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# "We Act as Their Agents" and the Prohibition of Judgment by Laymen: A Discussion of Babylonian Talmud Gittin 88b

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**Abstract:** *A sugya just a few lines long in the Babylonian Talmud, Gittin 88b, had enormous influence on the development of Jewish law in the area of the authority to pass judgment given to rabbinical courts in our day. According to the simple, commonly accepted understanding of this sugya, the Tannaim ruled that the Torah forbade men who had not received ordination to act as judges, and as a result, the judges in Babylonia were permitted to adjudicate, of necessity, only as agents of the judges of Palestine (שליחותיהו קא עבדינן, we act as their agents). The article reexamines these positions. The first part suggests two new ways to understand the essence of the agency of which R. Joseph spoke in the sugya. The second part of the article reexamines the source of the prohibition, to the extent that it exists, against adjudication by laymen.*

## Introduction

The first paragraph of the *Ḥoshen mishpat* section of the *Shulḥan ʿArukh* describes the areas of jurisdiction of present-day rabbinical judges (*dayyanim*):

> Nowadays the judges may adjudicate cases of admissions and transaction of loans, marriage contracts, inheritances, gifts, and damage done to another person's chattel, which are matters that are of frequent occurrence and involve a monetary loss; but matters that are not of frequent occurrence although they involve a monetary loss, e.g., cattle that injured other [cattle], or matters that do not involve a monetary loss although they are of frequent occurrence, e.g., the repayment of the double amount, and likewise, all fines that were imposed *by* the sages… and thus also whosoever pays more than the actual damage done, or one who pays half-damages—[the law is that] only authoritative judges duly ordained in the Land of Israel may judge it…[1]

The basis for the distinction among various areas of jurisdiction, and for the authority of present-day judges who are not expert and ordained, is found in two

1. *Shulḥan ʿArukh*, *Ḥoshen mishpat* 1:1.

sugyot of the Babylonian Talmud: Gittin 88b and Bava Kamma 84b. The first part of this article clarifies a central expression found in these two sugyot and discusses its origin: שליחותייהו קא עבדינן (we act as their agents). This expression is of critical importance, since the entire authority of present-day judges is built on it. As noted in the passage cited above, they may pass judgment in only three areas: monetary matters that are not fines (as stated in the *Shulḥan ʻArukh*), forcing husbands to grant a divorce,[2] and accepting converts.[3]

The expression, "we act as their agents," appears frequently in the legal decisions of both Rishonim and Aḥaronim (though it is important to emphasize that it hardly ever appears in the writings of the Geonim[4]) in order to explain the juridical capacity of judges outside of Palestine, and its scope. Thus, for example, Maimonides writes:

> Cases involving fines, such as larceny, mayhem, claims for twofold or fourfold or fivefold restitution, for rape or seduction, or claims of a similar nature, are adjudicated by three well-qualified judges, i.e., judges who received their ordination in Palestine. But cases that do not involve action in tort, such as admission of indebtedness and transaction of loans, do not require three well-qualified judges for their adjudication. Three laymen or even one well-qualified judge may try them. Therefore cases of admission and transaction of loans and the like may be tried even outside Palestine, for although no tribunal outside Palestine can be designated as *'elohim*, it merely acts as an agent of the court of Palestine. It is denied, however, the power to act as an agent for the court of Palestine in matters involving fines.[5]

This "agency" is also presented, without reservation, in some of the scholarly literature on Jewish Law as the true explanation of the authority of the judges of Babylonia. Thus, for example:

2. *Shulḥan ʻArukh*, *'Even ha-ʻezer* 134:5.

3. See the words of R. Yoḥanan in B. Yevamot 46b and Tosafot there (s.v. "משפט"); Naḥmanides's second explanation, and Ritba's, on B. Gittin 88b; but see also Rashba in Yevamot and in Gittin; *Beit Yosef*, *Ḥoshen mishpat* 1.

4. See at length Amihai Radzyner, "Yesodot dinei kenasot ba-mishpat ha-talmudi" (PhD diss., Bar-Ilan University, 2001), 152. The only exceptions in geonic literature are the author of the *She'iltot* (Shmu'el Kalman Mirsky, ed., *She'iltot de-R. Aḥai Ga'on*, vols. 1–2 [Jerusalem: Sura, 1982]) and the responsum of Rav Natronai Bar Hilai Gaon (ed. Robert Brody, [Jerusalem: Ofeq Institute, 1994]), 512; Avraham Epstein, ed., *Maʻasei ha-ge'onim* (Berlin: Hevrat Meitse Nirdamim, 1910), 72, in which the matter of agency appears in the last fragmentary sentence of the response and is not clear, and in *Maʻasei ha-ge'onim* the continuation belongs to a different response. The Geonim's rejection of the idea of "as their agents" was noted by Julius Newman, *Semikha* [Ordination] (Manchester: Manchester University Press, 1950), 34.

5. *Mishneh Torah*, *Sanhedrin* 5:8. Even in Maimonides's own approach there is a question as to how much he really regarded agency as the basis of the authority of judges outside of Palestine. This was noted by some of the Aḥaronim. See Yitzḥak Halevi Herzog, *Teḥukah le-Yisrael ʻal-pi ha-Torah*, ed. Itamar Warhaftig (Jerusalem: Mosad ha-Rav Kook, 1989), 3:297.

> Judges in Babylonia who were not "ordained experts" did not regard themselves as authorized to pass judgment except with the permission of judges in Palestine and as their agents. Therefore they only adjudicated ordinary matters entailing financial loss, as their purpose was to improve the world and establish peace and order on earth, and it may be supposed that with the permission of the judges of Palestine and as their agents, they adjudicated such matters. For that reason, the judges of Babylonia did not pass judgments connected with fines.[6]

Do the laws of agency really apply here? Did the Amoraim of Babylonia truly think that this was the basis of their permission to adjudicate various matters? Is there a historical basis to the claim that the authority to pass judgment was given to the judges of Babylonia by those of Palestine, or could this be a fictional halakhic justification?[7] Perhaps it is possible to understand the agency in question in an entirely different manner.

The second part of this article examines a baraita cited in the course of the sugya in B. Gittin 88b (and only there). This baraita is apparently the basic source for the prohibition of judgment by laymen (except in the areas where they are appointed, lacking an alternative, as agents of the ordained judges of Palestine, as stated above). Examination of this baraita and its parallels raises grave questions regarding the source of the prohibition of judgment before laymen, a prohibition whose influence on the areas of jurisdiction of halakhic courts can be seen to this day in the words of the authorities cited above and in countless other halakhic sources, such as the Tur in the first section of *Ḥoshen mishpat*:

> Today, when there is no ordination, all the judges are unqualified according to the Torah, as it is written, "before them," [Exodus 21:1] meaning before *'elohim*, as written in the pericope, which is to say ordained [judges], and we interpret that to mean "before them and not before laymen," and we ourselves are laymen [in that sense]. Therefore there are no judges with authority from the Torah except if they act as the agents [of the ordained judges of Palestine].

6. Shalom Albeck, *Pesher dinei ha-nezikim ba-Talmud* (Tel-Aviv: Devir, 1965), 91. See also Shalom Albeck, *Batei ha-din be-yamei ha-Talmud* (Ramat-Gan: Bar-Ilan University Press, 1980), 97–98, and other scholars such as: Jacob Shmuel Zuri, *Toldot ha-mishpat ha-ẓiburi ha-'Ivri*, book 3, part 1 (London: Narodiczky print, 1933), 181; Jacob Shmuel Zuri, *Torat ha-mishpat ha-'ezraḥi ha-'Ivri: mishpat ha-nezikin* (London: Urim, 1937), 316; Victor Aptowitzer, *Meḥkarim be-sifrut ha-ge'onim* (Jerusalem: Mosad ha-Rav Kook, 1941), 111; Emanuel B. Quint and Neil S. Hecht, eds., *Jewish Jurisprudence: Its Sources and Modern Applications*, vol.1 (Chur: Harwood Academic Publishers, 1980), 79–80; Michael S. Berger, *Rabbinic Authority* (New York: Oxford University Press, 1998), 50–51, 53. In the remarks cited above, Albeck connects "agency" with the justification of "improving the world." Indeed, we have found a similar connection in the writings of the Rishonim, who connect "as their agents" with the explanation of not "locking the door" to loans.

7. Similarly, the rabbis attribute various regulations and rulings to biblical authority (Moses, Joshua, Solomon, Ezra), to ancient sages (the court of the Hasmoneans), etc. In this connection, see Noaḥ 'Aminoaḥ, "Takanot Yehoshua ben Nun," *Shenaton ha-mishpat ha-'Ivri* 9–10 (1982–83): 301–327, esp. 302–306.

From this we see that the sugya in Gittin 88b is key for understanding the authority of judges in an age when there is no ordination and the influence of post-talmudic halakhic ruling is enormous.

As noted, the statement that present-day rabbinical judges act on the strength of an agency conferred upon them in the distant past by ordained judges in the Land of Israel, appears in many legal decisions handed down over the generations. The following are a few examples from medieval decisions.

The most significant and influential system of courts in the Jewish world today is that of the official rabbinical courts of the State of Israel. Rabbi Shlomo ʻAmar, the Chief Rabbi of Israel, who now serves as the president of the High Rabbinical Court in Jerusalem, administers this system by virtue of Israeli law. However, in the opening speech at the 2008 national convention of rabbinical judges in Israel, Rabbi ʻAmar went out of his way to emphasize the following point:

> How wonderful is the statement of the Tur, that today, since there is no ordination, all the *dayyanim* are abolished, and in any event there are no *dayyanim*. Thus, by what virtue do we pass judgment today? The Tur states that this is only by agency of the Rishonim, who were ordained, and, therefore, as long as we act as faithful agents, we have the power and also the authority to judge and to teach the word of God as Halakhah, according to the instruction of our holy Torah. However, if, heaven forfend, we damage this agency, then we have no authority.
>
> If we take the time from the giving of the Torah until today, we find that for most of these years, judgment was by virtue of agency, and this is more time than judgment was by virtue of ordination. This teaches the power of the ordinances of our sages, may they rest in peace, blessed be He who chose them and their teaching.[8]

Indeed, rabbinical judges frequently emphasize in practical terms that this agency is the source of their authority. Thus, for example, the Chief Rabbi of Haifa explains his authority to force husbands to divorce their wives in the present day: "The power of imposition is also given to a court in our day, which is not a court of ordained judges, because ʻwe act as their agents.'"[9] Similarly, the Rabbinical Court of Netanya stated:

> A rabbinical court is not a panel of jurors who hears testimony. A rabbinical court in our time "acts as their agents" and from the ancient agency it derives its authority, and it is incumbent upon it to issue judgments on the heart of matters according to the tradition of judgment accepted among the Jews for generations.[10]

8. Shlomo Moshe ʻAmar, "Divrei berakhah," in *Kenes ha-dayyanim 5768* (Jerusalem: The Rabbinical Courts Management, 2009), 11. See also his lecture: "Sheliḥ'utayhu de-kamai ʻavdinan," *Kenes*, 13–24.

