



EISH BEMOSHAVOT: RAMBAM'S VIEW OF MALKOT AND MITAT BEIT DIN RECONSIDERED

By Rabbi Daniel Fridman

I.

Parashat VaYakheil opens with the image of Moshe gathering the entire Jewish people and restating the mandate to work for six days, the prohibition of engaging in creative labor during the seventh day, and the capital penalty which would result from such a violation: "Kol Ha'Oseh Bo Melachah Yumat", "All who perform labor during [Shabbat] shall be killed"¹. This is by all means a broad prohibition. And yet, in the very next verse², the specification of the prohibition of Havarah, the creation of fire, seemingly included in the general prohibition against Melachah of any kind, lends itself to much scrutiny³.

A substantial body of the rabbinic literature⁴ concerning this difficulty considers whether the singular focus on Havarah is in fact indicative of the fact that it does not have the full status of a Melachah, but, like Techum Shabbat⁵, merely constitutes a prohibition, "LeLav Yatzat", "It is explicated as a separate prohibition"⁶, or conversely, whether it serves as an archetype to establish the concept of distinct accountability for individual Melachot violated on Shabbat, "LeChaleik Yatzat", "It is explicated to divide (between Melachot for purposes of accountability)". However,

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1 Shemot 35:2

2 Shemot 35:3

3 See, however, both Ibn Ezra and especially Ramban, ad loc, who note that there may have been good reason to believe that the previous verse, in eschewing the more comprehensive formulation of "Lo Ta'aseh Kol Melachah", "You shall not perform any labor", and instead using the term Melachah without the modifier "Kol", "All", left open the door either to kindling fire for the sake of cooking, or perhaps, heating water for bathing or generating light, in the spirit of Oneg Shabbat.

4 Shabbat 70b, Sanhedrin 62a

5 The biblical or rabbinic status of Techum Shabbat is itself a matter of controversy, with Rambam adopting the former approach, and Rashi adopting the latter.

6 See Seforno (35:3) for a fascinating presentation of Havarah that might be utilized as an explanation as to why Havarah is only a prohibition, and not a Melachah.

the Talmud in Masechet Sanhedrin⁷, as well as the Mechilta⁸, understands this verse in a different vein altogether, establishing a prohibition against implementing capital punishment on Shabbat.

While these rabbinic texts quite specially limit the Torah-level prohibition to capital punishment, on the basis of a Binyan Av from one of the four forms of capital punishment, Sereifah, Rambam, quite curiously, expands the Torah-level prohibition to include lashes. While Rambam alludes to this expansion in Sefer HaMitzvot⁹, he leaves no room for ambiguity of any kind in Mishneh Torah, in which he plainly states, citing the verse in question, "Lo Teva'aru Eish BeChol Moshevoteichem BeYom HaShabbat--' Harei SheNitchayev BeBeit Din Malkot O Mitah Ein Malkin Oto Ve'Ein MeMitin Oto BeShabbat", "Do not kindle a fire in all your dwelling places on the day of the Sabbath--' If one was found guilty and sentenced to lashes or capital punishment, we may neither administer lashes nor impose a capital penalty on Shabbat"¹⁰. It seems noteworthy that Rambam does not first state the halacha with respect to capital penalties, and then extend it to lashes, but he organically weaves lashes and capital punishment together, and even leads with lashes, firmly establishing the two as part of a singular unit of Onshin.

The source text for Rambam's expansion, as is so often the case, is by no means obvious. Maggid Mishneh points back to the aforementioned source in Masechet Sanhedrin, but careful scrutiny of that text merely highlights the difficulty, as the talmudic passage clearly restricts the scope of the prohibition of Havarat Eish in the Moshavot, meaning Beit Din, to capital punishment. Indeed, the Mechilta referenced above is equally unequivocal in its limitation of the restriction to capital punishment, Mitat Beit Din.

