

Rabbi Nissim of Girona on Judicial Bribery

Warren Zev Harvey

In his essay, “What’s Wrong with Bribery,” Stuart P. Green asks a good question: What *is* wrong with bribery? Why is it or is it not permitted for a client to give a tip to a waiter, cabby, or chambermaid, or for a prosecutor to give a promise of leniency to a State’s witness? Green defines bribery as “an agreement in which a briber promises to give a bribee something of value in return for the bribee’s promise to act in furtherance of some interest of the briber’s.” He emphasizes that bribery, like conspiracy or dueling, is a crime that requires “the voluntary ... participation of ... two parties.” He adds that in agreeing to the bribe the bribee violates some “duty of loyalty” arising out of his or her office or position.¹ In the course of defining the crime of bribery, Green makes an observation about the history of the crime: “For most of the history of bribery, the only kind of person who could be a bribee was ... a judge,” but today “the universe of people considered capable of being bribees has grown considerably.” While in most Western legal systems today the crimes of the briber and bribee are usually considered equally severe, it has historically been the case that the crime of the bribee was considered primary. The ancient view, he notes, is illustrated by the two injunctions against bribery in the Pentateuch, both addressed to the judge, that is, the potential bribee: “And no bribe shalt thou take, for a bribe doth blind the clear-sighted and perverteth the words of the righteous” (Exod 23:8); and “Thou shalt not take a bribe, for a bribe doth blind the eyes of the wise and perverteth the words of the righteous” (Deut 16:19).² Green makes a comment

- 1 Green, “What’s Wrong with Bribery,” in *Defining Crimes: Essays on the Special Part of the Criminal Law*, ed. R. A. Duff and Stuart P. Green (Oxford: Oxford University Press, 2005), 144–45.
- 2 *Ibid.*, 145–46. Cf. John T. Noonan, *Bribes* (Berkeley: University of California Press, 1984), 1–30. Deut 27:25 does not seem to refer particularly to judicial bribery, but

about the law of bribery in the modern State of Israel: "Under the original law of bribery, bribe-taking by judges was considered a more serious offense than bribe-taking by other kinds of government officials," and the crime of the bribee was defined as more severe than that of the briber.³ The fact that the Israeli bribery law was subsequently revised to conform to contemporary Western notions suggests that Israeli law is today less biblical than it was originally.

Clearly, in rabbinic law, the main crime of bribery is that of a judge accepting a gift. However, what is striking in the rabbinic sources is that bribery is not defined as requiring a *quid pro quo* or indeed any sort of an agreement whatsoever. Moreover, it does not even require criminal intent on the part of either the briber or the bribee. Thus, it is written in *b. Ketub.* 105a: "'And no bribe shalt thou take' [Exod 23:8]? What does this mean? If it comes to teach that [the bribe] must not be for the purpose of acquitting the guilty or convicting the innocent, it has already been taught: 'Thou shalt not wrest judgment' [Deut 16:19]. Rather, even for the purpose of acquitting the innocent or convicting the guilty, the Law said: 'And no bribe shalt thou take.'" Similar rulings by the Rabbis are found in *Mekhilta*, Kaspá, 3, and *Sifre Deut* 144. In the latter work, it is written: "'Thou shalt not take a bribe' [Deut 16:19]. It goes without saying that [the prohibition forbids bribes] for the purpose of acquitting the guilty or convicting the innocent, but [it also obtains] even for the purpose of acquitting the innocent or convicting the guilty." One modern example of a bribe for the purpose of acquitting the innocent or convicting the guilty is that of the prosecutor who offers a State's witness a lenient punishment in return for his or her telling the truth. The witness presumably has good reasons not to tell the truth (e.g., fear of self-incrimination or fear of being murdered by the criminals he or she incriminates), and thus may need an incentive to testify truthfully. Talmudic law, however, does not allow this practice.⁴

Maimonides applies it to the judge; see his *Mishneh Torah*, Hilkhot Sanhedrin 23:1.

- 3 Green, "What's Wrong," 145, 153. See State of Israel Penal Law Revision (Bribery and Rewards) Law, 1950, § 1(a) with § 2–3. According to the original Israeli law, the briber is liable for only half the penalty applicable to the bribee.
- 4 See Eliav Shochetman, "The Testimony of the State's Witness in Jewish Law," *Mishpatim* 11 (1981): 139–73 (Hebrew). The author considers ways in which Jewish law could permit the practice in extraordinary circumstances.

As for the reason for the prohibition of taking a bribe, one is offered at *b. Ketub.* 105b in the name of Rava: “What is the reason for the prohibition of bribery? When one receives a bribe from someone, one’s mind draws close to him and he becomes like one’s own person ... What is the meaning of ‘*shohad*’ [= bribe]? *She-hu*’ *had* [= he is one].” According to this rabbinic play on words, a gift willy-nilly prejudices the receiver toward the giver. The receiver feels as one with the giver, i.e., he or she empathizes with him or her.

