

Saving Life and Law: *mSanhedrin* 8:7 and its Babylonian Interlocutors

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Introduction

The human judge

After the flood, when Noah offers animal sacrifices, God withdraws from earth. Upon smelling the incense of the animals' flesh, God first acknowledges that the human's heart has an evil inclination from youth onwards (Genesis 8:21), promises that He will no longer destroy all life on earth on account of human beings' sins (ibid.), allows humans to consume animal flesh (ibid. 9:3),¹ and announces within one and the same phrase the prohibition of bloodshed and the murderer's capital punishment, to be administered and executed by humans themselves: "*Whoever sheds a human's blood, by a human shall his blood be shed; for in the image of God He made humans*" (Genesis 9:6).²

The human being's role as judge is new: Even though Cain, after having killed his brother Abel, fears that someone might kill him on account of his act, God at this point in time still rejects the human's role as judge and prevents the slaying of Cain. Only after the flood, in this world of Noah, murder is no longer punished by God, but by human beings.³ As if disappointed and demoralized by His creatures' sinfulness, God delegates the responsibility to

¹ For an interpretation of the permission to eat animal flesh at the beginning of the post-flood-world, cf. Steinmetz, "Vineyard," 195-196.

² Cf. Steinmetz, "Vineyard," 206.

³ The setting up of courts is, accordingly, one of the seven laws that are according to the rabbinic tradition incumbent upon every human being, the "Noahide laws." On the translation of *ba'adam* in Genesis 9:6 cf. Steinmetz, "Crimes and Punishments, Part II," n. 33, n. 68 and Lust, " 'For Man Shall His Blood be Shed'." Devora Steinmetz ("Crimes and Punishments, Part II," n. 33) notes that "[i]f *ba'adam* is understood as 'by means of a human being', there is a juxtaposition in Gen 9:5-6 between God seeking justice – *edrosh* – and human beings carrying out justice by killing the criminal – *ba'adam*. (Such a reading raises the possibility that we might read the end of Gen 9:6 – 'for in the image of God the human being was made' – not only as an explanation for why murder of a human being is punishable by death – because the murdered human being is created in God's image – but also as an explanation of why the human being is to carry out the justice which God has just said is in God's domain – because the human being, having been created in God's image, has the responsibility to carry out justice.)"

install justice, including capital punishment for murder, to humankind.

The two “ends” of Genesis 9:6 – the prohibition of bloodshed and the capital punishment of a murderer at the hands of humans – may give rise, at least in a contemporary reader, to a sense of tension, or a paradox: “How can God state the absolute inviolability of human life, and at the same time allow human beings to execute capital punishment?”⁴ The background of this perceived tension is the common formulation of the demand to respect another human being’s life in terms of universal, or natural rights: Each and every human being has a right to physical integrity, the protection of life and well-being, as the notion of life’s immutability is ordinarily articulated in the “modern West.” In biblical law, however, a murderer does not violate an individual’s “natural right” to physical integrity.⁵ Rather, a murderer commits a transgression that violates God, His “image” in mankind,⁶ His law and His entire creation.⁷ A

⁴ Lust, “‘For Man Shall His Blood be Shed,’” 91. Yair Lorberbaum (“Blood,” 58) notes that “[p]aradoxically, this idea [the sanctity of life, C.T.] is expressed in the opening chapters of the Bible in the statement that the only adequate punishment for bloodshed is death.” Cf. also Greenberg, “Some Postulates,” 15-16: “This view of the uniqueness and supremacy of human life has yet another consequence. It places life beyond the reach of other values. The idea that life may be measured in terms of money or other property, and a fortiori the idea that persons may be evaluated as equivalences of other persons, is excluded. Compensation of any kind is ruled out. The guilt of the murderer is infinite because the murdered life is invaluable. [...] The effect of this view is, to be sure, paradoxical: because human life is invaluable, to take it entails the death penalty.”

⁵ The difference between formulating respect for life in terms of universal rights and as a prohibition of taking an innocent life may at first seem a difference of form, rather than one of content. Both formulations seem to come down to the same thing: the prohibition of bloodshed. Charles Taylor (*Sources of the Self*, 11) explains that “[t]he difference lies not in what is forbidden but in the place of the subject. Law is what I must obey. It may confer on me certain benefits, here the immunity that my life, too, is to be respected; but fundamentally I am *under* the law. By contrast, a subjective right is something which the possessor can and ought to act on to put it into effect. To accord you an immunity, formerly given you by natural law, in the form of natural right is to give you a role in establishing and enforcing this immunity. Your concurrence is now necessary, and your degrees of freedom are correspondingly greater. At the extreme end of these, you can even waive a right, thus defeating the immunity.”

⁶ Rabbi Aqiva expounds that “everyone who sheds blood is like one, who diminishes the Presence, as is said: *Whoever sheds a human’s blood, by a human shall his blood*

murderer's act is of no less than cosmic magnitude and dimension; it leaves a mark on the world and affects the world as a whole, not just an individual's "right" to physical protection and wellbeing. Accordingly, a murderer's guilt is, as *mSanhedrin* 4:5 expresses, "as if he had destroyed a complete world."⁸ When a murderer is punished with humanly imposed death, he is thus not simply sanctioned for violating a divine command, such as any other

*be shed; [for in the image of God He made humans] (Genesis 9:6)" (tYevamot 8:5, bYevamot 63b and Genesis Rabbah, 34:14). Yair Lorberbaum argues that the tannaim based the concept of man being created in the image of God "[n]ot so much on an anthropomorphic notion of God but rather...upon a theomorphic conception of man" (Lorberbaum, *Tselem Elohim*, PhD diss., English Summary VIII, quoted in Berkovitz, *Execution and Invention*, 56). According to Yair Lorberbaum, a person's body, soul, personality and mind all embody the image of God and since man is, in this sense, divine, "[a]ctions directed at human beings influence God, both positively and negatively" (ibid., IX, quoted in Berkovitz, ibid., 56). Cf. also Lorberbaum, "Blood," 80 and *Sifre Numbers* 161.*

⁷ In line with this, the first commandment – the announcement God makes concerning Himself, "I am the Lord your God who has taken you out of Egypt out of the House of Bondage" – and the sixth commandment – "Do not murder" – were read as parallels. Cf. *Mekhilta de'Rabbi Ishmael*, Ba-hodesh, parasha 8: כיצד נתנו עשרת דיברות? חמשה על לוח זה וחמשה על לוח זה. מגיד הכת' אנכי יי אל'יך וכנגדו כת' לא תרצח. ("How were the Ten Commandments given? Five on one tablet and five on another. It is written: *I am the Lord your God* (Exodus 20:1; Deuteronomy 5:6) [on one tablet] and parallel to it [on the second tablet] it is written, *Do not murder* (Exodus 20:12, Deuteronomy 5:16). Scripture teaches that regarding anyone who spills blood, it is as if he diminishes the image"). The first commandment is read as a mirror of the sixth commandment. Cf. also the lecture Aryeh Cohen held in June 2011 at the "Reckoning with Torture" presentation organized by the National Religious Campaign Against Torture in Los Angeles (<http://www.rhr-na.org/blog/?p=2628>).

⁸ "For this reason alone was man created, to teach you, that whosoever destroys a single soul, Scripture imputes guilt to him as if he had destroyed a complete world; and whosoever preserves a single soul, Scripture ascribes merit to him as if he had preserved a complete world" (*mSanhedrin* 4:5, according to ms Kaufmann A 50, Budapest Akademia, and ms Parma, Biblioteca Palatina, 3173, 13 דה רוסי). According to the Vilna-edition of the Bavli and the ms Jerusalem Yad Harav Herzog of the Bavli, the text reads, "whosoever destroys a single soul of Israel, Scripture imputes guilt to him as if he had destroyed a complete world; and whosoever preserves a single soul of Israel." Yet, the gemara on this mishnah in *bSanhedrin* 38a implies that the amoraim are commenting on a version of the mishnah, which does not contain the addition "of Israel." Cf. on this mishnah, Wright, "Relationship Between *mSanhedrin* 4:5, Four Traditions about Adam Attributed to Rav in *bSanhedrin* 38a-b and Psalm 139."

transgressor. Murder needs to be addressed by the human community *beyond* the mere punishment of the murderer: When a murdered body is found and the murderer cannot be identified, a broken-necked heifer atones for the spilling of blood (though the murder is to be killed nevertheless in case he is found later) (Deuteronomy 21:4-9);⁹ and an unwitting murderer has to flee to the “city of refuge” until the death of the officiating High Priest (Numbers 35:25 and 35:32). Even though in the first case, the murderer cannot be brought to justice and in the second case is deemed undeserving, the land, that was forced to absorb the spilt blood, requires atonement¹⁰ and the exile of the murderer.¹¹ Murder is, as Devora Steinmetz describes, “[u]nique among crimes in that the act has an essential reality distinct from the legal responsibility of the perpetrator and the possibility of bringing the murderer to justice.”¹²

As an act that effects a human’s relation with the world as a whole, with the land, with God and with other human beings, murder requires of necessity a “repair” at the hands of the world: “*Whoever sheds a human’s blood, by a human shall his blood be shed; for in the image of God He made humans*” (Genesis 9:6)¹³ is a chiasmic structure, repeating each word of the first clause in reverse order in the second. The second clause virtually mirrors the first, and thereby emphasizes, first, the exact correspondence of offense (murder of man) and punishment (death at the hands of man), and second, the recovery of the

⁹ Cf. also *Sifre Numbers* 161, *tKeritot* 4:3, *bKetubbot* 37b, *mSota* 9:7 and Maimonides, *Hilkhot Rotzeah* 10:8.

¹⁰ Cf. Numbers 35:33, echoing Genesis 9:6: “[A]nd the land cannot be atoned for, for the blood that is spilt in it, but by the blood of the spiller.” Murder as a violation of the land, that requires the death of the murderer, is a motif that characterizes also God’s punishment of Cain, after killing his brother Abel: “¹⁰. And He said: What have you done? The voice of your brother’s blood cries unto Me from the ground. ¹¹. And now cursed be you from the ground, which has opened her mouth to receive your brother’s blood from your hand. ¹². When you till the ground, it shall not henceforth yield unto you her strength; a fugitive and a wanderer shalt you be in the earth” (Genesis 4:10-12). On murder as a violation of the land cf. also Steinmetz, “Vineyard.”

¹¹ On the city of refuge cf. Greenberg, “The Biblical Concept of Asylum.”

¹² Steinmetz, “Crimes and Punishments, Part II,” 293.

¹³ The capital punishment of the murderer is addressed, aside from Genesis 9:6 and Numbers 35:33, also in Exodus 21:12-14 and Deuteronomy 19:11-13.

creation's cosmic, metaphysical balance, as if a circle is being closed: When the murderer *of man* is punished with death *by man*, what has become out of balance is reinstated, the world's injury is "fixed," the land is being atoned for, and cosmic order is reinstalled.¹⁴

Framing the researched rabbinic texts

The rabbinic discourses on capital punishment, the power of Jewish courts to impose this punishment and the nature of these juridical executions, have long been the focus of intense scholarly research.¹⁵ However, the rabbinic texts I will focus on in this work – *mSanhedrin* 8:7 and its gemara – do not fit neatly and self-evidently into the rabbinic discourses on capital punishments: In *mSanhedrin* 8:7 the tannaim establish that one may kill a "pursuer,"¹⁶ that is, (among others) someone, who pursues his fellow in order to kill him. This mishnah, in other words, does not deal with what happens *after* a human being has lost his life through an act of bloodshed, but screens into a situation, in which there is still the opportunity to save a life from human aggression, *before* an act of murder takes place. The tannaim here seem not so much concerned with a murderer's capital punishment, as with the necessity to save a human life even at the cost of killing the murderer – and most of its academic

¹⁴ Cf. also Lorberbaum, "Blood," 66, on the "redeemer of blood: "The demand to expiate the blood of the victim through the blood of the murderer – and not with other blood – is a magic-ritual objectification of the feeling of revenge and the principle of reciprocal punishment that are latent in the phrase 'redeemer of blood.' According to this conception, the 'redeemer of blood' causes the situation to revert to a balance that was disturbed through the act of murder."

¹⁵ Recently, Beth Berkowitz has analyzed in her doctoral dissertation "*Execution and Invention. Death Penalty Discourse in Early Rabbinic and Christian Discourse*" the trends of scholarly research on the rabbinic death-penalty (cf. the monograph's first chapter "Reading Execution"). In particular, she embeds the scholarly readings of the rabbinic death-penalty within the history of twentieth century Judaism, and demonstrates how these readings reflect, and were shaped by the threats, challenges and political developments with which scholars were confronted.

¹⁶ Since the transgressor is termed in *mSanhedrin* 8:7 a "pursuer," this mishnah is commonly referred to as "the law of the pursuer," the "*din rodef*." Recently, this mishnah's claim to fame was its use in contemporary responsa, that used (or rather, misused) it for legitimizing the assassination of Yitzhak Rabin.

readers indeed understand *mSanhedrin* 8:7 as just that: a tannaitic permission to commit, in the specific outlined cases, an act of bloodshed *for the sake of saving life*.¹⁷

Yet, reading the mishnah in light of its possibly life-saving outcome is not seamless: For example – to mention just one disturbance – not only the murderer, but also one who tries to rape a betrothed girl or a boy may be killed in order to prevent him committing the act; he, too, is categorized a “pursuer.” However, a person, who pursues after a betrothed girl in order to have sexual intercourse with her, does not necessarily attempt to kill her. If one identifies as the mishnah’s rationale the saving of life, then one has to conclude, that it permits a rescue of the victim through bloodshed even though it is not necessarily the victim’s *life*, which is endangered. Moreover, it is, according to *mSanhedrin* 8:7, solely the rapist of a *betrothed* girl who may be killed. Yet, it is grotesque to assume that a bystander, who witnesses a man pursuing a girl in order to rape her, interrogates the girl about her marital status, and then decides about further action in accordance with her being betrothed, married or single.¹⁸ If, indeed, the tannaim attempted to enable the rescue of the pursued through this mishnah, then it seems to attest to their failure, or at least blatant inability to offer a practical and realistic guideline to action.

Instead of reading *mSanhedrin* 8:7 as legitimizing an act of bloodshed for the sake of saving a life, I will suggest an altogether different framing: I will argue that the mishnah is *not* (or at least, not exclusively) to be read in conjunction with other mishnayot, that deal with the saving of life to begin with, but needs to be read, instead, as part of the tractate into which it is woven: Tractate Sanhedrin – the tractate that deals with court procedure and the execution of

¹⁷ Cf., for example, Börner-Klein, “Killing in Self-Defense,” Zohar, “Killing a Rodef” and Finkelman, “The Rodef Defense.” An exception is Shapira, “The Law of the Pursuer.”

¹⁸ The transgression of the one, who pursues a betrothed girl or a boy, is not rape as defined by contemporary law-codes, but adultery, that is, sexual intercourse defined as illegitimate by Scripture. The fact that the pursuer appears to *force* the betrothed girl or the boy is irrelevant as far as the “prohibitedness” of the act is concerned.

punishments in its widest; with how a person is *judged*, and not with how a person is saved.

A necessary presumption of this framing of the mishnah is, that this tractate's description of capital punishments be read neither as reflections of scenes that actually took place, nor as indications of what should take place once rabbinic courts regain power to impose capital punishments. Instead, I assume along with Devora Steinmetz that "[r]abbinic texts on criminal justice offer a distinctive opportunity to look at an ideal system of criminal law. Ideal, that is, not in the sense of 'perfect' [...], but ideal in the sense of reflecting fundamental ideas, rather than being bound to the realities of real criminals and the needs of real human societies."¹⁹ When reading *mSanhedrin* 8:7 as part of rabbinic discourses on capital punishments, I thus presume these discourses to be of a theoretical nature in that they are not bound by the requirements of a juridical system that is, or has been, practically at work. I approach *mSanhedrin* 8:7 as part of the rabbinic discourse on a transgressor's capital punishment – yet not as a proper manual to the pursuer's criminal execution, but as an attempt to negotiate, as Devora Steinmetz formulates, "fundamental ideas:" the nature and purpose of the divine law, the meaning of its transgression, and related to this, the place of the human judge within this law.²⁰

I will try to show that the tannaim and amoraim, when identifying the specific acts that turn a Jew into a "pursuer," attempt to identify an area, *within* which a Jew's life is possible as a Jew, and *beyond* which a Jew's life is possible solely in a physical sense. When asking "what does a Jew die for?" (or formulated along the mishnaic terminology, "what is a Jew saved from through his life?"),

¹⁹ Steinmetz, "Crimes and Punishments, Part I," 82-83.

²⁰ I do not mean to say that rabbinic texts on capital punishments are purely theoretical, and have no impact whatsoever on people's real lives: Rabbinic texts on capital punishments are of a non-theoretical, practical nature in as far as the ideas that are being negotiated through them, inform halakhic decisions, which, of course, may have a very real and straightforward impact on the lives and deaths of the human beings they attempt to govern. As Robert Cover ("Violence and the Word," 1601) emphasizes, "[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another."

they struggle to define and demarcate the line separating the “livable” from the “non-livable,” culture from nature, law from lawlessness. “Fundamental ideas” indeed are negotiated here upon the bodies of those to be “saved,” or, as Alissa Gray concludes: “What a Jew must die for – and the very fact that a Jew must die at all – tell himself and the Gentile world who he is.”²¹ The primary question underlying *mSanhedrin* 8:7, its gemara, and its related intertexts will appear, in the end, to be a platform, upon which a Jewish self and its relation vis-à-vis the authoritative claims of the divine law is displayed, negotiated, and contested.

The first chapter: mSanhedrin 8:7

The first chapter of this work entails an analysis of *mSanhedrin* 8:7, in the course of which the mishnah will be read, as suggested above, as part of the rabbinic discourses on capital punishments. This reading draws partly on George Fletcher’s analysis of the mishnah, that precedes it, i.e., *mSanhedrin* 8:6. The latter deals with the biblical permission to kill a thief who breaks into a house (cf. Exodus 22:1).²² Fletcher argues that in the mishnaic version of this biblical law, the killing of the thief is legitimized not as an act that saves the house-owner’s life, but as a preemptive punishment of the thief: When the house-owner kills the thief upon catching him in the act, he acts as his primary judge and inflicts upon him a punishment as if he were a rabbinic court. I will redraw Fletcher’s reading of *mSanhedrin* 8:6, and then demonstrate that the killing of the pursuer too can be read as a juridical response to his transgression, that is imposed regardless of its life-saving effect. According to this reading, even if the pursuer would *not* endanger any human being, his act would nevertheless warrant his death at the hands of a bystander who witnesses the scene. What legitimates the killing of the pursuer is thus not the possible life-saving effect of his death, but his transgression of the law: The

²¹ Gray, “Martyrdom and Identity,” 243.

²² Fletcher, “Punishment and Self-Defense.”

pursuer may be killed, because his death saves *himself*, the pursuer, from committing a severe transgression.

However, I will argue that *mSanhedrin* 8:7 entails a predetermined breaking point (a “Sollbruchstelle”), which I will address in the first chapter’s second part: In *mSanhedrin* 8:7, the only transgressions, from which a person may be “saved through his life,” are those directed against God *and* human-beings – murder and adultery – even though other transgressions such as idolatry or sodomy are categorized as transgressions that are at least as severe as murder and adultery. The tannaim’s choice to exclude, for example, the idolater from its list of pursuers and to designate as pursuers only those transgressors, whose actions harm fellow human beings thus disrupts the reading and framing proposed previously: When only pursuers of *human-beings* may be killed before actually committing the act, it seems that the rescue of the pursued is part of what turns the killing of the pursuer into a legitimate act. If so, there are grounds to catapult the mishnah into a frame, that is entirely unrelated to and independent of criminal justice as advanced in Tractate Sanhedrin: mishnayot that deal with the saving of life, and are to be found mostly in Tractates Sukkah and Yoma.²³

At the end of the day then, the mishnah escapes an unambiguous determination of its underlying juridical motivation, and consequently, an explicit framing: If the rescue of the *pursued* legitimizes the killing of the pursuer, then the mishnah is to be contextualized among those mishnayot, that deal with the saving of life. But if the pursuer is killed even if his death does *not* result in the rescue of the pursued, if the pursuer *himself* is “saved” from committing a severe transgression, then the mishnah needs to be read as part of tannaitic criminal law.²⁴

²³ Cf., for example, *mSukkah* 2:4 and *mYoma* 8:5.

²⁴ On the difference between a ruling’s juridical motivation, its reason, and its effect cf. Hayes, *Between the Babylonian and the Palestinian Talmuds*, 68 and 215, n. 35: “Knowing the reason for a ruling can greatly alter its meaning, its possible corollaries, or the scope of its applicability. Consider the following example. A house sitter is told not to let the dog run outside. If the reason is that the dog is prone to attack the mail carrier, then a corollary to this rule would be that one must not let any

The second and third chapters: The gemara to mSanhedrin 8:7

The tension between the two possible legitimizations of the pursuer's death is fully fleshed out in the course of the amoraic discussion that *mSanhedrin 8:7* triggered. Throughout the gemara, the amoraim negotiate between the different frameworks the mishnah can be placed in – the framework of criminal justice of Tractate Sanhedrin, and the framework of those mishnayot, that deal with the saving of life. At no point do the amoraic discussions settle the issue unambiguously on one side, within one framework, but rather sway to and fro between the two, testing the limits of both readings, without ever attempting to finally “redeem” the mishnah from its entanglement in a web of inconsistencies and contradictions. In the second and third chapter of this work²⁵ my aim is to redraw the ways the amoraim maneuvered the ambiguities inherent in *mSanhedrin 8:7*, and thereby, to gain a glimpse into the controversies this mishnah provoked.

Scholarly attention, which the gemara to this mishnah received to date, is distributed unevenly: Whereas the gemara to the mishnah's first part has not been analyzed by scholars of rabbinic literature,²⁶ the gemara on the mishnah's second part, specifically one particular part of it, attracted the attention of its academic readers: The gemara on the mishnah's second part records a majority vote of a group of sages, who gathered “in the upper chambers of the house of Nithza in Lydda” (*bSanhedrin 74a*). According to this majority vote, a Jew who is, in a time of persecution, commanded to transgress or to die may transgress, with the exception of three negative commandments: the

animal run outside that might harm the mail carrier, and the scope of the law's applicability is limited to those days and times that the mail carrier comes to the house. On this explanation the house sitter would be permitted to let the dog run outside in the evenings or on Sunday. However, if the reason is that this particular dog is allergic to grass, then the corollary to this rule would be that other animals without this allergy are indeed allowed to run outside, and the scope of the law's applicability is universal: at all times on all days the dog must remain inside.”

²⁵ The analysis of the gemara is divided into two chapters, since the mishnah is divided by the amoraim themselves and commented upon in two distinct parts.

²⁶ An exception is Shapira, “Rodef and Self-Defense,” 264-268, who discusses also the first part of the gemara on the mishnah on the pursuer.

prohibition of bloodshed, adultery and idolatry. This tradition is the “locus classicus” of the halakhic, amoraic discussion concerning commandments a Jew may not transgress even at the cost of his life, and accordingly figures prominently in academic studies on “Jewish martyrdom.”²⁷

Yet, despite its prominence, the tradition on the Lyddan sages was so far not (yet) read by scholars as an integral part of the amoraic commentary on *mSanhedrin* 8:7, in the context of the sugya as a whole. A major and prosaic reason for the prevalence of such a non-contextual reading is probably the scarcity of halakhic texts on the subject-matter of transgressions a Jew may not commit under any circumstances: Since the vast majority of rabbinic texts, that record violent encounters between Jews and the political authorities to which they were subjugated, are of an aggadic nature, academic studies of “rabbinic martyriology” naturally ground their research in it.²⁸ The report on the Lyddan

²⁷ Rabbinic literature does not have a fixed, “traditional” term for martyrdom. Thus, the terminology referring to martyrdom, such as *qiddush ha-Shem* (“the sanctification of God’s name”) is not found in the oldest references to martyrdom in rabbinic literature. Statements by rabbinic sages living in the first two centuries CE contain a variation of terms and phrases for martyrdom, for example “to give one’s life for the commandments” or “to offer oneself to be slaughtered for the Torah.” In passages from the third century onwards, one frequently finds *qiddush ha-Shem* as the shorthand expression referring to the experiences, acts and statements of Jewish martyrs. Cf. Avemarie, “Zeugnis in Öffentlichkeit,” and Herr, “Persecutions,” 106. For the development of the technical use of the term *qiddush ha-Shem* in the sense of “death in religious persecution,” cf. Safrai, “Martyrdom in the Teachings of the Tannaim,” 146.

The first scholars who researched the theme of martyrdom in Jewish texts were Saul Lieberman (“The Martyrs of Caesarea,” 1939-1944), Yitzhak Baer (“Israel, the Christian Church, and the Roman Empire,” 1956) and Ephraim Urbach (“The Homiletical Interpretations of the Sages,” 1961). During the past twenty years, prominent and often quoted studies are Daniel Boyarins’s *Dying for God* (1999) and Aryeh Cohen’s “Towards an Erotics of Martyrdom” (1998). I refrain from giving a more extensive overview of scholarly research on the subject, since I am interested in the tradition on the Lyddan majority vote in as far as it is one of the building-blocks of which the gemara to *mSanhedrin* 8:7 is composed. I am not looking into the origins, or the development of rabbinic texts on Jewish martyrs, but rather focus on the function of the tradition on the Lyddan gathering within the amoraic discussion of *mSanhedrin* 8:7.

²⁸ It had already been observed by Daube (in 1965, *Collaboration*, 18), who focuses on halakhic responses to the permissibility of collaboration with an evil government,

gathering is thus, in line with the overall dominance of aggadic texts on the subject of “Jewish martyrdom,” read as just another quasi-aggadic tradition, without paying further attention to the function of this report within the *halakhic sugya*.

The non-contextual reading-preference may be related also to the historicist²⁹ approach to rabbinic literature that dominated earlier scholarship: Narrations on martyrs were often read by scholars as more or less straightforward reflections of historical events that occurred at the time of the respective martyr.³⁰ The guiding questions of scholarly analyses of “Jewish martyrdom” accordingly were: When and why did rabbinic views on martyrdom emerge?

that “[i]t is astonishing that modern writers analyzing Jewish reactions, now and in the past, to crises such as he [Rabbi Yeshoshua ben Levi, a rabbi who is reported to having handed over to the authorities a man, who found refuge in the rabbi’s house when fleeing from military corps, C.T.] faced with have paid no attention to the law and legal discussions on the matter: surely material as representative of Jewish thought as any.” Similarly, Alicia Grays, in her study on the halakha on martyrdom as it is elaborated in the Yerushalmi (2003, “Martyrdom and Identity,” 242-243, n. 3), emphasizes: “I refer specifically to the halakha of the Palestinian Talmud so as to distinguish the material on which my arguments are based from the non-legal, aggadic martyrdom stories on which much other recent scholarship has focused.”

²⁹ “Historicist” is a term I use for want of a better term. I want to characterize an approach that does not pay much attention to the rabbinic texts’ exegetical nature. For an example of such an approach cf. also n. 30.

³⁰ Daniel Boyarin demonstrates the pervasiveness of this reading through quoting scholarly interpretations of a midrash on the Song of the Sea (Exodus 15). The midrash is recorded in the *Mekhilta de-Rabbi Ishmael* (Parasha Hashira, Be’shelach 3) and attributed to Rabbi Aqiva. Ephraim Urbach, for example, claims that “Hadrian’s decrees and the consequent facts of martyrdom as the supreme expression of the Jew’s love for his Creator gave raise to interpretations that discovered in Canticles allusions to Jewish martyriology and to the uniqueness of Israel among the nations of the world” (Urbach, “The Homiletical Interpretation of Canticles,” 250, cited by Boyarin, “Language Inscribed by History on the Bodies of Living Beings,” 140-141). Yitzhak Baer similarly maintains that “[t]he verse *My Beloved is white and ruddy* alludes to the ecstatic vision to which the martyrs were privy in the days of their torture and at the hour of their death. The suggestion of the nations “Come, merge with us” [in the midrash, C.T.] is interpreted as a political suggestion that is made by the Roman politicians to the sages of Israel [...]” (Baer, “Israel, the Christian Church, and the Roman Empire,” 3, cited by Boyarin, *ibid.*). And Gedaliah Alon assumes that “the passage reflects memories from after the wars of the destruction, or it describes a reality from after the war or Quietus” (Alon, *History of the Jews*, 327 n. 25, cited by Boyarin, *ibid.*).

What is the influence of persecutions on rabbinic views on martyrdom? And are these views genuinely Jewish, or did, for example, the Christian ideology on the same subject-matter influence the rabbis' ideas?³¹ In line with these questions, the report on the sages' meeting in Lydda was of interest to scholars only in as far as this meeting was deemed worthy of shedding light on the historical setting, which might have inspired it. Moshe David Herr, for example, concludes that the meeting apparently did not take place during the Hadrianic persecutions, but shortly before the outbreak of the Bar Kokhba rebellion, since he detects in the sages' majority vote a spirit opposed to martyrdom.³² Focusing on the origins or the development of a "Jewish

³¹ In studies inquiring after the origins of martyrdom, the definition of Judaism and Christianity and their "parting of ways" becomes by necessity a subject of debate. W.H.C. Frend and his school consider the Jewish traditions to represent the original, primary martyr-traditions, while Glen Bowersock and his school argue for the primacy of the Christian martyr-traditions. Boyarin addresses (in *Dying for God*) the controversy over the dating of Jewish and Christian martyrdom narratives and declares both approaches to be problematic because of their separating Judaism and Christianity one from the other at too early a stage.

A further problem is the definition of martyrdom itself: The foundational work on rabbinic martyrdom by Saul Lieberman assumes its existence in parallel ways in both Christian and rabbinic sources (cf. Lieberman, "The Martyrs of Caesarea"). Moshe David Herr distinguishes between Christian and Jewish martyrdom, yet, he ultimately likens the two martyr traditions, and describes a rabbinic martyr who is very similar to the Christian one. Daniel Boyarin, in contrast, approaches martyrdom as a "work in progress" and argues that the problem of definition was precisely what concerned ancient Jews. According to Boyarin, one should not inquire whether Jews and Christians had an ideology of martyrdom at a particular date or not, but should rather look at how Jews and Christians used a discourse of martyrdom to define themselves in relation to each other. The priority one assigns to Rabbinic and Christian martyrdom narratives thus ultimately depends, so Boyarin, on how one defines it (cf. Boyarin, "Martyrdom and the Making of Christianity and Judaism" and "Justin Martyr Invents Judaism").

Gerald Blidstein, too, argues that martyrdom existed as one option for the rabbis, but was not highly valorized, and at times even discouraged. He argues that rabbinic martyrdom is not even "real" martyrdom: Rabbi Haninah ben Teradion, the closest to a martyr figure, wishes to escape death (Blidstein, "Rabbis, Romans, and Martyrdom," 57). Also Aryeh Cohen ("Towards an Erotics of Martyrdom") concludes that the rabbis had no fixed concept of martyrdom and points out that *qiddush ha-Shem* is woven into a discursive context that compares it to illegitimate sexual intercourse.

³² Herr, "Persecutions and Martyrdom in Hadrian's Days," 108.

approach” to martyrdom, the report’s function within the sugya itself has not yet been given due importance. The very circumstance that the only existing halakhic discussion on “martyrdom” is woven into the gemara on a mishnah, that deals with the pursuer’s death, was, so far, passed over as insignificant.³³

In a reading that does not credit context and focuses exclusively on only one part of the sugya, the drama in which the sugya’s “building-blocks” are made to take part in, remains unnoticed – and the tradition on the Lyddan scholarly gathering is a case in point.³⁴ The tradition is woven into the sugya as support for the view, that the idolater too is to be categorized a pursuer, who may be killed by the bystander watching him, the reasoning being: Such as the sages of Lydda decided that one has to save *oneself* from idolatry even if this leads to one’s death, so also the mishnaic voluntary idolater should be “saved” from committing the forbidden act through his death. The idolater, too, should be “saved by his life.”

Of course, one could reasonably argue that whereas the mishnah deals with a situation in which an individual pursues another human-being, the Lyddan

³³ An exception are Friedrich Avemarie’s “Theorien der Apodizee” (2003), Daniel Boyarins’s *Dying for God* (1999) and Aryeh Cohen’s “Towards an Erotics of Martyrdom” (1998).

³⁴ I assume that the need for such a reading in context is due to an essential characteristic of rabbinic literature, and is therefore necessary not only regarding the specific sugya on which I focus here. The gemara to any mishnah consists of various, smaller units, that can theoretically be read independently, without paying attention to the preceding mishnayot, or to the larger context of the sugya. Yet, these small units are “building-blocks” that, according to context, shift their function and meaning. Accordingly, one such small unit is also not exclusively woven into a single sugya, but appears in various sugyot and contexts. Its function and meaning is determined by the context into which it is woven, it is “flexible” like a splinter from a kaleidoscope that can occupy various positions in the picture as a whole, and takes up various functions and meanings according to its position.

When context makes meaning, a disregard for context necessarily has impact on meaning: For example, when two “building blocks” are interwoven within one and the same sugya, then the discussion might evolve around the one building block even when at the text’s surface, the discussion focuses on the other. A discussion of the laws of betrothal, for example, is based upon the laws concerning the sanctification of animals (*bQiddushin* 7a), such as the laws of slaughtering sacrificial animals are derived from the laws of writing a divorce document and laws of the spread of impurity in a clay vessel (cf. Rubenstein, “Nominalism and Realism,” 160).

sages envision an encounter between a (non-Jewish) tyrant, or some other sort of hierarchical superior, and a Jew. A situation of systematic, governmental persecution and suppression appears to be entirely incomparable to an individual pursuer and the Lyddan sages thus seem to address a situation that seems very unlike the situation *mSanhedrin* 8:7 describes. Yet, the Babylonian stama disregards here the difference between someone, who is *forced* to choose between a transgression and death (the Jew confronted by a tyrant), and someone, who *voluntarily* commits a transgression (the mishnaic pursuer). The stama discusses both the voluntary and the forced transgressor, both the mishnaic pursuer and the Jew, who is forced to decide between a transgression and death, within one and the same sugya. He transfers the discussion concerning the appropriate response to a *voluntary* idolater to the subject-matter of transgressions a Jew may not commit in order to save himself in a situation of persecution.

In the course of the sugya on *mSanhedrin* 8:7, this reasoning is challenged: At the very end of the sugya, an anonymous voice reminds its readers of Queen Esther. According to rabbinic tradition, Esther committed a transgression, which amounted to an act of adultery, in order to save the Jews from the decree of persecution issued by Ahasuerus. Would Esther have known the Lyddan majority vote and would she have heeded the sages' decision – she would not have saved her people. The fact that Esther *did* commit a transgression, the legitimacy of which is nonnegotiable, thus implies a critique of the Lyddan majority vote: Just as Esther did not need to “save herself” from transgression, so any other persecuted Jew does not need to save him/herself from a transgression, when the latter is necessary in order to save a life.

When the tradition on the Lyddan sages' meeting is read in isolation from the sugya in which it is woven, neither its function within the sugya as a whole, nor the critique it encounters can be noticed. Consequently, no attention can be paid to the circumstance that this tradition is mentioned as support for the view that also a voluntary idolater is to be “saved by his life,” and that the mention of Esther's transgression functions here as a critical “counter-tradition.” In the second and third chapter of this work, I will therefore analyze the gemara to

mSanhedrin 8:7 as a whole, focusing in particular on the voice(s) of the gemara's editor(s) and their creation of a controversy between the different halakhic and aggadic traditions of which the sugya is composed.³⁵

The fourth chapter: Martyrs and tricksters

mSanhedrin 8:7 and its gemara are the only existing halakhic discussions concerning the question of transgressions a Jew may not commit under any circumstance. Accordingly, Maimonides, in his discussion of the transgressions a Jew may not commit at all costs, refers solely to the traditions found in the gemara to *mSanhedrin* 8:7.³⁶ Additional aggadic illustrations of this mishnah are non-existent: Rabbinic literature does not record any occasion, or any incident, that features the killing of a pursuer. It seems as if no pursuer was ever actually killed in order to save him from a transgression.

Nevertheless, I will demonstrate in the course of the fourth chapter, that the halakhic microcosm of *mSanhedrin* 8:7 and its gemara can be embedded in a wider literary macrocosm: Complementary interconnections exist between *mSanhedrin* 8:7 and its gemara on the one hand, and aggadic "martyr-texts" – narrative traditions depicting the violent encounters of Jews and tyrants, kings and other "enemies" – on the other: The different "plots" and "typecasts"

³⁵ Cf. also Boyarin, *Dying for God*, 30-31, on the reading of aggadic texts: "The method employed here [in Boyarin's *Dying for God*, C.T.] is close reading of fictional or legendary narrative texts, that is, essentially classical talmudic methodology. In an earlier version of talmudic studies, one that we might, for want of a better term, call traditional Yeshiva study, such close reading was normative, without being made to do any historical work at all. Rashi (tenth century) or his grandson Rabbenu Tam and myriad others until perhaps the middle of the nineteenth century, when the Jewish early modern period begins, simply wanted to understand the logic of the talmudic text to the best of their ability, whether it was legal fiction (halakhic) or a narrative (aggadic) text. "Wie es eigentlich gewesen ist" was simply not a question. [...] I return to the methods of questioning the text employed by the traditional learning to ask questions about coherence, internal and external, and draw historical conclusions, not about events but about ideologies, social movements, cultural constructions, and particularly repressions – about the work of the text."

³⁶ Cf. Maimonides, *Hilkhhot Yesode ha-Torah*, 5:1-4.

underlying the *aggadic* martyr-texts can be read as illustrations, or stagings, of the arguments that underlie also the *halakhic* discussion on *mSanhedrin* 8:7.³⁷ I will at first characterize two main plots and their corresponding “typecasts,” which commonly inform *aggadic* martyr-traditions. According to the one plot, the Jew succeeds in escaping his enemies’ accusations through the use of wit, camouflage and disguise. The protagonists of this plot relinquish the possibility of public self-representation and autonomy, and instead, use whatever is at their disposal in order to survive. According to the other plot, the encounter between the Jew and the tyrant ends with the Jew’s violent death. Unlike the survivors, the protagonists of this plot are not willing to disguise themselves, and instead, propagate demonstratively and publicly their Jewish identity despite (or rather, because of) the existence of decrees of religious suppression, competition or persecution.³⁸

I will argue that the narrations on the martyrs reflect a reading of *mSanhedrin* 8:7, according to which the pursuer is killed in order to save him, the pursuer, from sin: As explained above, according to this reading of the mishnah, the permissibility to kill the pursuer is not granted on account of the necessity to save the physical life of the *pursued*, but on account of the necessity to uphold the pursuer’s life as a “*Jewish* life,” a life “untainted” by bloodshed, adultery and homosexual intercourse. The martyr, likewise, does not set his own physical survival, but his “*Jewish* survival” at the core of his motivation. The narrations on the survivors, in contrast, reflect a reading of the mishnah, according to which the rescue of the pursued *does* play part in the killing of the

³⁷ As noticed by Alicia Grays in her study on the halakhah on martyrdom in the Yerushalmi (“Martyrdom and Identity,” 242-243, n. 3), the halakhic and *aggadic* texts that address the subject-matter, have so far not been read in conjunction: “A natural desideratum would be to study the halakhic and *aggadic* materials together in order to see the interconnections (which may be complementary and/or contrasting) between the halakhic and *aggadic* constructions of martyrdom.”

³⁸ Blidstein (“Rabbis, Romans, and Martyrdom,” 61) identifies (specifically in *bAvodah Zarah* 17b-18a) three possible responses to a gentile government: collaboration, fight and secret disobedience. I identify only two possible responses – fight and secret disobedience – since I am concerned with those responses considered legitimate. Collaboration, if *not* paired with secret disobedience, is of course not considered a legitimate response.

pursuer: Just as the pursuer is killed so as to save his victim, so may also a persecuted Jew commit transgressions in order to save his life or that of his people.

The fifth chapter: Babylonian ambivalence

Even though the two aggadic plots, the one featuring the martyr and the other featuring the surviving “trickster,” can be read as embodiments of the tensions inherent in *mSanhedrin* 8:7, the transferal of the question “what is a Jew to die for?” from its mishnaic context into the context of persecution, generates a deviance from the mishnah: According to the mishnah, only he, who is about to commit bloodshed, adultery or homosexual intercourse may be “saved by his life.” The martyrs, however, save themselves from *all* transgressions. They even disdain acts that are no transgressions at all, but consist solely of an outward accommodation to the enemy: In face of the enemy, the rabbinic martyr does not differentiate any longer between the transgressive and the foreign; the foreign becomes inherently transgressive.

The martyrs’ strategy of resistance is, accordingly, far from independent from the political situation they are trapped in: To *both* the martyrs and the tricksters, the enemy is an integral part of their reasoning, even though its presence generates diametrically opposing strategies of resistance. In the fifth chapter, I will argue that it is precisely this dependence of the martyr on his surroundings, the enemy’s gaze, which raised suspicion in the Babylonian recipients of the Palestinian martyr-traditions. In some instances, the Babylonians therefore decipher the martyr’s heroic virility and independence as implying precisely the opposite, as dependence on, and attraction to the other. They point out that even though the martyrs’ strategy of resistance demarcates and strengthens the boundaries between the Jewish community and its antagonists, the martyrs’ faces are molded, like those of the tricksters, in interaction with the other’s gaze. The martyr is here depicted as a product of Roman hegemony, and not as its self-confident, independent antithesis.

The sixth chapter: Between the Bavli and the Yerushalmi

In the beginning of the sixth chapter, I will characterize a phenomenon that recurs both in the gemara to *mSanhedrin* 8:7 and in the Babylonian narrative traditions on martyrs: In the gemara to *mSanhedrin* 8:7, all the traditions on the transgressions a Jew may not commit even in order to save his life, are explicitly marked as emerging from Palestinian rabbis. The stama quotes these Palestinian traditions faithfully, yet juxtaposes them with a Babylonian counter-tradition: the story on Esther, the trickster par excellence. A similar editorial move is apparent also in the Babylonian aggadic portions that feature a martyr: Time and again, the Babylonian editorial voice(s) juxtapose narrations on martyrs with narrations on tricksters. Just as the stama de-gemara of *bSanhedrin* 74ab lets the Lyddan sages' majority vote confront the "trickster-queen" Esther, so too the Babylonian stamaim let each martyrdom-narrative be accompanied by a trickster-tale.

In the narrative traditions of Palestinian origin, however, the martyrs are *not* juxtaposed to tricksters. Only the Babylonian stamaim appear to challenge the martyr's ideology through placing again and again a trickster next to the martyr. The question, which obviously rises from this observation, is: Why do the Palestinian rabbis promote the martyr's mode of resistance, whereas the Babylonian rabbis only quote the martyr's stories, and juxtapose them with the trickster-tales of survival? Why is it that the Babylonians, and not the Palestinians, who display empathy towards the trickster, and an ambivalent attitude towards the martyr, foregrounded both in the promotion of the trickster-figure and in the "reading against the grain"³⁹ of some martyr-traditions, as described in the foregoing chapter?

³⁹ I am trying to track down the Babylonian's *own* "reading against the grain" of the traditions they inherited from Palestine. It is not me, who exposes a reading that does not cohere ideologically or otherwise to the dominant narrative, but rather, I assume that the Babylonian rabbis themselves, or at least part of them, engaged in a "reading against the grain" of the traditions they inherited from the Land of Israel. As a "reading against the grain" initiated by the Babylonians themselves, the analysis may also not be accurately described as the uncovering of suppressed Babylonian voices: After all, it is a critique the Babylonians *want* their readers to hear.

I will argue that the different political-cultural frameworks in which rabbinic literature emerged – Roman Palestine and Sassanian Babylonia – generated in the two rabbinic communities different self-perceptions, that find expression in the martyr's and the trickster's strategies of resistance respectively. The trickster's strategy of survival is, both in biblical and rabbinic literature, associated with "female characteristics": The tricksters are in dialogue with their antagonists and adapt themselves, if only tactically, to the necessities of physical survival, without ever aiming at the destruction of the oppressive situation itself. The "female" tricksters survive within an oppressive system without destroying it. The martyrs' strategy, in contrast, is associated with characteristics that are encoded as male: They *fight* their adversaries and insist on the public representation of a Jewish self. When negotiating between the different modes of resistance against a hostile superior, the rabbis thus imagine the divine law to be enacted and embodied by differently gendered Jewish social bodies, being equipped with boundaries of different permeability and visibility, and allowing different modes of interaction with what lays beyond these boundaries.

mSanhedrin 8:7

Introduction

The “saved pursuers”

The eighth chapter of the Mishnah Tractate Sanhedrin confronts its readers with an unprecedented formulation: “to save them by their lives”:

ואלו הן שמצילין אותן בנפשן: הרודף אחר חברו להרגו, אחר הזכור ואחר הנערה המארסה. אבל הרודף אחר הבהמה, והמחלל את השבת, והעובד עבודה זרה, אין מצילין אותן בנפשן.

The following are those whom one saves by their lives: He who pursues his neighbor to kill him, a male, and a betrothed girl. But he, who pursues an animal, and he who desecrates the Shabbat, and he who commits idolatry, these one does not save by their lives (*mSanhedrin 8:7*).¹

The expression “to save someone by his life”² has no biblical precedent and appears in the entire Mishnah only one time, in *mSanhedrin 8:7*. The amoraim

¹ The conglomeration of the three crimes, which the mishnah mentions in its first and second part, is a tannaitic innovation. Neusner (*A History of the Mishnaic Law of Damages*, Part III, 131) remarks that “[p]art of the reason for the tractate’s [Tractate Sanhedrin, C.T.] logical and orderly treatment of its topic is that the framers choose to ignore the way Scripture handles the same set of themes. They make ample use of the facts they find in the Mosaic law codes. But these they lay out and organize entirely in their own way.”

The triplet “idolatry, forbidden sexual relations and bloodshed” appears elsewhere in tannaitic literature: According to *tMenahot 13:4*, these three acts are responsible for the destruction of the First Temple; according to *mAvot 5:9* they lead to exile (in addition to the transgression of the commandment of the year of the release of the land, cf. Exodus 23:10-11 and Leviticus 25:3-5).

² The mishnaic manuscripts all read “the following are those whom one saves by their

and *stamaim* in both Talmudim, the *Tosfot*, the *Rishonim* and *Aharonim* unambiguously understand this expression to be a circumlocution for “to save someone through taking his life,” that is, “to kill him.” There is no attempt ever made to let the idiom “through life” refer solely to minor physical harm, or to exclude a lethal injury.³

But who are, according to this *mishnah*, the saved? As far as the *mishnah*’s syntax and grammar is concerned, one could theoretically read the *mishnah*’s wording as follows: “These [= the *pursued victims*] are saved by their [= the *pursuers*]’ lives.” Intuitively, this reading appears to be almost self-evident: When the pursuer is killed, it is obviously the life of his victim, the pursued, which is saved. And how, if not through the saving of an innocent life, could one justify an act of bloodshed? Accordingly, Maimonides, in his *Commentary on the Mishnah*, states: “And the purpose of this halakha is that we were commanded to save this pursued person from the hands of the pursuer, that wants to kill him or to commit a [sexual] transgression with him in any way possible, even by killing the pursuer, and even though he did not yet commit the transgression, and that is the meaning of “at the cost of his lives,” namely the life of the pursuer.”⁴ Similarly, Meir Halevy Abulafia in his *Yad Ramah*

lives” (cf. Budapest, Akademia, Kaufman A 50: אילו שמצילים אותן בנפשם, and Parma, Biblioteca Palatina, De Rossi 138: אלו מצילין אתן בנפשם). The ms Munich of the Bavli (Bayrische Staatsbibliothek, Cod. hebr. 95, fol. 351r) reads אלו הן שמצילין אותן בנפשן and the Yerushalmi, both in ms Leiden 8:9 (26c) and the ed. princ. Venice 8:9 (242b), reads אילו שמצילין בנפשן (cf. Schäfer and Becker, *Synopse zum Talmud Yerushalmi*, IV, 194).

³ The *toseftan* parallel on the killing of a pursuer, *tSanhedrin* 11:10-11, depicts the death of the pursuer as a practice of last resort. Following the general permission to save a pursuer by his life, an anonymous voice asks “How can one do so?,” the answer being, “one wounds one of his limbs; and if even so one cannot prevent him, one forthwith kills him” (*tSanhedrin* 11:10, all mms). The specification “one wounds one of his limbs, and if even so etc.” notwithstanding, the *Tosefta* includes here a lethal injury in the range of legitimate responses to the pursuer’s aggression. The *Tosefta* thus does not differ in principle from the *mishnaic* legislation.

⁴ Maimonides, *Commentary on the Mishnah*, Tractate *Sanhedrin*, Chapter Eight, s.v. [...] ועניין ההלכה זו היא שמצווה עלינו: ואלו הן שמצילין אותן בנפשן הרודף אחר וכו'. להציל זה האיש הנרדף מיד הרודף שהוא מבקש להרגו או לעבור בו עבירה באיזה פנים שיתכן ואפי' במיתת הרודף ואע"פ שעדיין לא עשה העבירה וזהו פירוש בנפשן [...] כלומר בנפש הרודף.

has to interpret ‘one may save’ [as: ‘one may save’] the human-being from sin.”⁶ In other words: A reading, which lets the saving refer to the human victims (“these [the victims] are saved by their [the pursuers’] lives”) cannot be upheld in the mishnah’s second part. One therefore has to conclude, Moshe Zucato reasons, that at least according to the mishnah’s literal sense the one saved is the one killed, i.e., the pursuer himself. And like Moshe Zucato, also Maimonides lets his linguistic analysis of the mishnah run counter to his legal analysis: Even though he explains, as mentioned above, that the *purpose* of this mishnah is the rescue of the pursued, he comments that the saved are those, whose transgressions are punished by a *kareth* or by a death-sentence inflicted by a Beth Din, meaning: the saved are the pursuers.⁷ The unavoidable, plain meaning of the mishnah thus is, as the Tosafists conclude, “that *the pursuer* is saved [at the cost of] the pursuer’s life.”⁸

mSanhedrin 8:7 thus confronts its readers with a counter-intuitive formulation: Those who attempt to kill another human-being, or to rape a betrothed girl or a male, are literally “saved through their lives”: they are “saved” from committing the latter transgressions through being killed. Yet, in the meantime the obvious, yet unwritten practical effect of the pursuers’ “rescue” is a physical, non-

⁶ *Kol ha-Ramaz*, s.v. שמצילין: שמוצילין הנרדף בנפשו של רודף אבל לא יתכן: שמוצילין הנרדף בנפשו של רודף אחר הבהמה וכיוצא בה לפיכך נראה לפרש שמצילין את האדם מן העבירה בנפשו של עצמו.

⁷ Cf. Maimonides on *mSanhedrin* 8:7, s.v. 'ואלו הן שמצילין אותן בנפשו הרודף אחר כו'. כל חייבי כריתות וחייבי מיתות ב"ד מן העריות מצילין אותם בנפשם, אבל זכר אלה השלשה בלבד, לפי שהם מבוארין יותר מאותן הבאין בלימוד, לפי שלמדנו ההצלה מדאמר רחמנא בנערה המאורסה אין מושיע לה הא יש מושיע לה מושיע לה בכול דבר שהוא יכול להושיעה ואפי' במיתתה. (The following are those, whom one saves by their lives: He who pursues etc.: All those, who are liable to excision (*kareth*) and death at the hands of a Beth Din on account of the forbidden relations, one saves them by their lives. But it [the mishnah] mentioned these three [cases] only, because they are clearer than those, that may be derived by reasoning, for we have learnt the rescue from what the All-Merciful said about the betrothed girl: *For there was none to save her* (Deuteronomy 22:27), but if there is someone to save her, he saves her by all means, even by the death of that same man, who rapes her.) Maimonides relies here on an interpretation of Deuteronomy 22:27 ascribed to Rabbi Ishmael in *bSanhedrin* 73a.

⁸ Cf. Tosfot, s.v. לפיכך נראה לפרש דמצילין את האדם מן העבירה: להצילו בנפשו וכו'. [...] Therefore, it seems that one has to understand that one saves the person from sin by his own life [...]

rhetorical rescue: At the moment the pursuer is “saved by his life,” it is of course the pursuer’s victim, who is saved from the pursuer. Literally, the saved are the *pursuers*, whereas practically, the saved are the *pursued*.⁹

A first question and a first assumption

When first encountering this mishnah, its peculiar wording was the “stumbling block” which raised my curiosity and led me to ask an initial question: Why do the tannaim refer to the killing of the pursuer as the pursuer’s “saving,” leaving the resulting rescue of the victims’ lives entirely unformulated, as if this were a coincidental, unintentional side-effect of the pursuer’s death? Why do they not simply state that the *pursued* is saved by the pursuer’s life, thereby straightforwardly identifying the saving of the *pursued* as the rationale which legitimizes the pursuer’s death? Theodor Albeck in his commentary on the Mishnah suggests that the mishnah’s wording was changed and revised. He assumes that the saving originally referred to the pursued, but that later on, this formulation was changed and referred to the pursuers.¹⁰ However, he does not explain why a clear formulation should have been abandoned in favor of a “weird” one, against the principle of *lectio difficilior*. The question thus remains: Why does the mishnah refer to the pursuers themselves as those, who are to be “saved through their lives”?

Intuitively, I assumed that the tannaim did not coincidentally or arbitrarily refer to the pursuer’s death as his rescue. In light of the Mishnah’s highly redacted, artistic, perfectionist literary style, this peculiar wording is, so my suspicion, not a scribal error or a rhetorical embellishment, the function and reason of which is to whitewash the act of bloodshed involved in the scenery the mishnah depicts.

⁹ Cf. also Shapira, “Rodef and Self-Defense,” 255: “In sum, the mishna reflects an inherent tension between its wording and its content. The wording reflects one principle – saving the pursuer and preventing the transgression, while the content reflects another principle – saving the pursued one and protecting his life and honor.”

¹⁰ Albeck, *The Mishnah*, Seder Nezikin, 452.

The decision to take seriously the “saving of the pursuer” was in my mind fueled, moreover, by an explicit formulation in the Tosefta *prohibiting* the shedding of blood for the sake of saving a life: “Nothing stands against a saving of life, except for idolatry, forbidden sexual relations,¹¹ and bloodshed” (אין לך דבר עומד בפני פיקוח נפש חוץ מע"ז וגילוי עריות ושפיכות דמים) (*tShabbat* 15:16).¹² This toseftan dictum is never recorded in the Mishnah. The compilers of the Mishnah at no point address the possibility that the obligation to save life has limits, or that life might not be saved by all means. At first sight then, it is possible to conclude that the tannaim eventually decided to permit a saving of life, which is brought about through the killing of the pursuer, and rejected the toseftan limitation of the means, through which life may be saved. At second sight, however, when taking seriously the mishnah’s

¹¹ The expression *arayot* (עריות) literally means “nakednesses” or “barenesses” (cf. Gesenius, *Hebrew and Chaldee Lexicon*, 653). In the Torah, the term appears most prominently in Leviticus 18:6-19. In these verses, the women with whom a man is closely related and with whom he may not have intercourse – the women “whose nakedness he may not uncover” – are enumerated. The term *arayot*, due to this biblical context, is often translated as “incest.” However, in rabbinic texts it refers in general to “biblically forbidden sexual relations” (Jastrow, *Dictionary*, 1114), and thus includes not only incest, but also adulterous sexual relations and intercourse with a menstruating woman.

¹² In the Tosefta’s first printed edition (the Tosefta was first published together with the *Halakhot* of Isaac Alfasi in Venice, in 1521) and the ms London of the Tosefta this principle appears (besides in *tShabbat* 15:16) one more time in *tShabbat* 9:22: “[...] they do not suck from a gentile woman or from an unclean beast. But if it was a matter of danger, nothing stands against a saving of life, except for idolatry, forbidden sexual relations and bloodshed.” In the ms Vienna and in the ms Erfurt, the text of *tShabbat* 9:22 ends with “nothing stands against a saving of life,” without the addition of “except for etc.” (cf. ms Vienna, Nationalbibliothek Wien, hebr. 20, and ms Erfurt, Staatsbibliothek Berlin, Orientabteilung, fol. 1220 (159, *tSanhedrin* 11:11-12:7). It seems therefore that in the Tosefta’s first printed edition and the ms London of *tShabbat* 9:22 the phrase “except for idolatry, forbidden sexual relations, and bloodshed” is a later addition, introduced in order to adjust *tShabbat* 9:22 to *tShabbat* 15:16.

In the Bavli, this dictum is quoted in *bPesahim* 25a-b, *bYoma* 82a, *bKetubbot* 19a and in the sugya discussed below, in *bSanhedrin* 74a; in the Yerushalmi in *ySheviit* 4:2 (35a) and in *ySanhedrin* 3:6 (21b). The historical background of this tradition is presumably the religious persecution in the days of Hadrian, in the thirties of the second century. Cf. Avemarie, “Zeugnis in Öffentlichkeit,” 260, and Herr, “Persecution and Martyrdom,” 108ff.

odd wording, the difference between *mSanhedrin* 8:7 and *tShabbat* 15:16 does not appear to be so straightforward and unambiguous any longer: According to the mishnah's literal sense, the pursuer's death is legitimate, yet it is not necessarily so on account of its life-saving effect. The mishnah does not, in fact, state that the *pursued* are to be saved by the pursuers' lives, but that "they" – the pursuers *themselves* – are to be saved by their own lives. Even though the rescue of the pursued is the practical effect of the pursuer's death, the mishnah does not argue that the rescue of the pursued is also the legal rationale or motivation on account of which the pursuer may be killed. The rescue of the *pursued* is indeed not referred to at all; it is made to appear no more than a coincidental, non-intended offshoot of the pursuer's death. Thus, a literal reading of *mSanhedrin* 8:7 lets the difference between *mSanhedrin* 8:7 and *tShabbat* 15:16 to some extent disappear: Since it is the pursuer *himself* who is to be "saved," it is impossible to claim that the mishnah legitimizes the killing of the pursuer for the sake of saving the pursued. If so, the mishnah cannot be read as weakening or negotiating the prohibition of bloodshed carried out for the sake of saving a life as it is recorded in the Tosefta.

