**Aversion to Religious Transgression and Enhancing Social Welfare**

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This article presents a proposal for improving social welfare by reducing the incidence of theft such as plucking fruit from trees in roadside orchards. The proposal relies on people’s aversion to religious transgression of the kind defined as “between man and God” (*ben adam le’Elohav or ben adam la-maqom*). The inspiration for the idea presented below originates in a halakhic ruling by Rabban Shimon ben Gamliel (hereinafter: RSbG )[[1]](#footnote-1): passersby who are tempted to pick others’ fruit should not be warned about the presence of forbidden fruit in the orchard, and trees bearing fruit forbidden for consumption or other benefit on religious grounds should not be marked as such.

That social welfare is abetted by norms of fair interpersonal conduct—originating in interpersonal (*ben adam la-havero*)commandments—is not novel; it is noted at length in the economic literature. We wish to present a new idea by adding that the aversion to a transgression against God may also, in certain cases, contribute to an enhanced state of social welfare.

We chose to present this general idea as a new explanation of RSbG’s foregoing halakha, which ostensibly contradicts a fundamental halakhic rule that one must distance a transgressor from his or her transgression. Our explanation not only draws on economic theory, but also on attempts by generations of interpreters of the Talmud to explain RSbG’s rule. According to our explanation, RSbG did wish to distance transgressors from the offense of stealing fruit “en passant” by invoking their aversion to a transgression that *people* consider more serious than theft: a *ben adam la-maqom* offense, a sin against God.

The discussion is organized as follows: Section 1 introduces the topic and presents the halakhic and historical background of RSbG’s ruling. Section 2 unpacks the halakha and offers a critical description of the explanations that have been put forward of why the halakha does not contradict the basic rule of distancing a transgressor from his or her transgression. Section 3 presents our economic explanation of RSbG’s rule. This is accompanied, in Section 4, by a numerical and graphical example that substantiates the argument. Section 5 summarizes and concludes.

The appendix, an integral part of the article, presents an economic model that sharpens and elucidates our explanation of RSbG’s halakha and the dispute between him and the Tannaim. The model also transforms the specific explanation of the halakha, noted above, into a more general theory of the utility of aversion to religious transgressions to enhance social welfare.

**A. Halakhic and Historical Introduction to Rabban Shimon ben Gamliel’s Rule**

The Introduction comprises three subsections that give the background of RSbG’s halakhic rule: that forbidden fruit in an orchard, which passersby might pick and eat—thus committing the transgression of theft—should not be marked as such. In the first subsection, we discuss the relative gravity of theft as reflected in halakha (rabbinic law) and aggada (rabbinic homiletics). Subsection 2 gives a brief historical background of RSbG’s times, and Subsection 3 sets his ruling against its agricultural background.

**1. The Religious Background of the Halakha: The Severity of Theft and the Dismissive Treatment of “Petty Theft”**

1.1 **The severity of theft:** Implicit in the Talmud and the halakhic literature is a view of theft as a transgression so dire that one of the Sages likened it to the three gravest offenses of all, for which Jews should forfeit their lives rather than transgress. The Jerusalem Talmud expresses it thus: “Not only if they told him [while threatening his life] that he must kill so-and-so [for then he must accept his own death rather than do the deed], but even if they tell him to pilfer from so-and-so, [he should surrender his life instead].”[[2]](#footnote-2)

A warning about the severity of the injunction against theft is explicit in the halakha, appears in *midrashe halakha* (exegetical midrash), and is give homiletic treatment in *midrashe aggada* (homiletic midrash). In halakha, one who steals from one’s fellow, even something of the smallest value, is said to having taken the victim’s soul.[[3]](#footnote-3) In midrash aggada: “Come and see how great the power of robbery is, as the generation of the Flood violated every precept, but their sentence was not sealed until they extended their hands and engaged in robbery, as it is stated ‘For the earth is filled with robbery through them, and behold, I will destroy them with the earth’ [Gen. 6].”[[4]](#footnote-4)

Thievery was originally defined as “appropriating another’s wealth by force” (Maimonides, *Hilkhot Gezela* 1) but the gravity of the prohibition includes anyone who appropriates money or its equivalent from another without the other’s permission, be this by coercion or without the other’s knowledge, as well as the *‘osheq*—one who falsely denies having received a deposit or loan.[[5]](#footnote-5)

The offense of theft applies to anything appropriated that is worth more than a *peruta,* such as a piece of fruit from another’s orchard, personal use of work time,[[6]](#footnote-6) and employer’s resources for personal use; all such actions and those resembling them are defined as theft. The midrash pertaining to the punishment of the generation of the Flood to extinction because it had transgressed so badly that “the earth is filled with robbery,” i.e., that theft became the norm, may sustain the argument that the Sages understood the immense danger to society intrinsic in the violation of property rights. Given that no system of policing and penalties had the strength to prevent theft in its broad sense, repeated emphasis of the gravity of this transgression helped to deter people from committing it.

1.2 **Scoffing at petty-theft transgressions:** Even though the halakha recognizes the severity of theft of all kinds, the Sages acknowledged that, under certain circumstances, people make light of theft or at least consider it less serious than other offenses, particularly those against God. For brevity, we define these offenses as religious transgressions or, simply, “transgressions.”

