Disqualified Witnesses between Tannaitic Halakha and Roman Law: The Archeology of a Legal Institution

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Tannaitic literature, composed in Roman Palestine during the second to third centuries, includes an eclectic list of four categories of person disqualified from giving testimony, which has long defied interpretation.[1]

1. On this list see Abraham Weiss, *Seder ha-diyun: Mehkarim be-Mishpat ha-Talmud* (New York: "Horev"–Yeshiva University Press, 1957), 44–64; Robert P. Maloney, "Usury in Greek, Roman and Rabbinic Thought," *Traditio* 27 (1971): 79–109; Shmuel Safrai, "Psuley 'Edut: Perek be-Toldot ha-Hevra ha-Yehudit," *Melo'ot* 1 (1983): 99–103; Lawrence H. Schiffman, *Sectarian Law in The Dead Sea Scrolls: Courts, Testimony, and the Penal Code* (Chico, CA: Scholars Press,1983), 60–65; Joshua Schwartz, "'Pigeon Flyers' in Ancient Jewish Society," *Journal of Jewish Studies* 48 (1997): 105–19; Joshua Schwartz, "Gambling in Ancient Jewish Society and in the Graeco-Roman World," in *Jews in the Graeco-Roman World*, ed. Martin Goodman (Oxford: Oxford University Press, 2004), 145–65; Mordechai Sabato, "Psuley 'Edut," *Sidra* 23 (2008): 5–30; Shraga Bar-On, "Hatalat Goralot Elohim ve-Adam, min ha-Mikra ve-Ad Shilhei ha-Renesance" (PhD diss., Hebrew University of Jerusalem, 2011), 331–38; Mordechai Sabato, *Talmud Bavli Masehet Sanhedrin Perk Shlishi* (Jerusalem: Bialik Institute, 2018), the chapters on Mishnah 3; and Amit Gvaryahu, "Diney Ribit be-Sifrut Hazal" (PhD diss., Hebrew University of Jerusalem, forthcoming 2019). I thank Amit Gvaryahu for sharing with me drafts of his work before final submission. For the dating of the list, see Shmuel Safrai, "Mitsvot Shvi'it ba-Metsi'ut she-le-Ahar Hurban Ba'it Sheni (2)," *Tarbiz* 35 (1966): 304–28, at 322; and Adolf Büchler, *Am ha-Aretz ha-Glili*, trans. Israel Eldad (Jerusalem: Mosad Harav Kook, 1964), 161–62, 176–77. Despite the fact that the four categories of person included in the list are disqualified not only for testimony, but also from serving as

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The author thanks Ishay Rosen Zvi, Shai Lavy, Maren Niehoff, and especially Omer Michaelis and Yakir Paz, for reading and commenting on previous drafts of this article.

Law and History Review November 2019, Vol. 37, No. 4

doi:10.1017/S073824801900018X

Curiously, the list includes "a dice-player, a usurer, pigeon flyers, and traders in Seventh Year produce" (המשחק בקוביה, המלוה בריבית, מפריחי יונים וסוחרי שביעית).[2] To this day, scholars struggle to understand the reasons that these particular categories of person were singled out from all other wrongdoers to constitute the primary list of those disqualified from giving testimony.

The commonly accepted scholarly hypothesis is that these four were disqualified because they were perceived as a type of thieves.[3] This understanding assumes the existence of a general principle according to which thieves cannot serve as witnesses, a principle that presumably predated the disqualification of these four types of person.[4] However, as I show in this article, this presumption is not supported by the textual evidence. In fact, the list of four categories of person seems to be part of an early stratum in which the rabbis deliberated for the first time over the legal possibility of disqualifying certain individuals for testimony based on negative behavior.[5] This article maintains that the disqualification of the four categories, and actually the entire apparatus that governs their disqualification according to Tannaitic literature—including the comparison between their degree of ineligibility and that of women, as well as the description of their rehabilitation process using the unique phrase "complete return" (חזרה גמורה)—is not indigenous. Rather, it is indebted to a process of legal borrowing from Roman law, where there was a well-established tradition of

judges as well as from taking a procedural oath, they are primarily referred to as "disqualified witnesses" both in traditional commentaries and modern scholarship.

2. Mishnah (M) Sanhedrin 3:3. All translations from rabbinic literature are mine unless stated otherwise. Mishnah translations are modified from Herbert Danby, *The Mishnah* (Oxford: Oxford University Press, 1938). For the same list in other sources, see Tosefta (T) Sanhedrin 5.2, M Rosh ha-Shanah 1:8, and M Shevu'ot 7:4 with regard to a procedural oath. In M Rosh ha-Shanah 1:8 the list also includes slaves, although scholars debate whether slaves were part of the original list; Weiss, *Seder ha-diyun*, 44–46, convincingly argues the opposite, and Sabato, "Psuley 'Edut," 18, agrees with Weiss. For a summary of the opinions, see Sabato, *Talmud Bavli Masehet Sanhedrin Perk Shlishi*, 218–20. The conclusions of this article shed light both on the absence of slaves from the core list of four categories of persons as well as their association with slaves in M Rosh ha-Shanah.

3. In fact, this view follows a traditional interpretation, see discussion in Part I of this article.

4. Babylonian Talmud (BT) 27a can be read as indicating that the disqualification of these four categories of person was inferred from scripture by midrashic methods; see Bar-On, "Hatalat Goralot," 332–33; and Gvaryahu, *Diney Ribit*. For the purposes of this article, it makes no difference what methods the rabbis used to anchor their innovative rule.

5. Other categories of people who are disqualified from giving testimony according to Tannaitic literature are women, minors, slaves, gentiles, and more. In all these cases, the disqualification is not based on behavior, but rather on social and biological identity.

disqualifying persons of ill repute from giving testimony, through the legal mechanism of *infamia*.[6]

The links between Tannaitic disqualification for testimony and the Roman *infamia* are not obvious, and require patient textual excavation. Unveiling them demands an awareness of the characteristic traits of Greco-Roman ethical discourse on self-control and how it plays out in texts from late antiquity,[7] a matter to which I dedicate a significant portion of this article. The underlying presence of an ethics of self-control in both the Tannaitic disqualification for testimony and Roman *infaimia* is a key common element of the two legal mechanisms. In addition to these shared philosophical underpinnings, I demonstrate structural affinities between the two mechanisms as well as textual similarities. This multidimensional resemblance between the Tannaitic and Roman mechanisms supports the conclusion that the rabbis designed their rules of testimony disqualification as a variation on Roman regulation of similar issues.

This article aims to reconstruct the intellectual foundations of a legal institution. I will offer a genealogical inquiry into the jurisprudential grounds of the Tannaitc rules regarding disqualification for testimony, and suggest a link between these rules and Roman *infamia*. This inquiry

6. The fullest account of *infamia* in all its periods continues to be Abel Hendy Jones Greenidge, *Infamia, its Place in Roman Public and Private Law* (Oxford: Clarendon Press, 1894). See further Max Kaser, "Infamia und ignominia in den römischen Rechtsquellen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistiche Abteilung* 73 (1956): 220–278; Jane F. Gardner, *Being a Roman Citizen* (London: Routledge, 1993), chapter 5; Thomas A. J. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (New York: Oxford University Press, 1998), 21–69; Tristan S. Taylor, "Aspects of Infamia" (PhD diss., University of Tasmania, 2006); Joseph G. Wolf, "Das Stigma ignominia," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 126 (2009): 55–113. For the development of this institution in later periods, see Sarah Bond, "Altering Infamy: Status, Violence, and Civic Exclusion in Late Antiquity," *Classical Antiquity* 33 (2014): 1–30; and Lorena Atzeri, "Il lessico dell'infamia nella legislazione imperiale tardoantica (secc. IV-V dC)," *Scritti per Alessandro Corbino* (Italy: Libellula, 2016), 123–55.

7. For a summary account of this idea, see William V. Harris, *Restraining Rage: The Ideology of Anger Control in Classical Antiquity* (Cambridge, MA: Harvard University Press, 2009), 80–88. For a broad survey of moderation (σωφροσύνη), which often overlaps with self-control in Greek and Roman literature, see Helen North, *Sophrosyne: Self-knowledge and Self-restraint in Greek Literature* (Ithaca, NY: Cornell University Press, 1966). Detailed accounts of self-control in the Roman period could be found in New Testament scholarship; see, for example, Stanley K. Stowers, *A Rereading of Romans: Justice, Jews, and Gentiles* (New Haven, CT: Yale University Press, 1994), ch. 2; and Katy E. Valentine, "'For You Were Bought with a Price': Slaves, Sex, and Self-Control in a Pauline Community" (PhD diss., Graduate Theological Union, 2014).

will be conducted through a philological study of these legal institutions as they are depicted in the texts, temporarily bracketing the question of how they were actually practiced in Jewish or Roman courts.[8] Investigating the rabbis' motivations in developing these legal institutions, as well as the mechanisms of transmission through which they became acquainted with Roman legal structures, shall be left for a future study.[9]

This article studies a central institution of Jewish law, and as such may be of interest to legal historians of Jewish law. It may also interest historians of Roman law, because the story I tell here provides a rare opportunity to study a Roman legal institution through the external perspective of jurists from a Roman province. In addition, I believe that this article may be of interest to legal historians working on the history of evidence law in other legal cultures. Rules regulating the inadmissibility of evidence have been studied mostly in the context of early modern common law, and they are often explained by scholars through a probative perspective, assuming that the purpose of such rules is mainly to exclude false evidence.[10] However, scholars of ancient law have already noted the inadequacy of this approach to the study of laws regarding disqualified witnesses in ancient legal regimes, in which testimony is excluded based

8. For a description of legal proceedings in Rome and its provinces, see, for example, Leanne Bablitz, *Actors and Audience in the Roman Courtroom* (London: Routledge, 2007); and Ari Z. Bryen, *Violence in Roman Egypt: A Study in Legal Interpretation* (Philadelphia: University of Pennsylvania Press, 2013). Notably, however, this literature almost never discusses witnesses.

9. Those motivations and mechanisms of transmission probably relate to the colonial condition in Roman Palestine. As Clifford Ando argues, there are reasons to expect provincial legal systems to come into alignment with imperial ones at the level of both principle and procedure, even when they were regulated by an overall principle of local autonomy. See Clifford Ando, "Pluralism and Empire: From Rome to Robert Cover," *Critical Analysis of Law* 1 (2014): 1–22.

10. For a discussion of inadmissibility rules in the Anglo-American tradition based on their assumed probative grounds, see, for example, Edmund M. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (New York: Columbia University Press, 1956); Stephan Landsman, "From Gilbert to Bentham: The Reconceptualization of Evidence Theory," *Wayne Law Review* 36 (1989): 1149–86; Frank R. Herrmann, "The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure," *Virginia Journal of International Law* 36 (1995): 1–51; John H. Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review* 96 (1996): 1168–202; Thomas P. Gallanis, "The Rise of Modern Evidence Law," *Iowa Law Review* 84 (1999): 499–560; and Frederick Schauer, "On The Supposed Jury-Dependence of Evidence Law," *University Of Pennsylvania Law Review* 155 (2006): 165–202.

on considerations other than probative value.[11] Beyond reinforcing this observation, this article contributes to an alternative conceptual framework for the study of witness disqualification laws from late antiquity, which accords a more important role to the political and ceremonial aspects of testimony, in addition to its probative function.