The question that needs to be asked in following this first observation is, accordingly: If not for the sake of saving the life of the *pursued*, on account of what rationale may the pursuer be killed, or "saved by his life"? How could the bystander's killing of the pursuer be possibly legitimized? As suggested in the introduction to this work, I will read *mSanhedrin* 8:7 as part of Tractate Sanhedrin and argue, in line with this contextualization, that the mishnah describes a juridical response to the pursuer's attempt to transgress the prohibition of bloodshed, adultery and homosexual intercourse. Whether this response brings about the rescue of the pursuer's victim is irrelevant as far as the legitimacy of the act that leads to the pursuer's death is concerned: It is indeed the pursuer, not the pursued, who is to be "saved."

The Pursuer's Death as the Pursuer's Rescue

Differences between an act of self-defense and a punishment

According to modern juridical thought, an act of self-defense and a punishment are two entirely different concepts. First of all, a punishment is an expression of power by an “authority constituted by a legal system,”¹³ whereas an act of self-defense may be carried out by any endangered individual. Accordingly, the purpose of self-defense is to prevent harm, whereas a punishment is a measure carried out by a court *after* the wrongful act has been committed, when it is too late for self-defense.

Secondly, a punishment is perceived as just only when the juridical response matches the deed, when a measure-for-measure-equivalence, is maintained. It is therefore deemed necessary to assess the degree of the offender's wrongdoing and the degree of his responsibility for the act he committed before punishment can be decided. For example, an offender who did not *intend* to commit a wrongful act, or was not capable of understanding the consequences of his deed, is judged considerably different from an offender, who knowingly and presumptuously transgressed the law. Thus, in order to execute a punishment, one has to find out whether the wrongdoer can be held responsible for his act at all: whether he knew or could have known about the act's illegitimacy. In self-defense, such a measure-for-measure-equivalence between a deed and its response is disregarded: Someone whose life is threatened can legitimately attack the offender, even though the latter is not culpable, as for example, if the offender's aggression is coerced, if he is not sane, or if he is a minor.¹⁴ The sole criterion, which needs to be fulfilled so that self-defense may be carried out legitimately, is that the aggressor in some way *acts*. (His mere “being alive” does not constitute a basis for legitimate self-defense.)¹⁵

¹³ Hart, “Prolegomenon to the Principles of Punishment,” 4-5.

¹⁴ Cf., on what is called “excused aggression,” Fletcher, *Rethinking Criminal Law*, 869 ff.

¹⁵ Fletcher (“Punishment and Self-Defense,” 210) notes that this view prevails in Western legal systems, even though it is not easy to justify: A humane, but not

Self-defense, in contrast to a punishment inflicted by a court, has also no clearly drawn limits: It is generally acknowledged by modern juridical systems, that in self-defense, the victim does *not* need to act according to a measure-for-measure principle; that is, a victim may, in order to defend his physical (and also his psychological) integrity, inflict *more* harm than the harm he is threatened with. For example, a woman whom a man tries to rape may kill the attacking man in order to prevent being raped. As explained by Fletcher, “[w]e have no systematic theoretical account of why the criteria of proportionality should limit the right of self-defense. Everyone seems to agree that a defender should be able to inflict more harm than he or she avoids by acting in self-defense, e.g., a woman threatened with rape should be able to kill to protect her sexual and bodily autonomy. The scales may be tipped in favor of the innocent victim and against the wrongful aggressor. [...] Yet, no one knows how much more harm the defender may inflict on the aggressor, how much the scales may be tipped in favor of the person attacked, before reaching the point of perceived injustice.”¹⁶

A precedence: mSanhedrin 8:6

In light of the above outlined differences between a punishment and an act of self-defense, the following biblical case would be categorized by a modern jurist with very high probability as an act of self-defense:

necessary culpable action, is the middle position between applying self-defense to *all* human-based threats, at one extreme, and insisting on a *culpable* act of aggression as the condition for self-defense at the other. According to Fletcher, it is easier to defend either of these extremes than explain why a *non-culpable human act* should be necessary and sufficient to trigger the right of self-defense.

¹⁶ Cf. Fletcher, “Punishment and Self-defense,” 201-215 and 241. These differences between an act of self-defense and a punishment have, of course, political implications if transferred to national contexts. When violence is claimed to be an act of national self-defense, the self-proclaimed defender can disregard a measure-for-measure equivalence between the aggression and its response, and direct its violence/self-defense against parties which did not necessarily act with hostile intent or bear culpability.

אם במחתרת ימצא הגנב והכה ומת אין לו דמים. (א)

¹⁾ If a thief is found breaking in, and he is struck so that he dies, there shall be no bloodshed for him [= the house-owner's blood shall not be shed] (Exodus 22:1).

According to this verse, a house-owner, who discovers a thief while breaking into his house, may kill the thief without being punished afterwards: "There shall be no bloodshed for him [the killed thief]" (ibid.). The house-owner may kill the thief without incurring the guilt of murder.

The house-owner's killing of the intruding thief appears to be legitimate, because he thereby defends his life and/or property. It is not comparable to a punishment inflicted by a court: The house-owner may kill the thief if he "catches him in the act"; he does not "judge" him after he has broken into his house and has escaped.¹⁷ The house-owner is also no court-like neutral, third person:¹⁸ He has his own, probably even vital interests in killing the intruder. And also as regards the ideal of an interdependency of culpability and punishment, the house-owner's case does not cohere at all to a trial carried out by a court, but fits the characteristics of self-defense: The house-owner cannot be sure about the thief's culpability, as for example, whether he breaks in under coercion. He kills him spontaneously, on the basis of a more or less vague assumption of being endangered and his response may therefore lack proportion: Possibly, even though the thief obviously intends to break in, he does not intend to threaten the house-owner's life and would not attack the house-owner even if the latter attempts to defend his property.

¹⁷ Also in biblical jurisdiction a person is sentenced to death only *after* having committed the crime, after having hit (מכה) somebody to death (cf. Exodus 21:12, 15, 20 and Numbers 35:16-18), or having "come willfully [...] to slay treacherously" (יזז להרגו בערמה איש) (Exodus 21:14). A death-sentence is never inflicted preemptively.

¹⁸ Whoever is involved in a trial as a judge or witness is required to be neutral in face of the accused and the accuser. Relatives of either party may therefore not serve as witnesses, cf. *mSanhedrin* 3:4.

The biblical case of the house-owner and the thief thus coheres to all characteristics defining, according to a modern understanding, an act of self-defense: The attacked acts at the very moment of being attacked; he is no neutral person, and he may react without taking into consideration a strict measure-for-measure ideal, i.e., he does not need to clarify the intruder's culpability or intention.

Nevertheless, the verse which succeeds Exodus 22:1 bears a formulation, which caused the tannaim to understand the house-owner's deed not as an act of self-defense, but instead, as a preemptive punishment:

ב) אם זרחה השמש עליו דמים לו שלם ישלם.

2) If the sun has risen upon him, there shall be bloodshed for him [= the house-owner's blood shall be shed], he [the thief] should make full restitution (Exodus 22:2).

Immediately following the above cited verse on the in-breaking thief, it is declared that in daylight, the house-owner may *not* kill the thief with impunity. In this case, moreover, the thief has to make full restitution for any material damage he might have caused during the theft: "He should make full restitution" (ibid.). If, for example, the thief broke a jug while breaking into a house, and is caught afterwards, he needs to pay restitution for the broken jug as well as anything he has taken.

The tannaim now reason beyond the boundaries of the biblical text: According to Exodus 22:2, a thief, whom a house-owner may *not* kill – if he does, he is guilty of bloodshed – is liable for the material damage he caused during the theft. This is what is explicitly stated in Exodus 22:2. But if so, then a thief, whom a house-owner may legitimately kill, is *not* liable for material damage:

הבא במחתרת נדון על שם סופו. היה בא במחתרת ושבר את החבית, אם יש לו דמים, חיב. אם אין לו דמים, פטור.

He who breaks in is judged on account of his end. If he broke in and broke a jug, should there be bloodshed for him [= the house-owner's blood is shed in case he kills the thief], he is liable (to pay for the broken jug); but if there is no bloodshed for him [= the house-owner's blood is not shed in case he kills the thief], he is not liable (to pay for the broken jug) (*mSanhedrin* 8:6).

If the house-owner is guilty of bloodshed because he killed the thief, then the thief is liable to pay restitution for damaged property: "If he broke in and broke a jug, should there be bloodshed for him, he is liable" (*ibid.*). But if the house-owner is *not* guilty of bloodshed even though he killed the thief, then the thief is not held liable for damaged property: "If there is no bloodshed for him, he is not liable" (*ibid.*). Only during the time the thief may be killed by the house-owner "lawfully," with impunity, the thief is exempt from liability for any material damage he caused in the course of the theft. But when the thief is killed unlawfully, that is, when the house-owner's blood is shed on account of his killing the thief, then the thief is liable for material damage.

But why is the thief not liable to retribute material damage in the case where the house-owner may kill him with impunity (that is, when the house-owner's blood is not shed on account of his killing the thief; when the thief may be killed "lawfully")? And why is the thief liable to retribute material damage in the case where the house-owner may *not* kill him with impunity (that is, when the house-owner's blood is shed on account of his killing the thief)? Why should he pay in the one case, but not in the other?

Of course, one option is to explain the mishnah's jurisdiction pragmatically: If the house-owner may legitimately kill the thief, and indeed does kill him, then the thief can no longer pay for the material damage he caused during the theft. Yet, I do not think that this explanation is persuasive, because the mishnah is not concerned about the question whether the house-owner "really" killed the thief, and whether the thief is *able* to retribute material damage at all. The reasoning here is not, "because the thief is dead, he cannot pay anymore, and thus, we exempt him in the first place." The mishnah rather seems to address

the thief's liability for material damage from a theoretical perspective, that is, the question is not: Is the thief practically able to retribute material damage, but rather, is the thief theoretically *liable* to retribute material damage?

I would therefore suggest a different explanation for the mishnah's jurisdiction concerning the thief: According to rabbinic jurisprudence, a person who commits two wrongs at the same time is liable only for the greater but not for the lesser wrong. The technical term which designates this principle is קם ליה ("he suffers the severer penalty only"), or in tannaitic literature: מדרבה מיניה ("he suffers the severer penalty only"), or in tannaitic literature: וכל המתחייב בנפשו אין משלם ממון ("he who is liable to a death-penalty does not pay a monetary penalty").¹⁹ For example, if someone breaks into a house on Shabbat, and then carries the stolen goods out of the house into the public domain without the existence of an *eruv*, he is liable for desecrating the Shabbat, but not liable for breaking into the house, because desecrating the Shabbat is considered a greater transgression.

Obviously, this principle may not be smoothly transferred to the case of the thief and the house-owner: The house-owner appears to kill the thief in order to *defend* himself, not in order to punish him. As a consequence, one cannot simply claim that the thief is subject to two *penalties* at the same time, a death-penalty and a monetary penalty: His death appears to be the consequence of the house-owner's *self-defense*, not the result of a court's *punishment*. Yet, the mishnah's jurisdiction seems to be guided by the assumption that the house-owner's legitimate killing of the thief is his legal punishment, which "swallows" the lesser punishment – the monetary restitution of damaged property. The tannaim seem to read into Exodus 22:2 a causal relation between

¹⁹ Cf. for example *bKetubbot* 33b, *bGittin* 52b, *bBava Qama* 22b and 42b. In tannaitic literature cf. *mKetubbot* 3:2, *mBava Qama* 3:10, *tBava Qama* 9:17 and *Mekhilta de'Rabbi Ishmael*, Nezikin parasha 8. On the origins of this principle cf. Dor, "The Punishments of Monetary Compensation," Lifshitz, "Does a Man not Receive Both the Death Penalty and Pay Damages?" and Miklishensky, "A Chapter in the Hebrew Criminal Law." Lifshitz (*ibid.*, 48) lists *mSanhedrin* 8:6 among those mishnayot, which were interpreted by the amoraim according to the principle "he suffers the severer penalty only," yet were in their original versions not composed in order to illustrate it. Miklishensky (*ibid.*, 21-22) and Fletcher ("Punishment and Self-defense," 203) explain *mSanhedrin* 8:6 with reference to this principle.

the thief's liability for damaged property and the house-owner's guilt of bloodshed: The house-owner is guilty of bloodshed in case he kills the thief, *because* the thief should have made full restitution. The fact that the thief has to retribute material damage implies that he is impossibly subject to another greater penalty, for if this were the case, the greater penalty (the death-penalty) would include the lesser (a monetary penalty for the damaged property). When the Torah declares the thief liable to a monetary penalty, the tannaim consequentially assume that this monetary penalty is the greatest penalty the thief was subject to. If the house-owner then nevertheless kills the thief, he is guilty of bloodshed: The thief was not subject to any greater penalty than material restitution, and therefore, he cannot be killed legitimately by the house-owner. The house-owner is guilty of bloodshed, *because* the thief should have made restitution of material damage and was therefore illegally subjected to capital punishment.

By the same token, during the time the house-owner may kill the thief *without* being guilty of bloodshed, the thief cannot simultaneously be liable also to a monetary charge: The thief, when exposing himself to the house-owner's lawful reaction, enters a "twilight zone,"²⁰ in which he may be lawfully killed. And since he may be lawfully killed, he cannot be liable for damaging or theft of property: The lesser punishment – restitution for material damage – is always included in the greater – liability to capital punishment, i.e., lawful execution. Therefore, "if he broke in and broke a jug, should blood be shed for him, he is liable; but if no blood should be shed for him, he is not liable" (*mSanhedrin* 8:6).²¹ Thus, when the tannaim refer to the house-owner's killing of the thief as a judgment – "He who breaks in is *judged* on account of his end" (הבא במחותרת נדון על שם סופו) – this is no terminological mistake or

²⁰ Cf. Fletcher, "Punishment and Self-defense," 203.

²¹ It may be added, that for this principle to be applied it is irrelevant whether the house-owner indeed kills the thief. The mere fact that the house-owner could do so without being guilty of bloodshed means that the thief makes himself subject to a death-penalty. In case the thief escapes the house-owner's lethal reaction, he is not prosecuted thereafter. Either the house-owner punishes the thief, or nobody does. Cf. Fletcher, "Punishment and Self-defense," 203.

inaccuracy: The house-owner indeed embodies the thief's primary judge. For purposes of displacing the lesser liability as included in the greater, the tannaim *have* to conceptualize the lethal intervention of the house-owner *as if* it were an official, court-administered penalty.

That the house-owner's lethal intervention is conceptualized by the tannaim as a preemptive punishment is reflected also in the way the tannaim interpret the "sun" mentioned in Exodus 22:2 ("If the sun has risen upon him, there shall be bloodshed [of the house-owner] for him [the killed thief]"): "If it is a matter of doubt, whether he came to kill or to take something, they do not save him by his life, as it is said, *If the sun has risen on him, there shall be bloodshed for him (ibid.)*. Now, does the sun rise on him alone? And does not the sun rise on the whole world? But: Just as at sunrise there is peace for the world, so it is that, so long as you know that he is peaceful, whether by day or by night, you do not save him by his life" (*tSanhedrin* 11:9, cf. also the parallel in *bSanhedrin* 72a-b). One could mistakenly understand Exodus 22:1-2 to declare that the permission to kill a thief depends on the time of the day – after all, this is what the verses explicitly state. But the "correct reading" is, so the tannaim whose view is recorded in the Tosefta, that whether the thief may be killed with impunity depends on his intentions, not on the time of the day.²² The "sun" of Exodus 22:2 is to be understood metaphorically as the clarity needed in order to *judge* the thief: As mentioned above, in self-defense the relation between the offender's culpability and intention, and the reaction of the offended does not necessarily need to be well-balanced. Were the house-owner's intervention an act of self-defense, he could kill the thief even if he is not certain about the thief's culpability. He would not need to clarify whether the thief's intentions are harmful, whether he acts under compulsion, whether he is aware of the error of his deed, etc. However, when the house-owner's intervention is a preemptive punishment, he needs to be able to answer these

²² Zohar ("Killing a Rodef," 56) argues that the formulation "he may be judged on account of his end" (used in *mSanhedrin* 8:5 and 8:6) can be read as "he may be judged on account of his *telos*," his purpose. Since the thief's "end," or purpose, is allegedly not peaceful, he is condemned to death.

questions – a punishment *does* depend on the offender’s culpability. Therefore, “as you *know* that he is peaceful, whether by day or by night, you do not save him by his life” (ibid.).

It may be noted also, that daylight is a motif which commonly symbolizes the clarity requested from a court dealing with capital charges. For example, in *mSanhedrin* 4:2, it is regulated that “civil suits are tried by day, and concluded at night. But capital charges must be tried by day and concluded by day [...]” In capital cases no obscurity, ambiguity or vagueness, associated with the darkness of the night, are tolerated.²³ The tannaim’s metaphorical interpretation of the “sun” in Exodus 2:22 may thus be read in the larger framework of other mishnayot about court-procedures and capital cases and typically interweave the motif of “sun” and “daylight” with juridical clarity.

Finally, also the amoraim’s attempts to apply regular court procedures to the thief’s case bespeak the conceptualization of the house-owner’s lethal intervention as a preemptive punishment (cf. *bSanhedrin* 72a): A court cannot condemn someone to death if the accused does not confess and if he was not warned by at least two witnesses that he is about to commit a capital crime. The accused must be fully aware of his deeds before they were committed. Obviously, it seems practically impossible to apply these principles to the thief’s case, but nevertheless, the amoraim insist on constructing the thief’s case in a way, which lets it, at least in a fictional manner, fulfill the requirements of a court-administered punishment.²⁴ Thus, not only the tannaim, but also the amoraim do not read *mSanhedrin* 8:6 as one dealing with the question of how the house-owner can *save* his life or property, but of how and when he may *judge* the intruding thief.²⁵

²³ In light of this, it may be no coincidence that one who kills someone unintentionally has to flee, according to Deuteronomy 4:41, to the “three cities on this side of the Jordan *toward the rising sun*” – he, who has to flee “toward the rising sun,” is him, who acted in negligence, without the “clarity” the sun provides.

²⁴ Fletcher (“Punishment and Self-defense,” 205) observes: “That the rabbis indulged in this reasoning, verging on legal fiction, reveals how seriously they took the conceptual links between official punishment and private self-defense.”

²⁵ Fletcher (“Punishment and Self-defense,” 206) assumes that the idea and ideal behind this tactical equation of the house-owner with the judge is one of a self-

mSanhedrin 8:7

In contrast to the thief of *mSanhedrin 8:6*, the pursuer of *mSanhedrin 8:7* has no biblical predecessor. Whereas the Hebrew Bible rules that a thief may be killed by a house-owner, it in no instance defines particular transgressors as “pursuers,” who may be legitimately killed by a bystander witnessing their acts.²⁶ Nevertheless, I will argue that also the bystander’s lethal intervention, as it is depicted in *mSanhedrin 8:7*, is conceptualized and legitimized as a juridical response to a transgression: The pursuer may be killed not in order to save his victim, but in order save him from a transgression. Three arguments in favor of this reading will be presented in the following.

1. *The mishnah’s context*

As formulated by Alissa Gray, “[a]n editor’s choice of context can reflect his or her substantive reflections on a given topic.”²⁷ Neither *mSanhedrin 8:6* on the thief, nor *mSanhedrin 8:7* on the pursuer is woven into Tractates Shabbat

administering legal system. Only if one thinks about punishments as a state-administered duty, if a punishment is an expression of power by an institutionalized organ such as a court, is one prone to distinguish between an act of self-defense and a punishment. But the more one thinks about the court’s punishing of criminals as a practice of last resort, the more one may regard acts of self-defense as the preferred mode of “punishing” aggressors: If every Jew devotes himself to the study of the texts, if everyone knows the laws and acts accordingly, judges and courts are superfluous. Cf. also Steinmetz’ observation concerning the “redeemer of blood” (“Crimes and Punishments, Part II,” 295): “[T]he Torah does not see the ‘redeemer of blood’ – the *go’eil hadam* – as an individual who functions wholly outside of the system of justice, as someone who attempts privately to redress a private wrong done to his kinsmen whether purposely or inadvertently. [...] [T]he Torah additionally portrays the *go’eil hadam* as someone who has a legal claim against the murderer (Num. 35:24) and as the person into whose hands the murderer is delivered if determined to be guilty (Deut. 19:11-12). The notion of a human being spilling the blood of the spiller of blood, then, forms the backdrop of and constitutes a component of the community’s formal response to this act which has violated the life of the community.”

²⁶ The verb “to pursue” is used also in the Bible in the sense of “to persecute, to follow someone with evil intentions,” cf. Genesis 14:14, 15; Genesis 35:5; Exodus 14:4, Judges 7:25, Job 19:28, Nahum 1:8, Proverbs 13:21. Cf. Gesenius, *Hebrew and Chaldee Lexicon*, 758.

²⁷ Gray, “Martyrdom and Identity,” 254.

or Yoma, the tractates, in which transgressions to be committed for the sake of saving a life are discussed. Rather, both mishnayot are situated in the midst of Tractate Sanhedrin – the tractate, which discusses penalty- and court-law: Tractate Sanhedrin deals with how a person is judged, rather than with how a person is saved from danger.

Moreover, the entire eighth chapter of Tractate Sanhedrin lists cases, that depict an offender being killed on account of the assumption, that he will, if he is not stopped, commit a severe crime in the future: *mSanhedrin* 8:1-5 discuss the biblical law of the “stubborn and rebellious son” (cf. Deuteronomy 21:18-21) and *mSanhedrin* 6-7 turn to the thief, who breaks into a house. Conceptually, *mSanhedrin* 8:7 is an extension of the cases presented in these foregoing mishnayot: The killing of the “stubborn and rebellious son” is initiated by his parents, the killing of the thief is carried out by a house-owner, and the killing of a pursuer is carried out by a bystander, who witnesses the pursuer.²⁸ All of these mishnayot present “judges,” who are in various degrees entangled with the offender they are empowered to “judge”: The stubborn and rebellious son is judged (or at least accused) by his closest relatives; the thief by the house-owner, whose property (or life) is threatened by the thief; and the pursuer is judged by a bystander, who happens to witness the latter. The eighth chapter of Tractate Sanhedrin thus presents judges, who are situated in concentric circles of acquaintance and interest round the prospective wrongdoer.

2. *The mishnayot on the saving of life vs. mSanhedrin 8:7*

That the bystander’s killing of the pursuer is not conceptualized as an act of bloodshed committed for the sake of saving a life is an assumption strengthened also by the following consideration: If – for the sake of the

²⁸ In modern juridical thought, though the right of self-defense is granted, an “extended” self-defense is prohibited if carried out without the victim’s consent. For example, a state may legitimately defend itself if under attack, but it may not rush to help another state, which is under attack, without the latter’s consent. Cf. Fletcher, “Punishment and Self-defense,” 211.

argument – one identifies the rescue of the *victims*' lives as the mishnah's rationale, then it needs to be read in conjunction with those mishnayot which discuss the saving of life. Seemingly similar to *mSanhedrin* 8:7, these mishnayot declare that a transgression of the law is obligatory if its immediate effect and purpose is the rescue of an endangered life. The end justifies the means.²⁹

As a result of this reasoning, whether or not a particular act carried out for the sake of saving a life is permitted, does not depend on the act *as such*, but solely on its intended effect. For example, if on Yom Kippur a sick person asks for food and no doctor, who could confirm the necessity of this medication, is around, the sick person may nevertheless “eat until he says: Enough” (*mYoma* 8:5). The transgression's aim being the sole criterion that decides its legitimacy, it cannot be decided from without whether or not it may be carried out. As Mar, son of Rav Ashi, elucidates: “Whenever he [the sick person] says ‘I need [food]’, even if there are a hundred who say, ‘He does not need it’, we accept his statement, as it is said: *The heart knows its own bitterness*’

²⁹ The biblical foundation for the obligation to save life (with or without a transgression) is commonly presumed to be the verse “*Do not stand still by the blood of your neighbor*” (Leviticus 19:16). There exist different translations of this verse. According to one line of translation, the imperative על לא תעמוד means something like “do not stand still,” that is, one has to *actively* save a human life in case of danger or harm. This translation corresponds to Rashi's commentary on the verse (cf. Rashi, s.v. רעך על דם רעך: לא תעמוד על דם רעך טובע (ת"כ) כגון טובע: לא תעמוד על דם רעך. בנהר וחיה או לסטים באים עליו. *Do not stand still by the blood of your neighbor*: [Do not] look at his death when you can save him, for example when he drowns in the river, or when robbers attack him). According to another line of translation לא תעמוד על implies an imperative to *not* to act. The King James-version reads: “*Neither shalt thou stand against the blood of thy neighbor.*” This translation coheres to the Targum Onkelos (י' לא תקום על דמא דחברך אנא – Do not raise against the blood of your fellow, I am the Lord) and Ibn Ezra (s.v. רעך על דם רעך: לא תעמד עם אנשי: לא תעמד על דם רעך – Do not raise against the blood of your neighbor: So that he won't familiarize with the people of blood, and it is known that many were killed and murdered on account of denouncement and the Doeg, the Edomite, is an example). The difference between the two versions thus pertains to whether one may not inflict harm either through *inactivity* or through *activity*. On the divergent translations of this verse cf. also Levine, “On Translating a Key-Passage.”

(Proverbs 19:10)” (*bYoma* 83a).³⁰ Whether a transgression effects a decrease of danger, and is therefore legitimate, cannot be decided save by the “heart” of the one, whose life is in danger.

The permission to carry out a normally prohibited act in order to save a life is thus connected inseparably with the subjectivity of every individual, endangered person. The line between “he should *not* eat” and “one *has* to give him food” is drawn exactly where the endangered person *asks* for food; the key which turns the transgression into a commandment is placed in the hands of the person presumed to be in danger him/herself. The endangered person’s subjective sentiments, although settled in an area which is impossible to control objectively, have the power to turn a transgression into a halakhically legitimate, even required act.

Accordingly, the saving of life through a transgression is also legitimate even if it is not certain at all whether there is indeed, objectively, a danger to life, whether the danger is real and acute.³¹ The Mishnah categorizes a pregnant woman or a sick person as potentially endangered lives (ספק נפשות) for the sake of whom the Shabbat or Yom Kippur must be desecrated.³² Likewise, the saving of life through a transgression is legitimate even if it is unknown whether the human-being to be saved is still alive (for example, when a person was buried

³⁰ Cf. Elaine Scarry’s *The Body in Pain* on the inexpressibility of pain, and the political ramifications of deliberately inflicted pain: “[F]or the person in pain, so incontestably and unnegotiably present is it that “having pain” may come to be thought of as the most vibrant example of what it is to “have certainty,” while for the other person it is so elusive that “hearing about pain” may exist as the primary model of what it is “to be in doubt.” Thus pain comes unsharably into our midst as at once that which cannot be denied and that which cannot be confirmed. Whatever pain achieves, it achieves in part through its unsharability, and it ensures this unsharability through its resistance to language” (ibid., 4).

³¹ Cf. *mSukkah* 2:4: “Sick persons and their attendants are free from [the obligation of] sukkah,” and *bSukkah* 26a, “Our Rabbis taught: The invalid spoken of here is not [only] an invalid who is in danger, but also one who is not in danger, even one who suffers from eye-ache or headache.” Cf. also *tSukkah* 2:2 und *ySukkah* 2:6 (53a).

³² Cf. *mYoma* 8:5: “If a woman with child smelt (a dish) on Yom Kippur and has a desire for it she must be given to eat until she feels restored. A sick person is fed at the word of experts. And if no experts are there, one feeds him at his own wish until he says, ‘Enough.’” Cf. also *tMiqvaot* 7:6: “They permitted a woman who is pregnant to taste a small quantity [of unclean food], because of the danger to life [...].”

beneath a collapsed ruin), or whether the endangered is a Jew or a gentile (cf. *mYoma* 8:7).³³ In face of a threat of death all kinds of doubt are ignored.

Yet, *mSanhedrin* 8:7 does not cohere at all to the aforementioned characteristics of the mishnayot that deal with the saving of life: First of all, the pursuer of a betrothed girl or a male does not necessarily threaten their lives. That he may nevertheless be killed is thus not due to a life being in danger, but rather, due to his transgression of the law.³⁴ Secondly, there is no attention at all paid to the practical difficulties, which arise from this mishnaic legislation: How can a bystander know whether the pursuer aims to rape a betrothed or a non-betrothed girl? Thirdly, the very circumstance that it is, according to *mSanhedrin* 8:7, only a *betrothed* girl, whose pursuer may be stopped with lethal force, is incompatible with the mishnayot on the saving of life: If the rationale of *mSanhedrin* 8:7 was the saving of the victim's life, then not only a particular, but *any* victim's being in danger would legitimize the bystander's intervention: A differentiation between a "betrothed" and a "not-betrothed" girl is entirely alien to those mishnayot, which deal with the saving of life – whether or not a person is married or single does not bear upon the need to save him/her from danger. Thus, if *mSanhedrin* 8:7 was conceptualized as a law that evaluates the transgressions one may commit in order to save a life, no differentiation between a betrothed and a non-betrothed victim would have been made.

That only the pursuer of a *betrothed* girl may be killed, can be halakhically justified only if one understands the pursuer's death as a legal response to his transgression of the law: The rape of a betrothed girl and the rape of a non-betrothed girl are, according to biblical and mishnaic law, transgressions of

³³ This means that when there is *no* doubt – when the person is certainly dead, or when he is certainly not Jewish – one does not desecrate the Shabbat or Yom Kippur for him/her.

³⁴ According to Zohar ("Killing a Rodef," 56), the context of *mSanhedrin* 8:7 supports the assumption, that the mishnah holds moral guilt to be a premise for the killing of the pursuer: "Only both conditions together – saving life and halting aggression – yield a justification for 'rescuing at the cost of [the aggressor's] life'." I disagree, since the saving of life is not at all (or at least, not necessarily) the result of the killing of the pursuer of a betrothed girl or a boy.

different severity. The rape of a non-betrothed girl is measured in terms of her father's economic loss: When a non-betrothed girl is raped, her father is deprived of the anticipated bride-price from his daughter's virginity. The punishment deemed appropriate for her rapist is therefore the payment of the bride-price of fifty sheqels to her father and the obligation to marry the "damaged property" (cf. Deuteronomy 22:28-29).³⁵ By means of this payment the father's economic loss is compensated and the matter is deemed resolved.³⁶ In contrast, the rape of a betrothed girl is to be punished with death: "*If a man finds a betrothed girl in the field, and the man forces her, and lies with her; then the man only who lays with her shall die*" (Deuteronomy 21:25). The violation of the virginity of a future husband's betrothed woman has a substantially different quality than the violation of the virginity of a father's daughter. The first constitutes a case of mere "property-damage," the latter is an act of adultery.

In the framework of criminal law then, the mishnah's distinction between the pursuer of a betrothed girl and the pursuer of a non-betrothed girl is consistent with the biblical differentiation between the two cases: Just as only the one, who rapes a betrothed girl is to be punished with death, so also only the one, who pursues a betrothed girl is to be "condemned to death" by a witnessing bystander. *mSanhedrin* 8:7 reiterates a distinction, which is biblically applied

³⁵ According to biblical legislation, the marriage between a rapist and his victim does not require the victim's consent. In rabbinic literature, however, either the raped girl herself or her father may reject the marriage. On the development of the punishments for rape, cf. Hauptman, *Rereading the Rabbis*, 77-101.

³⁶ Since the transgression is one of "property-damage," the punishment of a non-betrothed girl's rapist and that of a non-betrothed girl's seducer are roughly the same: the seducer "¹⁵ [s]hall pay the bride's dowry, and make her his wife. ¹⁶ If her father refuses absolutely to give her to him, he shall pay money according to the dowry of virgins" (Exodus 22:15-16). According to Rashi (s.v. *כמהר הבתולות* - according to the dowry of virgins) and *bKetubbot* 10a, this "dowry of virgins" is an amount of 50 shekel. There is thus no difference between the monetary fine paid by one who raped a non-betrothed girl and by one who seduced a non-betrothed girl (cf. above, Deuteronomy 22:29). Tigay (*JPS Torah Commentary, Deuteronomy*, 208) nevertheless suggests that the fifty sheqels to be paid by a rapist may represent a combination of an average bride-price and in addition, punitive damages.

to a rape that already happened, and transfers this distinction to a rape that is about to happen. Whereas the tannaim do not differentiate between a betrothed and a non-betrothed girl in the context of the saving of life, they do differentiate between the two in the context of criminal law: Any girl – be she betrothed or not betrothed – is saved from a vital danger, but only the rapist of a betrothed girl commits a transgression so severe that he needs to be “saved by his life.”

Consequentially, *mSanhedrin* 8:7 also does not partake at all in the victims’ perspective: A sick woman is asked whether she requires food, and she may eat until she feels better – yet no-one asks the non-betrothed girl whether she would prefer to be saved. A person’s subjective suffering legitimizes a transgression of the law, that is carried out in order to save life, but it does not influence the legal response to a transgression. Since *mSanhedrin* 8:7’s legal rationale is not the saving of life, the parameters of those mishnayot which deal with a saving of life thus simply do not apply.

3. *tSanhedrin* 11:10-11

The Tosefta Sanhedrin contains a close parallel to the mishnaic tradition on the pursuer:

י. (הרודף אחר חבירו מצילין אותו בנפשו [...]. יא.) הרודף אחר הזכור בין בבית ובין בשדה מצילין אותו בנפשו. אחר נערה המאורסה בין בבית ובין בשדה מצילין אותו בנפשו. אחד נערה מאורסה ואחד כל עריות שבתורה מצילין אותו בנפשו.

אבל אם היתה אלמנה לכהן גדול גרושה וחלוצה לכהן הדיוט אין מצילין אותו בנפשו. שנעברה בה עבירה אין מצילין אותו בנפשו [...]. ר' יהודה אומר אם אמרה הניחו לו מצילין אותו בנפשו [...]. רבי אליעזר ברבי צדוק אומר העובד עבודה זרה מצילין אותו בנפשו.

He who pursues his neighbor, one saves him by his life [...] ³⁷ (*tSanhedrin* 11:10). He who pursues a male, whether in a house or the field, one saves him by his life; a betrothed girl, whether in a house or the field, one saves him by his life. Equal are a betrothed girl and any of the prohibited relations (*arayot*) named in the Torah, one saves him by his life.

But if she was a widow (raped by) High Priest or a divorcee or a *halutsah* (raped by) an ordinary priest, one does not save him by his life. If a transgression was committed upon her, one does not save him by his life [...].³⁸ Rabbi Yehudah says: Should she say, ‘Let him be’, one saves him by his life [...] ³⁹ (*tSanhedrin* 11:11, according to ms Vienna and the first printed edition). Rabbi Eleazar bar Tsadoq says: He who commits idolatry, one saves him by his life (*tSanhedrin* 11:11, all mms).

Similar to *mSanhedrin* 8:7, also this toseftan tradition legitimizes the pursuer’s death as a response to his transgression: His death is *his* rescue from sin. Two arguments in favor of this reading will be presented.

3.1 *The mishnayot on the saving of life vs. tSanhedrin 11:10-11*

The Tosefta includes in the permission to “save by his life” not only a murderer and one, who attempts to rape a betrothed girl, but also one, who attempts to rape other women forbidden to him by the Torah: “Equal are a betrothed girl and any of the prohibited relations (*arayot*)⁴⁰ named in the Torah, one saves him by his life” (*tSanhedrin* 11:11).⁴¹

³⁷ The continuation is quoted above in n. 3.

³⁸ The continuation here reads: “If she can be otherwise rescued, one does not save him by his life” (*tSanhedrin* 11:11, ms Vienna and first printed edition).

³⁹ The continuation of the toseftan text at this point is difficult to translate. The ms Vienna reads: ומפני מה מצילין אותו בנפשו שאם היו ממחין בא על עיסקי נפשו. The first printed edition reads: ומפני מה מצילין אותו בנפשו שאם היו מוחין בידם באין על עסקי נפשו. And the ms Erfurt reads: שאם היו מניחין אתו ובא על עיסקי נפשות.

⁴⁰ On the term “*arayot*” cf. also n. 11 in this chapter. .

⁴¹ Maimonides explains in his commentary on *mSanhedrin* 8:7, in line with *tSanhedrin* 11:11, that the cases mentioned by the mishnah include “all those, who are

The “*arayot* named in the Torah” include – apart from sexual relations between married/betrothed women and men other than their husbands (cf. Leviticus 18:20) – sexual relations between parties related to one another within the prohibited degrees of kinship (for example, sexual relations between a man and his mother, daughter or sister, cf. Leviticus 18:7-18).⁴² A marriage between a man and one of those women, with whom intercourse is defined as *arayot* in the Torah, is prohibited *and* invalid. No *get* is needed for divorcing such a woman: A man, who had intercourse with his mother, or with a betrothed/married woman, does not need to divorce these women, since no *kiddushin* is deemed having taken place in the first place. Being guilty of *arayot*, the transgressor is punished either by a Beth Din with death, or by *karet*.⁴³ The children born out of such a union are considered *mamzerim*.⁴⁴

The Tosefta here applies the prohibitions of *arayot* (the אִיסוּרֵי עֲרִיּוֹת) to a rape-case: If a man rapes a woman, who is prohibited to him on account of the “*arayot* named in the Torah,” he may be killed. Against those women, whose intercourse with the rapist falls into the category of *arayot* and may be saved through the death of their rapist, the Tosefta presents the case of “a High Priest to a widow, and a divorcee and a *halutsah* to an ordinary priest” (אלמנה לכהן) (גדול גרושה וחלוצה לכהן הדיוט).

liable to *keritot* or death at the hands of a Beth Din on account of *arayot*” (cf. above, n. 7). He explains that the mishnah mentions specifically the rape of a betrothed girl in its enumeration, because her case is explicitly regulated by Scripture: According to Maimonides, it can be deduced from Deuteronomy 22:27 (“*For he [the rapist] found her [the betrothed girl] in the field, and the betrothed girl cried, and there was no one to save her [...]*”), that if there was someone to save the betrothed girl, he has to save her. Maimonides’ source for this exegesis is Rabbi Ishmael’s interpretation of Deuteronomy 22:27 as recorded in *bSanhedrin* 73a.

⁴² Cf. Schereschewsky, “Prohibited Marriage” and Melamed, *פרק ה.א, הלכות עריות*. Apart from adulterous and incestuous sexual relations, also sexual relations with a menstruating woman (Leviticus 18:19), homosexual relations (ibid. 18:22) and bestiality (ibid. 18:23) are defined as *arayot* in the Torah.

⁴³ In a case where he committed the act unintentionally, he has to bring a sin-offering. Cf. Maimonides, *Mishneh Torah, Hilkhhot Issurei Biah*, 1:1.

⁴⁴ Cf. Schereschewsky, “Prohibited Marriage.” Other marriages that are deemed prohibited and invalid – but are *not* defined *arayot* – are marriages between Jews and Non-Jews.

This passage can be translated in two different ways: In line with the common tannaitic meaning of the formula “a widow to a High Priest,” it needs to be translated as: “a widow *betrothed/married* to a High Priest, and a divorcee or *halutsah betrothed/married* to an ordinary priest.”⁴⁵ According to this translation, the Tosefta deals with a man, who rapes a widow, who is betrothed/married to a High Priest, or a divorcee or *halutsah*, who is betrothed/married to an ordinary priest. This translation is offered also by Neusner: “If she was a widow [married to] a High Priest, or a divorcee or *halutsah* [married to] an ordinary priest [...]”⁴⁶

However, even though this translation accords with the common tannaitic meaning of the formula “a widow to a High Priest etc.,” it entails a problem: Sexual relations between a widow and a High Priest, and a divorcee or *halutsah* and an ordinary priest do not fall into the category of *arayot*, but into the category of the איסורי לאוין (“prohibited on account of a general prohibition”) or איסורי קדושה (“prohibited on account of holiness”): “Every kind of intercourse, which is prohibited in the Torah and is not punished with a *karet*, is called איסורי לאוין or איסורי קדושה. And there are nine of them, and these are: A widow [married] to a High Priest; a divorcee, or a *zonah* or a *halalah* [married] either to a High Priest or an ordinary priest [...]”⁴⁷ The

⁴⁵ Cf. *mYevamot* 2:4, 6:2-3, 7:1, 9:3; *mKetubbot* 11:6; *mSotah* 4:1, 8:3, 8:5; *mGittin* 9:2, *mQiddushin* 3:12 and *mMakkot* 3:1.

⁴⁶ Neusner, *A History of the Mishnaic Law of Damages, Part Three (Baba Batra, Sanhedrin, Makkot)*, 207.

⁴⁷ Maimonides, *Mishneh Torah, Ishut* 1:7: הן כל שאסר ביאתו בתורה ולא חייב עליו כרת, הן הנקראים איסורי לאוין; ועוד, נקראין איסורי קדושה. ותשעה הן, ואלו הן: אלמנה לכוהן גדול; גרושה, או זונה, או חללה - בין לכוהן גדול, בין לכוהן הדיוט [...]

The prohibitions' biblical foundation is Leviticus 21:7 and 21:14. Here it is declared that an ordinary priest is prohibited from marrying a divorcee, a *halalah* and a *zonah* (Leviticus 21:7). A *halutsah* is prohibited to an ordinary priest by virtue of a rabbinic decision (cf. *Shulhan Aruh*, Even haEzer 15:1 and Maimonides, *Mishneh Torah, Hilkhoh Issurei Biah* 17:5). A High Priest is, in addition to the latter women, also prohibited from marrying a widow (Leviticus 21:14). (A *zonah* is, in this context, not a woman who earns her living through prostitution. The term here refers to the halakhic category of *zonah*: a woman who is not Jewish by birth, or a woman, who had intercourse with a man, to whom she is prohibited by virtue of a general prohibition, for example, a *mamzer* or a non-Jew. Cf. Schereschewsky, “Prohibited

punishment of a High Priest married to a widow, or an ordinary priest married to a divorcee or a *halutsah*, is, accordingly, not death at the hands of a Beth Din or a *karet*, but whipping.⁴⁸ The children born out of this relationship lose their priestly status, they are *halalim*,⁴⁹ but they are *not* considered *mamzerim*. A couple who enters such a relationship would be required to divorce with a *get* before being allowed to engage in sexual relations with someone else. Thus, even though the marriage is “prohibited on account of holiness” (*mYevamot* 2:4), a valid act of *kiddushin* is deemed to have taken place: “A widow [married to] a High Priest, and a divorcee or a *halutsah* [married to] an ordinary priest, these are like his wife in every respect. [...] He is betrothed to her and she needs a *get* from him” (*tYevamot* 2:3).⁵⁰ As a result, a man, who rapes a widow married to a High Priest, or a divorcee and *halustah* married to an ordinary priest, commits an act that falls under the category of “*arayot*”:

Marriages”).

⁴⁸ Cf. Maimonides, *Mishneh Torah, Hilkhoh Issurei Biah* 17:2. Someone, who unintentionally married a woman prohibited to him on account of the *issurei lavin*, is not punished by whippings (*Mishneh Torah, Hilkhoh Issurei Biah* 1:7).

⁴⁹ A *halalah* – the daughter of a priest, who is married to a woman forbidden to him – cannot marry a priest (*mQiddushin* 4:6) or eat of the heave-offering or the sacrificial meat (*mYevamot* 6:1). The son born of this union, a *halal*, is unfit for priesthood. A *halal* or a *halalah* are allowed to marry an Israelite of unimpaired status (unlike *mamzerim*, who are allowed only to marry other *mamzerim*). The children of a marriage between a *halal/halalah* and an Israelite follow the father’s status (cf. *mQiddushin* 3:12). A priestly father married to a woman forbidden to him loses the right to be called up to the Torah as the first person, and to say the priestly blessing for the community (*Shulhan Aruh, Orah Hayyim*, 128:40). However, he himself does not become a *halal* (Maimonides, *Mishneh Torah, Hilkhoh Issurei Biah* 19:1).

⁵⁰ Cf. *tYevamot* 2:3: לא פירות שאמרו אינן כאשתו לכל דבר: אין להם כתובה, ולא פירות, לא מזונות, לא בלאות, ואין זכאי לא במציאתה, ולא במעשה ידיה, ולא בהפרת נדריה. אין יורשה, ואין מטמא לה, אין לו בה קדושין, ואין צריכה הימנו גט. היא פסולה והולד ממזר. אלמנה לכהן גדול גרושה וחלוצה לכהן הדיוט הרי הן כאשתו לכל דבר, ויש לה כתובה, ופירות, מזונות, ובלאות, וזכאי במציאתה ובמעשה ידיה, ובהפרת נדריה. יורשה, ואין מטמא לה יש בה קדושין. Cf. also Schereschewsky, “Prohibited Marriage”: “In this category [the איסורי לאוין, C.T.] are included marriages which, although prohibited, do not constitute *gillui arayot* according to pentateuchal law and therefore are valid and not terminable unless by the death of either party or by divorce.” Since a betrothal that is conducted despite the *issurei lavin* is valid, it is ruled in *mYevamot* 6:4 that an ordinary priest, who is betrothed to a widow, and later on is appointed High Priest, may nevertheless marry the widow.

adultery. This rapist has intercourse with a woman, who belongs to another man, an “אשת איש.”

If one follows the common translation of “a widow to a High Priest” as “a widow *betrothed/married* to a High priest,” the Tosefta thus presents the following legislation: The rapists of betrothed/married women or women prohibited to them on account of the “*arayot* named in the Torah” are to be “saved by their lives.” Yet, the rapist of a widow, who is betrothed or married to a High Priest, is not to be “saved by his life” – even though he, too, has intercourse with an “*eshet ish*”. In this, he does not differ from those rapists enumerated in the Tosefta’s first part.

The only way to explain why the one adulterer is killed, but not the other, does not seem convincing: One would need to assume, that solely the status of the marriages between the raped women *and their husbands* is what decides the rapist’s fate: If a man rapes a woman, whose marriage is “valid and permitted,” he is killed. But if a man rapes a woman, whose marriage is “valid and prohibited” (i.e., the widow married to a High Priest etc.), he is not killed. The marriages between the raped women *and their husbands* are of different “marital legitimacy” and according to these different grades of legitimacy, their rapist is either killed or not.

However, this reasoning does not cohere to the Tosefta’s wording: The Tosefta rules that “equal are a betrothed girl and any of the prohibited relations (*arayot*) named in the Torah, one saves him by his life.” In other words: Not only someone, who violates a valid and permitted marriage (that is, an adulterer), but also someone, who rapes any other woman forbidden to him on account of the “*arayot* named in the Torah” is to be killed. (For example, a rapist of his non-married sister is to be killed, even though he does not violate any valid and permitted marriage: A man who rapes his sister, is killed, because of his incestuous “relation” to the raped victim.) Accordingly, it is not the status of the raped woman’s marriage, but the status of the sexual relations between her and the rapist, which decides whether the rapist is to be killed or not. A rapist of a widow married to a High priest, or of a divorcee or *halutsah*

married to an ordinary priest, thus should be killed, since he, too, commits an act that is prohibited on account of the “*arayot* named in the Torah.”

Possibly on account of these problems, the Tosefta is understood differently by Rashi.⁵¹ According to Rashi’s understanding of the formula אַלְמָנָה לְכַהֵן גָּדוֹל וְכוּ', it is here not to be understood in the sense of “a man, who rapes a widow *married or betrothed* to a High Priest etc.”, but in the sense of “a High Priest, who rapes a widow etc.”⁵² According to this understanding of the text, whether or not the rapist may be killed depends on the “marital status” of the sexual relations between the rapist and his victim. The rapist of a betrothed girl and of other women forbidden to him on account of the “*arayot* named in the Torah” is to be killed. The adulterous marriage between them would be, as explained above, both invalid and prohibited. But a High Priest who rapes a widow, and an ordinary priest who rapes a divorcee or *halutsah*, is *not* killed, because he could enter a prohibited, yet valid, marriage with his victim. The two kinds of rape are, as regards their “marital legitimacy,” of different severity, and according to these different grades of severity, the bystander may either kill the rapist or has to leave him unharmed: In case the rapist commits an act defined as “*arayot*,” he is killed, in case he does not commit an act defined as “*arayot*,” he is not killed.

Regardless of which of the two translations one chooses, however, the toseftan distinction between “prohibited and invalid marriages” and “prohibited, yet valid marriages” is, like the mishnaic distinction between a betrothed and a non-betrothed girl, in no way concurrent with the laws governing the saving of life: If the rescue of the rapist’s victim was the legal rationale of this toseftan text, then *any* woman, regardless of her marital status, has to be saved. The Tosefta declares that only the rapist of particular women – those, with whom intercourse amounts to adultery – may be killed, because the Tosefta’s legal

⁵¹ Rashi does not comment on the original Tosefta, but the “Tosefta in the Bavli,” that is, the baraita in *bSanhedrin* 73b.

⁵² Cf. Rashi on *bSanhedrin* 73a, s.v. אַלְמָנָה לְכַהֵן גָּדוֹל: אַלְמָנָה לְאַנּוֹס: אַלְמָנָה לְכַהֵן גָּדוֹל (A widow to a High-Priest: A high priest, who pursues a widow to rape her). This coheres also to Goldschmidt’s (*Sanhedrin*, 756) and the Soncino-translation of the Bavli.

rationale is the rapist's rescue from sin, and not the woman's rescue from the rapist.

On account of this same rationale, the Tosefta can also declare in its continuation that "if a transgression was committed upon her, one does not save him by his life" (*tSanhedrin* 11:11, ms Vienna and first printed edition):⁵³ Once it is too late for the rapist's "rescue," that is, once the act of rape has "begun," there is no point anymore in intervening, since the rapist, in any case, can no longer be saved from a transgression. The existence of a "third party" – the raped woman, who needs to be saved from her rapist – does not bear upon the necessity to save the rapist from sin and is therefore irrelevant. Finally, this legal rationale explains also the view of Rabbi Yehudah and Rabbi Eleazar bar Tzadoq.⁵⁴ According to Rabbi Yehudah, even if the woman "consents to be raped," the rapist needs to be "saved by his life." And according to Rabbi Eleazar bar Tzadoq, also an idolater needs to be "saved by his life."⁵⁵ In both cases, the bystander has to intervene in order to save the almost-transgressor from a transgression of the law – regardless of the existence or the interests of the victim.

3.2. "Whether in the house or in the field"

A further peculiarity of the toseftan text bespeaks this interpretation. The Tosefta specifies that the offender of a betrothed girl may be killed "whether in the house or in the field." This addition is probably inspired by the biblical text on the rape of a betrothed girl in Deuteronomy 22:23-25: ²³⁾ *If a girl who is a virgin is betrothed to a husband, and a man finds her in the city, and lies with her;* ²⁴⁾ *Then you shall bring them both out to the gate of that city, and you shall stone them with stones that they die; the girl, because she cried not, being in the city; and the man, because he has humbled his neighbor's wife; so you shall put away*

⁵³ The phrase "If a transgression was committed upon her etc." is not transmitted in the ms Erfurt of the Tosefta.

⁵⁴ The view of Rabbi Yehudah is transmitted differently in ms Erfurt of the Tosefta. I will comment on this further below.

⁵⁵ This is what Mattathias does at the outbreak of the Hasmonean revolt: He kills the Jew who consents to worship idols.

evil from among you. ²⁵⁾ *But if a man finds a betrothed girl in the field, and the man forces her, and lies with her; then the man only who lay with her shall die.*”

According to Deuteronomy 22:23-25, whether the raped girl is to be punished or not depends on whether she was raped “in the city” or “in the field.” Through this distinction the raped girl’s consent or refusal is believed to be inferable: A girl who does not consent to be raped is assumed to cry out for help, so that someone who is nearby can hear her, and come to save her from the rapist. In the densely populated city, her cries are assumed to be heard. Accordingly, if in the city nobody comes to help, this is interpreted as a proof of her not having cried out and therefore, of having consented. A girl who was raped “in the city” thus needs to be punished, whereas a girl who was raped “in the field” is assumed to be innocent.

The Tosefta, when declaring that a rapist of a betrothed girl may be killed *both* in the house (“in the city”) and in the field, most likely hints at this biblical distinction between a rape in the city and a field, between a betrothed girl, who consents to have intercourse with someone other than her husband, and between a betrothed girl, who does not consent. In contrast to the biblical verses, however, the Tosefta here dismisses the distinction between a rape that took place “in the house” and one that occurred “in the field,” between a rape to which the betrothed girl consented, and one that was coerced upon her. However, the Tosefta’s disavowal of the distinction between “the city” and “the field” does not indicate a disavowal of the biblical assumption, that a rape, which occurred in the city, was performed with the consent of the raped girl: The rape’s location is of interest to the biblical legislators, for they believe that they can infer her consent or refusal, and thus, her guilt or innocence, through this criterion.⁵⁶ In *tSanhedrin* 11:11, however, it is not the guilt of the girl, but that of the rapist, which is discussed. The rapist, however, is not “less guilty” or commits a transgression of lesser severity when the betrothed girl consented: Whether *she* consented is important regarding *her*

⁵⁶ Note that the authors of Deuteronomy attempt to construct “objective” criteria according to which they themselves can infer whether the girl consented or refused. Yet they do not consider the possibility of simply asking the betrothed girl herself.

culpability, yet it is irrelevant regarding *his* culpability: Whether she consented or not, whether he is a rapist or a seducer – he deliberately committed an act of adultery in any case, and therefore, may be killed (or “saved by his life”) regardless of her approval or disapproval, both “in the field” and “in the city.”⁵⁷

The Pursuer’s Death as the Rescue of the Pursued

As mentioned in the introduction to this work, *mSanhedrin* 8:7 entails an internal inconsistency implying that the *effect* of the pursuer’s death – the rescue of the pursued – is not only a mere coincidental side-effect of the pursuer’s death, but underlies the mishnah’s structure and composition. I will now turn to this inconsistency.

Proportionality

Commonly, the severity of a punishment is supposed to correspond to the severity of the transgression. A severe transgression ideally provokes an equally severe juridical reaction, whereas a minor transgression provokes a juridical response of lesser harshness. In the mishnayot, which precede *mSanhedrin* 8:7, the attempt to inflict a punishment in proportion to the transgression is plainly discernible: For example, the first five mishnayot of the eighth chapter of Mishnah Sanhedrin attempt to re-arrange the biblical law on the “stubborn and rebellious son” (cf. Deuteronomy 21:18-21), so that it fits the ideal of proportionality between a transgression and its punishment. According to the biblical law, a “stubborn and rebellious son” may be sentenced by the elders of the city to death by stoning, on account of not

⁵⁷ Judith Hauptman (*Rereading the Rabbis*, 80) argues that the rabbis “[v]iew all cases of forced sex as rape, without regard to where the act took place.” I argue that the rabbis’ disregard for the place where the rape took place is due to the circumstance, that the rapist’s transgression – adultery – does not depend on the victim’s consent or refusal.

having hearkened to the voice of his parents. The tannaim, on their part, were not at all content with the biblical institution of killing a “stubborn and rebellious son” simply on account of misbehavior towards his parents. Being a law which originates in the Torah, they could not abrogate it altogether, yet in the entire five mishnayot on the “rebellious son,” they are busy limiting the law’s applicability: The first mishnah defines the period, during which he may be accused, and exempts a minor son and daughter from the law (cf. *mSanhedrin* 8:1); the second and third define the transgressions, which have to be committed by the son in order to be liable (*mSanhedrin* 8:2-3), the fourth constructs criteria, which have to be fulfilled by the son’s parents in order to accuse him, and even invents a possible escape-route for the son (*mSanhedrin* 8:4). Only the fifth mishnah finally rules that “a stubborn and rebellious son is judged on account of his end” (*mSanhedrin* 8:5). In their entirety, these mishnayot limit the applicability of the law, or rather, the parent’s capability to accuse their son and the court’s power to condemn him.⁵⁸

Yet, *mSanhedrin* 8:7 disregards the ideal of proportionality between a crime and the juridical response it provokes. Even though the mishnayot of the eighth chapter of Tractate Sanhedrin form a coherent thematic unit – they all deal with the killing of a person, who is about to commit a transgression – *mSanhedrin* 8:7 implies that the designation of a transgressor as a “pursuer” does *not* depend on the severity of the transgression which is about to take place: *mSanhedrin* 8:7 rules that someone, who attempts to kill his neighbor, to rape a betrothed girl or a boy, may be “saved by his life,” whereas an idolater, a desecrator of the Shabbat and someone, who has intercourse with an animal, may not be “saved by their lives.” All the transgressions mentioned by the mishnah, in *both* of its parts, are according to biblical law to be punished with death: The death-sentence as a punishment for bloodshed is articulated in

⁵⁸ Also in the toseftan elaborations on the killing of a thief one may discern an attempt to inflict a punishment in proportion to the transgression which is about to be committed. Thus, a thief may not be punished with death as long as it is assumed that he does not intend to kill the house-owner: “He, who breaks in, [if] he came to kill someone, they save him by his life. [If] he came to steal money, they do not save him by his life” (*tSanhedrin* 11:9).