Now we present evidence that people are more averse to transgressions against God than they are to thievery. Discussing criminal suspects, the Talmud instructs: “R. Yehuda said in the name of Rav: The majority of people [succumb to transgression] with regard to robbery (Babylonian Talmud, Bava Batra 165a).[[7]](#footnote-7) R. Samuel ben Meir (Rashbam) explains *ad loc*: “‘Most people are suspect of robbery, of what is tantamount to robbery.’ For example, giving themselves license to impede others from gains that they deserve.” So we find in *Havot Yair*,[[8]](#footnote-8) which we mention below in the context of RSbG’s ruling that a passersby’s *en passant* picking of fruit from fields without the owner’s permission should be called theft.

Furthermore, people’s judgment of transgressions as something more serious than theft has an important practical implication. In the case of a financial claim where the defendant admits to only part, for example, the halakha instructs the defendant to swear to the veracity of his remarks and is then absolved. Here, as in all laws of oaths, “We do not say that since one who is suspect in financial matters is suspect with regard to taking an oath” (Babylonian Talmud, Bava Metsi’a 5b, *inter alia*). Namely, Jewish law does not hold that being suspect of a financial transgression (a false claim or theft) also makes one suspect of giving a false oath. This rule is the basis for taking an oath in additional contested cases involving money, e.g., an oath by an unpaid guard who has not been derelict in his guard duty.[[9]](#footnote-9)

Given that halakhic decisors rank the severity of theft and religious transgressions differently than do ordinary people, it is sometimes possible to exploit the revulsion that attaches itself to religious transgression to make thievery less prevalent. The purpose of this article is to propose that this is not only a theoretical, legalistic possibility, but also one that the halakha adopts in the case of marking forbidden fruit in order to advise passersby who may desire to eat it.

**2. Historical Background: Rabban Shimon ben Gamliel (RSbG) and His Times**

RSbG, who established the permanent injunction against marking forbidden fruit, presided over the Sanhedrin in 145–175 CE, the years immediately following the Bar Kokhba uprising (132–135 CE). Hadrian’s repression of the uprising brought disaster on the Jewish population of the country, when the damage sustained after the Great Rebellion and the destruction of the Second Temple (70 CE) had not yet been repaired. Hundreds of thousands of Jews were killed, tens of thousands were taken captive, and many emigrated. Judea was thoroughly laid waste; Jerusalem was put to the plough and became a Roman city renamed Aelia Capitolina.

The Jewish population shrank to some 700,000, nearly all concentrated in the Galilee, where the villages and towns had not participated in the uprising, at least not aggressively. Hadrian also adopted anti-religious edicts against the Jewish population: forbidding circumcision (an injunction first applied before the uprising), congregating in synagogues for Torah study, and other prescriptive commandments. The Sanhedrin migrated from Yavne to Usha, in the Galilee.

In 138 CE, Antoninus Pius took the Imperial throne and annulled the decrees. A short time later, (145 CE) RSbG appeared in Usha and accepted the presidency and leadership of the Jewish community in the Land of Israel as a scion of the Hillelite presidential dynasty. In so doing, he received the Roman authorities’ de facto recognition, on the one hand, and the Jewish population acquiesced to Roman rule, on the other.

The devastation that the quashing of the uprising left behind presented RSbG with difficult tasks:

1. Restoring recognition of the status of the presidency among the Sages of the Sanhedrin. In this, he was so successful that the Sages noted: “Every place where Rabban Shimon ben Gamliel taught [a ruling] in our Mishna, the halakha accords with his opinion [with three exceptions] because he expresses measured rulings before his court.”[[10]](#footnote-10)
2. Reasserting the hegemony of the Land of Israel over the Diaspora (foremost that in Babylonia) after this hegemony was challenged during the uprising;
3. Strengthening the Yavne tradition concerning the observance of the commandments after the destruction of the Temple;
4. Finally, upholding property rights. A society in need of revitalization after a catastrophe faces the risk of the erosion of ownership rights; action to shore up these rights is urgently needed. The halakha at issue here—to refrain from marking forbidden fruit—is, in our opinion, related to this undertaking, as will be shown below.

One may conjecture that in his dual role—as president of the Sanhedrin, whose authority is religious, and as the *nasi* (“prince”) of Jewish society in the Land of Israel, tasked with this society’s wellbeing—RSbG was more sensitive than his colleagues to the maintenance of property rights. At the time of revitalization from the ravages of the Bar Kokhva uprising[[11]](#footnote-11)

**3. Agricultural Background: Vineyards, Fruit Orchards, and Transgressions Relating to Fruit Consumption**

At the time in question, the Galilee was renowned for its vineyards and orchards. Josephus describes it as “a fertile land” blessed with a variety of trees; the wealth of its output is alluring, its soil “blessed with fertility.”

Abutting many of these vineyards and orchards were roads that carried heavy traffic on foot and horseback. The fences that encircled these assets, if any, was no obstacle to unauthorized entrance. Therefore, passersby were sorely tempted to enter other people’s orchards in order to pick and eat fruit on their way. Since all passersby were tempted independently of the others, and since there were so many of them, their temptation could reduce field owners to poverty.

Trees of various ages grew in these orchards. Some were less than three years old after planting; others were in their fourth year; and yet others were older.

According to the halakha, fruit grown on a tree in its first three years may not be eaten and may not produce any other benefit; it is called ‘*orla*. In the fourth year, it is called *neta’ reva’i* (or, in the case of a vineyard, *kerem reva’i*). That year’s fruit harvest must be brought to Jerusalem and eaten there; alternatively, it may be desacralized by being replaced with redemption money, so that when its owner visits Jerusalem he takes the money and spends it for his needs during the visit. One may also sell the fruit in the local market and pledge the proceeds to the purchase of foodstuffs in Jerusalem.

