

## ***Beyond the Written Word: Some Aspects of Originality in the Responsa of R. Simeon Duran***

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### **I. Introduction**

Rabbi Simeon ben Tzemah Duran (1361–1444) grew up on the island of Majorca, then under the sovereignty of Aragon. He was born into an aristocratic family, connected through his paternal grandmother to Gersonides.<sup>1</sup> He married into another aristocratic family. His father-in-law, R. Jonah de Maistre, a recognized scholar, was a direct descendant of Nahmanides. R. Jonah lived in Teruel, in Aragon, and Duran lived there for a certain amount of time and studied with him, before moving back to Majorca. Duran's education was wide indeed. In addition to his mastery of rabbinic studies, he mastered philosophy, mathematics and astronomy in his early years in Majorca.<sup>2</sup>

In the wake of the anti-Jewish riots and forced conversions of 1391, Duran, at the age of thirty, fled to Algiers, along with many other coreligionists in Majorca. The coastal cities of Algeria became populated by refugees from Aragon, among them a number of rabbis. The most important of these was Rabbi Isaac bar Sheshet Perfet, known by his acronym, Rivash (1326–1408). Rivash was a prime student of R. Nissim

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<sup>1</sup> Duran's great grandfather was both a first cousin of Gersonides and his brother-in-law.

<sup>2</sup> On Duran see I. Epstein, *The Responsa of Rabbi Simon B. Zemah Duran as a Source of the History of the Jews of North Africa* (Ktav: New York, n.d., first published in 1930); *Sefer ha-Tashbetz*, Mekhon Yerushalayim edition, v. 1 (1998), Introduction, Rabbi Yoel Katan (in Hebrew). Regarding Duran's philosophical writings, see the recent dissertation of Seth Kadish, published in PDF format: <<https://sites.google.com/site/kadish67/avraham-avinu>>.

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Gerondi (c.1290–1376), the most important halakhic authority in Catalonia, and in Aragon in general. Rivash served as rabbi in Saragossa, and then in Valencia. It was in Valencia that he was caught up in the cataclysmic events of 1391. About two years later, Rivash showed up in Algiers, and was recognized as the leading rabbinic authority there. Rivash ultimately became the chief rabbi of Algiers.<sup>3</sup>

The relations between Rivash and Duran were complex. They were completely different personalities. Whereas Duran had wide knowledge of philosophy and science, Rivash was a master solely of rabbinic studies.<sup>4</sup> Duran, who was thirty-five years younger than Rivash, was assertive and self-assured, whereas Rivash was a gentleman. Duran took issue with Rivash's rulings on a number of instances. In a later period, after the death of Rivash, he apologized for the disrespect he exhibited toward Rivash on one occasion, and attributed it to the brashness of youth.<sup>5</sup> But in many other ways Duran respected Rivash.<sup>6</sup> Rivash, for his part, respected the learning of Duran, even while disagreeing with him. He consulted Duran orally on occasion, and sometimes changed his mind as a result. Rivash appointed Duran to become a member of his rabbinic court. At the end of his life, Rivash indicated that Duran should succeed him. The position of chief rabbi of Algiers was subsequently passed down from Duran to his descendants for a number of generations.

There are a number of significant legal cases that both Rivash and Duran dealt with, and that each recorded in his respective responsa. In these cases, the responsa were edited by the authors themselves for publication. This allows for the ability to see Duran through the perspective of an alternative approach. I have also included some instances in which elements of Duran's methodology, as described in this study, are reflected in Rivash's responsa as well.

Duran named his collection of responsa *Tashbetz*, an acronym of "Teshuvot (Responsa) of Simeon Ben Tzemah." Duran's original *Tashbetz* consisted of three volumes. Subsequently, Duran's descendants added their own work to it as a fourth volume. The *Tashbetz* did not appear in print until the mid-18th century. In this study I used the new edition of

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<sup>3</sup> On Rivash see A. M. Hershman, *Rabbi Isaac ben Sheshet Perjet and his Times* (New York, 1943).

<sup>4</sup> He was, however, familiar with philosophy, at least on a popular level. See Hershman, p. 89.

<sup>5</sup> *Tashbetz*, 1:58, opening lines, at the end of his presentation of the case.

<sup>6</sup> See Epstein, pp. 18–26.

the *Tashbetz* by Mekhon Yerushalayim (1998–2013), which utilizes manuscripts and supplies notes.<sup>7</sup> References to specific pages, notes and paragraphs refer to this edition. The Mekhon Yerushalayim edition also added a fifth volume, which included manuscript material of earlier, unedited versions of some of the responsa, some responsa of Duran that were not included by him in the *Tashbetz*, and responsa by his contemporaries that had never been published.

The translations are my own unless otherwise indicated. My additions to the Hebrew wording, designed to make the passage clearer for the English reader, are indicated by brackets.

Phrases in bold type indicate my emphasis.

## II. Circumstantial Evidence

### [1] A Drowning at Sea (*Tashbetz* 1:73–84; Rivash 155, 181–183)

The following case is a good window into the originality of Duran's approach to legal decisions. An incident that took place in Algiers in the year 1406 or 1407<sup>8</sup> resulted in a ruling by Duran, which led to a controversy between him and other halakhic authorities, most significantly Rivash. A summary of the events is as follows:<sup>9</sup>

A ship from Bejaia, a town on the Algerian coast about 150 miles east of Algiers, was on its way to Algiers. Two Jews were on board. As they approached the coast of Algiers, a Christian ship bent on piracy was spotted bearing down on them. The crew jumped into the sea and swam toward shore. The two Jews jumped in as well. One of them quickly realized that he was not a strong enough swimmer to reach the shore, and returned to the ship. Miraculously, a sudden wave pushed it away from the attackers and toward the shore as the pirating ship approached, and he escaped. He later testified that after he returned to the ship he saw the other Jew floundering, in a way that indicated that he didn't know how to swim, but then lost sight of him. When he arrived ashore, he immediately climbed to a view that overlooked the sea, and noticed a body floating head down in the water.

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<sup>7</sup> The original three *Tashbetz* volumes were prepared by Rabbi Yoel Katan. His notes are superb, as is his lengthy and comprehensive introduction to the man and his work.

<sup>8</sup> Hershman, p. 225.

<sup>9</sup> All the testimony regarding the events presented below are from *Tashbetz* 1:74.

In addition to the testimony of the Jew who escaped, there was a good deal of technically inadmissible evidence suggesting that the other Jew had indeed drowned at sea. In order to appreciate the weight of this evidence, I will summarize it.

1. On the day of the event, some of the crew members entered the city gates. It was a Sabbath, and a number of Jews were leisurely standing around there. The crew members mentioned the missing Jew to them by name, and indicated that he drowned while trying to swim ashore.
2. It subsequently became known that there indeed were only two Jews on the ship.
3. The attackers subsequently docked at a Christian port, and related how they almost looted a Muslim ship, but everyone escaped, except one Jew who drowned.
4. A Muslim, who had been a prisoner on the Christian ship during the event, later escaped, and reported to Jews that the Christians on the ship were unsuccessful in taking any captives from the Muslim ship, either Muslim or Jew. This would rule out the possibility that the missing Jew was alive as a captive.
5. Another piece of evidence supported this conclusion. Subsequent to the escape of the ship from the Christian pirates, the latter encountered another Muslim ship, also on its way from Bejaia to Algiers. This ship they successfully looted. All aboard were taken captive, including a number of Jews. They subsequently docked at Majorca. Jews who had been in Majorca at the time testified in Algiers that they questioned the Jewish captives, and they knew nothing of a Jewish captive from an earlier attack.

Legal certification of the death of a missing person is a central issue in halakhic discourse. The classic context of this discourse is the situation of *'iggun*, the case of a woman whose husband is missing and believed to be dead. Such a woman may not remarry until her husband's death is certified by a rabbinic court. As we shall see, our case is unusual, because nowhere in the entire extended discussion between Duran and his challengers is there any mention of *'iggun*. It appears that there was no wife. The question before us has to do with a different issue entirely, as we shall see shortly. Nevertheless, the legal categories developed for the issue of *'iggun* lie in the background, and it is necessary for our purposes to understand the basics of the rabbinic approach to certifying a missing husband's death.

The attitude governing these rules is complex. Fundamentally, the standards of proof for the identification of a corpse, for the purpose of enabling his wife's remarriage, are very high. After all, if a mistake is made, and the husband who is presumed dead shows up after the woman has remarried, she would be guilty of "adultery," and the rabbinic court that gave her permission to remarry would be complicit. One example of these standards is that the major features of the face must be visible for an identification. Another example is the one before us. It is known as "falling into water without an end," that is, a body of water whose boundaries are not visible in their entirety. The Talmud refuses to recognize such a person as dead, because of the exaggerated fear that the victim might have emerged from the water in a spot that was not visible to the observer. Certainly, any circumstantial evidence would be unacceptable. Nevertheless, in spite of this extreme fear of even improbable error, there is a contradictory tendency toward leniency, out of concern for the wife in a situation in which the death is presumed but not legally proven. The Talmud expresses the sentiment that everything possible should be done to interpret the law such as to enable the wife's remarriage. The specific examples cited by the Talmud involve a relaxation of the rules of evidence. An important example of this is the acceptance of the testimony of only a single witness, instead of the normally required two. Even the incidental report of a non-Jew, "speaking in innocence" (i.e., in casual conversation and not as an official witness in court), is accepted.

The case before us has to do with the issue of inheritance. The man who did not make it to the shore at Algiers had, before he embarked at Bejaia, entrusted his assets to someone during his absence. This trustee now faced the question whether he should release these apparently considerable assets to the man's heir in Algiers. Duran supported the legal certification of the missing man's death. Everyone else on record opposed it.

It is possible to reconstruct the chronology of this extended correspondence, and it would be helpful to do so to get a sense of the extent of the opposition to Duran's ruling.

1. The hearing of evidence by a rabbinic court in Algiers. It appears that this was the court presided over by Duran.<sup>10</sup>
2. Objections from other rabbinic authorities, compelling Duran to respond.<sup>11</sup>

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<sup>10</sup> *Tashbetz*, 1:73, end of opening paragraph.

<sup>11</sup> *Tashbetz*, 1:73, opening paragraph.

3. Duran's detailed justification of his ruling.<sup>12</sup>
4. A critique of Duran's justification by R. Moshe Gabbai, the rabbi of Hunein,<sup>13</sup> and the brother of Duran's mother-in-law.<sup>14</sup>
5. Duran's response, rejecting R. Moshe Gabbai's critique (4 above).<sup>15</sup>
6. R. Moshe Gabbai's response, rejecting Duran's response to him (5 above).<sup>16</sup>
7. Duran's second response to R. Moshe Gabbai.<sup>17</sup>
8. R. Shem Tov ha-Levi of Hunein's critique of Duran's decision, which he sent to Rivash for his opinion.<sup>18</sup>
9. Rivash's response to R. Shem Tov ha-Levi, in which he agrees with the latter's criticism and adds some of his own.<sup>19</sup>
10. R. Moshe Gabbai's solicitation of Rivash's reaction to Duran's rejection of his (Gabbai's) argument against Duran's decision (5 and 7 above).<sup>20</sup>
11. Rivash's response to R. Moshe Gabbai, supporting his argument against Duran.<sup>21</sup>

This apparently universal opposition to the certification of the victim's death,<sup>22</sup> in the face of what would seem to a layman to be overwhelming evidence in favor of it, in fact bespeaks the traditionally accepted legal approach to the issue. That approach draws on the only body of settled law that deals with this issue, that is, the laws governing *'iggun*. Circumstantial evidence is not acceptable. The one witness to the floating body saw it with its head down, the face not visible, and that only from a considerable distance. The one area in which the law of *'iggun* would favor

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<sup>12</sup> *Tashbetz*, 1:73–82.

