

The Journal of the Beth Din of America

VOLUME 3

2023



BETH DIN *of* AMERICA

בית דין דאמריקא

The Journal of the
Beth Din of America

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Volume 3

2023

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The Journal of the Beth Din of America

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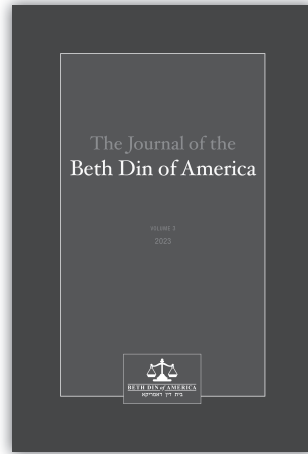
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Volume 3
2023

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Dedication

In honor of HaRav HaGaon Rabbeinu Mordechai Willig, shlita, on his
becoming the Av Beis Din of the Beth Din of America.
May the Rebbi go *mechayil el chayil* serving all of Klal Yisroel.

In memory of our beloved parents, Yosef Nissan ben Yechezkel and
Chana bas Meir Avraham, Mr. and Mrs. Joseph and Anna Glatt, a"h.

In memory of our beloved aunt, Bluma Sheva bas Yechezkel, Ms. Berta
Glatt, a"h.

In memory of our beloved mother, Esther Ettel bas Zalman Yosef,
Mrs. Ethel Korn, a"h.

Dedicated by Margie and Aaron Glatt

Editor's Introduction

THE *BEIT DIN* AS A BASIC INSTITUTION OF JEWISH LIFE

Political and legal institutions shape the societies they serve. Philosophers study these institutions to characterize societies and distinguish them from each other.¹ Free markets separate capitalist societies from socialist ones. Open elections differentiate democracies from dictatorships. The rule of law and the protection of basic liberties distinguish liberal societies from authoritarian ones.

Jewish communities are also shaped by their institutions. Shuls, yeshivot, *batei din*, tzedakah organizations, along with other institutions, form the basic structure of a Jewish society.² The influence of these institutions on the community they serve is so decisive that the character of a given *kehillah* is often forged by the *weltanschauung* of its institutions. Teaneck, NJ bears the imprint of Yeshiva University, while Lakewood, NJ resembles BMG. Further, we can gauge the vitality of a community by the vibrancy of its shuls and schools. Consider how *yeshivot* and Jewish day schools have transformed American Jewry from a fledgling community

¹ For the importance of institutions shaping the basic structure of society, see John Rawls, *Justice as Fairness* p. 55, "The... reason for taking the basic structure as the primary subject derives from its profound and pervasive influence on the persons who live under its institutions."

See also Wenar, Leif, "John Rawls", *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), Edward N. Zalta (ed.):

"The basic structure is the location of justice because these institutions distribute the main benefits and burdens of social life: who will receive social recognition, who will have which basic rights, who will have opportunities to get what kind of work, what the distribution of income and wealth will be, and so on. The form of a society's basic structure will have profound effects on the lives of citizens. The basic structure will influence not only citizens' life prospects, but more deeply their goals, their attitudes, their relationships, and their characters."

² See Tosefta Bava Metzia 11:23, Shulchan Arukh Choshen Mishpat 163, Rambam Tefillah 11:1, Rambam Matnot Ani'im 9:1.

of immigrants dependent on the public school system into the juggernaut it is today. A Jewish society is as strong as its basic institutions.

A *beit din* is one of the most important and basic institutions of a Jewish society. The Torah obligates each town, city, and province to appoint a *beit din* to apply and regulate Jewish law within its jurisdiction.³ As students of Jewish law can attest, the *beit din* looms larger in Jewish tradition than even the *beit ha-kneset* or the *beit ha-midrash*. Yet it is a poignant fact about American Jewry that while it has built thriving *batei kneset* and *batei midrash*, the community has yet to rally behind the institution of the *beit din*.⁴ The last decade has seen some progress, but plenty of work remains to reinvigorate the institution of the *beit din* and to restore it to its central place in the Jewish community, *le-hachzir 'atarah le-yoshnah*.

A *beit din* is the cornerstone of a Jewish community because it serves three vital roles. First, the *beit din* serves as *sfoftim* (judges/arbitrators), preserving concord and social harmony by resolving disputes.⁵ Second, the *beit din* serves as guardian of *mishpatim* (substantive Jewish law), breathing life into the abstract concepts of Jewish civil law and implementing the Torah's blueprint for a just and rightful society.⁶ Third, the *beit din* interprets the *devar ha-mishpat*, engaging in the theoretical exposition of Jewish law to determine how the principles of the Torah apply to the contemporary world around them, and to define and refine the halakhic concepts in light of it.⁷ Let us consider each of these.

³ Devarim 16:18, Rambam Mitzvat Aseh 176, Rambam Sanhedrin 1:1-2; Talmud Bavli Sanhedrin 16b, 56b.

⁴ See Rabbi J.D. Bleich, "The Bet Din: An Institution Whose Time Has Returned," in *Contemporary Halakhic Problems IV* (1995), p. 4:

"Collectively and individually, the American Jewish community is guilty of continuous and ongoing violation of one of the six hundred and thirteen commandments. 'Judges and court officers shall you place unto yourself in all your gates (Deuteronomy 16:17)'... Lamentably, the absence of formally established Batei Din in our country has given rise to the phenomenon of otherwise scrupulously observant Jews having recourse to civil courts for resolution of disputes involving other members of the Jewish community. Such actions entail serious violations of Jewish law."

See also Rabbi Yosef Eliyahu Henkin, "Madur ha-Halakhah," in *Edut be-Yisra'el*, ed. Rabbi Asher Rand (cited in Bleich *op cite*, p. 6):

"The positive commandment concerning appointment of judges is binding also in the Diaspora even in our era. Even in a locale in which there are scholars, the community is not relieved of its obligation to appoint designated persons for that purpose. Come and let us protest concerning the many cities and large metropolises in America that have many Torah-observant individuals but, nevertheless, they do not appoint judges and decisors."

⁵ For the concept of *sfoftim*, see Devarim 16:18.

⁶ For the concept of *mishpatim*, see Shemot 21:1. Note the Rambam's distinction between *Mishpatim* and *Sfoftim* as separate books in *Mishneh Torah*.

⁷ For *devar ha-mishpat*, see Devarim 17:9.

1. *SHOFTIM*: THE PURSUIT CIVIL HARMONY (*SHALOM*)

The first and most basic role of a *beit din* is to serve as *shoftim*, impartial judges and arbitrators, to resolve and extinguish disputes. When people live in close proximity and compete over resources, they inevitably will conflict with each other. Conflicts arise even without malice. A tree falls into a neighboring property, causing damage. A partnership is dissolved and its assets must be distributed. Services are rendered but the parties never agreed on a price. A pandemic makes it impossible for a school to provide in-person instruction. No one has acted wrongfully in these cases, yet the interests of the competing parties clash. Because the parties are partial to their own position, it is difficult for them to resolve the dispute on their own.⁸ It is therefore necessary for an impartial tribunal of judges (*shoftim*) to impose a fair resolution on the conflict.

Why is it important to resolve these conflicts? What benefit is achieved by the *beit din* intervening? Disputes are both intrinsically bad and instrumentally harmful. They are bad in themselves bad because they undercut the Torah's ideal of social unity. Conflicts create rifts and divisions. They sow animosity and ill-will. Thus they undercut the fraternity (*achvah*) and unity (*achdut*) that the Torah envisions for a Jewish community. Conflicts are also instrumentally harmful because they waste resources—economic, psychological, emotional—and thereby prevent people from pursuing the valuable ends the Torah prescribes for them.

Even if there were no substantive halakhic law (*mishpatim*) determining the outcome of a case, a resolution imposed by a panel of impartial judges (*shoftim*) would constitute a fair dispute-resolution procedure. Each time a dispute erupts, the parties would appear before a panel of *dayanim* who would impose a final, binding resolution on the conflict. Thus, the institution of *shoftim* (judges/arbitrators), even without *mishpatim* (substantive law), advances the Torah's vision of a community

⁸ See John Locke, *Two Treatises of Government*, II:13. After describing each person's natural right to protect their property and redress wrongs committed against them, Locke notes that "it is unreasonable for men to be judges in their own cases... self-love will make men partial to themselves... and... ill nature, passion, and revenge will carry them too far in punishing others." Locke sees this as the basis for entering political society. See *Two Treatises of Government*, II:87: "There only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community... thus all private judgement of every particular member being excluded, the community comes to be umpire... indifferent, and the same to all parties."

See also II:124: "Though the law of nature be plain and intelligible to all rational creatures, yet men being biased by their interest... are not apt to allow of it as a law binding to them in the application of it to their particular cases."

rooted in *achvah* (fraternity), *shalom* (social harmony) and *re'ut* (civic friendship). The Jewish legal tradition is replete with teachings about the value of social harmony and civic peace—and the role of *batei din* in securing it.⁹

Appreciating a *beit din*'s role in preserving civic peace—*shoftim* independent of *mishpatim*—can illuminate several ideas within the laws of *choshen mishpat*. One example is Judaism's preference for *pesharah* (settlement/compromise) over *din*. The doctrine of *pesharah* charges the *beit din* to seek a settlement rather than to issue a decision on the strict legal merits.¹⁰ The Talmud characterizes *pesharah* as a form of *mishpat-shalom*, peace-seeking-justice, precisely because it is better suited to achieve social harmony than pure *din*. Some authorities hold that wherever *din* will fail to end the dispute, the *beit din* ought to impose a settlement, since the purpose of adjudication is to achieve *shalom*.¹¹ Thus, even if we were to put aside the world of *mishpatim*, *batei din* serve a crucial social function in maintaining a society where *shalom* reigns.¹²

⁹ See Shemot 18:21-23. The verses suggest that the appointment of judges secures a peaceful society. See Ibn Ezra Shemot 18:23, Alshikh Shemot 18:23, and Harchev Davar Shemot 18:23. See also Avot 1:18 and Tur Choshen Mishpat 1.

For the centrality of *shalom*, see Talmud Bavli Gittin 59b, Mishlei 3:17, Rambam Chanukah 4:14, and Rambam Melachim 10:12.

¹⁰ See R. Itamar Rosensweig, "Pesharah vs. Din", *Jewishprudence* (April 2020).

¹¹ See Netziv, Responsa Meshiv Davar Vol. 3 no. 10.

¹² Beyond *pesharah*, other principles in *choshen mishpat* may reflect the independent significance of *shoftim*, separate from *mishpatim*. If we look to cases where the halakhah endorses dispute-resolution procedures that diverge from the substantive provisions of Jewish civil law (*mishpatim*) as the criterion, the following examples may point to the dispute-resolution role of *shoftim*:

a) A *beit din*'s authorization to decide some cases "beyond the letter of the law", *lifnim mi-shurat ha-din*, which, by definition, diverges from the substantive prescription of the *mishpatim*. See the discussion in Shulchan Arukh Choshen Mishpat 12:2.

b) A *beit din*'s power extra-legal power to punish and fine to preserve social order, "*makn ve-onshin shelo min ha-din*". See Shulchan Arukh Choshen Mishpat 2:1.

c) Halakhah's recognition of the prevailing commercial norms (*minbag ha-sochrim*) as halachically binding. See R. Itamar Rosensweig, "Minhag Ha-Sochrim: Jewish Law's Incorporation of Mercantile Custom and Marketplace Norms," *Jewishprudence* (November 2022). This category may also include halakhah's incorporation of the law of the jurisdiction, *dina de-malkbuta*, to fill halakhic lacunae. See my suggestion at note 112 therein.

d) Permitting a litigant whose adversary refuses to appear before a *beit din* to seek recourse in a secular court that will decide the case contrary to Jewish law. See Shulchan Arukh Choshen Mishpat 26:2. See also R. Yaacov Feit, "The Prohibition Against Going to Secular Court," *Journal of the Beth Din of America* 1 (2012) pp. 31-32.

e) Allowing Jewish parties to resolve a dispute through a non-Jewish arbitrator. See Shakh Choshen Mishpat 22:16 and R. Yaacov Feit "The Prohibition Against Going to Secular Court", p. 42.

f) Other examples might include *munach 'ad she-yavo Eliyahu*, where the *beit din* is charged to end the conflict by confiscating the disputed object rather than rendering a substantive decision. See the entry on *munach 'ad she-yavo eliyahu* in *Encyclopedia Talmudit*, vol. 22. Other *kelalei ha-sefeikot*—e.g., splitting losses

2. *MISHPATIM*: SUSTAINING THE *NOMOS* OF JUDAISM

The second role of a *beit din* is to serve as the guardian of *mishpatim* (substantive Jewish law), to breathe life into the abstract concepts and principles of Jewish law by granting them real-world application and enforcement. Judaism's substantive civil laws are a blueprint for a just and rightful society, one that embodies *din emet* (true justice).¹³ *Batei din* animate this blueprint, and implement it, when they structure the Jewish community's social, civil, and commercial affairs according to the Torah's vision of a righteous society. Judaism's conception of a rightful system of property, contracts, family law, torts, and bailments are brought to life by *batei din* that regulate society according to the vision and provisions of Jewish law.

Take the *ketubah* for example. Every *chatan* obligates himself to the financial commitment of the *ketubah*, which is a linchpin of the Jewish institution of marriage.¹⁴ But civil courts don't recognize the *ketubah* as a genuine financial obligation. They dismiss it as an unenforceable document of religious ritual.¹⁵ So long as Jewish divorces are overseen by civil courts, the *ketubah* loses real-world application. R. Moshe Feinstein noted that most people, including rabbis, have little notion of the *ketubah*'s dollar value because they organize their financial affairs by civil law and through civil courts.¹⁶ What was once the keystone of Jewish marriage has fallen into legal desuetude.

When parties come to *beit din* to dissolve their marriage and divide their marital property, the *ketubah* is brought to life and recognized as having full legal force. *Batei din* must consider how much the *ketubah* is worth, whether it has been

(*yachloku*), court refusal (*kol de-alim gevar*), an arbitrary decision imposed by the court (*shuda de-dayni*), *ba-motzi mei-chaveiro alav ha-ra'ayah*—may be understood as mechanisms for ending disputes rather than principles of right.

¹³ Ran (Derashot no. 11) carefully distinguishes between the role of the *beit din* as peacekeepers and their role in enforcing true justice. Ran notes that every society requires judges to preserve civil order. Without judges, individuals will devour each other. The Jewish people are no exception. But the Jewish people need judges also "*le-ba'amid chukei ba-Torah al tilam... kefi mishpat tzodek amiti*."

Ran proceeds to explain that the *mishpatim* are the DNA for a society worthy of the divine presence: "*mitzad she-hem tzodkim be-atzman, retzoni lomar, mishpetai ha-torah,... yimsakh she-yidabek ve-yachul ha-shefa ba-eloki ba-nu*." See also Talmud Bavli Sanhedrin 7a.

¹⁴ For the idea of the Ketubah as the linchpin of Jewish marriage, see R. Itamar Rosensweig, "Mitzvat Gerushin" in *Beit Yitzchak* 5783 (forthcoming) notes 10-12 and the accompanying text therein.

¹⁵ See *In Re Estate of White*, 356 N.Y.S.2d 208, at 210 (NY Sup. Ct, 1974): "Even for the observant and Orthodox, the ketubah has become more a matter of form and a ceremonial document than a legal obligation." See also R. Yonah Reiss and R. Michael Broyde, "The Value and Significance of the Ketubah," *Journal of Halacha and Contemporary Society* Vol. 47 (2004).

¹⁶ See Iggerot Moshe, Even Ha-Ezer 4:91.

forfeited, how it should be evaluated, and whether its valuation satisfies the underlying halakhic consideration *shelo tibeî kalab be-einav le-hotzi'ah*.¹⁷

The same holds true for other aspects of Jewish law that have no parallel in the Western legal tradition. Consider *dina de-bar metzra*, the law of the abutter, which grants a neighbor the right of first refusal when property is put up for sale.¹⁸ Or *yored*, whereby someone who confers a benefit is entitled to compensation for providing a valuable service. Or the prohibition against charging interest on loans. Civil courts do not recognize these principles of Jewish law. So long as Jews frequent civil courts, rather than *batei din*, they erode and diminish the normative world of Judaism. Without *batei din* giving legal recognition to these halakhic principles, the *mishpatim* cease to be a meaningful part of our world.¹⁹

The Torah's *mishpatim* constitute a comprehensive *nomos*—a normative universe. They create and maintain a world of right and wrong, of lawful and unlawful, of

¹⁷ See R. Yonah Reiss and R. Michael Broyde, "The Value and Significance of the Ketubah," *Journal of Halacha and Contemporary Society* Vol. 47 (2004).

¹⁸ See R. Itamar Rosensweig, "When has a Neighbor Waived his Right to First Refusal", *Jewishprudence* (July 2022).

¹⁹ Some halakhic constructs are coherent only under the jurisdiction of *batei din*. Take the *beter iska* which structures an equity investment, between an investor and a manager, to imitate features of a loan. The *iska* imposes an artificially difficult burden of proof on the manager to establish losses, and it incentivizes the manager not to rebut a presumption of fixed annual profits. Thus the parties create an equity relationship that carries the benefits of debt. The investor has secured his right to the principal and has generated a difficult to rebut entitlement to a fixed annual return, while the manager can keep additional profits. For an overview of the *beter iska*, see R. Yisroel Reisman, *The Laws of Ribbis* (1995), Chapter 22.

The *beter iska* works because the Torah permits profiting from an equity investment. The prohibition against charging interest is limited to loans. The *beter iska* is valid only if it succeeds in creating a genuine relationship of equity. If the *iska* is a sham, the *beter* fails. Now, the *beter iska* preserves the integrity of the equity relationship because it remains possible, even if difficult, for the manager to prove losses. It is also possible, though costly, for the manager to rebut the presumption of fixed annual returns.

But civil courts generally do not recognize the *beter iska* as a genuine equity relationship. They dismiss the document as a religious ritual required to conform with Jewish law. One New York court recently held "A *Heter Iska* constitutes merely a compliance in form with Hebraic law, and does not create a partnership, joint venture, or profit sharing agreement." See *Kirzner v. Plasticware, LLC*, 16 N.Y.S.3d 792 (N.Y. Sup. Ct. 2015). If Jews rely on civil courts, the *beter iska* is of dubious worth. It's questionable whether the *beter iska* succeeds in structuring the relationship as equity if both parties are relying on the civil court to enforce what it characterizes as an interest-bearing loan.

However, when Jews submit their commercial disputes to *batei din*, the integrity of the *beter iska* is upheld as an equity relationship under its true halakhic description, and the *batei din* will have to determine whether the manager has met his evidentiary burden to demonstrate losses and whether he can provide an accounting of profits to rebut the presumption of fixed annual returns. It follows that the validity of a *beter iska*—whether it succeeds in avoiding the prohibition of charging interest—depends on parties enforcing it through *batei din*.

valid and void.²⁰ *Batei din* sustain and nurture this normative world. With thriving, centralized *batei din* the *nomos* of *mishpatim* is vibrant, three-dimensional, and vivid. When we abandon our *batei din* and instead organize our commercial affairs under the civil courts, we diminish our *nomos* into a pale, flat and tepid shadow. Without *batei din* to regulate our halakhic *nomos*, we suffocate the concepts of Jewish law and drain them of their life-blood.²¹

3. *DEVAR HA-MISHPAT*: INTERPRETING THE DIVINE LAW

The third role of the *beit din* is to interpret the core principles of Jewish law and determine how they apply to the modern marketplace. Here *batei din* contribute to the enterprise of *talmud Torah*—our understanding and knowledge of Jewish law—the *devar ha-mishpat*. The economies and markets of the United States, Europe, and

²⁰ In Robert Cover's apt words:

"Law [is] not merely a system of rules to be observed, but a world in which we live. This *nomos* is as much "our world" as is the physical universe of mass, energy, and momentum... our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world."

Cover also notes that:

"A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute. The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited."

See Robert Cover, "The Supreme Court, 1982 Term—Foreword: Nomos and Narrative," 97 *Harvard Law Review* (1983), pp. 4-6.

The idea of halakhah as a *nomos*, a normative world, sustained by applying the principles and concepts of Jewish law to the reality around us is a central theme in R. Soloveitchik's writings. See *Halakhic Man* (1983), p. 19: "The essence of the Halakhah, which was received from God, consists in creating an ideal world and cognizing the relationship between the ideal world and our concrete environment."

And p. 23:

"Halakhic man orients himself to the entire cosmos and tries to understand it by utilizing an ideal world which he bears in his halakhic consciousness. All halakhic concepts are a priori, and it is through them that halakhic man looks at the world."

See also p. 72:

"Halakhic man does not enter a strange, alien, mysterious world, but a world with which he is already familiar through the a priori which he carries within his consciousness. He enters the real world via the ideal creation which in the end will be actualized—in whole or in part—in concrete reality."

And p. 94:

"According to the outlook of Halakhah, the service of God can be carried out only through the implementation, the actualization of its principles in the real world... Halakhic man's most fervent desire is the perfection of the world under the dominion of righteousness and loving-kindness—the realization of the a priori, ideal creation, whose name is Torah (or Halkahah), in the realm of concrete life."

²¹ See Talmud Bavli Shabbat 10a for the connection between *mishpatim* and "world building". See also Avot 1:18, which Robert Cover discusses in "Nomos and Narrative", pp. 11-13.

Israel in the twenty first century differ from those of the Jewish people wandering through the desert. They differ from the economy in Eretz Yisrael during the redaction of the Mishnah under R. Yehudah Ha-Nasi, and they differ from the marketplace in Babylonia under Ravina and Rav Ashi.

The financial and legal instruments we encounter every day—stocks, checks, bank accounts, wire-transfers, credit cards, derivatives, corporate ownership, futures, bilateral executory contracts—present before us a new world. *Batei din* must carefully weigh how the principles of halakhah govern and regulate this new world. With each *din Torah*, *dayanim* interpret, weigh, assess, and determine how halakhah applies to these instruments and how it governs the modern marketplace.²²

The *beit din*'s role in *talmud Torah*—interpreting and determining the *devar ha-mishpat*—operates at two levels, one centrifugal, the other centripetal. *Batei din* are tasked with extending the halakhah outwards, applying its precepts and statutes to new cases and realities, mapping a *nomos* of goring oxen onto a reality of colliding Teslas. *Batei din* are also tasked with probing inwards: examining, defining, and refining the internal categories of the halakhah in light of the novel phenomena and realities of modern commerce. Just as the discovery of electricity prompted a reexamination of the *melakhot* of Shabbat and Yom Tov, the modern marketplace stimulates fresh analysis of the internal categories of *choshen mishpat* and *even ha-ezer*. Does halakhah recognize the corporate structure and ownership of property by non-persons? Do emails count as a written *shetar*? *Batei din* preside over the halakhic frontier, extending its sovereignty into virgin territory, while buttressing the infrastructure of its internal fortifications.

For generations, Jewish law has been forged in the encounter of the *devar ha-mishpat* with the economic and commercial realities of the contemporary world. Hardly a page of the Shulchan Arukh turns without a legal precedent from the responsa of Maharam of Rittenberg or Rashba or Rivash, each interpreting and applying the *devar ha-mishpat* to the reality of their day. For this reason, the Torah charges “*ein lekha leilekh ela etzel shofet she-beyamav*.”²³ Each generation requires its *shoftim*, its *batei din*, to interpret the *devar ha-mishpat* and apply it for their generation. *Batei din* continue the multi-generational quest of *talmud Torah*, seeking to interpret and refine our comprehension of the *devar ha-mishpat*, the divine law.

²² Examples include bankruptcy, copyright, intellectual property, and antitrust laws.

²³ See Devarim 17:9 and Rosh Hashanah 25b.

THE BETH DIN OF AMERICA

For over half a century, the Beth Din of America has shaped Jewish life and society in North America, along the three dimensions outlined above. The Beth Din serves as a critical dispute resolution forum for conflicts that span the gamut of Jewish professional and social life. And it provides these services to a constituency as ideologically and sociologically diverse as American Jewry itself. The Beth Din's intimate familiarity with the institutions and nature of the Jewish community uniquely positions it to resolve disputes beyond the expertise of civil courts and other arbitration forums.

Quietly and consistently, the Beth Din maintains the *nomos* of the *mishpatim*. Each day, when the Beth Din convenes for a *din Torah*, the *dayanim* maintain and nourish, sustain and kindle, the world of the *mishpatim*. Each time the Beth Din deliberates and issues a decision grounded in the concepts of *choshen mishpat* and *even ha-ezer* the Beth Din revitalizes and breathes life into the *mishpatim* that too many Jews choose to neglect. The world of *mishpatim*—*yored*, *bar metzra*, *gud o agud*, *iska*, the prohibition of *ribbit*, the *ketubah*, *shomrim*, *chazakos*—is renewed and fortified each day with the Beth Din of America's sacred work.

Equally important, the Beth Din continues to enhance and deepen our knowledge of the *devar ha-mishpat*. Each case that comes before the Beth Din stimulates a rigorous and fresh assessment of the internal principles of *choshen mishpat* and a careful determination how they apply to the case at bar. The articles in this volume reflect the vibrant intellectual culture at the Beth Din of America, interpreting and applying the *devar ha-mishpat* to the realities of our day. *Tenu kavod la-Torah*—let us give honor to the Torah—that our primordial system of law continues to guide and govern our social and commercial affairs in the twenty-first century, even in the most sophisticated and complex economies.

Three times a day we pray for the restoration of Jewish courts: *hashivah shofetenu ke-va-rishonah*. Let us restore the *beit din* to its rightful and prideful place as the keystone of Jewish society, *le-bachzir 'atarah le-yoshnah*. Together, we can achieve the vision of our prayers, *u-melokh alenu atah Hashem levadekha*, as a community unified under the sovereignty of the *melekh ha-mishpat*.

Itamar Rosensweig
Rosh Chodesh Elul 5783
New York, NY

Please note that we deferred to our authors' preferences for transliterations and citations.

SECTION I:

Jewish Law and Commercial Norms

Equitable Distribution and the Enforceability of Choice of Law Clauses in Beit Din

Rabbi Mordechai Willig¹

I. CHOICE OF LAW CLAUSES

A choice of law clause is a provision in a contract specifying that any dispute arising under the contract shall be resolved in accordance with the law of a particular jurisdiction. Section 3(d) of the Beth Din of America's Rules and Procedures provides for the Beth Din to recognize a choice of law clause:

In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.²

To what extent is a choice of law clause, where Jewish parties elect to have their dispute governed by the legal principles of a particular jurisdiction, "permitted by Jewish law"?

II. RASHBA'S RESPONSUM

The *locus classicus* of this complex question is a responsum of Rashba (6:254), which the Beit Yosef excerpts in Choshen Mishpat 26.

The query in the responsum reads as follows:

מעשה היה בפירפיניאן בראובן שהשיא את בתו לאה לשמעון והכנים לו עמה סך ממון בנידוניה וילדה לו בת ואח"כ מתה לאה ואחר זמן מתה ג"כ הבת שילדה לו. ועכשיו עמד ראובן ותבע בדיני הגויים שיחזיר לו אותו ממון הנדוניה שהכנים לו עם לאה בתו. ואעפ"י שהבעל יורש את אשתו והאב את בתו בדיני ישראל טוען ואומר: שאין לחוש לירושת הבעל כיון שהכל יודעי' שהם הולכים בדיני הגויים והרי כל

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² Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules>.

הנושא אשה שם כאילו התנה כן... ועל ירושת האב בנכסי הבת, טוען שהמלך חקק בנימוסיו שכל שימות
הולד תוך זמן ידוע שיהא מה שיש לו מצד האם ליורשי האם, ודינא דמלכותא דינא

It happened in Perpignan that Reuven married off his daughter Leah to Shimon and provided her with a sum of money as a dowry. [Sometime thereafter] Leah gave birth to a daughter, after which Leah died. After that, the daughter also died. Reuven now claims, under the rules of the local non-Jewish law, that he is entitled to recover the dowry that he provided his daughter Leah.

[Reuven argues that] even though under Jewish law a husband inherits the assets of his deceased wife (according to which Shimon would inherit Leah's assets) and a father inherits his daughter (according to which Shimon would inherit the assets of the daughter born to him and Leah), the [halakhic] right of a husband to inherit his spouse is not applicable here because it is well known that [the Jewish community of Perpignan] follows the laws of the gentiles [on this matter] and therefore anyone who gets married in Perpignan, it is as if they stipulated so (i.e., that the husband does not receive the dowry of his deceased wife)...

And regarding [the halakhic rule] that a father inherits the assets of his deceased daughter (such that Shimon would inherit any assets belonging to the daughter he had with Leah), [Reuven] claims that the king enacted a law that if the child dies within a certain period, the assets that came into the marriage from the mother's side of the family (the dowry) revert to the mother's relatives. And the law of the kingdom is [halakhically] binding (*dina de-malkhuta dina*).

Note that Reuven advances two separate claims. First, he claims that the halakhah of spousal inheritance is inapplicable because the custom in the Jewish community of Perpignan was to follow the non-Jewish law, which did not recognize a husband's right to inherit his wife's assets. Reuven argues that anyone who gets married in Perpignan implicitly adopts this practice as a condition (*tenai*) at the time of the marriage. According to this claim, Shimon would not be entitled to inherit Leah's dowry at the time of her death.

Second, Reuven claims that, supposing Shimon and Leah's daughter inherited the dowry upon Leah's death, now that the daughter died, the dowry should revert to him (Reuven), the maternal grandfather, and not to the father (Shimon). Although this contradicts the rules of Jewish inheritance, according to which a father (and not the maternal grandfather) inherits the assets of a deceased daughter, Reuven argues that the non-Jewish law of the jurisdiction provides that if a child dies soon after the marriage, the assets the child inherited from the mother (such as the dowry) will revert back to the mother's family. Reuven claims that the law of the jurisdiction (*dina demalkhuta*) should be followed over the Jewish law of inheritance.

THE FIRST CLAIM

Rashba responds to each of these claims separately. He accepts Reuven's first claim that the custom in Perpignan overrides a husband's halakhic right of spousal inheritance. Rashba writes:

כל דבר שבממון תנאו קיים ובאמת אמרו שמתנין בכענין זה וכדאמר' בירושלמי הני דכתבין אין מיתת בלא בנים תהדיר מוהרא לבי נשא תנאי ממון וקיים. ומוסיף אני על זה שבכ"מ שנהגו להתנות ולעשות כזה תנאי אפי' הנושאים שם סתם גובין מהם אם מתה בלא בנים שכל הנושא סתם ע"ד הנוהג שם ביש-ראל נושא וזהו שקראוה בפ' המקבל דרישת הדיוט

In any monetary matter, one's conditions and stipulations are halakhically binding. And in fact, the Rabbis maintain that one can stipulate in this type of matter (that a husband will not inherit his wife's dowry). As the Yerushalmi states: "those who stipulate [before the marriage] 'if the wife dies without children the dowry shall revert to the wife's family'—that is a valid monetary stipulation and is binding."

And I go further: anywhere where the regnant custom and practice is to stipulate and to make such a condition, even those who get married without making such a stipulation explicit, the dowry should revert [to the wife's family] if the wife died without children. This is because anyone who gets married, without specifying otherwise, intends to do so in accordance with the prevailing custom in the Jewish community. And this [legal principle] (recognizing the normative force of communal practice) is called "derishat hedyot" (i.e. giving legal force to popular practice).

To summarize Rashba's position: He opens by stating that parties have broad discretion to make stipulations in monetary matters (*kol davar she-bemamon tena'o kayam*). He acknowledges that the parties could stipulate for the dowry to return to the wife's family upon her death. Further, where there is a common practice to make such a stipulation, the parties are considered bound by it, even if they did not stipulate so explicitly. The underlying rationale is that when people enter into agreements they do so with the intent of being bound by the prevailing custom and practice in the community. The responsum concludes as it began, by stating that in monetary matters all conditions are valid. Rashba therefore concludes that the parties are bound by the Perpignan custom, and Shimon is not entitled to inherit his wife's assets.

Having established that the custom in the Jewish community of Perpignan to override the Jewish law of spousal inheritance is halakhically binding, Rashba proceeds to criticize the origins of the communal practice. He admonishes the Perpignan community: if the Jewish community adopted the practice *because it was the gentile law*, then it was wrong (*asur*) for them to adopt the practice. It is against the Torah to adopt a gentile law if the reason for adopting it is to copy the gentiles. While Rashba does not call the legal bindingness or efficacy of the practice into question—Reuven still inherits Leah over Shimon—he suggests that Reuven will not benefit from money inherited via a custom of illicit origins. Rashba writes:

ומ"מ לנהוג כן מפני שהוא משפט גויים באמת נ"ל שאסור לפי שהוא מחקה את הגויים והוא שהזהירה תורה לפניהם ולא לפני גויים ואף על פי ששניהם רוצים בכך והוא דבר שבממון. שלא הניחה תורה את העם שהוא לנחלה לו על רצונם שייקרו את חקות הגויים ודיניהם ולא עוד אלא אפי' לעמוד לפניהם לדין אפי' בדבר שדיניהם כדין ישראל. ע"כ אנו פה תמהים מקום המשפט בעירכם מקום תורה ויתרון דעת איך נתנו יד לכלל דברים אלו שאסרתן תורה שלמה שלנו. ומה ממון יתהנה לירש שלא כתורתנו

However, to enact such a practice [solely] because it is the gentile law, indeed it appears to me that this is prohibited. For this imitates the gentiles, and the Torah warns against this [when it prohibits adjudication before gentiles] even when both parties agree and even when it is a monetary matter. For the Torah did not leave it to the choice of the nation to which it (i.e. the Torah) was bequeathed [to choose] to elevate the statutes of the gentiles and their laws....

We are therefore astounded: how can your city, which is a place of Torah and great learning, allow such things [i.e. adopting the gentile law] that the Torah prohibits?... And what financial gain will there be from inheriting property inconsistent with our Torah?

THE SECOND CLAIM

Rashba then addresses Reuven's second claim: as between Leah's husband, Shimon, and Leah's father, Reuven, who inherits the assets of Leah's daughter? While Jewish law clearly designates Shimon, the deceased-daughter's parent as the rightful heir (not the maternal grandfather), Reuven argued that he is entitled to inherit his granddaughter under the *dina de-malkbuta* (law of the gentile jurisdiction).

Here, Rashba summarily rejects Reuven's claim and declares that any inheritance taken by Reuven under a claim of *dina de-malkbuta* would be theft. A polemical diatribe follows, rejecting *dina de-malkbuta dina* when it clashes with the halakhic inheritance of blood relatives. Further, Rashba notes, universal application of *dina de-malkbuta dina* would render Torah law irrelevant. After all, Rashba states, if the law of the jurisdiction prevailed over Torah law, then we should send our children to law school rather than to Yeshiva. Rashba writes:

ואומר אני שכל הסומך בזה לומר שמותר משום דינא דמלכותא טועה וגזלן הוא וגזלה ישיב... ואם נאמר כן בטלה ירושת בנו הבכור דכל הנחלות ותירש הבת עם הבנים. ובכלל עוקר כל דיני התורה השלמה ומה לנו לספרי הקודש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי ילמדו את בניהם דיני הגויים ויבנו להם במות טלואות בבית מדרסי הגויים חלילה לא תהיה כזאת בישראל ח"ו שמא תחגור התורה עליה שק

And I maintain that anyone who relies on *dina de-malkbuta* to permit [overriding the Torah's rules of inheritance] is mistaken and is a thief and must return the stolen goods... If we were to hold this way (that *dina de-malkbuta* can override Jewish inheritance of blood relatives), then the [Jewish law] of a first born's inheritance will be obliterated, and a daughter would receive an equal share with the sons. And in general it would uproot all the laws of the Torah. And [if it were so] why would we need our sacred works [of Jewish law] that were composed by R. Yehudah Ha-Nasi (i.e. the Mishna) and by Ravina and Rav Ashi (i.e. the Gemara), they should teach their children gentile law and send them to study in the gentile academies! Perish the thought of this being true, and God forbid it.

Why does Rashba embrace the “all monetary conditions are valid” (*kol davar she-be-mamon tena’o kayam*) rule in his response to Reuven’s first claim but not entertain it at all in his response to the second claim? The answer is quite simple: The first claim pertains to spousal inheritance while the second claim pertains to the inheritance of blood relatives. The Torah rules of inheritance for blood relatives cannot be modified by agreement of the parties or altered through stipulated conditions.³ In this sense, the inheritance of blood relatives constitutes an exception within *dinei mamon*.⁴ By contrast, the halakhic rules of spousal inheritance *are* modifiable by agreement and by stipulation prior to the marriage.⁵ An implied condition based on a common practice is no stronger than an explicit condition stipulated by the parties. Since an explicit stipulation to override Shimon’s Torah right to inherit his daughter would be invalid, it follows a fortiori that an implied condition based on a communal practice is also invalid. Therefore, Shimon inherits his daughter, and Reuven does not inherit his maternal granddaughter.

III. SOME GENERAL CONCLUSIONS FROM RASHBA’S RESPONSUM

In matters other than inheritance of blood relatives, is it permissible for two individuals to agree to a “choice of law clause” that will produce a legal outcome different from what Torah law would have yielded? Rashba began by citing the Yerushalmi that it is acceptable to stipulate to override the Jewish law of spousal inheritance. Rashba himself added that wherever it is customary to make such a stipulation, that stipulation becomes an assumed, implicit condition even when it is not stated by the parties.

At the conclusion of the responsum, Rashba states that two parties can accept upon themselves the non-Jewish law in order to effectuate a transaction that would

³ See *Rambam, Nachalat* 6:1:

אין אדם יכול להוריש למי שאינו ראוי ליורשו ולא לעקור הירושה מן היורש אף על פי שזה ממון הוא, לפי שנאמר בפרשת נחלות והיתה לבני ישראל לחוקת משפט לומר שחוקה זו לא תשתנה ואין התנאי מועיל בה.

⁴ See *Rambam, supra* note 3.

⁵ See *Rambam, Isbut* 23:5–6:

התנה עמה שלא יירשנה הרי זה לא יירשנה... וכן אם התנה עמה שיירש מקצת נכסיה וכן אם התנה עמה שאם מתה בלא בנים יחזרו נכסין לבית אביה הכל קיים.

See also *Rambam, Nachalat* 6:8.

Although the Jewish law of inheritance is not modifiable by agreement of the parties, a device called a *shetar chatzi zachar* can be used to distribute one’s assets differently from how they would be distributed under the Jewish law of inheritance. See Beth Din of America, *Halachic Will Materials*, available at <http://bethdin.org/wp-content/uploads/2015/07/HalachicWill.pdf>.

otherwise not be efficacious in Jewish law. Rashba compares this to the Talmud's ruling that allows an unpaid watchman (*shomer chinum*) to modify his Torah status and stipulate to have the liability rules of a borrower (*sho'el*). According to Rashba, these cases reflect the general rule that parties have wide discretion in monetary matters to obligate themselves and generate liability to produce results different from *din Torah*. Moreover, the fact that Rashba compares the "choice of law" stipulation to the Talmud's case of a watchman (*shomer*) suggests that it is *fully permissible* to adopt a "choice of law" provision (just as it is fully permissible for the watchman to stipulate to modify his liability rules).

Rashba writes:

ואי נמי [אמרינן דינא דמלכותא דינא] במה שישראל עושה עם ישראל חבריו מדעת עצמו, כאותה שאמרו בפרק קמא דגיטין מתניתין דכל השטרות העולות בערכאות שלהן כשרים חוץ מגיטי נשים, דאקשינן קא פסיק ותני כל השטרות ואפילו שטרי מתנה, במאי קני בהאי שטרא, חספא בעלמא הוא, ופרקינן... ואיכא דאמרי משום דינא דמלכותא דינא, כלומר אף על פי שמצד דיני המלך אינו מועיל כיון שבמתנה אין בו תועלת למלך, כיון שזה מדעתו עשה מתנתו בערכאות הרי קבל עליו לילך בזה בדיני המלכות שאמר שכל שטר שיעלה בערכאות שיועיל ויקנה, ובדבר שבממון יכול לשעבד עצמו וליתן משלו שלא מן הדין כמו שאמרו מתנה שומר חנם להיות כשואל

Further, [the gentile law of the jurisdiction will be binding] when two Jewish parties voluntarily do business [in accordance with the gentile law]. Such is the principle in the Mishna that rules "any document that was validated by the gentile court is halakhically valid except for a bill of divorce (*get*).¹" And the Talmud asks, "any document" implies even a document gifting property—but how can property be gifted via a document that lacks the features to effect a proper halakhic *kinyan*? The Talmud answers that the document is valid because *dina de-malkhuta dina*. This means that even though the gentile law is not automatically binding, nevertheless, because these parties voluntarily effectuated their transaction through the gentile legal system, they have accepted upon themselves to be bound by the gentile law that recognizes such a document as valid and effective. And in monetary matters a party can obligate himself and make himself liable in ways that diverge from the [Torah] rules. As the Talmud says: an unpaid bailee can stipulate to have the liability of a borrower.

How does Rashba's ruling on the permissibility of two parties agreeing to execute their transaction according to the gentile law cohere with his criticism,

earlier in the responsum, of Perpignan's custom to follow the gentile law on spousal inheritance? The difference is that Rashba's earlier criticism is directed at the common custom of the community of Perpignan, which, if practiced *in order to copy the gentiles and their laws*, is prohibited by the Torah. (But even so, the transactions entered into under the prohibited custom are still halakhically binding.) By contrast, if two parties accept the validity of a document executed according to the non-Jewish law or organize their business deal around the non-Jewish law *out of considerations of expediency or efficiency*, then it is permitted. Parties may adopt the law of the jurisdiction in their business dealings for expediency and efficiency, but not so as to copy the gentiles and their practices.

Thus, it is certainly "permitted by Torah law," and even required, for the Beth Din of America to honor a choice of law clause in a contract. Based on Rashba's conclusion, it is also permissible for the parties themselves to enter into a choice of law clause if their intention is expediency or efficiency.

IV. LATER DEVELOPMENTS: BEIT YOSEF, REMA, AND SEMA

The Beit Yosef's Version of Rashba's Responsum

Rashba concluded that a couple married in Perpignan is considered to have implicitly adopted the custom overriding spousal inheritance. The Beit Yosef (Choshen Mishpat 26) excerpts components of Rashba's responsum but omits some sections (e.g., the entire discussion of Reuven's second claim, Rashba's conclusion, and parts of Rashba's response to the first claim).⁶ The effect of this

⁶ See *Beit Yosef, Choshen Mishpat* 26:

על פי שבדיני ישראל הבעל יורש את אשתו (ב"ב קח). כיון שהכל יודעים שהם הולכים בדיני הגוים הרי כל הנושא אשה שם כאלו התנה כן וכמו שאמרו (כתובות יז). גמלי דערביא אשה גובה פורנא מהן לפי שסומכת עליהם והשיב כל דבר שבממון תנאו קיים (כתובות נו). ובאמת אמרו (ירושלמי כתובות פ"ט ה"א) שמתנין בכענין זה אבל לנהוג כן מפני שהוא משפט הגוים באמת נראה לי דאסור לפי שהוא מחקה את הגוים וזהו שהזהירה התורה לפנייהם ולא לפני גוים ואף על פי ששניהם רוצים בכך והוא דבר שבממון שלא הניחה תורה את העם שהוא לנחלה לו על רצונם שייקרו חוקות הגוים ודיניהם ולא אפילו לעמוד לפנייהם לדין אפילו בדבר שדיניהם כדיני ישראל והמביא ראיה לזה מגמלי דערביא טועה דכתובה מן הדין היה לגבות ממטלטלי דמיניה ואפילו מגלימא דאכתפיה אלא ששמו רבנן שאין סמיכת האשה עליהם משום שגבייתה לזמן מרובה ובערביא שכל עסקיהם בגמלים סמיכתה עליהם אבל ללמוד מזה לילך בדרכי הגוים ומשפטיהם חס ושלום לעם קדוש לנהוג ככה וכל שכן אם עתה יוסיפו לחטוא לעקור נחלה הסומך על משענת קנה הרצון הזה ועושה אלה מפיל חומות התורה ועוקר שרש וענף והתורה מידו תבקש ואומר אני שכל הסומך בזה לומר שמותר משום דינא דמלכותא טועה וגזול הוא ואפילו גזלה ישיב רשע מקרי כדאיתא בפרק הכונס (ב"ב ק ס:) ובכלל עוקר כל דיני התורה השלימה ומה לנו לספרי הקדוש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי ילמדו את בניהם דיני הגוים ויבנו להם במות טלואות בבית מדרסי הגוים חלילה לא תהא כזאת בישראל חס ושלום שמא תחגור התורה שק עליהם עכ"ל

abridgment is that it appears to conflate Rashba's rejection of *dina de-malkhuta* regarding blood inheritance with his affirmation of the legal validity of the implied stipulation to override spousal inheritance. Reading the Beit Yosef's version, one might be left with the impression that Rashba would *invalidate* an implied stipulation to override spousal inheritance—the opposite of Rashba's actual conclusion in the responsum.

Rema's Two (Contradictory) Rulings

Rema's First Ruling

Led by the Beit Yosef's version of the responsum, Rema writes (Choshen Mishpat 369:11) that if a couple gets married in a city where the custom is to follow the non-Jewish law (and override the Jewish law of spousal inheritance), the wife's family cannot claim that the couple implicitly adopted the local custom.⁷ Rema's formulation suggests that a general custom to follow the gentile law does not create a presumption that any particular transaction was done with the implicit stipulation to follow the custom—contrary to the conclusion of Rashba's responsum.

Rema's Second Ruling

The Sema (Choshen Mishpat 369:20) notes that Rema's above ruling appears to contradict a different ruling of Rema in Choshen Mishpat 248. The discussion in Choshen Mishpat 248 pertains to a testator on his deathbed who wills his estate to his son Levi with the stipulation that upon Levi's death the estate should pass to a third party, Binyamin. The halakhah holds that because Levi is the testator's proper heir (*yoresb*) and therefore receives the estate qua inheritance (and not as a gift), the testator cannot exercise control over the estate after Levi's death: Once Levi receives the estate through the rules of inheritance, it is now his inheritance, and it passes, upon Levi's death, to Levi's rightful descendants—notwithstanding the will of the testator.⁸

⁷ *Rema, Choshen Mishpat 369:11*:

הנושא אשה במקום שדיני בדיני עובדי כוכבים, ומתה אשתו, לא יוכל אבי אשתו או שאר יורשיה לומר: כל הנושא אשה על דעת המנהג הוא נושא ונדון הדבר בדיני עובדי כוכבים דאם מתה לא יורשה בעלה או כדומה לזה.

⁸ *Shulchan Arukh, Choshen Mishpat 248:1*:

שכיב מרע שאמר: נכסי לפלוני ואחריו לפלוני... אם היה הראשון ראוי ליורשו, כגון שהיה בן מכלל הבנים, אין לשני כלום... שכל לשון מתנה ליורש הרי הוא כלשון ירושה, וירושא אין לה הפסק ואף על פי שיאמר: ואחריו לפלוני.

Suppose the same fact pattern but this time the testator lives in a community where the custom is to follow the non-Jewish law of the jurisdiction, which happens to allow a testator to do what the halakhah does not: to will his property to his son Levi with the stipulation that it pass to Binyamin upon Levi's death. Here Rema adopts Rivash's ruling (Responsum 52) holding that the parties are bound by the custom and, therefore, the non-Jewish law, and the estate passes to Binyamin upon Levi's death.⁹ This ruling suggests that a communal custom to follow the gentile law *does* create a presumption of an implied stipulation by the party to follow the custom. Under the principles of Jewish law, the estate would not pass to Binyamin. It is because we interpret the intent of the testator to execute the will *pursuant to the terms of the law of the jurisdiction* that Rivash and Rema hold that the estate should pass to Binyamin.

Sema's Reconciliation of Rema's Rulings

The Sema (Choshen Mishpat 369:20) notes that these two rulings of Rema appear to contradict each other. The ruling in Choshen Mishpat 369 suggests that we *do not* take a communal custom to follow the gentile law as grounds for interpreting the intent of the husband to forgo spousal inheritance. By contrast, the ruling in Choshen Mishpat 248 suggests that we *do* take a communal custom to follow gentile law as grounds for interpreting the testator's intent to structure the will in accordance with the gentile law.

The Sema reconciles the two rulings with the following distinction. In the spousal inheritance case (Choshen Mishpat 369), there was no explicit stipulation at the time of marriage regarding spousal inheritance, and further there was no evidence that, at the time of the marriage, the parties *even contemplated* what would occur in the future to the wife's assets if she predeceased the husband. Therefore, if the husband now claims that he never renounced and never intended to renounce his Jewish law right to spousal inheritance, a *beit din* should award him his wife's assets pursuant to *din Torah*.¹⁰

This principle is known as *yerushah ein lah befsak*.

⁹ *Rivash*, Responsum 52:

היה להם לדון בדיני עובדי כוכבים כי כן נהגו מעולם קהל מיוקק מרצונם.

¹⁰ Note that Sema's conclusion contradicts Rashba's position in the responsum. According to Rashba, if the husband failed to specify to the contrary, we presume that his intent at the time of the marriage was to conform to the communal custom, and he is considered to have renounced his spousal inheritance by default. Rashba attributes this to the halakhic principle of *darshinan lashon bedyot*. See the discussion above.

