Daf Ditty Bava Metziah 35: וּשְׁבוּעָה כְּדֵי לְהָפִיס דַּעְתּוֹ שֶׁל בַּעַל הַבַּיִת

1		**שומר חנם – UNPAID WATCHMAN** Someone who is watching an object without getting _____.
2		**שומר שכר – PAID WATCHMAN** Someone who is watching an object and is getting _____.
3		**שוכר – RENTER** Someone who pays money to be able to _____ an object.
4		**שואל – BORROWER** Someone who borrows an object without having to _____.

שלימו ימי אברותא: מתני׳ השוכר פרה מחבירו והשאילה לאחר ומתה כדרכה גשבע השוכר שמתה כדרכה *והשואל ישלם לשוכר א״ד יוסי ״כיצד הלה עושה סחורה בפרתו של חבירו אלא תחזור פרה לבעלים: גמ׳ א״ל רב אדי בר אבין לאביי מכדי

מַתְנִי׳ הַשּׂוֹכֵר פָּרָה מֵחֲבֵירוֹ וְהִשְׁאִילָהּ לְאַחֵר, וּמֵתָה כְּדַרְכָּהּ – יִשָּׁבַע הַשּׂוֹכֵר שֶׁמֵּתָה כְּדַרְכָּהּ, וְהַשּׁוֹאֵל יְשַׁלֵּם לַשּׂוֹכֵר. אָמַר רַבִּי יוֹסֵי: כֵּיצַד הַלָּה עוֹשֶׂה סְחוֹרָה בְּפָרָתוֹ שֶׁל חֲבֵירוֹ? אֶלָּא תַּחְזוֹר פָּרָה לַבְּעָלִים.

MISHNA: In the case of **one who rents a cow from another, and** this renter then **lends it to another** person, **and** the cow **dies in its** typical **manner,** i.e., of natural causes, in the possession of the borrower, **the renter takes an oath** to the owner of the cow **that** the cow **died in its** typical **manner, and the borrower pays the renter** for the cow that he borrowed.

A renter is exempt in a case of damage due to circumstances beyond his control, including death, but a borrower is liable to compensate the owner even for damage due to circumstances beyond his control.

Rabbi Yosei said: How does the other party, i.e., the renter, **do business with** and profit from **another's cow? Rather,** the value of the **cow should be returned to** the **owner.** The renter need not take an oath, but the borrower must compensate the owner of the cow.

גְּמָ׳ אֲמַר לֵיהּ רַב אִידִי בַּר אָבִין לְאַבָּיֵי: מִכְּדֵי, שׂוֹכֵר בְּמַאי קָנֵי לְהַאי פָּרָה? בְּשִׁבּוּעָה.

GEMARA: Rav Idi bar Avin said to Abaye: After all, with regard to **the renter, with what does he acquire this cow** to the extent that one who borrows the cow from him is liable to compensate him if it dies? He acquires

it **with an oath** that he took to the owner of the cow that the cow died of natural causes.

וְנֵימָא לֵיהּ מַשְׁכִּיר לְשׁוֹכֵר: דַּל אַנְתְּ וְדַל שְׁבוּעָתָךְ, וַאֲנָא מִשְׁתַּעֵינָא דִּינָא בַּהֲדֵי שׁוֹאֵל. אֲמַר לֵיהּ: מִי סָבְרַתְּ, שׁוֹכֵר בִּשְׁבוּעָה הוּא דְּקָא קָנֵי לַהּ? מִשְּׁעַת מִיתָה הוּא דְּקָנֵי. וּשְׁבוּעָה כְּדֵי לְהָפִיס דַּעְתּוֹ שֶׁל בַּעַל הַבַּיִת.

The Gemara asks: **But** since the acquisition is effected by the renter's oath, **let the one who rented** his animal for hire **say to the renter: Remove yourself and remove your oath.** I do not want to deal with you at all in this case, **and I will litigate with the borrower** to recover my cow. Abaye **said to** Rav Idi bar Avin: **Do you hold** that it **is with an oath** that the **renter acquires** the cow? That is not so, as **from the moment of** the cow's **death,** the renter **acquires** the cow. From the moment the cow dies in the possession of the borrower, the renter has the right to receive another cow in exchange. **And** this **oath** that the renter takes to the owner of the cow is not required by the *halakha*. Rather, he takes the oath **to alleviate the concerns of the owner,** so that the owner will not suspect him of negligence. Consequently, the owner of the cow cannot litigate with the borrower, and even if he waives his right to demand an oath from the renter, he is unable to receive a cow from the borrower.

RASHI

להפיס דעתו - שלא יאמר פשעת בה:

Steinsaltz

ושבועה זו שנשבע השוכר למשכיר אינה מעיקר הדין, אלא **כדי להפיס** (לפייס, להניח) **דעתו של בעל הבית,** שלא יחשוד את השוכר ברשלנות והזנחה. וכיון שכך, אין לבעל הפרה הראשון בעצם כל מקום למשא ומתן עם השואל, ואינו יכול לקבל את הפרה תמורת ויתור על השבועה.

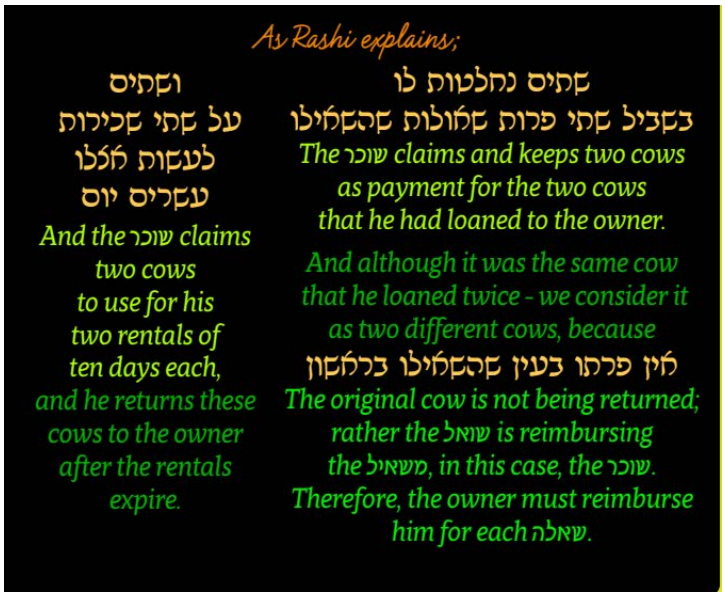
Tosafot Yom Tov on Mishnah Bava Metzia 3:2:2

שהוא פטור מאונסין נ"י]. **ושבועה כדי להפיס דעתו של בעל הבית.** ופירש"י **בשבועה** שהוא נשבע למשכיר. **להפיס דעתו** שלא יאמר פשעת בה. ע"כ....וסובר אני שנוסחא משובשת נזדמנה לו להר"ב בפירש"י *) דלא נסמן בה גמרא קודם דבור **בשבועה** שהוא נשבע למשכיר והעתיקה הר"ב לפירוש המשנה [*וגם בפירוש רש"י **בשבועה.** צ"ל **ושבועה**]:

אָמַר רַבִּי זֵירָא: פְּעָמִים שֶׁהַבְּעָלִים מְשַׁלְּמִין כַּמָּה פָּרוֹת לַשּׁוֹכֵר. הֵיכִי דָּמֵי? אַגְרַהּ מִינֵּיהּ מְאָה יוֹמֵי, וַהֲדַר שַׁיְּילַהּ מִינֵּיהּ תִּשְׁעִין יוֹמֵי, הֲדַר אַגְרַהּ מִינֵּיהּ תְּמָנַן יוֹמֵי, וַהֲדַר שַׁיְּילַהּ מִינֵּיהּ שִׁבְעִין יוֹמֵי, וּמֵתָה בְּתוֹךְ יְמֵי שְׁאֵלָתָהּ, דְּאָכֵל שְׁאֵלָה וּשְׁאֵלָה מִיחַיַּיב חֲדָא פָּרָה.

Rabbi Zeira says: According to the *halakha* in the mishna, there are **times when the owner pays several cows to the renter. What are the circumstances?** In a case **where** the renter **rented** a cow **from him** for **one hundred days, and the** owner of the cow **then borrowed** that cow **from** the renter for **ninety days, and** the renter **then rented** that cow **from** the

owner for **eighty days, and** the latter **then borrowed** that cow from the renter for **seventy days, and** that cow **died within** the seventh-day **period of its borrowing,** then **for each and every** occasion of **borrowing** of the cow, the owner, who then became the borrower, **owes one cow.** Since there were two discrete acts of borrowing and two discrete acts of rental, the owner owes him four cows, two outright as compensation for the borrowed cows that died, and two cows for the renter to use for the duration of his rental periods.



אָמַר לֵיהּ רַב אַחָא מִדִּיפְתִּי לְרָבִינָא: מִכְּדֵי חֲדָא פָּרָה הִיא, עַיְילַהּ וְאַפְקַהּ, אַפְקַהּ מִשְּׁכִירוּת וְעַיְילַהּ לִשְׁאֵילָה, אַפְקַהּ מִשְּׁאֵילָה וְעַיְילַהּ לִשְׁכִירוּת? אֲמַר לֵיהּ: וּמִי אִיתַהּ לְפָרָה בְּעֵינָא דְּנֵימָא לֵיהּ הָכִי?

Rav Aḥa of Difti said to Ravina concerning this *halakha*: **After all, it is one cow, and he introduced it into** one legal status **and removed it** from another legal status. **He removed it from** the status of **rental and he introduced it into** the status of **borrowing; he removed it from** the status of **borrowing and introduced it into** the status of **rental.** How then does the owner pay multiple cows for one cow? Ravina **said to** Rav Aḥa: **And is** the **cow intact** so **that** the owner **could say this to** the renter: Here is your cow? Since the borrower cannot return the cow to the creditor, he is liable to return that which he committed to return, and he committed to return two cows, not one.

מָר בַּר רַב אָשֵׁי אָמַר: אֵין לוֹ עֲלֵיהֶן אֶלָּא שְׁתֵּי פָּרוֹת, חֲדָא דִּשְׁאֵלָה וַחֲדָא דִּשְׂכִירוּת. שׁוּם שְׁאֵלָה אַחַת הִיא, וְשׁוּם שְׂכִירוּת אַחַת הִיא. דִּשְׁאֵלָה קָנֵי לִגְמָרֵי, דִּשְׂכִירוּת – עָבֵד בַּהּ יְמֵי שְׂכִירוּתֵיהּ, וּמַיְהֲדַר לֵיהּ לְמָרֵהּ.

Mar bar Rav Ashi said a third opinion: The renter **has against** the owner **only** a claim of **two cows, one for** the **borrowing** done by the owner, **and one for** fulfillment of his **rental** agreement. This is because the **category of borrowing is one and** the **category of rental is one.** As for the cow that is repayment **for** the **borrowing,** the renter **acquires** it **completely.** And as for the one **for** the **rental, he works with it** for the duration of **its rental period and** then **he returns it to its owner.**

אָמַר רַבִּי יִרְמְיָה: פְּעָמִים שֶׁשְּׁנֵיהֶם בְּחַטָּאת,

Apropos the situations described in the mishna, **Rabbi Yirmeya says:** If the renter and the borrower each took a false oath and are liable to bring offerings for their false oaths, there are **times that both** are liable **to** bring **a sin-offering.**

פְּעָמִים שֶׁשְּׁנֵיהֶם בְּאָשָׁם. פְּעָמִים שֶׁהַשּׁוֹכֵר בְּחַטָּאת וְהַשּׁוֹאֵל בְּאָשָׁם, פְּעָמִים שֶׁהַשּׁוֹכֵר בְּאָשָׁם וְהַשּׁוֹאֵל בְּחַטָּאת.

there are **times that both** are liable **to** bring **a guilt-offering;** there are **times that the renter** is liable **to** bring **a sin-offering and the borrower** is liable **to** bring **a guilt-offering;** there are **times that the renter** is liable **to** bring **a guilt-offering and the borrower** is liable **to** bring **a sin-offering.**

הָא כֵּיצַד? כְּפִירַת מָמוֹן – אָשָׁם. בִּיטוּי שְׂפָתַיִם – חַטָּאת.

The Gemara elaborates: **How so?** One who takes a false oath that involves the **denial of a monetary matter** is liable to bring **a guilt-offering.** One who takes a false oath on **an utterance of the lips** that involves no denial of a monetary debt is liable to bring **a sin-offering.**

Summary

3) **MISHNAH:** The Mishnah presents a discussion of whether someone who rents a cow and then lends her to a friend could profit from these transactions.

4) **Clarifying the Mishnah's ruling**

Abaye explained to R' Idi bar Avin the rationale behind the Mishnah's ruling.

R' Zeira presents an interesting application of the Mishnah's case in which the owner will be obligated to pay a number of cows to the owner.

R' Acha from Difti unsuccessfully challenged this ruling.

Mar bar R' Ashi follows the opinion of R' Acha. ■

SUMMARY[1]

If a lender claims that the Mashkon he was given was worth a Shekel and the borrower claims that it was worth three Dinarim the lender swears, not the

[1] https://www.dafyomi.co.il/memdb/revdaf.php?tid=22&id=35

borrower, because of the concern that the lender will pull out the Mashkon after the Shevu'ah of the borrower.

Abaye says even though R. Huna says that a Shomer who is willing to pay for the object must swear that it is not on his Reshus we are concerned that the lender will claim that he found the Mashkon after he swore.

R. Ashi says that the borrower is the one who swears however he only swears his Shevu'as Modeh b'Miktzas after the lender swear that it is not in his Reshus because of the concern that he will pull out the Mashkon after the Shevu'ah of the borrower.

If someone borrowed a Sela on a Mashkon and the borrower claims the Mashkon was worth two Sela'im and the lender claims it was worth only one Sela he is Patur from a Shevu'ah.

R. Nachman says if a Shomer says he doesn't know what happened to the object he was guarding it is Peshi'ah (negligence) and he is Chayav to pay.

If an object a Shomer was guarding is stolen and the Shomer pays for it if the Ganav is found the Kefel is paid to the Shomer.

If the owner was forced is take the Shomer to Beis Din before he paid the Shomer is not Koneh the Kefel and if the Ganav is found the Kefel is paid to the owner.

If the property of the borrower was taken from him and given to the lender for payment of his debt he may redeem the property from the lender within 12 months according to Nehardai.

Ameimar holds that the borrower may redeem the property that was taken from him forever.

If the property is taken from the borrower for payment of his debt and it is

subsequently taken from the lender for his own debt the borrower may redeem the property from the Ba'al Chov of his lender.

If the property is taken from the borrower for payment of his debt and the lender sells the property or gives it as a gift or it is inherited or the borrower may no longer redeem the property. (1)

If a woman borrows money and her property is taken from her for payment of her debt and she marries and subsequently dies her husband may not redeem her property from her lender. (2)

If a woman sells her Nichsei Melug during the lifetime of her husband and she subsequently dies her husband may take the property from the buyer. (3)

If the borrower willingly gave his property to the lender for payment of his Chov it is a Machlokes if he may redeem the property. (4)

Rabah says that as soon as a lender receives the Shtar Adrachta which gives him the right to take property from his borrower he may immediately start eating the Peiros of the property.

Abaye holds that as soon as the Shtar Adrachta is signed the borrower may immediately start eating the Peiros of the property.

Rava holds that the borrower may not eat the fruit of the property until the auction of the property has been completed. (5)

If someone rents a cow from his friend and lends it to another person and it dies naturally the renter swears to the owner that it borrower that it died naturally and the borrower pays the renter for the cow.

R. Yosi says that the renter may not make money from the cow of his friend and the borrower must pay the owner of the cow.

R. Zeira says sometimes the owner of a cow must pay for many cows to the renter; if he rents it for 100 days, lends it to the owner for ninety, rents it for eighty and lends it to the owner for seventy and it dies naturally in the hands of the owner. (6)

R. Ashi says that the owner only must pay the borrower the value of one Shor for borrowing it and he must pay him one Shor for ten days for the balance of the rental period.

Notes:

(1). Since the person who brought the property or received it as a gift or inheritance was due the property and not money they may not be forced to take money instead however a Ba'al Chov is due to receive money and not property therefore if the property was taken from the lender by his Ba'al Chov it may be redeemed.

(2). When the husband inherits the Nichsei Melug of his wife he is considered a buyer, not an inheritor and a buyer has no right to redeem the property that was taken from the seller, however if the husband was considered an inherit he would of has the right to redeem the property just as sons who inheritor their father have the right to redeem property that was taken from their father for his debt.

(3). The wife owns the Guf of the Nichsei Melug and the husband owns the Peiros and the man sold the Nichsei Melug so that the buyer owns the Guf while the husband continues to eat Peiros the Rabanan decreed that the husband is considered a buyer of the Nichsei Melug and therefore even though he only owns the Peiros he can tell the buyer I was the first buyer and I bought it before you and therefore the property must be returned to me.

