THE CASE OF THE POISONED SANDWICH

I. THE CONTROVERSY

Some time ago an incident occurred involving a socially inept American student who became the butt of his classmates’ derisive behavior. Matters reached a point at which one of the tormentors regularly invaded the oppressed student’s knapsack, stole the sandwich the latter had prepared for lunch and proceeded to eat it himself. Endeavors to enlist the aid of fellow classmates in order to identify the thief or to prevail upon him to put an end to the practice were of no avail. Finally, the victim, who excelled academically as a chemistry student, took matters into his own hands and proceeded one day to lace his sandwich with a poison. In the midst of an afternoon lecture one of the members of the class became violently ill. In the course of the ensuing tumult the victimized student revealed what he had done explaining that he had resorted to poisoning the sandwich in order to establish the identity of the thief. Thereupon the rightful owner of the sandwich administered an already prepared antidote to counter the effect of what otherwise would have been a lethal poison.

The students involved seem to have been non-Jews. However, many years later, a Jewish student who witnessed that episode, and who in the interim had become a physician in Israel as well as a participant in a periodic seminar conducted on behalf of physicians by Rabbi Yitzchak Zilberstein of Bnei Brak, asked Rabbi Zilberstein if the aggrieved student’s conduct was justified in accordance with Jewish law. Surprisingly, as reported in the Israeli Torah Journal, Pa’amei Ya’akov, no. 44 (Kislev 5760), Rabbi Zilberstein immediately responded, “Not only is it permissible, the matter even involves a mizrah!”

In a one-line statement published in that issue of Pa’amei Ya’akov, R. Chaim Kanievsky gives a qualified endorsement to that position. Rabbi Kanievsky writes: “It appears that there is a basis (yesh makom) for
the words of my brother-in-law." Later, as reported by R. Elisha Mann, *Derekh Sibah*, ed. Zevi Yaron (Bnei Brak, 5764), p. 371, Rabbi Kanievsky asserted that his opinion with regard to the case of the poisoned sandwich was solicited by Rabbi Zilberstein and that he had responded that the student was fully justified in poisoning the sandwich. Rabbi Kanievsky’s statement is presented in conjunction with his reply to a similar inquiry: A thief gained entrance to an upper story of a dwelling by means of a rope. In order to prevent repeated burglary, may the owner of the house replace the rope with a weaker one that will snap and cause the burglar to fall and injure himself? Rabbi Kanievsky responded in the affirmative.

The same issue of *Pa’amim Ya’akov* as well as the following issue, no. 45 (Nisan 5760), contain a series of critiques of Rabbi Zilberstein’s ruling authored by R. Sinai Meir Frankel of Yavni’el, R. Gedaliah Axelrod of Haifa, R. Mordecai Blinnov of France, R. Ya’akov Germeirer of Bnei Brak and R. Menasheh Klein of Brooklyn as well as two responses by Rabbi Zilberstein. A further critique by R. Gedaliah Rabinowitz of Jerusalem appears in the American Torah journal, *Or Yisra’el*, vol. 6, no. 2 (Tevet 5761). Rabbi Zilberstein’s view is also published as an article appended to *Hakham Lev Tikah Mitzvot*, authored by R. Eliezer Roth (Bnei Brak, 5761).

Although the rather bizarre fact pattern under discussion is unlikely to be replicated, the issues involved do have practical application in more usual situations. A classic example is the question of whether a householder who has reason to fear that his unoccupied premises may be burgled may booby-trap his house in order to protect his property by maiming or killing the miscreant. The crux of Rabbi Zilberstein’s position is that a person may do as he pleases in his own home, with his own knapsack or with his own sandwich. The thief or trespasser proceeds at his own risk. Consistent with this reasoning it follows that a person may store bleach or chlorine in a whisky bottle and need not be concerned lest a burglar read the label and consume the contents believing that the bottle contains whisky. Indeed, Rabbi Zilberstein asserts that such a course of action is justified even if the householder is aware of the fact that the would-be burglar has designs upon his whisky.

The basic point is reflected in the statement of the Gemara, *Bava Kamma* 47b, absolving a person who places poison before an animal from tort liability. The underlying principle is that there is no proximate cause on the part of the tortfeasor; the animal is responsible for its own death since “it should not have eaten” the poisoned substance. Rabbi
Zilberstein’s critics object that, as is the case with regard to other instances of indirect cause of harm, the statement of the Gemara is limited to actionability in a human court but does not absolve a person who acts in that manner from responsibility “according to the laws of Heaven.”

Rabbi Zilberstein counters that heavenly culpability is limited to placing poison before an animal in a place in which the animal has a right to be present; there is no similar heavenly liability if a person stores poison in his own backyard and it is consumed by a trespassing animal. Moreover, contends Rabbi Silberstein, a human is an intelligent being and if he trespasses for purposes of theft the householder who causes him harm in this manner is not guilty even in the eyes of Heaven. Certainly, he argues, a householder who posts a sign saying “Beware of the Dog” is entirely without guilt if a trespasser ignores the sign and is bitten. Rabbi Zilberstein regards the commandment “You shall not steal” as sufficient warning. Rabbi Zilberstein’s basic position is that a person may do as he wishes in his own home and with his own property provided others are on notice with regard to possible harm that may befall them.

Rabbi Zilberstein further cites an anecdote recorded in the Gemara, Yoma 83b. R. Judah and R. Jose deposited their purse with an innkeeper who later denied accepting the bailment. Subsequently, they succeeded in tricking the innkeeper’s wife into accepting their contention that her husband had directed them to retrieve the purse from her. Upon becoming aware of their successful ploy, the enraged innkeeper killed his wife. Rabbi Zilberstein regards it as unthinkable that the two tan-na’im did not appreciate the possible consequences of their actions. Evidently, he concludes, R. Judah and R. Jose were entitled to do whatever might be necessary in order to prevent an act of theft against them while the innkeeper and his wife alone were responsible for any untoward result.

Rabbi Zilberstein finds more direct support for his position in a narrative recorded in Tractate Derkh Erez Rabbah, chap. 5. On one occasion R. Joshua provided hospitality for a guest. After serving his guest food and drink, R. Joshua escorted him to the roof of his house where he had prepared a bed for the night. Fearing that the guest might abscond with some of his valuable possessions, R. Joshua removed the ladder leading from the roof to the ground. R. Joshua had correctly assessed his guest’s intention. In the dead of night the guest wrapped R. Joshua’s valuables in his cloak but, in attempting to descend from the roof, he fell and broke his neck.
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That narrative is analyzed by R. Shlomoh Zalman Auerbach, Minhat Shlomoh, III, no. 105. Rabbi Auerbach declares that the anecdote does not at all establish that it is permissible to cause harm to a putative thief. Rabbi Auerbach asserts that R. Joshua’s course of action was justified only because a prudent person would have observed the absence of the ladder. The purpose of removing the ladder was to prevent incipient theft, not to cause the thief to plunge to his death. The ladder was removed, not to cause physical harm to the thief, but to prevent him from absconding with his ill-gotten gains in the dark of night. The thief was unaware of the danger only because he acted with precipitous haste, a factor R. Joshua was not obliged to consider.5

Rabbi Zilberstein concedes the cogency of Rabbi Auerbach’s analysis and hence effectively further restricts the ambit of his ruling in the case of the poisoned sandwich. Accepting the premise that only a deterrent that would not bring harm to a prudent person may be employed, Rabbi Zilberstein argues that, since the sandwich thief was also proficient in chemistry, he should have tested the sandwich for the presence of a poison before partaking of his ill-gotten gains! Rabbi Zilberstein rather implausibly equates chemical analysis for the presence of a deadly poison with ascertaining that a ladder is in place before stepping off a roof. A prudent person does not step off a roof without determining that it is safe to do so; unless a person has specific cause to feel threatened, testing food for the admixture of a poisonous substance is probably a manifestation of paranoia.

Rabbi Zilberstein agrees that, if the suspected thief is not trained in chemistry, it is forbidden to entice him to eat a poisoned substance. Accordingly, he rules that, in ordinary circumstances, it is forbidden to place poisoned candy in close proximity to valuables in anticipation that the thief will not only make off with the valuables but will steal and consume the sweets as well.

Rabbi Kanievsky, as reported in Derekh Sibah, also cites the narrative involving R. Joshua recorded in Drekh Erez Rabbah but apparently does not accept the limitation conceded by Rabbi Zilberstein. As noted earlier, Rabbi Kanievsky was presented with a situation in which a burglar victim wished to replace a strong rope with a much weaker one that would not support the weight of the burglar. Rabbi Kanievsky ruled that a substitution of that nature is permissible but failed to indicate that such license is limited to a situation in which the burglar would discern the substitution were he to have examined the rope.

R. Zevi Spitz, Mishpetei ba-Torah (Jerusalem, 5768), I, no. 79, sim-
iliarly sanctions weakening the supporting pillars of a clothesline in order to prevent a thief from returning to burgle an upper story. Nevertheless, he forbids digging a deep pit in a courtyard and then camouflaging its opening so that a would-be thief would be trapped and injured by falling into the pit. Rabbi Spitz bases his latter ruling upon a statement recorded in the Gemara, Bava Kamma 15b, declaring that it is forbidden to maintain a ferocious dog or an infirm ladder in one’s house. Such conduct is forbidden even if all family members and acquaintances are advised in advance of potential danger. The fear is that an innocent but unwary person intent upon no harm might be injured. The case of Rabbi Joshua is readily distinguishable because, save for the thief cum guest who had been escorted to the roof, the roof was not generally in use and hence did not constitute a hazard. Rabbi Spitz permits only creation of a situation that will endanger no one other than a person whose intentions are malevolent. Innocent persons are unlikely to come to harm because the posts supporting a clothesline have been rendered unstable or because a weak rope has been substituted for a stronger one not customarily used for climbing. Weakened ropes or pillars do not constitute an inherent danger whereas a vicious dog and a ladder with loose rungs—and a camouflaged pit—are inherently dangerous.

Rabbi Zilberstein’s statement to the effect that a person may with impunity place poison before an animal that has entered his property is contradicted by earlier decisors. R. Yair Chaim Bacharach, Teshuvot Havvot Ya’ir, no. 165, presents a report of an incident involving a merchant who engaged in the sale of various beans and seeds. Chickens belonging to a neighbor repeatedly swarmed into his place of business and helped themselves to the merchant’s wares. The merchant repeatedly warned his neighbor that, should the latter fail to prevent continued trespass by his chickens, he, the merchant, would destroy the chickens. Finally, the merchant killed one of the marauding hens and was summoned by his neighbor to a din Torah before Havvot Ya’ir. To the merchant’s surprise and consternation, Havvot Ya’ir ruled in favor of the owner of the chicken. Havvot Ya’ir rules that destruction of another person’s animal is not warranted even if it occurs on one’s own property and is designed to prevent ongoing damage of property. Havvot Ya’ir does recognize that, under limited circumstances, a property owner faced with destruction of his property is entitled to avail himself of the remedy of avid inesh dina le-nafsheih, i.e., self-help, in order to prevent ongoing damage. Self-help, however, is available only in face of willful and intentional infliction of
damage. Hence, in the case of damage caused by animals, self-help is available only pursuant to formal notice to the animal’s master in the presence of witnesses. It is evident from the ruling of Shulhan Arukh, Hoshen Mishpat 397:2, that notice is required even if the damage is sustained because the animal has trespassed onto the property of the victim. The identical rule should apply to placing poison before a marauding animal although, since placing poison before an animal is regarded as only an indirect cause of the animal’s death, liability in such instances would be limited to punishment “at the hands of Heaven.”

