to the "hands of heaven" offering cold comfort to the owner.

While our responsibility to our animals must begin with ensuring they cause no harm it is such responsibility that lay behind the Torah's laws that we must feed our animals before we ourselves eat, that we not overburden them and that we ensure they are well attended to. We are even allowed to break certain laws to prevent pain to our animals.

In a remarkable teaching the Mishna (Sanhedrin 1:4) notes "like the death of the ox so is the death of the master" teaching that before an ox can be put to death it too is to have its day in court. The ox can only be put to death after a court of 23 declares the ox guilty, similar to the method used before a human can be given capital punishment. While we must never blur the distinction



between man and beast our animals (not to mention pets) are often part of the family.

None of this applies to children. Not yet fully responsible for their actions they cannot be put to death even for premeditated murder nor are they liable for monetary damages caused. As independent beings their parents cannot be made legally liable for the actions of their children - after all they did not cause the damage. Thus the Mishna (Bava Kamma 8:4) teaches, "encountering minors is bad. One [an adult] who assaults them is liable, they who assault others are exempt."

[1] Yet at the same time Jewish law demands a parent teach the child a "trade" so they can become self-supporting. Putting these two concepts together yields the result that while the child can choose the trade it is the parent who must pay for it.

[2] The Mishna (Bava Kamma 5:7) makes it abundantly clear that "the Torah spoke in the present" using the example of the ox because that was the human owned animal most likely to cause damage in the ancient world. That man was responsible for the damages caused by any animal he owned was axiomatic and other Mishnayot describe damage (or death) caused by chickens, dogs, donkeys, lions, tigers and more.

[3] In describing the ox's killing the first time the Torah uses the phrase *ki yigach*, when it goes, a most aggressive term. Such goring being unexpected no mention is made of the owner. However, the second time the ox kills the Torah uses the gentler term *vheimeet* if it [happens to] kill. The distinction is sharper in the Hebrew.

[4] "The killer shall be put to death he is a murderer"( Bamidbar 35:21)' for his murder he is put to death and not for the killing done by his ox.' (Sanhedrin 15b)

## Vayakhel | The 39 Labors Prohibited on Shabbat: From Where are they Derived?

**Rav Yoel Bin Nun** writes:

It is clear from all of the discussions concerning the labors that are prohibited on Shabbat – in the Mishna (*Shabbat*, chapter *Kelal Gadol*), in the Midrash Halakha (*Mekhilta*, *Ki-Tisa* and *Vayakhel*), and in the two Talmuds (Babylonian Talmud, *Shabbat* 73-75b; Yerushalmi, *Shabbat* 7:2) – that the number "forty minus one" – 39 prohibited labors – is iron-clad.

In many cases, the labors that are known to be prohibited on Shabbat are forced to fit into the frame of 39. To do so, several categories of labor are included under one name. (For example, the *melakha* of *hotza'a* includes: *hotza'a*, taking an object out from a private to a public domain; *hakhnasa*, bringing an object in from a public to a private domain; *hoshata*, handing over an object from one domain to another; *zerika*, throwing an object from one domain to another; see *mishna* and *gemara, Shabbat* 96b). Several similar labors are included under one roof. (For example, *boneh*, building; *mesatet*, chiseling; *kode'ach*, drilling.) In contrast, several similar labors are separated into multiple *melakhot* (e.g., *borer*, separating; *zoreh*, winnowing; *meraked*, sifting).

In the end, the number of labors must accord with the all-inclusive, sanctified number of 39.

"Forty minus one" was the iron-clad number mainly according to the teachings of R. Akiva and his disciples. According to R. Eliezer, it would appear that no importance was attached to this number, as he would impose liability for a secondary labor (*toleda*) even when performed together with its principal labor (*av*). In R. Eliezer's view, there are only labors that are prohibited on Shabbat (many dozens of them), unconnected to a numerical list of any kind. It is possible that the position of R. Eliezer reflects an earlier stage of the Halakha.[1] In any event, our *mishna* follows the view of R. Akiva, who in many contexts established measures, definitions, and numbers as foundations of the Halakha.

But from where did they derive the number 39 as the iron-clad number of prohibited labors on Shabbat?

Many years ago, I counted the items found in the detailed list at the beginning of *Parashat Vayakhel* (*Shemot* 35:10-20) and the parallel list at the end of *Parashat Pekudei* (*Shemot* 40:33-43), and I found a clear and explicit source for 39 vessels, materials, and garments in the *Mishkan*,[2] corresponding to which *Chazal* enumerated the 39 categories of prohibited labor.

It seems to me that this is also the meaning of the words of R. Yehuda Ha-Nasi, as they are cited in the *Mekhilta* (*Vayakhel*). The 39 vessels, materials, and garments in the *Mishkan* are spelled out in the Written Law, under the heading: "**This is the thing** (*zeh ha-davar*) which the Lord commanded" (*Shemot* 35:4) ... "And let every wise-hearted man among you come, and make all that the Lord has commanded" (*Shemot* 35:10). Commenting on this heading, the *Mekhilta* states: "These are the things' –

Rabbi [Yehuda Ha-Nasi] says: To include the 39 prohibited labors that were told to Moshe orally." Corresponding to the list of vessels in the Written Law, there is an allusion to another list that was transmitted orally, under the heading: **"These are the things** (*eileh ha-devarim*) that the Lord has commanded, that you should do them" (*Shemot* 35:1), and it relates to the labors that are prohibited on Shabbat, about which it is stated: "Whoever does any work therein shall be put to death" (35:2).

Just as Moshe spoke to Israel about the 39 items on the list connected to the *Mishkan*, and this was written down, so too he transmitted to them orally the 39 categories of labor that are prohibited on Shabbat. This is based on the correspondence between "this is the thing" and "these are the things," as "these are the things" are not followed by any specification, and it is not at all clear to what they refer. Indeed, explicit mention is found there only of the prohibition of lighting a fire on Shabbat (*hav'ara*): "You shall kindle no fire throughout your habitations upon the Sabbath day" (*Shemot* 35:3). That prohibition should therefore be understood not only as an example, and not just a special case,[3] but rather the opening or closing of the list of "these are the things," which was transmitted orally.

This is precisely what is stated in the *Mekhilta* in the name of R. Yehuda Ha-Nasi: "'These are the words'... To include the 39 prohibited labors that Moshe transmitted to them orally." [4]

A careful examination of the passage in the Yerushalmi (*Shabbat* 7:2) indicates that R. Yose ben Chanina follows in the same path: "R. Yose ben Chanina said: 'This is the word' – is not written here [in the command regarding Shabbat] but rather: 'These are the words' – *davar, devarim, ha-devarim* – from here [we derive] the principal and secondary labors." This means as follows: Just as there is a correspondence between the 39 vessels, materials and garments in the list of "this is the thing" in the command regarding the *Mishkan* and the 39 prohibited labors on Shabbat, according to the derivation of R. Yehuda Ha-Nasi, so too it can further be derived from the fact that the Torah distinguishes between "this is the thing" in the singular and "these are the things" in the plural that in the case of Shabbat, there are many additional labors. This is the source for "principal and secondary labors."

Below are the two lists of the various items that were made for the *Mishkan*, as they are counted in the Torah:

	<b>Vayakhel(35:11-19)</b>	<b>Pekudei(39:33-41)</b>
1	the tabernacle	And they brought the tabernacle to Moshe
2	its tent	the tent
3	and its covering	<i>and all its vessels</i>
4	its clasps	its clasps
5	and its boards	its boards
6	its bars	its bars
7	its pillars	and its pillars
8	and its sockets	and its sockets
9	the ark	and the covering of rams' skins dyed red
10	and the staves thereof	<i>and the covering of sealskins</i>
11	the ark-cover	and the veil of the screen
12	and the veil of the screen	the ark of the testimony
12	and the veil of the screen	the ark of the testimony
13	the table	and the staves thereof
14	<i>and its staves</i>	and the ark-cover
15	and all its vessels	the table
16	and the showbread	all the vessels thereof
17	the candlestick also for the light	and the showbread
18	and its vessels	the pure candlestick
19	and its lamps	the lamps thereof, even the lamps to be set in order
20	and the oil for the light	and all the vessels thereof
21	and the altar of incense	and the oil for the light
22	<i>and its staves</i>	and the golden altar
23	and the anointing oil	and the anointing oil
24	and the sweet incense	and the sweet incense

25	and the screen for the door, at the door of the tabernacle	and the screen for the door of the tent
26	the altar of burnt-offering	the bronze altar
27	with its grating of brass	and its grating of brass
28	its staves	its staves
29	and all its vessels	and all its vessels
30	the laver	the laver
31	and its base	and its base
32	the hangings of the court	the hangings of the court
33	the pillars thereof	its pillars
34	and their sockets	and its sockets
35	and the screen for the gate of the court	and the screen for the gate of the court
36	<i>the pins of the tabernacle</i>	the cords thereof
37	and the pins of the court	and the pins thereof
38	and their cords	<i>and all the instruments of the service of the tabernacle of the tent of meeting</i>
39	the plaited garments, for ministering in the holy place	the plaited garments for ministering in the holy place
39a	[which are] the holy garments for Aharon the priest	[which are] the holy garments for Aharon the priest
39b	and the garments of his sons, to minister in the priest's office	and the garments of his sons, to minister in the priest's office

Both lists place "the plaited garments (*bigdei ha-serad*), for ministering in the holy place" in the thirty-ninth place on the list. It is not by chance that it is the only item in the list that branches into two: "the plaited garments, for ministering in the holy place, [which are] the holy garments for Aharon the priest, and the garments of his sons, to minister in the priest's office." This seems to be the plain meaning of the verse, for with respect to the coverings of the vessels that are used during the journeys, there is no "ministering in the holy place." This seems also to be the understanding of Onkelos.

However, Rashi,[5] Ibn Ezra, and the Rashbam explain that the "*bigdei ha-serad*" are the coverings of the vessels that were used when the camp was in transit, even though these coverings are nowhere mentioned in the book of *Shemot* in the *parashiyot* dealing with the *Mishkan*, but only in the book

of *Bamidbar* (chap. 4), in the passage dealing with Israel's journeys in the wilderness.

It is possible that the disagreement about the meaning of *bigdei ha-serad* led some of the *Amora'im* to a different position regarding the Biblical source of the number 39 with respect to the labors that are prohibited on Shabbat.[6]

It should be noted that the two lists – *Vayakhel/ Pekudei* – differ with regard to three items on each side. The summarizing list in *Pekudei* adds at the beginning "and all its vessels," and at the end "and all the instruments of the service of the tabernacle of the tent of meeting"; the one covering appears as two coverings – "the covering of the rams' skins dyed red" and "the covering of sealskins," apparently because of the tendency in the summarizing list to specify the items according to the material used, just as the incense altar is referred to as "the golden altar" and the burnt-offering altar is referred to as "the bronze altar." On the other hand, the summarizing list omits "the staves" of the table and of the golden altar (as they too are made of acacia wood), and it unites the pins of the tabernacle and the pins of the court (as they are all of brass).

