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KORAH

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"LET TRUTH SPRING UP FROM THE  
GROUND": TRUTH'S CHANGING ROLE  
THROUGHOUT HISTORY

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Rabbi Shimon said: When God was about to create Adam, the ministering angels split into contending groups. Some said, 'Let him be created.' Others said, 'Let him not be created.' That is why it is written: 'Mercy and truth collided, righteousness and peace clashed' (Psalms 85:11). *Mercy said, 'Let him be created because he will do merciful deeds.'* *Truth said, 'Let him not be created, for he will be full of falsehood.'* Righteousness said, 'Let him be created, for he will do righteous deeds.' Peace said, 'Let him not be created, for he will never cease quarreling.' What did the Holy One, blessed be He, do? He took truth and threw it to the ground. The angels said, 'Sovereign of the universe, why do You do thus to Your own seal, truth? Let truth arise from the ground.' Thus it is written, 'Let truth spring up from the earth.' (Psalms 85:12) (*Bereishit Rabbah* 8:5; Emphasis added)<sup>1</sup>

**G**od continues to dialogue with the attribute of truth throughout the Bible. However, whereas in *midrash*, truth only appears as an abstract attribute, in the Bible, truth emerges from

the actions of Phinehas, Elijah, and Jonah.<sup>2</sup> A couple of patterns emerge amongst these "Truth Personas." They hold others to often unreasonably lofty standards, which society inevitably fails to meet. Similarly, they value lasting change and improvement but reject short lived repentance and resolutions. In sum, the moral and religious inconsistency of the masses frustrate the Truth Personas.

The Truth Personas may remain steadfast in their beliefs, but other variables change as history marches forward. Specifically, human morality develops. As humans develop morally, the role of truth in society diminishes, and mercy grows in its stead. Why? For the immoral person, a sin is a natural outgrowth, an outward manifestation of their inner disposition. As God responds to the immoral person with the attribute of truth, with punishment, it deters the immoral person from future sins.

However, the opposite standard applies to the moral person. For a moral person, a sin is an aberration that creates an asymmetry between their inner purity and outward impurity. Likely, their sin emanates from a lack of knowledge, physical temptation, or human frailty. Thus, God responds to the moral person with mercy—with forgiveness. Mercy provides moral people with the opportunity to learn from their mistakes and improve. Thus, as the Bible progresses, God's preference for mercy strengthens, and God's

tolerance for the Truth Personas' zealotry weakens.

### **The Phinehas Narrative and Analysis**

God's dialogue with the Truth Personas begins with Phinehas. Amidst an orgy of licentiousness and idolatry, he kills a couple in public. God then responds:

The LORD spoke to Moses, saying, "Phinehas, son of Eleazar son of Aaron the priest, has turned back My wrath from the Israelites by displaying among them his passion for Me, so that I did not wipe out the Israelite people in My passion. Say, therefore, 'I grant him My pact of peace [*brit shalom*]. It shall be for him and his descendants after him a pact of priesthood for all time, because he took impassioned action for his God, thus making expiation for the Israelites.'" (Numbers 25:10-13)

Phinehas's actions are commendable, as God rewards Phinehas with the eternal "pact of priesthood," and his zealotry atones for the Israelites' sins. Additionally, God bestows a "*brit shalom*" upon Phinehas, which is likely a positive reward.<sup>3</sup>

### **The Elijah Narrative**

God's attitude towards zealotry shifts in Elijah's story. Elijah gathers the Israelites on Mount Carmel. He rebukes them for worshipping both God and the idol *Ba'al*. He then challenges the priests of *Ba'al* to have *Ba'al* bring down fire on an altar. They fail. Yet, God sends down fire. The Israelites declare loyalty to God and execute the priests of *Ba'al*. When Jezebel, the idolatrous queen, hears of Elijah's crusade, she threatens to kill him. Frightened, Elijah flees to the desert and prays to die. An angel provides food for him and encourages him to continue his journey. After forty days and nights, he arrives at a cave in Horeb, which leads to the following scene:

Then the word of the LORD came to him. He said to him, "Why are you here, Elijah?" He replied, "I am moved by zeal for the LORD, the God of Hosts, for the Israelites have forsaken Your covenant, torn down Your altars, and put Your prophets to the sword. I alone am left, and they are out to take my life." "Come out," He called, "and stand on the mountain before the LORD." And lo, the LORD passed by. There was a great and mighty wind, splitting mountains and shattering rocks by the power of the LORD; but the LORD was not in the wind. After the wind—an earthquake; but the LORD was not in the earthquake. After the earthquake—fire; but the LORD was not in the fire.

And after the fire—a soft murmuring sound. When Elijah heard it, he wrapped his mantle about his face and went out and stood at the entrance of the cave. Then a voice addressed him: "Why are you here, Elijah?" He answered, "I am moved by zeal for the LORD, the God of Hosts; for the Israelites have forsaken Your covenant, torn down Your altars, and have put Your prophets to the sword. I alone am left, and they are out to take my life." (I Kings 19:9-14)

God then instructs Elijah to appoint new kings and anoint Elisha to succeed him as a prophet.

### **Analysis of The Elijah Narrative**

God disapproves of Elijah's attitude, as God rejects his prayer for death and questions his decision to abandon society. The awesome display of the wind, earthquake, and fire—followed by the soft, murmuring sound—also serves to rebuke Elijah. Malbim (I Kings 19:13) interprets this display as a symbolic rebuke. A successful prophet does not criticize with a stormy, loud, or fiery demeanor but rather encourages with soft, tender words. This explanation complements the *midrash (Eliyahu Zuta 8)* that imagines a dialogue between God and Elijah. In this dialogue, God reprimands Elijah for criticizing the Israelites and not advocating on their behalf. Following this educational spectacle, God again asks Elijah "Why are you here?" With this question, God grants Elijah the opportunity to adopt a merciful disposition. Instead, Elijah repeats his previous answer and complains about the Israelites' failures. Since Elijah refuses to change, God retires him and anoints Elisha in his stead.

### **The Jonah Narrative**

God further champions the attribute of mercy in the Book of Jonah. God commands Jonah to prophesize to Nineveh. Instead, Jonah flees and boards a boat to Tarshish. God sends a storm that threatens the ship, and the sailors panic while Jonah sleeps in the bowels of the boat. After waking him up and praying, the sailors cast lots that fall on Jonah. After Jonah identifies himself, they ask for advice:

They said to him, "What must we do to you to make the sea calm around us?" For the sea was growing more and more stormy. He answered, "Heave me overboard, and the sea will calm down for you; for I know that this terrible storm came upon you on my account." Nevertheless, the men rowed hard to regain the shore, but they could not, for the sea was growing more and more stormy

about them. Then they cried out to the LORD: “Oh, please, LORD, do not let us perish on account of this man’s life. Do not hold us guilty of killing an innocent person! For You, O LORD, by Your will, have brought this about.” And they heaved Jonah overboard, and the sea stopped raging. The men feared the LORD greatly; they offered a sacrifice to the LORD and they made vows. (Jonah 1:11-16)

A fish swallows up Jonah. Fearing death, Jonah prays to God, and—after three days—the fish spits Jonah out onto land. Again, God commands Jonah to preach to Nineveh. This time, Jonah listens and proclaims that the city will be overturned in forty days. In response, Nineveh fasts and repents from their sins and thereby averts destruction:

