

Headlines

With Rabbi Ari Sollish

Halachic Debates of Current Events

Intown Jewish Academy

PART 2

Charitable Ponzi Schemes: Must Jewish Charities Return Ill-Gotten Contributions?



Case Study: Stolen Charity

SHOULD CHARITIES REPAY THEIR MADOFF MONEY?

www.dealbook.nytimes.com/2009/06/29/should-charities-repay-their-madoff-money
(June 29, 2009)

Today, Bernard Madoff will likely be sentenced to spend the rest of his life in a federal penitentiary. But his sentencing is merely the beginning of the litigation and recrimination he has spawned with his vast investment fraud.

The inevitable accusations — and perhaps criminal charges — against his coconspirators, and particularly his family, are sure to continue. And another troubling aspect of the Madoff fraud has emerged in the past few weeks. It is now being alleged that certain charitable foundations and individuals on the whole reaped profits in the millions, if not billions of dollars, from Mr. Madoff's misdeeds.

And much of this money may have been subsequently donated to innocent charities. This situation raises some of the most troubling questions about Bernie's legacy. First, did charities on the whole benefit from Mr. Madoff's crime? And second, do these innocent charities have a moral or legal obligation to return the money?

Discussion Questions

Do you think charities have a moral or legal obligation to return money stemming from financial fraud?

Returning Theft

TEXT 1A *Leviticus 5:23*

והיה כִּי־יִחַטָּא וְאָשָׁם וְהָשִׁיב אֶת־הַגְּזֵלָה אֲשֶׁר גָּזַל.

Then it shall be, if he has sinned, and is guilty, that he shall restore the item that he robbed.

TEXT 1B *Exodus 22:3*

אִם־הֵמָצָא תִּמְצָא בְּיָדוֹ הַגְּנֵבָה מִשּׁוֹר עַד־חֲמֹר עַד־שֵׂה חַיִּים שְׁנַיִם יִשְׁלֹם.

If the theft is found in his possession alive, whether it is an ox, or a donkey, or a sheep, he shall pay double.

TEXT 1C *Exodus 21:37*

כִּי יִגְנֹב־אִישׁ שׁוֹר אֹ־שֵׁה וּטְבָחוֹ אוֹ מָכְרוֹ חֲמֹשֶׁה בְּקָר יִשְׁלֹם תַּחַת הַשּׁוֹר וְאַרְבַּע־צֹאן תַּחַת הַשֵּׁה.

If a man steals an ox or a sheep, and slaughters it or sells it, he shall pay five oxen for an ox and four sheep for a sheep.

Discussion Questions

1. Must the thief return the actual stolen item, or just the equivalent value of the stolen item? Can you find any clues in the texts above?
2. Can you think of a scenario where the stolen item exists, yet the thief does not need to return it (and instead gives the equivalent value)?

Acquiring Theft

TEXT 2 *Talmud, Bava Kama 65b*

אמר רבי אילעא: גנב טלה ונעשה איל, עגל ונעשה שור, נעשה שינוי בידו וקנאו. טבח ומכר, שלו הוא טובח שלו הוא מוכר.

Rabbi Ile'a says: If one stole a lamb and it subsequently became a ram, or if he stole a calf and it subsequently became a bull, the stolen item has undergone a change while in the thief's possession, and he has therefore acquired it as his own property. Consequently, his obligation of restitution consists of monetary payment rather than giving back the stolen item itself. If he subsequently slaughtered or sold the animal, it is in effect his own animal that he slaughters, or it is his own animal that he sells, and he is not obligated in the fourfold or fivefold payment.

TEXT 3 *Talmud, ibid. 66b*

אמר רבה: שינוי קונה כתיבא ותנינא, כתיבא (ויקרא ה, כג) והשיב את הגזלה אשר גזל, מה ת"ל אשר גזל, אם כעין שגזל יחזיר ואם לאו דמים בעלמא בעי שלומי, תנינא הגוזל עצים ועשאו כלים, צמר ועשאו בגדים, משלם כשעת הגזילה.

