

Ein Shaliach Lidvar Aveirah

“I Was Only Following Orders”

The Criminal Agent

Kiddushin 42b

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"?

1. Gemara Kiddushin 41b

A person's agent is considered like himself.

שְׁלוּחוֹ שֶׁל אָדָם כְּמוֹתוֹ.

2. Mishnah Bava Kamma 59b

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 הבערה ביד חרש
שוטה וקטן, פטור בדיני אדם.
וחיב בדיני שמים. שלח ביד
פקח הפקח חיב.

3. Kiddushin 42b

[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

והא דתנן "השולח את הבערה
ביד חרש שוטה וקטן, פטור
בדיני אדם. וחיב בדיני שמים.
שלח ביד פקח הפקח חיב":

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]?

וְאֵמַאי? נִימָא שְׁלוּחוֹ שֶׁל אָדָם
כְּמוֹתוֹ?

4. Ibid.

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?"

שְׂאֵנִי הֵתֵם דְּאִין שְׁלִיחַ לְדַבֵּר
עֲבִירָה דְּאִמְרִין דְּבְרֵי הָרַב
וְדְבְרֵי תַלְמִיד דְּבְרֵי מִי
שׁוֹמְעִים?

5. Ibid. 43a

If a person tells his agent, "Go kill a person," the murderer is liable, and the person who sent him is not. [However,] Shamaï 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 לְשְׁלוּחוֹ, "צֵא הַרְג אֶת
הַנֶּפֶשׁ," הוּא חַיִּב וְשׁוֹלְחֵו
פְּטוּר. שְׁמַאי הֶזְקֵן אוֹמֵר
מִשׁוֹם חֲגֵי הַנְּבִיא שׁוֹלְחֵו חַיִּב
שְׁנֵיאָמַר, "אוֹתוֹ הֶרְגַת בְּחֶרֶב בְּנֵי
עַמּוֹן."

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?

6. Rashi, Kiddushin 42b

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.

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

7. Tosafot Rid, Kiddushin 42b

“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 פְּקַח הַפְּקַח חַיִּיב
וְאִמְאֵי נִימָא שְׁלוּחוֹ שֶׁל אָדָם
כְּמוֹתוֹ וְלִיחַיִּיב הַמְשַׁלֵּחַ!
פִּירוּשׁ, וְאִם עַל גַּב דְּשְׁלִיחַ לֹא
מְצִי לְאִיפְטוּרֵי בִּינּוֹן דְּהוּא פְּקַח,
נִפְקָא מִינֵה דְאִי לִיכָא
לְאִישְׁתַּלּוּמֵי מִינֵיהּ מִפְּרַע מִן
הַמְשַׁלֵּחַ:

8. Glosses of Rema to Shulchan Aruch, Choshen Mishpat 182:1

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.

הִגָּה: בְּכָל דְּבַר שְׁלוּחוֹ שֶׁל
אָדָם כְּמוֹתוֹ, חוּץ מִלְּדַבֵּר
עֲבִירָה דְּקִיָּמָא לֹא אֵין שְׁלִיחַ
לְדַבֵּר עֲבִירָה.

9. Vayikra (Leviticus) 19:14

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 תִקְלַל חֵרֵשׁ וְלִפְנֵי עוֹר לֹא
תִתֵּן מִכְשָׁל וְיִרְאֵת מֵאֱלֹהֶיךָ אֲנִי
ה'.

10. Sefer HaMitzvot of the Rambam (Maimonides), Negative Commandment 299

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

וְלֹא זֶה אָמְרוּ שֶׁהוּא כּוֹלֵל גַּם בֵּין מִי
שֶׁיַּעֲזוֹר עַל עֲבִירָה אוֹ יִסְבֵּב אוֹתָהּ
כִּי הוּא יְבִיא הָאִישׁ הַהוּא שֶׁעוֹרָה
תַּאֲוָתוֹ עֵין שְׂכָלוֹ וְחָזַר עוֹר וַיִּפְתְּהוּ
וַיַּעֲזְרֵהוּ לְהַשְׁלִים עֲבִירָתוֹ אוֹ יִכְיֶן לוֹ
סִבַּת הָעֲבִירָה.