This displeased Jonah greatly, and he was grieved. He prayed to the LORD, saying, “O LORD! Isn’t this just what I said when I fled beforehand to Tarshish. For I know that You are a compassionate and gracious God, slow to anger, abounding in kindness, renouncing punishment. Please, LORD, take my life, for I would rather die than live.” The LORD replied, “Are you that deeply grieved?” Now Jonah had left the city and found a place east of the city. He made a booth there and sat under it in the shade, until he should see what happened to the city. The LORD God provided a ricinus plant [*kikayon*], which grew up over Jonah, to provide shade for his head and save him from discomfort. Jonah was very happy about the plant. But the next day at dawn God provided a worm, which attacked the plant so that it withered. And when the sun rose, God provided a sultry east wind; the sun beat down on Jonah’s head, and he became faint. He begged for death, saying, “I would rather die than live.” Then God said to Jonah, “Are you so deeply grieved about the plant?” “Yes,” he replied, “so deeply that I want to die.” Then the LORD said: “You cared about the plant, which you did not work for and which you did not grow, which appeared overnight and perished overnight. And should not I care about Nineveh, that great city, in which there are more than a hundred and twenty thousand persons who do not yet

know their right hand from their left, and many beasts as well!” (Jonah 4)

### **Analysis of The Jonah Narrative**

Jonah cites God’s attributes as his motivation to flee to Tarshish: “O LORD! Isn’t this just what I said when I was still in my own country? That is why I fled beforehand to Tarshish. For I know that You are a compassionate and gracious God, slow to anger, abounding in kindness, *renouncing punishment*” (Jonah 4:2, emphasis added). Yet, a comparison with the original list of God’s attributes (Exodus 34:6) reveals a discrepancy as Jonah replaces the original attribute of “truth” with “renouncing punishment.” Jonah prizes truth. Yet, he believes that God does not practice truth but rather prefers mercy.

Jonah’s journey differs from Elijah’s journey. Initially, God allows Elijah to launch a reign of zealotry. With a fervent demeanor, he declares a drought, criticizes Ahab, and challenges the idolatrous priests. God only encourages Elijah to embrace mercy after he despairs and deserts society. In contrast, God manages Jonah’s entire journey. God prevents Jonah—unlike Elijah—from preaching truth. From the outset, God forces Jonah to serve as an instrument of divine mercy and prophesize to Nineveh. Whether in the bowels of a boat, the stomach of a fish, or the shade of the *kikayon*, Jonah cannot escape God.

Furthermore, God reveals that even Jonah—at his core—believes in mercy. According to the attribute of truth, Jonah deserves death for his sin of ignoring God’s command. Yet, when facing death in the fish’s stomach, Jonah invokes the attribute of mercy and prays for salvation. From his ivory tower, Jonah advocates for pure justice and truth. However, when in the trenches, Jonah instinctively inclines towards mercy.<sup>4</sup>

God also utilizes the *kikayon* to highlight Jonah’s hypocrisy. After Nineveh repents, Jonah stations himself outside of the city and waits defiantly for Nineveh’s repentance to unravel.<sup>5</sup> If Nineveh returns to its evil ways, it will prove that their repentance was temporary and insincere. True change lasts forever. False change withers and disperses. In response to Jonah’s stubbornness, God decides to teach him a lesson through the medium of the *kikayon*. God erects a *kikayon* to provide shade for Jonah, but it withers after only

one day. According to the attribute of truth, Jonah must ascribe little significance to the shade of the *kikayon*, as its temporary existence nullifies its importance. However, Jonah grieves greatly.<sup>6</sup> Thus, this episode reveals that—in truth—Jonah values the temporary. Again, a gap emerges between the lofty truth that Jonah preaches and his natural desire for mercy. Jonah’s actions testify against the words his lips utter.

In the Book of Jonah, God’s strong affinity for mercy reflects the actions of the secondary characters. These characters act with genuine morality and religiosity.<sup>7</sup> The sailors try to save Jonah. When the lots identify Jonah as the cause of the storm, the sailors decline to immediately dispose of him. Instead, they ask Jonah how to stop the storm, and *he* suggests that they throw him overboard. Yet, even following Jonah’s suggestion, the sailors first attempt to row to land. Only then do they resolve to throw Jonah overboard. Even so, they first beg God not to hold them accountable for murder, and afterward they fear and sacrifice to God.

Similarly, after hearing Jonah’s prophecy, Nineveh immediately repents and abandons its evil ways. *Mishnah Ta’anit* (2:1) cites Nineveh’s transformation as an example of sincere repentance: “The elder among them says in front of them words of admonition, ‘Brothers, it does not say of the people of Nineveh, ‘And God saw their sackcloth and their fasting,’ but, ‘And God saw their deeds, for they turned from their evil way’ (Jonah 3:10)”<sup>8</sup> The inhabitants of Nineveh internalize the rituals of repentance. They fix their evil ways.

God favors mercy because—despite their naiveté—the secondary characters show potential for enlightenment. The sailors fail to realize that Jonah causes the storm and so they frivolously pray to God and row to shore. Nevertheless—in contrast to Jonah’s cynicism—their antics reveal a deep faith in morality and God. Initially, the people of Nineveh perform evil deeds. Yet their subsequent repentance demonstrates that these evil deeds emanate from a superficial ignorance and not a deep corruption. Once Jonah alerts them about their ignorance, they repent. God believes that ignorance requires mercy: “And should not I care about Nineveh, that great city, in which there are more than a hundred and twenty thousand

persons *who do not yet know their right hand from their left*, and many beasts as well!” (Jonah 4:11, emphasis added).

### Characteristics of the Truth Personas

A disdain of the temporal and alienation from society characterize these Truth Personas. Elijah temporarily succeeds and revives the nation’s religious spirit. Yet his success matters little to him, as history indicates that their spiritual high will eventually collapse into idolatry. Similarly, Jonah disregards the repentance of Nineveh because he believes it will be temporary.

Moreover, adherence to truth leads to alienation from society. Scripture does not introduce Elijah. He immediately declares a drought, but we learn nothing about his lineage and family. *Zohar Hadash* (Ruth 84:3) asserts—about Elijah—that we do not ask familial questions about an angel of heaven. In this matter, the Bible contrasts Elijah with his successor Elisha, who runs to kiss his parents before leaving them. The distant, mysterious Elijah watches the filial warmth of Elisha as he bids goodbye to his parents and home. Other characters view Elijah as a transcendental, awesome figure, as a superhuman. Obadiah says to Elijah: “When I leave you, the spirit of the LORD will carry you off [to a place] I know not where” (I Kings 18:12). Similarly, Abarbanel (II Kings 2:2) notes that a group of prophet disciples specifically approach Elisha because they fear Elijah. Not only does Elijah exhibit mysterious, superhuman characteristics, but he also eventually dissociates from society and runs away to Horeb.

Jonah also distances himself from society and runs away to Tarshish. The Bible’s various descriptions of Tarshish reveal that Jonah does not arbitrarily select it as his destination. As a wealthy kingdom, Tarshish would send fleets of ships loaded with precious metals to King Solomon (I Kings 10:22). Isaiah (66:19) lists Tarshish among the nations that do not know God. In short, Jonah views Tarshish as an Edenic destination, a prosperous and comfortable nation free from God’s yoke.<sup>9</sup> The Book of Jonah furthers this sense of alienation from society through images of shelter and cover.<sup>10</sup> Jonah descends into the recesses of the boat to sleep, resides in a fish’s stomach, and takes solace under the shelter of the *kikayon*. This recurring image drives home Jonah’s separation from

society, how he wishes to escape the intensity of life under God's yoke.

### **Changes Across the Truth Personas' Stories**

Throughout the Truth Personas' stories, God's tolerance for zealotry shrinks. God condones Phinehas' act and even rewards him. In contrast, Elijah's zealotry produces mixed results, as he initially achieves considerable success but eventually burns out. God rebukes him and implores him to embrace mercy. In the next story, God suppresses zealotry from the outset, forces Jonah to herald a merciful message, and educates Jonah about his natural inclinations towards mercy.

Humanity progresses morally throughout these stories. Phinehas faces a nation engaging in utter moral depravity as droves of men sleep with women from a foreign nation and worship their idols. This lack of shame culminates with the leader of one of the tribes fornicating in public. Elijah confronts a morally ambiguous nation who worships idols and allows the murder of prophets. Yet, they swear allegiance to God and eradicate the idolatrous priests after Elijah's performance on Mount Carmel. Jonah confronts a world filled with naïve, but moral, inhabitants. The sailors genuinely attempt to save him and express remorse after they cast him into the sea. When informed of their impending destruction, the citizens of Nineveh repent and abandon their evil ways. The moral progression of humanity underlies God's diminishing tolerance for acts of truth. For a moral person, sin results from a lack of knowledge or human weakness, not from evil intent. Rather than rebuke, people need guidance and the opportunity to correct their mistakes. Thus, a soft, gentle, murmuring voice best guides people who desire morality and God.