Finally, this article may also appeal to other legal historians, as well as to comparative lawyers, because it provides a non-trivial example of a culturally nuanced legal transfer. In this example, the borrowed legal mechanism (certain aspects of Roman *infamia*) underwent a process of complex cultural interpretation and adaptation that gave it a new form and enabled its integration into the receiving legal regime (Tannaitic halakha). This process differs greatly from the more frequently discussed instances in the literature on legal transplants in which the transferred norm remains identifiable throughout the process of transfer.[12] Therefore, it is an important test case for examining the adequacy of the metaphors that are used in the scholarly discussions of legal transfer and may deepen our understanding of the various ways in which the adoption of a foreign legal norm actually works.[13]

The article is composed of three parts. Part I examines and demonstrates the shortcomings of the prevailing scholarly premise that thieves constitute

11. Stephen C. Todd, "The Purpose of Evidence in Athenian Courts," in *Nomos: Essays in Athenian Law, Politics and Society*, ed. Stephen C. Todd and Paul Millett (Cambridge: Cambridge University Press, 1990), 19–40.

12. This is certainly the case regarding the examples considered by Alan Watson in his book, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, GA: University of Georgia Press, 1993). The most studied cases of legal transplant continue to be the reception of Roman law in Europe, the diffusion of some influential national codifications both inside and outside Europe, and the expansion of common law across the world, all cases that enable a clear-cut recognition of the transferred legal norms. See, for example, Michele Graziadei, "Transplants and Receptions," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmerman (Oxford: Oxford University Press, 2006), 440–75.

13. The metaphor of transplantation used by Watson was fiercely criticized by scholars who emphasized the changes in the meaning of the legal norm during the process of transfer. For such critique, see Pierre Legrand, "The Impossibility of 'Legal Transplants,'" *Maastricht Journal of European and Comparative Law* 4 (1997): 111–24. Many other metaphors have been suggested and discussed in the scholarship, such as "adaption," "borrowing," "circulation," "diffusion," "entanglement," "influence," "migration," "reception," "transfer, "amalgamation," "métissage," "hybridization," "creolization," "decontextualization," and "recontextualization," and lately also "translation." For the importance of metaphors, see, for examples, David Nelken, "Toward a Sociology of Legal Adaptation," in *Adapting Legal Cultures*, ed. David Nelken and Johannes Feest (Oxford: Hart, 2001), 7–54, 15–21; and Lena Foljanty, "Legal Transfers as Processes of Cultural Translation: On the Consequences of a Metaphor," *Max Planck Institute for European Legal History Research Paper Series*, 2015–09 (2015), http://ssrn.com/abstract=2682465 (accessed June 4, 2019).

the original category of incompetent witnesses. Part II suggests an alternative reading of the list and its guiding rationale in light of the ethical ideal of self-control. Part III demonstrates the parallels between the Tannaitic disqualification rule and Roman *infamia*. I conclude by pointing out a new direction for the study of legal testimony in late antiquity in light of the analysis set forth in this article.

Part I: "Thieves According to the Rabbis": The Common Explanation and its Limitations

Both traditional commentators and contemporary scholars assume that the four categories of person included in the list were disqualified from giving testimony because they were perceived as belonging to the more general category of "גזלנים וחמסנים";[14] in this context, this is a *hendiadys* loosely indicating those who unlawfully take other people's money (henceforth referred to as "thieves and robbers").[15] Thieves and robbers are indeed disqualified for testimony according to Tannaitic literature.[16] Moreover, in referring to them, the Tosefta adds a general criterion for disqualification, stating that "all those suspected in money matters are disqualified from giving testimony" (וכל החשודין על הממון עדותן פסולה).[17] This statement was interpreted as a generalization applicable also to the list of four categories of person, indicating that they too were disqualified because, like thieves, they were suspected in money matters.[18]

Surely, all four categories of person on the list engage in inappropriate ways of making money. The dice-player is a gambler;[19] the usurer is a person who breaks the Torah's prohibition on lending money at interest;[20] and the trader of seventh-year produce violates the rules forbidding trade in the produce of the seventh year. Pigeon flyers are harder to identify, as this epithet

14. See Safrai, "Psuley 'Edut," 100; Sabato, "Psuley 'Edut," 5–7, 11–12; Schwartz, "'Pigeon Flyers,'" 112–17; and Shimshon Ettinger, *Re'ayot ba-Mishpat ha-Ivri* (Jerusalem: The Institute for Research in Jewish Law, Hebrew University, 2011), 123.

15. Sabato, "Psuley 'Edut," 17 n. 70; Gvaryahu, *Diney Ribit*. For a similar use of the phrase, see M Kelim 26:8, T Bava- Kama 7.2, and especially T Ketubot 12.

16. See note 34.

17. T Sanhedrin 5.5.

18. This interpretation is in line with a common opinion that the phrase "חשוד" refers to a person who was already caught performing a forbidden act, and is not merely a suspect. However, some sources challenge this understanding of the term חשוד in Tannaitic literature; see, for example, M Demai 3.6.

19. The Hebrew המשחק בקוביא comes from the Greek word "κῦβεία"; see Schwartz, "Gambling," 153.

20. Gvaryahu, *Diney Ribit*.

https://doi.org/10.1017/S073824801900018X Published online by Cambridge University Press

is found only in the context of witness disqualification. However, all proposed identifications of these figures involve improper earnings. The Tosefta describes them as people who engage in bird fights, a practice that most likely included gambling.[21] Some scholars prefer an explanation that appears in the Babylonian Talmud, according to which pigeon flyers were fowlers, trapping and later selling birds that may have originally belonged to others.[22] Scholars also observed that all four practices are not occasional behaviors, but rather regular occupations or ways of making a living, an observation that again stresses misappropriation as crucial for inclusion in the list.[23] Furthermore, early extensions of the list (attributed to Tannaitic stratum) disqualified herdsmen, tax collectors and publicans,[24] all of whom adhere to a governing rationale of similarity to the behavior of thieves.[25] The four categories of person were therefore associated with illicit, larcenous, money making, in line with sayings in the Babylonian Talmud that refer to them as "thieves according to the rabbis" (גזלנים דבריהם).[26]

As plausible as this explanation seems, there are two good reasons to doubt that the four categories of person were originally disqualified because of the resemblance between their activities and thievery. First, even if we accept that they are similar to thieves, they obviously do not represent the archetypal examples of thievery.[27] Therefore, if we are to think of them as types of thieves, we must postulate that initially thieves were disqualified and that then, after their disqualification was accepted as a general principle, the disqualification was extended to those who resembled them, including these four categories. However, the sources preserve a contrasting historical account, according to which thieves were disqualified for testimony only after the four categories of person were disqualified.

21. T Sanhedrin 5.2.

22. Schwartz, "'Pigeon Flyers,'" 109. As noted by Schwartz, this practice was disparaged, but it was not strictly illegal according to Roman law; ibid., 116–17. For a similar attitude in Tannaitic sources, see M Gittin 5.8.

23. Sabato, "Psuley 'Edut," 15–16. This seems to be the logic guiding R. Yehuda; see M Sanhedrin 3.3 and parallels.

24. T Sanhedrin 5.5, BT Sanhedrin 25b.

25. T Baba Kama 8.26, M Kiddushin 4.14.

26. For example, BT Rosh ha-Shanah 22a, and BT Yevamot 25b. Other texts mention generally "a disqualification due to theft" (פסול גזלנות): BT Ketubot 21b, BT Sanhedrin 23b, and BT Kiddushim 66a. In BT Sanhedrin 24b–25a, the disqualification of both the dice player and the pigeon flyer for testimony is explained, inter alia, in terms of the lack of any valid property transfer in the transactions they make. The Palestinian Talmud seems to reflect similar presuppositions; see Jerusalem Talmud (JT) Sanhedrin 3.3 (21:1) and parallels.

27. Although see T Shevi'it 8.11.

Referring to the disqualification of the four categories of person, the Tosefta in tractate Sanhedrin 5:5 states the following: "They added to them herdsmen and thieves and robbers and all those who are suspected in matters of money—their testimony is disqualified" (הוסיפו עליהן הרועין והגזלנין והחומסנין וכל החשודין על הממון עדותן פסולה).[28] Here thieves are presented as a later addition to the existing list of four categories of person. Some scholars have tried to explain away this difficulty by emphasizing the general principle that appears in this ruling—that all those who are suspected in money matters are disqualified from giving testimony—and may be the reason for repeating the supposedly known disqualification of thieves and robbers.[29] However, this solution cannot be applied to other versions of the same tradition,[30] like that found in the Babylonian Talmud, which simply reads: "They added to them thieves and robbers" (הוסיפו עליהן הגזלנין והחמסנין).[31] This wording makes clear that thieves and robbers were the ones added to the original list, and not vice versa.[32]

28. According to the Vienna manuscript.

29. See Sabato, "Psuley 'Edut," 17.

30. For example, the Erfurt manuscript which reads: "They added to them thieves and herdsmen and robbers and all those who are suspect in money matters—their testimony is ineligible." See Sabato on this version, ibid., n. 68.

31. A *bariata* (Tannaitic tradition external to the Mishnah) cited in BT Sanhedrin 25b. A separate *baraita* on the same page describes the addition of three other suspicious categories: עוד הוסיפו עליהן הרועין והגבאין והמוכסין.

32. Sabato, "Psulei 'Edut," 17, notes this difficulty but does not suggest any resolution. In his book, *Sanhedrin Perek Shlishi*, 286–87, he dismisses it as resulting from later editing. Notably, some question the credibility of certain Babylonian *baraitot*, especially when they reinforce Babylonian halakha; see Shama Y. Friedman, "ha-Baraitot ba-Talmud ha-Bavli ve-Yahasan le-Makbilotehen she-Batosefta," in *Atara L'Haim: Studies in the Talmud and Medieval Rabbinic Literature in Honor of Professor Haim Zalman Dimitrovsky*, ed. Daniel Boyarin, Shamma Friedman, Marc Hirshman, Menahem Schmelzer, and Israel M. Tashma (Jerusalem: Magness Press, 2000), 163–201, at 197. However, this approach has been criticized and revisited; see Binyamin Katzoff, "Yahas ha-Baraitot ba-Tosefta le-Makbilotehen ha-Talmudiyot: 'Iyun Mehudash," *Hebrew Union College Annual* 75 (2004): 24.1; and Barak Cohen, *For Out of Babylonia Shall Come Torah and the Word of the Lord from Nehar Peqod: The Quest for Babylonian Tannaitic Traditions* (Leiden: Koninklijke Brill NV, 2017). It should be noted that in our case, the *baraita* is quoted in the Babylonian Talmud despite the fact that it plainly contradicts the assumption of the *sugya*, according to which thieves are excluded from testifying by Torah Law; see, for example, BT Sanhedrin 25b: "גזלן דאוריתא הוא," and also the words of Rava on page 26b: "בגזלן דאוריתא מי בעינן הכרזה." By describing thieves and robbers as a rabbinic addition, the *baraita* creates a historical picture that the *sugya* cannot accept. This difficulty is addressed and answered by applying a clearly forced *okimta*, suggesting that the thieves mentioned in the *baraita* are not thieves in the strict sense but rather those who steal an article that was found by "a deaf person, an imbecile and a minor." This supposedly solves the problem, because a deaf person, an imbecile, and a minor all lack the legal status that enables the finder of an article to become its legal owner. The artificial nature of this

The other reason to doubt the disqualification of the four categories of person as secondary to the disqualification of thieves is that the latter are rarely discussed in Tannaitic sources touching on the subject.[33] Thieves and robbers are briefly mentioned as ineligible to testify in two instances,[34] but they are not mentioned in the more central sources where the terms and conditions of witness disqualification are discussed in reference to the four categories of person. For example, the Tosefta in tractate Sanhedrin deals exhaustively with the processes of rehabilitation: each of the four categories of person is addressed separately, and prescribed specific requirements for performing a "complete return" (חזרה גמורה, a unique phrase that I shall discuss at length in the third part of this article) that will restore their former status as legitimate witnesses.[35] The dice player must break the blocks of wood that he used for gambling, the usurer must tear up the promissory notes he holds, and so on. Thieves and robbers, on the other hand, are not mentioned, nor are they anywhere prescribed a similar process for rehabilitation. Similarly, when the Mishnah in tractate Rosh Hashana discusses the range of disqualification from giving testimony, it clarifies that the four categories of person (as well as slaves) are ineligible as witnesses only in those cases in which women are ineligible: "Any testimony for which a woman is not eligible, these are also not eligible for" (כל עדות שאין האשה כשירה לה אף הן אינן כשרין לה).[36] However, there is no mention of thieves and robbers and their scope of disqualification.[37] The fact that these rulings refer only to the specific categories of person, and not to the supposedly more general category of thieves and robbers, is in

solution supports the originality of our *baraita*, as it seems to suggest that the editors were forced to include it in the sugya despite their contradicting world view. For a different view, see Büchler, *Am Ha-aretz ha-Glili*, 176.