(4). According to one opinion he may not redeem the property because it is tantamount to a regular sale since he gave it willingly, while the other opinion holds that he only gave it willingly without going to Din because he was embarrassed.

(5). After the borrower receives the Shtar Adrachta and property of the borrower is located the property is auctioned off and if the lender gives the highest bid the property is given to him and that is when he may start eating the Peiros.

(6). The owner must pay twice for the value of the cow since he borrowed it twice and it is as if two separate people borrowed it and he also owes the renter two cows for a period of ten days each for the balance of the rental period that he owes him.

If a lender claims that the Mashkon he was given was worth a Shekel and the borrower claims that it was worth three Dinarim the lender swears, not the borrower, because of the concern that the lender will pull out the Mashkon after the Shevu'ah of the borrower. The Gemara asks how the lender will pull out the Mashkon according to R. Huna who says that a Shomer must swear that it is not in his Reshus and the lender is considered a Shomer of the Mashkon. The Rashash asks that the Ramban says that a Shomer only swears that the object is not in his Reshus. If the object is something that is not readily available in the Markey. If so, maybe in this case the object is readily available and therefore the lender doesn't have to swear that it is not in his Reshus. The Rashash answers that in this case since there is a dispute regarding the value of the Mashkon even if the Mashkon is readily available the lender must swear that it is not in his Reshus.

If someone rents a cow from his friend and lends it to another person and it dies naturally or with an Ones since the borrower is Chayav he must pay the owner because the renter may not make money with the cow of his friend. If the owner told the renter if you want to lend it you may do so and your Din is with the borrower and my Din is with you in such a case the borrower pays the renter. (Shulchan Aruch CM 307:5)

The renter may not lend it to others,. however he transgressed that Din and he lent it out. (Sma)

R. Yosi says that the renter may not make money from the cow of his friend and the borrower must pay the owner of the cow.

Rav Avrohom Adler writes:[2]

How Much was it Worth?

[2] https://dafnotes.com/wp-content/uploads/2016/10/Bava_Metzia_35.pdf

Rav Huna said that when a custodian agrees to pay for the item he was entrusted with, even when he's not liable for the loss, he must swear that the item is not in his possession.

The Gemora cites a Mishna that discusses disputes in the value of a collateral item that was lost by a creditor. The creditor is a custodian for the collateral, and is liable for its loss, while the debtor owes the creditor the loan amount. In one case, the creditor claims that the collateral was worth half the loan amount, while the debtor claims it was worth three quarters the amount of the loan.

Effectively, the creditor is claiming an outstanding balance of half the loan, while the debtor is only admitting a quarter of the loan. Just as in any partial admission of a loan balance, the debtor must swear to his position, in order to avoid liability.

However, the Mishna says that we are concerned that the debtor will swear to his position, and then the creditor will produce the collateral, revealing the debtor as a liar.

Therefore, we make the creditor swear to his position in order to collect. If Rav Huna is correct, the creditor, who is a custodian, must swear that he does not have the collateral, so he wouldn't produce the collateral after the debtor swears.

The Mishna therefore seems to disprove Rav Huna. Rava suggests that the case is where the creditor has witnesses that the collateral was burned, and therefore need not swear that it is not in his possession.

The Gemora rejects this answer, since in such a case we would also not be concerned that the creditor will produce the collateral later. The Gemora offers three other answers:

1. Rav Yosef answers that the creditor has witnesses to the theft of the collateral, and therefore need not swear Rav Huna's oath. If the debtor swears falsely, the creditor will redouble his efforts to retrieve the stolen collateral and disprove the debtor. However, when the creditor swears, the debtor has insufficient information to do this.

2. Abaye answers that we are concerned that after the creditor takes Rav Huna's oath, he will claim to have found the collateral later, and disprove the debtor.

3. Rav Ashi says that the Mishna was not mandating that the creditor swear the worth of the collateral. Rather, the Mishna was assuming that the creditor swears Rav Huna's oath, and the debtor swears the worth of the collateral.

The Mishna was simply stating that the creditor must swear first, to avoid his disproving the debtor's oath with the collateral itself. Rav Huna bar Tachlifa quoted Rava, who said that another case of the Mishna seems to disprove Rav Huna.

The Mishna said that if the creditor claims the collateral was worth the loan amount – in which case, he owes the debtor nothing – while the debtor claims it was worth double the loan amount – in which the creditor owes him the loan amount, the creditor need not swear, just as any other person who totally denies a claim of a debt.

If Rav Huna is correct, when the creditor swears that the collateral is not in his possession, we should attach to that an oath to the collateral's value, using gilgul – attaching a new oath to an existing oath. Rav Kahana said that the Mishna is referring to a case where the debtor believes that the creditor has not taken the collateral, but feels he is mistaken in his estimation of its value.

Since the collateral is not the property of the creditor, he is not familiar with its worth. The creditor does not believe the debtor's estimation of the collateral, even though it's his property.

The rationale to assume such a situation is the verse in Mishlei, which states that righteous people are oftentimes rewarded with riches, while dishonest people are punished with poverty. Therefore, the debtor assumes his creditor is honest, since he is richer, while the creditor assumes the poorer debtor is dishonest.

Now, where did I Put it…?

A man entrusted a custodian with jewelry. When he requested them back, the custodian said he didn't know where he put them.

Rav Nachman said that forgetting where he placed the item is negligence, and the custodian is therefore liable. The custodian did not pay, so Rav Nachman seized the custodian's mansion.

Eventually, the custodian found the jewelry, and it had appreciated in value. Rav Nachman ruled that each party receives his property back – the custodian his house, and the depositor his jewelry.

Rava was present, and asked Rav Nachman why we don't consider the custodian to have acquired the jewelry once he paid for it, since the Mishna says that if a custodian declines to swear and instead pays for an item, he receives it when it is recovered.

Rav Nachman ignored the question, and Rava later realized that the Mishna's rule is only when the custodian did not trouble the depositor to go to court, and the depositor therefore gives it to him. However, in this case, the custodian troubled the depositor and the court to collect his obligation.

The Gemora suggests that this case proves that Rav Nachman holds that a court's seizure of assets is reversible, since he didn't consider the court's seizure of the mansion as concluding the case. The Gemora deflects this by saying that this case was a mistaken seizure, since the jewelry was later found intact.

No Returns?

The Gemora discusses at what point a court's seizure is irreversible. The Nehardean scholar said that a court's appraisal is reversible for only twelve months, while Ameimar (who was from Nehardea) says that it is always reversible. This is due to the creditor's obligation to be equitable, even when not necessitated by the letter of the law.

Since the creditor only received land in payment for a monetary obligation, he should accept payment in return for the land. The Gemora then discusses the reversibility of various cases of court seizure:

1. If a debtor's land was seized for a creditor, and he then used it to pay his creditor, the original debtor can retrieve the land, since the second creditor has no more rights than the first
2. If the land left the creditor via a sale, a gift, or to his estate upon his death, the new owners specifically want land, so it is not equitable for the land to be retrieved.
3. A husband is equivalent to a buyer. Therefore, if a woman creditor got married and then died, passing the seized land to her husband, he does not need to return it to the debtor. If a woman debtor whose land was seized got married and then died, her husband does not have the legal standing of an heir, and may not retrieve the seized land.

Rav Acha and Ravina dispute a case where a creditor personally collected the land, without court intervention. One says that since the debtor willingly gave the land, it is equivalent to a sale, which is irreversible. The other says that the debtor only gave the land since he was embarrassed to go to court, but it is still reversible. The Gemora cites three opinions as to when the creditor starts receiving the produce from land seized to pay his debt:

1. Rabbah: When he receives the collection document.
2. Abaye: When the collection document is signed.
3. Rava: When the public auction period is over.

Changing Hands

The Mishna discusses a renter who lends his rented item to someone else. A renter is liable only for loss or theft, while a borrower is liable for anything except loss through normal usage.

If the cow dies, the borrower is liable to pay the renter, but the renter simply swears that the cow died, and is not liable to pay the owner. Rabbi Yosi argues and says that the renter may not do business with his rented cow.

Instead, we remove the renter from the transaction, and the borrower pays the owner. Abaye explains that since the renter is not liable for the cow's death under normal usage, the renter acquires the cow at the time of death, and he therefore is paid by the borrower.

The oath he takes is simply to assuage the owner.

How many Cows?

Rabbi Zeira explains that the owner and renter can enter into transactions that will result in the owner paying the renter multiple times the value of the cow. The two principles are:

1. When one rents an item to someone, he must ensure the renter receives use of the item for the rental period. If the item is not available, the one providing the item must pay for the lost rental time
2. When one borrows an item, if it is lost not through normal usage, the borrower must pay the value of the item.

Below is a diagram of the transactions done with the cow:

Renter	Transaction	Duration	Owner	Obligation
	<<== Rents from	100 days ++++++++++		100 cow days
	==>> Lends to	90 days +++++++++		Cow (only 10 cow days of previous rental)
	<<== Rents from	80 days ++++++++		80 cow days
	==>> Lends to	70 days +++++++		Cow (only 10 cow days of previous rental)

Therefore, if the renter rented for 100 days, and then lent it back to the owner for 90 days, at that point in time, the borrower is liable to the renter for any loss on two counts.

Since he is borrowing the cow, he must pay for loss of the cow, and during the remaining 10 days, he must ensure the renter has use of a cow. If he then rented the cow back to the renter for 80 days, and the renter then lent it back

to the owner for 70 days, the owner has incurred two more payments – one for his second borrowing, and one for the 10 days of rental. Rav Acha from Difti disagrees and says that fundamentally there are only two obligations the owner has to the renter – one for borrowing, and one for rental. Regardless of how many iterations of these obligations are incurred, the owner only pays the renter these payments.

It's Somewhere...

The Gemora stated that if a custodian states that he doesn't know where he placed the item given to him, this is negligence, and he is liable. The Meiri says the negligence is the possibility that the location of the item is not secure. The Ritva says that even if the custodian knows that it's in a secure place, if he doesn't know where, that is negligence, since he's preventing the owner from accessing it.

Seized Land

The Gemora says that if a creditor sells land that he seized, the buyer need not return it to the debtor.

Tosfos (35a Zabna) asks how the buyer can have more rights than the creditor? He is buying the land from the creditor, who can only transfer his ownership rights as part of the sale.

Tosfos explains that in principle the creditor is not legally obligated to return the land, but only must do so to be equitable. Therefore, the buyer can buy the legal rights that the creditor has (to not return the land), and the equitable requirement does not apply to him, since he explicitly wanted to buy land, not its value.

The Gemora says that a husband whose wife died is considered a buyer of his wife's property, and therefore a debtor cannot retrieve land seized by the wife, nor can the husband retrieve land seized from the wife.

Tosfos (35a Loke'ach) explains that to prevent a debtor from retrieving land seized by the wife, it would suffice for the husband to be considered an heir, since heirs also have no obligation to return seized land. However, if the husband were considered an heir, he would be able to retrieve land seized from his wife.

Therefore, the Gemora had to state that the husband is considered a buyer. The Rishonim quote Rashi's opinion that when the wife is alive, the husband is neither an heir nor a buyer, and land can be retrieved by and from the wife. Tosfos seems to agree with Rashi's position.

According to the Ramban, the Gemora's case is even when the wife has not died. In that case, the husband is not an heir. If the husband is not considered a buyer, neither statement would follow – the land could be retrieved from and by the husband.

The Middleman

The Sages hold that if a renter lends his rented cow to someone, and it dies naturally, he may collect the value of the cow from the borrower, and swear to the owner, and avoid liability.

The Gemora explained that at the point of the cow's death, the renter acquired the cow, gaining its value from the borrower.

Rabbi Yosi rejects the renter profiting from his rented cow, and states that the borrower pays its value directly to the owner.

Tosfos (35b Tachzor) says that Rabbi Yosi holds that the renter would acquire the cow by his swearing or otherwise proving that he was not negligent, and at that point, the owner can tell the renter that he prefer to bypass the renter's intervention.

However, if the owner himself observed the cow dying naturally, the renter is already not liable, and the owner has no reason to bypass him. Other Rishonim (Rosh, Rif, Rambam) say that Rabbi Yosi considers the renter to be an agent of the owner when he lent it out.

Therefore, in all cases, Rabbi Yosi holds that the owner bypasses the renter, and receives payment from the borrower.

According to Tosfos, the Gemora's subsequent discussion of a renter and owner who exchange the cow multiple times is relevant even according to Rabbi Yosi, in the situation where the owner observed the cow dying. However, according to the other Rishonim, the discussion is only relevant according to the Chachamim.

Take it Back

The Gemora discusses the case of multiple exchanges of the cow between the owner and renter.

The Gemora deducts 10 days from the time period of guarding at each step. Tosfos (35b agra) suggests that if there were no change in the time period, we would assume each step was fully reversing the prior guarding, and there would be no accumulation of obligation.

Alternatively, Tosfos states that the borrowing has to be for a shorter time period, to ensure that the owner owes rental usage to the renter. Once the Gemora was reducing the time period for the borrowing, it also reduced the time period for the rental.

Profit from another's assets

Our mishnah cites Rabbi Yosi's famous rule: "How can one profit from another's cow?" The case presented here concerns someone who rented a cow and lent it to another.

The cow died while in the borrower's care and the halachah pertaining to shomerim requires the borrower to pay its worth to the renter. A borrower must compensate a lender – in this case, the renter – even in instances of force majeure (oness).

The renter, though, does not have to pass the payment on to the owner as he is liable only for theft or loss. Rabbi Yosei insists that the renter must give the payment gotten from the borrower to the owner as he must not profit from another's assets. *(This explanation is according to Rosh and other Rishonim quoted in Shittah Mekubbetzes, i.e., that the borrower acts as a shomer for the owner; Tosfos [s.v. "Tachazor"] interpret Rabbi Yosei's statement entirely otherwise; see Kehilos Ya'akov, 29*).

Profit from a twice-rented vehicle:

The meaning of the above rule becomes sharper if we consider this example: Someone rented a car for a day for NIS100 and immediately rented it to another for NIS150.

May the owner demand the additional NIS50 from the first renter? Machaneh Efrayim (Hilchos Sechirus, 19) explains that he must not as the first renter was not paid for the car itself, which was returned to the owner, but for its use.

The first renter paid the owner NIS100 to use the car and any profit he gets from its use is his. Rabbi Yosi's rule pertains if the renter profits from the property itself, as in our mishnah where the profit derives from the cow's death.

How would you rule?

A Torah scroll (sefer Torah) donated after a fire: The Jewish residents of a Brooklyn neighborhood moved on to greener pastures and the gabaim of the disused synagogue deposited their sefer Torah at a yeshiva. A fire broke out in the yeshiva which consumed the sefer Torah.

The community, shaken by the tragedy, eagerly donated funds for a new sefer but the gabaim of the old synagogue demanded it, quoting Rabbi Yosei's rule. If their sefer Torah had not been destroyed, they claimed, the yeshiva could not have raised contributions for a new one.

How would you rule?

A tenant who insured a rented dwelling: Rabbi Meir Simchah HaKohen (Or Sameach, Hilchos Sechirus 5:6) discusses a tenant who insured the house he was renting.

When the house caught fire, he collected the insurance and the landlord presented a claim, citing Rabbi Yosi's rule. The case obstensibly parallels that in our mishnah. The person who rented the cow gave part of the rental period to the borrower but we do not regard his act as an investment in hope of some force majeure that may happen to the cow; he must therefore pass on the payment to the owner.

Reasoning, likewise, we should disregard the tenant's investment in insurance and rule that the compensation for the fire damage belongs to the landlord. How would you rule?

Expectations of Honesty (or not); A Cow's Changing Status[3]

Who must take an oath if a collateral item is stolen: the creditor or the debtor? Who must prove that the stolen item is not in his possession? What if witnesses were present at the time of the theft? And what if there is a disagreement about the worth of the collateral item? Who takes an oath regarding that statement of value? Who trusts whom in such situations? We are reminded that the debtor might attribute goodwill to the creditor based upon Proverbs (11:3), where "The integrity of the upright shall guide them". The creditor may see the debtor as deserving of his fate, as well, based on the same verse: "But the perverseness of the faithless shall destroy them". We are privy to the reasoning behind the specific classist assumptions of antiquity.

We learn an example based on Rav Nachman's experience with a bailee who said that he could not find the jewels that a man deposited with him. Rav Nachman ordered the bailee to pay for the jewels due to his own negligence. When the bailee refused to pay, Rav Nachman ordered him to sell his palace and use the funds to pay for the jewels. Lo and behold, the jewels were found. And though they had increased in value, the bailee did not profit from the increase.

Rava tells of studying this chapter with Rav Nachman himself. Through his own story (revealing his ignorance in the face of his teacher, Rav Nachman), Rava clarified that no oath was taken; no oath was needed when ownership was not transferred. Further, the owner was inconvenienced by having to take the bailee to court. This leads to comments regarding appraisal, and the point that appraisals can be returned/changed based on Deuteronomy (6:18): And you shall do that which is right and good". A person can return once he has the funds to buy back his property, even if years have passed since the property's appraisal.

