Tractate Makkot - Offenders, the Commutation of Punishment, and What Lies between Them

Yair Eldan

A. Introduction

The commutation of punishment is a matter of considerable concern to those who shape penal policy in the modern state. When should an offender be sentenced to community service? Is prison overcrowding a sufficiently compelling reason to replace an offender's prison sentence with another punishment? In this chapter I will show that the idea of commuting punishment occupied a central place in the sages' world, and that they made radical use of it. As I will show, the foundational move they made was quite sophisticated: they grounded their authority to commute punishment in the fact that punishment is commuted in the Bible. And, as in the Bible, they made the *mens rea* of the criminal act the central consideration in deciding whether a punishment should be commuted.

Tractate Makkot would seem the least natural place to begin this book's discussion. Most manuscripts do not present it as a tractate in its own right, but regard it as an integral part of Sanhedrin. The questions that interest me, which concern the tractate as a single literary unit, would therefore seem irrelevant. What point is there in asking what principle governs its redaction? What conceptual and thematic connection links its first chapter, "How Do Witnesses Become Conspiring Witnesses?", with its second, "These Are Those Who Go into Exile," and those two with its third, "And These Are Those Who Are Flogged"? Such questions would seem meaningless if, as the prevailing scholarly view holds, Makkot was and remains part of Sanhedrin, and Sanhedrin was divided at some point into two tractates: eleven chapters on one side, and three—Makkot—on the other. J. N. Epstein writes:

"Sanhedrin–Makkot is a single tractate of fourteen chapters, as it is counted in Halakhot Pesuqot there[1] *… In the Kaufmann manuscript, too, Sanhedrin and Makkot were counted as one … The same is true of the Parma manuscript and one Cambridge fragment, as well as the commentary on Avot by Rabbi Jacob ben Samson … Hoffmann already observed (Ha-Misderonah, vol. 1, p. 215) that the end of the first chapter of Makkot is in fact a conclusion to Sanhedrin: 'The Sanhedrin has jurisdiction,' etc.; 'A Sanhedrin that executes,' etc. They cannot, therefore, be*

1 Halakhot Pesuqot, Adler manuscript 2639. See J. N. Epstein, Mevo le-nusah ha-Mishnah [Introduction to the Text of the Mishnah] (Jerusalem, 5724 [1964]), p. 982 (Hebrew).

separated in any event … In any event, it is clear that in the Land of Israel, Neziqin was regarded as a single tractate, and Sanhedrin–Makkot as another."[2]

Hanokh Albeck puts the matter simply:

"We have already said in the introduction to Sanhedrin that Makkot was originally a continuation of Sanhedrin and was included within it, but that it was subsequently established as a separate tractate. The name 'Makkot' does indeed appear in the Babylonian Talmud, Shevuot 2b, but it is possible that the reference there is to the laws of flogging taught in chapter 3. It is clear, however, that for this reason, and because those liable to flogging are mentioned in the opening mishnayot (1:1–3), our tractate was later given the name Makkot. The content of the first chapter is connected with the end of Sanhedrin, which concludes with conspiring witnesses (as noted in the Babylonian Talmud, Makkot 2a). The second and third chapters begin with the expression 'These are those,' as do Sanhedrin 7:4, 9:1, and 11:1."[3]

Yet questions must still be asked. Even if we accept the view that Makkot continues Sanhedrin, we must still account for the fact that Sanhedrin–Makkot was divided at a particular point. Maimonides, incidentally, gave the tractate an independent standing:

"Having set out the laws, he went on to discuss the judges who put those laws into effect, and therefore placed Sanhedrin after Bava Batra. In some copies, however, Makkot is joined to Sanhedrin and counted with it, since, having said 'These are those who are strangled,' they placed 'And these are those who are flogged' alongside it. This is incorrect. It is a tractate in its own right, and it was placed next to Sanhedrin because only judges administer flogging and punishment, as the Lord said: 'The judge shall have him lie down and have him beaten in his presence, according to his wickedness.'"

One can, of course, invoke arbitrariness: the editor wanted to divide Sanhedrin and arbitrarily decided to cut it at this or that point. The great weakness of this explanation emerges when one tries to reduce the editorial decision still further. Even if we assume that the editor chose the dividing point arbitrarily, a deeper explanation is still needed of the textual and thematic features that led him to cut the text at precisely that point. Moreover, the tractate was given the name Makkot—"Blows"—although the laws of flogging occupy only part of it, while most of it deals

2 Epstein, ibid., p. 983.

3 H. Albeck, Perush le-seder Neziqin [Commentary on the Order Neziqin], introduction to Makkot (Jerusalem, 5713 [1953]), p. 216 (Hebrew).

with conspiring witnesses and those exiled to a city of refuge.[4] We must therefore also explain the connection between the tractate's name and the content of its chapters.

In this chapter I will try to identify an organizing principle for the tractate's three chapters. My proposal rests principally on Justice Haim Cohn's argument that the commutation of *karet*—the divinely imposed punishment of "being cut off"—into flogging was a substantial innovation by the sages,[5] and on Aharon Shemesh's argument that this commutation represents an extensive interpretive effort on their part to reread the Torah's passage on flogging so that flogging would atone for all who violate negative commandments:

"… The picture that emerges is that flogging was an established punishment, and the Tannaim's innovation lay in the halakhic ruling that all those liable to karet who had been flogged were discharged from their liability to karet. Yet the sages' great innovation becomes clear if cause and effect are reversed; herein, too, lies the solution to the question of flogging in rabbinic teaching as a whole. The great innovation lay in the very ruling that those liable to karet should be flogged. The sages reinterpreted the Torah's passage on flogging so that it would encompass all who violate negative commandments, thereby making it possible for offenders to attain atonement through flogging … An examination of the tannaitic sources leads to the conclusion that the sages imposed an alternative punishment—flogging—on those liable to karet, in order to save sinners from the condition of karet, which, as noted, is irreversible and admits of no atonement."[6]

On the basis of this argument—that flogging is a rabbinic innovation intended to replace *karet*—I will try to advance two claims and offer one conjecture. First, I will try to show that the thread linking the tractate's three chapters is the commutation of the death penalty into an alternative punishment. Second, I will show how the commutation of punishment is inseparably connected with the distinction between inadvertent (*shogeg*) and deliberate (*mezid*) action. Finally, I will try to offer a conjecture about the reason for the tractate's particular redaction, based on my argument that the commutation of punishment is its guiding editorial principle.

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4 Albeck comments on the origin of the name "Makkot": "The name 'Makkot' does indeed appear in the Babylonian Talmud, Shevuot 2b, but it is possible that the reference there is to the laws of flogging taught in chapter 3. It is clear, however, that for this reason, and because those liable to flogging are mentioned in the opening mishnayot (1:1–3), our tractate was later given the name Makkot." Albeck, above, note 3, p. 216. The passage in the Babylonian Talmud to which Albeck refers is the Gemara's question at the beginning of Shevuot: "Given that the tanna has just finished Makkot, why does he now teach Shevuot?" Although "Makkot" may be understood as referring to chapter 3, which concerns flogging, this interpretation seems strained. It is more reasonable to suppose that the Babylonian Talmud refers to the entire tractate. If only the chapter were intended, the question should have been formulated: "Given that the tanna has just finished malkot [flogging], why does he now teach Shevuot?" The third chapter mentions those flogged and the act of flogging, malkot, but does not mention the name "Makkot." It is therefore most reasonable to take "Shevuot" as the tractate's name and "Makkot" likewise as the tractate's name, as Rashi understood it in his commentary there.

