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## **Cognizance of Sin and Penalty in the Babylonian Talmud and Pahlavi Literature: A Comparative Analysis**

Yishai Kiel

It is commonly held in Western legal tradition that *Ignorantia juris non excusat* – “ignorance of the law does not excuse”. According to this legal approach, which can be traced back to Aristotle, a claim of ignorance of the law cannot be used as a valid legal defense.<sup>1</sup> It has also been acknowledged by scholars that Talmudic law stands out in this respect, as rabbinic sources generally maintain that ignorance of the law does, in fact, exempt from legal liability, and can be used as a valid legal defense.<sup>2</sup>

Recently, it has been demonstrated, however, that the perceived clash between Talmudic and Western law concerning the claim of ignorance of the law, may not be as extreme as some scholars have imagined. In

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1 See for example: Richard G. Singer and John Q. La Fond, *Criminal Law* (Austin: Aspen Publishers, 2010), 97-124.

2 See for example: Haim Cohn, “The ‘Defense of Legality’ in Talmudic Law,” *Hebrew Union College Annual* 58 (1987), 251.

Western tradition, while ignorance of the law does not completely exempt one from legal liability, it can serve to mitigate the harshness of the sentence. In Jewish law, on the other hand, ignorance of the law does not completely exempt from criminal liability, as it only appears to reduce the degree of liability from a deliberate crime (*mezid*) to some form of an inadvertent transgression (*shogeg* or *shogeg karov le-mezid*).<sup>3</sup>

In this study, I shall argue that Talmudic law is not the only legal system that contains a theory of reduced liability in cases of ignorance of the law. In fact, I will contend that Talmudic law can hardly be perceived as *sui generis* among other religious legal systems, in terms of its approach to ignorance of the law. In the following, I will demonstrate that Zoroastrian law from the Sasanian and early Muslim periods contains a fascinating approach towards ignorance of the law, one that is, in many ways, comparable with the Talmudic system. Rather than comparing Talmudic law to prevailing Western conceptions of criminal liability, I would like to propose in this context an insightful comparison between the Talmudic and the Zoroastrian approaches towards ignorance of the law.

In both the rabbinic and the Zoroastrian systems, the issue of ignorance of the law is connected to the broader role of intention and mental awareness in the evaluation of one's religious merit and legal liability.<sup>4</sup> One can discern perhaps in the rabbinic and Pahlavi corpora

3 Arnold Enker, *Fundamentals of Jewish Criminal Law* (Ramat-Gan: Bar-Ilan University Press, 2007), 197-208.

4 The importance of intention and mental awareness in rabbinic literature is widely attested. To mention only several contributors to this realization, see: J. Bazak, "The Element of Intention in the Performance of *Mitsvot* Compared to the Element of Intention in Current Criminal Law," *the Jewish Law Association Studies 14: The Jerusalem 2002 Conference Volume*, ed. H. Gamoran, Binghamton: Global Academic Publishing, 2004, pp. 9-15; M. Higger, *Intention in Talmudic Law*, PhD Dissertation, Columbia University, 1927; B. Jackson, "Liability for Mere Intention in Early Jewish Law," *Hebrew Union College Annual* 42 (1971), pp. 197-225; H. Eilberg-Schwartz, *The Human Will in Judaism: The Mishnah's Philosophy of Intention*, Atlanta: Scholars Press, 1986; [cf. B. Jackson's review of Eilberg-Schwartz in *Jewish Quarterly Review* 81, 1-2 (1990), pp. 179-188]; S. Strauch-

similar religious and legal discussions, in which the categories of intentionality and mental awareness are prominent. 1. Certain religious activities are considered invalid when they are not accompanied by mental cognizance. The Rabbis inquire, for instance, whether or not active commandments require cognizance (*kavana*) at the time of their fulfillment.<sup>5</sup> Similarly, several Pahlavi texts urge that one “do the

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Schick, *Intention in the Babylonian Talmud: An Intellectual History*, PhD Dissertation, Bernard Revel Graduate School at Yeshivah University, 2011; one may also reflect perhaps on numerous observations made by Jacob Neusner throughout his voluminous commentary on the rabbinic corpus.

The importance of intention and mental awareness in Zoroastrianism and Pahlavi literature in particular is discussed in: M. Macuch, “On the Treatment of Animals in Zoroastrian Law,” in: *Iranica Selecta: Studies in Honour of Professor Wojciech Skalmowski on the Occasion of His Seventieth Birthday* (Silk Road Studies 8), ed. A. van Tongerloo, Turnhout: Belgium, 2003, pp. 109-129; Y. Elman, “Toward an Intellectual History of Sasanian Law: An Intergenerational Dispute in Hērbedestān 9 and Its Rabbinic Parallels”, in: *The Talmud in its Iranian Context*, C. Bakhos and R. Shayegan eds., Tübingen 2010, pp. 21-57; S. Shaked, “Religious Actions Evaluated by Intention: Zoroastrian Concepts Shared with Judaism”, in: *Shoshanat Yaakov: Ancient Jewish and Iranian Studies in Honor of Professor Yaakov Elman*, 2012 (Forthcoming); D. Brodsky ‘*Hirhur ke-ma’aseh damei*’ (‘Thought Is Akin to Action’): The Importance of Thought in Zoroastrianism and the Development of a Babylonian Rabbinic Motif, *Irano-Judaica* 7, eds. S. Shaked and A. Netzer, Jerusalem: Ben Zvi Institute (forthcoming).

- 5 See for instance: mBer 2:1; mMeg 2:2; mRoshH 3:7; tBer 2:2; tRoshH 2:6-7; yBer 2:5 5a; bBer 13a; bEruv 95b; bPes 114b; bRoshH 28b. Interestingly, the conceptualization of awareness (*kavana*) during the performance of *mitzvot* as an abstract category culminates in the Babylonian Talmud. The general conceptualizing tendency of the Babylonian Talmud is discussed in: L. Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization*, Texte und Studien zum antiken Judentum 89, Tübingen: Mohr Siebeck, 2002. The category of awareness (*kavana*) must not be confused with the adjacent rabbinic category of thought (*mahshava*), according to which human thought has the ability to invalidate a sacrifice or render implements and foodstuffs susceptible to ritual impurity. The derivatives of *mahshava* appear hundreds of times throughout the

worship and invocation of the gods well and with (full) observance (*pad nigerišn*)”.<sup>6</sup> 2. Certain mental states can also be considered sinful or meritorious in and of themselves, even when no action is involved. This category includes the rabbinic concept of *hirhur aveira* or the idea of thoughts being akin to actions (*hirhur ke-ma'ase*).<sup>7</sup> In a similar manner, numerous Pahlavi texts command that one “never think a sinful thing in his mind (*pad menišn*)”.<sup>8</sup> Recently, David Brodsky has convincingly demonstrated that these forms of intentionality, beyond their general prevalence in rabbinic and Zoroastrian literature, are conceptualized in the Babylonian Talmud and Pahlavi literature in a strikingly similar manner.<sup>9</sup>

Another form of awareness that is prevalent in rabbinic and Zoroastrian literature, and which comprises the focus of the present study, concerns the legal implications of being in a state of mental cognizance during the performance of sinful acts. In both rabbinic and Zoroastrian legal systems, intentional and cognizant crimes are distinguished from unwitting transgressions in terms of liability and punitive consequences.

Regarding the latter form of intentionality or cognizance, a twofold argument will be presented here: Firstly, I shall argue that the rabbinic and Zoroastrian legal designations of mental awareness resemble one another in many significant ways. Based on this general affinity, it will be further contended that the Babylonian Talmud and the Pahlavi literature in particular are engaged in a more specific legal discussion regarding a sinner who was cognizant of the sinfulness of his actions, while lacking sufficient awareness of the punishment and other legal consequences.

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mishnaic and toseftan orders of Sacrifices and Purities and elsewhere in rabbinic literature, and are discussed in: Eilberg-Schwartz 1986.

6 MX. 31.5. This and other related texts are discussed in: Shaked 2011.

7 See, for instance: bYom 28b-29a; bBB 16a; bBB 164b; bShab 64a-b; KR 1:5; KR 2:6.

8 Dk.6.236. This and other related texts are discussed in: Brodsky 2011.

9 Brodsky 2011.

The comparison between the rabbinic and Pahlavi corpora will thus be conducted on two levels. On the first level, situated in the broader realm of comparative law, I shall argue that the rabbinic and Pahlavi legal systems independently developed analogous perceptions of intentionality and unwitting transgression. In both systems similar modes of cognizance – namely, awareness of the reality at hand and awareness of the prohibition – developed simultaneously. To be sure, genealogical relations between these religious corpora will not concern us in this regard, nor will historical connections underlie our analysis. The discussion on this level will go beyond the Babylonian Talmud and Pahlavi literature as products of the Sasanian cultural milieu, and will also undertake comparisons of tannaitic and amoraic *Eretz Israel* rabbinic literature with earlier Zoroastrian sources.

On the second level of comparison, however, situated in the realm of developmental intellectual history, this study will engage in a more specific attempt to unearth intercultural connections that are likely to have taken place in the Sasanian Empire – stemming either from a shared intellectual discourse or perhaps from their coexistence in the same cultural milieu.<sup>10</sup> This will be done by investigating the particular legal discussion concerning a state of cognizance of the prohibition itself while lacking awareness of its punitive consequences, which is systematically

10 For a general orientation regarding the connections of the Babylonian Talmud and Pahlavi literature, see especially: Y. Elman, “Acculturation to Elite Persian Norms and Modes of Thought in the Babylonian Jewish Community of Late Antiquity,” in: *Neti’ot Le- David*, eds. Y. Elman, E. B. Halivni, and Z. A. Steinfeld, Jerusalem: Orhot, 2004, pp. 31-56; idem, “Middle Persian Culture and Babylonian Sages: Accommodation and Resistance in the Shaping of Rabbinic Legal Tradition,” in: *Cambridge Companion to Rabbinic Literature*, eds. C.E. Fonrobert and M.S. Jaffee, Cambridge: Cambridge University Press, 2007, pp. 165-197. A comprehensive survey of recent scholarship in Irano-Talmudic studies can be found in: Y. Kiel, *Selected Topics in Laws of Ritual Defilement: Between the Babylonian Talmud and Pahlavi Literature*, PhD Dissertation, The Hebrew University of Jerusalem, 2011, pp. 3-6; A survey of nineteenth and early twentieth century scholarship can be found in: Y. Elman, “Up to the Ears in Horses’ Necks: On Sasanian Agricultural Policy and Private ‘Eminent Domain,’” *JSIJ* 3 (2004), pp. 95-102.

treated and conceptualized in the Babylonian Talmud and the Pahlavi corpus, and which seems to have stemmed from a particular intellectual environment.

Methodologically speaking, then, I will argue that the sense of similarity that already exists between the rabbinic and Zoroastrian conceptions of intentionality and awareness is heightened and emphasized in the Babylonian Talmud-Pahlavi interplay, above and beyond the affinity that exists in tannaitic and earlier Zoroastrian literature.

### **Cognizance of Sin and Punishment in Zoroastrian Literature**

In a forthcoming article, Shaul Shaked provides several examples from the extant Pahlavi literature, which point to the importance of mental cognizance in the performance of righteous deeds on the one hand, and the performance of sins on the other.<sup>11</sup> In this respect, deliberate crimes are categorically distinguished from unwitting transgression, both in terms of legal liability and in terms of punitive consequences. For example, one text states that “In no way is one authorized to eat dead matter deliberately” (*pad ēk rāh nasā pad nigerišn jūdan nē dastwarīhā*), indicating that unwitting consumption of dead matter carries completely different consequences.<sup>12</sup>

The Pahlavi texts often utilize the verbs "*nigerīdan*" [lit. to look, observe]<sup>13</sup>, "*mēnīdan*" [to think, intend]<sup>14</sup> and "*dānistan*" [to know]<sup>15</sup>, to emphasize the role of intention and mental cognizance in establishing a state of legal liability. Maria Macuch has similarly called attention to

11 Shaked 2011.

12 RAF 57A.1.

13 MacKenzie, A Concise Pahlavi Dictionary, London: Oxford University Press 1971, p. 59.

14 MacKenzie 1971, p. 55.

15 MacKenzie 1971, p. 24.

several categories of sin, such as *bōdōwaršt* and *bōdōzed*, which indicate willful transgressions as opposed to unwitting sins.<sup>16</sup>

In the current context, I would like to focus on a passage from the Pahlavi *Vīdēvdād* – a Pahlavi translation and commentary on the Young Avestan *Vīdēvdād*<sup>17</sup> – concerning the mental aspects of the capital offense of corpse-carrying. Notably, however, the Avestan passage is hardly concerned with the sinner’s intention or state of mind, but focuses instead on the defilement of the sinner and the demonic attack that is launched against him.