Genesis 9:6, for forced intercourse with a betrothed woman in Deuteronomy 22:25. A case of forced homosexual intercourse is by biblical law not regulated, however, the death-sentence for homosexual intercourse, be it forced or by free will, is referred to in Leviticus 20:13, in the context of the regulations on the various unions forbidden on account of “the uncovering of nakedness.” The death-penalty for bestiality is mentioned in Exodus 22:18 and in Leviticus 20:15, for idolatry in Deuteronomy 17:2-5 and 13:7-9, and for the desecration of the Shabbat in Exodus 35:2 and Numbers 15:32-36. Those pursuers, whom the mishnah mentions in its first part (the murderer, the adulterer and the one who has homosexual intercourse), as well as those transgressors whom it mentions in its second part (the desecrator of the Shabbat, the idolater and the one who commits bestiality), commit a transgression of *identical* severity and are therefore all according to be punished with a death-sentence. No lesser severity is attached to those transgressions, which *mSanhedrin* 8:7 enumerates in its second part – on the contrary, idolatry is at least on the symbolic level even more severe than murder.⁵⁹

Also in tannaitic literature, all the transgressions listed in *mSanhedrin* 8:7 are assumed to be of identical severity. This may be deduced as follows: According to *mSanhedrin* 7:1, a rabbinic court can inflict four different types of capital punishments: stoning, burning, decapitation and strangulation. These are held to be of different grades of severity, corresponding to the different severities of the transgressions to be punished with death. According to *mSanhedrin* 7:4, rape of a betrothed girl, homosexual intercourse, bestiality, the profanation of the Shabbat and idolatry are to be punished with stoning. Thus, from among the six transgressions enlisted in *mSanhedrin* 8:7, only the murderer is punished differently, namely “by the sword,” i.e., by decapitation (cf. *mSanhedrin* 9:1). The transgressions mentioned in the mishnah’s first part are thus, apart from murder, not categorized as being more severe than the transgressions mentioned in the mishnah’s second part: He who rapes a betrothed girl and he who

⁵⁹ Cf. Zohar, “Killing a Rodef,” 55.

desecrates the Shabbat are to be punished identically – having committed a crime of identical severity, they are also punished identically. Why then does *mSanhedrin* 8:7 permit the killing of the betrothed girl’s rapist, but prohibits the killing of him, who desecrates the Shabbat etc.? If the transgressions mentioned in the two parts of the mishnah are of identical severity, why then are the transgressors not equally “saved from sin by their lives”?

According to *mSanhedrin* 8:7, whether a pursuer may be killed depends on the existence of a human victim: The transgressors, who are *not* to be punished preemptively, are he, who pursues an animal, who desecrates the Shabbat or who commits an act of idolatry. The transgressors, who are to be punished preemptively, are he who attempts to kill his fellow, to have (forced) intercourse with a betrothed girl or (forced) homosexual intercourse. They commit a crime against God and in addition, against a human being. The mishnah thus chooses to confront crimes of *identical* severity, and distinguishes them by the existence or absence of a human victim.

Also the mishnah’s structure reflects this human/non-human dividing-line. Its texture consists of two, identically structured parts. The first “set of pursuers” may be killed; the second set may not. In both parts of the mishnah, one transgression, enlisted in the beginning, is followed by two transgressions of a different “type.” In the first part, one encounters an act of murder, followed by two sexual transgressions: the rape of a betrothed girl and homosexual rape. In the second part, one encounters first one sexual transgression, bestiality, followed by two major transgressions against God, idolatry and the desecration of the Shabbat. The second part thus begins where the first ends, with a sexual transgression. This rhetorical technique highlights the difference between those sexual transgressions listed in the first part and the one listed in the second part, thereby highlighting the overall difference between the two parts: The pursued in the mishnah’s second part are no human-beings, the pursued of the first part are.⁶⁰

⁶⁰ In a way, also idolatry may be interpreted as a transgression against human beings, because idolatry invokes God’s jealousy and prompts Him to judge the people (cf. Exodus 20:5, Exodus 34:14 and Deuteronomy 5:8-10).

Notably, this structure is not identical with the one the parallel Tosefta displays (cf. *tSanhedrin* 11:11, quoted above). According to the Tosefta, if a man rapes a woman, with whom marriage would be both prohibited to him and invalid, he may be “saved by his life.” This rape constitutes a “marriage” punishable by excision or by a death-sentence of a Beth Din. But if a man rapes a woman with whom a marriage would be prohibited but valid, he does not need to be “saved by his life.” As explained above, the two rapes are, regarding their legitimacy, of different severity, and according to these different grades of severity, the bystander may either kill the offender or has to leave him unharmed. Thus, whereas *mSanhedrin* 8:7 contrasts crimes of *identical* severity (murder, the rape of a betrothed girl and homosexual rape versus bestiality, idolatry and the desecration of the Shabbat) the Tosefta contrasts transgressions of different severity.⁶¹ Even though both the Tosefta and the Mishnah permit the killing of a pursuer, the texts’ structure thus indicates different underlying rationales: In the Tosefta, whether or not the pursuer may be killed depends solely on the severity of the transgression, whereas in the Mishnah, it depends on the severity of the transgression *and* the existence of a human victim.⁶² Thus, the permissibility to kill a pursuer – even though it is conceptualized and legitimized as the pursuer’s rescue from sin – seems to be motivated also by an attempt to save a human being’s life and honor. Were it otherwise, there would be no reason to permit the “rescue” of those offenders, who attack human beings, but not of those, who commit other transgressions of identical severity.⁶³

⁶¹ Cf. also Shapira, “Rodef and Self-Defense,” 256.

⁶² Shapira (“Rodef and Self-defense,” 260) assumes that the editors of the Mishnah knew the Toseftan version of the law on the pursuer: “[T]he Mishnah expresses a radical change in the course of the tradition and in the perception of this law. This change can be described as a move from a theocentric view that was concerned with the problem of preventing transgressions of the divine law to a more anthropocentric view that is concerned with protecting the victim’s life and honor.”

⁶³ Cf. also the conclusion of Shapira (“Rodef and Self-Defense,” 269): “It seems that originally, prior to the Mishnah, the prevalent version of the law of the pursuer was the “religious” one that was aimed at saving the pursuer and preventing the violation of the divine law. This version, which one may describe as theocentric, would bring

Conclusion

As pointed out in the introduction to this chapter, the mishnah at first sight contradicts the toseftan principle on the means, which may be used for the sake of saving a life. Whereas the Tosefta explicitly prohibits a rescue of life, which is effected through bloodshed (cf. *tShabbat* 15:16), *mSanhedrin* 8:7 seemingly permits the killing of the pursuer so as to save his victim. At second sight, however, this contradiction between *mSanhedrin* 8:7 and *tShabbat* 15:16 appears to be ambiguous. The mishnah in fact does not formulate that the rescue of the *pursued* is the legal rationale on account of which the pursuer may be killed. It does not state, that the pursued is to be saved by the pursuer's life, but that the pursuer *himself* is to be saved by his own life. The question underlying the analysis thus was: If not for the sake of saving the life of the pursued, on account of what may the pursuer be killed?

In the course of the analysis, I have argued that the tannaim conceptualize lethal force against a pursuer as a juridical response to a transgression. Accordingly, they do not articulate, that the killing of the pursuer has to be carried out in order to save the victim: The thief is “judged on account of his end,” and the pursuer is “saved by his life.” Thus, even though the rescue of

under the same category all severe transgressions that the perpetrator was in the act of committing, including: bloodshed, adultery (and incest), idolatry and Shabbat. The other version, which is known from the Mishnah, expresses a different conception that can be described as more anthropocentric or humanistic. This version rejects the possibility of preventing transgression of the law by killing the transgressor in advance. It justifies such action only when it is needed for the rescue of a victim. Thus, it brings under the category of the pursuer only those violations that may cause severe harm to another person, namely bloodshed and adultery [...]. However, the Mishnaic law bears some features that are typical of the former “religious” version of the law. One of them is the mandatory character of the law. [...] the law of the pursuer is formulated as a duty, which is more typical of a religious obligation. Another feature is the inclusion of the rape of a betrothed girl (as well as other women that are forbidden under the rules of incest) among the cases that justify the killing of the attacker. It is not self-evident that these cases entail the right (and the duty) to kill the violater in advance. On the other hand, if one would have wanted to include rape under the category of self-defense, why should it be under the limitation of the specific rules of incest? It seems that we have here another remnant and trace of the religious layer of the law.”

the pursuer's victim may be the practical effect of the pursuer's death, this effect is not the mishnah's juridical backbone: The bystander's lethal intervention is legitimate, because it saves the pursuer from a transgression. As a result, the toseftan principle on the limits of the means through which life may be saved, does indeed not contradict *mSanhedrin* 8:7. The mishnah can be read, instead, as a re-working and re-contextualization of the toseftan principle: The Tosefta declares that one may not save someone from death through committing idolatry, forbidden sexual relations and bloodshed. One should rather let someone die than commit these three transgressions. In *mSanhedrin* 8:7 this same view is transferred to a situation involving the pursuer, the pursued and the bystander: Just as *tShabbat* 15:16 declares that the transgression of three negative commandments is to be avoided even at the cost of a human-being's life, so *mSanhedrin* 8:7 declares that the one, who transgresses these commandments voluntarily, needs to be stopped at the cost of his *own* life. Just as one has to save *oneself* from three transgressions at the cost of one's life, so one has to save the pursuer from committing these transgressions.⁶⁴ Here and there, according to both *tShabbat* 15:15 and *mSanhedrin* 8:7, life is deemed possible only *within* an area encircled by the law. Three transgressions are "beyond" this law. Even though the transgressor's life is in a physical sense intact also after the transgression of these three commandments, the transgression catapults him into an area, which is beyond the area encircled by the law and "habitable" only physically. In case there is no-one who "saves" the pursuer from his transgression, he keeps on living, yet is as though dead.⁶⁵ The pursuer's physical death, caused *before*

⁶⁴ Cf. Rashi on *bSanhedrin* 73a, s.v. מן העבירה: ואלו שמצילין אותן (The following are those whom one saves: from the transgression) and s.v. בנפשו: בניחוח ליהרג לכל אדם כדי (The following are those whom one saves: from sin. By their lives: It is permitted to everyone to kill them in order to save them from sin, and this is learnt from [biblical] verses). Cf. also Bertinoro on *mSanhedrin* 8:7, s.v. הן אלו שמצילין אותן מן העבירה: בנפשן. שניתן רשות לכל אדם להרגן כדי: שמצילין אותן בנפשם (The following are those whom one saves by their lives: whom one saves from the transgression. By their lives: It is permitted to every human-being to kill them in order to save them from the transgression).

⁶⁵ Cf. also Steinmetz, "Crimes and Punishments, Part I," 100.

entering this non-livable area, is therefore his “rescue,” carried out not by a murderer, but by a savior.⁶⁶ The bystander, when killing the pursuer, saves him from passing the line that separates a “void,” “non-livable” and lawless area from a “livable” area encircled by the law.⁶⁷

Yet, *mSanhedrin* 8:7 entails an internal inconsistency: Even though the tannaim conceptualize and legitimize the pursuer’s death as his “rescue from sin,” the matter-of-fact *effect* of the pursuer’s death – the rescue of the pursued – is far from being a coincidental side-effect of the pursuer’s death: Just as *tShabbat* 15:16 declares idolatry, bloodshed and forbidden sexual relations to be the three acts the avoidance of which is of higher value than a person’s life, so the Mishnah should (or could) have declared that the one, who is about to commit these three acts is to be “saved through his life”: Just as one saves *oneself* from committing these three transgressions, so one saves someone *else*

⁶⁶ Goldberg (“Der einmalige Mensch,” 296) accordingly dismisses the idea that the pursuer may be killed so as to punish him. Rather, Goldberg explains, the pursuer is worthy of being saved: “Ein vom Gericht zu verfolgendes Verbrechen liegt nur nach vollendeter Tat vor. Der Vorsatz kann (vom menschlichen Gericht) nicht bestraft werden. Einen Menschen um den Preis seines Lebens von der Tat abzuhalten wäre zweifellos Mord, selbst dann noch, wenn kein Zweifel an der Ausführung der Tat mehr besteht, und unter dem Gesichtspunkt der Rettung des Bedrohten wäre dies die Wahl zwischen zwei Leben. [...] Der hier verwendete Terminus „man rettet (den Täter) um den Preis seines Lebens“ mag in der Praxis ein Euphemismus sein, er läßt aber kein Urteil über den Täter zu. Vielmehr, ist dieser wert gerettet zu werden, genauso wie der Bedrohte.” The death of the “stubborn and rebellious son” is in *mSanhedrin* 8:5 accordingly interpreted as a “benefit to him and the world”: “Let him die innocent and let him not die guilty. For the death of the wicked benefits themselves and the world, of the righteous, injures themselves and the world. Wine and sleep of the wicked benefit themselves and the world; of the righteous, injure themselves and the world [...]” (*mSanhedrin* 8:5).

⁶⁷ The virtual “non-viability” of an area beyond the law comes to the fore also in the use of “water” as a synonym for “the law” in rabbinic exegesis. Cf. for example *bBava Qama* 17a: “Water signifies ‘the law’ as stated, *Everyone that is thirsty, come you to the waters* (Isaiah 55:1),” and *bBava Qama* 82b, “The [following] ten enactments were ordained by Ezra: [...] That the law be read [publicly] on Mondays and Thursdays. But was this ordained by Ezra? Was this not ordained even before him? For it was taught: *And they went three days in the wilderness and found no water* (Exodus 15:22), upon which those who expound verses metaphorically said: water means nothing but Torah, as it says: *Everyone that is thirsty, come you to the waters* (Isaiah 55:1).”

from these same three transgressions. However, the transgressions which, according to the Tosefta, “outweigh” life are only *almost* identical with the transgressions which, according to the Mishnah, “outweigh” life. One of the three prohibitions which the Tosefta classifies as more important than life, does *not* appear in *mSanhedrin* 8:7 among those transgressions, which need to be avoided at all costs: idolatry.

Even though idolatry is a transgression of no lesser severity than adultery and bloodshed, in the mishnah, idolatry has switched sides and appears, together with bestiality and the desecration of the Shabbat, among those transgressions, which do *not* need to be prevented at the cost of the pursuer’s life. Thus, even though according to the Tosefta, idolatry is one of the three transgressions that need to be avoided even at the cost of life, in the Mishnah, the idolater is not defined a “pursuer.” In mishnaic legislation, not the severity of the transgression, but the existence of a human victim is the decisive factor in the categorization of a transgressor as a pursuer: One may *not* stop (or “save”) the one who is about to commit an act of idolatry through killing him,⁶⁸ but solely the one, whose transgression violates God *and* human-beings: a murderer and an adulterer. Thus, without being spelled out explicitly, the effect of the pursuer’s “rescue from sin” – the rescue of the pursued – is inscribed in the mishnah’s composition and structure; it is the principle underlying its order.⁶⁹ *mSanhedrin* 8:7 thus entails two different legitimizations of the killing of the pursuer. On the one hand, the tannaim conceptualize the pursuer’s death as his rescue from a transgression. On account of this conceptualization, not only a murderer, but also a transgressor, who does not necessarily endanger another human being’s life, may be “saved by his life:” an adulterer and someone, who commits homosexual intercourse. According to this conceptualization,

⁶⁸ When reading the Mishnah and the Tosefta in conjunction, one has to conclude that Jews are supposed to save *themselves* from bloodshed, forbidden sexual relations and idolatry (according to the Tosefta), and save *someone else* from bloodshed and forbidden sexual relations (according to the Mishnah): One has to save oneself, but not the other, from idolatry.

⁶⁹ Shapira (“Rodef and Self-defense,” 263) assumes that the self-defense conception of the mishnah gained, in the course of time, dominance: “Thus, by the end of the tannaitic period the dominance of the self-defense conception was achieved.”

mSanhedrin 8:7 is “rightly” placed in tannaitic criminal law, in Tractate Sanhedrin. On the other hand, the tannaim disrupt the conceptualization of the pursuer’s death as his “rescue from sin”: An idolater is *not* among those to be “saved through his life,” even though the idolater’s transgression is as severe as the transgressions of those, whom one may save by their lives. The tannaim appear undecided between a legislation motivated by the aim to protect the life and honor of the pursued, and the aim to avoid a violation of the divine law at the hands of the pursuer. There exist, as Hayim Shapira surmises, “[t]wo different versions of the law of pursuer. One, in the Mishnah is aimed at protecting the life and honor of the pursued ones. The other one [...] is aimed at saving the transgressor and preventing the violation of divine law.”⁷⁰ Whether the *pursuer* is to be saved from sin, or the *pursued* is to be saved from death and dishonor, is a question that is not resolved in favor of either option.

⁷⁰ Shapira, “Rodef and Self-defense,” 256. The existence of two different possible legitimizations of the pursuer’s death is reflected also in the manuscript versions of the toseftan tradition, that parallels *mSanhedrin* 8:7: According to the ms Vienna and the first printed edition (quoted above), Rabbi Yehudah holds that one may kill the rapist, even though the betrothed girl advises the bystander not to intervene (ר' יהודה (אומ' אם אמרה הניחו לו מצילין אותו בנפשו). According to the ms Erfurt, however, Rabbi Yehudah holds that in this situation one may *not* kill the rapist (ר' יהודה אומ' אם אמרה (הניחו לו אין מצילין אתו בנפשו). When the pursuer is killed so as to save him from a transgression, then he needs to be killed regardless of the betrothed girl’s consent: In this case, it is irrelevant whether the man is a rapist or a seducer, since he commits, in either case, an act of adultery – a transgression he needs to be “saved” from. Even if the girl consents, even if he is a “seducer,” a bystander still has to act to fulfill the interest of the law. When, however, the pursuer is killed so as to save his victim, then the victim’s consent or opposition matters: If she opposes the adulterous intercourse, she requires a rescue from her rapist; but if she agrees, she does not need to be saved.

An afterthought: mSanhedrin 8:7 and different views on the nature of the law

Possibly, the different ways to legitimize the killing of a pursuer do not only imply different frameworks in which *mSanhedrin* 8:7 can be read – the framework of criminal law on the one hand, and that of the saving of life on the other. Echoing Devora Steinmetz’ claim, according to which the rabbinic criminal law is a site at which “fundamental ideas”⁷¹ are being negotiated, I propose that the different frameworks in which *mSanhedrin* 8:7 can be read also imply different views of the nature of the law.

A reading, that contextualizes the mishnah in tannaitic criminal law, seems to imply a positivist view of the law. A nutshell-definition of a positivist view of the law is, that law is a “[s]ystem of rules laid down by the authorities (in this case, God), regardless of whether the rules are moral or whether they correspond to reality (“a view of the commandments as orders resultant from the will of the commanding God”).”⁷² In the positivist conception of law as divinely commanded, the law’s legitimacy derives exclusively from the process of legislation.⁷³ Law is here regarded as authoritative by virtue of being a commandment of the authority, and a transgression of the law is criminal *in that* it is a violation of a command.⁷⁴ Cohering to this conception of the law is a reading according to which the pursuer is killed regardless of the

⁷¹ Cf. Steinmetz, “Crimes and Punishments, Part I,” 82-83 (quoted above, 7).

⁷² Rubenstein, “Nominalism and Realism,” n. 5. Rubenstein quotes Silman, “Halakhic Determinations,” 251. There are many more differentiations and sub-categories of legal positivism. An overview can be found in the *Stanford Encyclopedia of Philosophy*, “Legal Positivism” (<http://plato.stanford.edu/entries/legal-positivism/>).

⁷³ Steinmetz, “Crimes and Punishments, Part II,” 283.

⁷⁴ Steinmetz, “Crimes and Punishments, Part II,” 286. Cf. also Schwartz, “Law and Truth,” 231, who describes the rabbis’ perception of the nature of the law as “nominalist” (versus the Qumran’s “realism”). For example, he explains the difference between Qumranic and rabbinic legislation concerning a woman’s marriage with her uncle as follows: “[T]he CD legislator [CD 4, C.T.] assumed that the union of a man and his aunt is forbidden because there is something wrong about a union between people separated by only one generation and one lateral relationship, and therefore all such unions are forbidden. In other words, the union is not wrong because God forbade it, as a nominalist might say. Rather, God forbade it because it is wrong.” Cf. also Silman, “Halakhic Determinations” and Rubenstein, “Nominalism and Realism.”

eventual life-saving effect of his death: Here, the pursuer is killed because he is about to violate a divine command that is authoritative and binding by virtue of being a divine command – not because his act inflicts harm to a fellow human-being. The entire “affair” takes place on a vertical line spun exclusively between the pursuer and God, not between the pursuer and human society, that is, between the pursuer, the pursuer’s victim and the bystander. The avoidance of a transgression of divine commandments legitimizes the loss of life *regardless* of whether the one, who loses his life, is a pursuer or an innocent person, who happens to be in danger, whether the loss of life is caused actively (through killing the pursuer) or passively (through not committing a transgression in order to save life).

When the tannaim designate as pursuers only those, who harm God and human beings, they interrupt a positivist conception of the law, and instead, introduce a universalist-naturalist element into the mishnah: In a universalist-naturalist conception of the law, the *content* of the law is a constraint on its legitimacy. For example, an act of murder is, according to this view of the law, forbidden not only because God has “randomly” decided to classify murder as a transgression, and the murderer is killed not only because he transgresses a divine command – if this was his only “misdeed,” also the idolater (among others) was to be killed.⁷⁵ A murderer’s transgression and punishment are, in the universalist scheme, not situated on a straight, vertical line drawn between the murderer and God, but have a “horizontal” dimension: The murderer is killed because murder is *in and of itself* a wrong, his act entailing a violation of the universal and fundamental backbones of the human social order, *beyond* the commandments God delivered to Israel.⁷⁶ The murderer destroys “a whole

⁷⁵ According to a positivist conception of the law, *all* those who commit a transgression of equal severity are to be punished equally. When an act such as murder is categorized as prohibited solely by virtue of being a transgression of a divine command, then murder is not “more prohibited” or “graver” than other transgressions, that are equally to be punished with death. According to a purely positivist conception of the law then, idolatry or the desecration of the Shabbat, for example, should be punished exactly like murder.

⁷⁶ In line with this, the prohibition of murder is, according to the rabbinic tradition, part of the Seven Laws of the Children of Noah: Murder is forbidden to all “children

world,” and the bystander, when killing the pursuer in order to save the pursued, saves “a whole world” (cf. *mSanhedrin* 4:5).⁷⁷

In line with this, specifically murder is described by Devora Steinmetz as an anomaly within the positivist rabbinic conception of Sinaitic law as divinely commanded: In rabbinic legislation murder is the only transgression that is to be punished “by the sword.”⁷⁸ Execution “by the sword” is a rabbinic invention; it does not appear in the Bible nor in any other Jewish pre-tannaitic source as a method of execution.⁷⁹ Moreover, this mode of execution disrupts a principle, which the tannaim themselves established: “Death inflicted at the hands of man is death in which there is no mark” – yet execution by the sword more than anything leaves a “mark.” When the tannaim deviate from their principle, and invent a novel mode of execution reserved exclusively for a murderer, they mark, according to the reading of Devora Steinmetz, the murderer’s act as one directed not only against God and His law, but against the human social body as a whole: The murderer does not die, like all the other transgressors who are subject to a capital punishment, “without a mark,” through strangulation; he is not punished by an invisible, quasi “heavenly” act, but is virtually marked by the society he violated. The murderer’s death by the sword thus signifies his transgression, in the reading of Devora Steinmetz, as a transgression against the world he lives in, as an undermining of the legal

of Noah,” regardless of the giving of the Torah to Israel at Sinai. Notably, besides murder, also adultery and idolatry are transgressions applying to Noahides (cf. *tAvodah Zarah* 9:4). Cf. also Sifra Aharey Mot, pereq 13:10, “*My ordinances shall you do* (Leviticus 18:4). Those are the things that are written in the Torah, which, had they not been written, it stands to reason that they should have been written, for example [ordinances respecting] theft and adultery and idolatry and blasphemy and murder. Had they not been written, it stands to reason that they should have been written.”

⁷⁷ The mishnah’s key-term “pursuer” (פְּרָדֵר) itself indicates an act that is “three-dimensional” and relational: the desecrator of the Shabbat, or the idolater, do not “pursue” anything; only the one, who is about to commit an act of bloodshed or adulterous- or homosexual intercourse, commits an act that affects not only the law, but also another human-being.

⁷⁸ Lorberbaum, “Blood,” 59 and 64; Steinmetz, “Crimes and Punishments, Part II,” 293.

⁷⁹ Lorberbaum, “Blood,” 61-62.

underpinnings of human society, unlike other acts that are transgressions simply by virtue of being categorized as such by God.⁸⁰

Finally, the different views of law that underlie the different ways to legitimize the pursuer's death, also imply diverse assumptions concerning the role of the bystander, the human judge: In a positivist view of law, the role of the judge is essentially mechanical. When the commandments are an enigmatic accumulation of rules the purpose and sense of which is ultimately obscure to human-beings, then a person has to simply obey, like a machine, since s/he cannot and need not know something like a greater meaning, or a scheme behind it all. The transgressor's punishment accordingly does not require a three-dimensional evaluation of the situation to precede it: The circumstances that gave rise to the pursuer's transgression or the intention, with which the prohibited act was carried out, are irrelevant, since these are "horizontal" consideration lying beyond the vertical line spun between God and the transgressor. They do not bear upon the evaluation of the transgression. The pursuer's "judge," the bystander, merely "enacts" a fact the pursuer has already

⁸⁰ A presupposition of Steinmetz' reading of the murderer's "death by the sword" is that the modes of punishment which rabbinic sources ascribe to different transgressions are a reflection of rabbinic jurisprudence, and of the different natures of the bodies of law rabbinic literature identifies (e.g., Sinaitic law and Noachide law). In line with this presupposition, Steinmetz argues that strangulation reflects a positivist conception of Sinaitic law as based on divine command: Strangulation is the standard mode of rabbinic execution, the one incurred by the perpetrator of any one of the transgressions to which the Bible affixes death, without specifying the mode of death, and where no conclusions from *gezerah shavah* can be deduced (cf. *Mekhilta de'Rabbi Ishmael*, Mishpatim 5: "In any passage in the Torah in which there is a reference to the death penalty without further specification, it is to be inflicted only through strangulation." Cf. also *bSanhedrin* 52b. According to Steinmetz' reading, strangulation thus corresponds to the status of the transgressor as a criminal, who is "as if dead" already before the punishment of physical death, is brought about: He is punished with a "death in which there is no mark," in which there exists no visible, external mark of his humanly-caused death, because he transgressed the divine law and is, accordingly, punished "by heaven."

There exist different, concomitant and at times divergent explanations by scholars concerning the origins and reasons of the murderer's "death by the sword," and strangulation as the "default-mode" for any other transgression. For alternative explanations cf., for example, Lorberbaum, "Blood," and Berkowitz, *Execution and Invention*, Chapter Six: Paradoxes of Power.

taken upon himself when setting out to violate a divine commandment. As described by Devora Steinmetz, “[i]t is not, then, the court that imposes death on the criminal; the criminal comes to court already ‘dead’ – he has relinquished his right to life, and the court simply enacts that reality [...].”⁸¹ When transgressing the law, the transgressor is put to death because he has already condemned himself to die.

In contrast, when *mSanhedrin* 8:7 is read in the context of the mishnayot on the saving of life and is thus placed in a universalist-realist framework, the place and function of the bystander is active and non-mechanical: When bloodshed is understood as a violation not only of a divine command, but as a violation of human society as a whole, then the pursuer’s killer, the bystander, is not mechanically enacting a verdict the violator has already taken upon himself. The bystander’s intervention is here not the result of a nearly automatic, programmed necessity that affects the pursuer on the one end of the line and God on the other. Rather, when the bystander kills the pursuer *for the sake of saving life*, he consciously engages in the unfolding of the scenery he witnesses. He takes an active part in the shaping of the world he inhabits: The bystander, as much as anyone else who saves a human being by means of a transgression, *reasons* that God wants him, the bystander, to transgress the law in order to save another person in lethal danger. The law is here not a static entity, inaccessible to the human mind, “in heaven,” but down on earth,

⁸¹ Steinmetz, “Crimes and Punishments, Part I,” 99-100. According to Steinmetz, this notion comes to the fore, for example, in the rabbinic institution of warning (*hatra’a*) the criminal: “The violator must make it clear that he is violating the law in full acceptance of its prohibitedness and punishability. In the words of the baraita in the Bavli, he both accepts upon himself the *hatra’a* and gives himself over to death. [cf. *bSanhedrin* 40b, C.T.]. While the Torah says, ‘By the mouth of two witnesses or three witnesses *yumat hameit* [Deuteronomy 17:6, C.T.], the *derasha* puts the responsibility for the death of the violator of law squarely on the violator himself – he is put to death because he has already condemned himself to die” (ibid. 99). The willful transgression of a divine command is thus tantamount to the handing over of oneself to death: “What is left for the court upon conviction of the criminal, then, is a minimal role: essentially, making real the process that has already transpired in theory. The court simply implements *yumat* – effecting the death of the violator of God’s command by causing the breath of life to leave that person” (ibid., 100).

involving a human-being's assessment of the situation that includes God, the pursuer *and* the pursued. The commandments are here viewed not as "orders resultant from the will of the commanding God," but as "guidelines based in independently existing situations, which man, due to the grace of the wisdom-giving God, may introduce among his considerations by accepting the yoke of the commandments."⁸² An act which from a purely positivist perspective is categorized as a transgression is thus in the realist-universalist context of the saving of life not considered thus, but rather as a necessary and legitimate means to affirming and saving a higher value at stake.

⁸² Cf. Silman, "Halakhic Determinations," 251: "From a systematic point of view, the contrast between the nominalist and the realist trends is bound up with the contrast in principle concerning the actual nature of the link between God and the laws of the Torah – the contrast between a view of the commandments as orders resultant from the will of the commanding God, on the one hand, and, on the other hand, a view of the commandments as guidelines based in independently existing situations, which man, due to the grace of the wisdom-giving God, may introduce among his considerations by accepting the yoke of the commandments."

The Gemara's First Part (*bSanhedrin 73a-74a*)

Searching for the mishnah's biblical basis

The killings of those offenders, who appear besides the pursuer in the eighth chapter of Tractate Sanhedrin – the “rebellious and stubborn son” and the thief – have explicit biblical foundations. (The rebellious son’s capital punishment is mentioned in Deuteronomy 21:18-21, the thief, who breaks into a house, in Exodus 22:1-2.) The amoraic participants of the discussion on *mSanhedrin 8:7* attempt to identify also for the killing of the pursuer such a biblical basis. The amoraim’s principal question therefore is: “Whence do we know, that he who pursues his neighbor to kill him, must be saved by his life?” Three suggestions are made. The first two suggestions, as well as their rebuttals, are presented anonymously. The third, final and “successful” suggestion is ascribed to the School of Rabbi, and is accompanied by a supportive teaching ascribed to the School of Rabbi Ishmael.

1. *Leviticus 19:16*

תנו רבנן: מניין לרודף אחר חבירו להרגו שניתן להצילו בנפשו? תלמוד לומר: "לא תעמוד על דם רעך" (ויקרא יט טז). והא להכי הוא דאתא? האי מיבעי ליה לכדתניא: מניין לרואה את חבירו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו? תלמוד לומר: "לא תעמוד על דם רעך" (ויקרא יט טז). אין הכי נמי.

Our Rabbis taught: Whence do we know that he, who pursues his neighbor to kill him, must be saved by his life? From the verse, *You shall not stand still by the blood of your neighbor* (Leviticus 19:16). But does it come to teach this? Is it not employed for the following [baraita], that has been taught: Whence do we know that if a man sees his fellow drowning, mauled by beasts, or attacked by robbers, he has to save him?

From the verse, *You shall not stand still by the blood of your neighbor* (ibid.). Yes. That is also so (*bSanhedrin 73a*).

According to the first suggestion, the permissibility to kill a potential murderer may be deduced from Leviticus 19:16: “*You shall not stand still by the blood of your neighbor.*” Yet, this verse does not answer the question “whence do we know that he, who pursues after his neighbor to kill him, must be saved by his life?” This question refers to the *pursuer’s* rescue, brought about *through his own death*. It is an inquiry into the biblical basis of the permissibility to kill a pursuer. But Leviticus 19:16, first of all, refers to an innocent person’s rescue from death and secondly, does not indicate that a pursuer may be actually *killed* in order to save his victim.¹ In fact, no pursuer at all is mentioned in Leviticus 19:16. Read plainly, Leviticus 19:16 solely indicates, that one has to somehow *act* in order to save an innocent, endangered life: When the “blood of your neighbor” is in danger, you shall not stand nearby and not help him – but whether this duty to help one’s fellow involves also the *killing* of a pursuer is neither spelled out, nor implicitly indicated.

Thus it appears, that the question “whence do we know that he, who pursues after his neighbor to kill him, must be saved by his life?” is read by the anonymous respondent straightaway in light of its outcome: Leviticus 19:16 establishes the duty to save an endangered human-being from danger and this duty, in turn, is read by the anonymous respondent to be the *reason* for the permission to save the pursuer “by his own life.” In short: “Why is a pursuer killed? – Because one has to save his victim, the pursued.” The respondent perceives the initial question on the permissibility to kill the pursuer as an inquiry into the biblical basis of the duty to *save the pursued*.

As intuitively reasonable as this reading is,² it is anonymously rejected. The

¹ Cf. also Finkelman (“The Rodef Defense,” 1261): “But this verse [e.g. Leviticus 19:16, C.T.] does not necessarily permit harming the perpetrator in the process of attempting rescue.”

² For example, in Sifra Qedoshim, pereq 4:8, both the duty to save a drowning person *and* the permission to kill a pursuer is inferred from Leviticus 19:16: “From where do we know that if you can serve as a witness [in favor of the accused] you are not

argument raised against it, is, that Leviticus 19:16 is already “occupied” by a baraita, according to which one has to actively save him, who is about to drown in the sea, or is mauled by beasts or attacked by robbers. The presupposition of this argument is that it is impossible to deduce two different rules from one and the same verse: Since Leviticus 19:16 teaches, that one has to save a person, who is about to drown in the sea etc., it cannot teach simultaneously, that one may kill a pursuer.³

The question emerging from this argument is, of course: In what respect is *mSanhedrin* 8:7 different from the baraita, according to which one has to save a drowning person? After all, both *mSanhedrin* 8:7 and the baraita picture a life-threatening situation and both, apparently, establish the necessity to save a human being from danger. Why then should both acts of rescue not be deduced from the same verse, i.e., from Leviticus 19:16? Why does the anonymous voice argue that the killing of the pursuer requires a different scriptural basis than the saving of someone who is about to drown?

One possibility is, that the *means* through which a life may be saved, are perceived to be so different one from the other, that each “method of rescue” needs to be grounded on its “own” biblical verse. For example, that one may *deseccrate the Shabbat* in order to save a drowning person from death may be learnt from Leviticus 19:16, but that one may *kill a pursuer* in order to save a pursued may not be learnt from the same verse. If this were the reason of the

allowed to be silent about it? Because Scripture says: *You shall not stand still by the blood of your neighbor* (Leviticus 19:16). And from where do we know that if you see someone drowning in the river, or robbers attack him, or a wild animal attacks him, you have to save him? Because Scripture says: *You shall not stand still by the blood of your neighbor* (ibid.). And from where do we know that when someone pursues his neighbor to kill him, or a male, or after a betrothed girl, that you have to save him by his life? Because Scripture says: *You shall not stand still by the blood of your neighbor* (ibid.).” (ומנין שאם אתה יודע לו עדות אין אתה רשאי לשתוק עליה תלמוד לומר לא) (תעמוד על דם רעך. ומנין אם ראית טובע בנהר או ליסטים באים עליו או חיה רעה באה עליו חייב אתה להצילו ת"ל לא תעמוד על דם רעך. ומנין לרודף אחר חבירו להורגו ואחר הזכור (ואחר נערה המאורסה חייב אתה להצילו בנפשו ת"ל ולא תעמוד על דם רעך). On this text cf. Shapira, “Rodef and-Self-Defense,” 260-261.

³ This hermeneutical rule is a Babylonian invention. Cf. Brodsky, “From Disagreement to Talmudic Discourse,” 231-233.

anonymous' voice rejection, however, the anonymous voice could have simply argued that Leviticus 19:16 does not indicate that a pursuer may be *killed* at all: As mentioned above, Leviticus 19:16 establishes the necessity to save a human being through unspecified means from an unspecified harm, but in no way indicates that a human being may be saved through bloodshed. This simple argument, however, is not employed. The anonymous voice is untroubled by the fact that Leviticus 19:16 does not prescribe the means of rescue, or the limits of the means through which an endangered human being may be saved. The anonymous voice' argument, instead, simply points out that Leviticus 19:16 is already "occupied" by a baraita, which teaches the duty to save a person, whose life is endangered through drowning, animals or robbers. Possibly then, the avoidance of this most obvious and simple argument indicates that the anonymous voice does not perceive of the mishnah and the baraita as presenting two rescues of victims, the different *means* of which require a distinct scriptural basis.⁴ Rather, it seems likely that the baraita on the saving of the drowning person and the mishnah on the killing of the pursuer are perceived as two rules, which do not share the same rationale at all: The baraita, according to which one has to save an endangered life *from death*, is deduced from Leviticus 19:16: "*You shall not stand still by the blood of your neighbor,*" but you have to act, so as to save your neighbor. Yet, the obligation to save an endangered life from death does not quite explain, that one may "save a pursuer by [taking] his life." The mishnah and the baraita thus do not deal with one "type" of rescue, which varies only as regards its means, such as "the desecration of the Shabbat" and "the killing of the pursuer." Rather, the mishnah and the baraita present two entirely different cases: The baraita teaches that one has to save an endangered human being from death, and the mishnah teaches that one has to "save a pursuer through his own life" – these are not variations on the same theme, but two entirely different cases, which require, accordingly, distinct scriptural foundations.

⁴ This is assumed by Shapira ("Rodef and Self-Defense," 265): "It [the Talmud, C.T.] assumes that the license to take life needs a special source and cannot rest on the same ground as the general duty."

2. "A kal va-homer from a betrothed girl"

ואלא ניתן להצילו בנפשו מנלן אתיא? בקל וחומר מנערה המאורסה. מה נערה המאורסה, שלא בא אלא לפוגמה, אמרה תורה: ניתן להצילה בנפשו, רודף אחר חברו להרגו על אחת כמה וכמה. וכי עונשין מן הדין? דבי רבי תנא: הקישא הוא "כי כאשר יקום איש על רעהו ורצחו נפש" (דברים כב כו). וכי מה למדנו מרוצח? מעתה הרי זה בא ללמד ונמצא למד. מקיש רוצח לנערה המאורסה. מה נערה המאורסה ניתן להצילה בנפשו, אף רוצח ניתן להצילו בנפשו. ונערה מאורסה גופה מנלן? כדתנא דבי רבי ישמעאל: דתנא דבי רבי ישמעאל: "ואין מושיע לה" (דברים כב כז), הא יש מושיע לה, בכל דבר שיכול להושיע.

Then whence do we know that he must be saved by his life? It is inferred by a *kal va-homer* from a betrothed girl: If a betrothed girl, whom he wishes merely to dishonor, yet the Torah decreed that she may be saved by his life, how much more so does this hold good for one who pursues his neighbor to kill him? But can a punishment be inflicted as a result of a *kal va-homer*?⁵

The School of Rabbi taught: It is derived by analogy: *For as when a man rises against his neighbor, and slays him, even so is this matter* (Deuteronomy 22:26). What do we learn from a murderer? This comes to teach and ends learning: The murderer is compared to a betrothed girl: Just as a betrothed girl must be saved by his life, so a murderer must be saved by his [own] life. And whence do we know this of a betrothed girl [i.e., that she requires a rescue]? As was taught by the School of Rabbi Ishmael. For the School of Rabbi Ishmael taught: *And there was none to save her* (Deuteronomy 22:27), but, if there was someone to save her, he must save her by all possible means (*bSanhedrin 73a*).⁶

⁵ Cf. n. 10 on the expression "עונשין מן הדין."

⁶ The text quoted here coheres to the Vilna edition and the ms Yad ha-Rav Herzog (<http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=1&pereknum=075&>

According to this suggestion, the permissibility to save a pursuer by his life may be inferred by “a *kal va-homer* from a betrothed girl”: “If a betrothed girl, whom he wishes merely to dishonor, yet the Torah decreed that she may be saved by his life, how much more so does this hold good for one who pursues his neighbor to kill him?” (*bSanhedrin* 73a). The basis, upon which this *kal va-homer* is constructed (the תחלת דין or עיקרא דדינא), is *not* the comparability of a rapist and a murderer, or the comparability of a rapist’s victim and a murderer’s victim. Nothing is deduced from a “minor criminal” to a “major criminal” or from a “victim of a minor aggression” to a “victim of a major aggression.” The reasoning here is thus *not* “if a prospective *adulterer* may be saved by his life, then how much more may a prospective *murderer* be saved by his life,” or alternatively, “if a betrothed girl may be saved, then how much more should a *murderer*’s victim be saved.”⁷

Instead, the basis of this *kal va-homer* is the murderer’s and the betrothed girl’s need of a rescue: “If a *betrothed girl threatened with rape* may be saved by the life of her rapist, than how much more so should *he, who pursues after his*

masecet=34&manuscriptnum=2673&p=1&masecetindex=23&perekindex=72&numamud=1&manuscriptindex=1&k=). In the ms Munich the verb “to save” in “Just as a betrothed girl must be saved by his life, so a murderer must be saved by his [own] life” is abbreviated. It cannot be known therefore whether the verb is followed by a male or female personal pronoun (cf. <http://daten.digitaler-sammlungen.de/~db/bsb00003409/images/index.html?id=00003409&nativeno=351,351r, ll. 5, picture number 704>).

⁷ The Soncino-translation here reads: “Just as a betrothed maiden must be saved [from dishonour] at the cost of his [her violater’s] life, so in the case of a murderer, he [the victim] must be saved at the cost of his [the attacker’s] life.” This translation does not fit the introductory-statement: “The *murderer* (and not the murderer’s victim) is compared to a betrothed girl” (מקיש רוצח לנערה המאורסה). Moreover, this translation does not make sense, because the sugya at this point asks for the basis of the permissibility to save the *murderer* by his own life. Whether the murderer’s *victim* requires a rescue is irrelevant here. Also the manuscripts of the Bavli do not testify to any other version of the *kal va-homer*: In each manuscript witness, the “murderer is compared to a betrothed girl,” not “the murderer’s victim is compared to a betrothed girl.” Shapira (Rodef and Self-Defense,” 265) nevertheless reads differently: “This argument [the *kal va-homer*, C.T.] is based on an assessment of the harm that is done to the victims in the different cases; it is not based on the severity of the transgression.”

מה נערה המאורסה [...] ניתן להצילה בנפשו: *neighbor*, be saved by his own life". רודף אחר חבירו להרגו על אחת כמה וכמה. The *kal va-homer*'s two ends, its teacher (מלמד) and learner (למד),⁸ are the betrothed girl threatened with rape and the prospective murderer; the essential common denominator between the two cases, the עיקרא דדינא, is the betrothed girl's and the murderer's need of a rescue. Both need to be "saved," and this is why the case of the betrothed girl threatened with rape can "teach" the case of a prospective murderer: The necessity to save a betrothed girl "teaches" the necessity to save a prospective murderer.

The anonymous voice, which proposes this *kal va-homer* reads the initial question ("Then whence do we know that he must be saved by his life?") literally: The prospective murderer requires a "rescue" just like the betrothed girl threatened with rape requires a rescue. However, this *kal va-homer* disregards entirely a vast difference between the rescue a prospective murderer requires, and the rescue a betrothed girl threatened with rape requires: The betrothed girl threatened with rape does not need to be saved from any sin. A woman *forced* into intercourse with a man other than her husband is not categorized as an adulteress. Being forced, she may return to her legitimate husband (though she must wait three months to have intercourse with him again, in order to avoid confusion with regard to paternity of a possible pregnancy).⁹ Therefore, even if she is *not* saved from her rapist, she does not

⁸ Cf. Mielziner, *Introduction*, 132.

⁹ Cf. *bYevamot* 35a. Underlying this rule is the conceptualization of the raped woman's body as being subject to absolute coercion: "Absolute coercion' means someone throws me down in front of an idol; 'relative coercion' means I choose to bow down to the idol because I fear otherwise being murdered. In the former, the individual's body is the object of another's action; in the latter, the person's will is the object of coercion, for in relative coercion the individual must freely choose to actively abjure his religion to avoid death" (Soloveitchik, "Halakha, Hermeneutics and Martyrdom," 80). Transferred to the case of rape this means, that the raped woman is innocent because something is done to her, without her having any ability to influence the course of action. Being in a state of absolute coercion, without the capability to influence her situation, she does not commit any sin at all, even if "*there is none to save her*" (Deuteronomy 22:27), i.e., even if she is raped.

commit a sin and accordingly, is also not liable to any punishment: *There is in the girl no sin deserving death* (Deuteronomy 22:26). In contrast, a prospective murderer commits, if there is “none to save him,” one of the severest transgressions possible: He is about to kill a human-being and thus indeed requires a rescue from sin. Therefore, even though *both* a betrothed girl threatened with rape and a prospective murderer need to be “saved,” the particular *danger* they are saved from is far from being similar, let alone comparable: The murderer is saved from committing bloodshed, whereas the betrothed girl is saved from being raped. The murderer is saved *from sin*, a sin committed by himself, whereas the betrothed girl is saved *from her rapist*, but not from any sin.

Yet, this difference between the rescue a betrothed girl threatened with rape requires and the one a prospective murderer requires, does not cause the *kal va-homer* to stumble. The difficulty detected by the *stama de-gemara* regarding its underlying reasoning is, instead, of a technical kind: “But can a punishment be inflicted as a result of a *kal va-homer*?” (*bSanhedrin* 73a). The prospective murderer’s “rescue from sin” is grounded in the legal definition of adultery as a transgression, which is to be punished with death. Yet, since a punishment may not be inflicted as a result of a *kal va-homer*,¹⁰ the adulterer’s capital punishment cannot be used in order to legitimize the capital punishment of the murderer. However, as far as the murderer’s need to be “rescued” is concerned, the *kal va-homer* is upheld: That the prospective murderer’s need to be rescued may be deduced, indeed, from the rescue of a betrothed girl threatened with rape is not refuted. The immense disparity between the types of “rescue” they require – a rescue from sin and a rescue from rape – passes as though unnoticed.

¹⁰ The application of a *kal va-homer* is in talmudic hermeneutics restricted by several principles. According to one of them, “אין עונשין מן הדין”: A punishment may not be derived by a *kal va-homer*. This principle is according to talmudic interpretation derived from Scripture (cf. *bMakkot* 5b). On the restrictions in the application of a *kal va-homer*, cf. Mielziner, *Introduction*, 134.

3. *The hekesh*

Ignoring this difference between the two rescues, the School of Rabbi then proposes that the murderer's rescue may as well be deduced by a *hekesh*, an analogy, from the case of the betrothed girl threatened with rape. Therewith the technical problem with the suggestion made before, can be resolved. The scriptural basis of the School of Rabbi's exegesis is Deuteronomy 22:25, "*For as when a man rises against his neighbor, and slays him, so is this matter [the rape of a betrothed girl].*" Scripture here contains a comparison between a man, who is about to kill his neighbor, and the rape of a betrothed girl. However, as indicated by the following question, this comparison is not at all self-explanatory: "What do we learn from a murderer?" Regarding what are the two cases compared? The School's answer is that "this comes to teach (בא ללמד) and turns out learning (ונמצא למד)." The terminology used in this phrase is related to the *kal va-homer* suggested before: The necessity to save a betrothed girl was "teaching" (מלמד) the necessity to save the prospective murderer (למד). According to the School of Rabbi, the relation between the "teacher" and the "learner" is not, as suggested above, one of a "minor case" (קל) and a "major case" (חומר), i.e., a *kal va-homer*. Rather, since the two cases are connected by Scripture *itself* regarding one common predicate, their relation is reciprocal:¹¹ In Deuteronomy 22:25, the case of a murderer comes as a "teacher": *For as when a man rises against his neighbor, and slays him, even so is this matter [the rape of a betrothed girl]* (Deuteronomy 22:26). However, this "teacher" turns out to be a learner, since the case of the betrothed girl has an important implication for the teacher-case: Forced into intercourse, the betrothed girl requires rescuing. In this respect, the original teacher – the case of the murderer – turns out to be a learner: The potential murderer, too, requires rescuing, and therefore, he is compared by Scripture to the betrothed girl threatened with rape: "Just as a betrothed girl must be saved by his [the rapist's] life, so must the murderer be saved by his [own]

¹¹ On the method of *hekesh*, cf. Mielziner, *Introduction*, 152-155.

life” (מה נערה המאורסה ניתן להצילה בנפשו אף רוצה ניתן להצילו בנפשו) (*bSanhedrin* 73a). Thus, the original teacher, the case of the murderer, turns out a learner, and the original learner, the case of a betrothed girl, turns out a teacher.

As before in the *kal va-homer*, also the analogy between the two cases appertains not to the victims – the murderer’s and the rapist’s victim – but to the victim of the one case – the betrothed girl – and the perpetrator of the other case – the murderer. And as before, also in this analogy, the vast difference between a prospective murderer on the one hand, and a betrothed girl threatened with rape on the other is entirely disregarded: Whereas the murderer needs to be saved from committing a sin, the betrothed girl needs to be saved solely from the rapist, but not from any sin.¹² Yet, in spite of this difference, the School of Rabbi deduces through an analogy from the case of a betrothed girl threatened with rape that a pursuer may be “saved by his life”: Just as *she* requires rescuing, so also a potential murderer requires rescuing. All hinges on the betrothed girl’s need to be rescued.

Accordingly, this first unit of the sugya on *mSanhedrin* 8:7 also closes with a passage, which proves and emphasizes the need to save a betrothed girl threatened with rape: “And whence do we know this of a betrothed girl? [i.e., whence do we know, that she needs to be saved?] As was taught by the School of Rabbi Ishmael: For the School of Rabbi Ishmael taught: *And there was none to save her* (Deuteronomy 22:27), but if there was someone to save her, he must save her by all possible means” (cf. above, *bSanhedrin* 73a). The betrothed girl threatened with rape needs to be saved, and so too, a pursuer needs to be saved. With this exegesis, the stama deems the initial question, “whence do we know that a pursuer may be saved by his life?” to be sufficiently answered.

¹² As explained above, a woman’s *forced* intercourse with a man other than her husband is not categorized as an act of adultery, and a woman threatened with rape does not, therefore, commit any sin even if she is not saved from her rapist.

The pseudo-baraita

The exegesis outlined above generates the formulation of the following passage:

תנו רבנן, אחד הרודף אחר חבירו להרגו ואחר הזכר ואחר נערה המאורסה ואחד חייבי מיתות בית דין ואחד חייבי כריתות, מצילין אותן בנפשו. אלמנה לכהן גדול, גרושה וחלוצה לכהן הדיוט, אין מצילין אותן בנפשו.

Our Rabbis taught: He who pursues his neighbor to kill him, or a male and a betrothed girl, and equal are [women forbidden to him on pain of] death at the hands of a Beth-din, or [forbidden on pain of] *kareth*, these are saved by his life.¹³ But a High Priest in pursuit of a widow, and an ordinary priest in pursuit of a divorcee or a *halutsah*, these are not saved by his life¹⁴ (*bSanhedrin* 73a).

The text of *tSanhedrin* 11:10-11 is quoted at this point in the gemara almost verbally. Yet, the *meaning* of *tSanhedrin* 11:10 differs substantially from the text quoted here, in the gemara: In all toseftan manuscripts (i.e., the ms Vienna and the ms Erfurt) and in the Tosefta's first printed edition, the direct object

¹³ The Soncino-translation of the Bavli here reads, "They are saved [from sin] at the cost of their own lives." However, this translation neither coheres to the Vilna-edition (cited above), nor to the ms Munich of the Bavli. Here, "they are saved by *his* life," (מצילין אות' בנפשו) e.g., they are saved by the lives of their pursuers, not by their own lives (cf. <http://daten.digitale-sammlungen.de/~db/bsb00003409/images/index.html>, picture number. 704, l. 9).

The ms Jerusalem, Yad ha-Rav Herzog, 1, here reads: 'הרודף אחר חבירו ואחר הזכר ואחר נערה המאורסה [...] מצילין אותן בנפשם. אלמנה לכהן גדול אין מצילין אותה בנפשו. In the Yad ha-Rav Herzog-manuscript, too, it is not the victims, who are saved by their own lives, but the victims, who are saved by their pursuers' lives (cf. <http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=1&pereknum=075&masecet=34&mnuscriptnum=2673&p=1&masecetindex=23&perekindex=72&numamud=1&manuscriptindex=1&k=>).

¹⁴ This passage can be translated differently. For my argument in favor of the above given translation cf. chapter 1, "3.1 *The mishnayot on the saving of life vs. tSanhedrin 11:10-11.*"

appears in the third, masculine, singular form: One saves *him* by *his* life (מצילין אותו בנפשו). This is so regardless of whether the victim is a betrothed girl or a boy. Thus, the direct object cannot grammatically refer to the victim, but solely to the pursuer. Had it been otherwise, the feminine form should appear in order to indicate the rescue of the females. The one saved is thus, according to the toseftan manuscript tradition, like in *mSanhedrin* 8:7, the pursuer. Yet, in contrast to the Tosefta, in the gemara, it is the *victims* who are to be saved by the pursuer's life: One saves *them* by *his* life (מצילין אותן בנפשו). This baraita then is without doubt modeled according to *tSanhedrin* 11:10, yet differs in this fundamental point from it: it is a pseudo-baraita.

How and why this pseudo-baraita emerged becomes apparent once one considers its context within the sugya: In the preceding unit, the pursuer's need to be rescued was deduced from the rescuing of a betrothed girl threatened with rape: "Just as a betrothed girl must be saved by his life, so a murderer must be saved by his [own] life" (*bSanhedrin* 73a). Since a betrothed girl threatened with rape is among the victims mentioned by *mSanhedrin* 8:7, it is a short step to transfer the rescue *she* requires to the other victims mentioned in the mishnah: If *she* requires rescuing, then why should the same not hold true also for the other victims, the male threatened with rape and the person threatened with murder? All of them are threatened by the pursuer, so why should not all of them require rescuing?¹⁵

¹⁵ To let the rescue refer to the victims is for the toseftan text (*tSanhedrin* 11:10-11), according to which the baraita is modeled, logically less problematic than for the mishnaic text: The mishnah in its second part lists transgressions against God's law, which do not involve human victims. As a result, to let the rescue refer to the victims is problematic, since it would lead to a statement such as "the prohibition to desecrate the Shabbat – the case's "victim" – is not saved by the life of him, who desecrates the Shabbat," or "the prohibition of bestiality is not saved by the life of him who commits an act of bestiality." Unlike the Mishnah, the Tosefta does not consider violations other than those, which kill or dishonor human beings: He who pursues his neighbor, a male, a betrothed girl, a woman forbidden to him on pain of death etc. Violations against non-humans such as the desecration of the Shabbat are not treated by the toseftan text. Therefore, the toseftan text can let the rescue refer to the pursuer's victim, without creating thereby a "saving of the Shabbat by the life of him who desecrates it."

The pseudo-baraita necessarily generates a further divergence from the toseftan “original”: The Tosefta declares that “he who pursues after a betrothed girl, *whether in the city or the field*, one saves him by his life” (*tSanhedrin* 11:11). The passage “whether in the city or the field” indicates, as explained above, that the girl’s consent does *not* bear upon the permissibility to save the pursuer from sin: Her consent is crucial in order to determine *her* culpability, but since the Tosefta deals with the culpability of the *pursuer*, it is irrelevant whether the betrothed girl consented to intercourse. The pursuer is to be saved from sin *regardless* of her consent or objection. Accordingly, the Tosefta declares that it does not matter, whether the rape occurred “in the city or in the field,” namely, whether or not she consented: the pursuer should be “saved by his life” both in the city and in the field.

However, when the talmudic pseudo-baraita lets the rescue refer to the pursuers’ *victims*, the passage “whether in the city or in the field” becomes problematic: As long as the *pursuer*’s rescue from sin is at stake, the victim’s consent can be disregarded, as explained above. But once the permissibility to save the *victim* is turned into the law’s motivation, the victim’s consent becomes crucial: If the betrothed girl consented to the intercourse, she, too, should be “saved from sin,” since she commits in this case, like her rapist (or seducer, in this case), an act of adultery – and in order to know whether she consented, one has to determine whether intercourse occurred “in the field or in the city,” i.e., whether she has cried for help or had agreed. Therefore, whereas the toseftan text states that the pursuer is to be saved “whether in the city or in the field,” in the pseudo-baraita the passage “whether in the city or in the field” is omitted. In the pseudo-baraita, it *is* of importance whether the intercourse occurred “in the field or in the city,” since here, it has to be determined whether she needs to be saved from the rapist, or punished together with him: whether she is raped against her will and is free of all liability, or commits an act of adultery.¹⁶

¹⁶ There is a further difference between the toseftan text and the pseudo-baraita. Whereas the baraita reads, “a woman forbidden to him on pain of death at the hands of a Beth-din, or one forbidden on pain of *kareth*,” the Tosefta reads, “after all the

Before turning to the arguments which the amoraim formulate against the pseudo-baraita, I will shortly recapture the sugya's course so far: The necessity to "save the pursuer by his life" was deduced by an analogy from the necessity to save a betrothed girl threatened with rape. The betrothed girl threatened with rape needs to be saved, and so too, a pursuer needs to be saved. The difference between the kinds of rescuing the two require were bypassed as if unnoticed: Whereas the potential murderer requires rescuing from the sin he is about to commit, the betrothed girl requires rescuing from her rapist, but not from sin. Following this reasoning, a pseudo-baraita was introduced into the sugya: The necessity to save the betrothed girl is assumed to be the rationale of the law on the pursuer as a whole, and is therefore transferred also to the other victims mentioned in the (toseftan) tradition on the pursuer: Whereas the Tosefta and the Mishnah state that *the pursuer* is to be saved by his own life (*tSanhedrin* 11:10-11 and *mSanhedrin* 8:7), the pseudo-baraita declares that the pursuer's *victims* need to be saved by the pursuer's life (*bSanhedrin* 73a). At this point in the sugya then, the pursuer's death is no longer conceptualized as his rescue from sin, but is legitimate on account of its effect: The pursuer is killed so as to save the pursued victims.