By contrast, the testator on his deathbed (*Choshen Mishpat* 248) explicitly stated that his assets shall pass to Binyamin after Shimon's death. Given the custom in that society to abide by the non-Jewish law in such transfers, the testator undoubtedly intended to create the legal effect that is usually created by similar statements in that society.¹¹

In other words, the difference between the cases, according to the Sema, is primarily evidentiary. In the case of spousal inheritance there was no clear evidence at the time of marriage to suggest that the parties accepted the communal custom. In the case of the testator on his deathbed, the plain meaning of the testator's stipulation evidences his intent for the will to be effective in accordance with the communal custom.¹²

V. RECENT RULINGS

Equitable Distribution in a Prenuptial Agreement

In a recent letter, Rav Zalman Nechemia Goldberg zt"l allows couples to enter into a prenuptial arbitration agreement that provides for a *beit din*, in the event of

¹¹ *Sema, Choshen Mishpat* 369:20:

ו"ל דשאני התם כיון דהמצוה מת באותו מקום שדנין בדיני גוים ועשה צוה סתם ואחריו לפלוני, אמרינן דודאי דעתו היה כמו שמורגל בפי הבריות דמפרשים ואחריו לפלוני כפשוטו ואפילו אם הראשון ראוי לירש, ומש"ה פסק שדנין בדיני גוים, משא"כ כאן בהנשוא אשה דבשעה שנשאו זה את זה לא היה שעת הירושה ולא היה אז שום גילוי דעת שנשאה אדעתא דמנהגא, והבעל עומד עתה לפנינו ואומר שלא היתה דעתו אז לישא על דעת שאם תמות שלא יירשנה, דבזה ודאי לא עקרי דין תורה.

¹² Rivash and Rema's ruling in the testator case looks, *prima facie*, like an example where a communal custom to follow the law of the jurisdiction can override the Jewish law of inheritance for blood relatives. How else can the custom allow the estate that now belongs to Levi pass to Binyamin over Levi's descendants? Chatam Sofer (responsa *Choshen Mishpat* no. 142, cited in *Pitchei Teshuvah, Choshen Mishpat* 248:2), however, explains that the halakhic principle of *yerushah ein lah hefsek*, which is what keeps the estate with Levi's heirs over Binyamin, is a rule of inheritance and not gifts. Thus, in principle, the testator could have structured the transfer as a *gift* to Levi with the provision that it pass to Binyamin at Levi's death. The Talmud (*Bava Batra* 133a) states that a testator's gift to a rightful heir is halakhically characterized as inheritance, which cannot be interrupted. Chatam Sofer argues that the Talmudic principle that characterizes a testator's "gift to an heir" as inheritance is limited to those familiar with the Torah's language. In a society that adjudicates exclusively in secular court and that is unfamiliar with the Torah's rules, the clear intention of such a testator is to structure the transaction as a gift transfer, not through inheritance. As such, Rivash's ruling does not in fact uproot the Jewish law of inheritance for blood relatives. Chatam Sofer writes:

ויותר נ"ל דריב"ש נמי לא אמרו אלא בעובדא דילי' דהרי משמעות לשון מתנה איננו ירושה אלא בלשון התורה במי שראוי לירשוהו היא מתנה ג"כ ירושה אבל אי הוי ברי לנו שאין כוונת השכ"מ ללשון התורה הרי גם דין תורה הוא שמתנה הוא ולא ירושה ויש לה הפסק וכיון שבכוונה ובלשון תלי' מילתא ואילו האנשים לא הכירו לשון תורה כי כל התנהגותיהם בערכאות ה' אם כן גם דין תורה הוא שמתנה הוא ולא ירושה.

a divorce, to divide the couple's assets in accordance with any set of principles the couple chooses—including the principles of equitable distribution typically used under secular law if that is what the couple desires.¹³ Rav Goldberg permits this even though equitable distribution may differ from the halakhic rules for dividing marital property.¹⁴

Rav Goldberg writes that, in principle, it is permissible for the couple to explicitly adopt the non-Jewish law of the jurisdiction as the basis for dividing marital property upon divorce. Nevertheless, Rav Goldberg suggests that it is preferable for the couple to adopt the substantive principles of distribution (e.g., equitable distribution, equal distribution, etc.) which form the basis of the New York law, rather than refer specifically to “the laws of the State of New York.” Rav Goldberg's position constitutes the basis of the current version of the Beth Din of America's prenuptial agreement, which allows a couple to select “principles of equitable distribution in accordance with customary practice” as the basis for a *beit din* decision regarding the division of their marital property.¹⁵

Acceptance of an Entire System of Secular Law

Acceptance of an entire system of secular law is problematic, especially if it accepts the secular law as it may be *in the future* when the dispute arises.¹⁶ This may be prohibited according to Rashba.¹⁷ Still, in matters other than inheritance of blood relatives, the agreement between the parties to adopt the law of the jurisdiction remains halakhically binding, and a *beit din* must rule in accordance with the parties' agreement.¹⁸

¹³ See the exchange in YESHURUN II (2002), 698–703.

¹⁴ For an overview of the halakhic rules for dividing marital property, see *Pitchei Choshen Hilkebot Yerushah ve-Isbut*, Chapters 6–8.

¹⁵ Beth Din of America, *Standard Prenuptial Agreement*, Section II:A, available at <https://res.cloudinary.com/orthodox-union/image/upload/v1574874396/preup/Standard-Prenup-Rev-Nov-2018.pdf>.

¹⁶ The idea here is that if the parties accept the secular law of the jurisdiction even as it may be amended in the future, then they are accepting the authority of the law *because it is the secular law*, which is prohibited by the Torah. But if they are accepting the law as it is on the day of their agreement because its substantive terms are expedient for organizing their business relationship, then it constitutes a valid *minhag ha-sochrim* and is permissible. See Rabbi Yona Reiss, *Kanfei Yonah*, 41.

¹⁷ Although here, too, it may be permissible for the parties to accept ‘the law of the jurisdiction even as that law is later amended’ if their reason for doing so is grounded in considerations of expediency and efficiency and not to submit to the *authority* of the law.

¹⁸ See Rabbi Yaacov Feit, *The Prohibition Against Going to Secular Courts*, JOURNAL OF THE BETH

Choice of Law in a Post Dispute Arbitration Agreement

Similarly, a choice of law clause adopted in a post-dispute arbitration agreement that does not accurately reflect the intent of the parties during their business dealings might be problematic.¹⁹ To be sure, the choice of law provision is binding, as Rashba rules, and should be enforced by the *beit din*, even though it was wrong for the parties to adopt it.

Dinei Mammonot (Monetary Matters) vs. Issur ve-Heter (Ritual Prohibitions)

The enforceability of a choice of law clause is limited to *dinei mammonot* (monetary law). A choice of law clause would be invalid in areas of Jewish law that pertain to *issur ve-heter* (ritual prohibitions). For example, a stipulation against the cancellation of debts on *shemittah* (*shemittah kesafim*) is invalid.²⁰ Similarly, as we saw earlier, the inheritance of blood relatives is not characterized as normal *dinei mammonot*, and therefore stipulations to override it are invalid.²¹ In cases of *dinei mammonot*, it is permitted, and required, by Torah law for a *beit din* to enforce a choice of law provision—even in cases where it may have been prohibited for the parties to adopt the clause in the first place.

VI. IMPLICIT CONDITIONS AND EQUITABLE DISTRIBUTION

Section 3(e) of the Beth Din of America's Rules and Procedures provides:

In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community—whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common commercial practices in

DIN OF AMERICA I (2012), 41, available at <https://bethdin.org/wp-content/uploads/2019/07/The-Prohibition-Against-Going-to-Secular-Courts-by-Rabbi-Yaacov-Feit.pdf>.

¹⁹ See *Tumim* 26:4; Rabbi Yona Reiss, *Kanfei Yona*, 41–42. *Tumim* distinguishes between a pre-dispute choice of forum clause binding the parties to litigate in secular court and a post-dispute one. However, *Tumim*'s discussion of a choice of forum clause can be distinguished from the above discussion regarding a choice of law clause, in which case a post-dispute choice of law clause would also be permitted by Jewish law.

²⁰ See *Taz*, *Choshen Mishpat* 26:3; *Talmud Bavli*, *Makkot* 3b; *Netivot Hamishpat* 61:9; Rabbi Mordechai Willig, *Am Mordechai* IV, 266. Whether a stipulation against the cancellation of debts on *shemittah* is valid depends on how the stipulation is formulated. See *Shulchan Arukh*, *Choshen Mishpat* 67:9. A *pruzbul* relies on a different mechanism to allow for the collection of debts after *shemittah*.

²¹ See *Rambam*, *Nachalat* 6:1.

*this transaction — the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.*²²

How should this provision be interpreted? What constitutes an implicit adoption of common commercial practices?

It is often instructive to look at the manner in which the parties did business. If the contracts and business deals between the parties were drafted and reviewed by attorneys trained in secular law, then a dispute arising from these agreements should most likely be resolved according to secular law. Had the parties intended for their dealings to be resolved according to *din torah*, they would have been better served to have their contracts drafted and reviewed by Torah scholars with expertise in Jewish law.

Equitable Distribution in End-of-Marriage Disputes

It can also be instructive to look at the practice in the parties' community. Many years ago, an astute and distinguished, veteran *dayan*, Rabbi Leib Landesman, said to me that it is arguable, though he was not certain enough to rule that way, that for parties belonging to a modern orthodox community, a *beit din* should resolve end-of-marriage financial disputes by applying basic principles of equitable distribution. After all, the majority of such disputes in that community are resolved based on the principles of equitable distribution, whether by court decision, settlement in the shadow of court decision, or through mediation. Attorneys in the field have attested to me that at least 95% of divorce cases in the modern orthodox community are resolved in this way.²³

At the time, I disagreed, based on the Sema, discussed above in Section IV, who held that because there is no indication at the time of marriage that the parties were contemplating how their assets should be divided upon its dissolution, there is no basis to assume they accepted the common custom over Torah law.²⁴ Whereas commercial contracts are reviewed by attorneys, weddings are officiated and presided over by rabbis. Thus, it appeared to me at the time, based on the

²² Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules>.

²³ Recently, Rabbi Landesman added that this argument may possibly be extended to a basic minimal award of maintenance as well.

²⁴ At least, that is, when the husband denies that he ever intended to waive his right to spousal inheritance at the time of the marriage. See Sema's formulation, *Choshen Mishpat* 269:20: והבעל עומד עתה לפנינו ואומר שלא היתה דעתו אז לישא על דעת שאם תמות שלא יירשנה.

Sema's analysis, that the division of marital assets should be conducted according to Torah law.

However, based on the above presentation of Rashba's responsum, it seems that Sema's analysis is inconsistent with Rashba's position. As such, Rabbi Landesman's suggestion seems correct. Even if the genealogy of the practice in the modern orthodox community is grounded in a prohibition—litigating divorces in secular court and being subject to the non-Jewish law—the common custom is still binding on parties who implicitly adopt it, and a *beit din* must honor the common custom by dividing the couple's marital property in accordance with the principles of equitable distribution.

In supporting the Beth Din of America prenuptial agreement, Rav Zalman Nechemia Goldberg wrote that by allowing the parties to adopt a choice of law provision or, better, to specify that their assets should be divided according to equitable distribution, the prenup will make couples more amenable to resolving their end of marriage issues in *beit din* rather than secular court. Similarly, if the Beth Din of America were to publicize that, for any couple to whom this communal practice is relevant, it will resolve end-of-marriage financial disputes by utilizing principles of equitable distribution, couples will become more inclined to resolve their dispute in *beit din*.

There is a further benefit to adopting such a policy. Lawyers and mediators frequently complain that, whereas the contours of a secular court decision in marital disputes are generally foreseeable, a *beit din's* approach to resolving end of marriage disputes is totally unpredictable. For this reason, these lawyers and mediators are hesitant to recommend clients to go to *beit din*. Even Orthodox practitioners have expressed this hesitation.

Based on a careful reading of Rashba's classical responsum and the common practice within large segments of the Orthodox community, the Beth Din of America generally resolves end-of-marriage disputes for such couples by utilizing principles of equitable distribution and limited spousal maintenance, as the *dayanim* deem appropriate, according to principles of Jewish law, equity and local custom.²⁵ Publicizing the Beth Din's policy will allow parties to avoid the prohibition

²⁵ See Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules> See also Beth Din of America, *Standard Prenuptial Agreement*, Section II:A, available at <https://res.cloudinary.com/orthodox-union/image/upload/v1574874396/prenup/Standard-Prenup-Rev-Nov-2018.pdf>.

of secular court and the possible prohibition of *gezeilab* in enforcing the secular court's decisions.²⁶ It will also create a sense of predictability in the *Beth Din's* decisions, allowing couples to resolve their end-of-marriage disputes in *beit din* with greater confidence.

²⁶ See R. Akiva Eger, *Choshen Mishpat* 26:1.

Minhag Ha-Sochrim: Jewish Law's Incorporation of Mercantile Custom and Marketplace Norms

Rabbi Itamar Rosensweig¹

INTRODUCTION

Many litigants and students of Jewish law find it puzzling that commercial norms (*minbag ha-sochrim*)—customs and practices of the marketplace—may determine the outcome of a *din Torah*. After all, if the purpose of a *din Torah* is to adjudicate a dispute according to Torah law, why give any weight to practices that originate outside of Judaism, especially when they differ from the internal provisions of *choshen mishpat* (Jewish monetary law)?

This article offers an answer to that question by explaining Jewish law's incorporation of commercial norms and the mechanism through which it does so. The goal of this article is to provide an exposition of *minbag ha-sochrim* as a halakhic doctrine and to explain its normative power within Jewish law.

This article unfolds as follows. **Section I** introduces *minbag ha-sochrim* as a halakhic principle of incorporation that validates external commercial norms, distinct from *dina de-malkhuta dina*. **Section II** demonstrates that *minbag ha-sochrim* is firmly anchored in the Talmud and its case law, establishing that it constitutes a well-founded principle of Jewish law. **Section III** surveys post-talmudic case law where *poskim* apply *minbag ha-sochrim* to regulate commercial relationships—such as rent control, bankruptcy, and equitable distribution of marital property—between Jewish parties. **Section IV** considers what counts as a “valid” commercial practice as well as several restrictions that may limit the application of *minbag ha-sochrim*. **Section V** examines *minbag ha-sochrim*'s conceptual basis: What is the mechanism through which halakhah incorporates these external norms? The section develops two theories. One is grounded in the power of individuals to attach conditions to their private agreements (*tenai shel mamon*). The other is rooted in the authority of the townspeople to enact legislation (*takanot ha-kahal*) to regulate commerce (*rasha'in benei ha-'ir le-basi'a al kitzatan*). **Section VI** discusses whether

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minbag ha-sochrim is limited to contractual relationships that arise by agreement or whether it extends to non-contractual disputes, such as tort actions and claims of unjust enrichment. **Section VII** concludes with reflections on *minbag ha-sochrim* as an internal principle of Jewish law and how it facilitates the interface of halakhah and modern commerce.

I. PRINCIPLES OF INCORPORATION: DINA DE-MALKHUTA DINA AND MINHAG HA-SOCHRIM

Jewish law provides a comprehensive system of internal rules and principles that govern virtually all types of market interactions. But in addition to its internal provisions, Jewish law also contains principles of incorporation which *incorporate* and *validate* certain external commercial laws and practices that originate outside of Judaism. A principle of incorporation has the effect of making the external norm valid and binding as a matter of Jewish law.

Dina de-malkhuta dina is perhaps the best-known halakhic principle of incorporation. Through *dina de-malkhuta*, Jewish law incorporates some of the laws of the jurisdiction as halakhically binding. For example, under *dina de-malkhuta*, a tax imposed by congress becomes halakhically obligatory.² Similarly, if congress lawfully expropriates someone's property and converts it into public land, the transfer of ownership is recognized by Jewish law through *dina de-malkhuta dina*.³

Minbag ha-sochrim is also a principle of incorporation, but it differs from *dina de-malkhuta*. Whereas *dina de-malkhuta* incorporates *laws* enacted by governments and sovereigns, *minbag ha-sochrim* incorporates *customs* and *practices* of the marketplace. Through *minbag ha-sochrim*, external marketplace norms become valid and binding as a matter of Jewish law.

To appreciate the difference between *minbag ha-sochrim* and *dina de-malkhuta*, notice that a commercial practice can be widespread without being enshrined into law. Contrariwise, a law may be formally proclaimed by a legislature but fail to gain support in real-world commercial practice. *Minbag ha-sochrim* grants halakhic recognition to commercial practices even when they are not formally enshrined in law. *Dina de-malkhuta* recognizes laws even when they have not achieved widespread practice.

² Nedarim 28a, Rambam Gezeleh 5:11.

³ Bava Kamma 113b, Rambam Gezeleh 5:17.

Practically, *minhag ha-sochrim* may have a wider scope of application than *dina de-malkhuta dina*. This is because many *poskim* limit *dina de-malkhuta*. For example, some authorities maintain that *dina de-malkhuta* does not govern a private law dispute between two Jewish parties.⁴ Others hold that *dina de-malkhuta* is limited to cases where the law directly benefits the government or society (*tikkun ha-medinah*).⁵ Still others write that *dina de-malkhuta* does not apply wherever the secular law conflicts with an internal halakhic provision.⁶ And some hold that *dina de-malkhuta* does not apply in Israel.⁷ Yet *poskim* apply no such limitations to *minhag ha-sochrim*. Thus, *minhag ha-sochrim* enjoys a wider scope of application, and for that reason, it can serve as a more fruitful principle of incorporation than *dina de-malkhuta dina*.⁸

II. MINHAG HA-SOCHRIM: THE TALMUDIC CASE LAW

Having introduced the concept of *minhag ha-sochrim* above, this section proceeds to establish its talmudic basis. This section and the next seek to demonstrate that *minhag ha-sochrim* is a well-founded principle of Jewish law. I wish to emphasize at the outset that *minhag ha-sochrim* is itself a provision of *choshen mishpat* (Jewish monetary law). When a *beit din* applies *minhag ha-sochrim* to decide a case, it may appear as if the *dayanim* are failing to apply Jewish law, that they are choosing secular commercial norms over the provisions of *choshen mishpat*. But this perception is inaccurate, since Jewish law itself provides, under the right conditions, for the incorporation of marketplace norms and for those norms to be halakhically binding. Thus, a *pesak din* that decides a case based on *minhag ha-sochrim* is no different from a *pesak din* that decides a case based on *chazakah*, *migo*, or *shevu'a*. They differ only in the halakhic principle or *siman* that controls the *pesak*: In one case, it is the halakhic principle of *chazakah* (or *migo*, *shevu'a*, etc.) that controls. In the other

4 Piskei Ri"az Bava Batra 3:36, Responsa Maharik 187.

5 Sefer Ha-Terumot 46:8, Shulchan Arukh Choshen Mishpat 369.

6 Shakh Choshen Mishpat 73:39.

7 Or Zarua' Bava Kamma no. 447, Nemukei Yosef Nedarim 10a.

8 For statements emphasizing the wider scope of *minhag ha-sochrim* over *dina de-malkhuta*, see Iggerot Moshe, Choshen Mishpat I, 72, regarding rent control; Rabbi Y. L. Graubart, Chavalim Bene'imah Vol. 5, Even ha-Ezer 34, regarding the division of marital property:

אך נראה במדינה זו שע"פ דין הממשלה יש לאשה חלק שוה ברכוש הבעל וכל מי שחותר שטר נישואין יודע זאת ועל זה הוא חותר ברצונו, הרי זה שותפות גמורה... ואין זה ענין לדינא דמלכותא שיש דעות דמהני כמ"ש רמ"א... וכנגד זה ב"י חו"מ ס"ס כו... שדינא דמלכותא לאו דינא ושל"א כד"ת.... דהכא שאני שכן המנהג והכל נוהגים כן....

case, it is the halakhic principle of *minhag ha-sochrim*. The examples discussed in this section demonstrate that *minhag ha-sochrim* is a fundamental halakhic principle within *dinei mammonot*, firmly entrenched in the talmudic case law.

1. *Ha-Kol Ke-Minhag Ha-Medinah*

The Mishnah in Bava Metzia (83a), discussing employment agreements, establishes that ambiguous terms in a contract should be determined by regional custom (*ha-kol ke-minhag ha-medinah*). When an employment contract fails to specify some aspect of the agreement, such as the expected work hours or whether the employer will provide meals, the Mishnah rules that the ambiguous provisions should be filled out according to local custom: *ha-kol ke-minhag ha-medinah*.⁹

Crucially, the Talmud defers to *minhag ha-medinah* even when it diverges from the halakhah's normal set of rules. For instance, according to Jewish law, the workday begins at sunrise and concludes at nightfall: If you hired a worker and specified that the work hours are defined by *din Torah* (lit. "Torah law"), the workday would commence at sunrise and conclude at nightfall.¹⁰ Similarly, if you were to hire a worker in a city with no prevailing custom, and you didn't specify the work hours, the agreement is filled in by *din Torah*, and the worker is obligated to work from sunrise to nightfall.¹¹

Yet the presence of workplace norms overrides the default *din Torah*. According to the Mishnah, if you hire a worker in a town with established workplace norms (e.g., a nine to five workday), the unspecified content of the employment

And Pitchei Choshen Sekhirut 7 n. 17:

ובזמננו נהגו הבתי דינים לדון בקצת דיני ממונות עפ"י חוקי המדינה, ולכאורה יש לדון כן מצד דינא דמלכותא, ואף במקום דלא שייך דינא דמלכותא, כגון בא"י ש"א דלא אמרינן כן, וכן לדעת כמה אחרונים שבדיני ממונות שבין ישראל לחבירו לא אמרינן דינא דמלכותא... יש מקום לדון עפ"י החוק משום מנהג, וכן נהגו בתי דינים בא"י לדון בהרבה דיני שכירות עפ"י המנהג המבוסס על החוק, כגון דמי מפתח ופיצויי פטורין וכדומה, ולכן נראה שבדברים שאינם שכיחים יש לדון עפ"י ד"ת ולא עפ"י החוק.

See also Pitchei Choshen Halva'ah 2:29 n. 72:

אף במקום שאין כח מדינא דמלכותא, כיון שנהגו כך, יש לזה תוקף עפ"י מנהג הסוחרים, וכל אחד סבור וקביל עליו מנהג הסוחרים.

9 Bava Metzia 83a:

מקום שנהגו שלא להשכים ושלא להעריב אינו רשאי לכופן. מקום שנהגו לזון יזון, לספק במתיקה יספק, הכל כמנהג המדינה.

10 Shulchan Arukh Choshen Mishpat 331:1:

השוכר את הפועלים ואמר להם... אני שוכר אתכם כדן תורה, חייבין לצאת מבתים בזריחת השמש ולעשות מלאכה עד צאת הכוכבים.

11 Ibid:

לא היה מנהג בעיר... חייבין לצאת מבתים בזריחת השמש ולעשות מלאכה עד צאת הכוכבים.

agreement is filled out by workplace norms, not by the workday defined by *din Torah*.¹² In other words, the commercial *minhag* overrides the internal provisions of *choshen mishpat*.¹³

2. *Minhag Mevatel Halakhah*: Custom Prevails Over Halakhah

The Talmud Yerushalmi's (Bava Metzia 7:1) commentary on the above case illuminates the power of custom in two significant ways. Commenting on the fact

¹² Bava Metzia 83a-b; Shulchan Arukh Choshen Mishpat 331:1-2.

It's striking that the Talmud takes it as obvious that custom would override the "*din Torah*" workday. Immediately following its presentation of the "*din Torah*" workday, the Talmud wonders if it is ever relevant given that communities typically have customary work hours. The Talmud responds that the *din Torah* workday is relevant either in a new settlement lacking commercial norms or in a case where the employer and employee agree to define the workday by "*din Torah*". See Bava Metzia 83b:

פועל, בכניסתו משלו, ביציאתו משל בעל הבית, שנאמר תזרח השמש יאספון ואל מעונתם ירצון יצא אדם לפעול ולעבודתו עדי ערב. וליחזי היכי נהיגי! בעיר חדשה... איבעית אימא, דאמר להו: דאגריהו לי כפועל דאורייתא.

And note Mordekhai's comment (Bava Batra no. 477):

ופריך וניחזי היכי נהוג אלמא מנהג בני העיר דוחה את דין חכמי התלמוד אף על פי שמצאו לו סמך מן המקרא

Furthermore, according to some commentators, the *din Torah* work hours are structured to allow the worker to *daven* before work. See, e.g., *Torat Chayim*, Bava Metzia 83a. On this view, the *din Torah* workday is not defined arbitrarily. And nevertheless, custom prevails.

¹³ *Minhag ha-medinah* features prominently in other talmudic cases as well. In the same Mishnah (Bava Metzia 83a), R. Shimon ben Gamliel holds that custom can limit the amount of food an employer is obligated to provide his Jewish workers—even if halakhah would otherwise require that he provide them with significantly more:

מעשה ברבי יוחנן בן מתאי שאמר לבנו: צא שכור לנו פועלין. הלך ופסק להם מזונות. וכשבא אצל אביו, אמר לו: בני, אפילו אם אתה עושה להם כסעודת שלמה בשעתו לא יצאת ידי חובתך עמהן, שהן בני אברהם יצחק ויעקב. אלא, עד שלא יתחילו במלאכה צא ואמור להם: על מנת שאין לכם עלי אלא פת וקטנית בלבד. רבן שמעון בן גמליאל אומר: לא היה צריך לומר, הכל כמנהג המדינה.

In Bava Metzia 93a, the Mishnah rules that custom would permit a produce watchman to eat from the produce he guards, even though there is no right within Jewish law to do so. See Rashi s.v. *me-hilkhot medinah* and Shulchan Arukh Choshen Mishpat 337:6.

In Bava Batra 2a, the Mishnah holds that a privacy wall between abutting lots should be constructed to the specifications of local custom. According to some authorities, this example provides us with another striking illustration of *minhag* overriding the internal provisions of *choshen mishpat*. The Talmud provides a homeowner with the right to compel his neighbor to pay for half the costs of the privacy wall. Yet some commentators hold that a regional custom to forego privacy walls could defeat the halakhic right to one. See Rabbenu Yonah, Bava Batra 2a:

ואשמעינן תנא דמתני', שיכול כל אחד לכוף את חבירו מן הדין לבנות עמו כותל, ולסלק היוק ראה. אבל במקום שנהוג כולם שלא לבנות, שאין מקפידין על הזק ראה, אין מחייבין אותו לבנות.

See also Or Zarua' Bava Batra no. 2. For views that conceptualize *bezek re'iyah* as either a matter of ritual law or public policy, and therefore not waivable by *minhag*, see Yad Ramah Bava Batra 4a; Yad Ramah Bava Batra 60a; and Shut Rashba 2:268. See also Shulchan Arukh Choshen Mishpat 157:1.

Here are some further examples where *minhag* is decisive in monetary law: The Mishnah in Bava Metzia 103a rules that regional custom governs the allocation of agricultural responsibilities between a landlord and a tenant-sharecropper.

that local custom fills in the terms of the agreement rather than *din Torah*, the Yerushalmi concludes: “*minhag mevatel halakhah*”—literally, “custom overrides halakhah”.¹⁴ Here the Yerushalmi explicitly formulates the position that *minhag* overrides (*mevatel*) the internal rules of Jewish monetary law that would otherwise govern.¹⁵

Some commentators go further and explain that the Yerushalmi’s conclusion “custom overrides halakhah” extends to the procedural rules for adjudicating disputes. Specifically, while Jewish law normally assigns the burden of proof to the claimant, *minhag* will shift that burden onto the party whose claim runs contrary to local custom. For example, suppose an employer and worker were in a dispute over the amount of compensation or benefits that was initially agreed upon. Under

In Bava Metzia 110a, the Talmud considers a case of a sharecropper and a landlord who dispute the terms of their profit sharing agreement. Rav Nachman rules that a court should decide such a case by distributing the crop yield in accordance with the prevailing regional custom. Minhag also plays a central role in allocating tax burdens for public goods and other communal costs. See Bava Kamma 116b. As Mordekhai rules on the basis of that talmudic passage (Bava Batra 475):

וששאלתם אם יש לתת מס מן הבתים אם לאו זה הכלל הכל לפי מנהג העיר כדתניא בפ' הגזול בתרא שיירא שהיתה מהלכת במדבר ועמד עליה גייס לטורפה מחשבין לפי ממון ואין מחשבין לפי נפשות ואם שכרו תייר לפניהם מחשבין אף לפי נפשות ובלבד שלא ישנו ממנה החמרים אלמא אזלינן בתר מנהג ותניא נמי התם ספינה שהיתה מהלכת בים ועמד עליה נחשול של ים לטובעה והקילו ממשאם מחשבין לפי משאוי ואין מחשבין לפי ממון ובלבד שלא ישנו מנהג הספינים אלמא בתר מנהג אזלינן.

Mordekhai (Bava Batra 477) also rules that regional custom overrides the *din Torah* rule for determining which residents are obligated to shoulder the costs of public goods. According to the Talmud (Bava Batra 8a) a resident becomes liable to participate in the communal security tax only after residing in the town for twelve months. But Mordekhai holds that local custom can obligate the resident even sooner:

והרב ר' אביגדור כהן השיב וזה לשונו איש הבא אל עיר נושבת יהודים אם צריך ליתן מס תוך שנים עשר אם מנהג קבוע שם לחובה איני יודע לפוטרו כדתנן פרק הפועלים הכל כמנהג המדינה.

For Minhag’s role in governing the monetary obligations of the Ketubah, see e.g., Mishnah Ketubot 6:4, and Shulchan Arukh Even Ha-Ezer 80:1.

14 See Shita Mekubetzet Bava Metzia 87a citing R. Yehonatan’s second interpretation of the Yerushalmi:

יש לפרש זה הירושלמי על משנתנו שאומרת מקום שנהגו שלא להשכים ושלא להעריב כלומר שאין יוצאין הפועלים למלאכתן אלא עד אחר חצי שעה לזריחת השמש ושיוצאין ממלאכתן קודם שעה אחת לשקיעת החמה עושין ואף על פי שפועל הכתוב בתורה הוא מזריחת השמש עד שקיעת החמה דמנהג מבטל הלכה.

15 The language of the Yerushalmi—*minhag mevatel halakhah*—might lead some readers to conclude that halakhah’s incorporation of minhag is somehow contrary to halakhah. But this is erroneous since the Yerushalmi is clearly stating a halakhic position requiring the incorporation of minhag. It is paradoxical to say that “halakhah requires that we follow minhag rather than halakhah”. For that statement itself appears to be a statement of halakhah. It is better, therefore, to translate *minhag mevatel halakhah* as “custom overrides what would otherwise be the halakhah.” Put differently, custom displaces the internal provisions of Jewish law that would normally apply.

the internal procedural rules of *choshen mishpat*, the worker, as claimant, bears the burden of proof, since he is attempting to procure benefits or compensation from the employer. However, if the worker's position is consistent with the customary compensation or benefits for workers in the area, then the worker prevails.¹⁶ Under this interpretation, *minbag* modifies the procedural rules for adjudicating disputes, shifting the burden of proof from the claimant (*motzi*) to the party whose position runs contrary to local *minbag*.

Having surveyed two of the Talmud's explicit statements about the power of *minbag* to override the internal rules of Jewish monetary law (*ba-kol ke-minbag ha-medinah* and *minbag mevatel halakhah*), let us turn to talmudic rulings that reflect and presuppose the validity *minbag ha-sochrim*.

3. *Situmta*: Mercantile Custom as a Means of Conveyance

In Jewish law, the conveyance of property requires a *kinyan*. The Talmud details strict rules for how *kinyanim* are to be executed, and it specifies which *kinyanim* are valid for different types of property (e.g. real property can be conveyed through a symbolic payment (*keseif*) or by transferring a deed (*shetar*); small personal property is conveyed by lifting (*hagbahah*); domesticated animals can be conveyed by transferring the reins (*mesirah*)).¹⁷ Yet, notwithstanding the detailed rules and provisions for *kinyanim* indigenous to halakhah, the Talmud introduces the principle of *situmta*, which recognizes the prevailing commercial methods of conveyance as a valid halakhic *kinyan*.

Situmta is introduced in Bava Metzia 74a, where the Talmud refers to a commercial practice of marking wine barrels (*situmta*) to signify the conveyance of title to the purchaser. Marking barrels is not a *kinyan* specified by Jewish law. But the Talmud rules that it constitutes a halakhically valid *kinyan* wherever commercial

¹⁶ Tamud Yerushalmi Bava Metzia 7:I:

אמר רב הושעיה זאת אומרת המנהג מבטל את ההלכה א"ר אימי כל המוציא מחבירו עליו להביא ראיה חוץ מזו.

See the first interpretation R. Yehonatan cited in the Shita Mekubetzet Bava Metzia 87a:

והולכים אחר המנהג... וזה פירוש הירושלמי שהביא הרא"ף מנהג מבטל הלכה אף על פי שהלכה רווחת היא המוציא מחברו עליו הראיה, וכן השוכר טוען בפחות שבשכירות רצית לומר הבינוני מדברך והפועל אומר לא נתכוונתי אלא על הגדול שבשכירות היה לנו לומר המוציא מחברו עליו הראיה ולא יתן לו אלא כפי הפחות לפיכך בא המנהג שבדרך בעלי בתים לפעמים לשכור ביוקר ועל כן היה לו לבעל הבית לפרש דבריו ולא עשה יפסיד.

¹⁷ See, for example, Kiddushin 26a and 25b.

norms treat it as such.¹⁸ Many authorities explain that *situmta* instantiates the general principle that Jewish law incorporates and recognizes prevailing commercial practices as halakhically valid.¹⁹

A dispute recorded in the responsa of Ra'avan captures the novelty of *situmta*. The plaintiff claimed that he had purchased merchandise from the defendant "in accordance with the customs of merchants," by locking the door to the room where the merchandise was stored. The defendant countered that the sale was not valid because the plaintiff did not perform a halakhically recognized *kinyan* (the plaintiff never took possession of the merchandise through *meshikbah*).²⁰ Ra'avan holds for the plaintiff, based on the principle of *situmta*.²¹ A commercially recognized form of acquisition is valid, even if it is not one of the *kinyanim* indigenous to Jewish law.²²

18 See Bava Metzia 74a:

אמר רב פפי משמיה דרבא: האי סיטומתא קניא... באתרא דנהיגו למקני ממש - קנו.

For the interpretation of *situmta* as marking wine barrels, see Rashi Bava Metzia 74a s.v. *situmta*. Other commentators offer different interpretations of the actual commercial practice described by *situmta*. Rosh cites an opinion that *situmta* is a handshake performed between the buyer and seller. See Rosh Bava Metzia 5:72:

ור"ח פי' כדרך שנהגו הסוחרים בגמר המקח תוקע כפו לכף חבירו ובוזה נגמר המקח.

The underlying point remains the same: Jewish law incorporates the recognized commercial method of conveyance.

For a narrower interpretation of *situmta*, see Ritva Bava Metzia 74a, citing R. Pinchas.

19 See, e.g., Rashba Bava Metzia 74a s.v. *u-veduchta*, concluding from the Talmud's discussion of *situmta* that:

ושמענין מינה שהמנהג מבטל ההלכה וכל כיוצא בזה, שכל דבר שבממון על פי המנהג קונין ומקנין הלכך בכל דבר שנהגו התגרים לקנות קונין.

See also Maharshakh, Teshuvot 2:229:

הדבר ידוע דבענייני הקניות והסחורות וכל ענייני משא ומתן שנהגו הסוחרים בעסקיהם, יש לנו ללכת אחרי מנהגיהם, ואפילו בסתם מנהג. ועיקר דין זה נלמד מהא דאמר רב פפא פרק איזהו נשך האי סיטומתא באתרא דרגילי למקני קני.

("it is clear that in matters pertaining to acquisitions, commerce and business deals for which there are norms of commerce, we follow those norms, even if [the norm] is just a default one. This principle is based in the Talmud's ruling regarding *situmta*." See also R. Akiva Eger Choshen Mishpat 3:1.

20 Ra'avan Bava Metzia:

ראובן שטען לשמעון מכרת לי סחורה פלוני ונתת לי המפתח שהסחורה מונחת בו וסגרתי החדר במפתח כדי לקנות הסחורה כמשפט הסוחרים שקונים בסגירת הסחורה, ושמעון משיבו במה קנית סחורתי לא במעות ולא במשיכה ואני רוצה לחזור ב'.

21 Ra'avan op. cit.:

דין זה פסוק מיהא דאמר רב פפא משמיה דרבא האי סיטומתא קניא ומסקנא ובאתרא דנהיגי דקנו ממש קני, ה"נ כיון דרגילו הסוחרים בכך לקנות בהסגר המפתח קנה ראובן.

22 See the general statement in Shulchan Arukh Choshen Mishpat 201:1-2:

אם מנהג המדינה הוא שיקנה הרושם קנין גמור, נקנה המקח ואין אחד מהם יכול לחזור בו, והייב זה ליתן הדמים... וכן כל דבר שנהגו התגרים לקנות בו, כגון על ידי שנותן הלוקח פרוטה למוכר או על ידי שתוקע לו כפו, או במקום שנוהגים הסוחרים שמוסרים לקונה המפתח, וכן כל כיוצא בזה.

4. *Can Established Commercial Norms Invalidate a Kinyan?*

Situmta establishes that commercial norms can validate transfers that would otherwise not be recognized by Jewish law. Does *minbag ha-sochrim* also cut the other way? Suppose the halakhic mode of conveyance (*kinyan*) is contrary to the prevailing commercial norms. Does *minbag ha-sochrim* invalidate a transfer that is otherwise halakhically valid? For example, it is settled Jewish law that one can acquire real property by means of a down payment (*kesef*). But suppose commercial norms require transfers of real property to be in writing.²³ If you attempted to purchase property exclusively through a down payment (*kesef*), would the commercial norms halakhically invalidate the *kesef* transfer?

The Talmud (Kiddushin 26a) discusses exactly this case and rules that custom overrides the halakhically prescribed *kinyan*.²⁴ Rashi (s.v. *lo kanah*) explains that parties doing business in a commercial environment rely on the commercial norms to effectuate the transfer, not on the *kinyan* native to halakhah.²⁵ Thus, the transfer is only effective when it complies with accepted commercial practices. The Shulchan Arukh codifies the Talmud's ruling, and it is applied even more broadly by later *poskim*.²⁶

III. APPLICATIONS OF MINHAG HA-SOCHRIM IN THE POSKIM

Having surveyed the Talmud's statements on the power of *minbag* to override the internal provisions of Jewish monetary law, the present section examines how

²³ E.g., the statute of frauds.

²⁴ Kiddushin 26a:

בכסף מנלן? אמר חזקיה, אמר קרא: שדות בכסף יקנו... אמר רב: לא שנו אלא במקום שאין כותבין את השטר, אבל במקום שכותבין את השטר - לא קנה.

²⁵ Rashi s.v. *lo kanah*:

לא קנה - דכיון דרגילין בהכי לא סמכא דעתיה דלוקח עד דנקיט שטרא ועיקר דעתו לקנות על השטר הוא.

²⁶ See Shulchan Arukh Choshen Mishpat 190:7:

בד"א שקנה בכסף לבדו, במקום שאין דרך לכתוב שטר, אבל במקום שדרך לכתוב שטר, לא קנה עד שיכתוב את השטר. For the wide ranging formulation of later *poskim*, see Yam Shel Shlomo Bava Kamma 5:36:

אם תמצא בזמן הזה מנהג אחר שנהגו עמו לעשות הקניין... פשיטא דבטלו כל הדינים הנ"ל. אלא אזלינן בתר המנהג. כי המנהג מבטל אפילו קניין ממש. כגון באתרא דלא קני בכסף.

See also Iggerot Moshe Choshen Mishpat II:62:

בד"א שקנה בכסף לבדו, במקום שאין דרך לכתוב שטר, אבל במקום שדרך לכתוב שטר, לא קנה עד שיכתוב את השטר. Contemporary halakhic authorities discuss jurisdictions that require a formal registry of land ownership. In such places, some authorities hold that one cannot acquire land by performing a *kinyan* without registering ownership. See Pitchei Choshen Kinyanim 2:8-11:

יש אומרים שבזמננו שכל עיסקת מקרקעין נרשמת בטאבו, ודרך להקפיד על כך, חשוב כמקום שכותבין שטר, וכל שלא נרשם בטאבו אינו קנין גמור, אבל דעת הרבה פוסקים שאין הרישום מעכב.

See also note 14 therein; and see Responsa Divrei Malkiel 4:143 and Responsa Maharsham 2:31.

poskim apply *minbag ha-sochrim* to contemporary commercial practices. The goal of this section is to provide examples that illuminate both the scope of *minbag ha-sochrim* as a halakhic principle as well as its powerful effect on Jewish commerce through incorporating sweeping market regulations such as bankruptcy and rent control as binding under Jewish law.

1. What's Included in a Sale?

The fourth and fifth chapters of Bava Batra contain extensive discussions of what items are included in a sale. The fourth chapter delineates rulings on whether doors and appliances are included in the sale of a house,²⁷ whether air rights are included in the sale of land,²⁸ and whether clothing racks and benches are included in the sale of a bathhouse.²⁹ Similarly, the fifth chapter includes detailed provisions whether a mast and sail are included when you buy a boat,³⁰ whether the sale of a wagon includes the horses that pull it;³¹ whether the sale of a donkey includes its saddle and reins,³² and whether the sale of a tree includes the land that houses it.³³

Yet, despite these internal provisions of Jewish law, *poskim* hold that they are only applicable in the absence of marketplace norms. Wherever there are recognized norms, the content of a sale between two Jewish parties is determined by the marketplace norms, not by the provisions of the fourth and fifth chapters of Bava Batra.³⁴ Put differently, these chapters establish default rules for cases where there is no prevailing commercial norm. But in a jurisdiction governed by clearcut commercial rules, halakhah yields to the norms of the marketplace over its own

²⁷ Mishnah Bava Batra 4:1, 4:3.

²⁸ Ibid 4:4.

²⁹ Ibid 4:6.

³⁰ Ibid 5:1.

³¹ Ibid 5:1.

³² Ibid 5:2.

³³ Ibid 5:4.

³⁴ See the sweeping statement of Rambam, Mekhirah 26:7. After codifying many of the rules of the fourth chapter of Bava Batra, Ramabm writes:

במוכר ולוקח אין כל אלו הדברים וכיוצא בהן מענינים אמורים אלא במקום שאין שם מנהג... אבל במקום שנהגו שהמוכר כך מכר כך הרי זה מכור וסומכין על המנהג.

Similarly, in Mekhirah 26:8:

וזה עיקר גדול בכל דברי משא ומתן והלכין אחר לשון בני אדם באותו המקום ואחר המנהג, אבל מקום שאין ידוע בו מנהג ולא שמות מיוחדין אלא יש קורין כך ויש שקורין כך עושים כמו שפירשו חכמים בפרקים אלו.

See also Mekhirah 17:6 and 18:12. A similar statement appears in Rif, Bava Batra 47a (Alfasi), regarding the specifications in the Talmud for regulating the quality of merchandise:

הני שיעורי כולה באתרא דליכא מנהגא אבל באתרא דאיכא מנהגא עבדינן כמנהגא דקיימא לן בכל כהאי גוונא הכל כמנהג המדינה.

delineated set of internal rules. If you sold your home in Teaneck and are unsure whether the chandelier goes with the house, the answer will generally turn on New Jersey law, not the fourth chapter of Bava Batra.³⁵

2. Situmta: Contracting in Futures, Intangibles, and Speculation

In Section II:3, we saw that *situmta* expands the set of halakhically valid *kinyanim* to include commercially recognized means of conveyance. Many authorities develop *situmta* further. They argue that *situmta* can validate *types* of commercial transactions that would ordinarily be impossible under Jewish law. According to these authorities, *minbag ha-sochrim* doesn't simply bear on how a conveyance is performed. It expands the types of economic relationships recognized by halakhah.

Compared to western legal systems, halakhah significantly limits the types of binding agreements that can be entered into. For example, an individual cannot contract to sell an item that does not yet exist (*davar shelo ba le'olam*) or that is not yet in his possession (*davar she-eno be-reshto*).³⁶ Thus, I cannot sell you the penthouse in the apartment building that is not yet built. Nor can I sell you next year's etrogim crop. Similarly, I cannot sell you merchandise that I do not yet have in inventory, even if I've placed the order from my supplier. Jewish law also invalidates: contracting mere intangibles (*davar she-ein bo mamash*), such as licenses, copyrights, use-rights, and air rights; contracting by verbal promise to execute a *kinyan* at a later date (*kinyan devarim*); and contracts conditioned upon contingencies that undermine the parties' intent to categorically execute the agreement (*asmakhta*).³⁷ In other words, most of the routine contracts that power modern commerce would be invalidated and unenforceable under the internal provisions of Jewish contract law.

However, many authorities argue that *situmta* and *minbag ha-sochrim* will make these contracts valid and enforceable wherever they conform with standard

³⁵ See Iggerot Moshe Choshen Mishpat I.72:

וכן הוא בעניני מכירה מה הוא בכלל המכר שאף שאיכא דינים קבועים בפרקי המכירה בב"ב מה הוא בכלל המכירה מפורש ברמב"ם ס"פ כ"ו ממכירה ובש"ע חו"מ סי' רי"ח סעי' י"ט דהוא רק במקום שאין מנהג אבל במקום שיש מנהג הולכין אחר המנהג.

See also Tosefta Bava Batra 4:8:

המוכר את הראש בבהמה דקה לא מכר את הלחי ואם היה טבח כהן הרי זה מכור, המוכר את הראש בבהמה גסה לא מכר את הרגלים מקום שנהגו למכור הרי אילו מכורות.

And see Rashbam Bava Batra 83b s.v. *lo makbar*.

³⁶ See Shulchan Arukh Choshen Mishpat 209:4-5.

³⁷ See, respectively, Shulchan Arukh Choshen Mishpat 212:1-2, Shulchan Arukh Choshen Mishpat 157:2, and Shulchan Arukh Choshen Mishpat 207. For a general overview, see Pitchei Choshen Kinyanim, chapters 19 and 21.

commercial practice. Tosafot, for example, discuss the problem of *asmakhta* in pre-nuptial agreements (*shiddukhin*). It was common practice in Ashkenaz for the bride and groom to enter into a prenuptial agreement (*tena'im*) imposing a monetary fine upon the side that breaks the engagement. Tosafot observe that such a provision is an *asmakhta* because the parties lack the requisite intent (*gemirat da'at*) to obligate themselves in the fine. Neither party, at the engagement, believes they will break it off. But Tosafot argue that the penalty provision is nevertheless halakhically binding under the principle of *situmta* because agreements containing that provision have become standard practice.³⁸

Other rishonim invoke *situmta* to recognize the sale of future interests that have not yet vested in the seller (*davar shelo ba le-'olam*, *davar she'eno be-resbuto*). For example, on the basis of custom, Rosh validates tax farming contracts, even though they involve the transfer of future interests (i.e., the transfer of tax obligations not yet assessed or collected).³⁹ Similarly, Maharam holds that a promise to hire someone as a *mohel* for an unborn child or to honor him as a *sandek*, which would ordinarily be invalid under the principle of *davar shelo ba le-'olam*, becomes halakhically binding if such a practice is customary.⁴⁰

³⁸ See Tosafot Bava Metzria 66a:

ומנימי אמר אסמכתא לא קניא... אסמכתא אפי' מעכשיו לא קני... ומיהו קנס שעושין בשעת שידוכין מהני אפילו לא קנו בב"ד חשוב כיון שנוהגין בו כל העולם מידי דהוי אסיטומתא דלקמן (דף עד.) דקניא.

See also Or Zarua' Bava Metzria no. 188:

ובפרק זה בורר פירשתי עוד ענין אסמכתא. כתב רבינו שמשון בר אברהם זצ"ל אותם ריישמיניש שנותנין בשעת שידוכין קניא שתקנום העולם. כדאמ' בסוף פרקין שקונין במנהג. וגם כמו כן יש להועיל דיישמיניש בשידוכין כיון שכל העולם נוהגין ליתן אותם בשידוכין.

³⁹ Responsa Rosh 13:21:

ומה שטענו המורשין לבטל החכירות משום דהוי דבר שלא בא לעולם ומשום דאין אדם מקנה לאחר דבר שאינו ברשותו, בזה אני מודה לדבריהם. דמדין תורה אין קנין נתפס בחכירות, דאפי' חוב גמור אין אדם יכול להקנות חובו לאחר אפי' בקנין דמלוא להוצאה ניתנה ואין דבר שיחול עליו הקנין... וכל שכן חכירות אלמעונה דשנה הוי דבר שלא בא לעולם ודבר שאינו ברשותו.

אלא שאני רואה מנהג הארץ כל היום שחוכרין זה מזה ואין בו חזרה. וכן הודו המורשין דבחתמת ההורדה ובמסירתה למוכר מתקיימת החכירות, וכיון שנהגו כן הוי קנין דאין בו חזרה. כדאמרין בפרק איזהו נשך (ע"ד) אמר רב פפי האי סיטומתא קניא, ופירש רש"י ז"ל רושם שרושמי' החנונים על החכיות שלוקחין מבעלי בתים. ורבינו חננאל ז"ל פירש כדרך שנהגו הסוחרים בגמר המקח תוקע כפו לכף חברו ובוה נגמר המקח. ופסק ר"י ז"ל כיצא באיזה דבר שנהגו לגמור המקח כגון במקום שנוהגים שנותן הלוקח מטבע אחד למוכר ובוה נקנה המקח הכל כמנהג המדינה לענין גמר המקח.

