

THE JEWISH LAW
ANNUAL

VOLUME ELEVEN



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whose loving kindness was felt by everyone
whose life she touched

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PART ONE



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THE RABBINIC LAW ON ENTRY AND SEIZURE

by

STEPHEN M. PASSAMANECK*

The lawful warrant to enter private premises, to seize contraband, and to arrest alleged criminals constitutes a major weapon against crime in the United States today. Few topics in the field of criminal law have prompted as much debate in judicial, civil liberties and law enforcement circles as has the matter of the warrant, which allows lawful authority under specific circumstances to invade individual privacy in order to seize evidence or to make arrests, which would otherwise be impossible to obtain. The basic law governing matters of search and seizure in the United States is the fourth Amendment to the Federal Constitution, part of the Bill of Rights which is, as a whole, the fundamental charter of individual liberty that protects all persons from abuses of federal or state power.

The amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Clearly the debates in this field have explored in abundant detail what the notion of "unreasonable" might involve and what facts might provide probable cause. The literature on this amendment is extensive, but for the present purpose, the spare prose of the eighteenth century rule itself is sufficient. The principal

* I wish to acknowledge with thanks the assistance of the Institute for Computers in Jewish Life. The Institute searched its data base for responsa relevant to search and seizure. The results were meager, but their helpfulness and concern were abundant.

I am grateful to Prof. Elliot Dorff who read the draft of this article with a critical eye and made many excellent suggestions for its improvement.

ideas are sharply put. The fourth amendment coupled with the fifth amendment, which prohibits self-incrimination, form a powerful shield in protection of individual liberty.

Of these two major protections of civil liberty and the security of the individual, the matter of self-incrimination has long been identified as a concern in Jewish law, and the rabbinic safeguards against self-incrimination have already been ably demonstrated and discussed.¹ But what of search and seizure in Jewish law? Even with protection against self-incrimination, an individual remains seriously at risk if the individual is not secure in his person, house, papers, and effects against unreasonable search and seizure.

The enormous distance between the framers of the United States Constitution and the rabbis of Jewish law can be expressed both in terms of time and geography, not to mention differences in social outlook, legal philosophy, and world view. The rabbis did not of course develop any rule that even vaguely sounds like the fourth amendment. But just as the rabbis and the constitutional fathers spoke to the matter of self-incrimination, in their differing yet comparable ways, might not the rabbis have some views on search and seizure as well? After all, the proper and reasonable enforcement of the law was as clear a goal to the rabbis as it was to the constitutional fathers.

Let us consider the obvious fact that theft and robbery appear in Jewish legal texts with a fair degree of frequency. We may then reasonably assume that on occasion the thieves noted in the Jewish sources stored their loot on private premises. Thus there was the question of how that property was to be retrieved. The loot was itself evidence of a sort against the person in possession of it. Did the victim have some means of getting his property back, and, if so, was the rabbinical court necessarily involved in this retrieval process — and, if so, how?

The process for retrieval of stolen property under the fourth amendment involves an application for a warrant to a magistrate.² The application is usually made by a peace officer who

1 For instance, Aaron Kirschenbaum's masterful work *Self-Incrimination in Jewish Law* (New York: Burning Bush Press, 1970).

2 My own personal experience as a reserve deputy sheriff with the Los Angeles County Sheriff's Department has given me some excellent first-

also submits an affidavit articulating in great detail the probable cause for the warrant. The officer furnishes a clear description of the locations to be entered and searched and description in detail of the items or persons (or both) to be seized. The warrant, when issued, constitutes a lawful order to enter, search, and seize those items or persons specified in the warrant. The purpose of the warrant is plainly the lawful gathering of evidence or the lawful arrest of persons, which evidence — or persons — is vital to a criminal investigation and ultimately to a criminal proceeding.

Nelson Lasson, the historian of the fourth amendment, begins his lengthy study of its antecedents with a look at the English legal maxim that a man's home is his castle, and therefore proof against arbitrary invasion.³ He asserts that the general idea of the maxim is not peculiar to English law because, "[e]ven in ancient times there were evidences of that same concept in custom and law, partly as a result of the natural desire for privacy, partly an outgrowth, in all probability, of the emphasis placed by the ancients upon the home as a place of hospitality, shelter, and protection." Some of the ancient evidence he presents for this view is biblical.⁴ This inquiry will first review the biblical material he adduces and then look at some additional passages

hand knowledge of how warrants work, what goes into them, and, above all, how information leading to a warrant is developed. I wish to acknowledge the training of Sgt. Guido Gutierrez and Dep. David Silversparre in the matter of search warrants.