Reading the Pursuer's Death as His Rescue from Sin

Deconstructing the pseudo-baraita

Once the pursuer's death is viewed as legitimate on account of its life-saving effect, the principles underlying the mishnayot on the saving of life need to be applicable also to *mSanhedrin* 8:7. In the following I will demonstrate how the amoraim let the principles governing the saving of life collide with *mSanhedrin* 8:7. Predictably, this collision renders the irrevocable differences

relations prohibited as *arayot* in the Torah." This, however, is not a substantial difference, since "the relations prohibited as *arayot* in the Torah" are those with whom intercourse is prohibited on pain of *kareth* or on pain of death at the hands of a Beth-din.

between *mSanhedrin* 8:7 and these mishnayot visible: For example, it proves impossible to argue that a person's marital status plays any role in whether or not that person is to be saved from danger. Through letting the principles governing the saving of life collide with *mSanhedrin* 8:7, the amoraim deconstruct the reading, according to which the pursuer is killed so as to save the life of the pursued. Eventually, the mishnah is re-incorporated into the framework of criminal law; the killing of the pursuer remains legitimate as a response to his transgression regardless of its life-saving effect.

Collision Nr. 1

רבי יהודה אומר: אף האומרת: הניחו לו שלא יהרגנה.
במאי קמיפלגי? אמר רבא: במקפדת על פיגמה ומניחתו שלא יהרגנה. רבנן
סברי אפיגמה קפיד רחמנא והרי מקפדת על פיגמה. ורבי יהודה האי דקאמר
רחמנא קטליה משום דמסרה נפשה לקטלא הא לא מסרה נפשה לקטלא.
אמר ליה רב פפא לאביי: אלמנה לכהן גדול נמי קא פגים לה? אמר ליה:
אפיגמה רבה קפיד רחמנא, אפיגמה זוטא לא קפיד רחמנא.

Rabbi Yehudah said: The same [i.e., that one may not kill the pursuer] applies if she [the betrothed girl] said: 'Let him be', lest he kills her. In which case do they [Rabbi Yehudah and the rabbis] differ? Rava said: When she is scrupulous for her dishonor, yet permits him, so that he should not kill her. The Rabbis maintain: The Divine Law was scrupulous for her honor, and [since] she too is scrupulous for it, [her pursuer may be killed]. Rabbi Yehudah maintains that the reason that the Divine Law decreed that he should be killed is because she is prepared to give her own life [rather than be violated]; but this one is not prepared to do so. Rav Papa said to Abbayye: But a widow [betrothed/married] to a High Priest – is she not dishonored, too?¹⁷ He replied: The Divine Law was

¹⁷ In the context of *tSanhedrin* 11:11, I have translated this passage as “a widow raped by a High priest” etc. (cf. chapter 1, “3.1 *The mishnayot on the saving of life vs.*

scrupulous for great dishonor, but not for little dishonor (*bSanhedrin* 73b).

According to Rabbi Yehudah, a pursuer of a betrothed girl may be killed even if she says: “Let him be,” that is, even if she advises the bystander not to stop her rapist.¹⁸ The question arises, in what respect does Rabbi Yehudah differ from the teaching of the anonymously transmitted pseudo-baraita? Rava suggests that the difference appertains to a rape, to which the betrothed girl in principle objects, yet consents in practice, since she is afraid that her rapist will otherwise kill her. According to Rava’s understanding of Rabbi Yehudah, the latter holds that only if the betrothed girl is willing to die for the sake of not being raped, the rapist needs to be killed. Through killing the rapist one saves her *life*. But if she herself is willing to save her life through a “tactical consent to be raped,” there is no need for further, external intervention. In order to save her from rape, one may not kill her rapist. In contrast to Rabbi Yehudah, the rabbis hold that one intervenes regardless of the victim’s willingness to sacrifice her life: Even if she herself tactically agrees to be raped in order to save her life, her offender is to be killed. According to the rabbis then, the killing may not only be carried out for the sake of saving her life, but also for the sake of preventing her rape.

The difference of opinion between the anonymous pseudo-baraita and Rabbi Yehudah thus appertains, according to Rava’s interpretation, to the following question: Does one kill the rapist solely in order to save her from death, or also, in order to save her from rape? Rabbi Yehudah holds the killing to be

tSanhedrin 11:10-11”), against the more common translation “a widow married/betrothed to a High Priest.”

¹⁸ This saying of Rabbi Yehudah is part of the pseudo-baraita, since it is to be found in *tSanhedrin* 11:11 too (cf. chapter 1, 24). Shapira (“Rodef and Self-Defense,” 266) notes that the saying of Rabbi Yehudah, as it is transmitted in the Bavli, is consistent with the “self-defense conception” of the amoraim, that is, it coheres to the toseftan manuscript tradition of the ms Erfurt: “If it were a “religious” law that is aimed to save a transgressor and to prevent a transgression of the divine law, it would not depend on her consent. Even if she were willing to give up, one should act to fulfill the interest of the law.”

legitimate only in order to save her life, whereas the rabbis assume the killing to be legitimate both in order to save her life *and* in order to save her from rape.

Since an anonymous teaching ascribed to “the rabbis” is, according to talmudic hermeneutics, of a higher authority than a teaching ascribed to an individual, one would expect in the following a destabilization, or a questioning of the view of Rabbi Yehudah: One expects the amoraim to explain why the anonymous pseudo-baraita is “better” than the one ascribed to an individual rabbi, or to detect a flaw in the reasoning of Rabbi Yehudah. However, instead of pointing out a shortcoming in Rabbi Yehudah’s teaching or a decisive advantage in the view of the rabbis’ anonymous pseudo-baraita, the stama transmits in the name of Rav Papa a rhetorical question, which causes the rabbis’ view to stumble. Rav Papa asks: “But a widow [betrothed/married] to a High Priest – is she not dishonored, too?” Of course, she is: A widow, who is betrothed or married to a High priest, is considered an “*eshet ish*,” even though her marriage is prohibited.¹⁹ The rape of a widow who is betrothed or married to a High Priest thus constitutes (like the rape of a betrothed girl) an adulterous act. Since according to the rabbis (i.e., the anonymous pseudo-baraita), a killing of the pursuer is permitted also for the sake of saving the woman from an adulterous act, why then is the rapist of a widow who is married to a High priest *not* to be killed?²⁰ The widow, too, is dishonored (פגים לה) by an adulterous act, and if, as the rabbis presumably hold, one may kill the pursuer also for the sake of “saving” the raped woman’s honor, then the widow too needs to be saved from her rapist!

The difficulty, which becomes apparent with this rhetorical question of Rav Papa is the following: The only way to explain why a rapist of a widow, who is married to a High priest, is *not* “saved by his life,” is to translate this passage

¹⁹ Cf. chapter 1, 26ff.

²⁰ On account of this problem, I have translated the formula “a widow to a High Priest” in the context of *tSanhedrin* 11:11 as “High priest, who rapes a widow” etc. Cf. chapter 1, “3.1 *The mishnayot on the saving of life confront tSanhedrin 11:10-11*”), against the more common translation “a widow married/betrothed to a High Priest.”

as a “widow, who is *raped* by a High priest”. This translation renders the passage explainable: If a High priest rapes a widow, he does not commit an act of adultery and accordingly, does not need to be “saved from sin.” However, as mentioned above (chapter 1, “3.1, *The mishnayot on the saving of life vs. tSanhedrin 11:10-11*”), the ordinary translation of לכהן גדול is “a widow *betroted/married* to a High Priest.” Rav Papa’s question alludes to this understanding (and translation) of the passage: A widow, who is married to a High Priest, is an *eshet ish* like the betrothed girl. If (as the rabbis claim) killing the rapist is legitimate also in order to save the woman’s honor, then why is the widow’s rapist not to be “saved by his life”? She, too, is dishonored (נמי קא פגים לה)!

Reacting to Rav Papa’s question, Abbaye explains that “the Divine Law sought to protect her from great dishonor, but not from little dishonor,” meaning: whether or not the killing of the rapist is legitimate depends on the “level of dishonor,” which the forced intercourse constitutes. Of course, it is impossible to determine, how Abbaye understood the “little dishonor”: Is it a case, in which she was *married* to a High priest and raped by a stranger, or one in which she was not married to anyone and *raped* by a High priest? In case he understood that the widow was raped by a High Priest, his explanation means that adulterous rape (such as the rape of a betrothed girl) causes “great dishonor” (אפיגמה רבה), whereas non-adulterous rape (such as the rape of a widow by a High Priest) causes “little dishonor” (אפיגמה זוטא). Therefore, so Abbaye, a betrothed girl needs to be saved from her rapist, but not so a widow, who is threatened to be raped by a High Priest.²¹ In case Abbaye understood that the widow is married to a High priest and then raped by a stranger, his explanation means that the rape of a widow married to a High

²¹ This is how Rashi understands Abbaye’s explanation. Cf. Rashi on *bSanhedrin 73b* s.v. אפיגמה רבה: כגון עריות דכריתות שהן חמורות והויא חרפתה מרובה שהולד ממזר ונעשית: אפיגמה רבה (A great dishonor. For example, the sexual transgressions [that are punished by] *keritot*, which are severe, and which cause more shame, because the child is a *mamzer* and she is made a *zonah* through her intercourse, but a widow raped by a High Priest is not made a *zonah*, but a *halalah*).

Priest causes “little dishonor,” even though it is an adulterous act. The rape of a widow married to a High priest is, according to this line of thought, less dishonoring, since her marriage to a High priest is in any case prohibited.

Regardless of how Abbayye understood the “great” and the “little dishonor,” a presupposition of his explanation is, that dishonor can be “weighed” according to societal standards of what constitutes dishonor: As mentioned above, according to biblical and rabbinical legal thought, an adulterous rape constitutes a greater criminal offense than a non-adulterous rape, since it is not the violence directed against the woman, but the violation of the property-rights of the woman’s husband or father respectively, which is legally represented and relevant. The offense caused to the raped women’s *men* is greater in case of an adulterous rape. Thus, even though an act of rape involves violence against the body and psyche *regardless* of the raped woman’s marital status – an “adulterous rape” does not involve more violence than a “non-adulterous” rape – the implication of Abbayye’s explanation is that women perceive of an “adulterous rape” as a more dishonoring act than a “non-adulterous rape,” thereby internalizing a measuring of honor, which is, as a matter of fact, a measuring performed by their husbands or fathers: For a woman, a violation of *herself* may constitute what her father or husband defines as a violation of *himself*, since it is solely *his* rights and properties, which are legally represented, articulated and recognized.²²

However, since according to the pseudo-baraita, the pursuer’s death is caused for the sake of the *victim*’s rescue, Abbayye’s explanation does not solve the problem Rav Papa’s question for the honor of a raped widow alludes to: As mentioned above, the saving of life is obligatory even though the danger to life is a matter of doubt. One does not differentiate between a “great danger” and a “little danger.” Even an eye-ache or a headache is hold to be a potential danger to life and therefore legitimizes a transgression (cf. *bSukkah* 26a, cf. chapter 1,

²² The same holds true as regards a widow, who is married to a High Priest, and raped by a stranger: In case Abbayye defines her rape as a “little dishonor,” the assumption here is apparently that since her marriage is prohibited, she may perceive of her rape as “less dishonoring” than the betrothed girl whose betrothal is not prohibited.

n. 31). By implication then, such as one does not make the imperative to save a life dependent on a “great” or a “small” danger to life, one does also not make it dependent on a “great” or a “small” dishonor. Solely the pursuer’s need of a rescue from sin depends on the severity of the sin he is about to commit, but not the obligation to save a person from danger.

Moreover (and as mentioned above), it cannot be decided *from without* whether or not a transgression may be carried out for the sake of saving a life: Since a transgression’s legitimacy depends on its effect, solely the endangered person him/herself can decide about the transgression’s legitimacy, as Mar, son of Rav Ashi, explains: “Whenever he [the sick person] says ‘I need [food]’, even if there are a hundred who say, ‘He does not need it’, we accept his statement, as it is said: ‘*The heart knows its own bitterness*’ (Proverbs 19:10)” (*bYoma* 83a). The authors and editors of the laws evolving around the saving of life are aware of the impossibility to objectively measure the amount of pain and suffering, and explicitly reject the attempt to do so. Even though a doctor may attempt to categorize the human body according to medical, “objective” parameters as a “body in danger,” danger, pain and fear can be accessed and “measured” solely by the one who experiences the latter. In the context of the saving of life, recognition *is* therefore granted to the subjective assessment of the endangered person. A danger to life is measured regardless of “objective” fields of knowledge such as medicine, and regardless of parameters belonging into the realm of criminal law: Such as a sick person’s pain is here not measured by a doctor, also a raped woman’s pain (or “dishonor,” as אפיגמה is translated here) is not measured by her father or husband – even if she wittingly or unwittingly adopts their measuring. Thus, whereas Abbaye’s categorization of a widow’s rape as a “little dishonor” may well disarm Rav Papa’s critique in the context of criminal law, it does not succeed to do so in the context of the saving of life: Here, no differentiation between a “little” and a “great” dishonor, between a “little” and a “great” danger is made.

The pseudo-baraita, according to which the pursuer is killed so as to save his

victims, thus receives a first “blow” when being confronted with Rav Papas question about the widow’s dishonor: To let the rescue refer to the pursuer’s victims – “these [the victims] are saved by their [the pursuers’] lives” – proves problematic, since *if* the rescue was to appertain to the victims, then, it should appertain equally to *every* victim. Not only a betrothed girl, but also a widow (or a non-betrothed girl) should be included among those, who are to be saved by their pursuers’ lives.

Collision Nr. 2

Following the first weakening of the pseudo-baraita, its biblical basis is anonymously elaborated: “Whence do we know all this [e.g. what is the biblical basis of the pseudo-baraita]?” the stama inquires. Thereupon, the necessity to save the victims enumerated in the pseudo-baraita is derived through a counter-literal, pseudo-grammatical exegesis of Deuteronomy 22:26: *But to the girl you shall do nothing, there is in the girl no sin deserving death.* According to this exegesis, all those, whose pursuers may, according to the pseudo-baraita, be killed, are enumerated in Deuteronomy 22:26 (cf. *bSanhedrin* 73a).²³

In the course of this exegesis, it is suggested that the term “sin” in Deuteronomy 22:26 refers to women forbidden on pain of excision: women, who are forbidden to a man on pain of excision require a rescue by their pursuer’s life. However, this contradicts *mKetubbot* 3:1:

"חטא" (דברים כב כו), אלו חייבי כריתות. ורמינהו: ואלו נערות שיש להן

²³ The double mention of “girl” in Deuteronomy 22:26 is held to refer to a betrothed girl and a to a male: If the word “girl” (נַעֲרָה) is read both in the verse’s first and second part according to its “read” form (*kre*), then the second half of the verse is superfluous: From the first part it is already clear that one may not punish the girl, so it is unnecessary to mention again that “there is in the girl no sin deserving death.” This seeming redundancy of the biblical text therefore indicates that the word “girl” needs to be read one time in its *kre*-form, and the other time according to its *ketib*: *Na’ar* (נַעֲרָה) refers to a male, *na’arah* (נַעֲרָה) to a betrothed girl. The word “sin” in the verse is taken to refer to women forbidden on pain of excision; the word “death” to those forbidden on pain of death at the hands of a Beth-din.

קנס: הבא על אחותו.

אמרו רבנן קמיה דרב חסדא: משעת העראה דפגמה איפטר לה מקטלא,
ממונא לא משלם עד גמר ביאה. [...] אלא אמר רב חסדא: כגון שבא עליה
שלא כדרכה וחזר ובא עליה כדרכה. רבא אמר: במניחתו שלא יהרגנה, ור'
יהודה היא. רב פפא אמר: במפותה, ודברי הכל. אביי אמר: ביכול להציל
באחד מאבריו. [...]

אי אמרת: בשלמא יכול להציל באחד מאבריו, לא ניתן להצילו בנפשו היינו
דמשכחת לה דיענש כגון שיכול להציל באחד מאבריו. אלא אי אמרת יכול
להציל באחד מאבריו נמי ניתן להצילו בנפשו היכי משכחת לה דיענש?

[The word] “sin” [in Deuteronomy 22:26] refers to women forbidden on pain of excision. They objected: ‘And these are the girls [for the violation of whom] a fine is imposed: He who has intercourse with his sister’ (= *mKetubbot* 3:1).

The rabbis explained this before Rav Hisda: Once he has committed the first stage, thereby dishonoring her, he may no longer be killed; whereas monetary liability is not contracted until the completion of cohabitation. [...]. But Rav Hisda answered thus: This refers to unnatural followed by natural cohabitation. Rava said: This applies where she allows him [to have his will] so that he shall not kill her, and is based on the ruling of Rabbi Yehudah. Rav Papa said: This refers to seduction, and agrees with all. Abbayye said: This applies where one can save [himself] at the cost of one of the limbs [of the rapist] [...].²⁴

²⁴ An anonymous voice here argues that Abbayye’s view coheres to that of Rabbi Yohanan ben Sha’ul. According to the latter, a bystander, who kills a pursuer even though he could have stopped him through a non-lethal injury, is guilty of bloodshed. As a scriptural basis of this view the following verses are adduced: “*If men quarrel and hurt a pregnant woman, so that her fruit departs from her and yet no further harm follows, he shall be surely punished according to what the woman’s husband will lay upon him; and he shall pay as the judges determine* (Exodus 21:22). *And if any further harm follows, then you shall give life for life*” (Exodus 21:23). According to an exegesis ascribed to Rabbi Eleazar, Exodus 21:23 refers to attempted murder:

This [Abbaye's saying] is correct if you say that where he can be saved at the cost of one of his limbs, he may not be saved by his life: hence it is conceivable that he shall be punished [by a fine]. But if you maintain that even if he can be saved by one of his limbs, he may be saved by his life [i.e., he is subject to a death penalty in any case], how is it possible for him to be punished [by a fine]! (*bSanhedrin* 73b-74a)

According to the stama, who constructs a biblical basis for the pseudo-baraita's "list of victims," those women, who are forbidden to a man on pain of excision, need to be saved by their rapist's life, i.e., their rapist may be killed. One of those women, who are forbidden to a man on pain of excision is, according to Leviticus 18:9, a man's sister: "*The nakedness of your sister, the daughter of your father, or daughter of your mother, whether she was born at home, or born abroad, their nakedness you shall not uncover.*" Accordingly, if a woman is raped by her brother, she is to be saved by his life, i.e., a man who rapes his sister may be killed. However, if the stama's exegesis is correct, then why does *mKetubbot* 3:1 establish that a brother, who has intercourse with his sister, must pay a *fine*? "A *fine* is imposed for the violation of the following girls: he who has intercourse with his sister" (*mKetubbot* 3:1).²⁵

As explained above, when somebody commits two transgressions at the same time, only the punishment for the greater transgression is to be carried out. And since *mKetubbot* 3:1 declares the brother, who has intercourse with his sister, to be liable to a *monetary* penalty, then this is an obvious sign for that he

One man attacks another, whereupon the other deliberately kills the attacker, even though it would have been suffice to injure one of his limbs. (That the other deliberately killed the attacker is inferred by Rabbi Eleazar from Exodus 21:22: "*If no harm follows, he shall surely be punished.*" Usually, if no harm is caused, no punishment is inflicted. Here however, even though no harm is caused, "*he shall surely be punished*": That the other is to be punished even though he did not cause any harm thus implies that he *intended* to cause harm.)

²⁵ Cf. *mKetubbot* 3:1: "These are the girls to whom a fine is due: [...] If one had intercourse with his sister, [...] he has to pay the fine, for although these [transgressions, namely those mentioned in Leviticus 18:19ff.] are punished by excision, regarding these there is no death-penalty inflicted by a court (cf. Leviticus 20:9ff.)." Cf. also *bKetubbot* 29a.

is *not* liable to another heavier penalty, such as a death penalty for this same transgression: If he were subject to a heavier penalty, then the heavier penalty *only* would be stated. Why then does the stama claim that the brother, who has intercourse with his sister, may be “saved by his life,” i.e., killed? Since *mKetubbot* 3:1 declares the brother liable to a monetary penalty, the stama here cannot be right in declaring him subject to a death-penalty!

Different solutions to this contradiction are proposed. All attempt to establish a difference between the case of a brother, who has intercourse with his sister and is fined, and between him, who is killed. Through successfully constructing two different cases out of what seems to be one and the same case, the different penalties mentioned in the pseudo-baraita and in *mKetubbot* 3:1 become explicable – the lesser penalty does not need to be included in the greater, when the lesser refers to an entirely different case.

The difference between the proposed solutions concerns the criteria, by which a difference between the cases is constructed: According to the rabbis and Rav Hisda, the brother is killed when the sister’s virginity can thereby be “saved.” When it is too late to rescue her virginity (the rabbis²⁶), or when he engages in “unnatural intercourse”²⁷ with her (Rav Hisda), the brother is fined. Rava and

²⁶ According to the rabbis’ reasoning, the principle, according to which only the greater punishment is carried out, is operative only when the two penalties are incurred simultaneously. However, the brother, who has intercourse with his sister, does not incur the penalties simultaneously, according to the rabbis’ reasoning: As long as the sister’s virginity can be “saved,” that is before penetration, the brother may be killed. However, when it is too late for salvaging her virginity, after full vaginal intercourse, he is liable to a monetary penalty only. This explanation is rejected briefly as follows (I do not quote this passage above): An anonymous voice argues that if one follows the view, that already the first stage of intercourse destroys her virginity, the brother should be liable only to a monetary penalty right from the start. There is no reason to kill him, since the sister’s virginity is in any case forfeited: “Now, this agrees with the view that the first stage [of intercourse] is contact (נשיקה); but on the view that the first stage is the insertion of the membrum (הכנסת עטרה), what can you say?”

²⁷ “Unnatural intercourse” (לא כדרכה) is in rabbinic literature often understood to refer to homosexual intercourse. Here, it probably refers to anal or oral intercourse, which does not lead to the destruction of the hymen. Cf. also Rashi, s.v. שבא עליה: הוא או אחר כבר שלא כדרכה וחזר ובא עליה כדרכה דלא ניתן בביאה זו להצילה בנפשו שכבר נפגמה (When he, or someone else, already had unnatural intercourse with her, and he

Rav Papa move away from the criterion of virginity, by which the rabbis and Rav Hisda attempted to differentiate between a brother who is fined and a brother who is killed. They instead differentiate between intercourse to which the sister consented (for different reasons) and objected: According to Rava, one may kill the brother, when the sister is willing to sacrifice her life in order to avoid intercourse with her brother. If she tactically consents, for fear of her life, he may not be killed.²⁸ Rav Papa argues that the brother may be killed in case his sister objects, and is fined in case she consents: A rapist is killed, a seducer is fined. Rava's assumption of a "tactical consent for fear of life" is turned by Rav Papa into consent proper, for the sake of pleasure, not for the sake of saving one's life. Finally, Abbaye suggests that whether the brother may be killed or has to pay a fine, depends on whether he can be stopped through a lethal attack or also through a lesser injury: If he can be stopped through injuring one of his limbs, he is fined afterwards, but if he cannot be stopped by less than lethal means, he is killed.

Against Abbaye's suggestion, the stama voices the following argument: "This [Abbaye's saying] is correct if you say that where he can be saved at the cost of one of his limbs, he may not be saved by his life: hence it is conceivable that he shall be punished [by a fine]. But if you maintain that even if he can be saved by one of his limbs, he may be saved by his life, how is it possible for him to be punished [by a fine]? (*bSanhedrin* 73b-74a). If the brother is liable to a death-penalty, then he may legitimately be killed even if it would suffice to stop him through a non-lethal injury. In this case, the fine, again, should be "included" in his greater liability to death. This argument is applicable also to the suggestion of Rava and Rav Papa: If the brother is liable to a death-penalty, he may be killed *regardless* of his sister's consent: His transgression is of no lesser severity when his sister consents to the intercourse for tactical reasons, or for the sake of pleasure, or when he can be stopped through non-lethal

came back to have natural intercourse with her, then on account of this intercourse, she may not be saved by his life, for she was already dishonored).

²⁸ This was suggested also by Rabbi Yehudah (according to the ms Erfurt of the Tosefta and *bSanhedrin* 73a).

means.²⁹ The problem of the “fined brother” is thus not resolved: Is he subject to a monetary penalty, as *mKetubbot* 3:1 propounds, or subject to a death penalty, as is inferred from the pseudo-baraita?

“Counter logic”

In what follows, the reason for the difference between *mKetubbot* 3:1 and the pseudo-baraita regarding the punishment of one who has intercourse with his sister, is implicitly revealed: *mKetubbot* 3:1 explicates that the punishment of one who had sexual intercourse with his sister, is a monetary fine. The pseudo-baraita, however, addresses a situation, in which not only the potential wrongdoer’s appropriate punishment, but also the victim’s rescue, is at stake. Thus, the stama eventually “admits” that according to the pseudo-baraita, the saving of life is part of what turns the bystander’s lethal intervention into a legitimate act.

[...] דאמר רבא: רודף שהיה רודף אחר חבירו ושיבר את הכלים, בין של נרדף ובין של כל אדם, פטור. מאי טעמא? מתחייב בנפשו הוא. ונרדף ששיבר את הכלים של רודף פטור, של כל אדם חייב. של רודף פטור, שלא יהא ממונו חייב עליו מגופו. של כל אדם חייב, שמציל עצמו בממון חבירו. ורודף שהיה רודף אחר רודף להצילו ושיבר את הכלים, בין של רודף, בין של נרדף, בין של כל אדם, פטור. ולא מן הדין, שאם אי אתה אומר כן נמצא אין לך כל אדם שמציל את חבירו מיד הרודף.

[...] ³⁰ Rava³¹ said: If a man was pursuing his fellow and broke some

²⁹ I think that the stama’s argument nullifies also the differentiations introduced by Rav Hisda and the rabbis: According to the latter, the brother is killed only when the sister’s virginity can thereby be “saved” (cf. above). Yet, intercourse does not become “less adulterous” when the hymen is not destroyed. What makes intercourse adulterous is the kinship-relation between sister and brother, not its physiological details.

³⁰ In order to defend Abbaye’s suggestion, an anonymous voice argues here that “perhaps, it is different here, because his liability to death is incurred on account of

utensils, whether of the pursued or of some other person, he is free from liability. Why so? Because he is liable to be killed. If the pursued broke some articles: If they belonged to the pursuer, he is not liable for them; if to someone else, he is. ‘If they belonged to the pursuer he is not liable’, because his property is not more precious than his own person. But ‘if to someone else, he is’, because he saved himself at his neighbor’s expense. But if one pursuer was pursuing another pursuer to save him and broke some utensils, whether of the pursuer or the pursued or of any other person, he is not liable for them. This should not be so in equity (*ולא מן גדין*), but if you will not rule thus, no man will save his neighbor from a pursuer (*bSanhedrin 74a*).

In the beginning, the stama strengthens the reading, according to which the pursuer’s death is legitimate as his “rescue from sin”: Whether or not the pursuer may be killed depends on the severity of his transgression, not on the life-saving effect of his death. In the name of Raba, the stama therefore transmits, that the principle according to which “the lesser penalty is included in the greater” is at work even if the two penalties are incurred on account of two different persons: “If a pursuer, while pursuing, breaks utensils, *whether of*

one person, but his monetary obligation on account of another.” This argument refers to the view of Rabbi Yohanan ben Sha’ul, whose opinion was assumed to cohere to that of Abbaye (cf. this chapter, n. 36). The argument here is that Rabbi Yohanan ben Sha’ul’s case does not, in fact, cohere to Abbaye’s case: In Abbaye’s case, liability to death and a monetary punishment are inflicted on account of harm done to one and the same person. In the biblical case, which is constructed as support for Rabbi Yohanan ben Sha’ul, however, the offender’s liability to death is incurred on account of *one* person, whereas his monetary obligation is incurred on account of *another* person: If the attacker kills the by-standing woman, he is subject to a death-penalty, but if he caused her to abort her unborn child, he has to pay a monetary fine to the woman’s husband. However, an anonymous voice then argues that it does not matter whether the liability to a monetary penalty and the liability to a death-penalty are incurred on account of one or two persons. As support for this view, he cites the above-quoted teaching of Rava.

³¹ The ms Munich reads רבה (<http://daten.digitale-sammlungen.de/~db/bsb00003409/images/index.html>, picture number 704, fol. 351, ll. 29).

the pursued or of some other person, he is free from liability. Why so? Because he is liable to be killed” (*bSanhedrin* 74a).³² Since the pursuer is subject to the death-penalty, he is not subject to any lighter penalty, such as a monetary fine, even if he breaks the utensils of some other person. Being subject to a death-penalty, all lighter penalties are included therein, and it is irrelevant whether these lighter liabilities are incurred because of damage done to the pursued or to anybody else.

The situation changes when the one, who breaks utensils, is not the pursuer, but the *pursued*: If the broken utensils belong to the pursuer, the pursued is *not* liable for breaking them, since “the pursuer’s property is not more precious than the pursuer’s own person” (*bSanhedrin* 74a): Since the pursued may even *kill* the pursuer with impunity, how much more so may he also break his utensils with impunity.³³ If, however, the broken utensils belong to somebody other than the pursuer, then the pursued has to pay compensation, “because he saved himself at his neighbor’s expense.” The pursued is, of course, not liable to any other greater liability which could “swallow” the lesser liability, and since the owner of the broken utensils has nothing to do with the entire affair between the pursuer and the pursued, the pursued needs to compensate him for the broken utensils.

However, Rava lets logic end when turning to the case, in which he, who breaks the utensils, is neither the one who is liable to a death-penalty (the pursuer) nor the one, who defends his own life (the pursued), but a *bystander*. According to logic, also a bystander who breaks the utensils of somebody else should be liable for monetary compensation: If the pursued is liable for the damage of the utensils, which belong to someone other than his pursuer, then also a bystander should be liable for the damage done to the utensils of somebody else. But logic has a particular side-effect in this case: The *pursued* is, of course, not bothered by a compensation he has to pay in case he breaks

³² Cf. *bBava Qama* 117b for a parallel.

³³ Cf. Tosfot, s.v. *שלא יהא ממונו הביב עליו*. (Because his property is not more precious than his own person: For it is taught that one may save him [the pursuer] through his life, how much more so [one may save him] though his property).

the utensils of someone else. The pursued will not desist from defending his life because of his liability to monetary compensation. In contrast to the pursued, however, the bystander is not threatened with loss of life and could therefore indeed reason that it is better for his finances not to intervene – a consideration which is halakhically legitimate: The rescue of the pursuer from sin is permissible or approved, but not obligatory – the house-owner does not *have* to punish the thief, and likewise, the bystander is not duty-bound to intervene against the pursuer. The categorization of an act as permissible does not entail sanction in case of non-performance. The only negative consequence of noncompliance is the loss of an opportunity to increase one's piety. Thus, the bystander may indeed, because of his legitimate concern for financial loss, choose *not* to punish the pursuer.

However, the saving of life through a transgression such as the desecration of the Shabbat *is* an obligation, and not merely advisable.³⁴ Therefore, even though the killing of the pursuer is not legitimate as an act carried out for the sake of saving a life, and even though the killing of the pursuer is therefore no obligation, the punishment's *effect* – the rescue of life – causes at this point a rupture: The bystander, who damages the utensils of someone else, is *against logic* (לֹא מִן הַדִּין) not liable for the damage, since “if you will not rule thus, no man will save his neighbor from a pursuer.” All hindrances which could possibly prevent a bystander from intervening are to be removed.³⁵

³⁴ However, the failure to save life is not punishable, because the obligation rests upon the verse “*Do not stand still by the blood of your neighbor*” (Leviticus 19:16). This verse entails a negative commandment, which is violated through inactivity and the violation of a “negative commandment in which there is no act” is not punishable (cf. Maimonides, *Mishneh Torah, Laws of Murder and the Preservation of Life*, 1:16). The verse thus establishes no duty to rescue, but a negative duty not to not to rescue (cf. Weinrib, “Rescue and Restitution,” 60). Nevertheless, the urgency of this obligation, the failure of which cannot be punished, comes to the fore in many passages. Cf., for example, *bSanhedrin* 73a: “Whence do we know [that one must save his neighbor from] the loss of himself (i.e., from death)? *And you shall restore him to himself* (Deuteronomy 22:2). From that verse I might think that it is only a personal obligation, but that he is not bound to take the trouble of hiring men [if he cannot deliver him himself]: therefore, this verse teaches that he must.”

³⁵ A similar, conscious move “against logic” is apparent in the gemara on *mSanhedrin*

The reason for the difference between *mKetubbot* 3:1 and the pseudo-baraita regarding a man, who has intercourse with his sister, is therewith hinted at: *mKetubbot* 3:1 explicates that the *punishment* of someone, who had sexual intercourse with his sister, is a monetary fine. The pseudo-baraita, however, addresses a situation, in which not only the wrong-doer's appropriate punishment is at stake, but also the rescue of his victims: The permission to *kill* him is granted on account of the sister's rescue, yet regardless of this, he has to pay a fine, that is imposed by a court after having committed his crime, when it is too late to save the sister. At the very end of the sugya then, it is implicitly admitted, that the saving of life is, *against* the legal framework of punishments, at least part of what legitimizes killing the pursuer.

Conclusion

In the gemara to the mishnah's first part, the conceptualization of the pursuer's death as his rescue from sin is upheld. When the pursuer is "saved by his life," he is saved from committing a severe transgression, regardless of the life-saving effect of his death. That the pursuer may be killed for the sake of saving his victim is a possibility, which is probed, for example, via the pseudo-baraita cited in this sugya. Yet this reading is rejected: Too blunt are the contradictions between the halakhot, the subject-matter of which is a saving of life and *mSanhedrin* 8:7. Nevertheless, the existence of a major rupture is evident and ultimately appears on the text's surface: A bystander is not held liable for utensils he breaks during his intervention, since "if you will not rule thus, no man will save his neighbor from a pursuer" (*bSanhedrin* 74a). Thus, even though the amoraim and stamaim uphold the conceptualization of the pursuer's

8:6: As explained above, the thief's death, inflicted by the house-owner, is conceptualized by the tannaim as though this was his "official," court-administered punishment. However, a court is not allowed to work on Shabbat, and since the house-owner is "like" a court, he, too, should not be allowed to judge the thief on a Shabbat. Nevertheless, against the principles governing court-procedure, the amoraim reason that the house-owner may nevertheless "judge" the thief on a Shabbat and kill him (cf. *bSanhedrin* 72b).

death as his rescue from sin, the rescue's effect lurks as an implicit rationale behind the "official" legitimization of the pursuer's death: The pursuer is not killed solely for the sake of saving him from sin, but also in order to save the pursued.

The Gemara's Second Part (*bSanhedrin 74a-75a*)

Questioning mSanhedrin 8:7

As described in the first chapter on the mishnah, it is particularly the mishnah's structure which hints at its underlying "alternative" rationale, that is, the saving of life: The transgressions enumerated in the mishnah's two parts are of *equal* severity, and yet, only those pursuers who are mentioned in the mishnah's *first* part – namely those who are about to harm a human being – may be killed by a bystander before committing the transgression. Predictably then, it is in particular the mishnah's second part, which undermines the conceptualization of the pursuer's death as his rescue from sin: If the pursuer's death is conceptualized as a rescue from sin, then why are those, who are about to commit a transgression equal in severity, not equally saved from sin? Why may the one transgressor be saved from sin, but not the other? Since the idolater commits a transgression at least as severe as adultery or bloodshed, there appears to be no reason to "withhold" rescuing him.

The amoraim's discussion of the mishnah's second part begins accordingly by questioning it headlong: Rabbi Shimeon bar Yohai and Rabbi Eliezer, son of Rabbi Shimeon, argue that also an idolater and a desecrator of the Shabbat should be "saved by their lives." In other words: If he who pursues his neighbor, a betrothed girl and a boy may be "saved by his life," then he who commits transgressions of equal severity (such as desecrating the Shabbat or committing idolatry), should also be "saved by his life."

אבל הרודף אחר בהמה. תניא רבי שמעון בן יוחי אומר: העובד עבודת כוכבים ניתן להצילו בנפשו מקל וחומר, ומה פגם הדיוט ניתן להצילו בנפשו פגם גבוה לא כל שכן? וכי עונשין מן הדין? קא סבר עונשין מן הדין. תניא: רבי אלעזר ברבי שמעון אומר: המחלל את השבת ניתן להצילו בנפשו. סבר לה כאבוה, דאמר: עונשין מן הדין, ואתיא שבת בחילול חילול מעבודת

כוכבים.

אמר רבי יוחנן משום רבי שמעון בן יהוצדק: נימנו וגמרו בעליית בית נתזה בלוד: כל עבירות שבתורה, אם אומרין לאדם עבור ואל תהרג יעבור ואל יהרג, חוץ מעבודת כוכבים, וגילוי עריות, ושפיכות דמים.

But he who pursues an animal, [desecrates the Shabbat or commits idolatry, he may not be saved by his life] (= *mSanhedrin* 8:7). It has been taught: Rabbi Shimeon bar Yohai said: An idolater may be saved by his life. This is deduced by a *kal va-homer*: If for the dishonoring of a human being (פגם הדיוט) one must be saved by his life, how much more so for the dishonoring of the All-Highest (פגם גבוה)? But can we punish as a result of a *kal va-homer*? He maintains that we can. It has been taught: Rabbi Eliezer, son of Rabbi Shimeon, said: He who desecrates the Shabbat may be saved by his life. He agrees with his father, that a punishment is imposed as a result of a *kal va-homer*, and then he deduces the Shabbat from idolatry by [a *gezerah shavah* based on the use of] “profanation” in connection with the Shabbat and idolatry.

Rabbi Yohanan said in the name of Rabbi Shimeon ben Yehotsadak: By a majority vote it was resolved (נימנו וגמרו) in the upper chambers of the house of Nitza in Lydda that in every law of the Torah, if a man is commanded: “Transgress and suffer not death,” he may transgress and not suffer death, except for idolatry, forbidden sexual relations and bloodshed (*bSanhedrin* 74a).¹

Rabbi Shimeon bar Yohai and Rabbi Eliezer, son of Rabbi Shimeon, question *mSanhedrin* 8:7. Rabbi Shimeon bar Yohai argues that an idolater too is to be “saved by his life.” He holds that one may inflict a punishment as a result of a *kal va-homer* and accordingly reasons that “if for the dishonoring of a

¹ For a parallel in the Yerushalmi cf. *yShevi'it* 4:2 (35a-b) and *ySanhedrin* 3:6 (21b). Cf. also Gray, “Martyrdom and Identity.”

human being – namely a betrothed girl – the transgressor must be saved by his life, how much more so for the dishonoring of the All-Highest, when committing an act of idolatry?”² If an adulterer needs to be “saved from sin,” how much more so an idolater! Rabbi Eliezer, son of Rabbi Shimeon, deduces that also a desecrator of the Shabbat should be “saved by his life”: Since Scripture uses the word “profanation” both regarding the desecration of the Shabbat and the profanation of God,³ one may deduce via a *gezarah shavah*, that the desecrator of the Shabbat, just as the idolater, needs to be “saved by his life.”

Following these challenges to the mishnah, a report, transmitted by Rabbi Shimeon ben Yehotsadak in the name of Rabbi Yohanan, is woven into the sugya. According to this report, it was decided by a majority vote in the “upper chambers of the house of Nitza in Lydda”⁴ that a Jew, who is forced to choose between either committing a transgression or being killed, may commit a transgression – except for bloodshed, a sexual transgression and idolatry. If the Jew is forced to choose between death and an act of idolatry, sexual transgression or bloodshed, he should rather let himself be killed. Bloodshed, adultery *and* idolatry are the three transgressions that need to be avoided at all costs.

² Cf. also Rabbi Eleazar bar Tsadoq, whose opinion is transmitted in the Tosefta: “Rabbi Eleazar bar Tsadoq says: He who commits idolatry may be saved by his life” (*tSanhedrin* 11:11) and Rabbi Eliezer, son of Rabbi Shimeon, in *ySanhedrin* 8:9, (26c): “It was taught: Rabbi Eliezer, son of Rabbi Shimeon says: He who is going to worship an idol, they save him by his life.”

³ Cf. Exodus 31:14 and Leviticus 27:21: “*Everyone who profanes it shall surely be put to death*” (Exodus 31:14). “*And you shall not let any of your seed pass through the fire to Moloch, neither shall you profane the name of the Lord Your God*” (Leviticus 27:21).

⁴ On the dating of this meeting in Lydda cf. Herr, “Persecutions,” 109, n. 79. Safrai (“Martyrdom in the Teachings of the Tannaim,” 39 [12]) argues that the indication of the house of Nitza alludes to the days before the Bar Kokhba Revolt. If so, the decision was made prior to the Hadrianic persecutions. Herr argues against this, that Rabbi Yehotsadak was alive in the third century, about three generations after the event, and that there is no indication that the tradition was known earlier since it is not echoed by the behavior of the rabbis as normative (cf. Herr, *ibid.*, 108ff.).

The Lyddan sages characterize the persecuted Jew as a Jannus head: On the one hand, they consider him/her as someone, whose life needs to be saved from the tyrant's threat. Accordingly, they decide that s/he may commit virtually every transgression the tyrant forces him/her to. On the other hand, they establish three exceptions to this permission. The Lyddan sages thus do not consider the Jew, who is forced to decide between a transgression and death, merely as a pursued in need of a rescue. The persecuted Jew is, in addition, also someone, who is to be saved from bloodshed, a sexual transgression and idolatry. In this sense, the persecuted Jew is both a pursued to be saved from death *and* an (involuntary) "pursuer," to be saved from transgression: Both *mSanhedrin* 8:7 and the Lyddan sages are concerned with rescuing someone, who is about to commit a severe transgression.

The conceptual proximity between the Lyddan sages' vote and *mSanhedrin* 8:7 seems to be reflected also in a terminological particularity: As mentioned above, the expression "to be saved by one's life" appears solely in *mSanhedrin* 8:7. The deaths of the other offenders mentioned in the eighth chapter of Tractate Sanhedrin are described in different terms: The thief (*mSanhedrin* 8:6) and the "rebellious and stubborn son" (*mSanhedrin* 8:1-5), even though they may equally be killed before committing a transgression, are "*judged* on account of their end"; they are not "saved." Since the mishnayot of the eighth chapter of Tractate Sanhedrin form a coherent thematic unit, the use of divergent expressions in immediate proximity to each other seems not just an embellishment or an arbitrarily chosen rhetorical figure, introduced for the sake of stylistic variety.⁵ That the mishnah describes in particular the death of the pursuer as his *rescue* seems rather to be related to the fact that the pursuer's transgressions are almost identical to the transgressions identified by the Lyddan sages (and in *tShabbat* 15:16) as those transgressions, which may not be committed in order to save a life: one, who is forced to choose between death and "bloodshed, a sexual transgression or idolatry" should rather "be

⁵ In contrast to the Mishnah, the Tosefta also describes the killing of the thief as his rescue (cf. *tSanhedrin* 11:9).

killed and not transgress” (יהרג ואל יעבור) and one who voluntarily commits these transgressions is to be “saved through his life” (מצילין אותו בנפשו). The transgressions one needs to save oneself from even at the cost of life – bloodshed, sexual transgressions and idolatry – are thus almost identical with those, from which a pursuer needs to be saved – bloodshed and sexual transgressions. Only idolatry is absent among the latter, as Rabbi Shimeon bar Yohai and his son, Rabbi Eliezer argue.⁶

Thus, when the talmudic editors open their discussion of *mSanhedrin* 8:7 with the view, according to which also the idolater is to be “saved by his life,” they pose the following question: Why are the three transgressions from which a Jew should be saved if *forced* into a decision – bloodshed, forbidden sexual relations *and* idolatry – not identical with the transgressions, from which a *voluntary* pursuer may be saved – bloodshed and forbidden sexual relations? Why is idolatry “lacking” in the mishnaic list? Or more precisely: Why should a Jew, who is *forced* to choose between idolatry and death, let himself be killed, whereas a voluntary idolater may *not* be killed? Why are those, who are about to commit a transgression of equal severity, not equally “saved” from committing them?

⁶ Following the majority vote of the Lyddan sages, the stama quotes the view of Rabbi Ishmael. According to an exegesis of Leviticus 18:5 ascribed to Rabbi Ishmael, if one is forced to choose between idolatry and death, one should rather commit the act than sacrifice one’s own life: “*You shall therefore keep my statutes and my judgments, which if a man do he shall live in them*” (Leviticus 18:5) is read to mean, that the laws of the Torah exist so that human beings may *live* by them, and not die through them. Yet, Rabbi Ishmael restricts his view: If Scripture would include solely Leviticus 18:5 in its canon, one *could* believe that in order to save one’s live, one may practice idolatry both in private *and* in public: “I might think that it [idolatry] may even be openly practiced, but Scripture teaches, *Neither shall you profane My holy name; but I will be hallowed*’ (Leviticus 22:32)” (*bSanhedrin* 74a). Leviticus 22:32 teaches, that one may do so only under certain circumstances, namely, when the act of idolatry is about to occur in private. Only in this situation, when one is forced to choose between death and “private” idolatry, may one commit the act and *not* let oneself be saved from sin through death. But in public, one has to let oneself be killed rather than commit idolatry. Cf. also Sifra Aharey Mot 13:14, and *bAvodah Zarah* 27b.

Reactions to the Lyddan sages' vote

Following the clarification of the Lyddan sages' assumed reasoning,⁷ the stama introduces the views of Rabin and Rav Dimi, who transmit in the name of Rabbi Yohanan two further restrictions on the sages' vote.

כי אתא רב דימי אמר רבי יוחנן: לא שנו אלא שלא בשעת גזרת המלכות.
אבל בשעת גזרת המלכות, אפילו מצוה קלה יהרג ואל יעבור. כי אתא רבין
אמר רבי יוחנן: אפילו שלא בשעת גזרת מלכות לא אמרו אלא בצינעא, אבל
בפרהסיא אפילו מצוה קלה יהרג ואל יעבור. והא אסתר פרהסיא הואי?

When Rav Dimi came [from the Land of Israel] he said in Rabbi Yohanan's name: This [the decision of the sages of Lydda] was taught only if there is no royal decree (of persecution), but if there is a royal decree, one must be killed rather than transgress even a minor precept. When Rabin came [from the Land of Israel], he said in Rabbi Yohanan's name: Even without a royal decree it was only permitted in private; but in public one must be killed rather than transgress even a minor precept [...].⁸ But was not Esther's case in public? (*bSanhedrin* 74a-b)

Rav Dimi, a scholar who traveled regularly between Babylonia and the Land of Israel in order to report traditions from latter to the scholars of the former, transmits in the name of Rabbi Yohanan that the majority vote of the Lyddan sages pertains solely to a situation in which there is no "royal decree" forbidding the practice of Judaism.⁹ If, however, such a decree had been

⁷ Cf. appendix.

⁸ Here, it is determined what exactly a "minor precept" and "publicity" are: A transgression of a "minor precept" is "even to change one's shoe strap" (*bSanhedrin* 74b). The Tosfot (here: Rabbenu Tam) explain that the shoe laces worn by Jews were white, and those worn by heathens black (cf. Tosfot, s.v. ערקתא דמסאנא on *bSanhedrin* 74b). Cf. on this subject also p. 152 of this work. "Publicity" is understood to be constituted by the presence of ten Jews.

⁹ Cf. Stemberger, "The Maccabees in Rabbinic Tradition," on the terms "wicked government" (מלכות הרשעה) and "in times of a royal decree" (בשעת גזרת המלכות).

issued, even the most insignificant religious custom must be defended at all costs: “One must be killed rather than transgress even for a minor precept.” It is permissible to save one’s life by means of a transgression (except for bloodshed, adultery and idolatry) *solely* in a situation in which Jewish practice is not “officially persecuted” by the state.¹⁰

Rabin, another routine traveler between Babylonia and the Land of Israel, transmits a different, but similar restriction to the Lyddan majority vote, again, in the name of Rabbi Yohanan: Whether or not an official decree of persecution, a “royal decree,” was issued is irrelevant; what matters is solely whether the person, who is forced to choose between a transgression and death, commits that transgression in public or in private.¹¹ If one is forced to make the choice in public, *any* transgression, even a minor transgression, is forbidden; but if one is forced to choose between a transgression and death in private, one may commit a transgression in order to save one’s life (that is, every transgression except for bloodshed, adultery and idolatry).¹²

The tradition transmitted by Rabin is confronted by a rhetorical question: “But was not Esther’s [case] in public?” (וְהֵא אֶסְתֵּר פְּרָהֶסְיָא הוּאִי). If, as Rabin transmits, a Jew, who is forced to choose between a public transgression and

¹⁰ This tradition coheres to the toseftan “Nothing stands against a danger to life, except for idolatry, forbidden sexual relations and bloodshed” (*tShabbat* 15:16), which is equally embedded in a context of persecution. Following this general declaration, the Tosefta lets an anonymous voice ask, “Under what circumstances?” and answers, that the permissibility to transgress every commandment except for the three mentioned applies solely to normal times, “but in a time of persecution, for even the slightest of any of the lesser commandments a man must give his life” (*tShabbat* 15:17).

¹¹ That a Jew should die even for a minor transgression if he is forced to commit a public transgression is transmitted also in the Yerushalmi, in *yShevi’it* 4:2 (35a-b) and in *ySanhedrin* 3:6 (21b), and is in Sifra, Aharey Mot 13:14, and in *bSanhedrin* 74a ascribed to Rabbi Ishmael. On this subject see also Gray, “Martyrdom and Identity.”

¹² The phrase “nothing stands against a rescue of live except for bloodshed, forbidden sexual relations and idolatry” appears in the Bavli most frequently in contexts, in which a life-threatening situation is generated unwittingly, by “natural” circumstances (cf. *bPesahim* 25a-b, *bYoma* 82a-83a and *bKetubbot* 18b-19a). Only in Tractate Sanhedrin is this phrase woven into a context, which deals with a threat created on purpose. Therefore, it is also only in Tractate Sanhedrin, that the restrictions on the permission to transgress, as transmitted by Rav Dimi and Rabin, are added.

death should rather be killed than commit that public transgression, then Esther too should have let herself be killed, rather than commit a public transgression! However, Esther *did* commit a public transgression, and the actions, which Esther undertook are *per se* rightful – if she behaved in a particular fashion, her behavior cannot be construed as being guided by a fallacy.¹³ The undoubted, consensual legitimacy of her transgression thus indicates that a Jew, who is forced to choose between death and a public transgression, may in fact commit that transgression!

In order to defend the tradition transmitted by Rabin, two rabbis, Abbaye and Rava, now attempt to construe the public transgression Esther supposedly committed as *not* being identical with the public transgression with which Rabin is concerned:

אמר אביי, אסתר קרקע עולם היתה. רבא אמר, הנאת עצמן, שאני דאי לא
תימא הכי, הני קוואקי ודימוניקי היכי יהבינן להו? אלא הנאת עצמן שאני.
הכא נמי הנאת עצמן שאני.

Abbaye said: Esther was natural soil. Rava said: Their personal pleasure is different, for otherwise, how dare we yield to them our braziers and coal shovels?¹⁴ But their personal pleasure is different; so here too [in Esther's case] (*bSanhedrin* 74b).

¹³ Baskin (“Erotic Subversion,” 227), writes: “The rabbis were certainly hesitant to condone the union of a Jewish woman and a gentile man. However, Esther’s salvific role in her eponymous biblical story is so strongly drawn that she was, essentially, above direct rabbinic criticism.”

¹⁴ Rashi explains that קוואקי ודימוניקי are utensils made of metal, into which one puts coals and places in front of the kings’ tables so as to warm them (cf. Rashi, s.v. הני קוואקי ודימוניקי). That the Jews were asked to give their utensils to the unspecified “them” is explained by Rashi as follows: There was a festival day of the Persians, at which the “priests of idolatry” took by force the lights from every household, in order to place that light in their “house of idolatry” (cf. Rashi, s.v. היכי יהבינן להו).

According to Abbayye, Esther was *karka olam*, literally, the “soil of the world.”¹⁵ This term designates soil which is not considered tainted by an idolater even if an idol was attached to it (cf. *bSanhedrin* 47b and *bAvodah Zarah* 54b).¹⁶ Jews may therefore use the “soil of the world” after the idol had been detached from it. Moreover, when damage is caused by the “soil of the world,” nobody can be held liable (cf. *bBava Qama* 28b, 30a and 50b).¹⁷ The soil cannot choose, but is “acted upon.”¹⁸ When Abbayye calls Esther “soil of the world,” he thus argues that Esther was permitted to commit a transgression on account of two characteristics: First of all, her “attachment” to the idol – Ahasuerus – did not make her tainted by him; she was like the “soil of the world” not forbidden to be “used” by Jews after the idol has been detached from it.¹⁹ Esther never became prohibited from her “real husband,” Judaism.

¹⁵ Agricultural metaphors are abundantly used for women in the Bavli, as well as in Early and Late Antiquity in general (cf. Ilan, *Ta’anit*, “Introduction”). This is nonetheless the only instance in the Bavli in which the word *karka* explicitly describes a woman (cf. Cohen, “Erotics of Martyrdom,” 237). Cohen (“Erotics of Martyrdom,” 238-242) argues that *karka olam* here means “unused, virginal.”

¹⁶ “It was the practice of people to take earth from Rav’s grave and apply it to their body on the first day of an attack of fever [even though the use of an object belonging to the dead is forbidden, cf. *bAvodah Zarah* 29b]. When Shmuel was told of this, he said: They do well; it is the soil of the world and the soil of the world does not become forbidden, for it is written, *And he cast the dust thereof (of the Ashera) upon the graves of the common people* (II Kings 23:6). Thus he compares the graves of the common people to idols. Just as [the use of] idols is not forbidden when they are attached, [...], so here too, what is attached [what belongs to the dead] is not forbidden” (*bSanhedrin* 47b). “He, who worships a piece of ground, does not render it prohibited” (*bAvodah Zarah* 54b).

¹⁷ The expression occurs one more time in *bNiddah* 57b; here, however, the term simply signifies soil: “If a woman examined the soil of the world and after sitting on it, found on it some blood, she remains clean [...].”

¹⁸ Cf., for example, *bBava Qama* 50b: “If a man dug a pit on public ground and an ox or an ass fell into it, he becomes liable [...]” (*mBava Qama* 5:5). Rav stated: The liability imposed by the Torah in the case of a pit is because of the unhealthy air created by excavation, but not because of the blow (the blow which the animal receives when it falls into the pit). It could hence be inferred that he held, that so far as the blow was concerned it was the soil of the world that caused the damage.”

¹⁹ It is unlikely that “Esther’s public case” is understood by Abbayye to be an act of adultery: First of all, intermarriages are not adulterous relations. Only if one assumes that Esther was married to Mordecai and was not divorced before marrying Ahasuerus (cf. *bMegillah* 13b), her relationship to Ahasuerus is adulterous. In this case,

And secondly, being the “soil of the world,” Esther cannot be held liable for any damage: Esther was an entirely passive object, not in a situation of relative, but of absolute coercion. She could not *choose* to marry Ahasuerus and therefore, did not need to let herself be killed.²⁰

Like Abbayye, also Rava regards Esther’s public transgression as her marriage to the gentile king Ahasuerus, but follows a different strategy of justification. Rava explains that Esther did not need to let herself be killed, because Ahasuerus did not marry her in order to violate her faith, but solely for the sake of his personal pleasure.²¹ According to Rava, only if a tyrannical ruler commands a Jew to transgress in order to violate his faith has the Jew the duty to save him/herself from a transgression rather than to transgress and thereby save his/her life.

Since the actions which Esther undertook cannot be declared false, both Abbayye and Rava attempt to construe “Esther’s case” as unlike the case with which Rabin is concerned. Their explanations aim at dissolving the equivalence between Esther and a Jew, who is forced to choose between death and a public transgression: They explain why Esther is an exception, which proves the general rule, i.e., the majority vote of the Lyddan sages, and in particular, the tradition Rabin transmitted in the name of Rabbi Yohanan: A Jew, who is forced to choose between bloodshed, a forbidden sexual act, or idolatry and death, should rather die, and in public, he may not even commit a minor transgression.

however, reference to Esther’s presumed public transgression does not make sense, since adultery, even if committed in private, is absolutely prohibited. Furthermore, Esther’s previous marriage to Mordecai is held by the amoraim to have been a secret.

²⁰ Cf. also Rashi, s.v. *אינה עושה מעשה, הוא עושה בה מעשה: קרקע עולם היא* (She is the soil of the world: She does not do any act, he does upon her an act).

²¹ This argument is in a way related to the one of Abbayye: Esther is here neither the mountain, nor the soil upon which the idol stands, but the idol itself, that is, Ahasuerus “idol.”

The argument appears also in the Yerushalmi regarding a tradition transmitted by Rabbi Jonah and Rabbi Yosah. According to the latter, Jews are allowed to bake bread on Shabbat for the Roman general Ursicinus. When confronted with the majority vote of the Lyddan sages, it is explained that Ursicinus did not intend to violate the Jewish faith, but only to eat warm bread (cf. *γShevi’it* 4:2, 35a).

However, Abbaye's and Rava's explanations are questioned by the stama:

אמר רב יהודה אמר רב: מעשה באדם אחד שנתן עיניו באשה אחת והעלה
לבו טינא. ובאו ושאלו לרופאים ואמרו: אין לו תקנה עד שתבעל. אמרו
חכמים: ימות ואל תבעל. לו תעמוד לפניו ערומה? ימות ואל תעמוד לפני
ערומה. תספר עמו מאחורי הגדר? ימות ולא תספר עמו מאחורי הגדר.