Thus, we have proof that the Torah itself preserves the holy iron-clad number – three items are added while three other items are removed. The final number remains precisely the same – 39, or 40 if we count the two branches of the *bigdei serad*. It is amazing to reveal that in the list of the principal labors that are prohibited on Shabbat, the last one also branches into two – *hotza'a* and *hakhnasa* – and both of them are equal in status as a principal labor.

At the end of the second list (*Pekudei, Shemot 39:42-43*), there is a complicated verse, part of which seems to be extraneous:

According to all that the Lord commanded Moshe, so the children of Israel did all the work. And Moshe saw all the work, and behold, they had done it as the Lord had commanded, even so had they done it. And Moshe blessed them.

This is the way these verses should be understood, in accordance with the original Midrash Halakha, which we reconstructed above:

According to all that the Lord commanded Moshe [with regard to Shabbat and the *Mishkan*], so the children of Israel did [in the *Mishkan*] all the work. And Moshe saw all the work [which he had been commanded regarding Shabbat and the *Mishkan*], and behold, they had done it [in the *Mishkan*] as the Lord had commanded, even so had they done it. And Moshe blessed them.

Both Shabbat and the *Mishkan* are holy – the temporal sanctuary (from the time of creation) and the spatial sanctuary (from the time of Sinai), and it is prohibited to build the spatial sanctuary while desecrating the temporal sanctuary.

The expression that runs throughout all of these passages, from the beginning of *Vayakhel* to the end of *Pekudei*, is: "which the Lord has commanded." It appears in the command regarding Shabbat, under: "These are the things which the Lord has commanded, that you should do them" (*Shemot* 35:1).

The expression is also found in the command regarding the contributions that were to be made, at the beginning of the commands regarding the *Mishkan*: "This is the thing which the Lord commanded, saying" (*Shemot* 35:4). And it reappears in the commands in the detailed list: "And let every wise-hearted man among you come, and make all that the Lord has commanded" (*Shemot* 35:10). This is directly followed by the list of 39 items that must be made. In all these places, emphasis is placed on the doing in different ways: With regard to the command of Shabbat, it says: "that you should do them"; in the detailed list of the 39 items it says: "let them come and make"; at the end of the second list we find: "so they did... they had done it... even so had they done it."

The concept of "all the work (*melakha*)" (*Shemot* 39:43) penetrates the doing, and alludes once again to the commandment regarding Shabbat (in the Ten Commandments): "You shall not do any manner of work (*melakha*)."

The two detailed lists at the beginning and at the end of the work done for the *Mishkan* create the framework of 40 (minus 1) manners of work as an "iron-clad number," to which all the laws of Shabbat are subject. This is the way we understood the words of R. Yehuda Ha-Nasi cited in the *Mekhilta* and the words of R. Chanina bar Chama (*Shabbat* 49b): "That which we have learned: The principal categories of labor are forty minus one, to what do they correspond? R. Chanina bar Pappa said to them: To the labors in the *Mishkan*." And this is the way we also understood the words of R. Yose bar Chanina in the *Yerushalmi* (*Shabbat* 7:2): "'This is the thing' – is not written here [in the command regarding Shabbat] but rather: 'These are the things' – from here [we derive] the principal and secondary labors."

This is all one, clear and illuminating tradition of learning.

How did this tradition become lost from the majority of commentators on the Talmud, both early and modern?

At a later stage, an after-course of *gematriya***[7]** (using the numerical value of the letters of the alphabet) on the words "these are the things" (*eileh ha-devarim*) was added to the clear derivation, and this after-course remained as the explanation, in place of the original exposition, which is the bread and main course of the meal.

Surely this is what *Chazal* said about R. Yehuda Ha-Nasi, in their explanation of his redaction of the Mishna, in violation of the ancient prohibition to commit the Oral Law to writing, in addition to the Written Law: "R. Yehuda Ha-Nasi saw that the Torah is destined to be forgotten in Israel" (*Shabbat* 138b).

Many *midrashim* have become lost to us in their original form; they remain mere after-courses of remembrance and sophistication, which have often turned into the main course. People keep souvenirs of their dear ones who have perished, even if during their lives these souvenirs bore no meaning. One should not marvel about the *midrashim* which have become lost. One should be exceedingly happy about every allusion that has survived and try to reconstruct what has become lost.

Indeed, we are amazed by the intense stubbornness to preserve the "forty minus one" labors that are prohibited on Shabbat as an "iron-clad number," even after its clear and simple source disappeared.

After having written all of this, and having lectured about it, and having discussed the issue with important Torah scholars and Roshei Yeshiva (who could not recall such a derivation in any *midrash* or commentator), R. Shaul Baruchi showed me that this idea was already revealed by R. M.M. Kasher**[8]** in *Midrash Ha-Gadol***[9]** on *Parashat Vayakhel*.

Indeed, *Midrash Ha-Gadol* brings the list of the 39 vessels, materials, and garments in the *Mishkan*, precisely as we brought them above (though only the first list in *Parashat Vayakhel*). At the end, two explanations are brought for *bigdei serad*: "These are the priestly garments. And some say these are the cloths that are spread... when they are being transported." The first explanation accords with Onkelos and our interpretation, while the second is like that of Rashi and most commentators.

The *Midrash Ha-Gadol* says:

And from where do we know that he was commanded about all of these [i.e., in *Parashiyot Teruma-Tetzaveh*]? It says:



1. **The tabernacle.** This is what is stated ([Shemot 26:1](#)): "Moreover you shall make the tabernacle with ten curtains..."
2. **its tent.** This is what is stated ([Shemot 26:7](#)): "And you shall make curtains of goats' hair for a tent over the tabernacle..."
3. **and its covering.** This is what is stated ([Shemot 26:14](#)): "And you shall make a covering for the tent..."
4. **its clasps.** This is what is stated ([Shemot 26:6](#)): "And you shall make fifty clasps of gold..." "And you shall make fifty clasps of brass..." ([Shemot 26:11](#)).
5. **and its boards.** This is what is stated ([Shemot 26:15](#)): "And you shall make the boards for the tabernacle..."
6. **its bars.** This is what is stated ([Shemot 26:26](#)): "And you shall make bars of acacia wood..."
7. **its pillars.** This is what is stated ([Shemot 26:32](#)): "And you shall hang it on four pillars of acacia..." "And you shall make for the screen five pillars of acacia..." ([Shemot 26:37](#)).
8. **and its sockets.** This is what is stated ([Shemot 26:19](#)): "And you shall make forty sockets of silver..."
9. **the ark.** This is what is stated ([Shemot 26:10](#)): "And you shall make an ark of acacia wood..."
10. **and the staves thereof.** This is what is stated ([Shemot 25:13](#)): "And you shall make staves of acacia wood..."
11. **the ark-cover.** This is what is stated ([Shemot 25:17](#)): "And you shall make an ark-cover of pure gold..."
12. **and the veil of the screen.** This is what is stated ([Shemot 26:31](#)): "And you shall make a veil..."
13. **the table.** This is what is stated ([Shemot 25:23](#)): "And you shall make a table..."
14. **and its staves.** This is what is stated ([Shemot 25:28](#)): "And you shall make staves of acacia wood..."
15. **and all its vessels.** This is what is stated ([Shemot 25:29](#)): "And you shall make the dishes thereof..." And it is stated ([Shemot 37:16](#)): "And he made the vessels which were upon the table..."
16. **and the showbread.** This is what is stated ([Shemot 25:30](#)): "And you shall set upon the table showbread before Me always..."
17. **the candlestick also for the light.** This is what is stated ([Shemot 25:31](#)): "And you shall make a candlestick of pure gold..."
18. **and its vessels.** This is what is stated ([Shemot 25:39](#)): "Shall it be made, with all these vessels..."
19. **and its lamps.** This is what is stated ([Shemot 25:37-38](#)): "And you shall make the lamps thereof, seven... of pure gold..."
20. **and the oil for the light.** This is what is stated ([Shemot 27:20](#)): "And you shall command... that they bring you pure olive oil..."

21. **and the altar of incense.** This is what is stated ([Shemot 30:1](#)): "And you shall make an altar to burn incense upon..."
22. **and its staves.** This is what is stated ([Shemot 30:5](#)): "And you shall make the staves of acacia wood..."
23. **and the anointing oil.** This is what is stated ([Shemot 30:25](#)): "And you shall make it a holy anointing oil..."
24. **and the sweet incense.** This is what is stated ([Shemot 30:35](#)): "And you shall make of it incense..."
25. **and the screen for the door, at the door of the tabernacle.** This is what is stated ([Shemot 26:36](#)): "And you shall make a screen for the door of the tent..."
26. **the altar of burnt-offering.** This is what is stated ([Shemot 27:1](#)): "And you shall make the altar of acacia wood..."
27. **with its grating of brass.** This is what is stated ([Shemot 27:4](#)): "And you shall make for it a grating..."
28. **its staves.** This is what is stated ([Shemot 27:6](#)): "And you shall make staves for the altar..."
29. **and all its vessels.** This is what is stated ([Shemot 27:3](#)): "All the vessels thereof you shall make of brass."
30. **the laver,**
31. **and its base.** This is what is stated ([Shemot 30:18](#)): "You shall make a laver of brass, and the base thereof of brass..."
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32. **the hangings of the court.** This is what is stated ([Shemot 27:9](#)): "And you shall make the court of the tabernacle... hangings for the court."
33. **the pillars thereof.** This is what is stated ([Shemot 27:10](#)): "And the pillars thereof shall be twenty..." And it is stated ([Shemot 27:16](#)): "And for the gate of the court shall be a screen... their pillars four..."
34. **and their sockets.** This is what is stated ([Shemot 27:10](#)): "and their sockets twenty..."
35. **and the screen for the gate of the court.** This is what is stated ([Shemot 27:16](#)): "And for the gate of the court shall be a screen..."
36. **the pins of the tabernacle,**
37. **and the pins of the court.** This is what is stated ([Shemot 27:10](#), 19): "And all the pins thereof, and all the pins of the court..."
38. **and their cords.** This is what is stated ([Shemot 27:19](#)): "All the instruments of the tabernacle in all the service thereof..."
39. **the plaited garments, for ministering in the holy place.** This is what is stated ([Shemot 28:2](#)): "And you shall make holy garments..."

These are the thirty nine commands that Moshe heard from the Holy [God], and the likes of which Moshe commanded Israel, without adding or detracting. About this it is stated: "He is trusted in all My house" (*Bamidbar* 12:7), that he did not add or detract regarding the work of the *Mishkan*.

To all this the *Midrash Ha-Gadol* adds: **"These are the 39 commands, which correspond to the 39 principle labors that are prohibited on Shabbat."**

The additional novelty in the *Midrash Ha-Gadol* is the precise correspondence between each item in the list in *Parashat Vayakhel* and the parallel term of "doing" or "making" in *Parashiyot Teruma-Tetzaveh*.

However, "there is no Beit Midrash without some novelty." *Midrash Ha-Gadol* does not mention the parallel list in *Parashat Pekudei*, and it is precisely from that list that we see that the number of items in lists regarding the *Mishkan* is in fact fixed and sanctified, as the Torah adds 3 items in *Pekudei*, and then removes 3 other items.

