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The Nazir and the Priest
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Among the many laws of Parshat Naso is the fascinating law of Nezirut. The Nazir is enjoined from cutting their hair, touching a corpse, and consuming grape products. As described in the Torah, the Nazir is holy during their Nezirut period. At the end of their Nezirut period, the Nazir must go to the temple, shave their head, and offer sacrifices. The concept of Nazir is subject to a well-known debate in the Talmud: is a Nazir praiseworthy, on account of their holiness, or is the Nazir a sinner, for abstaining from what is permitted? Whatever the answer may be, it is clear that the conception of the Nazir is understood by Talmudic sages in different ways. A fascinating take on the Nazir is displayed in another well-known, yet less studied, passage in the Talmud. Embedded in the text is a confluence of content and form, and each enriches the other to achieve a creative dynamic. This text bears a meditation on Nezirut, and in order to uncover it, one must mine the literary fabric of the story. It must be stressed that the meaning of the text exists beyond the text, and therefore the analysis should be considered fundamentally speculative. However, even the attempt to extract meaning from the text is itself a noble task.

The Talmud (Nedarim 9b and Nazir 4b) records the following story:

Shimon Ha-Tzadik said: Only once (ehad) in my life have I eaten of the trespass-offering brought by an impure Nazir. On one (ahat) occasion one man (ehad) who was a Nazir came from the South country, and I saw that he had beautiful eyes, was of handsome appearance, and with thick locks of hair symmetrically arranged. I said to him: “My son (beni), why did you see [it fitting] to destroy (le-hashhit) this beautiful hair of yours?”

He replied: “I was a shepherd for my father in my town (ro’eh...le-abba be-iri). [Once] I went to draw water from a well, gazed upon my reflection in the water, whereupon my evil desires rushed (pahaz) upon me and sought to drive me from the world (olam). But I said unto it [my lust]: ‘Wicked thing (rasha)! Why do you vaunt yourself in a world (olam) that is not yours, with one who is destined to become worms and dust? [I swear by] the temple service (ha-avodah) that I will shave you off (agalehakha) for the sake of Heaven (shamayim)!”

I immediately arose and kissed his head, saying: “My son (beni), may there be many Nazirs such as you in Israel! Of you the scripture says, ‘when either a man or a woman shall separate themselves to vow a vow of a nazirite, to separate themselves unto the Lord.’”

Browsing the contents of this story yields a fairly straightforward message. Shimon Ha-Tzadik, who lived at the end of the second temple period, tells a story of a Nazir who nearly falls to the temptations of his heart, but heroically recoils from them and consequently dedicates his life to God through the medium of the radical Nazir laws. The Nazir is accepted by Shimon Ha-Tzadik as commendable and is in fact the only authentic Nazir among those who had broken the Nezirut law of not touching a corpse, according to Shimon Ha-Tzadik’s testimony. However, this straightforward reading does not rely on the literary content of the passage. This story has deeper levels of meaning that can be discovered only by perusing and analyzing its literary content.

The legend opens with a threefold mention of the word ehad/ahat, literally “one” – Shimon Ha-Tzadik ate only one sacrifice once from one Nazir. This introduction has two
purposes: it connotes added emphasis, as if to say: “pay attention – this is important!” But also, on a more fundamental plane, it highlights the uniqueness of this specific Nazir and the specific reason why Shimon Ha- Tzadik, a priest, partook of his sacrifice. *Ehad/ahat* can be rendered “unique,” meaning that this particular Nazir exemplifies the true, authentic meaning of the Nazir typology. Why exactly is this Nazir from the south the perfect example of a Nazir? What about his personal journey demonstrates the fact that he is a model that all other Nazirs should strive for?

The first step in answering this question lies in the first theme of the story. An interesting aspect of this passage is that Shimon Ha- Tzadik refers to the Nazir as *beni,* “my son.” This is a common term of endearment, but Shimon Ha- Tzadik says it twice (one of the only two instances in the Talmud of the term being used twice as a term of endearment from one person to another)—once when prompting the Nazir to tell his story, and once after hearing his story. Is it possible that calling the Nazir a son means more than just an informal sign of affection, and rather connotes a more familial bond? If we examine the story closely, we notice that in fact the Nazir’s spiritual awakening is precipitated by an uncomfortable confrontation with a lustful temptation which occurs as a result in helping his father, by being “a shepherd for [his] father in [his] town.” What emerges is a strong theme of familial relationships. The Nazir’s religious frustration is galvanized by his connection to his father and the task he is given by his father. Were it not for his father, the Nazir would not have confronted a religious crisis. Because of this, he is, in a sense, spiritually detached from his father. The first time Shimon Ha- Tzadik calls the Nazir his son perhaps does connote a term of endearment, but after the Nazir discloses his troubled relationship with his father, the second “my son” may mean that Shimon Ha- Tzadik has, in a sense, affirmed the Nazir’s actions and “adopted” him. What drives this message further is the kiss, an intimate act of affection. The theme of family already narrows the question of why this specific Nazir is special. The act of Shimon Ha- Tzadik’s “adoption” of this Nazir represents the adoption of the Nazir typology by the auspices of the priest typology. Specifically, the Nazir is subsumed by the category of the priest, and this specific story thus engenders a Nazir-as-priest-offshoot ideal, that the Nazir’s service and lifestyle mirrors that of a priest’s. Yet, the question has been narrowed and not answered—why does this Nazir represent the Nazir-as-priest ideal?

The answer is in the Nazir’s autobiographical account, specifically its literary structure and words. The word *olam,* world, is uttered twice. The first time the Nazir makes mention of a world is when his lust “sought to drive [him] from the world.” The world at this juncture means the life which one is supposed to live, namely the realms in which one can achieve religious excellence, were it not for sagaciousness and sinful intentions. The world, here, is the place where the Nazir wants to be in—a life of religious-spiritual potential. The second time it is used is exclusionary—a world that is not [*hashshiyon*],” one in which the Nazir’s body will “become worms and dust.” Accordingly, this world is meant for spiritual achievements, not for ephemeral aesthetics and worldly pleasures. The contrast is stark—a plan of existence of the spiritual, real, eternal, and holy, and that of the physical, fraud, temporary, and mundane. Additionally, the theme of the contrast between the superior religious and inferior aesthetic, manifests in the eventual demise of the Nazir’s beautiful appearance. The contrast is reiterated many times: deathly “worms and dust” and the unchanging sky, or “heaven,” which represents spiritual heights an individual can attain; the personification of the Nazir’s lust, and thus the bifurcation of the lustful aspect of humanly existence and its contra, the Nazir himself; and, of course, the Nazir’s luscious hair, which almost executes the Nazir (it “sought to drive [him] from the world”), and the opposing force of “destroying” (*le-hashshiyon*) his hair, as Shimon Ha- Tzadik calls it, ultimately bringing him to the temple, the center of religious potential. This, then, is the second, albeit more dominant, theme—the opposition of temporary, and thus sinful, aesthetics, and eternal, and thus ideal, religiosity.

The most fascinating example of this theme is the contrast between the desert and water. The Nazir’s story is set in the south, a dry desert, and he comes upon a well. Whereas the desert is barren, devoid of beautiful icons and buildings, and is more or less unchanging and unchangeable (the southern desert is one of the more difficult locations in Israel to settle and cultivate), the well reflects the beautiful image of the Nazir’s ever-growing hair. Furthermore, water will quench his thirst and support his physical health, but only temporarily, yet it is that very water which almost drove this Nazir to sin by reflecting his beauty. Although in Talmudic literature water usually represents the life-giving vitality of all things spiritual, here it represents the negative of all things positive. (There is even no mention of ritual immersion, which occurs at the end of the purification process of an impure Nazir—a glaring omission, which only emphasizes the water-as-sin idea.) Taken in this sense, water symbolizes the physical, temporal, aesthetic plane, and the desert the non-physical and perpetual plane.

The imagery of water-as-sin (in the ephemeral and aesthetic sense) is not only explicitly mentioned—there is a powerful
The Nazir proclaims that his personified lust “rushed upon [him] and sought to drive [him] from the world.” The word for “rushed” is pahaz. This is the only instance in Talmudic literature where pahaz is used as a verb. Its presence harkens back, as a sort of leitwort, a key word, to the only other time it is used as a verb – Yaakov’s curse of Reuven’s licentious behavior with his father’s concubine: “you hurried like water (pahaz ka-mayim), you shall excel no longer; for when you mounted your father’s bed, you brought disgrace—my couch he mounted!” (Genesis 49:4). Reuven’s temperament, or more precisely his lustful temperament, is likened to water. This contrast, then can be summarized in the following way. There is a realm associated with the words: water; beautiful hair; aesthetic quality; physical life; temporal/worm; eventual death; finite; and impurity. There is an alternative realm that is associated with the words: desert; baldness; lack of aesthetics; spiritual life; constancy; transcend death; eternal; and holiness.