While talmudic law is very clear in defining the crime of the bribee, it is not so clear in defining that of the briber. In his codification of Jewish law, *Mishneh Torah*, Hilkhoh Sanhedrin 23:2, Maimonides (1138–1204) defines the briber not as a criminal in his or her own right but as an accomplice: “Just as one who takes a bribe transgresses a negative commandment [namely, Deut 16:19], so does its giver, as it is written ‘Thou shalt not ... put a stumbling-block before the blind’ [Lev 19:14].”⁵ Bribes blind the clear-sighted, and the bribee puts a stumbling-block before the blind.

In what follows, I should like to examine the discussion of judicial bribery found in the Homily on Justice (Homily 11) by Rabbi Nissim ben Reuben of Girona, known by acronym as Ran (c. 1310–76).

Ran’s Discussion of Bribery

Ran’s discussion of the prohibition of judicial bribery begins with a distinction between two different commandments: not to wrest judgment and not to take a bribe.

“And they [the judges] shall judge the people with righteous judgment [*mishpat tsedeq*]” [Deut 16:18]. They were admonished regarding this [righteous] judgment that they not wrest judgment in any way, saying: “Thou shalt not wrest judgment” [ibid., v. 19]. In addition, they were admonished not to take a bribe even to judge righteous judgment, saying: “Thou shalt

5 Maimonides’ source is *b. B. Mets.* 75b, where it is argued that one who borrows from a usurer transgresses the prohibition of “Thou shalt not ... put a stumbling block before the blind.” The borrower in effect gives a bribe to the usurer in order to motivate him or her to lend the money.

not take a bribe, for a bribe doth blind the eyes of the wise and perverteth the words of the righteous" [ibid.].⁶

The judges were enjoined to judge with "righteous judgment," and this uncompromising righteous judgment includes the prohibitions of wresting judgment and of taking a bribe *even to judge with righteous judgment*.⁷

Ran now turns to explain the strict ruling that a judge may not take a bribe even to judge righteous judgment. He will give two explanations for this ruling: the first he found in his sources, and it is enunciated by Rabbi Solomon Isaaci or Rashi (1040–1105); the second is his own.

He begins by examining Rashi's remarks on Exod 23:8 and Deut 16:19.

Rashi wrote: "'For a bribe doth blind the eyes of the wise' [Deut 16:19]. Once [the judge] has received a bribe from [a litigant], it is impossible that he not incline his heart to him, seeking arguments in his favor. 'And perverteth *divre tsaddiqim* [usually translated: the words of the righteous]' [ibid.]. *Divre tsaddiqim* means *devarim metsuddaqim* [righteous words], namely, true statutes [i.e., those of the Law of Moses] [see *Mekhilta*, Kaspā, 3]." Rashi was forced to interpret the verse thus in order to avoid a redundancy [i.e., blinding the judge's eyes and perverting his words might have been understood as synonymous]. Accordingly, he interpreted "blind the eyes of the wise" to refer not to the final verdict, but [to the deliberation] – since [the judge's] heart is close to that of [the briber], he disproportionally seeks arguments in his favor. This [may be illustrated by] the story about Rabbi Ishmael ben Jose ... who paced back and forth saying, "If he wishes he can argue thus, or if he wishes he can argue thus" [*b. Ketub.* 105b]. Since [the judge] so keenly seeks arguments in [the briber's] favor, the bribe he took will pervert

6 *Derashot ha-Ran*, ed. Leon A. Feldman (Jerusalem: Shalem, 1974), 194; 2d ed. (Jerusalem: Mosad ha-Rav Kook, 2003), 422–23.

7 On Ran's concept of "righteous judgment," see my "Liberal Democratic Themes in Nissim of Girona," in *Studies in Medieval Jewish History and Literature*, iii, ed. Isadore Twersky and Jay M. Harris (Cambridge, MA: Harvard University Press, 2000), 197–211.

the judgment that should have been conducted only according to the truth. This is Rashi's opinion.⁸

Ran is in agreement with Rashi concerning the first part of Deut 16:19, "a bribe doth blind the eyes of the wise." However, he disagrees with him concerning its second part, "perverteth the words of the righteous." He explains his own interpretation as follows:

Now, I say with regard to the literal interpretation of this verse that it prohibits bribery even when the intention [of the judge] is to judge in true judgment, and this for two reasons:

[1] First, it should be feared that the bribe will blind the eyes of [the judge's] intellect, and even if he intends to judge only according to the whole truth, it will distort his judgment. This is what is said, "for a bribe doth blind the eyes of the wise" [Deut 16:19].