The propriety of setting out poison for the purpose of killing trespassing animals that cause property damage is addressed directly by R. Shalom Mordecai Schwadron, Teshuvot Maharsham, IV, no. 140. Maharsham cites Shulhan Arukh, Hoshen Mishpat 397:2 and Teshuvot Havvot Ya’ir, no. 165, in ruling that self-help is not sanctioned in such cases. Somewhat surprisingly, he does not add that self-help in the form of slaughter of an animal raised for its meat is permitted upon prior notice. Maharsham considers and rejects his interlocutor’s contention that such action may be appropriate provided it is carried out within the confines of the aggrieved party’s own property.

II. CULPABILITY IN COMMON LAW

There is a close parallel to Rabbi Zilberstein’s opinion in the case of the poisoned sandwich and two classic decisions of a British court in which a distinction is made with regard to whether or not the victim was given notice. Trespassing for the purpose of hunting game seems to have been common in nineteenth-century England. Landowners responded by setting up “spring-guns” that were designed to shoot an intruder who tripped a wire. In Ilott v. Wilkes, 3 Barn. & Ald. 304, decided in 1820, the plaintiff was gathering nuts on the land of the defendant upon which the latter had concealed nine or ten spring-guns. The court refused to allow recovery for damages because the plaintiff had notice of the presence of guns in the wood, albeit not of their location. Just five years later, in Bird v. Holbrook, 4 Bing. 628, 130 Eng. Rep. 911 (1825), the same court found a defendant liable for injuries caused to an innocent intruder intent upon retrieving a straying bird, but only because the defendant failed to give notice of the danger.

That distinction was rejected by an American court in Johnson v. Patterson, 14 Conn. 1, 1840 WL 334 (Conn), 33 Am. Dec. 96. With
notice, it had been argued, the trespasser, having full knowledge of the danger, assumes the risk voluntarily and hence must be deemed to have personally inflicted the injury on himself. The court dismissed that argument as applied to the taking of human life declaring: “The man who should furnish suicides with means of self-destruction, would justly be considered as partaking of the crime of homicide, however voluntarily or rashly they were bent on its perpetration.”

In a concurring opinion in Ilott, one of the justices of the British court justified the use of spring-guns on the grounds that “If you do not allow the men of landed estates to preserve their game, you will not prevail upon them to reside in the country. Their poor neighbors will then lose their protection and kind offices; and the government, the support that it derives from an independent, enlightened and unpaid magistracy.” Quite understandably, the Johnson court found little to commend in that rationale as applied to American society.11

Similarly, in 1971, in Katko v. Briney, 183 N. W.2d 657, 47 A.L.R.3d 624, the Supreme Court of Iowa affirmed an award in an action for damages resulting from injuries suffered by the plaintiff when he triggered a spring-gun placed in an uninhabited farm house. The court affirmed the principle that use of reasonable force in protection of property is permissible but that one may not use force that will result in the taking of a human life or that will inflict great bodily injury. Force of that nature, the court reiterated, is justified only if the trespasser was committing a felony of violence or if the trespasser was endangering human life.12

Even when employed to prevent danger to human life, only reasonable force may be used. The reasonableness of the force used is usually a question of fact for a jury to determine. Force may be employed in defense of property but the force used must be of a kind appropriate to the defense of the property. Since the law places a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels13 unless there is also a concomitant threat to the defendant’s personal safety of a gravity sufficient to justify self-defense.

Jewish law permits use of deadly force by a householder against a burglar on the basis of the consideration that when the householder attempts to resist in defending hearth and home the burglar will use deadly force against him. Accordingly, the burglar or, ba be-mahteret, is deemed to be a “pursuer” and the law of rodef applies. For obvious rea-
sons that principle cannot be applied to protection of unoccupied premises or to an endeavor designed solely to identify or apprehend a perpetrator no longer intent upon burglary since in such cases there is no conceivable threat to innocent life.  

Thus it is evident that, although American courts have abandoned the earlier doctrine, the position of Rabbi Zilberstein and Rabbi Kanievsky permitting booby-trapping one’s premises provided that prior notice is given of the potential hazard is entirely consistent with the common law position announced in *Ilott* and in *Bird*.

Liability for poisoning in order to prevent theft was considered by the Supreme Court of Mississippi in a 1958 decision, *Bruister v. Hanly* 233 Miss. 527, 102 So.2d 806. A farmer who suffered losses caused by trespassing cattle placed poison in little piles of oats on his premises with intent to injure or kill the marauding animals. The court held that a person who places poisoned food on his premises with intention to injure or kill animals trespassing on his land is liable for any resultant injury to, or loss of, such animals. That basic rule is consistent with Halakhah save for the fact that, since the harm was in the form of gerama, Halakhah would assign culpability only at the hands of Heaven.  

Citing *Johnson*, the court further found that notifying the owner of the animals of his intention to place poisoned food on his premises would not exonerate the farmer. Common law would have permitted such a course of action upon prior notice. Again, although Rabbi Zilberstein’s opinion is at variance with the decision in *Bruister*, his view is consistent with the common law position.

**III. THE DUTY OF RESCUE**

Nevertheless, Rabbi Zilberstein’s ruling is not as far-reaching as it might appear to be. Granted that a person may act as he wishes with his own possessions, nevertheless, unlike common law, the commandment “You shall not stand idly by the blood of your fellow” (Leviticus 19:16) serves to impose a duty of rescue and mandates that a person not allow the life of another to become forfeit. As codified by Rambam, *Hilkhot HaZe’ah* 4:12, and Shelah Arukh, *Hoshen Mishpat* 425:5, Leviticus 19:16 imposes a duty of rescue even with regard to a person who sins in the course of seeking to gratify lust or appetite. Certainly, one may not create a danger and allow a person to succumb if there is an obligation to rescue the victim from that danger. That consideration would seem to preclude any attempt to poison a putative thief.
However, in positing an exception to the obligation of rescue, Pithei Teshuvah, Yoreh De’ah 251:1, asserts that, according to Shulhan Arukh, there is no duty to preserve the life of a notorious thief. As evident from the ruling of Shulhan Arukh, Yoreh De’ah 251:2, there is certainly no obligation to rescue a repeated wanton and habitual transgressor. Although Rema, Yoreh De’ah 251:2, rules that ransom of a transgressor “le-tei’avon,” i.e., one who repeatedly transgresses for pleasure or benefit, is discretionary, Teshuvot Havvot Ya’ir, no. 139, rules that efforts must be made to secure the reprieve of a convicted thief from execution since his transgressions were le-tei’avon, i.e., born of avarice rather than of wanton disregard of the law. Accordingly, Rabbi Zilberstein concedes that, for example, one should not tempt a burglar by placing poisoned candy in a safe or in close proximity to valuables in order to punish the malfeassor, particularly since there is no evidence that the putative burglar has stolen property in the past and has thereby acquired the status of a mumar or habitual transgressor.17

Rabbi Zilberstein asserts that the sandwich thief acted, not because of hunger or out of a desire to satisfy an appetite stimulated by sight of the sandwich, but out of sheer maliciousness and, having done so repeatedly, the thief has acquired the status of a mumar le-hakh’is, i.e., of a habitual, wanton transgressor rather than of a person who trespasses for the purpose of enjoying a pleasure or benefit. Despite that contention, it is far from clear that the thief did not eat in order to satisfy an appetite: he may also have found the victim’s sandwiches particularly tasty or he may well have also coveted sandwiches belonging to others but have felt constrained not to steal from close friends or colleagues. Moreover, Rabbi Zilberstein does not establish that the pleasure derived from taunting or holding up another person to ridicule, perverse as that pleasure may be, fails to constitute a “benefit” of a nature that serves to remove the act from the category of le-tei’avon. Indeed, a statement found in Teshuvot Havvot Ya’ir, no. 146, cited by Pithei Teshuvah, Yoreh De’ah 251:1, supports the opposite conclusion. Havvot Ya’ir describes a person who had committed homicide as a transgressor le-tei’avon on the grounds that the person acted as he did in order to assuage his evil nature. Havvot Ya’ir regards giving vent to anger as a form of “pleasure,” albeit an evil pleasure. Surely, making sport of a hapless person, perverse as it at may be, is no less a pleasure than acting out pent-up aggression.

Presumably, Rabbi Zilberstein would also maintain that, even when there is no physical danger to the potential victim of further theft, it is
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nevertheless permissible to create a potentially lethal danger directed against a malevolent and habitual thief provided that the thief is given actual prior notice of an existing danger. It seems reasonable to assume that the imprudence inherent in ignoring such notice is at least as great as, and presumably greater than, the imprudence of not testing a sandwich for poison.

Rabbi Zilberstein’s position is not inconsistent with the normative view regarding the rescue of a person intent upon committing suicide. When an intention to commit suicide is manifest such intention must be thwarted but, unless there is evidence to that effect, it may be presumed that a rational person will seek to avoid harm to himself. Hence, according to Rabbi Zilberstein license to create a hazard designed to serve as a deterrent is not incompatible with a duty of rescue.

IV. “HAL’ITEHU LA-RASHA—POUR INTO THE WICKED”

Rabbi Zilberstein asserts not only that, as a matter of normative law, a person may do as he wishes within his own property but that he need not be concerned even in a moral sense with regard to potential harm that may befall a miscreant. Quite to the contrary, he asserts, any harm that is occasioned is to be welcomed.

“Hal’itehu la-rasha ve-yamot”—Pour into the wicked and let him die” is formulated as a principle of comportment by the Gemara, Bava Kamma 69a, with regard to thieves who steal fruit yielded by a sapling within the first four years after it has been planted. The fruit of the first three years is entirely forbidden as orlah; the fruit that grows during the fourth year, known as neta reva’i, or, in the case of grapes, as kerem reva’i, must either be transported to Jerusalem and consumed within the walls of the city or redeemed by exchanging the fruit for coins which must then be expended for the same purpose.

Thieves who steal fruit do not necessarily ignore other prohibitions. However, even if, in general, they would be concerned not knowingly to transgress the prohibition against consuming neta reva’i outside of Jerusalem, thieves are unlikely to be aware of the restricted status of the fruit they have appropriated to themselves. The rightful owners might readily mitigate the severity of the transgression committed by the thieves by expeditiously “redeeming” the fruit, i.e., by themselves transferring the sanctity of the fruit to coins so that the thieves would be spared the transgression of eating neta reva’i outside of Jerusalem.
Alternatively, they might simply post a notice indicating the restricted nature of the fruit. Yet they are not required to do so. Indeed, Me’iri, in his commentary ad locum, indicates that a potential victim of theft is advised not to provide any indication that the coveted object is a forbidden foodstuff. Rather than seeking to take measures that would cause the putative thief to desist from compounding his infractions, declares Me’iri, “it is preferable (mutav)” to allow the culprit to become mired in more serious transgression in order to hasten heavenly punishment. R. Solomon Sirillo, known as Rash Sirillo, in his commentary on the Palestinian Talmud, Dem’ai 3:5, similarly comments, “...the more severe the transgression the better, so that [the malefactor] will die speedily.”

The statements of Me’iri and Rash Sirillo to the contrary, the absence of a binding obligation to prevent a transgressor from sinning is not at all the same as discouragement of a voluntary undertaking of such a course of action. Moreover, there is reason to assume that, in disagreement with Me’iri and Rash Sirillo, such a distinction would be made by other early-day authorities.

The principle “hal’itehu la-rasha” is itself the subject of controversy. The source quoted in Bava Kamma 69a as announcing that principle is the Mishnah, Ma’aser Sheni 5:1, that describes how during the sabbatical year, when all produce is in effect res nullius, it was customary for landowners to mark vineyards in which vines bearing grapes that were orlah were present with pulverized pottery or potsherds so that those grapes would be eschewed and to mark vineyards in which the yield was kerem reva’i with clods of earth so that any person who legitimately helped himself to such fruit would be aware of its restricted nature. As recorded in the Palestinian Talmud’s version of the Mishnah and as cited in Bava Kamma 69a, R. Shimon ben Gamliel is quoted as declaring that placement of such markers is required only during the sabbatical year when produce is ownerless; however, during other years of the seven-year cycle, when the person helping himself to grapes in another person’s vineyard is a simple thief, the applicable principle is “Pour into the wicked and let him die.” The Mishnah, however, concludes with the citation of a contrary practice attributed to a group known as “the zenu’în,” i.e., “modest” or “virtuous” individuals, who did not simply mark the vineyard to warn against transgression but set aside their own funds and declared that any kerem reva’i taken from the vineyard be redeemed out of those designated funds.

