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## **Unforgettable Forgotten Things: Transformations in the Laws of Forgotten Produce (*shikhehah*) in Early Rabbinic Literature**

Mira Balberg

Both the book of Leviticus and the Book of Deuteronomy famously put forth laws that allow individuals in need to collect leavings of grain, grapes, and olives during the time of harvest. These laws are directed at the owner of the field and are phrased negatively, requiring the owner of the field *not* to gather every last piece of produce but rather to let the needy have it. Lev. 19:9-10 commands an owner of a field to leave a corner of the field unharvested, and to refrain from collecting “gleanings,” stalks of grain that fell to the ground in the course of the harvest.<sup>1</sup> Likewise, an owner of a vineyard is required not to strip the vineyard entirely bare but to leave something behind, and not to pick up separated grapes that have fallen to the ground. Deut. 24:19-24 forbids the owner of the field from performing a “second pass” after the field has been harvested: he is not to come back and retrieve sheaves of grain that were forgotten, and he may not collect the very last olives or last grapes left on branches after the harvest: those are to be left for those in need.

In rabbinic literature, the various leavings that the field owner is commanded not to collect acquired the name “gifts” (*matanot*) and have been applied to all types of harvest, not only to the three quintessential ones of grain, olive, and vine.<sup>2</sup> The title “gifts” can mistakenly lead one

1 This ordinance appears again in Lev. 23:22.

2 See T. Pe’ah 2.13. On these developments and their precursors in literature from the Second Temple period, see Cana Werman and Aharon Shemesh, *Revealing the*

to think that those leavings were seen as a form of charity given by field owners to the poor,<sup>3</sup> but as Gregg Gardner rightly observed, rabbinic texts are quite clear that these leavings are the rightful property of the poor and have nothing to do with the good will of the owner.<sup>4</sup> If a field owner prevents the poor from accessing what is theirs, or even attempts to direct certain individuals to his<sup>5</sup> field at the expense of others, he is said to be effectively stealing from them.<sup>6</sup> Gardner is certainly correct in concluding that in the rabbinic frame of thought “God is the benefactor of *pe’ah*, gleanings, and so forth – not humans.”<sup>7</sup> In the context of harvest, God’s benefaction of the poor is manifested in the imperfection of human action: humans’ propensity to drop things, leave things behind, not reach every branch, and not be entirely thorough the first time around, is construed as a space left intentionally by the legislator for those in need. The premise of the Mishnah’s laws regarding harvest gifts is that the owner of the field is inclined to collect and gather every last piece of produce but will necessarily not be able to do so – not without additional effort and repeated scrutiny. The owner’s predictable failure is

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*Hidden: Interpretation and Halakha in the Dead Sea Scrolls* (in Hebrew; Jerusalem: Bialik Institute, 2011), 231-35.

- 3 For an extensive study of definitions and realities of poverty in rabbinic literature, see Yael Wilfand Ben Shalom, *The Wheel that Overtakes Everyone: Poverty and Charity in the Eyes of the Sages of Israel* (in Hebrew; Ra’anana: He-kibbutz ha-me’uhad, 2017).
- 4 Gregg Gardner, “Pursuing Justice: Support for the Poor in Early Rabbinic Judaism,” *Hebrew Union College Annual* Vol. 86 (2015): 37-62.
- 5 Throughout this article I refer both to the field owner and to the poor person using masculine pronouns, thereby following the exclusive use of masculine pronouns in the biblical and rabbinic texts at hand. This is not to suggest that the laws and edicts discussed in the article pertained to men alone, either in theory or in practice, but rather to reflect the original text as accurately as possible.
- 6 See, for example, M. Pe’ah 5.6, 7.3; T. Pe’ah 2.13.
- 7 Gregg Gardner, *The Origins of Organized Charity in Rabbinic Judaism* (New York: Cambridge University Press, 2015), 31.

the poor person's opportunity, and all that the owner is asked to do is not to try to correct his initial failure.<sup>8</sup>

The law of forgotten produce, or as I will call it here, "the law of forgetting" (to denote the verbal noun *shikhehah*), is perhaps the most evident and extreme example of this dynamics, in which the omission of the field owner creates the space in which the one in need can operate. Whereas in other types of harvest gifts the owner of the field is asked not to be thorough in his actions (both while harvesting produce and while collecting the already-harvested produce), in the case of forgetting the owner is required not to rectify a mistake he has already made: "When you reap your harvest in your field and forget a sheaf in the field, you shall not go back to get it; it shall be left for the alien, the orphan, and the widow, so that the Lord your God may bless you in all your undertakings" (Deut. 24:19). Furthermore, the failure in the case of forgetting is not a physical or mechanical one but a cognitive one. The opportunity for the poor to get their share is not offered by the characteristics of the produce or by its location, but rather by mental oversight on the side of the owner of the field that may or may not happen. This aberration led several biblical scholars to argue that the law in Deut. 24:19 should not be understood in line with the other laws of harvest gifts, but rather be seen as a guise for something else: a trace of some ancient practice of dedicating sheaves to the deity,<sup>9</sup> or a subtle

8 For a similar analysis, see Roger Brooks, *Support for the Poor in the Mishnaic Law of Agriculture* (Chico, CA: Scholars Press, 1983), 18. More recently, see Eliezer Hadad, "Leqet, Peret, and Pe'ah: Between the Mishnah and the Sifra" (in Hebrew), *Mishlav* 42 (2010): 1-16. According to Hadad, there is a discernible difference between the approach manifested in the Mishnah, which considers defected and fallen produce to be God's gift to the poor, and the approach in the Sifra, which sees the owner of the field as the giver.

9 As argued by Gerhard von Rad, *Deuteronomy* (Old Testament Library), trans. Dorothea Barton (Philadelphia: Westminster Press, 1966), 152; Anthony Phillips, *Deuteronomy: The Cambridge Bible Commentary* (New York: Cambridge University Press, 1973), 166.

reference to the Joseph story, as Joseph was himself a “forgotten sheaf” of sorts.<sup>10</sup>

In this article I explore the development of the laws of forgotten produce in early rabbinic (tannaitic) literature by tracing the difficulties inherent in the nature of forgetting as a consciousness-based event, and the ways in which the rabbis attempted to grapple with these difficulties. I show that two separate issues were at stake for the rabbis: one had to do with determination of ownership and the other with the classification of forgetting as a commandment. Both of those issues combined, I argue, ultimately led to significant limitations on the applicability of the law of forgotten produce, as well as to a transformation of the meaning and essence of this law. My interest in this article is not in the social-historical dimensions of care for the poor in ancient Judaism, nor in the theological or ethical approaches manifested in rabbinic discourse on this topic, both of which were explored successfully by different scholars.<sup>11</sup> Rather, my interest is in the conceptual development of “forgetting” as a legal construct, and in the challenges it poses within the greater framework of rabbinic normative thought.

In the first part of the article I discuss the aspect of property ownership, which can be detected in the earliest tannaitic controversies regarding forgotten produce. As the rabbis maintained that certain

10 See Calum Carmichael, *Illuminating Leviticus: The Study of Its Laws and Institutions in the Light of Biblical Narratives* (Baltimore: Johns Hopkins University Press, 2006), 4-5; 131-38.

11 In addition to the abovementioned studies by Brooks, Gardner, and Wilfand, see also Ephraim E. Urbach, “Political and Social Tendencies in Talmudic Concepts of Charity” (in Hebrew), *Zion* 16.3-4 (1951): 1-27; Gildas H. Hamel, *Charity and Poverty in Roman Palestine: The First Three Centuries* (Berkeley: University of California Press, 1990); Tzvi Novick, “Charity and Reciprocity: Structures of Benevolence in Rabbinic Literature,” *Harvard Theological Review* Vol. 105 no.1 (2011): 35-52; idem, “Poverty and Halakhic Agency: Gleanings from the Literature of Rabbinic Palestine,” *Journal of Jewish Thought and Philosophy* Vol. 22 no.1 (2014): 25-43; Rivka Ulmer and Moshe Ulmer, *Righteous Giving to the Poor: Tzedakah (“charity”) in Classical Rabbinic Judaism* (Piscataway: Gorgias Press, 2014). Most recently, see Alyssa Gray, *Charity in Rabbinic Judaism: Atonement, Rewards, and Righteousness* (New York: Routledge, 2019).

elements of produce belong to the poor by definition, they sought to determine exactly what those elements are and how they can be clearly distinguished from what belongs to the owner of the field. This enterprise proves to be particularly difficult in the case of forgotten produce: if the determination of property rights depends on the inner workings of the field owner's mind, how can it be known to whom the produce in question belongs? I show that rabbinic texts work to eradicate this uncertainty by putting forth objective rather than subjective criteria for "forgetting." As a result of this quest for objective criteria, the applicability of "forgetting" to agricultural settings is significantly restricted.

