

ב. — 2a

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פרק ראשון

מעידין אנו באיש פלוני שהוא בן גרושה או בן חלוצה אין אומרים כו'.

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Chapter One

ד"ה מעידין



מעידין אנו באיש פלוני שהוא בן גרושה או בן חלוצה אין אומרים כו' — If witnesses say, “WE TESTIFY ABOUT THIS-AND-THIS PERSON (who was thought to be a valid Kohen) THAT HE IS THE SON OF A GERUSHAH,” OR “THE SON OF A CHALUTZAH,”^[1] and then the witnesses were found to be *zomemin*, WE DO NOT SAY that these witnesses become disqualified as *ben gerushah* (son of a *gerushah*) or *ben chalutzah* (son of a *chalutzah*) in the Kohen’s place; rather, they receive *malkus* for the false testimony they gave.^[2]

Introduction

§ **Hazamah/The Punishment of Zomemin:** *Hazamah* is a process of disqualifying witnesses. A set of witnesses testifies against a person, and then another set of witnesses disproves the first set by saying to them, “You were with us on that day in a different place,” so you could not have seen what you claim to have seen at that time (Mishnah 5a). The first set of witnesses, who were proven false through *hazamah*, are called *zomemin* (plotters), since they plotted to make someone liable to a penalty he did not deserve.

Zomemin witnesses receive the same punishment they tried to give to the person against whom they testified. This is taught by the verse (*Devarim* 19:19): וַעֲשִׂיתָם לוֹ כַּאֲשֶׁר זָמַם לַעֲשׂוֹת לְאָחִיו; You shall do to him as he plotted to do to his brother. Thus, this punishment is known as *ka’asher zamam* [כַּאֲשֶׁר זָמַם], which means, “as he plotted.”

§ **The Mishnah’s Ruling** discusses a case of witnesses who testify that a Kohen is the son of a *gerushah* or a *chalutzah* (and thus disqualified from the Kehunah), and the witnesses are then found to be *zomemin*. The Mishnah rules that even if the witnesses are Kohanim, we do *not* disqualify them from the Kehunah, as *ka’asher zamam* would seem to require; rather, they receive *malkus* for violating the prohibition of (*Shemos* 20:13) לֹא תַעֲנֶה בְּרֵעֲךָ עֵד שָׁקֶר, Do not bear false testimony against your fellow (see Gemara below, 2b, and *Tosafos* 4b ד"ה ורבנן). See below, note 20, for the reason they are not given the *ka’asher zamam* punishment.

§ **Disqualification of Ben Gerushah and Ben Chalutzah:** A woman who was divorced (a *gerushah*) or who received *chalitzah* (a *chalutzah*) may not marry a Kohen (Mishnah 13a). If she does

1. They claim that they witnessed this Kohen’s mother being divorced from a previous husband (*Rashi*), or receive *chalitzah* from a previous husband’s brother. If their testimony is accepted, the Kohen becomes disqualified from the Kehunah, because he was born from a forbidden marriage between his Kohen father and his mother, a *gerushah* or *chalutzah*.

2. Usually, *zomemin* receive the *ka’asher zamam*

punishment, which is the punishment they tried to inflict on the person they testified about. These *zomemin*, however, despite having tried to disqualify their victim from the Kehunah, are not punished with disqualification (even though they are Kohanim). Instead, they are given *malkus* for violating the prohibition against giving false testimony. See note 20 for why these *zomemin* do not receive the punishment they tried to impose.

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תִּימָה פִּינ דָּאָם הוֹמָמוּ אִינָן נִעְשִׂין בְּן גְּרוּשָׁה וְחַלּוּזָה, ח"כ גַּם בְּשָׁלָא יוֹמָמוּ אִיךְ יִטְעָה עַל פִּיָּהֶם בְּן גְּרוּשָׁה? דְּהִכִּי הוּא

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marry a Kohen and has a son (a *ben gerushah* or *ben chalutzah*), the son is a *chalah*; meaning, he is disqualified from the Kehunah, and is therefore prohibited to do *avodah* or eat *terumah*. His sons, and all further generations, are disqualified as well.

❧ **Chalitzah:** A married woman whose husband dies without having fathered children must marry her husband's brother. This marriage is called *yibum*. If the brother does not wish to marry her, he releases her through a ceremony called *chalitzah*. A woman who receives *chalitzah* is a *chalutzah*.

❧ **The Objective of Tosafos:** Tosafos has two objectives. In his main discussion, Tosafos seeks to explain why witnesses who testify that a certain Kohen is disqualified as a *ben gerushah* or *ben chalutzah* are believed despite not being disqualified themselves from the Kehunah upon being found *zomemin*, which seems to contradict the Talmudic rule of עֵדוּת שְׂאִי אֶתָּה כָּכֹל לְהַזְמִינָהּ לֹא שָׁמָּה לא שָׁמָּה, testimony that is not subject to the law of *hazamah* is not called testimony (see following Background box). Tosafos will give two answers to this question.

In Tosafos' second discussion, he aims to explain why the Mishnah discusses testimony that a Kohen is a *ben gerushah* or *ben chalutzah*, and not testimony that an ordinary Jew is a *mamzer*.

Q. The Mishnah rules that if witnesses testified that a certain Kohen is a *ben gerushah* or *ben chalutzah*, and they were found to be *zomemin*, they receive *malkus* for violating the prohibition against giving false testimony. The fact that the *zomemin* receive *malkus* indicates that their statement in court was initially considered valid "testimony," which means that if they had *not* been shown to be lying, the court would have accepted the testimony and would have disqualified the Kohen against whom they testified.³ Tosafos finds it difficult to understand why such testimony should be accepted:

Background To Tosafos' Question

❧ **Testimony That Is Not Subject to the Law of Hazamah:** The rule is that we accept testimony from witnesses only if: (a) it will be possible to disprove them through *hazamah*, and (b) it will be possible to give them the punishment of *ka'asher zamam* should they be disproved. If, for some reason, the witnesses cannot become *zomemin*, or cannot be given the punishment they planned to impose on their victim, their testimony is not accepted in the first place. As the Gemara says (Sanhedrin 41a): עֵדוּת שְׂאִי אֶתָּה כָּכֹל לְהַזְמִינָהּ לֹא שָׁמָּה עֵדוּת, testimony that is not subject to the law of *hazamah* is not called testimony.

It is astonishing that testimony which identifies a Kohen as a *ben gerushah* or *ben chalutzah* would be accepted! — פִּינ דָּאָם הוֹמָמוּ אִינָן נִעְשִׂין בְּן גְּרוּשָׁה וְחַלּוּזָה — Since [these witnesses], if proven to be *zomemin*, do not receive the *hazamah* punishment, and thus do not become disqualified as a *ben gerushah* or *ben chalutzah* themselves, — אִם בְּן גַּם בְּשָׁלָא יוֹמָמוּ — if so, then even when [these witnesses] are not shown to be *zomemin*, — אִיךְ יִטְעָה עַל פִּיָּהֶם בְּן גְּרוּשָׁה — how can [a Kohen] become disqualified as a *ben gerushah* or *ben chalutzah* through their testimony? — דְּהִכִּי הוּא הָאֱמֶת — For it is surely true that if these witnesses are not shown to be *zomemin*, then the Kohen against whom

3. One does not receive *malkus* for simply saying a lie; *malkus* is the punishment for false testimony. If *beis din* would never have accepted the testimony, then the *zomemin* could not receive *malkus* for their lie, since it would be as if they said the lie outside of court. Since they do receive *malkus*, it is obvious that *beis din*

originally accepted their testimony and would have disqualified their victim on its basis. When they are found to be *zomemin*, they are punished for testifying falsely (*Nimukei Yosef, Tzlach*). [For additional proofs that the testimony would have been accepted, see *Aruch LaNer* and *Otzar Mefarshei HaTalmud*.]

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האמת. ואמאי? הא הויה לה עדות שאי חפה יכול להזימה, ואין זה עדות. וי"ל בין דלוקין הוי פאשר זמם, והוי שפיר חפה יכול להזימה.

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they testified will be disqualified through their testimony!^[4] — ואמאי — **But why** should a Kohen ever become disqualified based on such testimony of faulty lineage? — הא הויה לה עדות שאי חפה יכול להזימה — **This is testimony that is not subject to the punishment of *hazamah*, and therefore, it is not considered to be valid testimony!**^[5]

A. *Tosafos* gives two answers to this question. The first answer maintains that although these *zomemin* are not disqualified from the Kehunah, their testimony is still considered to be subject to the *hazamah* punishment:

— ויש לומר — **We can answer** as follows: — בין דלוקין הוי פאשר זמם — **Since [the *zomemin*]** who testified that the Kohen is a *ben gerushah* receive *malkus* for their false testimony, **it is considered** as if they receive the punishment of *ka'asher zamam*. That is to say, the *malkus* they are given is a substitute for the usual *hazamah* punishment. — והוי שפיר חפה יכול להזימה — **Therefore**, although we cannot punish them by disqualifying them from the Kehunah, **[their testimony] can properly be considered [a testimony] that is subject to *hazamah***, because of the *malkus* they incur if it is refuted. Therefore, the testimony is valid.^[6]

Q. *Tosafos* challenges his above answer that *malkus* can take the place of the usual *hazamah* punishment. The challenge is based on a Gemara in *Sanhedrin*, which discusses a case of *zome-min* witnesses who testified that a *naarah hameorasah* committed adultery:

Background To Tosafos' Question From Sanhedrin

§ *Naarah Hameorasah* ("betrothed *naarah*"): A *naarah hameorasah* is a girl between 12 and 12½ years old (a *naarah*) who has gone through the first stage of marriage — called *erusin* (betrothal) — but has not yet completed her marriage by undergoing *nisuin*. She is a married woman in almost all respects; therefore, if she commits adultery, she becomes permanently forbidden to her husband, and he must divorce her. Additionally, if the act was witnessed and she was warned beforehand, she is subject to the death penalty.

§ *Punishment Requires Warning*: As a rule, a person cannot be punished for a sin unless he or she was warned about the punishment beforehand. Accordingly, if witnesses testify that a *naarah hameorasah* (or any married woman) committed adultery, but they do not testify that they warned her about this punishment before she committed the sin, the woman becomes prohibited to her husband, since she betrayed him with another man, but she does *not* receive the death penalty, since she received no warning.

4. In other words, do not try to dismiss the question by suggesting that the testimony would not have been accepted to disqualify the Kohen, because it is clear that the testimony *would* have been accepted to disqualify him, as explained in note 3 (*Tzlach, Aruch LaNer*; cf. *Maharam*).

5. As explained in the Background to Tosafos' Question, any testimony that is not subject to the law of *hazamah* is not called testimony. In our case, since the witnesses can never receive the *hazamah* punishment (meaning, they cannot be disqualified from the Kehunah, which is what they plotted to do to their victim), their testimony that he is a *ben gerushah* or *ben chalutzah* should not be accepted in the first place! And yet we see that it *is* accepted, unless it

is proven that they lied. How is this possible?

6. Since the Torah says that *zomemin* witnesses who cannot be punished with the same punishment that they plotted to give the victim are given *malkus* instead, it follows that the *malkus* stands *in place* of the usual *hazamah* punishment. Thus, their testimony *is* in fact punishable through *hazamah* — not with the usual *hazamah* punishment, but with the punishment of *malkus*, which is *also* considered a *hazamah* punishment. Therefore, *beis din* can accept testimony that a Kohen is disqualified, and can actually declare him unfit for the Kehunah on the basis of that testimony [unless, of course, the testimony is proven to be untrue] (see *Rosh* cited in *Shitah Mekubetzes* to *Bava Kamma* 75b להזימה ד"ה עדות שאי חפה יכול להזימה).

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וְקָשָׁה דִּלְכָּ"כ מֵאִי קָאָמַר פֶּרֶק הֵיוּ בּוֹדְקִין (סְנֵהֶדְרִין דף מ"א). גִּבִּי עַדִי נִעְרָה הַמְאֻרְסָה דְּלִיָּהּ לֹא מִקְטָלָא, דְּכִין דְּלִיָּהּ לֹא מִקְטָלִי מִשּׁוּם שְׂיֻכּוּלִין לֹמַר לֹאסְרָה עַל בַּעְלָהּ בְּאֵנוּ, וְהָיָא לָהּ עֲדוּת שְׂאִי אִתָּהּ יָכוֹל לְהַזְמִינָהּ.

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§ **The Law of a Learned Person:** According to one Tanna (R' Yose the son of R' Yehudah), a learned person (a *chaver*) is an exception to this rule that punishment requires a warning. Such a person can be executed for his sin even if he was not warned about the punishment beforehand, since we can assume that he knew the law on his own. The same applies to a learned woman (a *chaveirah*). Accordingly, if witnesses testify that a learned woman committed adultery, she *should* be liable to execution even if she was not warned about the penalty in advance. However, a Gemara in *Sanhedrin* teaches otherwise, as follows:

§ **The Gemara in Sanhedrin** (41a) says that if witnesses to the adultery of a *naarah hameorasah* (or any married woman) did not warn her beforehand that she would receive the death penalty, then even if they are later found to be *zomemin*, they cannot be executed, since they can claim, "We were not plotting to have her killed, but only to make her forbidden to her husband." Even if she is a learned woman who would be given the death penalty *without* a warning, we cannot punish these witnesses with *ka'asher zamam*, since we cannot prove that they were actually plotting to have her killed.

On the basis of this ruling, the Gemara then says that the adulteress *herself* is exempt from the death penalty, even though she is learned. The Gemara reasons as follows: Since these witnesses cannot be executed if they are found to be *zomemin*, their testimony is *אִתָּהּ יָכוֹל לְהַזְמִינָהּ*, a testimony that is not subject to [the punishment of] *hazamah*. Therefore, even if the testimony is true, *beis din* cannot accept it as a basis to execute this woman! In other words, even if a woman is learned and knows the punishment on her own, she is not executed for adultery unless the witnesses say that they warned her. Otherwise, their testimony is rejected as "testimony that is not subject to *hazamah*," since if they are shown to be *zomemin*, they will be able to avoid execution.

Based on this Gemara, Tosafos attempts to show that *malikus* is actually *not* a substitute for the *hazamah* punishment.

וְקָשָׁה — This answer, that *malikus* stands in place of the *hazamah* punishment, is difficult to accept. מֵאִי קָאָמַר פֶּרֶק — Because if it is so, that *malikus* is a fulfillment of the *hazamah* punishment, הֵיוּ בּוֹדְקִין גִּבִּי עַדִי נִעְרָה הַמְאֻרְסָה — then what is the meaning of [the Gemara's] statement in Chapter *Hayu Bodkin* (*Sanhedrin* 41a) about witnesses who testified that a *naarah hameorasah* who was a learned woman committed adultery, but who failed to warn her beforehand that adultery is punished by death?^[7] דְּכִין דְּלִיָּהּ לֹא מִקְטָלָא — In that case, the Gemara rules that she is not executed, — and explains that since these [witnesses] cannot be executed if they are found to be *zomemin*, — משּׁוּם שְׂיֻכּוּלִין לֹמַר לֹאסְרָה עַל בַּעְלָהּ בְּאֵנוּ — because they can claim that they only came to forbid her to her husband and not to have her killed,^[8] — וְהָיָא לָהּ עֲדוּת שְׂאִי אִתָּהּ יָכוֹל לְהַזְמִינָהּ — it

7. As explained in the Background above, a *naarah hameorasah* is a married woman. If she commits adultery, she is prohibited to her husband, and can be executed.

[Although the Gemara speaks of a *naarah hameorasah*, the law about to be taught would be true for any married woman. As far as our discussion is concerned, "naarah hameorasah" is simply an example of a married woman who is accused of adultery. See the Gemara there for why it specifies the case of a *naarah hameorasah*.]

8. Since they did *not* warn her, they can make this claim, and we have no way to disprove them. If they would have warned her, though, they would not be able to make this claim.

Ordinarily, witnesses who failed to warn an adulteress about the death penalty, and then were found to

be *zomemin*, would *automatically* be exempt from the death penalty, even without claiming that they had not intended to have her killed. Having received no warning, she never could have become liable to the death penalty. Obviously, then, the *zomemin* are not put to death, since there was never a chance that they would have caused her to be executed.

The Gemara in *Sanhedrin*, however, discusses the case of a learned woman, and follows the view of the Tanna who holds that a learned person is punished even without a warning, because he or she is assumed to know about the punishment on their own. In this case, if the witnesses could not make the claim that they never intended for her to be executed, they would be given the death penalty, since the woman, being learned, would

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is a testimony that is not subject to the *hazamah* punishment, and therefore, their testimony is not accepted to sentence the woman to death.^[9]

However, if, as Tosafos suggested above, *malkus* is considered a “*hazamah* punishment,” then this ruling is incorrect! Tosafos explains the difficulty:

וימאי קאמר — But if *malkus* stands in place of *ka'asher zamam*, what is [this Gemara] saying?! Should the fact that these witnesses cannot be executed if they become *zomemin* mean that we cannot accept their testimony? והא מכל מקום לוקין — But in fact, [such *zomemin*] will still receive *malkus* for testifying falsely that the woman is prohibited to her husband.^[10] And since we said that *malkus* is considered a “*hazamah* punishment,” their testimony is subject to the law of *hazamah*. Accordingly, their testimony should be accepted!^[11]

Yet, the Gemara says that their testimony is *not* accepted because it is not punishable by *hazamah*. Clearly, the *malkus* given for testifying falsely is *not* considered a “*hazamah* punishment.” This contradicts the answer Tosafos gave above!^[12]

A. Tosafos responds to this challenge. Indeed, *malkus* is able to take the place of the usual *hazamah* punishment, as we said above — but not in every case. *Malkus* can substitute for the *hazamah* punishment of witnesses who testified falsely that a Kohen is a *ben gerushah* or *ben chalutzah*. But *malkus* cannot substitute for the *hazamah* punishment of witnesses who testified falsely that a *naarah hameorasah* committed adultery. Tosafos explains the difference between these two cases:

Background To Tosafos' Differentiation Between
Ben Gerushah And Naarah Hameorasah

Prohibitions of Ben Gerushah and Ben Chalutzah: The offspring of a prohibited marriage between a Kohen and a divorced woman (a *ben gerushah*) is disqualified from the Kehunah (Vayikra 21:15). Such a person is a “*chahal*” — one who is unconsecrated. The Sages decreed *chalal* status upon the offspring of a Kohen and a *chalutzah* (a *ben chalutzah*) as well.

have been liable to execution even without having been warned. But in fact, the witnesses are able to make this claim, and therefore, if they are proven to be *zomemin*, they do not receive the death penalty.