- 3 Nelson B. Lasson, "The History and Development of the Fourth Amendment to the United States Constitution", *The Johns Hopkins University Studies in Historical and Political Science*, Series LV, no.2 (Baltimore: Johns Hopkins University Press, 1937). Obviously much has occurred in the area of fourth amendment law in the last 50 plus years. The historical research in the field, particularly for the earliest periods which are of interest here, remains however substantially the same. The author of course goes into Roman procedure on the impounding of documents and evidence and on provisions for search and seizure in other early systems. On the whole, the Jewish material is singularly slim. Lasson's work is customarily cited as the major study in the field.
- 4 Lasson, *supra* n.3, at 13-15. In addition to a few biblical references, the author cites some rabbinic legal material in translation. The translations are not quite accurate and some of the citations to rabbinic legal material are not traceable. But the attempt was made, Lasson, *supra* n.3, at 14 nn. 2-5.

that bear upon this matter. The Bible is the point of departure for this foray into a particularly unremarked area of Jewish law.

Lasson cites *Joshua* 7:10-26, the story of Achan and the banned goods. It is noted that Joshua's emissaries did not enter Achan's private premises to search for the contraband until Achan had confessed to the wrongful deed. The author also refers to *Joshua* 2:3-7, in which the King of Jericho sends a message to Rahab asking her to produce the two Israelite spies of whose presence in town he had been informed, *Joshua* 2:2. The royal messenger's brief no doubt included, in addition to the simple request to Rahab, an order to place the Israelites under arrest and bring them to the king. Thus we have a lawful order to a royal agent to search for specific persons, and though it is not made explicit in the text, to take them and produce them before the king. In other words, we have the ancient bare bones of an arrest warrant. Rahab hid the spies and sent the royal search off in the wrong direction. Lasson's point here is of course that the king's men conducted no entry to search, which presumably would have turned up the foreign spies.

There are however two further points here. The Bible identifies Rahab as a prostitute⁵ and from time immemorial strangers in town have found safe haven or at least anonymity among the demi-monde. After all, the royal agent (or agents?) went right to her house; they knew where to find new men in town. One gift that persons of Rahab's calling cultivate, perhaps above all others, is the gift of gab. She was easily able to put the royal agent off the track with a quick story — yes, they were here; no they're not here now; they left at sundown when the gate closed; I don't know who they were — you'd better get after them; you can catch them if you hurry. And off they went. A quick, plausible, and wholly deceitful story has confounded the agents of the law more than once in recorded history. But the royal agent did not enter; what he would have done had he not believed Rahab's little tale is an open question.

Second, this was a spy-hunt, a matter of "national security," it

5 Jewish tradition softens the biblical description of Rahab's trade. *Rashi*, following *targum*, indicates she kept a restaurant. No matter: bordellos may provide more than one refreshment for customers, and the Talmud does indeed recognize her career as a prostitute, Cp. *Zebahim* 116a, f.

was serious business. The fact that the royal agent did not enter the bordello when informed that the quarry had flown speaks as much for the urgency of the matter at hand as it does for the absence of a "right to search". Thus, if the agent thought Rahab was telling the truth, which he did, there was no point in wasting valuable time. In any event, on the basis of what scripture relates, the royal agent either did not have the authority to enter Rahab's premises — Lasson's theory — or he did not exercise it because he was completely fooled by her and was in a hurry. No search occurred.

Lasson also refers to the story of Lot, *Genesis* 19:4-11, in which Lot refused to turn his divine guests over to the hospitality of the men of Sodom.⁶ Clearly Lot attempted to protect his visitors, even at the possible price of his daughters' welfare, because the visitors had come under the protection of Lot's domicile. Lasson suggests that the crowd apparently hesitated in front of Lot's house and demanded that Lot surrender the two strangers before they made any attempt at forced entry. We are not dealing here with a lawful order to surrender persons but with a mob. Surely the mob will usually make its demands known first; why should they force an entry if they can avoid it? The most this passage shows is the extraordinary length that Lot was prepared to go to afford shelter and protection. The passage has nothing really to do with search and seizure. Without divine intervention the story would have doubtless ended with the sack of Lot's house and a tragic fate for Lot, his daughters, and the guests. We are far from any sort of lawful search and seizure here.

There are, however, four scriptural cases which do suggest some few data on search and seizure (or worse) in the ancient past. Lasson does not present these particular scriptural cases. If he had done so, perhaps a more rounded view of biblical ideas on the subject would have emerged.

Genesis, chapter 31:17-35. When Jacob realized that there was really no future for him and his family in his father in law Laban's household, he resolved to gather his family and flee when Laban was away shearing sheep. During the preparation for flight, and quite unknown to Jacob, his wife Rachel stole

6 Lasson, *supra* n.3, at 14 n.1.

Laban's household gods. Laban soon hears that Jacob and family have decamped, pursues them, and catches the party; Laban expresses surprise and chagrin that Jacob chose to leave secretly. The occasion of parting company, says Laban, could have been quite an event; and, what is more, why did you steal the household gods? Jacob responds that he had been afraid Laban would not have allowed his daughters to leave the paternal home. As for the household gods, Jacob immediately grants permission for Laban to inspect whatever Jacob's party has taken with it and to retrieve any of Laban's property that might have been carried away. In fact Jacob specifies death for whoever is caught in possession of Laban's goods — he did not know his favorite wife Rachel was the thief. So Laban searches all the tents and finally comes to Rachel's tent. Rachel had hidden the gods in a camel saddle and sat on it. While Laban poked through the tent, Rachel excused herself for not rising in her father's august presence; she claimed to be under the weather with menstrual problems. Laban never found the stolen gods. A woman's guile had deflected his purpose.