In the second part I turn to several rabbinic passages that further narrow down the applicability of the law of forgotten produce but go well beyond the need to determine ownership objectively. While some of these passages can be viewed as sweeping expansions of specific requirements for objective measures, other passages transform the concept of forgetting altogether. These passages suggest that forgetting requires a balance of awareness and lack of awareness: one must be aware of the *possibility* that one forgot certain items in the field, yet these items must be negligible enough that one would not remember what the forgotten items were. I argue that these transformative interpretations divulge the rabbis' discomfort with the idea of a commandment performed unconsciously, and their attempts to make the law of forgotten produce more similar to the laws pertaining to other harvest gifts.

### **Where, When, and How Much: Objective Criteria for Forgetting**

Those familiar with rabbinic legislation know well that determination of ownership is one of the most prevalent and discussed issues in rabbinic texts. The rabbis put forth clear rules for how property, moveable and unmovable, is acquired, how to handle cases of disputed property, when and how a person can legally claim that an object that she found belongs to her, and so on. Within this complex and elaborate framework, the case of harvest gifts presents a challenge, as produce is legally transferred from the owner to the poor without any formal or recognizable transaction taking place. While the guiding notion that harvest gifts are

the property of the poor to begin with theoretically helps eliminate this concern (since poor individuals are not acquiring something anew, but rather claiming what is already theirs), it presents its own problems: according to this notion, certain elements of the produce are designated for the poor before they are markedly separated and distinguished from the produce designated for the owner. For example, the grapes that will fall to the ground in the course of the harvest are considered to be the property of the poor before the first vine was ever harvested, and the grain in the corner of the field belongs to the poor even before the owner decides which corner he will leave unharvested. The rabbis perceived a host of difficulties and borderline cases that can arise in the allocation of harvest gifts, and they ventured to put forth clear distinctions between produce that belongs to the owner and produce that belongs to the poor.

For some harvest gifts determination of ownership is easier than for others. Most notably, the “corner of the field” (*pe’ah*), which the owner of the field is to leave unharvested, requires the greatest amount of deliberation and intention on the side of the owner, and therefore resembles an ordinary act of giving in which ownership is transferred from one person to another.<sup>12</sup> The poor can assume that the corner that was left unharvested at the end was left there for them. *Olelet*, which the rabbis defined as a cluster of few or unconnected grapes, ostensibly has distinct qualities on account of which it can be visually identified as the property of the poor, although it is acknowledged that sometimes it is doubtful whether a cluster of grapes fits the definition or not (in a case of doubt, it belongs to the poor).<sup>13</sup> The case is more complicated for gleanings of grain (*leqet*) and separated grapes (*peret*), which were broadly defined as “anything that falls to the ground at the time of harvest,” since here the rabbis found it necessary to distinguish between

12 This is indicated by the fact that the act of leaving a corner of the field unharvested is regularly referred to in rabbinic texts as “giving *pe’ah*.” As the discussions in M. Pe’ah 1-4 show, leaving an unharvested corner also requires some conscious decisions on the side of the owner, such as where to leave a corner, how large the corner ought to be, etc.

13 M. Peah 7.4, and cf. Sifra Qedoshim 1.3.3 (ed. Weiss 88a). The category of *olelet* is based on Lev.19:10, “you shall not pick your vineyard bare” (כרמך לא תעולל).

what falls down naturally, almost unnoticeably (which belongs to the poor) and what falls down as a result of accident (which belongs to the field owner).<sup>14</sup>

But how can ownership be clearly determined for items forgotten in the field? Here what distinguishes the property of the poor from the property of the owner is not the quality or location of the produce, but the hidden workings of the mind of the owner.<sup>15</sup> Items that the owner of the field purposefully left behind or left uncollected are not considered “forgotten” and the poor have no claim to them: only items that the owner accidentally forgot become the rightful property of the poor.<sup>16</sup> This setting, in which property is allocated based not only on a mental event but on an *unconscious* mental event, brings about two juridical problems, one practical and one conceptual. The practical problem is how ownership can be determined by law when the act (or non-act) that constitutes ownership is out of reach; the conceptual problem is what forgetting actually is and whether forgetting has degrees, stages, or other nuances that must be worked out in order to determine whether “real” forgetting has occurred. These two problems are to a great extent intertwined in rabbinic discussions, yet I will venture to separate them and discuss the practical aspect in this section and the conceptual aspect in the next.

- 14 See M. Pe’ah 4.10, 5.1 regarding *leqet* and M. Pe’ah 7.3 regarding *peret*, and cf. Sifra Qedoshim 1.2.5 and 1.3.2 (ed. Weiss 87d and 88a). According to Hadad (“Leqet, Peret, and Pe’ah”), there are subtle but important differences between the Mishnah and the Sifra on this issue.
- 15 The question whether forgetting should be thought of as a negative cognitive event (a failure to remember) or as a positive cognitive event (active deletion of information) is hotly debated among cognitive psychologists, and cannot be addressed in the confines of this article. For a helpful account of the debate, see Kourken Michaelian, “The Epistemology of Forgetting,” *Erkenntnis* Vol. 74 no.3 (2011): 399-424.
- 16 To be sure, rabbinic terminology distinguishes clearly between leaving items behind accidentally, for which the verb used is *shakhah*, and leaving items behind intentionally, for which the verb used is *hini’ah*. See, for example, M. Miq’vaot 4.1, which explicitly contrasts the two cases.



To clarify the juridical issue at hand, let us imagine a scenario in which a poor person finds an unattended sheaf of grain in a field, assumes that it was forgotten, and takes it. The owner of the field then runs after the poor person and yells that the sheaf was never forgotten and was left there for a reason. However we may judge the owner of the field morally in such a case (and do remember that the owner of the field may himself be only a few sheaves of grain away from starvation),<sup>17</sup> moral judgement is a separate issue from determination of ownership. The early rabbis do not imagine a perfect world in which landowners are eager to give whatever they can to the grateful poor, but rather construe the field during harvest time as a terrain of fierce competition in which the landowners are trying to retain as much produce for themselves and the poor are trying to get whatever they can.<sup>18</sup> It is therefore not beyond the owner to deny that he has forgotten something, nor is it beyond the poor person to claim that he assumed that something was forgotten even though it clearly was not. To determine whether produce legally belongs to one person or to another, the consequence of which is the ability (or duty) to force produce out of the hand of one and into the hand of another, more reliable criteria are required than the owner's willingness to admit that he had forgotten the produce.

17 As Wilfand mentions, rabbinic texts indicate that in many cases the economic gap between givers of charity and receivers of charity was not very large. See Wilfand, *The Wheel*, 321.

18 This is evident in the rhetoric of M. Pe'ah 6.6 and T. Pe'ah 3.7, which contrast "the power of the landowner" with "the power of the poor" and analyze which of them has the advantageous position in which situation, thereby pointing to the underlying competition between the two. As will be discussed below, M. Pe'ah 5.7 even suggests that poor individuals might try to interfere with or temper the harvesting process to ensure their own gain. From the other direction, T. Pe'ah 2.20 discusses a landowner who floods his field with water in order to keep the poor away from it. That said, T. Pe'ah 2.21 and Sifre Deuteronomy 284 (ed. Finkelstein 301) do mention a practice of purposefully leaving a generous amount to the poor, and see Saul Lieberman, *Tosefta ki-peshutah Zera'im* (New York: Jewish Theological Seminary, 1955), 170-172. However, the latter cases are clearly presented as the exception rather than the rule, and as pertaining either to times passed, to very specific types of produce, or to uniquely pious individuals.