Here arises the great question concerning the list in the *mishna*, which spells out the forty minus one principal labors (*Shabbat* 7:2):

- 11 labors connected to the preparation of bread;
- 13 labors connected to the making of a garment;
- 9 labors connected to the production of a book;
- 2 labors connected to the construction of a house;
- 3 labors connected to fire and the manufacture of implements;
- 1 final dual labor (*hotza'a* and *hakhnasa*) connected to conducting business.

On the superficial level, it would appear that a list of about 70 labors that are prohibited on Shabbat must be made to fit into the sanctified number of 40 minus 1, and that this forced *Chazal* to be very brief with regard to labors connected to the house, fire, the manufacture of implements, and business. How is this possible? In the *Mishkan*, the labors connected to construction and to the manufacture of implements were primary! How is it possible that the *Mishna* specifies the 11 labors connected to the making of bread – from plowing and sowing to grinding and baking – and it goes into great detail regarding the making of clothing or books, to the point that there is no room for hewing and chiseling, for drilling and sawing, for plastering and whitewashing?

However, a deeper examination leads us to a most important moral lesson from the words of the Sages, without their having said an extra word.

Every person has too basic needs – food and clothing, and a Jew has one more basic need – a book from which to learn Torah. These three needs are spelled out in detail in the list of prohibited labors!

A house, manufacturing, and business – with which the entire world is occupied without a minute of rest – are a "second story," a luxury, and there is no need to deal with them in such detail.

This sounds amazing and far-fetched, but let us go back to the vow taken by Yaakov when he set out for Charan (*Bereishit* 28:20-22):

***If God will be with me,  
and will keep me in this way that I go,  
and will give me bread to eat, and raiment to put on,  
so that I come back to my father's house in peace, then shall the Lord be my God,  
and this stone, which I have set up for a pillar, shall be God's house.  
and of all that You shall give me I will surely give the tenth to You.***

Food and clothing are our two basic needs, when God watches over us on the paths which we take, whereas a house (a permanent home for our families) and all the gifts of wealth are dreams and aspirations, which are referred to in brief with a commitment to set aside a "tenth of all" (*Bereishit* 14:20). Yaakov did not yet have a written book, but *Chazal* dealt at length with a book, because it is by way of a book that a Jew maintains a permanent connection with the One who gave the Torah. A Jew has 6 needs – 3 basic ones and 3 additional ones:

Six days shall work be done, but on the seventh day there shall be to you a holy day, a sabbath of solemn rest to the Lord" (*Shemot* 35:2)<sup>13</sup>

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[1] Mishna, Keritut 3:10. See also Bava Kama 2a; and see also Y. Gilat, Mishnato shel Rabbi Eliezer ben Horkanos, U-Mekoma Be-Toledot Ha-Halakha.

[2] This seems to be the intention of R. Chanina bar Chama (Shabbat 49b): "The principal categories of labor are forty minus one ... They correspond to the labors in the Mishkan." R. Chanina was a disciple of R. Yehuda HaNasi; see B. Lau, Chakhamim, vol. 4, pp. 107-117.

[3] As is expounded there in the Mekhilta in five different ways; there are more.

[4] This is also the way to understand the words of R. Yehuda Ha-Nasi in the Babylonian Talmud (Shabbat 97b, and also in the similar passage in Shabbat 70a): "Rabbi [Yehuda Ha-Nasi] said: 'Things' [devarim], 'the things' [ha-devarim], 'these are the things' [eileh ha-devarim] – these are the 39 labors that were told to Moshe at Sinai." R. Yehuda HaNasi does not mention a gematriya; the explanation that is based on gematriya (see Rashi, Shabbat 97b) is merely a clever allusion, which was

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<sup>13</sup> Translated by David Strauss



added to the primary derivation and whose source is the Yerushalmi, Shabbat 7:2, in the name of R. Chanina of Sepphoris and in the name of the rabbis of Caesarea. It is far more reasonable to understand R. Yehuda Ha-Nasi as his position is brought in the Mekhilta.

[5] If we count like Rashi, there will be 41 items on the list, or 40, if we say that the first item, "the tabernacle," is a generalization followed by the specifics. The Ramban, in his commentary to Pekudei (39:33), rejects this idea, because it is clear from the continuation that the "tabernacle" refers to the first curtains, while the "tent" refers the curtains of goats' hair. It is possible that the position of R. Yehuda, who adds to the list of prohibited labors closing up of the web and beating of the woof (Shabbat 75b), is based on a count of 41 in the list of items that were made for the Mishkan.

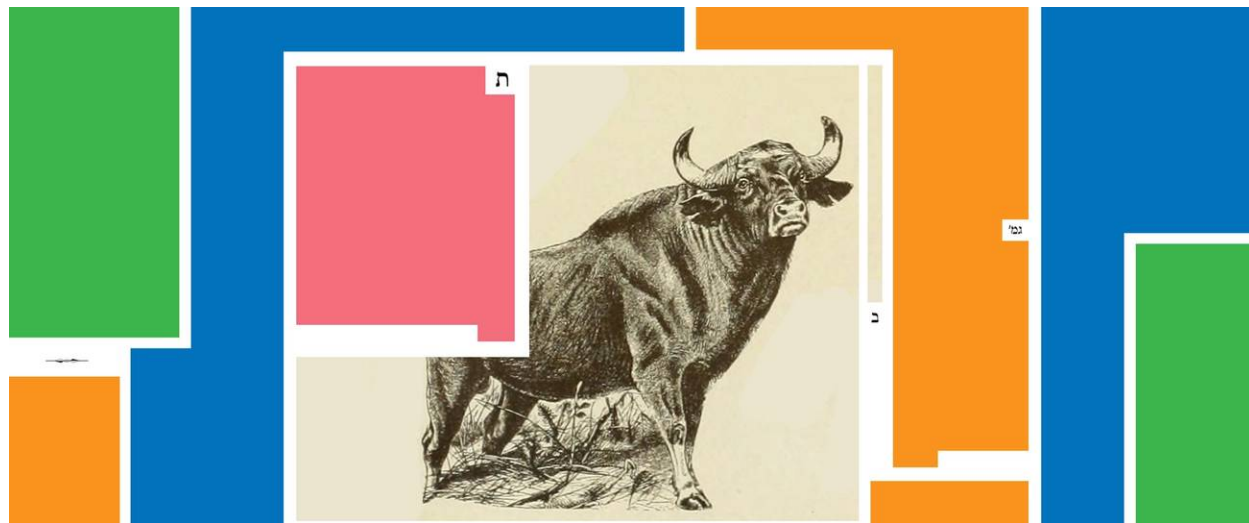
[6] In the passage mentioned above, especially in Shabbat 49a. Regarding the difficulties with the other position, which counts the instances of the term "melakha" in the entire Torah, as well as their solutions, see the full article on my website.

[7] Chazal in Avot say that gematriya is an "after-course to wisdom."

[8] In the addenda to Parashat Pekudei, Torah Sheleima 23, pp. 118-119. R. Kasher cites this explanation as a new explanation of the position of R. Chanina bar Chama (Shabbat 49b, corresponding to the labors in the Mishkan), but he does not consider the possibility, which is so reasonable, that this itself was also the exposition of R. Yehuda Ha-Nasi (in the Mekhilta and in the Talmudic passages), nor that R. Yose ben Chanina followed this path. What is missing, therefore, from the words of R. Kasher is the startling conclusion that this count is the primary and unequivocal source for the 39 labors that are prohibited on Shabbat, as a fixed and sanctified number in the Torah.

[9] Midrash Ha-Gadol on the Torah and on the book of Esther is twice as big as Midrashei Rabba on the Torah. It was apparently composed in Yemen (in the fourteenth century) by R. David Aladani, one of the great Yemenite Torah authorities, based on earlier midrashim – in the case of Shemot, primarily Mekhilta De-Rashbi and the Baraita De-Melekhet Ha-Mishkan. See Anat Reizel, Mavo Le-Midrashim (Alon Shevut, 2011), pp. 393-402.

, full\_html, the number of prohibited melakhot on Shabbat is presented by Chazal as iron clad. In this shiur, we will discuss an overlooked derivation of the number of 39.



## **Toward a Taxonomy of Damage**

***The Talmud is what happens when the laws of the Written Torah are not sufficiently broad or abstract to serve as the basis for a functioning legal system.***

**ADAM KIRSCH** writes:<sup>14</sup>

The Babylonian Talmud is composed of six large divisions, known as Sedarim or “Orders.” At the beginning of June, *Daf Yomi* readers reached a milestone when we began the fourth of the Talmud’s orders, Seder Nezikin, starting with Tractate Bava Kamma.

The word *nezikin* means “damages,” and this seder covers all situations in which one person damages another—which is to say, almost all the reasons why one Jew would bring another Jew to court. This makes it significantly different from the two complete sedarim we have already completed Moed, which deals with Jewish holy days, and Nashim, which covers marriage and divorce. (The first order, Zeraim or “Seeds,” has only one tractate of Gemara—Berachot, with which the whole *Daf Yomi* cycle began.)

In Seder Moed, the Talmud was primarily teaching about Jews’ obligation to God, as reflected in the observance of Shabbat and holidays. This Seder also included a good deal of information about the procedures of the Temple in Jerusalem, the holiest Jewish site. Seder Nashim was more down to earth, full of discussions of monetary matters like marriage contracts and divorce settlements, as well as reflections on sexual morality and gender roles. But it is Nezikin that deals with most of what we ordinarily think of as civil law—cases where people are arguing over money and property in all their forms.

Which is why it is a little surprising that the slipcover of the Koren Talmud’s edition of Bava Kamma is illustrated with a pair of handsome oxen, as if this were going to be a book about animal husbandry. The reason for those oxen, however, becomes clear in the first mishna in Bava Kamma 2a. Here the Talmud lists the “four primary categories of damage,” by which it seems to mean inadvertent damage caused by negligence. These are Ox, Pit, Fire, and *Maveh*—a Hebrew word whose exact meaning the rabbis themselves dispute. Some suggest that *maveh* means “tooth,” and that it refers to damage caused by an animal eating crops; others say that it means “man,” and refers to damage caused directly by a human being.

The names of these categories can be traced to chapters 21 and 22 of the Book of Exodus, where Moses laid down the original *halakhah* about negligence and damages. These laws are not stated in general or abstract terms; rather, they envision very concrete examples. For instance, if an ox gores a human being, it is to be put to death, and its owner bears no

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<sup>14</sup> <https://www.tabletmag.com/sections/belief>

responsibility. If, however, the ox was known as “a goring ox”—that is, if it had gored people in the past, so that it was known to be dangerous—then its owner is responsible for keeping it under control. If he allows it to hurt someone, he must pay damages as determined by a judge. Similarly, if a man digs an open pit and someone falls into it, the digger of the pit is responsible and must pay damages. Again, if someone starts a fire that gets out of control and destroys his neighbor’s field, he must pay for the damage.