33. In contradistinction to their dominance in the Babylonian debates over disqualification. Notably, a different Midrashic formulation that refers to the disqualification of thieves appears in BT Sanhedrin 27a. This tradition cannot be identified explicitly as a Tannaitic tradition and might be an Amoraic formulation. It is introduced by a "מיתיבי" in the majority of manuscripts, terminology that could also be used to introduce an Amoraic Midrash. See, for example, BT Berakhot 60a, and additional examples in Michael Higger, *Otsar ha-Baraitot*, vol. 9 (New York: Shulsinger Bros, 1946), 268.

34. Their disqualification is mentioned once in T Sanhedrin 5.5, discussed at length previously, and a second time in Mekhilta de-R. Ishmael, Kaspa 20, ed. Horowitz-Rabin, 322, which reads as follows: "R. Nathan says: Do not make *rasha* a witness, do not make *hamas* a witness—to exclude thieves and robbers who are disqualified for testimony."

35. T Sanhedrin 5.2 and parallels.

36. M Rosh ha-Shana 1.8 and parallels.

37. BT Yevamot 25b quotes a tradition in the name of Rav Menahse according to which a thief is ineligible to testify, also in certain cases in which women are eligible to testify (i.e., in the case of an *aguna*), but this appears to be a late Amoraic interpolation.

accordance with the historical account, mentioned previously, that presents thieves and robbers as secondary, and a late addition to the original list. Therefore, it seems that the list reflects the original rabbinic treatment of the disqualification of certain individuals from serving as witnesses on the grounds of negative behavior.

Part II: Defective Morality

What are the alternatives to the thief hypothesis? What kind of moral deficiency originally led to the disqualification of the four categories of person, if it was not their unlawful acquisition of money? Several suggestions were proposed already in traditional sources. The Tosefta emphasizes the opportunism of the trader of seventh year produce, who "sits idle for six years and once the Seventh Year comes, stretches out his hands and legs and does business in the fruits of transgression" (זה היושב ובטיל בשאר שני שבוע כיוון שהגיע שנת השמטה התחיל מפשיט ידיו ורגליו ונושא ונותן בפירות עבירה).[38] According to the Babylonian Amora Rav Sheshet, the problem with dice players is that "they are not involved in settling the world" (לפי שאין עסוקין ביישובו של עולם).[39] Certain modern scholars made further suggestions, stressing the fact that, despite their obvious disrepute, some of the practices listed do not amount to full criminality.[40] However, none of these suggestions provides a satisfactory explanation for the unique composition of the list and the choice of these particular four categories of person from among

38. T Sanhedrin 5.2. The translation is modified from Jacob Neusner, *The Tosefta* (Peabody, MA: Hendrickson Publishers, 2002), 1162.

39. It is possible that this saying alludes to the opinion of R. Yehuda, who holds that practicing a dignified trade may protect one from disqualification: "אימתי. בזמן שאין לו אמנות אלא היא. אבל אם יש לו אומנות שלא היא הרי זה כשר"; see M Sanhedrin 3.3 and parallels.

40. The lack of strict illegality has been noted by many: Sabato, "Psuley 'Edut," 12; Schwartz, "'Pigeon Flyers,'" 116; and Bar-On, *Hatalat Goralot*, 333–34. Gvaryahu, *Diney Ribit*, suggested that the problem with the four categories of person is their manipulative abuse of legal loopholes. He emphasizes the fact that the transactions they undertake were not enforceable in rabbinic courts (דברים שאינם יוצאים בדיינים), suggesting that their fault lies in operating outside the realm of rabbinic law. He further suggests an analogy to the way that the rabbis related to people who did not accept rabbinic orthodoxy, by excluding them from the world to come (M Sanhedrin ch. 11). However, this suggestion is inconsistent with Gvaryahu's own observation that lending money for interest and trading seventh year produce are clearly illegal according to Tannaitic law. These are by no means "loopholes." Moreover, M Sanhedrin chapter 11 indicates that when the rabbis disapproved of a behavior that was not strictly illegal, they did not apply any concrete legal ramifications against it, but rather left the sanctions to the afterlife. In the case of the four categories, however, a real and immediate sanction is introduced.

all other wrongdoers engaging in similarly (or more) undesirable behavior, who in the Tannaitic stratum are not disqualified from giving testimony.[41]

Indeed, it is hard to make a plausible case for a common denominator of immorality shared by the four categories, and for a good reason. As noted already by the traditional commentators, from a Jewish perspective the list exhibits a confusing heterogeneity:[42] there is a clear gap between the extreme criminality of, for example, the usurer, who illegally takes money while violating a central prohibition of Torah law, and the dice player, of whom one is hard pressed to say which law he transgressed at all.[43] By definition, it is impossible to escape this heterogeneity while maintaining a Jewish point of view. However, turning to the Greco-Roman context, it is easy to trace an identifiable ethical ideal, extremely

41. In the Babylonian Talmud, many more wrongdoers are designated as disqualified from giving testimony, until the conclusion is reached that anyone who violates a prohibition punishable by lashes is deemed disqualified. On the differences between the Tannaitic and Babylonian Amoraic rules of disqualification from giving testimony, see Safrai, "Psuley 'Edut," 101–2; Sabato, "Psuley 'Edut," 15–16; and Sabato, *Sanhedrin Perek Shlishi*, 211–14. Schiffman, *Sectarian Law*, 61, suggests that the Babylonian rules are in line with the sectarian approach to this issue. A full comparison of the Tannaitic and Amoraic disqualification rules exceeds the limits of this article.

42. See the Tosafot commentary on BT Sanhedrin 24b, "ואלו הן הפסולין," which struggles to present the usurer and the trader of sabbatical goods as only transgressing rabbinic law, and not strict Torah provisions, to account for their association with dice players and pigeon flyers.

43. Dice playing is described as clear-cut theft only in late Midrashic compilations, such as Seder Eliyahu Rabba 16 (ed. Ish Shalom, 77), and Midrash Tehilim 26.7 (ed. Buber, 220). In earlier sources it is sometimes mentioned in association with thievery, albeit without legally equating dice playing with theft; see, for example, T Baba Kama 4.7. As Lieberman points out, this ruling in the Tosefta merely teaches that "a slave would often be a thief or a gambler"; Saul Lieberman, *Tosefta Ki-Psuta*, vol. 10 (Jerusalem: Jewish Theological Seminary Press, 1988), 373 (my translation). Similarly, see BT Hulin 91b. Notably, in M Shabbat 23.2 dice playing is portrayed as a Sabbath prohibition, suggesting that it would be legitimate on other days of the week: "He wishes to earn money or its equivalent through the game, and this is a (forbidden) bargain in the Sabbath"; Chanoch Albeck, *ha-Mishna, Seder Mo'ed* (Jerusalem: Mosad Bialik, 1952), 70 (my translation). Other Talmudic sources mention the practice of gambling without any clear normative position against it; see BT Kiddushin 21b, JT Baba Kama 5.6 (5a). Sabato, *Sanhedrin Perek Shlishi*, 215 writes: "According to the plain meaning of the Mishna, it is possible that indeed (dice-playing) is not forbidden" (my translation). See also Schwartz, "Gambling," 156, who writes that already in Tannaitic period "everyone apparently knew that something was wrong with dicing but from a purely legal standpoint there was not much that could be said about precisely what it was." Probably in view of the disqualification of the dice player from giving testimony, some Babylonian *sugyot* insist that gambling must have been forbidden altogether, and not only on the Sabbath (see, e.g., BT Shabbat 149).

popular in the Roman period, which was encoded in this list: the ideal of self-control.[44]

The Four Categories as Lacking Self-Control

I will present a general outline of the moral ideal of self-control.[45] It is an ethics primarily focused on the control of sensual and emotional temptations and influences. Self-control means overcoming gluttony, lust and greed, as well as fear and anger, all forces that divert a person from acting prudently. More importantly for this article, a lack of self-control is commonly represented in literature by two metaphors: slavishness and femininity.[46] The passions and desires are considered to possess an enslaving quality: either a person controls his passions, or they control him. Therefore, a man who lacks self-control is described as slavish, as expressed by the first-century Stoic philosopher Epictetus: "A man without self-control is like a slave on holiday."[47] The use of the masculine in this phrase is not accidental, as women were seen as predisposed to lack

44. The moral ideal of self-control permeates Roman culture and literature of all genres; see, for example, North, *Sophrosyne*, chapter 8; Susanna Morton and Christopher Gill, eds., *The Passions in Roman Thought and Literature* (Cambridge: Cambridge University Press, 1997); and Catharine Edwards, *The Politics of Immorality in Ancient Rome* (New York: Cambridge University Press, 2002). The popularity of the idea of self-control in the Roman period has mostly been discussed by scholars in the context of early Christian texts: see Stowers, *A Rereading of Romans*, ch. 2; and Valentine, "'For You Were Bought with a Price,'" ch. 4. It is also addressed by numerous works that dealt with the construction of gender in late antiquity, as self-control serves as a proxy for masculinity; see the following discussion and especially note 64.

45. This description is based on Harris, *Restraining Rage*; North, *Sophrosyne*; Stowers, *A Rereading of Romans*; and Edwards, *The Politics of Immorality*. As Harris writes: "The history of Greek self-control and moderation has still to be written" (Harris, *Restraining Rage*, 80). The same is also true for the Roman period. For a discussion of certain variations within this tradition, see note 50.

46. As summarized by Catherine Edwards, "Unspeakable Professions: Public Performance and Prostitution in Ancient Rome," in *Roman Sexualities* (Princeton, NJ: Princeton University Press, 1997), 66–95, 75: "Self-control and discernment regarding sensual pleasures were traditionally the markers of masculinity and social refinement. Immoderate pursuit of low pleasure was associated with women, slaves, and the poor—those who had to be controlled by others if they were not to fritter away their lives in self-indulgence. Thus, to enjoy vulgar pleasures—the pleasures of eating and drinking, sex, gambling, going to the games—was to risk one's identity as a cultured person." On slavishness and the lack of self-control, see also "Free Yourself! Slavery, Freedom and the Self in Seneca's Letters," in *Seneca and the Self*, ed. Shadi Bartsch and David Wray (Cambridge: Cambridge University Press 2009), 139–59.

47. Epictetus, *Discourses*, 4.1.58, as translated by Edwards, *The Politics of Immorality*, 194.

self-control. Self-control requires strength to overcome influences and temptations, and women were perceived as weak. Courage, by which one overcomes fear—one of the main enslaving emotions—is viewed as a masculine quality, typical of warriors on the battlefield, who are obviously all males.[48] Slavishness and femininity therefore mark the discourse of self-control and are useful in identifying underlying ethical premises in the analysis of texts from the Greco-Roman cultural milieu.