### **How Thinkers Used Humanity's Moral Development to Redefine Halakhic and Hashkafic Norms**

R. Kook believes that humanity's moral development drives history:

The world is made up of a goodness that constantly increases, and it is this same goodness that is also revealed in the desire and nature of humankind. In the past, man's nature and desires were coarser than they are now, and in the

future they will be more refined than they are at present. In the past, the core of Torah and musar was directed more toward nullifying natural desire, because it was overflowing with evil. In the future it will develop and take on a new form, to the point that the expression of man's innate desires in all of their capacity will become a moral necessity, and it will then be evident how much good is embodied within them (*Orot HaKodesh* II 544).<sup>11</sup>

R. Kook views history as the constant expansion of goodness in human nature.<sup>12</sup> Earlier humans possessed a coarser nature that required strict religious and moral regulation. However—as history progresses—human nature progresses, and strict religious and moral regulations become less necessary. The progressive nature of human morality leads Meiri, R. Kook, and the prophet Isaiah to redefine halakhic and hashkafic norms.

Meiri—who lived in the 13<sup>th</sup> and 14<sup>th</sup> centuries—proposed an innovative approach to gentiles in his time. Halakhah limits commerce with idolatrous gentiles as it may lead Jews to either contribute to or benefit from idolatry.<sup>13</sup> However, historically, Jews in Christian Europe conducted commerce with gentiles out of economic necessity. This dissonance between Halakhah and economic reality motivated halakhists to retroactively justify these business dealings. Most halakhists found technical solutions to solve the rift without really addressing the fundamental shift in how Jews related to their non-Jewish neighbors. Meiri, however, reinterprets the status of gentiles in Halakhah and views Christianity and Islam as non-idolatrous religions. This position solves the concern that Jews would indirectly contribute to or benefit from idolatrous practices. Since the surrounding gentiles were not considered idolatrous, Jews could not possibly contribute to or benefit from idolatry.

Yet, Meiri expands the implications of his position beyond the economic realm. Meiri describes non-idolatrous gentiles as “nations restricted by the ways of religion,” as moral. This assertion renders many *halakhot* obsolete. The *Mishnah Avodah Zarah* (22a) suspects gentiles of bestiality, rape, or murder and thus prohibits a Jew from leaving an animal, a woman, or themselves alone with a gentile. Meiri (*ad loc.*) asserts that these prohibitions do

not apply to his contemporary Christians or Muslims, as they are “nations restricted by the ways of religion and punish these actions.” According to Meiri, *Avodah Zarah* discusses idolatrous gentiles who are “filthy in their actions and ugly in their attributes.” However, the immoral, primitive gentiles discussed by *Avodah Zarah* do not represent the Christians and Muslims of his time. Thus, the Meiri exempts Christians and Muslims from any prohibitions motivated by fear of crass immorality.

Meiri also applies the principle “nations restricted by the ways of religion” to gentiles’ judicial rights and obligations. For example, Maimonides rules that a Jew should let a gentile die instead of desecrating *shabbat* (*Mishneh Torah, Hil. Shabbat* 2:20). Meiri invokes this principle to exempt Christians and Muslims from this ruling, and thus holds that a Jew must desecrate *shabbat* to save the life of a Christian or Muslim (*Beit Ha-Behirah Yoma*, Y. HaKohen Klein ed., p. 212). Meiri even applies this principle to hashkafic statements. For example, the Meiri extends the saying that “Israel is not subject to the stars [i.e., determinism]” to moral gentiles (*Beit Ha-Behirah Shabbat*, p. 615). In sum, Meiri believes that *Avodah Zarah* equated gentiles with immorality. However, the rise of moral religions, mainly Christianity and Islam, motivated Meiri to elevate their status.

Six hundred years after Meiri, R. Kook reimagined the status of heretics. The Jewish tradition treats heretics harshly. *Shulhan Arukh* invalidates their testimony (*Shulhan Arukh, Hoshen Mishpat* 34:22), prohibits returning their lost objects (*idem.* 266:2), and permits loaning to them with interest (*Shulhan Arukh, Yoreh De’ah* 159:2). Rambam relegates them below idolaters in status (*Hilkhot Edut* 11:10) and even says it is a commandment to kill them (*Hilkhot Rotzeah* 4:10). However, R. Kook saw sparks of holiness in the work of heretics in his time, namely secular Zionists (*Shemonah K’vatzim* 1:327). R. Kook believed that the secular Zionists possessed strengths that religious Jews lacked. They exhibited stronger love for *Klal Yisrael*, the land of Israel, and the revival of the nation (*Orot Ha-T’hiyah* 43).

This worldview actualized itself throughout his life. When asked to eulogize Theodor Herzl, R. Kook faced a challenging situation, as *Shulhan Arukh* prohibits mourning heretics (*Shulhan Arukh, Yoreh*

*De’ah* 345:5). He compromised and delivered a general eulogy that never explicitly mentioned Herzl. The eulogy discussed *Mashiah ben Yosef*, the messiah who would revive the physical component of the nation and pioneer the path for spiritual redemption (*Ma’amarei Ha-Raiyah, Ha-Mispad Be-Yerushalayim*, translation into English by Bezalel Naor available in *When God Becomes History: Historical Essays of Rabbi Abraham Isaac Hakohen Kook*). Implicitly, R. Kook identified Herzl with *Mashiah ben Yosef* and viewed Herzl’s work as the flowering of the final redemption. Similarly, R. Kook led expeditions to secular *kibbutzim* to enhance ties with the secular Zionists, create dialogue, and expose them to traditional Jewish practices. Just as Meiri reimagined the moral status of gentiles, R. Kook redefined his contemporary heretics, the secular Zionists, as forerunners of the final redemption.

Isaiah imagines a king who wields power properly. The Bible distrusts the concentration of power that occurs in a monarchy. It provides a series of laws meant to curb the king’s power. The king may not excessively acquire chariots, wives, or gold, and he must always carry and read the Torah to develop a fear of God (Deuteronomy 17:16-19). This concern plays out in the Book of Samuel. The Israelites’ request for a king upsets Samuel, who proceeds to warn them that the king will abuse his power (I Samuel 8). The continuation of the narrative illustrates these different abuses of power. King Saul develops a paranoia and orders the massacre of the city of Nob because he suspects they helped David (*idem.* 19). Additionally, David abuses his power to commit adultery with Bathsheba and then send her husband Uriah to his death (II Samuel 11).<sup>14</sup>

Herein lies the irony of power. Ideally, the king should instrumentalize power to effect change, distribute welfare, and ensure human flourishing within his borders. However, as history shows, power often morphs into an end in and of itself. Rulers lose sight of broader goals and become paranoid. Soon, they abuse their power to retain power. Isaiah beautifully reverses this historical phenomenon and describes a messianic king who governs properly:

But a shoot shall grow out of the stump of Jesse, A twig shall sprout from his stock. The spirit of the LORD shall alight upon

him: A spirit of wisdom and insight, A spirit of counsel and valor, A spirit of devotion and reverence for the LORD He shall sense the truth by his reverence for the LORD: He shall not judge by what his eyes behold, Nor decide by what his ears perceive. Thus he shall judge the poor with equity And decide with justice for the lowly of the land. He shall strike down a land with the rod of his mouth And slay the wicked with the breath of his lips. Justice shall be the girdle of his loins, And faithfulness the girdle of his waist (Isaiah 11:1-5).