**B. The Specifics of RSbG’s Halakha and Possible Explanations**

**1. The Halakha and Its Details**

The halakha at issue in our discussion is presented in the Babylonian Talmud[[12]](#footnote-12) and is an expanded version of the Mishna in Tractate Ma’aser Sheni.[[13]](#footnote-13) Below it is presented as given in the Talmud (after removing what is irrelevant to our discussion); then it is explained:

With regard to a vineyard in its fourth year, they would mark it with clods of earth […] and mark a grapevine of ‘*orla* with potsherds. […] Rabban Shimon ben Gamliel said: In what case is this said? During the sabbatical year, when it is ownerless, but during all other years of the sabbatical cycle—feed it to the wicked man and let him die.

The Mishna rules as follows: a vineyard and other fruit trees in their fourth (*reva’i*) year are marked with clods of soil around their trunks, and trees not yet having reached their fourth year (*‘orla*) are marked with potsherds in order to warn those entering the field, including those not authorized to do so, that the fruit they see is forbidden. Rabban Shimon ben Gamliel asks: When should this demarcation be performed? Only in the sabbatical year, when all are allowed to enter the field and partake of its fruit. In other years, however, there should be no such demarcation; let the wicked eat the fruit and die.

**2. The Basic Problem in RSG’s Ruling against Demarcation**

RSbG’s ruling against marking fruit in non-sabbatical years has come down as permanent halakha. The rule is hard to understand, however, because it contradicts another halakha, universal in the Torah, to the effect that a transgressor should be warned against transgressing. The halakhic literature refers to this conundrum as the *Havot Yair* problem,[[14]](#footnote-14) either because this authority was the first to bring it up or because of the special way its author winds up his commentary in order to emphasize the gravitas of the question. Here we present the question in *Havot Yair*,[[15]](#footnote-15) giving part of it and its conclusion in the author’s own words (in boldface):

In view of our redoubled duty to distance a transgressor from his transgression … it is easy to distance the thief from the transgression by marking the fruit, and how was he allowed to stumble and we to cause him to stumble? Not only would we prevent transgression of the prohibitions of *‘orla* and *neta’ reva’i*; but **he may desist from theft through the additional transgression of *‘orla*[[16]](#footnote-16) […] and people take the injunction against theft lightly**.[[17]](#footnote-17)

“And he who would offer me a cure for this illness of mine,” the author of *Havot Yair* concludes,” should be called a master physician.”

**3. “Feed It to the Wicked Man and Let Him Die” and the Injunction against Demarcating Forbidden Fruit**

The expression “feed it to the wicked man and let him die,” which appears in the Talmud as a quotation from the Mishna, is not expressed in RSbG’s words; in fact, it does not appear in the original Mishna.[[18]](#footnote-18) Either way, this mordant aphorism is unique in the Talmud, occurring only here in the context of a thief who wishes to steal fruit that is forbidden to him but which he does not identify as such. All the *rishonim* who discuss the expression refer to this context.[[19]](#footnote-19) The “wicked man” is a thief and the thing he eats is forbidden fruit.[[20]](#footnote-20)

In our analysis, we are committed to the Talmud’s explanation of the halakha. Accordingly, we confine this surprising expression solely to the context in which it appears. As such, it amplifies the basic problem: that a thief whose targeted fruit is forbidden for consumption should not be forewarned and should be allowed to die for his sin. The halakhic directive not to mark the forbidden fruit emerges not only from the expression “feed it to the wicked man and let him die,” but also from RSbG’s own words as recorded in the original Mishna, from which the expression is absent. RSbG’s response to the determination of the Tannaim that the forbidden fruit should be marked is: “In what case is this said? During the sabbatical year!” Namely, in other years demarcation should not take place and growers should not mark the prohibited fruit.[[21]](#footnote-21)

Maimonides also construes the halakha as an instruction not to mark the fruit:

[…] Because no one has permission to reach out and eat something not his and one who transgresses and eats is a thief. We need not take corrective measures toward a thief so that he should not stumble, since the transgression of theft is exceedingly grave and these words are correct.[[22]](#footnote-22)

Maimonides’ unequivocal statement—“We need not take corrective measures for a thief!”—is plainly an instruction, not a recommendation, to refrain from marking the fruit.

Rabbi Tzvi Pesach Frank[[23]](#footnote-23) noticed a problem that, in his opinion, flows from Maimonides’ ruling that not only is one not required to mark forbidden fruit but is duty-bound not to mark it. Rabbi Frank reacts to this with amazement:

But [Maimonides’] wording, “We need not take corrective measures toward a thief so that he should not stumble,” plainly means that even if one can put [the thief] at a distance by marking, even then one should not mark. It is amazing.

**4. Attempts to Resolve the Contradiction**

Over the generations, there have been various attempts to resolve the contradictory halakhic imperatives: distancing a person from transgression and not marking forbidden fruit. All these attempts are based on some kind of distinction between the rule of compulsory distancing and the specific case of marking the fruit. Few, however, are thoroughly convincing. Two representative responsa follow.[[24]](#footnote-24)

**The responsum of *Bet Yitzchak***[[25]](#footnote-25): “It is definitely forbidden to place a stumbling block […] but here [when one does not mark fruit] it is but an auxiliary measure; furthermore, one [who does not mark] takes no real action to cause transgression […].” This responsum is unconvincing. Yes, no stumbling block is directly positioned, but an indirect one certainly applies because the minor act of marking the fruit could save the transgressor. Furthermore, even if the owner wishes to mark the fruit, halakha does not allow him to do so. “It is amazing” as Rabbi Frank (quoted above) says.