Let no one carry alone what is dead. But if he carries alone something that is dead, for certain the corpse will contaminate (him). From the nose, from the eye, from the tongue, from the jaw, from the penis, from the anus, this lie-demon, the corpse, will then rush upon their nails. Afterward they become impure forever and eternity.<sup>18</sup>

The Pahlavi version of this text, on the other hand, aside from providing a word for word translation of the Young Avestan passage, includes

- 16 Macuch 2003, pp. 180-182. Further discussion on these categories can be found in: Elman 2010, pp. 21-57.
- 17 On the content and structure of the *Vīdēvdād*, see especially: D.L. Bishop, *Form and Content in the Videvdad: A Study of Change and Continuity in the Zoroastrian Tradition*, PhD Dissertation, Columbia University, 1974, pp. 34-110. On the meaning of this name, see: E. Benveniste, “Que Signifie *Vīdēvdād*”, in: M. Boyce and I. Gershevitch eds., *W.B. Henning Memorial Volume*, London 1970, pp. 37-42; P.O. Skjærvø, “The *Vīdēvdād*: Its Ritual-Mythical Significance”, in: *The Idea of Iran: The Age of the Parthians*, V.S. Curtis and S. Stewart eds., London 2007, pp. 105-162. For critical and semi-critical editions of the *Vīdēvdād*, see: H. Jamasp and Mervanji Manekji Gandevia eds., *Vendidād: Avesta Text with Pahlavi Translation and Commentary*, Bombay: Government Central Book Depot, 1907; Anklesaria Behramgore Tehmurasp and Dinshah Dorabji Kapadia trans. and ed., *Pahlavi Vendidād: Zand-î Jvîw-Dêv-Dâd*, Bombay: K. R. Cama Oriental Institute, 1949; and see also: Alberto Cantera’s on-line edition at: [www.videvdad.com](http://www.videvdad.com).
- 18 V. 3.14. Translation of the Young Avestan text is based on Skjærvø, “Zoroastrian texts” (on-line edition), p. 126; I would like to thank Prof. Skjærvø for granting me permission to use his translation.

several interpretive glosses which seem to diverge fundamentally from the base text on several matters. The Pahlavi translation of the Avestan passage is followed by an extended Pahlavi commentary containing attributed and anonymous materials, which further discuss legal and theological matters that fall beyond the scope of the original Avestan text.<sup>19</sup> Such divergences of the *Zand* from the *Avesta* are relatively common in Pahlavi literature, and often can be located textually.<sup>20</sup>

*ma kas [mardōm]<sup>21</sup> barād ēwtāg [pad tan-ēw]<sup>22</sup> ka rist [kū murd ēd pad saxwan gōwam kū dānēd kū murd ast]. čē agar kas*

- 19 On the relationship between Avesta and Zand, see for example: S. Shaked, "The Traditional Commentary on the Avesta (Zand): Translation, Interpretation, Distortion?", in: *La Persia e l'Asia Centrale da Alessandro al X Secolo*, Rome: Accademia Nazionale dei Lincei, 1996, pp. 641-656; idem, "Scripture and Exegesis in Zoroastrianism", in: *Homer, the Bible, and Beyond: Literary and Religious Canons in the Ancient World*, M. Finkelberg and G.G. Stroumsa eds., Leiden 2003, pp. 63-74; Y.S.D. Vevaina, *Studies in Zoroastrian Exegesis and Hermeneutics with a Critical Edition of the Sūdgar Nask of Dēnkard Book 9*, PhD Dissertation, Harvard University: Cambridge, MA, 2007, pp. 18-34; idem, "Scripture Versus Contemporary (Interpretive) Needs: Towards a Mapping of the Hermeneutic Contours of Zoroastrianism", in: *Shoshanat Yaakov: Ancient Jewish and Iranian Studies in Honor of Professor Yaakov Elman*, 2011 (forthcoming); Elman 2010, pp. 21-57; idem, "The Other in the Mirror: Iranians and Jews View One Another: Questions of Identity, Conversion, and Exogamy in the Fifth-Century Iranian Empire, Part 1", *Bulletin of the Asia Institute* 19 (2009), pp. 15-26; idem, "The Other in the Mirror: Iranians and Jews View One Another: Questions of Identity, Conversion, and Exogamy in the Fifth-Century Iranian Empire, Part 2", *Bulletin of the Asia Institute* 20 (2010), pp. 25-46.
- 20 On the possibility of distinguishing between the different literary strata in Pahlavi literature, see: A. Cantera, *Studien zur Pahlavi-Übersetzung des Avesta*, Wiesbaden: Harrossowitz, 2004, pp. 164-239. On possible use of "Talmudic" literary separation techniques in the study of Pahlavi literature, see: S. Secunda, "The Sasanian 'Stam': Orality and the Composition of Babylonian Rabbinic and Zoroastrian Legal Literature", in: *The Talmud in its Iranian Context*, C. Bakhos and R. Shayegan eds., Tübingen 2010, pp. 140-160.
- 21 In the Avestan text there is only one term to denote a person (čiš). The Pahlavi *kas* seems to be a direct translation of the Avestan term, while *mardōm* is probably intended as a gloss.

[*mardōm*] *barēd ēwtāg [pad tan-ēw] ka rist. abar ō nasuš gumēxtēd az nāg bē az čašm bē az uzwān bē az padišxwar bē az kēr bē az kūn*<sup>23</sup> [ī ōy murdag]. *awēšān srū [wināhgārān abar pad awēšān wināhgārān ā-šān] ān druz ī nasuš abar dwārēd [ast kē srū ī murdagān gōwēd. ayōždahr pas bawēd tā ō hamē hamē rawišnīh].*

Let no person [a human being] carry alone [by himself] when dead [that is, dead. This I say with words: that he knows that it is dead]. For if a person [a human being] carries alone [by himself] that which is dead, on (him) the *nasuš* mixes from the nose, from the eye, from the tongue, from the jaw from the penis, from the anus<sup>24</sup> [of the corpse].<sup>25</sup> They upon the nails [upon the sinners], upon those [sinners], the demon of *nasuš* scurries upon (them). [Some say: the nails of the dead]. He then becomes impure forever and ever.

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- 22 According to Shaul Shaked, this word is probably a variant of *tanīhā* (private communication); if *tan-ēw* is intended, then we might compare this with the Middle Persian-Aramaic amalgamated expression: *טב למיתב טן דר* that appears in bYev 118b, bKet 75a, bQid 7a, bQid 41a, and bBQ 111a. There, *tan-dō* (טן דר) is a Persian loanword that connotes "togetherness" or "in matrimony", but literally means "two bodies". See: Sokoloff, p. 508. I am grateful to Shai Secunda for elucidating this point.
- 23 Jamasp, p. 65, following most manuscripts, has *kūn* (anus); E10 has *kūs* (vagina); M3 has *tan* (body).
- 24 The Avesta refers to the anus (*fra□umaka□*) as well as most Pahlavi manuscripts (*kūn*); E10 erroneously has *kūs* (vagina). The NP glossator in manuscript E10 translates in this manner as well. In a parallel list of organs that appears in V. 9.40, manuscripts K and L skip this word. E10 has *kūn* but then clearly changes it to *kūs*. The scribe of E10, then, may have intended to create a sense of gender symmetry in the text. I am grateful to Shai Secunda for this point. Compare: V 8.58 and V 9.32, which understand the exorcizing of the *nasuš* and the purification procedures as fundamentally different for men and women.
- 25 cf. V.8.42-58.

A. *ēn az abestāg paydāg, ān bawēd ka dānēnd kū murgdag ud dānēnd kū sag nē dīd ĵumbānēnd, kū wināh ī marg-arzān.*

This is manifest from the *Avesta*: This is the case when they know that (this is) a dead body, and know that there was no dog-gaze, (and yet) they move (the body), which is a death-deserving sin.

E. *u-š ēd nē abāyēd kū dānistan kunēnd kū wināh ī marg-arzān, čē ka dānēnd kū hambun-iz wināh ud pas kunēnd, ā-z margārzān ō bawēd.*

And it is not necessary for it that they know that this is a death-deserving sin, for if they know that (this) is a small sin, and yet do it, it becomes a death-deserving sin.

Before I discuss in detail the mental elements of corpse-carrying introduced in this passage, it is important to note that the Pahlavi text seems to address several arenas of religious life, which a student of rabbinics would probably have considered to be distinct discursive realms, namely ritual impurity, religious culpability, and criminal liability. The fact of the matter is, however, that in Pahlavi literature these arenas tend to overlap and intersect in many significant ways.<sup>26</sup> The Zoroastrian criminal system is essentially the product of priestly considerations and interests which address religious sin alongside issues that one might consider to be “purely” legal. The majority of transgressions requiring punishment in Pahlavi literature are thus “religious” and quite often “ritual” in nature.<sup>27</sup> It should come as no surprise, then, that the sin of carrying a corpse results in a tripartite state of ritual defilement, religious culpability and criminal liability.

Unlike the *Zand*, the *Avesta* does not seem to be interested in any kind of awareness or state of cognizance on the part of the sinner. It is simply stated that carrying a corpse is forbidden and ritually

26 On the lack of distinction between religious law, civil law and criminal law in early Zoroastrianism, see: Macuch 2003, pp. 109-129; J. Jany, "Criminal Justice in Sasanian Persia", *Iranica Antiqua* 42 (2007) pp. 347-361.

27 Jany 2007, pp. 347-361.

contaminating. In fact, a detailed description is given regarding the demonic attack that is launched against the sinner, but not a word is devoted to the carrier's state of mind, or any other mental condition for that matter.

Although the interest in ritual impurity and demonology is maintained in the Pahlavi *Zand* to some extent,<sup>28</sup> the *Zand* clearly diverges from the Avestan religious foci by introducing into the discussion the legal concepts of cognizance and liability. This matter appears to have been quite pressing to the Zandists, who made sure to add an unequivocal gloss right at the beginning of their translation of the Avestan text, stating: "This I say with words: that he knows that it is dead". Moreover, the extended commentary discusses in even greater detail the requirement of mental cognizance.

This is by no means to suggest that mental categories play no role in Avestan sources. On the contrary, it is quite plausible that the conviction of the Zandists regarding the role of mental cognizance in establishing legal liability stems from a sound "scriptural" basis. One of the sources that come to mind in this regard is V 5.3-4, which appears to exempt humans from any moral or legal responsibility associated with ritual contamination, when they could not have been mentally aware that impurity is involved.

Then Ahura Mazdâ said: Neither dog-borne, nor bird-borne, nor wolf-borne, nor wind-borne, nor fly-borne dead matter makes a man guilty. For if these corpses, namely, dog-borne, bird-borne, wolf-borne, wind-borne, and fly-borne, were to make a man guilty, right away my entire bony existence – at once his order would be crippled, every soul would be shuddering (in anger and

28 The *Zand* does not merely translate and gloss the demonological verses, but elaborates above and beyond the Avestan text on certain details pertaining to the demonic attack.

fear), every body would be forfeit, by the large amount of these corpses which lie dead upon this earth.<sup>29</sup>

But even if there is an Avestan basis for the role of cognizance or intention in establishing the level of religious accountability, it is quite evident that the Pahlavi *Zand* places much greater emphasis on these legal categories than do the Avestan passages, and it carries the discussion on the matter to a higher level of legal sophistication. In contrast to the general statement found in the *Avesta*, the Pahlavi *Zand* is engaged in a detailed discussion regarding the sinner's state of cognizance of the law and of the reality at hand, which ultimately establishes his religious and legal liability.

In any event, the passage from PV 3.14 provides us with the opportunity to view the diachronic development of these concepts from the *Avesta* to the Pahlavi commentary, within a specific framework. The divergence of the Pahlavi *Zand* from the *Avesta* does not provide us with an absolute chronology of the material, but it does enable us to detect relatively diachronic developments. We may thus point to a process of subjectification that is current in the shift from the *Avesta* to the more legally oriented *Zand*, and which emphasizes the role of cognizance and intention in establishing legal liability.

In essence, the Pahlavi *Zand* requires two kinds of awareness on the part of a corpse-carrier, in order for him to be considered a *margarzān*<sup>30</sup> – the worst of all sinners – awareness of the reality at hand and cognizance of the law. As for cognizance of the reality at hand, the sinner must know that the body he is handling is in fact dead,<sup>31</sup> and that this corpse has not been seen by a dog.<sup>32</sup> As for cognizance of the law, the

29 V 5.3-4. The translation of the Young Avestan is based on Skjærvø, "Zoroastrian texts" (on-line edition), p. 129.

30 On the classification of sins, see: ŠnŠ 1.1-2 and ŠnŠ Supplements 11:1-2 and 16:1-4; Macuch 2003, pp. 177-178; Jany 2007, pp. 347-361.

31 According to the Pahlavi translation and paragraph A in the extended commentary.

32 According to paragraph A of the extended commentary, the sinner must know that the corpse was not seen by a dog, to be considered a *margarzān*. Paragraph B, however, limits this rule and concludes that when the sinner carries the corpse in a

sinner must know that carrying a corpse is religiously forbidden. As we will see below, however, the exact scope of awareness that is required of the sinner was a source of dispute amongst different schools and religious authorities.