⁴⁰ Tashbetz Katan no. 398:

מהר"ם אמר אדם הנודר לחבירו ליתן לו בנו למול או להיות בעל ברית שצריך לקיים לו. ואף על גב דאמרין דאין אדם מקנה דבר שלא בא לעולם בכאן שהוא מנהג בני אדם שנודרין בניהם זה לזה למול או להיות בעל ברית ומקיימין. גם בכאן יש לקיים. כדאיתא בבבא מציעא (דף עד) האי סיטומתא קני פי' רושם של חביות וכו' ובאתרא דנהיגי למקני ממש קנין. כלומר הסיטומתא בשביל שהוא מנהג אף בכאן הואיל ומנהג הוא כמו שפירשתי צריך לקיים.

For an objection to Tashbetz's extension, see R. Yechiel of Paris's gloss on the spot. But see Responsa Chatam Sofer 5:66, who sees no fundamental disagreement between the two authorities.

Authorities also appeal to *situmta* to recognize transactions in intangibles (*davar she-ein bo mamash*). Maharshal discusses the case of a merchant who had purchased an exclusive license from the municipality to sell brandy. Maharshal acknowledges that the license is an intangible asset (*davar she-ein bo mamash*) which cannot be purchased. According to the internal provisions of *choshen mishpat*, then, the merchant could not exclude others from selling brandy in the municipality.⁴¹ However, Maharshal notes that wherever it is customary to recognize such a license, halakhah will validate and enforce it under the principle of *situmta*.⁴² On that basis, Maharshal rules that the merchant's exclusive license is enforceable as a matter of Jewish law.

In summary, many halakhic authorities interpret *situmta* as a sweeping halakhic validation of commercial relationships that would otherwise be impossible under Jewish law. Transactions in futures and intangibles and speculative agreements become halakhically binding when they conform with commercial practice.

3. Rashba's Ruling on Spousal Inheritance

Rashba's ruling on spousal inheritance illustrates the power of *minhag* to displace the internal provisions of halakhah. Rashba was asked to decide the following case. A couple had married in Perpignan, and the wife brought certain assets into the marriage. The wife died shortly thereafter, and a dispute broke out between her father and husband over who would inherit her property. Under Jewish law, a husband inherits the property of his deceased wife.⁴³ But the father argued that the established custom and practice amongst the Jews of Perpignan was to follow

41 Shut Maharshal 36:

דומה קניין זה של יין שרף, שהוא רק רשות, לדבר שאין בו ממש מתרי טעמי חדא דאין בו ממש רק רשות וגרוע יותר מדירה שפסקו בהג"ה מיימוני ר"ח והגאונים שקרוי דבר שאין בו ממש... כ"ש הכא דאין באותו הקניין שום דבר אפי' דירה רק רשות וכח שלא יעשה שום אדם יין שרוף זולתו, ועוד הוא דבר שאין בו ממש שלא בא לעולם עדיין והוא כמו פירות דקל, ועוד ריעותא שמוכרים היין שרף באותו זמן שאינו ברשותם [כי נמכר לאדם אחר עד איזה זמן] וכל דבר שאין ברשות של אדם קרוי דבר שאין בו ממש כמו מה שאירש מאבא כו' כדאיתא פ"ק דב"מ (ט"ז) וכן פסק הרמב"ם וכל הגאונים.

42 Ibid:

ומה שאינו מקח ממש אמרו ג"כ חכמים שהוא קנין גמור בסוף פ' הריבית (ע"ד) גבי סטומתא וכן כתב האשר"י בפ"ק דב"מ וז"ל כי הקניין לפי המנהג כדאמר לקמן גבי סטומתא ומה הביאו ראיה המחברים שיעקר קנינים בין בסחורה הכל לפי המנהג ק"ו מנהג ודת המלך וגדולה מזו כתב במרדכי" פרק המקבל וא"ו פרק הפועלין הטוען תמורת המנהג אפילו במיגו אינו מהימן אלמא דמנהג עיקר לעניין משא ומתן. הילכך הנראה בעיני מי שקונה מכס או כה"ג מן המלך אפי' קודם זמנו הוא קניין גמור והנוטלה ממנו הוא גזל גמור ויוצאת בדיינים.

43 See Bava Batra 111b, Shulchan Arukh Even Ha-Ezer 90:1.

the non-Jewish law, which did not recognize the right of a husband to inherit his wife.⁴⁴

Rashba rules in favor of the father, contrary to the general rule of spousal inheritance in Jewish law. He cites the practice (*minbag*) amongst the Jews of Perpignan to revert the assets to the deceased-wife's father and reasons that any couple who married there without specifying to the contrary implicitly adopts the local custom. Rashba explains that the couple, therefore, at their marriage, implicitly agreed that the wife's assets would revert to her father upon her death.⁴⁵

In this remarkable ruling, Rashba allows *minbag* to displace halakhah's internal rules of spousal inheritance.⁴⁶ As we shall see in the next example, some *poskim* see Rashba's ruling as a precedent for allowing *minbag* to determine how marital property should be divided upon divorce.

4. Equitable Distribution of Marital Property

Married couples accumulate property over the course of their marriage. How should that property be divided upon divorce? Under Jewish law, the wife generally

44 Responsa Rashba 6:254:

שאלת מעשה היה בפירפריניאן בראובן שהשיא את בתו לאה לשמעון והכניס לו עמה סך ממון בנידוניה וילדה לו בת ואח"כ מתה לאה ואחר זמן מתה ג"כ הבת שילדה לו ועכשיו עמד ראובן ותבע בדיני הגויים שיחזיר לו אותו ממון הנדוניה שהכניס לו עם לאה בתו. ואעפ"י שהבעל יורש את אשתו והאב את בתו בדיני ישראל טוען ואומר שאין לחוש לירושת הבעל כיון שהכל יודעי' שהם הולכים בדיני הגויים והרי כל הנושא אשה שם כאילו התנה כן.

45 Ibid:

תשובה כל דבר שבממון תנאו קיים ובאמת אמרו שמתנין בכענין זה וכדאמרי' בירושלמי הני דכתבין אין מיתת בלא בנים תהדיר מוהרא לבי נשא תנאי ממון וקיים. ומוסיף אני על זה שבכ"מ שנהגו להתנות ולעשות כזה תנאי אפי' הנושאים שם סתם גובין מהם אם מתה בלא בנים שכל הנושא סתם ע"ד הנוהג שם בישראל נושא וזהו שקראוהו בפ' המקבל דרישת הדיוט.

Rashba raises the further question of whether it is wrongful for a community to adopt a custom that runs contrary to the internal provisions of Jewish law. Here Rashba replies that it is wrongful only if the *reason* for the community adopting the practice is to imitate gentile practices:

ומ"מ לנהוג כן מפני שהוא משפט גויים באמת נ"ל שאסור לפי שהוא מחקה את הגויים.

If the custom was adopted for other reasons, say economic efficiency or considerations of equity, the practice would not be wrongful. In any event, Rashba appears to hold that the *minbag* would be binding even in the cases where it was wrongful for the community to adopt it. See note 10 in the Machon Yerushalayim edition of the responsum.

46 In another responsum (6:224), Rashba was asked about an aide who had set sail with an emissary of the king. The king's emissary had died mid-journey, causing the mission to be prematurely terminated. The aide sued to be compensated in full, arguing that it was no fault of his own that the mission was terminated and that, as far as he was concerned, he was willing to see the mission through to completion. Rashba ruled that regardless of the internal rules of Jewish commercial law on the matter, the aide is entitled to be fully compensated, since the *minhag ha-sochrim* was to pay full compensation in such cases:

דאפי' לא יהי' הדין נותן כן כיון שמנהג מפרשי ימים כן שם הכל הולך אחר המנהג.

receives a payment for the value of the ketubah, and she recovers certain forms of property that she brought into the marriage or that she acquired during the marriage.⁴⁷ All other marital assets go to the husband. By contrast, most jurisdictions in the United States provide for equitable distribution. Under this rule, the couple's property will be divided "fairly" (equitably) between the husband and wife. The two systems of law sharply diverge when, for example, the husband was the primary earner during the marriage. Equitable distribution will typically distribute a significant portion of the husband's earnings to the wife, whereas Jewish marital law (*even ha-ezer*) would not.

How, then, should a contemporary *beit din* divide marital assets upon divorce? Based on the principle of *minbag ha-sochrim*, some authorities maintain that if the majority of divorced couples in a given community divide their assets upon divorce according to equitable distribution, then equitable distribution constitutes a binding *minbag*—even if it is at odds with how Jewish law would normally distribute marital property.⁴⁸ According to this approach, wherever equitable distribution rises to the level of a *minbag*, a *beit din* should divide marital property according to the principles of equitable distribution and not according to the internal provisions of Jewish marital law (*even ha-ezer*).⁴⁹

47 For an overview, see Pitchei Choshen Yerushah ve-Ishut, chapter 8.

48 See Rabbi Mordechai Willig, "Equitable Distribution and the Enforceability of Choice of Law Clauses in Beit Din", Journal of the Beth Din of America 3:

"the common custom is... binding on parties who implicitly adopt it, and a *beit din* must honor the common custom by dividing the couple's marital property in accordance with the principles of equitable distribution."

See also Rabbi Y. L. Graubart, Chavalim Bene'imah Vol. 5, Even ha-Ezer 34. R. Graubart argues that within jurisdictions that treat marital property as joint property, Jewish law should recognize that property as jointly owned by the couple, based on *minbag*:

אך נראה במדינה זו ש"פ דין הממשלה יש לאשה חלק שוה ברכוש הבעל וכל מי שחותם שטר נישואין יודע זאת ועל זה הוא חותם ברצונו, הרי זה שותפות גמורה... ואין זה ענין לדינא דמלכותא שיש דעות דמהני כמ"ש רמ"א... וכנגד זה ב"ח"מ ס"ס כו... שדינא דמלכותא לאו דינא ושלא כד"ת... דהכא שאני... שכן המנהג והכל נוהגים כן

See also Rabbi Chaim Jachter, "Beit Din, Marital Finances in Light of Contemporary Arrangements," *Grey Matter III*.

49 For further examples of custom modifying the halakhic rules of marital property, see Rif Yevamot 22a (Alfasi), who rules that the husband's responsibility for the wife's *nichsei tzon barzel* (i.e., the documented assets the wife brings into the marriage) is determined by *minbag*, not by the talmudic rule:

מיהו אף על גב דדינא דגמרא הכי לא מחייבין ליה לבעל השתא בכחישה וביתרות דמים דכיון דלא נהגי עלמא הכי כל מאן דמקבל לנכסי צאן ברזל וכתב להו עליה אדעתא דמנהגא הוא דמקבל להו עליה הילכך לא מחייב אלא לפום מנהגא.

5. Maharshakh and R. Akiva Eger on Adjudicating in Accordance with the Customs of Merchants

An additional dimension of *minbag ha-sochrim* emerges from a decision of Maharshakh (d. 1601) regarding a dispute in the sixteenth century between two Venetian Jewish merchants. The core of the dispute was whether litigation over a business deal between the two parties was to be adjudicated according to the internal provisions of *choshen mishpat* or according to the commercial practices of Venetian merchants.

The plaintiff wanted to compel the defendant to adjudication that would be governed by the practices and norms of Venetian merchants. The plaintiff argued that adjudicating in this manner was itself the *minbag ha-sochrim* of the Jewish merchants in Venice. The defendant countered that the adjudication should be governed by the internal provisions of *din Torah*.⁵⁰

The dispute was sent to Maharshakh who ruled (Teshuvot 2:229) in favor of the plaintiff. Maharshakh reasons, based on the principle of *situmta*, that the parties are bound by the customs of the place where they did business, and he argues that *minbag ha-sochrim* includes the entire set of substantive principles and rules of decision that will determine the outcome of the adjudication.⁵¹

Maharshakh further observes that the business deal in question would have been incoherent if interpreted according to Jewish law. Had the parties intended to be bound by the internal provisions of *choshen mishpat*, their actions were irrational and irresponsible—their actions, under Jewish law, offered them no means to protect their investment—“as if they were putting their money on the antlers of a deer and sending it off.”⁵² Thus, Maharshakh concludes that it would be wrong to allow the defendant to compel adjudication according to *din Torah* when the

⁵⁰ Responsa Maharshakh 2:229:

נפל ההפרש בין יורשי ראובן לשמעון, ורוצים לחייבו לעמוד בדין הסוחרים שידונו ביניהם כמנהג ויניציאה, יען כי העסק שעשה ראובן אביהם נ"ע עם שמעון הנז' היה שם, מאן לימא לן שיוכלו לחייבו על כך ושללא יוכל שמעון לטעון כי אם יש להם איזה הפרש ותביעה שידונו על פי התורה כפי מקום התביעה.

⁵¹ Ibid:

כד מעיינן שפיר יראה דקושטא דמלתא היא שיכולים יורשי ראובן לכופ לשמעון לדון בדין הסוחרים על פי מנהג ויניציאה, כיון שנעשה שם העסק... [ו]נצרך עוד טעם לשבח, ונאמר שהדבר ידוע דבענייני הקניות והסחורות וכל ענייני משא ומתן שנהגו הסוחרים בעסקיהם, יש לנו ללכת אחרי מנהגיהם, ואפילו בסתם מנהג. ועיקר דין זה נלמד מהא דאמר רב פפא פרק איזהו נשך [ב"מ ע"א] האי סיטומתא באתרא דרגילי למקני קני.

⁵² Ibid:

הדבר היה ידוע שאם אותו העסק והמאורעות שאיפשר שיארעו באותו העסק היו נידונים בדין תורה, הניח מעותיו על קרן הצבי ויאכל הלה וחדר, ובלי ספק לא היה ראובן עושה עסק עמהם.

parties entered the deal—and the deal only made sense—assuming they would be bound by the customs of Venetian merchants.⁵³ Maharshakh's ruling is cited approvingly by R. Akiva Eger in his glosses to Choshen Mishpat.⁵⁴

Maharshakh's ruling is important because it extends the principle of *minbag ha-sochrim* to include the whole body of procedural and substantive rules that will govern adjudication.⁵⁵ Indeed, R. Akiva Eger's formulation of Maharshakh's ruling suggests that a *minbag ha-sochrim* to adjudicate in front of a panel of (non-Jewish) merchants with commercial expertise who will resolve the dispute according to commercial norms, rather than adjudicating in front of a *beit din* applying Jewish law, is binding.⁵⁶

Whereas our previous examples focused on narrow applications, such as validating the transfer of property or the implied terms of an employment contract, Maharshakh's responsum provides for the entire adjudication to be conducted according to mercantile custom.

⁵³ Ibid:

מאחר שראובן נשא ונתן עם שמעון במקום שנהגו שלא יצטרכו בעסקיהם לדון בדין תורה, שהיה מן הנמנעות לישא וליתן ויבטל העסק והמשא ומתן, היתכן שנאמר שישא ויתן על סמך אותו המנהג והדבר היה ידוע שאם אותו העסק והמאורעות שאיפשר שיארעו באותו העסק היו נידונים בדין תורה, הניח מעותיו על קרן הצבי ויאכל הלה וחדו, ובלי ספק לא היה ראובן עושה עסק עמהם. ואם כן היעלה על הדעת שהיה עושה עסק עמו על סמך אותו המנהג שבאותו מקום, ואחר כך יצא למקום אחר ויפשוט לו את הרגל ויאמר אין רצוני לדון ע"פ המנהג מקום המשא ומתן אלא כפי מקום התביעה, אם כן איפה לא שבקת חיי לכל בריה.

Maharshakh's language implies that the rationale for relying on *minbag ha-sochrim*, at least in the case before him, is one of fairness: It would be unfair to allow the defendant to wiggle out of a partnership agreement that all parties assumed would be governed by *minbag* through asserting, *ex post facto*, that it must be governed by *din Torah*. If this is correct, then at least one underlying theme of *minbag ha-sochrim* is the halakhah's desire to not frustrate the commercial expectations of the parties when their expectations are consistent with universal practice.

⁵⁴ R. Akiva Eger Choshen Mishpat 3:1:

על מחלוקת בין תובע לנתבע א' אומר שרצונו להתדיין בד"ת וא' אומר שאין לו להתדיין אלא בפני אחרים שכך הוא המנהג במקום שנעשה העסק הדין עמו. כיון דבמקום שנעשה העסק יש מנהג להתדיין כפי דרך הסוחר' ולא כפי ד"ת מנהג מבטל הלכה והביא ההיא דאסטימ'.

⁵⁵ This is implied by Maharshakh's order to conduct the adjudication according to *dinei ha-sochrim*. See also the formulation in the Pischei Teshuvah (Choshen Mishpat 3:2):

האחד אומר שאין לו להתדיין רק בדיני סוחרים שכך הוא המנהג במקום שנעשה העסק. הדין עם השני, כיון דבמקום שנעשה העסק יש מנהג להתדיין כפי דרך הסוחרים ולא כפי דין תורה.

⁵⁶ R. Akiva Eger Choshen Mishpat 3:1:

על מחלוקת בין תובע לנתבע א' אומר שרצונו להתדיין בד"ת וא' אומר שאין לו להתדיין אלא בפני אחרים שכך הוא המנהג במקום שנעשה העסק הדין עמו. כיון דבמקום שנעשה העסק יש מנהג להתדיין כפי דרך הסוחר' ולא כפי ד"ת מנהג מבטל הלכה והביא ההיא דאסטימ'.

See also Responsa Tzitz Eliezer 11:93. For further discussion about Jewish law's position on arbitration before non-Jewish arbitrators, see Rabbi Yaakov Feit, "The Prohibition Against Going to Secular Courts," *Journal of the Beth Din of America* 1, p. 41.

Our final two examples will illustrate how *minhag ha-sochrim* can give halakhic force to major commercial regulations like rent control and bankruptcy.

6. R. Moshe Feinstein on Rent Control

Jewish law has few restrictions on a landlord's power to evict a tenant at the end of a lease term or to increase the rent at the end of the term.⁵⁷ By contrast, many cities impose strict regulations on landlords, limiting their ability to raise rent and evict tenants. From the perspective of Jewish law, are Jewish parties bound by halakhah's internal landlord-tenant laws or by the city's regulations?

R. Moshe Feinstein (Iggerot Moshe Choshen Mishpat I, 72) rules that the parties are bound by the city's rent control regulations. R. Moshe declines to analyze the issue through the lens of *dina de-malkhuta dina*, noting that the scope of *dina de-malkhuta*—where and when it applies—is hotly contested.⁵⁸ Instead, R. Moshe bases his decision on the halakhic power of *minhag ha-sochrim*, citing the precedents discussed above of the power of minhag to determine the terms of an employment agreement and the content of a sale.

R. Moshe explains that when a landlord and tenant enter into a lease agreement, they implicitly accept the background commercial rules and customs, even if the custom originated outside of the Jewish community. Unless the parties had agreed to be bound exclusively by Jewish law's internal set of rules for landlord-tenant relationships, they have implicitly accepted the rules and practices of the jurisdiction and are bound by them.⁵⁹

⁵⁷ See Pitchei Choshen Sekhirut Chapter 5:5 and note 10 therein, and Shulchan Arukh Choshen Mishpat 312:8.

⁵⁸ Iggerot Moshe Choshen Mishpat I, 72:

בענין דינא דמלכותא קשה לכתוב בענינים אלו... מטעם שכתב בשו"ת השיב משה שהביא כתר"ה שיש מבוכה רבה בין הפוסקים וסתירות רבות וצריך לזה עיון וזמן רב אולי יעזור ה' להבין לאסוקי להלכה וכ"ש לקטני ערך כמוני.

⁵⁹ Ibid:

והגע עצמך דהא ברור ופשוט שכל אלו הדינים התלויין במנהג המדינה... א"צ שיעשה המנהג ע"פ חכמי תורה וגם אף לא ע"פ יהודים דוקא דאף שהנהיגו זה הנכרים כגון שהם רוב תושבי העיר נמי הוא מדין התורה בסתמא כפי המנהג דאדעתא דמנהג העיר נחשב כהתנו בסתמא.

וכן הוא בעניני מכירה מה הוא בכלל המכר שאף שאיכא דינים קבועים בפרקי המכירה בב"ב מה הוא בכלל המכירה מפורש ברמב"ם ס"פ כ"ו ממכירה ובש"ע חו"מ סי' רי"ח סעי' י"ט דהוא רק במקום שאין מנהג אבל במקום שיש מנהג הולכין אחר המנהג והטעם שבסתמא הוא כהתנו שהוא כהמנהג ולכן אין חלוק מי הם שהנהיגו דאף אם הנכרים שהם רוב תושבי העיר הנהיגו, נידון בדין התורה בסתמא כהמנהג.

7. Bankruptcy

Putting aside the special case of *shemitah*,⁶⁰ the internal provisions of Jewish law do not allow for a debtor to declare bankruptcy to clear himself from financial liability. Under Jewish law, an insolvent debtor—even if he has no assets to his name—always remains liable to repay his debts.⁶¹ In contrast, most western economies provide bankruptcy protections for insolvent debtors, allowing them to declare bankruptcy and become free from their past debt. Does Jewish law incorporate these external bankruptcy provisions?

Some *poskim* write that even if *dina de-malkhuta* cannot recognize federal bankruptcy laws,⁶² *minbag ha-sochrim* can incorporate them wherever bankruptcy has

60 Under the rule of *shemitat kesafim*, the seventh year cancels debts. But note that *shemitah* only cancels loans, not other forms of liabilities, and that *shemitah* can be avoided by *pruzbul*, and that it depends on the biblical force of *shemitah*. See generally, Shulchan Arukh, Choshen Mishpat 67.

61 See, e.g., Pitchei Choshen Halva'ah 2:26:

אפילו כשאין לו עכשיו במה לפרוע אינו נפטר לעולם מלפרוע החוב.

62 For the view that *dina de-malkhuta* cannot recognize bankruptcy laws, see Rabbi Breisch, Responsa Chelkat Yaakov, Choshen Mishpat, no. 32:

פה במדינות אירופא, מנהג ודין הערכאות, באם אחד פושט רגל הנקרא באנקראט או נאחלאס, אם רוב מהבעלי חובות מסכימים לקבל האחוזים מהרכוש שיש לו להלוה, בית המשפט מאשר זאת גם להמיעוט שלא הסכימו ע"ז או לא השיבו כלל ע"ז... [ו]לאחר שקיבל האחוזים שלו, ויותר על המותר ואין לו עוד רשות לתבוע מהלוה אף כשיהי' לו אח"כ רכוש גדול, וזהו האופן דנ"ד. וכמוכן דזה נגד דין תורה שלנו, דכ"ז שלא מחל בפירוש להלוה, פשיטא דעפ"י דיננו יכול לתבוע מהלוה מה שמגיע לו, ובאנו לזה אם בכח"ג שייך דינא דמלכותא דינא.

ונבאר קצת, בדברי הראשונים יש שיטות שונות בדמ"ד - יש מהסוברים דלא אמרינן דדמ"ד רק בדברים השייכים לקרקע - ויש סוברים דדוקא בדברי מסים וארנונות - ויש הסוברים דדוקא בדברים הנוגעים לתועלת המלך - ויש שסוברים שגם בשאר דברים השייכים להנהגת המדינה אמרינן דדמ"ד...

נמצינו למדין, בני"ד לכל השיטות אין לנו להשגיה על דין דערכאות שהוא נגד דין התורה, ולומר שהוא מחל על ממונו, אף שלא מחל לעולם, רק מפני שהערכאות פוסקין כן, אם כן יבטול כל דיני התורה.

One of the more surprising claims in this responsum is the assertion that bankruptcy laws provide no benefit to society and therefore do not qualify for *dina de-malkhuta*:

ואף להרמ"א המרים ביותר הגדר דדמ"ד, דאף משום תקנת בני המדינה אמרינן דדמ"ד, בני"ד איזו תקנת בני המדינה יש בזה לגזול ממונו מפני שאין ללוה לשעה לשלם, אח"כ ישלם וישלם, לא תהיה לו כנושה בשעה שאין לו כתוב בתה"ק, אבל לא שיופטר מפני זה לשלם אף כשיש לו אחר כך.

Economists and legislators generally agree that bankruptcy laws benefit society. These benefits include: incentivizing risk-taking that powers the economy; providing bankrupt individuals a fresh start free from crushing debt, and coordinating collection rights amongst competing creditors seeking to collect from an insolvent debtor.

become standard commercial practice.⁶³ A responsum of Maharshakh offers us a precedent from the 16th century for recognizing bankruptcy through *minhag ha-sochrim*. In Maharshakh's case, an insolvent debtor owed money to several creditors. In the interest of securing at least partial payment, most of the creditors collectively agreed to compromise and to accept only partial payment for the money they were owed. But one creditor held out, insisting that the debtor repay him the entire amount he owed. In effect, most of the creditors agreed on a bankruptcy rule: the debtor would use his remaining assets to pay back a portion of the amount he owed to each creditor and he would be released from the remaining liability—but the arrangement was being held up by one creditor who insisted on receiving full payment.

Maharshakh ruled that the majority of creditors can compel the individual hold-out-creditor to abide by the bankruptcy agreement reached by the majority. Maharshakh reasons that because it is customary for creditors to reach such bankruptcy settlements with insolvent debtors, the recalcitrant creditor is bound by the *minhag ha-sochrim*.⁶⁴ It follows that in a society where bankruptcy practices

63 Pitchei Choshen Halva'ah, Chapter 2 note 63:

יש לדון במה שידוע כיום מושג של פושט רגל, והיינו כשיש לאדם או לחברה חובות שאינו יכול לעמוד בהם, יש שבערכאות על פי תנאים מסוימים מכריזים עליו כפושט רגל, שנכסיו נמסרים לכונס נכסים, ולאחר ריכוז כל נכסיו וכל חובותיו מחלקים לכל נושה חלק מנכסיו לפי אחוזים של כלל הנושים ביחס לכלל הנכסים, ולאחר כמה הגבלות שיש על פושט הרגל מכאן ולהבא, הוא נפטר מלשלם חובותיו, ויש לדון מה דינו עפ"י דין תורה... וכן אם מועיל הפטור עפ"י ערכאות מדינה דמלכותא או מנהג המדינה. ואקדים קצת מדיני פשרה ומחילה הנוגעים לעניננו...

אלא שיש להסתפק בזמננו שענין פשיטת רגל מקבל תוקף עפ"י ערכאות, אם יש לומר בזה דינא דמלכותא, ומשמע מדברי הפוסקים שבכה"ג בדבר שאין ענין למלכות לא שייך דינא דמלכותא לדון על פיהם בין ישראל לחבירו... שאין בזה משום דינא דמלכותא אלא גזילה, וכמ"ש בשו"ת מהרי"ל סימן עה והובא בב"י חר"מ סימן קכ בשם מ"כ.

מיהו אפשר שיש לדון על פי מנהג המדינה... ונראה הטעם דעיקר תוקף מנהג הוא משום שמסתמא על דעת המנהג מתעסקים...

בחדושי רעק"א סימן יב סעיף יג כתב בשם שו"ת משאת משה שבעלי חוב שהסכימו להתפשר עם הלוח ואחד אינו מסכים, כופין אותו להתפשר משום שכן מנהג הסוחרים, ואפילו היה לחייב קצת נכסים והסכימו בעלי החובות להרחיב לו אולי יחון ה' אותו, כופין את שאינו רוצה, ויש להם על מה שיסמוכו מדין סיוטמתא, הרי שגם בזה הולכין אחר המנהג... וכ"ש לגבי חברה בע"מ שכל המושג וכל עניני הכספים של חברה מתנהלים מכח החוק ומנהג המדינה, הרי זה כאילו על דעת כן מתעסקים.

64 Responsa Maharshakh 2:113; R. Akiva Eger Choshen Mishpat 12:13:

בבע"ח שהסכימו לפשר עם הלוח וא' אינו מסכים עמהם מכמי אנפי רואה אני לכוף את הממאן להתפשר כשאר הסוחרים שהם הרוב כי מנהג הסוחרים לכוף את שאינו רוצה לבוא בפשרה ויש להם על מי שיסמוכו מההיא דאסטותא.

are widespread, Jewish law would incorporate such provisions under the doctrine of *minhag ha-sochrim*.⁶⁵

IV. WHAT COUNTS AS A VALID MINHAG?

The previous section surveyed several applications of *minhag ha-sochrim* where halakhah incorporates commercial norms. As we shall see in this section, not every commercial practice constitutes a valid *minhag*. This section considers several criteria raised by *poskim* that bear on whether a commercial practice constitutes a binding *minhag*. The first consideration pertains to how prevalent and widespread the practice is within a community. A second consideration raised by *poskim* is whether the parties need to have knowledge of the custom when they do business before they can be bound by it. Third, *poskim* consider whether a “foolish” or “silly” commercial practice can be rejected as illegitimate. Fourth, does a practice need to gain support from communal leaders for it to count as valid?

A. The “Common and Frequent” Standard

In section I, we noted that *minhag ha-sochrim* differs from *dina de-malkhuta dina*. Whereas *dina de-malkhuta* is binding in virtue of it *being the law*, *minhag ha-sochrim* is binding in virtue of it being a practice adopted and taken up by a community. Thus, for *minhag ha-sochrim* to bind in any given case, the parties must be part of a group (industry, community, etc.) that has taken up the relevant custom. How widespread must the practice be for it to be considered taken up by a community? The Shulchan Arukh adopts the standard that to rise to the level of *minhag*, a practice must be common (שכיח) and frequent (נעשה הרבה פעמים). It is not sufficient that the practice was performed on a couple of occasions.⁶⁶

⁶⁵ Would *minhag ha-sochrim* incorporate statutes of limitations? Jewish law does not impose time limits after which a litigant is barred from bringing their claim. But most secular-law jurisdictions do. Pitchei Choshen (Halva'ah Chapter 2 note 72) suggests that even if *dina de-malkhuta dina* cannot incorporate such laws, *minhag ha-sochrim* would:

ובזמננו קיים בכמה מדינות חוק התיישנות, והיינו שאם עבר זמן מסוים (זמנים שונים לכל סוג חוב) ולא תבעו שוב אינו יכול לתבוע, ומסתבר שמדין תורה אינו נפטר מכח החוק... ובשו"ת מהרש"ם ח"ה סימן מה. ובהשמטות לאורחיה"מ לכלל דינא דמלכותא הביא בשם רב פעלים שאף במקום שאין כח מדינא דמלכותא, כיון שנהגו כך, יש לזה תוקף עפ"י מנהג הסוחרים, וכל אחד סבור וקיבל עליו מנהג הסוחרים, עיין שם.

⁶⁶ Shulchan Arukh Choshen Mishpat 331:1:

ואינו קרוי מנהג אלא דבר השכיח ונעשה הרבה פעמים, אבל דבר שאינו נעשה רק פעם אחת או שני פעמים אינו קרוי מנהג.

See also Terumat Ha-Deshen no. 342, who requires the custom to be “regular and widespread”: צריכים לידע דמנהג קבוע ופשוט הוא.

B. Must the Parties Have Knowledge of the Custom?

Some authorities hold that, in addition to being widespread, the custom must be *known to* the parties when they enter into their business agreement.⁶⁷ Other authorities disagree. They counter that even when the parties are unaware of the custom, they nevertheless do business assuming that the ordinary norms of commerce will apply—whatever those norms may be.⁶⁸

C. “Improper” and “Foolish” Practices

Some *poskim* argue that even when a practice is widespread and frequent, it will not gain halakhic validity if it is “improper” or “foolish”. For example, the Talmud recognizes a concept of *hezek re'iyah*, which requires the construction of a privacy wall between neighbors.⁶⁹ Under this rule, a property owner can compel his neighbor to bear half the costs of the wall. But what happens if the communal practice is to *not* abide by halakhah’s privacy rules (*hezek re'iyah*)—i.e., if the practice is to not build a privacy wall? Can the property owner still compel his neighbor to pay for half of the wall? Or does custom prevail?

Some authorities rule that such a practice is invalid because it is foolish or improper.⁷⁰ Rashba, for example, explains that privacy regulations enshrine values of modesty (*tzeni'ut*) that affect the spiritual status of the entire Jewish people. Therefore, no community is authorized to waive *hezek re'iyah* regulations. Such a communal practice is invalid *ab initio*.⁷¹

See also Responsa Hacham Tzvi (no. 61) who suggests that the minhag needs to be practiced regularly and daily. See Pitchei Choshen Sekhirut 7, n. 17:

בשו"ת חכ"צ (סימן סא) ...משמע ... שכל מנהג צריך להיות שכיה כשכירות פועלים שהוא דבר המצוי בכל יום.

67 See Shakh Choshen Mishpat 42:36:

משמע בפשיטות דהיינו דוקא שידוע שידע מזה.

Rabbi Shlomo Daikhovsky, “Abrogation of Contract between Contractor and Tenant”, *Tebumin* 4 (1983), 378 (Heb.).

68 See, e.g., Pitchei Choshen Sekhirut 7, n. 17:

ונראה שבדיני ממונות ... שאמרו הלך אחר המנהג הוא משום שמסתמא ע"ד מנהג המקום עושים ... ואף על פי שגם אם אינו יודע המנהג אמרינן כן, היינו משום שמסתמא סומך על המנהג.

See also Rabbi Ya'akov Eli'ezerov, “Abrogation of Contract between Contractor and Tenant,” *Tebumin* 4 (1983), 369 (Heb.).

69 See Bava Batra 2a.

70 See Tosafot Bava Batra 2a, Rashba Bava Batra 2a.

71 Responsa Rashba, 2:268:

ומ"מ אם נהגו שלא להקפיד כלל על היוז' ראייה שעל הבתים וחצרות מנהג בטעות הוא ואינו מנהג. שאין מחולק ההקפדה אלא בממונות שאדם רשאי ליתן את שלו או לזיוק בנכסיו. אבל אינו רשאי לפרוק גדרן של ישראל ושלא לנהוג בצניעות ובגורם להסתלק שכינה מלישראל הוא.

Other *poskim* disagree and maintain that *any* custom within the realm of monetary law (*dinei mamonot*) is valid, even if the custom is “improper” or “foolish”.⁷² They even hold that a communal custom to flout the Talmud’s privacy rules of *hezek re’iyah* is valid. In such a community, a neighbor will not be obligated to share the costs of a privacy wall.⁷³

D. An Established Practice Recognized by Scholars

Some *poskim* impose a further limitation on the set of halakhically valid commercial norms. Or Zarua’ suggests that a commercial custom is valid only if it was accepted by the community’s scholars.⁷⁴ According to Or Zarua’, a commercial custom that never received the endorsement of the community’s scholars is not binding under Jewish law.

In theory, Or Zarua’s position might significantly limit *minhag ha-sochrim*. For it is rare for a commercial practice to gain official approval or recognition by Jewish law authorities. But Or Zarua’s position may be less limiting if it is satisfied by the practice having gained the *tacit* or *implicit* approval of communal scholars. For example, if rabbinic authorities have allowed their communities to adopt certain commercial practices, such as entering into contracts about futures and intangibles, declaring bankruptcy, or dividing their marital assets according to equitable distribution, these practices have, in effect, gained tacit approval of communal leaders.⁷⁵ Furthermore, later authorities seem to reject Or Zarua’s position.⁷⁶

72 See, e.g., Or Zarua’ Bava Batra no. 2:

ולא ידענא איזה מנהג שאין סומכין עליו... הדולכין בממון אחר המנהג.

73 See Rabbenu Yonah Bava Batra 2a:

במקום שנהגו כולם שלא לבנות, שאין מקפידין על הזק ראייה, אין מחייבין אותו לבנות.

74 Or Zarua’ Bava Metzia 280:

איתברר לן הדולכין אחר המנהג לענין דיני ממונות... מיהו נראה בעיני וכגון שהוא מנהג קבוע על פי חכמי המקום... וזהו שאמרו מנהג מבטל הלכה מנהג וותיקין. אבל מנהג שאין לו ראייה מן התור, אינו אלא כטועה בשיקול הדעת. הא למדת שאין מנהג חשוב אלא א”כ הנהיגוהו וותיקים וחכמי הדור.

75 It is also not clear whether this approval needs to come from rabbinic scholars or whether it is sufficient to secure the approval of legal and political experts (e.g., lawyers, judges, politicians, economists). If the purpose of securing such approval is to ensure that a practice is fair and to the benefit of society, it may be sufficient to have the approval of legal and political experts. See, for example, the requirement of securing the approval of an *adam chashuv* for communal ordinances enacted by the townspeople (Bava Batra 9a). Ritva there (s.v. *hanhu*) explains that the *adam chashuv* is required to ensure that the enactment is “appropriate” and “not to the detriment of the town”. This explanation is consistent with Ritva’s characterization of the *adam chashuv* as someone who is both wise and holds public office:

איכא אדם חשוב בעיר אין להם רשות לעשות שום תנאי וזולתו... כדי שיראה שיעשו כראוי ושאיין בו הפסד לבני העיר... וכתב הר”ם הלוי ז”ל דאדם חשוב בזה הוא דאית ביה תרתי תלמיד חכם שהוא ממונה פרנס על הצבור.

76 R. Moshe Feinstein (Iggerot Moshe Choshen Mishpat I:72) appears to explicitly reject it: א”צ שיעשה המנהג ע”פ חכמי תורה וגם אף לא ע”פ יהודים דוקא דאף שהנהיגו זה הנכרים כגון שהם רוב תושבי העיר נמי הוא מדין התורה בסתמא כפי המנהג.

To briefly summarize this section, not every commercial practice constitutes a binding *minbag ha-sochrim*. The halakhic validity of a given commercial practice may depend on a) whether it has achieved widespread support, b) the parties' knowledge of the custom and their intent to be bound by it, c) the appropriateness of the practice, and d) whether it has achieved the support of the community's scholars.

V. THE NORMATIVE BASIS OF MINHAG HA-SOCHRIM

This section examines the legal and conceptual basis for halakhah's incorporation of *minbag ha-sochrim*. Sections A and B below develop and analyze two competing grounds for *minbag ha-sochrim*. Section A examines the theory that *minbag ha-sochrim* is grounded in the parties' halakhic power to attach conditions and terms (*tena'im*) to their private agreements. Section B develops an alternative theory that grounds *minbag ha-sochrim* in the political power of a community to self-govern through binding legislation (*rasha'in benei ha-'ir le-basi'a al kitzatan*).

A. Stipulations in Monetary-Civil Law (Tena' Shel Mamon)

Some *poskim* write that *minbag ha-sochrim* is based in the halakhic principle of *kol tenai shel mammon kayam*.⁷⁷ Under this principle, stipulations attached to a private

⁷⁷ For the principle of *kol tenai shel mammon kayam*, see Bava Metzia 94a, Shulchan Arukh Choshen Mishpat 296 and Even Ha-Ezer 38:5.

For an explicit statement of the idea that *minbag ha-sochrim* is grounded in *tenai shel mammon*, see Responsa Maharashdam Choshen Mishpat 380:

כל דבר שבממון יש לו שני פנים במה שיתקיים או באחד מהדרכים הברורים כדון תורתנו הקדושה... או בכל תנאי שיתנה האדם עם חברו ומטע' זה יועילו דרכי ההקנאות שנוהגים הסוחרים אעפ"י שאינם כתובים בתורה ואינם מן הדין אלא שכיון שנהגו כך ה"ל שכל אחד מתנה עם חברו שכשיהיה כך יתקיים הדבר ואדעתא דהכי תינח וסלקי ומטעם זה אמרינן בגמ' פרק איזהו נשך אמר רב פפא משמיה דרבא האי סיומא קניא... שמעינן מהכא שהמנהג מבטל את ההלכה...

בדבר שבממון יכול לשעבד עצמו וליתן משלו שלא מן הדין כמו שאמרו מתנה ש"ח להיות כשואל כענין ערב דמשתעבד אף ע"ג דהוי אסמכתא הרי א"כ ברור שחייב האדם לקיים כל מה שנשתעבד בו אע"פ שימסמא הוא הפך הדין אלא שהתנה כך וא"כ בעיר הנז' כל התגרים כשעושים משאם ומתנם מתחייבים למה שהוא מנהג העיר וסוחריה ואף על פי שלא התנה ה"ל כאלו התנה.

And Responsa Chatam Sofer 2:314:

רבא הודיענו בב"מ ע"ד ע"א שהדין כן מה"ת כל שהנהיגו הסוחרים הו"ל כאלו התנו וכל תנאי שבממון קיים מה"ת... מה שהנהיגו מרצונם הטוב כל תנאי שבממון קיים מה"ת בלי ספק.

See also the formulation of Responsa Rashba 6:254. For an overview of this approach, see Ron Kleinman, *Methods of Acquisition and Commercial Customs in Jewish Law* (Ramat Gan, 2013) pp. 118-124. See also the analysis of R. Yona Reiss, *Kanfei Yonah*, pp. 37-42, which suggests that *minbag ha-sochrim* is grounded in the principle of *kol tenai shel mammon*.

agreement within monetary-civil law are generally binding, even if the stipulation runs contrary to the internal provisions of halakhah. For example, the liability rules of a bailee (*shomer*) are specified with great precision in Jewish law. Yet a bailor and bailee are free to stipulate and agree upon liability rules that run counter to the internal ones specified by Jewish law.⁷⁸

According to this view, the halakhic basis for *minbag ha-sochrim* is that parties to a financial agreement can explicitly stipulate a wide array of provisions (*tena'im*) that would override the default rules of *choshen mishpat* and mimic commercial practices like rent control, bankruptcy, equitable distribution, etc. This is the idea of *kol tenai shel mamon kayam*.

Minbag ha-sochrim simply extends this power to the realm of the implicit. Wherever there are prevailing commercial norms, the parties need not stipulate and agree to these provisions explicitly because they have *implicitly* adopted them by doing business within this commercial context. By entering into an agreement under these background conditions, it is *as if* the parties had explicitly adopted those provisions.⁷⁹

Grounding *minbag ha-sochrim* in the principle of *tenai shel mammon* explains how some commercial practices can become incorporated as implied terms in private agreements. It can explain, for instance, how the creditor is deemed to have agreed not to pursue the debt if the borrower has become bankrupt and why the landlord is deemed to have agreed to not raise the rent over a certain amount after the lease term.

But *tenai shel mammon* may fall short as an explanation for *minbag ha-sochrim*. Consider the fact that *minbag ha-sochrim* can generate novel forms of conveyance: It can generate new forms of *kinyanim* (i.e., *situmta*), and according to many authorities, it can validate transactions in futures and intangibles that would otherwise not be valid in Jewish law.⁸⁰ Now it's doubtful that two parties can originate

78 See Bava Metzia 94a and Shulchan Arukh Choshen Mishpat 296. For the example of a stipulation to restructure a husband's financial obligations to his wife, see Ketubot 56a and Even Ha-Ezer 38:5.

79 See the formulation in Responsa Rashba 6:254:

תשובה כל דבר שבממון תנאו קיים... ומוסיף אני על זה שבכ"מ שנהגו להתנות ולעשות כזה תנאי אפי' הנושאים שם סתם גובין מהם אם מתה בלא בנים שכל הנושא סתם ע"ד הנוהג שם בישראל נושא.

See also Iggerot Moshe Choshen Mishpat I:72:

דאדעתא דמנהג העיר נחשב כהתנו בסתמא... במקום שיש מנהג הולכין אחר המנהג והטעם שבסתמא הוא כהתנו שהוא כהמנהג.

80 See the discussions in Sections II and III above.

a new form of *kinyan* by *private agreement*.⁸¹ Nor can a private agreement between themselves make binding a contract in futures or intangibles. Thus, *minbag ha-sochrim* appears to be different from the concept of an implied stipulation (*tenai*) in a private agreement. The latter is not strong enough to explain the former.

There is another reason to disentangle *minbag ha-sochrim* from the concept of implied conditions to private agreements. If *minbag ha-sochrim* works because it is an implied stipulation within a private agreement, it stands to reason that *minbag ha-sochrim* is limited to business relationships that arise by agreement—by contract. For where there is no agreement, there cannot be implied terms of the agreement. Thus, without an agreement or a contractual relationship, there is no basis to apply *minbag ha-sochrim* as an implied term. Yet, as we shall see below, some *poskim* apply *minbag ha-sochrim* to cases where no antecedent agreement exists between the parties.

These two considerations suggest that the conceptual and legal basis for *minbag ha-sochrim* may lie elsewhere.⁸²

B. Practices of the Townspeople as Equivalent to Takanah Legislation

A different basis for *minbag ha-sochrim* is suggested by commentators who ground *minbag ha-sochrim* in the halakhic power of townspeople to legislate and enact binding *takanot* for monetary matters. The core idea of this approach is that a widespread practice of the townspeople can achieve halakhic status equivalent to a *takanah* (legally binding rabbinic enactment). This interpretation of *minbag ha-sochrim* emerges from combining two well-established halakhic principles: (a) most fundamentally, the principle (Bava Batra 8b) that the townspeople are halakhically empowered to legislate binding *takanot* in the realm of monetary matters (*rasha'in benei ha-ir le-basi'a al kitzatan*), and (b) the principle (Bava Metzia 104a-b) that a widespread commercial practice amongst the townspeople should be treated *as if* it was enacted through formal legislation (*darshinan lashon bedyot*). Combining these two principles, we can conclude that a widespread commercial practice

⁸¹ See, e.g., Ramban Kiddushin 25b:

אפי' פירש לו ואמר קנה במסירה דבר הנקנה במשיכה או בסימטא שאין מסירה קונה בה, אינה קונה, שלא מסרו חכמים דיני ההקנאות למוכרים.

⁸² Another reason to disentangle *minbag ha-sochrim* from *tenai shel mammon* is that the latter principle is introduced in the Mishnah as a dispute between the Tana'im. See Ketubot 56a and Bava Metzia 94a. Yet there is no indication that anyone disputes the normative force of *minbag ha-sochrim*. This suggests that two concepts may be distinct from each other.

within a community can achieve the halakhic force of a *takanah*. Let us examine these two principles, in turn.

1. The Power of the Townspeople to Legislate (Bava Batra 8b)

The Talmud in Bava Batra (8b) and the Tosefta in Bava Metzia (Ch. 11) establish the halakhic power of the townspeople to enact binding legislation for monetary matters within their jurisdiction—even where the substance of their legislation diverges from the internal provisions of Jewish monetary law. Further, the townspeople are authorized to impose sanctions and penalties on members of the community who violate their enactments.

The Talmud and Tosefta offer several examples of binding communal legislation. The townspeople can enact legislation regulating the price of commodities and wages.⁸³ They can declare social ownership over goods that enter the city.⁸⁴ They can mandate insurance policies whereby each member of the town would be obligated to pay a premium to insure mercantile vessels and other means of private transportation.⁸⁵ They can impose fines and penalties on the owners of animals that trespass through fields and vineyards.⁸⁶ And they can regulate business and store hours to ensure fair competition and to distribute consumers between the different establishments.⁸⁷

What is the basis for the townspeople's legislative power? Commentators explain that the townspeople themselves constitute a type of *beit din* with original legislative authority over the monetary affairs of their jurisdiction.⁸⁸ Accordingly,

83 Bava Batra 8b:

רשאים בני העיר להתנות על המדות ועל השערים, ועל שכר פועלים.

84 Tosefta Bava Metzia 11:24:

ורשאים הצמרין והצבעין לומר כל מקח שיבוא לעיר נהא כולנו שותפין בו.

85 Tosefta Bava Metzia 11:25-26:

רשאים החמרין לומר כל מי שתמות חמורו נעמיד לו חמור אחר... רשאים הספנין לומר כל מי שתאבד ספינתו נעמיד לו ספינה אחרת.

86 Tosefta Bava Metzia 11:23:

רשאים בני העיר לומר... כל מי שתרכזה או מי שתרכזה פרתו בין הכרמים יהא נותן כך וכך כל מי שתראה בהמת פלגיה יהא נותן כך וכך.

87 Tosefta Bava Metzia 11:25:

רשאים נחתומין לעשות רגיעה ביניהן.

And see Ramban Bava Batra 9a:

ופי' רגיעה חלוקת הרגעים, לא תמכור ברגעי ולא אמכור ברגעך.

88 See the next note. Ritva (Bava Batra 8a) explicitly connects the power of the townspeople to enact such legislation with the power of a *beit din* to reassign and redefine property rights:

ולהסיע על קיצותם וכו'. פירוש לתת קנס על מי שיעבור דבריהם כדאמרין לקמן בעובדא דטבח', כלומר שיסיעוהו מדין תורה, או ממונו, או מן העיר, ומשום דהפקר ב"ד הפקר כדכתיב וכל אשר לא יבוא לשלשת ימים.

the majority of the townspeople are halakhically authorized to enact monetary law *takanot* over their town.⁸⁹ It follows, then, that if a community were to enact legislation about bankruptcy, rent control, equitable distribution of marital property, what counts as a means of conveyance, etc., those laws would become binding as valid communal *takanot*. But because these commercial practices are usually not legislated formally by the Jewish townspeople of a given community, the crucial question is whether these practices can rise to the level of a *takanah* without

89 See Responsa Rashba 1:729

מה שתקנו הקהל הרשות בידם. דכל דבר שבממון יכולין הקהל להקל על עצמם ולהחמיר... וכ"ש קהל שקבלו ועשו תקנה במה שיראה בעיניהם שהוא מקובל להם. וכל ציבור וציבור במקומן כגאונים וכל ישראל שתקנו כמה תקנות לכל וקיימות לכל ישראל.

Responsa Rashba 5:126:

שורת הדין בהסכמת בני המדינה כל שהרוב מסכימין ומתקנין ומקבלין עליהם אין משגיחין לדברי היחיד שרוב כל העיר ועיר אצל יחידיהם הם כב"ד הגדול אצל כל ישראל. ואם גזרו הם גזירתם קיימת. והעובר ענוש יענש.