In order to demonstrate that the discourse of self-control is present in the Tannaitic discussion of the four categories, I will first show how these persons are represented in Greco-Roman sources. Scholars of Jewish law have noted that some of the four categories on the list are frequently discussed in Greek and Roman texts;[49] what has gone unnoticed, however, is that they are discussed in a particular ethical context and portrayed as persons who lack self-control. I will support this assertion by examining three lists of dishonorable occupations found in Greek and Roman sources: the first by Aristotle, the second by Cicero, and the third by Plutarch. Aristotle predates the relevant period, but is nevertheless important because of his influence on writers of the first to third centuries. Because of the nature of the sources, it is best to consider the lists by Aristotle and Cicero in tandem, and then look at the list by Plutarch, which most resembles the Tannaitic list. After presenting the Greek and Roman lists, I will return to the Tannaitic sources and discuss the similarity between the Tannaitic and Greco-Roman lists, as well as additional indications of the presence of self-control discourse in Tannaitic regulation of disqualified testimony.

Aristotle and Cicero

In the fourth chapter of the Nicomachean Ethics, Aristotle discusses virtues concerning money.[50] In the section of interest here, he criticizes the

48. This of course does not imply that men always have self-control whereas women always lack it; there are several classical depictions of women who demonstrated courage and bravery, therefore showing self-control and love of freedom. See, for example, Philo, *Quod. Omnis Probus Liber Sit*, 115. Another example in a Jewish context is the story of Hannah, a woman who died together with her seven sons while refusing to bow down to an idol; see 4 Maccabees, ch. 15–16.

49. Schwartz, "'Pigeon Flyers'"; Schwartz, "Gambling"; Maloney, "Usury"; and Gvaryahu, *Diney Ribit*.

50. The fourth book of the Nicomachean Ethics is part of the unit that deals with moderation (σωφροσύνη) rather than with self-control (ἐγκράτεια). As noted by Michele Foucault (following North, *Sophrosyne*), moderation according to Aristotle is a state in which one deliberately holds to the right mean between deficiency and excess with respect to bodily pleasures and desires, whereas self-control is a state in which one dominates or rules over pleasures and desires, but must struggle to do so (*The Use of Pleasure*, trans. Robert

https://doi.org/10.1017/S073824801900018X Published online by Cambridge University Press

improper conduct of those who cannot control their desire for money, tilting from moderation to extreme and excess. These people would act disgracefully to satisfy their sordid greed: [51]

> The other sort of people are those who exceed in respect of getting, taking from every source and all they can; such are those who follow illiberal (ἀνελεύθερος) trades, brothel keepers and all people of that sort, and petty usurers who lend money in small sums at a high rate of interest; all these take from wrong sources, and more than their due. The common characteristic of all these seems to be sordid greed (αἰσχροκέρδεια), since they all endure reproach for gain, and for a small gain. . . the dicer and the foot-pad or brigand are to be classed as mean (τῶν ἀνελευθέρων εἰσίν), as showing sordid greed (αἰσχροκερδεῖς), for both ply their trade and endure reproach for gain, the robber risking his life for plunder, and the dicer making gain out of his friends, to whom one ought to give; hence both are guilty of sordid greed, trying as they do to get gain from wrong sources. Meanness (ἀνελευθερία) is naturally spoken of as the opposite of liberality (τῇ ἐλευθεριότητι). . .

Dice-players and usurers are both portrayed here as people who cannot control their shameful desire for money: αἰσχροκέρδεια. Their lack of moral stamina, being swayed by temptation, is the center of Aristotle's criticism.[52] For Aristotle, the terms αἰσχροκέρδεια and ἀνελευθερία are

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Hurley [New York: Random House, 1990], 64–65). However, despite the differences between them, ἐγκράτεια and σωφροσύνη might be conceived as sequential models of ethical self-relation, and both deal with the management of pleasure. See North, *Sophrosyne*, ix: "The tension between sophrosyne and the 'heroic principle' in the Greek character has often been recognized, but perhaps too much emphasis has been laid on their opposition, too little on their reconciliation." She further describes σωφροσύνη as "the harmonious product of intense passion under perfect control. . . perfect yet precarious control of the most turbulent forces. . . the perfect symbol of this excellence [is] the charioteer guiding and holding in check his spirited horses: sophrosyne [is] 'saving phronesis'. . . from the assault of appetite and passion. . ." (ibid., x). Late antiquity arguably witnesses an intensification of both these forms of ethical self-relation. For the purposes of this article, the common denominator of the two ideas is what is at stake. I thank Virginia Burrus for her helpful comments on this point.

51. Nicomachean Ethics (NE) 1122a, based on the translation by Harris Rackhamm, *Loeb Classical Library 73* (Cambridge, MA: Harvard University Press, 1934), 203, with minor changes. I prefer this classical translation because of its relative proximity to the Jewish texts. Compare Robert C. Bartlett and Susan D. Collins, trans., *Aristotle's Nicomachean Ethics* (Chicago: University of Chicago Press, 2011), 71–72. See also Eudemian Ethics (EE) III.4.1232a11–12.

52. "Greatness of soul is exhibited when the good person has the opportunity to act in ways that are conspicuously heroic, that is, when circumstances make the acts of justice, courage, liberality, and all the other virtues incredibly difficult to perform because one may be either tempted by the prospect of great pleasures or discouraged by the prospect of excessive pains"; Helen Cullyer, "The Social Virtues," in *The Cambridge Companion*

evidently closely linked. αἰσχροκέρδεια means sordid love of gain or base covetousness, whereas ἀνελευθερία is illiberality of mind or servility. "The Greek term ἐλευθεριότης . . . means literally 'being in a free condition,' that is, in the condition characteristic of a free citizen, as opposed to a slave. . .. ἐλευθεριότης is the virtue by which someone is not, as we would say, 'bound' or 'tied down' by concerns about his possessions. . .."[53] Like the rabbis, Aristotle associates gamblers and usurers with thieves and robbers; however, clearly for Aristotle the link between these practices is not the illegality of the earnings, but rather the assumption that they are all driven by a contemptible and irresistible desire for gain.

Cicero's list of disgraceful occupations is found in *De Officiis* (1.150):[54]

> Now as to arts and acquisitive activities—those considered liberal (*liberales*) as well as sordid (*sordidi*)—we are generally told these things. First, those acquisitive activities are disapproved of that incur the hatred of other human beings, such as customs officers and usurers. Illiberal (*illiberales*) and sordid acquisitive activities also include all wage earners who are paid for their labor and not their art; for in their case that wage is recompense for slavery.. . . All craftsmen are also engaged in a sordid art; for there is nothing liberal (*liberales*) about a workshop. Least of all ought those arts to be approved of that are handmaidens to pleasure, "fishmongers, butchers, cooks, poulterers, fishermen," as Terence says. Add to this, if you approve, perfumers, dancers, and everything belonging to gambling. . . . Mercantilism, if on a small scale, must be thought sordid.

Here Cicero discusses the professions befitting free men. Replacing the Greek philosophical point of view with a Roman moralizing perspective, he alludes to the Aristotelian list in several ways.[55] Clearly, Aristotle's

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to Aristotle's Nicomachean Ethics, ed. Ronald Polansky (New York: Cambridge University Press, 2014), 146.

53. See Michael Pakaluk, *Aristotle's Nicomachean Ethics: An Introduction* (Cambridge: Cambridge University Press, 2005), 173. In this context, ἐλευθερία is sometimes translated as "generosity," however "liberality" is preferable "since it reflects the connection of the Greek noun with *eleutheros*, free." See Aristotle, *The Nicimachean Ethics*, trans. William D. Ross (New York: Oxford University Press, 2009), 224. And see also Bartlett and Collins, *Aristotle's Nicomachean Ethics*, 311. For a thinner account of liberality, which nevertheless does not change the general meaning of the passage according to the reading suggested, see Howard J. Curzer, *Aristotle and the Virtues* (New York: Oxford University Press, 2012), 83–108.

54. The translation follows Marcus Tullius Cicero, *On Duties*. Translated with Introduction, Notes, and Indexes, by Benjamin P. Newton. Agora editions (Ithaca; London: Cornell University Press, 2016), 81.

55. On Greek versus Roman sensitivities reflected in the text containing Cicero's list, as well as its links to the Aristotelian list, see Andrew R. Dyck, *A Commentary on Cicero, De officiis* (Ann Arbor: University of Michigan Press, 1996), 331–33.

emphasis on liberality is a central theme also for Cicero, as indicated by the dichotomous structure highlighted in the text: on the one hand, occupations considered free—*liberales*, and on the other hand, those considered *sordidi* —disgraceful and low. Disgracefulness is contrasted with freedom; it is associated first with slavish behavior, and a second time with the pleasures: *voluptates*, the base temptations of the senses.[56]

The reference to usurers and gambling (literally: "every game of dice") similarly echoes Aristotle's list, to which Cicero adds, inter alia, small scale trade. When we turn to Plutarch's list we will see that the small-scale trader is analogous to the Tannaitic "trader of seventh-year produce." Note that Cicero's list further includes tax collectors; they are also mentioned in a Tannaitic tradition quoted by the Babylonian Talmud as having been added to the Tannaitic list of disqualified witnesses.

Plutarch

Whereas Aristotle's and Cicero's lists partially overlap with the Tannaitic list of disqualified witnesses, the list by Plutarch, found in an essay titled "On How to Study Poetry" (*De audiendis poetis*),[57] presents an almost-perfect parallel to the Tannaitic one. This important parallel was unknown to scholars until it was recently pointed out by Amit Gvaryahu.[58] To fully appreciate its meaning, one needs to bear in mind the text's specific literary background, which I will now briefly describe.

As implied by its title, Plutarch's essay seeks to guide youths on how to understand poetry, and in this respect he introduces the principle of metaphor commensurability. According to Plutarch, a poetic text should not be understood at face value, but rather on a metaphoric level, so that any metaphor could potentially be replaced by a suitable equivalent. In the portion of the essay relevant to this article, the author demonstrates this rule using a quotation from a Greek tragedy that dramatizes a mythological story. The tragedy tells how Odysseus, who went to look for Achilles with whom he wanted to join forces in the Trojan War, finds him among the maidens in

56. On this section, see, further, Edwards, "Unspeakable Professions," 83. On the use of *liberalis* in Roman literature, see Charles E. Manning, "*Liberalitas*: The Decline and Rehabilitation of a Virtue," *Greece & Rome* 32 (1985): 73–83.

57. For the attribution of the work to Plutarch, see Richard Hunter and Donald Russell, eds., *Plutarch: How to Study Poetry (De audiendis poetis)* (Cambridge: Cambridge University Press, 2011), 1–2. The argument made here holds regardless of the accuracy of this attribution.

58. Gvaryahu, *Diney Ribit*. Gvaryahu disagrees with the reading proposed here of both Plutarch and the rabbis, and offers a different explanation of the four categories' disqualification. See note 40.

Scyros. Achilles himself is dressed like a maiden, and is carding wool together with the other maidens, after his mother tried to disguise him and, in this way, prevent his conscription. Odysseus rebukes Achilles for sitting among the maidens and behaving like one of them:[59]

> and so also that when they hear the rebuke which was administered by Odysseus to Achilles as he sat among the maidens in Scyrus,
>
> Dost thou, to dim the glory of thy race, Card wool, son of the noblest man in Greece?
>
> they may imagine it to be addressed also to the profligate (τὸν αἰσχροκερδῆ) and the avaricious and the heedless and the ill-bred, as, for example,
>
> Dost drink, son of the noblest man in Greece,
>
> or gamble, or follow quail-fighting, or petty trading, or the exacting of usury, without a thought of what is magnanimous or worthy of your noble parentage?
>
> (ἢ κυβεύεις ἢ ὀρτυγοκοπεῖς ἢ καπηλεύεις ἢ τοκογλυφεῖς,
> μέγα φρονῶν μηδ᾽ ἄξιον τῆς εὐγενείας;)

According to Plutarch, instead of accusing Achilles of carding wool among the maidens, the author could have used a series of other analogous metaphors without changing the meaning of his reproach. Following the metaphor of excessive drinking, he lists four other metaphors, similarly presented as analogous to behaving like a woman. This list of four negative behaviors includes gambling, usury, quail fighting, and small-scale trade.