Isaiah inverts the normal image of a king. Kings fall prey to the allure of their senses. David's eyes behold Bathsheba and entice him to sin. Saul's ears hear of how Nob helped David and push Saul to massacre the entire city. In contrast, the messianic king overcomes the pull of his physical senses and relies upon his spiritual senses endowed with divine wisdom. Furthermore, kings equip themselves with violent physical weapons to slay their enemies. However, the messianic king relies upon spiritual weapons—the “rod of his mouth” and “breath of his lips”—to slay the wicked. Similarly, he girds himself, not with physical weapons, but with spiritual values of justice and faithfulness. Finally, kings often corruptly employ power to help an inner circle of elites. However, the messianic king champions the cause of the lowly and destitute. Thus, Isaiah exemplifies the moral perfection of humanity through the image of a moral king.

### **Understanding the Midrash of “Let Truth Spring Up from the Earth”**

“Let truth spring up from the earth.” The key to understanding this *midrash* lies in the relationship

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<sup>1</sup> Translation from Rabbi Jonathan Sacks, <https://rabbisacks.org/permitted-tell-lie-vayechi-5775/>.

<sup>2</sup> Traditional Jewish sources associate Phinehas, Elijah, and Jonah with each other. In the *Midrash Aggadah* (Numbers 25), Reish Lakish identifies Phinehas with Elijah. In the same *midrash*, God attributes Phinehas' zealotry to Elijah. Similarly, the *Zohar* (II; 197a) explains that “Jonah draws from the strength of Elijah.” Both characters ask to die, and the Bible describes both with variants of the word “*emet*”. Also, *Yalkut Shimoni* identifies the child whom Elijah revives as Jonah.

between the attribute of mercy and the attribute of truth. Sometimes they may overlap. For example, a parent may refuse a child's request for candy. On a superficial level, the parent employs the attribute of truth, seeing that the child did nothing to deserve the candy. However, on a deeper level, the parent acts in accordance with the attribute of mercy. Candy is unhealthy. By denying their child's request, the parent protects their child from developing an unhealthy sweet tooth.

This phenomenon works in the reverse direction. In a moral society, an act of mercy may also be an act of truth. In such a society, humans are well-intended and strive to correct their mistakes. Thus, forgiveness serves as the most appropriate response to mistakes. In other words, mercy serves as the most *truthful* response to well-intentioned mistakes. With this understanding, we can reinterpret and understand “let truth spring up from the earth.” God never intended to recreate the harsh truth that argued against the creation of humanity. Rather, God intended to cultivate a softer truth. In its infancy, Truth was harsh, as humanity's moral depravity required strict justice. However, as history progressed and humans developed morally, mercy became more appropriate for the human soul. Mercy became truthful. At the logical conclusion of this process—the messianic era—humanity will be so morally advanced that only pure mercy will be fitting for their souls. On that day, mercy and truth will be one.

*I would like to thank Avi U-Mori Dr. Ira Oliff for helping me edit and write this essay.*

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<sup>3</sup> Some commentators think it possesses a more complex meaning. Abarbanel (Numbers 25:11-12) views the *brit shalom* as a command to protect Phinehas from revenge, and Netziv (*Emek Ha-Davar* on Numbers 25:12) sees it as a promise to Phinehas that his violent acts will not engender violent tendencies. Thus, Abarbanel and Netziv highlight the negative side effects of zealotry, that it may create enemies or instill violent traits. Still, *brit shalom* likely has a positive sentiment. Even according to Abarbanel and Netziv, the *brit shalom* does not serve as moral criticism of Phinehas' act. Rather, the *brit shalom* solves the negative side effects of

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Phinehas' act. An act could produce negative side effects but still be positive. Thus, God supports Phinehas' act.

<sup>4</sup> I heard this idea from Dr. Orit Avnery in a shiur titled "The Dove That Did Not Take Flight: *Peshat* and Symbolism in the Book of Jonah" given at Yeshivat Chovevei Torah's *Yemei Iyun* 2020.

<sup>5</sup> The verse says that Jonah waited to "see what happened" (Jonah 4:5). Jonah cannot be awaiting the result of his prophecy because Nineveh already repented and averted destruction.

<sup>6</sup> I heard this idea from Rabbi Amnon Bazak in a shiur titled "*Sefer Yonah V-Sukkot B-Mikrah (Part 2)*" given on Torah in Motion.

<sup>7</sup> Aharon Mirsky, Fivel Meltzer, Yehuda Kiel, *Da'at Mikrah: Trei Assar* (Mossad HaRav Kook, 1990), 330-332.

<sup>8</sup> Some members of *Hazal* believe that Nineveh's repentance was insincere. Rabbi Yehoshua Ben Levi (*Y. Ta'anit* 2:3) thinks that Nineveh threatened to harm their animals if God did not relent. This opinion stems from the weird detail that the animals of Nineveh also fasted. Furthermore, Rabbi Yohanan (*Ta'anit* 16a) believes that they only returned the stolen goods in their hands but not from their closets and drawers. This idea emerges from a close reading of the verse that they returned ". . . from the violence (*hamas*) which was in *their hands*" ([Jonah 3:8](#), emphasis added). According to R. Yohanan, they only repented for things literally in their hands. While this stream of thought possesses merit, the story explicitly says that they repented, and God forgave them. Thus, the simplest reading of the story is that Nineveh sincerely repented. For another analysis of the Jonah narrative which similarly touches on the themes of the nature of Nineveh's repentance and motivations, and Jonah's insistence on truth and reaction to Nineveh, see David Bashevkin, "[Jonah and the Varieties of Religious Motivation](#)," *The Lehrhaus* (October 9, 2016).

<sup>9</sup> I heard this idea from Dr. Erica Brown in her shiur titled "From Tarshish to Nineveh: Jonah's Long Walk to Responsibility" given at Herzog College's *Yemei Iyun Be-Tanakh* 2020.

<sup>10</sup> I heard this idea from Dr. Orit Avnery in a shiur titled "The Dove That Did Not Take Flight: *Peshat* and Symbolism in the Book of Jonah" given at Yeshivat Chovevei Torah's *Yemei Iyun* 2020

<sup>11</sup> Translation from Ari Ze'ev Schwartz, *The Spiritual Revolution of Rav Kook* (Gefen Publishing House, 2018), 170.

<sup>12</sup> Even though R. Kook died before it occurred, the Holocaust poses a major challenge to R. Kook's theory. How could such unprecedented atrocities occur if humanity was more morally developed than ever before? One possible answer is that moral development only occurs on average. That is to say, even though the average German in the 1930's and 40's was more morally advanced than the average human from any era beforehand, that does not rule out the possibility that historical conditions would allow for a small group of evil people to gain power. Additionally, modern technologies magnified human power. New communication technologies such as radio and film allowed governments to spread propaganda. Thus, a small group could utilize these new technologies to create groupthink and execute a genocide.

<sup>13</sup> Many of the ideas in this paragraph come from Dr. Moshe Halbertal's excellent essay. See: Moshe Halbertal, "['Ones Possessed of Religion': Religious Tolerance in The Teachings of The Me'iri](#)," *Edah Journal* 1:1 (2000): 1-25.

<sup>14</sup> Dr. Moshe Halbertal discusses how the Book of Samuel explores the effects of politics and power in a lecture on YouTube titled "The Problem of Power and The Nature of Political Crime." For a more in-depth analysis see Moshe Halbertal, Stephen Holmes, "[The Beginning of Politics: Power in the Biblical Book of Samuel](#)," (Princeton Press, 2017).

## “JUSTICE HAS NOT BEEN DONE”: OFFICER IMMUNITY AND ACCOUNTABILITY IN JEWISH LAW (PART 2)

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### Qualified Immunity in Halakhah<sup>1</sup>

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. In Part 1 of this article, I discussed the excessive use of force police officers employ, especially against communities of color. To attempt a halakhic approach to police violence, bias, and accountability, I discussed talmudic and halakhic discussions regarding the use of force by a court officer (*sheliah Beit Din*). It was his job to execute court judgments, administer punishments, and compel recalcitrant litigants to testify. I argued that three ideas emerged from the commentators and halakhic authorities' discussions of the court officer: (1) Agents of the law are required to minimize their use of force. If they can accomplish their aims without using force they are obligated to do so. (2) Those who knowingly use unnecessary excessive force are not legally acting as agents of the law; enforcement of justice itself must be just. (3) Officers of the law are expected to remain calm and level-headed enough to be able to recognize when and how they can accomplish their aims without using force.

