

Ein Shaliach Lidvar Aveirah

“I Was Only Following Orders” The Criminal Agent

Kiddushin 42b

Teacher's Guide

According to Jewish law, a person may appoint a *shaliach* (agent) to act on his behalf in carrying out various tasks. Through an agent one can conduct business (e.g. sell property), perform many mitzvot such as brit milah, and could even theoretically (though not advised) get married by means of an agent!

What about performing a transgression on behalf of somebody else? What if someone tells you to do a crime for him and you do it – who is the guilty party? The person who desires and asks that the crime be done, the one who actually accomplishes the misdeed, or both?

To complicate matters, someone might inadvertently find himself doing a criminal act on behalf of another **without even knowing it**, such as working on a computer with stolen software. Who then is held responsible?

In this class we will delve into a passage in the Talmud and look into what commentators and contemporary *halachic* (legal) authorities say about an issue that we will discover **can often hit close to home**.

KEY QUESTIONS

- When one person orders another to do something wrong – and he goes and does it – who is the guilty party?
- Does it make a difference if the agent does the action reluctantly or willingly?
- What if one person got another to **unknowingly** do something wrong on his behalf? Who then is guilty?
- Are there some transgressions for which we hold the **agent** culpable and others where we hold **the one who ordered him** responsible?

CLASS OUTLINE

Section I. The Criminal Agent

Case 1. “My boss asked me to copy this software ...”

Case 2. “Slash my boss’s tires...”

Section II. The Unknowing Criminal Agent

Case 3. Mrs. Heist and the Two Innocent Criminals

Section III. One Exception to the Rule – *Shelichut Yad*

Case 4. Lending Your Friend’s Bike Without Permission

Note: This shiur is not intended as a source of practical *halachic* (legal) rulings. For matters of halachah, please consult a qualified *posek* (rabbi).

SECTION I The Criminal Agent

Case 1. "My Boss Asked Me to Install This Software"

Shari recently got a job in IT at Shodeid Studios, a mid-sized web-design company. Soon after she came on board, she noticed that the number of programs installed on their computers did not correspond with the number of licenses they hold. She also found some questionable CDs, which appeared to be illegal copies, in a drawer in the office. She voiced some of her concerns to the bookkeeper but was not satisfied with the vague answers she received. In another hushed conversation, a coworker sardonically commented that the boss is from the "one disk for the world" generation. Shari, having spent four years as a developer, is sensitive to copyright law, and now has found herself feeling trapped in a setting of...piracy.

One day Shari was fixing the computer belonging to the boss, Mr. Balin. While Shari was working, the boss pulled out a flash drive and asked her, "Can you please install the graphics software on my, Vince's and Joe's computers? My son got a copy at his company, and he let me borrow it."

Shari said nothing at the moment but realized that she has a serious moral dilemma on her hands.

Can Shari perform her boss's request and install software she knows is pirated?

Is the following position defensible: "I would not do this myself, but in this case my boss is really the one doing it"?

Before we answer our question and see how Shari should manage her dilemma, we must introduce two assumptions:

1. It is prohibited to install proprietary software without purchasing a license.

This topic has been dealt with at length in contemporary halachic literature. A few of the reasons cited for halachically prohibiting software piracy are: It is prohibited by secular law (assuming that halachah recognizes the law through the principle of *dina demalchuta dina*); it harms the livelihood of the software developer, causing him a loss; it involves breach of contract; and it is actually defined as theft.

2. Jewish law recognizes *shelichut* (agency) as a legal means of representing someone else. Person A can request Person B to do an action on Person A's behalf, and Person A is considered as having done it. The following passage is the Talmudic source for this halachic principle:

1. Gemara Kiddushin 41b – Halachah recognizes agency.

A person's agent is considered like himself.

שְׁלוּחֵי אָדָם כְּמוֹתָיו.

The Gemara bases this principle on biblical verses. It applies to a range of different areas of halachah, such as selling and purchasing, divorce, sacrifices, tithes, circumcision (most people don't circumcise their own children, but use an agent

– the *moheh* – for performing the mitzvah), and others. An appointed agent, a shaliach, can sell on a person's behalf, and the sale is legally binding. A divorce can be executed through an appointed agent, and so on. By contrast, certain mitzvot are required to be performed by the individual himself, and an agent cannot be appointed on one's behalf to do these mitzvot, such as eating matzah, dwelling in a Sukkah or waving a lulav during Sukkot.

What about a transgression? What about a crime? If you ask someone to do something wrong on your behalf, is it considered your act or does the act relate back to the person who requested it?

Consider the following Mishnah:

2. Mishnah Bava Kamma 59b – Who is liable for damages when someone has another person light a fire?

If one set a fire by placing it in the hand of a deaf-mute, an insane person, or a child, he (the healthy adult) is exempt from liability in a human court (the victim cannot claim damages through the legal system), but he is held responsible by the “Heavenly Court” (the healthy adult has a moral obligation to pay the damages). If he set a fire by sending a healthy adult agent, the agent is liable.

בבא קמא נט:
השולח את הבוערה ביד חרש
שוטה וקטן, פטור בדיני אדם.
וחיב בדיני שמים. שלח ביד
פקח הפקח חיב.

In the second case of the Mishnah we learn that if a person asks another to light a fire, and the fire damages the property of a third party, the agent is liable. What does this teach us about the rules of agency in areas of wrongdoing?

3. Kiddushin 42b – The Gemara raises a difficulty in the Mishnah vis-à-vis the principle of agency.

[How can we understand] the Mishnah in Baba Kama 59b that teaches us, “If one set a fire by placing it in the hand of a deaf-mute, an insane person, or a child, he is exempt from liability in the human court but is obligated according by the ‘Heaven Court,’ but if he set a fire by sending a healthy adult agent, the agent is liable”? Why do we rule this way? Should we not say, “A person's agent is considered as the sender himself,” [and the person who sent him will be liable]?