Strikingly, this list closely resembles the Tannaitic list of four categories of person who are disqualified from giving testimony. Gambling and usury appear in both lists, and quail fighting is a clear parallel to the pigeon flying that, as mentioned, is already identified in the Tosefta as engaging in bird fights.[60] A juxtaposition of the two lists, warranted by their similarity in form and content, indicates that trading seventh-year produce is analogous to small-scale trade.[61] Apparently, Plutarch presents us with the origin from which the Tannaitic list was derived.

59. *De audiendis poetis*, 34 d. The translation follows Hunter and Russell, *Plutarch: How to Study Poetry*, 181.

60. The verb ὀρτυγοκοπεῖν literally means "striking quails." Striking was intended to make the birds angry (as in הממרא את היונים in the Tosefta), and in this way encourage them to fight. On bird fights in Greek and Roman cultures, see George Jennison, *Animals for Show and Pleasure in Ancient Rome* (Manchester: Manchester University Press, 1937), 10, 18, 101. A different practice that involved striking birds was a game in which the bird was repeatedly struck. If the animal withstood this ill-treatment, its owner won. See Hunter and Russel, *Plutarch: How to Study Poetry*, 194.

61. Interestingly, according to Tannaitic literature, trading in sabbatical produce is only forbidden when done on a large, commercial scale, but is allowed on a small scale: see M Shevi'it 7.3, 8.3, T Shevi'it 6.22.

I maintain that Plutarch views the four categories of person as paradigmatically lacking in self-control. This assertion is not only plausible in light of the cultural associations of gamblers, usurers, and small-scale traders demonstrated above (note that Plutarch groups persons who engage in all four practices under the heading "sordid love of gain"—τὸν αἰσχροκερδῆ, using the same word Aristotle used in his criticism of shameful occupations).[62] Rather, it follows from the very point that Plutarch makes in this paragraph, where he upholds that the four practices are as shameful as drinking or behaving like a woman. Excessive drinking, a practice frequently associated in Greco-Roman literature with gluttony and promiscuity, is deeply linked to lack of self-control.[63] Even more telling is the comparison with behaving like women.

In the Greco-Roman cultural context, the analogy between men of bad character and women is a clear instance of self-control discourse.[64] Recall, for example, Plato's Timaeus, in which he states that men who lack courage are destined to be reborn as women,[65] or Cicero's criticism of the femininity of a ruler who cannot control his passions.[66] Because

62. Plutarch, *Praecepta gerendae reipublicae*, 819e, links small-scale traders with moneylenders, presenting both as examples of shameless greed (for the association of the two, see also Aristotle, EE 12115a32). In *Regum et imperatorum apophthegmata*, 173c, he implies that small-scale trade is as shameful as keeping a brothel, a practice that was considered a disgraceful servicing of base passions. The two character types are similarly associated in Julius Pollux, *Onomasticon*, 6.128. Quail fighting is attributed to the greedy king Meidias in Plato, *Alcibiades* 120a9. Marcus Aurelius, *Meditations*, I.6, lists it among the acts he learned not to participate in.

63. See also Plutarch, *De puerorum educatione libellus*, 12b. Famously, Cicero criticizes Antony for excessive drinking (*Orationes Philippicae*, 2.63) and gambling (ibid., 2.66–8), and further links this behavior with the habit of associating with slaves, actors, and pimps, and sharing their base pleasures (ibid., 2.58, 2.101). Seneca, *De vita beata* 7.7.3, associates drinking with pleasure, softness, and darkness, as opposed to virtue. On drinking and self-control in the context of Octavian propaganda, see Patrick Porter, "Unlawful Passions: Sumptuary Law and the Roman Revolution," *Melbourne Historical Journal* 28 (2000): 1–18.

64. See Stowers, *A Rereading of Romans*, especially 50–52; Stephen D. Moore and Janice C. Anderson. "Taking It Like a Man: Masculinity in 4 Maccabees," *Journal of Biblical Literature* 117 (1998): 249–73; Colleen Conway, *Behold the Man: Jesus and Greco-Roman Masculinity* (Oxford: Oxford University Press, 2008), especially 15–34; Maud W. Gleason, *Making Men: Sophists and Self-Presentation in Ancient Rome* (Princeton, NJ: Princeton University Press, 2008); L. Stephanie Cobb, *Dying to Be Men: Gender and Language in Early Christian Martyr Texts* (New York: Columbia University Press, 2012); and Lin Foxhall and John Salmon, eds., *Thinking Men: Masculinity and its Self-Representation in the Classical Tradition* (London: Routledge, 2013).

65. Plato, *Timaeus*, 90e.

66. Cicero, *Orationes Philippicae*, 3. See also Diogenes Laertius, 7.1.8; Josephus, *Antiquitates Judaicae* (AJ) 13.108. For a broad discussion of accusations of effeminacy

women are supposedly incapable of resisting temptations and passions, describing a man as feminine amounts to saying that he lacks self-control. The analogy to women therefore implies that in Plutarch's view the disgraceful aspect of the four categories of person is their shared lack of self-control.[67]

The Tannaitic List in Context: A Comparison between the Four Categories of Person and Women

The Tannaitic list resembles that of Plutarch not only in its content, but also in the equation of the four categories of person with women. As mentioned, the rabbis, too, associated the four categories with women—as well as with slaves—when discussing the scope of their mutual incompetence to testify. Given its importance, I will quote again the full passage from the Mishnah:[68]

> אלו הן הפסולין. המשחק בקוביא והמלוה בריבית ומפריחי יונים וסוחרי שביעית ועבדים.
> זה הכלל. כל העדות שאין האשה כשירה לה אף הן אינן כשירים לה.

> The following are ineligible: the dice-player, the usurer, pigeon flyers and traders in Seventh Year produce, and slaves.
> This is the rule: any testimony for which a woman is not eligible, these are also not eligible.

Detached from its cultural context, the comparison made here among the four categories of person, slaves, and women may appear merely formal, reflecting a legal technicality that all these potential witnesses happen to be disqualified for matters of similar scope. However, the fact that both Plutarch and the rabbis make the comparison between the four categories and women cannot be dismissed as coincidental.[69] The argument that in

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and its meaning in Roman literature, see Edwards, *The Politics of Immorality*, ch. 2, especially 68–78.

67. The analogy comparing Achilles to the maidens stresses the weakness attributed to women, therefore highlighting the agonistic character of resistance to temptation. This enables the classification of this reference as relating to self-control rather than moderation; see note 50.

68. A parallel ruling in slightly different wording appears in T Sanhedrin 5.2: אבל עידות שהאישה כשירה לה הן כשירין לה. See also BT Sanhedrin 27b and JT Sanhedrin 3.5.

69. Notably, in the rabbinic period, an ongoing discourse attempted to present conduct according to the laws of the Torah as a manifestation of self-control; see Stowers, *A Rereading of Romans*, 56–64. Especially remarkable is an articulation of this claim with reference to the prohibition of usury in 4 Maccabees 2.8: "Otherwise how could it be that someone who is habitually a solitary gormandizer, a glutton, or even a drunkard can learn a better way, unless reason is clearly lord of the emotions? Thus, as soon as one adopts a way of life in accordance with the law, even though a lover of money, one is forced to act contrary to

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making this comparison the rabbis were consciously operating within the cultural paradigm of self-control is reinforced by the Tannaitic discussion of the disqualification of women from giving testimony, a legal context directly pointed to by the ruling quoted. Because the use of typical self-control language in that case has so far escaped scholarly attention, it merits presenting here in some detail.[70]

Most Tannaitic formulations of the rule regarding women's ineligibility to testify are exegetical and technical, refraining from openly discussing the reasoning behind this exclusionary rule. However, one instance of a reflection on this reasoning is found in the Tosefta in tractate Ktubot

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natural ways and to lend without interest to the needy" (Marc Brettler, Carol Newsom, and Pheme Perkins, eds., *The New Oxford Annotated Apocrypha: New Revised Standard Version* [New York: Oxford University Press, 2010], 379). Indeed, such discourse is mostly found in Jewish texts that are also expressly Hellenistic. However, several rabbinic sources that depict the Patriarchs as models for overcoming lust and greed, or emphasize the special challenges posed by commandments that require one to restrain greed, gluttony, and sexual desires, seem to be in agreement with this position. See, for example, Sifre Deuteronomy 33, M Makkot 3.15, T Horayot 1.5, Sifra Kedoshim 10.22.

70. The infiltration of self-control discourse into rabbinic literature has been discussed by scholars mostly with regard to the construction of gender and sexuality. Michael Satlow argues that the construction of masculinity in rabbinic literature is deeply influenced by the ethos of self-control: "'They Abused Him like a Woman': Homoeroticism, Gender Blurring, and the Rabbis in Late Antiquity," *Journal of the History of Sexuality* 5 (1994): 1–25; and "'Try To Be a Man': The Rabbinic Construction of Masculinity," *Harvard Theological Review* 89 (1996): 19–40. Daniel Boyarin opposes this approach and strives to present rabbinic Judaism as an alternative to the Western cultural myth, which sees maleness as "active spirit" and femaleness as "passive matter." See Daniel Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993), and also Daniel Boyarin, *Unheroic Conduct: The Rise of Heterosexuality and the Invention of the Jewish Man* (Berkeley: University of California Press, 1997). Ishay Rosen-Zvi, in *Demonic Desires: 'Yetzer Hara' and the Problem of Evil in Late Antiquity* (Philadelphia: University of Pennsylvania Press, 2011), has shown that the construction of the passions in rabbinic texts reflects demonological Eastern influences, which portray the evil inclination as external to the self, as opposed to the Greco-Roman perception of temptations as forming the baser part of the individual soul. In a different work, he doubts the influence of the Greco-Roman idea of gender fluidity on rabbinic constructions of masculinity; see Ishay Rosen-Zvi "The Rise and Fall of Rabbinic Masculinity," *Jewish Studies Internet Journal* 12 (2013): 1–22. Notably, occurrences of the ideal of self-control in rabbinic literature have so far been identified mostly in literary contexts; see Joshua Levinson, "An-Other Woman: Joseph and Potiphar's Wife—Staging the Body Politic," *Jewish Quarterly Review* 87 (1997): 269–301; and Jonathan Wyn Schofer, *The Making of a Sage: A Study in Rabbinic Ethics* (Madison: University of Wisconsin Press, 2005). For self-control in a halachic context, see Mira Balberg, *Purity, Body and Self in Early Rabbinic Literature* (Berkeley: University of California Press, 2014), 146–147.

3:3. There it is stated that, with the exception of certain special cases,[71] women (and minors) are generally not to be trusted as witnesses because they are suspected of testifying "out of temptation or out of fear" (שלא אמרו אלא מתוך הפיתוי ומתוך היראה).[72] This statement is often interpreted at face value as saying that women and minors are suspected of lying because they may have been influenced by an interested party.[73] However, in what follows, I maintain that, in fact, this language reveals a nuanced usage of the standard terminology of Greco-Roman self-control discourse.

As mentioned, the core of self-control is the ability to resist the influence of emotions and temptations. Classical authors speak of two types of forces that one ought to resist: (1) pleasure or delight (ἡδονή), which induces actions contrary to reason; and (2) pain or sorrow (λύπη), which deters one from doing what is proper. Stoic philosophers expanded the model to include two additional mental properties, adding (3) desire or temptation (ἐπιθυμία) as well as (4) fear or dread (φόβος).[74] These additions are actually the logical outcome of the first pair: pleasure attracts, creating temptation, whereas pain deters, creating fear. Desire and fear are complementary in nature, as Philo writes in "On That Every Good Man is Free," "Nothing is so calculated to enslave the mind as fearing death through desire to live."[75]

71. The exception discussed in this ruling is the case of a swarm of bees flying from a field owned by one person to a field owned by another. Here, the testimony of women and minors is accepted, despite the general rule that requires two adult male witnesses to decide monetary disputes. This exception is because of the special nature of bees, ownership of which was a very volatile issue in the ancient world. If the owner was not able to prove his ownership on the spot, he would lose the bees. See John A. Crook, *Law and Life of Rome* (Ithaca, NY: Cornell University Press, 1967), 142.

