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Inducing Acts in Rabbinic Law

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INDUCING ACTS IN RABBINIC LAW

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I. INTRODUCTION

The categories of persuasion and abetting are vital to causation law, as in them, a legal system determines the causal connection between external influence—inducement—and an act done in response to it. It defines the weight to append to persuasion in bringing about the response of the agent, that is, to what extent does the influence of the principal excuse or alleviate the induced party from responsibility, if at all, as well as what weight to ascribe to the inducing act itself, endeavoring to cause an agent to violate law, or 'planting an idea' in another's mind. In many contemporary systems, abetting and persuading constitute independent crimes[1] that stand apart from both the course of action the agent adopts and its effects on the victim. That is, even if the agent ultimately determines not to act on the counsel, or her attempt to carry it out is foiled, the principal will be just as culpable for the crime of persuading, which was already completed before the delegate went through with the act or changed her mind.

This paper will present four paradigmatic instances of agency in Rabbinic law, in the branches of ritual law and criminal law. The first case, which is the framework the *Bavli* uses to formalize its precept, "There is no agent for an

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[1] For instance, in Israeli Law, persuasion constitutes an independent crime, see § 30, Penal Law, 5737–1977, LSI 34A 16 (Isr.).

unlawful act," involves ritual law, a worshipper who commissions a delegate to perform the slaughter rite in a location outside the Tabernacle region where it is prohibited.[2] The second case treats compliance with orders of a superior in, "He Instructed His Agent: Go Kill That Person."[3] The third case involves authoritative coercion, "he instructed his wife or his slave: go steal it for me."[4] And the final case that will be explored examines agency principles in Seduction law in, "he seduced the young woman,"[5] which broadly parallels the early common law tort, "promise of marriage," which lends a claim of right to a woman against a seducer who has promised to propose, and "criminal conversation," which affords a husband a claim against the defendant who lured his wife into adultery.

A second aspect of the material focuses on the convergence between status and equality in the Rabbinic system, by considering whether the law applies a uniform standard to evaluate the conduct of all induced legal agents (*bar da-at*) or if its standard varies based on status and gender, conveying the law considers some agents more susceptible to the influence of persuasion. That is, does the law accord a wife or slave the same capacity and duty to exercise independent judgment as a male agent, and what are the implications of Persuasion law on Rabbinic conceptions of equality?

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[2] Babylonian Talmud, Kedushin 42b.
[3] Babylonian Talmud, Kedushin 43a.
[4] Babylonian Talmud, Bava Meziah 10b.
[5] Mishnah Ketubot 3:4; Babylonian Talmud, Ketubot 31b-32a, 40a; Palestinian Talmud, Ketubot 3, 1/12.

II. THE FORMALIZATION OF THE PRINCIPLE, "THERE IS NO AGENT FOR AN UNLAWFUL ACT"[6]: AGENCY IN UNLAWFUL RITES

The *Bavli* captures and articulates the core principle driving Tannaitic rulings for persuasion with its precept, "there is no agent for an unlawful act."[7] Its main effort in Kedushin ("Ked.") 42b-43a is to anchor the precept in Scripture and present it as unanimous policy, a move that is likely attributable to the factor that Torah law does not overtly treat liability for effecting persuasion, nor for acts carried out under its influence.[8] The greater part of the *sugya* is devoted to

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[6] *See generally* Babylonian Talmud, Kedushin 42b-43a. The study is not intended as a critical analysis of Talmudic material but as a conceptual analysis of its legal discussion. For a structural analysis of several *sugyot* dealing with agency for wrongful acts, see Peretz Segal, *An Inquiry into the Legal Maxim, "There is No Agent for Wrongful Acts,"* 73 JEWISH L. ANN. 9-10 (1981); Aharon Kirshenbaum, *Inquiries into Agency for Wrongful Acts*, 4 DINEI ISR. 55 (1972); and Aharon Kirshenbaum, *Inquiries into Agency for Wrongful Acts Part Two*, 1 JEWISH L. ANN. 219 (1973).

[7] *See generally* Babylonian Talmud, Kedushin 42b-43a. The *Bavli* does not create new policy with its precept, "There is no agent for an unlawful act," but rather it articulates a principle tacit in Tannaitic inducement rulings. As Leib Moscovitz observes, many principles in the *Bavli* originate in Tannatic law and are not innovations:

> One of the most important conclusions of this study is that rabbinic conceptualization did not spring forth abruptly and ex-nihilo in the amoraic period, as might be implied by, or at least inferred, from the writings of earlier scholars. Many types and aspects of rabbinic conceptualization seem to be rooted in the tannaitic period. These include certain types of explicit principles (e.g., explanatory principles, classificatory principles and legal fictions), as well as certain types of implicit conceptualizations. The development of amoraic and anonymous principles accordingly seem to be more of an evolutionary process than a revolutionary process.

LEIB MOSCOVITZ, TALMUDIC REASONING: FROM CASUISTIC TO CONCEPTUALIZATION 365 (2002). While the Amoraim do make certain legal innovations or extrapolations, a distinct legal accomplishment of the Amoraim was lending formal linguistic expression to precepts/doctrines and principles that are intrinsic in Tannaitic law but are not articulated. *See* Benjamin Porat, *Philosophy of Jewish Law*, 30 DINEI ISR. 179, 182 nn.14 & 17 (2015).

[8] *Deuteronomy* 13:9-19 is the Biblical case of the inciter to idolatry and cannot serve as a paradigm for persuasion owing to the extremity the law ascribes to the defendant's crime of luring others not merely to violate law, but to betray God. No reference at all is made to the Inciter in the Rabbinic material on inducement, and further,

demonstrating that whichever school of thought one belongs to, be it the Academy of Hillel or the Academy of Shammai, and whatever hermeneutic path one adopts,[9] all roads lead to the legal outcome that "there is no agent for an unlawful act."[10] According to this principle, an agent who violates law on behalf of the principal is not perceived as a delegate at all, but as a free agent who independently determines to breach law.[11] The key case the *Bavli* uses to establish this principle derives from a legal homily in the Sifra on ritual slaughter.

Scripture in *Leviticus* formulates that slaughter and sacrifice worship is only to be done in the Tabernacle region, while offerings brought in any other location are prohibited:

> [I]f anyone of the house of Israel slaughters an ox or sheep or goat in the camp, or does so outside the camp, and does not bring it to the entrance of the Tent of Meeting to present it as an offering to the Lord, before the Lord's tabernacle, bloodguilt shall be imputed to that

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as Kirshenbaum notes, the Sages actively distinguish the legalities that apply to the Inciter from those implemented in standard criminal instances of persuasion. *See* Aharon Kirshenbaum, *Entrapment and Instigation to Wrongful Acts in Jewish Law,* 15 DINEI ISR. 51 (1988).

