



Touring the Talmud
Makot 20-24 (Shabbat Vayishlah)

Mens Rea

Actus Non Facit Reum, Nisi Mens Sit Rea - 'An act does not make a person guilty, unless the mind is guilty'.
(Legal Maxim)

A gift consists not in what is done or given, but in the intention of the giver or doer.
— Lucius Annaeus Seneca

Our intent defines the meaning of our deeds. In criminal law, which is what we predominantly deal with in the Tractate of Makot (literally, 'Beatings'), the *intent* of the actor in the crime is what we examine in order to define the nature of the act itself. A crime must not only have *actus reus* - 'guilty act' but also *mens rea* - 'guilty intent' in order to be considered a crime and hold the person culpable.

The criminal act alone, independent of intent, may indeed have to be addressed and deterrents put into place so that it does not reoccur, but one is not deemed a criminal without the intention to be one. This is the basis for modern criminal law in many countries including Britain and the United States. It is also the ancient terms of Jewish Law set out by the Torah as described in Makot.

But intent is not binary in nature and one's thinking is difficult to judge, its different levels are detailed in modern law. The Torah, however, does not make such various distinctions. According to the Torah there are three major categories of *mens rea* - guilty thought other than the expressly intentional¹. And with each, the nature of culpability varies depending on the nature of one's intent, care and caution.

- *One who kills unintentionally, without at all knowing what will be the consequence of his actions.*
- *One who kills unintentionally, whose acts resemble those caused by forces beyond his control - i.e., that the death will be caused by an extraordinary phenomenon that does not commonly occur.*
- *One who kills unintentionally, whose acts resemble those willfully perpetrated - e.g., they involve negligence or that care should have been taken with regard to a certain factor and it was not.*

Intentional criminals in Torah must be undoubtedly so. Their intent to commit a crime must be indisputable. In order for one to be liable for lashes the act must have been clearly committed with guilty purpose. How clearly? The person must have been warned prior that he would be transgressing a Biblical commandment and he must have acted in the presence of two witnesses. Even today, when there are no lashes or judicial punishments, the intent one must have in order to be considered an intentional criminal is one of rebellion and full knowledge of what it is that he is doing along with its consequences. If any of these components are missing, it may well be deemed a prohibited act and poor judgement or negligence, but it is not *mens rea* — it is not with guilty intent and he is not considered an intentional criminal.

The difference between having criminal intent and not having it is crucial. We all fail, make mistakes, act negligently and sometimes quite stupidly. We fail to pay attention, take care and learn. All of these are poor behaviours and even show poor intent. But these things are not usually done with *mens rea* — truly guilty

¹ See Rambam, *Hilkhos Rotseah*, 6.



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intentions. They are done because we do not know better, we are weak, we are self-centred, we had difficult childhoods, we are uneducated or have learned to act that way from the examples of others around us — there are many factors. But we don't mean to cause damage and pain. We might need to be taught lessons as a result of our negligent actions, but that is different from needing to be converted from a malicious mindset.

The Talmud takes this principle beyond criminal issues and sees it as a lens with which to define all of our acts. *Why* we do something is more often than not, more important and meaningful than what we do.

The Talmud treats all of the commandments in the Torah as embedded within the context of our relationship with God. Did we intend to desecrate the relationship when we acted? Did we intend to do the commandment out of devotion and love? If not, what was the motivation?

Even the type of whip with which one is flogged for transgressing is selected to teach a lesson of relationship and belonging.

The mishna teaches: And two straps go up and down the doubled strap of calf hide. The Sage taught: And they are straps of donkey hide. As a certain Galilean interpreted before Rav Hisda: It is written: "The ox knows its owner, and the donkey its master's trough; but Israel does not know, My people does not consider" (Isaiah 1:3). The Holy One, Blessed be He, says: Let the one who recognises its master's trough, an ox and donkey, come and exact retribution, through lashes with a strap of calf and donkey hide, from one who does not recognise his Master's trough and performs transgressions. (23a)

It is not only guilty intent that we question, but also loving and benevolent intent. Just as we all rarely transgress commandments with a fully culpable mindset we also rarely fulfil a commandment with a fully loving and faithful mindset. Most of our deeds are done with a mindset that falls somewhere in between. Whilst it is not bad enough to destroy our covenant and bond with God it is also not good enough to deeply build love and connection with Him. The relationship itself falls somewhere in the middle — it is mediocre.

We accept mediocre and average actions but we also know that it is possible with just one act of malice or benevolence to make or break a relationship forever. These acts however are extremes, most of our deeds fall somewhere within the spectrum and they therefore do not become the definitions of the relationship itself, but rather acts that occur within it that define its qualities.