72. See also the parallel in JT Baba Kama10:2: אם יצאו וחזרו. . .. יוחנן, "ר' חיננא בר פפא בשם ר' אני אומ' מפני יראה ופיתוי אמרו". Notably, the assumption that women are more susceptible to intimidation and seduction is not the only view found in rabbinic literature. Other rabbinic sources emphasize the stability of women's opinions as compared with men's weakness; see Genesis Rabba 17.8.

73. Shimshon Etinger, *Isha ke-'Ed be-Diney Mamonot*, Dine Israel 20–21 (2000–2001) 241–67, at 247; and Ettinger, *Re'ayot*, 162. Others mention the connection to the Hellenistic context but do not elaborate on its meaning: Menahem I. Kahana, *Sifre Zuta Dvarim* (Jerusalem: Magnes Press, 2002), 280; and Tal Ilan, *Jewish Women in Greco-Roman Palestine: An Inquiry into Image and Status* (Tübingen: J. C. B. Mohr, 1995), 163.

74. Anthony A. Long and David N. Sedley, *The Hellenistic Philosophers* (Cambridge: Cambridge University Press, 1987), 410.

75. *Quod. Omnis Probus Liber Sit*, 22. Francis H. Colson, trans., *Philo in Ten Volumes IX, Loeb Classical Library* (Cambridge, MA: Harvard University Press, 1941), 23. See also Cicero, *Epistulae ad Atticum*, 9.2a.2, and the fragment quoted by Plutarch 34c, 106d: "What man who racks not death can be a slave?" Nauck. trag. Graec. Frag. Euripides No. 958.

https://doi.org/10.1017/S073824801900018X Published online by Cambridge University Press

The attribution of susceptibility to temptation (פיתוי) and fear (יראה) to women is in line with the cultural assumption that women are predisposed to lack self-control.[76] Roman jurists also attribute women's inferior legal status—including with regard to giving testimony—to their "weakness" of character, indicating the same basic attitude.[77] The coupling of women with minors in the Tosefta similarly suggests that an ethics of self-control is behind this ruling; Hellenistic thought links these two categories of people as lacking self-control, although for different reasons.[78]

Finally, this reading is reinforced by Josephus's description of the Jewish rule disqualifying women and others from giving testimony (Antiquities of the Jews [AJ] 4.8.15): "Let the testimony of women not be accepted because of the levity (κουφότητα) and boldness (θράσος) of their gender. Nor let slaves give testimony because if their ignobility of soul (τῆς ψυχῆς ἀγένειαν), since it is likely that they do not bear witness to the truth, whether because of gain (διὰ κέρδος) or because of fear (διὰ φόβον)."[79]

Here, Josephus repeats the convention according to which women and slaves are both defective in self-control. He attributes the disqualification of women to their levity or lightheartedness (κουφότης), which prevents them from making sound and solid judgments,[80] and to their boldness

76. Several rabbinic sources portray women as inherently unable to master their desires, in accordance with the Hellenistic theme; see Rosen-Zvi, *Demonic Desires*, ch. 7, and also "Do Women Have a Yetzer? Anthropology, Ethics and Gender in Rabbinic Literature," in *Spiritual Authority: Cultural Power Struggles in Jewish Thought*, ed. Howard Kreisel, Boaz Huss, and Uri Ehrlich (Beersheba: Bialik Institute, 2010), 21–34.

77. The legal ineligibility of women is frequently explained by Roman jurists of the second century, such as Gaius and Ulpian, in terms of their levity and weakness of character (*animi levitas*, *sexus infirmitas*); that is, their lack of self-control. Although in some places the reference to women's weakness is a late addition, in other places it is probably original. See Suzanne Dixon, "*Infirmitas sexus*: Womanly Weakness in Roman Law," *Legal History Review* 52 (1984): 343–71. The same attitude is clearly expressed in a passage from codex Theodosius (Cod. Theod. 9.24.1pr): "It was because of the fault of frivolity and the inconstancy of her sex and judgment that a girl is altogether excluded by the ancients from conducting suits in court and from giving testimony and from all matters pertaining to courts." Others, however, have argued that this language is most likely a reflection of Roman rhetoric rather than the original reason for these rules; see Gardner, *Being a Roman Citizen*, 88–89. Nonetheless, for the purposes of this article, Roman rhetoric itself is highly significant.

78. The triad usually also includes slaves. See Aristotle, *Politica*, 1260a10–14. Recall that slaves are mentioned as comparable to women in M Rosh ha-Shanah 1.8.

79. As translated by Steven Mason, ed., and Louis H. Feldman, trans., *Flavius Josephus: Translation and Commentary: Vol. 3: Judean Antiquities 1–4* (Leiden: Brill Academic Publishers, 2000), 411–12. The Jewish context of this paragraph in AJ escaped the commentators; see ibid., 412 note 674, and the subsequent discussion.

80. See, for example, AJ 3.15.2. Notably, rabbinic literature, too, uses the terminology of lightheadedness to describe women's lack of self-control: BT Kiddushin 80b does so in

(Θράσος) or excessive daring, which leads to passionate actions with no rational restraints.[81] Similar to the Mishnah, Josephus associates the disqualification of women with that of slaves, while stressing slaves' ignobility, τῆς ψυχῆς ἀγένειαν (echoing Plutarch's emphasis on a person's noble parentage: μέγα φρονῶν μηδ' ἄξιον τῆς εὐγενείας). Most importantly, when referring to slaves, Josephus employs the language of κέρδος and φόβος, which are synonymous with temptation and fear, or with rabbinic פיתוי and יראה.

Read against the backdrop of Josephus, it is clear that in the Tosefta, the rabbis intelligibly explained women's disqualification for testimony in terms of a lack of self-control. It therefore appears that self-control ethics comprehensibly informed the design of the Tannaitic rules concerning disqualified witnesses, including the list of the four categories, as well as the comparison of their incapacity to testify with that of slaves and women.

Part III: From Morality to Legality

I have attempted to show that in designing their rules regarding disqualified witnesses, the rabbis were engaging with the ethics of self-control. But what was the reason for applying foreign moral values to such a central legal institution? I contend that the explanation goes beyond mere cultural permeation of ethical discourse to a case of legal translation,[82] whereby a specific Roman legal mechanism was transformed and transmuted into a new Jewish form. I am referring to the Roman legal mechanism of *infamia.*

There are obvious differences between Roman *infamia* and the Tannaitic disqualification from giving testimony. Nevertheless, I propose that important similarities exist between the two legal paradigms. As mentioned in the opening of this article, I will point to affinities along three dimensions: (1) a shared underlying ethics of self-control, (2) structural similarities, and (3) a textual parallel. For the sake of clarity, the presentation of these affinities will be contextualized by a more general overview of *infamia*.

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explaining women's susceptibility to temptation, and BT Shabbat 33b presumes that women may be induced to act out of fear. These two instances show that the rabbis preserve the meaning of self-control discourse in its original cultural context.

81. For example, AJ 15.6.3.

82. I prefer the term "translation" over "transplantion" because my case study clearly involves the extensive reworking of the Roman legal norm in order to adapt it to a new Jewish context. On the meanings of "translation" in this context, see Foljanty, "Legal Transfers," 6–14.

Roman infamia*: Overview*

Infamia was an established Roman legal mechanism, contemporary with the rabbis, by which a moral judgment incurred legal consequences.[83] The people who were declared *infames* consequently suffered various political and legal disabilities: they were excluded from central and local office holding, from voting, and from acting as an *iudex*.[84] In addition to its effect on participation in the public domain, *infamia* also had serious ramifications in the realm of private law,[85] especially concerning participation in legal procedures. Those labeled *infames* were barred from speaking on behalf of others in a court of law and from bringing accusations against others.[86] Most importantly for the purposes of this article, they lost their eligibility to serve as witnesses in a court of law,[87] and were declared

83. "The term is not used only of disqualifications; it often appears in ancient texts in a less technical sense, meaning the degraded moral state that might or might not be recognized with the stamp of *infamia* by the law"; Edwards, "Unspeakable Professions," 69. Legal historians tend to draw a distinction between moral and legal *infamia*; for a discussion of the terminology used by ancient authors, see Kaser, "Infamia und ignominia," 227–35; and Wolf, "Das Stigma ignominia," 56–62. However, ancient writers connected the two, implying a conceptual link between them. See, for example, Cicero, *De legibus*, 1.90.50–51. Obviously, the two senses of the term closely overlapped when the legal institution was first developed. For certain reservations regarding this approach, see Gardner, *Being a Roman Citizen*, 110–11.

84. They were debarred from standing for election to magistracies (*Tabula heracleensis*) or from sitting on juries (*Lex Acilia repetundarum*). Actors, it seems, were not assigned to a tribe and were therefore unable to vote; see Greenidge, *Infamia*, 34–35.

85. Greenidge, *Infamia*, 154, argues that "*infamia* was primarily a matter of public law," and that the private law effects were only "secondary." However, Gardner, *Being a Roman Citizen*, 111, sees the public aspects of *infamia* as less central and claims that the restrictions resulting from *infamia* "are mainly concerned with private rights."

86. Greenidge, *Infamia*, 158–60; and Gardner, *Being a Roman Citizen*, 111–18.

87. Greenidge, *Infamia*, 166–70l and Gardner, *Being a Roman Citizen*, 118–23. The incapacity to be a witness is described by Greenidge as "a civic disability which had a long history throughout the whole period of Roman law, and which, in one of its aspects, is the oldest disability of the kind known to us" (*Infamia*, 165). The ineligibility to testify is attested as a provision for procedure created by a criminal law, as well as a penalty inflicted by such a law (D. 22.5.3.5; 28.1.20.6; 48.11.6). Ulpian twice mentions it as a penalty resulting from condemnation for *libellus* compositions, instituted either by a *senatus consultum* (D. 28.1.18.1) or by a law (D. 47.10.5.9). A complete account of the disqualification from giving testimony, which includes all infamous professions, is nowhere to be found. As Greenidge writes: "We see from these instances how very partial was the legal application of this disability for evidence based on character and on the fact of condemnation; nowhere is it stated that a definite list of infames was ever excluded, as a whole, from testimony" (*Infamia,* 167). Actors and dancers do not appear in the sources mentioned that discuss testimony. Nevertheless, it is clear that those in infamous professions, including gladiators and beast fighters, actors, prostitutes, and brothel keepers, were subject to legal *infamia* already at the time of Julius Caesar (see *Tabula heracleensis*, lines 112–23), and

intestabiles: unable to serve as witnesses to wills and other solemn acts of private law.[88]

Notably, the designation *infamia* was often ascribed to certain occupations or ways of earning a living, rather than to occasional negative behavior. These occupations included acting or performing on stage, serving as a gladiator or training gladiators, as well as participating in the sex business as prostitutes, brothel keepers, or procurers.[89] Only when these activities were practiced for money, as a way of earning a living, would *infamia* be imposed.[90] Usury was also included as one of the infamous ways of making a living, and was associated with *infamia* at least since the beginning of the second century CE.[91] Scholars believe that small financial businesses were also, at times, subject to *infamia*.[92] Other types of infamous characters included dishonorably discharged soldiers,[93] people convicted of certain civil and criminal offenses, including theft (*furtum*),[94] and many more.[95]

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scholars believe that this also included ineligibility to testify. For a discussion of the importance of the moral standing of witnesses in ancient Rome, see Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford: Clarendon Press, 1970), 231.