5 Haim H. Cohn, "Yesod le-penologyah ivrit" [A Foundation for Jewish Penology], The Fifth World Congress of Jewish Studies (Jerusalem, 5729 [1969]), pp. 191–202 (Hebrew).

6 Aharon Shemesh, Onashim va-hata'im: Min ha-Mikra le-sifrut Hazal [Punishments and Sins: From the Bible to Rabbinic Literature] (Jerusalem, 5763 [2003]), pp. 90–91 (Hebrew).

B. Exile

Since my discussion of the tractate is literary and structural in character, I would like to begin with its second chapter and the exile to cities of refuge discussed there. In literary and structural terms, this chapter has particular importance in a tractate of only three chapters.[7] It stands at the center of the tractate and is therefore connected both to its opening part and to its concluding part: it is, in effect, the tractate's core. According to the Bible, someone who has unintentionally killed another person must go into exile in a city designated in advance for this purpose, called a city of refuge. As we shall shortly see, this exile protects the killer from the victim's blood avenger, while also serving as punishment and atonement. Rabbi Menahem ha-Meiri sets out the second chapter's subjects:

"To explain in full the laws of exile for one who kills a person unintentionally. In this respect, the chapter's subjects fall into four parts. The first explains who is excluded from liability to exile even though he has killed unintentionally: whether because his inadvertence approaches compulsion, because it approaches deliberate action, or because he is exempt by virtue of his own status, as with a father in relation to his son or a teacher in relation to his pupil, as will be explained. The third concerns the cities of refuge: how many there are, how they afford refuge, and how the court would deal with him when he fled there. The fourth concerns the circumstances in which he leaves his city of refuge and returns to his own city, the circumstances in which he never leaves it, when the blood avenger has authority over him and when that authority lapses, and what the law is if he kills unintentionally there."[8]

The Bible emphasizes two aspects of the cities of refuge. One is protection: the city serves as a "refuge" for the unintentional killer. The other is atonement: only after the high priest's death may the killer safely leave the city of refuge. The possibility of fleeing there, together with the elements of protection—"a refuge to flee to" (Numbers 35:15)—and atonement that are inseparable from it, expresses the assumption that even an unintentional killer is a killer. He, too, has violated the prohibition on shedding blood: "Whoever sheds human blood, by a human being shall his blood be shed." Commuting the unintentional killer's punishment is no small matter, for biblical law establishes the principle of *lex talionis*, measure for measure:

7 As is well known, no tractate has fewer than three chapters. Some would argue that this fact underlies the division of Sanhedrin into eleven chapters on one side and three on the other. Yet the principle of a minimum number of chapters in a mishnaic tractate also implies an understanding of the "tractate" as a literary text, and such a text cannot have fewer than three chapters. Three chapters constitute the minimum required for a literary work. Whether the pattern is "beginning–middle–end," "problem–illustration–solution," or "exposition–conflict–resolution," in this order or another, the stipulation that a tractate contain three chapters reveals that it was regarded as a literary text.

8 Perushei ha-Mishnah la-Meiri [The Meiri's Commentaries on the Mishnah], vol. 5, Order Neziqin (Jerusalem, 5734 [1974]), p. 78 (Hebrew pagination). [Translator's note: The numbering of the parts follows the source.]

"Anyone who strikes down a human being shall surely be put to death. One who strikes down an animal shall make restitution for it, life for life. If anyone inflicts a bodily defect on his fellow, as he has done, so shall it be done to him: fracture for fracture, eye for eye, tooth for tooth. As he has inflicted a defect on a human being, so shall it be inflicted on him" (Leviticus 24:17–20).

This measure for measure expresses the view that harm to a human being or an animal is not merely physical harm: it also constitutes an offense against God and the community. As Milgrom observes: "Since an unintentional killer, too, is considered a shedder of blood, the avenger may kill him without fear of punishment."[9] And, in Greenberg's words on the biblical conception of killing:

"Taking life, then, imposes a guilt that cannot be expiated by any means short of death."[10]

The biblical creation of the institution of "cities of refuge" thus constitutes a commutation of the death penalty. Exile in a city of refuge until the high priest's death replaces the death penalty with another punishment. Hence the ruling in mishnah 7:

"If a killer went outside the boundary and the blood avenger found him, Rabbi Yose the Galilean says: it is a commandment for the blood avenger to kill him, and anyone else is permitted to do so. Rabbi Akiva says: the blood avenger is permitted to kill him, and anyone else incurs no liability for doing so."

Rabbi Yose the Galilean and Rabbi Akiva agree that any breach of the conditions of exile by the unintentional killer exposes him to being killed. On Rabbi Akiva's view, someone other than the blood avenger is forbidden to kill him; if he nevertheless does so, he incurs no liability. That is, the killer should have been liable to death; exile merely suspends the death penalty and, ultimately, after the high priest's death, constitutes its commutation.[11] In other words, the

9 Milgrom, commentary on Numbers 35, in Olam ha-Tanakh [The World of the Bible] (Tel Aviv, 1993), p. 203 (Hebrew).

10 Moshe Greenberg, "The Biblical Conception of Death," JBL 78 (1959), pp. 125, 129. Greenberg argues that, in contrast to ancient Near Eastern laws, the Bible distinguished monetary law from capital law. Capital offenses cannot be atoned for by a sacrifice; only the high priest's death—that is, the death of a human being—can atone for another person's death. See also Alexander Rofé, "Le-toldotehen shel arei miqlat ba-mishpat ha-miqra'i" [On the History of the Cities of Refuge in Biblical Law], Beit Mikra 31 (5746 [1986]), p. 110 (Hebrew). Rofé writes: "The multiplicity of explanations offered for the institution of cities of refuge undoubtedly derives from its many aspects … Cities of refuge are secular shelters scattered throughout the land; from this Wellhausen inferred that they inherited the functions of the sanctuaries abolished with the centralization of worship. In admitting fugitives, the cities distinguish between inadvertent and deliberate action; Weisman therefore inferred that they were instituted at a fairly early time, when this distinction was accepted in Israel, and specifically for its sake. They prevent the blood avenger from taking revenge; Löhr and Albright therefore connected them with the establishment of the monarchy, when it undertook to administer justice and righteousness in the land. They are spread throughout historical Israel; Löhr and Albright therefore conjectured that they were designated when all the land was in Israel's hands, in the days of the united monarchy. They detain the unintentional killer in compulsory residence until the high priest's death; Greenberg therefore found at their foundation the principle, ancient in his view, of the supreme value of human life" (pp. 112–113).

11 In this light, the disagreement between Rabbi Akiva and Rabbi Yose the Galilean is a disagreement of principle about the consequences of killing in the world. Rabbi Yose the Galilean sees killing as a disruption of the balance and an

disruption of the balance caused by taking a life requires the killer to be killed, but the Torah allows an exception for an unintentional killer, and only under very specific conditions. In the sages' understanding, then, this is the prototype of the commutation of the death penalty. On the one hand, someone who has killed is clearly liable to death, whether he killed inadvertently or deliberately. On the other, the Torah provides a mechanism for commuting punishment in certain cases and according to certain criteria. The sages' description of the cities of refuge in terms of "exile," and their consequent extensive treatment of the laws of unintentional killing, make clear the importance they attached to exile. This is no ordinary punishment, but the commutation of a death penalty, a commutation authorized by the Bible itself. The unintentional killer's punishment can be commuted only if he did indeed take the life unintentionally. The distinction between inadvertent and deliberate action is the very core of the second chapter.

