Wicked Ḥanan (*Ḥanan bisha*) Meets the American 'Bad Man': Literary and Legal Perspectives on the Addressee of Financial Penalties

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1. Introduction

Ḥanan bisha', or "Wicked Ḥanan," is a presumably Jewish character who breaks the law in two case stories of the Babylonian Talmud.[1] In one story, Ḥanan is convicted of battery by Rav Huna, and charged a fine, which he cheerfully pays. In fact, he even pays double – in order to strike his victim again (b. *B. Kam*. 37a=b. *Bek*. 50b). In another story, he is the known thief and

* I am grateful to Oliver W. Holmes, to Jennie Rosenfeld, and to the journal's anonymous reviewer, for thoughtful comments that significantly enriched this article. I was privileged to present at the Talmudic Literature Conference at Yale University (04–2023), and I wish to thank the following for their responses: Gregg Gardner, Christine Hayes, Jonathan Milgrom, Isaac Roszler, Moshe Simon-Shoshan, Loren Spielman, and thanks to Azzan Yadin-Israel for chairing that session with generosity of spirit. Pinchas Roth provided invaluable help with medieval Jewish historiography. Alexander Kaye gave me thoughtful feedback leading to meaningful improvement in the final draft. I wish to thank Margaret Hassel, editor-in-chief of the *Columbia Law Review*, for her help, as well as Yehudah Mirsky for a comment he made years ago at the Tauber Institute's Colloquium. Classes on *kinyanim* and *nezikin* with Rabbi Moshe Kahn, of blessed memory, prepared me for this research; I am grateful for those gifts. I wish to thank Sophie Livingstone for her editorial assistance, which was made possible by a grant from the Theodore and Jane Norman Fund at Brandeis University.

1 For ease of visual scanning in English, and because of the frequency of its appearance, I will omit the sign indicating the final aleph in the word *bisha*, בישא after this occurrence.

seller of a cloak. Despite being so identified, however, Ḥanan is excluded by Rav Huna from the process of restitution. Restitution is conducted between the cloak's original owner and the unwitting buyer of stolen goods (b. *B. Kam.* 115a). When legal and literary talmudic scholarship includes serious consideration of adjudication narratives like Ḥanan's, new aspects of the law emerge. Ḥanan's stories, where they are placed, and how they are discussed in the Babylonian Talmud, as well as their reception in post-talmudic Jewish legal writing, unsettle the definition of wickedness in cases of financial penalties. This, in turn, offers contemporary scholars an opportunity to interrogate whether the passages in which Ḥanan appears suggest talmudic attitudes towards a theoretical question shared in many traditions: to whom are financial penalties directed? Towards the wicked, or towards ordinary people, who normally seek to comply with the law? And where along this spectrum do the self-interested stand?[2]

Plato wrote that the state's laws, created through reason, would engage with people's reason, inducing them to follow the rules because of their calculations of the probable outcome: pleasure in compliance or pain in response to disobedience.[3] The laws would also educate people morally, through their reason about what is right and wrong behavior. In Plato's orientation, legal sanctions are intended to improve character.

> [644e] these inward affections of ours, like sinews or cords, drag us along and, being opposed to each other, pull one against the other to opposite actions; and herein lies the dividing line between goodness and badness.

2 I wish to thank Prof. Oliver Holmes for this question.

3 Likewise, Plato's *Laws* Book IX: 880, "Laws, it would seem, are made partly for the sake of good men, to afford them instruction as to what manner of intercourse will best secure for them friendly association one with another, and partly also for the sake of those who have shunned education, and who, being of a stubborn nature, have had no softening treatment to prevent their taking to all manner of wickedness. It is because of these men that the laws which follow have to be stated—laws which the lawgiver must enact of necessity, on their account, although wishing that the need for them may never arise." Bury, *Plato's Dialogues*, 291. A contemporary approach to laws for "good people," as well the gradations of "good," is Yuval Feldman, *The Law of Good People: Challenging States' Ability to Regulate Human Behavior* (New York and Cambridge: Cambridge University Press, 2018).

> …there is one of these pulling forces which every man should always follow …
> [645a] it is the leading-string, golden and holy, of "calculation," entitled the public law of the State…[4]

People have individual inclinations towards bad and good, but the law serves to guide people towards the correct behavior. Plato argues that good state rules and politics are necessary for everyone to be moral, or else the state will fall into degeneration. In *The Republic,* he describes how even a philosopher would be no match for the corrosive impact of a lawless society.

> "[the philosopher] would be as a man who has fallen among wild beasts, unwilling to share their misdeeds and unable to hold out singly against the savagery of all, and that he would thus, before he could in any way benefit his friends or the state come to an untimely end without doing any good to himself or others."[5]

Laws must help to mold the character and behavior of members of the community, because without the moral education of individuals, society has no hope of thriving. Accepting a society of wicked people, and orienting legal sanctions towards them, is contrary to this definition of law. There are other perspectives, however, such as that of Oliver Wendell Holmes, which will be brought forward later in this article, which refuses a philosophical and moral overlay on rules, and defines law through the cases decided. The Talmud's stories offer yet another perspective.

Suzanne Last Stone's multidisciplinary scholarship redefines law in light of the centrality of narrative in the Talmud. Her theoretical contributions to Jewish law take shape in dialogue with Anglo-American legal theory while illuminating it in equal measure. This article is inspired by Stone's interest

4 Plato, *Laws* 644–45. *Plato in Twelve Volumes,* vols. 10 & 11 translated by R.G. Bury (Cambridge, MA: Harvard University Press, 1967 & 1968), retrieved from perseus.tufts.edu. My thanks to Oliver Holmes for his illuminating comments on this passage in the *Laws*.

5 Plato, *Republic* Book VI: 496 d–e. *Plato in Twelve Volumes*, vols. 5 & 6, trans. Paul Shorey (Cambridge, MA: Harvard University Press, 1969). Retrieved from perseus.tufts.edu. I am grateful to Oliver Holmes for directing me to this passage and for his thoughts on its significance.

in legal-theoretical readings of talmudic narrative.[6] It seeks to follow her comparative orientation between Anglo-American and Jewish legal sources, particularly her interest in the parallels between the Talmud and common law, which never applies one paradigm to another, but recognizes the potential for multiple traditions to provide new vantage points on one another.[7]

Ḥanan's stories are told in adjudication narratives, which are a type of talmudic case story. They are frequently narrated by the Babylonian Talmud's narrators, and occasionally by an Amora.[8] They depict an Amora deciding a case for a party or parties. What distinguishes an adjudication narrative from other case law is the depiction of a judge rendering a ruling, and the dramatic and relational potential of having a person interact directly with the judge.[9] My current work introduces literary analysis to these stories. Narratological, character, and structural perspectives illuminate the legal-theoretical meanings of the stories. This fact has been often overlooked because the narratives are generally formulaic, and because they have been treated as legal precedent by the sugyot and, often, by the scholars who study them.[10]

This article begins with an examination of Ḥanan's title, "wicked," to establish its meaning in rabbinic literature and specifically its significance in an adjudication narrative. Following this, the two adjudication narratives

6 Suzanne Stone, "On the Interplay of Rules, 'Cases,' and Concepts in Rabbinic Legal Literature: Another Look at the Aggadot on Ḥoni the Circle-Drawer," *Diné Israel* 24 (2007): 125–55; eadem, "Rabbinic Legal Magic: A New Look at Ḥoni's Circle as the Construction of Legal Space," *Yale Journal of Law & the Humanities* 17 (2005): 97–124.

7 Suzanne Stone, "In Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106 (1993): 813–94.

8 An Amora was a sage living from the third to the early seventh century CE. See Eliezer Segal, *Case Citation in the Babylonian Talmud: The Evidence of Tractate Neziqin* (Atlanta: Brown Judaic *Studies*, 1990) for analysis of the forms of case stories in the Bavli, including the frequency of amoraic and editorial narration.

9 See Lynn Kaye, "Protesting Women: A Literary Analysis of Bavli Adjudicatory Narratives," *Nashim* 32 (2018): 131–57; eadem, "Arguments and Actions: Lay People's Advocacy and Resistance in Talmudic Adjudication Narratives," *Yale Journal of Law & the Humanities* 32 (2021): 77–118, for a description of the form.

10 Eliashiv Fraenkel, *Meetings and Conversations of Sages in Stories Regarding Halakhic Background in the Babylonian Talmud* (Ramat-Gan: Bar-Ilan University Press, 2015), 18 (Hebrew), observes that short stories with legal content in the Bavli are likewise often overlooked for literary analysis for the reason of brevity.

involving Ḥanan are presented. They are analyzed with literary (narratological) analysis, attending to character and style, as well as to the thematic resonances of the story in its redactional context. The narrative techniques in his stories allow the talmudic narrators to define Ḥanan as legally exceptional, and to accommodate him as such.

The literary analysis draws on medieval and post-medieval halakhic commentaries when the authors comment on, and change Ḥanan's character, or that of his victim. Using the legal commentaries in this way demonstrates how halakhic interpretation can provide character development while advancing legal arguments. Considering the fact that some medieval halakhic authors also wrote midrashic biblical commentaries, contemporary scholars need not impose rigid barriers between legal and literary interpretations of talmudic passages.[11] My analysis of the second narrative (b. *B. Kam.* 115a) provides comparisons with Anglo-American legal paradigms, because it helps to cast in relief Ḥanan's position as an exceptional member of society, and its contrast with other traditions. That discussion incorporates characterizations of Ḥanan from medieval and post-medieval commentators drawing on stories and legal issues involving both fines for physical battery and compensation for stealing.

The final section of the article is a comparison of the reception of Oliver Wendell Holmes' "bad man," a figure in U.S. jurisprudence, and Wicked Ḥanan, focusing on the goals of fines, and their utility to curb unwanted social behaviors. The article draws on law and economics research, as well as critiques of that field. It will particularly engage with the concern of some scholars that the "bad man" has changed from a warning to jurists, into the rational consumer of law, such that legal scholars and judges uncritically accommodate the "bad man's" perspective as a default audience for fines, and perhaps of laws more generally.

The article concludes with a theoretical consideration of the figure of Wicked Ḥanan, and of his positioning in the Babylonian Talmud and among its interpreters, in light of the foregoing discussion from U.S. jurisprudence.

11 Tosafot commentators also wrote biblical commentaries and worked in midrashic modes in their approaches to biblical characters. Ephraim Kanarfogel, *The Intellectual History of Medieval Ashkenazic Jewry* (Detroit: Wayne State University Press, 2012), 111–373; idem, "Midrashic Texts and Methods in Tosafist Torah Commentaries," in *Midrash Unbound: Transformations and Innovations*, ed. Michael Fishbane and Joanna Weinberg (London: Littman Library, 2013), 267–319.

Ḥanan is neither unimaginably evil, nor is he a monster, according to the Talmud's descriptions. By describing Ḥanan as a wicked person who appears in court, and also allowing his outré behavior to remain, to some extent, unanswered in the stories, the talmudic passages suggest an alternative approach to transforming "wicked people" into generic members of the wider population, or into typical, rational actors. This approach would acknowledge that exceptional characters exist, and that they enter legal procedures. Nonetheless, rather than create norms with them in mind, fines ought to be aimed at a population of those amenable to lower levels of social or financial pressure. This approach projects a more optimistic construction of communal bonds between people who conform for reasons other than financial incentives.

2. Wicked Ḥanan's Origin and Title

Wicked Ḥanan appears in only two distinct stories, and they both involve Rav Huna. This is scant evidence, but could suggest that his story originates in the late-third century CE Babylonia, in the environs of Sura, though the stable historical and geographical context could have been granted to him by later storytellers.[12] Neither of the two stories seem to be an origin for the other, nor do they seem to have any clear parallels in the Palestinian Talmud.[13] Eliezer Segal speculated that collections of case stories might have been collected and transmitted, independent of mishnayot.[14] In the case of the story of Ḥanan striking a man twice, which appears in both b. *Bek.* and *B. Kam.*, it fits tangentially into each sugya. Perhaps the story existed before either of the sugyot was incorporated into each independent of the other.

12 For a survey on Rav Huna, see Chanoch Albeck, *Introduction to the Talmud, Babli and Yerushalmi* (Tel-Aviv: Dvir, 1969), 195 (Hebrew).

13 y. *B. Kam*. 10:3 (7c), which parallels b. *B. Kam*. 115a, presents an adjudication narrative about someone who complained about lost property, and is described as בר נש דעקין הוה, which Michael Sokoloff, *Dictionary of Jewish Palestinian Aramaic of the Byzantine Period* (Ramat-Gan: Bar-Ilan University Press, 1990), 415, translates as "a man (who caused) troubles." However, he is not a likely origin for the Bavli's Ḥanan bisha. Amoraim can encounter more than one type of difficult person. Nonetheless, it is interesting that adjudication narratives in parallel sugyot in the Talmudim both have characters who trouble judges.