Rav Yehudah said in Rav's name: A man once set his eyes on a certain woman, and his heart was consumed by his burning desire. When the doctors were consulted, they said: His only cure is that she is made to have sexual intercourse [with him]. Thereupon the sages said: Let him die rather than that she should yield. Then [the doctors said:] Let her stand nude before him; [The sages answered:] Sooner let him die. Then, said the doctors, let her converse with him from behind a fence. Let him die, the sages replied, rather than she should converse with him from behind a fence (*bSanhedrin 75a*).

According to the reasoning of Rava and Abbaye discussed above, Esther was permitted to marry Ahasuerus, because Ahasuerus did not intent to violate her faith (Rava) or, because she was "the soil of the world" (Abbaye), an entirely passive object without will and autonomy. According to logic then, any other woman, whom a man desires without attempting to violate her faith, should be given to that man. Yet, the sages' severity as displayed in this story implies the opposite: Even if the doctors testify that the desiring man pines away because of his unfulfilled desire, the woman is not given to him, neither for intercourse, nor for anything else. He may not even converse with her from behind a fence, even though he, too, simply desires her and has absolutely no intention of violating her faith (or at least this is absolutely not indicated by the text), and even though she, too, may be considered the "soil of the world" just as much as Esther. This story on the unnamed woman and the equally unnamed desiring man thus contradicts Rava's and Abbaye's explanation for the legitimacy of

Esther's public transgression.

But what then is the justification of Esther's transgression? Why may Esther be legitimately "given" to Ahasuerus, and why may the unnamed woman of the story *not* be given to the desiring man? The stama quotes a dispute between Rav Jacob bar Idi and Rav Shmuel bar Nahmani on the matter:

פליגי בה רב יעקב בר אידי ורב שמואל בר נחמני. חד אמר: אשת איש היתה וחד אמר: פנויה היתה. בשלמא למאן דאמר: אשת איש היתה, שפיר, אלא למאן דאמר: פנויה היתה, מאי כולי האי? רב פפא אמר: משום פגם משפחה. רב אחא בריה דרב איקא אמר: כדי שלא יהו בנות ישראל פרוצות בעריות. ולינסבה? מינסב לא מייתבה דעתיה, כדרבי יצחק, דאמר רבי יצחק: מיום שחרב בית המקדש ניטלה טעם ביאה וניתנה לעוברי עבירה, שנאמר מים גגובים ימתקו ולחם סתרים ינעם (משלי ט יז).

Rav Jacob bar Idi and Rav Shmuel bar Nahmani dispute therein. One said that she was a married woman; the other that she was an unmarried woman. Now, this is intelligible on the view, that she was a married woman, but on the latter, that she was unmarried, why such severity? Rav Papa said: Because of the disgrace to her family. Rav Aha, the son of Rav Ika said: So that the daughters of Israel may not be immorally dissolute. Then why not marry her? Marriage would not assuage his passion, as Rabbi Isaac said: Since the destruction of the Temple, sexual pleasure has been taken [from those who practice it lawfully] and given to sinners, as it is written: *Stolen waters are sweet, and bread eaten in secret is pleasant* (Proverbs 9:17) (*bSanhedrin 75a*).²²

One of the two rabbis holds that the sages were so severe, because the woman was married. In this case, another man's intercourse with her constitutes an act

²² This story is recorded also in *yAvodah Zarah 2:2* (40d-41a) and in *yShabbat 14:4* (14d-15a).

of adultery, a transgression which may be committed neither in public nor in private, neither when a decree of persecution is issued nor when there is none. The sages' severity in this case simply coheres to the dictum, according to which bloodshed, adultery and idolatry may not be committed in order to save a life, or alternatively, to *mSanhedrin* 8:7: he, who attempts to rape a *betrothed* girl, is to be "saved by his life," i.e., killed before transgression: The man, who desires a *married* woman, should rather die than have intercourse with her.

However, one of the two rabbis holds that the woman of the story was *not* married. How can the sages' severity be explained in this case? Why do the sages not simply suggest – just as Scripture itself does – that he marry her? After all, intercourse with her would, after marriage, not involve any transgression. The anonymous answer offered to this problem is: If the man would marry the woman he desires, he will not desire her anymore. His survival *requires* a transgression: "Bread not eaten in secret" or "water not stolen" would not only have a different, less appetizing taste, but would also not save the man's life. There simply is no way to save his life through legitimate intercourse, through eating bread and water that is not stolen.²³

This explanation of the sages' severity links the story about the unnamed woman and the unnamed man to Esther's transgression: Both the rescue of the Jews *requires* a transgression – illegitimate sexual relations between Esther and Ahasuerus – and the rescue of the love-sick man *requires* a transgression – illegitimate sexual relations with the unnamed woman.²⁴ The *difference*

²³ For an identical interpretation of this verse cf. *bNedarim* 91b, *bSotah* 7a and *bSanhedrin* 26b.

²⁴ Sexual relations between a Jew and a gentile and sexual relations between two unmarried Jews are considered illegitimate, but not adulterous. However, according to *bMegillah* 13b, Esther was married to Mordecai *prior* to her marriage to Ahasuerus and was not divorced from him before entering a second marriage (cf. *bMegillah* 13b). In this case, her voluntary approach of Ahasuerus amounts to an act of adultery, as Walfish ("Kosher Adultery," 306) observes: "This interpretation [that she was married to Mordecai, C.T.], far from smoothing over Esther's intermarriage, in fact raised the level of transgression from one of intercourse with a gentile to possible adultery." The tradition, that Esther was married to Mordecai prior to her marriage to Ahasuerus, is found in the Babylonian Esther Midrash (*bMegillah* 10b-17a) and its derivatives (cf. Segal, *Babylonian Esther Midrash*, 2:51). However, it is corroborated

between the two cases appertains to the identity of the endangered person: The unnamed woman, who is confronted with a desiring man, does not need to save the life of an innocent victim. If the sages do not give her to the man, the only one, who possibly loses his life, is the love-sick man himself. His rescue from death *requires* a transgression, just as the Jews' rescue from death *requires* a transgression; yet in contrast to the threatened Jews of Esther's story, this desiring man is the very source of his own dangerous situation. He is therefore not to be compared to the threatened Jews, but rather, to someone, who needs to be "saved from sin," such as the pursuer of *mSanhedrin* 8:7: In *mSanhedrin* 8:7 the pursuer is saved from sin through the bystander's lethal intervention, and likewise is the desiring man "saved from sin" through denying him the woman he desires.²⁵

In contrast to the case of the desiring man, in Esther's case, those whose lives are threatened are not themselves "pursuers," but innocent people. Esther's transgression is thus legitimate not because she is akin to the entirely passive "soil of the world," or because Ahasuerus does not aim at the violation of her faith, but the very opposite: Her transgression is legitimate because of *her* aim: The rescue of innocent lives from the decree of persecution issued by Ahasuerus. According to the Esther-Midrash in the Bavli, the point of time Esther *transgresses* is fixed precisely at the moment she approaches Ahasuerus voluntarily:

"לך כנוס את כל היהודים וגו' עד אשר לא כדת" (אסתר ד טז). אמר רבי אבא: שלא כדת היה שבכל יום ויום עד עכשיו באונס, ועכשיו ברצון. "וכאשר אבדתי אבדתי" (שם). כשם שאבדתי מבית אבא כך אובד ממך.

independently in the Septuagint: "The presence of this tradition in the Septuagint, which dates from the third century B.C.E., suggests that it is indeed very ancient" (Walfish, "Kosher Adultery," 307).

²⁵ A difference between the pursuer and the desiring man is of course that the pursuer needs to be stopped (or "saved from sin") actively, whereas the desiring man can be stopped passively, through inactivity.

Go, gather together all the Jews [...] though it is against the law (Esther 4:16). Rabbi Abba said: It will not be [she said] according to the custom of every other day. Till now [I was with Ahasuerus] under compulsion, but now I will do so of my own will. *And if I am lost, I am lost* (Esther 4:16). As I am lost to my father's house, so I shall be lost to you (*bMegillah* 15a).

Esther's transgression takes place not at the moment she marries Ahasuerus, but at the moment she approaches him willingly and consciously in order to save the Jews.²⁶ Only through this deed does she run the danger of becoming "lost" to her legitimate husband, Mordecai and the Jewish people: "*If I am lost, I am lost.*" Before that particular moment, her relationship to Ahasuerus could be halakhically legitimized by assuming that it was *forced*, but now, at the time of persecution, she commits a *voluntary transgression* and is no longer a passive, untainted "soil of the earth," which cannot be held responsible for its deeds.²⁷

As a by-product of Esther's voluntary approach to Ahasuerus, Esther also stages a *public* transgression of the law. When she decides to go to Ahasuerus voluntarily, she ordains a public fast: "*Go, gather together all the Jews who*

²⁶ Cohen ("Erotics of Martyrdom," 237), too, concludes that the statement "was not Esther's [case] in public?" refers to her acts in the moment of persecution: "Some commentators and the translations seem to understand it as referring to Esther's marriage to Ahasuerus. This is untenable for two reasons. First, this wasn't in any sense "public." Essential to the story-line is that no one knew that she was Jewish. This must have included most of the Jews also, or else the king would have ended up knowing it too. Second, this was not at a time of a *shmad* (oppressive religious decrees). The decrees against the Jews are broached in Chapter 3, while Esther is married in Chapter 2. Therefore it seems to be referring to Esther's actions in the time of the decree of persecution – that is the use of seduction or implication of sexuality to save the Jews (Chapter 4-7)."

²⁷ Cf. Rashi, s.v. אבדתי ממך: אבדתי ממך וברצון: אסורה אני לך דאשת ישראל שנאנסה מותרת לבעלה וברצון: אסורה לבעלה. (*I am lost to you. Forbidden am I as an Israelite woman, for one who was raped is permitted to her husband, but one who willingly [had intercourse with another man] is prohibited to her husband*). Rashi's interpretation here is founded on the rabbinic assumption that Esther was married to Mordecai when marrying Ahasuerus (cf. *bMegillah* 13b and n. 24 in this chapter).

are present in Shushan, and fast for me, and neither eat nor drink three days, night or day; I also and my girls will fast likewise; and so will I go to the king, though it is against the law; and if I am lost, I am lost” (Esther 4:16). According to a midrash in Esther Rabbah, the three fast days included the fifteenth of Nisan, that is, the feast-day of Pesah, when it is forbidden to fast.²⁸ The public transgression the rabbis imagine when raising the question about Esther thus does not consist necessarily of her marriage to Ahasuerus, as Rava and Abbaye assume: If one presumes like Rava and Abbaye that Esther’s marriage to Ahasuerus was right from its beginning a public transgression, regardless of the ultimate aim of this marriage, one has to suppose, that the Jews *knew* that Esther was Jewish and that they were aware of her marriage to a gentile. Ahasuerus himself, however, is unaware of her Jewish faith, and it is not related by the biblical story or rabbinic literature, that their marriage was held in a public setting, namely in a setting where (at least) ten male Jews were present. In fact, the very association of Esther’s relation with Ahasuerus and “publicity” is unlikely: Esther is associated like no other biblical figure with secrecy.²⁹ It is much more likely that the *public* transgression to which the question alludes relates to the fast, which Esther ordained when she approached Ahasuerus voluntarily in order to save the Jews.

The strongest argument in favor of the assumption, that Esther’s “public minor transgression” is her ordinance of a fast on a feast-day, however, may be construed out of the sugya’s composition. I will shortly reiterate: According to a tradition Rabin transmits in the name of Rabbi Yohanan, a Jew forced to choose between a transgression and death has to avoid even a minor transgression if the latter is about to occur in public. A stamaitic voice thereupon claims that Esther *did* commit a public transgression. Since the legitimacy of Esther’s actions is an undisputable fact, this argument obviously

²⁸ Cf. Esther Rabbah 8:7: “She said to him: *Go, gather all the Jews that are present in Shushan, and fast for me, and neither eat nor drink three days* (Esther 4:16). These were the thirteenth, fourteenth and fifteenth of Nisan. He sent back word to her: But these include the first day of Passover? She replied: Elder of Israel, why is there a Passover? Mordecai thereupon acceded to her request.”

²⁹ Cf. *bMegillah* 13a and *bHullin* 139b.

implies that a Jew forced to choose between death and a public transgression need *not* choose death: Just as Esther opted for transgression, so may any other Jew do.

In order to defend the tradition Rabin transmits, both Rava and Abbaye then attempt to construct Esther's transgression as an exception which proves the rule. Both try to demonstrate why Esther's transgression is incomparable to that of a Jew forced to choose between death and a public transgression; why her public transgression is *unlike* the public transgression a Jew has to avoid even at the cost of his life, in short: why Esther was allowed to commit a public transgression. Both rabbis identify Esther's marriage to Ahasuerus as her public transgression and identify a difference between this transgression and the one Rabin's tradition addresses: According to Abbaye, Esther was "the soil of the world," i.e., in a situation of absolute coercion, without any choice. According to Rava, Esther was permitted to transgress because Ahasuerus did not aim at violating her faith, but married her for the sake of personal pleasure.

However, the story on the unnamed woman and the desiring man, which the *stama* weaves into the *sugya* at this point, proves both these explanations wrong. This story implies that, firstly, Esther was not like "the soil of the world": Neither Esther, nor the woman in the story are in a situation of absolute coercion; their bodies are not subject to some *force major* like a woman raped by a rapist. Instead, there exists the *choice* to either "give" the women to the men, or to refuse: The doctors and the rabbis *interrogate* this matter, and so too, in the beginning, Esther refused to appear before Ahasuerus and to approach him when Mordecai begged her to do so for the sake of saving the Jews.³⁰ Neither the case of Esther, nor the case of the unnamed woman is thus one, in which a man *acts upon* a woman's body – it is not a case of "absolute coercion" exerted upon "soil."

Secondly, the story implies that, contrary to Rava's explanation of "Esther's case," it is not Ahasuerus' intention, which turned her transgression into a

³⁰ Cf. *Esther* 4:11.

legitimate transgression: In the story, the love-sick man, like Ahasuerus, desires the woman for the sake of satisfying his sexual urges. The violation of the woman's faith is not his aim – and yet, the woman is *not* given to him. She remains absolutely beyond his reach *regardless* of his profane motivation. That Esther was “given” to Ahasuerus thus cannot, as Rava claims, be related to the fact, that Ahasuerus simply desired her.

The story on the man, who desires a woman, thus proves both Abbayye's and Rava's explanations of “Esther's case” wrong: That Esther's transgression was legitimate is neither due to her being “the soil of the world,” nor due to Ahasuerus' intentions. Rather, it was Esther's intention, *her* aim, which turned her transgression into a legitimate transgression.³¹ Thus, whereas Abbayye and Rava regard Esther as someone, who is in need of a “rescue from sin,” the stama's hints at another option: To him, Esther is a rescuer, who is not to be saved from sin, but who *has* to sin in order to save the lives of her people. Esther's “interpretative point of departure” is not the sacrifice of one's life so as to *avoid* a transgression of the law, but the necessity to *commit* a transgression so as to save the lives of an endangered human being. Abbayye and Rava focus on a *rescue from transgression through death*, yet to the stama, “Esther's case” teaches about a *rescue from death through a transgression*.

Implications of the stama's reading

The alternative explanation of the legitimacy of Esther's transgression is not formulated explicitly. As described above, it is implicated mainly by the

³¹ At this point, my reading differs from that of Aryeh Cohen, according to whom Esther's role in the salvation of the Jews is, by this sugya, erased: “What the question [Was not Esther's case in public?, C.T.] does is introduce the strong idea that Esther was actually radically passive or, according to Rava, merely an object of pleasure and not an agent” (Cohen, “Towards an Erotics of Martyrdom”). I think that the story about the unnamed woman implies that the reason that Esther did not need to kill herself, is *not* because she was “*karka olam*,” or because Ahasuerus simply desired her, but because she is akin to a bystander. The story implies a *rejection* of these proposals of Rava and Abbayye, according to my understanding of the text.

sugya's composition. Perhaps avoidance of a more explicit confrontation of this explanation with those offered by Abbaye and Rava is due to the implications this reading has for *mSanhedrin* 8:7, for the majority vote of the Lyddan sages, and for the very use of the Lyddan sages' vote in the gemara on *mSanhedrin* 8:7.

“Esther’s case” and mSanhedrin 8:7

As described above, the bystander's killing of the pursuer in *mSanhedrin* 8:7 is deemed “officially” legitimate not because it possibly saves the lives of the pursued, but because it saves the pursuer from sin. In contrast to the bystander's intervention as described in *mSanhedrin* 8:7, however, Esther's intervention is officially legitimate, because it aims at the rescue of innocent lives: Esther does not intend to save the “pursuer” Haman from sin, but to save the endangered Jews, the pursued, from Haman's decree of persecution. Thus, whereas in the situation envisioned in *mSanhedrin* 8:7 the bystander's intervention is justified as the pursuer's “rescue from sin” (which only effects a rescue incidentally), Esther's intervention is explicitly justified as a *rescue of the pursued* from the decree of persecution. The legitimacy of Esther's deed thus hints at the alternative justification for the bystander's killing of the pursuer: Esther's intervention is legitimate because it aims at the rescue of innocent lives – and the bystander's intervention might likewise be legitimate on account of its life-saving effect.

“Esther’s case” and the vote of the Lyddan sages

As mentioned above, according to *bMegillah* 13b, Esther was married to Mordecai before marrying Ahasuerus, and was not divorced after her first marriage. If one follows this tradition, it is not a minor transgression, which Esther commits in order to save her people, but one which may not be committed under *any* circumstance whatsoever: adultery. Thus, if one assumes, in line with *bMegillah* 13b, that Esther committed adultery, then “Esther's case” contradicts the majority vote of the Lyddan sages: Whereas the Lyddan

sages vote, that a persecuted Jew may not commit an act of bloodshed, adultery and idolatry in order to save his life, Esther commits an act of adultery in order to save the lives of her fellow Jews. And if Esther was forced *by the obligation to save life* to commit adultery, then why should the same argument not be made regarding a Jew, who is forced by a tyrant to choose between adultery and death?³² Is not the latter, too, forced to commit the act by the obligation to save his *own* life? Just as the obligation to save life – the *end* of Esther’s deed – legitimizes her adulterous transgression, so might it also legitimize the adulterous transgression of any other Jew, who is forced to choose between a transgression and death.³³

³² The same argument is not applicable to bloodshed: When a Jew refuses to commit bloodshed in order to save his own life, this refusal is most possibly motivated by an attempt not to kill an innocent human-being. Accordingly, the stama does not categorize the obligation to die rather than to *murder* one’s fellow as an instance of *qiddush ha-Shem* at all, but as a result of self-evident logical reasoning: “And how do we know this of murder [i.e., the prohibition to commit murder in order to save life] itself? It is logical reasoning (סברא הוא) (*bSanhedrin* 74a). Cf. also Cohen: “The obligation to die rather than murder one’s fellow is not necessarily an instance of *kiddush hashem*. It is a result of *sevara* – what greater right to live do you have than anyone else? [...] The idea of *kiddush hashem* is only introduced with the proof-text from Lev. 22:32: “Neither shall you profane my name, but I will be hallowed [ve'nikdashiti] amongst the children of Israel...” *Kiddush hashem*, for this sugya at least, is inherently tied to idolatry” (“Response to Elizabeth A. Shanks by Aryeh Cohen”). Cf. also Steinmetz’ analysis of Rashi’s understanding of *sevara* in this passage (“Crimes and Punishments, Part II,” n. 87) and Halivni, “The Meaning of S’vara.” In contrast to bloodshed, if a Jew refuses to commit idolatry or adultery, s/he does not avoid the death of other people, but a transgression of the law.

³³ Since Esther’s deed contradicts the Lyddan majority vote, how much more so does it contradict the modifications, which Rav Dimi and Rabin transmit: Whereas Rav Dimi and Rabin report that in times of persecution, or in public, one has to save oneself even from a minor transgression (cf. *bSanhedrin* 74a), Esther transgresses *precisely* at a time of persecution: Only after Ahasuerus issued the decree of persecution initiated by Haman, does she approach Ahasuerus voluntarily, and therefore, it is only now that she commits a transgression. Through introducing the legitimacy of Esther’s public transgression at a time of persecution, the stama thus challenges, at the least, the traditions which Rav Dimi and Rabin transmit concerning the majority vote of the Lyddan sages.

Whether “Esther’s case” contradicts solely the stringencies transmitted by Rav Dimi and Rabin (or also the majority vote of the Lyddan sages), depends on whether one holds that Esther committed adultery, or only a minor transgression in order to save her people’s lives. If one reads Esther’s transgression, alongside *bMegillah* 13, as an

“Esther’s case” and the use of the Lyddan sages’ vote

As described above (this chapter, 3ff.), the Lyddan sages’ vote implies, that the persecuted Jew not only needs to be saved from the tyrant, but also from a transgression. On account of this second “characteristic” of the persecuted Jew – his being akin to a pursuer – the Lyddan sages’ majority vote is woven into the sugya at this particular point: Just as the one *forced to choose* between idolatry and death is to be “saved from sin,” so, too, the *voluntary* idolater should be “saved from sin.”³⁴ The stama de-gemara construes the majority vote of the Lyddan sages as an argument in favor of the view that stands at the beginning of the sugya: Also the voluntary idolater and the desecrator of the Shabbat should be saved by their lives, as Rabbi Shimeon bar Yohai and Rabbi Eliezer, son of Rabbi Shimeon, argue (cf. this chapter, 2ff.).

Of course, this reasoning presupposes that the differences between the case of the mishnaic idolater, and the idolater the Lyddan sages are concerned with, are ignored: To be forced into a choice such as “idolatry or death” is an instance of what may be termed in juristic language “relative coercion.” In a situation of relative coercion, coercion is exerted on a person’s *will*, in contrast to a situation of absolute coercion, in which a person’s body is subject to another person’s coercion, without the coerced having any chance to influence

act of adultery, then “Esther’s case” contradicts the sages’ vote, but if she committed only a minor transgression, then her case contradicts only the traditions transmitted by Rav Dimi and Rabin.

³⁴ Also in the unit, which opens the discussion on the first part of *mSanhedrin* 8:7 (cf. *bSanhedrin* 73a), the School of Rabbi deduced the necessity to “save” a prospective murderer by his own life from the necessity to save someone, who is forced to do something: a betrothed girl threatened with rape. However, in contrast to the betrothed girl, the Jew who is forced to decide between death and bloodshed, adultery and idolatry *does* commit a sin if he opts for survival: Only in the case of *absolute* coercion – i.e., the case of the betrothed raped girl – is one free of all culpability; yet in the case of relative coercion, when there is some sort of choice possible, one is culpable.

Nevertheless, the amoraic discussion of the mishnah’s two parts resemble each other since here and there, the rescue of a *voluntary* transgressor is deduced from the necessity to save a person, who is in a situation of *coercion*. In the amoraic discussion of the mishnah’s two parts, the motif of “rescue” thus provides a link between cases, which – beyond this common denominator – have virtually nothing in common.

the situation.³⁵ The sages who met in the “upper chambers of the house of Nitzah in Lydda” associate with a “rescue from sin through death” a Jew who is forced to make a *choice* between death and a transgression, that is, a Jew trapped in a situation of relative coercion. *mSanhedrin* 8:7, by contrast, deals with transgressors who apparently act *without* being forced to choose between death and a transgression. From a non-technical, moral point of view then, the mishnaic voluntary transgressor and the one *forced* to choose between a transgression and death seem not to have much in common: The mishnaic voluntary pursuer bears moral culpability for his act, and as such, is rather incomparable to a Jew, who is forced to decide between a transgression and his own death.³⁶

Yet nevertheless, the stama here chooses to ignore the difference between a situation of relative coercion and a situation in which there is no discernible coercion at all: He uses the Lyddan sages’ vote as an argument in favor of the view, that also a voluntary idolater is to be “saved by his life,” and thus parallelizes not the mishnaic voluntary idolater and the tyrant – the two “evil-doers” – but instead, the mishnaic voluntary idolater and the Jew, who is forced to decide between a transgression and death – the “evil-doer” and the victim of a tyrant’s violence: Just as the Lyddan sages decided that a Jew *forced to choose* between death and idolatry should rather let himself be killed, so too, a *voluntary* idolater should rather be killed than transgress. Legally relevant is here solely the fact, that both the voluntary idolater and the Jew, who is forced to decide between idolatry and death, are about to commit an idolatrous act. A transgression committed for fear of life, is, according to this

³⁵ Cf. chapter 2, n. 20. Maimonides stresses that a Jew has to let himself be killed, rather than transgress, *only* in a situation of relative coercion (cf. Maimonides, *Hilkhot Yesode ha-Torah*, V:1-4).

³⁶ Cohen notes the difference between the two cases (cf. “Towards an Erotics of Martyrdom,” 231-232): “The statement [the Lyddan sages’ vote, C.T.] introduces a completely new facet to the discussion. Until now, the *sugya* was dealing with a situation where a person was him/herself going to commit a transgression. The *Bet Natzha* decision moves the *sugya* in a different direction. The potential transgressor is no longer active as in R. Shimon b. Yohai’s statement [...] the potential transgressor is passive. The whole point of the *Bet Natzha* decision is the coercion.”

reasoning, not to be judged differently from a voluntary transgression – for the transgressor it is in any case deemed “better” to be saved through death.

The mention of the legitimacy of Esther’s deeds, however, disrupts this reasoning: Esther’s transgression is legitimate on account of its end. And if a transgression’s end bears upon its legitimacy or illegitimacy, then a voluntary transgression as committed by the mishnaic pursuer becomes incomparable to a transgression committed in a situation of persecution, when a Jew is forced to decide between death and a transgression: The vote of the Lyddan sages concerns a Jew who is forced to decide between idolatry and death, yet this decision has no bearing upon the halakhic status of idolatry in a very different situation, when an act of idolatry is committed voluntarily. The Lyddan sages’ inclusion of idolatry among those transgressions a Jew needs to “die for,” is unrelated to the mishnaic exclusion of idolatry from those transgressions a Jew has to be “saved from.” When a deed’s end, and going along with this, a transgressor’s moral culpability, is given legal weight, then a voluntary act of idolatry becomes incomparable to an act of idolatry committed in mortal fear.

Also the stama’s juxtaposition of the legitimacy of Esther’s deed and the illegitimacy of the doctors’ advises in the story on the desiring man, makes this point: The forbidden act in question itself is identical here and there, yet, since its context is not, the one act is laudatory, while the other is a transgression. Esther was permitted to have intercourse with Ahasuerus, because she thereby attempted to save her people, but the story’s unnamed woman may not have intercourse with the man, because there is no innocent life saved thereby. The mention of the legitimacy of Esther’s deeds thus questions the very use of the Lyddan majority vote as an argument in favor of the view, that also a voluntary idolater is to be “saved by his life”: The stama, in the sugya’s end, suggests that once a positivist-technical reading of the two cases is abandoned, the question “what is a Jew to die for?” can no longer be answered equally for both the mishnaic “pursuer-context” and the Lyddan “persecution-context.”³⁷

³⁷ Possibly, on account of this critique, the Babylonian stama weaves the Palestinian discussion on the transgressions a Jew may not commit even in order to save his life into the gemara on *mSanhedrin* 8:7 to begin with: He juxtaposes transgressions which

Conclusion

According to the explicit, overt layer of the sugya, the permission to kill a pursuer is granted not on account of its life-saving effect, but on account of its being conceptualized as a rescue from sin: The pursuer is about to commit a transgression so grave, that he is “saved by his life” from passing the line separating this severe transgression from all others. His death is legitimate as *his* rescue, not as that of his victim. Yet, beneath this explicit layer of the sugya, the victim’s rescue is a motif lingering in between the lines of the spelled-out reasoning: This implicit layer is at first hinted at in the mishnah itself, when the idolater is placed among those, whom one may not save by their lives, even though the idolater’s transgression is as severe as the transgressions of those, whom one may save by their lives. This layer appears on the text’s surface a second time at the very end of the gemara on the mishnah’s first part, when an anonymous voice declares that “against logic,” a bystander who breaks the vessels of another person in the course of his intervention against the pursuer is not required to retribute the broken vessels, for “if you will not rule thus, no man will save his neighbor from a pursuer” (*bSanhedrin* 74a). And this layer is a third time hinted at at the very end of the gemara on the mishnah’s second part, when an anonymous voice reminds the readers of Queen Esther: According to rabbinic tradition, Esther committed a transgression, which amounted to an act of adultery, in order to save the Jews from a decree of persecution. Had Esther known the Lyddan majority vote and had she heeded the sages’ decision – she would not have saved her people.

The fact that Esther *did* commit a transgression, the legitimacy of which is beyond negotiation, thus hints at the mishnah’s “alternative” justification for

appear to be identical, in order to show that they, in truth, are not: An act of idolatry committed voluntarily, on account of an inner inclination, is unlike an act of idolatry committed by a Jew who does so for fear of his life – just as the act of bloodshed carried out by the bystander in *mSanhedrin* 8:7 is unlike the act of bloodshed committed by the pursuer.

the killing of the pursuer and implies a critique of the Lyddan majority vote: Just as the obligation to save life legitimizes the transgression of Esther, so might it legitimize also the bystander's killing of the pursuer and the transgression of a Jew, who is forced to choose between a transgression and death. Just as Esther did not need to "save herself" from a transgression, so too any other Jew does not need to save him/herself from a transgression when the latter is necessary in order to save life. Thus, in this sugya, the stama uses Esther as a Babylonian "icon," that symbolizes not a rescue from a transgression through death, but instead, a rescue from death through a transgression.

Nevertheless, the stama at no point overtly dismisses the conceptualization of the pursuer's death as his rescue from sin: The pursuer's death remains legitimate on account of its being a severe transgression; the end that sanctifies the means is never explicitly the rescue of the pursuer's victims, but the rescue of the pursuer from committing one of the severest possible transgressions.

In the course of the next chapter, I will demonstrate that the halakhic microcosm of *mSanhedrin* 8:7 and its gemara are embedded in a wider literary macrocosm: the Babylonian narrative traditions, that record encounters between Jews and tyrants. Even though *mSanhedrin* 8:7 and its gemara are the only existing halakhic discussion concerning the question of transgressions a Jew may not commit under any circumstance, I will show that there exist complementary interconnections between *mSanhedrin* 8:7 and its gemara on the one hand, and the aggadic traditions on the encounter of Jews and their adversaries on the other: Aggadic traditions, that record the encounter between Jews and tyrants, kings and other enemies can be read as illustrations, as "stagings," of the arguments that governed the gemara on *mSanhedrin* 8:7; the different "plots" and "typecasts" described in these aggadic texts reflect the answers, that were articulated in the gemara's halakhic context.

The narratives I will quote in the course of the fourth chapter will be predominantly the narratives' Babylonian versions, even though there exist, at times, parallel and/or earlier non-Babylonian versions in the Yerushalmi and

the midrashim. My focus on the Babylonian versions is due to my focus on the Babylonian interpretation of *mSanhedrin* 8:7 in the previous chapters: The conclusions I draw from my analysis of the Babylonian gemara do not necessarily also represent the “Palestinian discussion” of this text.

***mSanhedrin 8:7*, its Gemara, and Aggadic Traditions on Survivors and Murdered**

The Survivors

The trickster's veil

In the Yerushalmi, the following encounter between Rabbi Ba bar Zemina and his non-Jewish Roman employer is recorded:

רבי בא בר זמינא הוה מחיט גבי חד בר נש ברומי. אייתי ליה בשר נבילה.
אמר ליה: אכול. א"ל: לי נא אכיל. א"ל: אכול, דלא כן אנא קטיל לך. א"ל:
אין בעית מיקטול, קטול דלי נא אכול בשר נבילה. א"ל: מאן מודע לך דאילו
אכלתה הוינה קטלין לך. אי יהודי יהודי אי ארמאי ארמאי.

Rabbi Ba bar Zemina was working as a tailor for a man in Rome. [The man] brought him carcass-meat and said to him: Eat! He said to him: I will not eat. He said to him: Eat, for if not, I will kill you. He said to him: If you want to kill, then kill, for I will not eat carcass-meat. He said to him: Now, know that had you eaten, I would have killed you. If you are a Jew, be a Jew, if a gentile, a gentile (*yShevi'it* 4:2, 35a-b and *ySanhedrin* 3:6, 21b).

Instead of killing Rabbi Ba bar Zemina for his refusal to comply with his command, the Roman employer seems pleased, even relieved at the rabbi's steadfastness. His worker has proven to be a Jew, who behaves like a Jew, thereby fulfilling his expectations of what a Jew does and does not.¹ Had Rabbi Ba bar Zemina eaten of the carcass-meat, the Roman might have killed him for behaving like a gentile, as he himself announces.

The Roman's anxiety about a Jew, who submits to his power and eats carcass-

¹ On the role of food in Jewish-Greek martyrdom narratives, cf. Rajak, "Dying for the Law," 126-129.

meat upon being commanded to do so under threat of life, is surely counter-intuitive. One expects the Roman to be content with a Jew, who transgresses Jewish law and obeys to his commands. Yet, his unease about the “obeying Jew” it is not absurd or illogical: If Rabbi Ba bar Zemina’s Roman employer presumes that a Jew’s submission to his force is only *seeming* submission, if a Jew’s willingness to eat carcass-meat does not imply obedience, but is a mere strategy of survival, then his discomfort with what only *appears* to be submission is comprehensible: The Roman does not want to be fooled, but attempts to exert “real,” effective force over his Jewish employee. Yet a Jew, who, because of his *seeming* submission, is not recognizable for him as a Jew any longer, is a threat to an effective exertion of power. Not being able to identify his inferior’s true face, the Roman runs the risk of being ridiculed; he fears to be blinded by an illusion his hierarchically superior position itself gave rise to.² The employer of Rabbi Ba bar Zemina, aware of these unpleasant “side-effects” of hierarchy, accordingly prefers a rebellious, disobedient Jew to a Jew who fools him through seeming compliance, who is no longer identifiable to him as a Jew. An honest refusal to submit is, as far as his perspective is concerned, preferable to an outward, but false and vain act of submission and compliance.³

² A classic example of the “dangers” of a high position in the hierarchy of power-relations may be found in Hans Christian Andersen’s tale on the emperor and his new clothes: Two tricksters promise the emperor to create for him the finest suit of clothes from a most beautiful cloth. This cloth, they tell him, is of a very particular nature: It is invisible to anyone who is either too stupid or too unfit to acknowledge its elevated quality. The emperor and his ministers, afraid of appearing stupid and unfit, marvel at his “new clothes.” Upon parading in the “new clothes” among his people, all of them congratulate and applaud him, but of course, do not dare to tell him that he does not wear anything. In the story, it is finally a child screaming: “The emperor is naked!” The child (or as an alternative, the imbecile) as the one who can, on account of his young age or mental disability, speak the truth, is of course a common literary motif.

³ According to Homi Bhaba’s analysis of the relation between the colonizer and the colonized, “[t]he problem for colonial discourse is that it wants to produce compliant subjects who reproduce assumptions, habits and values – that is, “mimic” the colonizer. But instead it produces ambivalent subjects whose mimicry is never very far from mockery” (Ashcroft et al., *Key Concepts in Post-Colonial Studies*, 13). This “ambivalent subject” thus disturbs the simple relationship between colonizer and

With the conviction, that the king's subjects use a "veil," which hides their true intentions and loyalties, the Roman employer of the story quoted above is not alone. According to various narrative traditions transmitted in rabbinic literature, a number of rabbis were arrested by government officials and were accused of various acts which constitute, in the eyes of the *hegemon*, transgressions against the state's authority.⁴ Yet, in contrast to Rabbi Ba bar Zemina, these rabbis decide to fool their adversaries. For example, when Rabbi Eliezer is arrested, the governor asks him: "How can a sage like you occupy himself with those idle things?" Rabbi Eliezer thereupon replies: "I acknowledge the judge as right/reliable (יָמֵן)" (*bAvodah Zarah* 16b).⁵ The governor understands "the judge" to be an honorable designation of himself, is flattered and acquits Rabbi Eliezer, who, of course, designated as "the judge" *the* Judge, God, and not the governor.⁶ With comparable wit, also Rabbi Eleazar ben Perata succeeds in defending himself in face of the judges, who are supposed to condemn him: "When they brought Rabbi Eleazar ben Perata [to his trial], they said: Why have you been studying [the Torah] and why have you been stealing? He answered: If one is a scholar, he is not a robber; if a robber, he is not a scholar, and as I am not the one, I am neither the other" (*bAvodah Zarah* 17b).⁷

colonized and is an unwelcome aspect of hierarchy for the colonizer. On reading mimicry in the rabbis' relation to Rome cf. also Berkovitz, *Execution and Invention*, 162ff.

⁴ On the accusations rabbinic literature ascribes to those accused by the government, cf. Kalmin, "Rabbinic Traditions about Roman Persecutions."

⁵ This story is recorded primarily in *tHullin* 2:24 and also in *Ecclesiastes Rabbah* 1:24. Boyarin analyzes and interprets it in depth, cf. *Dying for God*, 27ff. and 97ff. As mentioned above, I am quoting here the Bavli's version because I focus in this work in particular on the Bavli's presentation of the trickster.

⁶ Schäfer (*Jesus in the Talmud*, 43) reads Rabbi Eliezer's answer not as a conscious, intended defense of himself: "The accused even does not bother to defend himself; he simply puts his fate into the hands of the heavenly judge."

⁷ This story, too, is analyzed by Boyarin in *Dying for God*, 52-56, and Kalmin, "Rabbinic Traditions about Roman Persecutions," 26ff. Rabbi Eleazar ben Perata's survival-talent is echoed in *mGittin* 3:4: "Three statements were made by Rabbi Eleazar ben Perata before the sages, who formally approved of them. [He said] that [people in] a besieged town, [people] in a ship storm-tossed at sea, and a man who

The tricksters leave the judges defenseless. They either remain entirely unaware of the trick, or are outmaneuvered through a response, which denies the very possibility of the accusation's veracity. In face of the trickster's wit, the hierarchically superiors lose the power with which hierarchy provides them: "Typically, the trickster makes his successful way through a treacherous environment of enemies out to defeat him [...] not by his strength but by his wit and cunning. Only by knowing the habits of his enemies, by deceiving them, by taking advantage of their greed, size, gullibility or haze does he manage to escape their clutches and win victories."⁸ Being unable to thwart the threats to their existence directly and openly, through physical or hierarchical strength, the tricksters employ whatever is at their disposal to reach their goal: They "kill their adversaries softly" through putting on a mask, appearing as if they were collaborating, submissive and pleasing subjects.

Just as Rabbi Eliezer and Rabbi Eleazar ben Perata conceal their true intentions and convictions through their cryptic responses, other rabbinic tricksters pull a real, physical veil over themselves: According to *Genesis Rabbah* 82:8, two disciples of Rabbi Yehoshua "changed their cloaks" in order to appear as gentiles at a time of persecution, and according to *Numbers Rabbah* 20:21, "an incident is related that during the period of religious persecution a certain Israelite shopkeeper used to cook ritually clean meat as well as the flesh of swine and sell them, so that it might not be suspected that he was a Jew."⁹

has been brought to court to be tried are presumed to be alive [so long as they are not known to be dead] [...]" For an analysis of the figure of Rabbi Eleazar ben Perata cf. also Blidstein, "Rabbis, Romans and Martyrdom," 56ff.

⁸ Scott, *Domination*, 162.

⁹ Another example of trickster-language and camouflage is to be found also in *bMe'ila* 17a: "The government had once issued a decree that [Jews] might not keep the Shabbat, circumcise their children, and that they should have intercourse with menstruating women. Thereupon Rabbi Reuben son of Istroboli cut his hair in the Roman fashion, and went and sat among them. He said to them: If a man has an enemy, what does he wish him, to be poor or rich? They said: That he be poor. He said to them: If so, let them do no work on the Shabbat so that they grow poor. They said: 'He speaks rightly', let this decree be annulled. It was indeed annulled. Then he continued: If one has an enemy, what does he wish him, to be weak or healthy? They

Also Esther's rescue of the Jews is accompanied and made possible through an act of concealment: Ahasuerus does not know that she is a Jewish woman, and even her name is interpreted as indicating "concealment": "And why was she called Esther? Because she concealed [*mastereth*] the facts about herself, as it says, *Esther did not make known her people or her kindred* (Esther 2:20)" (*bMegillah* 13a).¹⁰ It is Esther's association with camouflage, which may also account for the great emphasis rabbinic literature places on her outer appearance, her physical veil: "The rabbis taught: There were four women of surpassing beauty in the world: Sarah, Rahab, Abigail, and Esther. According to the one who says that Esther was greenish (cf. *bMegillah* 13a), Vashti should be inserted in place of Esther" (*bMegillah* 15a). Esther is veiled by tremendous beauty or by a "greenish" skin – yet this way or that, what Ahasuerus sees is a carnival costume, a mere façade.¹¹ Esther wears a costume, which God himself designed in order to make her pleasing in the eyes of

answered: Weak. He said to them: Then let their children be circumcised at the age of eight days and they will be weak. They said: He speaks rightly, and it was annulled. Finally he said to them: If one has an enemy, what does he wish him, to multiply or to decrease? They said to him: That he decreases. If so, let them have no intercourse with menstruant women. They said: 'He speaks rightly, and it was annulled. Later they came to know that he was a Jew, and [the decrees] were re-instituted.'" Cf. on this text and its discussion in scholarly literature, Kalmin, "Rabbinic Traditions about Roman Persecutions," 33-38.

¹⁰ Cf. also *bHullin* 139b: "Where is Esther indicated in the Torah? [In the verse] *And I will surely hide* [אסתיר] *my face* (Deuteronomy 31:18)." Also Esther's name-change from "Hadassah" to "Esther" may be linked to her camouflage. Esther is, moreover, assumed to be born into an entire "dynasty of concealers": "Rachel made silence her métier, and so all her children practiced concealment. [Thus the stone representing] Benjamin [in the High Priest's breastplate was the] *yashpeh*, signifying *yesh peh* (has he a mouth). He knew of Joseph's sale, yet did not reveal it. Saul: *But concerning the matter of the kingdom [...] he told him not* (I Samuel 10:16). Esther: *Esther had not made known her people or her kindred* (Esther 2:10)" (*Genesis Rabbah* 71:5). Cf. also *Esther Rabbah* 6:12.

¹¹ The late second part of Midrash *Esther Rabbah* develops the motif of Esther's costume further. It expounds that when Esther approaches Ahasuerus after the publication of the decree of annihilation, God increases her beauty to such an extent, that even though Ahasuerus attempts to turn away his face from her, he is forced to look straight into the *fata morgana* (cf. *Esther Rabbah* 9:1).

Ahasuerus (cf. Esther 8:5).¹²

Heightening the illusionary, superficial nature of the trickster's veil, the trickster-narratives also emphasize the trickster's innocence and righteousness – the message being: What lies *beneath* the veil is entirely unrelated to its surface. For example, according to the rabbinic accounts of Esther's story, she observed the Shabbat, the dietary restrictions and menstrual regulations even while living in Ahasuerus' palace (cf. *bMegillah* 13a-b). Also the tradition, according to which Esther was prior to her marriage to Ahasuerus married to Mordecai, from whom she was never divorced and with whom she even continued to have intercourse during her relationship to Ahasuerus (cf. *Megillah* 13b) may be motivated by an attempt to stress the costume-like nature of her marriage to Ahasuerus: For the sake of the Jews' survival, Esther is “outwardly” married to Ahasuerus, yet, she remains everlastingly attached and loyal to her people: Esther “used to rise from the lap of Ahasuerus and immerse, and sit in the lap of Mordecai” (*bMegillah* 13b).¹³

The tricksters do not approve of the acts they have to commit in order to

¹² The *Zohar*, carrying the idea of her wearing a costume to its extreme edge, interprets that the “real” Esther indeed never appeared before Ahasuerus, but that God sent down a female spirit in the guise of Esther to take her place. Cf. *Zohar*, Parashat *ki tetse (Ra'aya mehemna)*, 3:275b; cited in Walfish, *Esther in Medieval Garb*, 122: ואי תימרון שום ביש עלה דאסתאבת באחשוורוש, וזכתה לאתלבשא בה רוחא דקודשא, הדא הוא דכתיב ותלבש אסתר מלכות (אסתר ה א). (You may say that Esther has a bad reputation by saying that she was defiled by Ahasuerus, yet she was worthy that the Holy Spirit, which is *Malkhut*, would be clothed in her as is written, *Esther put on her royal apparel (= Malkhut)* (Esther 5:1).

¹³ My interpretation of the tradition of Esther's (bigamous) marriage to Mordecai differs from that of Segal, who suggests that “[t]he assertion that Mordecai married Esther developed alongside the interpretation that Esther was Mordecai's niece as a way of creating a biblical precedent for the controversial Pharisaic practice of niece-marriage” (Segal, *Babylonian Esther Midrash*, vol. 2, 51–52). Segal (*ibid.*, vol. 3, 249) himself notes that “[i]t is difficult to understand what homiletical, theological or halakhic end is being served by the introduction of this detail.”

Cf. also Boyarin on Esther (“Masada or Yavneh,” 307): “Perhaps the most remarkable feature of the Book (or in Jewish parlance, Scroll) of Esther is that it is about a Jewish woman who has sexual intercourse with a Gentile, and not even quite under conditions that could be called rape, and yet survives as a Jew and as Jewish heroine, as a model Jew, for whom pious Jews name their daughters until this day and who has a holiday in her honor.”

survive; they do not esteem what their veils exhibit: Ben Perata does not “enjoy” the denial of his Jewish faith before the judges, nor does Esther wish to marry Ahasuerus, or to approach him following his issue of the decree of persecution. (Indeed, when Hatach informs her about the king’s decree and Mordecai’s plea to exploit her position at court in favor of the Jews, she is at first reluctant, and answers that the king intends to punish everyone, who approaches him in the inner court without being commanded to do so (cf. *Esther* 4:11). Even about Rabbi Yose ben Kisma, whose funeral is attended by all the “great men of Rome” (cf. *bAvodah Zarah* 18a) and who rebuked Rabbi Haninah ben Teradion for not accepting Rome’s political superiority, the Bavli reports that he demanded from his students before his death that his coffin be placed deep into the earth, “for there is not one palm-tree in Babylon to which a Persian horse will not be tethered, nor one coffin in Palestine out of which a Median horse will not eat straw” (*bSanhedrin* 98a-b): Only if his coffin is placed deep into the earth, will his dead body be unaffected by the events occurring after his death.¹⁴ The tricksters spread a cloth of language, of beauty, or a real cloth over themselves in order to survive; yet their true, unveiled, outwardly hidden loyalty is with the Jews and Jewish law.

Knowing of the tricksters’ “true face,” God is presented as sanctioning their masquerade. His consent is made evident not only in His intervention on behalf of Esther, when He increases her beauty in the presence of Ahasuerus. It

¹⁴ The context of Rabbi Yose ben Qisma’s request is a discussion about the signs that precede the coming of the son of David, the Messiah. When prophesying that there will be “not one palm-tree in Babylon to which a Persian horse will not be tethered, nor one coffin in Palestine out of which a Median horse will not eat straw,” Rabbi Yose ben Kisma envisions the conquest of the Persians over Babylon and Palestine (cf. Feldman, *Judaism and Hellenism Reconsidered*, 802).

The request of Rabbi Yose ben Kisma resembles the request of (the biblical) Joseph to have his bones buried in the Land of Israel once the Israelites return (cf. *Genesis* 50:25 and *Exodus* 13:19): Joseph, who spent almost all his life in the palace of Pharaoh and does not live together with his family in Goshen even when they immigrate to Egypt, nevertheless wants his dead body to be with the Israelites. Also Blidstein (“Rabbis, Romans and Martyrdom,” 60) observes concerning Rabbi Yose ben Kisma that “[t]he collaborators deepest loyalties rest with the defiant teacher of Torah [that is, with Rabbi Aqiva, C.T.]”

is expressed also in the story on Rabbi Yehudah ben Perata's escape from the accusations issued against him by the government officials: After having defended himself against the accusation of being a robber and studying Torah (cf. above, *bAvodah Zarah* 17b), the judges accuse Rabbi Yehudah ben Perata of being called a "rabbi," whereupon he answers that he is, in truth, "a master, a rabbi, of weavers." In order to test the veracity of his claim, the judges bring him two coils, a woof and a warp, which are to a layman's eye undistinguishable. They ask him which of the two coils is the woof and which is the warp. Of course, the rabbi does not know the correct answer, but – "a miracle occurred to him" (ibid.): A female bee comes and sits on the warp and a male bee comes and sits on the woof, thereby identifying for ben Perata the two coils.¹⁵ Even then, the miracles do not cease: The judges ask him why he does not go to a place of idol-worship (a "House of Avidan")¹⁶ and he explains his absence with his fear of being trampled by the mass of people out there. Then the judges claim that such an accident has never occurred – but again, "a miracle occurred to him" (ibid.): On that same day, an old man is trampled to death in the House of Avidan. Finally, also Elijah intervenes in favor of ben Perata: When being accused of releasing his slave after six years, in accordance with the Biblical injunction to free all Jewish slaves after six years or at the advent of the Jubilee Year, the accused ben Perata denies ever having done so. Against this claim, a witness is about to rise and to testify against ben Perata, arguing that he indeed released his slave after six years. However, just

¹⁵ On the warp as a female and the woof as male, cf. Scheid and Svenbro, *The Craft of Zeus*, 87.

¹⁶ This is perhaps the "Odeon," "a meeting place where religious controversies were held" (Boyarin, *Dying for God*, 167 n. 44. Boyarin quotes Kimelman, "R. Yohanan and Origen," 571 and offers also further bibliography on the meaning of this term). Boyarin suggests, however, that "[w]hether or not "The House of Avidan" can be identified with the Cesarean Odeum in this passage or that passage of the Talmud (notably TB Shabbat 116a and 152a-b) has virtually nothing to do with what this – fictional! – text might have understood the term to mean. In the context of this story, it almost certainly must be a place for pagan worship and not a site for the disputatious between Jews, Christians, and pagans, for if it were the latter, how would the Rabbi's attendance or absence been indicative of his religious identity?" (Boyarin, ibid.).

at the moment that this witness attempts to rise, his services are required for delivering a letter to the House of Caesar. To make sure that he will be on his trip of delivery as long as possible and not succeed to return during the trial in order to testify against ben Perata, Elijah throws him back 400 parasangs – “and he did not come back” (ibid.).¹⁷ With divine intervention, the veiled Ben Perata succeeds to stay alive, even though for the sake of survival he must deny that he is a loyal Jew. For him, as for those, who follow his technique of survival, the choice between physical survival through an *outward denial* of one’s faith, and physical death through a *refusal of denial* of one’s faith, is to be decided in favor of survival. Through a veil, consisting of lies and tricks and strengthened by miracles, the trickster’s life is saved.

Those, who are granted insight into the sphere beneath the veil, are the hierarchically inferior and persecuted Jews the trickster-narratives address: Only they know that Esther only *appears* to submit to Ahasuerus when marrying him, that a Jew, who lies about his true convictions, only *appears* to submit to the tyrant’s force. The audience is aware of the fact that the story’s outcome does not depend on the tyrant’s political power, but on the trickster’s wit, and on the sophistication of his concealment. They understand, that the “puppets’ masters,” who pull the strings from beyond the open stage, are the

¹⁷ Cf. on this story also Boyarin, *Dying for God*, 55ff. For another example of divine intervention, cf. also *bShabbat* 49a: “The wicked Roman government once proclaimed a decree against Israel that whoever donned tefillin should have his brains pierced through; yet Elisha put them on and went out into the streets. [When] a quaestor saw him, he fled before him, whereupon he gave pursuit. As he overtook him he [Elisha] removed them from his head and held them in his hand. What is that in your hand? he demanded. The wings of a dove, was his reply. He stretched out his hand and they were the wings of a dove. Therefore he is called ‘Elisha, the man of the wings.’ And why the wings of a dove rather than that of other birds? Because the Congregation of Israel is likened to a dove, as it is said, *as the wings of a dove covered with silver* (Psalms 68:14): Just as a dove is protected by its wings, so is Israel protected by the precepts.”

In *bMe’ila* 17b it is reported that Rabbi Shimeon ben Yohai was chosen to appear before the ruler in order to annul his decrees, “because he is practiced in miracles” (cf. on this text Kalmin, “Rabbinic Traditions about Roman Persecutions,” 34ff.). In *bTa’anit* 21a, too, Nahum Ish Gamzu is chosen to bring a gift to the emperor, “because he is practiced in miracles.”

hierarchically inferior – themselves. Daniel Boyarin thus describes the tricksters’ tales of survival as classic samples “hidden transcripts”: A “discourse that takes place ‘offstage’, beyond direct observation by powerholders.”¹⁸

The only impediment to the trickster’s strategy is, in fact, the ruler’s cleverness: Once the ruler, unlike Ahasuerus, becomes aware of the Jew’s veil, once he detects flattery as bribery and compliance as tactical consent, he can destroy the trickster’s game. It is this latter scenario that the Yerushalmi, when transmitting the story of Rabbi Ba bar Zemina and his encounter with his Roman employer, ponders over. However, beside this smart Roman, the kings and government officials are not presented as overtly suspicious of the tricksters’ intentions, and even if they are indeed convinced of a Jew’s non-compliance such as in the case of Rabbi Eleazar ben Perata – in face of miracles which occur on the trickster’s behalf, the judges’ attempts to convict him of course remain without success.

Naturalizing oppression

According to the tricksters, it is not the tyrant, to whose force they submit. For example, Ahasuerus indeed does not wish to meet Esther at all at the moment she approaches him against his command (cf. Esther 4:10-11). The force Esther complies to, is the need to save her people: She leaves Mordecai and the Jewish community, marries Ahasuerus, and finally commits a transgression when approaching him voluntarily not because this is what *Ahasuerus* wants, but in order to achieve *her* aim.¹⁹ She *chooses* to approach Ahasuerus after the

¹⁸ Scott, *Domination*, 4. Scott differentiates between four modes of discourse of dominated populations. The first is public, within which the dominated are working within the terms of the dominators. The second is “hidden, offstage,” where subordinates may gather outside the gazes of power, where a dissonant political culture is possible. The third is the trickster tale, within which the hidden transcript is encoded in a public one, and the fourth is the speech of open rebellion: the martyr’s speech. Cf. Boyarin, *Dying for God*.

¹⁹ Rashi’s commentary on Esther 2:11, which attributes visionary capacity to Mordecai, needs to be read in light of this aim of Esther’s transgression: - ומה יעשה בה - זה אחד משני צדיקים שניתן להם רמז ישועה: דוד ומרדכי. [...] מרדכי אמר לא אירע לצדקת זו

latter had issued the decree of destruction. And just as it is not Ahasuerus, but the obligation to save lives, which forces Esther to commit a transgression, so is also the trickster, when denying his true convictions, forced to do so by the obligation to save (his own) life. In this sense, the tricksters confirm the tyrant's superiority only to neglect it at the same time: Their confirmation of his power is legitimate only because it is *not* interpreted as a confirmation of *his* power, but as a confirmation of life's primary value.

This re-interpretation of an act of submission to an evil government and its decrees finds an explicit expression in Rabbi Yose ben Kisma's rebuke of Rabbi Haninah ben Teradion. When the latter publicly teaches Torah despite the issue of a decree forbidding such activity, Rabbi Yose ben Kisma warns him:

חנינא אחי אי אתה יודע שאומה זו מן השמים המליכוה? שהחריבה את ביתו
ושרפה את היכלו והרגה את חסידיו ואבדה את טוביו ועדיין היא קיימת. ואני
שמעתי עליך שאתה יושב ועוסק בתורה [ומקהיל קהלות ברבים] וספר מונח
לך בחיקך.

Brother Haninah, do you not know that it is Heaven that has ordained this nation to reign? For though she (Rome) laid waste His House, burnt His Temple, slew His pious ones and caused His best ones to perish, still she is firmly established! Yet, I have heard about you that you sit and occupy yourself with the Torah, do publicly gather assemblies, and keep

שתלקח למשכב ערל אלא שעתידה לקום להושיע לישראל לפיכך היה מחזר לדעת מה יהא בסופה. (“*And Mordecai walked every day before the court of the harem, to know how Esther was, and what was done to her*” (Esther 2:11). *And what was done to her*: He was one of two righteous men to whom a hint of salvation (רמז ישועה) was given: David and Mordecai. [...] Mordecai said [to himself]: The only reason that this righteous woman was taken to the bed of a gentile was because she is destined to arise and save Israel. He therefore went around, to find out what would be her fate.”) According to Rashi then, Esther was right from the beginning married to Ahasuerus only because it was clear to Mordecai through a prophecy-like vision that she will “arise and save Israel.”

a scroll [of the Law] in your bosom [contrary to the Roman decree] (*bAvodah Zarah* 18a).

As Daniel Boyarin observes concerning Rabbi Yose ben Kisma's interpretation of Rome: "There is more than a hint here, in the voice of Rabbi Yose the son of Kisma, at a quietist theological position exactly antithetical to that of a martyr. It is God who has sent the Romans to rule over the Jews, and the rebellious act of provocatively gathering crowds to study Torah in public is thus rebellion against God's will."²⁰ According to Rabbi Yose ben Kisma then, the tricksters do not try to distort their God-given fate. Rather, God *wants* the Jews to maneuver themselves through an evil dominion. He does not want them to provoke their death through demonstrative non-compliance, but to survive despite oppressions and persecutions.