והא דתנן “השולח את הבוערה
ביד חרש שוטה וקטן, פטור
בדיני אדם. וחיב בדיני שמים.
שלח ביד פקח הפקח חיב”:
ואמאי? נימא שלוחו של אדם
כמותו?

The question of the Talmud is very clear: Based on the principle of legal agency (*shelichut*), the act of lighting the fire is related back to the person who ordered it. Why then is the person who lit the fire (the agent) liable, rather than the person who ordered its lighting?

What is the Gemara's resolution?

4. Ibid. – How does the Gemara resolve the difficulty?

Answer: [In general, agency is effective,] but we treat the case of damage differently because **“agency is ineffective concerning transgression.”** The reason for this is that we say [rhetorically, to the one who actually lit the fire], “You heard both the words of the Teacher (God who forbids damaging) and the words of the student (the person who instructed you to do something wrong) – whose words do you listen to?”

שְׁאֵי הֵתָם דְּאִין שְׁלִיחַ לְדַבֵּר
עֲבִירָה דְּאִמְרִינָן דְּבָרֵי הָרַב
וְדְבָרֵי תַלְמִיד דְּבָרֵי מִי
שׁוֹמְעִים?

The Gemara presents us with a special principle concerning agency: **Agency is ineffective concerning transgression.** The excuse of “I was only following orders” is not acceptable concerning transgression or wrongdoing. Our response is sharp: “You were **already** given prior orders not to do that by the Highest Authority. You should not have listened to a **human** authority, but to **God** who told you not to do it!”

Based on this passage in the Gemara, Shari must refuse to install the software. She cannot claim that it is legitimate for her as an employee to do whatever Mr. Balin, her employer, instructed her to do. If she goes ahead and installs the software, she will be held liable for any compensation or punishment that halachah dictates.

Yet, it is important to note that the principle that agency is inapplicable to transgression is not unanimously agreed upon. At the close of the above passage in Kiddushin, the Talmud records an approach which maintains, as a rule, that *shelichut* **does** apply to transgression, in which case the person who ordered the transgression will be culpable.

After listing a number of exceptions to the rule that agency does not apply to transgression, the Gemara records the radical approach of the Elder Shamai, quoting the Prophet Chagai.

5. Ibid. 43a – Does agency apply to murder?

If a person tells his agent, “Go kill a person,” the murderer is liable, and the person who sent him is not. [However,] Shamai the Elder quoted the Prophet Chagai, who said that the person who sent the murderer is liable, for it says (when David had Uriah sent to the front lines by his general Yoav), “You (David) killed him (Uriah) through the sword of the Amonites.”

הָאוֹמֵר לְשַׁלּוּחוֹ, “צֵא הָרֹג אֶת
הַנֶּפֶשׁ,” הוּא חַיִּב וְשׁוֹלְחֵי
פְּטוֹר. שְׁמַאי הִזְקֵן אוֹמֵר
מִשּׁוֹם חָגִי הַנְּבִיא שׁוֹלְחֵי חַיִּב
שְׁנַאמֵר, “אוֹתוֹ הִרְגַתְּ בְּחֶרֶב בְּנֵי
עַמּוֹן.”

The Gemara suggests three different approaches to understanding Shamai's statement that the person who ordered a murder is liable for it. The first approach

is that he maintains, as a rule (based on his methodology of deriving halachot from Torah verses), that agency **does** apply to sin, so that the person sending the envoy is culpable!

[The other two approaches are: 1. murder is a unique exception to the normal principles of *shelichut* and in such a case the sender is liable; and 2. Shamai meant that the Heavenly Court considers him a murderer, but a human court could not convict him.]

This does not make it permissible for Shari to commit a crime just because her boss told her to; she is still being party to committing a crime, and this remains a wrongdoing (see also below, Sources 6-7). Yet, it would open up the possibility that her boss is actually held responsible for that crime.

Let us further explore the practical ramifications of the approach that maintains that agency **does** apply to sin and crime (*yesh shaliach lidvar aveira*), so that the person sending the envoy will be liable. Sometimes the issue at hand is not whether to perform a wrongdoing on behalf of another, but who must bear liability for it after the event. Let us look at an unfortunate case where A sent B to damage C:

Case 2. “Slash my boss’s tire...”

Zeke was still bitter about getting fired from his job at MTX International, and was determined to get back at his former boss Rex, who, in his eyes, wronged him. Unfortunately, Zeke’s unhealthy and immoral side came to the fore, leading him to recruit two neighborhood ruffians – Mazik and Mashchit – to slash his boss’s tires (promising them tickets to an upcoming World Cup soccer game). Due to their unprofessional, sloppy work, they were caught in the act. Rex is sure that Zeke is behind it and claims \$2436 (plus tax = \$2636.97), the cost of replacing all four tires of his 2014 Bentley Continental GT.

Zeke, who happens to have a sizable bank account, claims that because Mazik and Mashchit actually caused the damage, they should pay. Mazik and Mashchit, who have few assets, claim: “We were only following orders!” and that Zeke, who commissioned them, should pay. Zeke’s response: “No way! Who says you have to do everything I say? You did it, not me!”

Can you support Zeke’s reasoning?

Do Mazik and Mashchit have a leg to stand on?

Rex clearly has a claim for damages. To whom should the claim be directed?

Following the approach that agency **does** apply to criminal acts, sins and wrongdoings, it would seem that Zeke, the sender, is culpable.

As we just saw in Source 5 above, according to one approach in the Talmud, this is the position of Shamai the Elder. According to the other approaches of the Talmud, even Shamai the Elder maintains that agency is not applicable to transgressions, indicating that the agent is responsible.

The question we now wish to address, however, is whether recognition of agency for transgression will actually get the agent off the hook. Meaning, in light of Shamai the Elder's position, will Mazik and Mashchit be entirely exempt from all punishment? Or in other words: If agency **does** apply to crime, is a crime perpetrated by an agent **solely the crime of his sender**, or **does the agent also have a share**?