14 See Segal, *Case Stories*, 90–91, 174, 214–15.

This is opposed to arguing for the story having been cited from one talmudic passage to the other.

Ḥanan's wickedness, furthermore, is attributed to him when the stories begin, and neither of these stories seem to be a definitive etiology for the title.[15] This is reminiscent of Ariel Furstenberg's observation that some amoraic concepts appear in the Bavli already named, their origins obscure.[16] These concepts gain specificity from their application to different legal contexts. Ḥanan, similarly, appears with some characterization established ("wicked"), and gains more through the stories, and even more in the reception of these stories in the legal commentaries from the medieval period onwards.

2.1 Ḥanan's Wickedness

In Jewish Babylonian Aramaic, "wicked" (**בישא**) is harm, and that which is contrary to goodness.[17] These are forces that have deleterious effects on an unsuspecting person, and which people try to mitigate when possible, somewhat like Wicked Ḥanan ("Ḥanan bisha"), a harmful presence in the shape of a person in the community. **בישא** can also oppose "good" **טוב** for people and objects.[18]

Ḥanan is the only person to appear as a party in court with the title "wicked," in either Hebrew or in Aramaic.[19] The Hebrew adjective "wicked"

15 Narratively, it is not clear if his interlocutors call him that, or if only the narrators do.

16 Ariel Furstenberg, *The Languages of Talmudic Discourse: A Philosophical Study of the Evolution of Amoraic Halakha* (Jerusalem: Van Leer Institute and Magnes Press, 2017), 179 (Hebrew).

17 The harmful eye: b. *Ber.* 20a; b. *Pes.* 26b; b. *B. Bat.* 118a; b. *B. Mets.* 84a, see Rachel Rafael Neis, *The Sense of Sight in Rabbinic Culture* (Cambridge: Cambridge University Press, 2013), 13–14.

18 b. *Ber.* 29a, about *minim,* b. *B. Bat.* 118b, "bad son," b. *B. Bat*. 4a about Herod, called a "bad slave." On that narrative, see Jeffrey L. Rubenstein, "King Herod in Ardashir's Court: The Rabbinic Story of Herod (b. Bava Batra 3b–4a) in Light of Persian Sources," *AJSR* 38 (2014): 249–74. b. *Ber*. 55a for dreams depending on their interpretation, see Haim Weiss, *All Dreams Follow the Mouth: A Reading in the Talmudic Dreams Tractate* (Or Yehudah: Devir, 2011) (Hebrew). b. *B. Kam*. 92b, b. *B. Bat.* 69b for date palms, b. *B. Kam.* 99b for a coin.

19 A statement in y. *Sot.* 1:7 (17a) describes men's characters, including a wicked man, defined by his response to his wife's sexual engagement with others. The passage names no specific example. In a tradition of rabbinizing biblical characters, the Bavli cites a Palestinian Amora to describe Do'eg the Edomite,

(הרשע) follows the names of other characters in the Bavli. Mirroring their characterization in tannaitic and amoraic midrashim and in the Palestinian Talmud, biblical figures such as Wicked Pharaoh, Wicked Bil'am, and Wicked Esav, as well as Roman figures (e.g. Wicked Hadrian and Wicked Titus) enter rabbinic narratives with this descriptor. Esav, Nebuchadnezzar and Bil'am feature frequently.[20] Yet in contrast to Wicked Ḥanan, the characters in

who served King Saul in 1 Sam 21–22 as "wicked Do'eg" (רשע), a sage. The passage pairs Do'eg with Aḥitophel, an advisor to King David who supported his son Absalom in a revolt (2 Sam 15). Richard Kalmin, *The Sage in Jewish Society of Late Antiquity* (London and New York: Routledge, 1999), 106. While the Bavli characterizes Aḥitophel as "violent and deceitful" (Kalmin, *Sage in Jewish Society*, 107) he is never called "wicked Aḥitophel." Aḥitophel is a "bad man," in b. *Ber*. 55b (Rav Huna discussing the dreams of a "bad man" (אדם רע). Kalmin, *Sage in Jewish Society,* 109.

20 Other characters who occur with high frequency in Palestinian collections appear in the Bavli as "wicked" more sparingly, such as Pharaoh, Haman and certain Romans. The following references were gathered from the Bar-Ilan Responsa Project. It is likely that the title "wicked" might come and go somewhat, if critical texts are created or consulted for each of these entries, as one can see in the example of Mishnah *Avot* 5:19, below. **In Mekhilta deRabbi Yishmael**, Pharaoh: 14:6:1; 17:14:1; Bil'am: 18:1:1; 19:2:7 twice; in **Mekhilta deRabbi Shimon bar Yoḥai**, Pharaoh: 12:29; 14:21; 15:7, 15:9, 15:10; **Midrash Tanna'im on Deuteronomy** (Berlin, 1908), Esau: 33:2:17; 32:47:2; Bil'am: 23:6:2; Titus: 32:37:4. **Mishnah *Avot***, 5:19 refers to "wicked Bil'am," in some versions, but not in Shimon Sharvit's critical edition and commentary, see Shimon Sharvit, *Tractate Avot Tractate through the Ages: Critical Edition, Prolegomena and Appendices* (Jerusalem: Bialik Institute, 2004), 206–7 n. 148 (Hebrew). **In Pesikta deRav Kehana**, Esau: 2:2; 3:1, 3:5; 5:14; 6:2; 10:1, 10:10; 12:20; 27:10; Pharaoh: 7:4; 11:9; 14:5; Haman: 8:4; Sennacherib 9:11; Nebuchadnezzar: 4:10; 5:18; 13:1, 13:8, 13:15; 26:1; Titus: 26:5. In **Genesis Rabbah**, the snake 18:6; Esav: 63:12; 65:6, 65:15; 67:9; 78:8-10 (four times), 76:9; 82:2, 82:14; Pharaoh: 90:2 (four times); Bil'am: 49:1; 99:7; Sennacherib: 89:6; Turnus Rufus (Tinneius Rufus): 11:5; Titus: 10:4 (twice). In **Leviticus Rabbah**, Esav: 30:16; Pharaoh: 7:6; 24:9 (three times); Sisera: 7:6; Haman: 11:7; 13:5; 15:9; 27:11; 28:4; Nebuchadnezzar: 13:5; Titus: 20:5; 22:3. **In Lamentations Rabbah**: Esav: ch. 24; Nebuchadnezzar: Pet. 1; Pet. 23. **In the Palestinian Talmud**, Esav: y. *Ned*. 3:8; Pharaoh: y. *Ket*. 7:9, Bil'am: y. *Sanh*. 10:2, Haman: y. *Meg*. 3:2, *Meg*. 1:5; Nebuchadnezzar: y. *Ber*. 4:1; Trajan: y. *Suk*. 5:1 (twice); Tineius Rufus: y. *Ber*. 9:5; y. *Sot*. 5:5; Hadrian: y. *Pe'ah* 7:1 (twice); y. *Ta'an*. 4:5; Seguv: y. *Sanh*. 10:2, 10:8. **In the Babylonian Talmud**: Nimrod: b. *Pes*. 94b, 118a; b. *Ḥag*. 13a; Esav: b. *Meg*. 6a, 28a; b. *Sot*. 13a; b. *Git*. 56b; b. *Sanh*. 39b; Pharaoh: b. *Sot*. 12a (twice); Bil'am: b. *Ber*. 7a (twice), 55b; b. *Ta'an*. 20a (twice); b. *Sanh*. 105b–106a (four times); b. *Avod. Zar*. 4a; b. *Zev*. 116a; b. *Nid*. 31a; Balak: b. *Naz*. 23b; b. *Avod Zar.* 25b; b. *Hor*. 10b; Do'eg the Edomite: b. *Sanh*. 106b; Haman: b. *Meg*. 10b; Sennacherib: b. *Sanh*. 95b; Nebuchadnezzar: b. *Ber*. 57b; b. *Pes*. 118a, 117a; b. *Meg*. 10b–11a (4 times);

midrashim are generally clear villains, such as Haman or Nebuchadnezzar, depicted in biblical texts as intending, or responsible for, enormous numbers of deaths among Israel. Ḥanan also stands out because his wickedness is treated as a matter of legal interest in b. *B. Kam*. 115a. Without drawing a significant distinction between the reality or fictiveness of midrashim about biblical figures and case narratives in the Bavli, since each are a part of the broader context of serious-minded and creative storytelling, there are, nonetheless, different issues raised for a legal tradition, when a person named "wicked" submits to, or alternatively, is exempted from, the court of a Babylonian rabbinic judge.[21] With some context for Wicked Ḥanan's title, it is possible to turn to the narratives.

3. Story 1: Ḥanan Strikes Twice (b. *B. Kam.* 37a)

> Wicked Ḥanan[22] hit a man. He came before Rav Huna. He [Rav Huna] said to him: Go give him half a *zuz*. He [Ḥanan] had with him a worn *zuz*.[23] He wanted to give him half a *zuz* from it, but he [the latter] did not take it. He hit him a second time and gave it to him.[24]

b. *Ḥag*. 13b; b. *Sanh*. 92b (twice), 94b; Tineius Rufus: b. *Ta'an*. 29a; b. *Avod. Zar*. 20a; b. *B. Bat*. 10a; b. *Sanh*. 65b; Titus: b. *Git*. 56b. The midrashim Ruth Rabbah, Song of Songs Rabbah, and Ecclesiastes Rabbah mention the same characters as these other collections, except for Song of Songs Rabbah, which adds a "wicked torturer" (Song of Songs Rabbah 7:5:1).

21 Fraenkel, "Meetings and Conversations," 32–35 presents prior scholarship distinguishing fantastical narratives from the legal court cases.

22 Please see appendix for Hebrew and Aramaic text and critical notes.

23 Vatican 116, mirroring the version of the story in b. *Bekhorot*, continues here with the phrase "that was not acceptable," דלא הוה נפיק. I follow many, including Rashba, who read the person who did not wish to receive the problematic coin as the victim, not a third party. This contrasts with the Steinsaltz English translation published by Koren. "Ḥanan the wicked had a clipped dinar, and wanted to give him a half-dinar from it, but there was no one who wanted to take it from him to give him smaller coins for it." Perhaps Steinsaltz interprets the story in light of the *Bekhorot* passage. *The William Davidson Digital Edition of the Koren Noé Talmud, with commentary by Rabbi Adin Even-Israel Steinsaltz*, Retrieved from www.sefaria.org.

24 The Escorial ms adds "it all" (כוליה), which a scribe also added to Munich 95. My sense of the rhythm of narration is that it ends more tartly without "all of

3.1 The Story

The story of Ḥanan will be analyzed as a short story, noting narrative features that resonate in the legal rhetoric. Next, it will be considered alongside its talmudic redactional context, and with post-talmudic legal commentaries, to explain its significance for fines.

Initially, the story follows the typical form for adjudication narratives: an action that prompts the case, a person comes before the rabbi for judgment, and a ruling.[25] What follows the ruling, however, is unusual. The syntax merits some attention. The narrative presents the exchange between Ḥanan and his victim in short sentences. This contrasts with the final sentence, in which Ḥanan strikes and pays his victim, which is a longer sentence, comprising two verbs, each taking an object or adverb. The narrative spends longer over its description of Ḥanan's second blow, changing rhythm, and perhaps weighing it more heavily.

Ḥanan's second blow also ends the story and pericope. The choice to end on the image of Ḥanan handing over the coin might add emphasis or at least pause for a reader, allowing the impact to resonate with absurdity, and possibly comically. Galit Hasan-Rokem describes a "humorous tale" in Leviticus Rabbah by its "characteristically surprising conclusion and punchline," as well as "mechanisms of…incongruence," elements that suggest that Ḥanan's narrative could also be read as humorous.[26] Eli Yassif similarly indicates that incongruity is a likely source of humor in rabbinic tales. Specifically, incongruous applications of rules are a source of humor in midrashim, as in a story involving Koraḥ and the Israelites in the desert, and another depicting the city ordinances of Sodom.[27] These are comparable to the narrator's presentation in b. *B. Kam.* 37a, which demonstrates what Yassif describes elsewhere as "parodical polish," exploiting incongruity between Ḥanan's exactness following rules and the intended goal of resolving the battery.

it." The juxtaposition of two words with the same final syllable, "to him," and "all of it" seem to add heaviness to the punchline.

25 Kaye, "Protesting Women."

26 Galit Hasan-Rokem, *Tales of the Neighborhood* (Berkeley: University of California Press, 2003), 98, 99.

27 Eli Yassif, *The Hebrew Folktale: History, Genre, Meaning,* trans. Jacqueline S. Teitelbaum (Bloomington: Indiana University Press, 1999), 167–69. Ordinances of Sodom: b. *Sanh.* 109a–b.