Yet, even though the narratives advocating the trickster's strategy of survival imply a reversal of power in that they present an undermining of the tyrant's outward, political superiority at the hands of the politically inferior, this reversal of power does not destabilize the basic parameters of the situation the trickster is trapped in: The tyrants remain tyrants, the judges remain judges, and the *hegemon* of flesh and blood remains in power. The tyrants' power is subverted, yet this subversion does not attack, destabilize or destroy the hierarchy. Accordingly, when Rabbi Yose ben Kisma dies, "all the great men of Rome" gathered by his funeral, paying him last honors (cf. *bAvodah Zarah* 18a).

The trickster's relation to the dominant culture thus has often been described by such terms as false consciousness and naturalization:²¹ "[H]idden transcripts seem not to matter; they do not change the conditions of domination and subordination. Consequently, it is often thought that the hidden transcript is ineffective, 'that the offstage discourse of the powerless is either empty

²⁰ Boyarin, *Dying for God*, 58. Cf. also Blidstein, "Rabbis, Romans, and Martyrdom," 59.

²¹ Cf. Scott, *Domination*, 70-107.

posturing, or worse, a substitute for real resistance.”²² Instead of the wished-for destruction of the oppressive system, the trickster’s masquerade thus is interpreted also as part and parcel of the oppressive system itself: When the trickster understands his masquerade to be no act of submission to the tyrant, but of submission to the obligation to save a life, the tyrant becomes, in the trickster’s scheme, as if he were a ruin which is about to shackle down every minute, a stormy ocean, a wild beast, a “natural” threat: Just as one may commit a transgression in order to save a person, above whom a ruin collapsed, so the trickster may wear a mask, so as to not to cause the “ruin” to collapse. The trickster tactically ignores the fact that the situation, in which a mask is a vital accessory, is purposefully created, and turns oppression into a perpetual *status quo* the Jew is supposed to live with. He blurs the difference between a tyrant and a natural incident: To the trickster, a tyrant is a ruin hovering above the Jews all the time. The narrations on the tricksters thus propagate a non-rebellious posture vis-à-vis the gentile *hegemon*: When the trickster wears a mask in order to survive, he contributes to the naturalization of this same oppressive system. He survives *within* the system without destroying it.²³

Female tricksters

In light of this non-revolutionary facet of the trickster’s strategy, it does not

²² Berkovitz, *Execution and Invention*, 178. Berkovitz (ibid.) quotes Scott, *Domination*, 185. She adds, that Scott “[r]ecommends that we understand the hidden transcript not as a deflection of real action but as the breeding ground for it. Scott reminds us that “most subordinates conform and obey *not* because they have internalized the norms of the dominant, but because a structure of surveillance, reward, and punishment makes it prudent for them to comply” (Scott, ibid., 193). That being the case, the “hidden transcript is continually pressing against the limit of what is permitted on stage, much as a body of water might press against a dam.” (Scott, ibid., 196).

²³ Scott (*Domination*, 87) argues that “[s]ubordinate groups are complitious in contributing to a sanitized official transcript, for that is one way they cover their tracks.” In this sense, the upholding and strengthening of the official, hegemonic discourse (in particular, the upholding of the self-image the rulers have of themselves) at the hands of the inferiors serves the purposes of both the *hegemon* and his inferiors. Cf. on this topic also Boyarin, *Dying for God*, 45.

come as a surprise that in both biblical and rabbinic literature, the trickster's strategy is time and again represented by female heroines and (biologically male, yet) feminized heroes: God tells Rebecca – not Isaac – about the fates of her yet unborn twins: “*Two nations are in your womb, and two peoples shall be separated from your bowels; and the one people shall be stronger than the other people; and the elder shall serve the younger*” (Genesis 25:23).²⁴ When time for Isaac's benediction of the firstborn is ripe, Rebecca takes action and contrives the fulfillment of the “preview” God had granted her earlier: She advises Jacob to pretend to be Esau, and prepares the food Esau was supposed to bring to his father (Genesis 27:5-17). She calms Jacob's fears and takes the responsibility for the lie upon herself. With the help of his mother, Jacob thus prevails over his biological disadvantage, his being second-born, through a set of characteristics, traits and behaviors that are “culturally encoded” as non-male: lies, tricks, and probably most intriguingly, the preparation and offering of food.²⁵ To Jacob himself feminine attributes are ascribed: In contrast to his hunting, hairy brother, he is a “dweller of tents” (Genesis 25:27) and has smooth skin (ibid. 27:11) – his mother slips an animal's skin over his hands, so as to make him resembling Esau. Also the preparation and offering of food was used by Jacob (even without the help of his mother) as a means to “seduce” Esau into selling him his firstborn status (Genesis 25:34).²⁶ An entire series of

²⁴ Cf. also Jarrell, “The Birth Narrative.”

²⁵ Boyarin (“Masada or Yavne,” 306-309; *Dying for God*, 49) emphasizes, that the characteristics which the trickster makes use of in order to survive, are not *essentially* female, but are culturally encoded as non-male, such as seduction, accommodation, lies, intrigues and tricks. Accordingly, also as a male, a trickster is situated on the female side on the scale of character-traits.

Masculinity, as Cobb demonstrates in *Dying to be Man*, was in antiquity not a mere biological matter of fact, but a trait to be actively fought for, something unstable and conditional. One had to prove one's manliness constantly (cf. Cobb, *ibid.*, 25ff and Moore and Anderson, “Taking it like a Man,” 250). On the femininity of tricksters cf. also Levine, “Diaspora as Metaphor,” 105-18, and Fonrobert, “The Handmaid.”

²⁶ Boyarin (*Dying for God*, 48-49) and Scott (*Domination*, 133) cite a passage of Ralph Ellison's *Invisible Man* (ed. New York 1952, 16), in which an African American grandfather advises his grandson, “I want you to overcome ‘em with yeses, undermine ‘em with grins, agree ‘em to death an destruction, let ‘em swoller you till they vomit or bust wide open...Learn it to the young ‘uns.” According to the reading

lies, initiated by Rebecca and performed by her feminine son, thus stands at the very beginning of Israel's existence as "Israel," as Jacob is re-named later on (Genesis 32:29 and 35:10).²⁷

Rebecca and Jacob are not the only "women," who enable the unfolding of Israel's history through tricksterism: Ruth and Naomi collaborate to seduce Boaz (Ruth 3:1-4), even though Ruth is, as a Moabite woman, forbidden to Boaz. Ruth and Naomi thus pave the way for the birth of David, a great-grandson of Ruth (Ruth 4:18-22). The Moabites themselves are produced through illegitimate intercourse: The daughters of Lot seduce their father after the destruction of Sodom and Gomorrah in order to ensure the survival of his seed (Genesis 19:32), and thereby turn into the matriarchs of the Moabites and the Ammonites (Genesis 19:37-38).²⁸ As Charlotte E. Fonrobert observes, also the midrashim on these biblical female tricksters attribute redemption, both concrete historical and messianic, to the collective transgressions of women: "The motif of the trickster women dominates the stories woven together to provide the genealogy of David, the proto-typical messianic king in rabbinic imagination."²⁹ The same holds true regarding the Exodus from Egypt. Women – the Hebrew midwives Shiphrah and Puah (Exodus 1:15), Moses' mother (Exodus 2:1), Pharaoh's daughter and Moses still unnamed sister (Exodus 2:7-

of Boyarin (*Dying for God*, 47-48) a quite similar idea is expressed by Rabbi Hiyya: "How does Rabbi Hiyya the Great explain the verse *You shall buy food from them [the gentiles] for money, and eat* (אוכל תשברו מאיתם בכסף, ואכלתם) (Deuteronomy 2:6)? If you feed him, you have bought and defeated him, for if he is harsh with you, buy/defeat (שבר) him with food, and if [that does] not [work], then defeat him with money" (*yShabbat* 1:3, 3c). Boyarin remarks that "[t]his is an obvious allusion to the situation within which the weak, "feminine" Jacob bought the favor of the "virile," dominant Esau by giving him food (*ibid.*, 48).

²⁷ The deceit of Esau is not the last instance of tricksterism in which Jacob engages. For further instances of famous Jewish males, including Jacob, engaging in tricksterism cf. chapter 6 of this work.

²⁸ Cf. Fonrobert, "The Handmaid," 261-262, on the midrashic valorization of their act in *Genesis Rabbah* 51:8 and *Pesiqta Rabbati* 42. Cf. also her discussion of the story of Tamar and Yehudah ("The Handmaid," 263-265) and of the aggadic midrash transmitted in the *Yalqut (ha-)Makhiri*, woven around the pre-history of the birth of David ("The Handmaid," 251-256).

²⁹ Fonrobert, "The Handmaid," 265.

9) – ensure the birth of the next generation in spite of pharaoh’s decree to kill all male Jewish newborns.³⁰ A midrash transmitted in Tractate Sotah (*bSotah* 11b) develops this biblical tradition of female activism further and attributes not only the survival of Moses, but of *all* Israelites to the collective action of women: According to this midrash, even though Pharaoh decreed that the Israelite men should not sleep at home, so that they cannot have intercourse with their wives,³¹ the women managed to become pregnant: When they went to draw water, God arranged that fish entered their pitchers, too. Then, the women went to visit their husbands on the fields, fed them with fish, washed and anointed them, and eventually, had intercourse with them.

Like the women saving and raising Moses, Ruth and Naomi, and the daughters of Lot, also Esther, Yael and Tamar enable the future – the birth of the next generation and the nation’s survival – through wit and seduction: Esther commits illegitimate intercourse with Ahasuerus in order to save her fellow Jews (Esther 5:1-14), Yael seduces Sisera in order to kill him afterwards,³² and thereby enables the Israelites’ victory in battle (Judges 4:18-21), and Tamar seduces her father-in-law Yehudah, so as to ensure the survival of his seed after the deaths of his two sons (Genesis 38:14). All these women do not seduce men for the sake of sexual pleasure, but for the sake of either producing a new generation, or defending the survival of an existing generation. Accordingly, the sexual transgression of Tamar is explicitly juxtaposed to that of Zimri:

אמר עולא, תמר זינתה זמרי זינה. תמר זינתה, יצאו ממנה מלכים ונביאים.
זמרי זינה, נפלו עליו כמה רבבות מישראל. אמר ר"נ בר יצחק, גדולה עבירה
לשמה ממצוה שלא לשמה.

³⁰ Cf. also the midrash on Miriam’s advice in *bSotah* 12a and the discussion of this text by Fonrobert, “The Handmaid,” 267-269, and Steinmetz, “A Portrait of Miriam.”

³¹ Cf. also *Midrash Tanhuma* pequdei 9.

³² Also the victory over Sisera is announced by a female, the prophetess Deborah (cf. Judges 4:17).

Ulla said: Both Tamar and Zimri committed a sexual transgression. Tamar committed a sexual transgression and gave birth to kings and prophets. Zimri committed a sexual transgression and on his account many tens of thousands of Israel perished. Rav Nahman bar Isaac said: A transgression performed with good intentions is better than a precept performed with evil intentions” (*bNazir* 23b-24a).³³

Zimri had intercourse with a Midianite woman for the sake of sexual pleasure and as part of an idolatrous rite (Numbers 25:6 and 25:14), and on account of his transgression, “many tens of thousands of Israel perished” (Numbers 25:9). In contrast to Zimri, Tamar committed a sexual transgression in order to produce Yehudah’s offspring – and was rewarded with the birth of “kings and prophets” (*ibid.*): David is of the tribe of Judah, and according to *bSotah* 10b, also the prophet Isaiah was of that same tribe.³⁴ Praise is uttered for Tamar less on account of her ability to subvert the power of Yehudah through wit and seduction, but on account of her willingness to commit a transgression for the sake of producing *his* heir: She subverts Yehudah’s power only in order to enable *his* continuity; and thus acts in his best interests. Her transgression does not question the hierarchies and roles ascribed to him and her, but instead, preserves and strengthens her role as the one, who is responsible for the production of his offspring.³⁵ As Charlotte E.

³³ Also regarding Yael the rabbis conclude that her act teaches, that “a transgression performed with good intention is better than a precept performed without a good intention” (cf. *bNazir* 23b). On the same *daf* (*bNazir* 23b-24a), also the daughters of Lot are praised for seducing their father: “One should always perform a good deed as early as possible, for as a reward for the one night by which she [the elder daughter of Lot] anticipated the younger, the elder gained the privilege of royal status [in Israel] four generations earlier” (*bNazir* 23b-24a). From the elder daughter of Lot descended Ruth, the ancestress of Oved, Jesse, David and Solomon (Ruth 4:21ff.), while from the younger descended Naamah, the Ammonitess, the mother of Rehoboam (I Kings 14:31), who is the first King of the divided Kingdom of Judah.

³⁴ Cf. *bSotah* 10b: “Prophets [issued from Tamar], as it is written: *The vision of Isaiah the son of Amots* (Isaiah 1:1), and kings [issued from her] through David.”

³⁵ According to II Samuel 20:1-22, a “wise woman” (II Samuel 20:16) delivers the traitor Sheba ben Bichri to Yoav and thereby saves the inhabitants of the city. In

Fonrobert observes: “The repetitiveness of the plot structure reads less as a rebellion against the strong or a ‘revenge of the weak’ represented in the trickster figure, than as a cultural main script that promotes women’s commitment to birth.”³⁶

Just as Tamar and her colleagues in spirit regard male dominion over a woman as a God-given fact they are supposed to live with, Rabbi Yose ben Kisma and the other rabbinic tricksters regard the dominion of Rome as a God-given fact the Jews are supposed to live with. “The women” are used to survive within an oppressive system without destroying it; they are the “natural” representatives of the trickster’s non-revolutionary, silent strategy of survival.

The Murdered

The fighter’s honesty

Rabbinic literature, however, does not only transmit reports of wonderful survivals, but also recounts the stories on those Jews, who were murdered by the state’s representatives. In diametric opposition to “the veiled tricksters,” the murdered rigorously refuse to use any veil. They are, in their willful ignorance of their subordinate position in the political hierarchy surrounding them, intentionally naïve. When Pappus ben Yehudah finds Rabbi Aqiva – the

Ecclesiastes Rabbah 7:11, this “wise woman” is identified as Serah, the daughter of Asher, son of Jacob (Genesis 46:17, Numbers 26:46, I Chronicles 7:30). Since Serah is the only female mentioned in the genealogical lists of the Israelites who go down to Egypt (Genesis 46:17) and who come back from Egypt (Numbers 26:46), the rabbis reasoned that she must have been an extraordinary woman, as also the “wise woman” mentioned in II Samuel 20:16.

³⁶ Fonrobert, “The Handmaid,” 270. Fonrobert also points out that the story always focuses on the production of the *male* leader, be it David or Moses (cf. *ibid* 271-272): “The righteousness for which women are rewarded with the messianic seed is that in each case they focus on the production of an heir, or at least of the next generation, from Lot’s daughters to Ruth and Naomi, the women of the Exodus generation, the midwives and Miriam [...]. In these stories women act and trick only to preserve and enforce their function as mothers, and more than that, as mothers of sons.”

most famous martyr of rabbinic literature³⁷ – publicly bringing gatherings together and occupying himself with the Torah, Rabbi Aqiva explains to him “to what the matter is comparable”:

אמשול לך משל למה הדבר דומה. לשועל שהיה מהלך על גב הנהר וראה דגים שהיו מתקבצים ממקום למקום. אמר להם; מפני מה אתם בורחים? אמרו לו: מפני רשתות שמביאין עלינו בני אדם. אמר להם: רצונכם שתעלו ליבשה ונדור אני ואתם, כשם שדרו אבותי עם אבותיכם? אמרו לו: אתה הוא שאומרים עליך פקה שבחיות? לא פקה אתה, אלא טפש אתה! ומה במקום חיותנו אנו מתיראין, במקום מיתתנו על אחת כמה וכמה. אף אנחנו עכשיו שאנו יושבים ועוסקים בתורה שכתוב בה כי הוא חייך ואורך ימך (דברים ל כ), כך אם אנו הולכים ומבטלים ממנה על אחת כמה וכמה.

I tell you with the help of a parable to what the matter is comparable: A fox was walking alongside of a river, and he saw fishes going in swarms from one place to another. He said to them: From what are you fleeing? They replied: From the nets cast for us by men. He said to them: Would you like to come up on to the dry land so that you and I can live together in the way that my ancestors lived with your ancestors? They replied: Are you the one that they call the cleverest of animals? You are not clever but foolish. If we are afraid in the element in which we live, how much more in the element in which we would die! So it is with us. If such is our condition when we sit and study the Torah, of which it is written *For that is your life and the length of your days* (Deuteronomy 30:20), if we go and neglect it how much worse off

³⁷ Mandel (“Was Rabbi Aqiva a Martyr?”) shows that in the Yerushalmi (in both its Leiden manuscript and its printed edition), the statement on Rabbi Aqiva’s death is not part of the original text. He subsumes that the original Yerushalmi version is “not a martyrological story at all: Rabbi Aqiva is being tried and tortured, but nowhere is it hinted that he knows that he is going to die, or that he will be or has been executed.”

we shall be (*bBerakhot* 61b).³⁸

Through comparing himself to fish, Rabbi Aqiva describes not only his unwillingness, but his sheer inability to use a veil. The trickster is not a “real fish” – he may jump out of the water like a reptile, he may condone the public teaching of Torah and his public life as a Jew and thereby save his life. But Rabbi Aqiva himself cannot do so. He would die upon leaving his “water,”³⁹ he has no choice but “to swim in swarms from one place to another,” always fleeing the nets, but never leaving his “water.” Accordingly, when he is accused of the public teaching of the Torah, it does not come to his mind that he could save his life through pretending to be something other than a fish. Being a “real fish,” the very idea of appearing like an animal which can live on the dry land does not occur to him. Like a fish, he cannot survive but inside his “water.”

Rabbinic stories on the murdered Jews do not necessarily depict their deaths as resulting from a rejection of a transgression. Many of those about whom it is reported that they were killed at the hands of a tyrant or his officials, are not portrayed as having been confronted with a choice between a transgression and death at all.⁴⁰ The focal point of these stories is not the heroic rejection of a

³⁸ Cf. on this story also Boyarin, *Dying for God*, 102, and Alexander, “Dialogues on the Theme of Martyrdom.” Cf. also the dialogue between Rabbi Aqiva and Rabbi Shimon bar Yohai in *bPesahim* 112a-b and Kalmin’s analysis of the latter: “The real ‘danger’ is not that Akiba or Shimon might be arrested by the Romans, but that R. Shimon, the student, will weaken and eventually die if R. Akiba denies him Torah, which is as necessary for life as mother’s milk” (Kalmin, “Rabbinic Traditions about Roman Persecutions,” 33).

A parallel of *bBerakhot* 61b is to be found in *ySotah* 5:7 (20c) and *yBerakhot* 9:5 (14b). Here, Rabbi Aqiva converses not with Pappus ben Yehudah, but with the Roman governor Tineius Rufus.

³⁹ On the water-metaphor for the Torah cf. chapter 1, n. 67, of this work.

⁴⁰ Exceptions are the case of Rabbi Ba bar Zemina quoted above (*yShevi’it* 4:2, 35a-b and *ySanhedrin* 3:6, 21b), the case of the seven sons of Miriam bat Tanhum (*Lamentations Rabba* 1:16), and the case of Joseph Meshitha, recorded in *Genesis Rabbah* 65:22. These cases are the exact aggadic equivalents to the situation, which the sages of Lydda imagine (cf. *bSanhedrin* 74a): A politically superior gentile forces a Jew to choose between a transgression and death, whereupon the Jew chooses death.

transgression demanded by a tyrant, but the heroic rejection *of the tyrant*. The stories on those murdered by the state are in this sense an anti-thesis of the trickster narratives: Whereas the naturalization of suppression is the side-effect of the trickster's survival through camouflage, the murdered insist on the *de-naturalization* of suppression and openly and publicly reject (or ignore) the tyrant's political superiority. I will demonstrate this facet of the martyrs' mode of resistance through the accounts on the violent deaths of Rabbi Aqiva and Rabbi Haninah ben Teradion.

The earliest accounts of Rabbi Aqiva's death are to be found in *yBerakhot* 9:7 (14b) and *ySotah* 5:7 (20c); the death of Rabbi Haninah ben Teradion is first recorded in *Sifre Deuteronomy* 307. In these sources the two rabbis are neither presented as being killed on account of their refusal to commit a transgression, nor is the kind of act they committed, which might have constituted in the eyes of the Romans a danger to the empire's authority named. This "lack" is corrected in the Babylonian traditions that recount the rabbis' deaths: In the Bavli, both rabbis are accused of gathering crowds to learn Torah despite a decree that prohibits such activity. Rabbi Yose ben Kisma confronts Rabbi Haninah ben Teradion: "I have heard about you that you sit and occupy yourself with the Torah, do publicly gather assemblies, and keep a scroll [of the Law] in your bosom!" (*bAvodah Zarah* 18a), and Rabbi Aqiva is met by Pappos ben Yehudah when "publicly bringing gatherings together and occupying himself with the Torah" (*bBerakhot* 61b).⁴¹

Their deaths are the result of the refusal to commit a transgression.

Herr ("Persecution and Martyrdom," 99-101) concludes that "[b]y their decrees the Romans did not force Jews, as did Antiochus Epiphanes, to eat pork or to worship idols, nor did they insist upon Jewish participation in the imperial cult [...] The overall conclusion follows, then, that the Romans, for various psychological and tactical reasons, only enacted prohibitions against the observance of positive precepts."

⁴¹ Boyarin ("Mashehu 'al Toldot ha-Martyrion be-Yisrael," and "Ha-Midrash ve-ha-Ma'aseh") emphasizes that the Babylonian stories on martyrs do not recount what actually occurred in the tannaitic period, but a later generation's use of those personalities for the purpose of developing ideas that belong to that generation.

Kalmin ("Rabbinic Traditions about Roman Persecutions," 24-25) demonstrates that in the Babylonian traditions on the persecutions following the Bar-Kokhba revolt, the

Rabbi Aqiva and Rabbi Haninah ben Teradion obviously do not consider the Roman government and its decrees as a God-given matter of fact with which they are supposed to live, in the verbal sense of the word. Both of them display in public that they do not pay heed to its decrees and demonstratively and provocatively ignore them. What the trickster expresses only offstage, beneath the veil, when conversing with his/her brethren, Rabbi Aqiva and Rabbi Haninah ben Teradion express in public: When being asked by the Roman judges for the reason of his public Torah-lessons, Rabbi Haninah ben Teradion straightforwardly answers: “*Thus the Lord my God commanded me (Deuteronomy 4:5)*” (*bAvodah Zarah* 17b).⁴² He directs the “hidden transcript” straight to the persecutor’s ears and eyes.

However, not to express the “hidden transcript” in public and not to openly reject the tyrant’s decrees, would not necessarily lead to transgression, but would, for example, lead to a pragmatic decision not to teach Torah in public. *Not* to gather crowds in order to teach and to learn Torah is, after all, no transgression. Through ignoring the government’s decrees, Rabbi Aqiva and Rabbi Haninah ben Teradion thus do not resist transgression, but instead, *fight* against a suppressive political reality. Their deaths are not the result of their refusal to commit a transgression, but the result of their willful and intended ignorance of Rome’s political superiority. Both die not for the sake of avoiding transgressions, but for the sake of rejecting the worldly king and his decrees.

Tellingly, if a life-threatening situation emerges *independently* of the worldly king, Rabbi Aqiva justifies life-saving pragmatism:

amoraim imagine the Romans having imposed a prohibition of Torah-study (in addition to the prohibition of circumcision and Shabbat observance), whereas the Palestinian sources associate with the Roman persecutions succeeding the revolt forced idolatry (again, in addition to the prohibition of circumcision and Shabbat observance). Kalmin assumes that the Bavli’s greater emphasis on Torah study may be evidence of a cultural difference between rabbis in the two localities (cf. *ibid.*, 49). Gray (“Martyrdom and Identity”) observes this, too. For further prohibitions of Torah-study in Babylonian sources, see *bPesahim* 112a-b and *bYevamot* 108b.

⁴² On Rabbi Haninah ben Teradion’s arrest as presented by the Bavli and *Sifre Deuteronomy*, cf. Kalmin, “Rabbinic Traditions about Roman Persecutions,” 26-29.

שנים שהיו מהלכין בדרך וביד אחד מהן קיתון של מים, אם שותין שניהם מתים ואם שותה אחד מהן מגיע לישוב. דרש בן פטורא, מוטב שישתו שניהם וימותו ואל יראה אחד מהם במיתתו של חבירו. עד שבא רבי עקיבא ולימד: "וחי אחיך עמך" (ויקרא כה כו), חייך קודמים לחיי חבירך.

Two are traveling on a journey, and one has a pitcher of water. If both drink, they will [both] die, but if one drinks, he reaches civilization. The son of Patura⁴³ taught: It is better that both should drink and die, rather than that one should behold his companion's death. Until Rabbi Aqiva came and taught: *That your brother may live with you* (Leviticus 25:26): Your life takes precedence over his life (*bBava Metsia* 62a).

Whereas ben Patura argues, that in a situation where only one person can survive, both should “drink and die,” Rabbi Aqiva holds that “your life takes precedence over his life”: You may take the pitcher and drink, and let the other die. Rabbi Aqiva derives this from an exposition of Leviticus 25:25 “*That your brother may live with you*”: If the only way to save your brother's life is to sacrifice your own life (here: through giving to him the full bottle of water), than you do not need to do this, since one's brother may live “*with you*,” but not “*without you*.” One does not need to sacrifice one's own life for the sake of saving the life of one's companion.⁴⁴

Of course, whether Rabbi Aqiva indeed said what he is reported having said,

⁴³ On this name cf. Schäfer, *Jesus in the Talmud*, chapter 1 (“Jesus' Family”). For a bibliography cf. Boyarin, *Dying for God*, 154 n. 27.

⁴⁴ For a philosophic reading of talmudic views on “justified homicide,” contrasting utilitarian with absolutist tendencies, cf. Sokol, “Some Tensions.” A similar teaching, without an attribution to Rabbi Aqiva, is transmitted as well in *tBava Metsia* 11:14 and in *bNedarim* 80b: “A well belonging to townspeople, when it is a question of their own lives or the lives of strangers, their own lives take precedence; their cattle or the cattle of strangers, their cattle take precedence over those of strangers; their laundering or that of strangers, their laundering takes precedence over that of strangers. But if the choice lies between the lives of strangers and their own laundering, the lives of the strangers take precedence over their own laundering.”

whether this attribution is historically reliable, cannot be known. Yet, it might be no coincidence that this teaching on the two men in the desert is attributed precisely to the rabbi, in whose mouth also the parable on the fish is put: When reading in conjunction Rabbi Aqiva's exegesis of Leviticus 25:26 as transmitted in *bBava Metsia* 62a and his fish-parable, the decisive difference between the two cases becomes apparent: The danger to life depicted in the teaching on the two men in the desert is brought about by natural circumstances. There is no human enemy or wicked government responsible for the situation the two men are trapped in, and consequently, there is also no danger to the men's identity involved here: The danger the men face is purely physical. In this situation, the urge to preserve one's own life legitimizes an act, the side-effect of which is the death of one's companion: The stronger grasps the pitcher of water and drinks, so that he can reach the next inhabited part of the desert, the weaker remains without water and dies of thirst. In the desert, far away from any human adversary, the urge to preserve one's own life legitimizes a breakdown of the "social order," according to which vital resources need to be shared, and according to which the weaker need to be helped by the stronger.

In opposition to a mortal threat brought about by natural circumstances, stands mortal threat brought about by a human enemy: Unlike a desert, a human enemy does not "only" (or not necessarily) endanger a Jew's physical survival, but his survival *as a Jew*. In Rabbi Aqiva's fish-parable, therefore, the fox – Rome – does not succeed in persuading the fish. The fox tempts them to leave their "water" – the Torah – and receive a safe, quiet life on earth in return, yet the fish are not willing to live as anything other than as fish. Even though the water became a dangerous element for them, they maintain that it is far better for them to remain in it, than to jump on the dry land and die as fish: "If we are afraid in the element in which we live, how much more in the element in which we die!" In face of a human enemy, priority is not physical survival, but "Jewish survival."

A similar differentiation between a non-human and a human enemy, between a threat to a Jew's physical life and his identity as a Jew, is apparent in the views ascribed to Rabbi Ishmael. In *bSanhedrin* 74a, Rabbi Ishmael is reported

having argued that in a private setting, one may indeed commit an act of idolatry in order to save one's life, since "he shall live in them [the laws of the Torah] (Leviticus 18:5), but not die through them."⁴⁵ Notwithstanding, Rabbi Ishmael prohibits Ben Dama, the son of his sister, to receive an urgently needed medication from Jacob, who is a native of Kefar Sekaniah and more importantly, who is a disciple of Jesus.⁴⁶

מעשה בבן דמא בן אחותו של רבי ישמעאל שהכישו נחש ובא יעקב איש כפר סכניא לרפאותו ולא הניחו רבי ישמעאל. ואמר ליה: רבי ישמעאל אחי הנח לו וארפא ממנו ואני אביא מקרא מן התורה שהוא מותר. ולא הספיק לגמור את הדבר עד שיצתה נשמתו ומת [...] ומאי הוה ליה למימר? "וחי בהם" (ויקרא יח ה) ולא שימות בהם. ורבי ישמעאל? הני מילי בצינעא, אבל בפרהסיא לא, דתניא: היה רבי ישמעאל אומר: מנין שאם אומרים לו לאדם עבוד עבודת כוכבים ואל תהרג שיעבוד ואל יהרג? תלמוד לומר: "וחי בהם" (שם) ולא שימות בהם. יכול אפילו בפרהסיא? תלמוד לומר: "ולא תחללו את שם קדשי" (ויקרא כב לב).

It once happened to Ben Dama, the son of Rabbi Ishmael's sister, that he was bitten by a snake and Jacob, a native of Kefar Sekaniah⁴⁷ came to heal him, but Rabbi Ishmael did not let him, whereupon Ben Dama said: My brother Rabbi Ishmael, let him, so that I may be healed by him. I will even cite a verse from the Torah that he is to be permitted. But he did not manage to complete his saying, when his soul departed and he died. [...]

⁴⁵ Rabbi Ishmael's exegetical technique ("He shall live by them, but not die by them") is similar to that of the son of Partura ("He, may live with you, but not die through you").

⁴⁶ Jacob is identified as a disciple of Jesus in this text's parallel versions (*tHullin* 2:22f., and variants in *yShabbat* 14:4 (14d-15a), *yAvodah Zarah* 2:2 (40d-41a) and *Qohelet Rabbah* 1:8, (3) and the manuscript-versions. Cf. Schäfer, *Jesus in the Talmud*, 138-139. I am quoting here the Bavli's version of the tradition on Ben Dama since the focus of this work is the Bavli.

⁴⁷ In the Yerushalmi-version of this story Jacob's village is termed "Kfar Sama," a pun on "sam" (poison, medicine). Cf. Schäfer, *Jesus in the Talmud*, 163 n. 14.

Now, what is it that he [Ben Dama] might have said? *He shall live by them* (Leviticus 18:5), but not die through them. And Rabbi Ishmael? This is only meant when in private, but not in public; for it has been taught: Rabbi Ishmael used to say: Whence can we deduce that if they say to one: Worship the idol and you will not be killed, that he may worship it, so as not to be killed? Because Scripture says, *He shall live by them* (ibid.), but not die through them. You might take this to mean even in public, therefore Scripture says, *And you shall not profane My holy name* (Leviticus 22:32) (*bAvodah Zarah* 27b).⁴⁸

Ben Dama and Rabbi Ishmael use one and the same verse, and one and the same interpretation of this verse to either proof the permissibility (Ben Dama) or the prohibition (Rabbi Ishmael) of receiving a cure from Jacob, the disciple of Jesus: “*He shall live by them* (Leviticus 18:5), but not die through them.” To Ben Dama, *He shall live by them* indicates that it is permissible to receive an urgent medication by a religious adversary. According to Rabbi Ishmael, however, this applies only to an instance of a *private* transgression: In private, he shall live by the laws of the Torah, and may transgress, but in public, he shall rather give his life than commit a transgression.

Obviously, the story on Ben Dama is not situated in a public setting, or at least, the text does not indicate this: Ben Dama is bitten by a snake, his life is in danger, and he asks for a medication delivered to him by a disciple of Jesus. He neither wanders around a market-place, nor is he accompanied by a larger group of other Jews, but probably lies in his house on a sick-bed. Nevertheless, Rabbi Ishmael prohibits the healing of Ben Dama at the hands of a disciple of Jesus – which implies, so the stama, that Ben Dama’s situation is perceived by Rabbi Ishmael as a public one. What constitutes publicity here, however, is not the presence of ten Jews or the setting in a public domain,⁴⁹ but the presence of

⁴⁸ On this story cf. also Boyarin, *Dying for God*, 34-36.

⁴⁹ Publicity can either consist of the presence of ten male, adult Jews or the event’s setting in a public domain, regardless of the presence of people. Gray (“Martyrdom

a representative of a rival religious sect.

Thus, whether Rabbi Aqiva and Rabbi Ishmael decide in favor of an endangered Jew's life or prefer his death over a transgression does *not* depend on the way they regard the act the Jew has to commit in order to survive in and of itself. The decision to either commit the transgressive act and to survive, or to not to commit it and to die, instead, depends on the setting at which the transgression is about to take place: In the desert (in "private"), without having the "other" watching, survival is the dominant theme, which subordinates everything else. But in face of an enemy, be it a tyrant or a member of a competitive religious sect, survival becomes secondary: When being confronted with a gentile government, Rabbi Aqiva compares the Jews to fish who can live only in their water, that is, with their Torah – even when the water is full of nets. And when being confronted with the disciple of Jesus, Rabbi Ishmael advises Ben Dama to die rather than receive a cure at the hands of an enemy's disciple: In times of persecution, "for even the slightest of any of the lesser commandments a man must give his life" (*tShabbat* 15:17 and *bSanhedrin* 74a). The public demonstration of the Jewish self, both to the Jewish and to the religious or political others' gazes, outweighs the saving of a Jew's physical life.

In contrast to the tricksters, the murdered thus distinguish more than anything else between a situation, in which danger is created by a tyrant and one, in which danger is caused by a natural catastrophe: Were the tyrant a "natural" threat, the public and provocative display of refusal to submit to the tyrant's authority would resemble a Don Quixote's fight against the windmills; to study Torah in public, despite a decree which prohibits this activity, would be akin to a picnic beneath a ruin, which is about to collapse – an almost suicidal endeavor. The murdered insist that the tyrant and his government *are no* collapsing ruin, but, instead, enemies to be confronted and rejected: Just as reluctance to punish a transgressor would imply an approval of his actions, so the avoidance of openly rejecting a tyrant would imply subjugation to his law.

and Identity," 250) analyzes how the Yerushalmi's amoraim and editors solved this ambivalence.

And just as in “normal times” the righteous Jew has to punish the wrong-doer, so, too, when the wrong-doer becomes king, the Jew has to confront him through any means available to him: through ignoring his decrees and openly refusing accommodation, collaboration and tactical consent.

To the mind of the martyr then, a trickster’s act of tactical accommodation is not forced upon him/her by the obligation to save life, but by the tyrant. The trickster’s strategy will therefore slide into approbation, with the distinctive heritage of the Jewish community being lost on the way: At the end of the day, the trickster-Jews and the Romans will not only *look* the same, but *be* the same. Thus, even though the murdered, too, agree that a Jew may commit a transgression for the sake of saving a life, they insist, that a “time of persecution” requires a complete rejection of any, however small deviation from Jewish practice: In a time of persecution, not only are those acts that are straightforwardly transgressive to be abandoned, but also those, that are foreign. In a “time of persecution,” the foreign becomes transgressive, and even the otherwise “permitted” transgressions (i.e., those other than bloodshed, adultery and idolatry) are to be rejected.

Tellingly, as a sample for such a “smallest of the smallest transgressions” that is to be avoided at all costs the Bavli depicts an act, which is no transgression at all: In a time of persecution, one may not “even change one’s shoe strap” (*bSanhedrin* 74b). (The Tosfot – here: Rabbenu Tam – explain that the shoe straps worn by Jews were white, and those worn by heathens black.⁵⁰) Even though shoe straps and their colors do not have any halakhic meaning in “normal times,” their color becomes, in a time of persecution, an identity-marker of the Jews to be upheld at all costs: It is not only forbidden to transgress the divine law, but also to slightly resemble someone, who does not obey this law.⁵¹

⁵⁰ Cf. Tosfot, s.v. ערקתא דמסאנא on *bSanhedrin* 74b.

⁵¹ Cf. also Berkovitz (*Execution and Invention*, 164-165) on Rabbi Yehudah’s interpretation of a “nice execution” (in *tSanhedrin* 9:11): The sages accuse Rabbi Yehudah of advocating a disgraceful mode of execution. To this, Rabbi Yehudah in principle agrees, yet he argues that one nevertheless has to adhere to this mode of execution because of ‘*neither shall you follow their laws*’ (Leviticus 18:3): “The dispute between Rabbi Yehudah and the Sages deals with the troubling area of foreign

Possibly, it is the fear of not being able to differentiate anymore between the “insider” and the hostile “outsiders,” which Rava has in mind when prescribing that on Purim one has to drink, until one cannot differentiate anymore between “Cursed be Haman” and “Blessed be Mordecai” (cf. *bMegillah* 7b). On the day the Jews celebrate the victory of the trickster Esther over Haman, one has to remember, that Esther’s strategy – her living in the midst of Ahasuerus’ palace as his wife – is a risky one: When everything looks the same, it may ultimately make no difference anymore who is blessed and who is cursed, who is insider in the palace and who is not.⁵² The words of Haman “There is a people (שְׂנוּ עַם) [scattered abroad and dispersed among the peoples in all the provinces of your kingdom]” (Esther 3:8), is interpreted by Rava, accordingly, as “they are negligent (“they slept” שָׁנוּ) of the precepts”: Haman was successful in persuading Ahasuerus to issue the decree of persecution, because the Jewish people were “sleeping,” they forgot their heritage, and were unaware of the difference between the blessed and the cursed.

In face of the enemy, when the Jewish people run the danger of forgetting the difference between the blessed and the cursed, more important than the defense of life becomes the public demonstration of “what this life is about.”⁵³ As

practices not explicitly prohibited. [...] The sages allow such borrowings, distinguishing between that which is foreign and that which is transgressive. Rabbi Yehudah identifies the two, making the foreign inherently transgressive – anything Roman must be shunned.” Cf. also the Yerushalmi’s story on Lulianus and Papias: “But if he is in public, even as concerns an insignificant rule he should not heed [the gentile]. As in the case of Lulianus and Papias, to whom gentiles gave water in a colored glass vessel, but they would not accept it from them” (*yShevi’it* 4:2, 35a). The colored glass made the water look like wine, and the brothers did not want people to think they were transgressing the law by drinking wine made by gentiles.

⁵² Rava’s famous statement is in the Bavli not associated with a joyful, amusing incident: Once Rava and Rav Zera partook together of the festive meal of Purim. Rava got so drunk that he could not differentiate anymore between “Blessed be Mordecai” and “Cursed be Haman.” As a result of his drunkenness, he “slaughtered Rav Zera.” He repented the next morning and luckily, could successfully resurrect Rav Zera. The next year, however, he refused to have another Purim-meal with him, since “miracles do not occur each year” (*bMegillah* 7b).

⁵³ Kalmin (“Rabbinic Traditions about Roman Persecutions,” 21-22) notes that the prohibitions of Jewish practice, which the Romans are described as having instituted,

Samuel Klausner subsumes: “Martyrdom, by placing ideology ahead of physical survival, affirms the priority of culture over nature and the group’s life, law, and civilization over biological self-interest.”⁵⁴ The murdered thus embody the precise opposite of the trickster’s naturalization of oppression: Whereas the tricksters physically survive through concealing their identities, the murdered lose their lives through acts of public self-representation: They set “culture over nature,” their identities as Jews over the physical survival of their bodies. And whereas the tricksters’ response to a tyrant, though presented as divinely sanctioned, leads to a physical survival *within* tyranny, the response of the murdered leads to death, yet aims at the *destruction* of the oppressive system: “[T]he staging of a voluntary act of self-sacrifice is meant to *transform reality*.”⁵⁵

Martyrs, tricksters, and mSanhedrin 8:7

The strategies of resistance that are enacted by the martyrs and the tricksters echo the different, contradicting interpretations of the killing of the pursuer inherent in *mSanhedrin 8:7* and its gemara. As described in the first chapter, according to one possible reading of *mSanhedrin 8:7*, the pursuer may be killed so as to save the pursuer’s victim. This legitimation of the pursuer’s death matches the trickster’s survival strategy, and is in the gemara to *mSanhedrin 8:7* embodied by Esther: When Esther approaches Ahasuerus in order to spoil Haman’s decree of persecution, she does not save anyone from sin – she saves the Jewish people from a decree of persecution. Esther thus symbolizes not a “rescue from a transgression through death,” but rather, “a

do not represent what the Romans actually did, but what the rabbis themselves regarded as the pivotal core of Judaism.

⁵⁴ Klausner, “Martyrdom,” 233. The “culture over nature”-motif might be apparent also in the description of Rabbi Haninah ben Teradion’s death. Rabbi Haninah ben Teradion is burned with a scroll of the Torah wrapped around him, and exclaims that “the parchments are being burnt but the letters are soaring on high” (*bAvodah Zarah* 18a). The *physis* of the parchment is destroyed, but the idea the letters express “survives.” Cf. also Shapira, “Rodef and Self-Defense,” 254, on the rabbinic ambivalence toward a “soul-body separation.”

⁵⁵ Pannewick, “Introduction,” 16.

rescue from death through a transgression.” Esther, had she been able to read *mSanhedrin* 8:7, would have placed it among those mishnayot, which deal with the saving of life and the transgressions which may be committed for survival’s sake: Just as she legitimately committed a transgression in order to save the lives of her people, so too, a bystander may kill the pursuer in order to save the life of the pursued.

According to the other possible reading of *mSanhedrin* 8:7, the pursuer is killed so as to save him, the pursuer, from committing a severe transgression. This reading is embodied in the gemara to *mSanhedrin* 8:7 by the decision reached by the Lyddan sages: As explained above, the sages do not only consider the persecuted Jew as a pursued in need of rescue from the pursuer (= the evil government), but also as someone, who is to be saved from a severe transgression. The Lyddan sages thus aim not only at the mere physical survival of the persecuted Jew, but also at his survival *as a Jew*, and they therefore identify three transgressions – bloodshed, idolatry and adultery – which catapult the transgressor “beyond the livable”: A Jew, who commits one of these three transgressions may survive physically – yet, he does not survive *as a Jew*, and is therefore to be “saved” from these three transgressions before committing them.

The reasoning behind the “rescue” of the pursuer and the Lyddan sages’ “rescue” of the persecuted is identical: Just as the mishnaic pursuer is “saved through his life” from committing a transgression, so too, the persecuted Jew “saves himself through his life” from a transgression. Both the mishnaic pursuer and the Jew, who suffers persecution, are to be “saved from sin through their lives” so as to ensure their survival as Jews.⁵⁶ The Lyddan sages would accordingly have placed *mSanhedrin* 8:7 into Tractate Sanhedrin, among those mishnayot that identify the transgressions a Jew needs to be “saved from” even at the cost of his life.

⁵⁶ On account of the Lyddan sages’ focus on the survival of the pursued as a Jew, their vote is also used in the gemara as an argument in favor of the view that also an idolater is to be “saved by his life”: Such as a persecuted Jew needs to be saved from bloodshed, adultery and idolatry, so, too, a pursuer should be saved from bloodshed, adultery *and* idolatry.

However, already in the gemara to *mSanhedrin* 8:7, the Lyddan sages' reasoning is "thought forward" to its logical conclusion: If the pursuer is "saved by his life" so as to ensure his survival as a Jew, then, when the survival of the distinct Jewish collective as a whole is at stake, or deemed to be at stake – when a transgression is performed in public or in times of a persecution – "one must be killed rather than transgress *even a minor precept*," as Rava and Rabin transmit in the name of Rabbi Yohanan (cf. *bSanhedrin* 74a and *tShabbat* 15:17). Since survival as a Jew is what "matters," in times of a persecution or in public, a Jew has to save him/herself even from acts that are no transgressions at all, but consist solely in an outward accommodation to the enemy: Rabbi Aqiva and Rabbi Haninah ben Teradion, the most illustrious rabbis who suffered a violent death at the hands of the gentile government, are being killed not because they refuse to transgress core commandments of the divine law, but because they engage in public acts of self-representation, rejecting tactical assimilation and pragmatic compromises.⁵⁷

Thus, the martyr's ideology, even though it can be read as a logical outcome of the Lyddan sages' vote, deviates from it (and from *mSanhedrin* 8:7): According to the latter, one may well live *and* commit a transgression.⁵⁸ Transgressions as severe as idolatry, the desecration of the Shabbat, and bestiality do *not* warrant a preemptive killing, a "rescue," of the transgressor.⁵⁹ *Unlike* the Lyddan sages,

⁵⁷ Cf. also Blidstein's remark on the suffering of the trickster: "Elazar b. Perata undertakes to both fight Rome and teach Torah, Hanina b. Teradyon lives and dies to demonstrate the Jew's uncompromising devotion to God and Torah; Jose b. Kisma teaches his people how to preserve themselves intact into the future. [...] If survival is a verdict, both Elazar b. Perata and Hanina b. Teradyon survive, though of course in different ways. Who suffers the most? R. Jose b. Kisma" (Blidstein, "Rabbis, Romans, and Martyrdom," 61). The one, who suffers most, is, according to Blidstein's reading, the one who survives physically, yet does not survive as a Jew.

⁵⁸ The Lyddan sages in principle cohere with the mishnah: They decide that one may commit a transgression in order to save a live. One shall "live by them and not die through them." Yet, whereas the mishnah does not "save the idolater by his life," the Lyddan sages include also idolatry among those transgressions, that "outweigh" life.

⁵⁹ One could imagine even a *kal va-homer* such as "if the *voluntary* idolater does not need to be saved by his life, as *mSanhedrin* 8:7 claims, how much more so should a person, who is *forced* to choose between death and idolatry, not require saving by his life?"

however, the martyrs do not “only” die for the sake of avoiding most severe transgressions, but for the sake of avoiding *any* transgression at all.

Paradoxically, too, the martyrs’ “over-reading” of the Lyddan sages’ vote catapults them into proximity with their strategic antagonists, the tricksters: According to *both* the tricksters and the murdered, the situation of persecution influences the way they value a transgression. The murdered and the tricksters draw entirely different conclusions from their socio-political reflections: Whereas the martyrs reason that, in a time of persecution, one may not even outwardly resemble the enemy, the tricksters support precisely the opposite reasoning: In a time of persecution, a Jew may cover himself with a veil and appear as if he were a subordinate, obedient subject. Yet, the difference between the tricksters and the murdered may not aptly be described as “the martyrs ignore the tyrant” and “the tricksters (tactically) assimilate.” The difference between their strategies of resistance lies rather in the way they envision themselves vis-à-vis the political and/or religious “other”: To the murdered, a Jewish identity requires the public gaze, Jewish and non-Jewish, to appraise and acknowledge the boundaries between the Jewish community and the non-Jewish, hegemonic other. To the tricksters, by contrast, the public demonstration and demarcation of boundaries and difference is less of a concern. Thus, whereas the murdered expose their selves, the tricksters conceal themselves. In contrast to the murdered, they differentiate between the foreign and the transgressive: The foreign other is here only one among other unfortunate incidents to cope with, almost like a collapsing ruin or a stormy ocean. It is akin to a natural evil, but no rival who challenges and endangers the maintenance of a distinct Jewish identity. The “other” is to the tricksters nothing to be fought against, but something to be lived through.

To *both* the murdered and the tricksters, however, the “other” is an integral part of their reasoning: Actions are not categorized mechanically into “good” and “bad,” or “right” and “wrong,” but are part of a multi-faceted, multi-dimensional reality. When it comes to the halakhic, juridical evaluation of human behavior, *both* the tricksters and the murdered thus share a non-technocratic, sociological approach: They understand the power-relations,

which frame any particular action, its socio-political context and purpose, to be part of what constitutes its meaning. To both, an action is not categorized as “right” or “wrong” without giving weight to the political and sociological context, in which it is embedded.

Babylonian Ambivalence

The martyr and his audience

In both the Palestinian and the Babylonian narrative traditions, those Jews who are killed by the state's officials are presented in direct or indirect conversations with their enemies. Here and there, the killed reveal straightforwardly in front of their adversaries their perception of themselves and the political situation they are trapped in. For example, the seven sons of Miriam bat Tanhum¹ declare to the tyrant's face, one after the other, that in their minds, he is nothing but a marionette of God. Upon being asked by the tyrant why God does not save him, the youngest son answers: "As for ourselves, our lives are forfeit to heaven. If you do not slay us, the Omnipresent has numerous executioners. There are many bears, wolves, serpents, leopards, and scorpions to attack and kill us (*Lamentations Rabbah* 1:16).² A direct, face-to-face conversation with a tyrant is conducted also by Lulianus and Pappus: Traianus (=Trajan) mocks Lulianus and Pappus, arguing that if they were of the people of Hananiah, Mishael and Azariah, their God should deliver them from his hands as He did to their predecessors.

¹ Miriam bat Tanhum is the name given in *Lamentations Rabbah* to the "Mother of Seven" from 2 Maccabees 6-7. Cf. besides *Lamentations Rabbah* 1:16 and 2 Maccabees 6-7 also 4 Maccabees, *bGittin* 57b, *Pesiqta Rabbati* 43, *Yalkut Shimoni*, Tavo § 938 and *Seder Eliahu Rabbah* 30). For a bibliography on the story cf. Ilan, "Hannah, Mother of Seven." In its rabbinic versions, the story contains an allusion to the Binding of Isaac: The mother asks her youngest son to transmit to Abraham that her trial is heavier than his trial – he was commanded by God to sacrifice only one of his sons, Isaac, whereas she sacrifices all seven. This allusion to Abraham possibly echoes a further parallel between the two stories: The sons' mother commits suicide after the murder of her youngest son, and like her, also Sarah dies after the sacrifice (or the almost-sacrifice) of her child (cf. Genesis 23:1-2 and its rabbinic interpretation). Cf. van Henten and Avemarie, *Martyrdom*, 136, on the interdependence of the Maccabean accounts of the "Mother of Seven" and the rabbinic tradition.

² Cf. also 2 Maccabees 7:18 ("Be not deceived without cause: for we suffer these things for ourselves, having sinned against our God, and things worthy of admiration are done to us") and 7:32 ("For we suffer thus for our sin").

Unimpressed by Traianus mockery, the brothers “inform” Traianus that “Hananiah, Mishael and Azariah were of clean [character], and Nebuchadnezzar was worthy of a miracle being wrought at his hands, but you are a wicked king, and you are not worthy of a miracle being wrought at your hands. And as for us, we are liable to death before heaven” (*Sifra emor* 9:5).³

Indirect conversations with their adversaries are conducted by Rabbi Haninah ben Teradion and Rabbi Aqiva: The two rabbis gather crowds and teach them Torah, directly defying the decree prohibiting this activity (*bBerakhot* 61b and *bAvodah Zarah* 17b-18a).⁴ Their public Torah-sessions are not a religious commandment, or an event which they were just “in the mood” of organizing – they are a deliberate response to the decree, directed towards their fellow Jews and those, who issued the decree: When rejecting tricksterism, the rabbis force both the other “insiders,” the Jews, and the enemy to become aware of the existence of the Jewish alternative, competing hierarchy and history. The whole “point” of teaching Torah in public despite the issue of a decree, which prohibits this activity, is to let all become aware of the position the tyrant occupies, according to the rabbis’ scheme, in the course of events: someone whose power is illegitimate, to be ignored and to be devaluated completely.

When leaving the tribunal, Rabbi Haninah ben Teradion and his family again display in public their submission to God’s judgment, and therewith, their de-valuation of the tyrant’s power.⁵ Rabbi Haninah ben Teradion declares: “*The Rock, His work is perfect; for all his ways are justice* (Deuteronomy 32:4). His wife continued: *A God of faithfulness and without iniquity, just and right is He* (ibid.); and the daughter quoted: *Great in counsel and mighty in work, whose eyes are open upon all the ways of the sons of humans, to give everyone*

³ Cf. also *bTa’anit* 18b, *Semahot* 8:15 and *Ecclesiastes Zuta*, parasha 3. The account in *Sifra* is the earliest mention of their martyrdom in rabbinic literature. Cf. van Henten and Avemarie, *Martyrdom*, 144.

⁴ The rabbis’ public Torah-lessons are transmitted only by the Bavli. They are not recounted in the Palestinian sources (cf. *Sifre Deuteronomy* 307 on Rabbi Haninah ben Teradion, and *yBerakhot* 9:7 (14b) on Rabbi Aqiva).

⁵ Also in the *Sifre*’s version of the tradition, Rabbi Haninah ben Teradion and his family are portrayed as accepting their deaths as God’s just judgment (cf. *Sifre Deuteronomy* 307).

according to his ways, and according to the fruit of his doing (Jeremiah 32:19). Said Rava: How great were these righteous ones, in that the three Scriptural passages, expressing submission to Divine justice, readily occurred to them just at the appropriate time for the declaration of such submission” (*bAvodah Zarah* 18a). All those, who watch the family on their way to execution (or rather, who hear about their story), understand that they treat the tyrant as if he did not exist.⁶

Thus, on the one hand, the murdered hollow out the tyrant’s power entirely: The tyrant neither succeeds in conquering their faith, nor does he inflict their deaths. The only participants in the scenery are the righteous Jews and God. The tyrant is virtually interpreted out of the story; he is a mere tool in a choreography designed by God and does not exist at all as an independent, self-determined agent.⁷ On the other hand, however, the tyrant’s presence is an integral part of the “staging” of their violent death.⁸ He is, far from being

⁶ Almost all murdered Jews are portrayed as accepting God’s just punishment and thereby, as “saving” the idea of a just God. Aside from Rabbi Haninah ben Teradion’s family in *bAvodah Zarah* 18a, or the seven sons of Miriam bat Tanhum/Hannah (*Lamentations Rabbah* 1:16, 2 Maccabees 7:18 and 7:32), cf. also Josephus, *Wars*, 7.320, who places the following words in the mouth of Eleazar ben Yair in Masada: “That fire which was driven upon our enemies did not of its own accord turn back upon the wall which we had built; *this was the effect of God’s anger against us for our manifold sins*, which we have been guilty of in a most insolent and extravagant manner with regard to our own countrymen; the punishments of which let us not receive from the Romans, but from God himself, as executed by our own hands; for these will be more moderate than the other” [emphasis mine]. Cf. also Avemarie (“Aporien der Theodizee,” 206): “Dass ein fremder Tyrann über Leben und Tod entscheidet ist nur äußerer Schein. In Wirklichkeit ist Gott der Herr der Geschichte, und deshalb kann der wahre Grund für den Tod der Märtyrer nicht in Ungehorsam gegenüber fremder Tyrannei, sondern nur in Ungehorsam gegen Gott, in einer Übertretung des göttlichen Gesetzes, liegen.” On the problem of theodicy cf. also Boyarin, *Dying for God*, 95ff., 106-107.

⁷ Cf. Berkovitz, *Execution and Invention*, 206, on the midrash, that ascribes a minor transgression to Rabbi Shimon (cf. *Mekhilta de-Rabbi Ishmael*, Mishpatim 18): “[T]he midrash is completely uninterested in the injustice of the Roman judge. The midrash assumes, from the outset, that all punishment comes from God, and it makes the Roman punishers irrelevant.”

⁸ Cf. also Bradatan’s description of the “staging” of suicide bombers (“A light For the Future”): “Martyrdom (political martyrdom included) is as much the deed of the one who performs it as it is of those who witness it. The self-immolator’s death, no matter

irrelevant, one of the scenery's main protagonists. As noted by Alicia Grays: "[T]he martyrs all conduct conversations with outsiders – whether persecutors or others – who thereby become aware of the martyrs understanding of his own situation and of the supreme religious value of the sacrifice."⁹ It is of crucial importance to the murdered, that the tyrant himself becomes aware of his devaluated position in the Jew's perception of history.¹⁰ It might be on account of this public facet of their violent deaths, too, that their deaths are recounted at all: Without the enemy's (and the Jew's) receptive gaze, without the "stage," the entire scenery is senseless. The existence of the audience provides the righteous Jew with the opportunity to demonstrate and testify to his Jewish faith, a presentation that is void of meaning "in the desert," or without an audience.¹¹

The transgressions of Rabbi Haninah ben Teradion and his family

The demonstrative, almost exhibitionist facet of the martyr's behavior is made subject in a narration on the transgressions Rabbi Haninah ben Teradion and

how spectacular, will remain utterly meaningless unless it is captured by a receptive gaze [...]. That's why suicide bombers' primary targets are not those whom they kill, but those in front of whom they perform the act. Whatever they do they do as if on a stage: the videotapes they leave behind, with all their rehearsals, mise-en-scène, and standard recitations; the posters displayed afterward; and the entire publicity industry backing them – all of these are a structural part of what suicide bombers do."

⁹ Gray, "Martyrdom and Identity," 243 n. 4.

¹⁰ It fits into this perception of things that most of the murdered themselves are not portrayed as being bothered by the precise nature of their transgression: It is irrelevant to them *why* they are being killed by the tyrant; what counts is that the tyrant becomes aware of their interpretation of the situation. Cf. Avemarie, "Aporien der Theodizee," 202-203, on Lulianus and Pappus: "Ungesagt bleibt lediglich, was es für Sünden sind, auf die die Brüder [here: Lulianus and Pappus, C.T.] ihr Leiden zurückführen. Das auszuführen scheint aber auch nicht nötig. Es genügt, sich grundsätzlich darauf verlassen zu können, dass Gott nicht ungerecht handelt. Der Hinweis auf die eigenen Sünden hat nicht empirischen, sondern abstrakten, thetischen Charakter."