The allusion to Reuven’s action serves another purpose. Reuven violated the sacred father-son relationship by engaging in an illicit sexual encounter with his father’s concubine. As a result, Yaakov’s dying words reflected this broken relationship, cursing Reuven’s heated temperament. Thus, the reference to Yaakov’s curse presents a confluence of the two themes, that of familial relationships and the aesthetic-spiritual opposition. Just as Yaakov “disowned” Reuven because of his “water-like” lust – Reuven was stripped of the firstborn status (his birthright should have granted him respectable status, yet the tribe of Yehudah was given monarchical privilege, the Levites priestly status, and the tribe of Joseph a double portion of land) – similarly, the Nazir’s lust is linked with his relationship with his father, which climaxed in a “slippery” moment. The pahaz alai yitzri-pahaz ka-mayim equivalent is the culmination of a broken familial relationship precipitated by a salacious experience. Shimon Ha-Tzadik then becomes the spiritual father of the recently “orphaned” Nazir.

Yet, it is still unclear as to why the Nazir’s struggle with his temptations leads to his spiritual adoption by Shimon Ha-Tzadik. The answer in full finally reveals itself in the clever, intentional use of a few words. Shimon Ha-Tzadik prompts the Nazir’s story by asking him why he decided “to destroy” (je-hashhit) his hair, yet the Nazir declares that he is “shaving it off” (agalehakha) – this Nazir’s intent is not a reckless destruction of his beauty, which is described as the most salient of features noticed by Shimon Ha-Tzadik (it is a much fuller description than that of his eyes and appearance), but rather a calculated effort to shave it off for God. The Nazir seeks not to obliterate the passing moment, a moment that he instantly regrets and presumably wishes to obliterate; his intent is that of joining the temporary, illusory – his beautiful locks – with the eternal, the temple. The Nazir’s heroic recoiling from the lustful act is pronounced by a swear which is indicative of this notion. There are many expressions of swears in Talmudic literature, and the one employed here is ha-avodah, which literally means “[by] the temple service.” Indeed, the Nazir pledges his beauty as a pseudo-offering in the temple. Not only does the Nazir come to the temple to sacrifice an animal as any Israelite would, but also actively deems his hair as a sacrifice! The Nazir channels his beauty for the sake of heaven.

The Nazir’s transvaluation receives fuller attention in the act of bringing a trespass-offering. This sacrifice is offered when a Nazir is defiled by a dead body. However, in this story, there is no mention of contact with a corpse. Textually, there is a death mentioned – the Nazir’s own death. His personified lust aimed to “drive [him] from the world,” or in simpler terms, to spiritually kill him, to cause him to become the Jewish Narcissus. It is possible that on the textual level, the death that the Nazir encountered was not only physical, but also metaphorical. This Nazir was defiled by his anthropomorphized desires, the desires that sought to kill his spiritual being. Touching a corpse means a physical encounter with human demise. The Nazir encountered his own demise, albeit spiritual. In order to correct this death potential, the Nazir decided to transcend the temporary plane of beauty, his symmetrical locks, by adding it to the eternal – heaven – in the temple. He does this out of a creative impulse, to dedicate his hair to heaven thereby demonstrating his religious audacity to join his finite essence, his hair, with the infinite.

The last piece of the puzzle is the structure of the story. Shimon Ha-Tzadik, a priest, tells a story which begins in the temple on the temple mount. The autobiographical interlude of the Nazir’s spiritual transformation describes a story that takes place in a desert, and subsequently the text returns to the temple. There are three distinct units, or to be precise, there are bookends, and the story itself is almost chiasitic. The frame serves to put the autobiography into context. Shimon Ha-Tzadik’s “adoption” of the Nazir is a microcosm of the typology of the priest, situated in the temple, “adopting” the Nazir typology. It is as if to say that this Nazir story demonstrates a specific Nazir typology which should be viewed as an offshoot of the priest typology. To put it bluntly, this Nazir attained honorary priestly status.

Anchoring the Nazir’s autobiography in the temple mount frame imparts the message that whereas the divine service, avodah, of the priest is confined to the temple, the divine
service of the Nazir is in the world in general. The priest stands at the particular Jewish axis mundi, where heaven and earth meet, and attempts to join in the ephemeral with the spiritual, bringing spiritual bounty down to the earth. This Nazir does exactly that – he strives to connect the finite to the infinite – but his domain is not that of the temple. The Nazir’s priestly “temple service” is accomplished even by a shepherd (a typology that the Talmudic sages generally did not view with favor),

digital even in the desert – regular, banal, day-to-day life. Shimon Ha-Tzadik recognizes the affinity between the priestly enterprise and this Nazir’s religious enlightenment and thus appropriates the Nazir paradigm, in this passage, as a priestly proxy. 

To return to the original question: when Shimon highlights the importance of this Talmudic story with the threefold mention of ebhad/ahat and says that this is the only true fulfillment of the Nazir paradigm, he does not mean that no one else benefited from Nazirite status, but rather that this specific Nazir fully recognized the goal of Nazirite status. Shimon Ha-Tzadik is advancing the agenda that the telos of Nazirite vows is not ascetic, but transformative. The Nazir’s ascetic practices are not the goal, but the medium to achieve religious transformation. This specific Nazir did exactly that – he took his shaved hair and offered it as a sacrifice to the eternal realm. The telos of the Nazir’s vows, according to Shimon Ha-Tzadik, is of priestly quality. Just as the priest delves into the fleshy, bloody corpse of an animal and raises it to a spiritual level, so too this Nazir gave his physical beauty for God. The Nazir is but the internal reflection of the priest’s divine service – the immanent individual, not external animal, undergoes a religious transformation. In fact, the Nazir’s father may be symbolic, referring not to his physical father but to mundane life – the Nazir is driven from the banality of neutral life, ro’eh...le-

abba be-iri, to one infused with religious value, sub specie aeternitatis. 

Just as the identity of his father is irrelevant and serves the literary function of contributing to the familial theme, so too the lack of the Nazir’s name is telling. He is described many ways – a man, a Nazir, a shepherd, “my son,” from the south, has beautiful hair, a nice appearance, pretty eyes – but he does not have a name. Names denote specificity, and the lack of a name expresses universality. This story didn’t happen – it can always happen. The lesson of this Talmudic passage is that the religious transformation that occurs when one sublimates ephemeral desires towards atemporal existence is a priestly endeavor that can be attained anywhere. In this sense, anyone who achieves such a religious enlightenment can be this Nazir: anyone from the “south,” the world, who has a broken relationship with their “father,” stunted spiritual habitation, using their own “beautiful hair,” whatever it may be, can do “temple service” outside the temple. For non-priests, the world is a potential temple. This Nazir realizes this and actualizes his potential.

Reading quickly through this Talmudic passage can benefit the reader with a simple message – don’t be a Jewish equivalent of Narcissus. However, a close textual reading of the literary aspects of the text yields a much deeper and more profound message. Religious sublimation, the telos of the Nazirite paradigm, conferring honorary priestly status to a non-priest – these are the messages that emerge after dissecting the form of the story, greatly enhancing, and adding to, the content. Perhaps using the tools used in this paper to understand the Talmudic text may yet inspire the reader to make a Nazirite pledge, if only metaphorical.

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1 Taanit 11a.
2 See two examples in Beitzah 15b.
3 The other instance is in Sotah 20a.
4 There are many parallels to this Talmudic passage from the ancient Greek myth of Narcissus preserved in Ovid’s writings. Both are beautiful men who look at their respective reflections and are tempted by their lustful passions. This has been noted by scholars and religious figures alike. For example, see Amram Tropper, “The Narrative of the Narcissistic Nazirite,” TheGemara.com (October 28, 2015), and Joseph B. Soloveitchik, Halakhic Morality: Essays on Ethics and Masorah (Jerusalem: Maggid Books, 2017), 91.
5 For example, see Bava Kamma 82a.
6 The New JPS translation renders pahaz as a noun (as per Rashi and Rashbam) – “unstable” – but this misses the action orientation. I replaced it with “hurried” as per Ibn Ezra, ad. loc.: “because you hurried (pahazta) like water.”
8 Freud might interrupt this discussion and quip that this is an example of the link between the Thanatos and Eros instincts.
9 For example, see Bava Metzia 5b: “Stam ro-eh pasul,” that a shepherd is deemed unfit to be a witness by default.
10 This is, in fact, not completely a novelty. There is a biblical juxtaposition of the Nazir passage (Numbers 6:1-21) and the priestly benediction (ibid. 6:22-27). Furthermore, the three main prohibitions of the Nazir, wine consumption (ibid. 6:3-4), cutting hair (ibid. 6:5), and touching corpses (ibid. 6:6) parallel the priest’s prohibitions of drinking wine upon
entering the temple (Leviticus 10:9), cutting hair as a form of mourning (ibid. 21:5), and touching non-relative corpses (ibid. 21:1-4). On the biblical link between the priest and the Nazir, see Israel Knohl, “The Concept of Kedusha (Sanctity),” TheTorah.com (April 23, 2014).

The parallel tradition preserved in the Talmud Yerushalmi makes minimal mention of his Nazirite status, and Shimon Ha-Tzadik commends him, not for being the ideal Nazir, but generally for fulfilling God’s will. This in fact emphasizes the universality of the Bavli’s version.