The most straightforward criterion put forth in the Mishnah is the stage of the harvest. “Forgetting” is only applicable at the very last stage of the harvest (in the paradigmatic case of grain, it is when the sheaves are put together in their final form before being transferred to the threshing floor). During intermediate stages of the harvest, before the sheaves take their final form, nothing that is left behind can qualify as forgotten.<sup>19</sup> As for forgetting during the last stage of the harvest, the Mishnah introduces one principle that seems simple enough: while harvesting one can only move forward and never move backward, that is, one cannot re-visit a spot he had already trodden. Taking the biblical edict “you shall not go back” at its most literal and mechanical sense, M. Pe’ah 6.4 envisions all produce that is to be collected as arranged in neat rows, and determines that if one accidentally skipped an item somewhere along the row and realized it only after he had passed it, the skipped item is considered forgotten and rightfully belongs to the poor.<sup>20</sup> If the owner (or his workers) must physically turn around in order to retrieve something, this thing is no longer his: “This is the rule: for any case in which ‘you shall not go back’ applies, the law of forgetting applies, and for any case in ‘you shall not go back’ does not apply, the law of forgetting does not apply” ( זה הכלל כל שהוא בל תשוב שכחה וכל שאינו בל תשוב (אינו שכחה).<sup>21</sup> Another passage, which deals specifically with forgetting in the vineyard, reiterates the same principle when asserting that if the harvester can still reach what he left behind with his stretched hand, he is entitled to it, but whatever requires walking to an area he had already been to is considered forgotten.<sup>22</sup> Presumably, then, the poor person can

19 M. Peah 5.8.

20 It is not clear whether this picture of harvesting in rows actually reflects prevalent agricultural practices in the time of the rabbis, or merely reflects a rabbinic attempt to present a controlled and unified manner of harvesting in order to subject this process to rabbinic legal precepts. I thank the reviewer for raising this point.

21 M. Pe’ah 6.4. All Mishnah quotations are according to MS Kaufman, Budapest A50.

22 M. Pe’ah 7.8. The Palestinian Talmud (PT Pe’ah 5.2, 18d and 6.4, 19c) mentions a ruling that applies the same principle to olives. Another ruling that seems to be pertinent to the same principle is that if a few ears of grain were forgotten next to a standing crop that is yet to be harvested, and the remaining ears of grain can be

safely assume that a lone sheaf, tree, or vine left somewhere along a row that was already worked through is up for grabs.

Yet this criterion was clearly not enough for at least some of the rabbis, who maintained that, first, not all produce can be assumed to be arranged neatly in rows, and second, not all produce items are equal. In M. Pe'ah 6.1-6 we find a series of controversies between the House of Hillel and the House of Shammai, as well as some anonymous rulings, that attempt to set clear criteria of size, quantity, location, and number in order to determine whether something can be construed as forgotten.<sup>23</sup> Note that in all the cases below it is explicitly stated that forgetting had indeed taken place, but that is beside the point of whether the property in question should be considered *legally* forgotten:

כל עומרי השדה של קב וקב ואחד שלארבעת קבים ושכחו בית שמי אומ' {אין} אינו שכחה ובית הלל אומ' שכחה

If all the sheaves in the field were [of the volume of] one *qav* and there was one [sheaf] of four *qabin*, and [the owner] forgot it – the House of Shammai say: [the law of] forgetting does not apply to it, and the House of Hillel say: [the law of] forgetting applies to it.<sup>24</sup>

העומר שהוא סמוך לגפה ולגדיש ולבקר ולכילים ושכחו בית שמי אומ' אינו שכחה ובית הלל אומ' שכחה

If a sheaf was adjacent to a fence or to a heap [of grain], or to cattle or to vessels, and [the owner] forgot it – the House of

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harvested along with the standing crop, they are not considered forgotten (M. Pe'ah 5.2).

23 The controversies in M. Pe'ah 6.1-2 appear also in M. 'Eduyot 4.3-4.

24 This is the version in MS Kaufman, MS Cambridge (Lowe), and in Genizah fragment Cambridge T-S E1.2. In both MS Parma 3173 (de Rossi 138) and in MS Leiden of the Palestinian Talmud the opinions are reversed: בית שמי אומ' שכחה ובית הלל אומ' אינו שכחה, and a second hand corrected this version to fit the one in MS Kaufman. The Palestinian Talmud's discussions, however, reflect the MS Kaufman version.

Shammai say: [the law of] forgetting does not apply to it, and the House of Hillel say: [the law of] forgetting applies to it.<sup>25</sup>

ראשי שורות העומר שכנגדו מוכיח העומר שהחזיק בו להוליכו לעיר ושכחו מודים שאינו שכחה

[Sheaves] in the beginnings of rows, the sheaf adjacent to it proves [that it was not forgotten]. A sheaf that [the owner] held in order to take it to town, and forgot it, [the House of Hillel] concede that [the law of] forgetting does not apply to it.

אילו הן ראשי שורות [...] יחיד שהיתחיל מראש השורה ושכח לפניו ולאחריו שלפניו אינו שכחה שלאחריו שכחה מפני שהוא בל תשוב זה הכלל כל שהוא בל תשוב שכחה וכל שאינו בל תשוב אינו שכחה

This is [what is meant by] beginnings of rows [...] <sup>26</sup> A single [worker] who started [collecting] from the beginning of the row, and forgot [items] ahead of him and behind him, to what is ahead of him [the law of] forgetting does not apply, and to what is behind him [the law of] forgetting does apply, because it is a case of 'you shall not go back.' This is the rule: for any case in which 'you shall not go back' applies, the law of forgetting applies, and for any case in 'you shall not go back' does not apply, the law of forgetting does not apply.

שני עמרים שכחה ושלשה אינן שכחה שני ציבורי זיתים והחרובין שכחה ושלשה אינן שכחה שני חוצני פשתן שכחה ושלשה אינן שכחה שני גרגרים

25 This is the version in all the Mishnah's manuscripts, as well as in the Mishnah of the Palestinian Talmud. However, in the Palestinian Talmud's discussion of this portion of the Mishnah the opinions appear as reversed ( בית שמי אומ' שכחה ובית הלל ) (אומ' אינו שכחה). Since a portion of the sentence is missing here and was added on the margins, this version may well be dismissed as a scribal error. However, it is possible that this version reflects an alternative construal of the disagreement between the houses. See also below, n. 31.

26 I skipped a section in which the Mishnah discusses a case of two workers collecting produce together, which requires some explanation and that will be addressed later in this article.

פרט ושלושה אינן פרט שתי שיבליים לקט ושלוש אינן לקט אלו כדברי בית הלל ועל כולם בית שמי אומ' שלושה לעניים וארבעה לבעל הבית

For two sheaves [the law of] forgetting applies, and for three it does not apply. For two piles of olives or carobs [the law of] forgetting applies, and for three it does not apply. For two bundles<sup>27</sup> of flax [the law of] forgetting applies, and for three it does not apply. Two grapes are considered separated, and three are not considered separated. Two ears of grain are considered gleanings, and three are not considered gleanings. All those according to the House of Hillel; and regarding all of them the House of Shammai say: three for the poor, four for the owner.

העומר שיש בו סאתיים ושכחו אינו שכחה. שני עמרים בהם סאתים רבן גמליא' אומ' לבעל הבית וחכמים אומ' לעניים [...]

If a sheaf holds two *se'ah*, and one forgot it – [the law of] forgetting does not apply to it. If two sheaves [together] hold two *se'ah*, Rabban Gamaliel says: [they belong] to the owner, and the sages say: [they belong] to the poor. [...]<sup>28</sup>

This series of rulings and disagreements is premised on the notion that whether or not the owner forgot produce in the field or left it there on purpose, one should be able to discern whether the produce in question is *likely* to have been forgotten or not. The disciples of the House of Shammai assert that if a sheaf was different in size or volume from those around it, the owner is not likely to have forgotten it even if it seems forgotten or has indeed been forgotten (6.1), and they similarly rule that a sheaf left in a conspicuous place that an owner visits frequently it is not

27 On the exact meaning of the term חוצני פשתן, see Emanuel Mastey, “A Forgotten Explanation to the Mishnaic Term חוצני פשתן (flax bundles)” (in Hebrew), *Leshonenu* Vol. 78 no.3 (2016): 269-82.