[9] Whether Scripture is approached through the hermeneutic, "Two verses that come as one impart [the norm]," or "Two verses that come as one do not impart [the norm]," the same legal outcome is arrived at, "There is no agent for an unlawful act," Babylonian Talmud, Kedushin 43a.

[10] Segal, *supra* note 6, believes the principle, "There is no agent for an unlawful act" was originally phrased, "This one sins and another is liable?" as it is found in Babylonian Talmud, Chagigah. 10b. Avraham Weiss-Halivni also identifies the phraseology, "there is no agent for an unlawful act," a later formulation that was interpolated into the present sugya, pointing to its absence in the tractates Bava Kama and Sanhedrin in particularly relevant contexts, such as Babylonian Talmud, Sanhedrin. 29a. *See* AVRAHAM WEISS HALIVNI, SOURCES AND TRADITIONS: A SOURCE CRITICAL COMMENTARY ON SEDER NASHIM 663-66 (2d ed. 1968).

[11] Margalit Shiloh points out a critical legal extension or application of the principle, "There is no agent for an unlawful act" to the realm of torts, that can account for the rule that a principal is not liable for damage her agent causes a third party. A damaging act inherently falls outside the scope of lawful conduct, and accordingly the precept, "There is no agent for an unlawful act" sets in, designating the agent alone liable for the injury she caused, *see Fundamental Questions of Agency in Jewish Law in Comparison with The Law of Agency – 1965*, *in* RULES OF MORALS AND EQUITY IN JEWISH LAW: COLLECTED ARTICLES 113, 115 (Berachyahu Lifshitz, Gidon Livson, & Margalit Shiloh eds., 2006).

> man: he has shed blood; that man shall be cut off from among his people.[12]

Although the Torah itself makes no express mention of any principal-emissary dynamic, the Sifra and the *Bavli* hone in on a subtle nuance which is that most individuals do not themselves perform ritual slaughter—it may be added, of large animals in particular—but rather appoint a delegate for this task. Adopting slaughter via a delegate then as the norm, the Sages cast it as the frame of reference of the verses and identify the slaughterer scripture refers to as the agent commissioned by the principal to perform the illicit ritual. Reading the verses through this slant allows the Sages to transform outer-Tabernacle slaughter into a Biblical paradigm for agency liability.

The Torah accentuates that it is the particular individual who spills the blood of the animal who has violated law, "bloodguilt shall be imputed to that man,"[13] and in the Rabbinic reading, this is the delegate-slaughterer, who is singularly responsible for performing the ritual on behalf of the principal. As the Torah repeats a second time several verses in Leviticus ("Lev.") 17:9 that it is the very individual who spills the blood who is punished,[14] the reiteration, is taken through hermeneutics to lend the specific ruling of the verse the authority of general law:

> "**That** person shall be cut off"
> If the content is not required for its context, its content is intended for all of Torah.[15]

According to the hermeneutic tool, since the repetition in Lev. 17:9 furnishes no new information on unlawful slaughter, its function is to establish the particular ruling, the liability of the delegate-slaughterer, as a general legal principle: a delegate induced to break law is exclusively accountable for her

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[12] *Leviticus* 17:3-4 (New Jewish Publication Society ed., 1985), at times with minor changes.

[13] *Id.* at 17:4. A central function of Rabbinic exegesis is to lend sharp definitions for legal and ritual materials in Biblical verses. *See* Yaakov Elman, *Midrash Halakhah in Its Classic Formulation*, *in* RECENT DEVELOPMENTS IN MIDRASH RESEARCH 3 (Lieve M. Teugels & Rivka Ulmer eds., 2005).

[14] *Leviticus* 17:9.

[15] Babylonian Talmud, Kedushin 43a.

transgression. A second feature of the framework that the Sages lend the verses, the "tacit understanding" they refer to an appointed slaughterer, is that no reference is then left amid them to the principal, the worshipper who actually commissions the slaughter, and this legal silence marks the second aspect of agency doctrine—which too becomes grounded in Scripture—no independent form of accountability is imposed on the principal for inducing an agent to violate law.

Perhaps an important feature in the model of unlawful slaughter is that the delegate is not merely sent on an errand by the principal, but intended to function as a proxy for the worshipper who cannot herself perform the sacrificial rite, lending stronger grounds for faulting the principal and exempting the mere stand-in. Yet notwithstanding this consideration, the degree of accountability of the appointed slaughterer is no different than had he performed the rite for himself. Or more precisely, Rabbinic law treats the delegate just as though he performed the rite for his own sake and of his own design.

The determination to adopt unlawful slaughter as a Biblical paradigm for expounding the precept "there is no delegate for unlawful acts" is not coincidental, as the Biblical model the Sages use in the *Mekhilta* to formalize agency doctrine in the cases lawful acts, "a man's agent is like the man himself," also involves a worshipper who appoints a delegate to slaughter an animal. Exodus relays that the entire body of Israelites were to slaughter the Pascal lamb, "you shall keep watch over it until the fourteenth day of this month; and the ***entire assembled congregation*** of Israelites ***shall slaughter*** it at twilight."[16] While the verses particularize that the ***entire*** congregation is to slaughter the Pascal lamb, the *Mekhilta* highlights the same pivotal detail as the *Sifra* and *Bavli* in Unlawful Slaughter, which is that not every person is qualified or capable of ritual slaughter, and rather the standard course for this task is to appoint a delegate[17]:

And They Shall Slaughter It.

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[16] *Exodus* 12:6.

[17] *See generally* Mekhilta De R. Ishmael, *Pis-ha 5, reviewed by* 1 JACOB Z. LAUTERBACK, A CRITICAL EDITION, BASED ON THE MANUSCRIPTS AND EARLY EDITIONS, WITH AN ENGLISH TRANSLATION, INTRODUCTION, AND NOTES 29 (Jacob Z. Lauterback trans., 2d ed., 2004).

> And did all of them really do the slaughtering? It merely implies that a man's agent is like the man himself. On the basis of this passage the sages said: A man's agent is like the man himself.[18]

The factor that Scripture applies the verb "will slaughter" to the *entire congregation*, though many individuals would not themselves slaughter the lamb, but appoint a delegate, is taken by the Sages as a reflection of the legal agency precept, "A man's agent is like the man himself." When an individual engages a delegate to satisfy a legal requirement or positive act on her behalf it is just as though she herself performed it. Accordingly, in adopting the prototype of unlawful slaughter to establish the precept "There is no agent for wrongful acts" the *Sifr*a formulates legal (and prototypical) symmetry between the two components of agency doctrine. When a principal appoints a delegate for a legal act, the agent is treated as a stand-in or proxy for the principal and it is as though the principal herself executed the deed. When a designated act is unlawful, agency does not take effect and there is no legal connection between the principal and the delegate, and accordingly, no tie between the act of the delegate and the principal.