The absurdity derives from Ḥanan's treatment of the fine. He converts it into a prospective price for another blow. Yet Ḥanan is not unidimensional. He is open to many interpretations. The humorous or absurd interpretation emphasizes his insistence on obedience, to a fault, and without deference to social norms. He strikes his victim again, but only after his victim refused payment. He is obedient by not defying Rav Huna. He appears in court and accepts his punishment.[28] There are other Bavli adjudication narratives in which people weep, curse, disobey, and protest.[29] Yet despite his obedience, Ḥanan is also willful. The narrative describes Ḥanan as "wanting to" or "trying to" pay his victim from that particular worn coin, and not another (בעי למיתבה ליה מיניה). That is the only instance of the verb "try" or "desire" (בעי) in the story, and Ḥanan's wish is fulfilled. Ḥanan acts as he desires in this story, engaging in compliance without a spirit of obedience.[30] Once he meets resistance, he continues in his campaign to pay his victim. Another character might have retreated to find another coin. Instead, Ḥanan insists on paying, by striking the man and forcing him to accept the coin he chose.

3.2 Character Development in Post-Talmudic Halakhic Commentaries

Medieval and later halakhic commentaries are not typically read as a site for literary characterization. Yet as talmudic commentators and responsa writers cite Ḥanan's name and his behavior, they change him in the mode of midrash. Interpretations recontextualize him, add new dimensions to his background

28 My thanks to Sergey Dolgopolski for sharing thoughts on this story, in which he characterized Ḥanan as silent, malleable matter in the hands of the rabbis, emphasizing his obedience and lack of speech in this narrative (personal communication, 1-23-2023). Another possible interlocutor for Ḥanan, for another article, would be the folkloristic "trickster," as Haim Weiss describes the dream interpreter bar Hedya, in b. *Ber.*, whose asocial behavior challenges social codes. Haim Weiss, "'Twenty-Four Dream Interpreters Were in Jerusalem...': On Dream Interpreters and Interpretation in the Talmudic 'Dream Tractate,'" *Jewish Studies* 44 (2007): 50 (Hebrew).

29 Kaye, "Protesting Women." Those stories dramatize another side of adjudication narratives, the experiences people have who suffer with the stakes of legal rulings. That does not apply to Ḥanan.

30 The most salient difference between the two versions of the story (b. *Bek.* 50b-51a; b. *B. Kam.* 37a) is that in b. *Bek.*, Ḥanan had a coin that could not be spent, (הוה איכא זוזא מאכא דלא נפיק). In b. *B. Kam.*, the story dramatizes the victim's choice whether to accept the coin.

and to the character of his interlocutors. Additional commentaries on Ḥanan's character will be considered after the second Ḥanan narrative, but a comment by Rabbi Solomon ibn Adret (Rashba) must be introduced here because it develops a different character in this particular story: Ḥanan's victim.

Rashba's legal observation points the tale's literary interpretation in a different direction, towards the responsibility of Ḥanan's victim for the altercation.[31] The plot includes the fact that the victim refused to accept the coin. Adret's commentary links a different talmudic passage and principle, which requires that people accept currency even if it is imperfect. Given that the victim would eventually find someone who would accept the worn *zuz* as currency, Ḥanan's payment was a valid coin, and the victim was wrong, too.

> A "worn *zuz*" means its form was diminished, and it seems to me it could be spent but with difficulty, and we say (b. *B. Mets*. 52b) "Someone who insists on his zuzim is called a bad person" and therefore he hit him again and gave him the entire thing, because if this were not so, when he hit him again, how could he give him the entire [*zuz*] and he receive it from him?[32]

Adret's description of the victim as someone who "insists on his coins," therefore renders him a parallel character to Ḥanan: the victim is *nefesh ra'ah* and Ḥanan is *bisha.* In Adret's retelling, the story is a struggle between two flawed characters: a miserly, stubborn victim, and pugnacious, determined Ḥanan: both of whom are called versions of "bad." Ḥanan's own wickedness, in Rashba's interpretation, may be balanced, somewhat, by that of his opponent.

3.3 The contribution of context in b. *B. Kam.* 36b–37a

The talmudic editors place Ḥanan's story immediately after another adjudication narrative, in which Rav Yosef fines a man for striking another person.[33] These narratives are linked to m. *B. Kam.* 4:1, which lists the payments for injuries to an ox by a serial gorer. If the goring ox injures several other oxen, it is the owner of the ox who was injured last who takes precedence

31 Adret's conventional dates are 1235–1310 CE. See Simcha Emanuel, *The Crown of the Elders: A New Look at the History of the Sages* (Jerusalem: Magnes, 2021), 42–153 (Hebrew), for discussion of that dating, and Adret's scholarship and biography.

32 *Ḥiddushei Ha-rashba* to b. *B. Kam.* 37a.

33 That adjudication narrative can be found in the appendix.

from a limited pool of money from the sale of an animal.[34] That mishnah, and Ḥanan's story, are linked to m. *B. Kam.* 8:6, listing fines for one person striking another, and other acts of battery and shaming. In this context, and through parallels between the two narratives, fines' limitations become more pronounced as a theme.

In both adjudication narratives, the victim appears reluctant to accept payment of a half-zuz. In the earlier story, the victim says, "since it is a half a *zuz*, I do not need it. Give it to the poor."[35] Perhaps juxtaposing the two stories indicates that a financial sanction for blows does not sufficiently repair what has been broken by the attack. Commentators describe the half-zuz as a fine for the shame associated with intentional blows.[36] The victim may have felt further aggrieved that the very fine that represented Ḥanan's responsibility for the victim's loss of face was to be paid in a defaced coin. While the proximate link between these narratives and m. *B. Kam*. 8:6 is clear, there is also thematic resonance between the diminishing payments for injured oxen and the two battery victims who refuse payment. Juxtaposing stories of shame fines with the insufficiency of restitution for an individual's dead ox when many people's oxen were gored raises more than a concern about the low value of fines – it may also highlight how victims feel unsatisfied with the definitional lack of connection between a fine and what was lost in the tort. In this discursive context, Ḥanan's story indicates that while Rav

34 The mishnah describes descending amounts of money that the various owners receive. If someone's ox were worth 200 zuzim, they might receive 100, or fifty, or less, depending on how many other oxen were gored.

35 b. *B. Kam.* 36b.

36 m. *B. Kam.* 8:1–3 describes shame as one of the five categories of payments a tortfeasor owes their victim. It further lists the criteria by which shame payments are apportioned. m. *B. Kam.* 8:6 lists further shame fines and Rabbi Akiva's opinion that accords all Jews the same honor and refuses differential shame payments. Rashi, to b. *B. Kam*. 36b s.v. *noten lo sela* (on the previous story, but appears to also pertain to Ḥanan), Maharam (Meir b. Gedalia of Lublin), *Me'ir Einei Ḥakhamim* (Venice, 1619) and Rabbi Yosef Ḥaim of Baghdad, *Ben Yehoyada*, ad loc. describe Ḥanan's payment as a shame fine. Rabbi Yosef Ḥaim adds a wordplay on Ḥanan bisha's "wicked" title. Despite the fact that Ḥanan paid what he was ordered, the Aramaic word *bisha* indicates how Ḥanan *bisha* wanted to shame (Hebrew room *b.w.sh*) Jews and did not regret it. Maharam commentary retrieved from Bar-Ilan Responsa Project, Rabbi Yosef Ḥaim of Baghdad commentary retrieved from Sefaria.org.

Huna's ruling may be correct, it did not guarantee good future behavior, even in the near term. Furthermore, fines can be unsatisfying to the victim.

4. Story 2: Ḥanan is Wicked, not a Notorious Thief (b. *B. Kam.* 115a)

> Wicked Ḥanan stole a cloak and sold it.
> He came before Rav Huna and he said to him (a proverb): Go, free your saddle.

While on its own, this narrative is cryptic (an unnamed man, not Ḥanan, appears before Rav Huna; Rav Huna's proverb requires explanation), Ḥanan's title becomes a crucial aspect of the story's legal significance. Indeed, the ensuing talmudic discussion recognizes tension between Ḥanan's treatment in the narrative, and how the editors presume that laws ought to treat a reputedly wicked man who stole someone's property. In what follows, the story will be analyzed from a narratological perspective, as well as for its legal significance, with a focus on how the story is interpreted by the Talmud's anonymous voice. In the editors' positioning of the case, and through the Talmud's inquiry into Ḥanan's "wicked" title, Ḥanan's story contributes to the consideration of how to incorporate a "wicked" character into a regime of restitution of stolen property and protection of, and compensation to, property buyers.

4.1 The legal context: Buying stolen goods and the market decree, "*takkanat ha-shuk*"

While the story of Ḥanan's thieving and sale and Rav Huna's order do not mention it, the story is presented in the talmudic context of *takkanat ha-shuk*, "the market decree." This principle directs financial compensation by an object's original owner to an innocent purchaser of stolen moveable property. After the dramatic moment when an owner recognizes their stolen item in the possession of an innocent buyer, the unlucky buyer of stolen merchandise dutifully returns the stolen property to its rightful owner. The market decree mandates that the owner, in receipt of their item, compensate the buyer the price the buyer swears that they paid for it. In that way, the buyer has not completely lost in the transaction – and the owner actually loses some money to the purchaser, even as they regain their item.

The original owner retains ownership of the stolen article in circumstances in which *takkanat ha-shuk* applies. When a thief steals an object, the article remains the property of the original owner as long as the owner does not despair of ever recovering it, and as long as the article does not undergo some significant change.[37] The preference for the original property is similar to the principle in common law that "no one can give what one does not have," *nemo dat quod non habet*, and "first in time, first in right."[38]

Moreover, there is a requirement for the thief, or anyone else, to return lost and stolen property to the original owner.[39] Without *takkanat ha-shuk*, which is an exception to the rules of stolen articles, a buyer's return of stolen property is simply required; it would not make a buyer eligible for compensation from the original owner. In talmudic law, regardless of their good intention in the purchase, or lack of notice about the article's lack of valid title, an innocent buyer would not have standing to keep an article if the article was subsequently discovered to be stolen and the owner still sought it, as is the case in Ḥanan's story. The buyer could only, perhaps, sue the thief to recover the lost purchase price.

b. *B. Kam.* 115a develops different interpretations of an ambiguously phrased amoraic dispute referring to parties as "the first" and the "second." Some interpretations assign one of these labels to the thief, thereby involving the thief in the requirement for restitution. Others leave out the thief. In the

37 Yisrael Tsingelov describes despair in Mishpat Ivri as a strategy to narrow the owner's claim to return of articles without challenging their fundamental priority. Yisrael Tsingelov, "Takkanat ha-shuk: hitpaṭuta shel takkanah u-fituḥo shel ha-din," *Mishpatim* 31 (2001): 840. According to some amoraic views, owner's despair (*ye'ush*) severs the ownership bond with the object and allows a thief to acquire transferable title. According to others, thieves should never be able to acquire title to stolen objects because the owner gives up on the object's return, as b. *B. Kam.* 66a, "Rav Yosef said, "Despair does not grant title, even from rabbinic law." If the law views the owner as having no reasonable hope of recovering the object, this also severs the owner's ownership tie, which could occur for a number of reasons, e.g. armed robbers. When a thief or robber acquires title, they have to return the value but not the object. The same would be true for a subsequent purchaser, if the owner despaired, but the thief was not available to return the value of the item. Tsingelov, "Takkanat ha-shuk," 846, discusses despair and change of location, a definitive way for a thief to acquire title.

38 Stephen L. Sepinuck, "The Various Standards for the 'Good Faith' of a Purchaser," *Business Lawyer* 73 (2018): 587.

39 Uri Shtruzman, "Takkanat ha-shuk ba-mishpat ha-ivri: mashma'utah ve-ḥiuniyutah," *Diné Israel* 9 (1978–1980): 9–10.

passage in which Ḥanan's story appears, the hypothetical presents a known thief, alongside an original owner and a purchaser. It is important to recognize that the ordinary case preserves three parties in the property dispute: thief, original owner, and purchaser. It is not a dyad of two innocent parties, the original owner and innocent purchaser.

However, in Ḥanan's story, he is the thief, and he disappears from the story as soon as he steals the cloak and sells it. He only reappears in the narrative when his character as "wicked" has implications for the implied level of notice that the buyer had in their purchase of the stolen cloak. The story's exclusion of Ḥanan both narratively and legally, appears similar a phenomenon recognized by English common law and related traditions: in cases of stolen property, "the thief is commonly judgment proof and seldom can be found."[40] Yet as the discussion below will emphasize, excluding Ḥanan, the thief, is exceptional in Jewish law. While *takkanat ha-shuk* places the original owner and innocent purchaser in direct relation, cutting out the thief, not every case applies the principle identically, and some Amoraim affirm the decree and others reject it. Most importantly, when the thief is known, the thief may be included as an option for restitution.