Responsa Rashba 4:11:

וכן מה שיגזרו או יסכימו רובו של קהל בצרכי קהלה כיון שעשו כן הרוב אפי' בעל כרחם של יחידים מה שעשו עשוי. ודוקא שעשו הרוב ובדבר שרוב הצבור יכולין לעמוד בו כדאיתא בפרק אין מעמידין. לפי שכל צבור וצבור היחידים כנתונים תחת יד הרבים על פיהם הם צריכין להתנהג בכל עניניהם והם לאנשי עירם ככל ישראל לב"ד הגדול או למלך ובין שיהיו במעמדם ובין שלא יהיו.

Responsa Rivash 399:

יכולין בני העיר לעשו' ביניהם תקנות וגדרין' והסכמות ולקנוס העובר עליהם מדין תורה. דגרסי' בב"ב (ח':) ורשאין בני העיר להתנות על המדות ועל השערים ועל שכר פועלי' ולהסיע על קצותם... ולא זו בלבד אמרו אלא אף בכל ענין שיראה בעיניהם לתקן ולקנוס העובר, הרשות בידם. אלא דלרבותא נקט הני ואף על גב דאינן דברים כוללין לכל בני המדינה אבל הם כנגד מוכרי פירות לבד, או כנגד הפועלים לבד ואית להו פסידא בהכי, אעפ"כ הרשות בידם... ולפי זה עלה בדינו שהקהל יכולים לקנוס בתקנותיהם כפי אשר יראה בעיניהם ואפי' בחוצה לארץ... שהדבר שהסכימו עליו בני העיר הרי הוא כאלו קבלוהו כל א' על עצמו ונתחייבו בו. ועוד כיון שעשו כן מפני שראו שיש גדר ותקנה בדבר, הוה ליה כהודאות והלואות ושליחותיהו קא עבדי. וגובין הקנסות ששמו בתקנתן. ... מה שעושין בני העיר בעירם לענין תקנותיהם הרי הם כבי דינא דרב אמי ורב אסי, ועדיפי מיניהו.

Note that Rivash explicitly sources the sovereign legislative authority of the townspeople and their status as a *beit din* over the community's monetary affairs in the talmudic passage in Bava Batra 8b.

For other examples, see Responsa Maharashdam Choshen Mishpat 447:

דבר פשוט הוא כי מה שעושים הקהל או ראשי הקהל הוא מאושר ומקיים עליהם כדבר הנגזר מפי ב"ד הגדול

Responsa Rashbash 566:

ודין הצבור על קהלם כדין ב"ד לכל העולם... ואליהם כחא דצבורא כחא ב"ד.

Responsa Yachin u-Bo'az 2:20:

ריקפהל תושרו חכ מהל שי רובצה מה כך תונן וידה ויאש המב תונקהל תונקת תושעלו ריקפהל ד"ב דיב תושר שיש ומכ עיסהלו סילעופ תוריש לעו תודמה לעו מירעשה לע תונתהל ריעה ינב ויאשר אינת (ב"ע' ח' פד) ארתבד ק"פב נירמאדמ ושכע אצמנ... ריקפהלו שינעהל ד"ב וילוכיש ומכ ריקפהלו שינעהל מה ויאשר רובצהש הזמ וידמל וניצמנ... ותוציק לע... סדאה ונממ ריקפהלו שינעהל מה מג סדיב תושר שיו ד"ב וידכ סניד רובצהש ודין ב"ד וצבור ששוה בזה שכח הצבור על היחידים כח הנשיא על כל ישראל.

Note that, like Rivash, the Yachin u-Bo'az sources the townspeople's power to legislate and their status as a *beit din* in Bava Batra 8b.

See also Chazon Ish Bava Batra 5:4 s.v. Tosafot:

הא דהולכים אחר המנהג... מפני שהסכמת הציבור הוי כח בית דין.

having been formally enacted by the legislative assembly of Jewish townspeople.⁹⁰ This depends on the principle of *darshinan lashon bedyot*, which is the topic of the next section.

2. Granting Statutory Effect to Common Practice: *Darshinan Lashon Hedyot* (Bava Metzia 104)

The Talmud in Bava Metzia (104a) introduces the principle of *darshinan lashon bedyot* (which roughly translates to: “interpreting the language of commoners”). This principle requires *batei din* to give legal force to the prevalent business practices of the common people. To get better traction on the principle, let’s consider the Talmud’s examples of *darshinan lashon bedyot*.

In one example, the Talmud discusses sharecropping arrangements wherein the landlord grants a tenant the right to use and cultivate his land in exchange for a percentage of the crop yield. In such a relationship, the landlord incurs the risk of the tenant leaving the land fallow (resulting in no compensation for the landlord). To protect against this risk, it was common practice to include a provision requiring the tenant, should he leave the field fallow, to compensate the landlord “as if the field produced a full yield.”⁹¹ The Talmud proceeds to explain that even if the landlord forgot to include such a provision, the principle of *darshinan lashon bedyot* entitles the landlord to receive such compensation as if the provision was explicitly incorporated into the agreement.⁹² *Darshinan lashon bedyot* gives legal recognition to prevalent communal practices.

A second talmudic example of *darshinan lashon bedyot* relates to marriage agreements. A Jewish marriage consists of two stages: legal acquisition (*kiddushin*) and chuppah (*nisu’in*). In talmudic times the two stages occurred twelve months apart. The *kiddushin*, which is performed first, prohibits the wife to other men. The

90 It’s an interesting question whether participation in general elections (not exclusive to the Jewish community) to appoint representatives, who then enact legislation, would count as a type of communal self-legislation under the halakhic principle of *rasha’in benei ha-’ir le-ha-si’a al kitzatan* (Bava Batra 8b). If yes, it might be argued that as long as sufficient members of the Jewish community participate in elections, then ordinary legislation (e.g., Congress, state legislatures, city councils) may carry with it the halakhic force of Bava Batra 8b.

91 Bava Metzia 104a:

רבי מאיר היה דורש לשון הדיוט; דתניא, רבי מאיר אומר: אם אוכיר ולא אעביד אשלם במיטבא.

92 See Tosafot Bava Metzia 104a:

היה דורש לשון הדיוט לשונות שלא תיקנו חכמים לכתוב אלא הדיוטות הורגלו לכותבן היה דורש ואפילו לא כתב כאילו נכתב.

Talmud relates that it was common practice in Alexandria to condition the legal effect of *kiddushin* on the later occurrence of *chuppah*. This way, the *kiddushin* (and therefore the prohibition to other men) did not go into effect until *chuppah* occurred twelve months later. Thus, if the wife were to start a relationship with another man before the *chuppah*, she would not be considered adulterous.

Based on *darshinan lashon bedyot*, Hillel Ha-Zaken ruled that if an Alexandrian woman were to get married without explicitly stipulating such a condition, the *kiddushin* is nevertheless contingent on the *chuppah*, consistent with communal practice. The Talmud relates that Hillel actually exonerated, based on *darshinan lashon bedyot*, Alexandrian women who had started relationships with other men prior to their *chuppah*. Hillel also ruled that the children born from these unions were not *mamzerim*. He reasoned that their *kiddushin* were contingent on the occurrence of *chuppah*, even though the *kiddushin* of the women in question did not contain such a stipulation.⁹³ *Darshinan lashon bedyot* gives legal effect to communal practices, even when the individual parties did not explicitly opt into it.

What legal or philosophical principle underlies *darshinan lashon bedyot*: Why are the parties bound by a common practice if they did not opt into it? Commentators explain that *darshinan lashon bedyot* enshrines the idea that a widespread communal practice (*minhag*) can be halakhically equivalent to a binding rabbinic enactment (*takanah/ tenai beit din*).⁹⁴ The logic of this idea is straightforward. As we saw in the last section, the townspeople are authorized to formally enact communal *takanot* to regulate commerce (*rasha'in benei ha-ir le-bas'ia al kitzatan*). The principle

93 Bava Metzia 104a:

הלל הזקן היה דורש לשון הדיוט; דתנאי: אנשי אלכסנדריא היו מקדשין את נשותיהם, ובשעת כניסתן לחופה באין אחרים וחוטפים אותם מהן, ובקשו חכמים לעשות בניהם ממזרים. אמר להן הלל הזקן: הביאו לי כתובת אמכם. הביאו לו כתובת אמן, ומצא שכתוב בהן לכשתכנסו לחופה הוי לי לאינתן, ולא עשו בניהם ממזרים.

See also Ramban Bava Metzia 104a:

ונראה מכאן דהא דאמרי' דורש לשון הדיוט ה"ק שהיה עושה מנהג ההדיטות עיקר ודן על פיהם... שאע"פ שלא נכתב כמי שנכתב דמי הואיל והוא מנהג פשוט וכולם עושין כן וכל המקבל על דעת כן מקבל והלל הזקן אפי' למי שלא ראה כתובת אמו מכשיר.

94 Responsa Rashba 3:433:

וזה שקראו חכמים לשון הדיוט כלומר ענינים והנהגות שהנהיגו הדיוטות מעצמן בלי שתקנום חכמים ואף שאם לא תקנום בהסכמה... הם כתקנות הקבועות שתקנו חכמים.

Ramban Bava Metzia 104a:

הא דאמרי' דורש לשון הדיוט ה"ק שהיה עושה מנהג ההדיטות עיקר ודן על פיהם כאלו נהגו על פי חכמים, ואף על פי שמעצמן הורגלו לכתוב כן שלא על פי חכמים, היה עושה אותו מנהג כתנאי ב"ד שאע"פ שלא נכתב כמי שנכתב דמי הואיל והוא מנהג פשוט וכולם עושין כן וכל המקבל על דעת כן מקבל... דכל הני דדרשי לשון הדיוט הלכתא נינהו וכתנאי ב"ד נינהו.

See also Chokhmat Sholomo Bava Metzia 104a:

הני לשונות... באתרא דנהגו למיכתב אמרינן דהוי כתקנתא דרבנן.

of *darshinan lashon bedyot* extends this idea ever so slightly. It states that when a practice has taken hold in a community and has gained widespread support, it is as if the community has formally enacted it. After all, the significance of a formal enactment (*takanah/ rasha'in benei ha'ir*) is just that it reflects the community's collective preference to adopt a certain ordinance or rule of conduct. Therefore, if the community has adopted a practice through its *actual* conduct—if that practice has gained widespread support—the practice has effectively been legislated by the community. So there is no fundamental difference between a *takanah* formally enacted by a community and a *minbag* that a community has adopted through its ongoing practice.⁹⁵

This provides us with our second basis for *minbag ha-sochrim*: *Minbag ha-sochrim* is binding because a widespread commercial practice has the force of a communally legislated ordinance (*takanah*).⁹⁶ Locating *minbag ha-sochrim* in the power of the townspeople to legislate *takanot* for monetary matters explains some of the features of *minbag ha-sochrim* that could not be explained by the view that located it in *tena'im* (i.e., *tenai shel mammon*: attaching conditions to private agreements). A communally legislated *takanah* can validate novel methods of conveyance (*kin-yanim*) as well as transfers in intangibles and futures. Moreover, a communally enacted *takanah* can impose commercial norms on the parties even when they lack a contractual relationship. This explains the position of Rashba and other authorities who apply *minbag ha-sochrim* to cases where no antecedent agreement exists between the parties. The view that locates *minbag ha-sochrim* in the power of parties to attach terms to their private agreements (*tenai shel mammon*) cannot explain this phenomenon. The next section discusses Rashba's ruling and its consequences for determining the scope of *minbag ha-sochrim*.

95 By analogy, compare Bruce Ackerman's two tracks of constitutional lawmaking. One through formal, legislative procedures for amendment, which is carried out by elected officials. The other through "higher lawmaking" through the popular actions of the sovereign citizens. See Bruce Ackerman, *We The People*. Alternatively, consider the nature of the common law itself as law based on customary practice.

96 See also Chazon Ish Bava Batra 5:4 s.v. Tosafot:

הא דהולכים אחר המנהג... מפני שהסכמת הציבור היא ככח בית דין.

See also Pitchei Choshen Shutfin 1:14 n. 31, citing Chatam Sofer (Responsa Choshen Mishpat 91) that *minbag ha-sochrim* has the legal effect of a community that stipulated an ordinance.

VI. DISPUTES ARISING FROM NON-CONTRACTUAL RELATIONSHIPS

The previous section outlined two different bases for *minbag ha-sochrim*. The first conceptualizes *minbag ha-sochrim* as *tenai shel mammon*, an implied condition or term attached to a private agreement between two parties. The second conceptualizes *minbag ha-sochrim* as a type of communal *takanah*.

The clearest practical difference between the two theories is whether *minbag ha-sochrim* extends beyond contractual relationships. If *minbag ha-sochrim* is a term/condition in a private agreement, then it is limited to relationships governed by an agreement between the parties. For example, *minbag ha-sochrim* would apply to a partnership, an employment relationship, the sale of goods and services, and similar relationships governed by an initial agreement or meeting of minds between the parties. But it would not extend to claims that arise outside of contractual relationships.

If, however, *minbag ha-sochrim* is grounded in *darshinan lashon bedyot* and conceptualized as equivalent to a communal *takanah*, then *minbag ha-sochrim* should apply outside the domain of contracts as well. It should affect, for example, torts cases and claims of unjust enrichment, wherever those norms have achieved widespread support within the Jewish community.

Indeed, Rashba applies *minbag ha-sochrim* to resolve a dispute that involved no prior agreement or contract between the parties. In Rashba's case, the plaintiff referred his friends to the defendant's store, where they then purchased goods. The plaintiff claimed that he was entitled to a referral fee from the store owner, on the theory that it was "the custom and practice of shopkeepers to pay a referral fee to anyone who brought customers to their shop." The defendant countered that he was not obligated to pay because he never agreed to pay it and never hired the plaintiff.⁹⁷

Rashba rules in favor of the plaintiff. He cites the custom and practice of shopkeepers and explains that under the principle of *darshinan lashon bedyot*, a widespread *minbag* is binding regardless of whether the person opted into it.⁹⁸ Crucially,

⁹⁷ Responsa Rashba 4:125:

שאלת ראובן הביא כותים אוהביו לחנותו של שמעון. וקנו ממנו בגדים. ותבע ראובן את שמעון ליתן לו מנה בשכירותו שכן מנהג בעלי חנויות ליתן שכר למביאי הקונים לחנותם. השיב שמעון שאינו חייב בכלום לפי שלא התנה לו כלום. ואף על פי שנהגו בעלי חנויות. הדין עם מי.

⁹⁸ Ibid:

תשובה הדין עם ראובן התובע. שכל שנהגו בעלי החנויות בכך כל שמביא קונים לחנות סתמן כפירושן שעל דעת כן מתעסק זה במלאכת בעל החנות. ומביא לו ריוח ומשביח מקחו. וכל דברים מה שנהגו בהם הרבים סתם הרי הוא כתנאי מפורש. וכיוצא באלו קראו חכמים דרישת לשון הדיוט. והן המוכרין בפרק המקבל (ק"ד ע"א).

Rashba's case involves no prior agreement between the plaintiff and defendant. There was no antecedent agreement between the parties through which they implicitly incorporated the custom and practice of shopkeepers as a term. The fact that Rashba rules on the basis of *minbag ha-sochrim* suggests that he conceptualizes *minbag ha-sochrim* as a communal ordinance—*takanah* or *tenai beit din*—and not as a term or condition embedded within a private agreement between two parties.

This suggests that *minbag ha-sochrim* may apply to tort cases as well. Consider an automobile accident between two Jewish parties. Should that dispute be governed by the internal tort principles of *chosben mishpat* or by the tort principles of the jurisdiction? According to Rashba's ruling, and the theory that conceptualizes *minbag ha-sochrim* as equivalent to a communal *takanah*, it seems that if the tort principles of the jurisdiction have gained widespread support within the relevant Jewish community, then those principles may be relevant to deciding the dispute. To be sure, the Tosefta's discussion of the townspeople's power to enact communal ordinances (*rasha'in benei ha-ir le-basi'a al kitzatan*) includes examples of tort legislation.⁹⁹

99 See, for example, the Tosefta's case of the townspeople holding a cattle owner liable if his cow trespasses across vineyards (Bava Metzia 11:23):

מי שתרעה פרתו בין הכרמים יהא גותן כך וכך.

Maharik (Responsa no. 8) was asked whether a communal *minbag* to disregard the first born's halakhic right to a double inheritance can be enforced:

באחד שרוצה להפקיע ירושת בן הבכור באמרו כי מנהג מבטל הלכה וכי נהגו בארץ ההיא להשוות הבכור והפשוט וחלק כחלק יטלו.

Maharik attacks the *minbag* on the ground that such a custom is improper and foolish and that it never gained the support of communal leaders (see the discussion above in section iv). If *minbag ha-sochrim* is grounded in an implicit condition attached to a private agreement, there would be no basis to even entertain modifications to the laws of inheritance, since inheritance does not depend on any agreement. The rules of inheritance govern automatically. Thus, to the extent that customs governing inheritance can even be a candidate for *minbag ha-sochrim*, *minbag ha-sochrim* must be grounded in the political powers of a community to legislate rather than in the power of individuals to attach conditions to their private agreements.

Another important difference between the theory that grounds *minbag ha-sochrim* in *tenai shel mammon* and the one that grounds it in *rasha'in benei ha-ir* is whether we would require the parties to know the custom before they can be bound by it (see the discussion above in section iv). If *minbag ha-sochrim* is grounded in communal legislation, then there is no reason to require the parties to have knowledge of the practice, since ordinances are binding whether or not a particular constituent is aware of it (see, e.g., Ramban's *Mishpat Ha-Cherem*). But if *minbag ha-sochrim* is grounded in conditions attached to private agreements, it seems at least reasonable that the parties would have to know what conditions are implicitly attached to the agreement.

VII. MINHAG HA-SOCHRIM AS A PRINCIPLE OF JEWISH LAW

By this point, it should be clear that *minhag ha-sochrim* is a firmly entrenched principle of Jewish law. It appears explicitly in the Mishnah and Talmud, and it implicitly underlies several rulings throughout the Talmud.¹⁰⁰ Furthermore, *minhag ha-sochrim* is consistently embraced by *poskim* throughout the ages who apply it to a wide range of cases.¹⁰¹ Thus, when a *beit din* decides a case based on *minhag ha-sochrim*, that decision is just as much a decision grounded in Torah law as one that appeals to other *choshen mishpat* principles such as *chazakah*, *migo*, and *shevu'a*. Put differently, *minhag ha-sochrim* is itself a provision of *choshen mishpat*, since it is Jewish law that provides for the incorporation of commercial customs, in the same way that it provides for *chazakah*, *migo*, and *shevu'a*. Thus, a *beit din* that fails to apply *minhag ha-sochrim* where it properly governs acts contrary to Jewish law. Such a *beit din* has erred by failing to apply the proper provision of *choshen mishpat* (i.e., *minhag ha-sochrim*) to the case.

Some readers might find it strange that Jewish law should be so amenable to incorporating commercial norms that displace the internal provisions of Jewish law. Bear in mind, however, that this concern is not unique to *minhag ha-sochrim*. As we saw, it is accepted halakhic doctrine that the townspeople are empowered to enact legislation in monetary matters that run contrary to the internal provisions of Jewish law.¹⁰² This parallels the rabbinic authority to enact *takanot* through *hefker beit din* that displace other internal provisions of Jewish law.¹⁰³ It is also well-established that private parties can stipulate contrary to the internal provisions of Jewish law in their monetary agreements.¹⁰⁴

¹⁰⁰ See section II and section V, above.

¹⁰¹ See section III, above.

¹⁰² Bava Batra 8b. See the discussion above, section v(b).

¹⁰³ See, e.g., Yevamot 89b, Gittin 36b. For some examples where *hefker beit din* modifies the internal rules of Jewish monetary law, see Encyclopedia Talmudit, "hefker beit din".

¹⁰⁴ See section v(a), above.

¹⁰⁵ This is one of the important differences between *dina de-malkhuta* and *minhag ha-sochrim*. *Dina de-malkhuta* is binding because it's the law, regardless of whether the particular law has been taken up by the Jewish community. This may explain why halakhah is far more reluctant to incorporate *dina de-malkhuta* than *minhag ha-sochrim*. See above Section I. If *dina de-malkhuta* were always binding as a matter of Jewish law, it might threaten the integrity of the internal principles of *choshen mishpat*, since they would always be displaced by the law of the jurisdiction. By contrast, *minhag ha-sochrim* is only binding when the Jewish community has actively embraced a given practice.

Some might object that if external commercial norms can displace the internal provisions of *chosben mishpat*, then there is hardly any room left for the “normal” halakhic provisions of *chosben mishpat* to apply. One response to this objection is that commercial norms do not automatically displace the provisions of Jewish law. Commercial norms are binding through *minbag ha-sochrim* only where the Jewish community has already adopted those practices.¹⁰⁵ So the set of norms that could displace the internal provisions of *chosben mishpat* is always limited to those that have been taken up by the Jewish community. Moreover, as we saw earlier, *minbag ha-sochrim* may be limited in scope, based on several considerations, including: the propriety of the practice, whether the practice has gained the approval of communal scholars, and the parties’ knowledge of the practice.

It is sometimes objected that it is difficult to make sense of the prohibition against litigating in non-Jewish courts if a *beit din* would anyway decide the case according to commercial norms. There are two responses to this objection. First, whether and to what extent *minbag ha-sochrim* should govern a given case is itself a determination of Jewish law that can only be decided by a Jewish court. Sometimes *minbag ha-sochrim* is not at all relevant to a case, and sometimes it is relevant to only part of the case. But even where the entire case may turn on *minbag ha-sochrim*, that conclusion can only be reached by a *beit din* applying Jewish law to determine that in fact *minbag ha-sochrim* halakhically governs the case at bar.¹⁰⁶

This distinction is implicit in the responsum of Rashba discussed above, section III(3), regarding spousal inheritance. A careful reading of the responsum (6:254) suggests that Rashba affirms the wife’s father’s first claim based on the *practice* of the community in Perpignan (to override spousal inheritance) but rejects his second claim based on *dina de-malkhuta* (to override a father’s right to inherit his daughter). Regarding the latter claim based on *dina de-malkhuta*, Rashba writes:

כל הסומך בזה לומר שמותר משום דינא דמלכותא טועה וגזולן הוא... ואם נאמר כן בטלה ירושת בנו הבכור דכל הנחלות ותירש הבת עם הבנים. ובכלל עוקר כל דיני התורה השלמה ומה לנו לספרי הקודש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי ילמדו את בניהם דיני הגויים ויבנו להם במות טלואות בבית מדרסי הגויים חלילה לא תהיה כזאת בישראל ח”י שמה תחגור התורה עליה שק.

This factual distinction between the two claims in the responsum is supported by the language of the inquiry. The father’s first claim is based on the community’s *practice* to adopt the non-Jewish law:

כיון שהכל יודעי’ שהם הולכים בדיני הגויים והרי כל הנושא אשה שם כאילו התנה כן.

The second claim is based on *dina de-malkhuta dina*, even though the community never adopted it:

ועל ירושת האב בנכסי הבת טוען שהמלך חקק בנימוסי שכל שימות הולד תוך זמן ידוע שיהא מה שיש לו מצד האם ליורשי האם ודינא דמלכותא דינא.

106 And, of course, even where *minbag ha-sochrim* governs the substantive matter of the case, it may not govern the procedural issues of the case.

Second, the prohibition against litigating in non-Jewish courts appears to be less about the outcome of a case and more about the impropriety of Jewish parties subjecting themselves to the *legal authority* of non-Jewish courts—that is, to a legal authority distinct from the Torah.¹⁰⁷ When parties litigate in *beit din* they are subjecting themselves to the legal authority of the Torah. The *dayanim* then determine, as a matter of Jewish law, the extent to which *Jewish law* would incorporate the relevant commercial practices in light of the facts before them. If the *dayanim* determine that *minhag ha-sochrim* is relevant, they apply it as a provision internal to Jewish law. Thus, *minhag ha-sochrim* does not run afoul of the prohibition against litigating in non-Jewish courts.

Halakhah's incorporation of commercial practices through *minhag ha-sochrim* may point to some broader themes of Jewish commercial law. On one level, it may reflect the principle that law should generally not upend the parties' legitimate expectations. If the parties organized their business dealings according to norms that enjoy widespread support, then, to the extent possible, the law should uphold the parties' expectations—even when they diverge from Jewish law's internal provisions. Here *minhag ha-sochrim* can be understood as an equitable principle that protects the legitimate commercial expectations of the parties.¹⁰⁸

On a second level, *minhag ha-sochrim* may reflect halakhah's recognition that commerce often takes place in a marketplace that cuts across different normative communities. People from different legal jurisdictions do business with each other: *Sephardim* do business with *Ashkenazim*, Jews do business with non-Jews. If

107 For an overview of the prohibition against litigating in secular court, see Rabbi Yaacov Feit, "The Prohibition Against Going to Secular Court", *Journal of the Beth Din of America* 1, pp. 30 - 47. For the idea that the prohibition is more about submission to foreign legal authority rather than the substantive outcome of the case, consider the fact that the prohibition applies even when the outcome will be the same. See Rambam Sanhedrin 26:7, Shulchan Arukh Choshen Mishpat 26:1. There are several other indications that support this thesis, which I will develop in a forthcoming article.

See also Responsa Ba'i Chai, Choshen Mishpat 1, no. 158:

דהקפדה אינה אלא לדון בפני עכו"ם מפני שהוא עילוי יראתם אבל אם קבלו לדון כדן ערכאות לפני דייני ישראל אין כאן איסור כל שבעלי דינים מרוצים בכך או התנו או נהגו כך.

108 See Responsa Maharshakh (2:229), discussed above, section III. Maharshakh emphasizes that it would be unfair to allow one party to sue under *din Torah* when the entire business deal was conducted according to local custom which both parties relied upon:

על סמך אותו המנהג והדבר היה ידוע שאם אותו העסק והמאורעות שאיפשר שיארעו באותו העסק היו נידונים בדין תורה, הניח מעותיו על קרן הצבי ויאכל הלה וחדל, ובלי ספק לא היה ראובן עושה עסק עמהם. ואם כן היעלה על הדעת שהיה עושה עסק עמו על סמך אותו המנהג שבאותו מקום, ואחר כך יצא למקום אחר ויפשוט לו את הרגל ויאמר אין רצוני לדון ע"פ המנהג מקום המשא ומתן אלא כפי מקום התביעה [כפי דין תורה], אם כן איפה לא שבקת חיי לכל בריה.

Jewish law did not incorporate marketplace norms, every transaction would be simultaneously subject to multiple systems of law. This would make ordinary marketplace transactions more cumbersome and generate considerable uncertainty about which system of law controlled the deal. *Minbag ha-sochrim* streamlines commerce by allowing the prevailing norms of the marketplace to govern.¹⁰⁹

On a third level, *minbag ha-sochrim* may reflect Jewish law's acknowledgement that commerce is dynamic and ever-changing, and that it would be exceedingly difficult to legislate iron-clad rules to govern all commercial transactions for all time and eternity.¹¹⁰ The marketplace is always in flux: with novel investment vehicles, new types of financial relationships, innovative methods of trading, emerging markets, and novel commodities. Now, Jewish law could engage with the dynamic marketplace by means of rabbinic *takanot*. The Talmud is full of such examples.¹¹¹ But *takanot* require centralized rabbinic institutions and councils, which for chunks of Jewish history are either non-existent altogether or unavailable at the local level at which commercial practices vary. One way of thinking about *minbag ha-sochrim* is that it serves as an automatic mechanism, built into Jewish law, through which halakhah engages with a dynamic marketplace.¹¹²

109 For the idea that *minbag ha-sochrim* serves to facilitate efficient commerce, see Responsa Ba'i Chai, Choshen Mishpat I, no. 158:

משא ומתן שאני דיש מקומות שאם יתנהגו על פי דין התורה הגמור לא יהיה להם קיום והעמדה ויתבטל המשא ומתן ולכך כל שאינם דנין לפני הערכאות אלא לנהוג שיתנהגו הם בעצמם בנימוסי העכו"ם כדי שיתקיים המשא והמתן מנהגם מנהג מפני ישובה של עיר.

110 For the idea that it would be difficult for the Torah to legislate commercial and social rules for all societies across time, see Ramban Devarim 6:18:

אי אפשר להזכיר בתורה כל הנהגות האדם עם שכניו ורעיו וכל משאו ומתנו ותקוני הישוב והמדינות כלם, אבל אחרי שהזכיר מהם הרבה... חזר לומר בדרך כלל שיעשה הטוב והישר בכל דבר.

Maggid Mishneh Shekheirim 14:

תורתנו התמימה נתנה בתקון מדות האדם ובהנהגתו בעולם כללים באמירת קדושים תהיו... וכן אמרה ועשית הישר והטוב והכוונה שיתנהג בהנהגה טובה וישרה עם בני אדם ולא היה מן הראוי בכל זה לצוות פרטים לפי שמצות התורה הם בכל עת ובכל זמן ובכל ענין ובהכרח חייב לעשות כן ומדות האדם והנהגתו מתחלפת לפי הזמן והאיש והחכמים ז"ל כתבו קצת פרטים מועילים נופלים תחת כללים אלו.

111 Consider, for example, the rabbinic enactment of *ma'amad shelashtan* (Gittin 13b), which provided a mechanism for selling and transferring debts. Rashbam explains (Bava Batra 144a s.v. *kanah*) that the rabbinic enactment formally recognized the common practice so that debts could be transferred without witnesses or *kinyanim*:

כך תקנו חכמים לפי שהדבר תדיר הוא בין הבריות ולא הזיקו חכמים להקנות בקנין ובעדים.

112 *Minbag ha-sochrim* can also be thought of as a mechanism through which halakhah can apply norms to cases that lack clear-cut halakhic rules. Suppose that it's desirable for there to be decisive rules governing all types of commercial relationships. Suppose further that certain commercial relationships are under-determined by the halakhic rules—that is, suppose that there is no clear halakhic rule that would govern some cases. *Minbag ha-sochrim* could serve as a gap-filling principle that extends some set of norms to cases that would otherwise lie in the

SUMMARY

This Article has argued that *minbag ha-sochrim* is a fundamental principle of Jewish commercial law. Under the right conditions, *minbag ha-sochrim* recognizes the prevalent commercial practices of the marketplace as binding in Jewish law. Section I introduced *minbag ha-sochrim* as a principle of incorporation and showed how it differs from *dina de-malkhuta dina*. Section II established the talmudic basis for *minbag ha-sochrim*, demonstrating that it is firmly rooted in the talmudic case law. Section III surveyed applications of *minbag ha-sochrim* in the poskim. Section IV offered several criteria that may limit the scope of *minbag ha-sochrim*, including the prevalence of the practice, the propriety of the practice, the parties' knowledge of the practice, and its endorsement by communal scholars. Section V explored two different conceptual bases for the normativity of *minbag ha-sochrim*: the power to attach conditions to private commercial agreements and the power of the townspeople to enact commercial legislation. Section VI discussed an important practical difference between these two bases: whether *minbag ha-sochrim* can be applied to disputes that arise outside of contracts, such as torts and claims of unjust enrichment. Section VII argued that *minbag ha-sochrim* is itself an internal provision of Jewish law. The section also responded to several concerns that arise in light of Jewish law incorporating commercial norms. Finally, the section pointed to several themes that may underlie *minbag ha-sochrim*. These include: giving legal recognition to the parties' commercial expectations, facilitating commerce between parties subject to different or multiple legal jurisdictions, and allowing Jewish law to engage with the realities of modern commerce.

interstices of halakhic-legal space. On this view, *minbag ha-sochrim* can be viewed as one method for filling in legal gaps. See the formulation in Responsa Rabad no. 131:

וכן אני אומר בכל דבר שאין דינו מפורש אצלנו ואין לנו בו מנהג ידוע שהולכים בו אחר מנהגות שלהם.

See also Rabad's gloss to *Hilkhot Malveh ve-Loveh* 25:10, where he suggests that the case discussed by Rambam should be decided by local custom, rather than by Rambam's suggestion. I am indebted to Jesse Lempel for fruitful discussion about the significance of Rabad's position.

SECTION II:
Beth Din Procedure

ZABLA Panels and Courts

Rabbi Yona Reiss¹

ZABLA ARBITRATION PANELS – THE IDEAL AND THE REAL

Much has been written about the potential benefits and pitfalls of convening an ad hoc “ZABLA” panel whereby each litigant chooses one *dayan* (Jewish law judge), known as a *borer* (rabbinic arbitrator) and the two *borerim* in turn select a third *dayan*, typically referred to as the *shalish* (literally, “third”), to round out the rabbinic panel.² In the time of the Talmud, a ZABLA was considered an effective mechanism for dispute resolution since each party would be comfortable with at least one of the judges on the panel, thus ensuring an acceptable decision.³

In one sense, a ZABLA is not so different from a standard model of arbitration routinely employed by the American Arbitration Association, whereby parties agree that each party will select a preferred arbitrator (either from a pool of arbitrators of a particular arbitral organization or otherwise), and then have the two selected arbitrators choose a third impartial arbitrator to round out the panel.⁴

However, as pointed out by Jewish law commentators throughout the generations, including the Rosh⁵ and the Pischei Teshuva⁶, ZABLAs have unfortunately become subject to various abuses and violations of Jewish law, including (a) the selection of *borerim* who essentially serve as zealous advocates on behalf of the party who selected them—as opposed to impartial jurists—in violation of the Jewish law mandate to judge a case impartially;⁷ (b) ex-parte conversations between one of

1 Rabbi Reiss is the Av Beth Din of the CRC, a Rosh Yeshiva at RIETS, and the Sgan Av Beth Din of the Beth Din of America.

2 See, e.g., Rabbi Shlomo Weissmann, *What to Do When You and Your Adversary Can't Agree On a Beit Din*, JEWISHPRUDENCE (January 2020), available at <https://bethdin.org/what-to-do-when-you-and-your-adversary-cant-agree-on-a-beit-din/>; Rabbi Itamar Rosensweig, *Published Procedural Letter: ZABLA Panels*, JEWISHPRUDENCE (February 2020), available at <https://bethdin.org/published-procedural-letter-zabla-panels/>.

3 See *Choshen Mishpat* 13:1 (R. Yosef Karo, 1488-1575).

4 See American Arbitration Association, *Streamlined Three-Arbitrator Panel Option*. Published in 2017, this option seeks to reduce costs by restricting the participation of three arbitrators to the final adjudication of the case, as opposed to the procedural motions earlier in the case, which may be handled by a single arbitrator.

5 *Rosh*, *Sanbedrin* 3:2 (Rabbeinu Asher ben Yechiel, 1250-1327) (raising the first concern discussed in the text).

6 *Pischei Teshuva*, *Choshen Mishpat* 13:3 (R. Tzvi Hirsh Eisenstadt, 1815-1868) (raising all three concerns discussed in the text).

7 See *Tur*, *Choshen Mishpat* 13 (Rabbi Jacob ben Asher, 1269-1343), who also raises this issue in the name of his father (the Rosh), and then cites the Ramah (R. Meir Abulafia, 1170-1244) as

the litigants and the arbitrator whom he or she selected, in violation of the Jewish law mandate for a judge not to hear the claims of one side without the other side present;⁸ and (c) payments rendered “on the side” by the litigant to the arbitrator whom he or she has selected, which violate the prohibition of accepting a bribe to adjudicate a case.⁹ It is a common complaint of contemporary authorities that many ZABLA panels today are conducted in a fashion that implicate the concerns raised by these earlier commentators.

Nonetheless, ZABLA is not an inherently pernicious dispute resolution device. If done correctly, it can result in what the Talmud describes as “*din emes l’amito*” – the most just and judicious decision.¹⁰ The Rosh notes that, notwithstanding the requirement of impartiality, it is perfectly legitimate for a *borer* to ensure that any possible Jewish law arguments that may support the side who selected him be fully explored and considered.¹¹ So long as the *borer* maintains the objectivity to decide against that side even after exploring all such arguments, the process is sound.

In addition, when parties are unable to agree upon a particular Beth Din institution or panel either in a pre-dispute arbitration clause in a contract or when adjudicating the case (if there is no pre-dispute arbitration clause), the ZABLA mechanism provides a default option for such parties to submit their dispute for resolution under Beth Din auspices, pursuant to Jewish law. Indeed, Jewish law authorities note that if there is no officially accepted Beth Din institution in a particular city, either party to a dispute has the right to insist upon convening a ZABLA panel that is conducted according to the pertinent precepts of Jewish law.¹²

expressing a dissenting view which he repudiates. However, the Beis Yosef (R. Yosef Karo) writes that the Ramah could also be read in a fashion which is consistent with the view of the Rosh.

⁸ See *Choshen Mishpat* 17:5. Although the *Aruch Hasbulchan*, *Choshen Mishpat* 13:4 (R. Yechiel Michel Epstein, 1829-1908), citing this practice, suggests that nowadays when ex-parte communications have become commonplace in ZABLA proceedings, there may be an implied waiver by both parties to permit them, such waiver is certainly not effective when one of the parties does not agree to it. In any event, a format in contravention of strict Jewish law is clearly not ideal. See Rabbi Mordechai Willig, *Ha’arot be-Reish Perek Zeh Borer*, *Beit Yitzchak* 36 (2004), 17–21, available at <https://www.yutorah.org/lectures/lecture.cfm/727296/rabbi-mordechai-i-willig> בורר/הערות-בריש-פרק-זה.

⁹ See *Pischei Teshuva*, *supra* note 6, and the extensive discussion in Rabbi Willig’s article, *supra* note 8, in which he notes that paying a *borer* for hours devoted to ex parte consultation would be particularly problematic.

¹⁰ *Sanhedrin* 23a.

¹¹ *Rosh*, *supra* note 5.

¹² See, e.g., *Pischei Teshuva*, *Choshen Mishpat* 2:2; *Igros Moshe*, *Choshen Mishpat* 2:3 (R. Moshe Feinstein, 1895-1986). Alternatively, if each party prefers a different Beth Din in the city, the two rabbinical courts can convene together a joint tribunal, which works as an alternative form of

ENSURING A PROPER ZABLA PROCESS

Nowadays, the best way for parties to ensure a legitimate ZABLA panel is to submit a dispute to the adjudication of a respected Beth Din, and to stipulate that each party will have the right to select one of the recognized *dayanim* on the roster of that Beth Din, and that the two *dayanim* will then sit with a third recognized *dayan* from that Beth Din. Alternatively, if the parties cannot agree upon a Beth Din to oversee the process, and each party prefers a different Beth Din, the parties can arrange for each Beth Din of their choosing to provide a borer, and for the two *borerim* to select the third *dayan* (the *shalish*), who will also be from a respected Beth Din.

In either of these configurations (namely, a ZABLA confined to recognized *dayanim* of a particular Beth Din, or two trusted *Batei Din* choosing the *borerim* from their own regular roster of *dayanim*), the chosen *borerim* can presumably be trusted to comply with the usual laws applicable to those who sit as a *dayan* for that Beth Din, including the requirement to be impartial, untainted and not have a conflict of interest. Nevertheless, the best way to avoid the vagaries of contemporary ZABLA proceedings, which typically do not operate under the aegis of an established Beth Din, is for the parties to agree upon a mutually respected Beth Din to adjudicate their dispute in an impartial and objective fashion.

It should also be noted that although ZABLA does require the impartiality of all three arbitrators, a *borer* is not disqualified by virtue of being an “*obeiv*,” a casual friend of the party who has selected him, unlike in a regular Beth Din proceeding. While an “*obeiv gamur*,” a really good friend, would be disqualified, as would a person with a genuine conflict of interest, a *borer* could be a person who has a generally favorable sense of the person who has selected him.¹³ Nonetheless, as noted by the Rosh,¹⁴ it would be improper for a *borer* to act as a zealous advocate on behalf of one side. It is for this reason that the Beth Din of America does not require one side to participate in a ZABLA when the other side has chosen someone who

a ZABLA panel. See *Nesivos Hamishpat (Biurim)*, *Choshen Mishpat* 14:3. See also Section II, *infra*.

¹³ *Rema*, *Choshen Mishpat* 7:7 (R. Moshe Isserles, 1530-1572).

¹⁴ *Rosh*, *supra* note 5.

typically serves as a *to'en* (a rabbinic advocate), since it can be presumed that the *borer* will serve as an advocate rather than as a neutral arbitrator.¹⁵

DRAFTING AN EFFECTIVE ZABLA PROVISION – AVOIDING THE *PAL V. PAL* PROBLEM

A sample ZABLA provision in a contract reads as follows:

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration by a Beth Din (rabbinical arbitration panel) panel, consisting of a first *dayan* (arbitrator) appointed by the claimant, a second *dayan* appointed by the respondent, and a third *dayan* appointed by the first two *dayanim* (arbitrators) selected by the parties, and judgment upon the award rendered by such Beth Din panel may be entered in any secular court having jurisdiction thereof. Within two (2) weeks after the initial notice has been sent by claimant appointing the first *dayan*, the respondent shall submit the name of the second *dayan*, and these two *dayanim* shall select the third *dayan* within thirty (30) days thereafter. The parties shall present their case before these three *dayanim*, constituting the Beth Din panel, within fifteen (15) days after the appointment of the Beth Din panel, and the Beth Din panel shall render a decision on the dispute within thirty (30) days after the hearing. Any selection of *dayanim* pursuant to this provision shall be in writing with notice to the other party and to the relevant arbitrators who have been selected at the time of any such notice, and shall include a citation of this provision. Unless otherwise agreed in writing by the parties, the internal rules and procedures of such Beth Din panel, which shall be consistent with the procedural requirements of the [State] arbitration statutes, shall be determined by the third *dayan*. In no event shall any dispute between the parties arising out of or relating to this contract be subject to any dispute resolution procedure except as explicitly set forth in this section, including, without limitation, the filing of any action, complaint or proceeding in any federal, state or local court.”

This standard language, although very extensive, may not always be sufficient to ensure enforceability of the provision. One of the challenges of convening a

¹⁵ See also *Pischei Teshuva*, *supra* note 6, who also quotes his ancestor the *Panim Meiros* as recommending that communities establish a rule against having even a casual friend (*obeiv*) as a *borer* based on similar considerations.

ZABLA panel is that the two *borerim* cannot always agree on the identity of the *shalish*, the third *dayan*. In addition, one of the sides may stall on the selection of a *borer*. When the parties have already entered into an agreement, such as the one described above, in which they have agreed to a ZABLA type process, the question arises as to the degree to which a court will become involved in ensuring the enforcement of the arbitration provision.

Typically, when the parties have selected a clearly defined Beth Din, such as the Beth Din of America, to adjudicate their dispute, a court will in fact order arbitration before that Beth Din.¹⁶ However, in the case of a ZABLA, convening the panel of *dayanim* depends upon the selection of specific individuals. With respect to a secular arbitration panel, a court will fill in the missing arbitrator when the parties are unable or unwilling to do so.¹⁷ But in the context of a rabbinical tribunal, it is questionable whether a court may be actively involved in selecting specific *dayanim*, especially when the parties have not agreed upon even an existing roster of potential *dayanim*.

Although one could argue that a court would simply be enforcing the agreement of the parties, the New York appellate court (Second Department) in a majority decision in *Pal v. Pal*¹⁸ ruled that a court has “no authority” to “convene a rabbinical tribunal,” and accordingly struck down a lower court order to appoint a specific religious court judge to sit on a ZABLA panel when the husband had failed to select a *borer* for a proceeding with respect to the wife’s request for a *get* (Jewish divorce). Thus, at least under the *Pal v. Pal* decision in New York, one of the pitfalls of the ZABLA process is that the ability to enforce the ZABLA provision depends very much on the good faith of the parties in convening the ZABLA panel in the first place.

Still, *Pal v. Pal* may not be dispositive. The New York court (First Department) in *Davis v. Melnicke*¹⁹ held, based on CPLR §7504, that when parties had entered into a contract stipulating that any dispute would be subject to a resolution through

¹⁶ See *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983); *Friedman v. Friedman*, 34 A.D.3d 418 (N.Y. App. Div. 2d Dept. 2006).

¹⁷ See NY CPLR §7504 (“Court appointment of arbitrator”) which states: “If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.”

¹⁸ *Pal v. Pal*, 45 A.D.2d 738 (N.Y. App. Div. 2d Dept. 1974).

¹⁹ *Davis v. Melnicke*, 2005 N.Y. Slip Op 30407 (N.Y. Sup. Ct. 2005).

ZABLA,²⁰ and each of the parties had selected a rabbinic arbitrator, but the two arbitrators could not agree on a third rabbinic arbitrator, the court had the power to appoint the third rabbinic arbitrator. Although this lower court decision was not officially published, the court decision was subsequently upheld in a published decision by the appellate court in the case, which rejected the other party's argument that the court's actions constituted impermissible entanglement with religion "since no doctrinal issue was decided by the court and no interference with religious authority will result."²¹

It is difficult to predict whether a court would choose to follow the holding in *Pal v. Pal* or *Davis v. Melnicke* (although it may depend on whether the court is situated in the First Department or the Second Department of the New York court system).²²

Additionally, it should go without saying that even if a court would determine that it is able as a matter of law to appoint a third arbitrator, there is a halakhic concern that a court-appointed arbitrator may not satisfy the prerequisites of Jewish law in terms of possessing the requisite credentials to serve as a *dayan*.²³

Accordingly, it would seem prudent for parties to include a clause (filling in the blanks below, as appropriate) in the ZABLA provision stating something like the following:

"in the event that one party fails to choose a *dayan* within the specified time, the parties agree that the Beth Din of [], or Rabbi [], shall be empowered to appoint the *dayan* on behalf of such party. Similarly, if the two *dayanim* are not able to select a third *dayan* within the time specified herein, the Beth Din of [] or Rabbi [] shall be empowered to select the third *dayan* in order to ensure the adjudication of the dispute pursuant to this provision."

²⁰ While the parties' contract did not specifically utilize the term ZABLA, the terms of the contractual clause in question were clearly those of a ZABLA.

²¹ *Davis v. Melnicke*, 25 A.D.3d 503 (NY App. Div. 1st Dept. 2006).

²² Another possible distinction may be based on the fact that the *Pal* court dealt with a dispute about a *get* matter, which would appear to be a more rabbinical type of determination on its face, while the *Davis* court dealt with a commercial dispute. However, given the fact that the appellate court in *David* relied upon the *Avitzur* decision, *supra* note 16, which dealt with the enforcement of an arbitration provision to adjudicate a *get* dispute, it would not appear that this distinction accounts for the conflicting decisions in these cases.

²³ See *Rema, Choshen Mishpat* 3:4.

Such a clause would likely be enforceable even under the *Pal v. Pal* decision, because the court would not be choosing a *dayan* to serve on the panel but simply empowering someone else to make that choice in accordance with the parties' own agreement.²⁴ Furthermore, since the selection of the third arbitrator would be made by a Rabbi or Beth Din authorized by the parties, it would more clearly satisfy the requirements of Jewish law.

IV. CASES OF COURT INTERVENTION IN CONVENING RABBINIC PANELS

Courts may also draw a distinction between the appointment by the court of an individual rabbinic arbitrator, as in the case of *Pal v. Pal*, and the ruling by a court that the parties submit to an unspecified Beth Din tribunal, including a ZABLA tribunal, based on a contract between the parties which stipulates that the parties submit any dispute to a Beth Din, but does not specify the Beth Din.

In one such case, where a synagogue's bylaws specified that any dispute relating to the internal affairs of the synagogue be adjudicated before "a Beth Din of Orthodox Rabbis," the District of Columbia Court of Appeals ruled²⁵ that one party to the dispute could compel the other party to appear before "a" Beth Din to resolve the dispute, even though the contract did not identify a specific Beth Din. The Court concluded that the term "Beth Din" was sufficiently clear and well-known to the parties, as set forth in the synagogue bylaws, that enforcement of this provision was simply an application of "neutral principles of law" that did not necessitate an ecclesiastical determination that would run afoul of Establishment Clause constitutional considerations. This decision did not implicate the holding in the *Pal v. Pal* case, because the court did not directly convene the rabbinical tribunal.

In an even more sweeping decision, a New York appellate court recently ruled in *In re Silberman v. Farkas*²⁶ that when parties had stipulated in their partnership agreement that they would arbitrate any disputes between them "before a

²⁴ It is noteworthy that in the *Pal* case, as noted by Judge Martuscello in his lengthy dissent, the parties' own contractual stipulation gave authority to the court to appoint a rabbinic arbitrator in the event that the parties could not reach an agreement on their own, and yet even this provision was struck down by the court (the *Davis* case also contained such a provision). However, the concern about a court not convening a rabbinical tribunal would not appear to be pertinent when a third party is empowered to make the appointment.

²⁵ *Mesbel v. Ohev Sholom*, 869 A.2d 243 (D.C. 2005).

²⁶ *In re Silberman v. Farkas*, 114 N.Y.S.3d 407 (N.Y. App. Div. 2d Dept. 2020).