It is tempting to suggest that Rambam's source is an alternative talmudic passage, not in the Bavli, but rather in a parallel text in the Yerushalmi¹¹. There, Rabbi Yannai is cited as interpreting the restriction of Havarat Eish BeMoshavot to be sufficiently capacious so as to be rendered "Ein Danin BeShabbat", "We do not adjudicate on Shabbat", an ambiguous term, to be sure, but one which might be defined more broadly than the text of the Bavli, so as to include lashes.

While it should be noted that the Penei Moshe explicitly limits the scope of Ein Danin BeShabbat to include only capital punishment, it is indeed possible that Rambam defined the term more

7 35b

8 Mechilta DeRabbi Yishmael- Masechta DiNezikin Parashah 4

9 Prohibition 322. Rambam's language here, "SheHizhiranu Mei'Anosh HaGedeirim Al HaChotim ULeHa'avir HaDinin BeYom HaShabbat", "That He prohibited us from enforcing the safeguards upon sinners and rendering judgements on the Sabbath", sounds more expansive than merely capital penalties, and corresponds to the more unequivocal language utilized in Mishneh Torah, "Ein Onshin BeShabbat", "We do not punish on the Sabbath", where lashes are explicitly included.

10 Hilchot Shabbat Chapter 24

11 Yerushalmi Sanhedrin (Vilna) Chapter 4

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expansively. After all, Rambam himself cited this particular text in Sefer HaMitzvot¹², where he strongly implies that there is a prohibition of administering lashes on Shabbat, over and above the restriction on capital punishment.

And yet, even if one might suggest that the Yerushalmi is indeed the source of Rambam's expansive definition of the prohibition of what Beit Din may not adjudicate on Shabbat, one is still left wondering as to why Rambam might have opted for such an expansive definition of the restriction on the basis of an ambiguous reference in Yerushalmi, and seemingly, against the more narrow rulings of Bavli and Mechilta. Might there be a more general consideration, in Rambam's general scheme, regarding the relationship between capital punishment and lashes, which might more fully explain his expansive ruling regarding lashes on Shabbat?

II.

The opening Mishnah of Masechet Sanhedrin¹³ presents a dispute between the majority and Rabbi Yishmael as to what level court must adjudicate a case which may result in a penalty of lashes. The majority view, which is accepted as the normative view, maintains that a court of three is required, in parallel to cases involving monetary disputes. Conversely, Rabbi Yishmael maintains that a Sanhedri Ketana is required, a court of twenty-three justices, typically reserved for capital cases.

The basis of Rabbi Yishmael's minority ruling is itself a matter of talmudic dispute¹⁴. Abayei understands that Rabbi Yishmael's view is rooted in the Torah's parallel description of someone who is guilty of a capital offense, as well as someone who is in violation of a prohibition subject to lashes, with the same term, Rasha. As such, the same level court would be required. Rava, in contrast, explicates Rabbi Yishmael's view with a phrase both tantalizing and enigmatic: "*Malkot BeMakom Mitah Omedet*", "Lashes stand in the place of a capital penalty".

The Tosafists¹⁵, citing the celebrated notion that a prohibition which is applicable to a gentile *eo ipso* carries along with it a capital penalty, "*Azharatan Zo Hi Mitatan*", "Their prohibition is their prescription of capital punishment", interpreted Rava's explanation of Rabbi Yishmael to mean that, in essence, a violation such as one which requires lashes in principle would require capital punishment, but, in an expression of Divine compassion for the Jewish people, in contrast to the draconian standards to which gentiles must adhere, we are afforded a lesser penalty of lashes. Nevertheless, given the fact that capital punishment, in principle, ought to have been required, a court of twenty three is imperative. Consistent with their position, the Tosafists slightly emend the text of Rava's statement, from *Malkot BeMakom Mitah Omedet*, to a phrase which makes it clear that lashes is in fact a substitute for capital punishment, "*Malkot Tachat Mitah Omedet*", "Lashes stand in the stead of a capital penalty".