4.2 The ruling: "Go, Free Your Saddle"

Talmudic lexicographers disagree on who appears before Rav Huna and receives the order to "untie/free/redeem your saddle." For some it is the buyer who Rav Huna directs to return the cloak, with the expectation of receiving money from the owner.[41] Others read the cloak's original owner, the theft victim, approaching the judge.[42] Rav Huna tells him to take back his

40 Alan Schwartz and Robert E. Scott, "Rethinking the Laws of Good Faith Purchase," *Columbia Law Review* 111 (2011): 1338.

41 Michael Sokoloff, *A Dictionary of Jewish Babylonian Aramaic* (Baltimore: Johns Hopkins University Press, 2002), 840 explains זיל שרי עביטך in y. *B. Kam.* 10:7 7c (19) "i.e. return the stolen item to its owner." Sokoloff appears to interpret the addressee as the buyer, who is directed to return the cloak to its original owner, to receive compensation (the saddle as a metaphor for compensation).

42 Jacob Levy, *Neuheibräisches und chaldäisches wörterbuch über die Talmudim und Midraschim* (Leipzig: F. A. Brockhaus, 1883), 3: 608, reads Rav Huna's order as directed to the original owner. The cloak's original owner should "collect" or "free" his cloak from the buyer. The owner would then be responsible to compensate the buyer. "Go and buy back the saddle!" Marcus Jastrow, *A Dictionary of the Targumim, the Talmud Babli and Yerushalmi, and the Midrashic Literature* (New York: Pardes Publishing House, 1950), 1037, likewise defines it as one person accepting

cloak, "free your saddle" is an expectation to compensate the buyer. "Free your saddle" appears once in the Palestinian Talmud, when Rav (Babylonian, and Rav Huna's teacher) uses it to argue a Jew can be forced to pay back another Jew who paid taxes on their behalf.[43] All interpreters of the Bavli story conclude that Rav Huna's order guarantees that compensation will be provided to the buyer, illustrating *takkanat ha-shuk*.

4.3 The story: Ḥanan's narrative exclusion

Wicked Ḥanan commits theft in this story, but unlike b. *B. Kam*. 37a, he does not appear for judgment. The story is not about his sanction, but about how to handle a dispute between the original owner of stolen property and a buyer. What follows are the narrative's stylistic aspects, which accentuate Ḥanan's removal from expectations of restitution. First, while the entire narrative is presented in the past tense, one can distinguish a different time for Ḥanan and for the dialogue in court. Ḥanan's crime is a completed action, and there is very little duration to the story's telling of it – just a few verbs. While the events in court are also narrated in the past tense, they have a livelier sense of unfolding. The narrative dramatizes a man coming to the judge and depicts direct speech between the two.[44] Wicked Ḥanan does not actually appear in the case's action, but rather in the narrative that precedes the case. Moreover, syntactically, he engages only with objects, never with the other characters. All of these contrasts, in time, duration of narrative, inter-personal dialogue or its lack, separate Ḥanan from the action of the plot. Narrative style mirrors legal substance, as Ḥanan is excluded from any

payment from the other for property, or a debt, "go untie thy saddle" means "redeem thy goods by indemnifying the buyer." Rashba and other commentators also presume Rav Huna is speaking to the owner. See Rashba, Commentary on b. *B. Kam.* 115a בעשו בו תקנת השוק קמפלגי.

43 y. *B. Kam.* 10:5 (7c) Hal. 6 רב אמ' יכיל מימר ליה את שרי עביטיך מיני, retrieved from www.maagarim.hebrew-academy.org.il. In an amoraic dispute, Rabbi Yehoshua ben Levi holds that no Jew can be forced to pay on behalf of another, except poll and municipal tax. Rav disagrees. Heinrich W. Guggenheimer, *The Jerusalem Talmud: Edition, Translation, and Commentary. Tractates Bava Qamma, Bava Mesi'a, and Bava Batra; Bava Qama* 10:6 (44a) (Berlin: De Gruyter, 2009) adds, "*If the government required A to pay for B's obligation, B always has to indemnify A.*" Retrieved from https://www.sefaria.org/.

44 Direct speech is relatively uncommon in adjudication narratives. Proverbs give the impression of hearing language of ordinary life.

appeal for restitution as a thief.[45] Wicked Ḥanan of this story, as opposed to Wicked Ḥanan of b. *B. Kam.* 37a, is marginalized. But it is his being left out of the remedy that invites the sugya's narrators to delve into the significance of his "wicked" character.

4.4 Sale of Stolen Property: b. *B. Kam.* 114b–115a and Comparative Legal Contexts

Ḥanan's story illustrates the problem of stolen property bought by unwitting buyers, an issue addressed by legal traditions beyond the Talmud. Both the Talmud and English common law, and contemporary legal traditions that incorporate common law, address the conflict that arises between a buyer of stolen property and the property's original owner.

> Here we meet the Eternal Triangle of the Law: an honest man (A), a rascal (B), and another honest man (C). Typically, the rascal imposes upon both of them ... and leaves to the law the problem of deciding which of them shall bear the loss.[46]

In b. *B. Kam.* 115a the original owner's ownership is protected to a greater degree than under common law's legal principle of "market overt," (purchase protection for articles bought in open market) and the bona fide purchaser in the Uniform Commercial Code (purchase protections given to buyers in many contexts).[47] The following overview of the Anglo-American comparative context will be referenced during the discussion of b. *B. Kam*.

45 Structuralist and other formalist literary criticism explains how the form of stories contribute to their meaning. Jonah Fraenkel, *The Aggadic Narrative: Harmony of Form and Content* (Tel Aviv: Kibbutz Hameuḥad, 2001) (Hebrew), for example, demonstrates that sections of stories, often demarcated by linguistic elements, advance narratives' themes.

46 A. James Casner & W. Barton Leach, *Cases and Texts on Property* (Boston: Little, Brown and Company, 1950), 179, cited by Menachem Mautner, "'The Eternal Triangles of the Law': Toward a Theory of Priorities in Conflicts Involving Remote Parties," *Michigan Law Review* 90 (1991): 95–154.

47 The Talmud's preference for the original owner's ownership, in the absence of their despair over lost items, is more pronounced for the amoraic views who reject *takkanat ha-shuk*. b. *B. Kam.* 65b–66b describes the process by which an innocent buyer acquires ownership of stolen goods: the sequence is an owner's despair followed by the transfer from thief to a subsequent purchaser, which allows the latter to gain clear title to the stolen goods. However, in our case, the owner never relinquished ownership.

The legal principle of market overt, which emerged in English law in the middle ages, addressed this problem of the "eternal triangle." It held that since people gathered for markets from distant places, it was impossible to determine the provenance of goods.[48] Furthermore, since those markets were the only places where chattels could be bought and sold in a large area, if the original owner overlooked their stolen item, they missed their chance to stop a sale. The principle has had wide application in common law jurisdictions over the centuries. Some American states considered the principle in the first half of the nineteenth-century and rejected it.[49] However, buyer protections giving title to qualified purchasers over original owners, even in the case of stolen property, did emerge in the U.S. in the Uniform Commercial Code.[50]

The U.C.C. protects good faith ("bona fide") buyers of goods: there are good faith purchasers for value, and within that, a subset are called buyers in ordinary course of business.[51] Bona fide purchasers have high protections, but there are conditions for buyers to qualify as good faith purchasers. The conditions amount to the buyer not ignoring indications that the seller has no title. Thus, there are expectations of responsibility to maintain this preferential treatment.[52]

There are disadvantages to policies protecting buyers over original owners. Such rules may incentivize theft because they encourage transactions that profit from theft. Schwartz and Scott argue these policies "reduce social

48 Market overt was abolished in the UK by the *Sale of Goods (Amendment) Act* of 1994. Other jurisdictions maintain it in some form: See Schwartz and Scott, "Rethinking Good Faith Purchase," 1335 n. 15 for a list in 2011, including Israel. Tsingelov, "Takkanat ha-shuk"; Shtruzman, "Takkanat ha-shuk" compare Mishpat Ivri *takkanat ha-shuk* and Israeli Sale Law 5728-1968 Section 34 (and related laws).

49 Peter M. Smith, "Valediction to Market Overt," *American Journal of Legal History* 41 (1997): 225–49; Harold R. Weinberg, "Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase," *Tulane Law Review* 56 (1981): 3–15. Moses Jung, "The Jewish Law of Theft: With Comparative References to Roman and English Law" (Dropsie College, PhD diss., 1929), 99 wrote that Roman law had no such parallel.

50 U.C.C. Section 1-201 (b) 9.

51 If a buyer in the ordinary course of business acted in good faith, and fulfilled the legal requirements to occupy that designation, even if the buyer bought an article that had been entrusted to, for example, a merchant for repair, and was sold without permission, the buyer acquires the prior owners' rights to the article through the sale. Sepinuck, "Various Standards," 600.

52 See Sepinuck, "Various Standards," 599 for a list of qualifications of "good faith."

welfare."[53] If the presumption in a market overt context is that the owner takes insurance to help protect the object's value, widespread insurance could also encourage crime if owners took less care in protecting their property.[54] Yet preferring the property rights of the original owner (as talmudic law does in the absence of despair) also has disadvantages. It discourages owners from taking the right amount of care to prevent theft, because they can recover their property even if it is stolen.[55]

The Talmud's *takkanat ha-shuk*, "the market decree," recognizes the problem that market overt and good faith purchaser rules address, i.e., the need for consumer confidence in an environment of theft, but addresses it without violating its prioritization of the original owner's ownership. As long as owner despair or change to the object has not occurred, the original owner owns the stolen article. Nonetheless, the innocent purchaser is also compensated by the original owner, which promotes confidence in market purchases. The payment does not recognize any acquisition of title based on the purchaser's payment to the thief. The thirteenth-century commentator Rabbi Menaḥem ha-Meiri states the purpose in terms of sellers' interests:

> Since he bought it in public, [the buyer needs to return it only in return for money] for were it not so, you have locked the door in sellers' faces.[56]

This resonates with English common law and related traditions' grounds for buyer protections in commercial law, which do not especially sympathize with the buyer, as much as raise concerns about knock-on effects for commerce, or "ease of transfer."[57] English jurist William Blackstone warned of the potential

53 Schwartz and Scott, "Rethinking Good Faith Purchase," 1342.

54 Burgess, "Market Overt Rule," 159.

55 Ibid.

56 Menaḥem ha-Meiri, *Beit ha-beḥirah B. Kam.* Ch. 10, cited in Shtruzman, "Takkanat ha-shuk," 10. See also Tsingelov, "Takkanat ha-shuk," 849, that despair and *takkanat ha-shuk* both prefer the purchaser over the original owner's rights "to ensure the confidence of sellers and buyers in the market and free, dynamic trade." Tsingelov "Takkanat ha-shuk," 869, 879, 893 notes that in the sixteenth century, Rabbi Israel Isserlein (*Terumat ha-Deshen*) limited the *takkanat ha-shuk* to compensation for the purchase price and not any yields, an attempt to find a "golden mean" between the original owner's and buyer's interests. He argues that Israeli law should attempt to find a similar balance.

57 Burgess, "Market Overt Rule," 157.

for an end to all commerce absent buyer protection: "otherwise all commerce between man and man must soon be at an end."[58] Likewise, several hundred years later, in his survey of the cases involving "good faith" purchasers in U.S. law, Stephen Sepinuck concludes that the Uniform Commercial Code's provisions appear to "protect the transaction more than it is protecting the buyer."[59]

The essential aspect that Wicked Ḥanan, the thief, adds to the existing considerations of competing interests between buyer and original owner across legal traditions emerges in the Talmud's choice to omit him, narratively and legally, from the account of the restitution procedure. The construction of Wicked Ḥanan as a known thief who is exceptional in disputes over stolen and sold property, sets up a contrast between him and the typical addressee of such rules in talmudic and other traditions.

4.5 The Talmudic Passage "He stole and sold, and afterwards the thief was recognized" (b. *B. Kam.* 115a)

The Talmud's discussion on b. *B. Kam.* 115a begins with an original owner recognizing their property in the hands of an unsuspecting purchaser. It cites a cryptic sentence summarizing an amoraic dispute about the correct addressee for a claim to retrieve (or compensate) for stolen movable property.

> It was stated: He stole and sold and afterwards the thief was recognized. Rav in the name of Rabbi Ḥiyya said the law (*din*) is with the first. Rabbi Yoḥanan in the name of Rabbi Yannai said the law (*din*) is with the second." Rav Yosef said, "They do not disagree: Here it is before [the owner] despaired – the law is with the second, here is after [the owner] despaired, the law is with the first."[60]

58 William Blackstone, *Commentaries on the Laws of England (1765–1769)* (Lonang Institute, 2005) 2:30, "Of Title by Gift, Grant, and Contract."