If it is established that a person did indeed kill unintentionally, he is liable to exile. Exile is a punishment, but it replaces the death penalty he deserves for having harmed the community and God and disrupted the cosmic balance by taking a life. Against this background, we may conjecture that the sages understood exile in the cities of refuge as a progressive punishment: it allows them to refrain from taking the life of someone who killed unintentionally, and to restore the cosmic balance without further bloodshed. I use the term "progressive" because the measure for measure punishment due to the killer is suspended here, and this suspension follows from the killer's mental state at the time of the killing. It is this attention to *mens rea* that makes exile progressive.

C. Flogging

1. Commuting death into exile as a model for commuting *karet* into flogging

The tractate's final chapter concerns the laws of flogging, and it is this chapter that gave the entire tractate its title. It begins by listing "And these are those who are flogged," then sets out the laws governing flogging itself. The chapter concludes with the words of Hananiah ben Gamliel (mishnah 15):

"All those liable to karet who have been flogged are discharged from their liability to karet, for it is said: 'And your brother shall be degraded before your eyes.' One who has been flogged is as your brother."

offense against God and the community, requiring a response to restore that balance; hence the blood avenger is commanded, and anyone else is permitted, to kill the unintentional killer. Rabbi Akiva's conception is more moderate. Perhaps the *mens rea* of the killing influences his conception of the act itself, and he therefore does not impose a duty on the blood avenger to kill the unintentional killer.

As noted, Aharon Shemesh proposes that this is a substantial innovation: the sages replace *karet* with flogging. The question that arises is how we should understand the placement of "These Are Those Who Go into Exile" alongside "And These Are Those Who Are Flogged." If we accept that subjecting those liable to *karet* to flogging is a rabbinic innovation, the juxtaposition becomes easier to understand. The arrangement of the second and third chapters side by side contains the following argument:

a. The death penalty that should have been imposed on an unintentional killer is commuted by the Torah into exile in a city of refuge.

b. The Bible makes this commutation in order to avoid a situation in which someone who has shed blood unintentionally is liable to death.

c. Just as the Bible permits an unintentional killer's death penalty to be commuted into a punishment with physical aspects, so *karet* may be commuted into flogging.

What condition do the sages seek to avoid by commuting *karet* into flogging? In his article on the penal methods of Jewish law, Justice Haim Cohn first advanced the view that commuting *karet* into flogging was a major innovation. He argues:

"The divine threat of the divine punishment of karet hung like a sharp sword over the neck of the person who had committed the offense: he was like a man whose physicians had discovered that his illness was incurable and that he might die at any moment. The sages saw that the threat of death at the hands of Heaven was a punishment too hard to bear. Though divine, it was an inhuman punishment. They deliberated and resolved that all those liable to karet or to death at the hands of Heaven should be flogged; once flogged, they were discharged from punishment at the hands of God."[12]

Following him, Shemesh argues:

"Biblical karet is an especially severe threat, and Jews in every generation have perceived it as such. Its particular severity derives both from its finality and irreversibility and from its being a punishment at the hands of Heaven. These facts place the sinner in a state of anxiety for his existence, as though a sharp sword were laid against his neck. According to the plain meaning of the passage in Numbers 15, the threat of karet is directed at anyone who commits an offense with a high hand—deliberately—and in my view this is how the members of the Judean Desert sect understood it, as did the sages after them."[13]

12 Cohn, above, note 5, p. 200.

13 Shemesh, above, note 6, p. 96.

The sages thus sought to avert the existential anxiety that accompanies living in the shadow of *karet*, and therefore aimed to establish an alternative system of punishment. The second and third chapters concern the same subject: an attempt to commute a death penalty into another punishment. In the case of exile in the cities of refuge, the commutation has a rationale, as the Bible itself expressly states, because the killing was unintentional. I shall shortly discuss the distinction between deliberate and inadvertent action in relation to *karet* and its commutation into flogging. Yet it is important to note that placing the two chapters side by side also makes their hierarchy clear. The commutation of the unintentional killer's punishment originates in a biblical command; the commutation of *karet* into flogging originates in the sages' teaching. Haim Cohn identified the profound difficulty involved in this move:

"How could the sages know and promise that God had indeed discharged the person flogged from his punishment at the hands of Heaven? Perhaps judicial floggings of this kind would make no impression on Him, as it were, and the explicit threat written in His Torah would remain in place and in force even after the flogging?"[14]

We may conjecture that the comparison between those exiled and those flogged arose from the editor's wish to reinforce the authority of the commutation of *karet* into flogging. Or perhaps his intention was more fundamental: to justify, in the first place, the revolutionary interpretive move involved in this commutation.

2. Distinguishing inadvertent from deliberate action

In the case of the unintentional killer, the distinction between deliberate and inadvertent action is profoundly significant; establishing which is involved underlies the chapter "These Are Those Who Go into Exile." Comparing the commutation of *karet* into flogging with the commutation of the unintentional killer's punishment into exile may teach us something about the sages' attitude toward flogging.

As noted, deliberate action is a necessary condition for liability to *karet*. On the analogy between the person exiled and the person flogged, deliberate action is necessary for liability to *karet* just as it is necessary for a killer to be liable to death. What is the other side of this equation? Perhaps we should understand inadvertence as necessary for someone to incur flogging instead of *karet*, just as it is necessary for a killer to incur exile.

The difficulty here is that there is no mention of a passage from deliberate to inadvertent action in the commutation of *karet* into flogging. Haim Cohn does see in Hananiah ben Gamliel's statement—"Once flogged, he is as your brother"—an indication that the person flogged "returns

14 Cohn, ibid., p. 200.

to his 'good standing' and to the innocence he enjoyed before his offense."[15] But we have no further evidence of a passage between inadvertent and deliberate action effected through the imposition of flogging. We can only conjecture: perhaps the sages understood flogging as a means of moving someone liable to *karet* from the condition of a deliberate offender to that of an inadvertent offender. Karet, as we know, applies to someone who commits an offense "with a high hand," deliberately. If we continue the analogy between the unintentional killer and the person flogged, flogging moves the sinner from deliberate to inadvertent wrongdoing.

In other words, if we accept the comparison between the person exiled and the person flogged on the basis that both have a death penalty commuted into a physical punishment, it may help us understand how the sages conceived the nature of flogging. There are two possible explanations of the passage between inadvertent and deliberate action brought about by flogging:

a. He acted inadvertently and remained an inadvertent offender. After the flogging, it becomes clear that he did what he did inadvertently. His survival attests to his innocence and to the fact that he was not a deliberate offender in the first place. This is a kind of ordeal instituted by the sages to establish the offender's state of mind when he committed the offense.

b. He acted deliberately but became an inadvertent offender. This argument belongs to the laws of repentance and can be formulated in two ways. First: flogging brings the sinner to remorse. That remorse has the power to change his status from deliberate to inadvertent offender. On this account, remorse shows that the fact that a person committed an offense deliberately does not express his deepest intention; it proves that, at the depths of his consciousness, he did not intend to commit the offense deliberately. Second: flogging itself—its physical force, the fact that it reduces a person to a "degraded" condition—changes the person. He is no longer the same person who deliberately committed the offense and is therefore no longer liable to *karet*.