Rabbinical court within the Jewish community,” and then were unable to agree upon a particular rabbinical court, the lower court had erred in directing them to arbitrate their dispute in front of the American Arbitration Association. Rather, the court, pursuant to NY CPLR §7504, remitted the matter to the lower court “to appoint a rabbinical court as the arbitrator of the parties’ dispute if the parties cannot agree to the selection of an arbitrator.”²⁷

Finally, the court in *Tal Tours v. Goldstein*²⁸ ruled that the defendant’s stated wish to submit to a ZABLA²⁹ pursuant to a summons by the Beth Din of America, constituted a valid option under Section 2 of the rules and procedures of the Beth Din.³⁰ Therefore, the court concluded that the party’s verbal agreement before the court “to resolve this matter through proceedings under the auspices of the BDA” must be understood in that spirit. Accordingly, the court ruled that the defendant was not obligated to submit to the jurisdiction of the Beth Din of America per se, but rather to a ZABLA proceeding pursuant to the rules and procedures of the Beth Din of America, according to which the plaintiff was obligated to select a *dayan* within a thirty-day period, after which the *dayan* selected by the plaintiff and the *dayan* previously selected by the defendant would designate the third *dayan*.

V. OTHER ZABLA ISSUES

Even when a Beth Din institution is tasked with convening a ZABLA, there are various areas of dispute from the perspective of Jewish law regarding the rules of doing so. One point of contention is whether the parties need to consent to the choice of the *shalish*, or whether the choice of this third *dayan* is solely at the discretion of the two *borerim*. According to the letter of Jewish law, the *shalish* can be

²⁷ *In re Silberman v. Farkas*, 114 N.Y.S.3d 407 (N.Y. App. Div. 2d Dept. 2020).

²⁸ *Tal Tours v. Goldstein*, 2005 NY Slip Op 51626 (Sup. Ct., Nassau County).

²⁹ The court actually employed the term “*Zebila*,” consistent with the spelling used in the text of the Rules and Procedures of the Beth Din of America.

³⁰ Section 2 of the Beth Din of America’s Rules and Procedures states, in relevant part, “[s]hould a person receiving an invitation (*hazmana*) not wish to participate in these proceedings, and wishes to avoid the issuance of a *shtar seruv* (see paragraph [i]) one of three responses must be forthcoming from that party: (1) That party wishes to proceed to arbitration in an alternative bet din recognized by the Av Beth Din and this case is not one in which the Beth Din of America was the pre-agreed forum for dispute resolution by the parties; (2) That party wishes to resolve the dispute through the procedure by which each side chooses an arbitrator, and the two chosen arbitrators agree on a third party (referred to as *zebla* in Jewish law), and this case is not one in which the Beth Din of America was the pre-agreed forum for dispute resolution by the parties;” See Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules>.

selected by the two *borerim* even without consent of both sides.³¹ Although many have the custom to elicit the consent of the parties with respect to the *shalish*³² this cannot be insisted upon later on in the proceeding when such a practice was not made a prerequisite to the selection of the ZABLA panel in the arbitration agreement.³³

This lack of party prerogative over the choice of the *shalish* can become relevant when the Beth Din needs to determine whether a ZABLA has been properly convened as a matter of Jewish law. For example, consider a case where the parties sign an arbitration agreement which specifies that any dispute will be submitted to a ZABLA. However, the parties also insert language in the arbitration clause that specifies that the case will revert to the jurisdiction of a certain Beth Din if the ZABLA cannot be successfully convened. Subsequently, the parties choose two *borerim*, and the two *borerim* agree upon a *shalish*, but then one of the original two *borerim* withdraws and is replaced by a substitute *borer*, who does not object to the previous selection of the *shalish*. The party who selected the initial *borer* now argues that a valid ZABLA panel was not formed, since the new *borer* did not participate in the choice of the original *shalish*, whom that party did not endorse. It would seem that in such a case the proper halakhic ruling to be followed by a Beth Din is that since the two initial *borerim* had agreed upon the appointment of the *shalish*, and the substitute *borer* also indicated satisfaction with their original choice, the ZABLA panel was validly convened and thus has jurisdiction to adjudicate the case.

VI. CONCLUSION

Based on all of the concerns described herein, parties entering into a dispute resolution clause or arbitration agreement which stipulates for a ZABLA proceeding should bear in mind the following considerations: (a) it is best to stipulate that the ZABLA be under the auspices and direction of a respected Beth Din (or network of respected *Batei Din*),³⁴ in order to prevent potential violations of Jewish law

³¹ See *Choshen Mishpat* 13:1.

³² See R. Avrohom Derbarmdikar, *Seder Hadin* 3:2.

³³ R. Derbarmdikar, *supra* note 32, at 3:30.

³⁴ See, e.g., Rabbi J. David Bleich, *The Bet Din – an Institution Whose Time Has Returned*, CONTEMPORARY HALAKHIC PROBLEMS IV (1992), 15–16, who argues for the establishment of a centralized national Beth Din which would include “establishing a fairly large roster of *dayyanim* and permitting litigants to use a limited form of the *zabla* system, i.e. the system under which each

regarding the impartiality and integrity of the ZABLA; (b) in the event of an impasse, there should be a designation of a specific Beth Din or rabbinic authority to fill any vacancy, especially since the standard arbitration rule that a court normally fills any arbitration vacancy cannot be confidently relied upon with respect to a Beth Din tribunal; and (c) despite the potential benefits of a properly convened ZABLA, the parties would be well advised to consider submission to a regular Beth Din process before a respected and established institutional Bet Din in order to avoid the vagaries of the ZABLA process from the perspective of Jewish law and to ensure the smooth enforceability of the arbitration agreement under secular law.

litigant chooses one member of the tribunal. Litigants might be permitted to designate the members of the Bet Din that would hear their case but would be limited in being able to select a panel of *dayyanim* only from among the designated list of members of the national Bet Din.” In a footnote, the author attributes the idea of putting together such a roster of *dayanim* to Rav Yaakov Kamenetsky (1891-1986), who had suggested it to Rabbi Bleich in the context of convening a ZABLA Bet Din for antenuptial agreements in order “to avoid the procrastination that unfortunately develops” in selecting members of a ZABLA.

What to Do When You and Your Adversary Can't Agree on a Beit Din

Rabbi Shlomo Weissmann¹

Ideally, parties to a dispute would agree to litigate at an established and reputable *beit din*. The *beit din* would then empanel a group of expert *dayanim* (arbitrators) to hear the case. Practically, however, the *din torah* process can get stalled when parties fail to agree on a *beit din*—when each party rejects the other's proposed forum. As we explained elsewhere, a *beit din* generally does not have jurisdiction to decide a case until it is accepted by both parties through an arbitration agreement.²

ZABLA PANELS

If the parties cannot agree on an established *beit din*, Jewish law provides for the formation of an ad hoc “*zabla*” panel.³ *Zabla* (זבל"א) is an acronym for *zeh borer lo echad* (lit. each party selects one arbitrator), which captures how the panel is formed: Each party selects one arbitrator (sometimes referred to as a *borer*). The two arbitrators then choose a third member to complete the panel (sometimes referred to as the *shalish*).

If the case proceeds before a *zabla* panel, each chosen *borer* has a heightened responsibility to consider the perspective of the party that chose him.⁴ But ultimately the *dayanim* on a *zabla* panel should function as impartial arbitrators and decide the case exclusively on its merits.⁵

ZABLA PROBLEMS

In practice, *zabla* panels can be problematic because litigants and *borerim* (pl. of *borer*) have approached *zabla* cases with the view that the *borer* should function as

¹ Rabbi Weissmann is the Director of the Beth Din of America.

² See Rabbi Yona Reiss, *Jewish Law, Civil Procedure: A Comparative Study*, JOURNAL OF THE BETH DIN OF AMERICA 1 (2012), 18–19, available at <https://bethdin.org/wp-content/uploads/2019/07/Jewish-Law-Civil-Procedure-A-Comparative-Study-by-Rabbi-Yona-Reiss.pdf>.

³ *Shulchan Arukh*, *Choshen Mishpat* 13:1.

⁴ *Rosh*, *Sanhedrin* 3:2; *Tur*, *Choshen Mishpat* 13:8; *Arukh Hashulchan*, *Choshen Mishpat* 13:3.

⁵ *Rosh* and *Tur*, *supra* note 4; *Shut Panim Me'erot* 2:159; *Pitchei Teshuvah*, *Choshen Mishpat* 13:3; Rabbi Mordechai Willig, *Ha'arot be-Reish Perek Zeh Borer*, *Beit Yitzchak* 36 (2004), 17–21, available at <https://www.yutorah.org/lectures/lecture.cfm/727296/rabbi-mordechai-i-willig/הנהגות-בורר>. See also Rabbi Yona Reiss, *The Torah-u-Madda Mandate for Beth Din in Today's World*, JOURNAL OF THE BETH DIN OF AMERICA 2 (2014), 24–25, available at <https://bethdin.org/wp-content/uploads/2019/07/The-Torah-u-Madda-Mandate-for-Beth-Din-in-Today's-World-by-Rabbi-Yona-Reiss.pdf>.

a full advocate for the party that chose him. This creates a host of halakhic problems and is the reason why *poskim* have discouraged *zablas*.⁶ For example, Jewish law prohibits *ex parte* communication between arbitrators and litigants.⁷ Yet *borerim* have sometimes engaged in private communications with the litigants who selected them.⁸ Similarly, Jewish law prohibits arbitrators from taking money from individual litigants.⁹ Yet *borerim* have sometimes even taken side payments in the form of consultation fees from the litigants who hired them.¹⁰

In addition to these halakhic problems, *zabla* proceedings can be very costly. *Borerim* who sit on *zabla* panels often charge hourly rates higher than rates charged for proceedings overseen by established *battei din*. *Zabla* panels have also been criticized because they are used as stalling mechanisms. A litigant can stall the *din torah* process by picking a *borer* of ill-repute, knowing that a competent *dayan* would refuse to sit with him.

Because of these problems, a *din torah* arranged by an established, reputable *beit din* is always preferable to a *zabla* proceeding. The best way to head off a forum dispute—and *zabla* proceeding—is to include in your contracts a pre-dispute arbitration provision that specifies an established and reputable *beit din*.¹¹

ENSURING PROCEDURAL FAIRNESS IN A *ZABLA*

If you find yourself in a forum dispute such that you and your adversary cannot agree on a *beit din*, there are some steps that you can take to enhance the fairness of a *zabla* proceeding.

One option is to arrange for the *zabla* to take place under the auspices and rules of an established *beit din*. The Beth Din of America has successfully conducted

⁶ *Shulchan Arukh*, *Choshen Mishpat* 17:5.

⁷ See *Shut Panim Me'erot* and *Pitchei Teshuvah*, *supra* note 5. But see *Arukh Hashulchan*, *Choshen Mishpat* 13:4, who justifies this practice on the basis of an implicit waiver. Rabbi Mordechai Willig, *supra* note 5, raises several concerns regarding the *Arukh Hashulchan's* justification. In addition, the *Arukh Hashulchan's* ruling should be qualified for those many cases where parties do not wish to allow such communications, and wish instead to follow the strict integrity of the *halakha*.

⁸ *Shulchan Arukh*, *Choshen Mishpat* 9. The *Shulchan Arukh* (9:5) provides that if the *dayanim* are to be compensated by the parties directly, the parties must bear the costs evenly; and *Shakh* (9:6) requires that each party must make the payment in the presence of his adversary.

⁹ See *Shut Panim Me'erot*, *Pitchei Teshuvah*, and Rabbi Mordechai Willig, *supra* note 5.

¹⁰ See, e.g., *Rema*, *Choshen Mishpat* 13:1.

¹¹ See Beth Din of America, *Sample Arbitration Provision*, available at <https://bethdin.org/wp-content/uploads/2018/07/Contractual-Arbitration-Provision.pdf>.

such proceedings under its rules and procedures,¹² often with panels staffed by a *dayan* appointed by the Beth Din of America, a *dayan* from the defendant's chosen *beit din*, and a third *dayan* mutually agreed upon by the two *batei din*. When a defendant responds to a *hazmana* sent by the Beth Din of America by opting to appear before a different *beit din*, the Beth Din of America will sometimes contact that *beit din* to establish a joint panel overseen by one or both of the *batei din*, and present that option to the parties.¹³

If you cannot arrange for a *zabla* under the auspices of an established *beit din*, it is a good idea to insist that each side choose a *borer* who regularly serves as a *dayan* at a reputable *beit din*. Furthermore, at the outset of any *zabla* proceeding, it is important to have a clear conversation among the parties and *dayanim* regarding procedural issues such as *ex parte* communication and payment arrangements for the panel. Expectations should be clearly set forth in the *shtar berurin* that will govern the *zabla* proceeding, specifying that each *borer* will arbitrate impartially, that *ex parte* communications will be prohibited, and the like. As a way of ensuring fairness in *zabla* proceedings and avoiding various abuses, the Beth Din of America will not allow a defendant to respond to a *hazmana* by selecting a *to'en* (rabbinic advocate) as their *borer* for a *zabla*.¹⁴ This policy is based on a presumption that a *borer* who regularly functions as a *to'en* will serve as an advocate for the party that hired him, not as an impartial *dayan*.

CONCLUSION

Zabla proceedings can be halakhically problematic, costly, and procedurally inefficient. A *din torah* arranged by an established *beit din* is almost always preferable to a *zabla*. It is therefore best to preempt a forum dispute by including a pre-dispute arbitration clause in your contracts, designating an established *beit din* as the arbitration forum for your dispute.

If you did not do that and you find yourself locked in a forum dispute, it is

¹² See Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules>.

¹³ See *Nesivos Hamishpat (Biurim)*, *Chosben Mishpat* 14:3.

¹⁴ Sections 2(e) and 2(f) of the Beth Din of America's *Rules and Procedures* provide that the Av Beth Din is entrusted with the authority to determine who is and is not authorized by Jewish law to serve as a selected arbitrator in a case. Accordingly, the Av Beth Din's opinion is dispositive with respect to these determinations, even if a particular litigant does not share the same opinions of the application of Jewish law. See Beth Din of America, *Rules and Procedures*, available at <https://bethdin.org/rules>.

WHAT TO DO WHEN YOU AND YOUR ADVERSARY
CAN'T AGREE ON A BEIT DIN

important to take steps to ensure the fairness and integrity of a *zabla*. These steps include attempting to arrange for the *zabla* to take place under the auspices of an established *beit din* and its rules; ensuring that only *dayanim* who regularly function at reputable *batei din* will serve as *borerim* on your *zabla*; and laying down clear rules and procedures that will govern the *zabla* proceedings.

SECTION III:
Substantive Jewish Law

Depriving a Worker of Employment Opportunities

Rabbi Itamar Rosensweig and Tzirel Klein¹

The Beth Din of America recently published an anonymized *pesak din*, *Chaya Plaut v. Anshei Troy Synagogue*.² This article presents an overview of the facts, analyzes the halakhic principles underlying the *dayanim*'s decision, and discusses whether secular law would yield a different outcome.

I. THE CASE

Chaya Plaut was hired as a Talmud Torah teacher at Anshei Troy Synagogue for the 2001-2002 school year. In March or April of 2002, the Synagogue renewed her contract for the 2002-2003 school year to teach about five and a half hours a week with a salary of \$10,600. Although her contract was renewed for one year, the Synagogue "had conveyed the sense that Mrs. Plaut would have long-term employment" with them.

In May 2003, the Synagogue leadership hired a new rabbi. They asked him to take over Mrs. Plaut's teaching responsibilities for the upcoming school year in order to consolidate the two positions and reduce their expenses, and he agreed. The Synagogue never told Mrs. Plaut that they were looking to eliminate her position, despite their active search for a rabbi who could also take over her job. On May 27, the Synagogue leadership informed Mrs. Plaut that her contract would not be renewed for the 2003-2004 school year.

The heart of the *din torah* is whether it was wrong for the Synagogue to wait until the end of May to inform Mrs. Plaut that her contract would not be renewed. Mrs. Plaut argued that by signaling to her that she would have long-term employment and then informing her so late in the year that her contract would not be renewed the Synagogue deprived her of the opportunity to secure alternative employment for the 2003-2004 school year. Mrs. Plaut argued that religious schools hire well before May or June, and that it is nearly impossible to enter the job market in June

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² *Chaya Plaut v. Anshei Troy Synagogue*, Beth Din of America (March 29, 2004) (anonymized decision), available at <https://bethdin.org/wp-content/uploads/2020/09/Chaya-Plaut-v-Anshei-Troy-Synagogue.pdf>.

and secure a position by September. She testified that after having been notified by the school that her contract would not be renewed she sought employment elsewhere. But her efforts were to no avail. The Synagogue countered that three months was ample time to find a new job.

The *dayanim* ruled for Mrs. Plaut. In their decision, they held that “given the academic calendar and hiring schedules of most religious schools... Mrs. Plaut was not given sufficiently early notice to enable her to find a replacement position for 2003-2004... Mrs. Plaut would likely have found an alternative position if the Synagogue had informed her [earlier in the year].”

The *dayanim*'s decision unfolds in three stages and appeals to three separate principles of Jewish law. The first principle is that an employer can become liable for causing a worker to lose alternative employment opportunities. The second principle is the idea of *po'el batel* (that a worker benefits from not having to work) which reduces the amount of damages an employer has to pay for depriving a worker of alternative employment opportunities. The third principle is the *dayanim*'s equitable determination, similar to the common law doctrine of comparative negligence, that Mrs. Plaut bears some responsibility for her loss, as she should have sought to clarify her employment status with the Synagogue earlier in the year.

In the next section, we discuss the three components of the *dayanim*'s decision and their halakhic bases.

II. HALAKHIC ANALYSIS

A. *Depriving a Worker of Alternative Employment Opportunities*

The basis for the Synagogue's liability is that they caused Mrs. Plaut to lose out on alternative employment opportunities by first creating the expectation of long-term employment and then notifying her at the very end of the school year—when it was effectively impossible for her to secure employment elsewhere—that her contract would not be renewed.

The paradigm for this type of liability is the Talmud's ruling in Bava Metzia 76b, codified in Shulchan Arukh (Choshen Mishpat 333:2). The Talmud discusses the following type of scenario: A homeowner calls a handyman and tells him to show up at 8 o'clock the next morning to do work in the house. An hour before 8, the homeowner decides he doesn't want the work and cancels on the handyman.

Suppose that but for the homeowner's instruction to show up at 8, the handyman could have (and would have) secured other jobs for the day. The Talmud holds that the homeowner is liable to compensate the handyman since he harmed the handyman by causing him to lose the other job opportunities.³

Most commentators understand the Talmudic case to be one where no contractual relationship existed between the handyman and the homeowner. In the eyes of halakhah, the initial phone call does not rise to the level of a contract.⁴ Commentators offer three separate grounds for the homeowner's liability. First, many rishonim see the homeowner's liability as grounded in the halakhic principles of tort (*dina de-garmi*). The homeowner harmed the handyman by causing him to lose income from the job opportunities he turned down, and he is therefore obligated to compensate him.⁵

³ See for example *Tosafot, Bava Metzia* 76b s.v. *ein*, "*al yado nitbatlu oto ha-yom*"; *Ramban, Bava Metzia* 76b, "*nitbatlu me-sekhirut ha-yom al yado*."

Note that the halakhah requires the handyman to mitigate his losses. See *Shulchan Arukh, Choshben Mishpat* 333:2 and *Pitchei Choshben, Sekhirut* 10:5-6.

⁴ For a contractual relationship to exist, according to halakhah, the parties have to perform a *kinyan* or the handyman would have to begin performance (*hatchalat ha-melakhah*). The halakhic liability rules are different once the parties are bound by a contractual relationship. See *infra* note 5.

⁵ See, e.g., *Tosafot, Bava Metzia* 76b s.v. *ein*; *Rosh, Bava Metzia* 6:2; *Sema, Choshben Mishpat* 333:8. *Dina de-garmi* is a kind of indirect tort, where the tortfeasor is not the immediate cause of the harm. Liability for this category of non-proximate causation is a matter of Talmudic dispute. We hold that a tortfeasor in *garmi* is liable, though the liability rules of *garmi* are weaker than those of proximate cause.

Two important halakhic consequences follow from the fact that liability arises under tort principles—i.e., from the fact that the homeowner caused the handyman to lose the other job—and not under contract principles. First, for the homeowner to be liable, the handyman must have been able to secure other job opportunities, which he "lost" by relying on the homeowner's instructions. If the handyman could not have received other work for the day, the homeowner is not liable, as he did not cause the handyman any loss. (It becomes an interesting question of Jewish law whether the handyman has the burden to show that he could have secured alternative employment or if the homeowner has the burden to show that he could not have; see *Pitchei Choshben, Sekhirut*, Chapter 10 note 4.)

Second, because the homeowner's liability arises in tort, the measure of damages is not what the handyman would have collected under a contract with the homeowner but rather what the handyman would have made from the alternative job offers. Of course, this counterfactual assessment of damages can be difficult to determine, so in many cases it is reasonable to assume that the handyman's compensation for an alternative job would be the same amount he was going to receive for the homeowner's job. This is what the *dayanim* assume in *Chaya Plaut v. Anshei Troy Synagogue* (see below).

Note that the liability rules are different when a contractual relationship exists between the handyman and the homeowner. Under a contractual relationship, such as when a *kinyan* was performed or when the handyman commenced performance (see *supra*, note 4), the homeowner must compensate even if the handyman could not have secured alternative employment, and

A second view in the rishonim suggests that liability arises from a principle of implied indemnification (*arev*).⁶ In their view, when the homeowner asks the handyman to arrive at 8 the next morning, he is effectively instructing the handyman to turn down other jobs that would conflict and is implicitly agreeing to indemnify the handyman from those losses, up to the value of the 8 o'clock contract.⁷ The basis of liability, on this view, is the homeowner's implied commitment to indemnify the worker (*arev*).⁸

A third view in the poskim holds that there is no pure-halakhic basis for liability in this type of pre-contract case. On this approach, as a matter of halakhic private

moreover, the measure of damages is determined by what the homeowner was obligated to pay the handyman for the 8 o'clock job, not what the handyman would have made in the next-best alternative job offer. For these distinctions, see *Ramban, Bava Metzia* 76b ("kevan she-bitchilu be-melakhah nitchayav me-akhshev litan labem sekharan meshalem kemo she-kibel'alav, she-ke-shem she-she'ar ba-devarim niknin be-kinyan, kakh sekhirut po'alim niknet be-batchalat melakhah..."); *Shulchan Arukh, Choshen Mishpat* 333:2 and *Shakh* 333:11; *Pitchei Choshen, Sekhirut* 10:7 and note 18 therein; and *Chazon Ish, Bava Kamma* 23:36 s.v. ve-nir'eh. *Chazon Ish* argues that if the basis for compensation is contractual, the homeowner has a duty to pay the handyman on time (*bal talin*), as if he had earned his wages ("sekhar zeh hu sekhar po'el mamash ve-lo garmi... ve-nir'eh de-over'alav be-val talin").

⁶ See *Ritva, Bava Metzia* 73b s.v. hai; *Ritva, Bava Metzia* 75b; Rabbi Akiva Eger, *Derush ve-Chidush, Bava Metzia* 76b, *Pitchei Choshen, Sekhirut* 8:1 and note 4 therein.

⁷ Here I follow *Ritva's* formulation that the indemnification is for the handyman's loss of the alternative job he could have accepted. Thus the amount of liability is set at the value of the job the handyman "turned down" (or didn't pursue) relying on the homeowner's instruction. *Ritva* writes: "chayav le-shalem lo mah she-bifsid be-bavtachato." But see *Pitchei Choshen, Sekhirut* 8:1 who writes, "chayav be-mah she-bivtiach lo," which implies that the handyman collects expectation damages—the value of the 8 o'clock contract.

The debate—whether the implied indemnification is for the value of the 8 o'clock contract or for the value of the loss of the next best job offer—turns on whether the implied indemnification rule works as a tort-like principle to protect the handyman from losing the value of the alternative job offer or whether it works as a contract-like principle to secure the handyman's claim to the 8 o'clock contract. Understood this way, the debate about implied indemnification (*arev*) tracks the discussion surrounding the common law's promissory estoppel, and whether it is a principle of tort or contract. See Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 *HOFSTRA L. REV.* 443 (1987).

On this point, note R. Akiva Eger's formulation, *Derush ve-Chidush, Bava Metzia* 76, that an implied indemnification makes it "as if there was a *kinyan*" (*havey kemo kinyan*).

⁸ Some commentators argue that this implied indemnification exists only in cases where the handyman, relying on the homeowner's word, *actually* turned down an alternative employment offer. It is not sufficient, on this view, that the handyman *could have* found other employment. See *Pitchei Choshen, Sekhirut* Chapter 10 note 10, and Chapter 8:1 and note 4 therein. Other commentators hold that for the homeowner to become liable under a theory of implied indemnification, the homeowner must *know* that he's causing the worker to lose other opportunities. On this view, it is reasonable to infer the homeowner's intent to indemnify the worker only when the homeowner is aware of the loss he would be imposing. See *Pitchei Choshen, Sekhirut* Chapter 11 note 22 and note 38.

law the homeowner should not be liable at all: his actions are too weak to rise to the level of a tort, and there is no reason to read-in an implicit indemnification. Rather, the homeowner's duty to compensate arises out of a public policy *takanah* (enactment) that was instituted to protect parties from losses when relying on the other party in a pre-contractual relationship.⁹ Although there is no pure-halakhic basis to hold the homeowner liable to compensate the worker before there is any contract, *chazal* sought to deter parties from canceling work-arrangements when it would detrimentally affect the other party who reasonably relied on the arrangement, and to protect the interest of the party who would otherwise suffer a loss.

There are, then, three possible bases for the homeowner's liability to compensate the handyman for depriving him of alternative employment opportunities: tort (*garmit*), implied indemnification (*arev*), or public policy (*takanah*).¹⁰

Whatever the ground of liability, Jewish law does require an inquiry into whether the handyman in fact could have received alternative employment opportunities.¹¹ The *dayanim* in *Chaya Plaut v. Anshei Troy Synagogue* determined that "Mrs. Plaut would likely have found an alternative position if the Synagogue had informed her [earlier in the year]."

The *dayanim* in *Chaya Plaut v. Anshei Troy Synagogue* seem to hold that the Synagogue's signaling to Mrs. Plaut that she would have long-term employment and then notifying her in late May without prior warning that her contract would not be renewed is analogous to the homeowner-handyman case. In the *dayanim*'s view, the Synagogue caused Mrs. Plaut to lose alternative employment opportunities by not notifying her earlier in the year, and therefore it has a duty to compensate. The *dayanim*'s ruling might be supported by an industry-wide norm—itsself a

⁹ *Netivot Ha-Mishpat* 333:3. See also *Tosefta, Bava Metzia* 11:27 and *Shut Sha'ar Ephraim* no. 138.

¹⁰ Note that whatever the ground of liability—whether it is tort (*garmit*), implied indemnification (*arev*), or public policy (*takanah*)—these same halakhot also protect the homeowner from a worker who cancels if the cancellation will cause the homeowner an immediate or irreparable loss (*davar ha-aved*). The principles underlying these halakhot are not designed to protect workers specifically but *parties* who make pre-contractual arrangements and appointments. The Talmud discusses several cases where the worker can become liable for the employer's losses when the employer relies on a pre-contractual arrangement (e.g., no *kinyan*) and the worker fails to perform. These include a person who arranges with a band to perform at a wedding or a funeral but the band never shows up, and an arrangement with a worker to harvest and process flax fibers (which ruin if not processed immediately). See *Bava Metzia* 75b and 76b; *Rashba, Bava Metzia* 76b; and *Hagahot Ashri, Bava Metzia* 6:2 ("chayavim le-shalem kol befsedo").

¹¹ See *Shulchan Arukh, Choshen Mishpat* 333:2 and *Pitchei Choshen, Sekhirut* 10:4.

function of hiring schedules in Jewish day schools—to notify day school teachers early in the year if their contract will not be renewed.¹²

B. The *Po'el Batel* Rule

Having decided that the Synagogue has a duty to compensate, the *dayanim* consider the amount owed. The *dayanim* begin with Mrs. Plaut's salary for 2002–2003 (\$10,600) as their point of departure,¹³ but argue that the amount should be reduced in accordance with the *po'el batel* rule. This rule, which appears in the Talmud (Bava Metzia 76b) and is codified in Shulchan Arukh (Choshen Mishpat 333:2), provides that when an employer is obligated to pay damages for causing a worker to lose alternative employment opportunities, the damages should be reduced in consideration of the benefit the worker receives by not having to engage in labor.

Suppose, for example, that relying on the homeowner's instruction to show up at 8 the next morning, the handyman turned down a labor-intensive job that would have paid \$500. When the homeowner cancels and thereby becomes liable for causing the worker to lose the \$500 job, the *po'el batel* rule says that the \$500 liability should be offset and reduced by the benefit the worker receives by not having to do labor-intensive work.

How is the *po'el batel* reduction calculated? Rashi explains (Bava Metzia 76b s.v. *oseh*) that we evaluate how much less pay a worker would be willing to receive to *not* have to do the difficult labor but still get paid. Suppose that I rely on your promise to hire me tomorrow at 8 and turn down a job to de-weed someone else's garden that was worth \$500. De-weeding is difficult labor, and I'd be willing to lower my pay to \$300 for a leisurely job like watering flower pots. When you cancel the 8 o'clock job and become liable to compensate me for my loss of the \$500 job offer that I turned down relying on your promise, the *po'el batel* rule reduces the amount you owe me from \$500 to \$300, since I capture the \$200 benefit of not having to do the difficult labor. If I capture further benefit by not having to work at all,

¹² Absent such a norm, we might wonder whether the Synagogue had any duty to inform Mrs. Plaut that her contract would not be renewed given that it was set to expire at the end of the school year.

¹³ Strictly speaking, the baseline of liability would be the value of the job Mrs. Plaut "lost" by relying on the Synagogue. But as we saw earlier, in some cases it's reasonable to assume that the two amounts will more or less converge.

then the *po'el batel* rule would reduce the amount even further—by the amount of benefit I receive by getting the day off.¹⁴

Some poskim suggest that instead of evaluating the subjective benefit in each case, the *po'el batel* reduction should be standardized (at least in simple cases) and valued at 50% of the contract price.¹⁵ The *dayanim* in this case follow the 50% rule. They take Mrs. Plaut's compensation from 2002-2003 (\$10,600) as the baseline for the Synagogue's liability and reduce it by 50% (to \$5,300) in consideration of the *po'el batel* rule. In their view, Mrs. Plaut's benefit of not having to teach and prepare classes for 2003-2004 was worth 50% of her contract.¹⁶

C. Contributory Negligence

The final consideration the *dayanim* raise is whether Mrs. Plaut was partially responsible for her own loss by not clarifying her employment status earlier in the year. They write:

“[W]e find that the Synagogue is not solely responsible for Mrs. Plaut's being without a replacement position for 2003-04. While Mrs. Plaut believed that her job at the Synagogue was secure, she had only two years of tenure at the Synagogue, a year-to-year contract (the second year of which was oral, rather than written), and an ill/unavailable supervisor. In this context, she should have proactively sought to clarify her employment status for the following year earlier in 2003.”

¹⁴ See *Rashi, Bava Metzia* 76b, s.v. *aval* and s.v. *oseh*.

¹⁵ See *Taz, Choshen Mishpat* 333 s.v. *she'eino*, citing *Rabbenu Chananel* and a *teshuvah* of *Rashi*.

¹⁶ The *dayanim*'s use of the *po'el batel* reduction in *Chaya Plaut v. Anshei Troy Synagogue* is not as straightforward as it might appear. The Talmud (*Bava Metzia* 77a) conditions applying the *po'el batel* rule on the worker benefiting in fact from not having to work, and it recognizes that in some cases the worker receives no benefit from not working. In such cases, there is no basis for reducing the award. The Talmud (*Bava Metzia* 77a) offers an example of a mover who benefits from the workout of heavy lifting (*akhlushey de-mechoza*). Since the worker benefits from the labor—it saves him a trip to the gym—he is entitled to be paid in full when the employer cancels on him. Another example might include a surgeon who wants to keep up her surgical skills and therefore receives no benefit from the patient canceling.

Some rishonim discuss the case of a Torah teacher who enjoys teaching. These rishonim argue that if the employer cancels, the teacher or rebbe would be entitled to their full salary (without a *po'el batel* reduction) since they receive little or no benefit from not teaching. See *Teshuvot Ha-Rasbba* 1:643 (“*im melamed zeh neheneh be-limmudo yoter me-beyoto batel noten lo sekharo mishalem, ve-im lav noten lo ke-po'el batel*”); *Mordekhai, Bava Metzia* 346; and *Shulchan Arukh, Choshen Mishpat* 335:1.

In finding Mrs. Plaut partially responsible for her loss, the *dayanim* are engaged in an analysis of Mrs. Plaut's contributory negligence. They found the Synagogue liable for not notifying Mrs. Plaut earlier in the year; now they find Mrs. Plaut partially responsible for not clarifying her employment status, given her short tenure and her year-to-year contract.

Having determined that Mrs. Plaut was contributorily negligent, the *dayanim* reduce the final award by about 25%, from the *po'el batel* amount of \$5,300 to \$4,000. The *dayanim*'s reduction of the Synagogue's liability based on Mrs. Plaut's contributory negligence parallels the common law doctrine of comparative negligence, which reduces the amount of damages a plaintiff can recover based on the degree to which the plaintiff's own negligence contributed to the harm.¹⁷

In sum, the *dayanim* found the Synagogue liable for terminating Mrs. Plaut so late in the year, which caused her to lose other employment opportunities. To assess the amount of damages, the *dayanim* start with the value of Mrs. Plaut's contract with the Synagogue from 2002-2003 (\$10,600) but cut it in half (to \$5,300) because of the *po'el batel* rule. The *dayanim* then reduce that amount by about 25% (to \$4,000) in consideration of Mrs. Plaut's own negligence. Ultimately, the *dayanim* award Mrs. Plaut \$4,000.

¹⁷ Here the *dayanim* appear to be working under *pesharah kerovah la-din*. See Rabbi Itamar Rosensweig, *Pesharah Vs. Din*, JEWISHPRUDENCE (April 2020), available at <https://bethdin.org/pesharah-vs-din/>.

Jewish law does recognize a principle of contributory negligence according to which the defendant would not be liable *at all* if the defendant was found to be more negligent than the plaintiff. See, e.g., *Yerushalmi Bava Kamma* 2:8; *Rambam, Chovel* 1:11; *Tosafot, Bava Kamma* 4a s.v. *kevan*; *Ramban, Bava Metzia* 82b ("*ba-sheni pash'a be-'atzmo*"); *Shita Mekubetzet, Bava Kamma* 27b s.v. *od kat-vu*. See also *Ralbag, Parshat Mishpatim*, pg. 227, who holds that the defendant is not liable so long as the plaintiff was *equally* negligent ("*she-lo yitchayev ha-mazik... im hayah ba-nizak hu ha-poshe'a yoter be-hag'at ha-nezek lo... ve-khen ba-inyan im hayu shneihem be-madregah achat me-ha-peshi'ah*"). But there is no clear indication that Jewish law recognizes a principle that would reduce the defendant's liability in proportion to the plaintiff's comparative negligence.

There is, however, a possible halakhic paradigm for comparative negligence, in Jewish law's principle of joint tortfeasors. According to this principle, each tortfeasor is liable in proportion to his contribution to the damage. See, e.g., *Pitchei Choshen, Nezikin* 10:25-27 and 10:31 note 77. Arguably, this principle can be extended to the case where the plaintiff (*nizak*) is negligent by considering the plaintiff, conceptually, as one of the tortfeasors by having contributed to his own loss. He would then be responsible for "his share" of the liability, which would reduce his co-tortfeasor's (the defendant's) liability in proportion to the plaintiff's contribution to the harm. For this kind of argument, see *Or Sameach, Nizkei Mammon* 12:19 and *Pitchei Choshen, Nezikin* Chapter 10 note 55. What is controversial about this move is that it views the plaintiff as both plaintiff (*nizak*) and defendant (*mazik*) in the same cause of action.

III. SECULAR LAW ANALYSIS

In *Chaya Plaut v. Anshei Troy Synagogue*, the *dayanim* determined that the case should be decided according to pure halakhic principles, and not according to secular law through halakhic incorporation of commercial custom (*minbag ha-sochrim*).¹⁸ In this section we consider whether a different outcome would have been reached if the *dayanim* had decided the case according to secular law principles.

How would the outcome of this case differ under a secular law analysis? The plaintiff's claim might be analyzed as a breach of contract claim, or under a promissory estoppel (reliance) theory. However, it is unlikely that she would have been able to recover any damages on either claim—particularly in New York, which is especially protective of an employer's right to discharge an employee at any time.¹⁹

Breach of Contract

To establish a breach of contract claim, a plaintiff must show that an enforceable contract existed prior to the alleged breach. In this case, Mrs. Plaut would have had to establish that a teaching contract for the 2003-2004 school year already existed on May 27, 2003, when the Synagogue informed her that her contract would not be renewed. If such a contract did exist, then the Synagogue may well have breached it.

However, the parties in this case do not appear to have entered into either an express or implied contract for the 2003-2004 school year. An express contract is “a promise stated in words either oral or written,”²⁰ while an implied contract is inferred from the conduct of the parties and “the facts and circumstances of the case.”²¹ The decision makes clear that the parties never expressly contracted

¹⁸ See Rabbi Itamar Rosensweig, *Commercial Custom and Jewish Law*, JEWISHPRUDENCE (June 2020), available at <https://bethdin.org/commercial-custom-and-jewish-law/> (discussing which factors determine whether a case should be decided according to *minbag ha-sochrim* or the other principles of Choshen Mishpat).

¹⁹ See, e.g., *Murphy v. Am. Home Products Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983) (stating that where “employment was at will, . . . the law accords the employer an unfettered right to terminate the employment at any time”). Although in this case Mrs. Plaut's employment may have been for a fixed term and was thus not technically at will, an employee is employed at will for the purposes of the renewal of an expired fixed-term contract, as the employer has no duty to renew. See *Rosen v. Vassar College*, 525 N.Y.S.2d 399 (N.Y. App. Div. 3d Dept. 1988).

²⁰ *Maas v. Cornell U.*, 721 N.E.2d 966, 969 (N.Y. 1999) (quoting Restatement (Second) of Contracts § 4 (1981)).

²¹ *Bader v. Wells Fargo Home Mortg. Inc.*, 773 F. Supp. 2d 397, 413 (S.D.N.Y. 2011) (quoting *Bear Stearns Inv. Products, Inc. v. Hitachi Automotive Products (USA), Inc.*, 401 B.R. 598, 615 (S.D.N.Y.2009)).

for the 2003-2004 year. But Mrs. Plaut may argue that an implied contract was formed by the Synagogue keeping silent until it was too late for her to find another position for that school year.

However, an implied contract argument would likely fail, because the Synagogue never provided an affirmative indication of its intent to rehire her for the 2003-2004 school year. A court may recognize an implied contract where the parties have, through their actions, indicated an intention to contract.²² However, “mere silence or inaction [by the party to be charged] is insufficient,”²³ and a contract “will not be implied unless the meeting of the minds was indicated by some intelligible conduct, act or sign.”²⁴ As the decision notes, both parties had stayed silent regarding Mrs. Plaut’s employment status for the 2003-2004 school year. It is thus unlikely that a court would infer that an implied contract had indeed been reached. And if there was no legally cognizable contract, then there would be no basis for asserting breach.

Promissory Estoppel

If there was no contract and thus no breach, the most relevant common-law doctrine might be promissory estoppel. Promissory estoppel allows a court to enforce a promise which is otherwise unenforceable as a contract, when the plaintiff reasonably relied on that promise to his or her detriment. To sustain a promissory estoppel claim, a plaintiff must allege “a clear and unambiguous promise; a reasonable and foreseeable reliance by the [plaintiff]; and an injury sustained by the [plaintiff] by reason of his reliance.”²⁵

In this case, Mrs. Plaut could argue that she relied on the Synagogue’s March 2002 indication of long-term employment by not seeking other employment for 2003-2004 until it was too late to do so. However, a promissory estoppel claim

²² *Maas v. Cornell U.*, 721 N.E.2d 966 (N.Y. 1999).

²³ *In re Goodman*, 790 N.Y.S.2d 837, 843 (N.Y. Sur. 2005), *aff’d sub nom. Goodman v. Druck*, 821 N.Y.S.2d 918 (N.Y. App. Div. 2d Dept. 2006) (“While an agreement can be implied, the agreement must be clear, unambiguous and unequivocal.”).

²⁴ *Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 598 (1923). Implied contracts sometimes are formed where parties continue to perform under an express contract even after the contract has expired by its own terms. See, e.g., *Watts v. Columbia Artist*. In those cases, a court might assume that the terms of the original contract apply to the new implied contract. *Id.* However, this is inapplicable in our case where Mrs. Plaut was told before the start of the school year that her services would not be necessary.

²⁵ *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.*, 804 F.2d 787, 793 (2d Cir. 1986) (quoting Restatement (Second) of Contracts § 90).

would likely fail on the first element, because the Synagogue did not clearly and unambiguously promise it would renew Mrs. Plaut's contract. According to the *pesak din*, the Synagogue merely "conveyed the sense" that it would employ her long-term.

In a case with similar facts, a school informed a teacher orally and in writing that she would be offered a contract for the following school year.²⁶ In May, the school then informed the teacher that she would not be rehired after all.²⁷ The court dismissed the teacher's promissory estoppel claim, finding that the school's promise to renew her contract lacked the requisite definiteness, and "manifested no present intention" to enter into a contract.²⁸ In our case, the Synagogue's promise was even more nebulous and thus almost certainly unenforceable under promissory estoppel.²⁹

Moreover, a promissory estoppel claim under New York law would be even less likely to succeed: several cases have suggested that promissory estoppel in the employment context is generally unavailable in New York.³⁰ This is because the jurisdiction's strong presumption that an employee may be terminated at will may make reliance on a promise of continued employment by definition unreasonable.³¹

Damages

Finally, with respect to damages, damages awarded for breach of contract usually consist of expectation damages, which aims to put the non-breaching party in the same position it would have been had the contract been performed.³² In this case, expectation damages would be the salary Mrs. Plaut would have received for the 2003-2004 school year, less any costs saved (e.g., travel costs). Expectation

²⁶ D'Ulisse-Cupo v. Bd. of Directors of Notre Dame High Sch., 202 Conn. 206, 208 (1987).

²⁷ Id. at 208-09.

²⁸ Id. at 214-15. The court in D'Ulisse conceded the teacher may have a valid negligent misrepresentation claim. Id. In our case, a negligent misrepresentation claim arising out of the Synagogue's failure to inform Mrs. Plaut of its search for a rabbi who would replace her would likely fail under New York law, which recognizes negligent misrepresentation only when there is a fiduciary duty between the parties. A fiduciary duty is generally not recognized in an employee-employer relationship. Stewart v. Jackson & Nash, 976 F.2d 86, 90 (2d Cir. 1992).

²⁹ See Kelly v. Chase Manhattan Bank, 717 F. Supp. 227, 236 (S.D.N.Y. 1989) (employer's "general assurances of longevity with the company . . . cannot form the basis of a promissory estoppel").

³⁰ See, e.g., Emmons v. City Univ. of New York, 715 F. Supp. 2d 394, 422 (E.D.N.Y. 2010), modified (July 2, 2010) ("New York law . . . does not recognize promissory estoppel in the employment context"); see also Smalley v. Dreyfus Corp., 10 N.Y.3d 55, 59 (2008).

³¹ See Smalley v. Dreyfus Corp., 10 N.Y.3d 55, 59 (2008).

³² See Emposimato v. CICF Acq. Corp., 932 N.Y.S.2d 33, 36 (N.Y. App. Div. 1st Dept. 2011).

damages would further be subject to the plaintiff's reasonable efforts to obtain alternative employment.

Damages awarded for promissory estoppel claims "may be limited as justice requires,"³³ and can consist of either reliance damages—actual losses incurred upon reliance on the promise—or expectation damages—the value of the promise had it been kept. These would also be subject to the plaintiff's reasonable efforts to mitigate her damages.³⁴

CONCLUSION

This article analyzes the *pesak din* issued by the Beth Din of America in *Chaya Plaut v. Anshei Troy Synagogue*. It provides an in-depth analysis of the halakhic principles underlying the decision, and also provides a comparative perspective by considering how the case might have fared under secular law.

³³ Restatement (Second) of Contracts § 90.

³⁴ See *Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39, 46 (2d Cir. 1995). The damages available under promissory estoppel reflect the larger question of whether the basis for liability in promissory estoppel sounds in tort law or contract law. See *supra* note 6; Mary E. Becker, *Promissory Estoppel Damages*, 16 Hofstra L. Rev. 131, 133–34 (1987). Reliance damages correspond to a tort theory of liability, while expectation damages correspond to a contract theory. *Id.* at 133. However, Conceptually, the value of lost opportunities is a kind of reliance damages. However, courts often limit reliance damages to actual costs incurred and do not include the value of lost opportunities, even where they arguably exist. *Id.* In those cases, the measure of expectation damages may in fact be the more complete measure of reliance. *Id.* at 133 n.13. See also *supra* note 4, 6. Still, in the present case, even if a court would allow lost opportunities to be included in reliance damages, it is unclear whether Mrs. Plaut would have been able to prove with sufficient certainty that she would have found another job had she been informed earlier.

Contributory Negligence and Comparative Negligence in Jewish Tort Theory

Rabbi Itamar Rosensweig and Rabbi Alex Maged¹

INTRODUCTION

When one party acts negligently,² and harms another party as a result, the negligent party must compensate the victim for their damages. Suppose, however, that the victim also acted negligently, and that their own negligence was partly responsible for the harm that they sustained. Should the negligent victim³ retain a right to compensation in such circumstances? If so, should the negligent victim receive full compensation, or should their damages award be reduced to reflect the partial responsibility that they bear for their own harm?

In the United States, jurisdictions vary on their approach to this issue. Several states have adopted a strict “contributory negligence” rule. Under this rule, a plaintiff’s right to recovery is completely barred if they bear any responsibility for the accident which produced their harm. Thus, a plaintiff who is even 5% responsible for an accident will not recover any damages.

Most states, however, have adopted the more lenient “comparative negligence” rule. Under this rule, a plaintiff’s right to recovery is merely reduced in proportion to their responsibility for an accident. Thus, a plaintiff who is 5% responsible for an accident will still recover 95% of their damages.

Finally, some states have adopted a middle-of-the-road, “modified comparative negligence rule.” Under this rule, a plaintiff’s right to recovery is reduced in

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² A tort is a civil wrong that causes a claimant to suffer loss or harm, resulting in legal liability for the tortfeasor, i.e. the person who commits the tortious act. Our focus in this article is on unintentional torts, which include both negligence and strict liability torts. As we will touch upon further in this article, negligence includes harms that a reasonable person can be expected to have foreseen and taken precaution to prevent, whereas strict liability torts include even harms that may not have been reasonably foreseeable or preventable.

³ Throughout this article, we will use the terms “negligent victim” to refer to tort victims who bear some responsibility for their injuries. In using the former phrase, we do not mean to limit our discussion to victims whose conduct formally qualifies as negligent under the law of the governing jurisdiction.

proportion to their responsibility for an accident, but is barred completely if their negligence rises above a certain threshold—typically around 50%. Thus, for instance, a plaintiff who is 5% responsible for an accident will recover 95% of their damages, but a plaintiff who is 60% responsible will recover nothing.

In Jewish law, meanwhile, the principles governing a victim's right to recover when he negligently contributes to his own harm are less clearly articulated. Our goal in this article is to identify those principles. First, in Part I, we consider Talmudic case law that supports a halakhic theory of "contributory negligence"—a theory under which a tort victim's recovery would be totally barred on account of their own responsibility for the harm they sustained. Second, in Part II, we consider Talmudic case law which might support a halakhic theory of "comparative negligence"—a theory under which a tort victim's recovery would be partially diminished, but not totally barred, on account of their responsibility for the harm they sustained.⁴

I. CONTRIBUTORY NEGLIGENCE IN HALAKHA

In this section, we examine halakhic sources that provide a basis for completely withholding recovery from a tort victim who bears some responsibility for their injuries. First, we will introduce two overarching theories of tort liability—fault-based liability vs. cause-based liability—and argue that halakhic commentators invoke both general theories of liability as possible grounds for withholding tort recovery from a negligent victim. Second, we will consider, in greater detail, several fault-based rationales for withholding recovery from a negligent victim. Third, and finally, we will consider in greater detail the cause-based rationale for withholding recovery from a negligent victim.

A. Fault-Based Liability (פשע בעצמו) vs. Cause-Based Liability

1. *The Overarching Theories*

Tort theory offers two distinct approaches for holding a defendant liable when he unintentionally harms another. The first approach focuses on the defendant's *fault*

⁴ Although our introductory example featured a tortfeasor who committed the tort of *negligence*, the principles of contributory and comparative negligence may also apply when tortfeasors commit *strict liability* torts. For cases in American law where the negligence of the victim served to bar or reduce the tort damages that they could recover from plaintiffs who were otherwise strictly liable, see Gary D. Spivey, Annotation, *Products Liability: Contributory Negligence or Assumption of Risk as Defense Under Doctrine of Strict Liability in Tort*, 46 A.L.R.3d 240 (1972).

or *blameworthiness*. Under this approach, if, for instance, the defendant could have reasonably foreseen that their actions might harm the plaintiff, and if the defendant could and ought to have taken reasonable precautions to avoid harming the plaintiff, then they may be at fault for that harm, and would have to compensate the plaintiff for that reason. This is the basic premise underlying negligence liability.