III. COMPLIANCE WITH ORDERS OF A SUPERIOR: "HE INSTRUCTED HIS AGENT, 'GO KILL THAT PERSON'"[19]

While a central drive in Kedushin 42b-43a is to fix 'There is no agent for an unlawful act' as a universally accepted and unchallenged precept, the *sugya* ultimately concludes

[18] Mekhilta De R. Ishmael, *Pis-ha 5.*
[19] Babylonian Talmud, Kedushin 43a.

with a dissenting view in a case of agency in murder.[20] The *Brayta* reads[21]:

> He instructed his agent, "Go kill a person," he [the agent] is liable, and the principal acquitted.
> Shammai the Elder relays in the name of the prophet Haggai:
> The principal/dispatcher is liable, as it is written, "Him you have slain with the sword of the children of Ammon."[22]

Based on the language the *Brayta* adopts, it seems to depict a classic case of a Don-like principal dispatching an agent hit-person to take out the victim. The very ability of the principal to *order* her agent—the *Brayta* uses the term *instruct* rather than *hire*[23]—indicates the principal holds at least some degree of power over the agent.

Shammai the Elder models the legal dynamic depicted in the *Brayta*, the power imbalance between principal and delegate, through the narrative of David instructing Joab, his chief of military, to dispatch Uriah to the battle frontlines in the war against Ammon. Since the minority ruling of Shammai the Elder features the condition of compliance with superior or royal orders, the majority view of Tanna Kamma, the 'disputing partner' necessarily applies to this condition as well. And while the dissent identifies the dispatcher, the King, culpable for occasioning the death of Uriah, the majority view finds the delegate, Joab, accountable for having Uriah killed off by the Philistines. The determination of Joab to comply with the instructions of the king, from a legal stance, is taken

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[20] *See* DAVID KRAEMER, MIND OF THE TALMUD: AN INTELLECTUAL HISTORY OF THE BALVI (1990) (a theory of the Talmudic method of discourse). Kraemer applies an observation made by L. Strauss on the significance of Plato's choice to adopt dialogue form, to understanding the legal significance of the Talmudic argumentative structure. Substance is inseparable from form, and as Plato's determination to adopt many voices to communicate thoughts embodies the idea there is no singular truth on a given matter, the Talmudic structure of argumentation and its preservation of conflicting views denotes the same outlook.

[21] This is the only appearance of the *Brayta* in Rabbinic literature; it does not feature elsewhere.

[22] Babylonian Talmud, Kedushin 43a.

[23] The Brayta uses the verb *hired* in its agency case of a principal who bribes false witnesses to testify against the plaintiff. Babylonian Talmud, Bava Kamma 56a.

for a choice. To clarify, the work of the Talmud here in the *sugya* is not to present a moral account of the Biblical narrative but is strictly legal—the narrative functions as a framework for establishing legal doctrine. The act of Joab severs the legal connection between David and the death of Uriah. As Rashi elucidates, the law treats an emissary in the context of unlawful acts as an independent individual acting of her or his own design:

> A delegate is not likened to an 'agent' for an unlawful act, so that his dispatcher is rendered liable, rather it is as though he acted on his own.[24]

From a legal perspective, the determination of Joab to send Uriah to the frontlines is appraised just as though it stemmed from his own initiative and for his personal advantage. The majority view does not veer from the principle, "there is no agent for an unlawful act," in compliance with orders of a superior, rather the subordinate-delegate has a duty to refuse to carry out the orders. Joab had a duty to refuse to send Uriah to the frontlines.

The Sages do not overtly treat the legal status of the principal in Unlawful Slaughter, who by default then seems to be acquitted. Here the *Brayta* particularizes, "And his dispatcher is acquitted," articulating the second component of agency doctrine, the Rabbinic determination not to accord any independent form or degree of legal accountability to the principal for effecting persuasion or coercion.[25] This determination contrasts with doctrine applied by many contemporary legal systems, that classify abetting and persuading as an independent crime that stands apart from the crime of the agent.[26]

The *Brayta* and *Bavli* also determinatively do not place any *moral* blame on the principal. The Sages could have ruled that while Joab alone is identified as the legal cause of the death, David is *morally* accountable for it, by implementing

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[24] Babylonian Talmud, Kedushin 42b.

[25] That is, even if in principle Rabbinic law will only convict one person for the harm, the victim's death, see Babylonian Talmud, Sanhedrin 78a ("[T]en people struck an individual with ten sticks . . . ."). No substantive blame is placed on the principal for inducing the agent who planted the idea.

[26] *See* § 30, Penal Law, 5737–1977, LSI 34A 16 (Isr.).

the sanction, 'He is liable in Divine law,' a form of adjudication used throughout the Rabbinic system to censure a defendant who cannot be identified as the legal cause of harm, though she or he is blameworthy for it.[27] Yet not even moral blame is imputed to the principal for the act of her delegate. Instead, Rabbinic law creates a chasm, an absolute legal and moral divide between the persuasion effected by the principal and reaction of the delegate. Why? Plausible grounds for the barrier the law effects between persuasion and a response to it will be discussed further on.

In the dissent of Shammai the Elder, it is the authority who is liable for the act of the delegate,[28] and David alone is culpable for the death of Uriah. The ruling of Shammai the Elder, "His dispatcher is liable"—which *prima facie* is qualified to the condition of compliance with orders of a superior—traces the liability of the principal through the act of the

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[27] The ruling 'He is exempt in court and liable in Divine law,' is broadly taken to indicate that although the defendant cannot be convicted by courts for a wrongful act in which he was involved (often owing to causal conditions that preclude his liability), he is nonetheless blameworthy for it from a moral standpoint. According to Boaz Cohen the function of the ruling is to typify the defendant's act as "morally reprehensible." 2 BOAZ COHEN, JEWISH AND ROMAN LAW 590 (1966). Elon as well classifies 'He is acquitted in court and culpable in Divine law,' as a form of moral sanction used by the legal system. THE INST. FOR RSCH. IN JEWISH L., THE HEBREW UNIV. OF JERUSALEM, THE PRINCIPLES OF JEWISH LAW 128-29 (Menachem Elon ed., 1975). A series of cases in Tosefta Bava Kamma 6:5 illustrate the Rabbinic tendency to convict a defendant to the sanction 'liable in Divine law' or to pass trial on to Divine courts when she or he is the factual cause of the given harm, but cannot technically be convicted as the legal cause owing to causal principles, 'One who terrifies his friend is acquitted from human law, and his judgement is passed on to Heaven, etc.' There is a single case in which the law sanctions the dispatcher to liability in Divine law, "He hired false witnesses," but even there it is not clear that the sanction is related to the aspect of procuring. Babylonian Talmud, Bava Kamma 55b. Rather it seems that as in the other cases of the series, the dispatcher has effected a legal chain that prevents the plaintiff from recovering his losses due to causal principles ('He burst the gate before another's animal; he leaned another's stalks towards a fire; he had testimony supporting another and did not testify'). On one hand, the plaintiff cannot recover her losses from the dispatcher, who is not liable for the act of his agents (the false witnesses), and on the other, the plaintiff cannot recover from the agents, the bribed witnesses, since they never directly handle the money, and therefore never assume possession over it, and therefore have not technically stolen.

