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A FORCE TO BE RECKONED WITH:

ARE POLICE ABOVE THE LAW?

Rabbi Micha Cohn

On July 17, 2014, Eric Garner died in the New York City borough of Staten Island after Daniel Pantaleo, a New York City Police Department (NYPD) officer, put him in a chokehold while arresting him, and was subsequently fired. Video footage of the incident generated widespread national attention and raised questions about the appropriate use of force by law enforcement. In this article we will examine if law enforcement officials have a dispensation for unintentionally causing death, and what the parameters are.

The Mishnah in Tractate Makkos (8a) exempts a Shliach Bais Din, an emissary of the court, from going into exile for unintentional homicide. The agent of Bais Din was performing a mitzvah, and as the Mishnah explains, there is a dispensation from exile for accidental homicide that occurs while performing a mitzvah. The Rishonim dispute in what capacity did the agent of Bais Din cause death. According to the Rambam (Rotzeiach 5,6), the emissary of the court was forcing a person to appear before Bais Din. Rashi and the Ra'avad understand that the Shliach Bais Din was administering makkos (flogging), and unintentionally

gave more than the prescribed amount.

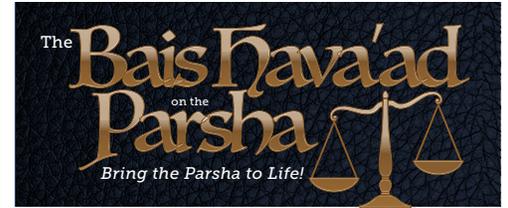
In 1830, Rabbi Moshe Sofer, the Chasam Sofer, was asked to give direction after a tragic incident (*Shu"t Chasam Sofer OC 177*). A young housemaid had fainted and her mistress panicked. She ran to get some whiskey to help revive her. In the rush the mistress mistook a bottle of petrol for whiskey. Thinking it was whiskey, she poured the petrol into the mouth of the housemaid killing her. The mistress turned to the Chasam Sofer to instruct her as to what form of atonement (*Kaparah*) she needs for this terrible mishap.

The Chasam Sofer cites the abovementioned Mishnah as his primary source. He raises an important question regarding the opinion of the Ra'avad. If the emissary of the court gave too many makkos why should he be exempt from punishment? Rabbi Sofer explains, the emissary must have become confused with the number and thought he had not given the proper amount when he actually had. Although the actual hit that killed the person was not a mitzvah, since the beginning of the emissary's actions were a mitzvah and sanctioned by Bais Din, he still has this dispensation.

Based on his understanding of the Ra'avad, the Chasam Sofer offers insight into this incident. When the mistress ran to get whiskey, she was clearly involved in a mitzvah, and is therefore comparable to the emissary of Bais Din. Therefore, even if she could have possibly been more careful she has the same dispensation as the emissary of the court who became confused and gave too many makkos. The Chasam Sofer concludes that she is not considered responsible for the death of the housemaid, but she should do some form of teshuvah because this terrible mishap happened at her hands.

A contemporary ruling from Rabbi Shmuel Wosner (Shevet HaLevi 4,151) about dental

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Rabbi Moshe Zev Granek

GUILT RELATED: CHILDREN ATONING FOR PARENTS' SINS

Do children atone for their parents' sins? An exposition on the bracha of Boruch Shepotrani

Two reasons for reciting the bracha of Boruch Shepotrani by a bar mitzvah.

Magen Avraham - Till the bar mitzvah the father is punished for son's sins, and now the son is punished for his own sins.

Levush- the reverse. The father is reciting a brocho giving gratitude in relieving the son from enduring punishment for the father's sin.

Question- the pasuk says *bonim lo yumsu al avon avos*- sons won't die on account of sins of their fathers.

Rambam-This passuk is only once he becomes an *ish*-an adult-but prior to then, a son may be punished on account of his father's sins.

Chochmas Shlomo /Rav Shlomo Kluger asks on the Levush: It can't be that the brocho is

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GENERAL HALACHA

CORRESPONDING RESPECT: *Privacy in Personal Mail*

By Rav Yitzhak Grossman, Dayan at The Bais HaVaad

READING THE CORRESPONDENCE OF OTHERS

Parshas Shelach contains the tragic narrative of the spies sent to survey the Land of Canaan. While their task was to observe and to report their observations, a major component of modern espionage is signals intelligence, and communications intelligence in particular, with Henry L. Stimson's celebrated distaste for the practice ("Gentlemen do not read each other's mail.") seen as laughably quaint. I am not aware of any significant discussion of the ethics of such intelligence gathering in the service of the national interest; this article explores some of the *Halachah* pertaining to such conduct in the context of the intercourse of private citizens.

THE CHEREM OF RABBEINU GERSHOM

There is a medieval tradition, generally attributed to *Rabbeinu Gershom Me'or Ha'Golah*, of a *cherem* [ban / anathema] against reading (or opening) a letter addressed to another.