3. The list of those flogged as a list of commutations of divine punishment into human punishment

The chapter "And These Are Those Who Are Flogged" opens with an enumeration of those liable to flogging. This list poses a considerable problem for commentators on the Mishnah, for it names no more than fifty such offenders. The difficulty is that, if we take the rule that flogging is incurred for every prohibition for which the Torah specifies no punishment, the number will be far greater than fifty. In the Mishneh Torah, Maimonides lists 177 prohibitions whose violation incurs flogging, when committed deliberately and after a warning. Aharon Shemesh traced the construction of the list in our chapter and held that it is a closed list expressing an early tradition. On this reading, the list in Makkot is precise and exhaustive.

15 Cohn, ibid., p. 200.

As Shemesh shows, the list is structured according to a principle of "holiness that sets Israel apart." Its prohibitions concern the body: forbidden sexual relations, forbidden foods, and the mutilation of the body. Shemesh proposes that, on this account, the rationale is that "flogging, which injures the body, is a kind of 'measure for measure' for impairing the body's holiness; and, generally speaking, punishment measure for measure is characteristic of ancient halakhic conceptions."[16] This possibility, Shemesh explains, is relevant only after the mishnayot concerning "one who breaks a bone" and "one who takes the mother bird together with the young" (mishnayot 3–4) have been removed:

"It appears, then, that these mishnayot are indeed not part of the original list of 'And these are those who are flogged.' They originated in tractates Pesahim and Hullin and were transferred here precisely because they use the expressions 'is flogged' and 'is not flogged.'"[17]

Shemesh concludes that mishnayot 7, 8, and 9 were also not part of the original list. They form "a unit in its own right concerning the 'division of offenses.' Their principal innovation is not the fact that a Nazirite who drinks wine, becomes impure through contact with the dead, or shaves is flogged, but the distinction between someone who performs a continuous act counted as one offense and someone who repeats the act after a warning and is liable for each instance separately."[18]

If we accept that the principle guiding the tractate's redaction is the commutation of divine punishment into punishment administered by human beings, the way in which the list "And these are those who are flogged" was put together—at least for the most part—may become clear. We therefore expect to find offenses liable to *karet* or death at the hands of Heaven, such as those detailed in mishnayot 1, 2, and 3, since flogging replaces *karet* in order to address the anxiety accompanying divine punishment. On this logic, the exceptions in these mishnayot are the offenses included in the list that do not incur *karet*: breaking a bone of the Passover offering, taking the mother bird together with the young, making a bald patch, rounding the edge of one's hair, destroying the edge of one's beard, making a cut in one's flesh, inscribing a tattoo, a Nazirite drinking wine, a Nazirite becoming impure through contact with the dead throughout the day, and wearing a mixture of wool and linen throughout the day.

The lists in mishnayot 1–2 also include offenses that do not incur *karet*: a widow marrying a high priest; a divorcée or a halutzah—a woman released from a levirate marriage obligation—marrying an ordinary priest; a mamzeret or a woman of the Nethinim marrying an Israelite; an

16 Shemesh, ibid., p. 204.

17 Shemesh, ibid., p. 186.

18 Shemesh, ibid., p. 183.

Israelite woman marrying a Nethin or a mamzer; eating carrion or animals with fatal defects, detestable creatures or creeping things; and consuming second-tithe produce or consecrated property that has not been redeemed. Shemesh observes that "carrion and animals with fatal defects, detestable creatures and creeping things" is a collective designation for forbidden foods.[19] As noted, he argues that the list of those liable to flogging comprises three subsidiary lists: forbidden sexual relations, forbidden foods, and the mutilation of the body:

"We thus find a conspicuous affinity between the three Torah passages that emphasize Israel's separation from the nations and its obligation to preserve this holiness by abstaining from acts that impair it—forbidden sexual relations, forbidden foods, and the mutilation of the body—and the list of those flogged in our mishnah."[20]

Shemesh argues that the prohibitions in the list belong to the domain of holiness that sets apart. They derive directly from

"the separative aspect of holiness. Therefore, impairing the holiness of the body through forbidden intercourse, eating forbidden foods, or mutilating the body entails bodily punishment in a kind of measure for measure. This is apparently the reason for the tradition that those who violate a prohibition in these series of prohibitions are punished by flogging."[21]

On this account, we must accept that additions to the list, such as breaking a bone of the Passover offering, are not intrinsically connected with the rest of it and were included for linguistic or associative reasons. Moreover, although flogging is a bodily punishment, if "measure for measure" is involved, we would expect a bodily punishment more closely related to the nature of the offense. If the offense concerns forbidden foods, for example, the punishment would be fasting or eating particular foods, and so on. The fact that the prohibitions enumerated in "And these are those who are flogged" belong to the domain of holiness that sets apart should lead us to consider how their punishment was conceived. Perhaps these prohibitions were regarded as particularly grave because they were central to Israel's sense of closeness to its God, as in the case of a Nazirite or a priest. The element of holiness that Shemesh identifies in many of the prohibitions—the holiness that sets apart—means, above all, that violating one of them impairs that holiness. Some of these prohibitions do not indeed carry *karet*; but if holiness that sets apart depends on their observance, violating them means nullifying that holiness and leaving the offender exposed outside the holy community.

19 Shemesh, ibid., p. 191.

20 Shemesh, ibid., p. 200.

21 Shemesh, ibid., p. 201.

Their inclusion in "These are those who are flogged" thus derives from the wish to confront the anxiety about punishment that accompanies them. As I will try to show, these offenses are listed because they were understood as prohibitions whose violation could have grave consequences for the sinner; liability to flogging therefore releases him from those consequences. This distinction matters: on this account, the list is not merely a list of prohibitions carrying *karet* that may be commuted into flogging. It is a list of prohibitions whose punishment, even when unspecified, is daunting and frightening, so that its power to intimidate and terrify must be removed through flogging.

As noted, most of the offenses detailed in mishnayot 1, 2, and 3 carry *karet* expressly prescribed in the Torah. We therefore expect to find them in a list of those liable to flogging, since flogging replaces biblical *karet*. The difficulty, as noted, concerns the offenses included in the list that do not carry *karet* in the Bible:

(1) The prohibition on taking the mother bird together with the young (3:4): "One who takes the mother bird together with the young: Rabbi Judah says, he is flogged and does not send her away; the sages say, he sends her away and is not flogged. This is the rule: no liability is incurred for a negative commandment that contains an obligation to perform a positive act."

The mishnah frames the disagreement between Rabbi Judah and the sages as a question of whether this is a prohibition remedied by a positive commandment or a prohibition preceded by a positive commandment. As noted, Shemesh regarded this mishnah as foreign to the list, included only because it contains the expressions "is flogged" and "is not flogged." Let us look briefly at the commandment to send away the mother bird in Deuteronomy 22:6–7:

"If you happen upon a bird's nest along the way, in any tree or on the ground, with fledglings or eggs and the mother sitting upon the fledglings or the eggs, you shall not take the mother together with the young. You shall surely send the mother away, and you may take the young for yourself, so that it may go well with you and you may prolong your days."

The Torah thus connects the prohibition on taking the mother bird together with the young, and the commandment to send her away, with a person's lifespan. Sending the mother away brings long life, whereas taking the mother bird together with her young brings a shortening of life. The disagreement between Rabbi Judah and the sages is not merely technical, a question of whether the prohibition is remedied by a positive commandment or preceded by one. Rabbi Judah holds that someone who takes the mother bird together with the young cannot remedy the act by subsequently sending her away. The prohibition has been violated; the harm to the mother will not be repaired by her belated release. The Bible prescribes no *karet* for taking the mother bird

together with the young. Yet the promise of long life contains the threat that violating the prohibition will shorten one's days, so that death at the hands of Heaven is involved as a punishment. Adding this prohibition to the list expresses the sages' attitude toward sending away the mother bird and the fear and threat that the commandment contains. On this account, the prohibition was included because of Rabbi Judah's view, which expresses the impossibility of making amends after its violation. That impossibility threatens the person because of the element of "you may prolong your days" attached to the commandment.