Early commentaries to the Talmud relate explicitly to this issue.

Rashi clarifies the question of who bears responsibility assuming that agency applies to transgression.

6. Rashi, Kiddushin 42b – Would the sender have sole responsibility for the crime?

Should we not say that a person's agent is considered like himself? [If so,] we would then say that the sender is liable (for damages) and not the agent.

גִּימָא שְׁלוּחוֹ שֶׁל אָדָם כְּמוֹתוֹ? -
יִתְחַיֵּב שׁוֹלְחוֹ וְלֹא הַשְּׁלִיחַ:

This is apparently the simple rendition of the Gemara. Yet, see how Tosafot Rid (Rabbi Yeshaya di Trani, Italy 1180-1250) differs with Rashi.

7. Tosafot Rid, Kiddushin 42b – Can a criminal agent ever be absolved from liability?

“If he set a fire through [the agency of] another healthy adult, the other healthy adult is liable.” Why do we rule this way? Should we not say, “A person's agent is considered as himself” and obligate the sender? This means to say: Although the agent cannot be exempted from liability, because he is a normal healthy adult (and therefore responsible for his own actions), the practical ramification (of recognizing criminal agency) is that if he (the agent) lacks the funds to compensate for the damage, the victim can claim the money from the person who sent him.

שְׁלַח בְּיַד פְּקֻחַ הַפְּקֻחַ חַיִּיב
וְאִמָּאֵי גִימָא שְׁלוּחוֹ שֶׁל אָדָם
כְּמוֹתוֹ וְלִיחַיִּיב הַמְּשַׁלֵּחַ!?
פִּירוּשׁ, וְאִם עַל גַּב דְּשְׁלִיחַ לֹא
מְצִי לְאִיפְטוּרֵי בֵּינוֹ דְּהוּא פְּקֻחַ,
נִפְקָא מִינָהּ דְּאִי לִיכָא
לְאִישְׁתַּלּוּמֵי מִיגִיָּה מִפְּרַע מִן
הַמְּשַׁלֵּחַ:

Assuming we **do** recognize criminal agency, what would Rashi and Tosafot Rid each say about liability for the tire slashing?

Rashi would say that Zeke (the sender) alone is liable – the agent himself is exempt. However, Tosafot Rid would rule that Zeke must pay only the part of the damages that Mazik and Mashchit cannot afford to pay. According to this view, the actual perpetrator of the crime – the agent – remains the party that bears primary liability, whereas the sender's liability is secondary.

Halachic Ruling

Do we or do we not recognize agency in cases of transgression? We will now examine how the halachic authorities rule, and then we will apply the ruling to the cases above.

8. Glosses of Rema to Shulchan Aruch, Choshen Mishpat 182:1 – What does the Shulchan Aruch rule about this principle?

Note: In all matters, a person's agent is considered as himself, except concerning transgression, for we take the position that agency is inapplicable to matters of transgression.

הָגָה: בְּכָל דְּבַר שְׁלוּחוֹ שֶׁל אָדָם כְּמוֹתוֹ, חוּץ מִלְדַּבֵּר עֲבִירָה דְקַיְמָא לֹא אֵין שְׁלִיחַ לְדַבֵּר עֲבִירָה.

This ruling is echoed elsewhere in the Shulchan Aruch (Yoreh De'ah 160:16 and Choshen Mishpat 348:8).

Thus, it emerges that not only will Shari have to refuse to install the software (as noted above, she would have to refuse according to all opinions), but if she did go ahead and install it, she alone would be held responsible for the cyber-crime.

Likewise, Mazik and Mashchit alone will be liable to pay for the damages they caused.

Causing Others to Sin

This leaves us with an uncomfortable question: ***Is Zeke getting off scot-free? Is Shari's boss exempt of all misdeed and crime? Surely, someone who ordered a crime or wrongdoing to be perpetrated should not get away unpunished?!***

According to Torah law, the sender is indeed exempt from financial liability. Yet, he has certainly committed the offense of **causing another to transgress**, which is included in the biblical instruction of “do not place a stumbling block before the blind.”

9. Vayikra (Leviticus) 19:14 – Do not place a stumbling block before the blind.

You should not curse a deaf man nor place a stumbling block before a blind man, and you should fear your God – I am God.

לֹא תִקְלֵל חֵרֵשׁ וְלִפְנֵי עוֹר לֹא תִתֵּן מְכֻשֵׁל וְיָרַאת מֵאֱלֹהֶיךָ אֲנִי ה'.

According to the Oral tradition, this verse teaches that we must not cause others to trip up in a metaphorical sense. The Rambam summarizes this aspect of the mitzvah:

10. Sefer HaMitzvot of the Rambam (Maimonides), Negative Commandment 299 – Do not bring others to sin.

The Sages also explained that this prohibition includes someone who aids a person in sinning

וְלֹא זֶה אָמְרוּ שֶׁהוּא כּוֹלֵל גַּם בֵּן מִי שֶׁיַּעֲזוֹר עַל עֲבִירָה אוֹ יִסְבֵּב אוֹתָהּ

or brings him to do so by blinding him with desire, so that he is considered visionless. He ensnares him and assists him in completing the sin, or prepares the cause of the sin.

כִּי הוּא יְבִיא הָאִישׁ הַהוּא שֶׁעֲנֵהוּ
תְּאֻתּוֹ עֵין שְׁכָלוֹ וְחִזּוֹר עוֹר וַיִּפְתְּהוּ
וַיַּעֲזְרֵהוּ לְהִשְׁלִים עֲבִירָתוֹ אוֹ יָכִין לוֹ
סִבַּת הָעֲבִירָה.