Given that Rabbi Yishmael's view is a minority position, one surely would not have expected its appearance in Mishneh Torah, in any context altogether. And yet, quite remarkably, Rambam¹⁶,

while conceding that cases adjudicating the commission of a violation which may result in lashes require only three justices, in the very same breath strikingly cites Rava's explanation of Rabbi Yishmael's position, "*Ve' Af Al Pi SheMalkot BiShloshah BeMakom Mitah Hi Omedet*", "And although lashes are adjudicated with three judges, they stand in the place of capital punishment". This shocking formulation, in which Rambam both rejects Rabbi Yishmael's conclusion regarding the need for a court of twenty three, yet embraces the very rationale utilized by Rava to explain Rabbi Yishmael's position, was noted by the Kesef Mishneh¹⁷ with more than a small measure of surprise.

Evidently, Rambam understood, in contrast to the Tosafists, that lashes were not a substitute for capital punishment, but, as the simple meaning of the words would indicate, *BeMakom Mitah*, that lashes are indeed a form of capital punishment, albeit one in which the recipient paradoxically survives. As such, Rambam is certainly prepared to concede the local point, namely the requirement of a court of twenty three, but maintains, unambiguously, that lashes require all of the same evidentiary and procedural standards that the other four forms of capital punishment would require, with respect to witnesses, warning, and witness interrogation.

The language of the Rambam is equally unmistakable, as he writes, "*KeSheim SheMitzaah LeHamit Et HaMechuyav Mitah Kach Mitzaah LeHalkot Et HaMechuyav Malkot*", "Just as it is a commandment to execute one who is sentenced to capital punishment, so too it is a commandment to administer lashes to one who is sentenced to lashes", establishing the fundamental relationship between lashes and capital punishment. Moreover, in mandating the same evidentiary and procedural standards in cases of lashes and capital punishment, Rambam once again formulated lashes as part of the broader rubric of capital penalties, noting, "*Ein Adam Lokeh Ela Be'Eidim Ve'Hatra'ah UBodkin Ha'Eidim BiDrisha VeChakirah KeDerech She'Osim BeDinei Nefashot*", "A person is not given lashes, except by witness testimony, with a warning, and we test the witness with questions and investigations in the manner which we do in capital cases". It is not that lashes are *in lieu* of capital punishment, as the Tosafists argued, but that lashes are a form of capital punishment, and belong, in many respects, to the world of *Dinei Nefashot*.

It is a small wonder, then, that Rambam extended the language of the Bavli and Mechilta regarding the prohibition of administering capital penalties on Shabbat to lashes, and opted for a more expansive interpretation of the Yerushalmi than one might otherwise have: categorically, Rambam understood lashes as wholly indigenous to the world of *Dinei Nefashot*, with the logical consequence being the prohibition of administering them on Shabbat, along with the other forms of *Mitot Beit Din*. And yet, insofar as lashes do not result in the demise of the recipient, how exactly could Rambam maintain a doctrine that sees lashes as part of the rubric of capital punishment?

17 Ad loc. Ultimately, he concludes that Rambam meant the expression *BeMakom Mitah* as essentially 'in parallel to' *Mitah*, that is to say, just as actual capital cases require multiple witnesses, warning, interrogation, and ordained judges, so too, cases involving the penalty of lashes require the same. We hope to advance a slightly more ambitious argument.

12 *ibid.*

13 Mishnah Sanhedrin 1:1

14 Talmud Sanhedrin 10a

15 Ad loc. *Malkot Tachat Mitah Omedet*

16 *Hilchot Sanhedrin Chapter 16*

III.