28 For the sake of brevity, I skipped the lengthy discussion between Rabban Gamaliel and the Sages in which each argues for their opinion. Basically, while Rabban Gamaliel argues that the increased number of sheaves strengthens the landowner's claim to them, the Sages argue that the decreased size of each sheaf weakens his claim.

likely to have been forgotten (6.2); the disciples of the House of Hillel dismiss these specific criteria, but apparently do agree that in other cases actual forgetting does not count as legal forgetting. The passage that follows relates that if the owner had explicit and conscious intentions regarding a particular sheaf and actually carried it from one place to another himself but then forgot it, even the House of Hillel agree that this does not count as “forgetting” (6.3). The odd location of this ruling (sandwiched between two sentences pertaining to the wholly different topic of “beginning of rows”) suggests that it is a later addition to the text, perhaps incorporated during the late stages of the redaction of the Mishnah. Moreover, in the Tosefta this ruling is presented specifically as a qualification of the ruling in M. Pe’ah 6.2, distinguishing between a sheaf that was left in a particular location incidentally and a sheaf that was left by a fence after the owner carried it with the intention of taking it into town. In the Tosefta, the distinction is based on the notion that in performing such intentional carrying the owner acquired the sheaf for himself, whereas no such acquisition was made if the sheaf was merely left somewhere.<sup>29</sup> It seems that the corresponding sentence in the Mishnah was originally meant to be incorporated after M. Pe’ah 6.2 but was added in the wrong place.

It should be noted that the Tosefta presents two different explanations of the controversy between the houses: whereas R. Yehoshua reiterates the controversy more or less as it appears in the Mishnah (thus indicating that perhaps the Mishnah was phrased in accordance with R. Yehoshua’s interpretation<sup>30</sup>), R. Eliezer argues that the House of Hillel and the House of Shammai actually concur that sheaves that were left in a distinct location *cannot* be considered forgotten, and disagree only on a sheaf that one had an intention to take to town but then left somewhere: the disciples of the House of Hillel consider it forgotten, whereas the disciples of the House of Shammai maintain that one has acquired the sheaf such that it cannot be considered

29 T. Peah 3.2, and a somewhat different version in PT Pe’ah 6.2, 19b.

30 As argued by Ya’akov N. Epstein, *Introduction to Tannaitic Literature: Mishnah, Tosefta, and Halakhic Midrashim* (in Hebrew; Jerusalem: Magnes Press, 1959), 61.

forgotten.<sup>31</sup> In the Mishnah, in contrast, all are said to concur that a sheaf that was intentionally carried is not considered forgotten. Evidently, whereas R. Eliezer in the Tosefta sought to increase the applicability of the opinion of the House of Shammai, whoever formulated the comment in the Mishnah sought to limit it. The complex textual history of these passages notwithstanding, they do give us a clear indication that already in the rulings attributed to the earliest generation of rabbis, in various circumstances produce items could have been actually forgotten but were still to be regarded as though they were *not* forgotten.

While the House of Hillel and the House of Shammai disagree (to a debatable extent) on whether location, intentionality, and distinguishability can exempt a produce item from the law of forgetting, both houses are said to agree that there is a maximum number of items that can be assumed to be forgotten when left together unattended. For the House of Hillel, when three or more items were left unattended the law of forgetting does not apply, whereas the House of Shammai requires at least four items (6.5). It is particularly noteworthy that the Mishnah applies the same quantitative distinction to separated grapes and grain gleanings, for which the issue is not discerning the state of mind of the owner but only determining an upper boundary to keep the poor from taking too much. This indicates that the rabbis attempted to unify the multifaceted system of harvest gifts and to harmonize the discrepancies between its different components, a point to which I shall return later on.

The anonymous Mishnah adds two similar criteria that preclude forgotten produce from being legally construed as forgotten. The first has to do with the location of the forgotten item not vis-à-vis the greater landscape of the field, but vis-à-vis identical items: when the forgotten sheaf (or tree, or pile of fruit, or any other agricultural produce) is located

31 See the lengthy discussion in Lieberman, *Tosefta ki-pshutah Zerai'm*, 162-64. More recently, Yair Furstenberg proposed a cogent analysis of this passage, arguing that R. Eliezer ventured to mitigate R. Yehoshua's overarching presentation of a disagreement between the houses by limiting the disagreement to one very particular case. See Yair Furstenberg, "From Tradition to Controversy: New Modes of Transmission in the Teachings of Early Rabbis" (in Hebrew), *Tarbitz* Vol. 85 no.4 (2018): 587-642.

in the beginning of a row, and the adjacent sheaf in the beginning of the row perpendicular to it is still there as well, this could be taken as a sign that the process of collecting the sheaves is still ongoing, whether the owner actually forgot the particular sheaf or not (6.3, 6.4). The assumption, as explained in the Tosefta, is that if one had collected all the sheaves in a row that extends from east to west, it is possible that once he got to the last sheaf he decided to change directions and work from north to south, such that the last sheaf in the east-west row he just finished is now the first in the north-south row he is about to start.<sup>32</sup> Because of this possibility, one cannot assume that the last sheaf remaining in a row was forgotten if the adjacent sheaf was also not collected. However, whatever was left uncollected in rows that the harvester already worked through can be construed as forgotten. A second criterion mentioned in the Mishnah anonymously is size: a particularly large sheaf that holds two *se'ah* or more cannot be considered forgotten (6.6).<sup>33</sup>

Similar criteria of location, size, special attributes, number, etc., are used in regard to olive trees (M. Pe'ah 7.1-2):

כל זית שיש לו שם בשדה כזיית הנטופה בשעתו ושכחו אינו שכחה במי דברים  
 אמורים בשמו ובמעשיו ובמקומו בשמו שהיה שפכוני או בשני במעשיו שהוא  
 עושה הרבה במקומו שהוא עומד בצד הגת או בצד הפרצה ושאר כל הזיתים  
 שנים שכחה שלשה שאינה שכחה ר' יוסה אומ' אין שכחה לזיתים

Any olive tree that has a distinct name in the field, like the olive tree of Netofah at its time<sup>34</sup> – if one forgot it, [the law of]

32 T. Pe'ah 3.4.

33 The explanation provided for this ruling in Sifre Deuteronomy 283 (ed. Finkelstein 300) is that a forgotten sheaf must be such that it can be carried “as one” (כולו) (כאהד) and a sheaf of two *se'ah* is too large for that. However, the explanation provided in the Mishnah itself suggests that according to the Sages, a sheaf so large is more like a heap of grain (גדיש) than like a sheaf (עומר). Cf. PT Pe'ah 6.5, 19c.

34 In the printed edition, as well as in MS Cambridge (Lowe), the version is “even (אפילו) like the olive tree of Netofah.” In MS Leiden of the Palestinian Talmud, the word אפילו was added above the line. This version does not make much sense: assuming that the “olive tree of Netofah” is famous because it produces much oil



forgetting does not apply to it. What does this refer to? To [an olive tree known for] its name, its deeds, or its place. For its name – that it was “a pourer” or “the one from Beit Sha’an”<sup>35</sup>; for its deeds – that it produces a great amount; for its place – if it stands next to the press or next to an opening [in the fence]. And for all other olive trees, for two trees [left unharvested the law of] forgetting applies, and for three [the law of] forgetting does not apply. R. Yose says: [the law of] forgetting does not apply to olive trees.

זית שנימצא עומד בין שלוש שורות של שני מלבנים ושכחו אינו שכחה זית שיש בו סאתים ושכחו אינו שכחה במי דבר' אמור' בזמן שלא התחילו בו אבל אם התחילו בו אפילו כזית הנטופה בשעתו ושכחו שכחה

An olive tree that is found standing between three rows of two rectangles,<sup>36</sup> and one forgot it – [the law of] forgetting does not apply to it. An olive tree that carries two *se'ah*, and one forgot it – [the law of] forgetting does not apply to it. To what does this refer? To [a case in which] one did not begin [to harvest] it. But if one did begin [to harvest] it, even if it is like the olive tree of Netofah at its time, [the law of] forgetting applies to it.

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(as explained in the Palestinian Talmud based on the root *nataf*, to drip), it serves here as a quintessential example of a famous tree and not as a borderline example as the word “even” would suggest. In all likelihood, the word “even” was inserted here mistakenly, because of the of resemblance to the sentence that concludes M. Pe’ah 7.2 (in which the word “even” is quite appropriate: even though the olive tree of Netofah is famous, it will be considered forgotten if one abandoned it mid-harvest).