**The responsum of R. Shlomo Eiger[[26]](#footnote-26)**: “Either way, he commits the transgression of theft […] and it is not our duty to steer him away from a different, additional transgression.” This responsum, too, is hard to accept. Why pursuant to one transgression do we absolve ourselves from distancing the offender from another? After all, the transgressor is still defined as one toward whom other Jews are responsible. Additional responsa that attempt to clear up the contradiction raise similar arguments, all of which, however, are strained.

Against this background, Rabbi Frank’s explanation of the halakha in question, one about which he remarks “It is amazing!” stands out for its originality: If the forbidden fruit were marked, passersby would turn to unmarked fruit and thereby violate the rule against theft, whereas if the fruit is not marked they would transgress by eating forbidden fruit but avoid theft, the more serious offense. But why would they skirt the injunction against theft by picking and eating forbidden fruit? It is because, in Rabbi Frank’s reasoning, some sanctity or a Torah injunction attaches itself to the fruit. Thus, appropriating it without its owner’s permission, although forbidden, is not defined as theft.[[27]](#footnote-27) We will first quote Rabbi Frank and then comment. “For theft is a graver transgression than others and the corrective measure, marking [the fruit], is its own drawback because it distances [the thief] from the less-serious offense—eating *reva’i* and *‘orla* [fruit], to which the *lo tigzol* [“do not steal”] proscription does not apply—and ushers him to the more serious offense, theft. Thus, to RSbG’s thinking, demarcation should not be done in other [non-sabbatical] years.”[[28]](#footnote-28)

Although the argument that no “theft” of forbidden fruit takes place is controversial, Rabbi Frank alerts us to two important fundamentals. First, by saying that marking forbidden fruit would distance passersby from it and direct them to non-prohibited fruit, he implies that people take stealing fruit more lightly than they do eating forbidden fruit. Invoked here is a rule that we already demonstrated above, concerning the relative gravitas that people attribute to transgressing against God. The second fundamental is that the duty to distance a transgressor from his transgression includes, under certain circumstances, diverting him from a major transgression to a minor one. The two fundamentals help us to offer the explanation that follows. We will not, however, assume that no theft takes place in consuming forbidden fruit; similarly, we avoid additional implicit and explicit assumptions made by Rabbi Frank which, in our opinion, are unsupported.[[29]](#footnote-29)

**C. The Economic Explanation—Dissuasion via Fear of Transgression, the Extent of the Theft, and the Extent of the Offense of Eating Forbidden Fruit**

The approach that we will use to justify the non-demarcation of forbidden fruit is simple and almost intuitive. If forbidden fruit in an orchard—*neta’ reva’i* and *‘orla*—is not marked and everyone knows it, one who sees a fruit tree will realize that its fruit may be forbidden. If people are strongly averse to eating such fruit, it is highly probable that they will refrain from picking it due to that concern. In turn, this will spare them from committing the transgression of stealing the fruit, which they would make light of in such a case.

If, in contrast, the custom is to mark the fruit, potential thieves may be sure that the fruit of an un-marked tree is safe to eat; since they consider stealing the fruit a minor offense, they would pick fruit and eat it for their pleasure.

Thus, the very practice of not marking forbidden fruit may forestall theft due to people’s reluctance to eat forbidden fruit, whereas marking it would not prevent theft because it diverts those not averse to the mere theft of fruit to take permitted fruit.

To complete our explanation, we specify its underlying assumptions. The first two are derived from the debate in the Talmud; the third is a projection of these assumptions to the case of uncertainty about whether fruit ripe for picking may not be consumed. The assumptions are:

1. Those who established the halakha see theft as a more serious transgression than eating *‘orla* and *neta’ reva’i* (The attitude of passersby toward these two offenses is exactly the opposite.)
2. Pursuant to the first assumption, people’s aversion to forbidden foods is stronger than their reluctance to commit theft by picking fruit from trees along the road.
3. This aversion persists, at least to some extent, amid uncertainty about whether the fruit to be stolen is forbidden for consumption Namely, when it is feared that the fruit is forbidden, some potential thieves are deterred enough to refrain from picking the fruit because of this concern only.

In view of these assumptions, it is readily seen that the non-demarcation of fruit results in fewer thieves. This is numerically demonstrated as follows:

Say 100 passersby are willing to steal and each plucks one apple. Then, *if the fruit is marked,* all pickers will switch to un-marked apples. The number of thieves will be 100 and that of consumers of forbidden apples will be zero. (We assume, of course, that the number of permissible apples in the orchard is equal to or greater than 100.)

*If the fruit is not marked* and we assume that 20 percent of the apples are off-limits, then the passerby realizes that there is a 20 percent probability that the apple she or he picks will be forbidden. Then, some of the 100 passersby, say twenty of them, will be deterred from picking the fruit. The number of thieves will fall to seventy-five, of whom fifteen (20 percent) will consume forbidden fruit.

**Overall, switching from a regime of demarcation to one of non-demarcation reduces the population of thieves but creates a positive number of consumers of forbidden food. In this case, a substitution takes place: fewer thieves at the price of creating a population of consumers of forbidden food.**

With that, the rest of this article will concern itself with how to explain RSbG’s ruling and the views of its opponents.