9. She'ar-Yishuv Cohen, "Kefiyat ha-get ba-zman haze," *Teḥumin* 11 (1990): 196.

10. *Piskei din rabaniyim* 17 (1997): 152. On the influence of the status of present day rabbinical courts on the capacity to adjudicate various cases of damages, see, for example: Yehuda Warburg,

## The Sugya in Gittin 88b

The expression, "we act as their agents," appears in only two sugyot in the Babylonian Talmud: Gittin 88b and Bava Kamma 84b. A comparison of the two sugyot shows that the one in Gittin is the source of the one in Bava Kamma, which improves upon it. The inclusion of the expression during an ordinary discussion in Bava Kamma indicates that it was known to its users from another source. The words of Rav Yosef in Gittin appear anonymously in Bava Kamma; the statement, according to which one may adjudicate as an agent of the sages of Palestine only on "matters of financial loss," was inserted of necessity in Bava Kamma as a consequence of the course of discussion, and it does not appear in Gittin.[11] Hence we shall examine the original source, in Gittin 88b.

Here is the text of the sugya:[12]

אביי אשכחיה לרב יוסף דיתיב וקא מעשי אגיטי.[13]
א"ל: והא אנן הדיוטות אנן, ותניא: היה ר' טרפון אומר: כל מקום שאתה מוצא אגוריאות[14]
של עובדי כוכבים,[15] אע"פ שדיניהם[16] כדיני ישראל, אי אתה רשאי להיזקק להם,

"Harnessing the Authority of Beit Din to Deal with Cases of Domestic Violence," *Tradition* 45, no. 1 (2012): 37–59, esp. 41 and the sources there in n. 26.

11. Shamma Friedman, "Hosafot ve-kit'ei sevarah be-perek ha-ḥovel," *Tarbiẓ* 40 (1970): 427; Noaḥ 'Aminoaḥ, "Mumḥim be-masoret ha-halakhah," *Dinei Israel* 8 (1977): 167; Radzyner, "Yesodot," chap. 8 esp. 188–189. Indeed, it is quite clear that the sugya in Bava Kamma uses the principle that emerges from our sugya, and only when it is not sufficient, it adds the principle of financial loss.

12. The version cited below is that of the Vilna edition. Significant textual variants have been presented in the notes according to the textual witnesses in the Lieberman Institute's Talmud text databank CD-ROM and in the databank of Yad Ha-Rav Herẓog. There are two Genizah fragments of this sugya: Oxford Bod. Heb. b. 10 (16) [2833] and TS F4.97; and four manuscripts: 1. Vatican 130; 2. Vatican 140; 3. Munich 95; 4. Leningrad-Firkowitz 187. The two first printings: Ḥaim Zalman Dimitrovski, *Seridei Bavli* (New York: JTSA, 1979), 3:361–362 and the Soncino edition of 1488. For information on the textual witnesses, see: Meir Simhah Feldblum, *Dikdukei sofrim: masekhet gittin* (New York: Horeb, 1966), 9–14; Hillel Porush, ed., *Talmud bavli 'im shinuyei nusḥa'ot mitokh kitvei ha-yad, Gittin* 1 (Jerusalem: Yad Ha-Rav Herẓog, 1999), 31–69. In addition to the direct witnesses, the text of the *She'iltot* should be examined: Mirsky, *She'iltot*, 23, where the beginning of the midrash of R. Tarfon is presented (as in all the manuscripts); in print: R. Meir and then the story of R. Joseph and 'Abaye. See also Mirsky, *She'iltot*, vol. 3 (Jerusalem: Sura and Mosad Ha-Rav Kook, 1963), 169–170.

13. In the Leningrad MS: "גיטא"; in fragments of the Talmud: "אגיטין."

14. In the Munich and Leningrad MSS: "ערכאות," also in the parallel in *Midrash ha-gadol* for Exodus 21:1, [ed. Mordekhai Margaliyot (Jerusalem: Mosad Ha-Rav Kook, 1957), 459]: "אורכיות/ארכיות/ארכאות." This term was very widespread whereas "אגוריאות" is hardly ever found in rabbinical literature, and this might be the only place where it is found. According to Daniel Sperber, *A Dictionary of Greek and Latin Terms in Rabbinic Literature* (Ramat-Gan: Bar-Ilan University Press, 1984), 32, the source of the term is "ἀγορά," meaning a judicial assembly.

15. In all the textual witnesses: "של גוים." And similarly the following use of "עובדי כוכבים" (heathens).

16. In MS Munich and Vatican 130: "אע"פ שדיניהם דין כדיני ישראל" (even though their laws are like those of the Jews).

שנאמר:"ואלה המשפטים אשר תשים לפניהם," לפניהם ולא לפני עובדי כוכבים, דבר אחר:[17] לפניהם - ולא לפני הדיוטות!
א"ל: אנן[18] שליחותייהו קא עבדינן'[19] מידי דהוה אהודאות והלואות.[20] אי הכי,[21] גזילות וחבלות נמי![22] כי[23] עבדינן שליחותייהו - במילתא דשכיחא, במילתא[24] דלא שכיחא - לא עבדינן שליחותייהו.[25]

'Abaye once found Rav Yosef sitting in court and compelling certain men to give a bill of divorce. He said to him: Surely we are only laymen, and it has been taught: R. Tarfon used to say: In any place where you find heathen law courts, even though their law is the same as the Israelite law, you must not resort to them since it says, "These are the judgments which thou shalt set before them," [Exodus 21:1] that is to say, "before them" and not before gentiles. Another explanation, is that it means "before them" and not before laymen!—He replied: We are acting merely as their agents, just as in the case of admissions and transaction of loans. If that is the case, we should do the same with robberies and injuries!—We can act as their agents only in matters which are of frequent occurrence, but not in matters which occur infrequently.

We must examine two points in this sugya: (1) what is the nature of the agency referred to by Rav Yosef? And (2) what is the connection between the words of Rav Yosef and the teachings that appear after them, which articulate the principle according to which the agency is valid only regarding matters "of frequent occurrence"? That general rule proposes the reason for the distinction between the areas

17. In MS Munich and the Oxford Genizah fragment the words "דבר אחר" are missing.

18. In three witnesses the word "אנן" (we) is missing: in *Seridei bavli*: "אמ' ליהשליחותיה;" in MS Leningrad: "א"ל שליחותיהו"; in MS Vatican 130: "א"ל שליחות'."

19. In MS Munich and Vatican 140: "קעבדינן."

20. In the Oxford Genizah fragment this sentence is missing, and it reads: "אמ' ליה אנן שליחותייהו קא עבדינן והכי דיני קנסות נמי כי… שליחותיהו במילתא דשכיחא". For examination of the meaning of this wording see Radzyner, "Yesodot," 291.

21. In MS Vatican of the *She'iltot*: "אמ' ליה אי הכי."

22. In MS Munich: "אי הכי אפי' גזילו' וחבלו'," and "נמי" are missing.

23. In MSS Munich, Vatican 140, and Leningrad is added: "א"ל כי." If we combine this with the earlier "אמ' ליה אי הכי" attested in MS Vatican, we find that these words are part of a conversation between 'Abaye and R. Joseph. And see the novelae attributed to Rabeinu Yonah to Sanhedrin 3a, s.v. "אלא אמר רבא" on the sugya in Gittin: "And 'Abaye questions him: if so, also robberies and injuries? And he answered him that they acted as their agents."

24. In Vatican 130 and fragments of the Bavli: "אבל במילתא."

25. This word is missing in Vatican 140. It is relevant to cite this sugya from *She'iltot* (ed. Mirsky, vols. 1–2). Changes in the MSS are presented in parentheses (and see Mirsky's note there): "אי הכי אפילו גזילות וחבלות נמי, דתנן דיני ממונות בשלשה [ברוב כתה"י נוסף: הודאות והלואות בשלשה. בכ"י פריז:] בשלשה הדיוטות], גזילות וחבלות בשלשה. אמר ליה הני שכיחי והני לא שכיחי" (If so even thefts and damages as well, for it was taught that monetary judgments by three [in most MSS there is an addition: admissions and loans by three. In MS Paris: by three laymen], robbery and damages by three. He answered: these are of frequent occurrence and those are not frequent.) Note how the author of the *She'iltot* introduces the interpretation of the Talmud that monetary matters are "admissions and loans," in a quotation ostensibly taken from the Mishnah.

of law adjudicated in Babylonia and those that may not be adjudicated there, a matter expanded upon, as noted, in the sugya in Bava Kamma 84b.

## The Character of the Agency

Both Rishonim and Aḥaronim discussed the expression, "we act as their agents," at length.[26] Its citation without attribution by Maimonides, as quoted above, and in other halakhic works, shows that it was understood as "a kind of agency" (although not a personal agency for each judge), which did not have to be explained in a special manner, a kind of explicit authorization given by the judges of Palestine to those of Babylonia to pass judgment in certain areas.[27] This was Rashi's approach[28] as well as that of Tosafot,[29] to this sugya. In his novelae on B. Yevamot, Naḥmanides[30] considers whether the validity of this agency is based on rabbinical or biblical authority, but in his novelae on Sanhedrin he writes:

> In a place where it is not possible [to find expert judges, and it is] a frequent occurrence and involves monetary loss, they did not see fit to deny judgment to the entire Jewish people outside of Palestine, and they mandated that we should be their agents and pass judgment with their permission.[31]

But where do we find that authorization? The Babylonian Talmud,[32] which deals with authority granted by the Exilarch and the Nasi' in Palestine, states that the

26. It appears that the Geonim indeed understood that this expression was not consequential and could not serve as the basis of the authority of their jurisdiction in Babylonia, as I shall immediately argue.

27. See, for example, *Responsa Ḥatam Sofer*, part 1 (*Oraḥ ḥayim*), sect. 84: "Your Excellency has written to ask about Gittin 88b, 'we act as their agents,' which Rashi interprets as simply receiving authority. You have written very well, that there one must interpret it that it is impossible to say there is real agency and we are their agents exactly according to the laws of agency, and they made us an agent for all the instances and events until the end of the exile until the glory will return quickly and in our day… Further, those who appointed the agents were already dead, and those appointed as agents were not yet born, and we have never encountered such a form of agency. See Gittin 14b regarding a dead person who sent an agent, whether he is free of the agency, or whether he is commanded to do the bidding of the dead man, because once he is dead his agency is canceled, and therefore 'as their agents' is the taking of authority and not a true agency." See further the Responsa of the Ribash, sec. 228.

