# A Violation that Can Be Fixed? לאו הניתק לעשה

Some violations in the Torah are followed by positive commandments that apply even if one has already transgressed the violation. A prominent example as understood by Chazal is sending away a mother bird even AFTER one already violated the Torah by taking her along with her chicks (Devarim 22:6-7). The Gemara calls this kind of negative-followed-by-positive commandment a מצות לא תעשה שיש בה קום עשה זס לאו הניתק לעשה, and it rules that one who violates such a commandment does not get lashes.

Why shouldn't a person who transgressed get lashes even if they fulfill the positive commandment later? Does fulfilling the positive commandment somehow stem the damage of the original transgression? Are we giving people a second chance here, or does this open the possibility of people exploiting the law by violating it and just making up for it by doing the positive commandment later?

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### משנה מכות ג:ד (מובאת בדף יז. בגמרא)

הַנּוֹטֵל אֵם עַל הַבָּנִים, רַבִּי יְהוּדָה אוֹמֵר, לוֹקֶה וְאֵינוֹ מְשַׁלֵּחַ. וַחֲכָמִים אוֹמְרִים, מְשַׁלֵּחַ וְאֵינוֹ לוֹקֶה. זֶה הַכְּלָל, כָּל מִצְוַת לֹא תַעֲשֶׂה שָׁיֶּשׁ בָּהּ קוּם עֲשֵׂה, אֵין חַיָּבִין עָלֶיהָ:

With regard to one who takes the mother bird with her fledglings, thereby violating the Torah prohibition: "You shall not take the mother with her fledglings; you shall send the mother, and the fledglings you may take for yourself" (Deuteronomy 22:6–7), Rabbi Yehuda says: The perp is flogged for taking the mother bird, and does not send the mother, and the Rabbis say: The perp sends the mother and is not flogged, as this is the principle: With regard to any prohibition that entails a command to arise and perform a mitzva, one is not liable to receive lashes for the original violation.

#### תוספתא מכות ד:ו

הנוטל אם על הבנים רבי יהודה אומר משום רבי יוסי הגלילי כל עוברי לא תעשה שעברו על מצות לא תעשה שיש בה קום עשה אם קיימו את מצות תעשה שבה פטורין ואם לאו חייבין

One who takes the mother along with the birds: R. Yehuda says in the name of R. Yose the Galilean: all who violated negative commandments that have positive commandments attached, if they performed the positive commandment, they are exempt from lashes, but if they did not do so, they are liable to receive lashes.

## מכות טו: - קיים לא קיים vs. ביטל לא ביטל

דְּתָנֵי תַּנָּא קַמֵּיהּ דְּרַבִּי יוֹחָנָן: כָּל מִצְוַת לֹא תַעֲשֶׂה שֶׁיֵּשׁ בָּהּ קוּם עֲשֵׂה, קְיֵים עֲשֵׂה שֶׁבָּהּ – פָּטוּר, בִּיטֵל עֲשֵׂה שֶׁבָּהּ – חַיֵּיב.

What is the dispute to which the Gemara is alluding? The *tanna* taught a *baraita* before Rabbi Yoḥanan: With regard to any prohibition that entails a command to arise and perform a mitzva, if he fulfilled the positive mitzva that is entailed therein, he is exempt from lashes, and if he nullified the positive mitzva that is entailed therein, he is liable to receive lashes.

אֲמַר לֵיהּ: מַאי קָא אָמְרַתִּ? קִיֵּים – פָּטוּר, לֹא קִיֵּים – חַיָּיב, בִּיטֵל – חַיָּיב, לֹא בִּיטֵל – פָטוּר! תְּנִי: בִּיטְלוֹ וְלֹא בִּיטְלוֹ. וְרַבִּי שָׁמִעוֹן בֵּן לַקִישׁ אוֹמֵר: קִיִּימוֹ וְלֹא קִיִּימוֹ.

Rabbi Yoḥanan said to the *tanna*: What is it that you are saying? The *baraita* that you recited is self-contradictory, as based on the first clause: If he fulfilled the mitzva he is exempt, apparently, if he did not fulfill the mitzva he is liable. Yet based on the latter clause: If he nullified the mitzva, he is liable, apparently, if he did not nullify the mitzva he is exempt, even though he failed to fulfill the mitzva. Rather, teach: If he nullified the mitzva, he is liable to receive lashes, and if he did not nullify the mitzva, he is exempt from lashes. And Rabbi Shimon ben Lakish says: The formulation of the *baraita* must be consistent; therefore, teach: If he fulfilled the mitzva, he is exempt, and if he did not fulfill the mitzva he is liable.