### **Diverging Traditions Regarding Mental Cognizance of the Penalty in Pahlavi Literature**

An important parallel to the passage quoted above appears in the ŠnŠ, a thematic legal compilation, whose final stage of composition took place circa the ninth century. The synoptic study of the ŠnŠ and its parallels from PV has yielded a rather complicated and diverse picture. While on occasion, passages from the ŠnŠ appear to have been excerpted from the PV, in other cases the ŠnŠ displays significant developments and often even preserves unique traditions that are unparalleled in the PV.<sup>33</sup>

*kē nasā pad tan-ēw barēd margarzān. ud ēd margarzān pad ān zamān bawēd, ka nasā sag nē dīd ud pad čār ud tuwān ud axwēškārīh jumbēnēd, ud ēw-kardagīhā jumbēnēd, ud dānēd ku wināh ī margarzān ud nasā ī sag dīd ud sag nē dīd, ēdōn wēš āmār dānišn ud mard ī nizār ud tuwān ud margīh ud rištaḡīh.*<sup>34</sup>

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manner of ēw-kardagīh, cognizance with regards to a dog's gaze is not necessary. Rōšn appears to hold, that cognizance that a dog has not seen the corpse is always necessary [paragraph F]. For the sag-dīd [dog-gaze] ceremony see: J.K. Choksy, Purity and Pollution in Zoroastrianism: Triumph over Evil, Austin: University of Texas Press, 1989, pp. 17-18.

33 See: Cantera 2004, pp. 220-229; S. Secunda, 'Dashtana – Ki Derekh Nashim Li': A Study of the Babylonian Rabbinic Laws of Menstruation in Relation to Corresponding Zoroastrian Texts, Ph.D. Dissertation, Yeshiva University, 2007, pp. 329-304.

34 ŠnŠ 2.63. Prods Oktor Skjærø suggested to me the reading rištaḡīh (damage) (private communication). The reading raxtagīh (sickness) is advocated by Kotwal and Kreyenbroek in their edition of the Hb., and by Tavadia in his edition of the ŠnŠ. Cf. Hb 2.9; 3.6; PV 5.4; 5.7; Elman 2010b, pp. 30-31.

He who carries a corpse alone is (considered) *margarzān*. And that one becomes a *margarzān* (who) moves (a corpse) when the corpse was not seen by a dog, and he moves it when he is not constrained and has power (to do otherwise) and (does so) without fulfilling a religious duty, and (if) he moves it in one piece, and (if) he knows that it is a *margarzān* sin. And (if) it is a corpse seen by a dog or not seen by a dog, this much reckoning is to be known, and (also if) he is a weak or a powerful man, and (if) there is death or damage.

*abarg guft ay čār ud tuwān āmār nēst, če wināh ī marg-arzān pad margīh ud rištagīh nē pādixšāy kardan.*<sup>35</sup>

Abarg said: no, but being constrained or having power is not the consideration, because one is not authorized to commit a *marg-arzān* sin in death and damage.

Some of the basic elements that are mentioned in PV as prerequisites for committing a *margarzān* sin are paralleled in the ŠnŠ. Thus, cognizance of the reality at hand, i.e. awareness that the body is in fact dead and that the corpse has not been seen by a dog, is mentioned in both texts, albeit with minor changes.

There is an important difference, however, between the PV and the ŠnŠ concerning the extent of legal cognizance required of the sinner. According to ŠnŠ, the sinner must know, not only that carrying a corpse is a religious crime, but also that it is a *margarzān* sin. This is unequivocally stated in the assertion that: *ud dānēd ku wināh ī margarzān* [and he knows that it is a *margarzān* sin]. In other words, it is not enough to be cognizant of the sinfulness of one's actions to become *margarzān*, but rather one must be cognizant of the severity and extent of the penal implications of his sin.

In contrast to the relatively lenient position introduced in the ŠnŠ, which exempts a deliberate sinner from a *margarzān*, based only on his lack of cognizance regarding the severity of, and the penalty for his sin,

35 ŠnŠ 2.64.

the PV presents a much more stringent position on the matter. According to PV 3.14 [paragraph E]: *u-š ēd nē abāyēd kū dānistan kunēnd kū wināh ī marg-arzān čē ka dānēnd kū hambun-iz wināh ud pas kunēnd ā-z margārzān ō bawēd* [And it is not necessary for it that they know that this is a *margarzān* sin, for if they know that (this) is a small sin, and yet they do it, it becomes a *margarzān* sin]. The PV stresses here that there is no need for the sinner to know that it is a *margarzān* sin. It is enough to know that carrying a corpse is sinful in order to be liable for a *margarzān* crime.

The ŠnŠ and the PV thus reflect two separate and contradicting Zoroastrian traditions on the matter of cognizance and intention. According to the ŠnŠ, in order to be liable for a *margarzān* sin, full cognizance on the part of the sinner of the severity and penal implications of the sin is necessary. The PV, on the other hand, asserts that deliberate intention to commit a sin is sufficient to make the sinner liable for a *margarzān* crime.

This legal inquiry seems to be a perfect example of the complexity of literary relations between the PV and the ŠnŠ. In the current case, the ŠnŠ clearly reflects a separate tradition, perhaps even a different *čāštag*, which diverges fundamentally from the tradition represented in the PV. Like in many other cases, the ŠnŠ seems to follow here the more lenient tradition which attempts to limit the applicability of the *marg-arzān* status to a bare minimum.

Although uncertain, it is possible perhaps to discern a literary kernel in this case, which seems to have circulated in both of the intellectual schools that produced the PV and the ŠnŠ. A close examination of these passages reveals that both traditions contain the following basic element: “*kū dānēd/dānēnd/dānistan*<sup>36</sup> *kū wināh ī margarzān*”. While the ŠnŠ articulates this sentence in itself, the PV adds a negating remark, according to which “it is not necessary (*nē abāyēd*) for it that they know”, followed by the very same articulation. It is thus possible in the context of an oral intellectual environment that a single tradition was

36 All forms stem from the same verb.

transmitted among two religious schools, but interpreted in completely different manners.

In sum, we have demonstrated that a level of cognizance is required of the sinner in order for him to be regarded *margarzān* (worthy of death). It has been pointed out, furthermore, that two different kinds of cognizance are required of the sinner, namely cognizance of the reality at hand and legal cognizance of the sin. Cognizance of the reality refers specifically to knowledge regarding the gaze of a dog and of a corpse being present, while legal cognizance of the sin refers to one's awareness that the act of carrying a corpse is forbidden.

Aside from cognizance of the reality at hand and of the nature of the sin, the *Zand* further discusses a more complicated case in which the sinner is cognizant of the sin itself, but at the same time remains ignorant as to the punitive consequences of his actions. Regarding this legal situation, we encounter two contradicting traditions in the extant Pahlavi literature. The PV holds that cognizance of the penalty is unnecessary as long as the sinner knows that he is committing a crime. The ŠnŠ, on the other hand, requires cognizance of both sin and penalty, for the sinner to be rendered *margarzān*.

### **Cognizance and Liability in Rabbinic Literature**

Not unlike the Zoroastrian discussion of cognizance and intentionality, in rabbinic literature we are similarly informed of two sorts of cognizance that are required of the sinner in order for him to be regarded as a willful offender and in some cases even worthy of death – cognizance of the reality at hand and legal cognizance of the sin. These prerequisites are commonplace in rabbinic discourse, and are particularly evident in the context of the laws of forbidden labor on the Sabbath. In this context we find it necessary for the sinner to know that the day on which he is laboring is in fact the Sabbath and not an ordinary day of the week, and at the same time he must be cognizant of the fact that his actions are considered a violation of the laws of the Sabbath.<sup>37</sup>

37 See for example: mShab 7:1; tShab 10:19.

To be sure, the mental prerequisites for deliberate and often death-worthy crimes are acknowledged already by early rabbinic sources, the production of which took place in *Eretz Israel*. Thus, the similarity between the rabbinic and Zoroastrian categorizations of legal cognizance seems to have existed before the alleged encounter between rabbis and *dastwars* took place in Sasanian Babylonia. The affinity that exists between the rabbinic and Zoroastrian legal theories in this respect is hardly reflective, then, of any genealogical or historical connections, and should probably be explored through the broader prism of analogous comparisons.<sup>38</sup>

While the early rabbinic sources establish the prerequisites of cognizance of the reality at hand and legal cognizance of the sin, they only briefly allude to the more complicated legal scenario we have encountered in the Pahlavi discussion, where the sinner acknowledges his crime but remains ignorant regarding the punitive consequences of his actions. Unlike the rabbinic material that was composed in *Eretz Israel*, however, this matter is systematically considered by the Babylonian Talmud in the course of a legal discussion that appears in tractate *Shabbat*.<sup>39</sup>

Admittedly, the tannaitic sources seem to address the notion of cognizance of the penalty in the context of the “forewarning” (*hatra’ah*) of a death-deserving sinner. According to several rabbinic sources, the sinner must be forewarned not only as to the sinfulness of his actions, but also regarding the death penalty incurred, and according to some, even with regard to the specific form of execution.<sup>40</sup> Since the requirement of “forewarning” is essentially intended to establish cognizance on the part of the sinner of the crime he is committing,<sup>41</sup> one may deduce perhaps

38 For a detailed discussion on analogous and genealogical connections, see for example: J.Z. Smith, *Drudgery Divine: On the Comparison of Early Christianities and Religions of Late Antiquity*, University of Chicago, 1990, pp. 46-53.

39 bShab 68b-69b

40 tSan 11:1; ySan 5:1 22c-22d; bSan 8b; bSan 80b.

41 According to R. Yose son of R. Yehudah (bSan 8b), a sage does not require forewarning since the purpose of the forewarning is to distinguish between shogeg and mezid – to establish cognizance – and a sage certainly knows the law. The

that the requirement that the sinner be forewarned with regard to the death-penalty is intended to establish cognizance of the penalty.

It should be borne in mind, however, that although the rabbinic requirement of forewarning may essentially be intended to establish cognizance, the forewarning procedures include many detailed requirements that are based on scriptural exegesis, and which are not directed towards this purpose.<sup>42</sup> It has been suggested, moreover, that according to the Rabbis - the interlocutors of R. Yose son of R. Yehudah in *bSan 8b* - the forewarning is meant to establish a “rebellious” state of mind, in which the sinner is not only aware of the sinfulness of his actions but deliberately intends to blaspheme and desecrate the Holy name, through the transgression of his commandments.<sup>43</sup> It is thus stipulated that it is not enough that the sinner say “I know (it is forbidden)” in response to the forewarning, but he must articulate, “I know (it is forbidden) and I am doing it for the sake of transgression”.<sup>44</sup>

The ambiguity surrounding the nature and purpose of the rabbinic requirement of forewarning, therefore, makes it somewhat difficult to ascertain that the tannaitic sources indeed required that the sinner be cognizant of the penalty in order for him to be held liable. However, even if the tannaitic sources did implicitly address the issue of cognizance of the penalty, via the requirement of forewarning, it is my contention that the *Bavli*'s explicit treatment of the sinner's state of mind and his

Rabbis hold, on the other hand, that even a sage requires forewarning. Certain commentators assumed that the Rabbis agree that the forewarning is meant to establish cognizance, but they hold that a sage may forget or may also be ignorant of the law. See esp.: Maimonides, *Laws of Sanhedrin*, 12:2; Rabbi Joseph Karo, *Kesef Mishneh*, ad loc.; David ben Solomon ibn (Abi) Zimra (*Radbaz*), ad loc.

42 *tSan 11:5*, for example, asserts that if the sinner forewarned himself, he is not liable, even though he was obviously cognizant of his crime. According to some authorities, moreover, if only some, but not all, of the witnesses to the crime forewarn the sinner, he is not held liable (*tSan 11:1*).

43 Enker, *Jewish Criminal Law*, pp. 197-208.

44 See, for example: *ySan 5:1 22c-22d*; Maimonides, *Laws of Sanhedrin*, 12:2.

awareness of the penalty systematically develops this “embryonic” tannaitic notion.

In my subsequent analysis of the Babylonian discussion, I shall argue that the legal category of cognizance of the penalty was addressed in the *Bavli* and in contemporaneous Pahlavi material in a very similar manner, a fact that strongly suggests a shared intellectual milieu. To be sure, while earlier rabbinic and Zoroastrian sources acknowledge the role of the sinner’s cognizance in establishing his own liability, the latter only briefly allude to the particular issue of cognizance of the penalty.

The Talmudic discussion will be examined from two separate exegetical perspectives, both of which are necessary for a valid understanding of the text. In the first stage, the Talmudic discussion will be internally analyzed in terms of higher source criticism, while focusing on the distinctions between *Eretz Israel* and Babylonian traditions that are incorporated in the text. The internal source criticism will aid us in isolating the traditions that seem to have originated in Babylonia and thus may reflect original Babylonian thought. In the next stage, the Talmudic discussion will be contextualized within the local intellectual milieu of Sasanian Babylonia. In other words, the Talmudic discussion will first be considered as a stage in the internal development of the rabbinic discourse, and only then as a product of the Sasanian intellectual culture, reflecting local religious and legal developments.