(2) Breaking a bone of the Passover offering (3:3): "One who breaks a bone of a ritually pure Passover offering."

Here are the verses in Exodus 12 that describe the Passover offering in Egypt and the commandment for subsequent generations:

"Moses summoned all the elders of Israel and said to them: Draw out and take sheep for your families, and slaughter the Passover offering. Take a bunch of hyssop, dip it in the blood in the basin, and touch the lintel and the two doorposts with the blood in the basin; and none of you shall go out of the door of his house until morning. The Lord will pass through to strike Egypt and will see the blood on the lintel and on the two doorposts; the Lord will pass over the doorway and will not allow the destroyer to enter your houses to strike you … This is the ordinance of the Passover … It shall be eaten in one house; you shall not take any of the meat outside the house, and you shall not break a bone of it."

These verses express the deep connection between the Passover offering and its protective, safeguarding element. S. E. Loewenstamm discussed the apotropaic tradition of the Passover offering—the tradition of its power to ward off harm—and the fact that it applies to the Passover offering of subsequent generations as well:

"We have thus reached the conclusion that the name Pesah signifies protection from the destroyer, who endangers the lives of the Israelites on that night. In light of this conclusion, it is reasonable to suppose at the outset that an apotropaic tendency can be discerned in the other laws of the Passover, or at least in some of them … The prohibition on breaking a bone, too, apparently fits this overall picture, as the Book of Jubilees holds: 'No bone shall be broken in it, for no bone of the children of Israel was broken' (Jubilees 49:13). This interpretation in terms of sympathetic magic apparently accords with the plain meaning of Scripture … The entire Passover ritual is explicitly intended to preserve the lives and bodily integrity of its participants, and the testimony

of Jubilees concerning the reason for the prohibition on breaking a bone should therefore be accepted as reliable and authoritative."[22]

Perhaps the addition in mishnah 3 of "one who breaks a bone of a ritually pure Passover offering" expresses an apotropaic tradition according to which the offering protects those who share in buying the lamb for sacrifice and eating it. Breaking a bone thus endangers those who eat the Passover offering and threatens their lives, since they are no longer "protected" by the sacrifice. Liability to flogging here expresses the commutation of the punishment at the hands of Heaven that awaits someone who does not eat the Passover offering in accordance with its laws.

(3) Mishnah 5 details several prohibitions connected with the response to a person's death: making a bald patch, rounding the edge of one's hair, destroying the edge of one's beard, and making a cut in one's flesh. These prohibitions expressly invoke the element of holiness that sets apart identified by Shemesh. As noted, that element in itself may arouse anxiety about violating a prohibition, since such a violation nullifies holiness and thereby leaves the sinner exposed outside the holy community.

(4) The Nazirite's prohibitions. As noted, Aharon Shemesh regarded these prohibitions as foreign to the list, added to provide an example of a continuous act and the flogging it incurs. Even if the Nazirite mishnayot were a later addition to an early list, they remain intrinsically connected with it. The Nazirite's prohibitions belong among those whose violation entails a daunting and frightening punishment, and whose punishment may therefore be commuted into flogging. As with the prohibitions of holiness that sets apart, including the Nazirite's prohibitions in the list expresses the assumption that breaking his state of holiness—"he shall be holy" (Numbers 6:5)—leaves him in constant fear that his life hangs by a hair. His closeness to God in his Naziriteship makes the breaking of that closeness especially terrifying. Hence the enumeration of "the three kinds of things forbidden to a Nazirite: impurity, shaving, and the products of the vine" (Nazir 6:1).[23]

(5) The prohibitions on a widow marrying a high priest and on a divorcée or a halutzah marrying an ordinary priest were added because of the holiness attributed to the priest in the Bible: "for the consecration of his God's anointing oil is upon him"; "for I, the Lord, sanctify him" (of the high priest); and "they shall be holy to their God" (of the ordinary priest). Here, too, as with holiness

22 Samuel E. Loewenstamm, Masoret yetzi'at Mitzrayim be-hishtalshelutah [The Development of the Exodus Tradition] (Jerusalem, 5725 [1965]), pp. 87–88 (Hebrew). See also Aharon Shemesh, "Pesah zeh al shum mah?" [Why This Passover?], AJS Review 21, no. 2 (1996), Hebrew section, pp. 1–17. In this article, Shemesh examines tannaitic disagreements in light of the apotropaic conception of the Passover offering, identifying Rabbi Eliezer as its most distinctive representative.

23 On this account, the words "he was wearing a mixture of wool and linen throughout the day" in mishnah 8 refer to the Nazirite rather than to anyone at all. The point is that violating the Nazirite's heightened holiness, like abruptly terminating Naziriteship, is an event akin to *karet*; hence its appearance in the list.

that sets apart and the Nazirite's prohibitions, the degree of closeness to God determines the degree of anxiety about violating the prohibition, even though it does not carry *karet*. The prohibition on an Israelite woman marrying a Nethin or a mamzer derives from the biblical words "he shall not enter the assembly of the Lord." No *karet* is expressly prescribed for a woman who marries a mamzer, but here, too, the danger of exclusion from the community hovers over her. The punishment for entering into a union with a mamzer is threatening because the mamzer himself is not part of the assembly; hence the prohibition's appearance in the list.

D. Conspiring Witnesses

1. Introduction

So far I have shown how the second chapter, "These Are Those Who Go into Exile," provides the basis for comparing someone exiled to a city of refuge with someone subjected to flogging. I have tried to argue that, if we accept the proposal that flogging was a rabbinic innovation that commuted *karet*, the two chapters prove to concern the same subject: commuting a death penalty into a physical punishment. I have also suggested that setting biblical commutation—exile for the unintentional killer—alongside rabbinic commutation—flogging for someone liable to *karet*—may have been intended to justify the sages' revolutionary interpretive move in commuting *karet* and death at the hands of Heaven into flogging. The comparison between those exiled and those flogged also implies a distinction between deliberate and inadvertent action; perhaps flogging effects a passage of this kind from the sphere of deliberate action to that of inadvertence.

I shall now turn to the first chapter's place in this argument. As noted, Epstein, following other commentators on the Mishnah, regarded the first chapter as an integral part of Sanhedrin, indeed as its conclusion. This is especially true of the chapter's ending, which deals directly with the Sanhedrin and judicial executions, making it still harder to relate the chapter to the concerns of Makkot as a whole.