All these laws seem fair and reasonable, but they are obviously very limited in application. The Bible speaks of an ox; but what if you have a cow that hurts somebody? Does the same principle apply? Or what if, instead of digging a pit that someone falls into, you leave something on your roof and it falls off and hits someone? Are you still responsible for the injury? In short, what we have here is a problem that we have seen countless times in the Talmud. The laws of the Written Torah are not sufficiently broad or abstract to serve as the basis for a functioning legal system. Bridging the gap between Torah and real life, with all its endless complications and permutations, is the job of the Oral Law, as codified in the Mishna and interpreted in the Gemara.

And that is what the Tannaim are doing in this first mishna of the tractate. Instead of seeing the ox, the fire, and the pit as particular cases of negligence and injury, they turn them into the names of broad legal and conceptual categories. Thus Ox covers not only cases involved actual oxen, but any case “in which there is a living spirit” that causes damage—that is, any kind of animal that acts of its own volition. Fire covers hazards in which there is no “living spirit” but that are still capable of moving and spreading, the way a fire does. In the mishna’s words, this includes all dangers “in which the typical manner is to proceed from one place to another and cause damage.” By this logic, a flood would fall under the legal category of Fire, even though water and fire are opposites. Pit, by contrast, deals with stationary hazards, in which “the typical manner is not to proceed from one place to another and cause damage.”

“The common denominator” of all these categories, the mishna explains, “is that it is their typical manner to cause damage,” so that “their safeguarding [is] upon you.” An ox, a fire, and an open pit are inherently dangerous, so anyone who owns or creates these hazards is answerable for the damage they cause. No sooner have these main categories been established, however, than the Gemara begins to analyze them into subcategories. Take Ox. An ox can do damage to people and property in several different ways, by goring with a horn, or by trampling, or by eating crops in the field. In turn, these subcategories have subcategories. Goring, for instance, covers not only damage done with a horn (what might be called goring proper), but “pushing, biting, crouching, and kicking”—any form of physical attack that causes injury.

But any time the Talmud engages in this kind of logical classification, arguments are sure to ensue.

Thus the Gemara asks: "Aren't crouching and kicking a subcategory of Trampling?" Trampling, after all, involves damage that an ox causes with its feet; aren't crouching and kicking also performed with the feet? Why, then, are they related to Goring, which is performed with the head? In other words, the Gemara is trying to determine what is the logical distinction between Goring and Trampling. Is it related to which body part the animal employs? As it turns out, the answer is no; there is a different, more sophisticated distinction at work here. The real difference between Goring and Trampling is that the latter is "commonplace," while the former is "not commonplace." That is, any time you let an ox into a field, you can expect that he is going to trample the crops, but you do not expect that he is going to gore other members of the herd. This distinction has to do with reasonable expectations of harm, which is morally and legally a more relevant issue than whether the damage is caused by the head or the feet.

Plato once defined the art of dialectic, or philosophical debate, as "carving nature at the joints." That is, to reason about any subject means finding the natural divisions and distinctions it contains, to grasp its inner logic. In this sense, the rabbis in Bava Kamma are engaging in pragmatic dialectic: They are trying to analyze the general concept of "damages" and figure out how it can be most logically divided, in order to create a legal system that is rational and useful. Yet they must do this while squaring their logical investigations with the terms dictated by the Torah—pit, ox, fire. In this way, the first pages of Bava Kamma are an ideal introduction to the whole spirit of the Talmud, which is likewise an enterprise in mediation—between the inscrutable statutes of God and the pragmatic needs of human society.





Image by Nadja Donauer

# Gone Digging

**Reuven Chaim Klein** writes:<sup>15</sup>

The first Mishna in *Bava Kama* (1:1) begins by listing four categories of damages for which a person might be responsible, with *bor* (“pit”) listed second. That term refers to a case in which somebody dug a pit that ended up causing damage to another.

The one who dug the pit is liable for all damages caused by the pit that he dug, as the Bible says, “When a man opens a pit, or when a man digs (*karah*) a pit and he does not cover it, and an ox or donkey falls into it, then the master of the pit shall pay; he shall recompense the owner...” (Ex. 21:33-34). While this verse uses the relatively obscure verb *karah* to denote “digging,” the typical Biblical word for the verb of “digging” is *chofer*. In fact, throughout the Mishna (*Shevi’it* 3:10, *Bava Kama* 5:5, *Bava Batra* 2:12), the Rabbis consistently use the verb *chofer* — not *karah* — to denote the act of creating a *bor*. In this essay we will explore the possible differences between these apparent synonyms and help shed light on the exact meanings of these two terms.

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<sup>15</sup> <https://blogs.timesofisrael.com/gone-digging/>

The Malbim explains that *karah* refers to the first stage in digging a pit, while *chafirah* refers to the completion of the dig. With this in mind, the Malbim accounts for the word order in the verse, "He dug (*karah*) a pit, and he dug it (*chafirah*)" (Ps. 7:16). At first, he began to dig the pit, so the word *karah* is used to denote those first acts of digging, but subsequently the person in question dug deeper to the completion of the pit, so in that context a cognate of *chafirah* appears (see also Ibn Ezra, Ibn Ramoch, and Meiri to Ps. 7:16).

The Malbim notes that this distinction can also be inferred from the verses concerning Isaac and his wells, as an earlier verse relates "and Isaac's servants dug (*karah*) there a well" (Gen. 26:25), with a later verse talking about those same wells reporting, "On that day, Isaac's servants came, and they told him about the well that they dug (*chafirah*), and they said, 'We found water'" (Gen. 26:32). In the beginning, digging that well was expressed with the verb *karah* because they had only *begun to dig* the well, but in the end the digging is described with the word *chafirah*. This explanation of the wording regarding Isaac's wells is also found in *Ha'Ktav V'Ha'Kabbalah* by Rabbi Yaakov Tzvi Mecklenburg (1785-1865) and in *Ha'Emek Davar* by Rabbi Naftali Tzvi Yehuda Berlin (1816-1893).

If you also get a copy of *G-d Versus Gods: Judaism in the Age of Idolatry* (Mosaica Press, 2018), maybe it will make you as happy as this guy? Click the picture to visit Amazon...

Based on this, the Malbim explains that when laying down the law that one who digs a pit is liable for all damages stemming from that pit, the Torah specifically uses the word *karah*. This is in order to teach that even if one digs "an incomplete pit" (i.e. one that is less than ten handbreadths deep), he is still liable for any damages incurred (except for if an animal dies by falling into that pit, per *Bava Kama* 5:5). This is implied by the Torah using the slightly less common verbiage *karah* to denote "digging" the pit, which implies even the most basic digging that does not penetrate as deep into the ground as the term *chafirah* implies.

*(According to Even Shoshan's concordance, cognates of chafirah in the sense of "digging" appear in the Bible 23 times, while cognates of karah in the sense of "digging" appear 15 times.)*

With this distinction between *karah* and *chafirah* in mind, Rabbi Berlin explains why the Bible used the word *karah* instead of *chafirah* in talking about Jacob's burial place. Before he died, Jacob made Joseph swear that he will bury him in the Land of Canaan: "In my grave that I have dug (*karah*) for

myself in the Land of Canaan — there you shall bury me” (Gen. 50:5). Rabbi Berlin explains that the Bible does not use the word *chafirah* in this context because that would imply the ludicrous notion that Jacob had already dug a deep grave intended for his burial while he was still alive. Usually, a person does not literally dig their own grave during their lifetime. Instead, explains Rabbi Berlin, Jacob merely meant that he had prepared a specific plot as his burial place, but not that he had actually dug the grave and completed all the preparations. Since Jacob meant that he had engaged in only perfunctory preparations for his burial but did not actually dig out the grave, the Bible used the word *karah*, which implies “digging” merely the beginning of a pit, as opposed to *chafirah*.

In a polemic against Modern Hebrew that highlights the richness and exaltedness of *Lashon HaKodesh*, Rabbi Shaul Bruch (1865-1940) notes that the Song of the Well uses the terms *karah* and *chafirah* in an opposite order than expected. That song reads: “O Well — she was dug (*chafirah*) by the officers, she was dug (*karah*) by the nation’s noblemen” (Num. 21:18). If this verse meant to refer chronologically to the stages of digging a well, it should have first used the word *karah* and then *chafirah*. Why, then, do these terms appear in the opposite order?

Rabbi Bruch answers by noting that while the Torah specifies that the Song of the Sea was sung by Moses and the Israelites (Ex. 15:1), the Song of the Well was only said to be sung by the Israelites (Num. 21:17). Moses’ absence can be accounted for in light of the fact that the song itself actually pays homage to Moses, as in this song the Jewish People acknowledged that although they (“the nation’s noblemen”) would undertake certain actions, the final results always depended on the nation’s ultimate leaders — Moses and Aaron — “the officers” who would seal the deal. For example, although the Jews themselves valiantly fought against Amalek, it was Moses’ raised hands (and the prayers to Hashem for help) that ultimately led them to victory.

Accordingly, the Song of the Well does not speak chronologically about the steps taken towards preparing a wellspring of water for the Jewish People in the wilderness. Rather, it reflects the qualitative reasons behind that miraculous entity: “She was dug by the officers” is mentioned first and foremost because those officers are Moses and Aaron in whose merit the well sprung into existence (see *Taanit* 9a). The *chafirah* — finalization — of the digging is attributed to them. Only after establishing the main reasons for the well’s existence can the song move on to discuss the secondary reasons: “She was dug by the nation’s noblemen,” which refers to the rest of the nation. Their merits can only “start” the digging process (*karah*) but cannot complete the project without the leadership of Moses and Aaron.

Rabbi Samson Raphael Hirsch (to Gen. 26:25, 49:5) sharpens the difference between *karah* and *chafirah* by explaining that *karah* refers to mere preparatory digging that does not finish the project (per the above). He connects the word *karah* (KAF-REISH-HEY) to its near-homonym *kara* (KUF-REISH-ALEPH), "calling," noting that just as one calls over his friend in preparation for some greater purpose, so does *karah* denote the beginning stages of a larger digging project.

In contrast to this, Rabbi Hirsch understands that the term *chafirah* refers to "digging" so deep that one reaches the depths of the earth and can thus bring up the spring waters embedded deep in the earth's crust. Besides the more concrete meaning of "digging," the word *chafirah* also appears in a more abstract sense, to "scout," "spy" or "investigate." Just as digging deep into the ground allows a person to retrieve the waters at the nadirs of the planet, so does the act of spying or investigating allow one to retrieve data or information that is otherwise hidden from view. (In Modern Hebrew, a nosy person is called a *chafiran*.) Rabbi Mecklenburg similarly notes that in the context of "digging for information," *chafirah* has a negative connotation (as if to say that one is searching for negative info about another to bring to light) and may be related to the Hebrew word *cherpah* ("embarrassment"). Elsewhere, Rabbi Hirsch (to Ex. 21:33) explains that *karah* refers to preparatory pre-digging arrangements needed to dig a pit, while *chafirah* refers to the actual act of "digging."