[28] The paradigm involves an extreme condition of persuasion, Royal Coercion, and therefore it is not clear that the dissent would find the dispatcher liable for the act of her delegate in conditions involving a lower degree of power imbalance.

delegate and renders no sentence for the agent, perhaps signifying, by default—that no moral or legal blame falls on an emissary for executing a superior's design.[29] The minority dissent then marks an antithesis to the rule of *Tanna Kamma*; while *Tanna Kamma* labors to place the full onus on the delegate. The objective of the dissent is to achieve the opposite effect and establish the principal as singularly responsible, at the expense of ridding the hitman from any form of blame for murder.[30] It is possible that in the minority view, the acquiescence of a subordinate to the command of a superior is classified as *ones*, an involuntary act. Or, that a subordinate is perceived through the legal model of *yado*, "the long arm of" the

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[29] Urbach articulates the surprising nature of Shammai the Elder's determination to exonerate the proxy altogether, "But what about the emissary, is he exonerated? Evidently it seems unreasonable to entertain it would be so." EPHRAIM E. URBACH, HA-HALAKHA: MEKOROTEHA VE-HITPATHUTAH 136 (1986) (translation provided by the author). However, Urbach follows up that this is indeed the law denoted by Scripture. David is deemed culpable for Uriah's death, not Joab. Urbach presents the complexity of Yoav's predicament; refusing the orders of David would be tantamount to Yoav forfeiting his own life, as it would lead to his own death conviction for rebelling against the king. Urbach affirms that the ruling 'His dispatcher is culpable' absent any sentence for the delegate signifies the latter is acquitted, and that Rava as well understands the hitman to be exonerated in Shammai's precept:

> According to the initial language Rava states that Shammai concedes that in 'Go engage in illicit relations and eat the [prohibited] animal fat,' he [the emissary] is culpable and his dispatcher exempted, as we have not found anywhere in the Torah that one [person] may gain pleasure and another pay for it. From here it is evident that in 'Go kill that person,' where the emissary experiences no benefit, his dispatcher is culpable, and the agent exonerated.

Id. Evidently, the rule of the dissent is that the principal is liable while the agent is altogether acquitted.

[30] Kirshenbaum believes the function of the ruling 'his dispatcher is liable' is not to exonerate the hit man, but to incriminate the dispatcher *in addition* to the agent. Aharon Kirshenbaum, *Inquiries into Agency for Wrongful Acts Part Two*, 1 JEWISH L. ANN. 219, 228-29 (1973). Kirshenbaum draws on the manuscript of R' Shmuel ben Hofni to support his theory, as in it the *brayta* reads, "Shammai the Elder says in the name of the prophet Haggai: *Even* the dispatcher is culpable." While the theory enables the don to be caught legally along with the hitman and aligns the *brayta* with contemporary doctrine for inducing, it negates the *brayta's* evident meaning in its standard version. A second difficulty posed by the theory that both the principal and her agent are then accountable for the victim's death, and it is not apparent that more than one person can be convicted for a single death in Rabbinic law. *See* Babylonian Talmud, Sanhedrin 78a ("[T]en people struck an individual with ten sticks. . . .").

superior, Joab, not being taken for a delegate of the king, but for an extension of David himself.[31]

While the dissent of Shammai the Elder, 'the dispatcher is liable' is not only the minority view, it is the only occurrence of a dissent amid the Rabbinic cases of agency for unlawful act that finds the principal liable and is lent substantial credence as it is traced to the Prophetic authority of Haggai.[32] Furthermore, the *sugya* concludes by sanctioning the view as sound law grounded in hermeneutics[33] and Rava even broadens the scope of its application; the minority ruling, 'the dispatcher is liable' can be implemented in any case—not merely authoritative coercion—wherein the principal derives exclusive benefit from the unlawful act perpetrated by the delegate. The hitman then who regularly murders on instruction is neither legally nor morally accountable for any of the victims' deaths in the minority view provided she derives no benefit from them. Yet although the *sugya* concludes by sanctioning

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[31] Segal offers an interesting theory for Shammai the Elder's determination to fault the principal which is unrelated to agency precepts altogether. Segal links the ruling to Shammai the Elder's doctrine of culpability for intentions, not merely for actions. Peretz Segal, *supra* note 6, at 92. Since murder is a crime that requires intent, the principal becomes culpable for it when she contrives it. Segal clarifies that if Shammai's principle, 'There is agency for wrongful acts' stems from liability for intention, the dispatcher will always be culpable when the procured act requires intent and the delegate will be accountable when the deed is not contingent on intent. *Id.* at 94.

[32] Shammai's determination that David is legally culpable for Uriah's death gives rise to two important causation principles in murder law. The first—when the principal has authority over the emissary, the precept 'a man's agent is like the man himself' applies. The second—an inference that a murderer's culpability is traced through chains of intervention she is banking on. David's accountability is not only traced through Joab's choice to comply with his orders, but through a second intervention as well: The Ammonites' perpetration of the killing. As a legally valid minority view, it can technically apply to the model of agency found in Sanhedrin 78a where the defendant provokes an aggressive animal towards the victim. Babylonian Talmud, Sanhedrin 78a. While the defendant is unanimously absolved from murder charges and the animal is identified as the killer, the defendant will be convicted in Shammai's legally valid doctrine. Not because the provoker's instigation is regarded as the cause of animal's reaction, which may be understood as an embodiment of its volition alone, but because the defendant was relying on the animal's intervention or reaction, and Shammai, it seems, convicts a defendant for a harmful enterprise he purposely sets in motion.

[33] Babylonian Talmud, Kedushin 43a. What is the reason [for Shammai the Elder's ruling]? Shammai the Elder holds that two verses that come as one impart [the norm], and he does not expound 'that man.'

the 'there is agency for unlawful acts,' as a valid minority view, it does not feature again in Rabbinic law.