<sup>13</sup> *Tashbetz*, 1:83, Heading.

<sup>14</sup> *Tashbetz*, 1:152, third paragraph from the beginning. For a bit more about R. Moshe Gabbai, see Hershman, p. 176.

<sup>15</sup> *Tashbetz*, 1:83.

<sup>16</sup> *Tashbetz*, 1:84, Heading.

<sup>17</sup> *Tashbetz*, 1:84.

<sup>18</sup> Heading and opening sentence of Rivash 155.

<sup>19</sup> Heading and opening sentence of Rivash 155.

<sup>20</sup> Rivash 181, heading and opening sentence. R. Moshe ben Gabbai's query to Rivash, summarizing Duran's argument but without his own rebuttal, was published from manuscript in the Mekhon Yerushalayim edition of the *Tashbetz*, 5:45.

<sup>21</sup> Rivash 181–183.

<sup>22</sup> In addition to the above, see also the responsum of Yeshe'a ha-Levi Provencal, published from manuscript in the Mekhon Yerushalayim edition of the *Tashbetz*, 5:199.

the certification of death is the acceptance of testimony from a single witness. But this is a case of inheritance, not of a wife's remarriage. Maimonides writes:

Heirs do not inherit until they bring clear proof that their bequeather has died. But if they [merely] heard that he had died, or if there were non-Jews speaking in innocence [indicating his death], even though they allow his wife to remarry on the basis of their word, and she can [even] collect her marriage settlement [from the estate], the heirs do not inherit on the basis of their word.<sup>23</sup>

"Clear proof" is not defined by Maimonides in this immediate paragraph. However, in the sequel he writes:

If one drowned in water that has no end, and **witnesses** came [and testified] that he drowned in their sight, and the memory of him was lost, even though his wife is not permitted to remarry *ab initio*, the heirs inherit on the basis of **their** testimony. So too, if **witnesses** came [and testified] that **they** saw him fall into a den of lions or tigers,... [he lists a few similar scenarios of strong circumstantial evidence]—in all these situations and others like them, and [if] subsequently the memory of him was lost, they [the heirs] inherit on the basis of **their** testimony, even though his wife is not permitted to marry. For I maintain that they [the Rabbis] were stringent in these cases only because of the prohibition of  *karet*  ["being cut off" from one's people, the biblical punishment for adultery]. But in matters of civil law, if **witnesses** testified to situations where there was a presumption of death, and **they** testified that they actually saw these things, and later the memory of him was lost, and it was heard that he died, they [the heirs] inherit on [the basis of] **their** testimony.<sup>24</sup>

The implication is that Maimonides' phrase "clear proof" means two witnesses.<sup>25</sup> An explicit requirement of two witnesses, precisely in the situation under discussion, is found in the early ge'onic work *Halakhot Gedolot* (ninth century): "If one fell into water without an end, on the basis of two witnesses, it is [considered] certain that he died with regard to civil matters [and] his heirs take possession of his property; [but] with regard to his wife, the Sages were strict [and he is not considered dead] until they [the witnesses] report the description of his forehead and his nose, and his other physical attributes."<sup>26</sup>

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<sup>23</sup> *Laws of Inheritance*, chap. 7, par. 1. See also par. 10.

<sup>24</sup> *Ibid.*, par. 3.

<sup>25</sup> See also *Ketubbot* 107a bottom, Rav Papa; *Yevamot* 117a top, Mishna, and Rashi ad loc.

<sup>26</sup> *Halakhot Gedolot, Yibbum ve-Halitza*

Duran's lengthy and detailed justification of his ruling was made necessary by the severe critique leveled against it by his peers, as he himself explains. It extends from *Tashbetz* 1:73 through 1:82, and continues through two subsequent responses to the objections of R. Moshe Gabbai, 1:83 and 1:84. It is a tour de force of out-of-the-box legal interpretation. Duran's rhetoric betrays his conviction that everyone knows that the man is dead.<sup>27</sup> He bases this conclusion on the overwhelming weight of the circumstantial evidence summarized above, along with the surviving Jew's testimony of his distant sighting of a corpse head down in the water, which itself is little better than circumstantial evidence for the purpose of identification. From Duran's perspective, this body of evidence, taken in totality, is compelling. The man's death is obvious to all. He sees the halakhic objections as technical obstacles, which have to be overcome in a technical way. That entails original interpretation of the relevant legal sources.

Circumstantial evidence in halakhic jurisprudence was the subject of a doctoral dissertation at the Hebrew University by Chaim Shlomo Heifetz.<sup>28</sup> The following discussion of circumstantial evidence prior to Duran draws heavily on Heifetz's study. Heifetz collected various references in the Talmud to the application of judicial discretion in determining the truth, including within that category the reliance on circumstantial evidence in civil cases.

In the Talmud these cases were each treated *ad hoc*, without any attempt to bring them together into a single conceptual category. It appears that the first to do so is Hai ben Sherira Ga'on (d. 1038), who speaks with reference to himself and his father:<sup>29</sup>

Our [i.e., my] opinion, and that of my father and teacher: It is known that in civil law one should always go according to the assessment [of the situation], and [one should] always look carefully into the actuality of the matter, ensuring that there be no trickery and evildoing. Rather [one should] go according to the truth of the matter, and bring the facts to light, and rule according to the truth.<sup>30</sup>

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<sup>27</sup> The most explicit example is *Tashbetz*, 1:77, p. 168, col. 2, cited below at the end of this article.

<sup>28</sup> Shelomo Hayyim Heifetz, *Re'ayot Nesibatiyot ba-Mishpat ha-Ivri* [Circumstantial Evidence in Jewish Law], diss. 1974. The following discussion of circumstantial evidence prior to Duran draws heavily on Heifetz's study.

<sup>29</sup> Heifetz, however, does not interpret Hai's statement as the expression of a general principle.

<sup>30</sup> *Tashbetz*, 1:80. *Ittur, matnat shekhiv mera'*, ed. Meir Yonah, 58 col. 4, 59 col. 1.



This general approach of arriving at the truth, *contra* restricting the ruling to the literal rules of evidence and procedure, is in evidence in a responsum of Alfasi, in the 11th century,<sup>31</sup> and by Rashba [R. Solomon ben-Adret], in the 13th.<sup>32</sup>

A far-reaching advance in the reliance on circumstantial evidence and its role in judicial discretion finds its expression in the responsa of Rabbenu Asher ben Yehiel (acronym: Rosh, c. 1250–1327).<sup>33</sup>

Rabbenu Asher saw the role of the judge as assuring the maintenance of justice, defined as what is moral, rather than what is technically legal.<sup>34</sup> He had no patience for legal loopholes that allowed for injustice in the face of convincing circumstantial evidence. If there were talmudic rulings to the contrary, he would reinterpret them in a way that allowed for what he believed was a just ruling.<sup>35</sup> What Rabbenu Asher did not do is propose a broad theoretical basis that would integrate his approach with the mainstream legal conventions of the Talmud. Where he does cite a talmudic rule in these cases, they have an *ad hoc* character to them.<sup>36</sup>

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<sup>31</sup> Cited by Heifetz 33-35 (= Harkavi, no. 456, p. 238, tr. into Hebrew, p. 322).

<sup>32</sup> Responsa, v. 1 no. 1146, and others. See Heifetz, 69–76. See also Maimonides, *Mishneh Torah, Laws of the Sanhedrin*, chap. 24, par. 1, which recognizes the broad judicial discretion of a judge to rule on the basis of his own understanding of the truth, and par. 2, which limits such discretion now that judges are “not properly learned and lacking in wisdom.” But Maimonides’ ruling does not seem to reflect actual court practice in this matter. Rashba does not cite him in this regard.

<sup>33</sup> Rabbenu Asher was born and educated in Germany. He migrated to Spain, and in 1305 he became the rabbi of Toledo. All of Rabbenu Asher’s responsa that are in our possession were written in Spain, but his learning derived from Germany. His conception of the role of judicial discretion had its roots in the approach of his teacher, R. Meir ben Barukh (Maharam Rottenberg). Heifetz, 134–135 on R. Meir ben Barukh; 88 on Rabbenu Asher.

<sup>34</sup> The discussion that follows is informed by Heifetz’s section on Rabbenu Asher, pp. 79–96.

<sup>35</sup> See Heifetz, p. 85, fn. 94.

<sup>36</sup> According to Heifetz, Rabbenu Asher based his approach on three talmudic principles. One of these is *hora’at sha’ab*, an *ad hoc* extralegal ruling. A second is *yedī’a be-lo’ re’iya*, “testimony derived from knowing without seeing,” see Shevu’ot 33b bottom, a phrase used only once, in reference to a very specific circumstance. The third is *din merummeh*, also of an *ad hoc* nature. *Din merummeh* is the conviction of a judge that the ruling that would be dictated by the evidence is false.

Duran, in his entire extended discussion, cites Rabbenu Asher only once in reference to circumstantial evidence, and then only briefly, almost as a passing reference.<sup>37</sup> Nevertheless, it would seem that in the present case Duran was influenced very much by Rabbenu Asher. He too relies heavily on the collective weight of circumstantial evidence. But unlike Rabbenu Asher, Duran, besieged by opposition, seeks to anchor his position in the bedrock of mainstream *halakha*. This he does by an original radical redefinition of “two witnesses.” It is this redefinition to which Rivash, R. Yom Tov ha-Levi and R. Moshe Gabbai all raise objection.<sup>38</sup>

The requirement of two witnesses in civil cases was derived by the Talmud from a midrashic interpretation of Deuteronomy 19:15, and it was considered a biblical law. Duran, in the face of this fact, lays out the following argument. Why, he asks, is the testimony of two witnesses probative? Because, he answers, there is a legal presumption that witnesses testify truthfully. So why isn’t a single witness sufficient? Because even though there is a presumption that the witness is testifying truthfully, there nevertheless remains some degree of possibility that a specific witness might be lying. The requirement of a second witness serves to guard against that rare occurrence. But, argues Duran, when there is another factor supporting the testimony of a single witness, such as convincing circumstantial evidence, then that extra support for the testimony serves the role of a second witness.<sup>39</sup> Duran argues that a single witness, whose

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<sup>37</sup> *Tashbetz*, 1:80, fn. 34.

<sup>38</sup> Rivash, 155; *Tashbetz*, 1:83-84.