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For this reason, while Maimonides insists that we should never say we are fulfilling the mitzvot for personal reasons or ulterior motives², he admits that if we do them for that purpose we are not seen as transgressors³ — there is no *mens rea* in it — but there is also no true love in it.

Love too finds its life in our intentions. The more we know about our friend, lover or family member the more we can have the intent to show love. We can love them in a manner that is fitting and unique to them. And so too can we love God.

It is well-known and clear that the love of God is dependent on one's knowledge of Him. The level of knowledge equals the level of love; if [the knowledge] is minor, the [love] is minor, if it is great, it is great. (Rambam, Hilkhot Teshuba, 10)

It is with this point, focusing on the positive that the tractate ends this week. While we spend much of the chapter discussing the delineations of sin based on our conscious intent of transgression, we end basing all of the commandments on a single principle of intent.

Habakkuk (the prophet) came and established the 613 commandments upon one [principle], as it is stated: 'And the righteous person shall live by his faithfulness' (Habakkuk 2:4) (24a).

*Rabbi Hananya ben Akashya says: The Holy One, Blessed be He, sought to confer merit upon the Jewish people; **therefore, He increased for them Torah and mitzvot**, as it is stated: "It pleased the Lord for the sake of His righteousness to make the Torah great and glorious" (Isaiah 42:21) (23b)*

***Therefore, He increased for them Torah and mitzvot** - Among the foundational principles of our faith is that if a person upholds one of the 613 commandments appropriately and properly without any ulterior motives at all, but rather does it for its own sake out of love, he merits the World to Come. For this reason Rabbi Hananya spoke about the multitude of commandments for since there are so many it is not possible that someone should not do at least one [faithfully] throughout one's entire life.*

(Rambam, Commentary on Mishna, Makot 3:17)

One true act of love seals the bond between us and God and one true act of malicious rebellion severs it.

Rabbi Hananya ben Gamliel says: And if for one who performs one transgression [intentionally] his soul is taken for it, (as one's soul can be uprooted from the world for one transgression), for one who performs a single mitzva [intentionally], it is all the more so the case that his soul will be given to him. (23b)

² Hilkhot Teshuba, 10:1

³ "It is an obligation to strive towards love. Yet, the Sages, peace be upon them, knew that it is very difficult and not every person can achieve it. And if they do, it is not something they see as appropriate at first glance, nor that it is a true principle. For the way of a person is primarily to do things to prevent damage rather than to achieve. And if it does not protect one from harm one tends to see one's acts as being in vain. How then, does one say to a person of Torah 'do not do things [with the intent] to protect yourself from punishment or the desire for reward'. This is very difficult because not all people perceive the truth and not all can be like Abraham our forefather. Therefore, they allowed the masses of the nation to fear as they understood to do good things with the hope of reward and to keep from punishment and calamity. And we encourage them in this and strengthen their thoughts in it until they come to know the truth." (Introduction to Sanhedrin, 10. Kafeh, p. 135.)



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Anything less of either extreme is part of learning and growing. But we know and remember that our deeds find their meaning in the motives and intentions that drive them. They may look the same but they are only similar in act — the meaning changes with the mindset. As we grow and gain consciousness and awareness our actions have the potential to become refined. We can live deliberately and build a life driven by purpose and we can intend to cultivate the love and relationships that we wish to have by learning and paying attention not just to *what* we do, but to *why*.

If our intent is impure, selfish, and dishonest it comes from a dark place and it is experienced as such. If, however, it is pure, born of love and based on truth, it comes from a sacred place and that too is felt. Our minds may not always consciously know it, but our souls do — as does God. And in the end it is always seen for what it is.

Shabbat Shalom,
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Touring the Talmud
Makot 20-24
Outline/Summary

Daf 20

MISHNA

The list of prohibitions that one may receive lashes for continues (albeit incomplete for reasons detailed in the commentary):

Pulling out hair as an act of mourning over a person who has passed away.

- Completely shaving the hair on the head at the temples.
 - Shaving the five corners of the face, two on each side, and the chin.
 - Hakhamim: Each corner is its own prohibition, and the shaving mentioned is specifically with a razor.
 - R' Eliezer: All five corners are one prohibition and the shaving mentioned is even with tweezers or the like.
- Self mutilation as an act of mourning over a dead person.

GEMARA

Pulling out hair:

Phrasing of the verse shows that a person gets lashes even for doing it many times for the same dead person - (so long that proper warning was given).

The size of the patch of hair one removes is debated.

Shaving the sides of the head:

This prohibition is said mainly in regards to the person shaving (either himself or another person who is also bound by the prohibition) however, a person being shaved may also receive lashes either:

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- 1) According to R' Yehuda who claims that a person is liable for lashes even upon transgressing a negative commandment that has no action.
- 2) If the person being shaved assists the person shaving in any way.