- 35 This seems to me as the most likely interpretation of the word בישני. The Palestinian Talmud (PT Pe’ah 7.1, 19d) offers another interpretation, according to which this is a tree so prolific that it “shames its fellows.” It is likely that in the time of the Mishnah the olive trees of Beit Sha’an were considered to have some distinct qualities, which were later – perhaps even by the time of the Palestinian Talmud – obscured or forgotten.
- 36 For an explanation of this agricultural structure, see Gil Klein, “Forget the Landscape: The Space of Rabbinic and Greco-Roman Mnemonics,” *Images: Journal of Jewish Art and Visual Culture* Vol. 10 no.1 (2017): 23-36.

Here the Mishnah presents unequivocally the notion that any olive tree that is remarkable in any way – because of its qualities, its size, its name, its location in the field or its location vis-à-vis other olive trees – cannot be considered forgotten even if one indeed forgot to harvest it. As Gil Klein rightly observed, the underlying principle here is that memory inherently depends on unique qualities and distinguishability, a principle discussed extensively by Greek and Roman authors who composed treatises on the art of memory.<sup>37</sup> Because special trees are not *likely* to be forgotten, the law of “forgetting” does not apply to them. Interestingly, R. Yose maintains that forgetting does not apply to olive trees at all – presumably, because they are all “special.”<sup>38</sup> Since the residents of the ancient Mediterranean relied heavily on olive oil not only for food preparation but also for purposes of illumination, cosmetics, and healing, we can understand the view that even unremarkable olive trees cannot be reasonably assumed to be forgotten.<sup>39</sup>

The criteria discussed in these passages are very reminiscent of the criteria discussed in rabbinic texts regarding the category of lost objects, a category that similarly presents the rabbis with the problem of determination of ownership based on presumed mental occurrences. When one finds an unattended object, one has to discern (or otherwise a

37 Klein, “Forget the Landscape.”

38 In the Palestinian Talmud (PT Pe’ah 7.1, 20a) it is suggested that R. Yose’s position reflects the conditions in the aftermath of the Bar Kokhba revolt, during which “Hadrian the Wicked destroyed the entire land” and olives have become particularly scarce, but ordinarily the law of forgetting should apply to olives. However, the same passage offers an alternative direction for interpretation, according to which the basis for R. Yose’s position is scriptural rather than practical – he simply does not see biblical grounds for expanding the law of forgotten produce, which in Deuteronomy applies only to grain, to olive trees. On this, see Raz Mustigman, “On Halakha and History: The Commandment of Shikheha of Olives as a Source for Jewish History in the Generation of Usha” (in Hebrew), in *Israel’s land: Papers presented to Israel Shazman on his Jubilee*, eds. Joseph Geiger, Hannah M. Cotton, and Guy D. Stiebel (Ra’anana: The Open University Press, 2010), 207-18.

39 See Rafael Frankel, *Wine and Oil Production in Antiquity in Israel and Other Mediterranean Countries* (Sheffield, UK: Sheffield Academic Press, 1999). I thank the reviewer for this reference.

court has to discern) whether one is entitled to the object one found or must make an effort to return the object to the one who lost it. This determination is made, as the Mishnah describes, based on considerations of location (where the item was found), number of items lost, significance of the item lost, and distinguishing markers that would allow the owner to identify the item.<sup>40</sup> At the core of all these criteria stands the principle of “despair” (יאוי), namely, the notion that there are cases in which the owner loses hope of getting the item he lost back – because it was lost in a place with too many people passing, because it does not have identifying markers, because it was lost too long ago, etc. – and when the owner mentally severs his attachment to the lost item, the finder becomes the rightful owner.<sup>41</sup> Although “despair” is a subjective criterion, the rabbis seek to determine it objectively: what matters is not whether a particular owner gave up on the item he lost, but rather whether it could be reasonably *assumed* that he gave up on this item.<sup>42</sup> It seems evident that the passages we have seen above attempt to make similar rulings of ‘objective subjectivity.’ They seek to determine whether produce can be considered forgotten not based on the inner workings of the owner’s mind, but based on the circumstances at hand. Indeed, in cases in which the circumstances do not allow for such determination, the laws of forgotten produce are suspended: for example, the Tosefta mentions that if the sheaves in a given field are not arranged in rows (such that one can determine whether or not they were forgotten based on their location) but are just thrown together without order, nothing can be considered forgotten.<sup>43</sup>

40 See M. Baba Metzi’a 2.1-5.

41 The concept of “despair” is mentioned explicitly in M. Baba Qamma 10.2 and T. Baba Metzi’a 2.1. Cf. T. Kelim Baba Batra 4.11.

42 The quest for ‘objective subjectivity’ is at play in various areas of rabbinic legislation. On its manifestations in the context of purity and impurity, see Mira Balberg, “Artifacts,” in *Late Ancient Knowing: Explorations in Intellectual History*, eds. Catherine M. Chin and Moulie Vidas (Oakland: University of California Press, 2015), 17-35.

43 T. Pe’ah 3.4 (cf. PT Pe’ah 6.3, 19c). Somewhat in contrast to that, the Sifra (Qedoshim 1.3.7, ed. Weiss 88c) and Sifre Deuteronomy (283, ed. Finkelstein 300)

The resonance between the criteria for “despair“ of lost objects and “forgetting” in harvest gifts is not surprising, considering that in both of these cases ownership is determined by recourse to a mental event that can only be assumed but never conclusively proven. But this resonance raises the question of whether these cases were, in the rabbis’ eyes, even more similar to each other than I suggested so far. If lost items become the property of the finder not when they are lost but when the original owner is not likely to try to find them, could it be that produce items do not become the property of the poor if they are forgotten, but rather if the owner is not likely to remember them? Put differently, is the distinction to be made between items that were forgotten and items that were left on purpose, or between items that were forgotten but will be remembered soon enough and items that were forgotten but will not be promptly remembered? According to the first interpretation, the poor are not entitled to particularly conspicuous produce items because they are to assume that they were not forgotten in the first place; according to the second interpretation, the poor are not entitled to particularly conspicuous produce items because they are to assume that the owner will want to retrieve them as soon as he recalls them.

From a practical point of view, the difference between these two interpretations is inconsequential: whatever is not likely to have been forgotten is also that which one is likely to recall quickly. Yet from a meta-legal point of view, the distinction is much more significant. The essence of the law of forgotten produce in Deuteronomy 24:19 is “you shall not go back.” The key moment in the mini case-drama put forth in the biblical text is not the moment of forgetting, but the moment of recollection: what the owner of the field is rewarded for is not coming back for the produce he left behind once he *realizes* that he has left it behind. If we read the Mishnaic passages that we have seen so far as saying that certain produce items cannot be considered forgotten because one is likely to remember them and come back for them, we must read the Mishnah as overthrowing the biblical law or at least as radically

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maintain that in any case of doubt, the law of forgetting should apply; this general principle, however, is not mentioned in the Mishnah or Tosefta.

reinterpreting it. Rather than saying ‘do not go back for forgotten produce’ the law now says ‘do not come back for forgotten produce unless this produce is really significant in quality, quantity, or location.’ One is to leave forgotten items for the poor only if these items were not particularly memorable to begin with – indeed, in the same way that the finder of a lost item is permitted to keep it only if the owner is not likely to be keen on retrieving it.<sup>44</sup>

Whether the question underlying the debates we have seen so far is what is not likely to have been forgotten, what is likely to be promptly remembered, or both, the juridical outcome is identical: when the Mishnah rules that the law of forgetting does not apply to certain items, it effectively gives permission to one who forgot those items and then recalled them to come back for them.<sup>45</sup> While the Mishnah maintains that objective criteria are required to discern the “forgettability” of an item that allows or does not allow it to be re-collected, in the Palestinian Talmud we find more radical formulations, which effectively assert that whatever item the owner can eventually remember is exempt from the law of forgetting, and no external discretion is required. R. Yirmiah proposes that “anything that is marked in [the owner’s] mind is considered as marked” (היה מסויים בדעתו כמי שהוא מסויים), which is to say that an item need not be particularly large or prolific or conspicuous to be considered categorically unforgettable: as long as the owner has some

44 Gardner notes that in general, the rabbis tend to allocate very modest amounts for the poor, and briefly mentions forgotten produce in this context: “Likewise, the laws of *forgotten produce* do not apply to especially productive olive trees – eliminating potentially fruitful sources of produce for the poor.” See Gardner, “Pursuing Justice,” 51. My goal here is to show that while the motivation behind the Mishnah’s rulings may well be a restriction of the quantity and quality of produce available to the poor, its rulings are presented as pertaining to an attempt to discern ownership in a situation of uncertainty.