The Gemara moves on to the topic of gifts and debts owed to women. We learn that if a woman marries after property has been appraised to repay her a debt, or if her property was appraised to repay her own debt and then she married and died, the husband does not pay his wife's debt through her

[3] https://dafyomibeginner.blogspot.com/2016/10/bava-metzia-35-expectations-of-honesty.html

appraised property. Further, he does not receive property that was repossessed from her if he pays her debt.

Rabbi Yaose bar Chanina teaches that in Usha the Sages decided that when women sold her usufruct property while her husband was alive and then she died, the husband repossess that property from the buyers. Rav Acha and Ravina argue over whether or not the prepossession is based on a reversed appraisal. the rabbis have different opinions on whether or not this was a full-fledged sale. Was this the husband's decision or that of his wife? Ultimately, a court document that includes writing and signing will transfer the rights of a wife to her husband.

A new Mishna teaches us that when one rents a cow and then lends it to someone else and the cow dies of natural causes, the renter swears to the owner of this occurrence and the borrower pays the renter for the cow. The renter is exempt when circumstances are beyond his control. However, a borrower is in fact responsible for circumstances beyond his control! Rabbi Yosei asks how the renter can profit from someone else's cow. Instead, the value of the cow should be returned to the owner. The renter should not need to swear but the borrower should compensate the cow's owner.

The Gemara wonders who should be liable in this case. Shouldn't the borrower be protected from a claim? Why is the renter not responsible for the owner's loss? In their conversation, the rabbis understand that the cow changes status from owned to rented to borrowed. In fact, some suggest, we are speaking of different cows. Of course, because there is only one actual cow, there is liability to pay for only one cow.

MAKING THE LENDER SWEAR THROUGH "GILGUL SHEVU'AH"

Rav Mordechai Kornfeld writes:[4]

Rav Huna (34b) rules that whenever a Shomer does not return the Pikadon itself (and either claims that he is exempt or returns money in its place), he must swear that the object is not in his possession. Rav Huna bar Tachlifa in the name of Rava challenges Rav Huna's ruling from one of the cases

[4] https://dafyomi.co.il/bmetzia/insites/bm-dt-035.htm

mentioned in the Mishnah in Shevuos (43a). The Mishnah there presents several scenarios of a lender who lent a Sela to a borrower and received an item of collateral from the borrower, which he subsequently lost. The lender and borrower now dispute how much the item of collateral was worth. In one of the scenarios, the borrower claims that it was worth two Sela'im, and thus the lender owes *him* one Sela. The lender claims that it was worth one Sela, and thus he owes nothing. The Mishnah rules that the lender is exempt and does not even need to make a Shevu'ah (since he denies owing anything -- "Kofer ha'Kol"). The Gemara asks that if Rav Huna's ruling is correct, then the lender -- who was a Shomer for the collateral of the borrower -- must swear that the object is not in his possession. Accordingly, the principle of "Gilgul Shevu'ah" should also obligate him to swear as to the value of the collateral.

Why does the Gemara assume that the principle of "Gilgul Shevu'ah" would obligate the lender to make a Shevu'ah? In this situation, he should not become obligated to make a Shevu'ah because he has a "Migu": if he wanted to lie, he could have made a more effective claim and asserted that the borrower never gave him collateral in the first place. Although this "Migu" does not exempt him from the primary Shevu'ah that he must make (that the item is not in his possession), that is because it would be a "Migu d'He'azah" (that is, he would not have made the more effective claim because he would have had to be overly brazen to do so). With regard to the Shevu'ah about the value of the item, since the lender anyway denies that he owes the borrower any money, the claim of the "Migu" (that he never received collateral) would be on the same level of brazenness, and the "Migu" should therefore exempt him from the "Gilgul Shevu'ah." (**REBBI AKIVA EIGER**, **CHASAM SOFER**)

(a) **REBBI AKIVA EIGER** and the **CHASAM SOFER** answer that the "Migu" is still a "Migu d'He'azah" because the claim that he never received any collateral actually would require an extra degree of brazenness. Although the lender already denies owing anything (with his claim that the collateral was worth one Sela), this claim is not as brazen because the borrower will not assume that the lender is an outright liar; the borrower will assume that the lender simply made a mistaken assessment of the item's value. In contrast, if the lender claims that he never received collateral from the borrower, the borrower will accuse him of being a liar. Therefore, the lender would prefer not to make that claim, and thus he has no "Migu."

(b) **CHIDUSHEI REBBI MEIR SIMCHAH** answers that the "Migu" does not exempt him from the "Gilgul Shevu'ah" because the lender would not want to make the claim of the "Migu," that the borrower never gave him collateral. Since the object indeed may have been stolen from him, the lender will not claim that he never received it, because if he does he will not be able to retrieve the object from the Ganav. (I. Alsheich)

A "SHEVU'AH" TO APPEASE

The Mishnah states that when someone (a Socher) rents an animal from its owner and then lends it to someone else (a Sho'el) and it dies in the Sho'el's possession, the Sho'el must pay the value of the animal to the Socher, and the Socher must make a Shevu'ah that the animal died a normal death, and he is then not required to compensate the owner. In the Gemara, Abaye explains that the Socher receives payment from the Sho'el because he actually "acquires" the animal at the moment of its death. The Socher's obligation to make a Shevu'ah is merely "in order to appease the owner" so that he will not think that the Socher was negligent ("Poshe'a") in guarding his animal.

Why does the Gemara need to give a reason for this Shevu'ah? The Torah always requires a Shomer to make a Shevu'ah (a "Shevu'as ha'Shomrin") whenever he exempts himself from payment for a Pikadon. Why does the Gemara need to provide the additional reason for the Shevu'ah, "to appease the owner"? (Acharonim)

(a) **REBBI AKIVA EIGER** answers that the Shevu'ah that the Socher must make is not a Shevu'ah d'Oraisa. In general, the primary Shevu'ah of a Shomer, which is the Shevu'ah that the object is not in his possession, is a Shevu'ah d'Oraisa, and the other Shevu'os that a Shomer must make are all because of "Gilgul Shevu'ah." In the case of the Mishnah, the Socher is *exempt* from a Shevu'ah that the object is not in his possession, because the Sho'el himself makes a Shevu'ah (or brings witnesses to testify) that the animal died a normal death. Since the Socher has the right to lend out the animal, and since he does not have to make a Shevu'ah that the animal is not in his possession, mid'Oraisa he is exempt from any Shevu'ah. Hence, the only reason why he must make a Shevu'ah in this case is that he receives money from the Sho'el as compensation for the animal, and thus he profits from property that belongs to someone else (the animal's owner). The Chachamim therefore instituted that the Socher must make a Shevu'ah in order to appease the owner of the animal.

(b) The **AVNEI KODESH** answers that the Gemara adds this reason to explain why the Socher makes a Shevu'ah according to the view of Rami bar Chama. Rami bar Chama is of the opinion (Bava Kama 107a) that a Shomer does not make any Shevu'ah unless he is "Modeh b'Miktzas" and "Kofer b'Miktzas." (The Gemara there explains that the Shomer makes a Shevu'ah only if he was given three animals to watch and he returns one, claims to have lost another (Modeh b'Miktzas), and completely denies the third (Kofer b'Miktzas)). The Mishnah here, though, clearly discusses only one animal, and, consequently, there should be no Shevu'ah according to Rami bar Chama. Therefore, the Gemara explains that the reason for this Shevu'ah, according to Rami bar Chama, is a Takanah of the Chachamim in order to appease the owner.

(c) The **OR SAME'ACH** (Hilchos To'en v'Nit'an 1:12) explains that the "Shevu'as ha'Shomrin" actually is not like any other Shevu'ah d'Oraisa. The reason why the Torah itself requires the Shomer to swear is in order to appease the owner. Hence, the Gemara is explaining the reason why the *Torah* requires a Shomer to swear. (I. Alsheich)

A Husband Inherits from His Wife

Steinsaltz (OBM) writes:[5]

Our Gemara discusses the story of a woman who wrote a will, giving her inheritance to her son. After her death, her husband contested the will, arguing that the inheritance belonged to him. Rabbi Yosei bar Hanina concludes that *takkanot Usha* allows the husband to take possession of his wife's property after her death, even if she sold it while she was alive.
What are *takkanot Usha*?

According to the Gemara in *Massekhet Rosh HaShana* (31a), at the time of the destruction of the Temple, as the Jewish people were sent into exile, God joined them by removing His presence from the Temple in a series of stages. In a parallel move, the Sanhedrin gradually removed itself from its offices on the Temple Mount, as well, making its way to the Galilee, where most of the remaining Jews were to live under Roman rule.

The Sanhedrin's first stop after leaving Jerusalem was the city of Yavne, which was established as a center of Torah study by Rabban Yohanan ben Zakkai and became most famous under the direction of Rabban Gamliel of Yavne. Throughout its continuing travels, the Sanhedrin was headed by descendants of the family of Hillel.

It appears that the Sanhedrin was moved to Usha in the aftermath of the Bar-Kokheva revolt, where a series of Rabbinic enactments – called *takkanot Usha* – were established. Under the leadership of Rabbi Shimon ben Gamliel there was an unsuccessful attempt to return the Sanhedrin to Yavneh, but due to the overwhelming devastation in the southern part of the country, they returned to the Galilee, first to Usha and then to Shefar'am.

Takkanot Usha deal mainly with establishing the norms of monetary relationships within families. While these enactments were not included in the Mishna, they were known to the *amora'im* based on oral traditions.

[5] https://steinsaltz.org/daf/bavametzia35/

The oath of the renter

ישבע השוכר שמתה כדרכה

The Mishnah describes a scenario of a renter who lends an animal to a third person to use during the term of his rental.[6]

While the animal was in the possession of the borrower, it died. The ruling of the Tanna Kamma is that the renter may take an oath that the animal died of natural causes, for which he is exempt from paying, and the borrower pays the value of the animal to the renter, who is the one who lent it to him.

Ritva explains that the original renter must take an oath to verify that the animal died, and it is not sufficient for him to summon the borrower to come to court and testify on his behalf that the animal died naturally.

Although the rule is that a single witness can require that an oath be taken to counteract his testimony (עד אחד שכנגדו נשבע), we do not find that a single witness can exempt one from taking an oath.

Here, the renter would have to take the oath of a watchman that the animal died, and the testimony of the borrower cannot exempt him from this requirement.

Rosh and Tosafos (2b) do mention that a single witness can relieve one of his obligations to take an oath, but it seems clear that their discussion revolves around an oath which is rabbinic.

Tosafos HaRosh writes that if, in fact, the borrower would testify that the animal died naturally, the renter would be exempt from his oath. Nevertheless, the ruling in the Mishnah is accurate, because the renter would be exempt from paying the original owner if and when he takes an oath, and the borrower would pay the renter.

If the renter would rely upon the testimony of the borrower, he would thus not have to take the oath. The Mishnah did not illustrate the case in this manner, as it is not necessarily assumed that the borrower has full knowledge about the death of the animal.

[6] https://dafdigest.org/masechtos/BavaMetzia%20035.pdf

Sometimes the renter was not present when the animal died, and he therefore has no first-hand knowledge about the circumstances of the animal's demise. In this case, Rabbi Akiva Eiger writes that he is required to take an oath to exempt himself, but he cannot swear about something he does not know. Consequently, we would use the rule "if someone is required to take an oath, and he cannot do so, he must pay."

On the other hand, Rambam (שאילה ופקדון ד:א) explains that the main oath of a watchman is to confirm that the object is not in his possession, and the other oaths (that he was not negligent and did not use the item for personal gain) are "rolled in" (via גלגול).

Therefore, if the oath that he was not negligent is only issued through a גלגול, being unable to take it may not lead to the need to pay.

The use of ma'aser money to purchase raffle tickets
כיצד הלה עושה סחורה בפרתו של חבירו

How could this one do business (i.e. profit) from his friend's animal? A common tzedaka question is whether a person is permitted to use ma'aser money to purchase a raffle ticket.

Rav Moshe Feinstein (1) writes that the matter depends on the type of raffle under discussion. If the raffle is structured in such a way that there are a limited number of tickets that will be sold, one may not use ma'aser money to purchase a raffle ticket.

The reason is that when there are a limited number of tickets each ticket has a specific monetary value which is set by the number of tickets that are sold and the value of the prize.

Once we assign a monetary value to each ticket one does not have the right to use ma'aser money towards that purchase since that would result in a person's making a purchase from his ma'aser money.

The second type of raffle does not limit the number of tickets that are sold and one is permitted to use ma'aser money to purchase these tickets. The reason is that it is not possible to assign value to the tickets. Even though the ticket provides the holder with the opportunity to win the prize, nonetheless that does not restrict him from using ma'aser money since the ticket does not have a market value.

Additionally, Rav Feinstein rules that one who uses ma’aser money to purchase a raffle ticket that wins is permitted to keep the prize for himself and it is not considered as though ma’aser won the prize.

The rationale behind this ruling is that we do not consider the ticket as a representative of a tangible right of the holder since there are an unlimited number of tickets that could be sold.

Rather the ticket is seen as a gift that the tzedaka organization provides for one of their donors and thus the holder is the recipient of a prize rather than one who made a purchase.

Teshuvas Even Yisroel (2) disagreed with Rav Feinstein and based on our Gemara rules that just as one is not permitted to do business with his friend’s animal so too he is not permitted to use ma’aser money for his benefit.

Therefore, if the winning ticket was purchased with ma’aser money the gift belongs to the ma’aser money.

1. שו״ת אג״מ או״ח ח״ד סי׳ ע״ו.
2. שו״ת אבן ישראל סי׳ ס״ד. ■

“We Were Learning Perek Hamafkid...”

"ופרקין המפקיד הוה..."

The Ponevezher Rav was a great visionary and never let public opinion dissuade him from taking the best spiritual path for himself and all of the many students under his care.

One unusual aspect of Ponevezh in Eretz Yisrael was the shiur that was given on the daf. In those days, there were very few yeshivos in Eretz Yisrael, and they had developed a general method where talmidim spent most of the weekdays learning the sugya or dapim the yeshiva wished to cover largely on their own.

The maggidei shiur would then give over a weekly lecture on some of the more involved aspects of the material.

However, many of the roshei yeshiva in Lithuania had believed that there was great value in hearing a shiur on the particulars of each and every daf. Rav Shmuel Rozovsky, zt"l, gave over just such a shiur in Ponevezh at the behest of Rav Kahanaman, despite its rarity in Eretz Yisrael.

Rav Rozovsky would bring three words from Bava Metzia 35 as a kind of siman to having a daf shiur: " ופרקין המפקיד הוה— "We were learning perek hamafkid." He was alluding to the story of a question regarding securities that was asked in Rav Nachman's beis midrash.

Rava identified that it was by virtue of being immersed in perek hamafkid that he was able to analyze the issue.

Rav Rozovsky meant to indicate that one can come to all the chiddushim and in-depth analysis that a less frequent but "deeper" shiur seems to offer just from learning the daf with great care. (1)

Rav Elchonon Wasserman, zt"l, learned a different message from this very same gemara. "

If a Torah student is asked a question on a mesechta or topic over which he happens to have full mastery, he must have a care not to give his questioner a false impression. He should make clear that his ability to answer immediately does not reflect on encyclopedic knowledge of shas.

Instead, he should declare as Rava did in our sugya: holding were We – ופרקין המפקיד הוה in perek hamafkid..." (2)

1. הרב מפונוביץ, ח״ב, ע׳ ר״ה
2. אור אלחנן, ח״א, ע׳ רפ״ד

Recovering Lost Jewels

Rabbi Elliot Goldberg writes:[7]

Our daf relates a case in which a person deposits jewels with an unpaid caretaker. Some time later, when the owner comes to collect the jewels, the caretaker claims to have lost them, so the owner sues the caretaker. Rav Nahman, presiding over the case, rules in favor of the owner. He finds the caretaker negligent and orders him to compensate the owner for the value of the jewels. But the caretaker refuses to pay, so Rav Nahman takes an extreme approach:

Rav Nahman went and gave instructions to repossess the caretaker's manor and sell it to pay for the jewels. Ultimately, not only were the jewels found, but they had also increased in value. Rav Nahman said: The jewels return to their initial owner, and the manor returns to its owner.

When the caretaker refuses to pay, Rav Nahman takes the dramatic step of confiscating his home and turning it over to the owner of the jewels. When the jewels are later discovered in the home, Rav Nahman grants them to their original owner who then gives the caretaker back his home.