Rambam, in his Commentary on the Mishnah, ad locum, as well as in
Hilkhot Ma’aser Sheni 9:7, followed by R. Ovadiah of Bartenura, Ma’aser Sheni 5:1, and by one opinion cited by Me’iri, Bava Kamma 69a, understand the zenu’in as having engaged in that practice only during the sabbatical year, i.e., when picking fruit on land belonging to another did not constitute theft. If so, there is no reason to conclude that the zenu’in rejected the principle hal’itehu la-rasha; quite to the contrary, during the balance of the seven-year cycle, during which time picking fruit belonging to another person constituted theft, the zenu’in refrained from mitigating the thieves’ transgression because they, too, recognized and accepted the principle hal’itehu la-rasha.

Tosafot, in disagreement with Rambam, maintain that redemption of kerem reva’i grown during the sabbatical year is entirely unnecessary. Hence, consistent with that position, Tosafot found it inconceivable that the zenu’in redeemed kerem reva’i during the sabbatical year. Accordingly, Tosafot explain the conduct of the zenu’in in a manner diametrically opposed to that of Rambam in asserting that the zenu’in engaged in that practice only in years other than the sabbatical year. R. Akiva Eger, Tosafot R. Akiva Eger, Ma’aser Sheni 5:1, advances yet a third interpretation of the conduct of the zenu’in in assuming that the zenu’in acted in the manner described by the Mishnah each and every year of the seven-year cycle. According to the interpretations of Tosafot and R. Akiva Eger, the zenu’in clearly disagreed with R. Shimon ben Gamliel and did not at all subscribe to the principle of “pour into the wicked.” Nevertheless, in accordance with the canon formulated by the Gemara, Bava Kamma 69a, the halakhah is in accordance with R. Shimon ben Gamliel.

However, recognition that the normative rule follows the opinion of R. Shimon ben Gamliel rather than the practice of the zenu’in does not necessarily entail acceptance of the opinion of Me’iri and Rash Sirillo to the effect that hal’itehu la-rasha constitutes a mandated mode of comportment. Rashi, Bava Kamma 69a, describes the zenu’in as “pietists who wish to preserve every person from sin.” It would seem that in defining the zenu’in as “pietists,” in contradistinction to R. Shimon ben Gamliel who did not emulate their practice, Rashi asserts that there is no substantive controversy between the zenu’in and R. Shimon ben Gamliel but that the zenu’in conducted themselves in a manner beyond that required by the letter of the law. If so—and if Rashi understood the zenu’in as having acted as they did during years in which picking fruit in other persons’ fields would constitute theivery—it follows that Rashi understood that, even for R. Shimon ben Gamliel, hal’itehu la-rasha is not an expression of a mizvah or even of a preferred policy. However, if
Rashi understood the *zenu'in* as having comported themselves in that manner only during the sabbatical year whereas in other years they conformed with R. Shimon ben Gamliel’s dictum, there is no evidence that Rashi disagrees with Me’iri and Rash Sirillo.23

At least one contemporary authority, R. Ya’akov Breisch, *Teshuvot Helkat Ya’akov*, II, no. 16, apparently understands *hal’itehu la-rasha* as merely sanctioning non-intervention rather than as a statement of affirmative encouragement of non-intervention. *Helkat Ya’akov* states, “Obviously, even for R. Shimon ben Gamliel there is no prohibition against marking [*kerem reva’i*],” i.e., *hal’itehu la-rasha* serves only to obviate an obligation to preserve the transgressor from sin but does not give rise to a prohibition or policy consideration against doing so.24

Nevertheless, Rabbi Zilberstein cites both Me’iri and Rash Sirillo in support of his assertion that indirectly causing the demise of the thief is not only permitted but constitutes a “*mizvah*” as well. In actuality, the most that can be inferred from the words of those commentators is that the death of such a person is a *desideratum*. It would be reading far too much into their comments to conclude that one who causes the death of a wicked person has actually fulfilled a divine command for which he is entitled to heavenly reward. Moreover, recognition of a particular result as a *desideratum* is not at all inconsistent with a prohibition against seeking even indirectly to obtain that result. *Hal’itehu la-rasha*, when that principle applies, certainly serves to negate an otherwise binding obligation to prevent transgression. At the very most, it might be argued that the malfeasor’s transgression may even be abetted in some way. The goal, even according to Me’iri and Rash Sirillo, is simply to hasten divine retribution; there is no evidence that the principle *hal’itehu la-rasha* serves to cancel the prohibition against overtly causing this-worldly harm to a human being even if the harm is caused only indirectly. Indeed, the examples of invocation of *hal’itehu la-rasha* in classic responsa are uniformly limited to permitting transgression to occur, not as justification for causing physical harm.

For example, R. David ibn Zimra, *Teshuvot Radvaz*, IV, no. 1,223 (152), addresses a situation involving a defendant who was ordered to swear a solemn oath affirming that he did not owe a sum of money and who was quite prepared to swear to that effect. The claimant, knowing that the oath would be false, queried whether he should allow the defendant to swear falsely or whether he should withdraw his claim. Radvaz responded that the claimant was under no obligation to absolve the defendant from the required oath.25
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The same author, Teshuvot Radvaz, IV, no. 1,357 (286), responded in a similar vein to another query as well. A divorce was executed on behalf of a woman accused of adultery on the condition that the wife not marry her paramour. It became evident that, despite the condition, the couple intended to marry with the result that the get would be nullified retroactively. Radvaz was asked whether it would be appropriate for the first husband to execute a second, unconditional divorce in order to preserve the couple from the sin of adultery. Radvaz responded by noting that, even if she were properly divorced by means of a second, unconditional get, the wife would remain forbidden to her paramour.27 Although the infraction of consorting with a person with whom one has had a previous adulterous liaison is far less severe than adultery itself, nevertheless, declares Radvaz, the principle “pour into the wicked” obviates any need to mitigate the transgression.28 Radvaz adds a tentative comment (karov ani lomar) to the effect that even in the absence of suspected adultery no attempt should be made to regularize the union “to satisfy the wicked” since, even if there was no prior adultery, the parties transgressed by entering into a civil marriage.29

In yet a third responsum, Teshuvot Radvaz, III, no. 893, Radvaz refused to sanction a religious marriage ceremony of behalf of an already civilly married couple in a situation in which the partners were merely suspected of being engaged in a pervious adulterous relationship.

V. PARAMETERS OF THE PRINCIPLE

Assuming that hal’itchu la-rasha establishes a “mizvah” of some type, the ambit of that concept is rather limited. R. Yair Chaim Bacharach, Teshuvot Havvot Ya’ir, no. 142, expresses bewilderment with regard to the cogency of the principle “pour into the wicked,” even as a discretionary principle, in light of the normative halakhic obligation to prevent a fellow Jew from committing any transgression. The fact that a person will commit one transgression does not relieve fellow Jews from their obligation to prevent him from another transgression.30 Moreover, contends Havvot Ya’ir, a would-be thief will not necessarily also transgress the prohibition against consuming orlah or kerem reva’i. Hence, if made aware of the status of the grapes, he may well refrain from stealing the grapes and thus both transgressions will have been prevented. Havvot Ya’ir leaves the problem unresolved and eloquently expresses his perplexity in declaring that “whoever will cure my sickness in this regard shall be deemed a skilled physician.”31
J. David Bleich

1. **Bet Yizhak**

R. Isaac Schmelkes, *Teshuvot Bet Yizhak, Orah Hayyim*, no. 29, sec. 4, accepts the underlying thesis dismissed by Havvot Ya‘ir, viz., that *hal’ite-hu la-rasha* effectively overrides obligations of surety and admonition. *Bet Yizhak* understands *Shakh*, *Yoreh De’ah* 151:6, as ruling that there is no obligation to prevent a putative evildoer from intentional transgression. According to that understanding, the obligations of surety and admonition are limited to unintentional transgression. *Bet Yizhak* defends *Shakh* against those who took issue with his position by asserting that indeed *Shakh* derived his position from the principle of *hal’itehu le-rasha* which he understood as establishing that there is no obligation to prevent the sin of a person intent upon willful transgression.

Other authorities do not go as far as *Bet Yizhak* in asserting a total negation of responsibility vis-à-vis willful transgressors. Instead, they resolve the problem voiced by Havvot Ya‘ir by asserting that *hal’itehu la-rasha* serves to define the limits of the obligations of suretyship and admonition and to carve out an exception to those duties.

2. **Tuv Ta’am va-Da’at and Mahari Perlow**

R. Shlomoh Kluger, *Teshuvot Tuv Ta’am va-Da’at*, no. 174, declares that the principle *hal’iteihu la-rasha* applies only if, even after intervention, the miscreant is left in a situation in which he will incur at least one infraction even though a second transgression is obviated; however, asserts *Tuv Ta’am ve-Da’at*, *hal’itehu la-rasha* is not applicable in circumstances in which all infractions can be prevented. *Tuv Ta’am va-Da’at*, explains that there is no obligation to prevent a person who is “wicked at that hour” from further transgression, i.e., there is no obligation to prevent transgression if the would-be sinner will remain “wicked” even though, in some sense, his transgression will have been mitigated. However, if the putative transgressor can be prevented entirely from sinning he is not “wicked at that hour,” i.e., he will not at all become a transgressor, and hence measures must be taken to preserve his innocence by sparing him from transgression. Those comments are apparently designed to resolve, at least in part, the question posed by Havvot Ya‘ir. The obligation of *arvut*, according to *Tuv Ta’am va-Da’at*, exists only if a would-be transgressor can be prevented from becoming “wicked at that hour” but does not mandate diminishing the severity of a wicked person’s sin.

A similar thesis, but one that reflects a somewhat different analysis...
of the obligation of suretyship, is developed by R. Yerucham Perlow, known as Mahari Perlow, in his commentary on R. Sa’adia Ga’on’s Sefer ba-Mitzvot, III, Miyan Shishim ve-Hamesh ba-Parsiyot, Parshah 57, s.v. ve-bineh yad’ana, and is explicitly presented as a resolution of the perplexity expressed by Havvot Ya’ir.

Mahari Perlow declares that hal’itehu la-rasha does not serve to sanction rendering active assistance to a would-be transgressor; hence the issue of placing a stumbling-block before the blind does not arise. The sole issue, then, is the obligation of suretyship that requires prevention of sin on the part of a fellow Jew.