Rabbi Pappenheim sees the word *karah* as reflective of the central meaning of the biliteral root KAF-REISH ("digging"), to which he ascribes a bevy of Hebrew terms united by various related themes:

- *Hakarah* ("recognizing") refers to the act of "digging" into one's mind to reach a conclusion before receiving all relevant facts. From this meaning are derived terms like *nochri* ("foreigner"), who is somebody that one does not "recognize," and *mechira* ("selling"), which refers to the act of commercial intercourse that causes people to "recognize" each other, or by which a seller "estranges" himself from the items he sells by giving them to somebody else.
- *Kur* ("furnace") refers to a sort of oven or kiln that is "dug" into the ground. This term produces such derivatives as *kiyor* ("laver"), which is a washing vessel fashioned in the shape of a *kur*; *kikar* ("a talent"), which is the amount of metal that can be processed in a *kur* in one time; *kirah/kirayim* ("oven"), which is also "dug" into the ground like a *kur*; and *kikar* ("loaf of bread"), which is typically baked in a *kirah*.
- *Kar* ("fertile field") refers to a place whose borders were typically demarcated by "digging" ditches around its perimeter. *Karim* refers to the "fat animals" who feast on the grounds of a *kar*, and *kor* refers to

the "measurement of grain" yielded by the typical *kar*. An especially large *kar* with luscious pasture lands is called a *kikar*. Knights who are granted fiefdoms over such lands are called *kreiti*, while a peasant who actually works such fields is called an *ikar*. The term *kerem* (literally, "vineyard") is also related to this meaning of KAF-REISH, because it refers to a land especially ripe for planting trees or vines.

- *Karet* ("cutting") also relates to "digging" in the sense that just as digging serves to break up the different parts of the dirt and separate them from each other, so does "cutting" serve to separate different pieces from each other.

In contrast to the terms for "digging" discussed earlier, the Malbim explains that *chatzivah* refers to "quarrying" and "excavating" with a hammer that chisels away at rock or hard ground. Nevertheless, Rabbi Yosef Kara (to Isa. 5:2) understands that *chatzivah* is a synonym to *karah* and *chofer*, except that it refers specifically to digging a round pit. He seems to relate the Biblical *chatzivah* to the Rabbinic term *chatzav* ("jug/pitcher"), which invariably refers to a round-shaped receptacle.



**NEZIKIN**<sup>16</sup> (Heb. נִזְקִין; "torts"), fourth order of the Mishnah according to the order given by Simeon b. Lakish (Shab. 31a), although according to another tradition (Tanḥuma in Num. R. 13:15), it is the sixth.

Originally *Nezikin* was the name of the first tractate only (see below). Because of Simeon b. Lakish's homily applying to it the word *yeshu'ot* ("salvation") in Isaiah 33:6, it is so called in many rabbinic sources, including the Tosefta. *Nezikin* is devoted to civil law (except for matrimonial law, dealt

<sup>16</sup> <https://www.jewishvirtuallibrary.org/nezikin>

with in the order *\*Nashim*), and the administration of justice and legal procedure, as well as penal law insofar as the subject does not appertain to some other part of the Mishnah.

The tractate *\*Eduyyot* was included in *Nezikin* because it contains "testimonies" most of which were given before the Sanhedrin of *\*Jabneh* after the destruction of the Temple and is consequently connected with the tractate *\*Sanhedrin*. *\*Avodah Zarah* was placed in *Nezikin* because it deals with the *halakhot* of idolatry, some of which are given in *Sanhedrin-Makkot*, and also because it opens with prohibitions against trade with idolators, thus connecting it with the tractate *Nezikin* (*\*Bava Kamma*, *\*Bava Mezia*, and *\*Bava Batra*), which gives the laws of trade in general. The inclusion of the aggadic tractate *Avot*, which deals with moral maxims, is due to the fact that it contains an exceptional number of instructions to *\*dayyanim*, dealt with in *Sanhedrin*.

*Nezikin* contains ten tractates, although at first there were only seven, the first three originally forming one tractate now divided into *Bava Kamma*, *Bava Mezia*, and *Bava Batra* (see Av. Zar. in Mishnah Kaufmann and Cambridge, etc.). The name of the first tractate was then applied to the whole order. *Sanhedrin* and *\*Makkot* were also originally one tractate (and are so in the Kaufmann and Parma Mishnah, in *genizah* fragments, and elsewhere), which contained 14 chapters; they were divided into two tractates, also apparently in Babylon, for reasons that are not yet sufficiently clear. Thus in the order *Nezikin*, too, the tractates were originally arranged according to the number of chapters in descending order. *Nezikin* has the following separate tractates: *Bava Kamma*, with 10 chapters; *Bava Mezia*, 10; *Bava Batra*, 10; *Sanhedrin*, 11; *Makkot*, 3; *\*Shevu'ot*, 8; *Eduyyot*, 8; *Avodah Zarah*, 5; *Avot*, 5; and *\*Horayot*, 3.

In the Tosefta of *Nezikin* each of the three *Bavot* has 11 chapters; *Sanhedrin*, 14; *Makkot*, 4 (or 5); *Shevu'ot*, 6; *Eduyyot*, 3; *Avodah Zarah*, 9 (or 8); and *Horayot*, 2 chapters; there is no Tosefta to *Avot*. *Eduyyot* and *Avot* have no *Gemara* in either the Jerusalem or the Babylonian Talmud. The importance of nearly all the tractates in the sphere of practical *halakhah* led to an abundant development of these spheres in rabbinic literature. Especially comprehensive is the literature on the first three tractates and on *Shevu'ot*, about which innumerable studies and commentaries have been written, which have material discussed in the responsa of all periods, and which (together with *\*Ketubbot* in the order *Nashim*) encompass the whole of Jewish civil law.

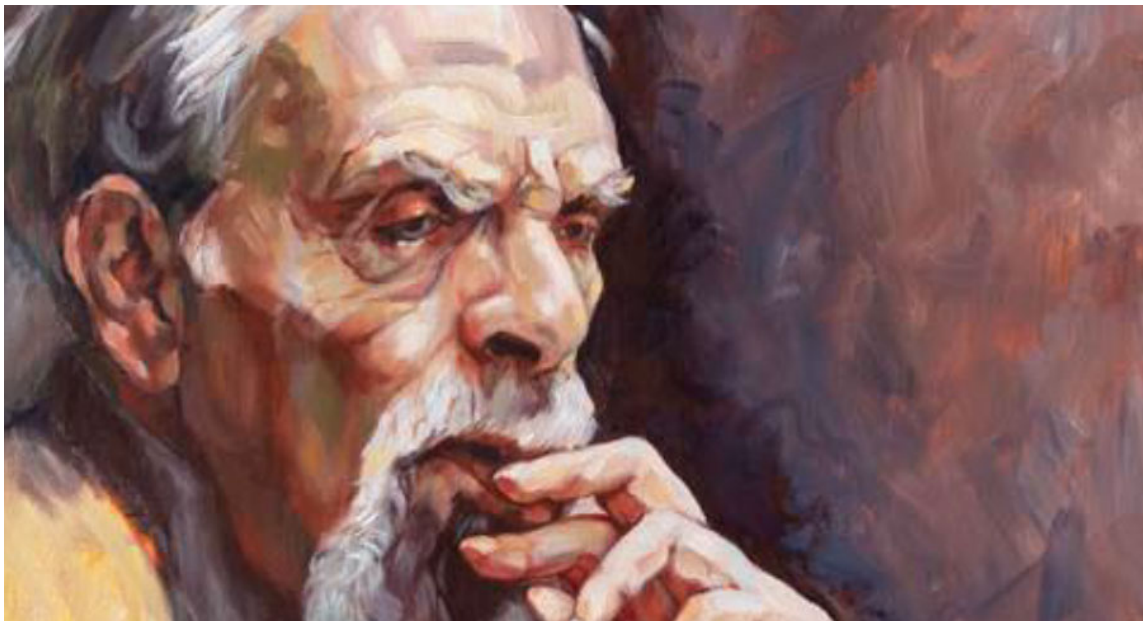
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**Portrait of Rabbi Louis Jacobs by Barbara Jackson (Image: Barbara Jackson)**



## Historical Thinking in the Post-Talmudic Halakhah

**Rabbi Dr Louis Jacobs** writes:<sup>17</sup>

From the close of the Babylonian Talmud in the sixth century CE down to the period of the Emancipation (late eighteenth century), the preponderance in Jewish studies was in the halakhah, the legal side of Judaism. Of course, in this period, too, many works were produced on other aspects of Judaism—biblical exegesis, Hebrew grammar, liturgical and general poetry, mysticism, and the kabbalah, and, especially, Jewish philosophy and theology—but the main emphasis everywhere was in the direction of halakhic studies.

Every legal system is to some extent indifferent to history. The law pursues its own way, with a life of its own, as it were, impervious to notions of historical development. This is true a priori of the halakhah, conceived of, at least on the surface, as a complete, self-contained system reaching back to the Torah given to Moses at Sinai. Even later rabbinic legislation is thought of as part of the same process, unchanging and with ultimate biblical sanction, so that, so far as Jewish practice is concerned, the origins of the laws become irrelevant. The keynote is sounded in the talmudic expression, used when a law is discussed of only past application: 'What difference does it make? What has been has been.' [1]

Moreover, medieval Jewish philosophy tended towards a metahistorical view of the whole Torah, to see the Torah as beyond the flux of time. The greatest of the medieval philosophers and also the most distinguished halakhist, Moses Maimonides (1135-1204), could calmly say of works of general history that they are of no practical consequence so that to read them is a sheer waste of

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<sup>17</sup><https://booksof.louisjacobs.org/articles/historical-thinking-in-the-post-talmudic-halakhah/?highlight=historical+thinking>. Originally published in Ada Rapoport-Albert, ed., *Essays in Jewish historiography. History and Theory* 27 (Middletown, CT: Wesleyan University Press, 1988), 66-77



time. [2] In addition, real historical study, as opposed to mere chronology, is largely the product of modern Jewish learning. It is, consequently, a little precarious to speak at all of historical thinking in the post-talmudic halakhah. For all that, such thinking can be detected as it entered through the back door, so to speak.

It was the Karaite rebellion against the authority of the Talmud at the beginning of the eighth century that gave the impetus to the followers of the Rabbis, the Rabbinites, to investigate the history of the Talmud itself. To face the Karaite challenge, the Rabbinites felt the need to demonstrate that there was a continuous chain of tradition from the Bible through the Talmud to the medieval representatives of Rabbinism. Furthermore, once the Talmud had become, as it did, the final court of appeal—in Maimonides' words, 'to it nothing must be added and from it nothing subtracted' [3]—the Talmud achieved the status of a sacred text, second only to the Bible, and the study of the lives of the talmudic sages as much part of the religious obligation to study the Torah as the study of the lives of the biblical heroes. But unless one knew which of the talmudic sages lived earlier and which later, many talmudic passages remained opaque, and the rule was laid down that from the time of the fourth-century teacher, Rava, and onwards, the law—the halakhah in the sense of practical decision—always followed the opinions of the later stages. (The rationale for this rule is that presumably the later stages knew of the opinions of the earlier sages and yet took issue with them. [4]) It was consequently essential for those rendering halakhic decisions to have some knowledge of talmudic chronology.