The chapter "How Do Witnesses Become Conspiring Witnesses?" concerns the laws of *edim zomemim*, conspiring witnesses: witnesses who plot to incriminate someone by testifying falsely against him. On the basis of that false testimony, the court may find the defendant guilty and punish him accordingly. The Torah rules that conspiring witnesses must suffer what they plotted to do to the defendant. The first chapter begins, however, by asking what should be done when it is impossible to do to them "as they plotted." Mishnayot 1 and 2 address precisely this question, while mishnah 3 discusses a case that is also problematic in terms of "as he plotted": witnesses who incur flogging both under "as he plotted" and for another offense. Mishnah 4 sets out the fundamental law of *hazamah*—a refutation establishing that the witnesses themselves were

elsewhere at the relevant time—and distinguishes it from contradiction of testimony. Mishnah 5 discusses a succession of sets of witnesses subjected to *hazamah*, while mishnah 6 states the rule that conspiring witnesses are executed only if they are subjected to *hazamah* after the verdict has been finalized and before the defendant has been executed. Mishnayot 7 and 8 state that each set of witnesses, whatever its number, constitutes a single set. Mishnah 7 rules that all the witnesses must be subjected to *hazamah*, even if there are a hundred of them, and that two witnesses can subject a set of a hundred to *hazamah*. Mishnah 8 further affirms the unity of the set and rules that all witnesses who come together must be legally qualified if their testimony is to be accepted. Mishnah 9 concerns two groups of witnesses who see the same act and establishes the criterion of mutual visibility as the basis for treating all the witnesses as a single set. Mishnah 10 apparently returns to judicial executions, leaving the subject of conspiring witnesses. It concerns someone who fled after the verdict was finalized and authorizes the implementation of the sentence when he returns and appears before a court, without repeating the entire judicial process. The chapter ends with the well-known statements:

"A Sanhedrin that executes one person in seven years is called destructive. Rabbi Eleazar ben Azariah says: one in seventy years. Rabbi Tarfon and Rabbi Akiva say: Had we been on the Sanhedrin, no one would ever have been executed. Rabban Simeon ben Gamliel says: They, too, would multiply the shedders of blood in Israel."

2. The tractate's opening and the commutation of punishment

This brings us to the place of the first chapter, "How Do Witnesses Become Conspiring Witnesses?", in the tractate as a whole. First, the tractate's opening declares its subject: the commutation of punishment. As noted, it begins with cases in which the rule of "as he plotted" cannot be carried out. The chapter's opening question thus concerns commutation: "How do witnesses become conspiring witnesses?" According to Torah law, conspiring witnesses must suffer "as he plotted to do to his brother," but sometimes the punishment of "as he plotted" must be replaced with another punishment. The Mishnah rules that the substitution is flogging. What does this arrangement express? First, as a literary decision, it provides, as noted, an opening that declares the tractate's subject. We may conjecture that the model of commuting *karet* into flogging inspired the commutation of "as he plotted" into flogging when it is impossible to carry out "as he plotted."

3. "Until the verdict is finalized" and "You were with us" — commuting a death penalty and the intent to harm in conspiring witnesses

a. Suspending measure for measure in the case of conspiring witnesses

Conspiring witnesses would seem to be the very opposite of the unintentional killer. In the latter's case, the biblical principle of measure for measure is suspended, even though his act disrupted the cosmic balance and offended against God and the community. Conspiring witnesses, by contrast, are a prototype of measure for measure: "You shall do to him as he plotted." Yet identifying the commutation of the death penalty and the distinction between inadvertent and deliberate action as principles of the tractate's redaction enables us to understand the sages' conception of conspiring witnesses better, particularly two important rules. First, conspiring witnesses are executed when no one has been executed on their testimony, provided that the verdict has been finalized: "If they did not kill, they are executed." Second, contradicting their testimony does not amount to *hazamah*. "As he plotted" is carried out only when their testimony has been subjected to *hazamah*, rather than merely contradicted. Let us begin with the first rule. Mishnah 6 states:

"Conspiring witnesses are not executed until the verdict has been finalized. For the Sadducees say: Not until he has been killed, as it is said, 'Life for life.' The sages said to them: Has it not already been said, 'You shall do to him as he plotted to do to his brother,' and his brother is still alive? If so, why does it say 'Life for life'? Might they be executed as soon as their testimony has been accepted? Scripture teaches: 'Life for life.' Thus they are not executed until the verdict has been finalized."[24]

S. Y. Friedman argues that the rule expressed by the sages in the Mishnah, and formulated in the Talmud by Beribbi as "If they did not kill, they are executed; if they killed, they are not executed," makes sense when read in its historical context.[25] He argues that parallel provisions in the ancient Near East punished a false witness with what he sought to bring upon a litigant, and did so during the trial. For "establishing the falsehood and imposing the penalty are matters for that moment;

24 For principal textual variants, see M. Friedmann, Talmud Bavli, Massekhet Makkot [The Babylonian Talmud, Tractate Makkot] (Vienna, 1888), pp. 10–11; see also Shlomo Naeh, "Shtei parashiyyot she-hen ahat: Iyyun be-Mishnat Makkot 1:4–6 u-va-Talmud she-aleha" [Two Passages That Are One: A Study of Mishnah Makkot 1:4–6 and the Talmud on It], Neti'ot le-David (5765 [2005]), p. 109, and p. 110, note 4 (Hebrew pagination). For our purposes, the most significant variant in Friedmann is his quotation of *nefesh be-nefesh*, "life for life," which occurs in the passage on conspiring witnesses: "You shall do to him as he plotted to do to his brother … Your eye shall not pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot" (Deuteronomy 19). Naeh uses the Kaufmann manuscript's wording, *nefesh tahat nefesh*, "life in place of life," from Leviticus; so does S. Y. Friedman in "Lo hargu neheragin, hargu ein neheragin: Mispah o mishpat?" [If They Did Not Kill, They Are Executed; If They Killed, They Are Not Executed: Bloodshed or Justice?], Sidra 20 (5765 [2005]), pp. 172–173 (Hebrew). In the body of this chapter I discuss the significance of this variant.

25 S. Y. Friedman, ibid., p. 175.

after the trial has ended, their time has passed, all the more so after the defendant has been executed on false testimony, when there is no one to bring this witness to trial."[26]

Even if we can explain the logic of "If they did not kill, they are executed," examining the disagreement between the Sadducees and the Pharisees in our mishnah through the principle of measure for measure reveals that it is the sages who depart from that principle. The Sadducees' view expresses measure for measure: conspiring witnesses incur death only when someone has been executed on their testimony. The sages' view departs from it: even if no one has been executed on their testimony and only the verdict has been finalized, the conspiring witnesses are to be executed. That is, measure for measure requires a person's death only when he has caused another person's death. Here, however, the witnesses incur death even when no one has been executed on their testimony and only the verdict has been finalized. So far, this is self-evident: it describes the sages' position in the Mishnah. Yet formulating it in this way enables us to understand why the law of conspiring witnesses is placed alongside the law of those exiled to the cities of refuge. On this account, conspiring witnesses and those exiled stand on opposite sides of the same coin. For those exiled to cities of refuge, measure for measure and the death penalty it entails are replaced with exile because of the killer's particular mental state: his inadvertence. A similar process occurs with conspiring witnesses. Here, too, measure for measure is displaced because of the strength of the *mens rea*. Their deliberate malice—the clear intention to harm—makes it possible to refrain from applying measure for measure, and they incur death even though no one has died on their testimony.

The tension between *lex talionis*—measure for measure—and the law of conspiring witnesses is already present in the Bible:

"If a malicious witness rises against a person to accuse him of wrongdoing … the judges shall inquire diligently, and if the witness is a false witness who has testified falsely against his brother, you shall do to him as he plotted to do to his brother, and you shall purge the evil from your midst. Those who remain shall hear and fear, and shall never again do such an evil thing in your midst. Your eye shall not pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot" (Deuteronomy 19:16–21).