Shimon Ha-Tzadik is not told that he is from the south – it must be a literary flourish intended as an allegory. It is possible to argue that the Nazir represents the rectification of Reuven. The firstborn status in the ancient world was of prime importance – the firstborns were generally the priests who served in a given temple. By birthright Reuven should have been the patriarch of the priestly tribe, but his status was stripped from him as a result of the sexual encounter with his father’s concubine, and the status was conferred (ultimately) to the Levites. Yaakov departs the world still with a broken relationship with Reuven, as seen from his dying words to Reuven. The shepherd, like Reuven, has a broken relationship with his father, but that is not the end of the story. The shepherd becomes a Nazir, thus assuming a semi-priestly status. The Nazir, in this sense, revitalizes the lost priestly status and forms a new, healthy metaphorical father-son relationship.

For a similar reading, albeit not heavily rooted in textual analysis, see Halakhic Morality, 90-92. For a different reading, that the key to understanding the Nazir’s transformation is the concept of dialogue, see Tzvi Sinensky, “Narcissus and the Nazir,” The Lehrhaus, (September 14, 2017). For a historical explanation of the development of this Talmudic text, see Amram Tropper, Simeon the Righteous in Rabbinic Literature: A Legend Reinvented (Leiden: Brill Publishers, 2013), 83-95.

Shared Leadership: A Response to Ezra Schwartz and Nathaniel Helfgot

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In the summer of 1993, Dr. Aaron Kirschenbaum wrote a eulogy for the concept of the local rabbi in Tradition. He bemoaned that “the telephone has done much to undo the role and stature of the old time mara de-atra.” The impact of the telephone is multiplied by the new development of halakhic WhatsApp groups for local rabbis to ask questions of the gedolim of Modern Orthodoxy. We need to move back to a time when the authority for answering even the most complex halakhic questions resided with the local rabbi. More healthy than centralization are cooperation and collaboration.

Rabbis Ezra Schwartz and Nathaniel Helfgot, in their recent public conversation about the nature of the halakhic decision-making process within the Modern Orthodox community, have foregrounded a deep question that has many implications. Rabbi Schwartz celebrates the centralization around a few major poskim who helped to guide our community with great sensitivity through the darkest times of the pandemic. In his description of the beauty of the WhatsApp groups, Rabbi Schwartz writes, “Every rabbi could question the approach the posek took and ask for clarification. The conversation that ensued was animated and fruitful.” 1 We should seek to build that “animated and fruitful” conversation in as many settings as possible.

Rabbi Helfgot offers an important critique of centralization, noting that “it can undercut local authority and homogenize halakhic practices.” However, he also notes the need for “broad shoulders” that can guide the community in certain areas, as “in the early stages of the pandemic and lockdown, many difficult and challenging questions emerged that required the halakhic expertise of gedolei ha-poskim.”

I agree with Rabbi Helfgot’s assessment that different kinds of questions exist. However, even in those life-and-death situations, the job of the gadol is to help guide the local rabbi, not simply to decide the matter at hand. It is a mistake to imagine that a great rabbi in New York or Jerusalem can pasken for every rabbi around the world. Those who have
been blessed with the opportunity to sit in a *Beit Midrash* and learn for many years have a responsibility to share that knowledge with others. They must also give guidelines and frameworks for the local rabbi. In turn, the local rabbi has a responsibility to interpret that invaluable learning and apply it to the unique community from which the question arises.

The debate between centralization on the one hand and the authority of the local rabbi on the other can be seen in the following two Tannaitic texts. The first pushes us toward uniform practice. The *Sifrei in Devarim (Piskah 96, Parashat Re'eh)* writes: “Lo titgodedu: do not make [small] agudot, rather you should all be in one [large] agudah.” While the Rabbis may encourage freedom of enquiry in general, there is a strong need to foster a sense of uniformity in practice. The second text (*Yevamot 14a*) promotes more localized decision-making:

> In the place of Rabbi Eliezer, they would cut down trees [on Shabbat] to prepare charcoal to fashion iron tools [with which to circumcise a boy on Shabbat]. In the place of Rabbi Yosi ha-Galili they would eat poultry meat in milk.

Although their positions diverged from the vast majority of the Tannaim, R. Eliezer and R. Yosi ha-Galili commanded authority in their local towns. Some communities are driven by a sense that conformity in practice—and the prohibition of *lo titgodedu*—is essential. However, there are groups for whom diversity in practice is seen as a feature and not a bug.

In March of 1834, Rabbi Akiva Eiger wrote a letter to his son about the publication of his own *teshuvot*. He did not want to call them “*pesakim*” because he did not want people to falsely assume that his answer was the conclusion on any matter of halakhah. He then expressed the following concern: “That people might come to rely on me without their own evaluation in a time of need based on their own analysis of the *gemara* and *poskim.*”

Rav Moshe Feinstein repeats this same ethos in his introduction to the first volume of *Igrot Moshe*. After quoting Rabbi Akiva Eiger’s hesitancy, Rav Moshe builds on the *baraita* about R. Eliezer and R. Yosi ha-Galili to explain why he felt the need to publish his own responsa. Rav Moshe and Rabbi Akiva Eiger both advanced the idea that every rabbi must investigate each issue based on his own understanding of the relevant texts, the parameters of the question, and the local circumstances that contextualize the question.

If we map this debate onto the contemporary landscape, we see a similar phenomenon regarding how halakhic decisions ought to be made for the Modern Orthodox community. Some participants in these debates are compelled by the notion that one or more individuals should be responsible for making key decisions that will influence the future of the community, and that we should foster uniformity. Others are wary of investing too much power in just a few individuals, and they locate the seat of authority in the local rabbi. The risks of coalescing power in the hands of a small group are too high. In addition, even if those at the center are beyond reproach—as many of these rabbis indeed are—there is a fundamental halakhic flaw in allowing a *gadol* who does not know the person asking the question to offer the final answer.

I propose the following maxim to guide communities: *ein she’eilah ela sho’el*—“there is no abstract question; there are only individual questioners.” When a great *talmid hakham*, with vast expertise in halakhah, is asked an abstract question about an issue that impacts every Jewish community, there is a real risk that people will ultimately make substantive halakhic errors in real life. That is why *she’ilot u-teshuvot* are designed to respond to the needs of the person who is asking the question.

When rabbis try to answer questions about relying on a non-Jew to press an elevator button for someone on Shabbat, for instance, and they don’t know if the individual lives on the second floor or the twenty-second floor, they simply cannot give the right answer. When people try to address complex *niddah* questions without knowledge of the relationship between husband and wife, terrible damage can be done.

The same is true, and perhaps even amplified, when trying to answer major communal questions about pandemic life. For some communities, hopping on Zoom and operating without a formal halakhic *minyan* may be the best and more appropriate option. For others, who may have people in an older generation for whom *Zoom* is complicated and for whom *kaddish* has a different pull, the answer simply cannot be the same.

When trying to answer the most difficult questions of life and death, rabbis simply cannot *pasken* without all of the facts. Of course, experts can and must give guidelines about ventilator triage, but no one can advise a doctor in a specific case if they do not have the medical facts at their fingertips.

The rabbinic WhatsApp groups that have proliferated in many communities meaningfully create a framework for conversation, debate, and analysis from multiple...
perspectives. One of the beautiful aspects of the internet and these communication tools is the democratization of knowledge. Hearing the pesak of a gadol often helps the local rabbi make an informed decision for their own community. What marks a true gadol is their understanding that offering their own approach is the beginning of a conversation and not the end.

We should cherish the “animated and fruitful” back and forth, the shakla ve-tarya, of these conversations. Instant global communication tears down boundaries and gives people access to great minds and great thinkers. We should celebrate that revolution and share the deep sensitivity, understanding, and willingness to listen to our great poskim.

The digital and printed sefarim that emerged from the WhatsApp groups are an amazing contribution borne out of the darkness of this time. However, another publication I can envision may be an even more powerful model: what if someone copied the actual shakla ve-tarya among the rabbis from the WhatsApp groups and published the process by which these gedolim arrived at their answers? It would, of course, be necessary to allow for the privacy of both the posek and the rabbi so that all involved could continue to feel safe to speak freely about the issue at hand. I have no doubt that there were instances in which the posek in the group changed their mind in response to a particular insight, text, or question that he did not anticipate—and that is a sign of true greatness.

Perhaps the most important lesson for future generations is that, when the Jewish community faces great need, rabbis all over the world—some in large pulpits, some in small shuls, some on campuses, some in classrooms, some working in hospitals, and some who are blessed to sit in yeshiva—will engage in life-saving debates for the sake of klal yisrael.

1 Another feature that Rabbi Schwartz implicitly celebrates is that these poskim are from within the Modern Orthodox community. That is certainly a welcome development and something that we should continue to foster.

2 See also Yevamot 13b-14a regarding the debates of Beit Shammai and Beit Hillel. The sugya begins with a question as to why the Mishnah itself set up a system whereby the Megillah can be read on multiple days of the month (see Ramban’s introduction to his commentary on Megillah for an important analysis of this issue). See also Ramban, Hilkhot Avoda Zara 12:14; Rema, Orah Hayyim 493:3.