In this section, I will discuss the degree to which Jewish law grants officers immunity from damage or death caused by their usage of force, whether authorized or not.

Police who use unnecessary force according to existing policies are highly unlikely to face lawsuits because of qualified immunity. This legal standard dictates that police officers cannot be held personally liable unless they have violated “clearly established” rights based on existing case law.<sup>2</sup> Thus, officers can knowingly use unnecessary force without being held liable unless previous case law specified that such actions are prohibited. These laws and policies enable police officers to use unnecessary deadly and non-deadly force without facing consequences other than losing their jobs under extreme circumstances.<sup>3</sup>

The issue of immunity is essential to discussions of police reform because qualified immunity exempts police officers from personal liability for violating constitutional rights if, at the time of the violation, the victim's constitutional rights were not “clearly established.”<sup>4</sup>

Qualified immunity does not require officers to have acted reasonably to the situation or to have been acting in good faith. In other words, it is not necessary for them to claim that they felt that their actions were necessary, appropriate, or even legally permissible in the moment. As long as it is not “clearly established” that they are violating a constitutional right, they will be exempt from civil liability. This legal standard preventing accountability creates a serious moral hazard for police officers since they have little reason to fear being held accountable when using excessive force.<sup>5</sup>

It is understandable that police officers should be granted some degree of legal protection. Since the nature of their job requires using force, it would be difficult for them to do their jobs if they were constantly in fear of lawsuits. Such a fear would discourage many qualified people from becoming police officers. On the other hand, if immunity is extended too broadly, officers are encouraged to behave recklessly and endanger the lives of citizens in general and people of color in particular, as is the case now.

As I will demonstrate, rabbinic sources do grant the court officer immunity so as not to discourage anyone from performing this communal function. At the same time, I will argue, the immunity he enjoys is of a smaller scope than the qualified immunity standard in US law.

The Rabbinic sources on immunity for court officers deal with two separate issues: accidental death and bodily injury. A person who unintentionally kills another is never liable to the death penalty. The exact consequences depend on the degree of negligence involved. If the death caused is completely unanticipated and beyond anyone's control, it is considered “*o-nes*,” or against one's will. In such a case, there are no consequences for the perpetrator.<sup>6</sup> If the death caused was unintentional but more foreseeable, the perpetrator is liable to exile. In the times of the Temple, they would have been exiled to one of the cities of refuge in the land of Israel until the death of the High Priest.<sup>7</sup> If they leave the city beforehand, the family of the victim would have the right to kill them.<sup>8</sup> When a person kills through negligent disregard for the another's life, it is considered comparable to wilful murder (*karov le-mezid*). In such a case, the murderer does not have the right of protection by fleeing to the cities of refuge, and the victim's family still has the right to kill the murderer.<sup>9</sup>

While an accidental killing would normally entail one of the above consequences, Jewish law grants immunity to those who are permitted or authorized to use force. For example, the Mishnah considers disciplining a student to be a Mitzvah. Therefore, if, while doing so, a teacher accidentally

kills the student, the teacher is exempt from exile.<sup>10</sup> Similarly, if a court officer is administering lashes to a person convicted by the *Beit Din* and the person receiving them dies, the court officer is exempt from exile. On the other hand, the court officer who accidentally lashes the convict even once more than the prescribed number is exiled if the convict dies.<sup>11</sup> One would therefore expect that a court officer who accidentally kills a recalcitrant litigant should also be exempt. However, there are seemingly contradictory sources on this.

In Mishnah *Makkot* 8a, Abba Shaul states that a court officer who accidentally kills is exempt from exile because he was performing a Mitzvah. It is not clear from Mishnah *Makkot* 8a, however, what exactly the court officer was doing. While many opinions interpret Abba Shaul as speaking about the court officer who administers lashes,<sup>12</sup> Maimonides<sup>13</sup> interprets him as speaking about a court officer trying to get a recalcitrant litigant to come to court.

*Tosefta Makkot* 2:5<sup>14</sup> seems to contradict such an interpretation. It teaches that a court officer who strikes another with the court's permission is exiled if he accidentally kills the one he struck. Despite the *Tosefta* contradicting Maimonides' interpretation of the Mishnah, he nonetheless rules in accordance with the opinion of Abba Shaul over the anonymous opinion in the *Tosefta*. According to those who interpret Abba Shaul differently from Maimonides, there is no source for the idea that a court officer who beats and accidentally kills a recalcitrant litigant is exempt from exile.

There are three other passages in the *Tosefta* regarding immunity for court officers. These passages, however, relate to civil liability for damages. Before examining them, we must appreciate that, generally speaking, people are liable even for unintentional property and personal damage.<sup>15</sup> Immunity thus serves to exempt court officers and others from personal and property damages for which they would otherwise be liable. These passages discuss not only court officers but also doctors who accidentally injure their patients,<sup>16</sup> teachers who accidentally injure the students they discipline, and other professions.

The first relevant passage in the *Tosefta* (*Gittin* 3:13) states that "an agent of the court who strikes with the permission of the court and unintentionally damages is exempt, but [if he does so] intentionally, [he is] is liable--an enactment to improve the world." Although the court officer who unintentionally injures someone he disciplines would ordinarily be liable, the rabbis decreed that the court officer would be immune from such damages. The suggested reason for the exemption is that court officers are a

communal necessity, and being personally liable for accidental damages would make qualified people less likely to serve in such positions. On the other hand, the sages never grant immunity for cases of willful damage. It is not completely clear from this passage what the parameters of "unintentional" and "wilful" damage are. For example, is it considered "unintentional" if the court officer used unnecessary force but did not intend to injure the other party? What if he was reckless? We will attempt to explain these terms shortly.

The second passage in the *Tosefta* (*Bava Kamma* 6:5) teaches that, "If an agent of the court beats a person with the court's permission and damages them, he is exempt from damages in human court but his judgment is handed over to Heaven." In contrast to the first *Tosefta*, there is no distinction between intentional and unintentional damages. Instead, it distinguishes between liability for damages in court vs. a moral obligation to pay the damaged party.

The third passage in the *Tosefta* (*Bava Kamma* 9:3) states, "An agent of the court that beats a person with the court's permission and damages is exempt. However, if they beat the person more than what was appropriate, they are liable." This *Tosefta* also omits any distinction between intentional and unintentional damage. Additionally, the meaning of "appropriate" for these purposes is ambiguous.

Relatively few later authorities reconcile the passages regarding the court officer specifically.<sup>17</sup> However, each of the four *baraitot* we cited from the *Tosefta* also states a parallel ruling regarding immunity for doctors. It is therefore possible to extrapolate many rabbis' approaches to immunity for court officers from their rulings on immunity for physicians.

### **Ramban**

The first halakhic authority to attempt to reconcile these seemingly contradictory sources is Ramban in his *Torat Ha-Adam*.<sup>18</sup> In the relevant passage, Ramban speaks about the degree to which immunity is granted to physicians who accidentally harm their patients. He argues that the Torah grants immunity to the physician so that qualified doctors don't withhold treating patients out of fear that they could be held liable for accidental damage and death. By extrapolation, the need to encourage qualified people would also apply to the case of the court officer. Few people would want to serve such an important communal role if they could be held liable for killing or damaging accidentally.