Prima facie, one might look to a celebrated passage concerning the near martyrdom of Chananiah, Misha'eil, and Azariah in Masechet Ketuvot¹⁸ for some direction regarding the relationship between lashes and death, and perhaps regarding bridging the gap between the two in the manner which Rambam apparently did. There, the Gemara famously challenges the notion that lashes are less severe than a death penalty by rather audaciously¹⁹ speculating that were the aforementioned triad beaten they may indeed have capitulated to idolatry, "Ilmalei Nagdu LeChananiah Misha'eil Ve'Azariah Palchu LeTzalma", "If only they had flogged Chananiah, Misha'eil, and Azariah, they would have prostrated themselves before an idol".

Whatever appeal such an approach might have, in raising lashes to the level of a capital penalty, and perhaps elevating it above capital punishment, the conclusion of the Gemara seems to militate against this suggestion. As the Gemara goes on to note, the very fact that the Torah imposes a strict limit on the number of lashes which may be given, "*Haka'ah SheYeish Lah Kitzbah*", "A smiting which has a limit", firmly establishes the relative severity of capital punishment as compared to lashes. As such, further explanation is surely required as to why Rambam might have bridged the two, given the radically different outcomes in each case. Surely, the very fact that in the case of lashes, the recipient does not actually die²⁰, in the literal sense, was sufficient grounds for Rambam to allow adjudication in front of a court of three in the first place.

Tentatively, we might suggest an approach on the basis of a remarkable passage in the Sifrei²¹. The Sifrei notes that, in its presentation of the process of administering lashes, the Torah repeatedly refers to the recipient as a Rasha until the final clause of this section, in which the Torah uses a term of fraternity, referring to him no longer as a wicked man, but as one's brother, "*Achicha*".

Indeed, the Sifrei discerned a halacha of great consequence in this linguistic shift, noting that if the one being lashed was otherwise liable for Kareit, the very process of undergoing lashes itself, *ipso facto*, releases this penalty: "*Kol Chayavei Keritot SheLaku Nifteru MiYedei Keritatom*", "All those liable for excision who were lashed have been released from their excision".

The premise is a striking one. The process of lashes is entirely transformative, but also restorative. He who, just a few moments ago was a definitive Rasha, "*Bin Hakot HaRasha*", no different than someone who requires the death penalty, "*Asher Hu Rasha LaMut*", is now, in every sense, "*Achicha BeTorah UVe'Mitzvot*", "Your brother in Torah and in Mitzvot". If there is a death here, as Malkot BeMakom

Mitah Omedet, it is not in the physiological sense, but, perhaps in so far as the Rasha is being fully expunged.

Indeed, no less an authority than Ramban²², in addressing the biblical limit of forty²³ lashes, notes, *inter alia*, the fact that, in committing a violation against the Torah, given in forty days, one has, spiritually speaking, murdered oneself, "*Garam Mitah Le'Atzmo SheNotzar Le'Arba'im Yom*", "Caused death for himself, who was formed in forty days", reversing the process of creation which takes place over forty days. As such, the forty lashes correspond to the desecration of the Torah, given in forty days, and oneself, created in the same amount of time.

Building off of this Ramban, would it be too great a leap to suggest that an intrinsic part of what the process of lashes achieves is the symbolic destruction of the Rasha, which has infiltrated and metastasized into this individual so created in forty days, so that a rebirth might take place, with the emergence of Achicha?

Where there was once the stigma of a Chiyuv Kareit, there is now a *tabula rasa*. Surely, we are dealing with something on the order of Dinei Nefashot, as Rambam so emphatically and consistently argued, a matter which cuts to the very soul of the recipient party. If so, Malkot BeMakom Mitah Omedet indeed, not merely in the sense of the gravity of the lashes, but, paradoxically, in the opportunity generated for spiritual renewal by the 'death' of that which had become so thoroughly desiccated.