3 This baraita also appears in Shabbat 130a and Hullin 116a.

4 See Shu”t R. Akiva Eiger, p. 1 (in some editions p. 2).

5 See also Teshuvot ha-Rashba 1:253, 1:1190; Rema, Hoshen Mishpat 25:2.

6 There is a deeper question of the celebration of autonomy in the contemporary world to such an extent that for many, the authority only ever lives inside the individual. This essay assumes that people are asking halakhic questions, an assertion that may not always be true.
“Justice has not Been Done”: Officer Immunity and Accountability in Jewish Law (Part 1)
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The murder of George Floyd by a police officer in May of last year has awakened many white Jews to the experiences Black people and other people of color have faced when encountering the police. Many studies have documented that police are more likely to stop Black people, arrest them, use force against them, and kill them. Police using unnecessary force—especially against Black people—are unlikely to be held accountable. There are precious few examples of police officers spending time in prison for killing white people, let alone Black people. Even officers facing charges are rarely indited, let alone convicted.

Those who do face charges are given wide latitude to claim self-defense, even when it is likely that their biases led them into their confrontations to begin with. For example, the confrontation leading to Michael Brown’s death at the hands of Darren Wilson began when Wilson stopped Brown for the rarely enforced crime of jaywalking. The criteria employed by courts is whether another reasonable officer would have used force in their given situation, not whether a reasonable officer could have avoided the situation to begin with through de-escalation or other means.

Since May, many Jews have joined in the numerous protests against police violence and racism. Those participating have cited Tikkun Olam and "tzedek tzedek tirdof," as well as the Torah’s many commands about protecting the stranger among other reasons for participating as Jews. As admirable as these motivations may be, I believe that halakhic sources can make a unique intellectual contribution to Jewish thought about these issues.

Although the organized police force is a modern development, there is one figure that played similar functions in classic Jewish texts, the sheliah Beit Din, literally the agent of the court. This court officer was charged with administering lashes to violators of certain Biblical commandments. He was also sent to enforce monetary rulings, collect debts, return stolen property, serve divorce papers, and bring recalcitrant litigants to court. The court agent may have also been specially empowered to save someone being assaulted. Clearly, the court officer was permitted to employ force when necessary.

Before going further, I should mention that rabbinic literature does not align with any particular ideologies regarding the police. In a number of ways, rabbinic teachings regarding the authority of the court officer and his right to use force was anything but liberal.

Police reform advocates believe that the use of force must be proportional to the crime and/or situation. For them, it is unreasonable to use force against suspects who are stealing or violating property rights without creating any risk of bodily harm. Talmudic sources, however, place no such limitation on the use of force by court officers or civilians. Bava Kamma 27b tells the story of a man who owns a well in partnership, and uses his hoe to beat up his partner when the latter uses it on the former’s day. Rav Nahman responds to the story by saying that since the owner would not have been able to recoup all of his financial losses in court, he would have been permitted to beat his partner even a hundred times with his hoe. Rabbi Yosef ibn Habib, in his Nemukei Yosef, uses this story to prove that the court officer must also be empowered to use force, since he should have no less rights to use force than a civilian. That being the case, it appears to be taken for granted that there are no inherent limitations on the use of force in property disputes. A recalcitrant husband who refuses to grant his wife a divorce is beaten until he changes his mind, no matter how many blows it takes.

Similarly, talmudic sources accept that it is permitted to use violence against anyone who disrespects a court officer. The Babylonian sage Rav would flog anyone disrespecting a messenger of the rabbis. This prescription is echoed by the Jerusalem Talmud, and accepted by later halakhic authorities. Although it is unfortunately common for police officers to arrest people for insulting them, doing so is officially considered a violation of free speech. Needless to say, this acceptance of violence to protect the authority of court officers would not be included in any police reform proposals.

It would therefore be anachronistic to try to fit rabbinic attitudes towards the use of force into contemporary ideological categories. Furthermore, the rabbinic and halakhic sources I explore are not monolithic. For these reasons it is important to analyze these sources in their full depth.

In this paper, I will discuss two main issues:

1. De-escalation and the minimization of force. To what degree are law enforcement officers expected to de-escalate to accomplish their aims without employing violence. When they have no
choice but to use force, are they expected to keep that usage of force to a minimum? If and when they use unnecessary force, can they be held liable for damages? Is using unnecessary force justified by its ends?

2. **Immunity for causing damage, injury, and death.** What is the reason for such immunity and to what degree is it comparable in scope to the doctrine of qualified immunity? (This issue will be addressed in part 2, which will be published shortly after this part.)

This paper seeks to analyze the sources and differing classical rabbinic and halakhic voices regarding these and other questions. Examining and discussing them will hopefully ground and enrich Jewish discussion regarding these important issues.

**The Use of Force by the Court Officer: The Case of Bava Kamma 28a**

Does the court agent have an obligation to de-escalate the situation or accomplish his task with more minimal force when possible? Could his failure to de-escalate be held against him, even if the specific damage he did was unintentional? What if he had to use physical force but could have used less than he did? Most of the halakhic discussion surrounding the use of (non-deadly) force by court officers stems from Bava Kamma 27b-28a.

In order to properly understand the subtle arguments made by commentators and halakhic authorities, I quote the relevant sections and summarize them in depth. The context is the Gemara’s discussion of whether a person is allowed to take the law into their own hands. For example, if a person steals, can the victim use physical force to retrieve their possessions, or do they need to take the other party to court?

The discussion starts off with a story on Bava Kamma 27b, in which two partners share a well. As part of their partnership, they alternate days on which they draw from a well. One day, the partner whose day it was finds the other using it. The partner entitled to that day beats the other with a hoe. Afterwards, that partner comes to the Amora Rav Nahman to ask whether he had done the right thing by taking the law into his own hands. Rav Nahman responds that he could have even beaten the other partner a hundred times for taking his day. Rav Nahman further explains that everyone agrees that if waiting to take the other party to court would entail a tangible loss (aside from the time spent), a person definitely has the right to take the law into their own hands. 29

This story serves as a lead-in for a general debate about the right to take the law into one’s own hands. According to Rav Yehudah, one is not allowed to take the law into their own hands unless one suffers a tangible loss by going through the legal process. Rav Nahman, on the other hand, argues that one is allowed to execute justice themselves since going to court to extract any money is a cumbersome process.

In the course of this discussion, 30 the Gemara attempts to prove that one is NOT allowed to execute justice on their own:

Here is a breakdown of the stages of this talmudic discussion:

1. The Midrash on Deuteronomy 25:12 teaches that a woman defending her husband by grabbing the assailant’s genitals pays money. 31 This seems to apply even if the woman had no other means to save her husband. 32

2. (Defense): No, the Midrash only makes her pay when she could have saved her husband by other means. If she had no other way to save her husband she would have been exempt.

3. (Challenge to this resolution): The Midrash on Deuteronomy 25:11 exempts a court officer from having to pay damages. If it were really the case that the woman is exempt when she has no other way to save her husband, why didn’t the Midrash make this distinction as well?

4. (Resolution): The Midrash that exempts the court officer is also coming to exempt the woman when she has no other way to save her husband. When faced with such a situation, she is legally considered a court officer and thus exempt as well. 33

Four themes relevant to police bias and violence emerge from the commentators’ discussions of this passage: The obligation to minimize force, that unnecessary force is incongruous with justice, the degree to which law enforcement officers are expected to remain level headed, and the question of whether officers have a greater right to use unnecessary force than regular citizens.

**A General Obligation to Minimize Force**

Very often, police have no choice but to use force to detain a subject or prevent a crime. However, police also
frequently end up using more force than necessary. This issue leads us to an ambiguity in the talmudic passage we studied, as it never specifies whether a person using justified force is still obligated to minimize it. Rabbeinu Asher (Rosh)\(^4^4\) makes this principle explicit. He argues that even someone justifiably using force has an obligation to minimize it. Rosh supports this assertion from Sanhedrin 74a regarding the right to kill a person who is trying to kill another (Rodef). Rabbi Yonatan ben Shaul there posits that even a person saving another from a Rodef can only murder as a last resort. If they can disarm the Rodef by attacking their limbs or use other means of non-deadly force they are obligated to do so. Should they kill the Rodef anyway, they are guilty of murder and even eligible for the death penalty.\(^3^5\)

Rosh argues that if one is obligated to minimize the use of force even to save another’s life, one should certainly be obligated to minimize their use of force in less deadly scenarios. That being the case, someone who must strike a person to save another is not allowed to hit the perpetrator any more than absolutely necessary. If they do so they would be liable.\(^3^6\) Although Rosh in this passage does not connect this liability for excessive force to the court officer, he offers an important principle in assessing the use of force.

**Executing Justice Through Unnecessary Force is Not Justice**

Rashi’s explanations of the passage offer important food for thought regarding unnecessary force and the execution of justice.\(^3^7\)

Regarding the Gemara’s conclusion, Rashi comments that “she did not execute justice.”\(^3^8\) This terse line requires explication to appreciate his understanding of the talmudic discussion, as well as its philosophical and legal implications.