From the point of view of search and seizure, however, Jacob gave permission to search. If a householder grants permission for someone, including lawful authority, to search his premises, no warrant is necessary; and depending on the scope of the permission granted, the search can be quite thorough.

The Bible story suggests that a permissive search was both known and known to be acceptable among the ancient Israelites. The permissive search appears in another story from Genesis as well, but this time, the case was a put up job.

In Genesis 44:1-12, Joseph develops a scheme to get his beloved younger brother Benjamin in what appeared to be a great deal of trouble. The brothers, including Benjamin, were not yet aware that the Egyptian lord who treated them so well was really their long lost brother whom they had sold into slavery years before. Just before the brothers were to leave on their return journey, Joseph ordered his people to put the gift of money the men had brought with them back into their baggage, and to put Joseph's special cup into Benjamin's pack. The brothers of course knew nothing about this little plot. No sooner had the men gotten on the road home than Joseph sent his officer to stop the caravan

and accuse the men of stealing the cup. Certainly Joseph was lawful authority in Egypt and the officer acting on Joseph's express order was clothed with that authority. The brothers were naturally thunderstruck by the accusation. They were confident of their innocence. Indeed, they said the thief, the one with whom the cup was found, should die and the others would become slaves. The Egyptian officer did not insist on a death penalty for the thief. He agreed to let all except the thief go on their way, but the thief would be held in custody as a slave. And so it was. The brothers immediately presented their baggage for inspection, and at length Benjamin was found in possession of the cup. The story had a happy ending of course when Joseph, who knew what he was doing all along, finally revealed his true identity after Judah's impassioned plea for Benjamin's freedom.

For the present purpose however we have another permissive search. In both cases, Jacob's and Joseph's, leave to search private property was granted in order to reveal the identity of a thief. In Jacob's case the search was unsuccessful; in Joseph's, it was a ruse, a plot, but an extremely successful search notwithstanding. The permissive search, presumably for the purpose of clearing oneself of suspicion, was a perfectly reasonable and practical procedure. Quite possibly the Egyptian officer could have required the brothers to open their packs had they been reluctant to do so. Or he could have brought them back in custody for Joseph himself to search them. But we do not know how matters would have gone if the brothers had been difficult. Permission to search precluded the invoking of authority and that was that.

Two other biblical passages tend to show that, under the proper circumstances, private premises were not so sacrosanct to the ancients as we might care to believe.

In *Numbers* 25:1-8 we find that the Israelites while on their journey to Canaan stayed for a while in Shittim and there engaged in idolatry with the local gods and harlotry with the local women. All this of course provoked divine displeasure of the direct sort. Moses ordered the judges of Israel to execute any man who had fallen into idolatry — and heathenish harlotry. One Israelite brought a Midianite woman to the camp, in the full view of Moses and all the congregation. When Phineas saw what was going on, he took a spear, entered the tent, and in the

chamber of the tent, found them and ran both of them through with one thrust of the spear.⁷

In the simplest terms, Moses, the chief magistrate, acting in his lawful capacity as chief magistrate, orders death for certain persons because of certain gross and wanton violations of the law. In order to carry out this order, Phineas, clearly acting in the spirit of Moses' command, if not perhaps on his direct authority, enters private property — a tent — undoubtedly without permission of the owner to do so, and executes summary justice upon persons known to be in violation of the law to which the death penalty had been annexed.

That this entry into private property involved much more than a search or a seizure is beside the point. The significant point here is that a person with every reason to believe he was acting in consonance with the law entered private property surely without the permission of its owner. The privacy of the property was not a barrier to the entry. Phineas, for his part, became revered as a heroic champion of the law and was not called to task for exceeding the bounds of lawful action. Indeed for his effort he received the divine covenant of peace and the covenant of perpetual priesthood for himself and his family (*Numbers* 26:10-13). This rather grim and gory passage in *Numbers*, set in a context of especially grave transgressions, perhaps affords no clear conclusion regarding authority to enter private premises. We can only say then that in a special circumstance such entry was countenanced. Another biblical passage is not so freighted with unusual circumstance.

In *I Samuel* 19:10-16 King Saul tried to kill David, but David fled to his house where his wife Michal was waiting for him. King Saul sent messengers to watch the house and to kill David when he appeared the next morning. The "messengers" were undoubtedly armed troops. The watching of the house is clearly understood as a surveillance. And the king's order, the lawful order of a magistrate at the least, was to arrest David and execute him. Michal helped David to escape the surveillance. Any officer who has worked on surveillance will be disappointed, but not surprised, if occasionally the primary suspect (in this case

7 See *Sanhedrin* 82a for the rabbinic anecdotal context of these events.

David) slips through the net. It happens.