59 Sepinuck, "Various Standards," 602.

60 b. *B. Kam.* 115a. The Talmud adds a further comment, referring to b. *B. Kam.* 111b, where Rav Ḥisda refers to someone who takes food from a robber. The original owner may choose to collect from either the robber or the person who took food, i.e., received stolen goods, because, the Talmud says, "as long as the owner has not despaired, [the object] remains in the ownership (*reshut*) of its master."

The section of the talmudic discussion in which Ḥanan appears, a framing attributed to fourth-century Amora Rav Papa, addresses a case in which a thief steals a cloak and sells it to an unsuspecting buyer. The original owner has never given up on finding the cloak, and soon after, recognizes it on the buyer's person. The thief is known. This means that the original owner still holds title to the cloak. The purchaser must return it, because they are now aware of its owner, and that it is stolen property. The thief, if tried, would be liable to pay a fine to the original owner.[61] The buyer loses their purchase price.

> Rav Papa said, 'They all agree that the cloak returns to [the original] owner, and they disagree about whether they apply *takkanat ha-shuk* to him.'
> Rav in the name of Rabbi Ḥiyya said, 'the law is with the first one,' meaning it is the law that the buyer will take money from the thief – he thinks they did not apply the market decree to him. Rabbi Yoḥanan said, 'the law is with the second,' meaning the law is that the buyer takes money from the original owner – he thinks they did apply the market decree to him.

Rav Papa asserts that Rav and Rabbi Yoḥanan would agree that the owner has the right to demand their cloak from the buyer.[62] There is no possibility that the purchaser has acquired title to the cloak. The only disagreement, says Rav Papa, between Rav and Rabbi Yoḥanan, is whether the original owner reimburses the purchaser for their loss. That compensation could, theoretically, also come from the thief who sold the cloak. Rav Papa argues that Rav would not apply *takkanat ha-shuk,* and Rabbi Yoḥanan would. Rav would leave the buyer to return the object and seek compensation from the thief. However, the talmudic *takkanat ha-shuk* creates a reciprocal relationship between original owner and purchaser – each indemnifies the other. As Hai Gaon summarized, "the meaning of *takkanat ha-shuk* is that anyone who buys something in the market, which is found to have been stolen, can get their money back and return the item."[63]

61 See m. *B. Kam*. 7:1 and talmudic discussions.

62 As opposed, to, for example, a claim that the thief or purchaser had acquired it, and the original owner could only claim its financial value.

63 *Mishpetei Shevuot le-Rav Hai Gaon* 2:19 (Jerusalem, 1960). Retrieved from Bar-Ilan Responsa Project. *Takkanat ha-shuk* was eventually applied to "a broad range of regulations instituted by the Sages for the purpose of facilitating commerce elements of financial law in the Talmud." See Nahum Rackover, *Ethics in the*

4.6 Wicked Ḥanan and the *takkanat ha-shuk*

Wicked Ḥanan's story is placed in the sugya because as a student of Rav, Rav Huna's rulings for litigants are presumed by the editors to reflect what Rav would think in a similar case. It happens that Rav Huna has a case story about a stolen and sold cloak, bought by an innocent buyer, which is subsequently discovered and claimed. It is a story involving Wicked Ḥanan. Did Rav Huna rule as Rav Papa thought Rav would, allocating all of the loss to the purchaser, with no compensation from the owner?

The fact is that the story itself is not completely clear. It is very brief, as discussed above, and Rav Huna's ruling is an uncommon idiom, "Go free your saddle." The story itself makes no reference to the principle of *takkanat ha-shuk*, which likely developed, or was named after the time of Rav or perhaps Rav Huna.[64]

Rav Huna's ruling is taken to mandate an exchange in which the owner receives their cloak and the buyer receives the purchase price from the original owner. This is the opposite of what Rav Papa said that he thought Rav would have ruled in such a case. Rav Huna's case story challenges the view that Rav opposed the *takkanat ha-shuk* in cases of stolen and sold objects. It would mean that perhaps both Rav and Rabbi Yoḥanan would apply something like a *takkanat ha-shuk* reimbursement to an innocent purchaser of stolen property, instead of Rav leaving the purchaser with a loss.

> Did Rav think they did not apply the marketplace decree to him? But Rav Huna was a student of Rav!
> And Wicked Ḥanan stole a cloak and sold it. He (the buyer)[65] came before Rav Huna and Rav Huna said to the man: "Go, free your saddle."

At this point the Talmud offers an opposing view. Rav Huna did indeed require the original owner to compensate the purchaser. But Rav Huna's

Marketplace: A Jewish Perspective, trans. Chaim Mayerson (Jerusalem: Library of Jewish Law, 2000), 92. Also, Nahum Rackover, "Takkanat ha-Shuk ba-Mishpat ha-Ivri," *Praklit* 29 (1974): 139–44.

64 Rav Papa is a much later personality than these Amoraim. Rava uses the phrase, Rav Huna is the generation before him; perhaps the principle existed in his time.

65 MS Hamburg 165 is the only textual witness to explicitly say זבונא, "the buyer." This elucidates the ambiguity but could be a sign of a scribal addition for an easier reading. See the appendix.

order is not evidence of what Rav would rule in Rav Papa's hypothetical case of a stolen and sold cloak given the absence of owner despair. Rav Huna made his ruling because he knew his case – and it included Wicked Ḥanan, who was an exceptional person.

> They say, Wicked Ḥanan is exceptional; because it is impossible to be repaid by him, it is like when the thief is unknown.

Rav Papa's hypothetical involves a known thief, a purchaser, and the original owner. Rav Huna's, and perhaps Rav's approach to an ordinary conflict between an original owner of stolen property and an innocent buyer, if the thief is known, would be to leave the purchaser with neither object nor compensation. The purchaser can, in Rav's words, approach "the first" that is, the thief, in a separate claim. Why should the original owner have to compensate the purchaser for the sake of market confidence, when the thief is known? Let the buyer return the stolen article as is their duty and turn to the thief for the compensation they are owed. It just happens that the case story that the Talmud had involved an exceptional thief, so Rav Huna's ruling did not actually dramatize what Rav's position would be in the general case.

Rav's lack of concern to compensate the buyer, and centering of the dispute between thief and purchaser, is extended when the Talmud adds a statement of Rava. Rava adds a specific exception to the *takkanat ha-shuk* for buyers who purchase from a known thief. This provision finds similarities to U.S. commercial law cases that define the "good faith" buyer.[66] The Uniform Commercial Code (U.C.C.) protects good faith purchasers from the competing interests of original owners, even owners of stolen goods, by granting purchasers complete ownership ("voidable title") when they buy goods from a seller, as long as the purchaser "has no reasonable basis for believing that the seller lacks" voidable title.[67] This rule is very different from the Talmud's protection of the owner's title, even in cases of *takkanat*

66 Sepinuck, "Various Standards," 603.

67 Under U.C.C. Section 2-403 (1) the buyer has a duty to investigate if the seller has a right to sell, if the goods are theirs or actually stolen if they get one of these warning signs: they know the value of the object and the sale price is too low, the place of sale is not an ordinary place of sale, or if the buyer knows the seller only recently acquired the objects and is selling them on quickly. If the buyer purchases the item anyway, ignoring the "red flag" this removes their ability to be protected as a "good faith" buyer, and their title. See Sepinuck, "Various Standards," 610.

ha-shuk, which provide buyer compensation. Yet despite the contrasts, the bona fide purchaser in the U.C.C. and *takkanat ha-shuk* of the Talmud withdraw protections extended to buyers from willful purchasers of stolen goods.[68] This is presumably because of a common concern to not enact a policy that contributes to encouraging theft.

> Rava said, "If a thief is reputed, they did not apply *takkanat ha-shuk* to him" (i.e., to purchasers).

Rava's application of *takkanat ha-shuk* adds the purchaser's responsibility to the correct application of purchaser protection. The *takkanat ha-shuk* should not apply to all buyers.

But to those who buy from a seller who is not a known thief, according to Rav Papa, all Amoraim would apply *takkanat ha-shuk*, ordering the original owner to compensate the buyer.

Here the Talmud returns to Rav Huna's case, and asks again, why then is Ḥanan excluded from responsibility to pay the buyer? Why is the original owner left to compensate the purchaser, when the thief is known, and reputed as wicked?

> But Wicked Ḥanan was well-known,[69] and Rav Huna said to the man, "Go, free your saddle."

The Talmud concludes with what may be, depending on the reader's perspective, either an unsatisfying, or alternatively, an original answer. When it comes to the reputation of sellers and *takkanat ha-shuk* compensation, the sole red flag that invalidates a buyer's protection is a seller's prior public history of theft. Any other bad acts, or "wickedness," are not considered sufficient notice to remove protections for buyers, according to Amoraim who rule that *takkanat ha-shuk* is in force.

> They say, let it be that he was famed for being wicked, but not famed for being a thief.

68 Tsingelov, "Takkanat ha-shuk," 851, 862–66, follows reception of Rava's comment, distinguishing two principles that flow from it: the buyer's innocence (*tom lev*) and the thief's reputation.

69 The printed editions and some manuscripts, though not Hamburg 165, read "Ḥanan was a well-known thief." The argument works better with the version above, that Ḥanan was "well-known," probing whether his reptation would include theft.

Wicked Ḥanan, in other words, was known as wicked, but not a known thief. To summarize, the talmudic narrators offer two possible reasons why Ḥanan is not treated like the known thief, i.e., a person who would be accountable to the purchaser for compensation instead of the owner. First, they suggest that it was "impossible to be repaid by him." This is a feature of his character and behavior, though not explicit in the story. As a result of this assertion, Rav Huna treated Ḥanan as if he was an unknown thief and could not be contacted to meet his obligations. This technical solution creates some interesting character development in the Talmud's reception, as will be examined below. But it also provokes further difficulties. The narrative itself contradicts the idea that Ḥanan was "unknown" as a thief. He is far from anonymous. His characterization as "wicked" suggests he is known to the community within the plot narrative, just as his character is known to the readers of the story.[70]

The Talmud then offers another option, revising the definition of wicked, so that it does not include a reputation for all forbidden actions, theft included. Ḥanan was reputed wicked in his community, but the purchaser could be covered by *takkanat ha-shuk* because Ḥanan, while a rascal, was not a known thief.

4.7 Relative Responsibility for the Conflict in Comparative Perspective

Several Anglo-American legal scholars explain exceptions to an original owner's property rights, such as in common law's market overt, or in the Uniform Commercial Code, by reference to the responsibility that the purchaser or the original owner bore for contributing to the dispute. Because of their relative responsibility for the conflict they should bear, in similar portion, the loss or gain of the asset.[71]

Menachem Mautner advocates allocating the potential loss and entitlement to disputed assets based on people's relative culpability and negligence in the

70 Theoretically, a narrator could view Ḥanan's title, "wicked," as information external to the plot, known only to the narrator and readers, "extradiegetic" in narratological terms, i.e. outside of the plot events. See Gerard Genette, *Narrative Discourse: An Essay in Method* (Ithaca: Cornell University Press, 1980).

71 I wish to thank the journal's anonymous reviewer for encouraging consideration of the legal theory shift from who holds the property rights to who will bear the loss.

conduct leading to the dispute, and by assessing who can better bear the loss after it has occurred.[72] This approach is also found in Sepinuck's explanation of the American cases that present exceptions to a good faith purchaser.

> This rule—or non-rule, given that it is unexpressed in the Code—is premised in part on an assessment of comparative responsibility. Certainly, the victim of the theft and a good faith purchaser from the thief might both be innocent of any wrongdoing. Neither bears any responsibility for the thief's criminal act and only one of them can have superior rights to the goods. The law sides with the owner partly out of respect for the fundamental principles of property… But there is another underlying reason for this rule. The purchaser entered into a voluntary transaction with the thief, whereas the owner did not. The purchaser is therefore deemed to bear greater responsibility for creating the situation in which two innocent parties claim the goods.[73]

72 Mautner, "Eternal Triangles," 128; Sepinuck, "Various Standards," 587. This assessment echoes Oliver Wendell Holmes' explanation of assessments of liability in torts. Oliver Wendell Holmes, *The Common Law*, ed. Mark DeWolfe Howe (Cambridge, MA: The Belknap Press of Harvard University, 1963), 118. "Most liabilities in tort...are founded on the infliction of harm which the defendant had a reasonable opportunity to avoid at the time of the acts or omissions which were its proximate cause." Mautner, "Eternal Triangles," 128 writes that in his view the reason that common law decisions reach outcomes that Law and Economics scholars view as efficient is because "the cheapest cost avoider is also the most blameworthy party, i.e., the party that under the basic sentiments of retributive justice deserves to assume liability." Other values identified in the scholarship in addition to property rights and efficiency are an economic interest in promoting commerce and maintaining the market value of objects; a social-economic and legal interest in promoting efficient use of courts and reducing unnecessary suits; and fairness that recognizes that all parties should take some care to avoid harming the other. Some scholarship is policy focused – in areas where market overt protects buyers, for example, it may be addressing its shortcomings, while other scholarship is more theoretical, providing conceptual grounding for the various interests that the cases appear to prefer. Burgess, "Market Overt Rule"; Schwartz and Scott, "Rethinking Good Faith Purchase"; Hanoch Dagan, "Takkanat ha-shuk ke-bituah," in *Essays in Honor of Joshua Weisman*, ed. S. Lerner and D. Lewinsohn-Zamir (Jerusalem: Ha-makhon le-meḥkerei ḥakikah, 2002), 15–42 (Hebrew).