<sup>39</sup> Some other examples of a supporting factor to which Duran refers in this regard include: (1) The casual conversation of non-Jews. This is accepted by the Talmud too in establishing a man’s death in order to allow his wife to remarry, but the reference there is to first-hand knowledge of the death. Duran extends it here to circumstantial evidence, and to civil law in general. (2) A similar acceptance of casual conversation from Jews who are disqualified from testifying. In this case they would not be relied upon to release a widow from *‘iggun*, because as Jews, who are presumed to be aware of the implications, they are suspect of simulating “speaking in innocence.” (3) The presumption that a witness would not lie in a situation in which the lie is likely to be found out, as is the case here if he is really alive. This consideration derives from Maimonides, who mentions it three times in the *Mishneh Torah* in connection with the testimony of one witness, though not in matters of civil law. The one which is closest to our case is that of a woman who returns from abroad and asserts that her husband died. The Talmud accepts her assertion. Maimonides supplies the reason, that she would not lie in a situation in which she is likely to be found out.

testimony is supported by other convincing factors, is considered by **biblical law** to be the equivalent of two witnesses. When Duran is challenged by his opponents with authoritative sources which specifically mention the need for two witnesses, among them most notably Maimonides,<sup>40</sup> he simply insists that the legal term “two witnesses” connotes also a single witness supported by other convincing factors. This, of course, implies that Maimonides and others (e.g., the ninth-century author of *Halakhot Gedolot*) understood the term “two witnesses” the way he did, and that they expected their readers to understand it that way as well. This is one example of Duran’s use of a forced interpretation, a byproduct of his need to arrive at a ruling which for him was obviously just.

### III. Functional Interpretation

In the case above, Duran interpreted “two witnesses” in a non-literal way, which he believed was true to the function of two witnesses, namely, to arrive at the truth. Duran’s interpretive methodology in this regard, which ignores the traditional literal understanding of a law and defines it instead in terms of its function (henceforth: “functional interpretation”), is in stark contrast to that of Rivash and the others who disagreed with him in this case.<sup>41</sup> Duran’s penchant for a functional interpretation of the law is attested in a number of other responsa.

#### [2] Honoring the Dead (*Tashbetz* 1: 22; Rivash 116)

In this instance, too, Duran and Rivash stood on opposite sides.

The case involves the intersection of two laws. One is the obligation to cease from certain activities defined as “work” on those holidays that the Bible describes as “holy convocations.” These include the first and last days of the pilgrimage festivals. In the Diaspora, the practice arose of adding a second holy-convocation day at both the beginning and the end

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<sup>40</sup> *Laws of Inheritance*, chap. 7, par. 3, cited above.

<sup>41</sup> In Case [4] below, Rivash, again in accord with the prevalent view, adopts a narrow literal interpretation. In another responsum, written in the early years of his career as a community rabbi, he responded to a question about a *get halitza*, in which one of the letters of the date was accidentally omitted. Rivash insisted on an extremely literal interpretation, thereby disqualifying the document (Rivash 382 and 385). He sent his responsum to his mentor, R. Nissim Gerondi. In his answer (no. 78 of the latter’s responsa, ed. Feldman), R. Nissim set him straight. See also Feldman’s introduction, p. 22. However, Cases [6] and [7] below adduce instances in which Rivash does indeed utilize functional interpretation.

of the festival. But the prohibition of work on the added second day was considered to have the status of rabbinic, rather than biblical, authority, and had a lower degree of sanctity, allowing for some leniencies in special situations.

The other law is the obligation of the kinsmen of a deceased to see to his proper burial at the earliest possibility. Such a burial entails the engagement in activities that are prohibited on days of “holy convocation.” The Talmud drew a distinction in this regard between the first holy-convocation day and the second, rabbinically ordained, holy-convocation day: “If one dies on the first holy-convocation day, he should be dealt with by non-Jews; on the second holy-convocation day, he should be dealt with by Jews.”<sup>42</sup> The extent to which Jews may engage in prohibited work on the second holy-convocation day is formulated in the pithy ruling in the Talmud by Rav Ashi: “The second holy-convocation day, with regard to the burial of a deceased, has been set by the Rabbis as a weekday.”<sup>43</sup>

Here is the account of the events presented in the Responsa of Rivash:

It happened that a Jew died in the evening during the Ten Days of Penitence,<sup>44</sup> eight days distant from a Jewish settlement. It became known to his relatives that Arabs placed him in a cave in his clothing, and closed the opening to the cave. But he was not buried, because there is no Jew in that entire region. This was on the eve of Sukkot.<sup>45</sup>

The event occurred in Mostaganem. The rabbinic authority there, Rabbi Abraham bar Natan, instructed the relatives to set out on the second holy-convocation day, when a deceased should be dealt with by Jews. And this includes travel to where the deceased is, there to give him a proper burial.<sup>46</sup>

The propriety of that ruling was subsequently challenged by the rabbi of Oran, Rabbi Amram ben Marwam, who sent his brief to Rivash for his opinion.<sup>47</sup> Rivash rejects some of R. Amram’s peripheral arguments, but otherwise finds in favor of R. Amram’s opinion, that the relatives should have been instructed to wait until after the entire festival before they set

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<sup>42</sup> BT *Shabbat* 139b; BT *Beṣab* 22a.

<sup>43</sup> *Beṣab* 6a.

<sup>44</sup> The ten days beginning with Rosh ha-Shana. The crucial events occurred on Sukkot, which begins two weeks after Rosh ha-Shana.

<sup>45</sup> In the more abbreviated version of the circumstances in *Tashbetz*, it states that he died on the eve of Sukkot.

<sup>46</sup> *Tashbetz*, 1:22, heading and first paragraph.

<sup>47</sup> Rivash, 116. This is part of a lengthy sequence of queries that Rabbi Amram sent to Rivash. The first, where the correspondent is identified, is #102.

out.<sup>48</sup> Except for those arguments of R. Amram that Rivash rejects, his response addresses and develops just one that had been raised by R. Amram. One should remember, though, that in general the queries that introduce responsa were formulated by the responder, or selectively abridged by him. Having himself edited the text of the query, and having found in favor of R. Amram's stringent position, Rivash, it is fair to assume, accepted those points that were raised by R. Amram and that he himself did not explicitly reject. He simply felt no need for further elaboration in his own response to R. Amram.

I'll begin with the one that he addresses specifically. The festivals of Passover and Sukkot extend seven and eight days respectively (*sans* the added "second day" on each end). The first and the last of these days are "holy convocations," in which all the activities that define "work" are prohibited. On the intermediate days, necessary "work" is permitted; the Talmud defines which activities those are. With regard to dealing with a burial during the intermediate days, the Talmud appears to indicate a concern lest some of the activities entailed be misunderstood by observers who are unaware of their purpose, and mistakenly believe that those activities are generally permitted on the intermediate days. Rivash applies an *a fortiori* argument, that if this is true for the intermediate days, it is certainly true for the second holy-convocation day:

Certainly in the case under discussion, which [involves] a holy-convocation day before the intermediate days, [and] in which the body<sup>49</sup> is several days distant from them so that they won't arrive until after the [entire] festival, one should prohibit [the travel] because of the fear lest people say, "They are traveling for their own business, for a matter that is not obligatory."

However, from the immediate sequel it is clear that Rivash's position is informed by a broader issue. He proceeds to cite a contrary opinion of Naḥmanides, who permitted the accompanying of the deceased to his burial on the second holy-convocation day even beyond the town's environs, where one is normally not permitted to stray on the Sabbath or on days of holy convocation.<sup>50</sup> To this Rivash counters:

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<sup>48</sup> "Entire festival" appears to be Rivash's intention. He writes in his opening line: "Surely, they should not [have been allowed] to go beyond the town's environs (*ba-teḥum*) for the purpose of burying a deceased who is not present, and who could not be reached until after the entire festival (*ba-mo'ed*).

<sup>49</sup> *Ha-met*, translated above as "deceased."

<sup>50</sup> *Torat ha-Bayit*, ed. Cheval p. 114.

But in the case under discussion, in which they are not [actually] accompanying the body, it appears certain that it is forbidden to violate the second holy-convocation day by travel outside the town's environs.

Why does this “appear certain”? Nahmanides had made his point with reference to a funeral procession. Rivash interprets him in a very narrow, literal way, as being limited only to a funeral procession accompanying the body, but excluding travel that is necessary in order to reach the deceased. But a funeral procession is the usual circumstance in which this issue is encountered, and it is possible that Nahmanides used it as an example of the principle in general. Rivash does not justify in argument this narrow literal reading, he just asserts it. It appears to be an arbitrary interpretation in order to counter the challenge that Nahmanides' ruling presents to his own position. But what motivated Rivash to take the stand that he does to begin with?

It seems to me that the answer lies with the closing sentence of R. Amram's query. Since the query as a whole was edited by Rivash, and this passage was not challenged by Rivash in his own responsum, it is fair to accept that it represented Rivash's own position. The sentence refers to *kevod ha-beriyot*, the respect given to human beings, here specifically in their death. The entire subject of the burial of the dead comes under the rubric of *kevod ha-beriyot*. The query, after presenting the reasons to disallow travel on the second holy-convocation day, concludes:

And the reason that *kevod ha-beriyot* does not apply, is because the body is not present among us.

A similar sentiment occurs earlier in the query. R. Amram asserts that the leniencies allowed on the second holy-convocation day apply only if the burial will take place that same day. He explains:

What would these [kinsmen] achieve in their violation of the sanctity of a holy-convocation day, given that they will [in any case] not be able to bury the body on the same day?

In other words, the obligation of *kevod ha-beriyot*, manifest in the act of burying the dead, an obligation that mandates prohibited work on the second holy-convocation day, is defined only by the act of burial itself. It does not extend to preliminary activities unless they culminate in a burial the same day. Rivash apparently shared that position. And they were not alone in this opinion. The rabbi who originally issued the permissive ruling, R. Abraham ben Natan of Mostaganem, after being challenged by R. Amram and unsure of his ground, sent a query to Duran, asking for his opinion on the matter. The query, edited by Duran, closes with the following sentence:

And you wrote that you permitted it only because you were told that the very same day it would be possible for them to reach him and to bury him.

Duran, after presenting the “fifth argument” for the disallowance of travel in the case at hand (cited immediately below), paraphrases it this way: “You have already [in your query] apologized for this, because the one who asked you the question misled you by telling you that there was enough time in the day to go [there] and bury him.”

So it appears that this view of *kevod ha-beriyot* as it relates to the burial of the dead, namely, that it applies only to the physical burial itself, was in fact a consensus opinion.

Duran tells us that R. Abraham ben Natan’s detailed legal argument did not reach him. He did, however, have access to R. Amram’s counter-argument, and responds to it point by point. Duran organizes his rebuttal by listing five arguments cited for disallowing the relatives to set out beyond the town’s environs on the second holy-convocation day, and rejecting each in turn. The responsum is rhetorically arranged, beginning with those arguments that are easiest to dispose of, and leading up to the more serious ones. The one that concerns us here is the last one:

The fifth argument: That the body was [a distance of] four or five days’ travel beyond the town, and what would they be able to accomplish [even by] traveling quickly?<sup>51</sup>

Duran proceeds to challenge the entire consensus that *kevod ha-beriyot* as it relates to the burial of the dead is limited to the physical burial of the body, and its prerequisite activities on the day of the burial:

Since we say that “the second holy-convocation day, with regard to the burial of a deceased, has been set by the Rabbis as a weekday,” we make no distinction between a burial that very day and a burial the following day, as long as the acts performed on the [second] holy-convocation day enable a sooner burial. For after all, as long as the body lingers it becomes uglier [i.e., it deteriorates more] ... and one who rushes to care for it so as to hasten its burial performs a *mitzva*. The second holy-convocation day does not stand in the way

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<sup>51</sup> Following the text of the *Abridged Tashbetz*, a work widely known long before the publication of the original responsa. The text before us appears to be corrupted. See fn. 40 in the Mekhon Yerushalayim edition.

of the obligation to bury the body, since it “has been set by the Rab-  
bis as a weekday.”<sup>52</sup>

That is to say, *kevod ha-beriyot*, the respect given to human beings by giving them a proper burial, is to be interpreted broadly, in consonance with its functional interpretation. This was in opposition to a literal interpretation of “burial,” which had been the consensus.