**4. Demarcation vs. Non-Demarcation—Implications and Demonstration with the Help of a Simple Numerical Example**

In the Appendix, we present an economic model that analyzes RSbG’s halakhic view, dissects its implications for its opponents, and generalizes the case at hand. To assess the principle behind the explanation of RSbG’s idea and its opponents’ views, however, a simple numerical example will suffice. One need only remember that the numbers in the example are totally arbitrary; their sole purpose is to elucidate the principle behind RSbG’s idea of non-demarcation and the dispute between him and the Tannaim according to our explanation.

1. **Method of Calculation**

Many people walk past the edges of the orchard area. Even if none of the fruit in the orchards is forbidden for consumption on religious grounds, some passersby will surely refrain from entering others’ orchards and plucking fruit, either due to moral scruples or due to the (minor) fear of being caught and punished (e.g., made to pay a fine). Some, too, will bear in mind that the ban on theft is also a religious one, a sin against God. Accordingly, they will refrain from stealing fruit for this additional reason even though people tend to downplay the transgression of theft when the damage caused by a single offender is small. The others will pick the fruit and their act will be considered theft.

For the numerical demonstration, it is convenient to represent the number of thieves among the passersby as 100. Let us begin with orchards that have **no** fruit that is halakhically unfit for consumption or other benefit. Thus we assume, arbitrarily, that there are 150 passersby and that thirty of them refrain from picking fruit solely on moral grounds and due to fear of being caught. This leaves 120 potential candidates for the epithet of “thief” insofar as theft is not a religious transgression, i.e., an offense against God. (This is the number that appears on the second line of Table 1.)

Now we move on to orchards where forbidden fruit is grown. A stranger who picks the fruit now commits a religious offense that comes in addition, and unrelated, to the religious offense of theft. This reduces the number of fruit thieves even more because now those unwilling to commit an eating infraction are also deterred. In accordance with our assumptions, people frown on this transgression more than they do the offense of theft; accordingly, it reduces the population of illicit pickers by more than twenty. By how many more? This depends on the severity of the offense. We specify a Grade 2 level of severity, the kind that reduces the population of fruit thieves by twice as many as the crime of stealing does. Here the number of illicit fruit pickers falls by forty, to sixty (100-[2x20]). This is the number of fruit thieves shown in Line 3 of Table 1; all are guilty of eating forbidden fruit.

This calculation is correct when *all* the fruit is forbidden and when everyone who picks it knows that she or he has consumed forbidden fruit. If, however, only some of the fruit is forbidden (say 50 percent) and it is not marked, then those who pick it know that they are as likely as not to be eating forbidden fruit. Therefore, the member that reduces the rate of fruit thieves on account of the transgression of eating forbidden fruit has to be multiplied by 0.5. This brings the number of fruit thieves to 80 (100-[40x0.5])—the expected number out of 100 potential thieves, appearing on Line 4. On average, of course, only half are eating forbidden fruit because this is the share of forbidden fruit in the orchard (as noted on the same line in the last column on Table 1).

Obviously, if the share of forbidden fruit in the orchard is smaller, the deterrence will be weaker. This is easy to calculate[[30]](#footnote-30):

**Table 1. Fruit Rustlers and Consumers of Forbidden Fruit by Nature of Fruit and Nature of the Transgression of Theft**

Number of passersby = 150

|  |  |  |
| --- | --- | --- |
| **Condition of orchard** | **Fruit thieves** | **Consumers of forbidden fruit** |
| 1. No forbidden fruit **and no religious prohibition of theft** | 120 | 0 |
| 2. No forbidden fruit and theft is also a religious offense against God | 100 | 0 |
| 3. All the fruit is forbidden and the prohibition is of “Grade 2” severity | 60 | 60 |
| 4. 50 percent of the fruit is forbidden and the prohibition is of “Grade 2” severity | 80 | 40 |

**2. The Stances of RSbG and His Opponents—Numerical Demonstration**

We continue the numerical example and method of calculation presented above by comparing marked and unmarked orchards in terms of the number of thieves and eaters of forbidden fruit in each. Again, the orchards compared are those in which trees bearing forbidden fruit stand alongside a large number of unmarked trees that give off permissible fruit, and orchards where trees bearing forbidden fruit are not marked.

By comparing these two classes of orchards, we can offer a possible way of resolving the dispute between RSbG and the Sages. Even though all Sages consider the sin of theft graver than other transgressions, such as eating forbidden fruit, the disagreement persists due to the “price” of reducing the incidence of theft: additional eaters of forbidden fruit.

In Table 2, we use our method of calculation to determine the number of expected thieves among 100 potential ones. The expected outcome is determined in accordance with their reluctance to transgress the rule against eating forbidden fruit.[[31]](#footnote-31) We assume that the severity of the prohibition that the public attributes to eating forbidden fruit is between 2 and 10, and in the table we demonstrated this for three levels of severity: 2, 5, and 10. We also assume that 30 percent of the fruit in the orchard is forbidden; this allows us to calculate the proportion of people who partake of it.

Study the middle column in the table, calculated for a case to which the public attributes Grade 5 severity—meaning that the public is five times as averse to eating forbidden fruit as it is to steal. When the orchard is marked, all potential thieves turn to unmarked trees and they are 100 in number. When the orchard is not marked and it is known that 30 percent of the fruit is forbidden, this will deter thirty (5 x 20 x 0.3) of the hundred, causing the number of thieves to fall to seventy. Since 30 percent of the fruit is forbidden and we assume that each thief picks a similar quantity, twenty-one passersby transgress the rule against eating forbidden fruit.