[2] [Scripture] gave an additional reason in its dictum, "And [a bribe] perverteth the words of the righteous" [ibid.]. This means that even if [the judge] does in fact judge in true judgment, it will appear to the litigant who lost the case that the judge's decision concerning him was distorted because of the money he took. For one of the salutary characteristics of a legal judgment is that even the litigant who has lost the case is not saddened by the decision. Thus, it was said ... "One who leaves the courtroom stripped of his cloak sings a song and goes his way." Said Samuel [of Nehardea] to Rabbi Judah [bar Ezekiel], "This is what is written, 'and also *all* this people shall go to their

8 *Derashot ha-Ran*, pp. 194–95; 2nd ed., pp. 423–24. The phrase "*divre tsaddiqim*" is usually interpreted as referring to the judges ("the words of the righteous [judges]"), and Ran thus interprets it. Others, however, see it as referring to the words of the innocent litigants (see Deut 25:1) or, like Rashi, to the just laws. As for the story about Rabbi Ishmael ben Jose, it is related in *b. Ketub.* 105b that he had a gardener who each Friday brought him a basket of fruit from the garden, but once he came on Thursday. He explained he had a lawsuit that day and thought that since he would be seeing the Rabbi in court he might as well bring him then the basket of fruit. Rabbi Ishmael refused to accept the basket and recused himself from the case. He soon found himself pacing back and forth, seeking arguments in favor of the gardener, "If he wishes he can argue thus, or if he wishes he can argue thus."

place in peace' [Exod 18:23]" [*b. Sanh.* 7a]. Therefore, the Law forbade the taking of a bribe even for the purpose of judging with righteous judgment also for the [second] reason that a bribe distorts and perverts righteous dicta [and makes them seem corrupt]. Accordingly, the meaning of "*yesallef*" [perverteth] will be similar to that in the verse, "The righteous one considereth the house of the wicked, and perverteth [*mesallef*] the wicked to evil" [Proverbs 21:12]. This means that since the righteous person discerns and knows the bad deeds of the wicked, he perverts and distorts his actions as evil even when he sees that they are good! So too here, the bribe distorts and perverts the righteous dictum [that is, the just decision by the judge], and leads the litigant who lost the case to pervert ["the words of the righteous"].⁹

Bribery is thus subversive, according to Ran, for two different reasons:

First, as Rashi had argued, it influences the thinking of the judge, even if he intends to rule justly, and thus can lead to unintentionally unjust decisions.

Second, it causes people, in particular the litigant who has lost the case, to infer that the ruling was unjust since the judge may be presumed to have been partial to the briber. In other words, it undermines confidence in the legal system, even if the judicial decisions are in themselves entirely just. The desired confidence in the judicial system is illustrated by the talmudic reference to the litigant who has just lost the shirt off his back, but leaves the courtroom singing a song, for he trusts that the judge has ruled fairly even if against him. "And also *all* this people shall go to their place in peace" – the litigants who lost as well as those who won.

Ran's interpretation of Prov 21:12 may be unprecedented. The verse itself is cryptic and has been interpreted in diverse ways. Rabbi Jonah of Girona (1180–1263) had written: "Since the righteous individual understands the final intent of the wicked individuals," he judges all their actions unfavorably (even the apparently good ones), for "one should not judge an individual favorably unless the majority of his deeds and the root of his intentions are on the good path."¹⁰ Ran moderates Jonah's illiberal exegesis. Whereas Jonah

9 *Derashot ha-Ran*, p. 195; 2nd ed., pp. 424–25.

10 Jonah Girondi, *Perush 'al Mishle*, ed. A. Löwenthal (Berlin: M. Poppelauer, 1910), 129.

justified the righteous individual's bias against the wicked individuals, Ran merely describes this bias as a fact of human behavior: the past prejudices us against the present. The judge may rule justly today, but if he took a bribe yesterday, we will naturally be skeptical about the justice of that ruling.

It is instructive to compare Ran's interpretation of Exod 23:8 and Deut 16:19 with that of the anonymous author of *Sefer ha-Hinnukh*, written in Spain about a century before the Ran. He explains that taking a bribe to rule justly is objectionable for educational reasons, that is, "in order to remove from us the bad habit [of taking bribes], lest we thus come to judge unjustly because of a bribe."¹¹ For Ran, unlike for the author of *Sefer ha-Hinnukh*, taking a bribe to rule justly is bad in itself, not merely a bad habit that can in the future lead to an injustice.

In sum, judicial bribes, according to Ran, must be prohibited with the utmost stringency – both because they may cause a judge to rule unjustly either intentionally or unintentionally, and because they undermine confidence in the legal system.

Excursus: Did Ran Permit Judges to Take Bribes?

To anyone who has read Ran's discussion of judicial bribery in his Homily on Justice, the suggestion that he could have permitted a judge to take a bribe in any circumstance should seem absurd. Nonetheless, an oft-repeated tradition has arisen according to which Ran and his disciple Rabbi Joseph Habiba (late 14th–early 15th centuries) taught that in situations of judicial discretion (*shuda de-dayyana* or *shuda de-dayyane*), judges are permitted to take bribes. The confusion began with Rabbi Moses Isserles or Rema (1530–72), was repeated but corrected by Rabbi Sabbatai Kohen or Shakh (1621–62), and was accepted and then rejected by Rabbi David Fränkel (c. 1704–62).