In the Gemara’s conclusion, it is indeed permitted for a person to take the law into their own hands; the Torah’s case is one in which the woman could have used other means to save her husband. This answer begs the question of why the fact that she could have used other means should make a difference. Clearly, the woman saw her husband being assaulted, and she therefore had to take some sort of action. That being the case, if the woman is able to take the law into her own hands, she should be able to save her husband by any means, even if such means is not inherently necessary.

Rashi therefore comes to explain that the woman’s use of unnecessary force means that she did not actually execute justice. The ability to take the law into one’s own hands presumes that the person employing force is executing justice, albeit outside of court. However, if and when someone uses unnecessary force, it means that the person is not, in actuality, executing justice.

Rashi also hints at a larger message about justice. Executing justice does not merely require the achievement of a “just” outcome. Executing justice requires acting justly, or acting in a way that furthers the cause of justice. A core stipulation of executing justice requires that any violence in its name be absolutely necessary. If a person employs unnecessary violence it by definition means that justice has not been executed. It can thus be said that using unnecessary force is, ipso facto, not considered an “act of justice.”\(^3^9\)\(^4^0\) The question of whether this same standard would apply to officers of the court, and not merely civilians taking the law into their own hands will be addressed in the next section.

**Police Officers Accountable for Bias Even When Under Duress**

While the murder of George Floyd prompted outrage and white awareness of police bias, most examples of police violence due to bias are not as explicit. Many of them are the result of police assessing people of color and their behaviors as more threatening than they would have had it been a white person.

For example, Tamir Rice was a 12 year-old boy playing with a toy gun. The police officer who shot him judged him to be a threat to human life in a matter of seconds, even though Rice was not pointing his gun at anyone in particular.\(^4^1\) Many activists noted that it is a common bias for Black children to be seen as being older (and more threatening) than they really are, a bias that is potentially deadly when held by a cop.\(^4^2\)

Philando Castile was driving with his family when he was pulled over by a cop. Castile, who had a gun license, informed the officer of such. The officer acted nervously, giving Castile contradictory instructions. Despite Castile’s attempt to comply, the officer shot him several times, killing him.\(^4^3\) When testifying in his jury trial, the officer stated that he became deathly afraid of Castile since he was able to smell marajuana. The officer said he felt that if Castile would smoke marajuana with his children in the car, he would think nothing about shooting him.\(^4^4\) Though difficult to prove in any individual case, it is doubtful that the officer would have felt that same sense of dread if the same facts were the case with a white father.\(^4^5\)

From these incidents and many others, it is evident that unnecessary police violence is often the result of implicit bias on the part of police officers. This implicit bias of unreasonable fear and suspicion of Black people prevents...
them from properly assessing the threats at hand and realizing that they can de-escalate. In many of these cases, such police bias is unconscious, as they may not “have a racist bone” in their body.\textsuperscript{46} Nonetheless, such ingrained perceptions, even if unintentional, have deadly implications.

The dangers of police violence resulting from fear-based racial bias should help us to appreciate \textit{Tosafot Ha-Rosh} on this passage.\textsuperscript{47} His comments relate to the stage in the Gemara where the Midrash excludes the court officer from liability. Since the Midrash is contrasting the court officer with the wife, the Gemara uses this distinction to argue against the woman being exempt should she have no other way to save her husband.

\textit{Tosafot Ha-Rosh} notes that the midrashic exclusion of the court officer seems to assume that the court officer should be exempt when the woman would be liable in an equivalent case. He therefore faces the implicit question that, if the woman and the court officer are treated the same according to the law, what is the midrashic exclusion of the court officer coming to do? For example, if the Torah (and by extension, the Midrash), is speaking about a case in which the woman is using unnecessary force, shouldn’t the Midrash’s exemption of the court officer be teaching us that the court officer is exempt even when he uses unnecessary force?

Although faced with this suggestion from the Gemara, \textit{Tosafot Ha-Rosh} cannot conceive that a court officer could possibly be exempt should he use unnecessary force. Instead, he writes, the Midrash’s exemption of the court officer must be speaking about a case in which he had no choice but to use physical force. The problem with this assumption is it does not seem to parallel the case it is being contrasted with. If the Torah’s case of the woman’s liability is one in which she would have been able to save her husband without grabbing the other man’s genitals, the equivalent case regarding the court officer is also one in which he could have accomplished his task without force but did so anyway. If so, the midrashic exemption of the court officer would teach that he should be exempt even when using unnecessary force.

\textit{Tosafot Ha-Rosh} answers that the case described in the Midrash is one in which there is no loss for going to court.\textsuperscript{48} \textit{Tosafot Ha-Rosh} describes a case in which the woman and the court officer respond to the same situation in different ways. The woman responds by using unnecessary force, while the court officer would only use force when absolutely necessary. Despite their differing reactions, the fact that they are responding to the same situation enables the Gemara to compare them. According to \textit{Tosafot Ha-Rosh}, the woman strikes her husband’s assailant without necessity “because she is distressed \textit{[bahulah]} by her husband being beaten, which is not the case with regard to the court officer.”\textsuperscript{49}

\textit{Tosafot Ha-Rosh}’s language is quite opaque. Why should the woman’s unnecessary force be considered parallel to the court officer’s use of necessary force? Why should the woman’s distress serve to differentiate them? I believe the best way to read this cryptic answer is that he is describing how the woman and the court officer react differently to the same situation.

According to \textit{Tosafot Ha-Rosh}, what the woman and the court officer share is the same situation in which a man is being beaten up but he can be saved with minimal force. In such a scenario, the woman is so distressed by seeing her husband being beaten that she overreacts and grabs the other man’s genitals even though she could have saved her husband by de-escalating the situation or stopping him in other ways. Although it is understandable, given the situation, for the woman to use excessive force in the heat of the moment, the woman is nonetheless considered liable.

The court officer, on the other hand, is expected to remain calm. His clear-headedness enables him to use minimal to no force. If he does end up using force, it is only because the situation has demanded it and he would have been able to save the victim without it. We, therefore, safely assume that because the officer is able to remain calm in the heat of the moment, he is able to keep any use of violence to a minimum.

\textit{Tosafot Ha-Rosh} recognizes that people in traumatic situations are capable if not likely to act more aggressively than would actually be necessary to an average observer. It is likely that, in the woman’s state of mind, there was no other way to save her husband but to take such an extreme action. On the other hand, trauma or distress is not considered a justifiable excuse for using more force than would actually be necessary.

We should also note \textit{Tosafot Ha-Rosh}’s presumption that the court agent would be clear-headed enough to avoid using unnecessary force. But what if that were not the case? Does the midrashic exclusion of the court officer teach that he is categorically excluded from having to pay for damages? Such a reading of \textit{Tosafot Ha-Rosh} is impossible in light of his words at the beginning of his comment, “Presumably the Torah only permits the court officer to use force when he is unable to save without it.” \textit{Tosafot Ha-Rosh}
is thus teaching that the court agent is exempt specifically when he acts according to this expectation that he only uses force when necessary. Otherwise, the court agent who acts violently due to excessive fear would indeed be held liable.

These legal principles are especially relevant to the topic of police bias and brutality. The idea that police must “make split second decisions” is basically a cliche at this point. Many officers also justify violence by claiming that they were “afraid for their lives.” This claim of fear and distress is frequently used to justify police shootings of Black men. Excessive fear and distress when confronting Black people cannot be used to protect officers from liability. The commentary of Tosafot Ha-Rosh suggests that, whether or not the officer handling the situation can control his biases and emotions, he is still responsible for them and should be held liable if he cannot. It also suggests that the standard for use of force and de-escalation should depend on how a trained and unbiased professional would react to and handle the situation.\(^5^0\)

Based on this reading of Tosafot Ha-Rosh, we can create the following legal standards for acceptable force by officers of the state: (1) An obligation to de-escalate and accomplish the task without physical force if possible; (2) Any force should be as minimal as possible while still enabling the officer to accomplish their task; (3) Force is only considered necessary if it would be viewed as such by a trained officer with no racial prejudice.