9. Since the witnesses cannot receive the *hazamah* punishment, the court cannot sentence her to death on the basis of their testimony, because it is testimony that is not subject to the *hazamah* punishment. Therefore, even if the *naarah hameorasah* is learned, and knows the penalty without being warned, she in fact cannot be given the death penalty unless she received a warning.

10. Although their testimony is not accepted to execute the adulteress, it is accepted to prohibit her to her husband (see Gemara there, בשוירתה וחוריה וינתה, because with respect to this aspect of their testimony, the witnesses are subject to *hazamah*. However, when these witnesses become *zomemin*, they cannot be punished by being prohibited to their wives (which would be equivalent to the punishment they tried to impose upon the *naarah hameorasah*), because this punishment would adversely affect their wives as well, and the Torah writes, you shall do to “him” as he plotted to do, which implies: to him, but *not* to his wife (see Tosafos below דעה בעיני, with Aruch LaNer and Gevuros Ari; see below, note 20). Since they cannot be given the usual *hazamah*

punishment, they are given *malkus*, like other *zomemin* witnesses who cannot be punished in the usual way (see *Marcheshes, Kuntres Hazamah* 4:3).

11. Granted, the witnesses cannot be executed, because they did not warn the woman about the death penalty, and therefore, they can claim that they intended only to forbid her to her husband. But they *can* receive *malkus* for their false testimony. If it is true, as Tosafos claimed above, that *malkus* serves as a substitute for the usual *hazamah* punishment, then the witnesses' testimony is subject to the law of *hazamah*. Accordingly, let the court accept the testimony, and let them execute the adulteress! The fact that the testimony is *not* accepted would seem to indicate that *malkus* does *not* take the place of the *hazamah* penalty, contrary to Tosafos' answer above.

12. And since that answer is refuted, Tosafos' question returns: Why are witnesses believed to testify that a Kohen is a *ben gerushah* if they would not become disqualified as *ben gerushah* themselves upon being found *zomemin*? Their testimony should be invalidated as “testimony that is not subject to the law of *hazamah*!” Tosafos answered that *malkus* takes the place of the *ka'asher zamam* punishment. But if *malkus* is not a substitute for *ka'asher zamam*, then the question has not been answered.

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וַיֵּשׁ לומר דהתם פִּינן שְׂחָזִין לְחִיּוּבָה מִיתָה וְזִמְמוּ לְהַרְגוֹ אֶת הַנֶּפֶשׁ, לֹא מִיִּקְיִים פֶּחָשֶׁר זִמְסָה בְּמַלְקוּת, דְּהָא זְהִדִּיא כְּתִיב נֶפֶשׁ בְּנֶפֶשׁ גְּבִי הַזֵּמָה דְּעֵדוּת נִפְשׁוֹת, וְלֹא חֲשִׁיב יָכוֹל לְהַזְימָה בְּמַלְקוּת. אֲבָל הֵבֵא שָׁלָא כְּוִין אֲלֵא לְשׁוּיָה בִּין גְּרוּשָׁה וְבִין חַלּוּטָה, דְּלִיפָא כִּי אִם לֹא בְּעַלְמָא, כְּוִין שְׁלָקוּ חֲשִׁיב שְׁפִיר עֵדוּת שְׁחָפָה יָכוֹל לְהַזְימָה.

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A *chalal* shares the law of a non-Kohen (*zar*) in every respect (*Rambam, Hil. Terumos* 6:7; *Rashi, Pesachim* 72b גרשה בן ד"ה). A non-Kohen is prohibited to do *avodah* in the Beis HaMikdash (see *Bamidbar* 18:4); likewise a *chalal* (*Aruch LaNer* here). A non-Kohen is prohibited to eat *terumah* (see *Vayikra* 22:10); so too a *chalal* (*Rambam* *ibid.* §5,7). If a *chalal* violates these Torah prohibitions, he receives *malkus*, just as a non-Kohen would (see *Rambam, Hil. Sanhedrin* 19:2,4). A *ben chalutzah* who does these things violates a Rabbinic law only. He receives Rabbinically imposed *malkus*, known as *מַכַּת מְרִדוּת*, *lashes for rebelliousness*.

We can answer that the *zomemin* of *naarah hameorasah* have a different law than the *zomemin* of *ben gerushah* and *ben chalutzah*: **There**, in the case of the *naarah hameorasah*, **since [the witnesses] came to court to make her liable to the death penalty, and they “plotted” to kill a person with their testimony,**^[13] **לא מיקיים באִשֶּׁר זָמַם** — **the requirement that we must be able to punish the witnesses *ka’asher zamam* (“as he plotted”) cannot be fulfilled by giving them *malkus* for testifying falsely.** **דְּהָא בְּהָרָא כְּתִיב נֶפֶשׁ בְּנֶפֶשׁ גְּבִי** — **This is because [the Torah] clearly writes a life for a life (*Devarim* 19:21) when describing the *hazamah* punishment of witnesses who testified falsely in a death-penalty case.**^[14] This teaches that fulfilling the *ka’asher zamam* requirement for *zomemin* who tried to take a person’s life requires that the *zomemin* lose their lives instead. This requirement cannot be fulfilled through *malkus*, **וְלֹא חֲשִׁיב יָכוֹל לְהַזְימָה בְּמַלְקוּת** — **and therefore, this testimony of the *naarah hameorasah* cannot be considered “testimony that is subject to the law of *hazamah*” simply because the *zomemin* would receive *malkus*.** Since *malkus* is not a fitting substitute for these witnesses’ *hazamah* punishment (i.e., death), the Gemara in *Sanhedrin* describes their testimony as “not subject to the law of *hazamah*,” and therefore rules that the *naarah hameorasah* is not executed.^[15]

In our Mishnah’s case, by contrast, *malkus* can take the place of the *hazamah* punishment! **— שלא כְּוִין אֲלֵא לְשׁוּיָה בִּין גְּרוּשָׁה וְבִין חַלּוּטָה** — **But here, in our Mishnah, [the witnesses] intended only to disqualify [the Kohen] as a *ben gerushah* or *ben chalutzah*,** **דְּלִיפָא** — **which would result in nothing more than the victim violating a Torah prohibition punishable by *malkus*,**^[16] **כְּוִין שְׁלָקוּ חֲשִׁיב שְׁפִיר עֵדוּת שְׁחָפָה יָכוֹל לְהַזְימָה** — **if they receive *malkus***

13. If the testimony of these witnesses would be accepted as “testimony that is subject to the law of *hazamah*,” and if they would *not* be proven *zomemin*, the woman they are testifying about would be executed. Since she was a learned woman who could be executed without a warning, the result of the witnesses’ testimony would have been her death.

14. After saying, וַעֲשִׂיתָם לוֹ כַּאֲשֶׁר זָמַם לַעֲשׂוֹת לְאָחִיו, *You shall do to him as he plotted to do to his brother* (*Devarim* 19:19), the Torah continues with a verse that teaches various *hazamah*-related laws (*ibid.* v. 21): וְלֹא תִחוּס עֵינְךָ נֶפֶשׁ בְּנֶפֶשׁ עֵין בְּעֵין, *Your eye shall not take pity, a life for a life, an eye for an eye* (see Mishnah below, 5b).

15. From the verse of *ka’asher zamam* (“as he plotted”) we learn that the punishment for *zomemin* witnesses must be *equivalent* to what the *zomemin* had plotted to do. When the *zomemin* plotted to kill a person, the only way to achieve the equivalence demanded by *ka’asher*

zamam is to execute the *zomemin* (as we learn from the verse, *a life for a life*). The penalty of *malkus* is not enough. This is why we cannot accept the testimony of the witnesses who testify about the adultery of the *naarah hameorasah*. Since their testimony, if accepted, would have sentenced her to death (regardless of what they say they intended), the only way to fulfill the law of *ka’asher zamam* if they are proven to be *zomemin* is by executing them. Although they would receive *malkus* for their false testimony, it is not a fitting substitute for the *hazamah* punishment. Accordingly, the Gemara in *Sanhedrin* rules that since they cannot be executed (for the reason explained above), their testimony is not accepted to execute the *naarah hameorasah*, because it is testimony that is not subject to the *hazamah* punishment.

16. A disqualified Kohen (*chalal*) is forbidden to eat *terumah* or do *avodah* in the Beis HaMikdash. If he does these things, he is punished with *malkus*, not

תוספות

ועמוד יש לומר דגצי עדות דבן גרושה וחלוה לא חיישין כלל באתה יכול להזימה.

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for their false testimony when they become *zomemin*, **it *can* properly be considered testimony “punishable by *hazamah*.”** Since the *zomemin* did not plot to make him liable to the death penalty, the *mal'kus* they receive can take the place of the usual *hazamah* punishment. Therefore, the testimony is valid.^[17]

Tosafos has concluded his first answer to the original question, which was: How can *beis din* accept testimony to disqualify a Kohen as a *ben gerushah* or *ben chalutzah*? Since the witnesses cannot be given the punishment of *ka'asher zamam*, it should be considered "testimony that is not subject to the *hazamah* punishment"! According to this answer, the *mal'kus* that the *zomemin* will receive for their false testimony is a substitute for the punishment of *ka'asher zamam*; therefore, the testimony is considered to be subject to the law of *hazamah*.

A. Tosafos offers a second answer to this question. In this new approach, Tosafos assumes that *mal'kus* is *not* a fitting substitute for the *hazamah* punishment, and therefore, testimony of *ben gerushah* is indeed “testimony that is not subject to the *hazamah* punishment.” Nevertheless, such testimony is accepted, because unlike most testimonies, it is valid even if *not* subject to *hazamah*:

Background to Tosafos' Second Answer

§ Source of the rule of עדות שאי אתה יכול להזימה לא שמה עדות, *testimony that is not subject to the law of hazamah is not called testimony*: This rule of testimony is learned from the Torah passage of ka'asher zamam ("as he plotted"), which describes the *hazamah* process.

The verses read (*Devarim* 19:18-19): וְרָשׁוּ הַשְּׁפָטִים הַטֵּיב וְהָיָה עֵד שֶׁקֶר הָעֵד שֶׁקֶר עָנָה בְּאָחִיו וְנִשְׁפָּט לוֹ: *The judges shall examine thoroughly, and behold, [they find that] the witness was a false witness; he testified falsely against his brother! You shall do to him as he plotted to do to his brother.* By teaching the law of *hazamah* in the passage of examining witnesses, the Torah implies that judges cannot accept the testimony of witnesses unless it is possible for the witnesses to become *zomemin* and receive the *ka'asher zamam* punishment, should their testimony prove false. If witnesses are not subject to this punishment for lying, *beis din* cannot accept their testimony in the first place (*Rashi, Sanhedrin* 41a ד"ה לא שמה עדות and *Pesachim* 12a ד"ה דהויא ליה עדות). This source is essential to Tosafos' second answer.

— **We can also answer** the question of why *ben gerushah* testimony is valid by saying — **דגבי עדות דכן גרושה וחלוצה** — **that in the case of testimony that a Kohen is a *ben gerushah* or *ben chalutzah*,** — **לא חיישינן כלל באתה יכול להזימה** — **we are not concerned at all about the rule that says that [testimony] is accepted only if it can be punished with *hazamah*.** This rule simply *does not apply* to testimony that disqualifies a Kohen for being a *ben gerushah*.^[18]

The reason the rule does not apply is as follows:

death (*Rashash*; *Aruch LaNer*). [When Tosafos says that the *malkus* is for “a Torah prohibition,” he refers to the case of *ben gerushah*. A *ben chalutzah*, however, receives Rabbinic *malkus* only.] See “Background to Tosafos’ Differentiation.”

17. The only punishment the witnesses were plotting to impose upon their victim through their *ben gerushah* testimony is *mal'kus*. Since the *zomemin* plotted nothing more than *mal'kus*, the *mal'kus* they receive for false testimony is an equivalent and satisfactory substitute for the *hazamah* punishment, and fulfills the requirement of *ka'asher zamam*. Since the testimony is subject to the law of *hazamah*, it is accepted (as long as

the witnesses are not found to be *zomemin*).

18. In Tosafos' previous approach, he agreed that testimony disqualifying a Kohen must be subject to the *hazamah* punishment, but maintained that since the *zomemin* are punished with *mal'kus*, this testimony meets that requirement. In this approach, Tosafos argues that such testimony does not *need* to be subject to the *hazamah* punishment; it is *excluded* from the requirement. Even though the *zomemin* are not punished by becoming *ben gerushah* or *ben chalutzah* themselves, and even though their *mal'kus* does not take the place of the *hazamah* punishment, nevertheless, their testimony is accepted.

תוספות

דמהיבא נפקא לן דצטען עדות שחתה יכול להזימה, מפאשר זמם. והא מוכח בגמרא דכאשר זמם לא נקטב לגבי עדות דבן גרושה, ולא קאי כלל עליה בשום ד שצטעולס.
אכל התם גבי נערה המאורסה, ודאי פאשר זמם קאי נמי עליה, דאם התרו בה, מיקטלי אינהו בשוהזמו,

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Because, from where do we learn that for testimony to be accepted, it must be subject to the *hazamah* punishment? — מבאשר זמם — This rule is learned from the verse that says that we punish a false witness *ka'asher zamam* (“as he plotted to do”). This follows another verse that commands judges to examine the witnesses carefully; the link between the verses teaches that judges may not accept testimony unless the examination can lead to *hazamah*. Since the source of this rule is the verse of *ka'asher zamam*, it stands to reason that the rule applies only to the type of testimony that is included in the basic law of *ka'asher zamam*.^[19] והא מוכח בגמרא דכאשר זמם — Now, it is clear from the Gemara below (on this *amud*) that the verse “*ka'asher zamam*” was never written about testimony concerning a *ben gerushah* (as the Gemara will explain) — and it does not refer to [such testimony] in any way whatsoever, which is why witnesses who gave this testimony and were then found to be *zomemin* are not themselves disqualified from the Kehunah.^[20] Since the law of *ka'asher zamam* does not include testimony disqualifying a Kohen as a *ben gerushah*, it follows that the other law we learn from the *ka'asher zamam* verse — that testimony is not valid unless it is subject to *hazamah* — was also never meant to include testimony of *ben gerushah*. For this reason, the court can accept testimony to disqualify a Kohen even though such testimony cannot earn the *hazamah* punishment. This answers Tosafos’ original question.^[21]

Having explained that when testimony is not included in the law of *ka'asher zamam*, it is valid despite not being subject to the *hazamah* punishment, Tosafos is troubled by the case of a learned *naarah hameorasah* discussed above. In that case, the witnesses cannot be punished with the death penalty “as they plotted” (*ka'asher zamam*), because they can claim that they never meant to give the *naarah* that punishment (but intended only to prohibit her to her husband). Since it is never possible to give these witnesses the punishment they plotted for their victim, it would seem that their testimony is not included in the law of *ka'asher zamam*. Yet, the Gemara in *Sanhedrin* (41a) rules that since these witnesses are not subject to the *hazamah* punishment, their testimony is not accepted in the first place. Seemingly, this contradicts what Tosafos just said — that when testimony is not included in the law of *ka'asher zamam*, it is valid even though the witnesses are not subject to the *hazamah* punishment! Tosafos explains why the case of *naarah hameorasah* is different from our Mishnah’s case, and why the rule of “testimony that is not subject to *hazamah*” still does apply there:

But there, in the case of witnesses who testified that a *naarah hameorasah* committed adultery, — ודאי כאשר זמם קאי נמי עליהן — the verse of *ka'asher zamam* (“as he plotted”) **certainly does apply also to them,** because there are cases of witnesses who testify about adultery who can be given the *hazamah* punishment (i.e., the death penalty). — דאם התרו בה — For example, the law is that if [the witnesses] say that they explicitly warned [the *naarah hameorasah*] that if she sins she will be killed, — מיקטלי אינהו בשוהזמו — then they too are killed if they are found

19. That is to say, only to the type of testimony whose witnesses, if found to be *zomemin*, will be liable to the exact same punishment they plotted to give the person about whom they testified, as per the law of *ka'asher zamam* (“as he plotted”).

20. The Gemara (below) explains that the verse וְעָשִׂיתָם לוֹ כְּכַשְׁמֶנּוּ, you shall do to “him” as he plotted to do (*ka'asher zamam*), implies: to him, but not to his children. Since disqualifying the *zomemin* from the Kehunah would disqualify their children as well, the *ka'asher zamam* punishment is not given. We see that the verse of *ka'asher zamam* was altogether not written

about testimony to disqualify a Kohen, because there is never a situation in which those who give such testimony can be punished “as he plotted to do.” In other words, testimony about *ben gerushah* is an exception to the law of *ka'asher zamam*.

21. Tosafos is saying that when the Torah excludes *ben gerushah* testimony from the punishment of *ka'asher zamam*, it is also excluding such testimony from the requirement of being subject to *ka'asher zamam*. Accordingly, testimony to disqualify a Kohen as a *ben gerushah* does not need to be punishable by *hazamah* in order to be accepted. Thus, Tosafos’ question is answered.

תוספות

ואילו חיה בלא הוּמָו (והתם מִיִּירי בלא התרו וכיון דכאָשֶׁר זַמַּם קאִי טלִייהו), לְכָךְ בְּעִינָן אֶתָּה יָכוֹל לְהוֹמָהּ.