**[3] Entrenched Religious Practice vs. Talmudic Law: Case One (*Tashbetz* 1: 22; Rivash 116)**

Early in the same responsum, in Duran’s response to “the first argument,” there is another example of his use of functional interpretation of halakhic rules. It is used to justify a widely established custom that appears to be in contradiction to a talmudic ruling.

Duran paraphrases Rabbi Amram’s argument thus:

It says in [the Talmud] Chapter “One may suspend,”<sup>53</sup> that neither Jews nor non-Jews may care for the deceased, neither on the first holy-convocation day nor on the second. And the reason [for this stringent ruling] was explained, because they [the people of Bashkar, who asked this question] were not learned in Torah. And we are not learned in Torah.

The talmudic ruling, cited from Tractate Shabbat, is contrary to the accepted *halakha* governing burial on holy-festival days, which allows for such burial. The Talmud explains it as an *ad hoc* stringency, lest those who are unlearned in Torah, seeing that these activities are permitted, mistakenly believe that they are generally permitted on holy-convocation days. Rabbi Amram’s argument is based on the theory of the decline of generations. Jews today are generally considered to be “not learned in Torah,” and the restrictive ruling should apply to them. The source in the Talmud refers to both the first and second holy-day convocation days, but the situation under discussion is restricted to the second day only. Both sides of this dispute treat the issue as referring to the second day.

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<sup>52</sup> In the sequel he takes issue with Rabbenu Asher, who, following Rashi, prohibited the beginning of the digging of a grave on the second holy-convocation day, which will be completed that night at the conclusion of the day. After referencing Rabbenu Asher’s ruling, he writes: “But I wrote what appears to me [to be the truth],” i.e., that for the reasons stated above it is permitted.

<sup>53</sup> BT *Shabbat* 139a-b.



Duran begins as follows, addressing himself to R. Abraham bar Natan of Mostaganem, who had permitted the relatives to begin their traveling on the second holy-convocation day:

And I say, that this argument of his [R. Amram's] is not an argument that can challenge you. Go and see how people act,<sup>54</sup> and Jewish practice is Torah.<sup>55</sup> We have not seen in our generations anyone who is concerned about this, and one who permits [something] on the basis of entrenched religious practice [henceforth: *minbag*] should not be scolded at all.

Duran does not deny the theoretical legitimacy of the restrictive ruling, and he does not deny that Jews in his generation are to be categorized as “not learned in Torah.” “One who permits on the basis of *minbag* should not be scolded,” but that formulation still does not give such permission total theoretical legitimacy. He avers, however, that to the extent possible, it is the rabbinic scholar's job to interpret the *halakha* to accord with *minbag*, thus to truly legitimate it:

But what is proper for every rabbinic scholar to do in such a case is to fix it so that the *minbag* accords with the *halakha*.

Since the rabbinic scholar has no effective control over accepted popular religious practice, Duran means that the *halakha* should be interpreted so as to accord with the *minbag*.<sup>56</sup> And indeed, he proceeds to propose a number of ways to do this, and it is one of these that is our concern here.

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<sup>54</sup> BT *Berakhot* 45a and parallels.

<sup>55</sup> *U-minbagan shel yisrael torah hi*. This derives ultimately from the Palestinian Talmud, *ba-minbag menatel et ba-halakha*, PT *Yevamot* 12:1, Ven. 12c; PT *Bava Mezi'a* 7:1, Ven. 11b. The phrase (with variants) as it appears here is evidenced in early Ashkenazic sources, see Ta-Shma, *Minbag Ashkenaz ba-Kadmon*, p. 38, n.33. The second source cited above, from PT *Bava Mezi'a*, is limited in scope, because it refers to the right of contract in civil law, which in any case is recognized in talmudic jurisprudence. It is that source of limited scope that is cited by Alfasi, *Bava Mezi'a* ch. 7, no. 495, 52a in the current pagination, thus entrenching it in Sephardi *halakha*. Duran, however, applies it here to religious law, giving it a wider applicability. See another explicit example of this principle in religious law, *Tashbetz* 1:125, concluding sentence.

<sup>56</sup> There is a close parallel to this in *Tashbetz* 1:50, in which, as here, he accepts the pure halakhic position *de jure*, but in practice finds a way to reinterpret the *halakha* to bring it into accord with the *minbag*; see especially the paragraph beginning on p. 112b and continuing on p. 113a. This approach to *minbag* had long been standard halakhic practice in Ashkenaz from its earliest days. See Ta-Shma, op. cit., p. 28 bot., 29 top. In Case [4] below there is an example of Rivash's reaction

Referencing only the second holy-convocation day, he points out that in the specific issue at hand, the factor of being “not learned in Torah” works, in (his) contemporary times, in the opposite direction from that implied by the Talmud. The second holy-convocation day was originally adopted before the adoption of a permanent calendar. Without such a calendar, the day on which the new month began was determined by the rabbinic leadership in Palestine by the sighting of the new moon, and it could vary by one day. Since the day of the festival was determined by the day the month began, Jewish communities beyond the reach of notification from the Palestinian center celebrated a second holy-convocation day to cover that uncertainty. Under such conditions, Duran explains, unlearned Jews, knowing from the Bible that only one such day was ordained, could easily become skeptical of the second day. Today, however, the second holy-festival day is so ingrained in religious practice, that unlearned Jews mistakenly think that it has the same biblical authority as the first. Their ignorance leads them to be more stringent than they need be on the second day, not less.

Unlike Duran’s definition of *kevod ha-beriyot* later in the responsum in his response to “the fifth argument” in Case [2], his response to “the first argument” here is somewhat peripheral to his “bottom line.” R. Amram’s argument is that “they are not learned in Torah,” and the Talmud sees that as a cause for stringency. Duran begins with the admission that he is attempting to adjust the *halakha* to the realities of *minhag*, and such a procedure invites forced interpretation. He brings a number of proofs for leniency, and he does not indicate any greater weight to this halakhic adjustment than the others he presents. Nevertheless, it is a legitimate example of his interpreting the *halakha* in light of its functional purpose rather than its literal reading.

**[4] Entrenched Religious Practice vs. Talmudic Law: Case Two (*Tashbetz* 1:28; Rivash 35)**

The *halakha* mandates that a woman immerse herself in a ritual pool (*miqveh*) after her menstrual period before having intercourse with her husband. Every part of her external body must be exposed to the water. In order to ensure that no foreign agent on her body block access to the

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to a *minhag* he believes to be halakhically untenable, which is more typical of Sephardic halakhic decisions. See also Rivash’s explicit statement in Rivash 146, which responds to the same question as *Tashbetz*, 1:50; see especially the last paragraph on p. 151.

water of the *miqveh*, she must thoroughly wash her body and her hair before entering the *miqveh*. The talmudic sage Rava states that the use of a hair-scrubbing agent, which the Talmud refers to as *neter*, may not be used for this purpose, because it detaches the hair.<sup>57</sup> The reason was understood to be that unattached hairs may entwine themselves with growing hair, thereby blocking the water's direct access to it.

It was common practice among women in Majorca to prepare for entering the *miqveh* by washing their hair with a scrubbing agent, called in the Romance vernacular *qalida*. The same vernacular term was used to translate the biblical word *neter* in Jeremiah 2:22, where it clearly refers to a body cleansing agent. The identification of *qalida* with *neter*, along with the Talmud's prohibition of the use of *neter* before entering the *miqveh*, led Rivash to object strongly to its use.

Rivash's statement comes as an addendum to a responsum on another subject entirely, sent in response to a query by the same R. Amram, the rabbi of Oran, whom we have met before. The query regarded a detail in the procedure for reading the Torah. It involved a *minbag* that Rivash himself believed to be contrary to *halakha*, but that he had no power to change. In an addendum, Rivash warns R. Amram about the insurmountable difficulties of changing a halakhically questionable *minbag*. He tells him of his previous experience in such an endeavor that regarded a different matter, an attempt to change women's practice of using *qalida* in preparation for immersion:

When I saw that the women obey [rulings] to be lenient, [a leniency] that is not proper for them in this matter, I backed away, so that they not say that I am casting an aspersion on a *minbag* regarding their immersion. But<sup>58</sup> regarding my own household,<sup>59</sup> with<sup>60</sup> my female relatives who listen to me and pay attention, I gave them orders to act properly. And thus I put into practice what the Sages, of blessed memory, said: "Just as it is a proper thing [*mitzva*] to say something that will be listened to, so it is a proper thing to refrain from saying something that will not be listened to. Rabbi Abba said: It is an obligation [*hova*]."<sup>61</sup>

It appears that the use of *qalida* before immersion was specific to Majorca. Rivash, who had lived in Catalonia, Aragon and Valencia, writes,

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<sup>57</sup> *Niddah* 66a-b.

<sup>58</sup> Literally, "and."

<sup>59</sup> Literally, house, perhaps meaning his wife. The Talmud mentions the use of "my house" in the sense of "my wife."

<sup>60</sup> Literally, "and with."

<sup>61</sup> *Yevamot* 65b.

“In our land [the women] had the practice of scrubbing their hair only with hot water.”

The lenient ruling that women obey, to which Rivash objects, is that of Duran, which we find in his responsum to the same R. Amram. Rivash tells of having heard of Duran’s position from the women of his household, who asked him about it when he instructed them otherwise. In Rivash’s responsum, cited below, his reference to Duran’s argument omits the latter’s major point (see below), leading to the strong probability that he had not seen Duran’s responsum to R. Amram, but only heard about it. That R. Amram sent this very question to Duran suggests that he did so in reaction to Rivash’s inclusion of his stringent ruling regarding *qalida*, inserted as an aside in his response to R. Amram’s original query, which dealt with an unconnected *minbag*.

Duran begins by concisely summarizing the objection to *qalida*, which was commonly identified with the prohibited *neter*. He proceeds as follows:

Now, let’s see. What did women [originally] rely on to scrub their hair with this *neter*? After all, the simple reading of the law prohibits it! [Surely], in a matter in which school children do not err, one cannot put the blame on error for such a widespread *minbag*!