Is An Officer of the Law Liable for Using Excessive Force?
While Tosafot Ha-Rosh appears to assume that a court officer who uses unnecessary force should be liable, Nemukei Yosef\(^5^1\) appears to come closer to making this case directly. He connects the authority of the court officer to use force with Rav Nahman’s permission to strike a hundred blows in the well story. On the surface of the story, there is no indication that Rav Nahman’s allowance of force is limited in any way. However, Nemukei Yosef’s belief that unnecessary force is wrong leads him to read Rav Nahman’s permission of a hundred blows as applying only when the partner refuses to abdicate before the hundredth blow. Otherwise, Nemukei Yosef believes, there is no way Rav Nahman would give permission to someone who could have protected his rights without employing violence. Relating the story back to the court officer, Nemukei Yosef argues that if the partner is able to use such force for his own needs, a court officer should certainly be allowed to use such force against a person who refuses the court’s orders. It cannot be that a regular person should have a greater ability to use violence against a partner who refuses to desist than the court officer has to compel a person to accept a court ruling. Nemukei Yosef’s equation between court officer and civilian rights to use force would thus suggest that the court officer’s authority to use force is no more expansive than for the civilian. Just as the civilian can only use force when absolutely necessary, the same is true of the court officer.\(^5^2\)

The one medieval sage who explicitly argues for the right of a court officer to use unnecessary force is Rabbeinu Yeruham.\(^5^3\) Without giving a proof he asserts that a court officer has the right to use force against a person who refuses to abide by the court’s rulings. This right to violence applies even if the court officer could have accomplished his goals without using force.\(^5^4\)

Shulhan Arukh\(^5^5\) does not cite Rabbeinu Yeruham, while Rema\(^5^6\) does. However, he only quotes Rabbeinu Yeruham as saying that a court officer is allowed to strike someone who refuses to obey the court’s rulings. He does not bring up the issue of whether the court officer is able to use force even when he could have used nonviolent means to maintain adherence to the court.\(^5^7\)

Two latter-day rabbinical authorities who discuss this issue more specifically are R. Jacob ben Joseph Reischer (Shevu't Ya’akov) and R. Yisrael Issur ben Zev Wolf (Sha’ar Mishpat). In their respective responses to this issue, the two rabbis come from differing approaches to Bava Kamma 28a’s distinction between the woman and the court officer.

Shevu't Ya’akov\(^5^8\) responds to a case in which a court agent mercilessly beat a person who had been refusing the court’s orders. While the agent may have gone overboard, the manner in which he struck the recalcitrant person does not typically cause damages. Yet, in this particular case, the person who was beaten was injured and sued the court agent for damages.

In response, Shevu’t Ya’akov first points to Bava Kamma 28a. As noted previously, it cites the Midrash that differentiates between the woman and the court officer. Earlier, we raised the issue of how the Midrash is distinguishing between the two of them. The exclusion of the court officer from the verse about the woman would suggest that the court officer would be exempt in the exact same case in which the woman would be liable. If it is speaking about a case in which the woman could have saved her husband without violence (as per the conclusion in the Gemara), wouldn’t that mean that, under the same circumstances, the court officer would be exempt? Shevu’t Ya’akov initially agrees with this argument and posits that the court officer should indeed be exempt from liability even when he uses unnecessary force.\(^5^9\) Some use this initial assessment to cite Shevu’t Ya’akov as a source for the notion that the court
officer is exempt even when he uses violence unnecessarily. ⁶⁰

However, Shevut Ya’akov then cites Nemukei Yosef, whom he understands the way I suggested above, that even the court agent is liable for using unnecessary force, and notes that this understanding fits well with the conclusion of the Gemara’s discussion, which equates the woman with the court agent when she cannot save her husband otherwise. Afterwards, he raises the possibility that the Gemara’s exclusion of the court agent from liability may only be speaking about the payment for embarrassment. ⁶¹ Only for this payment would the agent be exempt for using unnecessary force, but he would remain liable for other damages. He closes out his discussion of this point by saying “ve-tzarikh iyun (it requires further investigation).” In other words, Shevut Ya’akov does not really conclude that the court agent should be exempt for using unnecessary force. He does conclude that the court agent in this particular case is exempt, but for a different reason. He argues that since the manner in which the agent struck the other does not normally cause bodily injury, the officer had no way to know that he was going to injure him, and thus should be exempt.

What emerges from Shevut Ya’akov’s responsum is that the officer is not necessarily given any greater license to use force than other people. It is only when the officer reasonably assumes that his force would not cause significant damage that he would be exempt. This should be differentiated from a case in which an officer knows that his action will injure another but does it anyway. That being the case, it is impossible to read the Shevut Ya’akov as being a real support for immunity for police officers.

R. Yisrael Issur ben Zev Wolf, in his Sha’ar Mishpat (Hoshen Mishpat 8:2), argues more definitively that the court officer has no right to use unnecessary force. His main argument comes from one layer of the Gemara’s discussion about the wife on Bava Kamma 28a.

As we noted earlier, Bava Kamma 28a argued that the woman is only liable if she could have saved her husband without grabbing his assailant’s genitals. This assumption was then questioned through the Midrash, which stated that the Torah exempts a court officer from liability. If it is really the case that the woman is exempt had she no other way of saving her husband, the Midrash that differentiates between the woman and the court officer should have explicitly made that distinction.

At this stage, Sha’ar Mishpat argues, the Gemara must be assuming that the court officer would also be liable for an unnecessary use of force. If the court officer would be exempt even when using unnecessary force, there would have been no need for the Gemara’s challenge. The Midrash excluding the court officer would have been used to teach that while the woman is liable when she could have saved her husband otherwise, the court officer would still be exempt in such a case. In other words, the whole reason why the Gemara is bothered by the Midrash’s lack of specification is because it is assuming that the woman and the court officer have equal standards. He therefore argues that the Gemara never entertained the possibility that the court officer could be exempt for using unnecessary force.

According to R. Yisrael Issur, the Gemara’s conclusion defends the premise that the woman and court officer are equal by making this equation explicit. In his reading of the conclusion, the Midrash is agreeing that the woman and the court officer are treated the same, since, when the woman has no other way to save her husband, she is acting like a court officer. When the woman uses unnecessary force, she is liable. The midrashic exclusion of the court officer is coming to teach that he is exempt when using force is necessary. Thus, the woman’s usage of necessary force is the legal equivalent to that of a court officer, and they are equivalent regarding unnecessary force as well.

Sha’ar Mishpat uses this argument against Rabbeinu Yeruham, who had argued that the court officer should be exempt even when he could have accomplished his goals without using force. Rabbeinu Yeruham himself had not cited any prooftext from the Gemara. R. Yisrael Issur believes that his position is coming from the midrashic exclusion of the court officer. R. Yisrael Issur’s understanding of the Gemara, though, excludes such a reading.

After supporting himself with the previously cited Nemukei Yosef (whom he also understands to exclude the possibility that the court agent is allowed to use unnecessary force), Sha’ar Mishpat uses Sanhedrin 74a similarly to Rosh. The Gemara there cited Rabbi Yonatan ben Shaul who rules that one is not allowed to kill a pursuer if using such deadly force is unnecessary. Someone who could have stopped a pursuer with non-deadly force but kills him anyway is guilty of murder and deserving of death.

If a woman using necessary force to save her husband is acting as a court agent, certainly the same could be said for a person who saves another from being murdered. Yet, even when saving the life of the potential murder victim, one is prohibited from using any force greater than necessary. The same, Sha’ar Mishpat argues, should certainly apply to a court officer dealing with less serious cases.
R. Yisrael Issur concludes his argument by citing *Ketuvot* 100a, which speaks about the court selling property on behalf of orphans. If they misvalue the property they are selling, their sale is void. Since they err in judgment regarding basic facts, their agency on behalf of the orphans is invalid and therefore void.

He argues that "this should certainly be the case here [in which a court officer uses unnecessary force and damages], for there is no mistake greater than here, since it was possible for him to save by other means and he damaged the property of his fellow needlessly and is thus liable to pay." His language of "mistake" [ta'ut] is somewhat unclear in this context, though I believe he is suggesting that using unnecessary force reflects an error in judgment. This language would thus include a court officer who mistakenly thinks that using force is necessary when it is really not. This mistaken analysis of the situation, even if under the pressure of the moment, is still considered a mistake.62

Further, his comparison to the court serving as agents of the orphans is also striking. In *Ketuvot* 100a, the fact that the court erred means that they were not actually serving as proper agents of the orphans. Extending this analogy to the court officer, he may mistakenly assess the situation and the person with whom he is dealing, whether neglectfully or even accidentally. His severe error in judgment would mean that, when using excessive force, he is not acting as an agent of justice.

The same could be said of the police officer who, due to bias, views a person of color as more threatening than they actually are and thus uses excessive and unnecessary force. Such an officer is also making a severe error of "fact" and is thus not acting as a proper agent of the state. According to this analysis, police officers would be required to assess the situation and the subject they are confronting through the lens of an unbiased professional. Failing to do so and using unnecessary force would mean that they are not acting as true agents of the law and thus liable for damages.

R. Yisrael Issur concludes his argument against Rabbeinu Yeruham could be why R. Yosef Karo neglects to mention his opinion in the *Shulhan Arukh*.63 In his opinion, the Halakhah,

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1 I thank Rabbi Yosef Gavriel Bechhofer, Rabbi Ysoscher Katz, Rabbi Dr. Alan Brill, Rabbi Dr. Shlomo Pill, Rabbi Eliezer Finkleman, Terrell Mims, Keith Neely, and Shlomo Radner for their helpful comments. I would especially like to thank Rabbi David Fried for the many hours he spent working with

even according to the *Shulhan Arukh*, follows his read of *Nemukei Yosef* and not Rabbeinu Yeruham. That being the case, the court officer is bound by the same standards regarding the use of force as a civilian.

**Conclusion**

With the exception of Rabbeinu Yeruham, the preponderance of rabbinic and halakhic sources assume that even the court officer is obligated to minimize his use of force and employ it only when he has no other alternative. Although the court officer has no less of a right than a regular citizen to use force, *Tosafot Ha-Rosh* expects that his experience and professional training should make him more clear-headed under pressing circumstances than the civilian would. These abilities would enable him to use alternative tactics like de-escalation to enable him to accomplish his goals without employing violence.