28. "The agency—of the residents of Palestine. We act—they gave us authority." Cf. the approach of Ran (Rabbenu Nissim of Gerona) in his novelae to the beginning of Sanhedrin. He defines the agency as the experts' waiving of their prerogative so that laymen could also judge. Ran continues the approach of Naḥmanides, interpreting "as their agents" as rescinding the prohibition against the jurisdiction of laymen.

29. s. v. "במילתא ": "and if you say: how can we act as their agents, now there are no experts in Palestine, and who will give us authority? And it may be said that we are acting as their agents from long ago."

30. Yevamot 46b, s.v. "שמעת מינה." And many Aḥaronim discussed his words. See for example *Netivot ha-mishpat* 1:1.

31. B. Sanhedrin 3a, s.v. "וראיתי."

32. B. Sanhedrin 5a. There it is apparently already in the words of R. Ḥiyya to Raba bar Ḥana, and not only in the later parts of the sugya. Of course the Rishonim distinguished between financial

"authorization" (actual and direct, which is preferable to the general and abstract authorization of "we act as their agents") from the Nasi' in Palestine is ineffective for judgment in Babylonia. This means that it does not exempt the judge if he errs in judgment, but that Babylonian authorization is valid in Palestine.[33] Moreover, why does the Babylonian Talmud in Sanhedrin 2b–3a use this authorization to explain why laymen may adjudicate הודאות והלוואות (admissions and loans)? Some medieval authorities do indeed connect the reason given there for judging in loans cases—the fear that the lenders might have no legal recourse—with the expression, "we act as their agents."[34] Others see different justifications for it.[35]

Thus R. Isaac bar Sheshet (the Ribash) writes in his well-known responsum that deals with various aspects of the institution of agency, especially agency connected to a court:

> Certainly when a court appoints an emissary, this is for something they have already agreed upon to act according to the law, and they appoint an emissary to carry it out; for example: if they agreed to sell property to pay a woman's ketubah, or for a debtor to pay his debt, they may appoint an agent to perform

laws and the laws of fines. See Maimonides, *Mishneh Torah, Sanhedrin* 4:14. But the entire matter is difficult, because a person who adjudicates fines would appear to be preferable for monetary disputes as well!

33. This is according to the extant reading, which, too, "is not at all self-evident and there were many 'slight' but nevertheless critical changes in the text … and this teaching was touched up even in antiquity," according to Eliezer *S*himshon Rosenthal, "Rav ben Aḥi R. Ḥiyya gam ben 'aḥoto?" in *Sefer Ḥanokh Yalon*, ed. Saul Lieberman (Jerusalem: Kiryat-Sefer, 1963), 303 n. 52. See also, Rosenthal, "'Iyyunim be-toledot ha-nusaḥ shel ha-Talmud ha-Bavli," in *Rabbi Mordechai Breuer Festschrift*, ed. Moshe Bar-Asher (Jerusalem: Akademon, 1992), 576–577. Rosenthal points out in the latter source that the students in the yeshivot of Palestine (according to *Megillat 'Evyatar* and *Sefer ve-hizhir*) "in their zeal for the teachings of Palestine completely reversed the sugya," so that it would emerge for them that the authority of Babylonia was ineffective in Palestine. Rosenthal also used this insight to show that the text of this sugya was problematic. Hugo Mantel, *Meḥkarim be-toldot ha-sanhedrin* (Tel-Aviv: Dvir, 1969), 245–246 (n. 279 suggests that the Palestinian version was the original one). See his proofs (in the original English edition of this work). See also: David Rosenthal, "Mesorot 'Ereẓ-Yisra'eliot ve-darkan le-Bavel," *Katedra* 92 (1999): 41–44. A comprehensive analysis of the components of the sugya is found in Zuri, *Toldot*, 179–194. In this context, it should be pointed out that the author of *Megillat 'Evyatar* (R. 'Evyatar ben 'Eliyahu ha-Cohen, the last of the Geonim of Palestine, in the late eleventh and early twelfth century), of course uses "as their agents" in the framework of his arguments about the preference of Palestine. See Moshe Gil, *'Ereẓ Yisra'el ba-tekufah ha-muslemit ha-rishonah (634–1099)* (Tel-Aviv: Tel-Aviv University Press, 1983), 3:400–401. On this source see Neil Danzig, *Mavo le-sefer halakhot pesukot* (New York: JTSA, 1993), 65 n. 128.

34. Naḥmanides above in Sanhedrin, and following him his disciple the Rashba in his novelae on Gittin 88b, s. v. "כי עבדינן." Rashi, too, in Gittin there: "as in the case of—on monetary matters and loans where we act as their agents—as it is stated in Sanhedrin," and others. It appears that the first one to connect these things was the author of the *She'iltot* (vol. 3, 169–70): "what is the difference about the admission and loans where it is permissible before three laymen? So that they will not lock the door before borrowers, the rabbis stated that three laymen acted as the agents of experts."

35. Rashi himself in Sanhedrin 13b, s.v. "למידן." And see the discussion in Albeck, *Batei ha-din*, 97–98 n. 6, in Rashi's words.

> the sale, as in the case there. Just as they do to administer lashes and excommunicate and ban by an agent of the court, to whom the court has declared the obligation to that; but to appoint an agent to find guilty or innocent as he sees fit, perish the thought. And this is what they say in the chapter *Ha-ḥovel* (Bava Kamma 84b) and in the chapter *Ha-megaresh* (Gittin 88b), that in admissions and loans we act as their agents, for this is not fully an agency, but it means, in frequent occurrences where there is financial loss, we will make ourselves as if we were their agents. And as if the Great Court in Palestine, which has been appointed over all of the Jewish people from the time of our master Moses of blessed memory, had ordained that with these words the sages abroad could pass judgment without ordination.[36]

Careful reading of his words shows that he understands that this is neither agency nor authorization. The judges outside of Palestine appoint themselves, on their own,[37] as if they were emissaries of the court in Palestine, to pass judgment in areas where it is impossible not to do so.[38]

Hence there is a fictive element in the use of the concept of agency. Another proof that the concept of agency can entail a legal fiction is found in a sugya upon which a question addressed to the Ḥatam Sofer was based.[39] The Talmud[40] addresses the question of how gentiles could make trees in Palestine forbidden for use by Jews because of idol worship (*'asherah*). Since Palestine has been the heritage of the Jewish people from the time of Abraham, can a person make something forbidden if it does not belong to him? (Incidentally, the same difficulty is involved in the case of a Jew who placed a brick somewhere with the intention of bowing down to it, but did not bow down to it, and then a gentile came and bowed down to it, so that now the Jew is forbidden to use the brick.) Even if the gentile makes the use of the tree forbidden for different reasons, in order to permit a Jew to use a gentile's idol, it is enough for the gentile to deny it; why were the Jews then commanded to burn the *'asherot*? The Talmud says:

36. Responsa of the Ribash, sec. 228. A suggestion similar to that of the Ribash was made by Arieh Karlin, "Sheliḥutayhu ka-'avdinan," *Kol-Torah* 5, no. 22 (1951): 11–12. Cf. the words of Ribash in Responsum no. 271, which deals with actual agency, and there agency is equivalent to authorization.

37. Proof of the matter from B. Ḥullin 18a, where the expression, "we act as their agents," is used by Rav Ashi, who appointed himself on his own authority as an "agent" of Raba bar Ḥanina, and see Rashi there, s.v. "שליחותיה עבדינן."

38. It might be possible to state this with precision from the words of R. Akiva Eiger in his comments on M. Sanhedrin 1:1. A good formulation of his words can be found in Haim H. Cohn, "'Al 'arkha'ot shel goyim ve-'al 'arakhim shel Yehudim," *Mishpat u-mimshal* 4 (1997): 299–330, 301: "…Another expression: the words 'before them' mean before ordained judges alone. This was a restriction by which the rabbis of Babylonia could not abide. They solved the problem by creating a fictional agency, which is to say, we laymen are acting as the agents of ordained judges. Here we find the great difference between Jewish laymen and gentiles, for the former are capable and permitted to serve as agents of that kind, and the latter are not [for it is known that a non-Jew cannot be an agent]."

39. *Responsa Ḥatam Sofer*, pt. 1 (*Oraḥ ḥayim*), sect. 84, cited earlier.

40. B. 'Avodah Zarah 53b.

> אלא מדפלחו ישראל לעגל גלו אדעתייהו דניחא להו בעבודת כוכבים, וכי אתו עובדי כוכבים שליחותא דידהו עבדי, ה"נ ישראל שזקף לבינה גליא דעתיה דניחא ליה בעבודת כוכבים וכי אתא עובד כוכבים ופלח לה שליחותא דידיה קעביד.[41]

> But inasmuch as the Israelites worshiped the Golden Calf, they revealed their propensity for idolatry, so when the idolaters came [and worshiped *'asherot*] they acted according to [the Israelites'] bidding. Similarly when an Israelite set up a brick, he revealed his proneness for idolatry; therefore when a heathen came and worshiped it he acted according to [the Israelite's] bidding.

Some commentators sought to derive actual laws regarding agency from this sugya in the Talmud, as well, as is seen in a question addressed to the Ḥatam Sofer and the Ḥida (Rabbi Ḥaim Joseph David 'Azulai). The Ḥida himself explains that:

> We do not find him guilty because of the law of agency, and the term is used by extension, because who appointed [the gentiles] as agents? But the intention of the Talmud was that in worshiping the Calf [the Israelites] could not argue that a person cannot forbid what is not his own.[42]

Just as agency and authorization do not apply here, but the Talmud tries to deflect the difficult question that it raised and to explain that there is no contradiction among the various laws about idolatry, so it seems that Rav Yosef does the same thing in the sugya in Gittin. We must assume that Rav Yosef was not the first to force men to grant a bill of divorce in Babylonia, and, in contrast to several other areas of jurisdiction, we do not find any other doubt expressed in the Talmud regarding the capacity to impose a divorce in Babylonia. Early Amoraim, on this and other issues, speak as though it was self-evident that a bill of divorce that is legally imposed among the Jews is valid; they did not make the imposition of divorce dependent on the location of the court or on the quality of its judges.[43] 'Abaye expresses doubt on this for the first time in

41. There are no significant differences in the manuscripts aside from the fact that "עבודת כוכבים" is replaced by "עבודה זרה." For other examples of the use of the institution of agency with a borrowed meaning, see: B. Yevamot 10b regarding levirate marriage: "he merely acts as an agent of the brothers, he acts as the agent of her rival [the second wife]"; B. Bava Meẓi'a 106b, where Ravina and Rav Ashi treat the field as "the earth acting in the agency of its owner"; B. Me'ilah 21a, regarding agency carried out by an animal in the matter of '*eruv teḥumin*.