IV. COERCION: 'HE INSTRUCTED HIS WIFE OR SLAVE: GO STEAL IT FOR ME'[34]

The second central *sugya* in the *Bavli* that deals with agency for unlawful acts and defines its scope of application also incorporates the dimension of authoritative coercion to model the principle, "There is no agent for unlawful acts.' In the course of determining the liability of a principal for crimes brought about by his property, as when her land 'acquires' (steals) the animal of the plaintiff that wandered into it, the *Bavli* evaluates and classifies the nature of the legal relationship that exists between an individual and her property: Is property related to its owner through the legal model *yado*, "the long arm of," marking it an extension of her person, or through the rubric of agency?

An argument is raised against categorizing property as an agent of its owner since it leads to a conflict between a particular theft rule and the legal principle, 'there is no agent for an unlawful act.' In 'His Rooftop, Courtyard and Pen,' the *Brayta* determines the specific rule that a defendant is liable for theft not only when an article or animal belonging to the plaintiff is found right in her hands, but also if it is discovered in an enclosed space on her property.[35] If property is classified related to an individual as her agent, she becomes liable for the 'unlawful act,' (appropriation) of her delegate and the rule contravenes the agency precept.

Ravina reconciles the ruling in 'His Rooftop, His Pen, His Courtyard' and agency doctrine by refining (or redefining) that the doctrine, "There is no agent for an unlawful act" applies exclusively when an agent is bound to the law she violates. As the delegate in 'His Rooftop, etc.,' property, is not bound to the prohibition of theft, 'There is no agent for an unlawful act' does not apply, rather the precept, 'a man's agent is like the man' is implemented, and the principal is culpable for

[34] Babylonian Talmud, Bava Meziah 10b.
[35] *Id.*

the illegal acquisition of her agent, the property. The crux of agency doctrine emerges when a parallel is next drawn between a principal and his property and a principal and his wife or slave:

> The one who instructs a woman and a slave, "Go steal for me,"—as they are not bound by the law, we also fault their dispatcher.[36]

The very juxtaposition of the treatment of agency and property with agency and a wife and slave compels a certain point of departure, or lends itself to a prima facie impression, that in certain regards the wife and slave share similar legal elements with chattel in agency law. Moreover, the case 'He Instructed His Wife or Slave' does not appear elsewhere in Rabbinic literature and may have been designed for the present context to illustrate agency doctrine. The case clearly draws on a presumed distinction between the status of the master and that of the wife and slave. Initially it is suggested that the master is liable for the conduct of his wife and his slave when they act as his agents and violate law, just as he is liable for the unlawful acts of his agent when it is property, and it 'steals' the plaintiff's animal. However, a careful reading of the *sugya* reveals that the legal symmetry is drawn between property and the wife and slave—and the ruling finding the master liable for their conduct is issued—for the precise objective of repealing both.

The legal pretense for admitting the parallel between chattel and the slave and wife in this phase of the *sugya*, is that the wife and slave are not bound to theft law to the same *degree* the principal is. That is, while the slave and wife are obliged to the prohibition 'Do not Steal,' in this phase of the discussion their bond with the prohibition is taken to be somewhat weaker than that of the master, or for imperfect, since while living with the master neither pays indemnities for theft (a point that will be discussed shortly). As the delegates do not have the same legal obligation as the master who is immediately liable for indemnities in theft, 'There is no agent for an unlawful act' does not apply and instead, as with

[36] *Id.*

property, the precept, 'a man's agent is like the man himself' is implemented.

However, the undisclosed deeper issue which seems to be treated here, and the true grounds for which it appears the law proposes the master is liable when the wife and slave steal on his instruction, is that they are his subordinates, or in the very least, the wife and slave are not his equals.

The *Bavli* next rejects the rule that finds the master culpable for thefts carried out by the wife or slave. It defines and establishes the wife and slave as independent legal agents, through the technical mechanism of clarifying that their bond with the law of theft parallels that of the master -

> Rather the wife and slave are bound to the law, but now lack the means to pay damages. As the Mishna rules, the wife divorced, the slave emancipated—they must pay.[37]

Evidence is drawn from the Mishna that the wife and slave are just as bound to pay indemnities in theft as the master, but rather the payment is *postponed*, until each has the independent means to do so, when they leave the domain of the master.[38] It is not that previously while living with the master either was exempt from damages or had a weaker bond with the law. As equals before the law, the precept, 'There is no agent for a wrongful act' takes effect and the wife and slave are liable for the theft they perpetrate on the instruction of the master, and the master is acquitted.

However, the *Mishna* the *Bavli* draws on to issue a ruling for its case 'He Instructed His Wife or Slave,' involves an entirely set of circumstances.[39] *Mishna Bava Kamma* 8:4, which finds the wife and slave liable to make amends for injury they cause—for theft or tort damage—while living with the master upon leaving his domain, deals with the standard case where they steal on their own and for personal advantage.[40] The element of inducing, or authoritative coercion does not feature in this Mishna. Rather aligning the two disparate sets

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[37] *Id.*
[38] Mishna Bava Kamma 8:4.
[39] *Id.*
[40] *Id.*

of conditions achieves or conveys a particular legal effect. It elucidates that an unlawful act done by an agent through the coercion of the principal and for his advantage is typified and classified as an act done of the agent's initiative and for personal gain. The law determinatively allocates positively no legal value to inducement.

A feature that further accentuates the unwavering application of agency doctrine, and the severance the law effects between coercion and an act done in its wake, is that although the master appropriates the stolen article, he is not bound to restore it, only the wife and slave have this duty. The slave and wife have stolen and made him a gift; the law does not associate the master with the theft at all.[41]

The real motive then for the parallel the *Bavli* draws between 'One Who Instructs His Wife or Slave' and 'His Rooftop, His Courtyard and His Pen' is to accentuate and legally fix their incongruence. The rule in 'Go Steal for Me' determines the sovereignty of each legal agent—irrespective of class, social status and gender—over her independent judgment, and accordingly, her liability for every chosen act. The wife and the slave are taken for the singular cause of their conduct.

There is no dissent in the *Bavli*, nor are any further grounds demanded to determine this law. And (arguably, surprisingly), the law identifying the wife and slave liable is not met by any wonder on the part of classic commentators. It is not taken for unusual nor is its underlying conception found foreign or baffling; it is not questioned. Moreover, Medieval scholar R. Isaac Aboab deems the ruling *peshita*, self-evident and hence extraneous, and labors to find another legal objective for it:

> The Gemara adopted these [cases] as through them it makes a critical innovation: Even though the Jew [the principal] appears to have transgressed [the prohibition], 'Do not place a stumbling block before the blind,' he receives no punishment at all.

[41] And the corollary, the factor that the master benefits from the crime does not detract from the exclusive accountability of the wife or slave for the theft.