The Meiri, in his commentary on the Gemara's discussion of murder through an agent, thus cautions:

11. Meiri Kiddushin 43a – One who sends an agent to sin is an accessory to a crime.

Even though agency is not effective in areas of sin, one must nonetheless avoid causing another to stray. For a sin that one causes is referred to as his own. Thus we find that God told David concerning Uriah, “You killed him through the sword of the Ammonites.”

אִם עַל פִּי נְשִׂאִין נְשָׁלִיחַ בְּדַבַּר עֲבִירָה
מִכָּל מְקוֹם רָאוּי לְהִזְהַר שֶׁלֹּא לְגֵרוֹם
תְּקַלָּה שְׁכָל הַגּוֹרֵם תְּקַלָּה נִקְרָאת
הִיא עַל שְׁמוֹ הֵרִי הוּא אוֹמֵר לְדוֹד עַל
מַעֲשֵׂה אוּרִיָּה וְאוֹתוֹ הִרְגֵת בְּחַרְבַּ בְּנֵי
עַמּוֹן.

The Beit Yosef (Bedek Habayit, Yoreh De'ah 157) goes a step further, and writes that although the sender is not punishable by a human court, he is liable in the Heavenly Court – *chayav bedinei Shamayim*.

Someone like Zeke or Shari's boss, who orders others to commit a crime, does **not** “get off scot-free”! True, the **human** *beit din*, the human court, only punishes the actual sinner, but Jewish law relies on the **Heavenly** Court to mete out ultimate justice. Telling another to slash tires or pirate software is not a neutral act; it is the sin of “setting a stumbling block in front of a blind man,” causing another to sin, and is punishable by Heaven. And the Beit Yosef goes further and concludes that in Heaven's eyes Shari's boss is a thief and Zeke has done damage! The human court only punishes the first degree sinner but the facilitator of sin and crime is dealt with by God.

KEY THEMES OF SECTION I

- The majority opinion in the Talmud (and the halachic ruling) is that we do **not** recognize agency in areas of transgression, crime, and wrongdoing. However, a minority opinion does recognize agency even in these areas.
- Based on the majority opinion, if A orders B to do something wrong, B is liable for the crime. According to the minority opinion, A is liable for the crime (Rashi), possibly jointly with B (Tosafot Rid).
- The Talmud explains a simple reason for shifting the blame from the sender to the perpetrator. We tell the agent: “Whose words do you listen to – the human word that instructed you to transgress, or God who instructed you not to?”
- Who pays for damages if an agent was ordered to damage a third party? According to the majority opinion, the agent alone pays. According to the minority opinion, the matter depends on the dispute between Rashi and Tosafot Rid (as noted above).

- Even according to the (majority) opinion that does not recognize criminal agency, it is still wrong to order someone to do something wrong! Do not encourage another to sin. Although he is not legally responsible in a human court, he is nonetheless considered a sinner in the eyes of Heaven.

SECTION II The Unknowing Criminal Agent

Case 3. Mrs. Heist and the Two Innocent “Criminals”

Mrs. Heist was a boutique antique importer in New York City, mostly dealing in English antiques. She cultivated a friendship with two college-aged women who stopped by her shop periodically. She spoke about antiques, and they listened wide-eyed.

One day Mrs. Heist made the students an attractive offer. She said a client in London had a collection of rare antique clothes that she wanted to purchase, but due to their importance and value, she wanted them transported in protective garment bags taken as carry-ons by couriers she knew would take care of them. Would the students be interested in a four-day trip to London and on the return, each take a garment bag? The women happily accepted the offer. After the return flight from London to NYC, they were met by three customs agents, who took them aside and asked them to open their garment bags. To their surprise and horror, the customs officers cut open the padded garment bags and revealed tightly packed plastic containers full of ecstasy pills!

What the United States government will do to them remains to be seen, but what do you think about the culpability of an unwitting drug courier?

How do you view an unknowing criminal agent?

How do you view Mrs. Heist's culpability in this situation?

To help determine the liability of an “unknowing” criminal agent, we will examine an unusual example of agency discussed in the Gemara – a courtyard!

In a number of areas of halachah, a person's property (*chatzer* in Talmudic parlance, meaning a “courtyard”) can act on his behalf – for instance, a person can acquire an item by having it placed on his property.

The Talmudic Sages ask a conceptual question about how this acquisition works: Is a *chatzer* an extension of the person himself, so that the person directly acquires the object, or does the *chatzer* serve as his “agent” and acquires the object on his behalf? A *chatzer*, of course, is a completely unknowing agent, and we can thus extrapolate from the concept of its function as an agent to the nature and liability of a human but unknowing agent.

The Gemara raises a serious difficulty with the approach that sees a *chatzer* as an agent:

12. Bava Metzia 10b – How can a “courtyard” be considered an agent?

Is it possible to view the courtyard mechanism as agency? Do we not learn in the following Baraita: “In his hand’ (Shemot/Exodus 22:3) – a stolen object is found in the thief’s hand – if the Torah had not written anything else I would assume that the Torah liability refers only to theft by means of the thief’s hand; what if he stole by means of his courtyard, roof, or storage area? The Torah therefore adds the words, ‘If it is surely found,’ (Ibid.), teaching us that he is liable no matter what.”

מי איכא מאן דאמר חצר חצרו משום שליחות איתרבאי? והתניא: “בדידו” (שמות כב:ג) אין לי אלא ידו, גגו חצרו וקרפיו מנין? תלמוד לומר “המצא תמצא” (שמות כב:ג) מכל מקום.

There are many ways of stealing, one of them being locking somebody else’s property in one’s own “courtyard.” Imagine that someone’s dog wanders onto Merlin’s estate through an open gate and Merlin locks the gate behind it, stealing and adopting the dog as his own. His courtyard helped him steal – all he did was lock the door!

Now, based on the understanding that a person’s chatzer functions as his agent, we appear to run into trouble with the principle (as established in Section I) of *ein shaliach lidvar aveirah* – there is no agency concerning transgression. If agency doesn’t work for transgressions, how can a person steal by means of his courtyard-agent?