On the one hand, the Bible expressly says, "You shall do to him as he plotted": this is a situation in which no one has been executed on the conspiring witnesses' testimony. Moreover, the wording of the verses indicates that the identification of conspiring witnesses takes place during the trial or just before its conclusion: "The judges shall inquire diligently …" On the other hand,

26 S. Y. Friedman, ibid., pp. 175–176.

the verses concluding the passage about the conspiring witness express measure for measure and appear to imply that the witness has indeed caused someone's death.

This tension is also present in the textual variants. We have seen that mishnah 6 states: "Conspiring witnesses are not executed until the verdict has been finalized. For the Sadducees say: Not until he has been killed, as it is said, 'Life for life.'" Most textual witnesses thus use *nefesh tahat nefesh*, "life in place of life," the measure for measure principle in Leviticus 24, rather than *nefesh be-nefesh*, "life for life," which occurs in the passage on conspiring witnesses.[27]

M. Friedmann, however, uses precisely the wording *nefesh be-nefesh*.[28] The difference matters. Nefesh be-nefesh quotes measure for measure as it appears in the passage on the conspiring witness. Nefesh tahat nefesh quotes the original measure for measure passage in Leviticus 24. In Leviticus, the principle is unambiguous: after a person has been killed, the killer must be killed. In Deuteronomy, however, the principle can also be understood as part of "as he plotted." In other words, the law of conspiring witnesses does not necessarily require a life actually to have been taken in exchange for a life. This lack of clarity reveals how deeply problematic the sages' law of conspiring witnesses is in relation to measure for measure. For our purposes, however, what matters is the sages' ruling that conspiring witnesses are to be put to death under "as he plotted" when no one has been put to death on their testimony. This means suspending or relaxing measure for measure because of the strength of the *mens rea*.

b. The element of deliberate action in conspiring witnesses

The conspiring witnesses' mental state at the time of their testimony—their deliberate action—is, like the unintentional killer's mental state, a necessary condition for applying the law of conspiring witnesses or the law of exile. Just as "These Are Those Who Go into Exile" concerns establishing the element of inadvertence in the killer, so "How Do Witnesses Become Conspiring Witnesses?" concerns establishing deliberate malice in the witnesses. Mishnah 4 sets out a fundamental principle: conspiring witnesses are not witnesses whose testimony has proved unreliable, a case of contradiction. They are witnesses who, physically, could not have testified to the killing in the first place:

"Witnesses do not become conspiring witnesses until they themselves are subjected to hazamah. How so? If they said, 'We testify that a certain man killed a person,' and others said to them, 'How can you testify, when the victim or the killer was with us that day in a certain place?'—these are not conspiring witnesses. But if they said to them, 'How can you testify, when you

27 S. Y. Friedman, ibid., p. 172, note 9.
28 M. Friedmann, ibid., p. 10.

yourselves were with us that day in a certain place?'—these are conspiring witnesses, and they are executed on the testimony of the latter."

This mishnah makes clear the importance of deliberate malice in conspiring witnesses. It proposes that "as he plotted" be carried out only when their malicious intent is absolutely certain. Such certainty exists only in a case of "You were with us." Any other contradiction does indeed conflict with their testimony, but does not necessarily establish their intent as malicious. Telling the witnesses "The killer was with us" contradicts their testimony, but does not necessarily show that they wished to cause the death of the person against whom they testified: perhaps they thought they saw the killer but actually saw someone who resembled him. Only "You were with us" removes all doubt about the malicious character of their plan.[29] Establishing with certainty that the testimony was deliberately false thus leads to the suspension of measure for measure, just as inadvertence suspends it for those exiled to the cities of refuge.

The mishnah concerning "one whose verdict was finalized and who fled" (1:10) has traditionally been understood as returning to Sanhedrin's laws. In light of the foregoing, it may be read as a direct continuation of the discussion of conspiring witnesses. This mishnah may serve as a touchstone for the sages' position on measure for measure. There are two theoretical ways to understand their position on conspiring witnesses in relation to that principle. One is to suppose, as I have tried to show, that they regarded the law of conspiring witnesses as a departure from measure for measure because of the strength of the *mens rea*—their deliberate malice. The other is that they did not regard it as a departure, because they held that once a person's verdict has been finalized, he is considered dead even if he has not been executed. Thus, executing conspiring witnesses after the defendant's verdict has been finalized would constitute measure for measure, even though he had not been put to death. Indeed, the Mishnah's wording supports this second possibility: "If so, why does it say 'Life for life'? Might they be executed as soon as

29 David Henshke holds that "the tannaitic sources do not address at all how the first witnesses' falsehood was established, and are concerned only with punishment." Henshke addresses the difficult question raised by conspiring witnesses: why the testimony of the witnesses who establish *hazamah* is apparently believed in preference to that of the witnesses subjected to it. He argues: "The refutation of the latter's testimony does not rest on the testimony of the former alone, but emerges from the conclusive evidence produced by the court's investigation, leaving no room for doubt; the testimony establishing *hazamah* is necessary in order to punish those subjected to it." See David Henshke, "Edim zomemim: Le-fitronah shel hidah attiqah" [Conspiring Witnesses: Toward the Solution of an Ancient Riddle], Tarbiz 72 (5763 [2003]), pp. 370–371 (Hebrew). In my view, however, this interpretation is strained. The plain meaning of the Mishnah is that "You were with us" undermines the conspiring witnesses' credibility and that they are therefore executed on that testimony alone. I have tried to argue that this is not merely a matter of the testimony's credibility: there is also a distinction between inadvertent and deliberate action established beyond all doubt. Only "You were with us" leads to the conclusion of fully deliberate action. The Mishnah expresses here a simple legal rule, rather than a complex one, like the rule in Sanhedrin 6:2: "When he was about ten cubits from the place of stoning, they would say to him: Confess … Rabbi Judah says: If he knew that he had been falsely accused by conspiring witnesses, he would say: May my death atone for all my sins except this one. They said to him: If so, everyone would say this in order to clear themselves." The sages' response to Rabbi Judah shows the basic level at which the legal discourse in that mishnah operates. So, too, in our mishnah: "You were with us" is a stronger and more credible claim than any other, and it reveals the conspiring witnesses' malicious intent.

their testimony has been accepted? Scripture teaches: 'Life for life.' Thus they are not executed until the verdict has been finalized." S. Y. Friedman takes this approach in interpreting the sages' reply to the Sadducees:

"For them, too, 'life for life' indicates the loss of a first life. In their view, however, it refers not to an actual loss of life but to the finalization of the verdict, when the defendant has been sentenced to death, as though his life had thereby been lost, and he is henceforth like a dead man."[30]

The mishnah concerning "one whose verdict was finalized and who fled" enters precisely this conceptual framework. It clarifies the sages' position: conspiring witnesses are executed after a person's verdict has been finalized but before he has been put to death. This could create the impression that the finalization of the verdict is the decisive moment for the defendant, so that his flight afterward would render the imposition of punishment superfluous. The mishnah therefore rules that the punishment of someone whose verdict has been finalized and who has fled is not annulled: the law of conspiring witnesses is a special case. Moreover, it clarifies that the sages did indeed regard that law as a departure from measure for measure. According to the mishnah, someone whose verdict has been finalized is not considered dead. The law of conspiring witnesses therefore does not constitute an application of measure for measure.

The latter part of the chapter's final mishnah is well known:

"A Sanhedrin that executes one person in seven years is called destructive. Rabbi Eleazar ben Azariah says: one in seventy years. Rabbi Tarfon and Rabbi Akiva say: Had we been on the Sanhedrin, no one would ever have been executed. Rabban Simeon ben Gamliel says: They, too, would multiply the shedders of blood in Israel."