Note that the caretaker never took an oath that he had been responsible with the jewels. If he had, he might have saved himself some trouble. According to the opening mishnah of our chapter, if an unpaid caretaker cannot return an item to its owner, they can take an oath that they were not negligent while safeguarding an object that has gone missing and then they are not held responsible for the loss. If they do not wish to take an oath, they can instead compensate the owner for the loss, by which means they take possession of the object in their care. If the object is ever recovered, it now belongs to the caretaker.

But in today's case of the missing jewels, the caretaker neither took an oath nor compensated the owner for the loss (despite, as the size of his home suggests, being financially capable of doing so).

After hearing about the case, Rava, a student of Rav Nahman, asks him:

[7] Talmud from my Jewish learning

Isn't this the same as the case of a caretaker who paid the owner and did not wish to take an oath?

To Rava's thinking, this case *is* similar to the mishnah. After all, the caretaker refused to take an oath and ultimately compensated the owner. Rava now recounts:

Rav Nahman did not answer me, and he did well that he did not answer me.

There's an obvious difference between these two cases: In the earlier mishnah, the caretaker readily compensated the owner of the lost property. In Rav Nahman's case, not only did the caretaker not pay freely, he refused to pay even after a court order. In fact, the difference between the cases might explain Rav Nahman's drastic choice to confiscate the caretaker's home. The caretaker could easily have sworn an oath or compensated the owner. Not only did he refuse to do either, he also disobeyed a court order to compensate the owner. That is perhaps why Rav Nahman dealt so aggressively with him and confiscated his home.

Rav Nahman never gives Rava the answer to the latter's question — he remains silent — but he doesn't have to. Rava figures it out himself, and is grateful that his teacher gave him the space to do so. A wonderful reminder for contemporary parents, pastors and pedagogues that sometimes silence is a more powerful tool than offering an answer.

Rabbi Johnny Solomon writes:[8]

Our daf (Bava Metzia 35a) quotes Mishlei 11:3 as a way of reflecting the sentiments felt by a borrower towards a lender, and a lender towards a borrower. Here, I would like to offer some further layers of meaning to this verse.

Mishlei 11:3 reads: תֻּמַּת יְשָׁרִים תַּנְחֵם וְסֶלֶף בּוֹגְדִים יְשָׁדֵם – 'The wholesomeness of the upright guides them, but the deviance of the treacherous ruins them'. As the Vilna Gaon explains in his stunning commentary on Mishlei, 'yashrut' (uprightness) is a behaviour which is rooted in the mind which, on its own, is still susceptible to misdirection and deviance. This is why this word is (often) accompanied by a term expressing the emotional/spiritual quality of

[8] www.rabbijohnnysolomon.com

‘goodness’ or ‘temimut’ (wholesomeness) in order to remind us to act with uprightness towards the right moral goals.

Significantly, later on in this same daf, reference is made to Devarim 6:18 which states: וְעָשִׂיתָ הַיָּשָׁר וְהַטּוֹב בְּעֵינֵי ה' – ‘and you shall do the upright (Yashar) and the good (Tov) in the eyes of God’. Here too, we find that the concept of ‘yashrut’ comes with a qualifier - while in this case, the term isn’t ‘wholesome’, but rather, ‘good’.

If you’ve ever listened to an interview with former mobster Michael Franzese, you will know that those involved in the mafia were absolutely bound by a strict code of ‘integrity’. However, as should be obvious, this form of so-called integrity was totally disconnected from the kinds of values such as ‘temimut’ (wholesomeness) or ‘tov’ (good). As a result, as Franzese himself attests, ‘the deviance of the treacherous ruins them’.

God doesn’t just want us to be ‘yashar’; we also need to be ‘tov’ and ‘tamim’. Sometimes it is obvious what this means, while in some instances, it is less obvious. Still, by learning Torah, and especially by learning mussar, with an emphasis on its timeless teachings on ethics and morals, we have a chance to learn about and live a life that is yashar, tamim, and tov.

Cottage with a Still-Life of Kitchen Utensils by Egbert van der Poel

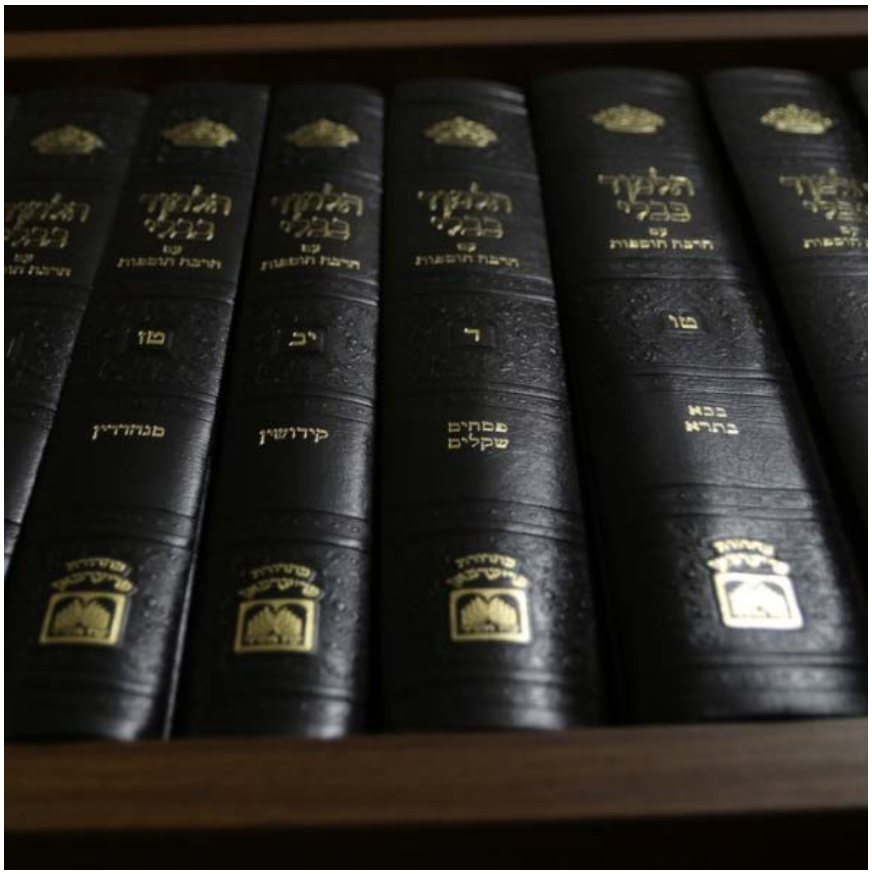
A Deposit that was Stolen (Finds)

Mark Kerzner writes:[9]

If one deposits an animal or utensils with another for safekeeping and they were stolen or lost, the custodian can take an oath that he was not negligent and free himself from payment. If he did not desire to swear and paid, and then the thief is found, the thief pays the double amount to the custodian.

If one rented a cow and then lent it to another, and it subsequently died a natural death, then the renter is not liable for that, but the borrower is liable to pay the renter. Rabbi Yossi says that the renter needs to return the value of the cow to the owner.

[9] https://talmudilluminated.com/bava_metzia/bava_metzia35.html



Making a Quick Dollar

Rabbi Jay Kelman writes:[10]

The difference between a smart businessperson and an ethically challenged one can be fine indeed - so fine that many will disagree on where to draw that line. "One rents a bull from his friend and loans it to another and the animal dies of natural causes…"(Bava Metzia 35b).

[10] https://torahinmotion.org/discussions-and-blogs/bava-metzia-35-making-a-quick-dollar

If introductory Talmud begins with *yeush shelo meda'at* (see here) it is quickly followed by an introduction to the *arba shomrim*, the four guardians; *shomer chinam, shomer sachar, shomer socher* and *shomer shoel*. A *shomer chinam* is one who agrees to watch an object as a favour to another. As he is not being paid he is exempt from payment should the object be lost, stolen or otherwise damaged.

Only in cases of gross negligence[1] would he be liable to pay the value of the object. A *shomer sachar* is paid to watch an object and is responsible to pay the value of the object should it be lost or stolen. A *shomer socher* rents an object and has the same level of responsibility as a *shomer sachar*, namely responsibility for negligence, loss, or theft but not for accidental damage. However, should a *shomer shoel* borrow an object without payment, he becomes responsible to the owner for any and all damages to the object regardless of how it might have been caused[2].

With different rules for different types of *shomrim* one can potentially take advantage of such distinctions to make a few dollars. The propriety of such is the subject of debate of our Mishna.

Reuven rents a bull from Shimon, thus becoming a *shomer sachar* who is exempt from *ones*, accidental damage done to the animal. He then turns around and lends the animal to Levi, making Levi a *shomer shoel* who is obligated to pay for any and all damages. While in Levi's possession an accident happens and the animal dies - a death for which a *shomer shoel* must make payment but not a *shomer sachar*. The Sages rule that Reuven the *shomer sachar* takes an oath that the death was accidental and is exempt from payment.

Once that is taken care of, Reuven can turn around and demand that Levi pay him. After all, Levi is a *shomer shoel* who is obligated to pay for damages whatever the cause. And since Levi borrowed the animal from Reuven, it is Reuven whom he must compensate. This makes eminent sense, especially when we consider the Gemara's comment that Shimon gave permission to Reuven to "sublet" his animal to others. Shimon's agreement was with Reuven and Reuven is not responsible for accidental damage and thus has no obligation to Shimon. Reuven entered into a second agreement with Levi and under terms of that agreement, Levi must pay Shimon. For all we know Levi and Shimon have never met, and Levi could care less what agreement Reuven and Shimon had.

Despite the cogency of the above argument – faithfully following the two separate agreements, Rav Yossi finds this a violation of basic ethical norms. "How can we allow one to profit from the animal of his friend?" Rather, "the payment must be returned to the original owner." One agreement or two, it makes little difference. Shimon gave his cow to Reuven and the cow died; and

while Reuven may not be legally responsible, for him to turn around and personally profit from the cow's death while leaving Shimon high and dry is just untenable. Don't spout legal niceties to allow one to profit from the accidental death of another's cow.

Though one of the principles of Jewish jurisprudence is "an individual and the majority, the law follows the majority" Jewish law has accepted the view of Rav Yossi as normative. One cannot take advantage of the property of others for one's personal gain.

This principle has much application in the modern day economy. It prohibits a professional who leaves a firm from taking any action to entice clients away from the firm. These are clients whom the firm toiled to attain and whom the former employee met because of the firm. To take advantage of that would be in violation of the principle, "How can we allow one to profit from the animal of his friend?[3]" It is this principle that is behind the laws protecting a copyright holder from infringement, and why firms will spend oodles of money to protect that copyright. Similarly firms will often insist employees sign non-competition agreements so that even if the clients want to switch, they can't.

The corporate world and business opportunities of today are vastly different – and that is an understatement – from those of the world of the Mishna. But such matters little as we seek to apply the unchanging moral principles to unchanged human nature.

[1] Drawing the line between lost and negligence or between stolen and an accident is not always easy to do, and undoubtedly would often be a matter of litigation.

[2] The exception being *meita mechmat melacha* if the animal would die of the accumulated work over the years. In such a scenario one can hardly blame the shomer. That would be akin to having to pay for a borrowed car whose battery dies just at the time you borrow it. Though our Mishna refers to the animal dying "*kdarcha*", of natural causes the assumption here is that it is due to an accident and not due to the workload over the years.

[3] There is nothing to prevent the client from giving their business to the new firm of their own volition, and no moral impediment to accepting such. Once again the line between active recruitment and passive acceptance is fine indeed.

The Liability of a Shoel

Rav Moshe Taragin writes:[11]

The Mishna in Bava Metzia (94a) describes the four distinct categories of Shomrim - people who safeguard others' possessions and items. A Shomer Chinam (who guards without charge) is only liable for gross negligence while a Shomer Sachar (a paid watchman) and a Socher (a renter) must compensate the owner for theft as well as loss. In all the above cases however pure accidents (Onsin) involving the guarded objects do not require their compensation. These watchmen only pay for their negligence - either gross or moderate. The sho'el is unique in that he must repay the owner even if a pure accident occurred. This unique level of liability and what it indicates about a sho'el forms the basis for this article.

Intuitively, there is no inherent reason for the sho'el's liability for *ones* (accidents). Evidently it is merely the product of "Hitchayvut" - a level of liability which a person can voluntarily accept upon himself. The classic instance of this occurs in the Gemara Bava Batra (173b) which posits that a guarantor can unilaterally accept liability if the borrower does not repay the loan. There is no independent foundation for this chiyuv other than the initiative of the guarantor. The gemara locates the incentive for this volunteerism: the Guarantor recognizes that as word of his altruism spreads his reputation will be improved. People will discern within him a reliable person whose 'word' brokered the ultimate loan. The benefit he receives inspires him to accept these obligations. However it is his acceptance alone which establishes the Halakhic foundation of the Chov. Similarly in the case

[11] https://etzion.org.il/en/talmud/studies-gemara/talmudic-methodology/liability-shoel

of a sho'el there is no inherent reason that he should be liable for Ones; he merely agrees to establish this coverage and is motivated to do so because of the utility he receives from the item.

An alternate view might be based upon the statements of the Rambam in Hilkhot Sh'eilah U'pikadon (1:5). The Rambam compares the sho'el's rights to an item to those of a Loke'ach (one who actually purchases an item) but only for its utility (rather than actually purchasing the item proper). Though they exhibit several notable differences they are similar in that both the Loke'ach and the sho'el actually OWN the PEIROT (utility). According to the Rambam the Loke'ach is not merely using the animal based upon the allowance of the owner. Instead he temporarily enjoys some degree of OWNERSHIP over the borrowed item. The Rambam cites a Halakha which best highlights this status. If a sho'el dies his children inherit his stake in the animal. Were his use of the animal based solely upon the allowance of the owner his children would not automatically receive this right; it was only granted to their father. However since the father actually OWNED these rights they are inherited by his children as part of his estate.

To be sure, in this section the Rambam does not address the source for the sho'el's liability. However based on his comments we might derive a different understanding. If indeed the utility which the sho'el enjoys defines him as a temporary and partial owner he might naturally absorb any and all accidental losses just as an Owner does. If my car gets hit by lightning I as owner suffer the loss. Similarly the utility which the sho'el enjoys might characterize him as partial owner and the one who ultimately is liable for accidental damage.

SUMMARY :

We have suggested two different models for the comprehensive coverage which the sho'el affords. Either he willingly accepts and establishes this liability (Hitchayvut) or liability evolves as a function of his status as partial Ba'al. Consequently we might define the utility he receives as that which inspires him and provides incentive for his voluntary acceptance of liability. Alternatively we might view the utility as that factor which defines

him as partial owner. Rashi in Sanhedrin (72a) clearly articulates this possibility and indeed compares a Ganav to a sho'el. A Ganav might be another person who though not the full legal owner, enjoys some partial Kinyanim.

Several issues stem from this fundamental question:

In the case of a sho'el who never voluntarily accepted liability but used the animal, is he forced to cover accidental damages? Indeed the most apparent example is a sho'el who uses an item without permission or prior agreement - A sho'el Shelo Mida'at. Is he liable because he used the item even though he never accepted liability? This case however should not be used as a litmus, because even if we don't consider him a sho'el he probably would be a Ganav who is liable to compensate the item anyway. Hence this might not provide the ideal 'test case.'

A more useful case however pertains to the inheritors of a sho'el. As we noted above they inherit the rights to use the animal. Once they benefit, however, are they automatically obligated to pay for accidental damages? On the one hand there has been no deliberate acceptance of liability on their part. On the other hand, they are using the item and enjoying the same partial ownership which carries with it an obligation to compensate accidents. This issue is a Machloket between opposing positions cited by the Rashba in Ketubot (34b) in the name of the Ra'avad. Quite possibly the debate revolves around the source of a sho'el's chiyuv.

Another question which stems from the original inquiry surrounds to whom payment should be made. Suppose a sho'el borrowed the animal from someone who is not the original owner. The Mishna in Bava Metzia (35b) presents a case in which a renter subsequently loaned his rental to a third party (his legal right). Does the sho'el (the only person liable for accidents) remit payment to the renter (with whom he struck his agreement) or to the original owner (who actually owns the animal)? The answer depends upon the source of a sho'el's chiyuv. If his agreement obligates him we might

offer payment to the one with whom he reached agreement. If however his objective status as ba'al obligates him we might offer payment to the original owner, who status was transferred to his sho'el. This very question is a Machloket Tana'im in Bava Metzia (35b).

Another issue which reflects the source of a sho'el's chiyuv stems from the point at which the sho'el's liability begins. The gemara in Bava Metzia (99a) cites several examples. According to one position in the Gemara once the sho'el indicates to the owner that he should direct the animal to his Reshut his liabilities begin - EVEN BEFORE THE ANIMAL EVEN ENTERS HIS RESHUT. Afterwards the gemara cites a second position that the sho'el's Obligation only begins once he performs a Meshicha - SIMILAR TO A LOKE'ACH. Possibly these two positions in the gemara dispute the source of a sho'el's obligation. If his Hitchayvut (agreement) creates liability it might begin from any fixed point of agreement - any point at which the sho'el indicates his readiness to 'get the show on the road.' If however his status as owner obligates him, his liability might only begin once he actually transfers the item to his Reshut - as a Loke'ach does.