The Talmudic discussion introduces a legal dispute between R. Yohanan and Resh Lakish concerning a sinner who was cognizant of the prohibition against laboring on the Sabbath, but lacked cognizance regarding the penalty of extirpation. The Talmudic discussion then cites several amoraic statements attributed to Rava and Abaye, in an attempt to define the extent of the dispute in *Eretz Israel*. Abaye appears to advocate a “minimalist” approach that reduces the dispute between R. Yohanan and Resh Lakish to a specific case, arguing that in essence all authorities are in agreement that cognizance of the sin is sufficient to render a person a deliberate sinner. Rava, on the other hand, upholds a “maximalist” position according to which any lack of cognizance of the penalty – be it extirpation, divinely imposed death, the sin-offering or the

additional one-fifth payment – falls under the same category. These essential approaches, I will argue, reflect the concerns of the Babylonian sages rather than those of their predecessors in *Eretz Israel*, and therefore they ought to be contextualized and viewed in comparison with the differing approaches to this legal matter that are displayed in Pahlavi literature.

The *Bavli* addresses several transgressions in this regard – performing forbidden labor on the Sabbath, taking an oath in vain, and the consumption of *terumah* by a non-priest – during which the sinner is cognizant of his sin but does not realize the full extent of the consequences of his actions. While the Zoroastrian discussion is concerned with the sin of carrying a corpse, a sin that is seemingly unrelated and irrelevant to the Talmudic discussion, from a perspective of comparative legal theory it would seem that both religious discussions grapple with the same legal issue concerning cognizance of the penalty, albeit from somewhat different perspectives.

The Talmudic discussion introduces in this regard three *baraitot* which appear to address the case of a sinner who was cognizant of the sin while lacking cognizance of the penalty. The subsequent analysis will demonstrate, however, that these sources do not necessarily reflect authentic tannaitic concerns – as the early rabbis of *Eretz Israel* did not pay much attention to the sinner's cognizance of the penalty in and of itself – but more generally to his cognizance of the sin. The focus on the mental state of awareness of the sin, while lacking cognizance of the penalty, is in fact mostly the product of Babylonian expanding, reworking, and reshaping of several tannaitic traditions.<sup>45</sup>

45 My methodological assumptions regarding the relationship between synoptic parallels in rabbinic literature are largely based on: S. Friedman, "Uncovering Literary Dependencies in the Talmudic Corpus", S.J.D. Cohen ed., *The Synoptic Problem in Rabbinic Literature*, Providence, 2000, pp. 35-57; idem, "The Baraitot in the Babylonian Talmud and their Parallels in the Tosefta" (Hebrew), Atara L'Haim, *Studies in the Talmud and Medieval Rabbinic Literature in honor of Professor Haim Zalman Dimitrovsky*, Jerusalem 2000, pp. 163-201; idem, "Towards a Characterization of Babylonian Baraitot: Ben Tema and Ben Dortai",

The first *baraita*, which deals with a proselyte who converted “in the midst of the gentiles”, is paralleled in *Tosefta* Shabbat 8:5. According to the *Tosefta*’s version, Monobaz rejects the extreme position, according to which even in the case of inadvertent sins the sinner must be cognizant of his transgression at the time of the sin. Monobaz’ argument is that although cognizance is required in the case of an inadvertent sin (and therefore a proselyte who converted to Judaism while living amongst the nations is exempt from a sin-offering since he had no cognizance at all), there is no requirement for cognizance at the time of the sin, for this is a prerequisite only in the case of deliberate crimes.

According to the Talmud’s version of the *baraita*, however, Monobaz accepts the extreme position, according to which even in the case of inadvertent crimes cognizance at the time of the sin is required. Based on the Talmudic version of the *baraita*, the *sugya* inquires what exactly Monobaz would consider to be inadvertent, since the sinner must be cognizant of the sin at the time of his transgression. It deduces, according to this position, that lack of cognizance concerning the sin-offering, while being cognizant of the crime, would be considered inadvertent. While this may be concluded from the Talmudic *baraita*, the *Tosefta* on the other hand, does not directly address the issue of cognizance of the penalty, a matter which appears to have been a typical Babylonian concern.

The second *baraita*, categorizing the cases of deliberate and inadvertent transgressions on the Sabbath, is paralleled in *Tosefta* Shabbat 10:19. While the *Tosefta* addresses only two cases that cover the realms of cognizance of the sin and cognizance of the reality at hand, the version cited in the Talmudic *baraita* includes a third scenario, regarding one who is cognizant of the sin while lacking sufficient cognizance regarding the sin-offering. It is thus evident that the *Tosefta* did not pay

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in: Neti’ot Ledavid: Jubilee volume for David Weiss Halivni, Y. Elman et al eds., Orhot Press, 2007, pp. 195-274.

much attention to the category of cognizance of the penalty, which was elaborated on in the Babylonian “embellishments” of the *baraita*.

The third *baraita* addresses a sinner who was cognizant of the crime of taking an oath in vain, but lacked sufficient cognizance regarding the liability to a reparation sacrifice. The *baraita*, although it addresses the issue of cognizance of the penalty, could hardly be considered an authentic tannaitic source, since it contains a statement that is elsewhere attributed to Rav Nahman and seems to reflect the position of his master, Rav.

It will be further argued, that the disagreement between the *Eretz Israel amoraim* R. Yohanan and Resh Lakish, which seems to address the issue of cognizance of the penalty, reflects in fact a Babylonian rather than an *Eretz Israel* tradition. While this dispute is paralleled in the *Yerushalmi*, several textual difficulties cast serious doubt on the possibility that the original dispute in *Eretz Israel* actually addressed the matter of cognizance of the penalty. It must be borne in mind in this respect that the *Bavli* quite often tends to reshape, reinterpret, and reattribute amoraic dicta set forth in the *Yerushalmi*.<sup>46</sup> It is therefore difficult to trace a source from *Eretz Israel* – whether tannaitic or amoraic – that unequivocally addresses the legal category of cognizance of the penalty.

The following passage includes the complete discussion in *Bavli Shabbat* concerning cognizance of the penalty.<sup>47</sup>

כלל גדול אמרו בשבת, כל השוכח עיקר שבת ועשה מלאכות הרבה בשבתות הרבה - אינו חייב אלא חטאת אחת. כיצד? תינוק שנשבה לבין הגוים וגר שנתגייר בין הגוים ועשה מלאכות הרבה בשבתות הרבה - אינו חייב אלא

46 For a discussion of attributed dicta that appear in both Talmuds, see: Z. Dor, *The Teachings of Eretz Israel in Babylon* (Hebrew), Tel Aviv: Devir, 1971, pp. 116-140; S. Friedman, *Talmudic Studies: Investigating the Sugya, Variant Readings and Aggada*, The Jewish Theological Seminary: New York and Jerusalem, 2010, pp. 40-44.

47 bShab 68b-69b, according to manuscript Oxford 366; The numbering of the paragraphs follows: S. Wald, *BT Shabbat Chapter 7: With Comprehensive Commentary*, Talmud HaIgdud, S. Friedman ed., Jerusalem, 2007, pp. 31-32, 49-50.

חטאת אחת. וחייב על הדם אחת ועל החלב אחת ועל ע"ז אחת, ומונבו פוטר. וכך היה מונבו דן לפני ר' עקיבא, הואיל ומזיד קרוי חוטא ושוגג קרוי חוטא, מה מזיד שהיתה לו ידיעה אף שוגג נמי שהיתה לו ידיעה. אמ' לו ר' עקיבא הרי אני מוסיף על דבריך. אי מה מזיד שהיתה לו ידיעה בשעת מעשה, אף שוגג שהיתה לו ידיעה בשע' מעשה. אמ' לו, הן וכל שכן שהוספת. אמ' לו, לדבריך אין זה קרוי שוגג אלא מזיד...<sup>48</sup>

1. ואלא מונבו שגגה במאי? כגון ששגג בקרבן.
2. ורבנן, שגג(ה)[ת] קרבן לא שמה שגגה. ורבנן שגגה במאי?
3. ר' יוחנן אמ': כגון<sup>49</sup> ששגג בכרת ואע"פ שהזיד בלאו.
4. וריש לקיש אמ': עד שישגוג בלאו וכרת.
5. אמ' רבה: מאי טעמא דריש לקיש? אמ' קרא אשר לא תעשינה בשגגה<sup>50</sup> ואשם, עד שישגוג בלאו<sup>51</sup> שבה.
- 7.<sup>52</sup> תנן, אבות מלאכות ארבעים חסר אחת, והוינן בה מניינא למה לי? וא"ר יוחנן: שאם עשאם כולם בהעלם אחת - חייב על כל אחת ואחת.
8. היכי משכחת לה? בזדון שבת ושגגת מלאכות. בשלמא לר' יוחנן דאמ' בכגון<sup>53</sup> ששגג בכרת אע"פ שהזיד בלאו, משכחת לה דידע לה לשבת בלאו. אלא לריש לקיש דאמ' עד שישגוג בלאו וכרת, דידע ליה לשבת במאי?
9. דידע ל(י)ה בתחומין, ואליבא דר' עקיבא.
10. מאן תנא להא, דת"ר שגג בזה ובזה - זהו שוגג האמור בתורה. הזיד בזה ובזה - זהו מזיד האמור בתורה. שגג בשבת והזיד במלאכות, או ששגג

48 This baraita is devoted to the case of a proselyte who converted to Judaism while living among gentiles, or a Jewish baby who was captured by gentiles. The latter two have violated the laws of the Shabbat unknowingly, and the question arises as to their level of accountability. This baraita serves as the basis for the following discussion, devoted to cognizance of sin and punishment.

49 Vatican 108: כיוון.

50 Thus according to Lev 4:22; the printed editions places the word בשגגה in brackets, which indicates the use of Lev. 4:27.

51 The printed editions add: וכרת.

52 I purposely skipped passage 6 in Wald's edition, since it only appears in the Vilna edition but not in any of the manuscripts.

53 Vilna has: כיוון.

- במלאכו' והזיד בשבת, או שאמ' יודע אני שמלאכה זו אסורה אבל איני יודע אם חייבין עליה קרבן אם לאו - חייב. כמאן, כמונבז.
11. אמ' אביי: הכל מודים בשבועת ביטוי שאין חייבין עליה קרבן עד שישגוג בלאו שבה.
12. הכל מודים מאן? ר' יוחנן. פשיטא! כי אמ' ר' יוחנן היכא דאיכא כרת, ה[י]כא [ד]ליכא כרת - <לא קאמ'>.<sup>54</sup> סד"א הואיל וחידוש הוא דבכל התורה כולה לא אשכחן לאו דמייתי עליה קרבן והכא מייתי, וכי שגג בקרבן נמי ליחייב, קמ"ל.
13. מיתיבי, אי זו היא שגגת ביטוי לשעבר? אמ' יודע אני ששבועה זו אסורה, אבל איני יודע אם חייבין עליה קרבן אם לאו - חייב.
14. הא מני? מונבז היא.
- 16.<sup>55</sup> ואמ' אביי: הכל מודים בתרומה שאין חייבין עליה חומש עד שישגוג בלאו שבה.
17. הכל מודים מאן? ר' יוחנן. פשיטא! כי אמ' ר' יוחנן היכא דאיכא כרת, ה[י]כא [ד]ליכא כרת - [לא]. מהו דתימא מיתא במקום כרת עומדת, וכי שגג במיתה נמי ליחייב, קמ"ל.
18. רבא אמ': מיתה במקום כרת עומדת. חומש במקום קרבן קאי.<sup>56</sup>

54 Missing in Oxford 366; Supplemented according to Munich and the printed editions

55 I purposely skipped passage 15 in Wald's edition, since the entire passage is omitted in manuscript Oxford 366. It appears in Munich 95 and the first printed edition, and is only summarized in Vatican.

56 The following translation follows the Soncino edition, for the most part, but includes several changes and adjustments:

A great principle is stated in respect to the Sabbath: he, who forgets the essential law of the Sabbath and performs many labors on many Sabbaths – incurs only one sin-offering. How is this? If a child is taken captive among gentiles, or a proselyte is converted in the midst of the gentiles, and [he] performs many labors on many Sabbaths – he is liable to one sin-offering only. And he is liable to one [sin-offering] on account of blood, one on account of forbidden fat, and one on account of idolatry. But Monobaz exempts him. And thus did Monobaz argue before R. Akiva: Since a willful transgressor is designated a sinner and an unwitting transgressor is designated a sinner; just as a willful transgressor had cognizance, an unwilling transgressor also had cognizance. R. Akiva said to him,

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behold, I will add to your words: If so, just as willful transgression involves that he had cognizance at the time of his deed, so in unwitting transgression he also had cognizance at the time of his deed. Indeed, he (=Monobaz) replied, all the more so since you have added [this argument]. He (=R. Akiva) said to him: as you define it, then, such is not designated unwitting but, rather, willful transgression...