42. *Ya'ir 'ozen, 'Ayin zokher*, sects. *aleph-hey*, principle no. 55 (Lemberg edition, 1865, 39). See also his remarks in the responsa *Tov 'ayin*, sec. 9 (Jerusalem, 1961), and his words in *Birkei Yosef*, '*Even ha-'ezer* 5:16 (Vienna 1860). Interestingly, I have not found any Rishonim who attribute halakhic importance to this sugya. Only Aḥaronim who deal with the agency of a gentile refer to it, and some of them are cited by the Ḥida.

43. See the extensive discussion of these approaches in David J. Mescheloff, *"*Get me-raẓon ve-get me'useh be-Yisra'el u-ba-goyim, ke-din ve-she-lo ke-din" (PhD diss., Bar-Ilan University, 2002), 142–202. See also B. Gittin 34b, which apparently shows 'Abaye's gratitude for the divorce given under duress in Babylonia.

Gittin, and Rav Yosef is forced to respond to him without any source in order to justify the practice in Babylonia.

Moreover, it should be noted that this sugya refers to deliberation in a court: אביי אשכחיה לרב יוסף דיתיב וקא מעשי אגיטי ('Abaye once found Rav Yosef sitting in court and compelling certain men to give a bill of divorce).[44] In such a situation the rabbi must reject his disciple, who doubts his authority in the course of the deliberation,[45] before the husbands who are forced to grant writs of divorce against their wills. No wonder that in response to this challenge Rav Yosef is forced to make an argument that might have no basis.[46] Were it not for the continuation of the sugya and the sugya in Bava Kamma 84, which continues to develop this problematic argument, it is doubtful whether the idea would have had any influence at all on the literature of Jewish Law in subsequent generations.

44. The issue of the historical status of the story as recounted in the Talmud, that is, whether the discussion between 'Abaye and Rav Yosef actually took place, is of little consequence for the present discussion, which is centered on a critique of these matters as presented in the Talmud and as understood in periods posterior to the two protagonists. Nevertheless, there is, in my opinion, no reason to assume that the dialogue does not reflect a true historical episode. Scholars have noted the relatively precise realism of the stories about rabbinical courts, especially those that describe a disciple sitting before his master while he is adjudicating a case. See: Jacob Neusner, *A History of the Jews in Babylonia*, vol. 4 (Leiden: Brill, 1969), 183ff (see especially 204–211 on divorce cases); Richard Kalmin, *Sages, Stories, Authors and Editors in Rabbinic Babylonia* (Atlanta: Scholars Press, 1994), 209–216. See also David M. Goodblatt, *Rabbinic Instruction in Sasanian Babylonia* (Leiden: Brill, 1975), 272–280; Isaiah Gafni, "Ma'asei beit din ba-Talmud ha-Bavli ẓurot sifrutiot ve-hashlakhot historiyot," *Proceedings of the American Academy for Jewish Research* 49 (1982) Heb. Sect.: 23–40. For a more skeptical approach, but one which is nevertheless prepared to accord some historical weight to the stories of rabbinical courts, see Barry S. Wimpfheimer, *Narrating the Law: A Poetics of Talmudic Legal Stories* (Philadelphia: University of Pennsylvania Press, 2011), 63–67.

45. Intervention by a disciple in a case being tried before his teacher appears in a number of places in the Talmud. For a general discussion of relations between master and disciple in the court, see: Goodblatt, *Rabbinic Instruction*, 272–280, esp. 277 n. 12; Isaiah Gafni, *Yehudei Bavel be-tekufat ha-Talmud* (Jerusalem: Merkaz Zalman Shazar, 1990), 230–232; Gafni, "Ma'asei beit din," 23–40. On 35–37 Gafni discusses cases that feature the active intervention of disciples in the course of judgment passed by their masters; these incidents all took place before the litigants, as in the present instance. See also Wimpfheimer, *Narrating the Law*, 112–121 on the story in B. Bava Meẓi'a 97a. See also B. Bava Meẓi'a 35a, where Rav Naḥman does not answer Rava, who "disturbs" him while hearing a case: "[Rav Naḥman] said to [Rava], Did I not say to you that when I am sitting in judgment you should not speak to me?" And this is after he puts him off on a groundless pretext, as Rava comments to him and as emerges from the end of his remarks. The Rishonim, especially the Tosafists, frequently comment about explanations in the Talmud that are "simply putting the question off," even in places where logical conclusions about the halakhah are discussed, and see B. Me'ilah 7b: "Resh Lakish said in the name of Rav 'Osha'ia: Rabbi Akiva answered that disciple with a stolen answer" that this means "he put him off with a straw" (Rashi and Tosafot on B. 'Avodah Zarah 44b).

46. Interestingly, in two other places in the Babylonian Talmud (Sukkah 19b, Mo'ed Katan 24a), we find stories that begin with the words that appear in our story: "אביי אשכחיה לרב יוסף," and they continue with a comment by 'Abaye about the conduct of Rav Yosef, which appears to contradict a well-known halakhah. In these cases as well, Rav Yosef offers rather forced explanations based on halakhic information that was not known earlier and is not known from other sources.

## The Limitations of Agency: "Just as in the Case of Admissions and Transaction of Loans … But in Matters Which Occur Infrequently We Do Not Act As Their Agents."

If we had only the sugya in Gittin 88, we would conclude that "admissions and transaction of loans" were adjudicated in Babylonia on the strength of this agency, just like the imposition of divorce. The general rule implied by this sugya is that one may judge every matter of frequent occurrence in Babylonia. However, since we also have the sugyot in B. Sanhedrin 2–3 and 30, which endeavor to find another reason for permitting the adjudication of admissions and transactions of loans, we must try to understand the connection between the sources and the function of this section in its larger context.

Comparison of the sugya in Gittin to the one at the beginning of Sanhedrin raises a number of questions, some of which were summarized by the author of *Ḥidushei ha-Ran* (Rabbenu Nissim of Gerona) for Sanhedrin 2b:[47]

(A) The sugya in Gittin implies that one may not adjudicate robberies in Babylonia, although we know of a number of cases in which they were adjudicated (a question also asked by the Tosafists).[48] In his commentary on Gittin, the Rid (R. Isaiah di Trani ben Mali), who was also perturbed by this question, simply suggests emending the text:

> If this is also true even about robberies and injuries as well, we should not read "robberies," for in robberies, too, we act as their agents, and they are adjudicated in Babylonia and in every court, but we should read "fines and injuries,"[49] because we act as their agents in matters of frequent

47. Ed. Yeḥiel Zaksh, (Jerusalem, 1978), 10 (although there are difficulties regarding these novelae by the Ran, which is what they are called, I will henceforth relate to them as the opinion of the Ran). The Ran resolves the difficulties that he presents on the basis of the approach of Naḥmanides, who suggests that "closing the door" was at the basis of the desire to allow laymen to hear cases, while "as their agents" was meant to revoke the prohibition of "before them and not before laymen." However, there are difficulties in this approach for which see Ya'akov K. Reinitz, "Samkhut ha-shiput shel batei ha-din she-'eynam smukhim be-'Ereẓ Yisra'el u-be-Bavel be-tekufat ha-Mishnah ve-ha-Talmud," *Shema'tin* 15 (1978): 17–28, 25. Some of these objections were raised by other Rishonim, and various answers were given. For a summary, see Avraham Shoshana, ed., *Ḥiddushei ha-Ramah ve-shitot kadmonim* (Jerusalem: Ofeq Institute, 1989), 2:393–395.

48. Gittin 88b, s.v. "אי הכי"; Bava Kamma 84b, s.v. "אי נמי"; Sanhedrin 3a, s.v. "שלא." The explanations they offer are rather forced (see Maharsha on Sanhedrin, there, who shows that one must say "thefts," and that "thefts" are "ordinary" theft). Other Rishonim also discussed this. The idea expressed in *Yad remah* to Sanhedrin 3a is that there was more than one regulation: first they discussed only acknowledged debts and then they ordained that they could adjudicate anything of frequent occurrence where there was monetary loss, among other things robbery and damages, because of improving the world. See a similar idea in *Keẓot haḥoshen* 1:3.

49. Cf. the version of this sugya in the Genizah fragment, n. 20 above. This was also the version of R. Shmu'el ha-Sardi, *Sefer ha-terumot, Shaḥar* 62 (ed. Goldschmidt, [Jerusalem: Machon Yerushalayim, 1988], 1329).

> occurrence, but in matters that are not of frequent occurrence we do not act as their agents.[50]

(B) The Ran asks: What is the relation between the reason that "we act as their agents" and the reason presented in Sanhedrin, according to which it is possible to adjudicate admissions and transactions of loans so as not to lock the door before borrowers? For it cannot be said that both of the reasons are necessary, that so as not to lock the door we act as their agents, as it were, because like the law on "interrogation and investigation" (Sanhedrin 32a–b):

> [The reason] that we act as their agents [does not appear], even though they act entirely unlike the law of the Torah; here, too, even though judgment must be passed by experts according to the Torah, the sages awarded it to non-expert [judges], because of the regulation, and there is no need for the reason of [their] being agents!

(C) The Ran points out that in Sanhedrin they derive the demand for experts in monetary disputes on the basis of עירוב פרשיות (combination of verses, a hermeneutic process), and that anyone who does not accept עירוב פרשיות does not demand experts. But according to our sugya, experts are necessary because of the expression "'before them' and not before laymen,"[51] and if this is the case, even those who do not accept עירוב פרשיות will concede that experts are required!

Examination of the sugya in Gittin on its own, based on the assumption that from the word "מידי" on the dialogue continues,[52] raises further questions:

1. What is the connection between imposing a divorce, and admissions and transactions of loans? Even if we assume that "acting as their agents" is the reason for the adjudication of admissions and transactions of loans, why must we conclude that it is also makes it possible to impose divorces?
2. From what source did 'Abaye raise the challenge, "If that is the case, we should do the same with robberies and injuries?" For he himself was present at the discussion of injuries adjudicated by R. Papa the son of Shmu'el (Bava Kamma 84a), and he did not challenge him by saying, "We ourselves are laymen [in that sense]." And if that is so, is it not also true that we act as their agents in robberies and injuries?[53]

50. But see *Piskei ha-Rid* to Sanhedrin 4a (ed. Wertheimer, [Jerusalem: Yad Ha-rav Herzog, 1994], 7). See also n. 27 of the editor there, who proposes an emendation in Gittin with no problem, whereas here he hesitates.