The obligation of suretyship is binding only in situations in which a person has it within his power to prevent transgression. Ordinarily, the owner of a vineyard cannot prevent the theft of his grapes and, accordingly, he has no obligation of suretyship with regard to that infraction. Mahari Perlow opines that the obligation of suretyship is limited to situations in which it is within a person’s power to prevent all taint of sin. Accordingly, R. Shimon ben Gamliel maintains that no indication need be made regarding the status of the fruit as orlah or as kerem revai other than during the sabbatical year. During that year the owner of the vineyard can prevent the only attendant transgression, i.e., orlah or kerem revai. During other years, trespassers who pick grapes are also guilty of theft; since that infraction cannot be obviated, asserts Mahari Perlow, there is no further obligation of suretyship.37

3. EIN YIZHAK

R. Yitzchak Elchanan Specktor, Ein Yizhak, I, no. 8, resolves the issue raised by Havvot Ya’ir but in doing so he severely limits the ambit of the principle hal’itehu la-rasha. Ein Yizhak observes that Jews are parties to a covenantal relationship requiring each person to serve as a surety for observance of the commandments by all others. The principle of suretyship, or arvut, is limited to transgressions of which one has knowledge; there is no responsibility, and hence no onus of suretyship, regarding the transgression of a fellow Jew of which one has no knowledge. The latter are in the category of nistarot, i.e., “concealed” or secret things, that are depicted in Deuteronomy 29:28 as matters to be dealt with solely by God. Applying that thesis to the paradigm case of hal’itehu la-rasha, viz., the situation described in Bava Kamma 69a, Ein Yizhak asserts that, since the identity of the individuals who steal grapes from the vineyard is unknown, those infractions are “concealed” and hence there is no obligation to prevent transgression by such individuals.38
4. PASSIVE NON-PREVENTION VS. ACTIVE ASSISTANCE

Havvot Ya'ir, in his previously cited responsum, further distinguishes between passive non-prevention of transgression and active “entrapment.” The former may be justified, at least in some circumstances, on the basis of hal’itehu la-rasha; the latter can never be sanctioned. In Havvot Ya’ir’s day, some villagers adopted the practice of drying or smoking hindquarters not eaten by Jews as well as animals that, upon slaughter, were found to be non-kosher so that the meat could be sold to non-Jews over a period of time without flooding the market and depressing the value of meat. Havvot Ya’ir was asked if it was proper for those Jews to retain non-kosher meat in their possession for an extended period of time because of a concern that itinerant guests might steal and later consume the non-kosher meat. Havvot Ya’ir rules that it is improper to do so since such a practice would compound the transgression of persons who might misappropriate the meat. Responding to the contention that the principle hal’itehu ha-rasha would render the practice innocuous, Havvot Ya’ir declares that the principle “pour into the wicked” serves to permit non-intervention but cannot be invoked to sanction active placement of a stumbling-block.

Poisoning a sandwich is certainly no less an act of overt placement of a stumbling-block before the blind than the act of preserving and retaining non-kosher meat on one’s premises. Accordingly, it would follow that the student’s conduct in this matter would not have been sanctioned by Havvot Ya’ir.

The distinction between active assistance and passive non-intervention in this context emerges from what would otherwise be a contradictory ruling of the Mishnah, Dem’ni 3:5, as interpreted by the Palestinian Talmud cited by R. Elijah of Vilna in a gloss appended to the commentary of Rabbenu Shimshon, ad locum. Apparently, in the days of the Mishnah, guests at an inn customarily brought their own flour and the like to be baked or cooked on their behalf by the proprietor. Inn-keepers were prone to illicit substitution of their own ingredients for those of their guests. As a result, a problem arose because many people were not meticulous with regard to separation of tithes. The Mishnah rules that the guest must tithe both the foodstuffs he delivers to the proprietor as well as the food he receives in return. The guest may not simply tithe the food after it has been returned to him because the proprietress may have been lax in that regard but must also tithe any food entrusted to the proprietress because of a fear that a portion of the raw ingredients he provided to his host may have been misappropriated and, if consumed by
the innkeeper, will result in a violation of the laws of tithing. Therefore, the guest must tithe before transferring those ingredients to the proprietress lest he be culpable for causing transgression. R. Jose disagrees and commenting, “we are not responsible for scoundrels,” rules that the guests need tithe only once, viz., before partaking of the food returned to him by the proprietress.

The Palestinian Talmud comments that R. Shimon ben Gamliel, the author of the dictum “hal’itehu la-rasha,” need not necessarily accede to the position of R. Jose. In other words, it is entirely consistent to rule that kerem reva’i need not be identified in order to spare a thief from transgression but at the same time to rule that untithed food my not be placed in the hands of to a person who may misappropriate such food and incur the transgression of consuming untithed food. Indeed, Rambam, Hilkhot Ma’aser Sheni 9:7, rules in accordance with R. Shimon ben Gamliel that markers indicating that grapes are kerem reva’i need be set out only during the sabbatical years whereas in Hilkhot Ma’aser 11:12 Rambam rules contrary to the opinion of R. Jose.41 In a succinct comment, Havvot Ya’ir explains that there is no contradiction between those rulings because “since [the guest] actively gives her [the foodstuff] it is more severe,” i.e., hal’itehu la-rasha serves to sanction passive non-intervention but not active assistance.42

Hazon Ish, Dem’ai 8:9, s.v. ve-amri, seems to draw a distinction identical to that of Havvot Ya’ir. Hazon Ish comments that allowing thieves to steal fruit does not constitute “placing a stumbling block” before them since the act is intrinsically forbidden and they have not been “invited” to transgress by the owner of the orchard. However, declares Hazon Ish, any overt act that serves to entice or enable additional transgression is forbidden.

Hazon Ish concludes his comments by stating that the term “pour into the wicked” should not be understood literally; rather, it means only that “you are not required to [be concerned] with regard to his action and to engage in his rescue.” Those comments certainly imply that any overt act likely to cause harm, spiritual or temporal, is forbidden.

The distinction regarding responsibility vis-à-vis those who steal kerem reva’i and vis-à-vis the proprietress who does not tithe is that in the situation involving theft of kerem reva’i the additional transgression results from passive failure to provide a warning concerning the restricted nature of the coveted fruit whereas the transgression of the proprietress could not occur save for the overt act of her guest in actively providing the opportunity for sin. The conclusion to be drawn is obvious: hal’itehu...

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hu le-rasha does not permit an overt act leading to spiritual harm. Hence, contrary to the view of Rabbi Zilberstein, it cannot be invoked as license for an overt act designed to cause physical harm. The cryptic dictum of the Palestinian Talmud cited by R. Elijah of Vilna, “It is not the wont of a scholar to cause an unperfected matter to issue from his hand,” is interpreted by Hazon Ish as reflecting the distinction between overt and passive acts rather than a formulation of a normative rule.

However, it seems to this writer that there is a more obvious explanation that will reconcile the ruling of R. Jose with the principle of hal’itehu la-rasha and which also reflects the more obvious meaning of the dictum “A scholar does not cause an unperfected matter to issue from his hand.” Rambam, Hilkhot Ma’aser 11:12, rules that one must tithe the foodstuffs delivered to the proprietress “so that there will be no misfortune to others” (emphasis added). The concern, apparently, is not that the proprietress might consume untithed produce; hal’itehu la-rasha might well obviate that concern. The proprietress, however, bakes and cooks on behalf of other guests of the inn as well. The concern, as expressed by Rambam, is for others, i.e., she is to be suspected of substituting untithed food for food entrusted to her by other guests and hence of serving them untithed food. According to this understanding, the distinction is not predicated upon general halakhic concerns of surety or of creation of a stumbling block but upon the much narrower principle that a scholar does not cause unsuspecting persons to sin by allowing “an unperfected matter to issue from his hand.”

V. AN ALTERNATIVE THESIS

The distinction drawn by Havvot Ya’ir and Hazon Ish between passive facilitation and an overt act providing an opportunity for transgression is not as obvious as it may appear. Such a distinction may or may not exist with regard to the prohibition against placing a stumbling block before the blind. The cogency of entertaining such a distinction arises from the language in which the prohibition is couched, viz., “you shall not place.” That terminology ostensibly restrains only overt action. However, the duty of admonition and the obligation to prevent transgression stemming from the more encompassing covenantal obligation of suretyship do not simply forbid action but command performance. Such duties cannot be avoided on the plea that one has limited oneself to mere non-intervention. Moreover, as remarked earlier, the aphorism employed by the Palestinian Talmud, “A scholar does not allow an
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unperfected matter to emerge from his hands,” certainly does not resonate as a code phrase for distinguishing between an overt act and passive non-intervention. More basically, despite the valiant efforts of latter-day authorities to resolve Havvot Ya’ir’s principal concern, viz., why the obligation to prevent transgression should be cancelled because of hal’itchu la-rasha, remains perplexing.

Havvot Ya’ir clearly maintains that it is forbidden to create a “stumbling block” in one’s own domain even if the only person likely to “stumble” is a person engaged in an illicit act. That position is in sharp contrast to the view of Iggerot Mosheh, Yoreh De’ah, III, no. 90, who asserts that a person may engage in normal activities without concern that others may “stumble” in attempting to reap vicarious benefit. Iggerot Mosheh formulates that thesis is explaining why it is permitted to teach Gemara in the vernacular through the medium of a radio program despite the possibility that non-Jews who are forbidden to study the Oral Law may also tune in to the program.

Iggerot Mosheh raises an objection to his own position in pointing out that the conduct of the owner of a vineyard in allowing orlah and kerem reva’i to grow represents normal activity conducted on his own premises. If so, he queries, why is it necessary to mark orlah and kerem reva’i in order to prevent transgression? Iggerot Mosheh responds by stating that during the sabbatical year the landowner has either explicitly or constructively invited all and sundry to partake of produce growing on his land. Such an invitation, he maintains, is tantamount to actively enticing people to transgress and therefore constitutes placing a stumbling block before them. Iggerot Mosheh recognizes that the first opinion recorded in the Mishnah requiring that orlah and kerem reva’i be marked as such every year—when surely no such invitation is extended—is not explained by his thesis. Iggerot Mosheh endeavors to explain that opinion in a rather vague and imprecise way but he is basically unconcerned with explaining that view since the normative rule is in accordance with the position of R. Shimon ben Gamliel. Be that as it may, and putting aside other considerations germane to the case of radio broadcasts, Iggerot Mosheh’s basic thesis is at variance from the ruling of Havvot Ya’ir.

The difficulty, both with regard to the position of R. Shimon ben Gamliel and of the first view recorded in the Mishnah, is, in this writer’s opinion, readily resolvable by positing that the requirement for marking orlah and kerem reva’i, either every year or only during the sabbatical year, is not mandated by the prohibition against placing a stumbling
block before the blind but by rabbinic legislation limited to those cases. Indeed the requirement to mark burial cites, also recorded in the same Mishnah, is explicitly regarded by many authorities as rabbinic in nature.48

The matter is perhaps best explained if it is understood that the biblical duties of admonition and of preventing transgression by others is personal in nature but does not mandate expenditure of financial resources or extensive travail.49 The Sages, by rabbinic decree, did, however, impose obligations involving expenditure of money, at least in some circumstances. Marking burial places in order to prevent unwitting infraction is an obvious example. The first opinion recorded in the Mishnah, Demai 3:5, maintains that the Sages promulgated a similar rule requiring landowners to mark orchards and vineyards producing prohibited orlah and restricted kerem reva'i despite the fact that the trespassers have no right to pick even fruit not subject to those restrictions. R. Shimon ben Gamliel declares that there could not have been a general edict of that nature because of a contravailing consideration: hal'itehu la-rasha. R. Shimon ben Gamliel recognizes the cogency of the concern auguring for such legislation but asserts that such concern was tempered by refusal on the part of the Sages to legislate on behalf of a person who is purposefully wicked.

The difficulty inherent in this thesis lies in explaining the statement of the Palestinian Talmud declaring that R. Shimon ben Gamliel is in agreement with the opinion that food presented to the proprietor of the inn must be tithed because “A scholar does not allow an unperfected matter to issue from his hand,” a principle that appears to have a quite different connotation and hence to be entirely extraneous.

The principle “A scholar does not allow an unperfected matter to issue from his hand” is formulated by the Gemara, Eiruvin 32a and Pesahim 9a, as a hazakah, i.e., a presumptive rule regarding comportment of learned individuals. The halakhic presumption is founded upon the usual comportment of scholars. Since it is their wont to tithe all produce in their possession, absent evidence to the contrary it may be assumed that they have done so.

The statement of the Palestinian Talmud can readily be understood as raising the presumptive principle to a mandatory role of comportment. The Sages did indeed base the rule of evidence upon empirical observation and hence the Gemara, Eiruvin 32a and Pesahim 9a, terms the principle a “hazakah” or a presumptive rule of conduct. But, having established the presumptive rule on empirical evidence, they sought to assure that reliance on that presumption would not lead to inadvertent transgression; accordingly, they transformed the evidentiary principle
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into a mandatory rule. R. Shimon ben Gamliel, since he subscribes to
the principle hal’itehu la-rasha, certainly recognized that there would
have been no reason to promulgate legislation for the purpose of pro-
tecting the proprietress from transgression. But, declares the Palestinian
Talmud, R. Shimon ben Gamliel concedes that they did so simply in
order to reinforce the underlying normative rule.