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to be *zomemin*, because it is clear in that case that they planned to have her executed;^[22] ואילו איהו — and thus, [the *naarah*] too is executed if [the witnesses] are *not* found to be *zomemin*, since the witnesses are subject to the *hazamah* punishment.^[23] Since there does exist a case in which witnesses who testified to adultery and were found to be *zomemin* receive the *hazamah* punishment (i.e., when they warned the adulterer about the death penalty), it is clear that such testimony is included in the basic law of *ka'asher zamam*. It is for this reason that when these witnesses cannot be given the *hazamah* punishment (i.e., when they failed to warn the adulterer), their testimony is rejected as “testimony that is not subject to the law of *hazamah*.”

By contrast, in the case of testimony disqualifying a Kohen, the Torah *completely* excludes such testimony from the *hazamah* punishment. Witnesses who give such testimony are *never* subject to the punishment of becoming a *ben gerushah* or *ben chaltzah*. Since the verse of *ka'asher zamam* is never applicable to such testimony, the rule that testimony must be *punishable* with *ka'asher zamam* also does not apply to it. Therefore, the testimony is accepted.

Tosafos continues, explaining why in the specific case of *naarah hameorasah* discussed in *Sanhedrin*, the testimony is not valid:

והתם מִיִּירי בלא התרו — The Gemara's case there, however, is where the witnesses *did not warn* the *naarah hameorasah* that adultery is punished with death. Since in that particular case, they can claim that they never intended to have her killed, we are not able to impose the *ka'asher zamam* punishment upon them. That, however, is an isolated case of testimony about adultery in which the witnesses just happen to be immune to the *ka'asher zamam* punishment. In general, though, the law of *ka'asher zamam* does apply to witnesses who testify about adultery, as we said above. וכיון דכאָשֶׁר זַמַּם קאִי טלִייהו — And since the verse of *ka'asher zamam* is referring also to them (i.e., to witnesses testifying about adultery), לְכָךְ בְּעִינָן אֶתָּה יָכוֹל לְהוֹמָהּ — therefore, any testimony about adultery has to be punishable with *hazamah* in order for it to be accepted.^[24]

Summary of Tosafos' Main Discussion

Tosafos points out that when witnesses testify that a Kohen is a *ben gerushah*, and they are not found to be *zomemin*, their testimony is accepted to disqualify the Kohen from the Kehunah. *Tosafos* questions this ruling on the basis of the law that states that “testimony that is not subject to the law of *hazamah* is not called testimony.” Since these *zomemin* are not punished by being disqualified from the Kehunah themselves, they are not subject to the *hazamah* punishment, and thus, their testimony should not be accepted!

Tosafos answers that the *mal'kus* given to these *zomemin* substitutes for the *hazamah* punishment. Thus, the witnesses are considered to be subject to the law of *hazamah*, and therefore, their testimony is accepted.

This answer is questioned on the basis of a Gemara (*Sanhedrin* 41a) that rules that if witnesses testified that a *naarah hameorasah* who is learned committed adultery, but they did not warn her about the death penalty, their testimony is not accepted. Since they can avoid the punishment of *ka'asher zamam* by saying that they never intended to have her killed (but only to make her

22. They cannot claim that they meant only to prohibit the woman to her husband and not to have her executed, since they themselves testified that they warned her about the death penalty. Thus, if they are proven to be *zomemin*, we can carry out the punishment of *ka'asher zamam* and execute them (see *Hagahos HaBach* to the Gemara there).

23. Since their testimony is subject to the *hazamah*

punishment, *beis din* accepts the testimony and, if no one refutes it, will carry out the woman's punishment for adultery.

24. [In the text of *Tosafos*, part of this paragraph appears in parentheses. Some commentators omit those words; however, the essential explanation is the same with them or without them.]

תוספות

וַיֵּשׁ לְדַקְדֵּק חֲמֵאִי לֹא נִקְטוּ מַעֲיָדִין אֲנִי בְּאִישׁ פְּלוֹנִי שֶׁהוּא מִמֶּזֶר כו', דְּזֶה הָיָה שֶׁיֵּיךְ צִין בְּיִשְׂרָאֵל צִין בְּכֹהֲנִים, וְצִין גְּרוּשָׁה לֹא פָסִיל אֲלָא בְּכֹהֲנִים.

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forbidden to her husband), their testimony is considered to be “not subject to the punishment of *hazamah*,” and therefore, it is not accepted. Tosafos asks that if indeed *malkus* stands in place of the *ka’asher zamam* punishment, their testimony should be accepted, since they too receive *malkus*!

Tosafos responds that although *malkus* substitutes for the *ka’asher zamam* punishment that would be given to *zomemin* who tried to disqualify a Kohen as a *ben gerushah* or *ben chaltzah*, it does not substitute when the *ka’asher zamam* punishment is execution, as in the case of *zomemin* who testified that a *naarah hameorasah* committed adultery.

Tosafos then gives a second answer to the original question of why testimony disqualifying a Kohen is accepted even though the *zomemin* are not punished with *ka’asher zamam*. Tosafos explains that since the Torah completely excludes this kind of testimony from the law of *ka’asher zamam*, it is also excluded from the requirement of being subject to the punishment of *ka’asher zamam*.

Tosafos clarifies the difference between the case of *ben gerushah* testimony and that of testimony against a *naarah hameorasah*. The testimony of *ben gerushah*, since it never receives the punishment of *ka’asher zamam*, is excluded from the law of *ka’asher zamam*. Therefore, such testimony is valid even though it is not subject to the *hazamah* punishment. The testimony that a *naarah hameorasah* committed adultery, by contrast, does sometimes receive the *ka’asher zamam* punishment (i.e., when the witnesses warned the woman about the death penalty), and is therefore included in the law of *ka’asher zamam*. Accordingly, when the witnesses are able to avoid the *hazamah* punishment (i.e., they did not warn the woman), their testimony is invalid, since it does not fulfill the condition of being subject to the *hazamah* punishment.

Q. Having completed his primary discussion, Tosafos turns to another matter, the Mishnah’s choice of cases:

Background to Tosafos’ Discussion of the Mishnah’s Choice of Cases

❧ **Mamzer:** A *mamzer* is a child born from an act of adultery (i.e., when a man has relations with someone else’s wife), or from parents who are prohibited to each other because they are close relatives, and whose prohibited act is punished with *kares* or the death penalty. A *mamzer* is forbidden to marry a Jew of proper descent. The child of a *mamzer* is also a *mamzer*.

וַיֵּשׁ לְדַקְדֵּק — Let us analyze why the Mishnah chose the cases of witnesses who testified that a Kohen is a *ben gerushah* or a *ben chaltzah*. — אֲמַאי לֹא נִקְטוּ מַעֲיָדִין אֲנִי בְּאִישׁ פְּלוֹנִי שֶׁהוּא מִמֶּזֶר כו' — Why did [the Mishnah] not choose the case of witnesses who say, “We testify about this-and-this person that he is a *mamzer*”? The law in this case, too, would be like that of *ben gerushah* and *ben chaltzah*, in that if the witnesses were found to be *zomemin*, we would not say that they become *mamzerim* themselves, but rather, they would receive *malkus* instead.²⁵ — דְּזֶה הָיָה שֶׁיֵּיךְ בֵּין בְּיִשְׂרָאֵל בֵּין בְּכֹהֲנִים — and it is a better case to use, because this law applies to both *Yisraelim* and *Kohanim* alike, — אֲלָא בְּכֹהֲנִים — whereas an accusation of *ben gerushah* or *ben chaltzah* disqualifies only *Kohanim*. Why did the Mishnah choose an example that applies only to some people, when it could have chosen an example that applies to everyone?

25. We cannot declare the witnesses *mamzerim*, because that would automatically make their children *mamzerim* as well. In the case of *ben gerushah* testimony, the Gemara (below) teaches that we do not declare *zomemin* to be *ben gerushah* or *ben chaltzah*, because such a declaration would also affect their

offspring. Instead, we give them *malkus*. The same applies to witnesses who testify about a *mamzer*. Tosafos points out that the Mishnah could have chosen this case as an example of witnesses who receive *malkus* instead of *ka’asher zamam*, rather than the case of *ben gerushah*.

תוספות

וַיֵּשֶׁב דְּנִקְטִיָּה מִשּׁוּם דְּקָלִי אֲזוּמִי בַּת כֹּהֵן, כְּדֹאִיתָא בְּגִמְרָא, וְלִכְךָ נִקְטוּ מִיְדֵי דְשִׁינָא צְבֻהָא:
מְעִידִין אָנוּ בְּאִישׁ פְּלוֹנִי שְׁחִיב גְלוּת.

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A. Tosafos explains why the Mishnah chose the case of *ben gerushah* over *mamzer*:
וַיֵּשֶׁב דְּנִקְטִיָּה מִשּׁוּם דְּקָלִי אֲזוּמִי בַּת כֹּהֵן — We can explain that [our Mishnah] chose the case of [a *ben gerushah*] because it is referring back to the final Mishnah in the previous tractate (*Sanhedrin* 89a), which speaks of *zomemin* who testified against the daughter of a Kohen, כְּדֹאִיתָא בְּגִמְרָא — as the Gemara will say.^[26] — Therefore, since that Mishnah was about members of the Kehunah, [our Mishnah] too chose a case that applies specifically to members of the Kehunah.



ד"ה מעידין

□ מעידין אנו באיש פלוני שחייב גלות — If the witnesses said, “WE TESTIFY ABOUT THIS-AND-THIS PERSON THAT HE IS LIABLE TO EXILE because he killed someone unintentionally,” we do not say that [the *zomeim* witness] is exiled in the victim’s place; rather, he receives *malkus*.^[1]

Introduction

☞ **Hazamah/The Punishment of Zomemin:** See Introduction to the previous Tosafos [p. 3] (ד"ה מעידין [א]).

☞ **The Mishnah’s Ruling** is about witnesses who testified that a person deserves exile because he unintentionally killed someone. If they are found to be *zomemin*, they are not punished with exile, but instead are given *malkus* for violating the prohibition (*Shemos* 20:13) against giving false

26. The Gemara (below) asks that since the Mishnah discusses cases in which the *zomemin* do not receive the *hazamah* punishment that they plotted to impose on their victim, the Mishnah should have started with the words, בִּיצֵר אֵין הָעֲרִים נֶעֱשִׂים וּזְמִין, *In what manner do witnesses “not” become zomemin*. The Gemara answers that the Tanna of our Mishnah is referring back to the final Mishnah in the previous tractate (*Sanhedrin* 89a), which discusses a Kohen’s married daughter who committed adultery. In that case, the woman is executed by burning, while the man is executed by strangling. The Mishnah rules that unlike ordinary *zomemin*, who receive the same form of death they tried to inflict on their victim, *zomemin* who

testified about the Kohen’s daughter do not receive the type of death they tried to inflict on her, but rather a different form of death. Our Mishnah refers back to that Mishnah, and teaches that there is yet another class of *zomemin* who are not given the *hazamah* punishment at all.

1. Ordinarily, *zomemin* witnesses receive the same punishment they tried to inflict on the person about whom they testified. The reason we do not punish these witnesses with exile is that the verse that teaches about the penalty of exile says (*Devarim* 19:5): דֹּאֵי יָנוּס: אֶל אַחַת הָעָרִים הָאֵלֶּה [of refuge]. The word “he” implies: but not *zomemin* witnesses (below, 2b).

תוספות

ואם תאמר היאך הם יכולים לחייבו גלות בעדותן, והא יכול לומר מזיד הייתי.

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testimony. Like the Mishnah's previous case, this is an exception to the rule that *zomemin* receive the same punishment they tried to inflict (*ka'asher zamam*, "as he plotted"). [See note 1 for the source for this exception.]

❧ **Exile for Unintentional Killing:** If someone kills another person unintentionally, he does not receive the death penalty, as he would for an intentional act of murder. Rather, he is punished by being sent into exile (*galus*) to one of the six cities of refuge (ערי מקלט), or one of the other forty-two cities of the Leviim.

❧ **The Objective of Tosafos:** Tosafos points out that a person accused of an unintentional killing is able to avoid the penalty of exile by claiming that the killing was intentional. Tosafos seeks to explain how, given that fact, the witnesses of our Mishnah would have been able to impose exile on this person had they not been proven *zomemin*.

Q. The Mishnah rules that if *zomemin* witnesses testified falsely that a person deserves exile because he unintentionally killed someone, they are not sentenced to exile, but receive *mal'kus*. The implication is that if these witnesses would *not* have been proven *zomemin*, their testimony would have been accepted, and the accused killer would have been exiled.^[2] Tosafos finds it difficult to understand how this testimony could possibly be effective:

ואם תאמר — One might ask: Since exile is imposed only upon someone who kills unintentionally, **היאך הם יכולים לחייבו גלות בעדותן — how would [these witnesses] have been able to impose exile upon [the killer] with their testimony?** — והא יכול לומר מזיד הייתי — **But he would have been able to claim, "I acted deliberately!"**^[3] Although he did not actually make this claim, the mere *ability* to make it would have freed him from being punished with exile!^[4]

2. The fact that the *zomemin* receive *mal'kus* indicates that their statement in court was initially considered valid testimony, and would have been accepted had it not been exposed as a lie. They are given *mal'kus* not for lying, but for *testifying* falsely. If their testimony would not have been admissible, then the *zomemin* would not receive *mal'kus* for saying it. Since they *do* receive *mal'kus*, it is clear that *beis din* would have accepted their testimony to exile the victim. See previous Tosafos, note 3.

3. The witnesses cannot possibly know what the killer was thinking when he killed the victim. They testify that he killed unintentionally, but he might actually have done it intentionally, in which case he is not liable to exile, which is a penalty reserved for those who kill without intent.

Claiming that he killed intentionally does *not* make the killer liable to the death penalty, because a person cannot be executed based on his own admission. Thus, in terms of punishment, the killer stands to gain by claiming that he acted intentionally, because he avoids a sentence of exile without exposing himself to a sentence of death.

4. Tosafos understands the case to be that the killer responded to the witnesses' accusation by saying, "I did not kill him." This *could* be interpreted to mean, "I did not kill him unintentionally, but rather

I did so intentionally." Since the killer can legitimately claim that this is what he meant, then even if he did not make the claim, the court must make it on his behalf (*Tos. Rabbeinu Peretz*; see Tosafos, *Bava Metzia* 3b ודא מה אם ירצה ב, and *Kereisos* 12a (ד"ה או דלמא)). It emerges that the testimony of these witnesses could not have caused this killer to be exiled, because the court would have argued that the killing was intentional. Why then does the Mishnah imply that if the witnesses had not been proven *zomemin*, their testimony would have resulted in exile?

[Tosafos is *not* asking that a killer can *always* claim that he killed intentionally, and therefore it should be impossible to *ever* impose the penalty of exile; for exile can certainly be imposed when the killer himself *admits* that he acted unintentionally. This, however, is certainly not the case of our Mishnah. The Mishnah says that the witnesses become *zomemin*. If, however, the killer's punishment is based on his own admission, then *hazamah* is impossible, because *hazamah* applies only where the punishment would have resulted from the witnesses' testimony, and not from some other cause, such as the killer's admission. Clearly, the Mishnah discusses a killer who was found guilty through testimony, not through his own admission (*Ritva*, explaining Tosafos; see below, note 17).]

תוספות

כְּדָאֵמַר גַּבִּי אֶכְלֵת חֶלֶב בְּפֶרֶק קָמָא דְּצִבָּח מִלִּיטָא (דף ג:).

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Tosafos cites a Gemara in *Bava Metzia* that supports this idea that a person accused of an accidental sin should be free of punishment because he would be able to claim that he acted deliberately:

Background to Tosafos' Proof

❧ **The Prohibition of Cheilev:** *Cheilev* is the prohibited fat of a *beheimah*, a kosher domesticated animal. The Torah commands (Vayikra 7:23-25): כֹּל חֶלֶב שֹׁר וְכֶשֶׂב וְעִז לֹא תֹאכְלוּ, *Any cheilev of oxen, sheep, or goats, you shall not eat*. Someone who violates this prohibition *unintentionally*, by eating *cheilev* without meaning to transgress, becomes obligated to bring a *chatas* offering. One who *intentionally* violates this prohibition does not bring a *chatas*.

❧ **The Gemara in Bava Metzia** (3b) cites a Mishnah (*Kereisos* 11b) that discusses witnesses who testify that a certain person ate *cheilev* unintentionally, and is therefore liable to a *chatas* offering. The person denies having eaten the *cheilev*. R' Meir rules that he must bring a *chatas*. But the Sages say that since the person can avoid a *chatas* by interpreting his statement of "I did not eat *cheilev*" to mean, "I did not eat unintentionally, but rather intentionally," the court itself interprets the statement that way, and therefore, the person is not liable to a *chatas* offering (see *Tosafos*, *Bava Metzia* 3b ירצה אם ירצה; cf. *Rashi* there; see *Kereisos* 12a).

כְּדָאֵמַר גַּבִּי אֶכְלֵת חֶלֶב בְּפֶרֶק קָמָא דְּצִבָּח מִלִּיטָא — The argument that the killer should be exempt from exile is like what [the Gemara] says in the first chapter of *Bava Metzia* (3b) about witnesses who testify about someone, "You ate *cheilev* unintentionally," in order to make him liable to a *chatas* offering. The person responds by saying, "I did not eat *cheilev*." The Gemara rules (based on a Mishnah, *Kereisos* 11b) that since the person could avoid bringing a *chatas* by claiming that what he *meant* was that he did not eat *cheilev* unintentionally but rather deliberately, therefore, the court interprets his denial to mean just that, and he does not bring a *chatas*.^[5] So too in the case of our Mishnah, since the killer can plausibly claim that he meant to say that he acted deliberately, the court should make that claim on his behalf, and should not sentence him to exile on the word of the witnesses. Why then does the Mishnah imply that if the witnesses had not been found to be *zomemin*, their testimony would have been effective in exiling the killer?^[6]

A. Tosafos answers that our Mishnah discusses a case in which it is *impossible* to claim, "I acted deliberately":

5. A *chatas* is brought *only* for an unintentional sin. By claiming that he actually ate the *cheilev* deliberately, the person would avoid the *chatas* obligation. Since he is *able* to make that claim, the court makes it on his behalf, and frees him from liability to bring a *chatas* (*Tosafos*, *Bava Metzia* 3b ירצה אם ירצה; cf. *Rashi* there; see *Kereisos* 12a).