88. The original meaning of *intestabilis* is the ineligibility to serve as a witness to a will. Later, it was expanded to include also the inability to summon others as witnesses to one's will; see Greenidge, *Infamia*, 168–69; and Gardner, *Being a Roman Citizen*, 118–22.

89. Some argue that these professions are the "core" of Roman *infamia*; see McGinn, *Prostitution*, 65–69.

90. For example, D.3.1.1.6; D.3.2.2.5. These references highlight the fact that some shameful occupations (male prostitution as well as beast fighting) were not considered infamous if they were performed as a voluntary practice. See Gardner, *Being a Roman Citizen*, 145, 149–52. Edwards, "Unspeakable Professions," 76, thinks that the requirement of payment is a matter of dispute among Roman jurists. On the special concern with shameful professions in Roman culture, see also Sarah E. Bond, *Trade and Taboo: Disreputable Professions in the Roman Mediterranean* (Ann Arbor: University of Michigan Press, 2016).

91. According to Suetonius's description of an action by Emperor Augustus (Suetonius, *Divus Augustus*, 39). Cod.ii.11 (12) tells us that usury was declared infamous at the end of the third century CE, however, Greenidge argues that this norm goes back much further. As he writes: "It may, therefore, be treated as one of the sources of *infamia* that had a long, if interrupted, recognition in Roman law; although it is only known to us as producing this effect from a constitution of Diocletian and Maximian of the year 290 A.D." (*Infamia*, 140–41).

92. Ibid., 70, in reliance of Tacitus, *Annales*, 13.23.

93. Anyone dishonorably discharged from the army was regarded as unfit both to govern his fellow citizens (*lex Iulia municipalis*) and to litigate or give evidence on their behalf (D. 3.2.1.1). See also Greenidge, *Infamia*, 71.

94. For example, Gaius, *Institutiones* 4.182, D.3.2.1. See also Greenidge, *Infamia*, 73; and Gardner, *Being a Roman Citizen*, 125, 152.

95. The activities that entailed *infamia* "are numerous"; Gardner, *Being a Roman Citizen*, 110. See further her discussion of such activities at 128–53. With regard to infamous

As noted, the defining feature of *infamia* was its grounding in a moral judgement. Although several attempts have been made to explain the common moral defect on which *infamia* depended, in view of the multitude of infamous activities, it can be argued that there is no single moral deficiency shared by all.[96] However, there is a consensus among scholars that we can discern certain groupings of infamous activities, and that it makes sense to look for a common rationale behind them.

There is a striking connection between several types of *infamia* and the ethics of self-control,[97] particularly regarding what scholars refer to as the core infamous occupations: stage actors, dancers, gladiators, prostitutes, and pimps.[98] Catharine Edwards has convincingly shown that these occupations were closely connected with pleasure, and that their inherent disgrace and dishonor resulted from their association with femininity, slavishness, and succumbing to temptation.[99] Roman writers described gladiators as those "whose appetite for love outdoes all others" and stressed their seductiveness to both men and women.[100] The term *voluptas* is often used to describe the experience of watching the games as well as of the more common pleasures of the flesh.[101] Many sources express the disturbing sexual ambiguity of male actors.[102] Actors and actresses were regularly

professions, see Edwards, "Unspeakable Professions," 75: "The lists of persons subject to various disabilities do not always correspond exactly… the question of exactly which professions were to bring infamy on their practitioners was certainly a matter of some dispute among the jurists."

96. For a survey and review of such opinions, see Gardner, *Being a Roman Citizen*, 110, n. 4 and 5 and the references there. For a criticism of such scholarly attempts, see Kaser, "Infamia und ignomia."

97. Edwards is the one who most convincingly outlines the link between legal *infamia* and the lack of self-control, however she does not suggest that this linkage is itself the reason that the infamous were subjected to legal restrictions.

98. See note 89.

99. This is the central argument throughout Edwards, "Unspeakable Professions." Gardner maintains that the link to sexuality alone does not suffice to create *infamia*, which requires also the performance of a service for payment (see note 90). Notably, the requirement of payment, when it exists, is in line with the Roman view that shameful professions reflect a lack of control over one's greed, as is demonstrated by the paragraph from Cicero's *De Officiis* cited above.

100. Tertullian, *De Spectaculis* 22. See Edwards, "Unspeakable Professions," 78.

101. See the many references mentioned by Edwards, "Unspeakable Professions," 83–84.

102. Tertullian, *De Spectaculis* 17: "The lewd performance of the actor playing a woman, stamping out all sense of sex and shame, so that they are more likely to blush at home than onstage, and finally the obscene experiences of the pantomime actor, who must suffer sexual humiliation from his youth, if he is to become a performer." Referring to this passage Edwards writes: "So closely are deviant sexuality and the stage associated for Tertullian that he represents the experience of being penetrated as a necessary part of an actor's professional training" ("Unspeakable Professions," 80).

assumed to be prostitutes,[103] but as Edwards explains, this was not because they "sold their sexual services. Rather, the way in which they made their living was perceived to be analogous to the way in which prostitutes made their living… The very sight of these performers was thought to produce sexual pleasure."[104] The unmanliness of acting is stressed by Livy, who claimed that the theater was alien to those who were by nature warriors.[105] Capital punishment was prescribed for soldiers who appeared on stage,[106] because the ideal of the fighting soldier—a model of self-restraint—was diametrically opposed to the art of the stage. Notably, infamy was also ascribed to soldiers who showed cowardice and deserted from battle, where they were expected to demonstrate virile, self-mastering courage.[107] Similarly, literary sources describe certain types of stage warriors as feminine.[108] In juridical writings, we find stage characters, gladiators, and beast fighters associated with shameful feminine behavior.[109]

In addition to being described as feminine, the infamous—even if free citizens—were stigmatized as slaves.[110] For example, torture is mentioned as a precondition for accepting the testimony of an arena fighter, as in the case of slaves.[111] Put more generally, such individuals were deprived of the general protection from corporal punishment granted to all Roman citizens, and, like slaves, were vulnerable to being treated in this insulting way.[112] Servility and femininity were therefore the common metaphors for the immorality of behaviors labeled as infamous.

103. Edwards, "Unspeakable Professions," 81, and the references in note 55.

104. Ibid.

105. Edwards, *The Politics of Immorality*, 101–2.

106. D.48.19.14, D.49.16.4.1–9. See Greenidge, *Infamia*, 154–57.

107. Greenidge, *Infamia*, 71, n. 4.

108. Actors were accused of adulterous liaisons (Tacitus, *Annales* 4.14.4; Cassius Dio, 57.21.3). Juvenal draws attention to the effeminacy of a tunic-clad *retiarius* (2.143 ff.; 8.199–210). According to Edwards, "Unspeakable Professions," 77, the conception of gladiators and beast fighters was ambivalent: on the one hand "they were a reminder of the virtue (virtus, 'military courage,' 'manliness') that had made Rome great. But they were also despised."

109. In D.3.1.1.6, Ulpian discusses the legal *infamia* imposed on a man "who has hired himself as a beast fighter" shortly after mentioning the similar case of one "who has been physically treated like a woman." See also D.22.5.3.5, which mentions beast fighters together with female prostitutes.

110. Edwards, "Unspeakable Professions," 85.

111. D.22.5.21.2. Torture was required to avoid the shame of deciding a case against the defendant on the basis of testimony by a person of a lower rank. See also Gardner, *Being a Roman Citizen,* 143–44.

112. In this context, Roman jurists compare the situation of *infmaes* to that of slaves. See, for example, D.48.19.28.16 and the discussion by Edwards, "Unspeakable Professions," 73–75.

Another feature of Roman *infamia*, which, as noted, is also relevant for appreciating the overarching framework of self-control ethics, is that it deprived Roman citizens of rights that were equally denied to women.[113] Women, too, were barred from standing for election as magistrates, from voting in public assemblies, and from serving on a jury. In the context of the courtroom, women, too, were not permitted to speak on behalf of others or to bring capital accusations against others. Women are listed along with men in infamous occupations as persons who cannot serve as witnesses to a will or perform any other solemn act of private law.[114] Classical jurists assume that women were accepted as witnesses in the law courts, and on this point their legal status differed from that of *infames*. It should, however, be noted that this was the case only after a doctrinal change in Roman evidence law; in earlier periods, women were also barred from testifying in court.[115] As mentioned above, Roman jurists often explained women's inferior legal status in terms of their deficient self-control.[116]

To recap my argument so far, Roman *infamia* and Tannaitic rules regarding disqualified witnesses seem to share both structure and spirit. Both institutions attribute legal outcomes to a moral judgment; both designate disqualification from giving testimony as one such legal outcome; both attribute this downgraded legal status to the practice of certain occupations or ways of earning a living; and finally, both compare the legal status of the infamous to that of women (although, interestingly, the analogy is not complete with respect to Roman rules concerning women's testimony). These structural affinities should be viewed against the backdrop of the shared ethical perspective through which infamous occupations

113. "Women were altogether exempt from the censorian *infamia* of the Republic, since it was concerned wholly with civic honors, in which women had no share. Neither could they be mentioned in the third Edict which contained the list of the praetorian *infames*, since this was a list of those who could postulate only in certain cases for others, and women were mentioned in the second Edict amongst those who could not postulate for others at all" (Greenidge, *Infamia*, 172). Admittedly, in several texts we find the attribution of *infamia* to women; for example, in the case of female prostitutes and women caught in adultery. For a discussion of this complexity, see Greenidge, *Infamia*, ch. 7. McGinn, *Prostitution*, 21–24, thinks that women should not be described as "second class and partial" citizens, while at the same time stressing that the exclusion of *infames*, which was similar to that of women, "amounted to a prescribed set of exclusions from the responsibilities and privileges of a full Roman citizen." It is regularly stated that "the status [of *infamia*] traditionally disqualified *men* from serving in key civic positions within Late Antique cities"; Bond, "Altering Infamy," 4.

114. D.28.1.20.6.

115. Yan Thomas, "The Division of the Sexes in Roman Law," in *A History of Women: From Ancient Goddesses to Christian Saints*, ed. Pauline S. Pantel (Cambridge, MA: Harvard University Press, 1992), 83–138, at 137.

116. See note 77.

were perceived, the perspective of the virtue of self-control. To this picture I will now add a last trait common to both legal mechanisms: the possibility of rehabilitation. This common trait not only supplements the structural similarity, but also adds a textual parallel between the Tannaitic and the Roman legal mechanisms, suggesting that some rabbis were actually familiar with Roman regulation of *infamia*.

Complete Return

Roman sources indicate that there was a way to overturn the status of *infamia* and repeal its legal ramifications.[117] According to Ulpian, a remission of this legal disability could be granted by the praetor (D. 3.1.1.8–10):

> This edict refers also to all the others who are blacklisted as incurring *infamia* in the praetor's edict. All these are not to make applications except on their own behalf or that of certain people only. Then the praetor adds: "Who out of all those mentioned above has not received *in integrum restitutio*." . . . If he is one of those previously referred to, *in integrum restitutio* will be obtained only with difficulty. . . . The opinion of Pomponius, that anyone condemned in a trial involving *infamia* and then absolved through *in integrum restitutio* is freed from *infamia*, is in accordance with this view.

The status of *infamia* was therefore at times reversible, through a grant of "*in integrum resitutio*." This was a legal remedy, applicable in a variety of legal contexts, which allowed the recovery of a former legal status by undoing a legal action or transaction.[118] It was generally used to reverse contracts or sales, but it was also used to recover the loss of legal status by people who suffered from *infamia* following conviction in an *iudicium publicum*.[119] The phrase "*in integrum restitutio*" means "full restitution," but its literal translation would be "complete return."