The works of talmudic methodology produced in our period usually consist of an exposition of terms used in the talmudic debates together with chronologies of the talmudic Rabbis who feature in the debates. As Gerson D. Cohen has noted, these chronological works exploited, in their defence of Rabbinism, the Muslim technique of *isnad*: that is, the authentication of a tradition or practice by scrutinizing the process of its transmission. [5] The earliest of these methodologies is the anonymous *Seder Tana'im Ve'amora'im* (The Order of the *Tana'im* and *Amora'im*), compiled probably in the year 885 according to Cohen, [6] thus coinciding with the period when the Karaite challenge was particularly acute. (The *tana'im* are the teachers, mentioned in the talmudic literature, who flourished in the first two centuries of the present era; the *amora'im* are their successors in both Palestine and Babylon.) The *Sefer Hakabalah* (Book of the Tradition) by Abraham ibn Daud (c.1110-1180) treats the history of the tradition from Bible times down through the talmudic sages to the rabbinic contemporaries of the author. [7] Ibn Daud's arrangement of the talmudic teachers generation by generation (for example, second generation *tana*, third generation *amora*, and so forth) was followed by practically all historians of the halakhah.

The other main works of the genre (in addition to the famous *Letter of Sherira Gaon* and the work of Maimonides, both to be noted presently) are: *Mevo Hatalmud* (Introduction to the Talmud) attributed to Samuel Hanaggid (d. 1055); [8] *Sefer Keritut* (Book of the Covenant—a loose translation of the title but conveying its meaning) by Samson of Chinon (end of the thirteenth century); [9] *Halikhot Olam* (Paths of the World or Eternal Paths) by Joshua of Tlemcen (compiled in Toledo c.1467); [10] *Shenei Luhot Haberit* (The Two Tablets of the Covenant) by Isaiah Horowitz of Prague (d. c.1630); [11] and *Yad Malachi* (The Hand of Malachi) by Malachi Hakohen of Leghorn (early eighteenth century). [12] To be noted is that all these works belong firmly in the halakhic tradition and have as their aim both the elucidation and application of that tradition.

The most influential work of talmudic chronology is the *Igeret Derav Sherira Gaon* (The Letter of Rabbi Sherira Gaon). The Geonim (excellencies) were the spiritual heads of the colleges of Sura and Pumbedita in Babylon, looking upon themselves, and accepted as such by the majority of Jews, as the legitimate heirs to the talmudic sages of Babylon and, therefore, since the Babylonian Talmud had become more authoritative than the Palestinian, as the authorities of Jews everywhere. In response to a question put by Jacob b. Nissim of Qairawan, Sherira, Gaon of Pumbedita, composed in 986 his *Letter* in which he sought to explain how the Mishnah and the Talmud, the great commentary to the Mishnah, were compiled. [13] The Talmud is notoriously obscure on the matter of its own compilation. The questions Sherira seeks to answer are: who edited the Mishnah and the Talmud and by which process?

Sherira describes the manner in which, as he sees it, the Mishnah was edited by Rabbi Judah the Prince towards the end of the second century. Much of the material found in the Mishnah, Sherira suggests, goes back to the Men of the Great Assembly, the originators, in the immediate post-biblical period, of the 'rabbinic' tradition, and contains all the doctrines, teachings, and laws delivered to Moses at Sinai in the form of the Oral Torah. At first, there was little debate on the laws; the material was simply handed down intact from generation to generation. The great debates arose among the *tana'im* during the first two centuries, a time when many details of the original revelation had been forgotten.

Various attempts were made to compile a Mishnah (the word means 'a teaching') that would provide a record both of the Oral Torah as a whole and of the debates which took place around its meaning and application. One such Mishnah was compiled by Rabbi Akiva, another by Rabbi Me'ir. Rabbi Judah the Prince, acknowledged Patriarch of the Jewish community in Palestine, was best equipped to compile his own Mishnah, soon afterwards accepted

universally as the Mishnah. The *amora'im* based all their teachings on the Mishnah of Rabbi Judah the Prince, discussing it and elaborating on it in both Palestine and Babylon.

The deliberations of the Palestinian *amora'im* are contained in the Palestinian Talmud, those of the Babylonians in the Babylonian Talmud— 'our' Talmud, as the geonim refer to it. The editors of the Babylonian Talmud were Rav Ashi and Ravina towards the end of the fifth century. The scholars known as the *savora'im* added glosses to the Babylonian Talmud and some little additional material of their own. Sherira records a tradition, for instance, that the opening passage of tractate *Kiddushin* is *savoraic*. The geonim of Sura and Pumbedita were the successors of the *savora'im* and Sherira proceeds to give a history of the gaonate down to his own day, thus seeking to demonstrate that the rabbinic tradition represented by rabbinic Judaism, with the geonim at its head, is the authentic tradition of Judaism as taught throughout the ages since the days of Moses.

The whole matter is complicated in that we are in possession of two distinct versions of Sherira's *Letter*. According to the Talmud itself there existed a prohibition against recording the Oral Torah in written form. [14] Since, however, the Talmud, the repository of the Oral Torah, was eventually written down, this, though illegal, must have been tolerated as an emergency measure 'lest the Torah be forgotten from Israel'. The French scholars in the Middle Ages piously refused to believe that Rabbi Judah the Prince and Rav Ashi and Ravina would have disregarded a clear prohibition or that the emergency that would have required the dispensation existed in talmudic times. The Spanish scholars, on the other hand, held that the emergency measure was both required and adopted as early as the time of Rabbi Judah the Prince. Consequently, in the Spanish version of Sherira's *Letter*, Rabbi Judah the Prince is said to have recorded the Mishnah in writing and Rav Ashi and Ravina the Babylonian Talmud. In the French version of Sherira's letter, Rabbi Judah the Prince only compiled the Mishnah, Rav Ashi and Ravina the Talmud, in verbal form; the whole corpus received its written form at a later date. It is difficult to know which version of the *Letter* is the authentic one. Scholars still discuss this question. [15]

Sherira's sources are twofold. The main source, naturally, is the Talmud itself. Sherira has pieced together observations found scattered throughout the Talmud to form some kind of coherent picture. But, as the successor to the geonim, Sherira relies, too, on traditions preserved by them. The tendency among modern historians of the halakhah is to acknowledge the value of Sherira's attempt while questioning some of his conclusions, arguing that, on occasion, he has read geonic patterns back into the talmudic period, much as, say, an historian writing in a thousand years' time might imagine that the

conditions of university life in the twentieth century accurately reflect conditions in sixteenth-century Oxford.

The problem of the *savora'im* and their contribution to the Babylonian Talmud has also been a source of contention in modern talmudic scholarship. [16] It is hard to accept at face value the view of Sherira that Rav Ashi and Ravina are the final editors of the Talmud since there are numerous talmudic passages in which these *amora'im* feature as heroes of the story with what appears to be later discussions of their views. The tendency is, nowadays, to insert a period of anonymous editors of the talmudic material between the *amora'im* (including Rav Ashi and Ravina) and the *savora'im*. [17] Thus, instead of Sherira's *tana'im*, *amora'im*, *savora'im*, and geonim, we have *tana'im*, *amora'im*, the anonymous editors, *savora'im*, and geonim. In short, the apologetic nature of Sherira's account cannot be overlooked. Sherira's intention was to demonstrate the unbroken chain of tradition, contrary to the Karaite rejection of that tradition. In the process it is hardly to be expected that he worked with complete objectivity, an ideal virtually unknown in Sherira's day.

Like Sherira, but with greater elaboration, Maimonides gives a summary of the history of the tradition, from Moses down to his own day, in his *Commentary on the Mishnah*, compiled in his youth. [18] In the introduction to his great code of law, the *Mishneh Torah*, [19] Maimonides repeats this history in capsule form, basing himself, as did Sherira, on statements found in the Talmud. For all his comparative indifference to general history, Maimonides, like Sherira, feels obliged to support the tradition by recording the chain from Moses onwards. In fact, he lists forty bearers of the tradition, working backwards from Rav Ashi through the *amora'im* and *tana'im* back to Ezra and the Prophets and then to Joshua, who received the tradition from Moses himself.

### **Maimonides continues:**

'All the sages mentioned are the great ones of their generation—some of them heads of yeshivas, some exilarchs, some members of the Great Sanhedrin—and together with them in each generation there were thousands and tens of thousands who heard it from them and with Ravina and Rav Ashi there were the final stages of the Talmud. Rav Ashi compiled the Babylonian Talmud in the Land of Shinar after R. Johanan, about one hundred years earlier, had compiled the Palestinian Talmud.' [20]

The nature of the two Talmuds is commentary to the words of the Mishnah and an exposition of its profundities together with all those topics that had been newly introduced by our holy master [Rabbi Judah the Prince] up to the

compilation of the Talmud. From the two Talmuds, the Tosefta, the Sifra, and the Sifrei [other tannaitic works], from all these there emerges an exposition of that which is forbidden and that which is permitted; that which is unclean and that which is clean; that for which there is liability and that for which there is no liability; that which is fit and that which is unfit, as was received from one to another reaching back to our teacher Moses at Sinai.

It can be seen that Maimonides' reconstruction is an artificial one, all extremely neat and tidy. Like his medieval contemporaries, Maimonides was not bothered by anachronisms, seeing, for example, the institution of the Sanhedrin reaching back to the biblical period. What we have here is not history but simple chronology with an avowed purpose. The need to verify the sources and test their reliability, a major concern for the historian, simply did not exist for Maimonides and his contemporaries. For all that, Maimonides often gives the history of particular laws in his code, of which the following is a typical example. [21]

### **Prefacing the section in his code dealing with marriage, Maimonides writes:**

'Before the Torah had been given, if a man met a woman in the market place and both he and she agreed to marry, he would bring her into his house, have intercourse with her in the privacy of the house, and she would then become his wife. Once the Torah had been given, Israel was commanded that if a man wished to marry a woman, he must first acquire her [to be his wife] in the presence of witnesses and [only] then does she become his wife, as it is said: "If any man take a wife and go in to her" [Deuteronomy 22: 13].

To take a wife in this way is a positive precept of the Torah. By one of the following means a woman is acquired [as a wife]: by the delivery of a sum of money; by the delivery of a marriage document [*shetar*, a document in which it is stated: "Be thou my wife"] or by intercourse; by intercourse or by the marriage document according to the Torah and by money according to the words of the Scribes [*midivrei soferim*]. These methods of acquiring [a wife] are referred to everywhere [in the rabbinic sources] as *kidushin* [designation] or *erusin* [betrothal] and a woman acquired by one of these methods is known as a *mekudeshet* or *meoreset*. Before the Torah had been given, if a man met a woman in the market place and both he and she agreed to have intercourse, he would pay her fee, have intercourse with her by the wayside and then go his way. Such a woman was known as a harlot [*kedeshah*]. Once the Torah had been given, the harlot [*kedeshah*] was forbidden, as it is said: "There shall be no harlot of the daughters of Israel" [Deuteronomy 23: 18]. Consequently, whoever fornicates with a woman without *kidushin* is liable to

the penalty of flogging by Torah law since he has had intercourse with a harlot.' [22]

It is abundantly clear what Maimonides is trying to do in this 'historical' introduction to the laws of marriage. He is concerned to demonstrate that the methods, found in the rabbinic sources, of acquiring a wife are the only methods and that extramarital sex is forbidden by the Torah. In obedience to these aims, Maimonides, aware that from the biblical narrative of Judah and Tamar (Genesis 38) a less restrictive attitude prevailed (since Judah is not condemned for associating with a harlot) and also aware that in the earlier period, too, the institution of marriage existed (since there are references in the early narratives of the Bible to married women), reconstructs the history to fit in with his understanding of the law as recorded by the Rabbis in the Talmud.