6. *Maharsha* raises a question. There is a Talmudic rule that states: אין אדם משים עצמו רשע, *a person cannot establish himself as a sinner*; which means that we do not allow a person to incriminate himself. If someone testifies that he himself is a sinner, we do not accept his testimony (see, for example, *Yevamos* 25b). How, then, can Tosafos say that the killer is believed when he says that he killed deliberately? His testimony that he is guilty of murder should not be accepted!

As for Tosafos' proof from the law of *cheilev*,

Maharsha dismisses it, saying that the person's claim to have eaten *cheilev* deliberately might have been made for a righteous reason; namely, to ensure that he would not violate the prohibition against bringing an unconsecrated animal as an offering. The reasoning is that if he actually ate the *cheilev* on purpose, he is not really liable to a *chatas*, and thus, any offering he brings would be unconsecrated, and forbidden for the Altar. To prevent this further sin, he admits to having eaten the *cheilev* deliberately. Since the reason for his admission is a righteous one, he is believed (*Tosafos*, *Bava Metzia* *ibid.*). The accused killer, however, has no such justification. His admission does not prevent any further sin, but is merely a statement that he is a sinner. Accordingly, it should not be accepted by the court.

Several Acharonim offer resolution of this difficulty; see, for example, *Pnei Yehoshua* and *Aruch LaNer*.

תוספות

וַיֵּשׁ לומר דמיירי פֿשָׁרָאוּ צו רגלים לדָבָר, שֶׁנֶּשְׁמַט הַבְּרָזֵל מִקֶּפֶסוֹ, וְאִיכָא לְמִימַר דְּלֹא נִתְפָּוּי. אֲבָל קָשָׁה מֵהָא דִּתְנֵן פֶּרֶק אֱלוֹ הֵן הַגּוֹלִין (לְקַמֵּן דָּף ט.). דְּשׁוֹנָא אִינוּ גּוֹלָה, לֹא כִי הָאִי גּוֹנָא דּוּמִיָּא דְּחוֹבֵב גּוֹלָה,

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Background to Tosafos' Answer

§ *The Torah's Case of Unintentional Killing*: The Torah gives us a model case of unintentional killing in the example of a woodchopper whose axe is faulty. As he chops, the iron head of the axe flies off and kills a person. [This explanation follows one opinion in a Mishnah below (7b); see there for another view.] The verse states (*Deuteronomy* 19:5): וְאִם יָבֹא אֶת רֵעֵהוּ בַּיַּעַר לְחַטֹּב עֵצִים וְנָפְלָה רֹאשׁ הָאֵבֶן מִן הָעֵץ וַיִּשָּׁלַח הַבְּרָזֵל מִן הָעֵץ וּמָצָא אֶת רֵעֵהוּ וּמָתוֹ הוּא יָנוּס אֶל אַחַת הָעָרִים הָאֵלֶּה וְחָי. Or if one comes with his fellow into the forest to chop trees, and his hand swings the axe to cut the tree, and the iron slips off the wood and finds his fellow, who dies — he shall flee to one of these cities and live. This is not a case of gross negligence [קְרוֹב לְמַעֲד], because axe heads do not usually become detached from their handles. It is not an unavoidable accident [אֶנְסָה], either, because if the wood-chopper would have checked the axe, he might have found the defect. Rather, it is the perfect example of the inadvertent act [שֹׁגֵג] for which a killer is exiled.

One could answer דְּמִיירִי פֿשָׁרָאוּ בּוֹ רִגְלִים לְדָבָר — that [our Mishnah's] case is where [the witnesses] saw circumstantial evidence that points to an [unintentional killing]; שֶׁנֶּשְׁמַט — for example, they saw that the iron axe-head came loose from its axe handle as the person chopped, and it flew off and killed the victim.^[7] Since there is evidence to say that [the killer] acted unintentionally, any claim he would make to the contrary would not be believed, and therefore, the court cannot make that claim on his behalf. Accordingly, had the witnesses not become *zomemin*, they would indeed have been believed to make the killer liable to exile, as our Mishnah implies.^[8]

Q. Tosafos challenges the idea that circumstantial evidence would prevent the court from claiming on the killer's behalf that he acted with intent. The challenge is based on the ruling of a Mishnah below:

Background to Tosafos' Challenge

§ *Where the Victim Was an Enemy*: The Mishnah teaches (below, 9b) that if someone kills his enemy in what appears to be an unintentional act, the killer is not exiled. [A person's "enemy" is a person who deliberately avoided speaking to him for at least three days because of hatred; see Mishnah *Sanhedrin* 27b.] Why is an enemy not exiled? Because although the act appears to have been unintentional, if the killer would claim that he did it deliberately, he would be believed, since they were enemies. Since he is able to avoid exile by making this claim, the court makes it on his behalf; therefore, he is not exiled (see *Tos. Shantz*).

But it is difficult to accept that circumstantial evidence is a reason to sentence a killer to exile, — מֵהָא דִּתְנֵן פֶּרֶק אֱלוֹ הֵן הַגּוֹלִין דְּשׁוֹנָא אִינוּ גּוֹלָה — in light of the teaching of a Mishnah in Chapter *Eilu Hein HaGolin* (below, 9b), which states that when the killer is a known enemy of the victim, he is not exiled, because if he were to claim that he intended to kill the person, he would be believed, and therefore, the court makes that claim on his behalf. Presumably, — לֹא כִי הָאִי גּוֹנָא דּוּמִיָּא דְּחוֹבֵב גּוֹלָה — the Mishnah means to say that in the very situation where a friend [a non-enemy; that is, an ordinary

7. This is the case the Torah gives as the perfect example of an unintentional killing (*Devarim* 19:5; see Mishnah below, 7b). If someone kills in this manner, it may be presumed that he acted unintentionally.

8. Our Mishnah deals with a case where it is not

possible to claim that he killed the person intentionally, because the circumstances of the killing point to it being unintentional. Therefore, the witnesses would be believed to say that he killed unintentionally, and is liable to exile.

תוספות

ואמאי אינו גולה, בין דראו דהוי רגלים לדבר? ויש לומר דשאני שוניה דיש לנו לומר טפי דבשנאה הכהו.

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person] **would be exiled**, an enemy is *not* exiled. In other words, while the court would make the claim that an enemy's killing was done intentionally, it would not do the same on behalf of an ordinary person.^[9]

What is the case in which the court would not make this claim on behalf of an ordinary person? Tosafos has just explained that the case is where there is circumstantial evidence that the killing was not intentional (e.g., the axe-head came loose from the handle). Based on the Mishnah on 9b, we may presume that under those same circumstances, if the killer was the victim's enemy, the court would make the claim that the killer acted deliberately and would not exile him, *despite* the circumstantial evidence to the contrary. Accordingly, Tosafos asks:

בין דראו דהוי — **But why indeed is [an enemy] not also exiled** in that same case? ואמאי אינו גולה — **Since [the witnesses] saw circumstantial evidence supporting the notion** that the killing was unintentional, even an enemy should be exiled! Yet, that Mishnah rules that an enemy is not exiled. This implies that circumstantial evidence is *not* enough to prevent the court from claiming that the killer acted intentionally, contrary to Tosafos' answer above.^[10]

Thus, Tosafos' difficulty returns: Since the killer of our Mishnah can avoid exile by claiming that he acted deliberately, the court is required to make the claim on his behalf. How then can our Mishnah imply that had the witnesses not been proved to be *zomemin*, they would have been exiled?

A. Tosafos answers that although circumstantial evidence of non-intent is enough to prevent the court from saying that a *friend* killed deliberately, it is not enough to prevent them from saying an *enemy* killed deliberately:

דיש לנו לומר טפי — **One could answer that** the case of an enemy is different, ויש לומר דשאני שוניה — **because we have greater [reason] to say that [an enemy] struck [the victim] out of hatred.** Therefore, even when the evidence points to an unintentional killing, the killer is believed to say that he acted deliberately. Since he is able to make this claim, the court makes it on his behalf, and he is not exiled. But where the killer was not the victim's enemy, there is no reason to suspect foul play. Therefore, if there is evidence that the killing was done unintentionally, the killer is not believed to say otherwise. Since he is powerless to make this claim, the court does not make it on his behalf. Hence, he is exiled.^[11]

Summary Of Tosafos' Discussion Until This Point

From the Mishnah it seems that the witnesses would have been believed to sentence the killer to exile had they not been proved *zomemin*. Tosafos asks that we learn from the law of *cheilev* that if the killer would claim that he did the killing deliberately, he would be believed, and

9. The point of the Mishnah's ruling is that in the same case where an ordinary person would be exiled, an enemy is not exiled. In the case of an enemy, the court argues on his behalf that he is actually guilty of a deliberate killing; therefore, he is not exiled. The court would *not* make that argument on behalf of an ordinary person, and thus he would face exile.

10. The Mishnah (9b) is teaching that the law of an enemy is different from that of a non-enemy. In the very case where a non-enemy would be exiled for an unintentional killing, an enemy is not exiled, because the court argues on his behalf that the killing was deliberate. Now, Tosafos claimed above that where there is circumstantial evidence that the killing was unintentional, an ordinary person (i.e., a non-enemy)

would be exiled, because the court cannot argue that the killer acted deliberately. It follows that in exactly that case, an enemy would *not* be exiled. The court, ignoring the evidence that points to the act being unintentional, presumes the enemy to have acted intentionally. This tells us that even in the face of circumstantial evidence to the contrary, *beis din* can argue that a killer acted intentionally. This refutes Tosafos' earlier claim.

11. In the case of an enemy, there is reason to suspect that the killing was intentional, but the killer cleverly made it *appear* accidental. This is why the circumstantial evidence is ignored. In the case of a non-enemy, there is no such suspicion, and therefore, the circumstantial evidence is decisive.

תוספות

ועוד יש לומר דמייירי שפיר דליכא רגלים לדבר, והשפא ניהא משונה, ומכל מקום אוקצ גולה כגון דשתיק כשאמר לו העדים.

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therefore, the court should make this claim on his behalf, and he should *not* be exiled. Tosafos answers that in the Mishnah's case, there was evidence suggesting that the killing was *not* intentional. Therefore, the killer is not believed to say otherwise, nor is the court able to make the claim on his behalf.

Tosafos challenges this on the basis of a Mishnah that rules that someone who killed his enemy unintentionally is not exiled, because the court assumes that the killing was actually deliberate. The case is where there is circumstantial evidence showing that he had *not* acted intentionally; nevertheless, he is not exiled. This would seem to indicate that even if circumstantial evidence suggests otherwise, the court will claim that the killing was deliberate, contrary to Tosafos' interpretation of our Mishnah!

Tosafos responds that in the case of a friend, where there is no suspicion of foul play, we follow circumstantial evidence that shows a lack of intent. In the case of an enemy, however, we reject such evidence, since there is good reason to suspect that he killed the victim deliberately, out of hatred.

A. Having resolved the difficulty posed by the law of an enemy, Tosafos returns to his original question, and offers a new approach, which resolves the question while avoiding the matter of an enemy altogether. The original question was as follows: The Mishnah implies that had the witnesses not become *zomemin*, they would have been believed to send the killer into exile. The difficulty is that since the killer could claim that the killing was deliberate, the court should make this claim on his behalf, in which case he could *not* be sentenced to exile! Tosafos above answered one way; he now gives a different answer: **One might also answer — דמייירי שפיר דליכא רגלים לדבר — that [our Mishnah] speaks of a case where there is no circumstantial evidence pointing to [an unintentional killing], והשפא ניהא — and thus, the difficulty from the later Mishnah's ruling about an enemy is laid to rest, since we are no longer saying that according to our Mishnah, circumstantial evidence is the reason the court does not claim that the killing was intentional.^{12]} Nevertheless, despite the lack of circumstantial evidence, our Mishnah holds that if witnesses testify that a friend of the victim killed him unintentionally, [the killer] is exiled. As for why the court does not claim on his behalf that the killing was deliberate, which would free him from the penalty of exile, כגון דשתיק — it is because the Mishnah's case is where [the killer] remained silent when the witnesses said to him that they saw him kill unintentionally, and he did *not* respond that in fact he acted with intent. His silence is regarded as an admission of sorts that what they said is true. Therefore, if he later says that he acted deliberately, he is not believed. Since he cannot make this claim himself, the court does not make it on his behalf.^{13]}**

12. According to Tosafos' first approach, the killer would have been exiled in our Mishnah's case because of circumstantial evidence showing that the killing was unintentional, which would have prevented the court from claiming that it was deliberate. Tosafos asked that if the non-enemy discussed in our Mishnah is exiled because such evidence exists, then it follows that the enemy discussed in the later Mishnah is not exiled *despite* the existence of such evidence. This implies that circumstantial evidence does *not* prevent the court from claiming intent, and thus Tosafos' question returns: Why does our Mishnah imply that the witnesses could have had the killer exiled?

In this new approach, however, Tosafos is saying that the killer of our Mishnah is exiled *not* because of circumstantial evidence, but for another reason, which Tosafos will soon explain. Since our Mishnah does not deal with circumstantial evidence at all, the question of an enemy disappears.

13. When the Mishnah implies that had the witnesses not become *zomemin*, they would have been believed, it refers to this case of the killer remaining silent when the witnesses testify that he killed unintentionally. As Tosafos will note, this is not a full-fledged admission of guilt; however, since he did not protest, it is treated as enough of an admission that when he later claims he acted with intent, he is not believed.

תוספות

בִּדְחִי אִי הוּא אָמַר לֹא הִרְגָּפִיו, יָכוֹל לְתַרְץ וְלֹאמַר לֹא הִרְגָּפִיו שׁוּגָג אֶלָּא מִזִּיד, כִּמוּ צֵלָא אֲכַלְפִי חֶלֶץ, אֲכַל פִּיִּן דְּשִׁטְקָא כְּהוֹדָאָה דְּמִיָּא:

כָּל הַזּוֹמְמִין מְקַדִּימִין לְאוֹתָהּ מִיָּתָהּ.

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Tosafos elaborates on this answer:

בְּדִחִי אִי הוּא אָמַר לֹא הִרְגָּפִיו — Certainly, if he would respond to the witnesses' testimony by saying, "I did not kill him!," — כִּיבֹּל לְתַרְץ וְלֹאמַר לֹא הִרְגָּפִיו שׁוּגָג אֶלָּא מִזִּיד — he would be able later to explain that he meant to say, "I did not kill him unintentionally, but rather I did so deliberately,"^[14] כִּמוּ בִּלְא אֲכַלְפִי — just as we find in *Bava Metzia* (3a), regarding someone who responds to the witnesses by saying, "I did not eat *cheilev*."^[15] Since the killer would be believed if he would respond that way, the court makes this claim on his behalf. אֲכַל פִּיִּן דְּשִׁטְקָא כְּהוֹדָאָה דְּמִיָּא — But in the Mishnah's case, since [the killer] remained *silent* in the face of the witnesses' testimony, [his silence] is like an admission that he indeed acted unintentionally. Therefore, if he later says that he acted deliberately, he is not believed.^[16]

[An additional *Tosafos* that belongs here, but was printed out of sequence in the Vilna Shas, can be found below, *ד"ה ועוד*, p. 32.]



ד"ה כָּל הַזּוֹמְמִין

□ — The Mishnah in *Sanhedrin* (89a) states: REGARDING ALL ZOMEMIN WITNESSES, THEY AWAKEN TO THAT very FORM OF EXECUTION that they tried to inflict on the accused.

Introduction

- § *Hazamah / The Punishment of Zomemin*: See Introduction to the first *Tosafos* on this *amud* [p. 3] (ד"ה מעידין [א']).
- § *The Mishnah in Sanhedrin* (89a), which is cited in our Gemara, describes the punishment of *zomemin* as: מְקַדִּימִין לְאוֹתָהּ מִיָּתָהּ, they awaken to that [very] form of execution that they tried to inflict. This is the interpretation of the phrase given by Rashi here. *Tosafos* will offer another interpretation.
- § *The Objective of Tosafos* is to explain what the Mishnah in *Sanhedrin* means to teach with the term מְקַדִּימִין לְאוֹתָהּ מִיָּתָהּ, which is an odd choice of wording.

14. See above, note 4.

15. In that case, if the person later explains that what he meant was that he did not eat unintentionally, but rather intentionally, he is believed. See above, note 5.

16. *Tosafos* says that his silence is *like* an admission. The significance of *Tosafos*' wording is as follows. We explained above (end of note 4) that our Mishnah *cannot* be discussing the case of a killer who admitted to the witnesses that he killed unintentionally, because in that case, the witnesses could not possibly become *zomemin*, since *hazamah* applies only where the punishment would have resulted from the witnesses' testimony, and

not from the killer's admission. Here too, if the killer's silence would be considered a full-fledged admission, we would run into the same problem; namely, that the witnesses could not become *zomemin*, because the punishment would be a result of the admission, not the testimony. Rather, says *Tosafos*, the killer's silence is *like* an admission. By remaining silent, the killer does not explicitly confirm the accusation of unintentional killing, but he does not deny it either. It is close enough to an admission that he is no longer believed to say that he acted deliberately, but it is not enough of an admission to negate the law of *hazamah* should the witnesses be proven *zomemin* (see *Ritva*).

תוספות

פ' הקונטרס שאין להם גם והמלטה. וקשה דמאי קא משמע לן? פשיטא. ובכתובות פירש שרונה לומר מקדימין שלא יענו הדין. וגם זה קשה, דמאי קא משמע לן? פשיטא. לכך פירש ר"י, מקדימין הכי פירושו: ודאי אפה לריד להמיתן צמיתה שהמיתו, אצל ודאי אם אינו יכול אפילו הכי נמיתם בכל מיתה שנוכל.

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This Mishnah in *Sanhedrin* uses an unusual term to describe punishing the *zomemin*: לאותה. Tosafos wonders what the Mishnah means to teach with this term. He begins with two approaches from Rashi, and rejects them both.