A third area of discussion might surround the type of benefit which a sho'el must receive in order to trigger his liability. If the benefit serves merely as incentive to accept liability we might view ANY benefit as capable of producing this incentive and obligating a sho'el. If however the utility defines him as Ba'al we might only apply the laws of sho'el if he derives the standard benefit which conventional owners receive.

The gemara in Bava Metzia (96a) raises several cases of non-conventional use: one who borrows an animal for sexual breeding, one who borrows it to keep on his estate and appear richer than he is (without actually using the animal per se), and one who borrows two animals and receives a sum total of a prutah’s worth of benefit without actually using either animal a Peruta’s worth. In each of these cases the gemara questions whether the borrower actually becomes a sho'el with a sho'el's liability. Again if the benefit merely inspires the sho'el to unilaterally accept liability we might not understand the gemara's hesitation to establish the full form of sho'el in this

instance. Why do we care about the exact nature of the sho'el's benefit - after all, he benefited and offers his coverage in exchange? Evidently his utility is not merely incentive but part of what defines him as an owner and obligates him to be liable as an owner. If this is so the gemara is correct in inspecting what type of 'use' does and does not define him as owner. Can 'abnormal' use be considered 'using it as owner'? Can parking the car in your driveway without actually driving it be considered the actions of an owner? What happens if less than a Peruta's worth is derived? You have achieved no monetary benefit whatsoever!!! By debating the nature of the benefit the gemara might have been addressing its role in establishing the liability of a sho'el.

SUMMARY:

We have witnessed that the fundamental question pertaining to the source of a sho'el's liability for accidents might influence a range of specific questions governing a sho'el.

What happens if a sho'el uses the item but never accepts obligation? When does the liability begin? What role does the benefit play in establishing the Chiyuvim?

METHODOLOGICAL POINTS:

1. Fundamental questions could potentially affect all variables of a particular Halakha. Not only would the parameters of a sho'el's liability (when and to whom) be impacted by the nature of his liability, but the role and type of benefit required (hana'a) might be affected by its role in triggering his liability.

2. Obligations very often are based either upon unilateral acceptance or upon some aspect of the 'relationship' which itself obligates payment. A Mazik never accepted to pay but his negligence obligates him. Alternatively one who

pledges Zedakah starts with no absolute obligating factor but through his pledge creates one. What about a Borrower of money? Does he pay because he received funds (and this somehow obligates him Halakhically to repay the loan) or because he agreed to obligate himself?

Is Silence Complicity?:

An Analysis of Sh'tikah Ke-Hoda'ah from Classic Halakhah to Current Events

Moshe Kurtz writes:[12]

"Silence is violence." "Silence is complicity." These are common soundbites that are often used to compel disinterested parties to state their position on a

[12] https://thelehrhaus.com/talmud-and-halakhah/is-silence-complicity-an-analysis-of-shtikah-ke-hodaah-from-classic-halakhah-to-current-events/

given political issue. Following the 2020 racial unrest catalyzed by the death of George Floyd, Professor Jonathan Turley makes the following observation:

"Silence is violence" has everything that you want in a slogan from brevity to simplicity. But it can also be chilling for some in the academic and free speech communities. On one level, it conveys the powerful message that people of good faith should not remain silent about great injustices. But it can at the same time have a much more menacing meaning to "prove the negative" by demanding that people show that they are not racist…[1]

Following the October 7 mass terror attack on Israeli civilians and the atrocities that ensued, Bret Stephens, writing for *The New York Times*, observed how "Silence is violence—but not when it comes to Israeli rape victims." The inconsistency of political leaders who advocated for the release of captives in previous crises, but either equivocated or were completely silent when it came to Israelis, has rightly incurred the ire of many Jews.

While the above example easily merits an ironclad condemnation from public officials, what remains less clear is how we determine which other geopolitical events merit a similar response—especially in a world with endless suffering in countries such as Ecuador, Ukraine, China (and even domestically within America!).

This quandary exists not only in the general political arena but also in religious contexts. When a scandal or significant event takes place, some will claim that if a rabbi or Jewish leader (particularly one they do not favor already) does not issue a public statement on the matter, then their silence is tantamount to approval, sometimes even employing the Talmudic principle of *sh'tikah ke-hoda'ah*: that their silence should be construed as admission. It therefore behooves us to clarify the actual parameters of this principle, which will in turn help us develop the ethical ramifications that naturally emerge.[2]

Silence Due to Disregard vs. The Expectation to Engage

There are several cases in which *shtikah ke-hoda'ah* appears in the Talmud—one of the iconic instances is found in *Yevamot* 87b:

And we also learned in a *mishnah* (Kereitot 11b) that if one witness says to someone: "You ate forbidden fat," and the accused says: "I did not eat it," the accused is exempt from bringing an offering. The Gemara infers: The reason he is exempt is that the individual in question said: "I did not eat it," which indicates that if he had been silent and failed to deny the accusation, the lone

witness is deemed credible. Apparently, one witness is deemed credible by Torah law with regard to certain issues… And from where do you infer that the reason is due to the fact that the one witness is deemed credible? Perhaps the accused must bring an offering because he remains silent, as there is a principle that **silence is considered like an admission**.[3]

Jewish law generally regards two witnesses as the gold standard, whereas a single witness's testimony is only admissible in more limited circumstances. In the case above, while the single witness's claim would not be sufficient to convict the accused of consuming forbidden fat, it does serve as a means to eliciting the accused party's silence which is thereby construed as admission. In civil law we regard the principle of *hoda'at ba'al din ke-meah edim damei*—a litigant's admission is equivalent to 100 witnesses (see *Kiddushin* 65b).[4] Thus, the accused party's silence is admissible evidence in Jewish law.

However, not every case of silence constitutes admission—sometimes one's silence is merely indicative of disinterest or disregard. *Shulhan Arukh* (*H.M.* 81:7)[5] rules:

Silence is only considered admission when it follows an initial verbal admission… but when he is silent from start to finish, **he can claim: "I need not concern myself with responding to you**."

When one verbally concedes to an initial claim, we can construe any subsequent silence to additional claims as continued admission. However, by default, silence does not necessarily constitute admission—quite the opposite actually—there are times that the claim is so spurious that one may decide that it is not even worth engaging with it. To take a lighter and more recent example, if someone were to suggest that we should "reinvent Yom Kippur" with "goat yoga, mosh pits, [and] glow sticks," as a *Wall Street Journal* article documented—would we expect that our synagogue rabbis should feel compelled to castigate it publicly? Or perhaps it is so exotic, shall we say, that it need not even be dignified with a response.

There are several occasions in Talmudic discourse in which Rav is silent. In the context of a debate regarding the proper configuration of a *sukkah*, Ritva (*Sukkah* 7a, s.v. *Ve-Amrinan De-Shatik Rav*) writes:

And it is unclear whether this silence is because [Rav] conceded or because he had no concern for their words and they were not worthy of a response.

Ritva concludes that since the conclusion of the Gemara records that the consensus was in line with the position of Rav, perforce Rav himself maintained his own stance. Thus Rav's silence was simply a disregard for his opponents' argumentation.[6]

Not only may one who remains silent claim to be disregarding a statement made against them, but even one who initially answers "yes" can later turn around and explain it was done in jest. The Talmud in *Sanhedrin* (29a) describes a case in which one party claims money from another and the latter can claim, "I was teasing you." Since this scenario took place in an informal context with no designated witnesses, the claimee can reasonably respond in any future litigation that when he said "yes" it was done in order to dismiss the claimant from further pressing him.

Birkat Avraham (*Sanhedrin* 29a), in elucidating the position of *Ketzot Ha-Hoshen*, explains that the claim of jest in the absence of witnesses is a substantial rationale (*amatla*)[7] to the degree that it renders the initial admission as uprooted from the outset. From what we have seen, in general contexts people are not expected to engage with every claim made against them—and even if one does opt to initially engage, it can subsequently be dismissed as immaterial rather than a formal admission of guilt or obligation.[8]

We should note, however, that the calculus changes when we shift our context to the courtroom. *Shulhan Arukh* (*H.M.* 81:6) clearly rules that:

If a claim was made and he admitted **in front of the court**… he is not able to retract on the basis of jesting. However, he can claim that he already paid [in the interim].[9]

From what we have reviewed, one is not expected to engage with every arbitrary accusation leveled against him. However, if the claim takes place in a formal context, namely a courthouse—a *makom mishpat*—where one is supposed to be taking the matter seriously, his lack of protest can thus be construed as admission. Furthermore, a subsequent claim of jest would not avail the defendant, as one is obligated to take the judge's interrogation with utmost seriousness. To return to our example of reinventing Yom Kippur with goats and glow sticks, if this was raised at a formal synagogue board meeting, it would behoove the rabbi to address it. Silence in such a circumstance would be unacceptable.

Silence as an Extrinsic-Circumstantial Mechanism

Rosh (*Responsa* 107:6), however, expands the application of *shtikah ke-hoda'ah* beyond our established norms. The case involves a claimee's refusal to reply in the face of constant accusations outside of the courthouse (in addition to his recalcitrance within the court):

And I say that he should respond and provide a rationale and proof [as to] why he did not respond to the warnings of [the collector's] agent. It would be expected that when the agent of Rebi Shlomo (i.e., the claimant) gave him the aforementioned warnings that **Rebi Yisrael [i.e., the claimee] ought to rend his garments and raise a great and terrible cry to shake the world and let them know that the money he already paid is being claimed from him again a second time**. He ought to reply to the agent, "How can you say these things to me—for he knows that I already paid him the money, and he gave me a receipt and it was torn up—for it was torn in front of you!" **And [the claimee] ought not to disengage from the agent with silence, which is tantamount to admission**.

Rosh asserts that anyone who is the subject of constant assaults on his integrity and reputation should naturally retort to defend himself—that is a fact of human nature. Thus, the accused individual's silence raises a suspicion.

However, R. Yaakov Ariel (*Responsa Be-Ohalah Shel Torah* 6:36)[10] explains that Rosh is not employing the literal principle of *shtikah ke-hoda'ah*; rather, the judges are using their common sense to assess the unique nature of the case presented to them. This is evident from Rosh's invocation of the guiding principle *ein lo la-dayan ela mah she-einav ro'ot*—a judge must rule in accordance with what he sees. While silence outside court generally does not constitute *shtikah ke-hoda'ah*, the court reserves the right to evaluate different instances of silence on a **circumstantial** level.[11]

In truth, while R. Ariel frames the circumstantial consideration of silence as an aberration beyond the framework of *shtikah ke-hoda'ah*, there is ample evidence, based on everything we have seen, to suggest that *shtikah ke-hoda'ah* is, in fact, **fundamentally** circumstantial in its very essence.

Let us return to the above-quoted passage in *Yevamot* in which a single witness accuses a person of consuming forbidden fat and the latter is silent. One way to understand this is to view the witness as instrumental in creating the circumstances in which the accused party's silence can serve as an admission.[12]

However, both *Tosafot* (*Yevamot* 88a, s.v. *De-shtikah*) and Ran (*Kiddushin* 61a; Rif on *Kiddushin* 28b) claim that, in truth, the opposite is what is occurring.[13] *Shtikah ke-hoda'ah* does not operate as an actual admission from the accused party; rather, his silence lends credence to the testimony of the single witness.[14] According to this framework, *Shtikah ke-hoda'ah* is fundamentally **circumstantial** in nature. We interpret the claimee's lack of opposition as lending sufficient basis to the claim leveled against him.[15] [16] With this understanding, it is clear how Rosh could have the latitude to apply *shtikah ke-hoda'ah* even when it does not occur before a courtroom nor before designated witnesses. Rosh could interpret the claimee's silence as a bona fide instance of *shtikah ke-hoda'ah* because the court's ability to invoke *shtikah ke-hoda'ah* is fundamentally a context-dependent decision.

Circumstantial Evidence: The Criminal Context

Unlike in civil matters (such as a financial dispute) in which we established that "a litigant's admission is equivalent to 100 witnesses," when it comes to criminal matters we generally apply the principle of *ein adam mesim atzmo rasha*, that categorically one is incapable of incriminating himself in court.[17] However, may the court interpret one's silence against him? If *shtikah ke-hoda'ah* is literally a formal admission, then an admission as a result of silence should not be any more legitimate than an outright verbal admission which is not admissible in a criminal context. However, if we instead construe *shtikah ke-hoda'ah* as circumstantial evidence, perhaps it could be taken into account in criminal cases since it would not be in violation of *ein adam mesim atzmo rasha.* Indeed, some went so far as to claim that overwhelming circumstantial evidence could actually be utilized in a criminal setting as well.[18] Rivash (no. 234) writes:

Also nowadays, that which we only adjudicate capital cases based on immediate necessities is because that general authority has terminated [from earlier generations]. However, the court will administer lashes and punishments that are not strictly mandated by the law, based on immediate needs, and **even absent absolute testimony**, so long as we have clear bases which indicate that the accused committed the sin.[19]

Following the dissolution of the ancient Sanhedrin and the loss of the tradition for bestowing bona fide rabbinic ordination, modern Jewish courts are generally not authorized to hand out punitive rulings, from fines to capital punishment. Nonetheless, Rivash was willing to accept the ad hoc use of such measures, even on the basis of circumstantial evidence.

Rivash (and some other sources) aside, normative Halakhah does not take circumstantial evidence into account except, potentially, for exceedingly extenuating circumstances. It would thus stand to reason that, in general, we cannot apply *shtikah ke-hoda'ah* in criminal matters, even if it is generally a flexible circumstantial concept.

Silence vs. Protest: The Ethical Dimension

There are many sources in rabbinic literature which praise the virtue of silence. In *Pirkei Avot* (3:13), "Rabbi Akiva says… 'A safeguarding fence around wisdom is silence.'" Likewise, in *Avot De-Rabbi Natan* (22:2),[20] it is recorded: "His son Shimon would say, 'All my life, I grew up among the sages, and I never learned anything better for a person than silence. And if silence is good for the sages, how much more so for the foolish!'" Indeed, R. Ariel, in his aforementioned reponsum, commends silence in the face of spurious claims:

One is not required to engage with any claim that appears to him as provocative. His silence in such a case **would constitute wisdom**, not admission.

Sefer Orhot Tzaddikim (Ch. 21, "The Gate of Silence") articulates which forms of silence are considered virtuous and which are ethically erroneous:

There are times when silence is good, as when **Divine justice** strikes against a man, as in the case of Aaron, as it is written: "And Aaron held his peace" (Leviticus 10:3). If a person hears people reviling him, he should be silent. And this is a great quality, to be silent in the face of one's revilers. And one should also accustom himself to be silent in the synagogue, for this is modesty, and it requires great alertness properly **to direct his heart in prayer**. And if one is sitting among the wise, he should be silent and listen to their words; for when he is silent, **he hears what he does not know**, but when he speaks, he does not add anything to his knowledge. However, if he is doubtful as to the meaning of the words of the wise, he should ask them, for to be silent in such a case is very bad: **King Solomon said, "A time to keep silence, and a time to speak" (Ecclesiastes 3:7)—there are times when speaking is good and there are times when silence is good…** But there are times when silence can be evil, as it is written, "Answer a fool according to his folly, lest he be wise in his own eyes" (Proverbs 26:5). With respect to words of the Torah, if a person sees that the fools are scorning the words of the wise, **he should answer in order to turn them back from their errors** so that they do not imagine themselves wise in their eyes. If a

man sees another man committing a transgression, **he should protest and reprove him**.[21]

The Talmud in *Bava Metzia* (84b) relates the terrible fate of Rabbi Elazar son of Rabbi Shimon. When prompted to explain why he suffered so terribly he explained, "One day I heard a Torah scholar being insulted, and I did not protest as I should have." Thus we can observe how in certain contexts it is specifically passivity and inaction which yield negative results.[22] Similar to what we reviewed in Rosh's responsum, certain situations should cause us such profound and untenable pain that our only natural response is to viscerally object with a *ze'akah gedolah u-marah*, a great and terrible cry.[23]

R. Elchonon Wasserman laments the fallacy that to be a righteous person is to always be passive and conciliatory. In *Kovetz Ma'amarim* (vol. 1, p. 262), he writes:

What should we do in a situation as terrible as this in which the Jewish people are not their own [empowered] nation? Should we give up and clasp our hands together until we receive mercy from Heaven? God forbid that such an idea should even occur to us! They say in the name of the author of the *Nefesh Ha-Hayyim* [R. Hayyim of Volozhin] of blessed memory—regarding the line in the Mishnah at the end of [Tractate] *Sotah* (49b): "And for us what can we rely on but our Father in Heaven"—that in this *mishnah* it lists that which will happen leading up to the Messiah. And the giant [R. Hayyim of Volozhin] explained that these final words in the Mishnah are also a curse—and they are worse than all the other curses which preceded it. For the God-fearing people who live in those days will give up, and their hands will loosen from waging the war of God—and this is a great error, for the verse (Psalms 68:35) declares: "Ascribe might to God…"

Some may justify their silence on the basis that they do not wield sufficient influence and thus *mutav she-yiheyu shogegin*—it is better to allow others to sin unknowingly. However, R. Aharon Lichtenstein in *Leaves of Faith*[24] debunks this erroneous suggestion:

Hence, where *tokhahah* [rebuke] will not result in the desired effect, and might even be counterproductive, it is best foregone. ***Meha'ah***, by contrast, is publicly oriented. It is part of an ongoing struggle for **communal spiritual integrity**… Consequently, the restrictive term, *amitekha*, which singles out a spiritual confrere, "a member of the nation who shares in your observance of Torah and *mitzvot*," for spiritual remedy of *tokhahah*, has no bearing upon *meha'ah* which is mandated by an event rather than by its agent.