R. Isaac Aboab takes the liability of the wife and slave for the crime as apparent. The *only* legal innovation effected by the case, he argues, is that in instructing his wife and slave to steal, the master has not even breached the prohibition, "Do not place a stumbling block before the blind."

V. INDUCING ACTS: 'HE SEDUCED A YOUNG WOMAN [NE-ARAH]'[42]

At first glance, it appears that law fixing liability in the category of seduction marks an exception to standard persuasion law, wherein the induced agent is exclusively accountable for her conduct, since extensive damages are imposed on a defendant who seduces a *ne-arah*.[43]

> The one who seduces a young woman pays for shame, blemish and a fine.[44]

The seducer who entices a young woman into relations must pay her father three indemnities for the harm she experiences as a result of their relationship: shame, blemish and a fine. The nature of this offense and the legal claim it gives rise to is similar to the early common law tort, 'promise of marriage,'[45] wherein a young woman is intimate with a man who has promised to propose, only to find that he has deceived her.[46] The comprehensive liability imposed on the seducer—the law requires him to pay for the *entirety* of the harm the young woman experiences—seemingly denotes that the

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[42] Mishna Ketubot 3:4, 6; Talmud Ketubot 31b-32a; Palestinian Talmud, Ketubot 3, 1/12.

[43] While 'girl' is used as a translation for *ne-arah,* it is important to note it refers to an adolescent, not a *ke-tana*, a minor; JACOB NEUSNER, THE MISHNAH: A NEW TRANSLATION 383 (1988); HERBERT DANBY, THE MISHNAH 249 (1933).

[44] Mishna Ketubot 3:4.

[45] The common law tort may well be based on this earlier offence from antiquity.

[46] Frost v. Knight [1872] All ER 221 at 222 (Eng.) (holding a contract to marry broken due to intended non-performance). While promise of marriage is no longer generally held to be a valid claim, in contemporary law the plaintiff has an action of battery against a defendant who beguiles him or her into relations with a deceitful identity. That was initially afforded to women who were deceived by soldiers returning from war and claimed to be their husbands. A related early common law tort to be discussed further on is criminal conversation, which affords a husband an action against a man who lures his wife into adultery.

seducer is fully accountable for her decision to become involved with him, or, that his persuasion or inducement is the *cause* of her conduct. And the upshot of the *Mishna's* law: The young woman is not responsible for the damages she experiences as a result of their relations. Had the *Mishna* wished to assign partial blame to the young woman, it could have implicated her in a limited way by reducing the seducer's damages. Alternatively, the *Mishna* could have apportioned damages between the seducer and the young woman, finding the defendant liable for half damages, to denote both parties are to blame, but it does not.

This anomaly to agency law may indicate that the law typifies the response of the young woman as involuntary. The *Bavli* clarifies that agency doctrine only applies when an agent has a choice, that is *chooses* to comply with an inducer,

> Said R. Sama: "Where do we hold there is no agent for a wrongful act? Where if he wishes he may [perform the] act, and if he wishes he need not [perform the] act."[47]

The delegate who acts of free choice is exclusively accountable for violating law, while if he has no alternative, "the dispatcher [procuring agent] is liable." However, the theory that the Mishna takes the maiden's determination to become involved with her seducer as unchosen and involuntary conduct is met by the problem that the Mishna itself distinguishes between voluntary and involuntary conduct, between seduction and rape; a response to seduction then is voluntary.

Perhaps an alternate rationale for the outstanding ruling in seduction is grounded in the status of the induced agent, the young woman. While the standard precept is that an agent is responsible to exercise independent judgment, the Mishna may not accredit the young woman in particular—while other agents in conditions of seduction it would[48]—with a capacity to be resolute, or veers from standard doctrine since the male seducer is taken to have greater sway over her. A third

[47] Babylonian Talmud, Bava Meziah 10b.

[48] As modelled by the scope of the Early Common Law violation, "Criminal Conversation" which affords the husband a claim against the defendant who seduced his wife, and not a right of the wife to assert a claim against a woman who seduced her husband into adultery.

account for the ruling stems from the legal status of the young woman, who is in a unique legal twilight phase of *ne-arut*. On one hand she is not a minor (*ketana*) and on the other hand, she is not an adult (*bogeret*). The *ne-ara* may not be ascribed the developed faculty of judgment of a *bar da-at* and not considered a replete legal agent.

However, a comparison with the Mishna, '[He seduced] an orphan young woman' elucidates the grounds underscoring the liability of a seducer:[49]

> An orphan (young woman) who was betrothed and divorced—R. Elazar says, 'He who seduces her is acquitted, but he who rapes her is liable.'[50]

This Mishna treats the case of a young woman who is legally independent, modeled by the orphan.[51] While the culpability of the rapist is identical in the case of the young woman and the orphan—all four reparations are paid however, directly to the orphan—there is a glaring difference in the liability of the seducer. While the seducer of a young woman pays her father the compensations of shame, blemish and a fine, the seducer of the orphan is acquitted from all three.

The key to understanding the difference in the law lies in the main legal distinction between the young woman and the orphan. The *ne-arah* in the jurisdiction of her father does not herself receive damages, rather the seducer pays them to her father. The orphan, on the other hand, is legally independent, and directly receives damages.

The contrasting rulings for 'He seduced the young woman' and 'He seduced the orphan' reveal that when there is no father in the picture, the seducer pays no damages at all, although his conduct is precisely the same in both cases, as is the harm the relations cause the young woman. The contingency of seduction reparations on the factor that they paid to the father, and not to the young woman, clarifies their function. The seducer has violated the will of the father, by causing shame to his daughter. It is the father who will receive a

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[49] Mishna Ketubot 3:6.

[50] *Id.*

[51] A young woman who divorces from betrothal is treated as legally independent, like the orphan, in certain regards.

lower dowry (reflected by 'blemish') on account of her non-virgin status when she marries. However, from a legal perspective, the seducer has not infringed or acted on the will of the young woman who has acted of her own free choice and determination. A tacit element in choosing a given course of action is accepting its invariable results, or as Rashi explains the legal process, in forfeiting its outcomes:

> *"And the seduced* [orphan]: As everything belongs to her there is no financial responsibility, since she has acted of her own mind and thoroughly pardons (absolves) him [for any harm]."[52]

In determining to become involved with the seducer the orphan forgoes the harm it is bound to effect, similar perhaps to the Voluntary Assumption of Risk doctrine. However, a young woman under her father's authority cannot pardon what is not hers but owed to her father. In conclusion, seduction law in the Mishna is consistent with standard agency doctrine, and a young woman is classified as a *bar da-at*, the Rabbinic term for 'legal agent,' that means 'endowed with knowledge,' or in the language of the early common law, 'competent.' The Mishna does not assign any form of reduced capacity to a young woman and hold her to a lower standard. Moreover, it chooses the young woman to model the duty of a legal agent to exercise independent judgment in the face of persuasion.