Rashi's first approach:

Rashi explained that this means **that [the *zomemin* witnesses] cannot avoid or escape** the punishment they tried to inflict on their victim. They cannot hope for some other penalty; rather, they awaken in the morning to face the very same death they planned for their victim.^[1]

Tosafos rejects this interpretation:

Q. But this is difficult to accept, — **because what is [the Mishnah] coming to teach us** by saying that the *zomemin* cannot escape their punishment? **פשיטא** — **It is obvious** that they receive their rightful punishment! There is no need for the Mishnah to emphasize this.

Tosafos cites another approach from Rashi, with a completely different interpretation of the term מקדימין:

In Tractate *Kesubos*, [Rashi] explained^[2] — שרונה לומר מקדימין — **that with the word [the Mishnah] means to say** — שלא יענו הדין — **that [the court] should not delay** carrying out the sentence, but should hurry the *zomemin* to be killed as soon as they are sentenced.^[3]

Tosafos rejects this interpretation as well:

Q. But this explanation is **also** difficult to accept, — **because what is [the Mishnah] coming to teach us** by saying that the court should not delay in carrying out the sentence? **פשיטא** — Since these *zomemin* are being given the death penalty, **it is obvious** that their sentence may not be delayed, for it is a general rule that the death penalty must be administered without delay!^[4]

Because of these difficulties, Tosafos offers his own explanation:

A. ***Ri (Rabbeinu Yitzchak)* therefore explained that the meaning of the Mishnah in using the term מקדימין is as follows:** — ודאי אתה צריך להמיתן במיתה שהמיתו — **You certainly must give [the *zomemin*] the same death they tried to give the accused if at all possible.** We give preference to that form of execution over all others.^[5] אצל ודאי אם אינו יכול אפילו הכי נמיתם בכל — **But just as certainly, if for some reason you are not able to execute them in that way, you shall kill them by whatever kind of death you are able to give them.**^[6]

1. According to Rashi, the term מקדימין is from the root קר, to come before, or to be early, and refers to waking up early. The Mishnah is translated: מקדימין לאותה מיתה: they awaken to that very form of execution; meaning, they cannot hope for some other form of execution (Rashi here and to *Kesubos* 45a מקדימין (ד"ה)). [This fits with the Mishnah that states (*Sanhedrin* 40a) that after a day of deliberation, the judges arise early the next morning to deliver the final sentence of death.]

2. This explanation is not found in our version of Rashi's commentary to *Kesubos*.

3. According to this approach, the word מקדימין is interpreted to mean: immediately, without delay. The Mishnah is translated thus: מקדימין לאותה מיתה, they go "immediately" to that very form of execution. There should be no delay between pronouncing the sentence

[in the morning — see note 1] and carrying it out.

4. A Mishnah (*Sanhedrin* 32a) teaches that when someone is sentenced to death, the sentence must be carried out promptly (see Gemara there, 35a). This law applies in all death-penalty cases. There is no need to specify that it applies also in the case of *zomemin*.

5. According to this interpretation, the Mishnah in *Sanhedrin* uses מקדימין in the sense of "giving preference to." In choosing the *zomemin's* punishment, the court gives preference to the same type of execution the witnesses tried to inflict. This is the preferred punishment for *zomemin*, as per the verse of כאשר לו כאשר לאחיו, וגם לעשות לאחיו, You shall do to him as he plotted to do to his brother (*Devarim* 19:19).

6. The phrase מקדימין לאותה מיתה, we give preference to that very type of execution, teaches that it is only

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כְּתִיבָה הִכָּה תִּכָּה (ב"מ דף לא:).
וְקָשָׁה דְּאִמְרִינָן פֶּרֶק נִגְמַר הֵדִין (סנהדרין דף מה:): דְּרוּצָה וְגוֹאֵל הֵדִים הוּא שְׁנֵי כְּתוּבִין הִבְאִין בְּאֶחָד,

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Ri cites a source for the rule that if necessary, *zomemin* are executed by any possible means. The rule is based on a Baraisa in *Bava Metzia*:

Background to the Baraisa in Bava Metzia

❧ *Ir Hanidachas*: If the majority of people in a Jewish city in Eretz Yisrael are persuaded by residents of the city to worship idols, the entire city is designated by the Great Sanhedrin as an עיר הנדחת, *ir hanidachas* (a subverted city). Any residents guilty of idolatry are killed by the sword; i.e., beheading (see *Devarim* 13:13-19).

כְּתִיבָה — This rule is in accordance with the teaching of a Baraisa (*Bava Metzia* 31b) about executing the idolaters of an *ir hanidachas*: תִּכָּה תִּכָּה — The Torah says (*Devarim* 13:16): **You must surely strike the residents of the city.** This teaches that if the idolaters cannot be killed by the sword as the Torah specifies, they should be killed by any means available.⁷ We learn the law of *zomemin* from the law of *ir hanidachas*. Just as these idol worshipers are killed, if necessary, in whatever way it can be managed, so too *zomemin*. If they cannot be given the death they planned for the accused, they must be killed by some other means.

Q. Tosafos raises a problem with *Ri*'s approach. The problem is based on the Talmudic rule of "two verses that come as one do not teach":

Background to Tosafos' Question

❧ שְׁנֵי כְּתוּבִים הִבְאִים כְּאֶחָד אֵין מְלַמְדִּין, *Two verses that come as one do not teach*: Generally, a law that the Torah states in one place can be applied to all similar cases. [This sort of comparison is known as בִּנְיָן אַב, *binyan av*.] If, however, the Torah teaches the same law in two [or more] places, that law *cannot* be applied elsewhere. This is the rule of "Two verses that come as one do not teach." The reasoning is that if the Torah wanted to apply the law elsewhere, it would have written it only once, and we would have extended it to other cases through *binyan av*. By teaching the law in multiple places, the Torah shows that it is relevant only in those specific cases, and nowhere else.

❧ *Murderer and Goel Hadam*: The Gemara in *Sanhedrin* (45b) gives an example of "two verses that come as one." One verse teaches that if a murderer cannot be killed with the sword as prescribed, he is killed מִיִּתְּהָ שְׂאֵתָהּ כָּכֹל לְהַמִּיתוֹ, *with whatever death you can give him* (e.g., an arrow, drowning). Another verse teaches that if the victim of an unintentional killer does not have a close relative to act as his *goel hadam* [גּוֹאֵל הַדָּם, *avenger of the blood*] and kill his killer, the court appoints a *goel hadam* for him. The common denominator between these teachings is the idea that when a person cannot be killed in the way the Torah prescribes (the sword; a close relative), he is killed in another way (see *Yad David to Sanhedrin* *ibid.* ד"ה מִשּׁוּם). These are "two verses that come as one."

וְקָשָׁה — But there is a difficulty with *Ri*'s explanation, as follows: דְּאִמְרִינָן פֶּרֶק נִגְמַר הֵדִין דְּרוּצָה וְגוֹאֵל — We have learned in Chapter *Nigmar HaDin* (*Sanhedrin* 45b) that the verses that teach the laws of a murderer and a *goel hadam* [avenger of the blood] are "two verses

preferable to give the *zomemin* the death they plotted for their victim. If, however, they cannot be killed in that way, they are killed in another way.

7. The phrase הִכָּה תִּכָּה translates literally as, *strike, you shall strike*. The double expression teaches that

although the prescribed death for idolaters of an *ir hanidachas* is beheading with a sword, if you are unable to strike them with the sword, you are to strike them with whatever type of death you are able to give them.

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וְכֵן קָשָׁה דְּצוֹסְפָא (פי"ז דְּסִנְהֶדְרִין) פִּגְיָא חֲבֵל (הזוממין) [המומתין] שְׁחִין אֶתָּה יָכוֹל לְהַמִּיתָן בְּמִיתָה הַפְּתוּבָה צֶהָן, אֶתָּה מְמִיתָם בְּכָל מִיתָה, וְדָרִישׁ לִיה מִן קָרָא דְּבִצְעָרָה הָרַע מְקַרְבָּךְ. וְאַמְרִי, [הא] הוּי רֹצֵחַ וְגוֹאֵל הָדָם שְׁנֵי פְתוּבִין הַצָּחִים כְּאֶחָד?

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that come as one,” since both verses teach that when the regular method of execution is not available, the guilty party is killed in some other way.^[8] It follows that this law cannot be applied anywhere else, including the case of *zomemin*. How, then, can *Ri* say that when *zomemin* cannot be killed in the usual way, they are executed in whatever way can be managed? His view is contradicted by the Gemara in *Sanhedrin*.^[9]

Q The same difficulty that was raised about the ruling of *Ri* can be raised about a certain *Tosefta*. Tosafos cites the *Tosefta*, and poses his question:

— because Tosefta (Sanhedrin 12:3) teaches the following: אָבֵל (הזוממין) [המומתין] שְׁחִין אֶתָּה יָכוֹל לְהַמִּיתָן בְּמִיתָה הַפְּתוּבָה בְּהֵן — **“But those who are sentenced to death, whom you are unable to execute with the death that is written for them, you must execute them with any other death.”** וְדָרִישׁ — **[Tosefta] learns this from the verse (Devarim 17:7): and you shall remove the evil from your midst,** which is understood to mean: remove the evil by whatever form of execution is necessary. **— ואמאי והא**^[11] הוּי רֹצֵחַ וְגוֹאֵל הָדָם ב' כְּתוּבִין הַבָּאִים כְּאֶחָד. **But why** is this so? The laws of **the murderer and the goel hadam** are **“two verses that come as one,”** and therefore, in other death-penalty cases, no form of execution should be permitted other than the one the Torah specified!^[12]

A Tosafos does not resolve the difficulty with *Ri*’s position.^[13] Instead, he cites a new approach from *Rabbeinu Yosef*, which resolves both the difficulty with the *Tosefta*, as well as the difficulty with the term *מְקַרְבִּימִין*, *we give preference to*, that appears in the Mishnah in *Sanhedrin*:

8. The Torah says the following about a murderer (*Bamidbar* 35:21): מוֹת יוֹמָת הַמִּכָּה רֹצֵחַ הוּא, *the one who struck him shall die, he shall die, he is a murderer*. The double expression teaches that if he cannot be killed with the sword, he is killed by any means necessary. For example, if he flees in a boat, he may be killed with an arrow, or by drowning (*Rashi*, *Bava Metzia* 31b).

A *goel hadam* is the close relative of a person killed unintentionally. He avenges the victim by killing the accidental killer (see below, 12a). If there is no close relative, the court appoints a *goel hadam*. This is known from this same verse (ibid.), which continues: גֹּאֵל הָדָם, *the goel hadam shall kill the killer when he meets him*. The phrase, *when he meets him*, is not needed. It is therefore available to teach that when necessary, the court appoints a *goel hadam* (*Sanhedrin* 45b).

9. The law allowing other means of execution is stated in the verses of a murderer and a *goel hadam*. This means that the law cannot be applied anywhere else [unless the Torah writes it there explicitly, as in the case of *ir hanidachas*]. Every other execution in the Torah, including that of *zomemin* witnesses, must be done as the Torah specifies. This contradicts the ruling of *Ri*, who said that if *zomemin* cannot be given the death they plotted to inflict, they may be killed in another way.

[This law is actually stated in *three* places; regarding a murderer; a *goel hadam*; and an *ir hanidachas*. The same rule applies. Since this law is stated in two or more contexts, it “does not teach” (see *Tos. Rabbeinu Peretz* here; Tosafos, *Sanhedrin* 45b משום [ר"ה]).]

10. Emendation follows *Tos. Shantz*, *Tos. Rabbeinu Peretz*, and *Maharsha*, and accords with the standard version of *Tosefta*. See *Maharshal* and *Maharam* for an explanation of Tosafos’ original reading.

11. Emendation follows *Hagahos HaBach* and *Maharam*.

12. *Tosefta* rules that in *all* death-penalty cases, we give a different death if necessary. But how can this ruling be correct? It is contradicted by the rule of “two verses that come as one do not teach,” which limits other methods of execution to the cases of a murderer and a *goel hadam*.

[Although *Tosefta* learns this law from the verse, *and you shall remove the evil from your midst*, the rule of “two verses that come as one do not teach” should tell us that this *cannot* be the meaning of that verse. If it were true that *every* person liable to death can be killed “by whatever form of execution is necessary,” why would the Torah need to teach this law in the specific cases of a murderer and a *goel hadam*?

13. However, *Tos. Shantz* and *Tos. Rabbeinu Peretz* do offer an answer to the question; see there for details.

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וְתִירֵץ הָרֶב רַבִּינוּ יוֹסֵף דְּרוּצָה וְגוֹאֵל הָדָם הוּא שְׁנֵי כְּתוּבִים הַבָּאִין כְּאַחַד לְעֵינַי שְׁלֹא נִלְמֹד שְׂאֵר מוֹמְתֵין מֵהֶם לְהַמִּיתָם אֶף צְמִיתָהּ שְׁאִינָה מֵאֶרְבַּע מִיתוֹת בֵּית דִּין, אֲבָל מֵאֶרְבַּע מִיתוֹת בֵּית דִּין פְּשִׁטָּא נִמְיָס כָּל חַיִּיבֵי מִיתוֹת:

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Background to Rabbeinu Yosef's Approach

§ **Four Methods of Execution:** There are four different types of execution administered by *beis din* as punishment for the various Biblical transgressions that carry the death penalty. The four methods of execution are: סְקִילָה, *stoning*; שְׂרִיפָה, *burning*; הֶרֶג, *beheading*; and חֲנָק, *strangulation* (Mishnah, *Sanhedrin* 49b). Any person liable to the death penalty is executed in one of these four ways. In his approach, *Rabbeinu Yosef* differentiates between the four methods of execution that the Torah prescribes, and other ways of killing a person that the Torah does not specify as methods of execution.

וְתִירֵץ הָרֶב רַבִּינוּ יוֹסֵף — *HaRav Rabbeinu Yosef*¹⁴ responded to the difficulties discussed earlier in the following way: דְּרוּצָה וְגוֹאֵל הָדָם הוּא שְׁנֵי כְּתוּבִים הַבָּאִין כְּאַחַד — When the Gemara says that the laws of a murderer and a *goel hadam* are “two verses that come as one,” לְעֵינַי שְׁלֹא נִלְמֹד שְׂאֵר מוֹמְתֵין מֵהֶם — it means that we cannot learn from their law that others who were sentenced to death לְהַמִּיתָם — are killed even with a death that is not one of *beis din*'s four methods of execution. The novel teaching of the “two verses” is that in those cases, the guilty person is killed by any means, even if it is not one of the four methods. However, this obligation to kill in any possible way is limited to the cases of a murderer, a *goel hadam*, and an *ir hanidachas*. It does not apply to other people who are liable to the death penalty.¹⁵ אֲבָל מֵאֶרְבַּע מִיתוֹת בֵּית דִּין פְּשִׁטָּא נִמְיָס — But with regard to executing someone with one of *beis din*'s four deaths even if it is not the exact death specified for him, it is obvious that we execute him in any of these four ways when necessary, כָּל חַיִּיבֵי מִיתוֹת — just as we do when administering the specified deaths to all others who are sentenced to death.¹⁶ Since *beis din* is empowered to execute people in these ways, it is reasonable to say that the verse, and you shall remove the evil from your midst, is authorizing *beis din* to administer one of these four deaths to anyone who is liable to the death penalty and cannot be given his specified death.

Thus, the difficulty with *Tosefta* is resolved. The law of the *Tosefta* is that any person who is liable to the death penalty is killed by any one of *beis din*'s four methods of execution if he cannot be killed by his prescribed method. This has no connection with the law of a murderer and a *goel hadam*, which allows any necessary form of death, not just one of the four.¹⁷

The same approach serves to explain the Mishnah in *Sanhedrin* that says that in punishing *zomemin* witnesses, “we give preference to” the death they planned to inflict. The Mishnah implies that if it proves impossible to execute them in that way, they are executed in another way. According to *Rabbeinu*

14. This is *Rabbeinu Yosef Ish Yerushalayim* — see *Tos. Rabbeinu Peretz*.

15. When the Gemara in *Sanhedrin* (45b) says that the laws of a murderer and a *goel hadam* are “two verses that come as one,” it refers to the obligation to kill the guilty person by whatever method is necessary, even if it is not one of *beis din*'s four methods of execution. This is clear in the language of the Gemara there, which says that he is killed מִתָּהּ שְׂאֵתָהּ כֹּל לְהַמִּיתוֹ, with whatever death you can give him, which implies: by any means whatsoever. This law applies only in the cases of a murderer, a *goel hadam*, and an *ir hanidachas*. It applies nowhere else. There is, however, another, more limited obligation (taught in the *Tosefta*) that applies in all cases of the death penalty, as *Rabbeinu Yosef* will now explain.

16. Anyone liable to the death penalty is executed by one of *beis din*'s four methods of execution (Mishnah, *Sanhedrin* 49b). When the *Tosefta* says that another form of death is substituted if the prescribed one cannot be carried out, it refers specifically to one of these four methods. It does not mean that the person may be killed in any possible way.

The fact that the *Tosefta*'s law is limited to these four methods of execution is evident from its language. The *Tosefta* does not say מִתָּהּ שְׂאֵתָהּ כֹּל לְהַמִּיתוֹ, with whatever death you can give him (see previous note). Rather, it says only that they are killed מִתָּהּ, with any death; meaning, with any of *beis din*'s four methods of execution.

17. *Tos. Rabbeinu Peretz*; see *Shiurei R' Shmuel Rozovsky* §60.

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Yosef, this means that they are given another one of *beis din's* four methods of execution. The Mishnah does *not* mean that they may be killed by any random method available. Thus, this ruling is in no way contradicted by the “two verses” of a murderer and a *goel hadam*, because those verses teach that these individuals can be killed in ways *other* than *beis din's* four methods, which is a different law entirely.¹⁸

Summary

Tosafos is troubled by the wording of the Mishnah in *Sanhedrin* (89a), which describes the punishment of *zomemin* as *מְקַדְמִין לְאוֹתָהּ מִיָּתָהּ*. Tosafos cites two explanations from Rashi: (a) the Mishnah means that the *zomemin* “awaken” to that very form of execution, and they have no hope of avoiding that punishment and receiving another; (b) the Mishnah is saying that the *zomemin* “go immediately” to the execution they had planned, and the court must not delay the punishment. Tosafos rejects both explanations because they are obvious, and need not be said.