Our goal is not always to change other people's minds but to maintain our own. Addressing protests[25] against public desecrations of Shabbat,[26] R. Moshe Sternbuch writes (*Responsa Teshuvot Ve-Hanhagot* 7:42):

The basis of protest (*meha'ah*) is because when the "free people" [non-observant Jews] breach the observance of the holy Shabbat—it causes harm to us. For it influences the general public to lessen the severity of violating the holy Shabbat—and in particular it compromises the education of our children internalizing the gravity of violating the holy Shabbat.

Protesting and not remaining silent in the face of desecration of our faith not only helps others; it helps us—we are the beneficiaries. Thus, there is a value to speaking up for Torah values, even if only for strengthening our own "communal spiritual integrity," as R. Lichtenstein put it. Lest our community see our complacency and conclude as the Talmud in *Gittin* (56a) formulated it: "Since the Sages were sitting there and did not protest, learn from it that they were content with what he did." Let not our *shtikah* be construed as *hoda'ah*.

The interplay between silence and speech is a delicate balance that requires mindful navigation. While silence can foster contemplation and cultivate wisdom, there arise moments when the weight of our convictions and the pressing nature of the circumstance demand that we respond with vehement objections and protestations. In a personal and informal context, one may have the luxury of simply disregarding spurious claims. However, in more formal and public forums, the perilousness of allowing them to proliferate renders it necessary to respond—to the extent that silence is akin to acquiescence, if not tacit approval.

This creates a precarious minefield for public figures who are inclined to take overt stances on critical issues. While it is practically untenable for an organization or individual to be expected to issue a statement of opposition or solidarity for every crisis that emerges, perhaps each one would benefit from developing predetermined criteria as to what kind of topics fall within their purview. An Israel advocacy organization can commit to only issuing statements that are pertinent to Israel, or a local non-profit professional may be advised to refrain from opining on other communal organizations' programming. Those not arguing in good faith will always find grounds for fault, but this should not deter an honest attempt at establishing consistent standards—at the very least to thine own self be true.

[1] Jonathan Turley, "How 'Silence is Violence' Threatens True Free Speech and Public Civility," *The Hill*, August 29th, 2020. See also Bret Stephens, "Silence Is Violence—but Not When It Comes to Israeli Rape Victims," *The New York Times*, December 5, 2023.

[2] A brief caveat is in order: *Minhat Hinukh* (58:1), on the commandments pertaining to "Claiming and Denying," presents an uncharacteristically truncated exposition on what should be a topic brimming with extensive commentary. He explains: "These laws span the wide seas of the Talmud and later legal literature; therefore, I have withheld my hand from writing about them." In other words, there is virtually no limit to how deep down the rabbit hole one can go when addressing a topic as broad as the legal parameters of claims and admissions. Therefore, I have endeavored to provide a substantive survey of the pertinent aspects of the matter, without presuming to provide a comprehensive collection of the virtually limitless source material.

[3] Biblical and Talmudic translations are from Sefaria. The rest are my own, unless otherwise noted.

[4] See *Ketzot Ha-Hoshen* (34:4) and the extensive surrounding literature regarding whether this principle is rooted in a hermeneutical tradition, *migo* reasoning, or the creation of a new obligation akin to granting a gift.

[5] Based on *Sanhedrin* (29a); see Rabbeinu Yonah (ad loc).

[6] Cf. *Bava Kamma* (11a). Rama Mi-Fano (*Shivrei Luhot*, p. 15) suggests that Rav possessed an answer on a "hidden" level of Torah. Accordingly, Rav did not concede, but he also did not respond with his "hidden" approach.

[7] Regarding the nature of *amatla*, see *Mishneh Torah* (*Hilkhot Issurei Biah* 4:10), *Ketzot Ha-Hoshen* (81:8), and *Responsa Iggerot Moshe* (*E.H.* 1:84). There are times when an *amatla* will be of no avail, such as when one admits on their own initiative (*Shulhan Arukh*, *H.M.* 81:5) or when an entire group confesses collectively (*Shulhan Arukh*, *H.M.* 81:1, cf. *Shakh* 81:4).

[8] This is in essence what the Gemara (*Sanhedrin* 29b) teaches in the name of Rava: "People do not remember all frivolous matters."

[9] This is not just true vis-a-vis explicit verbal admission but would likewise apply if his admission was inferred from his silence in court. The Talmud in *Bava Metzia* (6a) addresses a case in which both parties claiming ownership over a garment enter the courtroom holding it, when suddenly one party seizes it fully from the possession of the other in the presence of the judges. While the Gemara does not conclude what would happen in the case of only **initial** silence, what is clear is that if the claimee remains silent for the **entire** duration, then the principle of *shtikah ke-hoda'ah* would be applied. Rashba (*Bava Metzia* 6a, s.v. *Mi-Deke'amrinan*) elucidates that "specifically before the court does one need to cry out, for it is a place of rendering judgment, and therefore he should cry out before the court to adjudicate his case. Whereas when it is not in the presence of the court, he could reasonably claim: 'Since there is no one to adjudicate my matter, why should I bother crying out.' For one who has a matter that requires a judicial ruling should go to the courthouse; and there, he should put forth his grievance." See also R. Binyamin Wolf Lau (*Sha'arei Torah*, Vol. 1, *Klal* 3, *Prat* 10, Par. 13), based on a responsum of Maharit (Vol. 2, *E.H.*, no. 1) who likewise notes that the case in *Bava Metzia* is distinct from other scenarios we explored because "it is the norm to cry out before the court when false testimony is made against him."

However, see Ramban (*Bava Metzia* 6a, s.v. *Ha De-Ba'i*), Ritva (s.v. *Ba'i*), and Ran (s.v. *Ha Ka Hazu*), who suggest the opposite—that when there is no court present, he should feel compelled to defend himself since the judges are not there to witness them snatching the item from him. See also Shakh (*H.M.* 138:6), who equates the context of witnesses with being in court. However, *Urim Ve-*

Tumim (*Tumim*, *H.M.* 138:5) rejects Shakh, as none of the medieval commentators appear to be willing to equate silence in court with what occurs outside before witnesses.

[10] This responsum was originally published in the journal *Tehumin* (volume no. 24). Another important point he makes in this piece is that there is a distinction between the court and law enforcement. In the case of the latter, one may feel compelled to confess to something that he did not commit, due to the pressure exerted on him.

[11] A related example of judicial intuition is recorded by Shakh (*H.M.* 81:17), who cites *Piksei Maharam Rikanti* (no. 423)—that the court can determine that one was silent, since they required a moment to formulate their response.

[12] See *Birkat Avraham* (*Yevamot* 87b).

[13] Cf. *Shakh* (*Y.D.* 127:10).

[14] See R. Elchonon Wasserman in *Kovetz He'arot* (63:2), who explains that a single witness is not simply weaker than two witnesses but is fundamentally in a separate category. Whereas two witnesses determine the truth, the single witness can sometimes just help us with making a pragmatic yet uncertain determination. This framework can further help us appreciate how silence is used to bolster the tenuous admissible claim of a single witness.

[15] This is conceptually similar to one of the approaches to *modeh be-miktzat*—that when one admits to part of a claim, they are obligated to take an oath to substantiate their denial on the remainder as their initial admission lends credence to the claim against them (see *Kuntresei Shiurim* on *Bava Metzia* 3:2, s.v. *U-vebeiur*).

One other concept that connects to this discussion, but that I will leave for a future analysis, is the principle of *umdana de-mukhah* which iconically appears in *Bava Batra* (146b). The concept of *umdana* is fundamentally tied to the principle of *shtikah ke-hoda'ah* as it essentially dictates that in some circumstances we can draw inferences from unspoken factors. One example provided is a father who, upon hearing of his only son's death, bequeaths his entire inheritance to another party. Despite the fact that he did not append any explicit stipulations, it is evident from the sequence of events that he only intended to relinquish his estate because he was mistakenly led to believe that he had no son to inherit his estate. See Ritva (*Bava Batra* 146b) and *Ketzot Ha-Hoshen* (12:1), who reconcile *umdana* with the principle of *devarim she-balev einam devarim*—"the words of the heart are not words." For a general analysis of the *umdana de-muhakh*, see *Minhat Elazar* (2:39) and *Kuntrasei Shiurim* (*Kiddushin*, essay no. 21).

[16] This is akin to how *Ketzot Ha-Hoshen* (138:2) explains that the silence in the case in *Bava Metzia* (6a) does not constitute admission but rather the defendant's forfeiting the right to take an oath to help his case. See also R. Binyamin Wolf Lau's *Sha'arei Torah* (Vol. 1, *Klal* 3, *Prat* 5, Par. 7), which discusses a dichotomy in whether *shtikah ke-hoda'ah* is admission or *mehilah*, forgoing. The latter would be consonant with *Tosafot*, et al. who argue that *shtikah ke-hoda'ah* merely lends credence to the claimant rather than serving as bona fide admission. See also *Sha'arei Yosher* (5:16) about the nature of *mehilah* vis-a-vis one's possessions.

[17] See also Rabbi Dr. Norman Lamm's essay "Self-Incrimination in Law and Psychology: The Fifth Amendment and the Halakhah" (Norman Lamm, *Faith and Doubt: Studies in Traditional Jewish Thought* [Jersey City: KTAV Publishing House, 2006], chap. 10) in which he analyzes how the concept of *ein adam mesim atzmo rasha* in Jewish law differs from American law: "The Halakhah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic law arises. According to

the Constitution, a man cannot be compelled to testify against himself. The provision against self-incrimination is a **privilege** [emphasis added which differs from original] of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, **does not permit** self-incriminating testimony. It is **inadmissible**, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession" (268).

[18] See *Tosafot* (*Shevuot* 44a, s.v. *De-i*).

[19] From a practical standpoint, this is line with what Rambam (*Mishneh Torah, Hilkhot Rotzeah* 4:8) codifies regarding someone who is clearly guilty of murder but gets off on a technicality, yet court still has legal recourse for dealing with them by incarcerating them in a *kipah* where "they are fed parched bread and small amounts of water until their digestive tract contracts. Then they are fed barley until their bellies burst because of the extent of the sickness, and they die." See also *Hilkhot Rotzeah* (6:5) and *Hilkhot Melakhim* (3:10) for similar examples of super-legal mechanisms.

While Rambam codifies the use of alternative forms of punishment in instances of relying on circumstantial evidence, he nonetheless cautions in *Sefer Ha-Mitzvot* (Negative, no. 290) against using inferences to administer direct corporal or capital punishment: "That He prohibited the judge to declare punishments by way of strong conjectures, and even when it is almost certain… And when we do not declare punishments based on strong appearances, the end result is surely that we will acquit the sinner. But if we declare punishments based on appearances and conjecture, we would surely sometimes kill someone innocent."

[20] Cf. *Pirkei Avot* (1:17).

[21] Translation from Sefaria.org.

[22] There are countless additional sources which discuss the imperative to speak up, such as *Esther* (4:13-14), *Sotah* (11a), *Avodah Zarah* (18a), and many more.

[23] Rosh's language is adapted from Genesis 27:34 and Esther 4:1.

[24] Aharon Lichtenstein, *Leaves of Faith: The World of Jewish Living*, vol. 2 (Jersey City: KTAV Publishing House, 2003), 98. See *Shabbat* 55a regarding the distinction between rebuke and protest.

[25] Regarding the nature of protests and public demonstrations, see *Rosh Hashanah* (19a) and *Ta'anit* (18a). R. Yehuda Herzl Henkin (*Responsa Benei Banim* 2:51) employs these Talmudic passages as precedent for his support of the 20th-century demonstrations for Soviet Jews.

[26] See what R. Henkin writes in *Benei Banim* (Vol. 4, *Mamar* 11) in which, similar to R. Sternbuch, there is a value in protesting to remind ourselves of our own values (i.e., Torah values). See also R. Yosef Shalom Elyashiv's approach to Shabbat protests in *Kovetz Teshuvot* (4:35). For a broader survey of rabbinic approaches to protesting, see the following articles: R. Alfred Cohen, "Protest Demonstrations" *Journal of Halachah and Contemporary Society* 25 (1993); R. Yitzchok Oratz, "Property Values: Rabbinic Ruminations on Property and Protest, Racism and Riots," *Journal of Halachah and Contemporary Society* 76 (2021); and Yitzhak Grossman, "A Time To Keep Silence, and a Time To Speak" *The Lehrhaus* (October 26, 2020).

The Sound of Silence

Rabbi Jonathan Sacks writes:[13]

Bamidbar is usually read on the Shabbat before Shavuot. So the Sages connected the two. Shavuot is the time of the giving of the Torah. *Bamdibar* means, "in the desert". What then is the connection between the desert and the Torah, the wilderness and God's word?

The Sages gave several interpretations. According to the Mechilta, the Torah was given publicly, openly, and in a place no one owns because had it been given in the Land of Israel, Jews would have said to the nations of the world,

[13] https://rabbisacks.org/covenant-conversation/bamidbar/the-sound-of-silence/

"You have no share in it." Instead, whoever wants to come and accept it, let them come and accept it.[1]

Another explanation: Had the Torah been given in Israel the nations of the world would have had an excuse for not accepting it. This follows the rabbinic tradition that, before God gave the Torah to the Israelites, He offered it to all the other nations and each found a reason to decline.[2]

Yet another: Just as the wilderness is free – it costs nothing to enter – so the Torah is free. It is God's gift to us.[3]

But there is another, more spiritual reason. The desert is a place of silence. There is nothing visually to distract you, and there is no ambient noise to muffle sound. To be sure, when the Israelites received the Torah, there was thunder and lightning and the sound of a shofar. The earth felt as if it were shaking at its foundations. But in a later age, when the Prophet Elijah stood at the same mountain after his confrontation with the prophets of Baal, he encountered God not in the whirlwind or the fire or the earthquake but in the *kol demamah dakah*, the still, small voice, literally "the sound of a slender silence" (1 Kings 19:9-12)." I define this as *the sound you can only hear if you are listening*. In the silence of the *midbar*, the desert, you can hear the *Medaber*, the Speaker, and the *medubar*, that which is spoken. To hear the voice of God you need a listening silence in the soul.

Many years ago British television produced a documentary series, *The Long Search*, on the world's great religions.[4] When it came to Judaism, the presenter Ronald Eyre seemed surprised by its blooming, buzzing confusion, especially the loud, argumentative voices in the *beit midrash*, the house of study. Remarking on this to Elie Wiesel, he asked, "Is there such a thing as a *silence* in Judaism?" Wiesel replied: "Judaism is full of silences … but *we don't talk about them*."

Judaism is a very verbal culture, a religion of holy words. Through words, God created the universe: "And God said, let there be … and there was." According to the Targum, it is our ability to speak that makes us human. It translates the phrase, "and man became a living soul" (Gen. 2:7) as "and man became a *speaking* soul." Words create. Words communicate. Our relationships are shaped, for good or bad, by language. Much of Judaism is about the power of words to make or break worlds.

So silence in Tanach often has a negative connotation. "Aaron was silent," says the Torah, after the death of his two sons Nadav and Avihu (Lev. 10:3). "The dead do not praise you," says Psalm 115, "nor do those who go down to the silence [of the grave]." When Job's friends came to comfort him after the loss of his children and other afflictions, "they sat down with him on the ground for seven days and seven nights, yet no one spoke a word to him, for they saw that his pain was very great." (Job 2:13).

But not all silence is sad. Psalms tells us that "to You, silence is praise" (Ps. 65:2). If we are truly in awe at the greatness of God, the vastness of the universe and the almost infinite extent of time, our deepest emotions will indeed lie too deep for words. We will experience silent communion.