The court officer who fails to meet these expectations and uses unnecessary force violates not only his standards but even the cause of justice. As Rashi suggests, the court officer does not simply enforce justice. His actions are also subject to the criteria of justice as well.

These halakhic sources have important implications for police policies regarding the use of force in the United States. Even white U.S. citizens are more likely to be beaten or killed by police officers than citizens of other Western countries,64 in no small part because police department policies are much more permissive regarding the use of force than other developed countries.65 The U.N. Code of Conduct states that police officers "may use force only when strictly necessary and to the extent required for the performance of their duty."66 In the U.S., however, use of force policies often fail to require de-escalation or exhausting other means before using force.67 The Use of Force Project (created by Campaign Zero, a police accountability advocacy group) has found that police departments with more restrictive use of force policies have a lower rate of police killings than other departments.68 Police use of force policies more informed by Halakhah would therefore reduce the rate of police violence committed against United States citizens.
one of the few recent examples

also see

Liflog
counselors try

of Tamir Rice, a 12 year old

Rabanan

home to collect collateral (in contrast to the lender, who

https://www.youtube.com/watch?v=vsaCayrb

11

https://www.washingtonpost.com/nation/2021/04/04/walter

8

https://www.washingtonpost.com/nation/2021/04/04/wh
nen-police-kill-people-they-are-rarely-prosecuted-hard-

convict/.

https://www.newsweek.com/walter-scott-ruling-very-
rare-expert-says-741493. One of the few recent examples
of a police officer facing significant prison time for
unjustified shooting was in 2017 when a Muslim officer by
the name of Mohamed Noor shot and killed a white
Australian woman in Minneapolis.

An illustrative example is that of Tamir Rice, a 12 year old
Black boy in Cleveland playing with a toy gun who was shot
within two seconds of the officer arriving on the scene. The
Cuyahoga County prosecutor’s office convened a grand jury
only after a tremendous outcry. Usually prosecutors try
their best to indict. In this case, the Cuyahoga County
prosecutors claimed impartiality, even challenging expert
witnesses testifying that the officers’ actions were reckless.

Needless to say, the officers were not indicted. More
recently, the grand jury that failed to charge Breonna
Taylor’s killers did so in part because the prosecutor never
recommended charges against them.

Based on the U.S. Supreme Court case Graham v. Connor
(1989). The court decided that officers may use force when
another reasonable officer would have done so in a similar
situation.

Deuteronomy 16:20.

Like Exodus 23:9 and Leviticus 19:33-34.

Also see an argument for police accountability based on
a Midrash by Rabbi Aryeh Bernstein,
https://www.youtube.com/watch?v=vsACayrb-HY.

Rashi on Makkot 8a, s.v. “U-shliah Beit Din” and Rashi on
Makkot 22b, s.v. “Im Meit.”

Bava Metzio 113a. The Gemara there debates whether
the court agent has special permission to enter a debtor’s
home to collect collateral (in contrast to the lender, who
may not).

Bava Kamma 104a.

Gittin 29b.

Rashi on Kiddushin 12b “De-metza’er Sheliah De-
Rabanan.” Also see Maimonides, Laws of Murder, 5:6.

Bava Kamma 28a compares the court agent with the
woman who sexually assaults a man who had been beating
up her husband. Tosafot HaRosh (idem. s.v. “Liflog”) uses
the language of “saving” regarding the court agent,
suggesting that the court agent could be charged with
saving a person being beaten up by another.

Bava Kamma 28a. Nemukei Yosef on Bava Kamma 27b
proves this from a story there about the right of a regular
person to use force to protect himself against loss by
someone who hadn’t been acknowledging his claim. If a
regular person enjoys the right to use force in such
circumstances, the court agent certainly has the right to use
force against someone who doesn’t listen to him. Also see
Beit Yosef on Tur Hoshen Mishpat 8:16 and Rama on
Shulhan Arukh Hoshen Mishpat 8:5.

Also see this article by Rabbi Yaakov Ariel for other
halakhic sources for the authority of a modern day police
force:

https://www.toraland.org.il/%D7%A7%D7%98%D7%9C%D7%95%D7%92-%D7%A1%D7%A4%D7%A8%D7%99-
%D7%94%D7%A8%D7%91/%D7%91%D7%90%D7%94%D7%9C%D7%94-%D7%9A%D7%9C-
%D7%AA%D7%95%D7%A8%D7%94-%D7%93-%D7%A1%D7%99%D7%9E%D7%9F-
%D7%99%D7%96-%D7%9E%D7%A7%D7%95%D7%A8-
%D7%A1%D7%9E%D7%9B%D7%95%D7%AA%D7%94-
%D7%A9%D7%9C-
%D7%94%D7%9E%D7%A9%D7%98%D7%A8%D7%94/#!bclic
d=IwAR0gHcezsluBRCiPrwCl1e7IAlujYCP4z7YKKUjInxDrkrzOZ4QaE6PFfvo. I thank Rabbi Dr. Alan Brill for directing me
to this source.

https://static1.squarespace.com/static/55ad38b1e4b0185f827c13873eaf07c157600400070/Campaign%2BZero%2BModel%2BUse%2Bof%2BForce%2BPolicy.pdf.

As Rabbi Yoscher Katz pointed out to me, this statement
is likely a bit of a hyperbole. At the same time, it reflects a
wide latitude to use force, whether there are five blows or
one hundred.

Bava Kamma 27b.

Bava Batra 48a. Also see Maimonides, Laws of Divorce,
2:20.

Kiddushin 12b. Although it is possible to translate
“menagid” as excommunicate, halakhic authorities like
Rambam (Laws of Forbidden Intercourse 21:14), Tur
(Hoshen Mishpat 8), and Shulhan Arukh (Hoshen Mishpat
8:5) assume that it refers to lashes.

Kiddushin 3:8.

Tur Hoshen Mishpat 8; Bet Yosef on Tur Hoshen Mishpat
8:16; Shulhan Arukh Hoshen Mishpat 8:5.

Be-\textit{makom} for how going to court in the well case would have entailed a loss for the partner.

\textit{Bava Kamma} 28a.

The verse itself speaks about two men fighting each other and the wife of one of them protecting her husband by grabbing the genitals of the other. Although the literal reading of the verse commands that the woman’s hand be cut off, the Midrash interprets it as requiring monetary compensation to the victim for embarrassing him.

Most commentators (like Rashi, s.v. “\textit{Be-she’einah}”) assume that, since the woman’s husband is being beaten up, the woman would lose a great deal by waiting to take the assailant to court. Even if the woman would recoup the full value of her husband’s injury in court, her husband would have still been greatly injured. That being the case, the source is seen as a challenge to Rav Yehudah’s opinion as well. However, See Ra’avad (s.v. “\textit{Ta Shema}”), who raises the possibility that the husband is not being beaten seriously, which would mean that there would be no real loss to the wife by waiting to take the perpetrator to court. According to this understanding, the Gemara is only challenging Rav Nahman’s position.

Many contemporary talmudic analysts use the Gemara’s equation between the woman and the court officer to argue that it informs us about legal underpinnings of the ability to take the law into our own hands. According to this view, those who take the law into their own hands have the status of court officers when they do so. For example, see \textit{Kuntresei Shiurim} (Jerusalem, 1996), # 15, beginning on p. 135a.


Although a simple reading of the talmudic passage suggests that the such a person would be liable for the death penalty, see Maimonides, \textit{Laws of Murder} 1:13, which rules that the court would not actually impose the death penalty in such a case. I have written a discussion of this talmudic passage along with the opinion of \textit{Mishneh La-Melekh}, \textit{Laws of Bodily Injury} 8:1, and their implications for police shootings out of alleged self-defense, which I hope to publish at a later date.

Presumably, the amount for which they would be liable would be the difference between the degree of damage incurred and the amount of damage that would have been created if they used a minimal amount of force.

Rashi’s statements can be better appreciated in the context of his explication of the Gemara’s earlier stages. In \textit{Bava Kamma} 28a s.v. “\textit{Be-she’einah},” Rashi explains that, in the first step of the talmudic discussion, we are assuming that the woman had no other way to save her husband from being beaten than to grab the perpetrator’s genitals. Taking the perpetrator to court would therefore entail a loss; she would not want her husband beaten, even if they were compensated by the court. Rashi further adds that since the woman could not have saved her husband through other means she was acting according to the dictates of justice. Despite these two reasons to exempt the woman, the Midrash would be teaching that she is nonetheless liable. The woman’s liability even under these circumstances would thus prove that one can never take the law into their own hands, even in cases of loss.

As we will see more clearly from the next Rashi, the categories of “loss” and “executing justice” are really two separate categories with differing criteria. According to Rashi, a situation would be considered a case of loss if one would lose anything tangible (like money or the health of one’s husband) by going through the standard legal process. This is separate from the issue of whether the use of physical force is considered executing justice. A person snatching money owed to them would highlight this distinction. If they would not have been able to obtain the money to which they were entitled through the legal process, it would be considered a case of loss that would justify taking the law into one’s own hands, even according to the stricter opinion. However, snatching money is very different from beating up another person. Employing violence of this nature requires that it be absolutely necessary. Without this condition, it is considered as if justice was not executed properly, even if it results in the money going to the right person.