(When) do you have to fulfill the positive commandment?

#### ו. תוך כדי דיבור להתראה:

# רש"י חולין קמא. ד"ה קיימו ולא קיימו (ראו גם תוס מכות טו. ד"ה הניחא)

כל מצות ל"ת שיש בה קום עשה כגון זה שניתק הלאו לעשה דמשמע לא תקח ואם לקחה קיים עשה שבה כשהתרו בו לא תקח ולקחה ושלחה בתוך כדי דבור של התראה פטור ואע"פ שעבר על לא תקח דלכך נתקו לעשה לומר אם עברת על אזהרה זו עשה זה והפטר לא קיים עשה שבה תוך כדי דבור דקי"ל תכ"ד כדבור דמי כי עבר על התראה חייב אפילו שלחה אחר זמן...

Any violation that has a positive commandment within it, such as when the negative and the positive commandments are connected - which sounds like: Don't take (the mother with the children), but if you did, fulfill the positive commandment in it. And when they warned the person: Don't take; but the person took it anyway, but then sent away the mother within a few seconds of the warning, that person is exempt from lashes even though the violated the law of "Do not take." For this is why the Torah connected it to a positive commandment, to say that if you violated this warning, do this action and be exempted (from lashes). If one did not perform the positive commandment in it with in a matter of seconds which we consider to be as part of the original utterance, because the person violated the official warning, that person is now liable for lashes even if they end up sending away the mother bird eventually.

## וו. כשבית דין מזהיר לקיים את העשה:

רי"ף מכות ג: (בדפי הרי"ף)

תני קיימו ולא קיימו כלומר אע"פ שלא בטלו לעשה כיון שלא קיימו לוקה על לא תעשה:

## נימוקי יוסף שם ד"ה קיימו:

לגירסת הרי"ף ז"ל מיד כשהתרו בו ב"ד לתקן הלאו ולא תיקן שוב אין לו תקנה לתקן אותו ולוקה:

## III. כל שעוד שיש אפשרות לקיים את העשה שבה:

#### רמב"ם הל' מתנות עניים א:ג-ד

אָבַד כָּל הַקָּצִיר שָׁקָצַר אוֹ נִשְׂרַף קֹדֶם שָׁנָּתַן הַפֵּאָה הֲרֵי זֶה לוֹקֶה. שֶׁהֲרֵי עָבַר עַל מִצְוַת לֹא תַּעֲשֶׂה וְאֵינוֹ יָכוֹל לְקַיֵּם עֲשֵׂה שֶׁבָּה שֶׁנָּתָּק לוֹ: If the entire harvest that was reaped was destroyed or consumed by fire before one gave *pe'ah*, one is liable for lashes. [The reason is that] one has violated a negative commandment and did not fulfill the positive commandment that could correct it.

ּוְכֵן בְּלֶקֶט כְּשֶׁקּוֹצֵר וּמְאַלֵּם לֹא יְלַקֵּט הַשִּׁבְּלִים הַנּוֹפְלוֹת בִּשְׁעַת הַקָּצִיר אֶלָּא יַנִּיחֵם לָעֲנִיִּים שֶׁנֶּאֱמַר (ויקרא יט ט) (ויקרא כג כב) "וְלֶקֶט קְצִירְךָ לֹא תְּלַקֵּט". עָבַר וּלְקָטָן אֲפָלוּ טָחַן וְאָפָּה נוֹתֵן לָעֲנִיִּים שֶׁנֶּאֱמַר (ויקרא כג כב) "לֶעָנִי וְלַגֵּר תּעזֹב אֹתם". אבדוּ אוֹ נשׂרפוּ אחר שׁלֹקטן קֹדָם שׁנַתן לעניים לוֹקָה:

Similarly, with regard to *leket*: When one harvests or binds sheaves, one should not gather the stalks that fall during the harvest. Instead, one should leave them for the poor, as it is stated [*ibid.*]: "You shall not gather the gleanings of your harvest." If one transgresses and gathers them - even if one already ground them [into flour] and baked [them], one must give it to the poor, as it states [*ibid.*]: "Leave it for the poor and the stranger." If [this produce] is lost or consumed by fire after one gathered it, but before one gave it to the poor, one is liable for lashes.