51. See also Tosafot, s.v. "ליבעי," on B. Sanhedrin 2b.

52. See above, n. 23 and below n. 54.

53. 'Aminoaḥ, "Mumḥim," 166 n. 118. And see also Question A in the remarks of Ran cited above.

These questions greatly reinforce the possibility that the material from the word "מידי" to the end of the sugya is not a continuation of the words of 'Abaye and Rav Yosef, but rather an addition inserted by the editor of the sugya, who tied in information known to him from Sanhedrin.[54] The connection between the two sugyot derives from the status of the cases that were adjudicated in Babylonia. When Rav Yosef permitted the imposition of divorce in Babylonia, although the judges were not expert, the editor of the sugya added the language about admissions and transactions of loans, which are also adjudicated by laymen, but for entirely different reasons.[55] This addition to the words of Rav Yosef created the impression that in this case, as well, the permission to adjudicate these matters by laymen derives from "we act as their agents." Once, the reason for distinguishing between admissions and transactions of loans, and robberies and injuries, was eliminated in favor of the principle of "we act as their agents," there was reason to ask: if so, why are robberies and injuries not adjudicated according to that principle?

In summary, it seems that it was no coincidence that the Geonim refrained from using the principle of "we act as their agents." The true reason for adjudicating those monetary matters, which the BT calls "admissions and transactions of loans," is not agency but rather implicit in the understandings that arise from tractate Sanhedrin. In any event, this limited "agency" is not a reason for not judging robberies, injuries, and fines (which are what is not included under the rubric of "admissions and transactions of loans") in Babylonia. They, too, require expertise because of their essential character, which emerges from the sugyot in B. Sanhedrin,[56] and not because the authorization of the sages of Palestine was lacking.

## "As Their Agents"—A Rethinking

The common understanding, upon which our discussion has been based so far, regards the nature of the agency Rav Yosef referred to as the appointment of the judges of Babylonia as "agents" of the judges of Palestine. This possibility is an early interpretative assumption whose roots reach as far back as the anonymous addition to the sugya in Gittin that suggests the distinction between admissions and transactions of loans, which may be adjudicated by judges who are not ordained, and robberies and injuries, which cannot be adjudicated by them. The second sugya where the expression "as their agents" appears, in Bava Kamma

54. Thus also in 'Aminoaḥ, "Mumḥim," 166 n. 118. On the flexibility of the term "מידי דהווה," see Leib Moscovitz, *Talmudic Reasoning: from Casuisticus to Conceptualization* (Tubingen: Mohr Siebeck, 2002), 248. And see also 246 n. 65 there: "analogies sometimes appear at the end of amoraic dicta—often, analogies introduced by the terms *midei de-hawah* ('by analogy to…') and *hakha namei* ('here too')—and in such cases it is not clear whether these analogies are integral parts of the amoraic dicta or post-amoraic, redactional additions." However there are also textual witnesses in which this section says, "he said to him," see above nn. 21, 23. This is a common phenomenon, on which professor Halivni commented several times in his books. See, for example, David Halivni, *Mekorot u-mesorot: Masekhtot 'Eruvin u-Pesaḥim* (Jerusalem: JTSA, 1982), 408–409.

55. For an extended discussion of the basic distinction between admissions and transactions of loans and the other monetary laws, see Radzyner, "Yesodot," 194–283.

56. Radzyner, "Yesodot," 194–283.

84b, may clarify some of these issues. This sugya deals explicitly with the limited capacity of the judges of Babylonia to adjudicate cases of damages.

Nevertheless, this sense of "as their agents" is not made explicit in the Talmud, and certainly not in the words of Rav Yosef. For that reason a new suggestion of the meaning of that "agency" may be proposed, in which the element of legal fiction is smaller than in the common understanding, and according to which it is possible that Rav Yosef's words are not an offhand rejection of 'Abaye's challenge.[57]

It could be that the agency of which Rav Yosef speaks is not the problematic sort connected to the authority of ordained judges, but rather the agency of men whom he forces to divorce their wives (and note that Rav Yosef is speaking explicitly only about men who refuse to grant a divorce, and not about litigants in other areas of jurisdiction). Indeed, it should be noted that 'Abaye came upon Rav Yosef while he was "dealing with **writs** of divorce," meaning that he was imposing many divorces, and not just a single one.[58] Hence the word שליחתוייהו (their agency) is actually in the plural: the agency of those who are now being judged by him.

In other words, this dialogue must be read as follows: 'Abaye asks Rav Yosef how he permits himself to force husbands to grant writs of divorce (clearly 'Abaye would not challenge Rav Yosef's authority to issue a writ of divorce with the husband's free will), since for coercion expert judges are necessary, and Rav Yosef is not an expert. Rav Yosef answers him that this is not actual coercion, because he acts as an agent of the husbands themselves. That is, the coercion is enforced with their agreement, as will be explained immediately.

According to this reading, Rav Yosef does not dismiss 'Abaye's question, but rather presents a new formulation of an idea whose roots can be found in tannaitic literature. Indeed, the Mishnah states:

> חייבי ערכים ממשכנין אותן חייבי חטאות ואשמות אין ממשכנין אותן חייבי עולות ושלמים ממשכנין אותן אף על פי שאין מתכפר לו עד שיתרצה שנאמר "לרצונו,"כופין אותו עד שיאמר "רוצה אני." וכן אתה אומר בגטי נשים כופין אותו עד שיאמר "רוצה אני".

> Pledges must be taken from those who are liable for dedications [or vows] of valuations, but pledges are not taken from such as are liable to sin-offerings or

57. This explanation is especially consistent with the assumption that the baraita cited in this sugya is not part of 'Abaye's words.

58. This is the text of all the witnesses except MS Leningrad-Firkowitz, which uses the singular, "גיטא," see above, n. 13. This is not surprising, given the character of that manuscript. See in this connection Shulamit Valler, "Ha-perek ha-ḥamishi ba-masekhet ketubot ba-Talmud ha-Bavli: nusaḥ ve-parshanut*"* (PhD diss., JTS, 1987), x: "When we compare the texts of the manuscripts, a conspicuous and consistent phenomenon emerges, which is that the text of MS Leningrad-Firkowitz is different in many instances from the printed version and from the texts of other manuscripts." In Valler's opinion, the scribe who wrote that version intended it to be a kind of commentary. Hence it is rather clear that the original reading was indeed גיטין in the plural. However, it is possible that in the light of the common understanding of the baraita that follows, which places emphasis on the judges, the scribe who copied the manuscript saw no difference between the imposition of a single divorce and imposing many divorces, and for that reason he changed the word from plural to singular.

> guilt-offerings. Pledges must be taken from those who are liable to burnt-offerings or peace-offerings, although one cannot effect expiation unless one acts of his own freewill, as it is said, "that he may be accepted" [Leviticus 1:3], yet they may press him until he says, "I wish [to do it]." And likewise, also, is the ruling, in the case of bills of divorce of women, the court can press him [namely, the husband] until he says, "It is my will [to give the letter of divorce to my wife]."[59]

We find the same thing in the Sifra.[60] The Tannaim assume that there is no contradiction between a man's refusal to divorce his wife and the demand that he must give the bill of divorce voluntarily. The Tannaim do not explain why there is no contradiction between coercion and voluntary presentation, but A. A. Finkelstein[61] connected these words and Maimonides's famous explanation:

> If a person who may be legally compelled to divorce his wife refuses to do so, an Israelite court in any place and at any time[62] may scourge him until he says "I consent." He may then write a *get* [bill of divorce], and it is a valid *get* … Because duress applies only to him who is compelled and pressed to do something which the Torah does not obligate him to do, for example, one who is lashed until he consents to sell something or give it away as a gift. On the other hand, he whose evil inclination induces him to violate a commandment or commit a transgression, and who is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress; rather, he has brought duress upon himself by submitting to his evil intention. Therefore this man who refuses to divorce his wife, inasmuch as he desires to be of the Israelites, to abide by all the commandments, and to keep away from transgressions—it is only his inclination that has overwhelmed him—once he is lashed until his inclination is weakened and he says "I consent," it is the same as if he had given the *get* voluntarily.[63]

In other words, according to this explanation, the court acts as the agent of the man who refuses to divorce his wife by forcing him to fulfill his true desire. Maimonides's explanation actually appears in the writings of the Geonim, both

59. M. ʻArakhin 5:6.

60. *Dibura de-nedavah* par. 3:15, to Leviticus 1:3 according to MS Rome 66, and many other manuscripts (Sifra on Leviticus, [ed. Finkelstein (New York: JTSA, 1983), 2:31 and 3:83]). See also Sifra on *ʾEmor*, par. 7:2, to Leviticus 22:19 (ed. Weiss, p. 98a–b): "according to their will—we do not compel the community against its will," and the comment of Rabad there: "this means that if they did not wish to bring a contribution to the Temple treasury to take communal sacrifices from it, no one is forced to do so against his will, but they are compelled until they say, 'we want to,' because they are obligated to bring them."

61. Sifra on Leviticus: commentary, ed. Finkelstein, 4:30.

62. There appears to be no doubt that the source of this ruling is the story under discussion. See Naḥum ʾEliʻezer Rabinovits, *Mishneh Torah ʻim perush Yad peshutah* (Maʻaleh ʾAdumim: Yeshivat Birkat Mosheh, 1997), 9:614.

63. *Mishneh Torah, Gittin* 2:20.

in Babylonia and in Palestine,[64] but does it have roots in the Talmud? The *Mefaresh* (apparently a disciple of *Magid Mishneh*[65]) suggests that Maimonides's source is in B. Bava Batra 48a (and the parallel sugya in B. Kiddushin 50a).[66] The sugya there cites the Mishnah (or Sifra)[67] above and states that it implies that imposition of divorce results in a valid divorce, contrary to other acts of coercion whose validity could be problematic even if the coerced person ultimately says "I desire it." The explanation for this is that underlying the coercion of a divorce is the religious obligation, "it is a commandment to heed the words of sages," as the Gaon writes: "And regarding this, too, we say as in the Gemara that one may assume 'it is a commandment to heed the words of sages,' and this is certainly of his volition."[68]

It appears that the basis of the approach expressed by Maimonides is indeed found in the words of the Tannaim, though on a different topic. As we read in the Tosefta:

> משישבו במקדש התחילו למשכן, משכנו ישראל על שקליהן כדי שיהו קרבנות צבור קריבין מהן. משל לאחד שעלתה לו מכה ברגלו והיה הרופא כופתו ומחתך בבשרו בשביל לרפואתו כך אמ' הקדוש ברוך הוא משכנו ישראל על שקליהן כדי שיהו קרבנות הצבור קריבין מהן מפני שקרבנות הצבור מרצין ומכפרין בין ישראל לאביהן שבשמים...