\textit{Bava Kamma} 28a s.v. “\textit{Ki-she-yekholah}.”

Tosafot \textit{Bava Kamma} 28a s.v. “\textit{Lo}” use similar language to Rashi, saying that “since [the woman] was able to save [her husband] by other means, it is not even justice”. See also \textit{Shitah Mekubetzet \textit{Bava Kamma} 28a s.v. “Lo.” \textit{Shitah Mekubetzet} cites an anonymous commentator known as Gilyon who explains Tosafot’s statement that the woman has not even executed justice. He explains that Tosafot’s words serve to respond to the following scenario: Instead of immediately responding to her husband being beaten up, the woman decides to go to court and follow their instructions. The court then instructs the woman to save her husband by using physical force. Without Tosafot’s words, we may have thought that the woman would be exempt. According to the opinion that we can take the law into our own hands even without the need to prevent a loss, the woman should be exempt since she went to court and followed their instructions. We would have assumed that using unnecessary violence is not considered a loss because she could have solved the issue by going to court. Her coming to court would thus negate that issue. Tosafot’s language therefore teaches us that since the woman’s use of force was unnecessary, she would still be liable. As he puts it, executing justice on our own “applies specifically when someone acts according to the law. However, here, since she would have been able to save [her husband] without [violence], she has not even acted according to
justice. Therefore, she would be liable in such a case.” This explanation suggests that using unnecessary force is a separate issue from that of whether there is tangible loss. He also differentiates between going to court and acting according to justice. His approach thus reinforces my reading of Rashi, namely that employing unnecessary force is separate from the issue of loss and that means the act cannot be considered an act of justice.

40 A similar idea is expressed by R. Hayyim Soloveitchik in Hidushei Rabbeinu Hayyim HaLevi Al HaRambam, Hilkhot Edut 20:2. R. Soloveitchik discusses the case of a court that had erroneously administered lashes to a person due to false testimony. He argues that lashes given under false pretenses are not considered to have been administered on behalf of a court. Such lashes are legally akin to one person striking another outside the sanction of law. See also Gilyonot Hazon Ish ad loc. I thank Rabbi Yosef Gavriel Bechhofer for directing me to these sources.


44 https://www.ramseycounty.us/sites/default/files/County%20Interview%20Transcript%20 7.7.16.pdf.

45 Admittedly, it can unfortunately be difficult to prove racial bias in criminal cases that require the legal standard of “beyond a reasonable doubt.” Unless the officer used explicitly racist language or has obtainable racist social media posts (which is also unfortunately quite common https://www.cbsnews.com/news/police-officers-nationwide-alleged-racist-violent-social-media-posts-plain-view-project-2019-06-07/), it can be difficult to obtain a criminal conviction. However, in civil cases, which require just a “preponderance of evidence” (i.e. more likely than not), it is significantly easier to prove racial bias. For example, if an officer acted arbitrarily and only enforced the law against a member of a protected class or if they showed reckless disregard for their rights, they would have violated civil rights law. I would like to thank Shlomo Radner for providing me with this background in civil rights law.


47 Tosafot Ha-Rosh Bava Kamma 28a, s.v. “Liflog”; also quoted in Shitah Meikutzet, ibid.

48 As discussed previously, Rashi (at least in the concluding stage) suggests that unnecessary force should be liable because it is not even considered an act of justice, and separate from the issue of whether there would be a tangible loss by proceeding through the justice system. Tosafot Ha-Rosh, on the other hand, seems to assume that unnecessary force is connected to the concept of loss. Because the woman could have saved her husband without grabbing the other man’s genitals, it means that she would not have suffered a loss by avoiding this behavior. Unnecessary force remains connected to the issue of loss, in contrast to Rashi.

Rabbi David Fried pointed out that Tosafot Ha-Rosh’s focus on loss appears to make it a criteria for whether or not one may take the law into their own hands. This would seem to assume the opinion of the Amora Rav Yehudah, who believes that one can only take the law into their own hands when going through the legal system would entail a loss. This would differ from all other accepted halakhic authorities who follow Rav Nahman’s opinion that one can take the law into their own hands even if going through the legal system would not entail a loss (Shulhan Arukh Hoshen Mishpat 4:1).

I believe the most likely explanation is that Tosafot Ha-Rosh is working within the Gemara’s question. According to most commentators, the Gemara initially assumes that the husband being beaten is considered a case of loss. This would mean that the Gemara’s argument is that one cannot take the law into their own hands even in a case of loss. The discussion thus poses a challenge even to Rav Yehudah’s opinion (see Rashi on Bava Kamma 28a s.v. “Be-she’einah”). Since the challenge is even to the opinion that one can take the law into their own hands in a case of loss, Tosafot Ha-Rosh is explaining how, according to the conclusion of the Gemara, there is really no loss involved since the woman could have defended her husband through other means. Another possible solution is that Tosafot Ha-Rosh believes that there are two conditions to a situation being considered a case of loss. One is that the person would suffer an undue burden by working through the legal system. The accepted Halakhah is that this criteria is not necessary in order to take the law into their own hands. However, there is another condition of loss that the person is unable to accomplish their goals without using force. According to Tosafot Ha-Rosh, even Rav Nahman (who otherwise posits that one can take the law into their own hands even if there is no loss involved) would agree that a person cannot use force if they can accomplish their goals.
without it. Thus, even Rav Nahman agrees that this type of loss is absolutely necessary in order to be able to use force.

49 Here are the words of Tosafot Ha-Rosh in their original:

 dispersed to be able to perform willful murder. We see from this that the court officer is exempt even when he could have accomplished his mission without employing violence. Even when he could have accomplished his mission without employing violence.

50 The notion that professional immunity does not cover distress is also expressed by Rabbi Moshe Feinstein in Iggraot Moshe Even Ha-Ezer 4:31. In the context of a larger response about testicular surgery and the prohibition of castration, he discusses the degree to which a surgeon could be held liable if the patient is severely injured or dies: “However, if [the doctor’s error] was out of anxiety it is considered to be like negligence, even if it seemed to him at the time that further investigation was not necessary. In such a case, he would be exempt from exile because exile would not be sufficient for him.” In this passage, R. Feinstein states that if the doctor fails to make the proper decision out of anxiety or nervousness, their actions are considered negligent and thus borderline willful. That such a doctor would not be liable for exile because it is insufficient or because it is not apparent for willful or borderline willful murder. We see from this passage that, despite the pressure of the life and death situations, professionals are expected to keep a clear head and are not excused for anxious perceptions when they are not indeed true. Obviously, unlike the doctor performing surgery, the police officer puts his own life on the line in the course of duty. Nonetheless, it is still possible to assess the degree to which officers exhibit excessive distress when working in communities of color.

51 Nemukei Yosef on Rif Bava Kamma 12b, in the pages of the Rif.

52 On the other hand, it is also possible to read Nemukei Yosef as saying that the court officer cannot have any less authority to use force than a regular person. According to this reading, it is still possible for the court officer to have a greater right to use force than a regular person and thus be able to use violence even when not absolutely necessary. It is possible that Beit Yosef Hashen Mishpat 8:16 also reads Nemukei Yosef this way.

53 Sefer Meisharim, Netiv 31:2.

54 Beit Yosef Hashen Mishpat 8:16 cites Rabbeinu Yeruham without explicitly stating whether or not the Halakhah follows this opinion.

55 Hashen Mishpat 8:5.

56 Ibid.

57 However, see Me’irat Einayim (SMA) on Shulhan Arukh Hashen Mishpat 8:25. SMA there fills in the citation of Rabbeinu Yeruham to say that the court officer is exempt even when he could have accomplished his mission without employing violence.

58 Shevet Ya’akov 180.

59 Shevet Ya’akov uses this reading as a prooftext for Beit Yosef’s citation of Rabbeinu Yeruham. Interestingly, Shevet Ya’akov never mentions Rosh’s approach to this question.

60 For example, see Otzar Mefarshei Ha-Talmud, Bava Kamma 28a.

61 See Rashi on Bava Kamma 28a s.v. “Perat.”

62 Cf. Tosefta Kifshuta on Gittin 3:13. R. Lieberman is interpreting the Tosefta’s teaching that the court officer who injures someone un-intentionally (be-shogeg) is exempt, while the court officer who injures intentionally (be-meizid) is liable. He understands "shogeg" as a case in which the court officer added unnecessary blows by mistake, while "meizid" refers to a case in which he intentionally added extra blows. My reading of Sha’ar Mishpat would disagree with R. Lieberman’s assertion that a court officer should be exempt in such a case.

63 Sha’ar Mishpat never addresses Rema’s citation of Rabbeinu Yeruham. It should be noted, though, that his citation never mentions Rabbeinu Yeruham’s opinion that the court officer is exempt even for unnecessary force.


65 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=ihrc.

66 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=ihrc.

67 http://useofforceproject.org/#review.

68 http://useofforceproject.org/#analysis.