The second approach, by contrast, focuses on the fact that the defendant *caused* harm, irrespective of whether they are at fault. Under this approach, even if, for instance, the defendant could not have reasonably foreseen that their actions might harm the plaintiff, the very fact that their actions caused harm may provide sufficient reason to require compensation. This is the basic premise underlying strict liability.⁵

In Jewish law, a *tortfeasor's* liability for unintentional harms can be either cause-based or fault-based, depending on the context. For instance, harms caused by the tortfeasor's direct actions are generally subject to strict liability. The tortfeasor is liable for *causing* harm, regardless of whether his actions are blameworthy.⁶ By contrast, certain harms caused by property under one's custodianship generate liability only if the custodian acted *negligently*.⁷

Given that Jewish law assigns liability to *tortfeasors* on both fault-based and cause-based grounds, the distinction between these two theories of liability may help us evaluate how a tort *victim's* conduct affects his right to recover under Jewish law. Suppose, that is, that Jewish law does bar the recovery of a tort victim who participated in bringing about his or her own injuries. How do we account for this reduction? Is the victim's recovery reduced because they bear some *fault* for their injuries? Or, is the victim's recovery reduced simply because they participated in *causing* their own injuries, irrespective of whether they are at fault?⁸ As we will show below, there are authorities in support of

⁵ See John C.P. Goldberg and Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 Ford. L. Rev. 743 (2016); Richard Epstein, *A Theory of Strict Liability*, 2 Journal of Legal Studies 151 (1973); Ernest Weinrib, *The Idea of Private Law* (1995), pp. 145-203. See also Shana Schick, *Negligence and Strict Liability in Babylonia and Palestine: Two Competing Systems of Tort Law in the Rulings of Early Amoraim*, 29 Diné Israel 139.

⁶ See, e.g., Bava Kamma 26a ("adam mu'ad le'olam bein shogeg bein mezid bein 'er bein yoshen"). Despite the unequivocal formulation of this principle, note that some commentators carve out certain categories of harms for which persons are not actually held strictly liable. See Tosafot Bava Kamma 27b, s.v. *shemu'el*.

⁷ See, e.g., Bava Kamma 55b; Bava Kamma 45a and Rashi ad. loc., s.v. *kaltab*; Shulchan Arukh Choshen Mishpat 396:1 (henceforth simply "Choshen Mishpat").

⁸ Strictly speaking, of course, the conceptual reason for holding a *tortfeasor* liable for harm need not be the same as the reason for barring a *tort victim* from recovering for that harm. For example, one could theoretically hold that tortfeasors should be liable for harms which are their

either position.⁹ Nor is this distinction merely academic; in some cases, as we will see, the legal outcome of a tort case may turn on precisely this distinction.

2. *The Authorities*

The Talmud includes numerous cases in which a tort victim participates in their own harm and cannot seek recovery against the tortfeasor for that harm. One prominent example (“the walking case”) involves a barrel-carrier walking on a public street who comes to a sudden stop, leading the beam-carrier walking behind to collide into him and break his barrel.¹⁰ Another prominent example (“the sleeping case”) involves a plaintiff who decides to lie down beside another person who is already sleeping, or to place vessels beside that person. The plaintiff is then injured, or his vessels are then damaged, by that sleeping person, who rolled over in his slumber.¹¹ In neither case may the victim recover damages for their injuries.

Many authorities explain the victim’s bar to recovery in these cases as a function of the victim’s *carelessness* or *negligence*. Ramban, for instance, comments that in the sleeping case, “the second one [i.e. the victim] acted negligently/carelessly against himself (*mishum de-sheni pasha’ be-atzmo*),” and similarly, that in the walking case, “it is because of the victim’s negligence/carelessness that they exempt [the defendant] (*mishum peshi’ah de-nizak patru be-hu*)”¹² Similar formulations, all highlighting the “carelessness/negligence (*peshi’ah*)” of the victim in one or both of these cases, appear in the works of the Rambam, Tur, Shulchan Arukh and Sema.¹³ These commentators appear to ground the legal outcome of our cases in a *fault*-based (*peshi’ah*) theory of liability.

By contrast, Tosafot explain the victim’s loss of recovery in these cases not in

fault, but that victims should be barred from recovering for harms which they helped *cause*. In this section, we are primarily interested in the conceptual ground for barring a *victim’s* recovery. As such, references to fault- or cause-based theories of liability should be understood as applying to the specific question of why a victim should be barred from recovering from a tortfeasor, without implying any position on the question of why a tortfeasor might be compelled to compensate that victim, in the first place.

⁹ To be sure, halakha recognizes four distinct categories of tortfeasors (*shor*, *bor*, *ma’v’eh*, and *be’v’er*), each subject to its own rules of liability. See Bava Kamma 2a. It is thus conceivable that the halakhic treatment of negligent victims might depend upon the category of tortfeasor under discussion. For purposes of this article, however, we will not be wading into these subtler distinctions. Our aim instead is to outline, more broadly, the theoretical conditions under which halakha might adopt any version of a contributive or comparative negligence rule.

¹⁰ Bava Kamma 32a.

¹¹ Yerushalmi Bava Kamma 2:8.

¹² Ramban, Bava Metzia 82b, s.v. *ve-ata*.

¹³ Rambam, Hilkhot Chovel U-Mazik 1:11; Tur Choshen Mishpat, 421:6; Shulchan Arukh Choshen Mishpat 421:4; Sema ad. loc., s.v. *poshe’a*.

terms of the victim's *carelessness*, but instead, simply as a function of the victim's *causal* role. Commenting on the sleeping case, Tosafot write that the tortfeasor is exempt because "others caused it/him (הם גרמו לו)." ¹⁴ A clearer formulation appears in the novella of R. Nachum Partzovitz, who writes that, according to Tosafot, the tortfeasor is exempt in this case because the victim "is the one who caused the damage (הוא שגרם להזקק)." ¹⁵ These commentators appear to ground the legal outcomes of our case in a *cause*-based theory of liability. ¹⁶

3. *The Practical Difference*

Although Ramban and Tosafot's theories both produce the same outcome in our two cases, their theories diverge in several critical respects. Perhaps the best way to appreciate this difference is to recognize the legal problem which prompted their analysis in the first place. As referenced above, tortfeasors who cause harm through their direct actions (אדם המזיק) are generally held strictly liable. ¹⁷ Yet the Talmud exempts both the beam-carrier and the sleeper in the cases just considered, forcing commentators to identify why the exceptional feature of these cases—the participation of the victim in producing his own injuries—leads to their anomalous outcomes. Ramban and Tosafot diverge on several key issues as they attempt to explain this anomaly.

First, Ramban and Tosafot diverge on whether the tortfeasors in our cases actually committed cognizable torts. According to Ramban, the tortfeasors did commit cognizable torts—they are merely *exempted from liability* for those torts because of the victim's conduct. According to Tosafot, however, the tortfeasors actually did *not* commit any cognizable tort in the first place—their causal relationship to the harm is completely eclipsed by that of the victim, and as such, they actually fail to satisfy the element of causality required to establish even the basic case for tort liability. ¹⁸

¹⁴ Tosafot, Bava Kamma 4a, s.v. *keyvan*. Although it is not clear how precisely one ought to parse Tosafot's phrase "*hem garmu lo*," the phrase clearly allocates causative responsibility for the damage to the tort victim rather than to the tortfeasor.

See also Maharitz Chayot, Bava Kamma 4a, who writes that, according to Tosafot, the tortfeasor is exempt because "the actions of others caused it/him" ("מעשי אחרים גרמו לו").

¹⁵ Chiddushei R. Nachum (Partzovitz), Bava Kamma 4a, par. III.

¹⁶ For a cause-based explanation of the walking case, see Tosafot Bava Kamma 32a, s.v. *ve-ba*. Tosafot explain that the plaintiff barrel carrier who stopped short is barred from recovery because "by stopping, he caused [the defendant beam carrier]" to collide with him ("בעל חבית גרם לו בעמידתו").

¹⁷ See *supra*, n. 6.

¹⁸ Cf. Tosafot, Bava Kamma 27b, s.v. *shemu'el*. Tosafot explain that the damage caused in the "sleeping case" and the "walking case" is non-cognizable because it is characterized as "אונס גמור,"

Second, and derivatively, Ramban and Tosafot diverge on whether tort victims who participate in their own injuries are subject to any special doctrine in halakhic tort theory. Put another way, Ramban and Tosafot disagree on the fundamental issue at the heart of our inquiry: whether Jewish law recognizes contributory negligence as an independent tort principle. According to Ramban, Jewish law *does* recognize such a principle. After all, for Ramban, the victim's conduct in our cases is the only factor barring their recovery for the otherwise cognizable tort committed against them. Thus, it is specifically because the victim was contributorily negligent that they cannot collect against the tortfeasor. According to Tosafot, by contrast, Jewish law may *not* recognize a principle of contributory negligence. After all, for Tosafot, the victim's conduct in our cases is relevant only insofar as it brings the tortfeasor's causal contribution to their injury below the threshold for cognoscibility. Thus, it is not specifically because the *victim* hurt themselves that they cannot collect against the tortfeasor. Rather, *any* external factor which reduces the tortfeasor's causal contribution to the victim's harm would produce the same result—whether or not that factor was supplied by the victim themselves.

To illustrate these differences practically, let us consider the following hypothetical case. Suppose that Levi places Shimon's vessels beside Reuven, who is sleeping, and Reuven damages those vessels in his sleep. Is Reuven, the sleeper, liable to Shimon? According to Ramban, Reuven is indeed liable: he has committed a cognizable tort, and since Shimon played no role in his own harm, Ramban's rule would not bar him from recovery.¹⁹ According to Tosafot, by contrast, Reuven is not liable: he has not committed a cognizable tort, because Reuven's causal contribution to Shimon's harm is no greater when a third-party places Shimon's vessel beside him than it is when Shimon places those vessels there himself. As between Shimon and Reuven, then, Tosafot's rule would indeed bar Shimon from recovery.²⁰

i.e. a totally unavoidable mishap. In this sense, Tosafot's comment on 27b is consistent with their comment on 4a. The plaintiff's decisive causal role in bringing about the harm eclipses whatever causal role the defendant might have played. Therefore, the defendant's relationship to the harm is considered legally inconsequential "אונס גמור."

¹⁹ Cf. Shitah Mekubetzet Bava Kamma 21b, s.v. *ve-lo*, citing R. Yehonatan.

²⁰ Cf. Pitchei Choshen, Nezikin 6:1 n. 27; Chiddushei R. Nachum Bava Kamma 4a par. 111. Another important difference between the views would arise in a case where, by hypothesis, the defendant was the indisputable cause of the harm but the plaintiff, through his negligent conduct, contributed in some minor way to his own harm. By construction, the defendant in such a case would be the clear cause of the harm. Thus, according to Tosafot, the defendant would be liable, since Tosafot holds that the plaintiff can recover so long as the defendant caused the harm. According to Ramban, however, it is at least possible that the minor contributory negligence of the

4. *The Specific Theories*

In the preceding discussion, we examined two overarching theories of liability that explain why a tort victim who participates in their own harm forfeits their right to be compensated: a fault-based rationale and a cause-based rationale. While this dichotomy does not capture all the possible fine-grained halakhic theories for barring a negligent victim from tort recovery, the cause/fault distinction does provide a helpful framework for organizing those theories. We will therefore use that framework in the next sections as we consider, in closer detail, the different grounds upon which halakhic authorities bar a negligent victim from tort recovery.

First, we will consider fault-based theories: theories under which a negligent victim is barred from recovery because their own conduct is faulty in some way, or because their conduct somehow reduces the fault borne by the tortfeasor for their injuries. Second, we will consider the cause-based theory in greater detail: the theory under which a negligent victim is barred from tort recovery because their conduct vitiates the causal link between the tortfeasor's conduct and their own injuries.

B. Fault-Based Theories: Tort Victim's Harm of Self (פשע ניזק אנפשיה), Tort Victim's Harm to Tortfeasor (השבת אבדה), and Tort Victim's Waiver of Harm (מחילה)

Under a fault-based theory, a negligent victim is barred from recovery because their own conduct is faulty in some way, or because their conduct somehow reduces the fault of the tortfeasor. Commentators appear to offer three distinct explanations for how the victim's participation affects the allocation of fault.

The first possibility is that a negligent victim forfeits recovery because, through their negligence, they have harmed *themselves*. This is perhaps the most straightforward fault-based theory. Under this theory, the tortfeasor still bears fault for harming the victim; however, the victim loses their right to collect because they have directed *against themselves* the same sort of faulty conduct of which they accuse the tortfeasor.²¹ This appears to be the theory articulated by Ramban

plaintiff would bar him from recovery. Whether Ramban would in fact bar the plaintiff's recovery in such a case turns on the threshold question of how much negligence is required on the part of the plaintiff in order to bar him from recovery. Since Ramban does not address this question, see *infra* Sec. D, it is an open question whether, in this constructed case, the plaintiff could recover.

²¹ Cf. Page Keeton and William Lloyd Prosser, *Prosser and Keeton on Torts* (1984), p. 452 ("Many theories have been advanced to explain the defense of contributory negligence. It has been said that it has a penal basis, and that the plaintiff is denied recovery to punish him for his own misconduct. Another theory, sometimes advanced, has been that the plaintiff is required to come into court with 'clean hands.'... It has been said also that the rule is intended to discourage ac-

above, who specifically emphasizes that the negligent victim in the sleeping case forfeits recovery because “he acted negligently *against himself*” (פשע בעצמו).²² Tosafot Rid invokes a similar formulation when discussing the walking case (“פשע נזיק אנפשיה”).²³ Other commentators also apply similar formulations to a wide variety of cases involving negligent victims—including those who fall victim to an animal’s act of consumption, trampling,²⁴ or goring,²⁵ and even those harmed by judicial malpractice.²⁶

cidents, by denying recovery to those who fail to use proper care for their own safety.”)

²² Ramban op. cit.

²³ Tosafot Rid, Bava Kamma 48b.

²⁴ Per Talmudic law, an animal owner is exempt from damages caused when his animal consumes or tramples produce left in a public area—i.e., “tooth and leg” damages (“shen ve-regel”). See Bava Kamma 19b. Some commentators explain this exemption as grounded in contributory negligence. See Ralbag, Shemot 121, 239–40: (“ואין דרך האנשים להניח כליהם או” “פירותיהם ברשות הרבים ולזה יהיה הניזק הוא הפושע בזה, לא המזיק”). Along similar lines, Rambam explains that “one is free from responsibility [for the damage caused by] a tooth or foot [of an animal] in a public place... [for] he (i.e. the victim) who puts a thing in a public place is at fault toward himself and exposes his property to destruction. Accordingly, one is only responsible for [damage caused by] a tooth or a foot in the field of the injured party.” Moreh Nevukhim, 3:40; see also Yuval Sinai and Benjamin Shmueli, *Maimonides and Contemporary Tort Theory* (2020), pp. 257–258. See also Ralbag, Shemot 21, pp. 239–40.

²⁵ In several instances, the Talmud invokes a rule known as “כל המשנה” (“all who deviate”): “when one deviates and another then deviates, [the second actor] is exempt” (“כל המשנה ובא אחר ושינה בו פטור”). Under this rule, if a plaintiff acts in a manner that is unusual or out of the ordinary, and is harmed by the defendant’s animal due to this unusual conduct, the defendant is exempt from liability. Although this rule appears to state a general principle of contributory negligence, it is only applied in two cases in the Talmud. In the first case, a plaintiff’s cow crouches in the middle of a busy thoroughfare where it is then kicked by the defendant’s cow. See Bava Kamma 20a. In a second case, a plaintiff antagonizes a defendant’s dog which then bites him. See Bava Kamma 24b. Some commentators derive a general principle of contributory negligence from these cases, and apply the same sort of fault-based formulation that Ramban and others apply in the walking case discussed above. See, e.g., Bekhor Shor Shemot 22:4, who explains “כל המשנה” as consistent with the principle exempting “tooth and leg” damages (שן ורגל) in the public domain; cf. *supra* n. 24. In both cases, the victim is considered to have brought the injury upon himself (“איהו דאפסיד אנפשיה”). Other commentators limit the “כל המשנה” rule to animals, since animals are less capable of coordinating their response to extraordinary stimuli. See, e.g., Tosafot Bava Kamma 32a, s.v. *ve-ha*; Hagahot Ashri Bava Kamma 3:1; Melechet Shlomo Bava Kamma 3:1. Other commentators further limit the “כל המשנה” rule specifically to “horn” damages (“קרן”). On this theory, “horn” damages are defined by the defendant’s animal engaging in extraordinarily aggressive behavior, such as goring or kicking; thus, when the animal’s action flows from the *plaintiff’s* unusual conduct, its own action is no longer deemed extraordinarily aggressive. See, e.g., Shi’urei R. David (Povarsky), Bava Kamma 2b, par. 118. According to this last view, it would be difficult to derive a general principle of contributory negligence from the principle of “כל המשנה.”

²⁶ Rashba and Ba’al Ha-Ma’or both argue that a judge who makes a basic error in deciding a case and erroneously disqualifies or invalidates some item belonging to a party may be exempt from liability if the parties were negligent in not correcting his error. See Shu”t Rashba 2:370;

The second possibility is that a negligent victim forfeits recovery because, through their negligence to themselves, they have actually harmed *the tortfeasor*. This is perhaps the least intuitive fault-based theory. Under this theory, as under the first, the tortfeasor still bears fault for harming the victim; however, unlike under the first theory, the victim under this theory loses their right to collect because they have directed their own faulty conduct *back towards* the tortfeasor. This type of theory is articulated by Chiddushei Ha-Rim regarding a case where a tortfeasor inadvertently places a hot coal on the garment of another party. According to the Chiddushei Ha-Rim, if the garment owner had the opportunity to remove the coal before it singed his garment, but neglected to do so, then that garment owner cannot recover from the tortfeasor.²⁷ Chiddushei Ha-Rim explains that the garment owner owed a duty of rescue to the tortfeasor. Just as the garment owner has a duty to rescue lost property (השבת אבדה) and return it to its owner, he has a duty to remove the coal to rescue the tortfeasor from incurring financial liability.²⁸ By characterizing financial liability for the economic damage suffered by the tort victim as the “lost item” of the *tortfeasor*, Chiddushei Ha-Rim argues that the tort victim has a duty to mitigate his own harm in order to prevent the tortfeasor from incurring (additional) liability.²⁹ It is because the negligent victim did not properly protect the tortfeasor’s interests in this way that they themselves are barred from recovery.³⁰

Ba'al Ha-Ma'or Sanhedrin 12a (Alfasi): (“דמשום פשיעותא דבעל דין נגעו בה, דכל טועה בדבר משנה דבר” – “והוא היה לשיולי ולגלווי טעותא ולא היה ליה למסמך עליה, וכשנטלה דין, להאכילה לכלבים הוה לה למחויי ברור הוא, וכי לא מחה איהו דפשע בשל”).

According to these commentators, the negligent failure of the litigant to correct the judge’s error renders the litigant contributorily negligent and bars him from recovering compensation from the judge. Ramban, however, objects that it is unreasonable to hold litigants accountable for correcting the errors of learned judges. See Milchamot Sanhedrin 12a (Alfasi): (“אטו כולי עלמא ידעי ספרא וספרי ותוספתא וכולי תלמודא ... ובאשה וקטן מאי איכא למימר, אטו דינא גמירי”).

²⁷ See Bava Kamma 27a where the Talmud seems to rule that the tortfeasor is liable for placing the coal on the garment even when the owner could have removed it. But Chiddushei Ha-Rim limits the Talmud’s ruling to a case where the tortfeasor committed an intentional tort. When the tort was committed inadvertently, Chiddushei Ha-Rim holds that the tortfeasor would be exempt. Arukh Ha-Shulchan offers a similar distinction in interpreting the Talmud’s ruling. See Arukh Ha-Shulchan 418:35.

²⁸ Chiddushei Ha-Rim, Hilkhot Dayyanim 25, s.v. *amnam*: (“הגחלת] מטעם: “מחוייב זה להסיר [הגחלת] מטעם”)

²⁹ Note that other commentators explain such cases according to the more conventional, first fault-based approach discussed previously. See, for instance, Rabbah’s discussion of a tortfeasor who places a burning coal on someone’s incapacitated servant where the master negligently fails to remove it. Bava Kamma 27a. According to Ramban, the plaintiff in this case fails to recover because “he has harmed himself” (“כיון דהוה ליה לסלקה כמאן דאיהו אויך נפשיה”). Milchamot, Bava Kamma 12a (Alfasi), s.v. *ve-od*.

³⁰ Chiddushei Ha-Rim, Hilkhot Dayyanim 25, s.v. *amnam*: (וכיון שמחוייב מדין השב

The third possibility is that a negligent victim forfeits recovery not because their conduct creates harm, and therefore *accrues* fault to *themselves*, but rather because their conduct *absolves* from fault, or at least from responsibility, those who harmed *them*. Under this theory, unlike under the first and second theories, the tortfeasor actually bears *no* fault for the victim's injuries, because a victim who voluntarily participates in the activity is considered to have consented to the possibility of such injury. This doctrine, commonly referred to as of assumption of risk,³¹ is well established in halakhic tort theory.³² Thus, for instance, commentators explain that wrestlers who injure each other in the course of their jostling,³³ or celebrants who injure each other in the course of lively dancing on holidays or at weddings,³⁴ are exempt from tort liability, because each participant implicitly forgives the others for injuries they might

אבידה ממילא שוב אין בעל הגחלת כלל מחויב... דהא על כל פנים הי' מחויב מטעם השבת אבידה להסיר (הגחלת להציל המזיק מהפסד... ושוב בלא הציל... [המזיק] פטור)

³¹ Note that under common law, contributory negligence and assumption of risk are often discussed as two separate defenses to tort liability. As distinguished by one commentator, "Contributory negligence is a defense based on the plaintiff's failure to take reasonable care. Assumption of risk is a defense based on the notion that the plaintiff consented to the defendant's conduct, which annuls the plaintiff's theory of negligence." Keith Hylton, *Contributory Negligence and Assumption of Risk*, in *Tort Law: A Modern Perspective* (2016), pp. 147-169. Not all courts, however, recognize a formal distinction between the two doctrines, and at the very least, most courts acknowledge that the doctrines are very closely related. See E. H. Schopler, Annotation, *Distinction Between Assumption of Risk and Contributory Negligence*, 82 A.L.R.2d 1218 (1962). Thus, for instance, a tort victim who fails to take reasonable care ("contributory negligence") might sometimes be deemed to have consented to the consequences of their conduct ("assumption of risk") for that very reason. See also *infra* n. 33.

³² Note that under halakhah, as under common law, contributory negligence may be related to the principle of assumption of risk and waiver. For the suggestion that contributory negligence is in fact grounded in the principle of assumption of risk, see Chiddushei Ha-Rim, *Hilkhot Dayyanim* 25, s.v. *ve-im kein*. Chiddushei Ha-Rim posits, at one stage in his analysis, that in the case discussed above concerning the coal placed upon the garment, if the garment owner negligently failed to remove the coal from the garment, it is as if he instructed the defendant to destroy the garment and consented to damage ("מה שאינו מסיר ההיזק כאומר קרע... א"כ ממילא פטור דהוי אומר קרע... והוי ריצו"). See also Shitah Mekubetzet, Bava Kamma 27a, s.v. *c"m*, citing Rabbenu Peretz, who explains the coal case based on the principle of waiver ("משום דמחיל ליה"). See also Pitchei Choshen, *Nezikin* 1:18, n. 49.

³³ See, e.g., *Tur Choshen Mishpat* 421:7.

³⁴ See, e.g., *Tosafot Sukkah* 45a, s.v. *mi-yad*; *Pitchei Choshen, Nezikin* 6:1 n. 29.

reasonably incur in the course of these activities.³⁵ It is because the negligent victim waived their rights in this way that they are barred from recovery.³⁶

C. Cause-Based Theory: Tortfeasor as Non-Superseding Cause (מעשיו גרמו לו)

Under a cause-based theory, a negligent victim is barred from tort recovery due to some casual deficiency in the tortfeasor's conduct. Tosafot, cited above, advance this sort of theory by positing that the negligent victim who places his vessels beside a sleeping tortfeasor has thereby "caused" the damage that later befalls those vessels.³⁷ Of course, since it is the sleeping tortfeasor who ultimately breaks the vessels—not the negligent victim—Tosafot clearly cannot mean that the negligent victim caused the damage in a *real-world* sense. Instead, Tosafot must mean that though the tortfeasor's conduct *physically* caused damage, the causal connection between his conduct (i.e. lying down to sleep in an area clear of vessels) and the resultant damage (i.e. breaking, in his sleep, vessels that had not been there when he lay down) is too tenuous to meet the threshold of tort liability.³⁸

Indeed, neither under American law nor under halakha is a tortfeasor held liable for all possible damages caused by their actions. Instead, both systems adopt principles that limit the sorts of causality deemed legally actionable.³⁹ For our purposes, the most illuminating American law principle seems to be the doctrine of

³⁵ See also Bava Kamma 32a, which rules that a person rushing to complete chores before Shabbat who inadvertently injures a passerby is exempt from liability under the theory that he acts "with permission" ("ברשות"). R. Meir Simcha explains this ruling as an application of the doctrine of assumption of risk. The plaintiff knows that people are in a hurry and move about hectically on Friday afternoon. Thus, when he voluntarily walks outside during the Friday hustle and bustle, he is deemed to have assumed the risk of being injured in the medley. See Chiddushei R. Meir Simcha, Bava Kamma 32a.

³⁶ For the idea of waiver in Jewish tort law, see Choshen Mishpat 380:1.

³⁷ Tosafot, Bava Kamma 4a, s.v. *keivan*.

³⁸ Cf. Page Keeton and William Lloyd Prosser, *Prosser and Keeton on Torts* (1984), p. 452 ("The greater number of courts have explained [contributory negligence] in terms of 'proximate cause,' saying that the plaintiff's negligence is an intervening, or insulating, cause between the defendant's negligence and the result.")

³⁹ Whether these limiting doctrines are actually grounded in cause-based rationales (i.e. limiting tort liability because the tortfeasor's conduct was not sufficiently *causal*) or in fault-based rationales (i.e. limiting tort liability because the tortfeasor's conduct, despite being sufficiently causal, was not sufficiently *blameworthy*) is an open question. Although we will discuss these doctrines purely in terms of considerations of *causality*, many authorities assume or argue that the doctrines are also grounded in considerations of *blameworthiness*. See, e.g., David A. Fischer, *Products Liability-Proximate Cause, Intervening Cause, and Duty*, 52 Mo. L. Rev. 547 (1987). For an interesting comparative perspective on this issue, see Steven F. Friedell, *Nobody's Perfect: Proximate Cause in American and Jewish Law*, 25 Hastings Int'l & Comp. L. Rev. 111 (2002).

“intervening” and “superseding cause.”⁴⁰ Under this doctrine, a tort defendant may be exempt from liability if his negligent act is superseded by the harmful act of an independent third party, since this intervening act interrupts the chain of causality between the defendant’s negligence and the victim’s harm. If, however, the intervening act follows as a normal or foreseeable consequence of a situation created by the defendant, then the defendant remains liable, because the intervening act did not interrupt the chain of causality, and so the intervenor did not supersede the defendant as the legal cause of the harm.

Analogous principles exist in Jewish law. For instance, if Reuven leaves an obstacle in the public domain, but Shimon then kicks that obstacle to another location, and Levi trips upon it at that location, then it is Shimon, the kicker, who is held liable for the damage.⁴¹ By contrast, if Reuven gives a lit torch to an individual who lacks mental capacity, and that individual then sets the fire upon Levi’s property, some hold Reuven liable for the damage.⁴² The Talmud applies to both of these cases a version of the phrase “*ma’asav garmu lo*”—“his actions were its cause.” In the case of the kicked obstacle, Reuven’s actions are *not* deemed to cause the damage, because Shimon’s act interrupts the chain of causality, whereas in the case of the lit torch, Reuven’s actions *are* deemed to cause the damage, because the act of the incapacitated individual does not interrupt the chain of causality.⁴³

Since Tosafot also apply the phrase “הם גרמו לו” to the sleeping tortfeasor, it seems that our case should be analyzed along similar lines. On this reading, the sleeping vessel-breaker, like the incapacitated fire-setter, is not liable for damage because he neither initiated the chain of causation which produced that damage, nor intervened in that chain so significantly as to interrupt it. Applying this logic generally, the theory we would deduce from Tosafot for why a negligent victim is barred from recovery is that such a victim, through their negligent act, initiates the chain of causation that leads to their own injuries. To that extent, parties who emerge subsequently and direct harm towards the negligent victim would be mere intervenors, but would not be viewed as superseding causes of the victim’s injuries

⁴⁰ See generally Restatement (Second) of Torts § 447 (1965). As formulated by the Restatement, “superseding causes” absolve a tortfeasor from liability, but not all “intervening acts” rise to the level of a “superseding cause.”

⁴¹ Bava Kamma 6a.

⁴² Bava Kamma 59b.

⁴³ See also Pitchei Choshen, Nezikin 7:32.

unless they acted with autonomy sufficient to undermine the preexisting causal chain set in motion by the victim.⁴⁴

D. Threshold of Negligence

One remaining question, for the authorities who recognize a distinct halakhic principle of contributory negligence, is whether the victim is barred from recovery whenever he is negligent *to any degree* or only when his negligence has crossed a certain *substantial* threshold. Some commentators appear to hold that *any* amount of negligence from the victim is sufficient to bar him from recovery. Pitchei Choshen, for example, writes that if there is even a slight degree of negligence (“צד פשיעה”) from the victim, he cannot recover damages.⁴⁵ Other commentators hold that the victim is barred from recovery only when his negligence crosses a substantial threshold. Ralbag, for instance, writes that a victim is barred from recovery only when he is at least as negligent as the tortfeasor.⁴⁶

CONCLUSION: CONTRIBUTORY NEGLIGENCE IN JEWISH LAW

Talmudic case law establishes that a victim’s right to recover in a tort action may be affected by his own conduct. Whether this case law stands for the principle of contributory negligence may depend on whose interpretation of that case law we adopt.

According to Tosafot, it is not clear if Jewish law would recognize an independent principle of contributory negligence. After all, Tosafot appear to hold that the victim’s conduct will bar him from recovery only if he has disrupted the causal link between the tortfeasor and the harm.

According to Ramban and Tosafot Rid, however, Jewish law does recognize an independent principle of contributory negligence. In their view, the walking case

⁴⁴ To be sure, similar analysis could apply if it is the tortfeasor, not the tort victim, who first undertakes negligent conduct. In that scenario, a cause-based theory of contributory negligence would require us to characterize the negligent victim as a superseding cause of their own injuries—i.e., the tort victim’s negligence would be deemed to interrupt the chain of causation initiated by the tortfeasor.

⁴⁵ Pitchei Choshen, Nezikin, 1:13, n. 36: “נראה שאם יש צד פשיעה מצד הניזק... הרי זה כניזק.” [פושע, ופטור [המזיק].

⁴⁶ Ralbag, Shemot 21, p. 227: “שלא יתחייב המזיק בשגגה אם היה הניזק הוא הפושע יותר בהגעת הנזק.” [כך הענין אם לאו תאמר שזרק את האבן והוציא ראשו וקבלה, או שנכנס לרשות המזיק שלא ברשותו והזיקו בשגגה. וכן הענין אם.”] היו שניהם במדרגה אחת מהפשיעה. וזה מבואר בנפשו.

and the sleeping case establish that a victim's contributory negligence bars him from recovery. We outlined three theories that explain why a victim's contributory negligence blocks recovery. According to the first theory, the victim is considered to have harmed *himself* through his own negligence. According to the second theory, the victim is considered to have harmed *the defendant* by increasing his liability. According to the third theory, the victim is considered to have consented to the harm by having assumed the risk of injury through his conduct.

In Part II we explore whether Jewish law recognizes a principle of comparative negligence, according to which the amount the plaintiff can recover would be reduced in proportion to his contribution of negligence.

II. COMPARATIVE NEGLIGENCE IN HALAKHA

INTRODUCTION

In Part I, we examined sources that establish a halakhic principle of contributory negligence, under which a tort victim's recovery might be totally barred when they bear responsibility for the harm they sustained. In Part II, we will now examine sources that support a halakhic principle of *comparative* negligence, per which a tort victim's recovery might be partially reduced, though not completely precluded, when they contribute to their own injuries.⁴⁷

The two fundamental principles that would yield a halakhic doctrine of comparative negligence are well-established in Jewish law. The first principle is that a victim's right to recover tort damages may be negatively impacted when their own negligence contributed to their damages. This is the principle we discussed in Part I, and as we documented there, it has broad support among halakhic authorities. The

⁴⁷ Historically, several factors prevented common law courts from embracing the doctrine of comparative negligence. These included "the notion of the indivisibility of any single injury" and "the lack of any definite basis for apportionment." Page Keeton and William Lloyd Prosser, *Prosser and Keeton on Torts* (1984), p. 470. Cf. *Helf v. Glanding* ("[T]he law cannot measure how much the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct.") However, "there has been for many years an increasing dissatisfaction with the absolute defense of contributory negligence." *Prosser* op. cit., p. 469. The reason for this shift is that the doctrine of contributory negligence "places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage." *Id.* See also *Haeg v. Sprague, Warner & Co. Inc.*, 202 Minn. 425, 429, 281 N.W. 261, 263 (1938) ("the rule of comparative negligence would serve justice more faithfully than that of contributory negligence").

second principle is that tortfeasors are only liable for the share of damages that they cause, but are exempt for any share of damage sustained by the victim due to some other source. This, too, is a strongly supported halakhic principle.⁴⁸ Taken together, these two principles yield a halakhic doctrine of comparative negligence: a tortfeasor should not be liable for the share of damages caused by the victim, and the victim's right to recover should be reduced in proportion to the amount they contributed to their own harm. That said, no Talmudic case explicitly combines these two principles to articulate a clear rule of comparative negligence.⁴⁹

Our goal, then, is to explore the halakhic validity of a comparative negligence rule. We do so in two ways. First, we will consider whether it is possible to *derive* a comparative negligence rule *from* existing case law. To do so, we will find categories of tortfeasors who pay less than full damages under established halakha, and will evaluate whether the comparatively negligent tortfeasor can be reasonably characterized so as to fit into one of these established categories, such that the legal outcome applicable in those cases would apply in our case as well. Second, we will consider whether it is possible to *locate* a comparative negligence rule *within* existing case law. To do so, we will find, here again, categories of tortfeasors who pay less than full damages under established halakha, but this time, we will try to show that the halakhic ruling in those cases actually presupposes a rule of comparative negligence. Put another way, under the first approach, we will be grounding the halakhic rule of comparative negligence in other, pre-existing halakhic tort principles, whereas under the second approach, we will argue that in fact, those pre-existing tort principles are themselves grounded in the more fundamental principle of comparative negligence—even if that underlying principle is not explicitly identified as such.

Applying these approaches, we will consider, in this article, two particular categories of tortfeasors who pay less than full damages under established halakha: joint tortfeasors (שותפים בנזק), which might provide a model for a comparative negligence rule; and reciprocal tortfeasors (חבלו זה בזה), which might either provide a model for comparative negligence, or which might in fact presuppose such a principle. Under the paradigm of joint tortfeasors (שותף בנזק), the negligent victim will be characterized as having harmed *themselves*, while under the paradigm

⁴⁸ See, e.g., Shulchan Arukh Choshen Mishpat 410:13. See also *infra* n. 54.

⁴⁹ In general, Talmudic case law tends to focus more on determining liability than on apportioning damages once liability has been determined. Even where the Talmud finds a tortfeasor liable, it is an open question how damages are to be apportioned between the parties. See, e.g., Rambam, Hilkhot Sekhirut 3:6; Rabad, ad. loc.

of reciprocal tortfeasors (חבלו זה בזה), the negligent victim will be characterized as having harmed the *tortfeasor*. That said, characterizing the negligent victim in these ways, for the purposes of a comparative negligence rule (i.e. merely *reducing* their recovery), poses some doctrinal complications that are perhaps not as challenging in the context of contributory negligence (i.e. completely *barring* their recovery). We will note some of those complications in our discussion as well.

A. Theory #1: Negligent Victim as Joint Tortfeasor (שותף בנזק)

1. *The Theory*

Our first halakhic theory of comparative negligence appeals to the law of joint tortfeasors. Under the law of joint tortfeasors, two tortfeasors who mutually harm a victim must compensate that victim in proportion to the harm that each one caused. Thus, for instance, if the first tortfeasor is 40% liable for the victim's injuries, and the second tortfeasor is 60% liable, then the tortfeasors would be individually liable for 40% and 60% of the victim's damages, respectively. As applied to our case, this theory would characterize the comparatively negligent tort victim as a joint tortfeasor together with the actual tortfeasor. Put another way, the victim who contributes to his own harm would be viewed, under this theory, as having acted in concert with the actual tortfeasor to injure *himself*. Practically, then, if the victim's negligence was, say, 40% responsible for his injury, then he could recover that portion of the damages only from "himself." All he could recover from the actual tortfeasor would be the remaining 60%.

The key idea here is that every instance of comparative negligence can be characterized as a case of joint tortfeasors, which yields identical legal outcomes to an actual doctrine of comparative negligence.

2. *The Authority*

The legal principle of joint tortfeasors, which underlies our first theory, is firmly established in Jewish law. For example, the Talmud discusses a case involving six people who sit on a bench. If the bench breaks as a result of their combined force, each person is liable to pay for his share of the damage.⁵⁰ Based on this case and

⁵⁰ Tosefta Bava Kamma 2:9; Bava Kamma 10b.

similar cases in the Talmud,⁵¹ Rambam⁵² and Shulchan Arukh⁵³ codify the general principle that tortfeasors who participate jointly in inflicting damage upon a tort victim split the damages between them, with each party bearing their share of the liability. Several other authorities explicitly endorse the principle that liability should be apportioned among joint tortfeasors according to each party's contribution to the harm.⁵⁴

3. *The Challenge*

The challenge with our first theory is that it appears to present a single party as both tort victim and the tortfeasor in the same cause of action. It does this by characterizing the negligent victim as a joint tortfeasor vis-à-vis the damage he suffered. Yet the principle of joint tortfeasors typically applies to defendants. It is not obvious that this principle can be applied to the plaintiff himself in his own cause of action.⁵⁵

⁵¹ For some examples of joint tortfeasors in the Talmud, see Bava Kamma 10b and Choshen Mishpat 383:3; Bava Kamma 19b and Choshen Mishpat 390:10; Bava Kamma 21b and Choshen Mishpat 392:1; Bava Kamma 53a-b and Choshen Mishpat 410:32-34. For an overview of cases of joint tortfeasors in the Talmud, see Pitchei Choshen, Nezikin 10:25-33.

⁵² See Bava Kamma 10b; Rambam, Hilkhot Chovel U-Mazik 6:13-17.

⁵³ Shulchan Arukh Choshen Mishpat 383:3.

⁵⁴ See, e.g., Tur Choshen Mishpat 410:

דוקא עד שיעור מה דהוה חייב ביה אהאי נזקא היכא דהוה עביד ליה איהו לחודיה אבל טפי לא.

And Sema Choshen Mishpat 410:57 (first interpretation); Ketzer Ha-Choshen 410:3. See also Shulchan Arukh Choshen Mishpat 410:13:

חפר אחד שמונה ובא חבירו וחפר עוד טפה, שניהם חייבים בנזקין, כל אחד לפי מה שחפר.

And Pitchei Choshen, Nezikin 10:31 n. 67:

היה הספסל עומד להשבר מחמת הראשון תוך ב' שעות, ומחמת ישיבת השני נשבר קודם לכן, שניהם חייבים... נראה פשוט שאם הראשון גרם שנחרטע הספסל בישיבתו... חייב מה שנפחת הספסל מחמתו... שיש לשער כמה שוה חפץ שיכול לעמוד ב' שעות וכמה שוה שיכול לעמוד שעה אחת וההפרש ישלם השני לבד.

Other authorities write as though joint tortfeasors split the liability evenly. But it is possible that this is only true when either: (a) each party's contribution was sufficient to cause the damage on its own, i.e., each party was a sufficient cause of the harm; or (b) there is no possibility of a fruitful inquiry to determine each party's actual contribution. In such cases, an even split between the joint tortfeasors is quite reasonable. For an example of the first type of case, see Bava Kamma 53a:

האי כוליה היזקא עביד והאי כוליה היזקא עביד.

For an example of the second type of case, see Shulchan Arukh Choshen Mishpat 383:4:

אם אין ידוע כולם משלמים בשוה.

⁵⁵ In theory, one could raise a similar challenge against the first theory of contributory negligence discussed in Part I. After all, that theory similarly characterizes the negligent victim as having acted negligently against themselves. That said, the challenge is stronger against our current, comparative negligence theory, because this theory requires us to formally analogize the negligent victim to a joint tortfeasor, in order to import to our case the precedent of partial tort recovery. Taken to its logical extreme, this analogy might imply that the negligent victim technically functions as both a plaintiff and a defendant in the same cause of action.

Nevertheless, the crucial step of characterizing a negligent victim as a joint tortfeasor in his own harm has already been taken by Or Sameach. Or Sameach posits the following case.⁵⁶ Suppose that Reuven dug a pit but failed to guard it appropriately. Suppose further that Shimon owns two oxen, and that one of Shimon's oxen pushes the other one of Shimon's oxen into Reuven's pit. Or Sameach argues that Shimon (the ox owner) is a joint tortfeasor together with Reuven (the pit owner) in damaging his own ox.⁵⁷ As such, Or Sameach concludes, Shimon should recover only those damages arising from Reuven's share of the negligence, but not the damages arising from his own share. This is an explicit application of the comparative negligence principle, modelled upon the law of joint tortfeasors. Thus, there is precedent to support the theory that a tort victim can be characterized in the same cause of action as both a victim and joint tortfeasor in his own harm.⁵⁸

More fundamentally, we may not need to characterize the negligent victim as actually occupying the role of tortfeasor against *himself* in order to preserve our basic analogy between that victim and a joint tortfeasor. For our purposes, it is sufficient to treat the negligent victim as a joint tortfeasor merely in the sense that no *other parties* are liable for that share of harm which he brought upon himself. Put otherwise, the rule of joint tortfeasor liability can be conceptualized in two different ways. Phrased positively, the rule provides that a joint tortfeasor is liable for whatever share of harm he personally causes. Phrased negatively, however, the

⁵⁶ Or Sameach, Nizkei Mammon 12:19. Moreover, there are many cases in the Talmud and halakhic literature where the negligent plaintiff is characterized as having "harmed himself" ("איהו איזיק אנפשיה"). For several examples, see *supra* Part I.

⁵⁷ Or Sameach, Nizkei Mammon 12:19:

כיון דאיהו גרים לנפשיה, היינו ששורו דחף שורו... איהו שותף בנזק כמו... בעל הבור... דהוא [ר"ל בעל השור] עשה היזק כמו בעל הבור... וע"ז אין צריך לשלם בעל הבור, כיון שבעל השור הזיק שור של עצמו

See also Pitchei Choshen, Nezikin 10:27 n. 55, discussing Or Sameach's case:

[פשוט שאין בעל הבור משלם אלא חצי הנזק, כיון שהשור שלו [של הנזיק] הוא הדוחף, והרי זה כאילו הוא עצמו [ר"ל הנזיק] שותף לנזק

⁵⁸ Mishnah Bava Kamma 8:6 may shed light on this question. The Mishnah rules that one who inflicts an injury upon himself ("חובל בעצמו") is "exempt" ("פטור") from damages. This might imply that in principle self-harm does trigger a cause of action—after all, one cannot be "exempted" from a claim that was incognizable to begin with. If so, then an individual could theoretically occupy the role of both victim and tortfeasor in the same course of action. To be sure, one might be tempted to read "exempt" as referring to a different cause of action: the prohibition against destroying God's creatures ("בל תשחית"). But that reading is inconsistent with the fact that, in the very same breath, the Mishnah compares the exemption for self-injury with a ruling of financial liability for others who impose harm on him ("אחרים שהבלו בו חיביב"). This comparison implies that "exempt" and "liable" in this clause of the Mishnah refer to the same type of tort liability (i.e., compensation). See Tosafot, Bava Kamma 91b, s.v. *ha-chovel*; Tiferet Yisrael, Bava Kamma 9:6, 39.

rule provides merely that a joint tortfeasor is *not* liable for any share of harm that he did *not* personally cause. If this second, weaker formulation of the principle is applied to a tortfeasor whose victim was comparatively negligent, that principle alone would suffice to exempt the tortfeasor from the share of harm caused by the victim. This weaker application of the principle does not depend upon characterizing the victim's share of negligence in any sense. It depends merely on recognizing that the tortfeasor was not the source of that particular share of negligence.

B. Theory #2: Negligent Victim as Reciprocal Tortfeasor (חבלו זה בזה)

1. The Theory

Our second halakhic theory of comparative negligence is modelled upon a law pertaining to reciprocal tortfeasors. Under the law that we will consider, where two tortfeasors harm each other, their damages offset, and the party who sustained greater damage receives the difference from the other party. As applied to our case, this theory would characterize the comparatively negligent tort victim as a reciprocal tortfeasor of the actual tortfeasor. Put another way, the victim whose negligence contributes to his own harm would be viewed, under this theory, as having harmed not only himself through his negligence, but also *his tortfeasor*. One possible justification for this characterization, which we encountered in our previous article, is that a tort victim whose own negligence amplifies his losses thereby increases the amount in damages that his tortfeasor must pay him as compensation. By imposing this additional cost upon the tortfeasor—beyond what the tortfeasor ought to have paid on account of his own conduct—the victim “harms” that tortfeasor financially, and it is this harm, we might argue, which the actual tortfeasor recovers when he deducts that value from the full damages owed to the victim.⁵⁹ Practically, then, if the victim's negligence was, say, 40% responsible

⁵⁹ This theory of comparative negligence bears strong similarities to Chiddushei Ha-Rim's approach to contributory negligence, which we discussed in Part I. Chiddushei Ha-Rim, *Hilkhot Dayyanim* 25, s.v. *ammam*. Chiddushei Ha-Rim argues that a victim wrongs the tortfeasor when he negligently fails to avoid the harm that the tortfeasor set in place—for example, by failing to remove the burning coal that the tortfeasor placed on his garment. Such failure breaches the victim's duty to “rescue” the tortfeasor from incurring liability (“השבת אבדה”). As such, the victim forfeits his right to recover damages. See *supra*, n. 28–31. Like Chiddushei Ha-Rim, we also characterize a negligent victim as wronging the tortfeasor under the present theory of comparative negligence. However, for Chiddushei Ha-Rim, the wrong is one of nonfeasance: the victim *failed* to rescue the tortfeasor from liability. For us, it is one of *malfeasance*: the victim *caused* the tortfeasor to incur (additional) liability.

for his injury, then he would “owe” that portion of his injury to the tortfeasor, as compensation for causing the tortfeasor to incur the increased portion of liability. The tortfeasor would therefore deduct that amount from the full damages owed to the victim, leaving him with a net obligation of 60%.

To be sure, it is no simple matter to characterize the marginal increase in damages that the tortfeasor owes to the victim on account of the victim’s negligence as a “harm” imposed by the *victim* upon the *tortfeasor*. We will address that issue below. Notice, though, that this theory avoids the problem inherent in the previous theory: here, unlike there, the victim is not conceived of as both the plaintiff and the defendant in the same cause of action. Instead, the case is conceived as involving two separate causes of action: a first cause of action in which the victim sues the tortfeasor, and a second cause of action in which the tortfeasor countersues the victim.

2. *The Authority*

The legal principle underlying our second theory derives from a series of Mishnahic cases involving two oxen—or two people, or one person and an ox—each of whom harms the other and is harmed by that party in return. Although it will be necessary to examine the most complex of these cases later on, for now it will suffice to consider a simplified version of the most basic case. Suppose that Reuven and Shimon both own oxen and that both owners fail to guard their oxen appropriately. Suppose that as a result of this failure, Reuven’s ox gores Shimon’s ox, inflicting \$100 worth of damage, and that Shimon’s ox likewise gores Reuven’s ox, inflicting \$50 worth of damage. Suppose further than no other tort principles apply that would spare either Reuven or Shimon from paying full damages when their oxen gore. In this scenario, the Mishnah rules that the damages are netted against each other, leaving Reuven liable to pay Shimon \$50 (\$100—\$50).⁶⁰

When we consider the above scenario from Shimon’s perspective, we discover that the amount which he can recover, as the victim of Reuven’s tort, is directly reduced by the value assigned to his own tortious act. That is, Reuven’s tortious conduct cost Shimon \$100 of damage, but Shimon’s tortious conduct cost Reuven \$50 of damage. Thus, we deduct the value of Shimon’s tort from the value of Reuven’s tort in order to determine how much Shimon can ultimately recover.

Now return to the case of the comparatively negligent victim. In this case, too, the victim acts tortiously; and in this case, too, the victim’s tortious conduct

⁶⁰ Bava Kamma 33a.

imposes costs upon the tortfeasor—here, in the form of increased tort liability that the tortfeasor would not otherwise have incurred. If, then, we were to characterize the victim's act of imposing such additional costs upon the tortfeasor as a form of cognizable harm (קרן) committed against that tortfeasor, then perhaps we could reduce the tortfeasor's liability in such cases by applying the same principle which would require the greater of two joint tortfeasors to pay the lesser tortfeasor only the net damage produced between them. This would effectively result in a halakhic rule of comparative negligence.

The key idea here is that the cases of comparative negligence can be characterized as cases of reciprocal tortfeasors. Applying the principle of reciprocal tortfeasors would yield results identical to a comparative negligence rule.