According to this analysis, hal’itehu la-rasha is not at all an inde-
dependent principle of Halakhah justifying a course of action. Rather, it is
a rationale explaining why legislation was not promulgated in a particu-
lar instance. Hal’itehu la-rasha explains only why transgressors were not
shielded from further transgression; hal’itehu la-rasha is not an invita-
tion to entice malfeasors to further transgression and certainly not a
license to cause them physical harm.

VI. SPIRITUAL WELFARE VS. PHYSICAL HARM

Putting aside the issue of why one need not be concerned with the spiri-
tual welfare of the wicked, in context, the dictum hal’itehu la-rasha
establishes only that the wicked may be allowed to become mired in
transgression. As expressed explicitly by Rambam in his Commentary on
the Mishnah, Ma’aser Sheni 5:1: “We should not seek a remedy for a rob-
ber so that he does not stumble because the sin of robbery is even
greater.” The phrase “that he does not stumble” seems to reflect only a
lack of concern for the thief’s spiritual welfare. As Rabbi Frankel points
out in his contribution to the discussion in Pa’amei Ta’akov, despite the
presence of the concluding phrase “and let him die” there is no evidence
that the aphorism “Pour into the wicked and let him die” is intended lit-
erally as sanction for causing the physical death of a thief; the sole harm
defined by the thief in the case described by the Mishnah is a compounded
transgression bringing heavenly punishment in its wake. Rabbi Zilber-
stein, rather implausibly, insists upon a literal reading of the dictum.
However, as Rabbi Rabinowitz points out in his article, if the word
“hal’itehu” is understood literally, it follows that even overt execution of
the thief would be sanctioned—a conclusion that Rabbi Zilberstein
acknowledges to be incorrect.

Moreover, it is noteworthy that Rambam concludes his comment
with the observation that the robber need not be preserved from fur-
ther transgression “because the sin of robbery is even greater.” It may
be inferred that a would-be transgressor need not be prevented from
committing additional infractions that are less severe in nature but must
be prevented from committing transgressions more serious than those he intends.

Basing himself upon Rambam’s comment, R. Zevi Pesach Frank, Teshuvot Har Zevi, Torah De’ah, no. 125, offers a novel interpretation of R. Shimon ben Gamliel’s formulation of hal’itehu la-rasha. Har Zevi establishes that there is no prohibition of theft with regard to ma’aser sheni and kerem reva’i which are “property of the Deity (mammon Gevoha).” Accordingly, R. Shimon ben Gamliel opposed measures designed to prevent trespassers from eating kerem reva’i because that would only prompt them to pick grapes from other vines and thereby commit the more serious transgression of theft. Hal’itahu la-rasha, according to this analysis, means that the thief must be left to his own devices because intervention would only enhance the transgression. According to Har Zevi’s understanding of Rambam, R. Shimon ben Gamliel’s disagreement with the zenu’in is extremely narrow and hal’itehu la-rasha is not at all a principle of general application.

VII. CONCLUDING REMARKS

According to Rabbi Zilberstein, the poisoner must be exonerated and even commended because the aphorism “Pour into the wicked and let him die” is to be understood literally. Rabbi Zilberstein’s critics emphasize that theft is not a capital crime and that, in any event, punishment of that nature can be imposed only by a qualified bet din. Moreover, as codified by Rambam, Hilkhot Rozeah 2:2, even indirect homicide is a crime punishable by death only at the hands of Heaven. To Rabbi Zilberstein’s contention that it is the thief who causes his own death by imbibing poison they respond that, with regard to tort culpability, the Gemara, Bava Kamma 47b, declares that placing poison before an animal results in liability at the hands of Heaven even though the act of consuming the poison is initiated by the animal. Rabbi Zilberstein’s rejoinder is that placing poison in one’s own premises does not result in culpability even at the hands of Heaven and, moreover, a human being, unlike an animal, bears sole responsibility for the untoward results of his trespass.

Yet, as noted earlier, Rabbi Zilberstein concedes that, even in one’s own home, notice of impending danger, either actual (“Beware the dog”) or constructive (“Thou shalt not steal”) must be provided and, moreover, the visitor must have acted imprudently (by not ascertaining that the ladder was still in place or by not subjecting the sandwich to a chemical analysis). Indeed, if actual notice of placing poison has been
given to the potential victim, there seems to be no reason why the person placing the poison before a human being should be judged guilty even in the eyes of Heaven and even if the poison is placed outside of his domain. As expressed by Tosafot, Bava Kamma 47b, s.v. havah, since the harm was brought upon the victim by his own act, “it is not proper” that the person who merely made the poison available be held liable.55 If so, the person placing the poison before the victim with notice should be exonerated even if the poison is placed outside his own domain. If, on the other hand, constructive notice (“Thou shalt not steal”) is not regarded as sufficient notice, it should follow that, contrary to Rabbi Zilberstein’s distinction, the person who places the poison before the victim should be culpable at the hands of Heaven for intentionally causing the victim’s death even if it occurs in his own domain.

NOTES

1. R. Shalom Mordecai Schwadron, Teshuvot Maharsham, IV, no. 140, addresses precisely this issue and reaches the opposite conclusion. Maharsham was asked if it is permissible, with prior notice to their owner, to spread poison in one’s own field in order to destroy intruding animals. The interlocutor was inclined to permit such action on the grounds that “a person may do as he wishes within his property” and Maharsham indicates that the argument appealed to him. Nevertheless, citing R. Yair Chaim Bacharach, Teshuvot Havvot Ya’ir, no. 165, Maharsham rules that self-help directed against brute animals cannot be sanctioned even within one’s own property. See infra, notes 8-10 and accompanying text.

2. Presumably, in light of his later comment, Rabbi Zilberstein means that, by virtue of his intelligence, a human being is always on notice whereas a brute animal is not. See infra, note 4.

Although the Gemara, Bava Kamma 47b, invokes the consideration “lo hava lah le-mikhla—it should not have eaten” to exonerate the tort-feasor only from liability in a human court but not from liability according to the “laws of Heaven,” Rabbi Zilberstein apparently maintains that, in the case of a rational human being, invocation of that consideration obviates culpability even in the eyes of Heaven. As explained by Tosafot, Bava Kamma 47b, the rationale lo hava lah le-mikhla, when applicable, establishes that the cause of the resultant harm was intentionally generated by the victim; hence it is inappropriate that liability be assigned to another.

3. Rabbi Kanievsky, as cited in Derekh Sichah, apparently regards this as the crucial factor distinguishing the instant case from the rule with regard to placing poison before an animal.

4. Intentional infliction of harm is forbidden even if the resultant harm is in the form of force majeure. See Shakh, Hoshen Mishpat 398:2. Intentional
infliction of harm is apparently always forbidden and hence should be prohibited even against a trespasser. If so, the crucial consideration is notice which serves, according to Rabbi Zilberstein, to render the resultant harm unintentional from the vantage point of the tortfeasor. See *infra*, note 5. However, if notice is sufficient to render the victim the author of his own harm, it is difficult to understand why *gerama* with prior notice should exempt the tortfeasor from liability in the eyes of Heaven only in his own domain but not in a public place.

5. In effect, the negligence of the victim renders him the author of his own harm and hence exonerates the tortfeasor, who does not anticipate such negligence on the part of the victim, from culpability even at the hands of Heaven. See *supra*, note 4.

6. However, Maharsha, *Bava Kamma* 15b, comments that dogs of that nature are kept “to protect against *burglars* in the night.” Maharsha may readily be understood as interpreting the Gemara’s statement as interdicting physical harm to the burglar. Rabbi Zilberstein, however, dismisses such a reading of Maharsha’s comment in asserting that, although the dog may legitimately attack a burglar, the concern is that he may attack an unwary innocent person. Moreover, as Rabbi Zilberstein points out, until the intruder actually becomes a thief by committing the theft, there is an obligation of rescue.

Actually, in accordance with Rabbi Zilberstein’s own position with regard to the duty of rescue which will be discussed in section III, Maharaha’s comment presents no difficulty at all. Unlike Rabbi Zilberstein’s depiction of the sandwich thief, the burglar steals *le-tei’avon* and hence there does exist a duty of rescue. Moreover, Rabbi Zilberstein concedes that the duty of rescue is abrogated only if the endangered person’s transgression is both wanton and habitual. There is no reason to assume that the intruders against whom dogs afford protection are habitual burglars.

7. Rabbi Kanievsky’s ruling and the analysis presented by Rabbi Spitz seem problematic since intentional infliction of harm is always prohibited. See *supra*, note 4.

8. *Havvot Ya’ir* does, however, draw attention to the Gemara’s discussion, *Bava Kamma* 28a, regarding an ox that mounts a second ox with intent to kill. The Gemara declares that the owner of the attacked animal may extricate his animal and if, in the process of doing so, the attacking ox falls and is killed he is not liable. That provision would seem to indicate that self-help is available without notice, even against an animal causing damage without the knowledge of its master. That problematic ruling notwithstanding, *Havvot Ya’ir* reiterates that the general rule is that self-help requires prior notice and, as explained *infra*, note 9, is limited to slaughter of the offending animal.

9. Rambam, *Hilkhot Nizkei Mammon* 5:1, rules that the animal’s master must be warned three times. *Kesef Midneh, ad locum*, questions the need for three admonitions and argues that one warning is sufficient. *Havvot Ya’ir* contends that even Rambam would agree that three admonitions are required only in the case of a fence that has developed a breach that allows animals to escape but not with regard to an unrestricted marauding animal. Moreover, contends *Havvot Ya’ir*, the remedy that is sanctioned is slaugh-
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ter that renders the meat of the animal fit for consumption. Even that remedy is sanctioned only if the animal is in any event destined to be slaughtered since slaughter of an animal raised for its meat causes the animal’s owner no financial harm. However, slaughter is not permitted if the value of the animal is enhanced because it has been raised for breeding or the like, or has been raised to lay eggs as in the case of the hen that was the subject of litigation before Havvot Ta’ir.

10. Curiously, although Maharsham rejects this distinction, he comments that, were it possible to substantiate the distinction, it would be consistent with Havvot Ta’ir’s ruling prohibiting self-help, presumably because Havvot Ta’ir might be understood as forbidding self-help only outside of one’s own domain. However, a close reading of Havvot Ta’ir indicates that this cannot be correct for two reasons: 1) there is no indication in Havvot Ta’ir’s responsum that the hen was killed only after leaving the merchant’s establishment; and 2) such a distinction would entirely resolve Maharsham’s perplexity based upon the difficulty posed by the discussion presented in Bava Kamma 28a, cited supra, note 8. Since Maharsham allows the difficulty to remain unresolved it may be inferred that he rejected a distinction of that nature.

11. Unlike Halakhah, which would regard the danger resulting from a spring-gun to be in the form of gerama for which the person setting the trap would be culpable at the hands of Heaven but for which a bet din could not award damages, common law would enforce such a claim.

12. Restatement of Torts §85, p. 180 states:

The value of human life and limb, not only to the individual concerned but also to society, so out-weights [sic.] the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as is stated in §79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises. . . . A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present.

A leading authority on tort liability, William L. Prosser, Handbook of the Law of Torts, 4th ed. (St. Paul, 1974), p. 115, has summarized the relevant rule as follows:

Where the intruder is not proceeding with violence, defendant may normally, in the first instance, use only the mildest of force, for which the old form of pleading had a phrase —“molliter manus imposuit;” he
gently laid hands upon him, and if in the process his own safety is threatened, he may defend himself, and even kill if necessary; but in the first instance a mere trespass does not justify such an act. Even the tradition that a man’s house is his castle, and that one may kill in defense of his dwelling, has given way in most jurisdictions to the view that such force is not justified unless the intrusion threatens the personal safety of the occupants or the commission of a felony.