Self mutilation:

Phrasing of the verse (in contrast to pulling out hair, where it is explicit in the verse), shows that it must be done in distress over a dead person and a person gets lashes even for doing it many times for the same dead person. A single mutilation for many dead is the subject of conflict.

Two types of mutilation are discerned:

A scratch, generally done by hand.

A gash, generally done using an object (knife, spear etc.)

There is disagreement as to whether these two forms of mutilation are a single prohibition or two separate ones.

Daf 21

Shaving:

- Hakhamim show through nuance in the verse that the prohibition refers specifically to 'destructive' (a blade to the skin) and not with 'scissors' (the shaving with scissors is not seen as 'destructive' in that it does not cut as close to the skin as a razor. It must also be an act of 'shaving', and not the likes of tweezers. What remains is the use of a razor.
- R' Eliezer prohibits the use of tweezers and things similar because he sees them to be under the category of 'shaving'.

MISHNA

It is prohibited to tattoo the body.

R' Shimon prohibits specifically writing the name(s) of other god(s).

GEMARA

- Rab Melachya states that it is prohibited to place ash on a wound because it discolours the skin and appears like a tattoo.

(A condensed list of statements made by Rab Melachya is brought side by side with a list of statements made by a scholar with a similar name, Rab Melachyo — so as not to confuse their respective opinions.)

A different opinion of which scholar said what is brought, and a clever device to remember who said what is provided.)

- Rab Ashei disagrees and says that if there is a wound then it is clear to all that it is not a tattoo.

MISHNA

- A person who is perpetually transgressing a prohibition, like wearing *sha'atnez* (a garment made with both wool and linen) all day, is lashed only once (if he is properly warned). If he is warned again and again, and he undresses and dresses, he receives lashes for each time that he was warned.

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- A case is brought where a person plowing a field can be lashed eight times because of different prohibitions that coincide.

GEMARA

Discussion as to the definition of 'undresses and dresses' in the mishna:

- 1) R' Bebai - Removing his hand from the sleeve and putting it back in.
- 2) R' Aha - Completely removing the garment and redressing.
- 3) R' Ashei - Waiting the amount of time that it would take to remove the garment and put it back on.

- R' Yanai states that the prohibition of 'Kilayim' (planting two species together) includes simply covering a mixture of seeds (from different species) with dirt.
- R' Yohanan exclaims to his teacher that this is obvious because in our mishna 'Kil'ayim is listed as one of the eight prohibitions a person can transgress in the single act of plowing a field; how can this prohibition be 'achieved' by plowing if the simple act of covering the seed with dirt is not part of the prohibition?
- R' Yanai replies "Had I not lifted the rubble for you, you would not have found the pearl!"
- Reish Lakish tells R' Yohanan that if not for R' Yanai agreeing that the prohibition of 'Kil'ayim' mentioned in the mishna is covering the seeds with dirt, he would have assumed that the prohibition was sustaining 'Kil'ayim', as R' Akiva prohibits even sustaining 'Kil'ayim'.

Daf 22

Eight different scholars — each bring an additional prohibition that could be added to the list, the first and the last are discussed and reason is given as to why they are not in the mishna, the remaining six are left as questions.

MISHNA

PROCEDURE FOR ADMINISTERING LASHES

Lashes come in sets of three: one on each shoulder (from behind), and a third on the chest.

A maximum of 39 lashes are administered.

- R' Yehuda says that the maximum is forty (as mentioned explicitly in the Torah), the fortieth blow- which is not part of a set of three- hits between the shoulders on the back, as hinted in a verse.

If *after* some of the lashes are administered, it becomes clear that the original assessment was inaccurate, we go by the *lenient* assessment (this implies that if *before* lashes are administered there is a change in the assessment, we go with the **accurate** assessment).

GEMARA

The first opinion in the mishna is explained:

The verse states "...and he (the transgressor) is flogged in front of him (the judge), as per his evil, in number: Forty shall you flog him, do not add..." (Debarim 25, 2-3).



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Because the word 'number' precedes 'forty', and not the other way around, it is understood as 'a number that leads up to forty.

Raba exclaims: 'How stupid are the people that stand before a Torah scroll and do not stand before a great man, for in the Torah scroll it says "Forty" and the scholars came along and took one away!'

(Maimonides understands that biblically forty lashes are to be given, and rabbinically the maximum was limited to only thirty nine as a precautionary measure, so as not to transgress "*do not add*" *ibid.*)

Contradictory to the mishna, a source is brought that says that even if **before** lashes are administered there is a change in assessment, we go with the **lenient** assessment.

R' Sheshat suggests that the mishna refers to a case where he was assessed today, to be whipped on another day, reducing the accuracy and relevance of the assessment, therefore we go with the assessment given on the proper day. While the seemingly opposing source refers to when a person is assessed for that same day, establishing that as his (maximum) number of lashes.