We move on to Lines 3 and 4 in the same column. The thirty-person decline in the population of thieves has raised by seven the number of eaters of forbidden fruit. Dividing the latter number by the decrease in the number of thieves (21/30), we obtain the substitution ratio, i.e., the number of illegal-fruit eaters who will be added as the result of a 1 percentage point decrease in the population of thieves, as happens when they move from a marked orchard to an unmarked one. Multiplying this by 10, we get the substitution ratio for the subtraction of ten thieves; this is marked on Line 5 in the table.

It is readily seen in the table that the more severe the public considers the consumption of forbidden food, the more the population of thieves falls in the transition from a marked orchard to an unmarked one; the religious price of the subtraction is also small. The opposite happens when the severity of the injunction declines. (See data in the table for cases of higher and lower grades of severity [10 and 2, respectively] than Grade 5.)

**Table 2: 30 Percent of Fruit in the Orchard is Forbidden**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  |  | Marked orchard | Unmarked orchard | | |
|  |  | At each level of severity | Grade of severity (S) | | |
|  | 2 | 5 | 10 |
| 1. | Thieves | 100 | **88** | **70** | **40** |
| 2. | Eaters of illegal fruit | 0 | **26.4** | **21** | **12** |
| 3. | Decrease in number of thieves |  | 12 | 30 | 12 |
| 4. | Increase in number of eaters |  | 26.4 | 21 | 12 |
| 5. | Substitution ratio for subtraction of 10 thieves |  | 22 | 7 | 2 |

**3. RSGB’s Dispute with the Tannaim**

Here we use Table 2 to present our hypothesis about the nature of the dispute:

**RSbG’s view:** Theft is a very grave offense even if the object stolen is of negligible value (*shave peruta*). It is surely much more serious than the public thinks, since the public treats it lightly when it inflicts little damage on property owners. If the public rates the severity of eating forbidden fruit at 5, then not marking the fruit reduces the number of thieves by 30 percent. We should not mark the fruit even if the religious price for the omission is the creation of seven consumers of forbidden fruit. Furthermore, even if for some passersby the severity of eating forbidden fruit is, say, lower than 2, the religious price in terms of consumers of forbidden fruit is worth paying. Therefore, we should not mark the fruit no matter what.

**The view of the Tannaim:**  If people felt that eating forbidden fruit is a very severe transgression, say 10, then one could accept Rabban Shimon ben Gamliel’s view because, in this case, marking the fruit would shrink the population of thieves by 60 percent at the price of 2 percent who would transgress the forbidden-fruit prohibition. Some passersby, however, assign much less gravity to eating forbidden fruit, e.g., 2 or 3. This makes the price of reducing the thief population too high in terms of the number of eaters of forbidden fruit that it creates.

The ruling: the halakha is decided in favor of Rabban Shimon ben Gamliel.

**4. The Effect of the Share of Forbidden Fruit in the Orchard**

In Table 2, we calculated the number of thieves and illicit-fruit eaters in the two types of orchards: marked and unmarked. We assumed that 30 percent of the fruit in both orchards is off-limits.

When a larger share of the fruit is prohibited, the number of thieves declines at any level of severity. The number of consumers of forbidden fruit, however, may increase anyway because a larger proportion of the picked fruit is forbidden.

What matters for our purposes, however, is the following outcome: In each case, the substitution ratio dips mildly with an increase in the share of forbidden fruit. Namely, the religious price, manifested in the appearance of eaters of forbidden fruit per percent of decrease in the proportion of thieves as the transition to an unmarked field is made, falls steadily as the share of forbidden fruit in the orchards rises. Furthermore, the downturn is mild. Figure 1 demonstrates this.

**Figure 1**

**Percent increase in eaters of forbidden fruit (F on the vertical axis) occasioned by a 1% decrease in population of thieves in transition from marked field to unmarked field, parsed by percent of forbidden fruit in field (F, horizontal axis) and three degrees of severity (S)**

The following conclusion should be drawn from this finding: RSbG’s dispute with the Tannaim may be structured in the manner proposed above without limiting it to a given share of forbidden fruit in the orchards. There is no need to assume, as in Table 2, for example, that the share is 30 percent; the dispute presumably obtains at any reasonable rate of forbidden fruit.

**5. Summary and Conclusions**

**1. Halakha Concerning Non-demarcation of Forbidden Fruit: A Measure to Mitigate Petty Theft**

This article presents a halakhic rule laid down by Rabban Shimon ben Gamliel: that fruit forbidden for consumption should not be marked in the orchard in order to warn those who might be tempted to steal fruit. The rule is put forward as an expansion of the idea that norms and fair conduct originating in religious commandments can improve social welfare. The idea is expanded in the sense that it may be applied, at times, not only to interpersonal commandments but also to those between man and God.

Thus we have seen, among other things, that our Sages knew how to exploit people’s strong aversion to false oaths in order to help reveal the truth in dubious monetary claims. This article above added to this the halakha not to mark forbidden fruit in fields and orchards.

Indeed, this halakha abets the effort to minimize the incidence of petty theft. It is a known fact that the public is not sufficiently averse to appropriating other people’s things when the objects are of little value. If many people allow themselves this license, however, the owners of the coveted objects are severely harmed by having to absorb high costs of protection that would not be necessary were it not for the illegitimate custom of theft.

People are, however, strongly averse to interpersonal transgressions such as eating forbidden food. In regular orchards, one encounters *‘orla* and *neta’ reva’i* fruit that is prohibited for consumption. If the forbidden fruit is not marked, many will refrain from picking it lest their illicit “harvest” be forbidden. Thus, fear of eating forbidden fruit reduces the incidence of fruit pilfering—an offense that, according to the halakha, is graver than eating a forbidden food. This solution is effective because non-demarcation of the fruit induces few people to indulge in forbidden eating.