> Once they were set up in the Temple, they began to exact pledges from Israelites for their shekels, so that the public offerings might be made of their [funds]. This is like a man who had a sore on his foot, and the doctor had to force him and cut off his flesh so as to heal him. Thus said the Holy One, blessed be He: exact a pledge from Israelites for the payment of their shekels, so that the public offerings might be made of their [funds], for public offerings appease and effect atonement between Israel and their father in heaven.[69]

And as Lieberman explains there:

> The meaning of the baraita is that the Israelites are forced to pledge their shekels against their will, like a physician who performs surgery on a

64. Yeḥiel S. Kaplan, "'Kofin 'oto 'ad she-yomar roẓe 'ani': Mahut ha-'ikkaron ve-yisumo be-zmaneynu," in *'Iyyunim be-mishpat 'Ivri ve-halakhah: dayyan ve-diyyun,* ed. Yaacov Habba and Amihai Radzyner (Ramat-Gan: Bar-Ilan University Press, 2007), 194–195.

65. See *Kesef mishneh*, *'Ishut* 23:8.

66. Indeed the Geonim already refer to this source. For an extensive examination of the talmudic basis of Maimonides's ruling, see Binyamin Ze'ev Benedikt, *Ha-Rambam le-lo setiyah min ha-Talmud* (Jerusalem: Mosad Ha-Rav Kook, 1985), 213–219. See also Rabinovits, *Yad peshutah,* 219, who also points out that this sugya is the source of Maimonides's ruling. And see this idea along with a broad analysis of it in Michael Ẓvi Nehorai, "Kofin 'oto 'ad she-yomar roẓe 'ani," in *Beyn samkhut le-'otonomiah be-masoret Yisra'el*, ed. Ze'ev Safrai and 'Avi Sagi (Tel-Aviv: Ha-Kibbutz Ha-Me'uḥad, 1997), 365–370.

67. See: Jacob Naḥum Epstein, *Mavo le-nusaḥ ha-Mishnah* (Jerusalem: Magnes, 2000), 802 n. 2, and 852.

68. *Teshuvot ha-geonim* (ed. Avraham E. Harkavi [Berlin, 1887]), sec. 335.

69. T. Shekalim 1:6.

> wound in order to save the patient's life. Although sacrifices must be voluntary, the patient acknowledges after the fact that the surgery was to cure him, and he is reconciled to it afterward, which is like the explanation of Maimonides in Gittin 2:20.[70]

If this is the case, there are grounds for assuming that Rav Yosef was actually claiming that he was permitted to impose divorces (in particular), because he was acting for the benefit of the recalcitrant husbands whom he was judging, even if for that purpose he had to coerce them. He was indeed acting like the physician who wishes to benefit the patient, "to coerce him… in order to cure him." And like the physician, Rav Yosef was actually acting as an agent of those husbands who refused to divorce their wives. Even though the expression "agency" is not used here in the ordinary way, for the coerced husbands undoubtedly did not appoint him to coerce them, this is not the only place where "agency" is used in a broad sense.[71] There is another sugya in the Babylonian Talmud where the term "agency" is used when an agent acts against the will of the person represented, and there, too, the topic is connected to granting a bill of divorce:

> ואי בעית אימא: שליחות לקבלה נמי אשכחן בעל כורחה, שכן אב מקבל גט לבתו קטנה בעל כורחה.

> Or if you prefer, I can reply that we find cases where an agent for receiving [the *get* is also appointed] without the consent [of the wife], since a father can accept a *get* for his daughter who is still a minor without her consent.[72]

In summary, I argue that the words of Rav Yosef are based on tannaitic teachings; they are far less innovative than the common explanation of "we act as their

70. Saul Lieberman, *Tosefta ki-feshutah*, part 4 (New York: JTSA Press, 1962), 660. And see there the wording of the interpretation of Rabeinu Meyuḥas on the Torah: "And the physician compels him to cure him against his will." And this was already the explanation of the author of *Ḥasdei David* in his interpretation of that tosefta, and he added: "and this is in the manner of they compel him until he says 'I want to.'"

71. B. Yevamot 10b, B. Bava Meẓi'a 106b, B. Me'ilah 21a. See also other sources in Ḥanina Ben-Menaḥem, "The Judge-Agent Analogy in the Talmud," in *Authority, Process and Method, Studies in Jewish Law*, ed. Ḥanina Ben-Menaḥem and Neil S. Hecht (Boston: Harwood Academic Publishers, 1998), 33–58. In this article the author deals with the various analogies found in the Talmud between the judge and the agent, and before presenting them he makes a comment that is very important for our discussion: "Before turning to the talmudic sugiyot which advance the agent-judge analogy, I want to point out that these sugiyot are all from the Babylonian Talmud and lack parallel versions in the Jerusalem Talmud." At the conclusion of his article he writes: "In spite of its creative contribution to the derivation and formulation of a number of important laws, there is no true analogy between the judge and the agent. The apparent analogy is in essence little more than an evocative turn of phrase" (58).

72. B. Gittin 21a. Another example for such an "enforced agency" can be found in B. Bava Meẓi'a 108a (the sugya of *Bar-Meẓra*): "But if he bought it for two hundred, its value being only one hundred, it was [at first] thought that he [the abutting neighbor] can say to him, 'I sent you for my benefit, not for my hurt.'"

agents," and thus do not require the broad legal fiction upon which that explanation is based.[73] Since the words of Rav Yosef were misunderstood, and it was thought that the agency in question was that of the sages of Palestine, there was reason to ask, "If that is the case, we should do the same with robberies and injuries!" For if we (judges) are agents for coercion, why should this be only in cases of divorce and not in other areas, where judges are called upon to decide against defendants who acted incorrectly? The forced explanation suggested by the Talmud is that the agency was given only for "matters that are of frequent occurrence" (Rashi: "a loan and also a *get*").[74]

## Before Them and not Before Laymen

In the baraita that was cited to support 'Abaye's question, matters are again not at all simple. 'Abaye's question regarding Rav Yosef's ruling is "Surely we are only laymen?" His question is supported by a baraita that presents a midrash of R. Tarfon on the expression "before them," which appears at the beginning of the pericope *Mishpatim*. The final line of the baraita, which is relevant to 'Abaye's words, states: "[Another matter] *before them*—and not before laymen." The beginning of the baraita, which deals with the prohibition against trying cases before gentiles, corresponds to the discussion in the sugya that precedes the story about Rav Yosef and 'Abaye, about a bill of divorce given under compulsion exercised by a gentile court. Very interestingly, there is a sugya that parallels this opening section, which infers from the beginning of the pericope *Mishpatim* that it is forbidden to try cases before gentiles, whereas, as we shall see, the closing section that deals with laymen has no parallel. That parallel sugya appears in the Mekhilta de-Rabbi Yishma'el at the beginning of the pericope *Mishpatim* and it attaches the ruling concerning a bill of divorce given under compulsion exercised by a gentile court to the prohibition of trying cases before them:

> רבי אלעזר בן עזריה או', הרי הגוים שדנו כדיני ישראל, שומע אני יהו דיניהם קיימים, תלמוד לומר "ואלה המשפטים," אתה דן את שלהם והם אינן דנין את שלך; מכאן אמרו, גט המעושה[75] בישראל כשר ובגוים פסול; אבל גוים חובטין אותו ואומרין לו, עשה מה שישראל אומר לך, כשר.

73. Of course it is possible to argue that the law that one compels him until he says he wants to is also based on a fiction. See Shmuel Atlas, *Netivim ba-mishpat ha-'Ivri* (New York: Ha-Akademyah ha-Amerika'it le-Mada'ei ha-Yahadut, 1978), 290–291. These matters are not at all straightforward, but even if we assume that this is the case, this halakhah appears in the Mishnah, it is very ancient, and upon its basis it is possible to compel recalcitrant husbands to grant divorces.

74. This division of the anonymous Talmud is very difficult, primarily because injuries are also very common. The Talmud itself notes this difficulty in Bava Kamma 84b, and therefore it must add an additional restriction, according to which not only frequency of the obligation is demanded, but also its being a cause of financial loss. In addition, one must add contradictions from the Talmud itself, as we can see for example in Tosafot, s.v. "ואי" in our sugya. Of course here we can see how a forced explanation entails difficulties and explanations that are also forced.

75. In some of the manuscripts: "מעוסה."

> R. Ele'azar the son of 'Azariah says: Now suppose the gentile courts judge according to the laws of Israel. I might understand that their decisions are valid. But Scripture says: "And these are the ordinances which thou shalt set before them" [Exodus 21:1]. You may judge their cases but they are not to judge your cases. On the basis of this interpretation the sages said: A bill of divorce given by force, if by Israelite authority, is valid, but if by gentile authority, is not valid. It is, however, valid if the gentiles merely bind the husband over and say to him: "Do as the Israelites tell thee."[76]

In *Sefer ve-hizhir* we find the baraita in the Mekhilta merged with the sugya in Gittin 88a:

> R. Ele'azar the son of 'Azariah interpreted: If gentiles passed judgment, and their judgments are like those of Israel, I have heard how their judgments stand, for it is taught, "which you shall place before them," and not before gentiles, you may judge them, but they may not judge you, thence you have said that everywhere that you find courts of gentiles, even though their laws are like Jewish law, you are not permitted to make use of them, for it is said "before them" and not before gentiles. Thus they said that a bill of divorce given under compulsion exercised by Jews is valid and by gentiles, they beat him and say to him, do what Israel says to you.[77]

*Sefer ve-hizhir* also presents the end of our midrash (in fragmentary form), which continues the preceding section of Mekhilta cited above:

> *And these are the judgments which you shall place before them*—arranged before them like a laid table. Before them, not before laymen. You say before them and not before laymen, or else it is only before them and not before gentiles.[78]

These words are taken from the aforementioned sugya in B. Gittin or from the *She'iltot*.[79] Such borrowing from the *She'iltot* is also found in printed editions of Midrash Tanḥuma (*Mishpatim*, section 6) (unlike the Buber edition, in which the entire midrash on "before them and not before" is lacking). Although it contains early material, it also contains material drawn from geonic literature,[80] and in this case it even has the heading "*She'ilta*" (a question):

76. Mekhilta de-Rabbi Yishma'el, *Masekhta de-Nezikin* par. 1, to Exodus 21:1 (ed. Horowitz-Rabin, 246).

77. [Ḥefeẓ ben Yazliaḥ], *Ve-hizhir* (ed. Israel Meir Freiman [Leipzig, 1873]), 1:90. This book is based on the *She'iltot*. See in this connection Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven: Yale University Press, 1998), 214.