3. *The Challenge*

The challenge with our second theory is that it characterizes an indirect harm, i.e., amplifying the tortfeasor's liability, as a cognizable harm under halakha. The theory does this by assigning liability to the tort victim for the economic costs indirectly imposed upon the tortfeasor as a result of the victim's negligence. Yet as a general principle, only certain forms of indirect harm ("*garmi*" harms) are cognizable under halakha, whereas many other forms are not ("*gerama*" harms).⁶¹

However, the distinction between cognizable and non-cognizable forms of indirect harms is subject to dispute among the commentators.⁶² Thus, our case may conceivably fall outside the scope of the *gerama* exemption.

⁶¹ Note that the challenge discussed here may not apply with equal force to the parallel theory of *contributory* negligence discussed in Part I. Here, like there, the marginal harm produced by the victim's own negligence is viewed as producing some derivative harm to the tortfeasor. But here, that marginal harm is formally characterized as a tort injury ("נזק"), whereas there, Chiddushei Ha-Rim characterized the marginal harm as a "lost object" which the victim was required to "return" to the tortfeasor ("השבת אבדה"). On the other hand, Chiddushei Ha-Rim's characterization raises challenges of its own. Most fundamentally, it is not at all clear that the duty of returning lost objects can be applied to "returning" hypothetical future economic "liabilities," such as the liability that the tortfeasor would incur if a plaintiff were permitted to court additional injury at the tortfeasors' expense.

⁶² Per one view, the harm is sufficiently direct so long as it results from the actions of the tortfeasor himself. Per another view, it is sufficiently direct so long as there is no meaningful time delay between the tortious conduct and the injury. Per yet another view, the harm is sufficiently direct so long as it is the sort of harm that occurs with reasonable frequency. See Tosafot, Bava Batra 22b, s.v. "zot." For an overview of *gerama* and *garmi*, see *Encyclopedia Talmudit* Vol. 6, s.v. *gerama* and *garmi*. Whether the harm caused by the comparatively negligent tort victim qualifies as a halachically cognizable harm would thus depend on how it is characterized under these directness criteria.

Alternatively, and more fundamentally, the *gerama* exemption might be completely irrelevant for our case. For while the *gerama* rule does treat indirectly caused harms as legally insignificant, it does so only for a very specific purpose. Under the *gerama* rule, indirectly caused harms are not legally significant enough that we would *compel* a tortfeasor who caused such harms to *pay* compensation for having caused them. However, indirectly caused harms may be significant enough to *offset* the claims of a victim-plaintiff who imposed such harms on a tortfeasor-defendant in the same legal action.⁶³ After all, when we characterize the comparatively negligent victim-plaintiff as a reciprocal tortfeasor by virtue of his amplifying the liability of the tortfeasor-defendant, the legal question is not whether the victim-plaintiff must *pay* out damages, but whether the victim-plaintiff's role in causing the tortfeasor-defendant to incur additional liability is sufficient to offset and *exempt* the tortfeasor-defendant from those (additional) damages. Thus, even if the causal role of the victim-plaintiff in magnifying the liability of the tortfeasor-defendant formally amounts to *gerama*, it is *gerama* that works to extinguish the liability of the tortfeasor-defendant. The outcome of our case is thus fully consistent with the rules of *gerama*.

C. Theory #3: Reciprocal Tortfeasor as Negligent Victim (חבלו זה בזה)

1. The Theory

Our third halakhic theory of comparative negligence is a variation of the second in that it, too, looks to the law of reciprocal tortfeasors. Unlike in the previous section, however, where we used the principle of reciprocal tortfeasors as a model that would generate legal outcomes identical to a comparative negligence rule, here we will consider whether the relationship might be reversed—that is, whether a principle of comparative negligence may actually underly the law of reciprocal tortfeasors. To see how this might be, we will return once again to the case of the reciprocal tortfeasors, and this time, consider one of its variants in greater detail.

⁶³ The distinction between compelling a tortfeasor to *pay*, on the one hand, and *offsetting* liability, on the other, would also defeat a similar challenge one could raise against our theory based on the halakhic principle that blocks tort recovery for “indiscernible damage” (“היזק שאינו ניכר”). See generally *Encyclopedia Talmudit* Vol 9, s.v. *hezek she-eino nikkar*. It is not clear whether the reciprocal harm imposed by the negligent victim upon the tortfeasor by amplifying his liability would constitute a form of indiscernible damage.

1. *The Authority*

The Legal Rule

As described in the previous section, the halakhic treatment of reciprocal tortfeasors derives from a series of Mishnahic cases involving two parties, each of whom harms the other and is harmed by that person in return. Above we considered the simplest version of these cases. Here, however, let us consider a more complex case. The case involves two ox owners: one whose ox is a *tam* (literally: “innocent”) and another whose ox is a *mu’ad* (literally: “forewarned”). A *tam* ox is one who has no established history of goring, and whose owner generally pays only half damages when it gores. A *mu’ad* ox is one who does have an established history of goring, and whose owner generally pays full damages when it gores. The case addresses how damages are apportioned when the owner of a *tam* ox and the owner of a *mu’ad* ox each negligently fail to guard over their oxen, leading those oxen to gore one another. If the *mu’ad* ox causes greater damage than the *tam* ox, then, per the Mishnah, the owner of the *mu’ad* ox must pay “מותר נזק שלם”—“net of the full damage.”⁶⁴

Commentators debate how precisely this rule is to be applied. Let us illustrate the debate through an example. Suppose Reuven’s ox is a *mu’ad* and Shimon’s ox is a *tam*. Suppose further that Reuven’s *mu’ad* ox inflicts \$100 of damage upon Shimon’s *tam* ox, and that Shimon’s *tam* ox inflicts \$40 of damage on Reuven’s *mu’ad* ox. How do we determine how much money Reuven owes Shimon in this case?

According to Rambam, we apportion damages in the case of the goring oxen by netting the *legal liabilities* (מותר חיוב).⁶⁵ This means, in effect, that we analyze each act of goring separately, and allocate liability for each act per the usual rules applicable to goring oxen. Applying this approach, Reuven’s legal liability is \$100 (\$100 of damage inflicted x 100% recovery because Reuven’s ox is a *mu’ad*) and Shimon’s legal liability is \$20 (\$40 of damage inflicted x 50% recovery because Shimon’s ox is a *tam*). Thus, the net liability is \$80 (\$100 of Reuven’s liability — \$20 of Shimon’s liability), and Reuven owes Shimon this sum.

According to Rosh, however, we apportion damages by netting the *actual injuries* (מותר חבלה).⁶⁶ This means, in effect, that we ignore the usual rules applicable to goring

⁶⁴ Bava Kamma 33a.

⁶⁵ Rambam, Hilkhot Nizkei Mammon, 9:14.

⁶⁶ Rosh, Bava Kamma 3:13.

oxen and instead simply consider the economic impact of each ox's respective damage. Here, Reuven's ox inflicted \$100 of damage, and Shimon's ox inflicted \$40 of damage. Thus, Reuven's ox inflicted \$60 of net damage upon Shimon's ox (\$100 of Reuven's damage to Shimon — \$40 of Shimon's damage to Reuven). Since Reuven's ox is a *mu'ad*, Reuven owes Shimon the full \$60 (\$60 net damage inflicted x 100% recovery because Reuven's ox is a *mu'ad*).

The Implication of the Legal Rule

The debate between Rambam and Rosh regarding how we apply our Mishnah's rule for apportioning damages may implicate whether or not we can locate a principle of comparative negligence within our case. Both Rambam and Rosh agree that Reuven owes Shimon for negligently harming him. Both agree, moreover, that Reuven's obligation to Shimon is reduced because Shimon also acted negligently. Where the commentators diverge, however, is on how precisely Shimon's act of negligence affects his recovery.

According to Rambam, Shimon's act of negligence has no special effect upon his right to tort recovery. That is because, for Rambam, we treat each act of goring as an independent act of negligence: in order to determine each tortfeasor's individual liability, we apply to each tortious act the standard rule of tort liability pertinent to its particular negligence category (i.e. *tam*-negligence vs. *mu'ad*-negligence). Only afterwards do we net the monetary damages produced by this analysis. Thus—and this is the key—the netting process is in no way affected by the tortious nature of the liabilities in question.⁶⁷

According to Rosh, by contrast, Shimon's act of negligence *does* have a special effect upon his right to tort recovery. That is because, for Rosh, we do *not* treat each act of goring as an independent act of negligence. Instead, the fact that the victim also contributed harm changes the way we conceptualize the tort overall: rather than analyzing each act individually, and applying to each tortious act the standard rule of tort liability pertinent to its particular negligence category (i.e. *tam*-negligence vs. *mu'ad*-negligence), we evaluate the parties' actions *in toto*. Put another way, Rosh conceptualizes the case of reciprocal harm as consisting of a single tortious act, defined by the *net* harm. That is, instead of viewing Reuven

⁶⁷ To that extent, Rambam's rule is not fundamentally a tort rule. It is a generic debt rule. We could apply the same netting process to any other type of offsetting debt (for example, reciprocal loans) without any need to adjust the way the rule operates.

as having inflicted \$100 of damage on Shimon, and Shimon as having inflicted \$40 on Reuven, Rosh characterizes the event as a *single* tortious act *defined by* the \$60 of damage (the *net* amount, \$100 – \$40) that *Reuven imposed* on Shimon (“אין כאן חבלה אלא המותר”).

On Rosh’s interpretation, the Mishnah’s ruling appears to presuppose a principle akin to comparative negligence. For Rosh defines the tort in the Mishnah’s case exclusively in terms of the harm that Reuven imposed upon Shimon; in his view, as mentioned, the case involves a single tortious act defined by the net damage (אין כאן חבלה אלא המותר).⁶⁸ Yet whereas Reuven inflicted \$100 worth of material damage upon Shimon, Shimon only recovers \$60. Why is Shimon barred from recovering the remaining \$40 of damage he suffered? The answer appears to be that Shimon is barred from recovering \$40 because that is the amount Shimon (the victim) contributed to (Reuven’s) tort through his own negligence.⁶⁹ Thus, Rosh’s analysis presupposes the legal doctrine that a tortfeasor is not responsible for the portion of harm contributed by the victim—i.e., the doctrine of comparative negligence. Put another way, Rosh’s reading of our Mishnah represents at least one instance within established halakhic case law wherein the principle of comparative negligence is implicitly operative.

CONCLUSION

Where a tort victim bears some responsibility for their injuries, halakha offers several possible approaches for barring or reducing their recovery.

The grounds for barring recovery completely are more firmly established. As we discussed in Part I, such an outcome might result on the theory that the tort victim is at fault for harming themselves (איתזיק בנפשיה); that they are at fault for imposing additional liability upon the tortfeasor (השבת אבדה); that they absolved the tortfeasor from fault through implicitly consenting to the possibility of injury

⁶⁸ Rosh’s novel characterization of our case as involving only one tortious act bears halakhic implications beyond the issue of comparative negligence. See, e.g., Reshimot Shiurim Bava Kamma, s.v. *Tosafot d”h sbnei*.

⁶⁹ The answer cannot be that Reuven’s \$100 obligation to Shimon is offset by Shimon’s \$40 obligation to Reuven. That way of thinking is consistent with Rambam’s view that two tortious events occurred in this case, but it is inconsistent with Rosh’s view that a single tortious event occurred. Indeed, had Rosh treated these as two separate torts, then only \$20 should be offset, since Shimon’s ox, as a *tam*, is liable only for half damages. Yet Rosh requires Reuven to pay \$60. This result is reached only because Rosh views the case as involving a *single* tortious act that Reuven committed against Shimon.

(מחילה); or that, as a result of the tort victim's negligence, the tortfeasor's conduct now lacks the degree of causal connection to the victim's injuries that must be established in order to hold the tortfeasor liable for those injuries (מעשיו גרמו לו).

The grounds for merely reducing recovery in proportion to the victim's share of responsibility are less firmly established. As we discussed in Part II, such an outcome might result on the theory that the tort victim can be characterized as a joint tortfeasor (שותף בנזק) in causing their own injuries, or that the tort victim can be characterized as having reciprocally harmed (חבלו זה בזה) the actual tortfeasor by negligently increasing the scope of the tortfeasor's liability.⁷⁰ However,

⁷⁰ It is worth considering another Talmudic principle which may presuppose the doctrine of comparative negligence. As we saw above, when a *tam* (i.e., "innocent") ox gores, its owner is liable to pay half-damages. See Bava Kamma 15a. Why is the owner's liability reduced by one-half? Some contemporary tort scholars interpret Rambam in Moreh Nevukhim 3:40 as explaining the half damages rule as a comparative negligence rule. They write:

From the context of what Maimonides writes... it would appear that... since it is not the way of the ox to gore frequently, his owner does not know what caused the ox to gore that particular time and how to prevent such infrequent behavior in the future. In this case it is preferable to split the liability between the owner of the ox and the victim, for the injured party, too, ought to have taken precautionary measures on his part and been wary of the ox even if it was not considered a *mu'ad* ox, since all oxen can potentially gore. Yuval Sinai and Benjamin Shmueli, *Maimonides and Contemporary Tort Theory* (2020), p. 236

On their interpretation of Rambam, the owner's liability is reduced by a half because the victim is deemed to have been 50% comparatively negligent for not having taken proper precautions. Note, however, that the comparative negligence rule that would emerge from the *tam* half-damages case differs from a standard comparative negligence rule. Whereas a standard comparative negligence rule requires an inquiry into the amount of actual comparative negligence of the victim, the *tam* half-damages rule stipulates categorically, and without an inquiry, that the victim is deemed to have been 50% comparatively negligent.

Understood this way, Jewish law's *tam* half-damages rule parallels the old law of admiralty (the body of maritime law) governing a collision between two ships both of which were deemed to have acted negligently. See *Prosser* op. cit., p. 471 ("The original English admiralty rule divided the damages equally between the negligent parties.... The American courts followed the equal division rule in admiralty law until 1975.") One possible explanation for this categorical stipulation of an equal split is that a rigorous inquiry into the actual percentage assignment of fault can be exceedingly difficult, if not impossible. Thus, because of the difficulties in administering a pure comparative negligence rule, it may be reasonable to adopt a general rule of equal division for cases of comparative negligence. For an application of this type of reasoning to the case of joint tortfeasors, see Shulchan Arukh Choshen Mishpat 383:4 ("אם אין ידוע כולם משלמים בשוה"). See also *supra*, n. 54.

In any event, there is scant textual evidence to support Sinai and Shmueli's reading of Moreh Nevukhim 3:40.

It is true, as we noted in Part I, that Rambam appeals to the principle of contributory negligence to explain why there are no damages for "tooth and foot" ("שן ורגל") in a public domain. Rambam explains that for tooth and foot damages in the public domain, the victim is deemed to

these theories raise unique doctrinal challenges that may perhaps warrant further inquiry. Alternatively, these challenges may be irrelevant if, instead of grounding a comparative negligence principle in other tort principles, it turns out that one of those principles is actually itself grounded in a principle of comparative negligence. In that case, the principle of comparative negligence already functions within the halakhic system—a possibility we examined in the context of Rosh's interpretation of reciprocal tortfeasors (חבלו זה בזה).

have been negligent by leaving his property in the public domain, and therefore cannot recover damages: "[For] he who puts a thing in a public place is at fault toward himself and exposes his property to destruction." Moreh Nevukhim 3:40. *Cf. supra*, n. 24.

It is also true, as Sinai and Shmueli note, that Rambam's discussion of half damages for a *tam* ox immediately follows his discussion of tooth and foot in a public domain. Moreh Nevukhim 3:40. Yet to derive from this juxtaposition, as Sinai and Shmueli do, that the *tam* half damages rule must be grounded in considerations regarding the victim's negligence is problematic for several reasons. First, Rambam never explicitly applies the logic of comparative or contributory negligence to the case of *tam* half damages. Second, in the passage at issue, Rambam appears equally interested in the full damages of a *mu'ad* ox, implying no connection between the *tam* rule and prior discussion of the tooth and foot rule in the public domain.

The entire passage reads as follows:

One is free from responsibility [for the damage caused by] a tooth or a foot in a public place. For this is a matter with regard to which it is impossible to take precautions, and also damage is seldom caused in this way. Moreover he who puts a thing in a public space is at fault toward himself and exposes his property to destruction. Accordingly one is only responsible for [damage caused by] a tooth or foot in the field of the injured party.

On the other hand, damage caused by a horn and similar things regarding which precautions can be taken in all places and with respect to which those who walk in public places cannot take care, the law applicable to it—I mean the horn—is one and the same in all places. There is, however a distinction that is made between an animal that is docile and one about which its owner has been warned. If the act is exceptional, the owner is held responsible only for half the damage; if however, the animal that causes the damage continually does similar things and is known for this, the owner is held responsible for the whole of the damage. Moreh Nevukhim 3:40.

Detrimental Reliance and Promissory Estoppel in Jewish Law

Rabbi Itamar Rosensweig¹

I. INTRODUCTION: SAPPHIRE FINANCING V. TOWER REAL ESTATE

The Beth Din of America recently published *Sapphire Financing v. Tower Real Estate*, a decision involving a dispute between two financial firms. In this article, I summarize the facts of the case and discuss the halakhic principles that governed the dayanim's decision.

The Facts

The facts of the case are as follows. The plaintiff, *Sapphire Financing*, is a firm that specializes in mortgage brokerage. *Tower Real Estate*, the defendant, is a real estate investment firm. *Sapphire* had cultivated a relationship with *NicheBank*, a small bank that values close, personal relationships of the type that *Sapphire* had developed with it. Around 2013, *Sapphire* hired Shira Hart who over the next few years closed deals between *Sapphire's* clients and *NicheBank*. Beginning in 2016, Shira closed several deals between *NicheBank* and *Tower*, which was then a client of *Sapphire*.

In January 2020, during the height of the Covid-19 pandemic, *Sapphire* fired Shira. Shortly thereafter, *Tower* offered to hire Shira, with the intention of creating their own direct relationship with *NicheBank*. Shira asked *Sapphire* if they wanted to match *Tower's* offer, but *Sapphire* declined. At the same time, Shira and *Sapphire* discussed the fact that it would be unfair for *Tower* to profit (through Shira) off the relationship *Sapphire* had cultivated with *NicheBank*, since, by hiring Shira, *Tower* would effectively cut out *Sapphire* as the middle-man broker on its future deals with *NicheBank*.

Shira communicated *Sapphire's* concern to *Tower*, noting that her boss at *Sapphire* would be very upset if *Tower* profited off the relationship it (*Sapphire*) had cultivated with *NicheBank*. *Tower* told Shira not to worry about it and that they would "take care" of *Sapphire*. Shira forwarded a text message from one of *Tower's* principals that read "we will take care of *Sapphire*" to her old boss at

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Sapphire and told him that Tower “wants to work something out” and would be in touch to hammer out an agreement.

Tower never reached out to Sapphire, and the details of the arrangement were never discussed, let alone finalized. When Sapphire later pressed Shira about the arrangement, Shira responded that if Tower did not get in touch with Sapphire, she would personally pay Sapphire a certain basis point per each future deal that Tower closed with NicheBank, to ensure that Sapphire did not lose out by her move to Tower.

Sapphire’s Claim

Sapphire claimed that it is entitled to receive a certain basis point percentage from Tower for any future deal that Tower closes with NicheBank. Tower countered that it never entered into any agreement with Sapphire and that Shira’s offer to pay Sapphire a basis point per each deal was her personal offer to smooth things over with her former boss and does not bind Tower. Sapphire offered two arguments to support its claim.

II. INDUSTRY CUSTOM AND PRACTICE

Sapphire’s First Argument: Minhag

Sapphire’s first argument appeals to custom. Sapphire argued that in similar cases where a client benefits from a relationship that a past broker had developed with a lending bank, it is customary for the client to continue to compensate the broker on new deals, even where the broker is no longer involved. As evidence of this custom, Sapphire points to a settlement agreement it had worked out with a different client where the client agreed to compensate Sapphire with a certain basis point on any future deals the client would close with a bank that Sapphire introduced it to.

In their decision the dayanim acknowledge that were such an industry norm to exist, Sapphire would be entitled to compensation, as Jewish law often recognizes the norms of the industry (*minhag ha-sochrim*, *minhag ha-medinab*).² But they were not persuaded by Sapphire’s claim that such a minhag exists. The dayanim appeal to the Shulchan Arukh’s standard (Choshen Mishpat 331:1) that to rise to

² See Rabbi Itamar Rosensweig, “Commercial Custom and Jewish Law,” *Jewishprudence* (June 2020).

the level of *minhag*, a practice must be common (שכיח) and done frequently (פעמים נעשה הרבה).³ The *dayanim* concluded that Sapphire's settlement with a prior client reflects the terms of an isolated settlement agreement, not a common industry practice.

III. DETRIMENTAL RELIANCE IN JEWISH LAW

Sapphire's Second Argument: Detrimental Reliance

Sapphire's second argument appeals to a principle of detrimental reliance. Under the common law, a promisor can become liable for damages when he induces another party to rely on his promise to the other party's detriment.⁴ Sapphire argued that Tower promised (communicated through Shira) to "take care" of Sapphire and that it relied on that promise when it decided to not rehire Shira and match Tower's offer to her. Sapphire claims that without Tower's assurance that Sapphire would not lose out on future NicheBank deals, Sapphire would have matched Tower's offer to Shira and rehired her.

The *dayanim* discuss the Jewish law equivalent of promissory estoppel and detrimental reliance: *biyyuv mi-ta'am 'arev* (חיוב מטעם ערב). In the next section I offer an exposition of the halakhic principle of *'arev* as a basis for recovering damages in cases of detrimental reliance, its talmudic basis, and how it is interpreted and applied by halakhic authorities.

Promissory Estoppel and Detrimental Reliance in Jewish Law: *'Arev*

A. *Ritva's Analysis of the Wine Purchaser Case*

The Talmud (Bava Metzia 73b) discusses a plaintiff who had given money to the defendant to purchase wine at a below-market wine sale. The defendant accepted the money and assured the plaintiff that he would make the purchase at the price.

³ Shulchan Arukh Choshen Mishpat 331:1:

ואינו קרוי מנהג אלא דבר השכיח ונעשה הרבה פעמים, אבל דבר שאינו נעשה רק פעם אחת או שני פעמים אינו קרוי מנהג.

⁴ See, e.g., *Restatement (Second) of Contracts* § 90:

"A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

But the defendant was then negligent and never purchased the wine, failing to make good on his assurance. The Talmud rules that if the plaintiff could no longer purchase wine at that price, the defendant is liable to compensate the plaintiff for his reliance damages—i.e., the difference in wine price.⁵

Ritva explains the legal principle underlying the Talmud's ruling as that of promissory estoppel and detrimental reliance. The defendant assured the plaintiff that he would purchase the wine at the below-market price, and the plaintiff relied on the defendant's assurance. As Ritva explains, but for the defendant's promise the plaintiff would have purchased the wine himself or found a different agent to purchase it for him. Therefore, when the defendant negligently fails to perform, he becomes liable to compensate the plaintiff for the losses he induced.⁶

Ritva grounds the Jewish law liability for promissory estoppel and detrimental reliance in the halakhic principle of *arev* (ערב) 'Arev is the principle in Jewish law that a guarantor of a debt obligates himself and becomes liable for the value of the debt simply by inducing the creditor to rely on his assurance to lend to the borrower. By assuring the creditor and inducing him to lend, the guarantor himself becomes liable to compensate the creditor should the borrower default on his payment.⁷ Ritva interprets *arev* as a general principle that governs all cases of induced reliance. It is not limited to loans.⁸

⁵ See Bava Metzia 73b:

אמר רב חמא: האי מאן דיהיב זוזי לחבריה למיזבן ליה חמרא, ופשע ולא זבין ליה - משלם ליה כדקא אזיל אפרוותא דזולשפט.

⁶ Ritva Bava Metzia 73b:

כיון שנתן לו מעותיו ליקח סחורתו ואלמלא הוא היה לוקח ע"י עצמו או ע"י אחרים אלא שזה הבטיחו שיקח לו וסמך עליו ונתן לו מעותיו על דעת כן הרי הוא חייב לשלם לו מה שהפסיד בהבטחתו דבההיא הנאה דסמך עליה ונתן לו ממונו משתעבד ליה משום ערב.

Other rishonim read the Talmud's case differently and therefore propose a different basis for the defendant's liability. Ri interprets the case as one where the defendant explicitly and contractually obligated himself to pay the plaintiff for losses if he fails to perform—even though the Talmud omits that crucial fact. Ritva cites Ri's position:

ותירץ ר"י דהכא נמי כשהתנה כן בפירוש שאם לא יקח לו ישלם לו פסידא שלו.

⁷ See Bava Batra 173b. The guarantor becomes liable even without performing a *kinyan*, because it is the fact of his inducing reliance that generates liability. See Shulchan Arukh Choshen Mishpat 129:2:

אמר להם בשעת מתן מעות: הלוהו ואני ערב, נשתעבד הערב ואינו צריך קנין. הגה: ואפילו לא נתערב בהדיא, רק שאומר למלוה להלוות ללוה כי בטוח הוא, ועשאו על פיו והיה שקר, חייב לשלם לו, דהוי כאילו נתערב לו.

⁸ Ritva's crucial premise—that *arev* liability extends beyond loans—is implicit in the Talmud Kiddushin 6b, which applies the liability of *arev* to effect a kiddushin where a woman instructs her husband-to-be to incur an expense by relying on her instruction. See Ritva Kiddushin 8b s.v. *ve-ba-nakhon* and Shut Rashba 1:1015 (below, n. 17).

The fact that Ritva grounds the defendant's liability for detrimental reliance in the halakhah of *'arev* might suggest that detrimental reliance in Jewish law is best conceptualized as a principle of contract rather than tort. The idea of *'arev* is not that the defendant harmed the plaintiff or violated his rights. Rather, by instructing and inducing the plaintiff to act in a certain way the defendant is deemed to have agreed to indemnify the plaintiff from any financial losses that would result from relying on his instruction and inducement. This characterization is consistent with Ritva's formulation that the defendant, in consideration of the plaintiff relying on his assurance, "obligates himself" (משתעבד ליה) to cover the plaintiff's losses.⁹

B. *The Case of the Reneging Employer*

Ritva argues that the same halakhic principle of detrimental reliance (*'arev*) underlies the Talmud's ruling that a homeowner can become liable to a worker for inducing him to lose alternative employment for the day. The Talmud (Bava Metzia 76b) discusses the case of a homeowner who induces a worker to travel to perform work, but then cancels on the worker at the last minute such that the worker can no longer find alternative employment for the day.¹⁰ The Talmud finds the homeowner liable to compensate the worker for his reliance damages.¹¹ Ritva explains that even where no contractual employment relationship exists between the two parties,¹² the homeowner is liable to compensate the worker under the principle of

9 Further support for the position that *'arev* liability does not arise in tort emerges from the Ritva's analysis of the wine purchaser case. Ritva opens his discussion by noting that the agent's liability cannot arise in tort, because under Jewish tort law principles the agent's failure to purchase the wine would constitute mere *gerama* which would not generate liability. Ritva writes:

האי מאן דיהיב זוזי לחבריה למזבן ליה חמרא ופשע ולא זבין ליה משלם ליה כדאזיל אפרוותא דבלשפט... בבלשפט היה נמכר בזול והכא ה"ק שיתן לו במעותיו יין כפי שער הזול שנמכר בבלשפט... ולכולהו פירושי קשה לי למה חייב לשלם לו כלום ומאי שנא ממבטל כיסו של חברו שהוא פטור מפני שאין היזקו אלא גרמא.

This implies that when Ritva later settles on *'arev* as the basis of liability in the Talmud's case, he conceives of it as a liability distinct from tort.

10 For a discussion of this talmudic case, see Rabbi Itamar Rosensweig and Tzirel Klein, "Depriving a Worker of Employment Opportunities," *Jewishprudence* (October 2020).

11 Similarly, if the worker induced the homeowner to rely on his assurance and the worker reneged, the worker can become liable to compensate the homeowner for his reliance damages, or at least for a portion of them. See Bava Metzia 75b and 78a, and Ritva Bava Metzia 75b. See below, note 13.

12 Ritva Bava Metzia 75b:

ודעת מורי הרב שאין כל דיני משנתנו וגמרא דעלה אלא במי ששכר פועלים באמירה בלא קנין.

arev: The homeowner induced the worker to forgo work opportunities elsewhere, for which he becomes liable when he cancels on the worker.¹³

C. The Case of the Partnership's Risky Debt Payment

A third example of *arev* as detrimental reliance appears in a responsum of Rashba (Shut Rashba 1:1015). Rashba was asked to rule on a case involving partners, Reuven and Shimon, who had borrowed money from Levi and had signed a note (*shetar*) to secure the loan. When the debt came due, Levi arrived to collect, but he failed to bring the note (*shetar*). In Jewish law, a debtor who pays without retrieving the *shetar* runs the risk of the creditor later producing the *shetar* and enforcing a second collection of the debt.¹⁴ In light of this risk, the partners in Rashba's case—Reuven and Shimon—initially refused to pay the debt. Later, however, Reuven changed his mind: He instructed his partner Shimon to repay the debt from the assets of the partnership and assured him that he will retrieve the *shetar* by a specified date.¹⁵ Shimon relied on Reuven's assurance and made the payment.

As it happened, the creditor, Levi, died before Reuven retrieved the *shetar*. And Levi's heirs, who had found the *shetar* among their father's financial assets, enforced the document in court and were able to (re)collect the full value of the

¹³ Ritva Bava Metzia 73b:

וזה ענין שכירות פועלים דבפרקין דלקמן... שבעה"ב חייב לשלם להם מה שמפסידין כדיון שסמכו זה על זה נתחייבו זה לזה במה שיפסידו על פיו, וזה דין גדול.

Ritva Bava Metzia 75b:

והטעם בתשלומין אלו הוא ממה שאמרנו למעלה דכל שהבטיח לחברו וסמך חברו עליו ואלמלא הבטחתו לא היה בא לו שום הפסד חייב לשלם לו אם פשע בדבר.

Note that in the case where the worker reneges on the homeowner (see above note 11), the Talmud caps the worker's liability to the homeowner based on the value of the worker's labor or materials. Ritva explains these caps based on his general theory that *arev* liability arises from an implied indemnification of the promiser to the promisee. (See above.) The worker's liability is therefore capped by what is deemed to be the maximum amount reasonable for the worker to have indemnified the homeowner when he induced reliance. See Ritva Bava Metzia 75b:

וא"ת אם כן למה אינו שוכר עליהם אלא כדי כפל שכרן בלבד או כדי חבילה, י"ל דמסתמא היינו דאסיקו אדעתיהו שאם לא יוכלו לעשות שימצא לעולם פועלים בכפל שכרן ועל זה בלבד הבטיחוהו, וא"כ נתנו לו חבילה דמסתמא הקנו לו חבילה שלהו להתחייב לו עד כדי דמיה.

¹⁴ See Shulchan Arukh Choshen Mishpat 82; Choshen Mishpat 46:1-2; and Choshen Mishpat 69:2. This problem could sometimes be obviated by drafting a receipt (*shovar*). See Shulchan Arukh Choshen Mishpat 54:1-3. But this option was more cumbersome and provides the debtor with less security than if he retrieves the original note.

¹⁵ Shut Rashba 1:1015:

בראובן ושמעון שותפין לו מנה מלוי. ובא לוי לגבות חובו מהם ולא הביא שטרו בידו. ולא רצו ראוובן ושמעון לפרעו עד שיחזיר להם שטר חובו. ולבסוף נתרצה לו שמעון שאמר לו ראוובן פרעוהו ממעות השתוף ואני אתן לך השטר לזמן פלוני וכן אמר בשעת מתן מעות.

debt from the partnership. Now Shimon sues Reuven under the doctrine of *'arev* claiming that he relied to his detriment on Reuven's assurances and suffered losses because of it. Reuven counters that he never formally guaranteed to indemnify Shimon from losses.¹⁶

Rashba ruled in favor of Shimon, explaining that because Reuven induced Shimon to rely on his assurance, Reuven is liable under the principle of *'arev* to reimburse him for his losses.¹⁷

D. The Bailee's Liability Prior to Taking Possession

Ran's analysis of the Mishnah in Bava Metzia 98b offers a fourth illustration of Jewish law's *'arev* principle. The Mishnah discusses a bailee (*sho'el*) who had arranged to borrow a cow from its owner. The bailee instructs the owner to send the cow with one of *the owner's* servants for delivery. The Mishnah rules that if the cow dies en route to the bailee's house, the bailee is liable for the loss, not the owner.¹⁸

Ran observes that the bailee never took possession of the cow. It died in the possession of the *owner's* servant, and it never transferred into the bailee's domain. Why then is the bailee liable for the loss? Ran notes that the owner's servant cannot be characterized as the bailee's agent (*shaliach*), since the bailee's communication with the owner falls short of the halakhic requirements for appointing the servant an agent.¹⁹

Ran argues that the bailee is liable—never having taken possession of the cow—under the principle of *'arev*. The bailee instructed the owner to send the cow, and the owner relied on the bailee to his detriment.²⁰ In other words, the borrower's

¹⁶ Ibid:

ובנתים מת לוי ובאו יורשיו ותבעו שטר החוב והוצרכו לפרעם שלא היה להם ראיית פרעון. ועכשו תבע שמעון את ראובן שותפו שישלם לו מדין ערב. והלה טוען שאין כאן ערבות אלא עצה השיאו.

¹⁷ Ibid:

הדין עם שמעון שכל שעושה מעשה על פי אחר אותו אחר חייב מדין ערב. וכדאמר' בפ"ק דקדושין (דף ז') תן מנה לפלוני ואקדש אני לך מקודשת מדין ערב. ואמר רבא התם וכן לענין ממונא. לומר שאם אמר תן מנה לפלוני ושדי נתונה לך הרי זו נתונה.

¹⁸ Mishnah Bava Metzia 98b:

משנה. השואל את הפרה... אמר לו השואל: שלחה לי ... ביד בנך, ביד עבדך, ביד שלוחך... ושלחה ומתה – חייב.

¹⁹ Ran Bava Metzia 98b

אפילו למ"ד שליח שעשאו בעדים הוי שליח ה"מ בעדים כדאמרינן דלהכי טרח ואוקמיה בסהדי כי היכי דלוקמי ברשותיה והכא ליכא סהדי אלא דאמר למשאל לשדורי ליה בדיהו. וכי תימא כיון דאמר למשאל כשליח שעשאו בעדים דמי תינח לר' חסדא דאמר הוי שליח לרבה דאמר לא הוי שליח מאי איכא למימר.

²⁰ Ibid:

וי"ל דהכא לאו מדין שליחות הוא אלא מדין ערב שכיון שא"ל להוציא פרתו מרשותו ושלחה ביד עבדו נתחייב מדין ערב ככל מוציא ממון מרשותו של חבירו ונתחייב לו חבירו כדין ערב והכי מוכח בפ"ק דקדושין... שואל זה כשהוא מתחייב עליה בשהי' ברשות העבד לאו מדין שואל גמור הוא אלא מדין ערב.

liability arises not in the laws of bailments (*shemirah*) but rather in the laws of *'arev* and reliance.²¹

The Standard of Reliance: Direct and Justified Reliance

Having surveyed the halakhic principle of *'arev* and some of its applications, let us return to the dayanim's analysis in *Sapphire Financing vs. Tower Real Estate*. Recall that *Sapphire* argued that it relied on *Tower's* communication, which *Shira* conveyed to *Sapphire*, that it would "take care" of *Sapphire* regarding the *NicheBank* relationship. Here the dayanim explain that not every instance of detrimental reliance generates liability. The dayanim develop two important distinctions. First, they distinguish between direct and indirect reliance. Second, they distinguish between justified and unjustified reliance.

Direct vs. Indirect Reliance

The dayanim in *Sapphire* held that the liability of *'arev* requires a direct instruction, assurance, or promise from the defendant to the plaintiff. As they note in their decision, the halakhic "standard for liability is met only when the plaintiff acts under the immediate instruction or direct promise of the defendant." Here the dayanim appeal to the rishonim's formulations of the doctrine of *'arev*, which imply an assurance or instruction communicated directly from one party to the other.²² The dayanim write:

"[halakhic] authorities characterize the legal principle as *requiring hotzi mamon al piv* (i.e., that the plaintiff acted under the instruction of the defendant) or *samakh al havtachato* (that the plaintiff relied on the defendant's

²¹ For further cases of *'arev* liability as detrimental reliance, see *Netivot ha-Mishpat* 182:3 (a principal who instructs his agent to make a purchase on his behalf but later annuls the agency—without notifying the agent—becomes liable under *'arev* for the agent's expenditures); *Netivot ha-Mishpat* 344:1 (if *Reuven* instructs *Shimon* to tear *Reuven's* own garment, *Shimon* is exempt from tort damages because *Shimon's* damages to *Reuven* are canceled by *Reuven's* liability to *Shimon* under the doctrine of *'arev*); *Netivot ha-Mishpat* 306:6 (if a patron relies on an artisan to dye a fabric red but the artisan negligently dyes the fabric black, the patron is entitled to recover the lost profit of what the red fabric *would have been worth* (i.e., lost profit) under a theory of *'arev*, since the patron relied on the artisan); *Shulchan Arukh Choshen Mishpat* 14:5 as explained by *Yeshu'ot Yisrael Ein Mishpat* 14:4 (if one litigant induces another to travel to a distant court for adjudication but then fails to arrive for the hearing, that litigant becomes liable to pay the other's expenses under the principle of *'arev*).

²² Perhaps another way of putting the dayanim's point is that for the defendant to be found liable he must have directly induced the plaintiff to rely on his promise.

promise to him). These formulations imply a direct promise or directive from the defendant to the plaintiff.”

Tower never communicated directly to Sapphire that it will take care of Sapphire. Rather, one of Tower’s principals had texted Shira—in an effort to allay her fear that Sapphire will be angry with her for utilizing the relationship with NicheBank for Tower’s benefit—not to worry because “we will take care of Sapphire.” Shira on her own forwarded that text message to Sapphire. Thus, the dayanim concluded that “to the extent that Sapphire relied on anything, it relied not on any directive from Tower but on a WhatsApp message forwarded by a past associate eager to remain on good terms with her old boss.”

Justified vs. Unjustified Reliance

The dayanim also distinguished between justified and unjustified reliance, holding that a plaintiff is entitled to recover damages only when his reliance on the defendant was *justified*. The dayanim cite a responsum of Maharik, who discusses a case where the defendant, Reuven, had assured the plaintiff, Shimon, that he would lobby and advocate for him *pro bono* so long as the plaintiff covered the expenses.²³ The plaintiff relied on the defendant’s promise and paid the expenses. But then the defendant reneged and asserted that he will not complete the job unless the plaintiff also compensated him for his work. The plaintiff countered that the defendant is obligated to complete the job *pro bono*, since he had already relied on the defendant’s promise when he paid the expenses.²⁴

Maharik denies the plaintiff’s claim for reliance. He reasons that because the defendant was acting *pro bono*, the plaintiff was not justified in relying on the defendant’s assurances. Someone who offers a service without charge cannot be reasonably relied upon to complete the job. Therefore, Maharik concludes, the plaintiff “brought the loss upon himself.”²⁵ In other words, to prevail on a claim of reliance the plaintiff must have been justified in relying on the defendant’s promise.

²³ These expenses appear to be the costs of paying off the relevant officials or parties.

²⁴ Shut Maharik no. 133:

על דבר ראובן שהבטיח שמעון להשתדל בעבורו חנם וזולתי ההוצאה ואחר אשר הוציא הלה את מעותיו והיה הדבר עומד להגמר חזר בו ראובן מדיבורו ואומר לו שלא יגמור אם לא יתן לו כך וכך. וכן עשה שמעון פייסו בממון כרצונו ושוב באו מעות ראובן ביד שמעון ורוצה שמעון לעכבם באמרו כי שלא כדין הכריחו לפייסו בממון.

²⁵ Ibid:

ואף על גב שהוציא מעותיו על סמך דברי ראובן שמעון הוא דאפסיד אנפשיה דה”ל לאסוקי אדעתא דלמא דדר ביה ראובן.

As the dayanim write in Sapphire:

“for a claim of reliance to succeed, Jewish law authorities require that the plaintiff must have been justified in relying on the defendant’s promise or instruction. A plaintiff cannot recklessly embrace the defendant’s promise and collect damages. In such a case, the plaintiff is considered to have brought the loss upon himself.”

Applying this analysis to the case before them, the dayanim maintain that Sapphire was not justified in relying on the communication from Tower. They offer two reasons for characterizing Sapphire’s reliance as unjustified. First, they note that the content of Tower’s assurance was so underspecified and vague that it is not even clear what Sapphire expected to receive from Tower. What then did they rely upon? The dayanim write:

“Shira represented only that Tower desired to work something out with Sapphire, texting Sapphire that Tower “wants to work something out.” No definitive arrangement had been offered or assured. Such an arrangement could range from sports tickets to Tower using Sapphire as brokers to refinance prior deals Sapphire had brokered to anything else.”

The second reason the dayanim cite is the fact that Shira herself communicated to Sapphire that the specifics of the deal would have to be worked out with Tower’s principals. How, then, can Sapphire rely on a deal that had not yet materialized? The dayanim write:

“Shira explicitly communicated that any deal is subject to Sapphire’s future discussion with Tower’s principals. Shira wrote to Sapphire “AH [one of Tower’s principals] will likely call you sometime to work something out.” Those discussions never took place. Based on the forgoing, we conclude that Sapphire was not justified in relying on these vague and tentative overtures. If Sapphire truly relied on Shira’s communications, it did so recklessly.”

Summary: Damages for Detrimental Reliance (*‘Arev*) in Sapphire v. Tower

To summarize, the dayanim weighed whether Tower can be held liable under a theory of *‘arev*. They found that there is no basis for liability under *‘arev* because Tower never directly instructed Sapphire to act and because Sapphire’s reliance

was not justified. It is also worth noting that the dayanim raised a third consideration in rejecting Sapphire's claim: They were not persuaded that Sapphire in fact relied on Tower. The dayanim write:

"a claim of reliance requires actual reliance. We are not persuaded that Sapphire in fact relied on Shira's communications. The record reflects an inconsistency in Sapphire's testimony. Sapphire initially testified that it furloughed Shira and did not match Tower's offer to Shira because it was not in a financial position to do so, as the Covid-19 pandemic had slowed business. At the same time Sapphire wants to maintain that it was because it relied on Tower's assurances that it would take care of them on future NicheBank deals that it decided to not match Tower's offer and keep Shira. While these claims can perhaps be reconciled, the inconsistency casts some doubt on the extent to which Sapphire truly relied on the communications from Tower."

IV. LIFNIM MI-SHURAT HA-DIN

Judicial Enforcement of Supererogatory Conduct

The dayanim denied Sapphire's claim for damages. However, in the final paragraph of their decision, they note, based on Tower's own testimony, that industry etiquette often calls for investors to refinance a loan using the brokers who secured the initial financing. The dayanim counsel Tower that it would be proper for them to use Sapphire as brokers when they refinance the loans Sapphire originally secured, though the dayanim refrain from ordering Tower to do so. The dayanim write:

Tower indicated that industry etiquette often calls for investors to refinance deals using the brokers who secured the project's initial financing. We think that such a gesture from Tower to Sapphire would be appropriate, especially in light of the moral consideration that Tower will be benefiting from the relationship that Sapphire cultivated with NicheBank through Shira. To be clear, we do not order Tower to do so, as such conduct would constitute *lifnim mi-shurat ha-din*. But we believe that such a gesture from Tower would be appropriate and a productive step towards reconciliation, realizing the Torah's ideal of *mishpat shalom*: "*emet u-mishpat shalom shiftu be-sha'areichem* (Zechariah 8)".

Here the dayanim appeal to Jewish law's distinction between obligations that arise in *din* (justice) and supererogatory moral obligations (*lifnim mi-shurat ha-din*). Many Jewish law authorities hold that a beit din cannot compel performance of supererogatory moral obligations. For it is in that very sense that they are supererogatory.²⁶ Thus, given the dayanim's assessment that such behavior constitutes *lifnim mi-shurat ha-din*, they counseled that course of action but stopped short of compelling it.²⁷

V. SUMMARY

To summarize, the dayanim's decision in *Sapphire Financing v. Tower Real Estate* involves three separate areas of Jewish law. First, the dayanim considered whether there is a basis in minhag to support Sapphire's claim for a certain basis point on future deals Tower closes with NicheBank. Here the dayanim denied Sapphire's claim noting that even though Sapphire was able to point to some precedent in prior practice, that precedent hardly satisfied the halakha's criteria for what constitutes a minhag.

Second, the dayanim considered whether Sapphire was entitled to damages under a theory of detrimental reliance (*arev*). They analyzed the principle of *arev* liability in Jewish law and offered two distinctions to assess whether Sapphire was

²⁶ See Rosh Bava Metzia 2:7:

ואת המעשה זה הדין. אשר יעשו לפנים משורת הדין. ולא דכייפין ליה, דאין כופין לעשות לפנים משורת הדין. Shulchan Arukh Choshen Mishpat 12:2:

ואין בית דין יכולין לכופ ליקנס לפנים משורת הדין, אף על פי שנראה להם שהוא מן הראוי.

See also Beit Yosef Choshen Mishpat 12:2.

²⁷ Some Jewish law authorities maintain that a beit din can compel performance on supererogatory moral obligations. See Mordechai Bava Metzia no. 257:

גם אגן כייפין למיעבד לפנים משורת ... דתני רב יוסף והודעת להם את הדרך וגו' ואמר ר' יוחנן לא נהרבה ירושלים אלא בשביל שהעמידו דבריהם על דין תורה ולא עשו לפנים משורת הדין וכן פסק הראב"ן ואב"ה דכייפין להו לעשות לפנים משורת הדין.

See also the view cited in Shulchan Arukh Choshen Mishpat 12:2 and Bach Choshen Mishpat 12:4.

According to these authorities—who endorse judicial coercion of supererogatory obligations—what distinguishes obligations that arise in *din* from those that arise in *lifnim mi-shurat ha-din*? One distinction is that whereas a beth din *must* enforce obligations that arise in *din*, it has discretion over whether it wants to enforce an obligation that arises in *lifnim mi-shurat ha-din*. In other words, in the case of *din*, coercion is mandatory, whereas in the case of *lifnim mi-shurat ha-din* coercion is discretionary.

Another distinction is that decisions based on *lifnim mi-shurat ha-din* are more sensitive to a range of equitable considerations that would not bear on a decision grounded in *din*. For instance, some of these authorities maintain that a beit din should only enforce a ruling of *lifnim mi-shurat ha-din* if the party found liable is quite wealthy (*ashir*) but not if he is poor (*ani*).

entitled to damages. On one level, they distinguished between direct and indirect reliance. On another level, they distinguished between justified and unjustified reliance. The dayanim held that Sapphire's reliance was both indirect and unjustified, and therefore denied Sapphire's claims. In addition, they called into question, on factual grounds, Sapphire's assertion that it in fact relied on Tower's assurance.

Third, the decision raises the question whether a *beit din* should enforce conduct that the dayanim deem supererogatory. In this case, the question was whether the dayanim should impose "industry etiquette" even though the relationship between the parties had soured. Following Jewish law's distinction between *din* and *lifnim mi-shurat ha-din*, the dayanim counseled Tower in the proper course of action but refrained from ordering it.²⁸

²⁸ Sapphire Financing v. Tower Real Estate can be accessed at: <https://bethdin.org/wp-content/uploads/2021/11/Reported-Decision-13.pdf>

Loss Splitting in Jewish Law: A Covid-19 Example

Rabbi Itamar Rosensweig¹

INTRODUCTION

Economic losses are an inescapable part of commercial life. Suppose a train cancellation leaves you stranded at Penn Station and you have to splurge on an Uber to get home. Or a babysitter cancels at the last minute causing you to stay home and lose a day of work. Or a vehicle crashes into yours, leaving your vehicle in need of repair. In cases such as these, you suffer a loss. One of the primary tasks of a legal system is to determine how to distribute these losses between the relevant parties.

Consider the following true set of facts.² Ms. Stein drives a group of preschoolers to the local yeshiva day school. In September 2019, Mr. Grossman hired Ms. Stein to transport his son to and from school each day. From September through December, Mr. Grossman paid Ms. Stein at the end of each month. Beginning in January, however, Mr. Grossman decided that it was too burdensome to remember to write a check each month, so he paid Ms. Stein in advance for the remainder of the year.

The arrangement went smoothly until March 2020, when the school shut down because of the Covid-19 pandemic, under the governor's statewide orders. Is Mr. Grossman entitled to recover the amount he prepaid for March through June? Or is Ms. Stein allowed to keep the payment, even though she will not be providing transportation services? Or does justice require a different resolution? In previous articles, we discussed several principles of Jewish law that might bear on contracts canceled by the Covid-19 pandemic, some of which may be relevant to deciding the present case.³ In this article, I focus on the halakhic principle of loss sharing.

LOSS SPLITTING WHEN *FORCE MAJEURE* AFFECTS BOTH PARTIES TO A CONTRACT EQUALLY

The halakhic precedent for splitting a loss when a contract is frustrated by circumstances beyond the parties' control is articulated in a responsum of Ra'avan (R.

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² I discuss this case with the permission of the parties. The names of the parties have been changed at their request.

³ See Rabbi Michael Zylberman, "Covid-19 and Canceled Rental Contracts," *Jewishprudence* (June 2020); idem, "Employment Contracts and Covid-19," *Jewishprudence* (January 2021).