Rabba said: The principle that a change in a stolen item causes the thief to acquire it is written in the Torah, and we learned it in a Mishnah as well.

It is written in the Torah: "Then it shall be, if he has sinned, and is guilty, that he shall restore the item that he robbed" (Leviticus 5:23). What is the meaning when the verse states the seemingly superfluous phrase "that he robbed"? This serves to teach that if the item is the same as it was when he stole it, he must return the stolen item itself. But if it is not the same as it was then, he is required to pay only money, while the stolen item remains his to keep.

We learned this law in a Mishnah as well, as it is taught (Bava Kama 93b): In the case of one who robs another of wood and fashions it into vessels, or one who robs another of wool and fashions it into garments, he pays the robbery victim according to the value of the goods at the time of the robbery, and keeps the altered materials for himself.

Discussion Questions

1. In a case where the stolen item underwent a change and is now deemed as belonging to the thief, what is the law when the thief gives or sells this item to a third party? Does that third party have any obligation toward the original owner?

Discussion Questions Continued

2. In the above scenario, what if the third party steals the item from the thief? To whom must he give restitution – the first thief, or the original owner?
3. In a case where the stolen item remains unchanged – and is therefore still deemed as belonging to the original owner, albeit not in his physical possession – what is the law when the thief gives or sells this item to a third party? Does that third party have any obligation toward the original owner?
4. In the above scenario, what if the third party steals the item from the first thief? To whom must he give restitution – the first thief, or the original owner?

Unbroken Ownership

TEXT 4 *Talmud, ibid. 111b*

אמר רב חסדא: גזל ולא נתייאשו הבעלים, ובא אחר ואכלו ממנו רצה - מזה גובה, רצה - מזה גובה; מאי טעמא? כל כמה דלא נתייאשו הבעלים, ברשותיה דמריה קאי.

Rav Chisda said: If someone steals food, and the original owner has not yet given up hope of getting his stolen food back, and then a third party comes along and eats the stolen food, the original victim can choose to collect money to replace his stolen food from either party (i.e. from the thief or from the third party who ate the food).

What is the logic behind this ruling? So long as the original owner has not yet given up hope of reclaiming his stolen item, it remains partly in his possession.

TEXT 5 *Shulchan Aruch, Choshen Mishpat, Hilchot Gezeilah 361:5*

אם בא אחר ונטלו מבית הגזלן שלא מרצונו, כאילו נטלו מבית הבעלים, אם ירצה הנגזל גובה מהראשון או מהשני, או אם ירצה יגבה חצי מזה וחצי מזה. ואם פרעו השני לראשון, או שהגזלן הראשון מחל לשני, אינו כלום כי אין דינו של שני אלא עם הבעלים, לא שנא אם ידע השני שהוא גזול ביד הגזלן לא שנא שלא ידע; ואפילו אם אכלו השני, חייב לשלם לבעלים.

If a third party forcibly took the item from the thief, then this third party has effectively committed theft from the object's original owner by doing so [because he took something that was still partly in the original owner's possession]. The original owner can therefore collect the value of that item from either the thief or

TEXT 5 *Shulchan Aruch, Choshen Mishpat, Hilchot Gezeilah 361:5 Continued*

from that third party, or if he likes, he can collect half from the thief and half from the third party. This applies whether or not the third party knew that the item he took from the thief was acquired by theft from its original owner.

Discussion Questions

Based on what we've learned thus far, whose money is in the possession of the charities – Madoff's or the investors'? Do the charities have an obligation to return the money to the investors?

PART III *Money Matters**Money Well Spent***TEXT 6A** *Talmud, Kidushin 47a*

אמר רב: המקדש במלוה - אינה מקודשת, מלוה להוצאה ניתנה.