The Sages valued silence. They called it "a fence to wisdom" (Mishna Avot 3:13). If words are worth a coin, silence is worth two (Megilla 18a). R. Shimon ben Gamliel said:

> "All my days I have grown up among the wise, and I have found nothing better than silence."
>
> Mishna Avot 1:17

The service of the Priests in the Temple was accompanied by silence. The Levites sang in the courtyard, but the Priests – unlike their counterparts in other ancient religions – neither sang nor spoke while offering the sacrifices. One scholar, Israel Knohl, has accordingly spoken of "the silence of the sanctuary." The Zohar (2a) speaks of silence as the medium in which both the Sanctuary above and the Sanctuary below are made.

There were also Jews who cultivated silence as a spiritual discipline. Bratslav Hassidim meditate in the fields. There are Jews who practise *ta'anit dibbur*, a "fast of words". Our most profound prayer, the private saying of the Amidah, is called *tefillah be-lachash*, the "silent prayer". It is based on the precedent of Hannah, praying for a child.

> "She spoke in her heart. Her lips moved but her voice was not heard."
>
> 1 Sam. 1:13

God hears our silent cry. In the agonizing tale of how Sarah told Abraham to send Hagar and her son away, the Torah tells us that when their water ran out and the young Ishmael was at the point of dying, Hagar cried, yet God heard "the voice of the child" (Gen. 21:16-17). Earlier when the angels came to visit Abraham and told him that Sarah would have a child, Sarah laughed inwardly, that is, silently, yet she was heard by God (Gen. 18:12-13). God hears our thoughts even when they are not expressed in speech.

The silence that counts, in Judaism, is thus a listening silence – and listening is the supreme religious art. Listening means making space for others to speak and be heard. As I point out in my commentary to the Siddur,[5] there is no English word that remotely equals the Hebrew verb *sh-m-a* in its wide range of senses: to listen, to hear, to pay attention, to understand, to internalize and to respond in deed.

This was one of the key elements in the Sinai covenant, when the Israelites, having already said twice, "All that God says, we will do," then said, "All that God says, we will do and we will hear [*ve–nishma*]" (Ex. 24:7). It is the *nishma* – listening, hearing, heeding, responding – that is the key religious act.

Thus Judaism is not only a religion of doing-and-speaking; it is also a religion of listening. Faith is *the ability to hear the music beneath the noise*. There is the silent music of the spheres, about which Psalm 19 speaks:

> "The heavens declare the glory of God
> The skies proclaim the work of His hands.
> Day to day they pour forth speech,
> Night to night they communicate knowledge.
> There is no speech, there are no words,
> Their voice is not heard.
> Yet their music carries throughout the earth."
>
> Tehillim 19

There is the voice of history that was heard by the prophets. And there is the commanding voice of Sinai that continues to speak to us across the abyss of time. I sometimes think that people in the modern age have found the concept

of "Torah from Heaven" problematic, not because of some new archaeological discovery but because we have lost the habit of listening to the sound of transcendence, a voice beyond the merely human.

It is fascinating that despite his often-fractured relationship with Judaism, Sigmund Freud created in psychoanalysis a deeply Jewish form of healing. He himself called it the "speaking cure," but it is in fact a *listening* cure. Almost all effective forms of psychotherapy involve deep listening.

Is there enough listening in the Jewish world today? Do we, in marriage, really listen to our spouses? Do we as parents truly listen to our children? Do we, as leaders, hear the unspoken fears of those we seek to lead? Do we internalize the sense of hurt of the people who feel excluded from the community? Can we really claim to be listening to the voice of God if we fail to listen to the voices of our fellow humans?

In his poem, 'In memory of W B Yeats,' W H Auden wrote:

> In the deserts of the heart
> Let the healing fountain start.

From time to time we need to step back from the noise and hubbub of the social world and create in our hearts the stillness of the desert where, within the silence, we can hear the *kol demamah dakah*, the still, small voice of God, telling us we are loved, we are heard, we are embraced by God's everlasting arms, we are not alone.[6]

[1] Mechilta, Yitro, Bachodesh, 1.

[2] Ibid., 5.

[3] Ibid.

[4] BBC television, first shown 1977.

[5] Koren Shalem Siddur.

[6] For more on the theme of listening, see parshat Bereishit, "The Art of Listening," and parshat Eikev, "The Spirituality of Listening."

POURING OUT YOUR HEART:

RABBI NACHMAN'S HITBODEDUT AND ITS PIASECZNER REVERBERATIONS

Zvi Leshem writes:[14]

[14] https://traditiononline.org/wp-content/uploads/2019/06/pouring-out.pdf

R. SHAPIRA: A BRIEF BIOGRAPHY[2]

R. Kalonymus Kalmish Shapira was born in Grodzisk Poland in 1889 to Rabbi Elimelech of Grodzisk, who was known at the time as the "elder rebbe of Poland." He was descended from many of the greatest Polish rebbes, including R. Elimelech of Lyshensk, the Seer of Lublin, the Maggid of Kohznitz, and R. Kalonymus Kalman ha-Levi Epstein of Krakow (the author of *Maor va-Shemesh*), after whom he was named. All of the above rebbes had a major influence upon his thought and practice, as did the writings of the Chabad and Karlin schools. Orphaned at a young age, he assumed the role of rebbe in Piaseczna in 1909 and shortly thereafter was appointed as the town rabbi as well. During his lifetime he was active as the rebbe of a Hasidic court, as a *rosh yeshiva* and educator, and in the public realm. Following World War I he moved his court to Warsaw, although he continued to maintain a presence in Piaseczna as well, living there several months each year. He established Yeshivat Daat Moshe in 1923 and headed it until his death. In

[1] This article is based on a chapter in my dissertation, *Between Messianism and Prophecy: Hasidism according to the Piaseczner Rebbe* [in Hebrew] (Ramat Gan: Bar-Ilan University, 2007), 253-260. For *hitbodedut* in earlier Kabalistic sources, see 253-254. Thanks to Elie Leshem for editorial assistance.

[2] Based on *Between Messianism and Prophecy*, 1-4, and the sources cited there in nn. 1-11. As the focus of our article is on R. Shapira, we will not discuss R. Nachman's biography, upon which much has been written. See, for example, Arthur Green, *Tormented Master: The Life and Spiritual Quest of Rabbi Nachman of Bratzlav* (Vermont: Jewish Lights Classic, 1992).

Warsaw he was also an active member of Agudat Yisrael and put much energy into fighting the emerging phenomenon of secularization, and Shabbat desecration in particular. In 1932 he published *Hovat ha-Talmidim*, which quickly became a classic of Hasidic educational philosophy. All of his other surviving manuscripts were only published after the war.

At the beginning of the Holocaust most of his family was killed, and he remained alone in the Warsaw Ghetto, where his sermons were eventually published as *Esh Kodesh*. He was killed in November 1943 but there is a dispute amongst the scholars as to the place of his death. In the last two decades or so, his writings have begun to enjoy great popularity in wide circles and he has also merited significant academic attention.

The Decline Polish Hasidism in the Twentieth Century and R. Shapira's Response[3]

Broadly speaking, Polish Hasidism can be divided into two major trends. The first is the "popular" school introduced by R. Elimelech of Lyshensk (1717-1786), his student R. Yaacov Yitzhak Horowitz, the "Seer" of Lublin (1745-1815), and the Seer's students. This school preserved and cultivated mystical and magical trends within the context of "tsaddikism," including the mass influx of Hasidim to the courts of their rebbes where, in the context of ecstatic prayer, they expected to receive not only spiritual guidance but also material sustenance in the areas of *hayyei, banei u-mezonei* (health, children, and livelihood). This approach was challenged in the famous rebellion of R. Yaacov Yitzhak Rabinowitz of Pryshischa (1766-1813), formerly a leading student of the Seer. His school attempted to create an elitist Hassidic fraternity stressing Torah study and inner truth while deemphasizing the tsaddik's role as miracle worker and ecstatic preacher. R. Kalonymus Shapira was not only a direct descendent of the leaders of the first school; he was their spiritual heir as well. In all of his works he quotes them extensively, while never mentioning the

[3] Hasidism in Poland has merited a tremendous amount of academic research. For further study the reader is referred to the following works: Gedalyah Nigal, *The Hasidic Philosophy of R. Elimelech of Lyzhensk and his Students* [in Hebrew], PhD Dissertation (Jerusalem: Hebrew University, 1962); Mendel Piekarz, *Ideological Trends of Hasidism in Poland During the Interwar Period and the Holocaust* [in Hebrew] (Jerusalem: Bialik Institute, 1990); Zvi Meir Rabinowitz, *Between Pryshischa and Lublin: People and Approaches in Polish Hasidism* [in Hebrew] (Jerusalem: Kesharim, 1997); Yitzhak Alfasi, *The Hozeh of Lublin: Rabbi Yaakov Yitshak ha-Levi Horowitz,* [in Hebrew] (Jerusalem: Rabbi Kook Institute, 2006); Uriel Gellman, *Hasidism in Poland in the First Half of the Nineteenth Century: Typologies of Leadership and Devotees* [in Hebrew], PhD Dissertation (Hebrew University, Jerusalem 2001).

Pryshischa School a single time.[4] While it can be argued that he, too, moderated the role of the "tsaddik," preferring the more neutral term "rebbe," this was likely due to his sense that in the contemporary period, the *rebbe*s were not on the same spiritual level as were those of earlier generations – not because of any intrinsic difficulty with the mystical-magical role of the *tsaddik* of yesteryear. In fact, he strongly cultivated the mystical trend in Hasidism, and like his forefathers viewed the *rebbe* as responsible for the material as well as spiritual needs of his followers.[5]

In the eyes of R. Kalonymus the situation of Hasidism in Poland after World War I was very problematic. The challenges of modernity and urbanization, compounded with the allure of secular socialism and Zionism, had begun to wreak havoc in the Hasidic community, resulting in the defection of many young people from the Hasidic ranks. In addition, the unique spiritual intensity and mystical fervor of early Hasidism had largely been lost, and the average Hasid no longer understood what Hasidism was meant to be, other than an emphasis on special clothing and other external characteristics. It is against this backdrop that much of R. Kalonymus's educational and spiritual raison d'être emerges: He clearly saw himself as a Hasidic reformer attempting to revitalize the entire Hasidic community and return it to the path of the Baal Shem Tov as he understood it.[6] Part of this spiritual revival emphasized mystical techniques such as meditation, of which *hitbodedut* is but one example.

Rabbi Nachman's *Hitbodedut*

Rabbi Nachman of Bratzlav (1772-1810) is arguably one of the most prominent Hasidic rabbis in history. Unlike the persecuted iconoclast he was in his lifetime, R. Nachman is now a major cultural icon throughout much of the Jewish world. The interest in his works and the pilgrimages to his grave in Uman are only partial indicators of how influential he has become.

[4] In a latter written by R. Kalonymus that was recently published for the first time in the collection *Ginzei Yehuda* (Yehiel Goldhaber and Hananial Dov Leichtag, editors) 2013 (without place of publication), he mentions R. Menachem Mendel of Kotzk, a leading representative of the Pryshischa School, in a decidedly negative context.

[5] See *Between Messiansim and Prophecy*, 118-148.

[6] See R. Kalonymus's *Hovat ha-Talmidim* (Warsaw: Feder, 1932), 5-16; *Between Messianism and Prophecy,* 15-32. For a somewhat different view see Daniel Reiser, *To Fly like Angels: Imagery or Waking Dream Techniques in Hassidic Mysticism in the First Half of the Twentieth Century,* [in Hebrew], PhD Dissertation (Jerusalem, Hebrew University, 2011), 1-20.

One of R. Nachman's central spiritual practices is *hitbodedut* (literally, being alone with one's self), a meditative technique in which the Hasid engages in free dialogue with God in his own language.[7] As we shall demonstrate, certain aspects of R. Nachman's teachings on *hitbodedut* resurfaced, albeit subtly and with significant differences, in the early 20th century writings of R. Kalonymus.[8]

R. Nachman's major teaching on *hitbodedut* is found in his work *Likkutei Moharan*. These ideas were later developed in the booklet *Hishtapekhut ha-Nefesh* (*Outpouring of the Soul*), by R. Alter Tepliker. The following is one of Rebbe Nachman's descriptions of the practice:

> *Hitbodedut* is a great level, surpassing everything else. This means to set aside at least an hour every day to be alone in a room or a field and to speak with one's Creator, explaining oneself, appeasing, and supplicating Him to bring oneself close to true divine service. And this prayer and discussion should be held in the vernacular, i.e. Yiddish… for it is hard for us to speak in Hebrew, which we are not used to… But in Yiddish, which we are accustomed to, it is easier to express oneself… One should express all that is in one's heart before God: regret and teshuva regarding the past and supplications to draw close to God… It is important to practice this every day at an appointed time and the rest of the day is to be joyous. And this practice is very great and constitutes an excellent method for drawing close to God… for everyone can do this and in doing so one will reach a great level. Happy is he who follows this.[9]

[7] Despite the centrality of this practice in Bratzlav writings, little attention has been paid to it in the academic studies of scholars such as Joseph Weiss, Mendel Piekarz, and Arthur Green. A recent exception is Zvi Mark, *Mysticism and Madness: The Religious Thought of Rabbi Nachman of Bratzlav* (London: Continuum, 2009), 131-147. On the other hand it has been discussed in detail in internal Hasidic works, such as Aryeh Kaplan, *Jewish Meditation*, (New York: Schocken 1982), 92-98, and Ozer Bergman, *Where Earth and Heaven Kiss: a Guide to Rebbe Nachman's Path of Meditation*, (Jerusalem/New York: Breslov Research Institute, 2006).

[8] Most of the research on the Piaseczner Rebbe has focused upon his Holocaust era writings, collected in *Esh Kodesh*. For biographical and bibliographical information see Nehemia Polen, *The Holy Fire: The Teachings of Rabbi Kalonymus Kalman Shapira, the Rebbe of the Warsaw Ghetto*, (New Jersey – Jerusalem: Jason Aronson, 1999), 1-14, Leshem, From Messianism to Prophecy, pp. 1-32, Ron Wacks: *The Flame of the Holy Fire* [in Hebrew] (Alon Shvut: Tevunot, 2010). On R. Shapira's mystical techniques see also Jonathan Garb, *Shamanic Trance and Modern Kabbalah*, (Chicago: University of Chicago, 2011), 115-118. Most recently see Daniel Reiser, (above note 6), 75-77. On his meditative techniques see also Tomer Persico, *Jewish Meditation: the Development of Modern Spirituality in Contemporary Judaism* [in Hebrew], Phd Dissertation (Tel Aviv, Tel Aviv University 2012), 246-302.

[9] *Likkutei Moharan*, Part Two: 25. All translations are my own.

According to R. Nachman, *Hitbodedut*, while informal in content and style, becomes formal in that one is instructed to practice it every day, at a set time, for at least one hour. According to Zvi Mark, *Hitbodedut* should be considered a mystical technique. In its first stage the Hasid discusses his desire to improves his *middot*. This then leads to the more intense mystical stage, which culminates in divestment from corporality (*bittul ha-gashmiut*), and ultimately in mystical union and envelopment within the Divine.[10]

The Piaseczner Rebbe's *Hitbodedut*

In the twentieth century this method was echoed, with differences, in the mystical practices of the R. Kalonymus. Although the term *hitbodedut* is not always used, we see clearly the elements of the Bratzlav practice in several passages of R. Kalonymus' writings. And while R. Kalonymus never mentions R. Nachman or any Bratzlav works, it is clear that he was in fact deeply influenced by him.[11] Let us examine some of these passages.

In R. Kalonymus' first work, *Benei Mahashava Tova,* we read as follows:

> When you feel broken-hearted, even due to physical needs, turn quickly aside, face the wall and recite some chapters of Psalms, preferably those that are similar to the type of distress that you are experiencing… not that you should come in from the marketplace and immediately begin to recite without concentration; rather think first abut the concerns that are causing such consternation. Who can he turn to and who can help him, if not *ha-Kadosh Baruch Hu*, the all powerful and merciful Father? Now he approaches God's throne and in his mind imagining that he is standing before Him and supplicating… and after the Psalms he should pray

[10] *Mysticism and Madness*, n. 2. It is also interesting to compare this with another of R. Kalonymus' meditative techniques, *hashkata* (*mind-quieting*), which appears in his *Derekh ha-Melekh*, (Jerusalem, 1991),406-407. There as well work on one's *middot* is woven into the fabric on the mystical experience. On *hashkata* see *Between Messianism and Prophecy*, 247-253.

[11] See *Between Messianism and Prophecy*, 45-46, citing Piekarz who writes that "there is no doubt that that the Admor of Piaseczna knew his [R. Nachman's] works", and n. 122 that R. Kalonymus' personal copy of *Likkutei Moharan* is held in the rare book room of the Bar Ilan University library (thanks to Prof. Zvi Mark for calling this to my attention). Recently it was called to my attention by R. Shmuel Tefilinsky that the Bratzlav work *Shivho shel Tsaddik,* (Jerusalem, 2008), 146, contains evidence that R. Kalonymus studied extensively from the Bratzlav work *Hishtapekhut ha-Nefesh,* which deals entirely with the subject of *hitbodedut*. This source provides additional textual evidence linking R. Kalonymus with the study of Bratzlav works in general and of *hitbodedut* in particular.