Ramban then cites *Tosefta Makkot* 2:5<sup>19</sup> as an implicit challenge to his assertion. If the physician is granted immunity for error, why does the *Tosefta* teach that a

physician who accidentally kills their patient is exiled? Ramban answers by distinguishing between a moral, “Heavenly” obligation and a purely legal one. The physician who injures or kills accidentally is not legally obligated to pay or go into exile. They are nonetheless morally obligated to pay for damages if and when they realize the harm they have caused. Similarly, even though the court would not force the doctor into exile for accidentally killing their patient, they have a Heavenly mandate to exile themselves.

Many commentators are bothered by the fact that Ramban’s answer seems to contradict Abba Shaul’s teaching in Mishnah *Makkot* (8a) that the court agent, teacher, or father who accidentally kill while beating are exempt from exile because they had each been in the act of performing a Mitzvah.<sup>20</sup> Many latter-day commentators prefer the explanation of *Besamim Rosh*.<sup>21</sup> *Besamim Rosh* and others posit that there is a subtle distinction between the case of the physician and those of the court officer, et. al. The physician who heals their patient is indeed performing a Mitzvah. However, the physician is only doing a Mitzvah if and when they are actually healing the patient. If, however, they are harming the patient—even accidentally—they are not really performing a Mitzvah and thus not protected from exile. This is in contrast to the court officer, whose beating of the recalcitrant litigant is inherently considered a Mitzvah irrespective of its effectiveness. Since the court officer, et al. are inherently performing Mitzvot they are protected from exile according to Abba Shaul. The physician, on the other hand, is not inherently performing a Mitzvah and is thus exiled.<sup>22</sup>

I would like to suggest that examining Ramban’s analysis of Mishnah *Makkot* 8a<sup>23</sup> may provide an alternative perspective to these questions.<sup>24</sup> Ramban, it must be noted, understands the court officer case differently than Maimonides. As mentioned previously, Maimonides believes that Abba Shaul is speaking about the case of a court officer compelling a litigant to obey the court. Ramban, however, understands him as speaking about a court officer administering lashes who accidentally kills the person receiving them despite administering the court’s recommended number of lashes. In such a scenario, Ramban explains, the court officer is exempt because he had been doing a Mitzvah. The court officer administering lashes is observing the court’s very specific instructions, as every single lash had been explicitly commanded by the court. On the other hand, the court officer using force to compel the recalcitrant litigant is in part using his discretion regarding the amount of force necessary and acceptable to do his job.<sup>25</sup> There is thus no indication that Ramban believes a court officer executing other forms of justice would be exempt from exile.<sup>26</sup> Applying this principle to the

police officer would mean that the officer could also be deserving of exile for killing a suspect, even if the death was accidental.<sup>27</sup>

#### ***Arukh Ha-Shulhan’s Understanding of Ramban***

Another approach to Ramban is suggested by Rabbi Yehiel Mikhel Epstein in his *Arukh Ha-Shulhan*.<sup>28</sup> *Arukh Ha-Shulhan* believes that the primary distinction suggested by the *baraitot* from the *Tosefta* is whether the physician acts negligently or does his due diligence in examining and executing the best course of action. While this is his primary distinction, he applies it differently between cases of death and those of damage.

If the physician (or, by extension, court officer) acts irresponsibly and the patient dies, the physician is liable to exile. On the other hand, he suggests, if a patient dies or is injured due to normal error, the physician is not liable to exile and is exempt from financial liability, even from a Heavenly perspective.

In contrast to *Besamim Rosh* and others, *Arukh Ha-Shulhan* rejects any distinction between the physician and the court officer. As he puts it, “why would [the physician] be any worse than the father striking his son or the teacher striking his student—who are exempt from exile?”<sup>29</sup> As long as the physician is acting in good faith, they are performing the Mitzvah of healing others even if they should err and accidentally wound or kill their patient. The physician would thus be exempted from exile according to Abba Shaul no less than the court officer, the father, or the teacher.

According to *Arukh Ha-Shulhan*, there is a better way to reconcile Abba Shaul with *Tosefta Makkot* 2:5. The *Tosefta*, which makes the physician and court officer liable to exile, is speaking about a case in which they act negligently. Their negligence means that they were not performing a Mitzvah and thus not eligible for Abba Shaul’s exemption. Under those circumstances, the court officer and physician would both be liable to exile. Since Abba Shaul and the *Tosefta* are speaking about different cases, the two sources do not contradict each other.

*Arukh Ha-Shulhan* applies this distinction to cases of damage as well, though with a subtle distinction. When the physician (or court officer) inadvertently causes damage or injury, they have no financial obligation whatsoever, not even a moral one, provided they were not in any way negligent. If, however, the physician or court officer were negligent, they are still immune from financial liability, but have a Heavenly obligation to provide financial compensation. The fact that even the negligent physician is only liable from a Heavenly perspective implies that,

according to *Arukh Ha-Shulhan*, grant of immunity by *Tosefta Gittin* 3:13 for unintentional damage extends even to cases of negligence. Only if the court officer or physician intended to injure would their actions be considered willful [*meizid*] and thus liable for damages.<sup>30</sup>

*Arukh Ha-Shulhan's* otherwise broad extension of financial immunity for the negligent physician or court officer could be comparable to qualified immunity. One subtle distinction between the two would be that qualified immunity makes the officer liable when they engage in an act of force that they should know--by virtue of it being "clearly established" by prior case law-- is prohibited. *Arukh Ha-Shulhan's* distinction seems to revolve around whether or not the court officer intended to cause harm. One may think that *Arukh Ha-Shulhan's* exemption is even broader than the doctrine of qualified immunity. However, I believe that it is safe to assume that *Arukh Ha-Shulhan* would make the court officer liable should the officer use force that he should know is illegal.

#### **Tashbetz**

In his *Sefer Ha-Tashbetz*,<sup>31</sup> Rabbi Shimon b. Tzemach Duran attempts his own synchronization of the seemingly contradictory sources. *Tashbetz* reconciles the divergent *Baraitot* by arguing that they share the same message: the doctor or court agent who unintentionally damage should really be liable. However, in order to not discourage them from undertaking these communal functions, the rabbis exempted them. Nonetheless, they should ideally pay for such damages as per their "judgment in Heaven."

*Tashbetz's* explanation parallels the argument that agents of the state should be granted immunity to prevent them from avoiding a necessary state function. On the other hand, *Tashbetz* believes that there is still a moral obligation for the court officer to pay. That being said, we must analyze which cases he considers "unintentional" (and thus subject to immunity) and which he considers "intentional."

According to *Tashbetz*, the court officer's (or physician's, etc.) damage is considered "unintentional" even if he mistakenly acts more aggressively than necessary. As long as he meant to act properly and professionally, the damage caused is still "unintentional" and the Rabbinic enactments for the benefit of society would render him exempt.<sup>32</sup> According to *Tashbetz*, the term "unintentional" [*shogeg*] in the *Tosefta* is referring to the court officer's actions. Although the court officer failed to minimize his use of force, his mistake was in unintentionally choosing the wrong course of action.

However, *Tashbetz* qualifies, if the court officer, et. al. knowingly uses more force than is appropriate for the situation [*yoter min ha-raui lo*], "his damages would be considered intentional and he would thus be liable." Even if the court officer did not intend to injure, his knowing use of unnecessary force renders any damage "intentional" and opens him up to personal liability. Although *Tashbetz* seems to expand the definition of "unintentional," he still requires a good faith effort to minimize force.

In certain ways, his ruling parallels qualified immunity. Since the court officer hadn't known that he was acting improperly, he is considered to have acted unintentionally, making him exempt. However, there are significant differences between the two. Although *Tashbetz* exempts those who mistakenly act more aggressively, he nonetheless requires a good faith effort to minimize the use of force.<sup>33</sup> An example would be the officer who employs force that he believes is the minimum required to accomplish his aims while failing to realize at the time that a lesser degree of force would have also done the job. This is fundamentally different from qualified immunity, which permits the officer to use a degree of force he realizes is unnecessary as long as his conduct did not violate a right that had been "clearly established" by prior case law. That is, qualified immunity exempts a police officer from civil liability who knowingly uses excessive force as long as previous cases had not already determined that a constitutional violation had arisen out of similar facts and conduct.