If, in contrast, it is the custom to mark the forbidden fruit, potential thieves could be confident that the fruit of unmarked trees is fit for consumption. Given people’s dismissal of the gravity of stealing fruit, they are liable to pick fruit to their pleasure.

**2. Halakha Concerning the Non-marking of Forbidden Fruit: Expansion of the Duty to Distance People from Transgression**

For many later commentators, the halakha laid down by RSbG against marking forbidden fruit seems to contradict the basic halakhic imperative of distancing people from transgression. Above, we quoted Rabbi Yair Haim Bacharach, the author of *Havot Yair,* who queries RSbG’s halakhic instruction: “I am quite puzzled. […] How can it be that [we should not mark forbidden fruit]? We are cautioned to warn every Jew who may transgress due to negligence [*shogeg*] and to apply all our strength to prevent him from [doing so] deliberately [*mi-mezid*] […].”

Our explanation of RSbG’s halakha sheds a different light on his teaching. The principle of distancing people from transgression is not repudiated. Instead, it is adopted and broadened in the sense that, according to the halakha *à la* RSbG, the responsibility of members of society for each other is not limited to the imperative of deterring transgression; it also includes the possibility, which sometimes becomes real, to turn their offenses from grave to minor[[32]](#footnote-32)—in the case at hand, from theft by the many to the consumption of forbidden fruit by the few. This is exactly what takes place when forbidden fruit is not marked, relative to its being marked.

**3. A Word About “Feed it to the Wicked Man and Let him Die”**

The expression “feed it to the wicked man and let him die,” which appears in the Talmudic passage that quotes the Mishna in which RSbG’s halakha occurs, is unique in the Talmud; it shows up only here, in the context of a thief who willfully steals fruit even though it may be forbidden for consumption.

The analysis in this article demonstrates the importance of presenting context in order to avoid applying this grim statement for halakhic rulings about transgressors of other kinds.[[33]](#footnote-33) The expression at hand relates to the perpetrator of an offense that halakha considers exceedingly grave, almost at the level of the rules that Jews are expected to uphold at the cost of their lives. Indeed, theft may be the gravest sin of all—apart from murder and assault—among misdeeds that endanger society’s sound existence and wellbeing. Furthermore, the “wicked man” here not only steals knowingly but also proclaims that he does not fear God and is not concerned about the halakhic injunction against eating forbidden foods.

By implication, it is difficult to extrapolate from the “wicked man” in our context to other classes of transgressors.

1. President of the Sanhedrin in the generation following the Bar Kokhba uprising (see below). [↑](#footnote-ref-1)
2. Jerusalem Talmud, Shabbat 14:4 (77a in the Vilna edition). The view expressed is evidently that of R. Meir, as implied by the *rishonim* (early commentators) on Ketubot 19, who present a *baraita* not available to us— according to which R. Meir adds theft to the list of offenses to which the “die rather than transgress” rule applies.. [↑](#footnote-ref-2)
3. *Shulhah ‘Arukh, Hoshen Mishpat* 359:3. [↑](#footnote-ref-3)
4. Sanhedrin 108a. [↑](#footnote-ref-4)
5. “Who is a thief? Such as one who snatches objects from another’s hands, or enters another’s domain against the owner’s wishes and appropriates tools from said domain, or attacks another’s servants and beast and uses them, *or enters another’s field and consumes its fruit*, and all the corollaries thereof—this is a thief” (Maimonides, *Hilkhot Gezela* 1:2). [↑](#footnote-ref-5)
6. “Even if they are so strict about enjoining a worker against stealing from his work time as to deny him the right to participate in public worship and recite all the compulsory prayers as established” (Tosefta Berakhot 2:7–9, Berakhot 16a, 46a). [↑](#footnote-ref-6)
7. The full dictum: “R. Yehuda said in the name of Rav: The majority of people [succumb to transgression] with regard to robbery, and a minority of people with regard to sexual matters, and everyone with regard to malicious speech [...] a hint of malicious speech.” [↑](#footnote-ref-7)
8. Rabbi Yair Haim Bacharach, Responsa *Havot Yair,* Worms, Germany, 1670, 142. See also Maimonides (note 5). [↑](#footnote-ref-8)
9. We present additional evidence from the halakha at issue in this article of the Sages’ awareness that people more negatively view eating forbidden fruit than they do a passerby’s picking fruit without its owner’s permission. [↑](#footnote-ref-9)
10. Bava Metsi’a 38b. [↑](#footnote-ref-10)
11. To perform all these tasks, including reinforcing property rights, an authoritative leadership personality was needed. Gedaliah Alon describes RSbG’s traits in this way: “Sagacity, flexibility, and moderation, along with a decisive ability to act at a time of difficult escalation. Recognition of the power and authority of many and vigorous defense of his authority and rights in leading them—all these qualities rendered the Nasi fit to lead the generation and unify the nation.” Gedaliah Alon, *History of the Jews in Erets* *Israel in the Mishnaic and Talmudic Eras*, p. 72. [↑](#footnote-ref-11)
12. Bava Qama 69a. [↑](#footnote-ref-12)
13. Ma’aser Sheni 5:1. [↑](#footnote-ref-13)
14. See note 7. [↑](#footnote-ref-14)
15. Here we based outselves on the Hebrew wording in Yehuda Levi, “Protest and Distancing a Transgressor from His Transgression,” *Tehumin* 14 (Hebrew) (Tsomet Institute, 1994). [↑](#footnote-ref-15)
16. Note that *Havot Yair*disregards the possibility that demarcation would steer people toward plucking non-forbidden fruit and, accordingly, would not avert theft. [↑](#footnote-ref-16)
17. Above we showed that this assumption on the part of *Havot Yair* is based on several halakhic sugiyot in the Talmud. The halakha, they show, realizes that people are more afraid of prohibitions than they are of the transgression of stealing even though stealing is also a religious transgression and, in the halakhic decisors’ eyes, a very grave one.