Using the Bad for Good

By Eitan Mermelstein ('21)

This week's Parashah, Parashat VaYakheil, is a sequel of sorts to Parashat Tetzaveh, describing the actual construction of the vessels used in the Mishkan. The Torah lists how each vessel was made and how the leaders of the nation, who were tasked with building the Mishkan, obtained the materials required for its construction. However, with regard to the construction of the Kiyor, the vessel which contained the water for washing the hands and feet of the Kohanim, the Torah uses an unusual phrase to describe the material used: "*VaYa'as Et HaKiyor Ve'Et Kano Nechoshet BeMarot HaTzove'ot Asher Tzavu Petach Ohel Mo'eid*", "He made the Kiyor of copper and its pedestal of copper, with the mirrors of the legion women, who congregated at the entrance of the Ohel Mo'eid" (Shemot: 38:8). Many Rishonim ask: who were these women who gathered at the entrance to the Ohel Mo'eid, what is the significance of their mirrors, and what does the word "Tzove'ot" mean in this context?

Rashi (ibid. s.v. BeMarot HaTzove'ot) writes that these mirrors were used by the Jewish women in Egypt to beautify themselves. They would use these mirrors to apply make-up to help convince their husbands, weary of slavery, to have children. The success of this ploy caused the women to produce the legions ("Tzeva'ot" in Hebrew) of Klal Yisrael when they left Egypt. However, because these mirrors had been used for seduction, Moshe originally refused to accept them for the building of the Mishkan. Nonetheless, Hashem intervened and told Moshe to accept these mirrors as a contribution, as these mirrors had caused Klal Yisrael to grow so rapidly in Egypt; Hashem said that these mirrors were more

18 Ketuvot 33a

19 It was almost altogether too much for the Tosafists, in light of Rabbi Akiva's willingness, bordering on eagerness, to accept torture while consecrating the name of the Almighty. See Tosafot Ketuvot 33b s.v. Ilmalei.

20 The very basis for a court of twenty three is rooted in the need for an "Eidah", "Assembly", a group of ten which is the halakic representation of a tzibbur, to make the case for conviction, and a second Eidah, to make the case for exoneration: "VeShaftu Ha'Eidah VeHitzilu Ha'Eidah", "And an assembly shall judge while an assembly saves". This requirement is obviously only relevant when an actual death, in the literal sense of the term, might take place.

21 Ki Teitzei 286

22 Ramban to Devarim 25:1 s.v. VeHayah Im Bin Hakot HaRasha

23 In practice, thirty nine, "BeMispar Arba'im", "In the number [preceding] forty" (Devarim 25:3).

beloved to him than any other material. Indeed, these mirrors were used for the Kiyor, which held water used in the Sotah process of adjudicating marital infidelity; this would restore peace between husband and wife.

Ramban (ibid. s.v. BeMarot HaTzove'ot) concurs with Rashi that Moshe originally rejected the mirrors, until Hashem told him to utilize them for the Kiyor. Additionally, Ramban says that these women brought the mirrors directly to Moshe's tent because the Mishkan had not been built yet. However, the Ramban also presents a second interpretation of this Pasuk based on the view of Onkelos. He states that these women had abandoned worldly desires of beauty, and so their mirrors were now useless to them; this is why the women gave up their mirrors for the construction of the Mishkan. Now, they came each day to the entrance of the Ohel Mo'eid to daven and hear words of Torah. Ramban further posits that more and more women would join them each day, forming the legions alluded to in the Pasuk. Ramban also agrees with Rashi that it is fitting that these mirrors were used for the Kiyor, because of the role of the Kiyor in the aforementioned Sotah process.

Ibn Ezra (ibid. s.v. BeMarot) comments on this Pasuk in a similar vein to the Ramban's second approach. He writes that prior to the time of Parashat VaYakheil, these women would frequently look at themselves in these bronze mirrors and would act like the rest of the nations of the world. Now, these women, who had abandoned material desires, gave their mirrors as a gift to the Mishkan because they no longer felt a need for them. Instead, they came every day to the Ohel Mo'eid to daven and listen to Moshe's instructions about the Mitzvot.