Rema commented as follows in his *Darkhe Moshe, Arba'ah Turim, Hoshen Mishpat*, 240, n. 3:

Ran wrote at the beginning of the chapter "Oath of Testimony" [in his Commentary on Alfasi, *b. Shev.* 30b (13b), s.v. *i name de-shuda*] that there is a variant reading: *shuhda de-dayyana* with a *het* [i.e., "the bribe (*shohad*) of the judge" instead of "the discretion (*shuda*) of the judge"]; for it is permitted [for the

11 *Sefer ha-Hinnukh* (Jerusalem: Mosad ha-Rav Kook, 1960), com. 87, pp. 143–44.

judge] to take a bribe in this situation, since the judge may do as he wishes [i.e., he has complete judicial discretion]. So too wrote [Rabbi Joseph Habiba,] the author of *Nimmuqe Yosef*, in the chapter “Usucapation of Houses” [in his Commentary on Alfasi, *b. B. Bat.* 34b (18a), s.v. *mi-shne shetarot*]. Now, we must say that the words of Ran and the author of *Nimmuqe Yosef* are [true] only according to the interpretation of the Tosafists [on *b. Ketub.* 85b, s.v. *shuda*], who said that [in situations of judicial discretion] it is in the power of the judge to do as he wants. However, according to Rashi [at *b. Ketub.*, ad loc.], who said that the judges must try to determine which [claimant] the benefactor may have preferred [i.e., they do not have complete judicial discretion], it is forbidden to take a bribe, as with any other judgment. Nonetheless, the Tosafists wrote [loc. cit.]: “If [a judge] took payment, his judgment is no judgment.”

It seems to follow from Rema’s comments that Ran and Habiba permit a judge to take a bribe in situations of judicial discretion (*shuda de-dayyane*), but Rashi and the Tosafists forbid it.

Shakh responded to Rema in his *Sifte Kohanim, Shulhan ‘Arukh, Hoshen Mishpat*, 240, n. 4:

See [Rema,] *Darkhe Mosheh*, who wrote that Ran and the author of *Nimmuqe Yosef* are of the opinion that it is permitted [for the judge] to take a bribe in situations of judicial discretion [*shuda de-dayyane*], and that they agreed with the opinion of Rabbenu Tam [at *b. Ketub.* 85b, s.v. *shuda*, where the view Rema had attributed to the Tosafists is assigned in particular to Rabbenu Tam]. In my humble opinion, this is a mistake [*shegagah*]. For it is entirely clear from the words of the Tosafists that even according to the interpretation of Rabbenu Tam it is forbidden [for a judge] to take a bribe. It is certain that Ran and the author of *Nimmuqe Yosef* were of the opinion that [*shuda de-dayyane*] is “like a bribe” [*kemo shohad*, i.e., not an actual bribe] and their language was by way of hyperbole [*guzma*]. This is, in fact, what Nahmanides wrote in his *Novellae* [on *b. B. Bat.* 34b–35a, s.v. *u-mai shena*].

Unlike Rema, Shakh had seen Nahmanides’ *Novellae* on *b. B. Bat.*, and knew two things Rema did not know: first, the reference to “bribing” the judges

was not original with Ran or Habiba, but was borrowed from Naḥmanides; second, the reference was intended as a hyperbole and not meant literally.

Fränkel wrote in his Commentary on the Jerusalem Talmud, *Qorban ha- 'Edah*, at *y. Ketub. 10:4*, s.v. *shuḥḏa de-dayyane*:

[T]he court gives [the field] to whomever it wants ... It is permitted [for the judge] to take a bribe from the one to whom he wants to give the field.

Fränkel reached this conclusion under the influence of Rema's remarks in his *Darkhe Mosheh* concerning Ran and Habiba. However, sometime after writing *Qorban ha- 'Edah*, his attention was drawn to Shakh's comments in his *Sifte Kohanim*. In his *Sheyare Qorban*, which contains additions and revisions to *Qorban ha- 'Edah*, he wrote:

In my Composition [*Qorban ha- 'Edah*], I interpreted [*shuḥḏa de-dayyane*] in a way that permits [a judge] to take a bribe. This was according to Rema, *Darkhe Mosheh*, Ḥoshen Mishpat, 240 [citing Ran and Habiba]. However, Shakh wrote there [at Ḥoshen Mishpat, 240] in the name of Naḥmanides that it is not really a bribe but something "like a bribe," and it is a hyperbole.