#### **Hazon Yehezkel**

Rabbi Yehezkel Abramsky, in his *Hazon Yehezkel* on the *Tosefta*, reconciles the *baraitot* of the *Tosefta* similarly to *Tashbetz*.<sup>34</sup> Unlike *Tashbetz*, however, *Hazon Yehezkel* has different parameters for "intentional" and "unintentional." As we discussed earlier, *Tashbetz* believes that the court officer who mistakenly deemed an act of force necessary is still called "unintentional" and therefore exempt. *Hazon Yehezkel*, however, considers such a case to be one of intentional damage. A court officer may only use the minimal amount of force necessary to achieve his mission. Even so, it may be difficult to avoid causing inadvertent damage or injury despite his best efforts. For this reason, the court officer requires immunity to be protected from any unintentional damages.<sup>35</sup> This immunity, however, would not extend to cases where the officer misjudged how much force was necessary. In such cases, he is not given immunity and he is thus personally liable.

This standard is quite different from the current standard of qualified immunity, according to which police are protected from lawsuits unless their specific actions are "clearly

established” to be illegal. According to qualified immunity, the police officer is essentially presumed to be immune from liability until proven otherwise. In contrast, *Hazon Yehezkel* errs on the side of liability, believing that any use of force greater than appropriate makes the agent liable.

### Conclusions on Immunity in Jewish Law

We examined a cluster of *baraitot* in the Tosefta as well as differing approaches taken by halakhic authorities to integrate them. As we have seen, all of them agree that there is no immunity for the court officer who knowingly uses unnecessary force. As discussed previously, this standard greatly differs from that of qualified immunity.

The approaches differ, however, regarding whether a court officer could be liable for a case in which he mistakenly believes that using force is necessary when it is not. According to *Arukh Ha-Shulhan*, the court officer would be exempt from being held liable in an earthly court as long as he had not acted willfully.

In my opinion, there is a difficulty with his approach. It is hard to believe that *Tosefta Gittin* 3:13 would include negligence in its immunity for unintentional damage by court officers, etc. If the purpose for the immunity is the betterment of society, it is unlikely that the rabbis would want to make the court officer liable for intentional damage, yet create no disincentive for acting negligently. If the rabbis were concerned about the moral hazard of immunity for willful damage, the same should apply to negligence as well.<sup>36</sup>

According to *Tashbetz*, the court officer’s scope of immunity is narrower. For *Tashbetz*, the court officer must make a good faith effort to minimize his use of force in order to enjoy immunity. His opinion is similar to *Arukh Ha-Shulhan* in that *Tashbetz* grants immunity to the court officer who damages or injures due to a good faith error in judgment that force is necessary. One difficulty with this understanding is that *Tashbetz*’s understanding of the phrases *shogeig* and *meizid* in the *baraitot* do not match their conventional usage. While they are normally used to describe whether the *result* of one’s actions is accidental or willful, *Tashbetz* understands them as referring to the court officer’s decision to use force in the first place, even if there was no specific intent to damage.

Therefore, in my opinion, the simplest explanation (*peshat*) of these *baraitot* is the approach of *Hazon Yehezkel*, who limits immunity to cases in which the court officer correctly chose the minimum use of force necessary for the situation but accidentally damaged or injured despite his best efforts (and is therefore rabbinically exempted for liability). Unlike

*Arukh Ha-Shulhan* or *Tashbetz*, *Hazon Yehezkel* does not apply immunity when the court officer mistakenly uses force, even when done in good faith. Instead, the court officer is expected to choose the best course of action and recognize when force is necessary and when it is not.

### Integrating the Texts on Immunity with *Bava Kamma* 28a

In [part 1 of this article](#), we looked at *Bava Kamma* 28a, discussing whether the woman defending her husband and the court officer would be liable for employing unnecessary force. Both that text and the texts we’ve discussed here deal with the degree to which a court officer can be held liable for injuring. It is therefore perplexing that, to my knowledge, no commentators or halakhic authorities compare these two groups of texts with each other.<sup>37</sup> If the court officer is granted immunity for damages, why do none of the halakhic texts based around *Bava Kamma* 28a cite the *baraitot* we examined? Even if these texts cover different aspects of the court officer’s liability, it is nonetheless perplexing that no traditional sources seem to raise the possibility that they are connected with each other. It is therefore necessary to explain why halakhic authorities never sought to integrate them.

I think that the best explanation is based on *Hazon Yehezkel*’s distinction between necessary and unnecessary force. The court officer is only granted immunity when he is employing necessary force. If and when the court officer uses the minimum amount of force necessary to accomplish his mission, his actions are covered by immunity. When his actions are deemed necessary and he does not intend to create damage or injury, the *baraitot* grant him immunity from liability. The *Tosefta*’s immunity for accidental damage applies specifically when the court officer acts with the appropriate amount of force but does so in a way that causes unintentional damage. In such a case, the *Tosefta* grants immunity for these accidents since damage and injury are inevitable when the court officer uses justified force. If court officers could be held liable for damage beyond their control, few qualified candidates would choose to serve in that capacity. Immunity thus protects the court officer from personal liability for the inevitable damage or injuries that his job requires.

On the other hand, should the court officer use unnecessary or excessive force, he does not qualify for immunity. Even if the court officer had no specific intent to harm, he is not protected by immunity and thus is personally liable. An officer who realized (or one who should have realized) that such force is unnecessary and uses it anyway is not deserving of legal protection. These legal principles are suggested by *Tosefta Bava Kamma* 9:3 stating that if the court agent hit more than necessary he would be liable.<sup>38</sup>

The rabbis only sought to protect those who employ force responsibly. The reason for immunity--the need to encourage good people to serve as court officers--thus would not apply, as there would be no need to encourage such people to serve in such roles.

Further, to borrow the formulation of Rashi (cited in [part 1](#)), the court officer who uses excessive force is not serving the cause of justice. From that perspective as well, the use of excessive force is not deserving of the immunity granted to those serving as bona fide agents of the law. This legal principle should also apply to accidental deaths caused by agents of the law. In my understanding, any immunity granted by Abba Shaul to the court officers is inapplicable to cases in which they knowingly use excess force. By doing so, they cease to be serving in that capacity. Therefore, the court officer who uses excessive force has no protection for having performed a Mitzvah.

If these interpretations are correct, Jewish Law only grants immunity to officers who minimize their use of force. In sharp contrast to the doctrine of qualified immunity--which makes no such demands for de-escalation or the minimization of force--Jewish Law requires agents of the law to serve as true agents of justice or else face personal accountability.

### **The Relationship Between Police and the People**

These questions regarding the use of force also obligate us to think more deeply about the relationship between law enforcement and the people they are obligated to protect.

The [recent case of Second Lt. Caron Nazario](#) perfectly illustrates the pall of intimidation that police cast over people of color. On December 5th, 2020, Caron Nazario, a Black and Latino officer in the armed forces, was wearing his uniform while driving through Petersburg, VA before being pulled over by Windsor, VA local police for a minor traffic violation. With guns drawn, the police commanded him to get out of the car. Because of the many instances of police shootings of people of color, Nazario said, "I'm honestly afraid to get out of the car." One of the officers responded, "yeah, you should be." Later, after Nazario asks "what's going on?" the same officer responds with, "What's going on is you're fixing to ride the lightning, son."<sup>39</sup>

Police inducing this sense of terror in people of color does anything but engender respect for the law. This idea is

suggested by *Sanhedrin* 7b, which hints at the need for extreme care regarding the use of force in enforcing the law:

"And I charged your judges at that time..." (Deuteronomy 1:16)... Rabbi Yoḥanan says: [Moses urged the judges:] With regard to the rod and the strap, be vigilant.<sup>40</sup>

What sort of vigilance is the Gemara referring to here? Rashi<sup>41</sup> understands it as an instruction that judges should make sure to use the rod and strap enough such that the people have adequate fear of the law. According to Rashi, the officers must be vigilant in instilling fear of the law, provided that it is for sincere purposes.