    Evidence from our Mishna augments the evidence presented above. Indeed, it is clear that the duty of one required to demarcate fruit even in non-sabbatical years is justified because this practice would deter passersby from plucking and eating the forbidden fruit. If the fruit is not marked, in contrast, they would pick it even though clearly aware that they are committing theft. [↑](#footnote-ref-17)
18. For the source of this expression, see Yosef Ahituv, “Feed It to the Wicked Man and Let Him Die,” *Tehumin* 9 (Hebrew) (Tsomet Institute, 1988). [↑](#footnote-ref-18)
19. For example, Rashi (“[…] But during all other years of the sabbatical cycle—when they come to steal, he should let them, and they will eat something that is prohibited, and feed it to the wicked man and let him die”)— Bava Qama 69a (and other *rishonim*). [↑](#footnote-ref-19)
20. Even though the *rishonim* are cautious about using this expression as a halakhic directive, we find substquent and, foremost, contemporaneous authorities who lift it out of its context for the purpose of halakhic debate in matters wholly ungermane to the setting in which the expression appears. For example, is it proper to give directions on the Sabbath to drivers in search of an address and send them the right way so that they should do less travel on the Sabbath, or should mitigating others’ Sabbath desecration be of no concern? Or is it correct to allow Jews to violate the provisions of *shevut,* a rabbinical proscription, in order to preclude *de’oraita* transgressions by others? Ahituv (note 17 above) specifies these examples and offers others. Ahituv’s comment on these examples is worth noting: “It is unquestionably the right and even the obligation of a *poseq* [halakhic decisor] to invoke various halakhic principles when ruling on halakhic problems. […] Notably, however, this use of the ‘feed it to the wicked’ principle is far from the original use of the principle in the Mishna and the Talmud.” [↑](#footnote-ref-20)
21. It is also obvious that the redactor of the Mishna understood RSbG’s remarks in this manner, because he added to them: “In other years, […] let the wicked eat the fruit and die.” [↑](#footnote-ref-21)
22. Maimonides, *Commentary on the Mishna,* Tractate Ma’aser Sheni 5:1. [↑](#footnote-ref-22)
23. Chief Rabbi of Jerusalem, 1936–1960, in *Responsa Har Tzvi,* 10:125. [↑](#footnote-ref-23)
24. Yehuda Levi, “Protest and Distancing a Tragressor from His Transgression, *Tehumin* 14 (Hebrew) (Tsomet Institute, 1994). Levi presents many of the responsa and records his objections to them. The examples below are gleaned from his article. [↑](#footnote-ref-24)
25. Rabbi Yitzchak Yehuda Shmelkis (Galicia, 1827–1904), *Bet Yitzchak,* Oraḥ Ḥayyim 29:4. [↑](#footnote-ref-25)
26. Son of R. Akiva Eiger, Poland (1787–1852), commentary Maharasha 10:151 on *Siftei Kohen.* Subparagraph 6. [↑](#footnote-ref-26)
27. Fourth-year fruit (*neta’ reva’i*) is reserved for consumption in Jerusalem. It is defined as *qodashim qalim* (a “minor offering”) or, depending on the context, as *mammon gavo’a,* God’s property. The first three annual crops of a fruit tree are *‘orla,* forbidden for consumption and any other benefit. [↑](#footnote-ref-27)
28. Rabbi Tzvi Pesach Frank, *Responsa Har Tzvi,* 10:125. [↑](#footnote-ref-28)
29. In this article we made en passant reference to a brief article about Rabbi Frank’s novel approach and his explicit and implicit assumptions. Although startled by the originality of his perspective, we also illuminated the difficulties that, in our opinion, make his explanation less than fully acceptable and satisfactory as a response to the underlying question of why the forbidden fruit should not be marked. In our judgment, too, his responsum dos not elucidate the difficult expression “feed it to the wicked man and let him die.” Those interested in this article may receive it by contacting the authors. [↑](#footnote-ref-29)
30. We repeat the calculation in general terms. Let S denote the degree of severity of eating forbidden fruit and let f denote the share of forbidden fruit in the orchard. In this case, the number of fruit thieves (T) will be T = 100\*20\*S\*f and that of consumers of forbidden fruit will be f\*T (with f expressed as a decimal fraction). [↑](#footnote-ref-30)
31. We note again that the public, in contrast to the Sages, thinks little of committing the transgression of theft in the manner discussed here, in contrast to its strong aversion to a sin against God such as eating forbidden fruit. Grade 2 severity, for example, is defined as the kind that reduces the population of fruit thieves by twice the rate of the thieves, i.e, by forty, if it is known for sure that *all* the fruit picked is forbidden. [↑](#footnote-ref-31)
32. As noted, Rabbi Tzvi Pesach Frank, Chief Rabbi of Jerusalem, preceded us in expressing this idea. [↑](#footnote-ref-32)
33. See note 20 above. [↑](#footnote-ref-33)