As mentioned, rabbinic sources also introduce a process of rehabilitation that was available to disqualified witnesses. According to the Tosefta in tractate Sanhedrin 5:2, after forsaking their infamous occupations and satisfactorily proving that they had changed their ways, those practicing the four activities could regain their previous status and once again become legitimate witnesses. Moreover, the Jewish and Roman sources share not

117. Greenidge, *Infamia*, ch. 8; McGinn, *Prostitution*, 46–47; and Gardner, *Being a Roman Citizen*, 153–54.

118. D. 4.1. See Berger, *Encyclopedic Dictionary*, 682; and Max Kaser, "Zur in integrum restitutio, besonders wegen metus und dolus," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 94 (1977): 101–83.

119. Different rehabilitation mechanisms were available at certain periods for other types of *infamia*. See Greenidge, *Infamia*, 181–85.

only the legal possibility, but the legal terminology as well. Strikingly, the Tosefta describes the restoration of status to the four characters by using the phrase "complete return":

> המשחק בקובייא. . .לעולם אין יכול לחזור בו עד שיקבל שישבור את פסיפסיו ויחזור בו חזרה גמורה.
> המלוה בריבית אינו יכול לחזור בו עד שיקרע שטרותיו ויחזור בו חזרה גמורה.
> מפריחי יונים. . . לעולם אינו יכול לחזור בו עד שישבור את פגימיו ויחזור בו חזרה גמורה.
> סוחרי שביעית. . . . לעולם אין יכול לחזור בו עד שתגיע שמיטה אחרת ויבדק ויחזור בו חזרה גמורה.[120]
>
> The dice-player. . . he can never return until he breaks his psipasin and returns a complete return.
> The usurer can never return until he tears apart his bills and returns a complete return.
> Pigeon flyers. . . he can never return until he breaks his pigmin and returns a complete return.
> Traders of seventh-year produce. . . he can never return until another seventh year comes and he is examined, and returns a complete return.

The idiom חזרה גמורה is very rare in rabbinic literature, and in the context of the rehabilitation of persons practicing the four activities was interpreted as repentance and a change of ways.[121] However, this phrase does appear once more in Tannaitic texts, in Tosefta tractate Yevamot 13:5, and its use there can shed light on its true meaning. In tractate Yevamot, the phrase is used in the context of the legal ramifications of the divorce of a woman who is a minor, specifically addressing the possible reinstitution of her marital status in case she remarries (her divorced husband) while still a minor.[122] The Tosefta rules that the reinstitution of the woman's marital

120. According to the Erfurt Manuscript. In the Vienna Manuscript there is a clear scribal error in the first line, but otherwise the wording is the same. Compare the versions of the *baraita* in JT Sanhedrin 3.3 and parallels.

121. See Nahum Rakover, *Takanat ha-Shavim: Avaryan she-Ritzah et Onsho* (Jerusalem: Moreshet ha-Mishpat be-Israel, 2007), 361–438.

122. מודים חכמים לר"א בקטנה שהשיאה אביה וגרשה והחזירה [עליו] ומת שחולצת ולא מתיבמת [הואיל ונאסרה] עליו שעה מפני שגירושיה גירושין גמורים ואין חזרתה חזרה גמורה. Neusner, *The Tosefta*, 732, translates: "Sages concede to R. Eliezer in the case of a minor whose father married her off, and whose husband divorced her, then took her back, and died, that she performs the rite of *haliṣah* and does not enter into levirate marriage, for she has been prohibited to him for a single moment. The reason is that the act of divorce is completely valid, but the act of remarriage is not completely valid." The legal status of this woman is doubtful: as she is still a minor when her husband remarries her, only her father is legally eligible to give her in marriage at such a young age. However, following her divorce, she does not return to the authority of her father, and is deemed "an orphan in her father's lifetime" (M Yevamot 13:6). In this gray area, the woman can no longer be given in marriage by her father, but she is still unable to enter into a marriage contract herself as an adult.

status is not complete. This ruling uses the technical term "complete return," saying that "her [the woman's] return is not a complete return" (אין חזרתה חזרה גמורה). Clearly, the use of the phrase here has nothing to do with repentance. Rather, it is used as a technical legal term signifying the full recovery of a former legal status, very close to the use of *restitutio in integrum* in Roman law.[123]

If the rabbis were familiar with the Roman legal meaning of the phrase חזרה גמורה when discussing the marriage of a minor, there is no reason to doubt their acquaintance with it and its proper use in the case of the four categories of person. This example not only evidences structural and theoretical links between the Tannaitic disqualification for testimony and Roman *infamia*, but also provides a textual indication that some rabbis knew the mechanism of *infamia* and used it when formulating the Tannaitic rules regarding the disqualification of the four categories of person.

Admittedly, there are evident disparities between Tannaitic laws regarding disqualified witnesses and Roman *infamia*. The latter is a much more developed and overarching legal mechanism than the rabbinic treatment of the four categories of person. Furthermore, despite some overlap, different occupations cause a reduction of status in each case, and whereas the disqualification for serving as a witness and as a judge is shared by both legal regimes, Roman law imposes further sanctions on those labeled with *infamia* that are not paralleled in rabbinic law. Nevertheless, the affinities between the two institutions are strong and telling. They suggest that the Tannaitic legal apparatus of disqualifying individuals for testimony based on their defective morality developed by way of a rabbinic interpretation of Roman *infamia*.

Conclusion

In this article, I have maintained that the Tannaitic list of four categories of person should be understood in the cultural context of other lists of infamous occupations from the Greco-Roman world. Such lists are found in philosophical and literary texts as well as in legal ones, and in all instances are linked to lack of self-control. The Tannaitic list of four categories clearly parallels the list mentioned by Plutarch in a literary context. At the same time, the Tannaitic rules regarding the disqualification of these persons echo the Roman legal apparatus regulating lists of infamous occupations, as part of the mechanism of *infamia*.

123. Notably, in Roman law, transactions performed by minors were especially prone to be granted the sanction of *restitutio in itegrum*. See, for example, D. 3.3.39; 4.1.6; 4.1.8; 4.4; and more.

https://doi.org/10.1017/S073824801900018X Published online by Cambridge University Press

Although scholars of Roman law have demonstrated that the ethics of self-control is a common factor underlying the list of occupations causing *infamia*, they have nevertheless been hesitant to state that this moral vice was a guiding rationale for the legal institution as a whole. Given the complexity of Roman sources on this issue, that hesitation is justified.[124] However, the perspective provided by Tannaitic sources changes the picture. The partial nature of the Tannaitic rules regarding the four categories crystallizes the identification of the elements that the rabbis borrowed from their surrounding legal and cultural context when designing their rules of disqualified testimony. My analysis reveals that, in the eyes of the rabbis, self-control ethics played a central role in the Roman institution of legal *infamia*.

The strong link between a lack of self-control and *infamia* makes perfect sense in a Roman context, because many of the legal disabilities resulting from *infamia* are felt in the political domain. First and foremost, *infamia* inhibits a citizen's right to be active in the political sphere: to vote, to be elected for public office, and to serve as a juror. This is clearly explained by the fact that in Roman political thought, self-control was perceived a central political virtue, necessary for exercising political power; it was deemed inappropriate for a man who lacked self-control to have control over others.[125] In light of this typical Greco-Roman view, the relevance

124. See note 97. In "Unspeakable Professions," 84, Edwards points to the fact that pleasure is routinely contrasted by public moralists with public duty, while stressing the danger of political instability posed by those who practiced the infamous occupations. In her book *The Politics of Immorality in Ancient Rome*, 100, she claims that the Roman aversion toward stage actors relates to the anarchic potential of the theater. On this anarchic potential, see Hartmut Leppin, "Between Marginality and Celebrity: Entertainers and Entertainments in Roman Society," in *The Oxford Handbook of Social Relations in the Roman World*, ed. Michael Peachin (Oxford; New York: Oxford University Press, 2011). As he writes: "The mass that congregated for these public amusements were precariously exposed to the influence of the entertainers, who thus potentially could exercise significant power" (at 661); and "the fact that they could exercise influence over the political life of the community at an 'improper' junction made them dangerous in the eyes of the elite" (at 673).

125. See, for example, Cicero, *Paradoxa Stoicorum*, 33: "But granted that this person is lauded as commander in chief, or even that he is so styled, or is deemed worthy of that title: commander in what sense? Or to what free man will this person possibly issue commands, who cannot command his own desires? First let him curb his lusts despise pleasures, restrain his angry temper, control his avarice, repulse all the other defilements of the mind. Let him start commanding others only when he has himself left off obeying those most unprincipled masters, unseemliness and turpitude: so long as he is subservient to these he will be altogether unworthy to be deemed not merely a commander but even a free man." Translated by Harris Rackham. Loeb Classical Library 349 (Cambridge, MA: Harvard University Press, 1942), 285. For the association of self-mastery with political leadership in Roman culture, see Christopher Star, *The Empire of the Self: Self-Command and Political Speech in Seneca and Petronius* (Baltimore, MD: The Johns Hopkins University Press, 2012), especially ch. 1.

of self-control to the political aspects of *infamia* is evident, and seems to be of primary importance for understanding this form of legal sanction.

However, given that the disqualification from giving testimony is one of the most ancient legal disabilities entailed by *infamia*, an awareness of its underlining ethics of self-control serves as an important correction to the probative paradigm through which laws regarding testimony are often studied. Roman legal historians have noted that in the archaic period, testimony in court was a public role, which exceed a narrow probative function of reporting the facts.[126] Scholars who deal with Roman law in the classical and later periods tend to differentiate between the role of witnesses in courts of law, which at this period is assumed to be essentially probative, and the role of witnesses in mancipatory acts, especially wills, which is perceived as authoritative and ceremonial.[127] Although this scholarship stresses the immense importance that demonstrations of self-control had for establishing the soundness of the witnesses' testimony in legal proceedings, this has been understood almost exclusively on probative grounds: presumably, a person lacking self-control was seen to be more inclined to lie.[128] However, it is possible that self-control was important not only for evaluating the accuracy of witnesses' testimony, but also as a means for establishing their authority. Even if this authoritative capacity most clearly emerges in the context of ceremonial testimony, it might have been crucial for courtroom testimony as well.[129] The political nature of the mechanism of *infamia*, which linked disqualification from giving testimony with disqualification from holding public offices, may be seen as pointing in this direction, although additional research is required before one can reach decisive conclusions in this regard.

126. Thomas, "The Division of the Sexes," 137, note 166 and the references there.

127. On the role of the witnesses in mancipatory acts, see Elizabeth A. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge: Cambridge University Press, 2004), 118–19 and nn. 111–12. Meyer suggests that in this context one should view witnesses as "judges of correctness" (ibid., 159). For the use of *testes* as judges, Meyer is building on the work of Alan Watson, *International Law in Archaic Rome: War and Religion* (Baltimore, MD: The Johns Hopkins University Press, 1993), 10–19.

128. Elizabeth A. Meyer, "Evidence and Argument," in *The Oxford Handbook of Roman Law and Society*, ed. Clifford Ando, Paul J. Du Plessis, and Kaius Tuori (Oxford: Oxford University Press: 2016), 270–82. See also Andrew M. Riggsby, "The Rhetoric of Character in the Roman Courts," in *Cicero the Advocate*, ed. Jonathan G. F. Powell and Jeremy Paterson (New York: Oxford University Press, 2004), 165–85; and Jon E. Lendon, *Empire of Honour: The Art of Government in the Roman World* (Oxford: Oxford University Press, 1997).

129. On the importance of witnesses' *auctoritas*, see Meyer, "Evidence and Argument," 275–76.

The authoritative role of the witnesses may well explain why the political aspects self-control ethics were deemed relevant by Roman lawmakers in shaping their laws of disqualified testimony. Consequently, by drawing on this aspect of Roman law, the rabbis were doing much more than excluding liars. They were incorporating characteristic features of Roman political thought into Jewish law.