45 In the Midrash *Sifre* on Deuteronomy the rulings of the Mishnah are framed as downright qualifications of the biblical law of “not going back”: “*You shall not go back to get it* – except for the beginnings of rows [...], *you shall not go back to get it* – as long as it can be taken as one [...].” (*Sifre Deuteronomy* 283, ed. Finkelstein 300). The *Sifre* explicitly presents the Mishnaic laws as a series of exemptions from the obligation to let the poor have forgotten produce.

kind of a distinctive marker for it, the law of forgetting does not apply to it.<sup>46</sup> Even more radical is a ruling by R. La, according to which the law of forgetting does not apply in *any* case in which the object is later remembered: “R. La said: it is written ‘*when you reap your harvest in your field and forget a sheaf in the field*’ – this refers to a sheaf that you forget forever, to exclude a sheaf that you remember after some time.”<sup>47</sup> According to R. La, as soon as one remembers a forgotten item – presumably, regardless of its objective qualities – it is no longer considered forgotten. An item is considered forgotten only if one *never* remembers it, and is therefore never faced with the decision not to come back for it. Although I do not think this extreme interpretation of the law of forgetting can be read into the tannaitic passages we have seen for far, in the following section I will show that the Mishnah does offer several rulings that seem to point toward R. La’s transformative interpretation.

### “Until It is Forgotten of All Humans”: Reframing Forgetfulness

Whereas the passages discussed above can be read as attempts to define likely and unlikely scenarios of forgetting, other Mishnaic passages seem more like deliberate efforts to provide exceptions to the law of forgetting and to expand the range of cases in which the owner is exempt from the prohibition of going back. One such expansion can be traced in the rules regarding a forgotten “standing crop” (קמה). The premise of the rabbis is that a crop that is still standing (i.e., was not yet reaped) is subject to the same laws of forgetting as sheaves on their way to the threshing floor.<sup>48</sup> However, the Mishnah rules that if a forgotten standing crop holds more than two *se’ah*, the law of forgetting does not apply to it. This rule, which

46 PT Pe’ah 7.1, 20a. The example given in the Palestinian Talmud for a distinctive marker is “an olive tree by the side of the palm tree,” a rather specific example which was perhaps added by a redactor to restrict the very permissive ruling of R. Yirmiah. I thank the reviewer for this suggestion.

47 PT Pe’ah 7.1, 20a. Relying on the Palestinian Talmud, traditional Mishnah commentators tended to assume that this principle (namely, that what is likely to be later remembered is not considered forgotten) governs the criteria put forth in the Mishnah as well.

48 See Sifre Deuteronomy 283 (ed. Finkelstein 299).

is based on an analogy between forgotten crop and forgotten sheaf (for which the maximum amount that could be considered forgotten is two *se'ah*), is followed by another rule: even if the forgotten crop does not currently hold two *se'ah* but is theoretically capable of producing two *se'ah*, the law of forgetting does not apply to it. Furthermore, even if the two *se'ah* the crop can theoretically produce are of meager and stunted grain, it is still considered as though it is a crop of fully grown and robust grain and is not subject to the law of forgetting.<sup>49</sup> This ruling thus takes the principle that over a certain quantity the law of forgetting does not apply, and expands it to include even a case in which this quantity exists only *in potentia*.

The expansion of exemptions from the law of forgetting is even more perceptible in the following passage (M. Pe'ah 6.8):

קמה מצלת את העומר ואת הקמה העומר אינו מצלת לא את העומר ולא את  
הקמה איזו היא הקמה שהוא מצלת את העומר כל שאינה שכחה אפילו קלה  
אחד

A standing crop saves an [adjacent] sheaf and standing crop, but a sheaf does not save an [adjacent] sheaf or standing crop. Which is a standing crop that can save a sheaf? One to which [the law of] forgetting does not apply, even if it is only [a crop] of one stalk.

According to this ruling, if there is a standing crop that was either not forgotten in the first place or the law of forgetting does not apply to it (for example, because it holds two *se'ah*), this standing crop can “save” a second crop or a sheaf adjacent to it from being considered forgotten even if the law of forgetting does apply to them. Essentially, this ruling is guided by a principle of proximity: if the law of forgetting does not apply to item X, item X has the ability to exempt item Y that is proximate to it. While the Mishnah clarifies that this principle of proximity applies only if the non-forgotten item is a crop and not if it is a sheaf, the Tosefta mentions a minority opinion of Rabban Shimon ben Gamaliel according

49 M. Pe'ah 6.7.

to which sheaves, too, can save the items adjacent to them.<sup>50</sup> The Tosefta (T. Pe'ah 3.5) also mentions another minority opinion that seeks to expand the principle of proximity even further:

קמת חבירו מצלת על שלו, של חטין על של שעורין, של נכרי על של ישראל,  
דברי ר' מאיר. וחכמים אומ' אין מצלת (על) אלא על שלו, וממין על מינו.

The standing crop of one's neighbor can save one's own, a standing crop of wheat can save one of barley, the standing crop of a gentile can save one of an Israelite, the words of R. Meir.<sup>51</sup> And the Sages say: one's [standing crop] can only save one's own, and one kind [of crop] can only save the same kind.<sup>52</sup>

As these discussions reveal, there was a tendency among the early rabbis to find exemptions from the prohibition of going back for forgotten produce, and some rabbis were willing to go further than others in granting such exemptions.

The ruling regarding a non-forgotten standing crop and its ability to save what is in proximity to it can still be understood in line with the attempt to find objective criteria for forgetting. Ostensibly, if forgotten item Y is placed next to item X that was not (likely to be) forgotten, it could be deduced that item Y was also not forgotten. However, other rulings in the Mishnah significantly limit the applicability of the law of forgetting by working in a different direction: rather than determining what kind of produce is not likely to be forgotten, they seek to determine what counts as “real” forgetting. Such is the ruling in M. Pe'ah 5.7:

העומר ששכחוהו פועלים ולא שכחו בעל הבית שכחו בעל הבית ולא שכחוהו  
פועלים עמדו העניים בפניו או שחיפוהו בקש הרי זה אינו שכחה

If the workers forgot a sheaf but the owner did not forget it, or the owner forgot it and the workers did not forget it, if the poor

50 T. Pe'ah 3.6.

51 In PT Pe'ah 6.6, 19d this opinion is attributed to Rabbi.

52 Quoted from ed. Lieberman.



stood in front [of the sheaf] or covered it with straw – [the law of] forgetting does not apply.

The Mishnah presents two intertwined principles here. First, for an item to be considered truly forgotten it must be forgotten by everyone involved in the harvest process. Unlike in the biblical scenario, it is not exclusively the owner's lapse of memory that grants ownership to the poor, but there has to be a combination of forgetting both by the owner and by his workers.<sup>53</sup> 'Real' forgetting, then, is not simply a temporary omission of an item from one person's memory: forgetting is the effective *disappearance* of the item from human consciousness. Once again the Tosefta includes a minority opinion that takes the Mishnaic principle one step further: "R. Shimon ben Yehudah says in the name of R. Shimon: even if others were passing by and saw the sheaf that the workers have forgotten, [the law of forgetting does not apply] *until it is forgotten of all humans*".<sup>54</sup> As long as there is someone out there who remembers the sheaf, even if this someone has no connection to the harvesting process, the sheaf cannot be construed as forgotten.