Based on Rashi's interpretation, Rav Joseph B. Soloveitchik (the Rav) said that Moshe originally did not understand how these mirrors could be incorporated into the Kiyor; after all, the Kiyor stands directly adjacent to the Mizbei'ach, where Jews will come begging for forgiveness by offering a Korban Chatat. However, Hashem intervened. He said that these women, who were so fixated on their physical appearance in Egypt but who nevertheless raised a generation of children longing for redemption, would in fact recite their confessions for future sins with more grief than any others. Thus, it was fitting that their mirrors be utilized for the creation of the Kiyor.

The Rav explained that this story contains an idea which is fundamental to the concept of Teshuvah. Moshe did not want to accept these gifts because of what they represented, namely succumbing to materialism. However, Hashem explained to him that the idea of repentance is not only predicated on confession (acknowledging that we are sinners and God is righteous), but also on the idea that we must cleanse ourselves by using the very object of our sin for goodness. Accordingly, Rabbeinu Yonah, in his Sefer Sha'arei Teshuvah, writes that the tenth principle of Teshuvah is, "LeHeitiv Pe'alav BaDavar Asher Zadah Alav," "To improve one's deeds with the very matter with which one sinned" (Shaarei Teshuvah, Shaar 1 Tenth Principle). May we all take this lesson to heart in our continual quests for self-improvement.

BETZAL'EIL AS A MODEL FOR HUMAN CREATIVITY

By Levi Langer ('21)

In Parashat Ki Tisa (Shemot 31:3), Betzal'eil's divine ingenuity used to construct the Mishkan is described by God as "Va'Amalei Oto Ru'ach Elokim, BeChochmah, BiTvunah, UVeDa'at, UVeChol Melachah",

"And I have imbued him with the spirit of God, with wisdom, with insight, with knowledge, and with [talent for] all manner of craftsmanship." The Torah (Shemot 31:4-5) then specifies Betzal'eil's talents as they relate to the Mishkan, for example, his ability work with gold, silver, copper, stones, and wood. The Torah then concludes that he was able "La'Asot BeChol Melachah", "to do every [manner of] work."

This combination of intellect ("wisdom, insight, and knowledge") and artistry ("[talent for] all manner of craftsmanship") reflects the dual nature of the Tzelem Elokim (image of G-d) in which Hashem created man. In the first account of the creation of man, Hashem says (Bereishit 1:26), "Na'aseh Adam BeTzalmeynu KiDmuteinu," "Let us make man in our image, after our likeness." Rashi (s.v. KiDmuteinu), Rashbam (s.v. KiDmuteinu), and Sforno (s.v. BeTzalmeynu) contend that this refers to humans' noetics, whereas Rav Sa'adya Ga'on (s.v. BeTzalmeynu KiDmuteinu) identifies it as mankind's mastery over his surroundings.

Betzal'eil's Ru'ach Elokim granted him both qualities. He had power over his surroundings inasmuch as he could "do every manner of work," including manipulating numerous materials, and he used his sharp mind to execute his power intelligently to achieve the very precise and complex goal of building the Mishkan and its vessels. Thus, both elements of being created in the Tzelem Elokim work in tandem. In fact, Ibn Ezra (Shemot 31:4, s.v. LaChshov MaChashavot) understands Betzal'eil's ability (Shemot 31:4) "Lachshov MaChashavot," to be his power to derive novellae through the strength of his acumen. On the other hand, Rashi (s.v. LaChshov MaChashavot) translates it as a weaving ability which demonstrates that man's wisdom and control of the Universe are interconnected.

Rashi (Bereishit 1:26, s.v. VeYirdu) warns that if we forsake our divine gifts, then our environment will dominate us. Likewise, Rashbam (Bereishit 1: 26, s v. KiDmuteinu) notes that when a person sins he fulfills the verse "Adam BiKar Bal Yalin; Nimshal KaBeheimot Nidmu", "But man does not repose in his glory; he is compared to the silenced animals." (Tehillim 49:13) We ought to maximize our manifestations of Tzelem Elokim lest we lose our spiritual status like the "BeHeimot Nidmu."

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