14. Cf., however, R. Gedaliah Rabinowitz, Or Yisra’el, no. 22, vol. 6, no. 2 (Tevet 5761).

15. See supra, note 11.

16. However, as discussed in section I, Rabbi Zilberstein’s opinion is, contradicted by Teshuvtot Maharsham, IV, no. 140.

17. The principle “hal’itehu la-rasha,” discussed infra, sec. IV, does not apply, argues Rabbi Zilberstein, because the would-be thief may consume the candy before stealing the valuables. At that time he has not yet become a “wicked” person. That argument, however, seems flawed since the burglar is already “wicked” by virtue of having stolen the candy itself. On the other hand, Rabbi Zilberstein seems to have overlooked the additional point that an ordinary burglar, unlike Rabbi Zilberstein’s categorization of the sandwich thief, transgresses le-tei’avon and hence the duty of rescue remains in force.


19. This verb occurs but once in Scripture in Genesis 25:30: “Hal’iteni min ha-adom ha-adom ha-zeh—Pour into me, I pray thee, some of this red, red [pottage].” Ibn Ezra comments that the term “hal’iteni” connotes “eating.” The various English translations render the phrase “Let me swallow” or “Let me gulp.” Neither of those translations captures the lit’il, or causative, voice of the verb. The Soncino translation of the talmudic dictum is “Stuff the wicked.” The translation preferred by this writer as most accurately capturing the nuanced meaning of the text, “Pour into me,” is based upon the Bet Tehudah Yiddish-language translation of the passage. See also Bereshit Rabbah 63:30.

20. R. Judah Shaviv, Tehumin, X (5748), p. 157, note 3, suggests that the phrase...
“until he dies” is a reference to Esau’s exclamation “Behold I am about to die” (Genesis 25:32) in conjunction with his demand “Pour into me.”

21. R. Yitzchak Rosenberg, *Teshuvot Gevurot Tizhak, Be-Inyan Gittin*, secs. 56–62, rather improbably asserts that R. Shimon ben Gamliel refused to sanction redemption of *kerem reva‘i* because it would create the impression that persons who redeemed *kerem reva‘i* in order to spare thieves additional transgression were unconcerned with regard to the prohibition against theft. Accordingly, “hal’itehu la-rasha” is not an expression of an intrinsic policy but the practical result of an entirely different concern. The *zenu‘in*, asserts *Gevurot Tizhak*, in principle, were in agreement with R. Shimon ben Gamliel. However, he contends, in practice, the *zenu‘in* did redeem the *kerem reva‘i* because, in addition to redeeming the fruit, they forgave the theft. Since, unlike setting out markers, the acts of redemption carried out by the *zenu‘in* were private and unknown to any but themselves, they could not be suspected of indifference to the sin of theft.


24. In a similar vein *Iggerot Mosheh, Orah Hayyim*, II, no. 91, comments that one is under no obligation to trouble oneself to mark *orlah* on account of a wicked person but if the wicked person himself seeks to diminish his infraction “it is necessary to be responsive to him (le-hizdakek lo). As will be shown in section V, *Teshuvot Havvot Ya‘ir*, no. 142, expresses incredulity with regard to the permissibility of hal’itehu la-rasha. *Havvot Ya‘ir* certainly did not regard such conduct as obligatory.

25. Cf., the concluding statement in *Teshuvot Radvaz*, I, no. 354, in which Radvaz reports that, when he had reason to suspect that a defendant would swear falsely, it was his practice to effect a compromise between the litigants and recommends that other judges adopt a similar policy.

26. In this responsa Radvaz focuses upon the financial loss that would be incurred in preventing a false oath and remarks that one who assumes such loss is a “pious fool.” Cf., however, Rashi, *Shevu‘ot* 39b, s.v. halah, and *Tosafot, Shevu‘ot* 47b, s.v. halah, who aver that a plaintiff who has entrusted his funds to an unworthy person is not without blame. See also R. Chaim Palaggi, *Nishmat kol Hai*, II, no. 9, who declares that there is no obligation to accept financial loss in order to prevent transgression on the part of another. Cf., however, R. Chaim Hizkiyahu Medini, *Sedei Hemed*, *Keilaim*, ma‘arekhet ba-leh, sec. 45 and ma‘arekhet var, sec. 80. See also *Tzivat Gona, bakirah daled*, cited by *Pithoi Teshuvah*, *Yoreh De‘ah* 157:5. Accepting that premise, R. Shimon ben Gamliel may well be understood as announcing the principle hal’itehu la-rasha only as justification for avoidance of a financial burden such as is entailed in redemption of *kerem reva‘i*. See R. Shimon ha-Levi Gottlieb, *Ateret Mordekhai*, no. 8, sec. 2. See also *infra*, note 31.

Cf., R. Aaron Halberstam, *Teshuva Muzal me-Esh*, no. 45, who poses the question more generally in querying how it is ever possible to demand an oath since doing so is, in effect, “placing a stumbling block before the blind” and a person is obligated to sacrifice his entire fortune rather than transgress
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a negative commandment. Muzal me-Esh responds cryptically by invoking the principle hal’itehu la-rasha. See also R. Shlomoh Zalman Auerbach, Teshuvot Minhat Shlomoh, I, no. 7. That comment, however, begs the question in that it fails to spell out why hal’itehu la-rasha supercedes other halakhic principles. Cf. also, R. David Shlomoh Frankel, Teshuvot Be’er David, no. 24, who argues rather tenuously that, because of the general nature of the prohibition, avoidance of lishnei iver requires an outlay of funds no greater than required for fulfillment of a positive commandment. Cf., ibid., no. 3. The issue is also addressed by R. Amram Bloom, Teshuvot Bet She’arim, Yoreh De’ah, no. 17. R. Chaim Halberstam, Teshuvot Divrei Hayyim, Hoshen Mishpat, no. 8, asserts that it is permissible to demand an oath because of a statutory presumption that the defendant will not swear falsely. See also the comments of Imrei Barukh on Turei Even, Megillah 28a. Cf., the comments of R. Chaim ibn Attar, Or ha-Hayyim, Leviticus 19:11, to the effect that the plaintiff is forbidden to cause the defendant to swear if he knows that the latter is swearing falsely. Cf., Sedei Hemed, Kelalim, ma’arekhet ha-heh, sec. 45 and ma’arekhet vav, sec. 30.

27. Cf., however, Iggerot Mosheh, Even ha-Ezer, III, no. 5 and IV, no. 4, who adopts a different position with regard to obviation of mamzerut, or bastardry. Iggerot Mosheh contends that the concern in preventing bastardy is not for the sinner but reflects a societal concern for prevention of future unsuspecting marriage between mamzerim and persons of legitimate birth. In addition, as stated in Bereshit Rabbah 26:10, cited by Rashi, Genesis 6:13, mamzerut brings in its wake physical and social ills “and kills both good and evil.” Thus, in striving to diminish instances of adultery, society’s concern is not the spiritual welfare of the sinner but the interests of its own innocent members. See also Teshuvot Helkat Ya’akov, II, no. 16 and III, no. 31, sec. 5 and ibid., note 1 as well R. Joseph Konwitz, Teshuvot Divrei Yosef, no. 9.

See also R. Ben-Zion Uziel, Piskei Uzi’el be-She’elot ha-Zman, no. 63, sec. 2, who implicitly accept his interlocutor’s contention that hal’itehu la-rasha is irrelevant when the concern is the benefit of the community but dismisses it as not germane in the case of a woman seeking to convert to Judaism in contemplation of marriage to a kohen.

28. Cf., Teshuvot Sho’el u-Meshiv, I, no. 5. Similarly, Teshuvot Radvaz, III, no. 873, refuses to sanction a religious marriage ceremony for a couple already civilly married because the parties were suspected of having engaged in a sexual liaison while the woman was yet married to another man. Teshuvot Maharsham, VII, nos. 104 and 106, forbade relaxation of the rabbinic restriction against remarriage of a woman during the period of lactation in order to avoid violation of the laws of niddah. Teshuvot Helkat Ya’akov, I, no. 13, applies the principle hal’itehu la-rasha in forbidding the conversion of a woman of whom it is known that she will transgress the laws of family purity. [Cf., however, idem, I, no. 142, regarding non-interference in the marriage of a divorcée to a kohen in order to assure the execution of a get.] Piskei Uzi’el be-She’elot ha-Zman, no. 63, sec. 2, invokes the principle hal’itehu la-rasha in refusing to convert a gentile woman married to a kohen but cf., ibid., no. 60 and idem, Mishpetei Uzi’el, I, Toreh De’ah, no. 14, Yoreh De’ah, II, nos. 53 and 58 and Even ha-Ezer, II, no. 25. Many

For discussion of a similar issue in the case of a penitent see Rambam, *Teshuvot Pe’er ha-Dor*, no. 132. See also *Piskei Uzi’el*, no. 61, who notes that Rambam sanctions only an infraction that is forbidden merely le-khatilah, i.e., before the fact, but not an infraction that remains forbidden post factum even though the perpetrator would thereby be spared a more severe transgression. Moreover, it should be noted that Rambam himself maintains that hal’itehu la-rasha applies only when the resultant infraction is more severe than the infraction that is obviated. See *infra*, notes 53-54 and accompanying text.

The principle hal’itehu la-rasha is similarly cited by Leven, *Toreh De’ah* 334:1; *Teshuvot Hatam Sofer*, Hoshen Mishpat, no. 177; and *Teshuvot Helkat Ya’akov*, I, no. 142, in justification of the ruling of Rema, *Toreh De’ah* 334:3, providing for excommunication of a transgressor even in situations in which there is reason to fear that imposition of that sanction will not only fail as chastisement but will lead the transgressor to abandon Judaism entirely. Cf., however, *Taz*, *Toreh De’ah* 334:1.

For sources ruling that conversion for purposes of marriage may not be performed in order to avert threatened apostasy see R. Ezriel Hildesheimer, *Teshuvot Rabbi Ezri’el*, *Toreh De’ah*, no. 234 and *Iggerot Mosheh*, Even ha-Ezer, II, no. 4. See, however, R. David Zevi Hoffman, *Teshuvot Melamed le-Ho’il*, *Toreh De’ah*, no. 83, who permitted improper conversion of a man for purposes of marriage in order to prevent more serious infractions on the part of his Jewish paramour. Cf., R. Shalom Kluger, *Tev Ta’am va-Da’at*, I, no. 130, who, under such circumstances, permitted a man to marry a proselyte with whom he had consorted prior to her conversion. See also R. Eliyahu Chazan, *Ta’alumot Lev*, III, no. 31, followed by *Piskei Uzi’el*, no. 60, who sanction the marriage of a female convert within the statutory three-month waiting period in order to avoid more serious infraction. See also *ibid.*, no. 61, secs. 6-7 and no. 63, sec.1, which record Rabbi Uzi’el’s ruling permitting, conversion for the sake of marriage for the same reason. That position was earlier formulated in his *Mishpetei Uzi’el*, I, *Toreh De’ah*, no.14; II, *Toreh De’ah*, nos. 53 and 58; and *Even ha-Ezer*, II, no.
25. Rabbi Uziel invokes *Pe’er ha-Dor*, no. 132, in declaring that parties to such marriages are “penitents” for whom restrictions that are imposed only *le-khatilah*, i.e., before the fact, may be suspended. However, since a *kohen* who marries a convert must, *post factum*, divorce her, Rabbi Uziel is not prepared to sanction conversion for the purpose of marrying a *kohen*. There is, however, an apparent inconsistency between that ruling and his earlier-cited ruling permitting conversion of a woman consorting with a Jewish man in circumstances in which it is clear that the parties will not abstain from sexual relations for the mandated ninety-day period. That prohibition applies even *post factum* in the sense that it is ongoing and remains in force even if a valid marriage has been contracted.