At any rate Michal set up a dummy in the bed so that it would appear from a distance at least that someone was sleeping in it. Doubtless she expected the royal officers to enter and to search for her husband the fugitive. When the arresting party came to the door, she said David was sick. At that point presumably the officers were not quite sure of the next step, though the text does not say so, and sought clarification of orders from the King. The King sent the officers "to see" David — clearly they could enter the house on the strength of the royal command — and further the officers were to bring David for execution even if they had to bring him on a stretcher. The officers entered the apartments of the royal princess Michal, wife of the fugitive David, and found that David was gone and a mock up dummy had been placed in his bed.

There is no doubt here: a royal command can and does include the authority to enter private premises, with or without permission of the owner and to execute their charge — in this case, a death penalty. There is lawful warrant — and the warrant is carried out. Even if the personages of scripture believed the home a place of refuge and shelter, it was by no means proof from a lawful authorization to enter therein.

To an extent the story of Phineas demonstrates the presence of some assumed authority to enter and take action in harmony with the law and the story of King Saul, Michal, and David certainly discloses a royal power to enter and arrest.⁸

The matter of entry, search and seizure does not appear in the legal portions of the Hebrew Bible. The provision of *Deuteronomy* 24:10 that a lender is not to enter the premises of a creditor to take possession of a pledge on the loan is not related to search and seizure.⁹ It is part of the law of loans and security. The rule

8 It is curious that in three of the instances in which some type of entry, search, or seizure was effected, women foiled the plans of men. Rachel, Rahab, and Michal were simply too clever. The occasions in the Hebrew Bible in which women outwit men also include some of the adventures of Rebecca and of course Esther. The cleverness of women in the Hebrew Bible and their penchant for setting male schemes at naught raises a subject no less interesting and timely than search and entry. But this is another subject for another time.

9 Lasson however does mention *Deut.* 24:10 to suggest the degree of sanctity

tends to show that the debtor was to retain his dignity even though he had had to pawn his household goods. A creditor could not simply barge about in the debtor's house looking for the pledged property. There is, however, no element of search and seizure. The property is lawfully transferred to the possession of the creditor and there is no doubt on that point.

The debtor has pledged the item and has to bring it out to the creditor. The creditor is simply precluded from embarrassing the debtor, and the debtor's family. The matter of search and seizure contemplates a situation involving something identifiable as criminal activity, or what today is identified as criminal activity, and this is just not present in *Deuteronomy* 24:10. Scripture does not address the problem of a recalcitrant debtor; presumably there could be suits and counter suits. But we are not clearly instructed by Scripture on the point.

Biblical law really tells nothing on the matter; and the rabbis do not amplify any of the biblical narratives presented here in terms of search and seizure, or arrest. But they are not entirely silent on the matter of entry and seizure of goods. (The thornier matter of entry for the purpose of effecting arrest will receive some very brief comments in due course.)

One rabbi provided the basic text that opened the door for discussion of entry and seizure in both the Talmud and the post talmudic rabbinic legal literature. A *baraita* on B. *Baba Kamma* 27b reads:

Ben Bag Bag says 'Do not enter the courtyard of your fellow to take what is yours without permission lest you appear to him as a thief; rather, break his teeth and say to him "I am taking my own".'

This text is clearly related to the *Tosefta*, *Baba Kamma* 10:16:¹⁰

Ben Bag Bag says "A man shall not steal his own from the house of other lest he appear as a thief"; in the same vein Ben Bag Bag used to say "A man shall not steal his own from the house of the thief lest even he appear as a thief; rather he (should) break his teeth and rescue his cloak."

The *Sifra Kedoshim*, *Parshata* 2:2, includes the text:

Ben Bag Bag says: "You will not steal your own from a thief (so) that you not appear a thief."

accorded the home in Biblical law: Lasson, *supra* n.3, at 14.

10 In the Zuckerman edition, 10:37, 38.

This same formulation appears in the Palestinian Talmud, *Sanhedrin* 8:3.

The basic point in all the texts is simply that a person is not to take his own property from a thief, or any other person who has come into possession of it improperly or unlawfully, by surreptitious means, so that the lawful owner not appear as a thief through the act of retrieving his property. Both the *baraita* and the Tosefta recommend that the lawful owner confront the person in possession — the thief, the receiver of stolen property, the depositee (as we shall see) or whoever has it unlawfully, and, presumably if no lesser measures suffice, use violence, “break his teeth”, and declare that he is indeed taking his own property back.

The translation “without permission” renders the Hebrew phrase *shelo birshut*. The phrase can also mean “without authority” which of course comes to the same thing as permission in this context. The permission or authority in question is the permission or authority of the owner of the premises. Whether or not the court could undertake to authorize an entry does not figure in this discussion at all. The role of the court to do so will be discussed later. Clearly, in the Bible, lawful authority, that is, the king, appears to have enjoyed and exercised it.

The *baraita* explicitly states that no entry be made without permission (or authority) but the application of violence does not of course mean that permission has been granted. It may even suggest that permission to enter has been denied. Therefore it appears that the purpose of the violence is to ensure that no one can say the entry was secret or clandestine, a mere burglary, as well as to ensure the entry itself and the eventual retrieval of the property.