78. *Ve-hizhir*, 113. And see n.b. of the editor.

79. *She'iltot de R. Aḥai Gaon*, vol. 1–2 (Jerusalem: Sura, 1982), 23.

80. Leopold Zunz, *Ha-derashot be-Yisra'el ve-hishtalshelutan ha-historit*, ed. and completed by Ḥanokh Albeck (Jerusalem: Mosad Bialik, 1947), 110. On 367 n. 33, Zunz refers explicitly to our sugya as being taken from the *She'iltot*. See also Marc Bregman, *Sifrut Tanḥuma-Yelammedenu:*

> A question: An Israelite involved in litigation with his neighbor, is prohibited from going to a heathen judge for judgment, since it is said: "Now these are the ordinances which thou shalt set before them" [Exodus 21:1]. It is taught by R. Simeon:[81] Even if you should discover a non-Jewish court where the law is identical with the law in an Israelite court, you are prohibited from bringing the case before them, since it is said: "which thou shall set before them." Before them, and not before non-Jews, before them, and not before laymen.

Earlier in Tanḥuma (ch. 3) we find a sugya whose antiquity cannot be doubted, which is parallel to only the first part of the midrash in the sugya under discussion:

> *Which thou shalt set before them*—but not before idolaters. Whence do we know that litigants in Israel who are involved in litigation against each other must not turn to an idolatrous judge for a decision in their suit, even though they know that he will judge them according to Israel's laws, because it is forbidden (for Jews) to argue before them? Scripture states: "Which thou shalt set before them." That is, before the children of Israel and not before the Cuthites.

In *Midrash ha-gadol* on this verse in the pericope *Mishpatim* a distinction is presented between the teaching of R. Tarfon and the midrash in the sugya in Gittin:

> Another interpretation of "you shall place before them," before them, and not before gentiles, before them and not before laymen. It was taught in a baraita, R. Tarfon said: In every place where you find courts of the gentiles, even if their laws are like those of the Jews, you are not permitted to make use of them, as it is written: "and these are the laws that you shall place before them." [Exodus 21:1][82]

The purport of all this is that there is good reason to doubt whether R. Tarfon himself, or any other Tanna,[83] ruled that there was any problem with bringing

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*Te'ur nusaḥehah ve-'iyyunim be-darkhei hithavutam* (Piscataway, NJ: Gorgias, 2003), 185–186, who notes that the printed Tanḥuma for Genesis and Exodus used the *She'iltot* and the words of the Talmud, unlike Buber's edition of Tanḥuma.

81. As in the Mantua edition of 1563. In the first printing, Constantinople 1520–1522: "'היה ר טרפון אומר."

82. Ed. Mordekhai Margaliyot (Jerusalem: Mosad Ha-Rav Kook, 1957), 459–460. Here, too, one can wonder about the originality of the Midrash because of the Aramaic word "דכתיב" ["as it is written"]. Cf. this midrash to *Midrash ha-gadol* for Deuteronomy 17:18 (ed. Fish [Jerusalem: Mosad Ha-Rav Kook, 1973], 373), which deals only with the prohibition of adjudication by gentiles. In another Yemenite collection, Midrash ha-Ḥefeẓ to the beginning of the pericope of *Mishpatim* (ed. Meir Ḥavaẓelet [Jerusalem: Mosad Ha-Rav Kook, 1990], 366) we find only "before them and not before gentiles."

83. Perhaps this depends on the presence of "דבר אחר," (missing in MS Munich and the Oxford Genizah fragment) and cf. Avraham Goldberg, "Leshonot 'davar 'aḥer' be-midrashei ha-halakhah," in

suits before laymen.[84] This doubt is strengthened by a number of additional tannaitic sources about the prohibition of bringing suits before gentiles.[85] I have not found another tannaitic source that forbids adjudication before laymen, to the extent that the Tannaim acknowledged the division between experts and laymen in financial matters (with which the *Mishpatim* pericope is mainly concerned). In general, the systematic distinction in financial disputes between experts and laymen is Babylonian, and there is no mention of it in the teachings of the Tannaim or in the Jerusalem Talmud.[86]

Moreover, in the Babylonian Talmud itself no further use was made of this midrash to point out that according to Torah law it was forbidden for laymen to pass judgment. Indeed, the sugyot in Bava Kamma 84 and Sanhedrin

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'*Iyyunim be-sifrut ḥazal, ba-mikra u-ve-toldot Yisra'el* (E.Z. Melammed Festschrift), ed. Yitzhak D. Gilat et al. (Ramat Gan: Bar Ilan University Press, 1982), 99–107.

84. It is difficult to see a parallel to this in the Mekhilta de-Rashbi to Exodus 21:1 (ed. Epstein-Melamed, 158, completed according to *Midrash ha-gadol*): "*That you shall set before them*"—"'Before the Children of Israel'" is not stated here, rather, 'before them.' [Meaning,] before the important people among them. This teaches that one does not teach the laws of property to the ignorant." Indeed, Mikhael Higger, '*Oẓar ha-baraitot,* (New York: De-ve Rabanan, 1945), 8:80, and Ezra Ẓion Melamed, *Midreshe-halakhah shel ha-Tana'im ba-Talmud Bavli* (Jerusalem: Magnes, 1988), 124 para. 139, refer to this mekhilta (though Higger uses the term "cf." and Melamed, in a note there, raises the possibility that "another matter" is from the Talmud). Even if this is tannaitic material, it appears that we are dealing with a different judgment: the teaching of the laws of property to ignorant people. And it appears that the completion of the sugya in the Mekhilta de-Rashbi proves this. In the reconstruction of the Mekhilta de-Rashbi by R. David Ẓvi Hoffman, (Frankfurt, 1905) 117, this is proven even more forcefully. In any event, there are those who suggest regarding these words of the Mekhilta as connected to the baraita in question see Yiẓḥak Brand, '*Arkha'ot shel goyim be-medinat ha-Yehudim* (Jerusalem: The Israel Democracy Institute, 2010), 21–22.

85. Some of them were collected by historians who were dealing with the question of Jewish courts in Palestine after the destruction of the Temple. For example: Gedalia Alon, *The Jews in their Land in the Talmudic Age, 70–640 C.E.* (Jerusalem: Magnes, 1984), 537–542; Shmuel Safrai, "Jewish Self-Government," in *The Jewish People in The First Century*, ed. Shmuel Safrai et al. (Assen: Van Gorcum, 1974), 408. See also Midrash Tannaim on Deuteronomy, (ed. David Ẓvi Hoffmann [Berlin: Druck von H. Itzkowski, 1908], 95–96 [Deuteronomy 16:18]), which only mentions the prohibition of using gentile courts. Indeed, for generations the rabbis were in doubt: can one really compare the gravity of the prohibition against using gentile courts to that of adjudication by laymen? Does this show that the prohibition against adjudication by laymen is also Torah law? The doubt arose in particular around the words of Maimonides in *Sanhedrin* 26:7, and see Menaḥem Elon, *Jewish Law: History, Sources, Principles (Ha-mishpat ha-'Ivri)* (Philadelphia: JPS, 1994), 20 n. 64.

86. See 'Aminoaḥ, "Mumḥim" 162; Radzyner, "Yesodot," 214 n. 5, and the sources cited there. There is another difficulty in the interpretation itself: "before them—and not before laymen." Where does this come from? Granted, "not before gentiles," but why should we assume that Jewish laymen are not included in "before them"? This question is reinforced by another midrash that takes the literal meaning of the Bible to be the giving of laws to those who are obliged to obey them and not the grant of authority to judge, and therefore it includes women. See B. Bava Kamma 15a and Y. Bava Kamma 1:3 (2c). This difficulty disturbed the medieval commentators. See Rashi on our sugya of the Talmud, s. v. "לפניהם," and other Rishonim cited in Shoshana, *Ḥiddushei ha-Ramah*, 2:393, sec. 79 and 81.

2b, without any explicit Tannaitic basis, used the word "*'elohim*," which appears in Exodus 22:7–8, as the source for the requirement of expert judges. The sugya in Sanhedrin even makes use of the principle of the "combination of verses"[87] in order to deny non-experts the capability of adjudicating all monetary disputes (and not only in the context referred to in the aforementioned verses). Why do they not make use of our midrash, according to which one may infer that the Tannaim had already determined that no branch of justice could be adjudicated before laymen, just as it could not be adjudicated before gentiles?[88]

All of these difficulties lead to strong doubt as to the tannaitic origin of the baraita. Aside from the baraita in the sugya in Gittin, we have found no other midrashic source, and certainly no tannaitic source, that asserts "before them – and not before laymen." Regarding such cases, Professor Abraham Goldberg wrote:

> Every baraita in the Talmud which does not find a parallel in Tannaic sources or in the Palestinian Talmud is in a way suspect. Undoubtedly, the Babylonian Talmud does preserve authentic Tannaic teachings which may not be found elsewhere. But where a baraita is quoted by a Sage from middle or late Amoraic period, the probability is that it is of Babylonian manufacture, in many cases based upon a *memra*.[89]

This baraita is cited by 'Abaye,[90] or anonymously by the Talmud,[91] in order to give authority to 'Abaye's question and as a source for the ruling upon which it is based. However, as noted, the distinction between laymen and experts, and the view that judgment by laymen is a problem, is Babylonian; it is never mentioned in tannaitic literature (aside from the baraita in this sugya). Consequently,

87. On the use of this hermeneutic principle later on, see Ẓvi Arieh Steinfeld, *Modeh be-mikẓat* (Ramat-Gan: Bar-Ilan University Press, 1979), 77–85.

88. This question puzzled both Rishonim and Aḥaronim, who were forced to answer it with various kinds of distinctions. See, for example, Tosafot, s.v. "ליבעי," Sanhedrin 2b. "Another question was raised by the author of *Pnei-Yehoshu'a* on our sugya: 'It appears that according to the first opinion in the midrash: "before them" and not before gentiles, Jewish laymen can compel the litigants, because it was necessary to exclude gentiles explicitly. If so, why did 'Abaye challenge R. Joseph from this baraita, for one could say that R. Joseph thought like the first opinion?!'"