The Gemara itself raises this problem.

13. Ibid. – How can one steal through a courtyard-agent?

But if you take the position that one’s property is viewed as an agent, it emerges that we find a case in which one commits a crime [of theft] by means of an agent! Do we not hold that “Agency is not applicable concerning transgressions”?

ואי סלקא דעתך חצר משום שליחות איתרבאי אם כן מצינו שליח לדבר עבירה, וקיימא לן אין שליח לדבר עבירה!?

Can you think of a way of integrating all three statements?

1. My property functions as my **agent**.
2. When my yard helps me steal a dog, I am liable for the theft.
3. Agency is **not** recognized for crimes.

The Gemara cites two suggestions. The first is that criminal agency does apply where the agent is not obligated in the relevant mitzvah.

14. Ibid. – Ravina limits the principle of criminal agency.

Ravina says: Where does the principle “Agency is not applicable concerning transgressions” apply? It applies where the agent is prohibited from performing the crime. However, in stealing by means of a courtyard, which (as an inanimate object!) is not obligated in mitzvot, the person who sent him (the person who locked the gate, thereby “sending” his courtyard to steal the item) is liable.

אמר רבינא היכא אמרינן דאין
שליח לדבר עבירה היכא
דשליח בר חיובא הוא אבל
בחדר דלאו בר חיובא הוא
מיחייב שולחו.

The second possible qualification is that criminal agency applies where the agent has no choice in the matter of carrying out the agency.

15. Bava Metzia 10b – Rav Sama limits the principle of criminal agency.

Rav Sama says: Where does the principle “Agency is not applicable concerning transgressions” apply? It applies where the agent had the option to do it or not to do it. Concerning theft by means of a courtyard, which has no choice in the matter and is forced to be an accomplice to the crime, the one who sent him is liable.

רב סמא אמר: היכא אמרינן
אין שליח לדבר עבירה, היכא
דאי בעי עבד ואי בעי לא
עבד. אבל חצר דבעל כרחיה
מותיב בה מיחייב שולחו.

Based on each of these suggestions, how should we rule in the case of a human yet unknowing criminal agent? Perhaps the unknowing agent also “has no choice in the matter” (because he is unaware of the transgression). On the other hand, the agent differs from a courtyard in that a courtyard does not fall under the prohibition, whereas an agent does. What is the halachic ruling?

Tosafot relate directly to this question. The Gemara (Bava Kama 79a) mentions a case in which a scheming borrower deviously pays back a loan. He tells the lender to take a sheep in payment. However, unbeknownst to the lender, the sheep does not actually belong to the borrower! The Mishnah makes it clear that the borrower is considered a thief when the lender takes the sheep. The Tosafot ask why we do not apply the rule that agency does not apply to transgressions, and this is their answer:

16. Tosafot Bava Kama 79a “Netano” – A thief who uses an “unknowing agent” to steal is liable.

According to both approaches concerning why we do not recognize criminal agency...the principle is not applicable here. In general we say criminal agency is not applicable because the person ordering the crime does not know if the agent will commit the sin or not. In this situation (where the agent did not know any sin was involved)

ובין ללישנא דמפרש בפירק
קמא דבבא מציעא (דף י'
ושם) טעמא דאין שליח לדבר
עבירה משום דשליח בר
חיובא הוא ... ובין ללישנא דאין
בעי עבד אי בעי לא עבד אין
שניד לקאן דהתם אין יודע

the sender knows that the agent will transgress,
because the agent is under the misimpression that
the animal belongs to the sender.

שְׁהַשְּׁלִיחַ יַעֲבֹר אֲבָל כְּאֵן יוֹדֵעַ
הוּא נְשִׁיחָה מֵאַחַר שֶׁהוּא סָבוּר
שֶׁהוּא שְׁלוֹ.

According to the Tosafot, an unknowing agent is **not** liable for the crime, and the person sending him is: There **is** agency for transgressions, when the agent is unaware of the transgression.

Tosafot assume that the idea of the agent being obligated [by contrast with a courtyard which is not obligated] relates to the question we ask of the agent: “Whose words do you listen to, the Teacher’s [God’s] or the student’s?” Just as this question cannot be asked of a courtyard, which is inanimate, so it cannot be asked of somebody unknowing of the prohibition – he could not listen to the words of the Teacher, because he didn’t know there was any prohibition involved.

According to Tosafot, the Talmudic approach requiring the agent’s free choice [by contrast with a courtyard which has no choice] also relates to the choice between listening to God or to the sender; somebody unaware of the prohibition cannot choose.

Because the unknowing agent lacks the requisite knowledge to make an educated decision between following orders and refraining from sin, it follows that the person sending him is the true (and only) sinner, and he is liable for the perpetrated crimes. He cannot give the excuse that the agent should have listened to God rather than follow orders.

Mrs. Heist is thus considered the drug trafficker, and not the two students.

In practice, it is worth mentioning that many countries and states legislate extremely stiff penalties and punishments even for unknowing smugglers, thereby creating a powerful deterrent, inspiring even the nicest and most naïve to think twice and three times before “helping out” someone who asks them to “do them a favor” and transport packages and suitcases.

In fact, a dissenting approach appears in the sources – based on a Ritva on Kiddushin 42b and a comment by the Shach in Choshen Mishpat 348:6. Delving into the depth of this opinion is beyond the scope of this class. Yet, there is actually a case where there is certainly no dispute, and all will concede that the agent is exempt and only the person sending him liable. This will be true of a case where somebody makes use of somebody else as a tool – just as a person might use a hammer to cause damage.

Such cases are known as *bari hezeka* (“certain damage”). This term refers to circumstances where the fact that the agent is unknowing of the relevant crime creates a situation whereby the crime will be performed instantly and with certainty.