While some may think that the terror induced by police amongst many people of color fulfills Rashi's interpretation, I would argue that even according to Rashi, the conduct of many police officers towards communities of color is unacceptable. Enough racist behavior and statements by police officers has been uncovered that it is reasonable to question whether the fear they instill is really "for the sake of Heaven." Aside from the issue of intent, one can argue that disparities in policing towards communities of color does not engender fear of the law itself, only of the officers claiming to enforce it.

Tosafot,<sup>42</sup> on the other hand, take the opposite approach to Rashi, arguing that the officers must be ever careful not to provoke terror in the people they serve. According to Tosafot, the officers "should not cause the community excessive fear of them." Rather, "they should be patient with the community."<sup>43</sup>

For Tosafot, there is no value to making people afraid of the law. Instead, true moral authority comes from showing patience and care. As I have argued over the course of this article, true representation of the law requires officers to minimize their usage of force and for officers of the law to be held accountable when they fail to meet such standards.

We hope that this attitude by the police towards the Black community and other communities of color can divert from the Rashi approach of instilling terror and move towards that of Tosafot. Enabling love of the law will engender greater respect for its representatives. This will enable all citizens to better respect the rule of law.

for their helpful comments. I would especially like to thank Rabbi David Fried for the many hours he spent working with

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<sup>1</sup> I thank Rabbi Yosef Gavriel Bechhofer, Rabbi Ysoscher Katz, Rabbi Dr. Alan Brill, Rabbi Dr. Shlomo Pill, Rabbi Eliezer Finkelman, Terrell Mims, Keith Neely, and Shlomo Radner

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me in preparing this article for publication in *The Lehrhaus*. Any errors, however, are the responsibility of the author.

<sup>2</sup> <https://www.thoughtco.com/qualified-immunity-definition-and-examples-5081905>. Prof. Joanna Schwartz of UCLA points out that Qualified Immunity rarely ever serves the supposed purpose of protecting public servants from paying out of pocket for their violation of citizens' rights. Since police officers are almost always indemnified, 99.8% of the dollars paid to victims of police civil rights violations are paid by governments. (<https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-89-3-Schwartz.pdf>).

<sup>3</sup> Many police union contracts make it difficult to fire police officers even under these circumstances. See <https://www.joincampaignzero.org/contracts>.

<sup>4</sup> <https://www.law.cornell.edu/wex/qualified-immunity>.

<sup>5</sup> Practically speaking, qualified immunity prevents police officers from personal liability in most cases. This is because it is very difficult for victims of police brutality (or their families) to prove that a right was "clearly established" at the time that the violation occurred. For more background on Qualified Immunity, the "Bound by Oath" podcast produced two episodes discussing it: [https://ij.org/sc\\_long\\_podcast/season-2-ep-3-the-bubble/](https://ij.org/sc_long_podcast/season-2-ep-3-the-bubble/) and [https://ij.org/sc\\_long\\_podcast/ep206/](https://ij.org/sc_long_podcast/ep206/)

<sup>6</sup> Maimonides, *Laws of Murder and the Preservation of Life*, 6:3.

<sup>7</sup> *Idem*. 5:1. However, see *ibid.* 5:3 regarding non-Jews who are not resident aliens.

<sup>8</sup> *Idem*. 5:9-10.

<sup>9</sup> *Idem*. 6:4. Although these laws no longer apply after the destruction of the Temple, the categories still provide insight regarding the degrees of moral culpability for murder.

<sup>10</sup> *Makkot* 8a.

<sup>11</sup> *Makkot* 22b. For each person sentenced to lashes, the court assesses the number of lashes they are capable of receiving without endangering their lives (*Makkot* 22b). Lashes are no longer administered nowadays since it requires a special type of ordination that is no longer extant.

<sup>12</sup> Rashi, *Makkot* 8a, s.v. "*U-sheliah Beit Din*," Raavad's criticisms of the Mishneh Torah, *Laws of Murder*, 5:6. *Hidushei Ha-Ramban Makkot* 8a s.v. "*Yatza*" also seems to follow this interpretation.

<sup>13</sup> *Laws of Murder and the Preservation of Life*, 5:6.

<sup>14</sup> MS Erfurt.

<sup>15</sup> *Bava Kamma* 26a. Regarding damage that is completely beyond one's control, see Tosafot on *Bava Kamma* 27b, s.v. "*U-Shemuel*," and Ramban on *Bava Metzia* 82b, s.v. "*Ve-atah*."

<sup>16</sup> For a broader discussion of immunity for physicians, see "Medical Malpractice in Jewish Law" in Rabbi J.D. Bleich,

*Contemporary Halakhic Problems, Vol VI* (Ktav, 2012), available at [https://www.sefaria.org/Contemporary\\_Halakhic\\_Problems%2C\\_Vol\\_VI%2C\\_Chapter\\_5\\_Medical\\_Malpractice\\_and\\_Jewish\\_Law?lang=bi](https://www.sefaria.org/Contemporary_Halakhic_Problems%2C_Vol_VI%2C_Chapter_5_Medical_Malpractice_and_Jewish_Law?lang=bi).

<sup>17</sup> Probably because medical malpractice was more relevant to daily life than court officers striking others.

<sup>18</sup> *Kitvei Ha-Ramban* (Chavel ed.) Vol. 2, 41-42.

<sup>19</sup> See *Beur Ha-Gra on Shulhan Arukh Yoreh Deah* 336:6, who asserts that Ramban had been citing the *Tosefta* in *Bava Kamma*. However, *Or Same'ah, Laws of Murder and Preservation of Life* 5:6, assumes that Ramban is working from the *Tosefta* in *Makkot*. Considering that the *Tosefta* in *Makkot* does not appear in all manuscripts, it is likely that Gra's version of the *Tosefta* did not include it.

<sup>20</sup> See *Or Same'ah, Laws of Murder and the Preservation of Life*, 5:6, who is more bothered by the fact that Ramban never specifies that he is deciding against Abba Shaul.

<sup>21</sup> *Besamim Rosh* 386. Similarly, see *Hazon Yehezkel Bava Kamma* 9:3 (*Hiddushim*) and *Mareh Ha-Bazak* VII 108:6 footnote 1. Many scholars have challenged the attribution of *Besamim Rosh* to Rabbeinu Asher, arguing that it is a forgery (for example, see <https://seforimblog.com/2005/10/besamim-ros/>). *Or Same'ah's* and *Hazon Yehezkel's* agreement with this answer makes it worthy of citation no matter the identity of its author.

<sup>22</sup> *Besamim Rosh* argues that Ramban is not really deciding against Abba Shaul, who never actually mentions the physician. Ramban teaches that it is specifically the physician who is liable to exile, not the father, teacher, or court officer. In contrast to these other three, Abba Shaul does not apply their exemption of Mitzvah performance to the physician. Even though *Tosefta Makkot* also rules that the father, teacher, and court officer are subject to exile, *Besamim Rosh* believes that Ramban follows Abba Shaul, who teaches that they are exempt.

<sup>23</sup> Ramban on *Makkot* 8a, s.v. "*Ha Ditnan Yatza*."

<sup>24</sup> That Ramban never brings up that the *Tosefta* in *Makkot* may argue for *Besamim Rosh's* conceptual understanding.

<sup>25</sup> Admittedly, the same could be said regarding the father using force to discipline his son in Mishnah *Makkot* 8a.

<sup>26</sup> Granted, it is not clear how Ramban understands the court officer case in *Tosefta Makkot*.

<sup>27</sup> None of the discussions of Ramban that I have seen make this distinction. It is likely that they did not see any difference between the specific command to administer lashes and using appropriate force in the heat of the moment. From their perspective, the court agent's use of force would be a Mitzvah either way.

<sup>28</sup> *Arukh Ha-Shulhan Yoreh Deah* 336:2.

<sup>29</sup> *Ibid.*