Here we are, back to the position Duran presented in Case [3], when confronted by a dissonance between common practice and halakhic ruling: “What is proper for every rabbinic scholar to do in such a case is to fix it so that the *minbag* accords with the *halakha*,” i.e., to interpret the *halakha* to accord with the *minbag*. Duran “fixes it” by means of the following syllogism:

- 1) The reason that Rava, in the Talmud, gave for prohibiting *neter* was that it detaches the hair.
- 2) *Qalida* does not detach the hair, but makes it wavy.
- 3) Ergo, *qalida*, and the *neter* that Rava prohibits, are not the same product. (Or, he suggests alternatively, there are two different meanings to the word *neter*.)

This amounts to a functional interpretation of the *halakha*. The definition of the prohibited *neter* is determined by what it does. It is instructive to compare this with Rivash’s presentation. As we saw above, Rivash had objected to the Majorcan practice, which was new to him:

When I was informed of the practice of these [Majorcan] women, I ordered the *hazan* [here denoting a certain communal official] to tell his wife to privately warn the women coming to immerse to refrain from this practice. But this was hard for them to do. And some of Rabbi Duran’s female relatives asked him about this, and he said that

on the contrary, there is no [proper preparation for] immersion without *qalida*, because it cleans the head very well. And the meaning of *neter* is not *qalida*.... And when I heard [about it], I said that it is well known that the *la'aṣ* [Romance vernacular] of *neter* is *qalida* according to all the Bible teachers. Also the Ga'on Sa'adia, in his commentary, translated "*neter*"<sup>62</sup> [into Arabic] as *tfl*,<sup>63</sup> which is *qalida*.<sup>64</sup>

The argument appears convincing. Sa'adia established the tradition of identifying biblical *neter* with Arabic *tfl*. The identification of the biblical *neter*, which is used for washing, with the talmudic *neter*, used for washing but disallowed for pre-immersion hair cleansing, is extremely plausible. The *qalida* used in Majorca for hair scrubbing, and identified with *tfl*, was imported, we are told, from Valencia.<sup>65</sup> Valencia had a bilingual history of Arabic and Romance, and it is not unlikely that the term *qalida* was applied from the beginning of Christian settlement there to the product called in Arabic *tfl*. It appears likely that Duran's functional interpretation of *qalida* as something other than *neter* is original.

It is worth noting that Duran's argument, that *qalida* cannot be the same as the talmudic *neter* because *qalida* does not detach the hair, whereas the *neter* prohibited by the Talmud does, is based on empirical evidence. This is an example of the use of empirical evidence to challenge the authority of traditional understandings. By way of comparison, elsewhere Rivash expresses a sharply negative view of such a procedure. The halakhic context to which the responsum relates is different,<sup>66</sup> and the immediate example he brings to make his point is one that Duran would hardly challenge.<sup>67</sup> But the tone of his statement speaks for itself:

We may not deal with the laws of our Torah and its commandments on the basis of the scholars of nature and medicine. For if we accept

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<sup>62</sup> Jeremiah 2:21: "Though you wash with *neter*..."

<sup>63</sup> Wehr Cowan, p. 562, col. 2: *tufaal* – potter's clay; argil; clay, loam.

<sup>64</sup> Rabbi Yoel Katan, who edited the Mekhon Yerushalayim edition of *Tashbetz*, writes *ad loc* in n. 14: "From this [we learn] that Sa'adia composed a commentary to Jeremiah, though I haven't located as of now evidence for this elsewhere."

<sup>65</sup> *Tashbetz*, 1:28, after the notation for footnote 136.

<sup>66</sup> The determination of whether a child was born at full term.

<sup>67</sup> The physiology of animals presumed by the Talmud, which governs the laws of *kasbrut*. Rivash follows in the sequel with other examples dealing with the science of human reproduction.

their words, there would be no Torah from Heaven, God forbid! For so they laid down in their false proofs.<sup>68</sup>

In an addendum to this section I will adduce two other instances in which Duran has recourse to empirical evidence.

[5] The Widow's *Ketubba* and her Daughter's Inheritance (*Tashbetz* 2:150)

A wife does not inherit from her husband. In lieu of inheritance, at the time of marriage her husband undertakes a specific financial obligation to his wife, which takes effect at the dissolution of the marriage, either by death or by divorce. This obligation is called a *ketubba* (literally: "a written document"), and the husband's real property is held in lien for payment of the *ketubba*. The value of the *ketubba* was flexible, and reflected the socio-economic status of the parties concerned.<sup>69</sup> For her part, the wife brought into the marriage a dowry, consisting of valuable clothing, jewelry and home furnishings, referred to by the Talmud as "the assets of her paternal property."<sup>70</sup> In its broader sense, the term *ketubba* is applied to the dowry as well. The wife's dowry also reverts to her at the dissolution of the marriage, and her husband cannot alienate it without her permission. If the wife predeceased her husband, his *ketubba* debt is cancelled, and her dowry reverts to his outright possession.

As is the case with any creditor with a lien, a wife can sell her *ketubba* to a third party. However, this would be at a discounted rate, since, if the wife predeceases her husband, the husband's obligation to her lapses. The third-party purchaser of such a *ketubba* is betting that the wife will outlive her husband.

In addition to the sum specified in the *ketubba*, a number of other obligations bind the husband or his heirs. These are considered part and

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<sup>68</sup> Rivash 447. See, however, Rivash 349, which deals with the status of wine in caskets, the boards of which were glued together with prohibited fat (*helev*). Rivash presents an argument for stringency, specifically rejecting a possible argument for leniency drawn from preceding authorities. He then continues with the following addendum: "I afterwards saw that everyone acts [leniently] in this matter. **And they showed me clearly that the fat never mixes at all with the wine....** So I said, [citing BT *Pesahim* 66a]: 'Let the Jews be [in maintaining their questionable practice]. Though they are not prophets, they are sons of prophets.' Since it is the nature of wine not to adhere to fat, there is not even any [physical] contact here..." Given his own argument for stringency, the arguments he now presents for leniency are grudging, a way to accommodate a practice he disagrees with but can't prevent. The empirical proof he cites must be seen in that light.

<sup>69</sup> This is not true of the Askenazic *ketubba*, which was set at a fixed value.

<sup>70</sup> BT *Yevamot* 66b, translation Soncino.

parcel of the *ketubba*, even though they are not included in its written text. These are called “*ketubba* stipulations.”

One *ketubba* stipulation gives the widow the right to be supported by the heirs in the style to which she was accustomed, as long as she chooses to continue living in her late husband’s residence, or until she collects her *ketubba* or indicates her desire to remarry. A corollary to this right is that if she seizes moveable property from the estate after the death of her husband, and claims that she is doing so to insure her future support, she may keep the property for that purpose.

Another *ketubba* stipulation, referred to below, is called “the *ketubba* of male children.” When a man died, he was inherited by his sons, or his daughters if there were no sons. If a man had more than one wife, either together or in succession, according to the law of the Torah all his sons divide the inheritance equally.<sup>71</sup> If the man outlived his wives, their dowries became part of his estate. That meant that the dowries of his wives were divided equally among his heirs. If one wife had brought a large dowry and had few sons, and the other had brought a small dowry and had many, the children of the second would be inheriting, to some extent, the dowry of the first, “the assets of her paternal property.” In order to prevent this, there was a *ketubba* stipulation, that the sons of each wife should first take from the estate their mother’s dowry before the remainder of the inheritance was divided equally among the sons of all the wives.

The question posed to Duran was as follows:

You asked: A woman forwent [the right to] her *ketubba* in favor of her husband, in order [to enable him] to increase her daughter’s dowry, because she sought her daughter’s welfare, and was ashamed [of the small dowry] in the eyes of her daughter’s in-laws. She was [subsequently] widowed, and the property [of her deceased husband] was inherited by her daughter, since he had no son. The wife [however] seized them [the items that constituted the dowry] for [satisfaction of] her *ketubba*. What is the law concerning this? Does the daughter take all of the property as the heir of her father and the widow take nothing, since she forwent her right [to the *ketubba* obligation]? Or does the widow take them by right of her *ketubba*, and her forgoing [of the *ketubba*] be voided?

The Talmud discusses the situation of wife selling her *ketubba* to her husband:

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<sup>71</sup> Except for a firstborn who gets a second portion. See Deut. 21:17.

Rava said: It is obvious to me, that if she sells her *ketubba* to others, she maintains her [right to the] “*ketubba* of male children.” Why? Because she was forced [to do so] by [the need for] funds. It is also obvious to me, that if she forgoes her *ketubba* to her husband, she does not maintain her [right to the] “*ketubba* of male children.” Why? [Because, after all,] she forwent it. Rava [then] posed the question: If she sells her *ketubba* to her husband, is it like one who sells it to others, or like one who forgoes it to her husband? [Having posed the question,] he then made plain [the answer]: One who sells her *ketubba* to her husband is as one who sells to others.<sup>72</sup>

If one applies this talmudic ruling to the case at hand, it would seem that in this case the widow has no right to her *ketubba*. She forwent, rather than sold, her *ketubba* to her husband. One who sold her *ketubba* to her husband maintains her right to the *ketubba* after her husband’s death, but one who forwent it does not. Duran, however, applies a functional interpretation to the law. After paraphrasing the ruling in the Talmud, he continues:

In the case at hand, the law concerning this woman is, without any doubt, like the law of one who sold [her *ketubba*], because the reason [in both circumstances] is one and the same. Just as in the case of selling we say that she does not lose her *ketubba* because “she was forced [to sell] by [the need for] funds,” so it is with this woman. It is not the law that she should lose her *ketubba* rights, because “she was forced [to do so] by [the need for] funds.” She wanted to contribute to the dowry of her daughter above what her husband was willing to give. And since this is the law, even though this woman undoubtedly forfeited her *ketubba* because she gave it to her daughter, she [nevertheless] did not lose [her rights to] the other *ketubba* stipulations. And it is a *ketubba* stipulation that she be supported from her husband’s estate.

That is, in this specific case, “forfeiting” must be defined legally as “selling.” Here we do not have the advantage of an opinion of Rivash with which to compare it. But it is clearly an example of interpreting the talmudic law from the perspective of its function, and a rejection of its literal reading.

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<sup>72</sup> BT *Ketubbot* 53a.



[6] The Reluctant Levir (Rivash 159; *Tashbetz* 1:100)

In all the cases discussed above, Duran's use of a functional and/or non-literal interpretation shifted the ruling to a more lenient result than the literal interpretation would have yielded. It is possible to suggest, therefore, that Duran tended to utilize this method specifically in instances in which it would have an effect on the final outcome, not just for its own sake. This possibility is strengthened by the case to be presented now. It involves the law of levirate marriage.

The law of levirate marriage is found in Deuteronomy 25:5–10. The description presented here is based on the Talmud's interpretation thereof, which differs in important ways from the plain sense of the biblical passage. If a man dies without child, his brother (the levir) has an obligation to marry his widow. A widow in such a position, whose late husband has a brother but no children, is called a *yevama*. If the brother chooses not to marry his *yevama*, an alternative is offered. This involves a ceremony that includes the *yevama's* removal of the levir's shoe. This ceremony is referred to as *ḥalitza* (literally: "removal"; in this context: "shoe removal"). There is no doubt that in the biblical description *ḥalitza* is presented as an act that is meant to shame the levir for not fulfilling his obligation. Nevertheless, the Talmud records a dispute as to whether levirate marriage or *ḥalitza* is the preferable choice. The Sephardic tradition accepted the view that levirate marriage was preferable. If there was more than one brother, the eldest was approached to fulfill the levirate obligation.<sup>73</sup> If he refuses, the choice goes down the age ladder.<sup>74</sup> If none accepts to marry the *yevama*, then the eldest is approached to submit to a *ḥalitza*. If he refuses, he is compelled to do so. A *yevama* whose condition is not yet resolved by either levirate marriage or *ḥalitza* is called "bound to a levir." She is an "anchored" woman, that is, a woman who, in her present condition, may not remarry. But in a case in which two brothers are married to two sisters, so that marrying the *yevama* would result in incest,<sup>75</sup> the law of levirate marriage does not apply.