#### רמב"ם הל' נערה בתולה א:ז

אַף עַל פִּי שָׁנָּאֱמַר בְּאוֹנֵס (דברים כב כט) "לֹא יוּכַל לְשַׁלְּחָהּ" כֵּיוָן שֶׁקְּדָמוֹ עֲשֵׂה שֶׁנָּאֱמַר (דברים כב כט) "וְלוֹ תִּהְיֶה לְאִשָּׁה" הֲרֵי זֶה נִתְּקוֹ לַעֲשֵׂה וְנִמְצֵאת זוֹ מִצְוַת לֹא תַּעֲשֶׂה שֶׁנִּתְּקָהּ לַעֲשֵׂה שֶׁאֵין לוֹקִין עָלֶיהָ אֶלָּא אִם לֹא קְיֵם עֲשֵׂה שֶׁבָּהּ כְּמוֹ שָׁיִּתְבָּאֵר בְּהָלְכוֹת סַנְּהֶדְרִין. לְפִיכָךְ הָאוֹנֵס שֶׁעָבַר וְגֵרֵשׁ כּוֹפִין אוֹתוֹ לְהַחֲזִיר וְאֵינוֹ לוֹקֶה. מֵתָה גְּרוּשָׁתוֹ לְדֶם שֶׁיַחְזִירֶנָּה אוֹ נִתְקַדְשָׁה לְאַחֵר אוֹ שֶׁהָיָה כֹּהֵן שֶׁאָסוּר בִּגְרוּשָׁה הֲרֵי זֶה לוֹקֶה שֶׁהֲרֵי עָבַר עַל לֹא תַּעֲשֶׂה וְאֵינוֹ יָכוֹל לְקַיֵּם עֵשֵׂה שֶׁבַּהּ:

Although it is said with regard to a rapist: "He may not send her away as long as he lives," since [this prohibition] is preceded by a positive commandment, as it is said, "He must take [the girl] as his wife," the Torah made the prohibition [rectifiable] by the observance of the positive commandment. Thus, this is a negative commandment [whose violation] can be rectified by [the observance of] a positive commandment. Lashes are not given [as punishment for the violation of such a commandment] unless one does not fulfill the positive commandment, as will be explained in *Hilchot Sanhedrin*.

Therefore, when a rapist violates [this prohibition] and divorces [his wife], he is compelled to remarry her and is not punished by lashes. If, however, his divorcee dies or is consecrated by another man before he remarries her, or if he is a priest, who is forbidden to marry a divorcee, he should be punished by lashes. For he transgressed the negative commandment, and is unable to fulfill the positive commandment associated with it.

## וV. אם ביטל.ה בידים:

#### מכות טז.

?לְמֵאן דְּתָנֵי בִּיטְלוֹ וְלֹא בִּיטְלוֹ הֵיכִי מֵשְׁכַּחַתְּ לַהּ, אֶלָּא אוֹנֵס בִּיטְלוֹ וְלֹא בִּיטְלוֹ הֵיכִי מֵשְׁכַּחַתְּ לַהּ? But according to the one who teaches that the criterion for determining whether one is flogged in that case is whether he nullified the mitzva or did not nullify the mitzva, and one is flogged only if he performed an action that renders it impossible to fulfill the mitzva, granted, with regard to the sending away of the mother bird from the nest, you can find a situation where he nullifies the

mitzva, e.g., if he killed the mother bird. But in the case of a rapist, if the criterion is whether he nullified the mitzva or he did not nullify it, how can you find a situation where the man is flogged because he nullified any possibility of remarrying her?

אִי דְּקַטְלַהּ – קָם לֵיהּ בִּדְרַבָּה מִינֵיהּ! אָמַר רַב שִׁימִי מָחוֹזְנָאָה: כְּגוֹן שֶׁקִּיבֵּל לָהּ קִידּוּשִׁין מֵאַחֵר. אָמַר רַב: אִי שַׁוּויתֵיהּ שַׁלִיח – איהי קַא מְבַטָּלֵא לִיהּ, אי לֵא שׁוּויתִיהּ שָׁלִיח – כֹּל כָּמינִיהּ? וַלָא כָּלוּם היא!