In the light of Shakh's comments, Fränkel corrected his misunderstanding of Ran and Habiba, and revised his own position.¹²

Shakh's conjectural reconstruction of Ran's position on judicial discretion is entirely correct, as may be seen from the latter's various discussions of the subject which may not have been available to Rema, Shakh, or Fränkel. In my ensuing remarks, I shall try to clarify briefly the basic nature of Ran's position.

Shu(h)da de-Dayyane

The subject of *shuda de-dayyane* or "judicial discretion" is presented lucidly and succinctly in Hanina Ben-Menahem's *Judicial Deviation in Talmudic Law*.¹³ His presentation has provided the framework for my following discussion.

12 Jerusalem Talmud, *Nashim*, with *Qorban ha- 'Edah* and *Sheyare ha-Qorban* (Berlin: Community, 1756), *y. Ketub. 10:4* (35a).

13 Ben-Menahem, *Judicial Deviation in Talmudic Law* (Chur: Harwood, 1991), 80–82, 150–58, 163.

The cryptic Aramaic term *shuda de-dayyana* or *shuda de-dayyane* (the discretion of the judge or the judges) appears in seven different passages in the Babylonian Talmud: *Ketub.* 85b and 94a–b, *Qidd.* 74a, *Git.* 14b–15a, *B. Bat.* 34b–35a and 62b, *Shev.* 30a–b.¹⁴ It emerges from these sources that the rule was used first by Samuel of Nehardea in Babylonia. It also emerges from them that the rule was well known in Babylonia but not commonly accepted in the Land of Israel.¹⁵ In the cases in which the rule is applied, the court is unable to appeal to evidence and is compelled to decide at its own discretion. For example, in *b. Ketub.* 85b, the deceased bequeathed his estate to “Tobiah.” Two claimants named Tobiah appear in court. If one is a scholar, he is to be preferred. A close neighbor is preferred over a distant relative. If the two claimants are equal, then *shuda de-dayyane*, the case is decided at the discretion of the court. Again, in *b. Ketub.* 94a–b, two deeds of sale dated on the same day are presented in court concerning a certain property. Rav rules that the property should be divided between the two claimants. Samuel rules *shuda de-dayyane*, that is, the case is deferred to the discretion of the court. The meaning of the Aramaic word “*shuda*” is unclear. According to Rashi (on *b. Ketub.* 85a, s.v. *shuda*, et al.), it derives from the Aramaic root *shda*, “to throw” (see Targum Onqelos on Exod 15:4): the judges throw down their decision or perhaps they throw the dice. It has alternatively been suggested that the word is related to the Arabic root *sud* (rule, authority), and refers to the rule or authority of the court.¹⁶ More likely, it could be derived from the Persian verb *shudan* (to become, transfer, remove).¹⁷

The term appears in only one passage in the Jerusalem Talmud: *Ketub.* 10:4–5. However, there it is written “*shuhda*” (with a *het*), which is apparently a cognate of the Hebrew “*shohad*” (bribe). The term might thus mean: the bribe of the judges. It might be a wry pun: when judges rule not according to objective evidence but according to their subjective discretion, they are vulnerable to bribery. It has also been suggested, conversely, that the court’s decision is a gift (*shohad*) from the court to the claimant. In any case, it is not

14 At *b. Git.* 14b–15a, the word *shuda* stands alone and refers not to the discretion of the judges but to that of an agent. See Ben-Menahem, “Judge as Agent,” *Shenaton ha-Mishpat ha-Ivri* 9–10 (1982): 51–71, esp. 55–57 (Hebrew).

15 Ben-Menahem, *Deviation*, 80–82.

16 *Ibid.*, 82 n. 89.

17 This possible etymology was suggested to me by Elon Harvey.

known if the Babylonian *shuda* is an elided form of the original Palestinian *shuḥda*, or if the Palestinian *shuḥda* is a sort of midrash on the Babylonian *shuda*.¹⁸

Following Ronald Dworkin, Ben-Menahem distinguishes between “weak” and “strong” senses of judicial discretion. In the weak sense, a judge, in a difficult case, cannot mechanically rely on established precedents, but must use his or her own judgment or discretion in applying the standards set down by the juridical authority. In the strong sense, a judge, in a certain situation, is empowered to use discretion freely without being bound by any standards set by any authority. However, Dworkin adds an important proviso: “An official’s discretion [in the strong sense] means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by [a] particular authority.” Thus, a judge ruling according to judicial discretion in the strong sense may prefer the Tobiah who is known to be a responsible citizen over the Tobiah who is known to be of questionable character, since it is more likely that a responsible man would have been chosen to inherit the estate. However, it would not be legitimate for such a judge to prefer the Tobiah who has the longest ears or the bluest eyes. According to Dworkin, judicial discretion even in the strong sense is not *absolute*. Although it is not beholden to standards set down by any authority, it must make sense and be fair.¹⁹