The *acharonim* have additionally noted various *halachic* problems with reading others' mail, either as rationales for the ban or as independent considerations:

The utilization of another's property without permission is forbidden. "Thou shalt love thy neighbor as thyself" - "that which is hateful to you, do not do unto your friend".

"Thou shalt not go up and down as a talebearer among thy people".

Geneivas da'as is prohibited. [The phrase generally refers to deception, i.e., the *planting* of a *false* idea in the mind of another, whereas our situation appears to be the exact opposite: the *extraction* of a *true* idea from the mind of another; It is prohibited to cause harm to another, even indirectly (*grama be'nezikin asur*), and reading others' correspondence usually causes harm, whether financial or otherwise.

Among the Sephardim, it was common to inscribe a reference to the *cherem* on (the outside of) letters, although the *cherem* applies regardless.

IS THE CHEREM STILL IN EFFECT?

There is a tradition that *Rabbeinu Gershom's* ban on polygamy was only in force until the



end of the fifth millennium, and some extend this to our *cherem*, too. The basic tradition with regard to polygamy itself, however, is not universally accepted, and our *cherem* in particular may have no expiration date, as unlike polygamy, which is perfectly permissible according to Biblical law, the reading of others' mail may be prohibited to begin with, for the various reasons given above, and so *Rabbeinu Gershom* would not have included a sunset clause in his *cherem*.

DISCARDED LETTERS

Some of the medieval formulations of the *cherem* contain the dispensation that "if he has discarded it, it is permitted", and this has been understood to mean that even if the discarding has not been directly observed, the mere fact of the letter being apparently abandoned allows us to conclude either that it has been deliberately discarded or that care was not taken to secure it, due to its not containing any confidential information. There is, however, an opinion that limits this to where the letter has been discarded in a publicly accessible place, where it is likely to be read, as this clearly indicates that the discarder is unconcerned with its being read, but where it has been placed into a private or even a public garbage can, the contents of which are generally unlikely to be exposed, as dumpster-diving is uncommon in contemporary times, there is no basis to impute such unconcern to the discarder.

Additionally, there is an opinion that forbids reading a letter found in the street, as even insofar as the recipient does not care if the letter is read, the sender may still care.

UNSEALED LETTERS AND POSTCARDS

The *poskim* debate whether the *cherem* applies to unsealed letters and postcards; on the one hand, since the sender did not bother to seal his missive, he evinces unconcern with its being read, but on the other, perhaps he simply relies on general compliance with the *cherem*. Additionally, irrespective of the send-

er's lack of concern, the addressee of the missive may object to third party perusal.

PERMISSION OF THE RECIPIENT

There is an opinion that permission from the recipient of a letter suffices to allow third party perusal; others maintain that permission from the sender is also necessary.

EXTENUATING CIRCUMSTANCES

There is an opinion that the *cherem* applies even in the face of a *mitzvah*. On the other hand, some maintain that just as *Rabbeinu Gershom's* ban on polygamy may not apply in situations of *mitzvah* and *aveirah*, so, too, does our *cherem* include such an exception, and it is therefore permitted for an educator to read the correspondence of a female student with a young man where there is a suspicion that the contents are illicit, although it is preferable to simply ban the correspondence, and in any event, no one but her teacher may read it, and it must be perfectly clear that any information he gleans from his perusal must remain absolutely confidential. Similarly, where parents or teachers have a reasonable suspicion in particular circumstances that their children or students are corresponding with those who may incite them to sin, or where there is a reasonable suspicion of scandalous intercourse on the part of a woman, the parents, teachers, husbands, *batei din* or their agents may read the correspondence in order to prevent the illegitimate conduct or take other appropriate action.

It is unclear whether it is permitted to read another's correspondence in order to avoid harm.

EAVESDROPPING

Some maintain that the *cherem* applies to eavesdropping on telephone conversations and the like.

BEYOND THE CHEREM

Some maintain that even where the *cherem* is technically inapplicable, excessive curiosity and nosiness are inappropriate.

MATTERS OF INTEREST

AVISSAR FAMILY RIBBIS AWARENESS INITIATIVE:

GIFTS OF GRATITUDE

May one give a gift to someone who lent him their home or car for the weekend?

May a borrower give a Bar mitzvah present to the son of the lender?

Case #1: Since ribbis does not apply to items which are not consumed, it would be permitted to purchase a gift for the owner of the home or car.

If the owner asked that utility use be repaid, it nonetheless would be permitted to purchase a gift, as it is obvious that it is being done out of gratitude and not as a repayment for the



use of the utilities. According to some opinions the borrower should specify (or include a note) that the gift is out of gratitude for the use of the house. See also "Filling Up the Gas Tank."

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Case #2: One may benefit the child of a lender if no monetary benefit will be gained by

the parent. Therefore he may purchase the gift if the child is over bar/bas mitzvah, and the item is something the parent would not have wanted to buy him. It should also be something that does not benefit the entire family directly. Therefore, a book or toy is permitted (although others may use it, since that is not the direct intention).