The second principle is that forgetting has to happen independently, 'naturally' so to speak, and cannot be the result of the intervention of

- 53 A *baraita* that appears both in the Palestinian Talmud (PT Pe'ah 5.6, 19a) and in the Babylonian Talmud (BT Baba Metzi'a 11a) distinguishes between a situation in which the owner is in the field together with the workers, and a situation in which he is in town while the workers are in the field. T. Pe'ah 3.1 relates only a ruling regarding an owner who is in town, perhaps due to a scribal omission. However, the different versions in the Tosefta, as well as in the two Talmuds, disagree on whether the law of forgetting applies only when the owner is in town or only when the owner is in the field. See the lengthy discussion in Lieberman, *Tosefta ki-pshuta Zera'im*, 158-61.
- 54 T. Pe'ah 3.1. The Palestinian Talmud (PT Pe'ah 5.6, 19a) presents this ruling as pertaining only to a case in which the owner still remembers the sheaf that the workers have forgotten, but in my view the phrase "until it is forgotten of all humans" suggests that both the owner and the workers have forgotten the sheaf in question: it would make no difference whether random strangers remember the sheaf if the owner, the main interested party, still remembers it, and there would be no need to mention it. See Lieberman, *Tosefta ki-pshuta Zera'im*, 161.

others. In this passage, the intervention of others is imagined as the deliberate maneuvers of poor persons who are eager to get hold of as much produce as possible: they are therefore standing in front of it or covering it in order to hide it, either from the owners so that they will have technically forgotten it, or from other poor persons so they will not get to it before them.<sup>55</sup> On one level, this passage serves a rhetorical purpose: by depicting the poor as willing to take such underhanded measures to obtain what is not rightfully theirs, the Mishnah's redactors may be tacitly justifying their overall tendency to restrict poor persons' claims to forgotten produce, allowing the readers/listeners to empathize with the landowner to a greater degree. At least two rabbis, however, seem to operate with a larger principle that whatever is out of sight cannot be construed as forgotten. Thus R. Yehudah maintains that the law of forgetting does not apply to produce that is placed underground (such as onions, garlic, etc.),<sup>56</sup> and R. Shimon rules that if one sheaf is placed underneath another sheaf such that it is covered, the bottom sheaf cannot be construed as forgotten.<sup>57</sup>

Taken together, these two principles amount to a delicate equation: to be considered forgotten, an item must be forgotten by every single person involved in the harvesting process (and according to one opinion, even by people not involved in the harvesting process), yet at the same time this item cannot be simply out of sight. The 'forgotten sheaf' that one is prohibited from retrieving is one that is readily visible and nonetheless everyone manages to miss it. To this we should add one more Mishnaic passage, which suggests that if there is a discernible reason for one's forgetfulness, the forgotten items should not be construed as legally forgotten. Here I return to the Mishnah's discussion of "beginning of rows" (M. Pe'ah 6.4) and to a section I skipped earlier:

55 Violent struggles among the poor who are trying to collect harvest gifts are mentioned in M. Pe'ah 4.4.

56 M. Pe'ah 6.10; cf. Sifre Deuteronomy 283 (ed. Finkelstein 299). See also the lengthy discussion in BT Sotah 45a.

57 T. Pe'ah 3.3.

אילו הן ראשי שורות שניים שהתחילו מאמצע שורה זה פניו לצפון וזה פניו לדרום שכחו לפניהם ולאחריהם שלפניהם שכחה ושלאחריהם אינו שכחה

This is [what is meant by] beginnings of rows: if two [workers] started [collecting produce] from the middle of the row, one of them facing north and one of them facing south,<sup>58</sup> and they forgot [an item] ahead of them and [an item] behind them – to that which is ahead of them [the law of] forgetting applies, and to that which is behind them [the law of] forgetting does not apply.

To understand the scenario described in this passage, let us imagine a row of eleven sheaves, with each sheaf numbered 1-11 (sheaf 1 at the northern end of the row, and sheaf 11 at the southern end). Two workers are standing by sheaf 6, in the middle of the row, and decide to collect the sheaves while working in opposite directions: worker A proceeds to move north and collect sheaves 5 to 1, and worker B proceeds to move south and collect sheaves 7 to 11. Alas, neither of them takes care to collect sheaf 6, probably because each one of them assumes that the other will collect it, or simply because they already concentrate on the portion that is ahead of them. In this scenario, sheaf 6 (the sheaf that is “behind” the workers) is exempt from the law of forgetting – evidently, because it is easy to reconstruct what caused this sheaf to be forgotten. It could be said more generally, then, that when one forgets a produce item because of distinct circumstances that make such forgetting predictable, the law of forgetting does not apply.

Needless to say, the combination of all these principles significantly limits the applicability of the law of forgetting, restricting it mostly to cases in which the produce at hand is very negligible in quantity, quality, or both. Indeed, this may be exactly the intention of the legislators here. Through this set of restrictions, forgotten items become much more similar to the other harvest gifts that are all marked by their unremarkably: those are the things that the owner would not even notice

58 In MS Parma 3173 (de Rossi 138): “one of them turned (פנה) north and one of the turned south.”

were missing. In these passages the Mishnah takes a significant step in the interpretive direction bluntly expressed by R. La in the Palestinian Talmud, namely, that the only items that can be considered legally forgotten are by definition *unmemorable* items.

But if the law of “forgetting” only applies to items that one is not likely to remember, and to circumstances in which forgetting took place without any reason (and therefore one is not likely to be aware that it took place), what is the nature of the owner’s agency vis-à-vis the commandment “you shall not go back?” If the owner is allowed to retrieve what he knows he forgot, it would seem that he is only prohibited to retrieve what he does *not* know he forgot. But how can one not act in regard to something one is not aware of? The following passage (M. Pe’ah 6.11) gives some indication of the rabbis’ approach to this conundrum:

הקוצר בלילה והמעמר והסומה יש לו שכחה אם היה מתכוון ליטול את הגס  
הגס אין לו שכחה אם אמר הרי אני קוצר על מנת מה שאני שכח אני אטול יש  
לו שכחה

One who harvests at night, or collects sheaves [at night], or a blind person [harvesting or collecting] – [the law of] forgetting applies to him. If one intends to take only the coarse pieces, [the law of] forgetting does not apply to him. If one said: I am hereby harvesting so that whatever I forget, I will retrieve – [the law of] forgetting applies to him.

This passage begins by asserting that if one harvests in conditions in which one cannot clearly see what one is doing and is therefore bound to leave things in the field, the law of forgetting *does* apply if items were indeed left behind. This seems surprising, considering that just above the Mishnah ruled that the law of forgetting does not apply for items placed out of sight (in the words of the Palestinian Talmud: “is a blind person not like one for whom the entire field is covered in straw?!”) <sup>59</sup> and more generally to circumstances in which there is a discernible reason for

59 PT Pe’ah 5.6, 19a.

forgetfulness. The key difference between the cases, I propose, is that those working in the dark *know* that they are necessarily leaving things behind, and are either resigning to that – in which case, they have in fact voluntarily relinquished their property to the poor – or are taking special measures to prevent that from happening, which puts them on an equal playing field with those who harvest in the daylight. In contrast, if a person harvesting in these conditions makes a conscious decision to collect only the coarsest and most palpable pieces and then, presumably, to come back for the rest, whatever he left behind cannot be construed as forgotten.<sup>60</sup> The difference between the person in the first clause and the person in the second clause is the mental agency they exercise over the produce they left behind: the person in the first clause assumes that he will leave some things behind but has no sense of what those things will be nor any established intention in regard to them, whereas the person in the second clause has a sense of what he will leave behind and why, and does not think of those items as forgotten but rather as part of a multi-phase premeditated harvesting plan. Finally, the person in the third clause tries to apply the principle of the second clause to the circumstances of the first clause: like the person in the first clause, he assumes that he will leave things behind and does not know what those things will be, but he tries, like the person in the second clause, to make a stipulation that whatever will be left behind will be *retroactively* considered part of a multi-phase harvesting plan. Such stipulation is deemed invalid by the Mishnah.<sup>61</sup>

Taken together, the three scenarios in this passage provide important insight into the rabbis' transformed understanding of the law of forgotten produce. These scenarios suggest that for the rabbis the moment of

60 Following Maimonides (*Hilkhot matanot aniyim* 5.8), I read the second clause of this passage as a continuation or qualification of the first clause, referring to a blind person or a person working at night. Other commentators, however, understood this clause as referring to an entirely independent case. For my purposes here, the difference between the readings is not consequential.

61 In PT Pe'ah 6.10, 19d this ruling is explained though the common rabbinic principle that a condition meant to abrogate a commandment from the Torah is inherently invalid.

recognition – the moment that promises the owner of a field a reward for his piety – is *not* the moment in which he remembers that he left things behind and nonetheless decides not to go back to claim them, as it is in Deuteronomy. Instead, it is the moment of awareness (which may be passing or ongoing) that he is *likely* to have left things behind in the course of harvest – things of which he is not aware and cannot trace in his memory because they are too insignificant – and his willingness to refrain from going back for those unspecified things that he may or may not have forgotten. Put differently, if the imagined biblical scenario is ‘I know that I left a sheaf in the field, but I will not come back for it,’ the Mishnaic scenario is ‘I realize that I *probably* left some unimportant sheaves somewhere in the field, but I will not go back to check whether I did or did not.’ In this sense, the blind person and the person harvesting in the dark are the paradigmatic heroes of the Mishnah’s transformed understanding of the law of forgetting: these are people who assume that they *had* left things behind but do not know *what* those things are. They cannot claim continued ownership of the items they left, because they have no mental access to those items, but they also cannot claim that they assumed they had collected everything and did not resign themselves to the possibility of forgetting.