Eliezer b. Natan of Bonn, 1090-1170), who was asked to rule on the following case. A landlord had leased a property to a tenant for two years. The tenant paid the entire rent upfront at the beginning of the lease. But violence against the Jewish community during the lease term caused the Jewish citizens of the city to flee for their lives. The tenant fled with them, abandoning the leased property for several months until it was safe to return.

The parties disagree over whether the tenant was obligated to pay rent for the months that he had to abandon the property. The tenant argued that he is entitled to be refunded for the months of rent during which he could not use the property when he fled the city. The landlord counters that he is entitled to keep the rent that was paid for those months because the house was structurally sound and available, and it was the tenant's decision to abandon it.⁴

Ra'avan rules that the parties are to split the loss, with each party bearing half of it. Accordingly, Ra'avan ordered the landlord to return *half* of the rent for the months that the property sat unoccupied.⁵ Ra'avan explains that neither party was more, or less, responsible than the other for the contract having been frustrated. The contract was frustrated by the violence that affected the *entire* Jewish community (*makat medinah*), and thus the *force majeure* (אונס) that undermined the contract affected both parties equally.⁶ Therefore, Ra'avan reasons,

⁴ Responsa Ra'avan no. 98

לאיש כלבי קרובי אהובי ר' אליעזר בר' שמשון, אני אליעזר משיב על עסק ראובן ששכר בית משמעון לשתי שנים והקדים ונתן לו השכר של ב' שנים, ובתוך אותן ב' שנים ברחו היהודים מן העיר מפני פחד נפשם וברח גם הוא והניח הבית ריקם, ואח"כ חזרו היהודים וגם הוא ורוצה שישלם לו שמעון מה שהיה חוץ מביתו, ושמעון משיב בימי היה לפניך ואתה חוכרתו ואני משלם לך.

⁵ *ibid*:

שמעון ישלים לראובן מחצית הימים שהיה חוץ מביתו וראובן יפסיד המותר.

⁶ In one striking formulation, Ra'avan writes that the violence rendered the homes uninhabitable and caused the residents to flee. On this formulation, the violence undercut *both parties'* performance under the contract. The landlord could no longer supply a habitable home (given the violent social conditions), and the tenant could no longer live there. Ra'avan writes:

הכא איכא למימר גזירת המכה על שניהם היתה על הבתים להיות בדודים ועל האנשים להיות גולים הלכך לתא דשניהם הוא יחלוקו ההפסד.

Ra'avan bases his ruling on his interpretation of Bava Metzia 105b. The Mishnah there discusses a tenant-sharecropper who pays a fixed rate for his right to use and work the field. If the crop was destroyed by a natural disaster, such as a flood or a plague of locusts, the Mishnah rules that the tenant-sharecropper is not obligated to pay the entire rent (מן חכורו). Ra'avan interprets this to mean that the tenant-sharecropper pays half of the rent, effectively splitting the loss with the landlord:

ומיהו מנכה מן חכורו קתני ולא כל חכורו, דכיון דמכת מדינה היא על שניהם הוי ההפסד וזה יפסיד מחצה וזה יפסיד מחצה.

justice requires that the parties bear the loss equally by splitting it between themselves.⁷

It is important to emphasize that the loss splitting principle articulated by Ra'avan is *not* conceptualized as a compromise or court-imposed settlement (*peshara*). Rather it is conceptualized as a principle of *din*. It is a halakhic principle of justice that when *force majeure* affects both parties equally, the parties are to share the loss, with each party bearing half of it.⁸

GROSSMAN V. STEIN

Let's return to the case of Ms. Stein and Mr. Grossman. The facts of their case are similar to the case decided by Ra'avan. Neither Ms. Stein nor Mr. Grossman was at fault for non-performance. A third party (the governor) had shut down the school in the face of a nation-wide health pandemic (*makat medinab*), making performance unreasonable or purposeless to the parties. There was no school for Ms. Stein to

⁷ Ibid:

דכיון דמכת מדינה היא על שניהם הוי ההפסד וזה יפסיד מחצה וזה יפסיד מחצה... דמכת מדינה להאי דשניהם הוא לפיכך ההפסד על שניהם.

Sema (Choshen Mishpat 321:6) applies this loss splitting principle to a case that is even more analogous to the facts of Grossman v. Stein. Sema discusses a case where a parent hired a *rebbe* to educate his child, but the government later outlawed Torah study. Sema notes that in such a case the contract is frustrated by an outside force (*makat medinab*) that affects both parties equally, with neither party more responsible than the other for not performing under the contract. Sema therefore rules that the parties should split the loss, with the father paying the *rebbe* for *half* of the value of the contract:

מסתברא לומר כיון דמכת מדינה היא המשכיר והשוכר שוין בהדבר ואין לומר דמזלו דשום אחד גרם... יהיה ההפסד על שניהם... גם במלמד זה שגזר המושל שלא ללמד יחלוקו.

For a discussion of this Sema, see Rabbi Michael Zylberman, "Employment Contracts and Covid-19", *Jewishprudence* (January 2021).

⁸ Contrast Ra'avan's position (and Sema's, *supra* n. 7) holding that the loss should be split as a matter of pure justice (*din*) with the position of Hatam Sofer and later commentators who in similar scenarios agree with the legal outcome of loss splitting but ground it conceptually in compromise (*peshara*). See, e.g., Rabbi J. David Bleich's discussion of Hatam Sofer's position, *Tradition* 53:1 (2021), p.103:

"with regard to a comparable occurrence, apparently in the Napoleonic period during the Franco-Austrian War of 1809. Hatam Sofer reports that he himself paid tuition in full to the tutors of his children [even though they were unable to teach]. However, apparently as a *compromise*, he directed the *bet din* to compel parents to pay only half the usual fee."

For further examples of authorities who endorse loss splitting in similar scenarios but as a matter of compromise (*peshara*), not *din*, see, Rabbi Michael Zylberman, "Employment Contracts and Covid-19", *Jewishprudence* (January 2021), section III.B.

drive to, and there was no reason for Mr. Grossman to send his child to a locked school building. If the cases are analogous, as they appear to be, then based on the ruling of Ra'avan, the proper halakhic resolution is for the parties to split the loss, with Ms. Stein returning *half* of the amount Mr. Grossman advanced for March through June.

In fact, that is exactly how the parties amicably resolved their dispute, without having to litigate their case in *beit din*. The parties elected to resolve their dispute in accordance with the principle articulated by Ra'avan. Had the case proceeded to litigation, it is quite possible that the *dayanim* would have arrived at a similar conclusion.⁹

JEWISH LAW AND THE COMMON LAW: TWO DIFFERENT APPROACHES

Note how halakha's approach of loss splitting in the above type of case differs from the common law's approach. Under the common law doctrines of frustration of purpose and impossibility, a court would determine whether the contract remains enforceable under the circumstances or whether to excuse the parties from performance. The common law approaches the case from the perspective of "winner takes all," assigning the loss on an all-or-nothing basis.¹⁰

For example, in the above case of *Grossman v. Stein*, a court might find that the governor's closure of schools frustrated the purpose of the contract between Mr. Grossman and Ms. Stein, as the purpose of the contract—transportation to school—had been extinguished. On that theory, Mr. Grossman would be excused from having to pay Ms. Stein, and he would be entitled to recover the entire amount that he advanced. Alternatively, a court might find that the contract remains enforceable, such as when the risk of school closure was foreseeable to the parties when they entered into the agreement. On that theory, Ms. Stein would be entitled to keep the entire amount that she received.

Jewish law's approach of loss splitting avoids either of these extremes. Rather than picking a winner who takes all, Jewish law maintains that where parties are

⁹ Though the *dayanim* might consider some of the principles discussed in our earlier articles to be relevant as well. For those principles, see the articles cited in *Supra* n. 3.

¹⁰ In a previous article, we discussed the common law's approach and when it might be incorporated into halakha under a theory of *minbag ha-sochrim*, see Tzirel Klein, "Commercial Custom, Common Law, and Contracts Impacted by Covid-19," (*Jewishprudence*, July 2020).

equally affected by the loss, and where the parties are in moral equipoise regarding their responsibility or non-responsibility for it, they are to share the loss between themselves, with each party bearing half of the cost.

Thus, the different systems of law advance different conceptions of justice in their approaches to contracts frustrated by *force majeure* where the parties are in moral equipoise. The common law picks a winner and a loser, such that one party must bear the entire loss. Jewish law endorses *loss sharing* by assigning half of the loss to each party.¹¹

¹¹ Jewish law provides for loss sharing in other areas as well. See Bava Metzia 79b (one permutation of the wine-shipping case), Bava Metzia 2a (two parties exerting equal physical possession over a garment), Bava Kamma 15a (liability for damages caused by a mild-mannered ox), and Bava Kamma 46a (Sumchus's opinion for how courts should resolve disputes where there is insufficient evidence to support either party's claim). Here, however, we must be careful. For although all of these cases involve splitting a claim fifty-fifty between the parties, the underlying legal principle appears to differ between these cases. Further, some of these cases are better characterized as involving claim-splitting rather than loss-splitting.

Brokerage Commissions in the Absence of a Sale

Rabbi Shlomo Weissmann¹

Counterintuitively, in many jurisdictions a real estate broker may be entitled to collect a commission even when a sale fails to close. Parties can expressly condition the payment of a commission on the actual closing of title,² but the law in New York is well settled that absent a provision to the contrary, “a real estate broker who produces a person ready and willing to enter into a contract upon the seller’s terms is generally entitled to a commission.”³ If I want to sell my house and hire a broker to put it on the market, the broker earns her commission when she presents a buyer who is ready, willing and able to pay my asking price, even if I change my mind and decide not to sell.

Regular readers of *Jewishprudence* know that, with few exceptions, Jewish law defers to the negotiated terms of the parties.⁴ Even absent an explicit contractual provision, Jewish law recognizes that marketplace norms set the expectations of deal participants. A seller and broker in New York ordinarily assume that their arrangements will follow New York customs surrounding the earning of brokerage commissions.

But even indigenous Jewish law will arrive at a similar result and award a brokerage commission on a failed sale in some scenarios. Consider the case of a buyer and seller who contract to buy and sell a property, and agree that the buyer will pay the broker’s commission. The buyer plans to flip the property for a profit. The seller reneges, but ends up paying a breakup fee to the buyer in an amount that approximates the buyer’s anticipated profit on the deal. In a case with similar facts, a *pesak* (decision) handed down by the Beth Din of America included the following analysis, which complemented the secular law discussion that was also contained in the *pesak*:

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² See *Graff v. Billet*, 101 A.D.2d 355 (N.Y. App. Div. 1984) and *Levy v. Lacey*, 22 N.Y.2d 271 (N.Y. 1968).

³ *Mizrahi v. Hovas*, 30 N.Y.S.3d 859, 860 (N.Y. App. Div. 2016). See also *Srouf v. Dwelling Quest Corp.*, 11 A.D.3d 36 (N.Y. App. Div. 2004) and *Paul J. Boyer Realty v. Perry*, 208 A.D.2d 1024 (N.Y. App. Div. 1994).

⁴ Rabbi Itamar Rosensweig, “Commercial Custom and Jewish Law,” *Jewishprudence*, June 30, 2020 (<https://bethdin.org/commercial-custom-and-jewish-law/>)

The issue of a broker's ability to collect a commission on a failed sale is discussed in halachic sources in the context of another type of broker, a *shadchan*. Rama rules that in locations where it is customary not to pay the *shadchan's* commission until after the wedding, no payment is due if the engagement is broken prior to the wedding.⁵ In earlier times, the families of engaged couples would often agree upon *tenda'im* that called for the payment of a breakup penalty if one side cancelled the engagement prior to the wedding. If one party backs out the other party might be significantly disappointed, but at least they have collected some money (i.e., the breakup penalty), thus benefiting from the *shadchan's* services. Following this logic, Levush suggests the *shadchan* should be paid his or her customary commission by the collecting party.⁶ Sema counters that an engagement breakup fee is hardly a windfall.⁷ The collecting party likely wishes the engagement would not have occurred, and the breakup fee is merely a consolation for the embarrassment of the whole ordeal. With no net value added through the services of the *shadchan*, argues Sema, no commission is due. Aruch Hashulchan notes, however, that Sema's objection is limited to the realm of broken engagements.⁸ A failed commercial deal has no element of embarrassment, and the breakup fee that results from such a transaction should rightfully trigger the payment of the broker's earned commission.

The case before the *dayanim* was analogous to a failed transaction in which a breakup fee is collected. In the end, the would-be buyer obtained the full upside of his investment and was, essentially, paid a breakup fee to get out of his contract with the seller. If so, the broker would rightfully be entitled to his commission.

⁵ Rama, *Choshen Mishpat* 185:10.

⁶ Cited in Sema, *Choshen Mishpat* 185:26.

⁷ Ibid.

⁸ *Aruch Hashulchan*, *Choshen Mishpat* 185:11.

COVID-19 and Canceled Rental and Employment Contracts

Rabbi Michoel Zylberman¹

The onset of the COVID-19 pandemic in March 2020 created far reaching economic ramifications. As society went into extended lockdown in an unprecedented fashion, there were many canceled or postponed travel plans, institutional dinners, weddings, and the like. What does halacha say about a rental contract frustrated by a pandemic? If someone put down a deposit for a Pesach rental or program and was unable to reach the destination or the program was canceled, is he or she entitled to a refund? Would an employee be entitled to compensation for unperformed work during this period?

I. RENTAL CONTRACTS

1. A Tenant Who Dies Mid-Lease

Halacha addresses various instances of how an unanticipated *ones* (extenuating circumstance) impacts previously agreed upon contractual obligations and which party bears the loss. In the case of a tenant who dies in the middle of a lease term, Rashba (*Shu"t* 1:1128) rules that the deceased's estate must pay out the remainder of the lease. Rashba views a property rental as a sale for the duration of the lease term (*sechirus le-yomei memkar hi*). Once the contract is entered into, an *ones* does not discharge the tenant (or his estate) from the agreement, just as a property sale cannot be invalidated because of an *ones* that arises after the sale has been executed.

Maharam (cited in Mordechai Bava Metzia 345) disagrees with Rashba's ruling and rules that the estate is exempt from paying out the rent for the remainder of the term. Maharam views a property rental as more analogous to an employment contract than to a sale, and therefore applies the principle of Bava Metzia 77b (see below) which exempts an employer from paying workers whose job was rendered unnecessary by an unanticipated event.

¹ Rabbi Michoel Zylberman is the Associate Director of the Beth Din of America. The author wishes to thank Rabbi Yona Reiss and Rabbi Itamar Rosensweig for their review of and comments on this article.

Rema (*Choshen Mishpat* 334:1) favors the position of Maharam, although he quotes Rashba as an alternate position and concludes that if the landlord received the entire year's rent in advance he cannot be forced to refund it.^{2,3}

2. The Case of Unexpected Rainfall

The Gemara in Bava Metzia 77b discusses the case of an employer who hired workers to irrigate his field only to have unexpected rainfall render their job unnecessary. The Gemara rules that, absent a contrary stipulation, and unless the employer alone (and not the workers) was expected to foresee the *ones*, the employer need not pay the workers for the work they did not perform.

The general principle that emerges from this Gemara (as codified by Rema 334:1) is that absent a contrary stipulation, if the *ones* should have been anticipated by both the employer and employee equally, or the *ones* was equally unanticipated, the worker is not entitled to compensation for labor not performed. If, however, the employer was aware of an impending *ones* at the time that he hired the worker, but the worker himself was unaware of the *ones*, the employer is at fault for not conditioning the employment on the non appearance of the *ones* and must therefore pay the worker.

3. The Boat that Sinks with a Client's Merchandise

The aforementioned Maharam distinguishes between the case of workers who need not be paid at all in the event of an *ones* that renders their job unnecessary and the case (Bava Metzia 79; see *Choshen Mishpat* 311:3) of a wine merchant who hired a boat to transport his wine across a river where the boat subsequently sank in transit. The Gemara there establishes the general principle that the party who is preventing performance is stuck with the loss of the contract value. If the merchant hired a specific boat (*sefnah zo*) to transport a non specific quantity of wine (*yayin stam*), and the boat sank together with the wine, the merchant is entitled to

2 See *Terumas Hadesben* 329 and *Shach* 334:2. According to *Shach* (based on his understanding of *Terumas Hadesben*) the fact that the renter prepaid the year's rent indicated that he was willing to assume the risk and was prepared to part with the money in the event of an *ones*. This rationale appears in *Tosafos* (Bava Metzia 79b s.v. *iy atab*). According to *Shach*, Rema's distinction between whether the rent was prepaid is not predicated on a doubt as to whether to rule like Rashba or Maharam, as the simple reading of Rema would indicate.

3 Regarding whether other forms of *ones* would absolve a tenant from rent payments see *Machaneh Efrayim Sechirus* 5, *Shu"t Avnei Nezer Choshen Mishpat* 25, *Pischei Choshen Sechirus* 6:8, and Rabbi Baruch Levin in *Landlord-Tenant in Halacha* (Feldheim 2019) *Miluim* 7.

a refund, as he still has other wine that he can provide for transport, whereas the boat that he rented is no longer functional. In this case the boat owner prevents fulfillment of the contract.

If the merchant commissioned a non-specific boat (*sefnah stam*) to transport specified crates of wine (*yayin zeh*), the boat owner is entitled to full payment, as he has other boats that he can provide, but the merchant has no more wine to provide for transport. If the merchant commissioned a non specific boat (*sefnah stam*) to transport a non specific quantity of wine (*yayin stam*), since both parties retain the ability to provide the service and merchandise that they contracted for, they share the loss equally.⁴

4. The Case of the Sharecropper and Makas Medinah

The Mishnayos in Bava Metzia (103b, 105b) introduce another principle of loss allocation for *ones* in the context of a sharecropper obligated to pay a fixed quota of produce to his landlord. The Mishnayos rule that even if the field was destroyed or became unusable (e.g. it was destroyed by a swarm of grasshoppers or an unanticipated storm, or the water source of the field dried up), the sharecropper is still responsible for providing the agreed upon amount of produce. Rashi (105b s.v. *eino menakeh*) explains that even though the sharecropper could not have reasonably anticipated the destructive event, and would likely not have entered into such a contract had he known that it would occur, the owner of the field can claim that the event was attributable to the sharecropper's bad *mazal*, and the sharecropper is still responsible to fulfill his contractual obligations. However, if the same events affected the majority of fields in the area (*makas medinah*),⁵ the sharecropper may deduct his loss from his payments to the owner.

Shulchan Aruch invokes *makas medinah* in the aforementioned cases (*Choshen Mishpat* 321:1 and 322:1) as well as in the context of property rentals (Rema 312:17) and employee contracts (Rema 334:1).⁶ Examples of *makas medinah* cited in *risbonim*

4 For further analysis see *Machaneh Efrayim Sechirus* 5.

5 There is a dispute in the Gemara (105b) as to the scope of damage necessary to qualify an *ones* as a *makas medinah*. *Shulchan Aruch* (*Choshen Mishpat* 322:1) rules that for fields an *ones* is a *makas medinah* when it affects the majority of fields in the city.

6 Rema (321:1) writes that there is no claim of *makas medinah* if one could overcome the impediment posed through *torach ve-tachbulos*, effort and strategies. In other words, one cannot hide behind a *makas medinah* exemption if an external factor makes it more difficult but not impossible to meet one's contractual obligations. The source of this qualification is *Shu"t Maharam Padua* (39) regarding an individual who acquired the exclusive right to lend money with interest

include a city that was consumed by a fire (*Teshuvos Maimoniyos Mishpatim* 27 cited in Rema 312:1), a garrison of non-Jews that take over the majority of Jewish homes in a city (*Machaneh Efrayim Sechirus* 6), and an epidemic (*Machaneh Efrayim Secherus* 7 in understanding *Shu"t Ra'avan* 98⁷).

5. Makas Medinah and Rental Properties

The *risbonim* debate whether a *makas medinah* that makes a rental property unusable would release the tenant from his rent obligation for the period it was unusable. Rema (*Choshen Mishpat* 312:17 citing *Teshuvos Maymoniyos Mishpatim* 47) rules that if a fire burns down an entire city, which he characterizes as a *makas medinah*, a landlord is not entitled to collect or keep rent for the days during which the property was uninhabitable.⁸ Does the same apply to a situation in which the house is still standing but may not be easily accessed due to a war or epidemic?

5.1 Ra'avan's Position

Ra'avan (*Shu"t* 98) writes that in a situation where the majority of a city's residents are forced to flee and a tenant is unable to remain in his rented property, both parties share the loss equally such that the tenant pays only half of the rent for the period he is away. He suggests that the default rule for *makas medinah* is to

to the local non-Jewish population. Subsequent to his entering into this contract, the local leader retracted the right of Jews to charge gentiles interest on loans lacking collateral, significantly compromising the viability of this person's contract. Over the course of nine months he made some attempts to have this decree overturned, and then petitioned to back out of his initial contract based on a *makas medinah* exemption. Maharam Paduah ruled that since the decree could have been overturned with more effort, the questioner remained obligated to abide by his contractual obligations.

⁷ Ra'avan refers to Jews being forced to flee a city but does not cite a reason for their flight. *Machaneh Efrayim*, citing Ra'avan, presents the case as Jews fleeing because of an epidemic.

⁸ This ruling is not a function of *makas medinah* per se, but emerges from the cases of more generic ones discussed above. *Teshuvos Maimoniyos* compares it to the case of the wine merchant who rented a specific boat (*sefinah zo*) to transport unspecified wine (*yayin stam*) that sank mid-journey, where the gemara rules that the merchant need not pay as the boat owner is considered to be the party withholding performance. In this case as well, the tenant may claim that he is willing and able to reside in the rental property, but the landlord is unable to provide that residence since it burned down. See Sema (312:34) and *Nesivos Hamishpat* (312:13). It emerges from Nesivos's analysis that according to Rema if a house burns down, even if it is not due to a *makas medinah*, the landlord bears the loss just as the Maharam ruled regarding the tenant who died in the middle of the term that the estate need not pay the balance of the rent. The only difference that *makas medinah* makes is that if the tenant prepaid the rental fees he is entitled to a full refund for the period in which he was unable to reside in the residence. See below regarding prepayment of rental fees.

split the loss between the parties. He even interprets the Mishnah's ruling in the sharecropper case as holding that the sharecropper can deduct (*menakeb*) *part* of his losses in a *makas medinah*, as opposed to the standard interpretation according to which the sharecropper is *fully* released from his payment obligation. Ra'avan further argues that even if one accepts the standard interpretation of the sharecropper ruling, it is different from the case of the tenant who flees during a *makas medinah*. In the case of the sharecropper whose field flooded the *makas medinah* only affected the field, which is exclusively the property of the owner, and thus the sharecropper is not liable for his decreased production. By contrast, when a *makas medinah* causes the residents of a city to flee, both parties are equally affected. Ra'avan writes that "the houses were destined to be desolate and the tenants were destined to be exiled." However, Ra'avan's opinion does not appear to be accepted by later authorities.^{9 10}

5.2. *Maharam of Tiktin's Position*

Shach (334:3) quotes Maharam of Tiktin¹¹ who rules that if one rented a house but was unable to use it because a plague had forced the residents of the town to flee, the landlord remains entitled to the rent, as he may claim that the house remained standing and technically inhabitable throughout the term. Maharam of Tiktin compares this to the case of the wine merchant who hired a non-specific boat to transport a specific set of wine barrels in which the merchant must still pay the boat owner since the owner is able to provide another boat and the wine merchant is the one preventing performance.

⁹ Sema (321:6 and 344:2) does accept the idea of loss-splitting for employment contracts affected by a *makas medinah*.

¹⁰ The first and last sections of Ra'avan's teshuva without the lengthier middle section appear almost verbatim in *Shu"t Maharam MiRottenberg* (Prague 388). Read by itself, Mahram's formulation of the teshuva implies that in principle the landlord bears the entire loss but in practice the loss should be split, since the landlord may claim that he could have found someone else to rent the property who would not have fled. However, it seems difficult to present the Maharam's version as an alternative legal position to that of Ra'avan, given that the language in the teshuva is otherwise almost exactly the same as Ra'avan and is just missing the middle section that sheds light on the conclusion.

¹¹ Maharam of Tiktin was a student of Rema who wrote glosses on the Mordechai. This lengthy paragraph is printed on the last page of the classic printing of the Vilna Shas volume that includes Avodah Zarah, Horiyos, and Eduyos. In earlier printings, as referenced in the Shach, it was printed at the end of Seder Nashim or at the beginning of Seder Nezikin.

5.3. *Shach's Position*

Shach (ibid.) questions Maharam of Tiktin but does not explicitly articulate his own position. R. Asher Weiss (*Shu"t Minchas Asher* 2:120) assumes that Shach views the case of a rental property as analogous to the case of the sharecropper whose field flooded, in which case (according to the straightforward reading of the Gemara, albeit not that of Ra'avan) the landlord is not entitled to the rent. This also appears to be the position of the Taz (334:1).

6. Prepayment and Assumption of Risk

When a tenant is unable to reside in the rental property due to a *makas medinah*, does it matter, for the purpose of allocating the loss, whether the rental fees were prepaid or not? Regarding a rented house consumed by a city-ravaging fire, Rema holds that prepayment does not make a difference. Since the landlord failed to provide a residence, the tenant may recover his prepaid rent. This ruling stands in contrast to Rema's ruling in the case of a tenant who dies in the middle of the rental term where he rules that prepaid fees need not be refunded.

However, *Machaneh Efrayim* (*Sechirus* 7) quotes a Yerushalmi (Gittin 6:6) regarding a person who rented a boat to ferry him across the river and prepaid the fee. Before he was able to use the boat, the river dried up, rendering the boat service unnecessary. Rav Nachman ruled that the renter was not entitled to a refund. *Machaneh Efrayim* explains that here the boat remained intact and, in advancing the payment, which the renter was not required to do,¹² he implicitly accepted the risk of the proprietor retaining the funds.¹³ *Machaneh Efrayim* views the Yerushalmi's conclusion as normative; such that even in a situation of *makas medinah*, if the rented property is still standing and technically inhabitable and the

12 Jewish law holds that compensation for services need only be paid at the conclusion of the service—אין שכירות משתלמת אלא לבסוף—see Bava Metzia 56b.

13 See Supra footnote 2. Along these lines, R. Zalman Nechemia Goldberg (*Shaari Zedek* Vol. 8 p. 123 et. seq.) suggests that there is a difference between a rental with a prepayment and a rental for which payment is only required at the conclusion of the rental period. It is questionable whether this analysis would be as relevant when prepayment is the industry standard, as is generally the case with property rentals. R. Meir Orlian (*Business Halacha Weekly* #580 *Shavuot* 5780) cites *Maharach Obr Zarua* (66) as holding that when one demands prepayment, such prepayment does not indicate a willingness to forgo a refund in the event of an *ones*. Although *Maharach Obr Zarua* writes this in the context of advanced wages, the logic would apply to rental payments as well.

renter prepaid the landlord, the renter is not entitled to any refund.¹⁴ This is in contrast to a case where a fire burned down all the houses in a neighborhood, in which case the landlord must refund the payment since he is unable to provide a house to reside in.

In practice there does not appear to be a clear consensus as to how to assess the payment of a renter who is unable to benefit from a rental property due to a *makas medinah*, especially where money was prepaid. In his *Emek Hamishpat* (Sechirus 50), R. Yaakov Cohen ruled regarding summer rentals in the North of Israel during the Second Lebanon War (2006) that if the renter did not prepay he could not be obligated to pay, as he may rely on the opinions that even though the house was intact, the war situation created a *makas medinah* exemption.¹⁵ If, however, the renter did pay upfront, the landlord cannot be forced to refund the money, as he has the right to claim (*kim li*)¹⁶ that he holds like the *Machaneh Efrayim*.¹⁷ Nevertheless, he concludes that it may be appropriate to reach some sort of compromise and refund a portion of the advanced funds, especially as one could argue that a house in a war zone that could be impacted by a rocket at any moment is like a house that burned down such that the landlord is not in a position to provide the house that he was contractually obligated to provide.¹⁸

¹⁴ *Ketzos Hachoshen* (322:1) appears to accept this approach in practice, albeit for a different reason, as does *Nesivos Hamishpat* (312:13).

¹⁵ See Rav Ovadia Yosef Toledano, a grandson of Rav Ovadia Yosef and a member of Rav Asher Weiss's beis din, in *Shu"t Meishiv Mishpat* (1:47), for an analysis of whether *umdina*, a presumption that no one would enter into a contract under such circumstances, plays a role in such determinations.

¹⁶ The principle of *kim li* allows an individual holding on to disputed money (*muchzak*) to retain that money when there is an unresolved dispute among authorities as to which party prevails. See *Shu"t Chasam Sofer* (*Choshen Mishpat* 95) who explains that *kim li* is predicated on the principle of *ein bolchin be-mammon achar barov* - when it comes to monetary matters we do not necessarily follow the majority, and therefore one can claim to follow a minority opinion.

¹⁷ R. Toledano as well concludes that the landlord may keep any advanced payments. The context of his responsum is a wedding hall rental that was canceled due to Operation Cast Lead (Dec. 2008 - Jan. 2009). R. Cohen does raise the possibility that a short term rental is different from a long term rental. With a short term rental the landlord could not argue that he could have rented the property to someone else, as no one would enter into a short term rental in a war zone. Regarding a long term rental the Maharam of Tiktin would hold that the renter would have to pay the entire rental fee. One could argue, however, that if the rented house is inhabitable, even in a war zone, there may be individuals in need of a place to stay who would rent such a house for lack of a better alternative and therefore the Maharam of Tiktin would obligate the renter to pay in that case as well.

¹⁸ A recently published collection from the ledger of R. Zvi Pesach Frank's beis din (*Pinkas Beis Hadin Bichurvas Rebbe Yebuda HaChassid* Vol. 2) contains a ruling (625) of the beis din regarding

While the aforementioned R. Yaakov Cohen and R. Ovadia Yosef Toledano (*Shu"t Meishiv Mishpat* 1:47) give significant weight to the Machaneh Efrayim's position, R. Asher Weiss believes that the halacha follows Shach and Taz, and therefore not only may we not compel the renter to pay for the rental period affected by a *makas medinah*, but even if a down payment was previously advanced, the landlord must refund it in totality.

7. Conclusion

In light of the range of opinions that we have explored, how are we to resolve the cases we raised at the outset? If someone rented a house in Florida for Pesach 2020 and was unable to use it because of fear of contagion, interstate travel restrictions, or a ban on short term rentals, the renter presumably could not be held liable for unpaid funds, as per the Shach and Taz.

If the renter advanced most or all of the funds before the onset of the pandemic, is he entitled to a full or partial refund? Some would argue, as per R. Yaakov Cohen above, that the proprietor could claim *kim li* like the Machaneh Efrayim (or the Maharam of Tiktin) and keep all the money that he already received. However, R. Moshe Williger, in an article in *Kovetz Beis Abaron V'Yisroel*, (Vol. 208, Nissa Iyyar 5780) claims that all the *rishonim* who discuss a *makas medinah* that affects a rented property address a situation in which the *makas medinah* began after the tenant already moved into the property. It is possible that even those authorities who pin the loss on the tenant would agree that if the *makas medinah* began before the tenant ever stepped foot on the property, the tenant would be released from payment. Furthermore, if there were state or local restrictions on short term rentals that prevented renting the property to anyone, then even *Machaneh Efrayim* may agree that the proprietor must refund payment that had been advanced.¹⁹ Even if

the claim of a landlord for full rent from a tenant forced to flee from an apartment in Hebron following the 1929 massacre. The beis din awarded the landlord two-thirds of the money that he was owed for the period in which the tenant was unable to reside in the dwelling. While the reasoning for the ruling is not stated, presumably it was based on some sort of *psbaha* (compromise).
 19 What is the status of a post-dated check that is dated after the onset of a *makas medinah*? Is that considered pre-payment that the proprietor cannot be forced to relinquish? May the renter cancel the check? R. Zvi Ben Yaakov, currently a senior dayan on the Tel Aviv beis din (*Shu"t Mishpatecha L'Yaakov* 1:11:13-15), in the context of day care teachers who were paid in advance and could not provide any service during the Gulf War (1991), assumes that such checks are fully the possession of the recipient. However, his analysis likely only applies in Israel, where one may not legally cancel such a check. See R. Baruch Meir Levin in *Landlord-Tenant in Halacha* (2019), *Miluim* 7, who makes this point. He cites a teshuva from the Debriciner (R. Moshe Stern) who assumes that the possessor of a post dated check is not considered *muchzak*.

one does not accept R. Williger's observation and there were no legal restrictions to renting out the property²⁰ but the risk of contagion impeded people's mobility, a partial refund of money that had been advanced would be advisable - probably in the range of 50 to 75 percent - and it requires further analysis to determine whether a future credit would be sufficient.

The obligation to pay for a wedding hall rented for a reception canceled due to the coronavirus may be different from the case of a home rental in two ways. On the one hand, once state and local governments banned gatherings of more than a few people, in many situations wedding halls were unable to provide the services that they were contracted for and no one else could have rented the facility instead. That set of facts would make the case more analogous to the case of a burned down house such that even the *Machaneh Efrayim* and Maharam of Tiktin would presumably agree that the proprietor must refund any prepayment. However, if the wedding hall rental fee covered the salaries of multiple employees and service providers, that portion of the fee may be subject to the rules of *makas medinah* as they apply to employees.²¹ The same should apply to a canceled Pesach hotel program.²² In all of these situations it may be proper to arrive at a reasonable compromise.²³

20 Even if one were to accept the above argument that the Maharam of Tiktin's position would not apply in the middle of a war zone, where no one would rent a property, it is possible that amidst a pandemic with travel restrictions there may still be local residents in need of a place to live who would rent a property, especially when no other location is necessarily any safer. See also R. Y. Blau, *Pischei Choshen, Sechirus* 6:10 and R. Ovadia Yosef Toledano, *Mishpat HaSechirus* 23:13.

21 In a monograph published by a R. Yaakov Risner (available at http://beinenu.com/sites/default/files/alonim/408_69_80.5.pdf), the author entertains such a distinction between rental property cases and wedding hall cases where the hall must pay its employees but concludes that since one could argue that everything is packaged together, if the wedding party had not paid in advance, it could not be compelled to pay anything. R. Hershel Schachter in a brief letter (available at <http://www.torahweb.org/torah/docs/rsch/RavSchachter-Corona-22-April-08-2020.pdf>) regarding Pesach programs does accept this distinction, subject to further qualification of what compensation employees may receive through unemployment or other government stimulus programs. He notes as well that even if someone is not obligated to pay for certain services, if he has the means to afford it and the proprietor is in a compromised financial situation, it would be commendable to not demand the full refund that he may be entitled to, as a form of *tzedakah*.

22 R. Yitzchak Zilberstein (*Vavei HaAmudim Pesach* 5780 pp. 57-58) rules that in pandemic situations the wedding hall is not entitled to any compensation.

23 Many quote a comment of the Chasam Sofer (*Sefer Zikaron Pressberg* 1879 p. 37) who advocated a compromise in compensating employees who were unable to perform their duties due to war. However, the same may not necessarily be true of property rentals, as the Chasam Sofer indicates that the impetus for compromise was his belief that in principle the loss in a *makas medinah* employment situation should be split between the parties, which is not the case in practice with a rental dispute.

II. II. COMPENSATING EMPLOYEES FOR UNPERFORMED WORK

A. The Halachic Framework

Generally, in Jewish law an employee is only entitled to payment for work that he or she actually performed. However, when an unanticipated *ones* (extenuating circumstance) prevents the employee from performing the work that was agreed upon, a different standard may apply. What calculus does the onset of a *makas medinah* create for such evaluations?

1. Mordechai and Rema

Mordechai (Bava Metzia 343) writes that if a *rebbe* is unable to teach Torah because, subsequent to his hiring, the government promulgated an edict forbidding teaching Torah, then the *rebbe* remains entitled to compensation from his employer. While there are two variant texts of the Mordechai that may differ as to whether he is entitled to full compensation,²⁴ *Hagabos Ashri* (Bava Metzia 6:60) explicitly holds that the *rebbe* is entitled to the entirety of his wages. Rema appears to rule this way (*Choshen Mishpat* 321:1 and see 334:1),²⁵ and this approach is accepted by Shach (334:2) and Taz (334:1).²⁶

²⁴ Mordechai writes:

ואם הביטול של המלמד מחמת גזירת המושל שבעיר וא"א למלמד ללמוד הוי מכת מדינה ויהא הפסד (ההפסד) של בעל הבית

"If the unemployment of the instructor is due to an edict of the ruler in the city and the instructor cannot teach, it is a *makas medinah* and loss (the loss) is of the employer." If the correct text is *ההפסד* —the loss— that implies that the employee is entitled to full wages. If the text is *הפסד* —loss—it is possible that while the employer must pay the employee, he need not pay the entirety of the wages. See *Sema* 321:6 and R. Asher Weiss, *Shu"t Minchas Asher* 2:120.

²⁵ See Nesivos below who understands Mordechai and by extension Rema to be limited to a *rebbe*. R. Yosef Fleishman (*Alon Mishpat* 119 Tamuz 5780), Rosh Kollel of Kollel Choshen Mishpat in Yerushalayim, suggests a variant novel reading of Mordechai and Rema that would render their rulings of limited contemporary relevance. In the times of the *rishonim* the common practice was that a *rebbe* would travel and hire himself out to teach in a town far from his residence (see, for example, Mordechai Bava Metzia 459 and Tosafos Kiddushin 59a s.v. ani). If a *rebbe* found employment in a specific town and then the local authorities restricted his ability to teach, that development could be attributed solely to the *mazal* of his local employer, as the *rebbe* could just as well travel to any other town where he could teach freely. In such a case the employer would be responsible for the full wages of the *rebbe*, but in a case in which a *makas medinah* affects an entire region, not just a single city, perhaps the loss would be split.

²⁶ See R. J. David Bleich, *Coronavirus Queries Part 2*, Tradition Winter 2021, pp. 101-103, for a suggestion as to the logic of this position.

2. Sema

However, Sema (321:6 and see 334:2) strongly disagrees with Rema and argues that there is no basis for an employee to receive full wages for unperformed work. In fact, Sema considers the possibility that the employee would be barred from collecting any unpaid wages, under the principle of *ha-motzi me-chaveiro alav ha-rayah*—i.e., that the burden of proof is upon the party looking to collect money. Ultimately, however, Sema does not go this far. Instead, he concludes that the loss should be split, and the employee would be entitled to half of the lost wages. Sema contends that this was actually the position of Mordechai as well.

The rationale for Sema's approach is grounded in the halachic principle that when neither party is withholding performance, and both parties are equally affected by the *ones*, they are to share the loss equally. This principle is demonstrated by the wine-shipping case (Bava Metzia 79; see *Choshen Mishpat* 311:3) discussed above. If a wine merchant hired a boat to transport his wine across a river and the boat sank in transit, we assign the loss of the value of the contract to the party withholding performance. Thus, if neither party is withholding performance, such as when both parties can technically still perform (e.g. the merchant commissioned a non specific boat (*sefinah stam*) to transport a non specific quantity of wine (*yayin stam*) such that the wine merchant can still perform by shipping other barrels of wine and the shipper can still perform by sending a different vessel) but neither party is interested in continuing performance, they share the loss of the value of the contract equally.

Sema argues that the case of the *rebbe* is analogous to this one. The employer is willing to provide the children to be taught and the employee is willing to teach them. It is a third party that prevents both parties from performing their contractual duties. Both parties are thus equally blameless for the inability to perform, and thus, should split the loss.

3. Nesivos HaMishpat

Like Sema, *Nesivos HaMishpat* (334:1) takes issue with Rema entitling a non-performing employee to collect full wages in a situation of *makas medinah*. Nesivos argues that the opinion of the Mordechai which serves as the basis for Rema's ruling applies only to the specific facts of the case Mordechai addressed: that of a *rebbe* teaching Torah. Why should the case of a Torah teacher be different?

Nesivos explains that in principle a *rebbe* may not be compensated for teaching Torah, as the Talmud prohibits payments in exchange for Torah teaching (Nedarim 37a). Thus, payments to a *rebbe* are structured not as compensation for his teaching, but rather as compensation for the more basic role of watching and entertaining the children. If the government forbids Torah teaching, this decree does not technically affect the source of his livelihood. The *rebbe* essentially gets paid for babysitting, and the decree does not impede him from continuing to watch and entertain the children in his class, which he is ready, willing, and able to do. If the *rebbe's* employer is unwilling to pay the *rebbe* merely to watch the children, then it is the *employer* who has frustrated their agreement.²⁷ As such, Nesivos concludes, there is no special standard for compensating a regular employee impacted by a *makas medinah* than for a conventional *ones*.²⁸

B. Contemporary Applications

How does the above analysis apply to employment agreements that were frustrated due to the COVID-19 pandemic? In the United States, employment is generally at-will unless otherwise contracted. This means that an employer may dismiss an employee without cause.²⁹ While halacha would anyway typically defer to common practice regarding the default term of employment, Jewish law independently recognizes the notion of at-will employment. *Chazon Ish* (Bava Kamma 23:2) discusses whether absent a contrary common practice, the implied duration of the contracted term is day by day or for thirty days at a time (at least when thirty days is the normal payment period).³⁰

²⁷ This understanding of Nesivos serves to answer an apparent contradiction in the rulings of Rema. Rema (334:1) rules that if the residents of a city flee due to an epidemic, a worker or a *rebbe* who is unable to continue working is not entitled to compensation. This appears inconsistent with the ruling about the *rebbe* who cannot teach Torah due to a governmental decree. Nesivos explains that when the residents of a town flee, none of the workers are able to perform any of their normal tasks and are therefore not entitled to compensation. In the case of the governmental decree the *rebbe* is still available to babysit and he is entitled to be paid for that even if he is unable to teach Torah. See Shach (334:3) and *Aruch HaShulchan* (334:10) for alternative resolutions to this discrepancy in Rema.

²⁸ This may be the same position as that of the Vilna Gaon (321:7-8).

If the government shuts down not only yeshivos but child care facilities as well, as was the case during the first months of the COVID-19 pandemic, then according to the Nesivos even a *rebbe* would not be treated differently than any other worker, as the *rebbe* could not even function as a babysitter.

²⁹ See <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>

³⁰ See, however, R. Moshe Feinstein (*Igros Moshe Choshen Mishpat* 1:75) who argues that the default presumption is that an employee may not be terminated without cause so long as his services are still needed by the employer.

Where employment is at-will, the analysis of *makas medinah* is largely moot, since the employer can simply terminate the employee immediately, absolving himself of any future obligation toward the employee. In practice, then, our discussion is limited to employees with contracts that stipulate a term of employment or vendors hired for specific events that were unable to take place due to the pandemic.

In addition, our discussion is presumably limited to situations where halacha would award remuneration in excess of what the worker may collect from unemployment or other government benefits.³¹

1. Party in Possession of Funds Prevails

As we have seen, there is no clear consensus among halachik authorities regarding how much to award an employee in a situation of *makas medinah*. For this reason, R. Yosef Rosner (*Mishpat HaPoalim* 2007 p. 163) writes that the *muchzak* (the party currently in possession of the disputed funds) can successfully assert a claim of *kim li*—namely, that he holds the *halachik* view which favors his side, even if it is the minority view, and that he cannot be forced to relinquish those funds without compelling evidence that the minority opinion is incorrect. According to this approach, the party currently in possession of the disputed funds always prevails. Thus, if the salary was paid in advance then the worker need not return the money for any unperformed work; if the salary was not yet paid then the employer need not pay for any unperformed work.³² However, R. Asher Weiss (*Minchas Asher Corona Telisa'ah* 16) argues that one may invoke *kim li* only in the context of an individual dispute, but not when the issue at hand involves policy for a whole community.

2. Employer Pays Half Wages

A different approach requires the employer to pay half-wages for unperformed work, regardless of who currently possesses the funds. To that end, many quote

³¹ If an employee receives unemployment benefits he should not be entitled to “double dip” and receive additional compensation beyond what he would be entitled to halachically. See, for example, R. Fleishman (*ibid.*), R. Yitzchak Zilberstein, (*Vavei HaAmudim* 79 Nissan 5780, 8), R. Yona Reiss (*Sappirim* Issue 31 July 2020), R. Zvi Landman (*Heviani Chadarav* (Yerushalayim 2020) p. 405 in the name of R. Mendel Shafran). R. Avraham Derbarmdriker, Av Beis Din Hayashar V'hatov Yerushalayim (*Heviani Chadarav* p. 357) writes that if such an employee receives more than 50% of his expected wages from governmental compensation he would be entitled to no further remuneration from his employer. The Lakewood batei din, in a document approved by R. Yaakov Forchheimer, issued similar instructions.

³² See also R. Ovadia Yosef Toledano, *Shu"t Meishiv Mishpat* 1:47.

a comment of the Chasam Sofer (*Sefer Zikaron Pressberg* 1879 p. 37 cited above, footnote 23) addressing the compensation of *rebbeim* who were unable to teach due to a war. Chasam Sofer writes that he himself was inclined to the ruling of Rema and Shach, according to which the *rebbeim* are entitled to their full wages in such scenarios (see also *Shu"t Chasam Sofer Choshen Mishpat* 161). However, he also recognized the compelling argument for splitting the loss evenly between the parties and that it was difficult to require employers to pay the full wages. Therefore, Chasam Sofer ultimately recommended that people pay half of the lost wages.³³

A number of contemporary authorities have used this suggestion as the starting point for evaluating COVID-19 related employment termination claims.³⁴ If, for example, a babysitter or playgroup teacher was unable to provide the contracted services—either because of government restrictions or because parents were unwilling to have their children watched by others due to contagion concerns—and if the employee was unable to collect governmental unemployment benefits, then, these authorities suggest, the employee should receive half of his wages.

3. Employer Pays Less Than Half Wages: Po'el Batel

However, an additional consideration may further reduce the amount of money that the employee is entitled to recoup under the forgoing analysis. Although an employee may be entitled to compensation for work left unperformed due to *ones* or termination, *halachah* also recognizes that the employee receives some benefit from not having to work. In light of this benefit, the compensation to which he is actually entitled should be that of a *po'el batel*.³⁵ This means that the employer may deduct from his wage that amount of money which the employee would be willing to forgo in exchange for not needing to work (see Shulchan Aruch 333:1 and 335:1; Sema 333:7;

33 R. J. David Bleich (Contemporary Halachic Problems Vol. 4 p. 367) understands that Chasam Sofer's ruling is based on the principle of *kim li*, namely that since there is a dispute between Rema and Sema, the employers can claim that they hold like the Sema and only pay half of the wages. However, R. Yosef Fleishman (ibid.) and R. Asher Weiss (ibid.) understand that Chasam Sofer's conclusion was in the realm of *p'shara* (compromise) and not because he allowed the employers to claim to hold like the Sema.

34 See R. Yosef Fleishman (ibid.), R. Yitzchak Zilberstein (ibid. 7), and R. Yona Reiss (ibid.).

35 For a discussion of the *po'el batel* rule, see Rabbi Itamar Rosensweig and Tzirel Klein, "Depriving a Worker of Employment Opportunities," *Jewishprudence* (October 2020), Section II, B.

and Shach 333:8).³⁶ Taz (333:1) quotes earlier sources as indicating that *po'el batel* wages are half of normal wages.

According to this analysis, one might argue that if a worker is only entitled to half of his wages to begin with, the *po'el batal* consideration may knock that down to 25%. However, there may be other considerations that would limit the applicability of *po'el batel* to our situation. R. Rosner (Chapter 13 footnote 13) suggests that the context of the Taz may be limited to a day or week laborer who may prefer to receive a lower salary and not have to show up to work for an already limited period of employment. However, a regular full time employee would always prefer to remain employed and salaried at a higher rate than to stay home and make much less money. R. Asher Weiss (*Shu"t Minchas Asher Corona Telisa'ah* 16) further argues that if the starting point is already a 50% deduction in salary no one would agree to a further deduction in compensation, even in exchange for not having to work. This argument may either eliminate the relevance of *po'el batel* or significantly limit the amount of the deduction.³⁷

36 Not all workers are subject to a *po'el batel* deduction. The Gemara (Bava Metzia 77a) tells us about *ochlushei de-Mechuza*, individuals in the town of Mechuza who carried heavy loads for a living. Such people get weaker from not working and thus receive no benefit from unemployment. Similarly, Rema (334:3 and 335:1) rules that *rebbeim* become intellectually weaker from not teaching Torah and therefore are not subject to a *po'el batel* calculation (see Sema 335:4). In practice, even during the initial height of the pandemic, virtually all yeshivos and schools provided remote instruction while they were physically closed, and therefore *rebbeim* were entitled to their salaries anyway, as they may have invested as much total preparation and teaching time as they normally would, if not more.

37 The aforementioned Lakewood document indicated the *po'el batel* should be taken into consideration when calculating compensation for playgroup teachers but did not indicate an amount. A directive from a beis din in Neve Yaakov (*Heviani Chadarav* p. 369) recommended a *po'el batel* deduction of 16%. A directive from a beis din in Bnai Brak (*ibid.* p. 431) had a more complex calculation with a higher percentage but also suggested that there should be a lower *po'el batel* rate for playgroup teachers in the weeks before Pesach, since they would be more appreciative of having time off during those weeks.

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The Journal of the Beth Din of America



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305 Seventh Avenue
12th Floor
New York, New York
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The Beth Din of America is affiliated
with the Rabbinical Council of America
and sponsored by the Union of Ortho-
dox Jewish Congregations of America.

THE JOURNAL OF THE BETH DIN OF AMERICA VOLUME 3

2023