Tosafos offers a different explanation, in the name of *Ri*. The phrase *מְקַדְמִין לְאוֹתָהּ מִיָּתָהּ* is translated as: *we give preference to that form of execution*. The Mishnah teaches that while it is *preferable* to kill the *zomemin* with the same type of execution they tried to inflict, if this proves impossible, they are killed in whatever way is available.

Tosafos questions *Ri's* approach on the basis of the rule of “two verses that come as one do not teach,” which says that a law stated in two or more places does not apply anywhere else. In the cases of a murderer and a *goel hadam*, the Torah teaches that if the guilty party cannot be killed in the specified way, he is killed by whatever method is available. Since this law is stated in these two places (as well as in the case of *ir hanidachas*), it should not apply in the case of *zomemin*. This contradicts *Ri's* interpretation of the phrase *מְקַדְמִין*.

Another difficulty is that *Tosefta* (*Sanhedrin* 12:3) says that if a person sentenced to death cannot be killed in the specified way, he is killed in another way. This too is contradicted by the principle of “two verses that come as one do not teach,” which says that the obligation to kill in any possible way is limited to the cases of a murderer, a *goel hadam*, and an *ir hanidachas*.

Rabbeinu Yosef offers another approach. He agrees that *מְקַדְמִין לְאוֹתָהּ מִיָּתָהּ* means “we give preference to that form of execution,” which implies that if necessary, the *zomemin* are killed in a different way. However, they must be killed with one of the four methods of execution used by *beis din*. This is the law of the *Tosefta*. But in the specific cases of a murderer, a *goel hadam*, and an *ir hanidachas*, a different, broader law applies; namely, that the guilty party is killed by *any* means necessary. This law applies nowhere else, because of the principle of “two verses that come as one do not teach.” Thus, *Rabbeinu Yosef* avoids the difficulties that undermine *Ri's* approach.

18. ❧ **The difference between *Ri's* approach and *Rabbeinu Yosef's* approach:** Both *Ri* and *Rabbeinu Yosef* agree that when the Mishnah in *Sanhedrin* says, *מְקַדְמִין לְאוֹתָהּ מִיָּתָהּ*, *we give preference to that form of execution*, it means that although we first try to kill the *zomemin* in the way they plotted, they are killed in another way if necessary. The difference between them is as follows: According to *Ri*, they are killed by *any* means necessary, as we learn from the law of *ir hanidachas*. But according to *Rabbeinu Yosef*, if the preferred death is not possible, they are killed with one of *beis din's* four methods of execution, but *not* in any other way.

[Tosafos (at note 4) rejected Rashi's second approach to the Mishnah in *Sanhedrin* (that the Mishnah teaches that the execution should not be delayed) because this is a general law that has already been taught elsewhere, and there is no need to say that it applies also to *zomemin*. One might ask that *Rabbeinu Yosef's* explanation (that the *zomemin* can be killed by any of the four methods) seems to suffer from the same

problem, because it too is a general law that has been taught elsewhere, and therefore should not need to be repeated with respect to *zomemin*.

The answer is that although in ordinary death-penalty cases, the Torah allowed the court to substitute a different form of execution where necessary, one might think that the same does not apply in the case of *zomemin*. In a regular death-penalty case, the Torah prescribes one of the four types of execution, but allows any of the four to be given when necessary. In the case of *zomemin*, by contrast, the Torah never prescribed a particular form of death, but simply stated that the witnesses must receive the *very same* punishment they plotted to inflict. One could argue that if the exact death they intended is not available, the *zomemin* should not be executed, since the other deaths do not fulfill the requirement of “as he plotted.” Therefore, the Mishnah in *Sanhedrin* must inform us that in fact, whenever the Torah prescribes death, all four types are included in the prescription, even though only one of the four is preferred. It emerges that when *zomemin* try to have a

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זוממי בת כהן ובוועלה שאין מקדימין לאותה מיתה אלא למיתה אחרת. וטעם, דדרשין היא ולא

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ד"ה זוממי בת כהן

— זוממי בת כהן ובוועלה שאין מקדימין לאותה מיתה אלא למיתה אחרת □
Regarding all *zomemin* witnesses who are liable to the death penalty, we give preference to the same form of execution that they tried to inflict on the accused — except in the case of **THE ZOMEMIN WITNESSES OF THE married DAUGHTER OF A KOHEN AND THE MAN WHO COMMITTED ADULTERY WITH HER, WHERE WE DO NOT GIVE PREFERENCE TO THAT FORM OF EXECUTION** that they tried to inflict on her (i.e., burning), **BUT RATHER TO ANOTHER FORM OF EXECUTION** (i.e., strangling).

Introduction

§ **Hazamah/The Punishment of Zomemin:** See Introduction to the first Tosafos on this *amud* [p. 3] (ד"ה מעידין [א']).

§ **The Punishment for Adultery:** The regular punishment for adultery is execution by חנק, *strangling*. Both the man and the woman who committed the sin receive this punishment. However, if the married daughter of a Kohen commits adultery, she is put to death by שריפה, *burning*, which is a more severe form of execution. This is taught by the verse (Vayikra 21:9): וּבַת אִישׁ כֹּהֵן: *And if the daughter of a Kohen profanes herself through adultery, she profanes her father, in fire she shall be burned*. This special punishment applies only to the *woman*, i.e., the Kohen's married daughter. The man who commits adultery with the Kohen's daughter is *not* executed by burning, as she is. Rather, he is executed by strangling, the usual punishment for adultery (Mishnah, *Sanhedrin* 84b).

§ **The Zomemin of a Kohen's Daughter:** Our Gemara cites a Mishnah in *Sanhedrin* (89a) that teaches that if witnesses testified that a man and a Kohen's daughter committed adultery together, and the witnesses are found to be *zomemin*, they do not receive the death they plotted for the woman (i.e., burning). Rather, they are executed by strangling, which is the death they plotted for the man.

§ **The Objective of Tosafos:** Tosafos' objective is to present sources for several laws pertaining to the adultery of a Kohen's daughter: (a) that she is executed by burning, not strangling; (b) that the man she sinned with is executed by strangling, not burning; (c) that *zomemin* who testified about her adultery receive the man's punishment (strangling), and not her punishment (burning). In the course of clarifying the sources of these laws, Tosafos uncovers an unusual application of the law of *ka'asher zamam* ("as he plotted").

As mentioned in the Introduction, if a Kohen's daughter commits adultery, she is executed by burning, but the man who sinned with her is executed by strangling. And, as our Gemara notes, if witnesses testify that a man and a Kohen's daughter committed adultery together, and the witnesses are found to be *zomemin*, they receive the death they intended for the man (strangling), not the death they intended for the woman (burning). Tosafos will give the source for both of these laws, as taught by the Gemara in *Sanhedrin* (90a). He begins by explaining why the adulterer receives a different punishment than the Kohen's daughter:

בוועלה — **A man who commits adultery with [a Kohen's daughter]** is not executed by burning even though she is executed that way, דדרשין היא ולא בוועלה — **because** the Torah says (Vayikra 21:9):

person sentenced to death, they are in effect sentencing him to all four types of execution. Therefore, no matter which of the four types of death the court gives the

zomemin, the requirement of "as he plotted" has been fulfilled (see *Avi Ezri to Rambam, Hil. Sanhedrin*, end of 14:1-3.)

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צועלה, וזוממי צת פה, דכתיב לאחיו, דדרשין לאחיו ולא לאחותו. וא"ת למה לי דרשא דלאחיו ולא לאחותו, תיפוק ליה מהיא דנפקא לן, דדרשין (סנהדרין נא). את אביה היא מחללת, היא ולא צועלה היא ולא זוממיה.

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"She" profanes her father, in fire she shall be burned, and we explain this to mean: "She" is executed through burning, **but not the man who committed adultery with her**. Instead, the man is executed by strangling, which is the usual punishment for adultery.^[1]

Tosafos now gives the source for the law that if witnesses testified that a Kohen's daughter committed adultery, and they were found to be *zomemin*, they receive the man's punishment (strangling) and not the woman's punishment (burning):^[2]

דכתיב לאחיו — The *zomemin* of a Kohen's daughter are also not executed by burning — because the Torah writes in regard to *zomemin* (Devarim 19:19): And you shall do to him as he plotted to do "to his brother," — and we explain this to mean: you shall do to him as he plotted to do to his brother (the man), **but not** as he plotted to do to his sister (the woman). Therefore, the *zomemin* are executed by strangling, which is the death they intended for the man, and not by burning, which is the death they intended for the Kohen's daughter.^[3]

Q. Tosafos has shown that the two laws are learned from different verses: The word "she" teaches that only a Kohen's daughter who committed adultery is executed by burning, but the man who sinned with her receives the usual punishment of strangling. The expression "as he plotted to do to his brother" teaches that *zomemin* who testified that a Kohen's daughter committed adultery receive the punishment of the man (strangling) rather than the punishment of the woman (burning). Tosafos asks that we should be able to derive *both* of these laws from the first verse:

ואם תאמר — You may ask: למה לי דרשא דלאחיו ולא לאחותו — Why do I need this teaching of "as he plotted to do to his brother, but not to his sister," in order to learn that the *zomemin* of a Kohen's daughter are not executed by burning? — תיפוק ליה מהיא דנפקא לן — Let us rather learn [the law of the *zomemin*] from the same word "she" from which we learned that a man who commits adultery with a Kohen's daughter is not executed the same way she is! The word "she" implies that *only* the Kohen's daughter is executed by burning, but not *anyone else* to whom we might have thought to apply the same punishment as hers. It thus excludes not only the man who committed adultery with her, but also the *zomemin* who plotted to have her executed by burning!

Tosafos shows that it is indeed *possible* to learn both of these laws from the word "she":

— דדרשין את אביה היא מחללת — We know that this word can teach both laws, **because** in *Sanhedrin* (51a), [the Gemara] indeed **expounds** the verse, "She profanes her father, in fire she shall be burned," as teaching *two* things: — היא ולא בועלה היא ולא זוממיה (1) "She" is burned, **but not the man who**

1. The verse states: את אביה היא מחללת, *she profanes her father*. However, it could simply have stated את אביה מחללת, which means the same thing. The word *she*, is extra (*Malbim* to the verse). It teaches that only *she* is executed by burning, but not the man who committed adultery with her. The man is killed in the same way as any other adulterer — through strangling (*Rashi* here ד"ה חרץ, from *Sanhedrin* 90a).

2. When the witnesses testified that a certain man committed adultery with a Kohen's daughter, they were trying to have the man executed by strangling, and the woman executed by burning. Therefore, under the usual law of *hazamah*, the witnesses deserve *both* punishments. Since there is a rule that a person who is liable to two forms of execution is killed in the more severe way (*Mishnah*, *Sanhedrin* 81a), in this case the witnesses should receive the more severe punishment

of burning. However, the law is that they receive the *less* severe punishment of strangling (*Ritva*). Tosafos explains why this is so.

3. The verse could have said, ונעשיתם לו כאשר זמם לעשות, *And you shall do to him as he plotted to do*. The word *לאחיו*, *to his brother*, is unnecessary. By adding this masculine term, the verse teaches that whenever the testimony of the *zomemin* witnesses would have resulted in different punishments for a man and a woman, the *zomemin* receive the punishment that would have been given to the *man*, not the punishment that would have been given to the woman. In this case, therefore, the *zomemin* are not executed by burning, which is how they would have caused the Kohen's daughter to be executed. Rather, they are given the man's punishment of strangling (*Rashi*, *Sanhedrin* 90a).

תוספות

וַיֵּשׁ לומר הוֹאִיל וְזוֹמְמִין צָדוּ לְחֵיבָהּ שְׂרִיפָה, לֹא יָצָא לְאוֹקוּמֵי מֵעוֹטָא דְהִיא אֲלֵא צְדוּעָלָה, וְלֹא מִמַּעֲטִינָן זוֹמְמִין (אֲלֵא מִן אַחִיו). אֲבָל בֵּין דְּכַתִּיב אַחִיו, דְּרָשִׁינָן נָמִי מִהִיא לְמַעוֹטֵי זוֹמְמִיָּה. אֲבָל קָשָׁה בֵּין דְּכַתִּיב אַחִיו, אֲמַאי אֵינְטְרִיד לְמַעוֹטֵי זוֹמְמִין מִהִיא?

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committed adultery with her; (2) “she” is burned, but not her *zomemin*.^[4] The Gemara thus learns *both* laws from the word “*she*.” Why, then, do we need the teaching of “as he plotted to do to *his brother*” mentioned earlier?^[5]

A. Tosafos answers that had the Torah not written “to *his brother*,” we would not have been able to learn from the word “*she*” to also exclude *zomemin*:

וַיֵּשׁ לומר — We can answer that without the teaching of “to *his brother*,” the word “*she*” would not be understood as excluding *zomemin* from the punishment of burning, because we would say as follows: **הוֹאִיל וְזוֹמְמִיָּה בָּאוּ לְחֵיבָהּ שְׂרִיפָה — Since the *zomemin* of [the Kohen’s daughter] wanted to make her liable to burning,** and under the law of *hazamah* they should receive that same punishment, **לֹא — and it does not** exclude the *zomemin*, because that would go against the law of *hazamah*.^[6] This is what we would say if the teaching of “to *his brother*” did not exist. **אֲבָל בֵּין דְּכַתִּיב אַחִיו — However, now that the Torah writes “as he plotted to do to *his brother*”** to teach that the *zomemin* of a Kohen’s daughter receive the death they intended for the man and *not* the death they intended for her, it is clear that the usual law of *hazamah* does not apply in this case;^[7] **דְּרָשִׁינָן נָמִי מִהִיא לְמַעוֹטֵי זוֹמְמִיָּה — therefore, we also learn from the word “*she*” that the *zomemin* of [a Kohen’s daughter] are excluded** from being executed by burning, and are instead subject to strangling.

In short, the teaching of “to *his brother*” is needed because without it, we would not have said that the word “*she*” also excludes *zomemin*. Only after we have the teaching of “to *his brother*,” which tells us that the usual law of *ka’asher zamam* does not apply in the case of a Kohen’s daughter, are we free to also use the teaching of “*she*” to exclude the *zomemin*.

Q. Tosafos points out an obvious problem with his explanation: **אֲמַאי אֵינְטְרִיד לְמַעוֹטֵי זוֹמְמִין מִהִיא — אֲבָל קָשָׁה — However, there is still a difficulty:** **בֵּין דְּכַתִּיב אַחִיו — Since the Torah writes “to *his brother*”** to exclude *zomemin* from being executed by burning, **אֲמַאי אֵינְטְרִיד לְמַעוֹטֵי זוֹמְמִין מִהִיא — why do we also need to exclude *zomemin* from the word “*she*”?** Once the *zomemin* are excluded on the basis of “to *his brother*,” there is no longer any point in excluding them on the basis of “*she*”?^[8]

4. The Gemara that Tosafos now cites (*Sanhedrin* 51a) explains the verse: *she profanes her father*, in a broader way than the teaching he cited earlier (from *Sanhedrin* 90a). The word “*she*” excludes *both* the man who committed adultery with her, and the *zomemin* who plotted to have her burned. None of them are executed by burning, because the term “*she*” implies that *only* the Kohen’s daughter is punished with burning, but *no one else* that is associated with her sin receives that punishment (see *Rashi, Sanhedrin* 50b ד”ה וּזְמִין).

5. Since the Gemara in *Sanhedrin* 51a learns from the word “*she*” that the *zomemin* of a Kohen’s daughter are not executed by burning, why does the other Gemara (*Sanhedrin* 90a) need to derive this same law from the verse “to *his brother*,” as cited by Tosafos above? (*Aruch LaNer*).

6. The word “*she*” is certainly used to exclude the adulterer from being executed by burning. The question is

whether the word “*she*” can also exclude the *zomemin*. Since excluding the *zomemin* from burning would override the usual law of *hazamah*, we have no right to assume that the verse also means to do this. Rather, we can only say that the purpose of the extra word “*she*” is to exclude the adulterer from burning, which does not involve overriding any Torah law (see *Tos. Rabbeinu Peretz* and Tosafos, *Sanhedrin* 51b ד”ה לאחרי).

7. Under the usual law, the *zomemin* should have received *her* punishment of burning, which is the more severe manner of execution, and *not his* punishment of strangling (see note 2). By saying, *to his brother*, which teaches that the *zomemin* receive the man’s punishment, the Torah indicates that *ka’asher zamam* is applied differently here than in other cases.

8. Tosafos had explained that the two verses that exclude the *zomemin* from burning, cited by the two Gemaras (*Sanhedrin* 51a and 90a), work together. If not for the verse, “to *his brother*,” we would have used

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וַיֵּשׁ לוֹמַר דְּאִי מֵאֲחִיו, הוּא אֲמִינָא דְּה"מ פְּשָׁהֲבוּעַל הִיא גְדוֹן קְרִינָן צִיָּה לְאֲחִיו, אֲבָל אִם לֹא הִיא גְדוֹן עַל פִּי עֲדוּתָן, כְּגוֹן שֶׁהִיא קָטָן בֶּן תִּשְׁעַת שָׁנִים וְיוֹם אֶחָד, אוֹ שֶׁלֹּא הִבִּירוּ הַבּוֹעֵל, לֹא קְרִינָן צִיָּה לְאֲחִיו, קמ"ל הִיא וְלֹא זוֹמֵמִין לְמַעוּטֵי זוֹמֵמִין בְּכָל עֲנִין.