### **How is This Commandment Different from All Other Commandments?**

Having seen the different ways in which the rabbis limited, qualified, and ultimately transformed the biblical law of forgotten produce, we are now in a position to ask what stands behind their very restrictive interpretation and the many exemptions granted to field owners who wish to go back to retrieve forgotten produce. One explanation that immediately comes to mind is that the rabbis sought to protect the interests of landowners.<sup>62</sup>

62 Gardner (“Pursuing Justice,” 40) identifies “upper-class biases” in rabbinic legislation, largely following in the path of Shaye Cohen, who argued that “in the period before Judah the Patriarch the rabbis were well-to-do, associated with the well-to-do, and interested themselves in questions that were important to the landed classes.” See Shaye J.D. Cohen, “The Place of the Rabbi in the Jewish Society of the Second Century,” in *The Galilee in Late Antiquity*, ed. Lee I. Levine

The notion that whatever produce the owner forgot in the field automatically becomes the property of the poor regardless of the quality or quantity of what was left may have seemed unacceptable to the rabbis, who knew that most field owners at their time were not real estate tycoons but small-scale farmers struggling to make a living.<sup>63</sup> They certainly thought that the poor should get *something*, but wanted to make sure that the owner is not robbed of his rights to the produce he worked so hard to grow just because he happened to skip a tree or misplace a sheaf.

While an attempt to protect the rights of the owner may certainly be at play here – and we do see traces of it in the Mishnaic references to exempting something from the law of forgotten produce as “saving” it – I propose that the core issue for the rabbis is the peculiarity of the law of forgotten produce within the system of the commandments more broadly, and specifically its troubling nature as a commandment defined by unintentionality and lapse of consciousness. In order to fulfill the commandment of forgetting as formulated in the Torah, one must by definition be unaware that one is fulfilling it: this is a commandment that fundamentally depends on absence of deliberation. Of course, in the biblical framework of Deut. 24:19 there is an element of conscious deliberation, namely the decision not to go back once the forgotten items were recalled, but this conscious deliberation is nonetheless made possible only in response to an unintentional occurrence. The rabbis, who famously considered intention, attention, and will to be some of the most determining features in the performance of commandments,<sup>64</sup> were

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(New York: Jewish Theological Seminary, 1992), 169. For an attempt to question this view, see Wilfand, *The Wheel*, 98-106.

63 See Morton Hørning Jensen, “The Political History of Galilee from the First Century CE to the End of the Second Century CE,” in *Galilee in the Late Second Temple and Mishnaic Periods: Land, Culture, and Society*, Volume 1, eds. David A. Fiensy and James Riley Strange (Minneapolis: Fortress Press, 2014), 51-77, esp. 71-73.

64 For discussions of the centrality of intention in rabbinic literature, see Howard Eilberg-Schwartz, *The Human Will in Judaism: The Mishnah’s Philosophy of Intention* (Atlanta: Scholars Press, 1986); Mira Balberg, *Purity, Body, and Self in Early Rabbinic Literature* (Berkeley: University of California Press, 2014), 74–95.

highly aware of the aberrant nature of the law of forgetting, as the following anecdote from the Tosefta (T. Pe'ah 3.8) illustrates:

מעשה בחסיד אחד ששכח עומר בתוך שדהו ואמ' לבנו צא והקריב עלי פר לעולה ופר לשלמים. אמ' לו' אבא, מה ראית לשמוח במצוה זו מכל מצות האמורות בתורה. אמ' לו כל מצות שבתורה נתן לנו המקום לדעתנו, זו שלא לדעתנו, שאילו עשינוה ברצון לפני המקום לא באת מצוה זו לידינו.

אמ' לו הרי הוא אומר כי תקצור קצירך וגו', קבע לו הכתוב ברכה. והלא דברים קל וחומר, מה אם מי שלא נתכוון לזכות וזכה מעלין עליו כאילו זכה, המתכוין לזכות וזכה על אחת כמה וכמה.<sup>65</sup>

It once happened that a pious man forgot a sheaf in his field, and he told his son:

Go and offer on my behalf a bull for a burnt offering and a bull for a wellbeing offering.

[His son] told him: father, why do you rejoice in this commandment more than in any other commandment in the Torah? He told him: all other commandments in the Torah were given to us in respect to our awareness, but this one is not in respect to our awareness, for if we had performed it willingly before the Omnipresent this commandment would not have come into our hands.

He told him: behold, Scripture says “*when you reap your harvest in your field [and forget a sheaf in the field ...the Lord your God may bless you in all your undertakings]*” – Scripture established a blessing for this commandment. And one can learn *a fortiori*: if one who had no intention of acquiring merit (or: giving charity) but did so is considered as though he acquired merit, all the more so one who intended to acquire merit and did so.<sup>66</sup>

While this anecdote ostensibly celebrates the law of forgetting as a unique privilege given to Israel and marvels at the fact that one can act

65 Quoted from ed. Lieberman.

66 Cf. Sifra Hova 12.17.13 (ed. Finkelstein 207).



meritoriously without even knowing it, it also by and by indicates that this commandment is a very unreliable source of merit. The fact that the pious man finds the occasion worthy of a massive sacrifice of thanksgiving suggests that it is an uncommon occurrence. The pious man's comment that "if we had performed it willingly before the Omnipresent this commandment would not have come into our hands" identifies the paradoxical nature of the commandment of forgetting: if one *intends* to perform this commandment, one immediately fails at performing it. Forgetting, in this formulation, is not the ultimate easy commandment that requires no effort whatsoever, but quite the contrary: it is the hardest commandment to fulfill since one is prevented from trying to fulfill it.<sup>67</sup> The final section of this anecdote, which may well be a later addition or an alternative tradition, makes a point of asserting the superiority of intentionality in the performance of commandments over unintentionality. At the end of the day the exception— the fact that in a single case one is rewarded for something one did not choose to do — is only a way to affirm the rule, which is that reward is dependent upon deliberation and intention. If accidental beneficial acts are meritorious, *all the more so* that purposeful beneficial acts are meritorious.

I propose that the multiple restrictions and exceptions that the early rabbis presented to the commandment of forgotten produce can be understood as part of a greater attempt to make this commandment less aberrant and less paradoxical. In limiting the poor's rights only to insignificant and negligible forgotten produce, the rabbis made forgetting a much more reliable source of merit for the owner. Instead of a rare occurrence, defined by the fact that it can only happen when one does not intend for it to happen, the rabbis turned forgetting into a natural, if imperceptible, part of the workings of the harvest process. One can almost assume that one will leave something of no significance behind,

67 Lieberman argues that in contrast to the sentiment of this passage, some sources point toward established customs of intentional "forgetting" in order to benefit the poor. See Lieberman, *Tosefta ki-pshutah Zera'im*, 169-172. While these customs may well have existed, from a strictly legal perspective produce left behind intentionally is not considered "forgotten" but rather "abandoned" (הפקר) and is subject to a different set of rules.

in the same way that one can assume that one will drop some grapes while harvesting a vineyard. Thereby, the owner's position vis-à-vis the commandment becomes much more stable. In the biblical scenario, the owner is imagined as dependent upon multiple contingencies that lie outside of his control: (1) he may or not may forget an item in the field, and (2) may or may not remember that he left an item in the field, which means that he may or may not have the opportunity to perform the commandment by refraining from going back for the items. The owner as imagined in the Mishnah, in contrast, may or may not forget items in the field, but he does not expect to know whether he left items in the field, because the items he forgot were in all likelihood too negligible to remember. His agency is manifested in his passive acceptance that *if* there are things that he forgot and that he cannot think of because they are too unimportant, those things belong to the poor. In other words, the Mishnaic owner can always assume that he performed the commandment of forgetting, because his forgetting is defined by the fact that he does not know if he forgot. The only way to defy the commandment of forgetting, in this setting, is to go and purposely seek things that one does not remember having forgotten. As long as one does not do that, one can comfortably feel that one acquired merit.