1. But according to Monobaz, wherein lies his non-willfulness? E.g. if he was ignorant with regard to the sacrifice.
2. But the Rabbis hold that ignorance with regard to the sacrifice does not constitute ignorance. Now according to the Rabbis, with regard to what is ignorance [required]?
3. R. Yohanan said: e.g. if one errs with regard to the karet, even if he willfully sins with regard to the negative command.
4. And Resh Lakish maintained: He must offend unwittingly with regard to the negative injunction and the karet.
5. Rabbah said: What is R. Shimon b. Lakish's reason? Scripture says, '(And if any one of the common people sin unwittingly, in doing any of the things which the Lord has commanded) not to be done, and be guilty', hence he must err as to the negative injunction.
7. We learned: 'the primary forms of labor are forty less one'. Now we pondered thereon; why state the number? And R. Yohanan replied: [this comes to teach] that if one performs all of them in a single state of unawareness, he is liable [to a sin-offering] for each.
8. Now, how is this possible? [Surely, only] where he is aware of the Sabbath but unaware of [the forbidden nature of] his labors. As for R. Yohanan, who maintained that since he is ignorant with regard to the karet although fully aware of the negative injunction [his offence is considered unwitting], it is well: it is conceivable where he knew [that labor is forbidden on] the Sabbath by a negative injunction. But according to R. Shimon b. Lakish, who maintained that he must be unaware of the negative injunction and of the karet, wherein did he know of the Sabbath?
9. He knew of [the law of] boundaries, this being in accordance with R. Akiva.
10. Who is the authority for the following which was taught by the Rabbis: 'if one is unaware of both - he is the erring sinner mentioned in the Torah, if one willfully transgresses with regard to both - he is the deliberate offender mentioned in the Torah. If one is unaware of the Sabbath but aware of [the forbidden character of] his labors or the reverse, or if he declares, 'I knew that

## The Legal Discussion in Fourth Century Babylonia

Before I examine the Talmudic text in detail, it might be worth pointing out that the text is comprised of at least four distinct literary strata. While the precise scope of each stratum remains unclear, the general classification can perhaps be justified on literary grounds. The first layer includes three *baraitot* (The first paragraph, and paragraphs 10 and 13) which are presented as transmitted tannaitic material. The second layer includes an amoraic dispute between R. Yohanan and Resh Lakish with regard to a deliberate sinner who is cognizant of the prohibition, but is ignorant as to the extirpation penalty, i.e. the divine death penalty,

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this labor is forbidden, but not whether it entails a sacrifice or not, he is culpable? With whom does this agree? With Monobaz.

11. Abaye said: All agree with regard to an "oath of utterance" that a sacrifice is not incurred on account thereof, unless one is unaware of its interdict.
12. 'All agree', who is that? R. Yohanan. But that is obvious! When did R. Yohanan say [otherwise], where there is [the penalty of] karet, but here [in the case of an "oath of utterance"] that there is no [penalty of] karet, he did not state [his ruling]? One might argue: Since liability to a sacrifice in this case is an anomaly, for we do not find in the whole Torah that for a [mere] negative injunction one must bring a sacrifice, whilst here it is brought; then, even if he is unaware of the [liability to a] sacrifice, he is culpable, hence [Abaye] informs us [otherwise].
13. An objection is raised: 'what is an unwitting offence with regard to an "oath of utterance" relating to the past? Where one says, 'I know that this oath is forbidden, but I do not know whether it entails a sacrifice or not,' - he is culpable.
14. This agrees with Monobaz.
15. And Abaye also said: all agree in respect to *terumah* that one is not liable to [the addition of] a fifth unless he is unaware of its interdict.
16. 'All agree': who is that? R. Yohanan. But that is obvious! When did R. Yohanan say [otherwise], where there is the penalty of karet, but here that there is no penalty of karet he did not state [his ruling]. You might argue: death stands in the place of karet and therefore if one is ignorant of [this penalty of] death, he is culpable; hence he informs us [otherwise].
17. Rava said: Death stands in the place of karet and [adding] the fifth stands in the place of a sacrifice.

prescribed for his actions. The third layer includes several amoraic dicta attributed to the fourth century Babylonian sages Rava and Abaye. The fourth and seemingly latest stratum of the Talmudic discussion contains several interpretive and organizing stammaitic remarks.<sup>57</sup>

At first glance, the *sugya* seems to record a multi-generational discourse, which includes the positions of various authorities from different geographical and historical settings, all considering the legal category of cognizance of the penalty. One would be mistaken, however, were one to accept this literary multiplicity of the Talmudic discussion as a reflection of an actual vibrant discussion on this topic, which crosses geographical and historical boundaries and joins *tannaim* and *amoraim*; authorities in *Eretz Israel* and Babylonia. In fact, as I have mentioned, it is quite difficult to locate a rabbinic source that explicitly addresses the category of cognizance of the penalty, prior to the fourth generation of Babylonian authorities. I shall thus begin the detailed analysis with the third literary stratum stemming from fourth century Babylonia.

The *sugya* includes two statements in the name of Abaye, which are intended to minimize the scope of R. Yohanan's position concerning cognizance of the extirpation penalty, and bring it closer to the position of Resh Lakish (paragraphs 11 and 16). According to Abaye, R. Yohanan simply argues that a sinner who lacks cognizance concerning the extirpation penalty is considered an inadvertent transgressor. When the absence of cognizance pertains, however, to the obligation to bring a sin-offering, or to pay an additional one-fifth in the case of consuming *terumah*, all are in agreement that only the absence of cognizance of the prohibition itself renders the sinner an inadvertent transgressor. Abaye, in other words, by stressing the limited scope of R. Yohanan's position, appears to lean towards the position of Resh Lakish, albeit indirectly.

Rava's statement (paragraph 18) is confronted with Abaye's position, who attempts to reduce the dispute between R. Yohanan and Resh Lakish only to the case of cognizance concerning the extirpation penalty. In contrast to Abaye's "minimalist" approach, Rava argues that even when

57 The general stratification suggested here will be further justified throughout the discussion.

the absence of cognizance pertains to other penalties or legal consequences, such as the obligation to bring a sin-offering or to pay an additional one-fifth, the sinner is considered an inadvertent transgressor. Rava, in other words, not only supports R. Yohanan in his dispute with Resh Lakish, but promotes a “maximalist” interpretation of the former’s position, according to which any lack of cognizance on the part of a sinner with regard to the legal consequences of his actions renders him an inadvertent transgressor.<sup>58</sup>

It is noteworthy that Rava’s statement parallels an answer which was given to him by Rav Nahman according to *Bavli Shevuot*.<sup>59</sup> It is likely then that Rava’s conversation with Rav Nahman, which presumably took place in Mehoza, is the actual *Sitz im Leben* of Rava’s statement, and not his reconstructed dispute with Abaye. While the editors of our *sugya* juxtapose Rava’s position with that of Abaye’s, as they have done on numerous occasions, the interlocutors are not depicted in this context as commenting on one another’s statements.

One can delineate perhaps two essential approaches among fourth century Babylonian rabbis, with regard to the legal category of cognizance of the penalty. Interestingly, these approaches separate Abaye, a prominent rabbinic figure from Pumbeditha on the one hand,<sup>60</sup> and Rava and Rav Nahman, the famous authorities of Mehoza on the

58 Rava’s connection to R. Yohanan’s teachings were discussed in: Dor 1971, pp. 11-78.

59 bShev 26b. The text will be quoted and discussed below.

60 On the rabbinic circle of Pumbeditha, see especially: I. Geiger, *The Yeshivah of Pumbeditha from its Foundation until Abbaye's Days: Chapters in the Formation of an Educational Institution* (Hebrew), PhD Dissertation, The Hebrew University of Jerusalem, 2006. The authors’ use of the term Yeshivah before the late fifth century, however, must be significantly qualified, cf. D. Goodblatt, “The History of the Babylonian Academies,” in: *The Cambridge History of Judaism IV: The Late Roman-Rabbinic Period*, S. T. Katz ed., Cambridge: Cambridge University Press, 2006, pp. 821-839; J.L. Rubenstein, “The Rise of the Babylonian Rabbinic Academy: A Reexamination of the Talmudic Evidence,” *Jewish Studies: an Internet Journal* 1 (2002), pp. 55-68.

other.<sup>61</sup> While Abaye advocates a “minimalist” approach that attempts to reduce the early dispute in *Eretz Israel* to a specific case regarding the absence of cognizance of the extirpation penalty, Rava upholds a “maximalist” position, according to which the absence of cognizance of any sort of penalty – be it extirpation, divinely imposed death, the sin-offering, or the additional one-fifth payment – falls under the same category. In other words we might say that while Rava advocates an essentialized interpretation of the dispute regarding the absence of cognizance of the extirpation penalty, Abaye attempts to de-essentialize this dispute by means of reducing the dispute to a specific case.

It is also important to address the manner by which Abaye and Rava’s dispute is “reconstructed” by the later editors of the *sugya*, and consider the fact that the differing statements are not transmitted as a coherent tradition (Abaye said x and Rava said y), but rather appear to be distinct traditions that were juxtaposed at a later time.<sup>62</sup> In this respect, the discussion concerning Abaye’s statements (paragraphs 11-17) is deliberately interrupted and contradicted by a concluding authoritative statement made by Rava (paragraph 18). According to some textual variants, moreover, the first statement of Abaye is in fact straightforwardly rejected by the *sugya* (“תיבותא דאביי תיבותא”).<sup>63</sup> The Talmud, therefore, by means of editorial organization of the disputing opinions, appears to lean towards the position of Rava.<sup>64</sup>

61 On the distinct halakhic cultures reflected in Mehoza and Pumbeditha, see especially: Y. Elman, "A Tale of Two Cities: Mahoza and Pumbeditha" (Hebrew), in: *Torah Lishma: Essays in Jewish Studies in Honor of Professor Shamma Friedman*, D. Golinkin et al eds., Jerusalem 2007, pp. 3-38; idem, "Socioeconomics of Babylonian Heresy", in: *Jewish Law Association Studies 17: Studies in Medieval Halakhah in Honor of Stephen M. Passamanek*, eds. A. Gray and B. Jackson, Jewish Law Association, 2007, pp. 80-127.

62 See for instance: R. Kalmin, "Friends and Colleagues, or Barely Acquainted? Relations between Fourth-Generation Masters in the Babylonian Talmud", *HUCA* 61 (1990), pp. 125-158.

63 Admittedly, though, this passage is omitted in Oxford 366.

64 For the editorial methodology of "twisting" a Talmudic discussion towards the direction of one of the disputing opinions, see for instance: M. Kahana, "Intimation of

As I shall further argue, the Talmud's attempt to contrast and juxtapose two distinct approaches regarding the sinner's cognizance of the penalty is not only reflected in the presentation of Abaye and Rava's reconstructed dispute. In fact, the fundamental dispute between R. Yohanan and Resh Lakish regarding the absence of cognizance of the extirpation penalty, and the dispute between Monobaz and the Rabbis concerning the definition of the scriptural reference to inadvertent transgressions, are also reconstructed by the *sugya* in a similar manner, which advocates an ongoing and cross-generational dispute concerning the sinner's cognizance of the penalty.<sup>65</sup>

To summarize, the Talmudic discussion appears to construct a systematic and comprehensive statement depicting a cross-generational dispute that includes prominent authorities from different geographical and historical settings. In its reconstructed form, the Talmudic discussion implicitly asserts that: Monobaz, R. Yohanan and Rava all proclaimed the same position ["אמרו דבר אחד"] – the sinner's absence of cognizance with regard to the penalty renders him an inadvertent transgressor.<sup>66</sup> But is this "overarching" portrayal of a multi-generational rabbinic discussion justified? In the following section, I will examine the exegetical and editorial techniques, through which the editors incorporate and appropriate earlier *Eretz Israel* traditions, to address the novel issue of the sinner's cognizance of the penalty.

### **Legal Cognizance of the Penalty in Tannaitic Sources**

The Talmudic discussion transmits three purportedly tannaitic *baraitot*, which seem to address the legal requirement of cognizance of the

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Intention and Compulsion of Divorce – Towards the Transmission of Contradictory Traditions in Late Talmudic Passages", *Tarbiz* 62:1 (1993), pp. 225-263.

65 My argument regarding the reworking and reshaping of earlier Eretz Israel disputes will be elaborated on in the following sections.

66 On this common "overarching" tendency in the Talmud, see: L. Moscovitz, "'Ameru Davar Ehad' ('They Said the Same Thing') in the Bavli" (Hebrew), *Bar-Ilan* 30-31 (2006), Bar-Ilan University Press: Ramat Gan, pp. 251-258.

penalty. Based on Monobaz' position in the *baraita*, the Talmud attributes to Monobaz the position that inadvertent sins could only occur in the case of an absence of cognizance concerning the sin-offering [paragraph 1]. As for the interlocutors of Monobaz, the Talmud suggests two alternative possibilities which correspond to the positions of R. Yohanan and Resh Lakish. According to the latter, an inadvertent sin occurs only when the sinner is incognizant of the prohibition itself, while the former maintains that even the absence of cognizance of the extirpation penalty renders the sinner inadvertent [paragraph 2-4]. Both the opinion of Monobaz and that of his interlocutors are thus interpreted by the *sugya* as an integral part of the legal discussion regarding cognizance of the penalty.