This is Rivash's presentation of the query from Rabbi Amram of Oran, whom we have met before:<sup>76</sup>

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<sup>73</sup> This is based on a forced midrashic interpretation of Deut. 25:6, "the first son that she bears." The "she" is understood as the mother of the deceased, rather than as his wife.

<sup>74</sup> Mishna *Yevamot* 4:5; BT *Yevamot* 39a.

<sup>75</sup> Lev. 18:18.

<sup>76</sup> In Case 2.

You were also in doubt about a *yevama* whose husband left her with<sup>77</sup> three brothers. She was forbidden to the eldest, because he was married to her sister. The remaining two brothers quarreled. The older one rushed to take a stringent oath,<sup>78</sup> that he will neither marry her nor submit to *halitza*.<sup>79</sup> The other one said, “The obligation [*mitzva*] falls upon you, because you are the older.... Are we to compel the older one to either marry her or submit to *halitza*, even though he vowed [not to do so]? Or is there a way for him [the older brother] to avoid it since he took a vow to neither marry nor perform *halitza*, so that we now compel the younger brother to either release her by *halitza* or marry her?”

The basic law is that an oath to violate a biblical commandment is *ipso facto* invalid.<sup>80</sup> We learn from Duran’s account that Rivash discussed this with him. Rivash had questioned whether perhaps, for a technical reason that need not concern us here, the older brother’s oath in this specific case was an exception to this rule, and was in fact valid. Were that to be so, the levir could not be compelled to submit to *halitza* in violation of his oath, which he was commanded by biblical law to uphold. Rivash, in his responsum, raises this position as a hypothesis, and then proceeds to reject it, apparently as a result of his earlier oral conversation with Duran. Accordingly, Rivash rules that the older brother’s oath is invalid, and he is to be compelled to submit to *halitza*. Duran’s responsum was written to Rivash as a follow-up to their oral discussion. It is an expanded analysis of the case in all its aspects. His conclusion coincides with that of Rivash, that the levir, the older brother, cannot escape *halitza*.

The passage in Rivash’s responsum that is relevant to this discussion comes after he had already proven that the oath was indeed invalid, and the brother should be compelled to submit to *halitza*. It appears as an addendum at the end of the responsum:

There is yet another reason [for the oath to be null and void]. Since he is bound by the obligation to either perform levirate marriage or submit to *halitza*, this oath that the levir undertook constitutes an infliction of injury [upon the widow, in violation of the biblical pro-

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<sup>77</sup> Literally: “who fell to.”

<sup>78</sup> Literally: “leapt and swore.” The idiom connotes an impulsive or sudden act.

<sup>79</sup> Duran suggests that the brother included *halitza* in the oath out of ignorance of its true legal meaning, mistakenly thinking that it was part of levirate marriage.

<sup>80</sup> Mishna *Shevu'ot* 3:8, BT 29a.

hibition of injuring another], insofar as it prohibits her from marrying. And an oath<sup>81</sup> to do injury to others and to deprive them of their rights is not valid, as is mentioned [in the Talmud] in the aforementioned chapter.<sup>82</sup> Even though they said there: “What constitutes doing injury to others? ‘I will strike so-and-so and split his head,’” this was not meant literally. The same is true if he said: “I will rob or plunder him.” And there is no greater [cause of] sorrow than “anchoring” the widow.

Rivash applies here a functional interpretation to the phrase “I will strike so-and-so and split his head.” Rather than restricting it to its literal boundaries, he expands it to include broader forms of deep distress. The example of an oath to rob someone was drawn from Maimonides’ Code.<sup>83</sup> But Rivash extends it further, to an oath to apply non-tangible forms of extreme distress. It is of interest that Rivash introduces this argument, which reflects a deep emotional response, as an addendum. The body of the responsum is reserved for formal legal analysis.<sup>84</sup>

Surprisingly in light of what we have seen, Duran takes issue with Rivash’s functional interpretation. Duran agrees with Rivash that the levir can be compelled to submit to *halitza*, because his oath to the contrary was invalid, as Duran argues in great detail. But he rejects Rivash’s broad definition of “injury”:

But this is not [a case of] vowing to do injury to others [which would nullify the oath], because we have not found any prohibition in the Torah of “anchoring” a *yevama*. “Doing injury to others” includes only what the Torah prohibits, such as “I will strike so-and-so and

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<sup>81</sup> Literally: “An oath of expression,” i.e., an oath to do something or not to do it.

<sup>82</sup> BT *Shevu’ot* 27a.

<sup>83</sup> Laws of Vows, chap. 5, par. 16.

<sup>84</sup> Rivash’s use of an addendum to expose his deep inner motivation in arriving at a decision after he had argued the case on technical halakhic grounds is dramatically evident in responsa 266-267. The case concerns a powerful unscrupulous individual, whose proposal of marriage to a woman is rejected. After her betrothal to another, he concocts a case with false witnesses, to prove that he had actually betrothed her earlier. Responsum 266 is an unusually lengthy responsum. In the first part he presents arguments that would seem to support his own position of rejecting the evidence of prior betrothal, and then dismisses each one in turn on halakhic grounds. Then he presents the arguments that indeed lead to freeing the woman from the claim of prior betrothal. He does all this slowly and methodically, without any indication of emotion. Responsum 267 is an addendum. In it he pours his heart out over the shameless villainy of the affair, and the degeneration of the society that allows it to happen.

split his head” which is mentioned in the Talmud, or robbing or informing on someone, which Maimonides mentioned [in this connection]. But not something like this.

Duran rejects the inclusion of severe mental or emotional harm as part of the definition of “an oath to inflict injury” for purposes of compelling *halitza*.<sup>85</sup> One cannot, of course, say this for certain, but given Duran’s penchant for utilizing functional interpretation, it is tempting to suggest that if the decision would have depended on it, he might have himself adopted Rivash’s broadened definition of “injury.”

[7] The Legal Guardian (Rivash 489)

In the preceding example, Rivash’s expansion of the legal definition of “doing injury” appears as an addendum to his responsum. Its omission would not have changed the decision in any way. It is not infrequent for the authors of responsa to include arguments that do not emanate directly from the objective reading of the law, but are necessary for the decision that the responder believes to be the just and moral one in the case at hand. Here Rivash’s argument, based on the prohibition of mental anguish, is not such a case; the ruling would have been the same without it. Nor is it an example of a make-weight argument (Hebrew: *senif*), an additional argument commonly used to strengthen the force of the decision, but one that would not be convincing on its own.<sup>86</sup> From the passion evidenced by Rivash’s words cited above, “there is no greater [cause of] sorrow than ‘anchoring’ the widow,” it is clear that his broad definition of “doing injury” was intended as one that was fully valid in its own right. It was meant as a definition that could serve by itself to determine the ruling in a future case where it might be relevant. Its inclusion here is a reflection of what Rivash believed to be the proper reading of the law.

Another instance of this pattern in the responsa of Rivash is the following. The case involves a widow with minor children. These children are the heirs of their late father’s estate, and the Court had assigned a

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<sup>85</sup> Rivash’s position, that in spite of the Talmud’s examples, mental distress is equivalent to physical distress, can be seen as a meta-halakhic stance based on primary principles, in this case stemming from basic morality. There is a similar phenomenon in Rivash 175, where the primary principle is the teaching of Torah to children. There too, Duran, in *Tashbetz*, 1:64, rejects Rivash’s decision on the basis of a straightforward reading of the Talmud.

<sup>86</sup> For a discussion of *senifim*, see my volume, *Precedent and Judicial Discretion: the Case of Joseph ibn Lev*, Chapter 7.

guardian to take care of their financial affairs and to represent their interests. Such an undertaking entails time and effort, without compensation. The Court cannot compel an individual to take this upon oneself, so its choice of a guardian is limited to one who is willing to undertake it. The Tosefta, a component of talmudic literature but not part of the Talmud itself, speaks to the issue of a guardian of this type who accepted the task, but subsequently sought to withdraw from it:

Guardians, until they have taken possession of the assets of the orphans, may withdraw. Once they have taken possession of the assets of the orphans, they cannot withdraw.<sup>87</sup>

In the present case, the guardian had not yet taken physical possession of the assets. He did, however, engage in two acts on behalf of the orphans. The first, in order of presentation in the responsum, is that he represented them in court on a few occasions. The second is that he allowed the widow to collect on a debt that the estate owed her. The question is whether these activities on behalf of the orphans qualify as “taking possession of the assets,” and thereby prevent the guardian from withdrawing from his position.

The guardian’s role in allowing the widow’s collection of the debt is a strong case for classifying the guardian as having “taken possession of the assets,” even though the assets did not physically pass through his hands. Rivash points out that if a guardian sold land from the estate, even though he did not take physical possession of the land, his sale of the land nevertheless counts as his having taken possession, and allowing the widow to collect on a debt is no different. Rivash could easily have ruled on that basis alone that the guardian cannot withdraw. But he opts to argue first the weaker case, namely, that the act of representing the orphans in court in itself disqualifies him from withdrawing.

After some preliminaries that do not add up to a compelling argument, Rivash states his position explicitly, and justifies it by an original reinterpretation of the sense of the Tosefta. After paraphrasing the Tosefta, that guardians can withdraw “as long as they have not taken possession of the assets,” he continues:

But it appears that if they began to function in their appointment as guardians [in any way] they cannot withdraw... And that which the Tosefta states, “took possession of the assets,” comes to teach us something special,<sup>88</sup> that the reception of assets is [in itself] a beginning [of the guardianship], even though they did yet engage in any

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<sup>87</sup> *Tosefta, Bava Batra* 8:3; 8:12 ed. Lieberman.

<sup>88</sup> *Revuta*, Jastrow: “something remarkable.”

other guardianship activity. And so, if one appeared before a court of law several times as a guardian and argued on their behalf, this would constitute a beginning [of the guardianship], and he is now obligated to complete [his role as such].

Rivash is aware of the weakness of his argument. He begins his transition to the second, more convincing, act of guardianship, the allowance of the widow's collection of her debt from the estate, the following way:

And even if one say that we require actual possession of the assets, **like the plain sense of the Tosefta**, in this case, of a guardian who allowed the widow's collection of the debt, there is no greater [example of] taking possession of assets than this.