11. Meiri Kiddushin 43a

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.”

אף על פי שאין שליח בדבר עבירה
מכל מקום ראוי להזהר שלא לגרום
תקלה שכל הגורם תקלה נקראת
היא על שמו הרי הוא אומר לְדוֹד עַל
מַעֲשֵׂה אַוְרֵיהֶּ וְאוֹתוֹ הִרְגִּיתָ בְּחֶרֶב בְּנֵי
עַמּוֹן.

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?

12. Bava Metzia 10b

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:
“בְּיָדוֹ” (שמות כב:ג) אֵין לִי אֵלָא
יָדוֹ, גַּוּ חֲצֵרוֹ וְקַרְפִּיפוֹ מִנֵּי?
תְּלָמוּד לֹאֵמַר “הַמֵּצֵא תִּמְצֵא”
(שמות כב:ג) מִכָּל מְקוֹם.

13. Ibid.

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"?

וְאִי סֵלְקָא דְעֵתְךָ חָצֵר
מְשֻׁם שְׁלִיחוֹת אֵיתְרְבָא
אִם כֵּן מְצִינוּ שְׁלִיחַ לְדַבֵּר
עֲבֵירָה, וְקַיָּמָא לָן אִין שְׁלִיחַ
לְדַבֵּר עֲבֵירָה!?

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.

14. Ibid.

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.

אָמַר רַבִּינָא הֵיכָא אִמְרִינן דְאִין
שְׁלִיחַ לְדַבֵּר עֲבֵירָה הֵיכָא
דְשְׁלִיחַ בֵּר חֵיבָא הוּא אֲבָל
בְּחָצֵר דְלֹא בֵּר חֵיבָא הוּא
מִיחֵיב שׁוֹלְחוֹ.

15. Bava Metzia 10b

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.

רַב סָמָא אָמַר: הֵיכָא אִמְרִינן
אִין שְׁלִיחַ לְדַבֵּר עֲבֵירָה, הֵיכָא
דְאִי בְעֵי עֶבֶד וְאִי בְעֵי לֹא
עֶבֶד. אֲבָל חָצֵר דְבְעַל כְּרַחֲמֵיהּ
מוֹתִיב בָּהּ מִיחֵיב שׁוֹלְחוֹ.

16. Tosafot Bava Kamma 79a "Netano"

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

וּבִין לְלִישְׁנָא דְמִפְרֵשׁ בְּפֶרֶק
קָמָא דְבָבָא מְצִיעָא (דף י'
וְשֵׁם) טַעְמָא דְאִין שְׁלִיחַ לְדַבֵּר
עֲבֵירָה מְשֻׁם דְשְׁלִיחַ בֵּר
חֵיבָא הוּא ... וּבִין לְלִישְׁנָא
דְאִי בְעֵי עֶבֶד אִי בְעֵי לֹא עֶבֶד
אִין שְׁנִיד לְכָאן דְהֵתָם אִין יוֹדֵעַ
שֶׁהַשְׁלִיחַ יַעֲבוֹר אֲבָל פֶּאן יוֹדֵעַ
הוּא שְׁיַקַּח מֵאַחַר שֶׁהוּא סָבוֹר
שֶׁהוּא שׁוֹלְחוֹ.

17. Machaneh Efraim, Laws of Property Damage 7

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 hezekka*, where **damage will clearly take place** (and he is liable to pay).