MISHNA

A person who is meant to receive two sets of lashes and is assessed for both of them together is absolved. If he was assessed for just one set, he is flogged, recuperates and is flogged a second set.

GEMARA

Rav Sheshat explains that a person can only be absolved of both sets of lashes with one assessment, if the assessment is more than forty two lashes, in this case the additional three lashes count as the second set of lashes.

MISHNA

The flogging procedure is described.

Daf 23

GEMARA

Four statements are made by Rav Sheshat in the name of R' El'azar ben Azarya, by juxtaposition of verses, among them:

- 1) The whip used for flogging is made of calfskin
- 3) Someone who dishonours 'Hol Hamoed', (the intermediary days of a festival), is as if he commits idolatry.
- 4) Anyone who speaks/listens to gossip or falsely testifies is worthy of being thrown to the dogs.

Two strips of leather from a donkey are used together with the calfskin whip. A scholar explains why using a verse: "*the ox knows its owner, the donkey (knows) the trough of its master, Israel did not know...*" (Isiah, 1,3). The one who knows where his source of life comes from shall come and take vengeance on the one who does not.

The length of the whip is adjustable so that the tip of the whip should reach the belly of the person being flogged.



The people appointed to whip were smarter than average and weaker than average. The blows were delivered with all of the person's strength.

The head judge would read *"If you do not keep the law... God shall make your blows striking..."* (Debarim 28, 58-59), the second judge would count the lashes, and the third would tell the person hitting when to hit.

If a person loses control of their bowels or bladder they are exempt.
Details of this law are discussed.

MISHNA

R' Hananya ben Gamliel: Lashes remove the punishment of *Karet* from a person.

At the closing of the tractate R"H wishes to end on a positive note:

A person that transgresses even *one* transgression may have his life taken away, all the more so a person who completes a mitzvah should be given his life!

R' Shimon says that even if a person refrains from a transgression, it is as if he did a mitzvah and he merits life.

R' Shimon ben Ribbi: If a person refrains from eating blood, something that he finds disgusting anyway, he is rewarded, all the more so that a person who refrains from theft and forbidden relations, things that a person is driven to and finds attractive, should merit for himself, and his generations and the generations of his generations till the end of time!

R' Hananya ben Akashya said: God wanted to give merit to Israel, therefore, he made the Torah and mitzvot plentiful for them.

GEMARA

R' Yohanan claims that Hakhamim do not agree that lashes can remove a person's *Karet*, as there is a mishna that implies that they do not.

Two ways of harmonising the opinion of Hakhamim with R'Hananya are offered.

Rab states that halacha is like R"H, to which Rav Yosef exclaims 'did you go up to heaven and come back that you know that (that a person who is whipped, the heavenly court exempts him from *Karet*)?!', Abaye answers to R' Yosef that this is simply our understanding of the verses.

Additional cases of the mingling of the earthly and the heavenly courts:

R' Yehoshua ben Levi says that there were three (seemingly sacrilegious) decrees decreed by earthly courts and agreed upon by the heavenly courts (based on our understanding of verses):

- 1) To read the Megilah on Purim
- 2) To greet a friend with God's name (Hashem Imachem)
- 3) 'Ma'aser Rishon' normally given to the Levites could be given to priests as well, a penalty enacted during the time of the second temple due to the reluctance of the Levites to return to Israel.



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R' Elazar states that in three courts there were instances of divine assistance (based on tradition):

- 1) The court of 'Shem' (son of Noah)
- 2) The court of the prophet Samuel
- 3) The court of king Solomon

Daf 24

In the wake of our mishna mentioning that a person can achieve life by properly performing even one mitzvah R' Samlai poetically puts forth:

613 mitzvot were given to Moses at Sinai.

- King David came and established them on eleven principles.
- Isaiah reduced it to six.
- Micha reduced it to three.
- Isaiah further reduced it to just two.
- Habakuk boiled them down to one: *"A righteous man lives by his faithfulness"* (Habakuk, 2,4).

After mentioning qualifications to decrees that Moses issued, the gemara brings four "decrees" made by Moses that were nullified by later prophets.

Two stories are brought, of R' Akiva who was walking with fellow scholars:

In the first they heard the sound of crowds of people in a Roman plaza many miles away. They started crying and R'A started laughing.

They were crying because they could not understand how idol worshippers of Rome could prosper and live in such peace.

He was laughing because, if this is what it is like for people who go against the will of God, all the more so for people who do God's will.

They told him as follows "Akiva you have consoled us, Akiva you have consoled us".

In the second story they were by the temple mount and they cried over the desecration of such holy place, and there too he consoled them.

End of Tractate Makot