In the Tosefta the absence of permission is implied. There is to be no entry into anyone’s premises lest one appear as a thief. But one can use force for the entry and retrieval. The entry must thus be confrontational so that force — if necessary — can be applied. Any other sort of entry would amount to a secret matter, obviously without permission.

One might suppose that the matter of permission, its nature or form, becomes a significant element in the later analyses of this text. The absence of permission is, however, the constant and

significant element in all the later commentary. Disagreements, or at least contrary interpretations, arise on the basis of another factor in the matter — the danger of loss — to which commentators draw attention but which is not explicitly part of the text.

The *baraita* requires the lawful owner to declare that he is taking his own property back; the Tosefta does not.

The more important text for the present purpose is the *baraita*. It appears in the Gemara in a context of self-help. A person who is faced with an immediate and irreparable loss may take the law into his own hands, exercise force — even rather extreme force if necessary — to prevent the loss to himself. Where such loss is immediate and irreparable, there is agreement, principally between R. Judah and R. Naḥman who debate the matter, that a person may take the law into his own hands, with force if necessary. Where R. Judah and R. Naḥman part company is the case in which the loss is not irreparable and immediate. R. Judah would require the injured party to take the matter to court since the loss is not irreparable. R. Naḥman argues that the person may act in his own interests, and need not go to court, since after all he is permitted by law to act in his own behalf without the burden of bringing suit and litigating it. R. Naḥman's view prevails.

The Gemara introduces the *baraita* immediately following this debate between R. Judah and R. Naḥman.¹¹ The *baraita* is put as a possible challenge to R. Judah. After all it shows that one may act in his own self-interest. The objection is turned aside by the suggestion that Ben Bag Bag was a single authority but the majority (presumably) differed with him. The *baraita* indicates a single opinion; and the Gemara asserts that the majority did not accept that opinion. One medieval authority whose comment is presently cited reasons that matters are not quite so cut and dried.

There is a further comment on the *baraita* in the name of R. Yannai. He makes the point that the expression “break his teeth” may conceivably mean that the lawful owner of the property is to take the unlawful possessor of it to court — and break his teeth with proper legal proceedings. This objection is not

11 *Bava Kamma* 27b.

pursued because the language of the *baraita* presents an insuperable difficulty to such an interpretation, according to the Gemara.

Rabbi Solomon b. Adret, *Rashba*, 13th century, comments upon the assertion that Ben Bag Bag represents only an individual view that is contested by the rabbis.¹² He states that it is impossible to hold that the Rabbis clearly oppose him. If they did so, how then could Ravina (sic., R. Yannai in our text) propose that “breaking teeth” referred to taking the matter to court? If the rabbis had indeed disagreed with Ben Bag Bag, the suggestion that his statement about “breaking teeth” meant going to court is impossible to advance because what ground would the rabbis then have for disagreement? *Rashba* simply suggests that the rabbis could not have differed with Ben Bag Bag on the ground that he would have the victim go to court; there is no reason to reject such a sound, conservative procedure. *Rashba* seems to understand the *baraita* like this: One may not enter private premises without permission, like a thief, rather he should “break teeth” and take what is his, and the breaking of teeth can legitimately indicate the perfectly proper pursuit of a legal claim in court, a procedure to which the rabbis could not take exception. The further implication emerges that Ben Bag Bag was not necessarily proposing an individual view because the rabbis would not oppose legal process. On this reading Ben Bag Bag may well represent a legitimate majority opinion. *Rashba* does not appear concerned about the objection to R. Yannai’s point on the basis of the *baraita*’s language; he does not mention it.

Rashba does not, however, explore the fundamental question of how the presence or absence of immediate, irreparable loss to the victim affects the understanding of the *baraita*. Other commentators do discuss this matter at length, and the full sense of breaking teeth will wait upon the consideration of what those authorities have to say.

In any case, R. Nahman’s argument in favour of self-help, even when such an act involves violence, prevails in the *halakhah* and that is the sense in which later commentators understand it.

12 *Commentary of R. Solomon b. Adret to Baba Kamma*, ed. Prague, 1809, p.63a. The comment is cited almost verbatim in Bezalel Ashkenazi, *Shittah Mikubbetset*, ed. Venice, 1762, 57a. This collection, also known as *Asefat Ze’anim*, does not cite *Rashba* by name.

In the Gemara, R. Judah allows self-help only when the loss or damage is irreparable and immediate. This view suggests that self-help is appropriate when there is an element of hot pursuit, when the victim is on the spot and takes immediate and forceful measures to stave off harm. But that is not the only possible view of the matter. Thus later generations need not understand self-help as it appears in the talmudic debate as necessarily involving a hot pursuit or some immediate constraint to action lest all be lost. R. Naḥman says the victim may help himself and save the time and trouble of a lawsuit even where the wait would have caused no harm.