For instance, consider a (somewhat unusual) case where Simon asks his acquaintance Jason to help him break his gaming addiction by smashing his new

Nintendo Handheld Console with a sledgehammer. Jason, who happens to enjoy destroying the latest gadgets, gladly accepts the honor. The truth, however, is that the console isn't Simon's at all, but Mike's, and Simon wants to break it as an act of revenge for a past grudge.

In this case, Simon is simply using Jason as a hammer. As Rabbi Efraim Navon (Istanbul, Turkey, 1676-1734), in his work *Machaneh Efraim* explained, here all will concede that Simon alone is liable.

17. Machaneh Efraim, Laws of Property Damage 7 – Sometimes if one commands a wrongdoing, he can be held culpable.

Levi told Shimon to break Reuven's vessels, and he broke them because he thought they belonged to Levi – who told him to break them. Which one of them is liable to pay? It seems that Shimon is definitely exempt because he did not know that they belonged to Reuven...But regarding Levi, who told him to break them, it would at first seem that this case is the subject of a dispute (over whether agency applies where the agent does not know he is doing a crime)...However, when we delve deeper into this case, it is possible that everyone will agree that Levi must compensate. This is **not** based on agency, meaning that Shimon serves as Levi's agent. Rather, it is because it is as if Levi broke them himself. Since Shimon did not know (they belonged to Reuven), when Levi told him to break them, it is a case of *bari hezeka*, where **damage will clearly take place** (and he is liable to pay).

ומי שְׁאַמַר לְחִבְרוֹ לְשִׁבּוֹר
כְּלִים שֶׁל רְאוּבֵן וַיִּשְׁבְּרֵם מִחֶמֶת
שֶׁהָיָה סְבוּר שֶׁהֵם מִשְׁלַל לְוִי
שֶׁאַמַר לוֹ לְשִׁבְרֵם מִי מִשְׁנִיָּהֶם
חַיִּיב לְשַׁלֵּם. נִרְאֶה דְּשִׁמְעוֹן
וְדַאי פְּטוּר כִּינּוֹן שֶׁלֹא הָיָה יוֹדֵעַ
שֶׁהָיוּ שֶׁל רְאוּבֵן ... אֲבָל לְוִי
שֶׁאַמַר לוֹ לְשִׁבְרֵם אֵי חַיִּיב
נִרְאֶה לְכַאוּרָה דְּבִמְחֻלּוֹקֶת
שְׁנוּי ... אֲבָל כִּד דִּיִּיקִינָן בְּהַ
אֶפְשֵׁר דְּהִכָּא כּוּלֵי עֲלָמָא מוֹדוּ
שֶׁלְוִי חַיִּיב וְלֹא מִשּׁוּם שְׁלִיחוּת
וְלוֹמַר דְּשִׁמְעוֹן שֶׁשִׁבְּרֵם שְׁלוּחוֹ
הָוִי, אֶלָּא טַעְמָא הָוִי מִשּׁוּם
דְּחַשִׁיב לְוִי כְּאִלּוּ שִׁבְרֵם הוּא
שֶׁכִּינּוֹן דְּשִׁמְעוֹן לֹא הָוִה יוֹדֵעַ
כִּי אָמַר לוֹ לְוִי לְשִׁבְרֵם חֲרִי זֶה
כְּרִיא הִזְקָא.

Under such circumstances, where the resultant action is immediate and certain, **there is no need for the construction of agency to find the sender liable**. He has simply used a human tool for his criminal intentions, and he alone is liable for the results.

KEY THEMES OF SECTION II

- What is the status of an **unknowing** criminal agent – someone who was asked to do something but does not realize that what he is doing is a crime or sin? Is he or she liable or not?
- The answer to this question emerges from the rationale mentioned by the Gemara for the exemption of criminal agency, which levels an accusation at the agent: “Whose words do you listen to, the Teacher’s or the student’s?” Somebody who orders another to sin can always say, “I did not expect him to listen to me; he should have listened to God!” But when the agent does not

realize he is doing a crime, the person who sent him on his mission is held responsible.

- According to others, there is a blanket rule that there is no agency whatsoever in areas of sin or crime. Yet, where damage is an immediate certainty, such as where somebody instructs his friend to break an item (pretending that the item is his when it actually belongs to somebody else), the person giving the instruction will still be liable. In this case, the person who gave the instruction has used another person as a tool to damage, and only he (and not the tool) is liable.

SECTION III One Exception to the Rule - *Shelichut Yad*

Case 4. Lending Your Friend's Bike Without Permission

Ron went on a two-week vacation, and asked his cousin Mike to watch his bike. "Can I use it?" asked Mike.

"I know I am going to sound stingy, but I am very particular about my bike. It's a Focus Izalco Pro, and I've invested almost \$3,000 into it. I don't think you'd even want to take the responsibility for using it."

"Okay, okay, I was just asking."

Four days into Ron's vacation, Mike, a freelance writer, was doing an interview in his apartment with Lenny, a local social activist with a very powerful personality. "Wow. You've got a Focus! Can I take it for a spin? I would love to ride one of these, just for five minutes."

"Well, I don't know. I'm kind of protective about that bike," said Mike.

"I've been riding for seventeen years. Don't worry."

"Five minutes should be okay."

Even though Lenny was an extremely experienced and careful cyclist, something totally beyond his control took place. After riding the bike, he placed it near the curb. A powerful stray dog ran out of nowhere and knocked over the bicycle, which fell into the street and suffered damages estimated at \$700.

Who pays?

The dog has no owner.

Lenny?

Mike?

Does Ron absorb the loss?

*Whatever your answer, **why** is he liable?*

As we continue to study the passage in the Talmud about criminal agency (the continuation of Source 4 above), we are struck by something surprising: There are exceptions to the rule that criminal agency is not recognized; in certain instances, someone who sent another to perform a sin or crime **will** be held liable.