The *Bavli* and the *Yerushalmi* endorse the central seduction law in the *Mishna*—a young woman is fully accountable for a determination to become involved with a seducer. This law is not taken to be extreme, surprising, or even to require grounding in Scripture or legal reasoning. The law is initially treated within the context of reconciling a clash between two different rulings for a man who is physical with his sister, and the legal principle, "one may not be lashed and financially liable." While in the *Mishna* just discussed, a seducer is obliged to pay damages to the father of a young woman,[53] the *Mishna* in *Maccot* sentences a brother who is physical with his sister to lashes.[54] The brother who is physical with his *ne-*

[52] Babylonian Talmud, Ketubot 32a.
[53] Mishna Ketubot 3:4.
[54] Mishna Maccot 3:1.

arah sister then is subject to both monetary damages and lashes, contravening the Rabbinic principle, "one may not be lashed and financially liable." In an effort to reconcile the disparate laws of the *Mishna* with the sentencing principle, the *Bavli* and *Yerushalmi* seek a qualifying condition for the *Mishna* in *Maccot*, to lend it a framework wherein the brother is exempt from damages and consequently is only lashed. The provision ultimately admitted by the *Bavli*, is that the *Mishna* in *Maccot* involves a brother who seduces his adult (*bogeret*) sister.[55] As the seduced adult is not entitled to any damages, the brother is subject to only one form of penalty, lashes.

A striking feature in this phase of the *sugya* is that the *Bavli* relays as *given* law that no damages are awarded to a seduced *bogeret* mature woman even though this law had not yet been defined—the *Bavli* here defines it—although there is not a Tannaitic or Biblical source that treats the liability of a seducer in the case of an adult. The *Bavli* makes no effort to anchor this law in Scripture, legal principle, or to infer it from the previously discussed *Mishna* involving the seduced orphan. Rather, agency doctrine is that tacit and integrated a component of the Rabbinic legal structure, that a ruling specific to the *bogeret* is understood. A legal agent is accountable for choices made in the face of persuasion, and gender and status have no bearing on this. The Early Common Law tort 'Promise of Marriage' does not exist as a claim open to a woman in Rabbinic law. It is exclusively available to the father of a seduced *ne-arah*. Nor would Criminal Conversation be of any aid to a husband whose wife was lured into an affair, as she is accountable for her determinations. The *Bavli* adds that if the *Mishna* in *Maccot* involves the element of seduction, its law applies just as well to an orphan *ne-arah* young woman, as it does to the mature woman.

The *Yerushalmi* as well incorporates the element of seduction as a provisional condition for the *Mishna* in *Maccot* to lend a context wherein the brother pays no damages, however, with a subtle variation:

[55] *See* Babylonian Talmud, Ketubot 32a.

> The Sages of Caesarea said he is acquitted [from damages], as either she seduced him or she pardoned him [he seduced her].[56]

While the *Bavli* advances that the brother has seduced his sister, the *Yerushalmi* offers two possible frameworks to account for why it is that the brother pays no damages to his sister. *Either* the sister has seduced her brother, or he has seduced her. The *Yerushalmi* creates an alignment between a procuring act, "she has seduced him" and an act done under persuasion, "he has seduced her," and its legal effect is to establish that an induced act is treated in precisely the same way—with the same pitch of voluntariness or volition—as an inducing act. [57]

Moreover, both the *Bavli* and the *Yerushalmi* dub the law barring the seduced orphan from recovery *peshita*, one that does not even require explication, and since in both Talmuds consider *Mishna Ketubot* 3:6 superfluous, each identifies an alternate legal function for it:

> The [ruling for the] orphan is self-evident.
> Rather the Mishna comes to teach the engaged girl who divorces independently receives fines.[58]

The only legal innovation or function of the *Mishna*, according to the *Bavli*, is to establish that a young woman divorced from engagement independently receives fines, like the orphan, and consequently a seducer does not pay her a fine either. The *Yerushalmi* ascribes this purpose to the *Mishna* as well.[59]

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[56] Palestinian Talmud, Ketubot 3, 1/12. The *Bavli* uses the phrase "she absolves him" as an equivalent for "he seduced her," as a tacit part of the maiden's determination (or any determination) is a choice to forego its consequences, see Rashi, *in* Baylonian Talmud, Ketubot 32a (*She was seduced*: As everything belongs to her no damages are imposed since she acted of her own mind and [implicitly] thoroughly absolves him.).

[57] The Yerushalmi includes a dissenting view that requires the seducer to pay the orphan maiden a fine but denies her damages proper (shame and blemish). Palestinian Talmud, Ketubot 3, 7/2. The Radbaz clarifies the generic function of fines which is unrelated to enticing acts: The fine is not related to the act of rape or for seducing Anonymous' daughter against his will, but for [violating] the prohibition of having relations with a single person.
The Yerushalmi rejects the minority ruling.

[58] Babylonian Talmud, Ketubot 40a.

[59] *See* Palestinian Talmud, Ketubot 3:7.

VI. "DO NOT PLACE A STUMBLING BLOCK BEFORE THE BLIND."[60]

The bent to draw a complete divide between procurement and an act done in its wake is evident as well in the efforts of the *Bavli* to curtail the scope of the Biblical prohibition, 'Do not place a stumbling block before the blind.'[61] The command is a general prohibition against causing another person to falter by precipitating a wrongdoing. It does not detract from the accountability of the agent, who ultimately violates law, and it is not actionable—the lured agent cannot sue the enticer for damage that befalls him—rather it constitutes an independent wrongdoing. Yet the *Bavli* still drastically qualifies the scope of its application:

> Rabbi Natan said, 'from where [is the prohibition derived] that one may not extend (*lo yoshit*) a glass of wine to a Nazarite or a limb torn from a living animal to a Gentile?
> From [the verse] "Do not place a stumbling block before the blind."[62]

The *Brayta* the *Bavli* cites frames the Biblical prohibition as a basic form of enticement, by modelling through an instance of luring another with something forbidden to them. As the Nazirite is forbidden to drink wine, the individual who extends him a glass has violated the prohibition. The *Brayta* clarifies that the prohibition includes inducing Gentiles as well, lending it universally unethical character. Though there are no civil ramifications for this wrongdoing—the Nazarite has no action against the enticer—the *Bavli* creates a serious constraint on it:

> Is the condition [depicted] here that if he [the enticer] does not extend the object to him [the Nazirite, or Gentile], he will himself just take it and yet [the enticer] will

[60] Babylonian Talmud, Avoda Zara 6a-6b.
[61] Leviticus 19:14.
[62] Babylonian Talmud, Avoda Zara 6a-6b.