Thus we are left with a rather broad doctrine of self-help in talmudic jurisprudence. Ben Bag Bag tells us that a person may enter private premises to retrieve his own property and use force in the act if need be as long as he does not appear a thief. He is to confront his adversary. Clearly, as has been noted, his forceful entry implies no permission to do so, unless we assume that he has beaten the adversary until he has acquiesced in the entry, and that is hardly "permission", it is surrender.¹³

Ben Bag Bag's dictum does not appear as a rule in the *Mishneh Torah* of Maimonides, nor in the *Arba'ah Turim* of Jacob b. Asher, nor in the *Shulḥan Arukh* of Joseph Karo as glossed by Moses Isserles. It does, however, appear in the geonic restatement *Halakhot Gedolot* of Simon of Keyyara¹⁴ and in the *Sefer Mitzvot Hagadol* of Moses of Coucy.¹⁵ Talmudic commentators examine the text as well and we shall see it receives a degree of amplification and discussion which tends to show that it was indeed part of the corpus of law for many authorities of earlier periods, its absence in major restatements notwithstanding.

13 Rabbinic law does accept a coerced statement of volition in certain instances, for example, compelling a reluctant husband to authorize the preparation of a divorce document for the wife, (see *M. Arakhin* 5:6; *M. Ketubot* 7:10); or indeed a community may compel its members to share the burdens of certain public projects, *M. Baba Batra* 1:5. These sorts of coercion are however not between individuals. The court or the community exercises the coercion. By and large an individual may not lawfully compel or coerce another individual's consent or acquiescence to his own hurt.

14 Simon of Keyyara, *Halakhot Gedolot*, ed. Venice, 1548 Baba Kamma, 87b.

15 Moses of Coucy, *Sefer Mitzvot Hagadol*, ed. Venice 1522, negative commandments, no. 155.

The character of search and seizure envisioned by the fourth amendment seems to be remote as the farthest galaxy from the self-help entry and seizure of talmudic jurisprudence. Yet we would be remiss to let the matter go at that. Different legal systems functioning in different ages and societies, and proceeding from different assumptions, will often develop different means to achieve the same sort of ends. The methods of the systems are different; but that is not to say that the purposes behind the methods are also very different. Thus what is achieved under a lawful search (or arrest) warrant under United States law may not be so very far from what is achieved in talmudic law through self-help.

The concept of self-help may suggest a time and place in which the legal system does not, or does not yet, assert jurisdiction over private quarrels.¹⁶ The system may step in only after private individuals have taken some action or actions on their own behalf to redress some wrong or make some point. Or it may treat many matters which are today perceived as public or criminal offences as fundamentally involving only the parties in the matter, and thus private quarrels, noticed by the court upon the application of one or the other of the parties. But Jewish law perceives itself as having had jurisdiction over all causes among Jewish people since time immemorial.¹⁷ The classic rabbinic conception of the Jewish legal system includes the notion that ever since the law, both written and oral, was transmitted to the Jewish people at Mt. Sinai, courts of justice have existed and administered the whole of the law. The historical accuracy of such a notion is not in point; it is part and parcel of the rabbinic jurisprudential theory that undergirds the millennial operation of Jewish law from its beginnings to the present. Thus a notion such as self-help receives its sanction from the law itself and does not reflect a stage in

16 The ancient period of Roman law is often characterized in this manner.

17 The perception of Moses the lawgiver includes a fully functioning system of courts with Moses acting as the appellate judge when necessary. While history and anthropology may amply prove that the legal system of Moses's era differs markedly from rabbinic courts, either ancient, medieval, or modern, the point is one of philosophy and jurisprudence as viewed within the system itself. Thus there have "always" been courts of competent jurisdiction for all causes among Jews.

which persons acted first and went to court if they had to. As self-help has been sanctioned by the law, and the court system, for the resolution of certain problems, so too it *was* controlled and superintended by the system.

Moreover, we must be aware that Jewish law does not use the categories of civil law and criminal law as they are found in other legal systems both ancient and modern. Certainly some offences and wrongs recognized in Jewish law involve only pecuniary damage and to that extent may be seen to resemble "civil law". Yet in a larger and broader sense, any offence may be viewed not only as an offence against persons, or as involving only pecuniary claims, but as an offence against deity, the perceived source of the Jewish law and the ultimate sovereign of the Jewish people. Thus the offence assumes a criminal aspect as an offence against the sovereign. Further, the Jewish people have time and again asserted that what one Jew does affects all Jews. The sins or misdeeds of one embarrass or endanger the well-being of all, so any Jew whose acts detracted from the special propriety, modesty, and indeed holiness with which all Jews were required by law to conduct themselves had committed an offence against all other Jews. To this extent also any offence may assume a "criminal" aspect.

The best view, perhaps, of the problem of definition and classification of Jewish law in terms of "civil" and "criminal" law may well be that such terms are foreign to Jewish law and really do not offer a reliable classification system for it. The "civil" too often savours of the "criminal" and vice versa. Such terminology if not used with great care may obscure rather than enlighten.