89. Avraham Goldberg, "The Babylonian Talmud," in *The Literature of the Sages*, ed. Shmuel Safrai (Assen: Van Gorcum, 1987), 334–335. See also: Avraham Goldberg, *Perush la-Mishnah masekhet 'Eruvin* (Jerusalem: Magnes, 1986), 3–4, and 4 n. 8, where he shows another instance in which 'Abaye cites a baraita that is not mentioned elsewhere (B. 'Eruvin 10a) and that is connected to things that he said in the course of a discussion with Rav Joseph. See also: Louis Jacobs, "Are there fictitious Baraitot in the Babylonian Talmud?" *HUCA* 42 (1971): 185–196; Shamma Friedman, "The Baraitot in the Babylonian Talmud and their Parallels in the Tosefta," in '*Atarah le-Ḥayyim: meḥkarim ba-sifrut ha-talmudit ve-ha-rabanit li-khevod Professor Ḥayyim Zalman Dimitrovski* (Jerusalem: Magnes, 2000), 163–201, esp. 198–199. Also cf. on our instance the words of Shlomo Naeh, "'Eyn 'em la-masoret, 'o ha-'im darshu ha-Tannaim 'et ketiv ha-Torah she-lo ke-kriato ha-mekubbelet?" *Tarbiẓ* 61 (1992): 443–444.

90. See Goldberg, "Talmud," 334–335.

91. Doubtless this possibility is more likely in light of the difficulties raised above, especially the last one, which shows that this baratia was not known to the rabbis of the Talmud.

we should doubt whether the source of the midrash "before them – and not before laymen," is tannaitic. It was probably a Babylonian addition to the baraita that dealt with the prohibition of resorting to gentile courts.

We might even suggest that this baraita, which deals with "before them – and not before gentiles" (and that alone!), originated in the talmudic sugya, since the subject of the sugya is the prohibition against the use of gentile courts and the status of their law in the context of forcing a man to grant a divorce. As quoted above, the last words of the pericope from the Mekhilta de-Rabbi Yishma'el are: "[מכאן אמרו:] גט המעושה בישראל כשר ובגוים פסול; אבל גוים חובטין אותו ואומרין לו, עשה מה שישראל אומר לך, [כשר]." (On the basis of this interpretation the sages said: A bill of divorce given by force, if by Israelite authority, is valid, but if by gentile authority, is not valid. It is, however, valid if the gentiles merely bind the husband over and say to him: "Do as the Israelites tell thee.")[92] These words are taken from the mishnah explicated by our sugya (and this is the only place where the Mishnah mentions the prohibition of judgment by gentiles).[93] When 'Abaye's question regarding the permissibility of coercion by laymen arose—a question that assumes not only that coercion by gentiles is problematic, but also coercion by non-expert Jewish judges—this baraita was used to provide a source for the prohibition of adjudication by laymen. In order to adapt it to this use, a new homily was added to it, one which did not originally belong to it, a homily that was inspired by its predecessor: "before them and not before laymen."[94]

92. The words that were added to the mishnah in the Mekhilta are in parentheses. The word "וכשר" which is found in some printed editions of the Mishnah is not found in the vast majority of textual witnesses. See Mescheloff, *Get me-raẓon*, 80 and 112 n. 13.

93. "מכאן אמרו" as a quotation from the Mishnah in halakhic midrashim was treated extensively by Epstein, *Mav'o,* 728 ff. On 737 he discusses the citation in question and refers the reader to the words of Meir Ish-Shalom in his commentary *Me'ir 'ayin* on the Mekhilta, which assumes that the words "אבל" and "כשר" are additions. Horowitz, in his edition, points out that the word "אבל" is missing in some of the textual witnesses, but he makes no comment about the word "כשר," despite his words in the note to line 10.

94. See Mescheloff, *Get me-raẓon*, 185–186. Although he assumes that "דבר אחר" is part of the original baraita, he suggests that at first the baraita was "the entire sugya that was added to the Mishnah as an explanation of a halakhah in the Mishnah," according to which a writ of divorce drawn up by gentiles was invalid. Later, "when the discussion between R. Joseph and 'Abaye was recorded in the sugya, the baraita was included in it because of its last phrase. Then, or later, the baraita was removed from its original place at the beginning of the sugya, because there was no reason to write it twice." It should be added that something similar to the above proposal took place with baraitot that appear after the introductory phase, "תניא נמי הכי," in which an exact repetition of the previous citation appears. See the analysis by Judith Hauptman, "An Alternate Solution to the Redundancy Associated with the Phrase *Tanya Nami Hakhi*," *Proceedings of the American Academy for Jewish Research* 51 (1984): 73–104. She argues that the baraitot themselves are a stratum of the sugya, but in the form in which they appear they are "corrected" in the wake of the teaching. In another article she expands on the matter of baraitot as an early stratum of the sugya, which were first cited because of their connection to the mishnah. This became obscured because of the accretion of later teachings that were added to the sugya and placed before the baraita. See Hauptman, "Development of the Talmudic Sugya by Amoraic and Post-Amoraic Amplification of a Tannaitic Proto-Sugya," *HUCA* 58 (1987): 227–250. Regarding changing the place of the baraita in the sugya, a baraita that was originally placed there because of its

## Conclusions

Various Amoraim, including Rav Yosef himself,[95] adjudicated matters in the areas of "robberies and injuries."[96] As Professor Shamma Friedman stated:

> Although the Gemara contains rules as to what courts in Babylonia were permitted to adjudicate and what they were not … this issue remains cloudy. Certainly this matter changed according to the men involved and their location.[97]

In any event it appears that those Amoraim were not intimidated by the ostensible tannaitic prohibition, "before them and not before laymen," and they certainly did not think they were acting on the basis of a limited agency given to them by the sages of Palestine in a few areas of the law, limited to admissions and transaction of loans, and forcing men to grant divorces.

This, along with the many other difficulties raised in this article, shows that the creation of a Torah prohibition to resort to judgment before laymen is late. It is doubtful whether it was influential in the Talmud itself (which, as noted, does not employ this midrash even in places where it could have been useful). Moreover, it is unlikely that the expression, "we act as their agents," when it was first uttered, referred to what we commonly attribute to it.

The validity of this suggestion—that it is possible that Rav Yosef did not make his authority depend on the agency or quasi-agency given to him by the judges of the Land of Israel, and that Babylonian subordination to the Land of Israel in the area of legal judgment only emerges in later strata of the Talmud—can contribute to scholarship on the relations between the Land of Israel and Babylonia throughout the talmudic period. First, this interpretation can resolve the tension between this sugya and other talmudic sugyot that show that the Amoraim actually regarded Babylonian case law as preferable.[98] Accordingly, Rav Yosef did not regard Babylonian case law as inferior to that of the Land of Israel in any area, and this argument arose only at later stages. This is not the place for extended discussion of this matter, but my claim is that the beginning of the restriction of the authority of the judges of Babylonia in cases requiring the coercion of a defendant, by the argument that only experts can pass judgment

connection to the mishnah, see Shamma Friedman, *Talmud 'Arukh, B. Bava Meẓi'a 4,* (Jerusalem: JTSA, 1990), 1:98.

95. In B. Bava Kamma 36b R. Joseph deals with payments for injury. Indeed, the Rishonim, such as Rashi there, s.v. "ההוא" and Tosafot, Sanhedrin 3a s.v. "שלא," are forced to interpret this matter and they suggest, among other things, that the person who suffered the injury already possessed money from the person who caused the damage.

96. See various examples in the Tosafot mentioned in the previous note and throughout the article by 'Aminoaḥ, "Mumḥim," esp. 157–158; Radzyner, "Yesodot," 226–236.

97. Friedman, "Hosafot," 423.

98. B. Sanhedrin 5a.

in such cases, derives from the words of Rava, one of whose teachers was Rav Yosef.[99]

It is, perhaps, not coincidental, that Isaiah Gafni, who wishes to use the expression, "we act as their agents" as a key to understanding the relations between Babylonia and the Land of Israel, prefers to cite the sugya in Bava Kamma 84, which is later,[100] and not the sugya in Gittin. There, too, he entertains the possibility that this is a rather late use of the expression:[101]

> A simple solution to the plight of the Babylonians might have been the one suggested in a court-case recorded in b. B. Qama. 84a–b. … At the outset this case is assumed to require ordained judges, hence is considered beyond the jurisdiction of Babylonian Jewish courts. But, the talmudic sages [or anonymous redactors (on p. 114 n. 34 Gafni writes: The text seems to have undergone certain post-talmudic emendations and glosses and is far from clear in determining when, in fact, the Babylonians may be considered agents of the Palestinian authorities)] suggest in the midst of their deliberations, it just might be possible for the Babylonian court to adjudicate even such a case, because "we (in Babylonia) serve as their agents" (i.e. agents of the judges in Eretz Israel). This notion of agency might have served as the ideal solution. It formally recognizes the priority of Palestinian authority, while at the same time it removes the shackles from the hands of Babylonian judges, and in effect affords them a large degree of practical independence.

Moreover, if the proposed interpretation of Rav Yosef's words regarding the source of the prohibition against passing judgment before ordinary judges is correct, this shows that the halakhah, which greatly restricts judgment in rabbinical courts today, like many other halakhot, is the fruit of late interpretation and is not necessarily entailed by the sources from which it is claimed to derive.

Nevertheless, in later generations this short and cloudy sugya became a simple and explicit ruling, the basis for permission to pass judgment in the present time. Thus, this sugya is the basis for the first article in the laws of judgment that appears in central books of Jewish Law today: the *Tur* and the *Shulḥan ʿArukh*.

> Under strict Torah law, authority was conferred upon a judge through a procedure called *semikhah.* If this was lacking, his judgments were void. Today this form of authorization is impossible, and the Scriptural commandment to appoint judges is not applicable. However, by Rabbinical enactment, there is an obligation even today to appoint judges. The modern court is

99. For an extended discussion, see: Radzyner, "Yesodot," chs. 8 and 9. Indeed, it is difficult to deny the fact that at the time of Rav Yosef there were still Babylonian sages who imposed fines in Babylonia. See 231–232 and the references in 231 n. 258.

100. See above, n. 11.

101. Isaiah M. Gafni, *Land, Center and Diaspora: Jewish Constructs in Late Antiquity* (Sheffield: Sheffield Academic Press, 1997), 114 (emphasis added). See also Gafni, *Land, Center and Diaspora*, 116.

# “We Act as their Agents” and the Prohibition of Judgment by Laymen

> Rabbinically considered as functioning as an agent of the ancient courts that were properly authorized with *semikhah,* and from this it derives its authority.[102]

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102. *Encyclopedia Talmudica: A Digest of Halachic Literature and Jewish Law from the Tannaitic Period to the Present Time*, ed. Meir Berlin (Bar-Ilan) and Shlomo Yosef Zevin (Jerusalem: Talmudic Encyclopedia Institute, 1969), 4:22.