Two additional *baraitot* are quoted in our Talmudic passage [paragraphs 10 and 13], which address the absence of cognizance concerning the sin-offering. Following the aforementioned logic of the *sugya*, both *baraitot* are attributed to Monobaz, who is thought to have held the position that inadvertent transgressions could only apply in the case of the absence of cognizance concerning the liability to a sacrifice.

The first two *baraitot* [the opening passage and paragraph 10] have direct parallels in *Tosefta* Shabbat 8:5 and *Tosefta* Shabbat 10:19, respectively, while the third *baraita* [paragraph 13] is paralleled by a statement of Rav Nahman in *Bavli Shevuot* 26b. While the third *baraita* could hardly be considered a *baraita* in the sense of a genuine tannaitic source, the first two *baraitot* undoubtedly reflect an earlier tannaitic version. Subsequently, I would like to compare these Talmudic *baraitot* with the presumably earlier versions preserved in the *Tosefta*. This comparison will enable me to trace the history of transmission of these rabbinic sources and thus distinguish the original tannaitic elements of the discussion from later adjustments, which can be attributed to the Babylonian transmitters of the sources.

The synoptic problem in rabbinic literature concerning the relationship between the *Tosefta* and parallel accounts in the *Talmuds* was considered to be one of the most complicated issues in the critical study of rabbinic literature. Numerous studies were devoted to this topic

and various models were suggested to describe the precise relationships between parallel *baraitot* in the *Tosefta*, *Yerushalmi* and *Bavli*.<sup>67</sup> In recent years, Shamma Friedman has devoted several articles to this matter and concluded that the *Bavli*'s versions of many *baraitot* are often reworked and reformed, when compared with their tannaitic parallels. Rather than considering the varying version as two traditions in the sense of “*zakhor* and *shamor*”, which were articulated in one utterance, it is much more productive to speak in terms of early vs. late – a source and its embellished reworking. This conclusion fits quite well with what we already know about the *Bavli*'s utilization of its sources in general, which reflects creativity and embellishment.<sup>68</sup>

Except for changes relating to stylistic refinement, unification of terminology, combining of sources, and so forth, Friedman argues that there are often significant changes in content that stem from legal and ideological positions that characterize the *Bavli*'s agenda in particular.<sup>69</sup> Similarly, I shall argue that beyond typical stylistic changes, one can detect significant changes in the content of the *baraitot* in our *sugya*, which fit the latter's concerns rather than the original concerns that are reflected in the tannaitic version. As will be demonstrated, the legal agenda advocated by the Talmudic discussion, and reflected also in the Talmudic version of the *baraitot*, significantly intersects with certain intellectual trends that are current in the Sasanian cultural milieu, and are reflected in Pahlavi literature in particular.

### ***Tosefta* Shabbat 10:19**

Based on the *Bavli*'s version of the second *baraita* (paragraph 10) alone, we might erroneously infer that the question regarding the sinner's lack

67 For a discussion on the models proposed by Epstein and Albeck, see: E.S Rosenthal, "Hamoreh", PAAJR 31 (1963), p. 52; for more recent suggestions, see: Friedman 2000, pp. 163-201; B. Katzoff, The Relationship between Tosefta and Yerushalmi of Berachot, PhD Dissertation, Bar-Ilan University, 2003.

68 Friedman 2007, p. 202.

69 Friedman 2007.

of cognizance concerning the liability to a sacrifice was already addressed in tannaitic circles. A close examination of the parallel account in the *Tosefta*, however, reveals that the original tannaitic account apparently never considered this legal possibility at all. Here is a synoptic table of the Talmudic *baraita* viewed against the parallel version in the *Tosefta*.

<i>Tosefta Shabbat 10:19</i> <sup>70</sup>	<i>Bavli Shabbat 69</i>
<p>תנו רבנן: שגג בזה ובזה - זהו שוגג האמור בתורה.</p> <p>הזיד בזה ובזה - זו היא מזיד האמור בתורה.</p> <p>1. שגג בשבת והזיד במלאכות</p> <p>2. או ששגג במלאכות והזיד בשבת</p> <p>3. או שאמר: יודע אני שמלאכה זו אסורה אבל איני יודע אם חייבין עליה קרבן אם לאו - חייב.</p>	<p>זה הכלל כל חייבי חטאות אינן חייבין עד שתהא תחלתן וסופן שגגה. תחלתן זדון וסופן שגגה, תחלתן שגגה וסופן זדון - פטורין, עד שתהא תחלתן וסופן שגגה. אם יש בשגגה של אחד מהן כדי לעשות מלאכה - חייב. כיצד?</p> <p>היה יודע שהיא שבת והזיד במלאכה - זה הוא מזיד האמור בתורה.</p> <p>אם היה מתעסק פטור.</p> <p>1. שגג בשבת והזיד במלאכה</p> <p>2. או שהיה יודע שהיא שבת ונתכוון לעשות בה מלאכה אבל לא היה יודע שעל אותה מלאכה חייב חטאת</p> <p>-</p> <p>- זהו שוגג האמור בתורה.</p> <p>This is the general principle: all those who are liable to sin-offerings are not liable unless the beginning and the end [of the prohibited action] is inadvertent. If the beginning is deliberate and the</p>

70 Following Lieberman's edition, *Tosefta Moed*, p. 45.

<p>- If one is unaware of both, this is the erring sinner mentioned in the Torah.</p> <p>- If one willfully transgresses with regard to both, this is the deliberate offender mentioned in the Torah.</p> <p>1. If one is unaware of the Sabbath but aware of [the forbidden character of] his labor or</p> <p>2. He is unaware of his labors but is aware of the Sabbath</p> <p>3. Or if he declares, 'I knew that this labor is forbidden, but not whether it entails a sacrifice or not</p> <p>- He is culpable.</p>	<p>end is inadvertent, or the beginning inadvertent and the end deliberate, they are exempt, save if the beginning and the end [of the action] are inadvertent. If the inadvertent action of one of these transgressions meets the legal measure - he is liable.<sup>71</sup> How so?</p> <p>- If he knew that it was the Sabbath and he deliberately performed a forbidden act of labor this is the deliberate sinner referred to in the Torah.</p> <p>- If he was merely “tampering” he is exempt.</p> <p>1. If one is unaware of the Sabbath but aware of [the forbidden character of] his labor or</p> <p>2. He was aware of the Sabbath and he intended to perform an act, but he did not realize that this is a forbidden act for which one is liable to a sin-offering</p> <p>- This is the inadvertent sinner referred to in the Torah.</p>
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Regarding the *Tosefta*'s version, Lieberman notes that “according to the *Bavli*, the *baraita* follows the opinion of Monobaz”.<sup>72</sup> Lieberman thus

71 For the explanation of this obscure teaching, see: Lieberman, *Tosefta Moed*, p. 45, n. 58.

72 Lieberman, *Tosefta Kifshuta*, p. 166.

equates the *Tosefta* with the Talmudic *baraita* in terms of their contents, and simply notes that the *Bavli* attributes this *baraita* to Monobaz, while such an attribution is not mentioned in the *Tosefta*. As I shall demonstrate, however, the attribution to Monobaz is probably the least of the details in which the Talmudic *baraita* diverges from the *Tosefta*'s version.

The *Tosefta* addresses a sinner, who was cognizant of the Sabbath and had the intent to engage in the act he actually performed, yet he was incognizant of the fact that his actions consist of a transgression for which one must bring a sin-offering [clause 2]. At first glance, it would seem that this clause parallels the clause in the Talmudic *baraita* that refers to a person who says: 'I knew that this labor is forbidden, but not whether or not it entails a sacrifice' [clause 3]. The Talmudic *baraita* is clearly dealing here with a deliberate sinner to whom only the outcome of his crime (the sacrifice in this case) was unknown. After dealing with cognizance of the prohibition and of the reality [clauses 1 and 2] the Talmudic *baraita* goes on to entertaining a third scenario concerning cognizance of the penalty.

However, if we look closely at the *Tosefta*'s version, we can see that this cannot possibly be the case. The *Tosefta* includes only two cases [clauses 1 and 2] that cover the basic requirement for cognizance of the prohibition and of the reality at hand. Since the first clause in the *Tosefta* concerns a sinner who is incognizant with regard to the Sabbath, but cognizant regarding the act of labor, it is only logical that the second clause refers to the opposite case of a sinner who is cognizant regarding the Sabbath, and incognizant regarding the act of labor. The assertion that "he did not realize that this is a forbidden act for which one is liable to a sin-offering" is not intended to indicate an absence of cognizance of the penalty in particular, but rather of the entire sin. It is quite unlikely that the *Tosefta* would be dealing with the more complicated situation of an absence of cognizance of the penalty alone, when the more fundamental case of the absence of cognizance of the sin itself is omitted.

Why then does the *Tosefta* utilize this ambiguous terminology, if the mere absence of cognizance of the sin is intended in clause 2? It appears

that the *Tosefta* had to emphasize that in this case there was intention to perform the act, whereas in the previous case of “tampering” (*mit’asek*), even the action itself was inadvertent. The *Tosefta* therefore emphasizes that although the sinner meant to perform the act, he did not know that it is considered forbidden labor. The Talmudic *baraita*, by contrast, does not include the law of “tampering”, and therefore does not include the *Tosefta*’s reservation.

Regarding the relationship between this *baraita* and the *Tosefta*’s version, it has recently been suggested that significant changes were made in the Talmudic *baraita*.<sup>73</sup> Firstly, the Talmudic *baraita* omits the law regarding “tampering”, since it is not relevant to the Talmudic discussion. Secondly, the Talmudic *baraita* shortens and unifies the terminology. [שגג בזה ובוזה; הזייד בזה ובוזה; שגג בשבת והזייד במלאכות; שגג במלאכות] [שגג בזה ובוזה; הזייד בזה ובוזה; שגג בשבת והזייד במלאכות] And thirdly, the Talmudic *baraita* adds an additional clause that is missing from the *Tosefta*’s version, which concerns the absence of cognizance of the penalty while acknowledging the prohibition.

The last clause [clause 3] in the Talmudic *baraita*, although missing from the *Tosefta*, is paralleled by the answer of Rav Nahman to Rava’s inquiry according to *Bavli Shevu’ot*. This seems to indicate that this clause was not an original part of the tradition, but was added in fact by the Babylonian transmitters of the *baraita*, who reused an authoritative amoraic dictum attributed to Rav Nahman to amend the *baraita*.<sup>74</sup>

בעא מיניה רבא מרב נחמ' איזה הוא שגגת ביטוי לשעבר? אי דידיע מזיד הוא,  
ואי דלא ידע אנוס הוא. אמ' ליה !כ!אומר, יודע אני ששבועה זו אסורה אבל  
איני יודע שחייבין עליה קורבן.<sup>75</sup>

Rava inquired of Rav Nahman: what is considered an unwitting transgression of a retroactive oath of utterance? If he knew – he is

73 Wald 2007, pp. 52-57.

74 It is possible of course, although unlikely, that the *Bavli* preserves a genuine tannaïtic version of the *baraita*, which was merely repeated by Rav Nahman. On this point see: M. Benovitz, *BT Shevu'ot Chapter 3: Critical Edition with Comprehensive Commentary*, New York and Jerusalem: JTS, 2003, pp. 332-341.

75 *bShev* 26b, according to manuscript Vatican 140.

a willful transgressor, and if he did not know – he is considered compelled. He [=Rav Nahman] replied: [It is possible in the case of] one who says: ‘I know that this oath is forbidden, but I do not know whether one is obligated to bring an offering for it or not’.

In his commentary on the third chapter of *Bavli Shevuot*, Moshe Benovitz suggests that Rav Nahman’s position in this passage relies on an earlier statement made by Rav. According to Rav, one is considered an inadvertent sinner with regard to the oath of testimony when one was cognizant of the prohibition but was incognizant of the liability to a sacrifice.<sup>76</sup> Depending perhaps on this legal innovation, Rav Nahman suggests that concerning the oath of utterance too, an inadvertent sinner is one who was cognizant of the prohibition but was unaware of the liability to a sacrifice.<sup>77</sup>

To summarize the evidence, then, I have demonstrated that the case of one who is “deliberate with regard to the prohibition and inadvertent regarding the liability to a sacrifice” was not really addressed in the *Tosefta*, but only in the reworked version of the *baraita* that appears in the Talmud. It is interesting that Wald, who convincingly argues for late Babylonian reshaping of this *baraita*, suggests nevertheless that the *Tosefta* can also be interpreted as referring to the absence of cognizance of the penalty.<sup>78</sup> As I demonstrated, however, this interpretation is highly unlikely, since the *Tosefta* cannot possibly be addressing the absence of cognizance of the penalty without referring first to the absence of cognizance of the prohibition itself. It is thus my contention that the last clause of the Talmudic *baraita* was probably added later on by its Babylonian transmitters, in an attempt to subjugate the *baraita* to the extended Talmudic discussion.

76 Rav’s position appears in: bShev 31b; yShev 4:3 35c; yShev 3:1 34b; it is possible, furthermore, that even tSev 2:6-10 incorporated Rav’s position regarding cognizance of the penalty prior to his descending to Babylonia, see: Benovitz 2003, p. 334, n. 26.