73 Sepinuck, "Various Standards," 606.

Which party chose or was forced into contact with the thief compares the original owner and the purchaser, because they are competing to avoid loss and gain an asset, while the cause of the dispute – the thief, is not approached to help rebalance the losses and provide restitution.

All these cases leave the thief out of the question of restitution. In talmudic cases, when the thief is unknown, talmudic judges similarly must decide the dispute between the buyer and original owner. But when the thief is known, the Talmud differs from the common law traditions, making an identified thief a third member of the dispute, and required to help resolve it. The community of restitution, then, also involves thieves. The type of person it does not include is Wicked Ḥanan.

4.8 Post-Talmudic Characterizations of Ḥanan in Legal Talmudic Commentaries (b. *B. Kam.* 115a): "Impossible to be repaid" by Ḥanan

In b. *B. Kam.* 37a, Ḥanan's wickedness does not manifest as a refusal to submit to all rules, or to the authority of a local judge. In b. *B. Kam.* 115a, his wicked reputation does not extend to every type of rule-breaking, and buying property from him is not considered buying from a known thief. Post-talmudic commentaries illustrate the different trajectories in midrashic re-castings of Ḥanan's character.

"It is impossible to be repaid" by Ḥanan could indicate many different possible character traits. One could envision Ḥanan as unabashed at having been identified as a thief. He would not admit wrongdoing, and therefore make it impossible for a buyer to ever recoup his purchase price. However, his story in *B. Kam.* 37a shows him submitting to penalties for battery. It is difficult to construct a full character from two short vignettes, particularly when *B. Kam.* 115a includes almost no portrayal of Ḥanan at all. These lacunae are opportunities for the talmudic editors, and their subsequent interpreters, to envision Ḥanan as a more coherent character, which illuminates the legal issues, but also constitutes as an effort in psychological insight, literary analysis, and imagination.

The late twelfth-century Italian commentator, Barukh son of Rabbi Samuel (Barukh ha-Sepharadi), wrote that Ḥanan would never repay not because he was wicked, or a known thief, but because "he was poor, and did

not have money that could be collected."[74] Perhaps this interpretation draws on the other story of Ḥanan (b. *B. Kam*. 37a), in which he has a coin that is only spent with difficulty. This version of Ḥanan is more sympathetic, and it hews close to the legal conclusion that follows in the passage, which is to treat Ḥanan is an unknown thief. If he is poor, his debt temporarily moves outside of the network of restitution.

Tosafot in their commentary to b. *Sanhedrin* 58b portray Ḥanan as guilty, but not a regular offender.[75] Ḥanan could not be someone who repeatedly strikes people. If he were, Rav Huna would not have simply given him a fine in b. *B. Kam.* 37a.[76] A view cited in Bezalel son of Abraham Ashkenazi's 16th century compilation, *Asefat Zekenim* (*Shitah Mekubbetset*), disagrees – Ḥanan was a serial offender in b. *B. Kam.* 37a. The only reason that a Babylonian Amora like Rav Huna could impose a fine on Ḥanan, given the principle that Babylonian Amoraim were not empowered to impose financial penalties, was because it was a temporary measure, a *hora'at sha'ah,* to address Ḥanan's repeated strikes.[77]

74 On Rabbi Barukh son of Shemuel, see Israel M. Ta-Shma, *Knesset Meḥkarim: Studies in Medieval Rabbinic Literature* (vol. 3): *Italy and Byzantium* (Jerusalem: Bialik, 2010), 322–25 (Hebrew), who discusses Jacob Naḥum Epstein's earlier work on the scholar. Commentary of Barukh ha-Sepharadi, printed in *Shitat ha-kadmonim al masekhet bava kamma,* b. *B. Kam*. 115a, retrieved from the Bar-Ilan Responsa Project.

75 E. E. Urbach, *The Tosaphists: Their History, Writings, and Methods* (Jerusalem: Bialik, 1955), 508–9 (Hebrew) attributes this commentary to the school of Rabbenu Perets, who cited an eclectic set of sources.

76 Tosafot *Sanh.* 58b, s.v. *kets yada'*. Tosafot discuss "Ḥanan bisha of Rav Huna" in their examination of the wickedness of striking people. B. *Sanh.* 58b reports that Rav Huna interpreted a passage in Job to prove that someone who strikes should have their hand cut off, and then reports that "Rav Huna cut off a hand." Tosafot explain that the reason that Rav Huna did not impose such a penalty on Wicked Ḥanan was that he struck a blow just once, not repeatedly.

77 Rabbi Isaiah, cited in Bezalel son of Abraham Ashkenazi, *Shitah Mekubbetset* (*Asefat Zekenim*) *Bava Kamma* (Jerusalem, 1952), b. *B. Kam*. 84b, 264: "If you ask, Wicked Ḥanan who struck his fellow, how did they judge it in Babylon, do we not say, "we do not undertake their agency for [cases] involving injuries even in Babylon?" The answer is it was a temporary decree, they imposed a fine on him because he was forewarned about it (*mu'ad le-khakh*). For Ashkenazi's life and work, see Abraham David, "Bezalel ben Abraham Ashkenazi," in *Encyclopaedia Judaica*, ed. Michael Berenbaum and Fred Skolnik, 2nd ed. (Macmillan Reference USA, 2007), 2: 572–73 and Shlomo Toledano, "Rabbi Betsalel Ashkenazi: His

Ḥanan becomes a hardened criminal in the twenty-first-century commentary, *Ḥavruta*. The author, Rabbi Yaakov Shulevitz, connects Ḥanan's two appearances, and concludes that no one could collect money from Ḥanan because he was renowned for violence, "since he is a violent man, and it is not possible for the buyer to collect the payment from him."[78] People are afraid of "wicked" Ḥanan. Shulevitz's interpretation is coherent, but also fails to account for the nuance of the b. *B. Kam.* 37a narrative, in which Ḥanan attempts to pay his victim, and demonstrates precision (two blows, no more). Ḥanan is not simply "violent" in that tale. Shulevitz emphasizes Ḥanan's wicked character by applying descriptions of the biblical character, Navot (1 Sam 25:3). He was "a man of wicked ways" (JPS: "evildoer"). Navot is also called "hard" (קשה). The move towards consistency and creating a deeper, more consistent character comes at the cost of the nuance and ambiguity offered in the two Ḥanan stories.

The talmudic passages involving Ḥanan consider how rules of fines and financial restitution ought to apply to a "wicked man" in a community. Ḥanan's two crimes, battery and theft, each entail financial sanctions, and in both stories Ḥanan is shown to be, in some way, unaffected by them.

In the first story, he chooses to pay twice, and to strike his victim twice. In the second story, Rav Huna ignores Ḥanan, and does not address his theft, nor include him as a community member who owes a debt. Of course, there could have been another case story about Ḥanan's theft, but this was the story that was remembered and retold – about how Ḥanan's theft resulted in two other people having to resolve a financial dispute among themselves. Telling court cases involving Wicked Ḥanan, and examining the definition of his "wickedness," without examining or adjusting the financial sanctions, leads to the next section of this paper, a cross-cultural consideration of how these discussions depict the audience, purpose, and efficacy of financial sanctions, both fines and restitution in torts.

Literary Activity and His Library" (The Hebrew University of Jerusalem, PhD diss., 2002) (Hebrew).

78 Yaakov Shulevitz, *Sefer Ḥavruta le-Masekhet Bava Kamma* vol. 4 (Bnei Brak, 2002), retrieved from the Bar-Ilan Responsa project.

5. Comparative Views

5.1 "A Fine is a Price"

Ḥanan deduced from Rav Huna's ruling that the *a priori* price for a blow to one's fellow was a half-zuz. Ḥanan undertook to pay that, which means that the penalty did not deter Ḥanan's bad behavior, even in the very short term of completing a penalty.[79] Ḥanan's translation of some part of the fine into a projected price for unwanted behavior, is reminiscent of the findings of a 2000 Israeli legal study, entitled "A Fine is a Price," about day care centers in Haifa.[80] The study investigated whether a fine alone could deter bad behavior among a population, if all other circumstances remain the same. Teachers running a day-care center faced parents arriving late, after hours, to collect their children. Teachers had no choice but to wait for the late arrivals and delay the end of their workday. The daycare center imposed a fine on parents arriving late. The hypothesis was that "higher expected fines produce[d] lower levels of criminal behavior."[81] After the adjustment period, the study found that the number of parents arriving late to collect their children increased, with the interpretation that the parents saw the fine as a cost of extended childcare hours at daycare.

Michael Sandel, a legal philosopher, took the view that the daycare study reflected an expansion of financial incentives and market attitudes into areas in which other sorts of norms are meant to govern. When market norms crowd out other norms, he argues, society gets more unwanted behaviors, not fewer.

79 *Sh.Ar*. ḤM *Hilkhot Dayyanim* 1:1 describes striking someone as "one of the fines that the sages imposed," comparing it to "anyone who pays more than what he damaged or pays half damages." This is a foundational understanding of the difference between fines and restitution payments: fines do not restore the damage done. I would like to thank Jennie Rosenfeld for drawing my attention to this source.

80 Replicated in 2005. Uri Gneezy and Aldo Rustichini, "A Fine is a Price," *Journal of Legal Studies* 29 (2000): 1–17; idem, "The Second Day-care Study" 2005, https://arielrubinstein.tau.ac.il/papers/WC05/GR1.pdf. The 2001 study was discussed in the popular economics book, Stephen D. Levitt and Stephen J. Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (New York: Harper Collins, 2006).

81 Gneezy and Rustichini, "Fine," 2.

> [A]s markets reach into spheres of life traditionally governed by nonmarket norms, the notion that markets don't touch or taint the goods they exchange becomes increasingly implausible. A growing body of research confirms what common sense suggests: financial incentives and other market mechanisms can backfire by crowding out nonmarket norms. Sometimes, offering payment for a certain behavior gets you less of it, not more.[82]

Tractate *B. Kam.* debates whether Babylonian rabbis had the authority to impose fines for battery, as Rav Huna did in *B. Kam.* 37a.[83] Perhaps Sandel's observation about the weakness of fines where other forms of social coercion ought to govern people's behavior is apropos, in a context in which the very authority to impose the fines is questionable. Other sorts of social mechanisms might work better to deter physical attacks or to address shame and social standing.[84] Ḥanan's story demonstrates the limits of fines as deterrence for certain characters, and some skepticism about the value of imposing fines for battery. His story in *B. Kam.* 115a indicates that restitution payments are, for someone like Ḥanan, irrelevant if there is someone more available to step in and pay instead. Yet Ḥanan is not transformed by the Talmud and its commentators into a reasonable man of Anglo-American torts, simply assessing what is most favorable or efficient to pay in fines or restitution.

5.2 The Holmesian "Bad Man"

Ḥanan's title, "Wicked Ḥanan," suggests reading him as a character type, not just an individual in an adjudication narrative.[85] Folklore studies identifies

82 Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets.* 1st ed. (New York: Farrar, Straus and Giroux, 2012), 114. My thanks to Alexander Kaye for drawing my attention to this work.

83 b. *B. Kam.* 84b, and medieval commentators on "לא עבדינן שליחותיהו."

84 A goal for the shame fine is not articulated, but the payment is a fine and not compensation.

85 It is impossible to know if Ḥanan 's given name, which means "merciful," adds to his nuanced characterization, alongside "wicked." But see Norman Cohen's analysis of the rabbinic folktale, Joseph who honors the Sabbaths (b. *Shabb.*119a), which includes word play based on the character's given name. He is introduced as Joseph יסף who honors the Sabbath, and in the end, he illustrates the lesson that one who lends to the Sabbath יוף will be paid back. Norman J. Cohen, "Structural Analysis of a Talmudic Story: Joseph-Who-Honors-the-Sabbaths," *JQR* 72 (1982): 168.

recurring character types, and these permeate rabbinic literature, as they do the literatures of other societies, whether ancient or contemporary.[86] One example is the "evil neighbor woman," who functions, according to Galit Hasan-Rokem, in similar ways in many cultures' folklore. She typically provokes a "'good neighbor woman' to tease her husband into some venture with the purpose of finding riches."[87] It could be argued that Anglo-American legal theory has produced character types as well. The Holmesian "bad man," is one such example.[88] The "bad man" functions as a recurring character in law review articles and in judicial decisions (including of the U.S. Supreme Court).[89] When he enters a legal text, the interpretation follows a certain expected logic. The case likely involves contract law or tort law, as these were fields that Holmes identified as susceptible to a self-interested, "what's in it for me" analysis by a "bad man."[90] The "bad man," is only concerned with the "disagreeable consequences" that might follow disobedience.[91] Not only does the "bad man" follow a script, but his entry into legal considerations also tends to bend them towards his point of view.