As noted, this ending has been regarded as a conclusion to Sanhedrin as a whole. Yet, in light of the conceptual framework of "How Do Witnesses Become Conspiring Witnesses?", we may suggest that it is a fitting conclusion to a chapter about conspiring witnesses. As I have tried to show, the sages understood the law of conspiring witnesses as a departure from measure for measure, giving precedence to the witnesses' deliberate intention to cause someone's death. In the case of the unintentional killer, the departure from measure for measure takes the form of commuting the death penalty; in the case of conspiring witnesses, it takes the form of bringing the death penalty forward. This way of thinking could certainly give rise to an apologetic statement of the kind expressed at the end of chapter 1. "A Sanhedrin that executes one person in

30 S. Y. Friedman, above, note 24, p. 189.

seven years is called destructive" answers the apparent "unbearable lightness" of the death penalty in the law of conspiring witnesses.

E. The Tractate's Concluding Mishnayot

To conclude this chapter, I would like to discuss briefly the mishnayot that close the tractate. These are regarded as concluding mishnayot intended to "end on a good note."[31] Rejecting the argument that redaction proceeds by association requires us to account for these mishnayot beyond a general wish to end on a good note.

Mishnah 15

"All those liable to karet who have been flogged are discharged from their liability to karet, for it is said: 'And your brother shall be degraded before your eyes.' Once flogged, he is as your brother. These are the words of Rabbi Hananiah ben Gamliel. Rabbi Hananiah ben Gamliel said: If someone who commits one offense forfeits his life because of it, all the more should someone who performs one commandment be granted his life. Rabbi Simeon says: He learns it from the same passage, for it is said, 'The persons who do these things shall be cut off,' etc.; and it says, 'Which a person shall do and live by them.' Thus anyone who refrains from committing an offense is rewarded as though he had performed a commandment. Rabbi Simeon son of Rabbi says: Scripture says, 'Only be steadfast in not eating the blood, for the blood is the life,' etc. If someone who abstains from blood, which a person's soul recoils from, receives a reward, all the more shall someone who abstains from robbery and forbidden sexual relations, which a person's soul desires and covets, gain merit for himself, for his descendants, and for his descendants' descendants, to the end of all generations."

Mishnah 16

"Rabbi Hananiah ben Akashiah says: The Holy One, blessed be He, wished to confer merit upon Israel; therefore He gave them Torah and commandments in abundance, as it is said: 'The Lord desired, for the sake of His righteousness, to make the Torah great and glorious.'"

Rabbi Hananiah ben Gamliel's statement is not straightforward, and several scholars have discussed its interpretation. In any event, as Justice Haim Cohn argued, Rabbi Hananiah ben Gamliel faced the question of how to justify imposing flogging for offenses liable to *karet*. His statement must therefore be read in light of this apologetic purpose. In other words, Rabbi Hananiah ben Gamliel, and Rabbi Simeon after him, suggest that a situation in which a single

31 Epstein, above, note 1, p. 974. On p. 975 he also mentions the end of Sanhedrin–Makkot as an example of concluding mishnayot and of what he calls "additions at the end of a tractate."

offense condemns a person to *karet*, with no possibility of reversing that sentence, is problematic, to say the least. Rabbi Simeon son of Rabbi continues this line of thought. His words contain an unease with a situation in which a single offense determines a person's entire fate:

"'Only be steadfast in not eating the blood, for the blood is the life,' etc. If someone who abstains from blood, which a person's soul recoils from, receives a reward, all the more shall someone who abstains from robbery and forbidden sexual relations, which a person's soul desires and covets, gain merit for himself, for his descendants, and for his descendants' descendants, to the end of all generations."

The prohibition on eating blood appears, of course, in "And these are those who are flogged." Karet is expressly prescribed for eating blood: "Any person who eats any blood, that person shall be cut off from his people" (Leviticus 7:27). Yet Rabbi Simeon son of Rabbi cites the prohibition on eating blood from Deuteronomy. Precisely in connection with this prohibition, the Bible says: "So that it may go well with you and with your children after you, when you do what is right in the eyes of the Lord." As I have tried to show, the list "And these are those who are flogged" contains not only prohibitions expressly carrying *karet*, but also prohibitions that imply exclusion from the assembly or death at the hands of Heaven. Rabbi Simeon's citation of Deuteronomy rather than Leviticus expresses the same expanded conception of *karet* that, as I have tried to show, underlies the list.[32] The tractate ends with Rabbi Hananiah ben Akashiah's well-known statement:

"The Holy One, blessed be He, wished to confer merit upon Israel; therefore He gave them Torah and commandments in abundance, as it is said: 'The Lord desired, for the sake of His righteousness, to make the Torah great and glorious.'"

In light of the tractate's editorial principles as I have described them, the point here is less the multiplication of rewards than the refusal to accept a situation in which a single offense determines a person's fate. If a single offense determines someone's fate, the existence of many commandments bearing rewards has no value. Such a reading sees Rabbi Hananiah ben Akashiah's words as part of the argument intended to justify commuting *karet* into flogging.

32 By way of homiletical interpretation, we may also say that the allusion here is to the first commandment against eating blood: "But you shall not eat flesh with its life, its blood. And surely I will require your blood for your lives; from every animal I will require it, and from humankind—from each person for his brother—I will require the life of a human being. Whoever sheds human blood, by a human being shall his blood be shed, for in the image of God He made humankind" (Genesis 9:4–6). The prohibition on eating blood mentioned here mirrors the work of the tractate's redaction. Rabbi Simeon son of Rabbi's words point once more to *lex talionis* and to the insight that the unintentional killer, too, would have been liable to death before the law of cities of refuge was introduced.

F. Conclusion

Makkot comes before us as a tractate of three chapters that seem to address different subjects: the laws of conspiring witnesses, the laws of exile for the unintentional killer, and the laws of flogging. Although most scholars regard it as an integral part of Sanhedrin, or argue that its first chapter is Sanhedrin's final chapter, I have sought to understand why it was separated from Sanhedrin in the way that it was, how the different chapters of this literary work relate to one another, and what idea binds them together through redaction, whether conscious or unconscious. I have tried to show that "These Are Those Who Go into Exile," at the tractate's center, is closely connected in conceptual terms with both the third and the first chapters. Just as exile to a city of refuge commutes the unintentional killer's death penalty, so flogging commutes *karet*. I have argued that this understanding involves not only an attempt to justify the sages' revolutionary move in commuting *karet* into flogging, but also an insight into how they understood flogging itself. Just as the strength of the unintentional killer's *mens rea* brings about the commutation of his punishment, so flogging moves the punishment of *karet* from the sphere of deliberate action to that of inadvertence. The chapter on conspiring witnesses is connected with both these elements. Conspiring witnesses are a mirror image of the unintentional killer: just as measure for measure is suspended in the latter's case because of the *mens rea* of inadvertence, so it is suspended in theirs. Yet whereas unintentional killing brings about the commutation of the death penalty, the strength of the conspiring witnesses' *mens rea* leads to the imposition of death even without measure for measure being fulfilled—that is, without anyone having been put to death on their testimony. I have also tried to show that the final mishnah of the chapter on conspiring witnesses and the concluding mishnayot of the tractate as a whole are thematically connected with the tractate's governing ideas, in a way that distinguishes it from Sanhedrin and establishes it as a tractate in its own right.