77 Benovitz 2003, pp. 332-341.

78 Wald 2007, p. 53.

***Tosefta Shabbat 8:5***

In his commentary on the seventh chapter of tractate *Shabbat*, Wald points out several differences between the *baraita* quoted at the beginning of the Talmudic discussion, and a tannaitic parallel in *Tosefta Shabbat 8:5*. The following synoptic table will serve to elucidate the points of similarity and difference between the two versions.

<b><i>Tosefta Shabbat 8:5</i></b>	<b><i>Bavli Shabbat 68</i></b>
<p>כלל גדול אמרו בשבת: כל השוכח עיקר שבת ועשה מלאכות הרבה בשבתות הרבה תינוק שנשבה לבין הגוים, וגר שנתגייר בין הגוים ועשה מלאכות הרבה בשבתות הרבה</p> <p>וכך היה מונבז דן לפני רבי עקיבא: הואיל ומזיד קרוי חוטא ושוגג קרוי חוטא, מה מזיד שהיתה לו ידיעה, אף שוגג שהיתה לו ידיעה.</p> <p>אמר לו רבי עקיבא: הריני מוסיף על דבריך, אי מה מזיד שהיתה לו ידיעה בשעת מעשה, אף שוגג שהיתה לו ידיעה בשעת מעשה.</p> <p>אמר לו: הן, וכל שכן שהוספת. אמר לו: לדבריך, אין זה קרוי שוגג אלא מזיד.</p> <p>A great principle is stated in respect to the Sabbath: one who forgets the essential law of Sabbath and performs many labors on many Sabbaths, incurs one sin-offering only. How is this?</p>	<p>גר שנתגייר בין הגוים ועשה מלאכה בשבת, ר' עקיבא מחייב ומונבז פוטר</p> <p>והדין נותן שיהא פטור הואיל ושוגג חייב חטאת ומזיד חייב כרת מה מזיד אינו חייב עד שיבא לכלל ידיעה אף שוגג לא יהא חייב עד שיבא לכלל ידיעה.</p> <p>אמ' לו ר' עקיבא מוסיף אני על דבריך מה מזיד אינו חייב עד שיבא לכלל ידיעה בשעת מעשה אף שוגג לא יהא חייב עד שיבא לכלל ידיעה בשעת מעשה.</p> <p>אמ' לו כל שכן שהוספת, אם בא לכלל ידיעה בשעת מעשה אף הוא אינו שוגג אלא מזיד.</p>

If a child is taken captive among gentiles or a proselyte is converted while living in the midst of gentiles and performs many labors on many Sabbaths, he is liable to one sin-offering only. And he is liable to one [sin-offering] on account of blood, one on account of forbidden fat, and one on account of idolatry. But Monobaz exempts [him].

And thus did Monobaz argue before R. Akiva: Since a willful transgressor is designated a sinner and an unwitting transgressor is designated a sinner; then just as a willful transgressor had cognizance, an unwilling transgressor also had cognizance.

R. Akiva said to him, behold, I will add to your words: If so, just as a willful transgression involves that he had cognizance at the time of his deed, so in unwitting transgression he also had cognizance at the time of his deed.

Indeed, he [=Monobaz] replied, all the more so since you have added [this argument]. He [=R. Akiva] said to him: as you define it, then, such is not designated unwitting but rather a willful transgression.

A proselyte who converted while living amongst gentiles, and who performed a prohibited act of labor on the Sabbath; R. Akiva declares him liable, and Monobaz exempts [him].

And reason suggests that he should be exempt; since one who commits a sin inadvertently is liable to a sin-offering and one who commits a sin intentionally becomes liable to extirpation. Just as a willful transgressor is not liable unless he had cognizance, so an unwitting transgressor must also have cognizance.

R. Akiva said to him: behold, I will add to your words: just as a willful transgressor is not liable unless he had cognizance at the time of his deed, so in unwitting transgression he also not liable unless he had cognizance at the time of his deed.

He [=Monobaz] replied, all the more so since you have added [this argument]. If he had cognizance at the time of the deed he is not considered an inadvertent transgressor but rather a willful transgressor.

Wald rightfully notes that according to the *Tosefta*'s version of this *baraita*, the last clause consists entirely of the words of Monobaz, who rejects R. Akiva's attempt to attribute to him the rather extreme position, according to which even in the case of an inadvertent sin there is a requirement of cognizance at the time of the transgression. Monobaz' argument is that although there is a requirement of cognizance in the case of an inadvertent sin (and therefore a proselyte who converted to Judaism while living amongst the nations is exempt from a sin-offering since he had no cognizance at all), there is no requirement of cognizance at the time of the deed, for this is a prerequisite only in the case of a deliberate crime.

However, according to the Talmud's version of this *baraita*, Monobaz concedes that even in the case of an inadvertent sin there is a requirement of cognizance at the time of the deed. This is the reason perhaps for the *Bavli*'s addition of the word "indeed" (וְכֵן) to Monobaz' response, indicating his acceptance of this notion. R. Akiva disagrees, of course, and concludes that when there is cognizance at the time of the deed the sinner enters the realm of a deliberate crime, and is no longer considered an inadvertent transgressor. Monobaz, nevertheless, maintains his position that even in the case of an inadvertent sin there is a requirement of cognizance at the time of the deed.<sup>79</sup>

While I generally accept Wald's analysis of the *baraita*, it must be stressed that these changes are not merely minor variants concerning the exact position of Monobaz. The *Bavli*'s version of this *baraita*

79 Wald 2007, p. 45. Other significant differences between the two versions of the *baraita* are addressed in: R. Kalmin, "The Adiabenean Royal Family in Rabbinic Literature of Late Antiquity", *Tiferet Leyisrael: Jubilee Volume in Honor of Israel Francus*, Jewish Theological Seminary: New York, 2010, pp. 61-73; I disagree, however, with Kalmin's suggestion that the *Bavli* attempts to depict Monobaz as a fool, by accepting R. Akiva's supposedly absurd proposition that even an inadvertent sinner needs to have knowledge at the time of the sin. As I will demonstrate below, by narrowing the notion of inadvertent crimes according to Monobaz, the *Bavli* simply wishes to associate Monobaz with the Talmudic discussion of a sinner who is cognizant of the sin but not of the consequent penalty.

epitomizes the very foundation, upon which the entire Talmudic discussion is based. The Talmudic discussion, concerning the sinner's lack of cognizance of the penalty, simply could not have been based on the *Tosefta's* version of the *baraita*. Only if Monobaz is of the opinion that both inadvertent and deliberate crimes require cognizance at the time of the deed, is it necessary to further inquire: "according to Monobaz, wherein lies his non-willfulness?", which leads in turn to the solution, defining the inadvertent sinner as one who lacks cognizance of the liability to a sacrifice. According to the *Tosefta*, the difference between inadvertent and deliberate crimes is perfectly clear according to Monobaz; an inadvertent crime requires cognizance in general and a deliberate sin requires specific cognizance at the time of the deed.

The differences between the two versions of the *baraita* cannot simply be explained away by suggesting that they reflect two separate tannaitic traditions. These differences most likely reflect deliberate changes that were made by the Babylonian transmitters of the *baraita*, in accord with the Talmudic discussion. The *baraita* was thus adapted to the legal interests of the Talmudic discussion concerning the sinner's lack of cognizance of the penalty.

### **The Iranian Context of Monobaz's Tradition**

I must further account for the fact that particularly Monobaz, a relatively unattested figure in rabbinic literature, was chosen in this context to advocate the legal position wherein the absence of cognizance of the liability to a sacrifice renders a crime inadvertent. One is reminded in this regard that although dependent on the tannaitic tradition, it is ultimately the *Bavli* and not the *Tosefta* that attributes this far-reaching position to Monobaz. In fact, not only Monobaz himself is "appropriated" by the *Bavli* to bear on the matter of cognizance of the penalty, but his interlocutors are associated with this matter as well.

The fascinating conversion story of the Adiabenean royal family in the first century C.E is known to us primarily through the lengthy

account in Josephus,<sup>80</sup> and from scattered references by other ancient authors and in rabbinic literature.<sup>81</sup> It has been pointed out by several scholars that the conversion story, both in Josephus' account and in rabbinic sources, reflects some Iranian impact.<sup>82</sup> Recently, I have suggested that the *Bavli* in particular seems to have attributed to Monobaz, the converted King of Adiabene, legal practices and statements that are significantly reminiscent of Zoroastrian traditions.<sup>83</sup>

- 80 Josephus, *Antiquities*, 20.17-96; see also: *Jewish War*, 1.6; 2.388-89; 2.520; 5.55; 5.119; 5.147; 5.253; 5.474-476; 6.356-357; M. Stern, *Greek and Latin Authors on Jews and Judaism*, 2 vol., Jerusalem: Israel Academy of Sciences and Humanities, 1980, vol. 2, pp. 73-74, 84-86, 196-197; recent studies on the conversion of the Adiabenean family include: D. Barish, *Adiabene: Royal Converts to Judaism in the First Century C.E.*, PhD dissertation, Hebrew Union College, 1983, pp. 98-157; L.H. Schiffman, "The Conversion of the Royal House of Adiabene in Josephus and Rabbinic Sources", in: L.H. Feldman and G. Hata eds., *Josephus, Judaism and Christianity*, Leiden: Brill 1987, pp. 293-312; T. Rajak, "The Parthians in Josephus", in: J. Wiesehofer ed., *Das Partherreich und seine Zeugnisse*, Stuttgart: Steiner 1998, pp. 317-321; Kalmin 2010, pp. 61-78; a comprehensive survey of studies on this topic is provided in: Kalmin 2010, p. 61, n. 1.
- 81 The royal Adiabenean family is mentioned in the following rabbinic traditions: mYom 3:10; tPe'ah 4:18, p. 60; tShab 8:5, pp. 30-31; tYom 2:3, p. 3660; tMeg 3:30, p. 362; tSuk 1:1; Sifra Metzora Parasha 1:4; yPe'ah 1:1 15b; yMeg 4:12 75c; Genesis Rabbah 46:10; pp. 467-468; bSuk 2b; bB.B. 11a; bShev 26b; bMen 32b; bNid 17a; for a discussion of the rabbinic sources, see especially: Schiffman 1987, pp. 293-312; Kalmin 2010, pp. 61-78.
- 82 See especially: M. Frenschkowski, 'Iranische Königslegende in der Adiabene: Zur Vorgeschichte von Josephus: *Antiquitates XX*, 17-33', *ZDMG* 140:2 (1990), pp. 213-233; Rajak 1998, pp. 317-321; A. De Jong, "Zoroastrian Religious Polemics and their Contexts: Inter-confessional Relations in the Sasanian Empire", in: T.L. Hettema & A. van der Kooij eds., *Religious Polemics in Context: Papers presented to the Second International Conference of the Leiden Institute for the Study of Religions*, Assen 2004, n. 34; G. Herman, "Iranian Epic Motifs in Josephus' *Antiquities*, (XVIII, 314-370)", *Journal of Jewish Studies* 57:2 (2006), p. 261, n. 75; A. Hintze, "Treasures in Heaven: A Theme in Comparative Religion", *Irano-Judaica* 6, S. Shaked ed., Jerusalem: Ben Zvi Institute 2008, pp. 9-36.
- 83 Kiel, pp. 299-303. These considerations, of course, have nothing to do with the historical figure of Monobaz king of Adiabene, but rather with the literary

In the current context, in which the Talmudic and Pahlavi discussions regarding cognizance of the penalty appear to intersect in several important manners, it is thus hardly surprising to find the figure of the Adiabenean King, carefully selected due to his supposed Iranian origins. Indeed, as was previously demonstrated, the question of one's legal liability in the absence of cognizance of the penalty is systematically addressed in Pahlavi literature and was in fact the focus of a wide-ranging legal dispute, involving several religious and legal schools, during the Sasanian period. The Talmud's assertion that Monobaz was also engaged in a similar dispute with certain rabbis indeed supports the pattern I have outlined concerning the "Zoroastrian" character of many traditions that are attributed to Monobaz in the Babylonian Talmud.