ומי שְׁאַמַר לְחַבְרוֹ לְשִׁבּוֹר
כְּלִים שֶׁל רְאוּבֵן וַיִּשְׁבְּרֵם מִחֵמֶת
שֶׁהָיָה סְבוּר שֶׁהֵם מִשְׁלֵל לְוִי
שְׁאַמַר לוֹ לְשִׁבְרֵם מִי מִשְׁנִיָּהֶם
חַיִּיב לְשַׁלֵּם. נִרְאֶה דְּשִׁמְעוֹן
וְדַאי פְּטוּר כִּיּוֹן שֶׁלֹּא הָיָה יוֹדֵעַ
שֶׁהָיוּ שֶׁל רְאוּבֵן ... אֲבָל לְוִי
שְׁאַמַר לוֹ לְשִׁבְרֵם אֵי חַיִּיב
נִרְאֶה לְכַאוּרָה דְּבִמְחֻלּוֹקֶת
שְׁנוּי ... אֲבָל כִּד דְּיִיקִינָן בְּהַ
אֲפִשֵׁר דְּהִקָּא כּוּלֵי עֲלֵמָא מוֹדוּ
שֶׁלְוִי חַיִּיב וְלֹא מִשּׁוּם שְׁלִיחוּת
וְלֹאמַר דְּשִׁמְעוֹן שְׁשִׁבְרֵם שְׁלֹחוּ
הָיוּ, אֲלֵא טַעֲמָא הָיוּ מִשּׁוּם
דְּחַשִּׁיב לְוִי כְּאֵלּוּ שְׁבֵרֵם הוּא
שְׁכִיּוֹן דְּשִׁמְעוֹן לֹא הָיָה יוֹדֵעַ
כִּי אָמַר לוֹ לְוִי לְשִׁבְרֵם הָרִי זֶה
כְּרִיא הֶזְקָא.

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?*

18. Kiddushin 42b

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 מֵאִי הִיא?
דִּתְנִיָּא - “עַל כָּל דְּבַר
פְּשָׁע” (שְׁמוֹת כב:ח)
...
וּבֵית הַלֵּל אֹמְרִים ...
שְׂיֻכּוֹל אֵין לִי אֶלָּא
הוּא, אָמַר לְעַבְדּוֹ
וְלִשְׁלוּחֵי מִנֵּי?
תְּלַמּוּד לֹמַר “עַל כָּל
דְּבַר פְּשָׁע.”

19. Shulchan Aruch Choshen Mishpat 292:5

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 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.

שְׁלַחַן עֶרֶךְ חוֹשֵׁן מִשְׁפָּט רצב:ה
הַשּׁוֹלֵחַ יָד בְּפִקְדוֹן עַל יְדוֹ אוֹ
עַל יְדֵי שְׁלוּחֵוֹ, הִרִיזָה גְזֵלוֹ
וְנִתְחַיֵּב בְּאוֹנְסֵיוֹ, וְנַעֲשִׂית הַגְּזֵלָה
בְּרִשׁוֹתוֹ וּמִשְׁלָם אוֹתָהּ כְּדִין
הַגְּזֵלָנִים שְׂוִיתָבְאָר בְּהִלְכוֹת גְּזֵלָה:

20. Shach Choshen Mishpat 292:4

The verse (Shemot 22:8, “Concerning any matter of sin,” [which teaches that *shelichut yad* can be achieved through telling another to use the

... קָרָא (שְׁמוֹת כב:ח) - “עַל כָּל
דְּבַר פְּשָׁע” אֶתִּי הִכָּא שְׂאֵין
לוֹ לְשִׁלָּם, דְּפְשִׁיטָא דְלְכָלִּי

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). 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.

עֲלָמָא בְּעֲלָמָא פְּטוּר הַמְשִׁיחַ,
הָכָא חֲיִיב. אֲבָל אִם יֵשׁ לוֹ
לְשִׁלְמִים וְיָדַע וְהוּא בֵּר חַיִּיבָא
דְּבָכִי הָאִי גִּוְנָא פְּשִׁיטָא דְּחֲתִיב
הַשְׁלִיחַ לְכוּלֵי עֲלָמָא, מְשוּם
דִּיאִו שְׁלִיחַ לְדַבְרַ עֲבִירָה ...

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 Avera 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.