According to Maimonides, marriage in the pre-Torah age was optional. Casual sex with a harlot was not forbidden (that is, by the Noahide laws). There were also permanent marriage arrangements in which a woman consented to be a man's wife and she was then forbidden to all other men. This relationship could only be established by the two living together as man and wife in the privacy of their home. Once the Torah had been given, the laws, as recorded in the rabbinic literature, came into operation for the Israelites. One of the three methods of acquisition had to be adopted in the presence of witnesses. The legal formalities had to precede the physical union.

All this is Maimonides' own reconstruction to which he subordinates his sources, which is why other halakhists take issue with his formulation. Abraham ibn David, Maimonides' great critic, remarks on Maimonides' ruling that for a man to live with a woman without *kidushin* is harlotry: 'The word *kedeshah* means "one who is ready", that is, one who is ready to abandon herself to all and sundry, but when a woman devotes herself to one man there is neither the penalty of flogging nor even a negative precept. This is the *pilegesh* referred to in Scripture.' [23] Elsewhere in his code, [24] Maimonides states explicitly that the *pilegesh* (concubine) is only permitted to a king, never to a commoner. And in his *Guide of the Perplexed* Maimonides inveighs against concubinage, [25] stating that there is no way to engage in permitted sexual intercourse other than through singling out a woman and marrying her in public. Maimonides refers with approval more than once to the Aristotelian dictum that the sense of touch is shameful. [26] Here in his code he reconstructs the history to be in accord with his philosophical and ethical predilections.

Maimonides does not, however, yield entirely to anachronism. In his *Sefer Hamitzvot* (Book of the Commandments), for instance, while he holds that the

right of later sages to introduce new laws is sanctioned by the Torah, he understands this in a very general sense. Take the law introduced by the Rabbis that, in celebration of the victory of the Maccabees over Antiochus, the Hanukkah lights must be kindled and the benediction recited: 'Who has sanctified us with His commandments and has commanded us to kindle the Hanukkah lights'. This only means, Maimonides is at pains to point out, that the sages in Maccabean times had biblical warrant to introduce the new observance. He ridicules the notion that the biblical sanction involves a direct anticipation of events that were to happen in two thousand years' time—that, in the time of Moses, God informed him that one day the Maccabees would be victorious and the sages of the day would introduce a new practice, here and now meeting with God's approval. [27]

Maimonides refers to the two Talmuds, the Jerusalem (or Palestinian) Talmud and the Babylonian, stating that the latter was compiled about one hundred years after the former. This historical question of when the two Talmuds were compiled had implications for the post-talmudic halakhah. Since the principle, referred to above, is accepted, that the later teachers are to be followed where they are in disagreement with earlier teachers, the rulings of the Babylonian Talmud, where they differ from those in the earlier Palestinian Talmud, are the ones adopted by the post-talmudic halakhah. This was stated explicitly by R. Isaac Alfasi (1013-1103), known as the Rif, in his famous halakhic compendium, *Sefer Halakhot* [28], where he observes, regarding a certain Sabbath law on which the two Talmuds disagree, that the Babylonian ruling is adopted. The Babylonian Talmud, declares the Rif, must have known of the ruling in the Palestinian Talmud and yet departs from that ruling. As modern scholars note, there is no evidence that the editors of the Babylonian Talmud had before them the text of the Palestinian. Nowhere do they refer to the earlier work. [29] Yet the statement in the Rif resulted in the preference, on the part of the later halakhists, for the Babylonian Talmud as the basis of the halakhah. [30] This is as good an illustration as any of how the halakhah follows its own rules whatever the historians have to say.

The French glossators to the Talmud known as the Tosafists (eleventh through thirteenth century), whose opinions enjoy a good deal of authority among the later codifiers, evince a keen interest in historical matters. Their historical glosses are of two kinds. First, where the Talmud refers to past events and there is a degree of uncertainty about these, the Tosafists generally note the problem. Scores of such historical observations are found in the Tosafists, though their sources are exclusively rabbinic. [31] Second, where a law is said in the Talmud to be based on certain conditions and these no longer obtained in the time of the Tosafists, they generally note this, arguing that the law can be changed when the original circumstances in which it was promulgated are no longer relevant. Many halakhists take issue with

the Tosafists and hold that once the law is accepted in the Talmud it is irrevocable, even when the original conditions no longer obtain. [32]

The Tosafists, however, do accept the principle of change so that a further reason emerges why some knowledge of history is required for halakhic decision-making. For example, the Talmud is very strict regarding washing the hands after, as well as before, meals. In medieval France, the practice of washing hands after the meals was no longer in vogue. Defending their countrymen's neglect of a law stated in the Talmud, the Tosafists point out that the reason for the law given in the Talmud is that every trace of a certain salt must be removed from the hands after a meal because, if this came in contact with the eyes, it could cause blindness. [33] 'Nowadays,' remark the Tosafists, 'we no longer use this kind of salt and the law has justifiably fallen into abeyance.'

The Mishnah rules that dancing or even clapping the hands in joy is forbidden on a festival and yet this rule was ignored by the French Jews. The Tosafists point out that the reason for the prohibition, stated in the Talmud, is to prevent the fashioning of a musical instrument; that is, in the joy of the dance people might forget that it is a holy day and they might fashion an instrument to assist the merriment. 'Nowadays,' say the Tosafists again, 'we lack the skill to fashion a musical instrument so there is no reason for the original prohibition to stand.' [34]

The Talmud is opposed to a father exercising the right, given to him in the Bible, of marrying off his minor daughter before she is old enough to choose for herself the man she wishes to marry. Here, too, the French Jews ignored the law. In their defence, the Tosafists remark that while such marriages are valid, they are, indeed, illegal; yet, in the harsh conditions obtaining at the time it is essential to permit these marriages. If child marriages were to be disallowed, the opportunities for marriage may not arise later and the poor girls would remain unmarried all their lives. [35]

In these and similar instances history is invoked by the Tosafists as a *post factum* defence of a prevailing practice apparently at variance with the law. The Tosafists are certainly not engaged in objective historical investigation. Nevertheless, historical factors are allowed a voice in determining the halakhah, as they are when the Tosafists refer to a ruling of the Geonim. [36] In talmudic times, a widow could only claim her *ketubah*, the marriage settlement, from the real estate of her husband. It could not be claimed from movables, on which there was no lien. In geonic times, however, when ownership of real estate was far less frequent, it became imperative to introduce new legislation according to which movables were also held in lien



for the *ketubah*. The change in the historical circumstances is duly noted to allow changes in the law.

Another far-reaching change in the geonic period was in connection with the strict talmudic prohibition of Gentile wine. The geonim relaxed some of the restrictions on the grounds that the Gentiles among whom they resided were Muslims and the more severe talmudic restrictions applied only to the Gentiles in talmudic times who were idolators. [37]

Here a number of further instances of historical factors having a say in how the halakhah develops can be quoted. The Talmud states that a married woman need not recline at the Passover Seder since she is in awe of her husband, unless she is a 'woman of high rank' (*ishah hashuvah*). But a famous German halakhist argued that in talmudic times class distinctions were more pronounced, but 'all our women are of high rank'. [38]

According to talmudic law a man who profaned the Sabbath in public was to be treated as a non-Jew. [39] He could not, for example, help to form a quorum for prayer. Yet R. Jacob Ettlinger (1798-1871) of Altona argued that in talmudic times the Jew who publicly profaned the Sabbath had cast himself off thereby from the Jewish community. Nowadays conditions are different. Many Jews profane the Sabbath out of ignorance; the law was historically conditioned and no longer has force. [40]

In talmudic law the deaf-mute (*heresh*) is treated as an imbecile. R. Simhah Bunem Sofer of Pressburg (1842-1906) argues that this was because in talmudic times, in the absence of schools for the deaf, there was no way for him to be educated. [41] Nowadays such schools exist and there is no longer any reason for treating a deaf-mute as if he were an imbecile.

The halakhists at times show an interest in past events not so much because these have any relevance to the halakhah in practice, but because they seem to show the ancients acting in an illegal manner, which in turn seemed to challenge the doctrine of the immutability of the Torah. R. David ibn Abi Zimra (1479-1573), known as Radbaz, was asked how Adam could have disobeyed God to eat of the fruit of the tree of knowledge; [42] why Mordecai put the whole of his people in danger by refusing to bow to Haman when he could have avoided it by leaving Shushan to live elsewhere; [43] how Jacob could have married two sisters since, the Rabbis say, the patriarchs kept the Torah before it had been given; [44] and how Jonah could have avoided the direct command of God for him to go to Nineveh. [45] Radbaz defends the biblical heroes by demonstrating that, in the particular circumstances in which they found themselves, they could not have acted otherwise than they did.

R. Hayim Jair Bacharach (1638-1702) was asked how he would defend the insulting behaviour of some of the talmudic Rabbis in their debates. [46] Bacharach proceeds to examine all the talmudic passages in which it is said that such unworthy conduct took place and tries to explain them away.

There is an opinion in the Talmud that the Torah was originally written in the present square script, but a questioner wrote to R. Moses Alashkar (1466-1552) that he had in his possession an ancient coin with an inscription in the old Hebrew script, showing this to have been the original script. Alashkar replies that it does not follow from the inscription on the coin that the Torah was originally written in the script on the coin, only that the coin-makers used this script. [47]

While it can be seen from the above that it is not too anachronistic to speak of historical thinking in the halakhah, the majority of the great halakhists had little interest in history as a subject of study, and their methods, from the point of view of modern scholarship, were lacking in both objectivity and critical assessment. Historical critical method was not employed in the study of the halakhah until the rise of the *Judische Wissenschaft* movement in the nineteenth century, when Krochmal, Rapoport, Frankel, and I. H. Weiss used the recently developed tools and were followed, in this century, by Saul Lieberman, Louis Ginzberg, Louis Finkelstein, Chaim Tchernowitz, J. N. Epstein, and a host of others. Yet important links were provided to the moderns in the work of a handful of traditional halakhists who anticipated the new approach, albeit in rudimentary form. Prominent among these was the famous Moravian halakhist, Yom Tov Lippmann Heller (1579-1654).