Rav said: If one attempts to perform Kiddushin by forgiving a loan owed to him by a woman, it is ineffective, for a loan is given to be spent.

TEXT 6B *Rashi, ibid.*

להוצאה ניתנה - הלואה רשאי להוציאה בהוצאה ואינו חייב להעמידה בעיסקא שתהא מצויה בכל עת שיתבענו וכיון דלהוצאה ניתנה הויא לה כי דידיה ולא יהיב לה מידי.

A borrower is permitted to invest any money that was lent to him as a loan, and is not obligated to have the money accessible [to give back to the lender] at a moment's notice. Hence, once a woman borrows money from someone, that money is entirely hers, and if a man who lent her that money attempts to use that money to betroth

TEXT 6B *Rashi, ibid. Continued*

her later on [i.e. to betroth her by forgiving the debt and using that forgiveness as her betrothal money], the betrothal will be ineffective, since he has not given her anything she did not already own.

Discussion Questions

1. What is the fundamental difference between money and other objects of value? Why is money considered “to be spent”? What are the legal ramifications vis-à-vis ownership of money given as a loan or as an investment?
2. Based on this unique Talmudic teaching regarding money, whose money is in the possession of the charities – Madoff’s or the investors’? Do the charities have an obligation to return the money to the investors?

PART IV *Law of the Land**The Decree*

TEXT 7A *Rama’s Glosses to Shulchan Aruch, Choshen Mishpat, Hilchot Geneivah 356:7*

דמכל מקום צריך להחזירו לבעלים מכח דינא דמלכותא, דהכי נהיגי עכשיו להחזיר כל גניבה אפילו לאחר יאוש ושינוי רשות מכח דינא דמלכותא.

Now it is customary to return any stolen item, even after the owner has despaired of getting it back and/or it has changed possession. This custom is enforced due to the rule that Jews need to follow the law of the land in which they are living.

TEXT 7B *Shach, ibid.*

ואף על גב... דלא אמרינן דינא דמלכותא מה שהוא נגד דין תורתנו מ"מ דיינין הכי שפיר בלישנא דהכי נהיגי עכשיו כלוי דגם בישראל נהיגי כן ובת"ה א"ש טפי דכתב דהכי דייני עתה כו' ואף על גב דמנהג גרוע שהוא נגד דין תורה לא אזלינן בתריה וכמש"ל סי' ע"ב ס"ק ל"ה וכמה דוכתי? י"ל דהאי מנהג הוא שנתקן כך ופשיטא דיש ביד הדור לתקן תקנות ועוד דגם בדינא דמלכותא הוא כן ודוק.

Even though we do not usually follow the law of the land in cases where it stands in opposition to Torah law, in this case, we do follow the law of the land, since there was a custom in Jewish courts as well to return [stolen] objects. This custom was based on a formal Rabbinic enactment made by Jewish courts to always return [stolen] objects.

TEXT 7C *Ketzot Hachoshen 259:3*

כזית חלב או נבלה או פגול או נותר וכיוצא בהן שהניחו בחמה ונתמעט, האוכלו פטור, חזר והניחו בגשמים ונתפח חייבין עליו כרת או מלקות, היה פחות מכזית מבתחלה ונתפח ועמד על כזית אסור ואין לוקין עליו.

It appears that this custom that Jews developed (and was enacted formally by Jewish courts) – to return all stolen objects, even after their original owner has given up hope of getting them back – is a very appropriate one. This is because the Talmud (Bava Kama 114a) itself said that one should go beyond the letter of the law in such cases, and return stolen objects even after the original owner has given up on getting them back, because of the verse mandating that we “do what is right and just in the eyes of G-d” (Deuteronomy 6:18).

Discussion Questions

Based on Texts 7a-c, might there be grounds to say that the charities ought to return the money to the investors? Can you think of any reasons why the rabbinic enactment to return stolen property might not apply to our case where charities received monetary donations from a fraudulent investor?