So it appears that Rivash has no firm basis in the sources to rule as he does with regard to the guardian who had represented the orphans in court. He is fully aware that his interpretation of the Tosefta is original. A guardian, having begun his work, cannot withdraw from it. The Tosefta, the only source that defines what a guardian's "beginning his work" means, says that it means "taking possession of the assets." But as Rivash sees it, this is simply a ready example of a guardian's beginning his work, and does not exclude other activities on behalf of his charges. In the current instance, "beginning his work" happens to be representing the orphans in court. What Rivash has done here is apply a functional interpretation of the law. It wasn't necessary for him to do so in this case. He does so because he believes it is correct, and even if it isn't necessary to resort to it in the case at hand, he apparently wanted to establish it as a precedent. This is exactly parallel to the case of the reluctant levir. There, too, Rivash did not need to apply a broad functional interpretation of "injury" in order to establish the ruling that he believed to be just, but he nevertheless did so. Duran, however, who, as we have seen, utilized that approach in a number of cases in which it changed the decision, took issue with Rivash who used it on principle, without needing it to arrive at a desired conclusion.<sup>89</sup>

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<sup>89</sup> It is instructive to compare these responsa with two of Rivash's early ones, Responsum 382 and its follow-up, Responsum 385, composed about two years after he began his rabbinic career in Saragossa (cf. Hershman, p. 234). See above, n. 41.

### **Addendum on Empirical Evidence**

In Case [4] above, we saw Duran's use of empirical evidence. Following are two other cases in which empirical evidence is referenced. But unlike in Case [4], both of them fall short of determining his ruling on the basis of this factor alone.

#### **[8] The Overloaded Ass (*Tashbetz* 3:106)**

Barley is lighter in weight than wheat. The Mishna discusses the liability of one who hires an ass to transport wheat but uses it instead to transport barley, when in the end there was damage to the ass. The passage is not entirely clear, and there is discussion of its meaning in the Talmud.<sup>90</sup> In the *Mishneh Torah*, Maimonides presents the decisive view as follows:

If a man hired from another an animal for carrying 200 pounds of wheat but made it carry 200 pounds of barley instead, and the animal died, he is liable because bulkiness makes carrying more difficult, and barley is bulkier.<sup>91</sup>

The Mishna states, in the reading accepted as law, "Volume is hard for bearing."<sup>92</sup> This is understood to mean that once the weight is the same, any additional volume beyond that is more difficult for the beast to bear.

The question posed to Duran is a simple one:

If one hires an ass to transport ten measures of wheat, and he transported eleven measures of barley, and [the ass] died on route, [is he liable].

Duran answers briefly that the issue of more volume comes into play only once the weight is the same. In this case, the weight of eleven measures of barley is less than ten measures of wheat. After pointing out the obvious, that lessening the weight does not make the hirer liable, he continues as follows:

And even if it were of equal weight, the early authorities<sup>93</sup> wondered how the addition of volume [alone] could be [considered] an addition [to the difficulty of bearing the load]. **But experience proves that this is so, as workers of the land have told me.**

It appears that Duran was troubled by the principle underlying this law, namely, that an increase in volume, without any additional increase in weight, "is hard for bearing." Common sense would indicate that

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<sup>90</sup> BT *Bava Mezi'a* 80a.

<sup>91</sup> *Laws of Hiring*, chap. 4, par. 4. Trans. Yale Judaica Series.

<sup>92</sup> The reading supported by Rava.

<sup>93</sup> The generally thorough notes in the Mekhon Yerushalyim edition do not identify who they are.

weight alone determines the difficulty in bearing a load. He tells us that he sought out workers of the land to supply him with empirical evidence regarding this issue. Contrary to his expectations, they corroborated the counterintuitive principle enunciated in the Mishna.

**[9] Two Kinds of Raisins** (*Tashbetz* 1:57; Rivash 9)

The festive meal on the eve of sabbaths and festivals is preceded by a liturgical declaration of the sanctity of the day, called *kiddush*, which is accompanied by a glass of wine. The same question about this, which emanated from Oran, was posed to both Rivash and Duran.

This is the query as it appears in the *Tashbetz*:

You asked: What is the law [as to whether it is permitted] to recite the *kiddush* for the [holy] day with raisin wine. And you said that there is one [rabbi] among you who ruled that it is forbidden.

The issue of raisin wine is raised in the Talmud, where it is clearly decided that it may be used for *kiddush*.<sup>94</sup> Both Rivash and Duran, therefore, try to understand how anyone could have ruled to prohibit it. In this context, Duran quotes Maimonides. Maimonides here uses the term *devash*, which refers to the sweet liquid of ripe fruit.<sup>95</sup> He writes:

Wine that has the smell of vinegar but tastes like wine – one may recite *kiddush* with it. The same is true for ... raisin wine, one can recite *kiddush* with it. This is true as long as the raisins have [sufficient] moisture, so that, when treaded, they exude *devash*.<sup>96</sup>

The wording implies that there are two kinds of raisins, those that exude *devash*, and those that do not. Duran suggests that Maimonides construed the term *devash* narrowly. According to him, liquid from raisins that, because of their poor quality, would not be referred to as *devash*, would not qualify for the purpose of *kiddush*. This would exclude raisins as they were produced in North Africa.<sup>97</sup> This, says Duran, is a misunderstanding.

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<sup>94</sup> BT *Bava Batra* 97b.

<sup>95</sup> *Devash* refers also to bee's honey, which is its only meaning in Modern Hebrew.

<sup>96</sup> Laws of the Sabbath, chap. 29, par. 17.

<sup>97</sup> Rivash zeroes in on this aspect of the issue. He cites Alfasi, *Pesahim* no. 779, 22b in the current pagination. After quoting the Talmud to the effect that raisin wine is permissible for *kiddush*, Alfasi continues: "But the Great Ones [the *ge'onim*] say that not all raisins are permissible for the purpose of reciting *kiddush*, only those that are like the ones that dried [literally: "withered"] on the vine, and are not [totally] dried out." Rivash suggests that those who objected to North African



The dichotomy is between those raisins that, though dried, have some moisture, and those raisins that are so old that their natural moisture is completely gone. There may be some liquid that can be extracted from these raisins as well, but it is not a product of the original liquid of the fruit. It is what the Talmud calls *qiyuba*, an acidulous liquid,<sup>98</sup> which the Talmud explicitly distinguishes from wine and other kinds of fruit juice on a number of occasions with the dismissive expression “mere *qiyuba*.”<sup>99</sup>

None of this would be relevant to the purpose of this study, were it not for an argument based on empirical evidence that Duran introduces at this point, almost as an aside:

And it is apparent to the eyes that it [i.e., the raisin wine in use] is not mere *qiyuba*, because it ages and increases its strength with its aging. And if it were *qiyuba*, it would not maintain [its character]. So it is certainly not *qiyuba*, and it is [true] grape wine.

The case could have been made without this passage, as indicated by the rest of the responsum, and by Rivash’s responsum, which comes to the same decision without this argument. But Duran felt the need, apparently, to introduce an empirical proof.

#### **IV. Redefining the Law**

[10] “He’s Not my Son!” (*Tashbetz* 2:19; Rivash 41)

I have defined “functional interpretation” as interpretation based on the original intent of the law, in contrast to its being based on the law’s specific wording. The example before us now does not fit that exact definition. But it has an affinity to functional interpretation in the sense that, like it, it exhibits a more rational process of decision making, rather than a more mechanical/literal approach to it, and consequently yields an original legal ruling by Duran.

Deuteronomy 21:15–17 refers to a law of inheritance, in which a man’s firstborn inherits a double portion. The passage describes a man who has two wives, one whom he loves and the other whom he spurns, though his firstborn is the son of the latter. The Torah tells us that the father does not have the right to ignore the firstborn’s priority, and bequeath the double portion to a son of the wife he loves:

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raisin wine mistakenly took the example of drying on the vine as restrictive, excluding other ways of drying them that were used in North Africa.

<sup>98</sup> Translation ArtScroll.

<sup>99</sup> The occurrence most relevant to our purpose is at BT *Bava Batra* 97a.

He shall acknowledge the firstborn, the son of the spurned one, by giving him a double portion of all that he has.<sup>100</sup>

The Talmud understands the phrase “He shall acknowledge the firstborn” to mean that the father has the unilateral right to establish the son’s identity as the firstborn.<sup>101</sup> A corollary of this is that if there are older siblings, the father has the right to declare them illegitimate.<sup>102</sup> This, of course, runs counter to the accepted rules of evidence, and is understood as a unique right conferred upon the father by the Torah.

This issue is cited by both Rivash and Duran in the course of their respective responsa. Each of them responds to a different case, but both cases deal with the question of an unwed mother’s identification of the father. The case to which Duran responded arose after Rivash had died. Duran was aware of Rivash’s earlier responsum, and tells us that he disputed it with him orally at the time. Both cases concern an unmarried pregnant woman, who identified the father, who in turn denied the entire affair. In talmudic law, illegitimacy has no bearing on matters of civil law. Once the father acknowledges his child, or is proved in court to be the father, he is obligated to support his child. Most likely, this is the core of both cases.

The circumstances in the case before Rivash, as paraphrased by him from the original query, are unusually detailed, and present the woman as irrational, conniving and untrustworthy. It is not surprising that Rivash rejects the woman’s claim. One of the arguments Rivash presents is based on the law cited above, that in a marital situation a father has the right to declare that a child of his is in fact not his. Rivash argues that if this is true in a marital situation, it is certainly so in a non-marital situation. The alleged father has the right, derived from the Torah, to deny his paternity.

Unlike Rivash’s responsum, in which the query is given in lengthy and vivid detail, Duran’s later responsum provides very little detail, and it is not possible to reconstruct the details from the responsum. Duran rejects a number of Rivash’s arguments in the earlier case, among them the one based on the father’s right to declare his child to be illegitimate. In doing so, he offers various narrow interpretations of that law, which would preclude the defendant from escaping liability in the case at hand. The first of these is of interest to us. Duran does not deny that the Torah allows a father to declare his child to be illegitimate, contrary to the established rules of evidence. But he limits it to a rational claim on the father’s part. He can do so, says Duran, only if he maintains that he did not have sexual

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<sup>100</sup> Deut. 21:17, based on RSV.

<sup>101</sup> BT *Bava Batra* 127b.

<sup>102</sup> *Qiddushin* 78b. The *halakha* follows R. Yehuda.

relations with his wife for a length of time that precluded his paternity. In other words, the special dispensation that the Torah gives the father suspends the normal rules of evidence in favor of the father's word. But the father's word must be based on a rational argument. As far as I can determine, it appears that Duran's interpretation of this law is original. Maimonides, for instance, describes the law as follows:

If the father said, "This is not my son," **or** if her husband was abroad, then he [the child] is [legally] presumed to be illegitimate.<sup>103</sup>

The declaration "This is not my son," and the circumstance of being abroad for a period that precluded his paternity, are two independent instances in which the child is considered illegitimate. Duran, however, rolls the two into one. The father has the right to declare "this is not my son," but **only** when the situation makes his certainty of that claim feasible. In effect, Duran redefines the law that allows a father to declare his presumed son illegitimate, by restricting it only to a situation in which he could know that with certainty. Duran's redefinition of a law, in order to bring it into accord with the decision he is advocating, is attested in a few other cases.