Heller seems to have possessed a keen sense of history, extremely rare until the modern period. In his commentary on the Mishnah, *Tosefot Yom Tov*, [48] Heller is bold enough to suggest that the Mishnah is a work independent of the Talmud and that a student of the Mishnah is consequently entitled to read the Mishnah on its own terms, even if his interpretations are at variance with the interpretations of the Mishnah recorded in the Talmud. He did add, however, that this activity can only be a purely academic exercise. In actual practice the law must follow the interpretations given in the Talmud. In his commentary on the code of Asher b. Jehiel, entitled *Lehem Hamudot*, [49] Heller surveys historically the two methods of halakhic codification among the earlier codifiers. The codes of Maimonides and Jacob b. Asher's *Tur* follow the concise method of the Mishnah, while the codes of the Rif and Asher b. Jehiel follow the more discursive methods typical of the Talmud.

In his introduction to his commentary to the Mishnah, [50] Heller discusses the rabbinic saying that God showed to Moses at Sinai all the later laws that were to be expounded by the scribes and the rabbis. This cannot possibly be

taken to mean that everything was already given at Sinai for that would mean a complete abolition of human history. The teaching of the scribes and the rabbis were their own original teachings. These were not given to Moses. He had only shown them, God providing Moses with a miraculous glimpse into the future.

Links with modern scholarly methods were also supplied in two famous compendiums of halakhic biography and bibliography. Jehiel Heilprin (1660-1746) compiled his monumental *Seder Hadorot* (Order of the Generations), as he states in the introduction to the work, [51] because only halakhic confusion results from ignorance of talmudic and halakhic chronology. He provides a detailed list of textual errors which a knowledge of history can correct. To give only one illustration, many students of the halakhah often identify incorrectly references to Rabban Gamaliel, failing to appreciate that there were three Rabban Gamaliels living at different times. Heilprin, out of his great knowledge, has astonishingly presented in this work a wealth of material culled from the sources for the reconstruction of the life and activities of the talmudic and later rabbis. All subsequent biographers have used Heilprin's work as the basis of their own research, although, naturally, they view some of his sources with a more critical eye than a scholar living in eighteenth-century Russia could have possessed.

Heilprin was followed by the Palestinian Halakhist, Hayyim Joseph David Azulai (1724-1806), known as Hida. Hida's *Shem Hagedolim* (The Names of the Great Ones) [52] is in two parts. In the first the names and biographies of all the famed halakhists (and other saintly teachers) are given; in the second are listed all the works they compiled. Hida, a great traveller, visited European libraries, where he consulted hundreds of manuscripts and early editions. Despite his uncritical acceptance of a good deal of purely legendary material, Hida can be seen as the forerunner of the moderns to whom in a real sense he belongs.

In his detailed and colourful accounts of their lives, Hida brought the halakhists to life as real human beings, each with his own individual temperament, instead of, as in the older view, mere abstract legal cyphers. From this it was but a step to seeing the halakhah itself as governed by external conditions and a proper history of the halakhah became possible.

## NOTES

1. *Yoma* 5b; *Ketubot* 3a. Cf. the remarks of Menahem Me'iri of Perpignan (1249-1316) in his *Bet Habehirah*, ed. I. Ralbag (Jerusalem, 1974), 44, to the passage in *Sanhedrin* 15b in which the question is raised how many judges were required to sentence an ox to be stoned that had strayed onto the mountain (Exodus 19: 13). Me'iri, desperate to discover some practical halakhic application, suggests the instance where a man makes a solemn promise to provide as many poor men with clothes as there were judges in that far-distant event. On the general subject of talmudic chronology see Daniel Sperber's 'Studies in Talmudic Chronology' (Heb.) in *Michtam Ledavid*, Memorial Volume for Rabbi David Ochs, ed. Y. Gilat and E. Stern (Ramat Gan, 1978), 77-85.
2. *Commentary on the Mishnah*, ed. J. Kapah (Heb.) (Jerusalem, 1963), on *Sanhedrin* 10: 1; *Nezikin*, 140-1.
3. *Commentary on the Mishnah*, Introduction, 25 (my translation): 'After the demise of all the sages, on whom be peace, the last of whom were Ravina and Rav Ashi, the Talmud was complete so that whoever rose afterwards had no other purpose than to understand the words that had been compiled [i.e. the Talmud]. To it nothing must be added and from it nothing subtracted. Consequently, the geonim composed commentaries on the Talmud but to the best of our knowledge none of them managed to compile a commentary on the whole of the Talmud.'
4. This rule is post-talmudic but quite early. One of the sources in which it occurs is the *Sefer Keritut* of Samson of Chinon (Heb.), ed. J. Z. Rotha (Brooklyn, 1961), Part 4, section 3: 6, 263; ed. S. B. and J. M. Sofer (Jerusalem, 1983), 185. The reasoning behind the rule is given in the *Responsa* of Joseph Colon (d. 1480), the Maharik (Warsaw, 1884), no. 84, p. 92. Cf. the *Responsa* of Moses Alashkar (1466-1552) (Jerusalem, 1959), nos. 53 and 54, for the conservative view that the rule has no application after the geonic period.
5. Gerson D. Cohen, *The Book of Tradition: Sefer ha-Qabbalah by Abraham Ibn Daud* (London, 1967), Introduction, p. 1.
6. *Ibid.* iii. *Seder Tana'im Ve'amora'im*, ed. and transl. into German by K. Kahan (Frankfurt am Main, 1935).
7. Cohen, *The Book of Tradition*.
8. Printed with commentaries in the Vilna, Romm editions of the Babylonian Talmud, tractate *Berakhot*.
9. *Idem.*
10. Warsaw, 1883, with commentaries.
11. Amsterdam, 1649, section 'Torah Shebe'al Peh'.
12. Jerusalem, 1976.
13. *Igeret Derabbenu Sherira Gaon*, with commentary, *Patshegen Haketav*, by Aaron Hyman (London, 1911). The best edition is that of B. M. Lewin, *Igeret Rav Sherira Gaon* (Jerusalem, 1972).
14. *Temurah* 14a; *Gittin* 60b. See the discussion in detail in Hermann L. Strack, *Introduction to the Talmud and Midrash* (Philadelphia, 1945), 12-20.
15. See especially Lewin's introduction and I. N. Epstein, *Introduction to Amoraitic Literature* (Hebrew), ed. E. Z. Malammed (Jerusalem, Tel Aviv, 1962), Appendix, 610-15. Epstein casts doubt on whether the two different versions have anything to do with the question of writing down the Mishnah and the Talmud.
16. See the literature cited in my *The Talmudic Argument* (Cambridge, 1984), 18-19, and David Weiss Halivni, *Midrash, Mishnah, and Gemara* (Cambridge, Mass., 1986).
17. The much-discussed key passage is *Bava Metzia* 86a: 'Rav Ashi and Ravina the end of Hora'ah'. The best analysis of the whole question is still Julius Kaplan, *The Redaction of the Babylonian Talmud* (New York, 1933). See especially Kaplan, 31-2, for the uncertainty about Sherira's view. On Sherira reading back geonic institutions into the talmudic period see David Goodblatt, *Rabbinic Instruction in Sassanian Babylon* (Leiden, 1975).
18. *Commentary on the Mishnah*, ed. Kapah, Introduction, 1-31.
19. Ed. S. Z. Rubenstein, *Rambam La'am*, Introduction, and in various editions. The passage listing the 40 sages is in Rubenstein, 10-11.
20. This view that R. Johanan (d. c.270) was the editor of the Palestinian Talmud appears to be original with Maimonides and is probably based on the fact that this teacher is mentioned more often in the Palestinian Talmud than any other *amora*. But clearly the present text of the Palestinian Talmud must have been edited at a much later date; see *Encyclopedia Judaica*, vol. 10, 146, and J. J. Greenwald, *Hara'u Mesaderei Habavli et Hayerushalmi?* (New York, 1954), 9-11.
21. See e.g. 'Eruvin' 1: 1-2; 'Hametz Umatzah' 1: 8-9; 'Ta'anit' 1: 1-4; 'Megilah Vehanukah' 1: 1; 3: 1-3, and frequently in Maimonides' code.

22. 'Ishut' 1: 1-4.
23. Rabad on 'Ishut' 1:4.
24. 'Melakhim' 4:4.
25. *Guide*, III, 49.
26. *Guide*, II, 36, 40; III, 8, 49.
27. *Sefer Hamitzvot* (Warsaw, 1883), *shoresh rishon*, 3b.
28. Vilna, Romm edn., 35b.
29. On this question see Epstein, *Introduction to Amoraitic Literature*, 290-292, and Greenwald, *Hara'u Mesaderei Habavli et Hayerushalmi?*
30. See Malachi Hakohen, *Yad Malakhi* (Jerusalem, 1976), 'Rules Regarding the Two Talmuds', no. 2, 177: 1.
31. See e.g. Tosafot on *Betzah* 5b; *Megilah* 5b; *Gittin* 80b; *Bava Kama* 3b and passim.
32. On this see the survey in I. H. Weiss, *Dor Dor Vedoreshav* (Berlin, 1924), ii. 61-6.
33. Tosafot on *Hulin* 105a.
34. Tosafot on *Betzah* 30a.
35. Tosafot on *Kidushin* 41a.
36. Tosafot on *Ketubot* 51a.
37. See Maimonides, *Mishneh Torah*, 'Ma'akhalot Asurot' 11: 7.
38. Mordecai b. Hillel (d. 1298), *Sefer Mordekhai*, 'Pesahim' no. 128, quoted by Isserles in *Shulhan Arukh*, 'Orah Hayim' 472: 4.
39. *Sec Hulin* 51.
40. *Responsa Binyan Tzion*, New Series (Vilna, 1878), no. 23.
41. *Responsa Shevet Sofer* (Jerusalem, 1974), 'Even ha-Ezer', no. 21.
42. *Responsa Radbaz* (Warsaw, 1862), no. 256.
43. *Responsa Radbaz*, no. 284.
44. *Responsa Radbaz*, no. 696.
45. *Responsa Radbaz*, no. 842.
46. *Responsa Havot Ya'ir* (Frankfurt, 1699), no. 152.
47. *Responsa Maharam Alashkar* (Jerusalem, 1959), no. 74.
48. *Tosefot Yom Tov* (various editions) on *Nazir* 5: 5.
49. Introduction to *Lehem Hamudot* in *Sefer Rabenu Asher* (beginning) printed in Vilna, Romm edition of the Babylonian Talmud, immediately after the text of *Berakhot*.
50. Introduction to *Tosefot Yom Tov*, discussing the talmudic passage *Megilah* 19b. In this same Introduction, Heller remarks that while the tradition in general goes back to Moses at Sinai, many of the details were forgotten in the course of time and hence the debates among the rabbinic teachers are attempts at rediscovering the original Mosaic teaching.
51. *Seder Hadorot*, ed. Naftali Maskil le-Etan (Warsaw, 1877), photocopy with many supplements (Jerusalem, 1985).
52. *Shem Hagedolim*, ed. Menahem Mendel Krengil (Podgora-Cracow, 1905-30). I. A. Ben-Jacob's *Otzar Hasefarim* (Vilna, 1880), the standard tool for rabbinic bibliography, consists of the second part of Hida's work with further elaborations and notes.