Ben-Menahem gives examples of rabbis who interpreted *shuda de-dayyane* as judicial discretion in the weak sense and those who interpreted it as judicial discretion in the strong sense. Representatives of the first group are Rashi and his grandson Rabbi Samuel ben Meir or Rashbam (1085–1158). Representative of the second group is Rabbi Jacob ben Meir or Rabbenu Tam (1100–71), Rashbam’s younger brother. In his Commentary on *b. Ketub.* 85b, s.v. *shuda* (see also *ibid.*, 94b, s.v. *u-Shmuel*; *Qidd.* 74a, s.v. *be-shuda*), Rashi explains the practice of *shuda de-dayyane*: “The judges make a decision according to what they estimate was the way of the deceased ... or [if that is not possible,] they estimate which of the two claimants is [more properly

18 There are good reasons to presume the word is Babylonian: first, the rule is of Babylonian provenance and was not commonly adopted in the Land of Israel; second, when the rule is mentioned at *y. Ketub.* 10:4, it is followed by an explanatory comment, which may mean it was foreign to the Palestinians. See Ben-Menahem, *Deviation*, 81.

19 *Ibid.*, 155. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 31–33.

described as one who is] good and follows the straight path such that it might be said that the deceased would have intended to benefit him.” This approach of Rashi’s is followed by Rashbam, who writes in his Commentary on *b. B. Bat.* 35a, s.v. *shuda de-dayyane*: “[The property is given] to the one regarding whom the judges are inclined to think that the benefactor was a closer friend or relative.” However, Rashi’s comments are flatly rejected by Rabbenu Tam, whose position is reported by the Tosafists at *b. Ketub.* 85b, s.v. *shuda* (see also *Qidd.* 74a, s.v. *shuda*; *Git.* 14b, s.v. *ve-khan*; and *b. B. Bat.* 35a, s.v. *shuda*): “[The interpretation of this rule] is not in accordance with what is written in the Composition [i.e., Rashi’s Commentary], where it is said that the judges should estimate the opinion of the benefactor as to whom he preferred to give it. Rather, Rabbenu Tam says that the judge gives it to whomever he wants.” According to the Tosafists on *b. Git.*, ad loc., Rabbenu Tam found support for his definition of *shuda* in the case of an agent who was given discretionary power by the Babylonian scholars: “Here [in Babylonia] they said that the agent should do whatever he wishes ... [T]hey said *shuda* is preferred” (*b. Git.*, ad loc.).” They thereby indicated, according to Rabbenu Tam, that “whatever he wishes” to do is called *shuda*.

Rashi’s view is criticized also by Nahmanides in his *Novellae* on *b. B. Bat.* 34b–35a, s.v. *u-mai shena* (see also his *Novellae* on *b. Ketub.* 85b, s.v. *shuda*), the text cited by Shakh in his animadversion on Rema. Nahmanides writes: “As for the meaning of *shuda de-dayyane*, it is that the judge gives [the property] to whomever he wants. This is stated explicitly in the Jerusalem Talmud [*y. Ketub.* 10:4]: ‘The judges decide that it go to whomever they want.’ The term used there is ‘*shuhda le-dayyane*’ [i.e., ‘bribe to the judges’ and not *shuda de-dayyane*, ‘discretion of the judges’]. In other words, the judges do whatever they want. If they prefer an individual because he is ‘a colleague in the Law and the commandments’ [see *b. Shev.* 30a–b], they give it to him. Thus, one must give a bribe to the judges! This is said by way of hyperbole [*leshon guzma*] ... As for what Rashi explained, namely, that [the judges] estimate what [the benefactor] preferred, and Rabbi Samuel [= Rashbam] wrote similarly, he was not precise [*lo’ diyyeq*].”²⁰

20 Cf. Rabbi Yom-Tov of Seville or Ritba (c.1260–c.1320), *Novellae* on *b. Ketub.* 85b, s.v. *shuda*: “They say in the Jerusalem Talmud ‘*shuhda de-dayyane*’ [the bribe of the judges]. This is said by way of hyperbole [*leshon guzma*]. For the authority is given to [the judges] to do what they wish.”

In short, there was in the period before Ran a debate about the meaning of *shuda de-dayyane*. Rashi and Rashbam held a theory of judicial discretion in a “weak” sense, while Rabbenu Tam and Naḥmanides held one in a “strong” sense. According to Rashi and Rashbam, the judges must decide in accordance with what they conjecture was the will of the benefactor. According to Rabbenu Tam and Naḥmanides, the judges are free to decide howsoever they wish. It is not clear, however, if Rabbenu Tam and Naḥmanides recognized Dworkin’s important proviso that judicial discretion must always be in accordance with “sense” and “fairness,” or whether one or both of them held a theory of absolute or anarchic discretion (e.g., the farm goes to the claimant with the longest ears).