**[11] Honoring the Dead Revisited** (*Tashbetz* 1: 22; Rivash 116)

Case [2] dealt with a Jew who had died among non-Jews, a week's travel from a Jewish settlement. The local rabbi permitted his relatives to set out on the second holy-convocation day of Sukkot, for the purpose of burying him. He was challenged on this decision, and turned to Duran, who supported, and substantially broadened, the lenient decision. One of the arguments for stringency, not cited above, is relevant here. Duran presents it as "the third argument" for stringency. According to the accepted law, activities that are permitted on the second holy-convocation day for purposes of burial must be done in private, and not in the public eye, as was the case here.<sup>104</sup> Duran presents a number of reasons that this consideration is not relevant in the case at hand. Among them is the following:

I further say, that even according to the position of one who is strict [and rejects the arguments previously offered for leniency], one cannot challenge you on this matter. For they prohibited [burial activities] in public only where it was possible to do so in private, **or** [in a case] of delaying it for one day, such that it [the corpse] would not deteriorate so much as a result of such a delay. But in a case like this, one should permit it even in public.

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<sup>103</sup> Laws of Forbidden Intercourse, chap. 15, par. 19.

<sup>104</sup> *Tur, Oraḥ Hayyim*, no. 526

Duran offers here two reasons for justifying public activity in preparation for a burial. The second, introduced with the conjunction “or,” is presented as if it were a variant of the first. In fact, it is an independent reason, not connected to the former. He follows with a proof-text from the Talmud, but in fact it supports the first reason only. It is the second reason, however, that is at the heart of Duran’s argument. As we have seen above in Case [2], Duran asserts that it is the minimizing of the corpse’s continuing decay to the extent possible that defines the respect given to human beings in their death, not just the burial itself. This in itself has nothing to do with the requirement of private activity, the topic of “the third argument.” He introduces it here surreptitiously, and, without any source,<sup>105</sup> redefines the law requiring private activity in burial preparation to apply only to a one-day delay.

[12] The *Mamzer* of Uncertain Status (*Tashbetz* 3:327)

Deuteronomy 23:3 states: “A *mamzer* may not enter into the congregation of the Lord.” The *halakha* defines a *mamzer* (fem: *mamzeret*; m. pl: *mamzerim*) as one whose birth resulted from an act of adultery or incest. It defines not being able to “enter into the congregation of the Lord” as a prohibition to marry within the Jewish fold, except with another *mamzer*. This prohibition is qualified by the Talmud:

“A *mamzer* may not enter into the congregation of the Lord” – A *mamzer* of certain status may not enter. But a *mamzer* of uncertain status may enter.<sup>106</sup>

If there is uncertainty whether or not one is a *mamzer*, then the restriction of marriage does not apply in biblical law.

Levirate marriage is considered a religious obligation in the Sephardic halakhic tradition, but it applies only when a man dies without living children. Otherwise it is a violation of incest for a man to marry his brother’s wife, even after his brother’s death. There is no middle ground between the obligation of the levir to marry his sister-in-law when her husband had no living children at the moment of his death, and the prohibition of incest that is incurred if he marries her when he had a living child at that moment. In cases of doubt whether or not there was a living child at the moment of the husband’s death, there can be no levirate marriage, and the wife must undergo *halitza* to be able to remarry. If a child was born live, but lacking signs of vitality, and in fact does not survive thirty days,

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<sup>105</sup> In addition to Duran’s own silence, the usually thorough notes in the Mekhon Yerushalayim edition do not cite any references.

<sup>106</sup> BT *Qiddushin* 73a.

then he is considered a stillborn, and the widow is a candidate for levirate marriage.

Toward the end of his life Duran was involved in a controversy regarding a levirate marriage.<sup>107</sup> The incident took place in the city of Taza, in Morocco, on the route between Fez and Tlemcen, in Algeria. A man died without children, leaving a brother and a pregnant wife. The baby was born sickly and malformed, with signs that the midwives believed to be fatal, and indeed the baby died a few days later. The Talmud lists specific physical signs that define a child born live as a stillborn, but those in the present case were not among them.<sup>108</sup> Yet both the widow and the levir wanted to undergo levirate marriage. Furthermore, the levir was from a powerful family with considerable clout.

The case produced an extended correspondence, because the rabbi of Tlemcen, R. Ephraim Alneqawa, allowed the levirate marriage, while Duran, in Algiers, opposed it vehemently.<sup>109</sup> Most of the legal issues in this extended conflict do not concern us now. Suffice it to say that with the backing of Alneqawa, and the political power of the levir's family, the levirate marriage was allowed to go forth. Duran declared that any children born should be declared *mamzerim*. The family fought back, soliciting the backing of the rabbi of Soria, in Castile.<sup>110</sup>

We do not have the original argument of the rabbi of Soria, but it can be reconstructed from Duran's response. He based himself on the talmudic ruling, that the restrictive biblical law of the *mamzer* does not apply if there is an element of uncertainty with regard to his status. In the present case, the uncertainty derives not from the facts, but from conflicting legal opinions. The law, deriving from the Talmud, is that if the baby, born live, yawns suddenly and dies, it is considered a stillbirth in a case of levirate marriage. On the other hand, if it falls from a roof or is eaten by a lion during the thirty days, it is considered a live birth. But there was an unresolved controversy over a baby who took sick after birth and died during the thirty days.<sup>111</sup> In light of this controversy, the rabbi of Soria

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<sup>107</sup> The issue extends over several responsa: 3:242, 257, 285, 286, and 327. The latter, the one we are concerned with, is the last responsum in the three original volumes of the *Tashbetz*. The details of this case are summarized and analyzed by Noah Aminoah, *Rabbi Joseph Sasportas and his Responsa* (in Hebrew), Tel Aviv, 1994, pp. 90–93. The description that follows draws from this work.

<sup>108</sup> BT *Yevamot* 80b. The issue of signs of vitality relates to premature births. But in practice, there was rarely certainty in this regard.

<sup>109</sup> A responsum by Alneqawa to Duran defending his position is published from manuscript in the Mekhon Yerushalayim edition of the *Tashbetz*, 5:47.

<sup>110</sup> Aminoah identifies him as Joseph Albo, author of *Sefer ha-Iqqarim*.

<sup>111</sup> BT *Shabbat* 136a.

argued that the most that could be said about children subsequently born through this union was that their status as *mamzerim* was uncertain. They would not be *mamzerim* by biblical law, and therefore there should be no formal declaration declaring them as such.

Duran counters this argument by redefining the ruling of the Talmud regarding the status of an uncertain *mamzer*:

Even so, one may not permit them to “enter into the congregation” on the grounds that we say, “A *mamzer* of uncertain status was not prohibited by the Torah.” For this was said regarding one whose only flaw was in our knowledge [of the facts], because we don’t know whether he is legitimate or a *mamzer*, such as in the case of ... [he lists cases of children of uncertain provenance]. For then he could say, “I am legitimate, and I should not have to worry about your lack of knowledge.” But one who has fallen into an uncertain status because of a flaw is within him, like the case at hand, in which he was born through possible incest – regarding such a one we do not say, “The Torah prohibited only a *mamzer* of certain status.”

The reason it is “possible incest” is because the law is in doubt as to whether the child who died is considered a stillborn, which would permit the levirate marriage, or whether it is considered a live birth, which would exempt the widow from a levirate marriage and make the union with her brother-in-law incestuous. Duran distinguishes between doubt of the facts and doubt of the law. But this distinction is original.<sup>112</sup> Duran redefines the law in order to bring it into accordance with his intended ruling.

**[13] A Drowning at Sea Revisited (*Tashbetz* 1:77, [1]; *Tashbetz* 2:19, [8])**

Another example of this technique takes us back to the case with which we began, “A Drowning at Sea.” In that situation there was only one witness. Duran had no doubt at all that the man who had tried to swim to shore was dead. His main thrust was finding a way to justify reliance on a single witness in a civil litigation. He does so by supplementing the testimony of a single witness with other corroboratory evidence, and arguing that this would be sufficient, as part of the legal definition of “two witnesses.” In the course of doing so, he cites a passage in the Talmud regarding the rules of procedure in civil cases. Although the burden of proof is on the plaintiff, there are certain situations in which the plaintiff’s evi-

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<sup>112</sup> The editor in the Mekhon Yerushalayim edition refers to two rabbinic authors “who discuss the great innovation (*bidush*) of our Rabbi [i.e., Duran] here.”

dence falls short of being probative, yet the defendant is nevertheless required to take an oath to acquit himself of the plaintiff's claim.<sup>113</sup> But there are instances in which the defendant cannot take the oath. An obvious example is a case in which he has a proven record of swearing falsely. In such cases, the oath is transferred to the plaintiff, who can then collect on the basis of his own oath. The Talmud relates that the talmudic sage Rava was trying a case in which a female defendant was required to take such an oath. Rava's wife, the daughter of Rabbi Hisda, told him that she happens to know that this woman was untrustworthy. On the basis of that informal information, Rava transferred the oath to the plaintiff. Subsequently another case arose, and Rava's student, the later sage, Rabbi Papa, was present. He whispered to Rava that he happens to know that the note of indebtedness being presented had in fact already been paid. Rava told him that unless he has a second witness to testify with him, his testimony is not acceptable. When Rabbi Papa asked why his testimony was less reliable than that of his wife, Rava answered, "I have complete faith in the word of Rabbi Hisda's daughter. I do not have complete faith in you."<sup>114</sup> Maimonides ruled that although this rule of procedure is accepted in theory, nowadays courts do not have the authority to decide cases on the subjective basis of "I have complete faith in him."<sup>115</sup> Maimonides' ruling, which limited the range of acceptable evidence, militated against Duran's purposes. He confronts the challenge as follows:

And even though great rabbinic authorities have said that a judge does not have the right to say, "I have complete faith in him," ... that [ruling] refers to a situation in which no one but that [specific] judge has faith that this testimony is true. But in a situation in which the entire world has faith that this testimony that he testifies is true, we properly act according to it.<sup>116</sup>

In this manner Duran creates a new legal category for actionable testimony, namely, a wide popular conviction that a certain testimony is true, even though the supporting evidence by itself is legally unacceptable. Duran, without precedent, redefines the parameters of a law in order to reach a decision that he believes is just.

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<sup>113</sup> Mishna *Shevu'ot*; BT *Shevu'ot* 44b.

<sup>114</sup> BT *Ketubbot* 85a.

<sup>115</sup> *Laws of the Sanhedrin*, chap. 24, par. 1-2.

<sup>116</sup> *Tashbetz*, 1:77, p. 168, col. 2.

### **Summary**

This study has traced a number of ways in which Duran's originality is manifest in his responsa. We began with his daring redefinition of the biblical requirement of "two witnesses," which allowed him to bring under the umbrella of the law what he saw as the correct and proper ruling, clearly reflecting the facts on the ground. He did this by applying the function of two witnesses to other kinds of testimony of equivalent certainty. I called this "functional interpretation," and we saw a number of other examples in which he Duran utilizes this technique. Redefining the law to arrive at a ruling that he felt was the correct one for the case at hand is also evident in a number of other cases. In one of our examples of Duran's use of functional interpretation, that interpretation drew on empirical evidence. Two other cases were presented in which Duran relates to empirical evidence, thus indicating that empirical evidence played a role in Duran's judicial mentality. These are all examples of Duran's going beyond the literal word of the codified law as it had been traditionally understood. 