With this caveat in mind, it is suggested that self-help in Jewish law plays a role in what we may arguably characterize as "criminal" law so that just as search and seizure rules are part of criminal jurisprudence today, so too did self-help in the Jewish system function in the same general field of law. The debate on self-help itself was prompted by an inquiry addressed to R. Naḥman concerning certain fixed penalties — fines — for specific batteries. Only the judges of the Land of Israel had jurisdiction to impose such "criminal" penalties. Clearly the *baraita*, the principal text in question, comes in the context of self-help against robbery and allows retrieval of the property if the victim

himself takes pains to avoid acting like a thief. Indeed the most obvious modes in which the property of one person comes into the unlawful possession of another are theft, robbery, receiving stolen property, and embezzlement — all conceived today as criminal causes — and certainly offences against deity in Jewish law.

There is however one major distinction to be made between the modern search warrant and the retrieval of property through self-help under Jewish law; and we must not lose sight of it. The modern warrant is used for the purpose of gathering evidence (or taking persons into custody or both) for a criminal prosecution. It is therefore a preliminary stage in a much longer process. The retrieval of property through self-help puts the lawful owner back into possession of his goods, but there is no mention in any of the sources of further proceedings against the thief, receiver of stolen goods, embezzler, or whoever had the goods unlawfully. Self-help in the Talmud is by its nature direct action and redress without the necessity for intermediate stages of legal process. The specific case has presumably been resolved, the victim has been vindicated on the spot, and the need for a lawsuit to regain the property has been circumvented. But the matter does not necessarily have to end there. The retrieved property was clearly evidence of some sort of wrongdoing against the unlawful possessor. Once the victim got his goods back, the way was still open for imposition of sanctions upon the criminal by the community. Jewish communities could and did punish malefactors or make examples of them or call public attention to their deeds. Public opprobrium was no light matter in small and highly disciplined Jewish communities of the medieval period. Although the manifest difference between a modern warrant and self-help against the unlawful possessor is important, the point here is that each procedure in its own way appears to gain the same general purpose: seizure of the goods — on the one hand as evidence in a proceeding; and on the other hand, as satisfaction for the victim, and just perhaps as evidence.

At any rate, Jewish law does have a procedure — self-help — which permits entry into private premises in order to seize property unlawfully possessed, and the medieval authorities amplified the ancient dictum and described its applicability in detail.

The *Toṣafot* remark on the *baraita*'s recommendation of breaking the unlawful possessor's teeth:¹⁸

(the breaking of the teeth) applies because there is no (irreparable, immediate) loss involved since it is prohibited to enter without permission.

The comment obviously presumes the context of self-help and understands the text as applying to a situation in which the lawful owner of the property does not face an immediate, irreparable loss. Probably implicit in the comment is the notion that breaking teeth refers to taking the matter to court, an idea introduced in the Gemara by R. Yannai, but immediately rejected there as too difficult to support on the basis of the wording of the *baraita*. The alternative understanding of the text — that breaking teeth means actual physical violence — makes the idea of permission nonsensical. If there is no immediate loss in prospect and the lawful owner could still exercise violence to regain his goods, what need is there for permission — he can go in whether or not the loss is immediate.¹⁹

The comment also suggests a limitation on the view of R. Naḥman, who permitted exercise of self-help even if no loss were to be sustained by the delay necessary to bring the matter to court. The *Toṣafot* appear to prefer the view of R. Judah, who required legal process to resolve the problem when no loss would be incurred thereby.

Thus the comment then contemplates the circumstance in which there is no permission to enter and there is no impending

18 *Toṣafot Baba Kamma* 27b, s.v. 'ela'.

19 One authority who apparently takes precisely this line of reasoning is Joseph b. Moses Di Trani. In his responsum no. 132, ed. Lemberg, 1861, he says that a person may exercise the option of self-help even when there is no impending loss, and this is according to the *baraita* of Ben Bag Bag: "... break his teeth and say to him 'I am taking my own'." Where there is danger of impending loss, the owner can enter to retrieve his property even without permission. The *baraita* is then cited along with the *Toṣafot* ... There is no loss (to be suffered by waiting a while); if however there is danger of immediate loss, the victim enters — clearly even without permission. When there is no danger, the rule of self-help allows entry. When there is such danger, he may enter. Permission to enter becomes quite irrelevant. Presumably as long as there is no clandestine entry, the victim is acting properly. If there is danger, since no permission is required, one supposes that even a clandestine entry could be permissible.

loss. The lawful owner must presumably seek his redress in court.

The obvious question is what would happen if there were an immediate and irreparable loss in prospect? Are we to gather that the absence of permission to enter becomes irrelevant; or should private property be proof against entry by the lawful owner? Or the matter can be put this way: does the exercise of self-help really require some sort of permission in this matter? Permission and self-help seem to be mutually exclusive.

Any modern peace officer who has ever been involved with an application for a search warrant knows very well that speed in the process is essential to a successful recovery of evidence or contraband. Stolen property and illegal goods tend to disappear quickly into the hands of third parties. There is no reason to assume that the ancient or medieval thief retained the goods longer than his modern colleagues. Doubtless thieves have always attempted to move their merchandise swiftly. Therefore the probability of an impending and irreparable loss obtains in the vast majority of cases to which this *baraita* would be relevant.