An important proof-text both for and against the theory of absolute discretion is the tradition concerning Rabbi Ulla bar Illai (*b. Shev.* 30a–b) to which Naḥmanides alluded in the passage cited above. According to this tradition, Ulla was a claimant in a case heard by Rabbi Naḥman bar Jacob, a student of Samuel of Nehardea. Suspecting the case would be decided by *shuda de-dayyane*, Rabbi Joseph bar Ḥiyya sent a note to the judge: “Ulla our friend is a colleague in the Law and the commandments.” Now, if we wish to interpret this note according to the theory of *absolute* judicial discretion, we can say that Rabbi Joseph is informing Rabbi Naḥman that Ulla is one of our cronies (“our friend ... colleague”) and thus should be favored. However, if we wish to interpret it according to the theory of Dworkinian or *equitable* discretion, we can say that Rabbi Joseph is offering a character reference for Ulla, i.e., he is a scholar of the Law and a righteous man who observes the commandments. This, in fact, is precisely the kind of character reference that Rashi, if he were the judge, would have been interested in hearing. Unsurprisingly, Rashi writes in his Commentary on *b. Shev.* 30b, s.v. *i name le-shuda*: “There are cases that are dependent neither on the testimony of witnesses nor on an oath, but rather on whatever the heart of the judges is inclined to favor or disfavor [i.e., judicial discretion] ... Thus in this case, [Rabbi Joseph sent a note to Rabbi Naḥman]: ‘If the case is dependent on *shuda de-dayyane*, this individual [namely, Ulla] is worthy to be favored, since he is a scholar and a righteous man [*hakham ve-tsaddiq*].’” In support of Rashi’s interpretation, it may be observed that Rabbi Joseph did not recommend Ulla as an old drinking companion or as a scoundrel who happened to be his next-door neighbor, but as “a colleague in *the Law and the commandments*,” i.e., a scholar and a righteous man. In their Commentary on *b. Shev.*, ad loc., the Tosafists present an alternative interpretation: “According to Rabbenu

Tam, who explained *shuda* as meaning that the judge gives it to whomever he pleases, it must be said that [Ulla] was a claimant opposed by a scholar [*talmid hakham*], and [Rabbi Joseph] was worried that [Rabbi Naḥman] would favor [that scholar] [according to the directive recorded at *b. Ketub. 85b* (regarding the two Tobiahs) that even before the invocation of judicial discretion a scholar is preferred to a non-scholar], and therefore he sent [a note to Rabbi Naḥman] to the effect that this individual too [namely, Ulla] is a scholar, and he should use his discretion [*shuda*] to choose whichever [scholar] he pleases." Rabbenu Tam, following *b. Ketub. 85b*, seems to envision judicial discretion as taking place in a state of indifference, similar to the example of Buridan's ass. Extending Rabbenu Tam's reasoning, one might imagine that the two claimants are identical twins, both scholars and righteous, both having the same weight, height, etc.²¹

Ran on *Shu(h)da de-Dayyane*

In turning now to the comments of Ran about *shuda de-dayyane*, we shall try to determine to what extent it is true that he agreed with Rabbenu Tam and Naḥmanides against Rashi and Rashbam, and if he did hold a theory of judicial discretion in the strong sense, did he conceive of that discretion as being absolute or equitable? I shall also mention his use of the hyperbole of bribing the judges.

In his *Novellae* on *b. B. Bat. 35a*, s.v. *shuda*, Ran roughly paraphrases Naḥmanides:

As for the meaning of *shuda de-dayyane*, Rashi explained that [the judges] estimate which claimant [the benefactor] preferred, and Rabbi Samuel [= Rashbam] wrote similarly, but this is not clear [*lo' meḥuvvar*] ... Rather, the meaning of *shuda de-dayyane* is surely that the judges give [the property] to whomever they want. This is stated explicitly in the Jerusalem Talmud [*y. Ketub. 10:4*]: "The judges decide that it go to whomever they want." The term used there is "*shuḥda de-dayyane*" [i.e., "bribe of the judges"]. In other words, it is asserted by way of hyperbole [*derekh guzma*] that one must bribe the judges since they can

21 See Ran, Commentary on Alfasi, *b. Ketub. 85b* (44a), s.v. *shuda*: "they are identical in everything" (*shavim be-khol 'inyan*).

do whatever they want. If they prefer an individual because he is “a colleague in the Law and the commandments” [see *b. Shev.* 30a–b], they give it to him, as is it was said [ibid.]: “Ulla our friend is a colleague in the Law and the commandments” ... which makes a difference [*hu’ nafqa minnah*] with regard to *shuda de-dayyane*.