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A. Tosafos answers that the term “to his brother” would exclude the *zomemin* from being punished with burning only in a specific case. We therefore need the verse of “*she*,” as well, to teach that the *zomemin* of a Kohen’s daughter are *never* executed by burning:

וַיֵּשׁ לוֹמַר — We can answer: דְּאִי מֵאֲחִיו — If the exclusion of *zomemin* would be learned only from the verse, “*as he plotted to do to his brother* but not to his sister,” **הִנֵּה אֲמִינָא דְּהַנִּי מִלִּי בְּשֶׁהֲבוּעַל הִיא גְדוֹן — I would say that this [exclusion] applies only** in a case where the man who supposedly committed adultery with the Kohen’s daughter was actually subject to punishment as a result of the *zomemin*’s testimony. In such an instance, the *zomemin* would be executed by strangling and not by burning, **קְרִינָן בֵּיהּ לְאֲחִיו —** because then the *zomemin* actually plotted to have the man executed, so we can indeed apply to them the verse, “*you shall do to him as he plotted to do to his brother*,” by executing them the way they tried to have the man executed (i.e., by strangling). They would thus be exempt from the more severe punishment of death by burning. **אָבָל אִם לֹא הִיא גְדוֹן עַל פִּי עֲדוּתָן — But in** a case where [the man] who supposedly sinned with the Kohen’s daughter was *not* subject to any punishment as a result of their testimony, **כְּגוֹן שֶׁהִיא קָטָן בֶּן תִּשְׁעַת שָׁנִים וְיוֹם אֶחָד — such as where he was a minor** who was at least nine years and one day old,^[9] **אוֹ שֶׁלֹּא הִבִּירוּ הַבּוֹעֵל — or where [the zomemin] said that they did not recognize the adulterer,**^[10] **לֹא קְרִינָן בֵּיהּ לְאֲחִיו — we cannot apply to [the zomemin] the verse,** “*you shall do to him as he plotted to do to his brother*,” since they were not trying to have the man executed. We would thus say that in these cases, the *zomemin* indeed receive the same punishment they intended for the Kohen’s daughter (i.e., burning), since there is no other punishment that each of these witnesses had “*plotted to do to his brother*.”^[11] **קָא מְשַׁמְעֵ לָן הִיא לְמַעוּטֵי זוֹמֵמִין —** Therefore, the exclusion of “*she*, but not her *zomemin*” comes to teach us **לֹא זוֹמֵמִין —** that the *zomemin* are in fact excluded in all cases from being executed by burning. *She* is executed by burning, but not her *zomemin*! Even when their testimony would not have resulted in any punishment for the man, they are executed by strangling rather than by burning.

We thus understand that in order to fully exclude the *zomemin* of a Kohen’s daughter from being punished with burning, we need both the verse of “*to his brother*” and the verse of “*she*.” The teaching of “*as he plotted to do to his brother*; but not to his sister,” tells us that in a case where the adulterer was sentenced to death on the basis of their testimony, the *zomemin* receive *his* punishment (strangling), not the woman’s punishment (burning). Once we know from this teaching that the *zomemin* of a Kohen’s daughter are not subject to the regular rules of *ka’asher zamam*, we are able to derive an additional law from the word “*she*”: Even in a case where the adulterer was *not* sentenced to death on the basis of their testimony (e.g., he was a minor), the *zomemin* are exempt from burning. They do *not* receive the

the word “*she*” to exclude only the *adulterer* from burning, but not the *zomemin*. Now that it says “*to his brother*,” which implies, “but not to his sister,” we expound “*she*” as excluding even the *zomemin* from burning. The obvious question is: Once the Torah has excluded *zomemin* by saying “*to his brother*,” why do we also need the verse “*she*” to exclude the *zomemin*?

9. If a boy who is at least nine years old commits adultery with an adult woman, she is liable to the death penalty. The boy, however, is not punished, since he is a minor (Mishnah, *Niddah* 45a).

10. They know that she was intimate with someone other than her husband, but they do not know for sure who the man was. The woman is sentenced to death

even though the witnesses cannot positively identify the man with whom she sinned. Whoever that man is, he will obviously not be punished.

11. The verse, “*as he plotted to do to his brother* [but not his sister],” teaches that when the *zomemin*’s plot would have resulted in different punishments for the Kohen’s daughter and the man who sinned with her, the *zomemin* receive the punishment they had plotted for the man. However, in cases where the man would *not* have been punished (e.g., where he is a minor), this verse cannot exclude the *zomemin* from being executed by the death they had plotted for the Kohen’s daughter, which is burning (*Tos. Rabbeinu Peretz*).

תוספות

ומתחלה היה ר"י מסופק בהאוי מילתא, ושוב פשטה מפרק נגמר הדין (סנהדרין דף מו.), דקאמר מיתה אחת מעין

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woman's punishment, because only "*she*" (the Kohen's daughter herself) is executed by burning, but her *zomemin* are never subject to burning. Rather, they are always executed by strangling.

Tosafos has explained why we need both verses. However, this answer results in a novel rule, which Tosafos now addresses:

The word "*she*" excludes the *zomemin* of a Kohen's daughter from being punished with burning in *all* cases, even where their testimony would not have caused the man to be executed. It turns out that the *zomemin* receive a punishment they were not plotting to impose on *anyone*, neither the Kohen's daughter, nor the man with whom she sinned. They are instead receiving the punishment that the man *would have* received if he had been subject to judgment (e.g., if he were an adult). This is a very unusual application of the law of *ka'asher zamam* ("as he plotted"). Tosafos now proves from a Gemara in *Sanhedrin* that this novel point is true, meaning that the *zomemin* of a Kohen's daughter receive strangling even in a case where the supposed adulterer would not have been executed and they were only plotting to have *her* put to death through burning.

Background to Tosafos' Proof

🔗 **Zomemei Zomemin:** An ordinary case of *zomemin* involves two sets of witnesses: The first set gave the original testimony, and the second set discredited the first set through *hazamah*. There can, however, be a case where a *third* set of witnesses arrives and discredits the *second* set through *hazamah*. When this happens, the first set are reinstated as valid witnesses and their original testimony is restored. This is because the second set, who made them *zomemin*, have now been discredited themselves. The discredited second set is known as *zomemei zomemin* — witnesses who plotted to make others into *zomemin*, and were in turn shown to be *zomemin* themselves.

The punishment of the second set of witnesses (the *zomemei zomemin*) is the same as what they tried to do to the first set by making them *zomemin*. For example, if the first set testified that a person is guilty of the death penalty, they became subject to execution (for plotting to kill the accused) when the second set testified that they are *zomemin*. The second set were thus trying to have the first set killed. Therefore, when the second set are later proven to be the real *zomemin*, they receive the death penalty for having plotted to give this punishment to the first set of witnesses.

Tosafos notes that *Ri* (*Rabbeinu Yitzchak*) was originally uncertain whether the novel explanation given above is correct, but he later found proof for it:

ומתחלה היה ר"י מסופק בהאוי מילתא — At first, *Ri* was unsure about this matter of whether the *zomemin* of a Kohen's daughter are punished with strangling even when their testimony would not have caused the man to be executed. ושוב פשטה מפרק נגמר הדין — But [*Ri*] eventually resolved [his doubt] with a remarkable proof from a Gemara in **Chapter Nigmar HaDin** (*Sanhedrin* 46a), דקאמר מיתה אחת מעין שתי מיתות — which says that in a case involving adultery, it is possible to have "a single death-penalty case that is like two different death-penalty cases." This means that it is possible for two people to be involved in the same capital sin of adultery, but each of them is subject to a different death penalty for it, and therefore *beis din* may not try both of these people on the same day.¹² The

12. The Mishnah in *Sanhedrin* (45b) rules that a *beis din* may not judge two death-penalty cases on the same day. The Gemara there (46a) explains that this applies only where the two cases involve different sins or different methods of execution (because judging two different types of cases in a single day might lead to a fatal error). The Gemara adds that the restriction on judging two cases in a single day can sometimes

prevent *beis din* from taking up the cases of a man and woman who committed adultery together, even though they are partners in the same sin. In a situation where the people being judged are liable to different methods of execution, their cases may not be tried on the same day. Although it is a single death-penalty case, it is treated as two separate cases. The Gemara provides two examples of this rule, which Tosafos will now cite.

תוספות

שְׁתֵּי מִיתוֹת, כְּגוֹן בֵּית כֹּהֵן וּבִזְעֻלָּה, אִם בֵּית כֹּהֵן וְזוֹמְמֵי זוֹמְמִין. וְהִשְׁתַּח לָמָּה לִּיה זוֹמְמֵי זוֹמְמִין, פִּיפּוֹק לִיה דְּחִיבָא שְׁתֵּי מִיתוֹת בְּלֹא זוֹמְמֵי זוֹמְמִין, מִשּׁוּם הַבּוֹעֵל שֶׁהוּא בְּחִינָה.

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Gemara mentions *two* ways this can happen: **For example:** (1) If *beis din* is judging a **Kohen's daughter and the man who committed adultery with her**, where both of them committed the same sin, but she is executed by burning and he is executed by strangling; since they are subject to different death penalties, their cases may not be tried on the same day. **או בֵּית כֹּהֵן וְזוֹמְמֵי** — **Or**, for example, (2) If the judgment is about a **Kohen's daughter and her *zomemei zomemin*** (i.e., witnesses who tried to make the original witnesses into *zomemin*, but were then shown to be *zomemin* themselves).¹³ The *zomemei zomemin* are executed by strangling, which is the punishment they intended for the first set of witnesses, but the Kohen's daughter is executed by burning. In that case, too, although both punishments stem from a single sin, since the people receive different deaths their trials may not take place on the same day.¹⁴

Tosafos begins the proof. In a regular situation where a Kohen's daughter is accused of adultery, this results in two different kinds of death-penalty cases, since the Kohen's daughter is subject to burning and the adulterer is subject to strangling (if they are found guilty). This is the first example that the Gemara mentioned. In a situation where there also are *zomemei zomemin*, there usually are *three* death-penalty cases that result: The Kohen's daughter is subject to burning, the adulterer is subject to strangling, and the *zomemei zomemin* too are subject to strangling. Tosafos shows that if this is the case of *zomemei zomemin* that the Gemara refers to in its second example, there is a difficulty:

וְהִשְׁתַּח לָמָּה לִּיה זוֹמְמֵי זוֹמְמִין — **Now**, let us analyze that Gemara: **Why did [the Gemara] need to mention** the case involving *zomemei zomemin*? — **תִּפּוֹק לִיה דְּחִיבָא שְׁתֵּי מִיתוֹת בְּלֹא זוֹמְמֵי זוֹמְמִין** — In that case, **there were already two** different types of **death penalties** for *beis din* to consider even **without** taking the *zomemei zomemin* into account, — **מִשּׁוּם הַבּוֹעֵל שֶׁהוּא בְּחִינָה** — **because *beis din* needs to judge** the Kohen's daughter, who is subject to burning, as well as **the accused adulterer, who is subject to strangling!** This already makes it a situation of “one sin with two death penalties,” which cannot be judged on the same day. The additional factor of *zomemei zomemin*, who also are subject to strangling, does not make this *another* example of “one sin with two death penalties.” It is simply the same situation with additional defendants. Why does the Gemara say that there are *two* examples of “one sin with two death penalties”?

13. The first witnesses testified that a certain man committed adultery with a Kohen's daughter. A second set then discredited the first set through *hazamah*. Finally, the second set were themselves proven to be *zomemin*, so that the testimony of the first witnesses is restored. These second witnesses, the “*zomemei zomemin*,” are now subject to the death penalty, since their goal was to have the *first* set of witnesses executed through the law of *hazamah*.

In this situation, the Kohen's daughter is also subject to execution, because the original testimony of the first witnesses (that she committed adultery) is now back in place.

14. Both the woman and the *zomemei zomemin* receive the death penalty. The woman is killed by burning, since she is a Kohen's daughter who committed adultery. The witnesses, however, are killed by strangling, because this is the death they intended for their victims, the first witnesses. [If the second witnesses had succeeded in having the first witnesses punished as *zomemin*, the first witnesses would have been executed by strangling, since *zomemin* receive

the punishment of the man, as explained earlier.] Thus, the single sin of adultery leads to two different death sentences — burning for the woman, and strangling for the *zomemei zomemin* (Rashi to Sanhedrin ibid.).

[Technically speaking, the *zomemei zomemin* did a different sin than the woman. She committed adultery, and they gave false testimony. However, in the context of a *beis din* being allowed to judge two death-penalty cases on the same day, this is treated as a case involving a single sin, because the judgment of the *zomemei zomemin* is a direct outgrowth of the case against the adulteress. Their guilt and her guilt are determined by the same thing, because once they are found to have been *zomemin*, the testimony of the first witnesses is *automatically* reinstated; thus, both the adulteress and these false witnesses automatically become liable to execution through the *hazamah* that makes them *zomemei zomemin* (Rabbeinu Yonah, Sanhedrin 46a, first explanation). Nevertheless, since two different methods of execution will be used, the cases must be judged on different days.]

תוספות

חלל שמת מינה דחיירי בגון דליכא דין מיתה צבועלה, בגון שהוא קטן כדפירשתי, ואפ"ה קאמרי זוממי זוממין
בחקק, חלמא דהיה זוממין בחקק חט"פ דליכא דין מיתה צבועל:

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To resolve this problem, we are forced to say that the Gemara is speaking about a case where the adulterer was *not* being judged:

חלל שמת מינה דחיירי בגון דליכא דין מיתה צבועלה — Rather, since the Gemara *does* list the case of *zomemei zomemin* as a second example, **we must conclude that [the Gemara] is speaking about a case where there is no death-penalty being considered for the man who committed adultery with [the Kohen's daughter],** בגון שהוא קטן כדפירשתי — **such as where he is a minor, as I explained above.** The Gemara means that even when the adulterer is *not* subject to execution, there can be a case of “one sin with two death penalties,” when there are *zomemei zomemin*, because the *zomemei zomemin* receive a different death than the one that the Kohen's daughter receives. This is a *different* case than the Gemara's first example, in which the adulterer was subject to execution and there were no *zomemei zomemin*.^[15]

Tosafos concludes his proof:

ואפילו דכי קאמרי זוממי זוממין בחקק — We have shown that the Gemara's case of *zomemei zomemin* must be referring to a situation where the adulterer is not subject to the death penalty. **Yet, [the Gemara] says that the *zomemei zomemin* are sentenced to a different kind of execution than that of the Kohen's daughter, meaning that they are executed by strangling.**^[16] Why do the *zomemei zomemin* receive this punishment of strangling? Because that is what they were trying to do to the *first* set of witnesses by making them *zomemin*! חלמא דהיה זוממין בחקק אף על פי דליכא דין מיתה צבועל — **We thus see that the *zomemin* of a Kohen's daughter are always executed by strangling, even when there is no death-penalty being considered for the man who they claim committed adultery with her.**^[17]

Summary

There are two verses that teach that the *zomemin* of a Kohen's daughter are not executed by burning, even though that is the punishment she would have received as a result of their testimony: (1) “*She*” *profanes her father, in fire she shall be burned*, which implies that only *she* (the Kohen's daughter) is executed by burning, but not the *zomemin* who testified against her; and (2) *And you shall do to him as he plotted to do “to his brother,”* which implies that *zomemin*

15. The Gemara's two examples are: (1) The case of a Kohen's daughter and her adulterer, where the adulterer is a grown man and the witnesses identified him; her penalty is burning and his penalty is strangling. (2) The case of a Kohen's daughter and her *zomemei zomemin*, where the adulterer is a minor or is unidentified; her penalty is burning and the *zomemei zomemin*'s penalty is strangling, but the adulterer is not subject to any penalty. Thus, there are two *separate* examples of “one sin with two death penalties.”

16. The Gemara gives the case of *zomemei zomemin* as an example of a single sin with two different death penalties. Obviously, even in that case — where the adulterer is exempt from death — the Kohen's daughter is killed by burning while the *zomemei zomemin* are killed by strangling.

17. The punishment of the second set of witnesses (the *zomemei zomemin*) is the same as what they were trying to cause to the first set by accusing *them* of being *zomemin*. Obviously, then, if the first set had actually been convicted as *zomemin*, then *they* would

have been executed by strangling. Now, Tosafos has shown that the Gemara must be speaking of a case where there is *no* death sentence for the adulterer. Even so, the *zomemin* would have been punished with strangling. It is thus clear that even when witnesses give testimony to execute a Kohen's daughter but *not* the man (e.g., they claim she committed adultery with a minor), if they are found to be *zomemin*, they are executed by *strangling*, not by burning. This proves what Tosafos said earlier — that the *zomemin* of a Kohen's daughter are executed by strangling even when the man was not sentenced to death, because the verse “*she*” excludes *zomemin* from being executed by burning in *all* cases.

In short, the case of *zomemei zomemin* sheds light on the law of *zomemin*. Since *zomemei zomemin* receive strangling even when the adulterer is exempt from death, it must be that *zomemin* (i.e., the first set, if they are convicted) receive strangling in such a case. Clearly, the verse “*she* [profanes her father]” excludes the *zomemin* of a Kohen's daughter from *ever* being executed by burning.

תוספות

ועוד מדקתני לקמן.

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are executed in the way that the *man* they accused of adultery would have been executed (i.e., by strangling), not in the way the *woman* would have been executed (i.e., by burning).

Tosafos explains why both verses are necessary: From the word "*she*" alone, we would have excluded only the *adulterer* from burning, not the *zomemin*. We need "*as he plotted to do to his brother*" to teach that the *zomemin* receive the *man's* punishment of strangling rather than the woman's punishment of burning. On the other hand, from the term "*to his brother*" alone, we would have excluded the *zomemin* from burning only in cases where they actually plotted to make the adulterer die through strangling. We need the additional teaching of "*she*" [but no one else] to exclude the *zomemin* from burning (and make them liable to strangling) even in a case where their testimony would not have affected the adulterer, such as where he was a minor, or his identity was not known.