Unlike Wicked Ḥanan, the "bad man" has a clear author in American jurisprudence. In a speech by Oliver Wendell Holmes, delivered in 1897, he observed that:

> If you want to know the law and nothing else you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good

86 Galit Hasan-Rokem identifies character types such as the old man, wise ruler, bad neighbor woman, woman of tricks, and their places in different genres of folk tales in *Tales of the Neighborhood.* Examples of cross-cultural comparisons of folk figures can be found on 111–16.

87 Hasan-Rokem, *Tales of the Neighborhood,* 33.

88 A "reasonable man," in *Blythe v. Birmingham Co.* (1856) 156 Eng. Rep. 1047 (Ex.) and other such "types" are eligible for a literary and cultural examination of Anglo-American legal theory's folkloristic.

89 Jimenez, "Finding the Good," 2074–76 nn. 24–28 cites state and federal judicial decisions, law journal articles, and books.

90 Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 461; Jimenez, "Finding the Good," 2079; Jill Wieber Lens, "Justice Holmes's Bad Man and the Depleted Purposes of Punitive Damages," *Kentucky Law Journal* 101 (2013): 810. For Holmes's bad man's influence on tort law: Lens, "Justice Holmes's Bad Man," 811 n. 151; Jimenez, "Finding the Good," 2088.

91 Holmes, "Path of the Law," 461–62.

> one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.
> […]
> What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law. [92]

The "bad man" has evolved into a theory that rejects law as a force for the moral enhancement of society or the individual. Holmes had his own reasons for skepticism about arguments for morals grounding law of torts or other penalties. Having witnessed legal thinkers arguing for and against the abolition of slavery, many had lost confidence in appeals to moral arguments about the law.[93] Holmes was one of a group who sought to return the definition of law to its cases, and to a focus of the practice of lawyers, who would predict what judges would rule.[94] Avoiding sanctions, for instance, is what any "prudent man would do under given circumstances" based on "teachings of experience as to the dangerous character of this or that conduct under these or those circumstances."[95] This should be understood to stand in contrast with definitions of law originating in philosophy, whether Platonic, or John Austin's command theory of law, from which Holmes came to distinguish himself.[96]

92 Holmes, "Path of the Law," 459, 460–61.

93 William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994), 75–76.

94 Based on the judge's response to "dictates of tradition" and "their own and the community's judgment of what is required by public policy." See Mark DeWolfe Howe, "Introduction to Oliver Wendell Holmes, The Common Law," in Holmes, *Common Law*, xvii.

95 Holmes, *Common Law*, 119.

96 LaPiana, *Logic and Experience*, 117.

In *The Common Law* (1881), Holmes argues that language describing moral aspects of a person's behavior in torts such as "malice" or "negligence" represents not "inner corruption" by the aggressor, as prior theorists would have it. They are simply relics of earlier attitudes to people and articles that no longer represent what law is in Holmes's age. "The law, despite its language, is very seldom concerned with the true moral color of the inner man."[97] Holmes's lecture on the theory of torts observes, similarly, that financial compensation "for certain forms of harm to a person"[98] are assigned "because they are harms," and not "for the purpose of improving men's hearts."[99] The future tortfeasor is an intended audience for these payments, to guide their actions, but not in the sense that an aggressor might learn from the presence of sanctions that battery is wrong and they should care more for their neighbor. Rather, the payments in torts exist "to give a man a fair chance to avoid doing the harm before he is held responsible for it."[100]

In fact, Holmes pointed out that mill acts demonstrated that even when "conduct is made actionable" it does not follow that the "law regards it as wrong or seeks to prevent it." There is a difference between being liable for payment and being morally in the wrong. Tort law attempts to reconcile "the reasonable freedom of others with the protection of the individual from injury."[101] Mill acts, statutes in several states in the U.S., allowed property owners to build water-powered grist mills and factories on their property near rivers, and dam or divert the bodies of water to power them.[102] Mill acts directed mill owners to compensate their neighbors for the effects of these waterway changes but did not mandate they avoid the damage to their neighbors' lands.[103] This could be seen as an example of setting a price for a tort, rather than prohibiting it.

97 DeWolfe Howe, "Introduction," xxii.

98 Holmes describes compensation for loss to reputation, whereas talmudic law assigns a fine for shame.

99 Holmes, *Common Law*, 115.

100 On the other hand, the potential victims must also recognize some limitations on their own "enjoyments," a fair balance in Holmes's view. Holmes, *Common Law,* 115.

101 Holmes, *Common Law,* 115.

102 John F. Hart, "The Maryland Mill Act, 1669–1766: Economic Policy and the Confiscatory Redistribution of Private Property," *American Journal of Legal History* 39 (1995): 1–24.

103 See, by contrast, ch. 2 of tractate *Bava Batra*.

Some later legal approaches have attributed to Holmes a cynical view of law, in which the audience is the "bad man" who is advised by their lawyer, whether in torts or contracts, to comply as far as it is financially advantageous to do so. If, for example, the cost of adhering to a contract outweighed the benefit of keeping the contract (efficiency), or if the cost of fixing a potential flaw in a product was more than the potential liability for tort damages, a "bad man" figure would break a contract, or act negligently towards consumers.[104] Laws can either provide effective deterrents or accept bad behaviors as rational reactions to rules.

Marco Jimenez, in his analysis of Holmes' "bad man," critiques the attribution of this "bad man" theory of law to Holmes. Despite Holmes's warning to avoid "moral predilections" when explaining torts ("liability to an action does not necessarily import wrongdoing"[105]), Jimenez reads Holmes to judge sanctions as having the potential to reform "bad men," by inculcating better habits through identifying effective deterrents. By contrast, simply taking a bad man's view on sanctions would "make a mockery of the law itself by allowing individuals to inflict harm on others whenever they

104 The Learned Hand formula, in *United States v. Carroll Towing Co.* 159 F.2d 169 (2d. Cir. 1947), calculates damages in cases of negligence with the formula: B (precaution) =P (probability) L (magnitude of harm). Named for its author, Judge Billings Learned Hand, it states that if the probability of accident, multiplied by the magnitude of harm, exceeds the cost of precaution, the defendant should be liable for damages. If the cost of precaution is higher than PL, they should not be held liable for damages. See Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995), 48. The existence of the formula does not warrant the behavior, for example, of the Ford Motor Company, which decided to ignore engineers' warnings about dangers associated with their *Pinto,* calculating liability in relation to probability and magnitude (*Grimshaw v. Ford Motor Company* 119 Cal.App.3d 757). Scholars add that calculations of cost should be more expansive and include, for example, the length and costs of trials. See Albert W. Alschuler, "The Descending Trail: Holmes' *Path of the Law* One Hundred Years Later," *Florida Law Review* 49 (1997): 372; David Luban, "The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's *The Path of the Law*," *N.Y.U. Law Review* 72 (1997): 1571, cited in Jill Wieber Lens, "Justice Holmes's Bad Man and the Depleted Purposes of Punitive Damages," *Kentucky Law Journal* 101 (2013): 812.

105 Holmes, *Common Law*, 115. Liability is related to the choice the defendant made in the conduct that led to the harm, Holmes, *Common Law,* 121.

could pay the legal cost of doing so."[106] As Shalom Carmy wrote, Holmes "disavowed the move from what he considered realistic legal analysis to cynical moral prescription."[107] Nonetheless, some slippage has emerged, from considering the perspective of a "bad man" when making rules, to accepting his view of law as efficient, even ideal.

The "bad man" received attention in American legal studies most recently because of the 2008 U.S. Supreme Court decision *Exxon Shipping Co. v. Baker*,[108] in which punitive damages were explicitly molded to the perspective of a "bad man." In that decision, Justice Souter described unpredictably high punitive damages as unfair. The case struck down an award of $2.5 billion punitive damages against the company, Exxon, for its catastrophic Alaskan oil spill by the *Valdez* in 1989.

> Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another.[109]

Punitive damages were calculable based on compensatory damages with a ratio of 1:1.[110] Scholars criticized Souter's invocation of the bad man for denuding punitive damages of moral weight and social coercive effect. Jill Wieber Lens noted, "[The bad man] sees punitive damages as just another check that he *will* be required to write."[111] Jimenez warned, "what the judge

106 Marco Jimenez, "Finding the Good in Holmes's Bad Man," *Fordham Law Review* 79 (2011): 2091. It should be noted that Holmes refers to the prudent man and not the bad man in the theory of torts chapter of *The Common Law*.

107 Shalom Carmy, "Editor's Note: 'If You Want to Know the Law and Nothing Else'," *Tradition* 46, no. 2 (2013): 2.

108 128 S. Ct. 2605, 2627 (2008) (Souter, J.).

109 *Exxon Shipping Co. v. Baker* 128 S. Ct. 2605, 2627 (2008): 29.

110 *Exxon Shipping Co. v. Baker* 128 S. Ct. 2605, 2627 (2008): 40.

111 Lens, "Justice Holmes's Bad Man," 791, "The citation to Justice Holmes's bad man, who assumes he will pay compensatory damages, rejects the inclusion

or legislature need not do, however, is blindly parrot the bad man's own analysis, using his inputs, and reaching the same results."[112]

Regardless of how Holmes intended his image of the "bad man," the figure has developed through his application in U.S. court decisions, and in some law and economics-influenced contract and tort legal scholarship. These thinkers advocate writing rules with the "bad man" in mind. More than an imagined knave, the "bad man" becomes a legal orientation. I will compare Wicked Ḥanan to the bad man as a legal character type in financial disputes. This comparison will enable a consideration of the larger issue that the bad man raises in American jurisprudence: the intended addressee of fines, and other non-restitution payments, such as the talmudic *takkanat ha-shuk*.

5.3 Ḥanan, meet the "bad man"

Wicked Ḥanan is like the bad man, in that he is portrayed as shameless about his bad behavior. When interacting with a court, his morality is not subject to improvement.[113] The story of Ḥanan in b. *B. Kam.* 37a displays a matter-of fact description of a character who assesses a fine and determines that it is not a sufficient deterrent to strike. On the other hand, the talmudic discussions do not attempt to adjust fines or the *takkanat ha-shuk* to him: he is not, as proponents of an efficiency-focused bad man theory of law would have it,

of either optimal or complete deterrence within the damages' common law purpose."

112 Jimenez, "Finding the Good," 2124.

113 Shalom Carmy targets for critique a "bad man" of Jewish law in the present day. This is a legalistic person, who observes Jewish law, but who is not internally moved by the stories and moral content of the rules he observes. Two passages, also from tractate b. *B. Kam.*, supply grounding for this critique and reflect talmudic appeals to adherents' sense of divine accountability for their behavior, and not only to the fines of a court. In b. *B. Kam.* 55b, there are torts for which there is only heavenly liability, but no liability in rabbinic court for indirect causation of damage. Moreover, a story about R. Yoḥanan ben Zakkai credits him with the observation that a thief, who steals surreptitiously, is punished more harshly than a robber who steals openly, because the former showed no fear of Heaven, as he showed no fear of a rabbinic judge (b. *B. Kam*. 79b). Carmy, "Editor's Note," 2. Ḥanan bisha of *B. Kam.* 37a seems to be a prime example – he obeys the fine, but is not changed by its imposition, and strikes again. Carmy insists that despite such people's existence, "Judaism is not confined to the bad man's jaundiced perspective." Ibid., 6.

a "bad man" that the law needs to consider as the ordinary self-interested member of the community.

b. *B. Kam.* 115b indicates that rules about stolen and sold objects are not made with Ḥanan in mind. He is left out of the network of restitution, because he is "known for wickedness, but not a known thief." His case was exceptional, שאני, meaning that while Rav Huna did apply a rule that looked like the *takkanat ha-shuk*, in fact Ḥanan's case was no proof at all for the decree. Similarly, medieval commentators treat Ḥanan's case in b. *B. Kam.* 37a as out of the ordinary. Tosafot presumed Ḥanan's behavior was not repeated. Rabbi Isaiah, quoted in the *Shitah Mekubbetset*, considered Rav Huna's fine to be an act under *hora'at sha'ah,* a temporary enactment. The story in b. *B. Kam.* 37a is placed at the end of the sugya and told with markers of humor, and without commentary, potentially indicating that Ḥanan's behavior, while memorable, did not threaten to become widespread enough to strategize a response. In sum, the Talmud and its commentators do not expect tortfeasors to view their fines as the price for a second blow, nor do they fear that known thieves will be like Wicked Ḥanan.