If he cannot remarry her because he killed her, he will be executed, not flogged, based on the principle: He receives the greater punishment. Rav Shimi of Meḥoza said: He nullifies the possibility of remarriage in a case where he received, on her behalf, the money for betrothal from another, thereby ensuring that his own remarriage to her is no longer an option. Rav said: That is not a viable solution; if his ex-wife designated him as an agent to receive the money of betrothal on her behalf, it is she who nullifies the possibility of fulfilling the mitzva for him, as a woman is betrothed only with her consent, and he is not liable at all. If she did not designate him as an agent, is it in his power to accept betrothal on behalf of a woman who did not designate him to do so? His action is nothing, and the betrothal does not take effect.

אָלָּא אָמַר רַב שִׁימִי מִנְּהַרְדְּעָא כְּגוֹן שֶׁהִדִּירָהּ בָּרַבִּים. הָנִיחָא לְמַאן דְּאָמַר נֶדֶר שֶׁהוּדַּר בָּרַבִּים אֵין לוֹ הָפָּרָה, אֶלָא לְמַאן דְּאָמַר יֵשׁ לוֹ הָפָרָה, מַאי אִיכָּא לְמֵימַר? (דְּמַדִּירַהּ לַהּ) [כְּגוֹן שֶׁהִדִּירָהּ] עַל דַּעַת רַבִּים. דְּאָמַר אַמֵּימָר: הָלְכָתָא, נֵדֵר שֶׁהוּדַּר בַּרַבִּים – יֵשׁ לוֹ הַפָּרָה, עַל דַּעַת רַבִּים – אֵין לוֹ הַפַּרָה.

Rather, Rav Shimi of Neharde'a said: He nullifies the possibility of remarriage in a case where he vowed in public that it is prohibited for him to derive benefit from her, and it is consequently prohibited for him to marry her. The Gemara asks: This works out well according to the one who says that a vow that was taken in public has no nullification; he is flogged, since by taking that vow he has rendered remarriage impossible. But according to the one who says that even a vow taken in public has the possibility of nullification, what can be said? He can nullify the vow and remarry her. The Gemara answers: The reference is to a case where he vows on the basis of the consent of the public that it is prohibited for him to derive benefit from her, as Ameimar says that the *halakha* is: A vow that was taken in public has the possibility of nullification; a vow that was taken on the basis of the consent of the public has no nullification.

#### רש"י מכות טו. ד"ה הניחא

...שהלאו תלוי בביטול העשה ואינו נגמר עד שיבטל את העשה בידים ביטול עולם שלא יוכל להתקיים עוד איכא... למימר כל ימיו יש לו תקנה בחזרה שאין מבטל את העשה אלא א"כ מדירה שלא תהנה ממנו נדר שאין לו הפרה כדלקמן

...For the negative commandment depends on nullifying the positive commandment, and the violation is not complete until the perpetrator actively nullifies the positive commandment in a permanent manner, no longer allowing for a performance of the positive commandment. And it can still be said that there is always a way to fix it remarrying the woman (he raped), for he does not nullify the positive commandment unless he foreswears her any benefit from him an oath that cannot be undone, as discussed later (16a).

אלא למאן דתני קיים את העשה פטור לא קיימו חייב שהעשה תיקונו של לאו הוא ואין הלאו תלוי בביטול העשה שלא למאן דתני קיים את העשה ויפטר או ילקה שמשעה שעבר הלאו נגמר אבל העשה ניתן לעקור המלקות ולכשיבא לבית דין או יקיים העשה ויפטר או ילקה

ליכא למימר כל ימיו בעמוד והחזר קאי כדקאמרת שאם לא יחזירנה מיד כשיבא לב"ד ילקוהו דהא ליכא למימר יקיים לאחר זמן דא"כ לא קיים היכי דמי לעולם הוא יכול לומר אני מקיים:

But according to the one who learns that if one performed the positive commandment one is exempt from lashes, but if one did not do so, one is liable for lashes: for from the time that one transgressed, the violation is complete, but the positive commandment can uproot the lashes. And when one comes to court, one must either fulfill the positive commandment and be exempted from lashes or receive the lashes. According to this perspective, one cannot say that the rapist is always subject to the ability to remarry her as you said. For if he does not remarry her as soon as he comes to the court, they will lash him, for he cannot say that he will do the positive commandment later, because if so, how is there such a thing as "one who did not perform"? After all, he can always say, I will do it (in the future).