One of those exceptions is *shelichut yad* – literally “casting forth one’s hand” – which refers to someone who was supposed to be watching another’s property (as a guardian) and illegally uses it (“casts forth his hands” on it). Under these circumstances the guardian who uses the deposited object without permission becomes responsible for it, even if something happens to it beyond his control.

Note: Make sure the terminology does not cause confusion. The shiur has been speaking primarily about *shelichut*, agency (from the word *shaliach*, agent or messenger); and we now in Section III refer to a sin called ***shelichut yad*, illegally using a deposit.**

18. Kiddushin 42b – What happens if a guardian tells another person to use a third party’s object?

What is the exceptional case (where criminal agency is recognized) of using a deposit (“casting forth one’s hand,” using without permission something that another gave him to watch)? For we learn in a Baraita: “Concerning any matter of transgression” (Shemot 22:8)...The School of Hillel says...that perhaps only if he himself (the guardian) [used a deposit illegally is he responsible for subsequent damages]. How do we know that if he (the guardian) told his servant or agent to use it [the guardian is still responsible for all subsequent damages]? The Torah teaches this by adding the words, “any matter (devar is the Hebrew term for word) of transgression.” [Meaning, even by merely speaking, by telling another to use the deposited item, the guardian maintains responsibility for the object.]

שְׁלִיחוֹת יָד מֵאֵי הִיא?
דְּתַנֵּי אֶ – “עַל כָּל דְּבַר
פְּשָׁע” (שְׁמוֹת כב:ח)
...
וּבֵית הַלֵּל אוֹמְרִים ...
שְׂכֹל אֵין לִי אֶלָּא
הוּא, אָמַר לְעַבְדּוֹ
וְלְשִׁלּוּחוֹ מִנֵּי?
תְּלַמּוּד לּוֹמַר “עַל כָּל
דְּבַר פְּשָׁע.”

What does the Shulchan Aruch rule? We usually follow the rulings of Beit Hillel, the School of Hillel, so it should follow that a guardian who commits *shelichut yad* through an agent remains liable for damages to the object while it is used by the agent. Sure enough, that is the ruling.

19. Shulchan Aruch Choshen Mishpat 292:5 – One who commits *shelichut yad* through an agent will be responsible for damages.

One who illegally uses a deposit, either himself, or through an agent, becomes classified as a thief. He is therefore liable for any subsequent damages, even those beyond his control, and

שְׁלַחַן עֲרוּךְ חוֹשֵׁן מִשְׁפָּט רצב:ה
הַשּׁוֹלֵחַ יָד בְּפִקְדוֹן עַל יְדוֹ אוֹ
עַל יְדֵי שְׁלּוּחוֹ, תֵּרִי זֶה גְּזֵלוֹ

the object enters his domain so that he must pay according to the laws of thieves – as will be explained in the Laws of Theft.

וְנִתְחַיֵּב בְּאוֹנְסוֹ, וְנִעֲשִׂית הַגְּזֵלָה
בְּרִשּׁוֹתוֹ וּמִשְׁלֵם אוֹתָהּ כְּדִין
הַגְּזֵלָנִים שְׂוִיתָבְאָר בְּהִלְכוֹת גְּזֵלָה:

Based on this Gemara and the ruling of the Shulchan Aruch, the case of Lenny and Mike and the expensive bike seems to be an open and shut case. What should be the ruling? Who should pay?

It seems clear that Mike should pay. After all, he is the one who let Lenny use it. He was at first reluctant, but then agreed. Had he said no, Lenny would not have used the bicycle. This seems to be a case of a guardian (Mike) using a deposit (Ron's bicycle) by telling his agent (Lenny) to use it. Mike should thus be responsible for all subsequent damages, as the Shulchan Aruch rules.

However, the question is now whether the person who actually uses an object – in our case Lenny – gets **totally** off the hook, or whether he is **also** responsible for the item he took.

We can frame the question as follows: Is Lenny's use of the bike merely an extension of Mike's – Mike is illegally "using" the bicycle by giving permission to Lenny? Or are both of them illegally using the deposit, Mike by giving permission and Lenny by his actual use, whereby they will both be responsible for it? Or in other words: Is Mike alone considered a "thief" (as in Source 19), or are Mike and Lenny partners in theft?

The simple analysis of this question will bring us back to Sources 6-8. Based on Rashi, it appears that only the guardian will be liable. In this case the Torah **does recognize** criminal agency, so that only the sender (and not the agent) is culpable.

However, the second possibility (that both are responsible) appears in the Shach's commentary on the Shulchan Aruch:

20. Shach Choshen Mishpat 292:4 – When is the guardian and when is his agent liable in a case of *shelichut yad*?

The verse (Shemot 22:8, "Concerning any matter of sin," [which teaches that *shelichut yad* can be achieved through telling another to use the deposit]) is limited to a situation where the agent does not have the money to compensate. The ruling in that situation is obvious (according to all authorities). Whereas, in general, one who sent another to damage, the sender is exempt from any payment, even if the agent has no money (for compensation), here concerning *shelichut yad* the guardian (the sender) is obligated to compensate (because the biblical verse teaches us an extra scenario in which the sender-guardian is obligated).

... קָרָא (שְׁמוֹת כב:ח) - "עַל כָּל
דְּבַר פְּשָׁע" אֲתִי הֵיכָא שְׂאִין
לוֹ לְשֵׁלֵם, דְּפְשִׁיטָא דְלְכָלִי
עֲלָמָא בְּעֲלָמָא פְטוֹר הַמְשִׁלַּח,
הֵכָא חַיֵּיב. אֲבָל אִם יֵשׁ לוֹ
לְשֵׁלֵם וְיָדַע וְהוּא בֵר חַיֵּיבָא
דְּבִכִי הַאי גּוֹנָא פְשִׁיטָא דְחַיֵּיב
הַשְׁלִיחַ לְכוּלִי עֲלָמָא, מִשּׁוּם
דְּאִין שְׁלִיחַ לְדַבֵּר עֲבִירָה ...