It must be stressed in this regard that Monobaz' position according to the *Tosefta* has nothing to do with the sinner's cognizance of the penalty. As I have pointed out, it is only the *Bavli* that interprets the position of Monobaz in such a manner. Indeed, as is the case with regard to other traditions that are attributed to Monobaz in rabbinic literature, in this case

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reconstruction of his figure in rabbinic literature. Scholars have previously pointed out the historical peculiarity of rabbinic traditions that depict Monobaz as nearly a Rabbi, discussing legal matters with prominent tannaitic authorities (cf. Sifra Metzora Parasha 1:4; tSuk 1:1). A. Goldberg has convincingly suggested in this respect that Monobaz' figure was selected in *Tosefta Shabbat* for literary, rather than historical, reasons. Monobaz, who was himself a "proselyte who has converted among the nations", was chosen to advocate a lenient position that exempts such proselytes from bringing a sin-offering. See: A. Goldberg, "Heleni the Queen and Monobaz the King: Two Famous Proselytes at the End of the Second Temple Period" (Hebrew), *Mahana'im* 75 (1963), pp. 46-49. More recently, Kalmin has convincingly demonstrated that Babylonian as well as Eretz Israel traditions regarding Monobaz reflect diverging positions towards proselytism and social boundaries within the Jewish community. While the Eretz Israel traditions often depict Monobaz as a Rabbi, as they are relatively more open to accepting people of non-rabbinic descent, the Babylonian traditions never present Monobaz as part and parcel of the rabbinic movement. See: Kalmin 2010, pp. 61-73; idem, *Jewish Babylonia between Persia and Roman Palestine*, New York and Oxford: Oxford University Press, 2006, pp. 183-184.

too it seems that the association of Monobaz with “Zoroastrian” legal traditions is particularly emphasized in the Babylonian Talmud.<sup>84</sup>

To be sure, Almut Hintze has recently demonstrated that the famous rabbinic passage, which attributes to Monobaz the metaphor of “storing up treasures in heaven”, and which appears already in earlier *Eretz Israel* sources is derived from Iranian sources.<sup>85</sup> Iranian connections are thus by no means limited to Babylonian rabbinic sources, which were produced under Iranian dominance, but are also found in *Eretz Israel* compilations. It is my contention, however, that the *Bavli* in particular seems to attribute to Monobaz legal positions and practices that are closely related to the Zoroastrian legal discourse. Specifically the Babylonian sages, who might have actually been familiar with some of these local legal tendencies, felt the need to attribute the notion of cognizance of the penalty to an “Iranian” figure such as Monobaz.

### **The Dispute between R. Yohanan and Resh Lakish**

Once we have established that the *Tosefta* was probably not concerned with the state of cognizance of the penalty, we now turn to examine the early amoraic dispute between R. Yohanan and Resh Lakish, which seems to address precisely this matter. Before we can appreciate the scope of this third century dispute, however, we must consider a similar and perhaps related dispute in *Yerushalmi Shabbat*, between R. Yose ben Haninah and R. Yehoshua ben Levi.

ר' יוסי בן חנינה אמ'. בשוגג בלא תעשה. ובמזיד בלא תעשה. ר' יהושע בן לוי אמ'. בשוגג בהיכרת. ובמזיד בהיכרת. תני ר' שמעון בן יוחי מסייע לר' יהושע בן לוי. "את ה' הוא מגדף ונכרתה". הגע עצמך. אפילו מזיד בהיכרת מתרין בו

84 See especially the practices attributed to the household of Monobaz in bNid 17b; Kiel 2011, pp. 299-303.

85 See: Hintze 2008, pp. 9-36; Schiffman 1987, p. 299; tPe'ah 4:18 (p. 60 in Lieberman's edition); yPe'ah 1:1 15b; bB.B. 11a.

ולוקה ומביא קרבן. ר' אבהו בשם ר' יוחנן. השוגג בחלב ומזיד בחטאת מתריץ  
בו ולוקה ומביא קרבן.<sup>86</sup>

R. Yose ben Haninah said: an inadvertent sin means to be ignorant of the negative commandment, and a deliberate sin means to be aware of the negative commandment. R. Yehoshua ben Levi said: an inadvertent sin means to be ignorant of the extirpation penalty, and a deliberate sin means to be aware of the extirpation penalty. R. Shimon bar Yohai presented a teaching that supports R. Yehoshua ben Levi: 'He reviles the Lord and that person shall be cut off [from among his people]' – note that even if he is extirpated for his deliberate sin, [when witnesses] admonish him he is flogged and brings a sacrifice. R. Abbahu in the name of R. Yohanan [says]: if one is unwitting with regard to prohibited fat, but he is willful as regarding the sin-offering, [when witnesses] admonish him he is flogged and brings a sacrifice.

Several traditional commentators of the *Yerushalmi* interpreted the dispute between R. Yose ben Haninah and R. Yehoshua ben Levi, as mirroring the dispute between R. Yohanan and Resh Lakish in the *Bavli*. R. Yose ben Haninah holds, accordingly, that inadvertent sins must involve an absence of cognizance of both the prohibition and the extirpation penalty (in accordance with Resh Lakish), while R. Yehoshua ben Levi holds that even lacking cognizance of the extirpation penalty alone qualifies the sinner as inadvertent (in accordance with R. Yohanan).<sup>87</sup>

This understanding of the amoraic dispute led to the subsequent explanation of the rest of the passage in the *Yerushalmi* along the same lines. The supporting statement by R. Shimon ben Yohai was understood as follows: From the scriptural adjacency of the law of a deliberate sin and the requirement to bring a sacrifice, it can be deduced that there is a reality in which even a deliberate sinner must bring a sacrifice. This reality cannot possibly be interpreted as referring to a case in which both the prohibition and the extirpation penalty are known to the sinner, since

86 yShab 11:6, 13b; according to the academy's edition of the Leiden manuscript, p. 426.

87 See for instance: Pnei Moshe on the *Yerushalmi*, ad loc.

if this were the case we would have come to the absurd conclusion that a deliberate sinner receives forty lashes for his deliberate act and at the same time must bring a sacrifice for his inadvertent act. It must be concluded, then, that the deduction from Scripture refers to the case of a crime that is deliberate with regard to the prohibition, and inadvertent with regard to the extirpation penalty. In this case, the deduction teaches us indeed that the sinner receives lashes for the *mezid* aspect, and at the same time must bring a sacrifice for the *shogeg* aspect.<sup>88</sup>

R. Abbahu in the name of R. Yohanan follows in the footsteps of R. Shimon ben Yohai, arguing that in the case where there is cognizance concerning the consumption of forbidden fat, but an absence of cognizance concerning the liability to a sacrifice, the sinner indeed receives lashes for his deliberate intention to transgress, and at the same time must bring a sacrifice for the inadvertent aspect of his crime.

Although this interpretation of the *Yerushalmi* is somewhat appealing for its close affinity with the *Bavli*, there are several inherent problems with this line of thought. Firstly, R. Yose ben Haninah does not assert that the inadvertent sin must involve ignorance of both prohibition and extirpation penalty, but rather that both inadvertent and deliberate crimes depend on cognizance of the prohibition. R. Yehoshua ben Levi, on the other hand, argues that both inadvertent and deliberate crimes are dependent of cognizance of the extirpation penalty. Neither of the sages, then, explicitly addresses the case of “*mezid* regarding the prohibition and *shogeg* regarding the extirpation penalty”.

Secondly, with regard to R. Abbahu’s statement, the Leiden manuscript and printed editions of *Yerushalmi Shabbat* read: "השוגג בחלב" "ומזיד בהטאת", which points to the exact opposite of committing a deliberate sin while lacking cognizance regarding the penalty. In this case, the sinner is inadvertent regarding the sin, but is deliberate regarding the liability to a sacrifice. Although parallel accounts in *Yerushalmi B.K* and *Yerushalmi Shevuot* have: "הזיד בחלב ושגג בקרבן",<sup>89</sup> the principle of *lectio*

88 For this interpretation, see: Lieberman, *Yerushalmi Kifshuto*, pp. 172-173.

89 yBK 7:2 5d; yBK 7:5 6a; yShev 3:1 34b.

*difficilior* seems to support the authenticity of the more difficult version that appears in *Yerushalmi Shabbat*.<sup>90</sup>

These textual difficulties call into question the traditional assumption that the *Yerushalmi* is indeed engaged in a discussion regarding cognizance of the penalty. But then again, if this were not the meaning of the *Yerushalmi*, how could one possibly be inadvertent regarding the sin, but deliberate regarding the penalty? While the *Bavli*'s dispute between R. Yohanan and Resh Lakish may mirror perhaps the dispute in the *Yerushalmi*, it must also be kept in mind that the *Bavli* often tends to rework and even reattribute dicta originating in *Eretz Israel*.<sup>91</sup> While the *Yerushalmi* and *Bavli* seem to address the same basic tradition, both the attribution and the content of this tradition are somewhat different. Could the dispute between R. Yohanan and Resh Lakish regarding cognizance of the penalty have originated in the Babylonian academy, and not in third century *Eretz Israel*? This possibility, I believe, cannot be ruled out.

It is possible, moreover, that the dispute between R. Yohanan and Resh Lakish did not originally refer to the argument between Monobaz and the Rabbis, regarding a proselyte who converted among the nations, as suggested in the *Bavli*. It is true that according to most textual witnesses, R. Yohanan's statement begins with the words: "כגון ששגג בכרת", a fact which indicates that he is relating to an earlier source.<sup>92</sup> It is more likely, however, that this early source is the *Mishnah* in the eleventh chapter of tractate *Shabbat*, to which the dispute in the *Yerushalmi* refers.<sup>93</sup> The editors of our *sugya*, then, seem to have re-contextualized and resituated the amoraic dispute in a manner that associates the opinions of these prominent *Eretz Israel* authorities, to the argument between Monobaz and the Rabbis, and thus to the matter of cognizance of the penalty. If my reconstruction of the dispute is correct, the discourse regarding cognizance of the penalty should be attributed to

90 Cf. Lieberman, *Yerushalmi Kifshuto*, pp. 172-173, who amends the version of *Yerushalmi Shabbat* according to the parallels.

91 See especially: Dor 1971, pp. 116-140; Friedman 2010, pp. 40-44.

92 Thus according to all variants of paragraph 8 and most variants of paragraph 3.

93 See: Wald 2007, pp. 53-54.

the Babylonian editors, and not to third century authorities in *Eretz Israel*. Whether or not I am correct in this far-reaching assumption, and even if R. Yohanan and Resh Lakish were indeed concerned with the matter of cognizance of the penalty, it is undeniable that the systematic conceptualization of this dispute belongs in fact to the Babylonian academies of the Sasanian era.

### **Cognizance of Sin and Penalty: Between the *Bavli* and Pahlavi Literature**

The discussion of cognizance and intentionality in rabbinic and Zoroastrian literature displays fascinating similarities and areas of affinity. In both corpora we find it necessary that the sinner be cognizant of the reality at hand, and of the illegality of his actions, to be liable for a deliberate crime. These similarities are significant, first and foremost, since they enable us to examine in context the intellectual history of these legal discourses. From a purely comparative perspective (and regardless of the existence of possible genealogical connections between rabbinic and Zoroastrian literature), it would seem that the intersections of the legal discourses we have examined, should urge us to forsake the oft-invoked idea of *sui generis* religious phenomena.

It is my contention, nevertheless, that the affinity that exists between rabbinic and Zoroastrian legal theory reflects much more than mere parallel developments of distinct legal systems. The fact of the matter is that in both legal systems we see that particularly the Sasanian texts, namely the Babylonian Talmud and the Pahlavi corpus, are engaged in a discourse regarding a sinner who lacks cognizance of the penalty, while acknowledging the prohibition. The overwhelming affinity that is revealed between the *Bavli* and Pahlavi literature in this regard seems to point to a common intellectual environment and perhaps, one might suggest, to a broader cultural discourse, in which both Babylonian rabbis and Zoroastrian *dastwars* took part.

As we have seen, the dependence of legal accountability on the sinner's cognizance of the reality at hand and on his awareness of the prohibition, is present in several legal systems, including early rabbinic and Zoroastrian legal systems. The uniqueness of the *Bavli* and the

Pahlavi literature in this respect concerns their discussion of the possibility that the absence of cognizance of the penalty alone – while maintaining full awareness of the prohibition – reduces the severity of the sin. This particular legal issue appears to have been widely discussed in the intellectual milieu of Sasanian Iran, and was quite an important matter for both Babylonian rabbis and Zoroastrian *dastwars*.

To be sure, it is not simply the fact that the same legal inquiry is addressed in two contemporaneous and adjacent legal systems, but more importantly perhaps, the manner in which this issue is handled. In the *Bavli*, the PV, and the ŠnŠ, we encounter two opposing positions that stem from different legal schools or academies. While one school argues that the absence of cognizance regarding one's punishment reduces the severity of his crime (The school of Mehoza and the tradition represented in the ŠnŠ), the other school holds that as long as the sinner was cognizant that a religious crime was being committed, his crime is considered by all means intentional (The Pumbeditha school and the tradition represented in the PV).

In Pahlavi literature, the stringent position is advocated in PV 3.14, while the lenient position is accepted in ŠnŠ 2.63. These very same legal conceptions are reflected, albeit in a different religious context, in the fourth century dispute between Abaye and Rava, and the Talmudic reconstruction of earlier rabbinic discussions. In fact, the *Bavli* seems to have ingeniously designed earlier rabbinic disputes in a manner that retrojects on earlier rabbinic texts contemporary Babylonian concerns that are situated in the Sasanian intellectual milieu.

Aside from the significance of these similarities to the broader study of comparative law and religion, it would seem to me that the Babylonian and Pahlavi discussions on legal cognizance reflect specific intellectual trends that were current in the Sasanian world. A contextualized study of these trends thus contributes not only to the study of the intellectual histories of rabbinic and Pahlavi literature, but also to the reconstruction of the legal discussions that dominated the intellectual culture of Sasanian Iran.