¹¹ Boyarin (*Dying for God*, 21) stresses, that "[m]artyrdom, even more than tragedy, is *Thanatoi en tōi phanarōi*, 'deaths that are seen', murders in public spaces." Avemarie ("Zeugnis in Öffentlichkeit," 262) concludes that at the latest toward the end of the tannaitic period, the public aspect of the "sanctification of God's name" was part of its constituents. He argues (*ibid.*, 277) that this public aspect is *in nuce* apparent already in the Torah and the Prophets.

his daughter are imagined of being guilty:

מאי טעמא אענש? משום הוגה את השם בפרהסיא ועל אשתו להריגה דלא מיחה ביה. מכאן אמרו: כל מי שיש בידו למחות ואינו מוחה נענש עליו. ועל בתו לישב בקובה של זונות, דאמר רבי יוחנן: פעם אחת היתה בתו מהלכת לפני גדולי רומי. אמרו: כמה נאות פסיעותיה של ריבה זו. מיד דקדקה בפסיעותיה.

Why was he [Rabbi Haninah ben Teradion] punished? Because he used to pronounce the Name in public. His wife was punished by being killed, because she did not prevent him. From this it was deduced: Anyone who has the power to prevent [one from doing wrong] and does not prevent, is punished for it (cf. *bShabbat* 54b). His daughter was consigned to a brothel, for Rabbi Yohanan related that once his daughter was walking in front of some great men of Rome. They said: ‘How beautiful are the steps of this girl!’ Immediately she took particular care of her steps (*bAvodah Zarah* 17b-18a).

Both the transgressions of Rabbi Haninah ben Teradion and his daughter are actions of exaggerated self-assertion in front of a non-Jewish audience. Rabbi Haninah ben Teradion’s daughter walks in front of some “great men of Rome” and reacts, upon what she understands to be flattery, through taking even more care of her steps. She directly “answers” them, and likewise does her father: What arouses his reaction is not a Roman man’s flattery, but his discriminatory decree, yet, his act parallels the one of his daughter: He reveals himself in front of the Romans through gathering crowds and teaching them Torah, and finally, he even pronounces God’s name in public. The rabbi’s seemingly brave teaching of the Torah, his steadfast and daring rejection of the tyrant’s decree, is here stretched into an extreme and as such, it visualizes the negative implications of his deed: Like his daughter, Rabbi Haninah ben Teradion uncovers something intimate, which belongs to himself, in front of eyes and

ears that are not supposed to gaze at and listen to him. Metaphorically, both father and daughter strip themselves naked in front of a Roman audience.¹²

Both are seduced by the Romans: “To seduce is to incite someone to open up his or her innermost self to images, sounds and words offered by the seducer and to lead the seduced – complicitly or unwittingly – to an end first conceived by the former.”¹³ The Roman men detect the Achilles’ heel of Rabbi Haninah ben Teradion’s daughter – her desire for male praise – and upon touching this weak spot, she endows them with the power to influence her behavior: an outcome which coheres, regardless of whether the Romans indeed enjoyed watching her steps, to the hierarchy installed by them.¹⁴ She makes the Roman men into her “significant others.”

The same holds true regarding her father: Even though Rabbi Haninah ben Teradion intends to demonstrate, that the Romans do *not* have the power to influence his behavior, that they cannot “seduce” him into tricksterism and take control of his power to publicly represent himself, he endows the Romans with power through ascribing to them the role of those, who gaze and listen to his “performance” of his self. An outside, non-Jewish gaze becomes a constitutive element in the Jew’s perception of who he is – as if *without* the tyrant being aware of the Jew’s perception of history, without him seeing and understanding, and eventually, hearing God’s name, the Jew is “less” a Jew. The tyrant, without intending to do so, “helps” Rabbi Haninah ben Teradion to impressively and powerfully demonstrate his faith. In the aftermath of his public Torah-session he loses his life, yet he gains recognition.¹⁵

¹² Cf. Boyarin, *Dying for God*, 70ff.

¹³ Asad, *Is Critique Secular?*, 33.

¹⁴ Obviously, the same might be said about the trickster: The trickster, too, models his public behavior according to the enemy’s design and is, in this sense, far from independent from the enemy’s gaze. Yet, in contrast to Rabbi Haninah ben Teradion’s daughter, the trickster hides his “weak spots.” He does not aspire to be known by the others, but behaves in accordance with the enemy’s gazes out of necessity and pragmatism.

¹⁵ A similar “favor” is done by Tineius Rufus, the Roman governor of Judaea, to Rabbi Aqiva: The Yerushalmi tells, that just as Rabbi Aqiva is tried and tortured by Turnus Rufus, the time for the recital of the Shema’ arrives (*yBerakhot* 9:7, 14b).

Accordingly, Rabbi Haninah ben Teradion's self-conscious demonstration of a Jewish identity in face of the enemy is in the narration on his transgression inverted: His negative, deprecatory reaction to the Romans, his fight against their decrees, and his daughter's "positive" reaction are portrayed as two sides of the same coin: Just as the Romans' gazes shape his daughter's behavior and prompt her reaction, so the Romans' threat shapes also his behavior and prompts his reaction. The Romans, who direct words of flattery towards Rabbi Haninah ben Teradion's daughter, and issue a decree forbidding the public teaching of the Torah provoke the Jews' reaction, and let a force "beyond" Judaism influence, or shape Judaism. As noted by Daniel Boyarin, "[i]n defying the Romans and thus courting a martyr's death, Rabbi Hanina was behaving in a way culturally intelligible to the Romans – behaving like a "real man," a muscle Jew – while Rabbi Yose the son of Kisma through deceptive, "womanish" complicity with the Romans, *resisted* their cultural hegemony."¹⁶

Rabbi Aqiva recites the *Shema*' – and smiles. Turnus Rufus is irritated and asks him: "Old man, old man: Either you are deaf, or you make light of suffering" (ibid.). Rabbi Aqiva explains that "neither am I deaf, nor do I make light of suffering, but all of my life I have read the verse, *And you shall love the Lord, your God, with all your heart, and with all your soul, and with all your property* (Deuteronomy 6:5). I have loved him with all my heart, and I have loved him with all my property, but until now, "with all my soul" I have not been tested (lit.: has not been tested for/to me). But now, that the opportunity of loving him with all my soul has come to me, and it is the time of the recital of the *Shema*', and I was not deterred from it, therefore, I recite and therefore I smile" (ibid.). Rabbi Aqiva smiles, because he is able to perform a commandment at the very moment of being tried and thereby subverts the hierarchy which Turnus Rufus attempts to implement. Mandel ("Was Rabbi Aqiva a Martyr?") analyzes that "[w]hat is significant here for our narrator is the fact that Rabbi Aqiva was able to turn a simple act of reciting the *Shema* into political drama: His amusement and joy at being able to perform this act at the very moment that he is being tried becomes a weapon against the ruthless governor, in placing the love of God and His sovereignty above the honor due to Tineius Rufus himself – precisely that which the governor is trying to subvert by creating his act of drama through torture and inquisition."

¹⁶ Cf. Boyarin, *Dying for God*, 71. On the gender-politics of martyrdom- and trickster-narratives respectively cf. also Young, "The 'Woman with the Soul of Abraham'" (1991); Levine, "Diaspora as Metaphor" (1992); Satlow, "Try to be a Man" (1996); Boyarin, "Masada or Yavneh" (1997); Cohen, "Towards an Erotics of Martyrdom" (1998); Moore and Anderson, "Taking it Like a Man" (1998); Boyarin, *Dying for God* (1999); Fonrobert, "The Handmaid" (2006) and Cobb, *Dying to Be Men* (2008).

Rabbi Haninah ben Teradion and his daughter let “Roman culture define the parameters of rabbinic culture.”¹⁷

Thus, while the martyr does all in order to demonstrate that he ignores the other’s threats, the narrative on Rabbi Haninah ben Teradion’s transgression unwraps the implications of his behavior: When the martyr declares *any* transgression, however trivial, forbidden for the sake of saving his life, or even provokes the other’s violent response through deliberately ignoring his decrees, then his actions are just as much as the trickster’s camouflage determined by the latter. The martyr, like the trickster, takes notice of the other’s gazes and responds. Rabbi Haninah ben Teradion, like his daughter, configures his self in relation to an outsider, an ethnic, religious and political other.

In the Babylonians’ “reading against the grain” of the tradition on Rabbi Haninah ben Teradion’s public Torah-lesson, the latter are no longer associated with manliness, bravery and steadfastness, but instead, with the vulnerability, lack of self-determination and self-restraint of the weakest of his family-members: his daughter. When Rabbi Haninah ben Teradion’s transgression is paralleled to that of his daughter, his public, uncompromising rebellion against the tyrant’s decrees is exposed as being generated, just as much as the trickster’s masquerade, by the tyrant. The narrative on Rabbi Haninah ben Teradion and his daughter’s transgressions thus reveals the proximity between martyr and trickster: Neither act independently, but rather in reaction to the others’ gaze and threat. The martyrs’ actions are determined by the other, just as the trickster’s mask is designed by the other.

¹⁷ Beth Berkovitz concludes that Rabbi Yehudah, who argues in favor of a disgraceful mode of execution so as to *not* to resemble the Roman executioners (cf. *tSanhedrin* 9:11, according to ms Vienna and the Tosefta’s first printed edition), “[a]llows in Roman influence as much as the Sages do, since he continues to let Roman culture define the parameters of rabbinic culture” (Berkovitz, *Execution and Invention*, 164-165).

*The transgressions of Rabbi Eliezer and Ben Dama*¹⁸

A critique of excessive self-representation is apparent also in the Bavli's account on Rabbi Eliezer's encounter with the enemy. The Bavli transmits that Rabbi Eliezer was arrested for adhering to the "*minim*'s teachings." Rabbi Eliezer is distressed, for he does not remember having listened to any such teachings. Rabbi Aqiva helps him to remember:

עקיבא, הזכרתני! פעם אחת הייתי מהלך בשוק העליון של ציפורי ומצאתי אחד, ויעקב איש כפר סכניא שמו. אמר לי: כתוב בתורתכם "לא תביא אתנן זונה [וגו']" (דברים כג יט). מהו לעשות הימנו בהכ"ס לכהן גדול? ולא אמרתי לו כלום. אמר לי: כך לימדני "כי מאתנן זונה קבצה ועד אתנן זונה ישובו" (מיכה א ז). ממקום הטנופת באו למקום הטנופת ילכו. והנאני הדבר. על ידי זה נתפסתי למינות ועברתי על מה שכתוב בתורה: "הרחק מעליה דרכך" (משלי ה ח), זו מינות, "ואל תקרב אל פתח ביתה" (שם), זו הרשות.

Aqiva, you have reminded me! I was once walking in the upper-market of Sepphoris when I came across one [of the disciples of Jesus the Nazarene],¹⁹ Jacob of Kefar Sekaniah by name. He said to me: It is written in your Torah: *You shall not bring the hire of a harlot [or the price of a dog into the house of the Lord your God]* (Deuteronomy 23:19). May such money be applied to the erection of a latrine for the High Priest? And I did not say to him anything. Said he to me: Thus was I taught [by Jesus the Nazarene]:²⁰ *For of the hire of a harlot has she*

¹⁸ In the early Palestinian sources (*tHullin* 2:24 and *Qohelet Rabba* 1,8 (3) the stories on Rabbi Eliezer and on Ben Dama are linked together, one after the other, in the same chain. Boyarin (*Dying for God*, 35 and 40-41) suggests that also in the Bavli they are to be read in conjunction.

¹⁹ The bracketed words occur in manuscripts of the Bavli (ms Munich 95, ms Paris 1337 and ms New York 15). Cf. Schäfer, *Jesus in the Talmud*, 137-138.

²⁰ Again, the bracketed words occur in manuscripts (ms Munich 95, ms Paris 1337 and ms New York 15), and in the manuscripts versions of the text's parallels (*tHullin* 2:24,

gathered them and unto the hire of a harlot shall they return (Micah 1:7). They came from a place of filth; let them go to a place of filth. And I was pleased by this. This is why I was arrested for *minut* and I transgressed what is written in the Torah: *Remove your way far from her* (Proverbs 5:8), this is *minuth*; *and come not near to the door of her house* (ibid.), this is the ruling power²¹ (*bAvodah Zarah* 17a).

Rabbi Eliezer is arrested, because he once listened to a teaching of Jacob of Kefar Sekaniah, a disciple of Jesus.²² Rabbi Eliezer was, as he himself admits, pleased by this teaching. This pleasure, so Rabbi Eliezer, explains not only his being arrested by the Romans for *minuth* – adherence to an illegal sect, Christianity²³ – but also the punishment God inflicts upon him: The verse “*Remove your way far from her, and come not near the door of her house*” (Proverbs 5:8) is read by Rabbi Eliezer in relation to Proverbs 3:3, “*For the lips of a strange woman drip honey, and her mouth is smoother than oil*”: One

Qohelet Rabbah 1:8 (3). Cf. Schäfer, *Jesus in the Talmud*, 137-138. In the Toseftan parallel of this text the teacher is called “Yeshu the son of Pantiri.”

²¹ Cf. *mAvot* 1:10, “Seek not intimacy with the ruling power”; cf. also ibid. 2:3.

In the continuation of *bAvodah Zarah* 17a, it is asked how far one is to keep away from the ruling power and *minut*. Thereupon Rav Hisda answers that the necessary distance is four cubits. This measure appears as a distance to the “other” also in *bShabbat* 127b: “Our Rabbis taught: The scholars were once in need of something from a noblewoman where all the great men of Rome were to be found. [...] So Rabbi Joshua and his disciples went. When he reached the door of her house, he removed his tefillin at a distance of *four cubits*, entered, and shut the door in their face.” Also the distance Rabbi Aqiva keeps from Rabbi Eliezer, who was banned (possibly on account of his attraction to Christianity, cf. Boyarin, *Dying for God*, 26-41 and Schäfer, *Jesus in the Talmud*, 51), is four cubits (cf. *bBava Metsiah* 59a-b).

²² According to the disciple’s teaching, it is allowed to erect a latrine for a High Priest with money of the hire of a harlot. (In the Toseftan parallel of this text, in *tHullin* 2:24, the specific teaching of the disciple of Jesus is not spelled out. In *Qohelet Rabba* 1:8 (3) the teaching is spelled out in detail.) According to the analysis of Schäfer (*Jesus in the Talmud*, 46), this teaching possibly shows that “[t]he editor of our story wants to imply two things: first, R. Eliezer was indeed accused of being a member of a forbidden (orgiastic) sect; and second, in (allegedly) getting involved with a prostitute, who paid with her whore’s wages for her Temple offering, he infringes Jesus’ (and his own) Halakha according to which such money must not be used for purposes related to the Temple.”

²³ Cf. Schäfer, *Jesus in the Talmud*, 44 and 47; Boyarin, *Dying for God*, 27 n. 22.

may not come near the house of a “strange woman,” whose lips drop honey and whose mouth is smoother than oil – and such a strange and seductive woman is the rival’s pleasant teaching.²⁴

The association of an enemy with a seductive woman is, of course, no invention of Rabbi Eliezer, but a fairly common literary motif of biblical literature. For example, when the Israelites encamp, after their Exodus from Egypt, in Shittim, “¹ [t]he people began to commit harlotry with the daughters of Moab. ² And they called the people to the sacrifices of their gods; and the people ate, and bowed down to their gods. ³ And Israel attached himself to Baal-Peor; and the anger of the Lord was kindled against Israel” (Numbers 25:1-3). The Israelites’ downfall into idolatry begins with their sexual attraction to the daughters of Moab – and they are not by any means the only ones, whose attraction to foreign women causes both their sexual and their military, national submission: Shimshon’s defeat is brought about by his love for Delilah (Judges 16:1-21), Sisera loses both life and battle because of his attraction to Yael (Judges 4:18-21), Ahasuerus plans are distorted by Esther. Even the very first transgression of humankind is brought about by seduction and attraction to what lies beyond the boundaries of the permitted: The forbidden fruit Eve gave to Adam was “a pleasure (תאווה) to the eyes.” Having a pool of precedents at their disposal, the rabbis could thus identify not only with the seducing trickster-women, but also with the male “victims” of seduction.

The identification of the female seducer with the political and ethnic “other” is

²⁴ Boyarin (*Dying for God*, 97, 69) observes that in Hebrew, the expression “I was arrested for” (נתפסתי על) can be understood as well as “I was captivated by” *minut*. This reading makes sense especially in the context of Rabbi Eliezer’s story, who admits to having been pleased by the teaching.

Schäfer notes that in the story on Rabbi Eliezer’s trial (*bAvodah Zarah* 17a and *Qohelet Rabba* 1:8 (3)), the teaching which pleased Rabbi Eliezer was not problematic as such, but rather reflects normal, standard rabbinic reasoning. He concludes that “[i]t is not important *what* has been said and taught but rather *who* did it. Even if the teachings of the heretic are concordant with the rabbis and hence halakhically correct – this does not matter: they are invalid and dangerous because they come from a heretic” (Schäfer, *Jesus in the Talmud*, 45).

possibly most explicit in the rabbinic reworkings of the seduction-scene featuring Potiphar's wife and Joseph in Genesis 39.²⁵ As has been shown by Joshua Levinson, rabbinic literature evinces a sustained interest in the erotic aspects of the seduction scene, and aligns the latter to cultural seduction, too:²⁶ "Potiphar's wife functions not only as Joseph's sexual other, but as his cultural other as well, and the story of the trials and tribulations of a Hebrew slave in a foreign and hostile environment becomes emblematic of rabbinic culture itself [...]. [E]rotic attraction becomes a trope for cultural congress, dramatizing the transgression of cultural boundaries as mirrored in the body."²⁷ According to the rabbis' reading of Joseph's "near-seduction," Joseph's sin (or the sin he was about to commit, had he given in) is thus not only sexual transgression, but a kind of social infidelity. The "unruly body" of Potiphar's wife "[b]ecomes a symptom of a threatened national culture."²⁸ Thus, for Joseph, "[t]o be seduced by Potiphar's wife, to give in to his own desires, is not only to lose the defining characteristics of maleness itself, but also his cultural identity."²⁹ "[T]he woman as 'other' is being displaced onto the other as

²⁵ According to Levinson ("An-Other Woman," 271), there emerges a tendency in Jewish texts of Late antiquity "[t]o regard the body itself, by reason of its sexual components, as a highly charged locus of choice, mediating between self and society, as well as between the human and the divine realms." The body is made, in other words, into a vehicle for religious and social discourses; a political object, a field upon which plays of power are displayed, negotiated, and contested. Cf. also Brown, "Bodies and Minds," 481.

²⁶ Kugel (*In Potiphar's House*, especially chapter 3, "Joseph's Beauty") shows that this theme is developed already in Second Temple literature.

²⁷ Levinson, "An-Other Woman," 269. In pre-rabbinic accounts of the seduction scene (Philo, *On Joseph*, 9.40; *The Testament of the Twelve Patriarchs*; Josephus, *Antiquities*, 2.42-43; *Jubilees* 39:3-8) the gender of Potiphar's wife is excessively emphasized, yet, "[t]here is little to no narrative realization of her ethnic difference from Joseph." Cf. Levinson, *ibid.*, 273. Levinson emphasizes, however, that there is strong biblical precedence for this collocation of gender and cultural codes, where "[s]exuality was always a central issue in Israel's self-conception, and adultery and fidelity the dominant metaphors for both Israel's relationship to God and for national identity." Levinson (*ibid.*, 292) quotes Biale, *Eros and the Jews*, 12.

²⁸ Levinson, *ibid.*, 274.

²⁹ Levinson, *ibid.*, 294.

woman.”³⁰ Levinson thus concludes that “[t]his story is not about erotic attraction alone, but through the gendering of the cultural code and troping of the other as woman, the narrative dramatizes the transgression of cultural boundaries as mirrored in the body.”³¹

Inheriting and reiterating the association of a “cultural” enemy with sexual seduction, the rabbis identify not only in the narrative on Rabbi Eliezer’s transgression, but also in the narrative on Ben Dama’s transgression an ideological-religious enemy with seduction and pleasure: In *bMenahot* 99b it is related, that Ben Dama, the son of Rabbi Ishmael’s sister, aspires to learn Greek wisdom, but is forbidden to do so by Rabbi Ishmael.³² Fittingly then, Rabbi Ishmael prohibits Ben Dama also to receive a cure by the hands of Jacob, a disciple of Jesus, after Ben Dama was bitten by a snake (cf. *bAvodah Zarah* 27b). When Ben Dama dies, Rabbi Ishmael exclaims:

אשריך בן דמא שגופך טהור ויצתה נשמתך בטהרה ולא עברת על דברי
חביריך שהיו אומרים: "ופורץ גדר ישכנו נחש" (קהלת י ה).

Happy are you, Ben Dama, for you were pure in body and your soul likewise departed in purity; nor have you transgressed the words of your colleagues, who said, *He who breaks through a fence, a snake shall bite him* (Ecclesiastes 10:8) (*bAvodah Zarah* 27b).

³⁰ Levinson, *ibid.*, 280.

³¹ Levinson (*ibid.*, 300) notes, too, that “[t]his social drama is reminiscent of M. Douglas’ illuminating comments concerning the semiotic function of the body to symbolically enact and express social concerns, to figure in itself the margins of the social system, “to express danger to community boundaries” (Douglas, *Purity and Danger*, 122 (London 1966). Just as “[s]exual dangers are better interpreted as symbols of the relationship between parts of society, as mirroring designs of hierarchy or symmetry which apply in the larger social system,” (Douglas, *ibid.*, 4) so the sexual conflict between Potiphar’s wife and Joseph is being scripted as a narrative of self-fashioning encoded as cultural seduction.”

³² The Bavli here reworks earlier tannaitic versions of Ben Dama’s story; cf. *tHullin* 2:22-23, *yAvodah Zarah* 2:2 (11a), *yShabbat* 14:4 (77a) and *Qohelet Rabbah* 1:8 (3).

This praise of Rabbi Ishmael obviously alludes to Ben Dama's inclinations during his life-time: Ben Dama wanted to learn Greek wisdom and asked for a cure from a disciple of Jesus. He was attracted to "strange women," and prone to break his colleagues' "fences" around the Torah (cf. *mAvot* 1:1).³³ Ben Dama's death prevents him from breaking down these fences, and therewith, from the snake's bite that is about to occur *after* the transgression: A snake's bite is punishment for breaking down the fences which the rabbis have "built" around the Torah. When Ben Dama perishes *because* of a snake's bite, he is at the same time "saved" from a snake's bite." He is "saved from sin by his life," or in the words of Daniel Boyarin, Ben Dama's "[p]unishment has come before the crime."³⁴

Rabbi Ishmael thus praises Ben Dama because he (involuntarily) subdued an inclination, which Jesus' disciple and Greek wisdom, "the seductive women," generated in him. The final stamaitic statement on the story of Ben Dama's death accordingly concludes, that a teaching of *minim* may not be used for the sake of healing, since "it draws, *and one may be drawn after it*" (דמשכא דאתי (למימשך בתרייהו) (*bAvodah Zarah* 27b). The *minim*'s teaching is dangerous, because it is attractive, and the sick person may be attracted to it. Ben Dama is punished with death by God, because he perceives of the enemy as a source of seduction, and thus, is a potential sinner. He is "saved from sin by his life," because he is prone to commit a sin, like men who are attracted to and

³³ A snake's bite as a punishment for transgressing the words of the rabbis is mentioned also in *bShabbat* 109b-110a: "A certain officer of Pumbedita was bitten by a snake. Now there were thirteen white asses in Pumbedita (which could have been used for healing); they were all torn open and found to be *trefah*. There was another on the other side of Pumbedita, [but] before they could go and bring it a lion devoured it. [Thereupon] Abbaye observed: 'Perhaps he was bitten by a snake of the rabbis, for which there is no cure, as it is written, *and he who breaks through a fence, a snake shall bite him?*' (Ecclesiastes 10:8) 'Indeed so, Rabbi,' they answered. For when Rav died, Rav Isaac b. Bisna decreed that none should bring myrtles and palm-branches to a wedding feast to the sound of a tabla, yet he went and brought myrtle and palm-branches at a wedding to the sound of the tabla; [so] a snake bit him and he died."

³⁴ Boyarin, *Dying for God*, 35.

“attacked” by beautiful women.³⁵ It is them, and not the tricksters, whom the strange “women” succeeds in impressing.

The “other” is, according to this scheme, most dangerous *not* when perceived as a frightening tyrant, a cruel giant with military strength – in face of such an enemy, one may hide oneself beneath a trickster’s veil and subvert the threat through seeming submission and cooperation. The other is most dangerous when perceived as a pretext for transgression, as someone attractive: Once it is assumed that the enemy can potentially generate pleasure, it is necessarily assumed, too, that men are attracted to the enemy, or at least, are unable to remain indifferent upon tasting his (or her) forbidden fruits. Indifference, however, is the necessary prerequisite for the legitimacy and effectiveness of a trickster’s veil: A veil is a veil only when it is entirely unrelated to its wearer’s true convictions and beliefs. Pleasure, however, cannot be perceived by a veil, and is necessarily related to an individual’s “real” sensations; as Rava expounds regarding male sexual pleasure: “There can be no compulsion in sexual intercourse since erection depends entirely on the will” (*bYevamot* 53b).³⁶ Pleasure turns a veil into a skin, lets the mask become real, and therewith, spoils the attempt to survive through a veil.³⁷

³⁵ Cf. also Beth Berkovitz’ analysis of *tAvodah Zarah* 2:5 ([...] They [Jews] may go to stadia in order to cry out and save lives, and to the circus for the sake of the state, but if he conspires with them, behold, it is forbidden): “The last legislation evinces a concern that Jews may be seduced by the arena’s murderous events even if their motivations for attendance might be pure. According to this Tosefta, the arena poses a threat not only to the physical survival of the Jewish community, but also to their cultural/religious survival, as Jews who attend are seduced by its appeal. [...] Through these texts runs a pattern of repulsion, attraction, and competition with Roman culture, represented metonymically by the arena” (Berkovitz, *Execution and Invention*, 157-158).

³⁶ Cf. also *bNiddah* 43a: “If a man was troubled with unchaste thoughts in the night and when he rose up he found his flesh heated, he is unclean (cf. *mMiqvaot* 8:3). Rav Huna explained this to apply to a man who dreamt of indulging in sexual intercourse, it being impossible to indulge in the act without experiencing the sensation.”

³⁷ In *Avot de-Rabbi Nathan* the anonymous speaker explains: “Be not amazed about Rabbi Aqiva, for he is greater than us.” As proof for this claim, the following story is adduced: When Rabbi Aqiva travelled to Rome, a prefect sent two beautiful women to him: “They were bathed, anointed and fitted out like brides. Each kept wooing him, throughout the whole night. This one said: Come to me, and the other one said: Come

Whether a Jew may transgress in order to save his life, or has to refuse even the smallest transgression, thus seems to depend on how he *perceives* a transgression: Does it inevitably seduce him and generate pleasure even if initially forced upon him? Or is it possible to stay indifferent and unimpressed?³⁸ It is not the forbidden fruit or “the other’s daughter” as such, who are a danger to the Jews and the maintenance of their identity. The danger is encapsulated in the vulnerability of those, who are seduced by them into cooperation and submission, the “truly impressed.”

Also the account of the transgressions of Rabbi Haninah ben Teradion and his daughter may be read against the background of the association of transgression and seduction: Through his insistence on public self-representation Rabbi Haninah ben Teradion reveals that he perceives of the Romans as enemies, who pose a threat to his Jewish self. A pretense of cooperation and submission would lead to his being “seduced”: His veil and his true skin – his Jewish identity – would merge and become indistinguishable; he would ultimately not only *look* like a Roman, but *be* a Roman. The rabbi is, like his daughter, potentially seduced and therefore cannot use a trickster’s veil. He has to demonstrate to himself, and to the political and/or religious “other,” who he is: He has to teach public Torah lessons despite a decree, and eventually pronounces God’s name in public. Only the indifferent trickster can use a veil without running the danger of being seduced by its outer appearance, and remain Jewish without the public demonstration of his identity. The story on the alleged transgression of Rabbi

to me. But he sat between them and spat, and would not attend to them. In the morning they said to the prefect: We would rather die than be given to this man. The prefect sent for him and called him; he asked him: Why did you not act with these women as men generally do with women? Are they not beautiful? Are they not human beings like you? Did not he who created you created them? Rabbi Aqiva replied: What should I have done? Their odor overcame me, reeking of the flesh of *nevelot* (carrion) and *trefot* (animals torn by wild beasts) and creeping things” (*Avot de-Rabbi Nathan*, A, XVI.2).

³⁸ The question of forced sexual intercourse and pleasure is raised in the Yerushalmi (*ySotah* 4:5, 19d) and the Bavli (*bNiddah* 45a): A woman compares rape to one being fed honey on Yom Kippur. It is pleasurable even when forbidden. For a discussion of these texts cf. Ilan, *Silencing the Queen*, 185-188.

Haninah ben Teradion thus inverts the heroism of public self-representation in that it is here associated not only with a critique, but also with a confirmation of the enemy's seductive power.³⁹

Finally, the association of a transgression with an attraction, a metaphorical beautiful woman, is also the subtext of the gemara on *mSanhedrin* 8:7: As explained above, the majority-vote of the Lyddan sages is used as an argument in favor of the view, that also a Jew, who *voluntarily* commits idolatry, is to be "saved by his life."⁴⁰ No differentiation between a voluntary act of idolatry and one forced upon a person under threat of life is made here. Possibly, then, the underlying assumption of this reasoning is idolatry is an act impossible to be committed under pretense: If idolatry generates pleasure in either case, then it is irrelevant whether the Jew is forced by a tyrant or by his own inclination to commit it. Regardless of whether an "interior" or an "exterior" force presses the Jew into idolatry, if it is assumed to generate pleasure like sexual transgression, it inevitably leads to sin.

³⁹ Ambivalence is thought to be a general, overarching characteristic of the relation between the ruler and the ruled: "Ambivalence describes the complex mix of attraction and repulsion that characterizes the relationship between colonizer and colonized. The relationship is ambivalent because the colonized subject is never simply and completely opposed to the colonizer. Rather than assuming that some colonized subjects are "complicit" and some "resistant," ambivalence suggests that complicity and resistance exist in a fluctuating relation within the colonial subject. Ambivalence also characterizes the way in which colonial discourse relates to the colonized subject, for it may be both exploitative and nurturing, or represent itself as nurturing, at the same time" (Ashcroft et al., *Key Concepts in Post-Colonial Studies*, 12-13). Ambivalence is explicitly articulated also in *bShabbat* 33b: "Rabbi Yehudah commenced by observing, How fine are the works of this people (the Romans)! They have made streets, they have built bridges, they have erected baths. Rabbi Yose was silent. Rabbi Shimeon bar Yohai answered and said, All that they made they made for themselves; they built market-places, to set harlots in them; baths, to rejuvenate themselves; bridges, to levy tolls for them."

⁴⁰ The majority-vote of the Lyddan sages establishes that "if a man is commanded: 'Transgress and suffer not death' he may transgress and not suffer death, except of idolatry, forbidden sexual relations and bloodshed" (*bSanhedrin* 74a). The stama draws a parallel between a Jew, who is forced by a tyrant to transgress, and a Jew, who is forced by his own desire to transgress: If one has to save *oneself* from the three cardinal sins even in a situation of compulsion, as the sages of Lydda claim, then, one has to save also him, who voluntarily commits the transgression.

Idolatry and a sexual transgression are, in the sugya of *bSanhedrin*, also explicitly parallelized:

תניא רבי שמעון בן יוחי אומר: העובד עבודת כוכבים ניתן להצילו בנפשו
מקל וחומר, ומה פגם הדיוט ניתן להצילו בנפשו פגם גבוה לא כל שכן?

Rabbi Shimeon bar Yohai said: An idolater may be saved by his life. This is deduced by a *kal va-homer*: If for harming a human-being one must be saved by his life, how much more so for harming the All-Highest? (*bSanhedrin* 74a)

When a man has intercourse with a married woman he inflicts harm (פגם) to the woman's rightful husband,⁴¹ and when Israel commits idolatry she inflicts harm (פגם) to her "husband," God. Both adultery and idolatry are offenses against the legitimate "owners" of a wife, and both share a sexual connotation.⁴²

The metaphoric *kal va-homer* advanced here in *bSanhedrin* 74a draws upon a conceptual framework that is present already in the Bible, as formulated by

⁴¹ I think that the parallelism is drawn here not between the betrothed girl and God, but between the rightful owner of Israel, God, and the rightful owner of the betrothed girl, her future husband. This depends, of course, on the question to whom "harm" is done in the parallelism's first part: In case the "harming of a human-being" refers to adultery, the "harmed one" is the married woman's husband. (It is not the adulterous husband's wife, since a husband exclusively "owns" his wife, but a wife does not "own" her husband. Thus, whether the adulterous woman is married or not is of immense importance, but whether the adulterous man is married is irrelevant, since he does, in any case, not harm his wife.) In case the "harming of a human-being" refers to rape, the harmed one is, besides the married woman's rightful husband, the married woman herself. The parallelism would then compare God to the raped woman.

⁴² Cf. also Cohen ("Notes Towards an Erotics of Martyrdom") on the sexual connotations of the term "*pegam*": "These sexual connotations of the *p'gam* are present in the phrase *p'gam gavo'ah* ("damaging of the All-Highest"). Moreover, the framing of the sugya between the two instances of sexual damage, or sexually inflicted damage, highlights the fact that the sugya thematizes sex, pleasure, and death. Further, it is the question of pleasure which informs the decision of whether one need die – or be put to death."

Halbertal and Margalit: “The principal image in common use by the prophets for the elucidation of idolatry is the relationship between husband and wife, in which Israel is compared to the wife and God to the husband [...]. The image captures the uniqueness of the biblical religion: God unlike the pagan gods is a jealous God who forbids the worship of other gods. According to this metaphor, *idolatry is a sexual sin; even in the early strata of the Bible idolatry is identified as such*” [emphasis mine].⁴³ There exist also midrash-like parallels in the Bible between idolatry and adultery: For example, after the Israelites commit the sin of the golden calf, Moses makes them drink the water into which he had melted the calf’s gold (Exodus 36:20). The Israelites “went astray” like the suspected adulteress, and like her, they are forced to drink of “bitter waters.” Thus, when the rabbis in *bSanhedrin* 74a do not differentiate between an act of compulsory, and an act of voluntary idolatry, and conceptualize idolatry, like a sexual sin, as generating pleasure in either case, they could use a well-established adultery-idolatry metaphor as their reasoning’s backbone: Just as sexual intercourse generates pleasure both in its legitimate and in its illegitimate “version,” so, too, worship generates pleasure both in its legitimate and in its illegitimate “version.” Consequently, if a Jew can physically survive only through tasting the forbidden, yet delicious “stolen waters,” he should rather be “saved by his life.”⁴⁴

However, in the gemara on *mSanhedrin* 8:7 this reasoning is, as demonstrated above, contested: When invoking the story of Esther and the transgression she committed for the sake of saving the lives of her people, the stama suggests that Jews might *not* necessarily identify with the male “victims” of seduction, but instead, with the female seducer. To the latter, a transgression does not

⁴³ Halbertal and Margalit, *Idolatry*, 11.

⁴⁴ About the difference of opinion between Rabbi Ishmael and the Lyddan sages concerning an act of idolatry for the sake of saving life (in *bSanhedrin* 74a), Aryeh Cohen remarks that “[t]he difference between R. Ishmael [who permits an act of forced martyrdom in order to save life, C.T.] and the council of Nithza [who prohibits this, C.T.] is in the way they value the “act” of forced idolatry. That is, is the act of forced idol worship one which benefits/pleasures the worshipper? Or is it more akin to rape?” (Cohen, “Response to Elizabeth S. Alexander’s ‘Dialogues on the Theme of Martyrdom’”).

automatically involve pleasure: Esther does not marry Ahasuerus for pleasure's sake, nor do the other tricksters enjoy their deeds.⁴⁵ The stama thus suggests, that the Jew who is forced by a tyrant to transgress, or to cooperate, is *not* automatically to be identified with a man, who runs the risk of being seduced by a transgression, but rather, with the seducer: Like Esther, when a Jew commits a transgression for the sake of saving his life, he, too, does not derive pleasure from this act. The subtext of the sugya in *bSanhedrin* is, that if "a Jew is Esther," then he is *not* inevitably seduced by the forbidden tastes that lie beyond halakhic boundaries, and are embodied in the religious or political enemy. When a Jew is to be identified not with a male victim of a female seducer, but instead, with a female seducer herself, transgressions are not an inescapable, irresistible attraction. Acts of outward, tactic cooperation and submission do not represent true cooperation and submission, since a strategic seducer does not enjoy his (or rather her) act, and thus can indeed use a veil: It is not for naught that Esther is portrayed with much emphasis as an observant Jewess during the time she lives in Ahasuerus' palace.⁴⁶ Thus, when the opposite of a martyr is not necessarily a traitor, but very possibly, a trickster.

The martyr-hero

Nevertheless, despite the Babylonians' ambiguous reception of the martyrs' acts of self-representation, he remains also in the Babylonian tradition a hero. Accordingly, in some narrations, the alleged sins of those rabbis, who were killed by a tyrant and his officials, are so trivial, that any logical relation between the martyr's divine punishment and the transgression is factually disabled. The reader of these martyrdom-narratives is left with the impression, that there should have been a miraculous rescue, a turn to the good in the last second before destruction, a relief – but there is none. The Jew is murdered,

⁴⁵ Cf., for example, *bNazir* 23b: "But did she [Yael] derived pleasure from his intercourse? Rabbi Yohanan said: All the favors of the wicked are evil to the righteous."

⁴⁶ In the context of the gemara on *mSanhedrin* 8:7, this also implies, as mentioned above, that no parallelism can be drawn between a Jew, who is forced by a tyrant to transgress and a pursuer, who transgresses voluntarily, on account of some inner urge.

even though he appears to be entirely innocent and even though God is an entirely fair and just judge.⁴⁷

For example, Rabbi Haninah ben Teradion is not only imagined having pronounced God's name in public. Two more (mutually exclusive) transgressions might, according to the Bavli, account for the punishment God inflicts upon him: According to *bAvodah Zarah* 17b-18a, Rabbi Haninah ben Teradion was punished with death either because he did not practice charity, or because he mistook charity-money designated for Purim as regular charity-money.⁴⁸ Of course, no death-penalty is normally inflicted on account of such minimal transgressions. The harshness of God's punishment is beyond all proportions to the marginality of the transgressions Rabbi Haninah ben Teradion is assumed to be guilty of. His transgressions thus only *formally* explain the punishment God inflicts upon them, but their triviality, in the end, stresses the rabbi's innocence. More even, their acceptance of the punishment emphasizes their perfect righteousness, as Rava exclaims: "How great were these righteous ones [Rabbi Haninah ben Teradion and his family, C.T.], in that the three Scriptural passages, expressing submission to Divine justice, readily occurred to them just at the appropriate time for the declaration of such

⁴⁷ Suffering and death as a punishment for a sin is the dominant explanation of suffering in the Bible. On the centrality of this conception in the Bible, cf. Kraemer, *Rabbinic Responses*, 18-22, and in the Mishnah, cf. *ibid.*, 53-65. However, (already in biblical literature) ruptures in the sin-punishment relation are apparent: Kraemer distinguishes between suffering as a test (*ibid.*, 23), suffering as atonement for the sins of others (*ibid.*, 23-25), the unexplainable suffering of Job (*ibid.*, 29-33), and meaningless suffering in Ecclesiastes (*ibid.*, 33-35). Besides the Bible's "conventional" explanation for suffering – suffering as a punishment for sin – suffering is explained (especially by Amos) also as a sign of God's love for Israel: Toward the other nations God is indifferent and punishes them only for very severe sins, but Israel He loves, and therefore, punishes her much more heavily. Cf. Kraemer, *ibid.*, 22-25.

⁴⁸ For a discussion of this text, cf. Avemarie, "Aporien der Theodizee," 211-214: "Der Zusammenhang von Schuld und Strafe bleibt sowohl hier wie bei der Diskussion um die vernachlässigte Wohltätigkeit grundsätzlich gewahrt. Das Ausmaß der Schuld wird jedoch in beiden Fällen sowie zurückgeschraubt, dass auf das Bild des frommen Märtyrers kaum noch ein Schatten fällt."

submission” (*bAvodah Zarah* 18a).⁴⁹

The alleged sins of some martyrs are not at all raised. Rabbi Aqiva, for example, dies as a perfectly innocent man. Protest against Rabbi Aqiva’s fate is, accordingly, placed in the mouth of no lesser figure than the ministering angels and Moses: After Rabbi Aqiva is tortured to death, the angels complain before God, exclaiming “This is the Torah, and this is its reward? [He should have been] *from them that die by Your hand, O Lord* (Psalms 17:14)” (*bBerakhot* 61b). Likewise, Moses protests before God when he learns of Rabbi Aqiva’s horrible death: “Lord of the Universe, You have shown me his [Rabbi Aqiva’s] Torah, show me his reward. Turn around, said He; and Moses turned round and saw them weighing out his flesh at the market-stalls. Lord of the Universe, cried Moses, This is the Torah, and this is its reward! He replied: Be silent, for such it came up to My mind” (*bMenahot* 29b). That Rabbi Aqiva’s death is inexplicable on the grounds of a this-worldly “cause and effect” relation of sin and punishment is not even contested by God himself:

⁴⁹ In the *Mekhilta*, an exceedingly small transgression is ascribed also to Rabbi Shimeon: “When Rabbi Ishmael and Rabbi Shimeon came out to be beheaded, Rabbi Shimeon said to Rabbi Ishmael: Rabbi, it breaks my heart, for I do not know for what reason I am (to be) killed” (*Mekhilta de’Rabbi Ishmael*, Mishpatim 18; cf. also *Avot de-Rabbi Nathan* A 38 and B 41 and *Semahot* 8:8. Rabbi Ishmael thereupon proposes, that it might have happened to him once that “a man came to you for a judgment or for a question, and you detained him until you had sipped your cup or until you had tied your sandal or until you had put on your *tallit*?” When hearing this, Rabbi Shimeon is comforted, for now he knows what he is punished for: He once did not immediately receive someone, who came to ask him a question, since he had to strap his sandal or the like. Fittingly, Rabbi Aqiva warns his disciples after the violent deaths of Rabbi Shimeon and Rabbi Ishmael: “Prepare yourselves for punishment, for if good fortune had been about to come in our generation, the first to receive it would have been no one but Rabbi Shimeon and Rabbi Ishmael” (*Mekhilta de-Rabbi Ishmael*, Mishpatim 18). Cf. Avemarie, “Aporien der Theodizee,” 204-210, and his analysis of the “sin” of Rabbi Shimeon: “Wie es scheint, setzt der Text alles daran, die Schuld des Rabbis so weit zu minimieren, dass sie als Erklärung für seinen Märtyrertod gerade noch ausreicht [...] Seine angebliche Schuld ist nicht mehr als eine Ausrede, die es dem Text erlaubt, formal jener theologischen Konvention zu genügen, wonach das Leiden die von Gott verhängte Strafe für menschlichen Ungehorsam ist. Vordergründig wird das Theodizeeproblem nach konventionellem Muster gelöst, doch eine latente Argumentationsstrategie, die der vordergründigen geradewegs zuwider läuft, führt diese konventionelle Lösung ad absurdum“ (ibid., 208). Cf. on this midrash also Berkovitz, *Execution and Invention*, 205ff.

The death of Rabbi Aqiva merely “came up to His mind” (עלה במחשבה), a spontaneous idea sprouting without any particular reason.⁵⁰ Only through placing the reward for Rabbi Aqiva’s righteousness into the *next* world, is the blatant, scandalous lack of reward for righteousness in *this* world compensated: In the continuation of the tradition on the complaining angels, God defends his decree before them, explaining that those, who die by his hand had “their portion in life (Psalms 17:14)” (*bBerakhot* 61b) – but Rabbi Aqiva, who dies by the Romans’ hands, will have his portion in the world to come.⁵¹

Possibly, those traditions, which ascribe to the martyrs no transgression at all, or an entirely marginal transgression, retain a note of critique *against* the trickster’s conformist, pragmatic *modus vivendi* with the *status quo*: If the impartiality of divine justice is, in this world, unperceivable and utterly incomplete, then there is no reason to wait for better times in secret, quietly behind closed doors, accommodating everyday life to the necessities of “realpolitik.” One may just as well reject the wearing of a mask, and instead, show one’s real “face” in public. The political function of martyrdom is described by Costica Bradatan, in line with this, as consisting of the ability of martyrdom “[t]o teach though death how to live”: Acts of martyrdom “[r]esignify an individual’s violent death as a collective experience and thereby render it meaningful. They bring about, in those communities where they

⁵⁰ The verbal form “to come up to the mind” (לעלות במחשבה) is by the Talmud and midrashic literature used solely in relation to God’s spontaneous ideas. (Cf. *bBerakhot* 61a [Par.: *bEruvin* 18a, *bKetubbot* 8a], *bPesahim* 54a, *bQiddushin* 42b-43a and *Leviticus Rabbah* 29:1.

⁵¹ The struggle between the one, who beliefs in a just God and suffers in this world, and the one, who relinquished this belief and flourishes, is present also in the conversation between Yaqim of Tsererot and Yose ben Yoezer (cf. *Genesis Rabbah* 65:22).

Cf. van Henten and Avemarie (*Martyrdom and Noble Death*, 134), “Divine vindication and remuneration of the victims [are] present in almost every rabbinic martyrdom story.” Besides Rabbi Aqiva (*bBerakhot* 61b), also Rabbi Haninah ben Teradion (*bAvodah Zarah* 18a) and Yoze ben Yoezer and Yakum (*Genesis Rabbah* 65:22) are described as having entered paradise. Nothing is transmitted about the fate of Rabbi Haninah ben Teradion’s wife, even though she, too, was murdered.

occur, a certain sense of regeneration and renewal, the promise of a new political beginning. Far from being an annihilating occurrence, death becomes in such cases a life-enhancing event, as strange as this may sound. In the end, the practitioners of this rare “art of dying” are not gloomy figures and apostles of self-destruction. On the contrary, they end up being perceived as gifts, if gifts of a special kind. They demonstrate, as Simon Critchley put it, that “in learning how to die we might also be taught how to live.”⁵²

Conclusion

In a number of traditions, the Babylonians imagine that God, when “allowing” the righteous Jews to be murdered, punishes them *because* of their reaction to the political and/or religious adversary. Instead of praising the martyr’s courage, his public acts of self-assertion and his uncompromising rebellion against the tyrant’s decrees are here not (or not exclusively) depicted as acts of resistance to the tyrant’s power, but instead, as acts that provide the tyrant with power. Thus, one of the transgression Rabbi Haninah ben Teradion is imagined to be guilty of is the public exposure of something that is not destined to be public: He pronounces God’s name in public.

This transgression can be read as an extension of his demonstrative rejection of the Roman decrees: when he organizes a public teaching of the Torah, he “endows” the Romans with the role of an audience; moreover, an audience whose gaze becomes a constitutive element in the construction of his own perception of himself: Though he rejects the Romans’ power, he insists that

⁵² Cf. Baradatan, “A Light for the Future.” According to Baradatan, “[s]elf-immolators are effective in societies that feel responsible in part for their servitude, where feelings of complicity, mutual resentment, and distrust have not only poisoned people’s private lives, but also undermined whatever social life is left [...]. The strength of the witnesses’ embrace is in direct proportion to the intensity of the collective guilt; if the self-immolator redeems them of anything, it is of this oppressive feeling.” Similarly, Scott (*Domination*, 193-196) regards the tricksters’ technique of resistance as a breeding ground for action, and the violent deaths of the martyrs as that which “breaks up the spell and causes the web to unravel.”

they become aware of their devaluated position in his scheme of things. He needs the enemy to “know” him – and consequently also rejects the trickster’s pretense of cooperation and submission. In contrast to the trickster, he requires the enemy’s gaze and the latter’s acknowledgement of his undisguised self. He *wants* the Romans to take notice of his Torah lessons.

The martyr’s inability or unwillingness to use a trickster’s veil entails a further empowerment of the other: Ben Dama, Rabbi Eliezer and Rabbi Haninah ben Teradion’s daughter are punished because they were *attracted* to the enemy: Ben Dama dies because he was “bitten by a snake” – the teachings of Jesus’ disciple –, Rabbi Eliezer was arrested because he found pleasure in a *minim*’s teaching, and Rabbi Haninah ben Teradion’s daughter is punished with death because she was flattered by the Roman men’s remarks on the charm of her steps. The attraction these latter three Jews perceive towards their enemies hints at the flipside of the martyr’s rejection of the enemy: When the martyr insists on the public, demonstrative *rejection* of the enemy, he thereby also confirms that he is unable to merely pretend cooperation and submission: The enemy is something appealing and seductive, something that is dangerous, and thus, “important enough,” that one has to publicly announce one’s difference with the other watching. The martyr needs to publicly reject the religious and/or political other, precisely because *if* he’d pretend submission like the tricksters, he’d be seduced into accepting the Romans as “real” kings and masters, into truly enjoying the transgressions entailed in the acts they demand. He would not only look like them, but he would be like them. His veil would merge with his skin, until it has become his skin. The transgressions, that lie beyond the boundaries of the halakha and are embodied by the Romans, are, according to the martyr, not something one may commit without being affected “*for real*.” Thus, when Rabbi Eliezer, Ben Dama, and Rabbi Haninah ben Teradion’s daughter are accused of being seduced (or at least, as running the danger of seduction), the martyr’s public, demonstrative rejection of cooperation and submission is inverted: It is not read as a heroic confrontation and rejection of the enemy, but as a confirmation of the association of a religious or political enemy and seduction, of a transgression

and pleasure. The “seducer” – the Roman – is confirmed (or even constructed) in his role as a seducer through the one, who perceives of him as such. The martyrs’ demonstrative and heroic fight is turned into the vulnerability of a potentially seduced, whereas the trickster’s ability to appear *as if* complying and cooperating, his indifference towards the Romans’ gaze and threats, is associated with independence: The truly autonomous answer to a situation of political or religious suppression is represented by the one who does *not* react upon the enemy’s gaze and threats with an all-too revealing, public disclosure of self.

Between the Bavli and the Yerushalmi

Babylonia and Palestine in the gemara to mSanhedrin 8:7

In the gemara to *mSanhedrin* 8:7, all the traditions cited by the stama concerning the subject of transgressions a Jew may not commit even at the cost of his life, are found virtually without alterations also in the Yerushalmi.¹ Moreover, the Babylonian stama himself explicitly and repeatedly ascribes these traditions to various rabbis from the Land of Israel: The tradition, according to which someone who is forced to choose between the three “cardinal sins” and death should rather let himself be killed, appears first in *tShabbat* 15:16-17, and is ascribed in the above sugya to a majority vote of sages, who met at a private gathering in Lydda. Aside from the tradition ascribed to the gathering in Lydda, also the view, that one may commit idolatry in a situation of relative coercion is ascribed to a Palestinian rabbi, Rabbi Ishmael (cf. *bSanhedrin* 73b). Rav Dimi and Rabin, who add restrictions to the Lyddan majority-vote in the name of Rabbi Yohanan – another Palestinian rabbi – do so “when they come [from the Land of Israel].” The Babylonian rabbis seem not to add anything new to these traditions; they only bring them from the Land of Israel, unambiguously signifying them as not being of their “own,” original creation. As Soloveitchik observes: “The rules of martyrdom given in the Bavli come from Palestinian sources [...]. Even subsidiary discussions in the Bavli are either by a Palestinian *amor'a* or echo a Palestinian position.”²

¹ Cf. *yShevi'it* 4:2 (35a-b), its parallel in *ySanhedrin* 3:6 (21b) and *yAvodah Zarah* 2:2 (40d-41a) and its parallel in *yShabbat* 14:4 (14d-15a). For an analysis of these texts, cf. Gray, “Martyrdom and Identity.”

² Soloveitchik, “Halakha, Hermeneutics and Martyrdom,” Part II, 282. Cf. also Kalmin (“Rabbinic Traditions about Roman Persecutions,” 22): “In most respects Babylonian and Palestinian traditions describe the Romans interfering with the same set of Jewish practices. This is no argument in favor of the historicity of these traditions, but it does show that much was absorbed into the Bavli from Palestine without substantive change. Babylonian rabbis, for the most part, did not invent stories and traditions, or at least motifs about Roman persecutions, and attribute them

Explicitly signifying the origin of these traditions, the Babylonian stama weaves them into the sugya, quotes them faithfully – but in addition, he lets the sugya end with a *Babylonian* exilic heroine, Esther, and the narrative on the desiring man. This passage does not appear anywhere else in rabbinic literature, except here, in Bavli Sanhedrin.³ As explained above, it is this particular passage, which implies, first of all, that a bystander’s transgression may be legitimate on account of its life-saving *effect*, and secondly, questions the assumption that a Jew forced to choose between a minor transgression and death in public or in a situation of persecution, has to choose death.

To explicitly ascribe the traditions on the transgressions a Jew may not commit under any circumstance to the sages from the Land of Israel, and to let these traditions end with “Esther’s case” is, I assume, a conscious editorial decision: The Babylonian stamaitic editors, through concluding this sugya with a Babylonian “counter-hero,” deliberately juxtapose the traditions from the Land of Israel with an implicit, yet powerful counter-tradition. They seem unwilling to discard the inherited martyr-traditions from the Land of Israel, yet it seems as if they were not wholly content with them either. Something, they might have thought, is “wrong” with letting oneself be killed for the sake of avoiding a minor transgression.⁴ Yet, something obviously also seemed wrong to them with an outward rejection of the Palestinian traditions.

to Palestinian rabbis, nor did the Babylonians, for the most part, extensively doctor Palestinian traditions.” Cf. also Gray (“Martyrdom and Identity,” 249): “Although amoraim may have formulated these stories, they do not tell such martyrdom stories about themselves.”

³ The story on the love-sick man appears as well in *yAvodah Zarah* 2:2 (40d-41a) and in *yShabbat* 14:4 (14d-15a). Also the idea that only a transgression is “sweet” is commonly associated with the verse “*Stolen waters are sweet, and bread eaten in secret is pleasant*” (Proverbs 9:17) (cf. *bNedarim* 91b, *bSotah* 7a and *bSanhedrin* 26b). However, the story is only in the Bavli associated with the question on “Esther’s case” and thus, it only here conveys the message outlined above.

⁴ According to Gray’s analysis of the halakhah on martyrdom, as represented in the Yerushalmi (“Martyrdom and Identity,” 243), the editor(s) of this latter work associated martyrdom not only with a public denial of committing a transgression, but also with great hardship in the observance of the commandments.

Babylonia and Palestine in the Babylonian aggadic traditions

The stama's tendency to interweave a "martyr-tradition" with a "trickster-tradition" is also discernible in the Babylonian aggadic traditions: Time and again, the traditions on rabbis who demonstratively ignore the tyrant's decrees, are interwoven into the traditions on those, who choose concealment in order to survive: The condemnation of Rabbi Haninah ben Teradion is juxtaposed with the tricky escape of Rabbi Eleazar ben Perata (cf. *bAvodah Zarah* 17b); Rabbi Haninah ben Teradion, who engages in a public teaching of the Torah despite a decree which prohibits public learning, is confronted by Rabbi Eleazar ben Kisma, who regards the wicked government as a God-given yoke, with which the Jews are supposed to cope and live (cf. *bAvodah Zarah* 18a). Rabbi Aqiva's public gathering of Torah-students is put adjacent to a wondering Pappus ben Yehudah, who approaches him, inquiring: "Rabbi Aqiva, are you not afraid of the kingdom?" upon which Rabbi Aqiva tells his fable on the fish, who cannot survive outside their water, the Torah (cf. *bBerakhot* 61b). This conversation is, as noted by van Henten and Avemarie, among the "most salient amplifications" the story of Rabbi Aqiva undergoes from the Yerushalmi (in *yBerakhot* 9:7, 14b, and *ySotah* 5:7, 20c) to the Bavli.⁵ In the Bavli then, it appears that the fighters are not coincidentally, but systematically situated next to the tricksters. In both the halakhic and the aggadic portions of the Bavli, the stamaim seem to suggest that there need to exist not only those, who fight against a tyrant's dominion through refusing to hide themselves beneath an accommodating veil, but also those, who survive through collaboration and seeming compliance, who use a veil in order to hide and to save themselves.⁶

⁵ Van Henten and Avemarie, *Martyrdom*, 153.

⁶ Different interpretations of this typical rabbinic side-by-side-strategy have been articulated: Boyarin (*Dying for God*, 65), concludes that "[i]n rabbinic Jewish textuality, the very fact that both options remain enshrined in the same text with the same consequent authority produces a religio-cultural situation in which schism can be avoided while nearly opposing ideological options both remain active." For different interpretations cf. also Bruns, "The Hermeneutics of Midrash," 199, Hopkins, "Christian Number," 217, and Cohen, "The Virgin Defiled," 3.

In the Palestinian rabbinic compilations, in contrast, the martyrs are not juxtaposed to tricksters. Here, they are presented as the adversaries of those, who *truly* submit to the *hegemon's* dominion: When Yose ben Yoezer of Tseredah is crucified⁷ (cf. *Genesis Rabbah* 65:22), his nephew Yaqim of Tserorot taunts him: “See the horse on which my master has let me ride, and the horse upon which your Master has made you ride” (ibid.). Yaqim of Tserorot is no trickster, who heavy-heartedly collaborates out of necessity, but a true traitor, who mocks the crucified for his stubborn reluctance to collaborate and his naïve belief in a just God: His masters have rewarded him with a horse, whereas Yoze ben Yoezer’s master has rewarded him with a cross.