The authorities comment specifically on the matter of immediate and irreparable loss as a factor in understanding the *Toṣafot*. This subject is introduced as a major desideratum in most of the commentary. We examine it in detail first. Two other significant matters are suggested in some of the commentary, and they will be considered after we have taken due notice of the role of immediate and irreparable loss in the area of entry and seizure.

The *Hagahot Asheri* restates both the *baraita* and the *Toṣafot* and then adds the following clause:²⁰

But if there is an (immediate, irreparable) loss (in prospect, the lawful owner) enters (the premises) without permission ...

The *Toṣafot* and the additional clause are cited as the explanation of R. Isaac of Dampierre.

R. Solomon Luria, in his *Yam Shel Shelomo*, remarks that "... if there is danger of loss, the lawful owner enters even without permission."²¹

20 *Hagahot Asheri*, Israel of Krems, 14th century, to *Rosh*, *Baba Kamma*, ch. 3, no. 3.

21 Solomon Luria, 16th century, *Yam Shel Shelomo*, ed. Prague, 1616, p. 29a.

Both *Hagahot Asheri* and Luria's *Yam Shel Shelomo* refer to the same sources and indeed the two texts are roughly parallel. Both authorities cite the one responsum that has some relevance to the matter at hand. Luria's text is the more detailed of the two.

After declaring that if there is a danger of loss the lawful owner does not require permission to enter and retrieve his goods, Luria quotes a responsum concerning a case that occurred in Cologne. (The *Mordecai*²² which cites the responsum also gives the location of the events as Cologne, but *Hagahot Asheri* places the matter in Egypt!) It seems that one Jew deposited goods with another Jew. After some days, the depositee denied the deposit (either the depositor's ownership of the goods or the deposit itself — the nature of the denial is not related). The depositor went to the gentile court for help. He received that assistance and broke into the depositee's house. He retrieved his property. The gentiles brought accusations against the depositee; the Hebrew suggests that the accusations were false. (If they had anything to do with unlawfully holding that particular deposit they were not false!) At any rate the gentiles did bring their accusations which caused the depositee a good deal of loss. The depositee then sued the depositor for damages because the depositor was clearly the ultimate cause of his difficulties, and doubtless a suit against the gentile authorities would have been a total waste of time and effort.

The court ruled in the case that if there had been no other possible means for the owner to retrieve his goods, he bears no culpability in respect to the difficulties of the depositee. He would, however, be culpable if there had been some other course of action open to him and he did not pursue it. Luria offers the opinion that both R. Meir ben Barukh (of Rothenburg) and R. Asher b. Yehiel would have agreed with this judgment.

Meir of Rothenburg, cited in *Mordecai* to *Baba Kamma*,²³ asserted a most pertinent caution in the matter of self-help. He ruled that, although the law follows R. Naḥman, that a man may exercise self-help, the rule applies only where the goods in

22 *Mordecai* b. Hillel, 13th century, *Baba Kamma*, ch. 3, no. 37.

23 *Ibid.*, no. 29.

question are clearly his property, and some other party possesses them and refuses to return them. Where, however, the lawful ownership of the goods is not absolutely proveable, no permission for self-help exists, even if the claimant would suffer a loss if he did not seize the property. If such a permission to exercise self-help obtained even where the ownership was in doubt, society would be in constant turmoil because robbery would masquerade as self-help. No one could fault Meir of Rothenburg on this logic. Luria paraphrases R. Meir's opinion by writing that self-help is permitted only when the owner could establish in the Jewish court that he was lawfully entitled to the property. In the case at hand, however, the depositor was not able to mount such a good case; either he had no witness to the deposit or the depositor claimed he had returned the property. In any event, claims Luria, since the depositor knows the truth of the matter — his goods are unlawfully in the depositee's possession — he becomes analogous to the person in imminent danger of losing his property. He is certainly taking his own back. In this situation, the depositor may exercise self-help to retrieve his property — according to all authorities. Even Meir of Rothenburg — who was so concerned that self-help not become a pretext for robbery — would presumably concede that the lawful owner acted properly.

Luria writes that R. Asher b. Yehiel would also have agreed with the decision in the case.²⁴ R. Asher, the *Rosh*, restated R. Naḥman's opinion. R. Naḥman held, as *Rosh* explains, that since the owner of the property does after all act lawfully in retrieving his property and he is able to demonstrate clearly that he had a good legal case against the unlawful possessor, he has the authority of the law behind the rescue of his property — even by force — if no other means of reclaiming his goods was available to him. If, however, the owner was not able to present a clear and convincing case that the law was on his side, the court is not to accept his statement that he was exercising self-help in order to regain his goods. *Rosh* then adds that self-help is only available when a robber confronts the owner or when the owner sees his property in someone else's possession. Presumably the possibility of misidentification is not present: the owner sees *his*

24 *Yam Shel Shelomo, ibid.*