*Parenthetically, Rabbi Uziel’s citation of *Pe’er ha-Dor* as precedent is not apropos. Rambam addresses situations in which, *ante factum*, contracting a marriage is forbidden but once the marriage has been contracted the relationship is not disturbed. Sanctioning of the ongoing relationship is evidence of the diminished severity of the infraction. Rabbi Uziel assumes as a matter of course that a *bet din* that accepts the candidacy of a convert motivated by prospects of marriage incurs an infraction. That is also the position of many other authorities. See, for example, R. David Zevi Hoffman, *Melamed le-He’il, Yoreh Deah* no. 83. Cf., however, *Iggerot Mosheh*, Even ba-Ezer, II, no. 4. Nevertheless, a conversion carried out under such circumstances is valid. However, the validity of such a conversion is entirely unrelated to the infraction committed by the *bet din*. It is the *act* of conversion *per se* that is interdicted either by formal prohibition or procedural rule. Validity of the conversion has no bearing upon the prohibited nature of the *bet din*’s act of conversion; the *bet din* is prohibited from performing a perfectly valid conversion. The distinction between *ante factum* and *post factum* is irrelevant to the act performed by the *bet din* and hence there is no basis for regarding that infraction as one of diminished severity.*]

29. Although his statement is somewhat ambiguous, Radvaz states explicitly that the partners to a civil union are “wicked” even if they have not consorted. In this case Radvaz may have, considered them “wicked,” not because of entry into a civil marriage *per se*, but for having done so while the woman was still married to another man. However, in another responsum, VII, no. 11, Radvaz seems to deem the groom to be “wicked,” and hence unworthy of assistance in rendering the bride permissible to him, even if he is not suspected of having had a liaison with her.

30. *Teshuvot Havvot Ya’ir* himself invokes the aphorism *hal’itehu la-rasha* in another context but endows it with a different connotation. A certain individual accustomed himself to drink non-kosher wine. The community wished to censure him and to impose a fine but the local rabbi objected on the grounds that sanctions might well cause the sinner to eat other forbidden foods as well and perhaps even to “leave the religion.” *Havvot Ya’ir*’s reaction was “... *hal’itehu la-rasha va-yamot* and, in the days of the Temple, the Sanhedrin was never concerned lest transgressions increase ... . We may deduce that we are concerned for the well-being of the general populace even if it is inimical to the benefit of the individual.” It is clear that
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Havvot Ya'ir's substantive consideration was the spiritual welfare of the community for which the well-being of the individual must be sacrificed. The term “hal'itehu la-rasha” is invoked by him, not as an operative principle, but as a melizah or aphorism.

Much earlier, Akeidat Yizhak, Parashat Va-Yera, sha'ar 20, refused to sanction communal support of prostitutes. The argument for such support was that services provided by those women served to prevent the more severe sin of adultery. Akeidat Yizhak ruled that a community dare not become complicit in even a minor transgression in order to preclude individuals from more serious transgressions. Akeidat Yizhak does not, however, invoke the principle hal'itehu la-rasha. Cf., however, Ziz Eli'ezr, VII, no. 22. Cf. also, Yosef Achituv, Tehumin, IX (5948), p. 168. Ziz Eli'ezr, XII, no. 93, addenda, declined to permit the Rabbinate to grant a kashrut certificate to an establishment that served milk after meat. His concern was not the applicability of hal'itehu la-rasha but the concern voiced by Akeidat Yizhak. That point was not grasped by Yosef Achituv, Tehumin, p. 169. For an opposing view see the responsum of R. Ovadiah Yosef published in Ziz Eli'ezr, ibid., note 1, and in Rabbi Yosef's Yab'a Omer, IV, Torah De'ah, no. 7. For a general discussion see R. Abraham Sherman, Tehumin, V (5744), pp. 366–376.

31. R. Israel Meir Lau, Teshuvot Tahel Tira'el, I, no. 12, sec. 9, endeavors to resolve Havvot Ya'ir's perplexity by asserting that R. Shimon ben Gamliel maintained that the obligation of arvrut does not require expenditure of one's personal funds in order to prevent transgression on the part of another. See Rema, Torah De'ah 334:48 and Bi'ur ha-Gra, Torah De'ah 157:5. See also Nishmat kol Hai, II, no. 9 as well as Sedei Hemed, Kelalim, ma'arekhet ba-beh, sec. 45 and ma'arekhet vav, sec. 30. Rabbi Lau also asserts that excessive travail (tirha yeteira) is similarly not required. Cf., however, Pri Megadim's work, Teivat Goma, hakirah daled, cited by Pithei Teshuvah, Torah De'ah 157:5, who states that “perhaps” a person is obligated to expend his entire fortune in order to prevent another from transgressing a negative commandment.

For other attempts to resolve the problem identified by Havvot Ya'ir see Mishneh Halakhot, V, no. 282 and VII, no. 115. 32. Shakh is understood in a similar vein by R. Ezekiel Landau in his gloss on Shakh, Daggul me-Revavah, ad locum. See also R. Pinchas Zvichi, Teshuvot Ateret Paz, I, Orat Hayyim, no. 13. Shakh was understood in a different manner by R. Shlomoh Eger, Gilyon Maharsha, ad locum; R. Abraham Benjamin Sofer, Teshuvot Ketav Sofer, Torah De'ah, no. 83, s.v. ve-hineh ha-Shakh; and R. Isaac Elchanan Speckter, Ein Yizhak, Even ha-Ezer, no. 1, anaf 2; who read Shakh literally and regarded his ruling as applicable only to an apostate. See also, Seridei Esh, I, no. 25, s.v. ve-hineh yeh but cf., ibid., II, no. 9, ve-hineh im and II, no. 10, s.v. ve-yeh le-halek and R. Menashhe Klein, Mishneh Halakhot, V, no. 102 and VIII, no. 121 and no. 159. A number of authorities assert that there exists no obligation of admonition or suretyship with regard to an apostate. See R. Moshe Shick, Maharam Shik al Taryag Mizvot, no. 233, sec. 4; Teshuvot Avnei Nezer, Torah De'ah, no. 126; R. Elchanan Wasserman, Kovez Shu'urim, Beizah,
sec. 64; Iggerot Mosheh, Yoreh De'ah, III, no. 90; and R. Joel Teitelbaum, Teshuvot Divrei Yo'el, no. 59, secs. 4-5.

For other attempts to resolve the perplexity see Mishneh Halakhat, V, no. 282 and VII, no. 115.

In disagreement with Shakh, many authorities maintain that one may in no way assist even an apostate in committing a transgression. See Magen Avraham, Orah Hayyim 347:4; Teshuvot Sha’el u-Meshiv, Mahadura Tinyana, II, no. 6; Mishnah Berurah 347:4; Shulhan Arukh ha-Rav, Orah Hayyim 347:3; Teshuvot Ketav Sofer, Yoreh De’ah, no. 83, s.v. ve-hineh ha-Shakh; and R. David Feldman, Teshuvot Lev David, no. 4. See also Teshuvot Maharam Shik, Orah Hayyim, no. 303 and Bi’ur Halakhah 608:2. Cf., R. Moshe Stern, Teshuvot Be’er Mosheh, V, no. 159.

33. See also Iggerot Mosheh, Orah Hayyim, V, no. 29, s.v. ve-af, who seems to ascribe the same reasoning to Shakh. R. Yom Tov Zahalon, Teshuvot Maharitz ha-Hadashot, no. 209; Ziz Eli’ezer, XV, no. 18 and R. Samuel ha-Levi Wosznier, Teshuvot Shevat ha-Levi, II, no. 1. Of course, if, as discussed later in this section, hal’itehu la-rasha does not serve as license for overt assistance to a transgressor, hal’itehu la-rasha cannot be the basis upon which Shakh’s position is predicated. Cf., Shevet ha-Levi, II, no. 198, sec. 3.

34. See, for example, Teshuvot Avnei Nezer, Yoreh De’ah, no. 126, who understands Shakh’s ruling as limited to an apostate and develops a novel argument to demonstrate that there is no obligation of suretyship vis-à-vis an apostate.

35. Teshuvot Bet She’arim, Orah Hayyim, no. 181; Teshuvot Lev David, no. 4; and Teshuvot Helkat Ta’akov, I, no. 109, sec. 4; II, no. 16; and III, no. 31, sec. 4, similarly rule that hal’itehu la-rasha does not apply in situations in which all transgressions can be prevented. See also Ziz Eli’ezer, XX, no. 1 and Teshuvot Taba’i’a Omer, IV, no. 7, sec. 3. Cf., Teshuvot Bet She’arim, Yoreh De’ah, no. 17.

36. See also Teshuvot Muzal me-Esh, no. 45, who draws a similar distinction in asserting that only a second, simultaneous transgression need not be prevented but that hal’itehu la-rasha cannot be invoked with regard to an additional future infraction. See also Teshuvot Bet She’arim, Yoreh De’ah, no. 17 and Yoreh De’ah, no. 220, s.v. u-mah.

37. Mahari Perlow explains the ruling of R. Jose, Demai 3:5, discussed infra, note 41 and accompanying text, permitting delivery of untithed food to the proprietress of an inn in a similar manner. R. Jose predicates his ruling on the declaration “We have no responsibility for the dishonest.” Mahari Perlow explains that since the guest cannot prevent theft of his food he has no obligation of suretyship with regard to other prohibitions. However, it is unclear why delivery of untithed food to the proprietress does not constitute an active form of placing a stumbling-block before the blind. Mahari Perlow does comment that there is no stumbling-block because the guest delivers the food “from his own need . . . she eats of his produce in theft against his will and without his premission” and that it is not within his power to prevent her transgression with regard to tithes, “since he is compelled to deliver [his produce] into her hand to prepare his food.” Those comments are puzzling since the situation is certainly not one of force majeure.

38. See also R. Joshua Baumol, Teshuvot Emek Halakhah, II, no. 6.
39. This distinction is also drawn by a host of other authorities as will be shown later in this section.

40. Rabbi Zilberstein asserts that Havvot Ya’ir’s ruling is limited to invited guests. This writer fails to discern a halakhic distinction attachable to that factual difference.

41. See, however, Tosefet Yom Tov, Dem’ai 3:5. Tosefot Yom Tov suggests that, according to some early authorities, the proprietress may not be a “wicked” person and hence may deserve protection from inadvertent transgression even according to R. Shimon ben Gamliel. The Gemara, Hullin 6b, suggests that the Mishnah reflects a general concern that people commonly, but illicitly, make substitutions for commodities entrusted to them. The Gemara retorts that such is not a general practice but is limited to proprietresses of inns. As explained by Rashi, the proprietress justifies her conduct on the basis of the rhetorical consideration “Shall the student eat cold food while I eat hot food?” Although unauthorized substitution is indeed an act of a theft regardless of motivation, the proprietress erroneously believes it to constitute a legitimate and even laudable act of self-sacrifice. If so, although the proprietress indeed acts incorrectly, nevertheless, she can hardly be deemed “wicked.” In an alternative resolution of the apparent contradiction inherent in Rambam’s rulings, Havvot Ya’ir explains that Rambam understood the Mishnah in a manner identical to that of Rashi and hence rules that since the proprietress is not wicked she must be preserved from transgression.

Havvot Ya’ir further notes that the Palestinian Talmud indicates that R. Shimon ben Gamliel may not have accepted the view of R. Jose. The Palestinian Talmud suggests that, although hal’itehu la-rasha is the general rule, it does not extend to untithed food. Regarding untithed food the presumption is that “A scholar does not cause an unperfected matter to issue from his hands,” i.e., a person who observes the laws of tithing does not allow any food to leave his possession while yet untithed. The Palestinian Talmud, in effect, declares, that this dictum does not merely reflect an empirical presumption but has halakhic significance as establishing a hard and fast rule. Cf., however, Hazon Ish, Demai 81:1, whose understanding of that statement of the Palestinian Talmud is discussed herein.