Also the ending of the story on Yose ben Yoezer and Yaqim of Tserorot implies that the alternative to treachery is not a trickster’s masquerade, but sacrifice of one’s life: Yose ben Yoezer eventually succeeds in persuading his nephew of God’s righteousness. He argues that if God punishes even a righteous Jew like himself with cruxification, how much more so will He punish those, who do not obey His will: “This (argument) pierced him [Yaqim] like the poison of a snake, and he went and subjected himself to the four modes of execution inflicted by the Beth Din: stoning, burning, decapitation, and strangulation⁸ (*Genesis Rabbah* 65:22). Thus, when Yaqim repents, he does not become a trickster, but a martyr.

Another collaborator, who repents and becomes a martyr, is Joseph Meshitha: “When the enemies desired to enter the Temple mount, they said: Let one of them [the Jews] enter first. They said to him [to Joseph Meshitha]: Enter, and whatever you bring out is yours. So he went in and brought out a golden

⁷ On the debate surrounding cruxification as a “gentile” or a “Jewish” way to execute criminals, cf. Berkowitz, *Execution and Invention*, 47-49. The tradition on Yose ben Yoezer and Yaqim of Tserorot is the first post-biblical martyrdom documented by rabbinic tradition. *Genesis Rabbah* provides the earliest version of the story. Later accounts are found only in medieval writings. Cf. van Henten and Avemarie, *Martyrdom*, 134 and 143.

⁸ When Yaqim punishes himself with the “four modes of execution inflicted by the Beth Din,” his death is therewith marked as the antipode to Yose ben Yoezer’s cruxification, a “gentile” mode of execution.

lamp” (*Genesis Rabbah* 65:22). However, when they ask him a second time to enter the Temple and to bring them something, he does not obey: “Is it not enough that I have angered my God once, he exclaimed, that I should anger Him again! What did they do to him? They put him into a carpenter’s vice and sawed him in sunder, while he cried out, Woe, woe that I angered my Creator!” (ibid.)⁹

Also for the other martyrs, concealment and tricksterism are not presented as legitimate alternatives to martyrdom. Following the time-honored Palestinian tradition of the “seven sons” (cf. 2 Maccabees 6-7, 4 Maccabees, *Lamentations Rabbah* 1:16 and *bGittin* 57b), who disobey one after the other the tyrant’s commands and are brutally killed, even those, who try to survive, are unwilling to conceal their selves for the sake of physical survival: According to *Genesis Rabbah* 82:8, two disciples of Rabbi Yehoshua “changed their cloaks” in order to appear as gentiles at a time of persecution. Yet, they do not even consider the possibility to pretend, like ben Perata, that they are non-Jews in the moment their disguise is uncovered. When a Roman officer – who is tellingly identified as an apostate – detects their camouflage, they immediately confess and their trickster-like adjunction to the circumstances ceases abruptly: “A certain officer, an apostate, met them and said to them: If you are its [the Torah’s] children, offer your lives for it; while if you are not its children, why should you be slain for its sake? We are its children, they replied, and we do incur death for its sake” (ibid.).¹⁰

⁹ This story, too, has no parallel in rabbinic literature. The stories on Joseph Meshitha and Yaqim of Tzererot are part of a Midrash on Genesis 27:27, “And he (Isaac) smelled the smell of his (Jacobs) garments (בגדיו).” The word “his garments” is read as “his traitors” (בוגדיו). Joseph Meshitha and Yaqim of Tzererot are God’s traitors, who nevertheless pleased God such as the smell of Jacob’s garments pleased his father.

¹⁰ *Numbers Rabbah* 20:21 tells an ambivalent trickster-story. According to this text, “an incident is related that during the period of religious persecution a certain Israelite shopkeeper used to cook ritually clean meat as well as the flesh of swine and sell them, so that it might not be suspected that he was a Jew.” Once a Jewish customer entered the shop and ordered a meaty meal. Yet since he did not immerse his hands and bless before eating, the shopkeeper assumed the man to be not Jewish and served him swine.

Also in the above quoted story on the Roman, who forces Rabbi Abba bar Zemina to choose between death and the consumption of carcass-meat, the option to commit a “fake” transgression is not considered.¹¹ The rabbi simply responds to the Roman’s threat that “if you want to kill me, kill, but I will not eat carcass-meat” (*yShevi’it* 4:2, 35a-b and *ySanhedrin* 3:6, 21b). Thus, whereas according to the Palestinian narrative traditions the only possible alternative to treachery is sacrifice of one’s life, the Babylonian traditions constantly suggest a non-lethal alternative: Stepping in Esther’s – not Miriam bat Tanhum’s – footsteps, the Babylonian *stamaim* imagine concealment and camouflage as alternative, and legitimate modes of resistance to oppressive political circumstances.¹²

The question which obviously rises from this observation is: Why do the Palestinian rabbis promote the martyr’s mode of resistance, whereas the Babylonian rabbis only quote their stories, and juxtapose them with the trickster-tales of survival? Why does the Babylonian narrative tradition feature a “trickster-martyr” doublet, whereas the Palestinian narrative tradition features a “traitor-martyr” antithesis? Why it is solely the Babylonians, and not the Palestinians, who display affinity for the trickster?

Survival in Babylonia and Palestine

The maintenance of physical survival through tricksterism is, most probably, a phenomenon to be encountered wherever Jews live as a persecuted minority: Tricksterism is, at the end of the day, a strategy that is likely to develop at times of a persecution, when there is no possibility to freely practice one’s

¹¹ Note, however, the story on Rabbi Meir, who pretends to eat pork in order to save himself from Roman officers (*Qohelet Rabbah* 7,1 (1)).

¹² The only unambiguous “pro-trickster passage” of Palestinian origin appears to be in *yShabbat* 1:3 (3c): “How does Rabbi Hiyya the Great explain the verse *You shall buy food from them [the gentiles] for money, and eat* (אֹכֵל תִּשְׁבְּרוּ מֵאֵיתָם בַּכֶּסֶף, וְאָכַלְתֶּם) (Deuteronomy 2:6)? If you feed him, you have bought and defeated him, for if he is harsh with you, buy/defeat (שִׁבַּר) him with food, and if [that does] not [work], then defeat him with money” (*yShabbat* 1:3, 3c). For an interpretation of this passage cf. chapter 4, n. 26.

religion. In a situation of suppression and persecution, the primary aim becomes survival through whatever means available. If so, however, one would expect rabbinic texts of Palestinian origin to promote the trickster's strategy of survival: The Palestinian rabbis participated in, or at least witnessed within a relatively short time-span two devastating wars against Rome, the first of them (66 C.E. - 73 C.E.) resulting in the destruction of the Second Temple, the second (the Bar Kokhba rebellion, 132 C.E. - 135 C.E.) in the Hadrianic repression of Judean Jewry. Wars, destructions and persecutions shaped the Palestinian Jews' perception of themselves and the political situation surrounding them. They were far from living in peace and stability. Most probably then, at least part of them, if not even most of them, opted for tricksterism, for the sake of straightforward physical survival.¹³

Possibly, also the very circumstance, that the halakhic decision on the transgressions a Jew may not commit even in order to save his life, is explicitly transmitted as a "majority vote" indicates, that the question of transgressions a Jew has to "die for" was also in Palestine subject of an ongoing debate – after all, a vote was needed in order to come to the conclusion transmitted by the sources. There were also those, albeit a minority, who opted for a different policy.¹⁴ Thus, even though critique and ambivalence towards the martyrs' ideology are fully fleshed out in the Babylonian sources, and are explicitly manifest and verbalized in them via the construction of the trickster-figure, it appears very likely that the "trickster's ideology" is rooted in similar or identical ideas that circulated among Palestinian rabbis, and was

¹³ Christine Hayes has demonstrated in *Between the Babylonian and the Palestinian Talmud. Accounting for Halakhic Difference in Selected Sugyot from Tractate Avodah Zarah*, that halakhic differences between the Bavli and the Yerushalmi are often based on differing hermeneutical strategies and presuppositions, rather than on different historic realities, as is frequently proposed by scholars. I tend to think, however, that the halakhic affinities of the Palestinians and the Babylonians concerning the question "what is a Jew to die for" may indeed have been influenced by the historical circumstances in which the two Talmudim emerged.

¹⁴ The status of the majority-vote of the Lyddan sages is, as noted by Shapira ("The Law of the Pursuer," 257), not clear: "[T]he status of this ruling is not known as well. Was it a final decision that resolved all disputes and was accepted by all?"

also actively practiced by Palestinian (rabbinic and non-rabbinic) Jews. There are simply no grounds to assume that to Palestinian Jewry and its rabbinic elite, physical survival was of less concern than to the Babylonians.¹⁵

Possibly then, it is precisely the Palestinians' actual proximity to tricksterism, that generated the strategic propagation of the martyr's strategy of resistance: In times of persecution and violence, when the boundaries between the Jewish community's "inside" and the non-Jewish "outside" are under attack (or imagined to be under attack), the strengthening and reinforcement of these boundaries is perceived as vital for the "inside's" survival as a distinct collective. A "flirt" with compromises and an adjustment to the outside, the crossing of boundaries even if only for appearance's sake, would invoke a blurring of boundaries, as Rabbi Aqiva explains in his parable of the fish: Fish need their water and can only live as fish. Upon leaving their element, they may succeed in surviving, yet they die *as fish*.

Palestinian rabbis might therefore have imagined the Jewish social body as being represented by the body of a martyr¹⁶ – a body whose boundaries are *not* crossed: In contrast to the veiled tricksters, the martyrs do not accommodate to the circumstances surrounding them. They are defined and recognizable, and have clear-cut, unveiled faces, untainted by the interaction with Rome, undistorted by the necessities of physical survival. They enter public space, and tell their adversary straight to its face that they do not accept their authority, political or otherwise at all. No interrogation takes place here, no accommodation, no invasion, no blurring of boundaries, and no concealment. Rabbi Ba bar Zemina, when being forced by his Roman employer to eat carcass-meat, resists the intrusion of something strange and forbidden into his body. The motif of resistance to force-feeding represents, as Tessa Rajak analyzes, "[t]he intrusion of alien control and then rejection at the most

¹⁵ Cf., for example, *yShevi'it* 4:2 (35a), quoted in chapter 3, n. 21 of this work.

¹⁶ On the gendered representation of the martyr as male, cf. also Cobb (on Christian martyr narratives), *Dying to be Man*; Moore and Anderson, "Masculinity in 4 Maccabees"; Young, "The 'Woman with the Soul of Abraham'"; Boyarin, *Dying for God*, chapter 3 ("Thinking with Virgins. Engendering Judeo-Christian Difference"), and Rajak, "Dying for the Law."

intimate level, announcing control of an individual and a people's destiny through control of their bodies."¹⁷ When the enemy is casting his "nets," boundaries are not crossed, whether those prescribed by the laws of the Torah (= the fish' water), or those of the Jewish body.

In the Babylonian Diaspora, by contrast, the Jewish community was subject to a very different political reality: The Jews of Babylonia had been living in Babylonia since ancient times, "[s]ometimes persecuted, but mostly at peace. Whatever challenge diaspora as such represented had long before been addressed. Diaspora existence was not a problem for these Jews. Nor, of course, did the domination of Jews by other political powers in Babylonia create any problems of note. Jews had no claim to power in these territories and thus there was no reason to challenge the legitimacy of the power

¹⁷ Cf. Rajak, "Dying for the Law," 129.

Control of one's body is a masculine trait in most Greek and Latin literary and philosophical texts that survived from antiquity. In Jewish Greek texts, two types of mastery – mastery over others and over oneself – are contrasted, whereby mastery over others is radically devalued in favor of self-mastery. For example, concerning the seven sons, the second book of Maccabees recounts that "[i]t happened also that seven brothers and their mother were arrested and forced by the king to eat from the forbidden pig meat, while they were being tortured with scourges and cords made of sinew" (2 Maccabees 7:1) [...] The king exploded and commanded men to heat up skillets and cauldrons" (ibid., 7:4). While these were immediately heated up, the king also commanded them to cut out the tongue of the one who had become their advocate, to scalp him in Scythian fashion, and to cut off his hands and feet while his brothers and mother were watching together" (ibid., 7:5). The martyrs' bodies are tortured, but nevertheless as if narcotized, as if the physical pain inflicted upon them has no effect. Masculine virtue, "true manliness," consists here in rational self-mastery rather than in a manly physique and political, outward mastery over others' bodies (cf. Anderson and Moore, "Masculinity in 4 Maccabees," 250; Satlow, "Try to Be a Man.")

Even though the motif of "body-control" is in the rabbinic Babylonian tradition of lesser centrality, some texts, I think, echo this motif: Part of the Bavli's description of the martyrdom of Rabbi Aqiva and Rabbi Haninah ben Teradion, is, for example, a detailed description of each of their death-blows: "They combed his flesh with iron combs" (*bBerakhot* 61b, not present in the Palestinian parallel); or: "They brought tufts of wool, which they had soaked in water, and placed them over his heart, so that he should not expire quickly" (*bAvodah Zarah* 18a, not present in the Palestinian parallel).

exercised by others.”¹⁸ Even though this description of Jewish diaspora-dwelling in Sassanian Babylonia might be oversimplified, there is probably little doubt that the Jews of Babylonia were used to living as a minority in a land, where political authority is exercised by others, and where interaction with the sphere beyond the boundaries of the Jewish community is a sheer necessity of everyday life. A distinct Jewish identity was here maintained not through defending sovereignty unto death, but genealogically, through continued physical existence, ensured by the female (or feminized) tricksters.¹⁹ Not accidentally then, also in biblical texts, male Jews living in exile are presented as adherents of tricksterism: When Abraham and Isaac live in the territory of Pharaoh and Abimelech respectively, they pretend their wives to be their sisters, so as to not to raise the kings’ envy (cf. Genesis 12:11-13, 20:2 and 26:7). In the diaspora, the presence of a politically stronger, dominating

¹⁸ Kraemer, *Rabbinic Responses*, 153. In the Bavli, in general, one seems not to believe that a gentile would actually kill a Jew on account of his unwillingness to comply. Cf., for example, *bYevamot* 121b-122a: “A certain idolater once said to an Israelite, ‘Cut some grass and throw it to my cattle on the Shabbat; if not, I will kill you as I have killed so-and-so, that son of an Israelite, to whom I said, Cook for me a dish on the Shabbat, and whom, as he did not cook for me, I killed’.” The wife of this Israelite is then told to address Rav Joseph, who decides that the idolater’s statement is not to be taken seriously.

Compare also the Babylonian and the Palestinian versions of the following story: According to the Yerushalmi (*yTerumot* 8:4, 47a) and *Genesis Rabbah* 94:9, Rabbi Yehoshua once granted refuge to a man named Ulla. When the troops, who were searching for Ulla, threaten to kill the entire community if Ulla is not delivered to them, the rabbi gives in, and delivers Ulla to the hands of the troops. In the Bavli (*bMakkot* 11a) it is reported that once a man was torn *by a lion* next to the house of Rabbi Yehoshua ben Levi. That is, there are no gentile troops killing Ulla, but a lion happens to pass by. (Cf. also the analysis of this story in Daube, *Collaboration*, 13).

¹⁹ Cf. also Amy-Jill Levine’s characterization of the diasporic Book of Tobit (“Diaspora as Metaphor,” 105): “In the diaspora, no immediately clear solid grounds for self-definition exist. To alleviate these problems, the text makes three moves. First it emphasizes imaginary geographical and historical references; these indicate that the spatial and temporal coordinates of exilic life do not determine Israel’s identity. Next, it creates a series of boundary-breaking events – eating, defecating, inseminating, interring – to institute, transgress, and then reinforce distinctions. Finally, it delineates Israel by means of genealogy rather than geography. [...]” On anxiety focusing on genealogical purity cf. also Lavee, “Proselytes.”

male, forces eminent Jewish men to deprive themselves of their status as husbands, possessors of wives and conquerors. In exile, Abraham and Isaac demasculinize themselves. Isaac's son Jacob, too, proves to be a major trickster not only when deceiving his brother Esau. Also in exile, when he serves Laban, he lies to his wives and their father: He arranges with Laban that his reward shall be all sheep that have dots and dark wool. Jacob then breeds the sheep in such a way, that only his sheep multiply. When Laban notices this, he decides that from now on he himself should own those sheep with dots and dark wool. However, Jacob then breeds the sheep in a way that Laban's sheep do not multiply. As if by divine plan, only the sheep of Jacob multiply. Finally, Jacob even "pins the blame" for his mysterious success on God, and discredits Laban for having cheated him. To his wives, the daughters of Laban, he says: "⁷ *Your father has cheated me and changed my wages ten times; however, God did not allow him to hurt me.* ⁸ *If he spoke thus, 'The speckled shall be your wages,' then all the flock brought forth speckled; and if he spoke thus, 'The striped shall be your wages,' then all the flock brought forth striped.* ⁹ *Thus God has taken away your father's livestock and given them to me*" (Genesis 31:7-9). In exile, not only the "real," the biological women are tricksters. Also the men have no choice but to suffer blows to their masculinity, and to cultivate "female" modes of survival.²⁰

²⁰ Boyarin argues that the experience of being conquered, of permeability and vulnerability, generates in the conquered an identification with "female" modes of survival: "On the one hand, it is clearly the case that the behaviors the Rabbis portray as ideal for themselves are understood as proper male demeanor within their own systems of cultural values, particularly since gender dimorphism and separation of roles obviously was crucial to them. They therefore reject representations that would despise such practices as "effeminate." At the same time, they live within and are integral part of a larger cultural world, within which those very valorized rabbinic practices are often stigmatized as "female," and the Rabbis seem sometimes to have been willing and able to take that representation in and transvalue it into a positive self-representation as female or feminized. [...] I suggest that in such situations [of being colonized, C.T.], colonized people may sometimes come to identify themselves *with* or even *as* women, and – without for a moment forgetting the dangerous aspects of this identification *for* women – this identification can now and then be a source of ethical awareness" (Boyarin, "Masada or Yavneh," 317-318 and 325).

In contrast to rabbinic texts of Palestinian origin then, in texts of Babylonian origin, the Jewish (social) body could be imagined as a trickster's female body – a body whose confines *are* crossed: The female body is, as Daniel Boyarin describes, on the one hand, “[t]he vulnerable body, the body that is invaded, penetrated and hurt,” yet on the other hand “[i]t is the fecund body, the body that interacts with the world and creates new life (Bakhtin 1984).”²¹ It is a site, upon which the trickster's overcoming of the boundaries between the Jewish and other social bodies can be described;²² a body that represents the dangers and the powers of survival in a diasporic setting, and the trickster's strategy of survival itself: Like a female body, the trickster is bleary, fuzzy, and “lacks” solid boundaries and demarcations. He is “undefined” and “open,” he lets his hostile surroundings “penetrate” him in order to preserve the physical and “natural” life, and he is vulnerable, too: When Rabbi Yehoshua ben Levi returns to Acco from a trip to Rome, Rabbi Haninah goes out to greet him and finds him limping upon his thigh. He thereupon remarks: “You resemble your ancestor [e.g., Jacob]: *And he limped upon his thigh*” (*Genesis Rabbah* 78:5). Such as Jacob's thigh was injured after his struggle with the angel of Esau – the ancestor of Rome – also Rabbi Yehoshua's visit to Rome does not drip off the rabbi without leaving a mark.²³

²¹ Boyarin here quotes Mikhail Bakhtin who concedes that “[a]ll these convexities and orifices [of the female body, C.T.] have a common characteristic; it is within them that the confines between bodies and between the body and the world are overcome: there is an interchange and an interorientation” (Mikhail Bakhtin, *Rabelais and His World*, Bloomington 1984, 317, quoted in Boyarin, “Masada or Yavneh,” 308).

²² Cf. Boyarin, “Masada or Yavneh,” 308-309, and Levine, “Diaspora as Metaphor.”

²³ Cf. on this text also Daube, *Collaboration*, 16. The biblical text does not identify the figure that struggles with Jacob as an angel of Esau, but as a “Sar Elohim,” a ministering angel of God. In midrashic literature, however, it is assumed that this angel is related to Esau, since the fight takes place immediately before the meeting of Jacob and Esau.

Conclusion

In Babylonia and Roman Palestine, the Jewish communities were subject to different political realities. As a result, the rabbis imagined differently gendered embodiments of the Jewish community, coming to the fore in the Babylonian's embrace of a female trickster figure, and the Palestinian's appraisal of a male martyr.

In Palestine, the immediate impression of wars, the loss of autonomy, military failure and the destruction of the cult's focus shaped the Jewish community's self-perception. Here, the enemy was a close and "significant other." Accordingly, the Palestinian rabbis propagated a mode of resistance, that was, as Daniel Boyarin describes, "culturally intelligible to the Romans":²⁴ The martyrs do not veil their faces, but uncover them precisely when being seen. They insist on the public representation of a Jewish self. In the Babylonia diaspora, in contrast, the lack of autonomy and a cultic, territorial center were a self-evident matter of fact. Here, the rabbis could associate with a mode of survival, which is, in the Hebrew Bible, commonly enacted by female heroines and "feminized" heroes. A woman is, as Amy-Jill Levine summarizes, "[i]n a perpetual diaspora; her location is never her own, but is contingent on that of her father, husband, and sons."²⁵ Living in such a "perpetual diaspora," the Babylonian rabbis identified with "female" modes of survival (and could also rely on eminent biblical predecessors, such as Abraham, Isaac and Jacob): The tricksters interrogate with their antagonists and adapt themselves, if only tactically, to the necessities of physical survival, without ever aiming at the destruction of the oppressive situation itself.

The trickster's and the martyr's strategies themselves can be read as representations of male and female bodies respectively: Like a female body, the trickster interacts with the world s/he inhabits; s/he crosses boundaries and preserves life. In Babylonia, the body, that enacts the Jewish law and represents the Jewish social body, is a dominated, permeable, female body. The strategy of

²⁴ Cf. Boyarin, *Dying for God*, 71.

²⁵ Cf. Levine, "Diaspora as Metaphor," 110.

the murdered, in contrast, can be represented by a male body: Just as the male body is perceived as a body without permeable boundaries and openings, so too the martyrs claim to refrain from immersion, interaction and interrogation with what lays beyond the boundaries of their own community and its law.

Summary and Discussion

In the beginning of this work I suggested reading *mSanhedrin* 8:7 not as a manual to the pursuer's preemptive execution, but instead, as an attempt to negotiate "fundamental ideas":²⁶ the nature and purpose of the divine law, the meaning of its transgression, and related to this, the place of the human judge within this law. As is characteristic of rabbinic literature, these subjects are not discussed explicitly: Neither *mSanhedrin* 8:7, nor its gemara or the aggadot I've read as its counterpart, engage in philosophical debates about the role of the human judge, or the nature and purpose of the divine law. The idiom, through which the rabbis express philosophical or ethical thought, is legal: If someone pursues his fellow in order to kill him, in order to have sexual intercourse with a betrothed girl, or homosexual intercourse, then this pursuer is to be killed before committing the transgression. Murder, adultery and homosexual intercourse are, in other words, transgressions a Jew is to "die for," or formulated along mishnaic terminology: The one who is about to commit murder, adultery or homosexual intercourse is to be "saved by his life."

In the **first chapter** I have demonstrated that the tannaim, when constructing *mSanhedrin* 8:7, escape a determination of the mishnah's underlying juridical motivation: *mSanhedrin* 8:7 is neither exclusively motivated by an attempt to save the pursued from the pursuer, nor by an attempt to save the pursuer from a transgression. In the gemara to *mSanhedrin* 8:7, analyzed in the **second and third chapters**, the two possible legitimizations for the killing of a pursuer clash against each other: The question underlying *mSanhedrin* 8:7 – "what is a Jew to die for?" – is in the gemara to the mishnah's second part transferred to a situation of persecution, specifically, to a situation, in which a tyrant forces a Jew to either transgress and to live, or to avoid a transgression and to die. The Lyddan sages vote that if one has the choice to either transgress or to die, one has to transgress – except for bloodshed, adultery and idolatry.

²⁶ As above, this is a quote of Devora Steinmetz ("Crimes and Punishments, Part I," 82-83).

The “pursuer” and the “pursued” are, in this case, one and the same person: A Jew, who is forced by a tyrant to decide between his death and a transgression, is akin to a *pursuer* to be saved from sin *and* to a *pursued* to be saved from the pursuer, i.e, the tyrant. Depending on whether the Jew’s physical survival or his “Jewish survival” is given priority, he will either commit the transgression and survive, or reject a transgression and be killed. Yet again, the amoraim and stamaim do not decide: Should a Jew, in order to avoid a transgression, let himself be killed (יהרג ואל יעבור), as the gemara expresses), or should he be saved from the pursuer through a transgression? Is he a pursuer or a pursued?

In the **fourth chapter**, I demonstrated that the tensions, that are inherent in *mSanhedrin* 8:7 and in the amoraic-stamaitic controversy this mishnah invoked, are recaptured also in those Babylonian narrative traditions, that imagine an encounter between a Jew and his political and/or religious enemy. The two “plots” underlying these narrative traditions – the one featuring the trickster and the other the martyr – may be read as “stagings” of the gemara to *mSanhedrin* 8:7: According to the tricksters, the persecuted Jew is akin to a pursued, who requires rescue from the “pursuer,” the tyrant. The trickster, accordingly, hides his true self behind a veil, and “tricks” his way through dominion. The martyr, in contrast, conceptualizes the persecuted Jew as a pursuer, who is to be saved from a transgression: It is not the Jew’s physical survival, but his rescue from sin, his survival as a Jew, that is at the core of the martyr’s motivation.

However, when the question “what is a Jew to die for?” is transferred from its mishnaic context into one of political, systematic persecution, a modification of the mishnaic law on the pursuer occurs. According to the mishnah, only he, who is about to commit bloodshed, adultery or homosexual intercourse may be “saved by his life.” One does not need to save someone by his/her life for any other transgression. The martyrs, however, save themselves from *all* transgressions, and even from acts that are no transgressions at all, consisting

solely of an outward accommodation to the enemy. Their deaths are thus not necessarily the result of a decision against a transgression of the law.

Nevertheless, the martyr's ideology is the logical outcome of a reading of the mishnah, according to which the pursuer is killed in order to save him, the pursuer, from a transgression: Since according to this reading survival as a Jew is what "matters," in times of persecution or in public, the martyr saves himself even from acts that are no transgressions at all, but consist solely of an outward accommodation to the enemy. The martyrs' strategy of resistance resembles in this sense the trickster's strategy: To *both* the martyrs and the tricksters, the enemy is an integral part of their reasoning, even though the enemy's presence generates diametrically opposing strategies of resistance.

The martyrs' dependence on their Roman antagonists is the subject of a number of Babylonian martyr-traditions, in which the Babylonians imagine a transgression to be responsible for the martyrs' death. At the center of the **fifth chapter** stands an analysis of these texts. The Babylonians engage here in a "reading against the grain" of the martyr's encounter with the tyrant and decipher the martyr's heroic independence as implying precisely the opposite of what is intended: as dependence on, and attraction to the other. They point out, that even though the martyrs' resistance strengthens the boundaries between them and the "other," the martyrs' "faces" are molded, like those of the tricksters, in interaction with the other's gaze. The martyr is turned into a product of Roman hegemony, instead of its self-confident, independent antithesis.²⁷

²⁷ Despite the Babylonians' counter-reading of the martyr's acts of public self-representation, they do not deconstruct the glorious, awe-inspiring aura that accompanies the martyr-traditions. They retain traditions on quasi perfectly innocent martyrs: In these traditions, the transgressions ascribed to the martyrs do not consist in their exaggerated acts of self-representation when encountering the "other," the enemy. Here, God punishes the martyrs with death on account of a marginal transgression the martyrs committed *prior* to the confrontation with the enemy. Their deaths are therewith dissociated from the confrontation with the enemy: Even though the confrontation with the latter coincides with God's punishment, there is no cause-effect relation between the two. When confronting the tyrant, the martyrs are like "superstars," demonstrating upon their own bodies that mere physical survival is

In the **sixths chapter**, I demonstrated that only in rabbinic texts of Babylonian origin – in the gemara to *mSanhedrin* 8:7 and in the Babylonian martyr-narratives – tricksterism is presented as a legitimate alternative to martyrdom. I argued that the different political-cultural frameworks in which rabbinic literature emerged – Roman Palestine and Sassanian Babylonia – generated in the two rabbinic communities different (gendered) self-perceptions, coming to the fore in the propagation of the martyr’s and the trickster’s strategies of resistance respectively: In Palestine, the impression of wars and destruction was immediate, and the enemy a close and “significant other”: Here, the martyrs do not engage in “female” tricksterism, but instead, react with “male” courage; they do not veil their faces, but uncover them precisely when being observed. In face of the enemy, they insist on the public, visible representation of a Jewish self. To the Babylonian rabbis, by contrast, a situation of domination and exile was the norm. They could, accordingly, propagate survival not only through the public demarcation of boundaries, but instead through genealogical, ethnic continuity, ensured by the trickster’s “female” strategy: The trickster interacts with the world s/he inhabits; s/he crosses boundaries and adapts him/herself to the necessities of physical survival, without ever aiming at the rebellion against the oppressive situation itself.

When the Babylonians read the martyrs’ strategy of resistance “against the grain,” and present the boundaries which the martyrs signify as the result of an interaction with Rome, they accordingly also feminize the martyr: They thwart the idea of a male body, that is able to enact the Jewish law without being embedded in a particular “time and place,” a body with impermeable, stable boundaries. When the martyr becomes, like the trickster, a product of Rome, then the ideal of a Jewish social body entirely unshaped by Rome is turned into an illusion. The “male martyrs” react to the other’s gazes and threats with a public construction and demonstration of boundaries; the “female tricksters” resort, in public, to a veiling of their selves, yet both do not ignore the power-

meaningless, that “true” survival requires also a public demonstration of a distinct Jewish self.

relations, within which they act. The question “what is a Jew to die for?” when posed in a context of persecution, is thus not answered through the identification of specific acts, that may not be committed under any circumstance: The martyrs and tricksters do not necessarily avoid or commit a transgression; the martyrs do not “die for the law” and the tricksters do not “transgress and survive.” They differ rather regarding their public behavior and appearance: Whereas the tricksters veil their faces, the martyrs purposefully uncover them. “What is a Jew to die for” depends, in a situation of persecution, on whether markers of identity, such as Torah-learning, are to be displayed in public.²⁸ An act is endowed with an altogether different meaning in private, or without a situation of persecution, without the gazes of the other fellow Jews and the enemy.²⁹

Possibly, in line with this “sociological” evaluation of a transgression, too, “a situation of danger is no proof” (אין שעת הסכנה ראיה, *tBerakhot* 2:13):³⁰ A legal decision made in a situation of danger is not transferable to a “normal” situation and thus cannot serve as precedence. Normally, one may transgress every commandment except of the prohibition of bloodshed, of adultery and of idolatry in order to save a life; yet, in a situation of persecution, or in public, “one may not even change one’s shoe strap” (*bSanhedrin* 74b) in order to save a life. According to a midrash in *bBava Qama* 60b-61a, it is even forbidden to quote a legal ruling in the name of someone, who “who surrenders himself to meet death for words of the Torah.”³¹ When a legal teaching is delivered at the

²⁸ An act of idolatry is, accordingly, defined by Rabbi Ishmael as an act that may be committed in a private, but not in a public setting (cf. *bSanhedrin* 74a).

²⁹ Cf. also *bHagigah* 16a: “Rabbi Elai the Elder said: If a man sees that his inclination is prevailing upon him, let him go to a place where he is not known, and put on black garments, and wrap himself up in black garments, and let him do what his heart desires; but let him not profane the Name of Heaven publicly.”

³⁰ Cf. also *tEruvin* 5:18, *tSukkah* 1:4, *bEruvin* 91a and *bSukkah* 13b.

³¹ “*And David longed, and said, Oh that one would give me water to drink of the well of Bethlehem, which is by the gate. And the three mighty men broke through the host of the Philistines and drew water out of the well of Bethlehem that was by the gate etc. (II Samuel 23:15-16). [...] But he would not drink thereof (II Samuel 23:16)?* That he did not want to quote this teaching in their names (the names of the three men), for he said: This has been transmitted to me from the court of law presided

risk of life, or when a legal decision is made in a situation of danger, there occurs a connection between that legal teaching and the threat to life, a danger to the unity of the law and life, the “construction-plan” and the construction. The teaching is as if “born” out of a situation, that contradicts the divine law’s own, basic presupposition: that God created life with the Torah, and that the destruction of life is, accordingly, equivalent to the destruction of its creator: a “diminution of the divine presence” (*tYevamot* 8:5).

Also when constructing the case of the pursuer, the tannaim appear unable or unwilling to imagine any dichotomy between life and law: On the one hand, they identify transgressions, that catapult the Jewish transgressor beyond the “livable”: It is better for him to be “saved” from particular transgressions, than to commit them, and keep on living in a mere physical sense. Yet on the other hand, it is not the severity of the transgression, but the existence of a human victim, which ultimately warrants the transgressor’s death: The transgressor is “saved” solely from those transgressions, which have an immediate effect on another human-being. The rabbis do not decide whether the pursuer is to be killed in order to save the pursued, or in order to save the pursuer from a transgression; whether the act of killing the pursuer is

over by Shmuel of Ramah, that no halakhic matter may be quoted in the name of one who surrenders himself to meet death for words of the Torah (*bBava Qama* 60b-61a). The word “water” in II Samuel 23:15 is understood as a metaphor for a legal teaching. However, “*he would not drink thereof*” (II Samuel 23:16). Why did David not accept the teaching transmitted to him by the “three mighty men”? Nothing with their answer as such, so the anonymous voice reasons, troubled David, but the way it was delivered to him: The three mighty men “*broke through the host of the Philistines*” in order to bring to David the “water,” and thereby risked death at the hands of their enemies.

In the rabbinic post-talmudic tradition, this teaching is also thought to be related to the “classical” exegesis of Leviticus 18:5, “*And he shall live by them* (Leviticus 18:5), and not die because of them” (*bYoma* 85b). Cf. for example, Rabbi Yehudah (ben Shmuel) ha-Hasid of Regensburg (1140-1217): אפילו תלמיד חכם המוסר עצמו למות על דברי תורה, אין אומרים דבר הלכה משמו (ב"ק ס"א). דכתיב: וחי בהם - ולא שימות (פרי צדיק לפרשת תצוה, ד) בהם (Even when a *talmid chacham* submits to death for the sake of the Torah, one may not quote a legal teaching in his name (*bBava Qama* 60a), as is written: *And he shall live by them* (Leviticus 18:5), and not die because of them (*Pri Tzadik to Parashat Tetzave*, 4).”

legitimate on account of *life's* primary value, or on account of the divine *law's* primary value.

The same holds true regarding the majority-vote of the Lyddan sages: Their vote installs limits to an act, which constitutes according to modern juridical thought an act of self-defense: For example, when someone's own life is threatened through some "pursuer," that person may, if s/he cannot stop the pursuer through lesser means, legitimately kill the offender. The deed would be categorized as an act of self-defense.³² In the sages' legal thought, however, just as the killing of a human being is not conceptualized as the violation of an individual's *right* to physical integrity,³³ also a transgression committed for the sake of saving a life is not deemed legitimate on account of a Jew's "natural right" to be saved from danger.³⁴ Accordingly, the saving of life is not an imperative that outweighs any other legal obligation, duty, or moral consideration – the Lyddan sages *do* formulate negative commandments, which may at no point, not even for the sake of saving a life, be transgressed. The transgression of the law for the sake of saving a life is legitimate, rather, because it enables a survival of both the human-being *and* the law, or more precisely, the survival of the human-being within the law, as a living embodiment of the law: Thus, when the rabbis delve into the biblical basis for the permissibility to save a life through transgression, they do not reason that it is permissible to transgress because life is a value that outweighs any other, but rather, the transgression of the law is legitimized, because it enables the "children of Israel" to observe "many Shabbatot" and

³² Cf. Sinnott-Armstrong, "Consequentialism," on the so called "Transplant-problem."

³³ Cf. the introduction to this work.

³⁴ The articulation of norms such as respect of life in the terms of rights is, as mentioned in the introduction to this work, a modern invention. Only in the course of the 17th century was the language of rights used to express universal norms – this is the birth-hour of "natural rights," belonging to everyone regardless of social categories that formerly determined rights and duties (cf. Taylor, *Sources of the Self*, 11). When respect for life is not formulated in terms of universal, natural rights, which each individual "possesses," there is also no such right to be defended. As noted by Fletcher ("Self-Defense as a Justification for Punishment," 859), "[t]he concept of having rights would be virtually toothless unless we could use force to vindicate our rights against aggressions."

“to live by the law,” and therewith, to maintain and embody the law’s authority as *living* human-beings: “Rabbi Shimeon b. Menassia said: *And the children of Israel shall keep the Shabbat* (Exodus 31:16). The Torah said: Profane for his sake one Shabbat, so that he may keep many Shabbatot. Rav Yehudah said in the name of Shmuel: If I had been there, I should have told them something better than what they said: *He shall live by them* (Leviticus 18:5), but he shall not die because of them” (*bYoma* 85b, cf. also the parallel in *tShabbat* 15:17).

Accordingly, a transgression committed for the sake of saving a life is, in rabbinic literature, also not defined as an act to be preferably transferred to those who are not (yet) obligated to keep the commandments or whose opinion has no legal significance: “And they do not say: Let the matters be done by gentiles or children, but they should be done by adult Israelites” (*tShabbat* 15:11-15). To commit a transgression for the sake of saving a life is tantamount to defending the law – and consequentially, this transgression should not be carried out by those, who are not (yet) obligated by the law, but by male, adult Israelites – those, who are the core bearers of the law.³⁵

The Lyddan sages’ limitation of the means, which may be used for the sake of saving a life, and the mishnaic *din rodef* thus are rooted in one and the same idea: that a human being’s life and the law are “one,” and inseparable: “*You shall live by them*, and not die because of them” and may, accordingly, commit a transgression in order to save a life. Yet, particular transgressions catapult a person beyond the “livable”: Someone, who commits an act of bloodshed, of adultery and of idolatry in order to save a life, is “as if” dead.³⁶ A common

³⁵ This conception of the saving of life implies also, that it is not permissible to save the life of a non-Jew through a transgression of the law: Since the obligation to transgress the law in order to save a life is granted for the sake of the law itself, there is no reason to save the life of someone, who is not at all obligated to “embody” this law. It is thus not that the lives of Jews are “more precious” than those of non-Jews – neither the lives of Jews, nor those of non-Jews, are more important than the law.

³⁶ The fact that a transgression of the law is obligatory in order to save a life thus does not imply a hierarchy of values, in which a human-being’s life occupies first place, followed by the law. The law is not supposed to “serve” a human being in the

metaphor for “the divine law,” is, accordingly, “water”:³⁷ The law is as vital to life as water. It is not an entity external to nature; there is no “primitive” state of being, beyond the law, and an autonomous subject deciding whether or not to subjugate itself to the law. The law is inscribed in a living human being from its very beginning, the law being part of its essence, not one of its tangible attributes. Accordingly, the law as such, as an “idea” without the living human embodying the law, is void; yet life as such, as a purely physical-material reality without the law, is void, too.

As a result of this perception, also the distinction between a positivist and a universalist-naturalist conception of the law, that governs modern legal thought, is not necessarily at work in a rabbinic view of the law: Here, the law is positivist in that its authority is derived from its authoritative source, God. Whether this law serves a desirable end is irrelevant regarding its authoritativeness, that is, it is obligatory to obey the law not because it is “good” to do so, but because it is God’s command. Yet, this law is also universalist-positivist: Since the law is the world’s “construction plan,” one should not die because of it, but live by it. The “construction plan” cannot violate that, which was created according to its prescriptions. In a situation of persecution, when the unity of law and life breaks up, the rabbis

sense of an adaption to the differing circumstances a human being might encounter in the course of his life, including those circumstances that endanger his very life; it does not need to prove itself “flexible” to the changing needs of human existence.

Also, this perception implies that when a pursuer is “saved” from a transgression, this rescue does not entail the rescue of the pursuer’s “soul” from sin for the world to come, the soul being separable from the “sinful body.” The pursuer as a whole, his body and soul, is “saved,” because the law is an integral, immanent and vital part of life, and the pursuer (in an almost suicidal manner) rejects this part. Shapira, too, notes that the pursuer’s rescue does not need to be understood, in a rabbinic context, as a rescue of the transgressor’s soul, since this would presuppose a belief in a dualism, or separation, between body and soul. The rabbis did not unequivocally accept such a belief, and therefore, according to Shapira, the pursuer’s rescue should rather be understood as an “act of prevention per se.” Cf. Shapira, “Rodef and Self-Defense,” 254: “By killing the pursuer one saves him from committing these transgressions. (In this sense, his whole person is saved, not just his soul).”

³⁷ Cf. for example *bBava Qama* 17a.

consequentially refrain from establishing any binding policy of action: They do not even address the question as to which of the two answers to tyranny a Jew should choose³⁸ (even though in a situation of persecution, one has to decide to either stay alive through a masquerade, or to be killed as a result of public self-demonstration and defiance of the tyrant's commands).³⁹ Instead, they present the two responses to tyranny in immediate proximity to each other, interweaving and juxtaposing the traditions on the murdered with those on the tricksters.⁴⁰ Like two sides of one and the same coin, the one cannot

³⁸ Soloveitchik ("Halakha, Hermeneutics and Martyrdom," Part II, 299) explains the law's reluctance to judge extreme circumstances as follows: "Aware of its limitations, law tries to avoid judging cases of extreme circumstances, as, for example, when group survival is set against individual survival. [...] When supreme values are at stake – man's ultimate allegiance (either to God, king or country) opposes man's primal instinct for survival [...] and the choice then is left wholly up to the individual, the rational dictates of the law and its effective reach usually break down. The response is not reasoned but intuitive and unpremeditated. Not only does law often not control these choices, often it does not even seek to judge them." This approach is reflected as well in modern legislations. For example, the court installed in the British part of Germany after the Second World War acknowledged the existence of extreme situations, in which highest legal values collide. The acts of an individual in this situation are not judged by a court; the individual is legally immune (cf. "schuldausgleichende Pflichtenkollision," OGHSt (=Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen) 1, 321).

³⁹ This is in contrast to *mSanhedrin* 8:7: The mishnah pictures a scene, in which the pursuer's rescue from sin and the rescue of the pursued go hand-in-hand: A pursuer is "saved from sin" *and* his rescue effects the physical rescue of the pursued. This two-edged outcome of course breaks up in a context of tyranny, envisioned in the gemara on *mSanhedrin* 8:7 and the Babylonian narrative traditions.

⁴⁰ As if the two responses to tyranny are complementary, to be unified imaginatively, they interweave the deaths of a trickster – Rabbi Yose ben Kisma – with that of a martyr – Rabbi Haninah ben Teradion: Rabbi Yose ben Kisma, who interprets the gentile government as a God-given task one is supposed to live through, dies a natural death and "all the great men of Rome come to his burial and make great lamentation for him" (*bAvodah Zarah* 18a). Just as these "great men" return from the funeral, however, they encounter Rabbi Haninah ben Teradion "sitting and occupying himself with the Torah, publicly gathering assemblies, and holding a scroll of the Law in his lap" (*ibid.*). Immediately they arrest him, wrap him in his Scroll and set the two of them on fire – but had they not attended the funeral of Rabbi Yose ben Kisma, the trickster, they would not have met Rabbi Haninah ben Teradion, the fighter, on their way. The death of the one is intrinsically connected to the death of the other: The two rabbis, and with them, the two responses to the *hegemon* they embody, live and die together.

exist without the other: The trickster requires the public demarcation of a distinct Jewish collective by the martyr, and the martyr requires the trickster's physical survival. The martyr is a necessary, complementary anti-thesis of the trickster, and vice versa.

Appendix: The reasoning of the Lyddan sages

In the course of the gemara to *mSanhedrin* 8:7, the amoraim inquire into the reasoning of the Lyddan sages. What led their majority to decide that one may, if forced to choose between a transgression and death, transgress, except for the prohibition of bloodshed, forbidden sexual relations and idolatry?

אינהו דאמור כרבי אליעזר, דתניא: רבי אליעזר אומר: "ואהבת את ה' אלהיך בכל לבבך ובכל נפשך ובכל מאדך" (דברים ו ה). אם נאמר: "בכל נפשך" למה נאמר: "בכל מאדך", ואם נאמר: "בכל מאדך" למה נאמר: "בכל נפשך"? אם יש לך אדם שגופו חביב עליו מממונו, לכך נאמר: "בכל נפשך", ואם יש לך אדם שממונו חביב עליו מגופו, לכך נאמר: "בכל מאדך". גילוי עריות ושפיכות דמים כדרכי, דתניא: רבי אומר: "כי כאשר יקום איש על רעהו ורצחו נפש כן הדבר הזה" (דברים כב כו). וכי מה למדנו מרוצח? מעתה הרי זה בא ללמד ונמצא למד. מקיש רוצח לנערה המאורסה. מה נערה המאורסה ניתן להצילה בנפשו, אף רוצח ניתן להצילו בנפשו. ומקיש נערה המאורסה לרוצח. מה רוצח, יהרג ואל יעבור, אף נערה המאורסה, תהרג ואל תעבור.

רוצח גופיה מנא לן? סברא הוא, דהוא דאתא לקמיה דרבה ואמר ליה: אמר לי מרי דוראי: זיל קטליה לפלניא ואי לא קטלינא לך. אמר ליה: לקטלוך ולא תיקטול. מי יימר דדמא דידך סומק טפוי? דילמא דמא דהוא גברא סומק טפוי?

[Regarding idolatry] they ruled as Rabbi Eliezer. For it has been taught: Rabbi Eliezer said: *And you shall love the Lord your God with all your heart, and with all your soul, and with all your might* (Deuteronomy 6:5). Since 'with all your soul' is stated, why is 'with all your might' stated? Or if 'with all your might' is written, why also write 'with all your soul'? For the man to whom life is more precious than wealth, 'with all your soul' is written, whilst for him to whom wealth is more precious than life it is written, 'with all your might'.

Forbidden sexual relations and bloodshed – like Rabbi’s dictum: For it has been taught: Rabbi said: *For as when a man rises against his neighbor, and slays him, even so is this matter* (Deuteronomy 22:26). But what do we learn from this analogy to a murderer? This [the murderer-case] comes as a teacher [on the rape-case], and turns out a learner: The murderer is compared to a betrothed girl: Just as a betrothed girl must be saved by his [the rapist’s] life, so a murderer must be saved by his [own] life.⁴¹ And a betrothed girl is compared to a murderer: Just as a murderer must rather be killed than transgress, so also must the betrothed girl rather be killed than transgress.

And how do we know this of murder itself? It is common sense. Even as one who came before Rava⁴² and said to him: The governor of my town has ordered me, Go and kill so and so; if not, I will kill you. He answered him: Let him rather kill you than you commit murder; who knows whether your blood is redder? Perhaps his blood is redder? (*bSanhedrin* 74a).

Concerning the absolute prohibition of idolatry, the stama of the Bavli suggests that the sages of Lydda are relied upon Rabbi Eliezer, who interprets the seemingly redundant expressions “*with all your soul*” and “*with all your might*” in Deuteronomy 6:5 as follows: Scripture needed to state not only “*with all your might*,” but in addition also “*with all your soul*,” since there are people, to whom life is more precious than wealth and there are other people, to whom wealth is more precious than life. For those, to whom life is more precious than wealth, Scripture stated “*with all your soul*,” meaning: “one has to even *die* for the Lord.” For those, to whom wealth is more precious than life, Scripture stated, “*with all your might*,” meaning: one has to even give up all one’s *wealth* in order to observe His commandments.

⁴¹ According to the Soncino-translation, the one to be rescued is the murderer’s *victim*: “Just as a betrothed maiden must be saved [from dishonor] at the cost of his [the ravisher’s] life, so in the case of a murderer, he [the victim] must be saved at the cost of his [the attacker’s] life.”

⁴² Var. lec. Rabbah

Concerning the absolute prohibition of bloodshed and forbidden sexual relations, the *sama* assumes that the sages of Lydda founded their decision on the teaching of Rabbi. As described above, the School of Rabbi deduced the necessity to save a murderer by his life from the necessity to save a betrothed girl from her rapist, based upon the Torah's comparison of murder with rape in Deuteronomy 22:26 (“*For as when a man rises against his neighbor, and slays him, even so is this matter*”). Since the *betrothed girl* needs to be saved, so, also a *murderer* has to be saved (cf. *bSanhedrin* 73a).

This deduction, introduced in the *gemara* on the *mishnah*'s first part, is here at first repeated verbally: Following the biblical comparison of murder with rape, an anonymous voice asks: “But what do we learn from this analogy to a murderer?” In what respect are the two cases, murder and rape, compared by Scripture? The answer is, as before in *bSanhedrin* 73a, that “the murderer is compared to a betrothed girl. Just as a betrothed girl must be saved by his [the rapist's] life, so also a murderer must be saved by his [own] life” (*bSanhedrin* 73a).

As mentioned above, the prospective murderer and the betrothed girl threatened with rape were compared by the School of Rabbi regarding their need to be rescued, while the precise *nature* of that rescue – i.e., a rescue *from what?* – was not part of the comparison: The betrothed girl threatened with rape is in a state of absolute coercion and consequentially, does not commit a sin even if she is *not* saved. The School of Rabbi thus deduced the murderer's “rescue from sin” from the necessity to rescue someone, who does not need a rescue from sin at all.

This indifference toward the *kind* of rescue which the betrothed girl and the prospective murderer require, is a “flaw,” that is exposed once the reasoning of the School of Rabbi is transferred from the subject of a “rescue by one's life” (להצילו בנפשו) to the subject of “to be killed and not to transgress” (יהרג ולא יעבור): Here, in the context of *bSanhedrin* 74a, the question is not, as above, “From whence can be known, that a prospective transgressor is to be *saved by his life?*,” but instead: “From whence can be known, that a prospective

transgressor (i.e., a Jew, who is forced to choose between a murder, a forbidden sexual act and his own death) should *rather let himself be killed, than commit the transgression*. The text thus does not stop with “just as the betrothed girl needs to be *saved* [from her rapist], so does the murderer need to be *saved* [from sin].” It continues: “Just as the murderer should *rather be killed and not transgress*, so also the betrothed girl should *be killed and not transgress*.”

This conclusion is obviously awkward: The betrothed girl cannot “choose” to be raped, and therefore she does not commit any transgression even if she is not saved. It is entirely pointless to assume that she should kill herself, since there is no transgression from which she could save herself through her death. Since she is in any case innocent, there is no reason for her to “die and not to transgress.”⁴³ It becomes obvious then, that neither the necessity to let oneself be “saved from sin” when being forced to choose between a transgression and death, nor the necessity to “save” someone who voluntarily commits a transgression (the pursuer), can be deduced from the necessity to save someone, who does not, in any case, commit any sin! Neither a pursuer’s “rescue from sin,” nor a forced transgressor’s “death rather than transgression” can be deduced from the betrothed girl threatened with rape, who does not commit any transgression at all.

The flaw inherent in the reasoning ascribed to the School of Rabbi and the Lyddan sages, respectively, is reflected in scribal attempts to correct it: As a

⁴³ The awkwardness of the comparison was noticed, of course, by commentators of this text. Aryeh Cohen (*Erotics of Martyrdom*, 234) argues, for example, that “[f]irst, there is no basis for it. She is assumed to be a powerless (if not, at least Biblically, passive) victim. She is not doing anything. [...] Second, this is not at all analogous to the case of murder to which it is compared. There, it is a case where the murderer has the ability to decide whether he kills or is killed. The maiden is not given the choice.” Steven Passamaneck (“The Jewish Mandate,” 219) assumes that, [t]he potential murderer and the *na’arah* are both “transgressors,” but her transgression is something she is violently forced to do, while the potential murderer at this stage of the presentation appears to be a willful transgressor.” This is not quite correct, since the betrothed girl is, indeed, no transgressor, as explained above. Also the Tosfot comment on the girl’s suicide: “But the girl, who is the soil of the world, does not need to deliver herself” (cf. *bSanhedrin* 74b, s.v. והא אסתר שהיא אכל הנערה עצמה אין חייבת למסור עצמה).

first step, the Vilna-edition of *bSanhedrin* 74a articulates in the analogy's first part only the "rescue" of those, who indeed require a rescue *from sin*: the prospective murderer and the prospective rapist: "Just as the betrothed girl, *he [the rapist]* may be saved by his life, so may also the murderer may be saved by his life" (מה נערה המאורסה ניתן להצילו בנפשו אף רוצח ניתן להצילו) (בנפשו).⁴⁴ In the Vilna-edition of *bSanhedrin* 74a, the murderer is no longer compared to the betrothed girl (as in *bSanhedrin* 73a), but to the *rapist* of a betrothed girl – even though the text is explicitly introduced here as the reasoning of the School of Rabbi ("Forbidden sexual relations and bloodshed – like Rabbi's dictum") and is quoted before in the same sugya in *bSanhedrin* 73a as: מה נערה המאורסה ניתן להצילה בנפשו אף רוצח ניתן להצילו בנפשו (according to both the Vilna edition and the manuscripts versions). This latter version also coheres to the introductory statement, "The *murderer* is compared to a *betrothed girl*" – not "the murderer is compared to the rapist of a betrothed girl." Moreover, a parallel of this reasoning is to be found also in *bYoma* 82a and *bPesahim* 25b. Here too, in both the Vilna-edition and the manuscripts versions,⁴⁵ the text reads: מה נערה המאורסה ניתן להצילה בנפשו אף רוצח ניתן

⁴⁴ In the ms Munich of *bSanhedrin* 74a (351r, ll. 41-42, picture number 704) it is impossible to see to which object the verb "to save" refers here: מה נערה מאור' ניתן להצ' בנפשו אף רוצח ניתן להצ' בנפשו.

(<http://daten.digital-sammlungen.de/~db/bsb00003409/images/index.html?id=00003409&nativeno=351>).

The ms Herzog (ll. 29-30) contains only the analogy's "second part" (מה רוצח יהרג (ואל יעבור).

(<http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=1&pereknum=075&masecet=34&mnusriptnum=2673&p=1&masecetindex=23&perekindex=72&numamud=1&manuscriptindex=1&k=%2>).

⁴⁵ Cf. for *bPesahim* 25b: 1. ms London, Valmadonna Thrust, 9, folio 43, ll. 8-10 (<http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=2&pereknum=027&masecet=14&mnusriptnum=5012&p=1&masecetindex=4&perekindex=24&numamud=2&manuscriptindex=1&k=>).

2. Vatican, Bibliotheca Apostolica, Ebr. 134, second column, ll. 31-32: <http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=2&pereknum=027&masecet=14&mnusriptnum=374&p=1&masecetindex=4&perekindex=24&numamud=2&manuscriptindex=7&k=>

In the ms New York, Jewish Theological Seminary, Rab. 1623, l. 25, the first part of the

להצילו בנפשו.⁴⁶ The Vila-edition's comparison of the *rapist* with a murderer thus appears to be a correction of the more "difficult" reading: the comparison of the *betrothed girl* with the murderer.

Having thus corrected the analogy's first part, also the analogy's second part no longer leads to the betrothed girl's suicide: The ms Yad ha-Rav Herzog and the ms Munich of *bSanhedrin* 74a read: "Just as a murderer must rather be killed than transgress, so also the betrothed girl, *he [the rapist] must rather be killed than transgress.*" (מה רוצה יהרג ואל יעבור אף נערה המאורסה) (יהרג ואל יעבור).⁴⁷ Accordingly, the Lyddan sages' reasoning does not hinge, as was suggested before, on the necessity to save the betrothed girl from her rapist, but instead, on the absolute prohibition of bloodshed: "And how do we

analogy (מה נערה המאורסה ניתן להצילה בנפשו אף רוצה ניתן להצילו בנפשו) is not quoted. (<http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=2&pereknum=027&masecet=14&mnusriptnum=545&p=1&masecetindex=4&perekindex=24&numamud=2&manuscriptindex=4&k=>).

The same holds true for ms Vatican, Bibliotheca Apostolica, Ebr. 125, ll. 19-20 (<http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=2&pereknum=027&masecet=14&mnusriptnum=370&p=1&masecetindex=4&perekindex=24&numamud=2&manuscriptindex=6&k=>).

⁴⁶ Cohen ("Towards an Erotics of Martyrdom," 233) translates in line with the Vilna-edition: "Just as a betrothed maiden – he [the ravisher's soul] must be saved at the cost of his [the ravisher's life], so too in the case of a murderer – he [the attacker] must be saved at the cost of his [the attacker's] life." He argues in favor of the Vilna-edition, that "in the first part of the analogy [The murderer is compared to a betrothed girl etc.] the perpetrators are compared to one another. What is the logic to compare the perpetrator in one case (the murderer) to the victim in the other case (the maiden)?"

⁴⁷ Cf. ms Herzog:

<http://jnul.huji.ac.il/dl/talmud/bavly/showbav1.asp?mishnanum=1&pereknum=075&masecet=34&mnusriptnum=2673&p=1&masecetindex=23&perekindex=72&numamud=1&manuscriptindex=1&k=%2>, ll. 29-30.

ms Munich:

<http://daten.digital-sammlungen.de/~db/bsb00003409/images/index.html?id=00003409&nativeno=351>, 351r, ll. 41-42, picture number 704.

However, the Vilna-edition of *bSanhedrin* (and also the Vilna-edition of *bPesahim* 25b) here retains the more difficult reading, according to which the betrothed girl is to kill herself: "Just as a *murderer* must rather be killed than transgress, so also the *betrothed girl* must rather be killed than transgress."

know this of murder itself?” That is, how do we know that someone, who is forced to choose between bloodshed and his own death, should rather “be killed than transgress”? “It is common sense. Even as one who came before Rava and said to him: The governor of my town has ordered me, Go and kill so and so; if not, I will kill you. He [Rava] answered him: ‘Let him rather kill you than that you should commit murder; who knows whether your blood is redder? Perhaps his blood is redder?’” (*bSanhedrin 74a*).

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