> have violated 'Do not place a stumbling block before the blind?'
> Rather what are we dealing with? With individuals on two opposite sides of a river. We may exact this [from the Brayta's language], which states, 'he shall not sail,' (*lo yoshit*) and not, 'he shall not hand over,' (*lo yoshit*).[63]

The *Bavli* redefines the prohibition using a word play on homonyms for the term *yoshit*, which means "to extend" and "to sail." To violate the law of placing an obstacle before the victim it is not enough to simply entice the victim with something prohibited, the *Bavli* raises its threshold requirement to a condition more similar to a 'but for' cause. The transgressor must perform an act but for which the induced party would largely have been *unable* or *unlikely* to execute the wrongdoing. Planting an idea in another's mind or encouraging a misdemeanor does not meet the threshold requirement. So, while in the terms of the *Brayta* extending a glass of wine to the Nazirite constitutes a violation of the prohibition, in the *Bavli* it does not. The defendant or an individual has not violated the prohibition unless she makes serious efforts to lure the Nazirite—sailing over in a boat—with a glass of wine he would not otherwise have been able to access, or to which he had only remote access.

> A homily in *Genesis Rabbah* presents the doctrine "there is no agent for wrongful acts" as a legal advance[64]:
> "*Whoever sheds the blood of man, by man*."
> R. Hananya said: All these are [sufficient to convict for murder] in Noahide law—
> with one witness, with one judge, without witnesses, without warning, through his delegate's act.[65]

The command in *Genesis* to put a murderer to death falls under the rubric of Noahide law as it precedes Israel's formation.

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[63] *Id.*
[64] *Genesis Rabba* 34:14.
[65] *Genesis* 9:6.

R. Hananya relays several principles of Noahide murder law and contrasts them with their Rabbinic counterparts. The homily plays on the words "*Whoever sheds the blood of man* ***by a man***"[66]—in singular—the testimony of one witness is sufficient, one judge can try the case, circumstantial evidence alone suffices in the absence of witnesses, contra Rabbinic law which requires two witnesses, seventy-one judges, warning, etc. And while in Noahide law the principal is culpable for murder perpetrated through a delegate, (also a homily on "*Whoever sheds the blood of man* ***by a man****,"*) in Rabbinic law the delegate alone is culpable.

VII. CONCLUSIONS

Through the unwavering application of the precept "[t]here is no agent for an unlawful act," in the branches of ritual law and criminal law, and by means of the cases adopted by both Talmuds to concretely demonstrate its ambit, the Tannaim and Amoraim formalize independent judgment as a universal capacity and imperative incumbent on all legal agents, that is unrelated to gender and class. This tacit precept in Tannaitic law is not taken by the Amoraim to be surprising; on the contrary, the basic doctrine—an act done in the wake of external influence is regarded no differently than an act stemming from an agent's volition—is taken for *Peshita*—a given, self-apparent. The slaughterer who performs a ritual on behalf of the principal is considered to have performed this rite for himself. Yoav's determination to send Uriah to the battle frontlines on the King's command to have him killed off is taken by the majority view, *Tanna Kamma*, for his own design. This is the only case with a dissent, that finds the principal accountable, and the minority view of Shammai the Elder who faults the King rather than Joab, does not feature elsewhere in Rabbinic literature. The young woman seduced is identified as the exclusive cause for her determination to become involved with the seducer.

The correlative of the doctrine "there is no agent for an unlawful act" is the absence of any form of liability or moral blame placed on the principal. Not only are the wife and slave exclusively liable for theft they perpetrate at the master's instruction, the master is evidently under no obligation to restore it to the plaintiff. Rabbinic law creates

[66] *Id.*

a chasm between external influence and a response to it. This legal doctrine may well be anchored in the Biblical conception of Creation in the image of God, and notion of freedom of choice that underscores it. Ascribing the capacity to exercise independent judgment democratically—to every legal agent—is arguably a precondition for freedom of choice, and the potential to be like the Divine.

Rabbinic agency doctrine features as well in the *Bavli's* legal take on the liability of the primordial Biblical snake, the inducing agent in the Eden narrative.[67] "R. Simlai said: The serpent had many pleas to put forward but did not do so."[68] According to the *Bavli*, the snake should have objected to being punished for inducing Eve to consume fruit from the Tree of Knowledge, based on Rabbinic agency doctrine. Eve made her choice. Rabbinic agency doctrine may have grounds in Biblical thought yet. The 'Sin' the narrative of the Sin of the Spies is named for is spreading calumnies against the Land,[69] and not what at first blush seems to be their central and most severe wrongdoing—persuading the Israelites not to enter the Land. Moreover, when Moses appeals to God to forgive the nation for their response—their determination to give up the plan to enter the Land, appoint new leaders and head back to Egypt—Moses does not raise the argument that the people were induced by their leaders to excuse, justify or even mitigate their responsibility. The narrative itself enforces the singular responsibility of the Israelites for their reaction. While only the Spies had entered the land itself, and seen its inhabitants, the Israelites were accountable to appraise matters based on evidence they had themselves witnessed—the manifold interventions of God for their sake in Egypt, and the manner in which God had cared for them in the desert.[70] The Israelites had to weigh their own *knowledge*, the testimony of their own eyes against the *words* of their leaders.

While contemporary legal systems classify persuasion as an independent crime, Rabbinic law does not recognize any correlation between persuasion and a reaction to it. This doctrine is more profoundly understood through Ernest Weinrib's conception of single-ordering ideas in legal systems:

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[67] *See* BABYLONIAN TALMUD, SANHEDRIN ch. 29a (Rabbi Dr. I. Epstein, Jacob Shachter & H. Freedman trans., 1969).
[68] *Id.* at 178.
[69] The crime of the ten spies identified in *Numbers* 14:37 is slander against the Land of Israel. The Sages, likewise, do not insinuate the spies for persuading the Israelites not to enter the Land, but for slander against it. *See Ecclesiastes Rabbah* 9:2.
[70] *Deuteronomy* 1:30-31.

> The constituents of an intrinsic ordering are the reciprocally reinforcing expressions of the single idea that runs through the order as a whole. . . . [The] single justificatory consideration pervades the entire ordering without being limited by a competing justificatory consideration. An intrinsic ordering is thus coextensive with the scope of its underlying justification. . . . The function of [law as] a mode of ordering is to order. The more perfectly it orders, the more satisfactorily the mode discharges its function. [71]

When a legal order binds itself to a pre-eminent principle, alternate judicious rulings are necessarily precluded, and this theory may well account for the Rabbinic determination not to establish persuasion as an independent crime. A legal agent is required to append no weight to persuasion, the law does not.

[71] Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 496 (1989).