By contrast, American legal scholars who argue for efficiency in contract law, or predictability in tort awards, seem to idealize rule-making with bad men people in mind, characterizing them as reasonable. This is a distinction between Wicked Ḥanan and the subjects of the Haifa day-care study. The day-care parents are meant to be representative of a broad population, ordinary, rule-keeping people, in order to test whether fines, absent other mechanisms to deter unwanted behavior, can change actions.

The Talmud may offer the conditions for an alternative legal approach. Wicked Ḥanan assures rabbinic audiences, including judges of subsequent generations, that despite his existence, the norms jurists develop do not need to cater to people like him. He can be treated as exceptional (שאני) in legal reasoning and excluded from consideration in adjudication. His behavior is cited and remembered, but this may be, in addition to the entertainment value of b. *B. Kam.* 37a, in order to recall that despite Ḥanan's existence, he is not the basis for rule-making. This theory is along the lines of the view regarding the preservation of minority opinions in Tannaitic law, preserved to remember them as rejected.[114]

114 t. *Ed.* 1:4, m. *Ed.* 1:4–6. These passages are analyzed by Steven D. Fraade, "Rabbinic Polysemy and Pluralism Revisited: Between Praxis and Thematization," *AJSR* 31 (2007): 19–21; Richard Hidary, *Dispute for the Sake of Heaven: Legal Pluralism in the*

6. Conclusion

The Talmud's stories of Ḥanan are essential. This point is worth making because scholarship comparing the laws of stolen and sold objects in Jewish Law with Israeli and American law, for example, skip over the stories. The narratives suggest that acknowledging the presence of people who will not be coerced into better attitudes or behavior, does not require the law to gear itself towards them. Ḥanan must have stories told about him, but the rules are made for the good people, who are expected to be more amenable to pressures, whether religious, social, or legal. Marco Jimenez argued that Holmes wanted a legal theory that focused on the "good man." With Ḥanan's narratives, by acknowledging the existence of the "bad man" in society, but marking that character as legally exceptional, the talmudic narrators seem to be enacting one.

Talmud (Providence: Brown University Press, 2010), 274; and Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* (Cambridge: Harvard University Press, 1997), 51–52.

Appendix: Hebrew and Aramaic Texts with Critical Notes

Bavli manuscript transcriptions are cited from the Friedberg Jewish Manuscript Project: https://fjms.genizah.org/, also consulting the website of *The Historical Dictionary Project* of the Academy of the Hebrew Language, https://maagarim.hebrew-academy.org.il/.

b. *B. Kam.* 36b–37a (Hamburg 165)

Critical notes are offered to Ḥanan's narrative; context provided for ease of reference to article discussion.

תנן התם התוקע לחברו נותן לו סלע ר׳ יהודה משום ר׳ יוסי הגלילי אומ׳ מנה ההוא גברא דתקע ליה לחבריה שלחה רב טובי בר מתנה לקמיה דר׳ אסי סלע צורי תנן או סלע מדינה תנן אמ׳ ליה תנינא ושנים הראשוני(?ם?)[ן] דינרי זהב ואי סל׳ דע׳ דתני תנא סלע מדינה ליפלוג וליתני עד תריסר וסלע

אמ׳ ליה תנא כירוכלא ניתנ]י וניזיל מאי הוי עלה]הדור[פשטוה מ(?י?)הא דאמ׳ רב יהודה אמ׳ רב כל כסף קצוב האמור בתורה כסף צורי ושל דבריהם כסף מדינה

אמ׳ ליה ההוא גברא הואיל ופלגיה דזוזא הוא לא בעינא ליה נתביה לעניי[] הד(ו)ר אמ׳ להו נותבוה ניהלי איזיל ואברי ביה נפשאי אמ׳ ליה רב יוסף כבר זכו ביה עניים וא׳ע׳ג׳ דליכא עניים הכא דליזכו בהו אנן יד עניים אנן דאמ׳ רב יהודה אמ׳ שמואל היתומין אין צריכין לפרוסביל וכן תני רמי בר חמא היתומין אין צריכין פרוסביל רבן גמל׳ ובית דינו אביהן של יתומין

חנן[115] בישא תקע ליה להוא גברא אתא לקמיה דרב הונא אמ׳ ליה זיל[116] הב ליה פלגא

115 The variations among early printed editions and manuscripts do not offer significant interpretive issues. Escorial manuscript spells his name חנין.

116 Vatican 119 does not include "go" (זיל). See note 130 below, on the Florence manuscript in b. *Bek.* 50b, where Rav Huna's decision was also somewhat shortened, but much more than this.

דזוזא[117] הוה בהדיה[118] זוזא מכא[119] בעא[120] למיתב[121] ליה מיניה[122] פלגיה[123] דזוזא[124] [ו]לא הוה[125] [מ]ש[ת]קיל[126] (מיניה) [ליה][127] תקע ליה אחרינא ויהביה[128] ניהליה[129]

117 Munich 95 adds here a phrase that does not make sense in the narrative, "he said to him" (אמר ליה).

118 This word has the most variation among the manuscripts. Hamburg 165 is the only one with this word, Munich 95 and Vatican 116 use a verb, "he was holding" (נקיט), and the rest of the printed editions and manuscripts have הוה ליה, "he had."

119 This word displays a wide variety of spellings among the textual witnesses. Vatican 116, mirroring the version of the story in b. *Bek.*, continues here with the phrase "with him that was not acceptable," בהדיה דלא הוה נפיק

120 All versions of b. *B. Kam.* have a version of this verb here, by contrast with the story in b. *Bek*. However, the Escorial manuscript and the Venice, Soncino, and Vilna editions read בעי, Vatican 116 has וקבעי, and Munich 95 has בעו.

121 Some variation with the verbal form here, besides Hamburg 165 and Vatican 116, the others have למיתבה, and Florence 8–9 something else, perhaps לנהיתן or למיתן.

122 This word, "from it" is missing in the Florence and Vatican 116 manuscripts. It would read, "he wanted/tried to give him," not "he wanted/tried to give him from it."

123 All the other textual witnesses read פלגא, with no pronominal suffix.

124 Escorial is the only text witness which omits this word "of a zuz," reading "a half" rather than "half a zuz."

125 Vatican 116 omits this verb.

126 In Hamburg 165, a scribe noted here that the verb should read משתקיל rather than שקיל, i.e. the reflexive form, "be taken from." משתקיל is adopted by the Soncino, Venice, and Vilna editions, while the other manuscripts have versions of קא שקיל, the participle preceded by a particle.

127 In Hamburg 165, a scribe indicated that the word מיניה should be removed and replaced with ליה.

128 The Escorial manuscript has ויהבה.

129 Escorial adds "it all" (כוליה), which a scribe also added to Munich 95. My sense of the rhythm of narration is that it ends more tartly without "all of it." The juxtaposition of two words with the same final syllable, "to him," and "all of it" seem to add heaviness to the punchline.

b. *Bek.* 50b–51a (MS Florence II-I-7)

חנן בישא תקע ליה לההוא גברא אתא לקמיה דרב הונא א״ל׳ פלגיה דזוזא[130] הוה איכא זוזא מאבא[131] בהדיה דלא נפיק[132] תקע ליה אחרינ׳ ויהביה ניהליה

b. *B. Kam.* 115a (Hamburg 165)

Critical notes are offered to Ḥanan's narrative; context provided for ease of reference to article discussion.

איתמר גנב ומכר ואחר כך הוכר הגנב רב משמיה דר׳ חייא אמ׳ הדין עם הראשון ור׳ יוחנן משום ר׳ ינאי אמ׳ הדין עם השני[133] אמ׳ רב יוסף [ולא פליגי כאן לפני יאוש הדין עם השני כאן לאחר יאוש הדין עם הראשון ותרוויהו] תרויהו אית להו דרב חסדא דאמ׳ רב חסדא גזל ולא נתיאשו הבעלים ובא אחר ואכלו רצה מזה גובה רצה מזה גובה

[...]

רב פפא אמ׳ דכולי עלמ׳ גלימא למריה הדר והכא בעשו בו תקנת השוק קא מפלגי

רב משום ר׳ חייא אמ׳ הדין עם הראשון דינא דלוקח למשקל זוזי בהדי גנב סבר לא עשו בו תקנת השוק

ר׳ יוחנן אמ׳ הדין עם השני דינא דלוקח למשקל זוזי בהדי בעל הבית סבר עשו בו תקנת השוק

130 The Florence manuscript renders Rav Huna's decision simply as a sum, which works well. The other manuscripts and early printed editions add "give him" (הב ליה). At this point in the story, the Vatican 118–9 manuscript skips, resuming at "he went out (giving a different meaning to the verb נפק which refers in context to whether the mutilated currency was acceptable or not), struck him again, and gave it to him." There is no sign of damage to the manuscript, rather this seems to be a loss in the transmission of the story.

131 This should read מאבא, as it does in most texts.

132 This is the main difference with the *B. Kam.* 37a version of the story. In this version, and it is the same in all textual witnesses except for Vatican 118–9 which misses these words, the coin is not acceptable, "it doesn't spend" while in the *B. Kam.* version, there is tension between the victim who refuses to accept the coin and Ḥanan who wishes to use mutilated or worn currency to pay. In both places, the link to this story relates to currency, though in *B. Kam.* there is closer thematic interest in battery than in *Bek.*, which could explain this manuscript difference.

133 While there are spelling differences, this tradition is represented across the various manuscript and early printed editions, with no further clues regarding to whom the first and second refers.

וסבר רב לא עשו בו תקנת השוק והא רב הונא תלמידיה דרב הוה וחנן בישא גנב גלימא וזבניה[134] ואתא זבונא[135] לקמיה דרב הונא ואמ׳ ליה רב הונא[136] לההוא גברא זיל שרי[137] עביטיך אמרי שאני חנן בישא דכיון דליכא[138] לאשתלומי מיניה כמי[139] שלא הוכר הגנב[140] דמי אמ׳ רב[141] גנב מפורסם לא עשו בו תקנת השוק והא חנן בישא גנב מפורסם[142] הוא ואמ׳ ליה רב הונא לההוא גברא זיל שרי עביטיך[143] אמרי נהי דהוה מפורסם לבישותא לגניבותא לא הוה מפורסם

134 Munich 95 and Escorial Manuscripts omit "and sold it" while Oxford: Heb. d. 62/65–66 probably had it but the text is fragmentary. If Ḥanan did not both steal and sell the cloak, the narrative illustrates a different point of law.

135 This clarification, naming the seller as the person who came before Rav Huna appears only in MS Hamburg 165. The scribal work should be seen alongside the work of other interpreters seeking to clarify the difficult story, in my opinion.

136 Naming Rav Huna here, rather than leaving him unnamed, implied in "he said," is the characteristic of MS Hamburg 165 in this story. Only this text, and Oxford: Heb. d. 62/65–66 do so, among all text witnesses. This specificity continues the manuscript's identification of the seller in the previous sentence.

137 Munich 95 and the Soncino printed edition both have "throw" (שדי) rather than "free" or "redeem" (שרי).

138 Munich 95 adds the words "he had" (ליכא הוה ליה) with the effect of "he didn't have" to emphasize how he was unable to pay because he had nothing with which to pay.

139 Hamburg 165 and Oxford: Heb. d. 62/65–66 add "he is like" or "his case is like" (כמי). But the sense is the same without it.

140 The early printings, Venice, Soncino, and the Vilna edition all omit "the thief" (הגנב), the text reading "because it is not possible to be paid by him, it is like he is not known."

141 Only MS Hamburg 165 and Oxford: Heb. d. 62/65–66 have this *meimra* in Rav's name, the others have Rava or Rav with an apostrophe.

142 The manuscripts and early printings differ in an interesting way with this phrase, גנב מפורסם. The printed editions Venice, Soncino, Vilna, as well as the Florence 8-9 and Munich 95 manuscripts say Ḥanan was a "well-known thief" (גנב מפורסם), while the other textual witnesses, Hamburg 165, Oxford: Heb. d. 62/65–66, Escorial, Vatican 116 write that Ḥanan was "well-known" (מפורסם). I think the argument works better without "well-known thief," but with an argument that he was well-known, implicitly, as a bad person, probing, in the question, whether that reptation would include theft.

143 While Hamburg 165, Oxford: Heb. d. 62/65–66, and Munich 95 have this version, the rest of the textual witnesses have "applied to him the marketplace decree" (עשו בו תקנת השוק). The former version maintains the narrative's integrity, the latter form introduces the concept for which the narrative was introduced.