> spontaneously to God in his own language, and with each word he will feel that his consciousness is strengthening and he is ascending. Slowly he leaves behind his physical needs and a cry issues forth from the depths of his heart: *Master of the Universe, bring me close to You, purify me, lift me above all these worries so that I can be close to You*... and now he should be happy, for God is really close to him... all day he will feel spiritual pleasure, the pleasure of purity... and so too when he feels inner joy.[12]

When we analyze the Piaseczner's version of *hitbodedut* several points become apparent. First, *hitbodedut* is a response to a preexisting emotional state influenced by the events of everyday life, either positive or negative. This comes as no surprise when one considers the fact that R. Kalonymus generally views every emotional experience as an opportunity to move closer to God.[13] However, there is also a significant difference between R. Nachman's *Hitbodedut* and that of R. Kalonymus: For R. Nachman, *hitbodedut* is practiced in the context of fairly formal instructions, an hour a day, at a regular hour, preferably in the seclusion of the outdoors or a closed room. R. Kalonymus provides far less formal guidance, limited to the recommendation to recite Psalms and a personal prayer in the vernacular in a state of concentration. Other than facing the wall in order to concentrate, there is no suggestion of a special place, time, or frequency. While *hitbodedut* is certainly a powerful method of *avodat Hashem* that should be taken advantage of, he says, it is not part of the daily service of the Hasid. Additionally, while one's physical needs can serve as a trigger for the emotional state that facilitates *hitbodedut*, we do not find that these needs become the content of the meditation, as they do in Bratzlav.[14] Instead of praying for God to meet one's physical needs, the prayer is directed to moving beyond the physical, to coming close to God.

To summarize, the entire process, especially in the context of brokenheartedness, begins with the recitation of Psalms, followed by a personal prayer that expresses the Hasid's broken feeling. This, in turn, leads to a

[12] *Benei Mahashava Tova* (Tel Aviv: Committee of Piaseczna Hasidim, 1973), 23-24. In *Hakhsharat ha-Avreikhim*, (Jerusalem: Committee of Piaseczna Hasidim, 1962), 46a, 48a R. Kalonymus lists chapters of Psalms that are appropriate for different moods.

[13] Ibid. 21.

[14] See for example, *Histapekhut ha-Nefesh*, (Jerusalem, 1974), 63, where it says that one should pray over torn clothing, *and for all similar matters, great or small.* See also the sources quoted in *Between Messianism and Prophecy*, 255, n. 844.

request for closeness to God, and finally to a feeling of spiritual pleasure, which is meant to last throughout the day.

Returning to R. Nachman's words above, we find a similar process in his version as well, as he instructs the Hasid to:

> explain himself and appease God, supplicating Him to be brought close to true Divine service. This prayer and discussion should be held in the vernacular… supplicating God to draw close in truth from now on… and the rest of the day he should be joyous.[15]

Other discussions of *hitbodedut* can be found in R. Kalonymus' spiritual diary, *Tsav ve-Ziruz*. Let us look at one entry that adds several new points:

> If you have not yet tasted a prayer that is free of personal needs, if you have not yet cried while singing the praises of God, your prayer appears childish in the eyes of Heaven… This is what you should do: For a moment or two leave behind the world and its noise… meditate [*hitboded*] by yourself, and if possible go out into the forest, and imagine yourself as a simple creature among God's creations. Then sing before God together with the sun and the moon… and the trees of the forest. You have come to reveal God's grandeur and to fill the world with it.[16]

In addition to the explicit use of the word *hitboded* here, one can also note the strong disdain for personal requests as the essential point of prayer. This stands in stark contrast to the position attributed to R. Nachman – that one should supplicate Hashem for every worldly need, no matter how small.[17] An additional innovation here is the explicit instruction to go to the forest to meditate together with all of nature, which is a

[15] *Likkutei Moharan*, Part Two, 25. See also *Sihot ha-Ran*, ch. 41. Regarding the use of Psalms in *hitbodedut* by both masters, see *Between Messianism and Prophecy,* 254-256.

[16] *Tsav ve-Ziruz* (Jerusalem: Committee of Piaseczna Hasidim 1962), ch. 18.

[17] See R. Yitzhak Hutner, *Pachad Yitzchak Letters and Writings*, [in Hebrew] (New York: Gur Aryeh Institute, 1991), 332: "The feeling of closeness to God in a non-accepted prayer is no less than the feeling of closeness to God in an accepted prayer." R. Kalonymus also consistently stresses the experience of closeness to God in prayer over the "results." See for example, *Hovat ha-Talmidim*, 52-53. On the other hand, R. Nachman puts more stress on the "results" of prayer as well. See for example, *Likkutei Etsot, Tefilla* 3. For a detailed analysis of the debate concerning the legitimacy of petitionary prayer in early Hasidism, see Rivka Schatz Uffenheimer, *Hasidism as Mysticism: Quietistic Elements in 18th Century Hasidic Thought,* [in Hebrew] (Jerusalem: Magnes Press, 1968), 88-91, Louis Jacobs, *Hasidic Prayer*, (London/Washington: Littman, 1993), 23-33. Jacobs discusses a passage from *Tsav ve-Ziruz,* 32-34.

central feature of Bratzlav *hitbodedut*. R. Kalonymus' words here are reminiscent of R. Nachman's famous statement: "Know that when a person prays in the field, all of the plants come into his prayer and assist him, giving his prayer strength."[18]

In another passage in *Tsav ve-Ziruz* R. Kalonymus suggests that those with spiritual maladies discuss them with a close friend, a practice that he mentions elsewhere in the context of group spiritual work.[19] Here, however, the passage takes an unexpected turn:

> And do you have any friend who is comparable to your Heavenly Father?... Seclude yourself in a special room if you can, and if not turn toward the wall. Imagine that you are standing before God's throne, and pour out your heart in conversation and prayer, based on whatever enters your heart and in any language that you understand.[20]

In this passage we find that the human peer counselor that R. Kalonymus insists upon elsewhere[21] is effectively replaced by the divine counselor. Once again Rav Kalonymus instructs the Hasid to seclude himself, preferably in a special room, and to address God in a personal prayer in the vernacular, similarly to Bratzlav *hitbodedut*. Here R. Kalonymus even suggests a possible version of such a prayer, but only as an example; ultimately it is preferable to devise one's own prayer.[22] In this example as well, the main focus is upon the desire to draw close to God.

Conclusions

In conclusion, even though R. Kalonymus does not explicitly mention R. Nachman or his writings, and does not always use the technical term *hitbodedut*, it is clear both from textual evidence and outside testimony that R. Kalonymus was well versed in Bratzlav literature in general and particularly in the literature on *hitbodedut*. He chose to adopt *hitbodedut* while modifying certain aspects of it to make it more in line with his own spiritual/mystical practices, a unique blend derived of several earlier Hasidic

[18] *Likkutei Moharan*, Part Two: 11.
[19] *Benei Mahashava Tova*, 57.
[20] *Tsav ve-Ziruz*. Ch. 4. On the visualization of standing before God's throne, see *Between Messianism and Prophecy*, 177-188. I hope to discuss this topic in more detail in a forthcoming article.
[21] Ibid.
[22] Personal, informal prayers of this sort, some in Hebrew and some in Yiddish, are scattered throughout R. Kalonymus' writings. For a list, see *Between Messianism and Prophecy*, 260, n. 860.

systems that differ greatly from Bratzlav Hasidism.[23] Unfortunately, we cannot state definitively why R. Kalonymus never refers to R. Nachman other than the fact that in his time (unlike today) Bratzlav Hasidim comprised a relatively marginal and somewhat controversial group.[24] I once asked the current Piaseczner Rebbe, R. Kalman Menachem Shapira, about it and he said that there is a lot of similarity between the two but that R. Kalonymus chose not to mention R. Nachman due to his "extreme and radical style." Instead he offered his readers a more "moderate version," which R. Shapira called *Bratzlav be-hetter* ("permissible Bratzlav").

On silence, and speaking out, and bringing a better world[15]

This morning with my Hasidut hevruta, R' Megan Doherty, I read a beautiful teaching from the Aish Kodesh (R' Kalonymus Kalman Shapira, the rabbi of Piaseczno, Poland -- later the rabbi of the Warsaw Ghetto.) Joseph's dream, in this week's parsha, depicts his brothers' sheaves bowing down to his in the field. But the Aish Kodesh reads it through a different lens. He draws on a

[15] https://velveteenrabbi.blogs.com/blog/2019/12/on-silence-and-speaking-out-and-bringing-a-better-world.html

Hebrew pun between "sheaf" and "muteness," and he explores what it means to be silenced. This speaks right to my heart.

Think about the difference between holding one's silence and being silenced by an external force. There's a huge difference between holding silence for whatever reason(s) and having one's spirit be so broken by external circumstance that one cannot even begin to speak. Our job, in times of struggle, is to wait until our anger passes. And then we can say to ourselves: okay, I feel silenced by this circumstance, but I can still communicate. Even someone who has no (literal) voice can still communicate.

When the suffering of a whole community is such that everyone feels crushed and broken (in today's language, we might say traumatized or suffering from trauma), that's when we reach the circumstance alluded to in Joseph's dream of the sheaves. All of our sheaves are "bowing down," all of our souls feel silenced. But if one person can find the capacity to speak, then everyone else's silencing is lessened. If one person can find the inner strength to speak, everyone else can be strengthened thereby.

Righteous people want to seek serenity or tranquility in this world (notes Rashi) -- that's natural; of course we want and need to seek our own sense of peace. (Without some degree of peace and equanimity, we can't persist in times of sorrow or suffering.) But seeking inner peace isn't enough. God urges us not just to rest in the satisfaction of trusting that everything will be fine in the future somehow. Instead, we need to work to arouse heavenly mercy. We need to cry out to God to bring a better world.

That's what I took from the Aish Kodesh this week. And maybe, because we're not living in the Warsaw Ghetto like he was -- we have power to act in the world in ways that he didn't have -- we need to do something more external than pleading with God for a better world. We need to turn our hands to bringing "heavenly mercy" into the world. We need to act to create a world of safety, a world where no one is ground down by injustice or prejudice or unethical behavior, a world where no one is silenced.

SLATE
A WALKING STICK OF BEEF JERKY

Elie Wiesel's Profound and Paradoxical Language of Silence

JOHN KELLY writes:[16]

[16] https://slate.com/human-interest/2016/07/elie-wiesel-s-profound-and-paradoxical-language-of-silence.html

Elie Wiesel, the Nobel prize–winning Holocaust survivor who died at 87, was a prolific author. He was an outspoken activist. He was a distinguished professor and lifelong student of long-standing cultural and religious traditions of storytelling.

Yet in a 2006 interview, Wiesel shared that when Orson Welles approached him about making a film adaptation of Night, his masterful autobiographical account of the Holocaust, he refused. He wrote silences between his words, he explained, and film left no room for those silences.

Silence was the paradoxical language Wiesel developed in complex ways throughout his work and life. "Never shall I forget that nocturnal silence," recalls his narrator and stand-in, Eliezer, in Night, "which deprived me, for all eternity, of the desire to live." Wiesel didn't speak to that nocturnal silence until 10 years after he was freed from Auschwitz. Writing and abandoning a 600-page thesis at the Sorbonne, he turned to a different form of testimony: journalism.

Why was he silent on the Holocaust? "I was afraid of language," Wiesel remarked. He needed to be sure he was using the right words. He described this groping, aching search for language in his preface to the 2006 translation of Night. His thinking here is worth a longer look:

Convinced that this period in history would be judged one day, I knew that I must bear witness. I also knew that, while I had many things to say, I did not have the words to say them. Painfully aware of my limitations, I watched helplessly as language became an obstacle. It became clear that it would be necessary to invent a new language. But how was one to rehabilitate and transform words betrayed and perverted by the enemy? Hunger—thirst—fear—transport—selection—fire—chimney: these words all have intrinsic meaning, but in those times, they meant something else. Writing in my mother tongue—at that point close to extinction—I would pause at every sentence and start over and over again. I would conjure up other verbs, other images, other silent cries. It still was not right. But what exactly was "it"? "It" was something elusive, darkly shrouded for fear of being usurped, profaned.

Wiesel pushed on, and "trusted the silence that envelops and transcends words." He drafted a nearly 900-page literary memoir in Yiddish: Un di Velt Hot Geshvign, or And the World Remained Silent. It was edited down and

published in 1956, further pared to just over 100 trenchant pages in its subsequent French and English translations as Night. This work was his creative core; the rest of those silenced pages, the rest of his corpus, radiated outward like tree rings and talmudic commentary in his future writing.

But what was this strange and mystical enveloping, transcending silence Wiesel spoke of? For one, it's the silence of the victims. The Holocaust had silenced his language, culture, history, family, faith, identity—the lives of more than 6 million Jews.

It's also the silence of the ineffable. No words can ever properly articulate the Holocaust: It "cannot be described, it cannot be communicated, it is unexplainable," Wiesel said. "To me it is a mystical event. I have the feeling almost of sin when I speak about it." The Holocaust's truth lies beyond language, a reality accessed only through direct, first-hand experience.

And it is the silence of disbelief. It's our loss of words when we can't fathom an evil that so defies imagination or understanding. It's the silence of denial, as the Nazis tried to keep the Holocaust a state secret. It's the silence of indifference: "How was it possible that men, women, and children were being burned and that the world kept silent?" Eliezer wonders in Night. We don't have an answer to this urgent question. We only have silence.

Wiesel's silence is also cosmic silence. Wiesel grappled with how God could do or say nothing in the face of such suffering. For him, this silence demanded we protest, mock, and deny God. In speaking out against God, we speak up for humanity, refusing to be silenced by despair and destruction, refusing to remain silent about iniquities and injustices. In Night, Wiesel at one point defies his Yom Kippur fast—and more: "There was no longer reason for me to fast. I no longer accepted God's silence." According to Wiesel's complicated theology, this protestation ultimately affirms God in spite of God. A voice transcends the silence, in spite of the silence.

Wiesel even understood silence as its own form of action. As he painted it for the American Academy of Achievement:

You can be a silent witness, which means silence itself can become a way of communication. There is so much in silence. There is an archeology of silence. There is a geography of silence. There is a theology of silence. There is a history of silence. Silence is universal and you can work within it, within its own parameters and its own context, and make that silence into a testimony.

Job was silent after he lost his children and everything, his fortune, and his health. Job, for seven days and seven nights he was silent, and his three friends who came to visit him were also silent. That must have been a powerful silence, a brilliant silence.

Simon Sibelman, in his sweeping Silence in the Novels of Elie Wiesel, concludes Wiesel's silence possesses an "innate positive ontology": Emerging from the silencing devastation of the Holocaust is a regenerative and redemptive silence. Sibelman's metaphysics can be as daunting as Wiesel's mysticism, but we can feel the effects of this silence where it matters most: in his actual text.

Sibelman directs us to ways Wiesel uses silence as a literary technique, like a musician building a melody as much on rests as on notes. Consider this momentous passage in Night, when Eliezer, watching a child slowly die by hanging one day in camp, overhears a fellow observer:

Behind me, I heard the same man asking:

"For God's sake, where is God?"

And from within me, I heard a voice answer:

"Where He is? This is where—hanging here from these gallows…"

That night, the soup tasted of corpses.

Wiesel's diction is sparing and telegraphic but still conjures up ghastly images and provocative ideas in its terseness. He frequently pauses with punctuation, as if giving us time to catch our breath or compelling us to listen closely to the diastole and systole of each syllable. His lines are short and end-stopped, or suddenly break off to leave entire philosophies unsaid in the chasm of ellipsis. Wiesel's prose becomes poetry, disclosing meaning as much through absence as through presence, as much through silence as through sound.

And finally, we can see how Wiesel develops his rich language of silence by the many ways he uses the word silence. Sticking with his seminal Night, silence acts a character who speaks many lines throughout the story. We watch families share final meals in silence. We hear mothers and children cry themselves into silence in cattle cars. We observe men avoid (or survive) beatings by staying silent. We witness Nazi officers tell their prisoners to be silent. We watch wise fathers fall silent, unable to answer their sons' questions. Night is described as silent. Death is described as silent. Silence is

heavy. Silence is oppressive. Silence is defiant. Silence is indifferent. God is silent. The sky, watching over all the world and the ashes of the Holocaust's too many victims, is silent.

Wiesel's language of silence is loud and restive, embracing complex and often contradictory forces. But in the end, Wiesel's refusal to be silent—on the Holocaust, on oppression and suffering, on the Jewish experience, on the human experience—made a sublime music, a lasting art, out of silence. On a particularly bleak evening in Night, one of Eliezer's fellow prisoners manages to make some final music on his beloved violin. "He was playing a fragment of a Beethoven concerto," he writes. "Never before had I heard such a beautiful sound. In such silence."