However, Tosafot, disagreeing with Rashi, understands the contention attributed to the proprietress to be declarative rather than quizzical and hence as reflecting her own sense of fairness: “Let the student eat cold food and I will eat hot food!” The proprietress labors on behalf of her guest. She does not deem it fair to herself for her food to become increasingly colder as she prepares warm food for her guest. Therefore, she serves him already available cooked food that she had cooked for herself but which has become cold and cooks again for herself so that she may enjoy hot food. According to Tosafot’s understanding, her rationale is self-serving and not at all laudatory. Nevertheless, Be-Zel ha-Hokhmah, I, no. 27, argues that, although incorrect as a matter of law, even such a person genuinely believes her conduct to be justified on the grounds that she should not be deprived of a benefit because of a service she is performing on behalf of another. Hence, contends Be-Zel ha-Hokhmah, even according to Tosafot, the proprietress
should not be relegated to the category of the “wicked.”
42. An identical distinction is formulated by Melekhet Shlomoh, in his commentary on Demai 3:5, in stating that the ruling of the Palestinian Talmud is limited to situations involving an overt act. See also Teshuvot Emek Halakhah, II, no. 4. That distinction is rejected by Be-Zel ha-Hokhmah, I, no. 27, who maintains that hal’itehu la-rasha, in principle, extends to overt acts as well. Cf., Teshuvot Bet She’arim, Torah De’ah, no. 17.
43. Cf., infra, note 49.
44. Cf., March ha-Panim, Demu’i 3:5, who, without referring to Rambam, explains R. Jose’s concern in this manner. See also R. Yerucham Perlow, commentary on Sefer ha-Mitzvot of R. Sa’adia Ga’on, III, Miyan Shishim va-Hamesh ha-Parshiyot, Parashah 57, s.v. ve-gam nir’eh.
45. This analysis differs from that of Havvot Ta’ir presented supra, note 41, in that it does not posit an absolute rule.
46. Midneh le-Melekh, Hilkhot Kela’im 1:6, and Pri Megadim, Orah Hayyim, Eshel Arvaham 443:5, understand Rambam as prohibiting even passive non-removal of a stumbling block. See Minhat Tizhak, III, no. 93, who makes a similar inference from the ruling of Rambam, Hilkhot Talmud Torah 5:4, but argues that Tur Shulhan Arukh, Torah De’ah 242, disagrees. Cf. however, Minhat Tizhak, I, no. 56 sec. 3, who points to a contradictory inference from Rambam, Hilkhot Kela’im 9:2. Bi’ur ha-Gra, Torah De’ah 295:2, apparently ascribes a similarly restrictive view to Shulhan Arukh. An opposing view is espoused by Derishah, Torah De’ah 297:1. See also Sedei Hemed, Kela’im, ma’arekhet vav, klal 26, sec. 25 and R. Yitzchak Eliyahu Adler, Lifnei Iver (Ofakim, 5749), pp. 89-91. 47. For a fuller discussion of the issues presented by radio programs of that nature see this writer’s Contemporary Halakhic Problems, II (New York, 1983), pp. 311-340.
48. See Sedei Hemed, Kela’im, ma’arekhet vav, klal 26, sec. 25.
49. See supra, notes 26 and 31.
50. The phraseology of the Palestinian Talmud is “ein derekh le-haver—it is not the wont of a scholar.” Without remarking upon the discrepancy in language between the Babylonian Talmud and the Palestinian Talmud, Teshuvot Emek Halakhah, II, no. 4, asserts that the phrase “ein derekh le-haver—it is not the wont of a scholar” connotes a prohibition as is evident from Ma’aser Shenai 4:10; Eiruvin 86a; Rashi, Temurah 31b, s.v. halav ha-mukdashim; and Tosafot, Hullin 125b, s.v. yakhol. See also Taz, Orah Hayyim 286:2.
51. Cf., Be-Zel ha-Hokhmah, I, no. 27, who expresses the matter somewhat differently in stating that the Palestinian Talmud means to declare that a person who wishes to be considered a scholar must comport himself in this manner even vis-à-vis a proprietress who has no compunctions with regard to misappropriation of food entrusted to her.
52. There may well be entirely different grounds to justify the student’s course of action in the case of the poisoned sandwich. The Gemara, Ketubot 86a and Hullin 132b, declares that a person may be compelled to fulfill a commandment, e.g., the mizvah of sukkah or of the four species, by means of physical force, if necessary, “until his life departs.” There is considerable con-
trovery with regard to whether the recalcitrant person may be beaten only within an “inch of his life” since, if he dies, he certainly will not fulfill the commandment, or whether he may be beaten until he expires. Rambam, Sefer ha-Mitzvot, introduction, shorsh 14; idem, Commentary on the Mishnah, Ketubot 49a; Ramban, Commentary on the Pentateuch, Leviticus 20:8; Hiddushei ha-Ran, Bava Mezi’a 61b and Hullin 132b; R. Meir Simchah ha-Kohen of Dvinsk, Or Sameah, Hilkhut Mamrim 4:3, state that lethal force may be employed. However, Rabbenu Yonah, cited by Shitah Mekubbezet, Ketubot 86a, maintains that deadly force may not be applied in order to compel fulfillment of a mizvah. See also R. Meir Eisenstadt, Teshuvot Amudei Esh, no. 1, kellal 15. Amudei Esh endeavors to explain Rambam’s use of the term “until he dies” as a metaphor for weakness. Cf., Rambam, Guide for the Perplexed, Part I, chap. 12. Or Sameah asserts that, “when it is certain to us” that duress will not accomplish the desired result, not even a hair on the head of the would-be transgressor may be disturbed.

Kezot ha-Hoshen 3:1 rules that only a bet din comprised of ordained judges competent to impose capital punishment is authorized to use physical force to enforce specific performance with regard to fulfilling a commandment. The position of Kezot is reflected in the work of an early-day authority, R. Eliezer of Metz, Sefer Tere’im, I, no. 169, and Ramban, Exodus 20:8. Netivot ha-Mishpat 3:1 disagrees in maintaining that judicial authority is not required for this purpose but that every Jew is empowered and obligated to secure observance of commandments even, if necessary, by use of force. Or Sameah, Hilkhut Mamrim 4:3, concurs in that position but maintains that, when duress is warranted in execution of a divorce, only a bet din can compel such action because execution of a divorce requires acquiescence. See also R. Joseph Ber Soloveitchik, Teshuvot Bet ha-Levi, I, addendum to a responsum of R. Chaim of Volozhin, s.v. u-ba-zeh. Cf., the distinctions made by Hatam Sofer, Hoshen Mishpat, no. 177, sec. 3 and Hiddushei ha-Rim, Hoshen Mishpat 1:28 as well as R. Shimon Shkop, Sha’arei Teshur, sha’ar 7, chap. 5.

In his response to Netivot ha-Mishpat, the author of Kezot ha-Hoshen, Meshavev ha-Netivot 3:1, distinguishes between positive commandments and negative prohibitions: Enforcement of positive obligations, he maintains, requires judicial authority but a properly constituted bet din may apply coercive measures even to the point of death. However, prevention of transgression of a negative commandment, he asserts, is a private obligation and hence the force applied may not be lethal in nature. This is also the position of R. Joseph Babad, Minhat Hinnukh, mizzvah 8, sec. 10, and mizzvah 55, sec. 20. See also R. Jonathan Eybeshutz, Urim ve-Tumin 4:1 and Teshuvot Maharya, II, no. 164 as well as Sedei Hemed, Asifat Dinim, ma’arekhat leh, no. 4. Cf., however, R. Chaim Palaggi, Hikkekei Lev, Orah Hayyim, no. 19.

Teshuvot Radvaz, IV, no. 1,329 (258), seems to rule that physical force may be used only by a person having authority over the would-be transgressor, e.g., a father or a master. See the terminology employed by Rema, Hoshen Mishpat 421:13. However, R. Ya’akov Yeshayahu Blau, Pithei Hoshen, V, chap. 2, notes 19 and 20, understands Radvaz’ comments as being con-
sistent with the position of Yam shel Shlomoh cited later in this note. See also Sedei Hemed, Asifat Dinim, ma’arekhat beh, no. 4. However, R. Naphtali Zevi Judah Berlin, Ha’amek She’elat, Parashat Va-Yeshev, She’ilta 27, sec. 6, asserts that physical force may not be used but that, post factum, at least in the case of a master vis-à-vis his slave, there is no liability. See also sources cited by Pithei Hoshen, V, chap. 2, notes 19 and 20.

Thus, virtually all authorities agree that physical force may be employed to prevent transgression of a negative commandment. Accordingly, physical force would be warranted in order to identify a thief and thereby prevent further acts of theft. In the case under discussion, although a lethal poison was administered, the student was entirely confident of the ability of the already prepared antidote to avert a fatal result. Administration of the poison coupled with its antidote certainly constituted physical force—but non-lethal force is warranted in order to prevent prospective infraction of the prohibition against theft.

Nevertheless, it is necessary to be mindful of the comment of R. Shlomoh Luria, Yam shel Shlomoh, Bava Kamma 3:9, to the effect that, although technically correct, physical force of any kind should not be employed other than by designated authorities. The danger of, and possible abuses arising from, private parties taking the law into their own hands are readily apparent.

53. For a discussion of why theft is deemed a more grievous transgression than orlah and kerem reva’i see Teshuvot Be’er Mosheh, V, no. 162, sec. 9 and cf., Be-Zel ha-Hokhmah, no. 27. Teshuvot Shevet ha-Levi, II, no. 1, cites R. Meir Arak, Minhat Pittim, Yoreh De’ah, no. 1, who explains that theft is a more serious transgression because it is a sin against both God and man whereas orlah and kerem reva’i are only sins against God.

See Teshuvot Emek Halakhah, II, no. 4, who seeks to demonstrate that Rambam’s limitation of the principle is compelled by an analysis of the situation with regard to orlah and to kerem reva’i presented by the Mishnah. Emek Halakhah argues that, if hal’itehu la-rasha is a rule of general application there is no reason to caution against orlah and kerem reva’i even during the sabbatical year. Fruit whose status is doubtful, i.e., the fruit may possibly be prohibited, is also forbidden and hence, if the principle hal’itehu la-rasha were to apply, there would be no need to mark such fruit. Accordingly, reasons Emek Halakhah, Rambam must have deduced that hal’itehu la-rasha applies only during the years in which the produce is not ownerless and is occasioned by the more serious transgression of theft. Of course, that argument fails if, as postulated by Tiv Ta’am va-Da’at, hal’itehu la-rasha does not apply in situations in which all transgression can be prevented; accordingly, it is in the seventh year, during which the only possible infraction is orlah or kerem reva’i, that notice in the form of marking the fruit as orlah or kerem reva’i is required.

54. See R. Shlomoh Eger, Gilyon Maharsha, in a gloss on Shakh, Yoreh De’ah 151:6 and idem, Teshuvot R. Shlomoh Eger, Even ha-Ezer, no. 33, who rules in accordance with the position of Rambam. See also R. Naphtali Zevi Judah Berlin, Teshuvot Mesivah Davar, II, no. 43. However, the earlier-cited responsum of Radvaz, Teshuvot Radvaz, IV, no. 1,357 (286), is clearly in
disagreement with the position of Rambam. See also supra, note 28 and accompanying text. See also R. David Sperber, Teshuvot Afarkasta de-Anya, I, no. 132 and Teshuvot Emek Halakhah, II, no. 4.

55. Although that contention is rejected by the Gemara, it must be remembered that Rabbi Zilberstein maintains that it is rejected only with regard to brute animals, which cannot be expected not to consume food placed before them, but remains valid with regard to rational human beings who realize that they should not steal food belonging to others.