Tosafos brings proof to his novel point that the *zomemin* of the Kohen's daughter are punished with strangling (not burning) even when their testimony would not have triggered a strangling penalty:

The Gemara in *Sanhedrin* gives two cases where *beis din* must judge separate kinds of death penalties that came about through a single act of adultery. One case is where the judgment is about a Kohen's daughter and her adulterer, where she is subject to burning and he is subject to strangling. The second case is where the judgment is about a Kohen's daughter and her *zomemei zomemin*. In order for the second case to be different from the first, it must refer to a situation where there is no punishment for the adulterer (e.g., he was a minor), and *only* the *zomemei zomemin* are executed by strangling. Since the punishment of the *zomemei zomemin* is the same as what the original set of witnesses would have received if they had remained convicted as *zomemin*, we must conclude that the *zomemin* of a Kohen's daughter are executed by strangling even when their testimony would not have caused the man to be executed.



ד"ה ועוד

□ ועוד מדקתני לקמן — FURTHERMORE, THE MISHNAH TEACHES BELOW: But if [a second set of witnesses] said to [the original set]: "How can you testify about this when you were with us that day in another place?" they are *zomemin*.^[1]

Introduction

§ **Hazamah/The Punishment of Zomemin:** See Introduction to the first Tosafos on this *amud* [p. 3] (דה מעידין [א']).

§ **The Gemara's Questions:** The Mishnah begins with the question: כיצד העדים נעשים זוממין, *In what manner do witnesses become zomemin?* It responds with cases of *zomemin* who do not receive the usual *hazamah* punishment, but only *mal'kus* [i.e., those who testify falsely that a valid Kohen is a *ben gerushah* or *ben chalutzah*, or that someone is liable to exile]. The Gemara asks that since these witnesses do not receive the *hazamah* penalty, they are not really *zomemin*, and therefore, the Mishnah should have said, "In what manner do witnesses *not* become *zomemin*!"

1. This Tosafos is printed out of order. It belongs before ד"ה כל הווממין.

תוספות

פירש הקונטרס דמאי צעי פילד וכו', הא קתני לקמן וכו'. ועוד יש לפרש, ועוד, פלומר ואם תמצא לומר דלשון

TOSAFOS

The Gemara then asks a second question from the Mishnah below (5a). This second question is the topic of Tosafos' discussion.

✎ **The Objective of Tosafos** is to clarify the meaning of the Gemara's second question. Tosafos will present Rashi's interpretation, and then offer his own.

After asking that the Mishnah should have said, "In what manner do witnesses *not* become *zomemin*,"^[2] the Gemara poses another question: "Furthermore, the Mishnah teaches below (5a): *But if [a second set of witnesses] said to [the original set]: 'How can you testify about this when you were with us that day in another place?' they are zomemin.*"^[3] The meaning of this second question is not immediately clear. Tosafos cites Rashi's approach:

דמאי צעי ביצד — Rashi explained that this is a completely new question, as follows: **פירש הקונטרס** — **Why does [our Mishnah] need to ask, "In what manner do witnesses become *zomemin*," when the Mishnah below (5a) clearly teaches the details of the *hazamah* process?**^[4]

According to Rashi, the Gemara is noting two separate difficulties with our Mishnah's opening phrase: (a) The Mishnah should have said, "In what manner do witnesses *not* become *zomemin*," and (b) the Mishnah's question of how witnesses become *zomemin* is unnecessary, since the details of the *hazamah* process are clearly laid out in the Mishnah below.

Tosafos suggests that the Gemara does not mean to ask a new question, but merely to strengthen the Gemara's original question:

ועוד יש לפרש — But it is also possible to explain this second question differently, as preempting a possible response to the Gemara's initial question. The Gemara first asked that since the Mishnah deals with witnesses who do *not* receive the usual *hazamah* punishment, the Mishnah should have said, "In what manner do witnesses *not* become *zomemin*." The Gemara now considers and rejects a possible response. The Gemara's words are understood as follows: **ועוד — When it says, "Furthermore..."** — **[the Gemara] is implying that you might suggest that the question can be answered by saying that when the Mishnah refers to these witnesses as *zomemin*, it is simply using the language of *hazamah* to refer to witnesses who have been disproved through *hazamah*, but it does not mean to say that these witnesses are actually *zomemin*.**^[5]

2. The witnesses discussed in our Mishnah are discredited through the *hazamah* process (i.e., by a pair of witnesses saying that they were with them elsewhere on that day), but are not subject to the full law of *hazamah*, since they do not receive the punishment they intended for their victim. Why, then, the Gemara asks, does the Mishnah refer to them as *zomemin*?

3. The Mishnah on 5a explains that witnesses become *zomemin* through testimony about their own actions. In the case of witnesses who testify to a murder, if the second set of witnesses says that the murderer or his victim was with them on that day in another place, the first witnesses are not *zomemin*. But if the second set says that the witnesses *themselves* were with them on that day in another place, they are *zomemin*, and are given the death penalty that they tried to inflict on the defendant.

4. Since that Mishnah explains how witnesses become *zomemin*, there is no reason for our Mishnah to ask how it occurs.

5. In other words, one might try to answer that when

the Mishnah speaks about witnesses becoming *zomemin*, it uses this language to refer to witnesses who are merely discredited through the *hazamah* process (by other witnesses claiming that they were with them in another place at that time), but are not subject to the full law of *hazamah* with respect to punishment. This is why the Mishnah begins by saying, "In what manner do witnesses become *zomemin*," and then goes on to discuss cases where the witnesses are disproved through *hazamah* but are *not* given the same punishment they intended for their victim [such as where they testified, "he is a *ben gerushah*"] (see *Ritva*; see *Maharsha* and *Maharam* for other approaches).

This suggested answer is based on the fact that *hazamah* has two parts: (a) It discredits the witnesses without directly contradicting their testimony; and (b) it makes the witnesses liable to the same punishment they tried to impose on the accused. According to Tosafos, the Gemara is suggesting that when our Mishnah says "*zomemin*," it refers to witnesses who were discredited, but did not become liable to the *hazamah* penalty.

תוספות

הַזְמִינָה הוּא, זֶה חֵינוּ, דְּעַל פְּרָחָךְ דִּין הַזְמִינָה קֹאֲמֵר, כְּדִקְדָּנִי וּלְאֵלּוּמִי קוֹשִׁייתָא קַמִּייתָא:

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However, **this cannot be correct**, — because it *must* be that when our Mishnah mentions “*zomemin*,” it is referring to actual *zomemin* who are subject to the full law of *hazamah*. Why must this be so? The Gemara explains: — This is as the Mishnah teaches below (5a): But if [a second set of witnesses] said to [the original set]: “How can you testify about this when you were with us that day in another place?” [the first ones] are *zomemin*, and they are executed on the word [of the second set]. That Mishnah explains how witnesses “become *zomemin*.” In describing the *hazamah* process there, it gives the case of witnesses who are subject to the full *hazamah* punishment (“they are executed ...”). From there we see that when the Mishnah speaks of witnesses who “become *zomemin*,” it refers to witnesses who are not only *discredited* through *hazamah*, but also receive the punishment they intended for their victim!⁶

Tosafos sums up:

— And thus, this second question comes only to strengthen the original question, by proving from the Mishnah below that when our Mishnah uses the term “becoming *zomemin*” it refers to *zomemin* who are not only *discredited*, but are actually subject to the full law of *hazamah*. This reinforces the Gemara’s original difficulty, that since our Mishnah’s rulings are about witnesses who are *not* subject to the full *hazamah* punishment, the Mishnah should have said, “In what manner do witnesses *not* become *zomemin*!”

Summary

Our Mishnah begins with the phrase, “In what manner do witnesses become *zomemin*.” The Gemara asked that since the witnesses of our Mishnah do not receive the usual *hazamah* punishment, the Mishnah should have said, “In what manner do witnesses *not* become *zomemin*.” The Gemara then cites the Mishnah on 5a, which details the *hazamah* process.

According to Rashi, the Gemara’s second clause is a separate question: Why does our Mishnah bother to ask how witnesses become *zomemin*, when this is clearly taught in the Mishnah below?

Tosafos, however, suggests that the Gemara does not mean to raise a new difficulty, but rather to strengthen its *original* question by deflecting a possible response. One might have tried to justify the Mishnah’s wording by saying that the term “*zomemin*” includes witnesses who are *discredited* through the *hazamah* process, even though they do not receive the *hazamah* punishment. The Gemara proves from the Mishnah on 5a that the term “become *zomemin*” describes witnesses who are subject to the full law of *hazamah*, in which the *zomemin* are both *discredited and* receive the punishment they intended for their victim. Accordingly, since the witnesses of our Mishnah are not subject to the *hazamah* punishment, the Mishnah should have introduced its rulings with the phrase, “In what manner do witnesses *not* become *zomemin*!”

6. The actual process through which witnesses become *zomemin* is not described in our Mishnah. It is described only in the Mishnah on 5a, which begins with the words: ... אין העדים נעשים זוממין עד ... *the witnesses do not “become zomemin” until ...*. The Mishnah goes on to describe the full law of *hazamah*, in which the *zomemin* are both *discredited and* receive the punishment they intended for their victim (“they are executed ...”). This is the only description of the *hazamah* process that appears in the Mishnayos of our tractate, and it associates “becoming *zomemin*” with the full law of *hazamah*.

We see that in the language of the Mishnah, the phrase “become *zomemin*” refers to witnesses who receive the full *hazamah* punishment that they intended for their victim (and not merely to witnesses who are *discredited* through the *hazamah* process).

Thus, the Gemara’s first question is strengthened: Since the witnesses of our Mishnah do *not* receive the penalty they intended for the accused, our Mishnah should not have said, “In what manner do witnesses become *zomemin*,” but rather, “in what manner do witnesses *not* become *zomemin*.”

תוספות

בְּעִינֵן בְּאֶשֶׁר זָמַם וְלִכָּא.

TOSAFOS



ד"ה בְּעִינֵן

□ **בְּעִינֵן בְּאֶשֶׁר זָמַם וְלִכָּא** — If witnesses who tried to disqualify a Kohen were found to be *zomemin*, why do we not say that *they* are disqualified but not their children? Because **WE NEED** to fulfill the verse, “**AS HE PLOTTED TO DO** (*ka’asher zamam*),” **AND THIS IS LACKING**, since the witnesses had plotted to disqualify the person’s children as well.

Introduction

- § **Hazamah/The Punishment of Zomemin:** See Introduction to the first Tosafos on this *amud* [p. 3] (ד"ה מעידין [א]).
- § **Disqualification From Kehunah:** A woman who was divorced or who received *chalitzah* may not marry a Kohen (Mishnah 13a). If she illegally marries a Kohen and has a son, the son is deemed a *chalah*, meaning that he is disqualified from the Kehunah. The *chalah's* own sons, and all later generations, are also disqualified.
- § **Zomemin Who Plotted to Disqualify Someone:** Our Mishnah rules that if witnesses who are Kohanim testified that a certain Kohen is disqualified from the Kehunah (e.g., he is a *ben gerushah* or *ben chaltzah*), and the witnesses are found to be *zomemin*, they are not punished by being disqualified from the Kehunah themselves. Rather, they receive *mal'kus*. The Gemara explains that the reason we do not punish the witnesses with *ka’asher zamam* (“as he plotted”) is that disqualifying the witnesses as they had plotted would also cause their *children* to be disqualified, but the Torah says, “you shall do *to him* as he plotted,” which implies: *to him* but not to his children.
- § **An Egyptian Convert:** If a person from the nation of [ancient] Egypt converts to Judaism, he and his children (the second generation) are forbidden by Torah law to marry into the general Jewish community. They may marry only people of their category. However, the convert’s grandchildren (the third generation) are allowed to marry regular Jews (*Devarim* 23:9).
- § **The Objective of Tosafos:** Tosafos seeks to clarify the law in a case where witnesses testify that someone is a second-generation Egyptian convert, meaning that he is unfit to marry into the community but his children are fit, and the witnesses are then found to be *zomemin*.

Q. We have learned that if witnesses try to disqualify a Kohen, and are then found to be *zomemin*, they do not become disqualified from the Kehunah themselves, because in order to punish the witnesses exactly as they plotted for their victim, we would have to also disqualify their children, but the *hazamah* penalty can be given only “*to him*” (the witness himself), not to his children. Instead, the witnesses receive *mal'kus*.

Tosafos understands that this rule applies not only in the specific case of witnesses who tried to disqualify someone from the Kehunah, but also in any case where they tried to disqualify someone from marrying into the general Jewish community.¹ If the witnesses are found to be *zomemin*, we do not disqualify *them* from marrying into the community; rather, we punish them with *mal'kus*, because the *hazamah* punishment is given “to him but not to his children.” Tosafos asks that based

1. See the end of Tosafos ד"ה מעידין, above.

תוספות

קָשָׁיָה, הִיכָא שְׁמַעֲדִין שְׁהוּא מִזְרֵי שְׁנִי, דְּחִינָן בְּחִין לְפָסוּל זָרְעוּ כִּי אִם לְפָסוּל, אִם כֵּן נָפְסוּל? וַיֵּשׁ לומר דְּמַבְל מְקוֹם אֲשֶׁר נָפְסוּל, דְּפָסְלָה בְּבִיחָהּ, וְכַתִּיב וְעָשִׂיתָם לוֹ כְּאֲשֶׁר זָמַם, לוֹ וְלֹא לְאִשָּׁתּוֹ:

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on this reasoning, there should be one disqualification that *could* be imposed upon the *zomemin* in punishment:

קָשָׁיָה — There is a difficulty here: **הִיכָא שְׁמַעֲדִין שְׁהוּא מִזְרֵי שְׁנִי** — Let us consider a case **where [the witnesses] testify that [a certain person] is a second-generation Egyptian convert**; i.e., he is the *son* of an Egyptian convert. Such a person is forbidden to marry a regular Jewish woman, but his children (the third generation) are permitted to do so,^[2] **— דְּחִינָן בְּחִין לְפָסוּל זָרְעוּ כִּי אִם לְפָסוּל** — so it emerges **that [the witnesses] are not coming to disqualify [this person's] children at all, but only to disqualify him.** **אִם כֵּן נָפְסוּל** — **If so**, when the witnesses are found to be *zomemin*, **we should disqualify them** from marrying regular Jewish women, since this penalty will have no effect on their children, and is exactly what they tried to do their victim! Why indeed do we *not* disqualify the *zomemin* in this case?^[3]

A. Tosafos answers that while it is true that giving the witnesses the status of second-generation Egyptians would not affect their children, this punishment has a *different* consequence that prevents us from applying it:

וַיֵּשׁ לומר — **We can answer** **— דְּמַבְל מְקוֹם אֲשֶׁר נָפְסוּל** — **that** although the witnesses' testimony (that the person is a second-generation Egyptian) would not have disqualified his *children* in any way, **nevertheless, his wife would have become disqualified** from marrying a Kohen after his death, **— דְּפָסְלָה בְּבִיחָתָהּ** — **since he would have disqualified her by cohabiting** with her.^[4] Thus, if we were to punish the witnesses with the same penalty they intended for their victim, we would have to disqualify their wives as well. **וְכַתִּיב וְעָשִׂיתָם לוֹ כְּאֲשֶׁר זָמַם** — **But we cannot do this, because [the Torah] writes: And you shall do "to him" as he plotted,** **לוֹ וְלֹא לְאִשָּׁתּוֹ** — which implies, **"to him, but not to his wife"**!

Just as the Gemara learned from the words *"to him"* that the punishment of *ka'asher zamam* cannot be given to the children of the witness, so does the verse imply that the *ka'asher zamam* penalty cannot be given to the *wife* of the witness. Therefore, in the case of witnesses who tried to disqualify someone as a second-generation Egyptian convert, since giving them this disqualification would also cause their wives to become disqualified, the law of *ka'asher zamam* cannot be fulfilled. That is why the *zomemin* are punished with *mal'kus* rather than disqualification even in this case.

2. As explained in the Introduction, an [ancient] Egyptian who converted to Judaism would be forbidden to marry into the general Jewish population, and his children (the second generation) would also be forbidden to do so. The convert's grandchildren (the third generation), however, would be permitted to marry regular Jews.

3. The Gemara explained that the reason we cannot give the *ka'asher zamam* penalty to witnesses who tried to disqualify someone from the Kehunah is that this would cause their children to also be disqualified, which the Torah does not allow. Tosafos asks that this reasoning does not apply in a case where the witnesses plotted to label someone a second-generation Egyptian, since their testimony would *not* have caused the person's children to be disqualified. In that case, why are the witnesses themselves not disqualified, exactly as they plotted for their victim?

[Maharsha wonders: On what basis does Tosafos assume that the witnesses are *not* disqualified? Perhaps

in this case we actually *do* impose the penalty of *ka'asher zamam*, and forbid the *zomemin* witnesses from marrying regular Jewish women! For various answers to Maharsha's question, explaining how Tosafos *knew* that these *zomemin* are not disqualified, see Otzar Mefarshi HaTalmud.]

4. A woman who cohabits with a man whom she is forbidden to marry becomes disqualified from ever marrying a Kohen [e.g., if she is subsequently widowed] (*Yevamos* 68a). Therefore, had the witnesses succeeded in their plot to identify this person as a second-generation Egyptian, his wife would no longer have the option of marrying a Kohen after her husband's death, since she would be considered as having cohabited with someone who is forbidden to her.

[There is a dispute between Tannaim (in *Yevamos* 68a, 69a) as to whether cohabiting with a second-generation Egyptian disqualifies a woman from marrying a Kohen. Tosafos follows the view that it *does* disqualify her.]

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Summary

Tosafos has a difficulty in a case where witnesses testify that someone is a second-generation Egyptian convert, which prohibits him to marry into the community, and the witnesses are then proven to be *zomemin*. The law is that the *zomemin* are not disqualified from marrying into the community, as they “plotted to do”; rather, they receive *malkus*. Tosafos ask: Since the factor that normally prevents us from punishing *zomemin* with disqualification is that this would also disqualify their children, in this case the witnesses *should* be disqualified, because doing so would not affect their children at all, since the children of second-generation Egyptians are *fit* to marry into the community!

Tosafos answers that in this case, too, the witnesses’ disqualification would negatively affect someone other than the witnesses themselves, because giving them “second-generation Egyptian” status would cause their own wives to be disqualified from ever marrying a Kohen. The verse of *you shall do “to him”* teaches not only that the punishment of *zomemin* may not extend to their children, but also that it may not extend to their wives.