Like Naḥmanides, Ran criticizes Rashi and Rashbam, but his criticism is more moderate: he does not say Rashi was “not precise,” but that his explanation “is not clear.” Again like Naḥmanides, he notes the Jerusalem Talmud’s use of the word “*shuḥḏa*” (bribe) instead of “*shuda*” (discretion), and like him he explains its usage as a hyperbole – i.e., not real bribery but only *metaphorical* bribery. Like Naḥmanides he refers to the case of “Ulla our friend,” but whereas Naḥmanides’ reference may be understood as consistent with a theory of absolute judicial discretion, Ran’s additional phrase (viz., “which makes a difference with regard to *shuda de-dayyane*”) seems to entail a theory of equitable judicial discretion. A somewhat similar approach is found in Habiba’s Commentary on Alfasi, *b. B. Bat.* (18a), s.v. *mi-shne shetarot*.²²

In his Commentary on Alfasi, *b. Shev.* 30b (13b), s.v. *i name le-shuda*, which is the text that was cited and misconstrued by Rema, Ran discusses the case of “Ulla our friend”:

There are cases that are dependent neither on the testimony of witnesses nor on an oath, but rather the judge has the power to do whatever he wishes [i.e., judicial discretion] ... Thus in this case, [Rabbi Joseph sent a note to Rabbi Naḥman]: “If the case is dependent on *shuda de-dayyane*, this individual [namely, Ulla] is worthy to be favored, since he is a scholar and a righteous man [*hakham ve-tsaddiq*].” The word “*shuda*” is derived from [the Aramaic verb] “to throw” [*shda*; see Targum Onqelos on Exod 15:4]. However, there are those who interpret it as deriving from “*shuḥḏa*” [bribe], with the letter *het* elided.

22 Like Naḥmanides and Ran, Habiba cites the Jerusalem Talmud’s use of the term “bribe” instead of “discretion,” and like Naḥmanides he uses the phrase “*shuḥḏa le-dayyane*” (instead of *de-dayyane*). Like Naḥmanides and Ran, he cites the case of “Ulla our friend,” and like Ran he notes that Ulla’s description as a colleague in the Law and the commandments “makes a difference” with regard to *shuda de-dayyane*. Unlike Naḥmanides, Ritba, and Ran, he does not say the reference to bribery is a hyperbole.

In other words, give a bribe to the judge, who has the power to do whatever he wishes.

Significantly, Ran follows here Rashi, not Rabbenu Tam: the moral of the tradition about Ulla, as he presents it, is that in cases of judicial discretion the judge should take into consideration the character of the claimant, e.g., if he or she is a scholar and righteous. By siding with Rashi vs. Rabbenu Tam, Ran makes clear that, pace Rema, he holds a theory of equitable judicial discretion.

In his Commentary on Alfasi, *b. Ketub.* 85b (44a), s.v. *shuda* (see also *ibid.*, 94a [53b], s.v. *Rav amar*; and *Git.* 86b [47a–b], s.v. *amar Rav Yehuda*), Ran begins by quoting Rashi:

“The judges make their judgment according to what they estimate was the way of the deceased ... or [if that is not possible,] they estimate which of the two claimants is [more properly described as one who is] good and follows the straight path such that it might be said that the deceased would have intended to benefit him” [Rashi on *b. Ketub.* ad loc.]. Thus Rashi’s interpretation ...²³ His position has been criticized ... [His critics] understood the word “*shuda*” (discretion) to be derived from “*shuḥda*” (bribe), the *het* being elided ... This means that the power is in the hands of the judges to do as they wish. They [i.e., the critics, in particular, Rabbenu Tam] supported this view by citing *b. Git.* [14b–15a]: “Here [in Babylonia] they said that the agent should do whatever he wishes ... [T]hey said *shuda* is preferred.” They thus said that “whatever he wishes” to do is called *shuda* [see *Tosafot, b. Git.* 14b, *ve-khan*].

In this passage, Ran presents the positions of Rashi and Rabbenu Tam without clearly siding with either. As for the metaphor of “bribery,” he attributes it to Rashi’s critics, but does not affirm it himself. However, Habiba, in his *Novellae on Ketub.* 85b, s.v. *shuda de-dayyane*, holds that “*shuḥda de-dayyane*” is the original form and “the *het* is elided.”²⁴

23 In the text omitted here, Ran remarks that Rashi’s opinion is similar to that of Maimonides, *Mishneh Torah*, Hilkhot Zekhiyyah and Mattanah 11:3.

24 Habiba, *Hiddushe Ketubbot*, ed. Moshe Yehuda Blau (New York: Deutsch, 1960), 279: “It rests on the will [of the judges] to give the [property] to whomever they want ... It seems that only expert and ordained judges have the power to give it.”

Ran borrowed from Naḥmanides the metaphor of *shuda de-dayyane* as “the bribery of the judges.” He sometimes affirmed it himself, but other times merely cited it in the name of others. His own position on judicial discretion is complex and requires further study. It may be said, however, that he held a moderately strong but equitable theory of judicial discretion. His position was influenced by Naḥmanides and is situated somewhere in the middle between Rashi and Rabbenu Tam. He was very far from holding the view attributed to him by Rema.