YOU DAILY LIVING

Weekly Questions

HALACHOS OF ZEICHER LECHURBAN

What is the proper way for one to make a year round zecher l'Churban (a remembrance of the destruction of Yerushalayim and the Beis HaMikdash) in the construction of one's home?

One who builds a new house should leave a part of the wall, facing the entrance way, without plaster (*Shulchan Aruch* OC560:1 and *Mishna Berura* s.k. 4) or paint (*Kovetz Ohr Yisroel* 4, p. 89). The blank portion should preferably be at least one *amah* by one *amah*, although Rav Belsky, zt"l said in the name of Rav Moshe Feinstein that *bideved*, an area of a square *amah* is sufficient even if one side is less than an *amah* [e.g. 2 x ½ *amos*, which is an area of a square *amah*] (*Piskei Halachos*, Vol 1, p. 113, quoting *Sefer Habayis*, p. 215, footnote 11). There are numerous opinions among the *poskim* as to the size of an *amah*. Rav Moshe Feinstein, zt"l calculates an *amah* as being 21¼ – 22 inches (*Igros Moshe* OC 1:36, YD 3:66:1).

Are there any situations in which one may be lenient about leaving an unpainted and



non-plastered area of the wall, facing the entrance way, to commemorate the destruction of the Beis HaMikdash?

The *Kitzur Shulchan Aruch* (126:1) indeed wonders why many people are lenient in fulfilling the requirement of leaving an *amah* by an *amah* unpainted and non-plastered in their newly built homes *zecher l'churban*. (See *Aruch HaShulchan* OC560:3, 4 for a possible leniency.) Nevertheless, there is an opinion in the *poskim* which maintains that if one's spouse does not want the area exposed, then one may paint a spot measuring an *amah* by an *amah* in a different color than the rest of the wall instead (*Ohr L'tzion* 3:30:1). However, Rav Belsky, zt"l maintained that this should not be done *l'chatchilah* (from the outset) (*Piskei Halacha* Vol. 1, p. 114).

The Daf in Halacha

Bring the Daf to Life!

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malpractice illustrates this point. According to *Halacha*, a doctor has a similar dispensation as an agent of the court. Therefore, if he accidentally injures in the course of treatment he is not obligated to pay. Nonetheless, Rabbi Vosner ruled that a dentist who accidentally drilled the wrong tooth is fully obligated to pay. He explains that the doctor's favorable position in *halacha* is only when he damages in the actual course of treatment. Drilling the wrong tooth is not considered in the course of treatment and he has the same responsibilities as a layman.

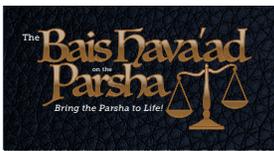
From these sources we can learn that an agent of *Bais Din*, a doctor, or law enforcement official that causes damage or death in

the course of doing his legitimate duties may not be held liable. However, this is only if the initial action that lead to harm was justified. In the case of the *Chasam Sofer*, the mistress had legitimate reason to get whiskey to revive the girl, as it was apparently considered a proper way to revive a person who fainted. Conversely, if she should have run to get a doctor and instead decided to use whiskey, then the *Chasam Sofer* might have held her liable for mistakenly bringing petrol. Similarly, in the case of Rabbi Vosner, the dentist never should have drilled that tooth and is not considered one who is 'involved in a *mitzvah*'. On the other hand, if while working on the proper tooth the dentist drilled too deep, Rabbi

Wosner would seemingly rule more leniently.

These same concepts could be applied to the use of force by law enforcement officials. Similar to the emissary of Bais Din, law enforcement officials should have a favorable halachic status if they unintentionally caused death, but only if they were following proper procedures. Therefore, if death accidentally occurred while the officer was using an appropriate form of force, even if he could have been more careful, the dispensation of *mitzvah* would apply. However, if the officer had no permission to use that form of force in a given situation, he loses this dispensation and is fully responsible for an inadvertent homicide.

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to give gratitude for now relieving the son of punishment for his father because it

contradicts an explicit *passuk* in our *parsha*: *uvaharon hisanaf lehashmido*. This means that Aaron's children, who were already past bar mitzvah, were killed on account of Aaron HaKohen's sins.

Question- The source for the *Levush* is a Rambam. And although the question from Aaron's children is a valid question, it doesn't vacate the reality of this concept.

A possible answer is that perhaps the *passuk* in our *parsha* has a different connotation based on an apparent contradiction in two *psukim*.

One *passuk* is - *poiked avon avos al bonim* that implies that children are punished on account of parents sins. The other *passuk* - *bonim lo yumsu al avon avos* implies to the contrary. How to reconcile the two contradicting *psukim*?

The gemara answers- when sons continue in

their father's path with committing the same *aveiros* as their fathers', then sons can get

punished. Our *passuk* is referring to when the children are not continuing in the father's path.



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