Yet, if the agent has the money to pay, and he knew it was another's deposit, and he is obligated to avoid the transgression – there it is obvious that the agent is obligated to pay according to all authorities, for we do not recognize agency in matters of transgression.

Let us isolate three separate cases and see how the Shach relates to them:

- A.** If the person who actually used the deposit **did not know** that it didn't belong to the guardian, the guardian is of course liable for damages. (This case was not even mentioned in the source above.) In this case, assuming Lenny didn't know that the bike wasn't Mike's, he will certainly be exempt, and only Mike will be liable.
- B.** If the person who actually used the deposit **did know** that it didn't belong to the guardian (Lenny knew the bicycle did not belong to Mike), but he **did not have** the money to pay (Lenny did not have the \$700), then the guardian pays. This is the application of the Torah's teaching that "agency does apply to illegally using a deposit." Mike will have to pay Ron even though Lenny broke the bicycle, because the bike was in Mike's care.
- C.** If the person who actually used the deposit **did know** that it didn't belong to the guardian (Lenny knew the bicycle did not belong to Mike), and the user-breaker **did have** the money to pay (Lenny had the \$700), then the user-breaker pays. Lenny must pay Ron for the bicycle. He is guilty for knowingly using and breaking someone else's property.

According to the Shach the Torah does not exempt the guilty breaker. It only holds the guardian responsible, **in addition to the user**, in a situation where the breaker does not have the money (Case B). A biblical derivation teaches us that if the agent lacks the means to pay for the damages, the person who sent him must pay.

Yet, the Shach's opinion is not agreed upon universally. Because *shelichut yad* is an exception to the rule of criminal agency, it follows that a more simple analysis will see the agent as being entirely exempt (at least according to Rashi – see above, Sources 6-8), so that liability is transferred to the sender (Mike).

KEY THEMES OF SECTION III

- There are exceptions to the rule that we do not recognize criminal agency. One of them is *shelichut yad*, illegally using a deposit. Based on Beit Hillel's derivation from the wording of the biblical verse (Shemot 22:8, "Concerning any matter of sin") about the topic, a guardian is not only prohibited to use a deposit himself, but will be liable even if he tells another person to use it (and even where the other person knows that it is not his own).
- A person who transgresses *shelichut yad* becomes responsible for anything that subsequently happens to the item in question. Who is liable if one person told

another to use a deposit? If the person who used the item did so unknowingly, then of course only the guardian is responsible. Even if the person who used it knew the item was only a deposit, the simple understanding is that since criminal agency is recognized here, only the guardian will be liable. However, the Shach rules that both the guardian and the agent are liable – first the agent, and if he lacks funds to pay, then the guardian as well.

- Other exceptions to the rule of ein shaliach lidvar aveirah mentioned in the Talmud include: illegally deriving benefit from items donated to the Temple or set aside for sacrifices, slaughtering a stolen animal, murder (according to a minority opinion).

CLASS SUMMARY

When one person orders another to do something wrong - and the second person then does it - who is the guilty party?

The one who actually did something wrong is considered the guilty party. “He told me to do it” is not recognized as an excuse. It is still wrong to order another to sin or do a crime, but the one who gave the order is not legally responsible for the act. However, our passage concludes that one who ordered another to commit a crime is *chayav bedinei Shamayim* – meaning that in Heaven he is considered as having committed the crime. He has a moral-spiritual obligation to compensate in whatever way he can.

Is there a difference if the agent does the action reluctantly or willingly?

As long as the agent knows he is sinning and does it, the agent's reluctance makes no legal difference (though, of course, God judges every case according to its nuances). The agent is responsible for his sin even if he did it at the order of another.

What if one person got another to unknowingly do something wrong on his behalf? Who then is guilty?

An agent is only held responsible for crimes he knew he was doing. An unknowing agent is not culpable, whereas the one who sent him is. There is a dissenting opinion on this matter, which we did not elaborate on in the class. However, for some cases, where the damage is immediate and certain, the unknowing agent is certainly exempt, because we look at the situation as though the sending is damaging by means of a “human tool.”

Does it make a difference which crime was committed? Are there some transgressions where we hold the agent culpable and others where we hold the one who ordered him culpable?

Our blanket rule is ein shaliach lidvar aveirah – when an agent performs a transgression on behalf of another, the agent is responsible for his actions, and not the person who sent him. However, the Gemara lists a number of exceptions to this

rule, where the person who instructs another is held culpable. For example, Beit Hillel holds that if a guardian tells another to illegally use a deposit, the guardian can be held responsible. Other exceptions include illegally deriving benefit from *hekdesh* – objects set aside for the Temple or sacrifices – slaughtering a stolen animal, and (according to one understanding of Shamai's approach) murder.

ADDITIONAL RESOURCES **Hebrew Articles**

Minchat Asher Bamidbar Section 41 – This article summarizes much of the discourse that appears in the Acharonim on this topic.

Toratcha Sha'ashu'ai Chapter 11 – This chapter discusses a clever thief who steals a car by getting an unsuspecting tow-truck driver to tow it away.

Kobetz Hayesodot Vehachakiroth pp. 55-57 – This entry includes a summary of most of the major discussions that appear in the Rishonim and Acharonim.

English Articles

“Shelichut le-Dvar Aveira and the Heter Mekhira,” based on a shiur by Rabbi Mordechai Willig. The shiur appears online on the Virtual Beit Midrash at <http://vbm-torah.org/archive/kiddushin/21p2-05kiddushin.htm>

“A Shaliach for an Aveira,” by Rabbi Moshe Taragin – focuses on the differences between whether we view the principle as based on logic or derivations. It is available online at www.vbm-torah.org/archive/metho62/12shaliachforaveirah.doc

This shiur does not address the application of the claim to be merely following orders in criminal warfare such as in the Holocaust. This discussion is beyond the scope of the class, and has been discussed at length in non-halachic literature.